

No. 17-35552

IN THE
**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIAN ADDISON,
Plaintiff-Appellee,

v.

CITY OF BAKER CITY, a municipal corporation,
Defendant
and
WYN LOHNER, in his individual capacity,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Oregon

**BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS AND 22 MEDIA ORGANIZATIONS
IN SUPPORT OF PLAINTIFF-APPELLEE URGING AFFIRMANCE**

Bruce D. Brown, Esq.
Counsel of Record
Caitlin V. Vogus, Esq.
Josh R. Moore, Esq.
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1250
Washington, D.C. 20005
Telephone: (202) 795-9300
Facsimile: (202) 795-9310

Additional amici counsel listed in Appendix B

CORPORATE DISCLOSURE STATEMENT

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

American Society of News Editors is a private, non-stock corporation that has no parent.

The Associated Press Media Editors has no parent corporation and does not issue any stock.

Association of Alternative Newsmedia has no parent corporation and does not issue any stock.

The Center for Investigative Reporting is a California non-profit public benefit corporation that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. It has no statutory members and no stock.

The E.W. Scripps Company is a publicly traded company with no parent company. No individual stockholder owns more than 10% of its stock.

First Amendment Coalition is a nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

First Look Media Works, Inc. is a non-profit non-stock corporation organized under the laws of Delaware. No publicly-held corporation holds an interest of 10% or more in First Look Media Works, Inc.

The Investigative Reporting Workshop is a privately funded, nonprofit news organization affiliated with the American University School of Communication in Washington. It issues no stock.

KPTV-KPDX Broadcasting Corporation is a wholly owned subsidiary of Meredith Corporation. Meredith Corporation is a publicly traded company on the New York Stock Exchange under the symbol MDP. Black Rock, Inc., publicly traded on the New York Stock Exchange under the symbol BLK, owns ten percent (10%) or more of Meredith Corporation's stock.

The McClatchy Company is publicly traded on the New York Stock Exchange under the ticker symbol MNI. Contrarius Investment Management Limited and Royce & Associates, LLC both own 10% or more of the common stock of The McClatchy Company.

The Media Institute is a 501(c)(3) non-stock corporation with no parent corporation.

Digital First Media, LLC. is a privately held company. No publicly-held company owns ten percent or more of its equity interests.

MPA – The Association of Magazine Media has no parent companies, and no publicly held company owns more than 10% of its stock.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

The News Guild – CWA is an unincorporated association. It has no parent and issues no stock.

Online News Association is a not-for-profit organization. It has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

Radio Television Digital News Association is a nonprofit organization that has no parent company and issues no stock.

Reporters Without Borders is a nonprofit association with no parent corporation.

The Seattle Times Company: The McClatchy Company owns 49.5% of the voting common stock and 70.6% of the nonvoting common stock of The Seattle Times Company.

Sinclair Broadcast Group, Inc. is a Maryland corporation which is publicly traded on NASDAQ under the symbol SBGI.

Society of Professional Journalists is a non-stock corporation with no parent company.

The Tully Center for Free Speech is a subsidiary of Syracuse University.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	V
STATEMENT OF IDENTITY AND INTEREST OF <i>AMICI CURIAE</i>	1
FED. R. APP. 29(A)(4)(E) STATEMENT	3
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
I. First Amendment retaliation claims under § 1983 are important to journalists, who are at risk of retaliation by government officials because their reporting may be critical of the government.	5
II. The district court properly found that journalists have a clearly established right to report on and critique government officials without fear of retaliation through a campaign of harassment.	12
A. A campaign of harassment by police, directed against a journalist in retaliation for First Amendment protected speech, violates the Constitution.	13
B. The right to be free from a retaliatory campaign of harassment for protected speech is clearly established.	17
CONCLUSION	19
APPENDIX A	21
APPENDIX B	29
ADDITIONAL COUNSEL FOR <i>AMICI CURIAE</i>	29
CERTIFICATE OF SERVICE	31

TABLE OF AUTHORITIES

CASES

<i>Allen v. Scribner</i> , 812 F.2d 426 (9th Cir.), <i>amended</i> , 828 F.2d 1445 (9th Cir. 1987)	15
<i>Anderson v. Creighton</i> , 483 U.S. 635 (1987)	17
<i>Anderson v. Larpen</i> , No. CV 16-13733, 2017 WL 3064805 (E.D. La. July 19, 2017)	9
<i>Ashcroft v. al-Kidd</i> , 563 U.S. 731 (2011)	5, 18
<i>Bantam Books, Inc. v. Sullivan</i> , 372 U.S. 58 (1963)	17
<i>Bart v. Telford</i> , 677 F.2d 622 (7th Cir. 1982)	15
<i>Blair v. Bethel Sch. Dist.</i> , 608 F.3d 540 (9th Cir. 2010)	13
<i>Bond v. Floyd</i> , 385 U.S. 116 (1966)	16
<i>Camarillo v. McCarthy</i> , 998 F.2d 638 (9th Cir. 1993)	18
<i>Coszalter v. City of Salem</i> , 320 F.3d 968 (9th Cir. 2003)	5, 14, 18
<i>Dunn v. Castro</i> , 621 F.3d 1196 (9th Cir. 2010)	18
<i>El Dia, Inc. v. Governor Rossello</i> , 165 F.3d 106 (1st Cir. 1999)	18
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982)	17
<i>Lacey v. Maricopa Cty.</i> , 693 F.3d 896 (9th Cir. 2012)	7, 8
<i>Leigh v. Salazar</i> , 677 F.3d 892 (9th Cir. 2012)	5, 6
<i>Mazzeo v. Young</i> , 510 F. App'x 646 (9th Cir. 2013)	5, 14, 16, 18
<i>McBride v. Vill. of Michiana</i> , 100 F.3d 457 (6th Cir. 1996) (“ <i>McBride II</i> ”)	15, 18, 19
<i>McBride v. Vill. of Michiana</i> , 30 F.3d 133 (6th Cir. 1994) (“ <i>McBride I</i> ”)	15
<i>Mills v. Alabama</i> , 384 U.S. 214 (1966)	6
<i>N.Y. Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	13
<i>N.Y. Times Co. v. United States</i> , 403 U.S. 713 (1971)	4, 5
<i>Richmond Newspapers, Inc. v. Virginia</i> , 448 U.S. 555 (1980)	6
<i>White v. Lee</i> , 227 F.3d 1214 (9th Cir. 2000)	17
<i>Zilich v. Longo</i> , 34 F.3d 359 (6th Cir. 1994)	19

OTHER AUTHORITIES

Abby Phillip, <i>Police in Ferguson Arrest and Threaten More Journalists</i> , Wash. Post (Aug. 18, 2014), http://wapo.st/1BthxmW	6
Amy Held, <i>Charge Dropped Against W.Va. Reporter Arrested After Questioning HHS Secretary</i> , NPR (Sept. 6, 2017, 5:49 PM), http://n.pr/2eLYhQj	11
Katie Moore, <i>Terrebonne Sheriff Reaches ‘Compromise’ with Blogger in 1st Amendment Lawsuit Over Illegal Search</i> , WWL-TV (Sept. 7, 2017), https://perma.cc/B5WY-T3G9	8, 9
Olivia Beavers, <i>Reporter Arrested After Repeatedly Questioning Health Secretary</i> , The Hill (May 9, 2017, 11:05 PM), http://bit.ly/2pjH595	11
Opening Brief of Defendant-Appellant, <i>Addison</i> , No. 17-35552 (Nov. 11, 2017), ECF No. 11 (“Appellant’s Brief”)	13
Reporters Committee for Freedom of the Press, <i>Police, Protestors, and the Press</i> (2012), https://perma.cc/258T-Z6JN	7
U.S. Press Freedom Tracker, https://pressfreedomtracker.us (last visited Jan. 4, 2018)	11
Walt Bogdanich & Grace Ashford, <i>An Alabama Sheriff, a Mystery Check and a Blogger Who Cried Foul</i> , N.Y. Times (Dec. 14, 2017), https://nyti.ms/2jU1IDJ ...	9, 10

RULES

Fed. R. App. P. 29	2, 3
--------------------------	------

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are The Reporters Committee for Freedom of the Press, American Society of News Editors, Associated Press Media Editors, Association of Alternative Newsmedia, The Center for Investigative Reporting, The E.W. Scripps Company, First Amendment Coalition, First Look Media Works, Inc., Investigative Reporting Workshop at American University, KPTV-KPDX Broadcasting Corporation, The McClatchy Company, The Media Institute, MediaNews Group Inc., dba Digital First Media, LLC, MPA – The Association of Magazine Media, National Press Photographers Association, The NewsGuild - CWA, Online News Association, Radio Television Digital News Association, Reporters Without Borders, The Seattle Times Company, Sinclair Broadcast Group, Inc., Society of Professional Journalists, and Tully Center for Free Speech. A supplemental statement of identity and interest of *amici curiae* is included below as Appendix A.

Amici file this brief in support of Plaintiff-Appellee Brian Addison. *Amici* are members of the news media or organizations who advocate on the news media's behalf and, as a result, have a strong interest in protecting the First Amendment rights of journalists from retaliation by government officials. Journalists are at risk of retaliation by government officials because their reporting may be critical of government actions or officials. Accordingly, when government

officials retaliate against journalists for exercising their First Amendment rights, it is essential that they be able to bring claims pursuant to 42 U.S.C. § 1983 to vindicate their own rights and deter future retaliation.

Here, Addison, a former reporter, alleges in this § 1983 suit that Defendant-Appellant Wyn Lohner used his position as police chief to harass Addison over a number of years—culminating in a phone call that led to Addison losing his job—in retaliation for a column Addison wrote that was critical of the police department. The trial court denied in part Appellant’s motion for summary judgment, and Appellant appealed. Appellant argues that the trial court erred in holding that he was not entitled to qualified immunity from Addison’s § 1983 First Amendment retaliation claims. *Amici* write in support of Addison and to emphasize the important interests at stake in this case for the news media.

SOURCE OF AUTHORITY TO FILE

Amici have moved for leave to file this brief in the accompanying motion pursuant to Federal Rule of Appellate Procedure 29(a)(3).

FED. R. APP. 29(A)(4)(E) STATEMENT

Amici declare that:

1. no party's counsel authored the brief in whole or in part;
2. no party or party's counsel contributed money intended to fund preparing or submitting the brief; and
3. no person, other than *amici*, their members or their counsel, contributed money intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

Journalists play an “essential role in our democracy” as watchdogs over government. *See N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring). Unfortunately, this role places reporters at risk of retaliation by government officials because the news media’s work is often critical of government. As a result, police officers and other officials have from time to time arrested journalists, raided their homes, or otherwise harassed them in retaliation for their work. In these cases, the ability for journalists to vindicate their right to be free from retaliation for exercising their First Amendment rights through claims under § 1983 is an important deterrent to the abuse of power.

In considering Addison’s § 1983 First Amendment retaliation claims, the district court correctly held that journalists have a clearly established right to report on and critique police without fear of retaliation. Opinion and Order, *Addison v. City of Baker City*, No. 2:15-cv-2041, at 19 (D. Ore. June 29, 2017), ECF No. 80 (“District Court Opinion”). Indeed, the court properly viewed Addison’s retaliation claims as alleging a “pattern of harassment,” *id.* at 21, because the alleged actions may, in total, chill speech in a way that discrete actions may not alone. The Ninth Circuit has repeatedly held that campaigns of harassment are actionable retaliation claims, making the right “beyond debate.” *Mazzeo v. Young*,

510 F. App'x 646, 648 (9th Cir. 2013) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)); *Coszalter v. City of Salem*, 320 F.3d 968, 975–76 (9th Cir. 2003).

Therefore, *amici* urge this Court to affirm the district court's order denying Appellant's motion for summary judgment with respect to Addison's § 1983 claims of First Amendment retaliation and supervisory liability for First Amendment retaliation against Appellant.

ARGUMENT

I. First Amendment retaliation claims under § 1983 are important to journalists, who are at risk of retaliation by government officials because their reporting may be critical of the government.

Journalists play an important role in a democratic society, representing the public as watchdogs over potential government wrongdoing or overreach. *See N.Y. Times Co.*, 403 U.S. at 717 (Black, J., concurring) (noting that the First Amendment protects the press's "essential role in our democracy," which is "to serve the governed, not the governors"). The Founding Fathers sought to shield the news media "so that it could bare the secrets of . . . [and] expose deception in government." *Id.*

The Supreme Court and the Ninth Circuit have long recognized the value of an unfettered press in a free society. Journalists represent the public when they observe government meetings, scrutinize government actions, and question government officials. *See Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012)

(“By reporting about the government, the media are ‘surrogates for the public.’” (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality opinion)). Indeed, the framers of the Constitution and the Bill of Rights saw the press as a critical check on government wrongdoing. *See Mills v. Alabama*, 384 U.S. 214, 219 (1966) (“[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.”); *see also Leigh*, 677 F.3d at 900 (“The free press is the guardian of the public interest . . .”).

This important role, however, necessarily requires a critical evaluation of government officials, and therefore exposes journalists to the risk of retaliation by government officials who are unhappy with news coverage about them. While fortunately relatively rare, journalists in the U.S. have been arrested, harassed, or intimidated for their work exposing official misconduct. Sometimes, the retaliation and intimidation happens immediately, such as the threats of violence against and arrests of several journalists while they were covering protests in Ferguson, Missouri, in 2014. *See Abby Phillip, Police in Ferguson Arrest and Threaten More Journalists*, Wash. Post (Aug. 18, 2014), <http://wapo.st/1BthxmW> (“Threats, tear gas and even arrest have become occupational hazards for reporters in Ferguson.”). Other acts of retaliation can occur over several months or years.

For example, freelance photographer Julian Harrison was arrested seven times over 15 years while covering the police in Durham, North Carolina. Reporters Committee for Freedom of the Press, *Police, Protestors, and the Press* at 10 (2012), <https://perma.cc/258T-Z6JN>. All charges stemming from each of those arrests, including trespassing and interference with an investigation, were eventually dropped. *Id.*

Retaliation against journalists frequently takes the form of unjustified investigations or arrests, again sometimes occurring well after the initial speech motivating the retaliation. For example, in Arizona, the two owners of the *Phoenix New Times* were arrested three years after the *New Times* published a series of stories in 2004 raising questions about Sheriff Joseph Arpaio's commercial real estate transactions. *See Lacey v. Maricopa Cty.*, 693 F.3d 896, 907 (9th Cir. 2012) (en banc). The *New Times* was a long-time critic of Arpaio, known as "America's toughest sheriff." *Id.* Arpaio sought to prosecute his critics at the *New Times* for publishing his home address—which was already public—under a statute meant to prevent the dissemination of personal information of law enforcement in circumstances in which it is "reasonably apparent" that the publication poses a threat to the officer's safety. *Id.* Arpaio's legal director admitted that Arpaio sought the prosecution because of the *New Times*' critical coverage of him, while other newspapers that had published the same information were not investigated

because they were not “anti-Arpaio.” *Id.* at 908. After multiple county attorneys declined to pursue charges, Dennis Wilenchik, a specially appointed independent deputy county attorney with connections to Arpaio, issued subpoenas to the *New Times* demanding the identity of confidential sources, as well as any notes or documents on any article critical of Arpaio. *Id.* at 909. About two months later, after the *New Times* published a story critical of the ongoing investigation and the subpoenas, Arpaio’s “Selective Enforcement Unit” arrested the owners at their homes. *Id.* at 910. The owners and the *New Times* brought § 1983 First Amendment retaliation claims, among other claims, against Arpaio, Wilenchik and other defendants. *Id.* at 906. After the district court dismissed the plaintiffs’ federal causes of action, this Court reversed, holding en banc, *inter alia*, that Wilenchik and Arpaio were not entitled to qualified immunity on plaintiffs’ § 1983 First Amendment retaliation claims. *Id.* at 940.

Yet another sheriff settled a First Amendment retaliation lawsuit brought under § 1983 after he ordered a raid on a home meant to expose an anonymous blogger who had been critical of him and other officials. Katie Moore, *Terrebonne Sheriff Reaches “Compromise” with Blogger in 1st Amendment Lawsuit Over Illegal Search*, WWL-TV (Sept. 7, 2017), <https://perma.cc/B5WY-T3G9>. A Louisiana sheriff had obtained a warrant under the guise of a criminal defamation charge, but the U.S. District Court for the Eastern District of Louisiana denied the

sheriff's motion to dismiss the civil suit on qualified immunity grounds. *Id.* The Court held that the “message—if you speak ill of the sheriff of your parish, then the sheriff will direct his law enforcement resources toward forcibly entering your home and taking your belongings under the guise of a criminal investigation—is inseparable from the injury and would certainly chill anyone of ordinary firmness from engaging in similar constitutionally protected speech in the future.”

Anderson v. Larpen, No. CV 16-13733, 2017 WL 3064805, at *13 (E.D. La. July 19, 2017).

Another sheriff, this one in Alabama, allegedly paid the grandson of a news blogger who had been critical of the sheriff to install spyware on the blogger's computers in 2016. Walt Bogdanich & Grace Ashford, *An Alabama Sheriff, a Mystery Check and a Blogger Who Cried Foul*, N.Y. Times (Dec. 14, 2017), <https://nyti.ms/2jU1IDJ>. Blogger Ana Franklin had reported extensively on the sheriff's finances, including revealing that \$150,000 budgeted for inmate food was instead invested by the sheriff into what *The New York Times* called a “now-bankrupt used-car dealership run by a convicted bank swindler.” *Id.* A week after the spyware was allegedly installed, the sheriff's drug task force secured a warrant and raided Franklin's construction company's office and seized the computers. *Id.* The sheriff denies the seizure was retaliation for Franklin's reporting, but Franklin has yet to be charged with any crime more than a year later. *Id.*

In yet another act of police retaliation against the news media, a Maryland sheriff, six of his deputies, and a candidate for the county state's attorney orchestrated the mass purchase of a weekly newspaper on Election Day in 1998 because it had previously been critical of the sheriff's office. *Rossignol v. Voorhaar*, 316 F.3d 516, 519–20 (4th Cir. 2003). The deputies went from store to store buying more than a thousand copies of *St. Mary's Today*, anticipating that the issue that day would contain further critical reporting on the sheriff's office and the candidate for state's attorney. *Id.* The deputies admittedly planned the seizure to annoy the newspaper publisher and to “protest” the paper's “irresponsible journalism.” *Id.* The publisher filed a § 1983 suit alleging, among other claims, violation of his First Amendment rights. *Id.* The district court granted summary judgment for the defendants on the § 1983 claims, but the Fourth Circuit reversed, finding that the defendants were acting under color of state law when they effectively censored the newspaper “to retaliate against [the publisher's] past criticism of their fitness for office and to censor future criticism along the same lines.” *Id.* at 522–23, 525. On remand, the district court held, *inter alia*, that the defendants were not entitled to qualified immunity. *Rossignol v. Voorhaar*, 321 F. Supp. 2d 642, 647 (D. Md. 2004). The county then settled the suit, agreeing to pay the publisher \$435,000. Arthus Santana, *Settlement Reached in St. Mary's 'Newspaper Caper'*, Wash. Post (April 7, 2005), <https://perma.cc/Z7L7-257K>.

An adversarial relationship between the news media and the government is nothing new, but these increasingly perilous times threaten even greater risks for journalists exercising their First Amendment rights. Politicians at all levels, from the White House to small-town city halls, now engage in regular anti-press rhetoric. In this environment, journalists face growing hostility and retaliation for their work. For example, according to the U.S. Press Freedom Tracker, at least 32 people were arrested while attempting to document or report the news in 2017. U.S. Press Freedom Tracker, <https://pressfreedomtracker.us> (last visited Jan. 4, 2018). The tally includes a journalist who was arrested and briefly jailed for shouting questions at Secretary of Health and Human Services Tom Price as he walked through a public building. Olivia Beavers, *Reporter Arrested After Repeatedly Questioning Health Secretary*, The Hill (May 9, 2017, 11:05 PM), <http://bit.ly/2pjH595>. Charges against the reporter were dropped four months later. Amy Held, *Charge Dropped Against W.Va. Reporter Arrested After Questioning HHS Secretary*, NPR (Sept. 6, 2017, 5:49 PM), <http://n.pr/2eLYhQj>.

As a result, it is more important than ever that journalists not only have the shield of the First Amendment, but also the sword of § 1983 retaliation claims to ensure a robust, free press. Granting government officials who engage in retaliatory campaigns of harassment against journalists qualified immunity against

§ 1983 suits would have a chilling effect on vital reporting by the press, which is ultimately detrimental to the public and to democracy.

II. The district court properly found that journalists have a clearly established right to report on and critique government officials without fear of retaliation through a campaign of harassment.

In rejecting Appellant’s argument that he is entitled to qualified immunity for Addison’s § 1983 First Amendment retaliation claims, the district court found that Addison had identified sufficient evidence to create a genuine issue of material fact as to whether his constitutional rights had been violated and that “[t]he First Amendment right of persons to be free from retaliation from police officers for speech is well established.” District Court Opinion at 18–19. Although Appellant takes great pains to separate each alleged wrongdoing into discrete actions in his opening brief, the district court properly viewed Addison’s allegations for what they are: allegations of a campaign of harassment directed at a journalist for his column discussing the actions of public officials. To ensure that similarly situated journalists are not intimidated and their speech chilled, this Court should affirm the district court’s holding that Addison’s constitutional rights would have been violated on the facts alleged and that the First Amendment right to be free from retaliation for speech—in the form of campaigns of harassment waged under color of state law—is clearly established.

A. A campaign of harassment by police, directed against a journalist in retaliation for First Amendment protected speech, violates the Constitution.

To make a claim of First Amendment retaliation under § 1983, a plaintiff must prove:

- (1) he engaged in constitutionally protected activity;
- (2) as a result, he was subjected to adverse action by the defendant that would chill a person of ordinary firmness from continuing to engage in the protected activity; and
- (3) there was a substantial causal relationship between the constitutionally protected activity and the adverse action.

Blair v. Bethel Sch. Dist., 608 F.3d 540, 543 (9th Cir. 2010). There can be no question that Addison engaged in constitutionally protected activity when he authored a column critical of the police. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (“The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions.”). Further, Appellant did not directly argue before the district court against the sufficiency of the evidence showing a causal relationship between the protected speech and the adverse actions. District Court Opinion at 16.

On appeal, however, Appellant claims that Addison failed to satisfy the adverse action prong, arguing that each alleged act, standing on its own, would not constitute an actionable adverse action. *See* Opening Brief of Defendant-Appellant at 2–4, *Addison*, No. 17-35552 (Nov. 11, 2017), ECF No. 11 (“Appellant’s Brief”).

That is the wrong approach and, if adopted, risks setting a precedent that permits retaliatory patterns of harassment that could unconstitutionally chill much speech. The district court properly viewed the alleged facts as a “pattern of harassment,” District Court Order at 21, which *is* an actionable § 1983 retaliation claim.

In the context of public employee First Amendment retaliation lawsuits, this Court has said that “severe retaliatory actions” like “engaging in campaigns of harassment” are actionable, even without the loss of a government benefit or privilege. *Coszalter*, 320 F.3d at 975–76. The is also true when private citizens allege retaliation claims against state actors. *See Mazzeo*, 510 Fed. App’x at 646 (holding that a private citizen who alleged conduct by government official that suggested a “‘campaign[] of harassment and humiliation’” alleged an adverse action sufficient to sustain a § 1983 retaliation claim (quoting *Coszalter*, 320 F.3d at 975–76)). Otherwise, all citizens—journalists included—would be vulnerable to repeated acts of harassment by police, each of which individually may not serve to chill the future speech of a person of ordinary firmness but when viewed collectively would certainly do so.

After all, a speaker, such as a journalist, who is repeatedly harassed by police would not weigh each past intimidating behavior individually in deciding whether to continue speaking about police misconduct. Instead, she would consider the full cumulative effect of all retaliatory acts. Indeed, “an entire

campaign of harassment which though trivial in detail may have been substantial in gross.” *Allen v. Scribner*, 812 F.2d 426, 434 n.17 (9th Cir.), *amended*, 828 F.2d 1445 (9th Cir. 1987) (quoting *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982)).

The Sixth Circuit’s decision in *McBride v. Village of Michiana*, 30 F.3d 133 (6th Cir. 1994) (“*McBride I*”), is persuasive in this regard. In that case, Noreen McBride, a journalist for several news organizations, alleged that multiple city government officials retaliated against her “for her less-than-glowing accounts of representative democracy in Southern Michigan.” *McBride v. Vill. of Michiana*, 100 F.3d 457, 459 (6th Cir. 1996) (“*McBride II*”), *abrogated on other grounds by Thaddeus-X v. Blatter*, 175 F.3d 378, 393 (6th Cir. 1999), *as recognized by Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 725 n.3 (6th Cir. 2010). Specifically, the defendants ejected McBride from the press table at a public meeting, verbally abused her during meetings, and called her editors threatening to boycott the publication if they did not remove McBride from the political beat. *Id.* at 459. One of the defendants also “contacted a potential employer of McBride and strongly suggested that the company not hire McBride.” *Id.* The district court originally dismissed the retaliation claim for failure to state a claim, and the Sixth Circuit reversed, finding that the harassment was “sufficient to state a cause of action for retaliation.” *McBride I*, 30 F.3d 133.

Addison has alleged that, as in *McBride*, Appellant engaged in a campaign of harassment against Addison, culminating in the use of Appellant's government position to interfere with Addison's private employment in retaliation for Addison's criticism of the government. Accordingly, the trial court did not err in holding that there is a genuine issue of material fact as to whether Addison was subjected to adverse action by Appellant that would chill a person of ordinary firmness from continuing to engage in the protected activity.

Amici recognize that public officials have their own First Amendment rights to speak about and criticize press coverage, and that some of Appellant's alleged adverse actions involved speech. *See Bond v. Floyd*, 385 U.S. 116, 136 (1966) ("The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators."). There is a clear line, however, between mere counterspeech and impermissible retaliation. *See McBride v. Vill. of Michiana*, No. 4:92-CV-155, 1998 WL 276139, at *7 (W.D. Mich. Apr. 2, 1998). Indeed, the Ninth Circuit has previously recognized that campaigns of harassment that include speech can form the basis for First Amendment retaliation claims. *See Mazzeo*, 510 F. App'x at 648 (holding that "speech-based actions may not, alone, be sufficient to constitute adverse action," but the cumulative conduct as alleged constituted a cognizable retaliation claim as a campaign of harassment (citing *Coszalter*, 320 F.3d at 975–76)). As this Court

has stated, “in the First Amendment context, courts must ‘look through forms to the substance’ of government conduct.” *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963)). Here, Addison alleges a prolonged campaign of harassment by Appellant—culminating in the loss of employment—motivated by Addison’s constitutionally protected speech critical of the police department. Viewed in the light most favorable to Addison, the facts are sufficient to create a genuine issue of material fact as to whether he suffered an adverse action.

B. The right to be free from a retaliatory campaign of harassment for protected speech is clearly established.

Governmental officials are entitled to qualified immunity only “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also White*, 227 F.3d at 1226. Not only do journalists like Addison have a First Amendment right to be free of harassment by police officers in retaliation for their protected speech, but this right was clearly established well before the course of the harassment alleged here.

A right is “clearly established” when “the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see also*

Camarillo v. McCarthy, 998 F.2d 638, 640 (9th Cir. 1993); *El Dia, Inc. v. Governor Rossello*, 165 F.3d 106, 109 (1st Cir. 1999) (finding it “obvious” that government officials could not retaliate against a newspaper by removing legal advertisements solely based on critical coverage). The Supreme Court does “not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.” *Ashcroft*, 563 U.S. at 741.

As the district court held, District Court Order at 20, it has been clearly established in the Ninth Circuit since 2003 that a campaign of harassment could give rise to a § 1983 First Amendment retaliation claim. *See Coszalter*, 320 F.3d at 975–76. Further, in 2013, this Court declared that it was “beyond debate that campaigns of harassment or intimidation, . . . if proven, could constitute adverse action sufficient to support First Amendment retaliation claims.” *Mazzeo*, 510 F. App’x at 648 (internal quotations and citations omitted).

The Sixth Circuit in *McBride* also found that journalists have a clearly established right to be free of harassment in retaliation for their news coverage. 100 F.3d at 458; *see also Dunn v. Castro*, 621 F.3d 1196, 1203 (9th Cir. 2010) (“In determining whether a right is clearly established, we may also look to precedent from other circuits.”). Although there had been no Supreme Court or Sixth Circuit decisions “*specifically* involving governmental retaliation against a news reporter,” the Sixth Circuit held that the illegality of such harassment was “apparent.”

McBride II, 100 F.3d at 461. Indeed, “[n]o reasonable official could possibly believe that it is constitutionally permissible to retaliate against a political opponent with physical threats, harassment and violence.” *Id.* (quoting *Zilich v. Longo*, 34 F.3d 359, 365 (6th Cir. 1994)).

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court affirm the district court’s order denying Appellant’s motion for summary judgment with respect to Addison’s First Amendment retaliation claims.

Respectfully submitted,

/s/ Bruce D. Brown

Bruce D. Brown

Counsel of Record

Caitlin V. Vogus

Josh R. Moore

THE REPORTERS COMMITTEE FOR

FREEDOM OF THE PRESS

1156 15th St. NW, Suite 1250

Washington, D.C. 20005

Phone: (202) 795-9300

Fax: (202) 795-9310

bbrown@rcfp.org

*Additional counsel for *amici* are
listed in Appendix B.

Dated: January 19, 2018
Washington, D.C.

CERTIFICATE OF COMPLIANCE WITH RULE 32(G)

I, Bruce D. Brown, do hereby certify that the foregoing brief of *amici curiae*:

- 1) Complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,059 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by the word-processing system used to prepare the brief; and
- 2) 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 Microsoft Office Word in 14-point, Times New Roman font.

/s/ Bruce D. Brown
Bruce D. Brown, Esq.
Counsel of Record
THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

Dated: January 19, 2018
Washington, D.C.

APPENDIX A

SUPPLEMENTAL STATEMENT OF IDENTITY OF *AMICI CURIAE*

The Reporters Committee for Freedom of the Press 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 Act litigation since 1970.

With some 500 members, **American Society of News Editors (“ASNE”)** is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The **Associated Press Media Editors** is a nonprofit, tax-exempt organization of newsroom leaders and journalism educators that works closely with The Associated Press to promote journalism excellence. APME advances the principles and practices of responsible journalism; supports and mentors a diverse

network of current and emerging newsroom leaders; and champions the First Amendment and promotes freedom of information.

Association of Alternative Newsmedia (“AAN”) is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

The **Center for Investigative Reporting (CIR)**, founded in 1977, is the nation’s first nonprofit investigative journalism organization. CIR produces investigative journalism for its <https://www.revealnews.org/> website, the Reveal national public radio show and podcast, and various documentary projects - often in collaboration with other newsrooms across the country.

The **E.W. Scripps Company** serves audiences and businesses through television, radio and digital media brands, with 33 television stations in 24 markets. Scripps also owns 33 radio stations in eight markets, as well as local and national digital journalism and information businesses, including mobile video news service Newsy and weather app developer WeatherSphere. Scripps owns and operates an award-winning investigative reporting newsroom in Washington, D.C.

and serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

First Look Media Works, Inc. is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

The **Investigative Reporting Workshop**, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

KPTV-KPDX Broadcasting Corporation owns and operates KPTV (Fox) and KPDX (MyNetwork) in the Portland, Oregon Designated Market Area.

The McClatchy Company is a 21st century news and information leader, publisher of iconic brands such as the Miami Herald, The Kansas City Star, The Sacramento Bee, The Charlotte Observer, The (Raleigh) News and Observer, and the (Fort Worth) Star-Telegram. McClatchy operates media companies in 28 U.S. markets in 14 states, providing each of its communities with high-quality news and advertising services in a wide array of digital and print formats. McClatchy is headquartered in Sacramento, Calif., and listed on the New York Stock Exchange under the symbol MNI.

The Media Institute is a nonprofit research foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

MediaNews Group Inc., dba Digital First Media, publishes the San Jose Mercury News, the East Bay Times, St. Paul Pioneer Press, The Denver Post and the Detroit News and other community papers throughout the United States, as well as numerous related online news sites.

MPA – The Association of Magazine Media (“MPA”) is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900

magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover politics, religion, sports, industry, and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA’s approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The News Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The News Guild is a sector of the Communications Workers of America. CWA is America’s largest communications and media union, representing over 700,000 men and women in both private and public sectors.

Online News Association (“ONA”) is the world’s largest association of online journalists. ONA’s mission is to inspire innovation and excellence among journalists to better serve the public. ONA’s more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

Radio Television Digital News Association (“RTDNA”) is the world’s largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Reporters Without Borders has been fighting censorship and supporting and protecting journalists since 1985. Activities are carried out on five continents through its network of over 150 correspondents, its national sections, and its close

collaboration with local and regional press freedom groups. Reporters Without Borders currently has 10 offices and sections worldwide.

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper *The Seattle Times*, together with *The Issaquah Press*, *Yakima Herald-Republic*, *Walla Walla Union-Bulletin*, *Sammamish Review* and *Newcastle-News*, all in Washington state.

Sinclair is one of the largest and most diversified television broadcasting companies in the country. Pro forma for all pending and previously announced transactions (before any related divestitures), the Company will own, operate and/or provide services to 233 television stations in 108 markets. The Company has multiple emerging networks as well as being affiliated with all the major networks. Sinclair is a leading local news provider in the country and a producer of live sports content. Sinclair's content is delivered via multiple-platforms, including over-the-air, multi-channel video program distributors, and digital platforms.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry,

works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

The **Tully Center for Free Speech** began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

APPENDIX B**ADDITIONAL COUNSEL FOR *AMICI CURIAE***

Kevin M. Goldberg
 Fletcher, Heald & Hildreth, PLC
 1300 N. 17th St., 11th Floor
 Arlington, VA 22209
Counsel for American Society of News Editors
Counsel for Association of Alternative Newsmedia

D. Victoria Baranetsky
 General Counsel
 The Center for Investigative Reporting
 1400 65th Street, Suite 200
 Emeryville, California 94608

David M. Giles
 Vice President/
 Deputy General Counsel
 The E.W. Scripps Company
 312 Walnut St., Suite 2800
 Cincinnati, OH 45202

David Snyder
 First Amendment Coalition
 534 Fourth St., Suite B
 San Rafael, CA 94901

David Bralow
 First Look Media Works, Inc.
 18th Floor
 114 Fifth Avenue
 New York, NY 10011

Joshua N. Pila
 Meredith Corporation
 425 14th Street NW
 Atlanta, GA 30318
Counsel for KPTV-KPDX Broadcasting Corporation

Juan Cornejo
 The McClatchy Company
 2100 Q Street
 Sacramento, CA 95816

Kurt Wimmer
 Covington & Burling LLP
 1201 Pennsylvania Ave., NW
 Washington, DC 20004
Counsel for The Media Institute

Marshall W. Anstandig
 Senior Vice President, General Counsel and Secretary
 Digital First Media
 4 North 2nd Street, Suite 800
 San Jose, CA 95113
 manstandig@bayareanewsgroup.com
 1-408-920-5784

James Chadwick
 Sheppard Mullin Richter & Hampton LLP
 379 Lytton Avenue
 Palo Alto, CA 94301-1479
 jchadwick@sheppardmullin.com
 1-650-815-2600
Counsel for MediaNews Group Inc. dba Digital First Media LLC

James Cregan
Executive Vice President
MPA – The Association of Magazine
Media
1211 Connecticut Ave. NW Suite
610
Washington, DC 20036

Mickey H. Osterreicher
1100 M&T Center, 3 Fountain Plaza,
Buffalo, NY 14203
*Counsel for National Press
Photographers Association*

Barbara L. Camens
Barr & Camens
1025 Connecticut Ave., NW
Suite 712
Washington, DC 20036
*Counsel for The Newspaper Guild –
CWA*

Laura R. Handman
Alison Schary
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20006
Thomas R. Burke
Davis Wright Tremaine LLP
Suite 800
500 Montgomery Street

San Francisco, CA 94111
Counsel for Online News Association

Kathleen A. Kirby
Wiley Rein LLP
1776 K St., NW
Washington, DC 20006
*Counsel for Radio Television Digital
News Association*

Bruce E. H. Johnson
Davis Wright Tremaine LLP
1201 Third Ave., Suite 2200
Seattle, WA 98101
Counsel for The Seattle Times Co.

Barry Faber
Exec. V.P./General Counsel
Sinclair Broadcast Group, Inc.
10706 Beaver Dam Rd,
Hunt Valley, MD 21030

Bruce W. Sanford
Mark I. Bailen
Baker & Hostetler LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
*Counsel for Society of Professional
Journalists*

CERTIFICATE OF SERVICE

I, Bruce D. Brown, do hereby certify that I have filed the foregoing Brief of *Amici Curiae* electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on January 19, 2018.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Bruce D. Brown
Bruce D. Brown, Esq.
Counsel of Record
THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-35552

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief*.

I certify that (*check appropriate option*):

- ☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- ☒ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is 4,059 words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- ☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- ☐ This brief complies with the longer length limit authorized by court order dated
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.
- ☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is words or pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- ☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- ☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or
Unrepresented Litigant

/s/ Bruce D. Brown

Date 1/19/18

("s/" plus typed name is acceptable for electronically-filed documents)