No. 21-1116

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Michael Faulk,
Plaintiff-Appellee,
v.
Gerald Leyshock, Scott Boyher, Timothy Sachs, Randy Jemerson, Matthew Karnowski, Brian Rossomanno, Andrew Wismar, Robert Stuart, Anthony Wozniak, Tom Long, John Gentilini, Bryan Barton, Lawrence O'Toole, Brian Gonzales, James Harris III, and James Wood,
Defendants-Appellants.

Appeal from an Order by the United States District Court
for the Eastern District of Missouri, Eastern Division
Case No. 4:18-cv-00308-JCH

UNOPPOSED MOTION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 29 MEDIA ORGANIZATIONS FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE

Bruce D. Brown, Esq.
Counsel of Record
Katie Townsend, Esq.*
Gabe Rottman, Esq.*
Emily Brown, Esq.*
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Ste. 1020
Washington, D.C. 20005
Telephone: (202) 795-9300
Facsimile: (202) 795-9310
bbrown@rcfp.org
**Of counsel*

The Reporters Committee for Freedom of the Press ("Reporters Committee") and 29 media organizations (collectively, "amici") move for leave to file the attached amici curiae brief in support of Plaintiff-Appellee Michael Faulk pursuant to Federal Rule of Appellate Procedure 29(a)(3).[1] Pursuant to Federal Rule of Appellate Procedure 29, amici endeavored to obtain the consent of all parties to the filing of the amici brief before moving the Court for permission to file the proposed brief. Both parties have consented to the filing of this brief.

A motion for leave to file an amici brief "must be accompanied by the proposed brief and state: (A) the movant's interest; and (B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(a)(3). Amici's proposed brief is included as an Exhibit to this motion.

As members of and advocates for the news media, amici have a strong interest in the proper and robust application of First Amendment protections for newsgathering at protests. These protections promote both journalistic safety and the free flow of information to the public about protest activity and the police response. The issue presented in this case—whether it is actually or objectively

[1] A list of all amici, a supplemental statement of identity and interest of amici, and corporate disclosure statements for all amici are included in the attached amici brief.

reasonable for officers to believe that a journalist, clearly identified and identifiable as such while covering protest activity, is part of an unlawful assembly based on mere proximity to a crowd—is of significant importance to individual journalists, the news media, and the public. Journalists, as proxies for the public, must observe protests first-hand to accurately report on what occurs at such assemblies, including the manner in which law enforcement officers enforce dispersal orders and conduct crowd control. Were Appellant's arguments concerning probable cause, arguable probable cause, or reasonable suspicion credited, they would allow police officers to arrest individuals whom they know or should know are journalists on the sole ground that the journalist is proximate to a crowd that law enforcement declares, at its discretion, an unlawful assembly. Such a result would ultimately chill news reporting vital to the public interest and imperil journalistic safety.

The proffered amici brief will aid the Court because it sheds light on the risks to First Amendment interests when law enforcement subjects journalists engaged in lawful newsgathering to kettling, the use of force, or arrest. Amici explain that Appellant's "unit" theory of probable cause cannot be extended to include journalists conducting lawful newsgathering. Rigorous protection for the newsgathering rights of journalists covering protests is not only compelled by the

First Amendment, it is essential if the press is to fulfill its constitutional obligation to ensure the government is accountable to the people.

For these reasons, amici respectfully request leave to file the attached amici curiae brief in support of Plaintiff-Appellee.

Dated: July 2, 2021

Respectfully Submitted,

/s/ Bruce D. Brown

Bruce D. Brown, Esq.
Counsel of Record
Katie Townsend, Esq.*
Gabe Rottman, Esq.*
Emily Brown, Esq.*
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Ste. 1020
Washington, D.C. 20005
Telephone: (202) 795-9300
Facsimile: (202) 795-9310
** Of Counsel*

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with:

1) the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 493 words, as calculated by the word-processing system used to prepare the motion;
2) the typeface and type style requirements of Fed. R. App. P. 27(d)(1)(E) and Fed. R. App. P. 32(a)(5)–(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman.
3) Eighth Cir. R. 28A(h) in that this motion has been scanned for viruses and is virus-free.

Dated: July 2, 2021

/s/ Bruce D. Brown

Bruce D. Brown, Esq.
Counsel of Record
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2021, I electronically filed the foregoing Unopposed Motion of the Reporters Committee for Freedom of the Press and 29 Media Organizations for Leave to File Amici Curiae Brief in Support of Plaintiff-Appellee with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: July 2, 2021

/s/ Bruce D. Brown
Bruce D. Brown, Esq.
Counsel of Record
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS

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BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 29 MEDIA ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLEE

Bruce D. Brown, Esq.
Counsel of Record
Katie Townsend, Esq.*
Gabe Rottman, Esq.*
Emily Brown, Esq.*
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Ste. 1020
Washington, D.C. 20005
Telephone: (202) 795-9300
Facsimile: (202) 795-9310
bbrown@rcfp.org
**Of counsel*

CORPORATE DISCLOSURE STATEMENT

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

BuzzFeed Inc. is a privately owned company, and National Broadcasting Company (NBC) owns 10% or more of its stock.

California News Publishers Association ("CNPA") is a mutual benefit corporation organized under state law for the purpose of promoting and preserving the newspaper industry in California. No entity or person has an ownership interest of ten percent or more in CNPA.

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The National Press Club is a not-for-profit corporation that has no parent company and issues no stock.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

The New York Times Company is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly held company owns 10% or more of its stock.

The News Leaders Association has no parent corporation and does not issue any stock.

The News Guild – CWA is an unincorporated association. It has no parent and issues no stock.

Online News Association is a not-for-profit organization. It has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

Pulitzer Center on Crisis Reporting is a non-profit organization with no parent corporation and no stock.

Radio Television Digital News Association is a nonprofit organization that has no parent company and issues no stock.

The Society of Environmental Journalists is a 501(c)(3) non-profit educational organization. It has no parent corporation and issues no stock.

Society of Professional Journalists is a non-stock corporation with no parent company.

The Tully Center for Free Speech is a subsidiary of Syracuse University.

WP Company LLC d/b/a The Washington Post is a wholly-owned subsidiary of Nash Holdings LLC, a holding company owned by Jeffrey P. Bezos. WP Company LLC and Nash Holdings LLC are both privately held companies with no securities in the hands of the public.

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INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press (the "Reporters Committee"), BuzzFeed, California News Publishers Association, Courthouse News Service, The Daily Beast Company LLC, Dow Jones & Company, Inc., The E.W. Scripps Company, First Amendment Coalition, First Look Institute, Inc., Gannett Co., Inc., Investigative Reporting Workshop at American University, The McClatchy Company, LLC, The Media Institute, MediaNews Group Inc., Meredith Corp. d/b/a KMOV-TV, Mother Jones, MPA - The Association of Magazine Media, National Press Club Journalism Institute, The National Press Club, National Press Photographers Association, The New York Times Company, The News Leaders Association, The NewsGuild - CWA, Online News Association, Pulitzer Center on Crisis Reporting, Radio Television Digital News Association, Society of Environmental Journalists, Society of Professional Journalists, Tully Center for Free Speech, and The Washington Post.[1] Amici have filed an accompanying motion seeking leave of Court to file this amici brief. Plaintiff-Appellee and Defendant-Appellant consent to the filing of this brief.

Lead amicus the Reporters Committee is an unincorporated nonprofit association. The Reporters Committee was founded by journalists and media

[1] No party's counsel authored any part of this brief. No person other than amici or their counsel contributed money intended to fund the brief's preparation or submission.

lawyers in 1970, when the nation's press faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

As members and representatives of the news media, amici have a strong interest in ensuring the news media's ability to safely and accurately report on what occurs during protests and demonstrations, including the manner in which law enforcement officers enforce dispersal orders and conduct crowd control. Accordingly, amici have a strong interest in the appropriate disposition of the motion to dismiss in this case—in which a journalist, clearly identifiable as such, has alleged he was kettled, assaulted, maced, arrested, and held for 13 hours, in a manner that completely halted his ability to gather and report the news.

Amici respectfully submit this brief to emphasize the important role played by the news media in this context, where the public interest in accurate information about the actions of the government and protesters is at its apex. Rigorous protection for the newsgathering rights of journalists covering protests is not only compelled by the First Amendment, it is essential if the press is to fulfill its constitutionally recognized function of holding the government accountable to the

governed. For the reasons herein, amici urge the Court to uphold the district court's order denying Defendant-Appellant James Wood's motion to dismiss.[2]

[2] Amici also urge the Court to uphold the district court's order denying Defendant-Appellant's motion for judgment on the pleadings, for the reasons set forth in Appellee's brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is another case involving the detention and arrest of a reporter during the demonstrations sparked by the acquittal of St. Louis police officer Jason Stockley for the death of Anthony Lamar Smith on September 15, 2017.

Appellee, an award-winning journalist, was assigned by the St. Louis Post-Dispatch to cover the protests. On the night of September 17, 2017, Appellee was downtown in St. Louis, reporting on the aftermath of events that day. He alleges that St. Louis police corralled him in an illegal "kettle," tackled him, maced him, struck him with a baton, arrested him for "failure to disperse," and held him for 13 hours, even when he was clearly identifiable as a member of the press, repeatedly identified himself as such, and was manifestly engaged in lawful newsgathering. J.A. at 55, 60.

When law enforcement subjects journalists engaged in lawful newsgathering to kettling, the use of force, or arrest—particularly, as here, when they claim to be effectuating a general dispersal order—they not only violate important First Amendment protections, *see Chestnut v. Wallace*, 947 F.3d 1085, 1091 (8th Cir. 2020) (recognizing that the First Amendment right to observe police activity is clearly established), they also deprive the public of essential reporting on how law enforcement itself responds to protest activity. Such conduct is thus a particularly acute threat to First Amendment first principles and an informed electorate.

The district court's order denying Appellant's motion to dismiss properly recognized that Appellee's allegations are sufficient to defeat a claim of qualified immunity, as those allegations detail the violation of "clearly established" constitutional rights by Appellant. *See Faulk v. City of St. Louis*, No. 4:18-cv-308, 2021 WL 37989, at *5 (E.D. Mo. Jan. 5, 2021). Appellant now raises arguments before this Court that actual probable cause or objectively reasonable ("arguable") probable cause existed to arrest Appellee, and that reasonable suspicion justified the initial detention, thus triggering qualified immunity. Specifically, Appellant argues that Appellee's proximity to the assembly rendered him part of a "unit" engaged in unlawful activity. Appellant also argues that Appellee's *failure to intervene* while observing and reporting on earlier incidents of vandalism, hours before his arrest, also established probable cause or arguable probable cause under the city's unlawful assembly ordinance.

Appellee has extensively briefed why the record below supports the conclusion that there was no unlawful assembly at all, and therefore no probable cause, arguable probable cause, or reasonable suspicion to detain or arrest him. Amici respectfully write to offer three arguments supporting the proposition that, even had there been unlawful activity by some individuals in the assembly, Appellee's status as a working journalist covering the protests and mass arrest would preclude the existence of any basis to support his detention and arrest.

First, the ability of reporters to observe and document protests in person is indispensable in facilitating the free flow of information about both protests and how law enforcement implements crowd control measures. Accordingly, were mere proximity to a protest sufficient grounds to use force against or arrest a journalist, it would dramatically stanch that flow of information to the electorate.

Second, Appellant argues that there was probable cause or arguable probable cause to arrest, or reasonable suspicion to detain, Appellee because he and the other individuals he was in proximity to were acting as a "unit."[3] Again, Appellee offers significant support for the proposition that there was no "unit" of *protesters* engaged in unlawful activity at the time of the kettle. But, even if there were, a journalist, clearly identifiable as such and engaged in lawful newsgathering, cannot be part of that "unit." Were that the case, law enforcement would always have grounds to detain or arrest journalists covering the dispersal of an assembly, who necessarily must be near the activity to do their job.

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[3] Appellant limits the argument concerning reasonable suspicion to the initial detention, not the subsequent arrest, but the reasonable suspicion argument rests on the same "unit" theory as the probable cause or arguable probable cause arguments. *See* Appellant Br. at 43–45. Amici discuss them together, as all three suffer from the same fatal flaw. That is, any detention must rest on particularized suspicion of criminal activity, which simply cannot exist when the conduct at issue is lawful newsgathering (or any First Amendment protected activity, standing alone).

Third, Appellant argues that there was probable cause or arguable probable cause to arrest Appellee because Appellee, *in his capacity as a reporter*, observed property damage by *other* individuals hours before the arrest, and failed to intervene in violation of St. Louis City Ordinance § 15.52.010. This claim, if credited, would have striking implications for press freedom. Not only would it chill newsgathering generally by threatening liability for merely documenting the unlawful acts of others, it would also harm the public's right to know about protest activity, and the police response, itself. Were § 15.52.010 construed in this manner, it would be patently unconstitutional.

ARGUMENT

I. Reporters cannot safely inform the public about protest activity if mere presence at the scene provides grounds to arrest or assault them.

The ability to gather news in-person is essential to a functional free press. Journalists have long covered protests, and their reports, pictures, and videos from those events have informed the public about some of the most pressing matters of the day. From covering the civil rights movement of the 1950s and 1960s[4] to broadcasting protesters' chants that the "whole world is watching" in Chicago in

[4] David Treadwell, *Journalists Discuss Coverage of Movement: Media Role in Civil Rights Era Reviewed*, L.A. Times (Apr. 5, 1987), https://perma.cc/S9TS-HRRS (quoting Rep. John Lewis stating, "The civil rights movement would have been like a bird without wings if it hadn't been for the news media").

1968[5] to photographing the iconic image of a teenage girl kneeling over the body of a slain protester at Kent State in 1970,[6] some of the most influential stories and images of the twentieth century were captured by journalists at protests. More recently, reporters across America have covered numerous acts of civil assembly, including demonstrations in support of former President Donald Trump,[7] Black Lives Matter protests,[8] the Youth Climate Strike,[9] and white supremacist rallies.[10]

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[5] Robert Davis, *The 1968 Democratic National Convention*, Chi. Tribune, https://perma.cc/NYG2-HV4S?type=image (last accessed Jan. 30, 2018) (describing television news cameramen at the Conrad Hilton Hotel capturing video of protesters chanting and being arrested and beaten during the 1968 protests of the Democratic National Convention).

[6] Sam Roe, *Thirteen Seconds. Dozens of Bullets. One Explosive Photo*, Colum. Journalism Rev. (Spring 2016), https://bit.ly/3qGy46i (describing how student journalist John Filo took the photograph at Kent State that "went on to win the 1971 Pulitzer Prize for spot news photography and become a fixture in history books").

[7] *See, e.g.*, Jason Slotkin & Suzanne Nuyen, *Trump Supporters, Counterprotesters Clash At D.C. Rally Contesting Biden's Victory*, NPR (Nov. 14, 2020, 12:21 P.M.), https://n.pr/3xdyHqu.

[8] *See, e.g.*, Nicole Chavez et al., *Tens of thousands march in largest George Floyd protests so far in the US*, CNN (June 6, 2020, 10:42 P.M.), https://perma.cc/32C2-CPEZ.

[9] *See* Rachel Becker, *Students 'strike for climate' across the United States*, The Verge (Mar. 15, 2019, 2:00 P.M.), https://perma.cc/4SJQ-EEVR.

[10] *See, e.g.*, *Charlottesville: Race and Terror*, VICE News (Aug. 21, 2017), https://perma.cc/44XK-YUHM (documentary showing VICE News reporter Elle Reeve as she followed white nationalist leaders during the "Unite the Right" rally in Charlottesville, Virginia).

Journalists' presence at protests benefits the public. *See Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) ("[Free press] guarantees are not for the benefit of the press so much as for the benefit of all of us."). Just as news organizations rely on firsthand accounts to ensure the accuracy and completeness of their stories in other contexts, *see, e.g.*, Liz Szabo, *On-the-Ground Reporting: Why It Matters*, NiemanReports (Sept. 16, 2007), https://perma.cc/5JJB-2Q8H, on-the-ground reporting is essential when covering protests, which can be fast-paced and unpredictable. Members of the news media serve as the public's eyes and ears at public demonstrations, observing protesters and government officials alike.

The ability to be in public spaces to report on public assembly is core to the press's role in reporting on matters of public concern. "Indeed, the Supreme Court has repeatedly observed that excluding the media from public fora can have particularly deleterious effects on the public interest, given journalists' role as 'surrogates for the public.'" *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 830 (9th Cir. 2020) ("*Index Newspapers*") (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572–73 (1980)). "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 to bring to him in convenient form the facts of those operations. . . . Without the information provided by the press most of us and many of our representatives

would be unable to vote intelligently or to register opinions on the administration of government generally." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 490–492 (1975); *see also* 9 Writings of James Madison 103 (Gaillard Hunt ed., 1910) ("A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.").

In gathering the news, journalists covering protests routinely follow demonstrators down public streets and sidewalks, so they can better serve the public by reporting an event they personally witnessed, rather than something recounted by bystanders. As one journalist who was reporting on the September 17 Jason Stockley protest wrote of the police response, "It is important that journalists be allowed to do their job. It is our responsibility to bear witness to newsworthy events. When police ignore the people who are smashing windows and destroying property in order to focus on handcuffing and berating journalists, it impedes our ability to show the world what is happening." Davis Winborne, *Commentary: Police posed a greater danger to journalists than demonstrators in St. Louis*, Columbia Missourian (Sept. 24, 2017), https://perma.cc/3Y92-AFWK.

Journalists who are near protest activities risk detention or arrest simply for being in the vicinity of protesters engaged in unlawful acts. The U.S. Press Freedom Tracker recorded the arrests of 117 journalists in 2020, the "vast majority" of which occurred while the journalist was documenting protests. *See*

New report: A record breaking number of journalists arrested in the U.S. this year, Freedom of the Press Foundation (Dec. 14, 2020), https://perma.cc/F2RT-GWMU. While journalists are not above the law and have no right to riot or engage in acts of assault or vandalism, lawful newsgathering in proximity to protest activity when others commit crimes is not criminal. Nevertheless, as is alleged to have happened here, reporters at protests are often swept up in mass arrests through a technique known as "kettling"—a police tactic in which officers corral a crowd into a confined space and then arrest everyone as a group.

The public has an interest in monitoring when dispersal orders are issued in response to protests and how they are enforced. *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1304 (8th Cir. 1986) ("Certainly, speech about government and its officers, about how well or badly they carry out their duties, lies at the very heart of the First Amendment."). This interest is particularly profound when those protests are in response to police conduct itself. *Cf. Index Newspapers LLC v. City of Portland*, 480 F. Supp. 3d 1120, 1145–49, 1155 (D. Or. 2020) ("When wrongdoing is underway, officials have great incentive to blindfold the watchful eyes of the Fourth Estate.") (quoting *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012)), *aff'd sub nom. Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817 (9th Cir. 2020). Preserving the ability of the press to report on police action helps ensure that such actions are carried out "fairly to all concerned,"

discouraging "misconduct of participants, and decisions based on secret bias or partiality." *Richmond Newspapers*, 448 U.S. at 569.

In short, the journalistic tradition of providing firsthand accounts of demonstrations requires reporters to be near protesters to observe their activities. And engaging in newsgathering, being present when others may break the law, and being in proximity to the targets of crowd-control efforts are not crimes. Appellee's actions, as recounted in his amended complaint, were consistent with those of a working journalist engaged in lawful newsgathering.

II. A journalist's mere presence at the scene of an unlawful assembly cannot support probable cause, arguable probable cause, or reasonable suspicion to believe that the journalist is a participant.

In connection with his qualified immunity claims, Appellant makes two related but distinct arguments in support of the contention that probable cause, arguable probable cause, or reasonable suspicion existed to detain or arrest Appellee. First, Appellant argues that at the time of the arrest, and based on his proximity to the scene, Appellee was acting as part of an unlawful "unit" in violation of state statutes and St. Louis city ordinances regarding impediments to traffic, City Ordinance § 17.16.275(A); refusal to disperse, *id.* § 17.16.275(E); and unlawful assembly, *id.* § 15.52.010. *See* Appellant Br. at 39–42. Second, Appellant argues that Appellee's reporting on alleged vandalism hours before the arrest, and his failure to intervene, also provides probable cause or arguable

probable cause for the arrest under the unlawful assembly ordinance. Appellant Br. at 38–39. Amici address the former argument here and the latter in Part III, *infra*.

With respect to Appellant's "unit" theory at the time of the arrest, *see Bernini v. City of St. Paul*, 665 F.3d 997, 1003 (8th Cir. 2012) (quoting *Carr v. District of Columbia*, 587 F.3d 401, 407 (D.C. Cir. 2009)), as an initial matter, finding probable cause, arguable probable cause, or reasonable suspicion based on mere proximity would be especially inappropriate here because Appellee alleges that the officers were on notice that Appellee was a journalist. J.A. at 55. ("At all times while Mr. Faulk covered these events he wore his Post-Dispatch ID."); *id.* at 60 ("As he was grabbed by the officer, Mr. Faulk shouted several times, 'Post-Dispatch!' and lifted his media credential ID card to show to the officer. This ID card had been hanging visibly around Mr. Faulk's neck for the entirety of the evening.").

In multiple cases presenting a similar fact pattern during the protests catalyzed by the murder of George Floyd by Officer Derek Chauvin in Minneapolis, courts have granted injunctive relief to limit the use of general dispersal orders in a manner that would lead to the arrest or use of force against individuals not engaged in unlawful activity, including journalists. These cases recognize that if an officer knows *or has reason to know* that a reporter is a

reporter, and the reporter is compliant with lawful police requests, First Amendment protections, including the right to observe police activity and the right to be free from retaliatory police action for the exercise of First Amendment rights, apply. (Importantly, Appellant offers no suggestion that Appellee failed to comply with police orders during the kettling; indeed, Appellee alleges that he was beaten and maced while compliant.)

Consequently, these courts have found that general dispersal orders permitting the arrest or assault of journalists or other bystanders for failure to disperse likely lack the requisite narrow tailoring under the First Amendment. For instance, in *Goyette v. City of Minneapolis*, 338 F.R.D. 109, 116–117, 121 (D. Minn. 2021), the court applied *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 9 (1986) ("*Press-Enterprise II*") for the proposition that general dispersal orders denying press and public access to public spaces must be narrowly tailored, and granted a temporary restraining order prohibiting the dispersal of individuals that officers "know or reasonably should know" are journalists. In *Index Newspapers LLC v. City of Portland*, 480 F. Supp. 3d at 1145–49, 1155, the court granted a preliminary injunction under the same *Press Enterprise II* theory, barring 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." *See also Alsaada v. City of Columbus*, No. 2:20-cv-3431, 2021 WL 1725554, at

*47 (S.D. Ohio Apr. 30, 2021) (granting preliminary injunction ordering defendants to recognize that individuals displaying "press" or "media" words or symbols are permitted to be present to record protests and that all individuals have the right to record police activity in public); *cf. Sabel v. Stynchcombe*, 746 F.2d 728, 731 (11th Cir. 1984) (reversing failure-to-disperse conviction as insufficiently tailored where law enforcement could have addressed risk of violence by enforcing generally applicable laws).

Indeed, the indiscriminate application of the unlawful assembly ordinance cited by Appellant has been deemed likely violative of the First Amendment with respect to this very mass arrest. *Ahmad v. City of St. Louis*, No. 4:17-cv-2455, 2017 WL 5478410, at *18 (E.D. Mo. Nov. 15, 2017), *injunction dissolved*, 995 F.3d 635 (8th Cir. 2021) (enjoining City of St. Louis from declaring an unlawful assembly under § 15.52.010 "when the persons against whom it would be enforced are engaged in expressive activity, unless the persons are acting in concert to pose an imminent threat to use force or violence or to violate a criminal law with force or violence"). And the St. Louis Metropolitan Police Department itself has acknowledged that it must tailor its conduct to accommodate newsgathering. Two months after Appellee's arrest, it agreed to issue a special order that its officers are required to read each month stating, among other things, "News media will be given every consideration by Department members so that they may perform their

news-gathering function." Celeste Bott, *St. Louis police issue special order reiterating rights of journalists*, St. Louis Post-Dispatch (Nov. 17, 2017), https://perma.cc/4EGF-U22H.

Consequently, because general dispersal orders that fail to exempt journalists and others who are in proximity to, but not participating in, the relevant assembly are likely improperly tailored under the First Amendment, Appellee's status as a clearly identifiable journalist at the time of his arrest provides an independent basis to find that probable cause, arguable probable cause, or reasonable suspicion simply could not exist. This is for two reasons.

First, if the underlying activity is not a crime, there can be no grounds to believe that a crime has or is being committed. "Obviously," after all, "one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution." *Wright v. Georgia*, 373 U.S. 284, 291–92 (1963). Courts across the country often find that grounds for detention or arrest are not present when the relevant conduct is not criminal. *See, e.g., Peterson v. City of Plymouth*, 60 F.3d 469, 476–77 (8th Cir. 1995) (reversing grant of qualified immunity on motion for judgment as a matter of law because arresting officer was "on notice that the dispute was a civil matter not involving criminal intent" and arrest was therefore "not supported by probable cause"); *see also Swartz v. Insogna*, 704 F.3d 105, 110–11 (2d Cir. 2013) (reversing grant of qualified

immunity on summary judgment because insulting officer not criminal activity and therefore not basis for probable cause or reasonable suspicion); *Wilson v. Martin*, 549 F. App'x 309, 311 (6th Cir. 2013) (affirming denial of qualified immunity at motion to dismiss stage in § 1983 action because plaintiff's gesture, extending two middle fingers toward police, "was crude, not criminal; and the officers were patently without probable cause to arrest her for it"); *Johnson v. Hawe*, 388 F.3d 676, 685 (9th Cir. 2004) (finding officer did not have reasonable expectation of privacy in dispatch call, recording that call was not criminal under Washington Privacy Act, and officer did not have probable cause for arrest).

Second, Appellant's "unit" theory is based exclusively on Appellee's proximity to the relevant assembly, the fact that he followed protesters while engaged in newsgathering, and, as discussed *infra*, that he failed to intervene when reporting on alleged vandalism several hours before the arrest. Consequently, if adopted, such a theory would contravene the extensive body of constitutional precedent precluding liability for the unlawful acts of others and, worse, do so in a way that allows police to effectively smother lawful newsgathering activity. *Cf. Healy v. James*, 408 U.S. 169, 186 (1972) ("'[G]uilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government,' is an impermissible basis upon which to deny First Amendment rights." (quoting *United States v. Robel*, 389 U.S. 258, 265 (1967)).

Fortunately, the Supreme Court has long confirmed that "guilt by association" cannot support the restriction of an individual's exercise of constitutional rights. *See, e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) (no liability for violence speaker did not authorize or incite); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (mere assistance at meeting of Communist Party cannot form basis for prosecution under criminal syndicalism law); *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) (speaker may not be charged fee based on expected audience reaction to speech). These principles apply with at least equal force to journalists engaged in lawful newsgathering and reporting during protest activity. The constitutionally proper approach is always to hold individuals responsible for their own unlawful conduct, rather than suppressing First Amendment activity, through general dispersal orders and mass arrests, of innocent individuals. *See Index Newspapers*, 977 F.3d at 834 ("The many peaceful protesters, journalists, and members of the general public cannot be punished for the violent acts of others.").

Finally, it bears emphasis that the undisputed facts of the mass arrest at issue here are dramatically different than those in the *Bernini* case, which Appellant relies heavily on for the "unit" theory and to argue that, at a minimum, reasonable suspicion existed to detain individuals in the kettle pending investigation. *Bernini* involved a large, identifiable mass of protesters, moving together, who, this Court

found, had approached a police line in a manner that officers reasonably could have concluded was an attempt to "break through." 665 F.3d at 1004. Officers used less-lethal munitions to divert the group to a nearby park, during which time other individuals joined the march, creating a situation where the Court found it would be "practically impossible" to verify that "each and every" member of the crowd had committed a riotous act. *Id.* at 1003 (quoting *Carr*, 587 F.3d at 408). Under those specific circumstances, the Court held the Fourth Amendment was satisfied so long as "officers have grounds to believe *all* arrested persons were a part of the *unit* observed violating the law." *Id.* (quoting *Carr*, 587 F.3d at 407) (first italics added, second in original). At the park, officers briefly detained about 400 people to determine who had been at the police line incident, releasing about 200 and taking into custody about 160. *Id.* at 1002, 1005.

The *Bernini* Court also expressly distinguished *Barham v. Ramsey*, in which the D.C. Circuit denied qualified immunity for the arrest of "an undifferentiated mass of people on the basis of crimes committed by a handful of individuals who were never identified." 434 F.3d 565, 568 (D.C. Cir. 2006). Importantly, *Barham* also firmly rejected any theory that mere proximity is enough to establish probable cause, citing the longstanding *Ybarra* rule that "mere propinquity to others independently suspected of criminal activity" cannot establish probable cause to search or seize. *Id.* at 573 (quoting *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979)).

Put simply, *Bernini* involved a far from indiscriminate police action, and, even if police mistakenly swept in a small number of innocent bystanders, the Court held that the park detention and arrests were "objectively reasonable"—that is, the officers had arguable probable cause. 665 F.3d at 1003, 1005.[11]

It is difficult to overstate the concern presented by Appellant's "unit" theory as applied to the arrest of a clearly identifiable journalist covering a protest who is caught up in a kettle because of "mere propinquity." The press must be allowed to observe and report on protest activity to ensure that the electorate has the information it needs to consider the demands of protesters or the actions of police:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

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[11] Amici do not concede that the *Bernini* scenario would establish grounds for the detention or arrest of a working journalist who is merely proximate to the "unit" while covering the protest or police response. That said, the *Bernini* Court placed great weight on law enforcement's efforts to separate out those detained in the park who were not suspected of being part of the police line group. At a minimum, that is exactly what should have happened to Appellee, a clearly identifiable journalist who repeatedly identified himself as such in the kettle.

Ahmad, 2017 WL 5478410, at *12 (quoting *De Jonge*, 299 U.S. at 365); *see also Mills v. Alabama*, 384 U.S. 214, 219 (1966) ("[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.").

Indeed, the need for the free flow of *this* information, which provides an independent accounting of what occurred at public protests, has been repeatedly borne out historically. For instance, the Kerner Commission, empaneled by President Johnson to study unrest in the 1960s, concluded that the government's control over information about the reality of the riots had contributed to public misunderstanding about the extent of the violence. *See* Report of the National Advisory Commission on Civil Disorders 202 (1968), https://perma.cc/D3J2-SFGQ (noting that official estimates left "an indelible impression of damage up to more than 10 times greater than actually occurred"). In one incident, journalists able to reach a scene themselves realized that what police had characterized as "nests of snipers" were, in fact, "the constituted authorities shooting at each other." *Id.* at 205. Across the board, where reporters were forced to rely on "police and city officials [as] their main—and sometimes only—source of information," coverage was skewed in favor of those sources. *Id.* at 207. "But more first-hand reporting in the diffuse and fragmented riot area," the Commission concluded,

could have "temper[ed] easy reliance on police information and announcements." *Id.*

Appellant's argument, that mere proximity to a gathering declared an "unlawful assembly" establishes grounds for detention or arrest of a journalist, would, if adopted, dramatically suppress the flow of these independent accounts of protests and crowd control responses to the public. For that reason, and because lawful newsgathering is not a crime, it should be rejected.

III. Liability for a journalist who observes and reports unlawful activity, but fails to intervene, would be patently unconstitutional.

Finally, Appellant argues that Appellee's presence and reporting on a crowd including several individuals who allegedly broke restaurant windows hours before Appellee's arrest provides an independent basis for "at least" arguable probable cause on the theory that Appellee's failure to intervene violates St. Louis City Ordinance § 15.52.010. Appellant Br. at 38. That ordinance, the city's unlawful assembly provision, states in relevant part that "every person present at such meeting or assembly, who shall not endeavor to prevent the commission or perpetration of such unlawful act, shall be guilty of a misdemeanor."

Preliminarily, ostensible bystander liability in the ordinance reflects a profoundly outdated approach to unlawful assembly laws, one that many jurisdictions took in the very early years of the Republic, long before modern policing and at a time of "fragile enforcement power." John Inazu, *Unlawful*

Assembly as Social Control, 64 U.C.L.A. L. Rev. 2, 11 (2017). For the reasons discussed below, it would be flatly unconstitutional as applied to a working journalist proximate to and covering the assembly, but it is important to note that the policy rationale behind bystander liability—that bystanders were needed to bolster the often outnumbered and outgunned authorities—"is as anachronistic in a world of professional police as is criminalizing a constable's failure to arrest." Br. of Amici Curiae Reporters Committee for Freedom of the Press and 60 News Media Organizations in Support of Plaintiffs-Appellees at 13 n.5, *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817 (9th Cir. 2020); *see also* Owen Healy, Comment, *Group Liability and Riot Acts: Can a Non-Opponent Wield a Heckler's Veto?*, 91 Temp. L. Rev. 107, 127 (2018) ("With few exceptions, the common law's rule that intentional presence at the scene of a riot is not a crime remains the law in the United States.").

As to the bystander liability provision's constitutionality, first, it is a bedrock protection for the free press, free speech, and free assembly that individuals lawfully exercising those constitutional rights may not be punished for the unlawful acts of others. *See, e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. at 925 & n.69 (rejecting theory that protest organizer has a duty to "disassociate" himself from others' unlawful acts to avoid liability).

Unlawful assembly or other public order laws are no exception to this principle. Indeed, because they vest broad discretion in officers, discretion that can be used to suppress protected First Amendment activity, the Supreme Court has rejected constructions of public order laws that would provide "for government by the moment-to-moment opinions of a policeman on his beat." *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965) (quoting *Cox v. Louisiana*, 379 U.S. 536, 579 (1965) (Black, J., concurring in part and dissenting in part)). The Court has also routinely invalidated the application of public order laws that operate to suppress First Amendment protected activity. *See, e.g.*, *Cox*, 379 U.S. at 542–43 (reversing conviction for breach of the peace and obstructing public passages statutes used against anti-segregation protest); *Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (same; breach of the peace); *Gregory v. City of Chicago*, 394 U.S. 111, 111–12 (1969) (same; disorderly conduct); *Bachellar v. Maryland*, 397 U.S. 564, 566–67 (1970) (same; disorderly conduct in anti-war protest). Construing the St. Louis ordinance to permit the arrest of a working journalist for failure to intervene would violate the well-established constitutional rule that public order laws cannot be used to punish First Amendment activity alone. *Cf. Gregory*, 394 U.S. at 111–13 ("[P]etitioners were charged and convicted for holding a demonstration, not for a refusal to obey a police officer.").

Second, were the ordinance applied in the manner Appellant urges, the threat of criminal prosecution for proximity to a protest could significantly chill both newsgathering and peaceable assembly more broadly. First Amendment "freedoms are delicate and vulnerable, as well as supremely precious in our society," *NAACP v. Button*, 371 U.S. 415, 433 (1963), and the threat of criminal liability, even when groundless, is a significant deterrent to the exercise of those rights. *See Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) ("The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.").

Indeed, the prospect of that chill is heightened in protests responding to police conduct itself. Notably, Appellee was not the only journalist arrested during the Stockley protests. *See, e.g.*, Jeff Bernthal, *Police begin releasing protesters from I-64 shutdown*, Fox 2 (Oct. 4, 2017), https://perma.cc/UW8Y-F77V (reporting the arrest of The Young Turks journalist Jordan Chariton); *Freelance photographer Daniel Shular arrested in St. Louis*, U.S. Press Freedom Tracker (Oct. 3, 2017), https://perma.cc/L335-7PQE; *Independent journalist Aminah Ali arrested in St. Louis*, U.S. Press Freedom Tracker (Oct. 3, 2017), https://perma.cc/U2SD-JUZS; *People's World reporter Al Neal arrested and jailed for over 24 hours*, U.S. Press Freedom Tracker (Oct. 3, 2017), https://perma.cc/D9PA-HUTA;

The Young Turks cameraman Ty Bayliss arrested in St. Louis, U.S. Press Freedom Tracker (Oct. 3, 2017), https://perma.cc/F2RY-QBKT.

He wasn't even the only journalist arrested during the September 17 kettle itself. *See Burbridge v. City of St. Louis*, 430 F. Supp. 3d 595, 605–07 (E.D. Mo. 2019), *aff'd on other grounds*, No. 20-1029, 2021 WL 2603181 (8th Cir. June 25, 2021)[12]; *Gullet v. City of St. Louis*, No. 4:18-cv-1571, 2020 WL 7122218, at *1 (E.D. Mo. Dec. 4, 2020); *Ziegler v. City of St. Louis*, No. 4:18-cv-01577, 2020 WL 709257, at *1–2 (E.D. Mo. Feb. 12, 2020); *Thomas v. City of St. Louis*, No. 4:18-cv-01566, 2019 WL 3037200, at *1–2 (E.D. Mo. July 11, 2019); *Alston v. City of St. Louis*, No. 4:18-cv-01569, 2019 WL 2869896, at *1–2 (E.D. Mo. July 3, 2019); *Getty photographer arrested while covering protest in St. Louis*, U.S. Press Freedom Tracker (Sept. 17, 2017), https://perma.cc/UZ98-BJVK.

Adopting the construction urged by Appellant would permit many more

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[12] Appellant relies heavily on the district court's opinion in *Burbridge*, which granted summary judgment in favor of defendants and found arguable probable cause that the crowd on September 17 was acting as a "unit." That case, however, involved a different arrest of different individuals and the court was presented with a completely different record, devoid of much of the evidence before the district court here. Notably, a later district court decision in yet another case arising out of the September 17 kettle pointedly refused to follow *Burbridge* in denying defendants' motion for judgment on the pleadings and finding, *inter alia*, that it was objectively *un*reasonable for officers to believe that the crowd was acting as a "unit" or violating the law at all. *Baude v. City of St. Louis*, 476 F. Supp. 3d 900, 911–12 (E.D. Mo. 2020) ("I respectfully decline to follow [the *Burbridge* district court] opinion. . . . Defendants have not established that the group was acting in concert.").

such arrests—including those of journalists who are simply doing their job and reporting on wrongdoing by others—heightening the risk of chill, and arbitrary or retaliatory enforcement of the unlawful assembly ordinance. It would physically endanger reporters. And it would flip a core First Amendment principle—that punishment for any unlawful activity apply to the lawbreaker—on its head. The "failure to intervene" theory should be rejected.

CONCLUSION

For the foregoing reasons and the reasons stated in Plaintiff-Appellee's brief, amici urge the Court to affirm the district court's order.

Dated: July 2, 2021

Respectfully submitted,

/s/ Bruce D. Brown

Bruce D. Brown, Esq.
Counsel of Record for Amici Curiae
Katie Townsend, Esq.*
Gabe Rottman, Esq.*
Emily Brown, Esq.*
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Ste. 1020
Washington, D.C. 20005
Telephone: (202) 795-9300
Facsimile: (202) 795-9310
** Of Counsel*

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief of amici curiae complies with:

1) the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7) because it contains 6,246 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by the word-processing system used to prepare the brief;
2) the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman.
3) Eighth Cir. R. 28A(h) in that this brief has been scanned for viruses and is virus-free.

Dated: July 2, 2021

/s/ Bruce D. Brown

Bruce D. Brown, Esq.
Counsel of Record
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2021, I electronically filed the foregoing Brief of Amici Curiae the Reporters Committee for Freedom of the Press and 29 Media Organizations in Support of Plaintiff-Appellee with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: July 2, 2021

/s/ Bruce D. Brown
Bruce D. Brown, Esq.
Counsel of Record
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS