

No. 21-1827

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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DIJON SHARPE,  
Plaintiff-Appellant,

v.

WINTERVILLE POLICE DEPARTMENT; OFFICER WILLIAM BLAKE ELLIS IV, in his individual and  
official capacity,  
Defendants-Appellees.

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On Appeal From the United States District Court  
for the Eastern District of North Carolina  
The Honorable James C. Dever III  
Dist. Ct. No. 4:19-cv-157-D

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**BRIEF OF *AMICUS CURIAE***  
**NATIONAL POLICE ACCOUNTABILITY PROJECT**  
**IN SUPPORT OF PLAINTIFF-APPELLANT DIJON SHARPE**

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## **CORPORATE DISCLOSURE STATEMENT**

Amicus curiae is the National Police Accountability Project (NPAP), a non-profit § 501(c)(3) corporation formed under the laws of New York. Amicus curiae does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

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### STATEMENT OF INTEREST OF AMICUS CURIAE<sup>1</sup>

The National Police Accountability Project (“NPAP”) was founded in 1999 by members of the National Lawyers Guild to address misconduct by police officers and their employers. NPAP has more than 550 attorney members throughout the United States; these attorneys represent plaintiffs in civil actions alleging misconduct by law enforcement officers. NPAP offers training and support to its attorney and legal worker members, educates the public about police misconduct and accountability, and provides resources for nonprofit organizations and community groups involved with victims of law enforcement misconduct. NPAP also supports legislative efforts aimed at increasing accountability and appears as amicus curiae in cases, such as this one, that present issues of particular importance for lawyers who represent plaintiffs in law enforcement misconduct actions. NPAP members who bring cases under 42 U.S.C. § 1983 frequently rely on video evidence to support their clients’ claims. NPAP members have brought actions in jurisdictions nationwide for violation of their clients’ First Amendment right to record the police.

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<sup>1</sup>All parties consented to the National Police Accountability Project’s participation as amicus curiae in this case. Accordingly, Amicus is permitted to file this brief without moving for leave pursuant to FRAP 29(a)(2).

### **RULE 29(C)(5) CERTIFICATION**

Pursuant to Fed. R. App. P. 29(c)(5), amicus states that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person, other than the amicus, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

## SUMMARY OF THE ARGUMENT

*Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.*

Justice Louis D. Brandeis

Police have great power. Civilian recording<sup>2</sup> of police officers serves the public's vital interest in ensuring that police exercise this power lawfully. Video taken by civilians using cameras and cellphones has on many occasions exposed police misconduct that would otherwise have remained hidden. The making and the use of such videos have spurred action at all levels of government to address police misconduct and to protect civil rights. For instance, the viral video of Derek Chauvin brutally murdering George Floyd in May 2020 ignited a long-overdue reckoning on racial justice and led to a wave of local and state legislation to reform policing

Civilian recording serves important purposes not met by police dashboard and body cameras. The First Amendment right to record helps those who exercise it to assert community control over local law enforcement and to influence the national debate on police violence. Civilian recording of police officers improves the fairness and integrity of the justice system. Video can provide critical evidence to civil rights

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<sup>2</sup> The term *recording* refers to capturing images, audio, or both by means of a camera, cellphone, or other device, irrespective of format (e.g., videotape, digital video, or film).

plaintiffs and to criminal defendants, particularly in cases that turn on police credibility. Video helps counterbalance the tendency of many judges and jurors to give greater weight to the testimony of police officers. The well-documented phenomenon of police perjury, or “testilying,” makes the need for this corrective imperative. Video is often more reliable than witness testimony even when the witness has no intent to deceive.

Courts should affirm that the First Amendment protects the right to record the police. Civilians recording police officers regularly encounter retaliation. Judicial recognition that such actions violate the First Amendment provides guidance to the police and protection to civilians who record them, and strengthens our democracy.

## **ARGUMENT**

### **I. Videotaping police officers promotes police accountability**

Our society entrusts the police with extraordinary powers—to arrest, to confine in a cell, and to use force, including deadly force. Abuse of these powers carries the potential for grave harm to democratic values and to individual lives. Police misconduct has resulted in false arrests and confinement, wrongful convictions, use of unreasonable force causing grievous bodily injury and death, emotional trauma, loss

of livelihood, and other financial damage. Police misconduct causes its victims and their families and communities to lose faith in law enforcement and the criminal justice system. NPAP's guiding principle is that the public has a vital interest in ensuring that police officers exercise their authority lawfully and in holding police officers accountable when they do not.

**A. Video exposes police misconduct that would otherwise remain hidden**

Civilian video regularly captures police violence against civilians that would otherwise remain hidden. In a highly publicized case from South Carolina, video taken by a bystander showed a police officer shoot and kill Walter Scott, who had been pulled over for a broken taillight.<sup>3</sup> Mr. Scott was unarmed and running away. Before the existence of the video became known, police claimed that the officer shot Mr. Scott during a struggle in which Mr. Scott had grabbed the officer's taser and attempted to use it against the officer. Without the video, this false narrative might have gone unchallenged; because of the video, which showed the officer planting the taser near Mr. Scott, the officer was fired and was prosecuted for murder.

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<sup>3</sup> The discussion of this case is drawn from Matthew E. Miller, et al., *How a cellphone video led to murder charges against a cop in North Charleston, S.C.*, Washington Post, (Apr. 8, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/04/08/how-a-cell-phone-video-led-to-murder-charges-against-a-cop-in-north-charleston-s-c/> (last visited Nov. 6, 2021).

Similarly, the facts surrounding the murder of George Floyd were obfuscated by the Minneapolis Police Department's initial press release about the incident, which described the situation as "a death after a medical incident."<sup>4</sup> It was not until a 17-year old bystander released a cellphone recording showing the officer pressing his knee onto Mr. Floyd's neck as he gasped for air that the public learned of the true nature of the incident and the officer's brutality. Additionally, legal experts agreed that the civilian video was integral to the successful prosecution of Mr. Floyd's killer.<sup>5</sup> There are innumerable other cases where civilian video has shown the police version of events to be false or misleading.<sup>6</sup>

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<sup>4</sup> Eric Levenson, *How Minneapolis Police first described the murder of George Floyd, and what we know now*, CNN, (Apr. 21, 2021), <https://www.cnn.com/2021/04/21/us/minneapolis-police-george-floyd-death/index.html> (last visited Nov. 6, 2021).

<sup>5</sup> Shannon Larson, *'Darnella Frazier changed the world': Following the Chauvin verdict, praise pours in for teenager who captured Floyd's murder*, The Boston Globe (Apr. 20, 2021), <https://www.bostonglobe.com/2021/04/20/nation/darnella-frazier-changed-world-following-chauvin-verdict-praise-pours-teenager-who-captured-floyds-murder/> (last visited Nov. 6, 2021).

<sup>6</sup> See, e.g., Nick Wing, *12 Videos that show the difference between what cops said and what actually happened*, Huffington Post (July 28, 2015), [http://www.huffingtonpost.com/entry/police-brutality-reports\\_us\\_55b65b79e4b0074ba5a53417](http://www.huffingtonpost.com/entry/police-brutality-reports_us_55b65b79e4b0074ba5a53417) (last visited Nov. 6, 2021).

## **B. Video aids government enforcement of civil rights protections**

Civilian videos capturing police use of excessive force have been instrumental in the passage of federal legislation, in federal and state prosecutions, in reforms of police department policies, and in departmental discipline of police officers.

The 1991 civilian video showing Los Angeles police officers repeatedly striking Rodney King not only led to criminal prosecutions of the officers involved, but also helped reveal patterns of excessive force and racism in the Los Angeles Police Department.<sup>7</sup> Public exposure of these evils resulted in federal legislation giving the Department of Justice broad power to bring actions against police departments having a similar pattern and practice of civil rights violations.<sup>8</sup> Using this authority, the DOJ has entered agreements and consent decrees providing for reforms of police practices in many cities nationwide, including Newark, Baltimore, Seattle, New

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<sup>7</sup> See *Report of the Independent Commission on the Los Angeles Police Department* iii-iv (1991), available at <http://cdm16064.contentdm.oclc.org/cdm/ref/collection/p266901coll4/id/4007> (last visited Nov. 6, 2021).

<sup>8</sup> See 42 U.S.C. § 14141; see generally Stephen Rushin, *Federal Enforcement of Police Reform*, 82 Fordham L. Rev. 3189 (2014).

Orleans, and Cleveland.<sup>9</sup> A number of these agreements contain provisions recognizing and protecting the public's right to record the police.<sup>10</sup>

Cellphone images of police using excessive force have provided the impetus for other criminal investigations and prosecutions. On New Year's Day 2009, for example, transit police officers in Oakland detained several young African American men on a station platform, including 22-year-old Oscar Grant III, after reports of a fight on a train.<sup>11</sup> As Mr. Grant lay face down with his hands cuffed, one of the officers drew his pistol and shot Mr. Grant in the back, killing him. Cellphone video of the incident, captured from multiple angles by several bystanders, led to the conviction of the officer for involuntary manslaughter.

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<sup>9</sup> For the agreements and related documents, see the web page of the Special Litigation Section of the Civil Rights Division of the Department of Justice, <https://www.justice.gov/crt/special-litigation-section-case-summaries#police-summ> (last visited Nov. 6, 2021).

<sup>10</sup> See, e.g., Consent Decree at 21-22, *United States v. Newark*, 2:16-cv-01731-MCA-MAH, ECF No. 4-1 (D.N.J. Apr. 29, 2016) (provisions protecting "First Amendment Right to Observe, Object to, and Record Officer Conduct"), available at Special Litigation Section web page, *supra* note 9.

<sup>11</sup> Discussion of this incident drawn from Demian Bulwa, *Mehserle convicted - Protests, Looting: Verdict: Jury finds Former BART Officer Guilty on Involuntary Manslaughter Charge*, S.F. Chron., July 9, 2010, at A1; see also *Shooting of Oscar Grant*, Wikipedia, [https://en.wikipedia.org/wiki/Shooting\\_of\\_Oscar\\_Grant#Shooting](https://en.wikipedia.org/wiki/Shooting_of_Oscar_Grant#Shooting) (last visited Nov. 6, 2021).



When there is video of misconduct, police departments are more likely to discipline the officers. Multiple factors make it difficult to bring successful disciplinary charges against police officers. Among these are the well-documented “code of silence,” which deters officers from reporting other officers’ misdeeds;<sup>12</sup> the reluctance of officers investigating civilian complaints to accept the word of a civilian over that of a fellow officer; and union contracts that provide officers with elaborate procedural protections that can frustrate the search for the truth.<sup>13</sup> Video helps overcome these barriers to enable departments to respond appropriately to police misconduct.<sup>14</sup>

**C. Civilian recording serves important purposes not met by police dashboard cameras and body cameras**

Cameras installed on the dashboards of police vehicles and worn by police officers have gained widespread acceptance among law enforcement agencies. NPAP

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<sup>12</sup> See, e.g., *Kinney v. Weaver*, 301 F.3d 253, 277 (5th Cir. 2002) (describing “deeply-rooted code of silence ... within the police department that, regardless what the behavior, one police officer does not report or testify against another police officer”)(citation and quotation marks omitted); *id.* at 277 n.19 (“[O]ur sister circuits have also recognized the existence of a ‘code of silence’ in law enforcement.”) (collecting cases).

<sup>13</sup> Mark Peters & Zusha Elinson, *Police Contracts Draw New Scrutiny After Shootings*, Wall Street Journal (Jan. 1, 2016), <http://www.wsj.com/articles/police-contracts-draw-new-scrutiny-after-shootings-1451696651> (last visited Nov. 6, 2021).

<sup>14</sup> See, e.g., Jon Hurdle, *4 Philadelphia Police Officers in Videotaped Beatings Will Be Fired*, N.Y. Times (May 20, 2008), at <http://www.nytimes.com/2008/05/20/us/20police.html> (last visited Nov. 6, 2021).

welcomes them too. Used properly in accordance with well-defined policies, these technologies have many of the same benefits as cellphone cameras controlled by civilians: strengthening police accountability while protecting against false accusations, increasing transparency, and documenting police-civilian encounters to assist later civil, criminal, or internal affairs proceedings. Like cellphone cameras, police cameras also deter misconduct, because some police officers behave better when they know they are being recorded.<sup>15</sup> Police cameras have shortcomings, however, and civilian cameras have advantages.

Civilians recording the police do not depend on police department policy or the discretion of individual police officers to decide when and what to record. Not all police departments require their officers to wear body worn cameras and retain footage.<sup>16</sup> Even where departmental policies exist, police officers do not always

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<sup>15</sup> See President's Task Force on 21st Century Policing, *Final Report of the President's Task Force on 21st Century Policing* 32 (2015); see also Robinson Meyer, *What to Say When the Police Tell You to Stop Filming Them*, The Atlantic (Apr. 28, 2015), <http://www.theatlantic.com/technology/archive/2015/04/what-to-say-when-the-police-tell-you-to-stop-filming-them/391610> (last visited Nov. 5, 2021).

<sup>16</sup> See Leadership Conference on Civil Rights et al., *Police Worn Body Cameras: A Scorecard*, available at <https://www.bwcorecard.org> (last visited Nov. 6, 2021); see also Jeff Proctor & Matt Grubs, *For years at Albuquerque police, option to delete body-cam footage was widespread*, KQRE News 13 (Dec. 22, 2015), <http://krqe.com/2015/12/22/for-years-at-albuquerque-police-option-to-delete-body-cam-video-was-widespread/> (last visited Nov. 6, 2021).

activate their cameras. Moreover, many officers do not face any consequences for noncompliance with body worn camera policies.<sup>17</sup> Civilian recording of police activity does not rely on these uncertain factors, and it fills gaps created when police recording devices malfunction, or police video is not retained.<sup>18</sup>

Video taken by civilians provides different perspectives from police video. Dashboard cameras show only events that occur in front of the police vehicle, and body cameras show events only from the police officer's point of view. Cameras controlled by civilian parties or witnesses capture events otherwise missed by police cameras, or show the same events in a different light.<sup>19</sup>

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<sup>17</sup> See e.g., Kevin Rector, *22% of LAPD officers failed to promptly activate body cameras in force incidents*, Los Angeles Times, (July 20, 2021), <https://www.latimes.com/california/story/2021-07-20/22-of-lapd-officers-failed-to-promptly-activate-body-cameras-in-force-incidents>.

<sup>18</sup> See, e.g., Radley Balko, *80 Percent of Chicago PD dash-cam cameras are missing audio due to 'officer error' or 'intentional destruction'*, Washington Post (Jan. 29, 2016), <https://www.washingtonpost.com/news/the-watch/wp/2016/01/29/80-percent-of-chicago-pd-dash-cam-videos-are-missing-audio-due-to-officer-error-or-intentional-destruction/> (last visited Nov. 6, 2021); Joel Rubin, *LAPD officers tampered with in-car recording equipment, records show*, Los Angeles Times, (Apr. 7, 2014), <http://articles.latimes.com/2014/apr/07/local/la-me-lapd-tamper-20140408> (reporting tampering with about half of 80 cars in one patrol division) (last visited Nov. 6, 2021).

<sup>19</sup> See, e.g., *Taylor v. Holtmeyer*, No. 4:14-CV-3127, 2016 WL 1611435, at \*3 (D. Neb. Apr. 21, 2016) (“After the punch, there were a few more seconds of wrestling, and the two men fell to the ground, out of the frame of the cruiser’s video recording.... But a video recorded on a bystander’s mobile phone picks up the scene just a few seconds

When police and government agencies alone possess video, they may choose to keep video incriminating police officers from the public. The City of Chicago's handling of dashboard video of the fatal shooting of a 17-year-old African American young man provides a case in point. In October 2014, a Chicago police officer shot Laquan McDonald 16 times although he was walking away from the officer and posed no threat. The officer's report to the contrary was false, as the dashboard video showed.<sup>20</sup> The City of Chicago, after paying a \$5 million settlement to Mr. McDonald's family, refused to publicly release the video for over a year. It did so only when ordered to by a judge, at which time the officer who fired the shots was charged with first-degree murder, and details of a widespread cover-up of the shooting began to emerge. Such secrecy breeds distrust in the police and erodes the public's confidence in its governing institutions. By contrast, when incidents like the Laquan McDonald

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later from a better vantage point.”); cf. President's Task Force on 21st Century Policing, *Final Report*, *supra* note 15, at 32 (“Now that agencies operate in a world in which anyone with a cell phone camera can record video footage of a police encounter, [body-worn cameras] help police departments ensure that events are also captured from an officer's perspective.”).

<sup>20</sup> Nausheen Hussein, *Laquan McDonald timeline: The shooting, the video and the fallout*, Chicago Tribune (Sept. 12, 2016), <http://www.chicagotribune.com/news/laquanmcdonald/ct-graphics-laquan-mcdonald-officers-fired-timeline-htmlstory.html> (last visited Nov. 5, 2021). The discussion in this paragraph of the incident and its aftermath is taken from this timeline.

shooting are caught on private civilians' cameras and uploaded to social media, the public can learn what happened and work to see that justice is done.

The right to record police activity empowers those who exercise it. Grassroots “copwatch” groups have developed throughout the country as a means of strengthening community oversight over local law enforcement. The act of recording puts the police on notice that the people they serve will hold them accountable for their actions; this deters misconduct and allows for redress when deterrence fails. On a broader scale, civilian video of police violence has contributed to calls for police reform and to movements such as Black Lives Matter dedicated to this purpose.

## **II. Videotaping improves the fairness and integrity of the justice system**

Video provides essential evidence to criminal defendants and civil rights plaintiffs. It is an antidote to police perjury and to the unreliability of eyewitness testimony more generally.

Video evidence is particularly important to individuals whose circumstances make them less credible in the eyes of many jurors—for example, people who have criminal records or who are accused of untoward or disrespectful behavior during their encounters with police. The perils faced by criminal defendants who choose to testify at trial are well known. These include potentially having the jury learn of past crimes and being perceived as not credible due to factors unrelated to truthfulness,

such as cultural differences, nervousness, or the inability to communicate clearly and persuasively. Civil rights plaintiffs typically must testify; they face many of the same dangers. Police officers, by contrast, testify regularly as a part of their job. Judges and juries are more likely to give them the benefit of the doubt.

This is so despite the well-documented prevalence of police perjury.<sup>21</sup> Among its causes is that it works; many judges and jurors are unwilling, without compelling evidence, to believe that a police officer would lie. Video provides such evidence. The existence of video disproving criminal allegations made by police officers has exonerated defendants and resulted in the dismissal of prosecutions.<sup>22</sup> Video has

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<sup>21</sup> See, e.g., Michelle Alexander, *Why Police Lie under Oath*, N.Y. Times (Feb. 2, 2013), <http://www.nytimes.com/2013/02/03/opinion/sunday/why-police-officers-lie-under-oath.html> (last visited Nov. 6, 2021); Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 Am. Crim. L. Rev. 1, 5-12 (2010) (citing “several decades” of mounting evidence of police lies and collecting empirical studies and other sources); Christopher Slobogin, *Testifying: Police Perjury and What to Do About It*, 67 U. Colo. L. Rev. 1037, 1040, 1041 (1996); Morgan Cloud, *The Dirty Little Secret*, 43 Emory L.J. 1311, 1311-12 (1994) (“Judges, prosecutors, defense lawyers, and repeat offenders all know that police officers lie under oath.”).

<sup>22</sup> See, e.g., John Eligon & Colin Moynihan, *Police Officer Seen on Tape Shoving a Bicyclist Is Indicted*, N.Y. Times, Dec. 16, 2008, at A33, *available at* <http://www.nytimes.com/2008/12/16/nyregion/16critical.html> (last visited Nov. 6, 2021).

provided critical evidence in support of plaintiffs' claims in civil rights cases.<sup>23</sup> It has also supported police officers' versions of events in some cases.<sup>24</sup>

Even when police or other witnesses have no intent to deceive, testimonial evidence is subject to influences and distortions that do not affect video. Memories fade or change, as do witnesses' willingness and availability to testify. Eyewitness testimony, the basis for many wrongful convictions, is notoriously unreliable.<sup>25</sup> While video does not always tell the whole story, and may give rise to competing inferences, it is undoubtedly more probative, objective, and reliable than witness testimony in

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<sup>23</sup> See, e.g., *White v. Martin*, 425 F. App'x 736, 745 (10th Cir. 2011) (unpublished) (affirming denial of summary judgment to defendant where the record consisted entirely of video from a dashboard camera and from a cellphone; "the video evidence allows inferences in favor of Mr. White that he was choked when not resisting, was not a threat, was not attempting to flee, and was seeking assistance from the other trooper"); *Washington v. City of Seattle*, No. C13-01556 RAJ, 2015 WL 5254166, at \*6 (W.D. Wash. Sept. 9, 2015) (denying summary judgment to defendants where "the video reveals that multiple officers used force on plaintiff, and although the picture is not crystal clear, a jury could infer based upon the footage, the testimony of the officers and other evidence, that the officers applied excessive force in concert against a single subject"); *Estate of Hernandez-Rojas ex rel. Hernandez v. United States*, 62 F. Supp. 3d 1169, 1178 (S.D. Cal. 2014) (denying summary judgment based in part on civilian video showing "at a minimum, that [decedent] was not resisting arrest or attempting to evade arrest" as claimed by defendants).

<sup>24</sup> See, e.g., *Gomez v. Lozano*, 839 F. Supp. 2d 1309, 1313–14 (S.D. Fla. 2012) ("Mr. Gomez also testified that he did not flail or move his arms during the incident, but the [cell phone] video discredits this testimony.").

<sup>25</sup> See, e.g., *State v. Henderson*, 208 N.J. 208, 218, 27 A.3d 872, 877–78 (2011), *holding modified by State v. Chen*, 208 N.J. 307, 27 A.3d 930 (2011) ("Study after study revealed a troubling lack of reliability in eyewitness identifications.").



many cases.<sup>26</sup> As the examples above illustrate, video has helped ensure just outcomes in civil rights lawsuits and criminal prosecutions.

In the experience of many NPAP member attorneys, video corroborating the police misconduct victim's story is often the difference between success and failure at trial. The existence of a video is sometimes the deciding factor in a lawyer's decision whether to take a civil rights case.

### **III. Judicial affirmation of the First Amendment right to record provides guidance to police and protection to civilians**

Although law enforcement agencies increasingly recognize the public's right to record the public actions of police officers, it is critically important for courts to affirm the First Amendment basis of this right. Civilians recording police officers regularly face harassment by the police. Police have seized or destroyed recording devices, threatened and intimidated persons recording them, physically assaulted these persons, and arrested them on pretextual grounds such as interference with a police officer or unlawful wiretapping.<sup>27</sup>

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<sup>26</sup> The criticism sometimes made of video—that it only evidences particular events from a particular perspective at a particular moment in time—applies equally to the testimony of any percipient witness.

<sup>27</sup> International Association of Chiefs of Police Law Enforcement Police Center (“IACP Policy Center”), *Recording Police Activity 2* (2015). For many examples of such harassment caught on video, see the website Photography Is Not a Crime, <https://photographyisnotacrime.com>.



Judicial authority recognizing the First Amendment right to record provides a partial check against this phenomenon. The International Association of Chiefs of Police recently noted that police departments have relied on the “consistency and uniformity” of case law in recent years to develop operational policies protecting civilian recording.<sup>28</sup> Without such clarity, law enforcement officers’ judgment is “clouded by a more or less natural aversion toward uninvited recording and scrutiny of their actions.”<sup>29</sup> For this reason, the United States Department of Justice has also stressed the importance of policies that “affirmatively set forth that individuals have a First Amendment right to record officers in the public discharge of their duties.”<sup>30</sup>

Civilians will be hesitant to record police officers if they know that the law may not protect this activity. Only the bravest civilians are willing to risk being arrested and convicted for recording police officers.

Judicial recognition of the First Amendment right to record provides a remedy for individuals who suffer retaliation from police officers unhappy about being

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<sup>28</sup> IACP Policy Center, *Recording Police Activity*, *supra* note 27, at 2.

<sup>29</sup> *Id.*

<sup>30</sup> Letter from Jonathan M. Smith, Chief, Special Litigation Section, United States Department of Justice Civil Rights Division, to the parties in *Sharp v. Baltimore City Police Dep’t, et al.* 4 (May 14, 2012) (*available at* [https://www.justice.gov/sites/default/files/crt/legacy/2012/05/17/Sharp\\_ltr\\_5-14-12.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2012/05/17/Sharp_ltr_5-14-12.pdf) (last visited Nov. 6, 2021)).

recorded. The proliferation of cases around the country involving asserted violations of the right to record shows the importance of judicial protection for this “basic, vital, and well-established liberty.” *Glik v. Cunniffe*, 655 F.3d 78, 85 (1<sup>st</sup> Cir. 2011).

#### **IV. Livestreaming Provides Unique Accountability Benefits Not Available through Traditional Recording**

Police frequently retaliate against people who film them.<sup>31</sup> Retaliation commonly takes the form of confiscating the person’s recording device.<sup>32</sup> Once confiscated, all of the value of civilian recording is at risk. An officer can destroy the footage or the

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<sup>31</sup> See Tyler Finn, *Qualified Immunity and Formalism: “Clearly Established Law” and the Right to Record the Police*, 119 Colum. L. Rev. 445, 475 (2019) (“given the ubiquity of recording devices in the contemporary United States and the growing prevalence of civilian cop-watch organizations, it is perhaps no surprise that cases of police retaliation against citizen recorders arise frequently”); See also Draugana Kaurin, *The Price of Filming Police Violence*, Vice, (Apr. 27, 2018) (detailing how the civilians who filmed the police killings of Freddie Gray, Eric Garner, Walter Scott, Philando Castile, and Alton Sterling have faced continued harassment at the hands of the police) <https://www.vice.com/en/article/evqw9z/filming-police-brutality-retaliation>

<sup>32</sup> See *Eg. Fields v. City of Philadelphia* 862 F.3d 353, 356 (3d Cir. 2017) (officer confiscated plaintiff’s phone for recording him at a protest); *Frasier v. Evans*, 992 F.3d 1003, 1011 (10th Cir. 2021) (officers forced plaintiff to provide them with access to tablet which contained footage of violent arrest). *Davis-Bey v. City of Warren*, 2018 U.S. Dist. LEXIS 24184 (E.D. Mich. 2018) (officer attempted to take plaintiff’s phone for filming an arrest); *Flores v. Rivas*, 2019 U.S. Dist. LEXIS 178034 at \*49 (W.D. Tex. 2019) (alleging officer attempted to confiscate phone that had footage of violent arrest of minors); Carlos Miller, *DC Cops Confiscate Phone, Steal Memory Card, Day After New Photo Policy Implemented*, PINAC (July 26, 2012), <https://perma.cc/4XR8-GU47>.

department can withhold it indefinitely as evidence of the individual filming's misconduct.<sup>33</sup>

Livestreaming ensures that proof of officer misconduct is not destroyed. Not only are community members being immediately informed of a police interaction, but most platforms maintain footage that can be recovered at a later date.<sup>34</sup> Even if an officer confiscates an individual's phone or other device, the public and the civilian recorder will still have access to footage. Additionally, livestreaming police interactions provides unique deterrence benefits. The possibility of real-time witnesses ensures that an officer will be less likely to engage in misconduct on camera with the intent of deleting footage after the fact.

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<sup>33</sup> See Andrew Rosado Shaw, Note, *Our Duty in Light of the Law's Irrelevance: Police Brutality and Civilian Recordings*, 20 GEO. J. ON POVERTY L. & POL'Y 161, 166 (2012) ("Even in jurisdictions that unequivocally provide for legal surveillance of police, officers have displayed a willingness to prevent or destroy the resulting evidence and to arrest the civilians behind cameras on other frivolous charges.").

<sup>34</sup> For instance, Facebook Live videos are automatically saved on a person's Facebook feed and viewable by all of their friends. *All of Your Facebook Live Video Questions Answered*, Shareablee, <https://www.shareablee.com/blog/2017/03/03/all-of-your-facebook-live-video-questions-answered> (last visited Nov. 6, 2021). Instagram live footage is available for up to 24 hours. Sarmarpita Yashaswini, *Here are the steps to watch an Instagram Live Video after it has ended*, PINKVILLA (June 2, 2021), <https://www.pinkvilla.com/lifestyle/people/here-are-steps-watch-instagram-live-video-after-it-has-ended-760374>.

If a person is ultimately arrested as a result of a police interaction, the recording device will likely be in the custody of the jail until the person is released. Any footage of misconduct or other evidence that could support lower bail or changes being dropped is stored on the recording device and thus will be difficult for advocates to access. Livestreaming ensures the public will have immediate access to footage that could demonstrate a lack of probable cause for the arrest or reveal police misconduct of immediate public concern.

Independent of accountability and deterrence, the ability to livestream can also minimize the life-crippling effects of an arrest.<sup>35</sup> If a person's social network learns they are being arrested, this network may provide them timely support with unexpected child care arrangements, help them avoid penalties at work for not showing up or calling, contact an attorney on their behalf, and even assist with pet care. A recording not publicly disseminated in real time does not provide the same benefits.

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<sup>35</sup> See Jenny E. Carroll, *The Due Process of Bail*, 55 Wake Forest L. Rev. 757, 772-73 (2020).

## CONCLUSION

For the foregoing reasons, Amicus Curiae National Police Accountability Project supports Plaintiff-Appellant's request for reversal of the district court opinion.

RESPECTFULLY SUBMITTED,  
/s/ J. Christopher Mills

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I, Christopher Mills, as counsel for the Amicus Curiae National Police Accountability Project, hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), as follows:

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Attorney for National Police Accountability Project,  
As Amicus Curiae,

/s/ J. Christopher Mills  
J. Christopher Mills

Dated: November 9, 2021

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