

June 5, 2020

BY EMAIL

Mayor Bill de Blasio
New York City Mayor's Office
c/o Freddi Goldstein
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Dermot F. Shea
New York City Police Commissioner
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Cyrus Vance, Jr.
Manhattan District Attorney's Office
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Leticia James
New York Attorney General's Office
c/o Kelley Donnelly
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Re: Arrest and Unlawful Assembly Charge of News Photographer Adam Gray on May 30, 2020

Dear Mayor de Blasio, Commissioner Shea, Mr. Vance, and Ms. James:

We are counsel to the news website The Sun U.S. (“The Sun”), photo agency Southwest News Service (“SWNS”), and SWNS news photographer Adam Gray. We write regarding the brazenly unlawful arrest of Mr. Gray by New York Police Department (“NYPD”) officers on Saturday, May 30 near Union Square – which occurred despite Mr. Gray wearing his U.S. State Department-issued foreign press credentials and repeatedly informing the NYPD officers he was a member of the press. Mr. Gray’s arrest was unsupported by probable cause, and violated his First Amendment rights to engage in newsgathering activities and to record the police in public. Indeed, outrage at Mr. Gray’s arrest has risen to the highest levels, with U.K. Prime Minister Boris Johnson condemning the NYPD’s actions.¹

¹ See <https://www.mirror.co.uk/news/us-news/brit-photographer-working-police-brutality-22118687>.

We write to first demand a public apology from the Mayor's Office and the NYPD; second to strongly urge the Manhattan District Attorney's Office to decline to prosecute the baseless unlawful assembly charge against Mr. Gray; and third to request the New York Attorney General's Office to investigate Mr. Gray's arrest – which is one among numerous instances of the NYPD unlawfully harassing and/or arresting journalists covering the recent protests.

A. Mr. Gray's Arrest Was Unsupported by Probable Cause and Contrary to NYPD Policy

Mr. Gray is a British photojournalist employed by SWNS, and currently based in New York City. On the night of May 30, 2020, Mr. Gray was on assignment for The Sun, photographing the anti-racism and anti-police brutality protests in New York City. After spending the day photographing protests in and around Union Square – including from behind the police line with the NYPD's consent – Mr. Gray was traveling by foot west down 13th Street in the vicinity of Union Square. Mr. Gray came upon a large group of protestors, and, from behind the protestor line, began documenting the crowd as they faced off with police.

NYPD officers suddenly rushed the crowd. As Mr. Gray was openly photographing these events, he was targeted and shoved to the ground with a baton by an NYPD officer, damaging at least one of three cameras he was wearing. Mr. Gray was quickly surrounded and handcuffed by other officers.² As this was happening, Mr. Gray told the arresting officers repeatedly and clearly that he was a member of the press. After he was lifted from the ground, he showed the officers his U.S. State Department-issued foreign press credentials, which were displayed on a lanyard around his neck. He was told this did not matter.

After his arrest, Mr. Gray was told by NYPD officers that the NYPD had previously instructed protestors to disperse from that area. *Mr. Gray had not heard any such orders.* And regardless, Mr. Gray was not a member of the protest group the NYPD supposedly told to disperse; he was a neutral press observer.³

Despite all this, Mr. Gray was loaded into a paddy wagon with other protestors (many of whom lacked face coverings), taken downtown, detained for eight hours in a crowded holding cell with more than 50 other detainees (who, again, largely lacked face coverings in a situation where social distancing was impossible), and eventually issued a desk appearance ticket charging

² Attached as **Exhibit A** is a photograph of Mr. Gray in handcuffs.

³ Our state government recognizes the vital purpose served by having members of the media continue to gather news in these extraordinary times. In his COVID-related executive orders, Governor Cuomo has designated the news media an "essential business." See E.O. 202.6. And the NYPD itself issued official guidance to its officers that "media personnel" would be exempt from citywide curfews related to the recent protests. See Jun. 1, 2020 Finest Message, Ser# 37641758.

him with unlawful assembly pursuant to New York Public Law Section 240.10 (“PL § 240.10”).⁴ Pursuant to the Desk Appearance Ticket, Mr. Gray is required to appear for a court hearing on September 10, 2020.

PL § 240.10 outlaws assembling with “four or more other persons for the purpose of engaging or preparing to engage . . . in tumultuous and violent conduct likely to cause public alarm,” as well as “remain[ing]” “at an assembly which either has or develops such purpose . . . with intent to advance that purpose.” As a member of the press, Mr. Gray’s purpose on the night of May 30 was not to engage in “tumultuous and violent conduct”; it was to document newsworthy events. Indeed, the New York City Police Department’s own patrol guide states unambiguously that “[t]aking photographs, videotapes, or tape recordings” at the scene of police incidents does not “constitute[] probable cause for arrest or detention.”⁵

Mr. Gray repeatedly announced himself as a member of the press during his arrest, thus the arresting officers were on notice of Mr. Gray’s lawful, peaceful intent. Indeed, at the moment of his arrest, Mr. Gray was wearing three cameras and his press credentials on his body, and was in the act of photographing – not participating in – events. Accordingly, there was no basis for his arrest even before he announced his press credentials. The arresting officers were on notice of Mr. Gray’s lawful role as a press observer, and lacked probable cause to detain him.

B. Mr. Gray’s Arrest Violated His First Amendment Rights

Mr. Gray’s arrest while he was peacefully exercising his right to document newsworthy events violated his First Amendment rights to gather news and to record police activity in public.

The Constitution does not allow government officials to arrest and impose punitive measures on a member of the press for engaging in newsgathering activities. As every single Federal Court of Appeals to address the issue has confirmed, under the First Amendment, there is a constitutional right of the public and the press to record police activity in public places. *See Turner v. Driver*, 848 F.3d 678, 689 (5th Cir. 2017); *Gericke v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014); *ACLU v. Alvarez*, 679 F.3d 583, 594 (7th Cir. 2012); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995); *Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017). *See also Higginbotham v. Sylvester*, 105 F. Supp. 3d 369, 380 (S.D.N.Y. 2015) (“the right to record police activity in public, at least in the case of a journalist who is otherwise unconnected to the events recorded, was ‘clearly established’ at the time of the events alleged in the complaint.”).

Indeed, in a case involving a similar set of facts (a photographer thrown to the ground and arrested for photographing police officers using excessive force against another man) the

⁴ Attached as **Exhibit B** is a copy of the Desk Appearance Ticket.

⁵ New York City Police Department Patrol Guide at 10, https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations_pdf/pg208-03-arrest-processing-strip-search.pdf.

U.S. Justice Department submitted a statement of interest to note that “[i]t is now settled law that the First Amendment protects individuals who photograph or otherwise record officers engaging in police activity in a public place.” Statement of Interest of the United States, *Garcia v. Montgomery Cty., Md.*, No. 8:12-cv-03592-JFM (D. Md. Mar. 4, 2013) (Dkt. 15 at 4). This right to record is, moreover, coextensive with Mr. Gray’s First Amendment right to gather news. *In re Express News Corp.*, 695 F.2d 807, 808 (5th Cir. 1982) (“[N]ews-gathering is entitled to first amendment protection, for ‘without some protection for seeking out the news, freedom of the press could be eviscerated.’”).⁶

In arresting Mr. Gray for photographing clashes between police and protestors – events of significant and international public concern, taking place in a public forum – the NYPD arresting officers violated his First Amendment rights. We recognize that chaotic events may make it difficult to distinguish protestors from lawful observers like Mr. Gray (though it seems unlikely in this case, given Mr. Gray was wearing several cameras and his press credentials). Nevertheless, once the arresting officers were clearly informed of Mr. Gray’s status as a photojournalist, he should have been immediately released, not detained for hours under crowded conditions, in the midst of a pandemic. As Governor Cuomo himself said this week, “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. They are essential – and they must be able to do their jobs. We all depend on them.”⁷

We strongly condemn the NYPD’s treatment of Mr. Gray, and demand a public apology from the Mayor’s Office and from the NYPD. Second, and it perhaps goes without saying, the District Attorney’s office should decline to prosecute the baseless unlawful assembly charge against Mr. Gray. Lastly, we urge the New York Attorney General’s Office to investigate the NYPD’s conduct in unlawfully arresting Mr. Gray.

Respectfully yours,

Davis Wright Tremaine LLP



Robert D. Balin

⁶ Notably, these protections are equally available to non-U.S. citizens gathering news in this country. See, e.g., *Mireskandari v. Daily Mail & Gen. Tr. PLC*, 2013 WL 12114762, at *6 (C.D. Cal. Oct. 8, 2013) (“The First Amendment, however, protects the speech of non-citizens as well as speech abroad”) (citing cases); *Times Newspapers Ltd. (Of Great Britain) v. McDonnell Douglas Corp.*, 387 F. Supp. 189, 192 (C.D. Cal. 1974) (rejecting the argument that “the First Amendment does not give ‘free speech’ to a foreign newspaper”).

⁷ See <https://twitter.com/NYGovCuomo/status/1268373734781530130?s=20>.

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EXHIBIT A

