16-3994

United States Court of Appeals
for the Second Circuit

DOUGLAS J. HIGGINBOTHAM,

Plaintiff-Appellant,

against

POLICE OFFICER CURTIS SYLVESTER, SHIELD 5060, POLICE SERGEANT CHRISTOPHER TOMLINSON, SHIELD 3686 and DEPUTY INSPECTOR THOMAS TAFFEE,

Defendants-Appellees,

and

CITY OF NEW YORK and POLICE CAPTAIN JOHN DOE,

Defendants.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLEES

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PRELIMINARY STATEMENT

Journalist Douglas Higginbotham, overzealous in his attempt to record an Occupy Wall Street demonstration at Zucotti Park on November 15, 2011, decided to prioritize his preferred vantage point over the safety and property of others by climbing atop the thin, curved roof of a phone booth in the midst of the tightly packed crowd. Ignoring multiple orders to descend, he towered above those individuals nearby, moving about on the phone booth roof while trying to balance his weighty equipment. When he finally acceded to officers' directives by coming down, he was arrested.

Higginbotham responded by bringing this action, now narrowed to two sets of § 1983 claims—one for Fourth Amendment false arrest and the second for First Amendment retaliatory arrest. Those claims are now asserted solely against three individual police officers—Officer Curtis Sylvester, Sergeant Christopher Tomlinson, and Deputy Inspector Thomas Taffee. The United States District Court for the Southern District of New York (Castel, J.) granted summary judgment on all the claims against the individual officers. This Court should affirm.

As the district court found, there was probable cause for Higginbotham's arrest. A reasonable officer on the scene could believe—as the individual officers here did—that his reckless conduct endangered the crowd below and the phone booth on which he perched. While Higginbotham speculates that the officers arrested him not because of his dangerous behavior but because he was recording the unfolding events—even though other journalists who were recording the events without endangering others were not arrested—his speculation finds no support in the record. Regardless, the individual officers' motive is irrelevant, as the presence of probable cause is a complete defense to all of his claims, including those under the First Amendment.

At a minimum, the individual officers are entitled to qualified immunity. Higginbotham and the amici media organizations that support him evidently see this appeal as an opportunity to secure this Court's imprimatur on a far-reaching First Amendment right to record police activity in public. But they concede that no controlling precedent in existence at the time of Higginbotham's arrest (or still to this day), recognized such a right, and amici suggest that lower courts created a

"climate of uncertainty" by reaching inconsistent decisions. These concessions alone suffice to entitle the officers to qualified immunity.

But even setting that to one side, Higginbotham and amici misidentify the relevant constitutional right. It is not, as they appear to believe, whether Higginbotham was engaging in First Amendment activity. The Court can assume that he was. The real question is whether any such First Amendment activity immunized him from an arrest supported by probable cause. On that question, the law of this circuit is clearly established, but in the officers' favor, not Higginbotham's: where an arrest is supported by probable cause, a First Amendment retaliation claim will not lie. Here, because the individual officers had probable cause—or at a minimum arguable probable cause—they are entitled to qualified immunity.

ISSUES PRESENTED FOR REVIEW

1. Was there probable cause to arrest Higginbotham for recklessly endangering the safety and property of others, where he towered above a dense crowd while standing and moving on a curved phone booth roof with heavy equipment, creating a substantial risk of

serious physical injury to those below him and damage to the phone booth itself?

2. In the alternative, are the individual officers entitled to qualified immunity, where Higginbotham and amici concede that the First Amendment right they mistakenly propose was not clearly established at the time, it was clearly established that he had no constitutional right to avoid an arrest supported by probable cause, and the officers at the very least had arguable probable cause?

STATEMENT OF THE CASE

A. Higginbotham's arrest after climbing atop the thin metal roof of a phone booth in the midst of a tightly packed crowd

Early in the morning of November 15, 2011, NYPD officers temporarily cleared downtown Manhattan's Zuccotti Park, which had for months been occupied by demonstrators associated with the Occupy Wall Street movement. *See People v. Nunez*, 36 Misc. 3d 172, 176-78 (N.Y. Crim. Ct. 2012). Later that morning, a group of demonstrators congregated to "take back" the park (A-175.1). Higginbotham was on the scene working as a freelance cameraman for TV New Zealand (A-193, A-36-37, A-65).

Higginbotham alleges that during the protest, he climbed on top of a phone booth to get a higher vantage point to film (A-37, A-66). The phone booth he scaled was over 7 feet tall, with a curved roof made of a thin layer of aluminum (A-194, A-195, A-114, A-124, A-176, A-186). Due to the height of the phone booth, Higginbotham had to climb on a pile of police barricade to get on top (A-194, A-114-15).

Higginbotham was 5'9" tall and weighed approximately 140 pounds (A-193, A107-08). He also carried 30 pounds of camera equipment, which was attached to him only by a handstrap (A-194, A-113-14). The crowd around the phone booth was densely packed, with scores of people immediately around it (A-194, A-195, A-115, A-175.1).

Officers on the scene ordered Higginbotham to descend at least five times (A-196, A-175.1)—in his words, "several times" (App. Br. at 5)—but he ignored the orders and continued to film, towering above the crowd while moving around on the phone booth roof (A-37, A-66, A-195-96, A-117-18, A-175.1). Finally, he passed his camera down and got down from the phone booth, landing on his feet; Captain Taffe instructed Officer Sylvester to arrest Higginbotham, and Higginbotham was placed under arrest (A-275).

B. This damages action and the decision below

Higginbotham originally filed this lawsuit under 42 U.S.C. § 1983 and New York state law. After the district court dismissed his claims of malicious prosecution, excessive force, assault, and municipal liability (A-11-34), he filed an amended complaint, reasserting municipal liability, false arrest, and First Amendment retaliation claims (A35-41). After the parties agreed to dismissal of the municipal liability claims (A-48-49), the individual officers sought summary judgment (A-57-58).

The district court found that the municipal defendants were entitled to summary judgment on the false arrest claim, finding that "a person of reasonable caution would believe that Higginbotham acted recklessly in creating a substantial risk of serious physical injury to another person" by ascending the phone booth, which was surrounded by a large crowd, after first climbing on top of police barricades (A-284-85). Given the fact that Higginbotham, who knew the phone booth had a curved top, climbed seven feet above a tightly-packed crowd with a 30-pound camera on his shoulder, the district court found that "probable cause existed for a reasonable person to believe that Higginbotham

consciously disregarded the risk of losing his balance and falling or dropping his camera" (A-285-86).

The district court emphasized that probable cause turns on the facts available to the officers at the time of and just before the arrest (A-286). Higginbotham did not contend that the officers knew the strength of the roof (A-286). Higginbotham's recklessness, the court found, could "be inferred from the fact that he himself knew that he was high above the densely-packed crowd, standing on a curved platform … that was also visible to the officers" (A-286).

The district court also rejected Higginbotham's argument that there was a genuine issue of material fact as to whether any "recklessness created a substantial risk of *serious physical injury* to another person" (A-288) (emphasis in original). Higginbotham's position high above the ground, with his heavy camera on his shoulder, was sufficient to cause a reasonable person to "conclude that had either Higginbotham or his camera [fallen] from that height, there was a substantial risk of protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of a bodily organ," as "serious physical injury" is defined (A-288).

The district court found that even if probable cause were lacking, the officers were entitled to qualified immunity because the evidence supported arguable probable cause. It was objectively reasonable, or at least arguably reasonable, "for officers of reasonable competence to disagree" on the existence of probable cause, based on Higginbotham's position perched above the crowd, regardless of his "own perceptions of the risk or the structural makeup of the phone booth's roof" (A-289-90).

The district court also granted summary judgment to the officers on Higginbotham's First Amendment retaliation claim (A-290-91), which was defeated by the court's finding that the arrest was supported by probable cause (A-290). The district court rejected Higginbotham's contention that his First Amendment claim could survive a finding of probable cause based on his theory that the sole premise for the arrest was his exercise of First Amendment rights, finding Higginbotham's position "directly contradicted by Second Circuit precedent" (A-290-91) (citing *Mozzochi v. Borden*, 959 F.2d 1174, 1180 (2d Cir. 1992)). Moreover, the district court found that the police's non-interference with dozens of other camerapersons recording at the same time

demonstrates that Higginbotham's exercise of his First Amendment rights was not the motivating factor for his arrest (A-291).

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

This Court reviews the district court's grant of summary judgment de novo, construing the evidence in Higginbotham's favor. *See Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 113 (2d Cir. 2005). The district court properly granted summary judgment to the individual officers—the sole remaining defendants—on Higginbotham's sole remaining claims—claims for Fourth Amendment false arrest and First Amendment retaliatory arrest under § 1983. His reckless conduct—prioritizing his preferred camera angle above the safety and property of others by climbing atop the thin, curved roof of a phone booth surrounded by a dense crowd, with a 30-pound camera resting on his shoulder—gave defendants probable cause to arrest him. His speculation that officers arrested him to deter him from recording the events, even while other journalists were left to perform their duties unhindered, finds no support in the record. Nor would it, in any case, salvage his claims, as the presence of probable cause is a complete defense to all of his claims, including his claims for First Amendment retaliatory arrest.

In the alternative, the individual officers are entitled to qualified immunity. Higginbotham and the amici who support him all but concede that the right they conceive—an abstract First Amendment right to record police activity—was not clearly established at the relevant time. But they misidentify the constitutional right in any case. Even assuming Higginbotham was engaging in First Amendment activity, the law of this circuit is clear that such activity afforded him no right to be free from an arrest that is objectively supported by probable cause. And the individual officers at the very least had arguable probable cause to arrest.

ARGUMENT

POINT I

PROBABLE CAUSE DEFEATS ALL OF HIGGINBOTHAM'S REMAINING CLAIMS

The existence of probable cause is a complete defense to all of Higginbotham's remaining claims—asserted under § 1983 and sounding in Fourth Amendment false arrest and First Amendment retaliatory arrest. *See Singer v. Fulton County Sheriff*, 63 F.3d 110, 118 (2d Cir. 1995), *cert. denied*, 517 U.S. 1189 (1996); *Fabrikant v. French*, 691 F.3d 193, 215 (2d Cir. 2012); *Mozzochi v. Borden*, 959 F.2d 1174, 1179-80 (2d

Cir. 1992).[1] Probable cause is an objective inquiry that turns on the information that was known or reasonably could be known to the arresting officers at the time of the arrest. *See Singer*, 63 F.3d at 119. It "is established when the arresting officer has knowledge or reasonably trustworthy information sufficient to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested." *Id.* (internal quotations omitted); *see also Dunaway v. New York*, 442 U.S. 200, 208 n.9 (1979).

The probable cause standard balances safeguarding citizens from arrests based on wholly unfounded charges with affording police officers, who are often required to act in the face of ambiguity and uncertainty, "fair leeway" to enforce the law. *See Brinegar v. United States*, 338 U.S. 160, 176 (1949). Here, based on the information known to the individual defendants, there was probable cause for officers to arrest Higginbotham for at least two independent reasons.

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[1] This precedent has made clear that, in this circuit, probable cause is a complete defense to First Amendment retaliatory arrest claims. The Supreme Court, for its part, has held that probable cause is a complete defense to retaliatory *prosecution* claims, *see Hartman v. Moore*, 547 U.S. 250, 261 (2006), but is yet to confirm that the rule extends to retaliatory arrest claims, though in granting qualified immunity to officers it has observed that it is "at least arguable" that the rule reaches such claims, *see Reichle v. Howards*, 566 U.S. 658, 664-70 (2012).

A. Officers could have reasonably believed that Higginbotham recklessly endangered people in the surrounding crowd (N.Y. Penal Law § 120.20).

Officers on the scene could have reasonably believed Higginbotham's conduct fit the contours of reckless endangerment in the second degree—a misdemeanor that arises when someone "engages in conduct [creating] a substantial risk of serious physical injury to another person." N.Y. Penal Law § 120.20. He used a stack of metal police barricades to mount the thin, curved roof of a phone booth in the middle of a crowd (A-194, A-114-15). As the video shows, and as Higginbotham concedes, the area below the booth was tightly packed with demonstrators and journalists (A-195, A-151-52, A-173, A-175.1). While Higginbotham's feet alone were 7'4" off the ground, he was 5'9" tall and 140 pounds, and he carried a 30-pound camera secured only by a hand strap (A-193-94, A-151-52, A-154, A-163). Towering above the crowd, he moved and spun around while trying to balance himself and his heavy equipment (A-175.1, A-245).

The individual officers reasonably perceived Higginbotham's position on top of the phone booth to be unsafe. Sergeant Tomlinson, for instance, testified if Higginbotham made just one misstep on the curved

top of the phone booth on what was a damp morning, someone could be seriously hurt or worse (A-132-33). Captain Taffe, for his part, believed that the phone booth roof, which appeared to be constructed of a thin hollow piece of tin, was not made to hold a person, and he, too, assessed that if Higginbotham lost his balance and fell or dropped his camera, people below could be seriously injured (A-141, A-143, A-248-49).

These on-the-scene assessments were plainly reasonable. It would be reasonable for any officer, seeing a curved phone booth roof 7'4" high, made of a thin piece of metal, to believe it was not designed as a platform, as Captain Taffe did (A-143). And it was reasonable for the officers to anticipate that Higginbotham's position above the crowd with his heavy equipment was precarious and posed a substantial risk of serious injury to the people below him, as both Captain Taffe and Sergeant Tomlinson feared (A-132-33, A-141).

Even now—far removed from the day's tense and evolving events—Higginbotham "concedes that had he fallen or dropped his equipment from that height onto someone standing below, there was a substantial risk of some injury" (App. Br. at 20). Officers were not compelled to stand by and hope that he would—or could—obviate the

risk he posed to others simply by "tak[ing] special care to keep his balance" (*id.* at 18).[2] If anything, Higginbotham's admission that "special care" was necessary proves the point.

Higginbotham is both off point and wrong to suggest that a jury "could reasonably infer that the telephone booth roof was a 'suitable platform for a male adult'" (App. Br. at 18). It is doubtful a jury could make that inference even with the benefit of hindsight. But that is not the question the case presents. The question is what officers on the scene could reasonably have concluded. And they certainly could have reasonably believed the thin, curved metal roof of a phone booth might not bear Higginbotham's weight. More to the point, even if the roof itself could theoretically sustain Higginbotham's weight, a reasonable officer could still believe that a full grown man towering well above a crowd, and moving while trying to balance 30 pounds of equipment, posed a substantial risk of serious physical injury to another person. In the end, the pertinent question on probable cause is not what the facts

[2] Higginbotham does not claim that he ever conveyed his alleged intention to "take special care" to the individual officers. Even if he had, the probable cause standard does not compel officers on the scene to undertake the "essentially speculative inquiry into the potential state of mind" of a suspect before making a lawful arrest. *See Garcia v. Does*, 779 F.3d 84, 96 (2d Cir. 2014).

actually were but how a reasonable police officer would have perceived them.

The fact that no one was injured is fortunate, but legally irrelevant. "[T]he reckless endangerment statutes 'seek to prevent the risk created by the actor's conduct, not a particular outcome,' and the risk of injury alone will sustain prosecution." *People v. Galatro*, 84 N.Y.2d 160, 164-65 (1994) (citing *People v. Davis*, 72 N.Y.2d 32, 36 (1988)). The threshold for a finding of probable cause in this regard is low, and the injury can remain speculative as the law criminalizes the risk-taking itself. It is the reckless conduct creating a substantial risk of serious physical injury to another that satisfies the statute. *See People v. Roth*, 80 N.Y.2d 239, 245 (1992). Higginbotham, an adult of ordinary height and weight, stood and moved around on a 7'4" curved piece of aluminum, over a densely packed crowd, holding a 30-pound camera next to his head. Clearly, probable cause to arrest Higginbotham for reckless endangerment in the second degree existed under these circumstances.

B. Officers could have reasonably believed that Higginbotham recklessly endangered the phone booth itself (N.Y. Penal Law § 145.25).

Reasonable officers on the scene could also have believed there was probable cause to arrest Higginbotham for reckless endangerment of property—a misdemeanor that arises when someone "recklessly engages in conduct [creating] a substantial risk of damage to the property of another person in an amount exceeding two hundred fifty dollars." N.Y. Penal Law § 145.25. Higginbotham does not dispute that the phone booth he mounted constitutes property belonging to another—and he cannot credibly dispute that a reasonable officer on the scene could believe that any material damage to the booth could exceed $250. The sole remaining question is whether a reasonable officer could have believed that Higginbotham's conduct posed a substantial risk of such damage.

Clearly a reasonable officer could hold that belief. The phone booth had no ladder or stairs leading to its roof—situated 7'4" off the ground (A-194, A-114-15). Upon his ascent, Higginbotham stood on what appeared to be a thin, curved, and hollow metal roof—confirmed during this litigation to be a 3.2mm aluminum sheet with a hollow or

partially hollow chamber underneath (A-194, A-197, A-176, A-77, A-179, A-186, A-187, A-192, A-141, A-143, A-132-33). It would be far from unreasonable for an officer to believe that there was a significant risk that the roof could not withstand the weight and movements of a fully grown man bearing heavy equipment without caving in or sustaining other damage (A-194, A-197, A-176, A-77, A-179, A-186, A-187, A-192). It would likewise not be unreasonable to believe that any damage that might be sustained would exceed $250.

Because the question is one of risk, it is of no moment that Higginbotham had the good fortune to avoid damaging the phone booth while he ignored officers' directives (App. Br. at 24-25). Nor were officers required to arrest Higginbotham the first moment probable cause arose. To be sure, officers may have had probable cause to arrest Higginbotham sooner, but their not doing so at the first moment possible did not extinguish probable cause.

C. Higginbotham's speculation as to the officers' motivation does not alter the analysis.

In his brief, Higginbotham speculates that the individual officers arrested him because he was recording the demonstration (App. Br. at

13-14). But his speculation rests on a handful of facially neutral circumstances surrounding his arrest—like some officers' initial restraint and others' failure to immediately specify the precise charge. The closest he comes to identifying a fact that has any bearing on his efforts to record the demonstration is his assertion that, perched far above the crowd, he had a "superior position" to record the events (*id.*).

But Higginbotham's physical position was also the reason he posed a danger to the crowd and the booth, and he cites no evidence—just his speculation—that would allow a jury to conclude that, despite this danger, his status as a cameraman with a superior vantage point was the "but-for cause" for his arrest. *See Hartman v. Moore*, 547 U.S. 250, 256 (2006). His thin reed of speculation becomes all the more suspect when one considers that no other journalists nearby were arrested—including cameramen within spitting distance of him who were holding their cameras above the crowd to capture the events from an adequate and far safer—even if arguably slightly less advantageous—point of view.

Regardless, the officers' motivation is irrelevant. As noted, this Court has made clear that probable cause is a complete defense to First

Amendment retaliation claims tied to law enforcement conduct. *See Fabrikant*, 691 F.3d at 215-16; *Mozzochi*, 959 F.2d at 1179-80. "[M]otivation is not a consideration for probable cause." *Singer*, 63 F.3d at 119; *accord Mozzochi*, 959 F.2d at 1179. Indeed, that is part of the virtue of the probable cause standard, as disentangling motive in the law enforcement context is a fraught endeavor. That is especially true for retaliatory arrest claims: if an objective assessment of probable cause were insufficient to defeat such claims, a plaintiff engaging in expressive activity could simply point to that activity as the motivation for the arrest.

This Court's decision in *Musso v. Hourigan*, 836 F.2d 736 (2d Cir. 1988), relied on by Higginbotham, does not express a different rule. As this Court observed in a later case, the reason the plaintiff in *Musso* was arrested was his non-compliance with a school board order, but the order itself may have targeted the content of the plaintiff's speech. *See Mozzochi*, 959 F.2d at 1180 (interpreting *Musso*). In that case, because there would be no probable cause "if the order had been improperly motivated," the defendants' motivation was inextricably tied up with the probable cause inquiry. *See id.* The Court's decision is perhaps best

understood as an anti-bootstrapping rule: a defendant cannot manufacture probable cause through an antecedent act that is itself retaliatory.

Here, because Higginbotham's conduct itself supplied probable cause, without any interference or intervention, the individual officers' motivations "need not be examined." *See id.* The presence of probable cause suffices to affirm the judgment below as to all of Higginbotham's claims.

POINT II

IN THE ALTERNATIVE, THE OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY

Qualified immunity shields government officials from § 1983 liability when the conduct attributed them either (a) did not violate the Constitution or other federal law, or (b) was objectively reasonable in light of then-existing clearly established law. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This is a "deliberately forgiving standard of review," *Zalaski v. City of Hartford*, 723 F.3d 382, 389 (2d Cir. 2013) (internal quotations omitted)—one that affords officials "ample room for mistaken judgments," *Malley v. Briggs*, 475 U.S. 335, 341, 343 (1986). "When

properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (quoting *Malley*, 475 U.S. at 341).

The doctrine recognizes that officials are entitled to "fair warning" about when and under what circumstances their conduct will "cross the line" between what is constitutional and unconstitutional so they can conform their conduct accordingly. *See Hope v. Pelzer*, 536 U.S. 730, 743 (2002). To that end, the relevant right—in this case, a constitutional one—must have been "clearly established" at the time a defendant acted. That is, the law must have been so well-settled that "*every* reasonable official" would have understood that he or she was crossing a constitutional line. *See Mullenix v. Luna*, ___ U.S. ___, 136 S. Ct. 305, 308 (2015) (emphasis added).

Stated differently, a defendant's conduct must be so beyond the pale, and the right so distinctly defined, that not a single reasonable official could think the conduct lawful. This case does not come near that terrain.

A. Higginbotham and amici all but concede that the law relevant to Higginbotham's First Amendment claims was not clearly established at the time.

If anything, Higginbotham and his supporting amici make the case for qualified immunity in connection with his First Amendment retaliatory arrest claims. They share the view that the relevant constitutional right is the right of journalists—or perhaps the public at large—to record law enforcement activity in public (App. Br. at 11; Amici Br. at 1). As we explain below, their articulation of the right is mistaken. But even crediting it, the individual officers—the sole defendants at this stage—would still be entitled to qualified immunity.

After all, to give government officials fair notice, there ordinarily must be controlling authority from the Supreme Court or this Court. *See al-Kidd*, 563 U.S. at 741-42. And here, Higginbotham concedes that, at the time relevant to his claims, "neither the Supreme Court nor the Second Circuit had conclusively determined the right of a journalist to record police activity in public" (App. Br. at 11). Amici agree, claiming that the absence of "a clearly defined right" created "a climate of uncertainty" yielding "[o]ngoing disagreement" and "[i]nconsistent rulings" among trial courts in this circuit (Amici Br. at 14-15 (citing

cases)). These concessions reflect that the right—as conceived by Higginbotham and amici—was not clearly established at the time of Higginbotham's arrest in November 2011. Such undefined legal territory is the precise situation that calls for qualified immunity.

With none of the analysis required to properly present an issue for appellate review, Higginbotham nonetheless asserts that non-binding decisions from other courts of appeals "were uniform in holding that such a right existed" (App. Br. at 11). But his assertion stops there. Higginbotham does not specify which extra-circuit decisions he has in mind. He refers generally to the opinion of the district court, but the court identified just three circuit-level decisions issued prior to Higginbotham's arrest. *See Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995). Higginbotham does not explain how such a small number of decisions reflects the rare kind of robust extra-circuit consensus that might constitute clearly established

law in this circuit.[3] *See al-Kidd*, 536 U.S. at 476. Nor does he explain why he expects the individual officers to have inferred such a right from three extra-circuit decisions when his supporting amici claim that a "climate of uncertainty" prevailed in the officers' home circuit (App. Br. at 1, 14).

Nor does Higginbotham identify a single decision that bears a close resemblance to this case. He claims only that an indeterminate set of extra-circuit decisions have recognized "the right of a journalist to record police activity in public" (App. Br. at 11). But framed in such broad terms, Higginbotham commits the error that the Supreme Court has repeatedly reminded courts to avoid—defining the underlying right "at a high level of generality." *See al-Kidd*, 536 U.S. at 472. In fact, in *Glik*, *Smith*, and *Fordyce*, the action challenged as violative of the First Amendment was taken in direct response to the action claimed to be protected, and there was no valid law enforcement purpose. *See Glik*, 655 F.3d at 79, 88 (plaintiff arrested, without probable cause, for

[3] Amici also cite non-binding decisions issued *after* Higginbotham's arrest (Amici Br. at 18-19), which cannot be used to show that the law was clearly established at the time. *See Brosseau v. Hogan*, 543 U.S. 194, 200 n.4 (2004) (per curiam).

videotaping officers arresting a man on the Boston Common); *Smith*, 212 F.3d at 1332 (plaintiffs allegedly harassed and prevented from videotaping police action); *Fordyce*, 55 F.3d at 438, 439 (plaintiff allegedly assaulted and battered in an attempt to prevent him from videotaping a public protest march). Unlike in those cases, Higginbotham was arrested for creating a danger by standing and moving with his heavy camera equipment on top of a phone booth with a curved roof made of a thin piece of aluminum. Higginbotham fails to address the "particular conduct" and "the specific circumstances" at issue in those cases and how they bear on the situation confronting the individual officers when arresting Higginbotham. *See Mullenix*, 136 S. Ct. at 308.

B. In urging this Court to declare an abstract right to record police activity, Higginbotham and amici misapprehend the relevant constitutional right.

With the writing on the wall, Higginbotham and amici implore this Court to use this doomed damages action to declare a sweeping constitutional right to record law enforcement activity (App. Br. at 11; Amici Br. at 1). To be sure, when addressing qualified immunity, courts are not obligated to bypass the question of whether a defendant

committed a constitutional violation and go straight to asking whether the defendant's conduct was objectively reasonable in light of clearly established law. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009). But Higginbotham and amici misconceive this discretion to decide whether an actual constitutional violation occurred as a license for courts to act as freewheeling constitutional advisors unshackled from prudential principles of judicial review.

Given that the lack of clearly established law cannot be seriously disputed, Higginbotham and amici propose "an essentially academic exercise." *See id.* at 237. And as academic exercises go, this one would be especially ill advised. Again, the right that Higginbotham and amici conceive—a broad right to record police activity—is defined at such "a high level of generality" that it would extend to a wide array of factual situations with no meaningful connection to this case. *See al-Kidd*, 536 U.S. at 472. Amici offer a dramatic example: while amici urge the Court to recognize a right that extends to the entire public, their brief seems to acknowledge that the freedom of the press may put credentialed journalists, like Higginbotham, on different constitutional footing (Amici Br. at 8 n.3, 21).

If this Court is to tread into new constitutional waters, it should await a case in which the constitutional question is presented with far greater precision and where the nexus between the right and the challenged conduct is far stronger. Moreover, this Court should heed the Supreme Court's recognition that both the parties' and judicial resources need not be wasted on such an academic pursuit in a case like this, in which there is no dispute that the First Amendment issue raised is not clearly established. *See Pearson*, 555 U.S. at 237.

But the even larger problem here is that Higginbotham and amici simply misconceive the relevant constitutional right for the purpose of qualified immunity. This Court can assume that Higginbotham was engaging in protected First Amendment activity and still conclude that the individual officers committed no actual constitutional violation. That is because, as the Supreme Court has made clear, "the right in question is not the general right to be free from retaliation for one's speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause." *Reichle*, 566 U.S. 658, 665 (2012). And regarding that claimed right, this Court's precedent

supplies a clear answer: where probable cause is present, no claim for retaliatory arrest will lie (*see supra* pp. 10-11).

C. The presence of arguable probable cause defeats all of Higginbotham's claims.

Because probable cause is a complete defense to all of Higginbotham's claims—whether they sound in false arrest or retaliatory arrest—the individual officers are entitled to qualified immunity so long as there was "arguable probable cause" for Higginbotham's arrest. *See Zalaski*, 723 F.3d at 389. An arresting officer has arguable probable cause if (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether there was probable cause. *Garcia v. Does*, 779 F.3d 84, 92 (2d Cir. 2014). In other words, the officer's probable cause determination must have been "so flawed that no reasonable officer would have made a similar choice." *Amore v. Novarro*, 624 F.3d 522, 530 (2d Cir. 2010) (internal quotation marks omitted).

In this context, qualified immunity builds upon the already forgiving probable cause standard by recognizing that officers cannot be

expected to make perfect on-the-spot assessments as to how an abstract legal standard applies to the particular factual situations they confront. *See Mullenix*, 136 S. Ct. at 308. Probable cause is the paradigm of such an abstract standard. It offers few clear-cut guideposts, making the specificity of preexisting law all the more important to affording officers clear guidance as to the lawfulness of their future conduct. After all, arrests are often made in tense, uncertain, and evolving situations—especially where, as here, an arrest occurs in the middle of a heated, large demonstration.

Actual probable cause supported Higginbotham's arrest. But at a bare minimum, reasonable officers could have disagreed on the point. Higginbotham towered above a tightly packed crowd, standing and moving around on the phone booth's curved, thin roof—his feet alone more than 7 feet above the ground—all while attempting to balance at least 30 pounds of equipment on his shoulder (A-108, A-112-15, A-132-33, A-140-41, A-143, A-176, A-186). Not every reasonable officer would have to imagine and accept that Higginbotham would both "take special care" (App. Br. at 18) and be able to prevent injury to everyone below

him and, thus, be compelled to conclude that probable cause was lacking.

It is telling, in this regard, that Higginbotham does not cite one decision that bears even passing resemblance to the facts of his arrest, much less one that would place the constitutional question facing the individual officers "beyond debate." *See al-Kidd*, 563 U.S. at 741. Because the officers had at least arguable probable cause to arrest Higginbotham, they are entitled to qualified immunity here.

CONCLUSION

This court should affirm the judgment below.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 5,727 words, not including the table of contents, table of authorities, this certificate, and the cover.

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