No. 16-729

IN THE

Supreme Court of the United States

ANTONIO FRANCIS BUEHLER,
Petitioner,

v.

AUSTIN POLICE DEPARTMENT, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR THE CATO INSTITUTE, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, AND FIVE MEDIA ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

MICKEY H. OSTERREICHER
National Press
Photographers Association
120 Hooper Street
Athens, GA 30602
(716) 983-7800
lawyer@nppa.org

ILYA SHAPIRO
Counsel of Record
DEVIN WATKINS
Cato Institute
1000 Mass. Ave. NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org
dwatkins@cato.org

January 4, 2017

QUESTION PRESENTED

The Court should grant the petition and supplement the question presented there with this additional question:

Has Mr. Buehler alleged a *prima facie* case of retaliation for his First Amendment protected activity?

At the very least, the Court should be cognizant of the First Amendment background to the petitioner's question presented.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF THE *AMICI CURIAE*[1]

Amici are the following organizations, whose descriptions appear in the appendix: Cato Institute, National Press Photographers Association, First Look Media Works, Inc., Getty Images, Inc., Society of Professional Journalists, Radio Television Digital News Association, and Reporters Committee for Freedom of the Press.

The present case concerns *amici* because official retaliation for speech, recording, and other activity protected by the First Amendment cannot be condoned in a free society. This case is of national importance because this is but one example of an epidemic of harassment and arrests of citizens and journalists who, without materially interfering with law-enforcement duties, photograph and record matters of public concern. Absent the opportunity to dispute the facts underlying grand-jury indictments stemming from such arrests, police will continue these chilling abridgments under color of law.

SUMMARY OF ARGUMENT

We all deserve to live in a society in which the power of government is not used in retaliation for exercising our constitutional rights. That is precisely what Antonio Buehler is alleging has occurred in this case: official retaliation for his First Amendment right to record and criticize the police. In addition to

---

[1] Rule 37 statement: All parties received timely notice of *amici*'s intent to file this brief; letters consenting to its filing have been submitted to the Clerk. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than the *amici* made a monetary contribution intended to fund its preparation or submission.

other disputed facts, Mr. Buehler alleges that there were never facts justifying a finding of probable cause for his arrest. While he was never found guilty of any of the charges made against him, he was also never given an opportunity to prove the lack of probable cause. Regardless, the grand jury result is being used to foreclose any suit he now seeks to prosecute. Mr. Buehler deserves the opportunity to make his case to a jury of his peers as to those facts.

This case is of national importance because this is but one example of an epidemic of harassment, interference and arrests by police of citizens and journalists for merely recording matters of public concern. If people are precluded from the opportunity to dispute the facts underlying grand jury indictments, police will have free reign to continue these chilling abridgments under color of law.

STATEMENT OF THE CASE

To better understand the significance of this issue, we must review the underlying facts of this case. Taking the facts with all justifiable inferences drawn in favor of Mr. Buehler, as the nonmovant, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), the following occurred:

On January 1, 2012, Mr. Buehler stopped for gas when he observed an ongoing DWI traffic stop. App. to Pet. Cert. 2a, 19a-20a. Officer Oborski was conducting a sobriety test on the driver while Officer Snider watched the passenger. App. 2a, 20a. The passenger told the driver that she had the right to refuse to submit to a field-sobriety test. App. 24a. Officer Oborski considered this an "interruption" to his investigation and told passenger that she could

"go to jail" if she did not stop interfering. Brief for Appellant at 6-7, *Buehler v. City of Austin*, 824 F.3d 548 (5th Cir. 2016) [Appellant Circuit Brief].

The passenger began to call and text, which Officer Snider ordered her to stop doing. When she did not, the officers forcibly removed her out of the car. App. 2a, 23a. Mr. Buehler then asked the officers, "Why are you pulling her out of the car?" App. 2a-3a, 24a-25a. Officer Oborski responded, "Hey don't worry about it." Appellant Circuit Brief at 7. When the passenger, Ms. Pizana, heard Mr. Buehler's question, she begged him "help me please!" *Id.* at 7. The police pushed her face to the ground and pulled her arms straight back while she cried out in pain and fear, as can be seen in this screen shot from the police dashcam video:

Dashcam video, placed in the district court record as a DVD exhibit and available at http://bit.ly/2i9Ulpi. (see 29:04 and beyond).

Mr. Buehler again asked the officers why they were acting in such a violent manner, to which the officer responded "Worry about yourself!" App. 25a.

Ms. Pizana then cried out, "Take a video of this please," and so Mr. Buehler started recording. Appellant Circuit Brief at 8. He recorded all this from about 20 feet away. App. 2a. After placing Ms. Pizana in the squad car, Officer Oborski moved aggressively to Mr. Buehler, stopping right in front of him. Appellant Circuit Brief at 9. Mr. Buehler asked the officer if it was his job to treat people in such a violent manner, after which a verbal disagreement ensued. App 25a; Appellant Circuit Brief at 9. At one point the officer grabbed him, as can be seen in this screen shot from a third-party recording:

Third-party recording, placed in the district court record as a DVD exhibit and available at http://bit.ly/2hgr3H5 (see 0:09 and beyond).

According to Officer Oborski he "placed his hand on [Buehler's] shoulder to keep a distance" between himself and Mr. Buehler. App. 3a, 25a.

Mr. Buehler asked the officer, "What are you touching me for? What are you touching me for?" Appellant Circuit Brief at 9. Officer Oborski responded "You're interrupting my investigation." *Id.* Mr. Buehler responded, "I'm not interrupting, I'm not interrupting." *Id.* They continued to argue, with Mr. Buehler urging, "This is a public place. You came up to me, you came up to me!" *Id.*

What happened at this point is disputed. Officer Oborski later claimed that Mr. Buehler spit on him. App. 3a, 24a. However, the video evidence and third-party witness provided evidence of the falsity of that claim. Appellant Circuit Brief at 33. The grand jury examined this evidence and refused to indict Mr. Buehler for this allegation. App. 21a.

Next, Officer Oborski tried to put Mr. Buehler in a choke hold and throw him to the ground. App. 25a. Mr. Buehler grabbed the tailgate of the truck to prevent being injured in the fall and asked, "What are you doing?" Appellant Circuit Brief at 11. Officer Oborski yelled "put your hands, put your hands, put your hands behind your back!" and "Stop resisting!" Mr. Buehler responded, "I'm not resisting!" *Id.*

After Officer Oborski had Mr. Buehler in handcuffs, he explained to him how he could have avoided being arrested and assaulted if he had only ignored what was happening to the passenger, stating that "it would have been so much easier if you would just pay attention to your own selves." *Id.*

Mr. Buehler wasn't the only person outraged by the officer's conduct. Another bystander, Jonathan Blackford, asked Officer Oborski if it was the police's job to arrest everyone, to which the officer replied, "Is

that our job? Yeah." Appellant Circuit Brief at 12. Officer Oborski then threatened Jonathan Blackford, "Hey, we've already taken like three people to jail off this one stop. You'll be number four, I promise." *Id.* When Mr. Blackford said he hadn't done anything wrong, he was told to "turn around and start walking" or he would be arrested. *Id.*

Mr. Buehler was indicted for "knowing failure to obey a lawful order of a peace officer"—specifically, for failing to put his hands behind his back. App. 21a. The jury found him not guilty of this charge. App. 21a. Mr. Buehler then started the "Peaceful Streets Project" to record such acts of police abuse. App. 3a-4a. The arrests that follow were part of this project.

On August 25, 2012, Mr. Buehler was peacefully recording the arrest of Christopher Williams by Officer Evers. App. 4a. Officer Evers was soon joined by Officer Castillo, while Mr. Buehler continued recording without incident. App. 27a. When Mr. Williams's fiancée found out why they were recording, she even hugged Mr. Buehler. App. 27a. When Officer Berry arrived, he immediately told Mr. Buehler to step back. App. 28a. Mr. Buehler wasn't as close as some of the other observers, such as Janus Lee, but he alone was ordered to back up. App. 28a; Appellant Circuit Brief at 17. Mr. Buehler informed the officer that he had been safely recording from this distance all night and asked for Officer Berry's name and badge number. App. 28a; Appellant Circuit Brief at 17. Officer Berry refused to provide his name and badge number and instead arrested Mr. Buehler for "interfering." App. 28a; Appellant Circuit Brief at 17.

On September 21, 2012, Mr. Buehler stopped about 25 feet from a squad car to record an ongoing

DWI stop. App. 5a, 25a. Officer Oborski turned the spotlight on him and ordered him to back up, using his loudspeaker. App. 25a. Mr. Buehler asked "How far?" and was told "Mr. Buehler, you need to back up." Appellant Circuit Brief at 19. Mr. Buehler again asked how far and was told "Back up until I tell you to stop. Back up." *Id.* Mr. Buehler backed up about 10 feet and began recording. *Id.*; App 29a.

Sergeant Adam Johnson then arrived on the scene and ordered Mr. Buehler to move to a sidewalk within a few feet of Officer Oborski—a considerable distance and a place he had already been ordered away from. App. 5a, 29a. Mr. Buehler believed he was being set up to be arrested, because the two officers' directives conflicted with each other. App. 29a. Mr. Buehler responded to Sgt. Johnson by asking "What's wrong with here? We're not interfering. We're not interfering here; we're not a threat to anyone." App. 29a; Appellant Circuit Brief at 19. Sgt. Johnson refused to allow Mr. Buehler to record there. Appellant Circuit Brief at 19. Mr. Buehler continued to back away from the traffic stop saying "Right now we are about fifty feet away. Would you agree? Fifty feet away, is that too close, really?" App 30a; Appellant Circuit Brief at 20.

Mr. Buehler continued to walk away from the scene, up to 65 feet from the DWI suspect. App. 30a. Sgt. Johnson repeated his order and also gave Buehler the alternative of leaving the scene. App. 5a, 30a. Mr. Buehler agreed to leave the scene, as he had been given the option of doing, but then also asked why Sgt. Johnson was bossing them around and being such a "bully" to which Sgt. Johnson said. "Ok,

you're going to jail." App. 5a-6a, 30a; Appellant Circuit Brief at 20.

The procedural history is laid out in the petition.

ARGUMENT

I. THE COURT SHOULD GRANT CERT. TO ALLOW MR. BUEHLER THE OPPORTUNITY TO PROVE THAT HIS ARREST WAS IN RETALIATION FOR HIS FIRST AMENDMENT-PROTECTED ACTIVITIES

It is rare that a grand jury (or magistrate) will refuse to indict or issue an arrest warrant against an individual when a law enforcement officer comes before them and swears under oath that he witnessed the person commit a crime. There is little more damning evidence then an eyewitness account by a trusted member of the community. Unless there is proof that the officer is lying, that testimony alone is enough to find probable cause.

But it is possible that the officers are lying—as the grand jury decided was the case here. Officer Oborski accused Mr. Buehler of spitting in his face, but a grand jury examining the video and third-party witnesses could not find probable cause and refused to indict for this. At this point in the proceedings, the Court must assume that Officer Oborski lied about the spit. *See Anderson* 477 U.S. at 255. That sequence of events and proceedings is the exception that proves the rule. Far more often what happens is what happened to Mr. Buehler in his other arrests: without conclusive evidence that the officer is lying, a grand jury or magistrate will find probable cause based only on the officers' testimony.

In this case, all finders of fact who have examined the evidence have found Mr. Buehler not guilty of any of the crimes with which he had been accused. In some cases, prosecutors didn't even charge him despite the arrest.

But did the officers have probable cause to arrest him in the first place? The answer to that question depends on disputed issues of fact that should have resulted in a denial of the police department's underlying summary judgment motion. According to Mr. Buehler, when he was arrested, he was attempting to comply with police orders and was not interfering with the police officers in any way. The Court must assume that this fact is true at this point. *Id.* Without this assumption, Mr. Buehler would not have an opportunity to prove these facts to a jury. And he was given no chance to prove these facts to the grand jury.

A. This Should Have Been a Standard First Amendment Retaliation Case

This should have been a simple case of potential retaliation for First Amendment protected activity. "[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory" actions for First Amendment protected activities. *Hartman v. Moore*, 547 U.S. 250, 256 (2006).

In such cases, first the plaintiff must prove that the circumstances support at least a *prima facie* inference that the arrest was based on retaliation for his First Amendment-protected activities. *Id.* at 260. Then the burden would the shift to the officer to prove a legitimate reason for which the arrest would

have occurred regardless. *Id.* In other words, to proceed with a retaliation claim, the retaliation must be the but-for cause of the arrest. *Id.*

Probable cause is merely one element—although a critically important one—that goes to the question of whether retaliation was actually the but-for cause of the arrest. *Id.* at 261. In most cases, arrests without probable cause would be presumed more likely to be retaliatory, while those with probable cause are presumed more likely to be non-retaliatory. *Id.*

Normally "[t]he cases have simply taken the evidence of the motive and the [adverse action] as sufficient for a circumstantial demonstration that the one caused the other." *Id.* at 260. But, retaliatory-prosecution cases require more than the standard retaliatory-action cases. *Id.* In retaliatory-prosecution cases, the plaintiff must prove not only that the defendant was motivated by animus, but that he convinced a third-party—the prosecutor—to go along with this. *Id.* at 262. The plaintiff must then rebut the "long-standing presumption of regularity accorded to prosecutorial decision-making." *Id.* 263. Mr. Buehler alleges that the Austin police directly caused his arrest—not that they convinced prosecutors to violate his rights—so this extra burden does not apply here.

But even in the harder case of retaliatory prosecution, probable cause is not dispositive. Probable cause "is not necessarily dispositive: showing an absence of probable cause may not be conclusive that the inducement succeeded, and showing its presence does not guarantee that inducement was not the but-for fact in a prosecutor's decision." *Id.* at 265. The Fifth Circuit ignored this

precedent. Not only did the lower court hold that probable cause was dispositive, in direct conflict with *Hartman*, but that the grand jury decision was conclusive as to probable cause.

The idea that the grand jury decision is conclusive is circular, because the grand jury relies on officers' testimony to find probable cause. In other words, a grand jury is an "accusatory" not an "adjudicatory body." *United States v. Williams*, 504 U.S. 36, 51 (1992). There is no "legal obligation to present exculpatory evidence in [the prosecutor's] possession." *Id.* at 52. The question for the grand jury is whether it believes there is probable cause to indict, not whether the officer had probable cause to arrest. While the two are usually the same, because the grand jury relies on the officer's testimony as to the facts, the officer can manufacture his own probable cause for arrest merely by lying to the grand jury.

Nor can a grand jury be assumed to determine whether an officer is lying, because at this stage there is no opportunity for cross-examination or impeachment. *See id.* ("If a 'balanced' assessment of the entire matter is the objective, surely the first thing to be done—rather than requiring the prosecutor to say what he knows in defense of the target of the investigation—is to entitle the target to tender his own defense.")

Making the grand jury decision conclusive would also compromise the secrecy of the grand jury process and prevent any meaningful suit based on an arrest in which the officer lies to a grand jury. If the plaintiff must prove that the officer lied to the grand jury to get to a trial, he has to know what was said. But "if preindictment proceedings were made public,

many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony." *United States v. Sells Eng'g*, 463 U.S. 418, 424 (1983).

Even if a grand jury's finding of probable cause were dispositive, that would require, according to the Court, that a plaintiff "plead and prove its absence." *Hartman*, 547 U.S. at 265. Mr. Buehler indeed pleads the absence of probable cause and seeks only to be allowed to prove it.

B. Mr. Buehler Has Made a *Prima Facie* Claim That His Arrest Was Based on Retaliation for His First Amendment-Protected Activities

There are three arrests that Mr. Buehler alleges were based on retaliation for his First Amendment-protected activities. If any one of them makes out a colorable claim, the Court should let this case move forward to trial.

The first arrest was on January 1, 2012. The reason given for the arrest was that Mr. Buehler spat at Officer Oborski. This fact is disputed and so, at this point in the proceedings, the Court must assume that this was a lie by the officer. *See Anderson*, 477 U.S. at 255.

Why would the officer have lied about this? Given the several references by the officer for Mr. Buehler to "Worry about yourself" and how "it would have been so much easier if you would just pay attention to your own selves" it's a reasonable inference that the officer was responding to Mr. Buehler's recording of the encounter. Such recording was correctly found by the lower court to be a First Amendment-protected

activity. Moreover, if there was no probable cause for the arrest, that too would lead to an inference that it was more likely retaliatory. The threat to the third party that he would be arrested without doing anything wrong if he did not walk away could also lead to an inference by the jury that the officer was not just attempting to enforce the law but instead had a retaliatory motive. Such factual determinations cannot be made by the Court, but the Court should allow a jury to decide the question.

Mr. Buehler was charged with failure to obey a lawful order—of which he was found not guilty. The order he was purported to have failed to obey was to put his hands behind his back. This order was clearly a means of effectuating the arrest for supposedly spitting at the officers, rather than an independent reason for the arrest. Even so, Mr. Buehler was found not guilty, and so the Court must, at this point in the proceedings, assume that Mr. Buehler was trying to obey all the police orders. This means that there was no probable cause for an arrest.

As to the second arrest on August 25, 2012, Mr. Buehler has asserted two reasons why it was based on a retaliatory motive. First, that the officer chose to order him back while ignoring Ms. Lee (who was closer). Second, that he was not actually interfering with the officers. Maybe there is a reason why the officer ignored Ms. Lee, despite her being closer, but so far one has not been provided. But without that reason, the inference must be that Mr. Buehler was arrested because he was recording the incident while Ms. Lee was not.

If it is true that Mr. Buehler was not interfering with the officers at the time of the arrest, the lack of

probable cause for arrest itself would be evidence of an improper motive. Such questions of fact should be decided by a jury.

For the third arrest, on September 21, 2012, Mr. Buehler was given conflicting orders by two officers. Trying to satisfy both, Mr. Buehler agreed to leave the scene as he had been given the option of doing. He was actively walking away when he was arrested after calling an officer a "bully." Because his arrest occurred immediately after that statement, it is a plausible inference for the jury to think that he was arrested for no actual interference. It is still possible for the officer to show he would have arrested Mr. Buehler anyway, but again such a question of fact must be decided by a jury.

Also, if Mr. Buehler was actually leaving the scene when he was arrested, there would not be probable cause to arrest him because he was complying with the orders of all the officers present. A jury must decide if he was really leaving the scene or merely claimed to be doing so.

II. THERE IS NATIONAL IMPORTANCE TO THIS CASE BECAUSE IT INVOLVES ONE OF MANY ABUSES BY POLICE OFFICERS AGAINST PEOPLE WHO RECORD THEM

From the video of the Rodney King beating in 1991 through the recent shooting of Philando Castile, the recording of police performing their official duties in a public place has brought much needed accountability to police departments. But while many police departments across the country have embraced the use of First Amendment activity to promote sound policing methods, others, unfortunately, have

resorted to illegal methods in a vain attempt to abridge the very constitutional protections they swore an oath to uphold. As a consequence, there has been an epidemic of harassment, interference, and arrests of journalists and citizens for doing nothing more than exercising their free speech and press rights. *See*, *e.g.*, Matt Hamilton, *L.A. Times Photographer Arrested After Covering Nancy Reagan Funeral Motorcade*, L.A. Times, March 9, 2016, http://lat.ms/1QFntAG; Tim Perry, CBS News Journalist Relives His Arrest at a Chicago Trump Event, CBS News.com, Nov. 14, 2016, http://cbsn.ws/2i0ihvJ; *Times Photographer Is Arrested on Assignment*, N.Y. Times, Aug. 5, 2012, http://nyti.ms/2hk8W4U; Steve Myers, *News Photographer Arrested on Long Island for Videotaping Police*, Poynter, Aug. 2, 2011, http://bit.ly/2i2zBmi.

Such arrests are often made on generalized charges of "failure to obey lawful orders," "disorderly conduct," or "disturbing the peace"—and often charges are dismissed without further action. In a civil-rights case brought against police by a journalist acquitted of disorderly conduct by a trial court that found the officers' testimony "not credible," *Mannie Garcia Files Federal Civil Rights Suit Over Wrongful Arrest*, NPPA, June 14, 2012, https://www.nppa.org/news/6188, the U.S. Justice Department expressed its concern "that discretionary charges, such as disorderly conduct, loitering, disturbing the peace, and resisting arrest, are all too easily used to curtail expressive conduct or retaliate against individuals for exercising their First Amendment rights." Statement of Interest of the United States, *Garcia v. Montgomery County,*

Maryland, No. 8:12-cv-03592-JFM (D. Md. Mar. 4, 2013), at 1-2. DOJ went on to state that "courts should view such charges skeptically to ensure that individuals' First Amendment rights are protected. Core First Amendment conduct, such as recording a police officer performing duties on a public street, cannot be the sole basis for such charges." *Id.* at 2. It also asserted that

> the First Amendment right to record police officers performing public duties extends to both the public and members of the media, and the Court should not make a distinction between the public's and the media's rights to record here. The derogation of these rights erodes public confidence in our police departments, decreases the accountability of our governmental officers, and conflicts with the liberties that the Constitution was designed to uphold.

Id.

In an analogous case, this Court held that the First Amendment encompassed not only the right to speak but also the freedom to listen and to receive information and ideas. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980). It also held that the First Amendment guaranteed the right of assembly in public places and noted that "certain unarticulated rights" were implicit in enumerated guarantees and were often "indispensable to the enjoyment of rights explicitly defined." *Id.* at 579–80.

The *Richmond* Court found moreover that, "[t]o work effectively, it is important that society's criminal process 'satisfy the appearance of justice,'

and the appearance of justice can best be provided by allowing people to observe it." *Id*. at 571–72 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). Although addressing open courtrooms, the Court went on to state:

> The right of access to places traditionally open to the public . . . may be seen as assured by the amalgam of the First Amendment guarantees of speech and press; and their affinity to the right of assembly is not without relevance. From the outset, the right of assembly was regarded not only as an independent right but also as a catalyst to augment the free exercise of the other First Amendment rights with which it was deliberately linked by the draftsmen. "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." People assemble in public places not only to speak or to take action, but also to listen, observe, and learn; indeed, they may "assembl[e] for any lawful purpose," Subject to the traditional time, place, and manner restrictions, streets, sidewalks, and parks are places traditionally open, where First Amendment rights may be exercised.

Id. at 577-578 (internal citations omitted).

In another case involving cameras in the courtroom, Justice Stewart observed, "I would be wary of imposing any per se rule which, in the light of future technology, might serve to stifle or abridge true First Amendment rights." *Estes v. Texas*, 381 U.S. 532, 603–04 (1965) (Stewart, J., dissenting). "The suggestion that there are limits upon the

public's right to know . . . causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms." *Id.* at 614–615.

For example, two online journalists were arrested and removed from a public meeting of the Washington D.C. Taxicab Commission in 2012 for taking photographs (including video of the arrest of the first of the two reporters). *See* Tom Sherwood, *Journalists Handcuffed, Removed from Taxi Commission Meeting*, NBC Washington.com, June 23, 2011, http://bit.ly/2h9JeLD (adding that disorderly conduct charges were later dropped). A photojournalist for the *Detroit Free Press* was arrested and her camera was seized while covering a police action in July 2013. *See* David Becker, *Detroit Newspaper Photographer Arrested While Covering Police Action*, Petapixel (reprinted from Detroit Fee Press), Jul 16, 2013, http://bit.ly/2hySmdC.

Mistreatment of members of the news media by police during various Occupy Wall Street protests also illustrates this problem. Many outlets reported numerous instances where news reporters and photojournalists were arrested along with protesters, merely for attempting to cover the events. *See* Sara Rafsky, *At Occupy Protests, U.S. Journalists Arrested, Assaulted*, Comm. to Protect Journalists, Nov. 11, 2011, http://bit.ly/2i2Mblp.

The law is also clear that these constitutional protections apply equally to individuals as they do the institutional press. As explained in *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), "changes in

technology and society have made the lines between private citizen and journalist exceedingly difficult to draw" and "news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper." *Id.* at 84.

Because professional journalists may not be on a jet to record a pilot being detained, or when an Italian cruise ship capsized, "the news-gathering protections of the First Amendment cannot turn on professional credentials or status." *Id.* (For stories about citizens journalists covering such events, *see*, *e.g.*, Jim Avila et al., *Jet Blue Pilot Yelled About Sept. 11 and "Push It to Full Throttle*," ABC News, March 28, 2012, http://abcn.ws/2iaUziM; *Costa Concordia Disaster: Crew Urged 'Return to Cabins,'* BBC, Jan. 20, 2012, http://bbc.in/2ib6HjZ.) Based on such longstanding precedent as noted in *Glik*, "the public's right of access to information is coextensive with that of the press." *Id.* at 83 (citing *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978)). Additionally, the fact that police officers may be "unhappy they were being recorded during an arrest . . . does not make a lawful exercise of a First Amendment right a crime." Id. at 80 (quoting the Boston municipal court's dismissal of charge for disturbing the peace).

The First Circuit reaffirmed and expanded on this principle even more recently, denying qualified immunity in a case that involved videotaping police during a traffic stop. *Gericke v. Begin,* 753 F.3d 1 (1st Cir. 2014). The court explained that the constitutional principles it applied were well established and did not depend on the existence of a prior case that was "directly on point," *id.* at 4, but "some constitutional violations are 'self-evident' and

do not require particularized case law to substantiate them." Id. at 7 n.11 (quoting *Glik*, 655 F.3d at 85). Accordingly, it had no difficulty concluding that there is a "fundamental and virtually self-evident nature of the First Amendment's protections" for a journalist's right to film officials in public places. *Id.* (quoting *Glik*, 655 F.3d at 84–85).

Courts have been able to find that these rights are "self-evident" because they are not writing on a blank slate. Holding that the First Amendment protects the right to photograph police officers in a public settling is nothing more than a specific application of numerous constitutional decisions through the decades that protect the rights of journalists and members of the public to gather information and to hold government officials accountable for their actions. For example, the *Glik* court quoted this Court's half-century precedent for the proposition that "[g]athering information about government officials in a form that can be readily disseminated to others serves a cardinal First Amendment interest in protecting and promoting the 'free discussion of governmental affairs.'" *Glik*, 655 F.3d at 82 (*quoting Mills v. Alabama*, 384 U.S. 214, 218 (1966)). The court explained that "[b]asic First Amendment principles," bolstered by case law from the Supreme Court and multiple circuits, answers the specific question about the right to photograph the police "unambiguously." Id. at 82 (citing, *e.g.*, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).

Federal courts have long recognized that the First Amendment protects the right to record police officers performing their duties in public.

In fact, every federal court of appeals to address the issue on the merits has acknowledged the existence of this First Amendment right. *See*, *e.g.*, *Gericke*, 753 F.3d at 7 ("[T]he Constitution protects the right of individuals to videotape police officers performing their duties in public."); *Schnell v. City of Chicago*, 407 F.2d 1084, 1085–86 (7th Cir. 1969) (reversing dismissal of suit against police by photographers who covered demonstrations at the 1968 Democratic National Convention for "interfering with plaintiffs' constitutional right to . . . photograph news events"); *Adkins v. Limtiaco,* 537 Fed. App'x 721, 722 (9th Cir. 2013) (holding that allegations that plaintiff was arrested in retaliation for taking photos of the police in public stated a claim for First Amendment retaliation); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (holding that recording of police conduct fell within the "First Amendment right to film matters of public interest"); *Bowens v. Superintendent of Miami S. Beach Police Dep't,* 557 Fed. App'x 857, 863 (11th Cir. 2014) ("Citizens have 'a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct.'" (quoting *Smith v. City of Cumming,* 212 F.3d 1332, 1333 (11th Cir. 2000))).

In circuits where the issue has not yet been decided at the appellate level, district courts have regularly recognized the First Amendment right to record the police. *See*, *e.g.*, *Crawford v. Geiger*, 131 F. Supp. 3d 703, 715 & n.5 (N.D. Ohio 2015) (surveying cases and holding that "there is a First Amendment right openly to film police officers carrying out their duties in public" and that the court is "firmly persuaded the First Amendment shields citizens against detention or arrest merely for making a

photographic, video or sound recording, or immutable record of what those citizens lawfully see or hear of police activity within public view"); *Higginbotham v. City of New York*, 105 F. Supp. 3d 369, 380 (S.D.N.Y. 2015) ("While videotaping an event is not itself expressive activity," it is protected by the First Amendment because it can be "an essential step towards an expressive activity."); *Lambert v. Polk Cty.*, 723 F. Supp. 128, 133 (S.D. Iowa 1989) ("It is not just news organizations . . . who have First Amendment rights to make and display videotapes of events—all of us . . . have that right."); *Channel 10, Inc. v. Gunnarson*, 337 F. Supp. 634, 638 (D. Minn. 1972) (recognizing "constitutional right to have access to and to make use of the public streets, roads and highways . . . for the purpose of observing and recording in writing and photographically the events which occur therein"). *See also Gaymon v. Borough of Collingdale*, 150 F. Supp. 3d 457, 468 n.9 (E.D. Pa. 2015) (observing in dictum that "federal case law has overwhelmingly held that citizens do indeed have a right to record officers in their official capacity so long as they do not interfere with an officer's ability to do his or her job").

Similarly, in *ACLU of Illinois v. Alvarez,* 679 F.3d 583 (7th Cir. 2012), *cert. denied,* 133 S. Ct. 651 (U.S. 2012), the plaintiffs used audio-visual devices to monitor police and brought a successful declaratory judgment action against a statute criminalizing such recordings in violation of the First Amendment.

Many law enforcement agencies and associations around the country have established policies, guidelines, and training regarding the right to record police in order to help officers avoid being sued for

their actions. One of the largest such groups states: "arrests of individuals who are recording police activities must be based on factors that are unrelated to the act of recording. Recording the police does not, of itself, establish legal grounds for arrest, issuance of citations, or taking other actions to restrict such recordings." Int'l Ass'n of Chiefs of Police, *Public Recording of Police*, http://bit.ly/2hqLJwd.

As the First Circuit said in a similar case, "A police officer is not a law unto himself; he cannot give an order that has no colorable legal basis and then arrest a person who defies it." *Iacobucci v. Boulter*, 193 F.3d 14, 25 (1st Cir. 1999).

CONCLUSION

For the foregoing reasons, we urge the Court to grant the petition and address the inapposite findings of probable cause here.

Respectfully submitted,

MICKEY H. OSTERREICHER
National Press
Photographers Association
120 Hooper Street
Athens, GA 30602
(716) 983-7800
lawyer@nppa.org

ILYA SHAPIRO
Counsel of Record
DEVIN WATKINS
Cato Institute
1000 Mass. Ave. NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org
dwatkins@cato.org

January 4, 2017

APPENDIX: DESCRIPTION OF *AMICI*

The **Cato Institute** is a nonprofit, nonpartisan public-policy research foundation that was established in 1977 to advance the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was founded in 1989 to restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

The **National Press Photographers Association** is the leading voice advocating for visual journalists today. It is routinely involved in cases of this type because coverage of breaking news frequently involves contact with police, and journalists have been threatened, arrested, and sometimes charged for doing nothing more than engaging in newsgathering activities. The same has happened to private individuals who use cell phones to record and document newsworthy events, as advanced technology has made citizen reporting more ubiquitous. The general proliferation of smartphone use to capture news events has generated an exceptional increase in "citizen journalism."

First Look Media Works, Inc. is a new-model media company that publishes *The Intercept*, a national-security focused digital news site, and also produces *Field of Vision*, a filmmaker-driven documentary unit that commissions and creates short-form films about developing and ongoing stories around the world.

Getty Images, Inc. is a global digital content marketplace for still imagery, video and music content. With offices in more than more than 20 countries, it offers more than 200 million assets for license, including more than 120 million unique digital assets in its library, and represents more than 200,000 individual contributors and 300 image partners to offer customers still imagery, video and music. Our more than 100 staff photographers cover more than 30,000 breaking news, sport and entertainment events globally on an annual basis.

The **Society of Professional Journalists** (SPJ) is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists, and protects First Amendment guarantees of freedom of speech and press.

The **Radio Television Digital News Association** (RTDNA) is a professional association devoted to electronic journalism. RTDNA represents local and network news executives, educators, students, and others in the radio, television, and cable news business worldwide. RTDNA's purpose is to encourage excellence in the electronic journalism industry and to work to uphold and promote the First Amendment freedoms of the news media.

The **Reporters Committee for Freedom of the Press** is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided assistance and research in First Amendment and Freedom of Information Act litigation since 1970.