No. 23-1090

In The

Supreme Court of the United States

SCOTT D. PITTA,

Petitioner,

v.

DINA MEDEIROS, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF SPECIAL EDUCATION FOR THE BRIDGEWATER RAYNHAM REGIONAL SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE CENTER FOR AMERICAN LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST[1]

The Center for American Liberty ("CAL") is a 501(c)(3) nonprofit law firm dedicated to protecting civil liberties and enforcing constitutional limitations on government power.[1] CAL has represented litigants in courts across the country and has an interest in ensuring application of the correct legal standard in First Amendment cases.

INTRODUCTION

The vast majority of public servants are diligent stewards of the public's trust. But, as Federalist 51 warned, "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal [controls] on government would be necessary." Federalist No. 51 (Feb 6, 1788), https://founders.archives.gov/documents/Hamilton/01-04-02-0199 (last visited May 2, 2024). Citizen recordings of public officials help provide an "external control" to keep public officials honest by providing a credible way for citizens to challenge official governmental narratives.

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[1] Consistent with Rule 37.1, the Center for American Liberty provided notice to counsel of record for all parties of their intention to file this brief at least ten days prior to the deadline to file this brief. No counsel for a party authored this brief in whole or part; no counsel or party contributed money intended to fund the preparation or submission of this brief; and no person other than amicus or its counsel contributed money intended to fund its preparation or submission.

The First Circuit drastically departs from First Amendment principles and the general First Amendment jurisprudence of this Court to substantially restrict the ability of citizens to gather and disseminate information about public officials' conduct. The First Circuit effectively adopts two holdings in the alternative, limiting First Amendment protections to only those videos created by individuals with an intention to distribute the resulting materials and to only videos of public officials performing their duties in indisputably public places. These holdings conflict with the First Circuit's own prior rulings concerning citizen recordings, as well as the holdings of several other circuits.

Given the widespread proliferation of smartphones, which enable the average citizen to record public officials at the click of a button, and the centrality of protecting speech that discusses and criticizes government activity, resolving these conflicts presents several important questions of national concern that merit the Court's attention.

SUMMARY OF THE ARGUMENT

The questions presented in this case ask when and under what circumstances can citizens record public officials performing their official duties? The ubiquity of smartphone technology has democratized these questions. When recording equipment was novel and expensive the circumstances under which citizens could record public officials was of primary importance to the institutional press and niche groups of citizens. That is no longer the case. Now, the overwhelming

majority of Americans regularly carry sophisticated recording equipment in their pockets. As a result, the questions presented in this case impact nearly every American in their interactions with government officials.

These questions are important because smartphone technology enables citizens to record public officials and contribute to the free discussion of government affairs. The protections of the First Amendment are not limited to an "institutional press" or specific media caste. They apply broadly to anyone who wishes to enter the marketplace of ideas and discuss the government's actions.

A central purpose of the First Amendment is to protect the free discussion of governmental affairs. Indeed, the ability to obtain, disseminate, and discuss information about government and public officials is a necessary precondition for the form of self-government guaranteed by our Constitution.

Citizen recordings of public officials serve this purpose. Regardless of whether an individual sets out to influence the public debate, citizen recordings are a powerful source of information that allows the public to raise informed questions about official conduct. Thus, the ability of citizens to record public officials performing their official duties strikes at the core of First Amendment protections.

In light of these significant national interests, it is important for the Court to clarify whether recording a public official is an inherently expressive activity. The Court has long held that conduct that

enables or serves as a necessary precondition to speech is protected under the First Amendment. This is particularly true in the campaign finance context, where the Court has recognized that the spending of money to support candidates is a necessary precondition for enabling political speech. In addition, the Court has looked skeptically at standards that categorize like conduct differently based on subjective criteria, such as motivation. Finally, the Department of Justice has previously recognized that recording public officials can be an inherently expressive activity, even without further commentary or editorial content contemplated. In light of this prior history, it is important for the Court to clarify whether the First Circuit's opinion reflects the correct view of the law or whether recording public officials is properly considered an inherently expressive activity.

It is also important for the Court to clarify *where* citizens can record public officials. The First Circuit opinion appears to adopt a bright-line, one-size-fits-all approach that limits citizen recording to only the most extreme circumstances. This is inconsistent with how this Court has addressed other First Amendment inquiries, where the Court has acknowledged the First Amendment considerations in play and looked to the specific circumstances and governmental interests to evaluate proposed restrictions.

Finally, this case is a good vehicle for addressing the questions presented. Unlike many right to record cases, this case does not have a qualified immunity element. Thus, it is possible to

address the First Amendment issues without needing to determine whether they were "clearly established." In addition, unlike many right-to-record cases, this case does not involve law enforcement conduct. Thus, the Court can address the questions presented without the complicated factual circumstances that flow from spur-of-the-moment law enforcement decisions.

ARGUMENT

I. The Ubiquity of Smart Phones Makes the Questions Presented Ones of Important National Concern

How Americans gather and disseminate information has changed dramatically. There was a time when only spies or people in specialized fields had miniature portable cameras. Indeed, the Central Intelligence Agency notes that the Minox B, developed in 1936, was a "portable camera that would easily fit into the palm of the hand and yet take high-qualify, spontaneous pictures," was "the world's most widely used spy camera," and was a "marvel of technology" in its day. *Artifacts—Minox B Camera*, Central Intelligence Agency, https://www.cia.gov/legacy/museum/artifact/minox-b-camera/ (last visited May 2, 2024).

In 2014, Chief Justice Roberts noted that modern 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). At that time, only 59% of such

phones were smartphones. *See Mobile Fact Sheet*, Pew Research Center (Jan. 31, 2024), https://www.pewresearch.org/internet/fact-sheet/mobile/ (smartphone prevalence from December 21, 2014). Today, the number is over 90%. *Id.* (smartphone prevalence from September 5, 2023). Today, technology that was beyond the wildest dreams of our nation's spies less than a century ago is literally at the fingertips of the average American.

The result is that 90% of Americans are routinely walking around with technology that makes it incredibly easy to record their surroundings. Given this ease and prevalence, it is critical that both citizens and government officials understand what they are—and are not—allowed to record.

A decision in this case will provide federal, state, and local officials, as well as average American citizens, with a framework to guide their decisions. While not framed this way, the questions presented in this case effectively ask this Court to address the impact of evolving technology on the law. And those are questions of immense national importance.

II. Smartphone Technology Enables the Free Discussion of Governmental Affairs

A. The First Amendment is Not Limited to an Institutional Press

The First Amendment, incorporated against the States through the Fourteenth Amendment, prevents

states from "abridging the freedom of speech, or of the press." U.S. Const. amend. I.

The right to gather and disseminate information about public affairs is not limited to an institutional press. For First Amendment purposes, the "press" is not a special caste. "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Branzenburg v. Hayes*, 408 U.S. 665, 684 (1972); *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 782 (1978) ("[T]he press does not have a monopoly on either the First Amendment or the ability to enlighten."). Rather, the Court has "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." *Citizens United v. FEC*, 558 U.S. 310, 352 (2010) (citation omitted); *see also Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring) ("The liberty of the press . . . is no greater than the liberty of every citizen of the Republic.").

At a time when 90% of Americans have a recording device in their pocket, anyone can become a member of the "press" merely by being in the right place at the right time. As the First Circuit previously recognized, "changes in technology and society have made the lines between private citizens and journalists exceedingly difficult to draw" as "[t]he 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 as just as likely to be broken by a blogger at her computer as a reporter at a major newspaper." *Gilk v. Cunniffee*, 655 F.3d 78, 84 (1st Cir. 2011); *see also Fields v. City of Phila.*, 862 F.3d 353, 360 (3d Cir. 2017) ("[C]itizens' gathering and disseminating 'newsworthy information [occurs] with an ease that rivals that of the traditional news media" while "[i]n addition to complementing the role of the traditional press, private recordings have improved professional reporting, as video content generated by witnesses and bystanders has become a common component of news programming." (cleaned up).

B. The Basic Purpose of the First Amendment is to Protect the Free Discussion of Public Officials and Affairs

"'[T]here is practically universal agreement that a major purpose of' the First Amendment 'was to protect the free discussion of governmental affairs . . . .'" *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 755 (2011) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)). Indeed, "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

This includes discussion about government officials. There is a "paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything

which might touch on an official's fitness for office is relevant." *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964).

This is, at its core, a fundamental precondition for democratic self-government. *See Citizens United*, 558 U.S. at 340 ("The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."). After all, how can the people effectively exercise sovereignty over their government if they do not know what their government is doing and are not able to freely discuss the activities of that government, including those of individual public servants?

C. Citizen Recording of Public Officials Facilitates the Discussion of Governmental Affairs

The credibility provided by audio and video recordings is crucial to the ability of citizens to discuss governmental affairs and serve as a check on governmental authority.

"To record what there is the right for the eye to see or the ear to hear corroborates or lays aside subjective impressions for objective facts." *Fields*, 862 F.3d at 359. Citizens already face a high bar when alleging official impropriety, whether in the court of public opinion or a court of law. For example, there is often a presumption of regularity that public officials "have properly discharged their official duties" "in the absence of clear evidence to the contrary." *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14–15

(1926); *see also National Archives and Recs. Admin. v. Favish*, 541 U.S. 157, 174 (2004) (noting the " presumption of legitimacy accorded to the Government's official conduct."); *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (""[I]n the absence of clear evidence to the contrary, courts presume that [Government agents] have properly discharged their official duties."). Recordings of public officials allow citizens to meet this high evidentiary bar.

"[R]ecordings have both exposed police misconduct and exonerated officers from errant charges." *Fields*, 862 F.3d at 355. Several recent high-profile incidents illustrate this process in action. Perhaps most famously, the initial police report concerning the death of George Floyd was titled "man dies after medical incident during police interaction" and describes the apprehension of Mr. Floyd as follows: "Two officers arrived and located the suspect, a male believed to be in his 40s, in his car. He was ordered to step from his car. After he got out, he physically resisted officers. Officers were able to get the suspect into handcuffs and noted he appeared to be suffering medical distress. Officers called for an ambulance. He was transported to Hennepin County Medical Center by ambulance where he died a short time later." Philip Bump, *How the First Statement From Minneapolis Police Made George Floyd's Murder Seem Like George Floyd's Fault*, Wash. Post (Aug. 20, 2021), https://www.washingtonpost.com/politics/2021/04/20/how-first-statement-minneapolis-police-made-george-floyds-murder-seem-like-george-floyds-fault/. It made no mention of the nearly ten minutes during which

Mr. Floyd was restrained by Minneapolis police, which came to light through subsequent citizen cell phone footage. *Id.* In the light most charitable to the government, the cell phone footage added context that was omitted from the initial police reports, context that was immensely important and led to widespread protests and the eventual conviction of a Minneapolis police officer for murder. *See generally Chauvin v. Minnesota*, 144 S.Ct. 427 (mem.) (2023) (denying petition for certiorari challenging the jury process in Mr. Chauvin's state criminal proceedings).

Citizen records, which are enabled by the proliferation of smartphones, serve the basic First Amendment purpose of facilitating the free discussion and criticism of public officials. Given this strong link between the challenged activity and core First Amendment interests, there is a significant national interest and importance in addressing the questions presented in this case.

III. It is Important for the Court to Clarify Whether Recording a Public Official is Inherently Expressive

Today, average citizens perform a vital, constitutionally protected role in our Republic by performing press functions that ensure citizens are informed and public officials are accountable. But they can only perform this function if they are able to record public officials in the first instance.

"[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of

information from which members of the public may draw." *Bellotti*, 435 U.S. at 783. Since "[f]acts . . . are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs," the "Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). Put differently, the ability to gather information is a necessary precondition for and component of "speech."

A contrary rule poses a mortal danger to the core protections of the First Amendment. As Justice Scalia warned, "[t]o a government bent on suppressing speech, this mode of organization presents opportunities: Control any cog in the machine, and you can halt the whole apparatus." *McConnell v. FEC*, 540 U.S. 93, 251 (2003) (Scalia, J., concurring in part). "Silencing certain voices at any of the various points in the speech process" enables "[g]overnment [to] repress speech," because, in our interconnected society, "'effective public communication requires the speaker to make use of the services of others.'" *Citizens United*, 558 U.S. at 339 (quoting *McConnell*, 540 U.S. at 251 (Scalia, J., concurring in part)).

The First Circuit's opinion is in tension with these principles. Specifically, the First Circuit's holding that necessary preconditions for speech are not themselves "speech" conflicts with the notion that government cannot discriminate between similarly situated speakers based on their identity or the content of their message. This also conflicts with the repeated pronouncements of the Department of

Justice that recording government actors is protected activity. All of these conflicts raise important questions that cry out for resolution by the Court.

A. The First Circuit's Approach Conflicts with this Court's Treatment of Necessary Preconditions to Political Speech in the Campaign Finance Arena

The First Circuit's conclusions also conflicts with this Court's longstanding approach other areas of First Amendment law, particularly campaign finance law. *See generally ACLU of Ill. v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012) ("The Supreme Court's campaign-finance cases illustrate how laws of this sort trigger First Amendment scrutiny.").

In the campaign finance context, the Court has long recognized that the dependence of a communication on prerequisite conduct does not "operate[] itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." *Buckley v. Valeo*¸424 U.S. 1, 16 (1976) ("[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment."). As Justice Breyer observed, "a decision to contribute money to a campaign is a matter of First Amendment concern—not because money is speech (it is not); but because it *enables* speech." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring). Because money enables speech, "a 'restriction on the amount of money

a person or group can spend on political communication during a campaign' . . . 'necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.'" *Citizens United*, 558 U.S. at 339 (quoting *Buckley*, 424 U.S. at 19).

Similarly, restricting the ability of citizens to record public officials based on their subjective intent *ex ante* necessarily reduces the quantity of expression and, with it, the number of issues discussed, the depth of their exploration, and the size of the audience reached. A citizen may well begin recording public officials with no intent to distribute the resulting footage yet change their mind once they realize that they have captured something important or newsworthy on film. Those videos will likely not come into existence under the First Circuit's test. Because the First Circuit's ruling restricts the ability of individuals to engage in activity that enables speech, thereby reducing the quantity of expression, it implicates First Amendment principles and stands in stark tension with this Court's campaign finance line of cases.

B. The First Circuit's Approach Conflicts with this Court's Cases Holding that Government Cannot Treat Similarly Situated Speakers Differently Based on the Content of Their Expression

The First Circuit's ruling also conflicts with the line of cases holding that government cannot treat speakers differently based on their expressive

message. *Bellotti* recognized "[e]ven decisions seemingly based exclusively on the individual's right to express himself acknowledge that the expression may contribute to society's edification." 435 U.S. at 783. The First Circuit implicitly treats like conduct differently based on the speaker's subjective intent. After all, the negative inference of the First Circuit's ruling is that the exact same conduct *would* receive First Amendment protection if Petitioner *had* intended to disseminate the footage *ex ante*.

This concern is exacerbated by the fact that "the value of the recordings may not be immediately obvious, and only after review of them does their worth become apparent." *Fields*, 862 F.3d at 358.

In the First Amendment context, this is not and cannot be correct. At very least, it is in tension with the idea that laws restricting speech must be based on objective criteria rather than the message or motivation of the speaker.

C. The First Circuit's Ruling Conflicts with the Department of Justice's Recognition that Recording Public Officials is an Expressive Activity

The First Circuit held in the alternative that Petition's proposed recording fell outside of First Amendment protections "because such a recording is not intended to be disseminated to the public." App. 24. This determination directly contradicts the prior position of the Department of Justice. To wit, the Department of Justice has previously opined that the right to record police officers discharging their duties

in public "does not depend on individuals criticizing police, commenting on their behavior, or engaging in any other expressive conduct beyond making the recording." Br. for the United States as *Amicus Curiae* in Support of Pls.-Appellants and Urging Reversal, *Fields v. City of Phila.*, Case Nos. 16-1651, 16-1650 (3d Cir. Oct. 31, 2016).

Given the significant First Amendment interests at stake in activities that facilitate commentary on governmental affairs, the Court's longstanding protection of activities that enable speech, and the Department of Justice's recognition that recording public officials can be an inherently expressive act, it is important for the Court to address the First Circuit's opinion and the question of whether recording public officials is an inherently expressive activity protected by the First Amendment.

IV. It is Important for the Court to Identify *Where* Individuals Can Film Government Officials

Citizens interact with public officials in a wide variety of circumstances, from observing police and public officials on the street to meeting officials at the counter of the Department of Motor Vehicles to meeting privately behind closed doors. As noted, the prevalence of smartphones means that citizens are rarely without a readily available camera, creating new opportunities for citizens to film public officials throughout these myriad interactions. This case presents an opportunity for the Court to delineate the

ground rules for not only by *whom* but also *when* and *where* filming is protected by the First Amendment.

The First Circuit effectively adopted a bright-line rule: "[A] First Amendment right to record government officials performing their duties [exists] *only* when those duties have been performed in public spaces." App. 18. But this rule runs counter to basic First Amendment principles and effectively discards traditional First Amendment forum analysis.

As discussed above, citizen recordings allow citizens to expose government misconduct, dishonesty, or maladministration, all of which are just as possible behind purportedly closed doors as in the public square. Indeed, if anything, concern that public officials may misrepresent their conduct is higher *away* from "indisputably public" places where there will likely be additional witnesses who can corroborate other eyewitness accounts.

These are not merely hypothetical concerns. At its core, this is what the facts of this case are about: a desire to record public officials engaged in their official duties to provide a check against misleading official statements. *See* Pet. at 3 ("[Petitioner] tried to video-record an online meeting with public school employees . . . because those school employees omitted key information[] from the minutes of previous meetings with him." (footnote omitted)).

In light of these background principles, there is no justification for the bright line rule adopted by the First Circuit. This Court's First Amendment analysis is rarely an all-or-nothing proposition. It often deals in

differing burdens and differing levels of scrutiny based on the surrounding circumstances. For example, the Court traditionally applies a forum analysis to determine what level of scrutiny is applicable to a laws that impact free speech and free expression on government property. This provides a framework for protecting the First Amendment rights of citizens while also ensuring that the rights of others and the need to perform key governmental functions are not impinged.

The First Circuit disregarded this long tradition of First Amendment jurisprudence in its primary holding.[2] Instead, it categorically excludes the recording of public officials outside of "indisputably public places in full view of the public" from the ambit of the First Amendment, regardless of the purported governmental interest. *See* App. 22.

This Court's First Amendment jurisprudence suggests that if there is a First Amendment right to record public officials in "indisputably public places," there is also a First Amendment interest at stake in recording public officials in other settings. To be sure, this right is not and need not be deemed absolute. Like any other form of speech protected by the First

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[2] The First Circuit does purport to engage in this analysis as an alternative holding. *See* App. 25–28. However, as the Petition notes, the First Circuit's analysis appears to misapply intermediate scrutiny by failing to address how a regulation that allows *audio* recordings but prohibits *video* recording is narrowly tailored to the stated interests. Pet. at 28–29. Thus, the First Circuit's alternative holding does not provide an independent and adequate basis to support the court's judgment.

Amendment, an individual's right to record public officials may well be subject to reasonable content-neutral restrictions. *See generally City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61 (2022); *Reed v. Town of Gilbert*, 576 U.S. 155 (2015).

Under such framework, important governmental interests—such as protecting the secrecy of the grand jury room or ensuring the integrity of the judicial process—may well be sufficient to justify highly restrictive generally applicable rules, while other interests—such as restricting video but not audio recordings in a meeting with school officials—may not. However, those restrictions can and should be viewed under this Court's traditional tests for evaluating restrictions on First Amendment activity, not categorically excluded from it.

The First Circuit's creation of a bright line rule for when First Amendment rights attach is in stark tension with this Court's broader First Amendment jurisprudence. Addressing this tension is an important national concern.

V. This Case is a Good Vehicle for Addressing the Impact of Changing Technology on the First Amendment

This case has two features that make it a good vehicle for addressing the nationally important questions of when citizens can record public officials. First, it does not involve a qualified immunity analysis. And second, it does not involve a "heat of the moment" decision by law enforcement.

A. The Questions Presented by the Petition Do Not Require the Court to Assess Claims of Qualified Immunity

Many of the leading Courts of Appeals cases addressing a "right to record" arise after the fact in the context of an individual who is arrested, threatened, or otherwise retaliated against by government officials for seeking to record the activities of public officials.[3] Such cases generally present a mix of "pure" First Amendment questions, as well as questions of individual liability that rise or fall based on doctrines of qualified immunity.

The introduction of questions of qualified immunity necessarily complicates such cases. It requires the Court to assess not only whether the conduct at issue *is* protected by the First Amendment,

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[3] *See, e.g.*, *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995) (plaintiff arrested while recording public demonstration); *Gilk*, 655 F.3d 78 (plaintiff arrested while filming police officers making an arrest); *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014) (plaintiff arrested for videotaping a traffic stop); *Fields*, 862 F.3d 353 (plaintiffs alleged that police retaliated against them for filming police activity); *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017) (plaintiff arrested after videotaping police activity); *Ness v. City of Bloomington*, 11 F.4th 914 (8th Cir. 2021) (plaintiff brought claim alleging that her rights were violated by police threats to enforce an antiharassment law if she continued videotaping people in a park as part of dispute with the city regarding park usage); *Irizarry v. Yehia*, 38 F.4th 1282 (10th Cir. 2022) (plaintiff brought claim alleging police violated his First Amendment rights by obstructing his filming of a traffic stop); *Sharpe v. Winterville Police Dep't*, 59 F.4th 674 (4th Cir. 2023) (plaintiff alleged a clearly established right to livestream a traffic stop).

but also whether such protection was "*clearly established*" beforehand.[4] This later inquiry is often as or more fraught and complicated than the basic question of whether this is First Amendment right to engage in the activity at issue to begin with.

This case avoids the pitfalls associated with a qualified immunity inquiry, allowing the Court to address the basic, broadly applicable First Amendment rights and limitations without having to wade into complicated questions of whether a right was clearly established. In short, this case presents a "clean shot" at crucially important First Amendment questions without the complicating baggage that often comes with cases brought after the fact.

B. This Case Allows the Court to Address the Questions Presented Outside of the Law Enforcement Context

This case also allows the Court to address important questions of the filming of public officials outside of the context of split-second law enforcement decisions. Unlike many of the cases listed above, this case does not involve law enforcement personnel or

[4] It may also require an evaluation of whether "qualified immunity" properly exists in the first instance. *See generally Hoggard v. Rhodes*, 141 S.Ct. 2421 (mem.) (2021) (Statement of Thomas, J., Respecting the Denial of Certiorari); *Baxter v. Bracey*, 140 S.Ct. 1862 (mem.) (2020) (Thomas, J., dissenting from denial of certiorari); *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1869–72 (2017) (Thomas, J., concurring in part and concurring in judgment) (raising concerns about the propriety of the Court's qualified immunity jurisprudence).

impromptu law enforcement decisions. This has two advantages that make it a good vehicle for addressing the First Amendment issues presented.

First, it allows for a broadly applicable ruling that does not lend itself to parsing between different categories of civil servants. This is far from an idle concern. In reviewing prior case law, the First Circuit effectively drew a distinction between filming police officers and filming other government employees, reasoning that because prior cases arose in the context of law enforcement actions, their reference to "public officials" or "government officials" are best understood as limited references to law enforcement personnel. *See* App. 22 ("We thus also reject Pitta's overbroad argument that the references to 'public officials' or 'government officials' in [prior cases], where those terms were used to refer to police officers, extends to anyone employed by a government.").

If this Court were to address the First Amendment issues raised in this case in the context of another petition stemming from an interaction with law enforcement, it would run the risk of needing to repeat the same exercise again with different classes of civil servants to prevent lower courts from adopting a different standard for different "public officials." Since this case presents a challenge to the conduct of public officials who are not law enforcement officers, it provides an excellent vehicle to address these questions in a single case.

Second, it avoids drawing the Court into second guessing the split-second decisions of law enforcement

personnel. It is often said "hard cases make bad law." While there are egregious outliers, cases involving law enforcement officers are often hard. The cases that rise to the Court's attention are often the hardest of all. They frequently involve spur-of-the-moment decisions in complex and potentially dangerous circumstances.

This case does not involve these considerations. Instead, it involves a deliberate decision in a safe and secure context. The risks associated with making the wrong choice in a Zoom meeting are not on par with those faced by law enforcement when affecting a nighttime traffic stop. While the legal questions at play may be challenging, the facts are not, making this case an excellent vehicle for the Court to address the underlying legal questions without the complicating factors associated with law enforcement activity.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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