

# 16-3994

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IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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DOUGLAS J. HIGGINBOTHAM,

*Plaintiff-Appellant,*

—against—

POLICE OFFICER CURTIS SYLVESTER, SHIELD 5060,  
POLICE SERGEANT CHRISTOPHER TOMLINSON, SHIELD 3686,  
DEPUTY INSPECTOR THOMAS TAFFEE,

*Defendants-Appellees,*

CITY OF NEW YORK, POLICE CAPTAIN JOHN DOE,

*Defendants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**BRIEF OF *AMICI CURIAE***  
**NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION**  
**AND MEDIA AND FREE SPEECH ORGANIZATIONS**  
**IN SUPPORT OF PLAINTIFF-APPELLANT**

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**LIST OF *AMICI CURIAE***

ABC, Inc.	National Association of Broadcasters
Advance Publications, Inc.	National Newspaper Association
ALM Media, LLC	The National Press Club
The American Society of Journalists and Authors	The National Press Photographers Association
American Society of News Editors	National Public Radio, Inc.
The Associated Press	NBCUniversal Media, LLC
Association of Alternative Newsmedia	New England First Amendment Coalition
The Association of American Publishers, Inc.	New England Newspaper and Press Association, Inc.
The Association of Magazine Media	The New York News Publishers Association
The Authors Guild, Inc.	The New York Press Club
The Buffalo News	The New York Press Photographers Association
BuzzFeed Inc.	The New York State Broadcasters Association, Inc.
Cable News Network, Inc.	The New York Times Company
CBS Broadcasting Inc.	The News Media Alliance
The Daily Beast Company LLC	NYP Holdings, Inc.
Daily News, LP	Online News Association
Discovery Communications LLC	PEN American Center
Dow Jones & Company, Inc.	Penske Media Corporation
The E.W. Scripps Company	Radio Television Digital News Association
Electronic Frontier Foundation	The Reporters Committee for Freedom of the Press
First Amendment Coalition	Reporters Without Borders
First Amendment Lawyers Association	Reuters America LLC
First Look Media Works, Inc.	Sinclair Broadcast Group, Inc.
Fox News Network LLC	Society of Professional Journalists
Free Press	Student Press Law Center
Freedom of the Press Foundation	Tully Center for Free Speech
The Freedom to Read Foundation	Vermont Press Association
Gannett Co., Inc.	Vox Media
Hearst Corporation	WNYW FOX 5
Inter American Press Association	
Media Coalition Foundation, Inc.	
The Media Consortium	
Media Law Resource Center, Inc.	
Meredith Corporation dba WFSB-TV	

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**WNYW FOX 5** is owned by Fox Television Stations, LLC, which is an indirect subsidiary of Twenty-First Century Fox, Inc., a publicly held company.

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## INTEREST OF THE *AMICI CURIAE*<sup>1</sup>

The *amici curiae* in this case are a broad coalition of over 60 media companies and organizations engaged in press photography, videography, broadcast news, journalism (both online and in print) and free-speech advocacy.<sup>2</sup> This case is of paramount importance to *amici* because it presents the Court with the opportunity to recognize and vindicate the First Amendment right of journalists, photographers, videographers and citizens to record matters of public concern—specifically, police performing their official duties in public places.

Although other federal courts of appeal have expressly acknowledged the existence of this crucial right, the Second Circuit has yet to declare that journalists and the general public enjoy a First Amendment right to photograph and record police activity taking place in public. This absence of judicial guidance has created a climate of uncertainty in the Second Circuit that inhibits the ability of *amici* to meaningfully cover newsworthy events. Without a clearly defined right to

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<sup>1</sup> Statement pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) and Second Circuit Local Rule 29.1: all parties to this appeal have consented to the filing of this *amici* brief. Further, no counsel for any party authored this brief in whole or in part and no person made a monetary contribution intended to fund preparation or submission of this brief. Appellant Higginbotham's legal costs were defrayed by a grant from the Press Freedom Litigation Fund of *amicus* First Look Media Works, Inc., although none of that funding supported the preparation of this *amici* brief.

<sup>2</sup> Specifically, *amici* are the companies and organizations whose descriptions appear in the Appendix annexed to this brief.

record, journalists and citizens seeking to document police activity run the risk of being arrested—even when the act of recording does not interfere with the duties being carried out by law enforcement officers. Moreover, until the Second Circuit affirmatively recognizes the right to record police activity in public places, officers who arrest or harass those seeking to record their official conduct will continue to evade liability under the qualified immunity that is available to public officials as long as “their actions did not violate clearly established statutory or constitutional rights of which a reasonable person would have known” at the time of arrest.

*Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 2515 (2002).

*Amici* believe the time has come for the Second Circuit to provide the police, the press and the public with much needed clarity on an issue that is central to the First Amendment’s guarantees of free speech and a free press. By unambiguously recognizing the existence of Mr. Higginbotham’s First Amendment right to record police activity in public, this Court will assist police departments in the training of their officers while also protecting the ability of *amici* and others to engage in frank discussion and debate of government affairs without fear of official retaliation, a guarantee that animates our very constitutional system of self-governance.

## STATEMENT OF THE CASE

To properly frame the constitutional issues that lie at the heart of Mr. Higginbotham's First Amendment retaliation claim, it is necessary to briefly summarize the pertinent facts and procedural history that led to this appeal.

Mr. Higginbotham is a professional freelance videojournalist, who was covering the Occupy Wall Street protest at Zuccotti Park on the morning of November 15, 2011. *Higginbotham v. Sylvester*, 14-cv-8549 (PKC), 2016 WL 6496253, at \*1-2 (S.D.N.Y. Nov. 2, 2016) (*Higginbotham II*). As there was a large crowd present that inhibited his view of the protest, Mr. Higginbotham climbed to the top of a seven-foot, four-inch tall phone booth to get a better vantage point for filming. *Id.* at \*2. While Mr. Higginbotham was recording the allegedly violent arrest of a protestor by the police, a number of police officers (the "Arresting Officers") told him to climb down. *Id.* at \*3; *Higginbotham v. Sylvester*, 105 F. Supp. 3d 369, 373 (S.D.N.Y. 2015) (*Higginbotham I*). Mr. Higginbotham contends that he attempted to comply and descend from the phone booth, but was forcibly pulled off by the Arresting Officers, though the Arresting Officers contest this characterization. *Higginbotham II*, 2016 WL 6496253, at \*3. Once Mr. Higginbotham reached the ground, he was arrested, taken into custody and issued a criminal summons for disorderly conduct. *Id.* at \*2. The criminal charge was subsequently dismissed. *Higginbotham I*, 105 F. Supp. at 372.

Following his arrest, Mr. Higginbotham brought a civil rights action against the Arresting Officers and the City of New York in the United States District Court for the Southern District of New York. In his complaint, Mr. Higginbotham asserted that he was falsely arrested in violation of the Fourth Amendment. *Id.* at 372. Mr. Higginbotham also alleged in his complaint that “the defendants retaliated against him for filming a violent arrest in violation of his First Amendment rights.” *Id.* at 378. “A plaintiff asserting a First Amendment retaliation claim must show that ‘(1) he has a right protected by the First Amendment, (2) the defendant’s actions were motivated or substantially caused by the existence of that right; and (3) the defendant’s actions caused him some injury.’” *Id.* at 378 (*quoting Dorsett v. Cty. of Nassau*, 732 F.3d 160 (2d Cir. 2013)).

In moving to dismiss Mr. Higginbotham’s First Amendment retaliation claim, the Arresting Officers took aim at the first of these three factors and argued (among other things) that Mr. Higginbotham’s “videotaping of the arrest was not protected by the First Amendment because it was not ‘expressive conduct.’” *Higginbotham I*, 105 F. Supp. 3d at 378. Judge Castel considered that argument and rejected it. Acknowledging that neither the Second Circuit nor the Supreme Court has addressed the existence of a constitutional right to photograph and record police activity, Judge Castel nevertheless concluded that First Amendment

protections “apply to a journalist who was filming a newsworthy protest for broadcast by a news organization.” *Id.* at 378. Addressing the narrower question of whether the First Amendment accords a right to record police officers in public places, Judge Castel further ruled that—as has now been held by several circuit courts—“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.” *Id.* at 379. Moreover, in rejecting the Arresting Officers’ contention that they were protected from Mr. Higginbotham’s First Amendment retaliation claim by qualified immunity, Judge Castel held that “the right to record police activity in public, at least in the case of a journalist who is otherwise unconnected to the events recorded, was ‘clearly established’ at the time of the events alleged in the complaint.” *Id.* 380. At bottom, the lynchpin of Judge Castel’s decision not to dismiss Mr. Higginbotham’s First Amendment retaliation claim for failure to state a cognizable claim for relief was his holding that Mr. Higginbotham had a clearly established First Amendment right to record police activity at the Occupy Wall Street protest on the day of his arrest.

The question of whether there exists a First Amendment right to record and photograph police activity in a public place also underpins the summary judgment decision that is the subject of this appeal. After denying the Arresting Officers’ Rule 12(b)(6) motion to dismiss, Judge Castel ultimately granted summary

judgment in favor of the Arresting Officers and dismissed Mr. Higginbotham's complaint in its entirety. In seeking summary judgment, the Arresting Officers argued that they had probable cause to arrest Mr. Higginbotham and that, in any event, "defendants are entitled to qualified immunity for his arrest, and any related First Amendment theory." Memorandum of Law in Support of Defendants' Motion for Summary Judgment, *Higginbotham II*, 14-cv-08549-PKC (S.D.N.Y. Mar. 31, 2016), Dkt. 58 at 14. *See also* Reply Memorandum of Law in Support of Defendants' Motion for Summary Judgment, *id.* (S.D.N.Y. May 4, 2016), Dkt. 63 at 8 ("[D]efendants' are entitled to qualified immunity on each of [their] claims").

With respect to Mr. Higginbotham's false arrest claim, Judge Castel ruled that the arrest was supported by probable cause or, at a minimum, arguable probable cause entitling the Arresting Officers to qualified immunity.

*Higginbotham II*, 2016 WL 6496253, at \*5. Employing this same reasoning, Judge Castel likewise dismissed Mr. Higginbotham's "First Amendment claim 'premised on the allegation that defendants prosecuted a plaintiff out of a retaliatory motive.'" *Id.* at \*6 (citation and quotation marks omitted). Specifically, the district court ruled that because Mr. Higginbotham, in order to record events, had "climbed more than seven feet above the ground atop a phone booth . . . while balancing a large camera on his shoulder," it was "objectively reasonable [for the Arresting Officers] to conclude that probable cause existed to arrest plaintiff for

reckless endangerment” and that “[n]o reasonable juror could conclude that the reason that police officers arrested Higginbotham was to suppress his First Amendment rights.” *Id.* at \*5, 6.

Although Judge Castel did not rehash the holding of *Higginbotham I* in *Higginbotham II*, the existence of a clearly established First Amendment right to record police activity was an implied and necessary prerequisite to the district court’s holding that both probable cause and, in the alternative, qualified immunity shielded the Arresting Officers from liability. Simply put, Judge Castel would not have reached the issue of whether Mr. Higginbotham’s First Amendment rights were trumped by superior law-enforcement interests if he had accepted the Arresting Officers’ argument that there was no clearly established First Amendment right at issue in the first place.

In sum, since the existence of a First Amendment right to record police activity in public places was a necessary predicate to the holding that is now on appeal, this Court can—and should—make an unambiguous declaration that the constitutional right articulated by the district court in this case is clearly established.

## ARGUMENT

### I. CLARIFICATION OF A CONSTITUTIONAL RIGHT TO RECORD POLICE ACTIVITY IN PUBLIC PLACES IS BOTH NECESSARY AND WARRANTED IN THIS CASE

*Amici* believe that this case offers the Second Circuit a ripe, and long overdue, opportunity to provide guidance to the police, public and press regarding whether there is a clearly defined First Amendment right to record police activity in public places.<sup>3</sup>

The doctrine of qualified immunity provides a shield to police and other government employees charged with abuse of authority, but it will cede to the interests of justice where a plaintiff pleads and proves that a government official's conduct "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 815 (2009). In this regard, "[q]ualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.* Where a clearly established constitutional right exists, the next and "ultimate question" is "whether it was objectively reasonable for the officer to believe that his conduct

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<sup>3</sup> *Amici* contend that the public in general has a First Amendment right to record police activity occurring in public places, but that this constitutional right is at minimum enjoyed by the press. *See* p. 21, *infra*.



did not violate [that] clearly established right.” *Zellner v. Summerlin*, 494 F.3d 344, 367 (2d Cir. 2007). The existence of probable cause supports such a necessary, “objectively reasonable” belief entitling an arresting officer to qualified immunity. *Id.* at 370. *See also Higginbotham II*, 2016 WL 649253, at \*5 (concluding that because “there was probable cause for Higginbotham’s arrest, *a fortiori* [defendants] would be entitled to qualified immunity on this claim.”) (citation and quotation marks omitted).

Thus, while Higginbotham’s appeal may ultimately turn on the presence or absence of probable cause, inextricably embedded in that inquiry is the antecedent question of whether Mr. Higginbotham possessed a clearly established First Amendment right to record police activity in a public park. Indeed, when presented with claims of qualified immunity, this Court will regularly identify the constitutional right at issue before turning to the question of whether a public official’s actions were nevertheless objectively reasonable. *See, e.g., Lennon v. Miller*, 66 F.3d 416, 423 (2d Cir. 1995) (finding first that the “rights at issue in this case . . . were clearly established at the time of the incident,” and only then finding that it was objectively reasonable for officers to conclude they had probable cause); *see also Bonide Prod., Inc. v. Cahill*, 223 F.3d 141, 145 (2d Cir. 2000) (noting the existence of a constitutional right before holding that it was not violated); *Thomas v. Roach*, 165 F.3d 137, 142–43 (2d Cir. 1999) (“Overcoming

qualified immunity entails a two-part process. First, a plaintiff must allege the violation of a clearly-established constitutional or statutory right. Second, qualified immunity will be denied only if a reasonable official should have known that the challenged conduct violated that established right”); *Zellner*, 494 F.3d at 367.

In determining whether a qualified immunity defense applies, courts engage in a “two-pronged” examination, asking first whether a plaintiff has made out “a violation of a constitutional right,” and second “whether the right at issue was ‘clearly established’ at the time of defendant’s alleged misconduct.” *Pearson*, 555 U.S. at 232, 129 S. Ct. at 816. For all its focus on the existence of a right, however, this two-pronged examination concerns itself above all with the state of mind of the government official. In asking whether a right is “clearly established,” courts are really asking whether the government official *ought to have known* about that right. “The general rule of qualified immunity is intended to provide government officials with the ability reasonably [to] anticipate when their conduct may give rise to liability for damages.” *Anderson v. Creighton*, 483 U.S. 635, 646, 107 S. Ct. 3034, 3042 (1987). Without clear guidance on the existence and scope of constitutional rights, government officials cannot be expected to curb their actions to avoid violating those rights, and journalists as well as citizens cannot be

expected to confidently exercise those rights safe in the knowledge that their actions are protected from official retribution.

For these reasons, the two-pronged qualified immunity analysis has become an invaluable vehicle for clarifying constitutional rights, particularly those rights that may not often arise outside the context of qualified immunity. The Supreme Court has acknowledged this vital role, noting that the “the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.” *Pearson*, 555 U.S. at 236, 129 S. Ct. at 818 (2009) (emphasis added). *See also Camreta v. Greene*, 563 U.S. 692, 708, 131 S. Ct. 2020, 2032 (2011) (“the very purpose served by the two-step process . . . is to clarify constitutional rights without undue delay”) (internal quotation marks omitted). In fact, in the context of qualified immunity cases, the Supreme Court has created an exception to its usual rules regarding what cases it may hear on appeal, precisely to allow for the prompt clarification of constitutional rights. *Id.* (“This Court, needless to say, also plays a role in clarifying rights. Just as that purpose may justify an appellate court in reaching beyond an immunity defense to decide a constitutional issue, so too that purpose may support this Court in reviewing the correctness of the lower court’s decision.”). These jurisprudential principles are motivated by the overwhelming practical need to provide guidance

to citizens, and fair notice to government officials of when their actions exceed what is allowed under the Constitution.

The demand for clarity on constitutional protection exists most vitally in circumstances involving the exercise of First Amendment rights, as exemplified by the instant case; such exercise constitutes “the essence of self-government.” *Garrison v. Louisiana*, 379 U.S. 64, 74–75, 85 S. Ct. 209, 215-16 (1964). “Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339, 130 S. Ct. 876, 898 (2010) (citation omitted). Indeed, the recent rise of citizen journalism has proved invaluable in making police departments more accountable to the public they serve and in inspiring democratic social movements.<sup>4</sup>

Perhaps more than any other constitutional right, “First Amendment freedoms need breathing space to survive.” *Nat’l Ass’n for Advancement of Colored People v. Button*, 371 U.S. 415, 433, 83 S. Ct. 328, 338 (1963). Without clarity as to the existence and scope of a First Amendment right, citizens may

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<sup>4</sup> See Dan Gillmor, *Ferguson’s citizen journalists revealed the value of an undeniable video*, The Guardian, Aug. 16, 2014, <http://bit.ly/2mfCtvL>.

avoid exercising that right for fear of unredressable reprisal, while government officials may feel free to retaliate against expressive actions they deem a nuisance. This concern is hardly hypothetical. Professional journalists and citizens are not infrequently arrested in the course of documenting newsworthy events on charges that are often dismissed without further action. For example, in 2011, a credentialed Long Island news videographer was arrested and charged with obstructing governmental administration for videotaping police activity from a public street, in the midst of other bystanders.<sup>5</sup> In August 2012, a photographer on assignment for *The New York Times* was assaulted, arrested, and charged with obstructing government administration and resisting arrest for photographing the arrest of a teenage girl in the Bronx.<sup>6</sup> Indeed, the numerous instances of mistreatment of members of the news media by police during various Occupy Wall Street protests starkly illustrate the problem. Many outlets have reported that news

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<sup>5</sup> Steve Myers, *News Photographer Arrested on Long Island for Videotaping Police*, Poynter, Aug. 2, 2011, <http://bit.ly/2i2zBmi> (noting that the charge was later dropped).

<sup>6</sup> *Times Photographer Is Arrested on Assignment*, N.Y. Times, Aug. 5, 2012, <http://nyti.ms/2hk8W4U>. See also, e.g., Tom Sherwood, *Journalists Handcuffed, Removed from Taxi Commission Meeting*, NBCWashington.com, June 23, 2011, <http://bit.ly/2h9JeLD>; David Becker, *Detroit Newspaper Photographer Arrested While Covering Police Action*, Petapixel (reprinted from Detroit Free Press), Jul 16, 2013, <http://bit.ly/2hySmdC>; Matt Hamilton, *L.A. Times Photographer Arrested After Covering Nancy Reagan Funeral Motorcade*, L.A. Times, March 9, 2016, <http://lat.ms/1QFntAG>; Tim Perry, *CBS News Journalist Relives His Arrest at a Chicago Trump Event*, CBS News.com, Nov. 14, 2016, <http://cbsn.ws/2i0ihvJ>.

reporters and photojournalists were arrested along with protesters, merely for attempting to cover the events.<sup>7</sup> In the absence of a ruling by the Second Circuit recognizing a clearly defined constitutional right to record police activity in public places, which would overcome the defense of qualified immunity: officers in this circuit who arrest members of the press and public for merely recording their public actions cannot be held to account; professional and amateur photographers, videographers and documentarians are inhibited from engaging in the socially invaluable pursuit of truth and accountability; and, in contravention of the core purpose of the First Amendment, important speech on matters of public concern is inevitably chilled.

Ongoing disagreement among trial courts only muddies the waters, depriving journalists and citizens of meaningful reassurance of their rights. After all, “[i]f judges . . . disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of a controversy.” *Wilson v. Layne*, 526 U.S. 603, 618, 119 S. Ct. 1692, 1701 (1999); *see also Morgan v. Swanson*, 659 F.3d 359, 372 (5th Cir. 2011) (en banc). Inconsistent rulings by the federal district courts in the Second Circuit have led to precisely this problem, leaving the police, public and press in a state of uncertainty as to their rights and

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<sup>7</sup> *See, e.g., Sara Rafsky, At Occupy Protests, U.S. Journalists Arrested, Assaulted, Comm. to Protect Journalists*, Nov. 11, 2011, <http://bit.ly/2i2Mblp>.

responsibilities. On the one hand, some district courts have expressed concern that it remains “unclear whether [recording police] is protected by the First Amendment.” *Pluma v. City of New York*, No. 13 Civ. 2017 (LAP), 2015 WL 1623828, \*7-8 (S.D.N.Y. Mar. 31, 2015). *See also Mesa v. City of New York*, No. 09 Civ. 10464 (JPO), 2013 WL 31002, at \*25 (S.D.N.Y. Jan. 3, 2013) (granting summary judgment dismissing First Amendment retaliation claim on qualified immunity grounds because “the right to photograph and record police is not clearly established as a matter of constitutional law in this Circuit”); *Basinski v. City of New York*, 192 F. Supp. 3d 360, 369 (S.D.N.Y. 2016) (same). By contrast, the district court in this action held that there *is* a clearly established constitutional right to record police activity. *Higginbotham I*, 105 F. Supp. 3d at 380 (“At the time of Higginbotham’s arrest, there was . . . a ‘robust consensus of persuasive authority’ in favor of the right” to record police officers in public places “that ‘clearly foreshadowed’ an analogous ruling by the Second Circuit or the Supreme Court.”).<sup>8</sup> Without affirmation by the Second Circuit, however, this ruling by the court below may ultimately stand alone and prove insufficient to solidify the right to record police activity in public. “[D]istrict court decisions—unlike those from the courts of appeals—do not necessarily settle constitutional standards or prevent

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<sup>8</sup> *Cf. Charles v. City of New York*, 12-cv-06180, 2017 WL 530460 (S.D.N.Y. Feb. 8, 2017) (in denying motion by arresting officers seeking summary judgment on qualified immunity grounds, declining to hold that First Amendment right to record police activity in public is not clearly established in the Second Circuit).

repeated claims of qualified immunity.” *Camreta*, 563 U.S. at 709, 131 S. Ct. at 2033.

The constitutional inquiry envisioned by the qualified immunity analysis calls for guidance from the Second Circuit Court of Appeals.

**II. THIS COURT SHOULD RECOGNIZE A FIRST AMENDMENT RIGHT TO RECORD THE POLICE IN PUBLIC AND DECLARE THAT RIGHT TO BE “CLEARLY ESTABLISHED”**

In disposing of Mr. Higginbotham’s appeal, this Court should embrace the opportunity to provide judicial assurance that the right to photograph and record police activity in public places is enshrined in the First Amendment. In addition, since the First Amendment guarantees the freedom to document police activity, this Court should give that guarantee teeth by holding that the constitutional right to record police is “clearly established.” Otherwise, officers in this circuit will continue to argue, as the Arresting Officers did below, that the doctrine of qualified immunity provides blanket protection against lawsuits challenging arrests aimed at thwarting the lawful recording of police activity.

There now exists consensus by all federal appeals courts that have addressed the issue that “the First Amendment protects the right to record police officers performing their duties in a public space, subject to reasonable time, place and matter restrictions.” *Higginbotham I*, 105 F. Supp. 3d at 379 (collecting cases). The jurisprudential underpinnings of this constitutional right have been explained



in several cases. In *Higginbotham I*, Judge Castel astutely noted that “[w]hile videotaping an event is not itself expressive activity, it is an essential step towards an expressive activity” worthy of First Amendment protection, “at least when performed by a professional journalist who intends, at the time of recording, to disseminate the product of his work.” *Id.* at 378. See also *Houchins v. KQED*, 438 U.S. 1, 11, 98 S. Ct. 2588, 2594 (1978) (“There is an undoubted right to gather news from any source by means within the law”) (citation and quotation marks omitted); *In re Express News Corp.*, 695 F.2d 807, 808 (5th Cir. 1982) (“[N]ews-gathering is entitled to first amendment protection, for ‘without some protection for seeking out the news, freedom of the press could be eviscerated.’”) (*quoting* *Branzburg v. Hayes*, 408 U.S. 665, 681, 92 S. Ct. 2646, 2656 (1972)).<sup>9</sup>

The recording of police activity in public places falls within the First Amendment’s protective aegis because it is a necessary prerequisite to documenting and reporting official conduct, as well as misconduct. As the First Circuit has explained:

Gathering information about government officials in a form that can be readily disseminated to others serves a cardinal First Amendment interest in protecting and promoting the free discussion of

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<sup>9</sup> See also Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 381-86 (2011) (“The modern process of image capture is an essential element in producing and ultimately disseminating, photos, videos, and montages which modern First Amendment doctrine solidly recognizes as protected media of communication.”)

governmental affairs. Moreover, as the [Supreme] Court has noted, freedom of expression has particular significance with respect to government because it is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression. This is particularly true of law enforcement officials, who are granted substantial discretion that may be misused to deprive individuals of their liberties. Ensuring the public's right to gather information about their officials not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally.

*Glik v. Cunniffe*, 655 F.3d 78, 82-83 (1st Cir. 2011) (citations and quotation marks omitted). *See also Turner v. Driver*, 848 F.3d 678, 689 (5th Cir. 2017) (“Filming the police contributes to the public’s ability to hold the police accountable, ensure that police officers are not abusing their power, and make informed decisions about police policy.”).

In holding that the right to record police activity was clearly established in the Second Circuit at the time of Mr. Higginbotham’s arrest, Judge Castel correctly stated that when neither the Supreme Court nor the Second Circuit has decided an issue, a district court “may nonetheless treat the law as clearly established if decisions from [this or] other circuits clearly foreshadow a particular ruling.”

*Higginbotham I*, 105 F. Supp. 3d at 380 (quoting *Terebesi v. Torres*, 764 F.3d 217, 231 (2d Cir. 2014)). In this regard and in itself recognizing a constitutional right to film police activity, the Court of Appeals for the Fifth Circuit recently noted that “every circuit that has ruled on this question . . . has concluded that the First Amendment protects the right to record the police.” *Turner*, 848 F.3d at 689.

*See also Gericke v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014) (“[T]he Constitution protects the right of individuals to videotape police officers performing their duties in public.”); *ACLU v. Alvarez*, 679 F.3d 583, 594 (7th Cir. 2012) (rejecting the “extraordinary argument” that “openly recording what police officers say while performing their duties in traditional public fora . . . is *wholly unprotected* by the First Amendment”) (emphasis in original); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (“[Individuals have] a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct.”); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recording of police activity falls within the “First Amendment right to film matters of public interest”). This appellate consensus on the right to record police activity in public “speaks to the fundamental and virtually self-evident nature of the First Amendment’s protections in this area.” *Glik*, 655 F.3d at 85.<sup>10</sup> Moreover,

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<sup>10</sup> In addition, district courts in those circuits where the issue has not yet been addressed by the appeals court have regularly recognized the First Amendment right to record the police in public places. *See, e.g., Lambert v. Polk Cty.*, 723 F. Supp. 128, 133 (S.D. Iowa 1989) (“It is not just news organizations . . . who have First Amendment rights to make and display videotapes of events—all of us have that right”); *Channel 10, Inc. v. Gunnarson*, 337 F. Supp. 634, 638 (D. Minn. 1972) (recognizing “constitutional right to have access to and to make use of the public streets, roads and highways . . . for the purpose of observing and recording in writing and photographically the events which occur therein”); *Gaymon v. Borough of Collingdale*, 150 F. Supp. 3d 457, 468 n.9 (E.D. Pa. 2015) (observing in dictum that “federal case law has overwhelmingly held that citizens do indeed have a right to record officers in their official capacity so long as they do not interfere with an officer’s ability to do his or her job”); *Crawford v. Geiger*, 131 F.

these appellate court holdings are consistent with the Supreme Court's pronouncement that "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256, 126 S. Ct. 1695, 1701. (2006).<sup>11</sup>

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Supp. 3d 703, 715 n.5 (N.D. Ohio 2015) (surveying cases, recognizing that there is a First Amendment right to "film police officers carrying out their duties in public," and noting that it was "firmly persuaded the First Amendment shields citizens against detention or arrest merely for making a photographic, video or sound recording, or immutable record of what those citizens lawfully see or hear of police activity within public view"), *aff'd and rev'd on other grounds*, 656 F. App'x 190 (6th Cir. 2016).

<sup>11</sup> The case the Arresting Officers relied upon below to argue that Mr. Higginbotham's "videotaping of the arrest was not protected by the First Amendment because it was not 'expressive conduct'" does not justify a finding that there is no constitutional right to record public police activity. *Higginbotham I*, 105 F. Supp. 3d at 378. In that case, the plaintiff attended an Occupy Wall Street protest as a "citizen journalist" who hoped to take some pictures and video recordings with his camera. *Pluma*, 2015 WL 1623828, at \*1 (S.D.N.Y. Mar. 31, 2015). While the *Pluma* plaintiff was taking pictures, he was caught up in the efforts by police to push a barricade back against the crowd and ended up being pepper sprayed by an officer. *Id.* Contrary to the contention of the Arresting Officers below, the *Pluma* court did not hold that recording police activity is categorically incapable of qualifying for First Amendment protection, but instead ruled that, in the absence of on-point Second Circuit or Supreme Court precedent, it "remains unclear" whether the plaintiff's filming in that instance "was protected by the First Amendment." *Id.* at \*7. For the same reasons set forth by Judge Castel below, *amici* believe the *Pluma* court committed error in holding the right to record police activity in public places is not clearly established in this circuit. *Higginbotham I*, 105 F. Supp. 3d at 381. But to the extent this Court agrees that the law is not clearly established in the Second Circuit, it should take this opportunity to announce the existence of First Amendment protection for individuals recording police action in public.

All courts of appeal that have recognized the constitutional right to record police officers in public places have extended that protection to private citizens as well as professional journalists. *See, e.g., Glik*, 655 F.3d at 84 (holding that the right applied to a private individual, stating “[t]he First Amendment right to gather news is, as the [Supreme] Court has often noted, not one that inures solely to the benefit of the news media”).<sup>12</sup> But at the very least, *amici* believe the Court should recognize—as did the district court—that members of the press unconnected with the underlying events have a clearly established First Amendment right to record officers in public places in furtherance of their free press rights to gather and disseminate news on matters of public concern.

In addition to the overwhelming weight of judicial authority, public statements by law enforcement organizations further underscore that the First Amendment right to record police conduct in public is clearly established. Thus, in *Garcia v. Montgomery Cty., Md.*, No. 8:12-cv-03592-JFM (D. Md.), a journalist

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<sup>12</sup> *See also Turner*, 848 F.3d at 688 (recognizing a “First Amendment right to record the police” rooted in “protection of the press and the self-expression of individuals” and the prohibition against the government “limiting the stock of information from which members of the public may draw”) (quotation omitted); *Alvarez*, 679 F.3d at 595 (explaining that “[t]he act of *making* an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights”) (emphasis in original); *Smith*, 212 F.3d at 1333 (holding that private individuals had the right to record “police conduct”); *Fordyce*, 55 F.3d at 438-39 (holding that a genuine issue of material fact existed as to whether a police officer infringed upon an “amateur journalist[‘]s” right to film a matter of public interest).

was acquitted of disorderly conduct after being thrown to the ground and arrested for unobtrusively photographing police officers potentially using excessive force against two men. The journalist subsequently brought a civil rights action against the arresting officers for violating his First Amendment rights. At the outset of the journalist's civil action, the U.S. Justice Department took the unusual step of submitting a Statement of Interest, in which it expressed concern that "discretionary charges, such as disorderly conduct, loitering, disturbing the peace and resisting arrest, are all too easily used to curtail expressive conduct or retaliate against individuals for exercising their First Amendment rights." Statement of Interest of the United States, *Garcia v. Montgomery Cty., Md.*, No. 8:12-cv-03592-JFM (D. Md. Mar. 4, 2013), Dkt. 15 at 1-2. In the view of the U.S. government, "[i]t is now settled law that the First Amendment protects individuals who photograph or otherwise record officers engaging in police activity in a public place." *Id.* at 4. Accordingly, the Department of Justice warned that "courts should view such charges skeptically to ensure that individual's First Amendment rights are protected. Core First Amendment conduct, such as recording a police officer performing duties on a public street, cannot be the sole basis for such charges." *Id.* at 2. The Justice Department likewise filed a Statement of Interest in another right to record case, making clear that "[t]he First Amendment protects the rights of private citizens to record police officers during the public discharge of

their duties.” Statement of Interest of the United States, *Sharp v. Baltimore City Police Department*, Civil No. 1:11-cv-02888-BEL (D. Md. Jan. 10, 2012), Dkt. 15 at 4.

In a similar vein, one of the largest law enforcement associations in the country, the International Association of Chiefs of Police, has issued guidelines stating that “arrests of individuals who are recording police activities must be based on factors that are unrelated to the act of recording. Recording the police does not of itself establish legal grounds for arrest, issuance of citations, or taking other actions to restrict such recordings.” Int’l Ass’n of Chiefs of Police, *Public Recording of Police*, <http://bit.ly.2hqLJwd>. Within the Second Circuit, in 2014 the Suffolk County legislature approved rules barring Suffolk County police officers from interfering with journalists filming police incidents as part of a settlement of civil litigation alleging that officers of the county had violated the First Amendment rights of a videographer by arresting him for filming police activity on a public street.<sup>13</sup> The patrol guide for the New York City Police Department likewise states that “[t]aking photographs, videotapes, or tape recordings” at the

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<sup>13</sup> See NYCLU, *New Settlement Protects Right to Film Police in Suffolk County* (June 18, 2014), <https://www.nyclu.org/en/press-releases/new-settlement-protects-right-film-police-suffolk-county>; *Datz v. Milton*, 12 Civ. 1770 (LDW)(WDW) (E.D.N.Y. June 6, 2014), Dkt. 38 Ex. B (setting forth new police department regulation that “[m]embers of the media shall not be precluded from observing incidents, producing recorded media and commenting regarding an incident, provided they do so from locations that are open to the public”).

scene of police incidents does not constitute probable cause for arrest.<sup>14</sup> In sum, the Arresting Officers' argument before the district court that they were unaware of Mr. Higginbotham's First Amendment right to record the arrest of protestors rings hollow in light of the extensive recognition of that right by federal appellate courts and by the law enforcement community as well.

Yet even assuming that the right to record the public conduct of police officers was not clearly established in the Second Circuit at the time of Mr. Higginbotham's arrest, this Court should nonetheless use this opportunity to declare the right to be clearly established going forward. That is the course recently followed by the Fifth Circuit in *Turner v. Driver*. In *Turner*, the Fifth Circuit found itself unable to hold that the right to record the police in public was clearly established in that circuit when the arrest that triggered the lawsuit took place. *Turner*, 848 F.3d at 687. The Fifth Circuit nevertheless noted that "whether such a right exists and is protected by the First Amendment presents a separate and distinct question." *Id.* "Because the issue [of whether the right exists] continues to arise in the qualified immunity context," the Fifth Circuit resolved "to determine it for the future." *Id.* at 688. To that end, the court held unequivocally that "First

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<sup>14</sup> New York City Police Department Patrol Guide at 10, [https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations\\_pdf/pg208-03-arrest-processing-strip-search.pdf](https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations_pdf/pg208-03-arrest-processing-strip-search.pdf).



Amendment principles, controlling authority, and persuasive precedent demonstrate that a First Amendment right to record the police does exist.” *Id.*

Police officers, journalists and citizens in the Second Circuit would benefit from a similarly clear ruling by this Court that individuals have a First Amendment right to document and record police conduct in public places. And by clearly establishing such a right, this Court would provide much-needed guidance to district courts in this circuit that are currently struggling to apply the law. *See, e.g., Mesa v. City of New York*, 09 Civ. 10464 (JPO), 2013 WL 31002, at \*25 (S.D.N.Y. Jan. 3, 2013) (dismissing First Amendment retaliation claim on the basis of qualified immunity even though district court was “inclined to agree with the First, Seventh, Eleventh, and Ninth Circuits that the photography and recording of police officers engaged in their official duties fits comfortably within First Amendment principles”).<sup>15</sup>

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<sup>15</sup> The judge in *Mesa* erroneously concluded that there is a circuit split, stating that two circuits have declined to “extend First Amendment protections to the recording of police activity.” *Id.* In fact, the “circuit courts are not split . . . on whether the right exists.” *Turner*, 848 F.3d at 687. The Third and Fourth Circuit decisions cited in *Mesa* do not affirmatively hold that recording police activity is categorically incapable of First Amendment protection, but rather held that “the law in their respective circuits is not clearly established while refraining from determining whether there is a First Amendment right to record the police.” *Id.* *See also Kelly v. Borough of Carlisle*, 622 F.3d 248, 261-62 (3d Cir. 2010) (holding that a First Amendment right to videotape police officers during traffic stops was not clearly established in Third Circuit); *Szymecki v. Houck*, 353 F. App’x 852, 853 (4th Cir. 2009) (per curiam) (noting that a First Amendment right to record police activities on public property was not clearly established in Fourth

Should the Second Circuit recognize the existence of a First Amendment right to record police activity in public, lower courts will no longer be in doubt and will be able to vindicate free speech rights they are already inclined to acknowledge. Police officers will also be assisted by a ruling from this Court recognizing the right of the public and press to record their activities. Not only will law enforcement benefit from greater accountability and a firmer understanding of the rights of journalists and citizens, but “[f]ilming the police also frequently helps officers; for example, a citizen’s recording might corroborate a probable cause finding or might even exonerate an officer charged with wrongdoing.” *Turner*, 848 F.3d at 689. Lastly, *amici* can attest to the immense benefit that greater clarity would confer upon professional photographers, videographers, journalists and the general public. Ultimately, by finally declaring that the First Amendment accords a right to record police activity in public places, this Court will promote the dissemination of information on matters of public concern—activity that is essential to the functioning of our constitutional democracy.

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Circuit). The existence of lower court confusion over the status of this important First Amendment right militates in favor of this Court affirmatively deciding the issue for the Second Circuit once and for all.

## CONCLUSION

*Amici* urge this Court to hold that there is a clearly established First Amendment right to record police activity in public places.

Dated: New York, New York  
March 17, 2017

Respectfully submitted,



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March 17, 2017



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**APPENDIX:**

**STATEMENT IDENTIFYING *AMICI CURIAE***

Pursuant to Rule 29(a)(4)(D) of the Federal Rules of Appellate Procedure, *amici curiae* submit the following statement of their identities:

**ABC, Inc.** is a broad-based communications company. Alone or through its subsidiaries, it owns ABC News, abcnews.com, and local broadcast television stations that regularly gather and report news to the public. ABC News produces the television programs World News with David Muir, Good Morning America, Nightline, 20/20, and This Week, among others.

**Advance Publications, Inc.**, directly and through its subsidiaries, publishes more than 20 print and digital magazines with nationwide circulation, local news in print and online in 10 states, and leading business journals in over 40 cities throughout the United States. Through its subsidiaries, Advance also owns numerous digital video channels and internet sites.

**ALM Media, LLC** publishes over 30 national and regional magazines and newspapers, including *The American Lawyer*, *The National Law Journal*, *New York Law Journal* and *Corporate Counsel*, as well as the website Law.com. Many of ALM's publications have long histories reporting on legal issues and serving their local legal communities. ALM's *The Recorder*, for example, has been published in northern California since 1877; *New York Law Journal* was begun a

few years later, in 1888. ALM's publications have won numerous awards for their coverage of critical national and local legal stories, including many stories that have been later picked up by other national media.

**The American Society of Journalists and Authors** ("ASJS") was founded in 1948 and is the nation's professional organization of independent nonfiction writers. Our membership consists of more than 1,200 outstanding freelance writers of magazine and newspaper articles, trade books, and many other forms of nonfiction writing, each of whom has met ASJA's exacting standards of professional achievement. A core part of the organization's mission is to protect the First Amendment rights of all journalists, including photojournalists.

**American Society of News Editors** ("ASNE") is an organization with some 500 members, that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

**The Associated Press** ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York, and owned by its 1,500 U.S.

newspaper members. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 300 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

**Association of Alternative Newsmedia** ("AAN") is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

**The Association of American Publishers, Inc.** ("AAP") is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and nonprofit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary and professional markets, scholarly journals, computer software and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

**The Association of Magazine Media (“MPA”)** is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover news, culture, sports, lifestyle, and virtually every interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

**The Authors Guild, Inc.** was founded in 1912, and is a national non-profit association of more than 8,200 professional, published writers of all genres. The Guild counts historians, biographers, academicians, journalists and other writers of nonfiction and fiction as members. The Guild works to promote the rights and professional interest of authors in various areas, including copyright, freedom of expression, and taxation. Many Guild members earn their livelihoods through their writing. Their work covers important issues in history, biography, science, politics, medicine, business and other areas; they are frequent contributors to the most influential and well-respected publications in every field.

***The Buffalo News*** is the largest news organization in the State of New York outside the New York City metropolitan area. *The News* is read by 345,000 (avg.) daily and 535,000 Sunday readers, on an average daily circulation of 141,000 and a Sunday circulation of 181,000 copies. *The News* is among the top five newspapers



in America in market penetration (print and online). Its average weekly online readership is 539,000.

**BuzzFeed** is a social news and entertainment company that provides shareable breaking news, original reporting, entertainment, and video across the social web to its global audience of more than 200 million.

**Cable News Network, Inc.** (“CNN”), a division of Turner Broadcasting System, Inc., a Time Warner Company, is among the most trusted sources for news and information. Its reach extends to nine cable and satellite television networks; one private place-based network; two radio networks; wireless devices around the world; CNN Digital Network; CNN Newsource, the world’s most extensively syndicated news service; and strategic international partnerships within both television and the digital media.

**CBS Broadcasting Inc.** produces and broadcasts news, public affairs and entertainment programming. Its CBS News Division produces morning, evening and weekend news programming, as well as news and public affairs newsmagazine shows, such as “60 Minutes” and “48 Hours.” CBS Broadcasting Inc. also directly owns and operates television stations across the country, including WCBS-TV in New York City.

**The Daily Beast** delivers award-winning original reporting and sharp opinion from big personalities in the arenas of politics, pop-culture, world news

and more. Fiercely independent and armed with irreverent intelligence, The Daily Beast now reaches more than one million readers each day. John Avlon is Editor-in-Chief.

**Daily News, LP** publishes the New York Daily News, a daily newspaper that serves primarily the New York City metropolitan area and is the ninth-largest paper in the country by circulation. The Daily News' website, NYDailyNews.com, receives approximately 26 million unique visitors each month.

**Discovery Communications LLC** satisfies curiosity and engages superfans with a portfolio of premium nonfiction, sports and kids programming brands. Reaching 3 billion cumulative viewers across pay-TV and free-to-air platforms in more than 220 countries and territories, Discovery's portfolio includes the global brands Discovery Channel, TLC, Investigation Discovery, Animal Planet, Science and Turbo/Velocity, as well as OWN: Oprah Winfrey Network in the U.S., Discovery Kids in Latin America, and Eurosport, the leading provider of locally relevant, premium sports content across Europe. Discovery reaches audiences across screens through digital platforms, as well as over-the-top and TV Everywhere offerings, including Eurosport Player, Dplay, Discovery Kids Play and Discovery GO.

**Dow Jones & Company, Inc.** is a global provider of news and business information, delivering content to consumers and organizations around the world

across multiple formats, including print, digital, mobile and live events. Dow Jones has produced unrivaled quality content for more than 130 years and today has one of the world's largest newsgathering operations globally. It produces leading publications and products including the flagship Wall Street Journal; Factiva; Barron's; MarketWatch; Financial News; Dow Jones Risk & Compliance; Dow Jones Newswires; and Dow Jones VentureSource.

**The Electronic Frontier Foundation** ("EFF") is a member-supported, nonprofit civil liberties organization that works to protect free speech and privacy in the digital world. Founded in 1990, EFF has over 37,000 members. EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law to technology. EFF has filed amicus briefs on many First Amendment issues, including the right to record police. See *Fields v. City of Philadelphia*, No. 16-1650 (3rd Cir.).

**The E.W. Scripps Company** serves audiences and businesses through television, radio and digital media brands, with 33 television stations in 24 markets. Scripps also owns 34 radio stations in eight markets, as well as local and national digital journalism and information businesses, including mobile video news service Newsy and weather app developer WeatherSphere. Scripps owns and operates an award-winning investigative reporting newsroom in Washington, D.C.

and serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

**First Amendment Coalition** is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

**First Amendment Lawyers Association** ("FALA") is an Illinois-based, not-for-profit organization of approximately 200 members who routinely represent businesses and individuals that engage in constitutionally protected expression. Founded in the late 1960s, FALA's membership has been involved in many landmark cases involving speech, including the following: *United States v. Stevens*, 559 U.S. 460 (2010); *Ashcroft v. Free Speech Coalition*, 535 US. 234 (2002); *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000); and *Alameda Books v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000), *rev'd*, 535 U.S. 425 (2002). FALA has a tradition of submitting amicus briefs to courts on issues pertaining to constitutionally protected speech.

**First Look Media Works, Inc.** is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

**Fox News Network LLC** owns and operates the Fox News Channel, the top rated 24/7 all news national cable channel, and the Fox Business Network, as well as Foxnews.com, Foxbusiness.com, and the Fox News Radio Network.

**Free Press** is a national, nonpartisan, non-profit organization with approximately one million members in the United States and around the world. It works to defend Internet freedom and press freedom, including the right of journalists and others to gather and report on information as well as the public's right to see, hear and read that information — both of which are crucial to a functioning democracy. Free Press has participated in numerous court and agency proceedings on media, telecommunications, and technology law topics, including those involving First Amendment issues, since the organization's founding in 2003.

**Freedom of the Press Foundation** is a non-profit organization that supports and defends public-interest journalism focused on transparency and accountability. The organization works to preserve and strengthen First and Fourth Amendment rights guaranteed to the press through a variety of avenues, including public

advocacy, legal advocacy, the promotion of digital security tools, and crowd-funding.

**The Freedom to Read Foundation** is an organization established by the American Library Association to promote and defend First Amendment rights, foster libraries as institutions that fulfill the promise of the First Amendment, support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and establish legal precedent for the freedom to read of all citizens.

**Gannett Co., Inc.** is an international news and information company that publishes 109 daily newspapers in the United States and Guam, including USA TODAY. Each weekday, Gannett's newspapers are distributed to an audience of more than 8 million readers and the digital and mobile products associated with the company's publications serve online content to more than 100 million unique visitors each month.

**Hearst** is one of the nation's largest diversified media, information and services companies with more than 360 businesses. Its major interests include ownership in cable television networks such as A&E, HISTORY, Lifetime and ESPN; majority ownership of global ratings agency Fitch Group; Hearst Health, a group of medical information and services businesses; 30 television stations such as WCVB-TV in Boston and KCRA-TV in Sacramento, Calif., which reach a

combined 19 percent of U.S. viewers; newspapers such as the Houston Chronicle, San Francisco Chronicle and Albany Times Union, more than 300 magazines around the world including Cosmopolitan, ELLE, Harper's BAZAAR and Car and Driver; digital services businesses such as iCrossing and KUBRA; and investments in emerging digital and video companies such as Complex, BuzzFeed, VICE and AwesomenessTV.

**Inter American Press Association** ("IAPA") is a not-for-profit organization dedicated to the defense and promotion of freedom of the press and of expression in the Americas. It is made up of more than 1,300 publications from throughout the Western Hemisphere and is based in Miami, Florida.

**Media Coalition Foundation, Inc.** is a non-profit organization, which works to protect the First Amendment and the public's right to access the broadest possible range of information, opinion and entertainment. The Foundation monitors potential threats to freedom of speech and engages in education and litigation to protect free speech rights.

**The Media Consortium** is a network of the country's leading, progressive, independent media outlets. Our mission is to amplify independent media's voice, increase our collective clout, leverage our current audience and reach new ones.

**The Media Law Resource Center, Inc.** ("MLRC") is a non-profit professional association for content providers in all media, and for their defense

lawyers, providing a wide range of resources on media and content law, as well as policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. The MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press and public on media law and First Amendment issues. The MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment.

**Meredith Corporation** owns or operates seventeen television stations reaching approximately eleven percent of United States households, including WFSB-TV (“Channel 3”) in the Hartford-New Haven Designated Market Area. Meredith’s stations produce nearly 700 hours of local news and entertainment content each week, and operate leading local digital destinations.

**The National Association of Broadcasters** (“NAB”) is a nonprofit incorporated trade association that serves and represents radio and television stations and broadcast networks. Our members cover, produce and broadcast the news and other programming to listeners and viewers across the nation. NAB seeks to preserve and enhance its members’ ability to create and disseminate freely programming and information of all types.



**National Newspaper Association** is a 2,400 member organization of community newspapers, founded in 1885. It has offices in Springfield, IL, Columbia, MO and Falls Church, VA.

**The National Press Club** is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

**The National Press Photographers Association** ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 6,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism community. Since its founding in 1946, the NPPA has been the *Voice of Visual Journalists*, vigorously promoting the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

**National Public Radio, Inc.** ("NPR") is an award-winning producer and distributor of noncommercial news, information, and cultural programming. A privately supported, not-for-profit membership organization, NPR serves an audience of more than 26 million listeners each week via more than 1,000

noncommercial, independently operated radio stations, licensed to more than 260 NPR Members and numerous other NPR-affiliated entities. In addition, NPR is reaching an expanding audience via its digital properties, including NPR.org and NPR's applications, which see more than 30 million unique visitors each month.

**NBCUniversal Media, LLC** is one of the world's leading media and entertainment companies in the development, production and marketing of news, entertainment and information to a global audience. Among other businesses, NBCUniversal Media, LLC owns and operates the NBC television network, the Spanish-language television network Telemundo, NBC News, several news and entertainment networks, including MSNBC and CNBC, and a television-stations group consisting of owned-and-operated television stations that produce substantial amounts of local news, sports and public affairs programming. NBC News produces the "Today" show, "NBC Nightly News with Lester Holt," "Dateline NBC" and "Meet the Press."

**New England First Amendment Coalition** ("NEFAC") is a non-profit organization working in the six New England states to defend, promote and expand public access to government and the work it does. The coalition is a broad-based organization of people who believe in the power of transparency in a democratic society. Its members include lawyers, journalists, historians and academicians, as well as private citizens and organizations whose core beliefs include the principles

of the First Amendment. The coalition aspires to advance and protect the five freedoms of the First Amendment, and the principle of the public's right to know in our region. In collaboration with other like-minded advocacy organizations, NEFAC also seeks to advance understanding of the First Amendment across the nation and freedom of speech and press issues around the world.

**New England Newspaper and Press Association, Inc.** ("NENPA") is the regional association for newspapers in the six New England States. NENPA's purpose is to promote the common interests of newspapers published in New England. Consistent with its purposes, NENPA is committed to preserving and ensuring the open and free publication of news and events in an open society.

**New York News Publishers Association** ("NYNPA") is the non-profit trade association representing the newspapers of New York State, which have a combined readership of more than five million people. NYNPA is the principal professional association representing New York State's newspaper industry in governmental, regulatory, and other matters.

**The New York Press Club** is an association of and for working journalists and media professionals. Founded in 1948, its membership includes professionals from all types of news organizations including the Web, television, radio, wire services, daily newspapers, weekly and monthly publications, as well as

professionals from the fields of communications, public relations and public affairs.

**The New York Press Photographers Association** was founded in 1915 and is dedicated to visually documenting the world around us and serving the truth through our images.

**The New York State Broadcasters Association, Inc.** is a not for profit trade association representing more than 400 radio and television stations throughout the state of New York. Providing news and information to the citizens of New York State is a cornerstone of our public interest obligation to serve our local communities. In order to fulfill this vital role under the First Amendment, The New York State Broadcasters Association, Inc. has a direct interest in ensuring that its members are able to obtain access to information.

**The New York Times Company** publishes The New York Times and nytimes.com.

**The News Media Alliance** is a nonprofit organization representing the interests of online, mobile and print news publishers in the United States and Canada. Alliance members account for nearly 90% of the daily newspaper circulation in the United States, as well as a wide range of online, mobile and non-daily print publications. The Alliance focuses on the major issues that affect today's news publishing industry, including protecting the ability of a free and

independent media to provide the public with news and information on matters of public concern.

**NYP Holdings, Inc.** owns and publishes the New York Post, the oldest continuously published daily newspaper in the United States, with the seventh largest circulation. It is published in print and online.

**Online News Association** (“ONA”) is the world’s largest association of online journalists. ONA’s mission is to inspire innovation and excellence among journalists to better serve the public. ONA’s more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

**PEN American Center** (“PEN America”) is a non-profit association of writers that includes novelists, journalists, editors, poets, essayists, playwrights, publishers, translators, agents, and other professionals. PEN America stands at the intersection of literature and human rights to protect open expression in the United States and worldwide. We champion the freedom to write, recognizing the power

of the word to transform the world. Our mission is to unite writers and their allies to celebrate creative expression and defend the liberties that make it possible, working to ensure that people everywhere have the freedom to create literature, to convey information and ideas, to express their views, and to make it possible for everyone to access the views, ideas, and literatures of others. PEN America has approximately 5,000 members and is affiliated with PEN International, the global writers' organization with over 100 Centers in Europe, Asia, Africa, Australia, and the Americas.

**Penske Media Corporation** ("PMC) is a digital media, publishing, and information services company, publishing more than 20 print and digital media outlets including: WWD, Variety, Deadline Hollywood, Indiewire, Robb Report, Gold Derby, Footwear News, TVLine, HollywoodLife, Beauty Inc., BGR, Spy.com and AwardsLine. The company is headquartered in New York, NY and Los Angeles, California.

**Radio Television Digital News Association** ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

**The Reporters Committee for Freedom of the Press** is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided assistance and research in First Amendment and Freedom of Information Act litigation since 1970.

**Reporters Without Borders** has been fighting censorship and supporting and protecting journalists since 1985. Activities are carried out on five continents through its network of over 150 correspondents, its national sections, and its close collaboration with local and regional press freedom groups. Reporters Without Borders currently has 10 offices and sections worldwide.

**Reuters America LLC** is a subsidiary of Reuters, the world's largest international news agency, is a leading provider of real-time multi-media news and information services to newspapers, television and cable networks, radio stations and websites around the world. Through Reuters.com, affiliated websites and multiple online and mobile platforms, more than a billion professionals, news organizations and consumers rely on Reuters every day. Its text newswires provide newsrooms with source material and ready-to-publish news stories in twenty languages and, through Reuters Pictures and Video, global video content and up to 1,600 photographs a day covering international news, sports, entertainment, and business. In addition, Reuters publishes authoritative and unbiased market data and

intelligence to business and finance consumers, including investment banking and private equity professionals.

**Sinclair Broadcast Group, Inc.** is one of the largest and most diversified television broadcasting companies in the country. The Company owns, operates and/or provides services to 173 television stations in 81 markets, broadcasting 505 channels and has affiliations with all the major networks. Sinclair is the leading local news provider in the country, as well as a producer of live sports content. Sinclair's content is delivered over multiple-platforms, including over-the-air, multi-channel video program distributors, and digital platforms. The Company regularly uses its website as a key source of Company information which can be accessed at [www.sbgi.net](http://www.sbgi.net).

**Society of Professional Journalists** ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

**Student Press Law Center** ("SPLC") is a nonprofit, nonpartisan organization which, since 1974, has been the nation's only legal assistance agency



devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

**The Tully Center for Free Speech** began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

**The Vermont Press Association** is a fraternal group representing the interests of 11 daily and four dozen non-daily printed newspapers circulating in Vermont. VPA works to defend the First Amendment, while promoting and expanding public access to government. It has its roots in the 1860s as the Vermont Association of Publishers, Editors and Printers.

**Vox Media** owns several web sites, including Vox, The Verge, SB Nation, and Recode, with 170 million unique monthly visitors.

**WNYW FOX 5** is owned and operated by Fox Television Stations, LLC, along with 27 other local television stations throughout the United States including ones in New York and New Jersey. The 28 stations have a collective market reach of 37.28% percent of U.S. households. Each of the 28 stations also operates Internet websites offering news and information for its local market, including FOX5NY.com and My9NJ.

**CERTIFICATE OF SERVICE & CM/ECF FILING**

**16-3994**

I hereby certify that I caused the foregoing Brief of *Amici Curiae* Media and Free Speech Organizations in Support of Plaintiff-Appellant to be served on all counsel via Electronic Mail generated by the Court's electronic filing system (CM/ECF) with a Notice of Docket Activity pursuant to Local Appellate Rule 25.1:

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I certify that an electronic copy was uploaded to the Court's electronic filing system. Six hard copies of the foregoing Brief of *Amici Curiae* Media and Free Speech Organizations in Support of Plaintiff-Appellant were sent to the Clerk's Office by hand delivery to:

Clerk of Court  
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on this 17th day of March 2017.

/s/ Samantha Collins  
Samantha Collins