Case Nos. 16-1650 and 16-1651

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RICHARD FIELDS,
Plaintiff-Appellant,
v.
CITY OF PHILADELPHIA, *et al.*,
Defendant-Appellees.

AMANDA GERACI,
Plaintiff-Appellant,
v.
CITY OF PHILADELPHIA, *et al.*,
Defendant-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

AMICUS CURIAE BRIEF OF THE RUTHERFORD INSTITUTE IN SUPPORT OF THE APPELLANTS AND REVERSAL

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court, as well as the U.S. Supreme Court and other federal courts of appeal, on numerous occasions over the Institute's 34-year history, including *Layshock v. The Hermitage School District*, 650 F.3d 205 (3d Cir. 2011).

One of the purposes of the Institute is to advance the preservation of the most basic freedoms our nation affords its citizens – in this case, the First Amendment right of individuals to photograph and videotape record law enforcement personnel in public places without fear of reprisal.

STATEMENT PURSUANT TO RULE 29(c)(5)

Pursuant to Fed. R. App. P. 29(c)(5), *Amicus Curiae* states that: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money intended to fund preparing or submitting this brief; and (3) no person – other than *Amicus Curiae*, its members or its counsel – contributed money intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

This case comes before the Court on a matter of significant constitutional and public concern – whether individuals may photograph or videotape law enforcement personnel in public places regardless of whether the recording is "expressive" in nature. In concluding that no such right exists under U.S. Const. Amend. 1, the District Court ruled in direct conflict with the decisions of multiple courts of appeal throughout the country and, if not reversed, the District Court's ruling will have a significant chilling effect on the First Amendment activities of numerous citizens.

Amicus Curiae respectfully submits that this Court should reverse the District Court's decision so that citizens located in this Circuit will enjoy the same constitutional rights as their fellow citizens across the country. Not only is the right to photograph and videotape law enforcement activities and personnel in public places now an established First Amendment right across the nation (regardless of whether the activity may be deemed "expressive"), but the right is essential to protect the citizen-press, which plays an ever-increasingly important role in the dissemination of information. Because the photographing and videotaping of law enforcement personnel might be unpopular with the subjects, citizens in this Circuit run the risk of retaliation, including arrest and incarceration, for engaging in the same activities that are constitutionally protected elsewhere.

Moreover, without a robust First Amendment right to photograph or videotape law enforcement personnel and activities in public places, similar abuses to those that have recently been uncovered will almost certainly go unnoticed and unchallenged.

ARGUMENT

1. Regardless of Whether It Is "Expressive," The Right to Photograph and Videotape Law Enforcement Personnel and Activities in Public Fora Is An Established First Amendment Right That Should Be Formally Acknowledged By this Court

In *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972), the Supreme Court noted that "without some protection for seeking out the news, freedom of the press could be eviscerated." This is precisely the issue that the Court faces in this case. As Professor Kreimer notes, "[i]mage capture can document activities that are proper subjects of public deliberation but which the protagonists would prefer to keep hidden and deniable." Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Penn. L. Rev. 335, 345 (2011).

If affirmed, the District Court's ruling below would take the right to create such pictures out of the hands of individuals located in this Circuit in situations where they film matters of significant public concern – law enforcement encounters with citizens that occur in public places. This is particularly concerning because police operations in public streets and sidewalks "are areas that have

historically been open to the public for speech activities." *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014). Moreover, the conduct of police, as government officials, is a matter of public concern, and speech regarding matters of public concern is, as the Supreme Court has repeatedly reiterated, including recently in *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011), at the heart of the First Amendment. Such a "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The recording of citizen interactions with law enforcement is hardly a new phenomenon. *See* Charles E. Jones, *The Political Repression of the Black Panther Party 1966–1971: The Case of the Oakland Bay Area*, 18 J. Black Stud. 415, 417 (1988) (reporting on the "Panther Police Patrol," which deployed tape recorders and cameras to document police stops). Accordingly, it is no surprise that this Circuit's sister circuits have found a constitutional right to videotape and photograph law enforcement personnel when they conduct operations in public. For example, the Ninth Circuit has held that an individual's "First Amendment rights were clearly established at the time of his arrest" when photographing police actions. *Adkins v. Limtiaco*, 537 F. App'x 721, 722 (9th Cir. 2013). The First Circuit framed the question directly by asking "is there a constitutionally protected

right to videotape police carrying out their duties in public?" *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011). The court held that

> [b]asic First Amendment principles, along with case law from this and other circuits, answer that question unambiguously in the affirmative. . . . "Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs."

Id. (quoting *Mills v. Alabama*, 384 U.S. 214, 216 (1966)). In so ruling, the First Circuit applied the following logic: if police officers must accept "'a significant amount of verbal criticism and challenge directed at'" them, then they must be expected to exercise similar restraint "when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces." *Id.* at 84 (quoting *City of Houston v. Hill*, 482 U.S. 451, 461 (1987)). Likewise, the Eleventh Circuit has held that citizens have a First Amendment right to photograph or videotape the police because "the First Amendment protects the right to gather information about what public officials do on public property." *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

Perhaps more tellingly, in upholding the right to record law enforcement personnel, the Seventh Circuit described as "an extreme position" and "an extraordinary argument" the state attorney's contention "that openly recording what police officers say while performing their duties in traditional public fora — streets, sidewalks, plazas, and parks — is *wholly unprotected* by the First

Amendment." *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012). The Seventh Circuit went on to hold that

> [a]udio and audiovisual recording are media of expression commonly used for the preservation and dissemination of information and ideas and thus are "included within the free speech and free press guaranty of the First and Fourteenth Amendments." Laws that restrict the use of expressive media have obvious effects on speech and press rights; the Supreme Court has "voiced particular concern with laws that foreclose an entire medium of expression."
>
> 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, as the State's Attorney insists. By way of a simple analogy, banning photography or note-taking at a public event would raise serious First Amendment concerns; a law of that sort would obviously affect the right to publish the resulting photograph or disseminate a report derived from the notes. The same is true of a ban on audio and audiovisual recording.

Id. at 595-96 (internal citations omitted).

Such a line of cases shows that the First Amendment right to photograph and videotape law enforcement personnel in public fora is now well-established from north to south and east to west. Moreover, ***this*** Circuit has already hinted that individuals may have a constitutional right to photograph and videotape police officers. *See Kelly v. Borough of Carlisle*, 622 F.3d 248, 260 (3d Cir. 2010) ("We have not addressed directly the right to videotape police officers. In *Gilles v. Davis*, we hypothesized that 'videotaping or photographing the police in the

performance of their duties on public property may be a protected activity.' We also noted that '[m]ore generally, photography or videography that has a communicative or expressive purpose enjoys some First Amendment protection.'" (internal citations omitted) (alteration in original)).

Under the District Court's analysis, however, whether there is a right to photograph or videotape law enforcement personnel and activities in public fora "remains subject to analysis based on the unique set of facts presented." *Fields v. City of Philadelphia*, No. 14-4424, 2016 WL 2754014, at *6 (E.D. Pa. Feb. 19, 2016). The inherent problem of the District Court's ruling is that it requires case-by-case determinations of whether the underlying conduct is "expressive." A natural consequence of this holding is that citizens will be deterred from undertaking First Amendment activities that otherwise would be constitutionally protected out of concern as to whether their activities are sufficiently "expressive." Holding that there is a blanket right to record or videotape law enforcement personnel and activities without regard as to whether such conduct is "expressive" would alleviate such concerns and the need for case-by-case determination for those individuals arrested for undertaking such activities. This is no hypothetical. Police officers in this Court's jurisdiction continue to "invoke the wiretap statute against those who antagonize them by recording them." Kreimer, *Pervasive Image Capture and the First Amendment*, 159 U. Penn. L. Rev. at 359 (collecting cases

from Pennsylvania).

It is likely that the opposition to photography and videotaping activities stems from the fact that "many would prefer to be in a position to shape perceptions of their actions without competing digital records. Police officers often view private digital image capture as a challenge to their authority." *Id.* at 357. This, rather than purported safety concerns associated with being recorded, has resulted in a "rich set of cases in which police have sought to prosecute critics or potential critics who capture their images. In these cases, police officers and other officials have enlisted both existing statutes and creative prosecutorial discretion in the struggle to constrain inconvenient image capture." *Id.* Indeed,

> [t]he typical police officer, plaintiff, or complainant in the image-capture cases canvassed above is not concerned with avoiding observation or preserving seclusion simpliciter. She is interested, rather, in assuring that evidence of dubious or potentially embarrassing actions is not credibly conveyed by the observer to a wider audience by transmission of the captured image. There are few cases on record of police officers arresting tourists who capture videos of polite official responses to inquiries for directions. Prohibitions on image capture are deployed to suppress inconvenient truths.

Id. at 383 (footnote omitted). Such conduct cannot be countenanced in a society in which "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Hill*, 482 U.S. at 462-63. At a minimum, the First Amendment requires "some sacrifice of [police] efficiency . . .

to the forces of private opposition." *Id.* at 463 n.12 (internal citation omitted) (ellipses in original).

2. The Emergence of Citizen-Journalists and the Key Role they Play Demonstrates the Necessity of the Enshrinement of a First Amendment Right to Photograph and Videotape Law Enforcement Personnel in Public Fora

Today, citizens armed with smartphones are increasingly performing the watchdog functions associated with the traditional news press. This is becoming more important because "[s]erendipitous amateur image capture can fill some of the lacunae left by the decimation of salaried news staffs." Kreimer, *Pervasive Image Capture and the First Amendment*, 159 U. Penn. L. Rev. at 350. As demonstrated below, such image capture and recordings are increasingly bringing to light events that would otherwise go unnoticed or unreported. *See Fed. Commc'ns Comm'n v. CBS Corp.*, 132 S. Ct. 2677, 2678 (2012) (Roberts, C.J., concurring) ("As every schoolchild knows, a picture is worth a thousand words."). As such, protecting the right to photograph and videotape interactions between law enforcement personnel and individuals must be enshrined.

This is particularly important because, as Professor Richardson observes, "courts repeatedly defer to the judgments of all officers, with no inquiry into the particular officer's training, experience, and skill." L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 Ind. L.J. 1143, 1155 (2012). Accordingly, cameras have become an effective tool for ordinary citizens to

protect against and expose police abuses. Unfortunately, it has taken several recent events to demonstrate the importance of the citizen-journalist – whether or not he or she intended to be one – in shedding light on police killings of minorities. For example, in December 2014, a black man, Eric Garner, was killed by a chokehold from a police officer. While the grand jury did not indict the police officer, the killing, which was recorded by a private citizen, Ramsey Orta, served to draw mass attention to the interactions between law enforcement personnel and minorities. *See* J. David Goodman & Al Baker, *New York Officer Facing No Charges in Chokehold Case*, N.Y. Times, Dec. 4, 2014, at A1.

Similarly, in connection with the Walter Scott killing in North Charleston, South Carolina on April 4, 2015, the police officer implicated stated that he feared for his life after Mr. Scott had disarmed him. The video recording by Feidin Santana, an individual who happened to be walking by at the time, shows Mr. Scott running away, unarmed, before being shot eight times. The footage also shows the officer placing an object (possibly a stun gun) near the body of Mr. Scott. As columnist Tony Norman of the Pittsburgh Post-Gazette stated, Mr. Santana's video "opened the eyes of millions of Americans who previously doubted that a police officer would be capable of shooting anyone who didn't truly deserve it. It takes away their certainty (until the next unrecorded shooting) that it is always the victim's fault." Tony Norman, *Video for Once Allows Police No Excuses*,

Pittsburgh Post-Gazette, Apr. 10, 2015, at A-2. As the Court is no doubt aware, these are sadly not isolated instances. Accordingly, "because the police have traditionally been the ones with control over official narratives about police conduct in court and in the news, the ability to counter those narratives with stories backed up by video has transformed the nature of both public opinion and court testimony." Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 Geo. L.J. 1559, 1571 (2016).

While the District Court acknowledged that it was not "addressing a First Amendment right to photograph or film police when citizens challenge police conduct," *Fields*, 2016 WL 2754014, at *1, the District Court's ruling that there is no First Amendment right to photograph or videotape law enforcement absent expressive conduct will cause numerous chilling effects if not overturned. The District Court's ruling fails to protect the many "citizen-journalists," such as Mr. Santana and Mr. Orta, who did not set out to challenge police conduct, but ultimately enabled themselves and others to do so because of the images they captured. The District Court's ruling excludes First Amendment protection in instances in which a citizen started out by recording police conduct without intending to challenge it.

Moreover, the District Court's statement that Appellants Fields and Geraci "are not members of the press," *id.* at *7, relies on an outdated notion of what

constitutes the press and, perhaps more concerning, who is entitled to First Amendment protections. Over forty years ago, the Supreme Court recognized that "liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who uses the latest photocomposition methods." *Branzburg*, 408 U.S. at 704. More recently, the Ninth Circuit recognized that "the protections of the First Amendment do not turn on whether the [party] was a trained journalist, formally affiliated with traditional news entities, engaged in conflict-of-interest disclosure, went beyond just assembling others' writings, or tried to get both sides of a story." *Obsidian Financial Group, LLC v. Cox*, 740 F.3d 1284, 1291 (9th Cir.), *cert. denied*, 134 S. Ct. 2680 (2014). It pointed out that "a First Amendment distinction between the institutional press and other speakers is unworkable: 'With the advent of the internet and the decline of print and broadcast media . . . the line between the media and others who wish to comment on political and social issues becomes far more blurred.'" *Id.* at 1291 (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 352 (2010)). As one court wrote in recognizing the constitutional rights of citizens to record police in public, developments in technology "make clear why the news-gathering protections of the First Amendment cannot turn on professional credentials or status." *Glik*, 655 F.3d at 84.

If the District Court's ruling is upheld, individuals in this Circuit would likely be dissuaded from taking actions to capture future instances of citizen-police interaction. Such concerns are by no means hypothetical. Mr. Santana has since moved out of the North Charleston area and stated that "[o]ne of my concerns before giving the video to the family was retaliation from the police department." Josh Sanburn, *The Witness*, Time, http://time.com/ramsey-orta-eric-garner-video/. The implications of the District Court's ruling – namely a case-by-case analysis of whether the photographing or videotaping of law enforcement personnel is sufficiently "expressive" through trial – will cause citizens to self-censor the subjects they would otherwise photograph or videotape when faced with the possibility of arrest and jail.

Reversing the District Court's ruling would have a minimal burden on law enforcement personnel – perhaps only a tangential one no different from the daily inconveniences they are expected to tolerate. Additionally, the "threat" of being recorded, along with the ubiquity of video-recording devices, could be expected to make law enforcement officials think twice before using disproportionate force and, perhaps, reduce the number of deaths that could and should have been avoided. *See Garcia v. Montgomery Cnty., Md.*, 145 F. Supp. 3d 492, 507 (D. Md. 2015) ("recording police activity enables citizens to 'keep them honest,' an undertaking protected by the First Amendment."). Indeed, "[c]aptured images

need not be conveyed to others to have a salutary effect. Just as public surveillance cameras are said to reduce crime, the prospect of private image capture provides a deterrent to official actions that would evoke liability or condemnation." Kreimer, *Pervasive Image Capture and the First Amendment*, 159 U. Penn. L. Rev. at 347.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the Brief of Appellants, *Amicus Curiae* respectfully requests the Court reverse the decision below.

Dated: October 31, 2016

Respectfully submitted,

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Dated: October 31, 2016 s/ Jason P. Gosselin
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CERTIFICATION OF ADMISSION

The undersigned certifies that at least one of the attorneys whose names appear on the foregoing brief is a member of the Bar of the United States Court of Appeals for the Third Circuit.

Dated: October 31, 2016 s/ Jason P. Gosselin
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 31, 2016, the foregoing Amicus Curiae Brief of The Rutherford Institute in Support of the Appellants and Reversal was filed and served on all counsel of record via the ECF system of the United States Court of Appeals for the Third Circuit, and by causing delivery one (1) paper copy of the foregoing Brief to each of the following via a third-party commercial carrier for delivery within three days:

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