

No. 23-227

In The
Supreme Court of the United States

SARAH K. MOLINA and CHRISTINA VOGEL,
Petitioners,

v.

DANIEL BOOK, et al.,
Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

**BRIEF OF AMICI CURIAE FIRST AMENDMENT
SCHOLARS IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI**

MATTHEW R. CUSHING
Instructor, Appellate
Advocacy Practicum
UNIVERSITY OF COLORADO
LAW SCHOOL
2450 Kittredge Loop Road
Boulder, CO 80309
(303) 735-6554
matthew.cushing@colorado.edu

TINA R. VAN BOCKERN
Counsel of Record
STEPHEN G. MASCIOCCHI
JONATHAN BENDER
HOLLAND & HART LLP
555 17th Street, Suite 3200
Denver, CO 80202
(303) 295-8000
trvanbockern@hollandhart.com

Counsel for Amici Curiae

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of <i>Amici Curiae</i>	1
Summary of Argument	2
Argument	5
I. The First Amendment Protects The Right To Record Police Officers Performing Public Duties In Public Locations	5
A. Public-Cubed Recordings Are A Form of Expression And Protected As Speech.....	6
B. Public-Cubed Recordings Are Critical To The Speech-Creation Process	11
C. Public-Cubed Recordings Are Vital To Exercising The First Amendment-Protected Newsgathering Right.....	15
II. This Case Avoids Privacy Concerns And, Thus, Is Ideal To Confirm The Right To Record In Public-Cubed Settings	22
III. The Court Should Grant Certiorari To Ensure The Right To Record In All Jurisdictions	23
Conclusion.....	25

TABLE OF AUTHORITIES

	Page
CASES	
<i>Abrams v. United States</i> , 250 U.S. 616 (1919)	16
<i>ACLU of Ill. v. Alvarez</i> , 679 F.3d 583 (7th Cir. 2012).....	6, 14, 23, 24
<i>Anderson v. City of Hermosa Beach</i> , 621 F.3d 1051 (9th Cir. 2010).....	13
<i>Barnes v. Glen Theatre</i> , 501 U.S. 560 (1991)	8
<i>Bartnicki v. Vopper</i> , 532 U.S. 514 (2001)	22, 23
<i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972)	16
<i>Buehrle v. City of Key West</i> , 813 F.3d 973 (11th Cir. 2015).....	12
<i>City of Houston v. Hill</i> , 482 U.S. 451 (1987)	9, 18, 19
<i>City of Ladue v. Gilleo</i> , 512 U.S. 43 (1994)	16
<i>Fields v. City of Philadelphia</i> , 862 F.3d 353 (3d Cir. 2017)	4, 6, 23, 24
<i>Fordyce v. City of Seattle</i> , 55 F.3d 436 (9th Cir. 1995).....	6, 23, 24
<i>Gericke v. Begin</i> , 753 F.3d 1 (1st Cir. 2014)	6, 23, 24
<i>Glik v. Cunniffe</i> , 655 F.3d 78 (1st Cir. 2011)	6, 18, 23, 24

TABLE OF AUTHORITIES—Continued

	Page
<i>Globe Newspaper Co. v. Superior Court</i> , 457 U.S. 596 (1982)	17
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965)	12
<i>Hague v. Comm. for Indus. Org.</i> , 307 U.S. 496 (1939)	17
<i>Harper & Row Publishers, Inc. v. Nation Enters.</i> , 471 U.S. 539 (1985)	12
<i>Irizarry v. Yehia</i> , 38 F.4th 1282 (10th Cir. 2022)	6, 23, 24
<i>Lewis v. City of New Orleans</i> , 415 U.S. 130 (1974).....	9
<i>Luis v. United States</i> , 578 U.S. 5 (2016)	12
<i>Mills v. Alabama</i> , 384 U.S. 214 (1966)	18
<i>N.Y. Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	3, 16
<i>Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.</i> , 475 U.S. 1 (1986)	16
<i>Press-Enterprise Co. v. Superior Court</i> , 464 U.S. 501 (1984)	17
<i>Press-Enterprise Co. v. Superior Court</i> , 478 U.S. 1 (1986)	17
<i>Project Veritas Action Fund v. Rollins</i> , 982 F.3d 813 (1st Cir. 2020)	18

TABLE OF AUTHORITIES—Continued

	Page
<i>Richmond Newspapers Inc. v. Virginia</i> , 448 U.S. 555 (1980)	15-17
<i>Rumsfeld v. Forum for Acad. & Inst. Rts., Inc.</i> , 547 U.S. 47 (2006)	8
<i>Sharpe v. Winterville Police Dep't</i> , 59 F.4th 674 (4th Cir. 2023)	6, 24
<i>Smith v. City of Cumming</i> , 212 F.3d 1332 (11th Cir. 2000).....	6, 23, 24
<i>Spence v. Washington</i> , 418 U.S. 405 (1974)	7, 8
<i>State v. Chauvin</i> , 989 N.W.2d 1 (Minn. Ct. App. 2023)	10
<i>Texas v. Johnson</i> , 491 U.S. 397 (1989)	8
<i>Tinker v. Des Moines Indep. Cmty. Sch. Dist.</i> , 393 U.S. 503 (1969)	7
<i>Turner v. Driver</i> , 848 F.3d 678 (5th Cir. 2017).....	6, 23, 24

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. I	2, 5, 22-24
-----------------------------	-------------

STATUTES

Colo. Rev. Stat. § 13-21-131 (2021).....	3
Haw. Rev. Stat. § 710-1010(2)(c) (2021).....	18

TABLE OF AUTHORITIES—Continued

	Page
N.Y. Civ. Rights Law § 79-p(2) (2021)	18
Utah Code § 76-8-305(2) (2021)	18

RULES

Supreme Court Rule 37.2	1
-------------------------------	---

OTHER AUTHORITIES

Al Baker et al., <i>Beyond the Chokehold: The Path to Eric Garner's Death</i> , N.Y. TIMES (June 13, 2015), http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html	21
Alexander Meiklejohn, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).....	19
Ashutosh Bhagwat, <i>Producing Speech</i> , 56 WM. & MARY L. REV. 1029 (2015)	12, 13
Barry P. McDonald, <i>The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age</i> , 65 OHIO ST. L.J. 249 (2004)	16
C. Edwin Baker, <i>Autonomy and Free Speech</i> , 27 CONST. COMMENT. 251 (2011)	11
C. Edwin Baker, <i>Scope of the First Amendment Freedom of Speech</i> , 25 UCLA L. REV. 964 (1978).....	12, 13

TABLE OF AUTHORITIES—Continued

	Page
Carla Clavell Ruiz, <i>Artículo: Police Officer’s Qualified Immunity v. First Amendment ‘Right To Record’</i> , 56 REV. JURIDICA U. INTER. P.R. 179 (2022)	8, 9
Carly LaForge, <i>Note: Qualified Knowledge: The Case For Considering Actual Knowledge In Qualified Immunity Jurisprudence As It Relates To The First Amendment Right To Record</i> , 64 WM. & MARY L. REV. 851 (2023)	9, 19
Cheryl Corley, <i>How Using Videos At Chauvin Trial and Others Impacts Criminal Justice</i> , NPR (May 7, 2021, 10:28 AM ET), https://www.npr.org/2021/05/07/994507257/how-using-videos-at-chauvin-trial-and-others-impacts-criminal-justice	4
Clay Calvert, <i>The First Amendment Right to Record Images of Police in Public Places: The Unreasonable Slipperiness of Reasonableness & Possible Paths Forward</i> , 3 TEX. A&M L. REV. 131 (2015).....	15
Clay Calvert, <i>The Right to Record Images of Police in Public Places: Should Intent, Viewpoint, or Journalistic Status Determine First Amendment Protection?</i> , 64 UCLA L. REV. DISCOURSE 230 (2016)	15
David A. Strauss, <i>Persuasion, Autonomy, and Freedom of Expression</i> , 91 COLUM. L. REV. 334 (1991).....	11

TABLE OF AUTHORITIES—Continued

	Page
Jake Seiner, <i>Streaming Revolution: Protestors Make Point with Viral Clips</i> , ASSOCIATED PRESS (June 15, 2020), https://apnews.com/article/new-york-ny-state-wire-nyc-wire-rodney-king-social-media-1819708dc4fbfc920e1874b4517a66c4	10
Jane Bambauer, <i>Is Data Speech?</i> , 66 STAN. L. REV. 57 (2014).....	11, 12, 14
Joanna Stern, <i>They Used Smartphone Cameras to Record Police Brutality—and Change History</i> , WALL ST. J. (June 13, 2020, 12:01 AM), https://www.wsj.com/articles/they-used-smartphone-cameras-to-record-police-brutalityand-change-history-11592020827	13, 20, 21
Jocelyn Simonson, <i>Beyond Body Cameras: Defending a Robust Right to Record the Police</i> , 104 GEO. L.J. 1559 (2016)	6-8
Jocelyn Simonson, <i>Copwatching</i> , 104 CALIF. L. REV. 391 (2016).....	9, 20
Joe Hernandez, <i>Darnella Frazier, Teen Who Filmed George Floyd’s Murder, Wins Pulitzer Prize</i> , NPR (June 11, 2021, 4:05 PM ET), https://www.npr.org/2021/06/11/1005601724/darnella-frazier-teen-who-filmed-george-floyds-murder-wins-pulitzer-prize-citati	20
Justin Marceau & Alan K. Chen, <i>Free Speech and Democracy in the Video Age</i> , 116 COLUM. L. REV. 991 (2016)	6, 11, 14, 19, 23

TABLE OF AUTHORITIES—Continued

	Page
Ken Stone, <i>SDPD Chief Announces Immediate Ban on Chokeholds; Move Called ‘Historic’</i> , <i>TIMES OF SAN DIEGO</i> (June 1, 2020), https://timesofsandiego.com/crime/2020/06/01/sdpd-chief-tells-immediate-ban-on-chokeholds-move-called-historic/	3
Mackenzie Boyer, <i>Student Note: “I Can’t Breathe”: How Recording The Police Can Save A Life And The Justice System</i> , 29 <i>WIDENER L. REV.</i> 241 (2023).....	20
Marc Jonathan Blitz, <i>The Fourth Amendment Future of Public Surveillance: Remote Recording and Other Searches in Public Space</i> , 63 <i>AM. U. L. REV.</i> 21 (2013).....	15
Marc Jonathan Blitz, <i>The Right to Map (and Avoid Being Mapped): Reconceiving First Amendment Protection for Information-Gathering in the Age of Google Earth</i> , 14 <i>COLUM. SCI. & TECH. L. REV.</i> 115 (2013).....	14
Margot E. Kaminski, <i>Privacy and the Right to Record</i> , 97 <i>B.U. L. REV.</i> 167 (2017)	6, 22
Martin H. Redish, <i>The Value of Free Speech</i> , 130 <i>U. PA. L. REV.</i> 591 (1982)	11
Michael Levenson & Bryan Pietsch, <i>Maryland Passes Sweeping Police Reform Legislation</i> , <i>N.Y. TIMES</i> (Apr. 10, 2021), https://www.nytimes.com/2021/04/10/us/maryland-police-reform.html	3

TABLE OF AUTHORITIES—Continued

	Page
Mobile Fact Sheet, PEW RESEARCH CENTER (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/mobile	4
Neil M. Richards, <i>Intellectual Privacy</i> , 87 TEX. L. REV. 387 (2008).....	22
Rachel Treisman, <i>Man Charged With Assault On Officer, As Seen In Viral Video From Capitol Riot</i> , NPR (Jan. 20, 2021, 5:30 PM ET), https://www.npr.org/2021/01/20/958896072/rioter-charged-with-assaulting-officer-in-incident-captured-on-viral-video	4
Reha Kansara, <i>Black Lives Matter: Can Viral Videos Stop Police Brutality?</i> , BBC (July 6, 2020), https://www.bbc.com/news/blogs-trending-53239123	10, 21
Richard Pérez-Peña & Timothy Williams, <i>Glare of Video is Shifting Public’s View of Police</i> , N.Y. TIMES (July 30, 2015), https://www.nytimes.com/2015/07/31/us/through-lens-of-video-a-transformed-view-of-police.html	21
Robert Post, <i>Encryption Source Code and the First Amendment</i> , 15 BERK. TECH. L.J. 713 (2000).....	13
Robert Post, <i>Participatory Democracy and Free Speech</i> , 97 VA. L. REV. 477 (2011).....	11

TABLE OF AUTHORITIES—Continued

	Page
Ryan Autullo, <i>Austin to Pay \$10 Million to Two Men Injured by Bean Bag Munitions in 2020 Protests</i> , AUSTIN-AMERICAN STATESMAN (Feb. 17, 2022, 6:29 PM CT), https://www.statesman.com/story/news/2022/02/17/austin-settle-2-hurt-police-during-black-lives-matter-protests-justin-howell-anthony-evans-floyd/6820949001/	3
Saja Hindi, <i>Here’s What Colorado’s Police Reform Bill Does</i> , DENVER POST (June 13, 2020), https://www.denverpost.com/2020/06/13/colorado-police-accountability-reform-bill/	3
Scott Skinner-Thompson, <i>Recording as Heckling</i> , 108 GEO. L.J. 125 (2019)	7, 8, 18, 22
Seth F. Kreimer, <i>Pervasive Image Capture and the First Amendment: Memory, Discourse and the Right to Record</i> , 159 U. PA. L. REV. 335 (2011)	7, 8, 11-13, 20, 21
<i>The 2021 Pulitzer Prize Winner in Special Citations and Awards—Darnella Frazier</i> , PULITZER PRIZES, https://www.pulitzer.org/winners/darnella-frazier (last visited October 10, 2023)	10

INTEREST OF *AMICI CURIAE*¹

Amici curiae are professors who teach, research, and publish on the First Amendment and privacy law. A complete list of *amici's* names, titles, and affiliations² follows:

Marc J. Blitz is the Alan Joseph Bennett Professor of Law at Oklahoma City University School of Law.

Clay Calvert is Professor of Law Emeritus at the University of Florida and Nonresident Senior Fellow at the American Enterprise Institute.

Alan K. Chen is the Thompson G. Marsh Law Alumni Professor of Law at the University of Denver Sturm College of Law.

Margot E. Kaminski is a Professor of Law and Director of the Privacy Initiative at Silicon Flatirons at the University of Colorado Law School.

Justin Marceau is the Brooks Institute Faculty Research Scholar of Animal Law and Policy at the University of Denver Sturm College of Law.

¹ Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of the intent to file this *amicus* brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* and their counsel made a monetary contribution to its preparation or submission.

² The listing of these affiliations does not imply any endorsement of the view expressed herein by *amici's* institutions.

Helen Norton is a University Distinguished Professor and Rothgerber Chair in Constitutional Law at the University of Colorado Law School

Jocelyn Simonson is a Professor of Law and Associated Dean for Research and Scholarship at Brooklyn Law School.

Scott Skinner-Thompson is an Associate Professor of Law at the University of Colorado Law School.

Amici present this brief to: (1) explain the doctrinal and theoretical underpinnings of the clearly established First Amendment right to record public officials performing public duties in public locations; and (2) impress upon the Court the importance of granting certiorari to confirm that right and establish a uniform rule protecting that right nationwide.



SUMMARY OF ARGUMENT

Petitioners ask this Court to grant certiorari to reverse the Eighth Circuit’s erroneous decision that the right to record police officers in public was not clearly established. *Amici* agree. For the following reasons, this Court should grant certiorari and confirm that the First Amendment protects the rights of individuals to record police officers performing public duties in public spaces—the so-called “public-cubed” pattern presented by this case.

The First Amendment’s core purpose is to protect and promote the unfettered dissemination and

discussion of ideas to bring about social, political, and legal changes desired by the people. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964) (citing cases). In recent years, recording public officials performing public duties in public spaces has been the vehicle through which citizens have promoted this core reform purpose. For example, citizens' recordings of police misconduct and other events of national importance involving law enforcement (*i.e.*, the recording of the homicide of George Floyd, social justice protests, and the January 6, 2021 U.S. Capitol riot), have pushed governments across the country to make significant changes in their policies and laws, including banning the police from using chokeholds;³ reforming policing practices;⁴ eliminating qualified immunity for police officers sued in their individual capacities in state courts for violating civil rights;⁵ and banning the use of nonlethal rounds in dispersing crowds.⁶ These

³ Ken Stone, *SDPD Chief Announces Immediate Ban on Chokeholds; Move Called 'Historic,'* TIMES OF SAN DIEGO (June 1, 2020), <https://timesofsandiego.com/crime/2020/06/01/sdpd-chief-tells-immediate-ban-on-chokeholds-move-called-historic/>.

⁴ Michael Levenson & Bryan Pietsch, *Maryland Passes Sweeping Police Reform Legislation*, N.Y. TIMES (Apr. 10, 2021), <https://www.nytimes.com/2021/04/10/us/maryland-police-reform.html>.

⁵ Saja Hindi, *Here's What Colorado's Police Reform Bill Does*, DENVER POST (June 13, 2020), <https://www.denverpost.com/2020/06/13/colorado-police-accountability-reform-bill/>; *see also* Colo. Rev. Stat. § 13-21-131.

⁶ Ryan Autullo, *Austin to Pay \$10 Million to Two Men Injured by Bean Bag Munitions in 2020 Protests*, AUSTIN-AMERICAN STATESMAN (Feb. 17, 2022, 6:29 PM CT), <https://www.statesman.com/story/news/2022/02/17/austin-settle-2-hurt-police-during-black-lives-matter-protests-justin-howell-anthony-evans-floyd/6820949001/>.

recordings have also served as key evidence in investigating those suspected of unlawful behavior, whether in cases of law enforcement accused of misconduct⁷ or in instances where police officers lawfully perform their duties and protect their communities.⁸

Millions of Americans—roughly 85%—have smartphones with the ability to make audiovisual recordings. *See* Mobile Fact Sheet, PEW RESEARCH CENTER (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/mobile/>. Given the omnipresence of smartphones and online streaming platforms, there are countless ways for citizens to utilize recording devices and contribute to public discourse on moral, political, and social issues. *See Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017) (“Filming police on the job was rare then but common now. With advances in technology and the widespread ownership of smartphones, ‘civilian recording of police officers is ubiquitous.’”).

⁷ *See, e.g.*, Cheryl Corley, *How Using Videos At Chauvin Trial and Others Impacts Criminal Justice*, NPR (May 7, 2021, 10:28 AM ET), <https://www.npr.org/2021/05/07/994507257/how-using-videos-at-chauvin-trial-and-others-impacts-criminal-justice> (“the protests and court proceedings after [George Floyd’s] murder in Minneapolis might never have happened without a bystander’s video”).

⁸ Rachel Treisman, *Man Charged With Assault On Officer, As Seen In Viral Video From Capitol Riot*, NPR (Jan. 20, 2021, 5:30 PM ET), <https://www.npr.org/2021/01/20/958896072/rioter-charged-with-assaulting-officer-in-incident-captured-on-viral-video> (“A Connecticut man has been charged with assaulting an officer during the breach of the U.S. Capitol in an incident captured on video and shared widely on social media.”).

It is thus imperative for this Court to confirm that the right to record in public-cubed settings, which serves a critical democratic function, is a clearly established right protected by the First Amendment.

◆

ARGUMENT

Public-cubed recordings can be viewed through three lenses: as an inherently expressive activity, *see* part I.A; as part of the speech-creation process, *see* part I.B.; or as necessary to exercise the First Amendment-protected right of newsgathering, *see* part I.C. Under any of these lenses, recording is protected by long-established First Amendment caselaw. This case is an ideal vehicle to address this issue because the public-cubed setting does not pose any line-drawing problems between the right to privacy and the First Amendment. *See* part II. And it is untenable that the right to record, so critical to our modern democratic process, may be unprotected depending on the jurisdiction within which the recording was performed. *See* part III. Accordingly, the right to record in public-cubed settings is a clearly established right under the First Amendment and certiorari is warranted.

I. The First Amendment Protects The Right To Record Police Officers Performing Public Duties In Public Locations.

Recording in public-cubed settings is protected by the First Amendment as: (a) expression itself; (b) a step

in the process of creating speech; and (c) a newsgathering function. See Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 GEO. L.J. 1559, 1570 (2016) (noting the “general consensus” among First Amendment scholars “that to record an official in public implicates the First Amendment because it is either expressive conduct itself or conduct that is essentially preparatory to speech”); Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. REV. 167, 177 (2017) (discussing the doctrinal, theoretical, and practical reasons why “[r]ecording should be protected under the First Amendment”).⁹

A. Public-Cubed Recordings Are A Form of Expression And Protected As Speech.

The act of recording police officers performing public duties in public locations is an expressive activity, rather than mere conduct. Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991, 1013-17 (2016). Some scholarship

⁹ That is why the circuit courts that have addressed the issue (other than the Eighth Circuit in the present case) have agreed that the First Amendment protects the right to record in the public-cubed setting. See, e.g., *Sharpe v. Winterville Police Dept.*, 59 F.4th 674, 681 (4th Cir. 2023); *Irizarry v. Yehia*, 38 F.4th 1282, 1292 (10th Cir. 2022); *Fields*, 862 F.3d at 356; *Turner v. Driver*, 848 F.3d 678, 688 (5th Cir. 2017); *Gericke v. Begin*, 753 F.3d 1, 7-8 (1st Cir. 2014); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 608 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995).

regards recording in public-cubed circumstances as silent, dissenting expression. Simonson, 104 GEO. L.J. at 1573 (“[L]ike cursing, the protection of open recording is supported by First Amendment values in part because it is a provocative form of expression—it allows civilians to challenge government authority on their own terms.”); Scott Skinner-Thompson, *Recording as Heckling*, 108 GEO. L.J. 125, 140 (2019) (“The act of recording operates as an assertion of the recorder’s agency toward the object being filmed—often the government—establishing the recorder’s independence through the communicative act of recording *qua* resisting.”); Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse and the Right to Record*, 159 U. PA. L. REV. 335, 339 (2011) (“In today’s world, personal image capture is part of a medium of expression entitled to First Amendment cognizance.”).

Although the First Amendment protects the freedom of “speech,” the Court has long applied the First Amendment’s protections to nontraditional forms of expression and conduct. *See, e.g., Spence v. Washington*, 418 U.S. 405, 406 (1974) (placing peace signs made of black tape on an American flag and displaying it publicly was “speech”); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (wearing black armbands to protest the Government’s policy in Vietnam “was closely akin to ‘pure speech’ which, [the Court has] repeatedly held, is entitled to comprehensive protection under the First Amendment.”).

In deciding whether certain conduct “possesses sufficient communicative elements to bring the First Amendment into play,” *Texas v. Johnson*, 491 U.S. 397, 404 (1989), the Court has typically, but not always, focused on whether the actor’s nonverbal conduct has “[a]n intent to convey a particularized message[.]” *Spence*, 418 U.S. at 410-11; *see also Johnson*, 491 U.S. at 404. “[T]he requirement of identifying a ‘message conveyed’ is generally applied by the Court only to conduct that is not considered ‘inherently expressive.’” Kreimer, 159 U. PA. L. REV. at 372 (citing *Rumsfeld v. Forum for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 65-66 (2006)); *see also Barnes v. Glen Theatre*, 501 U.S. 560, 577 n.4 (1991) (“inherently expressive” conduct is “conduct that is normally engaged in for the purpose of communicating an idea, or perhaps an emotion, to someone else”).

Public-cubed recordings are “inherently expressive” conduct protected by the First Amendment; however, even if the Court were to apply the “message conveyed” test to public-cubed recordings, they would still be protected First Amendment speech. For example, citizen recordings of police officers can serve “as an in-the-moment form of expressive resistance to government officials—communicating a message of critique, influencing official behavior, and reclaiming public space for the people.” Skinner-Thompson, 108 GEO. L.J. at 127 (footnotes omitted); *see also Simonson*, 104 GEO. L.J. at 1573 (“Pointing a smartphone at a police officer in public is a statement to that officer; it can serve as a symbol of quiet defiance.”); Carla Clavell Ruiz,

Artículo: Police Officer’s Qualified Immunity v. First Amendment ‘Right To Record,’ 56 REV. JURIDICA U. INTER. P.R. 179, 207 (2022) (“[T]he act of recording the police in public by, for example, holding up a cell phone camera expresses the idea that citizens should be monitoring the police.”).

Such recordings are inherently expressive even if no one else is present to view the act of recording. The officers are the intended audience, and the Court has protected the First Amendment right to speak to law enforcement officers. *See City of Houston v. Hill*, 482 U.S. 451, 461-62 (1987); *Lewis v. City of New Orleans*, 415 U.S. 130, 131-32 (1974). Officers understand recordings to be expressive conduct, which is why they sometimes have negative reactions to being recorded. *See* Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 440 (2016) (“As much as police departments are starting to realize the importance of respecting cameras, incidents of bad reactions to filming police continue[.]”); *see also* Carly LaForge, *Note: Qualified Knowledge: The Case For Considering Actual Knowledge In Qualified Immunity Jurisprudence As It Relates To The First Amendment Right To Record*, 64 WM. & MARY L. REV. 851, 878 (2023) (“Given the ubiquity of recording devices (like cell phones) in the United States at present and the rising prevalence of civilian cop-watch groups, it is hardly surprising that cases of police retaliation against citizen recorders arise regularly.”).

In the context of Darnella Frazier’s recording of former police officer Derek Chauvin’s murder of

George Floyd,¹⁰ and others’ recordings of the Black Lives Matter movement,¹¹ social commentators have recognized the importance of recording police officers performing public duties in public locations. In addressing video recordings that document police killings of citizens, one commenter opined that “Black people pick up their cell phones to do two things, . . . to say to the person who is dying, ‘I will not let you die alone,’ and ‘I will carry the message forward to your family—because I know that nobody would believe what happened to you here today.’” Reha Kansara, *Black Lives Matter: Can Viral Videos Stop Police Brutality?*, BBC (July 6, 2020), <https://www.bbc.com/news/blogs-trending-53239123> (quoting Allissa Richardson, author of *BEARING WITNESS WHILE BLACK: AFRICAN AMERICANS, SMARTPHONES, AND THE NEW PROTEST #JOURNALISM* (Oxford Univ. Press 2020)).

Protecting the right to record the police advances both the autonomy of individuals who express themselves by choosing to openly film police officers in the course of duty, and the autonomy of viewers and

¹⁰ See *The 2021 Pulitzer Prize Winner in Special Citations and Awards—Darnella Frazier*, PULITZER PRIZES, <https://www.pulitzer.org/winners/darnella-frazier> (last visited October 10, 2023). Floyd’s murder conviction was affirmed in *State v. Chauvin*, 989 N.W.2d 1, 38 (Minn. Ct. App. 2023).

¹¹ See Jake Seiner, *Streaming Revolution: Protestors Make Point with Viral Clips*, ASSOCIATED PRESS (June 15, 2020), <https://apnews.com/article/new-york-ny-state-wire-nyc-wire-rodney-king-social-media-1819708dc4fbfc920e1874b4517a66c4> (“[T]he ubiquity of smart phones during nationwide protests in recent weeks has provided a window into protesters’ interactions with officers unimaginable to past generations of Americans.”).

listeners who wish to receive and consider those recordings. See Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 74 (2014); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 478 (2011); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 371 (1991). The First Amendment protects against government interference with individuals' rational, autonomous, and reflective choices as democratic agents. See C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251-53 (2011). Allowing civilians to record police officers performing their public duties in public locations serves these values. To interfere with the right to record police officers, and thus the eventual receipt of those recordings, is to interfere with the ability of citizens to exercise their autonomy to receive and analyze their own chosen body of information.

Just as writing words on a page, applying paint to canvas, or wearing a black armband are recognizably protected speech, recording is fully protected expression, rather than mere conduct. See, e.g., Marceau & Chen, 116 COLUM. L. REV. at 1013-17; Kreimer, 159 U. PA. L. REV. at 376-77.

B. Public-Cubed Recordings Are Critical To The Speech-Creation Process.

The act of making a public-cubed recording is a critical component of the speech-creation process. If

courts limit protections only to the end product (*i.e.* a publicly-disseminated recording), the government could “simply proceed upstream and dam the source” by targeting other links in the production chain (the information gathering necessary for that end product, for example). *Buehrle v. City of Key West*, 813 F.3d 973, 977 (11th Cir. 2015). Thus, courts have recognized the necessity to protect other links in the production and distribution chain to ensure that core First Amendment rights are meaningfully protected. *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965) (noting that the peripheral rights “to distribute . . . to receive . . . to read” as well as “freedom of inquiry [and] freedom of thought” were all “necessary in making the express guarantees [of the First Amendment] fully meaningful” (citations omitted)); *see also Luis v. United States*, 578 U.S. 5, 26 (2016) (Thomas, J., concurring) (“Constitutional rights thus implicitly protect those closely related acts necessary to their exercise.”).

Unlike an oral speech, in which the acts of creation and dissemination occur simultaneously, recordings typically have temporally distinct phases of creation and dissemination.¹² Ashutosh Bhagwat, *Producing*

¹² Dissemination arguably is not necessary for a recording or other work to be protected under the First Amendment. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (explaining that unpublished drafts are protected by the First Amendment). Speech need not have an external audience to be protected; a right to record protects freedom of thought, which requires no audience. Bambauer, 66 STAN. L. REV. at 82-83; Kreimer, 159 U. PA. L. REV. at 377-81; *see also* C. Edwin

Speech, 56 WM. & MARY L. REV. 1029, 1033 (2015). Take, for example, Ms. Frazier’s recording of Mr. Floyd’s murder. She disseminated the recording for public viewing a day after she recorded it. See Joanna Stern, *They Used Smartphone Cameras to Record Police Brutality—and Change History*, WALL ST. J. (June 13, 2020, 12:01 AM), <https://www.wsj.com/articles/they-used-smartphone-cameras-to-record-police-brutality-and-change-history-11592020827>. But the distinct phases of recording and posting should not detract from the importance of protecting that recording as speech.

To fully protect end-product movies or recordings such as Ms. Frazier’s video, the upstream acts of recording and gathering information must be protected as well, even though they are sometimes temporally distinct from dissemination. Robert Post, *Encryption Source Code and the First Amendment*, 15 BERK. TECH. L.J. 713, 717 (2000) (“If the state were to prohibit the use of [film] projectors without a license, First Amendment coverage would undoubtedly be triggered. This is not because projectors constitute speech acts, but because they are integral to the forms of interaction that comprise the genre of the cinema.”); Kreimer, 159 U. PA. L. REV. at 382; *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010) (“[T]he process of expression through a medium has never been thought so distinct from the expression itself that we could disaggregate Picasso from his brushes and canvas, or that

Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 993 (1978).

we could value Beethoven without the benefit of strings and woodwinds.”).

Consistent with this reasoning, courts have recognized that “[t]he act of making an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee . . . as a corollary of the right to disseminate the resulting recording.” *Alvarez*, 679 F.3d at 595. As with other forms of expression, “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.” *Id.* “[B]anning photography or note-taking at a public event would raise serious First Amendment concerns; a law of that sort would obviously affect the right to publish the resulting photograph or disseminate a report derived from the notes. The same is true of a ban on audio and audiovisual recording.” *Id.* at 595-96.

Like putting pen to paper, audiovisual recordings are part and parcel of the speech-creation process. Marceau & Chen, 116 COLUM. L. REV. at 1018; *see also* Bambauer, 66 STAN. L. REV. at 70 (“[T]he collection of data is a necessary precursor to having and sharing it.”); Marc Jonathan Blitz, *The Right to Map (and Avoid Being Mapped): Reconceiving First Amendment Protection for Information-Gathering in the Age of Google Earth*, 14 COLUM. SCI. & TECH. L. REV. 115, 154-55 (2013) (“It is hard to see how such peripheral rights could fail to include the right to have access to the media and tools that make speech possible.”). The act of

recording is therefore protected under the First Amendment.

C. Public-Cubed Recordings Are Vital To Exercising The First Amendment-Protected Newsgathering Right.

Relatedly, recording can be an access right—that is, a newsgathering right—necessary for the proper functioning of a democracy. Clay Calvert, *The Right to Record Images of Police in Public Places: Should Intent, Viewpoint, or Journalistic Status Determine First Amendment Protection?*, 64 UCLA L. REV. DISCOURSE 230, 252 (2016) (“Citizens armed with smartphones play a vital watchdog role today. . . .”); Clay Calvert, *The First Amendment Right to Record Images of Police in Public Places: The Unreasonable Slipperiness of Reasonableness & Possible Paths Forward*, 3 TEX. A&M L. REV. 131, 155 (2015) (“In journalistic terms, . . . ‘using an iPhone to snap a photograph of one’s surroundings is, in many respects, simply a modern form of note taking.’” (quoting Marc Jonathan Blitz, *The Fourth Amendment Future of Public Surveillance: Remote Recording and Other Searches in Public Space*, 63 AM. U. L. REV. 21, 76 (2013))); see also *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 585-87 (1980) (Brennan, J., concurring) (identifying “the correlative freedom of access to information”).

Specifically, recording police officers performing their public duties increases the amount of information available in the marketplace of ideas, thereby

“serv[ing] significant societal interests’ wholly apart from the speaker’s interest in self-expression[b]y protecting . . . the public’s interest in receiving information.” *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 8 (1986) (citation omitted); see also *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Like displaying a sign in a yard, image capture is “an unusually cheap and convenient form of communication,” *City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994), and allows for widespread distribution of information.

“[W]ithout some protection for seeking out the news, freedom of the press,” and other First Amendment freedoms, “could be eviscerated.” *Branzburg v. Hayes*, 408 U.S. 665, 681-82 (1972). The government could merely prohibit the process of creating the body of information (*i.e.* the recording process) underlying the press’s stories. See Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 256, 273 (2004).

This newsgathering right plays a crucial part in the First Amendment’s role in ensuring the structural soundness of democracy. See *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring). “Implicit in this structural role is not only ‘the principle that debate on public issues should be uninhibited, robust, and wide-open,’ but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed.” *Id.* (quoting *N.Y. Times Co.*, 376 U.S. at 270); see also *id.* at 584 (Stevens, J.,

concurring) (“[T]he First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government[.]”).

The First Amendment’s newsgathering right also forms the core of numerous decisions providing access to judicial proceedings, which implicate the ability of ordinary citizens to hold their public officials accountable and monitor the proper functioning of government. *See, e.g., id.* at 583-84; *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 10 (1986) (finding a public right of access to pretrial hearings in criminal cases); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505 (1984) (finding a public right of access to jury selection in criminal trials); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (striking down state statute excluding the public during cases involving minors and sex crimes). These newsgathering/access decisions are based on two principles: first, that there was a historic “tradition of accessibility” in those forums, and second, that “access to a particular government process is important in terms of that very process.” *Richmond Newspapers*, 448 U.S. at 589.

Recording a police officer performing public duties in a public location is well within this newsgathering/access right and meets both elements of the *Richmond Newspapers* test. Because the recordings occur in public, there is no question that they occur in a location in which there is a tradition of accessibility. *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (noting that public fora have historically been open to the

public “time out of mind”). And, as in the cases concerning access to the justice system, recording a police officer serving his or her public function is crucial for improving that government function. See Skinner-Thompson, 108 GEO. L.J. at 134-35; see also *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 833 (1st Cir. 2020) (“[R]ecording can itself serve ‘a cardinal First Amendment interest in protecting and promoting ‘the free discussion of governmental affairs,’” and ‘not only aids in the uncovering of abuses . . . but also may have a salutary effect on the functioning of government more generally.’” (quoting *Glik*, 655 F.3d at 82-83 and *Mills v. Alabama*, 384 U.S. 214, 218 (1966))); see also *City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987) (“The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.”).¹³

¹³ Notably, and consistent with the newsgathering/access right recognized by the courts, some state legislatures have identified the importance of balancing citizens’ right to record police activity with the general prohibition on interfering with police activity by expressly identifying public-cubed recordings as activity that does not constitute unlawful interference. See Haw. Rev. Stat. § 710-1010(2)(c) (2021) (statute prohibiting obstructing government operations creates exemption for “[a] person who is making a video or audio recording . . . of a law enforcement officer while the officer is in the performance of the officer’s duties in a public place”); N.Y. Civ. Rights Law § 79-p(2) (2021) (“A person not under arrest or in the custody of a law enforcement official has the right to record law enforcement activity and to maintain custody and control of that recording and of any property or instruments used by that person to record law enforcement activities. . . .”); Utah Code § 76-8-305(2) (2021) (“Recording the actions

Recordings of police officers performing public duties in public locations foster a better system of self-governance by allowing citizens to hold police officers accountable for potential misconduct. *See* LaForge, 64 WM. & MARY L. REV. at 878 (“citizen recording gives the general public a vehicle with which to hold law enforcement officials accountable for their official actions”). The purpose of the First Amendment is “[t]o give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal.” Alexander Meiklejohn, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 88 (1948). Collecting information about police interactions with the public fuels important policy discussions about public safety, including the consideration of information the public would not otherwise know, and thereby facilitates review of police conduct by laypeople and legal professionals alike. *See* Marceau & Chen, 116 COLUM. L. REV. at 1007, 1031; *Hill*, 482 U.S. at 463 n.12 (1987) (“The strongest case for allowing challenge [to the police] is simply the imponderable risk of abuse . . . that lies in the state in which no challenge is allowed.” (citation omitted)).

Indeed, and as noted above, recordings of police officers performing their public duties have had significant real-world impacts, “sparking outrage and

of a law enforcement officer with a camera, mobile phone, or other photographic device, while the officer is performing official duties in plain view, does not by itself constitute . . . interference with the officer.”).

dialogue about police practices throughout the nation.” Simonson, 104 CALIF. L. REV. at 408. In recent years, smartphone recordings of police officers have been widely publicized by the media and have “ma[de] the world witness police brutality toward African-Americans that was all too easy to ignore in the past.” See Stern, *They Used Smartphone Cameras to Record Police Brutality—and Change History* (chronicling a decade of cell phone videos capturing police brutality against people of color); Mackenzie Boyer, *Student Note: “I Can’t Breathe”: How Recording The Police Can Save A Life And The Justice System*, 29 WIDENER L. REV. 241, 243 (2023) (“The growing awareness [of police brutality] has stemmed from the use of video recordings, connected with the use of social media, which aids in supporting social change.”). Moreover, the video recording of Mr. Floyd’s murder has been lauded as “play[ing] a major role in igniting a global protest movement against police violence. . . .” Joe Hernandez, *Darnella Frazier, Teen Who Filmed George Floyd’s Murder, Wins Pulitzer Prize*, NPR (June 11, 2021, 4:05 PM ET), <https://www.npr.org/2021/06/11/1005601724/darnella-frazier-teen-who-filmed-george-floyds-murder-wins-pulitzer-prize-citati>.

Lastly, contemporaneous recordings can also serve to deter police misconduct in real time, promote respectful policing and accountability, and improve the functioning of a governmental institution in the process. Simonson, 104 CALIF. L. REV. at 413-16 (“studies show that police behave differently when they know they are being recorded”); Kreimer, 159 U. PA. L. REV.

at 347 (“the prospect of private image capture provides a deterrent to official actions that would evoke liability or condemnation”).¹⁴ Whether misconduct is ultimately deterred, however, does not change the fact that recording the police in public serves the core purpose of the newsgathering/access right: that is, holding our government institutions accountable and structurally improving them. Kreimer, 159 U. PA. L. REV. at 350; see also Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES at A1 (June 13, 2015), <http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> (“Absent the video, many in the Police Department would have gone on believing [Eric Garner’s] death to have been solely caused by his health problems.”); Stern, *They Used Smartphone Cameras to Record Police Brutality—and Change History* (crediting Feidin Santana’s cell phone recording of former officer Michael Slager shooting Walter Scott five times and killing him

¹⁴ But see Richard Pérez-Peña & Timothy Williams, *Glare of Video is Shifting Public’s View of Police*, N.Y. TIMES (July 30, 2015), <https://www.nytimes.com/2015/07/31/us/through-lens-of-video-a-transformed-view-of-police.html> (“Experts say that cameras probably change for the better how the police and the public treat each other, but . . . the fact that one viral video after another surfaces, showing officers treating civilians harshly, demonstrates the limits of that change.”); cf. Reha Kansara, *Black Lives Matter: Can Viral Videos Stop Police Brutality?* (“[T]he video [of George Floyd’s murder] transfixed people because of the callous nature of the killing coupled with the brazen nature of the police, who knew they were being filmed and still did it anyway.” (quoting Allissa Richardson)).

as he tried to run as key evidence in a jury convicting Slager of second degree murder).

* * *

In sum, the First Amendment affords a clearly established right to record law enforcement officers performing public duties in public locations because these recordings are: (a) a form of inherently expressive activity or protected speech, rather than mere conduct; (b) part of the speech-creation process; and (c) necessary to the exercise of the First Amendment-protected newsgathering right.

II. This Case Avoids Privacy Concerns And, Thus, Is Ideal To Confirm The Right To Record In Public-Cubed Settings.

Although some cases require courts to balance recording rights against privacy concerns, this case does not present that challenge. Like most First Amendment rights, the right to record is not absolute. *See, e.g.*, Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 393-407 (2008). As addressed above, recording can constitute direct speech or serve as a critical tool to enable future speech. At the same time, recording can potentially impinge on others' privacy, both in public and private spaces. Depending on the context, that intrusion on privacy can justify restricting another's right to free speech. *See, e.g.*, Kaminski, 97 B.U. L. REV. at 171; Skinner-Thompson, 108 GEO. L.J. at 130-31. Courts typically weigh these competing First Amendment interests in right to record cases. *See Bartnicki v.*

Vopper, 532 U.S. 514, 533 (2001) (noting that privacy and speech “are important interests to be considered on *both* sides of the constitutional calculus.”) (emphasis in original). Sometimes privacy interests can and do outweigh speech interests in recording private individuals engaged in private activities in private spaces. See Marceau & Chen, 116 COLUM. L. REV. at 1044 (“There may also be times when a recording of intimate, private details . . . invades privacy concerns so fundamental as to exceed First Amendment protection.”). This balancing inquiry is necessarily fact-specific, and thus resistant to bright-line rules.

Here, the First Amendment interests in public-cubed recordings of police officers outweigh the minimal privacy interests of the police, as the circuits considering a public-cubed scenario have held in similar circumstances. See *Irizarry*, 38 F.4th at 1292; *Fields*, 862 F.3d at 356; *Turner*, 848 F.3d at 688; *Gericke*, 753 F.3d at 8; *Alvarez*, 679 F.3d at 595; *Glik*, 655 F.3d at 82-83; *Smith*, 212 F.3d at 1333; *Fordyce*, 55 F.3d at 439. Accordingly, the Court need not grapple with the various circumstances that may require the weighing of privacy interests.

III. The Court Should Grant Certiorari To Ensure The Right To Record In All Jurisdictions.

For the foregoing reasons, the right to record in public-cubed settings is clearly established under the First Amendment. Nonetheless, today citizens in

fourteen states and the District of Columbia remain unprotected and face retaliation from officers for recording them in public-cubed settings merely because the circuit courts for those jurisdictions have not expressly declared the First Amendment right to be “clearly established.”

Under the Eighth Circuit’s decision, this clearly established right may be violated within the Eighth Circuit without recourse while the First, Third, Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits agree that the First Amendment protects citizens’ right to record. *See Sharpe*, 59 F.4th at 681; *Irizarry*, 38 F.4th at 1292; *Fields*, 862 F.3d at 356; *Turner*, 848 F.3d at 688; *Gericke*, 753 F.3d at 8; *Alvarez*, 679 F.3d at 595; *Glik*, 655 F.3d at 82-83; *Smith*, 212 F.3d at 1333; *Fordyce*, 55 F.3d at 439.

Amici therefore urge the Court to grant certiorari and confirm that citizens across the United States have a clearly established First Amendment right to record in the public-cubed setting. Recognition of this right protects individual autonomy, increases the body of knowledge informing the debate over some of the most controversial aspects of our society, and protects the values upon which our democracy depends. Recent events surrounding police accountability are central to the functioning of our democracy and to the autonomy of its citizens. Recording police officers performing public duties in public is exactly the type of activity that the First Amendment should, and does, protect.



CONCLUSION

Amici respectfully request that this Court grant the petition for writ of certiorari.

Respectfully submitted,

TINA R. VAN BOCKERN

Counsel of Record

STEPHEN G. MASCIOCCHI

JONATHAN BENDER

HOLLAND & HART LLP

555 17th Street, Suite 3200

Denver, CO 80202

(303) 295-8000

trvanbockern@hollandhart.com

MATTHEW R. CUSHING

Instructor, Appellate

Advocacy Practicum

UNIVERSITY OF COLORADO

LAW SCHOOL

2450 Kittredge Loop Road

Boulder, CO 80309

(303) 735-6554

matthew.cushing@colorado.edu

Counsel for Amici Curiae