

LEGAL LIMBO: THE FIFTH CIRCUIT'S DECISION IN *TURNER v. DRIVER* FAILS TO CLARIFY THE CONTOURS OF THE PUBLIC'S FIRST AMENDMENT RIGHT TO RECORD THE POLICE

Abstract: On February 16, 2017, the U.S. Court of Appeals for the Fifth Circuit, in *Turner v. Driver*, held that the public has a First Amendment right to record the police that is subject only to reasonable time, place, and manner restrictions. Although *Turner* established that the public has a First Amendment right to film the police, the decision skirted the question of whether the particular conduct in *Turner*—video recording police activity and/or video recording the police station—was an activity protected by the First Amendment. This Comment argues that the Fifth Circuit erred in not clarifying the contours of the First Amendment right to film the police. Given the rise in smartphone usage, the public's ability to quickly disseminate videos to a large audience on social media, and the campaigns encouraging the public to record the police, the Fifth Circuit should have provided stronger guidance for the public on how to confidently exercise their First Amendment right to record the police in *Turner*.

INTRODUCTION

"I can't breathe!" panted Eric Garner.¹ Those were his last words, spoken as he was choked to death during an arrest by two New York Police Department officers in front of a convenience store in Staten Island, New York on July 17, 2014.² His crime was selling untaxed cigarettes.³ With his cellphone, Ramsey Orta, a Staten Island resident, filmed Garner's final struggle for life and created the video that ignited a national movement.⁴ If it were not

¹ See Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> [<https://perma.cc/3JA6-XYUK>] (discussing the police interaction that led to Eric Garner's death and the effects of a bystander's recorded video).

² *Id.*

³ See *id.*

⁴ See Matt Ford, *A Major Victory for the Right to Record Police*, ATLANTIC (July 7, 2017), <https://www.theatlantic.com/politics/archive/2017/07/a-major-victory-for-the-right-to-record-police/533031/> [<https://perma.cc/R52Q-AJRL>] (discussing the recent legal developments relating to the public's First Amendment right to record the police). Ramsay Orta's video, and other videos of police encounters with unarmed black men and women that rapidly circulated on social media, sparked the Black Lives Matter movement and national protests about the importance of police reform. *Id.*; Nicole Narea, *Protecting the Right to Record Police Brutality*, NEW REPUBLIC (Oct.

for Orta's video and the countless other cellphone recorded videos by members of the public that have shown the fatal interactions between citizens and police in the United States, it is unlikely that there would be such a strong national call to action for better policing policies.⁵ Over the past several years, there has been a growing movement to protect the public's right to record the police.⁶ In 2017, the U.S. Court of Appeals for the Fifth Circuit addressed the public's ability to record police activity in *Turner v. Driver*.⁷ The *Turner* majority opinion concluded that "First Amendment principles, controlling authority, and persuasive precedent demonstrate that a First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions."⁸

With this decision, the Fifth Circuit joined the majority of the Federal Courts of Appeals in ruling that the public has a First Amendment right to videotape encounters with law enforcement.⁹ Although *Turner* established that the public has a First Amendment right to film the police, it skirted the question of whether the particular conduct in *Turner*—video recording po-

7, 2016), <https://newrepublic.com/article/137533/protecting-right-record-police-brutality> [<https://perma.cc/3AZD-GJ2P>] (discussing the need for policymakers to step in and address the retaliation that citizens face from the police for video recording the police).

⁵ See Mercy Benzaquen et al., *The Raw Videos That Have Sparked Outrage Over Police Treatment of Blacks*, N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/interactive/2017/08/19/us/police-videos-race.html> [<https://perma.cc/E4JJ-WVFB>] (describing and depicting a timeline of video footage of police using excessive force and questionable police behavior with African Americans); Ford, *supra* note 4.

⁶ See Narea, *supra* note 4. There has been public pressure on states and cities to create policies that protect the right to film the police. *Id.* "Colorado passed legislation making it illegal to interfere with civilians lawfully recording the police" in May 2015. *Id.*; see COLO. REV. STAT. § 13-21-128 (2016) (giving the public a right to recover against a police officer who seizes, destroys, or damages a person's recording device or video while lawfully recording an incident with the police officer). In addition, California passed similar legislation that clarifies a First Amendment right to record the police while they are on duty in a public space, "without fear of intimidation or arrest" in 2015. Narea, *supra* note 4; see CAL. PENAL CODE § 69(b) (2016) (clarifying that a person who lawfully records a police officer is not deterring that officer from performing his or her duties). While not as forward as Colorado and California, the New York City Police Department ("NYPD") distributed a "Right to Know" internal memo with changes to the police administrative rules. Narea, *supra* note 4. These changes require officers to hand out business cards when requested and request consent to conduct searches in the absence of legal basis. See J. David Goodman, *New York Council Won't Vote on Police Reform Bills, but Agency Agrees to Changes*, N.Y. TIMES (July 12, 2016), <https://www.nytimes.com/2016/07/13/nyregion/new-york-city-council-will-not-vote-on-police-reform-measures.html> [<https://perma.cc/4NG8-NR5J>]. Nonetheless, these administrative changes do not have the same power as legislation, and compliance is contingent upon the NYPD's internal enforcement of these new rules. See *id.*

⁷ See *Turner v. Driver*, 848 F.3d 678, 687 (5th Cir. 2017).

⁸ *Id.* at 688.

⁹ See *id.* at 687 (citing *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 608 (7th Cir. 2012), *Glik v. Cunniffe*, 655 F.3d 78, 82, 85 (1st Cir. 2011), and *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000)). No federal appellate court has ruled to the contrary and the U.S. Supreme Court has not ruled on the subject. Ford, *supra* note 4.

lice activity and/or video recording the police station—was protected First Amendment activity.¹⁰ The Fifth Circuit’s failure to apply the particular facts of *Turner* to the established rule left the contours of the public’s First Amendment right to film the police in legal limbo.¹¹ In her dissenting opinion in *Turner*, Judge Edith Brown Clement recognized that the majority erred by establishing a law without particularizing it to the facts in the case.¹²

This Comment focuses on the zone of conduct protected by the public’s First Amendment right to film the police.¹³ Part I of this Comment provides an overview of *Turner*, with a focus on the Fifth Circuit’s First Amendment analysis.¹⁴ Part II discusses the current state of the law with respect to the conduct parameters of the public’s First Amendment right to video record the police and analyzes legislation passed by Colorado, Oregon, and California to secure this right.¹⁵ Lastly, Part III argues that the Fifth Circuit should have clarified exactly what conduct was clearly established after their ruling in *Turner* to add to the standard for the zone of conduct protected by the First Amendment right to record the police.¹⁶

¹⁰ See *Turner*, 848 F.3d at 685. The Fifth Circuit analyzed *Turner*’s conduct through the two-pronged qualified immunity test. *Id.* Qualified immunity protects government officials from civil liability when acting in their official capacity and when their “actions could reasonably have been believed to be legal.” *Id.* When a defendant raises a qualified immunity defense, the plaintiff has to show “(1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct.” *Id.* (internal quotations omitted). The Fifth Circuit made it clear that because the district court’s qualified immunity analysis rested on the “clearly established” prong and not the constitutional right violation prong, the Fifth Circuit would follow the same sequence of analysis. *Id.* The Fifth Circuit, however, had the discretion to analyze the constitutional right prong first. *Id.* Nevertheless, the Fifth Circuit upheld the police officers’ qualified immunity defense, reasoning that at the time of the alleged conduct, the First Amendment right to record the police had not been clearly established. See *id.* at 687. By showing that the law was not clearly established, the Fifth Circuit ended its analysis on *Turner*’s conduct and remained silent as to whether *Turner* was actually exercising a First Amendment right that was subsequently violated by a public official. See *id.*

¹¹ See *id.* at 697 (Clement, J., dissenting) (“The majority does not determine that the officers here violated *Turner*’s First Amendment rights—perhaps because it would be reasonable for security reasons to restrict individuals from filming police officers entering and leaving a police station. Because the majority does not hold that the officers actually violated the First Amendment, ‘an officer acting under similar circumstances’ in the future will not have violated any clearly established law.”) (quoting *White v. Pauly*, 137 S. Ct. 548, 552 (2017)).

¹² See *id.*

¹³ See *infra* notes 14–127 and accompanying text.

¹⁴ See *infra* notes 17–47 and accompanying text.

¹⁵ See *infra* notes 48–104 and accompanying text.

¹⁶ See *infra* notes 105–127 and accompanying text.

I. ANALYSIS OF *TURNER V. DRIVER*

In February 2017, the Fifth Circuit, in *Turner v. Driver*, ruled that the public has a First Amendment right to record the police.¹⁷ Section A of this Part examines the facts and procedural history in *Turner*.¹⁸ Section B of this Part provides an in-depth analysis of the Fifth Circuit's decision in *Turner*.¹⁹

A. *Turner v. Driver: Facts and Procedural History*

In September 2015, Phillip Turner videotaped the Fort Worth Police Station from a public sidewalk located across the street.²⁰ He was not carrying any weapons.²¹ While videotaping, two police officers approached Turner and asked to see his identification card ("ID").²² Turner refused to show the officers his ID and proceeded to ask if he was being detained.²³ One of the officers responded that Turner was being "detained for investigation and that the officers were concerned about who was walking around with a video camera."²⁴ Turner asked for which crime he was being detained and the same officer replied, "I didn't say you committed a crime."²⁵ After being asked for his ID and refusing to present it for a second time, Turner was suddenly detained, handcuffed, and placed in the back of the officers' patrol car.²⁶ Turner asked to see a supervisor.²⁷ A supervisor arrived on the scene and after a brief time, Turner was released without a charge.²⁸

Turner brought a civil rights claim under 42 U.S.C. § 1983 against the two police officers and their supervisor in the U.S. District Court for the Northern District of Texas, alleging that the officers violated his First Amendment right to record police activity and his Fourth Amendment rights to be free from "detention absent reasonable suspicion" and unlawful arrest.²⁹

¹⁷ *Turner v. Driver*, 848 F.3d 678, 687 (5th Cir. 2017).

¹⁸ See *infra* notes 20–35 and accompanying text.

¹⁹ See *infra* notes 36–47 and accompanying text.

²⁰ *Turner*, 848 F.3d at 683.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 684.

²⁹ U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); *id.* amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing

Each police officer filed a motion to dismiss, alleging that they were entitled to qualified immunity for Turner's cause of actions.³⁰

The qualified immunity doctrine protects government officials from liability for damages "when their actions could reasonably have been believed to be legal."³¹ When a defendant asserts a qualified immunity defense, the burden falls on the plaintiff to prove that it does not apply.³² According to the district court in Turner's case, to meet the qualified immunity burden, a plaintiff must show "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct."³³ The district court granted the police of-

the place to be searched, and the persons or things to be seized."); 42 U.S.C. § 1983 (2012) (providing a private remedy for violations of the Constitution by government actors); *Turner*, 848 F.3d at 684, 690.

³⁰ *Turner*, 848 F.3d at 684. Qualified immunity protects government officials from civil liability when acting in their official capacity and when their "actions could reasonably have been believed to be legal." *Id.* at 685. When a defendant raises a qualified immunity defense, the plaintiff has to show "(1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *Id.*

³¹ *Id.* at 685. Qualified immunity provides a layer of protection to government officials, thereby enabling them to fully perform their duties and exercise their discretion without the fear of financial liability or litigation. Sonja Marrett, Turkmen v. Hasty: *The Second Circuit Holds Highest Ranking Law Enforcement Officials Accountable for Post-9/11 Policies Infringing on Constitutional Rights*, 57 B.C. L. REV. E. SUPP. 194, 209 (2016), <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3506&context=bclr> [<https://perma.cc/NV7Y-NT6U>] (arguing that qualified immunity should not apply in the national security context because it prevents victims from recovering damages in constitutional and counter-terrorism lawsuits). Yet critics argue that this type of protection is unnecessary because all law enforcement officers are represented by counsel for free and are indemnified for settlements and judgments entered against them. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 59 (2017) ("In the six-year period from 2006 to 2011, law enforcement officers in forty-four of the seventy largest law enforcement agencies paid just 0.02% of the dollars awarded to plaintiffs in police misconduct suits.").

³² *Turner*, 848 F.3d at 685. There is currently a circuit split regarding who has the burden of proof on a qualified immunity defense. Kenneth Duvall, *Burdens of Proof and Qualified Immunity*, 37 S. ILL. U. L.J. 135, 143–45 (2012) (arguing that the defendant should bear the burden of proof when invoking a qualified immunity defense). The Fifth, Sixth, Seventh, Tenth and Eleventh Circuits place the burden of proof on the plaintiff. *Id.* at 143–44. Conversely, the First, Second, Third, Ninth, and D.C. Circuits place the burden of proof on the defendant. *Id.* at 144–45. In addition, the Fourth and Eighth Circuits take a slightly different approach. *Id.* at 145. The Eighth Circuit places the burden of establishing that the law was clearly established on the plaintiff and places the burden of establishing that the defendant did not violate a constitutional right on the defendant. *Id.* The Fourth Circuit does the opposite. *Id.*

³³ *Turner*, 848 F.3d at 685; see also *Pearson v. Callahan*, 555 U.S. 223, 232, 236 (2009) (laying out the two-pronged qualified-immunity test and granting judicial discretion regarding which prong to address first). In 2001, in *Saucier v. Katz*, the U.S. Supreme Court ruled that the qualified-immunity test must be addressed in proper sequence. 533 U.S. 194, 201 (2001) (requiring that courts must first answer whether the alleged facts violated a constitutional right, and if a violation occurred, the court would then continue to the "clearly established" prong). *Id.* The Court changed this requirement in 2009, in *Pearson v. Callahan*, and allowed courts to use their discretion to decide which prong to address first. 555 U.S. at 236 (relaxing the sequence and granting judicial discretion for analyzing qualified immunity).

ficers' motions to dismiss, finding that Turner did not show that the police officers acted unreasonably and in violation of any of his clearly established constitutional rights.³⁴ Turner appealed the decision to the Fifth Circuit.³⁵

B. Discussion of the Fifth Circuit's Decision in Turner v. Driver

On February 16, 2017, the Fifth Circuit affirmed in part and reversed and remanded in part the district court's order dismissing Turner's 42 U.S.C. § 1983 claims on the basis of qualified immunity.³⁶ The Fifth Circuit reasoned that at the time of Turner's arrest, neither the U.S. Supreme Court nor the Fifth Circuit had determined whether First Amendment protections extended to filming police.³⁷ Therefore, the court could not say that the law clearly and unambiguously prohibited the police officers' conduct.³⁸ Given the circuit split regarding whether or not the First Amendment right to film the police has been clearly established, the Fifth Circuit affirmed the district court's ruling that the police officers were entitled to qualified immunity against Turner's First Amendment civil rights violation allegation.³⁹ The Fifth Circuit's holding in *Turner* set precedent by ruling, as a matter of first impression, that recording police activity is protected by the First Amendment, subject to reasonable time, place, and manner restrictions.⁴⁰

Although the Fifth Circuit affirmed the dismissal of Turner's First Amendment claim, it reversed the district court's dismissal of Turner's Fourth Amendment claim by holding that the police officers were not entitled to qualified immunity under Turner's Fourth Amendment rights violation that claimed that the police officers arrested him without probable cause.⁴¹ The Fifth Circuit reasoned that the Fourth Amendment right to be

³⁴ *Turner*, 848 F.3d at 684.

³⁵ *Id.*

³⁶ *Id.* at 696.

³⁷ *See id.* at 686 (stating that because neither of these courts had addressed the public's First Amendment right to record the police prior to *Turner*, then the right was not clearly established in the Fifth Circuit's jurisdiction).

³⁸ *See id.* at 686–87 (“Circuit courts are split as to whether or not there is a clearly established First Amendment right to record the public activities of police. The circuit courts are not split, however, on whether the right exists.”).

³⁹ *Id.* at 686 (“If judges . . . disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.”) (quoting *Wilson v. Layne*, 526 U.S. 603, 618 (1999)). When the state of a constitutional law is underdeveloped, police officers cannot be expected to predict the future course of the law. *Wilson*, 526 U.S. at 617.

⁴⁰ *Turner*, 848 F.3d at 687 (“Although the right was not clearly established at the time of Turner's activities, whether such a right exists and is protected by the First Amendment presents a separate and distinct question. Because the issue continues to arise in the qualified immunity context, we now proceed to determine it for the future.”).

⁴¹ *See id.* (the Fifth Circuit examined the plaintiff's First and Fourth Amendment claims and held that the officers were not entitled to qualified immunity from the plaintiff's § 1983 claim that the officers violated his Fourth Amendment rights by arresting him without probable cause).

free from arrest without probable cause was clearly established and that no objectively reasonable person would believe there to be probable cause to arrest Turner given the circumstances.⁴²

Judge Clement dissented from the Fifth Circuit's majority opinion with regard to the establishment of a First Amendment right to film the police and the reversal of the qualified immunity ruling for the officers under Turner's Fourth Amendment unlawful arrest claim.⁴³ In discussing the First Amendment right to film the police, she focused on the Supreme Court's insistence that expressly stated, recognized laws should be unambiguous, rather than obscure or abstract.⁴⁴ In fact, Judge Clement asserted that clearly established law should be specific to the unique circumstances of the case.⁴⁵ She reasoned that the majority asserted a First Amendment right to film the police that was unnecessary and unconnected to the particular facts in the case.⁴⁶ Thus, by failing to connect the facts of *Turner's* case to the First Amendment right the majority subsequently established and by failing to determine if the police officers actually violated that right, the Fifth Circuit did not properly set out the law as they intended.⁴⁷

II. ANALYSIS OF THE ZONE OF CONDUCT PROTECTED BY THE PUBLIC'S FIRST AMENDMENT RIGHT TO RECORD THE POLICE IN CASE LAW AND STATE LEGISLATION

In *Turner v. Driver*, the U.S. Court of Appeals for the Fifth Circuit addressed whether the public has a First Amendment right to videotape the actions of police officers.⁴⁸ The Fifth Circuit held that the public does have a right to film law enforcement, but that the recording of police officers may be curtailed by reasonable time, place, and manner limitations.⁴⁹ The Fifth Circuit agreed with every circuit that has ruled on this question that the First Amendment principles of free speech extend to the right to film the

⁴² *Id.* at 694 (explaining that Turner neither aggressively threatened—or otherwise provoked—the officers nor attempted to flee or leave the scene).

⁴³ *Id.* at 696 (Clement, J., dissenting).

⁴⁴ *Id.* at 696–97 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)).

⁴⁵ *Id.* at 697 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

⁴⁶ *Id.* (“To the extent there is any consensus of persuasive authority, those cases focus only on the narrow issue of whether there is a First Amendment right to film the police ‘carrying out their duties in public.’ Turner did not allege that he filmed police officers conducting their public duties, but rather that he filmed a police station.”) (internal citations omitted).

⁴⁷ *See id.* (“Because the majority does not hold that the officers actually violated the First Amendment, ‘an officer acting under similar circumstances’ in the future will not have violated any clearly established law.”).

⁴⁸ *Turner v. Driver*, 848 F.3d 678, 690 (5th Cir. 2017).

⁴⁹ *Id.* The Fifth Circuit did not find it necessary to address the time, place, and manner restrictions in *Turner* because there were none imposed or in place at the time of the plaintiff's actions. *Id.*

police.⁵⁰ A significant reason for the Fifth Circuit's determination was that "filming the police contributes to the public's ability to hold the police accountable, ensure that police officers are not abusing their power, and make informed decisions about police policy."⁵¹ In making this determination, the court relied on precedent that focused on the First Amendment's protection of news-gathering, film, and the right to receive information and ideas.⁵² Yet, the court did not explain which specific time, place, and manner restrictions would be reasonable in the situation that arose in *Turner*.⁵³ The only clarifications given regarding these restrictions was that they must be "narrowly tailored to serve a significant government interest."⁵⁴ Section A of this Part focuses on the case law that developed the First Amendment right to record the police.⁵⁵ Section B of this Part focuses on state legislation that codifies this right.⁵⁶

A. Case Law Establishing the First Amendment Right to Record the Police

Prior to *Turner*, there was a growing consensus among the courts that First Amendment rights exist for individuals who video record the public ac-

⁵⁰ See *id.* at 687; *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 608 (7th Cir. 2012) (holding that the First Amendment protects the audio recording of police and concluding that an Illinois wiretapping statute burdens the public First Amendment rights); *Glik v. Cunniffe*, 655 F.3d 78, 82, 85 (1st Cir. 2011) (holding that the public has a First Amendment right to videotape the police given First Amendment principles and case law); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (holding that there exists a First Amendment right to videotape police subject to time, manner, and place restrictions).

⁵¹ *Turner*, 848 F.3d at 689. The Fifth Circuit further reasoned that "filming the police also frequently helps officers; for example, a citizen's recording might corroborate a probable cause finding or might even exonerate an officer charged with wrongdoing." *Id.*

⁵² *Id.* at 688 (describing the First Amendment's history of protecting film and newsgathering). The First Amendment protects newsgathering "from any source by means within the law." *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978). This protection extends to films and the act of making films. *Kingsley Int'l Pictures Corp. v. Regents of Univ. of State of N.Y.*, 360 U.S. 684, 688 (1959). In addition to the First Amendment's protection of the broader right to film, the principles underlying the First Amendment support the particular right to film the police because it leads to government accountability. *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

⁵³ *Turner*, 848 F.3d at 690.

⁵⁴ *Id.* Restrictions on the public's right to record police receive heightened judicial scrutiny, yet it is not quite on the level of strict scrutiny. See Elizabeth J. Frawley, *No Calling Cut: The Political Right to Record Police*, 17 U. PA. J. CONST. L. 287, 295–96 (2014) (arguing that restrictions on the right to record the police should be given the highest level of scrutiny given police officer's power and potential for abuse). This is because although these restrictions are content neutral, they encompass political speech that the First Amendment protects, resulting in the higher review standard. *Id.*

⁵⁵ See *infra* notes 57–88 and accompanying text.

⁵⁶ See *infra* notes 89–103 and accompanying text.

tivities of police.⁵⁷ In 2000, in *Smith v. City of Cumming*, the U.S. Court of Appeals for the Eleventh Circuit held that a plaintiff had a First Amendment right to photograph or videotape police conduct on public property because the First Amendment protects the public's ability to gather information on public officials who are acting in their official capacities in public places.⁵⁸ In *Smith*, the plaintiff, a member of the public, believed that the Cumming Police Department was inappropriately stopping vehicles in order to increase ticket revenue.⁵⁹ Accordingly, the plaintiff used a police scanner to track police cars and videotape random traffic stops.⁶⁰ The plaintiff videotaped these traffic stops from public property and did so without interfering with the police officers' ability to do their work.⁶¹ Nonetheless, the police obtained an arrest warrant for plaintiff and arrested him at his job.⁶² The case regarding plaintiff's arrest was dismissed and he filed a § 1983 complaint against the city alleging First Amendment violations.⁶³ Even though the Eleventh Circuit reasoned that the public had the right to record the activity of police on public property, it held that the plaintiff did not offer sufficient evidence to prove the actions of the police rose to the level of a § 1983 claim.⁶⁴

In 2007, in *Glik v. Cunniffe*, the U.S. Court of Appeals for the First Circuit provided more clarity on the types of conduct included within the public's First Amendment right to record the police.⁶⁵ In *Glik*, the plaintiff was walking past the Boston Commons—a public park in Boston—when he witnessed police officers arresting a man.⁶⁶ After hearing a bystander comment on the officers' use of excessive force during the arrest, the plaintiff used his cell phone to film the officers from a distance, without speaking to

⁵⁷ See *ACLU of Ill.*, 679 F.3d at 608 (holding that the First Amendment protects audio recording police officers); *Glik*, 655 F.3d at 82 (holding that the First Amendment protects video recording police officers); *Smith*, 212 F.3d at 1333 (holding that the public has a First Amendment right to video record police officers subject to time, place, and manner restrictions).

⁵⁸ 212 F.3d at 1333; see also *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a broad First Amendment right to record incidents of general public concern); *Blackston v. Alabama*, 30 F.3d 117, 120 (11th Cir. 1994) (holding that filming public meetings is protected by the First Amendment).

⁵⁹ Taylor Robertson, *Lights, Camera, Arrest: The Stage Is Set for a Federal Resolution of a Citizen's Right to Record the Police in Public*, 23 B.U. PUB. INT. L.J. 117, 131 (2014) (summarizing the facts of *Smith*).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 131–32.

⁶³ *Id.* at 132.

⁶⁴ See *Smith*, 212 F.3d at 1333 (stating that under 42 U.S.C. § 1983, the plaintiffs needed to prove that the police's conduct deprived them of a constitutional right, and even though the plaintiffs had a right to videotape police activities, they did not provide enough evidence to show that the police's actions violated that right).

⁶⁵ 655 F.3d at 82 (clarifying that members of the public should be a safe and appropriate distance away from the police officer so that they do not interfere with the police's duties).

⁶⁶ *Id.* at 79.

the officers or otherwise interfering with their actions in any way.⁶⁷ After informing the officers that he was video recording the arrest, the plaintiff was arrested on several charges, including for a violation of the Massachusetts wiretap statute.⁶⁸ The plaintiff brought a civil rights action against the officers and the City of Boston alleging First and Fourth Amendment rights violations under 42 U.S.C. § 1983; the officers raised qualified immunity defenses.⁶⁹

The First Circuit started their analysis of the First Amendment civil rights claim with the first prong of the qualified immunity test by considering whether there is a constitutionally protected right to record law enforcement acting in their official capacity in public.⁷⁰ The court held that the answer was a resounding yes.⁷¹ Although the First Amendment specifically mentions the press, given the technological advances, there is now a fine line between a journalist and a private citizen.⁷² Moreover, the increased availability and usage of smart phones and cameras make news creation just as likely to come from citizens on their personal devices as a professional journalist.⁷³ Thus, the *Glik* court held, the First Amendment news gathering protections must extend to the public.⁷⁴ With this analysis, the First Circuit

⁶⁷ *Id.* at 80.

⁶⁸ *Id.* at 86–87. The Massachusetts wiretap statute makes it a crime to “willfully commit[] an interception . . . of any wire or oral communication.” *Id.* at 86 (quoting MASS. GEN. LAWS ch. 272, § 99(C)(1) (2010)). The court noted that the term “interception” under the statute is defined to mean “to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication.” *Id.* (quoting ch. 272, § 99(B)(4)). The *Glik* court had to determine if the plaintiff had secretly videotaped the police officers. *Id.* at 87. The court found that the plaintiff openly recorded the police because his phone was in plain view; thus, he was not in violation of the wiretap law. *Id.*

⁶⁹ *Id.* at 80.

⁷⁰ *See id.* at 82 (using its discretion and analyzing the constitutional right prong of the qualified immunity doctrine first in order to establish the right to record the police). Most courts have used this discretion to avoid the constitutional right prong and have only analyzed the clearly established prong. *See* Karen M. Blum, *Qualified Immunity: Further Developments in the Post-Pearson Era*, 27 *TOURO L. REV.* 243, 248 (2011) (arguing that the majority of courts assess the second prong of the qualified immunity test first to avoid analyzing whether a constitutional rights violation occurred).

⁷¹ *Glik*, 655 F.3d at 82 (citing *Houchins*, 438 U.S. at 11) (mentioning the right to gather news from any lawful means); *see also* *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978) (reasoning that the First Amendment prevents government from limiting the stock of information from which public may draw); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (reiterating the well-established and constitutionally protected right to receive information and ideas).

⁷² *Glik*, 655 F.3d at 84; Kate Bulkley, *The Rise of Citizen Journalism*, *GUARDIAN* (Jun. 10, 2012), <https://www.theguardian.com/media/2012/jun/11/rise-of-citizen-journalism> [<https://perma.cc/9NC6-T8NY>] (discussing how the increase in technology is changing the documentary filmmaking landscape by allowing citizen journalists to add a richer dimension to current affairs).

⁷³ *Glik*, 655 F.3d at 82; Bulkley, *supra* note 72 (discussing that the new digital world of social media makes it difficult for the public to judge the value of an amateur video shot on a cellphone against a documentary broadcasted on traditional television).

⁷⁴ *See Glik*, 655 F.3d at 82.

concluded that First Amendment principles encompassed filming police officers performing their duties in a public place.⁷⁵

In *Glik*, the First Circuit focused on two parameters when deciding that the plaintiff had a First Amendment right to record the police.⁷⁶ First, it focused on the location of the videotaping, the Boston Common, noting that it was “the oldest city park in the United States and the apotheosis of a public forum.”⁷⁷ Given the traditionally public nature of the park, the state’s ability to limit free speech there was stringently constrained.⁷⁸ Second, the First Circuit focused on the plaintiff’s distance from the defendants while filming.⁷⁹ The court stated that the plaintiff recorded the officers from a safe, appropriate distance and neither verbally harassed them nor interfered with their actions in any manner, only answering their questions and statements.⁸⁰ Given these facts, the court reasoned that the plaintiff’s peaceful recording of an arrest in a public space did not interfere with the police officers’ performance of their duties.⁸¹

Building on both the persuasive and controlling decisions handed down by the various Courts of Appeals that have ruled on the First Amendment right to record the police, in 2015, in *Higginbotham v. City of New York*, the U.S. District Court for the Southern District of New York held that the right to record police activity “at least in the case of a journalist who was otherwise unconnected to the events recorded, was in fact ‘clearly established.’”⁸² While the *Higginbotham* court focused its holding on the videorecorder being a journalist who was a nonparticipant in the events that he was recording, its reasoning contributed to a deeper understanding of the zone of conduct protected by this First Amendment right.⁸³

⁷⁵ *Id.*

⁷⁶ *See id.* at 84.

⁷⁷ *Id.*

⁷⁸ *Id.* (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)) (emphasizing that the U.S. Supreme Court is strongly against the state limiting the public’s First Amendment activity in traditionally public spaces).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *See id.*

⁸² 105 F. Supp. 3d 369, 380 (S.D.N.Y. 2015); *see also Alvarez*, 679 F.3d at 608 (invalidating a state’s eavesdropping statute and holding that the First Amendment protects audio recording police officers performing their duties in public); *Glik*, 655 F.3d at 82 (holding that the First Amendment protects video recording police officers and that right was clearly established); *Smith*, 212 F.3d at 1333 (recognizing First Amendment right to video record police officers subject to time, place, and manner restrictions); *Fordyce*, 55 F.3d at 439 (recognizing the First Amendment right to film matters of public interest after he plaintiff was arrested for filming the police at a protest).

⁸³ *See Higginbotham*, 105 F. Supp. 3d at 381 (clarifying that the First Amendment right to record police exists when the recording is done from a reasonable distance and ends when the recording prevents the police officers from fully performing their duties). The plaintiff was in this

In *Higginbotham*, the plaintiff was arrested while filming an arrest during an Occupy Wall Street demonstration in Manhattan, New York from the top of a telephone booth.⁸⁴ Subsequently, the plaintiff filed § 1983 claims for First and Fourth Amendment violations.⁸⁵ The court held that the plaintiff's First Amendment rights were violated.⁸⁶ Nonetheless, in making that determination, the court noted that the right to video record police is not without limits.⁸⁷ The court explained that the right to record the police may not apply: 1) "in particularly dangerous situations," (2) "if the recording interferes with the police activity," (3) "if [the recording] is surreptitious," (4) "if [the recording] is done by the subject of the police activity," or (5) "if the police activity is part of an undercover investigation."⁸⁸ These five explicit exemptions served to broadly expand the understanding of the approved and unapproved conduct for filming the police.⁸⁹

B. State Legislation on the Right to Record the Police

Several states have passed legislation to protect the public's First Amendment right to record the police.⁹⁰ These statutes codify the public's

zone because he did not interfere with the arrest that he was recording and was at the protest in his role as a professional journalist. Eugene Volokh, *First Amendment Generally Protects Videorecording of Police, and This Right Is 'Clearly Established,'* WASH. POST (May 14, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/14/first-amendment-generally-protects-videorecording-of-police-and-this-right-is-clearly-established/?utm_term=.d262501cced8 [<https://perma.cc/NG29-PAV3>] (arguing that the court's holding on the clearly established prong of the qualified immunity test is a big win for the plaintiff because it enables him to collect damages from the defendant). Thus, a reasonable police officer would have been on notice that retaliating against the plaintiff for filming violated his First Amendment rights. *Id.*

⁸⁴ See *Higginbotham*, 105 F. Supp. 3d at 372.

⁸⁵ *Id.* at 372, 378 (alleging a false arrest that violated plaintiff's Fourth Amendment rights and a First Amendment retaliation claim; these claims are similar to the plaintiff's claims in *Turner*).

⁸⁶ *Id.* at 381, 382.

⁸⁷ *Id.* at 381.

⁸⁸ *Id.* The court held that the plaintiff's conduct was protected by the First Amendment. *Id.* This was because he was a professional journalist and was at the demonstration to record it and not to participate in it. *Id.* Additionally, there was no record that showed that his filming interfered with the police performing their duties during the arrest. *Id.* The court concluded that "a reasonable police officer would have been on notice that retaliating against a non-participant, professional journalist for filming an arrest under the circumstances alleged would violate the First Amendment." *Id.*

⁸⁹ See *id.*; 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, 139-62 (2015) (discussing the history of the First Amendment right to record the police and explaining case law that has articulated the contours of that right).

⁹⁰ See CAL. PENAL CODE § 69(b) (2016) (providing that a person who takes a photograph or makes an audio or video recording of a police officer in a public place is not preventing that officer from performing his duties); COLO. REV. STAT. § 13-21-128 (2016) (giving the public the right to recover civil damages when a police officer destroys or unlawfully seizes video from a

First Amendment right to record the police, but they still leave uncertainty regarding the contours of that right.⁹¹ Specifically, there is ambiguity around what constitutes police activity.⁹² The state of Colorado passed a statute that broadly interprets the zone of conduct protected by the First Amendment right to record the police.⁹³ Colorado's statute, which was enacted on May 20, 2015, gives members of the public the right to record any incident involving a police officer.⁹⁴ It also allows the public to maintain both custody and control of the recording and the device used to record, preventing the police from seizing the recording device without a search warrant or subpoena.⁹⁵ Yet, the Colorado statute fails to define the term "an incident."⁹⁶ This lack of a clear definition expands when the public can record the police, and leaves it to the courts to interpret the phrase "an incident."⁹⁷ Courts may even interpret the Colorado law as giving the public a much broader right than just recording the police publicly performing their duties.⁹⁸

Oregon and California have also passed legislation in 2015 that protects the First Amendment right to record the police, but the language in both pieces of legislation is more specific than the language found in the Colorado statute.⁹⁹ Oregon's statute allows the public to record a conversation in which a police officer is a participant if the officer is acting in an official capacity, the recording is made "openly and in plain view of the participants in the conversation," the conversation "recorded is audible to the

person lawfully recording the police officer); OR. REV. STAT. § 165.540(5) (2016) (providing that recording a police officer is not a crime of interfering with the police officer).

⁹¹ CAL. PENAL CODE § 69(b); COLO. REV. STAT. § 13-21-128; OR. REV. STAT. § 165.540(5).

⁹² See CAL. PENAL CODE § 69(b) (stating that the public has the right to record the police in public places but does not explicitly limit that right to the police performing their official duties); COLO. REV. STAT. § 13-21-128 (giving the public the ability to record "an incident" involving the police); OR. REV. STAT. § 165.540(5) (giving the public the ability to record the police conducting official duties, but failing to define "official duties").

⁹³ See COLO. REV. STAT. § 13-21-128. The Colorado law was created and passed after Colorado residents complained about police officers confiscating their recordings of the police. See Lindsay Watts, *'Right to Record' Bill Addresses Citizens' Right to Film Law Enforcement*, DENVER CHANNEL (Mar. 22, 2015), <http://www.thedenverchannel.com/news/politics/right-to-record-bill-addresses-citizens-right-to-film-law-enforcement> [https://perma.cc/FA49-CD2F]. The police shooting of Jessica Hernandez in Colorado prompted the legislation when another resident who tried to film the shooting was apprehended and prevented from filming the officers. See *id.* (arguing that the number of news reports about the police taking away recording devices from the public prompted the state legislators to act and create a bill addressing this issue).

⁹⁴ COLO. REV. STAT. § 13-21-128.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See *id.*

⁹⁸ See *id.* The use of the words "an incident" shifts the focus from what the police are doing when they are being filmed to where the police are and how public that place is. *Id.*

⁹⁹ Compare CAL. PENAL CODE § 69(b), with OR. REV. STAT. § 165.540(5).

person by normal unaided hearing,” and the person recording is in a place he or she has the right to be.¹⁰⁰ Although Oregon’s statute is much more specific than Colorado’s statute regarding the parameters of when the public can record the police, it fails to define “official duties.”¹⁰¹ This results in the lack of clarity regarding exactly what the public can record the police doing.¹⁰² California’s statute regarding recording police officers has similar language to Oregon’s statute, but instead of giving the public the ability to record the police “performing official duties,” it allows the public to record the police “while the officer is in a public place or the person taking the photograph or making the recording is in a place he or she has the right to be.”¹⁰³ The California statute focuses on where the police officers are instead of what they are doing when they are being recorded.¹⁰⁴

III. THE FIFTH CIRCUIT’S FIRST AMENDMENT HOLDING IN *TURNER* AND THE NEED FOR A CLEAR STANDARD

Although the U.S. Court of Appeals for the Fifth Circuit’s 2017 decision in *Turner v. Driver* established that the First Amendment right for the public to record the police exists, it did not further clarify the conduct included within the parameters of that right.¹⁰⁵ This is particularly important because it is ambiguous whether the Fifth Circuit’s holding aligns with the

¹⁰⁰ OR. REV. STAT. § 165.540(5). Prior to the enactment of the law, it was a crime to record a conversation in Oregon without specifically informing the parties to the conversation. *Victory! The Right to Film the Police Passes the Oregon Legislature*, ACLU OR. (June 16, 2015), <https://aclu-or.org/en/legislation/victory-right-film-police-bill-passes-oregon-legislature> [<https://perma.cc/ET7D-ESQ4>]. The law amended Oregon’s eavesdropping statute by adding an exemption for recording police officers. *Id.*; § 165.540(1)(c) (stating that it is unlawful to record conversations without the consent of all participants). This exemption changed the requirement that a member of the public specifically inform the officer that he or she is being recorded to allowing a member of the public to record the officer without consent if, among other requirements, “the recording is made openly and in plain view.” § 165.540(5)(b)(B).

¹⁰¹ Compare OR. REV. STAT. § 165.540(5), with COLO. REV. STAT. § 13-21-128.

¹⁰² Compare OR. REV. STAT. § 165.540(5), with COLO. REV. STAT. § 13-21-128. These bills highlight that lack of a clear definition of “official duties” makes it difficult for the public to know when they can and cannot record the police and may lead to members of the public exercising their right to record the police incorrectly. Compare OR. REV. STAT. § 165.540(5), with COLO. REV. STAT. § 13-21-128.

¹⁰³ CAL. PENAL CODE § 69(b). The office of the state senator who introduced the bill that would become § 69(b), Senator Ricardo Lara, released a statement on the day that the bill was signed into law by California Governor Jerry Brown that provided further insight on why the bill was created. *Governor Brown Signs Right to Record Act*, RICARDO LARA (August 11, 2015), <http://sd33.senate.ca.gov/news/2015-08-11-governor-brown-signs-right-record-act> [<https://perma.cc/5CVL-QKS9>]. The statement notes that “[a]t a time when cell phone and video footage is helping steer important national civil rights conversations, passage of the Right to Record Act sets an example for the rest of the nation to follow.” *Id.*

¹⁰⁴ CAL. PENAL CODE § 69(b).

¹⁰⁵ See *Turner v. Driver*, 848 F.3d 678, 697 (5th Cir. 2017) (Clement, J., dissenting).

facts in the case.¹⁰⁶ By failing to particularize the facts in the case to the established First Amendment right to record the police, the Fifth Circuit failed to add to the zone of conduct protected by this right and has left the public without a clear path forward.¹⁰⁷

Turner's majority opinion and dissent make it clear that at no point did the Fifth Circuit classify the plaintiff's action to determine whether he was filming the police station, the police entering and exiting the police station, and/or both.¹⁰⁸ Moreover, the Fifth Circuit failed to determine if Turner had a protected First Amendment right to record the police during the event in question.¹⁰⁹ These determinations are absolutely pivotal to further establishing the contours of the First Amendment right to film the police, especially given that other Courts of Appeals, having established this right, did so when a member of the public was arrested for filming a police arrest or traffic stop.¹¹⁰

Judge Clement focused on this ambiguity in her dissent in *Turner*.¹¹¹ She argued that there is a consensus of persuasive authority on the First Amendment right to film the police acting in their official capacity as officers in public.¹¹² Yet, at no point did the Fifth Circuit determine whether or not the police were carrying out their duties in public in *Turner*.¹¹³ Judge Clement focused on the point that Turner alleged that he was filming the police station, not that he was filming the police officers conducting their public duties.¹¹⁴ Since the Fifth Circuit did not determine that Turner's First Amendment rights were violated, the court did not properly establish that Turner had a First Amendment right, nor did it establish that his conduct was within the zone of conduct protected by the First Amendment right to film the police.¹¹⁵ In fact, it added no clarity to the currently developing body of law surrounding the filming of police officers that is in need of interpretation.¹¹⁶

¹⁰⁶ *See id.*

¹⁰⁷ *See infra* notes 108–127 and accompanying text.

¹⁰⁸ *See Turner*, 848 F.3d at 687; *infra* notes 108–127 and accompanying text.

¹⁰⁹ *See id.*

¹¹⁰ *See Glik v. Cunniffe*, 655 F.3d 78, 82, 80 (1st Cir. 2011) (showing that the plaintiff was arrested for filming an arrest in a public park); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (showing that the plaintiff was arrested for filming the police conducting traffic stops).

¹¹¹ *See Turner*, 848 F.3d at 697 (Clement, J., dissenting).

¹¹² *Id.*

¹¹³ *See id.*

¹¹⁴ *Id.*

¹¹⁵ *See id.*; Calvert, *supra* note 89, at 139–62 (discussing the case law that highlights the conduct parameters protected by the First Amendment right to record the police).

¹¹⁶ *See Turner*, 848 F.3d at 697 (Clement, J., dissenting); Matthew Slaughter, *First Amendment Right to Record Police: When Clearly Established Is Not Clear Enough*, 49 J. MARSHALL L. REV. 101, 121 (2015) (arguing that the right to record police in public is a prudent policy decision

The Fifth Circuit erred by not clarifying the contours of the First Amendment right to film the police.¹¹⁷ With the emergence of technology and the pervasive use of smartphones in the United States, more people than ever before have the ability to record the police and disseminate videos to a broader audience in a short period of time.¹¹⁸ In fact, an assessment from the Pew Research Center shows that 77% of Americans own smartphones and 70% Americans use social media.¹¹⁹ With recent campaigns from advocacy organizations, such as the American Civil Liberties Union, encouraging the public to record the police, the courts have a responsibility to create a clear standard so that individuals can confidently exercise their First Amendment rights.¹²⁰ Additionally, only a few states have passed legislation codifying the right to record the police, and the statutes that have been passed are not detailed enough.¹²¹ The lack of clear definitions regarding what and when the public can record, particularly concerning police activities, makes it difficult for these pieces of legislation to provide adequate protections.¹²² Thus, the courts can no longer put the contours of the First Amendment right to film the police on the back burner.¹²³ This is a front

because it aids evidentiary interests, assists with the public's conduct, and deters police misconduct).

¹¹⁷ See *Turner*, 848 F.3d at 696 (Clement, J., dissenting).

¹¹⁸ Kirk Miller, *Watching the Watchers: Theorizing Cops, Cameras, and Police Legitimacy in the 21st Century*, in *THE POLITICS OF POLICING: BETWEEN FORCE AND LEGITIMACY* 257, 258 (Mathieu Deflem ed. 2016) (discussing the use of video to document police interactions with the public and how upgrades in technology adds to a new visibility of policing and changes the dynamics of traditional police/community relations).

¹¹⁹ Aaron Smith, *Record Shares of Americans Now Own Smartphones, Have Home Broadband*, PEW RES. CTR. (Jan. 12, 2017), <http://www.pewresearch.org/fact-tank/2017/01/12/evolution-of-technology/> [<https://perma.cc/JH34-LD4V>]. Most young adults have smartphones and nearly three-quarters (74%) of Americans ages fifty to sixty-four are now smartphone owners. *Id.* This is a sixteen percentage-point increase compared to 2015. *Id.* Furthermore, social media usage has drastically increased with 69% of U.S. adults using it. *Id.*

¹²⁰ *ACLU Apps to Record Police Conduct*, ACLU, <https://www.aclu.org/issues/criminal-law-reform/reforming-police-practices/aclu-apps-record-police-conduct> [<https://perma.cc/2CBU-9DQY>] (encouraging the public to download the smartphone apps "Mobile Justice" and "Stop and Frisk" to record the police and hold them accountable); *Your Right to Film Police*, ACLU TEX., <https://www.aclutx.org/en/know-your-rights/your-right-film-police> [<https://perma.cc/T8XP-ZR3L>] (encouraging the public to film the police and providing guidelines to film lawfully).

¹²¹ See CAL. PENAL CODE § 69(b) (2016) (providing that the public has the right to record the police in public places but not explicitly limiting that right to the police performing their official duties); COLO. REV. STAT. § 13-21-128 (2016) (granting the public the ability to record "an incident" involving the police); OR. REV. STAT. § 165.540(5) (2016) (granting the public the ability to record the police conducting official duties but not explicitly listing these official duties).

¹²² See CAL. PENAL CODE § 69(b); COLO. REV. STAT. § 13-21-128; OR. REV. STAT. § 165.540(5).

¹²³ See Jay Stanley, *Suppression of Photographers During Civil Rights Movement an Important Reminder for Today*, ACLU (May 31, 2017, 8:00 AM), <https://www.aclu.org/blog/free-speech/photographers-rights/suppression-photographers-during-civil-rights-movement> [<https://perma.cc/E85H-ET4P>] (discussing the role that photography played during the Civil Rights Movement to

burner issue and the courts have a responsibility to create a clear standard for the public.¹²⁴

The particular facts in *Turner* were unlike any of the cases that have addressed the First Amendment right to film the police and, therefore, the Fifth Circuit should have addressed this unique set of facts.¹²⁵ Judge Clement was correct in her dissent in *Turner* when she declared that because the majority did not rule that the police officer violated the plaintiff's First Amendment right, another officer acting in the same manner and under similar circumstances would not be violating any clearly established law.¹²⁶ This application of the First Amendment right to film the police to the facts in *Turner* would have strengthened the authority of the case and provided guidance for future claimants and courts.¹²⁷

CONCLUSION

In 2017, the U.S. Court of Appeals for the Fifth Circuit ruled on the public's ability to record police activity in *Turner v. Driver*. With *Turner*, the Fifth Circuit had the opportunity to either expand or restrict the scope of conduct that is protected by the public's First Amendment right to film the police. It failed to do either. By failing to connect the particular facts in the case to the First Amendment right to film the police and determine whether Turner's conduct was even protected by said right, the Fifth Circuit effectively abdicated its judicial responsibility. The Fifth Circuit established that the public has a First Amendment right to video record the police without adding any context or support to that right, outside First Amendment principles. As Judge Clement discussed in her dissent, defining this First Amendment right at such a high level of generality, without particularizing it to the facts in the case, does a disservice to future claimants and weakens the precedential power of the opinion. Additionally, given the current social and political climate, it keeps a pressing issue that deserves clarification on the back-burner. Although the Fifth Circuit established that the public has a First Amendment right to video record the police, it failed to clarify the contours of that right.

highlight the injustices and brutality during the freedom marches and how the high use and availability of smartphones are having the same effect during the Black Lives Matter era).

¹²⁴ See Jay Stanley, *The Video Revolution in Policing*, ACLU (Sept. 4, 2014, 1:39 PM), <https://www.aclu.org/blog/national-security/video-revolution-policing?redirect=blog/video-revolution-policing> [<https://perma.cc/T43C-DS8N>]. This blog post by an American Civil Liberties Union Senior Policy Analyst explains that historically, judges, juries, and prosecutors have viewed police officers as more credible than the victims of police brutality and the emergence of videos from cellphone offers objectivity and another lens of visibility. *Id.*

¹²⁵ See *Turner*, 848 F.3d at 686.

¹²⁶ *Id.* at 697 (Clement, J., dissenting).

¹²⁷ See *id.*

Thus, the Fifth Circuit's decision in *Turner* leaves this newly developing body of case law without a sense of clarity or path forward.

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