

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

**BRIEF OF PROPOSED AMICI CURIAE THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS AND DOW JONES & CO.
IN SUPPORT OF APPELLANT**

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

Proposed amici curiae are the Reporters Committee for Freedom of the Press (“Reporters Committee”) and Dow Jones & Company, publisher of *The Wall Street Journal* (together, “amici”). The Reporters Committee is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation’s news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide *pro bono* legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. The Reporters Committee regularly files in this Court on issues of First Amendment significance. *See, e.g.*, Br. of Amici Curiae Reporters Comm. for Freedom of the Press & Other Orgs., *Courthouse News Serv. v. Gabel*, No. 21-3098 (2d Cir. Jul. 12, 2022); Br. of Amici Curiae Reporters Comm. for Freedom of the Press & Other Orgs., *Giuffre v. Maxwell*, No. 18-2868 (2d Cir. Dec. 17, 2018); Br. for Intervenor-Appellants Time Inc. & Reporters Comm. for Freedom of the Press, *Hardy v. Equitable Life Assurance Soc’y*, No. 16-3273 (2d Cir. Nov. 22, 2016).

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newsgathering operations. Dow Jones's professional information services, including the Factiva news database and Dow Jones Risk & Compliance, ensure that businesses worldwide have the data and facts they need to make intelligent decisions. Dow Jones is a News Corp company.

Amici share an interest in ensuring that the press's First Amendment rights are fully protected when recording in public. These rights are also essential for members of the public who are sometimes the first to record breaking news that then becomes part of the news cycle. Amici submit this brief because the decision below, an outlier among the circuits, would unduly undermine the ability of the news media to record or obtain recordings of public information.¹

Appellant has consented to the filing of this brief. Appellee does not consent, and amici therefore seek leave to proceed as amici curiae pursuant to Federal Rule of Appellate Procedure 29(a)(3).

¹ No party or its counsel had any role in authoring this brief. No person or entity other than amici and their counsel contributed money to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Every circuit to have considered the underlying question before this Court—whether an individual may record government activity in public—has recognized that the First Amendment protects that act.

The District Court distinguished this resounding precedent based on what appears to be a mistaken understanding that the recording at issue captured private spaces. Order (ECF No. 58) at 4–5. In fact, the record below—showing that Appellant’s recording was made on a public sidewalk and captured only that which was visible to any member of the public sharing the sidewalk—does not support the lower court’s holding, and the decision risks jeopardizing the ability of the press to gather the news. Specifically, it puts journalists in New York, Connecticut, and Vermont at risk of harassment and arrest when they attempt to record in public and jeopardizes their ability to obtain similar recordings from the public. This, in turn, would stymie the flow of information to the public. And it would be out of step with the overwhelming consensus among courts to address the question whether there is a First Amendment right to record government activity in public spaces.

For the reasons below and those set forth in the brief of Appellant, the right to record in this case was clearly established in 2018 when Appellant recorded video of the exterior of the Waterbury, Connecticut police station. Yet even if this

Court does not agree that the District Court erred in its analysis of Appellees' entitlement to qualified immunity, it should hold here that the First Amendment protects the right to observe and record a public building from a public space.

ARGUMENT

I. The ability of the press to gather news and inform the public depends on the well-settled right to record in public places.

It is axiomatic that the First Amendment not only “protects freedom of speech and freedom of the press” but also ““goes beyond”” such protections to additionally ““prohibit government from limiting the stock of information from which members of the public may draw.”” *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017) (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978)); *see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Couns.*, 425 U.S. 748, 757 (1976) (recognizing ““First Amendment right to ‘receive information and ideas’”) (citation omitted). ““[A]n undoubted”” corollary to this right to information is the ““right to gather news from any source by means within the law.”” *Turner*, 848 F.3d at 688 (citing *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978)). Such newsgathering is typically, though not always, the province of the press, which holds a “special and constitutionally recognized role . . . in informing and educating the public.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978).

Newsgathering “is entitled to first amendment protection,” because as courts have recognized, ““without some protection for seeking out the news, freedom of the press could be eviscerated.”” *Turner*, 848 F.3d at 688 (quoting *In re Express–News*, 695 F.2d 807, 808 (5th Cir. 1982) (citations omitted)); *see also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (recognizing First Amendment “right to gather information”). It is through this ability to observe, gather, and publish the news, a process that often relies on sources, that the press serves as an important and necessary check on governmental power. *See New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (“The press was protected so that it could bare the secrets of government and inform the people.”); *Herbert v. Lando*, 441 U.S. 153, 185 (1979) (writing that “the [First] Amendment shields those who would censure the state or expose its abuses”).

Included within the ability to gather the news is the right to record video and audio in public places. *See, e.g., Brown v. Kemp*, 86 F.4th 745, 763 (7th Cir. 2023) (“[T]he ‘act of *making* an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.’” (citations omitted)); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011); *Fields v. City of Phila.*, 862 F.3d 353, 359 (3d. Cir. 2017); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) (“[T]he creation and

dissemination of information are speech within the meaning of the First Amendment.”).² Indeed, recording a video or taking photographs is among the modern equivalents of taking written notes.

It is thus no surprise that all the circuits that have considered the question presented, primarily arising in the context of filming the police on public streets, have found there exists a right to record on public property secured by the First Amendment. *See Sharpe v. Winterville Police Dept.*, 59 F.4th 674, 681 (4th Cir. 2023); *Irizarry v. Yehia*, 38 F.4th 1282, 1292 (10th Cir. 2022); *Ness v. City of Bloomington*, 11 F.4th 914, 923 (8th Cir. 2021); *Turner*, 848 F.3d at 690 (5th Cir. 2018); *Askins v. U.S. Dep’t. of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018); *Fields v. City of Phila.*, 862 F.3d 353, 356 (3d Cir. 2017); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d at 1333 (11th Cir. 2000). Numerous district courts in this Circuit have reached the same conclusion. *See, e.g., Annan v. City of New York Police Dep’t*, No. 12-CV-2702 (CBA)(CLR), 2015 WL 5552271, at *9

² In addition to the First Amendment precedent confirming the right to report, and record, in public, the diminished privacy interest in activity that can be observed in public is also recognized in the Fourth Amendment context. *See, e.g., Dow Chem. Co. v. United States*, 476 U.S. 227, 238 (1986) (holding that aerial photography of the exterior property was “not so revealing of intimate details as to raise constitutional concerns” because although they gave the photographer “more detailed information than naked-eye views,” they were exterior shots not akin to the interior or “curtilage” of a home and the “mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems”).

(E.D.N.Y. Sept. 18, 2015) (“Every Court of Appeals faced with the question . . . has concluded that the First Amendment ‘protects the right to record police officers performing their duties in a public place, subject to reasonable time, place, and manner restrictions.’ . . . Courts in this Circuit have followed suit.”) (citations omitted); *Higginbotham v. City of New York*, 105 F. Supp. 3d 369, 379 (S.D.N.Y. 2015) (same); *Reyes v. City of New York*, No. 23-CV-6369 (JGLC), 2023 WL 7212192, at *5 (S.D.N.Y. Nov. 2, 2023) (same).³

In *Turner v. Lieutenant Driver*, decided the year prior to the arrest that gave rise to this appeal, the Fifth Circuit likewise considered the recording of a police station exterior. There too, Appellant had recorded areas of a police station from a public sidewalk across the street and continued recording as police approached him to question and eventually arrest him. 848 F.3d 678 (5th Cir. 2017). The Fifth Circuit held that “the specific act at issue here—video recording the police or a police station,” *id.* at 686, was protected under the First Amendment, subject to reasonable time, place and manner restrictions that “must be ‘narrowly tailored to

³ Federal district courts in Connecticut have declined to reach whether a First Amendment right to record police in public exists in the absence of a decision by this Court. They held, on facts not analogous to the ones presented here, that such right was not clearly established. *See Picard v. Torneo*, No. 3:16CV1564(WWE), 2019 WL 4931353, at *4 (D. Conn. Sept. 16, 2019), *on reconsideration*, No. 3:16CV1564(WWE), 2019 WL 4933146 (D. Conn. Oct. 4, 2019); *Rivera v. Foley*, No. 3:14-CV-00196 (VLB), 2015 WL 1296258, at *9 (D. Conn. Mar. 23, 2015).

serve a significant governmental interest.” *Id.* at 690 (citations omitted).⁴ The same is true in this case.

In addition to the constitutional principles supporting this conclusion, the policy reasons for it are sound. As one court aptly put it, first-person news accounts “buttressed by video evidence, enhance accuracy and credibility in reporting and increase transparency and reader trust, allowing the press to tell more complete and powerful stories.” *People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed’n, Inc.*, 60 F.4th 815, 829 (4th Cir. 2023) (cleaned up)).

The District Court’s decision, if allowed to stand, will hinder the ability of the news media to gather the news and provide the public with information of significant public interest, and in so doing, would make this circuit an outlier in its treatment of the right to record in public spaces.

II. The right to record in public is not limited to the press but ensures that the press can obtain and report the news.

In covering the news, members of the news media often rely on video taken by bystanders or other members of the public, such as Appellant here. The news media does not perform its functions in isolation, and the law is clear that constitutional protections for recording apply equally to individuals as they do the

⁴ The Fifth Circuit determined that as of 2016 when the incident occurred, the right was not firmly established, so in that case, the officers did receive qualified immunity.

institutional press. *See Glik*, 655 F.3d at 83 (explaining “the public’s right of access to information is coextensive with that of the press”) (internal citation omitted). The District Court’s decision, if allowed to stand, would interfere with the right to record video in this Circuit and restrict an important source of information on public issues and controversies.

Today, the first source of information from the scene of a newsworthy event may be a member of the public with a smart phone. Likewise, non-reporters may have an interest or expertise in an issue and have the time, ability, and knowledge to position themselves to record meaningful information. These witnesses, who sometimes become sources and sometimes disseminate their video content to the public, play a meaningful role in monitoring the functioning of government, particularly when they work with the news media to distribute such information. *See Claire Wardle et al., Amateur Footage: A Global Study of User Generated Content in TV and Online-News Output*, A Tow/Knight Report, at 5 (2014), <https://perma.cc/5MCB-WUHK>.

For example, many important news events would not have had the same impact absent video of the event, some of which was taken by bystanders with a camera. *See George Floyd: Videos of police brutality during protests shock US*, BBC, (June 5, 2020), <https://perma.cc/8GAG-SR4H>; Audra D. S. Burch and John Eligon, *Bystander Videos of George Floyd and Others Are Policing the Police*,

N.Y. Times, (May 26, 2020) <https://perma.cc/453X-8WXZ>. As a source of news, video and audio recordings, including ones taking by non-journalists and disseminated over the internet, are increasingly indispensable. NBC News, for example, has a dedicated “group of reporters who specialize in . . . sourcing and verifying videos and photos showing the news as it unfolded in real time” and “using social media to find, verify and report on different stories.” *How to Use Social Media for Newsgathering*, NBC News (Oct. 5, 2021), <https://perma.cc/PB3Z-4SS5>. The New York Times explains, for instance, that social media “plays a vital role in our journalism” allowing “our reporters and editors [to] harvest and curate information, cultivate sources, engage with readers and experiment with new forms of storytelling and voice.” *Social Media Guidelines for the Newsroom*, N.Y. Times (June 21, 2024), <https://perma.cc/M2T9-J2DX>. And amicus The Wall Street Journal has a team of journalists devoted exclusively to reporting the news via video, including video recorded by non-journalists. *WSJ Video: All Series*, Wall St. J., <https://perma.cc/HY3H-WY75> (last visited Aug. 18, 2025) (“Video from around the world on the latest news developments, with insight from Wall Street Journal editors and reporters.”). In a 2022 survey, 75 percent of polled journalists said social media helped them find stories, 79 percent said that it helped them find sources, and 49 percent specifically reported that it helped them verify information.

Jeffrey Gottfried et al., *Journalists Sense Turmoil in Their Industry Amid Continued Passion for Their Work*, Pew Research Center (June 14, 2022), <https://perma.cc/46R7-PY2D>.

With the power to contradict or support official accounts of events, images and video shot by eyewitnesses enable the press to tell stories that may not have been told in a different era. One particularly famous example is George Holliday’s 1991 video of police beating Rodney King, which sparked public outrage and a drive to reform the Los Angeles Police Department. *See* Paul Pringle & Andrew Blankstein, *King Case Led to Major LAPD Reforms*, L.A. Times (June 17, 2012), <https://perma.cc/EWF9-GPQD>. After LAPD officials rejected Mr. Holliday’s attempts to provide them with his footage, he took his tape elsewhere—to KTLA, a local news station. KTLA aired the footage the following night, setting in motion a sequence of events that resulted in the video being seen by millions. *See* Report of the Independent Commission on the Los Angeles Police Department 11 (1991). As an independent commission later concluded, without Mr. Holliday’s footage and its distribution by the press, there may never have been an investigation of the assault because “the report of the involved officers was falsified.” *Id.* at ii; *see also* Special Awards and Citations: Darnella Frazier, The Pulitzer Prizes (2021), <https://perma.cc/JVH8-FABW> (Pulitzer Prize Board honoring bystander during George Floyd’s arrest with a special citation “[f]or courageously recording” the

events of that day because contemporaneous recordings of government activity play “crucial role . . . in journalists’ quest for truth and justice”).

Frequently, individuals on the scene of a newsworthy event—both journalists and others—capture evidence that the official account was misleading or incomplete. See Alex Horton, *In Violent Protest Incidents, a Theme Emerges: Videos Contradict Police Accounts*, Wash. Post (June 6, 2020), <https://perma.cc/UTU8-5VX7>. And the reverse is also sometimes true—documentary evidence also can demonstrate that allegations of official misconduct were unfounded. See, e.g., Justin Zaremba, *Dashcam Proves Woman Lied About Cop Aiming Gun at Her*, NJ.com (Dec. 2, 2015), <https://perma.cc/3JUT-JH8S>. On either footing, the right to record advances “the paramount public interest in a free flow of information to the people concerning public officials, their servants.” *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964).

Whether the news media receives the information directly from the source or views it alongside the public, journalists can often quickly identify, work to verify, and where the news value warrants it, further distribute important footage to the public when reporting on events. The benefits to the public’s understanding of newsworthy events and information are significant. Third party video enriches the stories journalists tell, routinely adding a distinct, first-person perspective to news coverage. Such videos also improve the timeliness and the accuracy and depth of

news reporting and expand the store of information to which the public has access. The District Court's holding risks chilling the creation of this type of video in this Circuit, in contravention of both the consensus among every circuit to consider the question and good public policy. To protect news reporting, and the gathering of information on which the press relies, this Court should take this opportunity to confirm that recording of this kind on a public sidewalk is a clearly established First Amendment right.

CONCLUSION

For the foregoing reasons, amici respectfully request that this Court reverse the order of the District Court below.

Dated: August 18, 2025

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 2,762 words.
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Dated: August 18, 2025

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