

2018

Watching Big Brother: A Citizen's Right to Record Police

Vincent Nguyen

Fordham University School of Law, nguyen.vincent17@gmail.com

Follow this and additional works at: <https://ir.lawnet.fordham.edu/iplj>



Part of the [Intellectual Property Law Commons](#)

Recommended Citation

Vincent Nguyen, *Watching Big Brother: A Citizen's Right to Record Police*, 28 Fordham Intell. Prop. Media & Ent. L.J. 637 (2018).
Available at: <https://ir.lawnet.fordham.edu/iplj/vol28/iss3/4>

This Note is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Intellectual Property, Media and Entertainment Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Watching Big Brother: A Citizen's Right to Record Police

Cover Page Footnote

Managing Editor, Fordham Environmental Law Review; J.D. Candidate, Fordham University School of Law, 2018; B.A., Loyola University Chicago, 2013.

Watching Big Brother: A Citizen's Right to Record Police

By Vincent Nguyen*

Due to growing technological advances and the ubiquity of mobile phones, it has become increasingly common for citizens to use these devices to photograph and record events. Though largely uncontroversial, when used to record public police activity, some citizens have been arrested and charged under state wiretapping or eavesdropping statutes. Over time, various circuit courts have held that this right to record public police actions is a protected activity. Most recently, however, the U.S. Court of Appeals for the Eighth Circuit affirmed a lower court decision, which held that this act of recording is unprotected, thereby exemplifying how circuit courts are split on the issue. Given the importance and timeliness of this issue, this Note agrees with the majority of circuit courts and argues that recording public police activity receives constitutional protection. Part I discusses the First and Fourth Amendment protections surrounding this right to record police activity, further supplemented by the common law right to acquire information. Part II reviews the current circuit split, providing a brief synopsis of the various cases dealing with this issue. Part III, siding with the majority of circuit courts, argues that the citizen right to record is entitled to constitutional protection and advocates for its legality as a matter of public policy.

* Managing Editor, *Fordham Environmental Law Review*; J.D. Candidate, Fordham University School of Law, 2018; B.A., Loyola University Chicago, 2013.

INTRODUCTION	639
I. LEGAL PROTECTIONS FOR THE RIGHT TO RECORD	642
A. <i>First Amendment</i>	643
1. Constitutional Right to Gather and Receive Information	644
2. Right of Access	645
B. <i>Fourth Amendment</i>	647
C. <i>Common Law Right to Know Information</i>	648
II. CURRENT CIRCUIT SPLIT ON THE RIGHT TO RECORD ...	650
A. <i>Circuits Holding a Qualified Recordation Right Exists</i>	651
1. The First Circuit	651
2. The Third Circuit	653
3. The Fifth Circuit	655
4. The Seventh Circuit	655
5. The Ninth Circuit	657
6. The Eleventh Circuit	657
B. <i>Eighth Circuit Holding Recordation Right Does Not Exist</i>	658
III. PROPOSAL FOR THE SUPREME COURT TO RULE ON THE ISSUE OF THE CITIZEN'S RIGHT TO RECORD	660
A. <i>Act of Recording Amounts to Speech Triggering First Amendment Protections</i>	660
B. <i>Right to Disseminate Recordings of Police Activity</i>	663
C. <i>Laws Negatively Impacting the Citizen's Right to Record Are Unconstitutional</i>	663
D. <i>Police Officers Performing Their Official Duties in Public Have No Reasonable Expectation of Privacy</i>	665
E. <i>Benefits of Recordings Trigger Protection</i>	666
1. Video Evidence Provides Probative Evidence in Criminal Cases	667
2. Vindication of Civil Rights in Section 1983 Claims	667
3. Need for Symmetry and Police Reform	669
CONCLUSION	670

INTRODUCTION

“I can’t breathe.”

– Eric Garner

The now-infamous nearly three-minute video shows the escalating interaction between Eric Garner and the police, with Garner repeating the phrase “I can’t breathe” eleven times.¹ The video is difficult to watch for a number of reasons, primarily because Garner was later pronounced dead at the hospital.² While the video provides a holistic view of the interaction, some unrecorded details are of importance, namely (according to witnesses) that police arrested Garner twice that year near the same spot for selling untaxed cigarettes, and that Garner flailed his arms to resist frisking and avoid detention.³ Though this information provides a more comprehensive view of the interaction, these events are not necessarily pertinent to the events of Thursday, July 17, 2014.⁴

If police forbade citizens from recording them while they perform their official duties in public, society would remain uninformed of such harrowing police interactions. Videos are important evidentiary devices because they can provide a complete and accurate record of events, including dialogue, body movements, and other contextual details. According to the American Civil Liberties Union (“ACLU”), video “creates an independent record of what took place in a particular incident, free from accusations of bias, [incorrect testimony], or faulty memory.

¹ See *‘I Can’t Breathe’: Eric Garner Put in Chokehold by NYPD Officer – Video*, GUARDIAN (Dec. 4, 2014), <https://www.theguardian.com/us-news/video/2014/dec/04/i-cant-breathe-eric-garner-chokehold-death-video> [<https://perma.cc/59Z9-SMT4>]; see also Christopher Mathias, *Eric Garner Said ‘I Can’t Breathe’ [Eleven] Times — Now Activists Are Making [Eleven] Demands in His Name*, HUFFPOST (Dec. 11, 2014), https://www.huffingtonpost.com/2014/12/11/eric-garner-protests-demands_n_6308956.html [<https://perma.cc/5VAH-TZP9>].

² See Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> [<https://perma.cc/J47G-M48F>].

³ See *id.*

⁴ See Ford Fessenden, *New Perspective on Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/interactive/2014/12/03/us/2014-12-03-garner-video.html> [<https://perma.cc/BN75-U5C3>].

It is no accident that some of the most high-profile cases of police misconduct have involved video and audio records.”⁵ Most importantly, video recordings, as opposed to witness accounts, do not erode over time.⁶ Eyewitness testimony is fickle, and all too often, shockingly inaccurate.⁷ Furthermore, “[b]ystander videos provide different perspectives than police and dashboard cameras, portraying circumstances and surroundings that police videos often do not capture. Civilian video also fills the gaps created when police choose not to record video or withhold their footage from the public.”⁸ In addition to a video’s evidentiary value, video recording can assist law enforcement, ranging from Justice Department investigations of civil rights violations to exonerations of police officers accused of wrongdoing.⁹ In other words, bystander videos can not only protect citizens from inappropriate police activity, but also protect police from allegations of misconduct.¹⁰

In a recent federal circuit court decision, *Akins v. Knight*,¹¹ the U.S. Court of Appeals for the Eighth Circuit affirmed a lower court decision,¹² which held that citizens do not have the right to record

⁵ *Filming and Photographing the Police*, ACLU, <https://www.aclu.org/issues/free-speech/photographers-rights/filming-and-photographing-police> [<https://perma.cc/U5Z6-WQZE>] (last visited Jan. 28, 2017) (defending the constitutional right to take photographs and video in public and committing itself to defend this right).

⁶ See Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2 FED. CTS. L. REV. 1, 10 (2007) (describing the rapid decline in reliability of memory over time); see also Richard P. Conti, *The Psychology of False Confessions*, 2 J. CREDIBILITY ASSESSMENT & WITNESS PSYCHOL. 14, 22–23 (1999) (describing the effect misleading post-event information can have on recounting the original information).

⁷ See *Commonwealth v. Martin*, 850 N.E.2d 555, 570 (Mass. 2006) (Cordy, J., dissenting) (revealing seventy-seven percent of wrongful convictions were due to mistaken eyewitness testimony).

⁸ *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017).

⁹ See Robinson Meyer, *The Courage of Bystanders Who Press ‘Record’*, ATLANTIC (Apr. 8, 2015), <https://www.theatlantic.com/technology/archive/2015/04/the-courage-of-bystanders-who-press-record/389979/> [<https://perma.cc/9NW9-6HF2>].

¹⁰ See Maya Wiley, *Body Cameras Help Everyone – Including the Police*, TIME (May 9, 2017), <http://time.com/4771417/jordan-edwards-body-cameras-police/> [<https://perma.cc/794Z-WFCG>].

¹¹ 863 F.3d 1084 (8th Cir. 2017).

¹² See *id.* at 1088; see also *Akins v. City of Columbia*, No. 2:15-CV-04096-NKL, 2016 WL 4126549, at *17 (W.D. Mo. Aug. 2, 2016).

public officials.¹³ In the lower court decision, the appellant argued that he was stopped from filming in a police precinct lobby in 2011.¹⁴ The U.S. District Court for the Western District of Missouri referenced an Eighth Circuit decision in declaring that “neither the public nor the media” enjoys a right of equal access or special First Amendment rights.¹⁵ In contrast to the U.S. Courts of Appeals for the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits¹⁶—all of which held that the Constitution guarantees the right to film public officials in public settings, sometimes subject to reasonable time, place, and manner restrictions¹⁷—the Eighth Circuit ruled that citizens have no right to film politicians or police in public.¹⁸ The Eighth Circuit incorrectly ruled on this matter and should align itself with the majority of circuit courts, not only to provide uniformity, but also to provide citizens with greater protections in accordance with their constitutional rights.

This Note argues the First Amendment protects the citizen’s right to record police officers in public spaces.¹⁹ The common law right to know information further supports the right to record police activity.²⁰ Part I outlines the existing constitutional basis, specifically the First and Fourth Amendments, and the common law which protects citizens from prosecution when recording police activity. The majority of federal circuit courts have held that both this constitutional and common law right to record public

¹³ The circuit court affirmed the district court ruling, *see Akins*, 863 F.3d at 1088, which held that appellant “has no constitutional right to videotape any public proceedings he wishes to,” *Akins*, 2016 WL 4126549, at *17.

¹⁴ *See Akins*, 2016 WL 4126549, at *17.

¹⁵ *Id.* (citing *Rice v. Kempker*, 374 F.3d 675, 678 (8th Cir. 2004) (“[N]either the public nor the media has a First Amendment right to videotape, photograph, or make audio recordings of government proceedings that are by law open to the public.”); *see also infra* notes 145–58 and accompanying text.

¹⁶ *See infra* Section II.A.

¹⁷ *See* Stephen Wyse, *[Eighth] Circuit Rules No First Amendment Right to Film Police in Public*, WYSE L. FIRM, P.C. (Aug. 9, 2017), <http://wyselaw.com/index.php/2017/08/09/8th-circuit-rules-no-first-amendment-right-to-film-the-police-in-public/> [<https://perma.cc/KD4S-XMFN>].

¹⁸ *See Akins*, 863 F.3d at 1088 (affirming the district court decision that held that citizens have no right to film politicians or police in public).

¹⁹ *See infra* Section I.A.

²⁰ *See infra* Section I.C.

police activity exists.²¹ Part II describes how the most recent Eighth Circuit decision departs from convention, thus creating a split at the circuit court level. This Note asserts that as a result, the U.S. Supreme Court should address this issue of public significance, and subsequently hold this right to exist. Part III establishes that recording is a form of speech, entitled to First Amendment protection. This First Amendment designation protects the recorder when disseminating the recording in the future, and from statutes attempting to criminalize recordings.²²

I. LEGAL PROTECTIONS FOR THE RIGHT TO RECORD

This Part details the constitutional protections afforded to the recording of public police actions, further supported by the common law right to know information. The First Amendment, in conjunction with the Fourth Amendment, protects the citizen's right to record public police actions.²³ First Amendment jurisprudence suggests there is an affirmative constitutional right to gather and receive information on matters of public interest.²⁴ This right to access information prohibits federal and state governments from interfering.²⁵ In addition, Fourth Amendment jurisprudence indicates that police officers have no reasonable expectation of privacy while performing their duties in public, indicating citizens can legally record these activities.²⁶ Finally, American common

²¹ See, e.g., *Turner v. Lieutenant Driver*, 848 F.3d 678, 687–90 (5th Cir. 2017); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 594–602 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012); *Glik v. Cunniffe*, 655 F.3d 78, 82–85 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); see also *infra* Section II.A.

²² See *supra* note 21 and accompanying text.

²³ See *infra* notes 28–42 and accompanying text.

²⁴ See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). The right to receive information about public officials is necessary to inform and enable political discourse in a democracy. See *id.* Further, the First Amendment protects the right to disseminate or publish recordings of public significance, *even if* another party illegally intercepted the recording. See *Bartnicki v. Vopper*, 532 U.S. 514, 519, 534–35 (2001).

²⁵ See *infra* notes 43–55 and accompanying text.

²⁶ See, e.g., *Hornberger v. Am. Broad. Cos.*, 799 A.2d 566, 592–95 (N.J. Super. Ct. App. Div. 2002); *Commonwealth v. Henlen*, 564 A.2d 905, 906–07 (Pa. 1989); *State v. Flora*, 845 P.2d 1355, 1357–58 (Wash. Ct. App. 1992); see also *infra* notes 56–62 and accompanying text.

law protects the act of recording public police activity, allowing citizens to create and inspect public records.²⁷

A. First Amendment

Because the First Amendment prohibits the government from limiting public information, citizens can record the police performing their duties in public.²⁸ The right to gather and receive information about public officials informs and enables political discourse.²⁹ The nation's founders prioritized transparency and information regarding governmental affairs, because it allowed for the election of responsible political representatives.³⁰ In fact, the Founding Fathers intended the First Amendment to protect discussions of politics and government.³¹ Recordings are commonly used for the preservation and dissemination of information, and are “included within the free speech and free press guaranty of the First [Amendment].”³² Similarly, the Supreme Court recognized that a First Amendment right to gather

²⁷ See *infra* Section I.C. (explaining how the common law right to know information supports recording police activity).

²⁸ See U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise thereof; or abridging the freedom of speech . . .”). In interpreting the First Amendment, the Supreme Court has recognized the right to receive information and ideas. See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976); *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). Even though this right is not absolute, newsgathering is “entitled to [F]irst [A]mendment protection, for without some protection for seeking out the news, freedom of the press could be eviscerated.” *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017) (quoting *In re Express-News Corp.*, 695 F.2d 807, 808 (5th Cir. 1982)); see also *Davis v. E. Baton Rouge Par. Sch. Bd.*, 78 F.3d 920, 928 (5th Cir. 1996). Finally, there is “an undoubted right to gather news from any source by means within the law.” *Turner*, 848 F.3d at 688 (quoting *Houchins*, 438 U.S. at 11).

²⁹ See *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 599–600 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012).

³⁰ See *id.* Furthermore, “speech and press freedom includes, by implication, ‘some protection’ for [individuals] gathering information about the affairs of government[, which] is consistent with the historical understanding of the First Amendment.” *Id.* at 599.

³¹ *Mills v. Alabama*, 384 U.S. 214, 218 (1966); see also *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964) (this constitutional right reflects our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”).

³² *Burstyn v. Wilson*, 343 U.S. 495, 502 (1952).

and disseminate public information exists,³³ including the public activities of police officers. In a quick succession of cases in the 1980s,³⁴ the Court decided that the First Amendment right to access information was tantamount to the right to communicate, applying strict scrutiny toward any law trying to circumscribe this right.³⁵

1. Constitutional Right to Gather and Receive Information

The Supreme Court has held that gathering and receiving information is included within the First Amendment's protections.³⁶ In 1969, the Court held the "right to receive information and ideas, regardless of their social worth, is fundamental to our free society."³⁷ Not only do citizens have the right to *receive* information and ideas, but the Supreme Court has

³³ Cf. *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). This notion is discussed in more detail in the next Section. See *infra* notes 37–42 and accompanying text.

³⁴ See *infra* note 44 and accompanying text. See generally Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2418–24 (1996) (restating briefly the strict scrutiny doctrine and the Supreme Court's method of evaluating restrictions on speech).

³⁵ Strict scrutiny is the highest level of judicial review that a court employs to determine the constitutionality of a law, which applies to content-based speech restrictions. See, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (subjecting content-based speech restrictions to strict scrutiny analysis); see also *Skinner v. State of Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942) (attesting to the importance with which strict scrutiny is applied); Legal Info. Inst., *Strict Scrutiny*, CORNELL LAW SCH., https://www.law.cornell.edu/wex/strict_scrutiny [<https://perma.cc/H3EQ-7EVK>] (last visited Oct. 26, 2017) ("Strict scrutiny is a form of judicial review that courts use to determine the constitutionality of certain laws. To pass strict scrutiny, the legislature must have passed the law to further a 'compelling governmental interest,' and must have narrowly tailored the law to achieve that interest [This] represents an approach in which a presumption of constitutionality is shed in favor [of] more exacting judicial review.").

³⁶ See *Branzburg*, 408 U.S. at 681 (indicating that gathering of information is protected by First Amendment and explaining that "without some protection for seeking out the news, freedom of the press could be eviscerated"); see also *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (determining that the First Amendment protects information and ideas); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (holding First Amendment protections extend to right to receive literature); *Glik v. Cunniffe*, 655 F.3d 78, 82–83 (1st Cir. 2011).

³⁷ See *Stanley*, 394 U.S. at 563 (citations omitted).

also recognized the right to *gather* news and information.³⁸ This right to gather news is not limited to members of the professional press, but extends to the general public as well.³⁹ Furthermore, the Supreme Court has acknowledged that video recordings are a protected medium of speech under the First Amendment.⁴⁰ Ultimately, the underlying principles of the First Amendment protect discussions of matters of public interest.⁴¹

2. Right of Access

The right of access is an affirmative right to know information, requiring the government to avoid intervening in the acquisition of such information.⁴² However, recognition of this right of access is relatively new⁴³: The Supreme Court first acknowledged its

³⁸ *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (“There is an undoubted right to gather news ‘from any source by means within the law’” (quoting *Branzburg*, 408 U.S. at 681–82 (1972))).

³⁹ See *Branzburg*, 408 U.S. at 684 (stating that the press is not afforded any special right or “access to information not available to the public generally”); see also *Glik*, 655 F.3d at 83–84.

⁴⁰ First Amendment speech protections encapsulate audiovisual recordings as speech. See *Burstyn v. Wilson*, 343 U.S. 495, 502 (1952) (holding that movies are a protected form of speech); see also *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595–96 (7th Cir. 2012) (holding that freedom of press and freedom of speech necessitate the protection of making audio or audiovisual recordings), *cert. denied*, 133 S. Ct. 651 (2012); *infra* note 172 and accompanying text.

⁴¹ See *Turner v. Lieutenant Driver*, 848 F.3d 678, 689 (2017). The First Circuit explained, “[t]he filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within [basic First Amendment] principles.” *Glik*, 655 F.3d at 82.

⁴² See David Mitchell Ivester, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109, 109 (1977); see also Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.-C.L. L. REV. 95, 102–03 (2004) (drawing a distinction between “negative structuralism,” which prevents the government from interfering with the dissemination and consumption of speech, with “affirmative structuralism,” which requires the government to provide access to its proceedings or information in its possession).

⁴³ The Court held a right to access federal information beginning with *Richmond Newspapers, Inc. v. Virginia* in 1980. 448 U.S. 555, 580 (1980). Conversely, the statutory right to access information originates with the Freedom of Information Act (“FOIA”) of 1966. See 5 U.S.C. § 552 (2012). FOIA generally requires federal agencies and government-controlled entities to release a record when a member of the public submits a request for its release, unless the document falls under an enumerated exemption. See *id.* § 552(a)(1)(A)–(E) (listing provisions related to certain mandatory disclosures); *id.* § 552(b)(1)–(9) (listing exemptions to the Act’s disclosure requirements); see also David

existence in 1980 in *Richmond Newspapers, Inc. v. Virginia*,⁴⁴ where, after a series of mistrials in a Virginia murder case, the judge closed the trial to the public and the media.⁴⁵ Two reporters blocked from accessing the courtroom challenged the judge's actions.⁴⁶ The Supreme Court held the First Amendment played a structural role in requiring an open government.⁴⁷ Seven of the eight justices ruled that the First Amendment guaranteed the press and the public a right of access to the government.⁴⁸ Although the case directly concerns the public's right to attend a criminal trial, the opinion's theoretical implications for the public's right to know are much broader.⁴⁹ Similar to the rights of association and privacy, the right of access is implicitly guaranteed in the enumerated rights of the First Amendment.⁵⁰

Richmond Newspapers left unclear what standard the lower courts should apply when determining whether a presumptive First

C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787, 1797 (2008) (“The right of access conferred by FOIA could not have been more broadly conceived. It allows ‘any person’ . . . to request any record . . . on any subject . . .”).

⁴⁴ See 448 U.S. at 580. After the *Richmond Newspapers* decision, the Court quickly decided three additional First Amendment right of access cases, extending the right of access to pretrial hearings, sexual assault trials, and voir dire proceedings. See *Press-Enter. Co. v. Superior Court of Cal.*, 478 U.S. 1, 13 (1986) (extending the right to preliminary hearings); *Press-Enter. Co. v. Superior Court of Cal.*, 464 U.S. 501, 510–13 (1984) (extending the right to voir dire proceedings); *Globe Newspaper Co. v. Superior Court for Norfolk*, 457 U.S. 596, 610–11 (1982) (extending the right to sexual assault trials); see also Mary-Rose Papandrea, *Under Attack: The Public's Right to Know and the War on Terror*, 25 B.C. THIRD WORLD L.J. 35, 38 (2005). Since the mid-1980s, however, the Court has left further development of this doctrine to the lower courts. See Eugene Cerruti, *'Dancing in the Courthouse': The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 263–69 (1995) (discussing the holdings of *Globe Newspaper Co.*, 457 U.S. 596, *Press-Enter. Co.*, 464 U.S. 501, *Press-Enter. Co.*, 478 U.S. 1, as well as lower court right of access cases).

⁴⁵ See *Richmond Newspapers*, 448 U.S. at 559–63.

⁴⁶ See *id.*

⁴⁷ See *id.* at 580 (holding that the First Amendment guarantees the public's right to attend criminal trials) (Burger, J., plurality op.).

⁴⁸ See *id.* Justice Powell did not take part in the decision. *Id.* at 581. Justice Rehnquist was the lone dissenter. See *id.* at 604.

⁴⁹ See generally Papandrea, *supra* note 44, at 44–48 (tracking the right to know doctrine from its origin in *Richmond Newspapers* through subsequent case law).

⁵⁰ See *Richmond Newspapers*, 448 U.S. at 579–80. Free speech is given enumerated protection by the First Amendment, which expressly states “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I.

Amendment right of access attaches. As a result, the Supreme Court adopted a two-prong history-and-logic test derived from Justice Brennan's *Richmond Newspapers* concurring opinion.⁵¹ This inquiry considers two factors: (1) whether the proceeding has traditionally been open to the public; and (2) whether public access to the proceeding at issue would "play[] a significant positive role."⁵² If the right of access attaches, the court may only restrict access to the proceeding if it determines that there is a "compelling governmental interest" which necessitates closure, and that this closure is "narrowly tailored" to serve such an interest.⁵³ By applying strict scrutiny, the Supreme Court clearly indicates that the public's First Amendment right of access receives the same legal protections as the right to communicate.⁵⁴

B. Fourth Amendment

The Fourth Amendment relates to the act of recording police activity because it protects an individual against unreasonable searches and seizures, thus creating the foundation for privacy law.⁵⁵ The Supreme Court originated this significant body of case law from Justice Harlan's concurring opinion⁵⁶ in *Katz v. United States*, which details an individual's "reasonable expectation of privacy."⁵⁷ Though originally in a concurring opinion, subsequent

⁵¹ The Court points primarily to the *Globe Newspaper* decision, specifically, those sections of which relied upon Justice Brennan's concurrence in *Richmond Newspapers*. See *Press-Enter. Co. v. Superior Court of Cal.*, 478 U.S. 1, 8–9 (1986) (citing *Globe Newspaper Co. v. Superior Court for Norfolk*, 457 U.S. 596, 605–06 (1982)); *Globe Newspaper*, 457 U.S. at 605–06 (quoting *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring)); *Richmond Newspapers*, 448 U.S. at 597–98 (Brennan, J., concurring) (concluding with a summation of the history-and-logic test).

⁵² See *Press-Enter.*, 478 U.S. at 8.

⁵³ See *Press-Enter.*, 464 U.S. at 510 (citing *Globe Newspaper*, 457 U.S. at 606–07).

⁵⁴ See *id.*; see also *Globe Newspaper*, 457 U.S. at 606–07. In his *Globe Newspaper* dissent, Justice Burger argued that the right of access should not be treated the same as the right to disseminate information or to discuss ideas publicly, and that the court should instead ask whether the restriction is "reasonable," balancing the competing interests of access and closure. See 457 U.S. at 615–16 (Burger, C.J., dissenting).

⁵⁵ See U.S. CONST. amend. IV; *Katz v. United States*, 389 U.S. 347, 360–62 (1967) (Harlan, J., concurring) (noting the Fourth Amendment's reasonable expectation of privacy).

⁵⁶ See *Katz*, 389 U.S. at 360–62 (Harlan, J., concurring).

⁵⁷ See *id.* Charles Katz used a public pay phone booth to communicate illegal gambling bets between Los Angeles, Miami, and Boston. See *id.* at 348 (majority opinion). The

case law adopted this two-prong test to evaluate when a governmental intrusion constitutes a “search” under the Fourth Amendment.⁵⁸ The first prong considers whether a person demonstrates an actual “subjective expectation of privacy”;⁵⁹ and the second prong examines whether the “expectation [is] one that society is prepared to recognize as ‘reasonable.’”⁶⁰ The first prong is a factual inquiry, while the second prong is a question of law.⁶¹

C. *Common Law Right to Know Information*

Americans have a vital interest in acquiring information about their government because it fundamentally affects their lives.⁶² The common law right to information “antedates the Constitution.”⁶³ The general common law right to information is a remnant of the English common law that allowed citizens to inspect records.⁶⁴ This common law right to know information is measured by evaluating the requester’s interests in seeking the information.⁶⁵

When reviewing the case law applying this common law right in various U.S. courts since the nation’s founding, it is unclear precisely what a plaintiff must initially show to trigger a right to information.⁶⁶ Some courts have followed the English rule that

FBI recorded his conversations via an electronic eavesdropping device attached outside of the phone booth he was in. *See id.* Though lower courts convicted Katz on the basis of these recordings, he challenged the conviction, arguing that the recordings violated his Fourth Amendment rights. *See id.* at 348–50.

⁵⁸ *See, e.g.,* California v. Ciraolo, 476 U.S. 207, 211 (1986).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Hornberger v. Am. Broad. Cos., 799 A.2d 566, 592 (N.J. Super. Ct. App. Div. 2002) (citing United States v. Clark, 22 F.3d 799, 801 (8th Cir. 1994)).

⁶² *See* Ivester, *supra* note 42, at 109–10.

⁶³ Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 161 (3d Cir. 1993).

⁶⁴ *See* Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1069 (3d Cir. 1984) (“The Supreme Court [has] recognized that [the] English common law right of access was transferred to the American colonies.”). For a discussion of the underpinnings of the English common law right see, for example, Nowack v. Fuller, 219 N.W. 749, 750 (Mich. 1928); State v. Williams, 75 S.W. 948, 958 (Tenn. 1903); State *ex rel.* Ferry v. Williams, 41 N.J.L. 332, 334–36 (N.J. 1879).

⁶⁵ *See* Nixon v. Warner Commc’ns, Inc., 435 U.S. 589, 597–98 (1978) (discussing the operation of the U.S. common law right to information).

⁶⁶ There is a dearth of recent common law right to information cases because various FOIA statutes are typically relied on for access, and when the common law right is litigated it is usually in the context of judicial records. *See* Wash. Legal Found. v. U.S.

requires plaintiffs to show some special need or interest in the information before claiming this right.⁶⁷ However, a substantial line of cases have denounced this approach, and held that the policies of public access and open government are sufficient without any showing of need.⁶⁸

While some U.S. courts require a special or proprietary need for information before the right exists, both federal and state case law require no significant showing of need beyond having an actual interest in the information.⁶⁹ Courts focus on traditional American democratic ideals, reasoning that all citizens have a right “of free access to and public inspection of public records.”⁷⁰ In *Nixon v. Warner [Communications, Inc.]*,⁷¹ “[t]he Supreme Court squarely addressed the common law right to information.”

Sentencing Comm’n, 89 F.3d 897, 902 (“[T]he growth of the common law has been stunted in recent years by the spread of comprehensive disclosure statutes Since the Watergate cases, the common law right of access has been invoked in federal courts with some frequency, but still almost always in cases involving access to court documents.”).

⁶⁷ See, e.g., *Ferry*, 41 N.J.L. at 334 (“The documents in question are of a public nature, and the rule is that every person is entitled to the inspection of such instruments, provided he shows the requisite interest therein.”); *Daluz v. Hawksley*, 351 A.2d 820, 823 (R.I. 1976) (“[T]his court recognizes the common law right of inspection by a proper person or his agent *provided* he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information.” (emphasis in original)); see also *Hanson v. Eichstaedt*, 35 N.W. 30, 31 (Wis. 1887).

⁶⁸ See, e.g., *Boylan v. Warren*, 18 P. 174, 176 (Kan. 1888); *Hawes v. White*, 66 Me. 305, 306 (Me. 1876); *Burton v. Tuite*, 44 N.W. 282, 285 (Mich. 1889); *State ex rel. Cole v. Rachac*, 35 N.W. 7, 8 (Minn. 1887); *MacEwan v. Holm*, 359 P.2d 413, 417 (Or. 1961).

⁶⁹ See, e.g., *Daluz*, 351 A.2d at 823; see also William Randolph Henrick, *Public Inspection of State and Municipal Executive Documents: ‘Everybody, Practically Everything, Anytime, Except . . .’*, 45 *FORDHAM L. REV.* 1105, 1108–09 (1977) (noting that while many courts have relaxed the interest requirement, “[n]evertheless, absent a statute, the requirement of an interest in the document itself generally remains a prerequisite to inspection”).

⁷⁰ *Burton*, 44 N.W. at 285; see also *Nowack v. Fuller*, 219 N.W. 749, 750 (Mich. 1928) (“If there be any rule of the English common law that denies the public the right of access to public records, it is repugnant to the spirit of our democratic institutions. Ours is a government of the people.”); *Laurie Romanowich, Belo Broadcasting Corp. v. Clark: No Access to Taped Evidence*, 32 *AM. U. L. REV.* 257, 261 (1982) (“[T]he common law right, like the [F]irst [A]mendment, creates ‘an informed and enlightened public opinion.’” (quoting *United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976), *rev’d on other grounds sub nom.*, *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589 (1978))).

⁷¹ 435 U.S. at 597.

Although the Court ultimately denied the request for information, it offered a detailed examination of the common law right to information's historical origin, and affirmed that a common law "right to inspect and copy public records and documents" exists.⁷² These underlying First and Fourth Amendment principles indicate the existing constitutional basis for the citizen's right to record.

II. CURRENT CIRCUIT SPLIT ON THE RIGHT TO RECORD

This Part details the current circuit split regarding the citizen's right to record police officers performing their official duties in public. While the majority of circuits addressing this issue held a fundamental First Amendment right to record police activities in public exists, subject to reasonable restrictions—commonly time, manner, and place—the most recent federal circuit to rule on this issue reached the opposite conclusion.⁷³ Most circuit courts recognize the right as clearly established with the surrounding factual circumstances affecting whether this right exists in a particular police interaction.⁷⁴ As such, the average citizen has little prior notice of whether their filming is protected by the First Amendment. The First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits adjudicated cases specifically addressing the right to film public police activity;⁷⁵ whereas the Fourth Circuit only commented on this issue in passing.⁷⁶ In opposition, the Eighth Circuit recently held that citizens do not have this recordation

⁷² See *Nixon*, 435 U.S. at 597.

⁷³ See, e.g., *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011) (finding "the right to film . . . may be subject to reasonable time, place, and manner restrictions"); see also *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 607 (7th Cir. 2012) (finding that the police are generally permitted to take "reasonable steps to maintain safety and control," even if they have incidental effects on an individual's exercise of the First Amendment right to record), *cert. denied*, 133 S. Ct. 651 (2012).

⁷⁴ See, e.g., *Gericke v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014) (noting the importance that the subject filmed is "police carrying out their duties in public," which is a factual inquiry) (quoting *Glik*, 655 F.3d at 82).

⁷⁵ See e.g., *Turner v. Lieutenant Driver*, 848 F.3d 678, 689 (5th Cir. 2017); *Alvarez*, 679 F.3d at 594; *Glik*, 655 F.3d at 82; *Kelly v. Borough of Carlisle*, 622 F.3d 248, 251 (3d Cir. 2010); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 438 (9th Cir. 1995).

⁷⁶ See, e.g., *Szymecki v. Houck*, 353 F. App'x 852, 853 (4th Cir. 2009) (per curiam).

right.⁷⁷ The following sections detail the relevant factual circumstances and holdings of the aforementioned circuits.

A. Circuits Holding a Qualified Recordation Right Exists

The First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits issued rulings to protect the right of bystanders to record police actions in public, subject to reasonable limitations.⁷⁸ In total, “[t]heir collective jurisdictions now amount to exactly half of the [United States,] and roughly [sixty] percent of the American population.”⁷⁹

1. The First Circuit

In August 2011, the First Circuit Court decided *Glik v. Cunniffe*,⁸⁰ after many instances of police arresting or charging people for recording police under Massachusetts’s wiretapping statute.⁸¹ In 2007, police arrested Simon Glik for recording the arrest of another young man on the Boston Commons park grounds on his cell phone.⁸² After verifying Glik recorded the arrest, one of the officers arrested Glik for unlawful audio recording in violation

⁷⁷ See *Akins v. Knight*, 863 F.3d 1084, 1086 (8th Cir. 2017).

⁷⁸ See *infra* Sections II.A.1–6. See, e.g., *Alvarez*, 679 F.3d at 607 (determining that reasonable orders to maintain safety and control, which have incidental effects on an individual’s exercise of the First Amendment right to record, may be permissible); *Glik*, 655 F.3d at 84 (exercising the right to film may be subject to reasonable time, place, and manner restrictions).

⁷⁹ Matt Ford, *A Major Victory for the Right to Record Police*, ATLANTIC (July 7, 2017), <https://www.theatlantic.com/politics/archive/2017/07/a-major-victory-for-the-right-to-record-police/533031/> [<https://perma.cc/6BCX-2RC9>].

⁸⁰ 655 F.3d 78.

⁸¹ See, e.g., *Commonwealth v. Manzelli*, 864 N.E.2d 566, 568 (Mass. App. Ct. 2007) (discussing Jeffrey Manzelli, who was convicted for illegal wiretapping and disorderly conduct after recording police during a protest on Boston Commons); see also *Commonwealth v. Hyde*, 750 N.E.2d 963, 964 (Mass. 2001) (discussing Michael Hyde’s prosecution under Massachusetts’s wiretapping statute for recording police during a traffic stop); Daniel Rowinski, *Police Fight Cellphone Recordings: Witnesses Taking Audio of Officers Arrested, Charged with Illegal Surveillance*, BOSTON GLOBE (Jan. 12, 2010), http://archive.boston.com/news/local/massachusetts/articles/2010/01/12/police_fight_cellphone_recordings/ [<https://perma.cc/6UWS-XFN7>] (describing Jon Surmacz’s arrest after recording police breaking up a party).

⁸² *Glik*, 655 F.3d at 79–80.

of Massachusetts's wiretap statute.⁸³ Glik subsequently filed suit, claiming the charge violated his First and Fourth Amendment rights.⁸⁴ The First Circuit answered the narrow question of whether a constitutional right exists to record police publically performing their official duties.⁸⁵ The court held “though not unqualified, a citizen’s right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty.”⁸⁶ The court further held that “[g]athering information about government officials[,]” which “can readily be disseminated to others,” protects and promotes the First Amendment’s goals by “promoting ‘the free discussion of governmental affairs.’”⁸⁷

On May 23, 2014, three years after *Glik* was decided, the First Circuit again addressed the right to record police in public in *Gericke v. Begin*.⁸⁸ Carla Gericke, was charged under New Hampshire’s wiretapping statute⁸⁹ after she pretended to record a late-night traffic stop of her friend in another vehicle.⁹⁰ Shortly thereafter, she was arrested and charged, and as a result, sued the city.⁹¹ The First Circuit held that private citizens have the First Amendment right to film “police officers performing their duties in public.”⁹² The court extended the holding in *Glik* regarding an individual’s right to film a public police interaction, to also

⁸³ See *id.* at 80. The Massachusetts wiretapping statute prosecutes any individual who “willfully commits an interception, attempts to commit an interception, or procures any other person to commit an interception or to attempt to commit an interception of any wire or oral communication” MASS. GEN. LAWS ANN. ch. 272, § 99(c)(1) (West 2018).

⁸⁴ See *Glik*, 655 F.3d at 79 (bringing “suit under 42 U.S.C. § 1983, claiming that his arrest for filming the officers constituted a violation of his [constitutional] rights”).

⁸⁵ *Id.* at 82.

⁸⁶ *Id.* at 85.

⁸⁷ *Id.* at 82 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)); see *supra* notes 37–42 and accompanying text (emphasizing the importance of gathering and disseminating information).

⁸⁸ 753 F.3d 1 (1st Cir. 2014).

⁸⁹ See N.H. REV. STAT. ANN. § 570-A:2 (2017).

⁹⁰ *Gericke*, 753 F.3d at 2–3.

⁹¹ *Id.* at 3–4.

⁹² See *id.* at 7. A traffic stop, regardless of the additional circumstances, is still a public police act. See *id.* at 7. Therefore, “a traffic stop does not extinguish an individual’s right to film.” *Id.*

encompass a citizen's right to record to traffic stops.⁹³ However, the court approved of future reasonable restrictions when justified by the circumstances.⁹⁴

2. The Third Circuit

The two plaintiffs in *Fields v. City of Philadelphia*,⁹⁵ Richard Fields and Amanda Geraci, filed lawsuits that led to the Third Circuit's ruling, though their claims originated because of two separate incidents.⁹⁶ In September 2012, Geraci filmed officers arresting a protester during an anti-fracking demonstration.⁹⁷ During the filming, "[a]n officer abruptly pushed Geraci . . . against a pillar," which effectively "prevented her from . . . recording the arrest."⁹⁸ In 2013, Fields used his iPhone to photograph "police . . . breaking up a house party across the street."⁹⁹ An officer arrested Fields and searched his phone.¹⁰⁰ Though neither plaintiff was charged, both filed 42 U.S.C. § 1983 claims, alleging the individual police officers, and by extension the City of Philadelphia, violated their constitutional rights.¹⁰¹ Because of the similarity in their claims, the court consolidated their suits for discovery, dispositive motions, and trial.¹⁰²

⁹³ See *id.* at 7–8. The First Circuit held that "First Amendment principles apply equally to the filming of a traffic stop and the filming of an arrest in a public park." *Id.* at 7. "In both instances, the subject of filming is 'police carrying out their duties in public.'" *Id.* (quoting *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011)). In doing so, the court extended *Glik*: "[I]t is clearly established in this circuit that police officers cannot, consistently with the Constitution, prosecute citizens for violating wiretapping laws when they peacefully record a police officer performing his or her official duties in a public area." *Id.* at 5.

⁹⁴ See *id.* at 8 (finding "[t]he circumstances of some traffic stops, particularly when the detained individual is armed, might justify a safety measure—for example, a command that bystanders disperse—that would incidentally impact an individual's exercise of the First Amendment right to film"); see also *supra* note 73 and accompanying text.

⁹⁵ 166 F. Supp. 3d 528 (E.D. Pa. 2016). Notably, the district court's opinion contains a more detailed factual record and analysis than the Third Circuit. See *generally id.*; see also *infra* note 96 and accompanying text.

⁹⁶ See *Fields v. City of Philadelphia*, 862 F.3d 353, 356 (3d Cir. 2017).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Fields v. City of Philadelphia*, 166 F. Supp. 3d 528, 533 (E.D. Pa. 2016).

¹⁰² See *id.* at 528.

The U.S. District Court for the Eastern District of Pennsylvania held the plaintiffs did not have the First Amendment right “to observe and record police officers absent some other expressive conduct,”¹⁰³ citing the lack of Third Circuit or Supreme Court precedent.¹⁰⁴ The court noted that because neither plaintiff spoke during the incidents, their act of recording would only be protected if understood as expressive conduct.¹⁰⁵ The court declined to expand First Amendment protection to the act of observing and recording, finding there was no “authority compelling this broad a reading of First Amendment precedent.”¹⁰⁶ Accordingly, the court declined “to create a new First Amendment right for citizens to photograph officers when they have no expressive purpose such as challenging police actions.”¹⁰⁷ Fields and Geraci appealed the ruling to the Third Circuit, which rejected the lower court’s reasoning.¹⁰⁸

The Third Circuit disagreed with the lower court, holding the First Amendment protects citizens recording public police activity.¹⁰⁹ In its ruling, the Third Circuit emphasized the importance of “[a]ccess to information regarding public police activity,” also alluding to the importance of the First Amendment in the discussion of governmental affairs.¹¹⁰ However, the Third Circuit also upheld the First Circuit’s imposition of reasonable restrictions.¹¹¹

¹⁰³ *Id.* at 533.

¹⁰⁴ *See id.* at 534–35 (noting the Third Circuit “has never held speech unaccompanied by an expressive component is always afforded First Amendment protection”).

¹⁰⁵ *See id.* at 535–37.

¹⁰⁶ *Id.* at 535.

¹⁰⁷ *Id.* at 542.

¹⁰⁸ *See* Fields v. City of Philadelphia, 862 F.3d 353, 355 (3d Cir. 2017) (“[T]his case is not about whether Plaintiffs expressed themselves through conduct. It is whether they have a First Amendment right of access to information about how our public servants operate in public.”).

¹⁰⁹ *Id.* at 355–56.

¹¹⁰ *See id.* at 359.

¹¹¹ *See id.* at 360 (“We do not say that all recording is protected or desirable. The right to record police is not absolute. ‘[I]t is subject to reasonable time, place, and manner restrictions.’” (quoting Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3d Cir. 2010))); *see also supra* note 73. Time, place, and manner restrictions are the typical restrictions that a court applies to the act of recording, *see supra* note 73 and accompanying text, however, discussion of these restrictions is outside the scope of this Note.

3. The Fifth Circuit

In 2017, the Fifth Circuit addressed citizen surveillance of police officers in *Turner v. Lieutenant Drive*.¹¹² While standing on public property, the defendant, Phillip Turner, attempted to record a police station when two officers approached him and asked him to identify himself.¹¹³ After Turner refused to provide his identification, he was arrested.¹¹⁴ At the precise point of his arrest, the Fifth Circuit held Turner did not have the “clearly established” right to record police activity, thereby entitling the officers to qualified immunity.¹¹⁵ However, the Fifth Circuit held this right exists moving forward,¹¹⁶ affirmatively holding that citizens have the right to record police officers performing their public duties.¹¹⁷ The court, referring to the decisions of other circuits, agreed that the right to film police promotes First Amendment principles, but opined that the right was subject to similar limitations, such as time, place, and manner restrictions.¹¹⁸

4. The Seventh Circuit

In 2012, in *American Civil Liberties Union of Illinois v. Alvarez*,¹¹⁹ the Seventh Circuit affirmed the right to record police in public.¹²⁰ At issue was a statute enacted by the Illinois General Assembly in 1961 criminalizing the use of electronic devices which could “record all or part of any oral conversation without [the] consent” of the speakers.¹²¹ The law was subsequently “amended . . . to require the consent of ‘all of the parties’ to the

¹¹² See 848 F.3d 678, 683 (5th Cir. 2017).

¹¹³ *Id.*

¹¹⁴ See *id.* (“Turner asked the officers whether he was being detained, and Grinalds [one of the officers] responded that Turner was being detained for investigation and that the officers were concerned about who was walking around with a video camera. Turner asked for which crime he was being detained, and Grinalds replied, ‘I didn’t say you committed a crime.’ Grinalds elaborated, ‘We have the right and authority to know who’s walking around our facilities.’”).

¹¹⁵ *Id.* at 685.

¹¹⁶ See *id.* at 687–90.

¹¹⁷ See *id.*

¹¹⁸ See *id.* at 689.

¹¹⁹ 679 F.3d 583 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012).

¹²⁰ See *id.* at 608.

¹²¹ *Id.* at 587.

conversation.”¹²² Here, the ACLU, a civil liberties organization, filed a pre-enforcement action against the State of Illinois, requesting declaratory and injunctive relief to bar enforcement of the eavesdropping statute.¹²³

The ACLU proposed a police accountability program to better hold law enforcement officials accountable for their actions.¹²⁴ This plan included plans to publish recordings of police officers speaking at an audible volume while performing their duties in public.¹²⁵ Based on its familiarity with the statute, and before implementation of the plan to collect recordings, the ACLU filed the pre-emptive suit against Alvarez to protect their videographers from prosecution.¹²⁶ The Seventh Circuit recognized that a citizen’s right to record police activity is protected via “the First Amendment’s guarantee of free speech and press rights,”¹²⁷ after extensively reviewing the First Amendment jurisprudence.¹²⁸ The Seventh Circuit held the Illinois eavesdropping statute burdens individual speech and free press rights, based on “the expansive reach of the statute[;]”¹²⁹ and concluded by granting a preliminary injunction to prevent its application against the ACLU and its agents.¹³⁰

¹²² *Id.*; see also 720 ILL. COMP. STAT 5/14-2(a)(1) (2012).

¹²³ See *Alvarez*, 679 F.3d at 588.

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ See *id.* at 586.

¹²⁷ See *id.* at 595 (finding that “[a]udio and audiovisual recording are media of expression commonly used for the preservation and dissemination of information and ideas” and are therefore protected by the First Amendment’s free speech and free press rights).

¹²⁸ See *id.* at 589, 595–603. The court of appeals noted at the outset that the State of Illinois had staked out an “extreme position,” rejecting the notion that openly recording the speech of police officers while they performed their duties in public was not protected by the First Amendment. See *id.* at 594.

¹²⁹ *Id.* at 595 (noting “the statute sweeps much more broadly, banning *all* audio recording of *any* oral communication absent consent of the parties regardless of whether the communication is or was intended to be private” (emphasis in original)).

¹³⁰ See *id.* at 608.

5. The Ninth Circuit

In *Fordyce v. City of Seattle*,¹³¹ the Ninth Circuit reversed a grant of summary judgment to police officers who allegedly assaulted a marcher who attempted to film police interference with a public protest.¹³² On August 5, 1990, Jerry Edmon Fordyce, a participant in the protest, attempted to videotape the public march “presumably for broadcast on a public access channel.”¹³³ Though recording the overall protest, Fordyce also recorded the activities of police officers monitoring the protest.¹³⁴ When “attempt[ing] to videotape sidewalk bystanders,” Fordyce was arrested for violating a Washington privacy statute.¹³⁵ Because Fordyce’s appeal was based on an alleged assault and battery incident, the Ninth Circuit did not engage in a thorough discussion of the First Amendment right to record police.¹³⁶ However, the court briefly noted the existence of the right to record matters of public interest (i.e., the police in a public setting), albeit in dicta.¹³⁷

6. The Eleventh Circuit

In 2000, the Eleventh Circuit recognized that a broad First Amendment right to photograph or videotape police exists.¹³⁸ James and Barbara Smith sued the City of Cumming, Georgia alleging that the police prevented Mr. Smith “from videotaping police actions.”¹³⁹ The U.S. District Court for the Northern District of Georgia granted summary judgment for the city.¹⁴⁰ However, the court of appeals reversed, holding that “[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.”¹⁴¹ Though the opinion is short, the Eleventh

¹³¹ 55 F.3d 436 (9th Cir. 1995).

¹³² *See id.* at 438, 442.

¹³³ *Id.* at 438.

¹³⁴ *Id.*

¹³⁵ *Id.*; *see also* WASH. REV. CODE § 9.73.030 (2017) (forbidding the recording of private conversations without the consent of all participants).

¹³⁶ *See Fordyce*, 55 F.3d at 438–42.

¹³⁷ *See id.* at 440.

¹³⁸ *See Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

¹³⁹ *Id.* at 1332.

¹⁴⁰ *See id.*

¹⁴¹ *Id.* at 1333.

Circuit recognized the First Amendment right to record police, similarly subject to reasonable restrictions.¹⁴² Nonetheless, the court dismissed the complaint, determining that the Smiths failed to prove the police officers had violated that right based on the facts alleged in the complaint.¹⁴³ As stated by the majority of circuit courts, the First Amendment protects recording of police activity not only as a form of expressive activity, but also in support of First Amendment principles by promoting the discussion of governmental affairs.¹⁴⁴

B. Eighth Circuit Holding Recordation Right Does Not Exist

Most recently, the Eighth Circuit, in *Akins v. Knight*, upheld a lower court ruling that citizens do not have a First Amendment right to videotape the police or any public official in public.¹⁴⁵ Matthew Akins of Columbia, Missouri claimed the local police department retaliated against him after multiple attempts to record police activity.¹⁴⁶ While videotaping the encounters, Akins typically stood on public property, such as a street or sidewalk.¹⁴⁷ Based on previous interactions with the police, Akins formed a group called Citizens for Justice in 2010, which aimed to document and report on police activity.¹⁴⁸ Akins regularly videotaped police activity and posted the videos onto the Missouri police department Facebook website on several occasions.¹⁴⁹ In

¹⁴² See *id.*; see also *supra* note 73 and accompanying text.

¹⁴³ See *Smith*, 55 F.3d at 1333.

¹⁴⁴ See *supra* Sections II.A.1–6.

¹⁴⁵ See 863 F.3d 1084, 1088 (8th Cir. 2017) (per curiam) (affirming grant of summary judgment motion to dismiss complaint on constitutional grounds).

¹⁴⁶ See *Akins v. City of Columbia*, No. 2:15-CV-04096-NKL, 2016 WL 4126549, at *16–17 (W.D. Mo. Aug. 2, 2016).

¹⁴⁷ See, e.g., *id.* at *7.

¹⁴⁸ See *Akins*, 863 F.3d at 1085; *Akins*, 2016 WL 4126549, at *6. Akins founded the technology-based “interactive community resource” based on his frustrations with local police officers. See Brad Racino, *Citizens for Justice Keep Watchful Eyes on Columbia Police Department*, COLUMBIA MISSOURIAN (Feb. 13, 2012), https://www.columbiamissourian.com/news/citizens-for-justice-keep-watchful-eyes-on-columbia-police-department/article_895281f4-a37e-5f8a-9c14-be38f26747a9.html [<https://perma.cc/A6ZP-G5A5>]. Previous encounters with law enforcement officers solidified Akins’s belief that many police officers often overstepped their authority. See *id.* Thus, Akins founded this organization to not only hold police accountable, but also to support local activism in police reform. See *id.*

¹⁴⁹ See *Akins*, 2016 WL 4126549, at *8.

2011, Akins was in the police department lobby and attempted to film a person wearing a Ku Klux Klan hood.¹⁵⁰ While filming, he was instructed to stop and ultimately complied.¹⁵¹ Approximately four years later, “[i]n October 2015, the Police Department held an invitation-only ‘Media Training Day,’” only inviting traditional media members due to space limitations.¹⁵² Despite not receiving an invitation, Akins attempted to RSVP to the event, but organizers informed him that he was not invited and could not attend.¹⁵³

Akins filed suit against Boone County Prosecutor, Dan Knight, and several Columbia police officers, citing violations of his First Amendment right, among other miscellaneous claims.¹⁵⁴ The U.S. District Court for the Western District of Missouri ruled that Akins, and by extension, any citizen or member of the traditional press—i.e., individuals representing traditional media organizations—have no right to record the activities of public officials on public property.¹⁵⁵ Akins appealed the decision, arguing that the district court judge should have recused herself from the case, and the lower court erred in “granting the defendant’s motion to dismiss and for summary judgment.”¹⁵⁶ The Eighth Circuit affirmed the district court’s decision.¹⁵⁷ In affirming the lower court’s decision, the Eighth Circuit also affirmed the district court’s finding that Akins had no right to film police activity.¹⁵⁸

¹⁵⁰ See *id.* at *7.

¹⁵¹ See *id.*

¹⁵² *Id.* at *8.

¹⁵³ See *id.*

¹⁵⁴ See *Akins v. Knight*, 863 F.3d 1084, 1085 (8th Cir. 2017).

¹⁵⁵ See *Akins*, 2016 WL 4126549, at *17 (finding Akins “has no constitutional right to videotape any public proceeding he wishes to”); see also *id.* (“[N]either the public nor the media has a First Amendment right to videotape, photograph, or make audio recordings of government proceedings that are by law open to the public.” (citing *Rice v. Kempker*, 374 F.3d 675, 678 (8th Cir. 2004))).

¹⁵⁶ *Akins*, 863 F.3d at 1086.

¹⁵⁷ See *id.* at 1088.

¹⁵⁸ See *id.*; see also *supra* note 155 and accompanying text.

III. PROPOSAL FOR THE SUPREME COURT TO RULE ON THE ISSUE OF THE CITIZEN'S RIGHT TO RECORD

Whether it intended to or not, the Eighth Circuit decision contradicts other circuit courts by holding that the right to record police officers in public does not exist.¹⁵⁹ Considering the importance of this right, especially in relation to the underlying First Amendment cornerstone of free discussion of governmental affairs, the Supreme Court must overrule any lower court decision endangering this right. Without this right, citizens in the Eighth Circuit are stripped of an important mechanism to hold the police accountable for their activities. Section III.A proposes that the act of video recording official public police activity qualifies as speech, thereby entitling it to First Amendment protections.¹⁶⁰ Section III.B explains that because of this constitutional protection, citizens have the right to disseminate these recordings.¹⁶¹ Finally, Section III.C explains that the societal benefits far outstrip the potential negative consequences of these recordings.¹⁶²

A. Act of Recording Amounts to Speech Triggering First Amendment Protections

The First Amendment protects video recordings because “conduct is necessary to produce speech,”¹⁶³ and courts have “increasingly recognize[d] that the antecedent process of speech

¹⁵⁹ See *supra* Part II.

¹⁶⁰ See *infra*, Section III.A.

¹⁶¹ See *infra*, Section III.B.

¹⁶² See *infra*, Section III.C.

¹⁶³ Clay Calvert, *The Right to Record Images of Police in Public Places: Should Intent, Viewpoint, or Journalistic Status Determine First Amendment Protection?*, 64 UCLA L. REV. DISCOURSE 230, 241 (2016). The Supreme Court has recognized some First Amendment protection for the speech process, and not merely the expressive end product. See *infra* notes 166–78 and accompanying text. First Amendment jurisprudence separates speech from conduct. See Randall P. Bezanson, *Is There Such a Thing as Too Much Free Speech?*, 91 OR. L. REV. 601, 601 (2012) (emphasizing that the First Amendment guarantee of free speech traditionally “has rested on two fundamental boundaries: speech versus conduct and liberty versus utility”); Martin H. Redish, *Fear, Loathing, and the First Amendment: Optimistic Skepticism and the Theory of Free Expression*, 76 OHIO ST. L.J. 691, 700 (2015) (addressing “the fundamental distinction between speech and conduct”).

creation” deserves protection.¹⁶⁴ The Ninth Circuit in *Anderson v. City of Hermosa Beach* confronted the issue of First Amendment protections for alternative conceptualizations of speech.¹⁶⁵ In *Anderson*, Johnny Anderson, a tattoo artist, attempted to open a tattoo parlor in Hermosa Beach, California, a city with a pre-existing municipal ordinance effectively banning tattoo parlors.¹⁶⁶ Anderson alleged that the ordinance violated his First and Fourth Amendment rights.¹⁶⁷ The Ninth Circuit reasoned:

Neither the Supreme Court nor our court has ever drawn a distinction between the process of creating a form of *pure* speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded. Although writing and painting can be reduced to their constituent acts, and thus described as conduct, we have not attempted to disconnect the end product from the act of creation.¹⁶⁸

The Ninth Circuit thus concluded that the First Amendment protected the entire process of tattooing—beginning with the act of creation—as a form of expressive activity.¹⁶⁹ Because little to no time lag exists between the act of pushing the record button “and the result[ing] image[,]” the First Amendment—similar to tattoos—protects video recordings as a form of expressive activity, from its moment of creation.¹⁷⁰ No legal difference exists separating the unprotected act of recording from the speech it immediately produces.¹⁷¹

¹⁶⁴ Calvert, *supra* note 163, at 241. *See, e.g.*, *Buehrle v. City of Key West*, 813 F.3d 973, 978 (11th Cir. 2015); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010); *Coleman v. City of Mesa*, 284 P.3d 863, 870 (Ariz. 2012).

¹⁶⁵ *See Anderson*, 621 F.3d at 1055 (noting that the case is one of first impression, involving the First Amendment protections for tattoo parlors).

¹⁶⁶ *See id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 1061–62 (emphasis in original).

¹⁶⁹ *See id.* at 1060 (“The tattoo *itself*, the *process* of tattooing, and even the *business* of tattooing are not expressive conduct but purely expressive activity fully protected by the First Amendment.” (emphasis in original)); *see also* Calvert, *supra* note 163, at 234.

¹⁷⁰ *See* Calvert, *supra* note 163, at 234.

¹⁷¹ *See id.*

Furthermore, the Supreme Court has consistently viewed film as deserving of First Amendment protections.¹⁷² Therefore, the First Amendment protects the act of making film, as “there is no fixed First Amendment line between the act of creating speech and the speech itself.”¹⁷³ Because recording the police activity is necessary for the film’s creation, the First Amendment protects this prior act of recordation.¹⁷⁴ If the preliminary act of recordation was unprotected, the accompanying First Amendment rights of publication or broadcast would be essentially valueless.¹⁷⁵ Within First Amendment jurisprudence, the Supreme Court has rejected narrow definitions of “speech” or “press,” finding both terms to be expansive given the importance of this right in American society.¹⁷⁶ Perhaps most significantly, the Supreme Court found that in the absence of these broader surrounding rights, specifically enumerated rights would be more vulnerable.¹⁷⁷ If the First Amendment failed to protect the recording of public police actions,

¹⁷² *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017); *see also* *Kingsley Int’l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 688 (1959) (“[T]he First Amendment’s basic guarantee is of freedom to advocate ideas. The State, quite simply, has thus struck at the very heart of constitutionally protected liberty.”); *Superior Films, Inc. v. Dep’t of Educ. of Ohio*, 346 U.S. 587, 589 (1954) (Douglas, J., concurring) (“Motion pictures are of course a different medium of expression than the public speech, the radio, the stage, the novel, or the magazine. But the First Amendment draws no distinction between the various methods of communicating ideas.”); *Burstyn v. Wilson*, 343 U.S. 495, 502 (1952) (“[W]e conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First . . . Amendment[.]”).

¹⁷³ *Turner*, 848 F.3d at 688–89 (quoting *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012)); *see also Alvarez*, 679 F.3d at 596 (citing *Anderson*, 621 F.3d at 1061–62), *cert. denied*, 133 S. Ct. 651 (2012).

¹⁷⁴ *See Calvert*, *supra* note 163, at 243.

¹⁷⁵ *Alvarez*, 679 F.3d at 595 (“The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected . . .” (emphasis in original)).

¹⁷⁶ *See Calvert*, *supra* note 163, at 244; *see also supra* note 50 and accompanying text (explaining the concept of penumbral rights); *see also Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (“The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, [and] the right to read.”).

¹⁷⁷ *See Griswold*, 381 U.S. at 482–83; *see also Calvert*, *supra* note 163, at 244.

the very existence of the resulting images, and free speech by proxy, would be threatened as well.¹⁷⁸

B. Right to Disseminate Recordings of Police Activity

Citizens can disseminate recordings of police activity because any interference would constitute an unconstitutional restraint on speech.¹⁷⁹ In *N.Y. Times Co. v. United States*, the Supreme Court criticized interfering with the dissemination of information.¹⁸⁰ As discussed above, such restraints on dissemination relate to the prior act of recording public police activity.

In his concurring opinion, Justice Black noted the Founding Fathers sought to prevent the government from censoring the press to prevent the government from abusing its power.¹⁸¹ In the age of constant connectivity and the twenty-four-hour news cycle, citizens recording and disseminating such information functions as the same check on government abuse as traditional news outlets.¹⁸² However, because an overarching presumption of unconstitutionality remains,¹⁸³ essentially any restriction on disseminating information is presumptively invalid.

C. Laws Negatively Impacting the Citizen's Right to Record Are Unconstitutional

The First Amendment prevents the government from restricting speech based on “its message, its ideas, its subject matter, or its content.”¹⁸⁴ Therefore, laws attempting to limit the citizen’s right to record affect constitutionally protected speech rights. Statutes

¹⁷⁸ See Calvert, *supra* note 163, at 244.

¹⁷⁹ See Jacqueline G. Waldman, Note, *Prior Restraint and the Police: The First Amendment Right to Disseminate Recordings of Police Behavior*, 2014 U. ILL. L. REV. 311, 343–45 (2014).

¹⁸⁰ 403 U.S. 713, 714 (1971) (per curiam).

¹⁸¹ See *id.* at 717. If the press is not “free and unrestrained,” it cannot “effectively expose deception in government.” *Id.* See also Waldman, *supra* note 179, at 322.

¹⁸² See *id.* at 324–26, 333.

¹⁸³ See *id.* at 323; see, e.g., *N.Y. Times Co.*, 403 U.S. at 726 (Brennan, J., concurring) (“Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment’s ban on prior judicial restraint may be overridden.”).

¹⁸⁴ *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 603 (7th Cir. 2012) (citing *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)), *cert. denied*, 133 S. Ct. 651 (2012).

that impose liability on citizens recording police action impede speech by restricting the “use of common instruments of communication.”¹⁸⁵ Regulating the use of a recording device in regard to a particular subject (i.e., police officers) “suppresses speech just as effectively as restricting the [later] dissemination of a recording.”¹⁸⁶ Criminalizing the recording of police interactions “necessarily limits” later access to that information, inevitably impinging on First Amendment rights.¹⁸⁷ Accordingly, if a statute “interferes with the gathering and dissemination of information about [police officers] performing their duties,”¹⁸⁸ it is subject to strict scrutiny as a result of its impact on First Amendment principles.¹⁸⁹ Laws that restrict speech based on its content are facially invalid; therefore, the burden shifts to the government to overcome this presumption of unconstitutionality.¹⁹⁰

¹⁸⁵ *Id.* at 600 (“In short, the eavesdropping statute restricts a medium of expression—the use of a common instrument of communication—and thus an integral step in the speech process. As applied here, it interferes with the gathering and dissemination of information about government officials performing their duties in public. Any way you look at it, the eavesdropping statute burdens speech and press rights and is subject to heightened First Amendment scrutiny.”).

¹⁸⁶ *Id.* at 596.

¹⁸⁷ *See id.* at 597.

¹⁸⁸ *Id.* at 600.

¹⁸⁹ *See id.* at 603. The *Alvarez* court stated that “[u]nlike the federal wiretapping statute and the eavesdropping laws of most other states, the gravamen of the Illinois eavesdropping offense [was] not the secret interception of surreptitious recording of a private communication.” *Id.* at 595. The court reasoned that the statute did not sufficiently advance the State’s interest in protecting conversational privacy. *See id.* at 606. Instead, the court held the Illinois statute was much broader, banning “*all* audio recording of *any* oral communication absent consent of the parties regardless of whether the communication is or was intended to be private.” *Id.* at 595 (emphasis in original). The court concluded that “[t]he expansive reach of th[e] statute [wa]s hard to reconcile with basic speech and press freedoms.” *Id.* The court rejected the State Attorney’s argument that the broad sweep of this statute was legitimized by the government’s interest in protecting conversational privacy, noting that this interest was not implicated, and the application of the statute would likely fail even under a relatively lenient intermediate standard of scrutiny applicable to content-neutral burdens of speech. *See id.* at 586–87.

¹⁹⁰ *See id.* at 603 (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010)).

D. Police Officers Performing Their Official Duties in Public Have No Reasonable Expectation of Privacy

The *Katz* test applies to police officers in evaluating whether police officers have a privacy interest when performing their duties in public.¹⁹¹ The test, so applied, functionally collapses into a single inquiry: can a police officer reasonably expect his public actions will not be recorded?¹⁹² If police officers are found to possess this requisite privacy interest, their activities would be protected from recording.¹⁹³

As a matter of law, most public interactions with police officers lack a reasonable expectation of privacy.¹⁹⁴ This diminished privacy expectation is anchored in *Katz*, such “that knowing[ly] expos[ing] a conversation to the public is tantamount to . . . surrender[ing its] constitutional protection.”¹⁹⁵ In fact, courts have generally concluded that people conversing in open and public spaces have no objective privacy expectation.¹⁹⁶ Of utmost importance, the Court held that communications during traffic stops—comparatively a smaller and more contained interaction—are akin to open and public conversations, and thus, may receive no justifiable Fourth Amendment protection.¹⁹⁷

¹⁹¹ See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (enumerating what would come to be adopted as the *Katz* test, and providing that a “person,” which would include a police officer, has a reasonable expectation of privacy).

¹⁹² See, e.g., *Hornberger v. Am. Broad. Cos.*, 799 A.2d 566, 592 (N.J. Super. Ct. App. Div. 2002) (applying the *Katz* test to police officers).

¹⁹³ See *id.*

¹⁹⁴ See, e.g., *Berkemer v. McCarty*, 468 U.S. 420, 438 (1984); *Kee v. City of Rowlett*, 247 F.3d 206, 217 n.21 (5th Cir. 2001); *Hornberger*, 799 A.2d at 593.

¹⁹⁵ Jesse Harlan Alderman, *Police Privacy in the iPhone Era?: The Need for Safeguards in State Wiretapping Statutes to Preserve the Civilian’s Right to Record Public Police Activity*, 9 FIRST AMEND. L. REV. 487, 516–17 (2011). See *Katz*, 389 U.S. at 351.

¹⁹⁶ See *Katz*, 389 U.S. at 351 (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”); see also *Kee*, 247 F.3d at 217 n.21; *Wishart v. McDonald*, 500 F.2d 1100, 1113–14 (1st Cir. 1974) (finding “[t]he right of privacy . . . may be surrendered by public display”); *Hornberger*, 799 A.2d at 593.

¹⁹⁷ See *Berkemer*, 468 U.S. at 437–38; see also *Chambers v. Maroney*, 399 U.S. 42, 48 (1970). In *Chambers*, the Court held that individuals usually lack an objective expectation of privacy in an automobile because cars are exposed to the public. See *Chambers*, 399 U.S. at 48. Additionally, vehicles can be moved quickly and therefore it is not practical to require officers to secure a warrant. See *id.*

Additional factors also weigh against an objective privacy expectation for police.¹⁹⁸ Because police must later report their official communications, any privacy expectation is necessarily diluted.¹⁹⁹ Under *Katz*, an officer's duty to accurately report his actions—whether at trial or elsewhere—creates exposure, thereby eliminating any privacy right the officer may have against recordation.²⁰⁰ Furthermore, witnesses to a police interaction “are regularly called into court to repeat or testify about the encounter.”²⁰¹ Thus, under Justice Harlan's *Katz* two-part test, a police officer in public has no reasonable expectation of privacy.²⁰²

As detailed by numerous courts, police officers, in the public performance of their duties, have no reasonable expectation of privacy.²⁰³ “[T]he public interest in detecting, punishing, and deterring crime” outweighs the privacy rights of police officers acting in their official law-abiding capacity.²⁰⁴ Therefore, police officers in public lack the requisite privacy interest to qualify for protection under state and federal wiretapping statutes.²⁰⁵

E. Benefits of Recordings Trigger Protection

Numerous arguments support citizens recording police activity. Recordings of police activity can provide probative evidence in criminal cases, ensure civil rights claims are properly upheld, and allow the public to hold the police accountable.²⁰⁶

¹⁹⁸ See *Katz*, 389 U.S. at 351.

¹⁹⁹ *Kee*, 247 F.3d at 214 (listing six nonexclusive factors to evaluate subjective expectation of privacy which include, inter alia, “the potential for communications to be reported”).

²⁰⁰ See *id.* at 214–15.

²⁰¹ See Alderman, *supra* note 195, at 516–17.

²⁰² See *Kee*, 247 F.3d at 215 (summing up a framework of factors for the *Katz* test applied to officers that implicates a dearth of reasonable privacy expectations).

²⁰³ See *id.*; see also *Katz*, 389 U.S. at 361; *Commonwealth v. Henlen*, 564 A.2d 905, 906–07 (Pa. 1989); *Hornberger v. Am. Broad. Cos.*, 799 A.2d 566, 595 (N.J. Super. Ct. App. Div. 2002); *State v. Flora*, 845 P.2d 1355, 1357–58 (Wash. Ct. App. 1992).

²⁰⁴ See *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 598–600 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012). *Cf. Branzburg v. Hayes*, 408 U.S. 665, 700 (1972).

²⁰⁵ See *Hornberger*, 799 A.2d at 595; see also *Henlen*, 564 A.2d at 907; *Flora*, 845 P.2d at 1358.

²⁰⁶ Alderman, *supra* note 195, at 525–26.

1. Video Evidence Provides Probative Evidence in Criminal Cases

“[I]t is increasingly common for dispositive evidence in criminal trials to come from common mobile devices.²⁰⁷ However, wiretapping statutes pose a dangerous problem in states that prohibit . . . recording.”²⁰⁸ Wiretapping statutes would effectively suppress video or audio evidence instead of providing additional evidence relevant for the prosecution or defense.²⁰⁹ State laws that bar recordings would then hinder the prosecution of police officers, even if the misconduct could have been captured on tape.²¹⁰ Unfortunately, if a statute criminalizes third-party recording, police officers could charge the civilian recorder, and escape accountability in the event of wrongdoing.²¹¹ In other words, criminal trials might exclude “exculpatory evidence collected in violation of wiretapping statutes,” preventing “true justice” from being served.²¹² By allowing citizens to record, the potential evidentiary value for trial will benefit society by helping to convict guilty parties and assist in the exoneration of innocent individuals.

2. Vindication of Civil Rights in Section 1983 Claims

Laws preventing police officers from being publicly recorded effectively exempt law enforcement from liability, even though

²⁰⁷ See, e.g., Timothy Williams, *Recorded on a Suspect's Hidden MP3 Player, a Bronx Detective Faces [Twelve] Perjury Charges*, N.Y. TIMES (Dec. 7, 2007), <http://www.nytimes.com/2007/12/07/nyregion/07cop.html> [<https://perma.cc/DAB9-PN7T>].

²⁰⁸ Alderman, *supra* note 195, at 526; see, e.g., *supra* notes 121–30 (noting the ACLU’s perceived need for a preliminary injunction against such a statute before commencing a police accountability program); see also *Project Veritas Action Fund v. Conley*, 244 F. Supp. 3d 256, 259 (D. Mass. 2017) (holding one such law from Massachusetts unconstitutional (citing Mass. Gen. Laws ch. 272, § 99 (West 1968))).

²⁰⁹ See Alderman, *supra* note 195, at 526; see also *supra* note 208 and accompanying text.

²¹⁰ See generally Alderman, *supra* note 195, at 525–30 (providing examples of incidents where video evidence proved to be uniquely probative).

²¹¹ See *Commonwealth v. Hyde*, 750 N.E.2d 963, 971–72 (Mass. 2001) (Marshall, C.J., dissenting) (“[H]ad police beaten Rodney King in Massachusetts” (prior to the holding in *Conley*, 244 F. Supp.3d at 259), “it might have been George Holliday, the recorder, rather than the four abusive officers, charged in the aftermath of the incident,” with his crime being “‘secretly’ recording police without consent.”).

²¹² Alderman, *supra* note 195, at 527.

Congress enacted section 1983 to provide citizens with legal recourse if their constitutional rights were infringed upon.²¹³ However, Section 1983 claims are civil, requiring the plaintiff to allege that they have suffered a constitutional deprivation by a preponderance of the evidence.²¹⁴ Given the potential impact of video and audio recordings, such evidence should be admitted when, otherwise, it might be excluded from being added to the evidentiary record.²¹⁵

The Supreme Court has admitted the value of such recordings, finding videos to create a near perfect evidentiary record, even in preliminary court proceedings.²¹⁶ In *Scott v. Harris*, the Supreme Court dismissed a section 1983 action, which alleged a law enforcement official intentionally drove his car into the suspect's car for the purpose of arrest.²¹⁷ The legal issue concerned whether the intentional collision violated the individual's Fourth Amendment right of freedom from "unreasonable seizure."²¹⁸ Although the appellate court is required to view the facts "most favorable to the non-moving party,"²¹⁹ Justice Scalia found an "added wrinkle in this case: existence in the record of a videotape capturing the events in question."²²⁰ The Court stated that when a recording contained applicable and dispositive proof, the fact finder should incorporate this evidence into its ruling.²²¹ Justice Scalia considered the value of this video evidence to be particularly probative, arguing that "[t]he Court of Appeals should not have rel[ied] on [the plaintiff's] visible fiction," rather, the lower court "should have viewed the facts in the light depicted by

²¹³ See *id.* at 528; see also 42 U.S.C. § 1983 (2012) (creating a private right of action for persons whose constitutional liberties are violated by persons acting under color of state law).

²¹⁴ See Alderman, *supra* note 195, at 529.

²¹⁵ See generally *Scott v. Harris*, 550 U.S. 372 (2007) (concerning a motorist who brought a section 1983 claim against police officers for allegedly using excessive force, in a case where a police recording was essentially dispositive).

²¹⁶ See *id.* at 380–81.

²¹⁷ See *id.* at 374–76.

²¹⁸ *Id.* at 375–76.

²¹⁹ *Id.* at 380; see also FED. R. CIV. P. 56(c).

²²⁰ See *Harris*, 550 U.S. at 378.

²²¹ *Id.* at 380–81 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986)).

the videotape.”²²² The overall benefit of allowing citizens to record police activity helps create reliable video evidence, and thus, would support a Supreme Court decision finding this right to exist.

3. Need for Symmetry and Police Reform

Symmetry of power dynamics must exist between police figures and the general public, “which favor recordation of custodial interrogations, confessions, and . . . field stops from cameras mounted on patrol cars.”²²³ In the United States, police reform advocates have successfully encouraged lawmakers to require confessions, interrogations, and identifications to be recorded.²²⁴ In addition, some jurisdictions have voluntarily introduced systemic recordings for the range of interpersonal interactions to comply with social norms.²²⁵ This increased power balance between police forces and the general public further supports the finding of the First Amendment right to record police activity.

Recording police activity can bring about cohesion and solidarity between police forces and the public, which would create a positive net benefit to society.²²⁶ The impact of distrust between police officers and society is significant, resulting in decreased compliance with and trust of law enforcement.²²⁷ It is possible to build trust through transparent information sharing.²²⁸ Transparency not only minimizes distrust of law enforcement but also allows for increased cooperation in civil society.²²⁹ For wider society to trust the government and police, citizens must be allowed to communicate their experiences and share information, instead of being criminalized for attempting to exercise this free

²²² *Id.*

²²³ Alderman, *supra* note 195, at 525–26.

²²⁴ *Id.* at 530–31.

²²⁵ *Id.*

²²⁶ See Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *YALE L.J.* 2054, 2083 (2017); see also Erik Luna, *Transparent Policing*, 85 *IOWA L. REV.* 1107, 1120–31 (2000) (describing the democratic bases for increasing availability of governmental information about policing).

²²⁷ See Luna, *supra* note 226, at 1158–60.

²²⁸ See *id.* at 1163.

²²⁹ *Id.* at 1159–60, 1163–64.

speech right.²³⁰ If police interactions follow official guidelines and rules, data and transparency can further solidify the relationship between officers and communities.²³¹

CONCLUSION

Fundamental and practical evidentiary value exists in recordings of public police activity. Any government ability to prevent recordings of its own activities or suppression of a citizen's innocence is deeply problematic. Moreover, recordings of encounters between civilians and law enforcement often produce reliable evidence, which can increase trust in the criminal justice system. Given this issue's importance, in addition to the impact on the First and Fourth Amendments, the current circuit split requires intervention from the Supreme Court. The Founding Fathers' emphasis on free speech and resulting protections afforded to it reflect its importance in American legal jurisprudence. Therefore, as the majority of circuit courts have stated, the First Amendment protects civilians' right to record police officials performing their duties in public. This constitutional classification not only protects the recording in future dissemination but also protects the recording from statutes trying to infringe upon this right. Further, Fourth Amendment jurisprudence indicates police officers have no reasonable expectation of privacy when publicly performing their official duties. Finally, courts should strictly scrutinize any regulatory statute attempting to interfere with this right to record to promote the exercise of free speech and transparent democracy.

²³⁰ *Id.* at 1164.

²³¹ *See id.* at 2144. *See generally* Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 *L. & SOC'Y REV.* 103 (1988).