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## Lights, Camera, Action . . . As Long As You Live in the Proper Circuit: An Analysis of the Circuit Split Concerning Civilians' First Amendment Right to Record Police Officers

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# Lights, Camera, Action . . . As Long As You Live in the Proper Circuit: An Analysis of the Circuit Split Concerning Civilians’ First Amendment Right to Record Police Officers

*Chloe Cornett\**

## ABSTRACT

While the United States Circuit Courts are not required to keep their precedents in synch, there are times when they should be. So-called “circuit splits” arise when the circuit courts divide themselves in a way that creates two competing schemes of caselaw. The core question of the split addressed in this Comment is whether or not there is an established First Amendment right for civilians to record police officers in public and, if so, whether that right ultimately defeats the doctrine of qualified immunity. The majority of circuits hold there is, while the minority point of view holds there is no such established right. Although the courts can mend the split themselves, this Comment advocates for the Supreme Court of the United States to assert its power as the highest court in the land and conclusively mend the split by holding that citizens have a right a right to record police officers in public pursuant to the First Amendment. Uniformity, efficacy, and percolation are advanced when the circuits are aligned. Moreover, the Supreme Court has the power to bind all courts—whether they have spoken on an issue or not. Public policy concerns, like officer accountability and the societal inequalities pertaining to the dissemination of information, and the essential foundations of our Constitution require the Supreme Court to enforce what most circuit courts already hold: First Amendment protections afford Americans the right to film law enforcement as we find them.

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## I. INTRODUCTION AND BACKGROUND

Imagine for a moment that no one was allowed to record the Minneapolis police officers and their violent interactions with George Floyd. Imagine the footage that ultimately portrayed a radically different scene from how the officers described that day was never allowed to be captured and, as a direct result, never spread globally and never admitted in court.<sup>1</sup> To imagine such videotaping not being permitted is to experience the citizens living under the law as interpreted by two United States Circuit Courts: the Tenth and Fourth Circuits.<sup>2</sup> While the old adage of “majority rules” might apply when picking a restaurant or a flick for family movie night, the Supreme Court periodically tolerates such differing interpretations among federal courts, and they are known as “circuit splits.”<sup>3</sup> Such splits are not a new legal phenomena, and civilians, judges, and attorneys look to the highest court in the land to resolve the legal discrepancy.<sup>4</sup> While many splits have been addressed and remedied in the past, this particular circuit discrepancy remains intact.<sup>5</sup> The Supreme Court has twice denied certiorari on this particular issue in the last ten years.<sup>6</sup> Specifically, the circuits are divided as to whether there is an established First Amendment right of civilians to record police officers in public and if

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1. See Audra D. S. Burch & John Eligon, *Bystander Videos of George Floyd and Others Are Policing the Police*, N.Y. TIMES (Nov. 24, 2021), <https://www.nytimes.com/2020/05/26/us/george-floyd-minneapolis-police.html> [<https://perma.cc/LWQ2-JDMZ>].
  2. See *infra* Part III.
  3. Cornell Law School, *Circuit Split*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/circuit\\_split](https://www.law.cornell.edu/wex/circuit_split) [<https://perma.cc/HQ9J-XXUW>].
  4. Wyatt G. Sassman, *How Circuits Can Fix Their Splits*, 103 MARQUETTE L. REV. 1401, 1403 (2020).
  5. See Nick Sibilla, *Supreme Court Refuses to Protect First Amendment Right to Film Police Brutality*, FORBES (Nov. 2, 2021, 10:45 AM) (discussing the Supreme Court’s recent denial of certiorari on the issue, allowing it to percolate further), <https://www.forbes.com/sites/nicksibilla/2021/11/02/supreme-court-refuses-to-protect-first-amendment-right-to-film-police-brutality/?sh=7a5eb20e7d91> [<https://perma.cc/FK5H-RWWY>].
  6. See Tyler Finn, *Qualified Immunity Formalism: “Clearly Established Law” and the Right to Record Police Activity*, 119 COLUM. L. REV. 445, 454 (2019).

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that right ultimately defeats the doctrine of qualified immunity.<sup>7</sup> The Fourth Circuit and Tenth Circuit do not currently recognize the filming of on-duty police officers as a “clearly established” right under the First Amendment.<sup>8</sup> These two circuits face strong disagreement from six other circuit courts, clearly making their viewpoint the minority.<sup>9</sup> The majority approach holds that recording officers is a clearly established right protected by the First Amendment.<sup>10</sup> Circuits within the majority include the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits.<sup>11</sup> The majority view applies to some of the largest and most densely populated states in the country like Texas, California, and Florida.<sup>12</sup> The Second Circuit, which includes New York, Vermont, and Connecticut, has yet to produce binding caselaw addressing this issue.<sup>13</sup> The Sixth, Eighth, and D.C. Circuits have also not addressed the constitutional merits of the right.<sup>14</sup>

Cases that fall within the ultimate question at the center of this split typically involve three parties: (1) police officer(s), (2) the person interacting directly with police, and (3) a bystander or otherwise uninvolved party that records the interaction.<sup>15</sup> There are also cases that center around an individual recording a police building and then being approached by police officers because of the recording activity.<sup>16</sup> Historically, these cases have shown that once a police officer becomes aware of such filming, they command the individual to stop immediately.<sup>17</sup> Even if there is such a right to record, the doctrine of qualified immunity is frequently relied upon by officers to justify

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7. See Jay Schweikert, *Tenth Circuit Grants Qualified Immunity to Police Who Knowingly Violated the First Amendment*, CATO (Apr. 12, 2021, 2:04 PM), <https://www.cato.org/blog/tenth-circuit-grants-qualified-immunity-police-who-knowingly-violated-first-amendment> [https://perma.cc/FP5B-36BF].
8. Sibilla, *supra* note 5; Finn, *supra* note 6, at 455.
9. See Billy Binion, *The Supreme Court Declines To Determine if You Have a First Amendment Right to Film the Police*, REASON (Nov. 1, 2021, 3:16 PM), <https://reason.com/2021/11/01/the-supreme-court-declines-to-determine-if-you-have-a-first-amendment-right-to-film-the-police/> [https://perma.cc/RU77-GFJ8].
10. Sibilla, *supra* note 5.
11. Binion, *supra* note 9.
12. *Geographic Boundaries of United States Courts of Appeals and United States District Courts*, U.S. COURTS, [https://www.uscourts.gov/sites/default/files/u.s.\\_federal\\_courts\\_circuit\\_map\\_1.pdf](https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf) [https://perma.cc/AHY3-8MA2].
13. See Finn, *supra* note 6, at 459.
14. *Id.*
15. See, e.g., *Fields v. City of Philadelphia*, 862 F.3d 353, 356 (3d Cir. 2017).
16. See, e.g., *Turner v. Lieutenant Driver*, 848 F.3d 678, 683 (5th Cir. 2017).
17. See, e.g., *Fields*, 862 F.3d at 356.

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their actions.<sup>18</sup> Qualified immunity is an affirmative defense used by public officials to shield them from liability in civil suits alleging violation or infringement of a particular right.<sup>19</sup> So long as the violated right is not a “clearly established statutory or constitutional rights of which a reasonable person would have known,” then the defendant-official is protected from liability.<sup>20</sup> This is a high bar for the plaintiff to overcome in light of the fact that courts follow a broad qualified immunity approach which affords greater protection to government officials.<sup>21</sup> The doctrine attempts to strike a balance between two vital concerns: (1) holding public officials responsible should they wield their power inappropriately, and (2) protecting those officials from badgering, disturbing, or otherwise counterproductive interactions that prevent them from doing their job.<sup>22</sup> Government officials keep people safe, but they must not have not have limitless discretion in doing so.<sup>23</sup> It is important to understand that this immunity protects a government official from lawsuits alleging the official violated a plaintiff’s rights, and the doctrine only allows suits where officials violated a clearly established statutory or constitutional right.<sup>24</sup> Explained differently, “qualified immunity is applicable unless the official’s conduct violated [a citizen’s] clearly established constitutional right.”<sup>25</sup>

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18. *See, e.g., id.*

19. *See Finn, supra* note 6, at 447.

20. *Id.*

21. *Id.*

22. Cornell Law School, *Qualified Immunity*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/qualified\\_immunity#:~:text=%E2%80%9CQualified%20immunity%20balances%20two%20important,Callahan%20](https://www.law.cornell.edu/wex/qualified_immunity#:~:text=%E2%80%9CQualified%20immunity%20balances%20two%20important,Callahan%20) [<https://perma.cc/BRZ2-7Y7G>].

23. *See id.*

24. *Id.*

25. Eugene Volokh, *First Amendment right to videotape police extends even to probationers, and to one’s own home as well as public places*, WASH. POST. (Aug. 11, 2014, 10:29 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/11/first-amendment-right-to-videotape-police-extends-even-to-probationers-and-to-ones-own-home-as-well-as-public-places/> [<https://perma.cc/34HN-LW3L>]; Eugene Volokh, *First Amendment Right to Videotape Police Extends Even to Probationers, and to One’s Own Home As Well As Public Places*, WASH. POST. (Aug. 11, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/11/first-amendment-right-to-videotape-police-extends-even-to-probationers-and-to-ones-own-home-as-well-as-public-places/> [<https://perma.cc/34HN-LW3L>].

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This particular split is more relevant now than ever because virtually every American has some sort of video camera at their fingertips daily.<sup>26</sup> Video footage played on news channels and in courtrooms is no longer only provided by television stations or police departments.<sup>27</sup> Civilians of all ages are capturing anything and everything, whether public officials like it or not.<sup>28</sup> Furthermore, these recordings enhance accuracy in describing incidents or spreading information due to the objective nature of recordings.<sup>29</sup> People’s recollections of what they saw or heard can be tainted with subjective bias.<sup>30</sup> Respecting and making proper use of civilian recordings fosters a discrete shift in the societal power balance as well.<sup>31</sup> Now that cameras are regularly in the hands of the public and officers alike, those who have historically been without the power to capture their surroundings can now do so.<sup>32</sup> This right to record can lead to the power to expose and hold accountable individuals and abusive practices that otherwise have gone unseen, unappreciated, and unchecked.<sup>33</sup> Additionally, sharing footage captured by the public sparks important nationwide conversation, much like the Black Lives Matter social justice revolution after the George Floyd footage spread worldwide.<sup>34</sup> In order to ensure that police officers are held accountable for their actions, the ability of civilians to record those officers while on active duty cannot face hurdles or burdensome limitations like “professional credentials or status.”<sup>35</sup> This right must be protected by the First Amendment, which applies broadly to all regardless of profession.<sup>36</sup>

This Comment furthers the argument that the majority’s perspective should prevail, eliminating the approach held by the minority circuits, and that all circuits should find that the right to record police officers in the course of their employment is a clearly established right within the First Amendment. In Parts II and III, this article summarizes the relevant caselaw

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26. See *How Many Americans Have Smartphones (2011-2021)*, OBERLO, <https://www.oberlo.com/statistics/how-many-americans-have-smartphones> [https://perma.cc/DF4L-BHTV].

27. See *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011).

28. See *id.*

29. *Fields*, 862 F.3d at 359.

30. *Id.*

31. See *Chapter Four: Considering Police Body Cameras*, 128 HARV. L. REV. 1794, 1816 (2015).

32. See *id.*

33. See *id.*

34. See *Fields*, 862 F.3d at 359.

35. See *Glik*, 655 F.3d at 84.

36. See *id.* at 83.

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on the issue within each circuit.<sup>37</sup> Part IV discusses why the majority approach is preferable, as it achieves public policy and constitutional goals, and how, as well as why, this split should be settled, uniting the circuits on this issue once and for all.<sup>38</sup>

## II. THE MAJORITY

### A. The First Circuit

In 2011, the First Circuit made it clear that police officers in that jurisdiction do not easily reap the benefits of qualified immunity when it comes to being filmed on the job by civilians.<sup>39</sup> While standing a short distance away from an active arrest, Simon Glik videotaped the encounter as he believed that he saw the officers punch the man being arrested.<sup>40</sup> One of the officers asked Glik if he captured the altercation on video, to which Glik responded that he had.<sup>41</sup> The officer then arrested Glik and took him to the South Boston police station, where his cellphone and other tech devices were confiscated.<sup>42</sup> Glik was later charged with “violation of the wiretap statute, disturbing the peace, and aiding in the escape of a prisoner.”<sup>43</sup> With all charges being either dismissed or dropped, the Boston Municipal Court noted that “the fact that the ‘officers were unhappy they were being recorded during an arrest . . . does not make a lawful exercise of a First Amendment right a crime.’”<sup>44</sup>

In early February of 2010, Glik filed suit against the police officers as well as the City of Boston.<sup>45</sup> Specifically, in his suit he alleged that his First and Fourth Amendment rights were infringed during the original incident in 2007.<sup>46</sup> In response to Glik’s § 1983 claim, the defendants asserted that the suit must be dismissed due to the protections stemming from the doctrine of qualified immunity.<sup>47</sup> The assertion heavily relied on the claim that it was “not well-settled” law that the right to record officers is a constitutional

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37. See *infra* Parts II-III.

38. See *infra* Part IV.

39. See *Appeals Court Unanimously Affirms Right to Videotape Police*, ACLU (Aug. 29, 2011), <https://www.aclu.org/press-releases/appeals-court-unanimously-affirms-right-videotape-police> [<https://perma.cc/NC7J-EZUW>].

40. *Glik*, 655 F.3d at 79–80.

41. *Id.* at 80.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Glik*, 655 F.3d at 80.

47. *Id.*

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one.<sup>48</sup> But the district court was not convinced and held that such a right was indeed clearly established in the First Circuit.<sup>49</sup>

In hopes of a reversal, the defendants appealed to the First Circuit where the district court's ruling was unanimously affirmed.<sup>50</sup> In the dual issue inquiry, the court found that Glik's First Amendment rights were indeed infringed upon and that the right to record on-duty public officials is clearly established and protected by the First Amendment.<sup>51</sup> With regard to the first question asking if the appellee's First Amendment rights had been compromised, the court had no difficulty in determining that the Amendment protects methods of communication beyond those explicitly enumerated in the text.<sup>52</sup> The First Circuit in its opinion emphasized that recording officers falls under the umbrella of the types of acts the First Amendment seeks to protect, such as obtaining and dispersing information about public officials.<sup>53</sup> The holding was not the first of its kind, as the court noted that other circuits also concluded "that the First Amendment protects the filming of government officials in public spaces."<sup>54</sup> This privilege is not exclusive to official news outlets and press publications but also applies to the general public.<sup>55</sup> Noting that "news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper," the court emphasized that First Amendment protections extend to average passersby attempting to disseminate information they legally gathered.<sup>56</sup>

The second inquiry as to whether the right to film was clearly established did not stump the judges of the First Circuit either.<sup>57</sup> The court found the cases appellants relied on to be utterly unpersuasive and held that "a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment."<sup>58</sup> The court addressed the balance sought by qualified immunity by noting that public officials are required to perform their duties in spite of obstacles that arise from citizens acting in accordance with their First Amendment protections.<sup>59</sup>

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48. *Id.*

49. *Id.*

50. *Appeals Court Unanimously Affirms Right to Videotape Police*, *supra* note 39.

51. *See Glik*, 655 F.3d at 82, 84–85.

52. *Id.* at 82.

53. *Id.*

54. *Id.* at 83.

55. *See id.* at 84.

56. *Id.*

57. *See Glik*, 655 F.3d at 85.

58. *Id.* at 85.

59. *See id.* at 84.



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The First Circuit acknowledged that there are sensible and rational limitations on the right to film, but Glik did not impermissibly push those limits in his case.<sup>60</sup> The court's stance on civilians' right to record police officers is best summarized in its own words: "basic, vital, and well-established."<sup>61</sup>

The First Circuit's opinion is often characterized as pro-protectionist on behalf of civilians.<sup>62</sup> Unlike a circuit in the minority group, the court in *Glik* was not afraid to incorporate precedent and authority from neighboring circuits in its reasoning.<sup>63</sup> The First Circuit addressed the constitutional question again three years later in *Gericke v. Begin*.<sup>64</sup> The court affirmed and reiterated the core holding of *Glik* when it expanded the right to include interactions at traffic stops as such a situation "does not extinguish an individual's right to film."<sup>65</sup>

## B. The Third Circuit

In *Fields v. City of Philadelphia*, the Third Circuit filled a hole it created in an prior opinion and elected to join the "growing consensus" among circuits on the issue of First Amendment protections for civilian's filming police when it stated that "the First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public."<sup>66</sup> While the court acknowledged that it held that the recording right was not clearly established seven years earlier, it declared that it had not yet ruled on the First Amendment right issue.<sup>67</sup> In the earlier case, the Third Circuit affirmed the district court's summary judgment in favor of a police officer after concluding that the caselaw on the First Amendment question did not provide the court with a definite rule to work with.<sup>68</sup>

In the Third Circuit's first case concerning the First Amendment recording question, Brian Kelly was riding in the passenger seat of a vehicle driven by his friend, Tyler Shopp.<sup>69</sup> The car was stopped by police officer David Rogers, and Shopp was subsequently questioned.<sup>70</sup> Kelly began recording the

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60. *Id.*

61. *Id.* at 85.

62. *See generally* Finn, *supra* note 6, at 455.

63. *Id.*

64. *Gericke v. Begin*, 753 F.3d 1, 2 (1st Cir. 2014).

65. *Id.* at 7.

66. *Fields*, 862 F.3d at 356.

67. *Id.* at 357.

68. *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d. Cir. 2010).

69. *Id.* at 251.

70. *Id.*

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conversation between Rogers and Shopp on his personal portable camera.<sup>71</sup> Officer Rogers's attention shifted from Shopp to Kelly when he noticed that Kelly had a recording device in his lap.<sup>72</sup> Rogers confiscated Kelly's camera and arrested him after calling for additional police presence.<sup>73</sup> Kelly's sworn statements revealed he heard one of the backup officers say to him, "when are you guys going to learn you can't record us."<sup>74</sup>

The District Attorney brought charges against Kelly for violating a local wiretap act, but those charges were ultimately dropped, and, as a result, Kelly filed suit a § 1983 suit for infringement of his First and Fourth Amendment rights against both Officer Rogers and the Borough of Carlisle.<sup>75</sup> The defendants filed for summary judgment in response to Kelly's suit, which was granted by the district court.<sup>76</sup> Despite his appeal efforts, the Third Circuit affirmed the district court's holding, and Kelly's allegations failed once again.<sup>77</sup> The core of the court's holding was that there was no clear-cut, established rule on First Amendment protections and recording police officers.<sup>78</sup> The Third Circuit was not inclined to extend any First Amendment precedent to these traffic stop facts.<sup>79</sup> As a direct result of the Court's conclusion that there was no clearly established right, summary judgment in favor of Officer Rogers was affirmed.<sup>80</sup>

A few years later, the Third Circuit again faced a case with facts similar to those in *Kelly*.<sup>81</sup> In 2012, Amanda Geraci attended a protest in Philadelphia as an observer.<sup>82</sup> When a protestor was arrested during the event, Geraci attempted to position herself to better videotape the arrest.<sup>83</sup> Although careful not to interfere with police proceedings, Geraci was physically restrained by an officer and did not see the active arrest or capture any of it on her recording device.<sup>84</sup> About a year later, college student Richard Fields witnessed

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71. *Id.*

72. *Id.*

73. *Id.* at 251–52.

74. *Kelly*, 622 F.3d at 252.

75. *Id.*

76. *Id.*

77. *Id.* at 266.

78. *Id.* at 262–63.

79. *See id.*

80. *Kelly*, 622 F.3d at 266.

81. *See Fields*, 862 F.3d at 356.

82. *Id.*

83. *Id.*

84. *Id.*

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police officers tending to a situation at a home.<sup>85</sup> Fields took a picture on his cellphone from across the street where he was standing at the time of his observation.<sup>86</sup> After an officer saw Fields snap the photograph, the officer approached Fields and commanded him to move along.<sup>87</sup> Fields refused to do so.<sup>88</sup> At that point, the police officer arrested Fields, took his cellphone, detained him, and cited him for roadway obstruction.<sup>89</sup> Ultimately, Fields was freed and the charges were dropped.<sup>90</sup>

Pursuant 42 U.S.C. § 1983, Geraci and Fields sued the City of Philadelphia and certain Philadelphia police officers for infringing upon their First and Fourth Amendment rights.<sup>91</sup> But the district court granted summary judgement for the defendants on the First Amendment claims based on qualified immunity.<sup>92</sup> On appeal, the Third Circuit stated at the outset that the issue before the court was one of “great importance” and acknowledged that recording police officers is not at all a rare occurrence.<sup>93</sup> The same court that waived on how to approach the question of whether the First Amendment right existed in *Kelly* delivered a clear conclusion on the central question in *Fields*.<sup>94</sup> The overall holding reads like a loss for individuals like Geraci and Fields because the court affirmed the officers’ entitlement to qualified immunity protections.<sup>95</sup> But the real win is rooted within the court’s recognition that the First Amendment right to “photograph, film or audio record” officers exists going forward.<sup>96</sup> Qualified immunity had to be granted by the court in light of their concession that this right did not exist at the time of Geraci and Fields’s police interactions in 2012 and 2013, respectively.<sup>97</sup> Judge Ambro justified the court’s position on the constitutional question with considerations of First Amendment principles and societal benefits.<sup>98</sup> The opinion posited that video and audio recordings lie “squarely within the First

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85. *Id.*

86. *Id.*

87. *Fields*, 862 F.3d at 356.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Fields*, 862 F.3d at 357.

94. *Id.* at 357–58.

95. *See id.* at 360.

96. *Id.*

97. *Id.* at 362.

98. *See id.* at 359–60.

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Amendment right of access to information.”<sup>99</sup> And, importantly, this right is not only granted to the press but also to the general public.<sup>100</sup> Addressing societal concerns, Judge Ambro explained the essential role that the public plays in keeping police officers accountable for their impermissible actions.<sup>101</sup> Such actions can include editing or misconstruing dash camera footage, or disregarding essential ethical practices.<sup>102</sup> The court claimed that simply just “recording, regardless what is recorded, may improve policing,” and civil rights preservation.<sup>103</sup>

### C. The Fifth Circuit

Much like Geraci and Fields, Philip Turner’s case embodies the phrase “wrong place, wrong time” in the sense that his case marked the end of one approach taken by the Fifth Circuit and sparked the beginning of another.<sup>104</sup> In 2015, Mr. Turner stood across the street from the Fort Worth Police Station and simply videotaped it with his tablet device.<sup>105</sup> Police officers observed Turner’s actions and approached him with suspicion.<sup>106</sup> The interaction between Turner and the officers started off relatively relaxed but ended with Turner’s arrest.<sup>107</sup> The officers asked him for identification and why he was filming the station, but Turner provided neither an ID or a reason for recording.<sup>108</sup> This prompted the officers to place Turner in handcuffs and into the back of a police car without his video camera.<sup>109</sup> Lieutenant Driver arrived to the scene and talked for a while with the two arresting officers.<sup>110</sup> After conversing with both the officers and Turner, Driver released Turner and gave him the camera back.<sup>111</sup>

Three years after the incident, Turner filed suit against all three officers under § 1983 alleging that his First, Fourth, and Fourteenth Amendment rights were transgressed.<sup>112</sup> But, the officers’ motion to dismiss based on

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99. *Fields*, 862 F.3d at 359.

100. *Id.*

101. *See id.*

102. *Id.* at 360.

103. *Id.*

104. *See Turner*, 848 F.3d at 687–88.

105. *Id.* at 683.

106. *See id.*

107. *Id.* at 683–84.

108. *Id.* at 683.

109. *Id.*

110. *Turner*, 848 F.3d at 684.

111. *Id.*

112. *Id.*

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qualified immunity ultimately prevailed at the district court.<sup>113</sup> The court held that Turner “failed to show that [the officers’] actions violated any of his clearly established statutory or constitutional rights or that their actions were objectively unreasonable.”<sup>114</sup>

Turner’s appeal to the Fifth Circuit triggered the court to address the past and discuss the future to establish a new direction on the question of First Amendment protections when videotaping police officers.<sup>115</sup> Most unfortunately for Turner, the court held that “no clearly established First Amendment right to record the police” existed in 2015, when Turner’s situation unfolded.<sup>116</sup> But, in recognition of the importance and prevalence of the issue, the court made it clear that such a right to record officers under the First Amendment was now clearly established going forward.<sup>117</sup> The court explained that at its most basic core, the First Amendment preserves freedoms of speech and press.<sup>118</sup> Under that umbrella falls judicially recognized activities like gathering news, sharing ideas and information, and recording methods.<sup>119</sup> Moreover, there is almost complete consensus on the belief that the Amendment’s primary goal was to protect the free discussion of governmental affairs.<sup>120</sup> In light of those truths and findings of law, the Fifth Circuit adamantly held that the right Turner was claiming was now firmly and clearly established.<sup>121</sup>

The court provided further justification for recognizing the right by explaining the importance of police accountability and accuracy.<sup>122</sup> To permit people to record police officers is to keep the great power they wield in check.<sup>123</sup> Public officials serve the people, and when the power of those officials is beyond the reach of the people’s opinion, democracy can suffer.<sup>124</sup> Furthermore, this right to record can actually benefit public officials too.<sup>125</sup> In

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113. *Id.*

114. *Id.*

115. *Id.* at 685–90.

116. *Turner*, 848 F.3d at 687.

117. *Id.* at 687–88.

118. *Id.* at 688.

119. *Id.* at 688–89.

120. *Id.* at 689.

121. *Id.* at 690.

122. *See Turner*, 848 F.3d at 689.

123. *See id.*

124. *See id.* at 689–90.

125. *Id.*

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situations that boil down to differences in recollections of a situation, video footage can serve as the truth-teller and can dispel inaccurate assertions.<sup>126</sup>

#### D. The Seventh Circuit

In what was explicitly characterized as a “test case,” the Seventh Circuit spoke to the First Amendment question in the context of recording police officers in *American Civil Liberties Union of Illinois v. Alvarez*.<sup>127</sup> The factual circumstances of this case is different than other cases surrounding the same issue because the American Civil Liberties Union (ACLU) filed this suit under § 1983 as a “preenforcement” effort against the Cook County State’s Attorney in Chicago, Anita Alvarez.<sup>128</sup> Specifically, the ACLU wanted to prevent Alvarez from enforcing an Illinois eavesdropping law.<sup>129</sup> The statute seems to hinge on consent and sound.<sup>130</sup> Under the law, anyone who recorded “all or any part of any conversation” would be charged with a Class 4 felony unless all participants in the communication exchanged consent.<sup>131</sup> The charge would increase to a Class 1 felony should any of the parties in the recording be a police officer executing the obligations of their profession.<sup>132</sup> While it was permissible to take silent recording of officers at work, a simple “on” switch of a microphone places the individual recording the officer in Class 1 felony territory.<sup>133</sup> An interesting carveout of the statute pertained to police officers: they were permitted to record any and all civilian interactions without their consent.<sup>134</sup>

The ACLU’s issue with the statute honed in on their ability to operate their program focused on accountability of police officers.<sup>135</sup> The program involved recording police officers at work in public places and intended to capture their movements and speech that could be seen and heard by those around them.<sup>136</sup> The captured material would then be posted online and distributed via other media and entertainment platforms.<sup>137</sup> Out of fear of prosecution of its cameramen due to these recording activities, the ACLU halted implementation of the accountability program and filed suit to prevent en-

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126. *Id.*

127. *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 586 (7th Cir. 2012).

128. *Id.*

129. *Id.*

130. *See id.*

131. *Id.*

132. *Id.*

133. *Alvarez*, 679 F.3d at 586.

134. *Id.* at 587–88.

135. *Id.* at 588.

136. *Id.*

137. *Id.*

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forcement of the statute.<sup>138</sup> The ACLU encountered a few procedural issues with the district court on requirements such as standing and injury.<sup>139</sup> Ultimately, the district court disposed of the ACLU's case on the basis of the "right to audio record" not being protected by the First Amendment.<sup>140</sup>

On appeal, the Seventh Circuit rescued the ACLU's claim and corrected the legal misunderstandings of both the State's Attorney and the district court.<sup>141</sup> The court focused on how the specific provisions of the Illinois law ran afoul with Constitutional protections within the First Amendment.<sup>142</sup> State eavesdropping and wiretapping statutes are permissible, to be sure.<sup>143</sup> But as the Seventh Circuit noted, when those laws are too sweeping, First Amendment protections can be eliminated in the process.<sup>144</sup> The law challenged by the ACLU is a perfect example of what overly inclusive and broad eavesdropping legislation looks like.<sup>145</sup> "All audio recording of any oral communication absent consent of the parties" is prohibited.<sup>146</sup> Further, the parties' intent on the speech remaining public or private is not considered.<sup>147</sup> At the core of its holding, the Seventh Circuit explained that because audio and visual videotaping are within the protections afforded to speech and press under the First Amendment, the Illinois statute is limited in what it can restrict and cannot be as broad as it seeks to be.<sup>148</sup> The gathering process is one of the first steps in the overall system of speech, and restricting one of the steps compromises the essence of freedom of speech overall.<sup>149</sup> This holds true because gathering, creating, and disseminating speech are not separated by harsh, black-and-white dividing lines.<sup>150</sup> Rather, all those activities are shades of gray within the color of expression of speech itself.<sup>151</sup> To restrict the gathering process is to restrict the communication altogether, and to restrict that communication is to infringe on a First Amendment right.<sup>152</sup>

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138. *Id.*

139. *Alvarez*, 679 F.3d at 588.

140. *Id.* at 589.

141. *Id.*

142. *See id.* at 607.

143. *See id.* at 607–08.

144. *See id.* at 595.

145. *See Alvarez*, 679 F.3d at 596.

146. *Id.* at 595.

147. *Id.* at 586.

148. *See id.* at 596.

149. *Id.* at 595.

150. *Id.* at 595–96.

151. *Alvarez*, 679 F.3d at 595–96.

152. *Id.* at 598.

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### E. The Ninth Circuit

Although only addressed in one paragraph, the Ninth Circuit made it clear that it operated under the majority's approach on the First Amendment recording question in its holding in *Fordyce v. City of Seattle*.<sup>153</sup> Jerry Edmon Fordyce attended a Seattle protest with his video camera in tow.<sup>154</sup> At some point during the protest, Fordyce's actions irked police officers to the point of physically preventing him from filming the protest further.<sup>155</sup> Fordyce escaped arrest at that moment, but was later arrested that same day during another altercation in which he filmed pedestrians.<sup>156</sup> Charges against Mr. Fordyce were brought pursuant to a Washington privacy statute but were ultimately dropped.<sup>157</sup>

Among other things, Fordyce brought suit against the City of Seattle and various officers under § 1983 for allegedly infringing upon his First Amendment rights.<sup>158</sup> But on the basis of qualified immunity, the district court granted the officers' motion for summary judgment as to the § 1983 claims.<sup>159</sup> While the Ninth Circuit affirmed several aspects of the district court's holdings, it reversed and remanded the § 1983 claims pertaining to the physical altercation that occurred.<sup>160</sup> In the court's opinion, "a genuine issue of material fact [did] exist regarding whether Fordyce was assaulted and battered by a Seattle police officer in an attempt to prevent or dissuade him from exercising his First Amendment right."<sup>161</sup>

It is essential to read this opinion with the understanding that qualified immunity cannot apply if the officer's conduct violated an individual's clearly established constitutional right.<sup>162</sup> The court recognized Fordyce's filming as an action that would trigger acknowledgment of infringement of an activity rooted in a constitutionally protected activity and would thus defeat a claim of qualified immunity.<sup>163</sup> As such, the court's granting of summary judgment shows where the court stands.<sup>164</sup> Although not stated as explicitly as other circuit opinions, the Ninth Circuit's opinion in *Fordyce* is

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153. See *Fordyce v. City of Seattle*, 55 F.3d 436, 442 (9th Cir. 1995).

154. *Id.* at 438.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Fordyce*, 55 F.3d at 438–39.

160. *Id.* at 442.

161. *Id.* at 439.

162. Volokh, *supra* note 25.

163. Finn, *supra* note 6, at 446 n.9.

164. *Id.*



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consistently cited as precedent of an established right to record police officers under the First Amendment.<sup>165</sup>

#### F. The Eleventh Circuit

While the Smiths did not get the relief they sought on appeal, the Eleventh Circuit made important statements in its relatively short opinion on the issue of First Amendment recording of police officers by civilians.<sup>166</sup> In *Smith v. City of Cumming*, Mr. and Mrs. Smith filed a § 1983 suit against the City of Cumming and Earl Singletary, the Chief of Police.<sup>167</sup> The Smiths claimed that they suffered harassment at the hands of Cumming police officers.<sup>168</sup> More importantly, they alleged that Mr. Smith's First Amendment rights were violated when he was not permitted to record the officers in action.<sup>169</sup> The district court granted the defendants' motion for summary judgment, and the Smiths appealed.<sup>170</sup>

The Eleventh Circuit affirmed the district court's ruling but corrected an error of the lower court by explicitly stating that it had "erred in concluding that there was no First Amendment right" when granting summary judgment.<sup>171</sup> To prevail on their § 1983 claim, the Smiths had to satisfy two requirements: (1) have the type of right that qualified immunity applies to, and (2) show that the right was indeed deprived or compromised.<sup>172</sup> The Smiths met the first requirement but not the second.<sup>173</sup> As a result, the Eleventh Circuit affirmed the district court's ruling.<sup>174</sup> But the court's recognition that the Smiths were correct when they asserted that they had a constitutional right at the center of the issue is the important precedent set by the Eleventh Circuit.<sup>175</sup>

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165. Volokh, *supra* note 25.

166. *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

167. *Id.* at 1332.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 1333.

172. *Smith*, 212 F.3d at 1333.

173. *Id.*

174. *Id.*

175. Volokh, *supra* note 25.

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### III. THE MINORITY

#### A. The Fourth Circuit

Compared to the Tenth Circuit, the Fourth Circuit's stance on the First Amendment recording issue is much less solidified.<sup>176</sup> Although the unpublished per curiam opinion affirmed the district court, "unpublished opinions are not binding precedent in" the Fourth Circuit.<sup>177</sup> Nevertheless, the 2009 decision is consistently recognized as following the minority approach on the split issue.<sup>178</sup> Mrs. Szymecki claimed that her husband was forcefully removed from a local festival because he brought his handgun to the public event.<sup>179</sup> Officers informed Mr. Szymecki that he needed to rid himself of the weapon before reentering the festival per city code.<sup>180</sup> When he did not comply with the officers' order, additional police arrived on the scene, and that is when Mrs. Szymecki claims that things got physical between the officers and her husband.<sup>181</sup> At that point, she started filming the situation but was allegedly shoved, threatened, and removed from the park where the festival was held.<sup>182</sup>

Several months later, Mrs. Szymecki filed suit under § 1983 against the officer who first communicated with her husband and then later called for backup, Deputy Houck.<sup>183</sup> Mrs. Szymecki claimed that Houck violated her First and Fourth Amendment rights.<sup>184</sup> Houck moved to dispose of Szymecki's claims on the basis that she did not allege an applicable constitutional right.<sup>185</sup> The district court granted Deputy Houck's motion for summary judgement because it concluded that "the specific right implicated . . . was not clearly established at the time" of the incident, and therefore, qualified immunity prevailed.<sup>186</sup>

In response, Szymecki appealed to the Fourth Circuit.<sup>187</sup> In its rather short opinion, the court affirmed the district court without hearing any oral

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176. *See generally* Finn, *supra* note 6, at 455.

177. *Szymecki v. Houck*, 353 F. App'x 852 (4th Cir. 2009).

178. Finn, *supra* note 6, at 455.

179. *Szymecki v. City of Norfolk*, No. 2:08CV142, 2008 WL 11259782, at \*1 (E.D. Va. Dec. 17, 2008).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Szymecki*, 2008 WL 11259782, at \*2.

186. *Id.* at \*4.

187. *Szymecki*, 353 F. App'x at 852.

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argument.<sup>188</sup> The court used a quite narrow lens and explained that only caselaw from the Fourth Circuit itself or the Supreme Court will be considered when determining if a constitutional right is clearly established.<sup>189</sup> Because the Supreme Court has not ruled on this issue, and there is no binding precedent in the Fourth Circuit, the court did not have to use this case to finally state their conclusion and stance on the issue.<sup>190</sup> Although the court confronted the First Amendment issue at the center of this circuit split, it dodged having to actually put forth binding precedent and therefore sits in the minority view group.<sup>191</sup>

## B. The Tenth Circuit

Of all the circuit caselaw on the First Amendment issue, *Frasier v. Evans* is the most recent case and has reignited much passionate discussion.<sup>192</sup> The Tenth Circuit's ruling was issued in March 2021 and the Supreme Court denied certiorari a several months later.<sup>193</sup> Rather than answering the First Amendment question for all circuits, it is evident that the Supreme Court will allow the split to persist for now.<sup>194</sup> Mr. Frasier witnessed Denver police officers beating a man in August 2014.<sup>195</sup> To the officers' disdain, the entire altercation was recorded by Frasier.<sup>196</sup> Police approached and surrounded Frasier, one of them telling him the daunting "we could do this the easy way, or we could do this the hard way" threat.<sup>197</sup> With no warrant and no consent from Frasier, the officers grabbed the recording device and rummaged through it trying to locate the video.<sup>198</sup> Frasier's footage was saved from destruction as the officers never found it.<sup>199</sup> But, the officers' fears came true when Frasier submitted the footage to a local news station and it was publicly aired.<sup>200</sup>

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188. *Id.* at 853.

189. *Id.* at 852-53.

190. Finn, *supra* note 6, at 455.

191. *Id.*

192. *See generally* Sibilla, *supra* note 5.

193. *See id.*; *see also*, *Frasier*, 992 F.3d at 1003.

194. *See* Sibilla, *supra* note 5.

195. *Id.*

196. *See id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *See* Sibilla, *supra* note 5.

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As the community witnessed the misconduct of the officers, Frasier filed suit.<sup>201</sup> Frasier prevailed on his First Amendment claim in the district court when it did not grant the officers qualified immunity.<sup>202</sup> Although it held that the right to film public officials during the course of their duties was *not* a clearly established right, the court based its conclusion on another fact.<sup>203</sup> In the years leading up to Frasier’s altercation with police, Denver officers had been commanded to “respect the public’s ‘right to record them performing their official duties in public spaces.’”<sup>204</sup> Moreover, the Department of Justice set forth in a letter to the Baltimore Police Department recommendations and advice for police officers across the country on the right to record officers.<sup>205</sup> Their guidance explicitly stated that officers should be aware that “individuals have a First Amendment right to record police officers,” citing cases from circuits that echo that conclusion like *Glik*, *Smith*, and *Fordyce*.<sup>206</sup> As a result, the district court denied the officers qualified immunity not on the basis of a right to record being clearly established but on the fact that “the officers actually knew from their training that people have a First Amendment right to record them in public.”<sup>207</sup>

In response, the officers appealed the district court’s ruling to the Tenth Circuit.<sup>208</sup> Writing for the majority, Judge Holmes expressed deep disagreement with the district court’s alternative basis used to reach its holding.<sup>209</sup> Judge Holmes defeated the lower court’s opinion on two separate but equally potent lines of reasoning.<sup>210</sup> First, the Tenth Circuit clarified that how the officers viewed the law is wholly *subjective* and that qualified immunity is only analyzed with an *objective* lens.<sup>211</sup> In the Tenth Circuit’s opinion, subjective understanding is “irrelevant” to a qualified immunity analysis.<sup>212</sup> Second, if that reasoning was not enough to correct the district court, Judge Holmes provided another justification for finding error.<sup>213</sup> The court explained that police training is not an “interpretive source” in a “clearly-estab-

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201. *Id.*

202. *Frasier*, 992 F.3d at 1008.

203. *Id.*

204. Sibilla, *supra* note 5.

205. Letter from Jonathan M. Smith, Chief of Special Litigation Section, Dep’t of Just., to Mark H. Grimes, Baltimore Police Dep’t (May 14, 2012).

206. *Id.* at 2–3.

207. *Frasier*, 992 F.3d at 1008.

208. *Id.* at 1009.

209. *See id.* at 1013–23.

210. *Id.* at 1015.

211. *Id.*

212. *Id.*

213. *Frasier*, 992 F.3d at 1015.

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lished-law inquiry.”<sup>214</sup> Judicial precedent shall be the only controlling source, and the district court acknowledged that they had no such precedent to rely on in its holding.<sup>215</sup> Frasier cited persuasive law from numerous cases and commentary but the Tenth Circuit was not moved by any of it due to the nature of the citations: concurrences, dicta, and opinions from other circuits.<sup>216</sup> Judge Holmes characterized the district court’s analysis as “erroneous rationale” and granted police officers in the Tenth Circuit more leeway when he stated that “even if officers subjectively kn[o]w . . . that their conduct violated” an individual’s First Amendment rights that qualified immunity shall still be granted as the right remains unestablished.<sup>217</sup>

#### IV. ANALYSIS AND IMPLICATION

##### A. “Majority Rules”

In this particular circuit split, the conclusions and opinions of the majority viewpoint are the correct interpretation as it best upholds public policy concerns and is undoubtedly rooted in our constitution.<sup>218</sup> The minority position is out of step with both public policy considerations and foundational pillars of this nation’s Constitution and, thus, should be defeated in favor of the majority’s approach.<sup>219</sup>

One of the most compelling public policy concerns served by the majority’s stance on this issue is police accountability.<sup>220</sup> Providing dual benefits and strengthening the integrity of police officers behooves both the general public’s and states’ interests.<sup>221</sup> The population at large desires to capture and make accessible the incidents they witness without fear of search and seizure.<sup>222</sup> The popular motto “see something, say something” loses all effect when those who see something are too afraid to say something, and as a result, the pertinent incident goes unaddressed.<sup>223</sup> The state maintains an interest in maintaining a credible and efficacious law enforcement depart-

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214. *Id.*

215. *Id.* at 1015, 1019.

216. *Id.* at 1016–18.

217. *See id.* at 1019.

218. *See infra* Part IV.

219. *See infra* Part IV.

220. *See generally* Raoul Shah, *Cop-Watch: An Analysis of the Right to Record Police Activity and Its Limits*, 37 MITCHELL HAMLINE L.J. PUB. POL’Y & PRAC. 215, 228 (2017).

221. *See generally id.* at 223–33.

222. *See id.* at 233.

223. *See id.* at 232–33.

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ment.<sup>224</sup> Further, the recordings could serve as essential evidence in trial proceedings, thus enhancing the courts' pursuit of justice.<sup>225</sup>

Alongside officer accountability lies the public policy concern of consistency among jurisdictions.<sup>226</sup> It is concerning that officers in the minority view states could escape liability for the same actions that the majority would not let slide.<sup>227</sup> This inconsistency typically manifests as a benefit to the defendant-officer in minority jurisdictions.<sup>228</sup> Of course, the majority's approach would not create such an automatic advantage for police officers who should potentially be held accountable.<sup>229</sup> This inconsistency affects civilians as well.<sup>230</sup> Some individuals enjoy the freedom to record officers and share what they gather, while other fellow Americans live an almost censored life with respect to recording their government officials.<sup>231</sup>

A more social justice-oriented policy interest is furthered by the majority's view, too.<sup>232</sup> Historically underrepresented or disrespected populations can be acknowledged as the community representatives they are by allowing their captured footage to be absorbed by the necessary parties.<sup>233</sup> These groups—women, racial minorities, and those with disabilities, for example—can put forth evidence that supersedes real or socially constructed barriers that accurately convey real experiences and incidents that deserve attention.<sup>234</sup> Properly utilizing information is a way governments can promote and enforce justice in courts and with the press.<sup>235</sup> Empowerment at the individ-

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224. *See id.* at 229.

225. *See generally id.* at 233.

226. *See generally* Finn, *supra* note 6, at 452.

227. *See The Supreme Court Hasn't Ruled on Whether Recording the Police is a First Amendment Right. This Could be the Year It Does.*, FIRST AMEND. WATCH AT N.Y. UNIV. (Aug. 27, 2021), <https://firstamendmentwatch.org/the-supreme-court-hasnt-ruled-on-whether-recording-the-police-is-a-first-amendment-right-this-could-be-the-year-it-does/> [<https://perma.cc/Y45Z-LMZJ>].

228. Finn, *supra* note 6, at 452.

229. *See generally The Supreme Court Hasn't Ruled on Whether Recording the Police is a First Amendment Right. This Could Be the Year It Does.*, *supra* note 227.

230. *See generally* Clay Calvert, *The First Amendment Right to Record Images of Police in Public Places: The Unreasonable Slipperiness of Reasonableness & Possible Paths Forward*, 3 TEX. A&M L. REV. 131, 140–41 (2015).

231. *See generally id.* at 141.

232. *See generally Chapter Four Considering Police Body Cameras*, *supra* note 31, at 1801-07.

233. *See generally id.* at 1798–802.

234. *See id.* at 1798–99.

235. *See* Duncan Green, *The Role of the State in Empowering Poor and Excluded Groups and Individuals*, UNITED NATIONS (Jul. 2013), <https://www.un.org/esa/>

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ual level within that citizen recording police is an “essential precondition” for collective change.<sup>236</sup>

The majority approach rules when it comes to abiding by the protections and goals of the U.S. Constitution.<sup>237</sup> The First Amendment promises Americans that Congress will “make no law[s] . . . abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances.”<sup>238</sup> Per interpretation by the Supreme Court, the First Amendment protects citizens’ ability to gather and spread information without the government stifling the public’s access to such information.<sup>239</sup> The Supreme Court emphasized the importance of speech’s ability to inform the public by explaining that such ability does not stem from the gatherer and sharer of the information.<sup>240</sup> “[W]hether [the source is a] corporation, association, union, or individual,” information benefits the public.<sup>241</sup> The central issue of this circuit split is implicated on the front end of the freedom of speech timeline.<sup>242</sup> How can one be free to share information that they are prohibited from gathering in the first place? This paradox resolves itself under the majority’s approach because one is not prevented from gathering what one is later free to share to the public.<sup>243</sup> The essence of the First Amendment could be hollowed out by the minority’s perspective by telling civilians that they can share what they please but with the caveat that, what can be gathered is significantly limited.<sup>244</sup>

## B. Why Mend the Split?

Of course, the public policy and constitutional concerns make it clear that this disagreement among the circuits should be mended.<sup>245</sup> On a more systematic level, three broad and functional aspects of circuit law are enhanced when the circuits are all on the same page: (1) uniformity, (2) efficiency, and (3) percolation.<sup>246</sup>

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socdev/egms/docs/2013/EmpowermentPolicies/Background%20Paper.pdf  
[<https://perma.cc/66X8-N7GM>].

236. *Id.* at 3.

237. *See generally* Shah, *supra* note 220, at 223–33.

238. U.S. CONST. amend. I.

239. Shah, *supra* note 220, at 223.

240. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

241. *Id.*

242. *See Alvarez*, 679 F.3d at 595.

243. *See, e.g., id.*

244. *See generally id.*

245. *See supra* Part IV(a).

246. Sassman, *supra* note 4, at 1437.

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## 1. Uniformity

While each of the circuits addressed in this comment has intercircuit uniformity and consistency within its own particular circuit, there is a lack of uniformity between the circuits: intracircuit uniformity.<sup>247</sup> Given the advantages modern life affords us to easily and readily float between jurisdictions, it is a legal truth that most Americans will be affected somehow by intracircuit inconsistencies.<sup>248</sup> Some individuals might reside in one circuit for the vast majority of their lives, but far more individuals migrate between the states and ultimately between the circuits for life milestone moments, such as educational, familial, and professional pursuits.<sup>249</sup> These pursuits could be comprised by inconsistencies within the circuits and result in unfair, unpredictable, and unstable outcomes.<sup>250</sup>

Under the circuit doctrine, uniformity within a circuit is more important than uniformity between circuits.<sup>251</sup> This prioritization directly compromises the advantages of intracircuit consistency by sparking litigation within other circuits and shaking up precedent within the circuits involved in the issue.<sup>252</sup> Lack of uniformity can also lead to “circuit shopping” and flooding some jurisdictions and courts with suits more than others.<sup>253</sup>

## 2. Efficiency

Somewhat in the same vein as uniformity, circuit splits compromise efficiency of jurisprudence.<sup>254</sup> How efficient can a legal system be when its own laws are applied unevenly and unequally?<sup>255</sup> Probably the most common advantage set forth in favor of mending circuit splits is that when the circuits are unified, judicial efficiency is enhanced because judges need not make time intensive inquiries.<sup>256</sup> The benefit of efficiency sits at the end of a domino effect of judicial proceedings ruled by uniformity.<sup>257</sup> The theory is that when splits are fixed and the circuits all agree, conflict decreases workload

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247. *Id.* at 1438.

248. *Id.*

249. *See generally id.*

250. *Id.*

251. *Id.* at 1443.

252. Sassman, *supra* note 4, at 1443.

253. Deborah Beim & Kelly Rader, *Legal Uniformity in American Courts*, 16 J. EMPIRICAL LEGAL STUD. 448, 451 (2019).

254. *Id.*

255. *See generally id.*

256. Sassman, *supra* note 4, at 1444.

257. *See id.* at 1446.



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and time that must be spent on each case, therefore efficiency increases.<sup>258</sup> Justice Cardozo summarized this principle when he stated that “the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case.”<sup>259</sup>

### 3. Percolation

Circuit percolation is the idea that conflicting precedent shall stand for a while before the Supreme Court hears the issue.<sup>260</sup> Proponents of the approach argue that tolerating the clashing caselaw for a time ultimately allows for more material to develop, giving the Court more reasoning and perspective to consider.<sup>261</sup> It is essential to recognize that percolation is limited, and strife cannot and should not be tolerated for too long.<sup>262</sup> The percolation period allows the circuits to communicate and exchange methodologies which is beneficial.<sup>263</sup> But, should percolation last too long, circuits can lock-in on their own precedent and become less and less willing to hear competing precedents.<sup>264</sup> This “lock-in” often leads circuits to listen only to their own precedent and refuse any and all precedent from non-binding courts, such as other circuits.<sup>265</sup> Moreover, studies show that more caselaw within a split does not mean that the split is more likely to be resolved.<sup>266</sup> On the other hand, it is unknown if the Court’s certiorari denial is just procrastination or if it means that the Court never plans to resolve the split.<sup>267</sup> It is clear that the Supreme Court is allowing this First Amendment issue to percolate further.<sup>268</sup> The question as to whether it has percolated too long remains unanswered.

### C. How to Mend the Split

The first approach to settle this First Amendment split that likely comes to mind is to petition again for the Supreme Court to establish a final rule that puts all the circuits on the same page.<sup>269</sup> This approach is the most formal one

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258. *See id.*

259. *See id.* at 1445.

260. *Id.* at 1447–48.

261. *Id.* at 1448.

262. *See Sassman, supra* note 4, at 1450.

263. *See id.*

264. *Id.*

265. *Id.* at 1431.

266. Beim & Rader, *supra* note 253, at 2.

267. *Id.* at 6.

268. *See Sibilla, supra* note 5.

269. *See id.* (highlighting the number of entities that turned to the Supreme Court for resolution of the issue).

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that can be used to resolve a division between the circuits.<sup>270</sup> Additionally, a split among the circuits is one of the strongest indicators of Supreme Court review.<sup>271</sup>

There are both advantages and disadvantages of the Supreme Court certiorari approach.<sup>272</sup> Some of the hurdles include the Court's unchallengeable discretion to decline certiorari<sup>273</sup> and the Court's shrinking docket size.<sup>274</sup> Political researchers believe that the Court prefers to address splits that are highly divisive and truly split the circuits down the middle.<sup>275</sup> More "shallow" and less controversial splits seem to concern the Court less and are often not granted certiorari.<sup>276</sup> But other circumstances still affect whether the Court grants certiorari or not.<sup>277</sup> Timing, factual intricacies, whether a particular party petitions for certiorari, and the Court's own unique discretion all contribute to the Court's ultimate decision to employ judicial review;<sup>278</sup> along with the Court's discretion is the issue of shrinking docket size.<sup>279</sup> The courts' caseload makes a triangle with the Supreme Court at the top and the lowest federal courts at the bottom.<sup>280</sup> The disproportional docket sizes have led some analyses to question whether our highest court can even handle all the current issues and if uniformity among the courts is a lost cause.<sup>281</sup> But, there is a reason so many petition to the Supreme Court in hopes of judicial review in spite of these potential downsides.<sup>282</sup>

A special benefit the Court settling a circuit split is that the decision speaks to both "sleeper" circuits and the "origin" circuit.<sup>283</sup> The origin circuit is the circuit that produced the case that the Court granted certiorari to.<sup>284</sup>

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270. Beim & Rader, *supra* note 253, at 4.

271. *Id.* at 1.

272. *See generally* Sassman, *supra* note 4, at 1451–62.

273. *See* Karen M. Gebbia, *Circuit Splits and Empiricism in the Supreme Court*, 36 *PACE L. REV.* 477, 479 (2016).

274. Sassman, *supra* note 4, at 1403.

275. Beim & Rader, *supra* note 253, at 5.

276. *Id.*

277. *See* Gebbia, *supra* note 273, at 504–05.

278. *Id.*

279. *See* Sassman, *supra* note 4, at 1403.

280. *See id.* at 1409.

281. *See id.*

282. *See A Reporter's Guide to Applications Pending before the Supreme Court of the United States*, PUB. INFO. OFF. SUP. CT. OF THE U.S., <https://www.supremecourt.gov/publicinfo/reportersguide.pdf> [<https://perma.cc/ZB5S-7QZW>].

283. *See* Gebbia, *supra* note 273, at 504–5.

284. *Id.* at 498.

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Sleeper circuits are circuits who have spoken on the issue at the center of a split but they were not granted certiorari.<sup>285</sup> A Supreme Court decision on a circuit split reveals to what degree the Court accepts or rejects the legal reasoning and rulings of all sleeper circuits and the origin circuit.<sup>286</sup> Such a ruling also directly impacts silent circuits that have not spoken on the issue at all because all circuits are bound by Supreme Court caselaw.<sup>287</sup> Moreover, this approach strengthens one of the Court's core responsibilities: the law's ultimate "conflict-resolver."<sup>288</sup>

Other legal scholars advance that a different method to mend circuit splits enables the circuits to settle the differences on their own.<sup>289</sup> Advocates of this approach argue that if circuits could relax their strict and rigid adherence to considering only their own precedent and instead consider holdings and reasonings of fellow courts, the circuits could fix their own rifts.<sup>290</sup> This would require somewhat loosening what is known as the "law of the circuit" doctrine.<sup>291</sup> This doctrine is a firm, inflexible rule "that a panel of a federal court of appeals may not revisit the decision of a prior panel on the same court."<sup>292</sup> Only a modification in caselaw from a superior court permits this revisitation.<sup>293</sup> All the circuit courts abide by this rule, but the important catch is that the application of the rule varies from court to court.<sup>294</sup> While one court allows consideration of persuasive, non-binding precedent, others disagree on what a change in "higher authority" even means.<sup>295</sup>

The strict nature of the circuit doctrine is not how things have always been either.<sup>296</sup> Historically, the circuits operated much more flexibly before this new rigid methodology became commonplace in the late 1900s.<sup>297</sup> So pulling back on the severity of the doctrine would not be novel, it would be returning to what was previously the norm.<sup>298</sup> But under the current rule's strict confines, circuits effectively have horse blinders on and do not con-

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285. *Id.* at 503 n.77.

286. . *See id.* at 505.

287. *See, e.g.,* Payne v. Taslimi, 998 F.3d 648, 654 (4th Cir. 2021).

288. Sassman, *supra* note 4, at 1450.

289. *See id.* at 1451.

290. *See id.*

291. *Id.*

292. *Id.* at 1426.

293. *Id.* at 1426-27.

294. Sassman, *supra* note 4, at 1427.

295. *Id.* at 1427-28.

296. *See id.* at 1428.

297. *See id.* at 1428-29.

298. *See id.* at 1428.

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verse with each other which, unsurprisingly, creates gridlock.<sup>299</sup> The courts become cemented in their position on an issue, making resolution extremely difficult at best.<sup>300</sup> An example of how this tunnel vision can complicate resolution among the circuits is the Fourth Circuit's reasoning in *Szymecki*<sup>301</sup> and the Tenth Circuit's holding in *Fraiser*.<sup>302</sup> If the Court permitted consideration of other circuits in the majority's precedent and sources that led to their holdings, perhaps the holding could have been different, leaving only the Tenth Circuit out of step with the other courts and essentially not being a real split at all.<sup>303</sup> Advocates of an approach like this postulate that even if the conflict is not totally mended, considering factors and findings in other circuits leads to "further development of the issue by better articulating its position."<sup>304</sup>

Those who favor this method also argue that it would decrease reliance on the Supreme Court to resolve conflict and alleviate some strain on the federal court system.<sup>305</sup> If the circuit courts make use of the legal methodologies and other "tools already available" to them, they could increase the overall rate at which circuit conflicts are actually resolved.<sup>306</sup> Arguably the most compelling benefit of this less rigid consideration approach is that the courts could render more sound decisions.<sup>307</sup> Genuine communication between the circuits would likely enhance confidence in the legitimacy of the federal court system and might lead to legal minds discussing respective caselaw that previously would not have been addressed.<sup>308</sup>

Of course, this approach has its downsides.<sup>309</sup> The law and those who practice it value predictability, and this change could compromise that to some degree.<sup>310</sup> Perhaps the most consequential risk of this approach is the potential implication of destabilizing what rights are and are not clearly established in constitutional issues.<sup>311</sup> Whether or not the right of citizens to film police officers is a clearly established right within the First Amendment is at the center of the circuit split this article addresses. It is true that some cases have come down to the exact moment at which the court decided when

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299. *See id.* at 1431.

300. *See Sassman, supra* note 4, at 1431–32.

301. *See Szymecki*, 353 F. App'x at 852.

302. *See Fraiser*, 992 F.3d at 1015.

303. *See Sassman, supra* note 4, at 1452.

304. *See id.*

305. *See id.* at 1453.

306. *See id.* at 1454.

307. *See id.* at 1456–57.

308. *See id.*

309. *Sassman, supra* note 4, at 1460.

310. *See id.* at 1460.

311. *See id.* at 1462–63.

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this right was in fact clearly established.<sup>312</sup> So if that determination is not fixed in time and is susceptible to subsequent alteration, there could be dire consequences relating to consistency, constitutionality, and equality.<sup>313</sup> Whether the former or later approach is adopted, if any effort to mend the split is taken at all, there are benefits and risks.<sup>314</sup> It would not be surprising if another petition for certiorari is filed since, as previously explained, we as a society are comfortable with the Supreme Court having the final say and being the conflict resolver.<sup>315</sup>

## V. CONCLUSION

Americans cherish their constitutional rights, especially the freedom of speech, and do not take lightly threats to this pillar of what it means to be an American.<sup>316</sup> The reality is that citizens seeking to gather information are everywhere; camera phones are in every hand, and police officers are in all states and cities. This means the potential for another First Amendment case like the ones this article addresses is endless.<sup>317</sup> Therefore, the split dividing the circuit courts should be done percolating and settled because the core of the issue is not going anywhere anytime soon.<sup>318</sup> Furthermore, the majority's perspective should prevail if the essential underpinnings of the U.S. Constitution are to be preserved and for crucial public policy considerations to be advanced further.<sup>319</sup> Police accountability, consistent treatment of civilians seeking to exercise the same right, utilization of information from historically underrepresented groups to promote equality in information dissemination, and the ability to discuss governmental affairs without unreasonable limitations are concerns that cannot go unaddressed any longer.<sup>320</sup> Therefore, a method to settle this split must be selected. The rich discussion surrounding this issue cannot die down, but, rather, it must get louder if we, Americans with constitutional protections, want those with the power to fix this split, to fix it once and for all.

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312. See, e.g., *Turner*, 848 F.3d at 687–88.

313. See *Sassman*, *supra* note 4, at 1462–63.

314. See *supra* Part IV.

315. See *supra* Part IV.

316. See Jérôme Viala-Gaudefroy, *The idolization of free speech in the United States*, THE CONVERSATION (Feb. 22, 2021, 12:38 PM), <https://theconversation.com/the-idolization-of-free-speech-in-the-united-states-155778> [https://perma.cc/EK6H-VEXP].

317. See *supra* Parts I and II.

318. See generally *Sibilla*, *supra* note 5 (highlighting the most recent instance of the issue and alluding to the conclusion that conflict surrounding this issue will occur again since the Court will not address the issue).

319. See *supra* Part IV.

320. See *supra* Part IV.