

THE RIGHT TO RECORD THE POLICE IN PUBLIC PLACES

Many courts have held that members of the public have a right under the First Amendment to record Law Enforcement Officers in the performance of their duties in public places.¹ In addition, the U.S. Justice Department has asserted that the First Amendment includes this right.² However, the U.S. Supreme Court has not specifically ruled whether there is a constitutional right to record the police. Therefore, each Federal Circuit Court of Appeals can determine for the territory within its jurisdiction if such a right exists, and what the parameters are of any such right.

U.S. SUPREME COURT

Although the U.S. Supreme Court has not specifically ruled on the issue of whether you have a First Amendment right to record police performing their duties in public, the reasoning of numerous Supreme Court cases supports the conclusion that the First Amendment does include that right.

The Supreme Court has ruled that photos, videos and recordings are forms of speech protected by the First Amendment;³ and that the First Amendment protects the public's right to access to information about government officials, and prohibits the government "from limiting the stock of information from which members of the public may draw."⁴ "It is ... well established that the Constitution protects the right to receive information and ideas."⁵ "There is an undoubted right to gather news 'from any source by means within the law' "⁶ and this right to gather news applies equally to the press and to members of the public.⁷

In addition, the Supreme Court has held that speech regarding matters of public concern (such as the conduct of police carrying out their official duties) is entitled to the greatest protection under the First Amendment: "The *First Amendment* reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' That is because 'speech concerning public affairs is more than self-expression; it is the essence of self-government.' Accordingly, 'speech on public issues occupies the highest rung of the hierarchy of *First Amendment* values, and is entitled to special protection.'"⁸

¹ *Gilk v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017); *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017); *ACLU of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995); *Irizarry v. Yehia*, Case No. 21-1247, (10th Cir. July 11, 2022); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000).

² Brief for the United States as *Amicus Curiae* in Support of Neither Party, *Irizarry v. Yehia*, Appellate Case No. 21-1247, 10th Cir.; Statement of Interest of the United States, *Sharp v. Baltimore City Police Dept.*, Civil No. CCB-11-2888, D. Md.

³ *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790, (2011).

⁴ *First Nat'l. Bank of Bos. v. Bellotti*, 435 U.S. 765, 783, (1978).

⁵ *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

⁶ *Houchins v. KQED, Inc.*, 438 U.S. 1, 11,(1978) (citation omitted).

⁷ *Id* at 16.

⁸ *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011)(citations omitted).

FEDERAL CIRCUIT COURTS OF APPEALS

Since the Supreme Court has not expressly ruled on whether the First Amendment includes the right to record police performing their duties in public, each Federal Circuit can make its own determination regarding that right. **The following Federal Circuit Courts have held that there is a clearly established right to videorecord police performing their duties in public: 1st (Maine, Massachusetts, New Hampshire, Rhode Island, Puerto Rico), 3rd (Delaware, New Jersey, Pennsylvania, U.S. Virgin Islands), 5th (Louisiana, Mississippi, Texas), 7th (Illinois, Indiana, Wisconsin), 9th (Alaska, Arizona, California, Hawaii, Idaho, Montana, Oregon, Washington, Guam, Mariana Islands), 10th (Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming) & 11th (Alabama, Florida, Georgia).** No Circuits have held that there is no such right, but some have held that if there is such a right, it was not clearly established in that Circuit at the time of that litigation.⁹

The following statements are from Federal Circuit Courts of Appeal regarding the right to record police:

“In sum, under the First Amendment’s right of access to information the public has the commensurate right to record—photograph, film, or audio record—police officers conducting official police activity in public areas.”¹⁰

“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.”¹¹

“[A] citizen’s right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment.”¹²

“[A] First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions.”¹³

“Simply put, the First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public.”¹⁴

⁹ (The reason the court's focus is whether or not the right was “clearly established” is because if it was not, the Officer will have “qualified immunity” as a defense to a lawsuit claiming that the Officer violated that right; but if the right was clearly established then the Officer is not protected by qualified immunity. Thus, in a qualified immunity case the court doesn't have to say whether the right exists in that Circuit; it only has to say whether there was a clearly established right at the time of the incident.)

¹⁰ *Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017)

¹¹ *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

¹² *Gilk v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011).

¹³ *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017).

¹⁴ *Fields v. City of Philadelphia*, 862 F.3d 353, 356 (3d Cir. 2017).

“[The] right to film the police falls squarely within the First Amendment’s core purposes to protect free and robust discussion of public affairs, hold government officials accountable, and check abuse of power.”¹⁵

LOWER FEDERAL COURTS

In some of the Circuits where the Circuit Court of Appeals has not ruled that there is a right to record, some lower Federal Courts (District Courts) have ruled that there is such a right:

(E.D. Michigan) “[T]here is a clearly established First Amendment right to openly record police officers in public spaces.”¹⁶

(N.D. Ohio) “[T]here is a First Amendment right openly to film police officers carrying out their duties in public.”¹⁷

(D. Maryland) “[V]ideo recording of police activity, if done peacefully and without interfering with the performance of police duties, is protected by the First Amendment.”¹⁸ This right is now clearly established.¹⁹

(D. Nebraska) First Amendment protects the right to watch and take pictures of police interacting with protestors.²⁰

(S.D. New York) “[T]he First Amendment protects the right to record police officers performing their duties in a public space, subject to reasonable time, place and manner restrictions.”²¹

(E.D. Virginia) “Considering this growing consensus, this Court finds that the First Amendment protects the right to record government officials performing their duties.”²²

¹⁵ *Irizarry v. Yehia*, Case No. 21-1247, (10th Cir. July 11, 2022).

¹⁶ *Craft v. Billingslea*, Case No. 17-cv-12752, 30 (E.D. Mich. May. 8, 2020) [6th Cir].

¹⁷ *Crawford v. Geiger*, 131 F. Supp. 3d 703, 715 (N.D. Ohio 2015)(*Aff'd in part, Rev'd in part*, 656 Fed. Appx. 190 (6th Cir. 2016) [6th Cir]

¹⁸ *Garcia v. Montgomery Cnty.*, 145 F. Supp. 3d 492, 508 (D. Md. 2015) [4th Cir]

¹⁹ *Hulbert v. Pope*, 535 F. Supp. 3d 431 (D. Md. 2021)

²⁰ *Keup v. Sarpy County*, 2022 WL 195822 (D. Neb. 01/21/2022)

²¹ *Higginbotham v. City of N.Y.*, 105 F. Supp.3d 369, 379 (S.D. N.Y. 2015) [2nd Cir]

²² *Dyer v. Smith*, 2021 WL 694811 (E.D. Va. 02/23/2021) [4th Cir]

SPECIFIC CAUTIONS

- Some courts have questioned (but have not decided) whether a person who is the subject of the police action has a right to record,²³ so it's **best to have someone else record the encounter**.
- The person doing the recording does not have the right to do so in a way that interferes with the Officer performing his duties, so it is **important not to crowd the Officer or to provoke others to interfere with the police**.
- Some courts have suggested that there may not be a right to record the police surreptitiously,²⁴ so it is advisable to **record openly or with express notice to the Officer**.
- The right to record police is not absolute: it is **subject to reasonable time, place or manner restrictions**. Thus, if an Officer directs the person recording to back up to a reasonable distance, that command probably does not violate the Constitution.
- If you are within one of the Federal Circuits which has **not specifically ruled** that there is a “clearly established” right to record police conducting their official duties in public, there is no guaranty that a court in that jurisdiction will determine that you have such a right, and a Police Officer who prevents you from recording may be immune from civil liability. As of the date of this publication, **the following Federal Circuit Courts have not held that there is a clearly established right to videorecord police in public: 2nd (Connecticut, New York, Vermont), 4th (Maryland, North Carolina, South Carolina, Virginia, West Virginia), 6th (Kentucky, Michigan, Ohio, Tennessee), 8th (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota), and the D.C. Circuit (District of Columbia)**. See the attached Quick Reference Guide indicating where the right to record police has been “clearly established” by court rulings.

QUESTIONS?

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²³ *Sandberg v. Engelwood*, 727 Fed. Appx. 950 (10th Cir. 2018).

²⁴ *Higginbotham v. City of N.Y.*, 105 F.S.3d 369 (S.D.N.Y. 2015); *but see Project Veritas Action Fund v. Rollins*, 982 F.3d 813 (1st Cir. 2020)(striking down a law that banned secret recordings, including recordings of police performing their duties in public).

Quick Reference Guide: Where is the right to record police “clearly established”?

STATE or TERRITORY	FEDERAL CIRCUIT	RIGHT TO RECORD ESTABLISHED BY: • Federal Circuit Court of Appeal • Federal District Court OR NOT YET FORMALLY ESTABLISHED
Alabama	Eleventh	YES - Federal Circuit Court of Appeal
Alaska	Ninth	YES - Federal Circuit Court of Appeal
Arizona	Ninth	YES - Federal Circuit Court of Appeal
Arkansas	Eighth	NOT YET FORMALLY ESTABLISHED
California	Ninth	YES - Federal Circuit Court of Appeal
Colorado	Tenth	YES - Federal Circuit Court of Appeal
Connecticut	Second	NOT YET FORMALLY ESTABLISHED
Delaware	Third	YES - Federal Circuit Court of Appeal
Florida	Eleventh	YES - Federal Circuit Court of Appeal
Georgia	Eleventh	YES - Federal Circuit Court of Appeal
Hawaii	Ninth	YES - Federal Circuit Court of Appeal
Idaho	Ninth	YES - Federal Circuit Court of Appeal
Illinois	Seventh	YES - Federal Circuit Court of Appeal
Indiana	Seventh	YES - Federal Circuit Court of Appeal
Iowa	Eighth	NOT YET FORMALLY ESTABLISHED
Kansas	Tenth	YES - Federal Circuit Court of Appeal
Kentucky	Sixth	NOT YET FORMALLY ESTABLISHED
Louisiana	Fifth	YES - Federal Circuit Court of Appeal
Maine	First	YES - Federal Circuit Court of Appeal
Maryland	Fourth	YES – Federal District Court
Massachusetts	First	YES - Federal Circuit Court of Appeal
Michigan	Sixth	YES – Federal District Court
Minnesota	Eighth	NOT YET FORMALLY ESTABLISHED
Mississippi	Fifth	YES - Federal Circuit Court of Appeal
Missouri	Eighth	NOT YET FORMALLY ESTABLISHED
Montana	Ninth	YES - Federal Circuit Court of Appeal
Nebraska	Eighth	YES – Federal District Court
Nevada	Ninth	YES - Federal Circuit Court of Appeal
New Hampshire	First	YES - Federal Circuit Court of Appeal
New Jersey	Third	YES - Federal Circuit Court of Appeal
New Mexico	Tenth	YES - Federal Circuit Court of Appeal
New York	Second	YES – Federal District Court
North Carolina	Fourth	NOT YET FORMALLY ESTABLISHED
North Dakota	Eighth	NOT YET FORMALLY ESTABLISHED
Ohio	Sixth	YES – Federal District Court
Oklahoma	Tenth	YES - Federal Circuit Court of Appeal
Oregon	Ninth	YES - Federal Circuit Court of Appeal
Pennsylvania	Third	YES - Federal Circuit Court of Appeal
Rhode Island	First	YES - Federal Circuit Court of Appeal
South Carolina	Fourth	NOT YET FORMALLY ESTABLISHED
South Dakota	Eighth	NOT YET FORMALLY ESTABLISHED
Tennessee	Sixth	NOT YET FORMALLY ESTABLISHED
Texas	Fifth	YES - Federal Circuit Court of Appeal
Utah	Tenth	YES - Federal Circuit Court of Appeal
Vermont	Second	NOT YET FORMALLY ESTABLISHED
Virginia	Fourth	YES – Federal District Court
Washington	Ninth	YES - Federal Circuit Court of Appeal
West Virginia	Fourth	NOT YET FORMALLY ESTABLISHED
Wisconsin	Seventh	YES - Federal Circuit Court of Appeal
Wyoming	Tenth	YES - Federal Circuit Court of Appeal
Dist. of Columbia	D.C. CIRCUIT	NOT YET FORMALLY ESTABLISHED
Puerto Rico	First	YES - Federal Circuit Court of Appeal
U.S. Virgin Is.	Third	YES - Federal Circuit Court of Appeal
Guam	Ninth	YES - Federal Circuit Court of Appeal