



National Press Photographers Association

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VIA EMAIL

June 30, 2022

Hon. Douglas A. Ducey
Arizona State Governor
1700 W Washington St
Phoenix, AZ 85007
engage@az.gov

Re: Veto HB 2319, Law enforcement activity; recording prohibition

Dear Gov. Ducey:

On behalf of the National Press Photographers Association (NPPA) along with the Radio and Television Digital News Association (RTDNA), the Reporters Committee for Freedom of the Press (RCFP), the Press Freedom Defense Fund (PFDF) and the twenty-three (23) organizations listed below, we write to request you **veto** HB 2319, An Act Amending Title 13, Chapter 37, Arizona Revised Statutes, By Adding Section 13-3732; “Unlawful video recording of law enforcement activity.”

This bill would make it “unlawful for a person to knowingly make a video recording of law enforcement activity if the person making the video recording does not have the *permission* of a law enforcement officer and is within *eight feet* of where the law enforcement activity is occurring” (emphasis added). Additional language regarding law enforcement activity occurring in an enclosed structure on private property permits a person who is authorized to be on the private property to “make a video recording of the activity from an adjacent room or area that is less than *eight feet* away from where the activity is occurring, unless a law enforcement officer determines that the person is *interfering* in the law enforcement activity or that it is not safe to be in the area and *orders the person to stop recording or to leave the area*” (emphasis added).

We are extremely concerned that this language violates not only the free speech and press clauses of the First Amendment, but also runs counter to the “clearly established right” to photograph and record police officers performing their official duties in a public place, cited by all

the odd-numbered U.S. Circuit Courts of Appeal¹ including the Ninth Circuit.² While such rights are not absolute and subject to reasonable time, place and manner restrictions, we believe that requiring the "permission of a law enforcement officer" and setting a minimum and arbitrary distance of eight feet in between a law enforcement officer and the person recording, would not survive a constitutional challenge and is completely unworkable in situations (such as demonstrations and protests) where there are multiple officers and people recording. It is also constitutionally infirm to grant an officer the right to order a person who is filming "to stop recording or to leave the area" under an officer's sole determination that such First Amendment protected activity constitutes interference (which is undefined under the proposed statute). Because the proposed law only applies to a law enforcement officer being recorded, we believe it would fail constitutional muster as not being "content neutral," where the U.S. Supreme Court has held that a statute which "restricts visual and auditory depictions, such as photographs, videos, or sound recordings, [because of its content] ... is presumptively invalid."³

As HB 2319's sponsor, Rep. Kavanaugh, noted in another bill he proposed regarding the redaction of police bodycam footage⁴ a critical element regarding filming is whether someone has a reasonable expectation of privacy in a public place. It is clear from well-established jurisprudence regarding this matter that officers performing their official duties in a public place do not have any reasonable expectation of privacy when it comes to being recorded⁵ and therefore taking enforcement action against someone who "fails to comply with a verbal warning of a violation of this section" is both impermissible and unconstitutional. As the U.S. Court of Appeals for the First Circuit noted, "[a] police officer is not a law unto himself; he cannot give an order that has no colorable legal basis and then arrest a person who defies it."⁶

Given our concerns and legal citations in opposition to HB 2319, we respectfully request that you veto this bill to avoid the cost to taxpayers of a very possible constitutional court challenge should it become law in Arizona.

Please feel free to contact us should you have any questions or issues you would like to discuss. Thank you.

¹ See: *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017); *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017); *ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000).

² *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir.1995) (recognizing a "First Amendment right to film matters of public interest.")

³ *United States v. Stevens*, 559 U.S. 460 (2010).

⁴ See: HB 2081 at [Microsoft Word - HB2081P.docx \(azleg.gov\)](#)

⁵ See: IACP Law Enforcement Policy Center, "Recording Police Activity" [RecordingPolicePaper.pdf \(theiacp.org\)](#) ("[privacy] interest is not implicated when police officers are performing their duties in public places and engaging in public communications audible to persons who witness the events." quoting *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012), cert. denied, No.12-318, 2012 WL 4050487 (U.S. Nov. 26, 2012).

⁶ *Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999).

Very truly yours,

Mickey H. Osterreicher

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General Counsel

Alicia Wagner Calzada

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cc:

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On behalf of:

American Society of Media Photographers
The Atlantic
The Associated Press
BuzzFeed, Inc.
Center for Investigative Reporting d/b/a Reveal
Committee to Protect Journalists
The Daily Beast Company LLC
The E.W. Scripps Company d/b/a KNXV-TV (Phoenix) and KGUN-TV (Tucson)
First Amendment Coalition
Freedom of the Press Foundation
Gannett Co., Inc.
Gray Television, Inc. d/b/a KPHO-TV/KTVK-TV (Phoenix) and KOLD-TV (Tucson)
The Media Institute
MediaNews Group Inc.
National Newspaper Association
News Leaders Association
News Media Alliance
The New York Times Company
Online News Association
The Seattle Times
Society of Environmental Journalists
Society of Professional Journalists
Student Press Law Center
TEGNA Inc. d/b/a KPNX-TV/12News (Phoenix)