

SCOTUS declines to hear Denver case involving First Amendment right to record police

Michael Karlik

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The nation's highest court will not review a lower court decision finding Denver police officers deserved immunity for allegedly retaliating against a man recording an act of brutality — despite being trained about the First Amendment rights of bystanders.

The U.S. Supreme Court's announcement on Monday lets stand a decision of the U.S. Court of Appeals for the 10th Circuit that civil liberties and First Amendment advocates decried for its deleterious effects on police accountability. Not only did the 10th Circuit determine that officers could receive immunity for going against their own training, but the court refused to say whether the First Amendment guarantees the right to record police in public.

"This confirms that the Supreme Court is simply not interested in reconsidering any aspect of qualified immunity," said Jay Schweikert, a research fellow with the Cato Institute's Project on Criminal Justice.

Qualified immunity is a judicial doctrine meant to shield government officials from civil liability if they are acting in good faith. In practice, courts deny qualified immunity only if prior judicial decisions under similar circumstances have found that a police officer or other public employee has violated a person's clearly-established rights.

The case of Levi Frasier attracted attention from the libertarian Cato Institute and constitutional scholars for its potential to clarify whether officers may be held accountable for what they actually know about citizens' legal rights, or if judges alone may dictate the limits of qualified immunity.

"The 10th Circuit is seriously out of step with other circuits on this question. In addition, this would have been a perfect vehicle to narrow the doctrine of qualified immunity," said Alan K.

Chen, a University of Denver law professor who signed on to a brief to the Supreme Court urging it to hear Frasier's appeal.

Frasier's case dates to August 2014, when he recorded on his tablet a Denver police officer punching a suspect in the head, while another officer grabbed the suspect's pregnant girlfriend and caused her to fall. Afterward, Frasier alleged that Officer Christopher Evans inquired about the video. Frasier responded that no video existed, for fear of police deleting the evidence of their use of force.

According to Frasier, the officers surrounded him until he retrieved the tablet. Evans allegedly took the device, looked through it and announced to the others that he could not find the video. One officer reportedly said that "as long as there's no video, it's okay." Frasier then sued, alleging the officers retaliated against him for exercising his First Amendment rights.

A district court judge declined to grant qualified immunity to the officers. Although no prior judicial decision had established the First Amendment guaranteed a right of bystanders to record police, Denver officers had in fact been trained that such a right existed.

U.S. District Court Senior Judge Robert E. Blackburn noted it "smacks of gamesmanship" if Evans and the other officers could avoid liability when they actually knew they were allegedly violating a constitutional right.

But on appeal, a three-judge panel for the 10th Circuit reversed Blackburn's decision earlier this year. The appellate panel asserted that judicial decisions alone are what place constitutional limitations on the conduct of government employees, not their training.

"This case is a great example of qualified immunity jurisprudence run amok," Elizabeth Wang, one of Frasier's attorneys, told Colorado Politics. "It makes no sense for the officers in this case to be entitled to qualified immunity when they were not only trained on the existence of the very First Amendment right at issue, but they admitted that it exists and that Levi's recording activity that day was constitutionally protected."

Denver, in its response to Frasier's Supreme Court petition, defended the 10th Circuit's ruling, and said that no court had adopted the "extreme position" that officer training could supplant prior judicial decisions for the purpose of determining qualified immunity. The city also pointed to Frasier's lies about the existence of a video to justify the officers' investigation.

Bystander video of police actions has historically played a role in uncovering excessive force, from the 1991 beating of Rodney King in Los Angeles to the 2020 murder of George Floyd in Minnesota. The latter instance prompted worldwide racial justice protests and directly led the

Colorado General Assembly to abolish qualified immunity as a defense for state-level civil rights lawsuits.

Legislative efforts in Congress to address federal qualified immunity, however, have stalled.

Schweikert, who submitted a brief to the Supreme Court in support of Frasier, said that all circuit courts that have addressed whether the First Amendment guarantees the right to record police officers have decided in the affirmative.

"It's actually not that difficult or controversial of a constitutional question. The only reason it becomes difficult is because of qualified immunity," he said.

Schweikert added that Frasier's case illustrates that qualified immunity does not actually pertain to whether officers act in good faith. If so, the violation of their training would have made a difference to the outcome.

"I hope the 10th Circuit sees this perverse Catch-22 is abetting the ongoing violation of constitutional rights, but it's something that's up to the discretion of the judges," he said.