No. 12345

IN THE

Supreme Court of the United States

Huey Lyttle,
PETITIONER.

v.

Sydney Cagney and
Robert Lacey,
RESPONDENTS.

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

BRIEF FOR RESPONDENTS

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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?

PARTIES TO THE PROCEEDING

Plaintiff-appellant in the proceedings below was Huey Lyttle.

Defendants-appellees in the proceedings below were Sydney Cagney and Robert Lacey.

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The opinions below appear in the transcript of the record.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on June 5, 2015. (R. at 36). Petitioner filed its Petition for Writ of Certiorari on July 5, 2015. (R. at 37). This Court granted the Petition on October 15, 2015. (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*.

CONSTITUTIONAL PROVISION AND STATUTE

Relevant provisions of the U.S. Constitution are reproduced in an appendix to this brief.

STATEMENT OF THE CASE

Midday on August 18, 2013, Sergeant Sydney Cagney and Officer Robert Lacey ("the officers") began their patrol on Pony Island. (R. at 13). The Thisis Police Department provided Sergeant Cagney with a description of three male suspects wanted for a string of residential break-ins that occurred in the morning. (R. at 13). After monitoring the streets for a few hours, the officers noticed three young men riding bicycles who, in the opinion of Sergeant Cagney, fit the description of the suspects. (R. at 13). Officer Lacey also observed that one of the men's bicycles did not conform to the New Normal Motor Vehicle Code. (R. at 13). Therefore, the officers approached and stopped the men for the vehicle code violation and to question them about the break-ins. (R. at 13). During questioning, Officer Lacey noticed that Huey Lyttle ("Petitioner") used his cellular device to record the interaction. (R. at 15). Sergeant Cagney asked Petitioner to cease recording given the safety concerns during traffic stops, and the fact that the men were potential suspects. (R. at 14). Petitioner complied and stopped recording. (R. at 14). The officers continued questioning the men for approximately fifteen minutes. (R. at 14). At the end, one of Petitioner's friends received a citation for the bicycle code violation. (R. at 14).

Unbeknownst to the officers, Petitioner recorded the entire police encounter using a GoPro camera attached to his surfboard. (R. at 11). A couple of days later, Petitioner posted the video online. (R. at 4, 11). One week after the incident, Jim Walsh, Head of the Thisis Police Department, discovered multiple news stories that included the surreptitiously recorded video of the interaction between the three young men and the officers. (R. at 15). Walsh instructed the officers to obtain a warrant for any footage or related video equipment used in the filming, recording, and dissemination of the video encounter. (R. at 16). A few hours later, the officers arrived at Petitioner's residence with the warrant. (R. at 14). The officers confiscated one computer hard drive and two GoPros from Petitioner's bedroom. (R. at 14). Officer Lacey

placed Petitioner under arrest for violating New Normal Statute § 943.03, which prohibits the illegal interception and disclosure of wire, oral, or electronic communications. (R. at 8, 14).

On November 3, 2013, Petitioner filed a 42 U.S.C. § 1983 action against Sergeant Cagney and Officer Lacey in the New Normal federal district court, alleging the officers violated his First Amendment right to free speech and freedom of the press. (R. at 4, 5). On January 22, 2014, Sergeant Cagney and Officer Lacey filed a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(a). (R. at 17). Petitioner filed his opposition to the motion on February 12, 2014. (R. at 25). On April 25, 2014, the district court granted the officer's motion for summary judgment. (R. at 31). Petitioner filed a notice of appeal, which the Fourteenth Circuit granted on July 26, 2014. (R. at 33). On June 5, 2015, the Fourteenth Circuit affirmed the district court's ruling, holding it does not recognize an unrestricted right to record police activity, and therefore, the Officers were entitled to qualified immunity. (R. at 36). Petitioner filed his Petition for Writ of Certiorari on July 5, 2015. (R. at 37). This Court granted certiorari on October 15, 2015. (R. at 38).

SUMMARY OF THE ARGUMENT

I. The lower courts correctly held the First Amendment does not guarantee an unrestricted right to record police activity because the First Amendment does not guarantee a right for the public to access all governmental information. Although the First Amendment undeniably protects important freedoms of citizens, including the right to free speech and freedom of press, it does not confer absolute, unrestricted rights. Several circuit courts have held that even if the First Amendment protects the right to record police activity, law enforcement officers may impose reasonable time, place, and manner limitations on the recording when the practice interferes with their official police duties, such as investigating a crime or maintaining public safety. In this case, Petitioner filmed his own questioning by police in close proximity to the

officers, using a secret application to hide his recording, and ultimately interfering with the officers' ability to investigate a vehicle violation and his possible involvement in earlier break-ins in the area. Based on these circumstances, the Fourteenth Circuit correctly held Sergeant Cagney's request to cease recording was reasonable. Furthermore, Petitioner's claim that the confiscation of his cameras and hard drive amounts to prior restraint fails because his recording did not constitute protected speech. Given that Sergeant Cagney's request to stop filming was lawful, Petitioner's video was not protected speech, but rather an illegally recorded video. Accordingly, this Court should affirm the lower courts' holding that the First Amendment does not guarantee an unrestricted right to record police activity, and Petitioner did not have a right to record police under the circumstances.

II. The Fourteenth Circuit correctly held that Sergeant Cagney and Officer Lacey are entitled to qualified immunity because neither this Court nor the Fourteenth Circuit have case precedent to put an officer on fair notice of a clearly established right to record police. Qualified immunity provides an important defense to liability for public officials acting in the course of their employment to ensure the robust functioning of governmental duties. This Court should not look outside the jurisdiction within which the incident occurred to find a clearly established right. Even if this Court takes into account lower court decisions outside of the Fourteenth Circuit, it will find circuit courts are split and unable to agree on whether the First Amendment provides a right to record police. The split of opinion on the exact nature of the right to record police, including whether it may be limited due to a traffic stop or close proximity, as held in *Kelly* and *Crawford*, clearly illustrates that a reasonable officer could have believed his order to cease recording was lawful. Therefore, this Court should affirm the Fourteenth Circuit's holding that Sergeant Cagney and Officer Lacey are entitled to qualified immunity.

ARGUMENT

I. THE LOWER COURTS CORRECTLY HELD THE FIRST AMENDMENT DOES NOT GRANT AN UNRESTRICTED RIGHT TO FILM POLICE ACTIVITY, AND EVEN IF SUCH A RIGHT EXISTS, POLICE MAY LAWFULLY IMPOSE TIME, PLACE, AND MANNER RESTRICTIONS TO FURTHER AN IMPORTANT GOVERNMENTAL INTEREST.

A. The First Amendment does not protect activities that lack an intended particularized message, and does not guarantee an *absolute* right for the public to access *all* governmental information.

The First Amendment to the U.S. Constitution undeniably guards important freedoms of citizens, including the right to free speech and freedom of press, but does not confer absolute, unrestricted rights. *See* U.S. CONST. amend. I; *see also Branzburg v. Hayes*, 408 U.S. 665, 684−85 (1972) (holding that because First Amendment freedoms are not absolute, a judge may impose reasonable limitations). Rather, this Court has interpreted several correlated and qualified rights derived from the free speech and free press clauses, including the right of the press to gather news on matters of public interest, the right to publish speech, and the right of the public to receive information. *See id.* at 681. While gathering, publishing, and receiving news implicates activity beyond spoken and written word, not all activity or expression qualifies for First Amendment protection. *See Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (noting not all activity that conveys an idea meets the threshold of protected communicative speech). The First Amendment protects expressive conduct, which (1) the actor intended to communicate a particularized message with the act, and (2) the message is likely to be understood by its intended audience. *Id.* If the expressive activity does not fall within the scope of the First Amendment, the government may outright prohibit it. *See id.*

In this case, Petitioner's filming did not fall within the scope of First Amendment protection because, when recording, Petitioner did not intend to convey a particular message, such as criticizing or opposing the officers. *See Fields v. City of Philadelphia*, No. 14-4424, 2016 U.S. Dist. LEXIS 20840, at *6−7 (E.D. Pa. Feb. 19, 2016). In *Fields*, the Eastern District of Pennsylvania ruled on two separate incidents in which plaintiffs sought relief for First Amendment violations. *Id.* at *1. The officers arrested the first plaintiff because he took a photograph of police breaking up a house party. *Id.* at *2. Meanwhile, police physically restrained the second plaintiff, a self-described legal observer, to prevent her from filming an interaction between a protester and another officer. *Id.* at *3−4. Since both plaintiffs sought to record the police as observers, rather than to criticize their activity, the court ruled the police regulation was constitutional. *Id.* at *5−7. Multiple district courts agree that observing a police officer is not, by itself, sufficiently communicative to receive First Amendment protection simply due to a police officer's status as public official. *See Kelly v. Borough of Carlisle*, 622 F.3d 248, 260 (3d Cir. 2010) (finding no clearly established right to film the police without expressive intent); *cf. Higginbotham v. City of New York*, 105 F. Supp. 3d 369, 371 (S.D.N.Y. 2015) (denying summary judgment against the police defendants when the plaintiff filmed as a professional journalist with clear expressive intent).

In this case, Petitioner came to Pony Island to surf—not to oppose or criticize the police. He did not communicate anything to the officers as to why he recorded them, and has not pled that he recorded them to express his disagreement with the traffic stop. Additionally, even if the online blog audience reacted to Petitioner's video by expressing criticism about the police, Petitioner has never indicated he intended to convey the particularized message of portraying the police in a negative light. *See Fields*, 2016 U.S. Dist. LEXIS 20840, at *6−7. Therefore, Petitioner's conduct fails to meet the necessary elements to qualify as protected speech under the

First Amendment, and further, Sergeant Cagney and Officer Lacey acted lawfully when they requested he stop recording.

Petitioner also asserts his right to record police is correlated to the right to gather information under the freedom of the press. *But see Am. Civil Liberties Union of Ill.v. Alvarez*, 679 F.3d 583, 607 (7th Cir. 2012) (clarifying the First Amendment right to gather news does not protect behavior that interferes with effective law enforcement). Assuming, *arguendo*, that Petitioner intended to record in order to gather news, this Court has consistently held the First Amendment does not grant the press unrestricted access to information in the government's control. *See Branzburg*, 408 U.S. at 684−85 (citing instances where information in the control of government is inaccessible to the press, including grand jury proceedings, Supreme Court conferences, executive sessions of officials, and evidence from crime scenes and sites of natural disasters).

This Court has repeatedly recognized the unique tension facing law enforcement officers in the public performance of their duties. *See Colten v. Kentucky*, 407 U.S. 104, 109 (1972) (affirming defendant's conviction for disorderly conduct because he failed to heed officer's order to disperse from a traffic stop). Police manage numerous responsibilities, including questioning suspects, controlling accident sites and crime scenes, administering emergency care to injured persons, enforcing traffic laws, and securing statements from victims and witnesses. *See Alvarez*, 679 F.3d at 611 (Posner, J. dissenting). A police officer executing a traffic stop or criminal investigation, as in the present case, is privileged to take unquestioned command of the scene in order to minimize risk to those involved and the public at large. *See Kelly*, 622 F.3d at 262−63. Command includes the officer's power to tell members of the public to "move-on" when they attempt to converse with an officer or come into close proximity. *See Colten*, 407 U.S. at 109.

Members of the public do not have a right to watch police issue a traffic ticket, and predictably less of a right to observe highly sensitive criminal investigations, as Petitioner attempted in this case. *See id*. The privilege of a police officer to issue move-on orders to people interfering with a traffic stop (even by their very presence) implies the government controls the scene of a traffic stop and access to information exchanged therein. *See id*. Accordingly, Petitioner's argument that he had an unrestricted right to video record police fails to take into account the authority of police officers to control any activity interfering with their duties. This Court should affirm the Fourteenth Circuit's decision and not recognize such an unrestricted right.

B. Even if the First Amendment guarantees a right to record police activity, law enforcement may impose content-neutral, narrowly tailored, and reasonable time, place, and manner restrictions upheld by multiple circuit courts.

No circuit has recognized an unrestricted right to film police activity; rather, each decision acknowledges the authority of government agents to enact reasonable regulations on time, place, and manner of speech in public. *See, e.g., Gericke v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014) (deeming public roads a public forum in which law enforcement constitutionally restricts the right to record based on the time, place, and manner of filming); *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011); *Alvarez*, 679 F.3d at 605; *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). The First, Seventh, Ninth, and Eleventh Circuits recognize a limited First Amendment right to film the police in the public performance of their duties. *Gericke*, 753 F.3d at 3; *Glik*, 655 F.3d at 82; *Alvarez*, 679 F.3d at 594; *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995); *Smith*, 212 F.3d at 1333. However, the Third, Fourth, Tenth and Fourteenth Circuits do not recognize such a right as being clearly established. *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010); *Szymecki v. Houck*, 353 Fed. App'x. 852, 853 (4th Cir. 2009);

Mocek v. City of Albuquerque, No. 14-2063, 2015 WL 9298662, at *10 (10th Cir. Dec. 22, 2015). When a person's expressive conduct combines "speech" with "nonspeech" elements—"speech" being Petitioner's digital video file and "nonspeech" being the act of recording the video—the government may lawfully impose restrictions on the conduct to further a sufficiently important government interest. *See Kelly*, 622 F.3d at 262. A government regulation survives scrutiny if it furthers a substantial governmental interest, is content-neutral, and is applied no more than is necessary to further that interest. *See id* at 262−63. Police officers need only show an order to stop filming furthers a substantial governmental interest that would be less effectively achieved without making the order. *See id.*

C. Sergeant Cagney and Officer Lacey reasonably limited Petitioner's recording because they suspected he had committed a violent crime, and his recording in close proximity interfered with their police duties.

The circumstances surrounding Petitioner's recording differ significantly from lower court precedents that recognize a qualified right to record police activity. Sergeant Cagney and Officer Lacey reasonably limited Petitioner's right to record police activity because he attempted to record a traffic stop, which multiple circuit courts recognize as a particularly dangerous situation. *See Glik*, 655 F.3d at 85 (holding a traffic stop is worlds apart from an arrest on the Boston Common); *see also Kelly*, 622 F.3d at 262 (finding no clearly established right because traffic stops are inherently dangerous). Furthermore, Petitioner's stop involved two other male companions, a scenario that increases the level of risk to the officers. *See Kelly*, 622 F.3d at 262−63 (describing the dangerousness of traffic stops such that police and occupants will be safer when police maintain command). Sergeant Cagney and Officer Lacey acted reasonably in asking Petitioner to cease recording because the filming served as a distraction and interfered with the substantial government interest of enforcing traffic laws. *See Colten*, 407 U.S. at 109

(finding bystanders may be lawfully limited in exercising their First Amendment rights when their expressive conduct interferes with proper law enforcement).

In addition to the vehicle code violation, Petitioner and his friends fit the description of dangerous home break-in suspects. The police duties of issuing a traffic citation and questioning crime suspects required Sergeant Cagney and Officer Lacey to come in close contact with Petitioner. Nearly unanimously, circuit courts have failed to recognize the right to record police when the person filming is in close proximity to police officers and related to the suspicious activity at hand. *See Kelly*, 622 F.3d at 262 (filming a traffic stop from within the stopped car is a not a clearly established right); *see also Syzmecki v. Houck*, 353 Fed. Appx. 852 (4th Cir.2009) (recording the arrest of a close family member is not clearly established); *Mocek*, 2015 WL 9298662, at *31 (filming one's own questioning at airport security is not clearly established); *see also Smith*, 212 F.3d at 1333 (finding no First Amendment right to record police when the officer reasonably fears for his safety). Those circuit courts that have recognized a right to record police emphasized the person filming maintained a comfortable distance between the camera and police officers. *See, e.g., Glik*, 655 F.3d at 84 (holding plaintiff could film an arrest in a public park from ten feet away); *Gericke*, 753 F.3d at 7 (upholding right of bystander to film police from a distance of at least thirty feet); *Alvarez*, 679 F.3d at 605 (holding bystanders may openly video record police from afar).

Dangerous crime suspects are reasonably limited from recording their own police investigation because officers, in order to ensure the safety of a crime scene, maintain the authority to restrict their movements. *See id.* at 607. In *Mocek*, security officers acted reasonably in requesting plaintiff stop filming an airport security checkpoint open to the public. *Mocek*, 2015 WL 9298662, at *31. Mocek's potentially nefarious intent in a setting of heightened security led the officers to reasonably believe his continued filming jeopardized public safety.

Id. Similarly, Sergeant Cagney and Officer Lacey reasonably interpreted Petitioner, the suspect of a violent crime, to conceal nefarious intentions when he surreptitiously filmed using a secret phone application. *See Higginbotham*, 105 F. Supp. 3d at 381 (pointing to multiple circumstances where video recording police may be held as unprotected, particularly when done surreptitiously). The North District of Ohio recently held there was no clearly established right to record police when police officers responded to a break-in call at night and impeded plaintiffs from filming the arrest. *Crawford v. Geiger*, No. 3:13-CV-1883, 2015 WL 5569007, at *2−9 (N.D. Ohio Sept. 22, 2015). The court held there was no clearly established right to record the police activity in light of the extenuating and dangerous circumstances. *See id.* at 19−20.

In this case, Petitioner posed a risk to public safety given that he was involved in a traffic stop and was a suspect in a dangerous string of residential break-ins. Therefore, Petitioner's filming interfered with the substantial government interest of crime prevention and enforcement of traffic laws. *See Alvarez*, 679 F.3d at 607 (balancing an individual's right to free speech against the public's interest in effective law enforcement). The officers did not violate Petitioner's First Amendment right because expressive activity that interferes with police duties does not rise to the level of First Amendment protected speech. *See Colten*, 407 U.S. at 109.

Finally, Petitioner's argument that the officers' confiscation of his recording materials amounted to a prior restraint fails because his recording did not constitute protected speech, but rather, was created in direct violation of a lawful order. As described earlier, Sergeant Cagney and Officer Lacey lawfully requested Petitioner to stop recording their interaction. Thus, any video footage made thereafter directly violated Sergeant Cagney's lawful order, and was created illegally. Since Sergeant Cagney and Officer Lacey reasonably restricted the time, place, and manner of Petitioner's filming, the request to stop filming and any future confiscations of the recordings do not amount to a prior restraint. Furthermore, even if this Court recognizes a right

to record police activity, Petitioner's actions should not receive protection because he directly violated New Normal Statute § 943.03, which criminalizes the disclosure of any illegally intercepted electronic communication related to a criminal investigation. As this Court has previously held, the First Amendment does not confer the right to break the law. *See Branzburg*, 408 U.S. at 691 (requiring journalists to respond to grand jury subpoenas to answer whether they witnessed criminal activity in the presence of their sources). Therefore, this Court should affirm the lower courts' holding that there is no unrestricted right to record police activity, and find that the officers lawfully instructed Petitioner's to cease recording.

II. THE FOURTEENTH CIRCUIT CORRECTLY HELD SERGEANT CAGNEY AND OFFICER LACEY WERE ENTITLED TO QUALIFIED IMMUNITY BECAUSE NEITHER THIS COURT NOR THE FOURTEENTH CIRCUIT HAVE HELD THE RIGHT TO RECORD POLICE IS CLEARLY ESTABLISHED.

A. This Court should hold Sergeant Cagney and Officer Lacey are entitled to qualified immunity because the courts are split on whether the First Amendment grants a clearly established right to record police activity in public.

Qualified immunity balances the public's need to hold governmental officials accountable while protecting officials from frivolous lawsuits and costly litigation. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The public benefits when law enforcement officers exercise broad discretion in carrying out their official work without fear of litigation. *See Glik*, 655 F.3d at 81. Qualified immunity operates as a powerful defense to lawsuits because, if awarded, courts will dismiss § 1983 claims prior to discovery. *Pearson*, 555 U.S. at 231−32. It appropriately protects those officials who reasonably interpret the law, even if they make a mistake in their interpretation. *See Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (finding officers entitled to qualified immunity regardless of their violation of plaintiff's Eighth Amendment right

against cruel and unusual punishment). Qualified immunity stops short of protecting the irresponsible and unreasonable actions of officials. *See Pearson*, 555 U.S. at 231. To judge whether an official acts reasonably or unreasonably, this Court set forth a rule that public officials must have fair warning their behavior violates a citizen's constitutional right before being subject to liability. *Hope*, 536 U.S. 739−740. In other words, the constitutional right must be clearly established. *Id.*

Even if this Court finds Petitioner sustained a First Amendment violation, the Court should find Sergeant Cagney and Officer Lacey are entitled to qualified immunity because the right to record was not clearly established at the time of the incident. A right is clearly established when the law provides fair warning to the defendant that his conduct violated the plaintiff's rights under the particular circumstances at the time. *Id*. The current state of the law represents a strong disagreement among the circuits, proving the constitutional question is far from consensus. *See id*. (requiring existing case precedent to place the contours of the right beyond debate before public officials can be held liable).

As stated above, the First, Seventh, Ninth, and Eleventh Circuits recognize a qualified right to film the police; while the Third, Fourth, Tenth and Fourteenth Circuits refuse to recognize such right as clearly established. *Gericke*, 753 F.3d at 3; *Alvarez*, 679 F.3d at 594; *Fordyce*, 55 F.3d at 439; *Smith*, 212 F.3d at 1333; *Kelly*, 622 F.3d at 262; *Szymecki*, 353 Fed. App'x. at 853; *Mocek*, 2015 WL 9298662, at *31. Within the Second Circuit, recent district court decisions weighing similar fact patterns have reached contrasting decisions. *See Higginbotham*, 105 F. Supp. 3d at 379−80 (finding a clearly established First Amendment right to record police in public by a person unrelated to the core police activity, but distinguishing its facts from two other Second Circuit decisions which do not find that a bystander's right to photograph police is clearly established). In *Crawford*, a district court case within the Sixth

Circuit, a judge originally found a clearly established First Amendment right to record police activity, only to reverse his decision one year later. *Crawford*, 2015 WL 5569007, at *20−21. This Court held that when judges, employed to study and interpret the law, cannot agree on a constitutional question, police should not be liable for making a wrong guess. *Wilson v. Layne*, 526 U.S. 603, 617 (1999). Accordingly, this Court should find police cannot be held to such a high standard when a single judge looking at a single set of facts cannot agree on the legal question. *See id.*

B. No precedent within this Court or the Fourteenth Circuit recognizes a clear First Amendment right to record public police activity.

This Court has not directly addressed the issue of whether the First Amendment protects an individual's right to record police activity. *See, e.g., Alvarez*, 679 F.3d 583, *cert. denied*, 133 S. Ct. 651 (2012); *Smith*, 212 F.3d 1332, *cert. denied*, 531 U.S. 978 (2000). Additionally, the Fourteenth Circuit has not recognized an unrestricted right to film police activity. This Court should not require a police officer to know the law outside of its jurisdiction, especially when circuit courts find no consensus on the legal question. *See Wilson*, 526 U.S. at 617. Sergeant Cagney and Officer Lacey urge this Court to affirm the Fourteenth Circuit's holding rather than attempt to find consensus across jurisdictions. Police officers should be required to apprise themselves of the law within their respective jurisdictions—asking police to make a judgment call on imperfectly defined rights across the United States would expose officers to an untenable level of liability. *See id*. Thus, upholding the qualified immunity defense in this case would ensure police officers can continue the important performance of their duties despite the increasingly litigious world, and would ensure officers are shielded from liability unless they are plainly incompetent or in active defiance of the law. *See id.*

C. Petitioner fails to allege that, under the circumstances in this case, a reasonably competent officer should have known the right to record police existed, and the officer's actions violated such right.

Sergeant Cagney and Officer Lacey deserve qualified immunity because the circumstances present in this case would lead a competent officer to believe he lawfully requested Petitioner to stop recording. To put an officer on fair notice of a clearly established right, the weight of authority must define the contours of a right so as to alert a reasonable official that his actions violate such right. *Id*. at 603.

Not only do circuit courts disagree on the right to record police activity in public, but they firmly show Petitioner's circumstances *do not* fit within any clearly established right to record police. First, Petitioner attempted to record the police during a traffic stop, which several courts distinguish as an inherently dangerous situation and one in which a clearly established right to record police does not apply. *See e.g., Glik*, 655 F.3d at 85; *Kelly*, 622 F.3d at 262; *see Higginbotham*, 105 F. Supp. 3d at 381; *Williams v. Boggs*, No. CIV.A. 6:13-65-DCR, 2014 WL 585373, at *5 (E.D. Ky. Feb. 13, 2014) (granting qualified immunity for defendant who stopped plaintiff from recording his own traffic stop with a helmet-camera).

Several courts have drawn a line between a bystander who records from a safe distance and a person at the center of police activity because crime suspects pose heightened security risks and their recording stands to interfere with police duties. *See Mocek*, 2015 WL 9298662, at *10 (filming at an airport checkpoint requires officials to divert attention in order to investigate suspicious activity). Petitioner drew the officers' attention because he fit the profile of a dangerous break-in suspect. As the subject of police activity, Petitioner necessarily stood in close proximity to the officers until the completion of the investigation.

In *Williams*, the district court held the First Amendment did not grant a young man the right to record his own traffic stop. *Williams*, 2014 WL 585373, at *5. The facts showed the officer knew the plaintiff, a minor, from previously warning him not to perform "wheelies" on his motorcycle, and the traffic stop amounted to a citation. *Id.* at *2. Sergeant Cagney and Officer Lacey, however, did not know Petitioner, but rather suspected him of a dangerous crime. Similarly, in *Crawford*, a police officer suspected two male plaintiffs of breaking and entering a business based on a 911 call. *Crawford*, 2015 WL 5569007, at *20. The officer prevented one of the plaintiffs from reaching for his cellular phone to record the arrest. *Id.* at *7−8. The court decided a reasonable officer would not be on fair notice that his actions, based on split second judgment under the circumstances, violated the plaintiffs' First Amendment right to free speech. *Id*. at *20. Therefore, these cases describe circumstances where speech might fall outside of the bounds of First Amendment protection, such as the surreptitious recording made in this case. *See Higginbotham*, 105 F. Supp. 3d at 381.

In this case, Sergeant Cagney and Officer Lacey reasonably believed they acted lawfully when they requested Petitioner to stop filming the interaction. Petitioner's filming interfered with important police functions of enacting traffic laws and investigating a violent crime. Sergeant Cagney and Officer Lacey reasonably believed Petitioner's conduct posed a risk to the crime investigation, issuance of traffic citations, and potentially placed the officers and public at greater risk. Therefore, this Court should uphold the Fourteenth Circuit's decision and find Sergeant Cagney and Officer Lacey are entitled to qualified immunity.

CONCLUSION AND PRAYER

The lower courts correctly held the First Amendment does not guarantee an unrestricted right to record police activity, and even if a right exists, police officers may reasonably limit the time, place, and manner of such speech if the regulation furthers an important governmental

interest. Sergeant Cagney and Officer Lacey reasonably limited Petitioner's recording because they suspected him of committing a violent crime and questioned him during a traffic stop. Furthermore, the Fourteenth Circuit correctly held Sergeant Cagney and Officer Lacey were entitled to qualified immunity because neither this Court nor the Fourteenth Circuit have recognized the right to record police as being clearly established, and therefore, the officers had no fair notice that that their order to cease recording would constitute a violation of such a right. Importantly, many circuit courts are split on the existence of, as well as the exact nature of, the right to record, including whether it exists in the context of a traffic stop or investigation. Accordingly, Sergeant Cagney and Officer Lacey respectfully pray this Court affirm the Fourteenth Circuit's holding that the First Amendment does not guarantee an unrestricted right to film police activity and hold they are entitled to qualified immunity.

Respectfully Submitted,
/s/ Zoe Russell
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March 11, 2016

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. mail to Sandra Sotomayor, Esq., Counsel of Record, 454 Beach Rd., Thisis, NN 98765.

APPENDIX

U.S. CONST. amend. I – Right to Free Speech

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . . "

42 U.S.C. § 1893 (1979) – Civil Action for Deprivation of Rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured . . . ."