

FIRST AMENDMENT LIMITATIONS ON PUBLIC  
DISCLOSURE OF PROTEST SURVEILLANCE

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*During and after last year’s expansive Black Lives Matter protests, police departments nationwide publicly shared robust video surveillance of protestors. Much of this footage rendered individual protestors identifiable, sometimes in ways that seemed intentional. Such disclosures raise First Amendment concerns under NAACP v. Alabama ex rel. Patterson and its progeny, including the recent Americans for Prosperity v. Bonta decision. Those cases limit how the government may collect and distribute sensitive associational information. Bonta raised the First Amendment bar by adding (or clarifying) a narrow tailoring requirement to the exacting scrutiny test for associational disclosures.*

*This Piece argues that wholesale dumps of unedited footage likely violate the First Amendment in at least some circumstances, including those of last summer’s Black Lives Matter protests. While the Supreme Court has insulated governmental collection of protest surveillance from First Amendment challenges via its standing doctrine, public dissemination of such surveillance creates a cognizable injury that avoids standing obstacles. That injury is inflicted by governmental distribution of protest surveillance despite the public nature of protests, as protestors retain certain privacy interests in the public square. And despite the strong governmental interest in transparency surrounding police–protestor interactions, blanket dumps of footage likely fail under exacting scrutiny when they render individual peaceful protestors publicly identifiable. Threat of identification chills protestors’ speech and assembly rights by subjecting them to threats of private retaliation like adverse actions by employers and violence by extremist militias. Bonta’s narrow tailoring requirement likely requires police to avoid identifying peaceful protestors by blurring out faces before releasing (or while livestreaming) protest footage and by not zooming in surveillance cameras for extended, close-range livestreaming of individuals.*

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## INTRODUCTION

Last summer, law enforcement officers policing Portland, Oregon's nightly protests tried something new. They livestreamed the protests on the official Twitter feed of the Portland Police Bureau (PPB), zooming in and lingering on individual protestors' faces and shoes, apparently trying to identify certain protestors to the public. The experiment proved short-lived. By summer's end, a state circuit court had enjoined PPB from publicly broadcasting protests in real time on social media.<sup>1</sup> The court's temporary restraining order rested on two local sources of binding legal authority.

This Piece asks if the First Amendment might demand the same result. More broadly, this Piece examines the constitutional dimensions of public disclosure of protest surveillance, particularly in light of the Supreme Court's most recent First Amendment decision—*Americans for Prosperity Foundation v. Bonta*—issued on the last day of the 2020 Term.<sup>2</sup> The First Amendment is generally understood to allow individuals to engage, associate, and communicate with others for purposes of political expression.<sup>3</sup> The Supreme Court has deployed this right as a shield against unchecked governmental collection and dissemination of information, most notably in cases dealing with the monitoring and regulation of political activists.<sup>4</sup> These cases—beginning in 1958 with *NAACP v. Alabama ex rel. Patterson* and continuing through 2021 with *Bonta*—set forth a clear doctrinal rule that government action may not unduly chill the exercise of First Amendment associational rights through disclosure.<sup>5</sup>

In the 1972 decision *Laird v. Tatum*, however, the Supreme Court sharply curtailed the chilling effect doctrine in the arena of protest surveillance.<sup>6</sup> The Court held that a “subjective ‘chill’” did not confer standing to challenge an Army program that monitored Vietnam War era

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1. KATU Staff, Court Blocks Portland Police From Livestreaming Protests, KATU News (July 30, 2020), <https://katu.com/news/local/court-backs-aclu-lawsuit-barring-police-from-livestreaming-protests> [<https://perma.cc/8M8K-SEDK>].

2. 141 S. Ct. 2373 (2021).

3. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–61, 466 (1958) (“It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”). The Court’s opinion dealt exclusively with the Fourteenth Amendment, but the case is commonly understood as a First Amendment case. See *Bonta*, 141 S. Ct. at 2382 (“[In *Patterson*,] [w]e held that the First Amendment prohibited such compelled disclosure.”).

4. See *Patterson*, 357 U.S. 449; see also *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965); *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

5. See *Lamont*, 381 U.S. at 307; *Dombrowski*, 380 U.S. at 495–96; *Patterson*, 357 U.S. 449, 460–61.

6. 408 U.S. 1, 13–14 (1972).

protestors.<sup>7</sup> Hence the Court deemed mere information collection at protests an incognizable First Amendment injury.<sup>8</sup>

But later cases have cabined *Tatum*'s seemingly expansive holding in important ways. A solo opinion by Justice Thurgood Marshall denying an application for a stay indicated challengers might prevail in cases where governmental surveillance is shared publicly or inadequately justified.<sup>9</sup> The Third Circuit soon went further, ruling in favor of protestors and holding *Tatum* does not insulate identification of protestors to the general public without a legitimate governmental purpose.<sup>10</sup> And the recent *Bonta* decision makes clear these two considerations loom large over compelled disclosures that implicate associational freedom, especially given advances of modern technology.<sup>11</sup>

Drawing on these decisions, this Piece argues that governmental publicization of protest surveillance raises constitutional red flags. Part I introduces two types of disclosures: (1) law enforcement livestreaming, defined as public broadcasting of protests in real time by law enforcement officers in a manner that intentionally identifies individual protestors to the general public, and (2) releasing footage captured by police bodycams, dashcams, drones and helicopters, and mounted building cams made public days, weeks, or months after a protest has ended. Part II traces the development of the chilling effect doctrine as relevant to public disclosure of protest surveillance. Part III confronts the paradox of public privacy, contending that the inherently public nature of protests does not preclude disclosure from chilling protestors in certain contexts. Part IV evaluates Article III standing issues in surveillance cases and advocates relaxed requirements for chilling effect claims. And Part V considers how protest surveillance disclosures might fail under exacting scrutiny, especially given that standard's requirement of narrow tailoring articulated in *Bonta*.

## I. PUBLIC DISCLOSURES OF PROTEST SURVEILLANCE AFTER GEORGE FLOYD'S MURDER

### A. *Livestreaming in Portland*

As protests have mounted over the last decade,<sup>12</sup> technology has changed how they are documented. Livestreaming is perhaps the most

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7. *Id.* at 13–14.

8. *Id.*

9. *Socialist Workers Party v. Att'y Gen.*, 419 U.S. 1314, 1320 (1974) (Marshall, J., denying application for stay).

10. See *Phila. Yearly Meeting of Religious Soc'y of Friends v. Tate*, 519 F.2d 1335, 1338–39 (3d Cir. 1975).

11. See *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2389 (2021).

12. Samuel J. Brannen, Christian S. Haig & Katherine Schmidt, Ctr. for Strategic & Int'l Stud., *The Age of Mass Protests: Understanding an Escalating Global Trend 1* (2020), [https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/200303\\_MassProtests\\_V2.pdf](https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/200303_MassProtests_V2.pdf) [<https://perma.cc/3836-3LLP>].

notable innovation. Starting with the Arab Spring and Occupy Wall Street movements, activists and reporters have broadcast protest videos in real time on websites like Ustream.<sup>13</sup> As technology advanced to allow direct uploads to social media sites from smartphones, livestreams accelerated rapidly. 2020's Black Lives Matter protests solidified livestreaming as a primary mechanism for transmitting protests nationwide. On the popular streaming platform Twitch, nightly livestreams attracted tens of thousands.<sup>14</sup> One Twitch user generated over eight million views in a three-week stretch by broadcasting a curated feed of protest livestreams.<sup>15</sup> A compilation of footage from livestreams posted on Twitter has garnered 54.3 million views.<sup>16</sup> Sites like YouTube host videos of livestreams for posterity.<sup>17</sup>

Livestreams draw notice in part because of the gaps they fill. Their intimacy and unfiltered spontaneity submerge couch loungers in the heat of the protest.<sup>18</sup> And experts spy social utility in livestreaming's rise: Real-time video makes every citizen a witness and can help protect protestors, particularly minorities, from police violence.<sup>19</sup>

Livestreams boomed in Portland, where demonstrators massed almost nightly for over six months.<sup>20</sup> The protests (often turning destructive in early morning) and the government's response (for weeks deploying federal officers, ostensibly to protect the federal courthouse) were the subject of months-long controversy.<sup>21</sup> Lawsuits over officers' mistreatment

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13. Dia Kayyali, Opinion, Hey Activists: You Need to Think Twice Before Livestreaming Protests, WIRE (March 19, 2017), <https://www.wired.com/2017/03/hey-activists-need-think-twice-livestreaming-protests> [<https://perma.cc/WCX7-8HFX>].

14. Kellen Browning, Where Black Lives Matter Protesters Stream Live Every Day: Twitch, N.Y. Times (June 18, 2020), <https://www.nytimes.com/2020/06/18/technology/protesters-live-stream-twitch.html> (on file with the *Columbia Law Review*) (last updated June 19, 2020).

15. *Id.*

16. jordan @JordanUhl, Twitter (May 30, 2020), <https://twitter.com/JordanUhl/status/1266917228752056320> (on file with the *Columbia Law Review*).

17. See, e.g., Ruptly, Live: Protest in Chicago Calls for Defunding of Police Department as Feds Expected in City, YouTube (July 24, 2020), <https://www.youtube.com/watch?v=mn3rZr7Kmpw> (on file with the *Columbia Law Review*).

18. Richard Nieva, 'I Wanted Everybody to See': How Livestreams Change Our View of Protests, CNET (June 11, 2020), <https://www.cnet.com/news/i-wanted-everybody-to-see-how-livestreams-change-our-view-of-protests-facebook-twitter> [<https://perma.cc/8S2E-8DRR>].

19. See Taylor Lorenz, People Can't Stop Watching Videos of Police and Protestors. That's the Idea., N.Y. Times (June 2, 2020), <https://www.nytimes.com/2020/06/02/style/police-protests-video.html> (on file with the *Columbia Law Review*) (last updated June 3, 2020).

20. Mike Baker, Nicholas Bogel-Burroughs & Simon Romero, 'Count Every Vote': Protests Over Ballot Tallies Sweep Through U.S. Cities, N.Y. Times (Nov. 5, 2020), <https://www.nytimes.com/2020/11/05/us/election-protests-portland-minnesota-arizona.html> (on file with the *Columbia Law Review*) (last updated Nov. 7, 2020).

21. See, e.g., Mike Baker, Thomas Fuller & Sergio Olmos, Federal Agents Push Into Portland Streets, Stretching Limits of Their Authority, N.Y. Times (July 25, 2020), <https://www.nytimes.com/2020/07/25/us/portland-federal-legal-jurisdiction-courts.html> (on file with the *Columbia Law Review*) (last updated July 31, 2020).

of protesters and journalists are currently wending their way through the courts.<sup>22</sup>

Around the beginning of July 2020, Portland police officers joined the trend and launched protest livestreams on YouTube and Twitter. At least three times, PPB linked to its livestreams<sup>23</sup> on its official Twitter feed,<sup>24</sup> which has nearly 250,000 followers.<sup>25</sup> Officers repeatedly zoomed in and lingered on individual protesters' faces and shoes, making those protesters easily identifiable and vulnerable to facial recognition and other surveillance technologies.<sup>26</sup> According to the ACLU, those identified were not behaving criminally or destructively when being livestreamed.<sup>27</sup>

PPB offered several rationales in defense of its livestreams.<sup>28</sup> First it claimed that livestreaming was necessary to provide "situational awareness" to its officers and to monitor potential criminal activity.<sup>29</sup> This rationale accords with PPB policy, which holds that "[d]emonstrations may be broadcast to Bureau facilities by live video feed to provide situational awareness to" the officer in charge.<sup>30</sup> If the livestream captures potential criminal activity, the policy authorizes PPB to pass the recording to detectives or the District Attorney's office.<sup>31</sup>

But this rationale doesn't account for public, rather than internal, livestreaming. PPB policy does not explicitly authorize publicizing protest

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22. See, e.g., *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817 (9th Cir. 2020) (order denying emergency motion for a stay pending appeal).

23. See, e.g., Portland Police (@PortlandPolice), Twitter (July 17, 2020), <https://twitter.com/portlandpolice/status/1283994768414916609> [<https://perma.cc/WLJ5-ZAZ3>].

24. See Portland Police (@PortlandPolice), Twitter, <https://twitter.com/PortlandPolice> [<https://perma.cc/HT8G-FY78>] (last visited Sept. 2, 2021).

25. Maxine Bernstein, Portland Police Barred From Collecting Audio, Video of Protesters—Except in Relation to Criminal Inquiries, *Oregonian* (July 30, 2020), <https://www.oregonlive.com/crime/2020/07/judge-bars-police-from-collecting-audio-video-footage-of-protesters-except-in-relation-to-criminal-inquiries.html> [<https://perma.cc/SZ4R-Z4MG>].

26. *Id.*; see also Joanne Cavanaugh Simpson & Marc Freeman, South Florida Police Quietly Ran Facial Recognition Scans to Identify Peaceful Protestors. Is That Legal?, *S. Fla. Sun Sentinel* (June 26, 2021), <https://www.sun-sentinel.com/local/broward/fl-ne-facial-recognition-protests-20210626-7sl5uuuqfbeda32rndlv3xwxi.htmlstory.html> [<https://perma.cc/4YUY-LGBD>] (detailing how, in May and June 2020, South Florida police photographed peaceful protesters not suspected of crimes and ran those photos through an expansive, unregulated facial recognition database).

27. Complaint for Declaratory and Injunctive Relief at 2, *ACLU of Or. v. City of Portland*, No. 20CV27116 (Or. Cir. Ct. filed Aug. 5, 2020), 2020 WL 4559956.

28. Cassie Maas, ACLU Sues Portland to Stop Police From Livestreaming Ongoing Demonstrations, *Jurist* (July 30, 2020), <https://www.jurist.org/news/2020/07/aclu-sues-portland-to-stop-police-from-livestreaming-ongoing-demonstrations/> [<https://perma.cc/D4EH-PXMD>].

29. *Id.*

30. Directive No. 0635.10: Crowd Management/Crowd Control at 4.3, Portland Police Bureau (Aug. 1, 2017), <https://www.portlandoregon.gov/police/article/649358> [<https://perma.cc/UZ3K-N9MJ>].

31. See *id.*

broadcasts.<sup>32</sup> And a Senior Deputy City Attorney later cast doubt on PPB's initial justification. The attorney wrote that PPB had livestreamed the protests not to provide "situational awareness" but "so the community could understand what was occurring at the protest."<sup>33</sup>

The ACLU brought suit in Oregon state court, citing two local sources of legal authority that it claimed prohibited PPB's livestreaming.<sup>34</sup> Within days of the suit's filing, the trial court entered a temporary restraining order enjoining the City from collecting or maintaining audio or video of protestors not engaged in criminal activity, effectively barring PPB from continuing its livestreams.<sup>35</sup> Videos of the livestreams no longer appear on PPB's web video platform feeds.<sup>36</sup> Because local law controlled, the court did not consider the First Amendment.<sup>37</sup>

B. *Released Bodycam, Dashcam, Aerial, and Mounted Camera Footage*

Another more common type of protest surveillance disclosure in the aftermath of Black Lives Matter protests was the later release of video footage, including that captured by police bodycams, dashcams, drones and helicopters, and mounted cameras. Police in Albany, New York, for example, released a trove of footage after an April 2021 protest outside the police station.<sup>38</sup> The police chief and mayor held a joint press conference at which several videos of protestors were displayed and narrated.<sup>39</sup> Later the videos were made available online.

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32. See *id.*

33. KATU Staff, Oregon ACLU Sues to Stop Portland Police From Livestreaming Protests, KATU News (July 29, 2020), <https://katu.com/news/local/oregon-aclu-files-lawsuit-to-stop-ppb-from-livestreaming-protests> [<https://perma.cc/EN39-RHWQ>].

34. See Complaint for Declaratory and Injunctive Relief, *supra* note 27, at 4. One authority was a state statute banning surveillance of the political and social views, associations, or activities of any individual, group, association, or organization unless such information reasonably and directly relates to an investigation of criminal activities. The other was a longstanding civil agreement enshrining that state law into Portland Police Bureau Policy. See *id.*

35. See Temporary Restraining Order, ACLU of Or. v. City of Portland, No. 20CV27116 (Or. Cir. Ct. filed July 30, 2020), [https://aclu-or.org/sites/default/files/temporary\\_restraining\\_order\\_-\\_aclu\\_et\\_al.\\_v.\\_city\\_of\\_portland.pdf](https://aclu-or.org/sites/default/files/temporary_restraining_order_-_aclu_et_al._v._city_of_portland.pdf) [<https://perma.cc/A59B-5DQL>].

36. See, e.g., Demonstrations in Portland, OR 2020, Portland Police Bureau, <https://player.cloud.wowza.com/hosted/7spgmhwz/player.html> [<https://perma.cc/C882-DCPL>] (last updated July 3, 2020).

37. Temporary Restraining Order, *supra* note 35.

38. See Tim Robertson, Albany Police Chief Releases Body Cam Footage, Mayor Says Officers Showed Restraint in South Station Protest, Spectrum News 1 (Apr. 16, 2021), <https://spectrumlocalnews.com/nys/capital-region/news/2021/04/16/albany-protest-body-cam-footage-released> [<https://perma.cc/646T-TC2U>].

39. See WRGB CBS 6 News, Albany Mayor, Police Chief Address Protest at the Albany Police South Station, Facebook (Apr. 16, 2021), [https://www.facebook.com/watch/live/?v=250247256791555&ref=watch\\_permalink](https://www.facebook.com/watch/live/?v=250247256791555&ref=watch_permalink) (on file with the *Columbia Law Review*).

The first video shown, captured by a camera mounted outside the police station, shows individuals yelling angrily at officers and then breaking a police station window.<sup>40</sup> Most of those captured in the footage are protesting peacefully.<sup>41</sup> They are holding signs, chanting, using bullhorns, or simply standing in solidarity afar from the police station.<sup>42</sup> The police chief referred to them during the press conference as “the peaceful protestors out on the periphery.”<sup>43</sup> Many of their faces appear plainly in the exterior camera footage, sometimes in close-up.<sup>44</sup>

Released bodycam footage shows protestors’ approach to the station.<sup>45</sup> Protestors from the first video appear again, aggressively screaming at officers.<sup>46</sup> One protestor shines a high intensity light directly in their faces.<sup>47</sup> Again, the footage captures the faces, clothing, and identifying features of many crowd members, albeit for less time than the exterior camera footage.<sup>48</sup> The video goes on to show the officers’ perspective from inside the station as the window is broken.<sup>49</sup> The pictured officers were not then in riot gear.<sup>50</sup> Later footage shows officers clearing the station ramp with pepper spray and grabbing a microphone from a woman.<sup>51</sup> The final video shows a few Black protestors shouting taunts and racial slurs at a Black officer.<sup>52</sup>

The police chief and mayor explained that showing the videos was necessary to combat a false narrative. Protestors’ livestreams and community chatter had suggested that Albany police had instigated a riot and violated protestors’ rights by responding to verbal harassment with riot gear and pepper spray.<sup>53</sup> The mayor argued that release of the department’s footage was also necessary to avoid escalating community tensions.<sup>54</sup> The aim was to show officers’ restrained response to protestors’ harassment and racist language.<sup>55</sup> She added that citizens need to “get the whole story,” which she said was missing because many of Albany’s local journalists weren’t at the protest and protestors’ livestreams were misleading.<sup>56</sup> The police chief claimed the videos reassured citizens that

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40. See *id.* at 04:27–08:10.

41. See *id.*

42. See *id.*

43. *Id.* at 20:56.

44. See *id.* at 05:25–06:04.

45. See *id.* at 09:25–15:50.

46. See *id.* at 12:01–14:09.

47. See *id.*

48. See *id.*

49. See *id.* at 15:59–19:54.

50. See *id.*

51. See *id.* at 21:37–22:37, 24:59–25:55.

52. See *id.* at 27:55–30:44.

53. See *id.* at 31:53–32:35, 37:05–37:34.

54. See *id.* at 31:53–36:17.

55. See *id.*

56. *Id.* at 47:05–48:59.

police were meeting requisite standards of conduct and were not using pepper spray indiscriminately.<sup>57</sup>

Similarly, the Chicago Police Department (CPD) released on Twitter annotated footage purporting to show a clash instigated by protestors and followed by a proportionate police response.<sup>58</sup> The footage shows individuals donning ponchos, lifting umbrellas, advancing toward the CPD line with locked arms, and scuffling with officers.<sup>59</sup> One protestor hits an officer with a skateboard as police venture into the crowd.<sup>60</sup> Nearly all of the protestors are masked, their faces largely obscured.<sup>61</sup> But at least one unmasked face and the hair, clothes, bicycles, and other identifying features of protestors uninvolved in the actions CPD flagged are visible throughout the two-minute clip.<sup>62</sup>

Under pressure for increased transparency, several police departments released footage months after the protests. In response to an activist's lawsuit seeking videos, the Raleigh, North Carolina, city government published on YouTube 583 videos with dozens of hours of footage.<sup>63</sup> The footage captures everything from police violence against protestors to protestor violence against police, and a lot of peaceful protest activity. Some footage identifies individual protestors.<sup>64</sup>

Just last month, the ACLU of Northern California acquired via public records requests a cache of surveillance video footage from the California Highway Patrol (CHP).<sup>65</sup> The footage, comprised of seventeen videos from May and June of 2020 and matched with corresponding flight logs,

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57. See *id.* at 37:35–37:50, 41:20–41:57.

58. See Chicago Police (@Chicago\_Police), Twitter (Aug. 16, 2020), [https://twitter.com/Chicago\\_Police/status/1295008403123773440?s=20](https://twitter.com/Chicago_Police/status/1295008403123773440?s=20) (on file with the *Columbia Law Review*).

59. See *id.* at 00:23–00:59.

60. See *id.* at 01:18.

61. See *id.* at 00:10. The protests occurred a few months into the COVID-19 pandemic, likely explaining at least some of the masking.

62. See *id.*

63. Josh Chapin, RPD Releases Hundreds of Body, Dash Cam Videos From Demonstrations at End of May, ABC 11 Eyewitness News (Oct. 27, 2020), <https://abc11.com/raleigh-police-rpd-body-camera-dash/7399230> [<https://perma.cc/L83A-RM22>].

64. See Garrett Bergquist, Protest Organizers Question Motives in Body Camera Footage Release, Spectrum News 1 (Oct. 28, 2020), <https://spectrumlocalnews.com/nc/triangle-sandhills/news/2020/10/28/raleigh-police-release-protest-body-camera-footage> [<https://perma.cc/JEX8-E838>].

65. Andres Picon, 'Extremely Troubling': ACLU Questions CHP's Use of Aerial Surveillance During 2020 Racial Justice Demonstrations, S.F. Chron. (Nov. 16, 2021), <https://www.sfchronicle.com/bayarea/article/Extremely-troubling-ACLU-questions-CHP-s-16627231.php> (on file with the *Columbia Law Review*); Hannah Wiley, ACLU Calls for Investigation Into CHP's Use of Aerial Surveillance at Racial Justice Protests, Sacramento Bee (Nov. 16, 2021), <https://www.sacbee.com/news/politics-government/capitol-alert/article255854936.html> (on file with the *Columbia Law Review*); ACLU of Northern CA, Spies in the Sky: California Police Aircraft Record George Floyd Protests, YouTube (Nov. 16, 2021), <https://www.youtube.com/watch?v=aGk8w4OeIVY> (on file with the *Columbia Law Review*).



includes extensive aerial video captured by drones and helicopters of crowds peacefully protesting—sitting, standing, marching, chanting, kneeling, and dancing.<sup>66</sup> Aerial surveillance was conducted in at least twenty-five cities statewide, including Berkeley, Oakland, Palo Alto, Placerville, Sacramento, San Francisco, and San Luis Obispo.<sup>67</sup> Most troublingly, at multiple points CHP cameras zoomed in for extended stretches to focus on stationary individual protestors doing things like making signs, capturing faces and rendering multiple individuals identifiable.<sup>68</sup>

And in San Jose, California, facing a threat by the mayor to release footage via executive authority, the police department published on YouTube three video compilations several months after the protests.<sup>69</sup> The footage depicts contentious crowd control efforts following a dispersal order, including tear gas use, physical confrontations, and the arrest of an individual (whose face is blurred out) for swinging at an officer and grabbing his baton.<sup>70</sup> Other protestors appear throwing bottles at officers.<sup>71</sup> But again, some videos clearly identify many peaceful protestors.<sup>72</sup> A graphic preceding one video says the San Jose police released the footage “to provide additional information and context to events captured by public video and widely distributed online or in the media and are [sic] of significant public interest.”<sup>73</sup>

The Seattle Police Department (SPD) likewise published several hours of footage months after the protests that it had submitted as evidence in a federal case.<sup>74</sup> In the immediate wake of the protests, SPD had released on Twitter and YouTube only heavily edited and selective body-cam footage totaling less than five minutes.<sup>75</sup> That footage, which SPD said

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66. Wiley, *supra* note 65; ACLU of Northern CA, *supra* note 65, at 00:33–01:30.

67. See Picon, *supra* note 65; Wiley, *supra* note 65; ACLU of Northern CA, *supra* note 65, at 00:20–00:33.

68. Wiley, *supra* note 65; ACLU of Northern CA, *supra* note 65, at 01:30–01:44.

69. Maggie Angst, San Jose Police Release First Body Cam Footage From George Floyd Protests, Mercury News (Sept. 11, 2020), <https://www.mercurynews.com/2020/09/11/san-jose-police-releases-first-body-cam-footage-from-george-floyd-protests> (on file with the *Columbia Law Review*).

70. See San Jose Police, Incident 2 Case Number 20-150-0495 (Subject Attempting to Disarm Officer/Failure to Disperse), YouTube at 02:52–03:30 (Sept. 11, 2020), [https://www.youtube.com/watch?v=JCljSF8Q2Dk&ab\\_channel=SANJOSEPOLICE](https://www.youtube.com/watch?v=JCljSF8Q2Dk&ab_channel=SANJOSEPOLICE) (on file with the *Columbia Law Review*).

71. See, e.g., *id.* at 03:58–04:03.

72. See, e.g., *id.* at 04:33–06:00.

73. *Id.* at 00:08–00:15.

74. Matt Markovich, City Releases Body Cam Video of Seattle Police Clashing With Protestors, KOMO News (Nov. 11, 2020), <https://komonews.com/news/local/city-releases-more-body-cam-video-of-seattle-police-clashing-with-protesters> [<https://perma.cc/X4RD-R7WS>].

75. Seattle Police Dep’t, July 25 Protest, YouTube (Aug. 9, 2021), [https://www.youtube.com/watch?v=zF-I2OyGD\\_A&ab\\_channel=SeattlePoliceDepartment](https://www.youtube.com/watch?v=zF-I2OyGD_A&ab_channel=SeattlePoliceDepartment) (on file with the *Columbia Law Review*) [hereinafter Seattle Police Dep’t, July 25 Protest];

it released “in an attempt to be transparent,” exclusively showed fleeting violence against officers, as protestors threw bottles and traffic cones and set off fireworks dangerously near the officers.<sup>76</sup> No protestors were identifiable in the short clip.

## II. CHILLING EFFECTS, ASSOCIATIONAL DISCLOSURE, AND SURVEILLANCE

The animating concern of the chilling effects doctrine is self-censorship.<sup>77</sup> The typical chill claim is thus that one has chosen not to engage in First Amendment activity rather than risk retribution<sup>78</sup> by government action or regulation.<sup>79</sup> This Part traces the evolution of the chilling effect doctrine as relevant to public disclosure of surveillance.

### A. *Foundational Cases: NAACP v. Alabama ex rel. Patterson, Bates v. City of Little Rock, and Shelton v. Tucker*

*NAACP v. Alabama ex rel. Patterson* first established constitutional protection for association.<sup>80</sup> In doing so, the Court reasoned that “[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”<sup>81</sup> The Court held that the State of Alabama could not compel the NAACP to disclose a list of its members’ and agents’ names and addresses to the Alabama Attorney General (AAG).<sup>82</sup> The Court explained that group association promotes effective advocacy of views public and private, and especially controversial ones.<sup>83</sup> Nodding to the “close nexus” between the First Amendment freedoms of

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Seattle Police Dept. (@SeattlePD), Twitter (July 20, 2020), <https://twitter.com/SeattlePD/status/1285398726421307393?s=20> [<https://perma.cc/B4T7-77DL>].

76. Seattle Police Dep’t, July 25 Protest, *supra* note 75; Seattle Police Dept. (@SeattlePD), *supra* note 75.

77. See Brandice Canes-Wrone & Michael C. Dorf, Measuring the Chilling Effect, 90 N.Y.U. L. Rev. 1095, 1095–96 (2015) (“Supreme Court case law provides robust remedies for parties claiming violations of the right to freedom of speech based on the supposition that without such protections, people will self-censor.”).

78. See *Nitke v. Ashcroft*, 253 F. Supp. 2d 587, 597 (S.D.N.Y. 2003) (“The essence of a claim of chill is an assertion that one has elected to refrain from speaking, rather than risk prosecution . . .”).

79. Frederick Schauer, Fear, Risk and the First Amendment: Unraveling the “Chilling Effect,” 58 B.U. L. Rev. 685, 693 (1978).

80. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

81. *Id.* at 462.

82. *Id.* at 451, 466–67. The dispute arose from the AAG’s attempted enforcement of Alabama’s foreign corporation statute. The AAG filed suit against the NAACP under the statute, seeking to force the organization to cease operations in the state. The NAACP’s national headquarters was in New York, which the AAG argued subjected it to the statute even though it had a local affiliate with an office in Alabama. In litigation, the AAG demanded a load of information it deemed necessary for prosecution of its case. The organization had complied with initial requests, producing its charter and a list of officers, but balked at demands for a full membership roster. See *id.* at 451–53, 464–65.

83. *Id.* at 460.

speech and assembly, the Court deemed “beyond debate” the notion that the Constitution protects the freedom to engage in association for the advancement of beliefs and ideas.<sup>84</sup>

Critical to the Court’s holding was its recognition of the “vital relationship” between free association and privacy.<sup>85</sup> The Court focused on the potential harms of revealing rank-and-file NAACP members’ identities, including “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”<sup>86</sup> These harms would unconstitutionally impede members’ efforts to collectively pursue First Amendment protected activities by inducing members to withdraw or dissuading potential members from joining due to fear of public exposure.<sup>87</sup> The Court rejected the state’s attempt to duck responsibility for the disclosure’s chilling effects by shifting blame to private community members.<sup>88</sup> Focusing on the “interplay” of state and private actors, the Court reasoned that the State was culpable because “it is only after the initial exertion of state power represented by the production order that private action takes hold.”<sup>89</sup>

The Court expanded the chilling effects doctrine in a series of cases following *Patterson*. Most notable are two 1960 cases ruling Arkansas statutes unconstitutional. In *Bates v. City of Little Rock*, the Court considered a law similar to that at issue in *Patterson* and reached the same result.<sup>90</sup> It held that free association is “protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.”<sup>91</sup> The law at issue in *Shelton v. Tucker* required teachers to list all organizations to which they belonged.<sup>92</sup> The statute did not require school boards to keep the information confidential, and a member of a citizens’ anti-integration group testified at trial that his group sought access from the state to teachers’ affidavits “with a view to eliminating from the school system persons who supported organizations unpopular within the group.”<sup>93</sup> The Court held that Arkansas failed to “narrowly achiev[e]” its interest in ensuring teachers’ competency, which the state had “pursued by means that broadly stifle fundamental personal liberties.”<sup>94</sup>

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84. *Id.*

85. *Id.* at 462.

86. *Id.*

87. *Id.* at 463.

88. *See id.*

89. *Id.*

90. 361 U.S. 516, 523 (1960).

91. *Id.* The Court reached the same conclusion in a substantially similar case a few years later. *See Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 546 (1963) (holding that the government could not obtain and disclose NAACP membership records without an “overriding and compelling state interest”).

92. 364 U.S. 479, 480 (1960).

93. *Id.* at 486 n.7.

94. *Id.* at 488.

B. *The Doctrine's Weakness Against Protest Surveillance: Laird v. Tatum*

*Patterson* and its progeny were quintessential Warren Court decisions born in the heart of the Civil Rights Movement. After the political tumult of the 1960s and a change in the Supreme Court's roster, the Court sharply curtailed the chilling effect doctrine's applicability to public surveillance of protests. *Tatum* concerned an Army domestic intelligence program instituted in the wake of major protests after Martin Luther King Jr.'s assassination.<sup>95</sup> The Army surveilled protestors and stored records of their activities in Army databases shared with other governmental entities.<sup>96</sup> The information was gleaned largely from news media and other general circulation publications but also included direct surveillance.<sup>97</sup>

The Court rejected the plaintiffs' claim that the Army's program inhibited exercise of their First Amendment rights.<sup>98</sup> It acknowledged that surveillance may unconstitutionally burden protestors' rights despite having only an indirect effect on their exercise.<sup>99</sup> It concluded that the plaintiffs had not shown any indirect effects sufficient to trigger federal jurisdiction. The plaintiffs' claims lacked allegations beyond their being surveilled and thus, the Court reasoned, amounted only to general disagreements with the surveillance program or "speculative apprehensiveness that the Army may at some future date misuse the information in some way that would cause direct harm."<sup>100</sup> The Court also raised a separation of powers concern, worrying that the judiciary is not properly equipped to second-guess determinations as to how and why the government collects information.<sup>101</sup> The Court was unwilling to condone what it saw as a significantly intrusive endeavor without sufficient justification.<sup>102</sup> But it stressed

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95. See *Laird v. Tatum*, 408 U.S. 1, 4–5 (1972).

96. *Id.* at 6. The Court summarized the surveillance program as the collection of information about public activities that were thought to have at least some potential for civil disorder, the reporting of that information to Army Intelligence headquarters . . . , the dissemination of these reports from headquarters to major Army posts around the country, and the storage of the reported information in a computer data bank.

*Id.*

97. *Id.*

98. *Id.* at 2–3. The plaintiffs alleged that the information collected served no legitimate military purpose, was indiscriminately spread to many other governmental agencies, and included a "blacklist" of potential troublemakers. *Id.* at 7.

99. *Id.* at 12–13.

100. *Id.* at 13.

101. *Id.* at 15. This portion of the opinion addressed concerns specific to the military's role in civilian society, as opposed to law enforcement writ large. The Court's broader concern about judicial overreach is, however, one that has been applied to police surveillance matters. See *infra* Part IV.

102. *Tatum*, 408 U.S. at 14. The Court characterized the plaintiffs' case as seeking "a broad-scale investigation, conducted by themselves as private parties armed with the subpoena power of a federal district court and the power of cross-examination, to probe into the Army's intelligence-gathering activities." *Id.*

that constitutional determinations are warranted only when surveillance rises to the level of a cognizable injury.<sup>103</sup>

C. *Cabining Tatum: Socialist Workers Party v. Attorney General of United States and Philadelphia Yearly Meeting of Religious Society of Friends v. Tate*

Not long after *Tatum*, a dispute arose out of the FBI's planned surveillance of a national convention of the Young Socialist Alliance (YSA).<sup>104</sup> The full convention, including "delegated" sessions, was open by registration to anyone under age twenty-nine.<sup>105</sup> The district court granted a preliminary injunction against the FBI Director, barring agents and informants from attending or otherwise monitoring the convention.<sup>106</sup> The Second Circuit vacated the order in part, leaving in place only the ban on FBI disclosure of convention attendees' names to the Civil Service Commission.<sup>107</sup> The Socialist Workers Party, YSA, and several individuals (collectively, the "applicants") took the matter to the Supreme Court, seeking to have the stay restored in full.<sup>108</sup>

Justice Marshall denied the request in a solo opinion issued in his capacity as Circuit Judge for the Second Circuit.<sup>109</sup> But he reached the merits of applicants' chilling effect claim. In rejecting the FBI's argument that the applicants did not plead a cognizable injury, Justice Marshall refuted its reading of *Tatum* as overly broad.<sup>110</sup> Equally significant was Justice Marshall's recognition that the FBI expressly conceded it would not share the information publicly.<sup>111</sup> Indeed, he concluded the denial by making this representation a condition of his order.<sup>112</sup> He also specifically referenced the relief already granted by the Second Circuit preventing the FBI from sharing the names of any attendees with the Civil Service Commission.<sup>113</sup>

The Third Circuit decided a similar case the next year. In *Philadelphia Yearly Meeting of Religious Society Friends v. Tate*, the Philadelphia Police Department (PPD) attended, photographed, and recorded peaceful

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103. Id. at 15–16.

104. *Socialist Workers Party v. Att'y Gen.*, 419 U.S. 1314, 1314–15 (1974) (Marshall, J., denying application for stay).

105. Id. at 1317.

106. Id. at 1314–15.

107. Id. at 1315.

108. Id.

109. Id. at 1320.

110. Id. The FBI argued that *Tatum* required for Article III standing an "exercise of governmental power [that] is regulatory, proscriptive [sic], or compulsory in nature" and a plaintiff who was presently or prospectively subject to such an exercise. Id. at 1318.

111. Id. at 1320. He noted that "the Government has represented that it has no intention of transmitting any information obtained at the convention to nongovernmental entities such as schools or employers."

112. Id.

113. Id. at 1320.

public assemblies and demonstrations of citizens whose political or social views PPD disagreed with.<sup>114</sup> PPD had compiled some 18,000 intelligence files on various groups and individuals.<sup>115</sup> The files were kept indefinitely and held information including the subjects' political views, associations, personal life details, and habits.<sup>116</sup> No safeguards existed to protect the information in the files.<sup>117</sup> Hence the information was available to other law enforcement agencies, private employers, governmental employers, the press, and antagonistic private political organizations.<sup>118</sup> And PPD intentionally publicized its surveillance program and some of the information it captured.<sup>119</sup> On a network television broadcast, PPD agents disclosed without approval the names of certain groups and individuals on whom files were kept.<sup>120</sup>

The Third Circuit held that publicization of the surveillance chilled plaintiffs' associational rights.<sup>121</sup> It found cognizable chilling effect injuries from both the lack of safeguards for the surveillance files and the intentional release of certain information—including protestors' identities—on television, both of which might reasonably subject protestors to private retaliation. The court was “unwilling to say that the Supreme Court in *Tatum* intended to leave our citizens judicially remediless against . . . activity [that] strikes at the heart of a free society.”<sup>122</sup> At least one lower court has followed this approach in a similar case.<sup>123</sup>

#### D. *Recent Gloss: Americans for Prosperity Foundation v. Bonta*

The Court again weighed in on the chilling effects of associational disclosures in *Bonta*. It held that a California law requiring that nonprofits provide the state with lists of its significant donors impermissibly chilled those donors' associational rights.<sup>124</sup> Despite assurances from California that the information would be kept confidential going forward, the Court essentially treated the case as one involving public disclosure because of rampant prior leaks.<sup>125</sup> In finding “an unnecessary risk of chilling,” the Court pointed to threats of violence and retaliation against the petitioners by private actors and deemed that evidence sufficient to render the law

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114. 519 F.2d 1335, 1336 (3d Cir. 1975).

115. *Id.*

116. *Id.*

117. *Id.* at 1337.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 1339.

122. *Id.*

123. *All. to End Repression v. Rochford*, 407 F. Supp. 115, 118 (N.D. Ill. 1975) (distinguishing *Tatum* and finding standing where surveillance was released to newspaper reporters, prospective employers, academic officials, and others).

124. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021).

125. See *id.* at 2388 n.\*.

facially overbroad.<sup>126</sup> It reasoned that advancing technology heightened those risks.<sup>127</sup> And it relied heavily on *Patterson*, reaffirming that “compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action.”<sup>128</sup>

### III. PUBLIC PRIVACY AND DISCLOSURE OF PROTEST SURVEILLANCE

What expectation of privacy, if any, do protestors retain in public? This basic question prefaces application of the chilling effects doctrine to protest surveillance disclosures. The notion of public privacy has long generated robust scholarly and judicial attention.<sup>129</sup> Consider a case from just last year, in which the Fourth Circuit held that a drone surveillance program that digitally logged individual protestors as nonidentifiable dots did not unconstitutionally chill protected activity.<sup>130</sup> The panel opined that “[t]he basic problem with plaintiffs’ argument is that people do not have a right to avoid being seen in public places.”<sup>131</sup>

Such wholesale rejection of public privacy is conceptually tenuous and pragmatically untenable in the modern world.<sup>132</sup> Public privacy is counterintuitive only if “public” and “private” are understood as mutually exclusive absolutes.<sup>133</sup> But “[p]rivacy is a matter of degree,” waxing and waning contextually rather than abruptly beginning or ending at one’s front door.<sup>134</sup> Information can have a set of costs and benefits when used in one context and a different set when used in another one.<sup>135</sup> “Exposure to one audience does not obviate a privacy interest with respect to other

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126. *Id.* at 2388 (internal quotation marks omitted) (quoting *Sec’y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 968 (1984)).

127. *Id.*

128. *Id.* at 2382.

129. See, e.g., Woodrow Hartzog, *The Public Information Fallacy*, 99 *B.U. L. Rev.* 459, 492 (2019) (collecting articles and noting that “[w]hile some scholars generally agree with the ‘no privacy in public’ sentiment, others have long critiqued the idea that there is no privacy in public”).

130. *Leaders of a Beautiful Struggle v. Balt. Police Dep’t*, 979 F.3d 219, 232 (4th Cir. 2020), *rev’d on other grounds*, 2 F.4th 330 (4th Cir. 2021) (*en banc*).

131. *Id.*

132. See generally Joel R. Reidenberg, *Privacy in Public*, 69 *U. Miami L. Rev.* 141, 143 (2014) (describing the conceptual problem of public privacy and arguing that “constitutional democracy depends on spheres of privacy in public”).

133. Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 *N.C. L. Rev.* 989, 1044 (1995).

134. *Id.* at 1041.

135. Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 *Duke L.J.* 967, 1031 (2003).

audiences.”<sup>136</sup> While we inevitably forfeit some privacy when we participate in public life, we also retain some.<sup>137</sup>

The Supreme Court has repeatedly acknowledged as much. It recently held that “[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere.”<sup>138</sup> And its disclosure cases dealing with “a sort of *partial* anonymity” make clear that the same is true under the First Amendment.<sup>139</sup> In *Brown v. Socialist Workers ’74 Campaign Committee*, the Court prohibited Ohio from collecting and publicizing political parties’ donor and disbursement lists.<sup>140</sup> That the information included reimbursements, advances, and wages paid to party members, campaign workers, and supporters—many of whose support for the party was already public to some degree—did not alter the analysis.<sup>141</sup> In *McIntyre v. Ohio Elections Commission*, the Court deemed Ohio’s prohibition on the anonymous distribution of campaign literature unconstitutional even though McIntyre personally and publicly handed out the literature at issue.<sup>142</sup> And in *Talley v. California*,<sup>143</sup> *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*,<sup>144</sup> and *Buckley v. American Constitutional Law Foundation, Inc.*,<sup>145</sup> the Court struck down laws banning anonymous handbill distribution, requiring registration with local officials before door-to-door canvassing, and mandating name badges be worn while soliciting signatures. “In other words, privacy and anonymity are not all-or-nothing in the context of speech—even partial privacy can advance important speech values.”<sup>146</sup>

Protection for public privacy is essential in light of advancing technology.<sup>147</sup> A major historical benefit of protests as a method of political engagement was that they gave individual members safety in numbers, offering substantial (though incomplete) anonymity by allowing people to blend in with the crowd.<sup>148</sup> This partial anonymity incentivized physical

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136. Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. Rev. 167, 209 (2017).

137. McClurg, *supra* note 133, at 1044; see also Mariko Hirose, *Privacy in Public Spaces: The Reasonable Expectation of Privacy Against the Dragnet Use of Facial Recognition Technology*, 49 Conn. L. Rev. 1591, 1601 (2017).

138. *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018).

139. *Doe v. Reed*, 561 U.S. 186, 220 (2010) (Scalia, J., concurring in the judgment).

140. 459 U.S. 87, 97 (1982).

141. *Id.*

142. 514 U.S. 334, 337–39 (1995).

143. 362 U.S. 60, 63 (1960).

144. 536 U.S. 150, 165–68 (2002).

145. 525 U.S. 182, 192 (1999).

146. Scott Skinner-Thompson, *Recording as Heckling*, 108 Geo. L.J. 125, 150–51 (2019).

147. The Second Circuit has recognized that “one of the most difficult issues of modern jurisprudence” is “whether modern technology changes traditional and reasonable expectations of privacy.” *ACLU v. Clapper*, 804 F.3d 617, 625 (2d Cir. 2015).

148. Skinner-Thompson, *supra* note 146, at 159; see also James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* 65–66 (1990).



participation in politics by dulling the threat of retaliation inherent in more solitary endeavors like street-corner proselytizing.<sup>149</sup> But advanced recording and related technologies have dramatically undermined that incentive, especially with the rise of doxing.<sup>150</sup> “There is a difference, which the law should recognize, between being ‘seen’ in public and being closely scrutinized or . . . recorded on film or videotape.”<sup>151</sup> Recording in a manner that intentionally strips the historical anonymity of group protests “weaponiz[es] recording to burden others’ expressive choices, over which some modicum of privacy is needed.”<sup>152</sup> The Supreme Court acknowledged in *Bonta* that “[s]uch risks are heightened in the 21st century and seem to grow with each passing year, as ‘anyone with access to a computer [can] compile a wealth of information about’ anyone else, including such sensitive details as a person’s home address or the school attended by his children.”<sup>153</sup>

The Court has given itself latitude to account for public privacy in protest surveillance cases, recognizing that “normative inquir[ies]” are “proper” in situations where individuals might subjectively lack an expectation of complete privacy despite an overwhelming public interest in their having some privacy rights.<sup>154</sup> Those inquiries should focus on how information is used, not on putting it into a public or private box.<sup>155</sup> And given the immense social value of protest, there are substantial normative justifications for erecting strong First Amendment bulwarks against public surveillance disclosure.

One is the vital role that protest plays in our democracy: “[D]isruptive protest has been a central tactic of American democratic politics since the

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149. Skinner-Thompson, *supra* note 146, at 159.

150. See *id.*; see also Paul Mozur, In Hong Kong Protests, Faces Become Weapons, N.Y. Times (July 26, 2019), <https://www.nytimes.com/2019/07/26/technology/hong-kong-protests-facial-recognition-surveillance.html> (on file with the *Columbia Law Review*); Umberto Bacchi, Fears Raised Over Facial Recognition Use at Moscow Protests, Reuters (Feb. 4, 2021), <https://www.reuters.com/article/russia-protests-tech/fears-raised-over-facial-recognition-use-at-moscow-protests-idUSL8N2KA54T> [<https://perma.cc/5WSQ-BUSK>]; George Joseph & Jake Offenhardt, NYPD Used Facial Recognition Technology in Siege of Black Lives Matter Activist’s Apartment, Gothamist (Aug. 14, 2020), <https://gothamist.com/news/nypd-used-facial-recognition-unit-in-siege-of-black-lives-matter-activists-apartment> [<https://perma.cc/6VWQ-KK6R>].

151. McClurg, *supra* note 133, at 1041.

152. Skinner-Thompson, *supra* note 146, at 172.

153. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2388 (2021) (quoting *Doe v. Reed*, 561 U.S. 186, 208 (2010) (Alito, J., concurring)).

154. See *Smith v. Maryland*, 442 U.S. 735, 741 n.5 (1979) (“For example, if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy . . . [and] in such cases, a normative inquiry would be proper.”).

155. See Solove, *supra* note 135, at 1031.

Founding—one that was explicitly protected by the First Amendment, notwithstanding its well-known coercive tendencies.”<sup>156</sup> But as Scott Skinner-Thompson has argued, surveillance laws and technologies amplify governmental control over public fora at protestors’ expense.<sup>157</sup> Invasions of public privacy “impose barriers to the public square, and, therefore, participation in a democratic society.”<sup>158</sup> Marginalized individuals and groups are disproportionately dissuaded by such barriers.<sup>159</sup> Driving them from the public square has homogenizing and polarizing effects harmful to democracy.<sup>160</sup> Strong protections for public privacy can help reclaim public space for all individuals and groups, thereby promoting an active and diverse demos.

A distinct but related justification is the value of dissent. Steven Shiffrin theorizes that “the First Amendment should be interpreted as part of a Constitution designed to achieve justice (but failing badly) and to empower those who would combat injustice by engaging in dissent.”<sup>161</sup> The Supreme Court has stressed that protected association “is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.”<sup>162</sup> Nurturing diversity demands that we police protests in a way that facilitates dissent.<sup>163</sup> We must take extra care not to dissuade protestors from assembling. Carving out protections for public privacy ensures that dissenters can build public coalitions that might meaningfully effect change.<sup>164</sup>

#### IV. ARTICLE III STANDING FOR PUBLIC SURVEILLANCE DISCLOSURE CLAIMS

Rooted in Article III’s “cases or controversies” requirement, standing doctrine ensures that disputes are properly within federal courts’ constitutional ambit.<sup>165</sup> *Tatum*’s disposition of the plaintiffs’ case on standing grounds erected a barrier to merits determinations in governmental surveillance cases. The *Tatum* Court explained that “[a]llegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.”<sup>166</sup> Because the mere

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156. Tabatha Abu El-Haj, *Defining Nonviolence as a Matter of Law and Politics*, in *Protest and Dissent: Nomos LXII*, at 201, 206 (Melissa Schwartzburg ed., 2020).

157. Skinner-Thompson, *supra* note 146, at 156–57.

158. *Id.*

159. See *id.* at 157–59.

160. See *id.*; see also Solove, *supra* note 135, at 1048.

161. Steven Shiffrin, *Dissent, Democratic Participation, and First Amendment Methodology*, 97 *Va. L. Rev.* 559, 562 (2011).

162. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

163. Steven H. Shiffrin, *The First Amendment, Democracy, and Romance* 99 (1990).

164. *Id.*

165. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). The Supreme Court requires that plaintiffs show (1) an injury-in-fact that is (2) fairly traceable to the defendant’s conduct and (3) redressable by the relief sought. *Id.*

166. *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972).

existence of surveillance did not constitute a present or sufficiently definite future harm, there was no judicially cognizable injury.<sup>167</sup>

The Court sharpened its injury-in-fact requirement in another surveillance chilling effect decision, *Clapper v. Amnesty International USA*.<sup>168</sup> The case involved a statutory expansion of intelligence agencies' ability to monitor communications between foreign persons abroad and Americans on home soil. The plaintiffs—attorneys, journalists, and advocates—refrained from engaging in certain speech with foreign clients, sources, and other international connections due to fear of surveillance. They asserted two bases for standing: an “objectively reasonable likelihood” that their communications would eventually be acquired, and injuries already incurred, including speech not undertaken due to threat of monitoring and costs expended on traveling abroad to speak in person.<sup>169</sup>

The Court rejected these arguments. It first held that an objectively reasonable likelihood of injury was insufficient; threatened injury must instead be “certainly impending.”<sup>170</sup> The Court deemed the plaintiffs' future injury too speculative—there was no proof that surveillance was happening under the challenged provision or that the plaintiffs' communications would be intercepted under it.<sup>171</sup> Registering its reluctance “to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment,” the Court also declined to speculate about whether the Foreign Intelligence Surveillance Court would approve any such surveillance.<sup>172</sup> The Court further held that the plaintiffs could not “manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.”<sup>173</sup> The Court added that the costs and burdens were not traceable to the challenged provision because, due to preexisting surveillance programs, incentives to take the measures existed before the provision was passed.<sup>174</sup>

Neither *Tatum* nor *Clapper* involved releasing surveillance to nongovernmental entities, a key distinction from public disclosure of protest surveillance. *Tate* is instructive. Addressing the television broadcast in which

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167. Id. at 3.

168. 568 U.S. 398 (2013).

169. Id. at 401–02.

170. Id. (internal quotation marks omitted) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

171. Id. at 411. Beyond finding no injury-in-fact, the Court also found that the plaintiffs' alleged future injury was not fairly traceable to the challenged FISA provision because the government might use another FISA provision if it sought to surveil them. Id. at 410–11.

172. Id. at 413–14.

173. Id. at 416.

174. Id. at 417.

PPD disclosed protestors' identities, the court found a "strikingly apparent" injury.<sup>175</sup> It concluded that such disclosure had "a potential for a substantial adverse impact . . . even though tangible evidence of the impact may be difficult, if not impossible, to obtain."<sup>176</sup> So, too, for the lack of safeguards to prevent widespread release of the information.<sup>177</sup> The court reasoned that disclosure might interfere with the plaintiffs' job opportunities, careers, or travel rights, perhaps even without their knowing.<sup>178</sup> And it acknowledged that the "mere anticipation of the practical consequences" might have dissuaded potential members from joining the plaintiffs' organization or persuaded members to resign.<sup>179</sup> Justice Marshall used the same reasoning in finding standing in *Socialist Workers Party v. Attorney General*.<sup>180</sup> A Northern District of Illinois case, in which disclosure damaged the plaintiffs' personal and professional lives and subjected them to ridicule and further police surveillance and harassment, likewise used this reasoning.<sup>181</sup> It did not alter the injury analyses that the surveillance in *Tate* and *Socialist Workers Party* was of public activity.

These decisions were handed down long before *Clapper*. And many of the issues relied on by the *Clapper* majority would be present in public surveillance disclosure cases. Consider protestors who wish to prospectively challenge a police department's decision to release surveillance footage from a protest they attended. Without knowing whether they were captured by the surveillance, and, if they were, whether it renders them identifiable, individual plaintiffs might run into *Clapper's* attenuation problem.<sup>182</sup>

Another hurdle is traceability, given the prevalence of private livestreaming. The disincentives to attend protests flowing from public disclosure of surveillance might already exist to some extent at protests where other protestors are already livestreaming and media cameras are rolling. But media, bystanders, and protestors are trained or encouraged to take

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175. *Phila. Yearly Meeting of Religious Soc'y of Friends v. Tate*, 519 F.2d 1335, 1339 (3d Cir. 1975).

176. *Id.*

177. *Id.*

178. *Id.* at 1338.

179. *Id.*

180. See *Socialist Workers Party v. Att'y Gen.*, 419 U.S. 1314, 1319 (1974) ("Whether the claimed 'chill' is substantial or not is still subject to question, but that is a matter to be reached on the merits, not as a threshold jurisdictional question.").

181. *All. to End Repression v. Rochford*, 407 F. Supp. 115, 118 (N.D. Ill. 1975).

182. A unique issue in *Clapper* was that the surveillance was classified. See Reply Brief for the Petitioners at 10, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013) (No. 11-1025), 2012 WL 5078759. Plaintiffs like those hypothesized here might be able to have a court review footage in camera to determine whether they themselves are identified, avoiding the attenuation problem.

affirmative steps to avoid intentional identification of individual protestors.<sup>183</sup> For example, the NGO WITNESS trains people to make videos so as to avoid exposing personally identifying information.<sup>184</sup> And there is a large amount of self-regulation by protestors: For example, protestors in Washington, D.C., recently encircled a *Washington Post* photographer and prevented him from filming, reportedly because they felt he had not demonstrated enough care to protect protestors' identities while shooting previous demonstrations.<sup>185</sup> Traceability could thus turn on the nature of the disclosure challenged. PPB's livestreaming in Portland (with its intentional, extended focus on individual faces and disregard for repeated requests by protestors to stop filming them) differs from the typical private livestream in a way that bodycam footage (with its sometimes glancing angles and fleeting focus) might not. The former could well dissuade potential protestors more than the latter.

Moreover, police disclosure of surveillance can itself take on communicative significance. Livestreams dwelling on specific protestors' faces disaggregate groups into discrete actors, making them more attractive and vulnerable targets for retributive aims. A militia member watching police feed focused on one protestor's face for minutes on end might see it as an invitation to violence.<sup>186</sup>

It is unclear how, in adjudicating claims brought by publicly identified protestors, courts would handle *Clapper's* concern about independent decisionmakers. *Tate* and *Socialist Workers Party* found standing based on consequences flowing from private retaliation—loss of employment, harassment, etc. Indeed, these were the fundamental concerns in such foundational chilling effect cases as *Patterson* and *Shelton*. And the Court in *Bonta* just reaffirmed the centrality of these concerns to the doctrine. Given the importance of such concerns to this long line of cases, it seems likely that public disclosure of identity would be enough to get a protestor into federal court. But taken at face value, the Court's reasoning in *Clapper*

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183. See, e.g., Eliana Miller & Nicole Asbury, Photographers Are Being Called on to Stop Showing Protesters' Faces. Should They?, Poynter (June 4, 2020), <https://www.poynter.org/ethics-trust/2020/should-journalists-show-protesters-faces> [https://perma.cc/8T7R-3ZFD].

184. See, e.g., 10 Important Tips: Filming Protests and Police Abuse, Witness.org, [https://www.witness.org/portfolio\\_page/filming-protests-and-police-abuse/](https://www.witness.org/portfolio_page/filming-protests-and-police-abuse/) [https://perma.cc/PV9X-V9V9] (last visited Sept. 21, 2021) (“If identities should be anonymous, film crowds from behind and only record the backs of people’s heads or their feet.”); WITNESSToolkit, How to Film Protests, YouTube, at 01:58 (Apr. 27, 2012), [https://www.youtube.com/watch?time\\_continue=118&v=po-FJzH3vUs&feature=emb\\_logo&ab\\_channel=WITNESSToolkit](https://www.youtube.com/watch?time_continue=118&v=po-FJzH3vUs&feature=emb_logo&ab_channel=WITNESSToolkit) (on file with the *Columbia Law Review*).

185. Fredrick Kunkle WaPo (@KunkleFredrick), Twitter (Sept. 5, 2020) <https://twitter.com/KunkleFredrick/status/1302410800653578242?s=20> [https://perma.cc/B8S8-9ARH].

186. For a discussion of the threats of private militias to protestors, see *infra* section V.C.

cuts against a finding of standing for claims rooted in fears of private reprisal.

One way to resolve this tension is by relaxing standing requirements for chilling effect injuries, an approach that some courts have already taken. In the Eighth and Ninth Circuits, the standing inquiry “tilts dramatically toward a finding of standing” when government action implicates First Amendment rights (and particularly for chilling effects injuries).<sup>187</sup> And in the Fourth Circuit, “standing requirements are somewhat relaxed” for chilling effect injuries.<sup>188</sup> Treating chilling effects differently for standing purposes has roots in Supreme Court precedent. The Court has held that prudential limits on standing should be eased in First Amendment chilling cases<sup>189</sup> and has reaffirmed post-*Clapper* that the injury-in-fact requirement allows for pre-enforcement chilling effect challenges to statutes. The Court condoned less stringent requirements in these instances because self-censorship carries collective costs beyond the individual’s chilling injury by decreasing viewpoint diversity.<sup>190</sup> This rationale supports a broader loosening of standing standards for chilling injuries from disclosures. Indeed, the dissenters in *Bonta* read the majority’s opinion as doing just that: “[A] subjective preference for privacy, which previously did not confer standing, now subjects disclosure requirements to close scrutiny.”<sup>191</sup>

Whether lower courts will share the dissent’s interpretation of standing requirements remains to be seen. Of course, the Court did not ease its standards for the chill alleged by the *Clapper* plaintiffs. But a primary factor driving the Court in *Clapper* was its separation of powers anxiety: It observed that the Court’s “standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.”<sup>192</sup> The Court expanded that “[r]elaxation of standing requirements is directly related to the expansion of judicial power” and noted it has often found a lack of standing in cases reviewing the other branches’ discretion over intelligence gathering and foreign affairs.<sup>193</sup> That concern is no impediment to courts’ taking a less-

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187. *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016) (internal quotation marks omitted) (quoting *Ariz. Right to Life Pol. Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003)).

188. See *PETA, Inc. v. Stein*, 737 F. App’x 122, 129 (4th Cir. 2018) (quoting *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013)); see also *Am. Fed’n of Gov’t Emps. v. Off. of Special Couns.*, 1 F.4th 180, 187 (4th Cir. 2021) (reiterating the relaxed standard for alleged First Amendment chilling injuries but rejecting a claim of standing based on prospective government prosecution that was “highly remote and utterly speculative”).

189. *Sec’y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984).

190. *Id.*

191. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2395 (2021) (Sotomayor, J., dissenting).

192. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013).

193. *Id.* at 408–09.

than-rigorous approach in cases involving challenges to state or local police disclosures, which would include most public disclosure of surveillance cases.

#### V. HEIGHTENED SCRUTINY AS APPLIED TO PROTEST SURVEILLANCE DISCLOSURES

In *Bonta*, the Supreme Court left undecided the standard of scrutiny that applies in associational disclosure cases. All nine Justices agreed that at least exacting scrutiny applies.<sup>194</sup> That standard, derived from the Court's election disclosure jurisprudence, requires that a disclosure be substantially related to a sufficiently important governmental interest, the strength of which must reflect the seriousness of the First Amendment burden imposed.<sup>195</sup> Significantly, the *Bonta* Court added a narrow tailoring requirement that, although not a least restrictive alternative means demand, has real teeth.<sup>196</sup>

Chief Justice Roberts's plurality opinion declared that exacting scrutiny applies in all associational disclosure cases,<sup>197</sup> a position seemingly endorsed by the three Justices in dissent.<sup>198</sup> Justice Thomas wrote separately to advocate for strict scrutiny as the appropriate standard of review.<sup>199</sup> And Justice Alito, joined by Justice Gorsuch, took no position on whether exacting or strict scrutiny should govern, finding no need to resolve the issue because California's law failed under both.<sup>200</sup> They rejected Chief Justice Roberts's categorical approach.<sup>201</sup>

That approach seems to command six votes between the Roberts plurality and the dissent. So this Part proceeds on the assumption that exacting scrutiny would govern public disclosures of protest surveillance. This Part discusses the standard's three components—governmental interest, tailoring, and burden—as they might apply to protest surveillance disclosures. Post-*Bonta*, the standard's narrow tailoring requirement poses the biggest obstacle to police livestreaming and released footage, at least in the forms seen in recent years.

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194. *Bonta*, 141 S. Ct. at 2383; id. at 2395 (Sotomayor, J., dissenting).

195. Id. at 2383 (majority opinion).

196. Id. The majority disputed the dissent's characterization that it added this requirement, arguing that previous disclosure cases applying exacting scrutiny also used it. Id. at 2384.

197. Id. at 2383. Chief Justice Roberts's opinion commanded a majority except for the section addressing whether exacting or strict scrutiny applied. Id. at 2378.

198. See id. at 2396 (Sotomayor, J., dissenting, joined by Breyer & Kagan, JJ.).

199. Id. at 2390 (Thomas, J., concurring in part and concurring in the judgment).

200. Id. at 2392 (Alito, J., concurring in part and concurring in the judgment).

201. Id.

A. *Transparency Interest in Publicly Disclosing Protest Surveillance*

Police justified recent disclosures of protest surveillance on transparency grounds. Reasons given include informing the public about what was happening at the protests, how officers were being treated, and how officers were performing their duties.

Transparency will generally satisfy the doctrine's demand for a sufficiently important governmental interest.<sup>202</sup> Transparency is a core First Amendment value, and an especially important one in the arena of police protesting. The rampant violence and abuses of authority at last year's Black Lives Matter protests remind us why.<sup>203</sup> Unsurprisingly then, many of the footage dumps section I.B discusses resulted from community pressures or lawsuits seeking release of the footage. But exacting scrutiny also requires that important interests be substantially related to the disclosure at issue. That requirement might matter at the margins.

The extensive disclosures by Raleigh and San Jose police likely clear this bar. They include unfiltered footage of officers berating,<sup>204</sup> shoving,<sup>205</sup> and tear-gassing protestors.<sup>206</sup> So too for the Albany video clip showing officers using pepper spray only in a limited manner,<sup>207</sup> and for Chicago's<sup>208</sup> footage refuting claims of police instigation. These videos clearly relate to the goal of transparency in police-citizen interactions.

Some disclosures could be closer calls. The initial Seattle video was released with the stated goal of "being transparent."<sup>209</sup> But the video was essentially propaganda, containing very limited and highly edited footage

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202. See, e.g., *Doe v. Reed*, 561 U.S. 186, 199 (2010) (finding "transparency and accountability in the electoral process" a sufficiently important governmental interest in upholding a law mandating public disclosure of ballot initiative signatures).

203. See Kim Barker, Mike Baker & Ali Watkins, *In City After City, Police Mishandled Black Lives Matter Protests*, N.Y. Times (Mar. 20, 2021), <https://www.nytimes.com/2021/03/20/us/protests-policing-george-floyd.html> (on file with the *Columbia Law Review*) (last updated June 28, 2021) (describing the lack of training and failures of various police departments to cope with protesters demonstrating against George Floyd's murder).

204. See SanJosePolice, *Officer Expletive*, YouTube, at 03:02 (July 22, 2020), <https://www.youtube.com/watch?v=BZMZl7xhDZU> (on file with the *Columbia Law Review*).

205. See Raleigh Police, *BC 4 5.30*, YouTube, at 00:35 (Oct. 27, 2020), [https://www.youtube.com/watch?v=tn91kSLMQG4&ab\\_channel=RaleighPolice](https://www.youtube.com/watch?v=tn91kSLMQG4&ab_channel=RaleighPolice) (on file with the *Columbia Law Review*).

206. See Trent Brown, *Raleigh Police Bodycam Video Shows Hidden Side of Violent Downtown Protests in May*, News & Observer (Oct. 1, 2020), <https://www.newsobserver.com/news/local/crime/article245980905.html> (on file with the *Columbia Law Review*).

207. See WRGB CBS 6 News, *supra* note 39, at 27:30. An officer can be heard yelling "no more pepper, no more pepper" less than a minute after officers began using pepper spray, which the Albany police chief called a "de-escalation technique." *Id.*

208. See John Garcia & Alexis McAdams, *Chicago Police Defend Response to Weekend Protest Clash Downtown as Protestors Demand Apology*, ABC7 Chicago (Aug. 17, 2020), <https://abc7chicago.com/chicago-protest-protests-arrests-video/6373822/> [<https://perma.cc/PFT6-BLZB>].

209. Seattle Police Dept. (@SeattlePD), *supra* note 75.



that showed only violence by protestors against police. A similarly slanted video that identifies individual protestors might not further a substantial governmental interest. In *Bonta*, the Court rejected California's proposed interest in policing fraud because the state had not used the disclosures it collected to initiate any fraud investigations.<sup>210</sup> The Court found that fraud was not California's real concern in collecting donors' names based on how the state used the information it collected.<sup>211</sup>

Police departments claiming a transparency interest in slanted and opaque disclosures could meet a similar fate, though differentiating between biased and objective accounts poses a difficult line-drawing problem courts might rather avoid. In practice, only disclosures that are flagrantly one-sided will likely face scrutiny at the strength-of-interest stage. The bigger hurdle for police is whether disclosures identifying peaceful protestors are tailored to meet a transparency interest.

B. *Narrow Tailoring for Livestreams and Released Footage*

*Bonta's* enunciation of a narrow tailoring requirement reorients how associational chills will be evaluated under exacting scrutiny. Indeed, the Court centered the analysis around it, explaining that "a reasonable assessment of the burdens imposed by disclosure should begin with an understanding of the extent to which the burdens are unnecessary, and that requires narrow tailoring."<sup>212</sup> In defending this approach, the Court pointed to the long-celebrated axiom that "First Amendment freedoms need breathing space to survive," meaning it is better to err on the side of rigidity in reviewing government action or regulation curtailing First Amendment protected activity because laxer standards might dissuade speakers or protestors from pushing boundaries for fear of consequences.<sup>213</sup> A substantial relation to an important interest is thus necessary but not sufficient to ensure the government accounts for First Amendment risks before revealing sensitive information about those engaged in protected activity.

What this means for surveillance disclosures is that police departments must "demonstrate [a] need" to publicly identify protestors "in light of any less intrusive alternatives."<sup>214</sup> While not a least restrictive means requirement, *Bonta's* narrow tailoring mandate raises a high bar. Public disclosure of protestors' identities doesn't have to be the single least intrusive option for police departments, but it will need to be close.

Many if not all of the disclosures that this Piece discusses raise alarm under this standard. PPB's livestreaming almost certainly fails—it is hard

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210. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2386 (2021).

211. The dissent vigorously disputed this finding. See *id.* at 2401 (Sotomayor, J., dissenting).

212. *Id.* at 2385 (majority opinion).

213. *Id.* at 2384 (citing *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

214. *Id.* at 2386.

to see how livestreaming specific protestors' faces in what amounts to doxing closely hews to any important governmental interest. The same is true for much of the video released in bulk in Raleigh, such as dashcam footage that displayed rows of protestors' faces and clothes at close range for minutes.<sup>215</sup> Such indiscriminate overdisclosure resembles the "dragnet for sensitive . . . information" that *Bonta* deemed insufficiently tailored.<sup>216</sup> Even for videos with strong justifications for disclosure, like San Jose's or perhaps Chicago's, simply releasing unaltered footage is insufficient.

To satisfy narrow tailoring, police departments will likely need to blur out identifying features like faces, voices, tattoos, and clothes. Congress has recently considered a proposal that would authorize federal officers wearing mandatory body cameras to do just that. The George Floyd Justice in Policing Act—which passed the House of Representatives both this year and last before twice failing in the Senate—contemplated the use of redactions "to obscure the face and other personally identifying characteristics of that person, including the tone of the person's voice," when doing so would be necessary to "protect personal privacy."<sup>217</sup>

These redactions are doable: San Jose police blurred out the face of the individual arrested for trying to grab an officer's baton.<sup>218</sup> And blurring footage on a broader scale would only minimally burden police departments. Software that selectively or automatically blurs faces out of protest videos is already commonplace.<sup>219</sup> In a situation like Albany's—where the city sought to share with residents the racialized verbal abuse officers endured—footage that blurs faces and clothes and anonymizes audio would be significantly less intrusive than the video the city released, which displayed not only speakers' faces and voices but also those of uninvolved protestors in the background.<sup>220</sup>

At least until this technology can be implemented in real time, police should not livestream protests on social media. And even if technology progresses to allow effective, instantaneous blurring of livestreams, police should avoid zooming in livestreaming cameras to linger on individual

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215. See, e.g., Raleigh Police, DC 16.1 5:30, YouTube, at 13:00 (Oct. 27, 2020), [https://www.youtube.com/watch?v=q57wbJMuEks&ab\\_channel=RaleighPolice](https://www.youtube.com/watch?v=q57wbJMuEks&ab_channel=RaleighPolice) (on file with the *Columbia Law Review*); Raleigh Police, DC 5 5.30, YouTube, at 04:30 (Oct. 27, 2020), [https://www.youtube.com/watch?v=LNEEzwnaMak&ab\\_channel=RaleighPolice](https://www.youtube.com/watch?v=LNEEzwnaMak&ab_channel=RaleighPolice) (on file with the *Columbia Law Review*).

216. *Bonta*, 141 S. Ct. at 2387.

217. H.R. 1280, 117th Cong. § 372 (2021).

218. See San Jose Police, *supra* note 70, at 19:13.

219. See Coral Murphy Marcos, Want to Blur a Face in Your Video? These Video and Photo Editing Tools Can Help, USA Today (May 29, 2020), <https://www.usatoday.com/story/tech/2020/05/29/video-editing-tools-photo-apps-blur-faces-protect-identity/5284733002/> [<https://perma.cc/C6P3-HE75>] (last updated May 30, 2020); Dia Kayyali, Protect Human Rights Defenders' Identities With the Updated YouTube Blurring Feature, Witness.org: Blog, <https://blog.witness.org/2017/10/updated-youtube-blurring-feature-video/> [<https://perma.cc/LUR3-QJTP>] (last visited Nov. 18, 2021).

220. See *supra* section I.B.

peaceful protestors. Extended, close-up livestreaming of mundane protest activity like the footage livestreamed by PPB (and that was captured, but not livestreamed, by CHP) is not narrowly tailored to promote meaningful transparency.

Requiring these types of privacy protections would not amount to a least-restrictive-means imposition. Should strict scrutiny apply rather than exacting scrutiny, even blurring out faces and avoiding lingering close-up livestreams would likely not suffice. In many instances, close-range video will not be needed at all to satisfy basic transparency interests. Police departments routinely tweet information such as the number of arrests made at protests, the charges, and the extent and nature of the property damage underlying the charges.<sup>221</sup> If video is necessary to show the scale of a crowd, aerial footage from a vantage point high enough to avoid showing faces, hairstyles, or tattoos should suffice.

In instances where only close-range video will do—like instances of violent police–protestor interaction—even blurred livestreaming would not pass muster. The least restrictive approach would require police to wait until a protest has ended to release footage, minimizing the risk of immediate retaliation. They would likely also be required to excise footage irrelevant to particular instances of conflict or controversy in addition to editing relevant footage. This would mean, for example, culling many hours of footage from wholesale video dumps like Raleigh’s, with some sort of monitoring mechanism in place to ensure that important footage is not cut. And for the footage to be released, police would have to crop videos to cut out protestors whose presence in the disclosure is not vital. The upshot is that ample means exist for police to convey information about protests—including the challenges that officers face—to the public without chilling First Amendment activity. As in *Bonta*, there is a “dramatic mismatch” between a general informational interest and disclosures that expose identifying information of numerous individual protestors.<sup>222</sup>

### C. *First Amendment Burdens of Protest Surveillance Disclosure*

Establishing a burden of First Amendment rights from associational disclosure requires “a reasonable probability” that the disclosure will yield “threats, harassment, or reprisals from either Government officials or private parties.”<sup>223</sup> This standard is not “unduly strict.”<sup>224</sup> Evidence of previous harassment of the group or its members suffices.<sup>225</sup> In *Bonta*, the Court

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221. See, e.g., LAPD HQ Police Dep’t (@LAPDHQ), Twitter (May 31, 2020), <https://twitter.com/LAPDHQ/status/1267208820381511680?s=20> [<https://perma.cc/25L8-XV8E>].

222. *Bonta*, 141 S. Ct. at 2386.

223. *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (per curiam).

224. *Id.*

225. *Id.* (“The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself.”).

accepted as sufficient a threatening (though perhaps satirical) social media post and evidence that one of the petitioners had received “threats, harassing calls, intimidating and obscene emails, and even pornographic letters.”<sup>226</sup>

One objectively reasonable chill the Court has identified is the prospect of being fired or disciplined at work for protected First Amendment activity. In *Patterson*, for example, the Court reasoned that publicization of NAACP members’ identities would lead to “economic reprisal [and] loss of employment.”<sup>227</sup> Public disclosure of protest surveillance strongly implicates this concern. In Portland, PPB’s livestreams reportedly zoomed in on individual protestors’ faces to make those protestors easily identifiable.<sup>228</sup> Less intentional disclosures of protestors’ uncovered faces, such as those captured in the voluminous Raleigh footage, pose the same risk.

Employees around the country have claimed in recent years that they were fired because of their support for the Black Lives Matter protests.<sup>229</sup> Others have reported threats of termination if they took part in these protests<sup>230</sup> or supported them while at work.<sup>231</sup> This is nothing new. In 2017, dozens of employees nationwide were fired for participating in an immigration-related protest.<sup>232</sup> Except in select jurisdictions, private sector employees have only limited protections against discipline or termination based on their participation in political protests.<sup>233</sup> Against this backdrop, individuals captured in publicly disclosed footage at a Black Lives Matter protest have sound reasons to avoid future protests based on a fear that more surveillance disclosures might identify them to their employers.

Another private-party activity is also relevant here: para-policing of protests by private militias. The second justification for the chilling effects

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226. *Bonta*, 141 S. Ct. at 2381.

227. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

228. Bernstein, *supra* note 25.

229. Katie Way, *Some Black Lives Matter Supporters Say Their Stance Got Them Fired*, *Vice* (Oct. 1, 2020), <https://www.vice.com/en/article/g5p4qj/some-black-lives-matter-supporters-say-their-stance-got-them-fired> [<https://perma.cc/GSJ9-2LBZ>].

230. See Abigail Johnson Hess, *As People Protest Across the U.S., Some Wonder: Could You Be Fired for Protesting?*, *CNBC* (June 5, 2020), <https://www.cnn.com/2020/06/05/can-you-get-fired-for-attending-a-protest.html> [<https://perma.cc/J2C4-4NJU>] (describing a protester who “said he was explicitly told protesting could ‘result in termination’”).

231. Meera Jagannathan, *A Taco Bell Employee Says He Was Fired for Supporting Black Lives Matter: Could Your Company Fire You for the Same Reason?*, *MarketWatch* (June 21, 2020), <https://www.marketwatch.com/story/americans-have-increasingly-embraced-black-lives-matter-will-employers-let-them-do-so-at-work-2020-06-16> [<https://perma.cc/9UCU-6SMW>].

232. Avalon Zoppo, *Employees Across U.S. Fired After Joining ‘Day Without Immigrants’ Protest*, *NBC News* (Feb. 19, 2017), <https://www.nbcnews.com/news/us-news/employees-across-u-s-fired-after-joining-day-without-immigrants-n722991> [<https://perma.cc/7ZT2-6MJ8>] (last updated Feb. 20, 2017).

233. See Andrew Melzer & Whitney Barth, *Whether Employees Can Be Fired for Participating in Peaceful Protests*, 2020 U. Ill. L. Rev. Online 221, 224–31.

doctrine articulated by the Supreme Court in *Patterson* was the “threat of physical coercion, and other manifestations of public hostility.”<sup>234</sup> That concern remains disturbingly valid today, as private militias have attended recent protests with alarming frequency.

There were nearly 200 such groups operating in the United States last year.<sup>235</sup> At the 2014 Black Lives Matter protests in Ferguson, Missouri, armed militia members in camouflage gear positioned themselves on rooftops, purportedly to help officers protect private property.<sup>236</sup> Last year, these groups appeared at over 50 Black Lives Matter protests.<sup>237</sup> As tallied by the Center for Analysis of the Radical Right, their members and other right wing actors committed frequent violence against protestors: 64 assaults, 38 vehicle assaults, and 9 cases of shots fired at demonstrators resulting in 3 deaths.<sup>238</sup>

Compounding the problem is the discomfiting relationship between militias and police. According to experts, modern militias see themselves as extensions of local law enforcement, believing “it’s their constitutional duty to help local law enforcement and, therefore, their presence is needed in order to keep communities safe.”<sup>239</sup> Most troublingly, one prominent militia has been directly linked to police departments and local governments. An anonymous hacker’s release of emails and membership lists of the Oath Keepers militia included the names of active-duty officers and public officials in New York and New Jersey.<sup>240</sup>

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234. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958); see also *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2388 (2021).

235. Safia Samee Ali, *Where Protesters Go, Armed Militias, Vigilantes Likely to Follow With Little to Stop Them*, NBC News (Sept. 1, 2020), <https://www.nbcnews.com/news/us-news/where-protesters-go-armed-militias-vigilantes-likely-follow-little-stop-n1238769> [<https://perma.cc/W2RY-CM5B>].

236. *Id.*

237. *Id.*

238. Ryan Devereaux, *The Thin Blue Line Between Violent, Pro-Trump Militias and Police*, Intercept (Aug. 28, 2020), <https://theintercept.com/2020/08/28/kyle-rittenhouse-violent-pro-trump-militias-police/> [<https://perma.cc/U2JL-64YH>] (last updated Aug. 30, 2020); Christopher Mathias, *White Vigilantes Have Always Had a Friend in Police*, HuffPost (Aug. 28, 2020), [https://www.huffpost.com/entry/white-vigilantes-kenosha\\_n\\_5f4822bcc5b6cf66b2b5103e](https://www.huffpost.com/entry/white-vigilantes-kenosha_n_5f4822bcc5b6cf66b2b5103e) [<https://perma.cc/9543-NQ64>]; see also Laura Bliss & Marie Patino, *Tracking the Shifting Shape of Far-Right Political Violence*, Bloomberg City Lab (Oct. 16, 2020), <https://www.bloomberg.com/news/articles/2020-10-16/is-far-right-political-violence-getting-worse> [<https://perma.cc/Y74G-B9JE>].

239. Ali, *supra* note 235 (quoting Howard Graves, a senior research analyst for the Southern Poverty Law Center).

240. George Joseph & Micah Loewinger, *Hack of Oath Keepers Militia Group Includes Names of Active NYPD Officers, De Blasio Launches Investigation*, Gothamist (Sept. 30, 2021), <https://gothamist.com/news/hack-oath-keepers-militia-group-includes-names-active-nypd-officers-de-blasio-launches-investigation> [<https://perma.cc/VHU4-78BJ>]; George Joseph, Matt Katz, Micah Loewinger & Joseph Gordon, *Hacked Records Reveal Hundreds of Oath Keepers Across New Jersey*, Gothamist (Oct. 13, 2021), <https://gothamist.com/news/hacked-records-reveal-hundreds-oath-keepers-across-new-jersey> [<https://perma.cc/DMY6-RUBQ>].

It is perhaps unsurprising then that militias have routinely assembled under the banner of the “thin blue line” flag, meant to signify support for police.<sup>241</sup> In Arizona, Oregon, Wisconsin, and elsewhere, militias have engaged in violence with counter-protesters while police watched and did not intervene.<sup>242</sup> And from cities around the country come reports that public officials expressly accepted militia offers to assist law enforcement’s crowd-control efforts at protests.<sup>243</sup> Though law enforcement mostly denies such reports,<sup>244</sup> a Texas constable publicly encouraged an armed group to help defend a Dallas hair salon against looting.<sup>245</sup> And a Washington police chief was fired “after welcoming dozens of armed men, including one waving a Confederate flag, who responded to false Internet rumors that ‘antifa’ looters planned to ransack the town.”<sup>246</sup> Officers nationwide have been recorded offering tips and support to militia members.<sup>247</sup>

The combination of militia presence and violence along with law enforcement’s apparent tacit support has had substantial chilling effects on expressive activity.<sup>248</sup> A protest in Utah was canceled due to the perceived threat of the frequent presence of armed militia members at protests in the state.<sup>249</sup> In rural Oregon, seventy armed men dissuaded people from joining a demonstration.<sup>250</sup> The problem is particularly pronounced

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241. See Devereaux, *supra* note 238.

242. *Id.* Livestreaming in combination with refusal to protect protestors from violence would unquestionably violate the First Amendment. See *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 151 (D.D.C. 1976); *All. to End Repression v. Rochford*, 407 F. Supp. 115, 118–19 (N.D. Ill. 1975).

243. Mara Hvistendahl & Alleen Brown, *Armed Vigilantes Antagonizing Protestors Have Received a Warm Reception From Police*, *Intercept* (June 19, 2020), <https://theintercept.com/2020/06/19/militia-vigilantes-police-brutality-protests/> (on file with the *Columbia Law Review*).

244. Devereaux, *supra* note 238.

245. Joshua Partlow & Isaac Stanley-Becker, *As Clashes Between Armed Groups and Leftist Protesters Turn Deadly, Police Face Complaints of Tolerating Vigilantes*, *Wash. Post* (Aug. 30, 2020), [https://www.washingtonpost.com/politics/as-clashes-between-armed-groups-and-leftist-protesters-turn-deadly-police-face-complaints-of-tolerating-vigilantes/2020/08/30/d2c36c20-e952-11ea-a414-8422fa3e4116\\_story.html](https://www.washingtonpost.com/politics/as-clashes-between-armed-groups-and-leftist-protesters-turn-deadly-police-face-complaints-of-tolerating-vigilantes/2020/08/30/d2c36c20-e952-11ea-a414-8422fa3e4116_story.html) (on file with the *Columbia Law Review*).

246. *Id.*

247. See *id.* (reporting that local authorities have at times appeared to support people who took up arms against protests, and on other occasions, police officers “have been photographed smiling or fist-bumping with members of far-right armed groups”).

248. See Nicolle Okoren, *The Birth of a Militia: How an Armed Group Polices Black Lives Matter Protests*, *Guardian* (July 27, 2020), <https://www.theguardian.com/us-news/2020/jul/27/utah-militia-armed-group-police-black-lives-matter-protests> [<https://perma.cc/R28B-5C5X>].

249. *Id.*

250. Isaac Stanley-Becker, *As Protests Spread to Small-Town America, Militia Groups Respond With Armed Intimidation and Online Threats*, *Wash. Post* (June 18, 2020), [https://www.washingtonpost.com/national/as-protests-spread-to-small-town-america-militia-groups-respond-with-online-threats-and-armed-intimidation/2020/06/18/75c4655e-b0a1-11ea-8f56-63f38c990077\\_story.html](https://www.washingtonpost.com/national/as-protests-spread-to-small-town-america-militia-groups-respond-with-online-threats-and-armed-intimidation/2020/06/18/75c4655e-b0a1-11ea-8f56-63f38c990077_story.html) (on file with the *Columbia Law Review*).

in more rural areas, where protestors might skew younger and have less experience dealing with counterdemonstrators.<sup>251</sup>

An objective protestor might reasonably believe that public surveillance disclosures would encourage militia presence at protests and aggravate the risk of physical violence. Protestors in rural areas face an elevated risk. And real-time disclosures like livestreaming are particularly troublesome. Militias frequently organize and plan incursions on social media, where police livestreams are posted.<sup>252</sup> It requires no leap of logic to see how members might take a livestream on an official police department Twitter account as a call to action.

Widespread instances of private employer retaliation and militia violence like that seen against Black Lives Matter protestors should easily satisfy *Bonta's* past-harassment-of-group-members standard for reasonably likely associational burdens. There remains, however, one major conceptual roadblock. Many protestors actively want to be publicly associated with a movement and attend protests precisely because they want to advertise their support for it. The *Bonta* Court confronted this problem directly. The Court deemed it “irrelevant . . . that some donors might not mind—or might even prefer—the disclosure of their identities” because such disclosure created an unnecessary risk of chilling for “every major donor.”<sup>253</sup>

The same principle holds for protests. Some protestors might want (or at least not mind) their images being disclosed. Yet for others—particularly those from small or marginalized communities—disclosure leads to readier “identification and fear of reprisal [that] might deter perfectly peaceful discussions of public matters of importance.”<sup>254</sup> This is so even though they protest in public. Hence, it is nonetheless governmental action that needlessly chills associational rights. Just as “each governmental demand for disclosure brings with it an additional risk of chill,” so too does each governmental action that dramatically expands the identifiability of protestors.<sup>255</sup>

## CONCLUSION

Forced disclosure of identity in public has a long, pernicious history in this country. In the early eighteenth century, New York City passed “lantern laws” requiring slaves in public at night to carry a flame that cast light rendering them identifiable.<sup>256</sup> In the 1960s and 1970s, police departments

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251. See *id.*

252. See, e.g., Digit. Forensic Rsch. Lab, *Armed Militias Mobilize on Social Media Hours Before Deadly Kenosha Shooting*, Medium (Aug. 28, 2020), <https://medium.com/dfirlab/armed-militias-mobilize-on-social-media-hours-before-deadly-kenosha-shooting-1ee5925a035f> (on file with the *Columbia Law Review*).

253. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2388 (2021).

254. *Talley v. California*, 362 U.S. 60, 65 (1960).

255. *Bonta*, 141 S. Ct. at 2389.

256. See Simone Browne, *Dark Matters: On the Surveillance of Blackness* 78 (2015).

nationwide—most notably CPD’s infamous “Red Unit”—extensively photographed and otherwise surveilled peaceful protestors, sharing the spoils indiscriminately.<sup>257</sup> Today’s protestors risk the same every time they enter the public square,<sup>258</sup> constantly watched by means old<sup>259</sup> and new.<sup>260</sup>

The threats to our system of free expression are self-evident. Surveillance disclosures induce conformity because public exposure incentivizes compliance with social norms. This danger intensifies when protestors are targeted for surveillance because their political views deviate from the mainstream.<sup>261</sup> Limiting how surveillance can be shared publicly protects the vital freedom of association that enables organized social movements. As the Supreme Court has recognized, the First Amendment demands that “[t]he price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power.”<sup>262</sup>

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257. See Kevin Klose, Chicago ‘Red Squad’ Shared Files on Activists, New Evidence, Wash. Post (Dec. 29, 1984), <https://www.washingtonpost.com/archive/politics/1984/12/29/chicago-red-squad-shared-files-on-activists-new-evidence/c68c350c-3b11-40e5-a99c-b1dbd6cba4a0/> (on file with the *Columbia Law Review*).

258. See Zolan Kanno-Youngs, U.S. Watched George Floyd Protests in 15 Cities Using Aerial Surveillance, N.Y. Times (June 19, 2020), <https://www.nytimes.com/2020/06/19/us/politics/george-floyd-protests-surveillance.html> (on file with the *Columbia Law Review*); Rebecca Jacobs & Hajar Hammado, DEA Approved More Than 50 Requests for Covert Surveillance of Racial Justice Protests Last Summer, CREW (Oct. 5, 2021), <https://www.citizensforethics.org/reports-investigations/crew-investigations/dea-approved-more-than-50-requests-for-covert-surveillance-of-racial-justice-protests-last-summer/> [<https://perma.cc/AK3S-ETLE>].

259. See generally Sahil Singhvi, Police Infiltration of Protests Undermines the First Amendment, Brennan Ctr. for Just. (Aug. 4, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/police-infiltration-protests-undermines-first-amendment> [<https://perma.cc/YE2V-7X9E>] (describing the history of police infiltration of protests).

260. See generally Katelyn Ringrose & Divya Ramjee, Watch Where You Walk: Law Enforcement Surveillance and Protester Privacy, 11 Calif. L. Rev. Online 349 (2020) (describing modern surveillance technologies used by police, including drones and facial recognition).

261. *Phila. Yearly Meeting of Religious Soc’y of Friends v. Tate*, 519 F.2d 1335, 1338 (3d Cir. 1975).

262. *United States v. U.S. Dist. Ct. (Keith)*, 407 U.S. 297, 314 (1972).