

PROTESTS, THE PRESS, AND FIRST AMENDMENT RIGHTS BEFORE AND AFTER THE “FLOYD CASELAW”

*Peter Jacobs**

INTRODUCTION

CNN reporter Omar Jimenez was standing in the middle of an empty street, holding a microphone, wearing a press pass, and speaking directly into a professional-grade video camera when he was arrested by Minneapolis police officers. In footage of his arrest, presumably seen live by millions of households tuned in to CNN to watch coverage of the unfolding protests following George Floyd’s death, Jimenez clearly identifies himself and his camera crew to police officers. Nevertheless, he is led away in handcuffs.¹

Two days later, Andrea Sahouri was pepper sprayed by police and arrested while covering a Black Lives Matter protest in Des Moines, Iowa. Sahouri, a reporter for the Des Moines Register, wasn’t wearing a press badge but announced herself to police at the scene—“I’m press, I’m press,” she said, right before she was pepper sprayed. While recovering, she told the officer “I’m just doing my job. I’m a journalist,” which was confirmed by her boyfriend at the time and a colleague, who displayed her own press badge.² Despite her identification, Sahouri was arrested and charged with failing to disperse and interfering with official acts. This was the rare press case where the charges actually stuck, despite wide-spread condemnation of

* Peter Jacobs is a 2022 graduate of the University of Pennsylvania Law School, J.D., and served as Comments Editor for Volume 24 of the *University of Pennsylvania Journal of Constitutional Law*. Previously, he received his B.A. in 2013 from Cornell University. He would like to extend enormous thanks to Professor Seth Kreimer for his guidance on the scope and content of the work that became this Comment. He also offers thanks to JCL’s stellar editors, including Jessica Rizzo, Katie McKeen, and Dana Dyer; and, as always, to Rebecca, and his family.

¹ CNN, *Police Arrest CNN Correspondent Omar Jimenez and Crew on Live Television*, YOUTUBE (May 29, 2020), <https://www.youtube.com/watch?v=fiLzQefpBvM> [<https://perma.cc/W5FP-EY89>].

² William Morris, *‘This Is My Job!’: Register Reporter Andrea Sahouri Testifies in Her Own Defense in Her Second Day on Trial*, DES MOINES REGISTER (Mar. 9, 2021, 6:43 AM), <https://www.desmoinesregister.com/story/news/crime-and-courts/2021/03/09/this-my-job-iowa-reporter-said-she-arrested-while-covering-floyd-protest/4638859001/> [<https://perma.cc/T3J-TEMJ>].

the First Amendment implications of putting a journalist on trial for their coverage of a protest.³

“I’m a reporter, bro,” Gustavo Martínez Contreras told police officers as he was arrested while covering a protest in Asbury Park, New Jersey, the following night.⁴ Martínez Contreras, a reporter for the Asbury Park Press, had every reason to expect to not be a police target. Although the town had put a curfew in place, journalists were expressly exempted from the order—which is why Martínez Contreras “wore his brightly colored press badges on a lanyard around his neck all night, so there would be no question that he was one such reporter,” according to a lawsuit filed after the charges against him for failure to disperse were dropped.⁵

These are just a few of the more than 100 journalists around the country who were arrested while on the job in 2020.⁶ As protests following the murder of George Floyd engulfed the country, Americans watched in shock as members of the press were beaten, fired upon, and arrested while covering mass demonstrations.⁷ These arrests, in particular, stood out as “a blatant violation of constitutional protections and long-standing ground rules that guide interactions between media and law enforcement officials.”⁸ Even as charges against these reporters have largely been dropped, several members of the media have fired back, filing lawsuits asserting the constitutional rights guaranteed by federal civil rights statutes.⁹ The cases that emerged from these protests—what one federal judge termed the “Floyd Caselaw”¹⁰—all

³ In March 2021, an Iowa jury acquitted Sahouri in under two hours.

⁴ Complaint at 3, *Martínez v. City of Asbury Park*, No. 3:20-CV-08710-AET-DEA, 2021 U.S. Dist. LEXIS 43944 (D.N.J. July 13, 2020).

⁵ *Id.* at 2.

⁶ Jessica Jerreat, *At Least 117 Journalists Detained, Arrested Covering US Protests This Year*, VOICE OF AM. (Dec. 14, 2020, 8:08 PM), <https://www.voanews.com/press-freedom/least-117-journalists-detained-arrested-covering-us-protests-year> [<https://perma.cc/FJL3-FETM>].

⁷ See, e.g., Paul Farhi & Elahe Izadi, *‘The Norms Have Broken Down’: Shock as Journalists Are Arrested, Injured by Police While Trying to Cover the Story*, WASH. POST (May 31, 2020), https://www.washingtonpost.com/lifestyle/media/journalists-at-several-protests-were-injured-arrested-by-police-while-trying-to-cover-the-story/2020/05/31/bfbc322a-a342-11ea-b619-3f9133bbb482_story.html [<https://perma.cc/6MEL-FNHR>] (noting that an MSNBC anchor reporting in Minneapolis was hit by rubber bullets fired by police).

⁸ *Id.*

⁹ E.g., *Woodstock v. City of Portland*, No. 3:20-CV-01035-BR., 2020 WL 3524230 (D. Or. June 8, 2020) (bringing § 1983 actions against Portland Police Department for disturbing and assaulting media members while reporting).

¹⁰ *Alsaada v. City of Columbus*, No. 2:20-CV-3431, 2021 WL 1725554, at *26 (S.D. Ohio Apr. 30, 2021) (“Since the last year’s protests in the wake of George Floyd’s killing, there have been no fewer than seventy-three cases exploring how these protests shine a light on existing First Amendment or Fourth Amendment principles. (‘Floyd Caselaw’).”).

present “a similar tale” about the state of First Amendment rights in America.¹¹ Taken as a whole, these decisions may signal a broader acceptance of judicially-recognized press rights.

The professional press were not the only groups potentially targeted by police while attending protests, however. Legal observers,¹² citizen journalists,¹³ and protest medics¹⁴ have all asserted that law enforcement retaliated against them for First Amendment protected conduct. Individuals deprived of their constitutional rights can bring a claim against state agents under 42 U.S.C. §1983, including an allegation that an official arrested them in retaliation for First Amendment protected conduct.¹⁵

Generally, plaintiffs seeking to bring a § 1983 First Amendment retaliatory arrest lawsuit need to prove three elements—1) that the plaintiff was actually engaged in constitutionally protected conduct, 2) the plaintiff suffered some sort of injury connected to this conduct, and 3) a state actor caused this injury because of a retaliatory motive.¹⁶ As detailed below, the Supreme Court’s holding in *Nieves v. Bartlett* established a fairly high bar for plaintiffs bringing these lawsuits, as they now need to prove there was no probable cause for their arrest.¹⁷

¹¹ *Id.*

¹² Jake Offenhartz, “Round Up The Green Hats”: NYPD Accused Of Deliberately Targeting Legal Observers in Brutal Bronx Mass Arrest, GOTHAMIST (June 8, 2020, 9:13 PM), <https://gothamist.com/news/round-green-hats-nypd-accused-deliberately-targeting-legal-observers-brutal-bronx-mass-arrest> [<https://perma.cc/RZV9-2S2K>].

¹³ Complaint at 26, *Hall v. Warren*, No. 6:21 Civ. 06296 (W.D.N.Y. Apr. 05, 2021) (alleging that police “targeted and shot at . . . people who were recording officers,” such as the plaintiff).

¹⁴ Melissa Gira Grant & Katie McDonough, *Protest Medics on Being Targeted by the Police, in Their Own Words*, NEW REPUBLIC (June 3, 2020), <https://newrepublic.com/article/157985/protest-medics-targeted-police-words> [<https://perma.cc/FL5W-NX36>].

¹⁵ *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (“[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions’ for engaging in protected speech. . . . [T]he injured person may generally seek relief by bringing a First Amendment claim.”).

¹⁶ *See, e.g., Hartman v. Thompson*, 931 F.3d 471, 484 (6th Cir. 2019) (“A claim of First Amendment retaliation requires proof that: ‘(1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between’ the first two elements, i.e. ‘the adverse action was motivated at least in part by the plaintiff’s protected conduct.’”) (quoting *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999); *DeMartini v. Town of Gulf Stream*, 942 F.3d 1277, 1289 (11th Cir. 2019) (“To state a § 1983 First Amendment retaliation claim, a plaintiff generally must show: (1) she engaged in constitutionally protected speech, such as her right to petition the government for redress; (2) the defendant’s retaliatory conduct adversely affected that protected speech and right to petition; and (3) a causal connection exists between the defendant’s retaliatory conduct and the adverse effect on the plaintiff’s speech and right to petition.”).

¹⁷ *See Nieves*, 139 S. Ct. at 1723 (establishing that plaintiffs bringing First Amendment retaliatory arrest claims must prove that there was no probable cause for their arrest).

These groups face two major impediments to vindicating these attacks on their constitutional rights. For one, they have to navigate an uncertain legal landscape surrounding the right to report on and observe police activity under the First Amendment. The Supreme Court—as well as several circuit courts—has not acknowledged this right.¹⁸ While it seems that every circuit court that has encountered the question has determined the right exists, the contours and scope of it are still to be widely accepted.¹⁹ Is this right based on speech and expressive conduct, or does it derive from the right to access information? How it is defined will have implications for who can successfully state a claim for First Amendment retaliation.

Second, these plaintiffs must overcome a Supreme Court-mandated barrier to First Amendment retaliatory arrest claims. In *Nieves v. Bartlett*, the Court established that, as a general rule, plaintiffs seeking to bring a First Amendment retaliatory arrest claim need to prove that there was no probable cause for the officer's action.²⁰ This, as will be explained below, is a hard bar to reach.

The good news for these plaintiffs is the second prong—concerning injury to the individual engaged in protected conduct—is comparatively straightforward. Plaintiffs typically either need to show they suffered a direct harm or that their protected speech was chilled. In First Amendment retaliation cases, the arrest itself is typically considered evidence that a plaintiff's speech was chilled.²¹ “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,”

18 Christina Murray, *Cameras Down, Hands Up: How the Supreme Court Chilled the Development of the First Amendment Right to Record the Police*, 71 MERCER L. REV. 1125, 1126 (2020) (“Of the nation’s thirteen federal circuit appellate courts, only six have unequivocally recognized a citizen’s First Amendment right to record the police as they conduct their public duties.”).

19 See, e.g., *Crocker v. Beatty*, 995 F.3d 1232, 1241 (11th Cir. 2021) (“The dearth of detail about the contours of the right announced in *Smith* undermines any claim that it provides officers ‘fair warning’ under other circumstances.”) (citing *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000)).

20 *Nieves*, 139 S. Ct. at 1723 (agreeing with defendants’ argument that the “no-probable-cause requirement should apply to First Amendment retaliatory arrest claims.”).

21 See, e.g., *Hoyland v. McMenemy*, 869 F.3d 644, 657 (8th Cir. 2017) (“[T]here can be little doubt that ‘being arrested for exercising the right to free speech would chill a person of ordinary firmness from exercising that right in the future.’”); *Sexton v. City of Colorado Springs*, No. 20-CV-00108-PAB-KMT, 2021 WL 1210375, at *12 (D. Colo. Mar. 31, 2021) (“[A] retaliatory arrest unsupported by probable cause is an injury that would chill a person of ordinary firmness.”); *Hartley v. Wilfert*, 918 F. Supp. 2d 45, 52 (D.D.C. 2013) (compiling “substantial caselaw in which the threat of an arrest—even in the absence of an actual arrest—is sufficient to chill speech, in violation of the First Amendment.”) (emphasis in original).

according to the Supreme Court.²² As long as the plaintiff will be able to show that their conduct was protected by the First Amendment, a retaliatory arrest claim should qualify as harm.

Even before the emergence of the “Floyd Caselaw,” professional journalists could assert a strong case against these arrests—finding that their First Amendment rights are protected and there may not be probable cause to arrest members of the press at protests. Other groups, however, including legal observers, citizen journalists, and protest medics, faced hurdles that could halt their claims. Part I of this paper examines *Nieves v. Bartlett* and explains why this paper focuses on the professional press. Part II outlines the constitutional right at issue for non-participants at a protest, using recent “right to record” cases as a stand-in for a general right to engage with matters of public importance. Part III charts two paths for individuals to push back on the *Nieves* “no probable cause” requirement. Part IV evaluates the strengths and weaknesses of several non-participant groups’ First Amendment retaliation claims following the framework established for professional journalists. Part V unpacks new First Amendment developments arising from the “Floyd Caselaw,” including trends in municipal *Monell* claims and injunctive relief.

I. *NIEVES V. BARTLETT* AND PROTECTING THE PRESS

In 2019, the Supreme Court released their decision in a landmark § 1983 retaliatory arrest case, *Nieves v. Bartlett*. The case centered around a man, Russell Bartlett, who was charged with disorderly conduct and resisting arrest while attending a “raucous” weeklong festival in Alaska.²³ He subsequently alleged his arrest was in retaliation for exercising his First Amendment right to free speech, based on a confrontation with the arresting officers.²⁴ In the Court’s opinion, Chief Justice John Roberts established a general rule that probable cause should defeat a First Amendment retaliatory arrest claim.²⁵ As Roberts writes, “[b]ecause there was probable cause to arrest Bartlett, his retaliatory arrest claim fails as a matter of law.”²⁶

Succinctly summing up the impact of the ruling, one lower court notes, “*Nieves* makes clear that a First Amendment retaliatory arrest claim fails

²² Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

²³ *Nieves*, 139 S. Ct. at 1717.

²⁴ *Id.* at 1721.

²⁵ *Id.* at 1723.

²⁶ *Id.* at 1728.

when probable cause—an objectively reasonable legal justification for the arrest—is evident.”²⁷ Framed another way, plaintiffs seeking a § 1983 retaliatory arrest claim must now prove that the defendant officer did not have probable cause to pursue an arrest for any crime.²⁸

The case has special resonance for the press.²⁹ The late Justice Ruth Bader Ginsburg, in her partial concurrence to the Court’s ruling, issued a warning that *Nieves* will leave members of the press “with little protection against police suppression of their speech.”³⁰ The case’s sole dissenter, Justice Sonia Sotomayor, was more explicit about the decision’s impact on First Amendment rights, using the case of a hypothetical citizen journalist arrested for trespassing for stepping onto someone’s front yard while filming a homeowner’s fiery confrontation with the police.³¹ Under the *Nieves* rule, Sotomayor asks, “Will this citizen journalist have an opportunity to prove that the arrest violated her First Amendment rights?”³²

Nieves already has new relevance as journalists across the country push back against seemingly retaliatory arrests they suffered during the summer of 2020. Specific, credible allegations and evidence entered into courtrooms around the country make it clear that journalists were targeted—both with force and with arrest—during protests that year.

Following George Floyd’s death while in the custody of the Minneapolis Police Department, numerous journalists traveled to report on the protests in the city. One of these journalists was Linda Tirado, who—while reporting on the protests—was left permanently blind in one eye after she was shot with a foam bullet by a police officer. She subsequently brought a claim against the city and certain police officers under § 1983. The details of Tirado’s experiences reporting on the protests in Minneapolis, as well as those of other journalists, were “serious and troubling,” according to the

²⁷ *Bello Reyes v. McAleenan*, No. 19-CV-03630-SK, 2019 WL 5214051, at *5 (N.D. Cal. July 16, 2019).

²⁸ *First Amendment—Nieves v. Bartlett*, 133 HARV. L. REV. 272 (2019).

²⁹ See Clay Calvert, *Dissent, Disagreement and Doctrinal Disarray: Free Expression and the Roberts Court in 2020*, 28 WM. & MARY BILL RTS. J. 865, 892 (2020) (“[T]he *Nieves* rule is both journalistically and constitutionally important.”); John S. Clayton, *Policing the Press: Retaliatory Arrests of Newsgatherers After Nieves v. Bartlett*, 120 COLUM. L. REV. 2275, 2275 (2020) (“The ruling threatens the ability of journalists to bring viable civil claims to help deter pretextual arrests, since probable cause for some minor offense will often be easy to articulate.”).

³⁰ *Nieves*, 139 S. Ct. at 1735 (Ginsburg, J., concurring).

³¹ *Id.* at 1740 (Sotomayor, J., dissenting).

³² *Id.*

court.³³ Though the incidents were not identical, the court acknowledged a series of similar experiences where journalists faced police misconduct—“journalists were identifiable as press, separated from protestors and at a distance from police, and were not engaging in any threatening or unlawful conduct.”³⁴ Taken as a whole, these police encounters may establish an unconstitutional custom in Minneapolis of “targeting journalists for unlawful reprisals” during the George Floyd protests.³⁵

The Black Lives Matter protests spurred by George Floyd’s death were not limited to Minneapolis, however. A line of cases from Portland, Oregon brought by publisher Index Newspapers demonstrates the animus that journalists faced while covering protests in that city. The court found a pattern of journalists being singled out for doing their jobs. Even during peaceful demonstrations, the court wrote, “the record is replete with instances in which members of the press were targeted.”³⁶ The court highlighted at least forty-five examples of law enforcement using unlawful force against clearly-identified members of the press—these instances “provide exceptionally strong evidentiary support” for the finding that law enforcement members “were motivated to target journalists in retaliation for plaintiffs’ exercise of their First Amendment rights.”³⁷

Just from the cases that are currently moving forward in the federal courts, it’s clear that journalists across the country have valid reasons to bring First Amendment retaliation claims for the harm and arrests they suffered covering protests in 2020. Because of their clearly defined role, cases involving arrests of journalists typically feature particularly “compelling” facts for finding a constitutional violation and a lack of probable cause.³⁸ These press cases are often used to model a particular right available to the

³³ *Tirado v. City of Minneapolis*, 521 F. Supp. 3d 833, 846 (D. Minn. 2021). While *Tirado*’s lawsuit only alleges incidents of unlawful showings of force against journalists, rather than arrests, the substance of the claims could easily apply to journalists who faced unlawful arrests. *Tirado* even alleges that her backpack was “hit with a bright green ballistic tracking round”—“used to designate individuals for arrest”—during the protests. *Id.* at 837.

³⁴ *Id.* at 841.

³⁵ *Id.* at 846.

³⁶ *Index Newspapers v. U.S. Marshals Serv.*, 977 F.3d 817, 834 (9th Cir. 2020).

³⁷ *Id.* at 829.

³⁸ *See, e.g., Molina v. City of St. Louis*, No. 4:17-CV-2498, 2021 WL 1222432, at *7 (E.D. Mo. Mar. 31, 2021) (finding that the facts in a previous First Amendment retaliation case were especially “compelling” in establishing a right without clear precedent in the circuit because the plaintiffs were journalists, but confirming that the First Amendment “applies with equal force to citizens.”); *Stolarik v. City of New York*, No. 15-CV-5858, 2017 WL 4712423, at *3 (S.D.N.Y. Sept. 7, 2017) (finding that a group of cases “‘clearly foreshadowed’ the right of journalists—if not all citizens—to record (photograph) police activity in public.”).

public or create a framework to articulate a constitutional claim. For example, in evaluating a First Amendment right to film police activity, one circuit court noted, “[a]s no doubt the press has this right, so does the public.”³⁹

The Supreme Court has been clear, however, “that the organized press has a monopoly neither on the First Amendment nor on the ability to enlighten”⁴⁰—“As indispensable as is the role of the press in a free society, journalists and the media have ‘no special immunity from the application of general laws.’”⁴¹ Put another way, a journalist does not possess any “special privilege” just for doing their job.⁴² To be sure, there are many situations where a reporter’s status as a member of the press is not a defense of any sort to an arrest or legal justification for their actions.⁴³ Journalists have no right to trespass on private property.⁴⁴ Journalists also have no right to enter an area—however newsworthy it may be—where the general public is barred.⁴⁵ And, journalists certainly have no right to interfere with or impede ongoing police activity.⁴⁶

Although not cloaked with any unique constitutional protections, journalists have an acknowledged role to play in a “free society”—“to provide an independent source of information so that a citizen can make informed decisions.”⁴⁷ In this role, the professional press are generally “surrogates for the public.”⁴⁸ The Supreme Court has noted that journalists

³⁹ *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017).

⁴⁰ *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 773 (1985).

⁴¹ *Mosely v. City of Chicago*, 252 F.R.D. 421, 426 (N.D. Ill. 2008), *order vacated in part on reconsideration sub nom. Mosley v. City of Chicago*, 252 F.R.D. 445 (N.D. Ill. 2008) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 683 (1972)).

⁴² *United States v. Carpenter*, 791 F.2d 1024, 1034 (2d Cir. 1986), *aff'd*, 484 U.S. 19 (1987).

⁴³ *E.g.*, *Hendricks v. Pierce County*, No. C13-5690, 2014 WL 1053318, at *4 (W.D. Wash. Mar. 19, 2014) (“[Plaintiff’s] claimed status as a journalist does not give her the unfettered right to document, or even watch, any interaction she desires, and she has not plausibly plead that it does.”).

⁴⁴ *E.g.*, *Skvorak v. Thurston County*, No. C05-5100, 2006 WL 8455147, at *3–4 (W.D. Wash. Sept. 15, 2006) (rejecting an argument that plaintiffs, as reporters covering a protest, were “entitled to special consideration” and instead finding that there was probable cause for the arrests because the journalists “remained unlawfully on private property”—“The owner of the property had not given plaintiffs permission to be on the property, whether they were members of the press or not.”).

⁴⁵ *See Branzburg*, 408 U.S. at 684–85 (“Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded.”).

⁴⁶ *E.g.*, *Cobarobio v. Midland County*, No. MO:13-CV-00111, 2015 WL 13608102, at *27 (W.D. Tex. Jan. 7, 2015), *aff'd*, 695 F. App’x 88 (5th Cir. 2017) (“This Court finds, while there may indeed be a First Amendment right to photograph an active crime scene, it does not include intruding onto that crime scene or interfering with police and first responders in the performance of their duties during an emergency.”).

⁴⁷ *Dean v. Utica Cmty. Schs.*, 345 F. Supp. 2d 799, 804 (E.D. Mich. 2004).

⁴⁸ *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012).

are “a mighty catalyst in awakening public interest in governmental affairs” and “informing the citizenry of public events and occurrences.”⁴⁹ Indeed, the press’ right of access is particularly “important”—“In a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press.”⁵⁰ Therefore, the press must be allowed “maximum freedom.”⁵¹

Courts have also acknowledged that government officials may be motivated to go after the press because of their reporting.⁵² Just as with any individual or group, “journalists should not be targeted and penalized on the basis of their associations or content of their expression.”⁵³ As one circuit court notes, “[w]hen wrongdoing is underway, officials have great incentive to blindfold the watchful eyes of the Fourth Estate.”⁵⁴

This judicially recognized and defined role is distinct from other groups who may seek to bring First Amendment retaliation claims, such as legal observers. As one circuit court notes, while “case law has frequently observed the importance of the press as surrogates for the public,” the court had “not considered whether legal observers serve the same function.”⁵⁵ The judges left the question open.⁵⁶

Similarly, although the Supreme Court has remarked that in the modern world “the line between the media and others who wish to comment on political and social issues becomes far more blurred”⁵⁷—due to the rise of the Internet and the decline of traditional print and broadcast media—citizen journalists and bystanders may not share the same presumptions about dissemination of information that protect some journalistic conduct as

⁴⁹ *Estes v. Texas*, 381 U.S. 532, 539 (1965).

⁵⁰ *Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1069 (7th Cir. 2018) (quoting *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975)).

⁵¹ *Estes*, 381 U.S. at 539.

⁵² *See Koala v. Khosla*, 931 F.3d 887, 907 n.3 (9th Cir. 2019) (“Although the [Supreme] Court has said that ‘the institutional press’ enjoys no ‘constitutional privilege beyond that of other speakers,’ . . . it has long treated discrimination against the press as constitutionally suspect.”) (quoting *Citizens United v. FEC*, 558 U.S. 310, 352 (2010)); *Villarreal v. City of Laredo, Texas*, No. 20-CV-40359, 2021 WL 5049281, at *5 (5th Cir. Nov. 1, 2021) (“It should be obvious to any reasonable police officer that locking up a journalist for asking a question violates the First Amendment.”).

⁵³ *Guan v. Mayorkas*, No. 19-CV-6570, 2021 WL 1210295, at *20 (E.D.N.Y. Mar. 30, 2021).

⁵⁴ *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012).

⁵⁵ *Index Newspapers v. U.S. Marshals Serv.*, 977 F.3d 817, 825 n.2 (9th Cir. 2020).

⁵⁶ *Id.*

⁵⁷ *Citizens United*, 558 U.S. at 352; *see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 782 n.7 (Brennan, J., dissenting) (“Owing to transformations in the technological and economic structure of the communications industry, there has been an increasing convergence of what might be labeled ‘media’ and ‘nonmedia.’”).

expressive speech.⁵⁸ Protest medics—who almost universally do not benefit from a judicially-recognized distinct role—face similar issues.⁵⁹

Looking outside of case law, established norms and customs across the country make it clear that journalists carry certain presumptions about their behavior and role when reporting on a protest. “Reporters have a fundamental right to cover the demonstrations we’re seeing in Delaware and across our country,” Delaware governor John Carney said in a statement following the arrest of a reporter covering a protest in his state in 2020.⁶⁰ “They should not be arrested for doing their jobs,” Carney said. “That’s not acceptable.”⁶¹

Arkansas governor Asa Hutchinson echoed this sentiment, stating during a news conference that journalists “should not be arrested.”⁶² “When they’re identified as a journalist, obviously, they should go about their business,” Hutchinson said, following the detention of several journalists at protests in Arkansas the same year.⁶³ Notably, Carney is a Democrat from a solidly blue state and Hutchinson is a Republican from a solidly red state.

In practice, this sentiment has manifested in various governmental systems that create special exemptions and advantages for the press. Legislators and regulations recognize “that effective newsgathering requires greater levels of access than what the First Amendment provides,” according to a Harvard University report on media credentials.⁶⁴ It is normal for government policies, therefore, to grant the press “certain privileges to do things that ordinary citizens may not.”⁶⁵ General curfew orders exempting

⁵⁸ See *Cummins v. Bat World Sanctuary*, No. 02-12-00285-CV, 2015 WL 1641144, at *8 (Tex. App. Apr. 9, 2015) (noting that while the press serves an “important purpose” “entitling it to special protections under the First Amendment,” “private citizens now have a greater ability to also serve that role, though usually to a lesser degree”).

⁵⁹ See, e.g., *Wise v. City of Portland*, 483 F. Supp. 3d 956, 967 (D. Or. 2020) (“Nowhere did the court recognize that participating in a protest as a medic is a distinct type of expressive conduct.”) (citing *Abay v. City of Denver*, 445 F. Supp. 3d 1286 (D. Colo. 2020)).

⁶⁰ Governor John Carney (@JohnCarneyDE), TWITTER (June 9, 2020, 9:35 PM), <https://twitter.com/JohnCarneyDE/status/1270529883299631104> [<https://perma.cc/K46D-GBXZ>].

⁶¹ *Id.*

⁶² Brent Renaud, *KATV Journalist Detained While Livestreaming Little Rock Protests*, U.S. PRESS FREEDOM TRACKER (June 2, 2020), <https://pressfreedomtracker.us/all-incidents/katv-journalist-detained-while-livestreaming-little-rock-protests/> [<https://perma.cc/J3AD-YR4G>].

⁶³ *Id.*

⁶⁴ Jeffrey Hermes, John Wihbey, Reynol Junco & Osman Tolga Aricak, *Who Gets a Press Pass? Media Credentialing Practices in the United States*, SHORENSTEIN CTR. ON MEDIA, POL. & PUB. POL’Y (June 2014), <https://shorensteincenter.org/wp-content/uploads/2014/06/Press-Pass-Report.pdf> [<https://perma.cc/E59P-MXSB>].

⁶⁵ *Id.*

journalists, for example, demonstrate that “state and local governments have concluded that press access . . . is both important and workable.”⁶⁶

Another such privilege is the issuance of press passes or other credentials, which may allow reporters access to certain areas or conjure up presumptions of journalistic independence when reporting in the field.⁶⁷ Federal, state, and local government officials “routinely provide the press with special rights of access to government-controlled information and places,” notes the University of Georgia School of Law’s Sonja R. West.⁶⁸ These credentials offer the press unique access to everything from government buildings, press conferences, and other non-public spaces to executions, military operations, and crime and disaster scenes.⁶⁹ When reporting from a protest, press passes were traditionally viewed as “powerful symbols of neutrality that helped protect journalists.”⁷⁰

Importantly for this paper, the dispersal orders and other ordinances typically at issue in cases involving protests tend to exempt the press.⁷¹ As noted above, many of the recent journalist arrests that led to § 1983 lawsuits occurred in jurisdictions where press had been exempted from generally applicable curfews.⁷² This was typical of the protests that spread across the country in 2020.⁷³ As the *New York Times* reported in June of that year, cities across the country “recognized the special status of journalists by exempting them from the curfews that have gone into effect in recent days.”⁷⁴

⁶⁶ *Goyette v. City of Minneapolis*, 338 F.R.D. 109, 117 (D. Minn. 2021).

⁶⁷ Geneva Kay Loveland, Comment, *News Gathering: Second-Class Right Among First Amendment Freedoms*, 53 TEX. L. REV. 1440, 1460 (1975) (“The press has the same right of access [as the public], similarly subject to police power restrictions; however police often allow reporters preferential access through the issuance of press passes.”).

⁶⁸ Sonja R. West, *Favoring the Press*, 106 CALIF. L. REV. 91, 119 (2018).

⁶⁹ *Id.*

⁷⁰ *Press Pass Offering Little Defense for Journalists Caught in the U.S. Fray*, TAMPA BAY TIMES (June 3, 2020), <https://www.tampabay.com/news/nation-world/2020/06/03/press-pass-offering-little-defense-for-journalists-caught-in-the-us-fray/> [<https://perma.cc/L9S7-VLMD>].

⁷¹ *E.g.*, *Menotti v. City of Seattle*, 409 F.3d 1113, 1125 (9th Cir. 2005) (noting an exemption for credentialed press members from a government order prohibiting access to certain municipal areas in the face of protests).

⁷² *E.g.*, *Sasso v. City of Dall.*, No. 3:20-CV-1398-S, 2020 WL 2839217, at *2 (N.D. Tex. June 1, 2020) (exempting “members of the news media” from a curfew).

⁷³ See Jennifer M. Kinsley, *Black Speech Matters*, 59 U. LOUISVILLE L. REV. 1, 9–10 (2020) (noting that although “[m]any cities responded to the protests by enacting and enforcing overnight curfews” orders such as the one in Cincinnati exempted members of the press as “essential workers.”).

⁷⁴ Marc Tracy, *A.C.L.U. Sues Minneapolis, Claiming Police Tactics Violated Freedom of Press*, N.Y. TIMES (June 3, 2020), <https://www.nytimes.com/2020/06/03/business/aclu-sues-police-minneapolis.html> [<https://perma.cc/6TYS-DTGH>].

Similar considerations have been enshrined in statute, as well as government orders.⁷⁵ California’s penal code, for example, allows “a duly authorized representative of any news service, newspaper, or radio or television station or network” to enter areas otherwise closed due to a riot or other civil disobedience.⁷⁶ Similarly, Seattle’s municipal code creates a press exemption for failure to disperse orders, stating that these orders do not apply “to a news reporter or other person observing or recording the events on behalf of the public press or other news media.”⁷⁷

Although the below analysis will focus on the professional press, this paper will later address whether other groups—such as legal observers, citizen journalists, and protest medics—can effectively utilize a similar framework.⁷⁸

II. WHAT IS PROTECTED WHEN REPORTING ON, RECORDING, OR OBSERVING POLICE ACTION?

What is the reporter doing when they anchor a broadcast from the middle of a protest, or focus their camera on a police officer, or just jot down notes to potentially use in a future story? Is this different than the legal observer who monitors how police interact with the public, or the citizen journalist who walks by and whips out their phone to record something that catches their eye?

Courts inevitably face these questions when defining the precise First Amendment right raised by a retaliatory arrest claim. Broadly, these plaintiffs posit that they’re engaging with police activity—a matter of public interest—either by reporting, recording, or just watching. Although the specific rights at play may not be found in the text of the constitution itself, the Supreme Court has noted that the First Amendment is “broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights.”⁷⁹

⁷⁵ *E.g.*, ARK. CODE ANN. § 5–71–206 (B) (1975) (establishing a defense to prosecution for “the offense of failure to disperse” if the arrested individual is “a news reporter or other person observing or recording the events on behalf of the news media”).

⁷⁶ CAL. PENAL CODE § 409.5 (d) (West 1997).

⁷⁷ SEATTLE MUN. CODE 12A.12.020 (A) (1973).

⁷⁸ For an argument that “courts should create a legal observer exemption from police dispersal orders,” see Erica D. Lunderman, *Protecting the Protectors: Preserving and Enhancing the Rights of Legal Observers*, 21 MARQ. BENEFITS & SOC. WELFARE L. REV. *29 (2020).

⁷⁹ *Globe Newspaper v. Sup. Ct. Norfolk Cnty.*, 457 U.S. 596, 604 (1982) (discussing a constitutional “right of access to criminal trials”).

Courts typically classify this protected First Amendment right in one of two distinct ways.⁸⁰ In one line of cases, courts have found that the plaintiff is engaging in “expressive conduct,” akin to some form of speech. This conduct is protected, according to these cases, because as speech it is concerned with the communication of ideas and dissemination of information. Other courts, however, have found that the plaintiffs are invoking their right to acquire information. The protected conduct that falls under this banner seems to be broader than just speech and other expressive conduct.

Although the rights at issue in discussions of “freedom of expression” and “access to information” are both “rooted in First Amendment principles,” the cases have “developed along distinctly different lines.”⁸¹ While most decisions seem to draw from both lines of cases,⁸² some have declared that the right fits solely within one camp. This not only has implications for the scope and definition of the right,⁸³ but also may impact whose conduct is actually protected.

For example, a case arising from the Occupy Wall Street protests, *Higginbotham v. City of New York*, found that recording a protest is protected under the First Amendment as “an essential step towards an expressive activity.”⁸⁴ The court, however, attributed the right to conduct “performed by a professional journalist who intends, at the time of recording, to disseminate the product of his work”—implying that this protection might not exist for parties who are not planning to disseminate the information.⁸⁵

By contrast, when courts have framed the right as concerning access to information, as in *Glik v. Cunniffe*, it made no difference that the plaintiff was “a private individual, and not a reporter, gathering information about public officials.”⁸⁶ Rather, the court established, the “First Amendment right to gather news”—derived from the public’s right of access to information—is “not one that inures solely to the benefit of the news media.”⁸⁷

⁸⁰ See, e.g., *Knight v. Montgomery Cnty.*, 470 F. Supp. 3d 760, 765 (M.D. Tenn. 2020).

⁸¹ *S.H.A.R.K. v. Metro Parks Serving Summit Cnty.*, 499 F.3d 553, 559 (6th Cir. 2007).

⁸² See, e.g., *Turner v. Lieutenant Driver*, 848 F.3d 678, 688–89 (5th Cir. 2017).

⁸³ Stephanie Johnson, Comment, *Legal Limbo: The Fifth Circuit’s Decision in Turner v. Driver Fails to Clarify the Contours of the Public’s First Amendment Right to Record the Police*, 59 B.C. L. REV. E. SUPP. 245, 261 (2018) (“The Fifth Circuit established that the public has a First Amendment right to video record the police without adding any context or support to that right, outside First Amendment principles.”).

⁸⁴ *Higginbotham v. City of N.Y.*, 105 F. Supp. 3d 369, 378 (S.D.N.Y. 2015).

⁸⁵ *Id.*

⁸⁶ *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011).

⁸⁷ *Id.*

A. *Protected expressive conduct*

The First Amendment “rests on the assumption that the widest possible dissemination of information . . . is essential to the welfare of the public.”⁸⁸ Generally, “the creation and dissemination of information are speech within the meaning of the First Amendment” and therefore subject to certain protections.⁸⁹ Where there is a “mutual desire to communicate” between the press and their source, “news gathering and news dissemination cannot be disassociated.”⁹⁰

Assuming that photographing and filming are expressive—and therefore are protected by the First Amendment⁹¹—“it is difficult to see why that protection should disappear simply because their subject is public police activity.”⁹² Under this line of cases, the First Amendment protects “the recording of matters of public interest” as the “creation of speech.”⁹³

One circuit court has emphasized the expressive qualities of the “First Amendment right to film matters of public interest”—“decisions about content, composition, lighting, volume, and angles, among others, are expressive in the same way as the written word or a musical score.”⁹⁴ Another circuit proposes a simple analogy to explain the protections on recording. The court notes that “banning photography or note-taking at a public event would raise serious First Amendment concerns” because of its impact on how that information may be distributed.⁹⁵ That law “would obviously affect the right to publish the resulting photograph or disseminate a report derived from the notes.”⁹⁶ For this same reason, recording matters of public interest must be protected.

Certain circuits seem to place this right primarily, if not solely, within the expressive conduct framework. When the Seventh Circuit acknowledged the right in a 2012 case, *American Civil Liberties Union of Illinois v. Alvarez*, the court

⁸⁸ *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

⁸⁹ *Sorrell v. IMS Health*, 564 U.S. 552, 570 (2011).

⁹⁰ *Washington Post v. Kleindienst*, 357 F. Supp. 770, 773–74 (D.D.C. 1972).

⁹¹ *See Ness v. City of Bloomington*, 11 F.4th 914, 923 (8th Cir. 2021) (“The acts of taking photographs and recording videos are entitled to First Amendment protection because they are an important stage of the speech process that ends with the dissemination of information about a public controversy.”)

⁹² *Higginbotham v. City of New York*, 105 F. Supp. 3d 369, 379 (S.D.N.Y. 2015).

⁹³ *M.C. Through Chudley v. Shawnee Mission Unified Sch. Dist.* No. 512, 363 F. Supp. 3d 1182, 1195, 2012 (D. Kan. 2019).

⁹⁴ *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018).

⁹⁵ *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 595–96 (7th Cir. 2012).

⁹⁶ *Id.* at 596.

wrote that, “the act of *making* [a] recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.”⁹⁷ In a more recent case, the circuit reaffirmed that “gathering information for news dissemination” is a First Amendment-protected form of expressive activity.⁹⁸ Framed differently, the Eighth Circuit found that photography or recording “unrelated to an expressive purpose . . . may not receive First Amendment protection.”⁹⁹

B. *The right to acquire information*

“Members of an organized society, united for their common good” have a “natural right” to “acquire information.”¹⁰⁰ The Supreme Court has consistently held that the Constitution protects the right to “receive information” as the First Amendment protects the right to “receive information and ideas.”¹⁰¹

This reading is by definition broader than the scope of expressive conduct—because the First Amendment “embraces the right to distribute literature,” it also “necessarily protects the right to receive it.”¹⁰² The “peripheral rights” that derive from the First Amendment—“the right to receive” and “freedom of inquiry”—make the specific constitutional rights from the freedom of speech and press more secure.¹⁰³

These cases describing the First Amendment’s “right of access to information” establish that the public has a right to record matters of public interest.¹⁰⁴ As one court notes—“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. Pretty simple rule.”¹⁰⁵

⁹⁷ *Id.* at 595 (emphasis in original).

⁹⁸ John K. MacIver Inst. for Pub. Pol’y v. Evers, No. 20-1814, 2021 WL 1324386, at *5 (7th Cir. 2021).

⁹⁹ Ness v. City of Bloomington, 11 F.4th 914, 923 (8th Cir. 2021); *but see* Chestnut v. Wallace, 947 F.3d 1085, 1090 (8th Cir. 2020) (finding a “clearly established” constitutional right “to watch police-citizen interactions at a distance” in the Eighth Circuit).

¹⁰⁰ Grosjean v. American Press Co., 297 U.S. 233, 243 (1936).

¹⁰¹ Richmond Newspapers v. Virginia, 448 U.S. 555, 576 (1980).

¹⁰² Martin v. City of Struthers, Ohio, 319 U.S. 141, 143 (1943).

¹⁰³ Griswold v. Connecticut, 381 U.S. 479, 482–83 (1965).

¹⁰⁴ Fields v. City of Philadelphia, 862 F.3d 353, 360 (3d Cir. 2017) (finding that “the First Amendment’s right of access to information” grants the public the “right to record—photograph, film, or audio record—police officers conducting official police activity in public areas”).

¹⁰⁵ Dunn v. City of Fort Valley, 464 F. Supp. 3d 1347, 1354 (M.D. Ga. 2020) (citing Smith, 212 F.3d at 1333).

Courts have engaged in a continuing set of steps to spin out this right from the text of the constitution. In the 1970s, the Supreme Court concluded that because the First Amendment protects freedom of the press there must be “some protection for seeking out the news.”¹⁰⁶ Over the first few decades of the 21st Century, circuit courts have extended this logic, finding that if there is a “right to gather news,” protections must also exist for recording matters of public interest—such as government officials on the job—to create the news itself.¹⁰⁷ To take this analysis one step further, “if the constitution protects one who records police activity, then surely it protects one who merely observes it—a necessary prerequisite to recording.”¹⁰⁸

Certain circuits have established that this right to engage with matters of public interest derives solely from citizen’s access to information. The Third Circuit, in *Fields v. City of Philadelphia*, found that this right “falls squarely within the First Amendment right of access to information” protected by the Constitution even “absent some sort of expressive intent.”¹⁰⁹ The First Amendment, the circuit found, “goes beyond protection of the press and the self-expression of individuals” to protect “the public’s right of access to information about their officials’ public activities.”¹¹⁰

C. *Journalists and protected conduct*

The First Amendment “protects the media’s right to gather news.”¹¹¹ It is “beyond dispute” that “journalists actively reporting a news event” are engaged in First Amendment protected conduct.¹¹² This conduct is protected regardless of whether it derives from protections on expressive activity, or the right to acquire information.

¹⁰⁶ *Branzburg v. Hayes et al.* 408 U.S. 665, 681 (1972).

¹⁰⁷ *Dyer v. Smith*, No. 3:19-CV-921, 2021 WL 694811, at *7 (E.D. Va. Feb. 23, 2021) (compiling circuit court decisions); *see also Fields*, 862 F.3d at 358 (“The First Amendment protects actual photos, videos, and recordings . . . and for this protection to have meaning the Amendment must also protect the act of creating that material.”).

¹⁰⁸ *Chestnut v. Wallace*, 947 F.3d 1085, 1090 (8th Cir. 2020).

¹⁰⁹ *Fields*, 862 F.3d at 362.

¹¹⁰ *Id.* at 359 (citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)).

¹¹¹ *Daily Herald Co. v. Munro*, 838 F.2d 380, 384 (9th Cir. 1988); *see also Bowens v. Superintendent of Miami South Beach Police Dep’t*, 557 F. App’x 857, 863 (11th Cir. 2014) (finding that “a member of the press plausibly states a First Amendment violation by alleging he was arrested for taking photographs of alleged police misconduct and police then deleted the photographs he took.”).

¹¹² *Quraishi v. St. Charles County, Missouri*, No. 4:16-CV-1320 NAB, 2019 WL 2423321, at *6 (E.D. Mo. June 10, 2019), *aff’d in part, rev’d in part and remanded*, No. 19-2462, 2021 WL 278347 (8th Cir. Jan. 28, 2021).

Under an expressive activity framing that draws on information dissemination, the “foundational principle” of the First Amendment’s press clause is that “the media serves the public” by offering information for citizens to consume.¹¹³ Courts have routinely found that journalists who clearly self-identified as a member of the press create a reasonable belief that they are inhabiting the unique role of the press and plan to disseminate the information they are gathering.¹¹⁴

This has often taken on particular importance in protest cases.¹¹⁵ In *Burdett v. Reynoso*, a reporter “wearing a press pass around his neck” and filming an arrest made it apparent “to even a casual observer” that he was engaging in specific protected First Amendment activities.¹¹⁶ Similarly, in *Benjamin v. Peterson*, the court found it would be reasonable to conclude that “officers should have been on notice” an individual was engaged in protected activity because he “was wearing press credentials, was carrying a video camera, and identified himself as ‘media.’”¹¹⁷

The press also engage in protected conduct when they merely collect and document information. In *Index Newspapers v. City of Portland*, the court found that members of the press engaged in constitutionally protected activity under the First Amendment by “newsgathering, documenting, and recording government conduct” during protests.¹¹⁸

Index Newspapers expanded on the media’s unique role in acquiring information during a protest, noting, “the point of a journalist observing and documenting government action is to record whether the ‘closing’ of public streets (*e.g.*, declaring a riot) is lawfully originated and lawfully carried out.”¹¹⁹ Without journalists on the scene, the court wrote, “there is only the government’s side of the story to explain why a ‘riot’ was declared and . . . whether law enforcement acted properly in effectuating that order.”¹²⁰

¹¹³ *Alaska Landmine v. Dunleavy*, No. 3:20-CV-00311-JMK, 2021 WL 686931, at *7 (D. Alaska Jan. 22, 2021).

¹¹⁴ *E.g.*, *Garcia v. Montgomery County, Maryland*, 145 F. Supp. 3d 492, 524 (D. Md. 2015) (finding that a videographer “audibly [identifying] himself as a member of the press . . . would support the reasonable belief that [he] intended to disseminate his recording to the public.”).

¹¹⁵ *E.g.*, *Tirado v. City of Minneapolis*, 521 F. Supp. 3d 833, 836 (D. Minn. 2021) (finding that a journalist “was identifiable as a member of the press because she wore a standard reflective press credential around her neck [and] carried a professional-grade camera and lens.”).

¹¹⁶ *Burdett v. Reynoso*, No. C-06-00720 JCS, 2007 WL 2429426, at *28 (N.D. Cal. Aug. 23, 2007), *aff’d* 399 F. App’x 276 (9th Cir. 2010).

¹¹⁷ *Benjamin v. Peterson*, No. 12220 DWF/SER, 2013 WL 3097271, at *6 (D. Minn. June 18, 2013).

¹¹⁸ *Index Newspapers LLC v. City of Portland*, 480 F. Supp. 3d 1120, 1142 (D. Or. 2020).

¹¹⁹ *Id.* at 1146.

¹²⁰ *Id.*

III. PROVING THE CAUSAL CONNECTION AND ARGUING AGAINST PROBABLE CAUSE

The final element a plaintiff needs to prove for a First Amendment retaliatory arrest claim is that they suffered a harm because of some retaliatory motivation by a state actor. This “but-for causation” is often difficult to prove, but as the Supreme Court notes in *Nieves*, probable cause “speaks to the objective reasonableness of an arrest.”¹²¹ If there was probable cause for an arrest, it’s likely that it was not caused due to a retaliatory motivation, according to the Court.¹²² A demonstration that there was no probable cause, however, provides “weighty evidence that the officer’s animus caused the arrest.”¹²³

On its face, the *Nieves* decision appears to be a significant barrier for journalists—as well as other supposed non-protestors at a protest—bringing a retaliatory arrest case.¹²⁴ *Meyers v. City of New York*, a case arising from the 2011 Occupy Wall Street demonstrations that was subsequently analyzed under *Nieves*, demonstrates the potential problem these would-be plaintiffs face with protests and probable cause.¹²⁵ In a Second Circuit decision, the *Meyers* judges note that protestors’ “refusal to comply with that lawful dispersal order supplied probable cause to arrest them for disorderly conduct,” which in turn invoked *Nieves*’s barrier to retaliatory arrest claims.¹²⁶

Similarly, the probable cause argument for arresting anyone at a protest seems straightforward—a dispersal order was issued, certain journalists, legal observers, or other individuals did not disperse, and they were therefore arrested.¹²⁷ As Northern Kentucky University’s Jennifer Kinsley notes, “By

¹²¹ *Nieves v. Bartlett*, 139 S. Ct. 1715, 1724 (2019).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *First Amendment—Freedom of Speech—Retaliatory Arrest—Nieves v. Bartlett*, 133 HARV. L. REV. 272, 279 (2019) (arguing that *Nieves* “may authorize retaliatory arrests for engaging in certain protected activities . . . because such retaliatory arrests are commonplace”) (emphasis in original); John S. Clayton, *Policing the Press: Retaliatory Arrests of Newsgatherers After Nieves v. Bartlett*, 120 COLUM. L. REV. 2275, 2288 (2020) (“At protests in particular, it is likely that almost any person present—including a newsgatherer—is ‘guilty of some minor infraction.’ Thus, while a journalist at a protest may not need to ask ‘permission’ to gather news, they nonetheless rely on a favorable exercise of discretion by police to not arrest or otherwise interfere with the reporting process—even when such interference may serve the state’s interest.”).

¹²⁵ *Meyers v. City of N.Y.*, 812 F. App’x 11, 14–15 (2d Cir. 2020).

¹²⁶ *Id.*

¹²⁷ *Cervantes v. San Diego Police Chief Shelley Zimmerman*, No. 17-CV-01230-BAS-AHG, 2020 WL 5759752, at *9 (S.D. Cal. Sept. 28, 2020) (finding that the plaintiff “has not shown the absence

declaring a curfew and arresting those in violation of it, lawmakers have transformed otherwise constitutionally-protected political expression into criminal activity.”¹²⁸

Notably, the “state of mind” of an individual arrested at a protest—whether that person believed “they were participating in a sanctioned, First–Amendment–protected” activity or intentionally breaking the law—is “irrelevant to the question of probable cause.”¹²⁹ Where there is otherwise probable cause for the arrest, a plaintiff’s “status as a ‘participant’ or member of the press does not affect the outcome of [the] case.”¹³⁰

This analysis, however, ignores an open question that has arisen repeatedly in cases where journalists, legal observers, and other groups faced arrest while reporting on and monitoring protests. In short, as teased but not answered in a 2020 federal court ruling, does an otherwise peaceful and law-abiding individual engaged in certain constitutionally protected conduct need to stop doing their job when faced with a seemingly lawful general dispersal order?¹³¹

This thorny subject has been raised as both a matter of constitutional rights and statutory interpretation. When courts have previously grappled with this issue, other concerns—such as a separate justification for the arrest¹³² or pre-existing legal circumstances that make the problem superfluous¹³³—often allow judges to circumvent making a ruling one way or the other.¹³⁴

of probable cause for his arrest because City Defendants had probable cause to arrest [him] for failing to disperse.”); *Owen v. City of Buffalo*, N.Y., 465 F. Supp. 3d 267, 277 (W.D.N.Y. 2020) (“[T]he police had probable cause to arrest [plaintiff] and take him into custody for disorderly conduct. Even if they did not have probable cause to arrest him for that offense, they had probable cause to arrest and take him into custody for simply disobeying the lawful order of a police officer.”).

¹²⁸ Jennifer M. Kinsley, *Black Speech Matters*, 59 U. LOUISVILLE L. REV. 1, 11 (2020).

¹²⁹ *Garcia v. Bloomberg*, 662 F. App’x 50, 53 (2d Cir. 2016).

¹³⁰ *Skvorak v. Thurston Cnty.*, No. C05-5100 RBL, 2006 WL 8455147, at *1 (W.D. Wash. Sept. 15, 2006).

¹³¹ *Index Newspapers LLC v. City of Portland*, 480 F. Supp. 3d 1120, 1126 (D. Or. 2020); *but see Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1190 (9th Cir. 2018) (“We are sensitive to journalists’ constitutional right to investigate and publish exposés on [matters of public importance] However, the First Amendment right to gather news within legal bounds does not exempt journalists from laws of general applicability.”).

¹³² *Higginbotham v. City of N.Y.*, 105 F. Supp. 3d 369, 373 (S.D.N.Y. 2015) (passing on resolving whether a journalist covering a protest is “congregating” with protesters due to probable cause based on a separate unlawful act).

¹³³ *Index Newspapers*, 480 F. Supp. 3d at 1126 (citing a preliminary injunction already in place).

¹³⁴ *But see Wise v. City of Portland*, 483 F. Supp. 3d 956, 962 (D. Or. 2020) (considering and rejecting “the narrow issue of whether protest medics . . . should effectively receive special dispensation under

Assuming for the purposes of this paper, however, that there is no general exemption to dispersal orders or special rights for non-protestors at a protest, these groups have two potential ways to fulfil the third prong of the First Amendment retaliatory arrest claim. A plaintiff can either argue that their arrest fits into the narrow exemption the Supreme Court articulated to *Nieves*' probable cause requirement, or they can argue that there was no probable cause for their arrest, as a matter of law.

A. *The Nieves exemption*

In *Nieves*, the Supreme Court outlines a “a narrow qualification” that is effectively an exemption from the “no-probable cause” requirement.¹³⁵ This exemption, the Court notes, should be evoked in “circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so.”¹³⁶ Chief Justice Roberts, writing for the majority, describes a hypothetical jaywalker who is arrested after complaining about police conduct.¹³⁷ As jaywalkers are not typically arrested, the argument goes, this person should not have their First Amendment claim thrown out based on a weak version of probable cause.

In her dissent in *Nieves*, Justice Sotomayor critiques the “clarity” of the probable cause exemption. “What exactly the Court means by ‘objective evidence,’ ‘otherwise similarly situated,’ and ‘the same sort of protected speech’ is far from clear,” she writes.¹³⁸ Justice Neil Gorsuch also appears to argue that the new standard is open to interpretation—citing a previous case to note that the Court “seems to indicate that something like *Armstrong*'s standard might govern a retaliatory arrest claim when probable cause exists to support an arrest.”¹³⁹ Both Justices express hope that lower courts follow this rule “commonsensically.”¹⁴⁰

the First Amendment to remain in areas where police have issued lawful dispersal orders,” citing practical and constitutional reasons.)

¹³⁵ *Nieves v. Bartlett*, 139 S. Ct. 1715, 1727 (2019).

¹³⁶ *Id.*

¹³⁷ *Id.* (“If an individual who has been vocally complaining about police conduct is arrested for jaywalking at such an intersection, it would seem insufficiently protective of First Amendment rights to dismiss the individual’s retaliatory arrest claim on the ground that there was undoubted probable cause for the arrest.”).

¹³⁸ *Id.* at 1741 (Sotomayor, J., dissenting).

¹³⁹ *Id.* at 1733 (Gorsuch, J., concurring in part and dissenting in part).

¹⁴⁰ *Id.* at 1734 (Gorsuch, J., concurring in part and dissenting in part); *Id.* at 1741 (Sotomayor, J., dissenting). There is some indication that courts have taken these concerns to heart. *See, e.g.,* *Lund v. City of Rockford, Ill.*, 956 F.3d 938, 945 (7th Cir. 2020) (“We agree with Justice Gorsuch’s

Courts appear to have approached the *Nieves* exemption in two ways—one narrow and one more broad. In the narrow interpretation of the exemption, courts focus on whether the plaintiff can point to contemporaneous evidence that similarly situated persons not engaged in protected speech were not arrested. In *Owen v. City of Buffalo, New York*, for example, a street preacher arrested outside of a Donald Trump rally was not able to invoke the *Nieves* exemption because there was no evidence “that other individuals who, like him, lacked a ticket for the Trump rally were, unlike him, not arrested after refusing to leave the no-protest zone.”¹⁴¹ Here, the court focused only on the single Trump rally in question.

The broad approach, however, seems to follow Justice Gorsuch’s and Justice Sotomayor’s commonsense plea, as courts look to a practice or history of not arresting the type of person in question. In *Ballentine v. Las Vegas Metropolitan Police Department*, a group of activists was arrested for placing graffiti after using chalk to write messages outside a law enforcement agency.¹⁴² As the judge writes in *Ballentine*, “*Nieves* directs me to look to whether Metro officers typically arrest individuals for chalking on sidewalks.”¹⁴³ The court found that the plaintiff could invoke the *Nieves* exemption because there was no evidence that the police department “ever arrested anyone besides the plaintiffs for chalking on the sidewalk.”¹⁴⁴ In *Ballentine*, the focus was on the overall practice of the police, not a single incident.

Looking specifically at cases involving mass arrests for failure to disperse at a protest, courts have employed both the narrow and the broad approaches. In *Meyers*, described above, the court wrote the *Nieves* exemption “exists where there is ‘objective evidence’ that the police refrained from

interpretation of the majority opinion in *Nieves*; the majority does not appear to be adopting a rigid rule that requires, in all cases, a particular form of comparison-based evidence . . . [W]e surmise that Justices Gorsuch and Sotomayor are correct—common sense must prevail.”; *McKenzie v. City of N.Y.*, No. 17 Civ. 4899 (PAE), 2019 WL 3288267, at *9 (S.D.N.Y. July 22, 2019) (stating that evidence for the *Nieves* exemption “could potentially include admissions by officers, statistical evidence of the arrest rates for the offense in question, or other direct evidence.”) (citing *Nieves*, 139 S. Ct. 1715, 1727 (2019) (opinions of Gorsuch, J., concurring in part and dissenting in part and Sotomayor, J., dissenting)).

¹⁴¹ *Owen v. City of Buffalo, N.Y.*, 465 F. Supp. 3d 267, 275 (W.D.N.Y. 2020).

¹⁴² *Ballentine v. Las Vegas Metro. Police Dep’t*, 480 F. Supp. 3d 1110, 1113–14 (D. Nev. 2020), *aff’d in part, rev’d in part and remanded sub nom.* *Ballentine v. Tucker*, 28 F.4th 54 (9th Cir. 2022)

¹⁴³ *Id.* at 1116; *see also* *Castro v. Salinas*, No. 5:18-CV-00312-JKP-ESC, 2020 WL 3403071, at *5 (W.D. Tex. June 19, 2020) (finding that, to invoke the *Nieves* exemption, a plaintiff alleging retaliatory arrest needs to show evidence that “police officers routinely do not arrest persons” for the offense in question).

¹⁴⁴ *Ballentine*, 480 F. Supp. 3d at 1115.

arresting similarly situated people not engaged in speech.”¹⁴⁵ The phrasing “the police refrained” seems to define it specifically as examining police action at the time of the arrest. This reading is supported by the evidence the court highlights—in the case, which was about Occupy Wall Street protestors, no facts could support the *Nieves* exemption because “the NYPD arrested ‘everyone who remained in the Park’ following the dispersal order.”¹⁴⁶ The court, it seems, was solely looking at the events of that evening.

Conversely, in *Cervantes v. San Diego Police Chief Shelley Zimmerman*, which concerned a legal observer at a protest outside a Trump rally, the court took the broad approach. Unlike the *Meyers* court, which just looked at the one protest, here the court articulated the *Nieves* exemption as needing “objective evidence that police have ‘typically exercised their discretion’ not to arrest others similarly situated” to the arrested individual.¹⁴⁷ Applied to the case, this would have allowed the plaintiff to show that “legal observers who publicly challenge police conduct in their capacity as attorneys” are not typically arrested at protests.¹⁴⁸ The court was looking for a typical practice of the police, not just the one Trump rally in the case.

1. *Journalists and the Nieves exemption*

Few cases involving journalists have been analyzed under the *Nieves* exemption. *Nigro v. City of New York*, however, involved a professional journalist and photographer who was arrested during a protest against then-presidential candidate Donald Trump in 2016.¹⁴⁹ He claimed that the arrest—for disorderly conduct and jaywalking—was in retaliation for his First Amendment protected conduct, as he was photographing police officers.

The court found his case “troubling” and wrote that the allegations raise “the specter of a police officer singling out a member of the media in retaliation for his First Amendment activity.”¹⁵⁰ While the plaintiff’s arrest took place before the Supreme Court ruled on this issue, the court noted that

¹⁴⁵ *Meyers*, 812 F. App’x at 15.

¹⁴⁶ *Id.*

¹⁴⁷ *Cervantes v. San Diego Police Chief Shelley Zimmerman*, No. 17-CV-01230-BAS-AHG, 2020 WL 5759752, at *9 (S.D. Cal. Sept. 28, 2020).

¹⁴⁸ *Id.*

¹⁴⁹ *Nigro v. City of New York*, No. 19-CV-2369, 2020 WL 5503539, at *1 (S.D.N.Y. Sept. 11, 2020). While the incident in the case took place before *Nieves* was decided and, therefore, would not impact the district court’s decision, the judge still undertook a *Nieves* analysis as a thought experiment.

¹⁵⁰ *Id.* at *7.

his “retaliatory arrest claim would seem to fall squarely within the *Nieves* exemption.”¹⁵¹

The case also seemed to validate the Justices’ fears about the potential impact on the press—the court made a point that “it was precisely facts like those alleged here that caused the Supreme Court concern in *Nieves*.”¹⁵² This exemption may be a lifeline for members of the media bringing similar claims in the future.

B. The path to arguing against probable cause runs through the “individualized suspicion” requirement

A constitutional requirement mandated by the Fourth Amendment, probable cause rests on “a reasonable ground for belief of guilt.”¹⁵³ This generally requires individualized suspicion that a specific person has broken the law.¹⁵⁴ An individualized probable cause requirement can get somewhat fuzzy in a mass arrest situation, such as protests.¹⁵⁵ Individualized suspicion, however, is still needed to establish probable cause for an arrest, even in the mayhem of a protest.¹⁵⁶

As probable cause is a reasonableness analysis, specific circumstances are given weight when determining an individual’s guilt. For instance, the court in *Dinler v. City of New York* cited dispersal orders’ importance in “making such individualized determinations of probable cause” during a protest.¹⁵⁷ Officers, however, are still expected to ensure an individual’s likely guilt

¹⁵¹ *Id.* at *4.

¹⁵² *Id.* at *7.

¹⁵³ U.S. Const. art. IV; *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (“the probable-cause standard is a “practical, nontechnical conception” that deals with “the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act”).

¹⁵⁴ See, e.g., Andrew E. Taslitz, *What Is Probable Cause, and Why Should We Care?: The Costs, Benefits, and Meaning of Individualized Suspicion*, 73 L. & CONTEMP. PROBS. 145, 146 (2010); Karen J. Pita Loo, *Tear Gas + Water Hoses + Dispersal Orders: The Fourth Amendment Endorses Brutality in Protest Policing*, 100 B.U. L. REV. 817, 847 (2020) (arguing that a group probable cause standard for protestors “substantially deviates from and is inconsistent with traditional individualized determinations of suspicion.”).

¹⁵⁵ *Dinler v. City of New York*, No. 04-CV-7921, 2012 WL 4513352, at *6 (S.D.N.Y. Sept. 30, 2012) (assessing and rejecting “a theory of collective or group” probable cause).

¹⁵⁶ See *Dinler*, 2012 WL 4513352, at *6 (finding that individualized probable cause “remains the lodestar” even “in a large, and potentially chaotic, group setting.”); see also Amanda Peters, *Mass Arrests & the Particularized Probable Cause Requirement*, 60 B.C. L. Rev. 217, 269 (2019) (“Supreme Court opinions addressing probable cause in multi-suspect searches and arrests . . . reiterate that probable cause must be particularized. This fact alone settles the area of law and puts it beyond the realm of debate.”).

¹⁵⁷ *Dinler*, 2012 WL 4513352, at *6.

before making an arrest. In *Hickey v. City of Seattle*, the court found that “without individualized investigation,” officers at the scene of a protest “could not distinguish which of the protestors had committed or were committing arrestable offenses.”¹⁵⁸

C. A clearly identified member of the press should enjoy protection against individualized suspicion

Although the Supreme Court has long maintained a broad and open interpretation of the First Amendment’s press clause,¹⁵⁹ the 1960s and 1970s may have been the reporters’ legal “Glory Days”—both for the cases the Court took on and the way Justices described the professional press.¹⁶⁰ During this period, Justice Potter Stewart was arguably the highest-profile advocate for a distinct set of press rights that should be available to professional journalists.¹⁶¹ Writing in a concurrence in *Houchins v. KQED*, a 1978 case about press access to a county jail, Justice Stewart makes two arguments on behalf of the press, one constitutional and one practical.

It is “no constitutional accident” that the First Amendment “speaks separately of freedom of speech and freedom of the press,” according to Stewart.¹⁶² This distinction is rather “an acknowledgment of the critical role played by the press in American society.”¹⁶³ His practical argument, drawing from this constitutional analysis, posits that, therefore, “equal access” to information “must be accorded more flexibility in order to accommodate the practical distinctions between the press and the general public.”¹⁶⁴

¹⁵⁸ *Hickey v. City of Seattle*, No. C00-1672, 2006 WL 3692658, at *7 (W.D. Wash. Dec. 13, 2006); *Dinler*, 2012 WL 4513352, at *6 (“police efforts to sort lawbreakers from bystanders . . . are highly probative of whether it would be reasonable to conclude that every person arrested violated the law.”).

¹⁵⁹ *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 n.3 (1942) (“The protection of the First Amendment . . . is not limited to the Blackstonian idea that freedom of the press means only freedom from restraint prior to publication.”)

¹⁶⁰ RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 AIA. L. REV. 253, 255–56 (2014); see also Mary-Rose Papandrea, *Protecting the Role of the Press During Times of Crisis*, 61 WM. & MARY L. REV. 1159, 1161 (2020) (arguing that “courts have continued to embrace the largely press-protective interpretation of the First Amendment that arose . . . in the 1960s and 1970s.”).

¹⁶¹ Potter Stewart, “*Or of the Press*”, 50 HASTINGS L.J. 631, 634 (1975) (“The primary purpose of the constitutional guarantee of a free press was a similar one: to create a fourth institution outside the Government as an additional check on the three official branches.”).

¹⁶² *Houchins v. KQED*, 438 U.S. 1, 17 (1978) (Stewart, J., concurring).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 16.

Justice Stewart’s view—which has both its champions¹⁶⁵ and critics¹⁶⁶—has been repudiated in the courts as a matter of constitutional rights.¹⁶⁷ However, his argument framing the press as a separate entity from the public with a distinct role has, directly or not, likely impacted how courts approach the question of probable cause as it relates to journalists.

The case *Sennett v. United States* provides a helpful example of Justice Stewart’s view in action.¹⁶⁸ Laura Sennett, a photojournalist “specializing in the coverage of demonstrations, protests, and grassroots activism,” was investigated by police after photographing a demonstration.¹⁶⁹ Sennett, notably, “did not display any press credentials” or carry any professional photographic equipment—in fact, she was dressed like the “vandals” she was documenting. She then argued that her status as a journalist should exempt her from the criminal statutes she may have broken. The court found that “common sense flatly precludes” this reasoning—“a person’s status as a journalist . . . does not immunize the person from the strictures of the criminal law.”¹⁷⁰

However, the lack of rights that stem from being a journalist “does not mean that a person’s status or occupation as a journalist is never relevant to the probable cause calculus,” according to the court.¹⁷¹ Rather, “the fact that a person is a photojournalist who records demonstrations” should always be considered and—in certain cases—may be evidence that “precludes a probable cause finding.”¹⁷² This distinction between

¹⁶⁵ Floyd Abrams, *The Press Is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 564 (1979) (arguing that “the press is ‘different’ from ‘everyone’; that it is, in a variety of circumstances, entitled to constitutional treatment distinct from that generally afforded those who exercise their freedom of expression; and that the nature of the treatment should largely be as urged in the provocative articulations of Justice Potter Stewart.”).

¹⁶⁶ Eugene Volokh, *Freedom for the Press As an Industry, or for the Press As A Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 464 (2012) (arguing for a “press-as-technology reading” of the First Amendment, “under which all users of mass communications technologies have the same freedom of the press.”).

¹⁶⁷ See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (noting that “generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”); *Citizens United*, 558 U.S. 310, 352 (“We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.”).

¹⁶⁸ *Sennett v. United States*, 667 F.3d 531 (4th Cir. 2012). Although Sennett’s case concerned her Privacy Protection Act rights, the probable cause reasoning is still relevant to this paper.

¹⁶⁹ *Sennett v. United States*, 778 F. Supp. 2d 655, 657 (E.D. Va. 2011), *aff’d*, 667 F.3d 531 (4th Cir. 2012).

¹⁷⁰ *Id.* at 666.

¹⁷¹ *Id.* at 666 n.21.

¹⁷² *Id.*

constitutional rights and what is reasonable to expect for a probable cause determination is how many courts have approached the issue of journalist arrests at a protest.

Contemporary constitutional law establishes that the press does not possess any rights of access distinct from the general public.¹⁷³ Setting aside for purposes of this paper whether or not this is the correct interpretation of the First Amendment,¹⁷⁴ it would not be an effective argument for journalists to claim an innate right to go where protestors or the general public cannot.

It is true, however, that journalists and protestors are distinct groups who draw on different rights when engaging in protected activity.¹⁷⁵ The George Floyd protests in 2020—and the court decisions that followed—highlighted the split between the two groups. For instance, in *Abay v. City of Denver*, the court specified that officers’ weapons and tactics impacted not only protestors’ ability to demonstrate peacefully, but also “the media’s ability to document the demonstration.”¹⁷⁶ The *Abay* court also found it is “clearly in the public interest” to protect both of these separate and distinct rights.¹⁷⁷

More specifically, protestors draw upon the First Amendment to make their voices heard. In Denver, for example, protestors exercised “the constitutional right of the public to speak against widespread injustice,”¹⁷⁸ while those who marched in Seattle “were engaged in the constitutional right to protest police brutality.”¹⁷⁹ As a practical matter, the press do not protest. Not only is this against longstanding journalistic standards,¹⁸⁰ but it is also

¹⁷³ See, e.g., *Branzburg*, 408 U.S. at 684–85 (“Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded.”); *BH Media Grp., Inc. v. Clarke*, 466 F. Supp. 3d 553, 660 (E.D. Va. 2020) (“[T]he First Amendment’s protection of freedom of the press has traditionally focused on the right of the press to publish information without government restraint, rather than on the acquisition of the information in the first place.”)

¹⁷⁴ See, e.g., Sonja R. West, *Favoring the Press*, 106 Cal. L. Rev. 91, 95 (2018) (claiming “the text, history, and spirit of the First Amendment’s Press Clause” allows the government to “treat press speakers differently”)

¹⁷⁵ *De Jonge v. State of Oregon*, 299 U.S. 353, 364 (1937) (“The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.”)

¹⁷⁶ *Abay*, 445 F. Supp. 3d at 1293

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1294

¹⁷⁹ *Black Lives Matter Seattle-King County v. City of Seattle, Seattle Police Department*, 466 F. Supp. 3d 1206, 1213 (W.D. Wash. 2020).

¹⁸⁰ See, e.g., N.Y. TIMES, *Ethical Journalism Handbook*, <https://www.nytimes.com/editorial-standards/ethical-journalism.html> [<https://perma.cc/M8TT-PRUH>] (last visited Jan. 20, 2022) (“Staff members may not march or rally in support of public causes or movements”).

documented in federal court rulings following protests.¹⁸¹ Courts repeatedly stress that it is reasonable for police to recognize this distinction when determining probable cause and arresting individuals present at a protest. In many cases, a reporter's status as a member of the press makes it unreasonable to arrest them and may preclude a finding of probable cause.

In *Landers v. City of New York*, for example, the court was “skeptical” that a reporter wearing a visible press credential while covering a Black Lives Matter demonstration could “properly [be] considered a participant.”¹⁸² Similarly, *Index Newspapers* highlights “the constitutionally protected newsgathering, documenting, and observing work of journalists . . . who peacefully stand or walk on city streets and sidewalks during a protest.”¹⁸³

Effectively, it is unreasonable for police officers to link journalists to the protestors they are covering. “It cannot be seriously contended,” one court writes, that “covering the march as a journalist . . . makes the observer part of a ‘unit’ that is parading unlawfully.”¹⁸⁴ As another court notes, when an officer knows an individual at a protest is a journalist, that officer can't reasonably believe the journalist “intended to aid the protesters in some way.”¹⁸⁵

1. *Is there probable cause to arrest a journalist covering a protest?*

Not only are members of the press reasonably distinct from protestors who may be the target of a dispersal order,¹⁸⁶ but journalists carry a

¹⁸¹ See, e.g., *Goyette v. City of Minneapolis*, No. 20-CV-1302 (WMW/DTS), 2021 WL 5003065, at *13 (D. Minn. Oct. 28, 2021), *superseded sub nom.* *Goyette v. City of Minneapolis*, No. 20-CV-1302 (WMW/DTS), 2022 WL 370161 (D. Minn. Feb. 8, 2022) (“Generally, members of the press are in proximity to a protest to observe, record, and report about the protest, not to *participate* in the assembly.”)(emphasis in original).

¹⁸² *Landers v. City of New York*, No. 16-CV-5176PKCCLP, 2019 WL 1317382, at *8 (E.D.N.Y. Mar. 22, 2019).

¹⁸³ *Index Newspapers LLC v. City of Portland*, 480 F. Supp. 3d 1120, 1125 (D. Or. 2020).

¹⁸⁴ *Dinler v. City of New York*, No. 04-CV-7921, 2012 WL 4513352, at *14 (S.D.N.Y. Sept. 30, 2012) (distinguishing between “photographers and journalists covering the march” and “the marchers themselves”).

¹⁸⁵ *Eberhard v. California Highway Patrol*, No. 3:14-CV-01910-JD, 2015 WL 6871750, at *5 (N.D. Cal. Nov. 9, 2015).

¹⁸⁶ *Berg v. City of Los Angeles*, No. 20-CV-7870 DMG (PDX), 2021 WL 4691154, at *12 (C.D. Cal. May 28, 2021) (noting that “at demonstrations where orders to disperse were given and flouted, the use of injurious less-lethal force on peaceful protesters, and *especially* on journalists . . . , is not justified by a strong government interest”) (emphasis added).

presumption against violent activity due to their professional status.¹⁸⁷ Courts have found that, because it is reasonable to assume that a person clearly marked as press is not participating in the protest, they are likely not contributing to any rioting, violence, or other illegal activity.

Benjamin v. Peterson, a case concerning a journalist's arrest at the 2008 Republican National Convention, demonstrates how an officer's initially reasonable belief that an individual was "part of a rioting crowd" could become unreasonable when that person identified themselves as a member of the press.¹⁸⁸ The *Benjamin* court found that the reasonableness of the arrest could be called into question because the reporter "declared that he was 'media' and was wearing press credentials that were visible to the arresting officers."¹⁸⁹

Similarly, the *Index Newspapers* decisions distinguishes between journalists and other people in the area of the protest, in a way that implies certain presumptions for members of the press. The *Index Newspapers* court stated that the existence of "some violent offenders" does not give government agents "carte blanche to attack journalists . . . and infringe their First Amendment rights."¹⁹⁰ Furthermore, the court wrote, "The fact that a few people may have engaged in some unlawful conduct does not outweigh the important First Amendment rights of journalists."¹⁹¹ An individual's status as a member of the press signifies that they are not "violent offenders" or engaged in "unlawful conduct."

IV. OTHER GROUPS—LEGAL OBSERVERS, CITIZEN JOURNALISTS, AND PROTEST MEDICS

On its face, the argument for journalists seeking to bring a First Amendment retaliatory arrest claim under § 1983 seems strong. Members of the press have a First Amendment right to report under either framing of the protection, they can show clear injury if arrested, and they have a good

¹⁸⁷ See, e.g., *Asociacion De Periodistas De Puerto Rico v. Mueller*, 680 F.3d 70, 82 (1st Cir. 2012) ("A reasonable agent could reasonably have believed that some number of non-journalists had entered [an apartment complex] . . . based in part on intimations and evidence that some members of the crowd were angry or hostile").

¹⁸⁸ *Benjamin v. Peterson*, No. 12-CV-220 DWF/SER, 2013 WL 3097271, at *4 (D. Minn. June 18, 2013).

¹⁸⁹ *Id.*

¹⁹⁰ *Index Newspapers LLC v. City of Portland*, 480 F. Supp. 3d 1120, 1143 (D. Or. 2020).

¹⁹¹ *Id.* at 1155.

argument against a finding of probable cause to escape the *Nieves* bar (or they may be able to invoke the case's exemption).

Journalists, however, are not the only individuals that have recently drawn attention after facing arrest for potentially protected activity at a protest. Local governments have also recognized the distinct role that groups such as legal observers or protest medics play, carving out certain protections from the police.¹⁹² Additionally, individuals acting as medics and legal observers have been able to show that their protected speech was chilled as the result of police action.¹⁹³

Following the model articulated above with respect to professional journalists, there are two questions that need to be answered about these groups in order to determine whether an individual would be able to bring a claim for First Amendment retaliatory arrest. One, is their conduct protected under both readings of the First Amendment right to engage with matters of public interest? These groups may run into problems if courts look for expressive conduct. Two, is the potential plaintiff so clearly distinguishable from a protestor that it would be unreasonable to arrest them? Each group faces questions about whether their activity is *really* that distinct from that of a protestor.

A. *Legal observers—protected conduct and probable cause*

In the *Index Newspaper* cases, a series of courts have found that legal observers share the same First Amendment rights as journalists covering a protest—like the professional press, these observers are “engaged in newsgathering, documenting, and recording government conduct.”¹⁹⁴ As these courts have fleshed out, the First Amendment protects individuals observing government conduct under the right of access to information.¹⁹⁵ In a similar case, a court found that legal observers at a protest “undoubtedly” engage in activity protected by the First Amendment because the right to “monitor police conduct is a core constitutional right.”¹⁹⁶

¹⁹² *Black Lives Matter Seattle-King County*, 406 F. Supp. 3d. at 1211 (where an injunction was amended to add “certain protections for journalists, medics, and legal observers”).

¹⁹³ See, e.g., *Breathe v. City of Detroit*, 484 F. Supp. 3d 511, 518 (E.D. Mich. 2020), *order clarified*, No. 20-12363, 2020 WL 8575150 (E.D. Mich. Sept. 16, 2020); *Downes-Covington v. Las Vegas Metro. Police Dep't*, No. 220 Civ. 01790GMNDJA, 2020 WL 7408725, at *7 (D. Nev. Dec. 17, 2020).

¹⁹⁴ *Index Newspapers*, 480 F. Supp. 3d. at 1124.

¹⁹⁵ *Id.*

¹⁹⁶ *Cervantes v. San Diego Police Chief Shelley Zimmerman*, No. 17-CV-01230-BAS-AHG, 2020 WL 5759752, at *8 (S.D. Cal. Sept. 28, 2020)

However, when courts frame the First Amendment protection as one concerned with expressive conduct, observers at a protest may fall short of being able to assert their rights. As one court has held, observing demonstrators and police at a protest “is conduct with little or no expressive content” and, therefore, “is afforded no particular protection by the First Amendment.”¹⁹⁷

Importantly, many legal observers assert that they attend protests and demonstrations to “serve as a ‘legal observer,’ but not as a participant.”¹⁹⁸ These lawyers attend protests “for the sole purpose of observation.”¹⁹⁹ Additionally, like members of the professional press, legal observers tend to visually distinguish themselves when observing a protest. Lawyers associated with the National Lawyers Guild, for example, wear bright clothing and badges to identify themselves.²⁰⁰ Police officers have acknowledged that these indicia signify that the individual is a legal observer.²⁰¹ As noted above, at least one court has articulated that legal observers are a distinct enough group to qualify for *Nieves*’s similarly-situated probable cause exemption.²⁰²

Courts, however, have also not been clear as to whether legal observers are so distinct from protestors that it should impact a probable cause analysis. “[T]he goals, rights and obligations of legal observers do not always overlap with those who are protesting,” although they may sometimes.²⁰³ While some courts have found that “the roles of a legal observer and a protestor are distinct,”²⁰⁴ drawing on different First Amendment protections, other courts have found that it’s not enough for a lawyer to allege to attend a protest “in the capacity of an observer . . . as observation and participation are not mutually exclusive.”²⁰⁵

¹⁹⁷ *Pesola v. City of New York*, No. 15-CV-1917 (PKC)(SN), 2016 WL 1267797, at *11 (S.D.N.Y. Mar. 30, 2016).

¹⁹⁸ *Dubner v. City & Cty. of San Francisco*, 266 F.3d 959, 962 (9th Cir. 2001).

¹⁹⁹ *Downes-Covington v. Las Vegas Metro. Police Dep’t*, No. 220-CV-01790GMNDJA, 2020 WL 7408725, at *2 (D. Nev. Dec. 17, 2020).

²⁰⁰ *Collins v. City of New York*, 295 F. Supp. 3d 350, 359 (S.D.N.Y. 2018).

²⁰¹ *Id.*

²⁰² *Cervantes v. San Diego Police Chief Shelley Zimmerman*, No. 17-CV-01230-BAS-AHG, 2020 WL 5759752, at *9 (S.D. Cal. Sept. 28, 2020).

²⁰³ *Chua v. City of Los Angeles*, No. LA CV16-00237, 2017 WL 10776036, at *14 (C.D. Cal. May 25, 2017).

²⁰⁴ *Id.* at *9.

²⁰⁵ *People v. Cohen*, 800 N.Y.S.2d 352, 2005 WL 293510, at *4 (N.Y. Crim. Ct. Feb. 7, 2005).

B. Citizen journalists—protected conduct and probable cause

The rights of a citizen journalist at a protest—basically, any individual present who chooses to record or watch—seem to turn explicitly on how courts define that First Amendment activity. Crucially for claiming protection under an expressive conduct framework, courts have found that the mantle of “citizen journalist” does not imply the individual would disseminate the information, in the same way a journalist likely would. In *Pluma v. City of New York*, for example, a self-described “citizen journalist” brought a First Amendment retaliatory arrest claim after he was harmed while taking photos and video of police action at an Occupy Wall Street gathering.²⁰⁶ Noting that the plaintiff went to Zuccotti Park “with hopeful reflection upon the efforts of Occupy Wall Street,” the court found that his filming was only potentially expressive.²⁰⁷

Other courts, however, have recognized that the First Amendment protects any citizen filming police activity and misconduct, linking this to the press’ “vital role in holding the government accountable.”²⁰⁸ Courts have also recognized “the First Amendment rights of the audience” observing a protest, because such bystanders—regardless if they even invoke the title of “citizen journalist”—have a “primary interest” in access to “readily available” information.²⁰⁹ In *MacNamara v. City of New York*, for example, the court found that the First Amendment “protects and promotes” bystanders at a demonstration, such as a man riding his bike home from a play who stopped to observe the crowd at a political protest and was subsequently arrested by police in a mass arrest.²¹⁰

In some cases, courts have linked “citizen journalists” to other protestors, while in others courts have evoked the language around the rights of “newsmen.” For example, in *Cobarobio v. Midland County*, a line of cases about a self-described “citizen journalist” who was arrested while photographing the site of a deadly train crash, courts appeared to take his claim at face value and framed the allegations against police as a matter of the “First

²⁰⁶ *Pluma v. City of New York*, No. 13 Civ. 2017 (LAP), 2015 WL 1623828, at *1 (S.D.N.Y. Mar. 31, 2015).

²⁰⁷ *Id.* at *7.

²⁰⁸ *Index Newspapers v. U.S. Marshals Serv.*, 977 F.3d 817, 831 (9th Cir. 2020).

²⁰⁹ *MacNamara v. City of New York*, 275 F.R.D. 125, 141 (S.D.N.Y. 2011).

²¹⁰ *Id.* at 133–34, 141 (“Although [Randall] Steketee explained that he was not participating in any protest or demonstration, he was arrested, handcuffed, and transported to Pier 57, where he was detained for approximately 33 hours.”).

Amendment right of the press” (although one court did compare the plaintiff to “real journalists”).²¹¹

On the other hand, recording protests events on a cellphone can be someone’s “chosen form of protest.”²¹² In *Sullivan v. Metropolitan Transit Authority Police Department*, the court situated the plaintiff—a “citizen journalist” who specifically went to the site of an Occupy Wall Street protest to film the demonstration—as one of the many protestors present at the event.²¹³ When establishing a First Amendment retaliation claim, the plaintiff’s “self-described status as a ‘citizen journalist,’ rather than an ordinary citizen at the event, is irrelevant to the legal analysis.”²¹⁴

This framing could have broader repercussions for these “citizen journalists.” As one later case described the details of *Sullivan*, the “plaintiff was one among a number of similarly situated protestors filming events and there was no evidence that the police otherwise arrested protestors indiscriminately.”²¹⁵ This type of analysis would likely preclude any “citizen journalist” from qualifying for the *Nieves* exemption to the probable cause requirement.²¹⁶

C. *Protest medics—protected conduct and probable cause*

Courts have consistently rejected arguments that organized medics appearing at protests invoke any First Amendment protections distinct from protestors. In *Marom v. City of New York*, for example, the court found that it was reasonable to infer that a “volunteer street medic” at an Occupy Wall Street protest was present “with the intention of supporting the OWS movement and its political message.”²¹⁷ The court found it plausible that the

²¹¹ *Cobarobio v. Midland County*, No. 13-CV-00111, 2015 WL 13608102, at *24 n.8, *26 (W.D. Tex. Jan. 7, 2015), *aff’d*, 695 Fed.Appx. 88 (5th Cir. 2017).

²¹² *Day v. City of Baton Rouge*, No. 17-328-EWD, 2020 U.S. Dist. LEXIS 222317, at *6 (M.D. La. Nov. 30, 2020). Plaintiff’s other forms of protest included his presence at the protest and “talking sh*t” to police. *Id.*

²¹³ *Sullivan v. Metro. Transit Auth. Police Dep’t*, No. 13 Civ. 7677 (NRB), 2017 WL 4326058, at *2 (S.D.N.Y. Sept. 13, 2017).

²¹⁴ *Id.* at *8 n.9.

²¹⁵ *Abujayyab v. City of New York*, No. 15 Civ. 10080, 2018 WL 3978122, at *12 (S.D.N.Y. Aug. 20, 2018).

²¹⁶ *But see Day*, 2020 U.S. Dist. LEXIS 222317, at *44–45 (finding that a case where a plaintiff was arrested while filming police could “fit the exception to the no-probable-cause requirement announced in *Nieves*” because “[a] reasonable jury could conclude that the only difference between Plaintiff and the protestors who were not arrested is that Plaintiff was directing his protected speech at the officers, rather than just present at the protest.”).

²¹⁷ *Marom v. City of New York*, No. 15-CV-2017, 2016 WL 916424, at *2, *10 (S.D.N.Y. Mar. 7, 2016), *on reconsideration in part*, No. 15-CV-2017, 2016 WL 5900217 (S.D.N.Y. July 29, 2016).

medic, one of the plaintiffs in the case, “intended to convey a particularized message of political support for OWS” by physically associating with other people involved with the movement—even if they “were not shouting or holding signs.”²¹⁸

Similarly, in *Wise v. City of Portland*, the court rejected a group of protest medics’ “novel position” that “rendering medical aid to support and advance a protest is itself a form of constitutionally protected expression.”²¹⁹ Instead, the court found that protest medics, in short, protest, and therefore do not have “unique recognition under the First Amendment beyond that afforded any individual who attends a protest.”²²⁰

The court in *Wise* also rejected practical arguments put forth by the plaintiffs to charge law enforcement with distinguishing between medics and protestors. The judge emphasized that protest medics “lack a distinct uniform, instead identifying themselves primarily with crosses taped or painted onto ordinary clothing.”²²¹ Additionally, the court noted that as part of the medics’ role at protests, they will “enmesh themselves with other protesters” to provide aid or may even “deliberately stand in the spaces between law enforcement and the protesters.”²²² Because of these considerations, “protest medics’ actions and appearance would not obviously distinguish them from a diverse crowd of protesters.”²²³

Notably, the protest medics bringing the case in *Wise* were from Portland, where other federal courts have established and upheld requirements for law enforcement to exempt journalists and legal observers from the dispersal orders in the city. Here, however, the relief being sought would create “an unworkable distinction between the ordinary protestor, who is subject to dispersal orders, and the protest medics, who are not.”²²⁴

²¹⁸ *Id.* at *10.

²¹⁹ *Wise v. City of Portland*, 483 F. Supp. 3d 956, 967 (D. Or. 2020) (quoting the Electronic Case File).

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at 960.

²²³ *Id.* at 972.

²²⁴ *Id.* at 971; *see also id.* at 967–68 (“This lack of uniformity cuts against the proposition that protest medics are readily identifiable, especially when considering the chaotic situations where officers must distinguish between protest medics and other protesters through split-second judgments.”).

V. THE ‘FLOYD CASELAW’ AND FUTURE FIRST AMENDMENT TRENDS

Dozens of cases now make up the “Floyd Caselaw,” and the group is growing every day. Underlying many of these decisions is the unfortunate reality of future demonstrations against police actions and the inevitability that protestors—as well as journalists—will once again be face to face with officers.²²⁵ As one court noted, a year and a half after George Floyd’s murder, “the likelihood of demonstrations and protests persists” and therefore “the threat of imminent future interactions between [police] and members of the press persists.”²²⁶

Two trends emerging from these decisions signal a broadening acceptance of judicially-created press rights distinct from the general public. First, judges have recognized the blatant unconstitutionality of police targeting journalists in a series of municipality-focused *Monell* claims. Second, courts across the country have created or enshrined press exemptions from otherwise-enforceable dispersal orders through judicially-imposed injunctive orders. Both of these sets of cases seem to acknowledge the impact of widespread attacks on the press in the summer of 2020 and likely foreshadow a new judicial reality where law enforcement is on notice that officers cannot go after members of the press for doing their jobs.

A. *‘Floyd Caselaw’ Monell claims put cities on notice*

In addition to bringing § 1983 claims against individual officers, plaintiffs can also seek to vindicate their First Amendment rights through a suit directly against the city, under what’s become known as a *Monell* claim. Several of the “Floyd Caselaw” decisions have allowed these claims against municipalities to go forward, often tying in contemporary coverage of the widespread attacks on the press as evidence that a certain police department should be “on notice” for requiring proper press interactions.

²²⁵ See, e.g., *Alsaada v. City of Columbus*, No. 2:20-CV-3431, 2021 WL 1725554, at *32 (S.D. Ohio Apr. 30, 2021), *modified sub nom.* *Alsaada v. City of Columbus*, Ohio, No. 2:20-CV-3431, 2021 WL 3375834 (S.D. Ohio June 25, 2021) (“As long [as] police killings are met with public outrage and protest ... there remains a reasonable likelihood that Plaintiffs will face the same challenged conduct again”); *Samaha v. City of Minneapolis*, 525 F. Supp. 3d 933, 945–46 (D. Minn. 2021) (“Although Plaintiffs have not pleaded when they will again participate in protests in Minneapolis, Plaintiffs are not required to divine the date when the next controversy will spark widespread outrage in this community”); *Gaffett v. City of Oakland*, No. 21-CV-02881, 2021 WL 4503456, at *4 (N.D. Cal. Oct. 1, 2021) (noting that police brutality cases “are all too common” and “there is a high chance there will be similar incidents to protest”).

²²⁶ *Goyette v. City of Minneapolis*, No. 20-CV-1302, 2021 WL 5003065, at *9 (D. Minn. Oct. 28, 2021).

The Supreme Court has found that a municipality can be liable for a “deliberate indifference” failure-to-train *Monell* claim when city is on “actual or constructive notice that a particular omission in their training program causes city employees to violate citizens’ constitutional rights” and keeps the program without remedying the issue.²²⁷ “The city’s ‘policy of inaction’ in light of notice that its program will cause constitutional violations ‘is the functional equivalent of a decision by the city itself to violate the Constitution.’”²²⁸

In practice, as at least two circuits have elaborated, this can be proven by meeting a set of distinct factors. Drawing on the Supreme Court’s guidance, the Second Circuit and Third Circuit follow a three-part test as articulated in *Carter v. City of Philadelphia*. In order for a plaintiff to allege “deliberate indifference” and demonstrate a municipality’s failure to train or supervise they need to prove that “(1) municipal policymakers know that employees will confront a particular situation; (2) the situation involves a difficult choice or a history of employees mishandling; and (3) the wrong choice by an employee will frequently cause deprivation of constitutional rights.”²²⁹

This is the test the court used in *Martínez v. City of Asbury Park*, finding that a journalist’s—Gustavo Martínez, mentioned above—failure-to-train allegations met each criterion. For part one, the court found it plausible that the municipality “knew that their officers would ‘confront a particular situation’—namely, journalists or reporters covering a protest.”²³⁰ Additionally, this situation would involve “a difficult task—namely, how to identify and interact with reporters during and after a protest.”²³¹ And, finally, the court gave credence to Martínez’ allegation that “failures to navigate interactions with reporters properly could ‘frequently cause deprivation of constitutional rights.’”²³² Thus, Martínez was able to move forward with his claim against Asbury Park.

An examination of the court’s reasoning reveals a series of findings that may signal broader acceptance of standalone press rights. The court cited several pertinent facts in evaluating the first two criteria, finding that the city reasonably should have known that their officers would confront reporters

²²⁷ *Connick v. Thompson*, 563 U.S. 51, 61 (2011).

²²⁸ *Id.* at 61–62.

²²⁹ *Carter v. City of Philadelphia*, 181 F.3d 339, 357 (3d Cir. 1999) (citing *Walker v. City of New York*, 974 F.2d 293, 297–98 (2d Cir. 1992)).

²³⁰ *Martínez v. City of Asbury Park*, No. 20-8710, 2021 U.S. Dist. LEXIS 43944, at *16 (D.N.J. Mar. 5, 2021).

²³¹ *Id.* at *16–17.

²³² *Id.* at *17.

covering a protest—effectively, that they were “on notice” of this particular situation—and the decision of how to handle these journalists would require “more than the application of common sense.”²³³ Of note was that Martínez had a press pass from the New Jersey Police Press Credential Program, which “ensures that law enforcement in New Jersey can identify journalists and tailor their interactions with them,” and that Asbury Park’s emergency curfew in place that night exempted “credentialed members of the media.”²³⁴

These facts could likely apply to most journalists arrested while covering protests. As described above, press passes and curfew exemptions are standard practice for the professional press. This creates a situation where any municipality should be aware police officers will encounter journalists at a protest and that these encounters require special considerations. Similarly, regardless of whether the specific circuit has outlined a broad right to record or otherwise engage with matters of public interest, journalists’ conduct is uniformly acknowledged to be protected by the First Amendment. Members of the press are well situated to show that an unconstitutional arrest is emblematic of a broader unlawful policy or failure-to-train, especially when they have a press pass and are exempted from general regulations.²³⁵

The *Martínez* court also highlighted something potentially less obvious in finding the journalist could move forward with his claim, which could be a potential harbinger for similar cases. In finding the police department should have been on notice, the court noted that “[o]ther journalists were ostensibly unlawfully arrested at protests around the country in summer 2020.”²³⁶ The widespread coverage of this unconstitutional practice was evidently enough to make municipalities aware of the need to create a policy response. This could perhaps be the silver lining of the scores of targeted attacks and unlawful arrests that journalists faced while covering protests in 2020—it put cities and police departments across the country on notice.

This language in *Martínez* recalls similar reasoning in other cases allowing *Monell* claims following the police response to the protests in 2020. Linda Tirado’s lawsuit against the Minneapolis Police Department, for example, was able to go forward in part because the city allegedly was aware of unlawful targeting of journalists through “broad reporting by news outlets”

²³³ *Id.* (quoting *Walker*, 974 F.2d at 297).

²³⁴ *Id.* at *16; see also *id.* at *17 (“The existence of the New Jersey Police Press Credential Program suggests that fulfilling those obligations calls for more than common sense.”).

²³⁵ See, e.g., *Tirado v. City of Minneapolis*, 521 F. Supp. 3d 833, 842 (D. Minn. 2021) (finding that “disparaging comments made by [police] to two journalists about their press passes and exemption from the curfew” was evidence that pointed to a “pattern of misconduct.”).

²³⁶ *Martínez*, 2021 U.S. Dist. LEXIS 43944, at *16.

and “social media monitoring efforts.”²³⁷ This was sufficient to allege that the city knew about the unofficial unconstitutional policy, and stayed the course. Similarly, a court allowed a *Monell* suit to proceed against the municipal government of Louisville, Kentucky—accusing the police department of using aggressive force against journalists reporting on local protests—because the city was on notice “of a pattern of constitutional violations” based on “local and national news articles” on officers’ tactics.²³⁸

In all three of the above cases, the courts acknowledged that media reporting from the time of the protests themselves could play a substantive role in establishing *Monell* claims against a city. Each decision allowing the *Monell* claims to go forward credited contemporaneous accounts of police misconduct—locally in Minneapolis and Louisville, and nationally in Asbury Park—as putting government officials on notice that this was something necessary to address. This stands in contrast to another federal court decision from a few years before, where a judge found that a police department would not have the knowledge necessary to meet a deliberate indifference standard for not addressing policies for filming police activity just based on a few cases—one national and two within the circuit—involving individuals filming the police.²³⁹

In *Basler v. Barron*—a 2017 case where a plaintiff sued Harris County, Texas which includes Houston—the court found that even assuming the county had knowledge of these past cases, it was too much of a leap to claim that “mere knowledge of these events gives rise to a conclusion that Harris County was deliberately indifferent and consciously disregarded any risk that there might be retaliation for filming.”²⁴⁰

In essence, these past incidents were not enough to establish that the police department would have been on notice for a failure to train claim. It seems likely, however, that following the high-profile attacks on members of the media during 2020’s protests, this case may have come to a different conclusion if decided now. Journalists are well positioned to argue—and courts should find—that any municipality in the country is now on notice.

²³⁷ *Tirado*, 521 F. Supp. 3d at 843.

²³⁸ *Scott v. Louisville/Jefferson Cnty. Metro Gov’t*, 503 F. Supp. 3d 532, 533–34 (W.D. Ky. 2020).

²³⁹ See *Basler v. Barron*, No. CV H-15-2254, 2017 WL 477573, at *11 (S.D. Tex. Feb. 6, 2017) (concluding that “Basler failed to provide the evidence required to establish failure to train was a policy of the department.”).

²⁴⁰ *Id.*; see also *Martinez v. City of Santa Rosa*, 499 F. Supp. 3d 748, 749 (N.D. Cal. 2020) (dismissing a municipal liability claim for First Amendment violations because “generic, boilerplate terms” were insufficient “to hold city liable under § 1983 for alleged retaliation by individual officers against protestors based on their speech or filming”)

B. “*Floyd Caselaw*” injunctive relief establishes press privileges

Someday, a court may need to decide whether the First Amendment protects journalists and authorized legal observers, as distinct from the public generally, from having to comply with an otherwise lawful order to disperse from city streets when journalists and legal observers seek to observe, document, and report the conduct of law enforcement personnel; but today is not that day.²⁴¹

Although this theoretically remains an open question, it is axiomatic within modern First Amendment jurisprudence that members of the press do not receive special rights or privileges due to their profession. One of the most intriguing legal determinations to emerge from the 2020 demonstrations is an unusual line of cases stemming from protests in Portland. The cases appear to have established a dispersal order exemption for journalists as a matter of judge-made law.²⁴² As part of a temporary restraining order (TRO), the first of these cases—*Woodstock v. City of Portland*—exempts journalists from dispersal orders and prevents local law enforcement from “arresting, threatening to arrest, or using physical force directed against any person whom they know or reasonably should know is a Journalist.”²⁴³ In essence, the court created a dispersal order carve out for members of the press.

Although this ruling was expanded to include protections from federal law enforcement in *Index Newspapers*²⁴⁴ and formalized in an agreement with the city,²⁴⁵ granting these rights to journalists flies in the face of established media law norms. The exemption for journalists in Portland “seems to run afoul of the principle that the press does not have special status from other speakers when it comes to what they can say and their access to spaces,”

²⁴¹ *Index Newspapers v. City of Portland*, 480 F. Supp. 3d 1120, 1126 (D. Or. 2020).

²⁴² Although the injunction underlying this exemption remains in place, a district court judge signaled in January 2022 that the injunction could be dissolved if the Ninth Circuit remands the case, citing “the significantly reduced number and size of protests in Portland” and “a significantly reduced federal response involving the use of force.” *Index Newspapers LLC v. City of Portland*, No. 3:20-CV-1035-SI, 2022 WL 72124, at *6 (D. Or. Jan. 7, 2022)

²⁴³ *Woodstock v. City of Portland*, No. 3:20 Civ. 1035-SI, 2020 WL 3621179, at *4 (D. Or. July 2, 2020) (establishing that journalists “shall not be required to disperse following the issuance of an order to disperse, and . . . shall not be subject to arrest for not dispersing following the issuance of an order to disperse.”).

²⁴⁴ *Index Newspapers*, 480 F. Supp. 3d at 1120.

²⁴⁵ *Id.* at 1157.

according to Florida International University law professor Howard Wasserman.²⁴⁶

Rather than standing out as an oddity, however, the Portland cases now stand as the first of several federal court injunctive orders granting the press special protections against police action. To understand how much this thinking has changed in less than a year, it's worthwhile to examine two rulings from *Goyette v. City of Minneapolis*—one released in June 2020 and one released in April 2021. In the June decision, the court found that a TRO that would enjoin police officers from arresting and threatening members of the news media was unnecessary under the circumstances.²⁴⁷ While there were “extensive allegations of egregious conduct by law enforcement directed at members of the news media,” the court found that no facts “plausibly demonstrate that such conduct is likely to recur imminently.”²⁴⁸

The April decision came out quite differently, as the court granted a TRO exempting journalists from general dispersal orders and forbidding police from using force against members of the press.²⁴⁹ Notably, the court rejected the city's argument that journalists have “no right to ‘remain in an active dispersal area,’” instead finding that a dispersal order that includes journalists is not “narrowly tailored.”²⁵⁰

In contrast to the findings of the June 2020 decision, the harm journalists may face at the hands of police officers “is no longer speculative or a mere possibility”—“Rather, the protests have continued and the harm exists.”²⁵¹ The court cited “the events that have occurred over the last year” as evidence for the TRO, seemingly taking the likelihood of constitutional violations as a given.²⁵² The “demonstrations and protests likely will continue” and

²⁴⁶ Howard Wasserman, (*Update*) *Grab Your Fedora, We Are All Journalists Now and Other Thoughts on the Portland TRO*, PRAWFSBLAWG (July 24, 2020, 8:26 AM), <https://prawfsblawg.blogs.com/prawfsblawg/2020/07/grab-your-fedora-we-are-all-journalists-now-and-other-thoughts-on-the-portland-tro.html#more> [<https://perma.cc/T7BG-CHKK>].

²⁴⁷ *Goyette v. City of Minneapolis*, No. 20 Civ. 1302, 2020 WL 3056705, at *19 (D. Minn. June 9, 2020).

²⁴⁸ *Id.* at *3–4.

²⁴⁹ See *Goyette*, 338 F.R.D. at 121 (enjoining the Minneapolis police department from “arresting, threatening to arrest, or using physical force . . . directed against any person whom they know or reasonably should know is a Journalist . . . unless the State Defendants have probable cause to believe that such individual has committed a crime”).

²⁵⁰ *Id.* at 109, 116.

²⁵¹ *Id.* at 119.

²⁵² *Id.*

journalists “cannot document these ongoing events of public importance” without the court intervening in police action.²⁵³

These decisions following the George Floyd protests make it clearer than ever that certain words, actions, and attire signify that an individual is a member of the press. The Portland TRO lists what qualifies as being an “indicia of being a Journalist,” which ostensibly creates a badge of protection against police action. The list in *Woodstock* includes, while not limiting what could count as an indicia, “visual identification as a member of the press, such as by carrying a professional or authorized press pass or wearing a professional or authorized press badge or distinctive clothing that identifies the wearer as a member of the press.”²⁵⁴ Similarly, *Goyette* finds that indicia that establishes a journalist’s “visual identification” includes a press credential—such as a pass or badge—as well as “distinctive clothing that identifies the wearer as a member of the press.”²⁵⁵ Another recent TRO issued by a federal court, while not expressly granting dispersal order exemptions for these groups, takes this process one step further. In *Alsaada v. City of Columbus*, the court ordered police officers to “recognize that individuals legitimately displaying ‘press,’ ‘media,’ ‘reporter,’ ‘paramedic,’ ‘medic,’ ‘legal observer’ . . . are permitted to be present in a position enabling them to record at protests and/or to intervene to assist individuals who appear to have been injured.”²⁵⁶ The court also granted protections to citizen journalists, ruling that “all individuals, regardless of their occupation or nonviolent activity, are permitted to record at protests or whenever any police officer interacts with the public.”²⁵⁷

There is a strong argument that these types of arrangements work. As the court noted in *Index Newspapers*, where it applied a similar TRO to federal law enforcement, the fact that the City of Portland did not ask to modify the original restrictions when adopting it as a primarily injunction “is compelling evidence that exempting journalists . . . is workable.”²⁵⁸ Additionally, a later

²⁵³ *Id.* The judicial order at the heart of the *Goyette* cases has subsequently been converted to a preliminary injunction—see *Goyette v. City of Minneapolis*, No. 20-CV-1302 (WMW/DTS), 2021 WL 5003065 (D. Minn. Oct. 28, 2021)—and enshrined as a monitored injunction under a settlement agreement—see *Goyette v. City of Minneapolis*, No. 20-CV-1302 (WMW/DTS), 2022 WL 370161, at *1 (D. Minn. Feb. 8, 2022).

²⁵⁴ *Woodstock v. City of Portland*, No. 3:20 Civ. 1035-SI, 2020 WL 3621179, at *4 (D. Or. July 2, 2020).

²⁵⁵ *Goyette*, 338 F.R.D. at 122.

²⁵⁶ *Alsaada v. City of Columbus*, No. 20 Civ. 3431, 2021 WL 1725554, at *47 (S.D. Ohio Apr. 30, 2021).

²⁵⁷ *Id.*

²⁵⁸ *Index Newspapers v. City of Portland*, 480 F. Supp. 3d 1120, 1148 (D. Or. 2020).

decision on the order featured expert testimony establishing that law enforcement personnel “are able to protect public safety without dispersing journalists” and “can differentiate press from protesters, even in the heat of crowd control.”²⁵⁹ Somewhat ironically, law enforcement may have inadvertently provided courts with evidence of the efficacy of these injunctions by targeting journalists. As one court examining the *Goyette* order found, “numerous examples of law enforcement officers specifically and intentionally targeting identifiable members of the press, both verbally and physically ... belies any suggestion that members of the press were somehow indistinguishable from others.”²⁶⁰

The TROs that have come out following the Portland decisions demonstrate that this may be a lasting trend. Citing to these cases, *Goyette* outlines a preliminary injunction framework proven to be effective—in circumstances where police forces were using force and arrest against journalists, courts “have required members of the press to adequately identify themselves, refrain from impeding law enforcement activities, and comply with all laws other than general dispersal orders.”²⁶¹ It seems likely courts will continue to implement similar injunctions, regardless of whether the privileges granted directly derive from First Amendment principles.

CONCLUSION

Members of the press traditionally occupy an odd role at protests. On the one hand, journalists are entitled to no different rights than any other individual, including no special access to newsworthy events. On the other hand, however, government officials, police officers, and judges all seemed to recognize that journalists have a distinct role in American society—therefore, it may be reasonable to give them some leeway while doing their job.

The protests following George Floyd’s murder in 2020 upended any protections the press thought they had. While it was not uncommon for journalists to be arrested at protests, the U.S. had rarely if ever seen the widespread targeting of clearly marked members of the press—as well as the

²⁵⁹ *Id.* at 1136.

²⁶⁰ *Goyette v. City of Minneapolis*, No. 20-CV-1302 (WMW/DTS), 2021 WL 5003065, at *8 (D. Minn. Oct. 28, 2021), *superseded sub nom.* *Goyette v. City of Minneapolis*, No. 20-CV-1302 (WMW/DTS), 2022 WL 370161 (D. Minn. Feb. 8, 2022).

²⁶¹ *Goyette*, 338 F.R.D. at 118.

widespread condemnation of police action by commentators, activists, and government officials.

These instances of police violence against the press may have pushed the judiciary to create certain judge-made protections for the press. The implied notice in recent *Monell* claims and the willingness of judges to issue injunctions granting journalists distinct privileges both signal an emerging recognition of unique press rights, in contrast to traditionally held First Amendment principles. Courts may not feel limited to offering these protections solely to the press—rather, legal observers, citizen journalists, and medics could all be entitled to judicially-enacted carve outs.

Judges should not hesitate to acknowledge the distinct roles of these groups and enact protections against police retaliation. The “Floyd Caselaw” is only growing and will hopefully continue to provide decisions that allow for the safe performance of First Amendment protected activity. These judicial protections should not stop at the press, but deserve to be extended to other groups such as legal observers, citizen journalists, and medics. After all, the world only knows the truth of how George Floyd died “because citizens standing on a sidewalk exercised their First Amendment rights and filmed a police officer.”²⁶²

²⁶² *Index Newspapers*, 977 F. 3d at 830.