25-1104

In the United States Court of Appeals for the Second Circuit

KEITH MASSIMINO,
Plaintiff-Appellant,
v.
MATTHEW BENOIT and FRANK LAONE,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Connecticut

AMICI CURIAE BRIEF OF FIRST AMENDMENT SCHOLARS AND ADVOCATES IN SUPPORT OF APPELLANT AND REVERSAL

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INTEREST OF AMICI[1]

Amici are scholars and advocates who focus on issues of free expression, the free press, and democratic self-governance. *Amici*, identified in the Addendum, have an interest in ensuring robust protections for activities that implicate core First Amendment values and in safeguarding those protections as technological advances enable new modes of communication and public discourse. While *Amici* may sometimes differ in their views about the proper interpretation of the First Amendment, all agree that it protects the act of recording in public and urge this Court to recognize that right.

SUMMARY OF ARGUMENT

Recording directly advances core First Amendment values. It facilitates public discourse, promotes democratic accountability, and advances the pursuit of truth by enabling individuals to document and easily share information on matters of public concern. It is no surprise, then, that every circuit to have resolved the question now before this Court—the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh—has recognized that the First Amendment protects the act of recording, at least in the context of recording police activity in public.

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[1] No party or its counsel had any role in authoring this brief. No person or entity—other than *amici curiae* and their counsel—contributed money to fund the preparation or submission of this Brief. Amici seek leave to file this brief under Federal Rule of Appellate Procedure 29(a)(2).

While the reasoning of these nine sister circuits in recognizing a First Amendment right to record has varied, this simply reflects the multiple First Amendment interests implicated by the act of recording. Recording warrants protection as an essential precursor to speech; it is often expressive in its own right; and it facilitates the right to gather and disseminate information. Each of these functions falls independently within the sphere of activity the First Amendment protects. Together, these three functions strongly support—and clearly establish—First Amendment protection for the act of recording in public.

By joining its sister circuits in recognizing such a right, this Court can vindicate the important First Amendment interests at stake and end the chilling impact of the ongoing uncertainty here, in the communications capital of the nation. Without a clear statement from this Court, those who wish to exercise the right to record in public face a difficult choice: forego their expressive activity or risk arrest. Meanwhile, uncertainty empowers officers who view recording (and the concomitant public scrutiny) as a nuisance. It enables them to turn away, punish, and even arrest those who exercise their right to record, notwithstanding the constitutional protection afforded that right in other circuits—and the state law protections afforded in this one.[2]

[2] Conn. Gen. Stat. § 52-571j(b) (2015); N.Y. Civ. Rights L. § 79-p(2) (2020).

Like other First Amendment-protected activities, the act of recording can sometimes present difficult balancing and line-drawing questions. This case, however, presents none. Mr. Massimino recorded only content that was visible to all passersby from the public sidewalk where he stood. The government has no valid interest in suppressing such recording, done safely and temporarily from a public place. When more complex situations do arise, existing First Amendment doctrine will provide carefully calibrated tools to allow future courts to ensure restrictions are narrowly tailored and properly assess interests on both sides of the camera lens.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS THE RIGHT TO RECORD IN PUBLIC LOCATIONS

A. Recording Serves Important First Amendment Interests

The protections of the First Amendment advance core values of our democratic society. The guarantee of free speech facilitates public discourse, makes possible democratic accountability, furthers the search for truth in the "marketplace of ideas," and safeguards expression essential for individual growth and autonomy. *McCullen v. Coakley*, 573 U.S. 464, 476 (2014); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001); Robert Post, *Participatory Democracy and Free Speech*, 97 Va. L. Rev. 477, 478 (2011). Each of these core purposes is served by the act of recording in public.

1. Facilitating public discourse.

Video recordings have long played an instrumental role in shaping and informing public dialogue—particularly when it comes to policing. *See, e.g.*, Jocelyn Simonson, *Copwatching*, 104 Calif. L. Rev. 391, 408 (2016). The 1991 video of Rodney King being beaten by Los Angeles police officers profoundly shifted public perceptions of law enforcement and marked the beginning of a new era of empowerment for citizens exposing police misconduct.[3] More recently, the recording of George Floyd's murder in 2020 galvanized public attention, catalyzing national protests and a renewed discourse on racial justice and police accountability.

The power of video to shape and advance public discourse extends well beyond policing. Examples abound of bystanders recording and disseminating important, accurate information as an event of great public significance is unfolding—the Miracle on the Hudson in 2009[4] and the Boston Marathon Bombing in 2013,[5] to name just two. Indeed, citizen bystanders, through "[s]erendipitous amateur image capture," frequently document incidents that might otherwise remain hidden from public view. Seth F. Kreimer, *Pervasive Image Capture and the First*

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[3] Jon Schuppe, *Rodney King Beating 25 Years Ago Opened Era of Viral Cop Videos*, NBC News (Mar. 3, 2016) [https://perma.cc/TMX7-LT6S?type=image].

[4] David Shedden, *Today in Media History: 2009 Hudson River crash-landing photo sent with Twitter,* Poynter (Jan. 15, 2015) [https://perma.cc/KX4U-CEF3].

[5] Matt Stroud, *In Boston Bombing, flood of digital evidence is a blessing and a curse,* CNN (Apr. 18, 2013) [https://perma.cc/LH5E-L9T7].

Amendment: Memory, Discourse, and the Right to Record, 159 U. Pa. L. Rev. 335, 350 (2011).

Recordings of peaceful protests, public hearings, and even natural disasters have all played a central role in providing the public with unfiltered, first-hand accounts. For example:

> Video footage from the 2016 Standing Rock protests helped elevate national attention to environmental justice and Indigenous sovereignty;[6]
>
> Livestreamed coverage of the January 6 riots provided the public with real-time documentation of that historic attack on democratic institutions and later helped law enforcement identify rioters;[7] and
>
> Citizen recordings during California wildfires offered timely on-the-ground perspectives, often capturing local conditions and developments that were inaccessible to traditional media.[8]

In each case, the ability of individuals to record what they witnessed played a critical role in informing the public and fostering national dialogue.

2. Enabling democratic accountability.

By shifting power from the government to its citizens, modern video recording also plays a vital—and often irreplaceable—role in promoting democratic

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[6] Joshua Barajas, *Police deploy water hoses, tear gas against Standing Rock protestors*, PBS News (Nov. 21, 2016) [https://perma.cc/3EF4-CHVV].

[7] Darrell M. West, *Digital fingerprints are identifying Capitol rioters*, Brookings (Jan. 19, 2021) [https://perma.cc/T353-KBKZ].

[8] Shana Gillette et al., *Citizen journalism in a time of crisis: lessons from California wildfires*, 17 Elec. J. Commc'n 1, 2 (2007) [https://perma.cc/SY4H-YWXB].

accountability. Modern-day cellphones have placed a powerful tool for documentation in everyone's pocket. This capability, combined with the reach of the internet, allows almost anyone to disseminate information instantly. Particularly when individuals document official misconduct that one would literally have to see to believe, this capability "creates transformative ways for individuals to participate in democracy and inform public discourse." Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 Colum. L. Rev. 991, 1000 (2016). This participatory function is central to democratic accountability and furthers the open discussion about governmental affairs that the First Amendment seeks to advance. *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

In many instances, particularly those involving misconduct within police departments, recordings may serve as the only available evidence for individuals seeking to hold officers accountable. The need for such documentation is especially pronounced given the substantial deference courts typically grant police characterizations of on-the-ground facts in contested encounters. *See Graham v. Connor*, 490 U.S. 386, 396-97 (1989); *United States v. Hagood*, 78 F.4th 570, 579 (2d Cir. 2023); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 Ind. L.J. 1143, 1155 (2012). Connecticut and New York have acknowledged the importance of citizen-made videos of police encounters by enshrining protection for

such recording into their states' laws. *See* Conn. Gen. Stat. § 52-571j(b) (2015); N.Y. Civ. Rights L. § 79-p(2) (2020).

3. Advancing the search for truth.

Video recording also strongly supports the truth-seeking values of the First Amendment. *See Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969). The ability to document what one sees is indispensable to the public's ability to pursue and discover the truth, ensuring that events are not only preserved but also remembered and characterized as they actually occurred. *See, e.g.*, *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011); *Fields v. City of Phila.*, 862 F.3d 353, 359 (3d Cir. 2017); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012). Video evidence can be so clear and compelling that courts rely on it to resolve disputes in contested cases. *E.g., Scott v. Harris*, 550 U.S. 372, 380-81 (2007); *Edrei v. Maguire*, 892 F.3d 525, 539 (2d Cir. 2018). As explained above, video can also play an essential role in counteracting the kinds of official narratives that can otherwise be impossible to disprove when powerful actors engage in misconduct.

4. Facilitating individual growth and autonomy.

As Professor Baker has underscored, the freedom of an individual to persuade or associate with others is a foundational First Amendment value because the "legitimacy of the legal order" depends in large part on respecting the autonomy of "the people whom it asks to obey its laws." C. Edwin Baker, *Autonomy and Free*

Speech, 27 Const. Comment. 251, 251 (2011). Audiovisual recording advances this autonomy and facilitates individual contributions to collective decision-making. A person creating an audiovisual recording communicates a message to the public official being recorded: Your conduct matters to me. You are being watched. Scott Skinner-Thompson, *Recording as Heckling*, 108 Geo. L. J. 125, 139 (2019).

In short, the right to record directly serves the core values of the First Amendment. It enables civic participation and collective decision-making, demands accountability, and ensures that public officials remain answerable to the communities they serve.

B. The Act of Recording in Public Spaces Embodies at Least Three Activities Protected By the First Amendment

The right to record is triply protected under the First Amendment: as a precursor to speech, a form of expression, and a means of gathering information.

1. Necessary precursor to speech.

The First Amendment's protections are not limited to the final stage of speech or expression—they extend to "creating, distributing, [and] consuming speech" equally. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011). Conduct preparatory to speech, such as buying ink and paper, has long been recognized as protected under the First Amendment. *See Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983); *Vincenty v. Bloomberg*, 476 F.3d 74, 76-77 (2d Cir. 2007). Without such protection, the government could block speech

before it even begins by targeting upstream conduct and effectively nullifying the First Amendment's protections. *Alvarez,* 679 F.3d at 595-96; *Buehrle v. City of Key West*, 813 F.3d 973, 977 (11th Cir. 2015); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010).

This Court has applied this logic to invalidate restrictions on speech at both ends of the speech-production process. In *Vincenty*, the law at issue prohibited minors from possessing spray paint. 476 F.3d at 76. This Court concluded that the law unconstitutionally "hinder[ed]" minors' "access to the materials they need for their lawful artistic expression." *Id.* at 89. In *Bery v. City of New York*, the Court struck down a law that restricted artists from exhibiting or selling their artwork on the street, reasoning that without the ability to market and sell their art, "the plaintiffs would not have engaged in the protected expressive activity." 97 F.3d 689, 696 (2d Cir. 1996).

By this same reasoning, the First Amendment's protection extends to recording as an essential precursor to the protected activity of broadcasting video. Wesley J. Campbell, *Speech-Facilitating Conduct*, 68 Stan. L. Rev. 1, 50 (2016); Ashutosh Bhagwat, *Producing Speech*, 56 Wm. & Mary L. Rev. 1029, 1037-38 (2015); Marceau & Chen, 116 Colum. L. Rev. at 1018.

Several circuits relied on this rationale in recognizing a First Amendment right to record. For example, in *Turner v. Lieutenant Driver*, the Fifth Circuit found First

Amendment protection for the act of making film a necessary "corollary" to the First Amendment protection for films themselves, "as there is no fixed First Amendment line between the act of creating speech and the speech itself." 848 F.3d 678, 688-89 (5th Cir. 2017) (internal quotation marks omitted); *see also Ness v. City of Bloomington*, 11 F.4th 914, 923 (8th Cir. 2021) (finding recordings to be "an important stage of the speech process").

Notably, the First Amendment protects recording as an essential precursor of speech regardless of whether it is independently expressive. The acts of buying ink or spray paint, for example, are not expressive at all. In the context of recording, however, the case for First Amendment coverage is even stronger, because the act of recording is itself expressive.

2. Expressive activity.

The First Amendment's protection of speech extends beyond spoken words to encompass expressive conduct. The act of recording will typically fall squarely within this protection because it is fundamentally expressive, akin to the process of creating art, writing a book, or designing a website. *303 Creative LLC v. Elenis*, 600 U.S. 570, 587 (2023) (designing website); *Emilee Carpenter, LLC v. James*, 107 F.4th 92, 101 (2d Cir. 2024) (taking wedding photos).

When individuals record, they make deliberate choices about what to capture, from what angle, in what light, and for how long. *See Project Veritas v. Schmidt*,

125 F.4th 929, 945-46 (9th Cir. 2025) (en banc). These choices reflect an individual's intent and discretion. Like an author choosing words or a filmmaker framing a scene, a recording can curate reality to convey meaning. *See, e.g.*, *Bery*, 97 F.3d at 695. This is true regardless of the quality of the video—the First Amendment protects stick figures just as it protects fine art. *Mastrovincenzo v. City of New York*, 435 F.3d 78, 97 (2d Cir. 2006). Although courts have inquired whether certain automated recordings—like security camera footage—might be so devoid of intentional artistic choices that their creation falls short of First Amendment protection, *see Emilee Carpenter*, 107 F.4th at 104, surely any video made by a human being with a handheld camera falls on the sufficiently expressive side of the line, *see Schmidt*, 125 F.4th at 946.

3. Information-gathering.

The right to record is independently protected under the First Amendment for a third reason—recording is the act of information gathering, which is itself protected by the First Amendment in many situations. *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576-77 (1980) (recognizing First Amendment-protected "right to gather information" in context of criminal trial). The right to gather information plays a vital role in ensuring transparency and democratic accountability. It enhances the "accuracy and credibility" of information, *PETA, Inc. v. N. Carolina Farm Bureau Fedn., Inc.*, 60 F.4th 815, 829

(4th Cir. 2023), promotes the discussion of governmental affairs, *Turner*, 848 F.3d at 689, and enables public oversight, *Richmond Newspapers*, 448 U.S. at 576. Recording a video is the modern equivalent of taking written notes, but "[t]he unimpeachable and rapidly transmittable nature of modern video images ought to make recording more, not less, valuable than the hand-scribbled retellings of a firsthand observation." Marceau & Chen, 116 Colum. L. Rev. at 1055.

Although the First Amendment right to gather information is a qualified right, it can outweigh countervailing concerns like privacy, particularly where matters of public concern are involved. In *Galella v. Onassis*, for example, this Court invalidated aspects of an injunction that "unnecessarily infringe[d]" on a photographer's "reasonable efforts to 'cover'" a public figure. 487 F.2d 986, 998 (2d Cir. 1973). Of course, the right to gather information does not guarantee unrestricted access to spaces and information under any circumstances. *See, e.g.*, *L.A. Police Dep't v. United Reporting Publ'g. Corp.*, 528 U.S. 32, 40 (1999); *Press-Enter. Co. v. Superior Ct.*, 478 U.S. 1, 8-9 (1986). But when individuals record what is visible from public spaces, there is typically nothing to balance against the right to observe and document what anyone may lawfully see in plain sight.

Several circuits have relied specifically on the right to gather information as their justification for recognizing the right to record on the facts before them. *See*

Glik, 655 F.3d at 82; *Fields,* 862 F.3d at 359; *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

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Any one of the doctrinal frameworks detailed above would be sufficient to establish that the First Amendment covers the act of recording. Taken together, they clearly establish that safeguarding the right to record what is visible in public spaces is not only consistent with First Amendment principles but is necessary to preserve the public's ability to ensure meaningful access to accurate information. It is no wonder that every circuit to resolve the question has held that the First Amendment protects the act of recording, at least as to public officials in public spaces. *See Glik*, 655 F.3d at 82 [1st Cir.]; *Fields*, 862 F.3d at 356 [3d Cir.]; *Sharpe v. Winterville Police Dept.*, 59 F.4th 674, 681 (4th Cir. 2023); *Turner*, 848 F.3d at 690 [5th Cir.]; *Alvarez*, 679 F.3d at 595-96 [7th Cir.]; *Ness*, 11 F.4th at 923 [8th Cir.]; *Askins v. U.S. Dep't. of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018); *Irizarry v. Yehia*, 38 F.4th 1282, 1292 (10th Cir. 2022); *Smith*, 212 F.3d at 1333 [11th Cir.].

II. A CLEAR RULE IS CRITICAL TO PROTECTING THE FIRST AMENDMENT INTERESTS AT STAKE

This Court should vindicate the First Amendment interests outlined above by reaching the constitutional question in this case, irrespective of whether it agrees with the district court's ruling on qualified immunity. Doing otherwise will leave a lingering fog over First Amendment rights in this Circuit. While citizens and

journalists in most circuits can document what happens in public without fear that they will be arrested or punished, the current state of Second Circuit law forces those who seek to exercise their First Amendment rights to do so at their own peril.

If the district court's ruling is allowed to stand, public officials will remain empowered to arrest or harass those who create recordings in public spaces, confident that they may evade liability under the qualified immunity doctrine. This Court should close the door to such future First Amendment injuries by holding that the right to record is now clearly established, particularly where (as here) the content recorded is a matter of public concern.

In doing so, the Court need not worry that it is providing carte blanche to record anywhere and anything, irrespective of countervailing interests that might come into play. Existing First Amendment frameworks will enable future courts to apply appropriate scrutiny to restrictions on the act of recording and to ensure that privacy and property interests are being appropriately respected.

A. This Court Should Acknowledge That the Right to Record Is Clearly Established and Eliminate the Uncertainty in This Circuit

The First Amendment does not tolerate ambiguities that force individuals to choose between the "Scylla" of punishment and the "Charybdis" of "foregoing what [one] believes to be protected expressive activity in order to avoid becoming enmeshed in a criminal proceeding." *Reyes v. City of New York*, 141 F.4th 55, 67 (2d Cir. 2025) (cleaned up).

This Court recently held that forcing a plaintiff to choose between foregoing expressive activity—recording inside a police precinct—and facing potential punishment constituted irreparable harm. *Id.* Significantly, it held as much without passing on the merits of the plaintiff's claim under the applicable state Right to Record Act and without relying on the First Amendment. *Id.* Instead, it explained in no uncertain terms that foregoing expressive activity constituted irreparable harm *regardless* of whether Reyes was likely to succeed on the merits of his state law claim and *regardless* of whether the challenged law "codif[ied] a right of expression coextensive with the First Amendment[.]" *Id.* (alterations adopted).[9]

Without clarity about the existence and scope of the right to record, citizens may avoid exercising that right for fear of reprisal any time a government official deems their recording a nuisance or seeks to shield their behavior from public scrutiny. Case law and news reporting are rife with examples of police officers who order citizens to stop recording, take away cameras, subject recorders to arrest, or even press charges against them. *See, e.g.*, *Incident Database*, U.S. Press Freedom Tracker, https://pressfreedomtracker.us/all-incidents/ (last accessed August 8, 2025); Anna Thérèse Beavers, *First Amendment Audits: A Socio-Political*

[9] Notably, the *Reyes* Court grappled with the question whether the New York Right to Record Act went beyond the First Amendment or merely "afford[ed] state protection to a right *already afforded* under the federal Constitution[.]" *Reyes*, 141 F.4th at 72 (emphasis added).

Movement, 93 Miss. L.J. 527, 530 (2023); *Rodney v. City of New York*, 1:22-cv-01445 (S.D.N.Y. 2022) Dkt. 231 (reflecting $150,001 settlement paid to woman tackled by police who thought she was recording in precinct lobby).

The district court's apparent distinction between recording police activity and recording police *buildings* exacerbates this ambiguity, rather than resolving it. SPA4-5. As an initial matter, it would be senseless to conclude that Mr. Massimino's right to record sprang into being once officers walked out of the precinct to harass and arrest him, but not a moment before. More fundamentally, a rule that defines the existence of a right to record from a public place by the content of the images captured would be unworkable and impose an especially strong chill. An individual does not know just what will happen on camera when they start recording. Someone filming an open doorway, for example, can only guess whether a person will walk through it—much less whether that person will be a police officer or a civilian, an adult or a juvenile. Nor could someone filming a police officer on the street necessarily discern whether a building the officer passes by is publicly or privately owned. The First Amendment does not countenance a right to record that is conditioned at the threshold on the hope that nothing impermissible will suddenly appear in a public place.

Nor is it constitutionally sufficient to conclude that a person may record from a public space unless and until the police tell them to stop or request their

identification. *See* SPA7-8. Both this Court and the Connecticut Supreme Court have made clear that police may not arrest a defendant for their speech by telling them to stop speaking, then arresting them for "interference" when they refuse to comply. *Friend v. Gasparino*, 61 F.4th 77, 85 (2d Cir. 2023) (citing *State v. Williams*, 534 A.2d 230, 239 (Conn. 1987)).

In *Friend*, Connecticut police officers arrested the plaintiff for standing upstream of a police checkpoint with a sign that said "Cops Ahead" after they told him to stop displaying the sign. *Id.* at 82. This Court rejected the district court's conclusion that the officers had probable cause to believe Friend was "interfering" under Connecticut General Statutes § 53a-167a (the same statute at issue in this case). *Id.* at 84-87. The Court stressed that Connecticut's interference statute is limited to "physical conduct and fighting words." *Id.* at 85; *see also Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 836-37 (1st Cir. 2020) (rejecting argument that mere recording interferes with police activity). Any other interpretation of the statute would trench on important First Amendment interests by allowing police to arrest individuals based on First Amendment-protected conduct. *Williams*, 205 Conn. at 473, 473 n.6; *City of Houston v. Hill*, 482 U.S. 451, 466-67 (1987) (invalidating as overbroad ordinance allowing police to arrest those who verbally interfere with police work).

At bottom, the officers' demand to stop protesting in *Friend* was not a lawful order, "because Friend was violating no law by standing on the sidewalk and displaying his sign, and [the officer] had no lawful reason to order him to desist from that conduct." 61 F.4th at 87. "To let a policeman's command become equivalent to a criminal statute comes dangerously near making our government one of men rather than of laws." *Id.* (quoting *Gregory v. City of Chicago*, 394 U.S. 111, 120 (1969) (Black, J., concurring)). The same is true here.

B. It is Especially Important to Recognize Protection for the Recording at Issue Because it Involves a Matter of Public Concern

The First Amendment protects the act of recording in public irrespective of whether the content recorded is a matter of public concern.[10] As this Court recently reiterated in *Friend*, a private citizen "does not need to establish that his speech addressed a matter of public significance in order to receive the protection of the First Amendment." 61 F.4th at 88 (cleaned up). This makes good sense; recording in public facilitates First Amendment values like autonomy and truth-seeking regardless of whether it captures cats playing, clouds passing, protest, or crime.[11]

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[10] Margot E. Kaminski, *Privacy and the Right to Record*, 97 Bos. Univ. L. Rev. 167, 232 (2017); Marceau & Chen, 116 Colum. L. Rev. at 1032. *But see* Joel R. Reidenberg, *Privacy in Public*, 69 U. Mia. L. Rev. 141, 155 (2014) (advocating for right to record that is limited to matters of public concern).

[11] Marceau & Chen, 116 Colum. L. Rev. at 1032; *cf.* Jane Bambauer, *Is Data Speech?*, 66 Stan. L. Rev. 57, 101 (2014).

Even if this Court were to limit the First Amendment's protections to recording matters of public concern, however, recording a government building—particularly a police precinct—would be protected. Discussion of matters of public concern lies "at the heart of the First Amendment's protection." *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) (cleaned up). For First Amendment purposes, a matter "of public concern" can be "fairly considered as relating to any matter of political, social, or other concern to the community," or is "a subject of general interest and of value and concern to the public." *Id.* at 453 (cleaned up); *Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Ed.*, 444 F.3d 158, 163-64 (2d Cir. 2006) ("Generally, the First Amendment protects any matter of political, social or other concern").

Speech scrutinizing or criticizing government actions undoubtedly touches on matters of public concern, even if it is not flashy or nationally important. *See, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (high-school teacher salary negotiations of "public concern" despite being relatively "mundane"); *Friend*, 61 F.4th at 88-89 ("cops ahead" speech on matter of public concern); *Berge v. Sch. Comm. of Gloucester,* 107 F.4th 33, 42 (1st Cir. 2024) (video filmed in public school lobby matter of public concern). Recording to scrutinize a key site of government activity—like a police precinct—clearly fits the bill.

The speech at issue in this case separately involves a matter of public concern because it informs the public how police respond when citizens peacefully exercise their right to record. Videos of "First Amendment audits" like those posted by Mr. Massimino are a form of social activism that has been described as "a sociopolitical movement with specific policy objectives and a personal demonstration of dissatisfaction with the status quo." Beavers, 93 Miss. L.J. at 531. Although a large audience is not a prerequisite when determining a matter is of "public concern," it is worth noting that one auditor in this Circuit apparently amasses more than 20 million views per month on his auditing videos. *Reyes*, 141 F.4th at 61. Courts must be especially vigilant to ensure robust First Amendment protections for such speech on public issues. *Snyder*, 562 U.S. at 452.

C. Existing First Amendment Doctrine Provides Nuanced Tools for Fine-Tuning the Right to Record in Future Cases

Recognizing the constitutional right to record what is in public view will not saddle future courts with unanswerable questions. Like other conduct protected by the First Amendment, the government may limit the right to record so long as any restrictions satisfy the appropriate level of constitutional scrutiny.[12] But a critical

[12] Marceau & Chen, 116 Colum. L. Rev. at 1026-27; Kaminski, 97 B.U. L. Rev. at 172; *PETA*, 60 F.4th at 827.

distinction remains between the First Amendment "coverage" of an activity and the level of "protection" that activity receives.[13]

When an activity falls within the coverage of the First Amendment, questions still remain about the nature of its protection and whether countervailing interests can overcome it. For example, where an individual has a valid interest in not being recorded, or where a property owner seeks to prevent recording on their premises, courts have engaged in a careful assessment to ensure that the restrictions at issue are properly tailored to respect the competing interests. *See, e.g.*, *Schmidt*, 125 F.4th at 952-58 (upholding narrowly tailored Oregon law that required notice before recording face-to-face oral communications, with important exceptions); *see also* Kaminski, 97 Bos. Univ. L. Rev. at 176.

The kind of recording Mr. Massimino was engaged in, however, raises no complicated questions about what level of First Amendment scrutiny to apply. In such circumstances, it is doubtful that government officials will ever have a valid basis for suppressing recording activity, and First Amendment challenges like Mr. Massimino's should prevail under any level of constitutional scrutiny.

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[13] *See generally* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 Vand. L. Rev. 265 (1981); Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. Rev. 318 (2018).

III. EXISTING PRECEDENTS CLEARLY ESTABLISH THAT THERE WAS NO LEGITIMATE BASIS TO RESTRICT MR. MASSIMINO'S RECORDING OF ACTIVITY OPEN TO PUBLIC VIEW

Unlike some recording-related cases, this case requires no difficult balancing and presents no challenging line-drawing questions. Mr. Massimino recorded only the portions of a public building he could see from a public sidewalk. He was not standing on private property, eavesdropping on private conversations, nor engaged in persistent surveillance that could, taken as a whole, invade a person's privacy or constitute harassment. *Cf. Carpenter v. United States*, 585 U.S. 296, 310-11 (2018); *Galella*, 487 F.2d at 994-95. He was not engaged in dangerous activity that put bystanders at risk, *Higginbotham v. Sylvester*, 741 F. App'x 28, 31 (2d Cir. 2018) (summary order), nor was he recording anything that implicated others' intellectual property rights. In such circumstances, it should have been abundantly clear to any reasonable police officer that there was no valid basis to interfere with Mr. Massimino's recording activity.

Precedents from both the Supreme Court and this Court clearly establish that Mr. Massimino's recording did not implicate any private property rights. Public streets and sidewalks are just that: public. *See, e.g.*, *McCullen*, 573 U.S. at 477 (stressing "traditionally open character of public streets and sidewalks"). Not only may the public use sidewalks to travel, it also has clearly established rights to use them to speak or listen, since they have been "held in trust" for such uses since

"time out of mind." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (plurality opinion).

It is equally well-settled that Mr. Massimino's recording did not implicate any privacy rights. Fourth Amendment precedents long ago established that individuals have no reasonable expectation of privacy over their actions in public, unless they take steps to shield those actions from public perception. *Katz v. United States*, 389 U.S. 347, 351 (1967); *United States v. Knotts*, 460 U.S. 276, 282 (1983).

The same is doubly true for inanimate objects like the exteriors of buildings that are exposed to public view—or, as in this case, to the view of anyone who searches on Google Maps.[14] *Dow Chem. Co. v. United States*, 476 U.S. 227, 236 (1986) (no reasonable expectation of privacy over exterior of manufacturing plant); *Oliver v. United States*, 466 U.S. 170, 178 (1984) (same for open fields, except those immediately surrounding a home).[15]

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[14] Google Maps, *19 N. Elm St. Waterbury, Conn.*, [https://perma.cc/H6R2-D6ZW?type=image] (last accessed July 26, 2025) (showing side entrance and garage of Waterbury police department).

[15] Nor may the defendant officers justify their behavior by arguing that recording the precinct's publicly visible exterior publicized sensitive information that implicated matters of security. It is the government's obligation to protect sensitive information from the public eye. It may not shirk that obligation, then seek to muzzle publication after-the-fact. *See, e.g.*, *Fla. Star v. B.J.F.*, 491 U.S. 524, 534-35 (1989); *N.Y. Times Co. v. United States*, 403 U.S. 713, 728 (1971)

Even on private property, individuals have diminished expectations of privacy over what they expose to others. In *United States v. Harry*, for example, this Court recently held that a businessowner had no reasonable expectation of privacy over the exterior of his business, its parking lot, or its "occasionally open garage," and thus police did not violate his Fourth Amendment rights by erecting a pole camera that recorded the premises for fifty days straight. 130 F.4th 342, 346-49 (2d Cir. 2025). Specifically, the Court found no objectively reasonable expectation of privacy "on a property outsiders could enter at will or observe from the public highway." *Id.* at 349.

Harry built on similar cases, including *Caldarola v. County of Westchester*, 343 F.3d 570 (2d Cir. 2003). In *Caldarola*, this Court likewise concluded that a Department of Corrections employee had "minimal" privacy interests when he was on Department of Corrections grounds, such that it did not violate the Fourth Amendment for another employee to videotape the "perp walk" that followed the first employee's arrest there. *Id.* at 575, 577.

The same principles apply equally—if not more strongly—to police officers and police precincts. *Garrison*, 379 U.S. at 77 (recognizing "the paramount public interest in a free flow of information to the people concerning public officials, their

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(Stewart, J., concurring) ("The responsibility [for maintaining security-related secrets] must be where the power is.").

servants"). Courts have concluded time and again that police officers have no reasonable expectation of privacy when they undertake their duties in public. *Lynch v. City of New York*, 737 F.3d 150, 164 (2d Cir. 2013) (finding sufficiently "diminished expectation of privacy" over facts related to fitness for police duty to overcome interest in bodily privacy); *Tancredi v. Malfitano*, 567 F. Supp. 2d 506, 512 (S.D.N.Y. 2008) (front desk of public precinct); *Alvarez*, 679 F.3d at 605-06 (public duties); *Johnson v. Hawe*, 388 F.3d 676, 683-84 (9th Cir. 2004) (radio communications on publicly accessible channel).

Some have raised concerns about the erosion of privacy rights in public, and particularly about the use of persistent video monitoring of the sort this Court blessed in *Harry*.[16] And First Amendment jurisprudence has long recognized that privacy can, itself, promote important free speech values. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342-43 (1995); *United States v. Jones*, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring) ("Awareness that the government may be watching chills associational and expressive freedoms."). These concerns could provide reason to re-evaluate existing privacy jurisprudence, particularly the

[16] *E.g.*, Kaminski, 97 B.U. L. Rev. at 214-17; Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to A World That Tracks Image and Identity*, 82 Tex. L. Rev. 1349, 1407-08 (2004).

broad powers this Court grants the government to surveil its citizens.[17] But such concerns cannot justify a rule that selectively provides *more* privacy protections to public servants and public buildings than it provides to ordinary individuals.

It should be inconceivable to conclude that the government has a greater right to record private citizens going about their daily lives than those same citizens have to record *the government's* public spaces and public servants as they work on the public's behalf. That is essentially what the district court did when it granted the officers qualified immunity after they stopped Mr. Massimino from recording a public police precinct from a public sidewalk. This Court should correct that serious error.

CONCLUSION

For the foregoing reasons, *Amici* urge this Court to join its sister circuits and hold that the First Amendment covers the act of recording and that government officials generally may not restrict individuals in public places from safely and temporarily recording anything in public view. Such recording serves a crucial role in promoting government transparency, facilitating democratic self-governance, and furthering the pursuit of truth. Clear protection—and a clear ruling from this Court

[17] *See, e.g.*, Blitz, 82 Tex. L. Rev. at 1431-32 (arguing that government surveillance is more threatening than private surveillance).

recognizing that the right is clearly established for the future—is essential to preserve the vision of self-governance at the First Amendment's core.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29 and 32, undersigned counsel certifies that the foregoing brief:

1. Complies with the type-volume limitation of Local Rules 29.1(c) and 32.1(a)(4)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,091 words.

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