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CONSTITUTIONAL LAW—FILLING THE GAP: THE NEED FOR  
LEGISLATIVE ACTION TO PROTECT THE RIGHT TO RECORD POLICE IN THE  
AGE OF CITIZEN JOURNALISM

I. INTRODUCTION

The streets of Louisiana were buzzing with excitement as Mardi Gras celebrations unfolded, but the atmosphere quickly turned chaotic when a brawl erupted.<sup>1</sup> Among the parade-goers caught in the fray was Jacobi Cage, a twenty-year-old former high school athlete with no criminal record.<sup>2</sup> Despite not being involved in the altercation, Cage found himself on the wrong side of the law when Sergeant Dowling, a police officer at the scene, accused him of hurling obscenities at a fellow officer.<sup>3</sup>

What followed was a nightmare that would haunt Cage for months to come. According to the police report, Sergeant Dowling attempted to remove Cage from the scene quietly, only for Cage to become physically violent and swing at the officer.<sup>4</sup> As a result, Sergeant Dowling forced Cage to the ground and arrested him for battery of an officer and resisting arrest.<sup>5</sup> With the weight of the criminal justice system bearing down on him, Cage protested his innocence to his friends and family.<sup>6</sup>

But it wasn't until Cage scrolled through his Twitter feed that he discovered a piece of evidence that would change everything.<sup>7</sup> A video titled "man just recording got assaulted and arrested for nothing" showed what had really happened that night.<sup>8</sup> In the video, Cage was seen standing behind a barricade, recording the police officers with his phone.<sup>9</sup> When an officer motioned him to move away, Cage complied, but another detective reached across the barrier, smacked the phone out of Cage's hand, and flipped him off.<sup>10</sup> In response, Cage held up two hands to flip the officer off.<sup>11</sup> The officer lunged at

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1. Richard A. Webster, *He Was Filming on His Phone. Then a Deputy Attacked Him and Charged Him with Resisting Arrest*, PROPUBLICA (Dec. 22, 2021, 7:00 AM), <https://www.propublica.org/article/he-was-filming-on-his-phone-then-a-deputy-attacked-him-and-charged-him-with-resisting-arrest>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Webster, *supra* note 1.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

Cage, dragged him over the barricade, and slammed him headfirst into the ground.<sup>12</sup> Despite the violence inflicted upon him, Cage never became violent himself.<sup>13</sup>

Although Cage's name was cleared twenty-one months later, the damage had already been done.<sup>14</sup> Cage's story is just one example of how the police can interfere with a citizen's right to record them in their official duties. Jacobi Cage was not only brutalized at the hands of the police, but he was stripped of his ability to record the police in a public forum.<sup>15</sup> Like Jacobi Cage, persons across the United States have been ordered to stop recording, had their devices taken away, had flashlights shone in their phone cameras, or ultimately been arrested for recording the police.<sup>16</sup> Unfortunately, the current judicial remedies do not adequately deter officers from interfering with citizen recordings.<sup>17</sup> This Note argues that cities and states should follow recently enacted legislation in New York City that recognizes a right to record police in their official duties, establishes a private right of action to address officers unlawfully interfering with that right, and provides the opportunity to institute clearer standards for both citizens and law enforcement on how to lawfully record police.<sup>18</sup>

Section II of this Note will discuss the importance of preserving citizens' right to record the police<sup>19</sup> and track the rise of a First Amendment right to record in the federal judicial system.<sup>20</sup> Section III will explore how police officers have used broad interference statutes to prevent or deter citizen recordings<sup>21</sup> and how qualified immunity blocks current judicial remedies from providing meaningful relief.<sup>22</sup> Finally, Section IV advocates for a statutory response modeled by New York City that creates a private right of action to deter police interference with the right to record<sup>23</sup> and proposes further legislative provisions that will quell the uncertainty of recording police.<sup>24</sup>

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12. *Id.*

13. Webster, *supra* note 1.

14. *Id.*

15. *See id.*

16. *See infra* Section III.A.

17. *See infra* Section III.B.

18. *See infra* Section IV.

19. *See infra* Section II.A.

20. *See infra* Section II.B.

21. *See infra* Section III.A.

22. *See infra* Section III.B.

23. *See infra* Section IV.A.

24. *See infra* Section IV.B.

## II. THE GROWING RECOGNITION OF RECORDING POLICE AS A FIRST AMENDMENT RIGHT

This Section will demonstrate the need for citizen recordings as society calls for increased transparency and accountability. Part A will explain how law enforcement's implementation of body camera footage is limited in its ability to effectuate justice, and citizen recordings are needed to fill the gap.<sup>25</sup> Part B will walk through how a growing number of federal courts have extended protections to citizen recordings, relying on well-established First Amendment jurisprudence from the Supreme Court.<sup>26</sup> Part B also explains several circuits' continued reluctance to decide on the merits of recording police as a First Amendment right that has created an artificial circuit split.<sup>27</sup>

### A. Police Accountability and the Need for Citizen Recordings

Around eighty-five percent of Americans carry a smartphone that can capture memories, document everyday routines, and seamlessly connect with friends, family, and strangers.<sup>28</sup> However, Jacobi Cage and millions of other Americans rarely contemplate how that same device could unexpectedly launch them into the role of a citizen journalist, capturing events and conversations that can be shared nationwide in seconds.<sup>29</sup> In recent years, citizens and media groups have begun promoting video recordings of law enforcement to document excessive use of force and spearhead conversations about police misconduct, training, accountability, and injustice.<sup>30</sup>

Although documenting police abuses dates back to the infamous recording of the Rodney King beating,<sup>31</sup> the movement for police accountability began to linger in American consciousness when social media repeatedly displayed instances of police abuse starting in 2014.<sup>32</sup> As the public began to

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25. See *infra* Section II.A.

26. See *infra* Section II.B.

27. See *infra* Section II.B.

28. *Mobile Fact Sheet*, PEW RSCH. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/mobile/>.

29. See Audra D. S. Burch & John Eligon, *Bystander Videos of George Floyd and Others are Policing the Police*, N.Y. TIMES (Nov. 24, 2021), <https://www.nytimes.com/2020/05/26/us/george-floyd-minneapolis-police.html> (providing examples of citizens being unexpectedly launched into citizen journalism.).

30. Daniel Konikoff, *Digital Oversight: How Social Media Users "Oversee" Police Misconduct in North America*, SOCARXIV, 1, 2 (Mar. 10, 2022), [osf.io/preprints/socarxiv/bkqxu](https://osf.io/preprints/socarxiv/bkqxu).

31. Cydney Adams, *March 3, 1991: Rodney King Beating Caught on Video*, CBS NEWS (Mar. 3, 2016, 6:00 AM), <https://www.cbsnews.com/news/march-3rd-1991-rodney-king-lapd-beating-caught-on-video/>.

32. See PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 1 (May 2015), [https://cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf) [hereinafter *21st Century*].

pressure law enforcement for excessive use of force, law enforcement responded by implementing body-camera footage on officers' persons and dash-cam footage on officers' vehicles.<sup>33</sup>

### 1. *The Limitations of Police Controlled Footage*

While implementing body-camera footage was a demonstrated effort toward police accountability, police body-camera footage has significant shortcomings and practical limitations that inhibit its usefulness for police accountability.<sup>34</sup> First, body-camera footage requires discretionary manual activation by officers and allows officers to turn off body-camera footage when "it is unlikely to capture information having evidentiary value."<sup>35</sup> Over time, more and more body-camera "failure" and "malfunction" have been reported.<sup>36</sup> "Many officers do not comply with activation policies," and some departments have recognized a "suspicious frequency of cameras malfunctioning."<sup>37</sup> Despite the mass implementation of body-camera footage, there is no indication that the footage has led to either decreased use of force or accomplished other stated aims of the body-camera footage implementation.<sup>38</sup>

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*Policing*]. Although police accountability is not a new topic, the police reform movement moved to the forefront of social topics after the shooting of Michael Brown and the release of President Obama's Task Force on 21st Century Policing. *Id.*

33. See Candice Norwood, *Body Cameras Are Seen as Key to Police Reform. But Do They Increase Accountability?*, PBS NEWSHOUR (June 25, 2020, 4:41 PM), <https://www.pbs.org/newshour/politics/body-cameras-are-seen-as-key-to-police-reform-but-do-they-increase-accountability>; see also *21st Century Policing*, *supra* note 32, at 31–39.

34. See discussion *infra* Section II.A.1.

35. Kirsten Swanson, *Officers Across Minnesota Allowed to Turn Off Body Cameras in Middle of Investigations*, KSTP (Jan. 10, 2022, 1:58 PM), <https://kstp.com/kstp-news/top-news/officers-across-minnesota-allowed-to-turn-off-body-cameras-in-middle-of-investigations/>.

36. See, e.g., Amy Forliti, *Officer's Body Camera Went Dark During Key Moment of Patrick Lyoya's Death*, PBS NEWSHOUR (Apr. 15, 2022, 5:28 PM), <https://www.pbs.org/newshour/nation/officers-body-camera-went-dark-during-key-moment-of-patrick-lyoyas-death>; see also Radley Balko, *The Ongoing Problem of Conveniently Malfunctioning Police Cameras*, WASH. POST (June 28, 2018, 2:34 PM), <https://www.washingtonpost.com/news/the-watch/wp/2018/06/28/the-ongoing-problem-of-conveniently-malfunctioning-police-cameras/>.

37. JOEL M. SCHUMM, NAT'L ASS'N OF CRIM. DEF. LAWS., *POLICING BODY CAMERAS: POLICIES AND PROCEDURES TO SAFEGUARD THE RIGHTS OF THE ACCUSED* 1, 16–17 (2017), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/bwc/pdfs/BWC-NACDL-March2017.pdf>.

38. BRYCE E. PETERSON, ET AL., URBAN INST., *THE MILWAUKEE POLICE DEPARTMENT'S BODY-WORN CAMERA PROGRAM* 1, 7 (May 2018), [https://www.urban.org/sites/default/files/publication/98461/the\\_milwaukee\\_police\\_departments\\_body\\_worn\\_camera\\_program\\_1.pdf](https://www.urban.org/sites/default/files/publication/98461/the_milwaukee_police_departments_body_worn_camera_program_1.pdf); see also David Yokum et al., *Evaluating the Effects of Police Body-Worn Camera: A Randomized Controlled Trial* 1, 18 (Oct. 20, 2017) (working paper), [https://discover.pbcgov.org/criminaljustice/BodyWorn%20Camera%20Clearing-house/TheLabDC\\_MPD\\_BWC\\_Working\\_Paper\\_10.20.17.pdf](https://discover.pbcgov.org/criminaljustice/BodyWorn%20Camera%20Clearing-house/TheLabDC_MPD_BWC_Working_Paper_10.20.17.pdf).



Police agencies collect and use the footage to “improve officer safety, increase evidence quality, reduce civilian complaints, and reduce agency liability.”<sup>39</sup> While all the above goals are commendable objectives for law enforcement, agencies are protecting their own interests and “control[ing] access to the footage and narratives surrounding any release of the footage . . . .”<sup>40</sup> Police maintenance and control over the camera’s operation and footage allow police to craft official narratives before handing over the footage to the public or even to conceal evidence of wrongdoing.<sup>41</sup> Acknowledging the limitations of body-camera footage is not to discount its contribution to police accountability and usefulness for the social justice movement.<sup>42</sup> Instead, it highlights that body-camera footage is not an all-inclusive solution to uncovering police abuses.<sup>43</sup>

## 2. *The Perspective Bias of Police Body-Cam Footage*

An often-overlooked aspect of police body-camera footage is the perspective of the footage and the camera bias it can create.<sup>44</sup> When shot from the police officer’s viewpoint, camera perspective bias will tend to create sympathy for the officers’ actions more than it would if a person was recording from a different angle.<sup>45</sup> Consequently, multiple perspectives are needed to effectuate justice in a disputed interaction.<sup>46</sup> The importance of this added perspective is particularly prudent, considering police body-camera footage is often used in criminal trials against defendants.<sup>47</sup> Despite many findings

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39. *Research on Body-Worn Cameras and Law Enforcement*, NAT’L INST. OF JUST. (Jan. 22, 2022), <https://nij.ojp.gov/topics/articles/research-body-worn-cameras-and-law-enforcement#are-body-worn-cameras-effective>.

40. Jocelyn Simonson, *Beyond Body Cameras: Defending A Robust Right to Record the Police*, 104 GEO. L.J. 1559, 1568 (2016).

41. Simonson, *supra* note 40; *see also* Chad Marlow, *A Tale of Two Body Camera Videos*, ACLU (Dec. 23, 2020), <https://www.aclu.org/news/privacy-technology/a-tale-of-two-body-camera-videos>. *See* Jim Mustian & Jake Bleiberg, *Beatings, Buried Videos a Pattern at Louisiana State Police*, ASSOCIATED PRESS (Sep. 8, 2021), <https://apnews.com/article/police-beatings-louisiana-video-91168d2848b10df739d73cc35b0c02f8>, for an example of how an internal investigation revealed at least a dozen cases that the Louisiana State police had ignored or concealed evidence of beatings and impeded efforts to root out misconduct.

42. *See 21st Century Policing*, *supra* note 32 for a discussion of how body-camera footage was introduced as a key reform in President Obama’s 21st Century Policing Report.

43. *See* Suat Cubukcu, et al., *The Concrete Effects of Body Cameras on Police Accountability*, CONVERSATION (Nov. 16, 2021, 8:18 AM), <https://theconversation.com/the-concrete-effects-of-body-cameras-on-police-accountability-171460> (highlighting the positive characteristics of police body-camera footage).

44. Simonson, *supra* note 40, at 1556.

45. *Id.*

46. *Id.*

47. Natalie P. Pike, Note, *When Discretion to Record Becomes Assertive: Body Camera Footage as Hearsay*, VAND. J. ENT. & TECH. L. 1259, 1262 (2020); *see also* Scott v. Harris,

that video footage is far from a neutral account of an event due to its frame, position, perspective, length, and sound, courts have treated it as “conclusive evidence.”<sup>48</sup> While body-camera footage can help to resolve conflicts over differing testimonies about police-citizen encounters, there is still a risk of justice being miscarried if the evidence is treated as an impartial, objective witness that “speaks for itself.”<sup>49</sup> The perspective bias of body-camera footage and its prevalence in courtrooms exemplifies the need for citizen recordings to provide an additional viewpoint to bridge the gap created by police controlled footage.<sup>50</sup>

### 3. *The Role of Citizen Recordings*

Citizen recordings promote the concept of “sousveillance—being watched from below rather than from on high—[which] facilitates the transfer of power from authorities to the less powerful.”<sup>51</sup> Many civilians value this power shift and how it can increase concepts of fairness and the potential for transparency in decision-making.<sup>52</sup>

This power shift is evidenced by citizen recordings stimulating conversations nationwide about police accountability and leading to disciplinary action for excessive use of force.<sup>53</sup> Darnella Frazier, at just seventeen years old, captured the murder of George Floyd at the hands of Officer Derek Chauvin in 2020.<sup>54</sup> Her video of George Floyd’s last breaths was used at trial to convict Derek Chauvin.<sup>55</sup> Feidin Santana recorded Officer Michael Slager fatally shooting Walter Scott, which created national attention and ended up sending

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550 U.S. 372 (2007) (summary judgment granted on body cam footage because the “footage speaks for itself”).

48. Howard M. Wasserman, *Police Misconduct, Video Recording, and Procedural Barriers to Rights Enforcement*, 96 N.C. L. REV. 1313, 1322–24 (2018).

49. *Id.* at 1326–27; see also Mary D. Fan, *Justice Visualized: Courts and the Body Camera Revolution*, 50 U.C. DAVIS L. REV. 897, 947–50 (2017).

50. See Wasserman, *supra* note 48, at 1328–36. “The broader answer to decreasing police-controlled video must be increasing citizen-created and controlled video to fill the gap. This ensures recordings of many police-public encounters regardless of department policies or officers’ conformity with policies.” *Id.* at 1336.

51. Simonson, *supra* note 40, at 1568.

52. Simonson, *supra* note 40, at 1568.

53. See Catherine Kim, *Viral Videos of Police Violence are Leading to Disciplinary Action*, VOX (June 6, 2020, 1:10 PM), <https://www.vox.com/2020/6/6/21282412/protests-viral-videos-police-violence-disciplinary-action-suspension-firing>.

54. See Rachel Treisman, *Darnella Frazier, Teen Who Filmed Floyd’s Murder, Praised for Making Verdict Possible*, NPR (Apr. 21, 2021, 11:15 AM), <https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/21/989480867/darnella-frazier-teen-who-filmed-floyds-murder-praised-for-making-verdict-possib>.

55. *See id.*



Officer Slager to prison for twenty years.<sup>56</sup> In both instances, law enforcement's initial statements minimized the use of force used by the officers and were later contradicted by citizens' video footage that portrayed a very different story.<sup>57</sup> Consequently, citizen recordings play an essential role in spurring national conversations and contributing to civic discourse about police accountability. The power and importance of citizen recording did not go unnoticed by the federal judiciary, which has begun to extend First Amendment protections to citizen recordings over the past twenty years.<sup>58</sup>

## B. The Evolution of the Right to Record Police in the Federal Judiciary

The Supreme Court has set forth a series of First Amendment principles related to civic discourse and free speech toward police officers.<sup>59</sup> A series of federal circuit courts have relied on those principles and extended First Amendment protection to the act of recording police in their official duties while imposing certain limitations on it.<sup>60</sup>

### 1. *Supreme Court Guiding Principles for First Amendment Protections*

The Supreme Court has firmly established that public debate of public issues is at the heart of the First Amendment's protection and therefore occupies the "highest rung of the hierarchy of First Amendment values."<sup>61</sup> This special protection applies to speech that many citizens would find offensive and disrespectful.<sup>62</sup> The Supreme Court has recognized that the First Amendment may even serve its highest purpose when it "induces a condition of unrest, creates a dissatisfaction with conditions as they are, or even stirs people

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56. Radley Balko, *Walter Scott's Killer is Going to Prison. But His Case is An Anomaly*, WASH. POST (Dec. 8, 2017, 2:40 PM), <https://www.washingtonpost.com/news/the-watch/wp/2017/12/08/walter-scotts-killer-is-going-to-prison-but-his-case-is-an-anomaly/>.

57. See Eric Levenson, *How Minneapolis Police First Described the Murder of George Floyd, and What We Know Now*, CNN (Apr. 21, 2021, 3:35 PM), <https://www.cnn.com/2021/04/21/us/minneapolis-police-george-floyd-death/index.html>; see also Anya van Wagtenonk, *How and Why You Should Record the Police*, PBS (Apr. 10, 2015, 11:07 AM), <https://www.pbs.org/newshour/politics/6-rules-follow-citizen-journalist>.

58. See *infra* Section II.B.2.

59. See *infra* Section II.B.1.

60. See *infra* Section II.B.2.

61. *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

62. See *Snyder*, 562 U.S. at 443 (Supreme Court of the United States held that speech of church members who picketed about LGBTQ in the military near the funeral of a military service member was entitled to First Amendment protection); see also *Texas v. Johnson*, 491 U.S. 397, 408–409 (1989) (Supreme Court of the United States held that burning an American flag was an expressive activity protected by the First Amendment).

to anger.”<sup>63</sup> Consequently, the First Amendment is necessary to protect the free discussion of governmental affairs without restraint or fear of subsequent punishment.<sup>64</sup> As a part of this function, citizens hold the right to gather and disseminate information that can lead to a robust discussion of issues of social importance.<sup>65</sup>

Under this special protection, citizens have a wide latitude to oppose and criticize the public duties of law enforcement officers without being violative of the law.<sup>66</sup> The Supreme Court laid down a landmark decision in *City of Houston, Tex v. Hill*, that invalidated an ordinance that made it illegal to “oppose, molest, abuse, or interrupt a police[] [officer] in the execution of his duty.”<sup>67</sup> Notably, the Court held that people’s freedom to verbally oppose police action without fear of arrest is “one of the principal characteristics by which we distinguish a free nation from a police state.”<sup>68</sup>

Moreover, an officer cannot arrest someone for interference with police duties for mere criticisms or verbal protests.<sup>69</sup> In *District of Columbia v. Little*, the Supreme Court held that the respondent’s objection to the officer’s entry into her home without a warrant did not constitute interference.<sup>70</sup> According to the Court, although physical force is not always necessary to establish interference with police duties, “mere remonstrances or even criticisms of an officer are not usually held to the equivalent of unlawful interference.”<sup>71</sup>

Therefore, under current legal precedent, a citizen is afforded First Amendment protections to oppose law enforcement officers verbally.<sup>72</sup> Citizen recordings have a demonstrated catalytic ability to bring about reform and accountability for police abuses.<sup>73</sup> Nonetheless, the Supreme Court has not explicitly stated that recording police is a protected activity under the First Amendment and has denied the opportunity to speak on the matter.<sup>74</sup>

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63. *Johnson*, 491 U.S. at 408–09 (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)).

64. *See* *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 601 (7th Cir. 2012) (finding that the right to record was clearly established based on the Supreme Court’s historical emphasis on the right to collect and disseminate information about governmental actions).

65. *Id.*

66. *See* *City of Houston, Tex. v. Hill*, 482 U.S. 451 (1987) (finding an ordinance to be overbroad and burdensome on First Amendment rights).

67. *Id.*

68. *Id.* at 462–63.

69. *See* *District of Columbia v. Little*, 339 U.S. 1, 6 (1950).

70. *Id.* at 7.

71. *Id.* at 6.

72. *See supra* notes 66–71 and accompanying text.

73. *See supra* Section II.A.3.

74. *See* Nick Sibilla, *Supreme Court Refuses to Protect First Amendment Right to Film Police Brutality*, FORBES (Nov. 2, 2021, 10:45 AM), <https://www.forbes.com/sites/nick-sibilla/2021/11/02/supreme-court-refuses-to-protect-first-amendment-right-to-film-police-brutality/?sh=7cb12df17d91>.

2. *Federal Circuit's Growing Establishment of the Right to Record the Police and the Artificial Circuit Split*

However, the Supreme Court's silence on the subject has not stopped the slowly growing majority of appellate courts from recognizing a citizen's right to record the public duties of police officers.<sup>75</sup> Circuits within the majority include the First, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits.<sup>76</sup> However, an artificial circuit split has emerged since the remaining circuits have avoided discussing the merits of whether recording police is a clearly established First Amendment right.<sup>77</sup> Although no federal circuit has held that citizens do not have a right to record police under the First Amendment, the lack of controlling decisions in the remaining circuits has created an "artificial circuit split."<sup>78</sup> The split is artificial in the sense that it is not based on any disagreement on the merits but instead exists due to remaining jurisdictions not issuing an on-point opinion that clearly establishes the right.<sup>79</sup> In federal circuits where the question has not been affirmatively resolved, lower courts have swung back and forth in recognizing a right to record police relying either on persuasive authority from other jurisdictions or the lack of controlling authority in their jurisdictions.<sup>80</sup> Therefore, citizens in Vermont, New York, Connecticut, West Virginia, Virginia, North Carolina, South Carolina, Maryland, Michigan, Ohio, Kentucky, Tennessee, North Dakota, South Dakota, Nebraska, Minnesota, Iowa, Missouri, and Arkansas are left with uncertainty

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75. See *infra* note 76.

76. See *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017); *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017); *ACLU of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995); *Irizarry v. Yehia*, 38 F.4th 1282 (10th Cir. 2022); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000).

77. See *Szymecki v. Houck*, 353 F. App'x 852, 853 (4th Cir. 2009) (Fourth Circuit affirmed summary judgment on qualified immunity grounds because First Amendment right to record police activities was not clearly established in the circuit); *Higginbotham v. Sylvester*, 741 F. App'x 28, 31–32 (2d Cir. 2018) (Second Circuit disposed of the First Amendment claim on other grounds and declined to address whether recording police was a First Amendment activity); see also Tyler Finn, Note, *Qualified Immunity Formalism: "Clearly Established Law" and the Right to Record Police Activity*, 119 COLUM. L. REV. 445, 459 (2019).

78. Finn, *supra* note 77, at 448.

79. *Id.* at 465–66.

80. See *Dyer v. Smith*, No. 3:19-CV-921, 2021 WL 694811, at \*19 (E.D. Va. Feb. 23, 2021) (recognizing right as clearly established even without Fourth Circuit precedent); *Keup v. Sarpy Cnty.*, No. 8:21-CV-312, 2022 WL 195822 at \*4 (D. Neb. Jan. 21, 2022) (interpreting recent decision to recognize First Amendment right to record); *Cf. Hornback v. Czartorski*, No. 3:20-CV-703-RGJ, 2022 WL 3084592 at \*15 (W.D. Ky. Aug. 3, 2022) (illustrating that the Sixth circuit still has yet to officially recognize it as a clearly established right); *Molina v. City of St. Louis*, 59 F.4th 334, 340 (8th Cir. 2023) (Eighth Circuit finds that right to record was not clearly established in 2015 but still does not address whether it should be recognized as First Amendment activity).

about how to record police and whether they can rely on judicial remedies to address police interference with citizen recording.<sup>81</sup>

### III. UNCERTAINTY OF EXERCISING THE RIGHT TO RECORD

Despite a growing majority of federal circuit courts recognizing a right to record under the First Amendment, citizens subject to the artificial circuit split still face several uncertainties should they choose to exercise that right.<sup>82</sup> Part A of this Section will discuss how law enforcement has routinely used broad criminal interference statutes to prevent citizen recordings and how subjects of police activity are especially susceptible to this interference.<sup>83</sup> Part B will discuss how the artificial circuit split creates a “clearly established” twilight zone preventing plaintiffs from overcoming qualified immunity to challenge unlawful interference.<sup>84</sup> Finally, Part C will discuss how the Supreme Court is unlikely to break its silence on the matter.<sup>85</sup>

#### A. Police Interference with Citizen Recording

Federal circuit courts that have recognized a First Amendment right to record police have stipulated that a person has the right to record as long as it does not interfere with police duties.<sup>86</sup> Although federal courts have chosen not to explore what specific conduct constitutes interference in the context of recording police, courts have considered what constitutes interference with police duties generally.<sup>87</sup>

Interference is most commonly understood as physical conduct that goes beyond verbal statements.<sup>88</sup> However, interference can also be “inappropriate and disruptive conduct” without physical force.<sup>89</sup> Consequently, federal courts have generally given broad discretion in deciding what constitutes

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81. See *Geographic Boundaries of United States Courts of Appeals and United States District Courts*, U.S. COURTS, [https://www.uscourts.gov/sites/default/files/u.s.\\_federal\\_courts\\_circuit\\_map\\_1.pdf](https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf).

82. See *infra* Section III.A–B.

83. See *infra* Section III.A.

84. See *infra* Section III.B.

85. See *infra* Section III.C.

86. See *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011); *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 607 (7th Cir. 2012); *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 833–834 (1st Cir. 2020).

87. See *Kass v. City of New York*, 864 F.3d 200, 203 (2d Cir. 2017) (finding that police had probable cause to believe the protestor was obstructing governmental administration and failing to obey a police order when he refused to move).

88. *Id.* at 209.

89. *Id.* at 209–10.

interference to allow officers to “routinely exercise unquestioned command of the situation.”<sup>90</sup>

Given broad discretion in what constitutes interference, police can arrest, charge, or otherwise order citizens to stop recording even though the conduct may not physically interfere with police duties.<sup>91</sup> As the digital documentation of police activity has risen, there has been a simultaneous increase in police interference with citizens’ efforts to video and photograph police activity.<sup>92</sup> Officers do not cite their reasons for arrest as being related to the citizen recording and instead rely on broader criminal statutes that allow for far-reaching enforcement discretion.<sup>93</sup>

In the tumultuous climate of police-citizen relations, how does a citizen determine when recording the police turns from lawfully protected public discourse into unlawful interference with police duties? Citizens are left to wonder whether the majority federal court rulings on the existence of a First Amendment right to record the police will be of much use when standing face-to-face with an officer ordering them to stop recording. If a person refuses this command, is he or she guilty of disobeying police orders? As a bystander,

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90. *Arizona v. Johnson*, 555 U.S. 323, 330 (2009) (cleaned up) (exploring the constitutionally permissible actions of law enforcement during a traffic stop as an “inherently dangerous activity”).

91. See Abby Ohlheiser, *The Tactics Police Are Using to Prevent Bystander Video*, MIT TECH. REV. (Apr. 30, 2021), <https://www.technologyreview.com/2021/04/30/1024325/police-video-filming-prevention-tactics/>. For many examples of this type of harassment caught on video, see PINAC NEWS, <https://photographyisnotacrime.com> (last visited Sept. 8, 2023).

92. See generally N. Stewart Hanley, Note, *A Dangerous Trend: Arresting Citizens for Recording Law Enforcement*, 34 AM. J. TRIAL ADVOC. 645 (2011) (providing numerous examples from cases of individuals being arrested for recording the police); Kimberly McCullough, *Changing the Culture of Unconstitutional Interference: A Proposal for Nationwide Implementation of a Model Policy and Training Procedures Protecting the Right to Photograph and Record On-Duty Police*, 18 LEWIS & CLARK L. REV. 543 (2014).

93. Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 361–62 (2011). See, e.g., Taya Graham & Stephen Janis, *Cops Arrested Him for Filming an Accident Scene, But Did the Police Break the Law?*, REAL NEWS (Apr. 22, 2022), <https://therealnews.com/cops-arrested-him-for-filming-an-accident-scene-but-did-the-police-break-the-law>. Cop watcher was arrested on interference charges for filming the police even when he complied with all orders to maintain distance. *Id.* Just a few weeks later, he was charged with organized crime after filming a car accident from a reasonable distance and complying with police orders. *Id.* See also Hadley Tomicki, *Teen Volunteer Arrested While Filming LAPD-Sponsored Movie Night in Harbor City*, L.A. TACO (Sept. 6, 2022), <https://www.lataco.com/harbor-city-lapd/>. While the department was hosting a movie night to bolster community relations, a volunteer began to record officers arresting two young men. *Id.* With no show of violence or other form of interference, the person recording was thrown to the ground, arrested, and his bail was set for \$25,000. *Id.* See Valentina Di Liscia, *Photojournalist Arrested by NYPD While Filming Police Officers*, HYPERALLERGIC (Feb. 13, 2020), <https://hyperallergic.com/542727/photojournalist-arrested/> for a story of a well-known Egyptian photographer who was arrested and had his press card taken from him for recording the situation of police brutality in New York.



how close is too close to the police? If one obeys a police order to move, can he or she still be arrested? Does it matter whether police are conducting a traffic stop, investigating a crime scene, or responding to a car accident? What if the person is the subject of police activity?

These questions and more are not answered by “know your rights” campaigns telling citizens that they have a right to record and should not “interfere” with police activities.<sup>94</sup> As an ACLU attorney said, “[t]here’s the law, there’s the Constitution, and then there’s what you do when you’re face to face with the police.”<sup>95</sup> Citizens within jurisdictions that have upheld recording police as a First Amendment right are left with the reality that “even if it’s legal, it’s not always safe.”<sup>96</sup>

1. *The Uncertainty of Recording Police as a Subject of Police Activity*

The uncertainty of a citizen’s ability to record police is even more unclear for the person who is the subject of the police officer’s stop or investigation.<sup>97</sup> The broad discretion afforded to law enforcement is especially prevalent when the person seeking to record police is not a bystander but the subject of specific police work.<sup>98</sup> In particular, traffic stops are the most common police encounters that civilians may wish to record law enforcement officers.<sup>99</sup> Traffic stops have often turned deadly for unarmed drivers when they appeared to reach for something or held something that the police mistook for a weapon, including “cellphones, . . . butane torch lighters, . . . cigarette[s], an electric toothbrush case, a bottle of anti-freeze and a bag of sandwiches.”<sup>100</sup> Not only can traffic stops be deadly, but a subject of police activity may not have the luxury of having an uninvolved bystander nearby to capture the

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94. *See Know Your Rights: Stopped by Police*, ACLU, <https://www.aclu.org/know-your-rights/stopped-by-police> (last visited Sept. 8, 2023); Sophia Cope & Adam Schwartz, ELEC. FRONTIER FOUND., *You Have a First Amendment Right to Record the Police* (June 8, 2020), <https://www.eff.org/deeplinks/2020/06/you-have-first-amendment-right-record-police>.

95. Ohlheiser, *supra* note 91.

96. *Id.*

97. *See* cases cited *infra* note 104 and accompanying text.

98. Aracely Rodman, Comment, *Filming the Police: An Interference or a Public Service*, 48 ST. MARY’S L.J. 145, 163 (2016). Although the right to film does not automatically differ for a person who is stopped or detained, “the differences arise from the fact that this type of individual will be in a more interactive situation with the officer, and it is this that imposes more limitations on his rights.” *Id.*

99. *See, e.g.*, David D. Kirkpatrick et al., *Why Many Police Traffic Stops Turn Deadly*, N.Y. TIMES (Nov. 30, 2021), <https://www.nytimes.com/2021/10/31/us/police-traffic-stops-killings.html>. “Over the past five years, a New York Times investigation found, police officers have killed more than 400 drivers or passengers who were not wielding a gun or a knife, or under pursuit for a violent crime . . . .” *Id.*

100. *Id.*



interaction. Thus, subjects of police activity have a direct incentive to record police activity as they are more at risk of having their constitutional rights infringed upon than an uninvolved bystander.<sup>101</sup>

Nevertheless, the case law establishing the right to record police is typically in the context of bystanders recording police activity.<sup>102</sup> Bystander videos taken from a reasonable distance are considered “less of a hindrance to legitimate police activity.”<sup>103</sup> On the other hand, courts have been hesitant to apply First Amendment protections to recording traffic stops and other situations where the person recording is the subject of police activity.<sup>104</sup> More recently, lower federal courts have begun to hold that officers are not on notice that subjects of police work are entitled to the same First Amendment protections as bystanders; therefore, officers are entitled to qualified immunity against any claims of First Amendment violations.<sup>105</sup> Therefore, even under the expanding rhetoric of courts protecting the right to record police, the subjects of police work are left unprotected and at an even greater risk of being unable to record interactions that infringe on their constitutional freedoms.<sup>106</sup>

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101. A person stopped by police is at risk of being unlawfully seized under the Fourth amendment, unlawfully searched under the Fourth amendment, or arrested without probable cause. *See* U.S. CONST. amend. IV.

102. *See* *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000); *ACLU of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017); *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017); *Irizarry v. Yehia*, 38 F.4th 1282 (10th Cir. 2022).

103. *Higginbotham v. City of New York*, 105 F. Supp. 3d 369, 379 (S.D.N.Y. 2015).

104. *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010) (holding that none of the precedents establishing the right to record as a clearly established right involved traffic stops and they are recognized as “inherently dangerous situations”). In *Higginbotham*, the court reasoned that the right to record police “may not apply in particularly dangerous situations, if the recording interferes with the police activity, if it is surreptitious, if it is done by the subject of police activity, or if the police activity is part of an undercover investigation.” *Higginbotham*, 105 F. Supp. 3d at 381.

105. *See* *Pierner-Lytge v. Hobbs*, 601 F. Supp. 3d 404, 413 (E.D. Wis. 2022) (officers were entitled to qualified immunity because it was not a clearly established right for the subject of an arrest to record); *see also* *Annan v. City of New York Police Dep’t*, No. 12-CV-2702 (CBA) (CLP), 2017 WL 9940285 (E.D.N.Y. Jan. 4, 2017) (“[N]o circuit had held that filming the police during a traffic stop was an activity protected by the First Amendment.”). *But see* *Figuroa v. Moyer*, No. 3:21-CV-601, 2023 U.S. Dist. LEXIS 15840, at \*34–35 (M.D. Pa. Jan. 31, 2023) (holding that a narrow interpretation of precedent to exclude subjects of police activity is an “illogical” and narrow reading of previous decisions).

106. *E.g., Annan*, No. 12-CV-2702 (CBA) (CLP), 2017 WL 9940285, at \*6 (E.D.N.Y. Jan. 4, 2017).

## B. Artificial Circuit Split and the “Clearly Established” Twilight Zone

A citizen who was ordered to stop recording, had their device knocked out of their hand or was otherwise prevented from recording, may wish to challenge such conduct in court as violative of the First Amendment. In order to do so, a citizen can seek relief by filing a suit under 42 U.S.C. § 1983.<sup>107</sup> However, government officials performing discretionary functions are “generally shielded from liability for civil damages insofar as their conduct does not violate clearly established constitutional rights of which a reasonable officer would have known.”<sup>108</sup> This doctrine, known as qualified immunity, is meant to protect an officer’s ability to take independent actions “without fear of consequences.”<sup>109</sup>

For a right to qualify as “clearly established,” the “contours of the right must be sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right.”<sup>110</sup> The inquiry into whether a right is “clearly established” requires that the existing precedent has placed the constitutional question “beyond debate.”<sup>111</sup> The right cannot be established by other cases that establish a “broad general proposition,” but the precedent must be relevant to the “specific context of the case.”<sup>112</sup> The pertinent question is whether the “state of the law” gave the officer “fair warning that their alleged treatment . . . was unconstitutional.”<sup>113</sup>

Federal circuits that have yet to make an affirmative decision on whether recording police is protected under the First Amendment often rely on this “clearly established” doctrine to dismiss suits under qualified immunity, never reaching a decision on the case’s merits.<sup>114</sup> This approach creates a twilight zone that allows officials to act under the protection of qualified immunity as long as a federal circuit does not make an affirmative decision on the right to record.<sup>115</sup>

Not only does this prevent circuits from discussing the merits of a citizen recording as a First Amendment, but it also deters these types of cases from

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107. 42 U.S.C. § 1983.

108. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

109. *Id.* at 819 (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)).

110. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

111. *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8 (2021) (per curiam) (citations omitted).

112. *Id.* (citations omitted).

113. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

114. *See Finn*, *supra* note 77, at 462–65.

115. *See Susan Bendlin, Qualified Immunity: Protecting “All but the Plainly Incompetent” (and Maybe Some of Them, Too)*, 45 J. MARSHALL L. REV. 1023, 1047 (2012); *see also* Chloe Cornett, Comment, *Lights, Camera, Action . . . As Long as You Live in the Proper Circuit: An Analysis of the Circuit Split Concerning Civilians’ First Amendment Right to Record Police Officers*, 25 SMU SCI. & TECH. L. REV. 237, 239–40 (2022).

being filed in the first place.<sup>116</sup> Data suggests that most attorneys avoid any cases where qualified immunity issues might arise in the litigation and only file cases “within the ‘clearly established’ zone that will defeat a qualified immunity defense.”<sup>117</sup> Consequently, qualified immunity often ends up “limit[ing] the extent to which civil rights litigation tests the boundaries of the law.”<sup>118</sup>

1. *The Backwardness of Qualified Immunity in Frasier v. Evans*

The extent of qualified immunity’s protection and limitation on advancing this right was evidenced by the Tenth Circuit’s recent decision in *Frasier v. Evans*.<sup>119</sup> The case takes place in Denver, Colorado.<sup>120</sup> Since 2007, the City of Denver has trained its police officers to respect that the public has the right to record them performing their official duties in public spaces.<sup>121</sup> In 2010 and 2012, the Denver Police Department began providing a mandatory course that told officers that citizens have a First Amendment right to videotape police officers.<sup>122</sup>

On August 14, 2014, a detective followed a car to a parking lot that he suspected was involved in a drug transaction.<sup>123</sup> Levi Frasier was observing this incident from a nearby parking lot.<sup>124</sup> Before the officer’s backup arrived, the officer asked Frasier for help getting a sock out of the suspect’s mouth that he suspected contained drugs.<sup>125</sup> When the other officers arrived, they asked Frasier to step back, and he did so.<sup>126</sup> After moving about ten feet away, Frasier began recording the event on his tablet.<sup>127</sup> Frasier’s recording captured this group of officers pinning the suspect down and repeatedly punching the

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116. See Alexander A. Reinert, *Does Qualified Immunity Matter*, 8 U. SAINT THOMAS L.J. 477, 494 (2011).

117. *Id.*

118. *Id.* at 495.

119. See generally *Frasier v. Evans*, 992 F.3d 1003 (10th Cir. 2021), *cert. denied*, 211 L. Ed. 2d 251, 142 S. Ct. 427 (2021). In 2022, the Tenth Circuit followed the lead of the other federal circuits and officially recognized the right to record police activities in the case *Irizarry v. Yehia*. See generally *Irizarry v. Yehia*, 38 F.4th 1282 (10th Cir. 2022). Nevertheless, this case illustrates the power of the qualified immunity discussion in foreclosing cases involving recordings of police in circuits that are without an appellate court level decision securing the right to record as a First Amendment right.

120. Petition for Writ of Certiorari at 4, *Frasier v. Evans*, 142 S. Ct. 427 (2021) (No. 21-57).

121. *Id.*

122. *Id.*

123. *Id.* at 5.

124. *Id.*

125. *Id.*

126. Petition for Writ of Certiorari, *supra* note 120, at 5.

127. *Id.*

suspect.<sup>128</sup> As Frasier continued filming, he captured the suspect's seven-and-half-month pregnant girlfriend approach the officers.<sup>129</sup> The video captures one of the officers grabbing her ankle and pulling her off her feet, causing her to fall on her face and stomach on the pavement.<sup>130</sup> Frasier stopped filming and returned to his car.<sup>131</sup>

One of the officers approached Frasier and asked him to bring the device he had been recording on.<sup>132</sup> Afraid that they would delete the only evidence of the wrongdoing he just captured,<sup>133</sup> he told the officer that he had only taken a picture on Snapchat, which immediately disappeared.<sup>134</sup> The officer, believing he had recorded them, demanded that he bring them the tablet.<sup>135</sup> The officer then searched his tablet for a video but did not find it.<sup>136</sup> The officer then gave the Frasier back his tablet while another officer commented, “[a]s long as there’s no video, it’s okay . . . .”<sup>137</sup>

Soon after the encounter, Frasier gave a copy of the video to the Denver Police Department and a media outlet.<sup>138</sup> The video led to several investigative reports and ultimately led to a change in the department’s use of force policy.<sup>139</sup> Frasier subsequently sued the officers and the departments, claiming that they had violated the First Amendment by retaliating against him for recording them.<sup>140</sup>

Even though the officers were explicitly trained to respect citizens’ right to record police, the Tenth Circuit applied qualified immunity since the right to record police was not clearly established in 2014.<sup>141</sup> The Tenth Circuit reasoned that a showing of a “clearly established” law for qualified immunity generally requires a Supreme Court decision, a governing circuit decision on the point, or a weight of authority from other courts.<sup>142</sup> Frasier argued that the officers should be denied qualified immunity because their department’s training put them on notice that there was a right to record the police.<sup>143</sup> The

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128. *Id.* at 5–6.

129. *Id.* at 6.

130. *Id.*

131. *Id.*

132. Petition for Writ of Certiorari, *supra* note 120, at 6.

133. *Id.* at 6–7. After asking for the recording repeatedly, the officer gestured to the back seat of his patrol car and said “[w]ell, we can do this the easy way or we can do this the hard way.” *Id.*

134. *Id.* at 6–7.

135. *Id.* at 7.

136. *Id.*

137. *Id.*

138. Petition for Writ of Certiorari, *supra* note 120, at 8.

139. *Id.*

140. *Id.*

141. *Frasier v. Evans*, 992 F.3d 1003, 1015 (10th Cir. 2021).

142. *Id.* at 1014.

143. *Id.* at 1015.

court held that this subjective knowledge is irrelevant in an objective, qualified immunity analysis, and judicial authority is the only source for determining “clearly established law.”<sup>144</sup> Therefore, the continued artificial circuit split results in an environment where exercising a seemingly clear right to record suddenly becomes unclear when the issue enters a federal courtroom.<sup>145</sup>

## 2. *The Likelihood of Continued Silence from the Supreme Court*

To quell the continuing uncertainty about whether recording police is a “clearly established” right, the Supreme Court could affirmatively declare recording police as a First Amendment right.<sup>146</sup> However, since the circuit split is not based on a dispute about the merits of a First Amendment right, the Supreme Court is not likely to take up the case.<sup>147</sup> The Supreme Court docket tends to address legal questions where lower courts have differed on substantive issues to create uniformity.<sup>148</sup> To date, no federal circuit has held that recording police is not a First Amendment activity.<sup>149</sup> The Supreme Court’s disinterest in addressing the split is evidenced by its rejection of at least two opportunities in the last ten years.<sup>150</sup> Consequently, citizens are left with a constitutional anomaly. While circuits continue to affirm a First Amendment right to record police,<sup>151</sup> and law enforcement agencies train their officers to respect a First Amendment right to record;<sup>152</sup> a citizen may still fail a qualified immunity battle due to the artificial circuit split.<sup>153</sup> Therefore, while the federal judiciary’s rhetoric supporting a First Amendment right to record police is robust, genuine protection of the right is undermined by the consistent application of qualified immunity in jurisdictions subject to the “clearly established” twilight zone.<sup>154</sup>

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144. *Id.*

145. *See, e.g.,* Doori Song, Note, *Qualified Immunity and the Clear, but Unclear First Amendment Right to Film Police*, 33 NOTRE DAME J.L. ETHICS & PUB. POL’Y 337 (2019) (arguing that citizens should remain cautious in exercising the right because circuit courts will likely continue to hold in most cases that the right is not clearly established enough to put a reasonable officer on notice).

146. *See generally* Cornett, *supra* note 115 (advocating for the Supreme Court of the United States to settle the circuit split).

147. *See* Finn, *supra* note 77, at 469.

148. *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1569 (2008).

149. *See* Finn, *supra* note 77, at 447.

150. *See* Cornett, *supra* note 115, at 238.

151. *See supra* note 102 for a list of federal circuit court cases that have affirmed a First Amendment right to record police.

152. *Public Recording of Police Activities: Instructors Guide*, INT’L ASSOC. OF CHIEFS OF POLICE (2017), <https://www.theiacp.org/sites/default/files/pdf/PROP%20Instructor%27s%20Guide.pdf>.

153. *See* Song, *supra* note 145, at 354; Cornett, *supra* note 115.

154. *See* Cornett, *supra* note 115, at 253–55.



#### IV. ADVOCATING FOR A STATUTORY RESPONSE TO CURE THE UNCERTAIN CLIMATE OF RECORDING POLICE

Even in the absence of an explicit declaration from the nation's highest court, states subject to the artificial circuit split are not left without options. State legislatures and city governments can fill this judicially created gap by creating a statutory avenue for relief. In fact, to further protect the right to record police activities, cities and states have already begun to enact legislation.<sup>155</sup> Part A will detail the recently enacted New York City law that protects citizen recordings through an affirmative right to record, a method to challenge police interference with recordings and a system of reporting arrests and summons involving citizen recordings.<sup>156</sup> Part B will explain how cities and states can follow the legislative route of New York City while adding additional parameters to keep officer discretion in check.<sup>157</sup>

##### A. New York City's Statutory Protection of Citizen Recordings

The New York City Administrative Code created a clear statutory right to record police officers in their official duties.<sup>158</sup> Under §14-189(b), “[a]

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155. States have enacted statutes that are meant to protect the right to record but have done so in varying ways. Oregon took the position that openly recording a police officer in their official duties is an exception to its criminal wiretapping statute. *See* OR. REV. STAT. ANN. § 165.540(5)(b) (West 2022). California added a section to the statute that prohibits resisting an officer to clarify that a person recording the police in a public place does not in of itself constitute interference or resistance. *See* CAL. PENAL CODE § 69(b) (West 2016). Colorado enacted an administrative procedure that would allow a citizen to recover money for property damage to cell phones caused by an unlawful seizure. *See* Colo. Rev. Stat. § 13-21-128(1)(a) (2016). If the claim is denied, the person can bring a civil action against the law enforcement agency. COLO. REV. STAT. § 13-21-128(1)(c). However, the person must be able to prove that the denial was made in bad faith to recover. *Id.* All these efforts, although genuine steps toward protecting the right to record, do not address the prevailing problem of unhindered police discretion chilling First Amendment activity. *See supra* Section III.A. Creating an allowance in a statute for certain activity, like Oregon and California, does not automatically create a right of private action to challenge conduct that criminalizes the lawful activity. Moreover, in Colorado, the administrative approach only addresses instances of police damaging or seizing the property of persons recording, and therefore missing the population of people who either didn't have their property damaged or chose not to record out of fear of retaliation. Therefore, this Note examines the New York City approach because of its encompassing effort to not only establish an affirmative right to record but also the legal remedy for interference at the hands of police. For exploration of these other statutes, *see generally* Joshua Sipp, Comment, *Lights, Camera, Inaction: Advocating A Statutory Response to Protect the Right to Record Police Activity in Public*, 32 KAN. J.L. & PUB. POL'Y 95 (2023).

156. *See infra* Section IV.A.

157. *See infra* Section IV.B.

158. N.Y.C. ADMIN. CODE § 14-189 (2023).



person may record police activities and maintain custody and control of any such recording and of any property or instruments used in such recordings.”<sup>159</sup>

The New York City Administrative Code goes beyond mere recognition of the right to record.<sup>160</sup> A citizen can pursue a civil lawsuit against an officer for “unlawful interference with recording police activities” and can seek damages, punitive damages, and even declaratory or injunctive relief.<sup>161</sup> The plaintiff has the burden to demonstrate that he or she was recording or attempting to “record police activities in accordance with subdivision b and an officer interfered . . .” with those activities.<sup>162</sup>

The NYC code gives examples of what officer conduct could constitute interference and, therefore, subject them to liability. This non-exhaustive list of conduct includes:

- (a) preventing or attempting to prevent the recording of police activities;
- (b) threatening or making any effort to intimidate a person recording police activities;
- (c) stopping, seizing, searching, issuing any summons, or arresting any individual because such individual recorded police activities;
- or (d) seizing property or instruments used by any individual to record police activities.<sup>163</sup>

Finally, the New York City Administrative Code instituted a reporting requirement for law enforcement agencies.<sup>164</sup> Under the statute, the department must publicly post a report that contains “the number of arrests, criminal summonses, and civil summonses in which the person arrested or summonsed was recording police activities.”<sup>165</sup>

This reporting requirement allows the city to analyze enforcement data and increases transparency about how law enforcement may be preventing citizen recordings.<sup>166</sup> The reporting requirement specifically tracks instances where the subject of police activity was recording or was attempting to record and what that person was ultimately arrested or summonsed for.<sup>167</sup> Moreover,

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159. *Id.*

160. *Id.*

161. *Id.*

162. *See id.*

163. *Id.*

164. N.Y.C. ADMIN. CODE § 14-189 (2023).

165. *Id.*

166. *See* Chris Glorioso, *I-Team: More Nyers are Being Arrested or Ticketed While Recording Video of NYPD*, NBC N.Y. (Nov. 17, 2022, 1:38 PM), <https://www.nbcnewyork.com/investigations/i-team-more-nyers-are-being-arrested-or-ticketed-while-recording-video-of-nypd/3960766/#:~:text=Under%20the%20city%27s%20new%20Right,or%20pictures%20of%20police%20interactions> (after the implementation of the reporting requirements, New York City media outlets were able to notify citizens on the rates at which people are recording and their interactions with the criminal justice system).

167. *See Right to Record*, N.Y.C. POLICE DEP’T, <https://www.nyc.gov/site/nypd/stats/reports-analysis/right-to-record.page> (last visited Sept. 9, 2023).

the data is “disaggregated by offense, gender, race, and the precinct where the enforcement occurred.”<sup>168</sup> Reporting requirements are an essential part to statutorily protecting citizen recordings because they increase transparency with the public and allow lawmakers to make informed future decisions.<sup>169</sup> However, despite the comprehensive provisions of the New York City Administrative Code, additional legislative considerations are necessary to effectively address instances where police officers exploit interference statutes to impede individuals’ right to record.

#### B. Legislative Considerations to Address Unhindered Police Discretion

Under Section 14-189, an officer may assert the affirmative defense that they had “probable cause to believe that the person recording police activities physically interfered with an official and lawful police function, or that the officer’s action was otherwise authorized by law.”<sup>170</sup> States and cities that wish to protect citizen recordings should go further to define citizen behaviors that are generally considered to interfere with police duties and, therefore, worthy of being restricted. The mere act of recording alone should not form the basis of probable cause to arrest or interfere with a person’s right to record.<sup>171</sup> Although it may appear that the New York statute goes a step further by requiring “physical interference,” the ambiguous meaning of this term is left to the officer’s discretion, presenting a similar problem of broad discretion that can lead to infringing on a person’s ability to record police.<sup>172</sup>

If an officer asserts the affirmative defense that a citizen interfered with his official duties, the officer should prove the existence of conduct that accompanied the recording and constituted interference with police duties.<sup>173</sup> Consequently, statutes like New York City’s should include clear parameters of what behaviors constitute interference, limited to such actions as:

- (a) directly creating an imminent danger to the safety of the officer, suspect/detainee, and/or other members of the public located in close physical proximity to the officer; or
- (b) interfering with the preservation of evidence at the scene of an accident or crime. Such additional conduct might include: (1) physically trying to obstruct the officer in performing duties; (2) repeatedly trying to engage the officer in disruptive conversation while

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168. *Id.*

169. *See* Glorioso, *supra* note 166.

170. N.Y.C. ADMIN. CODE § 14-189 (2023).

171. Clay Calvert, *The First Amendment Right to Record Images of Police in Public Places: The Unreasonable Slipperiness of Reasonableness & Possible Paths Forward*, 3 TEX. A&M L. REV. 131, 174 (2015).

172. *See supra* Section III.A for discussion of how broad interference statutes leave citizens uncertain about recording police.

173. *See* Calvert, *supra* note 171.

the officer is talking with the suspect/ detainee and after being told by the officer to remain quiet; or (3) verbally trying to incite others in the near vicinity to attack the officer.<sup>174</sup>

By adding these standards into legislation, the law could proscribe clear parameters for what constitutes interference with police activities to minimize unfettered discretion used to stop citizen recordings while providing clarity for citizens on how to appropriately record police. When both sides can ascertain what is permitted, citizens may exercise the right with more confidence.<sup>175</sup> Moreover, law enforcement can rely on the statute and any subsequent litigation to inform its behaviors and actions to avoid liability.<sup>176</sup>

#### IV. CONCLUSION

Citizen recordings of police can ignite a firestorm of anger, fuel social unrest, and leave a bitter taste of dissatisfaction with the state of policing in America. Paradoxically, it is precisely this potent ability to evoke such emotions that necessitates their utmost protection. Nevertheless, across the country, citizens find themselves at the mercy of law enforcement officers, with their recording abilities subject to arbitrary interference and retaliation.

This injustice is further exacerbated by an artificial circuit split that denies some citizens the opportunity to seek judicial relief. As the Supreme Court of the United States hesitates to take a definitive stance, individuals in jurisdictions yet to rule on the right to record police and subjects of police activity face a disheartening reality—their claims obstructed by the formidable shield of qualified immunity. To confront this uncertainty head-on, cities and states must seize the opportunity to enact legislation that explicitly grants citizens the statutory right to record police officers, creates a method of attainable judicial relief, and institutes reporting procedures for greater transparency surrounding arrests that involve citizens recording police.<sup>177</sup> Moreover, cities and states should include additional criteria that clearly define the boundaries of citizen interference with police conduct, providing much-

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174. *Id.*

175. *See* *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (due process requires that “laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly”); *Reno v. ACLU*, 521 U.S. 844, 872 (1997) (vague regulations deter lawful activity because citizens are subject to discriminatory enforcement with the possibilities of criminal penalties).

176. *See* Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1067–70 (2010). Research suggests that reviewing lawsuits can and does help law enforcement make informed reforms to their departments and training programs. *Id.* at 1067–69. The process of litigation and the information gathered along the way has more deterrent value than the outcome itself. *Id.* at 1069–70.

177. *See supra* Section IV.A.

needed clarity for both individuals and law enforcement.<sup>178</sup> In doing so, citizen recordings can be safeguarded and empowered to drive the growing movement for police accountability.

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178. *See supra* Section IV.B.

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