



ALAN WILSON  
ATTORNEY GENERAL

December 29, 2022

The Hon. Ivory Thigpen, D.C.  
South Carolina House of Representatives  
333-A Blatt Building  
Columbia, SC 29201

Dear Representative Thigpen:

Thank you for reaching out to the South Carolina Attorney General's Office with your request for an opinion on several questions related to proposed legislation on video recording police. This opinion will set out each of the questions and answer them in turn.

**Issues (as quoted from your letter):**

1. Given the provisions of H. 3565, do you see any unreasonable time, manner, or place restrictions in it as filed? How about the language of Amendment 1?
2. Does the language in this bill treat these individuals in the same manner as others in similar conditions and circumstances? How about the language of Amendment 1?
3. Since your state-delineated duties include general supervisory responsibilities in the prosecutorial area, do you, in your opinion, foresee any prosecution pitfalls or challenges when enforcing this law, as written? How about the language of Amendment 1?
4. To the extent you identify any pitfalls, deficiencies, challenges, or other issues in this legislation as filed, or in Amendment 1 that is enclosed, what are they and how are they best addressed, in your opinion?

Your letter includes the filed version of the bill and a document titled "Amendment 1 to H 3565." As filed, the bill would add a statute to Title 16, Chapter 3, Article 11 of the South Carolina Code that reads as follows:

A bystander who is recording an incident scene with a camera or another recording device must remain no less than twelve feet from a law enforcement

officer while the officer is apprehending, arresting, searching, or consulting an individual. A person who violates this section is guilty of a misdemeanor and, upon conviction, must be imprisoned not more than thirty days.

H.R. 3565, 124th Leg. (S.C. 2021-2022). Your attached Amendment 1 would amend the bill such that the statute would read:

A person or a bystander is guilty of obstructing or interfering when within 6 feet from the law officer while the officer is apprehending, arresting, searching, or consulting an individual. A person who violates this section is guilty of a misdemeanor and upon conviction must be imprisoned not more than 30 days.

A person is permitted to exercise their right to photograph or record a law officer performing their duties while the officer is in a public place or public view or the person is in a private place the person has the right to be but must remain no less than 12 feet from the law officer.

If such photography recording occurs [an officer] shall not: intentionally hinder, prevent, or obstruct the person from taking a photograph or making a recording; detain, arrest, threaten, intimidate, or otherwise [] harass such person; search or seize the photograph, recording, or device used to take the photograph or make the recording without such persons permission or a warrant; or damage or destroy the photograph recording [device] used to take the photograph or make the recording.

This subdivision shall not apply to a person if an officer is in the act of placing such person under arrest or the person is under arrest if any officer violates the subdivision search persons or have a civil cause of action against the officer and the officer's law-enforcement agency.

**Law/Analysis:**

Your questions involve an area of law that has grown substantially over recent years, and that continues to evolve. In fact, after receiving your request our Office monitored a relevant case in the 10th Circuit, *Irizarry v. Yehia*, 38 F.4th 1282 (10th Cir. 2022) which was decided earlier this year. Furthermore, it appears that neither the United States Supreme Court nor the Fourth Circuit have yet decided a precedential case which speaks directly to your questions. Due to the evolving nature of the law in this area, our Office cannot definitively opine on whether the proposed legislation would or would not pass constitutional muster if challenged. Hereafter we discuss

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relevant law in the abstract in order to be as responsive as possible to your questions without offering any definitive opinion.

At the outset, we observe – as our Office has many times before – that any act of the General Assembly is entitled to a presumption of constitutionality, and only a court may declare a legislative enactment unconstitutional. *Op. S.C. Att’y Gen.*, 2017 WL 4464415 (September 26, 2017). In addition, we have consistently advised that a statute ‘must continue to be enforced unless set aside by a court or repealed by the General Assembly.’ *Id.* (citing *Op. S.C. Att’y Gen.*, 2003 WL 20143494 (April 1, 2003)). “This Office, in its Opinion, may only comment upon potential constitutional issues which we see as possibly arising in a judicial proceeding. *Id.*

The general rule as stated in *Smith v. City of Cumming* is that there is “a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct. 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). Several reported cases in various federal circuit Courts of Appeals have expanded on this general rule, as discussed below. It appears that the Fourth Circuit has not yet decided a case on point. However, earlier this year the Tenth Circuit held that the “right to record the police performing their duties in public . . . was clearly established . . . based on the persuasive authority from six other circuits.” *Irizarry v. Yehia*, 38 F.4th 1282, 1295 (10th Cir. 2022).

In *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), Mr. Glik witnessed an arrest and started recording it with his cell phone from “roughly ten feet away.” An officer approached Mr. Glik, confirmed he was recording, and then arrested him. After all charges against him were dropped, Mr. Glik brought a § 1983 case alleging a violation of his constitutional rights. On appeal, the First Circuit held that the officer was not entitled to qualified immunity for the arrest, opining: “[T]hough not unqualified, a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment.” 655 F.3d at 85; *cf. Turner v. Lieutenant Driver*, 848 F.3d 678 (2017) (recording “from a public sidewalk across the street”).

The district court opinion in *Benny v. City of Long Beach*, from the Eastern District of New York, is instructive for how far the right to record police extends:

[T]he right to videotape is “not without limitations” and “may be subject to reasonable time, place, and manner restrictions.” *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011) (citing *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000)); see also *Higginbotham v. City of New York*, 105 F. Supp. 3d 369, 379

(S.D.N.Y. 2015) (“All of the circuit courts that have [addressed the issue] ... have concluded that the First Amendment protects the right to record police officers performing their duties in a public space, subject to reasonable time, place and manner restrictions.” . . . “the right [to record police officers in public] does not apply when the recording would impede police officers in the performance of their duties.” *Higginbotham*, 105 F. Supp. 3d at 379-80; *see also Basinski*, 192 F. Supp. 3d at 368 (“[C]ourts within this Circuit have recognized that ‘in cases where the right to record police activity has been recognized by our sister circuits, it appears that the protected conduct has typically involved using a handheld device to photograph or videotape at a certain distance from, and without interfering with, the police activity at issue.’ ”

*Benny v. City of Long Beach*, 2022 WL 2967810 (E.D.N.Y. July 27, 2022). Crucial to this decision was the stipulated fact that the person recording the law enforcement activity was instructed by an officer to leave the area of an arrest and refused to do so. *Id.* This also points to how fact-specific any inquiry into such violations must be. *See id.*

In *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012), the ACLU brought a pre-enforcement declaratory judgment action against Illinois’ eavesdropping statute, which “[made] it a felony to audio record ‘all or any part of any conversation’ unless all parties to the conversation give their consent.” As stated by the Seventh Circuit, “[t]he question here is whether the First Amendment prevents Illinois prosecutors from enforcing the eavesdropping statute against people who openly record police officers performing their official duties in public.” *Id.* at 586. The opinion of the court in *Alvarez* contains a thorough discussion of the purpose and extent of First Amendment protections in this context, including this observation:

The act of making an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of making the recording is wholly unprotected . . . .

The court also was mindful of the realities of police work in public spaces:

It goes without saying that the police may take all reasonable steps to maintain safety and control, secure crime scenes and accident sites, and protect the integrity and confidentiality of investigations. While an officer surely cannot issue a “move on” order to a person because he is recording, the police may order bystanders to

disperse for reasons related to public safety and order and other legitimate law-enforcement needs.

*Id.* at 607. The Seventh Circuit also discussed whether the eavesdropping statute was content-based, and therefore subject to strict scrutiny. *Id.* at 603. Ultimately the court held that while the statute probably was content-neutral, the challenge had a “strong likelihood of success on the merits” and remanded it to the district court for further proceedings. *Id.* at 608.

At least one federal court has determined, in September of this year, that a police video recording law – strikingly similar to the ones described in your letter – was a content-based restriction on speech and subject to strict scrutiny. In *Arizona Broadcasters Association v. Brnovich*, 2022 WL 4121198 (U.S.D.A. 2022), the US District Court for the District of Arizona weighed a motion for a preliminary injunction against the enforcement of an Arizona law which prohibited “knowingly make a video recording of law enforcement activity if the person making the video recording is within eight feet.” *Id.* (quoting A.R.S. § 13-3732(A)). The court opined:

Because there is a clearly delineated right under the First Amendment to record law enforcement activity, Plaintiffs next argue that HB2319 is a content-based restriction and is therefore subject to strict scrutiny. [citation omitted] The Court agrees. HB2319 singles out the activity of video recording law-enforcement activity, and in doing so, it “singles out specific subject matter for differential treatment.” *Reed v. Town of Gilbert*, 576 U.S. 155, 166, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015). Such restrictions are subject to strict scrutiny. *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, — U.S. —, 140 S. Ct. 2335, 2346, 207 L.Ed.2d 784 (2020) (explaining that “[c]ontent-based laws are subject to strict scrutiny,” while “content-neutral laws are subject to a lower level of scrutiny”).

*Id.* at p.2. The court in *Arizona Broadcasters Association* went on to note that the law as written was not narrowly tailored, and to grant the preliminary injunction, in part because the law could not withstand strict scrutiny. *Id.*

Finally, although the Fourth Circuit have yet decided a reported case which speaks directly to this question, one district court in our circuit has. In *Garcia v. Montgomery County Maryland*, 145 F.Supp.3d 492 (2015), a journalist brought a § 1983 action against officers who arrested him, allegedly solely because he was recording their public activity. The facts were in dispute, and it is not clear from the opinion exactly how close Mr. Garcia got to the officers he was recording. *Id.* at 500. In a published opinion Judge Theodore Chuang found “that video recording of police activity, if done peacefully and without interfering with the performance of police duties, is protected by the First Amendment.” *Id.* at 508. However, Judge Chuang went

on to conclude that the right was not clearly established in the Fourth Circuit when the conduct occurred in 2011, and therefore the officers were entitled to qualified immunity on that claim:

[B]ased on the fairest reading of Supreme Court precedent, and the great weight of authority from other circuits, it seems fairly well-settled in 2015 that there is a First Amendment right to video record police officers as they carry out their public duties. But the Fourth Circuit has specifically identified the sources from which a clearly established right can be identified, and as of 2011 — and still today [in 2015] — none of the three identified courts has held that citizens have a right to record police officers as they perform their routine duties. Indeed, the Fourth Circuit, albeit in an unpublished opinion, expressly stated that this right is not clearly established. *Szymecki*, 353 Fed.Appx. at 853. Thus, the Court must conclude that the right to record police officers in the routine public performance of their duties was not clearly established in this Circuit at the time of the events at issue in this case.

145 F.Supp.3d at 509.

### Conclusion

In conclusion, due to the evolving nature of the law in this area, our Office cannot definitively opine on whether the proposed legislation would or would not pass constitutional muster if challenged. We have discussed relevant law in the abstract in order to be as responsive as possible to your questions.

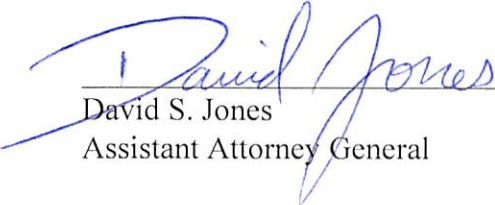
The general rule is that there is “a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct. The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.” *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). Several reported cases in various federal circuit Courts of Appeals have expanded on this general rule. *See discussion, supra*. It appears that neither the United States Supreme Court nor the Fourth Circuit has not yet decided a case on point, although such a case was decided and reported by the United States District Court for the District of Maryland. *Garcia v. Montgomery County Maryland*, 145 F.Supp.3d 492 (2015).

“As this Office has consistently opined, any act of the General Assembly is entitled to a presumption of constitutionality, and only a court may declare a legislative enactment unconstitutional.” *Op. S.C. Att’y Gen.*, 2018 WL 1991745 (April 17, 2018). We observe that a challenge to either version of the draft legislation likely would assert that the laws are content-based restraints on First Amendment rights and ask the court to apply strict scrutiny, because as written the laws apply only to recording police conduct and not the conduct of any other person.

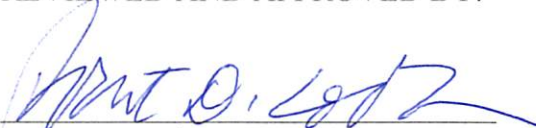
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*See Arizona Broadcasters Ass'n v. Brnovich*, 2022 WL 4121198 (U.S.D.A. 2022). For the reasons stated above, we offer no opinion on how the court would resolve such a challenge.

Sincerely,

  
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David S. Jones  
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REVIEWED AND APPROVED BY:

  
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