22-423 (L)
22-528 (XAP)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHARLIE MELI,
Plaintiff-Appellee-Cross-Appellant,

JEREMIE MELI,
Plaintiff-Appellee,

ALBIN MELI,
Plaintiff

v.

CITY OF BURLINGTON, VERMONT; BRANDON DEL POZO, individually and in his official capacity as Chief of Police for the City of Burlington, Vermont; JASON BELLAVANCE, individually and in his capacity as a Police Officer for the City of Burlington, Vermont,
Defendants-Appellants-Cross-Appellees,

CORY CAMPBELL, individually and in his official capacity as a Police Officer for the City of Burlington, Vermont,
Defendant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT
No. 2:19-CV-71 (Hon. William K. Sessions III)

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF VERMONT IN SUPPORT OF PLAINTIFF-APPELLEE-CROSS-APPELLANT CHARLIE MELI

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September 8, 2022

CORPORATE DISCLOSURE STATEMENT

Amicus American Civil Liberties Union of Vermont makes the following corporate disclosure statement pursuant to Fed. R. App. P. 26.1(a):

The American Civil Liberties Union of Vermont has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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INTEREST OF AMICUS

The American Civil Liberties Union of Vermont (ACLU-VT) is a nonprofit, nonpartisan organization committed to protecting and advancing Vermonters' rights of liberty and equality as enshrined in the Vermont and United States Constitutions.[1] With approximately 8,000 members statewide, the ACLU-VT is an affiliate of the national ACLU, which has nearly two million members across the nation.[2]

This case embodies an important intersection of rights central to the mission of the ACLU-VT: First and Fourth Amendment freedoms and racial justice. As discussed more fully in its motion for leave to file an amicus brief, the ACLU-VT has a longstanding history of advocating for constitutional rights and racial justice in the courtroom and at the statehouse. The ACLU-VT appears as amicus here to highlight how Charlie Meli's First Amendment rights were disregarded and to provide important

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), the undersigned certifies that no party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

[2] Amicus wishes to thank Hillary Rich, ACLU of Vermont Legal Fellow, and Harrison Stark, ACLU of Vermont Staff Attorney, for their substantial assistance in drafting this brief and Dr. Olivia Derella for her invaluable research contributions.

context on the Burlington Police Department's history of retaliatory arrests of young Black men.

INTRODUCTION

When Charlie Meli, a Black man, exited a bar in downtown Burlington, Vermont, on September 9, 2018, he discovered his brother, Jeremie Meli, lying crumpled on the sidewalk after being shoved into a wall by police.[3] DC Dkt. No. 144 at 3, 7. As Jeremie slowly regained consciousness, an officer braced him against the ground with a knee on his back to put him in handcuffs. *See id.* at 4. Charlie's other brother, Albin Meli, was being dragged to the ground, handcuffed, and arrested by police while Albin begged them to stop. *Id.* at 5.

Having witnessed Jeremie and Albin assaulted, injured, and arrested by law enforcement, Charlie started to yell and cry in fear for his brothers' safety. DC Dkt. No. 144-3 at 5–7. Although Charlie was emotional, he spoke with the officers about what he saw and ultimately agreed to take a seat in their police cruiser. *Id.* at 7. Charlie never touched a police officer or attempted to physically interfere with his brothers' arrests.

Police nevertheless arrested Charlie for violating Vermont's disorderly conduct statute. Although the City ultimately dropped these charges, the City continues to claim that Charlie's "screaming and crying" was "more than sufficient" for an arrest for "the offense of disorderly

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[3] Unless otherwise noted, all facts discussed are undisputed.

conduct." DC Dkt. No. 134 at 7–8 (quotation marks and citation omitted). The police equated the distress of a Black man with danger.

The City is wrong. Charlie was arrested for nonviolently expressing his understandable fear and distress at witnessing one brother lying injured and unconscious and the other violently arrested. That nonviolent expression, moreover, is protected by the First Amendment.

But the District Court did not recognize the protections the First Amendment afforded Charlie's speech. Instead, in just two and a half pages, the Court accepted the City's argument that "scream[ing] at police officers" in this context constituted "tumultuous and threatening behavior" and "unreasonable noise"—and therefore disorderly conduct. *Id.* at 7 (citing 13 V.S.A. §§ 1026(a)(1)–(2)); *see also* DC Dkt. No. 158 at 30–32. Nor did the District Court view the plethora of disputed facts—including whether Charlie was complying with officers' demands or was at risk of interfering with his brother's arrest, *see* DC Dkt. No. 144-3 at 6–7[4]—as an impediment

[4] Indeed, because summary judgment is appropriate only where "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law," Fed. R. Civ. P 56(a), the District Court was "compelled at this stage to credit [the nonmoving party's] version of the events," *Tracy v. Freshwater,* 623 F.3d 90, 98 (2d Cir. 2010). The District Court's failure to acknowledge the significance of the discrepancies regarding material facts and to credit Charlie's version constitutes another error warranting reversal.

to granting summary judgment for the City. DC Dkt. No. 158 at 31. Rather, because Charlie was "clearly . . . demonstrating signs of distress" by "yelling, cursing,[5] and making noise," the District Court found there was "arguable probable cause to arrest Charlie for disorderly conduct." *Id*. Like the police officers that night, the District Court cursorily determined that, in voicing his distress, Charlie presented a public danger.[6] *See Schenk*, 190

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[5] Although the District Court mentions "cursing" in its brief disorderly conduct analysis, the City did not cite the "abusive or obscene language" provision of Vermont's disorderly conduct statute to justify Charlie's arrest. *See* 13 V.S.A. § 1026(a)(3). Nor could that provision support a disorderly conduct charge in this case: the Vermont Supreme Court has narrowed the reach of the abusive language provision "to conform to constitutional requirements, and held that prosecution under that provision is appropriate only when a defendant's spoken words, when directed to another person in a public place, tend to incite an immediate breach of the peace." *Long v. L'Esperance*, 701 A.2d 1048, 1053 (Vt. 1997) (quotation marks, alterations, and citations omitted). Accordingly, the Vermont Supreme Court recently limited the abusive language provision to only fighting words "that, in the context in which [they are] uttered, [are] so inflammatory that it is akin to dropping a match into a pool of gasoline." *State v. Schenk*, 190 A.3d 820, 833 (Vt. 2018) (citation omitted). Charlie's distressed shouts did not rise to the level of such incendiary fighting words here.

[6] Not only did Charlie's reaction fail to meet the definition of disorderly conduct, as discussed below, but he also lacked the requisite intent. The disorderly conduct statute requires a person to act "with intent to cause public inconvenience or annoyance, or recklessly create[] a risk thereof." 13 V.S.A. § 1026. A person who is yelling and being disruptive "for [a] legitimate purpose," such as getting a police officer's attention, has not shown an intent "to cause public inconvenience, annoyance, or alarm." *Provost v. City of Newburgh*, 262 F.3d 146, 158 (2d Cir. 2001) (quotation marks omitted). As the District Court acknowledged, Charlie was "*demonstrating signs of distress*" to the police officers, which suggests that

A.3d at 830 (explaining that Vermont's disorderly conduct statute is "about protecting the public from breaches of public order caused by threats").

That conclusion was incorrect, and this Court should reverse. Contrary to the City's contentions and the District Court's holding, Charlie's understandable distress was not unreasonably noisy, tumultuous, or threatening—or unlawful. Instead, his reaction was protected by the First Amendment, and his arrest therefore violated his rights. Moreover, the District Court erred in analyzing only the second prong of the qualified immunity analysis and therefore declining to fully discuss the right at issue: freedom from arrest without probable cause. By skipping the first step in the qualified immunity analysis, the Court failed to consider how the contours of probable cause are shaped by the protections of the First Amendment in the context of disorderly conduct. These errors warrant reversal.

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he was trying to communicate his emotions, not create unreasonable noise or tumult—thus undercutting the necessary intent element. DC Dkt. No. 158 at 31 (emphasis added). This intent to engage with the police—and more specifically, the intent to engage in speech protected by the First Amendment—should not be conflated with the intent to cause disorderly conduct.

ARGUMENT

I. By Mischaracterizing Charlie Meli's Legitimate Distress at His Brother's Injuries as Disorderly Conduct, the City Violated Charlie's First Amendment Rights

a. Charlie's conduct was protected under the First Amendment, and his arrest for disorderly conduct therefore violated his constitutional rights

1. The First Amendment restricts the scope of speech that may be criminalized under disorderly conduct statutes

"[C]riticism of the police is not a crime." *Duran v. City of Douglas*, 904 F.2d 1372, 1377 (9th Cir. 1990). "[T]he First Amendment protects a significant amount of verbal criticism and challenge," even when that speech is "directed at police officers." *City of Houston v. Hill*, 482 U.S. 451, 461 (1987). Indeed, the ability to criticize authority is fundamental to our democracy; the Supreme Court has stated that "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Id.* at 462–63; *see also Long*, 701 A.2d at 1053 ("The United States Supreme Court has long recognized that persons may not be arrested for uttering constitutionally protected speech."). This First Amendment right to challenge law enforcement is not limited to staid and sedate criticism but also includes the freedom to express oneself emphatically, passionately, and "without moderation." *Baumgartner v.*

United States, 322 U.S. 665, 673–74 (1944). Unless speech directed at police is "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest," it is "protected against censorship or punishment." *City of Houston*, 482 U.S. at 461 (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)).

The existence of a disorderly conduct statute does not change this constitutional analysis. Of course, although the bulwark of First Amendment freedoms is expansive, "the government may regulate certain categories of expression consistent with the Constitution." *Virginia v. Black*, 538 U.S. 343, 358 (2003). Vermont's disorderly conduct statute provides that "[a] person is guilty of disorderly conduct if he or she, with intent to cause public inconvenience or annoyance, or recklessly creates a risk thereof: (1) engages in fighting or in violent, tumultuous, or threatening behavior; [or] (2) makes unreasonable noise." 13 V.S.A. § 1026(a); *see also* DC Dkt. No. 134 at 7 (identifying these provisions as the basis for Charlie's arrest). But "[o]ne of the legal dilemmas raised by disorderly conduct statutes is the breadth of the conduct and speech that they prohibit when considered against the First Amendment guarantee of freedom of speech." *State v. Colby*, 972 A.2d 197, 200 (Vt. 2009). Indeed,

the United States Supreme Court has noted that, although "the preservation of liberty depends in part upon the maintenance of social order," *City of Houston*, 482 U.S. at 473, "if absolute assurance of tranquility is required, we may as well forget about free speech," *Spence v. Washington*, 418 U.S. 405, 416 (1974) (Douglas, J., concurring). The Court must therefore apply Vermont's disorderly conduct statute—like any state's—narrowly, "to conform to constitutional requirements." *Long*, 701 A.2d at 1053 (discussing the Vermont Supreme Court's limitations on the reach of a provision of the disorderly conduct statute).

A warrantless arrest for disorderly conduct is lawful only if there is probable cause that the purported offender engaged in conduct *outside the protections of the First Amendment*. Any disorderly conduct arrest absent such probable cause violates the Constitution. *See Provost*, 262 F.3d at 156–57.

2. Charlie's understandable distress did not constitute unreasonable noise

Consistent with the bedrock First Amendment principles described above, the Vermont Supreme Court has read the State's disorderly conduct statute narrowly to avoid infringing upon Vermonters' First Amendment rights. When analyzing what constitutes "unreasonable noise," 13 V.S.A. § 1026(a)(2), the Vermont Supreme Court has emphasized that this

provision is not synonymous with *unnecessary* noise. *State v. McDermott*, 373 A.2d 510, 514 (Vt. 1977); *Howard Opera House Assocs. v. Urban Outfitters, Inc.*, 131 F. Supp. 2d 559, 565 (D. Vt. 2001) (applying *McDermott*'s statutory interpretation). Instead, courts must use an objective standard: unreasonable noise is "a noise of a type or volume that a reasonable person, under the circumstances, would not tolerate." *Provost*, 262 F.3d at 159; *see also Howard Opera House*, 131 F. Supp. 2d at 565 (citing *McDermott*, 373 A.2d at 514). Not all noisy speech—even screaming—is therefore unreasonable. *See, e.g.*, *Provost*, 262 F.3d at 158; *see also United States v. Fernandez-Antonia*, 278 F.3d 150, 162 (2d Cir. 2002) (noting federal courts defer to state courts' interpretations of their own statutes).

The District Court failed to heed these precedents. Against this backdrop of protective First Amendment precedent, Charlie's conduct plainly did not rise to the level of unreasonable noise. When Charlie left the bar, he encountered a chaotic and frightening scene: his brothers were on the sidewalk, injured and restrained by the police. He reacted audibly in distress. An objective standard focuses on how a reasonable person would react to Charlie's audible response; it is simply not correct that Charlie's understandable distress was "a noise of a type or volume that a reasonable

person, under the circumstances, would not tolerate." *Provost*, 265 F.3d at 159. His distress therefore was not, in this context, unreasonably noisy, and was thus protected by the First Amendment.

3. Charlie did not exhibit tumultuous or threatening behavior

The Vermont Supreme Court has also construed the tumultuous or threatening behavior provision to avoid running afoul of the Constitution.[7] *Schenk*, 190 A.3d at 823. Because "threats of violence are outside of the First Amendment," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992), the State may lawfully prohibit tumultuous or threatening behavior—*but* these terms must be narrowly defined to respect constitutional limits. Specifically, "[t]umultuous behavior may refer to the commotion and agitation of a large crowd or a violent outburst." *Prive v. Wells*, No. 5:13-CV-320, 2015 WL 1257524, at *9 (D. Vt. Mar. 17, 2015) (quotations and citation omitted). Threatening behavior connotes similar danger: "Threatening behavior is behavior that communicates the requisite intent . . . to inflict harm on person or property." *Id.*; *see also State v. Cole*, 554 A.2d 253, 255 (Vt. 1988).

[7] Although 13 V.S.A. § 1026(a)(1) also includes a prohibition on violent behavior, the City alleges that Charlie demonstrated only the "tumultuous and threatening behavior" components of the provision. *See* DC Dkt. No. 134 at 7.

Importantly, the Vermont Supreme Court has held that an individual who is merely vocalizing displeasure, even rudely, has not exhibited violent or threatening behavior. For instance, when a tenant was arrested for arguing with his landlord, the Court acknowledged that the tenant had been "mouthy and obnoxious" but "did nothing beyond expressing his displeasure at a perceived injustice." *State v. Sanville*, 22 A.3d 450, 453 (Vt. 2011). Thus, the Court maintained that "[t]he idea that such behavior could properly be considered either 'violent or threatening' . . . is to stretch its meaning impermissibly." *Id.* at 453–54.

As with unreasonable noise, context is crucial. Tumultuous or threatening behavior is also viewed via "an objective standard—whether a reasonable person would conclude a defendant's conduct was threatening—not a subjective standard—whether the recipient of a defendant's allegedly threatening behavior perceived that behavior as a threat." *Schenk*, 190 A.3d at 825. The Vermont Supreme Court has further articulated several factors to evaluate whether conduct constitutes threatening behavior, including "whether the threatening behavior was directed at a particular person, the threatening behavior contained a significant physical component, the strong implication that harm may come to the victim, and a comment or act

coupled with an aggressive move toward the victim." *Id*. at 825 (citing *State v. Albarelli*, 19 A.3d 130, 137–38 (Vt. 2011).

A reasonable person could not conclude that Charlie's behavior was a "violent outburst" or "communicated [an] intent to inflict harm on person or property." *Prive*, 2015 WL 1257524, at *9. Charlie exhibited *none* of the threat factors that the Vermont Supreme Court has enumerated. His cries were an emotional response to the scene generally, not directed at a particular person. *See Schenk*, 190 A.3d at 825. Charlie did not express any intention of harming the police present. *See id*. And there was no physical component to his response—much less a significant one—or an aggressive move toward the police. *See id*. In fact, the City does not claim that Charlie physically interfered with either brother's arrest or made any attempt to do so.[8] Instead, Charlie responded to the horrible tableau before him by, like the tenant in *Sanville*, "expressing his displeasure at a perceived injustice," 22 A.3d at 453, and his concern for his brothers. Such undirected screaming and crying, without any physical component, cannot meet the

[8] In fact, other than screaming and crying, the City's only support for charging Charlie with tumultuous or threatening behavior is the disputed allegation that a witness advised Charlie "he shouldn't jump in" to intercede with Albin's arrest. DC Dkt. No. 134-1 at 3; s*ee also* DC Dkt. No. 144-3 at 6 (contesting this fact). This comment could just as easily be interpreted as expressing the witness's belief that the situation unfolding was one in which someone might be expected to consider "jump[ing] in."

definition of tumultuous or threatening conduct. A reasonable person would not misperceive such pure speech with no intent to harm as a threat.

4. The disorderly conduct cases the District Court relied on are procedurally and factually distinct from this case

The cases cited in the District Court's order do not support its cursory conclusion that Charlie's distress constituted disorderly conduct. In explanatory parentheticals, the District Court referenced two unreported summary orders concerning New York's analogous disorderly conduct statute. First, the District Court noted that in *Stern v. City of New York*, 665 F. App'x 27 (2d Cir. 2016) (summary order), the Second Circuit held that "a 'jury could . . . reasonably have concluded that by yelling and cursing and *threatening*, [plaintiff] was making "unreasonable noise"' and therefore was not entitled to judgment as a matter of law on whether officers had probable cause to arrest him for disorderly conduct." DC Dkt. No. 158 at 32 (emphasis added). The plaintiff in *Stern* had interrupted deputy sheriffs towing his vehicle for unpaid parking tickets, and his shouting and threats escalated to the point where the deputy sheriffs called for police assistance. 665 F. App'x at 28. Such conduct, the Second Circuit held, could reasonably be construed by the jury as unreasonable noise in violation of the disorderly conduct statute. *Id.* at 30.

Second, the District Court cited *Hollins v. City of New York*, 761 F. App'x 15 (2d Cir. 2019) (summary order), where this Court held "that a district court did not abuse its discretion in denying a new trial after a jury found that police officers had probable cause to arrest someone for 'screaming profanities for several minutes around 10:00 p.m. on the street of a residential neighborhood.'" DC Dkt. No. 158 at 32. In *Hollins*, police officers had encountered the plaintiff in a residential neighborhood in the midst of a conflict with her brother, whom she lunged at and "tried to attack, supporting the inference that the disruptive behavior would continue and perhaps escalate absent interruption by the police." 761 F. App'x at 17 (quotation marks and citations omitted). "A reasonable jury," the Second Circuit held, "could therefore find that the police had probable cause" to arrest her for disorderly conduct. *Id.*

Neither case supports the trial court's conclusion here. To start, they are procedurally distinguishable: In *Stern* and *Hollins*, the Court was asked to set aside a jury verdict; in both cases, the Court refused to do so, citing the extremely high bar for overruling a jury's fact-finding. *See Stern*, 665 F. App'x at 30; *Hollins*, 761 F. App'x at 16–17. Moreover, these cases are factually nothing like this one. Unlike the volatile, verbally threatening Stern or the physically aggressive Hollins, Charlie presented no threat of

danger to anyone. And the apples-to-oranges comparison of Stern's overreaction towards his car being towed to Charlie's fear for his brothers' safety delegitimizes Charlie's very reasonable distress. Instead, the police saw distress and, without adequate cause, misconstrued it as danger. But such knee-jerk, baseless fear does not transmogrify protected First Amendment speech into disorderly conduct as a matter of law. No reasonable jury could conclude that Charlie's speech violated the disorderly conduct statute as properly narrowed by First Amendment limitations. The police therefore lacked probable cause for his arrest, and summary judgment for the City was inappropriate.

b. The determination that Charlie's distress was disproportionate and threatening reflects the harmful stereotype that Black men's emotions are dangerous

The assumption that Charlie's emotional reaction was a threat to public order is unsupported by the facts or precedent. But it is unfortunately unsurprising: Black men frequently face the stereotype that their emotions—and, by extension, their very persons—are dangers to the public. These stereotypes profoundly affect interpretations of their behavior and must provide critical context for any judicial evaluation of whether reactions to their speech was "reasonable."

"Stereotypes are the culturally shared beliefs, both positive and negative, about the characteristics and behaviors of particular groups," Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & Human Behavior 483, 484 (2004) (citations omitted), and social science research consistently demonstrates that they "clearly influence how people interpret the behavior of others," Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 Psych. Science Rsch. Rep. 640, 640 (2003).[9] Stereotypes color our assessments of others' emotions and actions, especially when interacting with an individual of a different cultural or racial background. *See generally* Hillary Anger Elfenbein & Nalini Ambady, *On the Universality and Cultural Specificity of Emotion Recognition: A Meta-Analysis*, 128 Psych. Bull. 203 (2002).

This impact of stereotypes is particularly harmful for Black men. Multiple studies reveal a consistent and pernicious mental association between Black men and "hostility, aggressiveness, violence, and danger." Graham & Lowery, *supra*, at 485 (listing studies); *see also* Sonia K. Kang & Alison L. Chasteen, *Beyond the Double-Jeopardy Hypothesis: Assessing Emotion on the Faces of Multiply-Categorizable Targets of Prejudice*, 45 J.

9 Amicus will provide the cited research articles at the Court's request.

Experimental Soc. Psych. 1281, 1281 (2009) ("Compared to White men, Black men are stereotyped as aggressive and hostile." (citation omitted)); Katherine B. Spencer, Amanda K. Charbonneau, & Jack Glaser, *Implicit Bias and Policing*, 10 Soc. & Personality Psych. Compass 50, 54 (2016) ("Other studies have uncovered pervasive implicit and explicit stereotypes of African Americans as dangerous, violent, and hostile.") (listing studies). Because study participants have been found to be "less able to recognize the emotions of Black versus White individuals," these negative stereotypes of Black men taint interpretations of their behavior. Amy G. Halberstadt, Alison N. Cooke, Pamela W. Garner, Sherick A. Hughes, Dejah Oertwig, & Shevaun D. Neupert, *Racialized Emotion Recognition Accuracy and Anger Bias of Children's Faces*, Am. Psych. Ass'n Emotion 2 (2020) (citing Elfenbein & Ambady, *supra*, at 228).

Consequently, studies have shown "that individuals are racially biased when judging the emotions of others and particularly regarding attributions about the emotion of anger." *Id.* at 1 (citing Elfenbein & Ambady, *supra*, at 203). Social science research is replete with examples of this racialized anger bias. Not only are people quicker to see anger in young Black men's faces compared with young white men, but they are also more likely to perceive anger in a Black person *even when their faces are neutral*.

Id. at 3 (listing studies); *see also* David S. March, Lowell Gaertner, & Michael A. Olson, *Danger or Dislike: Distinguishing Threat from Negative Valence as Sources of Automatic Anti-Black Bias*, 121 J. Personality & Soc. Psych. 984, 994 (2021). Furthermore, racialized anger bias influences interpretations of Black individuals' behavior: researchers have found "that ambiguous behavior was interpreted more negatively when performed by a Black actor than when it was performed by a White actor." Hugenberg & Bodenhausen, *supra*, at 640 (citation omitted).

People also view the negative emotional displays of Black men as more intense. One study demonstrated that "ambiguously hostile behaviors were rated as more hostile when performed by a Black rather than White actor," *id*., and a study using computerized faces revealed that, when evaluating Black faces, "perceptions of anger intensity were actually greater" than for white faces, Halberstadt et al., *supra*, at 3 (citing Paul B. Hutchings & Geoffrey Haddock, *Look Black in Anger: The Role of Implicit Prejudice in the Categorization and Perceived Emotional Intensity of Racially Ambiguous Faces*, 44 J. Experimental Soc. Psych. 1418 (2008)). Overall, "cultural stereotypes tend to bias interpretations of ambiguous behaviors of Black targets in a negative manner;" essentially, Black men are more likely to be viewed as angry—and angrier—than white men exhibiting

the exact same emotions and behaviors. Hugenberg & Bodenhausen, *supra*, at 640.

Concerningly, in addition to misidentifying anger and hostility in Black men, people are also more likely to perceive Black men as presenting a physical threat. The "stereotypes linking Black[] [people] with aggression have been shown to cause people to judge the behavior of a Black person as more aggressive than the identical behavior of a White person." Spencer et al., *supra*, at 54 (citations omitted). This misperception has been markedly consistent over time and across research studies. In 1976, researchers found that white Americans were "more likely to construe an ambiguous behavior (*i.e.*, a push) as violent when enacted by a Black than a White man." March et al., *supra*, at 985 (citing Birt L. Duncan, *Differential Social Perception and the Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping Blacks*, 34 J. Personality & Soc. Psych. 590 (1976)). And in a recent series of priming studies, David March and colleagues measured white Americans' implicit biases and found similar associations of "Black men with physical threat." *Id.* at 984. When shown Black faces, white American participants were significantly faster at identifying threatening targets than when primed with white faces. *Id.* at 987. In fact, "[a]ll five studies unambiguously indicated that White Americans

automatically evaluate Black men as a survival threat." *Id*. at 1000. Disturbingly, the stereotypes of Black men as threatening and the resultant fear those stereotypes engender have been shown to "activate hostile responses in the perceiver." Halberstadt et al., *supra*, at 3 (citation omitted).

Importantly, police officers are not immune to these cognitive errors and negative Black stereotypes. In one study of implicit bias, police officer participants read vignettes about hypothetical adolescents who committed crimes; the officers "who were unconsciously primed to think about the category *Black* judged the alleged offenders to have more generalized negative traits," "judged the offenders to be more culpable," and "endorsed harsher sanctions." Graham & Lowery, *supra*, at 493. Because "[p]olice officers must frequently assess civilians' ambiguous behavior to decide whether to take action," their susceptibility to negative Black stereotypes is especially problematic—and warrants close examination when police label Black men's emotive conduct as unreasonable, tumultuous, and threatening. Spencer et al., *supra*, at 54.

But that examination was blatantly lacking here. The social science research demonstrates how pernicious racial stereotypes can permeate the interpretation of Black men's behavior and provides critical context when

evaluating the reasonableness of conduct. A reasonable person would not allow such bias to cloud their objectivity: Charlie's screaming and crying in these circumstances, distilled of stereotypes, was not unreasonably noisy, tumultuous, or threatening. The police cannot so easily skirt the protections of the First Amendment by claiming "threat" where they can show only "distress." The District Court's crediting of this error warrants a hard look from this Court—and reversal.

c. The Burlington Police Department has demonstrated a pattern of its officers arresting men and boys of color for their constitutionally protected speech

This Court should hesitate to condone Charlie's arrest for another reason: the Burlington Police Department (BPD) has a demonstrated history of improperly punishing Black men engaging in constitutionally protected speech. In 2017, the ACLU sent a letter to BPD's then-Chief Brandon del Pozo describing how "Burlington Police Department officers have arrested and threatened multiple Burlingtonians, virtually all boys or men of color, in retaliation for their speech protected by the First Amendment to the United States Constitution and Article 13 of the Vermont Constitution." DC Dkt. No. 144-25 at 1. The letter cited multiple examples of Burlington police officers penalizing Black and brown men's and boys' protected speech with disorderly conduct charges. *Id.* at 1–2. Over a two-year period, several people of color—both adults and children—

who swore at or challenged the police were chased down, pepper sprayed, and arrested by police. *Id*. Although none of these individuals were violent or made a clear threat, each was charged with disorderly conduct. *Id*. at 2. In conclusion, amicus explained to Chief del Pozo:

> The arrests in these cases demonstrate a troubling pattern of Burlington police unlawfully retaliating in violation of individuals' First Amendment rights. We bring these incidents to your attention to urge you to ensure that your officers understand the full scope of rights protected under the First Amendment and that they do not act in violation of those rights.

Id. at 3.

As Charlie's case demonstrates, BPD did not heed amicus's urgings. Rather, the troubling practice of police responding to Black men's speech with handcuffs has continued—and has been sanctioned by the District Court here. This disturbing history provides important additional context when considering the police's reaction to Charlie's distress.

II. The District Court's failure to recognize how Charlie's First Amendment rights were implicated exemplifies the problems with skipping the first prong of the qualified immunity analysis

In its brief discussion of Charlie's Fourth Amendment claim, the District Court veered from the traditional sequence of the qualified immunity analysis. Rather than analyzing the right at issue, the Court began and ended with the "clearly established" inquiry and reasoned that,

because "a reasonable police officer could believe he had arguable probable cause to arrest Charlie for disorderly conduct," the District Court could not "conclude that it was clearly established law that an arrest in this case would violate Charlie's constitutional rights." DC Dkt. No. 158 at 31. The Court then chose to "skip the constitutional inquiry all together" and held the police officers were entitled to qualified immunity. *Id*. at 28, 32 (citation omitted). But by failing to discuss the specific constitutional right at issue, the District Court ignored the First Amendment limitations on the disorderly conduct inquiry and thus reached the wrong conclusion.

a. A court generally should not deviate from the standard sequence of the qualified immunity analysis because it is often necessary to articulate the constitutional right at issue before deciding if that right was clearly established

Qualified immunity is a court-created doctrine that "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Importantly, in lawsuits challenging the unlawful actions of police officers, qualified immunity is not intended to shield police from accountability. *See id*. at 231–32 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, n. 2 (1987)) (describing the goal of qualified immunity as

"ensur[ing] that insubstantial claims against government officials will be resolved prior to discovery" (cleaned up)). Indeed, as courts have noted:

> [T]here are well-defined limits on what police officers may do in discharging their duties, and police may be held liable for acting outside these limits. Perhaps the most fundamental of these is the requirement that the police not interfere with the freedom of private persons unless it be for specific, legitimate reasons.

Duran, 904 F.2d at 1376 (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968)).

To that end, in *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court developed a two-step sequence for analyzing qualified immunity claims. First, the court must determine if the facts the plaintiff has alleged "make out a violation of a constitutional right." *Pearson*, 555 U.S. at 232 (describing *Saucier* sequence). "Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Id.* Proceeding in this sequence reflected past Supreme Court cases' consensus that "the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all." *Id.* (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998)). Moreover, by first articulating the right at issue, courts were more likely to provide the necessary elaboration in each case and to foster the development of

constitutional law. *Id.* at 236 (explaining "the *Saucier* Court was certainly correct in noting that the two-step procedure promotes the development of constitutional precedent").

However, in 2009, the Supreme Court shifted course. In *Pearson v. Callahan*, the Court "conclude[d] that, while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory." *Id.* Instead, courts could exercise their discretion to determine the proper sequence of the qualified immunity analysis on a case-by-case basis. *Id.* But even while permitting some flexibility, the Supreme Court emphasized that proceeding with the established two-step sequence was still "often beneficial." *Id.* The Supreme Court expected that the lower courts would frequently default to the *Saucier* sequence because "it often may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be." *Id.* (quoting *Lyons v. Xenia*, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring) (cleaned up)).

Accordingly, in discussing the importance of exercising their discretion with appropriate caution and consideration, lower courts have reiterated the continuing value of the *Saucier* sequence. The Second Circuit has frequently recognized the necessity of first articulating the

constitutional right at issue in order to conduct a cogent analysis. In cases in which it would be challenging to analyze whether the law was clearly established without first precisely defining the constitutional right, the Second Circuit has embraced the traditional sequence. *See, e.g.*, *Okin v. Vill. of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 429 n.9 (2d Cir. 2009) (citing *Pearson*). And because the clearly established inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition," *Saucier*, 533 U.S. at 201 (overruled on other grounds), the Second Circuit has held that "the specificity with which a right is defined" is integral "[t]o determin[ing] whether the relevant law was clearly established," *Terebesi v. Torreso*, 764 F.3d 217, 231 (2d Cir. 2014). Conceptually, the qualified immunity prongs cannot be so neatly divided to always allow for reordering.

b. Inappropriately sidestepping Charlie's constitutional right at issue distorted the District Court's qualified immunity analysis

The District Court is entirely correct that, per *Pearson*, it may examine the "clearly established" prong of qualified immunity first. *See* DC Dkt. No. 158 at 28. But it articulated no reason for doing so beyond citing the Supreme Court's grant of discretion. *Id.* The District Court court's analysis illustrates the difficulty of "decid[ing] whether a right is clearly established without deciding precisely what the existing constitutional right

happens to be"—and the consequences of deviating from the *Saucier* sequence without basis. *Pearson*, 555 U.S. at 236 (citation omitted). Specifically, by jumping immediately to the second prong of the qualified immunity test, the District Court entirely overlooked the First Amendment limitations on the disorderly conduct inquiry.

Instead of defining and discussing with specificity the weighty constitutional right at issue, the District Court framed the qualified immunity analysis solely as whether it was clearly established that the police had probable cause to arrest Charlie. DC Dkt. No. 158 at 31. The Court quickly concluded that "[a]rresting a person for disorderly conduct when they are in fact yelling, cursing, and making noise, even with the remaining factual disputes, cannot be said to put a reasonable officer on notice that an arrest would be unlawful." *Id*. (citations omitted).

To be sure, the District Court was correct that—as a general matter—"[t]here can be no federal civil rights claim for false arrest where the arresting officer had probable cause." *Singer v. Fulton Cnty. Sheriff*, 63 F.3d 110, 118 (2d Cir. 1995). But in the context of an arrest for disorderly conduct, probable cause cannot properly be analyzed without considering the First Amendment. And by declining to fully engage with the specific constitutional right at issue—freedom from arrest for *disorderly conduct*

without probable cause—and starting with the clearly established prong, the Court completely overlooked how First Amendment protections constrain the probable cause analysis, particularly when applied to "the specific context of the case." *Saucier*, 533 U.S. at 201.

As discussed above, *see supra* Part I.a., Charlie had a constitutional right to express his distress to the police for injuring and arresting his brothers. This First Amendment right to challenge police without risking arrest is such "a fundamental right in our society," *Long*, 701 A.2d at 1054, that it is viewed as a "prerogative[] of American citizenship" that underpins our democracy, *Baumgartner*, 322 U.S. at 673–74. A probable cause analysis that fails to consider the significant limitations that the First Amendment places on the reach of the disorderly conduct statute is thus constitutionally deficient. Yet the part of the Order addressing Charlie's claims does not even mention the phrases "First Amendment" or "free speech."

If the District Court had not been lured into error by skipping the first prong of the qualified immunity analysis, it would have been apparent that it is clearly established that a warrantless arrest for constitutionally protected speech lacks probable cause and is thus unlawful. Looking to precedent existing at the time of the violation, *see Okin*, 577 F.3d at 433

(citation omitted), a reasonable officer would understand that an arrest without a warrant requires probable cause, or the reasonable belief that a crime was committed, *see State v. Morse*, 219 A.3d 1309, 1314 (Vt. 2019) (citation omitted). That reasonable officer would also be aware that free speech is a fundamental right with "contours [that] are well-established," as evidenced by a plethora of case law reading disorderly conduct statutes narrowly to avoid infringing upon that right. *Long*, 701 A.2d at 1054; *see also State v. Colby*, 972 A.2d 197, 200–01 (Vt. 2009). Therefore, a reasonable officer would not believe that a man acting well within the parameters of speech protected by the First Amendment is committing a crime; rather, that officer would know that an arrest for such constitutionally protected speech violates his "clearly established right to free speech, and in turn, his right not to be arrested without probable cause." *Long*, 701 A.2d at 1054 (citation omitted).[10]

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[10] Not only would a reasonable police officer know that an arrest for constitutionally protected speech lacks probable cause, but *this specific police department* had notice that it had been committing *this specific constitutional violation*. As discussed above, *supra* Part I.c., the ACLU sent a letter to Chief del Pozo detailing how Burlington police officers were unlawfully arresting men and boys of color for disorderly conduct. DC Dkt. No. 144-25. The letter also provided two paragraphs of case law explaining how these arrests violate the First Amendment. *Id.* at 2–3. The Court did recognize the import of this letter and the First Amendment protections against disorderly conduct charges—but only when considering Jeremie's claims, not Charlie's. DC Dkt. No. 158 at 43–44.

By choosing to forgo the first constitutional right prong of qualified immunity, the District Court disregarded how Charlie's First Amendment rights were violated by his false arrest and ignored the well-established law that protected speech cannot provide the basis for a disorderly conduct arrest. In deviating from the *Saucier* sequence, the Court's resultant perfunctory analysis led it to reach that erroneous conclusion on qualified immunity, further warranting reversal.

Importantly, this error reflects a broader issue with the qualified immunity doctrine: it is neither textually nor historically justified, and its policy justifications are no longer applicable. *See, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress."); *Thompson v. Clark*, 14-CV-7349, 2018 WL 3128975, at *13 (E.D.N.Y. June 26, 2018) ("Case precedent and policy rationale fail to justify an expansive regime of immunity that would prevent plaintiff from proving a serious constitutional violation [at trial]."); *Jamison v. McClendon*, 476 F. Supp. 3d 386, 402 (S.D. Miss. 2020) ("Just as the 19th century Supreme Court neutered the Reconstruction-era civil rights laws, the 20th century Court limited the

scope and effectiveness of Section 1983 after *Monroe v. Pape*. The doctrine of qualified immunity is perhaps the most important limitation."). Allowing a nebulous doctrine resting on legally insupportable grounds to stymie the development of constitutional law effectively bars plaintiffs from vindicating their rights. And qualified immunity's free-wheeling nature and ill-defined parameters invite errors, as occurred here, to obscure the important constitutional rights at stake.

CONCLUSION

For the reasons set forth above, this Court should reverse the District Court's grant of summary judgment in favor of the City.

Dated: September 8, 2022
Montpelier, Vermont

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Certificate of Compliance

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