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NO. 88694-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

E.J.J.,

Petitioner/Appellant.

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STATE OF WASHINGTON
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BRIEF OF *AMICUS CURIAE*
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonprofit, nonpartisan organization with over 20,000 members that is dedicated to the principles of liberty and equality embodied in the Constitution. As part of its mission, the ACLU works to preserve the First Amendment freedom of expression—even when it comes to unpopular or inconvenient speech. Part of this work involves efforts to protect the rights of individuals both to observe and criticize government officials, including law enforcement officers, acting in their official capacity.

In addition, the ACLU has long been committed to safeguarding the right of individuals to be treated by police officers in a manner within the bounds of law. As part of its efforts in this regard, the ACLU successfully advocated that the Seattle Police Department implement policy changes designed to curtail abuse of Washington's obstruction statute and boost police accountability.

II. ISSUE ADDRESSED BY AMICUS

Whether a conviction for obstructing a law enforcement officer under RCW 9A.76.020(1) violates the First Amendment where that conviction rests upon an individual's refusal to cease observing and verbally criticizing police officers.

III. STATEMENT OF THE CASE

The incident that sparked the obstruction conviction of E.J.J. ("Jordan") arose on February 14, 2011, when Jordan's mother called police officers to the family home to escort Jordan's little sister off the property. RP 14-17. Jordan's sister was intoxicated and belligerent when three male Seattle Police Department ("SPD") officers guided her outside her home. RP 14-17. To encourage his sister to leave the property voluntarily and observe the manner in which police officers treated her, Jordan followed his sister and the officers outside, remaining 10-15 feet away. RP 27, 30. At all times Jordan stayed on his family's property. RP 27, 30.

During the SPD's opening interactions with Jordan's sister, and even when the officers began to cluster around her, Jordan encouraged her to comply with the officers' orders for her to leave the property. RP 27. Yet when one officer unsheathed his nightstick, Jordan became concerned for his sister's safety and began to criticize the officers' conduct, calling them names such as "motherfucker." RP 69-70. Jordan "made no threatening movements . . . and there's no evidence of any threats made by [Jordan]." RP 95; CP 14.

Upon hearing Jordan's words, an officer ordered Jordan to go inside his home. RP 70-71. Initially, Jordan remained outside and

continued to observe and criticize how the officers handled the situation with his little sister, despite the officers' orders that he return inside. RP 70-71. But Jordan ultimately complied and went inside his home. RP 71. He shut and locked a wrought iron screen door and then stood behind that screen door continuing to observe the scene outside and voicing his concerns. RP 72-73. Yet despite Jordan's efforts to comply with the officers' directions by closing and locking the wrought iron door, the officers demanded more. RP 51-56. An officer directed Jordan to shut and lock the main wooden front door of his home, in addition to the wrought iron screen door—an action that, had Jordan complied, would have had only two effects: (1) to block the sound of Jordan's voice and (2) prevent him from witnessing the officers through the screen door. RP 51-56. When, out of concern for his sister, Jordan refused to shut the wooden door, an officer entered his home and arrested him. CP 16.

The Juvenile Division of the King County Superior Court found Jordan guilty of the crime of obstructing a law enforcement officer in violation of RCW 9A.76.020(1). RP 99. The Juvenile Court found Jordan guilty on the basis of his speech, or "back-and-forth" with the officers, and opined that if Jordan had simply stood silently observing in the doorway, "we might not be here today." RP 99-100.

On appeal, Jordan challenged his conviction on several grounds. *State v. E.J.J.*, No. 67726-8-I, 2013 WL 815921, at *1 (Wash. Ct. App. Mar. 4, 2013), *review granted*, 178 Wn.2d 1025, 312 P.3d 652 (2013). He argued that the conviction violated his right to engage in constitutionally protected speech and contended that there was legally insufficient evidence of obstructive conduct other than constitutionally protected speech and/or actions. *Id.* The Court of Appeals nevertheless affirmed Jordan's conviction. *Id.* Echoing the Superior Court's reasoning, the Court of Appeals based its decision in large part on the fact that Jordan yelled at the officers and called them names. *See id.* at *7 (stating that "the following facts support the trial court's determination that E.J.J. was guilty of [obstruction]: . . . E.J.J. was 'irate,' calling the officers names, yelling, and using profanity").

This Court granted Jordan's Petition for Review.

IV. ARGUMENT

Jordan's conviction for obstruction of a law enforcement officer violated the First Amendment in two ways. First, Jordan's arrest and conviction were based on the speech he used to criticize the police officers. But the First Amendment grants individuals the freedom to verbally criticize police action without risking arrest, much less a criminal

conviction. U.S. Const. amend. I; *City of Houston, Tex. v. Hill*, 482 U.S. 451, 462-63, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987) ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state").

Second, Jordan's conviction also was based on his refusal to stop observing police conduct. Yet the First Amendment also grants individuals the right to observe—and even record and videotape—police in the course of their duties. *See Fordyce v. City of Seattle*, 55 F.3d 436, 437-39 (9th Cir. 1995) (finding that appellant, who was arrested for filming the police, had a "First Amendment right to film matters of public interest"); *State v. Flora*, 68 Wn. App. 802, 806, 845 P.2d 1355 (1992) (rejecting view that public officials performing an official function enjoy a privacy interest); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (noting that "[b]asic First Amendment principles" and federal case law "unambiguously" establish that individuals have "a constitutionally protected right to videotape police carrying out their duties").

Taken together, the rights to criticize and observe police conduct are not only enshrined in the First Amendment and SPD's own policies but also ensure that police do not act with impunity. *See Flora*, 68 Wn. App. at 806 (recognizing public interest in observing police); Letter from

Kathleen Taylor, Exec. Dir., ACLU, to Thomas Perez, Assistant Att'y Gen., United States Dep't of Justice Civil Rights Div. (Dec. 3, 2010), *available at* https://aclu-wa.org/re-request-investigate-pattern-or-practice-misconduct-seattle-police-department (last visited Jan. 23, 2014) (discussing widely publicized incidents of use of force and advocating DOJ investigation of SPD). For these reasons, this Court should reverse the ruling of the Court of Appeals and dismiss Jordan's conviction.

A. An Obstruction Conviction Cannot Stand When It Is Based on Speech Protected by an Individual's First Amendment Right to Criticize On-Duty Police Officers

In this case, SPD officers used Washington's obstruction statute, RCW 9A.76.020, to silence the voice of a youth of color who was concerned for his sister. Although the State insists that this application was lawful, the history of Seattle police misuse of the obstruction statute to arrest persons of color has been well documented. *See, e.g.*, Eric Nalder et al., *Anti-Crime Team Has a Tough Reputation—Maybe Too Tough: Unit Racks Up Most 'Obstructing' Arrests*, Seattle Post-Intelligencer, Feb. 28, 2008 (finding that African Americans are arrested for obstruction more than eight times as often as whites); Lewis Kamb, *Cops at Times Use 'Obstruct' Charge as Leverage*, Seattle Post-Intelligencer, Feb. 27, 2008 (discussing how obstruction charges often are improperly used as leverage against individuals whom the police deem to be uncooperative). This

misuse of the obstruction statute in Jordan's case was unconstitutional. The notion that police may wield "the awesome power at their disposal" to silence an individual solely for their convenience or because they feel insulted is entirely foreign to the First Amendment. *Duran v. City of Douglas*, 904 F.2d 1372, 1377-78 (9th Cir. 1990) (finding that the First Amendment protected an individual's profanities and obscene gesture towards a police officer). An individual's verbal criticism of on-duty police officers falls squarely within the protective penumbra of the First Amendment and, when a criminal statute is applied to disturb this right, as occurred here, the individual's conviction must be reversed. *Hill*, 482 U.S. at 462; *see also Gulliford v. Pierce Cnty.*, 136 F.3d 1345, 1350 (9th Cir. 1998) (finding that defendant's obscenity-laden criticism of police was protected speech).

1. Individuals May Freely Criticize Police Officers Without Fear of Arrest

"The First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." *Hill*, 482 U.S. at 461. Though speech may be provocative or challenging, it "is nevertheless protected against censorship or punishment." *Id.* (internal quotations and citations omitted).

In *Hill*, a case with facts substantially similar to those before this Court, the United States Supreme Court found that a city ordinance could not constitutionally prohibit speech that interrupted a police officer. 482 U.S. at 466. In *Hill*, the Defendant's arrest was sparked by an incident in which he shouted at a police officer "in an attempt to divert [the officer's] attention" away from his friend. *Id.* at 451. Among other statements, Hill challenged the officer to "'pick on somebody your own size.'" *Id.* at 454. After being charged and acquitted, Hill contested his arrest on constitutional grounds. *Id.* at 455.

In addressing Hill's challenge, the Supreme Court held that a statute may not criminalize protected speech, emphasizing that its decision "reflects the constitutional requirement that, in the face of verbal challenges to police action, officers and municipalities must respond with restraint." *Id.* at 471. The Court also emphasized that "the First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive." *Id.* at 472.

Multiple other cases are in accord with the outcome reached in *Hill*. *See, e.g.*, *Lewis v. City of New Orleans*, 415 U.S. 130, 134, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974) (holding that municipal ordinance ran afoul

of First Amendment where it was "susceptible of application to speech, although vulgar or offensive, that is protected"); *Duran*, 904 F.2d at 1377-78 (noting that "while police, no less than anyone else, may resent having obscene words and gestures directed at them, they may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment").

Much like the obstruction statute at issue in *Hill*, here RCW 9A.76.020(1) was applied in a "sweeping" manner to silence protected verbal criticism of police conduct. The factual record makes clear that it was Jordan's speech and his continued observation of police officers, who were engaging in their official duties in public on Jordan's family's property, that the police deemed obstructive: it was when Jordan called the officers at his home insulting names that an officer demanded he go inside, RP 43-44, 60, and it was when Jordan refused to cease criticizing the officers and their conduct that an officer came into Jordan's home and arrested him, RP 53.

Moreover, it is not only the factual record that indicates that Jordan's protected speech was what constituted "obstruction" in the minds of the officers involved. The trial court and the Court of Appeals also acknowledged that Jordan was convicted on the basis of his speech. The Juvenile Court, for example, opined that "we might not be here" if Jordan

had remained silent. RP 99. Likewise, the Court of Appeals ratified the Juvenile Court's reasoning on appeal, basing its holding on Jordan's calling the officers names and "yelling." *E.J.J.*, 2013 WL 815921, at *7.

Like the arrestees in *Hill* and *Lewis*, Jordan sharply criticized the officers, who may have viewed these insults as constituting "contempt of cop." *See Retz v. Seaton*, No. 8:11CV169, 2013 WL 1502235, at *2 (D. Neb. Apr. 10, 2013) ("The theory [of contempt of cop as described by an expert] suggests that when an individual is rude to a police officer . . . the officer may want to show 'who's boss,' effecting an arbitrary arrest, detention, or use of force"). But the First Amendment protects even "vulgar or offensive" speech directed toward a police officer, and "contempt of cop" is not a crime. *Lewis*, 415 U.S. at 134. The Constitution in fact requires officers to exercise "a *higher* degree of restraint" than ordinary citizens in responding to such criticism and mandates that officers "not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment," via an obstruction statute or otherwise. *See United States v. Poocha*, 259 F.3d 1077, 1080, 1081 (9th Cir. 2001) (emphasis added) (internal quotations and citations omitted); *Duran*, 904 F.2d at 1378.

For these reasons, Jordan's arrest and conviction cannot be reconciled with *Hill*.

2. Conviction Under Washington's Obstruction Statute Requires Obstructive Conduct To Ensure That Protected Speech Is Not Criminalized

The lower court was not without guidance in assessing the constitutionality of Jordan's arrest. To ensure that RCW 9A.76.020 is applied in a manner consistent with both federal and state constitutional principles, this Court has repeatedly narrowed the lawful application of RCW 9A.76.020's to cases involving obstructive conduct. *See, e.g.*, *State v. Williams*, 171 Wn.2d 474, 486, 251 P.3d 877 (2011) ("Our constitution puts constraints on the State and guarantees certain protections and liberties to the people. Our continued interpretation of obstruction statutes as requiring some conduct ensures these constitutional limits are maintained."); *State v. Budik*, 173 Wn.2d 727, 735, 272 P.3d 816 (2012) ("Conviction under [RCW 9A.76.020] requires 'some conduct'") (quoting *Williams*, 171 Wn. 2d at 486). Yet despite these clearly established constitutional requirements, Jordan was arrested and convicted for violating RCW 9A.76.020(1) because he insisted on exercising his right to stay, observe, and criticize officers who were on his family's property arresting his sister.

This is not a case where the speech at issue falls within one of the narrow categories of less protected speech. *See Poocha*, 259 F.3d at 1080 (noting that language that may be legally proscribed by the government includes classes of speech "which by their very utterance inflict injury or tend to incite an immediate breach of the peace," such as "fighting words" and "incitement to riot") (internal quotations and citations omitted). To the contrary, the officers even acknowledged that Jordan took no affirmative action—apart from his spoken words and his refusal to leave the scene and cease observing the police's interactions with his sister—to interfere with the officers' duties, and that Jordan's words, though inconvenient and insulting, did not rise to the level of threats. *See* RP 95; CP 14 (outlining officer's acknowledgment that Jordan "made no threatening movements" and the fact that there is "no evidence of any threats made by [Jordan]").

Thus, because officers used the obstruction statute to pierce "the . . . shield that protects criticism of official conduct," this Court should reverse Jordan's conviction, however provocative his speech might have been. *Poocha*, 259 F.3d at 1081 (internal quotations and citations omitted). In addition, to ensure that RCW 9A.76.020 is no longer used to unlawfully arrest individuals for exercising their rights, this Court should reaffirm that a conviction under that statute must be supported by

obstructive conduct (rather than protected speech) and further clarify that the conduct cannot simply be an individual's mere presence, insistence on observing official police action, and/or vocal critique of the police, but rather genuinely obstructive conduct that interferes with an officer's duties.

B. The First Amendment Protects an Individual's Right to Observe Police, and This Observation Is Crucial to Ensuring Police Accountability

The First Amendment protects not only the end product that is protected speech but also an individual's ability to receive information in order to formulate that speech. *See Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 595-96 (7th Cir.), *cert. denied*, 133 S. Ct. 651, 184 L. Ed. 2d 459 (2012) ("By way of a simple analogy, banning photography or note-taking at a public event would raise serious First Amendment concerns; a law of that sort would obviously affect the right to publish the resulting photograph or disseminate a report derived from the notes."). In the context of law enforcement, observation is entitled to First Amendment protection because, like the act of note-taking at a public event, observation allows individuals to later formulate protected speech related to the police officers' conduct. Additionally, "[i]nstances of abuse and corruption will be minimized if those in power are required to operate transparently, in the light of day." Steven A. Lautt, *Sunlight Is Still the*

Best Disinfectant: The Case for A First Amendment Right to Record the Police, 51 Washburn L.J. 349, 350 (2012).

1. Subject to Limited Conduct-Specific Restrictions, Individuals Have the Right to Observe the Police in the Course of Their Official Duties

In the face of a police officer's demand that he close his wooden front door and cease observing the scene unfolding outside his home, Jordan intuitively understood his right to bear witness to the officers' conduct. RP 73 ("Well, I felt like as a citizen in this United States . . . everybody should have the right to observe the [police] scene."). Yet Jordan was arrested, and subsequently convicted, for exercising that right. *See* Lautt, supra, at 356 (noting that "when [an] individual does not obey the command [to stop recording], officers sometimes threaten arrest and prosecution under hindering, interference, or obstruction statutes, despite the fact that recording police officers in public is not against the law per se").

Jordan's conviction cannot stand because an individual's right to observe the police is protected by the First Amendment. *See Fordyce*, 55 F.3d at 439 (recognizing "First Amendment right to film matters of public interest" in context of police interaction); *Flora*, 68 Wn App. at 807 (reasoning that individuals have an interest in observing and recording police officers); *see also Glik*, 655 F.3d at 85 (holding that "a citizen's

right to film [and by implication observe] government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment").

As the ACLU emphasized in the amicus brief it filed in this case before the Court of Appeals, Washington state law allows police officers to be observed and filmed while acting in their official capacities. In *Flora*, for example, the Court of Appeals addressed a challenge under Washington's ban against "[i]ntercepting, recording, or divulging private communications" and rejected the State's argument that police have a privacy interest in undertaking their official duties that is capable of protection under this statute. 68 Wn. App. at 805. Likewise, in *Fordyce*, the Ninth Circuit acknowledged a "First Amendment right to film matters of public interest." 55 F.3d at 439.

Other circuit courts agree. In *Glik*, for example, the defendant was arrested for violating Massachusetts' wiretap statute after he videotaped three police officers arresting a young man because he was concerned for the man's safety. 655 F.3d at 79-80. In assessing the arrestee's First Amendment challenge, the First Circuit reasoned that "[i]t is firmly established that the First Amendment's aegis extends further than the text's proscription on laws 'abridging the freedom of speech, or of the

press,' and encompasses a range of conduct related to the gathering and dissemination of information." *Id.* at 82. On this basis, the First Circuit determined that the right to record police activities is "fundamental and virtually self-evident." *Id.* at 89. The court emphasized that "[i]n our society, police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights." *Id.* at 89; *see also Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) ("The First Amendment protects the right to gather information about what public officials do on public property . . . ").

Using Washington's obstruction statute to punish Jordan for trying to observe the officers' treatment of his sister cannot be reconciled with this case law or with SPD's own internal policies. *See, e.g.*, Seattle Police Dep't, *Draft Policy Revision: 16.090-In-Car Video System* (Dec. 18, 2013), *available at* http://www.seattle.gov/spd/compliance/draft_policy/ICV_Draft_Policy_11-30-13.pdf (last visited Jan. 23, 2014) (acknowledging importance of police visibility by mandating that SPD employees themselves record enforcement-related activities); *see also* Letter from Jonathan Smith. Chief, Special Litig. Section, to Mark H. Grimes, Baltimore Police Dep't, Office of Legal Affairs (May 14, 2012), *available at* http://www.justice.gov/crt/about/spl/documents/Sharp_ltr_5-14-12.pdf

(last visited: Dec. 30, 2013) ("DOJ Opinion Letter") (recognizing that the First, Fourth and Fourteenth Amendments support right to record police officers). Like the defendant in *Glik*, who was arrested for attempting to videotape an arrest out of concern for the arrestee's safety, Jordan was arrested (and convicted) for exercising his right to observe the police interact with his sister on his own property. Not only that, Jordan was arrested even though he was standing behind a locked screen door—where he posed no danger to anyone, much less the officers. There was no safety justification for limiting Jordan's right to observe the scene unfolding outside his home. Nor could Jordan have interfered with the officers' investigation of a crime by observing their conduct from behind a screen door. To the contrary, the officer ordered Jordan to close his door *explicitly* for the purpose of blocking Jordan's view of the officers' interactions with his sister. RP 96.

The Constitution does not permit police officers to use criminal prosecution and conviction under RCW 9A.76.020 (or other similar statutes) to impede citizen observation. The officers at Jordan's home mustered the strong arm of the law to repress Jordan's observation, and for this reason standing alone, this Court should reverse his conviction.

2. The Constitutionally Protected Right to Observe, Videotape, and Record Police Misconduct Is Crucial to Holding Police Accountable for Their Actions

The public's right to observe police conduct promotes police accountability, thereby fostering confidence and trust in our justice system.[1] Recently, the U.S. Department of Justice affirmed that protecting the constitutional right to observe police conduct "engender[s] public confidence in our police departments, promote[s] public access to information necessary to hold our governmental officers accountable, and ensure[s] public and officer safety." *See* DOJ Opinion Letter at 1.

For example, public dissemination of individual observations and recordings of multiples instances of SPD officers using what appeared to be excessive force against minorities contributed to persuading the Justice Department and the U.S. Attorney's Office to open an investigation in 2011. *See* U.S. Dep't of Justice, Civil Rights Div. Investigation of the Seattle Police Department, (Dec. 16, 2011) http://www.justice.gov/crt/about/spl/documents/spd_f indletter_12-16-11.pdf (last visited Jan. 23, 2014) ("Justice Dep't Investigation of SPD"). That investigation later resulted in meaningful policy changes within the SPD. *See* Mike Carter, *Justice Department to investigate Seattle Police*

[1] *See* Lautt, supra, at 371 (arguing that "[f]ar from worthless, citizen-recording of police activity has been a powerful tool for exposing police abuse and getting bad cops off the streets"); Andrew John Goldsmith, *Policing's New Visibility*, 50 Brit. J. Criminology 914, 914 (2010) (discussing how technologies such as camera phones and the Internet have increased public visibility of the police and heightened police accountability).

civil-rights practices, Seattle Times, Mar. 31, 2011 (discussing how the request by the ACLU and community groups that the Justice Department investigate the SPD "came after highly publicized incidents" that were observed, recorded, and disseminated by citizens); *see also* Justice Dep't Investigation of SPD at 3 (referring to "a number of widely publicized incidents involving use of force by the police, leading to understandable public concern"). The sheer fact that public observation and criticism of the police played a critical role in the DOJ investigation illustrates how citizen observation of police activities fosters accountability. Simply put, individuals such as Jordan, who exercise their constitutional right to witness, videotape, or record police misconduct, are key to ensuring that the police comply with the constitution and other legal requirements in carrying out their duties.

V. CONCLUSION

This Court should dismiss Jordan's conviction, affirm citizens' fundamental rights to criticize and observe police conduct, and make clear that affirmative, obstructive conduct, rather than mere presence and speech, is necessary to support a conviction under RCW 9A.76.020(1). Even though he is a teenager, Jordan understood that he had a right to criticize and observe the officers who were detaining his sister on his family's property. The officers should have known that he had these

rights too. But instead of exercising restraint in the face of a teenager's decision to invoke his First Amendment rights, the officers inflicted a permanent, if "unseen," injury upon Jordan by arresting him.[2] Even if his conviction is reversed and dismissed—and it should be—that injury will follow him for the rest of his life.

DATED: January 27, 2014

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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[2]*See* Eric Nalder, *Dubious Bust Leaves 'Unseen Injury' for Life*, Seattle Post-Intelligencer, Feb. 27, 2008 (noting that convictions for engaging in protected activities can limit a person's opportunities for a substantial period of time).

CERTIFICATE OF SERVICE

I, David A. Perez, attorney for Amicus Curiae American Civil Liberties Union of Washington, certify that on January 27, 2014, I personally served to each of the following persons a copy of the document on which this certification appears:

Lila Silverstein (via email)	Counsel for Petitioner/Appellant
Dennis J. McCurdy and Daniel T. Satterberg (via email)	Counsel for Respondent

Signed at Seattle, Washington, this 27th day of January, 2014.

/s/ David A. Perez
David A. Perez