

No. 19 – 1015

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

LEVI FRASIER,
Plaintiff-Appellee,

v.

Denver Police Officers CHRISTOPHER L. EVANS, CHARLES C. JONES, JOHN
H. BAUER, RUSSELL BOTHWELL, and JOHN ROBLEDO
Defendants-Appellants.

On Appeal From the United States District Court
for the District of Colorado
The Honorable Robert E. Blackburn
Dist. Ct. No. 15-CV-1759-REB-KLM

**BRIEF OF *AMICUS CURIAE*
NATIONAL POLICE ACCOUNTABILITY PROJECT
IN SUPPORT OF PLAINTIFF – APPELLEE LEVI FRASIER**

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae is the National Police Accountability Project (NPAP), a non-profit § 501(c)(3) corporation formed under the laws of New York. Amicus curiae does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The National Police Accountability Project (“NPAP”) was founded in 1999 by members of the National Lawyers Guild to address misconduct by police officers and their employers. NPAP has more than 550 attorney members throughout the United States; these attorneys represent plaintiffs in civil actions alleging misconduct by law enforcement officers. NPAP offers training and support to its attorney and legal worker members, educates the public about police misconduct and accountability, and provides resources for nonprofit organizations and community groups involved with victims of law enforcement misconduct. NPAP also supports legislative efforts aimed at increasing accountability and appears as amicus curiae in cases, such as this one, that present issues of particular importance for lawyers who represent plaintiffs in law enforcement misconduct actions. NPAP members who bring cases under 42 U.S.C. § 1983 frequently rely on video evidence to support their clients’ claims. NPAP members have brought actions in jurisdictions nationwide for violation of their clients’ First Amendment right to record the police.

All parties have consented to the filing of this brief.

RULE 29(a)(4)(E) CERTIFICATION

Pursuant to Fed. R. App. P. 29(a)(4)(E), amicus states that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person, other than the amicus, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

“Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” Justice Louis D. Brandeis. Police have great power. Civilian recording¹ of police officers serves the public’s vital interest in ensuring that police exercise this power lawfully. Video taken by civilians using cameras and cellphones has on many occasions exposed police misconduct that would otherwise remain hidden. Many recordings, such as the famous video of the beating of Rodney King, have begun with relatively innocent, unremarkable conduct before quickly becoming violent. The making and the use of such videos have spurred action at all levels of government to address police misconduct and to protect civil rights. Civilian recording serves important purposes not met by police dashboard and body cameras. The First Amendment right to record promotes public discourse on police violence and encourages community oversight over law enforcement.

Civilian recording of police officers guards against injustice and promotes public faith in the judicial process. Video can provide critical evidence to civil rights plaintiffs and to criminal defendants, particularly in cases that turn on police credibility. Video helps counterbalance the tendency of many judges and jurors to give greater weight to the testimony of police officers. The well-documented phenomenon of police perjury,

¹ The term *recording* refers to capturing images, audio, or both by means of a camera, cellphone, or other device, irrespective of format (e.g., videotape, digital video, or film).

or “testilying,” makes the need for this corrective imperative. Video is often more reliable than witness testimony even when the witness has no intent to deceive.

Courts should affirm that the First Amendment protects the right to record the police. Civilians recording police officers regularly encounter retaliation. Judicial recognition that such actions violate the First Amendment provides guidance to the police and protection to civilians who record them, and strengthens our democracy.

ARGUMENT

I. Videotaping police officers promotes police accountability

Our society entrusts the police with extraordinary powers—to arrest, to confine in a cell, and to use force, including deadly force. Abuse of these powers carries the potential for grave harm to democratic values and to individual lives. Police misconduct has resulted in false arrests and confinement, wrongful convictions, emotional trauma, loss of livelihood, and other financial damage, and grievous bodily injury and death. Police misconduct causes its victims and their families and communities to lose faith in law enforcement and the criminal justice system. NPAP’s guiding principle is that the public has a vital interest in ensuring that police officers exercise their authority lawfully and in holding police officers accountable when they do not.

A. Video exposes police misconduct that would otherwise remain hidden

Civilian video regularly captures police violence against bystanders that would otherwise remain hidden. In a highly publicized case from South Carolina, video taken by a bystander showed a police officer shoot and kill Walter Scott, who had been pulled over for a broken tail light.² Mr. Scott was unarmed and running away. Before the existence of the video became known, police claimed that the officer shot Mr. Scott during a struggle in which Mr. Scott had grabbed the officer's taser and attempted to use it against the officer. Without the video, this false narrative might have gone unchallenged; because of the video, which showed the officer planting the taser near Mr. Scott, the officer was fired and later pled guilty to federal civil rights violations. In numerous other cases, civilian video has shown the police version of events to be false or misleading.³

² The discussion of this case is drawn from Matthew E. Miller, et al., *How a cellphone video led to murder charges against a cop in North Charleston, S.C.*, Washington Post, (Apr. 8, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/04/08/how-a-cell-phone-video-led-to-murder-charges-against-a-cop-in-north-charleston-s-c/?utm_term=.ca2c2b580813 (last visited May 6, 2019).

³ See, e.g., Nick Wing, *12 Videos that show the difference between what cops said and what actually happened*, Huffington Post (July 28, 2015), https://www.huffpost.com/entry/police-brutality-reports_n_55b65b79e4b0074ba5a53417?guccounter=1 (last visited May 6, 2019).

B. Video aids government enforcement of civil rights protections

Civilian videos capturing police use of excessive force have been instrumental in the passage of federal legislation; in federal and state prosecutions; in reforms of police department policies; and in departmental discipline of police officers.

The 1991 civilian video showing Los Angeles police officers repeatedly striking Rodney King not only led to criminal prosecutions of the officers involved, but also helped reveal patterns of excessive force and racism in the Los Angeles Police Department.⁴ Public exposure of these evils resulted in federal legislation giving the Department of Justice broad power to bring actions against police departments having a similar pattern and practice of civil rights violations.⁵ Using this authority, the DOJ has entered agreements and consent decrees providing for reforms of police practices in many cities nationwide, including Newark, Baltimore, Seattle, New Orleans, and Cleveland.⁶ A number of these agreements contain provisions recognizing and protecting the public's right to record the police.⁷

⁴ See *Report of the Independent Commission on the Los Angeles Police Department* iii-iv (1991), available at <https://archive.org/details/ChristopherCommissionLAPD/page/n9> (last visited May 6, 2019).

⁵ See 42 U.S.C. § 14141; see generally Stephen Rushin, *Federal Enforcement of Police Reform*, 82 *Fordham L. Rev.* 3189 (2014).

⁶ For the agreements and related documents, see the web page of the Special Litigation Section of the Civil Rights Division of the Department of Justice, <https://www.justice.gov/crt/special-litigation-section-case-summaries#police-summ> (last visited May 6, 2019).

⁷ See, e.g., Consent Decree at 21-22, *United States v. Newark*, 2:16-cv-01731-

Cellphone images of police using excessive force have provided the impetus for other criminal investigations and prosecutions. On New Year's Day 2009, for example, transit police officers in Oakland detained several young African American men on a station platform, including 22-year-old Oscar Grant III, after reports of a fight on a train.⁸ As Mr. Grant lay face down with his hands cuffed, one of the officers drew his pistol and shot Mr. Grant in the back, killing him. Cellphone video of the incident, captured from multiple angles by several bystanders, led to the conviction of the officer for involuntary manslaughter.

When there is video of misconduct, police departments are more likely to discipline the officers. Multiple factors make it difficult to bring successful disciplinary charges against police officers. Among these are the well-documented “code of silence,” which deters officers from reporting other officers’ misdeeds;⁹ the reluctance of officers

MCA-MAH, ECF No. 4-1 (D.N.J. Apr. 29, 2016) (provisions protecting “First Amendment Right to Observe, Object to, and Record Officer Conduct”), *available at* Special Litigation Section web page, *supra* note 6.

⁸ Discussion of this incident is drawn from Demian Bulwa, *Mehserle convicted - Protests, Looting; Verdict: Jury finds Former BART Officer Guilty on Involuntary Manslaughter Charge*, S.F. Chron., July 9, 2010, at A1; *see also Shooting of Oscar Grant*, Wikipedia, https://en.wikipedia.org/wiki/Shooting_of_Oscar_Grant#Shooting (last visited May 6, 2019).

⁹ *See, e.g., Kinney v. Weaver*, 301 F.3d 253, 277 (5th Cir. 2002) (describing “deeply-rooted code of silence ... within the police department that, regardless what the behavior, one police officer does not report or testify against another police officer”)(citation and quotation marks omitted); *id.* at 277 n.19 (“[O]ur sister circuits have also recognized the existence of a ‘code of silence’ in law enforcement.”) (collecting cases).

investigating civilian complaints to accept the word of a civilian over that of a fellow officer; and union contracts that provide officers with elaborate procedural protections that can frustrate the search for the truth.¹⁰ Video helps overcome these barriers to enable departments to respond appropriately to police misconduct.¹¹

C. Civilian recording serves important purposes not met by police dashboard cameras and body cameras

Cameras installed on the dashboards of police vehicles and worn by police officers have gained widespread acceptance among law enforcement agencies. NPAP welcomes them, too. Used properly in accordance with well-defined policies, these technologies have many of the same benefits as cellphone cameras controlled by civilians: strengthening police accountability, increasing transparency, and documenting police-civilian encounters to assist later civil, criminal, or internal affairs proceedings. Like cellphone cameras, police cameras also deter misconduct, because some police officers behave better when they know they are being recorded.¹² Police cameras have shortcomings, however, and civilian cameras have advantages.

¹⁰ Mark Peters & Zusha Elinson, *Police Contracts Draw New Scrutiny After Shootings*, Wall Street Journal (Jan. 1, 2016), <https://www.wsj.com/articles/police-contracts-draw-new-scrutiny-after-shootings-1451696651> (last visited May 6, 2019)

¹¹ See, e.g., Jon Hurdle, *4 Philadelphia Police Officers in Videotaped Beatings Will Be Fired*, N. Y. Times (May 20, 2008), at <https://www.nytimes.com/2008/05/20/us/20police.html> (last visited May 6, 2019).

¹² See President's Task Force on 21st Century Policing, *Final Report of the President's Task Force on 21st Century Policing* 32 (2015); see also Robinson Meyer, *What to Say When the Police Tell You to Stop Filming Them*, The Atlantic (Apr. 28, 2015), <https://www.theatlantic.com/technology/archive/2015/04/what-to-say-when-the->

Civilians recording the police do not depend on police department policy or the discretion of individual police officers to decide when and what to record. A recent survey of 50 major police departments' policies on body cameras revealed that many policies either failed to make clear when officers must turn on their body cameras, gave officers too much discretion when to record, or failed to require explanations when officers did not record.¹³ Civilian recording of police activity does not rely on these uncertain factors, and it fills gaps created when police recording devices malfunction or police video is not retained.¹⁴

Video taken by civilians provides different perspectives from police video. Dashboard cameras show only events that occur in front of the police vehicle, and body cameras show events only from the police officer's point of view. Cameras controlled

[police-tell-you-to-stop-filming-them/391610/](https://www.krqe.com/news/investigations/police-tell-you-to-stop-filming-them/391610/) (last visited May 6, 2019).

¹³ See Leadership Conference on Civil Rights et al., *Police Worn Body Cameras: A Scorecard*, available at <https://www.bwccscorecard.org/> (last visited May 6, 2019); see also Jeff Proctor & Matt Grubs, *For years at Albuquerque police, option to delete body-cam footage was widespread*, KQRE News 13 (Dec. 22, 2015), <https://www.krqe.com/news/investigations/for-years-at-albuquerque-police-option-to-delete-body-cam-video-was-widespread-20180308042905985/1019591967> (last visited May 6, 2019).

¹⁴ See, e.g., Radley Balko, *80 Percent of Chicago PD dash-cam cameras are missing audio due to 'officer error' or 'intentional destruction'*, Washington Post (Jan. 29, 2016), https://www.washingtonpost.com/news/the-watch/wp/2016/01/29/80-percent-of-chicago-pd-dash-cam-videos-are-missing-audio-due-to-officer-error-or-intentional-destruction/?utm_term=.cd3cae5f8f9a (last visited May 6, 2019); Joel Rubin, *LAPD officers tampered with in-car recording equipment, records show*, Los Angeles Times, (Apr. 7, 2014), <https://www.latimes.com/local/la-xpm-2014-apr-07-la-me-lapd-tamper-20140408-story.html> (last visited May 6, 2019) (reporting tampering with about half of 80 cars in one patrol division).

by civilian parties or witnesses capture events otherwise missed by police cameras, or show the same events in a different light.¹⁵

When police and government agencies alone possess video, they may choose to keep video incriminating police officers from the public. The City of Chicago's handling of dashboard video of the fatal shooting of a 17-year-old African American young man provides a case in point. In October 2014, a Chicago police officer shot Laquan McDonald 16 times although he was walking away from the officer and posed no threat. The officer's report to the contrary was false, as the dashboard video showed.¹⁶ The City of Chicago, after paying a \$5 million settlement to Mr. McDonald's family, refused for over a year to publicly release the video. It did so only when ordered to by a judge, at which time the officer who fired the shots was charged with first-degree murder, and details of a widespread cover-up of the shooting began to emerge. Such secrecy breeds

¹⁵ See, e.g., *Taylor v. Holtmeyer*, No. 4:14-CV-3127, 2016 WL 1611435, at *3 (D. Neb. Apr. 21, 2016) (“After the punch, there were a few more seconds of wrestling, and the two men fell to the ground, out of the frame of the cruiser’s video recording.... But a video recorded on a bystander’s mobile phone picks up the scene just a few seconds later from a better vantage point.”); cf. President’s Task Force on 21st Century Policing, *Final Report*, *supra* note 12, at 32 (“Now that agencies operate in a world in which anyone with a cell phone camera can record video footage of a police encounter, [body-worn cameras] help police departments ensure that events are also captured from an officer’s perspective.”).

¹⁶ Nausheen Hussein, *Laquan McDonald timeline: The shooting, the video and the fallout*, Chicago Tribune (Sept. 12, 2016), updated January 18, 2019, <https://www.chicagotribune.com/news/laquanmcdonald/ct-graphics-laquan-mcdonald-officers-fired-timeline-htmlstory.html> (last visited May 6, 2019). The discussion in this paragraph of the incident and its aftermath is taken from this timeline.

distrust in the police and corrodes public confidence in its governing institutions. By contrast, when incidents like the Laquan McDonald shooting are caught on private civilians' cameras and uploaded to social media, the public has an opportunity to learn what happened and to work to see that justice is done. In this context, the adage of Justice Brandeis applies with force: sunlight is the best disinfectant.

The right to record police activity empowers those who exercise it. In many parts of the country, grassroots “copwatch” groups have developed as a means of strengthening community oversight over local law enforcement. The act of recording puts the police on notice that the people they serve will hold them accountable for their actions; this deters misconduct and allows for redress when deterrence fails. On a broader scale, civilian video of police violence has contributed to calls for police reform and to movements such as Black Lives Matter dedicated to this purpose.¹⁷

D. Civilian recordings of the death of Anastacio Hernandez-Rojas at the San Diego border: a case study

In May 2010, Border Patrol agents and Customs and Border Protection (CBP) officers killed Anastacio Hernandez-Rojas at the San Ysidro Port of Entry in the Tijuana-San Diego border. Officers killed him on a Friday evening around 8:00 PM near a pedestrian bridge at the busiest land border crossing in the world.¹⁸ A civilian

¹⁷ *Developments in the Law—Policing: Chapter Four: Considering Police Body Cameras*, 128 Harv. L. Rev. 1794, 1794-95 & n.9 (2015)

¹⁸ Daniel Gonzalez, Bob Ortega, and Rob O'Dell, *Immigrant's death by border agents captured on video*, The Arizona Republic (Dec. 16, 2013),

video recording would later reveal that a CBP officer repeatedly discharged a Taser at Mr. Hernandez-Rojas while he lay handcuffed, face-down on the ground, and surrounded by more than a dozen officers.¹⁹ Before the civilian-recorded video became public, CBP issued a statement stating Mr. Hernandez-Rojas had “become combative” which prompted officers to use a Taser to “subdue the individual and maintain officer safety.”²⁰ The San Diego Police Department stated Mr. Hernandez-Rojas had been fighting with federal law enforcement officers.²¹ Although the San Ysidro Port of Entry is one of the busiest border crossings in the world with extensive security measures, the United States claimed that it did not have any video of the incident showing Mr. Hernandez-Rojas allegedly fighting its officers.

But during the incident, multiple civilian witnesses began recording events, including Humberto Navarrete, who recorded video on his cell phone.²² Although certain events are not visible in Mr. Navarrete’s recorded video, Mr. Hernandez-Rojas’

<https://www.azcentral.com/story/news/nation/2014/03/28/border-force-video-immigrant-death/7017089/> (last visited April 30, 2019).

¹⁹ *Id.*

²⁰ Randal C. Archibold, *San Diego Police Investigate the Death of a Mexican Man Resisting Deportation*, N.Y. Times (June 1, 2010), <https://www.nytimes.com/2010/06/02/us/02border.html> (last visited April 30, 2019).

²¹ *Id.*

²² Jean Guerrero, *Five Years Later, Family Still Demanding Justice in Taser Death At The Border*, KPBS (May 28, 2015), <https://www.kpbs.org/news/2015/may/28/immigrants-family-demands-justice-after-tasing-dea/> (last visited April 30, 2019).

“screams for help and cries of pain are audible.”²³ Mr. Hernandez-Rojas can be heard screaming in Spanish “Help me!” and “I didn’t do anything!”²⁴ Mr. Navarrete is heard approaching an officer on the scene to note the officers’ conduct and observe that this was an “excessive use of force.”²⁵ Although several people at the Port of Entry had gathered to record events and protest what they saw, Navarrete was only one of two people who shared his video and spoke about the incident.²⁶

The second witness who shared video she had recorded, Ashley Young, stood on a pedestrian bridge overlooking the area where more than a dozen officers surrounded Mr. Hernandez-Rojas.²⁷ CBP officer Jerry Vales, the officer who repeatedly “tased” Mr. Hernandez-Rojas, realized members of the public were recording video and taking photos from the pedestrian bridge.²⁸ Officer Vales used his radio to warn other officers that people were recording video and taking photos.²⁹ He told his fellow officers that “[s]omebody needs to go over there and apprehend

²³ *Id.*

²⁴ Cleve R. Wootson Jr., *Border agents beat an undocumented immigrant to death. The U.S. is paying his family \$1 million*, Washington Post (March 28, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/03/28/border-agents-beat-an-undocumented-immigrant-to-death-the-u-s-is-paying-his-family-1-million/?utm_term=.cd84bf397e74 (last visited April 30, 2019).

²⁵ Guerrero, *supra* note 20.

²⁶ *Id.*

²⁷ Gonzalez, *supra* note 18

²⁸ Plaintiffs’ Opposition to Summary Judgment, *Estate of Anastacio Hernandez Rojas et al. v. Jerry Vales et al.*, Southern District California case no. 11-cv-00522-L-DHB, doc. 263, at 52.

²⁹ *Id.* at 53.

them, stop them from getting those photos.”³⁰ Two CBP officers, Supervisor Ramon De Jesus and Officer Ernest Kalnas, approached civilians on the pedestrian bridge.³¹ The officers seized civilians’ cell phones, examined what they had recorded, and deleted footage from the phones.³²

Ms. Young recounted that as she recorded events on the pedestrian bridge, other civilians began to warn that officers were approaching.³³ The officers forced people to stop watching and made them move along.³⁴ The officers grabbed people’s devices and stated, “What did you record? We’re going to delete it.”³⁵ Two CBP officers rapidly approached Ms. Young, who became uncomfortable because of their conduct.³⁶ An officer looked directly at Ms. Young and said, in an aggressive tone of voice, “Keep on walking,” which shook Ms. Young.³⁷ Ms. Young quickly left because she did not believe that officers wanted anyone to witness what had just happened.³⁸ Ms. Young later testified, “Surely if they don’t want anyone seeing it, they probably

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Wootson, Jr., *supra* note 22.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Plaintiffs’ Opposition to Summary Judgement, *supra* note 27, at 44.

³⁷ *Id.*

³⁸ *Id.*

wouldn't want anyone recording it either.”³⁹ To prevent officers from deleting her video, Ms. Young slipped the phone's memory card into her pants.⁴⁰

A year and a half later, Ms. Young agreed to share her cellphone video with investigative journalists.⁴¹ In their reports, federal law enforcement officers described Mr. Hernandez Rojas as “violent and aggressive, kicking and screaming at agents, continuing to be combative even as an officer shocked him with a stun gun repeatedly[.]”⁴² But Ms. Young's video showed Mr. Hernandez-Rojas handcuffed, face-down on the ground, surrounded by agents.⁴³ On the video, an agent is seen ripping off Mr. Hernandez-Rojas' pants as another repeatedly “tases” Mr. Hernandez-Rojas.⁴⁴

Ms. Young's video was featured prominently in the PBS investigative program “Need to Know” in an episode entitled “Crossing the Line at the Border” that examined Anastacio Hernandez-Rojas' death.⁴⁵ The PBS program prompted 16 members of Congress to demand an investigation by the Department of Homeland Security (DHS), the Attorney General's Office, and the DHS Office of the Inspector

³⁹ *Id.*

⁴⁰ Wootson, Jr., *supra* note 22.

⁴¹ Gonzalez, *supra* note 18.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ PBS Need to Know (October 25, 2012), *Crossing the Line at the Border*, https://www.youtube.com/watch?v=iUyy85t8E_U (last accessed April 30, 2019).

General (OIG).⁴⁶ The Justice Department convened a grand jury to investigate the officers' conduct in this case, but ultimately declined to pursue charges against the officers.⁴⁷

In response to the request by members of Congress, the Office of the Inspector General at DHS issued a report examining the use of force at CBP. It made specific recommendations to better identify and document excessive force allegations and to "act upon field audit results."⁴⁸ The OIG report referenced the PBS program that had featured Ms. Young's video.⁴⁹

Due to the increased scrutiny, CBP commissioned the Police Executive Research Forum (PERF) to conduct a review of use of force incidences by CBP officers.⁵⁰ Of particular significance, given Ms. Young's video showing the use of a Taser on Mr. Hernandez Rojas while he lay on the ground in handcuffs, PERF recommended CBP amend its Use of Force Policy Handbook on the use of electronic

⁴⁶ Press release of Congresswoman Lucille Roybal-Allard (May 10, 2012), available at <https://roybal-allard.house.gov/news/documentsingle.aspx?DocumentID=294987> (last visited April 30, 2019).

⁴⁷ Wootson, Jr., *supra* note 22

⁴⁸ Department of Homeland Security Office of Inspector General, CBP Use of Force Training and Actions to Address Use of Force Incidents (September 12, 2013), available at https://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-114_Sep13.pdf (last accessed April 30, 2019), at 1

⁴⁹ *Id.* at 2

⁵⁰ PERF report, "U.S. Customs and Border Protection Use of Force Review: Cases and Policies (February 2013), available at <https://www.cbp.gov/sites/default/files/documents/PERFReport.pdf> (last accessed April 30, 2019).

control weapons (ECWs) such as Tasers and stun guns. PERF recommended that CBP's policy be amended to state, "ECWs should be used only against subjects who are exhibiting active resistance in a manner that, in the agent's judgment, is likely to result in injuries to themselves or others. ECWs should not be used against a passive subject."⁵¹ CBP subsequently revised its Use of Force policy by incorporating many of PERF's policy recommendations.⁵² It issued an updated Use of Force Policy Handbook in May 2014.⁵³

II. Videotaping improves the fairness and integrity of the justice system

Video provides essential evidence to criminal defendants and civil rights plaintiffs. It is an antidote to police perjury and to the unreliability of eyewitness testimony more generally.

Video evidence is particularly important to individuals whose circumstances make them less credible in the eyes of many jurors—for example, people who have criminal records or who are accused of untoward or disrespectful behavior during their encounter with police. The perils faced by criminal defendants who choose to testify at

⁵¹ *Id.* at 18.

⁵² CBP Press Release (May 30, 2014), "CBP Release Use of Force Policy Handbook and Police Executive Research Forum Report," available at <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-use-force-policy-handbook-and-police-executive-research>

⁵³ See CBP Use of Force Policy, Guidelines and Procedures Handbook (May 2014), available at <https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf> (last accessed April 30, 2019).

trial are well known. These include potentially having the jury learn of past crimes and being perceived as not credible due to factors unrelated to truthfulness, such as cultural differences, nervousness, or the inability to communicate clearly and persuasively. Civil rights plaintiffs typically must testify; they face many of the same dangers. Police officers, by contrast, testify regularly as a part of their job. Judges and juries are more likely to give them the benefit of the doubt.

This is so despite the well-documented prevalence of police perjury.⁵⁴ Among its causes is that it works; many judges and jurors are unwilling, without compelling evidence, to believe that a police officer would lie. Video provides such evidence. The existence of video disproving criminal allegations made by police officers has exonerated defendants and resulted in the dismissal of prosecutions.⁵⁵ Video has

⁵⁴ See, e.g., Michelle Alexander, *Why Police Lie under Oath*, N.Y. Times (Feb. 2, 2013), <https://www.nytimes.com/2013/02/03/opinion/sunday/why-police-officers-lie-under-oath.html> (last visited May 6, 2019); Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 Am. Crim. L. Rev. 1, 5-12 (2010) (citing “several decades” of mounting evidence of police lies and collecting empirical studies and other sources); Christopher Slobogin, *Testifying: Police Perjury and What to Do About It*, 67 U. Colo. L. Rev. 1037, 1040, 1041 (1996); Morgan Cloud, *The Dirty Little Secret*, 43 Emory L.J. 1311, 1311-12 (1994) (“Judges, prosecutors, defense lawyers, and repeat offenders all know that police officers lie under oath.”).

⁵⁵ See, e.g., John Eligon & Colin Moynihan, *Police Officer Seen on Tape Shoving a Bicyclist Is Indicted*, N.Y. Times, Dec. 16, 2008, at A33, available at <https://www.nytimes.com/2008/12/16/nyregion/16critical.html> (last visited May 6, 2019).

provided critical evidence in support of plaintiffs' claims in civil rights cases.⁵⁶ It has also supported police officers' versions of events in such cases.⁵⁷

Even when police or other witnesses have no intent to deceive, testimonial evidence is subject to influences and distortions that do not affect video. Memories fade or change, as do witnesses' willingness and availability to testify. Eyewitness testimony, the basis for many wrongful convictions, is notoriously unreliable.⁵⁸ While video does not always tell the whole story, and may give rise to competing inferences, it is undoubtedly more probative, objective, and reliable than witness testimony in many

⁵⁶ See, e.g., *White v. Martin*, 425 F. App'x 736, 745 (10th Cir. 2011) (unpublished) (affirming denial of summary judgment to defendant where the record consisted entirely of video from a dashboard camera and from a cellphone; "the video evidence allows inferences in favor of Mr. White that he was choked when not resisting, was not a threat, was not attempting to flee, and was seeking assistance from the other trooper"); *Washington v. City of Seattle*, No. C13-01556 RAJ, 2015 WL 5254166, at *6 (W.D. Wash. Sept. 9, 2015) (denying summary judgment to defendants where "the video reveals that multiple officers used force on plaintiff, and although the picture is not crystal clear, a jury could infer based upon the footage, the testimony of the officers and other evidence, that the officers applied excessive force in concert against a single subject"); *Estate of Hernandez-Rojas ex rel. Hernandez v. United States*, 62 F. Supp. 3d 1169, 1178 (S.D. Cal. 2014) (denying summary judgment based in part on civilian video showing "at a minimum, that [decedent] was not resisting arrest or attempting to evade arrest" as claimed by defendants).

⁵⁷ See, e.g., *Gomez v. Lozano*, 839 F. Supp. 2d 1309, 1313–14 (S.D. Fla. 2012) ("Mr. Gomez also testified that he did not flail or move his arms during the incident, but the [cell phone] video discredits this testimony.").

⁵⁸ See, e.g., *State v. Henderson*, 208 N.J. 208, 218, 27 A.3d 872, 877–78 (2011) *holding modified by State v. Chen*, 208 N.J. 307, 27 A.3d 930 (2011) ("Study after study revealed a troubling lack of reliability in eyewitness identifications.").

cases.⁵⁹ As the examples above illustrate, video has helped ensure just outcomes in civil rights lawsuits and criminal prosecutions.

In the experience of many NPAP member attorneys, video corroborating the police misconduct victim's story is often the difference between success and failure at trial. The existence of a video is sometimes the deciding factor in a lawyer's decision whether to take a civil rights case.

III. Judicial affirmation of the First Amendment right to record provides guidance to police and protection to civilians

Although law enforcement agencies increasingly recognize the public's right to record the public actions of police officers, it is critically important for courts to affirm the First Amendment basis of this right. Civilians recording police officers regularly face harassment by the police. Police have seized or destroyed recording devices, threatened and intimidated persons recording them, physically assaulted these persons, and arrested them on pretextual grounds such as interference with a police officer or unlawful wiretapping.⁶⁰

⁵⁹ The criticism sometimes made of video—that it evidences only particular events from a particular perspective at a particular moment—applies equally to the testimony of any percipient witness.

⁶⁰ International Association of Chiefs of Police Law Enforcement Police Center (“IACP Policy Center”), *Recording Police Activity 2* (2015). For many examples of such harassment caught on video, see the website Photography Is Not a Crime, <https://photographyisnotacrime.com>.

Judicial authority recognizing the First Amendment right to record provides a partial check against this phenomenon. The International Association of Chiefs of Police recently noted that police departments have relied on the “consistency and uniformity” of case law in recent years to develop operational policies protecting civilian recording.⁶¹ Without such clarity, law enforcement officers’ judgment is “clouded by a more or less natural aversion toward uninvited recording and scrutiny of their actions.”⁶² For this reason, the United States Department of Justice has also stressed the importance of policies that “affirmatively set forth that individuals have a First Amendment right to record officers in the public discharge of their duties.”⁶³

Civilians will be hesitant to record police officers if they know that the law may not protect this activity. Only the bravest civilians are willing to risk being arrested and convicted for recording police officers.

Judicial recognition of the First Amendment right to record provides a remedy for individuals who suffer retaliation from police officers unhappy about being recorded. The proliferation of cases in this Circuit and around the country involving

⁶¹ IACP Policy Center, *Recording Police Activity*, *supra* note 24, at 2.

⁶² *Id.*

⁶³ Letter from Jonathan M. Smith, Chief, Special Litigation Section, United States Department of Justice Civil Rights Division, to the parties in *Sharp v. Baltimore City Police Dep’t, et al.* 4 (May 14, 2012) (*available at* https://www.justice.gov/sites/default/files/crt/legacy/2012/05/17/Sharp_ltr_5-14-12.pdf (last visited May 6, 2019)).

asserted violations of the right to record shows the importance of judicial protection for this “basic, vital, and well-established liberty.”⁶⁴

⁶⁴ *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011).

CONCLUSION

For the foregoing reasons, Amicus Curiae National Police Accountability Project supports Plaintiffs-Appellants' request that the decision of the district court be affirmed.

RESPECTFULLY SUBMITTED,
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because the brief contains 4728 words, excluding the portions exempted by Rule 32(f). I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and type style requirements of Rule 32(a)(6) because this brief has been prepared in the proportionally spaced typeface of 14-point Garamond.

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STATEMENT OF ORAL ARGUMENT

Amicus Curiae National Police Accountability Project do not request oral argument.

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CERTIFICATE OF DIGITAL SUBMISSION

I, Julia Yoo, hereby certify as follows:

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I hereby certify that seven hard copies of this brief, which are required to be submitted to the Clerk's Office within two days of electronic filing pursuant to 10th Cir. R. 31.5, are exact copies of the brief filed with the Clerk of the Court through the Court's CM/ECF system on May 6, 2019.

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CERTIFICATE OF SERVICE

I, Julia Yoo, hereby certify that I filed the foregoing Brief of Amicus Curiae National Police Accountability Project on May 6, 2019, via the Court's CM/ECF system, which delivered an electronic copy to all counsel of record for all parties and amici curiae. All attorneys of record for the parties and for the amici are ECF Filers and will receive service via their respective email addresses.

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