No. 12345

In The

Supreme Court of the United States

October Term 2015

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 PETITIONER

Daniela Mondragon
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether there is an unrestricted right to record police under the First Amendment.

II. Whether the doctrine of qualified immunity protects the police officers' conduct.

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OPINIONS BELOW

The opinions of the District and Appeals Courts have not been reported. The opinions appear in the record (R. at 33).

JURISDICTION

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

STANDARD OF REVIEW

A district court's fact finding 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 . . . abridging the freedom of speech, or of the press; or of the right of the people . . . to petition the Government for redress of grievances." CONST. AMEND. I. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (2006).

STATEMENT OF THE CASE

On August 18, 2013, Huey Lyttle, accompanied by two of his friends, Dewey Large and Louie Small, spent the day at the beach. (R. at 11). For the purposes of filming surfing scenes for his blog, Lyttle attached a GoPro camera to his surfboard. (R. at 3). Later that afternoon, Lyttle and his friends stopped at a local restaurant. *Id.* As they were leaving the restaurant, Lyttle and his friends were ordered by Police Officers Cagney and Lacey to get off their bikes and step

back. *Id*. According to the officers, Large's bicycle did not comply with New Normal's Motor Vehicle Code, since it was missing a bell and horn (R. at 10).

While Lyttle and his friends were detained, Lyttle turned on "PoliceTape," a phone application that allows the screen to remain dark while recording. (R. at 3). Officer Lacey, who became aware of the recording, angrily asked Lyttle to stop filming or otherwise be arrested. (R. at 11). Lyttle ceased filming and was asked by both officers to erase the recording, to which Lyttle complied without objection. *Id.* Immediately after Lyttle erased the recording, Cagney issued a ticket to Large for not having a bell, and Lyttle and his friends were allowed to leave. (R. at 10).

Later that day, while editing surfing footage, Lyttle realized that his GoPro camera, which had remained on his surfboard the entire day, had recorded the traffic stop from that afternoon. (R. at 11). On August 20, 2013, Lyttle posted to his blog the surfing footage, along with the interaction between his friends and Officers Cagney and Lacey. *Id.* Three days later, media websites visited Lyttle's blog and reposted the footage on their own websites. (R. at 4). On August 25, 2013, Officers Cagney and Lacey, along with two members of the Thisis Police Department went to Lyttle's home pursuant to a search and arrest warrant. *Id.* For an hour, while Lyttle sat in handcuffs, the four officers searched Lyttle's home and confiscated a computer hard drive and two GoPros. (R. at 12). Lyttle was arrested and charged with one count of violating New Normal Statute § 943.03. *Id*.

Lyttle filed a complaint against Officers Cagney and Lacey, alleging that the officers had violated his right to free speech under the First Amendment by forcing Lyttle to erase the initial recording, arresting him, and subsequently confiscating his property. *Id.* Officers Cagney and Lacey filed a motion for summary judgment pursuant to rule 56 of the Federal Rules of

Procedure. (R. at 17). In this motion, the officers contended that Lyttle is not entitled to an unrestrained constitutional right to record the police, because no such right exists under the First Amendment. *Id.* Additionally, the officers claim protection under qualified immunity. *Id*.

Lyttle countered that a majority of circuit courts and many district courts have recognized a right under the First Amendment to openly record police activity that extends beyond the press and is held by the public generally. (R. at 22 – 23). Furthermore, government officials are only protected by qualified immunity when their conduct does not violate a person's constitutional rights. *Id*. Officers Cagney and Lacey violated Lyttle's constitutional rights twice, by deleting the first recording, and subsequently arresting him for disseminating the second recording. *Id.*

The district court granted the officers' motion for summary judgment. (R. at 26). The court recognized a general right under the First Amendment to gather news that may be limited by law enforcement as long as this limitation is reasonable. *Id*. According to the court, Lyttle did not establish that the officers' limitation of his first amendment right was unreasonable. (R. at 31). Lyttle then appealed, and the appellate court affirmed the district court's judgment. (R. at 36). Lyttle filed a petition for certiorari with the United States Supreme Court. (R. at 37). This Court has granted certiorari to determine, first, whether there is an unrestricted right to record police under the First Amendment; and second, whether the doctrine of qualified immunity protects the police officers' conduct. (R. at 38).

SUMMARY OF THE ARGUMENTS

I

Under the First Amendment, a citizen is entitled to the free and truthful discussion of all matters of public interest without previous restraint or fear of subsequent punishment. Federal courts have recognized that recording devices are a form of speech through which private

citizens may gather and disseminate information of public concern, including the conduct of law enforcement. Recording police officers performing their duties in public allows citizens to create a check against police abuse, for it creates an incentive for police officers to be on their best behavior at all times. Lyttle's recording of the interaction between his friends and Officers Cagney and Lacey is an expression of his right to free speech under the First Amendment.

New Normal Statute § 943.03, in restricting all audio visual recording, effectively criminalizes speech that is protected by the Constitution. In doing so, section 943.03 violates the First Amendment by limiting rights afforded to the public by the Constitution. The government's interest in protecting the privacy of police officers does not outweigh the public's right to be free from prior restraint and subsequent punishment. Lyttle's right to free speech under the First Amendment was violated both when he was forced to erase the first recording, and subsequently when he was arrested for publishing the second.

II

Officers Cagney and Lacey should not be protected by qualified immunity. Although an officer's reliance on a state statute, regulation, or official policy that explicitly approves of the conduct in question may relieve the officer from knowing that his conduct was unlawful, reliance on a statute is not without limitations. Where a statute authorizes conduct that is clearly unconstitutional, reliance on the statute does not immunize the officer's conduct.

Furthermore, Lyttle's right to record police officers is a right that is clearly established. For officials to be placed on notice, it must be shown that their conduct violated the law even under novel factual circumstances. All circuit courts have concluded that the First Amendment protects the right to record police officers performing their duties in a public space, subject to reasonable time, place and manner restrictions. Because the use of cell phones to record police

activity is not a novel practice, Officers Cagney and Lacey reasonably should have known that there is a public right to record police officers in the scope of their public duties.

ARGUMENT

I. ALTHOUGH NOT UNQUALIFIED, LYTTLE HAS A RIGHT UNDER THE FIRST AMENDMENT TO RECORD OFFICERS CAGNEY AND LACEY, AND FURTHER TO PUBLISH HIS RECORDING.

A. The First Amendment protects the recording of police officers performing their duties in public.

Freedom of speech allows for the public and truthful discussion of all matters of public concern without previous restraint or fear of subsequent punishment. *First Nat'l Bank v. Bellotti,* 435 U.S. 765, 776 (1978). A main purpose of the First Amendment is to protect the free speech of governmental affairs. *First Nat'l Bank,* 435 U.S. at 777 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). Additionally, this Court established that the press does not have a monopoly on either the ability to enlighten or the First Amendment, and thus free speech is a right held equally by the people. *See id*. at 782. An officer acting in his official capacity is subject to public debate, because speech on public issues occupies the highest rung of the hierarchy of First Amendment values, entitling it to special protection. *Connick v. Myers*, 461 U.S. 138, 145 (1983). Because Lyttle's recording is free speech on matters of public concern, it should be assured a special place in society, for it brings about an unfettered exchange of ideas, which is essential to political and social change lead by the people. *Connick*, 461 U.S. at 145.

There is clear recognition that the First Amendment protects the right of private citizens to record police officers performing their duties in a public space. *See*, *e.g.*, *Glik v. Cunniffe,* 655 F.3d 78, 85 (1st Cir. 2011) (holding that basic principles under the First Amendment and federal case law clearly establish that private citizens possess a constitutionally protected right to videotape police carrying out their duties); *Gilles v. Davis*, 427 F.2d 197, 212 (3rd Cir. 2005)

(discussing videotaping the police in the performance of their duties on public property may be protected activity); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing a right under the First Amendment to gather news about what public officials do on public property); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a right under the First Amendment to film matters of public interest).

There is no binding precedent that suggests differently. *See* Jacqueline Waldman, *Prior Restraint and the Police: The First Amendment Right to Disseminate Recordings of Police Behavior*, 2014 U. Ill. L. Rev. 311, 315 (2014).[1] In *Szymecki v. Houck*, 353 F. App'x 852 (4th Cir. 2009), the Fourth Circuit delivered a one page, unpublished per curium opinion that summarily concluded without discussing facts or relevant law that the right to record police performing their duties on public property was not clearly established in that circuit at the time of the alleged conduct. *See id*. at 315. Because such unpublished opinions lack precedential force, the Fourth Circuit's per curiam opinion in *Szymecki* should not prevent this Court from coming to a conclusion based on constitutional principles. *See Glik*, 655 F.3d at 85 (stating that the lack of substantive discussion deprives *Szymecki* of any minimal persuasive value it may have otherwise had); *see also United States v. Stewart*, 595 F.3d 197, 199 n.1 (4th Cir. 2010) (recognizing that unpublished opinions have no precedential value).

The right to record police activity is only subject to reasonable manner, place and time restrictions. *Glik*, 655 F.3d at 84. In *Glik*, the defendant, a bystander, was arrested for using his cell phone to film an arrest in Boston Common, the oldest city park, approximately ten feet away from where the police officers stood. *Id*. at 84. The court held the defendant's exercise of his rights under the First Amendment fell within constitutional bounds, because the rights of the

[1] Letter from Jonathan M. Smith, Chief of Special Litig. Section of the U.S. Dep't of Justice, to Mark H. Grimes & Mary E. Borja, litigants in *Sharp v. Baltimore City Police Department* available at https://www.justice.gov/sites/default/files/crt/legacy/2012/05/17/Sharp_ltr_5-14-12.pdf.

state to limit the exercise of first amendment activity in such traditional public spaces are limited. *Id*. Similarly, Lyttle, a bystander to the traffic stop, inadvertently filmed the interaction from a comfortable remove. *Id*. Additionally, Lyttle's recording occurred in a public place and did not bother either party in any way. *Id*. Lyttle's peaceful, unintentional, and rightful recording in a public place did not interfere nor endanger Officers Cagney and Lacey's performance of their duties. *Id*.

Furthermore, although there is concern that dissemination of the second recording may denigrate the Thisis Police Department, injury to official reputation does not allow suppression of speech. *New York Times v. Sullivan,* 376 U.S. 254, 272 (1964). The First Amendment protects a significant amount of verbal criticism and challenge directed at police officers. *Glik*, 655 F.3d at 83 (citing *Houston v. Hill*, 482 U.S. 451, 461 (1987)). The principle that debate on public issues should be uninhibited, robust, and wide-open, means that it may include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. *New York Times,* 376 U.S. at 270. Criticism of official conduct does not lose its constitutional protection merely because it may affect officials' reputations. *Id*. at 273. In fact, the act of recording the police may serve both as a check on officers' actions and an incentive to be on their best behavior at all times. Dina Mishra, *Undermining Excessive Privacy for Police: Citizen Tape Recording to Check Police Officers' Power*, 117 YALE L.J 1549, 1553 (2008).

Police officers pose the greatest risk to citizens' physical character and privacy because officers have the authority to carry out the state's most physically coercive and invasive powers. *Id*. at 1551. When cases involving police brutality or abuse arise, police departments could deny the existence of inculpatory recordings or simply shield evidence from discovery. *Id*. at 1553. Police recordings enable the general public to use the political process to pressure law

enforcement officers to respect the limits of their authority. *Id*. at 1554. Lyttle, in exercising his constitutional right to free speech by creating and disseminating both of the recordings, creates a check against police abuses. *Id*. at 1553. Further, in reposting the footage on their websites, media outlets allow Lyttle's speech to enter the marketplace of ideas where it may become a part of a larger conversation where citizens review police actions, placing the power of governance in the hands of all individuals. *Id*. at 1555.

B. New Normal Statute § 943.03 is unconstitutional, because it criminalizes all nonconsensual speech, thereby creating a chilling effect on free speech.

The First Amendment provides that, "Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the right of the people . . . to petition the Government for redress of grievances." CONST. AMEND. I. Audiovisual recordings are forms of expression used for the protection and dissemination of ideas and information and are thereby included within the free speech guaranty of the First Amendment. *ACLU v. Alvarez,* 679 F.3d 583, 595 (7th Cir. 2011). Because they are communication technologies, audiovisual recordings, enable speech. *Id*. at 597. The act of making a recording is given first amendment protection as a corollary of the right to disseminate the resulting recording. *Id.* at 595. Therefore, Lyttle's recordings and the dissemination thereof are rights provided to him directly by the Constitution. *See id*. New Normal Statute § 943.03, in restricting audio visual recordings, violates the First Amendment, because a state statute may not further limit rights afforded to the public by the Constitution. *See id*. at 608.

In *ACLU,* the Seventh Circuit analyzed an eavesdropping statute that criminalized all audio recording, whether the recording was meant to be private or not. *Id*. at 587. The Illinois eavesdropping statute was found to restrict an expressive method for the protection and dissemination of ideas and information, thus burdening the speech and press rights of the public.

Id. at 597. To prove that a statute is constitutional, the State must establish that the statute directly advances a substantial governmental interest and that the measure is narrowly drawn to achieve that interest. *Id.* at 604. However, by criminalizing all nonconsensual speech, even that which is in fact not private, the statute was an overbroad regulating measure. *Id*. at 607. Thus, because the statute did not serve an important governmental interest that outweighed the public interest in protecting free speech, the court held it was unconstitutional. *Id*. at 608.

Similarly, New Normal Statute § 943.03 restricts a method of expression by criminalizing speech protected under the Constitution. *Id*. at 597. This Court has voiced particular concern with laws that foreclose an entire method of expression, reasoning that banning the act of recording the police and justifying the destruction of individuals' recordings is an overbroad regulating measure. *Id*. at 595 (citing *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994)). While the effectiveness of law enforcement officers is a state concern, it does not outweigh an individual's right to record the police, which serves as a check on governmental action. *See id*. at 608. New Normal Statute § 943.03 arbitrarily chills speech, and our courts recognize that the loss of first amendment freedoms, for even minimal amounts of time, constitutes irremediable injury, because that speech can never become a part of the public discussion. *Id*. at 589.

Because the process of expression through a medium has never been thought as different from the expression, Lyttle's speech begins at the moment he creates both recordings, and follows through the dissemination of the second recording. *Id* at 597. Because his full speech, both the creating of the recordings and the dissemination thereof, is protected speech, the state may not repress Lyttle's speech by silencing his voice at any part of the speech process *See id.* Lyttle's voice is silenced by New Normal Statute § 943.03 at two different points: (1) when his first recording is erased and (2) subsequently, when he is arrested for publishing the second

recording. (R. at 4). New Normal Statute § 943.03, by restricting a whole method of expression, and thus an integral step in the speech process, interferes with gathering and dissemination of information about government officials performing their duties in public, and thus burdens Lyttle's right to free speech under the First Amendment. *See ACLU*, 679 F.3d. at 608.

C. *Lyttle has a right to publicize his recording and to be free from prior restraint of his free speech.*

Not allowing the communication of ideas and information to be published bars the individual from speaking entirely and prevents the speech from entering the marketplace of ideas. Jacqueline Waldman, *Prior Restraint and the Police: The First Amendment Right to Disseminate Recordings of Police Behavior*, 2014 U. Ill. L. Rev. 311, 334, 318 (2014). This creates a prior restraint on free speech. *Id*. This Court has acknowledged that freedom of the press is historically rooted in immunity from previous restraints. *Id*. at 321. The argument that misrepresentative news stories may cause harm if they allow false or distorted information to reach the public cannot be used as valid justification for state regulation of speech. *See id*. at 335. It is widely accepted that media influences the way individuals perceive reality, regardless of whether news stories are true or false. *Id*. Nearly half of all American adults and two thirds of all young adults now own a smartphone, which allows for endless access to media – both false and true. *Id*. at 314. Because of our society's ability to capture and disseminate information quickly, the practice of police recording has become routine, so much so that the United States Department of Justice drafted a letter asserting that the right to videotape actions of police officers in public places is embedded within the First Amendment. *Id*. at 315.[1]

[1] Letter from Jonathan M. Smith, Chief of Special Litig. Section of the U.S. Dep't of Justice, to Mark H. Grimes & Mary E. Borja, litigants in *Sharp v. Baltimore City Police Department* available at https://www.justice.gov/sites/default/files/crt/legacy/2012/05/17/Sharp_ltr_5-14-12.pdf.

Subsequent punishment, despite punishing speech after it occurs, may become a prior restraint if the punishment is so threatening that it causes a chilling effect on speech. *Id*. at 342. The first previous restraint Lyttle was subjected to was the deletion of his first recording, which barred communication before it even took place. *See id*. at 336. The second was the act of confiscating both of Lyttle's GoPros, along with his computer's hard drive, actually preventing further dissemination of any information. *See id*. at 341. Lyttle's right to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment was violated both by Officers Cagney and Lacey's conduct and New Normal Statute § 943.03, which unduly robbed society of Lyttle's speech and its potential impact on the marketplace of ideas. *See id*. at 343.

II. OFFICERS CAGNEY AND LACEY ARE NOT PROTECTED BY QUALIFIED IMMUNITY.

A. The doctrine of qualified immunity is a two-part test.

42 U.S.C. 1983 § allows for a private right of action against public officials who violate constitutional rights under the color of state law. *See Harlow v. Fitzgerald,* 475 U.S. 800, 809 (1982) (discussing *Butz v. Economou*, 438 U.S. 478 (1978)). Accordingly, § 1983 serves to compensate victims and deter harmful conduct that might come from police abuse of discretionary power. *See Harlow,* 475 U.S. at 819. Early cases, in interpreting § 1983, reflected a need to protect both officials in exercising their discretion and the public interest in encouraging the exercise of official authority. *See id.* at 801. This Court created the doctrine of qualified immunity to balance these conflicting interests, and to protect certain defendants from § 1983 claims in order to facilitate the conduct of public activities and institutions. *See id*. at 807.

Under the objective approach of qualified immunity, public officials were protected from liability for civil damages insofar as their conduct did not violate clearly established statutory

and constitutional rights of which a reasonable person should have known. *Id*. at 818. The purpose of qualified immunity is to allow government officials to carry out their discretionary duties without fear of personal liability or harassing litigation. *Vinyard v. Wilson,* 311 F.3d 1340, 1346 (11th Cir. 2002) (citing *Lee v. Ferraro*, 248 F.3d 1188, 1194 (11th Cir. 2002)). Thus, the doctrine protects from suit all but the plainly incompetent official or one who is knowingly violating the federal law. *Vinyard*, 311 F.3d at 1346. Officers Cagney and Lacey's conduct falls within the latter, because it violated Lyttle's constitutional rights. *See id*.

This objective test is divided into a two-part approach that protects officials from money damages unless a plaintiff can prove (1) the official violated a statutory or constitutional right, and (2) the right was clearly established at the time of the challenged conduct. *Glik*, 655 F.3d at 81. The threshold inquiry a court must undertake in a qualified immunity analysis is whether the plaintiff's allegations, if true, establish a constitutional violation. *Vinyard,* 311 F.3d at 1346. If a constitutional right would have been violated under Lyttle's version of the facts, the next step is to ask whether the right was clearly established. *Id*. Thus, first we must analyze whether Lyttle's rights under the First Amendment were violated. *Id*. Second, this Court should determine whether the right to record Officers Cagney and Lacey was clearly established. *Id*.

B. Officers Cagney and Lacey's reliance on New Normal Statute § 943.03 does not entitle them to qualified immunity.

Officers Cagney and Lacey claim reliance on the New Normal Statute § 943.03 for having not only forced Lyttle to erase the material already recorded, but also for their subsequent arrest and taking of Lyttle's property both of which violated Lyttle's rights under the First Amendment (R. at 4). An officer's reliance on a state statute, regulation, or official policy that explicitly authorizes the conduct in question may relieve the officer from knowing that his conduct was unlawful; however, reliance on a statute is not without limitations. *Lawrence v.*

Reed, 406 F.3d 1224, 1232 (10th Cir. 2005). Where a statute authorizes conduct that is clearly unconstitutional, reliance on the statute does not immunize the officer's conduct. *Lawrence,* 406 F.3d at 1232.

In *Lawrence,* a sheriff was denied qualified immunity where he relied on both a local ordinance and advice of the city attorney to remove vehicles from a lot without permission from the owner. *Id* at 1226. The court held that the taking had been a clear deprivation of property without due process and denied the sheriff the qualified immunity defense. *See id*. at 1233. Likewise, Officers Cagney and Lacey clearly violated Lyttle's rights under the First Amendment when they relied on New Normal Statute § 943.03 to (1) force Lyttle to erase the first video, a prior restraint on the dissemination of Lyttle's free speech, (2) take all of Lyttle's recording devices, thereby restricting the use of an audiovisual recording device, and (3) arrest Lyttle for the dissemination of his ideas, amounting to subsequent punishment. (R. at 3-4).

Additionally, even if the statute does not clearly violate an established right and is presumptively valid, officers may still not be able to rely on a statute. *Boles v. Neet,* 486 F.3d 1177, 1184 (10th Cir. 2007). In *Boles*, a prison warden relied on a regulation that required prisons to wear orange jumpsuits and shoes or slippers when they were being transported. *Id*. at 1179. In reliance on this statute, the warden denied a prisoner the option to wear a religious garb in clear violation of the prisoner's rights under the First Amendment. *Id*. The Tenth Circuit held that although the regulation implicitly supported the warden's position, it did not explicitly support it, and thus the warden was not entitled to the defense of qualified immunity. *Id*. at 1184. Similarly, in this case, although the New Normal Statute is presumptively valid, § 943.03 does not give Officers Cagney and Lacey the explicit right to force Lyttle to delete his first recording,

or to take all of Lyttle's audiovisual recording devices thereafter. *See id*. These actions were in clear violation of Lyttle's rights under the First Amendment. *See id*.

C. There is a clearly established right to record public officials carrying out their official public duties.

Officers Cagney and Lacey argue that Lyttle's right to record police and further disseminate this information was not a clearly established right of which they were or should have been aware of, and thus did not put them under fair notice that they may have been violating Lyttle's constitutional rights at the time. (R. at 20). Qualified immunity operates to ensure that, before public officials are subjected to a civil suit, they are on notice that their conduct is unlawful. *Hope v. Pelzer,* 536 U.S. 730, 752 (2002). For a constitutional right to be clearly established, so as to place public officials under notice, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Hope,* 536 U.S. at 753. Placing an official on notice does not mean that the conduct was previously held unlawful. *See id*. at 743. Instead, for an official to be on notice, pre-existing law must make the unlawfulness apparent. *See id*. Thus, a case directly on point is not necessary and the existing precedent clearly establishes Lyttle's right to record police activity within the scope of their public duties subject to reasonable time, manner, and place restrictions. *Glik*, 655 F.3d at 81. Precedent gave officers Cagney and Lacey a fair warning that their conduct was unconstitutional. *See id.*

In *Hope*, this Court held that for officials to be placed on notice, their conduct must be shown to have violated the law even under novel factual circumstances. 536 U.S. at 754. There is clear recognition that the First Amendment protects the right of private citizens to record police officers performing their duties in a public space. *Glik*, 655 F.3d at 85; *see*, *e.g*., *Gilles*, 427 F.2d at 212; *Smith*, 212 F.3d at 1333; *Fordyce*, 55 F.3d at 439. Although earlier cases involving

fundamentally similar facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. *Hope,* 536 U.S. at 741. With the advent of technology, the practice of police recording has become routine, many of which involve cases of police brutality and the abuse of police power. Jacqueline Waldman, *Prior Restraint and the Police: The First Amendment Right to Disseminate Recordings of Police Behavior*, 2014 U. Ill. L. Rev. 311, 314 (2014). Because it has been recognized that there is a right under the First Amendment to record police activity subject to reasonable time, place and manner restrictions, Officers Cagney and Lacey reasonably should have known that there is a public right to record police officers in the scope of their public duties. *Glik*, 655 F.3d at 85.

In *Hope,* this Court noted that general statements of law are capable of giving fair and clear warning, and that in other instances, a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question. 536 U.S. at 741. As a result, *Hope* clarified that a plaintiff could overcome a qualified immunity claim when a public official's actions obviously violated a constitutional right, notwithstanding the absence of applicable precedent. *See id.* The First Amendment provides Lyttle with freedom of speech. U.S. CONST. AMEND. I. This right to freedom of speech, provided directly from the Constitution, extends to the right to record public officials while performing within the scope of their public duties. *Glik*, 655 F.3d at 85. By forcing Lyttle to erase his first recording and subsequently arresting him for the publishing of the second recording, officers Cagney and Lacey twice violated Lyttle's constitutional rights, rights that are inherent under the Constitution and which alone should have served as notice. *See Hope,* 536 U.S. at 741.

CONCLUSION

In a free society, there is no such thing as permission to speak. Under the power of the First Amendment, a citizen is granted the right to speak freely about that which is of public concern, so that his speech may become a part of a larger conversation. Because government authorities are granted substantial power to enforce laws – a power granted by the people, for the people – it is crucial to guard against police abuse. A citizen's right to freedom of speech is method to guard against police abuse for it allows speech to enter into the marketplace of ideas, thereby placing the power of governance in the hands of the people.

Huey Lyttle is granted the right to freedom of speech under the First Amendment. His right to speak freely, without fear of prior restraint or subsequent punishment, was violated when he was forced to delete his initial recording, and subsequently when he was arrested for the dissemination of the second recording. New Normal Statute § 943.03, in criminalizing all nonconsensual speech, effectively creates a prior restraint on free speech. Section 943.03, an overbroad regulating measure, creates a chilling effect on speech, because it threatens to punish all those who attempt to exercise a right provided to them by the Constitution.

Officers Cagney and Lacey should not be protected by qualified immunity, for their conduct violated clearly established constitutional principles. Officers Cagney and Lacey may not claim reliance on New Normal Statute § 943.03 both because it is unconstitutional and because reliance is not without limitations. Courts have acknowledged that there is a right to record public officials within the scope of their public duties subject to reasonable manner, time and place restrictions. Additionally, because videotaping police officers is not a novel situation and because the freedom of speech is a constitutional right, Officers Cagney and Lacey should have had fair notice that their conduct was unlawful.

PRAYER

For these reasons, Petitioner prays this Court recognize a right to record police officers within the scope of their public duties, and deny Officers Cagney and Lacey's qualified immunity.

_____
Daniela Mondragon
Counsel for the Petitioner

CERTIFICATE OF SERVICE

Counsel for Petitioner certifies that this brief has been prepared and served on all opposing counsel in compliance with the Rules of the Freshman Moot Court Competition.

_____

Daniela Mondragon
Counsel for the Petitioner

APPENDIX

New Normal Statute § 943.03

§ 943. 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), s. 943.07, or 943.09 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 s. 775.082, s. 775.083, s. 775.084, or s. 934.41.

(b) If the offense is a first offense under paragraph (a) and is not for any tortious or illegal purpose or for purpose or 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 s. 775.082 or s. 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 s. 775.082 or s. 775.083.