No. 12345

IN THE

Supreme Court of the United States

Huey LYTTLE,

Petitioner,

v.

Sydney CAGNEY and Robert LACEY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENTS

Scott Fee

Counsel for Respondents

Law Offices of StMU
One Camino Santa Maria
San Antonio, TX 78228
sfee@mail.stmarytx.edu
(210) 436-4011

March 11, 2016

QUESTIONS PRESENTED

I. Is there an unrestricted right to record police under the First Amendment?

II. Does the doctrine of qualified immunity protect the police officers' conduct?

LIST OF PARTIES TO THE PROCEEDING

Petitioner, Huey Lyttle, was the plaintiff before the United States District Court for the District of New Normal and the appellant before the United States Court of Appeals for the Fourteenth Circuit.

Respondents, Sydney Cagney and Robert Lacey, were the defendants before the United States District Court for the District of New Normal and the appellees before the United States Court of Appeals for the Fourteenth Circuit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Statutes

Cases

OPINIONS BELOW

The United States District Court for the District of New Normal's Opinion and Order Granting Defendants' Motion for Summary Judgment (R. at 26–31) is unpublished. The United States Court of Appeals for the Fourteenth Circuit's Opinion and Order (R. at 34–36) is unpublished.

STATEMENT OF JURISDICTION

The court of appeals issued its opinion and judgment on June 5, 2015. (R. at 34–36). Petitioner filed his petition for writ of certiorari on July 5, 2015. (R. at 37). This Court granted the petition on October 15, 2005. (R. at 38). This Court's jurisdiction rests on 28 U.S.C. § 1254(1) (2012).

STANDARD OF REVIEW

A district court's fact findings and the reasonable inferences to be drawn from them are reviewed for clear error. Its legal conclusions are reviewed *de novo*.

PROVISIONS INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

Freedom of Information Act, 5 U.S.C. § 552 (2009).

New Normal Statute § 943.03 (2013).

STATEMENT OF THE CASE

On the morning of August 18, 2013, in Thisis, New Normal, criminals broke into the homes of several city officials. (R. at 13). The Thisis Police Department (the "ThisisPD") described the suspects as three young men, approximately 20 to 25 years old, one with long brown hair and the other two with short blonde hair. (R. at 13). The information related to the break-ins and the description of the suspects were confidential. (R. at 13). At approximately 12:00 p.m., the ThisisPD stationed Sergeant Sydney Cagney ("Sergeant Cagney") and Officer Robert Lacey ("Officer Lacey") (collectively, the "Officers") at the corner of Foal Street and Pony Island Way to look for the break-in suspects and other criminal activity. (R. at 13).

At approximately 4:00 p.m., the Officers observed three young men, which fit the description of the break-in suspects, riding their bicycles in violation of the New Normal Vehicle Code. (R. at 13). The Officers stopped the three young men and identified them as Huey Lyttle ("Petitioner"), Dewey Large ("Large"), and Louie Small. (R. at 3). Officer Lacey observed Petitioner surreptitiously recording the sensitive encounter on his cell phone. (R. at 3). Due to the inherent safety concerns during traffic stops and the confidential nature of the break-in investigation, Sergeant Cagney asked Petitioner to stop recording. (R. at 13–14). However, despite Petitioner's apparent compliance, he continued to record the Officers without their knowledge. (R. at 3–4, 14). Sergeant Cagney briefly questioned the young men, determined that their alibis were legitimate, and issued Large a civil infraction for violating New Normal's Vehicle Code. (R. at 14). After approximately 10 to15 minutes, the Officers released the young men. (R. at 16).

On August 20, 2013, Petitioner uploaded a video of the sensitive encounter to his blog. (R. at 4, 13–14). On August 23, 2013, several media outlets mirrored the video from Petitioner's

blog on to their respective websites. (R. at 4). Consequently, on August 25, 2013, Jim Walsh, Head of the ThisisPD, directed Sergeant Cagney to obtain a warrant to confiscate any material related to the filming, recording, or dissemination of the sensitive encounter in Petitioner's possession. (R. at 14). Sergeant Cagney obtained the warrant as directed and, accompanied by Officer Lacey and two other officers, served the warrant on Petitioner. (R. at 4, 14). In accordance with the warrant, Officer Lacey arrested and charged Petitioner for violating New Normal Statute § 943.03 (App. 2) and the Officers confiscated Petitioner's hard drive and two GoPros. (R. at 4).

On November 03, 2013, Petitioner filed a complaint with the District Court for the District of New Normal. (R. at 2–5). Petitioner alleged that the Officers violated his First Amendment right to gather information when the Officers asked him to delete the video of the encounter on his cell phone, arrested him for recording and posting the video to his blog, and confiscated his GoPros. (R. at 4). On January 22, 2014, the Officers filed a motion for summary judgment arguing that they did not violate Petitioner's alleged First Amendment right to record police. (R. at 17–21). On April 25, 2014, the District Court found that Petitioner failed to demonstrate that the Officers' conduct was unreasonable and granted the motion for summary judgment. (R. at 26–31).

On May 09, 2014, Petitioner filed an appeal with the Court of Appeals for the Fourteenth Circuit. (R. at 32). On June 05, 2015, the Court of Appeals found that Petitioner failed to identify a clearly established First Amendment right to record police and held that the Officers were entitled to qualified immunity. (R. at 34–36).

On July 05, 2015, Petitioner filed a petition for certiorari with this Court. (R. at 37). This Court granted certiorari on October 15, 2015. (R. at 38).

SUMMARY OF THE ARGUMENT

I.

The First Amendment does not provide a right to access, gather, or disseminate confidential information related to police investigations. Furthermore, the First Amendment does not provide a right to record police as a subject of police action or in an interfering or surreptitious manner. Therefore, Petitioner did not have a First Amendment right to record the Officers, because Petitioner recorded the Officers while he was a subject of a traffic stop, interfered with the traffic stop and the confidential investigation, and recorded the Officers surreptitiously after a lawful request to stop.

Alternatively, an alleged First Amendment right to record police is subject to reasonable time, place, or manner restrictions. Reasonable time, place, or manner restrictions may negatively affect First Amendment rights provided the restrictions are content-neutral, serve significant government interests, and leave open alternate means of expression. When the Officers asked Petitioner to delete the video, arrested Petitioner, and seized Petitioner's GoPros, the Officers did not target the message of the video, served significant government interests in officer safety and integrity of confidential investigations, and left open alternative forms of communication. Consequently, any restrictions imposed by the Officers on Petitioner's alleged First Amendment right to record police were lawful.

II.

This Court has consistently held that government officials are entitled to qualified immunity unless a plaintiff sufficiently pleads that the defendant violated a particular constitutional right *and* that the right was clearly established at the time of the violation. First, the Officers did not violate Petitioner's alleged First Amendment right to record police, because,

either Petitioner did not have a right to record the Officers as a subject of a traffic stop, or in an interfering or surreptitious manner, *or* the Officers lawfully imposed reasonable time, place, or manner restrictions on Petitioner's alleged right. Consequently, Petitioner's failure to show that the Officers violated one of his constitutional rights entitles the Officers to qualified immunity.

Second, this Court requires that judicial precedent render an alleged First Amendment right to record police beyond debate. This Court has not established a First Amendment right to record police and the Fourteenth Circuit held that judicial precedent does *not* clearly establish the right. Consequently, an alleged right to record police is *not* clearly established, because, absent this Court's decision, the Fourteenth Circuit is the *only* binding authority in this case. Alternatively, an alleged right to record police is necessarily debatable as a result of the circuit courts' split. Therefore, the Officers are entitled to qualified immunity, because Petitioner failed to demonstrate that an alleged First Amendment right to record police was clearly established at the time of the alleged violation.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT PROVIDE AN UNRESTRICTED RIGHT TO RECORD POLICE.

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I. However, the First Amendment does not provide an unrestricted right to gather information. *Houchins v. KQED, Inc.*, 438 U.S. 1, 12 (1978). This Court declined to recognize a First Amendment right to gather information not available to the public. *Id.* at 9, 11. Furthermore, courts consistently find that the First Amendment does not provide a right to record police as a subject of police action or in an interfering or surreptitious manner. *See, e.g.*, *Gericke v. Begin*, 753 F.3d 1, 8 (1st Cir. 2014)

(finding that a bystander's qualified right to record police during a traffic stop may not interfere with police); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 606 (7th Cir. 2012) (finding that a bystander's qualified right to record police during demonstrations does not apply to surreptitious recording); *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010) (finding that a passenger subjected to a traffic stop does not have an established First Amendment right to record police).

A. The First Amendment Does Not Provide a Right to Access or Gather Information Not Available to the General Public.

The First Amendment does not provide a right to access all government-controlled sources of information or to access information not available to the public. *Houchins*, 438 U.S. at 9, 11. Furthermore, Congress explicitly excluded public access to ongoing criminal investigations from the Freedom of Information Act. Freedom of Information Act, 5 U.S.C. §§ 552(b)(7), 552(c)(1) (2009). Consequently, the First Amendment does not and should not provide a right to gather information on police investigations, because police investigations are controlled by the government. *See Houchins*, 438 U.S. at 9, 11. Therefore, Petitioner did not have a First Amendment right to record the Officers, because the Officers were engaged in ThisisPD's confidential break-in investigation, which was government-controlled and not available to the public. (R. at 13–14); *see id.*; 5 U.S.C. § 552(b).

B. The First Amendment Does Not Provide a Right to Record Police to Subjects of Traffic Stops.

Petitioner will argue that courts generally find that the First Amendment provides a (restricted) right to record police. *See, e.g.*, *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). However, although some courts find that the First Amendment provides bystanders a

restricted right to record police, courts deny the right to subjects of traffic stops. *Compare*, *e.g.*, *Alvarez*, 679 F.3d at 606 (finding that *bystanders* had a restricted right to record police), *and Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011) (finding that a *bystander* had a restricted right to record police), *with Kelly*, 622 F.3d at 262 (finding that a *passenger* subjected to a traffic stop did *not* have a right to record police). Consequently, subjects of traffic stops do not have a First Amendment right to record police. *Kelly*, 622 F.3d at 262. Therefore, Petitioner did not have a right to record the Officers, because the Officers stopped Petitioner and his friends to enforce New Normal's Vehicle Code. (R. at 3); *see id.*; *see also Colten v. Ky.*, 407 U.S. 104, 109 (1972) (finding that bystanders do *not* have a constitutional right to observe traffic stops).

C. The First Amendment Does Not Provide a Right to Interfere with Police Engaged in Traffic Stops or Investigations.

This Court recognizes that police officers may enforce traffic laws without interference. *Colten*, 407 U.S. at 109. Courts also recognize that recording police may serve as an intimidation tactic that interferes with police business. *See, e.g.*, *Mocek v. City of Albuquerque*, No. 14-2063, 2015 WL 9298662, at *7 (10th Cir. Dec. 22, 2015). Consequently, courts expressly hold that recording police may not interfere with police business. *See, e.g.*, *Gericke*, 753 F.3d at 8; *Alvarez*, 679 F.3d at 607. Petitioner interfered with the Officers traffic stop and investigation, because Petitioner forced the Officers to immediately address Petitioner when they discovered he was surreptitiously recording the sensitive encounter. (R. at 3, 14); *see Colten*, 407 U.S. at 109; *Mocek*, 2015 WL 9298662, at *7. As a result, Petitioner did not have a First Amendment right to record the Officers, because Petitioner interfered with the Officers' official business. *See Colten*, 407 U.S. at 109.

The First Amendment does not provide a right to record or release information regarding a confidential police investigation, because it may interfere with the investigation or reveal the means and methods police use to investigate criminal matters. *See* 5 U.S.C. §§ 552(b)(7), 552(c)(1); *Baumann v. D.C.*, 795 F.3d 209, 216 (D.C. Cir. 2015). Furthermore, the Freedom of Information Act expressly provides that the public may not access or gather information that *could* (not would) interfere with an ongoing police investigation *or* provide insight into the police's investigatory means and methods. 5 U.S.C. § 552(b)(7). Petitioner released a video of a sensitive investigational encounter that *could* have interfered with or revealed the investigatory means of methods of ThisisPD's confidential break-in investigation. *See id.* Therefore, Petitioner did not have a First Amendment right to record or release a video of the Officers investigating a confidential criminal matter. (R. at 3–4, 13–14); *see id.*; *Baumann*, 795 F.3d at 216.

D. The First Amendment Does Not Provide a Right to Surreptitiously Record Police.

Some courts that find a restricted First Amendment right to record police explicitly distinguish surreptitious recording from open recording. *See, e.g.*, *Alvarez*, 679 F.3d at 606–07 (holding that bystanders had a restricted right to *openly* record police); *Glik*, 655 F.3d at 80, 84 (holding that a bystander had a restricted right to *openly* record police in plain view from a safe distance). Furthermore, some courts that find a restricted First Amendment right to record police expressly hold that the right does *not* apply to surreptitious recording. *See, e.g.*, *Alvarez*, 679 F.3d at 606 (holding that a bystander's restricted right to record police does not apply to surreptitious recording). Petitioner did not openly record the Officers in plain view; Petitioner surreptitiously recorded the Officers with a cell phone application specifically designed to record in a discreet manner and with a GoPro inconspicuously attached to his surfboard. (R. at 3–4); *see*

Glik, 655 F.3d at 84. Consequently, Petitioner's surreptitious actions precluded protection by an alleged First Amendment right to record police. *See Alvarez*, 679 F.3d at 606.

E. An Alleged First Amendment Right to Record Police is Subject to Reasonable Time, Place, or Manner Restrictions.

Governments may impose reasonable time, place, or manner restrictions on protected free speech provided the restrictions are content-neutral, serve a significant government interest, and leave open alternative methods of speech. *Ward v. Rock Against Racism*, 491 U.S. 781, 798–99 (1989). In accordance with *Ward*, courts that find a First Amendment right to record police also find that the right is subject to reasonable time, place, or manner restrictions. *See, e.g.*, *Alvarez*, 679 F.3d at 605; *Smith*, 212 F.3d at 1333. Sergeant Cagney's request to delete the video and the Officers' subsequent seizure of Petitioner's illicit GoPros did not directly target the video's message, served significant government interests in officer safety and investigation integrity, and left open alternate methods of communication. (R. at 3–4, 13–14); *see Ward*, 491 U.S. at 798–99; s*ee also Gericke*, 753 F.3d at 8 (finding that a reasonable order from police may restrict a First Amendment right to record traffic stops). Therefore, even though Petitioner will argue that he had a First Amendment right to record the Officers, the right is subject to reasonable restrictions, which the Officers lawfully imposed. *See Ward*, 491 U.S. at 798–99.

i. Police may lawfully impose content-neutral restrictions on First Amendment rights.

The first issue regarding reasonable time, place, or manner restrictions is whether the restrictions serve a purpose unrelated to the message of the content. *Ward*, 491 U.S. at 791. Restrictions that incidentally and negatively affect protected free speech are reasonable as long as the restrictions are content-neutral. *Id.* In other words, a government official may restrict free

speech for reasons other than simply *because* a person is recording. *Alvarez*, 679 F.3d at 607. Sergeant Cagney asked Petitioner to stop and delete the video to promote government interests in safety and investigation integrity (government interests discussed below). (R. at 3, 13–14); *see Ariz. v. Johnson*, 555 U.S. 323, 330 (2009); *Alvarez*, 679 F.3d at 606. Also, Officer Lacey arrested Petitioner and the Officers seized Petitioner's GoPros in accordance with a warrant, which demonstrates that the Officers acted with legitimate reason. (R. at 13–14); *see Ward*, 491 U.S. at 791. Consequently, despite any negative incidental effects, the Officers imposed lawful content-neutral restrictions on Petitioner's alleged First Amendment right to record police, because they did not target the content of the video. (R. at 3–4, 13–14); *see Ward*, 491 U.S. at 791; *Kelly*, 622 F.3d at 262–63.

ii. Police may lawfully impose restrictions based on government interests in officer safety and investigation integrity on First Amendment rights.

The second issue regarding time, place, or manner restrictions is whether the restrictions serve a significant government interest. *Ward*, 491 U.S. at 798–99. This Court recognizes the significant government interest in officer safety. *Ariz.*, 555 U.S. at 330. This Court also recognizes that traffic stops are inherently dangerous and that the risk of a police officer discovering evidence of additional criminal activity increases the apprehension of violence even further. *Id.* at 330–31. The Officers subjected Petitioner and his friends to a traffic stop that, from the Officers' point of view, had a significant propensity towards violence, because Petitioner and his friends outnumbered the Officers and matched the description of criminal suspects. (R. at 3–4, 13–14); *see id.* Consequently, the inherently dangerous traffic stop created a compelling government interest in officer safety and, in pursuit of that interest, validated reasonable

restrictions of an alleged right to record the Officers. *See Johnson*, 555 U.S. at 330; *Ward*, 491 U.S. at 798–99.

Furthermore, courts that find a First Amendment right to record police often distinguish cases involving dangerous situations such as traffic stops. (R. at 3–4); s*ee, e.g.*, *Gericke*, 753 F.3d at 5, 7–8 (distinguishing dangerous traffic stops that involve multiple vehicles and citizens and concluding that safety issues may justify restricting First Amendment rights); *Glik*, 655 F.3d at 85 (distinguishing a bystander's restricted right to record police in a common area from traffic stops such as in *Kelly*). Consequently, the particularly dangerous nature of this traffic stop, i.e., Petitioner and his friends matched the description of criminal suspects and outnumbered the Officers, reasonably justified the Officers' unchallenged control to ensure the safety of everyone involved, even if those measures incidentally and negatively affected Petitioner's alleged First Amendment right to record police. (R. at 13); *see Johnson*, 555 U.S. at 330–31; *Gericke*, 753 F.3d at 7–8; *Alvarez*, 679 F.3d at 607.

Courts also recognize the significant government interest in maintaining the integrity of police investigations. *See, e.g.*, *Baumann*, 795 F.3d at 216 (finding that a government has a significant interest in protecting confidential information that, if released to the public, would interfere with a criminal investigation). Consequently, police officers may impose restrictions on First Amendment rights to protect the integrity of confidential police investigations. *See, e.g.*, *Alvarez*, 679 F.3d at 606 (finding that police may take all reasonable steps to maintain the confidentiality and integrity of investigations). Petitioner potentially compromised the integrity of the confidential break-in investigation by posting a video of the sensitive encounter on his blog. (R. at 4, 13–14); *see* 5 U.S.C. § 552(b)(7); *Baumann*, 795 F.3d at 216. Therefore, even though Petitioner will argue that the First Amendment provides him a right to record police, the

dangerous nature of the traffic stop and the confidential nature of the break-in investigation empowered the Officers to impose reasonable time, place, or manner restrictions on Petitioner's alleged First Amendment right. (R. at 3–4, 13–14); *see Johnson*, 555 U.S. at 330; *Ward*, 491 U.S. at 791, 798–99; *Baumann*, 795 F.3d at 216.

iii. Police may lawfully restrict a particular method of communication as long as alternative methods of communications remain open.

The final issue regarding time, place, or manner restrictions is whether the restrictions leave open alternative methods of communication. *Ward*, 491 U.S. at 802. This Court recognizes the ease of satisfying this element by simply showing that *an* alternative method of expression was available at the time of the alleged violation. *Id.* When the Officers asked Petitioner to delete the video and subsequently seized Petitioner's GoPros, the Officers did not restrict every method of communication. (R. at 3–4); *see id.* Instead, the Officers limited one method of communication for the purposes of safety and investigation integrity. (R. at 13–14); *see Ward*, 491 U.S. at 802; *Alvarez*, 679 F.3d at 607. Petitioner could have written or spoken about the traffic stop after the Officers released him and disseminated the information accordingly. *See Ward*, 491 U.S. at 802–03. Therefore, the Officers' lawfully imposed restrictions satisfied the three elements developed by this Court in *Ward* and established that the Officers did not violate Petitioner's alleged First Amendment right to record police. *See id.* at 791, 798–99.

II. PETITIONER'S FAILURE TO SHOW THAT THE OFFICERS VIOLATED A CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT ENTITLES THE OFFICERS TO QUALIFIED IMMUNITY.

This Court has consistently held that qualified immunity protects government officials in discretionary positions from civil liability for reasonable mistakes related to unresolved legal

issues. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011); *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Consequently, the Officers are entitled to qualified immunity unless Petitioner sufficiently pleads that the Officers violated his alleged First Amendment right to record police *and* that the alleged First Amendment right to record police was clearly established at the time of the alleged violation. *See al-Kidd*, 131 S. Ct. at 2080; *see also Anderson*, 483 U.S. at 639–40 (finding that a defendant must violate a *particular* clearly established right). Failure to sufficiently plead both elements will provide the Officers with qualified immunity. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009). To be clear, this Court expects qualified immunity to shield police officers from civil liability for constitutional violations unless the officers were plainly incompetent or knowingly violated a plaintiff's right. *See al-Kidd*, 131 S. Ct. at 2085; *Anderson*, 483 U.S. at 638.

A. The Officers Did Not Violate Petitioner's Alleged First Amendment Right to Record Police.

i. The Officers did not violate Petitioner's alleged First Amendment right to record police, because the First Amendment does not provide the right.

The first element of qualified immunity requires that a plaintiff sufficiently plead that the defendant violated a constitutional or statutory right. *Al-Kidd*, 131 S. Ct. at 2080. The First Amendment does not provide Petitioner a right to record police as a subject of police action or in an interfering or surreptitious manner. *See Colten*, 407 U.S. at 109 (holding that police are entitled to enforce traffic laws without interference); *Alvarez*, 679 F.3d at 606 (finding that a restricted right to record police does not include surreptitious recording); *Kelly*, 622 F.3d at 262 (finding that a passenger did not have a right to record police during a traffic stop). As a result, Petitioner did not have a First Amendment right to record the Officers, because Petitioner

surreptitiously recorded the Officers as a subject of a traffic stop and then interfered with a confidential investigation by posting the video online. (R. at 3–4, 13); *see Johnson*, 555 U.S. at 331; *Colten*, 407 U.S. at 109; *Alvarez*, 679 F.3d at 606; *Kelly*, 622 F.3d at 262. Therefore, the Officers are entitled to qualified immunity, because they did not violate Petitioner's alleged right to record police. *See, e.g.*, *Kelly*, 622 F.3d at 262–63.

ii. The Officers lawfully imposed restrictions on Petitioner's alleged First Amendment right to record police.

An alleged First Amendment right to record police is subject to reasonable time, place, or manner restrictions. *See Ward*, 491 U.S. at 791; *Smith*, 212 F.3d at 1333. Reasonable time, place, or manner restrictions may negatively affect First Amendment rights as long as the restrictions are content-neutral, serve a government interest, and leave open alternative forms of communication. *Ward*, 491 U.S. at 791. The Officers lawfully asked Petitioner to stop recording the sensitive encounter for safety reasons, asked Petitioner to delete the video to maintain the integrity of the confidential break-in investigation, arrested Petitioner for violating New Normal Statute § 943.03, and seized Petitioner's GoPros in accordance with a warrant. (R. at 3–4, 13–14); *see id.* Consequently, the Officers did not violate Petitioner's alleged First Amendment right to record police, because the Officers imposed restrictions that did not target the specific message of the video, served significant government interests in officer safety and investigation integrity, and left alternative forms of communication open. (R. at 13–14); *see Ward*, 491 U.S. at 791, 798–99, 802. Therefore, the Officers are entitled to qualified immunity, because Petitioner failed to establish that the Officers violated his alleged First Amendment right to record police. (R. at 3–4); *see al-Kidd*, 131 S. Ct. at 2080.

B. An Alleged First Amendment Right to Record Police Is Not Clearly Established.

The second element of qualified immunity requires that a plaintiff sufficiently plead that the defendant violated a clearly established constitutional right. *Al-Kidd*, 131 S. Ct. at 2080. This Court has developed two methods to determine whether a constitutional right is clearly established and each method must be independently satisfied to meet the second element of qualified immunity. *See, e.g.*, *al-Kidd*, 131 S. Ct. at 2083–85. First, *al-Kidd* provides that an alleged First Amendment right is clearly established only if judicial precedent renders the right beyond debate. *Id.* at 2083. Second, *Pearson* provides that an alleged constitutional right is clearly established only if *all* reasonable officers would find that the allegedly wrongful conduct violated a protected right. *Pearson*, 555 U.S. at 231.

i. A circuit split regarding the clear establishment of a First Amendment right to record police necessarily precludes clear establishment.

It is unjust to hold police officers liable for discretionary actions related to constitutional issues when there is a circuit split. *Pearson*, 555 U.S. at 244–45. Furthermore, if this Court has not established a particular First Amendment right, then the circuit courts must consistently and uniformly recognize the right. *Al-Kidd*, 131 S. Ct. at 2084; *but see Taylor v. Barkes*, 135 S. Ct. 2042, 2044–45 (2015) (questioning whether a robust consensus among the Courts of Appeals can clearly establish a First Amendment right without this Court's decision and discussing only *arguendo* that a circuit split can form a clearly established First Amendment right). Neither this Court nor the Fourteenth Circuit, which are the only binding authorities in this case, has found a clearly established First Amendment right to record police. (R. at 35–36). In fact, the Fourteenth Circuit explicitly found that an alleged First Amendment right to record police is *not* clearly established. (R. at 35–36). Consequently, in the context of the circuit courts, an alleged First

Amendment right to record police is necessarily debatable. (R. at 34–36); *compare, e.g.*, *Glik*, 655 F.3d at 85 (finding an established but qualified right to record police), *with Kelly*, 622 F.3d at 262–63 (finding no clearly established right to record police). Therefore, the Officers are entitled to qualified immunity, because a First Amendment right to record police is not clearly established. *See al-Kidd*, 131 S. Ct. at 2084.

ii. The Officers imposed lawful and objectively reasonable restrictions on Petitioner's alleged First Amendment right to record police.

To determine whether a defendant's conduct violated a clearly established constitutional right, courts look at the objective reasonableness of the conduct in question. *Anderson*, 483 U.S. at 639–40. A police officer's actions violate a clearly established constitutional right only if *all* reasonable officers would find that the actions violated the plaintiff's particular right. *See id.* A reasonable officer, however, could find that the Officers reasonably asked Petitioner to delete the video, because the Officers wanted to maintain officer safety and integrity of the confidential break-in investigation. (R. at 13–14); *see id.* at 638; *Ward*, 491 U.S. at 802. Furthermore, a reasonable officer could find that Officer Lacey reasonably arrested Petitioner and the Officers reasonably confiscated Petitioner's GoPros, because the Officers had a warrant based on Petitioner's violation of New Normal Statute § 943.03. (R. at 14); *see Malley v. Briggs*, 475 U.S. 335, 344–45 (1986) (finding that qualified immunity protects an officer that executes a warrants so long as the officer reasonably believes the warrant is valid). Consequently, the Officers are entitled qualified immunity, because a reasonable officer could find that the Officers' conduct did not violate Petitioner's alleged First Amendment right to record police. (R. at 13–14); *see Anderson*, 483 U.S. at 638–40.

C. Petitioner Failed to Allege a Violation of a Particular First Amendment Right.

Finally, a plaintiff must sufficiently plead that the defendant's conduct was an obvious violation of a clearly established and *particular* constitutional right. *Anderson*, 483 U.S. at 640. This Court recognizes that allowing a plaintiff to successfully plead a violation of a broad First Amendment right to collect information would undermine qualified immunity and ignore the interests this Court intends qualified immunity to balance, i.e., protecting constitutional rights and enabling police to effectively perform their discretionary duties. *See id.* at 639. Stated differently, this Court requires that a plaintiff sufficiently plead a violation of a particular right as opposed to a particular violation of a general right. *Id.* at 641. Consequently, a plaintiff may not successfully sue a defendant by simply alleging a violation of a broad First Amendment right. *See id.* at 639–40; *see also al-Kidd*, 131 S. Ct. at 2084 (warning lower courts against defining clearly established rights too generally). Petitioner's complaint alleges that the Officers violated his First Amendment right to gather information when the Officers asked him to delete the video, arrested him, and seized his GoPros; however, Petitioner's complaint fails to specify what *particular* First Amendment right the Officers' allegedly violated. (R. at 2–4); *see al-Kidd*, 131 S. Ct. at 2084. Therefore, Petitioner's allegation that the Officers violated his general First Amendment right to gather information lacks the specificity required by this Court to deny the Officers qualified immunity. (R. at 4); *see Anderson*, 483 U.S. at 639–40.

CONCLUSION AND PRAYER

For the foregoing reasons, Sergeant Cagney and Officer Lacey pray that this Court affirm the Fourteenth Circuit's judgment, which declined to recognize an absolute First Amendment right to record police and granted the Officers qualified immunity.

Respectfully submitted,

/s/ Scott Fee

Scott Fee

Counsel for Respondents

Law Offices of StMU
One Camino Santa Maria
San Antonio, TX 78228
sfee@mail.stmarytx.edu
(210) 436-4011

APPENDIX

Freedom of Information Act, 5 U.S.C. § 552 (2009)

§ 552. Public Information; Agency Rules, Opinions, Orders, Records, and Proceedings

(a) Each agency shall make available to the public information as follows:

. . . .

(b) This section does not apply to matters that are:

. . . .

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

. . . .

(c) (1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and:

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

. . . .

. . . .

New Normal Statute § 943.03 (2013)

§ 934.03. Interception and Disclosure of Wire, Oral, or Electronic Communications Prohibited

(1) Except as otherwise specifically provided in this chapter, any person who:

(a) Intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, oral, or electronic communication;

(b) Intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when:

1. Such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

2. Such device transmits communications by radio or interferes with the transmission of such communication;

(c) Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) Intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(e) Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication intercepted by means authorized by subparagraph (2)(a)2., paragraph (2)(b), paragraph (2)(c), § 934.07, or § 934.09 when that person knows or has reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation, has obtained or received the information in connection with a criminal investigation, and intends to improperly obstruct, impede, or interfere with a duly authorized criminal investigation;

shall be punished as provided in subsection (4).

. . . .

(4) (a) Except as provided in paragraph (b), whoever violates subsection (1) is guilty of a felony of the third degree, punishable as provided in § 775.082, § 775.083, § 775.084, or § 934.41.

(b) If the offense is a first offense under paragraph (a) and is not for any tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, and the wire or electronic communication with respect to which the offense under

paragraph (a) was committed is a radio communication that is not scrambled, encrypted, or transmitted using modulation techniques the essential parameters of which have been withheld from the public with the intention of preserving the privacy of such communication, then:

1. If the communication is not the radio portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication, or a paging service communication, and the conduct is not that described in subparagraph (2)(h)7., the person committing the offense is guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083.
2. If the communication is the radio portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication, or a paging service communication, the person committing the offense is guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083.

CERTIFICATE OF SERVICE

I, Scott Fee, certify that I prepared this Brief for Respondents in accordance with the Spring 2016 Legal Research and Writing Appellate Brief Rules and submitted this Brief via TWEN (the Texas Westlaw Education Network) to Professor Claire Hargrove on March 11, 2016.

Respectfully submitted,

/s/ Scott Fee

Scott Fee

Counsel for Respondents

Law Offices of StMU
One Camino Santa Maria
San Antonio, TX 78228
sfee@mail.stmarytx.edu
(210) 436-4011