RECORD NO. 21-1827

In The
United States Court of Appeals
For The Fourth Circuit

DIJON SHARPE,

Plaintiff – Appellant,

v.

WINTERVILLE POLICE DEPARTMENT;
WILLIAM BLAKE ELLIS, in his official capacity only;
MYERS PARKER HELMS, IV,
in his individual and official capacity,

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA AT RALEIGH

BRIEF FOR THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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6. This is not a criminal case in which there was an organizational victim.

Dated: November 9, 2021

/s/Victoria Clark
Counsel for Amicus Curiae

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INTEREST OF THE *AMICUS*[1]

The Institute for Justice ("IJ") is a nonprofit, public-interest law firm dedicated to defending this nation's constitutional structure and securing the foundations of a free society. IJ believes that it is critical that the courts enforce constitutional limits on governmental power and ensure that the public can hold officials accountable when they violate the Constitution.

IJ's interest in this case arises from, among other things, qualified immunity's deleterious effect on the ability of people to vindicate their constitutional rights, including the well-established right to record police officers in performance of their duties.

SUMMARY OF ARGUMENT

Any reasonable officer should have known that preventing Mr. Sharpe from livestreaming his encounter with police would violate his clearly established First Amendment rights. After all, six federal circuit courts, the Department of Justice ("DOJ"), and numerous local governments have long agreed that the First Amendment protects an individual's right to record police in public. That is enough to have given Officer Helms fair notice here. *See Hope v. Pelzer*, 536 U.S. 730, 741

[1] Both parties, through their respective counsel, have consented to the filing of this *amicus* brief. No person other than *amicus*, its counsel, or its members contributed money intended to fund the preparation and submission of this brief. In addition, no party or party's counsel authored this brief in whole or in part or contributed money intended to fund the preparation or submission of this brief.

(2002) (holding that the clearly established inquiry turns on whether "the state of the law . . . gave respondents fair warning" that their actions were unlawful); *see also Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (per curiam) (citing *Hope*, 536 U.S. at 741).

Ignoring this unanimous chorus in favor of the right, the District Court took a path no other court has taken, dividing the right up into small, arbitrary pieces and then unsurprisingly concluding that no previous cases blessed the precise recording technology Mr. Sharpe used. The court also took a myopic view of the authorities that recognize the right by placing undue emphasis on a decade-old unpublished opinion and failing to fully consider more persuasive authorities. Because the doctrine of qualified immunity must not be divorced from its fair-notice foundations, the District Court's decision should be reversed.

ARGUMENT

I. Qualified immunity is grounded in fair notice to government officials.

According to the Supreme Court in *Hope v. Pelzer*, the purpose of qualified immunity is to give government officials "fair warning" that their conduct is unconstitutional. 536 U.S. at 741; *accord Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 540 (4th Cir. 2017) (observing that "[t]he clearly established inquiry asks whether the state of the law gave a reasonable [] official 'fair warning'" that their conduct was unconstitutional); *see also Kisela v. Hughes*, 138 S. Ct. 1148, 1152

(2018) (per curiam) (affirming that the "focus" of the clearly established inquiry is "whether the officer had fair notice that her conduct was unlawful" (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam))). This purpose shapes the clearly established inquiry in two key ways. First, not all factual distinctions are constitutionally relevant—a right may be clearly established even without an earlier, factually similar case. *Hope*, 536 U.S. at 741–42; *see also Thompson v. Virginia*, 878 F.3d 89, 98 (4th Cir. 2017) (citing *Hope*, 536 U.S. at 741). Second, courts should look to a variety of authorities, including state and federal executive-branch guidance, in deciding whether a right is clearly established. *Hope*, 536 U.S. at 743–45.

In *Hope*, the Supreme Court reversed the Eleventh Circuit's decision granting qualified immunity to prison guards who handcuffed an inmate to a hitching post for seven hours with no shirt, little water, and no restroom breaks. 536 U.S. at 734–36. The Eleventh Circuit acknowledged that the guards violated the Eighth Amendment's prohibition on cruel and unusual punishment. *Id.* at 736. But it concluded that the guards were entitled to qualified immunity because the right at issue was not clearly established. *Id.* The inmate produced a binding case holding that prison guards violated the Eighth Amendment by "handcuffing inmates to the fence and to cells for long periods of time" and "forcing inmates to stand . . . or otherwise maintain awkward positions for prolonged periods." *Id.* at 742 (internal

quotation marks omitted). But the Eleventh Circuit still held that the inmate's right was not clearly established because prior caselaw, "though analogous," was "not materially similar to Hope's situation." *Id.* at 736 (cleaned up).

The Supreme Court reversed, explicitly warning of the "danger of a rigid[] overreliance on factual similarity." *Id.* at 742. The Court observed that a right could be clearly established even without the presence of earlier, factually similar cases, as long as "the state of the law" at the time of the incident gave the guards "fair warning that their alleged treatment of [the inmate] was unconstitutional." *Id.* at 741. Accordingly, the Court saw no "reason to draw a constitutional distinction between a practice of handcuffing an inmate to a fence for prolonged periods and handcuffing him to a hitching post for seven hours." *Id.* at 742. Although the precise tools involved differed, the Court concluded that earlier cases provided the guards with "fair notice" that their actions were unlawful, and thus the inmate's right was clearly established. *Id.*

Further, the Court explained that the fair-notice analysis is not limited to judicial authorities alone. The Court also considered both a regulation promulgated by the state's department of corrections as well as a report by the U.S. Department of Justice—both of which suggested that the guards' actions were impermissible. *Id.* at 743–45. Moreover, even though there was no evidence that the guards actually knew about the DOJ report, the Court still concluded that the report "len[t] support

to the view that reasonable officials" should have known that the conduct violated the Eighth Amendment. *Id.* at 745.

As discussed next, the Fourth Circuit has expressly adopted both of *Hope*'s key principles. *See infra* pp. 9, 13–14. But the District Court ignored them both, opting to apply qualified immunity in the face of a clearly established constitutional right. This Court should correct the District Court's errors on both counts.

II. The District Court applied the fair-notice rule too narrowly by erroneously defining the right in terms of legally irrelevant facts.

The "first step" of the clearly established inquiry is to define the right at issue. *Halcomb v. Ravenell*, 992 F.3d 316, 319 (4th Cir. 2021); *see also Booker*, 855 F.3d at 539. Consistent with *Hope*, the right at issue here is the First Amendment right to record police performing their duties in public. *See also Williams v. Strickland*, 917 F.3d 763, 770 (4th Cir. 2019) (observing that, in some cases, "government officials can be expected to know that if X is illegal, then Y is also illegal, despite factual differences between the two"). Six circuit courts, the Department of Justice, and numerous local governments across the country all agree that the right exists. *See infra* Part III.b. Despite this overwhelming consensus, the District Court erroneously carved the right to record into five small, arbitrary pieces and then analyzed whether each individual piece was clearly established:

> It does not suffice for a court simply to determine whether an individual's behavior constitutes "recording" or not "recording" a traffic stop. After all, such "recording" may

> fall within five, distinct factual scenarios: (1) recording; (2) recording *and* real-time broadcasting; (3) recording and real-time broadcasting with geo-location information; (4) recording *and* real-time broadcasting with the ability to interact via messaging applications in real-time with those watching; and (5) recording *and* real-time broadcasting with geo-location information and the ability to interact via messaging applications in real-time with those watching.

Sharpe v. Winterville Police Dep't, 480 F. Supp. 3d 684, 698 (E.D.N.C. 2020).

At bottom, the District Court drew a legally irrelevant distinction between livestreaming—that is, broadcasting a video in real time—and recording for later playback. This is a problem because, again, *Hope* instructs that not all facts are relevant to the qualified-immunity analysis. 536 U.S. at 742. The Supreme Court has carried this theme through a pair of its most recent qualified-immunity decisions.

In *Taylor v. Riojas*, the Court considered whether prison guards violated an inmate's clearly established Eighth Amendment rights when the guards housed the inmate in cells "teeming with human waste" for six days. 141 S. Ct. 52, 53 (2020) (per curiam) (internal quotation marks omitted). The Fifth Circuit had concluded that the inmate's right was not clearly established because the court "hadn't previously held that a time period so short violated the Constitution." *Taylor v. Stevens*, 946 F.3d 211, 222 (5th Cir. 2019). But the Supreme Court disagreed, reasoning that "no reasonable correctional officer could have concluded" that his or her actions were "constitutionally permissible." *Riojas*, 141 S. Ct. at 53. The Court so held without

relying on or even identifying any caselaw addressing the six-day period—that detail just didn't matter. *See id.* at 53–54. What *did* matter was that the inmate endured "deplorably unsanitary conditions" for "an extended period of time," which clearly violated the Eighth Amendment's prohibition on cruel and unusual punishment. *Id.* at 53; *see also id.* at 53–54 (citing, among others, *Hope*, 536 U.S. at 741).

The Court further affirmed *Riojas*'s approach in *McCoy v. Alamu*, 141 S. Ct. 1364 (2021) (mem.) (*McCoy II*). There, the Fifth Circuit concluded that a prison guard violated the Eighth Amendment by pepper spraying an inmate without provocation. *McCoy v. Alamu*, 950 F.3d 226, 232 (5th Cir. 2020) (*McCoy I*). The court acknowledged, in theory, that the specific tool the guards used—that is, the pepper spray—was irrelevant. *See id.* at 233. The court nonetheless held that the right was not clearly established because the court had not previously recognized that a single use of pepper spray could be a constitutional violation. *Id.* at 233–34; *see also id.* at 235 (Costa, J., dissenting in part) ("Although the majority purports to recognize that the instrument of force does not matter . . . its grant of immunity ultimately turns on the fact that the guard used pepper spray instead of a fist, taser, or baton."). But the Supreme Court summarily vacated the Fifth Circuit's decision, instructing the court to reconsider in light of *Riojas*. *McCoy II*, 141 S. Ct. at 1364. Thus, both *Riojas* and *McCoy* involve the same misstep: a hyper-specific focus on

the facts at hand, without a corresponding assessment of which facts are legally relevant.[2]

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[2] The Supreme Court's recent qualified-immunity decisions in *City of Tahlequah v. Bond*, --- S. Ct. ----, 2021 WL 4822664 (Oct. 18, 2021) (per curiam), and *Rivas-Villegas v. Cortesluna*, --- S. Ct. ----, 2021 WL 4822662 (Oct. 18, 2021) (per curiam), are consistent with *Hope*. Both cases involved excessive-force claims against police who, in response to 911 calls, faced split-second decisions about how to react to armed individuals. *Bond*, 2021 WL 4822664, at *1–2; *Rivas-Villegas*, 2021 WL 4822662, at *1; *see also Villarreal v. City of Laredo*, --- F.4th ----, 2021 WL 5049281, at *4 (5th Cir. Nov. 1, 2021) (observing that, unlike split-second decisions, a calculated decision by government officials provided an "especially weak basis for invoking qualified immunity"). The Court often gives officers wide latitude in such high-pressure situations. *See, e.g.*, *Kisela*, 138 S. Ct. at 1153 (granting qualified immunity to an officer who shot a woman carrying a knife, in part because the officer "had mere seconds to assess the potential danger to" a bystander); *City & County of San Francisco v. Sheehan*, 575 U.S. 600, 612 (2015) (granting qualified immunity to officers who shot an armed, mentally ill woman who was threatening violence and observing that "[t]he Constitution is not blind to the fact that police officers are often forced to make split-second judgments" (internal quotation marks omitted)); *Mullenix v. Luna*, 577 U.S. 7, 13–14 (2015) (per curiam) (granting qualified immunity to an officer who "confronted a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering [another] officer"). And the Court based its reasoning in both cases on the unique challenges, including high-stakes split-second decisions, that officers face in the Fourth Amendment excessive-force context. *See Bond*, 2021 WL 4822664, at *2 (*citing Mullenix*, 577 U.S. at 12); *Rivas-Villegas*, 2021 WL 4822662, at *2 (same). Neither opinion questioned the continued validity of *Hope*'s fair-notice standard.

Riojas and *McCoy*, on the other hand, concerned alleged violations that did not involve split-second decisions in the face of significant possible danger. *See Riojas*, 141 S. Ct. at 53 (inmate incarcerated in unsanitary conditions for six days); *McCoy I*, 950 F.3d at 231 (inmate sprayed with pepper spray after allegedly doing nothing to provoke the officer). Similarly, at no point were any of the officers here faced with the kind of quick-moving, life-or-death decisions at issue in *Bond* and *Rivas-Villegas*—Officer Helms simply had to decide, during a routine traffic stop, whether

Unlike the Fifth Circuit in *Riojas* and *McCoy*, this Court has stayed in lockstep with the Supreme Court's direction. For example, this Circuit has recognized prisoners' "right to *fair* notice of a security detention hearing, rather than a specific right to 48 hours' notice," *Halcomb*, 992 F.3d at 320 (emphasis in original), and their "right not to be assaulted by their captors," rather than the right to be free from a specific method of assault, *Thompson*, 878 F.3d at 102. *See also Dean v. Jones*, 984 F.3d 295, 310 (4th Cir. 2021) (rejecting a narrow framing of the right and concluding that the right at issue was an inmate's "right to be free from pain inflicted maliciously and in order to cause harm"); *Estate of Jones v. City of Martinsburg*, 961 F.3d 661, 668 (4th Cir. 2020) (concluding that "it was clearly established that officers may not shoot a secured or incapacitated person"). These cases define the right at issue using only legally relevant facts—that is, those facts that are necessary to give reasonable government officials fair notice. That is what *Hope*, *Riojas*, and *McCoy II* require.

In contrast, the District Court did exactly what *Hope* instructs courts not to do. Like the Fifth Circuit in *McCoy*, the District Court framed the right in terms of the specific tool involved rather than considering what a reasonable government official would need to know to determine the legality of her actions. *Cf. McCoy I*, 950 F.3d at 235 (Costa, J., dissenting). This "rigid[] overreliance on factual

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Mr. Sharpe had a right to continue recording their encounter. Thus the officers in this case, like those *Riojas* and *McCoy*, have no exigency-based justification for invoking qualified immunity.

similarity" unmoors the doctrine of qualified immunity from its foundation—fair notice—and instead unnecessarily deprives plaintiffs suffering clear-cut constitutional violations of any way to right the wrongs they suffered.[3] *Hope*, 536 U.S. at 742.

The Eighth Circuit has recently held that police officers were not entitled to qualified immunity from a First Amendment retaliation claim when the officers teargassed reporters filming in preparation for a live broadcast from the site of a protest. *Quraishi v. St. Charles County*, 986 F.3d 831, 834, 839 (8th Cir. 2021). The court held that the reporters were engaged in constitutionally protected activity without separately considering whether they had a clearly established right to broadcast the protest, presumably including police officers, in real time. *See id.* at 838–39. The court simply concluded that it was clearly established that "deploying a tear-gas canister at law-abiding reporters is impermissible," without specifying whether the video was being broadcast during the events in question. *Id.* at 839; *see*

[3] The District Court also placed some weight on the fact that Mr. Sharpe was a passenger in the stopped vehicle rather than a disinterested bystander. *See Sharpe*, 480 F. Supp. 3d at 697–99 & n.10. For the reasons discussed above, this distinction is also irrelevant for qualified-immunity purposes—a reasonable officer would have had fair notice that any member of the public could record the traffic stop. And the First Circuit has rejected this precise distinction. *Gericke v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014) (concluding that "[a] traffic stop, *no matter the additional circumstances*, is inescapably a police duty carried out in public" and is thus subject to recording (emphasis added)); *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 831 (1st Cir. 2020) (observing that the First Amendment protected the right to record of "an individual whom the police had pulled over during a traffic stop").

also id. (relying on, among others, *Hoyland v. McMenomy*, 869 F.3d 644, 655–58 (8th Cir. 2017), where a non-reporter plaintiff was unlawfully arrested while filming police officers). Thus the Eighth Circuit, consistent with *Hope*, has implicitly acknowledged that whether a recording is broadcast in real time is irrelevant to the clearly established inquiry for First Amendment retaliation claims.

Distinguishing between recording and livestreaming in this context also defies common sense. *See Booker*, 855 F.3d at 545 (concluding that the right there was clearly established based on "fundamental constitutional principles and common sense"). These are times of rapid "technological progress," and nowhere is this progress more obvious than the increasing "ubiquity of smartphone ownership." *See Fields v. City of Philadelphia* 862 F.3d 353, 357–58 (3d Cir. 2017); *see also* Terry Collins, *Study: TikTok, Livestreaming, and 'Creator Economy' Quickly Changing Social Apps Landscape*, USA Today (Sept. 6, 2021), https://tinyurl.com/aba2pmv7. Because smartphone technology is always changing, the practical availability of an enforceable constitutional right cannot turn on the precise app an individual uses to exercise that right. As the Third Circuit recognized, "[a]ll we need to decide is whether the First Amendment protects the act of recording police officers carrying out official duties in public places." *Fields*, 862 F.3d at 358.

Further, the DOJ has repeatedly acknowledged that the First Amendment protects recording the police, no matter the technology used. In consent decrees

around the country, the DOJ chose broad language that protects the right to record "by camera, video recorder, cell phone recorder, *or other means*." *United States v. City of New Orleans*, No. 2:2012-cv-1924, ECF Dkt. 565 at 45 (E.D. La. Oct. 2, 2018) (emphasis added); *see also United States v. City of Newark*, No. 2:2016-cv-1731, ECF Dkt. 4-1 at 22 (D.N.J. Apr. 29, 2016) (another settlement agreement with identical language); *United States v. Town of East Haven*, No. 3:2012-cv-1652, ECF Dkt. 2-1 at 20 (D. Conn. Nov. 20, 2012) (same). Legally, then, the DOJ agrees that the First Amendment protects all methods of recording. And practically, this reflects what common sense already tells us: a "rigid" approach is completely unworkable in this space because it is impossible to predict what recording technology will look like in the future. *Cf. Hope*, 536 U.S. at 742.

In short, just because a court can make factual distinctions doesn't mean it should. The First Amendment protects an individual's right to record police performing their duties in public. That formulation of the right is specific enough to have given a reasonable official fair notice that Mr. Sharpe was entitled to record the traffic stop—via livestream or any other method.

III. The District Court also erred by failing to consider the robust consensus of authorities recognizing the right to record.

Having defined the right with fair notice in mind, the court must next consider whether the right was clearly established at the time of the incident in question. *Booker*, 855 F.3d at 538. When, as here, this Circuit has not yet considered the

specific right in question, the right may still be clearly established "based on a consensus of cases of persuasive authority from other jurisdictions." *Id.* at 543 (internal quotation marks omitted). That "robust consensus" exists here. *See District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (internal quotation marks omitted).

a. Courts must consider both out-of-circuit judicial authorities and non-judicial authorities in determining whether a consensus exists.

Again, under *Hope*, courts should consider the full spectrum of judicial and non-judicial authorities in deciding whether a right is clearly established. The Supreme Court has explicitly acknowledged that a right may be clearly established by a "consensus of cases of persuasive authority." *Wilson v. Layne*, 526 U.S. 603, 617 (1999); *see also Wesby*, 138 S. Ct. at 589. And this Court has followed suit. *See, e.g.*, *Ray v. Roane*, 948 F.3d 222, 230 (4th Cir. 2020); *Booker*, 855 F.3d at 543.

But cases are not the only relevant authorities; *Hope* also considered executive-branch guidance on both federal and state levels. 536 U.S. at 743–45; *see also Groh v. Ramirez*, 540 U.S. 551, 564 (2004) (relying in part on a federal executive-branch directive to conclude that the right at issue was clearly established). This Circuit adopted *Hope*'s approach in *Booker v. South Carolina Department of Corrections*, concluding that the right at issue there—an inmate's right to be free from retaliation for filing a prison grievance—was clearly established despite the lack of binding precedent on point. 855 F.3d at 543–46. The court observed that a consensus of other circuits recognized the right and found further

support for its conclusion in the state department of corrections' internal policies. *Id.* at 546 (citing, among others, *Hope*, 536 U.S. at 741–45). Those policies "unequivocal[ly]" prohibited prison officials from retaliating against an inmate for filing a grievance, thus giving the official-defendants in that case "fair warning" that retaliation was unconstitutional. *Id.*

b. At the time of the incident, a robust consensus of authorities recognized the right to record.

Despite this clear direction from the Supreme Court and this Court, the District Court here gave short shrift to out-of-circuit authorities[4] and completely failed to consider executive-branch guidance. *See Sharpe*, 480 F. Supp. 3d at 697–98. That was error. Had the court properly considered all relevant authorities, it would have recognized that a clear and robust consensus in favor of the right to record existed on the date of the incident.[5]

By the time of the events here, six circuit courts had held that the First Amendment protects the right to record. None have held otherwise. The Ninth Circuit was the first federal appellate court to recognize a "First Amendment right to film matters of public interest." *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th

[4] This arose in part out of the court's erroneous conclusion, discussed *supra*, that right-to-record cases were irrelevant because Mr. Sharpe was recording the encounter via livestream. *See Sharpe*, 480 F. Supp. 3d at 697–98.

[5] Mr. Sharpe's encounter with Officer Helms occurred on October 9, 2018. *See Sharpe*, 480 F. Supp. 3d at 697.

Cir. 1995). The First, Third, Fifth, Seventh, and Eleventh Circuits have since followed suit:

- *Gericke v. Begin*, 753 F.3d 1, 9 (1st Cir. 2014) (holding that an individual attempting to film a traffic stop had a clearly established right "to film a law enforcement officer in the discharge of his duties in a public space").
- *Fields*, 862 F.3d at 360 (holding that the First Amendment protects the "right to record—photograph, film, or audio record—police officers conducting official police activity in public areas").
- *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017) (concluding that "a First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions").
- *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 600 (7th Cir. 2012) (concluding that the First Amendment protected the "gathering and dissemination of information about government officials performing their duties in public," including police officers).
- *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing "a First Amendment right, subject to reasonable time,

manner, and place restrictions, to photograph or videotape police conduct").[6]

A common thread through these cases is the vital importance of First Amendment protections for "access to information about their officials' public activities." *Fields*, 862 F.3d at 359. The right to record police, in particular, "serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs." *Gericke*, 753 F.3d at 7 (internal quotation marks omitted); *see also Alvarez*, 679 F.3d at 597. And "[f]ilming the police contributes to the public's ability to hold the police accountable, ensure that police officers are not abusing their power, and make informed decisions about police policy." *Turner*, 848 F.3d at 689. Moreover, officers may also benefit from additional recordings of an event, as the recordings may "support further investigation," "confirm a dead end," or "exonerate an officer charged with wrongdoing." *Fields*, 862 F.3d at 360 (internal quotation marks omitted); *see also Turner*, 848 F.3d at 689. Everyone stands to benefit from having a clear record of law enforcement's public activities.

Unsurprisingly, no federal appellate court has held that this important right does not exist—though some have held that the right was not clearly established in

[6] This robust consensus continues to grow: in 2020, the Eighth Circuit relied on several of these cases to conclude that individuals have a clearly established right to "watch police-citizen interactions at a distance and without interfering." *Chestnut v. Wallace*, 947 F.3d 1085, 1090 (8th Cir. 2020).

years past. *See, e.g.*, *Frasier v. Evans*, 992 F.3d 1003, 1020 n.4, 1023 (10th Cir.), *cert. denied*, -- U.S. ---- (2021) (concluding that the right was not clearly established in August 2014, before the Third and Fifth Circuits recognized it, but expressly declining to decide whether the right exists). Key among these decisions is *Szymecki v. Houck*, 353 F. App'x 852 (4th Cir. 2009) (per curiam) (*Szymecki II*). There, in an unpublished decision, this Court summarily concluded that the plaintiff's "asserted First Amendment right to record police activities on public property was not clearly established in this circuit" in June 2007. *Id.* at 853; *Szymecki v. City of Norfolk*, No. 2:08cv142, 2008 WL 11259782, at *1 (E.D. Va. Dec. 17, 2008) (*Szymecki I*). The District Court here relied in part on *Szymecki* to conclude that Mr. Sharpe's right to record police was also not clearly established in October 2018. *Sharpe*, 480 F. Supp. at 697–98. But *Szymecki* does not support the District Court's conclusion here for several reasons.

First, unpublished opinions from this Court "are not even regarded as binding precedent in [this] circuit," so "they cannot be considered in deciding whether particular conduct violated clearly established law for purposes of adjudging entitlement to qualified immunity." *Booker*, 855 F.3d at 543 (internal quotation marks omitted). Second, *Szymecki* did not hold that the right did not exist; rather, it provided that the right was not clearly established in 2007. *See Szymecki II*, 353 F. App'x at 853; *Szymecki I*, 2008 WL 11259782, at *1. That was over a decade before

the events at issue here, at the dawn of the proliferation of smartphones[7] and before the First, Third, Fifth, and Seventh Circuits' decisions on the right to record. *See supra* p. 15. Third and finally, *Syzmecki*'s holding is not supported by any analysis, thus "depriv[ing] [it] of any marginal persuasive value it might otherwise have had." *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011). *Syzmecki* therefore does not chip away at the consensus of circuit courts that recognize the right to record police.

This unanimous consensus is further buttressed by executive-branch guidance from the DOJ and municipalities across the country—all of which inform law enforcement of the public's right to record. Years before the facts of this case, the DOJ issued public guidance unequivocally recognizing the "First Amendment right to observe and record police officers engaged in the public discharge of their duties." U.S. Department of Justice, Civil Rights Division, *Re: Christopher Sharp v. Baltimore City Police Department, et al.*, 2 (May 14, 2012) (DOJ Guidance). The Guidance, acknowledging that the "justification for [the] right [to record] is firmly rooted in long-standing First Amendment principles," advised the Baltimore City Police Department to adopt policies that "affirmatively state that individuals have a First Amendment right to record police officers." *Id.* at 3. And the DOJ has since reiterated the importance of the right to record in numerous other statements of

[7] The iPhone, for instance, was first released in the United States on June 29, 2007. *This Day in History: Steve Jobs Debuts the iPhone*, History (Aug. 29, 2012), https://tinyurl.com/w884rsw.

interest and settlement agreements. *See, e.g.*, *United States v. City of New Orleans*, No. 2:2012-cv-1924, ECF Dkt. 565 at 45 (E.D. La. Oct. 2, 2018) (settlement agreement); *United States v. Police Dep't of Balt. City*, No. 1:2017-cv-99, ECF Dkt. 2-2 at 84 (D. Md. Jan. 1, 2017) (settlement agreement); *United States v. City of Newark*, No. 2:2016-cv-1731, ECF Dkt. 4-1 at 22 (D.N.J. Apr. 29, 2016) (settlement agreement); *United States v. City of Ferguson*, No. 4:2016-cv-180, ECF Dkt. 41 at 27 (E.D. Mo. Apr. 19, 2016) (settlement agreement clarifying that "[t]he use of a recording device during a police encounter shall not in itself be considered a threat to officer safety"); *Garcia v. Montgomery County*, No. 8:2012-cv-3592, ECF Dkt. 15 (D. Md. Mar. 4, 2013) (DOJ statement of interest emphasizing that "recording a police officer performing duties on a public street" is "[c]ore First Amendment conduct"); *United States v. Town of East Haven*, No. 3:2012-cv-1652, ECF Dkt. 2-1 at 20 (D. Conn. Nov. 20, 2012) (settlement agreement).

Municipalities across the country have agreed, enacting their own policies to protect the right to record well before the events in question here. For example, in 2009 the St. Louis Metropolitan Police Department issued a "special order" acknowledging that individuals "have an unambiguous First Amendment right to record officers in public places." *See Chestnut v. Wallace*, No. 4:16-cv-1721, 2018 WL 5831260, at *3 (E.D. Mo. Nov. 7, 2018). The order accordingly prohibited officers from preventing members of the public from exercising that right. *See id.*

The City of Denver adopted a similar policy sometime before 2014. *See Frasier*, 992 F.3d at 1012. And the Philadelphia Police Department has formally acknowledged on several occasions that the right to record exists, instituting a formal training program in 2014 to "ensure that officers ceased retaliating against bystanders who recorded their activities."[8] *Fields*, 862 F.3d at 356; *see also* International Association of Chiefs of Police, *Recording Police Activity Model Policy* (Dec. 2015) (providing that "[m]embers of the public . . . have an unambiguous First Amendment right to record officers in public places" using "a camera, cell phone, audio recorder, or other device"); Montgomery County Police, *Citizen Videotaping Interactions* (Jan. 1, 2013) (also acknowledging the right to record).

In sum, six circuit courts, the DOJ, and local governments across the country agree that individuals have the right to record police performing their official duties in public. That is more than enough to have given Officer Helms fair notice here. And although the qualified-immunity test is objective, *Pearson v. Callahan*, 555 U.S. 223, 244 (2009), one of Officer Helms's colleagues acknowledged at the scene

[8] Other municipalities have issued similar guidance after the events of this case. For instance, in 2020 the Houston Police Department issued a "General Order" recognizing "a First Amendment right to video record, photograph, and/or audio record officers of the Houston Police Department in any public setting." Houston Police Department, *General Order 600-21: Public Recording of Police Activity* (Feb. 25, 2020). The Austin and Chicago Police Departments have also issued similar orders. Austin Police Department, *General Order 302: Public Recording of Official Acts* (July 6, 2021); Chicago Police Department, *General Order G02-02: First Amendment Rights* (Apr. 13, 2021).

that Mr. Sharpe had a right to record the encounter, *Sharpe*, 480 F. Supp. 3d at 693. This fact, though legally irrelevant, reinforces on a practical level that a reasonable officer would have known of the right. The District Court erred in concluding otherwise.

Further, the ubiquitous recognition of the right affirms the right's importance. From Rodney King to George Floyd, our society-level conversations about law enforcement have benefitted from—and, in many cases, centered on—video evidence of police encounters. *See, e.g.*, *George Floyd: What Happened in the Final Moments of His Life*, BBC News (July 16, 2020), https://tinyurl.com/zfndypwn; Cydney Adams, *March 3, 1991: Rodney King Beating Caught on Video*, CBS News (Mar. 3, 2016), https://tinyurl.com/495vk6vv. In important but tense moments, recording "corroborates or lays aside subjective impressions for objective facts. Hence to record is to see and hear more accurately." *Fields*, 862 F.3d at 359. Accurate information, in turn, enables our public discussions of these crucial issues to be "uninhibited, robust, and wide-open," to the benefit of all. *Id.* at 359 (quoting *Snyder v. Phelps*, 562 U.S. 443, 452 (2011)).

CONCLUSION

This is not a case of "bad guesses in gray areas." *See Hill v. Crum*, 727 F.3d 312, 321 (4th Cir. 2013) (internal quotation marks omitted). Every circuit court to address the issue has concluded that individuals have a First Amendment right to

record the police in public. The DOJ and numerous municipalities agree. In this legal landscape, a reasonable official in Officer Helms's shoes would have had fair warning that Mr. Sharpe had a right to record here. This Court should therefore reverse the District Court's dismissal of the individual-capacity claims against Officer Helms.

Dated: November 9, 2021

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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