No. 07-2196

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ASOCIACIÓN DE PERIODÍSTAS DE PUERTO RICO, et al.,
Plaintiff-Appellants

v.

ROBERT MUELLER, et al.,
Defendant-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

BRIEF OF *AMICUS CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PLAINTIFF-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* The Reporters Committee for Freedom of the Press discloses that it is an unincorporated association of reporters and editors with no parent corporation and no stock.

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

The Reporters Committee for Freedom of the Press ("the Reporters Committee") is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment and freedom of information litigation in state and federal courts since 1970. The Reporters Committee files this Brief along with its Motion for Leave to File Brief of *Amicus Curiae* and respectfully requests that this Court grant its Motion.

The interest of *Amicus* in this case is ensuring journalists' rights under the First Amendment, U.S. CONST., AMEND I, to gather news for dissemination to the public. Journalists serve as a watchdog on government — they provide an additional check on state action earning the news media the unofficial designation as the "fourth estate" of government, outside the three official branches. *See* Gerald G. Ashdown, *Journalism Police*, 89 MARQ. L. REV. 739, 740 (2006) ("Besides simply disseminating the news to foster participatory government and facilitate decisionmaking in a complex culture, it is the constitutional responsibility of the news media to take an active, watchdog role that goes beyond merely reporting on matters of public interest."). In their constitutionally protected role, the media frequently serve as the primary conduit of government information

to the public. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980). Reporters need access to events unfolding in the public interest so they may perform their role and duty in the public's behalf.

Here, journalists were attempting to fulfill their duty as "surrogates for the public," *id*., by gathering news and information related to an investigation and raid by the Federal Bureau of Investigation ("FBI") on a high-profile political activist. Their attempts to collect and report information were halted by FBI action forbidding their entrance to the investigation site, blocking photographic and broadcast access to the incident, and outright assaulting the journalists, precluding them from covering the newsworthy investigation and concurrent protests associated with it.

These FBI actions were a violation of the journalists' First Amendment rights to gather and disseminate news — rights strongly supported and defended by the Reporters Committee. Under the defendant's rationale, it has qualified immunity and can freely commit such acts that result in blatant First Amendment newsgathering violations. However, when journalists pose no threat to the investigation of a state actor and are merely present to observe and report on public events, such aggressive conduct by a state actor is surely unwarranted and cannot be tolerated.

STATEMENT OF THE ISSUE

Do federal agents' concerted efforts, including assault and intimidation, that prevented Plaintiff-Appellant journalists from gathering news regarding an incident of public interest violate the journalists' First Amendment rights, such that Plaintiff-Appellants have a valid cause of action that may survive summary judgment?

STATEMENT OF THE CASE AND FACTS

Amicus hereby adopts the statement of the case and facts set forth in Plaintiff-Appellants' brief.

SUMMARY OF ARGUMENT

The press has long been afforded a constitutional right to gather news. Though the press receives no greater right than the public to observe and collect news on matters of public interest, the United States Supreme Court has enumerated newsgathering as a protected constitutional right. *Richmond Newspapers*, 448 U.S at 575. Freedom of the press is a core First Amendment purpose "assuring freedom of communication on matters relating to the functioning of government." *Id*.

In *Bivens v. Six Unknown Federal Agents*, 403 U.S. 388 (1971), the United States Supreme Court held that if an individual "can demonstrate an injury consequent upon the violation by federal agents" of his constitutional rights, he

may potentially recover damages from those officials in federal court. *Id*. at 397. A federal official can be sued when the plaintiff can show that a constitutional right was violated, that right was clearly established, and any reasonable officer would have known that his or her alleged actions violated that right. *See Starlight Sugar, Inc. v. Soto*, 253 F.3d 137, 141 (1st Cir. 2001).

In the present case, the United States District Court for the District of Puerto Rico found that Plaintiff-Appellants did not adequately establish that a "deprivation of an actual constitutional right" occurred, thus failing the test altogether. However, in declaring that Plaintiff-Appellants did "not establish specific rights of the press during the recording of live events from public locations or at an investigatory scene," the court overlooked the long-established right of the press (and the public) to collect news at a place where they have the express right to be present. Further, the idea that the press has the right to gather news on public property — and on private property where there is express consent to their presence — is staunchly ingrained and rarely questioned because of its basic nature.

The lower court also held that Plaintiff-Appellants failed in the first step of its three-step inquiry because they did not cite any case in which the government actors in question performed exactly the same actions in violation of the First Amendment — "pushing away a microphone or temporarily seeking to obstruct

recording by placing a hand on a camera" — as the FBI agents did in this case. Joint Appendix ("J.A.") at 28. In a departure from established American jurisprudence, the court examined the individual actions of the officers rather than assessing the totality of the circumstances surrounding the incident in question. Even if each individual act of each FBI agent did not violate Plaintiff-Appellants' First Amendment rights, the agents' overall scheme to threaten and intimidate the journalists in order to prevent them from gathering information — by punching, kicking, spraying mace at, and pointing a rifle at the journalists — violated the most fundamental principles of the First Amendment.

This Court should take notice of the grave First Amendment violations that occurred here and accordingly reverse the District Court's grant of summary judgment and remand the case for trial.

ARGUMENT

I. The First Amendment protects the right to gather and disseminate news.

The United States Supreme Court has said that newsgathering deserves First Amendment protection. *Richmond Newspapers*, 448 U.S. at 575 (1980); *Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"). The Fourth U.S. Circuit Court of Appeals has ruled, for example, that a First Amendment violation occurs when a state actor buys up the entire press run of a

newspaper's copies as a de facto form of censorship on the newspaper's message, *Rossignol v. Voorhaar*, 316 F.3d 516, 522 (4th Cir. 2003), *cert. denied*, 71 U.S.L.W. 3791, 72 U.S.L.W. 3225, 3236 (U.S. Oct. 6, 2003) (No. 02-1795). By preventing the newspaper's message from being disseminated — a message that was "core" First Amendment speech — the state actors in *Rossignol* violated the paper's constitutional right to disseminate news. *Id.*

The *Rossignol* findings are precisely the proper application to the facts here. It logically follows that stifling the newsgathering process at the start to censor reporting on a potentially controversial state action would serve as a violation as well. State actors intimidated, harassed, and assaulted journalists to the point where they were unable to gather news and disseminate the message they had come to deliver; the investigation they were there to cover was a matter of public interest and thus core First Amendment speech; and, the result was that the FBI prevented the journalists from actually disseminating the news they had come to gather. *Id.* Just as the *Rossignol* court recognized the state action there violated the First Amendment and resulted in censorship, this Court should similarly find that a First Amendment violation occurred.

A. The First Amendment guarantees the right of the press to gather news in places where there is public access.

The right of a journalist to gather news for dissemination to the public is

well established and essential to a healthy democracy. With only minor exceptions, the press' right to be the eyes and ears of the public at newsworthy events extends from the halls of the courthouse to the public street, and to every other piece of government-owned property that functions as a public forum. *See Globe Newspaper Co. v. Beacon Hill Architectural Comm'n*, 100 F.3d 175, 181 (D.Mass. 1996) (stating that "traditional public fora, places which by long tradition or by government fiat have been devoted to assembly and debate, government's authority to restrict speech is sharply circumscribed" and subject to strict scrutiny) (internal citations omitted).

The public has the right to observe and gather news in various public forums. Contrary to the lower court's dismissive notion of the right to collect news, it has always been a recognized right and is constitutionally established and protected. In *Richmond Newspapers* and its progeny the Supreme Court affirmed the long-established common law principle that there is a First Amendment right of access to criminal proceedings. 448 U.S. at 480. The Supreme Court has held that this First Amendment right of access applies beyond the actual criminal trial to proceedings such as preliminary hearings and *voir dire* as well. *See Press-Enterprise Co. v. Superior Ct. of Calif.*, 464 U.S. 501 (1984) ("*Press-Enterprise I*"); *Press-Enterprise* II, 478 U.S. at 8. For all other proceedings, the public has a First Amendment right of access when (1) "the place and process have historically

been open to the press and general public," and (2) "public access plays a significant positive role in the functioning of the particular process in question." *Id*. Generally, when "the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches." *Id*. at 9.

The right to access information in the public interest extends far beyond the courtroom. Courts have recognized the necessity for citizens to have widespread access to matters concerning the government. "At the heart of the First Amendment is the ineluctable relationship between the free flow of information and a self-governing people, and courts have not hesitated to remove the occasional boulders that obstruct this flow." *Thomas v. Board of Ed. Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1047 (2d Cir. 1979).

The public and the press enjoy the right to be present on any government property that is used as a public forum without fear of content-based restrictions on newsgathering. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). Furthermore, like the public, journalists enjoy the right to enter and gather news on private property when granted that right by the owner. A property owner's right to control access to his property is a fundamental right of property ownership.

There are doubtless some occasions when the government may properly

overrule a landowner with regard to access issues — valid zoning laws, a crime scene where vital exigent evidence may be destroyed, or even eminent domain. However, in the present case, the FBI's actions overruled the property owner's right to grant access, *see* J.A. at 22 (stating that "[a]fter the search concluded . . . reporters entered the premises of the condominium in response to Laboy's daughter's signal to them to come through the pedestrian gate."), with none of those circumstances present. Moreover, the FBI's search of the residence was admittedly concluded, and there was no longer an opportunity for members of the public (or the press) to frustrate the FBI's efforts with their presence on the property. No exigent circumstances existed at that time, warranting the FBI to overrule the private property owner's rights and, further, there were no procedural safeguards to ensure that the government was not overstepping its bounds.

In the present case, the lower court also held that the line of cases that clearly interprets the First Amendment right of freedom of the press instead does "not establish specific rights of the press during the recording of live events from public locations or at an investigatory scene." J.A. at 27. There is little case law that establishes the right of the public and the press to be present at either government-owned public forums or present on public property with the express permission of the owner. Indeed, there is a reason. A government-led attempt to exclude the press from a place where they have the express right to be present falls

into the category of those "elementary violation[s] of the First Amendment" where "the absence of a reported case with similar facts demonstrates nothing more than widespread compliance with well-recognized constitutional principles." *McIntyre v. United States*, 336 F.Supp.2d 87, 124 n. 37 (D.Mass. 2004) citing *Eberhardt v. O'Malley,* 17 F.3d 1023, 1028 (7th Cir.1994). Some courts have found that when the state actor's "conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established." *McIntyre*, 336 F.Supp.2d at 124, citing *Mendoza v. Block,* 27 F.3d 1357, 1361 (9th Cir. 1994). This court should not allow officers "who understood the unlawfulness of [their] actions to escape liability simply because the instant case could be distinguished on some immaterial fact, or worse, because the illegality of the action was so clear that it had seldom been litigated." *Id.*

B. Government actors should have a heightened awareness that the news media play a vital role in the public's receipt of important information.

In *Branzburg v. Hayes*, 408 U.S. 665 (1972), Supreme Court Justice Byron White famously wrote that "news gathering is not without its First Amendment protections." *Branzburg*, 408 U.S. at 707. Further, Justice White noted that investigations "instituted or conducted other than in good faith . . . pose wholly

different issues for resolution under the First Amendment," and that "[o]fficial harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification." *Id*. at 707-8. Although the Court in *Branzburg* found that the First Amendment does not protect a reporter from being compelled to testify before a grand jury, the Court did recognize heightened protection for journalists from the government, especially when government actors actively attempt to hinder newsgathering.

In the wake of *Branzburg*, this Court found that the First Amendment gives journalists a qualified right to keep their sources and newsgathering materials confidential. In *Bruno & Stillman, Inc. v. Globe Newspaper Co*., 633 F.2d 583 (1st Cir. 1980), this Court held that:

> [C]ourts faced with enforcing requests for the discovery of materials used in the preparation of journalistic reports should be aware of the possibility that the unlimited or unthinking allowance of such requests will impinge upon First Amendment rights. In determining what, if any, limits should accordingly be placed upon the granting of such requests, courts must balance the potential harm to the free flow of information that might result against the asserted need for the requested information.

633 F.2d at 595-6. Although this right is not absolute, it recognizes the need to balance the press' right to gather and disseminate news — and the public's right to receive that news — with the government interest at hand.

Generally, the First Amendment guarantees that journalists have the same rights of access to places and proceedings as the public. *See, e.g., Saxbe v. Washington Post Co.,* 417 U.S. 843 (1974). However, as in reporter's privilege cases, there is some indication that because of their role as the "surrogates for the public" at newsworthy events, journalists should have broader rights when it comes to access issues. *Richmond Newspapers*, 448 U.S. at 573. The Supreme Court has found that government policies and actions must "not place the press in any less advantageous position than the public generally." *Saxbe,* 417 U.S. at 849 (1974). Although the public and the press generally stand in the same shoes, the fact that "the First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgment of the critical role played by the press in American society." *Houchins v. KQED, Inc*., 438 U.S. 1, 17 (1978) (Stewart, J. concurring).

In his concurring opinion in *Houchins v. KQED, Inc*., Justice Potter Stewart wrote that "[t]he Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively." *Id*. Specifically, Stewart wrote that any "person touring [a] jail can grasp its reality with his own eyes and ears. But if a television reporter is to convey the jail's sights and sounds to those who cannot personally visit the place, he must use cameras and sound equipment." *Id*. Stewart emphasized that the purpose of allowing the press to use the tools of their trade in

violation of rules pertaining to the general public was because the press was "there to convey to the general public what the visitors see" — a feat that would be far more difficult without cameras. *Id*. Stewart said that the press' right of access should be modified and slightly expanded since "[t]hough not without its lapses, the press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences." *Id* (internal citations omitted).

This notion of the news media playing a vital role must especially be respected and furthered in cases where the public may have occasion to question state action, as here. This Court should recognize the media as crucially important conduits of information between the government and its people; conduits here whose First Amendment rights were disregarded by state actors intimidating and harassing them when attempting to report on an important matter of public interest involving state actors.

II. A state actor's actions and motives must be assessed as a whole for qualified immunity purposes.

It is a well-established principle of American jurisprudence that the individual actions of a person or a government cannot be examined in a vacuum; rather, a court must always look to the totality of the circumstances surrounding an

alleged crime, tort, or deprivation of right. For example, a magistrate must examine "the totality of the circumstances" when considering whether or not an informant's tip creates probable cause that a crime has been committed. *See Illinois v. Gates*, 462 U.S. 213, 214 (1983) (stating that a magistrate must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, there is a fair probability" that the tip is legitimate).

Additionally, when a jury is charged with determining whether a statement is libelous, the "tone of the article as a whole" should be used "in determining capacity for defamatory meaning" rather than the allegedly defamatory statements in isolation. *See Stanton v. Metro Corp*., 438 F.3d 119, 129-130 (1st Cir. 2006) (stating that when "assessing whether a statement can bear a defamatory construction, meaning is to be derived as well from the expression used as from the whole scope and the apparent object of the writer." (internal citations omitted)).

This tenet logically extends to any assessment of a potential violation of a constitutional right by a state actor. "In the course of its state action inquiries, the Supreme Court has not opted for an objective or subjective test, but simply for a look at the totality of circumstances that might bear on the question of the nexus between the challenged action and the state." *Rossignol*, 316 F.3d at 523 n.1. The lower court erred when it examined each of the FBI agents' individual actions as

separate potential violations of the First Amendment rather than looking at the agents' overall scheme and motivation. It does not matter whether government actors prevent a journalist from gathering the news by threatening him, seizing his camera or notebook, beating him, "pushing away a microphone," or "placing a hand on a camera." J.A. at 28. The ultimate motive — to censor newsgathering and potential publication — is the same.

The Supreme Court has said that the government's restraint on newsgathering and publishing "need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974). Indeed, a government actor's actions do not even have to be illegal under the letter of the law. For example, in *Rossignol*, the Fourth Circuit Court of Appeals found that off-duty sheriff's deputies violated a newspaper publisher's First Amendment rights when they intentionally purchased all copies of a newspaper that criticized an election candidate. 316 F.3d at 516, discussed *supra*. The deputies' actions were clearly legal when considered on an action-by-action basis, since they paid for the newspapers. However, the court held that when the deputies schemed and executed a plan to censor the publisher and prevent the news from reaching the public, they "did more than compromise some attenuated or penumbral First Amendment right; they struck at its heart." *Id*.

Examining the motive behind government actions is just as important as looking at those actions as a whole. In 1963, the Supreme Court found that the state of Rhode Island violated the First Amendment when the state created a commission that was endowed with the right to recommend the criminal prosecution of any publisher or distributor of material that the commission deemed objectionable. *Bantam Books v. Sullivan,* 372 U.S. 58 (1963). In considering whether the state's actions were unconstitutional, the Court considered the motivation behind those actions in determining whether they violated the First Amendment. *Bantam Books*, 372 U.S. at 72. The Court said that if the commission in question was "genuinely undertaken with the purpose of aiding the distributor to comply with such laws and avoid prosecution under them, it need not retard the full enjoyment of First Amendment freedoms. But that is not this case." *Id*. When the state's ostensibly legal actions were considered together with the motivation behind those actions, the Court said that the "operation was in fact a scheme of state censorship" that was unconstitutional. *Id*.

The same is true in this case. It does not matter whether there is previous case law that "establish[es] specific rights of the press during the recording of live events from public locations or at an investigatory scene." J.A. at 27. It is irrelevant that there is no case "where the court found a First Amendment violation based on law enforcement agents pushing away a microphone or temporarily

seeking to obstruct recording." *Id*. Those actions, when taken out of context or consideration apart from motivation, may or may not violate the First Amendment. However, when taken as part of a larger scheme to intimidate the press and inhibit their ability to gather important news, as here, it is clear that these actions "establish a constitutional violation" that any "reasonable officer" would understand. *Starlight Sugar*, 253 F.3d at 141.

CONCLUSION

The constitutional protections afforded by the First Amendment to gather and report news and information are cornerstone rights long recognized by American government and jurisprudence. Those rights should not be disregarded, nor should a court ambiguously look at state actors' individual interactions rather than their acts as a whole, and the result those acts led to: a violation of Plaintiff-Appellants' constitutional rights to gather and disseminate the news. Such action should not stand, and we respectfully request that this Court reverse the grant of summary judgment and remand the case for trial.

Respectfully submitted,

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CERTIFICATIONS

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because when measured by WordPerfect version 10.0, the word processing program used to prepare the brief, it measured 3,889 words.

2. This Brief complies with 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 WordPerfect version 10.0 in 14-point Times New Roman font.

3. The CD-Rom version of this Brief of *Amicus Curiae* The Reporters Committee for Freedom of the Press in Support of Plaintiff-Appellants is in compliance with Local Rule 32.0 as a WordPerfect document on a Windows-based CD-Rom disc.

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2007, I caused to be served, by U.S. mail, an original and eight copies of the Brief of *Amicus Curiae* The Reporters Committee for Freedom of the Press in Support of Plaintiff-Appellants to the Clerk of the Court; I further certify that on November 6, 2007, I sent an identical copy of that Brief, in a WordPerfect file on a CD-Rom, to the Clerk of the Court; and I further certify that on November 6, 2007, I served two copies of the foregoing Brief, by U.S. mail, first class, postage prepaid, to:

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