Nos. 16-1650 & 16-1651

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Richard Fields,
Plaintiff – Appellant,
v.
City of Philadelphia, *et al.*,
Defendants – Appellees.

Amanda Geraci,
Plaintiff – Appellant,
v.
City of Philadelphia, *et al.*,
Defendants – Appellees.

BRIEF OF *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF APPELLANTS AND URGING REVERSAL

Appeal from the United States District Court
for the Eastern District of Pennsylvania
Case Nos. 14-cv-4424 & 14-cv-5264

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CORPORATE DISCLOSURE STATEMENT

The Cato Institute states that it has no parent companies, subsidiaries, or affiliates, and that it does not issue shares to the public.

Dated: October 31, 2016

/s/ Alfred W. Putnam, Jr.
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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs.

This case interests Cato because it concerns the right to document government actions through video and photographic recording of the conduct of public officials performing their duties in public places. Accurately capturing the conduct of government actors is a necessary ingredient in discussing and, where warranted, seeking to adjust the government's conduct.

No person other than *amicus* and *amicus*'s counsel has authored any portion of this brief or paid for its preparation and submission. All parties have consented to this filing. Fed. R. App. P. 29(a).

ARGUMENT

The District Court held that the act of non-disruptively photographing and videotaping public officials who are engaged in the open, public performance of their duties is not protected by the First Amendment. That holding conflicts with prior holdings of the Supreme Court and other Courts of Appeals, which recognize the public's right to access, collect, and preserve information regarding the conduct of its government. More fundamentally, the failure to recognize the protected status of Appellants' activities threatens to chill speech and deter members of the public from actively participating in the process of self-governance.

DOCUMENTING THE ACTIVITIES OF POLICE OFFICERS IN THE PUBLIC PERFORMANCE OF THEIR DUTIES IS PROTECTED BY THE FIRST AMENDMENT

As numerous other courts have concluded, photographing police officers in the public performance of their duties is protected by the First Amendment.[1] The

[1] *See, e.g.*, *ACLU v. Alvarez*, 679 F.3d 583,595 (7th Cir. 2012) ("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." (emphasis in original)); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) ("[W]e agree with the Smiths that they had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct."); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (1995) (recognizing a "First Amendment right to film matters of public interest"—in that case, the police response to a public protest); *Garcia v. Montgomery Cnty.*, 145 F. Supp. 3d 492 (2015); *Montgomery v. Killingsworth*, No. 13-cv-256, 2015 WL 289934, at *8 (E.D. Pa. Jan. 22, 2015); *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005).

core principles of the First Amendment—and the decisions expounding on those principles—permit no other conclusion.

1. In our constitutional system, "the citizenry is the final judge of the proper conduct of public business." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975); *accord Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); 1 Smolla & Nimmer on Freedom of Speech § 2:31 ("Freedom of speech thus serves as a vital restraint on tyranny, corruption, and ineptitude . . . ."). The public's role in this process is wide-ranging, extending beyond "discussions of candidates, [and] structures and forms of government," to encompass as well "the manner in which government is operated or should be operated," *Mills*, 384 U.S. at 218, including the conduct of the police, *see Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1035-36 (1991) (noting that "[t]he public has an interest in [the] responsible exercise" of the discretion that the law affords to the police).

To secure citizens' ability to make *informed* decisions about the way that government manages public affairs, the First Amendment guarantees to members of the public an "undoubted right to gather news 'from any source by means within the law.'" *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (quoting *Branzburg v.*

Hayes, 408 U.S. 665, 681–82 (1972)). This right to *gather* information includes not just the right to witness what transpires, but also the right to *record* those encounters. *Glik*, 655 F.3d at 82 ("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.'" (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)); *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."); *Smith*, 212 F.3d at 1333 ("The 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."). Indeed, the well-being of our democratic society depends on people putting forward as truth not just their reaction to something that occurred, but also documentation as to how in fact it occurred.

2. Critically, the right of access is guaranteed not just to the credentialed reporter, but rather to *all* members of the public. As the Supreme Court has repeatedly explained, "the First Amendment goes beyond protection of the press . . . to prohibit government from limiting the stock of information from which members of the public may draw." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978); *accord Branzburg*, 408 U.S. at 684 ("[T]he First Amendment does not

guarantee the press a constitutional right of special access to information not available to the public generally."); *Houchins*, 438 U.S. at 16 (Stewart, J., concurring) (the Constitution "assure[s] the public and the press equal access once government has opened its doors"). Because individuals have the right to decide for themselves the "ideas and beliefs deserving of expression, consideration, and adherence," *Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (*quoting Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994)), it is important that people have the right to observe and document and then reflect upon public servants in the course of their duties. Reserving for the *press alone* the right to gather and document information on public officials would undermine that core First Amendment value.

Similarly, the right to observe and document governmental activity is not held in reserve for zealous protesters, committed advocates, or trained observers. To be sure, an individual sharing images and ideas generated through such activities is engaged in political speech that merits its own distinct protection under the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (noting that "expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values" (internal quotation marks omitted)). But whatever protection may be afforded to an individual's ultimate *expression*, it would be neither logical nor consistent with the precedents and

principles discussed above to hold that the right to *observe and record* belongs only to those who conclude—prior to the event they will record—what they are going to say about that event and what they will do with the images they capture. The First Amendment protects discourse and the search for truth, not just the pronouncements of those who have already made up their minds. *See Cohen v. California*, 403 U.S. 15, 23-24 (1971) ("The constitutional right of free expression . . . . is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity . . . ."). Its aegis thus should shelter those (like Mr. Fields) who stumble across police activity just as strongly as it shields those (like Ms. Geraci) who go looking for it, and it should protect alike those who ultimately affirm the action of the police, those who question it, and those who conclude that there is nothing to be said on one side or the other.

Retrenching the right to observe and record would increase the average citizen's temptation to yield his "veto power"[2] over the actions of his government

[2] *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 ABF Res. J. 521, 542 (observing that "the role of the ordinary citizen is not so much to contribute on a continuing basis to the formation of public policy as to retain veto power to be employed when the decisions of officials pass certain bounds").

to the institutional press or professional protester—a cession that would cut against the First Amendment's central premise that civic engagement and public discourse by the whole body politic is crucial to the continued vitality of our democracy. *See* 1 Smolla & Nimmer on Freedom of Speech § 2:31 ("It is through nonviolent speech that the people may ferret out corruption and discourage tyrannical excesses, keeping government within the limits of the constitutional charter."). Deliberation is itself a value worth upholding.[3]

In sum, both precedent and first principles demonstrate that the First Amendment protects the process of capturing inputs that may yield expression, not just the final act of expression itself—it protects the chronicler, as well as the poet. "The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer." *Citizens United v. FEC*, 558 U.S. 310, 373 (2010) (Roberts, C.J., concurring). Thus, although the vital role of law enforcement officials in our civil society cannot be gainsaid and should never be minimized, it remains equally true that the American citizenry has both the right and the obligation to subject them to rigorous oversight. *See Press–Enter. Co. v. Superior Court*, 478 U.S. 1, 8

[3] Indeed, the fact that this right is not confined to members of the institutional press is particularly important in an era where "changes in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw," and where the "proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew." *Glik*, 655 F.3d at 84.

(1986) (observing that "many governmental processes operate best under public scrutiny"). And the first step in that process of providing oversight is observing *and documenting* officers' conduct.

3. The District Court's analysis failed to take account of these principles, focusing instead on whether plaintiffs' recordings were made with expressive intent. *See, e.g.*, JA11-13. Yet the presence of expressive intent at the moment of documentation is irrelevant to whether the act of gathering and preserving information—which, again, is necessarily antecedent to its publication—is protected by the First Amendment. *See First Nat'l Bank* , 435 U.S. at 783 ("[T]he First Amendment goes beyond protection of . . . the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.").

The District Court also failed to appreciate the chilling effect that its ruling would have on protected speech. For one thing, allowing state interdiction of information-gathering would naturally hamstring those wishing to use that information to challenge official conduct or otherwise hold the state accountable. *Citizens United*, 558 U.S. at 336 ("Laws enacted to control or suppress speech may operate at different points in the speech process."); *accord Alvarez*, 679 F.3d at 595 ("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."); *see also* Appellants' Br. at 23-24.

In addition, the District Court's rule could deter prospective speakers from gathering the inputs they need to formulate their message. For example, under the District Court's framework, photographing police officers in the course of their duties *would* be protected if that photography were undertaken for purposes of criticizing the police. JA18. That activity, however, would look to all the world—and, in particular, to your run-of-the-mill police officer—exactly like the purportedly *un*-protected activity plaintiffs engaged in here. Similarly, one who was interested in use-of-force or police-conduct issues but was endeavoring to keep an open mind and assess each situation on its own merits could be barred from recording official police actions, thereby constraining that individual's ability to compare particular encounters and formulate a conclusive view. One who wanted to avoid the legal difficulties that plaintiffs encountered here might well decide to refrain from recording police activity at all—or may capture only an arbitrary and distorted view that in turn distorts the public discourse.

Nor does an intent-based test make sense from a practical perspective. Very often, at the moment an individual records an image, he or she will not know what (if any) use will be made of that image. The same goes for a reporter who records an interview, a musician who jots down a few chords on the back of a napkin, or a

painter who makes a quick sketch of a landscape. For that matter, police themselves operate on the same principle, photographing crime scenes and deploying dashboard cameras in patrol cars—not because they know at the moment they take their photographs that a particular image will be used to incriminate a suspect or persuade a jury, but in order to preserve a record of what has transpired in order to facilitate later review, analysis, and fully accurate reproduction to others. Ordinary citizens seeking to scrutinize the conduct of their government are entitled to the same opportunity to record and preserve.

For all these reasons, a much sounder rule would recognize that all photographing and recording of officers that does not disrupt or interfere with officers' ability to perform their duties—and subject to reasonable time, place, and manner restrictions[4]—is protected by the First Amendment. Such a rule, moreover, would also be consistent with the protection already afforded to "verbal criticism and challenge directed at police officers." *City of Houston v. Hill*, 482 U.S. 451, 461 (1987).[5] Indeed, "the freedom of individuals verbally to oppose or challenge

[4] *Smith*, 212 F.3d at 1333.

[5] *Cf. Gray v. Udevitz*, 656 F.2d 588, 591 (10th Cir. 1981) ("The cop on the beat is the member of the department who is most visible to the public. He possesses both the authority and the ability to exercise force. Misuse of his authority can result in significant deprivation of constitutional rights and personal freedoms, not to mention bodily injury and financial loss. The strong public interest in ensuring open discussion and criticism of his qualifications and job performance warrant the conclusion that he is a public official.").

police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Id.* at 462-63. It follows that the proper course would be to hold that "[t]he same restraint demanded of law enforcement officers in the face of provocative and challenging speech, must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces." *Glik*, 655 F.3d at 84 (citations omitted).

CONCLUSION

The decision below fails to recognize the protection the First Amendment affords to those who gather and record information. If left in place, it will chill protected expression and deter citizens from participating actively in their own self-governance. The judgment of the District Court should be reversed.

Date: October 31, 2016

Respectfully submitted,

By: /s/ Alfred W. Putnam, Jr.

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word 2010.

2. This brief also complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified by Fed. R. App. P. 29(d), because this brief contains 2,595 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

3. The text of the electronic version of this Brief filed on ECF is identical to the text of the paper copies filed with the Court.

4. The electronic version of this Brief filed on ECF was virus-checked using Microsoft System Endpoint Protection software, and no virus was detected.

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LOCAL RULE 28.3(d) CERTIFICATION

I hereby certify that at least one of the attorneys whose names appear on the foregoing brief, including the undersigned, is a member of the bar of this Court.

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2016 I caused to be filed the foregoing document with the United States Court of Appeals for the Third Circuit, via the CM/ECF system, which will provide notice to all counsel of record.

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