



Is it a right to record police? Feds cite First Amendment, ask 10th Circuit Court to agree

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The U.S. Department of Justice is urging the federal appeals court based in Denver to establish that the First Amendment protects the public's right to record police in the performance of their duties.

In a brief submitted to the U.S. Court of Appeals for the 10th Circuit on Wednesday, the department's Civil Rights Division advocated for the appellate court to settle the question once and for all as cases continue to arise implicating the right to record. The government indicated it has a stake in the outcome, given its authority to investigate patterns of police misconduct.

"The U.S. Department of Justice frequently relies on photos and videos of police misconduct — including photos and videos taken by members of the public — when investigating and prosecuting police officers" for constitutional violations, wrote attorneys Natasha N. Babazadeh and Nicolas Y. Riley.

The brief comes as the 10th Circuit prepares to consider the appeal of Abade Irizarry, a Colorado man who alleges a Lakewood police officer physically blocked him and other observers from

recording a roadside sobriety test in May 2019. Irizarry, who describes himself as a YouTube journalist and blogger, sued Officer Ahmed Yehia for an infringement of his First Amendment right to freedom of the press.

Notably, the appeal comes several months after the 10th Circuit, in a separate case involving Denver police, refused to address whether the First Amendment protects bystanders' rights to record police. In that case, *Frasier v. Evans*, the U.S. Supreme Court declined to take up the 10th Circuit's decision earlier this month, even as several civil liberties and First Amendment advocates wrote in support of a review.

Elizabeth Wang, the Boulder attorney who represented Levi Frasier before the 10th Circuit, said the Justice Department under the Trump administration did not speak up on behalf of the right to record, as it has now in Irizarry's case.

"I applaud the United States for joining the increasingly large chorus of voices calling for courts to clarify that the First Amendment protects the right of people to record the police while they are performing their duties in public," said Alan K. Chen, a law professor at the University of Denver who joined briefs in support of both Frasier and Irizarry.

Six federal circuit courts of appeals have established that bystanders have a constitutional right to record police officers in public. But in the 10th Circuit, which covers Colorado and five other states, qualified immunity is the issue that bogged down Frasier and Irizarry's cases. Qualified immunity is a judicial doctrine that shields government employees from liability when they are acting in good faith.

In practice, holding an officer accountable for violating a constitutional right can only happen if the court system has already clearly defined that the right exists.

The panel of judges that decided *Frasier*'s case in March of this year concluded that at the time of the alleged constitutional violation in 2014, there was no clearly-established right to record police. Shortly afterward, U.S. Magistrate Judge Nina Y. Wang ruled in June that there was still no clearly established right in 2019, when Irizarry's encounter took place — although she did believe that the right to record exists now.

Irizarry's appeal has carefully suggested that the 10th Circuit can still stand by its *Frasier* decision while delivering a different result in his case, given the increasing consensus of appellate courts that the right to record exists under the U.S. Constitution. The Justice Department is also arguing that the 10th Circuit can treat the two cases differently, noting the court had declined to rule on the issue in *Frasier* because neither side disputed that such a right existed.

"Officer Yehia explicitly argued in the district court that 'videotaping a police officer's actions in public spaces is not protected activity under the First Amendment.' Thus, this case presents a better vehicle for deciding the constitutional question than *Frasier*," the department's brief reads.

It also quoted from Lakewood Police Department policy, which advises that officers "should not act to prevent the lawful efforts of the news media to photograph, tape, record and televise adult subjects in a public place."

Although the government indicated it was not weighing in on behalf of either party, it pointed out a long string of court decisions striking down various bans on speech, from wildlife photography to "ballot selfies." The Justice Department acknowledged that the right to record police may be subject to reasonable limitations on the time, place and manner of recording.

But it asked the 10th Circuit to respond to the First Amendment question definitively — and separately from deciding qualified immunity — because the "frequency with which this issue now arises underscores the need for this Court to provide a clear answer."

Mark Silverstein, legal director for the ACLU of Colorado, agreed with that sentiment. The 10th Circuit's decision in *Frasier*, he said, "was the kind of ruling that in legal circles reduces respect for the court ... I hope the 10th Circuit will issue the ruling here that it should have issued in *Frasier*."

In the past several days, the National Police Accountability Project, Cato Institute and Electronic Frontier Foundation have also filed briefs to the 10th Circuit backing Irizarry.

The case is *Irizarry v. Yehia*.