



# Excellence in Policing and Public Safety Program

## Joseph F. Rice School of Law

### UNIVERSITY OF SOUTH CAROLINA

## About EPPS

The Excellence in Policing & Public Safety (EPPS) Program was created in Fall 2023, initially funded by a \$10 million appropriation by the South Carolina legislature. EPPS is dedicated to integrating police practitioners, researchers, and community members to address contemporary challenges in policing and public safety.

## Our Vision

To equip officers, agencies, and communities with the tools and insights needed to address contemporary and future challenges, foster innovation, and lead with integrity, ultimately contributing to safer and more resilient communities.

## Our Mission

Empower police professionals by providing comprehensive leadership development, cutting-edge research, tailored technical assistance while advancing knowledge, refining practices, and elevating professionalism within policing.



## First Amendment Auditors

### What Agencies & Officers Should Know

First Amendment auditors intentionally film or photograph public spaces, government buildings, and public officials to test and assert their constitutional rights. Police encounters with auditors can escalate if not properly understood or managed. This bulletin explains what auditors do, outlines the relevant legal framework, and recommends best practices for officers and agencies to ensure constitutionally sound and professional responses during interactions with auditors.

### What are First Amendment Auditors?

First Amendment auditors are individuals or groups who photograph, video record, or audio record public spaces, government buildings, and police-citizen encounters to “audit” (or test) the police response to their activities, sometimes calling themselves media journalists” or “citizen journalists” to take full advantage of the First Amendment’s freedom of press guarantee.<sup>1</sup>

Encounters between First Amendment auditors and officers can quickly

<sup>1</sup> Sean T. Leavey, “We’re Just Here Working on a Story:” First Amendment Auditors, Policial Culture, and the Mediated Public Sphere, 56 COMM. & DEMOCRACY 71 (2022).

# Our Values

Excellence  
Collaboration  
Respect  
Innovation  
Professionalism

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become contentious.<sup>2</sup>

Some auditors are motivated by the desire to ensure that the government is respecting constitutional limits, identifying and bringing attention to deficiencies. In this context, auditors are engaged in a form of social activism. Other auditors, however, are motivated by internet fame or personal financial gain through monetizing YouTube channels or using crowdfunding tools like GoFundMe to finance and profit from “audits” that go viral. By recording and broadcasting confrontations with public officials, auditors create content that drives viewership and revenue. They can also create compelling evidence for future legal action if the police response infringes on their constitutional rights

## Can Someone Record Police-Citizen Interactions?

**Yes.** Free speech is an essential part of an informed and engaged democracy, and subject to strong constitutional protections. When the First Amendment freedom of speech applies, the government cannot regulate—that is, restrict or punish—speech or expressive conduct. That means officers cannot make an arrest even when an individual’s speech or conduct appears to violate a state statute or local ordinance. Instead, the Constitution permits an arrest only when the speech or conduct is *not* protected by the First Amendment.

Courts have uniformly ruled the public has a First Amendment right to record police-citizen encounters if the recordings are made from or in a public place.<sup>3</sup> Infringing on the right to record—by, for example, instructing someone *not* to record, physically seizing their camera or other equipment, or detaining or arresting someone for recording—violates the auditors’ First Amendment right to record.

In *Sharpe v. Winterville Police Department*, the United States Court of Appeals for the Fourth Circuit—South Carolina’s federal circuit—held that a vehicle occupant who livestreamed a police traffic stop was protected by the First Amendment.<sup>4</sup> Although the court did not specifically hold that recording *without* livestreaming is protected speech, it logically follows that if livestreaming is protected speech, then simply recording for later viewing and dissemination is

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<sup>2</sup> See, e.g., Kevin Accettulla, *Florence County Deputy no Longer Employed After Recorded Incident Uploaded to YouTube*, WBTW News13, September 20, 2022, <https://www.youtube.com/watch?v=yuwa9UAXmow&t=3s>

<sup>3</sup> See, e.g., *Sharpe v. Winterville Police Department*, 59 F.4th 674, 681 (4th Cir. 2023) (holding livestreaming a police traffic stop is expressive conduct covered by the First Amendment); *Irizarry v. Yehia*, 38 F.4th 1282, 1292 (10th Cir. 2022) (stating “[T]here is a First Amendment right to film police performing their duties in public.”); *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 833 (1<sup>st</sup> Cir. 2020) (same); *Turner v. Lieutenant Driver*, 484 F.3d 678, 688, (5th Cir. 2017) (same); *Fields v. City of Philadelphia*, 862 F.3d 353, 356 (3rd Cir. 2017) (same); *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 595-96 (7th Cir. 2012) (same); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (same).

<sup>4</sup> *Sharpe*, 59 F.4th at 681.



also protected speech. This likely "clearly established" the right to record police in the public performance of their duties, such that officers who infringe on that right will not be protected by qualified immunity.<sup>5</sup>

Many state statutes and local ordinances that purport to prohibit or limit recording police activities predate recent First Amendment caselaw and are unconstitutional when used to restrict recording.<sup>6</sup> When recording activity is not interfering with or obstructing an investigation, officers should seek legal advice before relying on a statute, ordinance, or policy that purports to prohibit recording activity.

## What Can Officers Do to Limit Interference in Investigations?

First Amendment rights are not absolute, and courts place reasonable time, place, and manner restrictions on speech, including the right to record police activities in public areas. Officers can take appropriate action to address activity that **actually interferes with or obstructs** an investigation, or that jeopardizes the safety of an officer, suspect, or members of the public.<sup>7</sup> Courts seem particularly inclined to allow officers more flexibility to maintain control during traffic stops given the potential dangers they pose to officer safety.<sup>8</sup>

Officers must be able to articulate why an individual who is recording police activity is, in fact, interfering with or obstructing an investigation—rather than, for example, mere speculation that it *might* interfere with or obstruct an

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<sup>5</sup> When community members sue individual officers for violating their constitutional rights, see 42 U.S.C. § 1983, the qualified immunity doctrine protects officers from suit unless the violation was "clearly established" at the time of the violation. *Harlow v. Fitzgerald*, 457 U.S. 899, 818 (1982). A right is clearly established if there is binding caselaw from the United States Supreme Court, a court within the officer's jurisdiction, or by a consensus of persuasive authority from courts in other jurisdictions. *Sharpe*, 59 F.4th at 683.

<sup>6</sup> See, e.g., *Sharpe*, 59 F.4th at 682 (holding plaintiff plausibly alleged town adopted a livestreaming policy that violates the First Amendment); *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 837 (1st Cir. 2020) (Massachusetts statute prohibiting the secret, nonconsensual recording of police discharging their duties violates First Amendment); *Gericke v. Begin*, 753 F.3d 1, 10 (1st Cir. 2014) (use of statute prohibiting interception of oral communications to arrest plaintiff for filming police violated First Amendment); *Alvarez*, 679 F.3d at 608 (7th Cir. 2012) (finding Illinois eavesdropping statute likely unconstitutional as applied to the open recording of police).

<sup>7</sup> See, e.g., *Colten v. Kentucky*, 407 U.S. 104, 109 (1972) (noting, officers are entitled to enforce traffic laws free from interference or interruption from bystanders); *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 607 (7<sup>th</sup> Cir. 2012) (noting First Amendment doesn't immunize behavior that obstructs or interferes with effective law enforcement).

<sup>8</sup> See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1049 (1983) (recognizing traffic stops are "especially fraught with danger"); *Gericke v. Begin*, 753 F.3d 1, 7-8 (1st Cir. 2014) (right to film traffic stop not unlimited); *Gilk v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011) (reasonable restriction on filming police may be imposed when circumstances justify); *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 607 (7th Cir. 2012) (police directives aimed at maintaining safety and control during a traffic stop, which have incidental effects on the First Amendment, may be permissible).

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investigation. Officers should then carefully consider their response; courts allow restrictions on speech only when the restriction is “narrowly tailored to serve a compelling governmental interest.”<sup>9</sup> When faced with close calls, courts tend to side with protecting speech rather than curtailing it.<sup>10</sup>

Appropriate actions will most often include asking or telling the individual to back up or otherwise relocate *without* requiring the individual to stop recording. In situations where officers are concerned about someone recording their interviews with witnesses or victims, it is generally preferable to relocate the interview (e.g., moving inside a building or a police vehicle). Commands to stop recording entirely are unlikely to be permitted by the courts.

In short, officers should remember that it is almost never the *act of recording* that interferes with police activity; instead, they should focus on an individual’s physical location (e.g., dangerously close to officers) or other actions (e.g., entering a crime scene) that legitimately interfere with officer duties.

## What Can Agencies Do?

The United States Department of Justice and the International Association of Chiefs of Police provide the below guidance to departments considering policies to address the issue<sup>11</sup>:

- 1. Affirmatively state citizens have a First Amendment right to observe and record police officers engaged in the discharge of their duties from traditional public spaces like streets, sidewalks, and other locations open to the public.**

The law in this area is well-settled. Officers must be trained to recognize citizens are legally entitled to record police-citizen encounters in public areas if their actions do not interfere with the officer’s duties or create a safety risk.<sup>12</sup>

- 2. Describe the range of prohibited responses to individuals recording the police.**

Some citizens may act provocatively in hopes of eliciting a violent or otherwise unconstitutional response that will garner website clicks and provide grounds for a lawsuit. Exercising restraint is key.

- Avoid profanity and unwarranted aggression or threats;
- Don’t destroy recording devices or delete recordings;
- Don’t seize recording devices without a warrant, consent, or exigent

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<sup>9</sup> *American Association of Political Consultants, Inc. v. FCC*, 923 F.3d 159, 167 (4th Cir. 2019).

<sup>10</sup> *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 457 (2007).

<sup>11</sup> Letter from DOJ Civil Rights Division, to the Baltimore Police Department (May 14, 2012); International Association of Chiefs of Police, Recording Police Activity, Model Policy (2015).

<sup>12</sup> See *Irizarry v. Yehia*, 38 F.4th 1282, 1290-92 (10th Cir. 2022) (collecting cases).

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circumstances;

- Don't view recorded content without a warrant, consent, or exigent circumstances; and
- Don't interfere with recording activities unless there is an articulable obstruction with an investigation or a danger to an officer, detainee, or member of the public.

**3. *Describe when recording actions amount to interference with police duties by jeopardizing the investigation or safety of officers or the public.***

Citizens should maintain a reasonable distance from the officer engaged in enforcement activity and may not interfere with the investigation. The exact distance that may be considered "reasonable" depends on the totality of the circumstances.

Citizens must not impede the movement of emergency equipment and personnel or the flow of vehicular or pedestrian traffic.

Citizens should not interfere or obstruct an investigation by physical intervention, tampering with a witness, or by persistently engaging an officer with questions or interruptions.

Prior to making an arrest for failing to comply with any of the above, citizens should be informed they are engaging in restricted activity and given instructions on how to remain compliant.

**4. *Provide clear guidance on supervisory officer review.***

State when supervisory intervention is required. Barring exigent circumstances, the presence of a supervisor or supervisory approval should be considered before an officer conducts a warrantless seizure and search of a recording device or arrests a citizen for using a recording device.

**5. *Describe when it is appropriate to seize recordings and devices.***

In addition to First Amendment concerns, the immediate seizure and search of a recording device may also violate an auditor's Fourth Amendment right against unreasonable searches and seizures. Recording equipment may not be seized without a warrant, consent, or exigent circumstances. Exigent circumstances require an objectively articulable reason to believe evidence will be imminently destroyed, or that a person is at risk of death or serious bodily

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injury.<sup>13</sup>

If a recording device is seized incident to the arrest of the recording party, the warrantless downloading or viewing of the contents of the device are generally prohibited.<sup>14</sup> Absent exigent circumstances, officers should seek a warrant or voluntary consent before viewing the contents of recording device.

**6. *Don't hold individual citizens to a higher standard than the traditional press.***

Courts don't distinguish private citizens from credentialed journalists when reviewing First Amendment claims. They have consistently noted private individuals have the same right as members of the press to gather and disseminate newsworthy events.<sup>15</sup>

### **Discussion Questions**

1. Why do courts consistently uphold the public's right to record police-citizen interactions in public?
2. How can you distinguish between a lawful recording and a situation that presents a safety threat or obstructs official duties?
3. When is it appropriate to involve a supervisor in a First Amendment audit situation?
4. What should an officer do if a person recording is asking repeated questions but staying at a safe distance and not interfering?
5. What advice would you give a new officer about how to respond when a community member appears to be attempting to provoke them into an overreaction on camera? How should they manage confrontational or provocative behavior from a First Amendment auditor without escalating the situation?

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<sup>13</sup> *United States v. Williams*, 998 F.3d 716, 739 (6th Cir. 2021) (approving the warrantless seizure of cellphone when officers had objectively reasonable basis to believe it contained evidence of a crime that could be destroyed).

<sup>14</sup> Cf. *Riley v. California*, 575 U.S. 373 (2014) (holding warrantless search of cellphone, incident to the owner's arrest, violates the Fourth Amendment).

<sup>15</sup> See, e.g., *Gilk v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011) (noting, "bystanders with a ready cell phone or digital camera rather than a traditional film crew" are just as likely to break a story as a major media outlet).