**No. 25-30128**

In The
# United States Court of Appeals
For The Fifth Circuit

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*Plaintiffs-Appellees / Cross-Appellants*,

v.

LIZ MURRILL, in her official capacity as Attorney General of Louisiana; ROBERT P. HODGES, in his official capacity as Superintendent of the Louisiana State Police; HILLAR C. MOORE, III, in his official capacity as District Attorney of East Baton Rouge Parish,

*Defendants-Appellees*.

On Appeal from the United States District Court
for the Middle District of Louisiana,
No. 3:24-cv-0623,
Honorable John W. deGravelles, Presiding

## BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLEES

An Altik, *Lead Counsel*
Patrick Jaicomo
Anya Bidwell
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320
aaltik@ij.org

July 3, 2025

*Counsel for Amicus Curiae*

## SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities, in addition to those listed in the parties' briefs, have an interest in the outcome of this case.

**Amicus Curiae**
Institute for Justice

**Counsel for Amicus Curiae**
An Altik (Institute for Justice)
Patrick Jaicomo (Institute for Justice)
Anya Bidwell (Institute for Justice)

Undersigned counsel further certifies, pursuant to Federal Rule of Appellate Procedure 26.1(a), that amicus curiae Institute for Justice is not a publicly held corporation and does not have any parent corporation, and that no publicly held corporation owns 10 percent or more of any corporation's stock.

Dated: July 3, 2025

/s/ An Altik
*Lead Counsel for Amicus Curiae*
*Institute for Justice*

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## INTEREST OF AMICUS CURIAE[1]

The Institute for Justice ("IJ") is a nonprofit, public interest law firm dedicated to defending constitutional rights and ensuring a free society by protecting individual liberty and restoring constitutional limits to the power of government. IJ believes that the people must be able to hold government officials accountable for their actions when they violate constitutional rights. To this end, IJ litigates First Amendment cases, qualified immunity cases, and cases at the intersection of both issues, because a free society necessarily requires the right to observe and record police officers without fear of arrest or punishment.

IJ has an interest in ensuring the rights of Louisiana's residents are not infringed when the police already have numerous legal protections in place to shield them from harm while doing the public's business. This brief asks the Court to protect the well-established right of citizens to observe and record police encounters—a right this Court has already recognized—without fear of retributive arrest or other punishment.

[1] Consistent with Fed. R. App. P. 29(b), Appellees and Appellants consented to the filing of this brief. *See* Mot. for Leave. No party or party's counsel authored this brief in whole or in part, and no person other than *amicus* contributed money to prepare or submit this brief.

## SUMMARY OF ARGUMENT

Police officers play an essential role in keeping the public safe. And while their heroic acts should be lauded, their unconstitutional acts should be challenged. Public observation makes both things possible. Both the Supreme Court and this Court have recognized that the First Amendment includes the right to gather, disseminate, and receive information and ideas. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (plurality opinion); *Turner v. Driver*, 848 F.3d 678, 688 (5th Cir. 2017).

Louisiana's buffer law, which criminalizes anyone who approaches within 25 feet of an officer who has issued a retreat order, effectively nullifies this right. The law is so vague that it can reasonably be read to outlaw anything and everything a person may be doing if they approach a police officer who has ordered them to retreat—all at the officer's complete discretion. Citizens who wish to observe the police must now continuously gauge the 25-foot buffer zone from the officer or risk arrest and fines. The law requires no specific conduct or demonstrated intent before an officer may order someone to retreat. Fear of arrest is understandably strong and will chill First Amendment activity in times when it is most needed.

Society has a legitimate interest in allowing police to do their jobs without unnecessary second-guessing from the courts, but that interest has constitutional and practical limits. When police violate the Constitution, their actions can themselves undermine public safety—both directly, by violating individual rights in ways that make people less safe, and indirectly, by undermining public respect for the rule of law. Beyond the boundaries of legitimate police work, then, society also has a legitimate interest in holding police accountable. Today, a raft of doctrines prevent that necessary accountability, with deleterious effects.

Louisiana has enacted multiple statutory provisions enabling police officers to arrest disorderly individuals who interfere with the execution of their duties. These laws can be valuable and legitimate, but, in some circumstances, they can also be abused. Much worse, an officer named in a lawsuit can assert a defense of qualified immunity, which a plaintiff can only overcome by showing that the police officer violated a clearly established constitutional right. In cases involving the First Amendment and qualified immunity, the Supreme Court has crafted another tool for police officers—the *Nieves* bar. If a plaintiff brings a retaliatory arrest claim in relation to their speech, the officer may defeat the claim by

asserting that probable cause existed for the arrest irrespective of the speech. Further, any state officer who joins a state-federal task force is granted broader protection on top of qualified immunity, subject only to a successful *Bivens* or FTCA claim.

Louisiana's buffer law will inevitably discourage citizens from exercising their right to record. This Court has held that recording police is protected First Amendment activity. *Turner*, 848 F.3d at 691. True, the law does not explicitly outlaw recording or observing police. But the law's vague language enables widespread enforcement, preventing bystanders from recording even if they aren't interfering with police duties. As this Court has acknowledged, bystander videos have played an important role in holding the police accountable for their actions. *Id.* at 689.

With all these protections in place, further shielding by Louisiana's unconstitutionally vague buffer law will only deepen the mistrust between police and the public. As the district court noted, the law fails to inform citizens of any standards by which an officer may issue a retreat order, lending itself to arbitrary and discriminatory enforcement. This Court should find the law unconstitutional.

## ARGUMENT

### I. Louisiana's vague buffer law will inevitably chill speech.

The Supreme Court has articulated two independent reasons that a law may be struck down as vague: failure to give notice as to what conduct is prohibited and authorization of arbitrary and discriminatory enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). Examined under either reason, a law that gives discretionary power to order citizens to retreat cannot be called anything but vague. It will prohibit protected First Amendment activity—including simply standing there and observing police encounters. Because the law restricts public presence, First Amendment rights are implicated.

The Supreme Court struck down a similarly vague statute in *City of Chicago v. Morales*, which involved a law banning loitering in a public place. 527 U.S. at 50. The law defined loitering and listed prerequisites to enforcement: a requirement that the police believed at least one person present was a criminal street gang member, the police officer must have ordered dispersal, and the individuals must have disobeyed the order. *Id.* at 48. Despite these requirements, the Court found the law to be vague because "[i]f the loitering is in fact harmless and innocent, the dispersal

order itself is an unjustified impairment of liberty." *Id.* at 58.

Louisiana's buffer law contains even fewer guidelines for observers to follow. If the approach is in fact harmless and innocent, the retreat order itself is an unjustified impairment of liberty. And the retreat order can come at the whim of the officer, no prerequisites necessary. The law is therefore "impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *Id.* at 52.

## II. Multiple statutes, doctrines, and rules already shield police conduct.

Louisiana claims to enact the buffer law as part of their "continued pledge to address public safety in the state."[2] And public safety—including the safety of police officers—is of the utmost importance. But there are at least four layers of additional protection that were implemented for the same purpose that have resulted in excessive protection for officers at the expense of the public's safety. First, Louisiana has enacted multiple laws to ensure officers can arrest individuals interfering with their duties. Second, the defense of qualified

[2] *Gov. Landry signs bill that requires public to stay 25 feet from police at a crime scene*, WWLTV, https://www.youtube.com/watch?v=-f2OejTkKaU.

immunity is granted to almost all police officers, placing the burden of overcoming the defense on the plaintiff. Third, the Supreme Court's creation of the probable cause bar to the retaliatory arrest lawsuits in *Nieves v. Bartlett* puts the burden on the plaintiff to prove the absence of probable cause in order to proceed with his retaliation claim. 587 U.S. 391, 404 (2019). Fourth, the creation of state-federal task forces confers federal immunity on state officers, in addition to qualified immunity. Louisiana's buffer law gives even more insulation to police officers who are already shielded by these protections at the expense of public safety.

### A. Louisiana has already enacted laws that criminalize unlawful interference with police.

For the past 75 years, it has been illegal to resist an officer by intentionally interfering with, opposing, or resisting an officer who is authorized by law to make a lawful arrest, lawful detention, seize property, or serve any lawful process in the state of Louisiana. La. Rev. Stat. § 14:108.2(A).

In addition to outlawing resisting arrest, Louisiana has enacted laws criminalizing obstruction of justice by tampering with evidence or using force to influence a criminal proceeding and disturbing the peace by engaging in a "fistic encounter" or "[a]ddressing any offensive,

derisive, or annoying words to any other person who is lawfully in any street, or other public place . . . .” La. Rev. Stat. §§ 14:130.1, 14:103(A)(1)–(2).

These laws are more than sufficient to serve as a deterrent for any bad actors who may attempt to interfere with a police officer lawfully discharging his duties. In fact, they are often abused by officers who lack an alternative basis for arrest. In 2013, a Florida sheriff's office adopted a predictive policing program that purported to prevent crime by targeting individuals and harassing them and their families at home. *Taylor v. Nocco*, No. 8:21-CV-555-SDM-CPT, 2024 WL 3678322, at *1 (M.D. Fla. Mar. 24, 2024). As punishment for not cooperating by providing detailed information about the target's location and associations, officers would arrest their parents for supposedly obstructing or resisting an officer. *Id.* at *5. Although obstruction type laws are more specific than the buffer law in articulating specific conduct that may lead to arrest, they are still subject to abuse. If the buffer law is enforced, abuse will inevitably follow.

As this Court noted in *Buehler v. Dear*, the difficulty is “figuring out when filming [or observing] veers from documenting to interfering.” 27

F.4th 969, 976 (5th Cir. 2022). Although the facts will always play a determining role in the analysis, Louisiana's statutes already require harmful intent in the offender's actions as a signal of interference. The buffer law does not capture any illegal activity left out by the current statutes—it only serves to include innocent conduct as a basis for arrest.

### B. Qualified immunity is a vast affirmative defense that relieves police officers of liability.

Qualified immunity is a doctrine created by the Supreme Court to let officers cross unclear constitutional lines in "the spur (and in the heat) of the moment" without fear of "surviving judicial second-guessing months and years" later. *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). When assessing whether qualified immunity applies, courts ask whether the constitutional right was clearly established and if a reasonable officer could not be "expected to know that certain conduct would violate . . . constitutional rights." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

The numbers show that, more likely than not, officers will be granted the defense of qualified immunity. A comprehensive study found that across all federal appellate courts, 59% of cases were appealed with a grant of qualified immunity—and the percentage is highest at 67% in

this Court.[3] Qualified immunity is an all-encompassing defense that is granted to almost every officer who brings it, in addition to being incredibly difficult to overcome. Not only does Louisiana's buffer law fail to provide any novel or significant protections for police officers, it simply provides another backdrop in which officers may perform unconstitutional arrests protected by qualified immunity.

### C. The Supreme Court's *Nieves* bar protects police officers who conduct retaliatory arrests in violation of the First Amendment.

Yet another protection that shields police misconduct is the *Nieves* bar articulated by the Supreme Court in *Nieves v. Bartlett*. 587 U.S. at 404. The Court held that for a plaintiff to prove that they were arrested in retaliation for their speech, they must first "establish[] the absence of probable cause" for their arrest. *Id.* Only then can they "show that the retaliation was a substantial or motivating factor behind the arrest, and, if that showing is made, the defendant can prevail only by showing that the [arrest] would have been initiated without respect to retaliation." *Id.* (citing *Lozman v. City of Riviera Beach*, 585 U.S. 87, 97 (2018)).

[3] INSTITUTE FOR JUSTICE, UNACCOUNTABLE: HOW QUALIFIED IMMUNITY SHIELDS A WIDE RANGE OF GOVERNMENT ABUSES, ARBITRARY THWARTS CIVIL RIGHTS, AND FAILS TO FULFILL ITS PROMISES (2024), https://ij.org/report/unaccountable/executive-summary.

*Nieves'* probable cause bar allows officers to arrest people who annoy them, as long as they can claim that the person was committing a crime too. In creating the bar, the Supreme Court cited the dangerousness of arrests, requiring officers to "make[] quick decisions in 'circumstances that are tense, uncertain, and rapidly evolving.'" *Nieves*, 587 U.S. at 403 (citation omitted). But if a dangerous situation requiring arrest presented itself, the officer would have likely prevailed in a retaliatory arrest suit without the probable cause bar. The law, and the courts upholding it, respect that officers may arrest someone who is endangering someone's life—including the officer. If Louisiana's buffer law is enforced, police officers will *always* have probable cause to arrest. It provides a go-to statute to cite as long as officers first issue a retreat order.

### D. State-federal task forces confer absolute immunity to state actors.

State-federal task forces have become increasingly common in recent years. Formed to address nationwide issues such as human trafficking or terrorism, federal agencies like the U.S. Marshals Service and the FBI employ local state police officers to combine resources.[4]

[4] For example, the FBI lists a Capitol Area Gang Task Force, Central Louisiana

These task forces result in officers with confusing job descriptions who cannot affirmatively answer whether they are acting under color of state or federal law.

In *Mohamud v. Weyker*, a local Minnesota police officer serving on a state-federal task force falsified information that led to a 16-year-old's imprisonment for two years. No. 17-CV-2069, 2024 WL 1255536, at *3 (D. Minn. Mar. 25, 2024). Despite the vast falsifications the officer committed throughout her entire investigation, the court was focused solely on what law the officer was acting under—state or federal? *Id.* at *9. Because the answer was federal, Mohamud, who lived the last years of childhood behind bars for a crime she didn't commit, had no claim. *Id.* at *11.[5]

Participation in these task forces should not encourage state officers to avoid liability for violating citizens' constitutional rights while acting under the guise of a federal agency. Yet, courts have promoted this

Gang Task Force, New Orleans Gang Task Force, Northwest Louisiana Violent Crime Task Force, and South Central Louisiana Gang Task Force in Louisiana. FBI, Violent Gang Task Forces, https://www.fbi.gov/investigate/violent-crime/gangs/violent-gang-task-forces.

[5] Mohamud's *Bivens* claim was dismissed. *See Ahmed v. Weyker*, 984 F.3d 564, 570 (8th Cir. 2020).

exact mindset in holding that state officers are allowed to assert a defense of federal immunity—in addition to qualified immunity. This results in absolute immunity that makes it virtually impossible for any citizen to pursue a remedy in court if their constitutional rights are violated. Due to the nebulous status of state-federal task force officers, any action plausibly conceived as part of their federal duties is automatically protected.

## III. The First Amendment right to record police benefits everyone.

While the buffer law does not explicitly forbid observing or filming public police encounters, citizens will be reluctant to do so if there is no specific act they must commit before an officer gives a retreat order. And, once ordered to retreat at a distance of 25 feet away, filming will be less effective—or in some instances—not effective at all. The loss of bystander videos will be detrimental to police officers and citizens alike.

This Court has recognized that "[w]ithout question, video footage plays a major role in exposing incidents of police brutality." *Buehler*, 27 F.4th at 976. But citizens have also captured videos that have cleared police officers of false accusations or aided in their investigations. As this Court noted, "a citizen's recording might corroborate a probable cause

finding or might even exonerate an officer charged with wrongdoing." *Turner*, 848 F.3d at 689. Videos are "[i]mportant to police . . . [because] these recordings help them carry out their work. They, every bit as much as we, are concerned with gathering facts that support further investigation or confirm a dead-end." *Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017). To capture such videos, citizens must be able to observe at a reasonable distance without risking arrest.

This Court has affirmatively recognized this right, holding that "the principles underlying the First Amendment support the particular right to film the police." *Turner*, 848 F.3d at 689; *see also Buehler*, 27 F.4th at 992. In addition to this Court, almost every other federal appellate court has recognized a First Amendment right to record police activity:

- *Gericke v. Begin*, 753 F.3d 1, 9 (1st Cir. 2014) (holding that gathering information about public officials such as police officers serves a cardinal First Amendment interest).
- *Fields*, 862 F.3d at 360 (holding that the First Amendment protects photos, videos, and recordings of police activity, which necessarily includes the act of creating that material).
- *Sharpe v. Winterville Police Dep't*, 59 F.4th 674, 681 (4th Cir.

2023) (holding that recording police, including livestreaming a police traffic stop, is protected First Amendment speech).

- *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 600 (7th Cir. 2012) (holding that the First Amendment protects the gathering and dissemination of information about government officials performing their duties in public).
- *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (holding that the First Amendment includes a right to film matters of public interest).
- *Irizarry v. Yehia*, 38 F.4th 1282, 1289 (10th Cir. 2022) (holding that filming the police performing their duties in public is protected First Amendment activity).
- *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (holding that there is a First Amendment right to photograph or videotape police conduct).

Two circuits have addressed more narrow issues, but have acknowledged the right in dicta:

- *Chestnut v. Wallace*, 947 F.3d 1085, 1090 (8th Cir. 2020) (concluding that the constitution protects one who records police

activity, which necessarily includes one who merely observes it).

- *Price v. Garland*, 45 F.4th 1059, 1070–71 (D.C. Cir. 2022) (concluding that prohibiting the recording of a public official performing a public duty on public property is unreasonable).

The remaining circuits have not held otherwise and have acknowledged the consensus of their sister courts. *See, e.g.*, *Hils v. Davis*, 52 F.4th 997, 1005 (6th Cir. 2022) (holding that the right to film police discussed in other federal appellate court cases is not applicable to the present case involving recording internal, ongoing government investigations); *Higginbotham v. City of New York*, 105 F. Supp. 3d 369, 379 (S.D.N.Y. 2015) (finding that there is a First Amendment right to record police activity but stating that "neither the Supreme Court nor the Second Circuit has decided" the question).

Videos of police encounters can have a major impact during litigation. In *Pulliam v. Fort Bend County*, Justin Pulliam's First Amendment rights were violated when a police officer ordered his removal from a press conference because the officer did not consider Pulliam, a social media journalist, to be media. No. 4:22-CV-04210, 2024 WL 4068767, at *1 (S.D. Tex. Sept. 5, 2024). The district court, finding

that Pulliam did have a First Amendment right to attend the press conference, held that the officer's conduct failed strict scrutiny. *Id.* at *6–7. Addressing the officer's qualified immunity defense, the judge stated that "the video speaks for itself . . . [b]efore the press conference even began, [the officer] ordered Pulliam's removal without offering a justification that survives strict scrutiny. As such, [he] is not entitled to qualified immunity." *Id.* at *8.

Conversely, in *King v. United States*, James King was detained by unidentified plain-clothed police officers and subsequently violently assaulted when he attempted to escape because he believed he was getting mugged. 917 F.3d 409, 417 (6th Cir. 2019), *rev'd on other grounds sub. nom Brownback v. King*, 592 U.S. 209 (2021). The officers were looking for a man who had committed a home invasion, and King was a similar height. *Id.* Although multiple bystanders filmed the incident, police officers responding to 911 calls told bystanders to delete all the videos to protect the identities of undercover FBI agents. *Id.* Had police officers not ordered the videos of the altercation deleted, the videos could have provided clarification and resolved key fact disputes. If Louisiana's buffer law were in effect in either Pulliam's or King's states, bystanders

may have been prohibited from observing, or worse—arrested for doing so.

Increasingly, courts have emphasized the key role of the public's presence on outcomes related to police accountability. This Court has recognized the importance of "the public's ability to hold the police accountable, ensure that police officers are not abusing their power, and make informed decisions about police policy." *Turner*, 848 F.3d at 689. The right to record necessarily includes the right to observe police activity as "a necessary prerequisite to recording." *Chestnut*, 947 F. 3d at 1090. Because Louisiana's buffer law unduly burdens the right to record police, it is unconstitutional.

## CONCLUSION

Police officers do invaluable work, often putting themselves in harm's way for the public's safety. And when people observe the police doing their work, it serves as a method of accountability that strengthens the relationship between police and the public and contributes to improving public safety. But the current state of the law undermines this outcome by providing statutes and judicially created doctrines that shield unconstitutional police conduct. Louisianans do not need a law that

allows a retreat order at the whim of the officer. Not only does the law fail to serve its purported need of helping officers do their job, but it invites unfettered discretion to encroach on the public's constitutional rights. This Court should find the buffer law unconstitutional and affirm the district court's grant of a preliminary injunction.

Dated: July 3, 2025

Respectfully submitted,

/s/ An Altik
An Altik, *Lead Counsel*
Patrick Jaicomo
Anya Bidwell
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320
aaltik@ij.org

*Counsel for Amicus Curiae*
*Institute for Justice*

## CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2025, I caused the foregoing Brief of Amicus Curiae Institute for Justice to be filed electronically with the Clerk of the Court using the Court's CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

Dated: July 3, 2025

/s/ An Altik
*Lead Counsel for Amicus Curiae Institute for Justice*

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation in Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 3,651 words.

2. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

Dated: July 3, 2025

/s/ An Altik
*Lead Counsel for Amicus Curiae*
*Institute for Justice*