No. 19-2492

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DANIEL THOMAS ROBBINS,

Plaintiff-Appellant,

v.

CITY OF DES MOINES ET AL.,

Defendants-Appellees.

On Appeal from the U.S. District Court for the
Southern District of Iowa
Central Division
Hon. Charles R. Wolle
Case No. 4:18-cv-289

BRIEF OF *AMICUS CURIAE*
AMERICAN CIVIL LIBERTIES UNION OF IOWA FOUNDATION
IN SUPPORT OF PLAINTIFF-APPELLANT
FOR REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), the American Civil Liberties Union of Iowa Foundation (ACLU of Iowa) certifies it is a non-profit organization that has no parent organization and issues no stock.

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

Pursuant to Federal Rule of Appellate Procedure 29(a)(4), the ACLU of Iowa certifies 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 this brief, and no person other than the ACLU of Iowa or their counsel contributed money that was intended to fund the preparing or submitting of this brief.

CONSENT OF THE PARTIES

The ACLU of Iowa obtained written consent on September 11, 2019 from both Plaintiff-Appellant and Defendants-Appellees to file this brief.

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS

The American Civil Liberties Union of Iowa ("ACLU of Iowa") is a statewide nonprofit and nonpartisan organization with over 6,500 dues-paying Iowa members that is dedicated to the principles of liberty and equality embodied in the Constitution. Founded in 1935, the ACLU of Iowa is the fifth oldest state affiliate of the national American Civil Liberties Union in the country. As part of its mission, the ACLU works to preserve the First Amendment freedom of expression—including the protection of the right to engage in unpopular or inconvenient speech. Part of this work includes efforts to protect the rights of individuals both to observe and criticize government officials, including law enforcement officers acting in their official capacity.

The ACLU of Iowa has also long been committed to safeguarding the right of individuals to be treated by police officers in a way that falls within the bounds of the Constitution. As part of these efforts, the ACLU has worked in the courts, state legislature and through policy advocacy to promote appropriate and nondiscriminatory police practices.

Because video recording of police interactions has become an important tool to criticize police and hold police accountable to the public, the proper resolution of this case is a matter of substantial interest to the ACLU of Iowa and its members.

ARGUMENT

I. THE DISTRICT COURT'S FINDING OF QUALIFIED IMMUNITY ON ROBBINS' FIRST AMENDMENT RETALIATION CLAIM WAS IN ERROR.

The district court below granted summary judgment in favor of Defendants on Robbins' First Amendment retaliation claim because, "assuming *arguendo*" that the right to record police was "clearly established at the time of the violation," the district court determined that Robbins could not meet the required element "that the officers' actions were motivated by the exercise of this constitutional right." App. 275-76. The court reasoned that because Robbins "refused to answer" police questions about why he was recording them, "it was reasonable for the officers to suspect that Robbins took the photographs for surveillance or other purposes not constitutionally protected." App. 276. Thus, while the district court stated that it assumed the right to record was clearly established at the time of the violation, it incorrectly held that this right was contingent on making affirmative statements to police "that Robbins was gathering information pursuant to his First Amendment right to publicize the photographs." *Id*. This was reversible error, because the right to record police, which *was* clearly established at the time of the violation, *in no way* depends on Robbins' affirmative statements to police that intended to publish the recordings. Further, the district court erred because reasonable suspicion alone does not bar a First Amendment retaliation claim. Finally, if this Court holds that the right

to record was not clearly established at the time of Robbins' seizure, it should use this case to clearly establish such a right in future cases.

This Court reviews "a district court's qualified immunity determination on summary judgment *de novo*, viewing the record in the light most favorable to the plaintiff and drawing all reasonable inferences in his favor." *Shannon v. Koehler*, 616 F.3d 855, 861-62 (8th Cir. 2010) (alterations and citation omitted). Appellees are entitled to summary judgment only "if no genuine issues of material fact exist and the movant [was] entitled to judgment as a matter of law." *Montoya v. City of Flandreau*, 669 F.3d 867, 870 (8th Cir. 2012). Here, because a reasonable jury could find that the facts, viewed in a light favorable to Robbins, establish a First Amendment retaliation claim to which qualified immunity does not apply, the district court's grant of summary judgment in favor of Defendants should be reversed.

A. Controlling and Persuasive Authority Had Clearly Established Robbins' Right to Record Police at the Time of His Seizure.

Appellees are not entitled to qualified immunity on Robbins' First Amendment retaliation claim because Robbins' right to record was clearly established at the time of his seizure. Whether a right has been clearly established "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). A "case directly on point" is not required, but "existing precedent must have placed the . . .

question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Prior cases need not be "materially similar": "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). The touchstone is whether "every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (internal quotation omitted). Interpreting these principles, this Court looks to whether there is a prior Eighth Circuit or Supreme Court "case that is controlling authority," or to whether "a robust consensus of cases of persuasive authority" has clearly established the right. *De La Rosa v. White*, 852 F.3d 740, 745 (8th Cir. 2017) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)).

The 'right to record police' means the First Amendment right to photograph or video- or audio-record police officers in public, so long as the observer does not physically interfere with the officer in conducting their official duties, and subject to reasonable time, place, and manner restrictions. *See, e.g.*, *Fields v. City of Philadelphia*, 862 F.3d 353, 356, 360 (3d. Cir. 2016) (internal citation omitted).

It is "clearly established" in the Eight Circuit that the First Amendment forbids "retaliation from government officials" against protected activity. *Kilpatrick v. King*, 499 F.3d 759, 767 (8th Cir. 2007). And this Court has explicitly held that retaliatory seizure cases are encompassed within this "clearly established" right. *See Thurairajah v. City of Ft. Smith*, 925 F.3d 979, 985 (8th Cir. 2019) ("Thurairajah's

First Amendment right to be free from retaliation was clearly established at the time of his arrest."); *Baribeau v. City of Minneapolis*, 596 F.3d 465, 481 (8th Cir. 2010). The only question, then, is whether the right to record police clearly fell within the First Amendment's protections at the time of Robbins' seizure. It did.

1. Controlling Case Law Ensured Robbins' Right to Record Police.

At the time of Robbins' seizure, controlling case law had established his right to record police with sufficient particularity that "every reasonable official" in Appellees' shoes "would have understood" that they were violating Robbins' First Amendment rights. *Reichle*, 566 U.S. at 664.

For over forty years, it has been beyond question that—independent of the right to speak or publish—news-*gathering* "qualif[ies] for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972); *see also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (recognizing First Amendment " 'right of access' or a 'right to gather information' " (internal citations omitted)); *Houchins v. KQED, Inc.*, 438 U.S. 1, 10-11 (1978) ("There is an undoubted right to gather news from any source by means within the law." (internal quote omitted)); *Pell v. Procunier*, 417 U.S. 817, 833 (1974) ("In *Branzburg* . . . the Court went further [than holding that the First Amendment protects only the

publishing and receipt of ideas] and acknowledged that 'news gathering is not without its First Amendment protections.'").

These cases are not sufficiently "particularized" so as to avoid application in the mind of every reasonable officer to the gathering of information *about police*. *See Quraishi v. St. Charles Cty.*, 2019 WL 2423321, *10 (E.D. Mo. Jun. 10, 2019) ("The First Amendment right to gather the news [audiovisual recording of police activity] was clearly established" in the Eighth Circuit as of 2014), *appeal docketed on other grounds sub nom. Quraishi v. Anderson*, No. 19-2462 (8th Cir. Jul. 12, 2019). Indeed, such a distinction would run afoul of the principle that the First Amendment's protections cannot be granted or withheld upon a government official's determination of the proper subject of journalistic investigation. *See Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) ("[The] determination concerning the newsworthiness . . . of a photograph cannot help but be based on the content of the photograph. . . . Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."); *Marcus v. Iowa Pub. Television*, 97 F.3d 1137, 1142 (8th Cir. 1996).

Nor is it relevant that Robbins did not work for a major news outlet, because First Amendment protections for newsgathering are not contingent on the identity or affiliation of newsgatherer. *See Branzburg*, 408 U.S. at 704 ("[L]iberty of the press is the right of the lonely pamphleteer . . . just as much as of the large metropolitan

publisher . . . . Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals.'"); *see also Quad-City Cmty. News Service, Inc. v. Jeben*, 334 F. Supp. 8, 17 (S.D. Iowa 1971) ("[O]ur complex federal system of government has been repeatedly jarred and reshaped by the continuing investigation, reporting and advocacy of independent journalists unaffiliated with major institutions.").

It was also clearly established at the time of Robbins' seizure that photography and audiovisual recordings are protected by the First Amendment. *See Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (holding "picture or portrait" protected by freedom of the press); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 636-37 (1994) (recognizing that audio-visual journalism is protected by freedom of the press); *Telescope Media Group v. Lucero*, 936 F.3d 740, 750-51 (8th Cir. 2019).

These three well-established First Amendment principles put Robbins' right to record police "beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). A reasonable officer, in light of these "existing precedent[s]," *id.*, and viewing the record in the light most favorable to Robbins as required at the summary judgment stage, *Gilani v. Matthews*, 843 F.3d 342, 347 (8th Cir. 2016), could only have concluded that Robbins was engaged in protected activity.

2. A Robust Consensus Had Clearly Established A Right to Record Police.

Even if controlling authority did not put the illegality of Appellees' seizure of Robbins "beyond debate," a "robust consensus of persuasive authority" did. *De La Rosa*, 852 F.3d at 745. This Court "subscribe[s] to a broad view of the concept of clearly established law, and we look to all available decisional law, including decisions from other courts . . . Even in the complete absence of any decisions involving similar facts, a right can be clearly established . . . ." *Vaughn v. Ruoff*, 253 F.3d 1124, 1129-30 (8th Cir. 2001).

All six circuits that had directly considered the issue at the time of Robbins' seizure had concluded that the First Amendment protects the right to record police. No circuit has concluded otherwise.[1] The First, Ninth and Eleventh Circuits recognized that this right was clearly established at the time of the alleged violation. *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (holding that recording of police is protected by the First Amendment); *Smith v. City of Cumming*, 212 F.3d 1332, 1333

[1] The Fourth Circuit, which is sometimes erroneously cited as having determined that there is no right to record the police, has never considered the merits of the constitutional question. *Szymecki v. Houck*, 353 F. App'x 852, 853 (4th Cir. 2009) (unpublished decision). Furthermore, while *Szymecki* was unpublished and is not precedential, it also cannot stand for the proposition that the right to record police is not recognized in the Fourth Circuit; only that "it was not clearly established sometime prior to 2009." *Charles v. City of New York*, No. 12-CV-6180, 2017 WL 530460, *24 (E.D.N.Y. Feb. 8, 2017); *see also* Tyler Finn, Note, *Qualified Immunity Formalism: "Clearly Established Law" and the Right to Record Police Activity*, 119 Colum. L. Rev. 445, 455 (2019).

(11th Cir. 2000) ("[Plaintiffs] had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct. The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (reversing grant of summary judgment because "a genuine issue of material fact does exist regarding whether Fordyce was assaulted and battered by a Seattle police officer in an attempt to prevent or dissuade him from exercising his First Amendment right to film matters of public interest.").

The Third and the Fifth Circuit also recognized the right to record, choosing to clearly establish that right prospectively. *See Turner v. Driver*, 848 F.3d 678, 688 (5th Cir. 2017) ("We conclude 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."); *see also Buehler v. City of Austin*, 2015 WL 737031, *9 (W.D. Tex. Feb. 20, 2015), ("In light of the existing Fifth Circuit precedent and *the robust consensus among circuit courts of appeals*, the Court concludes that the right to photograph and videotape police officers as they perform their official duties was clearly established . . . ." (emphasis added)); *Fields v. City of Philadelphia*, 862 F.3d

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353, 359 (3d Cir. 2017) ("[R]ecording police activity in public falls squarely within the First Amendment right of access to information.").

The Seventh Circuit recognized the First Amendment right to record police in public outside of the question of whether qualified immunity applies. *Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 595-96 (7th Cir. 2012) (holding that "[t]he act of *making* an audio or audiovisual recording [about police] is necessarily included within the First Amendment's guarantee or speech and press rights as a corollary of the right to disseminate the resulting recording" in granting preliminary injunction).

In addition, the Tenth Circuit has recognized in dicta that the right to record police is clearly established, noting that "several of our sibling circuits have held that the First Amendment protects the recording of officials' conduct in public," and held on that basis that an "individual who photographs animals . . . is creating speech in the same manner as an individual who records a police encounter." *Western Watersheds Project v. Michael*, 869 F.3d 1189, 1196 (10th Cir. 2017) (citing *Fields*, *Turner*, *Alvarez*, *Glik*, *City of Cumming*, and *Fordyce*).

Some of these decisions frame the right in question as recording police in the performance of their public duties. *See, e.g.*, *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011), while others frame the right more broadly as a "right to record the police," *see, e.g.*, *Turner v. Driver*, 848 F.3d at 688. That distinction does not matter

in this case, because Robbins recorded police in the performance of their public duties. Specifically, he recorded Officer Youngblut approaching and questioning him and recorded part of the resulting exchange before he was forced to turn his camera off. JA 274-75. Viewing the record in the light most favorable to Robbins as required, a jury could reasonably conclude that Appellees retaliated against him in substantial part because of his recording of Appellees' official conduct in confronting him; this obviates the question of whether his earlier photography of illegally parked cars is included in the right to record.

In addition to the circuits that have recognized a First Amendment right to record police, the other circuits have recognized the clearly established newsgathering right from which the right to record police flows. *See, e.g.*, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 520 (4th Cir. 1999) ("[T]here are First Amendment interests in newsgathering." (internal quotation omitted)); *Auersperg v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987) ("[T]he process of newsgathering is a protected right under the First Amendment . . . ."); *see also* *Higginbotham v. City of New York*, 105 F. Supp. 3d 369, 380 (S.D.N.Y. 2015) ("At the time of Higginbotham's [2011] arrest, there was thus a 'robust consensus of persuasive authority' in favor of the right [to record] that 'clearly foreshadowed' an analogous ruling by the Second Circuit or the Supreme Court." (citation omitted)); *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) ("But the press' function as a

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vital source of information is weakened whenever the ability of journalists to gather news is impaired."); *Sherrill v. Knight*, 569 F.2d 124, 129-30 (D.C. Cir. 1977) ("Not only newsmen and the publications for which they write, but also the public at large have an interest protected by the First Amendment in assuring that restrictions on newsgathering be no more arduous than necessary . . . ."); *Enoch v. Hogan*, 728 F. App'x 448, 456 (6th Cir. 2018) (unpublished decision) ("[T]he Deputies argue that there is no clearly established right to record [and that they are therefore entitled to qualified immunity]. But that issue is not dispositive in this case. We have long and clearly held that newsgathering 'qualifies for First Amendment protection.'" (citing *Boddie v. Am. Broad. Cos.*, 881 F.2d 267, 271 (6th Cir. 1989)).

In addition to this persuasive legal authority, recent scholarship has recognized that the right to record has been clearly established by a robust consensus. *See* Comment, *Fields v. City of Philadelphia*, 131 Harv. L. Rev. 2049, 2053-54 (2018) ("In light of *Pearson* [*v. Callahan*] and other cases where courts granted qualified immunity based on the existence of judicial disagreement or silence, the level of [total] judicial agreement here is especially compelling." (citations omitted)); David L. Hudson Jr., *First Amendment Right to Receive Information and Ideas Justifies Citizens' Videotaping of the Police*, 10 U. St. Thomas J. L. & Pub. Pol'y 89, 91-92 (2016) ("[T]he U.S. Supreme Court has established a body of law recognized over decades and decades that the right to receive information and ideas

is a clearly established part of First Amendment jurisprudence."); Jesse Harlan Alderman, *Before You Press Record: Unanswered Questions Surrounding the First Amendment Right to Film Public Police Activity*, 33 N. Ill. U. L. Rev. 485, 533-34 (2013) ("[T]here is likely a 'robust consensus' of persuasive authority that render the right 'clearly established.'").

3. Independent of the Newsgathering Right, the Act of Peacefully Recording Police is Expressive Conduct Protected by the First Amendment.

In addition to enjoying the First Amendment's protection of information-gathering, recording police in public is protected by the freedom "to oppose or challenge police action . . . [which] is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 463 (1987); *see also Thurairajah*, 925 F.3d at 984-85 (holding that plaintiff's "First Amendment right to be free from retaliation was clearly established at the time of his arrest" and that his "profane shout [at a police officer] was protected activity."). Peacefully holding up a camera to record police, without physically interfering in their duties, is an expression of criticism protected by the First Amendment. As Professor Simonson has explained, "the value of filming police as speech lies not only in its future contributions to public discourse and democratic dialogue, but also to that in-the-moment communication to police officers . . . ."

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Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 Geo. L.J. 1559, 1561 (2016).

The facts of this case illustrate the communicative value of recording police as criticism. Recalling a long tradition of police retaliation against "copwatching" organizations, Detective Youngblut asked Robbins, "So what organization do you belong to that [is] making you be difficult?" App. 48, Lt. Joseph Leo Body Camera at 0:03:27; *see also* Jocelyn Simonson, *Copwatching*, 104 Calif. L. Rev. 391, 393-94 n.7 (2016) ("[C]opwatching has been a tactic of social movements since at least the 1960s."); *see also* Mary D. Fan, *Democratizing Proof: Pooling Public and Police Body-Camera Videos*, 96 N.C. L. Rev. 1639, 1647-52 (2018) ("For community members, recording the police is a form of self-protection, protest, and proof and is a peaceful way to redress an imbalance of power in credibility and the legitimate use of force."). The irritation Robbins' filming caused Defendants is obvious; but their retaliatory seizure of Robbins and his property was nevertheless unconstitutional.

B. The Right to Record Police Does Not Require an Affirmative Statement of Intent to Publish.

The District Court erred in determining that Robbins' right to record police was contingent on him making satisfactory statements to police about *why* he was engaging in protected newsgathering, and in particular, that he was required to inform police he intended to publish the video. App. 277. The right to record police is not contingent on an affirmative statement explaining an intent to publish the

video. *See Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017) (reversing *Fields v. City of Philadelphia*, 166 F. Supp. 3d 528 (E.D. Pa. 2016) on its determination that the constitutional right to film police requires that the recorder's expressive purpose must be known to the officers.). As the Seventh Circuit explained in *Alvarez*: "The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected." 679 F.3d at 595 (emphasis in original). "This is a straightforward application of the principle that '[l]aws enacted to control or suppress speech may operate at different points in the speech process.'" *Id.* at 596 (quoting *Citizens United v. FEC*, 558 U.S. 310, 336 (2010)). *See generally* Ashutosh Bhagwat, *Producing Speech*, 56 Wm. & Mary L. Rev. 1029 (2015) (developing theory of First Amendment protections for speech production and applying this theory to support the right to record).

The Supreme Court's cases upholding the Fourth Amendment right not to answer police questions shed further light on the district court's error. As the Court held in *Royer*, the "person approached . . . need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." *Florida v. Royer*, 460 U.S. 491, 497 (1983) (citations omitted). Since

someone *not* engaged in First Amendment activity is protected by this Fourth Amendment guarantee, someone like Robbins, who *is* engaged in such activity, may not be required to answer police questions about whether he intends to publish that information to avoid being seized.

C. First Amendment activity not indicative of underlying criminal conduct cannot support reasonable suspicion.

The district court also erred in holding that First Amendment activity not indicative of articulable underlying criminal conduct can provide reasonable suspicion barring a retaliation claim. *See* App. 277-78. It does not. *See Thurairajah*, 925 F.3d at 984-85; *Baribeau v. City of Minneapolis*, 596 F.3d 465, 478-79 (8th Cir. 2010) ("[A]t the time of the arrests [it] was clearly established . . . that a reasonable person would have known there was no probable cause to arrest the plaintiffs for engaging in protected expressive conduct."); *see also City of Houston v. Hill*, 482 U.S. at 462 ("The Constitution does not allow such speech [criticism of police] to be made a crime."). This rule protects individuals from "arbitrary invasions solely at the unfettered discretion of officers in the field." *Brown v. Texas*, 443 U.S. 47, 51 (1979).

Here, because the sole basis of the stop was Robbins' exercise of a protected First Amendment right to record police, police lacked an objectively non-retaliatory justification for the seizure. "Adverse action that cannot be defended by any non-retaliatory explanation provides a basis for a reasonable jury to find that the

defendants acted with improper motives." *Kilpatrick v. King*, 499 F.3d at 768. *See also Nieves v. Bartlett*, 139 S. Ct. 1715, 1724 (2019).

Because Appellees lacked an objective basis to seize Robbins on reasonable suspicion of particularized criminal wrongdoing, granting summary judgment for Appellees was reversible error.

D. Even if Appellees Had Reasonable Suspicion to Seize Robbins, Reasonable Suspicion Alone Does Not Bar A First Amendment Retaliation Claim.

The district court also erred in granting summary judgment to Defendants on Robbins' First Amendment retaliation claim because "Robbins's actions in photographing police cars outside the station created reasonable suspicion among the officers that he was engaged in criminal activity," and that Robbins' exercise of his constitutional right to decline to answer police questions further created reasonable suspicion. JA 276. For the reasons argued by Appellant, and viewing the facts in a light favorable to him, police lacked reasonable suspicion to seize him. *See* Appellant's Br. at 22-25. However, even if police had reasonable suspicion, that should not bar his retaliation claim.

The Eighth Circuit has previously held that reasonable suspicion bars a retaliatory stop claim. *See Waters v. Madson*, 921 F.3d 725, 742 (8th Cir. 2019). But *Nieves v. Bartlett* abrogates that holding for two reasons. 139 S. Ct. 1715.

First, *Nieves* recognized an exception for selective enforcement not found in *Waters*. *Nieves* recognized that probable cause is *not* an absolute bar to a retaliatory arrest claim. *See* 139 S. Ct. at 1727 (holding that "an unyielding requirement to show the absence of probable cause could pose 'a risk that some police officers may exploit the arrest power as a means of suppressing speech.'") (quoting *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1953-54 (2018)). Rather, a retaliatory arrest claim can succeed despite probable cause if "a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Id.* The Court's reasoning included the fact that the expansion of criminal laws to cover "a much wider range of situations" since the enactment of Section 1983 exacerbates the risk of retaliation under the cover of "very minor criminal offense[s]" like jaywalking. *Id.* (quoting *Atwater v. City of Lago Vista*, 532 U.S. 318, 344-345 (2001)).

Nieves' warning of selective enforcement applies even more strongly to stops based on reasonable suspicion than to stops based on probable cause. Put simply, if police will too often have probable cause of minor offenses to justify supporting an absolute bar to retaliatory arrest claims, then *a fortiori* they will too often have reasonable suspicion to support an absolute bar to retaliatory stop claims. *See United States v. Arvizu*, 534 U.S. 266, 273-74 (2002) (noting that reasonable suspicion will exist in more circumstances than probable cause). *Waters*'s absolute bar to

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retaliation claims based merely on reasonable suspicion cannot coexist with *Nieves*'s exception to such a bar based on probable cause for selective enforcement. Therefore, *Waters* does not bar Robbins' claim. Instead, the question of whether selective enforcement occurred in this case is one for the jury.

Second, *Nieves* emphasized the evidentiary value that probable cause provides as to animus. 139 S. Ct. at 1724 (noting that the absence of probable cause will "generally provide weighty evidence that the officer's animus caused the arrest, whereas the presence of probable cause will suggest the opposite."). Because of this probative weight, probable cause should defeat most retaliation claims. *Id.* at 1725. But the evidence required for reasonable suspicion "is obviously less demanding than that for probable cause." *United States v. Sokolow*, 490 U.S. 1, 7 (1981). The existence of reasonable suspicion will therefore provide less evidence as to animus than probable cause. *Id.* If probable cause—and its higher evidentiary standard—cannot support an absolute bar to retaliation claims, then the much lower standard of reasonable suspicion cannot create such a bar.

E. Viewing The Facts In A Light Favorable To Robbins, A Reasonable Jury Could Find Defendants Engaged In First Amendment Retaliation.

In ruling on the Defendants' motion for summary judgment, the district court erred in failing to determine whether, "viewing the record in the light most favorable to the plaintiff and drawing all reasonable inferences in his favor," a jury could have

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discerned retaliatory motivation from Appellees' comments during the encounter. *Shannon v. Koehler*, 616 F.3d at 861-62 (citation and alteration omitted). "Retaliation need not have been the sole motive, but [only] . . . a 'substantial factor' in the decision" to seize Robbins for Appellees to have violated his clearly established rights. *Baribeau*, 596 F.3d at 481 (quoting *Kilpatrick*, 499 F.3d at 767). There is ample record evidence supporting such a reasonable jury's determination of retaliatory motive.

First, the lack of an objective, permissible basis for Robbins' seizure is itself probative of retaliatory motive. *Nieves*, 139 S. Ct. at 1724; *see* Part I.D, *supra*.

Second, viewing the facts in a light favorable to Robbins as required, a reasonable jury could find blatant animus in Appellees' recorded comments. For example, Sergeant Curtis described Robbins as "an angry little guy," App. 48, Det. Bradley Youngblut Body Camera at 0:03:17, and acknowledged that "[w]hat is illegal about it [Robbins' behavior] is nothing." App. 48, Officer Michelle Strawser Body Camera at 0:03:23. When Robbins asked Detective Youngblut where in state law being "suspicious" is criminalized, Detective Youngblut responds by asking Robbins "what organization do you belong to that is making you be difficult?" App. 48, Lt. Joseph Leo Body Camera at 0:03:20. Detective Youngblut also told Robbins, "rather than just talk to me, *you talked to me with an attitude*"—an explicit admission that Robbins was seized because of what he said and how he said it. *Id.* at 0:05:30

(emphasis added). Later, Robbins asked Lieutenant Rhamy what police academy he attended and for his name. Lieutenant Rhamy replies that Mr. Robbins is loitering, and threatens to arrest Robbins unless he provides them information. App. 48, Det. Bradley Youngblut Body Camera at 0:03:43. A reasonable jury could easily conclude that Rhamy threatened arrest at least in part because of Robbins' questioning his authority, especially given that no reasonable officer could have suspected Robbins of loitering. *See* Appellant's Br. 22-25; *Kilpatrick*, 499 F.3d at 768. Nor can Robbins' failure to identify himself comprise the basis of reasonable suspicion. *See Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177 (2004) (Iowa has no law requiring individuals to identify themselves to police upon request); *Florida v. Royer*, 460 U.S. at 497. Detective Rhamy at one point even expressly warned Robbins, "you're gonna talk yourself right into jail next time." App. 48, Det. Bradley Younglut body camera at 0:07:30.

Courts have permitted claims based on animus to proceed on far less. For example, this Court denied summary judgment on a retaliatory arrest claim to defendant officers who arrested the plaintiff after yelling "drop the camera" at him. *Hoyland v. McMenomy*, 869 F.3d 644, 649 (8th Cir. 2017). The Court noted, "True, it is entirely possible that the decision to arrest [the plaintiff] was based on his refusal to follow orders and not his verbal conduct . . . But what the record makes clear is that this question is not free from doubt. Summary judgment, therefore, would be

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inappropriate." *Id.* at 657. Likewise, in *Crawford-El v. Britton*, the Supreme Court cited various comments by a prison official as sufficient to establish retaliatory motive against an "outspoken" inmate. 523 U.S. 574, 579 n.1 (1998). These included referring to the plaintiff as a "legal troublemaker" and stating "you're a prisoner, you don't have any rights." *Id.* Recently, the Ninth Circuit held, and the Supreme Court assumed, that an arresting officer's comment "bet you wish you would have talked to me now" could sustain a retaliation claim for refusing to speak to police. *Bartlett v. Nieves*, 712 F. App'x 613, 616 (9th Cir. 2017), *rev'd on other grounds*, 139 S. Ct. 1715 (2019).

Because the undisputed facts in this case, viewed in the light most favorable to Robbins, could lead a reasonable jury to find ample evidence that retaliatory animus was a motivating factor, the district court's grant of summary judgment in favor of Defendants was reversible error.

II. ALTERNATIVELY, BECAUSE THIS IS A MATTER OF GREAT IMPORTANCE, THIS COURT SHOULD AFFIRMATIVELY ESTABLISH CLEAR PRECEDENT MOVING FORWARD.

In the alternative, if Robbins' right to record was not clearly established at the time of the violation, this Court should nevertheless hold that such a right is protected by the First Amendment. Doing so is permitted by applicable Supreme Court law and is necessary to assure greater clarity in the law and to protect against First

Amendment retaliation in future cases given the prevalence and importance of recording police encounters.

In determining whether qualified immunity applies, this Court has the authority to consider the existence of constitutional rights before addressing the issue of whether the right is clearly established. *Pearson v. Callahan*, 555 U.S. 223 (2009), *overruling Saucier v. Katz*, 533 U.S. 194 (2001). In returning the decision to prospectively establish constitutional rights to the discretion of lower courts, the *Pearson* opinion critiqued *Saucier*'s rigidity in cases where "the constitutional question is so factbound that the decision provides little guidance for future cases." *Id.* at 237.

Various other courts addressing the right to record police have taken this approach. *See, e.g.*, *Turner*, 848 F.3d at 687-88 ("Because the [right to record] issue continues to arise in the qualified immunity context, we now proceed to determine it for the future."); *Fields*, 862 F.3d at 357 ("We reject this invitation to take the easy way out [by not ruling on the constitutional question]. Because this First Amendment issue is of great importance and the recording of police activity is a widespread, common practice, we deal with it before addressing, if needed, defenses to liability.").

This is a matter of great importance. The police have been empowered to deprive civilians of their freedom and other civil liberties, including, in some cases,

the use of deadly force. The public has increasingly become engaged in efforts to hold police accountable to ensure that the way police use the power they have conforms to the Constitution. *See, e.g., Gaymon v. Borough of Collingdale*, 150 F. Supp. 3d 457, 468 n.9 (E.D. Pa. 2015) ("Police abuse captured by the cameras of bystanding videographers, followed by public broadcast of the footage, has become a regular feature of public life and the underpinning of effective demands for redress." (quoting Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 350 (2011)); Simonson, *Copwatching*, *supra*, at 408 ("Today, given the widespread use of smartphones, civilian recording of police officers is ubiquitous.").

In particular, recording the police has become an important tool to combat disparities in policing and disproportionate use of force by police against people of color, helping to amplify and propel important organizations and efforts for reform. Sarah Almukhtar *et al.*, *Black Lives Upended by Policing: The Raw Videos Sparking Outrage*, N.Y. Times (Apr. 19, 2018), https://www.nytimes.com/interactive/2017/08/19/us/police-videos-race.html; Bijan Stephen, *How Black Lives Matter Uses Social Media to Fight the Power*, Wired (Nov. 2015), https://www.wired.com/2015/10/how-black-lives-matter-uses-social-media-to-fight-the-power; Scott Calvert & Valerie Bauerlein, *Viral Videos Shape Views of*

Police Conduct, Wall Street J. (Dec. 30, 2015), https://www.wsj.com/articles/viral-videos-shape-views-of-police-conduct-1451512011; Anthony Fisher, *How Local Anti-Violence Activists Brought the Alton Sterling Shooting Video to the Public*, Reason (Jul. 7, 2016), https://reason.com/2016/07/07/anti-violence-activists-alton-sterling.

By promoting accountability for police misconduct and potentially exonerating police incorrectly alleged to have committed abuses, the right to record enhances trust in the responsible, law-abiding officers who risk their lives to protect their communities without violating constitutional rights. Steven A. Lautt, *Sunlight is Still the Best Disinfectant: The Case for A First Amendment Right to Record the Police*, 51 Washburn L.J. 349, 371 (2012) ("Far from worthless, citizen-recording of police activity has been a powerful tool for exposing police abuse and getting bad cops off the streets."); Andrew John Goldsmith, *Policing's New Visibility*, 50 Brit. J. Criminology 914, 914 (2010) (by increasing visibility of the police, camera phones have heightened police accountability); Tristan Montaque, *Policing the Police: Analyzing the Legal Implications of the Sequestration of Cellphone Video Footage*, 22 J. Tech. L. & Pol'y 1, 4, 5-11 (2018) (acknowledging that while many police officers escape criminal indictment for unlawful use of force despite clear cell phone video evidence, in other documented instances, cell phone recording of police misuse of force have led to the criminal investigations and proceedings against

officers involved); Matt Ford, *A Major Victory For The Right To Record Police*, Atlantic (Jul. 7, 2017), https://www.theatlantic.com/politics/archive/2017/07/a-major-victory-for-the-right-to-record-police/533031 (discussing usefulness of cell phone video to provide perspectives and show circumstances often not captured by dashcam and bodycam recordings, and to aid Department of Justice investigations of civil rights violations).

Furthermore, the existence of the right to record is a pure legal question, and not "factbound." *Pearson*, 555 U.S. at 237. Nor does this First Amendment question turn "on an uncertain interpretation of state law," *id.* at 238, come "at the pleading stage, [where] the precise factual basis for the plaintiff's claim or claims may be hard to identify," *id.* at 238-39, or risk "bad decisionmaking" because of inadequate briefing and lawyering, *id.* at 239. At a time when cell-phone and other mobile recording capabilities are proliferating, this case provides a well-pled opportunity for this Court to "promote[] the development of constitutional precedent" in an area that has never been more important. *Id.* at 236.

In light of the prevalence and importance of the use of cell phone and other mobile recording of police, this Court should reach the question of whether the First Amendment protects the right to record regardless of whether it determines that the right was clearly established at the time of Robbins' seizure.

CONCLUSION

For the reasons set forth above, and for the reasons set forth by Plaintiff-Appellant, this Court should reverse the district court's grant of summary judgment in favor of Defendants.

Dated: October 21, 2019

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CERTIFICATE OF SERVICE

I caused the electronic filing of this paper with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit through the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and therefore will be served by the appellate CM/ECF system.

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