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By e-mail

October 23, 2020

The Honorable Charles Allen  
Chairman, Committee on the Judiciary and Public Safety  
District of Columbia Council  
John A. Wilson Building, Room 412  
1350 Pennsylvania Ave. NW  
Washington, D.C. 20004

Dear Chairman Allen and Members of the Committee:

The Reporters Committee for Freedom of the Press appreciates the opportunity to contribute to this conversation and to comment on the bills under discussion: the Rioting Modernization Amendment Act of 2020 (B23-0771); the Internationally Banned Chemical Weapons Prohibition Act of 2020 (B23-0882); and the Comprehensive Policing and Justice Reform Amendment Act of 2020 (B23-882). At the outset, we welcome the Committee's attention to these important issues.

Founded in 1970, the Reporters Committee is an unincorporated nonprofit association dedicated to safeguarding the right to a free and unfettered press. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect essential First Amendment freedoms. This summer, in jurisdictions across the country, the Reporters Committee has defended the right of journalists to do their jobs without fear of retaliation, rubber bullets, or tear gas.<sup>1</sup> Our hope in these comments is to highlight why the reforms under discussion matter to the journalists who have risked their safety covering protests against systemic racism and police brutality—and to note room for further progress.

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The right to document government activity in public has long been protected by the First Amendment. *See, e.g., Iacobucci v. Boulter*, 193 F.3d 14, 25 (1st. Cir. 1999). As the U.S. Department of Justice has explained, that freedom is “not only required by the Constitution” but also “consistent with our fundamental notions of liberty.” *See* Statement of Interest of the United

<sup>1</sup> *See, e.g., Reporters Committee Condemns Arrest of Journalist Josie Huang*, Reporters Comm. for Freedom of the Press (Sept. 16, 2020), <https://bit.ly/2TcQhbA>; *Letter to California Governor Denounces Police Attacks on Journalists*, Reporters Comm. for Freedom of the Press, (July 8, 2020); <https://bit.ly/2Tal6Of>; *In Letter to New York Officials, Reporters Committee Denounces Police Attacks Journalists*, Reporters Comm. for Freedom of the Press (June 7, 2020), <https://bit.ly/35mymFk>; *Reporters Committee Letter to Minnesota Officials Denounces Polices Attacks on Journalists*, Reporters Comm. for Freedom of the Press (June 2, 2020), <https://bit.ly/3kkbcpa>.

States, *Sharp v. Baltimore City Police Dep't*, No. 1-11-cv-02888 (D. Md. Jan. 10, 2012). But the indiscriminate use of riot-control tactics—along with the improper use of criminal charges like unlawful assembly, failure to disperse, or rioting—makes it exceptionally difficult to exercise that right safely.

This summer has seen a staggering number of police attacks on clearly identified journalists. Here in Washington, D.C. alone, among the incidents documented by the Reporters Committee and the Press Freedom Tracker, a reporter for the *Washington Examiner* was pepper sprayed while carrying a bag clearly marked “PRESS;” a journalist with *Voice of America* caught an officer on video firing a projectile at him, even though his press badge was displayed; and an Australian news crew was assaulted by U.S. Park Police, live on air, during the clearing of Lafayette Park. Cf. Third Amended Complaint, *Black Lives Matter D.C. v. Trump*, No. 1:20-cv-01469 (D.D.C. Sept. 3, 2020) (raising claims against both federal and local law enforcement officers in connection with the clearing of protesters from the park). All told, nationwide, more than eight hundred press freedom violations have been reported to the Tracker in connection with the protests. See U.S. Press Freedom Tracker (last visited Oct. 23, 2020), <https://pressfreedomtracker.us/>.

These interactions run counter to established First Amendment protections for the press. When law enforcement officials assault someone they know or should know to be a journalist, they violate clearly established law and are not entitled to qualified immunity. See *Higginbotham v. New York*, 105 F. Supp. 3d 369, 379-80 (S.D.N.Y. 2015) (collecting cases). Even where the use of force is incidental rather than retaliatory, a crowd-control response that is not tailored to accommodate lawful reporting violates the Constitution. See *Index Newspapers, LLC v. U.S. Marshals Service*, No. 20-35379 (9th Cir. Oct. 9, 2020), slip op. at 32 (“[P]eaceful protesters, journalists, and members of the general public cannot be punished for the violent acts of others.”). But after-the-fact litigation cannot put a reporter back on the scene if rubber bullets drive that reporter away.

In that light, we appreciate the Committee’s effort to ensure fewer are fired in the first place. Unfortunately, experience has made clear that the language under consideration is ambiguous. The legislation provides that less-lethal or chemical munitions “shall not be used by MPD to disperse a First Amendment assembly.” MPD, though, appears to interpret that language to permit their use *during* a protected assembly so long as the officers’ specific intent is not to disperse protected activity. See Rachel Kurzius, *Would D.C.’s Police Reform Bill Have Stopped MPD from Pepper Spraying Protestors?*, NPR (June 25, 2020), <https://n.pr/3jKCK05> (quoting MPD spokesperson Brianna Jordan); cf. D.C. Code § 5-331.16(b)(1) (setting out pre-amendment standards for the use of irritants). That is not, as we understand it, what the Council intended, and it is not an approach that provides adequate breathing space for lawful reporting.<sup>2</sup>

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<sup>2</sup> Oregon’s experience has been similar: When its Governor signed a bill to limit the use of tear gas to “riots,” police in Portland declared a riot the same night—and twenty more over the next two months. See Jonathan Levinson, *Portland Protests Frequently Labeled ‘Riots,’ But Some Say Police Use Laws Arbitrarily*, OPB (Aug. 28, 2020), <https://bit.ly/30QMfdd>.

We urge the Committee to make clear that the use of crowd-control munitions is prohibited where the *effect* would be to disperse those engaged in protected activity. “The proper response to potential and actual violence is for the government to ensure an adequate police presence . . . and to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment activity as a prophylactic measure.” *Index Newspapers*, No. 20-35379, slip op. at 32 (quoting *Collins v. Jordan*, 110 F.3d 1363, 1373 (9th Cir. 1996)).

\* \* \*

With similar concerns in mind, we appreciate the Committee’s attention to the chilling effect of vague, poorly defined criminal charges like “rioting.” Across the country, law enforcement officers have used a range of these overbroad “public order” offenses—such as rioting, failure to disperse, unlawful assembly, or obstruction of a police officer—in a manner that has impaired lawful newsgathering. To cite a prominent example: In Los Angeles County, sheriff’s deputies violently arrested KPCC reporter Josie Huang for exercising her right to record their response to a protest. *See Reporters Committee Condemns Arrest of Journalist Josie Huang*, Reporters Comm. for Freedom of the Press (Sept. 16, 2020), <https://bit.ly/2TcQhbA>. The Sheriff’s Department cited Ms. Huang for obstruction, initially claiming that she did not comply with the deputies’ instruction to give them space and did not identify herself as press. Video evidence made clear that neither claim was true. *Id.* While the District Attorney declined to pursue charges, the damage had already been done—the deputies prevented Ms. Huang from documenting their enforcement actions related to the protest.

As this Committee is aware, the same dynamic has played out in the District. *See* D.C. Code § 22-1322(a) (defining the offense of rioting). During the J-20 protests in 2017, a number of journalists were arrested and charged with rioting while they were engaged in lawful newsgathering at the scene. Thankfully, none of those charges ended in conviction—a District jury acquitted one defendant, and prosecutors ultimately dismissed the remaining charges. *See, e.g.,* Jaclyn Peiser, *Journalist Charged with Rioting at Inauguration Protest Goes Free*, N.Y. Times (Dec. 21, 2017), <https://nyti.ms/3nvG2NA>. But the law remains badly in need of reform. The statute relies on concepts as vague as “tumultuous” conduct and “does not include the common law requirement of a common purpose or intent on the part of the rioters.” Gabe Rottman, *Memo to D.C.: Protesters Are Not Rioters*, Wash. Post. (Feb. 4, 2018), <https://wapo.st/3jGikvL> (quoting *United States v. Matthews*, 419 F.2d 1177, 1190 (D.C. Cir. 1969) (Wright, J., dissenting)).

In one key respect, the Rioting Modernization Amendment Act improves on that status quo: It requires that the individuals charged themselves commit or attempt a predicate criminal offense. But the Act is unnecessarily broad in ways that could nevertheless chill reporting from the scene of a demonstration. For instance, acts that “cause[] or would cause . . . damage to, or taking of, property” are predicate offenses. Of course, reporters do not have a First Amendment right to cause property damage; still, charges for trespassing, an offense that arguably involves risks to property, have been

misused to target reporters. *See, e.g.,* Mark Berman, *Washington Post Reporter Charged with Trespassing, Interfering with a Police Officer*, Wash. Post (Aug. 10, 2015), <https://wapo.st/2Teu5xN>. In some cases, avoiding plausible trespass liability will be almost impossible: In the chaos of a protest, it can be exceptionally difficult to stay within the bounds of a public forum, especially where a police response gives reporters no lawful place to go. In Minneapolis, for instance, a correspondent for the *L.A. Times* was forced to scale a wall to escape a cloud of tear gas after officers backed the press into a corner. *See* Molly Hennessey-Fiske, *Times Reporters Recounts Being Hit With Rubber Bullets by Minnesota Police*, *L.A. Times* (May 30, 2020), <https://lat.ms/3ogwUNI>.

Once an individual has arguably committed a predicate offense, the Act’s *mens rea* provision is too vague to provide meaningful protection. A defendant can be charged if they are “reckless as to the fact nine or more other people are attempting to commit or committing a criminal offense . . . in the area perceptible to the person.” It is not clear what it means to be reckless as to the presence of someone you do not know whose actions you do not and cannot control. *Cf. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (noting that the constitutional bar on vague criminal laws is “more stringent” when overly broad laws “threaten[] to inhibit the exercise of constitutionally protected rights,” such as “the right of free speech”). This recklessness provision would continue to deviate from the common law, under which “the true gravamen of the offense” of riot was the fact that participants had “*planned*” to commit violent acts together, “for that is what made the entire group, rather than just the actual and direct perpetrators of the violent or tumultuous behavior, guilty of the offense.” *Schlamp v. State*, 891 A.2d 327, 332 (Md. 2006) (emphasis added). As a result, the Act still threatens to impose liability for the uncoordinated actions of third parties, which would chill First Amendment activity—including newsgathering and reporting—in the District of Columbia.

We urge the Committee to amend the Act to address these concerns: by making clear that mere trespass is not a predicate offense, and by making clear that individuals can only be convicted if they share a common, unlawful intent with the other assembled individuals who commit criminal acts. Those revisions would ensure that “rioting” does not sweep in reporters engaged in lawful First Amendment activity at a protest.

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The Reporters Committee appreciates the opportunity to present these views. Please do not hesitate to contact Grayson Clary, the Stanton Foundation National Security/Free Press Fellow at the Reporters Committee, at [gclary@rcfp.org](mailto:gclary@rcfp.org) with any questions.

Sincerely,

Grayson Clary  
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Reporters Committee for Freedom of the Press