CODIFYING THE RIGHT TO RECORD POLICE: NATIONAL CHALLENGES DEMAND A CONGRESSIONAL SOLUTION

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Although the proliferation of video footage documenting police misconduct has cemented a public expectation that individuals have a First Amendment right to film officers, the right to record law enforcement remains unsettled and under threat. This Note undertakes a comprehensive survey of every federal appellate decision on the right to record, revealing a fragile consensus that the right exists, coupled with pervasive uncertainty about its contours. Despite growing recognition of the right, this Note argues that it cannot be fully vindicated due to qualified immunity, a Supreme Court that is deferential to law enforcement, and disagreement among the judiciary regarding the limits of the right. State legislatures have exploited this ambiguity and uncertainty, proposing and enacting buffer-zone laws and other restrictions that criminalize and chill the act of filming police. Given the importance of the right to record and the patchwork of conflicting federal, state, and local laws, a federal solution is needed. Drawing on successful statutes in Colorado, New York, and California, as well as lessons from failed restrictions, this Note proposes model legislation that would clearly define and robustly protect the right to record.

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INTRODUCTION

"Man Dies After Medical Incident During Police Interaction" was the title of the press release put forward by the Minneapolis Police Department after one of its officers killed George Floyd by kneeling on his neck for nine minutes and twenty-nine seconds.[1] The police report stated that Floyd "appeared to be suffering medical distress" yet failed to describe the police misconduct that would have explained why Floyd was suffering.[2] At first, local news outlets uncritically parroted the police's account of the events, essentially reading the department's press release word for word on air.[3] Only because Darnella Frazier, a brave seventeen-year-old bystander, videotaped Floyd's murder did the public eventually learn the truth.[4]

Unfortunately, the George Floyd case was anomalous in that there was accountability for the officer involved.[5] The reality is that

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1. Eric Levenson, *How Minneapolis Police First Described the Murder of George Floyd, and What We Know Now*, CNN (Apr. 21, 2021), https://www.cnn.com/2021/04/21/us/minneapolis-police-george-floyd-death/index.html [https://perma.cc/67A9-4U6P].

2. *Id.*

3. Last Week Tonight, *Crime Reporting: Last Week Tonight with John Oliver*, YOUTUBE (Oct. 10, 2022), https://www.youtube.com/watch?v=kCOnGjvYKI0&t=1011s [https://perma.cc/4H8B-M2D7].

4. *See* Holly Yan, *A Teen with 'a Cell Phone and Sheer Guts' Is Credited for Derek Chauvin's Murder Conviction*, CNN (Apr. 21, 2021), https://www.cnn.com/2021/04/21/us/darnella-frazier-derek-chauvin-reaction/index.html [https://perma.cc/QNA5-QXR9] (explaining that Frazier's footage provided undeniable evidence of Floyd's murder and quoting Minnesota's Governor as saying "taking that video, I think many folks know, is maybe the only reason that Derek Chauvin will go to prison").

5. *See* Mark Berman, *How Derek Chauvin Became the Rare Police Officer Convicted of Murder*, WASH. POST (Apr. 20, 2021), https://www.washingtonpost.com/nation/2021/04/20/chauvin-police-officer [https://perma.cc/F5JB-4NF5]; *see also* German Lopez, *Police Officers Are Prosecuted for Murder in Less than 2 Percent of Fatal Shootings*, VOX (Apr. 4, 2021), https://www.vox.com/21497089/derek-chauvin-george-floyd-trial-police-prosecutions-black-lives-matter [https://perma.cc/XJ2J-UR4Y].

police officers regularly lie[6] and everyone knows it[7], but they normally get away with it.[8] Misrepresentation and outright fabrication are such common fixtures of policing that a phrase has been coined to describe

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6. Police lie in many different contexts, including about people they have killed. *See* Stuart Schrader, *The Lies Cops Tell and the Lies We Tell About Cops*, NEW REPUBLIC (May 27, 2021), https://newrepublic.com/article/162510/cops-lie-public-safety-defund-the-police [https://perma.cc/NY3N-DTKX] (discussing how the Minneapolis Police Department released a misleading statement after George Floyd's murder and concluding "[c]ops lie about how hated they are . . . [c]ops lie about dangers they face . . . [c]ops lie to make arrests . . . [c]ops lie about what they must do . . . [c]ops lie to proclaim themselves indispensable"); *see also* Sam Levin, '*They Kill the Person Twice': Police Spread Falsehoods After Using Deadly Force, Analysis Finds*, THE GUARDIAN (May 19, 2021), https://www.theguardian.com/us-news/2021/may/19/us-police-shootings-george-floyd-press-releases-reports [https://perma.cc/5TMN-2PZF] (finding at least a dozen cases of police killings over five years in California where "initial police statements misrepresent[ed] events, with major omissions about the officers' actions, inaccurate narratives about the victims' behaviors, or blatant falsehoods about decisive factors"); Jonathan Blanks, *Reasonable Suspicion: Are Police Lying in Use of Force Cases?*, CATO INSTITUTE (Jan. 7, 2015), https://www.cato.org/commentary/reasonable-suspicion-are-police-lying-use-force-cases [https://perma.cc/3BEZ-KAC3] (arguing that police are incentivized to lie "not only in their day-to-day work, but also when their actions result in violence against the public"). Even police admit that perjury is commonplace among law enforcement. *See* Peter Keane, *Why Cops Lie*, SF GATE (Mar. 15, 2011), https://www.sfgate.com/opinion/openforum/article/Why-cops-lie-2388737.php [https://perma.cc/2MS3-PGCG]. It is impossible to quantify exactly how often police lie, but statistical evidence suggests the problem is commonplace. *See* Harmeet Kaur, *Videos Often Contradict What Police Say in Reports. Here's Why Some Officers Continue to Lie*, CNN (June 6, 2020), https://www.cnn.com/2020/06/06/us/police-reports-lying-videos-misconduct-trnd/index.html [https://perma.cc/7KNN-S3BB] (citing a database of 10,000+ arrests that found 6.3% of cases involved false reports or statements and quoting Philip Stinson, a criminologist, a professor of criminal justice, and the man behind the database, as saying police lie even more often than the data suggests); *see also* Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 107 (1992) (noting that the author's survey study found that Chicago judges, prosecutors, and defense attorneys estimate that judges disbelieve police in 18–21% of suppression hearings); Michael Foley, Police Perjury: A Factorial Survey (Apr. 14, 2000) (Ph.D. dissertation, City University of New York), https://www.ojp.gov/pdffiles1/nij/grants/181241.pdf [https://perma.cc/A5SN-CATU] (surveying cops to find the conditions in which they would commit perjury and finding that around 77% of the officers believed that some officers would perjure themselves in the scenarios presented in the survey); Myron Orfield Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1050 (1987) (asking police officers if "[i]n your experience, do police officers ever shade the facts a little (or a lot) to establish probable cause when there may not have been probable cause in fact?" and finding 76% of officers said yes).

police falsifications: "testilying."[9] But police dishonesty isn't new; cops have lied for as long as they have existed.[10] However, the ability to catch and memorialize police officers' lies via cell phone recordings is a relatively new development.[11] George Floyd's brother, Philonise, made this point when he analogized his sibling's murder to that of Emmett Till, stating the only difference was "the cameras, the technology. It

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7. *See* Irving Younger, *The Perjury Routine*, THE NATION (May 8, 1967), http://users.soc.umn.edu/~samaha/cases/irving_younger.htm [https://perma.cc/7DZU-WUBG] (quoting a former Assistant United States Attorney for the Southern District of New York and New York University law professor as remarking that "every lawyer who practices in the criminal courts knows that police perjury is commonplace"); *see* Keane, *supra* note 6 (quoting a former San Francisco Police Commissioner as saying that perjury by police officers to justify drug searches is "[o]ne of the dirty little not-so-secret secrets of the criminal justice system").

8. *See* Keane, *supra* note 6 ("Why do police . . . show contempt for the law by systematically perjuring themselves? The first reason is because they get away with it."); *see also* Younger, *supra* note 7 (arguing that police are "as likely to be indicted for perjury by [their] co-worker, the prosecutor, as [they are] to be struck down by thunderbolts from an avenging heaven"); *see also* Andrew Case et al., *Shielded from Accountability: How NYPD Officers Get Away with Lying to the CCRB* (Apr. 2022), LATINOJUSTICE PRLDEF, https://www.latinojustice.org/sites/default/files/ccrb_report/CCRB%20Report_v4_4-9.pdf [https://perma.cc/X64N-JZGQ] (analyzing 169 incidents of police lying to New York's Civilian Complaint Review Board and finding that around 47% of officers faced no discipline, only around 2% were suspended or put on probation, and none were fired).

9. Nick Malinowski, *Testilying: Cops Are Liars Who Get Away with Perjury*, VICE NEWS (Feb. 2, 2013),

https://www.vice.com/en/article/jmv94x/testilying-cops-are-liars-who-get-away-with-perjury [https://perma.cc/7V65-4Q9R].

10. Samuel Dunkle, *"The Air Was Blue with Perjury": Police Lies and the Case for Abolition*, 96 N.Y U. L. REV. 2048, 2079 (2021). The recognition that cops lie is not intended to denigrate the character of individual police officers but rather is a critical insight about the broader system of American policing and even human nature. *See* Michelle Alexander, *Why Police Lie Under Oath*, N.Y. TIMES (Feb. 2, 2013), https://www.nytimes.com/2013/02/03/opinion/sunday/why-police-officers-lie-under-oath.html (on file with the *Columbia Human Rights Law Review)* (explaining that "police officers are human. Research shows that ordinary human beings lie a lot . . . . The natural tendency to lie makes quota systems and financial incentives that reward the police for the sheer numbers of people stopped, frisked or arrested especially dangerous").

11. *See* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 354 (2011) (concluding that "the spread of pervasive image capture in the last decade has been accompanied by a rich set of cases in which police have sought to prosecute critics or potential critics who capture their images").

helped open up doors because without that, my brother just would have been another person on the side of the road left to die."[12]

As smart phone technology has proliferated, courts are increasingly considering 42 U.S.C. § 1983 claims brought by individuals asserting a First Amendment right to film law enforcement activities.[13] Some scholars have argued that the act of recording is not speech or that the First Amendment right to record police activities extends only to the press.[14] But now the consensus position of appellate courts that have addressed the issue is that filming the police is expressive conduct and/or constitutes newsgathering, both of which fall under the umbrella of the First Amendment.[15] Courts have coalesced around the position that the right to record police conduct is protected by the First Amendment and is subject to "reasonable time, place, and manner restrictions" but have largely declined to expand upon what restrictions on recording are reasonable.[16] Accordingly, the conversation surrounding the right to record has evolved in recent years; the question is no longer does the First Amendment protect the right to film police but rather to what extent? At present, courts are just scratching the surface on this issue, and it is likely that the government will continue to resist a robust right to record under the First Amendment.

This Note argues that, despite the trend towards national recognition of a right to record police when publicly engaged in their official duties, the right remains vulnerable and under attack. The judiciary has thus far proven incapable of adequately safeguarding the right. Meanwhile, state legislatures have seized on the opportunity with bills that would criminalize filming the police. In this crisis, only a swift, federal legislative response can suffice. Congress should codify a robust, clearly defined right to record. Part I summarizes existing case law in the various circuit courts regarding the right to record, with a focus on how courts have thus far left the scope of the right ambiguous. Part II describes how this uncertainty surrounding the

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12. Levenson, *supra* note 1.

13. *See generally infra* Part I (discussing recent cases where individuals brought § 1983 claims and asserted a First Amendment right to record police); *see also* Kreimer, *supra* note 11 at 339 (arguing that "the proliferation of digital visual capacity will regularly require legal decisionmakers to come to grips with the status of pervasive image capture under the First Amendment").

14. Kreimer, *supra* note 11 at 370.

15. *See infra* note 17 and accompanying text.

16. *See infra* notes 18–19, and accompanying text.

scope of the right to record has prevented individuals from effectively vindicating the right in court and paved the way for regressive state legislatures to restrict the right with draconian legislation. Lastly, Part III argues that Congress should enshrine the right to record police into federal law and clearly define its limits.

I. CURRENT APPELLATE LAW RECOGNIZES A RIGHT TO RECORD SUBJECT TO REASONABLE TIME, PLACE, AND MANNER RESTRICTIONS

Currently, eight circuits explicitly recognize a First Amendment right to record police officers while exercising their official duties in public.[17] Nonetheless, these courts have refrained from delineating the outer limits of such a right. Appellate courts are coalescing around the position that the right to record police in public is protected by the First Amendment subject to "reasonable time, place, and manner restrictions" but have generally declined to explain what restrictions are reasonable.[18] While observing that the right to record can be restricted when it interferes with police activities, these courts have provided little guidance as to what constitutes interference.[19] This Part examines in chronological order the appellate court decisions

17. *See infra* notes 27, 40, 57, 78, 87, 101, 107, 112 and accompanying text. The Eighth Circuit has also implied the right to record police could be protected by the First Amendment. *Compare* Chestnut v. Wallace, 947 F.3d 1085, 1090 (8th Cir. 2020) (finding individuals have a clearly established "right to watch police-citizen interactions at a distance and without interfering" under the Fourth Amendment) *with* Molina v. City of St. Louis , 59 F.4th 334, 340 (8th Cir. 2023) ("It is not beyond the realm of possibility that a First Amendment right to observe police exists, but our Fourth Amendment cases like Walker and Chestnut do not clearly establish it . . . . It is one thing to conclude that officers cannot arrest someone passively standing by and watching as they do their job . . . . But it is another matter to say that watching is itself expressive").

18. *See infra* notes 32, 47, 88, 91, 102, 117, and accompanying text.

19. *See infra* notes 60, 68, 108, and accompanying text (discussing cases where courts held that police can restrict filming of themselves when recording interferes with police activity but did not explain what constitutes interference).

that have enshrined a right to record while leaving the contours of that right undefined.

A. The Ninth Circuit

The Ninth Circuit set the legal foundation for a First Amendment right to record police in 1995.[20] On August 5, 1990, Jerry Edmon Fordyce was participating in and videotaping a public protest march for a local television station.[21] Police attempted to prevent Fordyce from recording police working the march and later arrested him for taping a group of bystanders.[22] Fordyce subsequently brought a section 1983 claim against various officers for interfering with his First Amendment right to gather news.[23] The district court granted summary judgment to the defendants, finding that there was insufficient evidence that Fordyce was assaulted.[24] Subsequently, in *Fordyce v. City of Seattle*, the Ninth Circuit reversed and remanded, finding there was a genuine issue of material fact as to whether "Fordyce was assaulted and battered by a Seattle police officer in an attempt to prevent or dissuade him from exercising his First Amendment right to film matters of public interest."[25] However, the court did not address the scope of a First Amendment right to record as neither party raised the issue on appeal.[26]

In 2018, the Ninth Circuit cited *Fordyce* for the proposition that the First Amendment protects "the right to record law enforcement officers engaged in the exercise of their official duties in public places."[27] The court explained that whether a place is public depends on its location and that the government's ability to restrict speech in traditional public forums is sharply limited.[28] In public

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20. *See generally infra* Section II.B (discussing circuit court cases about the right to record that were decided after *Fordyce*); *see also* Kalisa Mora, *Observe, Record, and Report: Fighting Police Misconduct in the Technological Age*, U. CIN. L. REV. BLOG (Jan. 11, 2017), https://uclawreview.org/2017/01/11/observe-record-and-report-fighting-police-misconduct-in-the-technological-age [https://perma.cc/G7TH-VW3T] (recalling the origins of the right to record, starting with the Ninth Circuit's decision in *Fordyce*).

21. Fordyce v. City of Seattle, 55 F.3d 436, 438 (9th Cir. 1995).

22. *Id.*

23. *Id.*

24. Fordyce v. City of Seattle, 840 F. Supp. 784, 788 (W.D. Wash. 1993) *aff'd in part, vacated in part, rev'd in part*, 55 F.3d 436 (9th Cir. 1995).

25. Fordyce, 55 F.3d at 439.

26. Mullen, *infra* note 76 at 814.

27. Askins v. U.S. Dep't of Homeland Sec., 899 F.3d 1035, 1044 (9th Cir. 2018).

28. *Id.*

forums, reasonable restrictions on the time, place, or manner of speech can only be imposed if they are content-neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication.[29] Content-based constraints must be necessary to advance a compelling state interest.[30] But in non-public forums, restrictions need only be "reasonable in light of the purpose served by the forum and viewpoint neutral."[31] Despite engaging in this forum analysis, the Ninth Circuit concluded there was an insufficient record to determine whether the recording had occurred in a public forum, so the court did not detail what constitutes a reasonable, content-neutral time, place, and manner restriction.[32]

Six years later, the Ninth Circuit revisited the right to record in *Serrano v. Sanders*. Daniel Serrano was arrested for obstruction when observing the arrest of his brother, and subsequently brought claims for alleged violations of his First and Fourth Amendments.[33] The district court denied the arresting officer's motion for summary judgment, reasoning there were genuine issues of material fact.[34] The Ninth Circuit affirmed, citing *Askins*, and explained that the right to record "necessarily includes the right to peacefully observe officers carrying out their official duties in public."[35] The court explained there was sufficient evidence for a reasonable jury to conclude that Serrano did not obstruct police, given that he recorded from a safe distance and acted peacefully.[36] Further, a reasonable factfinder could conclude that

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29. *Id.* For a discussion on the difference between content-neutral and content-based restrictions, see Kristi Nickodem & Kristina Wilson, *Responding to First Amendment Audits: Content-Based vs. Viewpoint-Based Restrictions*, COATES' CANONS NC LOCAL GOVERNMENT LAW (Nov. 18 2022), https://canons.sog.unc.edu/2022/11/responding-to-first-amendment-audits-content-based-vs-viewpoint-based-restrictions/ [https://perma.cc/7KZZ-PJ5U] ("Content-based restrictions apply to particular types of speech based on the topic or subject matter discussed.").

30. *Askins*, 899 F.3d at 1044.

31. *Id.* (quoting Long Beach Area Peace Network v. City of Long Beach, 574 F.3d 1011, 1023–24 (9th Cir. 2009)).

32. *See id.* at 1045, 1047 (stating "the devil lies in the details" when justifying reasonable restrictions on speech activities and holding that "further factual development is required before the district court can determine what restrictions, if any, the government may impose in these public, outdoors areas").

33. Serrano v. Sanders, No. 23-35437, 2024 WL 2206344, at *1 (9th Cir. May 16, 2024).

34. *Id.* at 1 n. 1.

35. *Id.* at 3.

36. *Id.*

the officer's actions were "retaliatory content-based restrictions on Serrano's First Amendment rights."[37]

B. The Eleventh Circuit

In 2000, the Eleventh Circuit joined the Ninth Circuit in recognizing a right to record police rooted in the First Amendment.[38] In *Smith v. City of Cumming*, James and Barbara Smith alleged that they were harassed by police for exercising their constitutional right to videotape public police activities.[39] In reviewing the Smiths' claim, the court recognized "a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct" based on the right "to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."[40] While the *Smith* court recognized a First Amendment right to record, it found the Smiths did not show that the police violated that right and therefore did not address the scope of the right any further.[41]

Over two decades later, the Eleventh Circuit expounded upon *Smith*. In *Crocker v. Beatty*, James Crocker alleged that he was lawfully filming the police following a fatal car accident on the I-95 highway when police seized his phone, and he was wrongfully arrested.[42] The court reaffirmed a right to record the police, but granted the arresting officer qualified immunity.[43] The Eleventh Circuit recognized that "*Smith*'s declaration of a right to record police conduct came without much explanation" and that the "dearth of detail about the contours of the right announced in *Smith*" meant that the defendant officer had not been provided fair warning of the unlawful nature of his conduct.[44] The court concluded that *Smith* only clearly established a right to film police in public forums.[45] Reasoning that Crocker was not taping in a public forum, the court determined the

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37. *Id.*
38. Smith v. Cummings, 212 F.3d 1332, 1333 (11th Cir. 2000).
39. *Id.* at 1332.
40. *Id.* at 1333.
41. *Id.*
42. 995 F.3d 1232, 1239 (11th Cir. 2021).
43. *Id.* at 1240. For a more in-depth discussion of qualified immunity and how it pertains to the right to record police, *see generally infra* Section II.A.2.
44. *Crocker*, 995 F.3d at 1241.
45. *Id.* at 1242.

rule announced in *Smith* did not apply with "obvious clarity."[46] Accordingly, the court granted qualified immunity and did not reach the issue of what reasonable time, place, and manner restrictions could be placed on the right to record.[47]

In January 2025, the Eleventh Circuit reconsidered the right to record in *Hoffman v. Delgado*. Hoffman, a self-described photojournalist, was arrested while filming inside the lobby of a police headquarters for violating a city ordinance that prohibited recording in municipal buildings.[48] Hoffman argued the ordinance and his arrest violated his First and Fourth Amendment rights.[49] The court recognized that the First Amendment protects the right to record matters of public interest, citing *Smith*, but noted the right "is not absolute."[50] The court explained that restrictions in nonpublic or limited public forums, like police departments, are constitutional if viewpoint neutral and reasonable in light of the purpose served by the forum.[51] Applying these principles, the court affirmed the dismissal of Hoffman's complaint, concluding that the city ordinance was viewpoint neutral and reasonable.[52] The court reasoned that the ordinance was permissible because it "protect[ed] the police headquarters from distractions," "guard[ed] documents from confidentiality threats, and "secure[d] the building for its intended purpose of facilitating assistance for those with public safety needs."[53]

C. The First Circuit

In *Glik v. Cunniffe*, the First Circuit addressed whether the First Amendment encompasses a right to record police officers.[54] Police officers arrested Simon Glik for videotaping them, allegedly in violation of Massachusetts' wiretapping statute, as they were arresting a young man on the Boston Common.[55] The charges against Glik were dismissed by the Boston Municipal Court and Glik subsequently filed

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46. *Id.* at 1242–43.
47. *Id.* at 1243.
48. *Hoffman v. Delgado*, No. 23-13213, 2025 WL 25856, at *1 (11th Cir. Jan. 3, 2025).
49. *Id.*
50. *Id.* at 2.
51. *Id.* at 3.
52. *Id.*
53. *Id.*
54. 655 F.3d 78 (1st Cir. 2011).
55. *Id.* at 79.

a section 1983 action against the City of Boston and its officers for violating his First and Fourth Amendment rights.[56] The court found for Glik, rejected the officers' qualified immunity defense, and held that the right to film government officials engaged in their duties in public fit within the right to gather news under the First Amendment.[57] Citing *Smith*, the court recognized that the right to film is subject to reasonable time, place, and manner restrictions, but concluded that "[w]e have no occasion to explore those limitations here."[58] Nonetheless, the court cautioned that "police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment right."[59] Consequently, it held that "peaceful recording of an arrest in a public space that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation."[60]

In 2014, the First Circuit built upon its decision in *Glik* and analyzed the right to record in the context of a traffic stop. In *Gericke v. Begin*, plaintiff Carla Gericke and Tyler Hanslin, her friend, were caravanning on their way to Hanslin's house when Hanslin was pulled over by a police officer, Sergeant Kelly.[61] Gericke pulled her car to the side of the road, retrieved a video camera from her car, and began to record Kelly from thirty feet away.[62] Kelly ordered Gericke back to her car, and while she immediately complied, she continued to record.[63] Eventually, Gericke placed the camera on her car's center console and was subsequently approached by another officer on the scene who demanded to know where her camera was located.[64] Gericke refused to tell the officer, and she was arrested for unlawful interception of oral communications.[65] The local prosecutor declined to move forward with the charges, and Gericke filed a section 1983 action against the officers and the Weare Police Department for violating her First Amendment rights.[66] On appeal, the First Circuit recognized the unique dangers posed to police in traffic stops and reiterated that "[r]easonable

56. *Id.* at 80.
57. *Id.* at 84.
58. *Id.*
59. *Id.*
60. *Id.*
61. Gericke v. Begin, 753 F.3d 1, 3 (1st Cir. 2014).
62. *Id.*
63. *Id.*
64. *Id.* at 3–4.
65. *Id.* at 4.
66. *Id.*

restrictions on the exercise of the right to film may be imposed when the circumstances justify them."[67] Nonetheless, the court found for Gericke, explaining that restrictions on filming the police performing their duties in public may only be imposed "if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with [their] duties."[68] In the absence of a reasonable restriction, the right remains "unfettered."[69]

The First Circuit last discussed the scope of the right to record in 2020 in *Project Veritas Action Fund v. Rollins*.[70] In *Project Veritas*, individuals who regularly record police filed a section 1983 action against a City Police Commissioner and County District Attorney, alleging that Massachusetts' statute prohibiting secret, nonconsensual audio recording violated the First Amendment.[71] Relying on *Glik* and *Gericke*, the court found that the surreptitious recording of police on duty constituted newsgathering protected by the First Amendment.[72] The court deemed the statute unconstitutional insofar as it criminalized the recording of police officers engaging in their official duties in public.[73] For the first time, the First Circuit explicitly discussed the appropriate level of scrutiny for content-neutral restrictions on the right to record, stating forum analysis was not key to resolving the issue.[74] Applying intermediate scrutiny, the court found that Massachusetts' statute was not narrowly tailored to advance an important government interest since there was no evidence that the law reduced interference with police activities "in any meaningful way with respect to at least the mine-run of circumstances . . ."[75]

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67. *Id.* at 7.

68. *Id.* at 8.

69. *Id.*

70. Project Veritas Action Fund v. Rollins, 982 F.3d 813, 817 (1st Cir. 2020), *cert. denied*, 142 S. Ct. 560 (2021).

71. *Id.* at 820.

72. *Id.* at 832–33.

73. *Id.* at 833, 844. The court, nonetheless, upheld the statute against other challenges, including that it was facially overbroad. *Id.* at 844.

74. *See id.* at 835 (quoting Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992)) (explaining that "[n]either *Glik* nor *Gericke* . . . purported to predicate the level of scrutiny that applied to the challenged recording restrictions on forum analysis" and "there is no indication in [the Supreme Court's] precedent that the 'forum based' approach that is used to evaluate a 'regulation of speech on government property' necessarily applies to a regulation on the collection of information on public property").

75. *Id.* at 837.

D. The Seventh Circuit

The Seventh Circuit recognized a right to record public police activities in 2012 in arguably the most comprehensive appellate opinion written on the issue thus far.[76] In *ACLU v. Alvarez,* the ACLU brought a pre-enforcement action challenging an Illinois eavesdropping statute that criminalized recording a conversation without the consent of all parties.[77] The court ruled that the statute was likely unconstitutional insofar as it criminalized the recording in public of law enforcement officers engaging in their official duties.[78] It reasoned that intermediate scrutiny applied and looked to three requirements: (1) content neutrality, (2) an important public interest justification for the challenged regulation, and (3) a reasonably close fit between the law's means and its ends.[79] Although the court recognized conversational privacy as an important government interest, it determined the statute was overly broad as it criminalized all audio recordings made without the consent of both parties without regard for whether the conversation was private.[80] Consequently, the court did not reach the issue of whether the statute left open alternative speech channels.[81] Further, the Seventh Circuit recognized that the right to record does not justify videographers' obstructing effective law enforcement.[82]

E. The Fifth Circuit

In *Turner v. Lieutenant Driver,* plaintiff Phillip Turner videotaped a police station "from a public sidewalk across the street."[83] Two officers approached Turner, asked for his ID, and detained him for investigation.[84] The officers handcuffed Turner but ultimately released him and returned his camera.[85] Turner subsequently brought a section 1983 claim against the officers for violating his First, Fourth, and

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76. Jared Mullen, *Information Gathering or Speech Creation: How to Think About a First Amendment Right to Record*, 28 WM. & MARY BILL RTS. J. 803, 811 (2020).
77. Am. C.L. Union of Ill. v. Alvarez, 679 F.3d 583, 586 (7th Cir. 2012).
78. *Id.* at 608.
79. *Id.* at 605.
80. *Id.* at 607.
81. *Id.*
82. *Id.*
83. Turner v. Lieutenant Driver, 848 F.3d 678, 683 (5th Cir. 2017).
84. *Id.*
85. *Id.* at 684.

Fourteenth Amendment rights.[86] Citing *Alvarez*, *Gericke*, and *Glik*, the court found that citizens possess a First Amendment right to record police subject to reasonable time, place, and manner restrictions.[87] However, the court declined to elaborate on which restrictions would be reasonable, finding that the officers sued were entitled to qualified immunity.[88]

In January 2025, the Fifth Circuit reaffirmed the right to record in *Bailey v. Ramos*. David Bailey sued police officer Oscar Ramos under section 1983 for unlawful arrest, excessive force, malicious prosecution, violation of his right to record the police, and First Amendment retaliation after being arrested while filming police activity at an active crime scene.[89] The Fifth Circuit reversed the district court's denial of summary judgment for Ramos, finding that he was entitled to qualified immunity on all claims.[90] In doing so, the court noted that the First Amendment protects the right to record police subject to reasonable time, place, and manner restrictions, but did not explain what restrictions are reasonable.[91]

Less than two months later, the Fifth Circuit revisited the right to record. In *Rincon v. City of Laredo, Texas*, Ismael Rincon sued the city and its police officers for violating his right to film the police by confiscating his phone twice and shining a flashlight into the his cell phone camera.[92] The court noted the First Amendment protects the right to record the police, subject to reasonable time, place, and manner restrictions and held that Rincon had plausibly alleged a claim for First Amendment retaliation.[93] Nonetheless, the court granted the officers qualified immunity as to Rincon's claim based on the initial confiscation of his phone because there was no controlling authority establishing that "an officer violates the First Amendment by confiscating the phone of an armed, unidentified, and uncooperative criminal suspect for fifteen minutes while he is handcuffed during a *Terry* stop."[94] The court explained that the facts were significantly different from *Turner*, where the plaintiff was unarmed and filming a

86. *Id.*
87. *Id.* at 690.
88. *Id.* at 687, 690.
89. Bailey v. Ramos, 125 F.4th 667, 674 (5th Cir. 2025).
90. *Id.* at 686.
91. *Id.* at 685.
92. *Id.*
93. *Id.* at 4–5.
94. *Id.* at 6.

police station from a public sidewalk.[95] In addition, the court dismissed Rincon's claims based on the second confiscation of his phone and the shining of a flashlight into his phone, finding Rincon had failed to allege an injury that would chill a person of ordinary firmness.[96]

F. The Third Circuit

Fields v. City of Philadelphia was a consolidated appeal that took place in 2017 and concerned two incidents in which Philadelphia police officers retaliated against individuals for exercising their right to record the police.[97] In the first incident, Amanda Geraci was attempting to film an arrest during a protest when an officer abruptly pushed her, pinning her against a pillar for one to three minutes, which prevented her from observing or recording the arrest.[98] In the second incident, Richard Fields took a photograph of police on a public sidewalk fifteen feet from where officers were breaking up a house party; an officer subsequently arrested Fields, confiscated his phone, and detained him.[99] Both Geraci and Fields brought section 1983 actions against the City of Philadelphia and individual police officers, alleging that officers illegally retaliated against them for exercising their First Amendment right to record public police activity.[100] The court concluded that "recording police activity in public falls squarely within the First Amendment right of access to information."[101] Yet, it addressed neither the level of scrutiny courts should apply to plaintiffs' challenges nor the scope of the right to record beyond acknowledging that reasonable time, place, or manner restrictions may be applied.[102]

G. The Tenth Circuit

In July 2022, the Tenth Circuit joined the chorus of federal appellate courts that have recognized a right to record police.[103] In *Irizarry v. Yehia*, Abade Irizarry, a YouTube journalist and blogger, was filming a DUI traffic stop when a second police officer arrived on

95. *Id.*
96. *Id.* at 6–7.
97. Fields v. City of Philadelphia, 862 F.3d 353, 356 (3d Cir. 2017).
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 359.
102. *Id.* at 360.
103. Irizarry v. Yehia, 38 F.4th 1282, 1292 (10th Cir. 2022).

the scene and began obstructing Irizarry's filming.[104] The officer shined a flashlight into Irizarry's camera and drove his police cruiser at Irizarry and a fellow journalist in an apparent attempt to get Irizarry to move.[105] Irizarry brought a section 1983 claim against the second officer for violating his First Amendment rights.[106] The Tenth Circuit acknowledged a First Amendment right to film the police performing their duties in public.[107] While observing that this right is qualified and subject to reasonable time, place, and manner restrictions, the court found that the peaceful recording of a traffic stop in "a public space that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation."[108]

H. The Fourth Circuit

In February 2023, the Fourth Circuit became the most recent federal appellate court to recognize that recording the police warrants First Amendment protection.[109] In *Sharpe v. Winterville Police Department*, the court considered whether a town's policy of banning livestreaming violated the First Amendment and whether a police officer who stopped a passenger from livestreaming their traffic stop could successfully be sued under section 1983.[110] The Fourth Circuit granted the individual officer involved qualified immunity, determining that an individual's right to livestream police encounters was not clearly established at the time the plaintiff was stopped.[111] However, the court allowed the plaintiff's claim against the town to proceed, finding that the municipality had a policy of prohibiting livestreaming and that livestreaming, like recording the police, is protected speech under the First Amendment.[112] The court remanded the case for further proceedings, finding that it needed a more robust factual record to consider the town's argument that officer safety justified a ban on livestreaming.[113]

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104. *Id.* at 1285.
105. *Id.* at 1285–6.
106. *Id.* at 1286.
107. *Id.* at 1292.
108. *Id.* (quoting Glik v. Cunniffe, 655 F.3d 78, 84 (1st Cir. 2011).
109. Sharpe v. Winterville Police Department, 59 F.4th 674, 678 (4th Cir. 2023).
110. *Id.*
111. *Id.*
112. *Id.* at 679.
113. *Id.* at 678.

One year later, the Fourth Circuit reaffirmed the right to record in *Williams v. Mitchell*.[114] Brandon Williams sued several police officers for allegedly falsifying an accident report to retaliate against him for exposing an officer's perjury in an unrelated incident.[115] Williams had recorded his initial interaction with the officer who charged him with trespassing and used the recording to show that the officer lied at trial.[116] The Fourth Circuit reversed the district court's dismissal of Williams' First Amendment retaliation claim, finding that he engaged in protected speech by recording the officer and that the officers' intentional misrepresentation on the accident report would likely deter Williams from recording police activity in the future.[117] Although the court recognized that recording police encounters is protected speech under the First Amendment, it did not discuss the limits of the right.[118]

II. AMBIGUITY REGARDING THE SCOPE OF THE RIGHT TO RECORD HAS UNDERMINED ITS ENFORCEABILITY

As courts continue to hear more right to record cases, the body of law supporting such a constitutional guarantee has only increased and to date no federal circuit has held that individuals do not have a right to record police officers in public. Nonetheless, the Supreme Court has not yet recognized such a right.[119] And while a growing chorus of circuits have already acknowledged this constitutional right, the Second, the Sixth, the Eighth, and D.C. Circuits still have not.[120] Further, given the absence of a ruling by the Supreme Court, these remaining circuits may well conclude that the right to record the police is not clearly established for the purpose of determining qualified immunity. Additionally, even where circuits have recognized a clearly established right to record police at a general level, the precise contours of the right remain unclear.[121] This ambiguity has resulted in officers continuing to claim the umbrella of qualified immunity and has also enabled state legislators nationwide to pass onerous restrictions on the filming of police.

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114. 122 F.4th 85 (4th Cir. 2024).
115. *Id*. at 87.
116. *Id.*
117. *Id*. at 91.
118. *Id*. at 89.
119. Irizarry v. Yehia, 38 F.4th 1282, 1294 (10th Cir. 2022).
120. *See supra* note 17 and accompanying text.
121. *See supra* notes 18, 19, and accompanying text.

A. The Judiciary Cannot Reliably Safeguard a Robust Right to Record

All circuits to address the issue have found that the Constitution protects the right to record police performing their duties in public.[122] Several courts have noted that such a right falls squarely within the First Amendment.[123] Some scholars have argued that we are heading towards a national right to film police and contend that the true debate will be over the scope of that right.[124] Given the growing consensus of appellate courts, that seems likely to be true. Nonetheless, the right to record remains poorly elucidated and vulnerable if left solely to the courts.[125] This lack of precision, in turn, could result in wrongful arrests of hundreds of citizens in the future and could also greatly reduce the number of recordings made as many citizens may not know their rights or record the police due to their fear of adverse consequences.

1. A National Right to Record is Not Guaranteed

The Supreme Court still has not recognized a right to record public police activities, and a robust national right to record is hardly assured. Historically, the Supreme Court has not used the Constitution to restrain the police but instead has often enabled law enforcement's worst excesses.[126] Specifically, the Court has made it impossible to sue localities for injunctive relief over chokehold policies;[127] enabled law

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122. *Irizarry*, 38 F.4th at 1290.

123. *Id.* at 1295; Fields v. City of Philadelphia, 862 F.3d 353, 359 (3d Cir. 2017).

124. Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 GEO. L.J. 1559, 1563 (2016); Glenn Harlan Reynolds & John A. Steakley, *A Due Process Right to Record the Police*, 89 WASH. U. L. REV. 1203, 1204 (2012).

125. *See* Marianne F. Kies, *Policing the Police: Freedom of the Press, the Right to Privacy, and Civilian Recordings of Police Activity*, 80 G.W. L. REV. 274, 306 (2011) (arguing that "a bright-line statutory solution is preferable to the caprices of judicial decisionmaking that necessarily accompany developing common law dealing with sensitive constitutional questions" and that federal legislation is optimal to ensure national consistency); *see also* Johnson, *infra* note 144 and accompanying text.

126. Brandon Tensley, *The Supreme Court Has Sided with the Police at the Expense of Black Americans,* CNN (Aug. 26, 2021), https://www.cnn.com/2021/08/26/politics/policing-supreme-court-race-deconstructed-newsletter/index.html [https://perma.cc/9JYC-HYV6].

127. *Id.*; *see* City of Los Angeles v. Lyons, 461 U.S. 95, 113 (1983) (Marshall, J., dissenting) (lamenting that "[s]ince no one can show that [they] will be choked in the future, no one—not even a person who, like Lyons, has almost been choked to

enforcement to stop people so long as they have a reasonable suspicion that they violated a traffic law, even if it is a pretext for a drug search;[128] and endorsed qualified immunity as a means of shielding officers from liability.[129] And although the legal argument for a right to record seems overwhelming, the Court could still find the right either does not exist or is highly qualified. After all, Richard Posner, the most cited legal scholar of all time[130] and one of the most influential appellate judges in the nation,[131] concluded in his dissent in *Alvarez* that there is no First Amendment right to record police in their public functions, citing privacy concerns, safety risks, and the need to protect government informants.[132] Other circuits and the Supreme Court could

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death—has standing to challenge the continuation of the policy. The City is free to continue the policy indefinitely as long as it is willing to pay damages").

128. *See* Tensley, *supra* note 126 and accompanying text; Whren v. United States, 517 U.S. 806, 818 (1996).

129. Joanna Schwartz, *How the Supreme Court Protects Police Officers*, ATLANTIC (Jan. 31, 2023), https://www.theatlantic.com/ideas/archive/2023/01/police-misconduct-consequences-qualified-immunity/672899 [https://perma.cc/Y8Z8-DYBF]; Pierson v. Ray, 386 U.S. 547, 554–55 (1967).

130. Karen Sloan, *New 'Most-Cited' Legal Scholars List Includes Big Names, Few Women*, REUTERS (Nov. 10, 2021), https://www.reuters.com/legal/legalindustry/new-most-cited-legal-scholars-list-includes-big-names-few-women-2021-11-10 [https://perma.cc/HP7B-TQB2].

131. *See* Dan Klau, *First Amendment Protects Citizens' Rights to Record Police Activities*, APPEALINGLY BRIEF (Nov. 28, 2012), https://appealinglybrief.com/2012/11/28/the-first-amendment-protects-citizens-rights-to-record-police-activities [https://perma.cc/9VLA-RCJ2] (quoting a Connecticut Superior Court judge describing Posner as "one of the most respected federal appellate jurists" whose arguments "are always worth serious consideration"); *see also* Kermit Roosevelt, *Richard A. Posner's 'Divergent Paths: The Academy and the Judiciary'*, N.Y. TIMES (Jan. 29, 2016), https://www.nytimes.com/2016/01/31/books/review/richard-a-posners-divergent-paths-the-academy-and-the-judiciary.html (on file with the *Columbia Human Rights Law Review*) (calling Posner "arguably America's greatest living judge").

132. *See* Alvarez, 679 F.3d at 609–14 (Posner, J., dissenting) (lamenting the majority's opinion for endorsing "the right to record conversations to which police officers are parties even if no party consents to the recording, as long as the officers are performing public duties . . . in a public place and speaking loudly enough to be heard by . . . a person standing nearby"); *see also* Jonathan Turley, *Posner Ridicules Right of Citizens to Film Police in Seventh Circuit Oral Argument*, JONATHAN TURLEY (Sept. 19, 2011), https://jonathanturley.org/2011/09/19/posner-ridicules-right-of-citizens-to-film-police-in-seventh-circuit-oral-argument/ [https://perma.cc/H33M-BTUN] (quoting Posner in oral argument as saying "[o]nce all this stuff can be recorded, there's going to be a lot more of this snooping around by reporters and bloggers . . . I'm always suspicious when the civil liberties people start telling the police how to do their business").

well be persuaded by Posner's dissent, and in any event, Posner's opinion illustrates a reticence among some jurists to recognize a right to record police.[133]

Further, while the Supreme Court has always been a political vehicle, the current Court is especially driven by right-wing ideological beliefs[134] and is likely to remain so for the next generation.[135] A

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133. *See* Steven A. Lautt, *Sunlight Is Still the Best Disinfectant: The Case for a First Amendment Right to Record the Police*, 51 WASHBURN L.J. 349, 367 (2012); *see also* Jonathan Turley, *Your Right to Record*, L.A. TIMES (Nov. 8, 2011), https://www.latimes.com/archives/la-xpm-2011-nov-08-la-oe-turley-video-20111108-story.html [https://perma.cc/PJ2V-RZT3].

134. *See* Amelia Thomson-DeVeaux & Laura Bronner, *The Supreme Court's Partisan Divide Hasn't Been This Sharp in Generations*, FIVE THIRTY EIGHT (July 5, 2022), https://fivethirtyeight.com/features/the-supreme-courts-partisan-divide-hasnt-been-this-sharp-in-generations [https://perma.cc/L9SR-KR28] (concluding that "the divide between the court's Republican and Democratic appointees is deeper than it's been in the modern era" and that the Court's most conservatives justices are "wielding more power than they have in years"); *see also* Richard Posner, *The Supreme Court Is a Political Court. Republicans' Actions Are Proof*, WASH. POST (Mar. 9, 2016), https://www.washingtonpost.com/opinions/the-supreme-court-is-a-political-court-republicans-actions-are-proof/2016/03/09/4c851860-e142-11e5-8d98-4b3d9215ade1_story.html (on file with the *Columbia Human Rights Law Review*) (arguing that "the Supreme Court is . . . a political court, or more precisely a politicized court, which is to say a court strongly influenced in making its decisions by the political beliefs of the judges"); *see also* Joel Cohen, Richard Posner & Jed Rakoff, *Should Judges Use Their Roles to Effect Social Change?*, SLATE (Aug. 24, 2017), https://slate.com/news-and-politics/2017/08/posner-rakoff-dialogue-on-how-judges-should-effect-social-changes.html [https://perma.cc/T5RK-D5AR] (explaining that the Supreme Court "has been a policy-making body since its inception" that justifies "its policy preferences in terms of not departing from past precedents and/or not interfering with the exercise of power by other branches of government"). *But see* Darragh Roche, *Supreme Court Justices Insist They Aren't Partisan. Americans Disagree*, NEWSWEEK (Oct. 21, 2021), https://www.newsweek.com/supreme-court-justices-partisan-americans-poll-conservatives-liberal-1641173 [https://perma.cc/PBU8-RSRL] (quoting Justice Amy Coney Barrett at the opening of the McConnell Center at the University of Louisville as saying that her goal was "to convince [people] that [the Supreme Court] is not comprised of a bunch of partisan hacks").

135. Adam Serwer, *The Lie About the Supreme Court Everyone Pretends to Believe*, ATLANTIC (Sept. 28, 2021), https://www.theatlantic.com/ideas/archive/2021/09/lie-about-supreme-court-everyone-pretends-believe/620198 (on file with the *Columbia Human Rights Law Review*) (stating that the "conservative movement seems to have secured the Court for a generation at least"). *See* Tensley, *supra* note 126 (quoting Erwin Chemerinsky as saying "the reality is that the Supreme Court is very conservative, and is going to be that way for a long time to come. This conservatism means that it's very pro-law enforcement and quite unlikely to put limits on policing. But I'm hopeful that the limits on policing can come from elsewhere.").

rigorous analysis of over 8,500 Supreme Court cases between 1946 and 2016 shows that justices are particularly ideological, almost doubly so, in narrow cases where their vote is pivotal.[136] Accordingly, if a close case concerning the right to record were to make its way to the Supreme Court, the pro-law enforcement justices on the bench may fall back on their ideological convictions. The Supreme Court's typical deference to law enforcement,[137] combined with an increasingly ideological, right-wing Court could mean "that the outcome of what should be a slam-dunk case is impossible to predict.[138]

2. The Right to Record Is Not Clearly Established in Many Jurisdictions

Even if the Supreme Court eventually recognizes a right to record, the process of clearly establishing the contours of such a right for purposes of qualified immunity will likely be slow and prevent plaintiffs from vindicating the right in the short term.[139] For now, the right to record exists in most federal circuits, but only if you live in the right jurisdiction. Federal circuits interpreting the law in fourteen states and D.C. have yet to analyze and confirm that this right exists.[140]

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136. Jake Smith, *Supreme Court Justices Become Less Impartial and More Ideological When Casting the Swing Vote*, KELLOGG INSIGHT (Sept. 13, 2018), https://insight.kellogg.northwestern.edu/article/supreme-court-justices-become-less-impartial-and-more-ideological-when-casting-the-swing-vote [https://perma.cc/M9UX-CWYA].

137. Historically, the Supreme Court has justified its deference to law enforcement by reasoning that "police cannot effectively do their jobs and keep people safe if they must meticulously respect people's rights." JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE 13 (2023).

138. *See* Adam Serwer, *Deleting the Right to Record the Police*, THE ATLANTIC (Oct. 6, 2022), https://www.theatlantic.com/ideas/archive/2022/10/arizona-restrict-video-recording-police-aclu-lawsuit/671650 (on file with the *Columbia Human Rights Law Review*); *See also* Editorial, *The Supreme Court Isn't Listening, and It's No Secret Why* (Oct. 1, 2022), N.Y. TIMES, https://www.nytimes.com/2022/10/01/opinion/supreme-court-legitimacy.html (on file with the *Columbia Human Rights Law Revie*w) (explaining that the Supreme Court's rulings are "now in line with the views of the average Republican voter").

139. Doori Song, *Qualified Immunity and the Clear, but Unclear First Amendment Right to Film Police*, 33 NOTRE DAME J.L. ETHICS & PUB. POL'Y 337, 350 (2019).

140. *See supra* note 17 and accompanying text (explaining that the Second, Sixth, Eighth, and D.C. Circuits have not found a First Amendment right to record police).

This is problematic because persons suing law enforcement officers for infringing on their right to record need to show not only that a constitutional right exists and has been infringed upon, but also that the right was clearly established at the time of the incident.[141] Plaintiffs seeking to recover for violations of their right to record may face unique difficulty overcoming qualified immunity depending on where the suit is filed and may in the future have to deal with circuits which have different approaches to the issue.[142] For example, the Tenth Circuit found that there is a clearly established First Amendment right to record, not by looking to binding authorities in that circuit, but by reviewing the "consensus of cases of persuasive authority" in other jurisdictions.[143] The consensus of persuasive authority approach represents one path for the four circuits that have not yet recognized a right to record to swiftly join most jurisdictions. While arguably optimal, this approach may not be used in jurisdictions that do not typically consider the opinions of other jurisdictions when determining qualified immunity.[144] In these circuits, the right to record may remain unestablished unless and until the Supreme Court or legislatures act.

Moreover, qualified immunity will make vindicating the right to record challenging even in jurisdictions that already recognize the right since circuit courts have thus far avoided defining the specific contours of the right, instead offering only the most generic statements

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141. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

142. Tyler Finn, *Qualified Immunity Formalism: "Clearly Established Law" and the Right to Record Police Activity*, 119 COLUM. L. REV. 445, 453 (2018).

143. Irizarry v. Yehia, 38 F.4th 1282, 1294 (10th Cir. 2022) (finding that the right to record police performing their duties was clearly established as of May 2019 because of a consensus of cases of persuasive authority, not binding precedent) (citing Ullery v Bradley, 949 F.3d 1282, 1294 (2020).

144. Finn, *supra* note 142 at 454, 476 (arguing that courts should consider the "weight of persuasive authority" when evaluating qualified immunity in right to record cases but acknowledging that certain circuits do not ordinarily consider appellate opinions outside of their jurisdiction in making qualified immunity determinations); *see also* Basinski v. City of New York, 192 F. Supp. 3d 360, 368 (S.D.N.Y. 2016), *aff'd*, 706 F. App'x 693 (2d Cir. 2017) (finding that the right to record is not clearly established and that the "law of our sister circuits and the holdings of district courts cannot act to render that right clearly established within the Second Circuit").

that citizens have the right to record public police activities.[145] This is critical because the Supreme Court has consistently reiterated that, to defeat a qualified immunity defense, the contours of the right in question must be clear enough that a reasonable official could understand that their actions violate that right.[146] Courts will continue to recognize that the First Amendment protects one's right to record police but could dismiss legitimate claims by framing the right at issue more narrowly.[147] After all, "seemingly small and insignificant" differences are often sufficient to ensure that the police avoid liability.[148] Although courts have already recognized or assumed a right to record police generally exists, they have nonetheless held or implied that the right to record one's own arrest,[149] to record police

145. *See* Stephanie Johnson, *Legal Limbo: The Fifth Circuit's Decision in* Turner v. Driver *Fails to Clarify the Contours of the Public's First Amendment Right to Record the Police*, 59 B.C. L. REV. 245, 247 (2018) (arguing that the Fifth Circuit's choice not to clarify the contours of the right to record in *Turner* leaves the right in limbo and that the "Fifth Circuit should have clarified exactly what conduct was clearly established").

146. *See* Finn, *supra* note 142 at 452 (noting that the Supreme Court "has followed a distinct trend toward greater specificity in recent years, reversing several denials of qualified immunity for relying on prior precedent that established constitutional principles at a high level of generality").

147. *See id.* at 483 (stating that "[d]etermining whether the manner of recording is otherwise lawful will likely present the greatest difficulties in future litigation").

148. Howard M. Wasserman, *Police Misconduct, Video Recording, and Procedural Barriers to Rights Enforcement*, 96 N.C. L. REV. 1313, 1346 (2018).

149. Sandberg v. Englewood, Colorado, 727 F. App'x 950, 963 (10th Cir. 2018) (holding that "it was not clearly established that officers violate the First Amendment when they prevent a person who is the subject of the police action from filming the police" because the other cases cited by plaintiff were "factually distinguishable"); Pierner-Lytge v. Hobbs, 601 F.Supp.3d 404, 413 (E.D. Wis. May 5, 2022) (acknowledging that the First Amendment protects the right to record police activity but concluding that an individual's right to film the police *while they are being arrested* was "either absent or not clearly established"); Collins v. Barela, No. 21-CV-00863-STV, 2021 WL 6063592, at *6 (D. Colo. Dec. 21, 2021) (concluding that even if a right to record police activity exists broadly the right of an individual "who is the subject of police activity to tell another individual to record that police activity" was not clearly established); McKenzie v. City of New York, No. 17 CIV. 4899 (PAE), 2019 WL 3288267, at *7–8 (S.D.N.Y. July 22, 2019) (holding that even assuming there is a First Amendment right to record police activity, "it was not clearly established, as a matter of law, that [the plaintiff] had a constitutional right to commence filming while he was in the course of being arrested"). *But see* Gericke v. Begin, 753 F.3d 1, 7 (1st Cir. 2014) (acknowledging that traffic stops may "justify more invasive police action than would be permitted in other settings" but that "First Amendment principles apply equally to the filming of a traffic stop and the filming of an arrest in a public park").

surreptitiously,[150] to livestream the police,[151] and to film during a traffic stop are not clearly established for purposes of qualified immunity.[152]

3. The Limits on the Right to Record Remain Up for Debate

Even if the Supreme Court recognizes a constitutional right to record or all circuit courts establish that such a right exists, that does not ensure the right will be broad and extend to the various scenarios that the right ought to cover. Appellate courts have uniformly been careful to stipulate that the right to record public police activities is not absolute.[153] While courts have held that the right is subject to reasonable time, place, and manner restrictions, they have thus far declined to explain what restrictions are reasonable, instead issuing narrow rulings confined to the facts in front of them.[154] Accordingly, even if the Supreme Court does in fact follow the various circuits and finds that individuals have the right to record the police, the true debate over the right to record in the future is likely to be over its scope.[155]

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150. Palmer v. Allen, No. 14-CV-12247, 2016 WL 3405872, at *7 (E.D. Mich. June 21, 2016) (concluding that "[b]ased on the legal ambiguity that surrounds a right to surreptitiously film police officers at a traffic stop, this Court cannot say that this right was clearly established in this Circuit at the time of the incident"). *But see* Project Veritas Action Fund v. Rollins, 982 F.3d 813, 828–29 (1st Cir. 2020), *cert. denied*, 142 S. Ct. 560 (2021) (finding individuals have a right to secretly record the police).

151. *Supra* note 112 and accompanying text.

152. *See* Wasserman, *supra* note 148, at 1346 (parsing *Fields* and concluding the "Third Circuit suggested that there might be a constitutionally meaningful factual distinction between recording a traffic stop and recording a sidewalk confrontation, rendering the right not clearly established in the different context"); *see also* Kelly v. Borough of Carlisle, 622 F.3d 248, 262–63 (3d Cir. 2010) (citing cases recognizing a right to record in general but concluding those cases were insufficiently analogous and that "the right to videotape police officers during traffic stops was not clearly established").

153. *See* Fields v. City of Philadelphia, 862 F.3d 353, 360 (3d Cir. 2017); *see also* Robbins v. City of Des Moines, 984 F.3d 673, 678 (8th Cir. 2021).

154. *Supra* notes 18 and 19 and accompanying text.

155. Finn, *supra* note 142; Simonson, *supra* note 124; Daniel Denvir, *The Legal Right to Videotape Police Isn't Actually All That Clear*, BLOOMBERG (Apr. 10, 2015), https://www.bloomberg.com/news/articles/2015-04-10/in-many-states-including-south-carolina-the-legal-right-to-videotape-police-isn-t-all-that-clear (on file with the *Columbia Human Rights Law Review*).

For example, at least one district court judge in the Southern District of New York has posited that restrictions on filming may be reasonable "in particularly dangerous situations, if the recording interferes with the police activity, if it is surreptitious, if it is done by the subject of the police activity, or if the police activity is part of an undercover investigation."[156] Additionally, while civil liberties advocates have persuasively argued the right to record encompasses protections for livestreaming the police, others disagree.[157] As the Fourth Circuit's recent decision in *Sharpe* highlights, it remains unclear to what extent, if any, livestreaming may be analyzed differently by courts than in the more common recording cases we have seen to date.[158]

B. Legislating in the Shadow of the Law: State Attempts to Undermine the Right to Record

Notwithstanding the judicial trend towards recognizing a national First Amendment right to record police, progress has been rolled back by reactionary state legislatures eager to "back the blue"[159] and seize on judicial ambiguity regarding the scope of the right to record.[160] Republican-majority legislatures nationwide have taken action both to inhibit recording the police ("recording restrictions") and to prevent the publishing of police recordings by criminalizing the posting of personally identifiable information of public officials with the intent to harass ("publishing restrictions").[161] In the face of

156. Higginbotham v. City of New York, 105 F. Supp. 3d 369, 381 (S.D.N.Y. 2015).

157. Shreya Tewari, *Livestreaming Police is a Critical First Amendment Right*, ACLU (Nov. 22, 2021), https://www.aclu.org/news/free-speech/livestreaming-police-is-a-critical-first-amendment-right [https://perma.cc/BTJ9-SY6Z].

158. *See supra* notes 110–113 and accompanying text.

159. *See infra* notes 167, 180, and accompanying text (explaining how bills proposed in Arizona and Texas to restrict recording the police were initially introduced at the insistence of cops).

160. *See* John Kavanagh, *I'm Not Saying You Can't Video Police. Just Stay Back a Few Feet in Some Situations*, AZCENTRAL (Mar. 24, 2022), https://www.azcentral.com/story/opinion/op-ed/2022/03/24/hb-2319-videotape-police-8-feet-during-violent-encounters/7130071001 [https://perma.cc/W7RS-PS7H]. The author, Rep. John Kavanagh, who sponsored Arizona's recording restriction, stated that he believed in a right to record police subject to reasonable time, place, and manner limitations but thought that his bill was a reasonable restriction.

161. Trone Dowd, *Your Right to Film the Police Is Under Attack*, VICE NEWS (Mar. 25, 2022), https://www.vice.com/en/article/g5qn57/filming-police-legality [https://perma.cc/YQ8E-DA2F].

potential constitutional concerns, legislators have been undeterred and proposed bills that criminalize and chill protected speech.[162] Even where these laws have been ruled unconstitutional, legislators remain committed to passing pro-law enforcement statutes that threaten the First Amendment right that the various circuit courts have embraced.[163] Proposed recording restrictions in Texas, Arizona, Mississippi, Indiana, Louisiana, and Florida and publishing restrictions in Oklahoma and Florida illustrate this national attack on the right to record and serve as cautionary tales for how the right to record may be challenged in the future.[164]

1. Texas

In 2015, Republican Texas Representative Jason Villalba introduced HB 2918, which criminalized "filming, recording, photographing, or documenting [an] officer within 25 feet"; if the recorder carried a handgun, the bill prohibited them from filming within one hundred feet.[165] Villalba, who has close personal connections to law enforcement,[166] said the bill was initially proposed

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162. Editorial, *Police Don't Need Extra Protection Against Citizens Videotaping Their Actions*, AZCENTRAL (Apr. 13, 2022), https://www.azcentral.com/story/opinion/editorial/2022/04/13/arizona-bill-silence-unwanted-speech-wont-help-police/7284163001 [https://perma.cc/2B39-NFUK]; *see also ACLU Of Arizona and ACLU Challenge Arizona's Ban on Recording Police*, ACLU (Aug. 23, 2022), https://www.aclu.org/press-releases/aclu-arizona-and-aclu-challenge-arizonas-ban-recording-police [https://perma.cc/C2QW-6JXF] (quoting the deputy director of the ACLU Speech, Privacy, and Technology Project as saying "Arizona's law will prevent people from engaging in recording that doesn't interfere with police activity, and it will suppress the reporting and advocacy that results from video evidence of police misconduct").

163. *Infra* note 196, 200, 201, 203 and accompanying text.

164. This Article focuses on recording restrictions, not publishing restrictions. For a discussion of the threat posed to the right to record by publishing restrictions *see* Dowd, *supra* note 161. The right to record has also been subject to other restrictions that defy neat classification. *See* Katherine Timpf, *New York County Passes Bill That Could Jail People if They 'Annoy' a Cop*, NATIONAL REVIEW (Nov. 14, 2019), https://www.nationalreview.com/2019/11/new-york-county-passes-bill-that-could-jail-people-if-they-annoy-a-cop [https://perma.cc/8M4F-PQUX] (describing a bill passed by a New York county legislature making it a crime to "annoy" police).

165. H.R. 2918, 84th Leg., Reg. Sess. (Tx. 2015); Daniel Perez, *Bill Restricting Rights of Citizens to Videotape Police Introduced in Texas House*, CHRON (Mar. 12, 2015), https://www.chron.com/politics/texas/article/Bill-restricting-rights-of-citizens-to-videotape-6130903.php [https://perma.cc/2MGV-SK5E].

166. Eric Nicholson, *Dallas State Rep. Jason Villalba Wants to Restrict Where Citizens Can Photograph Cops*, DALLAS OBSERVER (Mar. 13, 2015),

by the Dallas Police Association and the Texas Municipal Police Association.[167] He introduced the bill to back his "brothers/sisters in blue" who had asked for it.[168] Kevin Lawrence, executive director of the Texas Municipal Police Association, claimed that he supports the right to record officers but takes issue with interfering with officers performing their duties.[169] Villalba echoed these concerns, arguing that, to keep police "comfortable," copwatchers should not be too close to law enforcement.[170] But Villalba went even further, falsely maintaining that his bill did not restrict filming police[171] and presented no constitutional concerns.[172]

Mere days after Villalba introduced HB 2918, a bystander recording taken in South Carolina revealed a police officer lied about the circumstances under which he murdered a Black man, triggering widespread criticism of the bill.[173] Shortly after, Villalba dropped the legislation.[174] Villalba maintains he dropped the bill not in response to

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https://www.dallasobserver.com/news/dallas-state-rep-jason-villalba-wants-to-restrict-where-citizens-can-photograph-cops-7143627 [https://perma.cc/FV2F-6J3P].

167. David Lee, *Lawmaker Pulls 'Don't Photograph Cops' Law,* COURTHOUSE NEWS SERVICE (Apr. 13, 2015), https://www.courthousenews.com/lawmaker-pulls-dont-photograph-cops-law [https://perma.cc/YA97-DY3C].

168. *Id.*

169. *Id.*

170. Nicholson, *supra* note 166.

171. Jason Villalba (@JasonVillalba), TWITTER (Mar. 13, 2015, 4:29 AM), https://twitter.com/jasonvillalba/status/576298921388986368 [https://perma.cc/P5MS-ZE2C] (arguing that "I have not restricted filming police. Merely asking folks to stand back a little to let the cops do their job"). *But see supra* note 165 (highlighting the text of Villalba's proposed bill, which plainly restricts recording the police); *see also* Alysia Santo, *Why Cops Aren't Ready for Their Close-Up*, MARSHALL PROJECT (Apr. 24, 2015), https://www.themarshallproject.org/2015/04/24/why-cops-aren-t-ready-for-their-close-up [https://perma.cc/4Z5Q-HAN5] (quoting the President of the Dallas Police Association and supporter of Villalba's bill as acknowledging that the bill would prevent civilians from recording their own interactions with the police when pulled over, calling this issue an "oversight").

172. Editorial, *Don't Gouge the Public Eye*, AUGUSTA CHRON. (Mar. 24, 2015), https://www.augustachronicle.com/story/opinion/editorials/2015/03/25/dont-gouge-public-eye/14374185007 [https://perma.cc/MJ2H-3F7U]. *But see infra* note 190 (finding Arizona's HB 2319, a law like Villalba's proposed bill but less restrictive, to be unconstitutional).

173. Lee, *supra* note 167.

174. Hassan Kanu, *Laws Restricting Right to Film Police Prove to Be a Waste of Time*, REUTERS (Sept. 19, 2022), https://www.reuters.com/legal/government/laws-restricting-right-film-police-prove-be-waste-time-2022-09-19 [https://perma.cc/AV5N-WS2M].

public outcry but because police organizations, including Texas's largest police union, came out against the legislation.[175] While Villalba's attempt to pass HB 2918 failed, other state and local officials share his motivation and may attempt similar, more competently drafted laws that could fare better in the courts.[176]

2. Arizona

In 2022, the Arizona state legislature was home to the most direct and brazen restriction on the right to record in recent years: HB 2319. In effect, Arizona's response to ongoing calls for police accountability was to make it easier for police to arrest the very people trying to hold law enforcement accountable.[177] Similar to Villalba's bill, HB 2319 made it "unlawful for a person to knowingly make a video recording of law enforcement activity if the person making the video recording is within eight feet" of the activity and has been ordered by law enforcement to stop recording.[178] The bill defined protected law enforcement activity as (1) questioning a suspicious person, (2) conducting an arrest, issuing a summons, or enforcing the law, and (3) handling an emotionally disturbed or disorderly person who is exhibiting abnormal behavior.[179] Under the Arizona law, the people who filmed the police killings of George Floyd and Eric Garner would have faced criminal charges because they recorded from a close distance.[180]

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175. *Texas Bill to Make It Illegal to Film Near Police Dropped*, NBC DFW (Apr. 11, 2015) https://www.nbcdfw.com/news/local/texas-police-filming-bill-dropped-amid-renewed-opposition/167330 [https://perma.cc/4U7J-2KLC]; *see also* John Austin, *Lawmaker Drops Attempt to Restrict Films of Police*, JACKSONVILLE PROGRESS (April 18, 2015), https://www.jacksonvilleprogress.com/news/lawmaker-drops-attempt-to-restrict-films-of-police/article_37d43dde-e552-11e4-8660-0782659f9c2b.html [https://perma.cc/F7H6-PWX4] (quoting Villalba's communication director lamenting how the Combined Law Enforcement Associations of Texas came out against the bill).

176. Wasserman, *supra* note 148, at 1349.

177. Adam Serwer (@AdamSerwer), Twitter (Oct. 6, 2022, 9:57 AM), https://twitter.com/adamserwer/status/1578021562393202688 [https://perma.cc/2N2F-5CU9] (tweeting that "Arizona has tried a novel solution to police misconduct: Making it easier for police to arrest you for recording them").

178. H.R. 2139, 55th Leg., 2d Reg. Sess. (Az. 2022).

179. *Id.*

180. *See* Jerod MacDonald-Evoy, *House Republicans Approve Bill to Restrict Who Can Film Cops and When*, ARIZ. MIRROR (Feb. 23, 2022), https://www.azmirror.com/2022/02/23/house-republicans-approve-bill-to-restrict-who-can-film-cops-and-when [https://perma.cc/M6HM-M8MJ]; *see also* NowThisNews, Woman Who Captured George Floyd Killing Returns To Scene |

The law was the result of a virtual one-man effort by then-Arizona State Representative John Kavanagh, a conservative House member and former police officer who introduced the bill in response to a complaint he received from a Tucson police officer about a local copwatching group.[181] Once introduced, HB 2319 and Kavanagh came under swift, vocal public criticism.[182] In an op-ed defending HB 2319, Kavanagh recognized the First Amendment right to videotape police but argued that the right is subject to reasonable restrictions and that individuals filming too closely is a dangerous practice that threatens to distract law enforcement officers.[183] He claimed that he had "listened to critics" by amending the bill and decreasing the buffer zone where people may not film from fifteen to eight feet and adding language allowing individuals to film their own police encounters so long as they are not being searched or handcuffed.[184] To support his claim that HB 2319 conforms with the Constitution, Kavanagh cited *Hill v. Colorado*: a 2000 Supreme Court decision upholding a Colorado law that created a buffer zone around health care facilities.[185] The law in *Hill* made it unlawful for any person to knowingly approach another person within eight feet, without that person's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person" within one hundred feet of a health care facility's entrance.[186] Despite constitutional concerns and opposition from Arizona Democrats, the statute passed the Arizona legislature due to overwhelming Republican support[187] and was subsequently signed into law by Arizona Governor Doug Ducey on July 6, 2022.[188] HB 2319 was set to go into effect on

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NowThis, YOUTUBE, (May 27, 2020), https://www.youtube.com/watch?v=GXKMih20Ur0 [https://perma.cc/C7H9-JPJA] (showing Darnella Frazier saying "[t]hey killed [George Floyd]. And I was right there! I was like five feet away!"). *But see* Kavanagh, *supra* note 160 (arguing "[o]pponents of the bill also claim that the videotaping of some recent high-profile police use of force incidents would not be possible under my bill. They are incorrect").

181. Kanu, *supra* note 174 and accompanying text.

182. Gantz, *infra* note 201 and accompanying text (describing opponents of HB 2319, including civil rights groups and 10 media organizations, who called the bill "deeply problematic and unconstitutional").

183. Kavanagh, *supra* note 160.

184. *Id.*

185. *Id.*

186. Hill v. Colorado, 530 U.S. 703, 707 (2000).

187. MacDonald-Evoy, *supra* note 179.

188. Sally Stapleton, *Next Up: Lawsuit Imminent to Challenge New Arizona Law Restricting the Recording of Police*, FIRST AMEND. WATCH (July 25, 2022),

September 24[189] until the judiciary blocked its implementation on September 9.[190]

In a short, six page ruling, Judge Tuchi of the U.S. District Court for Arizona granted a request for a preliminary injunction and ruled that HB 2319 unconstitutionally infringed on the First Amendment right to record law enforcement officers in the exercise of their official duties.[191] The court applied strict scrutiny in reading the statute, having found that the statute was a content-based speech restriction because it specifically targeted the recording of law enforcement activity.[192] The court concluded that HB 2319 did not serve a compelling government interest and could not withstand strict scrutiny, reasoning the bill was both over- and under-inclusive.[193]

However, one need not have the hindsight of Judge Tuchi's opinion to know that HB 2319 was unconstitutional from its inception. Kavanagh, specifically, should have known better as he had already introduced and withdrawn a similar law in 2016 when it was met with controversy and widespread denunciation.[194] Kavanagh's reliance on *Hill* as judicial support for HB 2319 was also misplaced; there are notable distinctions between HB 2319 and the law in *Hill* that strain Kavanagh's comparison.[195] Moreover, *Hill* has been effectively overturned or at the very least undercut by recent decisions; in any event, buffer zones around abortion clinics exist on constitutionally

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https://firstamendmentwatch.org/next-up-lawsuit-imminent-to-challenge-new-arizona-law-restricting-the-recording-of-police [https://perma.cc/9EJ3-KZ39].

189. *Id.*

190. Kanu, *supra* note 174.

191. Arizona Broadcasters Association v. Brnovich, 626 F. Supp. 3d 1102, 1104 (D. Ariz. Sept. 9, 2022).

192. *Id.* at 1106.

193. *Id.*

194. *See* Alia Beard Rau, *Arizona Lawmaker Kills Bill to Limit Recording of Police*, ARIZ. REPUBLIC (Jan. 27, 2016), https://www.azcentral.com/story/news/arizona/politics/2016/01/27/arizona-lawmaker-kavanagh-kills-bill-limit-recording-police/79424852 [https://perma.cc/A5VA-V5VP] (quoting Kavanagh, in reference to a 2016 proposal to prohibit recording police within twenty feet, as acknowledging the bill "generated very emotional opposition on both sides" and saying "it's time to move on").

195. K.M. Bell, *A New Bill Restricts How and When You Can Film Cops in Arizona,* ARIZ. PBS (Mar. 3, 2022), https://azpbs.org/horizon/2022/03/a-new-bill-restricts-how-and-when-you-can-film-cops-in-arizona (on file with the *Columbia Human Rights Law Review*).

shaky ground.[196] Regardless, Arizona lawmakers were explicitly warned by the House and Senate Rules attorneys that the bill was constitutionally problematic but passed the bill anyway.[197] Legislators were inclined to let any challenge to HB 2319 escalate to the Supreme Court "because they [could],"[198] with Arizona House Speaker Rusty Bowers summarizing the strategy as "let's just try and see what happens."[199]

The Arizona Attorney General and legislature declined to appeal the decision, which Kavanagh attributed to the financial cost of litigation.[200] Kavanagh declared that he would rework HB 2319 "from now until doomsday until I get it right"[201] and that he would "be back in January [2023] to draft a new bill."[202] In July 2023, the Attorney

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196. *See* McCullen v. Coakley, 573 U.S. 464, 470 (2014) (striking down a statute "modeled on a similar Colorado law that this Court had upheld in *Hill v. Colorado*"); *see also* Kevin Russell, *What Is Left of* Hill v. Colorado*?*, SCOTUSBLOG (June 26, 2014), https://www.scotusblog.com/2014/06/what-is-left-of-hill-v-colorado [https://perma.cc/N3M3-J5TC] (explaining that it is "unclear" whether Hill has been overturned and that there is a "good argument" that *McCullen* effectively renders buffer zones like Colorado's unconstitutional, despite the result in *Hill*).

197. Elias Weiss, *Arizona Legislature Was Warned Ban on Filming Cops Was 'Unconstitutional' Before Passing Law*, PHOENIX NEWS TIMES (July 13, 2022), https://www.phoenixnewtimes.com/news/az-legislature-was-warned-that-ban-on-filming-cops-within-8-feet-was-unconstitutional-14013505 [https://perma.cc/Q7DN-HAB7].

198. *Id.*

199. Bob Christie, *Arizona Legislature Won't Defend Law Limiting Police Filming After Federal Judge Block*, PBS (Sep. 16, 2022), https://www.pbs.org/newshour/politics/arizona-legislature-wont-defend-law-limiting-police-filming-after-federal-judge-block (on file with the *Columbia Human Rights Law Review*).

200. Kanu, *supra* note 174.

201. Kirsten Dorman, *New Arizona Law Restricting Video Recording Police Sparks Legal Battle*, FRONTERAS (Sep. 27, 2022), https://fronterasdesk.org/content/1812744/new-arizona-law-restricting-video-recording-police-sparks-legal-battle [https://perma.cc/5Q3B-EVEL].

202. Kanu, *supra* note 174 ; s*ee also* Tori Gantz, *Police-Recording Ban Likely Blocked, As Kavanagh Fails to Mount Defense*, ARIZ. MIRROR (Sep. 19, 2022), https://www.azmirror.com/2022/09/19/police-recording-ban-likely-blocked-as-kavanagh-fails-to-mount-defense [https://perma.cc/WY2X-Z82S] (quoting Kavanagh as saying that he would "be looking at the criticisms and the briefs and other sources of criticism" and that "in January, I will amend the law to deal with those issues"); *see also* KTAR NEWS, *Arizona Legislator Plans to Keep Pushing for Law Limiting Filming of Police* (Sep. 20, 2022), https://ktar.com/story/5254826/arizona-legislator-plans-to-keep-pushing-for-law-limiting-filming-of-police [https://perma.cc/Y8SK-U9SL] (quoting Kavanagh as

General reached a settlement agreement that stipulated that "there is a clearly established right to record law enforcement officers engaged in the exercise of their official duties" and that HB 2319 "cannot withstand intermediate scrutiny because the law prohibits or chills a substantial amount of First Amendment protected activity and is unnecessary to prevent interference."[203] Nonetheless, Kavanagh still remains committed to passing restrictions on the right to record.[204]

3. Mississippi

In January 2023, Mississippi Representative Jill Ford introduced legislation criminalizing filming law enforcement within fifteen feet of an officer after being told to desist.[205] Like Villalba and Kavanagh, Ford argued that her proposal was necessary to ensure public safety and that police should be able to establish a clear perimeter around themselves.[206] Nevertheless, HB 448 ultimately died in Division B of the House Judiciary Committee shortly after being proposed.[207]

4. Indiana

In January 2023, Indiana Representative Wendy McNamara introduced legislation criminalizing knowingly getting within twenty-five feet of law enforcement officers performing their jobs after an

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saying that he is "committed to reintroducing this bill with changes that will align with whatever the judge said was problematic constitutionally").

203. Document 66-1 at 1–2, Arizona Broadcasters Association v. Brnovich, 626 F. Supp. 3d 1102 (D. Ariz. 2022) (No. CV-22-01431-PHX-JJT).

204. Ashley Sinclair, *State Bill Regarding Recording Police Coming Back*, DAILY INDEP. (Dec 1, 2023), https://www.yourvalley.net/stories/state-bill-regarding-recording-police-coming-back,464435 (on file with the *Columbia Human Rights Law Review*).

205. H.B. 488, 2023 Legislature, Reg. Sess. (Ms. 2023); Mina Corpuz, *Bill seeks to keep public at a distance in videoing law enforcement actions*, MISS. TODAY (Jan. 30, 2023), https://www.sunherald.com/news/politics-government/article272030777.html [https://perma.cc/E5BA-H4YD].

206. Christopher Fields, *New Bill Proposed to Prohibit Recording Police at a Certain Distance*, WBLT (Jan. 18, 2023), https://www.wlbt.com/2023/01/19/new-bill-proposed-prohibit-recording-police-certain-distance/ [https://perma.cc/R8HH-B9B7]; *supra* notes 170, 183, and accompanying text.

207. MISS. LEGISLATIVE BILL STATUS SYSTEM, *Miss. Legislature 2023 Regular Session House Bill 448*, http://billstatus.ls.state.ms.us/2023/pdf/history/HB/HB0448.xml [https://perma.cc/W3H9-DMVS].

officer orders the person to stop approaching.[208] Notably, Indiana HB 1186 is even broader than Texas HB 2918, Arizona HB 2319, and Mississippi HB 448, as it restricts being close to law enforcement even if one is not filming. Nonetheless, HB 1186 soared under the radar and was subject to functionally no mainstream media scrutiny. McNamara justified the bill by arguing that police work involves unpredictable situations, and officers should be able to minimize unnecessary distractions that endanger public safety.[209] With strong support from local and state police groups, HB 1186 passed through the Indiana state legislature and was signed into law by the governor in April 2023.[210]

HB 1186 went into effect on July 1, 2023.[211] On January 12, 2024, Judge Damon Leichty of the Northern District of Indiana, South Bend Division denied a motion to permanently enjoin enforcement of HB 1186, concluding the bill "is not unconstitutional by virtue of being facially overbroad."[212] The court reasoned that HB 1186 "isn't directed toward speech, but encroachment" and "at most" poses an "incidental" burden on the First Amendment.[213] Judge Leichty differentiated HB 1186 from Arizona HB 2319 by noting that Arizona's bill was "directed toward speech," unlike Indiana's bill which is "directed at conduct with incidental effect on speech."[214] On January 23, 2024, the plaintiff appealed, and the case remains pending in the Seventh Circuit.[215]

A second challenge to HB 1186 brought by news reporting and production organizations has been more successful. On September 27, 2024, Judge James R. Sweeney II of the Southern District of Indiana, South Bend Division granted a motion to preliminarily enjoin the

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208. H.B. 1186, 2023 Legislature, Reg. Sess. (In. 2023).

209. Braden Dunlap, *McNamara's bill supporting first responders, public safety head*, INDIANA HOUSE OF REPRESENTATIVES REPUBLICAN CAUCUS (Feb. 16, 2023), https://www.indianahouserepublicans.com/news/press-releases/rep.-mcnamara-s-bill-supporting-first-responders-public-safety-heads-to-senate/ [https://perma.cc/BG3A-AU44] (explaining that the Indiana House just voted to approve a bill that requires bystanders of police activity to stand twenty-five feet back if an officer asks them to).

210. *Id.*; IND. GENERAL ASSEMBLY 2023 SESSION, *Actions for House Bill 1186*, https://iga.in.gov/legislative/2023/bills/house/1186.

211. Nicodemus v. City of S. Bend, Indiana, No. 3:23CV744 DRL, 2024 WL 139248, at *1 (N.D. Ind. Jan. 12, 2024).

212. *Id.* at 2.

213. *Id.* at 12, 16.

214. *Id.* at 18.

215. Notice of Appeal at 1, Nicodemus v. City of S. Bend, Indiana, No. 24-1099 (7th Cir. Jan. 23, 2024), ECF No. 1.

enforcement of HB 1186, concluding the bill is void for vagueness.[216] First, Judge Sweeney explained that HB 1186 does not provide "specific enough [limitations] to allow the general public or reporters to know how to conduct themselves to avoid receiving an order to move."[217] Second, Judge Sweeney concluded that HB 1186 is prone to arbitrary and discriminatory enforcement, reasoning the law "lacks standards for officers to guide them in deciding who should be ordered to move and under what circumstances."[218] On October 25, 2024, the state appealed, and the case remains pending in the Seventh Circuit.[219]

5. Florida

In October 2023, Senator Bryan Avila introduced SB 184, a bill criminalizing approaching or remaining within fourteen feet of first responders performing their duties, after receiving a warning to back away.[220] Avila argued SB 184 was necessary to protect police from harassment in Miami-Dade county, where large events often result in disorder.[221] SB 184 also received strong support from Governor Ron DeSantis, who portrayed the bill as part of a broader pro-law enforcement stance.[222] With support from police unions,[223] who argued that officers need a safe buffer zone to perform their jobs without

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216. Reps. Comm. For Freedom of the Press et al. v. Rokita et al., 751 F. Supp. 3d 931, 948 (S.D. Ind. 2024).

217. *Id*. at 945 (citation modified).

218. *Id.*

219. Notice of Appeal at 1, Reps. Comm. For Freedom of the Press et al. v. Rokita et al., No. 24-2927 (7th Cir. Oct. 25, 2024), ECF No. 1.

220. S.B. 184, 2024 S., (Fl. 2023).

221. Jesse Scheckner, *Bills Creating Harassment-Free Zone Around First Responders Head to Senate, House Floors*, FLORIDA POLITICS (January 24, 2024), https://floridapolitics.com/archives/654947-bills-creating-harassment-free-zone-around-first-responders-head-to-senate-house-floors/ [https://perma.cc/K7BX-ZB9T].

222. C.A. Bridges, *DeSantis Signs Bills Protecting Police, Limiting Review Boards. What Do SB 184 and HB 601 Do?*, TALLAHASSEE DEMOCRAT (April 12, 2024), https://www.tallahassee.com/story/news/politics/2024/04/12/new-florida-law-creates-25-buffer-zone-around-1st-responders-police-limit-citizen-review-boards/73302496007/ [https://perma.cc/L56X-JVWH].

223. C.J. Ciaramella, *Ron DeSantis Signs Florida Bill Limiting How Close Bystanders Can Get to Police*, Reason (April 12, 2024), https://reason.com/2024/04/12/ron-desantis-signs-florida-bill-limiting-how-close-bystanders-can-get-to-police/ [https://perma.cc/HE6C-F2FF].

interference or intimidation, SB 184 passed the Senate with a vote of 39-1.[224]

Although Representative Alex Rizo, the House sponsor of SB 184, promised to get the bill into "a much better place," the bill became even more restrictive in the House.[225] SB 184 originally proposed a fourteen-foot buffer zone, but Rizo amended the bill to establish a buffer zone of twenty-five feet.[226] Furthermore, the House rejected an amendment from Democratic Representative LaVon Bracy Davis that would have protected the act of peacefully recording, photographing, or observing a first responder.[227] Nonetheless, the Senate concurred with the House version and sent the bill to the governor's desk.[228] On April 12, 2024, Governor DeSantis signed SB 184 into law, and the bill went into effect on January 1, 2025.[229]

6. Louisiana HB 173

Following the lead of the Indiana legislature, in March 2023, the Louisiana House began considering HB 85 to prohibit individuals from approaching within twenty-five feet of police officers.[230] Republican Representative Mike Johnson, author of HB 85, carried the bill forward on behalf of the Louisiana Fraternal Order of Police, arguing the legislation was necessary for public safety.[231] HB 85 passed the Louisiana legislature but was vetoed by then-Governor John Bel

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224. Jesse Scheckner, *Legislature Approves Bill Creating Harassment-Free Zone Around First Responders*, FLORIDA POLITICS (March 7, 2024), https://floridapolitics.com/archives/663980-legislature-approves-bill-creating-harassment-free-zone-around-first-responders/ [https://perma.cc/FZ9U-R6GE].

225. Douglas Soule, *Florida Legislature Passes 'No-Go' Zone Around First Responders Despite Transparency Concerns*, TALLAHASSEE DEMOCRAT (March 7, 2024), https://www.tallahassee.com/story/news/politics/2024/03/07/florida-legislature-passes-no-go-zone-around-first-responders/72881182007/ [https://perma.cc/M7HB-9H6J].

226. Scheckner, *supra* note 224.

227. *Id.*

228. Soule, *supra* note 225.

229. Dave Elias, *Concerns Surround New Florida Law Criminalizing Harassment of Police, First Responders on Duty*, GULF COAST ABC (April 15, 2024), https://www.gulfcoastnewsnow.com/article/florida-law-criminalizing-harassment-police-first-responders-duty/60502829 [https://perma.cc/D677-KYDE].

230. H.B. 85, 2023 Legislature, Reg. Sess. (La. 2023).

231. Alena Noakes, *Proposed 'Safety' Law to Create Buffer Between Police, Bystanders*, KALB (Apr. 6, 2023), https://www.kalb.com/2023/04/06/proposed-safety-law-create-buffer-between-police-bystanders/ [https://perma.cc/7FKM-XLRV].

Edwards, a Democrat, because it was "unnecessary" and "would chill exercise of First Amendment rights."[232]

In February 2024, after Governor Edwards was replaced by a Jeff Landry, a Republican and former police officer,[233] the Louisiana House began to consider a nearly identical bill: HB 173.[234] The bill was introduced by Representatives Mike Johnson and Bryan Fontenot, who argued it would provide officers "peace of mind and safe distance to do their job."[235] Fontenot, a former police officer,[236] contended that a twenty-five-foot buffer zone was necessary to protect law enforcement from various threats, including being spat on or attacked with bottles.[237] Despite opposition from civil rights groups and black Democratic lawmakers who argued that the bill was unconstitutional and unnecessary, the bill passed the legislature with overwhelming Republican support.[238] On May 28, 2024, Governor Landry signed HB 173 into effect, arguing that the bill was "part of a continued pledge to address public safety."[239]

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232. KALB Digital Team, *Gov. Edwards Vetoes State Rep. Mike Johnson's House Bill 85*, KALB (June 28, 2023), https://www.kalb.com/2023/06/28/gov-edwards-vetoes-state-rep-mike-johnsons-house-bill-85/ [https://perma.cc/2FRA-7DFF].

233. Sara Cline, *Republican Jeff Landry Elected Governor of Louisiana,* PBS (October 15, 2023), https://www.pbs.org/newshour/politics/republican-jeff-landry-elected-governor-of-louisiana [https://perma.cc/TXBY-FXKK].

234. Press Release, National Police Association, The National Police Association Supports Louisiana House Bill 173 to Create the Crime of Approaching a Law Enforcement Officer Lawfully Engaged in Law Enforcement Duties (April 8, 2024), https://nationalpolice.org/main/the-national-police-association-supports-louisiana-house-bill-173-to-create-the-crime-of-approaching-a-law-enforcement-officer-lawfully-engaged-in-law-enforcement-duties/ [https://perma.cc/7KTX-998B]; *Louisiana Law Makes It Crime to Stand Too Near Police*, YAHOO: ASSOC. PRESS (May 29, 2024), https://www.yahoo.com/news/louisiana-law-makes-crime-stand-212339468.html [https://perma.cc/VH2P-L6YP].

235. Sudhin Thanawala, *Louisiana Law That Could Limit Filming of Police Hampers Key Tool for Racial Justice, Attorneys Say*, ASSOC. PRESS (June 1, 2024), https://apnews.com/article/louisiana-police-distance-filming-civil-rights-713aa455c39d9204f7843c169f315a01#.

236. David Jones, *Louisiana Law Creates 25-foot Buffer Zone Around Working Law Enforcement Officers*, FOX 8 (May 28, 2024), https://www.fox8live.com/2024/05/29/louisiana-law-creates-25-foot-buffer-zone-around-working-law-enforcement-officers/ [https://perma.cc/PB47-2Q88].

237. Thanawala, *supra* note 235.

238. *Louisiana Law Makes It Crime to Stand Too Near Police*, *supra* note 234.

239. Nigell Moses, *Gov. Landry Signs Bill that requires Public To Stay 25 Feet from Police at a Crime Scene*, WWL-TV (May 28, 2024), https://www.wwltv.com/article/news/politics/baton-rouge-governor-landry-house-

However, news organizations quickly challenged HB 173, arguing the bill is unconstitutionally vague and runs afoul the First Amendment.[240] On January 31, 2025, Judge John deGravelles of the Middle District of Louisiana granted plaintiffs' motion for a preliminary injunction, finding plaintiffs were likely to succeed on their vagueness claim.[241] Judge deGravelles concluded that HB 173 fails to provide sufficient "notice of what behavior to avoid" or "standards by which officers are to determine whether to issue an order to retreat," and thus did not reach the issue of whether HB 174 infringes upon the First Amendment.[242] On March 3, 2025, the defendants appealed the decision to the Fifth Circuit, where the case is still pending.[243]

III. THE NEED FOR A LEGISLATIVE RESPONSE

While we may be trending towards a national right to film police, the ensuing debate is likely to be over the scope of such a right, and courts are only scratching the surface of this controversy. Given this uncertainty, citizens seeking to hold law enforcement accountable by recording their conduct will face the growing specter of being arrested in Republican-led states and may struggle to vindicate their claims in civil courts, especially in cases that push the boundaries of the right to record.[244] Further, ambiguity over the contours of the right has opened the door for fanatical lawmakers to restrict the right based on their own interpretation of what constitutes a reasonable restriction.[245] As a result of legislative attacks on the right to record

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bill-173-public-stand-away-25-feet-police-crime-scene/289-d3907d98-168e-49fa-888b-b121726d9405 [https://perma.cc/WSV3-535Z].

240. Ruling and Order at 2, Deep South Today et al. v. Murill et al., No. 25-30128 (M.D. La. Jan. 31, 2025).

241. *Id.* at 56.

242. *Id.* at 57.

243. Notice of Appeal at 1, Deep South Today et al. v. Murill et al., No. 25-30128 (5th Cir. March 3, 2025).

244. Section II.A discusses some but not all of the barriers that plaintiffs face vindicating the right to record in the courts in the absence of a statutorily defined right. See Wasserman, *supra* note 148 at 1357 for an exploration of the other procedural barriers plaintiffs face enforcing their right to record, including standing issues and the unavailability of substantial damages.

245. *See supra* note 183, 184 and accompanying text (describing how Arizona legislatures restricted the right to record based on their own idea of what constitutes a reasonable restriction); *see also supra* notes 198, 199, and accompanying text (explaining how Arizona Republicans restricted the right to

and the judiciary's reticence to fully safeguard the right on its own, this constitutional guarantee exists in a precarious position, and socially valuable speech is chilled.[246]

This Part argues that federal lawmakers should address this problem not just by rebutting attempts to restrict the right to record, but by affirmatively enshrining the right into law. Section A outlines the general principles derived from the collective wisdom of academia, the federal judiciary, and legislatures nationwide that should guide lawmakers in codifying the right to record; Section B synthesizes these guidelines in the form of model legislation; and Section C explains the imperative for federal action despite the barriers such legislation is likely to face in Congress.

A. Guiding Principles

The particularities of any right to record bill passed through a given legislature will depend on the political dynamics of the legislature. Governing bodies in Democratic states will likely have greater success in securing a capacious right to record, while legislatures in Republican states are more likely to enact bills like HB 2319 and HB 2918. California,[247] Colorado,[248] New York,[249] and New York City[250] have all successfully codified the right to record in some capacity, while Texas,[251] Arizona,[252] Mississippi,[253] Indiana,[254]

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record in the face of constitutional concerns, figuring that there was some hope the HB 2319 would be upheld and that they would "see what happens").

246. Finn, *supra* note 142 at 477.

247. S.B. 411, 2015–2016 Legislature, Reg. Sess. (Ca. 2015) (criminalizing attempts to deter or prevent an executive officer from performing their duties but providing that recording executive officers in public places "does not constitute, in and of itself" a violation of the law).

248. H.R. 15-1290, Seventieth Gen. Assembly, First Reg. Sess. (Co. 2015) (providing those who lawfully record an incident involving police and are retaliated against, have their recording destroyed, or their recording interfered with a private cause of action).

249. S.B. 3253A, 2019-2020 Legislative Session (Ny. 2015) ("A person not under arrest or in the custody of a law enforcement official has the right to record law enforcement activity and to maintain custody and control of that recording and of any property or instruments used.").

250. N.Y.C. Admin. Code §§ 14-189 ("A person may record police activities and maintain custody and control of any such recording and of any property or instruments used in such recording").

251. *Supra* Section II.B.1.

252. *Supra* Section II.B.2.

253. *Supra* Section II.B.3.

254. *Supra* Section II.B.4.

Florida,[255] and Louisiana[256] and have attempted to restrict it or chill its exercise.[257] Nonetheless, the following guiding principles provide lawmakers with an effective roadmap for protecting the right to record while recognizing that politicians often need to compromise on a bill's language to ensure its passage.

1. Individuals Possess an Unqualified Right to Record Police That Can Only Be Limited by an Affirmative Restriction

Everyone agrees that the right to record police is subject to limits. However, in the absence of a reasonable restriction, which could take the form of a contemporaneous order from a police officer, a statute, an ordinance, or regulation, the right to film police activity in public remains "unfettered."[258] As a starting point, this means that citizens have an inherent, unbridled right to record police activity in public that is only curbed when the government affirmatively restricts that right because of a legitimate purpose.

2. Recording In and of Itself Does Not Interfere with Policing

The act of recording the police does not by itself constitute interference with police activity.[259] This is not to say that individuals can never interfere when filming law enforcement. Rather, it is a recognition that the mere act of turning on a camera does not magically transform otherwise mundane, non-threatening conduct into criminal obstruction. In fact, some anti-recording statutes themselves recognize that a person's proximity to an officer is what constitutes interference, not the mere act of recording.[260] Accordingly, when a videographer impedes police activity by being too close to an officer, it is their

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255. *Supra* Section II.B.5.

256. *Supra* Section II.B.6.

257. Dowd, *supra* note 161 and accompanying text.

258. Gericke v. Begin, 753 F.3d 1, 8 (1st Cir. 2014).

259. Simonson, *supra* note 124 at 1576 (2016); *see* Glik v. Cunniffe, 655 F.3d 78, 84 (1st Cir. 2011) (explaining that "peaceful recording of an arrest in a public space that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation").

260. *Supra* notes 205, 208, and accompanying text (describing bills proposed in Mississippi and Indiana that criminalized knowingly getting within a certain range of police after being told to desist).

physical obstruction of police that is at issue—not their act of recording.[261]

3. Interference Needs to Be Defined Specifically and Narrowly

Legislation ought to specify when recording interferes with police and provide examples to guide officer conduct.[262] Only a fine line distinguishes socially valuable speech from conduct that improperly interferes with police operations.[263] Law enforcement officers are likely to have a broader definition of interference than journalists, First Amendment advocates, or even the average citizen.[264] Further, the police often respond poorly when their authority is threatened and may offer pretextual charges of "interference" against civilians seeking to hold them accountable.[265] Accordingly, police should not be the ones determining when a recording crosses the line to become interference.[266]

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261. Aracely Rodman, *Filming the Police: An Interference or a Public Service*, 48 ST. MARY'S L.J. 145, 170 (2016); *see* Arizona Broadcasters Association, No. CV-22-01431-PHX-JJT, 2022 WL 4121198, at *2 (striking down a blanket prohibition on recording within eight feet of law enforcement, finding the law to be over and under-inclusive because "the law's purpose [was] not to prevent interference with law enforcement, but to prevent recording").

262. *See* Jonathan Smith, *Christopher Sharp v. Baltimore City Police Department, et. al*, United States Department of Justice Civil Rights Division, (May 14, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/05/17/Sharp_ltr_5-14-12.pdf [https://perma.cc/29XZ-KPCN] (arguing that policies "should define what it means for an individual to interfere with police activity and, when possible, provide specific examples").

263. *See Alvarez*, 679 F.3d 583, 612 (7th Cir. 2012) (Posner, J., dissenting) (stating that a "fine line separates 'mere' recording of a police-citizen encounter (whether friendly or hostile) from obstructing police operations by distracting the officers and upsetting the citizens they are speaking with").

264. Clay Calvert, *The First Amendment Right to Record Images of Police in Public Places: The Unreasonable Slipperiness of Reasonableness & Possible Paths Forward*, 64 TEX. A&M L. REV. 131, 160 (2015).

265. *See* Kermit Lipez, *The First Amendment and the Police in the Digital Age*, 69 ME. L. REV. 215, 233 (2017) (describing a 1959 study of police in New York City showing that police officers interpreted any criticism of their conduct as a challenge to their authority and that they often arrested citizens for police interference or disorderly conduct for writing down an officer's shield number).

266. Calvert, *supra* note 264 at 160.

Further, given the substantial policy benefits of recording law enforcement,[267] lawmakers should minimize police discretion and define interference in a limited way. Recording should be protected up until it "presents a concrete, physical impediment to a police officer or public safety."[268] Filming should not constitute interference just because it makes an officer uncomfortable.[269]

4. The Right to Record Does Not Immunize Videographers from the Law

Just as the act of recording the police does not magically transform otherwise peaceful activity into interference, recording cannot make otherwise unlawful conduct permissible. A federal right to record statute would not prevent police from arresting videographers for interfering with police activities, for crossing a police line into a crime scene, for trespassing, or if police have a reasonable suspicion that the person has committed a crime.[270] Notably, police already have the legal tools at their disposal to address these concerns and do not need greater enforcement authority.[271]

B. A Model Legislative Approach

Over the last decade, numerous states and cities across the nation have proposed or passed legislation focused on the videotaping of police.[272] These statutes provide useful insights both into how the

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267. *See* Rodman, *supra* note 261 at 166–70 (extolling the value of video evidence as being the "best type of conclusive evidence," "promot[ing] good behavior" by law enforcement officers, and providing citizens an opportunity to "be involved in the community by freely exercising their freedom of speech").

268. Simonson, *supra* note 124 at 1559.

269. Lipez, *supra* note 265 at 225.

270. *See* Andrew J. Baruck, *Attorney General Law Enforcement Directive No. 2021-11*, STATE OF NEW JERSEY OFFICE OF THE ATTORNEY GENERAL (December 7, 2021), https://www.nj.gov/oag/dcj/agguide/directives/ag-Directive-2021-11-Rght-to-Record.pdf [https://perma.cc/F43N-6YFR] (recognizing limitations on the right to record including where police have reasonable suspicion, or a videographer enters an area unavailable to the public).

271. *See* Arizona Broadcasters Association v. Brnovich, No. CV-22-01431-PHX-JJT, 2022 WL 4121198, at *2 (explaining that HB 2319 is unnecessary because "Arizona already has other laws on its books to prevent interference with police officers").

272. *See generally* Section II.B (describing legislative efforts to restrict the right to record in states across the country).

right to record remains vulnerable and how it can be codified.[273] Lawmakers need not start from scratch and should draw lessons from these bills. Recognizing that politicians constantly tweak the language of bills, the statute proposed below need not represent the final iteration of a law protecting the right to record but rather exists as a starting template which can be used in the legislative process.

> (A) *The Right to Record.* A person may record police activity, surreptitiously or in open sight, and maintain custody and control of any such recording and of any property or instruments used in such recording any place where they are legally allowed or authorized to be.
>
> (B) *Infringement on the Right to Record*. A claim of unlawful infringement on the right to record is established under this section when an individual demonstrates they were exercising or attempting to exercise their right in accordance with subsection (A) and were inhibited from doing so. Such infringement includes but is not limited to the following actions.
>
> (1) preventing or attempting to prevent the recording of police activity;
>
> (2) obstructing or attempting to obstruct the recording of police activity;
>
> (3) seizing property or instruments used by any individual to record police activity;
>
> (4) intimidating or attempting to intimidate individuals recording or attempting to record police activity;
>
> (5) threatening individuals recording or attempting to record police activity;
>
> (6) stopping, seizing, searching, issuing any summons, or arresting any individual because they have recorded, are recording, or are attempting to record police activity;

273. Accordingly, the model statute relies heavily on language from previous bills safeguarding the right to record passed in New York City and Colorado.

(7) demanding an individual's identification because they have recorded, are recording, or are attempting to record police activity; and

(8) demanding that an individual explain why they have recorded, are recording, or are attempting to record police activity.

(C) Limitations on the Right to Record:

(1) Nothing in this bill shall be construed to prevent the seizure of any property or instruments used in a recording of law enforcement activity where the seizure is otherwise authorized by law, or to prohibit any officer from enforcing any other provision of law.

(2) Nothing in this bill shall be construed to allow a person to interfere with a peace officer in the lawful performance of their duties.

(3) Law enforcement officers shall not be liable under subsection B if:

(i) the person recording police activities was substantially interfering or about to substantially interfere with law enforcement activity; or

(ii) their action was necessary to

(a) protect public safety, or

(b) preserve the integrity of a crime scene or criminal investigation, or

(c) safeguard the privacy interests of the victim of a crime or accident, a witness to a crime, or a government informant; or

(iii) the officer did not know and a reasonable officer in the position of such officer would not know that such

person was recording or attempting to record police activities.

(D) *Private Right of Action*. A person subject to unlawful infringement on the right to record as described in subsection B may bring an action for actual damages, a civil penalty of $15,000, and attorney's fees and costs.

(E) *Definitions*.

(1) *Record*. To capture or attempt to capture any moving or still image, sound, or impression using any recording device, camera, or any other device capable of capturing audio, moving or still images, or by way of written notes or observations.

(2) *Police Activity*. Any conduct of a police officer acting under the color of law.

Interfere. To physically obstruct law enforcement work. Conduct that is merely annoying, distracting, or that makes an officer feel uncomfortable does not rise to the level of interference. This bill is based on the principle that recording the police is a social good that should be reasonably encouraged. While some critics are likely to remain unsatisfied with any measure that threatens to hold law enforcement accountable,[274] the above proposal fairly reconciles the competing policy interests at hand. The judiciary, legislators, and law enforcement have raised concerns that filming the police can interfere with police activities, undermine public safety, expose informants, and undermine the privacy of crime victims.[275] The above proposal explicitly addresses these recurring arguments, ensuring that law enforcement can enact measures when the circumstances actually require them. On the other hand, this model bill limits police discretion by ensuring that restrictions are truly necessary and supported by

274. *See* Lautt, *supra* note 133 at 379–80 (explaining that the Connecticut Police Chiefs Association vocally opposed a bill codifying the right to record, citing concerns that were directly addressed by the bill's language); *see also* Mike Riggs, *Connecticut Senate Passes Bill Allowing Citizens to Record Cops So Long as the Cops Are OK with It*, REASON (April 23, 2012), https://reason.com/2012/04/23/connecticut-senate-passes-bill-allowing/ [https://perma.cc/62WA-5A3N] (explaining that Connecticut Republicans voted against a bill to codify the right to record even though the "legislation couldn't be more protective of police if it was written by the cops themselves").

275. S*upra* notes 132, 133, 169, 170, 181, 205, 231 and accompanying text.

more than an officer's premonition.[276] Further, the bill's steep financial penalty for infringement, although likely to be decried by law enforcement, would serve to deter misconduct.[277]

Under the bill, restrictions on recording the police are only justified by a discrete set of law enforcement objectives, and interference is understood only as a significant physical obstruction to police work. This approach ensures that the mere act of recording itself is not interpreted as interference, and that interference can only be found when filming materially impedes law enforcement. This standard recognizes that police should be able to do their job without physical disruption while recognizing that "police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights."[278] Additionally, the bill makes clear that a person has a right to surreptitiously record police activity in public. Ultimately, the proposed bill provides for a strong right to record that individuals will be able to vindicate in court while carving out exceptions for legitimate law enforcement concerns.

C. The Need for Congressional Action

National problems require national solutions. Given the nationwide assault on the First Amendment, Congress must codify the right to record. Only congressional action can counter the growing trend of state legislatures restricting the ability to film police.[279] Further, given the reality that courts have and will continue to have different interpretations of what restrictions on filming the police are reasonable, federal legislation is necessary to enable everyone,

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276. *See* Calvert, *supra* note 264 at 177–78; (arguing that restrictions on the right to record should be the least restrictive necessary to limit police discretion); *see also* Riggs, *supra* note 274 (decrying the vagueness of a Connecticut statute that would have protected the right to record unless officers had "reasonable grounds to believe" that recording would endanger public safety, violate privacy, or violate other laws).

277. *See* Evgen, *Colorado Introduces "Right to Record" Bill Punishing Police Officers Interfering With Photographers*, TRUTH VOICE (2015), http://truthvoice.com/2015/04/colorado-introduces-right-to-record-bill-punishing-police-officers-interfering-with-photographers/ [https://perma.cc/H78T-KAF4] (quoting the spokesperson for the Chiefs of Police Association in Colorado as saying the provision of the state's right to record legislation entitling plaintiffs to a $15,000 civil penalty for infringement on their rights was "not an appropriate penalty").

278. Glik v. Cunniffe, 655 F.3d at 84.

279. *See supra* note 159, 160 and accompanying text (describing growing efforts by state legislatures to codify restrictions on the right to record police).

regardless of which state they live in, to consistently and effectively vindicate their right to record.[280]

Critics of the above proposal may contend that, given the difficulties of legislating at the federal level, the issue should be left to individual states or to the courts. Others in academia have espoused these positions, and they are not without merit.[281] Codifying the right to record at the federal level certainly remains an uphill battle. Political polarization and the influence of police lobbying are powerful forces that stand in the way of legislative success.[282] And even more importantly, just three years ago, Congress failed to pass police reform in response to the biggest civil rights uprising in a generation, instead choosing to increase funding for law enforcement.[283] Notwithstanding these concerns, federal action is optimal. Legislatures at the state level in Connecticut, Mississippi, and Montana have already tried to codify the right to record and been unsuccessful,[284] which illustrates that the challenges of congressional action also apply to state lawmaking.

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280. *See supra* notes 148–51 and accompanying text (explaining how courts may come out on different sides of whether the right to record includes a right to record in dangerous situations like traffic stops, a right for the subjects of police conduct to record their interactions, and a right to livestream police); *see also* Kies, *supra* note 125 at 306 (arguing that "the federal interest in preserving the constitutional rights of all of citizens outweighs [state] interests and makes federal legislation preferable to state action").

281. *See* Robertson, *infra* note 282 at 147 (arguing that "[w]ithout any practical legislative solution, the Supreme Court is the most efficient and effective method to impact a citizen's right to record the police in public"); *see also* Joshua Sipp, *Lights, Camera, Inaction: Advocating a Statutory Response to Protect the Right to Record Police Activity in Public*, 32 KAN. J.L. & PUB. POL'Y at 95, 113 (2022) (arguing that the "unavailability of federal protection leaves state legislatures in a unique position to step in and fill this judicially created gap").

282. Taylor Robertson, *Lights, Camera, Arrest: The Stage Is Set for a Federal Resolution of a Citizen's Right to Record the Police in Public*, 23 B.U. PUB. INT. L.J. 117, 145–46 (2014); Mark Brncik, *Case for Non-Enforcement of Anti-Recording Laws against Citizen Recorders*, 62 CASE W. RES. L. REV. 485, 514 (2011); *see supra* notes 167, 168, 180, 209, 228, 236 and accompanying text (highlighting the important role police lobbying has played in legislative efforts to restrict the right to record).

283. Derecka Purnell, *The George Floyd Act Wouldn't Have Saved George Floyd's Life. That Says It All*, GUARDIAN (March 4, 2021), https://www.theguardian.com/commentisfree/2021/mar/04/the-george-floyd-act-wouldnt-have-saved-george-floyds-life-thats-says-it-all [https://perma.cc/LCB7-HBAA].

284. Oliver Laughland & Jon Swaine, *'I Dream About It Every Night': What Happens to Americans Who Film Police Violence?*, GUARDIAN (August 17, 2015), https://www.theguardian.com/us-news/2015/aug/15/filming-police-violence-walter-scott-michael-brown-shooting [https://perma.cc/AL7F-BM8M].

However, without federal intervention, individuals will be faced with different legal terrains depending on the state they live in and are likely to struggle to vindicate their right to record due to a multitude of hurdles: an ideologically motivated, pro-law enforcement judiciary,[285] qualified immunity,[286] procedural hurdles to bringing suit,[287] and disagreement over the scope of the right to record.[288]

Moreover, there are still reasons to hold out hope for congressional action. In recent years the prospects of national right to record legislation have greatly improved; public confidence in police is at a low point[289] and the right to record has taken on a new salience in public discourse.[290] The public overwhelmingly supports the usage of video footage as a means of curbing law enforcement's worst excesses, even as other police reforms attract controversy.[291]

Savvy congresspersons should recognize that codifying the right to record subject to common sense limitations is a political winner, respond to ongoing calls for criminal justice reform, and seize the opportunity to enshrine the right. In fact, in 2010, one congressman attempted to do just that: Edolphus Towns, a member of the House of Representatives from New York, introduced a concurrent resolution that would have given members of the public a right to make video or sound recordings of the police during the discharge of their public duties.[292] While the measure died in committee, his effort represents that some congresspersons may have the willingness to legislate on this important issue.[293]

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285. *Supra* Section II.A.1.

286. *Supra* Section II.A.2.

287. *Supra* note 172 and accompanying text.

288. *Supra* Section II.A.3.

289. Emily Washburn, *America Less Confident in Police than Ever Before: A Look at the Numbers*, FORBES (February 3, 2023), https://www.forbes.com/sites/emilywashburn/2023/02/03/america-less-confident-in-police-than-ever-before-a-look-at-the-numbers/?sh=5420b3166afb [https://perma.cc/8H9N-JXZM].

290. *See generally supra* Section II.B (discussing recent legislative efforts across the nation to restrict the right to record police).

291. *See* Nolan McCaskill, *Americans Agree on Police Reforms that Have Divided Washington, New Poll Shows*, POLITICO (July 14, 2020), https://www.politico.com/news/2020/07/14/americans-agree-police-reforms-360659 [https://perma.cc/E27D-W6HF] (surveying the public's opinion on ten proposals for police reform and finding body cameras to be the most popular with support from 90% of respondents, including 85% of Republicans).

292. Robertson, *supra* note 282 at 147; H.R. Cong. Res. 298, 111th Cong. (2010).

292. Brncik, *supra* note 282 at 514.

Despite the challenges to codifying the right to record at the federal level, the stakes are simply too high not to try. Videotaping the police can exonerate the wrongfully accused, help departments weed out dishonest and/or violent police officers, and deter police misconduct.[294] Even if congressional attempts to enshrine the right to record are ultimately unsuccessful, a full-throated defense of the right to record on the national stage could reset the national conversation on filming the police and throw cold water on state proposals to limit the recording of law enforcement.

CONCLUSION

George Floyd was murdered in May 2020, yet American policing today remains largely unchanged and plagued by institutional rot.[295] In 2023, at least 1,300 people were killed at the hands of police: the most in recorded American history.[296] Just last year, Americans took to the streets to protest the murder of Tyre Nichols in Memphis at the hands of police—a killing that was only exposed due to body and street camera footage.[297] It is hard not to feel a sense of déjà vu, and that we are destined to repeat mistakes of the past.

After all, despite recurring incidents of police brutality and slow progress towards a national right to record police, the right to film law enforcement remains vulnerable. While generally recognizing the right, judges have thus far avoided the necessary follow up question of what restrictions on the right to record are permissible, punting the

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294. *See* Simonson, *supra* note 124 at 1559 (explaining that civilian filming of the police "deter[s] misconduct and document[s] police activity").

295. Neil Gross, *3 Years After George Floyd's Murder, Cop Culture Still Hasn't Changed*, TIME (May 25, 2023), https://time.com/6282369/george-floyds-murder-cop-culture-hasnt-changed/ (on file with the *Columbia Human Rights Law Review*)

296. N'dea Yancey-Bragg, *2023 Was the Deadliest Year for Killings by Police in the US. Experts Say this Is Why,* USA TODAY (January 17, 2024), https://www.usatoday.com/story/news/nation/2024/01/17/police-killings-record-2023/72174081007/ [https://perma.cc/G5FT-CTX4]; *see* Sam Levin, '*It Never Stops': Killings by US Police Reach Record High in 2022*, GUARDIAN (January 6, 2023), https://www.theguardian.com/us-news/2023/jan/06/us-police-killings-record-number-2022 [https://perma.cc/C9DE-RFAQ] (explaining that 2013 is when experts first started tracking police killings nationwide).

297. *See* Kiara Alfonseca, *Discrepancy Between Police Accounts, Evidence in Tyre Nichols Case Revealed*, ABC NEWS (February 2, 2023), https://abcnews.go.com/US/discrepancy-police-accounts-evidence-tyre-nichols-case-revealed/story?id=96795495 [https://perma.cc/7NZ2-KCMU] (explaining that the police's account of Nichols' murder was highly misleading and made no mention of how cops savagely beat and kicked Nichols to death).

issue for future courts and legislators and chilling free speech in the process. In turn, overzealous legislators in several states have sprung into action, seizing their opportunity to "back the blue" by proposing regressive, legally questionable measures.

There is a way to break the cycle, but it will take political courage. Congress must consider the collective wisdom of the judiciary, state and city legislatures, and academia and codify a robust right to record the police. While such a proposal is not a panacea, without it we are likely to confront the same daunting challenges again and again, and the only difference will be the name protestors chant in the streets.