

No. 16-1082

IN THE
Supreme Court of the United States

KARINA GARCIA, YARI OSORIO,
BENJAMIN BECKER, CASSANDRA REGAN,
YAREIDIS PEREZ, STEPHANIE JEAN UMOH, TYLER SOVA,
MICHAEL CRICKMORE, AND BROOKE FEINSTEIN,
Petitioners,

v.

MICHAEL R. BLOOMBERG, RAYMOND W. KELLY, CITY OF
NEW YORK, AND JANE AND JOHN DOES 1-40,
Respondents.

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

BRIEF OF *AMICI CURIAE* THE REPORTERS
COMMITTEE FOR FREEDOM OF THE PRESS AND
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION
IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*¹

Amicus The Reporters Committee for Freedom of the Press (the “Reporters Committee”) 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 representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Amicus The National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA’s approximately 6,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted and defended the rights of photographers and journalists, including intellectual property rights and freedom of the press in all its forms, especially as it relates to visual journalism.

Amici are advocates for the rights of news media and others who seek to provide information to the public about important issues that affect them, and thus they have a strong interest in ensuring that

¹ No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. The parties were notified of *amici*’s intention to file a brief more than ten days before the filing date, and have consented to this filing.

First Amendment rights are respected by law enforcement.

SUMMARY OF ARGUMENT

In recent years, *amici* have observed an alarming rise in journalists being arrested while covering political protests and demonstrations in public places. Frequently, reporters and photographers are swept up in mass arrests that the police initiate without warning or an opportunity for the journalist to identify him- or herself as a member of the press. In fact, at least two journalists were among those arrested with the Petitioners in the incident giving rise to this lawsuit. *Amici* have spoken out publicly on numerous occasions to condemn this trend,² provided legal advice on the risks of being arrested (and what to do if arrested) to journalists covering public events,³ and have filed *amici curiae* briefs in cases involving arrested journalists.⁴

² See, e.g., Reporters Committee for Freedom of the Press, *Press Release: Reporters Committee statement on arrest of journalists in Ferguson* (Aug. 14, 2014), available at <https://www.rcfp.org/reporters-committee-statement-arrest-journalists-ferguson> (“The unwarranted arrest of reporters ... in Ferguson, Mo., last night is outrageous and unacceptable in a nation that cherishes a free press.”).

³ See, e.g., Reporters Committee for Freedom of the Press, *Reporters Committee reminds journalists of legal assistance hotline during inaugural events* (Jan. 18, 2017), available at <https://www.rcfp.org/reporters-committee-reminds-journalists-legal-assistance-hotline-during-inaugural-events>.

⁴ See, e.g., Brief of *Amici Curiae* National Press Photographers Association and Media and Free Speech Organizations in Support of Plaintiff-Appellant, *Higginbotham v. City of New York*, No. 16-3994 (2d Cir. Mar. 17, 2017), available at

The legal reasons why the Court should resolve the clear split among the Courts of Appeals on the requirement that police provide fair warning prior to arresting participants in a previously-permitted demonstration are amply set forth in the Petition. *Amici* write separately to underscore the particular impact that unclear standards in this area have on the press, which plays a vital role in informing the citizenry about the political messages expressed at mass public demonstrations and in monitoring the conduct of law enforcement. There can be no greater chill on the exercise of the freedom of the press than the threat of arrest for doing nothing more than reporting a story. The Court should take this opportunity to reaffirm the importance that, when regulating core First Amendment-protected speech activity, law enforcement must adhere to the highest constitutional standards.

ARGUMENT

Given the close interrelationship between the freedom of the press and protections for peaceable assembly, the news media has a strong interest in ensuring that First Amendment rights generally are given the necessary “breathing space to survive.” *NAACP v. Button*, 371 U.S. 415, 433 (1963). Public protests are inherently newsworthy, so it is vital that law enforcement officials rigorously follow due process in regulating such events, both to establish clear constitutional boundaries and to prevent collateral damage to the First Amendment. This case raises important issues for the press in particular, because reporters are so frequently

subject to arrest (and even criminal prosecution) when covering demonstrations.

The Court should take this opportunity to resolve the split among the circuits and reaffirm the need for “appropriate limitations on the discretion of public officials where speech and assembly are intertwined with regulated conduct.” *Cox v. State of Louisiana*, 379 U.S. 559, 574 (1965). At a minimum, these limitations must include the common-sense requirement that before police begin arresting demonstrators, they must provide clear, fair warning.

A. The First Amendment Rights of Freedom of the Press and Freedom to Peaceably Assemble Are Intertwined

Public protest has long been central to the political discourse in this country. *See United States v. Cruikshank*, 92 U.S. 542, 551 (1875). And this Court has long recognized the close interrelationship between the rights of speech, assembly and the press expressly protected by the First Amendment. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577–78 (1980) (the three rights were “deliberately linked by the draftsmen”; “[p]eople assemble in public places not only to speak or to take action, but also to listen, observe, and learn”) (quotation marks and citation omitted); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958) (“[T]his Court has more than once ... remark[ed] upon the close nexus between the freedoms of speech and assembly.”). In many ways, press coverage is essential for a demonstration to be effective—its impact would be greatly diminished if the broader

public had no way of learning the protesters' message—or even that a protest took place.

This Court has recognized that “in a society in which each individual has but limited time and resources with which to observe at first hand” public events, “he relies necessarily upon the press to bring to him in convenient form the facts” of those events. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975). In this way, the importance of the news media in “acting as the ‘eyes and ears’ of the public” is “[b]eyond question.” *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978) (noting that, “with greater information, the public can more intelligently form opinions”). See also *Estes v. State of Tex.*, 381 U.S. 532, 539 (1965) (“The free press has been a mighty catalyst in awakening public interest in governmental affairs ... and generally informing the citizenry of public events and occurrences”).

The press plays an additional, equally important role in reporting on public protests beyond simply informing the public about the protest itself: monitoring and reporting on the response of the police and other government officials to the protest. Because “informed public opinion is the most potent of all restraints upon misgovernment,” *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936), “[t]he Constitution specifically selected the press ... to play an important role in the discussion of public affairs,” and “to serve as a powerful antidote to any abuses of power by governmental officials.” *Mills v. State of Ala.*, 384 U.S. 214, 219 (1966).

Nowhere is the public monitoring of the government more important than when state officials

are in a position to directly suppress First Amendment-protected speech and assembly. *Cf. First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.11 (1978) (“Freedom of expression has particular significance with respect to government because it is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.”) (citation, quotation marks and brackets omitted). And the Court has specifically noted the role of the press in “guard[ing] against the miscarriage of justice by subjecting the police ... to extensive public scrutiny and criticism.” *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966). *See also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1035–36 (1991) (noting that “[t]he public has an interest in [the] responsible exercise” of the “vast discretion” granted to law enforcement officials, and therefore “[p]ublic awareness and criticism [of government] have even greater importance where ... they concern allegations of police corruption”).

These principles explain why an overwhelming trend of circuit court opinions has found a First Amendment right to photograph, videotape or otherwise record police officers performing their duties in public space (subject to reasonable time, place and manner restrictions).⁵ As the Fifth Circuit explained recently, “[f]ilming the police contributes

⁵ *See Turner v. Lieutenant Driver*, 848 F.3d 678, 689 (5th Cir. 2017); *ACLU v. Alvarez*, 679 F.3d 583, 608 (7th Cir. 2012); *Glik v. Cuniffe*, 655 F.3d 78, 82 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995).

to the public's ability to hold the police accountable, ensure that police officers are not abusing their power, and make informed decisions about police policy." *Turner*, 848 F.3d at 689. But protections for journalistic activities have little practical force if reporters can be swept up in mass arrests of demonstrators without due process.

B. The News Media Has a Particularly Strong Interest in Curbing Law Enforcement Abuses During Public Protests

In recent years reporters and photographers covering public protests across the country have been arrested, often despite clearly identifying themselves as members of the media. In fact, at least two journalists were among those arrested in New York City along with the Petitioners on October 1, 2011. See Erika Fry, *Who's a Journalist?*, Columbia Journalism Review (Oct. 7, 2011), *available at* http://archives.cjr.org/behind_the_news/whos_a_journalist_1.php.

They were far from alone. A letter from over a dozen media organizations (including *amici*) to the Deputy Commissioner of Public Information of the New York Police Department ("NYPD") catalogued numerous abuses by the NYPD against credentialed members of the press during the Occupy Wall Street protests.⁶ And in the year that followed the initial

⁶ See Letter from George Freeman, *et al.*, to Deputy Commissioner Paul J. Browne (Nov. 21, 2011), *available at* <https://www.rcfp.org/sites/default/files/20111121-lettertonypd-deputycommissionerforpublicaffairs.pdf>. See also Jack

Occupy Wall Street protests, more than 90 journalists were arrested in 12 cities while covering other “Occupy” protest events.⁷

Since then, the problem has grown, as journalists were arrested while covering the mass protests in response to police shootings of unarmed African-American men in 2014–2016,⁸ the Chicago protests of

Mirkinson, *Occupy Wall Street November 17: Journalists Arrested, Beaten By Police* (Nov. 17, 2011, updated Jan. 17, 2012), available at http://www.huffingtonpost.com/2011/11/17/occupy-wall-street-nov-17-journalists-arrested-beaten_n_1099661.html.

⁷ See Josh Stearns, *Tracking Journalist Arrests at Occupy Protests Around the Country*, Storify, <https://storify.com/jcstearns/tracking-journalist-arrests-during-the-occupy-prot> (documenting through news reports and social media posts all reported arrests of journalists covering Occupy protests from September 2011 through September 2012) (last visited April 7, 2017). See also Sara Rafsky, *At Occupy protests, U.S. journalists arrested, assaulted*, Committee to Protect Journalists (Nov. 11, 2011), available at <https://cpj.org/blog/2011/11/at-occupy-protests-us-journalists-arrested-assault.php>.

⁸ Cities where journalists were arrested include Ferguson, Missouri (see, e.g., Brian Stelter, *6 more journalists arrested in Ferguson protests*, CNN (Aug. 19, 2014), available at www.cnn.com/2014/08/19/us/ferguson-journalists-arrested/; Melanie Eversley, *Getty photographer arrested in Ferguson, Mo. unrest*, USA Today (Aug. 19, 2014), available at www.usatoday.com/story/news/nation/2014/08/18/getty-photographer-arrested-scott-olson/14265155/; Abby Phillip, *Police in Ferguson arrest and threaten more journalists*, Wash. Post (Aug. 18, 2014), available at <http://www.washingtonpost.com/news/post-nation/wp/2014/08/18/police-in-ferguson-arrest-and-threaten-more-journalists/>); Minneapolis (see, e.g., Steven Nelson, *Reporter Arrested*

now-President Trump during the Republican primary in March 2016,⁹ the protests of the North Dakota Access Pipeline in the Fall and Winter 2016–2017,¹⁰ and the protests in the North Carolina state legislature house in December 2016.¹¹ Most recently

Covering Minnesota Highway Protest, U.S. News (Nov. 17, 2015), available at <https://www.usnews.com/news/articles/2015/11/17/reporter-arrested-covering-minnesota-highway-protest-over-jamar-clark-shooting>); Rochester (*see, e.g.*, Morgan Winsor, *Black Reporter's Arrest During Rochester, New York, Protest Captured on Live TV*, ABC News (July 9, 2016), available at <http://abcnews.go.com/US/police-arrest-74-people-including-reporters-protest-rochester/story?id=40459279>); and Baton Rouge (*see, e.g.*, Casey Ferrand, *Reporter describes 'scary' arrest while covering protests in Baton Rouge*, WDSU (July 14, 2016), <http://www.wdsu.com/article/reporter-describes-scary-arrest-while-covering-protests-in-baton-rouge/3608763>).

⁹ *See, e.g.*, Michael Calderone, *CBS News Reporter Sopan Deb Arrested While Covering Donald Trump Rally*, Huffington Post (Mar. 12, 2016), http://www.huffingtonpost.com/entry/sopan-deb-detained-trump-rally_us_56e3fb1de4b0860f99d931a2.

¹⁰ *See, e.g.*, Amy Dalrymple, *At least 7 journalists charged with crimes during ND pipeline protests*, Bismarck Tribune (Nov. 5, 2016), available at http://bismarcktribune.com/news/state-and-regional/at-least-journalists-charged-with-crimes-during-nd-pipeline-protests/article_64d2a5cc-f1f1-5873-87d0-22b54f05e8aa.html; Alleen Brown, *Arrests of Journalists at Standing Rock Test the Boundaries of the First Amendment*, The Intercept (Nov. 27, 2016), <https://theintercept.com/2016/11/27/arrests-of-journalists-at-standing-rock-test-the-boundaries-of-the-first-amendment/>; Alexandra Ellerbeck, *Journalists covering Standing Rock face charges as police arrest protesters*, Comm. to Protect Journalists (Feb. 17, 2017), <https://cpj.org/blog/2017/02/journalists-covering-standing-rock-face-charges-as.php>.

¹¹ *See, e.g.*, Colin Campbell, *Journalist arrested during protests at legislature*, News & Observer (Dec. 15, 2016),

seven journalists were arrested while covering the protests surrounding the inauguration of President Trump in January 2017, and were each charged with felony rioting before charges were dropped against six of them.¹²

In many of these cases, reporters were swept up in mass arrests without warning from the police. For example, in Rochester, New York, Carlet Cleare, a reporter from local ABC affiliate WHAM-TV was briefly arrested (along with one of her colleagues) when local police arrested 74 people at a protest against police brutality. Upon her release, she posted to the social media website Twitter a message stating, “Welp, that was interesting. Cuffed by RPD

<http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article121175203.html>.

¹² See Reporters Committee for Freedom of the Press, *Updates on journalists arrested and charged with rioting during Presidential Inauguration protests*, <https://www.rcfp.org/inauguration-protest-arrests> (last visited Apr. 6, 2017). See also Liam Stack, *Felony Charges Dropped Against 4 Reporters Arrested at Inauguration Protests*, N.Y. Times (Jan. 30, 2017), available at <https://www.nytimes.com/2017/01/30/us/journalists-arrested-inauguration-charges.html>; Johan Engel Bromwich, *Felony Charges for Journalists Arrested at Inauguration Protests Raise Fears for Press Freedom*, N.Y. Times (Jan. 25, 2017), available at www.nytimes.com/2017/01/25/business/media/journalists-arrested-trump-inauguration.html; Steven Nelson, *Inauguration Mass Arrest of Protesters, Journalists a Throwback With a Familiar Face, Attorneys Say*, U.S. News (Jan. 24, 2017), available at <https://www.usnews.com/news/national-news/articles/2017-01-24/inauguration-mass-arrest-of-protesters-journalists-a-throwback-with-a-familiar-face-attorneys-say>.

while cover protest in downtown ROC. Was never told I wasn't supposed to be on sidewalk.”¹³

As the Columbia Journalism Review reported, three of the journalists arrested during the Occupy Wall Street protests in New York in Fall 2011 presented police with identification showing that they were members of the media, but were nevertheless detained and charged with disorderly conduct because they did not possess official NYPD-issued press credentials from the Office of the Deputy Commissioner for Public Information. *See Fry, supra*. Without advance warning from the police that protesters were going to be arrested, the reporters did not have an opportunity to affirmatively identify themselves as members of the media before they were arrested, let alone to move to a different location to avoid arrest entirely.

It is fundamental to our democracy that the government must “give citizens fair warning as to what is illegal” before it can impose criminal penalties. *Cox*, 379 U.S. at 574. This requirement is all the more necessary in the context of public protests and demonstrations, which lie squarely at the core of the rights protected by the First Amendment.

CONCLUSION

When police engage in mass arrests of peaceful protesters without warning, they impair not only freedom of assembly but also freedom of the press, as

¹³ Carlet Cleare (@ccleare), Twitter (July 8, 2016, 10:45 PM), <https://twitter.com/ccleare/status/751653412295548928>.

journalists covering the protest are frequently arrested along with the participants in the protest. Freedom of the press requires that journalists who are otherwise obeying the law not be subject to indiscriminate mass arrests simply for reporting on the scene at a newsworthy event. The Court should grant the Petition to affirm these fundamental constitutional principles.

Respectfully submitted,

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