No. 07-2196

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ASOCIACIÓN DE PERIODISTAS DE PUERTO RICO, Puerto Rico Journalists Association; OVERSEAS PRESS CLUB OF PUERTO RICO; NORMANDO VALENTIN, individual capacity and on behalf of his respective Conjugal Partnership; VICTOR SANCHEZ, individual capacity and on behalf of his respective Conjugal Partnership; JOEL LAGO-ROMAN, individual capacity and on behalf of his respective Conjugal Partnership; COSSETTE DONALDS-BROWN, individual capacity and on behalf of her respective Conjugal Partnership; VICTOR FERNANDEZ, individual capacity and on behalf of his Conjugal Partnership; ANNETTE ALVAREZ, individual capacity and on behalf of her respective Conjugal Partnership

Plaintiffs-Appellants,

v.

ROBERT MUELLER, in his official capacity as Director of the Federal Bureau of Investigation; TEN UNKNOWN AGENTS OF THE FEDERAL BUREAU OF INVESTIGATION, individually and in their official capacity and on behalf of their Conjugal Partnership; AGENT KEITH BYER, individually and in his official capacity and on behalf of his Conjugal Partnership; AGENT LUIS S. FRATICELLI, individually and in his official capacity and on behalf of his Conjugal Partnership; AGENT JOSE FIGUEROA-SANCHA, individually and in his official capacity and on behalf of his Conjugal Partnership.

Defendants-Appellees.

On Appeal from the United States District Court for the District of Puerto Rico

BRIEF OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

None of the plaintiffs have parent corporations, and no publicly held company own ten percent or more of stock in any plaintiff.

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Oral argument is appropriate because this case raises important constitutional issues. Specifically, this case addresses the degree to which the First and Fourth Amendments constrain the ability of law enforcement officers to impede the press as it gathers the news. Oral argument would help further illuminate the issues briefed by the parties, and allow the parties to respond to this Court's precise questions and concerns.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over plaintiffs' Complaint for violation of their First and Fourth Amendment rights under 28 U.S.C. §§ 1331 and 1346.

The district court's grant of summary judgment to defendants was a final order disposing of all parties' claims. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

The district court entered judgment against plaintiffs on June 12, 2007. Plaintiffs timely filed their notice of appeal on July 9, 2007.

STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that defendants were entitled to summary judgment because plaintiff journalists failed to state a claim for Fourth Amendment excessive use of force, where defendants punched and kicked plaintiffs and sprayed them in the face with pepper spray.

2. Whether the district court erred in holding that defendants were entitled to summary judgment because plaintiffs failed to state a claim for a violation of the First Amendment right to gather the news, where defendants assaulted plaintiffs and engaged in a series of acts to intimidate them, including aiming a rifle at one journalist, to prevent plaintiffs from gathering the news.

3. Whether plaintiffs have standing to pursue injunctive relief, given plaintiffs' well-founded belief that their attempts to report on future FBI actions will be met with the same type of interference and physical force.

STATEMENT OF THE CASE

This case concerns the ability of the government to interfere with the media's efforts to gather the news. Plaintiffs are well-known journalists who assembled at a condominium complex to report on a search being conducted by the Federal Bureau of Investigation (FBI). The FBI was searching an apartment belonging to an individual associated with the Puerto Rico independence movement. The raid occurred at a time when the FBI was the subject of intense public scrutiny and criticism as a result of a raid executed months earlier in which a known leader of the Puerto Rico independence movement was killed.

Rather than allow the reporters to do their jobs, FBI agents took steps to intimidate the journalists. Among other things, they physically pushed one journalist while he was asking questions and then raised an automatic rifle and pointed it directly at him in an unambiguously threatening manner. They prevented filming by covering the lens of a camera. They later punched and kicked journalists and sprayed them in the face with pepper spray.

Plaintiffs sued to vindicate their Fourth Amendment right to be free from excessive use of force and First Amendment right to gather the news. The district court granted defendants summary judgment on the ground that plaintiffs had not stated a claim as a matter of law. The district court's decision was erroneous. Summary judgment on plaintiffs' Fourth Amendment claims is inappropriate because there are material facts in dispute. Both the government's argument and the district court's decision were premised on the notion that plaintiffs were unruly. Plaintiffs submitted affidavits to the contrary. The district court expressly did not consider defendants' only evidence on this issue. Even if it had, defendants' evidence is insufficient to overcome plaintiffs' affidavits on summary judgment. If plaintiffs' allegations are true, plaintiffs have clearly stated a Fourth Amendment claim for excessive force and defendants are not entitled to qualified immunity. Because there is a sharp factual dispute about whether *any* force was necessary against the plaintiff journalists, it was inappropriate to grant summary judgment in this case.

Summary judgment on plaintiffs' First Amendment claims was also inappropriate because the district court failed to consider significant portions of plaintiffs' evidence that preclude summary judgment. Specifically, the district court never considered the First Amendment implications of kicking, punching

and spraying plaintiffs with pepper spray, or with pointing a rifle at a reporter in an unambiguously threatening manner. Had it done so, it would have recognized that defendants' interference with newsgathering merited denial of summary judgment.

This Court should reverse the district court's entry of summary judgment for defendants and remand for trial. At the least, it should remand the case with an order that discovery be permitted.

STATEMENT OF THE FACTS

At about 10 a.m. on the morning of February 10, 2006, the FBI executed a search of an apartment in a condominium complex in San Juan, Puerto Rico. App. 92. The apartment belonged to Liliana Laboy, a known advocate of independence for Puerto Rico. App. 87, 92. When journalists learned the search was in progress, they arrived on the scene to cover it. *Id.*

The FBI's search was particularly newsworthy because of recent public scrutiny of its conduct. Fewer than six months earlier, a different pro-independence activist was shot dead when the FBI worked to arrest him. App. 78. The death sparked public demonstrations, and was the focus of extensive press attention. Frances Robles, *Protests Mount Against FBI Over Tactics*, The

Miami Herald, Mar. 27, 2006. The governor of Puerto Rico criticized the FBI's actions.[1] *Id.*

It was against this backdrop that plaintiffs and other reporters set up outside the condominium complex. App. 83. All of the plaintiffs are seasoned and respected journalists. Plaintiff Normando Valentín, a journalist for Televicentro de Puerto Rico, has worked as a reporter for different television stations in Puerto Rico since 1991. He has received many awards for his work as a journalist, including from the Overseas Press Club, the Puerto Rico Journalists Association (ASPPRO), the Chamber of Commerce of Bayamon Municipality, and the Association of Young Entrepreneurs. App. 82. On the day of the incident, Valentin was accompanied by cameraman Victor Sanchez, also from Televicentro. Plaintiff Cossette Donalds Brown has been a reporter for Univision Radio for the past seven years. App. 87. She regularly covers breaking news and press conferences as well as conducts interviews and carries out special investigative assignments. *Id.* In 2006, the Overseas Press Club granted her an award for her investigative reports on the unicamerialism referendum, and the same year ASPPRO awarded her the National Journalism Award for her report on the February 10, 2006 incident. *Id.* Plaintiff Victor Fernandez is a cameraman for

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[1]This Court reviewed the relevant facts from the incident in *Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 54 (1st Cir. 2007).

Univision TV. Plaintiff Annette Alvarez is a reporter for TUTV. She has received various EMMY awards and other awards from several prestigious press organizations. Plaintiff Joel Lago Roman is a reporter for Radio Puerto Rico, an all talk and news station. App. 92.

The condominium complex where the search took place consists primarily of a multiple-unit condominium building. App. 51. In addition to the condominium building, the complex grounds include a parking lot. App. 52. The condominium complex is surrounded by a metal fence. App. 51, 92.

A security guard maintains access to the condominium complex. App. 51. The security guard does so from a booth located between two gates leading into the complex. One of the gates is for vehicular traffic. The other gate is narrower and is for pedestrians. *Id.*

The journalists set up outside of the pedestrian gate. App. 53, 83, 88. They remained outside of the condominium complex gate for much of the day. App. 83, 88. Throughout the day, residents and others were permitted to come and go from the building and parking lot through the pedestrian and vehicle gates. App. 51.

The parties dispute whether the FBI agents established a perimeter to prevent the media and members of the general public from entering the complex. Plaintiffs submitted evidence that the FBI never established a perimeter and never

consistently limited access to the condominium complex grounds. Three plaintiffs submitted sworn statements that the FBI never set up a perimeter to control access to the condominium grounds. App. 83-84, 89, 94-95. In addition, no FBI agents were guarding the alleged perimeter. *Id.* Moreover, other individuals, who were not FBI agents, freely entered and exited the condominium complex grounds. App. 83-84, 89.

Defendants nevertheless claim that a perimeter was set up. According to Defendant Keith Byers, "FBI agents established a perimeter by using the vehicle gate and exterior property wall as a natural perimeter." App. 52. Defendant Byers also claims that an FBI agent instructed the complex security guards to permit "only residents and others with legitimate business at the building to enter the parking lot area." *Id.*

Defendants' claims are contradicted by plaintiffs' affidavits. The Byers affidavit is further contradicted by the sworn testimony of Sergeant Mary Ann Rodriguez, who was working the security booth during the morning of the FBI action. App. 115. Rodriguez testified that although initially she was not allowed to permit people to enter or exit the condominium complex, by around 11:40 a.m. the FBI told her she could allow access through the pedestrian gate, and by noon the FBI told her she could allow vehicular access. App. 118. *See also*

Defendants' DVD at 00:09:36-00:09:40 (two women in civilian attire walking past FBI agents and into condominium building); 00:11:30-00:11:40 (woman and man in civilian clothes walking past FBI agents and out of condominium building).[2] The incidents that are the subject of this lawsuit occurred well after this time.

After the search had been in progress for some time, a helicopter labeled "Department of Homeland Security" flew overhead and landed in a nearby field. App. 89, 93. Defendant Byers explained that the helicopter contained additional agents from a special FBI command post who had been requested by the agents at the condominium complex. App. 57. Some of the reporters left their spot outside the condominium complex and went to the field to investigate. App. 89, 93-94. Plaintiff Lago Roman was among this group. App. 93-94.

Several heavily armed tactical agents in combat dress exited the helicopter. The tactical agents physically interfered with the reporters' efforts to approach them. *Id.* For example, Lago Roman approached one of the agents and asked him the reason for their presence. *Id.* The agent physically pushed him away. *Id.* Lago Roman told the agent he was just doing his job. *Id.* He repeated his question and also asked whether the FBI intended to arrest someone. *Id.* Instead of responding

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[2]As will be discussed in greater detail below, defendants' DVD is not admissible evidence and was not relied on by the district court. Plaintiffs provide relevant citations for this Court's considerations should the Court rely on the DVD.

verbally, the agent again pushed him. *Id.* A different agent then pointed his rifle directly at Lago Roman in a threatening manner. *Id.*

Lago Roman was not the only affected reporter. At the landing site, agents pushed away the microphones of other reporters and one agent used his hand to cover a camera lens. App. 127. These agents and others then departed toward the condominium complex. App. 89, 94. The journalists who had approached the helicopter rejoined their colleagues outside the condominium complex.

By this time, the number of people outside the condominium complex grounds had grown. Over the course of the day, additional media members, local students, and the general public gathered outside the condominium complex grounds. App. 54. Some members of the public shouted foul language at the FBI agents. App. 94.

In the afternoon, Liliana Laboy's daughter, Natalia Hernandez Laboy, arrived at the condominium complex. App. 84, 94. Hernandez Laboy arrived around the time the search was concluding and agents began exiting the building with seized material that they were loading into vehicles on the scene. App. 57, 84. Hernandez Laboy entered the condominium complex through the pedestrian gate. App. 89. Defendant Byers met Hernandez Laboy, as well as others

accompanying her, "in the driveway area / path to the lobby as agents were loading [their] vehicles with evidence." App. 57-58.

A short time thereafter, Hernandez Laboy waved her hand to invite the reporters into the apartment complex. App. 59, 84, 94. Plaintiffs and other journalists then filed through the narrow pedestrian gate, which was wide open and unguarded. App. 84, 89. As they passed through the gate, the reporters were immediately recognizable as reporters because they carried standard journalistic tools such as cameras, video recorders, and microphones. App. 89-90. For example, Plaintiff Donalds Brown held a small tape recorder, her cell phone, and a notebook. *Id.*

There is a factual dispute about whether only journalists entered the condominium complex grounds, and whether those who entered were unruly. Plaintiffs maintain that only journalists entered the complex grounds and, further, that they were peaceful at all times. App. 84, 89, 90, 94, 96. Defendants argue that non-journalists also entered, and that law enforcement officers confronted an "unruly crowd." App. 59-60; Defs.' Mem. Supp. Summ. J. at 16.

Reporters approached Hernandez Laboy and the agents seeking a statement. App. 84. Defendant Byers states that he saw three male reporters, including plaintiff Lago Roman, enter the parking lot area from the direction of the front

pedestrian gate. App. 59; Defs.' DVD at 00:12:15-00:12:45. The agents immediately began to physically push the reporters back outside the apartment complex gate. App. 84, 90, 95.

There is a factual dispute regarding whether the reporters attempted to comply with agents' demands to retreat outside the condominium complex gate. Defendant Byers states that reporters "ignored [his] instructions and physically resisted [his] efforts to escort them outside the perimeter." App. 59. For their part, the reporter plaintiffs assert that they attempted to comply with the agents' demands that they retreat. App. 89-90. However, it was physically impossible for the reporters to exit quickly because the pedestrian gate was too narrow. *Id.* A bottleneck formed that left a substantial number of the reporters trapped inside the gated area. App. 95.

Not satisfied with the speed of the reporters' departures, the agents then used force against the journalists. One agent attempted to seize Plaintiff Lago Roman's microphone with one hand, and grabbed his chest with the other. App. 95. The agent grabbed Lago Roman with such force that the mark of the agent's fingers was visible on Lago Roman's body for the next two to three days. App. 94. Another agent hit Lago Roman with a retractable baton on his lower abdomen and lower part of his body. App. 94. The pushing and hitting was so forceful it

caused Lago Roman to lose the equipment that allowed him to hear the transmission from his station. App. 95-96.

Defendant Byers then pushed Plaintiff Valentín with his left elbow and at the same time started to punch him in the abdomen with his right fist, causing acute pain in Valentín's lower body. App. 84. Valentín asked Byers, "what do you gain by hitting me?" App. 84. That did not stop the aggression. App. 84. Defendant Byers' affidavit notably does not refute these facts. His affidavit narrates, in detail, the days' events up to the point where the reporters entered the gate and abruptly terminates.

Another agent then took out a can of pepper spray and sprayed it directly into the faces of the reporters. App. 95-96. Lago Roman was hit with the spray, which forced him to turn away and caused his throat and face to burn. App. 94-95. He fell to the ground. *Id.* An agent immediately stuck a can of pepper spray between his sunglasses and his forehead and sprayed him at close range once more. *Id.* Lago Roman felt an intense burn, experienced temporary blindness, and felt as though he was suffocating. *Id.* An agent then grabbed him by the leg and kicked and shoved him until his body was completely outside the gate. *Id.*

When Lago Roman finally made it outside the gate, other reporters came to his aid to see if he was okay. App. 96-97. He was unable to open his eyes and

was compelled to sit on the sidewalk until the pain subsided. *Id.* Minutes later he was offered medical assistance in an on-site ambulance. *Id.* He was then transferred to a nearby hospital where he was provided with first aid and eye drops and had his face and chest cleaned. *Id.* He was given medication for the continuing burning sensation in his throat and chest, a sensation he continued to feel for two days. *Id.* Lago Roman's chest, upper back, abdomen, arms and shoulders were covered with bruises. App. 97.

Plaintiff Donalds Brown also inhaled the pepper spray. App. 90. It immediately provoked an intense irritation in her throat. *Id.* She started to cough and felt suffocated. *Id.* She saw the reporters in front of her fall to the ground while the FBI officers aggressively kept pushing her and others until they were all outside the gate. *Id.*

Plaintiff Valentín was also hit with the pepper spray. App. 85. It caused an intense irritation in his eyes and compelled him to keep his eyes closed for several minutes. *Id.* He felt dizzy and also experienced a strong burning sensation on his face. *Id.* He felt suffocated. *Id.* Like Lago Roman, Valentín went to the hospital. *Id.* He had his face cleaned and was given prescription medication for the pain and the burning sensation. *Id.* Valentín was covered in bruises and was in pain for several days. *Id.*

PROCEDURAL HISTORY

On September 20, 2006, plaintiffs filed this case against the director of the FBI, the local FBI officials in charge, Special Agent Keith Byers, and ten unknown federal agents who participated in the events described above. App. 5. Plaintiffs asserted that the FBI agents violated the Fourth Amendment by using excessive force against them and the First Amendment by interfering with their right to gather the news. Plaintiffs sought declaratory, injunctive and compensatory relief. App. 48.

In response, defendants sought and obtained a stay of all discovery. App. 7. Defendants then asked the court to grant them summary judgment on plaintiffs' damages claims on the basis of qualified immunity, and to dismiss plaintiffs' claims for injunctive relief on the ground that plaintiffs lacked standing. App. 9.

In their memorandum in support of summary judgment, defendants countered plaintiffs' claim that they used excessive force by disputing many of plaintiffs' factual contentions. Defs.' Mem. Supp. Summ. J. at 12. Defendants never deny kicking or punching plaintiffs or spraying them with pepper spray. The lynchpin of defendants' argument is that the individuals who entered through the condominium complex gate were unruly and prone to violence, and that kicking, punching, and spraying them with pepper spray was appropriate. As

mentioned above, defendants' sole declaration, submitted by Defendant Byers, terminates its narrative prior to the violence that is at the core of plaintiffs' Complaint. Instead, on summary judgment defendants relied exclusively on a DVD containing excerpts of the event that defendants claimed conclusively proved that their version of the facts was correct. *Id.* at 12 ("[T]he Court need not rely upon either party's version of events to dispose of this case. Undisputed video evidence, filmed by the media itself, proves that plaintiffs' allegations fail as a matter of law.").

As to plaintiffs' claim for injunctive relief, defendants argued that plaintiffs lacked standing. Relying primarily on *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), defendants suggested that plaintiffs lack standing because they do not face a "real and immediate" threat of being injured by the FBI in the future.

Plaintiffs responded by filing a Motion for Relief Pursuant to Rule 56(f), asking the court to deny or at least postpone consideration of summary judgment until plaintiffs obtained discovery. App. 10. Defendants opposed plaintiffs' request. App. 10. The court ultimately denied plaintiffs' request. App. 12.

Plaintiffs then filed a brief in opposition to defendants' motion for summary judgment. App. 10. Plaintiffs asserted that where, as here, the parties' disagreements are *factual* in nature, summary judgment is inappropriate. Plaintiffs

relied on the evidence in their affidavits, set out in the Statement of the Facts section above, to argue that only journalists entered the complex grounds, that the journalists were peaceful at all times, that the use of any force was unwarranted, and that defendants were therefore not entitled to summary judgment even under the more demanding qualified immunity standard. Plaintiffs also relied on this evidence to argue that defendants took steps to intimidate the journalists and prevent newsgathering, including aiming a rifle at a journalist in a threatening manner. Defendants' sole evidence contradicting plaintiffs' account was their DVD. Plaintiffs argued that reliance on defendants' DVD was improper because it was not authenticated and appeared to be heavily edited. Plaintiffs further argued that when the facts were construed in the light most favorable to plaintiffs, defendants' assertion of qualified immunity failed.

As for defendants' argument that plaintiffs lacked standing, plaintiffs argued that it would be inappropriate to dismiss plaintiffs' claim for injunctive relief for lack of standing at such an early stage. Plaintiffs had not yet been afforded discovery into defendants' policies regarding treatment of the media.

On June 13, 2007, the court issued an Opinion and Order granting defendants' motion. App. 12. The court disposed of plaintiffs' claims by concluding that plaintiffs' allegations, if true, failed to establish either a violation

of their Fourth Amendment right to be free of the excessive use of force or their First Amendment right to gather the news. App. 25, 28, 33.

With respect to the Fourth Amendment claim, the district court first addressed the agents' use of pepper spray. The district court reasoned that although "[i]n some circumstances, using pepper spray against non-suspects may be considered unreasonable," there was an exception "[w]here a crowd presents a threat to the safety of themselves or law enforcement." App. 29. Citing to the DVD, the district court accepted defendants' argument "that it was necessary for them to use pepper spray to subdue the crowd due to the 'proximity of the crowd to weapons and the manner in which crowd members were crushed against the gate.'" App. 29 (quoting Defendants' brief in support of summary judgment, and citing Docket Number 41, the DVD). By implication, the district court appears to have accepted defendants' factual contention that there was a crowd on complex grounds that was a safety threat, despite plaintiffs' evidence to the contrary.

The district court then turned to defendants' kicking and punching of plaintiffs. The district court declined defendants' invitation to rely on the DVD to conclude that defendants did not in fact kick and punch plaintiffs, explaining that plaintiffs disputed the accuracy and authenticity of the DVD. App. 31. Without citing to an evidentiary source for its factual findings, the district court then wrote:

> [F]aced with an angry mob that shouted insults at agents and carried rocks that they later hurled at departing FBI vehicles, Defendants reasonably could have believed that it was necessary to use physical force against members of the crowd that included kicking, punching, and hitting Plaintiffs with batons in order to prevent the situation from escalating into one that would threaten the safety of the agents, the crowd, and innocent bystanders.

App. 32. Again, the district court seems to have accepted defendants' factual contention that an "angry mob" was on complex grounds, not peaceful reporters.

The district court also concluded that plaintiffs failed to state a claim under the First Amendment. The district court held that plaintiffs did not allege a violation of their First Amendment right on the ground that they failed to cite a factually identical case:

> Plaintiffs have not cited to any case, nor have we found one, where the court found a First Amendment violation based on law enforcement agents pushing away a microphone or temporarily seeking to obstruct recording by placing a hand in front of a camera.

App. 28. The district court did not address several of the acts that plaintiffs allege violated the First Amendment: pointing a rifle at a reporter in a threatening manner, and kicking, punching, and spraying reporters with pepper spray.

The court then reasoned that because it had dismissed plaintiffs' claims, it did not need to address the question of whether plaintiffs had standing to pursue injunctive relief. App. 33.

SUMMARY OF THE ARGUMENT

The district court erred when it granted summary judgment to defendants. There is a heated factual dispute at the center of this case that precludes summary judgment: whether those who entered the condominium complex grounds were unruly. Absent a conclusion that plaintiffs were unruly, the court could not have held that "it was necessary to use physical force against members of the crowd that included kicking, punching and hitting Plaintiffs." App. 32. Plaintiffs submitted three affidavits that they and the other journalists who entered the grounds were peaceful. Defendants' sole evidence to the contrary is their DVD.

The district court committed additional errors with regard to plaintiffs' First Amendment claims. First, it failed to address whether pointing a rifle at a reporter in a threatening manner, or kicking, punching and pepper spraying reporters doing their job, interferes with the right to gather the news. Second, the district court rejected plaintiffs' claims because plaintiffs did not point to a factually identical case. Plaintiffs were not required to do so as a matter of law. There is abundant case law raising similar issues that sets out the relevant legal principles, and the First Amendment itself is ample support for plaintiffs' claims.

If the district court had credited plaintiffs' view of the facts, a requirement on summary judgment absent extraordinary circumstances, it would have been apparent that defendants are not entitled to qualified immunity. At the time of the

incident, a reasonable officer would have known that it was excessive force to kick, punch, hit and pepper spray peaceful professional journalists reporting on a news event. That same reasonable officer would have known that it violated the First Amendment to assault journalists in this manner, as well as to prevent a journalist from asking questions by physically pushing him away and then raising an automatic rifle and pointing it at the journalist.

The district court did not reach plaintiffs' claims for injunctive relief. If this Court chooses to do so, it should hold that plaintiffs have standing to pursue injunctive relief because of their well-founded belief that their planned attempts to report on future FBI actions will be met with the same types of interference and physical force.

This Court should reverse summary judgment and remand to the district court for trial. At the least, it should remand with an order that discovery be permitted.

ARGUMENT

I. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' DAMAGES CLAIMS

A. Standard of Review

Defendants have moved for summary judgment. The district court's grant of summary judgment is reviewed de novo by this Court. *Walker v. Waltham*

Hous. Auth., 44 F.3d 1042, 1047 (1st Cir. 1995). Summary judgment is only appropriate if the record shows "there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "An issue is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party, and a fact is material if it has the potential to affect the outcome of the suit." *Velazquez-Garcia v. Horizon Lines of Puerto Rico, Inc.*, 473 F.3d 11, 15 (1st Cir. 2007) (internal citations and quotation marks omitted).

In response to a motion for summary judgment, the non-moving party must offer proof "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In considering a request for summary judgment, this Court must view the facts in the light most favorable to the plaintiff-appellants. *Buchanan v. Maine*, 469 F.3d 158, 162 (1st Cir. 2006). As the Supreme Court clarified last Term, "[i]n qualified immunity cases, this usually means adopting . . . the plaintiff's version of the facts." *Scott v. Harris*, 127 S. Ct. 1769, 1775 (2007).

In this case, the individual federal defendants have asserted qualified immunity. This Court has established a tripartite test for qualified immunity:

> (1) whether the claimant has alleged the deprivation of an actual constitutional right; (2) whether the right was clearly established at the time

> of the alleged action or inaction; and (3) if both of these questions are answered in the affirmative, whether an objectively reasonable official would have believed that the action taken violated that clearly established constitutional right.

Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 141 (1st Cir. 2001). Courts must answer these questions sequentially. *Scott*, 127 S. Ct. at 1774 (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)) ("If, and only if, the court finds a violation of a constitutional right, 'the next, sequential step is to ask whether the right was clearly established.'").

B. Defendants are Not Entitled to Qualified Immunity on Plaintiffs' Fourth Amendment Claims

i. Kicking, Punching and Pepper Spraying Peaceful Reporters Violates the Fourth Amendment

The first question for this Court is whether a reasonable jury could conclude that plaintiffs have alleged a violation of their Fourth Amendment right to be free from excessive force. *Starlight Sugar*, 253 F.3d at 141. This Court must ask whether the particular force utilized by defendants in this case was unreasonable under the circumstances. *Graham v. Connor*, 490 U.S. 386, 397 (1989); *see also Jennings v. Jones*, 499 F.3d 2, 11 (1st Cir. 2007) (recognizing that *Graham* sets out the standard for analyzing excessive use of force claims). Whether the use of

force is reasonable "must be judged from the perspective of a reasonable officer on the scene . . . ." *Graham*, 490 U.S. at 396. Courts must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396 (internal quotation marks and citation omitted).

In *Graham*, the Supreme Court specified that in deciding whether a given use of force is excessive, the finder of fact should consider "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*

Simply listing the *Graham* factors illustrates how remote this case is from any circumstance in which the Court contemplated that the use of force might be justified. *All* of these factors weigh in favor of plaintiffs. Plaintiffs committed no crime. Until the FBI pepper sprayed and beat the reporters, the scene was peaceful. Plaintiffs were present at the condominium complex to cover the FBI search in progress. App. 87, 92. They only passed through the complex's pedestrian gate when invited to do so by Hernandez Laboy. App. 84, 94. There is a factual dispute about whether plaintiffs breached a law enforcement perimeter,

but at summary judgment this Court must give credit to plaintiffs' evidence that no such perimeter existed. *Buchanan*, 469 F.3d at 162.

Second, it is undisputed that plaintiffs posed no threat to the safety of the officers or others. *Graham*, 490 U.S. at 396. The reason for the plaintiffs' presence was to report the news. App. 87, 92. Plaintiffs approached the agents and Hernandez-Laboy for the same reason reporters routinely approach individuals who are part of a newsworthy event: to get a quote. App. 84. It is unreasonable for a law enforcement officer to find a journalist threatening under these circumstances.

Defendants argued, and the district court accepted, that defendants' use of force was justified because individuals at the scene were unruly. App. 32 ("[F]aced with an angry mob that shouted insults at agents and carried rocks that they later hurled at departing FBI vehicles, Defendants reasonably could have believed that it was necessary to use physical force against members of the crowd that included kicking, punching, and hitting Plaintiffs with batons . . ."). This argument suffers from a variety of flaws. It is not apparent what the court and defendants meant by "unruly." One possibility is that the court and defendants meant that the "crowd" was interfering with the search. This is unlikely, as the search was indoors and no one has ever contended that plaintiffs and others

entered Laboy's apartment. Another option is that they meant that the "crowd" interfered with transporting evidence to the FBI agents' cars. There is no evidence in the record to support this contention. Yet another option is that they meant that the "crowd" was interfering with the FBI agents' ability to leave the complex. Again, there is no evidence to support this theory.

The most likely theory is that the district court and defendants meant that the individuals inside the gate were disobeying FBI orders. This cannot serve as the basis for summary judgment, however, because it depends on crediting defendants' facts and discounting plaintiffs' account, which is not appropriate at summary judgment. Plaintiffs maintain that the only people who entered the condominium complex grounds were journalists, and that the journalists were peaceful at all times. App. 84, 89-91, 94, 96. To the extent that individuals outside the condominium complex gate were unruly, that does not justify actions against the journalists. Chaotic circumstances do not mean it is open season on all individuals who are unfortunate to be in proximity to law enforcement agents. *See, e.g., Ciminillo v. Streicher,* 434 F.3d 461, 468 (6th Cir. 2006) ("The use of less-than-deadly force in the context of a riot against an individual displaying no aggression is not reasonable.").

Third, it is undisputed that plaintiffs were not resisting arrest or attempting to flee. In fact, the evidence shows that plaintiffs were attempting to comply with the officers' demands. When the agents asked the reporters to return back through the gate, they attempted to comply. App. 89-90. The reason the reporters did not retreat immediately was the narrowness of the gate, through which only one or two journalists could pass at a time. *Id.*

When the facts are viewed in the light most favorable to plaintiffs, it was excessive to use *any* force against plaintiffs. It was particularly unreasonable to spray plaintiffs in the face with pepper spray, a chemical designed to cause intense, if temporary, pain and the feeling of suffocation. It provoked intense pain in the plaintiffs in this case. Exposure to pepper spray caused Lago Roman, Donalds Brown, and Valentín to feel that their faces were burning and that they could not breathe. App. 85, 90, 95-96. After an agent stuck a can of pepper spray between Lago Roman's face and his sunglasses and sprayed him directly in the eyes, Lago Roman's pain was so intense that he had to go to the hospital for treatment. App. 95-97. The pain did not completely subside for two days. App. 97. Valentín also went to the hospital and was given medication to abate the burning sensation. App. 85. The consequences of being sprayed with pepper

spray are potentially serious. *See, e.g., United States v. Neill*, 166 F.3d 943, 949 (9th Cir. 1999) (holding that pepper spray was a "dangerous weapon").

It was especially unreasonable for the FBI agents to kick and punch the professional journalists. Defendant Byers punched Valentín in the abdomen with his right fist. App. 84. He continued to do so even after Valentín pleaded with him to stop. *Id.* One agent used a retractable baton to hit Lago Roman repeatedly in the abdomen. App. 95. Lago Roman fell to the ground, and then an agent kicked and shoved him until his body was completely outside the gate. App. 95-96. The Constitution does not abide such unchecked aggression from trained law enforcement personnel.

Several courts have concluded that actions such as those taken by the FBI agents here are excessive use of force. "Courts have consistently concluded that using pepper spray is excessive force in cases where the crime is a minor infraction, the arrestee surrenders, is secured, and is not acting violently, and there is no threat to the officers or anyone else." *Vinyard v. Wilson*, 311 F.3d 1340, 1348 (11th Cir. 2002). In *Vinyard*, a police officer arrested a woman for disorderly conduct and obstruction and placed her in the back of his patrol car. *Id.* at 1342-43. As they drove to the police station, the woman proceeded to scream at the arresting officer. *Id.* Despite the fact that there was protective glass between

the woman and the officer, the officer stepped outside of the car, opened the door, grabbed the woman hard enough to leave bruises on her, and sprayed her in the face with pepper spray. *Id.*

The Eleventh Circuit applied the *Graham* factors and concluded that they weighed in the woman's favor. It noted that the crime she committed was minor, that she was a nuisance but not a threat, and that she never attempted to evade arrest. *Id.* Based on this analysis, the circuit concluded that the officer "used force that was plainly excessive, wholly unnecessary, and, indeed, grossly disproportionate under *Graham*." *Id.* at 1348.

The legal conclusion drawn by the Eleventh Circuit in *Vinyard*-that use of pepper spray is excessive where an individual's crime is minor, the individual poses no safety risk, and is not attempting to flee-is the same conclusion that other circuits have drawn. This is true even where, contrary to *Vinyard*, the individual sprayed had not been subdued by the police. In *Headwaters Forest Defense v. County of Humboldt*, officers used pepper spray against peaceful environmentalist protesters who were seated and had locked themselves together using metal devices that made it difficult to separate the protesters from each other. 276 F.3d 1125, 1127-28 (9th Cir. 2002). The Ninth Circuit found that use of pepper spray against the protesters was excessive force. *Id.* at 1129-30. It rejected defendants'

argument that the use of the metal devices constituted "active resistance" justifying use of force, accepting the plaintiffs' argument (again, as required on summary judgment) that they were peaceful, easily moved, and nonviolent. *Id.* at 1130. *See also Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 895 (6th Cir. 2004) (holding that it was excessive force where the police continued to pepper spray and apply pressure to the back of a subdued suspect); *Park v. Shiflett*, 250 F.3d 843, 853 (4th Cir. 2001) (excessive force where police pepper sprayed a woman who was distraught at watching her husband being arrested); *Adams v. Metiva*, 31 F.3d 375, 387 (6th Cir. 1994) (excessive force where officer used pepper spray against an incapacitated person sitting in a car).

It was also excessive force for the officers to use force more severe than pepper spray, such as kicking and punching the journalists. To be sure, "not every push or shove" that later appears unnecessary violates the Fourth Amendment. *Saucier v. Katz*, 533 U.S. 194, 210 (2001). Kicking, punching and beating someone with a baton are far different from a mere push or shove. Moreover, kicking and punching can serve as the basis for an excessive use of force claim and indeed have served as the basis for such claims. *See, e.g., Blackmore v. City of Phoenix*, 126 Fed. Appx. 778, 782 (9th Cir. 2005) ("Additionally, Blackmore testified in his deposition that an officer dug the heel of his boot into Blackmore's

back, and that an officer kicked him. This is evidence of excessive force.") (citing *Ruvalcaba v. City of Los Angeles*, 167 F.3d 514 (9th Cir.1999)).

It is telling that in the district court, defendants never took issue with plaintiffs' view of the law. It is even more revealing that they never argued that plaintiffs' facts, if true, would justify denial of qualified immunity. Instead, defendants staked their case on convincing the court that many of plaintiffs' factual contentions were false and unsupportable. Although defendants did not dispute that they kicked and punched the journalists and sprayed them with pepper spray, they argued that their actions were reasonable because the journalists were unruly. Defendants made this argument despite the fact that their sole witness affidavit, the Byers affidavit, terminates its narration of events prior to the pepper spraying and beating of the reporters. The only piece of evidence defendants offered is a DVD compilation of media excerpts of coverage of the incident. Defendants argued that this footage is so definitive and so undermining of plaintiffs' evidence that the court was justified in discounting plaintiffs' affidavits altogether. Defs.' Mem. Supp. Summ. J. at 12 ("Undisputed video evidence, filmed by the media itself, proves that plaintiffs' allegations fail as a matter of law.").

The district court expressly declined to rely on Defendants' DVD. It wrote, "Plaintiffs dispute the accuracy and authenticity of Defendants' DVD. We, therefore, base our discussion on Plaintiffs' version of the facts . . . ." App. 31. The district court was correct not to rely on the DVD. It is true that, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott*, 127 S. Ct. at 1776. In *Scott*, the Supreme Court discounted a plaintiff's affidavits and relied on defendants' videotape where "[t]here are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened." *Id.* at 1775.

Here, plaintiffs did dispute the authenticity and accuracy of the DVD. The DVD consists of many segments of footage, some of which are only a few seconds in duration. The segments appear to be taken from a variety of media sources. Some of the segments purport to be unedited, even though there are significant and unexplained breaks in the recording. Some do not purport to be unedited and appear to be taken from news broadcasts.

Defendants took no steps to authenticate the DVD as required by Federal Rule of Evidence 901(a). Because Federal Rule of Evidence 1001(2) defines the term photograph to include videotapes, defendant was required to produce an original or a duplicate of the footage on which it wished to rely. Plaintiffs raised in the district court and raise again here a genuine question as to the authenticity of the tape. Defendant did not submit any evidence regarding who recorded the footage in question. Defendant did not submit any evidence that there were no changes, additions or deletions to the footage. Defendants did not submit any evidence regarding how the footage segments were compiled into the DVD presented to the court. The district court correctly did not consider the DVD.

Without the DVD, plaintiffs' evidence of their peaceful nature is undisputed. Nonetheless, the district court agreed with defendants that the agents' use of force was reasonable. The evidentiary basis for the district court's factual conclusions is unclear. On the one hand, the court explicitly stated that it did not rely on the DVD submitted by defendants. App. 31. On the other hand, when analyzing plaintiffs' claim that use of pepper spray was excessive, the district court cited to the DVD and held that the FBI agents did not use excessive force because "it was necessary for [the FBI agents] to use pepper spray to subdue the crowd due to the 'proximity of the crowd to weapons and the manner in which the

crowd members were crushed against the gate.'" App. 29 (quoting Defs.' Mem. Supp. Summ. J. and citing to Defs.' DVD). Addressing claims that it was excessive force for defendants to kick and punch plaintiffs, the district court wrote, "faced with an angry mob that shouted insults at agents and carried rocks that they later hurled at departing FBI vehicles, Defendants reasonably could have believed that it was necessary to use physical force against members of the crowd that included kicking, punching, and hitting Plaintiffs with batons . . . ." App. 32. These facts are not contained in plaintiffs' or defendants' affidavits.

In any event, the DVD does not present the unambiguous picture that defendants claim it presents. In the district court, defendants argued that "[v]ideo footage occurring approximately 12 to 13 minutes, and again at approximately 40 minutes, into defendants' DVD reveals that . . . law enforcement agents confronted an unruly crowd that refused to comply with instructions." Defs.' Mem. Supp. Summ. J. at 16.

The DVD shows nothing of the sort. The DVD shows that plaintiffs were peaceful at all times and that the only confrontations between plaintiffs and defendants occurred when defendants starting pepper spraying and hitting them. During the first segment ("approximately 12 to 13 minutes"), the DVD shows three journalists inside the condominium complex grounds approaching

Hernandez Laboy. Defs.' DVD at 00:12:17. Defendant Byers approached them before they reached her. *Id.* The camera's view is then largely obscured by another agent, who appears to be pushing the person filming the footage on defendants' DVD backwards. Defs.' DVD at 00:12:24. About 15 seconds after they were seen approaching Hernandez Laboy, the three journalists are then seen walking away, on their own volition, from Defendant Byers and the condominium complex and back toward the gate. Defs.' DVD at 00:12:39. For the next 60 seconds, perhaps because the footage was shot by a cameraman standing close to the agents, the only view provided by the footage is of a variety of agents, who appear to be pushing the cameraman and perhaps others off-screen backwards. Defs.' DVD at 00:12:39-00:13:39. Then there is an abrupt break in the footage, and the next segment appears to have been shot outside the condominium complex gates. Defs.' DVD at 00:13:39. It is impossible to tell how much time elapsed between the two segments, how the cameraman got behind the gate, and what happened between the agents and the journalists in the interim. It is also impossible to tell whether the cameraman stopped filming during this time segment, or whether the footage is simply cut from the record.

The only information revealed by this footage is that the agents were pushing the cameraman and others backwards, and that the three reporters who

initially approached Hernandez Laboy voluntarily began returning outside the condominium complex grounds. It does not show an "unruly crowd"-indeed, no crowd is visible at all. Although the existence of a number of journalists can be inferred, there is no evidence that the journalists were unruly. Further, and again contrary to defendants' claims, the DVD does not show that the journalists refused to comply with instructions. It demonstrates that the FBI agents were pushing the journalists backward, but it does not show *why* the agents were pushing the journalists. The DVD does not refute plaintiffs' explanation that the reason they were slow in moving back was because the condominium complex pedestrian gate was too narrow for more than one or two persons to pass through at a time. App. 89-90.

But for lack of space, plaintiffs could conduct the same detailed refutation of the entirety of defendants' DVD, some of which appears to include footage of wholly unrelated events. In any event, under the circumstances of this case, where plaintiffs posed no threat to anyone, it was an excessive use of force to spray them with pepper spray and shove them backward through the pedestrian gate.

If the DVD establishes anything, it is that there is an important factual dispute whether "kicking, punching, and hitting Plaintiffs with batons" was

necessary because the journalists were unruly. If anything hinges on this factual determination, then summary judgment is inappropriate. The district court was required to accept plaintiffs' version of the facts but failed to do so. Under plaintiffs' facts, a reasonable jury could conclude that defendants used constitutionally excessive force when they punched, kicked and pepper sprayed reporters.

ii. It Was Clearly Established at the Time of the Incident that Punching, Kicking, and Pepper Spraying the Plaintiff Journalists Was Excessive Use Of Force

The next question this Court must reach is whether plaintiffs' rights were clearly established at the time of the incident. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The "dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Defendants are not entitled to qualified immunity if they had "fair warning" that their conduct deprived plaintiffs of their constitutional rights. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

In analyzing whether a right is clearly established, courts search "the decisions of the Supreme Court, [the relevant] court of appeals, and the highest court of the state in which the case arose." *Owens ex rel. Owens v. Lott*, 372 F.3d 267, 279 (4th Cir. 2004) (internal alterations and quotation marks omitted). If there are no such decisions from courts of "controlling authority," the courts of review looks to determine whether there is "a consensus of cases of persuasive authority" from other jurisdictions. *Wilson v. Layne*, 526 U.S. 603, 617 (1999). Courts also consider whether the officer violated applicable governmental policies. *Hope*, 536 U.S. at 741-42 (reviewing Alabama Department of Corrections regulations to determine whether a right was clearly established). There need not be a First Circuit case precisely on point. *Wilson v. City of Boston*, 421 F.3d 45, 56-57 (1st Cir. 2005).

Here, there is a consensus of cases of persuasive authority from other jurisdictions. As noted previously, "[c]ourts have consistently concluded that using pepper spray is excessive force in cases where the crime is a minor infraction, the arrestee surrenders, is secured, and is not acting violently, and there is no threat to the officers or anyone else." *Vinyard*, 311 F.3d at 1348. Not only have courts found that use of pepper spray is excessive in these circumstances, they have denied qualified immunity. *Id.* at 1355 (denying qualified immunity

where police officer sprayed subdued but agitated woman with pepper spray); *Headwaters Forest Def.*, 276 F.3d at 1130 (holding that "it would be clear to a reasonable officer that it was excessive to use pepper spray against the nonviolent protestors"); *Champion*, 380 F.3d at 895 (denying qualified immunity where the police continued to pepper spray and apply pressure to the back of a subdued suspect); *Adams*, 31 F.3d at 387 (denying qualified immunity where officer used pepper spray against an incapacitated person sitting in a car); *Park*, 250 F.3d at 853 (denying qualified immunity where police pepper sprayed a woman who was distraught at watching her husband being arrested). Given the above case law, this Court should also deny the officers qualified immunity to the extent the force the agents used was more severe than the use of pepper spray.

There is a consensus of persuasive authority that what defendants did in this case is excessive force. Cases from the Fourth, Sixth, Ninth and Eleventh Circuits establish that the use of pepper spray is excessive where the targeted individual has committed only a minor crime or no crime at all, is not a safety threat, and is not evading arrest. This description fits the plaintiffs' circumstances precisely.

Because the district court erroneously accepted defendants' version of the facts and discounted plaintiffs' evidence, it also failed to appreciate the similarity between the facts at issue here and the circumstances in *Vinyard*, *Headwaters*

Forest Defense, and the other cases cited above. Instead, the court analogized this case to *Jackson v. City of Bremerton*, in which a court found the use of pepper spray reasonable where an unruly crowd engaged police officers in physical altercations as the police attempted to arrest one crowd member on an outstanding felony warrant. 268 F.3d 646, 653 (9th Cir. 2001). *Jackson* is inapposite. The journalists in this case were not an unruly crowd, they did not engage the police in physical altercation, and the police did not have a compelling reason to use force such as apprehending a felony suspect.

The two other cases the district court found controlling are even more factually remote. The district court analogized this case to *McCormick v. City of Fort Lauderdale*, where an officer used pepper spray against an individual who was wielding a large stick and had already given a woman a gaping head wound from which she was bleeding profusely. 333 F.3d 1234, 1245 (11th Cir. 2003). It also analogized the case to *Gomez v. City of Whittier*, 211 Fed. Appx. 573 (9th Cir. 2006). The Ninth Circuit's memorandum disposition in *Gomez* is uninformative because it contains no discussion of the underlying facts, but in any event, it appears that the officer had probable cause to arrest the individual subjected to pepper spray. *Id.* at 577. No one has ever suggested that the plaintiffs in this case

were suspected of committing aggravated assault, as in *McCormick*, or some other crime, as in *Gomez*.

Not only is there a consensus of persuasive authority that what defendants did was excessive force, but also, as in *Hope*, the officers had "fair warning" their conduct was unconstitutional because they violated express FBI policy. In *Hope*, the Supreme Court held that applicable governmental policies could provide fair warning. *Hope*, 526 U.S. at 741-42 (reviewing Alabama Department of Corrections regulations to determine whether a right was clearly established). The FBI has a policy on the use of pepper spray. App. 63-64. The policy specifies that use of pepper spray is appropriate only where "(a) The subject is likely to cause serious bodily injury if not controlled, and (b) Force is necessary to safely achieve control." App. 63. As described above, it was unreasonable for the officers to believe that the journalists were not under control, let alone that they were likely to cause serious bodily injury. The FBI's own policy does not countenance the use of force here.

Construing the facts in the light most favorable to plaintiffs, it was clearly established that it was excessive for defendants to kick, punch and pepper spray the plaintiff journalists.

iii. An Objectively Reasonable Official Would Have Believed That Kicking and Punching Reporters and Spraying Them With Pepper Spray Violated Clearly Established Fourth Amendment Law.

Finally, this Court must address whether an objectively reasonable official would have believed that the action taken violated that clearly established constitutional right. *Starlight Sugar, Inc.*, 253 F.3d at 141. No reasonable officer would have done what defendants did here. Defendants violated the FBI's own policy on the use of pepper spray and targeted a compliant group of journalists with the spray. They did so despite the fact that the journalists did not pose a risk of serious bodily injury to anyone. This is not an action that a reasonable officer would have taken.

Further, no reasonable officer would have punched and kicked the journalists who had just been sprayed in the face with pepper spray. After Lago Roman fell to the ground because of the pepper spray, no reasonable officer would have grabbed him by the leg and kicked and shoved him, as the FBI agents did. App. 95-96. Reasonable officers would not have persisted in kicking and shoving Lago Roman until they had succeeded in dropping his whole body just outside the condominium complex gate. App. 95-96. Similarly, no reasonable officer would have punched Valentín repeatedly in the stomach as Defendant Byers did. App. 84.

This Court should reverse the district court's grant of summary judgment on plaintiffs' Fourth Amendment claim.

C. Defendants are Not Entitled to Qualified Immunity on Plaintiffs' First Amendment Claims

i. Plaintiffs Have Alleged a Violation of Their First Amendment Right to Gather the News

Plaintiffs have alleged a violation of their First Amendment rights. *Starlight Sugar*, 253 F.3d at 141. Plaintiffs offered evidence that federal agents physically intimidated and assaulted members of the press to prevent them from gathering the news. Plaintiffs offered further evidence that these actions bore no relationship to any reasonable law enforcement activity. Based on this evidence, a reasonable jury could conclude that plaintiffs have alleged a violation of their First Amendment right to gather the news.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. The explicit reference to the press in the Bill of Rights underscores the media's central role in facilitating the free flow of information necessary in a democracy. It is self-evident that in order to spread the news, the media must be able to gather it. The Supreme Court recognized that the First Amendment's protection of press freedom would be a nullity without protection for newsgathering when it wrote

that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). See also *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (the First Amendment forbids the "government from interfering in any way with the free press").

The Court's seminal newsgathering case is *Richmond Newspapers*, which sets out principles applicable to this case and that other courts have applied to analyze newsgathering claims. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). In *Richmond Newspapers*, the Supreme Court held that the First Amendment protects the right of the press to attend a criminal trial. *Id.* at 563. The Court recognized that the press is a proxy for the public, members of which rarely take the time to attend such events themselves. *Id.* at 572-73. The reason the Court gave for justifying a right of press access was that a courtroom is "a public place where the people generally-and representatives of the media-have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place." *Id.* at 578.

The implications of *Richmond Newspapers* extend beyond the courtroom. The import of the Court's reasoning is that this right extends to all other places where the public has traditionally had a right to be present and where the public enhances the integrity of events taking place. *Id.* In *Richmond Newspapers*, the

Court identified streets, sidewalks, and parks as other places where the media and public have a right to be present. *Id.* The Court held that absent a compelling state justification for exclusion, the media have a right to receive information in such venues. *Id.* at 580.

Where courts have confronted instances of interference with the media's newsgathering function similar to the interference in this case, they have recognized a First Amendment violation. Perhaps the most closely analogous case is *Connell v. Town of Hudson*, 733 F. Supp. 465 (D. N.H. 1990). In *Connell*, a freelance photographer took pictures of an automobile accident scene. *Id.* at 466. Police officers ordered him to move away and then threatened to arrest him if he continued to take pictures. *Id.* at 466. The freelancer sued, alleging a violation of his First Amendment rights.

The court recognized that the First Amendment protects the right to gather the news. *Id.* at 468. It held that "those who gather news 'have a constitutional right not to be interfered with' by the police so long as they 'do not unreasonably obstruct or interfere with the [government]'s official investigations of physical evidence or gain access to any place from which the general public is prohibited for essential safety purposes.'" *Id.* at 469 (quoting *Channel 10, Inc. v. Gunnarson*, 337 F. Supp. 634, 638 (D. Minn. 1972)). The court held that the restrictions

placed on the freelance photographer were not reasonable. *Id.* at 469. The court observed that the freelancer "followed all instructions reasonably designed to prevent interference with police and emergency activities." *Id.* Notably, the court even found that it was excusable that the freelancer may have crossed the police perimeter. It reasoned, "[a]lthough he may have crossed a police perimeter, that perimeter was not clearly delineated, and, when asked to move, he moved." *Id.* at 470.

In *Channel 10, Inc. v. Gunnarson*, the police confiscated the camera of a news reporter covering a burglary. 337 F. Supp. 634, 636 (D. Minn. 1972). The police conditioned return of the camera on the reporter's willingness to allow the police to review the footage to make sure none of it was detrimental to the prosecution of the individuals involved in the alleged burglary. *Id.* at 636. The court said that the reporter had "a constitutional right not to be interfered with by [law enforcement] so long as [he did] not unreasonably obstruct or interfere with the defendant's official investigations of physical evidence or gain access to any place from which the general public is prohibited for essential safety purposes." *Id.* at 638.

Similar holdings have been reached by courts around the country. *See, e.g.*, *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (holding that

individuals had a right to film police conduct because "[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (reversing a district court's grant of summary judgment where "a genuine issue of material fact does exist regarding whether Fordyce was assaulted and battered by a Seattle police officer in an attempt to prevent or dissuade him from exercising his First Amendment right to film matters of public interest."); *Daily Herald Co. v. Munro*, 838 F.2d 380, 384 (9th Cir. 1988) (striking down a state law that prohibited exit polling within 300 feet of polling place and recognizing that "the First Amendment protects the media's right to gather news"); *Schnell v. City of Chicago*, 407 F.2d 1084, 1085 (7th Cir. 1969) (holding that a class of news photographers who covered the 1968 Democratic National Convention and attendant demonstrations in Chicago stated a claim against the police for "interfering with the plaintiffs' constitutional right to gather and report news, and to photograph news events") (overruled on other grounds by *City of Kenosha v. Bruno*, 412 U.S. 507 (1973)); *Lambert v. Polk County*, 723 F. Supp. 128, 133 (S.D. Iowa 1989) ("[I]t is not just news organizations . . . who have First Amendment rights to make and display videotapes of events."); *CBS Inc. v. Smith,* 681 F. Supp. 794, 802 (S.D. Fl. 1988)

(preliminarily enjoining, on First Amendment grounds, a state statute that "prohibit[s] the media from the solicitation of all opinion from the voters of Florida, within 150 feet of the polling place, without regard to whether the conduct is disruptive, and without concern as to whether the prohibition encompasses public streets, public sidewalks, public parks or other traditionally public forums.").

The above case law establishes that journalists have a First Amendment right to report the news from locations where they are lawfully present, so long as they do not pose a threat to safety or interfere with law enforcement activity. Defendants abridged that right. Their treatment of Plaintiff Lago Roman and other reporters at the helicopter landing site is one example of their intentional interference with newsgathering. Lago Roman submitted a sworn affidavit stating as follows:

> When the [Department of Homeland Security] helicopter landed, I saw about eight heavily armed agents wearing green uniforms deploy from the helicopter. I approached one of them with my microphone and asked him about the reason for their presence. He pushed me away rudely, and I replied that I was just doing my job. These agents moved toward two vehicles that were located near a group of reporters. I again asked them in English what they were doing and if they were going to arrest someone. They responded aggressively by pushing me, and an agent located to my left kept pointing his rifle toward me.

App. 93-94. Lago Roman was not the only reporter treated so inappropriately. Also at the helicopter landing site, agents pushed away the microphones of other reporters and one agent used his hand to cover the lens of a camera. App. 127.

Beating, kicking, and spraying the plaintiffs with pepper spray also interfered with the plaintiffs' ability to gather the news. Obviously, defendants prevented Lago Roman from reporting the news while he was being hit with a retractable baton, sprayed with pepper spray, and then, after he had fallen down, kicked and shoved until his body was outside the security gate. App. 95. Defendant Byers prevented Valentín from reporting by punching him repeatedly in the abdomen. App. 84. Valentín was also unable to do his job while he was being sprayed with pepper spray and recovering. The same can be said of Donalds Brown. App. 90.

Neither party has disputed that the reporters were lawfully present when they were at the helicopter landing site or outside the gate. The parties do dispute whether the reporters were allowed inside the condominium gate, but again, that factual disagreement must be resolved in plaintiffs' favor at summary judgment. *Buchanan*, 469 F.3d at 162.

Plaintiffs submitted evidence sufficient for a reasonable jury to find that interference with newsgathering was unnecessary for safety or investigative

purposes. Plaintiffs were peaceable at all times and there were no disturbances that interfered with the operation. App. 84. Members of the public came and went through the purported perimeter throughout the day. App. 83-84. When plaintiffs finally entered the gate, they did so at the invitation of Hernandez Laboy. *Id.* They did so for the standard journalistic purpose of obtaining a statement. *Id.*

As with plaintiffs' Fourth Amendment claims, in the district court defendants did not dispute plaintiffs' view of the relevant First Amendment case law or that they would not be entitled to qualified immunity if plaintiffs' facts were true. Instead, they argued that plaintiffs' facts were demonstrably false such that the district court could discount them. Defs.' Mem. Supp. Summ. J. at 9. Defendant argued that no interference with newsgathering occurred because "SA Byers repeatedly came out to the edge of the perimeter to explain the situation to reporters," *id.*; "the extensiveness of [the media's] footage itself demonstrates the farcical nature of plaintiffs' allegations," *id.* at 10; and defendants' DVD "conclusively reveals" that it was the reporters and cameramen who interfered with the FBI agents' work, not the other way around, *id.* at 11.

All of these arguments are without merit. Giving the occasional press briefing does not excuse pointing a weapon at a reporter in a threatening manner or kicking, punching and pepper spraying a reporter. Neither does the

extensiveness of the media footage demonstrate that plaintiffs' allegations are "farcical." Defendants' argument is akin to saying that if 10 reporters show up to cover a story, the government has license to beat up nine. Although some reporters may have been able to continue filming when the FBI agents assaulted the reporters, others were not. Finally, the DVD does not "conclusively reveal[]" anything. For the reasons described above, the district court did not rely on it and neither should this Court. Even if the Court does rely on the DVD, it only captures some of what transpired at the helicopter landing scene. Its brief coverage does not conclusively determine what happened during the intervals not shown on Defendants' DVD.

The district court did not adopt defendants' arguments. It did, however, agree with defendants that plaintiffs failed to state a First Amendment claim. The court held that defendants' actions did not constitute a First Amendment violation because these actions were not *identical* to actions courts have previously recognized as a First Amendment violation. The court reasoned:

> Plaintiffs have not cited to any case, nor have we found one, where the court found a First Amendment violation based on law enforcement agents pushing away a microphone or temporarily seeking to obstruct recording by placing a hand in front of a camera. We, therefore, find that Plaintiffs have not alleged a violation of their First Amendment rights.

App. 27-28.

The district court's reasoning is flawed. Nothing in the law requires plaintiffs to point to a case raising facts identical to the facts forming the basis of their complaint. Rather plaintiffs need to allege a First Amendment violation, which can be proved through First Amendment case law raising similar issues and setting out relevant principles, or even by reasoning from the text of the First Amendment itself (although, as shown above, this is unnecessary as there is ample case law on point). The district court should have instead focused on the principles articulated in those cases. The district court failed to do so.

Equally significant, the court failed to consider important components of plaintiffs' evidence. The court did not analyze whether it comports with the First Amendment to intimidate journalists by pointing a rifle at them in a threatening manner. Nor did the court consider whether kicking, punching and spraying the journalists with pepper spray violates the First Amendment. Instead, the district court addressed only whether "pushing away a microphone or temporarily seeking to obstruct recording by placing a hand in front of a camera" violates the First Amendment. App. 28.

The district court's failure to consider these key facts is clear error. Under the First Amendment and the case law involving similar, albeit not identical facts, plaintiffs have stated a claim for violation of the First Amendment. *See Connell*,

733 F. Supp. at 469; *Channel 10, Inc.*, 337 F. Supp. at 638. Rather than focusing just on the pushing away of the microphone and the covering up of the camera, the district court should have looked at the totality of defendants' acts: (1) physically pushing away a journalist and then raising an automatic rifle and pointing it directly at him in a threatening manner; (2) pushing away other reporters' microphones and concealing a camera lens; and (3) later punching and kicking journalists and spraying them with pepper spray. Viewed in this light, the answer is clear: a reasonable jury could conclude that the agents' actions violated the plaintiff journalists' right to gather the news.

ii. Plaintiffs' Right to Gather the News Was Clearly Established at the Time of the Incident

Defendants are not entitled to qualified immunity because they had fair warning that their actions violated the First Amendment. There is both Supreme Court and circuit court case law on point. Since *Richmond Newspapers*, it has been apparent that when the press is in "a public place where the people generally-and representatives of the media-have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place," the government cannot interfere with the media's newsgathering function absent a compelling reason. 448 U.S. at 578.

Further, at least three circuits have recognized that the First Amendment right to gather the news is in full force when individuals film government actions. The Eleventh Circuit had no difficulty concluding that "[t]he First Amendment protects the right to gather information about what public officials do on public property," and that a police department's preventing individuals from filming such conduct may violate that right. *Smith*, 212 F.3d at 1332-33. The Ninth Circuit has similarly concluded that where a police officer assaults an individual in an attempt to prevent him from recording events of public significance, the individual has a potential First Amendment claim. *Fordyce v. City of Seattle*, 55 F.3d at 439. Likewise, the Seventh Circuit has concluded that news photographers could potentially state a claim for "interfering with the photographers' constitutional right to gather and report news and to photograph news events." *Schnell*, 407 F.2d at 1085. In *Connell*, the court held that the right to gather the news, as long as one does not pose a safety threat or interfere with a police operation, was so clearly established that it denied qualified immunity. 733 F. Supp. at 471.

If plaintiffs' facts are accepted, as they must be, defendants had "fair warning" that their actions violated the First Amendment right to gather the news. Defendants took steps to prevent a reporter from asking questions, by pushing him away and raising an automatic rifle at him in a threatening manner. They batted

away microphones and concealed a camera lens. Later, they punched and kicked plaintiffs and sprayed them with pepper spray even though they were lawfully present, not a safety threat, and not interfering with the police operation. Under these circumstances, it was clearly established that what defendants did here violated the First Amendment right to gather the news.

iii. An Objectively Reasonable Official Would Have Believed that the Action Taken Violated a Clearly Established Constitutional Right

Further, defendants are not entitled to qualified immunity because a reasonable officer would have known that the actions taken here violated the plaintiffs' right to gather the news. An objectively reasonable law enforcement officer would know that the First Amendment strictly limits their authority to interfere with or prevent the gathering and reporting of news. *Richmond Newspapers*, 448 U.S. at 563. That same reasonable officer would know that in the absence of any claimed interference or other security considerations, the law enforcement officers do not have the authority to actively prevent the press from gathering the news. *Connell*, 733 F. Supp. 469. In this case, plaintiffs did not interfere with the operation or pose a safety threat. Plaintiffs were invited onto the premises by Hernandez Laboy and they were permitted to enter the security gate without challenge. App. 84. Plaintiffs did not approach the agents and Hernandez

Laboy in a threatening way or in a way that would interfere with the officer's duties, but only for the purpose of taking a statement. *Id.*

An objectively reasonable officer would also know that in the absence of the most exigent security considerations there is no justification for using force or intimidation against members of the press. At all times, plaintiffs were peaceful. App. 90-91. None of them threatened the FBI officers in any way. *Id.* They did not disrupt the operation, and no reasonable officer would have thought they were disruptive. After all, the apartment the agents were searching was on the sixth floor of a building that plaintiffs did not enter. App. 119.

Under these circumstances, no reasonable officer would have done what the federal agents did here. Law enforcement officers, including these officers, are taught how to handle the press. App. 61. Indeed, these specific officers were given instructions on how to handle the press that very day. *Id.* The press, whose job it is to cover crime scenes frequently, and who can be expected to understand the ground rules for such coverage, stand in different shoes for law enforcement officers than an angry mob, or protesters (who might not know the rules), or even bystanders who might interfere with the scene.

The district court failed to take this factor, and all of the other issues properly into account. Defendants' motion for summary judgment should have been denied.

II. PLAINTIFFS HAVE STANDING FOR INJUNCTIVE RELIEF

Because the district court held that plaintiffs failed to state either a First or Fourth Amendment claim, the district court did not address defendants' contention that plaintiffs lacked standing to pursue injunctive relief. (Defendants did not challenge plaintiffs' standing to pursue damages.)

If this Court reaches the issue of standing to pursue injunctive relief, it should reject defendants' claim, made in reliance on *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), that plaintiffs lack standing to seek declaratory and injunctive relief because plaintiffs do not face a "real and immediate" threat of injury. That contention is incorrect. Plaintiffs have standing to seek injunctive relief because the allegations in the Complaint and affidavits demonstrate that they face a "credible threat" of future injury from the FBI's policy. *Lyons*, 461 U.S. at 106 n.7 (1983) (case or controversy exists for purposes of claim for injunctive relief where plaintiff faces "realistic threat" of future injury); *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) ("realistic danger").

This case arises in the context of the FBI's widely reported on-going investigation of the Puerto Rico Independence movement and other nationalistic organizations. Those organizations have been the focus of intense FBI scrutiny since at least the 1940s. App. 78. In the last several years the FBI has shown renewed interest in the activities of these organizations and conducted a number of high profile raids on the homes of their leaders. *Id.* In September 2005, there was a widely reported raid on the home of Filiberto Ojeda Rios that led to his shooting death after a 24-hour siege. *Id.* The raid led to a public outcry and to claims that the FBI shot him unnecessarily. *Id.* The press was kept at bay during the siege and was only notified of the shooting many hours after it occurred. *Id.* Several months later, on February 10, 2006, the FBI simultaneously conducted a series of raids on the homes and businesses of three leaders of other groups associated with the independence movement in Mayaguez, Trujillo Alto, and at the home of Liliana Laboy. *Id.* Once again the press was kept at bay and provided only with the information that a search was being conducted. *Id.*

The FBI's past and continuing activities targeting the independence movement are the subject of intense media scrutiny and public interest. App. 78-79. The journalists and journalists' organizations that have brought this case will continue to report on the FBI's activities, and will continue to report on the

type of high profile military style raids that were conducted in this case. *Id.* Based on the widely reported claim that excessive force that was used in this case, plaintiffs have submitted testimony establishing a well grounded fear that their attempts to report on future FBI tactical operations involving independence organizations will be met with the same type of interference and physical force that occurred in this case.

Defendants' actions were not aberrant, particularly in regard to operations targeting pro-independence supporters suspected of criminal activity. Plaintiffs believe they are victims of a carefully planned and well-organized security apparatus that has been established by the FBI without regard to the right of the press to gather the news. The FBI has an obligation to deal with the press in a way that accommodates this right and recognizes the media's role in a free society. There is no justification for using force to prevent journalists from doing their job when there is no objective basis to believe that they pose a threat. Plaintiffs are entitled to the injunctive relief sought.

Defendants' reliance on *Lyons* is misplaced. The plaintiff in Lyons had been subject to an unprovoked chokehold by Los Angeles Police Department (LAPD) officers during a traffic stop. He sought damages and injunctive relief forbidding the LAPD from using the choke holds "except in situations where the

proposed victim of said control reasonably appears to be threatening the immediate use of deadly force." 461 U.S. at 98. In order to show that Lyons faced a realistic threat of being subjected to a chokehold again, the Court held that Lyons would not only have had to allege that he would have another encounter with the police, but also "make the incredible assertion either (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, whether for purposes of arrest, issuing a citation or for questioning or, (2) that the City ordered or authorized police officers to act in such a manner." *Id.* at 105-06.

However, the *Lyons* plaintiff's complaint did not allege, and the record did not support, that the City's policy authorized chokeholds where there was "no resistance or other provocation." *Id.* at 106 n.7. The record showed only that "police officers were instructed to use chokeholds only when lesser degrees of force do not suffice and then only to gain control of a suspect who is violently resisting the officer or trying to escape." *Id.* at 110 (internal quotation to record omitted). Under those circumstances, the Court held that Lyons did not face a credible threat of future injury because it was too speculative to assume that Lyons would be stopped or arrested in the future, and that he would provoke the use of the chokehold by resisting arrest, or fleeing, or threatening deadly force. As a

result, the Court concluded that Lyons could not credibly allege that he faced a realistic threat from future application of the City's policy.

Defendants' faith in *Lyons* fails for two reasons. The Supreme Court in *Lyons* based its decision that the plaintiff lacked standing to seek injunctive relief after reviewing a full and detailed record, compiled in an evidentiary hearing that was held by the district court. The Court's ruling did not come on an appeal from a disposition in the lower courts where there had been no discovery. Here, by contrast, defendants have made their standing argument very early in the case, and where the district court did not allow the plaintiffs to conduct any discovery. The court even rejected the plaintiffs' request for sharply limited discovery. App. 7. At this point in the proceedings, this Court must "consider the facts in the light most favorable to the nonmoving party, drawing all reasonable inferences in his favor." *Buchanan v. Maine*, 469 F.3d 158, 162 (1st Cir. 2006). The evidence offered by plaintiffs regarding their intention to cover FBI raids in the future is sufficient to support plaintiffs' standing at this stage of the proceedings.

Plaintiffs are also entitled to discovery to establish an evidentiary basis for their claims for injunctive relief. In *Riggs v. City of Albuquerque*, 916 F.2d 582 (10th Cir. 1990), the court denied a motion to dismiss plaintiffs' claims for injunctive relief, distinguishing *Lyons* on the ground that it had been decided on a

full evidentiary record. The court observed that "[n]othing in this opinion would preclude defendants from seeking a motion for summary judgment for lack of standing if plaintiffs are unable to establish a factual basis for their complaint *after they have been afforded a fair opportunity to develop the facts*." *Id.* at 586 (emphasis added); *see also Rodriguez v. California Highway Patrol*, 89 F. Supp. 2d 1131, 1142 (N.D. Cal. 2000) ("Plaintiffs are entitled to discovery to attempt to establish an evidentiary basis for the claims for injunctive relief.").

This case presents a good example of why defendants' motion should be denied, at least until plaintiffs have had the opportunity to pursue discovery. At this stage of the proceedings, plaintiffs have not had the opportunity to conduct discovery on what policies defendant has enacted regarding treatment of the media. These policies would shed light on the validity of plaintiffs' claims regarding the FBI's treatment of the media in Puerto Rico. That information is exclusively in control of the defendants, which militates against entering a judgment against plaintiffs at this early stage of litigation.

Lyons is inapplicable here for a second independent reason. In *Lyons*, the Supreme Court found that there was no concrete controversy in part because in order to be again at risk of being put in a chokehold, *Lyons* would have to break some law-a law which he was *not* challenging-in order to be subjected to the

action he contended was illegal. *Lyons*, 461 U.S. at 106. In this case, plaintiffs would not have to violate any law in order to face the threat that they would again be subjected to the use of force under defendants' policy. They would merely have to be exercising their First Amendment rights and doing their jobs-using cameras and other equipment to cover newsworthy FBI raids. Accordingly, unlike in *Lyons*, plaintiffs here face a credible threat of future injury. See *LaDuke v. Nelson*, 762 F.2d 1318, 1326 (9th Cir. 1985) (noting that plaintiffs have standing because they "are subject to constitutional injury based on . . . completely innocent behavior.").

CONCLUSION

For the reasons stated above, this Court should reverse the district court's grant of summary judgment to defendants and remand for trial. At the least, this Court should remand this case to the district court with an order that discovery be permitted.

DATED: November 5, 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,983 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

DATED: November 5, 2007

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CERTIFICATE OF SERVICE

I hereby certify that on the fifth day of November 2007, I served the foregoing BRIEF OF APPELLANTS as well as a JOINT APPENDIX by causing the required number of copies of the brief and appendix to be delivered to the Court by Federal Express next-day delivery and served upon the following counsel by Federal Express next-day delivery:

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ADDENDUM

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