

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

ANTONIO FRANCIS BUEHLER,)
Plaintiff,)
v.)
CITY OF AUSTIN/AUSTIN)
POLICE DEPARTMENT, <i>et al.</i> ,)
Defendants.)

Civil Action No. 1:13-cv-01100

**BRIEF *AMICUS CURIAE* OF
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION**

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Amicus National Press Photographers Association (“NPPA”) submits this brief pursuant to this Court’s Order of May 12, 2014.

Interest of Amicus

This case involves allegations that the Austin Police Department and the named defendants violated Antonio Francis Buehler’s constitutional rights, and in particular his right to document police misconduct that occurs in the public forum. Sadly, this is not an isolated case, but is part of a nationwide phenomenon where police have interfered with citizens’ rights to photograph and video-record officers engaged in official business in public spaces. NPPA follows these cases closely, and strives to ensure that the crucial role that journalists and citizens play in promoting the discussion of matters of public concern is not diminished.

NPPA 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 smart phone use by individuals to capture news events in photos and video has generated an exponential increase in “citizen journalism.” Members of the public increasingly are “playing an active role in the process of collecting, reporting, analyzing and disseminating news and information.”¹ But while changes in technology have created new fact patterns, NPPA believes they implicate settled and well-established constitutional precepts that apply in this case.

¹ Shane Bowman and Chris Willis, “We Media: How Audiences are Shaping the Future of News and Information,” July 2003, The Media Center at the American Press Institute, available at <http://www.mediacenter.org/mediacenter/research/wemedia/>.

I. The Constitutional Issues Presented in this Case Involve Issues of National Importance

In 1991 the nation was shocked by images of Los Angeles police officers savagely beating the prone and inert body of Rodney King. It was a graphic demonstration of the power of photographic evidence as a check on police misconduct. And while many police departments across the country during the intervening 23 years have embraced the use of public photography to promote accountability and sound policing methods, some others, unfortunately, have resorted to illegal methods in a vain attempt to stuff the technological genie back in the bottle.

As a consequence, there has been an epidemic of arrests for nothing more than the journalistic enterprise of photographing public events.² Frequently, such arrests are made on generalized charges of “disorderly conduct” or “disturbing the peace,” and often charges are dismissed without further action. For example, two online journalists were arrested and removed from a public meeting of the Washington D.C. Taxicab Commission in 2012 for taking photo-

² See, e.g., Wills Citty, *NYPD Officer Indicted After Investigation of NPPA Member’s Unlawful Arrest*, Aug. 28, 2013, <http://blogs.nppa.org/advocacy/2013/08/28/nypd-officer-indicted-after-investigation-of-nppa-members-unlawful-arrest>; Steve Myers, *News photographer arrested on Long Island for videotaping police*, Aug. 2, 2011, <http://www.poynter.org/latest-news/mediawire/141291/news-photographer-arrested-on-long-island-for-videotaping-police/>; *Photographers arrested during rioting, imprisoned overnight*, Aug. 24, 1998 <http://www.rcfp.org/browse-media-law-resources/news/photographers-arrested-during-rioting-imprisoned-overnight>; *Mayor apologizes to photographer for arrest at football game*, Aug. 24, 1998, <http://www.rcfp.org/browse-media-law-resources/news/mayor-apologizes-photographer-arrest-football-game>; *Charges dropped against photographers arrested in Idaho and New Mexico*, Sept. 25, 1995, <http://www.rcfp.org/browse-media-law-resources/news/charges-dropped-against-photographers-arrested-idaho-and-new-mexico>; *Police launch investigation after wrongful arrest of editor, photographer*, Aug. 14, 1985, <http://www.rcfp.org/browse-media-law-resources/news/police-launch-investigation-after-wrongful-arrest-editor-photographe>; *Times Photographer Is Arrested on Assignment*, N.Y. Times, Aug. 5, 2012, available at 2012 WLNR 16502285; Henry K. Lee, *UC pays to settle photographer’s suit over arrest*, July 2, 2012, <http://www.sfgate.com/bayarea/article/UC-pays-to-settle-photographers-suit-over-arrest-3679859.php>.

graphs (including video of the arrest of the first of the two reporters).³ Both were charged with disorderly conduct and “unlawful entry/remaining” by U.S. Park Police, but the government did not press charges. Similarly, a photojournalist for the *Detroit Free Press* was arrested and her camera was seized while covering a police action in July 2013.⁴ In March 2014, a reporter and photographer were detained by police, their cameras confiscated, and photographs deleted at an incident outside a General Dynamics plant in Lima, Ohio.⁵

Mistreatment of members of the news media by police during various Occupy Wall Street protests well illustrates this problem. Many media outlets reported numerous instances where news reporters and photojournalists were arrested along with protesters, merely for attempting to cover the events.⁶ During a one-year period beginning in September 2011, more than 90 journalists were arrested in 12 U.S. cities while covering Occupy protests. See Josh

³ See, e.g., Tom Sherwood, *Journalists Handcuffed, Removed From Taxi Commission Meeting*, June 23, 2011, <http://www.nbcwashington.com/news/politics/Journalists-Handcuffed-Removed-From-Taxi-Commission-Meeting-124384719.html>. Charges were dismissed almost immediately after the actions were widely criticized in the press. See Mark Seagraves, *Journalists won't face charges*, June 24, 2011, <http://www.wjla.com/articles/2011/06/journalists-won-t-face-charges-62814.html>.

⁴ See Jim Schaefer, *No charges for Detroit Free Press photographer or police officer after cell-phone seizure and arrest*, Aug. 24, 2013, <http://www.freep.com/article/20130823/NEWS01/308230111/detroit/free/press-photographer-mandi-wright-officer-Lamar-Penn>; David Becker, *Detroit Newspaper Photographer Arrested While Covering Police Action*, July 16, 2013, <http://petapixel.com/2013/07/16/detroit-newspaper-photographer-arrested-while-covering-police-action/>.

⁵ See Nolan Rosenkrans, *The Blade Files Lawsuit Over Incident at Lima Tank Plant*, THE BLADE, April 4, 2014 (<http://www.toledoblade.com/local/2014/04/04/The-Blade-files-lawsuit-over-incident-at-Lima-tank-plant.html>).

⁶ See, e.g., Sara Rafsky, *Protest Puts Coverage in Spotlight*, N.Y. Times, Nov. 21, 2011, available at 2011 WLNR 24091906; *At Occupy protests, U.S. journalists arrested, assaulted*, Nov. 11, 2011, <http://www.cpj.org/blog/2011/11/at-occupy-protests-us-journalists-arrested-assault.php>; Josh Stearns, *Citizen Journalist Arrests on the Rise at Occupy Protests*, Jan. 10, 2012, <http://www.freepress.net/blog/12/01/10/citizen-journalist-arrests-rise-occupy-protests>.

Stearns, *Tracking Journalist Arrests at Occupy Protests Around the Country*, <http://storify.com/jcstearns/tracking-journalist-arrests-during-the-occupy-prot> (last visited Mar. 6, 2014).

The facts presented in this case provide yet another example in this alarming trend. Plaintiff Buehler alleges he was targeted for exercising his First Amendment right to video-record police officers conducting official business in a public place. He alleges that for video-recording an officer manhandling a young woman during an arrest, Buehler himself was in turn arrested without probable cause, as part of which he was put in a choke-hold, forced to the ground, and subjected to an arm-bar. Am. Compl. ¶¶ 9-20. Subsequent arrests occurred after Buehler formed a citizens group to oppose abuses of police authority and, with his compatriots, was on the scene of police activity in public fora. *Id.* ¶¶ 21-24, 30-35, 36-49. This is precisely the type of harassment suffered by the victims in the incidents described above.

II. The First Amendment Right to Gather Information and Photograph Police in Public Settings is Well Established

Defendants' argument that a "First Amendment right to videotape law enforcement is not a cognizable claim," Def. Reply to Plaintiff's Response to Def's Rule 12(b)(1)&(6) Mot. to Dismiss ("Def. Reply") at 3, is both incorrect as a matter of law and frames the issue far too narrowly. Although a growing number of cases have dealt with this specific factual situation and found constitutional interests were implicated, they based their decisions on general principles that have been well established for decades.

In *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), for example, a citizen was arrested after using his cell phone to photograph Boston police officers he believed were using excessive force in effectuating an arrest. Charges against him were later dropped, and Glik filed a civil action against the Boston police. In denying the individual officers' claim of qualified immunity, the First Circuit observed, "a citizen's right to film government officials, including law enforcement

officers, in the discharge of their duties in a public space is a basic, vital, *and well-established liberty safeguarded by the First Amendment.*” *Id.* at 85 (emphasis added). 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 Boston Municipal Court’s dismissal of charge for disturbing the peace).

The court cited numerous circuit and district court decisions that had reached the same conclusion. *Id.* at 83 (collecting cases). The Seventh Circuit echoed the principle that “making an ... audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the [] recording.” *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012). “Basic First Amendment principles, along with case law from [multiple] circuits ... unambiguously” confirm “there is a constitutionally protected right to videotape police carrying out their duties in public.” *Id.* at 601-02. The Eleventh and Ninth Circuits both have long recognized as much. *See Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (“The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.”); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing “First Amendment right to film matters of public interest”).⁷

Most recently, the First Circuit reaffirmed and expanded on this principle, denying qualified immunity in a case that involved videotaping police during a traffic stop. *Gericke v.*

⁷ *See also Robinson v. Fetterman*, 378 F.Supp.2d 534, 541 (E.D. Pa. 2005) (finding “no doubt” that First Amendment protected plaintiff who videotaped police officers, as “[v]ideotaping is a legitimate means of gathering information for public dissemination and can often provide cogent evidence”); *Channel 10, Inc. v. Gunnarson*, 337 F.Supp. 634, 638 (D. Minn. 1972) (“[E]mployees of the news media have a right to be in public places ... to gather information, photographically or otherwise.”).

Begin, ___ F.3d ___, 2014 WL 2142519 (1st Cir., May 23, 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. The holdings that the First Amendment protects the right to photograph police officers in a public setting 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 Court in *Glik* quoted a nearly fifty-year-old Supreme Court 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 82-83, citing, *e.g.*, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is ... well established that the Constitution protects the right to receive information and ideas.”); *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (“[t]here is an undoubted right to gather news ‘from any source by means within the law’”); *Houston v. Hill*, 482 U.S. 451, 461 (1987) (“[t]he freedom of individuals verbally to

oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state”).

The United States Department of Justice (“DOJ”) reached the same conclusion, that the right to photograph police is well-established, even in a circuit that has not yet issued a decision in a case with a specific set of facts similar to *Glik*. DOJ took the extraordinary step of filing “Statements of Interest” supporting the plaintiffs in a pair of Maryland cases that presented right to record questions in two very different situations. *Sharp v. Baltimore City Police*, No. 1:11-cv-02888-CCB (D. Md.) was a Section 1983 action based on search and seizure (and destruction) of cell phone photographs depicting the arrest of another individual. The DOJ Statement of Interest stresses that “[t]he interests animating the Fourth Amendment’s prohibition against unreasonable searches and seizures are heightened when the property at issue is also protected by the First Amendment.”⁸ The *Sharp* case has since been settled. See http://www.aclu-md.org/uploaded_files/0000/0486/sharp_v._bpd_final_signed_agreement.pdf.

The second case, *Garcia v. Montgomery County*, No. 12-cv-03592-JFM (D. Md.) is a Section 1983 action in which an experienced photojournalist alleges that defendant officers unconstitutionally confronted him and stopped him from video-recording an arrest they were making off a public thoroughfare. Garcia further alleges that the officers used excessive force, and that the memory card from his camera was illegally seized. As here, Garcia was charged with the type of amorphous criminal violations often manufactured in such instances, in his case, disorderly conduct. He was prosecuted – and acquitted – and his current claims against the

⁸ DOJ Statement of Interest, at 11 (available at http://www.justice.gov/crt/about/spl/documents/Sharp_SOI_1-10-12.pdf). DOJ explained that the United States has a strong interest in cases like this because it is charged with enforcing civil rights statutes that prohibit state and local law enforcement agencies from engaging in unconstitutional conduct.

county include false arrest and imprisonment and malicious prosecution. As in *Sharp*, DOJ filed a Statement of Interest supporting Garcia's claims and opposing the County's motion to dismiss. DOJ Statement of Interest (available at http://www.justice.gov/crt/about/spl/documents/garcia_SOI_3-14-13.pdf) ("U.S. Garcia SOI"). Among other things, DOJ explained that supporting precedent goes back over eighty years for the proposition that "government action intended to prevent the dissemination of information critical of government officials, including police officers, constitutes an invalid prior restraint on the exercise of First Amendment rights." *Id.* at 7 (citing *Near v. Minnesota*, 283 U.S. 697 (1931)). DOJ thus concluded "[i]t is now settled law that the First Amendment protects individuals who photograph or otherwise record officers engaging in police activity in a public place." *Id.* at 4.

The law is also clear that these constitutional protections apply equally to individuals as they do the institutional press. As *Glik* explained, "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." *Glik*, 655 F.3d at 84. For that reason, "the news-gathering protections of the First Amendment cannot turn on professional credentials or status." *Id.* Based on longstanding precedent, "the public's right of access to information is coextensive with that of the press." *Id.* at 83 (citing *Houchins*, 438 U.S. at 16).

Applying this prevailing body of law, the District Court in *Garcia* denied the county's motion to dismiss his First Amendment and Fourth Amendment claims, finding "a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment." *Garcia v. Montgomery County*, 2013 WL 4539394 at *3 (D. Md., Aug. 23, 2013),

(quoting *Glik*, 655 F.3d at 85). *See also id.* (finding Fourth Amendment principles to be well-established). It was able to do so without the need for a Fourth Circuit case that dealt specifically with photography, since the overarching First Amendment principles were obvious and beyond dispute.

For that reason, the Defendants' argument in this case that there is no cognizable First Amendment claim in the Fifth Circuit misses the point. *See* Def. Reply at 3. The case on which Defendants rely, *Morgan v. Swanson*, 748 F.3d 241 (5th Cir. 2014), has nothing whatever to do with the issues in this case. Its only common element is that it deals with qualified immunity in a First Amendment case, but one that involves religious expression in a public school setting. This is like comparing apples to aardvarks simply because they both begin with the letter "a." *Morgan* is utterly unlike this case, where the relevant First Amendment principles have been the law for decades, and their application to the facts at bar is "self-evident."⁹

CONCLUSION

This Court should find, as have many other circuit and district courts, that the right to photograph the police in public settings is well-established, and that Mr. Buehler has cognizable constitutional claims. Derogation of the rights that Mr. Buehler seeks to protect "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." U.S. Garcia SOI at 2.

⁹ *Glik*, 655 F.3d at 85; *Gericke*, 2014 WL 2142519 at *7 n.11. In any event, Defendants in this case cannot claim to lack knowledge of this well-established right. The Defendant Austin Police Department's own Policy 302: Public Recording of Official Acts "recognizes that members of the general public have a First Amendment right to video record, photograph, and/or audio record APD officers while they are conducting official business or while acting in an official capacity in any public space unless such recordings interfere with police activity." *See* http://austintexas.gov/sites/default/files/files/Police/APD_Policy_2013-2_Effective_6-1-2013.pdf at 105.

Dated: June 2, 2014

Respectfully submitted,

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