

REPORTERS COMMITTEE

FOR FREEDOM OF THE PRESS

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By email

November 6, 2020

The Honorable Bill de Blasio
Mayor, City of New York
City Hall
New York, NY 10007

Commissioner Dermot F. Shea
New York City Police Department
1 Police Plaza
New York, NY 10038

Re: Arrest of journalist Chae Kihn

Dear Mayor de Blasio and Commissioner Shea:

The undersigned are members of state and local news media, national news organizations with properties in New York, wire services, and nonprofit groups that protect the rights of journalists to gather and report news. We write to ask that New York City take immediate steps to prevent another incident like the forcible arrest of Chae Kihn, an independent photographer, who was tackled by multiple NYPD officers, arrested, and charged with obstructing traffic in the lawful course of her reporting.

We urge that the charges against Ms. Kihn be dismissed. Further, the public interest would be served by an accounting from the Department explaining why she was arrested in the first place and why NYPD originally claimed that no “members of the press” had been detained. *See* Sydney Pereira & Gwynne Hogan, *Heavily Armored NYPD Officers Arrest 11 While Quashing Small Anti-Trump Protest in Manhattan*, Gothamist (Nov. 1, 2020), <https://perma.cc/9WPQ-B2BR>.

The right to document police activity in public is clearly established, and an officer who violates that First Amendment freedom—especially through the use of force—enjoys no legal immunity. *See, e.g., Higginbotham v. New York*, 105 F. Supp. 3d 369, 379-80 (S.D.N.Y. 2015); *cf. N.Y. Civ. Rights Law* § 79-P(3)(iv) (providing a cause of action for “unlawful interference with recording a law enforcement activity”). As the U.S. Department of Justice has explained, this right to record is “not only required by the Constitution” but also “consistent with our fundamental notions of liberty.” Statement of Interest of the United States, *Sharp v. Baltimore City Police Dep’t*, No. 1:11-cv-02888-BEL (D. Md. filed Jan. 10, 2012).

For just that reason, offenses such as “disturbing the peace” or “loitering” are rightly viewed “skeptically” when deployed against reporters. Statement of Interest of the United States, *Garcia v. Montgomery County*, No. 8:12-cv-03592-JFM (D. Md. filed March 4, 2013).

To the extent officers may order individuals who are exercising those First Amendment rights to move or disperse, such orders must be narrowly tailored to accommodate lawful reporting. *See Index Newspapers v. U.S. Marshals Service*, 2020 WL 5988501, at *9, – F.3d – (9th Cir. 2020). At the absolute minimum, the First Amendment requires that such orders be accompanied by fair warning and a reasonable opportunity to comply. *See Jones v. Parmley*, 465 F.3d 46, 60 (2d Cir. 2006) (Sotomayor, J.); *Dellums v. Powell*, 566 F.2d 167, 181 n.31 (D.C. Cir. 1977).

Based on press reports and video from the scene, it appears the Department’s arrest of Ms. Kihn violated these First Amendment rights. In [a recording](#) taken by Freedom News TV, Ms. Kihn appears to be moving to the sidewalk—complying with law enforcement instructions—when several officers race toward her and wrestle her to the ground. Kihn, consistent with the video, told reporters that she was “on the way” to the sidewalk when she was tackled; a journalist with *Gothamist* reported that Kihn was “chased.” Valentina Di Liscia, *Photographer Arrested by NYPD While Covering Anti-Trump Demonstration*, Hyperallergic (Nov. 2, 2020), <https://perma.cc/42NL-XQTL>.

Kihn was also clearly identifiable as a journalist: In a [separate video](#) of the incident, other demonstrators can be heard loudly shouting “She’s press” and “She’s a reporter” as the officers arrest her. The Department has nevertheless [claimed](#) that Kihn was not a “member[] of the press” because she was not “NYPD credentialed.” But “the newsgathering protections of the First Amendment cannot turn on professional credentials or status.” *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011). If an officer knows or has reason to know that an individual is engaged in newsgathering, and if that individual is compliant with reasonable law enforcement requests, First Amendment protections apply. *Cf. Index Newspapers LLC v. City of Portland*, No. 3:20-cv-1035, slip op. at 58, 2020 WL 4883017, – F. Supp. 3d – (D. Or. Aug. 20, 2020), *appeal docketed*, No. 20-35739 (9th Cir. Aug. 21, 2020) (enjoining 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”) (emphasis added).

Please find attached a letter from an earlier Reporters Committee coalition—sent to you and other officials this summer—laying out steps that law enforcement officials should take immediately to protect reporters engaged in lawful newsgathering. To support the strong public interest in coverage of police activity, we urge that the NYPD implement these steps in New York City.

Please do not hesitate to contact Bruce Brown, Executive Director of the Reporters Committee, with any questions at bbrown@rcfp.org.

Sincerely,

The Reporters Committee
for Freedom of the Press

Committee to Protect Journalists
Dow Jones & Company, Inc.
The E.W. Scripps Company
First Amendment Coalition
First Look Media Works, Inc.
Freedom of the Press Foundation
Fundamedios Inc.
Inter American Press Association
International Documentary Association
The Media Institute
National Association of Broadcasters
The National Press Club

The National Press Club Journalism Institute
National Press Photographers Association
New York News Publishers Association
The NewsGuild-CWA
The NewsGuild of New York
News Leaders Association
News Media Alliance
Radio Television Digital News Association
Society of Professional Journalists
Tully Center for Free Speech
WNET

cc: The Honorable Andrew Cuomo
Governor, State of New York

The Honorable Letitia James
Attorney General, State of New York

The Honorable Cyrus R. Vance, Jr.
District Attorney of New York County, Borough of Manhattan

The Honorable Darcel D. Clark
District Attorney of Bronx County, Borough of the Bronx

The Honorable Eric Gonzalez
District Attorney of Kings County, Borough of Brooklyn

The Honorable Melinda Katz
District Attorney of Queens County, Borough of Queens

The Honorable Michael E. McMahon
District Attorney of Richmond County, Borough of Staten Island

ATTACHMENT

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JAMES GRIMALDI
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LAURA HANDMAN
Davis Wright Tremaine

DIEGO IBARGÜEN
Hearst

KAREN KAISER
The Associated Press

DAVID LAUTER
Los Angeles Times

MARGARET LOW
WBUR

JANE MAYER
The New Yorker

COLLEEN MCCAIN NELSON
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JAMES NEFF
The Philadelphia Inquirer

NORMAN PEARLSTINE
The Los Angeles Times

THOMAS C. RUBIN
Stanford Law School

CHARLIE SAVAGE
The New York Times

JENNIFER SONDAG
Bloomberg News

NABIHA SYED
The Markup

ADAM SYMSON
The E.W. Scripps Company

PIERRE THOMAS
ABC News

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Freelance

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By email

June 6, 2020

The Honorable Bill de Blasio
Mayor, City of New York
City Hall
New York, NY 10007

Commissioner Dermot F. Shea
New York City Police Department
1 Police Plaza
New York, NY 10038

Re: Law enforcement targeting journalists during protests

Dear Mayor de Blasio and Commissioner Shea:

As members of the news media and organizations that protect the rights of journalists to gather and report news, the undersigned write to ask that you take immediate, concrete steps to end the series of police arrests and attacks on credentialed and clearly identifiable journalists in New York City in recent days. These incidents occur as, across the country, police have arrested, detained, and threatened journalists, and have physically assaulted them with rubber bullets, pepper spray, tear gas, batons, and fists.

In the cases of threats, arrests, and assaults that we are aware of in New York City, there are indications, many strong, that officers knew the journalist was a member of the press.

Law enforcement officers do not have legal immunity when they violate clearly established rights under the First Amendment. The right of the press to document police activity is foundational to our democracy and has long been recognized and protected by the courts. Beyond, however, the Constitution and the law, any targeting of reporters for doing their jobs—keeping the public informed during an extraordinary period of civil unrest—is beyond the pale in a free society.

The challenges that officers face in policing during times of civil protest do not supersede any of the rights guaranteed by the First Amendment, and moments of crisis demand that we protect the bedrock American ideal of a free press even more zealously.

As Governor Cuomo rightly tweeted on June 3, “A free press is the lifeblood of democracy. Now more than ever, it is critical that reporters & photographers can safely document protests without fear of harm or targeting.” Governor Cuomo confirmed that journalists are “essential—and they must be able to do their jobs. We all depend on them.” Governor

Cuomo is correct. When an officer knows a journalist is a journalist, just one arrest or assault is a profound and clear violation of the First Amendment.

In New York City alone, among other incidents:

- Brendan McDermid, a Reuters photographer, was assaulted by police while taking pictures of arrests at a protest in downtown Brooklyn. McDermid was wearing a vest marked “PRESS,” was carrying a professional camera, and was clearly displaying his press credentials. An officer asked him to move, he complied, and without provocation, the officer lunged at McDermid with a baton, knocked him down, kicked him in the leg, beat his helmet with the baton, and laughed;
- Chris Mathias, a senior reporter on assignment for HuffPost, was violently taken into custody by New York Police Department officers, even though he identified himself as a reporter and was wearing a clearly visible press pass;
- Writer Keith Boykin, while freelancing, said that as he was taking videos and photos of protests, and after informing NYPD officers he was with the press, he was arrested, and only released hours later;
- Robert Bumsted and Maye-E Wong, a videographer and photographer for the Associated Press wearing identification, were surrounded and shoved by NYPD officers, who also shouted expletives at the journalists, while the journalists attempted to explain the press was exempt from curfew. Bumsted and Wong were forced to leave the scene entirely;
- Tyler Blint-Welsh, a reporter for the Wall Street Journal, was hit in the face multiple times with riot shields and pushed to the ground by NYPD, even though his NYPD-issued press badge was clearly visible;
- A Newsday multimedia producer with a press pass taking video of the protests in lower Manhattan was struck with a baton in the back and pushed down, hitting a metal fence. He had on a bike helmet, which cracked. He complained to an officer about what happened, who walked away.

The Reporters Committee for Freedom of the Press has documented at least four other incidents in New York City where police detained or assaulted journalists who appear to have been clearly identified as members of the news media and were not physically located among protesters. The U.S. Press Freedom Tracker has confirmed almost thirty incidents of arrest or assault by the police around the country, and the Reporters Committee and the Tracker are investigating several hundred more.

Officers on the ground must understand that gathering news and recording police activities are not crimes, and that journalists who are complying with reasonable law enforcement directions when covering civil unrest are protected by the First Amendment.

In incidents captured on camera in New York City, the journalists were clearly identified as such and indisputably in compliance with the law.

Additionally, officers should recognize that training for journalists and documentarians who cover protests or civil unrest provides guidance on how to interact with law enforcement. They know to comply with an order to move, they will not resist arrest, and they will identify themselves as a member of the news media. At the same time, officers properly trained in crowd control should know that an identifiable journalist may not be arrested or assaulted.

We also strongly urge you to affirmatively order all commanders to instruct their officers that the news media is exempt from curfew orders in New York City, as was clearly stated in the “Finest Message” of June 1.

A general curfew order that fails to provide an exemption for *all* members of the press would violate the First Amendment, and gives law enforcement a potent tool to silence reporting through assaults or arrests of journalists, as we have seen over the past several days. *Cf. Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (“Any system of prior restraint of expression comes before this Court bearing a heavy presumption against its constitutional validity.”). Furthermore, that arrest or detention of a reporter during a curfew would itself violate the First Amendment. *See id.*

We appreciate Mayor de Blasio’s tweet early on June 5 confirming that media personnel are essential and exempt from the curfew, and his pledge to “get NYPD to fix this immediately,” but that message *must* filter down to the officers on the ground.

A. The right to report on police activities is clearly established and officers have no immunity when they directly target reporters covering protests.

The right of the press to document police activities in public has long been protected by the First Amendment. *See Iacobucci v. Boulter*, 193 F.3d 14, 25 (1st Cir. 1999) (“Because Iacobucci’s [journalistic] activities were peaceful, not performed in derogation of any law, and done in the exercise of his First Amendment rights [police] lacked the authority to stop them.”). News reporting on police conduct serves the crucial First Amendment interest in promoting the “free discussion of governmental affairs.” *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

The right to record police activity, by the press and public, has been held repeatedly to be “clearly established” by many courts around the country. Therefore, a police officer or official who violates that right, especially through the use of force, cannot claim legal immunity. *See Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011) (citing cases); *see also American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (finding eavesdropping statute barring recording of police activity in public violated First Amendment).

The Department of Justice has taken the position that this right to record law enforcement is a crucial First Amendment protection that should apply across the

country. *See* Statement of Interest of the United States, *Sharp v. Baltimore City Police Dep't*, No. 1:11-cv-02888-BEL (D. Md. filed Jan. 10, 2012) (“[The right to record is] not only required by the Constitution . . . [it is] consistent with our fundamental notions of liberty, promote[s] the accountability of our governmental officers, and instill[s] public confidence in the police officers who serve us daily.”); *see also* Statement of Interest of the United States, *Garcia v. Montgomery County*, No. 8:12-cv-03592-JFM (D. Md. filed March 4, 2013) (arguing that discretionary charges like disorderly conduct or disturbing the peace should be viewed skeptically when based on recording police activity).

Journalists, photojournalists, and documentarians deprived of that right are entitled to relief under 42 U.S.C. § 1983, which permits individuals whose rights are violated under color of law to sue the government official responsible. *See Higginbotham v. New York*, 105 F. Supp. 3d 369, 379-80 (S.D.N.Y. 2015) (finding reporter forcibly arrested covering protest stated clearly established First Amendment right-to-record claim sufficient to defeat qualified immunity); *see also Terebesi v. Torres*, 764 F.3d 217, 231 (2d Cir. 2014) (“Even if this Court has not explicitly held a course of conduct to be unconstitutional, *we may nonetheless treat the law as clearly established* if decisions from this and other circuits *clearly foreshadow a particular ruling on the issue.*”) (emphasis added and internal quotations and citations omitted).

While law enforcement may impose reasonable restrictions on newsgathering to prevent undue interference with legitimate police work, journalists who comply with those restrictions—who stand at a fair remove from any police activity, who obey orders to disperse, and who conspicuously identify themselves as journalists—may not be subject to arrest or physical attack, the quintessential “unreasonable” restriction.

Though physical restraints on newsgathering, such as those which we have seen in New York City in recent days, are thankfully rare and therefore seldom litigated, there is little question that a court would find a “clearly established” First Amendment right of journalists to be free from arrest and the baton.

B. New York City should immediately implement protocols to protect reporters and ensure the public is informed.

Accordingly, we urge you to:

- Instruct your officers and staff that the arrest or physical attack of a journalist who is compliant with reasonable police orders is a clearly established First Amendment violation;
- Take swift action to discipline any officer who is found to have arrested or assaulted a journalist engaged in newsgathering;
- Inform your officers that they themselves could be subject to legal liability for violating these rights;

- Ensure that crowd control tactics are appropriate and proportional, and are designed to prevent collateral harm to journalists covering the protests;
- Continue to exempt members of the news media from mobility restrictions, including, and especially, curfews; and
- Release all information about arrests of or physical interactions with the press to the public to allow it to evaluate the legitimacy of police conduct.

Please do not hesitate to contact Bruce Brown, Executive Director of the Reporters Committee, with any questions at bbrown@rcfp.org.

Sincerely,

The Reporters Committee
for Freedom of the Press

American Broadcasting Companies, Inc.
on behalf of ABC News and WABC-TV, New York
Advance Publications, Inc.
ALM Media, LLC
America's Newspapers
American Journalism Project
Article 19
The Associated Press
Association of Alternative Newsmedia
The Atlantic Monthly Group LLC
Bloomberg News
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BuzzFeed
Cable News Network, Inc.
California Broadcasters Association
California News Publishers Association
CBS Broadcasting Inc., on behalf of
CBS News and CBS Television
Stations
The Center for Investigative Reporting
(d/b/a Reveal)
Chalkbeat
THE CITY
Colorado Press Association
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 NowThis News
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 Reuters News & Media Inc.
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 Society of Environmental Journalists
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 Society of Professional Journalists
 New England
 South Carolina Press Association
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 Univision Communications Inc.
 Utah Press Association
 Vermont Press Association
 Vice Media Group
 Virginia Press Association
 Vox Media
 Washingtonian
 The Washington Post
 Weigel Broadcasting Co.
 WNET
 Yahoo News

cc: The Honorable Andrew Cuomo
Governor, State of New York

The Honorable Letitia James
Attorney General, State of New York

The Honorable Cyrus R. Vance, Jr.
District Attorney of New York County, Borough of Manhattan

The Honorable Darcel D. Clark
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The Honorable Eric Gonzalez
District Attorney of Kings County, Borough of Brooklyn

The Honorable Melinda Katz
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The Honorable Michael E. McMahon
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