UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KEVIN ALFARO and GEORGANA SZISZAK *Plaintiffs*, v. **MICHAEL REMPUSHESKI** *Defendant*.	The Hon. Madeline Cox Arleo Civ. Action No. 2:21-mc-00052

[PROPOSED] BRIEF OF AMICUS CURIAE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PLAINTIFFS

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INTRODUCTION

Frequently, officials engaged in newsworthy conduct in public are not immediately recognizable. *See, e.g.*, Philip Bump, *A Dangerous New Factor in an Uneasy Moment: Unidentified Law Enforcement Officers*, Wash. Post (June 4, 2020), https://perma.cc/W26G-TLQY. Frequently, too, agencies ignore or impede requests for the identity of employees responsible for conduct the public has a right to evaluate. *See, e.g.*, Meg O'Connor, *Amid Backlash, Phoenix Refuses to ID Aggressive Cop, Family Files $10M Claim*, Phoenix New Times (June 13, 2019), https://perma.cc/9XEN-Y7GQ. As a result, reporters often turn to the public—as Plaintiffs did—for information of public concern the government would rather not provide. *See* Zipporah Osei et al., *We Are Tracking What Happens to Police After They Use Force on Protestors*, ProPublica (July 29, 2020), https://perma.cc/D63N-EKSQ ("Do you have information about one of these cases? Tell us about it.").

Such an intent to expose official conduct to scrutiny cannot, consistent with the Constitution, be punished as intent to "place a reasonable person in fear of physical or emotional harm." N.J. Stat. Ann. § 2C:33-4.1(a)(2). As the Supreme Court has explained, there is nothing unlawful about "rel[ying] upon routine newspaper reporting techniques to ascertain the identity" of an individual responsible for a newsworthy act. *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979). And "obtain[ing] the name . . . simply by asking various witnesses" is

plainly routine. *Id.* at 99. In Defendant's view, though, New Jersey has criminalized that conduct. That position runs grave risks to press freedom—especially the right to report on law enforcement—and it cannot be squared with the "First Amendment right of access to information about how our public servants operate." *Fields v. City of Philadelphia*, 862 F.3d 353, 355 (3d Cir. 2017).[1]

For the following reasons, amicus curiae the Reporters Committee for Freedom of the Press ("amicus") urges the Court to deny the motion to dismiss.

ARGUMENT

I. Defendant's interpretation of New Jersey's cyber-harassment statute criminalizes routine newsgathering in the police accountability context.

Defendant's argument turns on the suggestion that speech that merely solicits an officer's identity necessarily expresses an intent "to operate as a vigilante in meting out retribution against the officer." Def.'s Br. in Supp. of Mot. to Dismiss at 10 (ECF No. 12-2). But ordinary newsgathering communications routinely seek that kind of information, and few political moments have been marked by a greater legitimate interest in tying images of police conduct to the identity of the officer depicted. *Cf. Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 831 (9th Cir. 2020) (noting that "the public became aware of the circumstances surrounding George Floyd's death" in the first instance "because

[1] Though amicus writes to highlight the importance of this question to the press, the public has an equal right to seek this kind of information. *See id.* at 359.

citizens standing on a sidewalk exercised their First Amendment rights"). Plaintiffs may have phrased their request for information more coarsely than a reporter would have, but they expressed no interest in promoting anything other than the kind of public accountability that journalists work to make possible.

As other courts have observed, "[t]he publication of truthful personal information about police officers is linked to the issue of police accountability." *Brayshaw v. City of Tallahassee*, 709 F. Supp. 2d 1244, 1249 (N.D. Fla. 2010). It allows the public to judge, for one, whether an agency knew or should have known of a pattern of misconduct. *See* Craig McCarthy, *N.J. to Overhaul How It Tracks Police Force Following NJ.com Investigation*, NJ.com (Dec. 5, 2018), https://perma.cc/4VEY-JLKG. It enhances the fairness of criminal trials, by permitting defendants to argue that "the officer who arrested them has a misconduct record that might affect their credibility." Kendall Taggart & Mike Hayes, *Here's Why BuzzFeed News Is Publishing Thousands of Secret NYPD Documents*, BuzzFeed News (Apr. 16, 2018), https://perma.cc/S6U7-ZJCM. And it empowers those deprived of their rights by a particular officer to vindicate those rights in court. *See, e.g.*, Order Directing Parties to Investigate Identity of Doe 1, *Jones v. City of Los Angeles*, No. 2:20-cv-11147 (C.D. Cal. Mar. 17, 2021) (ECF No. 45) (requiring city to review available video evidence to identify an officer who fired a rubber bullet at a filmmaker exercising who was his right to record).

Those values can only be realized, though, if the press and public have the practical means to identify officers in the first place. In principle they have several. For instance, many jurisdictions mandate that officers identify themselves—or at least wear identifying information—when engaging with the public in certain ways. In that vein, the New Jersey Attorney General's Model Rules and Regulations for municipal police departments recommend that "[e]xcept when impractical or where the identity is obvious, police officers shall identify themselves by displaying the[ir] official badge or identification card before taking police action." N.J. Att'y Gen., Model Rules and Regulations § IV.G.6 (2001), https://perma.cc/K3LU-7BWB. As the Department of Justice has explained, requiring that "[o]fficers wear[] name plates while in uniform is a basic component of transparency and accountability" as well as "a near-universal requirement of sound policing practices." Letter from Christy E. Lopez, U.S. Dep't of Justice, to Chief Thomas Jackson, Ferguson Police Dep't (Sept. 23, 2014), https://perma.cc/5REB-9CU8. But compliance with those mandates is uneven, *see* Steve Almasy, *Some Law Enforcement Officers at Protests Have No Badges and Some Have Covered Them. City Officials Say That Is Unacceptable*, CNN (June 5, 2020), https://perma.cc/5867-VNG4, which often means that the identity of an officer whose actions warrant scrutiny must be investigated after the fact, *see Fields*, 862 F.3d at 360 (noting that the right to record helps "identify" officers).

In such cases, the press often works to make the connection between a newsworthy depiction of police conduct and the name of the officer depicted. A recent ProPublica investigation, which aimed to determine whether the most egregious incidents of excessive force arising out of the George Floyd protests prompted a disciplinary response, is characteristic. *See* Zipporah Osei & Mollie Simon, *What Has Happened to Police Filmed Hurting Protesters? So Far, Very Little*, ProPublica (July 29, 2020), https://perma.cc/WE4C-KKHN. There, reporters "set out to see whether the incidents caught on camera were investigated, whether officers were named and what information [they] could get about any investigations or discipline"—all questions of obvious and legitimate interest to the broader public. *Id.* Most of the agencies contacted, though, "refused to name the officers" involved. *Id*. That kind of resistance on the part of the institution in the best position to identify an officer is, regrettably, not uncommon, even where reporters are clearly entitled to the information under the public records laws.[2]

[2] *See, e.g.*, Elizabeth Koh, *The Globe Files Suit Against the Boston Police for Keeping Officer Misconduct Records Secret*, Boston Globe (Apr. 30, 2021), https://perma.cc/PZB8-CG96; Martin Macias, Jr., *Police Watchdog Sues LA County DA and Sheriff for Misconduct Lawsuit Records*, Courthouse News Service (Apr. 29, 2021), https://perma.cc/2BS3-6CAY. Here in New Jersey, despite Attorney General Grewal's determination that "it is in the public's interest to reveal the identities of New Jersey law enforcement officers sanctioned for serious disciplinary violations," N.J. Att'y Gen. Law Enf't Directive No. 2020-5, at 2 (June 15, 2020), https://perma.cc/R65E-LEXF, law enforcement groups have continued to fight disclosure—unsuccessfully—in the state's courts, *see In re Att'y*

But journalists can and do pursue those answers in other ways, including by communicating with sources who may have personal knowledge relevant to an incident. *See* Osei & Simon, *supra* (providing an online form for public input). As the Supreme Court has made clear, the law not only condones but expects reporters to seek the truth in that way, because "[a] free press cannot be made to rely solely upon the sufferance of government to supply it with information." *Smith*, 443 U.S. at 104. And similar examples abound. Journalists have used a mix of methods, for instance, to identify government officials who took part in the January 6 riot at the Capitol, including—intuitively—reaching out to potential sources for comment. *See, e.g.*, Linda So et al., *Off-Duty Cops, Other Officials Face Reckoning After Rallying for Trump in D.C.*, Reuters (Jan. 13, 2021), https://perma.cc/4SPD-5HQ8. Indeed, such stories routinely included an express call for members of the public to name even *private* individuals depicted in photos or video of the event. *See, e.g.*, USA TODAY Staff, *Help USA TODAY Tell the Story of Those Who Stormed the US Capitol*, USA TODAY (Jan. 7, 2021), https://perma.cc/R8FN-699G. Of course, the consequences of being identified in such images are serious—from "[p]ublic backlash" to federal criminal liability. So et al., *supra*. But no one would suggest seeking those tips reflected an intent to harm rather than inform.

Gen. Law Enf't Directive Nos. 2020-5 & 2020-6, 240 A.3d 419, 427–30 (N.J. Super. Ct. App. Div. 2020), *certification granted*, 241 A.3d 579 (N.J. 2020).

The expression at issue here may have been more vulgar, but it was, like the aforementioned examples of ordinary journalistic inquiries, neither violent nor threatening: Plaintiffs asked members of the public to come forward with knowledge of the identity of an officer performing his duties in public, an officer they allege had conducted himself inappropriately while obscuring the identifying information that his agency required him to wear. It is difficult to imagine a subject closer to the heart of the public's interest in evaluating the performance of its government, *see Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring) (noting that "commentary and reporting on the criminal justice system is at the core of First Amendment values"), or farther afield from any legitimate expectation of privacy, *see Fields*, 862 F.3d at 355. But if probable cause existed to issue a summons to Plaintiffs, then probable cause exists to issue a summons to any reporter in New Jersey who solicits the same kind of information.

II. This Court should decline to interpret the cyber-harassment statute to criminalize the exercise of clearly established First Amendment rights.

Thankfully, the cyber-harassment statute does not proscribe that speech, as any reasonable officer would have understood. In construing a closely related provision of the harassment laws, N.J. Stat. Ann. § 2C:33-4(c), the Supreme Court of New Jersey explained that the First Amendment prohibits their application to speech "that poses no threat to a person's safety or security" and "that does not intolerably interfere with a person's reasonable expectation of privacy." *State v.*

Burkert, 174 A.3d 987, 1001–02 (N.J. 2017). In other words, because "[t]here is no categorical 'harassment exception' to the First Amendment[]," *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001) (Alito, J.), the cyber-harassment statute must be read to conform to the well-established boundaries defining true threats, *see Gov't of Virgin Islands v. Vanterpool*, 767 F.3d 157, 167 (3d Cir. 2014), incitement, *see Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), and the privacy torts, *see, e.g.*, *Bowley v. City of Uniontown Police Dep't*, 404 F.3d 783, 786 (3d Cir. 2005). None of those categories, though, can plausibly be stretched to cover speech that does no more than solicit newsworthy information.

Because the Constitution recognizes a "paramount public interest in a free flow of information to the people concerning public officials," *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964), listeners understand that a bare request for that information does not contain a silent "expression of an intent to commit an act of unlawful violence," *Vanterpool*, 767 F.3d at 831 (quoting *Virginia v. Black*, 538 U.S. 343, 344 (2003)), or an unspoken exhortation to violence. Such speech may cause stress, of course, and the speaker may intend, in a broad sense, that the subject face the anxieties that unavoidably accompany public scrutiny. But such an effort to expose a party to evaluation is, as the Supreme Court has explained, "not fundamentally different from the function of a newspaper." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). As a result, efforts to punish that

expression are—to amicus's knowledge—vanishingly rare in our system. *Cf.* Ephrat Livni, *Hong Kong's Latest Injunction Protects Police While Putting Press Freedom at Risk*, Quartz (Oct. 26, 2019), https://perma.cc/6ZSB-VGD4 (noting that a Hong Kong court order prohibiting the publication of police officers' personal information was widely understood as a grave threat to press freedom).

Despite the rarity of such overreach, familiar principles governing true threats and incitement "apply with obvious clarity" to this sort of expression, *Williams v. Bitner*, 455 F.3d 186, 191 (3d Cir. 2006) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)), and any reasonable officer would have understood as much. Courts have consistently concluded, for instance, that laws restricting the *publication* of officials' personal information—including information considerably more personal than a name—will trigger and fail strict scrutiny, because such disclosures do not by their terms communicate intent to harm. *See, e.g.*, *Brayshaw*, 709 F. Supp. 2d at 1248–50 (law enforcement officers); *Sheehan v. Gregoire*, 272 F. Supp. 2d 1135, 1140–48 (W.D. Wash. 2003) (same); *Publius v. Boyer-Vine*, 237 F. Supp. 3d 997, 1013–21 (E.D. Cal. 2017) (legislators); *cf. Keefe*, 402 U.S. at 419 (urging others to call realtor's phone number was protected speech). On the contrary, as discussed above, that information is essential to the press's ability to report on—and the public's right to evaluate—the operations of the police, a topic

sharing space on "the highest rung of the hierarchy of First Amendment values." *Fields*, 862 F.3d at 359 (quoting *Snyder v. Phelps*, 562 U.S. 443, 452 (2011)).

The same insight applies *a fortiori* to speech that merely requests the same information. *See Fields*, 862 F.3d at 358 ("[T]he First Amendment protects the process of capturing inputs that may yield expression, not just the final act of expression itself." (citation omitted)). Reasonable people interpret such requests in light of the bedrock principle that the press and public are entitled to "rel[y] upon routine newspaper reporting techniques," such as witness questioning, "to ascertain the identity" of individuals of legitimate public interest. *Smith*, 443 U.S. at 103. To state the obvious, then, that expression is not intrinsically "directed to inciting or producing imminent lawless action" because the only thing it asks potential sources to do—provide an officer's identity—is not illegal. *Brandenburg*, 395 U.S. at 447. And the only intent it expresses on the speaker's part is an intent to make the information public; that too, of course, is legal. If no one would contend Plaintiffs could be held liable simply for sharing a photograph with the caption "This is Officer X," *see, e.g.*, *Smith*, 443 U.S. at 105–06 (name of juvenile offender); *Florida Star v. B.J.F.*, 491 U.S. 524, 526 (1989) (name of sexual assault victim), it plainly follows that "Who is Officer X?" is protected expression too.

That conclusion—that no reasonable officer could interpret speech seeking their identity, without more, as a threat—is reinforced by the reality that officers

lack a cognizable privacy interest in the way they perform their duties in public. As the Third Circuit has explained, the police "exercis[e] the most awesome and dangerous power that a democratic state possesses with respect to its residents," and the corresponding "need . . . for public confidence" in those officials entails a diminished expectation of privacy. *Policemen's Benevolent Ass'n of N.J., Local 318 v. Township of Washington*, 850 F.2d 133, 141 (3d Cir. 1988); *see also Rawlings v. Police Dep't of Jersey City*, 627 A.2d 602, 605 (N.J. 1993). That expectation drops away entirely in public fora, where members of the press and public have a clearly established right to record them. *Fields*, 862 F.3d at 360.

It cannot be the case that an officer who accepts that their actions will be documented retains an interest in ensuring that their identity remains secret. As the Third Circuit has already held, one of the very points of the right to record is to make it possible to "identify and discipline problem officers." *Id.* And when officials know that disclosure "has historically been required by those in similar positions, their expectation of privacy in that type of information is reduced." *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 114 (3d Cir. 1987). It makes no sense, then, to suggest a reasonable officer could 'fear' disclosure of a name they have no right to keep hidden from the people they serve.

To be sure, there may be instances in which context makes clear that an individual is sharing another's personal information with genuinely threatening

intent. *See United States v. Fullmer*, 584 F.3d 132, 156 (3d Cir. 2009) (website disseminating personal information of corporate employees became unprotected when it "used past incidents" of actual violence "to instill fear in future targets"). Here, though, Defendant has offered nothing that would meaningfully distinguish Plaintiffs' speech from ordinary newsgathering communications. The only way to validate the summons would be to conclude that a request for an officer's identity *alone* supplies probable cause of intent to harm, without need for further context. That conclusion would cast a chilling pall over efforts to report on police misconduct. And it would flip on its head, too, our system's presumption that the press and public have a keen interest in "information about their officials' public activities," along with a fundamental "right" to obtain it. *Fields*, 862 F.3d at 359.

At base, while officers may well want to avoid associating their names with evidence of inappropriate behavior, the law does not dignify that interest. "Few personal attributes are more germane to fitness for office," after all, "than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character." *Garrison*, 379 U.S. at 77. The press therefore pursues that information energetically, and "a police officer will not be heard to complain," in response, "that he is being held up as a model of proper conduct." *In re Att'y Gen. Law Enf't Directive Nos. 2020-5 & 2020-6*, 240 A.3d at 441 (internal quotation marks and citation omitted). That scrutiny is simply "one

of the obligations an officer undertakes upon voluntary entry into the public service." *Id.* This Court should reject the suggestion New Jersey has prohibited it.

CONCLUSION

For the foregoing reasons, amicus respectfully urges that Defendant's motion to dismiss be denied.

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