No. 21-1827

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DIJON SHARPE,
Plaintiff-Appellant,
v.
WINTERVILLE POLICE DEPARTMENT; Officer WILLIAM BLAKE ELLIS, in his official capacity only; Officer 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

REPLY BRIEF OF APPELLANT

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REPLY

This is a clear case. An innocent man unobtrusively livestreamed a traffic stop from the passenger seat of a stopped vehicle. A police officer retaliated against him for doing so and now seeks to escape liability by claiming he did not know the passenger had a constitutional right to broadcast the stop. That claim strains the credulity of the credulous. The Court should reverse.

At the time of the traffic stop in this case, in October 2018, it was clearly established that individuals have a First Amendment right to film police officers in the discharge of their duties in public. That right had no blanket carve-out for vehicle passengers and no special exception for live broadcasting. The right was clear enough that it gave Officer Helms fair warning that retaliating against Dijon Sharpe for livestreaming the traffic stop in this case was flatly unconstitutional. "This is not a case of 'bad guesses in gray areas.'"[1]

Appellees' efforts to avoid that obvious conclusion are meritless.

[1] Brief for the Institute for Justice as Amicus Curiae, at 21 (Dkt. 23-1) (quoting *Hill v. Crum*, 727 F.3d 312, 321 (4th Cir. 2013)) [hereinafter "IJ Br."].

Appellees argue that Officer Helms can escape liability because a factually-identical prior case in this circuit is necessary to overcome qualified immunity. Ans. Br. 10, 20-21 (Dkt. 51). But that is a distortion of qualified immunity. Qualified immunity is a doctrine of fair notice, not a one-free-bite rule. Officer Helms had fair notice. The right to film police—a right that includes the right to live broadcast—was clearly established in this Circuit because it was obvious in light of Supreme Court precedent and settled by the unanimous consensus of six other courts of appeals.

Appellees argue that even if the right to film police is clearly established in some situations, the situations in which the right has been recognized are not similar enough to this case to have put Officer Helms on notice of the unconstitutionality of his conduct. Ans. Br. 10, 12. They argue that a reasonable police officer could have thought livestreaming differs from recording and that vehicle passengers differ from other bystanders. *Id.* That is nonsense. These are post-hoc justifications, not actual distinctions with any reasoned basis in First Amendment law. In carrying out their duties, police officers, like everyone else, are expected to draw logical inferences, reason by analogy, and exercise common

sense. Appellees point to no First Amendment case (except the court below) that has ever held or even conjectured that live broadcasting is entitled to less First Amendment protection than recording. The protections are exactly the same. *See Quraishi v. St. Charles Cty.*, 986 F.3d 831, 834, 837-39 (8th Cir. 2021) (retaliating against reporters for live broadcasting protest violated clearly established First Amendment rights). To the extent there is any distinction at all between the two, livestreaming is worthy of greater protection. *See* Op. Br. 47, n.9 (Dkt. 18). Gathering information would be useless if not for its dissemination.

Even more unfounded is Appellees' argument that passengers in pulled-over vehicles forfeit their First Amendment rights. Passengers in pulled-over vehicles maintain all of their constitutional rights during a traffic stop, including their right to record and livestream. No case holds otherwise. Officers can "command the situation" during a traffic stop, but reasonable officers know that the individuals involved retain their constitutional rights. Officer Helms had no more right to stop Mr. Sharpe from recording on his phone out of a generalized concern for "officer safety" than he had the right to seize and search Mr. Sharpe's phone out of a generalized concern for "officer safety." The right of individuals

involved in traffic stops, specifically, to film traffic stops was clearly established at the time of the stop in this case. *See Gericke v. Begin*, 753 F.3d 1, 7-8 (1st Cir. 2014) (setting forth the First Amendment analysis that applies to recording by individuals involved in traffic stops).

No matter how the Court resolves the qualified immunity issue, it will need to rule on the constitutionality of Winterville's policy banning livestreaming. Appellees' defense of that policy also misses the mark. Ans. Br. 11. Appellees argue that a ban on livestreaming police is a content-neutral restriction. *Id*. That is wrong. A ban on livestreaming police is a content-based restriction: it applies only to filming police officers and it exists only because Winterville wants to prevent viewers from seeing its content. In any event, banning livestreaming cannot survive any level of scrutiny whether strict or intermediate: it advances no substantial government interest and banning it without also banning text messaging and phone calls makes it so poorly tailored that it cannot be said to reasonably advance any government interest.

Appellees' other argument, that Mr. Sharpe's complaint fails to plausibly allege an unconstitutional policy or practice for purposes of *Monell* liability, also fails. Ans. Br. 11-12. As the Opening Brief

explained, two officers of the Winterville Police Department acted as if Winterville had an official policy banning livestreaming that they were merely carrying out. Op. Br. 58-60. That is sufficient to give rise to the inference that Winterville has such an official policy. Certainly it is enough to permit Mr. Sharpe to take discovery on the issue before dismissing his lawsuit. Appellees have no answer to this basic point.

The logic of Appellees' position is chilling. Appellees insist that police officers can prevent real-time communication with the outside world by those inside a stopped vehicle in the name of a generalized conjectural concern for "officer safety" in every routine traffic stop. Adopting Appellees' logic would mean that police officers in this Circuit—without any particularized justification—have the authority to restrict individuals in stopped vehicles from making phone calls, text messaging, sending emails, taking photos, or audio-recording traffic stops because any communication outside the vehicle during the stop could pose a danger to the officers involved in the stop.

Transforming traffic stops into black boxes cut off from the rest of the world would be inconsistent with decades of First Amendment doctrine and shred the First Amendment's most vital guarantees in a

circumstance where its protections are most urgent. It is a traffic stop's "exposure to public view" that "reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear that, if he does not cooperate, he will be subjected to abuse." *Berkemer v. McCarty*, 468 U.S. 420, 438 (1984).[2] Any speculative concern for "officer safety" is counterbalanced by the passenger's rights and interests in being able to broadcast during his interactions with police officers in public.

Appellees' argument that "officer safety" is jeopardized by livestreaming is not only unfounded—it is wrong. Officer safety is enhanced when traffic stops are livestreamed. Livestreaming deters unlawful conduct because it ensures that anyone who engages in unlawful action will be held accountable for it. The notion that officers are in more danger when there are more witnesses runs contrary to everything our society knows about the impact of cameras on criminal conduct. Sunlight may be the best disinfectant, electric light the most

[2] *See also* Brief of the Electronic Privacy Information Center As Amicus Curiae, at 17-23 (Dkt. 35-1) [hereinafter "EPIC Br."] (explaining there is no government interest in preventing the public from knowing real-time information about a traffic stop).

efficient policeman, but cameras are the strongest deterrents against unlawful action.

The Court should reverse the decision below and hold that Officer Helms violated Mr. Sharpe's clearly established First Amendment rights and that Winterville's official policy banning vehicle passengers from livestreaming of traffic stops violates the First Amendment.

ARGUMENT

I. Officer Helms Violated Clearly Established Law By Retaliating Against Mr. Sharpe for Filming the Traffic Stop

As Mr. Sharpe explained in his Opening Brief, the right to film police officers in the discharge of their duties in public was clearly established in this Circuit in October 2018. Op. Br. 18-41 (Dkt. 18). The right was obvious in light of existing Supreme Court precedent. *Id.* at 21-31. Three other Circuits—the First, Ninth, and Eleventh—found the right was obvious at the time they recognized it many years ago. *Id.* at 33-34. A robust consensus of persuasive authority also established the existence of the right. *Id.* at 31-38. By October 2018, six federal courts of appeals had held that there is a right to film police officers in the discharge of their duties in public, and not one Circuit had reached a contrary conclusion. *Id.* at 38. None ever has. As Mr. Sharpe also

explained, as further evidence of the right, the Department of Justice has taken the view, since 2012, that individuals have the right to record police officers in public. *Id.* at 29-30. It recently filed an *amicus* brief in another case reiterating its long-settled view. *See* Brief For the United States as Amicus Curiae, *Irizarry v. Yehia*, No. 21-1247 (10th Cir.) (docket entry of Nov. 24, 2021).

Against this overwhelming weight of authority, Appellees mount four arguments. *First*, they contend that Mr. Sharpe's retaliation claims fail as a matter of law, either (a) because Officer Helms failed in his attempt to prevent Mr. Sharpe from filming, or (b) because officer conduct during a traffic stop supported by probable cause should be insulated from First Amendment retaliation claims under § 1983. Ans. Br. 25, 47-49 (Dkt. 51). *Second*, they suggest that Mr. Sharpe's right to film the stop in this case was not clearly established because the Fourth Circuit lacked a factually identical case so holding. *Id.* at 20-21. *Third*, they claim that because Mr. Sharpe was a bystander in the vehicle during the traffic stop, rather than a bystander outside it, a reasonable officer could have concluded that he forfeited his constitutional right to film the stop. *Id.* at 21-22. *Fourth*, they claim that livestreaming is fundamentally

different from recording in a way that would permit a reasonable police officer to believe individuals lack a First Amendment right to livestream even if they have a First Amendment right to record. *Id.* at 31-42.

All of those arguments fail.

First, Officer Helms violated Mr. Sharpe's constitutional rights by retaliating against him. In a retaliation case, the objective question is (1) whether the person was engaged in a First Amendment protected activity, and, if so, (2) whether the officer's actions would chill a person of ordinary firmness from engaging in the protected activity. *See* JA60-61 (decision below) (citing *ACLU of Maryland, Inc. v. Wicomico Cty., Md.*, 999 F.2d 780, 785 (4th Cir. 1993)); *see also Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 537 (4th Cir. 2017).

As the court below correctly found, and Appellees do not dispute, "[a] police officer reaching into a vehicle to grab a phone that is real-time broadcasting 'would likely deter a person of ordinary firmness from the exercise of First Amendment rights.'" JA61 (quoting *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005)). The Court should reject Appellees' suggestion that somehow Officer Helms did not violate Mr. Sharpe's First Amendment rights

because he did not succeed in stopping Mr. Sharpe from recording the traffic stop. Ans. Br. 25, 47-48. Appellees apply the wrong test. That Officer Helms's actions would have chilled a person of ordinary firmness is enough, regardless of whether or not he actually succeeded here.

Appellees' other argument—that vehicle passengers should not be permitted to bring First Amendment retaliation claims against police officers at all without pleading an absence of probable cause for the traffic stop, Ans. Br. 48-50—is incorrect. Appellees contend that as long as a traffic stop is lawful, any action taken by a law enforcement officer in retaliation for the exercise of a First Amendment right during the traffic stop should also be considered lawful as long as it could be undertaken for a non-retaliatory purpose during the stop. Ans. Br. 49. That is not the law. The Supreme Court has recognized on numerous occasions that lawful conduct routinely gives rise to actionable First Amendment retaliation claims. *See, e.g.*, *Heffernan v. City of Paterson, N.J.*, 578 U.S. 266, 268 (2016); *Hartman v. Moore*, 547 U.S. 250, 256 (2006); *see also Gericke v. Begin*, 753 F.3d 1, 6 (1st Cir. 2014) (First Amendment retaliation for filming traffic stop). The analysis in *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722-24 (2019), cited by Appellees for their contrary rule,

Ans. Br. 48-49, is limited to the unique context of arrests supported by probable cause, which the Supreme Court has said pose special hurdles to establishing causation. Moreover, in the retaliatory-arrest cases the arrest is the alleged retaliatory act; for the analogy to work in this case the traffic stop would have needed to be the alleged retaliatory act. The *Nieves* analysis has no application in this case because the retaliation was a physical altercation followed by a threat of future arrest.

Second, as the Opening Brief explained, Op. Br. 18-19, a right can be clearly established even with no in-circuit case on point either because it is obvious or because it is clearly established by a consensus of persuasive authority. *See Booker*, 855 F.3d at 543; *see District of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018). Appellees err when they claim that "[t]he lack of even a single case in Plaintiff's brief even discussing the right to livestream shows that there is no clearly established right to livestream, in the Fourth Circuit or elsewhere." Ans. Br. 21. Far from establishing that proposition, it establishes the opposite. Cases do not distinguish between recording and livestreaming because there is no material distinction between recording and livestreaming. *See Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011) (explaining that the

"terseness" of First Amendment right-to-film cases "implicitly speaks to the fundamental and virtually self-evident nature of the First Amendment's protections in this area"). The absence of discussion in other cases shows only that the right to livestream is "manifestly included within [a] more general" right to record. *Booker*, 855 F.3d at 538 ("We must consider not only specifically adjudicated rights, but also those manifestly included within more general applications of the core constitutional principles invoked." (quotation marks omitted)); *Williamson v. Stirling*, 912 F.3d 154, 187 (4th Cir. 2018) (similar); *Wall v. Wade*, 741 F.3d 492, 502-03 (4th Cir. 2014) (similar); *see also Dean ex rel. Harkness v. McKinney*, 976 F.3d 407, 419 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2800 (2021) (similar). Courts have drawn no distinction between the First Amendment rights that attach to live broadcasting and other kinds of filming. *See Quraishi*, 986 F.3d at 834, 837-39.

Appellees' argument illustrates a larger problem that pervades Appellees' Brief: a fixation on immaterial distinctions between this case and other right-to-film cases.[3] Appellees elevate form over substance and

[3] *See* IJ Br. 5-12 (Dkt. 23-1).

offer a distorted vision of qualified immunity, a kind of super qualified immunity, in which police officers may freely engage in blatantly unconstitutional conduct as long as there is no prior case exactly like it. But qualified immunity is a doctrine of fair notice not "a scavenger hunt for prior cases with precisely the same facts." *Perea v. Baca*, 817 F.3d 1198, 1204 (10th Cir. 2016) (quotation marks omitted).[4] Government officials cannot shield obviously unconstitutional conduct by claiming they are "incapable of drawing logical inferences, reasoning by analogy, or exercising common sense." *Williams v. Strickland*, 917 F.3d 763, 770 (4th Cir. 2019). They need not be "creative or imaginative in determining the scope of constitutional rights" but they do have a "responsibility to put forth *at least some mental effort* in applying a reasonably well-defined doctrinal test to a particular situation." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1278 (11th Cir. 2004) (emphasis added). Measured against that standard, Appellees' attempt to conjure distinctions between this case and other right-to-film cases fails.[5]

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[4] *See* IJ Br. (Dkt. 23-1); Brief of the Cato Institute as Amicus Curiae, at 20-26 (Dkt. 37) [hereinafter "Cato Br."].

[5] If qualified immunity would shield Officer Helms's conduct in this case, the doctrine should be overruled. *See* Cato Br. 6-18 (Dkt. 37).

As the First Circuit has recognized, "it is firmly established that the First Amendment protects 'a range of conduct' surrounding the gathering and dissemination of information," *Gericke*, 753 F.3d at 7 (quoting *Glik*, 655 F.3d at 82), and "gathering information about government officials in a form that can be readily disseminated 'serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs.'" *Id.* (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). Notably, the court further asserted that "[t]hose First Amendment principles apply equally to the filming of a traffic stop and the filming of an arrest in a public park . . . A traffic stop, no matter the additional circumstances, is inescapably a police duty carried out in public. Hence, a traffic stop does not extinguish an individual's right to film." *Id.* The First Circuit tempered the right to film in some obviously dangerous situations by stating that "[t]he circumstances of some traffic stops, particularly when the detained individual is armed, might justify a safety measure," *id.* at 8, but the court endorsed a view that individuals presumptively have a right to film traffic stops absent an exceedingly persuasive justification for preventing them from doing so; no reasonable reader of *Gericke* would conclude otherwise. "[T]he fundamental and

virtually self-evident nature of the First Amendment's protections in this area" are "crystal clear" and beyond debate. *Dyer v. Smith*, No. 3:19-CV-921, 2021 WL 694811, at *8 (E.D. Va. Feb. 23, 2021) (quoting *Glik*, 655 F.3d at 85).

Third, Appellees are wrong that a reasonable officer would have thought Mr. Sharpe forfeited his First Amendment right because he was a bystander in the stopped vehicle rather than a bystander standing outside it. Ans. Br. 15, 21-24, 48-50. Even Officers Helms and Ellis were not so brazen as to make this claim during the traffic stop in this case. *See id.* at 5 ("If you were recording, that is just fine.").

Appellees claim that because police can engage in "*de minimis* intrusions" and "restrictions" on the liberty of passengers in pulled-over vehicles, *id.* at 11, 15, 32-33, 40-42, 49-50, and because passengers are "'seized' for the duration of the traffic stop," *id.* at 21-22; *see also id.* at 15, 19, 27, 32-33, 40, 46-48, a reasonable police officer would have thought it lawful to impose a blanket rule preventing the passengers in stopped vehicles from filming. No reasonable officer would have believed

that.[6] Reasonable officers know that vehicle passengers retain all of their constitutional rights during traffic stops.[7] Any intrusion greater "than an order to exit the car … requires commensurately greater justification." *United States v. Sakyi*, 160 F.3d 164, 168-69 (4th Cir. 1998). The generalized interest in officer safety obviously "does not, without more, justify a frisk of the automobile's occupants," *United States v. Robinson*, 846 F.3d 694, 699 (4th Cir. 2017), searching the vehicle, *Knowles v. Iowa*, 525 U.S. 113, 117 (1998), or even opening a car door and leaning into the vehicle, *United States v. Ngumezi*, 980 F.3d 1285, 1289-90 (9th Cir. 2020). If police ask questions unrelated to the basis for the stop, vehicle occupants are "not obliged to respond." *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984).[8] Police officers cannot even prolong a stop to investigate

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[6] *See* Brief of Amici Curiae American Civil Liberties Union and American Civil Liberties Union of North Carolina, at 17-23 (Dkt. 30-2) [hereinafter "ACLU Br."]; Brief of Amici Curiae National Press Photographers Association et al., at 13-17 (Dkt. 34-1) [hereinafter "NPPA Br."].

[7] At least one Court has specifically rejected the argument that passengers in stopped vehicles lose the right to record because they are part of the stop. *See Bacon v. McKeithen*, No. 5:14-CV-37-RS-CJK, 2014 WL 12479640, at *4 (N.D. Fla. Aug. 28, 2014).

[8] Appellees appear to suggest (Ans. Br. 39-40) that Mr. Sharpe had an obligation to respond to the officers' questions during the stop, but under *Berkemer* and its progeny he had no such obligation. The officers were

a vehicle passenger out of a generalized concern for officer safety. *United States v. Henderson*, 463 F.3d 27, 46-47 (1st Cir. 2006). A traffic stop carries some risk—all police-citizen encounters carry some risk—but the Supreme Court has recognized that "[t]he threat to officer safety from issuing a traffic citation … is a good deal less than in the case of a custodial arrest." *Knowles*, 525 U.S. at 117.

Because they know the narrowness of the "command of the situation" doctrine, reasonable officers know that vehicle passengers cannot be searched without a warrant out of a generalized concern for officer safety. *Robinson*, 846 F.3d at 699; *Bennett v. City of Eastpointe*, 410 F.3d 810, 822 (6th Cir. 2005) (same). They know that vehicle passengers cannot have their cell phones or other effects seized and searched out of a generalized concern for officer safety. *See Riley v. California*, 573 U.S. 373, 388 (2014). And they also know, because it is obvious and because it has been established by a consensus of persuasive authority, that "[p]eaceful recording" of police activity "in a public space

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allowed to ask him questions, but he had no obligation to respond to those questions because the stop had nothing to do with him. That is also why Mr. Sharpe had no obligation to provide his name to the officers.

that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation." Ans. Br. 27 (quoting *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011)). Appellees argue "that is not the case here." Ans. Br. 27. But it is exactly the case here, as the complaint alleges, and as the video shows.

The First Circuit's decision in *Gericke* removes all doubt about whether a person involved in a traffic stop has the right to film it. In *Gericke*, a bystander filmed a traffic stop. 753 F.3d at 3-4. The witness approached the stop and "announced to [the officer] that she was going to audio-video record him." *Id.* She was later charged with several crimes. *Id.* at 4. She filed a § 1983 suit alleging retaliation for engaging in First Amendment protected activity. *Id.* at 4, 7. The First Circuit held that she had stated a valid First Amendment claim and that the right to film the stop was clearly established. *Id.* at 6-10. The Court engaged in an extensive analysis that expressly considered—and rejected—the "command of the situation" doctrine as a basis for barring bystanders and the passengers in the vehicle stopped by the officer from filming the interaction. *Id.* at 8. The Court wrote: "[A] police order that is specifically directed at the First Amendment right to film police performing their

duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties." *Id.* The bystander outside the vehicle in *Gericke* is indistinguishable from the bystander inside the vehicle in this case.

The decision in *Dyer v. Smith*, No. 3:19-CV-921, 2021 WL 694811 (E.D. Va. Feb. 23, 2021) is just as significant. *Contra* Ans. Br. 22. The airport in *Dyer* was not as public as a public street, and the need for command of the situation at a TSA checkpoint is arguably far greater than the situation an officer confronts when issuing a mere traffic citation. Nonetheless, the district court found the First Amendment right to film a pat-down search at an airport "crystal clear," "fundamental" and "virtually self-evident." *Dyer*, 2021 WL 694811 at *8.

To emphasize the total inapplicability of the "command of the situation" doctrine to this case, consider that while Mr. Sharpe happened to be holding his cell phone during the traffic stop, he could have had his phone on the floor, propped on the dashboard, or up against the seat. Nothing about the officers' need to "command the situation" would be implicated in any of those circumstances because the phone is not

involved in "the situation." No reasonable officer could believe that the mere fact that a broadcast is done from inside a stopped vehicle, rather than outside it, implicates the holdings or the logic of the *Arizona v. Johnson*, 555 U.S. 323, 330-32 (2009) line of cases cited by Appellees. *See* Ans. Br. 33-34. Especially where, as here, the officer would have to conclude that those cases negated by implication a well-established First Amendment right to record police encounters. And where, as here, and as in virtually all traffic stops, the reason for the stop is nothing more than "a minor vehicular offense." *Arizona*, 555 U.S. at 331.

Fourth, there is no constitutionally salient distinction between livestreaming and recording.[9] *Contra* Ans. Br. 24-25, 33-42. Appellees appear to admit that livestreaming is, at minimum, First Amendment protected, and that the government's asserted interest in restricting a First Amendment protected activity is a different question than whether it is a First Amendment protected activity. *See* Ans. Br. 33-42; Op. Br. 43-48; *see also Holder v. Humanitarian L. Project*, 561 U.S. 1, 8 (2010)

[9] *See* Brief of Amicus Curiae Electronic Frontier Foundation, at 4-9, 17-27 (Dkt. 36-1) [hereinafter "EFF Br."]; ACLU Br. 13-16 (Dkt. 30-2); NPPA Br. 6-13 (Dkt. 34-1).

(holding that material support of terrorism by means of speech is still subject to First Amendment analysis). As a consequence, Appellees also appear to admit that, for Officer Helms's conduct to be lawful, a reasonable officer would have needed to believe that restricting Mr. Sharpe's livestreaming survived intermediate scrutiny. *See* Ans. Br. 33-42 (analyzing constitutionality of restricting livestreaming under intermediate scrutiny analysis).

Appellees' concessions in this regard are fatal. As an initial matter, they are wrong about the standard of scrutiny: A reasonable police officer who knows that livestreaming is First Amendment protected activity also knows it cannot be restricted on the basis of its content unless the restriction can meet strict scrutiny.[10] That is First Amendment 101.

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[10] Appellees argue that Mr. Sharpe "waived" arguments that the "policy was overbroad or an impermissible content-based restriction on speech" by not raising them below. Ans. Br. 16-17. The assertion is incorrect. *See* D. Ct. Dkt. No. 39, at 8 (arguing overbreadth); D. Ct. Dkt. No. 19, at 7-8 (arguing content-based restriction subject to strict scrutiny).

Whether these arguments were made below is irrelevant in any event. These are not new claims and thus are not subject to waiver. *See United States v. Green*, 996 F.3d 176, 184 (4th Cir. 2021); *United States v. Boyd*, 5 F.4th 550, 556 (4th Cir. 2021). And the district court passed on them, making them reviewable. *See United States v. Pratt*, 915 F.3d 266, 271 n.4 (4th Cir. 2019); *see also United States v. Williams,* 504 U.S. 36, 41

There is no dispute in this case that Officer Helms sought to prevent Mr. Sharpe from filming because of the content he was filming. The claim that the restriction was in the name of "officer safety" does not change that analysis, because the speech allegedly endangered officer safety only because of its communicative content. Op. Br. 48-51. Just as a speech advocating a viewpoint that could endanger police officers is protected by the shield of strict scrutiny because restricting it is content-based, a livestream of police officers is protected by the shield of strict scrutiny because restricting it is content-based.

Regardless, even if a reasonable police officer could have believed that restricting livestreaming was subject to intermediate scrutiny, no reasonable officer could have believed that restricting livestreaming and no other form of live communication out of a stopped vehicle survives intermediate scrutiny. Appellees attempt to argue that the "dangers" posed to police officers by livestreaming are real. Ans. Br. 33-42. But the "evidence" they offer is so weak it does not even deserve to be called

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(1992); *see also United States v. Young*, 998 F.3d 43, 52 n.2 (2d Cir. 2021); *see also Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699, 707 (D.C. Cir. 2009).

evidence. They suggest that gang members who have been pulled over by police might use livestreaming to ambush the officers. Ans. Br. 34-35. They offer not one example of it ever happening.[11] *See* Ans. Br. 34-35. Appellees vaguely suggest that there is a "connection" between livestreaming and violence, but it is unclear what they believe the connection is. *See* Ans. Br. 36-38. Appellees offer a handful of anecdotes in which a person engaged in violence while livestreaming. *Id*. That proves nothing. There is no evidence that there is any correlation between livestreaming and danger to police officers, let alone any evidence of causation. Intermediate scrutiny requires more than speculation, *see Billups v. City of Charleston, S.C.*, 961 F.3d 673, 688 (4th Cir. 2020), as every reasonable police officer knows. Appellees' complaint that livestreaming might draw a crowd that interferes with the stop, Ans. Br. 13-14, is irrelevant. "[P]olice activity invariably draws a crowd"; the assertion" that a crowd of bystanders creates a "distraction that prevent[s]" the safe completion of a traffic stop "is, in a word,

[11] Appellees suggest that, in this particular case, the officers might have had reason to believe Mr. Sharpe's livestream endangered them. Ans. Br. 35-36. Appellees' argument is pure speculation. *See* Op. Br. 35-36. And it cannot be decided on a motion to dismiss; it would need be decided at summary judgment.

preposterous." *Walker v. City of Pine Bluff*, 414 F.3d 989, 993 (8th Cir. 2005).

Appellees do not contest the weighty societal interests involved in the right to record police, as recognized by six other courts of appeals. Nor do they convincingly contend that those interests evaporate when an individual opts to broadcast live. As amici have shown, livestreaming is especially worthy of the First Amendment's protections.[12] And Appellees' argument that livestreaming makes traffic stops less safe defies belief.[13] It is *self-evident* that cameras make police interactions safer both for officers and for citizens by deterring unlawful conduct.[14] *See* Eric L. Piza

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[12] *See, e.g.*, ACLU Br. 16 (Dkt. 30-2) ("[A] ban on livestreaming can be, in essence, a ban on any publication of recordings of police at all."); NPPA Br. 11 (Dkt. 34-1) ("[L]ive broadcasting is especially valuable in that it conveys immediacy, urgency, and cannot be manipulated or suppressed.").

[13] Police regularly film *themselves* via live broadcast. *See, e.g., Alsaada v. City of Columbus*, 536 F. Supp. 3d 216, 228 (S.D. Ohio 2021) (noting that the "[t]he 1993 law-enforcement siege in Waco, Texas, was broadcast live for weeks on end.").

[14] *See* EPIC Br. 4-17 (Dkt. 35-1) (discussing ways filming police interactions makes them safer); Brief of Amicus Curiae National Police Accountability Project, at 4-13 (Dkt. 22-1) (explaining the ways filming police encounters fosters accountability); EFF Br. 9-16 (Dkt. 36-1) (similar).

et al., *CCTV Surveillance for Crime Prevention,* 18 Crim. & Pub. Policy 135, 135-159 (2019).

The unlawfulness of Officer Helms's conduct is apparent from the fact that Officers Helms and Ellis permitted the driver of the stopped vehicle to speak on the phone for the entire duration of the traffic stop, including about the specific location of the traffic stop, and made no effort to prevent the driver or Mr. Sharpe from using their phones to send and receive text messages and emails or post and receive updates on social media. *Contra* Ans. Br. 39. Nothing better shows that the supposed concern for officer safety in this case is a pretext than the fact that the officers made no effort to restrict Mr. Sharpe's and the driver's communications with others outside the vehicle (all of which posed precisely the same "dangers" to the officers as livestreaming).[15]

[15] Appellees argue (at Ans. Br. 3, 5) that individuals were posting comments in real time in response to Mr. Sharpe's livestream. Appellees appear to be referring to the timestamps next to the comments. But those timestamps simply show where *in the video* the viewer was when the viewer posted the message, not the time or day when the message was posted. This basic factual error shows why the Court should simply ignore Appellees' inappropriate efforts (at Ans. Br. 2-7, 35-36) to inject facts outside the record into this appeal. This case is here on a motion to dismiss.

The Court should reject Appellees' qualified immunity defense. Qualified immunity does not permit law enforcement officers to engage in clearly unconstitutional conduct then escape liability by manufacturing distinctions that have no basis in the law and run contrary to the facts the officers themselves confronted. Mr. Sharpe had a clearly established First Amendment right to livestream the stop in this case, as every reasonable officer would have known in October 2018.

II. Winterville's Ban on Livestreaming Is Unconstitutional

Appellees' efforts to defend the constitutionality of Winterville's ban on livestreaming fail. The ban is unconstitutional. It is a content-based restriction on speech that cannot survive strict scrutiny. Indeed, it cannot even survive less-exacting intermediate scrutiny. And contrary to Winterville's argument, Mr. Sharpe alleged facts sufficient to survive a motion to dismiss.

As an initial matter, Winterville is wrong that a ban on livestreaming traffic stops is content-neutral. Ans. Br. 29-31 (Dkt. 51). Quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 784 (1989)—a case about a city's attempt to regulate the volume of amplified music in a park—Appellees argue that the ban on livestreaming is content-neutral

because "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral." Ans. Br. 30 (quoting *Ward*, 491 U.S. at 791). But a noise ordinance, or time, place, and manner restriction, or other content-neutral restriction, can be enforced without looking at the content of the speech. "No music after dark" and "no parades on Sundays" are content-neutral restrictions. "No livestreaming police officers," in contrast, is a quintessentially content-based restriction: the livestream must depict police officers to be forbidden. This distinction is as straightforward as it appears. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). Even facially content-neutral restrictions can become content-based in how they are applied. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011).[16]

[16] Appellees argue that, under the definition above, "federal securities regulations" barring "misrepresentations" would be content-based restrictions. *See* Ans. Br. 30-31. But they *are* content-based restrictions. *See United States v. Alvarez*, 567 U.S. 709, 722-24 (2012) (holding that the Stolen Valor Act's prohibition on false claims of receipt of military decorations or medals constituted a content-based restriction on free speech). They are exempt from First Amendment scrutiny however, because "[w]here false claims are made to effect a fraud or secure moneys or other valuable considerations . . . it is well established that the Government may restrict speech without affronting the First Amendment." *Id.* at 723; *see id.* at 717, 719 (similar).

Even if a ban on livestreaming police officers were content-neutral, it manifestly could not survive intermediate scrutiny. Appellees argue, on the basis of essentially no evidence, that banning vehicle passengers from livestreaming traffic stops "furthers an important or substantial governmental interest." Ans. Br. 43. But as the Opening Brief explained, a restriction cannot survive intermediate scrutiny unless the government can point to "actual evidence" that the problem is real and not imaginary and that it "seriously undertook to address the problem with less intrusive tools readily available to it." Op. Br. 52 (Dkt. 18) (quoting *Billups v. City of Charleston, S.C.*, 961 F.3d 673, 688 (4th Cir. 2020). Appellees do not dispute that standard, yet make no effort to meet it. *See* Ans. Br. 43-44.

The ban on livestreaming is also too poorly tailored to survive intermediate scrutiny. As the Opening Brief explained, to survive intermediate scrutiny a restriction must be "narrowly tailored." Op. Br. 51-52. And, as the Opening Brief explained, Winterville's ban is not narrowly tailored because all of the supposed dangers caused by vehicle passengers livestreaming traffic stops arise from any kind of real-time communication from inside the vehicle to those outside it, and because

the ban reaches a large amount of livestreaming that poses no danger to officers. Op. Br. 55-56. Appellees admit that the ban must be narrowly tailored but do not even try to elucidate how it is narrowly tailored when recording, phone calls, text messaging, emailing, and posting to social media are all permitted.

Finally, Appellees are wrong that Mr. Sharpe's complaint failed to raise a plausible inference that Winterville had a "policy or custom" that resulted in the violation of his First Amendment rights in this case. Ans. Br. 53; *see* Op. Br. 58 (quoting *Owens v. Baltimore City State's Att'ys Office*, 767 F.3d 379, 403 (4th Cir. 2014) ("The recitation of facts need not be particularly detailed, and the chance of success need not be particularly high.")). No party disputes that Mr. Sharpe's claim turns on whether Winterville has an "official" policy banning livestreaming. *See* Ans. Br. 53 (explaining that *Monell* liability can arise from "an official, express policy *such as* a written ordinance or regulation") (emphasis added). Yet, without explaining why, Appellees argue that "Plaintiff has not adequately alleged a *Monell* claim." Ans. Br. 55. This is especially perplexing given Appellees' admission that Officer Ellis attempted to "clarify the policy regarding livestreaming" during the traffic stop—i.e.,

that Winterville prohibits livestreaming of police officers in the performance of their duties. *See* Ans. Br. 4.

As the Opening Brief explained, the conduct of the officers in this case overwhelmingly supports an inference that Winterville has an official policy banning livestreaming. *See* Op. Br. 58-60. Winterville may very well have a written handbook, training manual, or policy instructing officers that livestreaming is prohibited. But Mr. Sharpe has not yet had the opportunity to take any discovery in this case because it was decided on the pleadings. *See* Ans. Br. 51-52. Discovery will resolve whether Winterville in fact has an unconstitutional official policy. Given what Mr. Sharpe knows, based on the statements of the officers in this case, the existence of such a policy is certainly "plausible," and the factual allegations in the complaint are sufficient to survive a motion to dismiss.

CONCLUSION

The Court should reverse the district court's dismissal of the personal capacity claims against Officer Helms and the official capacity claims against Officers Ellis and Helms and remand this case for further proceedings.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a) and 32(g), the undersigned counsel for appellee certifies that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because this brief contains 6,375 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically on February 23, 2022 and will, therefore, be served electronically upon all counsel.

s/ *Andrew Tutt*
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