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Tenth Circuit Recognizes Constitutional Right To Record the Police

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In 'Irizarry v. Yehia', the Tenth Circuit joined six other circuits in holding that the First Amendment protects the right to record police encounters—and further held that the defendant officer wasn't entitled to qualified immunity for violating that right. In doing so, the appellate court offered guidance on the scope of the clearly established prong of qualified immunity.

A few weeks ago, the U.S. Court of Appeals for the Tenth Circuit joined six other circuits in recognizing that the First Amendment protects the right to record the police in public as they perform their official duties. In that decision, the appellate court also held that the right was clearly established as of mid-2019, and as a result, it allowed a litigant's §1983 claim against a police officer to move forward.

Case Background

In May 2019, plaintiff Abade Irizarry, "a YouTube journalist and blogger," was filming a traffic stop in Lakewood, Colo. *Irizarry v. Yehia*, __ F.4th __, 2022 U.S. App. LEXIS 18960, at *2 (10th Cir. July 11, 2022). Soon after Irizarry began recording, another police officer, defendant Ahmed Yehia, arrived at the scene and walked up to Irizarry, positioning himself so that he blocked Irizarry's view of the stop. Id. Officer Yehia also shined a flashlight into Irizarry's camera and later "blasted his air horn" and repeatedly drove his police car towards Irizarry and another journalist in a threatening manner. Id. at *2-4.

Initially proceeding pro se, Irizarry filed a 42 U.S.C. §1983 complaint against Yehia, asserting a retaliation claim premised on Irizarry exercising his First Amendment rights. Id. at *5. The district court agreed that the First Amendment protects the right to record police officers performing their official duties in public, but it nevertheless dismissed the lawsuit on qualified-immunity grounds after concluding that the right wasn't clearly established in the Tenth Circuit. Id. Irizarry appealed the district court's decision, and the case quickly garnered substantial attention. Five amicus briefs were submitted, including one filed by the Department of Justice on behalf of the United States. Id. at *1.

The Tenth Circuit's Decision

In a 3-0 decision, the Tenth Circuit reversed the judgment below. It began by setting out the three elements necessary for Irizarry to make out a First Amendment retaliation claim: He had to allege facts showing "(1) that he was engaged in constitutionally protected activity, (2) that the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness …, and (3) that the defendant's adverse action was substantially motivated" by Irizarry's exercise of his rights. Id. at *7 (brackets omitted) (quoting *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000)). The primary dispute between the parties was whether Irizarry properly pled the first element—that is, whether Irizarry had a First Amendment right to record the police. The appellate court had little trouble concluding that he did. Id. ("Irizarry was engaged in protected First Amendment activity when he filmed the traffic stop.").

The more difficult question was whether that First Amendment right was clearly established at the time of Irizarry's encounter with Yehia. If it was, then Yehia could not raise qualified immunity as a defense. The court recognized that there was no binding Supreme Court or Tenth Circuit precedent directly on point, but it noted that "persuasive authority from other circuits may clearly establish the law in this circuit when that authority would have put a reasonable officer on notice that his or her conduct was unconstitutional." Id. at *19. The court noted that six other circuits (the First, Third, Fifth, Seventh, Ninth and Eleventh) had all previously held that the First Amendment protects the right to film the police. Id. at *11-16 (citations omitted). The decisions in those six other circuits, according to the Tenth Circuit, "place[d] the constitutional question beyond debate." Id. at *21 (quoting *Cummings v. Dean*, 913 F.3d 1227, 1239 (10th Cir. 2019)).

The appellate court also relied on two other factors to bolster its conclusion. First, the court noted that in a previous published decision, it "indicated, without reservation, that filming the police performing their duties in public is protected under the First Amendment." Id. at *22 (citing *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1196 (10th Cir. 2017)). And while that single statement, "on its own, may be insufficient to satisfy prong two of qualified immunity, it supports the conclusion that a reasonable officer would have known there was a First Amendment right to film the police performing their duties in public." Id. at *22-23. Second, the Tenth Circuit noted that "Irizarry's right to film the police falls squarely within the First Amendment's core purposes to protect free and robust discussion of public affairs, hold government officials accountable, and check abuse of power." Id. at *23. But see id. at *23 n.14 ("We need not and do not rely, however, on general First Amendment principles to show that clearly established law protects filming the police.").

Finally, the court directly responded to Yehia's argument that Irizarry's claim was foreclosed by Frasier v. Evans, 992 F.3d 1003 (10th Cir. 2017). That case involved a highly similar set of facts: The plaintiff filmed the police arresting a suspect in 2014 and later allegedly intimidated the plaintiff and threatened arrest if he did not hand over the video. Id. at 1010-11. In that case, the court held that as of August 2014, the law regarding the right to record the police wasn't clearly established. Id. at 1020-22. But

in the present case, the Tenth Circuit held that "*Frasier* does not undercut our clearly-established-law analysis …." *Irizarry*, 2022 U.S. App. LEXIS 18960, at *25. The court noted that "the legal landscape has changed since August 2014" because in the intervening years, "the Third and Fifth Circuits joined four other circuits in concluding" that the First Amendment protects such conduct. Id. In reaching this conclusion, the court came very close to holding that six is the magic number of circuit courts that tips the scales in favor of finding that a right is clearly established: "[T]he weight of authority from other circuits may clearly establish the law when at least six other circuits have recognized the right at issue." Id. at *21; see also id. ("[W]e hold that the right was clearly established here based on the persuasive authority from six other circuits … ."); id. at *22 ("All six decisions held there is a First Amendment right … , which clearly establishes the law in this circuit."). Based on these data points, the court "ha[d] no doubt that Mr. Irizarry had a clearly established First Amendment right to film the traffic stop in May 2019." Id. at *23.

Conclusion

The Tenth Circuit's *Irizarry* decision is important for two distinct reasons. First, it confirmed that the First Amendment protects an individual's right to record the police in public while they perform their official duties. After *Irizarry*, the right to record the police is now clearly established in at least 31 states. Second, a litigant in the Tenth Circuit can almost certainly prove that a right is clearly established—and thus defeat a qualified immunity defense—even if there is no Supreme Court or Tenth Circuit decision directly on point if that litigant can demonstrate that at least six other circuits have recognized the right at issue.

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