

NO. 21-01247

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

ABADE IRIZARRY,

PLAINTIFF-APPELLANT,

v.

AHMED YEHA,

DEFENDANT-APPELLEE.

On Appeal from the United States District Court
For the District of Colorado (Denver)
Case No. 1:20-CV-02881-NYW
The Honorable Nina Y. Wang, U.S. Magistrate Judge

**BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION
IN SUPPORT OF PLAINTIFF-APPELLANT ABADE IRIZARRY AND
REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Electronic Frontier Foundation states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

Dated: November 24, 2021

/s/ Mukund Rathi
Mukund Rathi

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STATEMENT OF INTEREST¹

Amicus Curiae Electronic Frontier Foundation (EFF) has an interest in citizens having the right to use technology to further government accountability. EFF is a San Francisco-based, member-supported, nonprofit civil liberties organization that has worked for over 30 years to protect free speech, privacy, security, and innovation in the digital world. With over 38,000 members, and harnessing the talents of lawyers, activists, and technologists, EFF represents the interests of technology users in court cases and policy debates regarding the application of law to the Internet and other technologies. EFF has filed many *amicus* briefs in support of the First Amendment right to record on-duty police officers. *See Fields v. City of Philadelphia*, 862 F.3d 353 (3rd Cir. 2017); *Project Veritas Action Fund v. Rollins*, 982 F.3d 813 (1st Cir. 2020); *Frasier v. Evans*, 992 F.3d 1003 (10th Cir. 2021). EFF calls upon this experience in concluding that the First Amendment clearly establishes the right to record on-duty police officers, including the right to be free from police interference with the exercise of this right.

¹ No counsel for a party authored this brief in whole or in part, and no person other than amicus or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

INTRODUCTION

This Court should hold that the First Amendment clearly establishes a person’s right to record—whether through photographs or audio-video—on-duty police officers. Further, this Court should hold that the right to record bars police from interfering with the exercise of that right by, for example, shining a light directly into that person’s camera or standing between that person’s camera and the officer they are trying to record. Finally, this Court should hold that this right was clearly established in 2019, at the time of the challenged events.

As the First Circuit held in *Glik v. Cunniffe*: “though not unqualified, 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.” 655 F.3d 78, 85 (1st Cir. 2011). The Court reasoned that the First Amendment “encompasses a range of conduct related to the gathering and dissemination of information.” *Id.* at 82. The Court also reasoned: “The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper.” *Id.* at 84.

Modern photography and audio-video technologies are ubiquitous and flourishing. Powered by smartphones, modern cameras, and social media applications (“apps”), ordinary people can quickly, easily, and inexpensively record and share compelling and newsworthy scenes, including those involving police misconduct. Such recordings contribute to the democratic process by informing debate on important public issues, including whether police use excessive force.

A person’s right to record and publish what police officers are doing must include protection from interference. Otherwise, police can prevent the publication of information about government officials that is central to the First Amendment, by simply preventing people from exercising their First Amendment right to record. Unfortunately, some officers prevent people from recording them or retaliate against those who do, for example, by ordering people to stop recording or to delete the files, deleting the recordings directly, destroying the recording device, or arresting the person.² In this case, Officer Yehia interfered with Plaintiff Irizarry’s attempt to record a traffic stop by standing in the way of the camera and

² See, e.g., Sophia Cope and Adam Schwartz, *Tenth Circuit Misses Opportunity to Affirm the First Amendment Right to Record the Police*, EFF (Apr. 1, 2021), <https://www.eff.org/deeplinks/2021/04/tenth-circuit-misses-opportunity-affirm-first-amendment-right-record-police> (“Frasier filed a First Amendment retaliation claim against the officers for detaining and questioning him, searching his tablet, and attempting to delete the video.”).

by shining a light into the camera. This violated Plaintiff’s First Amendment rights.

This Court should follow its sister circuits and hold that the First Amendment protects people who record on-duty police officers. Photography and videography are inherently expressive activities and recording police officers are protected forms of information gathering—a necessary predicate to publishing the recording,—about a matter of profound public concern: how police exercise their extraordinary powers.

ARGUMENT

I. PEOPLE USE POWERFUL TECHNOLOGIES TO RECORD AND SHARE PHOTOS AND AUDIO-VIDEO

A. People Capture Photos and Audio-Video With Ubiquitous Mobile Devices

Today, the widespread adoption of mobile electronic devices means that the right to record extends not just to a select few, but to everyone with a mobile device capable of capturing photographs and audio-video.

As Chief Justice Roberts wrote, cell phones are “now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.” *Riley v. California*, 573 U.S. 373, 385 (2014). Indeed, 97% of American adults own a cell phone, including 85% who

own a smartphone with Internet access.³ Also, 53% of American adults own a tablet computer with the same capabilities.⁴ Globally, there are 8 billion mobile subscriptions.⁵ Additionally, modern smartphones have completely changed the way people take photos and videos. With people taking over a trillion photos every year, 89% of them are captured by smartphones⁶ equipped with advanced cameras.⁷

B. People Share Photographs and Audio-Video on Social Media Apps

The ease with which individuals can capture photos and audio-video is complemented by the ease of sharing them with others online. Sixty-seven percent of smartphone owners use their devices to share photos or videos, and 35% do so frequently.⁸

³ Pew Research Center, *Mobile Fact Sheet* (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/mobile/>.

⁴ *Id.*

⁵ Ericsson, *Mobility Report* (June 2021), <https://www.ericsson.com/4a03c2/assets/local/reports-papers/mobility-report/documents/2021/june-2021-ericsson-mobility-report.pdf>.

⁶ Nina Pantic, *How Many Photos Will Be Taken in 2021?*, Mylio Blog, <https://blog.mylio.com/how-many-photos-will-be-taken-in-2021-stats/> (last visited Nov. 9, 2021).

⁷ Sascha Segan and Steven Winkelman, *The Best Camera Phones for 2021*, PC Magazine (Oct. 29, 2021), <https://www.pcmag.com/picks/the-best-camera-phones>.

⁸ Aaron Smith, *U.S. Smartphone Use in 2015*, Pew Research Center (Apr. 1, 2015), <https://www.pewresearch.org/internet/2015/04/01/us-smartphone-use-in-2015/>

People share photos and audio-video on the Internet via a plethora of social media apps. Some apps that allow livestreaming (publishing audio-video as it is captured) can also record for future viewing and sharing. Some apps allow users to upload photos and audio-video previously taken with a smartphone. Others capture photos and audio-video within the apps and post them instantly, making the record-and-publish process seamless.

Facebook has 2.89 billion monthly active users, over 98% of whom access it through their mobile devices.⁹ Every day, Facebook users watch 100 million hours of audio-video recordings.¹⁰ Indeed, video now accounts for almost half of all time spent on Facebook, with 8 billion video views a day.¹¹ Facebook Live enables users to show viewers exactly what they are observing as it happens.¹² Two billion

⁹ Statista Research Department, *Number of Monthly Active Facebook Users Worldwide as of 3rd Quarter 2021*, Statista (Nov. 1, 2021), <https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/>; Statista Research Department, *Device Usage of Facebook Users Worldwide as of July 2021*, Statista (Sept. 7, 2021), <https://www.statista.com/statistics/377808/distribution-of-facebook-users-by-device/>.

¹⁰ 99 Firms, *Facebook Video Statistics*, <https://99firms.com/blog/facebook-video-statistics/> (last visited Nov. 9, 2021).

¹¹ Mediakix, *13 Facebook Video Statistics That Matter for Businesses and Creators*, <https://mediakix.com/blog/facebook-video-statistics-everyone-needs-know/#gs.96p9mo> (last visited Nov. 21, 2021).

¹² Facebook, *Facebook Live*, <https://www.facebook.com/formedia/solutions/facebook-live> (last visited Nov. 9, 2021).

people have viewed Facebook Live videos.¹³ Facebook automatically records and posts the livestreamed video on the user's profile, which they may choose to keep or delete.

Twitter has 199 million daily active users.¹⁴ Tweets with videos are the most popular.¹⁵ There are over 2 billion video views on Twitter each day.¹⁶ Twitter Live enables users to livestream.¹⁷ Twitter Live is a replacement for Twitter's recently archived Periscope livestreaming app, on which 10 million people had accounts and watched 40 years of Periscope live broadcasts every day.¹⁸ Twitter also automatically records and posts the livestreamed video on the user's profile. Twitter users may also share photos and previously recorded audio-video content.

¹³ 99 Firms, *Facebook Live Statistics*, <https://99firms.com/blog/facebook-live-stats/> (last visited Nov. 9, 2021).

¹⁴ Salman Aslam, *Twitter by the Numbers: Stats, Demographics & Fun Facts*, Omnicore (Jan. 3, 2021), <https://www.omnicoreagency.com/twitter-statistics/>.

¹⁵ *Id.*; Liz Alton, *How Video is Reshaping Digital Advertising*, Twitter Business, <https://business.twitter.com/en/blog/how-video-is-reshaping-digital-advertising.html> (last visited Nov. 21, 2021).

¹⁶ Alton, *supra* n.15.

¹⁷ Twitter, *How to Create Live Videos on Twitter*, <https://help.twitter.com/en/using-twitter/twitter-live> (last visited Nov. 9, 2021).

¹⁸ Periscope, *Periscope, by the Numbers* (Aug. 12, 2015), <https://medium.com/periscope/periscope-by-the-numbers-6b23dc6a1704#.9ja29il34>.

YouTube has 845 million monthly active users.¹⁹ Fully 81% of Americans have used the site, to which over 500 hours of new audio-video content are uploaded *every minute*.²⁰ Users can livestream on YouTube Live, which, like Facebook and Twitter, automatically records and posts the livestreamed video.²¹

Instagram has over one billion monthly active users.²² Posts with video are the most popular.²³ Users can livestream on Instagram Live—and then may choose whether to share the replayable livestreamed video on their profile.²⁴

TikTok is a fast-growing platform for short videos and has 1 billion monthly

¹⁹ Laura Ceci, *Number of Monthly Active Users (MAU) of the YouTube App Worldwide From 1st Quarter 2018 to 3rd Quarter 2021*, Statista (Nov. 3, 2021), <https://www.statista.com/statistics/1252627/youtube-app-mau-worldwide/>.

²⁰ Brooke Auxier and Monica Anderson, *Social Media Use in 2021*, Pew Research Center (Apr. 7, 2021), <https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/>; Brian Dean, *How Many People Use YouTube in 2021?*, BackLinko (Sept. 7, 2021), <https://backlinko.com/youtube-users>.

²¹ YouTube, *YouTube Live Streaming & Premieres*, <https://www.youtube.com/howyoutubeworks/product-features/live/#youtube-live> (last visited Nov. 9, 2021).

²² Statista Research Department, *Instagram: Distribution of Global Audiences 2021, By Age Group*, Statista (Sept. 7, 2021), <https://www.statista.com/statistics/325587/instagram-global-age-group/>.

²³ Lindsay Liedke, *25+ Instagram Marketing Statistics You Need to Know*, Startup Bonsai (Nov. 15, 2021), <https://startupbonsai.com/instagram-marketing-statistics/>.

²⁴ Instagram, *How Do I Share a Live Broadcast on Instagram After It's Ended?*, <https://help.instagram.com/562982737951475> (last visited Nov. 9, 2021).

active users.²⁵ U.S. users spend over an hour a day watching videos on TikTok.²⁶ Users can livestream on TikTok Live—and then have up to 90 days to privately replay or download the livestreamed video.²⁷

Ordinary people use these new technologies to act as citizen journalists. They record newsworthy events and publish them to a global audience. Seven percent of U.S. adults post their own news videos on social media, and 7% submit their own content to news sites.²⁸

II. PEOPLE HOLD POLICE ACCOUNTABLE BY SHARING RECORDINGS OF ON-DUTY OFFICERS

The power of citizen journalists to use their electronic devices to publish newsworthy events, by posting recordings such as photos or audio-video, is perhaps most important when applied to police exercising their extraordinary powers to detain, search, and use force against people. These recordings ensure that troubling episodes receive the public scrutiny that they deserve, and they

²⁵ Werner Geysler, *TikTok Statistics – Revenue, Users & Engagement Stats*, Influencer Marketing Hub (Sept. 28, 2021), <https://influencermarketinghub.com/tiktok-stats/>.

²⁶ Mansoor Iqbal, *TikTok Revenue and Usage Statistics*, Business of Apps (Sept. 28, 2021), <https://www.businessofapps.com/data/tik-tok-statistics/>.

²⁷ TikTok, *TikTok LIVE Replay*, <https://support.tiktok.com/en/live-gifts-wallet/tiktok-live/tiktok-live-replay> (last visited Nov. 9, 2021).

²⁸ Amy Mitchell, et al., *News Video on the Web*, Pew Research Center (Mar. 26, 2014), <https://www.pewresearch.org/journalism/wp-content/uploads/sites/8/2014/03/News-Video-on-the-Web.pdf>.

greatly contribute to the quality of public discussion about police use of force and racism in our criminal legal system.

A. Recording Police Informs the Public of Misconduct

Time and time again, the public has learned about police misconduct because someone recorded it.

Earlier this year, the Pulitzer Prize board awarded a special citation to Darnella Frazier, who recorded the shocking police murder of George Floyd in June 2020 on her phone.²⁹ The board commended her for “courageously recording the murder of George Floyd, a video that spurred protests against police brutality around the world, highlighting the crucial role of citizens in journalists’ quest for truth and justice.”³⁰ Similarly, in July 2014 in New York City, Ramsey Orta recorded Eric Garner screaming “I can’t breathe” as police officers choked him to death during an arrest, purportedly for selling loose cigarettes.³¹ Because of this

²⁹ Meredith Deliso, *Darnella Frazier, Who Recorded Video of George Floyd’s Death, Recognized by Pulitzer Board*, ABC News (June 11, 2021), <https://abcnews.go.com/US/darnella-frazier-recognized-pulitzer-prizes-george-floyd-video/story?id=78225202>.

³⁰ *Id.*

³¹ The Guardian, *‘I Can’t Breathe’: Eric Garner Put in Chokehold by NYPD – Video* (Dec. 4, 2014), <https://www.theguardian.com/us-news/video/2014/dec/04/i-cant-breathe-eric-garner-chokehold-death-video>; Benjamin Mueller and Ashley Southall, *25,000 March in New York to Protest Police Violence*, N.Y. Times (Dec. 13, 2014), <https://www.nytimes.com/2014/12/14/nyregion/in-new-york-thousands-march-in-continuing-protests-over-garner-case.html>.

recording, Garner's final words quickly became a well-known rallying cry for the movement against police killings.³² Bystander videos have also captured other police killings, including officers shooting people of color in the back while running away.³³

Bystander videos have exposed many other episodes of police violence to public scrutiny. On August 11, 2018, Baltimore Police Officer Arthur Williams confronted Deshawn McGrier, whose friend recorded the encounter. Officer Williams demanded McGrier's identification. McGrier pushed Officer Williams' hand off him and said, "Don't touch me." Officer Williams then began to repeatedly punch McGrier's face until McGrier fell to the ground. McGrier's friend posted the video on Instagram and Facebook. McGrier was treated at a hospital for a fractured jaw among other injuries.³⁴ In response to the video, the

³² Oliver Laughland, et al., *'We Can't Breathe': Eric Garner's Last Words Become Protesters' Rallying Cry*, *The Guardian* (Dec. 4, 2014), <https://www.theguardian.com/us-news/2014/dec/04/we-cant-breathe-eric-garner-protesters-chant-last-words>.

³³ Michael S. Schmidt and Matt Apuzzo, *South Carolina Officer Is Charged With Murder of Walter Scott*, *N.Y. Times* (Apr. 7, 2015), <https://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html>; Julie Turkewitz and Richard A. Oppel Jr., *Killing in Washington State Offers 'Ferguson' Moment for Hispanics*, *N.Y. Times* (Feb. 16, 2015), <https://www.nytimes.com/2015/02/17/us/killing-in-washington-state-offers-ferguson-moment-for-hispanics.html>.

³⁴ Kevin Rector and Talia Richman, *Baltimore Police Officer Suspended with Pay After Viral Video Shows Him Punching, Tackling Man*, *Baltimore Sun* (Aug. 11,

Baltimore Police Department suspended Officer Williams, a grand jury indicted him on assault charges, and Williams eventually resigned and was sentenced to nine months in prison.³⁵ And on August 23, 2020, a bystander recorded police officers in Kenosha, Wisconsin shooting Jacob Blake, a 29-year-old Black man, several times in the back.³⁶ The video spread on social media and prompted hundreds to protest in Kenosha.

Livestreams have also exposed police violence. In July 2016, police officer Jeronimo Yanez fatally shot Philando Castile during a traffic stop in Falcon Heights, Minnesota. Diamond Reynolds, Castile's girlfriend who was in the car, livestreamed the immediate aftermath of the shooting, while Castile was still bleeding and officers were still present with their guns drawn, on Facebook Live.³⁷ The next day, traditional news media republished the recording to a broader

2018), <https://www.baltimoresun.com/news/crime/bs-md-ci-police-incident-20180811-story.html>.

³⁵ Juliana Kim, *A Young Baltimore Cop Heads to Prison as the Young Man He Attacked on Tape Works to Get Healthy*, Baltimore Sun (Aug. 9, 2019), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-arthur-williams-sentencing-20190809-wvsgpc3oyjae5niymuamacbcay-story.html>.

³⁶ Adam Gabbatt, Victoria Bekiempis, *Wisconsin Deploys National Guard Amid Protests Over Police Shooting*, The Guardian (Aug. 24, 2020), <https://www.theguardian.com/us-news/2020/aug/24/protests-in-wisconsin-after-video-appears-to-show-police-shooting-black-man-in-the-back>.

³⁷ Alexis Saint-Paul, *Lavish Reynolds Falcon Heights Shooting*, YouTube (July 6, 2016), https://www.youtube.com/watch?v=Ia5_q7hZN5Y.

audience.³⁸ After watching the video, Minnesota Governor Mark Dayton asked: “Would this have happened if the driver were white, if the passenger were white? I don’t think it would have.”³⁹ Officer Yanez was separated from the police department.⁴⁰

Many people livestream protests and end up capturing violent police responses to protesters. In June 2020, Kris Smith was streaming for half an hour on Facebook Live near demonstrations against police violence in Louisville, Kentucky when he heard gunshots.⁴¹ Police had opened fire on the protesters and killed a restaurant owner—but officers had not turned on their body cameras. National news outlets used Smith’s livestream to report on the shooting.⁴² In July

³⁸ ABC News, *Philando Castile Shooting Livestream Video*, YouTube (July 7, 2016), <https://www.youtube.com/watch?v=p5Pt1nkw3Mk>.

³⁹ Matt Furber and Richard Pérez Peña, *After Philando Castile’s Killing, Obama Calls Police Shooting ‘an American Issue’*, N.Y. Times (July 7, 2016), <http://www.nytimes.com/2016/07/08/us/philando-castile-falcon-heights-shooting.html>.

⁴⁰ Ralph Ellis and Bill Kirkos, *Officer Who Shot Philando Castile Found Not Guilty on All Counts*, CNN (June 16, 2017), <https://www.cnn.com/2017/06/16/us/philando-castile-trial-verdict/index.html>.

⁴¹ Richard Nieva, *‘I Wanted Everybody to See’: How Livestreams Change Our View of Protests*, CNET (June 11, 2020), <https://www.cnet.com/tech/mobile/i-wanted-everybody-to-see-how-livestreams-change-our-view-of-protests-facebook-twitter/>.

⁴² *Id.*; Hayes Gardner and Bailey Loosemore, *42-year-old Protest Leader Kris Smith Shot and Killed Friday, Chaplain Says*, Louisville Courier Journal (Dec. 14, 2020), <https://www.courier-journal.com/story/news/local/2020/12/11/louisville-protest-leader-kris-smith-shot-and-killed-friday/6511515002/>.

2016, DeRay McKesson, a Black Lives Matter activist, livestreamed on Periscope his own arrest during a protest against the shooting of Alton Sterling.⁴³

People have used cameras to document other incidents including officers flipping a Black high school student upside down merely because she refused to stand up,⁴⁴ firing pepper spray directly into the faces of nonviolent protesters,⁴⁵ arresting people who were themselves protesting police misconduct,⁴⁶ deploying

⁴³ Deray Mckesson, *#BatonRouge. Protest.*, Periscope, <https://www.periscope.tv/deray/1DXxyZjvrWVKM>; Yamiche Alcindor, *DeRay Mckesson, Arrested While Protesting in Baton Rouge, Is Released*, N.Y. Times (July 10, 2016), <http://www.nytimes.com/2016/07/11/us/deray-mckesson-arrested-in-baton-rouge-protest.html>.

⁴⁴ Richard Fausset and Ashley Southall, *Video Shows Officer Flipping Student in South Carolina, Prompting Inquiry*, N.Y. Times (Oct. 26, 2015), <https://www.nytimes.com/2015/10/27/us/officers-classroom-fight-with-student-is-caught-on-video.html>.

⁴⁵ Phillip Kennicott, *UC Davis Protesters Pepper-Spraying Raises Questions About Role of Police*, Wash. Post (Nov. 20, 2011), https://www.washingtonpost.com/lifestyle/style/uc-davis-pepper-spraying-raises-questions-about-role-of-police/2011/11/20/gIQAOr8dfN_story.html.

⁴⁶ German Lopez, *Ferguson Police Arrested Protestors After Release of Justice Department Report*, Vox (Mar. 5, 2015), <https://www.vox.com/2015/3/5/8152737/ferguson-protesters-arrests>.

battlefield weaponry to respond to civil rights protesters,⁴⁷ and brutally beating Rodney King.⁴⁸

B. Police Routinely Interfere with the Right to Record

Sadly, many police officers use many tactics to stop people from exercising their First Amendment right to record on-duty police. For example, Ramsey Orta, the civilian who posted a recording of the police killing of Eric Garner, faced harassment and intimidation afterwards from police, and an apparently retaliatory prosecution on drug charges during which police even arrested his mother.⁴⁹

In August 2014, bystander Levi Frasier recorded police officers punching a suspect in the face to get drugs out of his mouth as his head repeatedly bounced off the pavement, and tripping his pregnant girlfriend.⁵⁰ The police officers retaliated

⁴⁷ Robert Mackey, *Images of Militarized Police in Baton Rouge Draw Global Attention*, The Intercept (July 11, 2016), <https://theintercept.com/2016/07/11/images-militarized-police-baton-rouge-draw-global-attention/>.

⁴⁸ CNN, *The Viral Video that Set a City on Fire*, YouTube (Apr. 28, 2017), <https://www.youtube.com/watch?v=1zLA2gzQQ0g>.

⁴⁹ Chloé Cooper Jones, *Fearing for His Life*, The Verge (Mar. 13, 2019), <https://www.theverge.com/2019/3/13/18253848/eric-garner-footage-ramsey-orta-police-brutality-killing-safety>.

⁵⁰ Chris Koeberl, *Denver Police Accused of Using Excessive Force, Illegal Search*, Fox31 Denver (Nov. 24, 2014), <https://kdvr.com/news/problem-solvers/denver-police-accused-of-excessive-force-illegal-search/>.

against Frasier by seizing his tablet without a warrant and deleting the video.⁵¹

Fortunately, Frasier was able to retrieve the video by synching his tablet with his backup cloud storage.⁵² See *Frasier v. Evans*, 992 F.3d 1003, 1008 (10th Cir. 2021).

On-duty officers have also played loud popular music to prevent the publication and sharing of recordings. Some online platforms, where many people publish their audio-video recordings, use automated filters to block content that contains copyrighted materials. The officers hope that when the person who recorded them attempts to publish their recording, a copyright filter will block it.⁵³ One Alameda County sherriff's deputy, for example, explicitly told an activist: "You can record all you want. I just know it can't be posted to YouTube. I am playing my music so that you can't post on YouTube."

Other examples of interference abound: officers have destroyed civilians'

⁵¹ *Id.*

⁵² *Id.*

⁵³ See, e.g., Katherine Trendacosta, *What Cops Understand About Copyright Filters: They Prevent Legal Speech*, EFF (July 16, 2021), <https://www.eff.org/deeplinks/2021/07/what-cops-understand-about-copyright-filters-they-prevent-legal-speech>.

devices,⁵⁴ confiscated their devices and footage,⁵⁵ commanded them to delete their footage on threat of arrest,⁵⁶ slapped their devices to misdirect their recording,⁵⁷ menaced them with guns,⁵⁸ or detained or arrested them.⁵⁹

⁵⁴ Mekahlo Medina and Michael Larkin, *New Video Shows Woman Arguing With Federal Agents Moments Before Her Phone Is Smashed*, NBC Los Angeles (Apr. 22, 2015), <https://www.nbclosangeles.com/news/local/New-Cellphone-Video-of-US-Marshal-Destroying-Womans-Phone-301024981.html>.

⁵⁵ Zack Kopplin, *Alton Sterling Witness: Cops Took My Phone, My Surveillance Video, Locked Me Up*, Daily Beast (Apr. 13, 2017), <https://www.thedailybeast.com/alton-sterling-witness-cops-took-my-phone-my-surveillance-video-locked-me-up>; NPPA, *District of Columbia Metropolitan Police Agrees to Settle Civil Rights Lawsuit Brought by NPPA Member* (Apr. 22, 2021), <https://nppa.org/news/district-columbia-metropolitan-police-department-agrees-settle-civil-rights-lawsuit-brought>.

⁵⁶ Abby Phillip, *Woman Who Posted Video of Officer Punching a Suspect Becomes Target of Miami Police Union*, Wash. Post (Aug. 14, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/08/14/woman-who-recorded-officer-punching-a-suspect-becomes-target-of-miami-police-union/>.

⁵⁷ Marlene Lenthag, *Chicago Cop Under Investigation After He was Caught on Tape Repeatedly Hitting a 16-Year-Old Black Boy Over the Head with Handcuffs After They Mistakenly Thought He Was a Robber*, Daily Mail (Dec. 4, 2018), <https://www.dailymail.co.uk/news/article-6456541/Chicago-cop-caught-camera-hitting-16-year-old-head-handcuffs.html>; Rosel Labone, *Watch: Police Hit a Phone Out of a Portland Protester's Hands*, Heavy (July 15, 2020), <https://heavy.com/news/2020/07/police-declare-riots-portland/>.

⁵⁸ Laura Anthony, *Rohnert Park Officer Being Sued for Drawing Gun on Man*, ABC7 News (Aug. 7, 2015), <https://abc7news.com/news/rohnert-park-officer-being-sued-for-drawing-gun-on-man/911687/>.

⁵⁹ *Supra* n.34; Christina Carrega-Woodby, *Police Assaulted, Arrested Staten Island Woman as Revenge for Filming Eric Garner Video: Lawsuit*, N.Y. Daily News (July 14, 2015) <https://www.nydailynews.com/new-york/cops-assaulted-woman-filming-eric-garner-video-lawsuit-article-1.2291194>.; Daniel Denvir, *The Danger in Recording a Cop*, Bloomberg CityLab (Aug. 20, 2015), <https://www.bloomberg.com/news/articles/2015-08-20/why-it-s-still-dangerous-to>

III. THE FIRST AMENDMENT PROTECTS THE RIGHT TO RECORD ON-DUTY POLICE

People have the right to record on-duty police for several reasons: recordings are inherently expressive mediums, recording is information gathering which is a necessary predicate to publication, and recording on-duty police advances government accountability, especially because police cameras are no substitute for civilian recordings. The First Amendment also protects people from interference when they exercise this right.

A. Photos and Audio-Video Recordings of Police Are Inherently Expressive Mediums and the First Amendment Protects the Process of Making Them

Photographs and audio-video recordings of police are inherently expressive mediums entitled to First Amendment protection. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 568 (1995) (holding

record-u-s-police-activity; CBS Sacramento, *Man Arrested for Recording Police Awarded \$275,000* (Nov. 29, 2017), <https://sacramento.cbslocal.com/2017/11/29/man-arrested-for-recording-police-awarded-275000/>; NBC Chicago, *Gary Man Arrested for Recording Police Officer, Now Considering Legal Action* (Aug. 9, 2020), <https://www.nbcchicago.com/news/local/gary-man-arrested-for-recording-police-officer-now-considering-legal-action/2319456/>; Allyson Waller, *Man Sues Police After Being Pepper-Sprayed While Filming Son's Arrest*, N.Y. Times (Dec. 27, 2020), <https://www.nytimes.com/2020/12/27/us/marco-puente-texas-police-arrest.html>; Dave Collins, *Man Arrested For Filming Police Station Sues Officers*, AP (Aug. 24, 2021), <https://apnews.com/article/arrests-a63bfde993816607fd2efb98ebe84e1c>.

that mediums with “inherent expressiveness” are protected by the First Amendment). The Supreme Court has held that photographs and movies are forms of expression protected by the First Amendment. *See Kaplan v. California*, 413 U.S. 115, 119–20 (1973); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952). The First Amendment also protects radio and television. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981).⁶⁰

The First Amendment also fully protects the communication medium where people today most frequently post photographs and audio-video: the internet. It is a “dynamic, multifaceted category of communication” where anyone “can become a town crier with a voice that resonates farther than it could from any soapbox.” *Reno v. ACLU*, 521 U.S. 844, 870 (1997). Indeed, the Supreme Court held: “While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the vast democratic forums of the Internet in general, and social media in particular.” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (internal quotations and citation omitted).

⁶⁰ Many other mediums of expression likewise enjoy full First Amendment protection. *See, e.g., Hurley*, 515 U.S. at 568-69 (parades); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (music); *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 470 (2009) (monuments).

Because the First Amendment protects photographs and audio-video of police as inherently expressive mediums, it also protects the process of making them. “Speech” is a process that contains a continuum of events protected by the First Amendment. *See Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 336 (2010) (“Laws enacted to control or suppress speech may operate at different points in the speech process.”). Thus, the First Amendment protects not just the end-products in the speech process—as relevant here, photographs and audio-video—but also their *creation*. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) (“the creation and dissemination of information are speech within the meaning of the First Amendment”); *Brown v. Entm’t Merchants Ass’n*, 564 U.S. 786, 792 n.1 (2011)

(“Whether government regulation applies to creating, distributing, or consuming speech makes no difference.”); *U.S. v. Stevens*, 559 U.S.460, 482 (2010) (holding unconstitutional a federal statute that outlawed not only the possession or sale of photos and videos of animal cruelty, but also their creation). *See also Western Watersheds Project v. Michael*, 869 F.3d 1189, 1196 (10th Cir. 2017) (“If the creation of speech did not warrant protection under the First Amendment, the government could bypass the Constitution by simply proceeding upstream and damming the source of speech.”) (internal quotations and citation omitted).

Other circuits, in upholding the First Amendment right to record the police, have emphasized that the First Amendment protects the creation of recordings. The Seventh Circuit in *American Civil Liberties Union of Ill. v. Alvarez*, stated, “Criminalizing all nonconsensual audio recording necessarily limits the information that might later be published or broadcast—whether to the general public or to a single family member or friend— and thus burdens First Amendment rights.” 679 F.3d 583, 597 (7th Cir. 2012). The Fifth Circuit in *Turner v. Driver* stated, “[T]he First Amendment protects the act of making film, as ‘there is no fixed First Amendment line between the act of creating speech and the speech itself.’” 848 F.3d 678, 689 (5th Cir. 2017) (quoting *Alvarez*, 679 F.3d at 596). The Fifth Circuit further explained:

[T]he Supreme Court has never “drawn a distinction between the process of creating a form of pure speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded. Although writing and painting can be reduced to their constituent acts, and thus described as conduct, we have not attempted to disconnect the end product from the act of creation.”

Id. (quoting *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-62 (9th Cir. 2010)).

B. The First Amendment Protects the Information Gathering That is a Necessary Predicate to Recordings of Police

The First Amendment protects photographs and audio-video recordings of police as inherently expressive mediums and protects their sharing or publication.

But a person cannot share information about police without first gathering it. Thus, the First Amendment protects not just the publication of information, *see, e.g., New York Times Co. v. United States*, 403 U.S. 713 (1971), but also the collection of that information as a necessary predicate to publication.

In *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972), the Supreme Court stated, “Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.” *Accord Alvarez*, 679 F.3d at 598; *Turner*, 848 F.3d at 688.

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980), the Supreme Court, citing *Branzburg*, held that criminal trials must be open to the public. The Court stated, “The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.” *Id.* at 576–77.

Similarly, in striking down the removal of books from a public school library, the Supreme Court emphasized that, under the First Amendment, “the right to receive ideas is a necessary predicate to the *recipient’s* meaningful exercise of his own rights of speech, press, and political freedom.” *Board of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (emphasis in original).

Other circuits, in upholding the First Amendment right to record the police, have explained that capturing audio-video is a necessary predicate to publication:

“The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected[.]” *Turner*, 848 F.3d at 689 n.41 (quoting *Alvarez*, 679 F.3d at 595) (emphasis in original).

C. The First Amendment Protects Recordings of Police Because They Advance Government Accountability

How police officers exercise their extraordinary government powers is a matter of profound public concern. Capturing photographs and audio-video of on-duty officers can play a critical role in holding the police accountable.

One of the “major purpose[s]” of the First Amendment is “to protect the free discussion of governmental affairs.” *Mills v. Alabama*, 384 U.S. 214, 218 (1966). *Accord Glik*, 655 F.3d at 82; *Alvarez*, 679 F.3d at 601; *Turner*, 848 F.3d at 689. *See also Richmond Newspapers*, 448 U.S. at 575 (one of the “core purposes” of the First Amendment is to facilitate “communication on matters relating to the functioning of government”); *Thornhill v. State of Alabama*, 310 U.S. 88, 101–02 (1940) (individuals have “the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment”).

Were police officers granted the power to restrict civilian recording, they would control the information ultimately available to the public about their own conduct. The First Amendment “prohibit[s] government from limiting the stock of

information from which members of the public may draw.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). *Accord Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3rd Cir. 2017); *Alvarez*, 679 F.3d at 597; *Turner*, 848 F.3d at 688.

Other circuits emphasize that people advance government accountability by exercising their First Amendment right to collect and publish information on the police. The Eleventh Circuit stated, “The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.” *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). The Fifth Circuit stated, “Filming the police contributes to the public’s ability to hold the police accountable, ensure that police officers are not abusing their power, and make informed decisions about police policy.” *Turner*, 848 F.3d at 689. The Third Circuit stated, “These videos have helped police departments identify and discipline problem officers.” *Fields*, 862 F.3d at 360. And the Seventh Circuit held that “the First Amendment provides at least some degree of protection for gathering news and information, particularly news and information about the affairs of government.” *Alvarez*, 679 F.3d at 597.

D. The Right to Record On-Duty Police Includes the Right to be Free from Interference with Such Recording

The First Amendment prohibits police from restraining, retaliating against, or otherwise raising the literal or figurative cost for a person who records them. Otherwise, police could defeat this First Amendment right simply by interfering with its exercise. As explained above, police have intererred with the right to record by, for example, slapping devices to misdirect the recording, seizing devices and deleting images, destroying devices, detaining and arresting people, and playing loud music to trigger copyright filters. *Supra* Part II(B).

Accordingly, the cases establishing a First Amendment right to record on-duty police have ruled against many forms of police interference with this right. *See, e.g., Alvarez*, 679 F.3d at 587 (prosecution); *Glik*, 655 F.3d at 79 (arrest); *Turner*, 848 F.3d at 686 (detention); *Fields*, 862 F.3d at 356 (phone confiscation); *Askins v. DHS*, 899 F.3d 1035 (9th Cir. 2018) (phone seizure and photo deletion); *Dyer v. Smith*, 2021 WL 694811 (E.D. Va. 2021) (command to stop recording and to delete images already recorded).

More generally, government officials violate the First Amendment not just by arresting or prosecuting a person for their free expression, but also by unduly burdening that free expression. *See, e.g., Forsyth County v. National Movement*, 505 U.S. 123 (1992) (excessive fee for assembly permit); *McIntyre v. Ohio Elections Commn.*, 514 U.S. 334 (1995) (unmasking anonymous leafleter);

Burbridge v. City of St. Louis, 2 F.4th 774 (8th Cir. 2021) (excessive force in retaliation for protesting). In short, the court below legally erred by holding that the established First Amendment right to record on-duty police at most barred police from detaining, arresting, or prosecuting a person who exercises this right, rather than barring all police interference. *Irizarry v. Yehia*, 2021 WL 2333019, *8-9 (D. Colo. 2021). Uncorrected, this decision will allow on-duty police officers to continue using new tactics to interfere with civilian recordings.

This Court should take this opportunity to move past *Frasier*, which declined to hold officers accountable for seizing bystander Levi Frasier's tablet and deleting his recording of their violent arrest. *Frasier*, 992 F.3d at 1011. This Court held that the right to record was not clearly established in August 2014. *Id.* at 1019-20. In the interim between then and 2019, however, numerous additional federal courts upheld the right to record specifically against police interference. *Infra* Part IV.

E. Police Recordings Are No Substitute for Civilian Recordings

While recordings made by police officers themselves (such as with body-worn cameras or dashboard cameras) may provide some benefits,⁶¹ they are inadequate substitutes for photographs and audio-video recordings by civilians.

Officers often fail to record their enforcement activity.⁶² Even if they do, police departments often refuse to disclose the recordings of newsworthy incidents.⁶³ For example, Chicago officials refused for 13 months to release a dashboard camera video of a police officer fatally shooting Laquan McDonald.⁶⁴

Additionally, civilians often capture valuable information that officers cannot. For example, an officer's body-worn camera cannot fully reflect what the officer is doing, and video from an officer engaged in a physical altercation may be

⁶¹ Brett Chapman, *Body-Worn Cameras: What the Evidence Tells Us*, Nat'l Institute of Justice (Nov. 14, 2018), <https://nij.ojp.gov/topics/articles/body-worn-cameras-what-evidence-tells-us>.

⁶² See, e.g., Justin Hicks, *Concerns Mount in South Bend After a White Police Officer Kills a Black Man*, NPR (June 21, 2019), <https://www.npr.org/2019/06/21/734665327/concerns-mount-in-south-bend-after-a-white-police-officer-kills-a-black-man>.

⁶³ Ryan J. Foley, *AP analysis: Police Routinely Deny Access to Officer Video Footage*, PBS News Hour (Mar. 13, 2019), <https://www.pbs.org/newshour/nation/ap-analysis-police-routinely-deny-access-to-officer-video-footage>.

⁶⁴ Kyung Lah, *Laquan McDonald Shooting: Why Did It Take 13 Months to Release Video?*, CNN (Dec. 2, 2015), <https://www.cnn.com/2015/12/01/us/chicago-police-shooting-explainer/>.

chaotic or blurry.⁶⁵ This is because the officer’s camera is pointed towards the public, which effectively only surveils those being policed.⁶⁶ The civilian’s camera, by contrast, is appropriately pointed towards the officer. The Third Circuit recognized the limits of police-created videos: “Bystander videos provide different perspectives than police and dashboard cameras, portraying circumstances and surroundings that police videos often do not capture. Civilian video also fills the gaps created when police choose not to record video or withhold their footage from the public.” *Fields*, 862 F.3d at 359.

IV. THE RIGHT TO RECORD ON-DUTY POLICE, FREE FROM POLICE INTERFERENCE, IS CLEARLY ESTABLISHED

This Court should hold that the First Amendment right to record, including the right to be free from police interference, was clearly established in 2019 at the time of the challenged events in this case.

⁶⁵ Timothy Williams, et al., *Police Body Cameras: What Do You See?*, N.Y. Times (Apr. 1, 2016)e, <https://www.nytimes.com/interactive/2016/04/01/us/police-bodycam-video.html>; German Lopez, *The Failure of Police Body Cameras*, Vox (July 21, 2017), <https://www.vox.com/policy-and-politics/2017/7/21/15983842/police-body-cameras-failures>.

⁶⁶ Adam Schwartz, *No Police Body Cams Without Strict Safeguards*, EFF (Nov. 2, 2020), <https://www.eff.org/deeplinks/2020/11/no-police-body-cams-without-strict-safeguards> (“If worn by hundreds of thousands of police officers, BWCs would massively expand the power of government to record video and audio of what we are doing as we go about our lives in public places, and in many private places, too.”).

The Supreme Court long ago established that the First Amendment protects the rights to collect and create information, as necessary predicates of free expression. *See, e.g., Brown*, 564 U.S. at 792 n.1; *Sorrell*, 564 U.S. at 570; *Stevens*, 559 U.S. at 482; *Citizens United*, 558 U.S. at 336; *Pico*, 457 U.S. at 867; *Richmond Newspapers*, 448 U.S. at 580; *Branzburg*, 408 U.S. at 681. *See also Western Watersheds Project*, 869 F.3d at 1196; *Anderson*, 621 F.3d at 1061-62.

Further, many courts for many years have established that the First Amendment protects, in particular, the right to record on-duty police. *See, e.g., Turner*, 848 F.3d at 689; *Fields*, 862 F.3d at 360; *Alvarez*, 679 F.3d at 597; *Glik*, 655 F.3d at 85; *Smith*, 212 F.3d at 1333.

Thus, a reasonable police officer in the shoes of Mr. Yehia would have known, in 2019, that the First Amendment prohibited him from purposefully interfering with Plaintiff's efforts to record on-duty police. Among other things, they would have known that they could not lawfully stand in the way of a person's camera, or shine a light at that camera, in order to interfere with the recording of on-duty police. *See generally Dyer*, 2021 WL 694811, *8 (citing *Glik* and *Sorrell* and holding that in 2019, the right to record on-duty police was clearly established, "crystal clear," and "obvious").

V. THE FIRST AMENDMENT RIGHT TO RECORD IS NOT LIMITED TO ON-DUTY POLICE IN PUBLIC

In deciding this appeal, *amicus* urges this Court to eschew any language that would unduly impede the continued judicial development of the First Amendment right to record, in at least three contexts.⁶⁷

First, the First Amendment right to record on-duty police will often extend to *non-public* places, such as inside private homes when the residents are the ones doing the recording. Whether the First Amendment protects the act of recording should turn on whether the recorded persons have a reasonable expectation of privacy. This may be affected, but is not controlled, by whether they are in a public or private place. On-duty officers generally will not have a reasonable expectation of privacy when they are interacting with members of the public inside their homes. *See, e.g., Gaymon v. Borough of Collingdale*, 150 F. Supp. 3d 457, 469 (E.D. Pa. 2015) (on a motion to dismiss, holding that a jury could reasonably conclude that police officers violated plaintiff's rights when they arrested her inside her home for recording them); *J.A. v. Miranda*, 2017 WL 3840026, at *6 (D. Md. 2017) (on a motion to dismiss, holding that police violated plaintiff's First Amendment right to

⁶⁷ Although the party whom *amicus* supports (Plaintiff-Appellant Irizarry) does not address these issues on appeal, we nevertheless address them because they implicate the interests of EFF and its members.

record when officers beat and arrested him for using his cell phone to record them arresting his brother in the living room of his home).

Second, the First Amendment right to record should include other types of on-duty *government officials*, and not just police. As with the police, the issue should be whether government officials have a reasonable expectation of privacy. For example, people have a First Amendment right to record on-duty firefighters and emergency medical services (EMS) providers, particularly when these first responders do their jobs in newsworthy ways.⁶⁸

Third, the right to record *non-government actors* should balance their reasonable expectation of privacy with First Amendment interests, such as whether the conversation is newsworthy. *See, e.g., Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200, 231-32, 236-37 (1998).

CONCLUSION

Amicus EFF respectfully asks this Court to hold that the First Amendment protects the right to record on-duty police officers, including the right to be free

⁶⁸ *See, e.g.,* Aundrea Cline-Thomas and Dan Stamm, *Raw Video Shows Heroin Antidote Saving Mother's Life*, NBC 10 Philadelphia (Feb. 12, 2016), <http://www.nbcphiladelphia.com/news/health/Heroin-Overdose-West-Deptford-Narcan-Antidote-Saving-Lives-368592941.html>; Andrew Siff, *4 EMS Workers Suspended Without Pay in Chokehold Arrest*, NBC 4 New York (July 21, 2014), <http://www.nbcnewyork.com/news/local/Staten-Island-Chokehold-Arrest-Death-Staten-Island-Eric-Garner-Video-NYPD-267913291.html>.

from police interference with such recording, and that this right was clearly established in 2019, at the time of the challenged events.

Dated: November 24, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of *Amicus Curiae* Electronic Frontier Foundation in Support of Plaintiff-Appellant Abade Irizarry and Reversal complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,450 words, excluding the parts of the brief exempted by Fed. R. App. P.

32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, the word processing system used to prepare the brief, in 14-point font in Times New Roman font.

Dated: November 24, 2021

/s/ Mukund Rathi
Mukund Rathi

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

- (1) all required privacy redactions have been made per 10th Cir. R. 25.5;
- (2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;
- (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus-scanning program, Virus Total, updated November 24, 2021, and according to the program are free of viruses.

Dated: November 24, 2021

/s/ Mukund Rathi
Mukund Rathi

CERTIFICATE OF SERVICE

I certify that on this 24th day of November 2021, I electronically filed the foregoing Brief of Amicus Curiae using the Court's CM/ECF system which will send notification of such filing to all parties of record.

Dated: November 24, 2021

/s/ Mukund Rathi
Mukund Rathi