No. 19-1015

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LEVI FRASIER,

Plaintiff-Appellee,

v.

DENVER POLICE OFFICERS
CHRISTOPHER L. EVANS, #05151; CHARLES C. JONES, #04120; JOHN H. BAUER, #970321; RUSSELL BOTHWELL, #94015; AND JOHN ROBLEDO,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Colorado, No. 1:15-cv-01759-REB-KLM
Hon. Robert E. Blackburn

BRIEF OF *AMICI CURIAE* INSTITUTE FOR JUSTICE, CATO INSTITUTE, AMERICAN CIVIL LIBERTIES UNION, AND AMERICAN CIVIL LIBERTIES UNION OF COLORADO IN SUPPORT OF PLAINTIFF-APPELLEE

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INTEREST OF *AMICI CURIAE*[1]

The Institute for Justice ("IJ") is a nonprofit, public interest law center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of governing, including holding individual public officials liable for their constitutional wrongdoing.

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[1] Pursuant to Fed. R. App. P. 29, all parties have consented to the filing of this brief. No party or party's counsel for either side authored this brief in whole or in part. No person or entity other than the *amici* and their members made a monetary contribution to its preparation or submission.

Amici's interest in this case arises from, among other things, qualified immunity's deleterious effect on the ability of people to vindicate their constitutional rights, including the well-established right to record police officers in performance of their duties.

INTRODUCTION

The district court was correct to find that a First Amendment right to record the police is clearly established and to reject Appellants' qualified immunity defense. By April 2014, when Appellants detained Mr. Frasier and attempted to delete his recording documenting them in the performance of their duties, all courts—including the First, Seventh, Ninth, and Eleventh circuits—that squarely grappled with the existence of this right wholeheartedly decided in the affirmative. Furthermore, the U.S. Department of Justice and numerous police departments across the country also recognized this right, with some of these departments, including Appellants' employer in Denver, even training their officers on respecting it.

The district court's decision in this case was a correct application of Supreme Court and Tenth Circuit precedent. But the arguments raised by Appellants on appeal demonstrate both the legal and practical

infirmities with the current doctrine of qualified immunity. Given the maturing consensus that qualified immunity is not justified by any plausible textual or historical basis, this Court should be reluctant to permit any extension of the doctrine beyond its current bounds.

ARGUMENT

A First Amendment right to record the police is essential to the running of a free government. *See Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 599 (7th Cir. 2012) ("To the founding generation, the liberties of speech and press were intimately connected with popular sovereignty and the right of the people to see, examine, and be informed of their government."). It enables the unencumbered "'discussion of governmental affairs,'" and allows for uncovering of constitutional violations as well as for maintenance of continuous public oversight. *Glik*, 655 F.3d at 82-83 (citing *Mills v. Alabama*, 384 U.S. 214, 218 (1966) and *Press-Enter. Co. v. Superior Court*, 487 U.S. 1, 8 (1986)). Such "[p]ublic awareness and criticism have even greater importance" when, as here, there are "allegations of police corruption." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1035 (1991). In situations where "interactions between

government officials and private citizens . . . result in disputes over what actually occurred," video recordings "can help resolve the conflict" between "differing eyewitness accounts." Justin Marceau & Alan Chen, *Free Speech and Democracy in the Video Age*, 116 Colum. L. Rev. 991, 1009-10 (2016).

This First Amendment right to record the police is clearly established and has been for some time,[2] so much so that the City of Denver (the "City") instituted a formal policy to that effect back in 2007. *Frasier v. Evans*, No. 15-cv-01759, 2018 U.S. Dist. LEXIS 198591, *3, *7-8 (D. Colo. Nov. 21, 2018). To ensure compliance, the City produced a training bulletin explicating this policy. *Id.* at *3. The City also trained its officers, including Appellants, to apply the policy in the performance of their duties. *Id.* at *1.

Despite both their training, and the unambiguous state of the law on the right to record police in public as of 2014, Appellants

[2] The phrase "clearly established" is a term of art. It refers to one of the two hurdles plaintiffs must overcome when faced with a qualified immunity defense. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009). To make qualified immunity unavailable to government defendants, plaintiffs must show that (1) defendants' actions violated their constitutional rights; and that (2) at the time of the violation, these rights were clearly established, putting every reasonable officer on notice that such behavior is unconstitutional. *Id.*

interrogated Mr. Frasier and threatened him with arrest, after he, as a passerby, used his tablet to record their use of force against a suspect. App'x 0002; App'x 0007-11. When the officers finally got possession of the tablet, one of them scrolled through the applications, and tried to delete the recording (Mr. Frasier was ultimately able to recover a back-up copy). App'x 0011. The officers handed the tablet back to Mr. Frasier and let him go, but only after the officers were satisfied that the recording was deleted. *Id*.

In its ultimate determination, the district court correctly found that individuals have a clearly established First Amendment right to record police officers in performance of their duties, resulting in the denial of qualified immunity. *Frasier*, 2018 U.S. Dist. LEXIS 198591, at *7-8. That finding is consistent with the purpose of the clearly-established test, which is to ensure that officers have fair warning and are thus put on notice that what they are doing is unconstitutional before they can be sued for damages. Here, at the time of the incident, (1) the state of the law on police recordings was such that four federal circuit courts had confirmed that the right to record is protected by the First Amendment and no circuit court disagreed; (2) the Department of

Justice had fully embraced this right by, among other things, issuing a recommendation recognizing the right; and (3) numerous police departments across the nation had acknowledged this right in their official policies.

There is serious reason to doubt whether the "clearly established law" standard, as first articulated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), is a proper interpretation of the text and history of 42 U.S.C. § 1983 ("Section 1983")—yet even under existing precedent, Appellee has made the necessary showing.

I. The purpose of the clearly-established test is to ensure officers have fair warning that their conduct is unconstitutional.

The district court's conclusion that a First Amendment right to record the police is clearly established is fully consistent with the stated purpose of the "clearly established" test in qualified immunity doctrine. The test reflects the judiciary's view that public officials are entitled to fair warning and clear notice on whether their conduct would violate constitutional rights and expose them to civil liability. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982); *Hope v. Pelzer*, 536 U.S. 730, 739 (2002); *see also Marsh v. Butler Cty.*, 268 F.3d 1014, 1031 (11th Cir.

2011) (en banc) ("[F]air and clear notice to government officials is the cornerstone of qualified immunity."). One way to show that a right is clearly established is to identify a "robust consensus of cases of persuasive authority" such that "a reasonable officer could not have believed that his actions were unlawful." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (internal quotations and citations omitted).

The key question for the purposes of the clearly-established inquiry is whether, at the time defendants committed the act in question, the state of the law was such that it gave them fair warning that this act would violate an individual's constitutional rights. *Hope*, 536 U.S. at 741; *Walker v. City of Orem*, 451 F.3d 1139, 1151 (10th Cir. 2006) (discussing how for a right to be clearly established, "in the light of pre-existing law the unlawfulness must be apparent.") Thus, in *Hope*, the U.S. Supreme Court asked "whether the state of the law in 1995 gave [prison guards] fair warning" that punishing a prisoner by handcuffing him to a hitching post at a worksite would be unconstitutional. *Hope*, 536 U.S. at 741. To determine the answer, the Court looked to judicial precedent, as well as to regulations promulgated by the Alabama Department of Corrections and to a report

from the Department of Justice on the constitutionality of the practice. *Id.* at 743-45. The Court concluded that together, these sources "put a reasonable officer on notice that the use of the hitching post under the circumstances alleged . . . was unlawful." *Id.* at 745-46. Such "'a fair and clear warning'" was enough to deny the prison guards qualified immunity. *Id.* at 746.

The decision in *Hope* is instructive. In addition to judicial precedent itself, the Court found that other sources of law, such as a regulation issued by the Alabama Department of Corrections and at the Department of Justice's report were "relevant" and "buttressed" judicial precedent. *Id.* at 744. Together they constituted what the Court would later call a robust consensus of authority that put officers on notice that their behavior was unconstitutional. *See al-Kidd*, 563 U.S. at 742.

II. At the time of the incident, there was a robust consensus of persuasive authority to provide fair warning about the constitutionality of the Appellants' conduct.

The state of the law on the right to record the police provided Appellants with fair warning at the time of the incident giving rise to this lawsuit. By April 2014, every federal circuit court to squarely

address the question,[3] the Department of Justice, and various city and county police departments had developed a robust consensus, unambiguous in its conclusion: individuals have a First Amendment right to record the police in performance of their official duties. This conclusion was beyond debate, with no circuit court authority to the contrary.[4] As such, at the time of the incident, every reasonable officer would be on notice that detaining Mr. Frasier and deleting his recording would violate his First Amendment right.

[3] The U.S. Supreme Court had an opportunity to take on a case involving the right to record in 2012, but it declined to do so. *Alvarez v. ACLU of Ill.*, 568 U.S. 1027 (2012). Given that most of the Supreme Court's docket involves circuit splits, it is no surprise that it declined to hear the case. After all, there is a robust consensus among federal circuit courts that there is a First Amendment right to record police officers in public places while they are performing their official duties. No federal appellate court has disagreed with that consensus. Therefore, there was no urgent need for the Supreme Court to take up the question.

[4] In 2009, the Fourth Circuit, without ruling on whether the right to record the police exists, found that this right was not clearly established at the time, within the Fourth Circuit. *Szymecki v. Houck*, 353 F. App'x 852, 853 (4th Cir. 2009). This decision does nothing to undermine the circuit-court consensus about the existence of this right, of course. After all, the court specifically chose not to resolve this question. *Id.* at 852 (noting that it is "'permitted to exercise [its] sound discretion in deciding which of the two prongs of the qualified immunity analysis' to address").

A. All circuit courts that reached the issue by 2014 agreed that there is a First Amendment right to record the police. [5]

By 2014, four federal courts of appeals were in agreement that there is a constitutional right to record official police activities in public places. The first appellate court to reach this conclusion was the Ninth Circuit, when in 1995, it recognized a "First Amendment right to film matters of public interest" in a case involving an activist recording police activities during a public protest march. *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995). The Eleventh Circuit followed suit in 2000, by holding that individuals have "a First Amendment right . . . to photograph or videotape police conduct," since "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." *Smith v. City of Cumming,* 212 F.3d 1332, 1333 (11th Cir. 2000). In 2011, the First Circuit too found that "[t]he filming of government officials engaged in their duties in a public place,

[5] Today, this consensus has only grown, with the Fifth and the Third Circuit courts joining the other four circuits in recognizing this First Amendment right. *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017); *Fields v. City of Philadelphia*, 862 F.3d 353, 356 (3d Cir. 2017) (recognizing the right, but not finding it to be clearly established).

including police officers performing their responsibilities, fits comfortably" within the principles protected by the First Amendment. *Glik*, 655 F.3d at 82. It is a right that is "basic, vital, and well-established.'" *Id.* at 85 (citation omitted). Finally, in 2012, the Seventh Circuit found that defendants' position that the right to record the police is not protected by the First Amendment was "extreme" and "extraordinary." *Alvarez,* 679 F.3d at 594. Instead, the Seventh Circuit agreed with the Eleventh, concluding that police interference with "the gathering and dissemination of information about government officials performing their duties in public" must be "subject to heightened First Amendment scrutiny." *Id.* at 600.

In sum, over the period of seven years (from 1995 to 2012), four federal courts of appeals had carefully considered the question of whether there is a First Amendment right to record police officers performing their official duties in public places. All four unambiguously said yes. This is precisely the type of precedent that clearly establishes a constitutional right. It was more than sufficient to put Appellants on notice that they were acting illegally when they detained Mr. Frasier and tried to get rid of his video recording.

B. By 2012, the U.S. Department of Justice issued a guidance that further underscored the existence of a First Amendment right to record the police.

The four circuit-court decisions discussed above led to a full-on embrace of the right-to-record by the United States Department of Justice ("DOJ"). Just six days after the Seventh Circuit decided *Alvarez*, DOJ issued a guidance recognizing "individuals' First Amendment right to observe and record police officers engaged in the public discharge of their duties." U.S. Department of Justice, Civil Rights Division, *Re: Christopher Sharp v. Baltimore City Police Department, et. al,* 1 (May 14, 2012) ("DOJ Guidance"). Prior to 2014, the DOJ also filed two statements of interest, which made the same argument, and included provisions to protect the right to record police in two settlement agreements it reached with police departments in New Orleans, Louisiana and East Haven, Connecticut. *See Sharp v. Baltimore City Police Dep't*, Statement of Interest of the United States, No. 1-11-cv-02888 (D. Md. Jan. 10, 2012); *Garcia v. Montgomery Cty.*, No. 8:12-cv-03592 (D. Md. March 4, 2013); *see also United States v. Town of E. Haven*, No. 3:12-cv-01652, Settlement Agreement at 20-21(D. Conn.

Dec. 20, 2012); *United States v. City of New Orleans*, 35 F. Supp. 3d 788, Consent Decree at 44-45 (E.D. La. 2013).

In 2012, the DOJ position was very clear and very consistent with the appellate courts' consensus: individuals have a First Amendment right to record the police in performance of their duties, and this right "is critically important because officers are 'granted substantial discretion that may be used to deprive individuals of their liberties.'" DOJ Guidance at 3 (citing *Glik*, 655 F.3d at 82). When armed with the right to record, the public can "'guard against miscarriage of justice.'" *Id*. at 3 (citing *Neb. Press Assoc. v. Stuart*, 427 US 539, 560 (1976)).

C. Many cities and municipalities, including the City of Denver, joined the robust consensus by recognizing a First Amendment right to record the police years before the incident.

Consistent with the four appellate decisions and with the guidance provided by the Justice Department, cities and counties across the country, prior to the incident in 2014, began to adopt policies recognizing the right to record police officers in performance of their duties and to develop training on how to respect that right.[6] The City of

[6] *See* DOJ Guidance at 3 (recommending that police departments implement policies that "explain the nature of the constitutional right at stake and provide

Denver, for example, instituted "a policy regarding the First Amendment rights of citizens to record officers" as early as 2007 and began to provide "both formal and informal training regarding the subject." *Frasier*, 2018 U.S. Dist. LEXIS 198591 at *3, *7-8. Two years later, in 2009, the St. Louis Metropolitan Police Department issued a special order, recognizing "an unambiguous First Amendment right" to record police officers in public places. *See Chesnut v. Wallace*, No. 4:16-cv-1721, 2018 U.S. Dist. LEXIS 190476, *9 (E.D. Mo. Nov. 7, 2018). In 2011, the Philadelphia Police Department published a Commissioner's Memorandum "advising officers not to interfere with a private citizen's recording of police activity because it was protected by the First Amendment" and in 2014, "instituted a formal training program to ensure that officers ceased retaliating against bystanders who recorded their activities." *Fields v. City of Philadelphia*, 862 F.3d 353, 356 (3d Cir. 2017). Similarly, in 2013, the Montgomery County, Maryland Police published a directive stating that "[i]ndividuals have a right to record police officers in the public discharge of their duties" and that "[o]fficers

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officers with practical guidance on how they can effectively discharge their duties without violating that right").

are prohibited from deleting recordings or photographs, and from intentionally destroying recording devices/cameras." Montgomery County Police, *Citizen Videotaping Interactions*, 1-2 (January 1, 2013).

As the U.S. Supreme Court stated in *Hope*, documents such as regulations issued by the department employing government officers or DOJ reports analyzing the constitutionality of a particular practice are "relevant" to the performance of the clearly-established analysis and can "buttress it." *Hope*, 536 U.S. at 743, 744. DOJ's guidance and its practices, as well as positions adopted by various police departments across the country certainly do so here. To be sure, even without these widely publicized statements uniformly recognizing the right to record police activity, there was and continues to be a robust consensus among federal appellate courts that such a right exists. But these additional sources of law helpfully added to this consensus and, together with judicial opinions, pointed Appellants in one unambiguous direction, providing Appellants with plenty of fair warning that interfering with Mr. Frasier's right to record them would violate First Amendment.

III. The Court should affirm the denial of immunity and address the shortcomings of the doctrine generally.

Amici recognize, of course, that this Court is obliged to follow Supreme Court precedent with direct application. And for all the reasons given above, and in Appellee's merits brief, faithful application of that precedent requires affirming the denial of qualified immunity. By April 2014, when Denver police officers retaliated against Mr. Frasier for recording them, four federal courts of appeals, as well as the DOJ and numerous police departments across the country all agreed that individuals have a First Amendment right to record the police in the performance of their official duties. No circuit court ever found to the contrary, and many police departments, including in Denver, created training programs and issued training materials informing police officers of the existence of the right.

But the Court should still acknowledge and address the emerging judicial and academic consensus that qualified immunity itself lacks any valid textual or historical basis. After all, the text of Section 1983, which provides a cause of action directly against state officers for "the deprivation of any rights . . . secured by the Constitution," does not

mention any defenses potentially available to such officers. 42 U.S.C. § 1983; *see also Owen v. City of Independence*, 445 U.S. 622, 635 (1980) (discussing the "absolute and unqualified" language of Section 1983). And with limited exceptions, the baseline assumption both at the founding and when Section 1983 was first passed was that public officials were strictly liable for unconstitutional misconduct. *See generally* William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797 (2018).

This criticism-and-commentary function of lower-court judges is especially important with respect to qualified immunity, and there is every reason to think the Supreme Court will be very attentive to any such discussion. Although the doctrine is nominally derived from Section 1983, it is doubtful whether qualified immunity should even be considered an example of statutory interpretation. It is not, of course, an interpretation of any particular word or phrase in Section 1983 itself. Rather, the doctrine operates more like free-standing federal

common law, and lower courts routinely characterize it as such.[7] And in the realm of federal common law, *stare decisis* is less weighty, precisely because courts are expected to "recogniz[e] and adapt[] to changed circumstances and the lessons of accumulated experience." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

Indeed, the Supreme Court has already demonstrated its willingness to "openly tinker[] with [qualified immunity] to an unusual degree."[8] Most notably, the Court created a mandatory sequencing standard in *Saucier v. Katz*, 533 U.S. 194 (2001)—requiring courts to first consider the merits and then consider qualified immunity—but then retreated from the *Saucier* standard in *Pearson v. Callahan*, 555 U.S. 223 (2009), which made that sequencing optional.

Pearson v. Callahan is especially instructive, because the Supreme Court justified reversal of its precedent in large part due to the input of lower courts. *See* 555 U.S. at 234 ("Lower court judges, who have had the task of applying the *Saucier* rule on a regular basis for the

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[7] *See, e.g.*, *Cousins v. Lockyer*, 568 F.3d 1063, 1072 (9th Cir. 2009); *Woodson v. City of Richmond*, 88 F. Supp. 3d 551, 577 (E.D. Va. 2015); *Jones v. Pramstaller*, 678 F. Supp. 2d 609, 627 (W.D. Mich. 2009).

[8] Baude, *supra*, at 81.

past eight years, have not been reticent in their criticism of *Saucier*'s 'rigid order of battle.'") (quoting *Purtell v. Mason*, 527 F.3d 615, 622 (7th Cir. 2008)); *id.* at 235 ("'Whether [the *Saucier*] rule is absolute may be doubted'" (quoting *Pearson v. Ramos*, 237 F.3d 881, 884 (7th Cir. 2001)) (alteration in original).

Input from the lower courts on this issue is especially relevant now, as several members of the Supreme Court have recently expressed an interest in reconsidering qualified immunity. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting, joined by Ginsburg, J.) (describing how qualified immunity has become "an absolute shield for law enforcement officers" that has "gutt[ed] the deterrent effect of the Fourth Amendment"); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence.").

It is thus unsurprising that a growing number of lower-court judges have also begun to express concerns with the doctrine. *See, e.g.*, *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring) ("I write . . . to register my disquiet over the kudzu-like

creep of the modern immunity regime [which]. . . ought not be immune from thoughtful reappraisal."); *Estate of Smart v. City of Wichita*, No. 14-2111, 2018 U.S. Dist. LEXIS 132455, *46 n.174 (D. Kan. Aug. 7, 2018) ("[T]he court is troubled by the continued march toward fully insulating police officers from trial—and thereby denying any relief to victims of excessive force—in contradiction to the plain language of the Fourth Amendment.").[9]

Amici respectfully request that this Court—in addition to affirming the denial of qualified immunity—add its voice to the larger dialogue on this crucial and timely issue.

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[9] *See also Manzanares v. Roosevelt Cty. Adult Det. Ctr.*, No. CIV 16-0765, 2018 U.S. Dist. LEXIS 147840, *57 n.10 (D. N.M. Aug. 30, 2018) ("The Court disagrees with the Supreme Court's approach. The most conservative, principled decision is to minimize the expansion of the judicially created clearly established prong, so that it does not eclipse the congressionally enacted § 1983 remedy."); *Thompson v. Clark*, No. 14-cv-7349, 2018 U.S. Dist. LEXIS 105225, *26 (E.D.N.Y. June 11, 2018) ("The legal precedent for qualified immunity, or its lack, is the subject of intense scrutiny."); *Wheatt v. City of E. Cleveland*, No. 1:17-cv-377, 2017 U.S. Dist. LEXIS 200758, *8-9 (N.D. Ohio Dec. 6, 2017) (criticizing the Supreme Court's decision to permit interlocutory appeals for denials of qualified immunity); Lynn Adelman, *The Supreme Court's Quiet Assault on Civil Rights*, Dissent Magazine (Fall 2017) (essay by judge on the U.S. District Court for the Eastern District of Wisconsin); Jon O. Newman, Opinion, *Here's a Better Way to Punish the Police: Sue Them for Money*, Wash. Post (June 23, 2016) (article by senior judge on the Second Circuit); Stephen Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity*, 113 Mich. L. Rev. 1219 (2015) (article by former judge of the Ninth Circuit).

CONCLUSION

Recording police in performance of their official duties is one of the most important and effective ways for citizens to be engaged in affairs of their government. It provides for effective general oversight and also helps uncover instances of police abuse. Furthermore, it is "a basic, vital, and well-established liberty safeguarded by the First Amendment." *Glik*, 655 F.3d at 85. It is little surprise then that every federal appellate court that has considered whether this right exists, has answered in the affirmative. This is the case now and this was the case in 2014, when Appellants violated this right by detaining Mr. Frasier and trying to delete his recording of them. Moreover, DOJ and numerous police departments across this county also explicitly recognize this right, with police departments implementing procedures and training to safeguard it. In sum, the right is clearly established, with all sources of law pointing in one unambiguous direction and providing plenty of notice and fair warning to police officers. This Court should affirm the judgment below and refuse to permit an unwarranted expansion of the doctrine of qualified immunity.

Dated: May 6, 2019.

Respectfully submitted,

/s/ Anya Bidwell

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Dated: May 6, 2019

/s/ Anya Bidwell

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/s/ Anya Bidwell

CERTIFICATE OF SERVICE

I hereby certify that on the 6th of May, 2019, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

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