[Oral argument not yet scheduled]

No. 14-5002

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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WAYNE ANDERSON, *Appellant*,

v.

CHARLES HAGEL, Secretary of Defense, et al., *Appellees*.

_____

On Appeal from the United States District Court
for the District of Columbia
(Civil No. 12-1243)

_____

[CORRECTED] BRIEF OF *AMICUS CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF APPELLANT WAYNE ANDERSON AND THE REVERSAL OF THE DISTRICT COURT

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INTERESTS OF *AMICUS CURIAE*

The Reporters Committee for Freedom of the Press files this brief in support of Appellant Wayne Anderson. The Reporters Committee is a voluntary, unincorporated association of reporters and editors working 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 Act litigation since 1970, and it frequently files friend-of-the-court briefs in significant media law cases.

As a committee of journalists and an advocate for press freedom, the Reporters Committee has a strong interest in the policies governing the rights of journalists reporting on military operations throughout the world. It is from this perspective that it writes to emphasize to this Court the public interests at stake in this case.[1]

[1] Per Fed. R. App. P. 29(c)(5), the Reporters Committee hereby affirms that no party's counsel authored this brief in whole or in part, that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and that no person other than the *amicus curiae* contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

This case is about an alleged act of governmental retaliation against a member of the media based on the content of that journalist's reporting. Mr. Anderson claims that the government terminated his embed status without proper explanation and expelled him from Afghanistan because he published information inconsistent with the military's public relations interests. Mr. Anderson further contends that the military's own rules governing embedded journalists did *not* provide a basis for his termination. If Mr. Anderson's allegations are true, the Reporters Committee is concerned that the termination of his embed status was improper retaliation for his truthful reporting on the war in Afghanistan, which is protected speech under the First Amendment. If the Defendants punished Mr. Anderson because of the content of his communications, their retaliatory conduct was unconstitutional and in violation of Mr. Anderson's clearly established rights. This alleged retaliation cuts to the core of First Amendment protections — the ability of the press to report openly and accurately without fear of governmental reprisal — and has implications for many other journalists who face different forms of retaliation from government officials.

At the outset, it is important to recognize that the complained-of conduct in this case goes beyond government officials choosing to give some reporters better access than others, refusing to speak to certain reporters, or generally attempting to

manage a message. This case is not about finding a First Amendment right to embed status, a proposition that this Court has rejected. *See Flynt v. Rumsfeld*, 355 F.3d 697, 698 (D.C. Cir. 2004).

Rather, this case is about the alleged punishment of a journalist by the government because he exercised his right of free speech. The alleged retaliation had more than a chilling effect; it actually precluded Mr. Anderson from continuing to report from the warzone. Courts have long held that content-based retaliation for the exercise of free speech violates the First Amendment. Despite its illegality, content-based retaliation remains an unfortunately prevalent and harmful practice that undermines accurate reporting, chills free speech, and compromises the public's right to know what its government is doing. This practice cannot be condoned. Respectfully, this Court should refuse to permit retaliation against journalists that has the effect, if not purpose, of whitewashing reporting from a warzone.

ARGUMENT

I. Under the First Amendment, the government cannot retaliate against journalists based on the content of their reporting.

The First Amendment protects journalists from retaliation by government officials based on the content of their reporting. Content-based retaliation has several negative effects: it chills — and in some cases precludes — free speech, sanitizes reporting, and compromises the public's right to receive accurate information about its government. This Court should not condone retaliation against journalists and remand this matter to the district court for consideration of Mr. Anderson's First Amendment retaliation claim.

A. Federal courts consistently protect journalists from content-based retaliation.

Federal courts across the country have consistently recognized that retaliation by government officials against journalists for the content of their speech violates the First Amendment. "Official reprisal for protected speech offends the Constitution [because] it threatens to inhibit exercise of the protected right, and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (citations and quotation marks omitted).

In *Rosenberger v. Rector*, 515 U.S. 819, 826-27 (1995), the U.S. Supreme Court rejected viewpoint discrimination against student journalists. The University of Virginia denied financial support to the newspaper because it promoted or manifested religious beliefs. *Id.* The Supreme Court explained that the university impermissibly selected "for disfavored treatment those student journalistic efforts with religious editorial viewpoints." *Id.* at 831. The Court recognized that "[v]ital First Amendment speech principles" were at stake, including the "danger to liberty . . . in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them," and the "chilling of individual thought and expression." *Id.* at 835. The government's selective denial of financial support was thus a denial of the "right of free speech guaranteed by the First Amendment." *Id.* at 837.

In a case decided by the Fourth Circuit, the author of a magazine article critical of the White House and FBI stated a claim for First Amendment retaliation when he alleged that, shortly after publication, the FBI conducted a warrantless search of his home. *Trulock v. Freeh*, 275 F.3d 391, 397 (4th Cir. 2001). The Fourth Circuit vacated the district court's dismissal of the journalist's retaliation claim and rejected a qualified immunity argument asserted by the defendants, noting that "it was clearly established at the time of the search that the First Amendment prohibits an officer from retaliating against an individual for speaking

critically of the government." *Id.* at 406. The court rejected the argument that a reasonable FBI agent "could reasonably have believed that the article did not enjoy First Amendment protection." *Id.*

Similarly, in Arizona, the Ninth Circuit held that the investigation and arrest of an owner of a weekly newspaper, allegedly in retaliation for critical articles published in the paper, stated a claim under the First Amendment. *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 916-17 (9th Cir. 2012). The court noted that alleged irregularities in the prosecutor's procedure, such as lacking probable cause and not waiting for warrants or approval before authorizing arrests, were sufficient to create an inference that the prosecutor's primary purpose was to silence the paper and that the actions would chill the owner's speech. *Id.* at 917. The court rejected the prosecutor's argument that he was entitled to qualified immunity, stating that "[i]t is hard to conceive of a more direct assault on the First Amendment than public officials ordering the immediate arrests of their critics." *Id.*

In California, a reporter was arrested during a protest, allegedly in retaliation for his unfavorable reporting about the transit police in the wake of the 2009 killing of Oscar Grant III and Charles Hill at a Bay Area Rapid Transit station. *Morse v. San Francisco Bay Area Rapid Transit Dist.*, No. 12-cv-5289, 2014 WL 572352, at *1 (N.D. Cal. Feb. 11, 2014). The district court denied a motion to

dismiss the reporter's First Amendment retaliation claim, finding that the reporter's "arrest reasonably suggests a retaliatory motive," following "numerous stories that were, at best, critical" of the transit police. *Id.* at *9. The court also denied the defendants' qualified immunity argument, stating that police "have been on notice since at least 1990 that it is unlawful to use their authority to retaliate against individuals for their protected speech." *Id.* at *12. The court held that "whether Plaintiff's arrest was caused by an improper motive is a question for the trier of fact." *Id.* at *13.

In Chicago, county officials denied a newspaper reporter access to a jail only after she wrote a critical article about strip-search policies at the jail. *Chicago Reader v. Sheahan*, 141 F. Supp. 2d 1142, 1143 (N.D. Ill. 2001). She sued the county officials, who argued that her access had been denied because she had deceived officials about her previous article. *Id.* at 1146. The district court found that denying access "could chill someone's speech" and rightly observed that although "[r]eporters frequently do resort to alternate sources when first-hand observations are not possible, . . . that in no way negates that actually being there is optimal." *Id.* The district court denied the county officials' motion for summary judgment because the denial of access has "exactly the type of chilling effect the First Amendment guards against." *Id.* The court granted the reporter's motion for

summary judgment because "defendants' stated justification still violates the First Amendment." *Id.* at 1147.

In southern Michigan, village officials retaliated against a newspaper reporter who had written stories critical of the village and its misuse of public funds, voting improprieties, and violations of state statutes. *McBride v. Vill. of Michiana*, 100 F.3d 457, 458 (6th Cir. 1996). Among other things, village officials threatened physical removal of the reporter if she did not leave the press table at council meetings. *Id.* at 459. The Sixth Circuit, reversing the district court's entry of summary judgment in favor of the defendants on qualified immunity grounds, recognized that although individuals "may have no 'right' to certain government 'benefits,' those benefits may not be denied because of constitutionally protected speech or associations." *Id.* at 461. *See also id.* ("the right to be free from retaliation for exercise of First Amendment freedoms is clearly established.")

In Washington state, a journalist, who had reported on police retaliation against people who videotaped police abuse in public places, was removed from a courtroom during an arraignment of a man who the journalist believed was a victim of police retaliation. *Hendricks v. Pierce Cnty.*, No. C13-5690, 2014 WL 1053318, at *1 (W.D. Wash. Mar. 19, 2014). The journalist alleged that a county deputy detained him until the proceeding was essentially over in order to prevent him from witnessing or documenting the proceeding. *Id.* at *4. The district court

denied a motion to dismiss the claim because the journalist had plausibly pleaded that "Defendants' conduct deterred his political speech and that such deterrence was a substantial or motivating factor in that conduct." *Id.*

Similarly, in *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1176 (3d Cir. 1986), the Third Circuit held that the government cannot "discriminat[e] between newsseekers, granting access to those favorably disposed to it while denying access to those whom it considers unfriendly." *See also Times-Picayune Pub'g Corp. v. Lee*, 15 Med. L. Rptr. 1713, 1720 (E.D. La. 1988) ("The selective denial of access to a governmental forum based on content is unconstitutional regardless of whether a public forum is involved unless the government can show a compelling state interest and is the least restrictive means available to achieve the asserted governmental purpose.").

Governmental conduct designed to eliminate criticism in the press also violates the First Amendment. In Maryland, on the night before a local election, six policemen drove around their county buying up all of the newspapers for sale at local stores, anticipating that a newspaper story would be critical of them and their favored candidates. *Rossignol v. Voorhaar*, 316 F.3d 516, 519-20 (4th Cir. 2003). The Fourth Circuit, reversing the district court's entry of summary judgment in favor of the defendants, held that, if the police acted under color of state law, such a seizure "clearly contravened the most elemental tenets of First Amendment law"

because the police acted with "censorial motivation." *Id.* at 521, 523. The Fourth Circuit recognized that "[i]f we were to sanction this conduct, we would point the way for other state officials to stifle public criticism of their policies and their performance." *Id.* at 528.

These cases illustrate the strong protections afforded by the First Amendment to journalists who face retaliation, interference, or censorship from the government based on their reporting. As set forth in Mr. Anderson's principal brief, and as the cases cited above make clear, Mr. Anderson's Complaint sufficiently states a claim for First Amendment retaliation.

B. Content-based retaliation chills speech and harms the public.

As the foregoing courts recognized, content-based retaliation is a particularly troubling and coercive form of press control. By engaging in retaliatory conduct, government officials force journalists to choose between sanitizing their reporting and facing consequences that could harm their livelihood. These choices may be particularly difficult for freelance war correspondents, like Mr. Anderson, who depend on their ability to report from the battlefield to continue their work, and who do not necessarily have a contract or job waiting for them upon return to the United States. The government retaliation alleged in this case no doubt has a chilling effect on journalists who depend on their embed status to make a living. But the particular kind of retaliation alleged here also has

outright censorial effects: the removal of a journalist from a warzone precludes that journalist from reporting from the warzone.

The effects of government retaliation can be subtle and diffuse, pressuring reporters — not only the journalist directly targeted — to self-censor their speech. Government retaliation is designed to stifle criticism and dissent, forcing reporters to shade or shape their coverage in a way that meets the approval of those in power. Ultimately, the public is harmed if the media ceases to function as an effective public watchdog and fails to provide an uncensored account of current events, especially those as important as war. In the military context, retaliation of the kind alleged here results in the loss of discerning eyes and ears on the ground, which are essential to informing the public about the costs and benefits of military action. As Mr. Anderson notes in his Complaint, reporting on legitimate news stories from warzones is vital to the public's understanding of the conflicts and can have a significant effect on public support for, or opposition to, continued military action. *See* JA-15 at ¶¶ 30-31 (referencing how reporting on events like the My Lai Massacre turned public opinion against the Vietnam War).

While a chilling effect may be hard to prove in some cases, because it is often difficult to find empirical evidence of what was *not* written or reported, the effects of retaliation on free speech in this case are plainly evident. The physical removal of a war correspondent from the continent necessarily prevents him from

serving as an eyewitness from the battlefield and producing the stories he otherwise would have published. The alleged termination of embed status and the physical removal of Mr. Anderson from Afghanistan are both acts of retaliation and censorship. An ordinary freelancer in Mr. Anderson's position, if ever permitted to embed with a military unit again, would alter his or her coverage — an example of chilled speech — in order to remain embedded and make a living.

Courts have recognized the negative effects retaliation has on journalists and the public. "Fear of retaliation may chill an individual's speech, and, therefore permit the government to 'produce a result which [it] could not command directly.'" *Trulock*, 275 F.3d at 404 (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)); *accord DeGuiseppe v. Vill. of Bellwood*, 68 F.3d 187, 192 (7th Cir. 1995) ("retaliation need not be monstrous to be actionable under the First Amendment; it need merely create the potential for chilling employee speech on matters of public concern").

Retaliation of the sort alleged here occurs against a backdrop of other efforts by the government to control the press. According to one thorough examination by Leonard Downie, Jr., a former executive editor of *The Washington Post* and professor of journalism at Arizona State University, the present administration has employed a multitude of techniques — including "increased limitations on access to information that is in the public interest," as well as prosecutions of leakers,

surveillance of journalists, and issuance of subpoenas to journalists — that have the effect of "thwart[ing] a free and open discussion necessary to a democracy." *CPJ's recommendations to the Obama administration*, Committee to Protect Journalists (Oct. 10, 2013, 10:00 AM), http://cpj.org/x/5730; *see also* Leonard Downie, Jr. & Sara Rafsky, *The Obama Administration and the Press: Leak investigations and surveillance in post-9/11 America* (2013), *available at* https://www.cpj.org/reports/us2013-english.pdf.

The military has been particularly vigilant about limiting dissent, underscoring the need for courts to uphold First Amendment protections for journalists. The military even hired a public relations firm to track and grade reporters' coverage as "positive," "negative," or "neutral," and used the media assessment reports "to decide how to steer [reporters] away from potentially negative stories." Charlie Reed, *Journalists' recent work examined before embeds*, Stars & Stripes, Aug. 24, 2009, *available at* http://www.stripes.com/news/journalists-recent-work-examined-before-embeds-1.94239; Leo Shane III, *Army used profiles to reject reporters*, Stars & Stripes Aug. 29, 2009, *available at* http://www.stripes.com/news/army-used-profiles-to-reject-reporters-1.94340. In one notable case, the military barred a *Stars & Stripes* reporter "from embedding with a unit of the 1st Cavalry Division because the reporter 'refused to highlight' good news that the military commanders wanted to emphasize." Reed,

Journalists' recent work examined before embeds, *supra*. In this atmosphere, the termination of a reporter's embed status would chill the free speech of journalists.

If borne out by the evidence, Mr. Anderson's claim is but one illustration of the harm that content-based retaliation inflicts on the press and the public: a loss of freedom of expression about a war fought in the public's name. The termination of his status in this case not only ended his ability to speak by denying him eyewitness access, but sent a clear message to other journalists to be cautious about their reporting, even if their stories technically complied with the Media Ground Rules. Content-based retaliation of this kind violates the First Amendment and cannot be condoned.

C. Providing process for grievances is a desirable check on governmental retaliation.

A core tenet of our legal system is that an individual has the right to have notice and a meaningful opportunity to be heard before being deprived of a protected interest. *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (internal citation omitted). Indeed, the U.S. Supreme Court has recognized the necessity of providing such procedural protections to members of the media when access to government proceedings is being denied. *See Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 401 (1979) (Powell, J., concurring) ("If the constitutional right of the press and

public to access [court proceedings] is to have substance, representatives of these groups must be given an opportunity to be heard on the question of their exclusion."); *accord Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) (quoting Justice Powell's concurrence in *Gannett*). Although these cases have not specifically applied these rights in an embed context, they do analyze the important constitutional rights of the media when their attempts to report on the workings of government are restricted.

This Circuit has recognized that "the protection afforded newsgathering under the first amendment guarantee of freedom of the press requires that this access not be denied arbitrarily or for less than compelling reasons." *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977) (citations omitted). In considering the standards for obtaining a White House press pass, this Circuit directed the government to "publish or otherwise make publicly known the actual standard employed in determining whether an otherwise eligible journalist will obtain a White House press pass." *Id.* at 130. The Court continued: "We think that notice to the unsuccessful applicant of the factual bases for denial with an opportunity to rebut is a minimum prerequisite for ensuring that the denial is indeed in furtherance of Presidential protection, rather than based on arbitrary or less than compelling reasons." *Id.* at 131.

Implicit in this analysis is that written guidelines for access should be enforced neutrally and objectively — not by judging the favorability of the journalist's reporting. *See Getty Images News Servs., Corp. v. Dep't of Defense*, 193 F. Supp. 2d 112, 122 (D.D.C. 2002) (summarizing federal court cases as holding that "particular journalists could not be singled out for exclusion but rather were entitled to access on the same terms as other journalists"); *accord Am. Broad. Cos., Inc. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977) ("we think that the danger would be that those of the media who are in opposition or who the candidate thinks are not treating him fairly would be excluded. And thus we think it is the public which would lose."); *Westinghouse Broad. Co., Inc. v. Dukakis*, 409 F. Supp. 895, 896 (D. Mass. 1976) (stating that news agencies have a right to be treated to access on equal terms and that the right, while not absolute, "may not be infringed upon by state officials in the absence of a compelling government interest to the contrary"). Even within the military context, the First and Fifth Amendments "require, at a minimum, that before determining which media organizations receive the limited access available, [the Department of Defense] must not only have some criteria to guide its determinations but must have a reasonable way of assessing whether the criteria are met." *Getty Images*, 193 F. Supp. 2d at 121.

According to Mr. Anderson's Complaint, he was not afforded a meaningful opportunity to challenge his termination prior to being expelled from Afghanistan.

He alleges that the military did not conduct a reasonable assessment of whether he had complied with the Media Ground Rules, and did not provide him the "factual bases for denial with an opportunity to rebut." *Sherrill*, 569 F.2d at 131. Providing such an opportunity is of particular importance here, where Mr. Anderson has alleged that a violation of the Media Ground Rules did not occur. If he had been given a meaningful opportunity to present his side of the story, Mr. Anderson could well have demonstrated that he was simply trying to carry out his role as a journalist in a manner that was ethically sound and respectful of the soldiers, and in compliance with the Media Ground Rules.

CONCLUSION

For the foregoing reasons, this Court should remand this matter to the district court for consideration of Mr. Anderson's First Amendment retaliation claim.

Respectfully submitted,

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September 29, 2014

CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1 and Fed. R. App. P 26.1, the *amicus curiae* respectfully submits the following corporate disclosure statement:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors working to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee certifies that it has no parent corporation and that no publicly-held company owns 10 percent or more ownership interest in the organization.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,752 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Time New Roman font.

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Dated: September 29, 2014

CERTIFICATE OF SERVICE

I, Bruce D. Brown, do hereby certify that I have filed the foregoing Brief of *Amicus Curiae* electronically with the Court's CM/ECF system with a resulting electronic notice to all counsel of record on September 29, 2014. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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