

No. 20-35739

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

INDEX NEWSPAPERS LLC, DBA
Portland Mercury; et al.,

Plaintiffs-Appellees,

v.

UNITED STATES MARSHALS SERVICE;
U.S. DEPARTMENT OF HOMELAND
SECURITY,

Defendants-Appellants,

and

CITY OF PORTLAND, a municipal
corporation; et al.,

Defendants.

On Appeal from the United States District Court for the
District of Oregon
Case No. 3:20-cv-1035-SI (Honorable Michael H. Simon)

**BRIEF OF AMICI CURIAE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS AND 14 NEWS MEDIA
ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-APPELLEES**

[Caption continued on next page]

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CORPORATE DISCLOSURE STATEMENTS

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

What's Happening Inc, DBA Eugene Weekly is a privately owned news organization that has no parent company and issues no stock.

Gales Creek Journal LLC is a wholly-owned subsidiary of Firestarter Media LLC, a holding company owned by Jacob Hundley. Gales Creek Journal LLC and Firestarter Media LLC are both privately held companies with no securities in the hands of the public.

KPTV-KPDX Broadcasting Corporation is a wholly owned subsidiary of Meredith Corporation. Meredith Corporation is a publicly traded company on the New York Stock Exchange under the symbol MDP. Black Rock, Inc., publicly traded on the New York Stock Exchange under the symbol BLK, owns ten percent (10%) or more of Meredith Corporation's stock.

The Malheur Enterprise is a wholly owned subsidiary of Wheatland Publishing Corp., an Oregon corporation engaging in the news business since 1987.

Oregon Lithoprint, Inc., dba News-Register Publishing Co. — wholly-owned by members of the Bladine family — has no parent corporation or outside stock issue.

The Oregon Association of Broadcasters (“OAB”) has no parent corporation and issues no stock.

Oregon Newspaper Publishers Association has no parent corporation and issues no stock.

OPB is a nonprofit public benefit corporation with no parent corporation and issues no stock.

Advance Local Media LLC is a wholly owned subsidiary of Advance Local Holdings Corp., a Delaware corporation. No publicly traded corporation ultimately owns 10% or more of the stock of Advance Local Media LLC.

American City Business Journals, Inc. is a wholly owned subsidiary of Advance Publications, Inc., a privately-held company with no parent corporation. No publicly held corporation owns any of its stock.

Salem Reporter is owned by Salem Reporter LLC, a privately held Oregon corporation established in 2018.

Oregon Territory Chapter of the Society of Professional Journalists has no parent corporation and issues no stock.

TEGNA Inc. has no parent company, and no publicly-held company has a 10% or greater ownership interest in TEGNA, Inc.

Underscore.news is a nonprofit organization that has no parent company and issues no stock.

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press (the “Reporters Committee”), Eugene Weekly, Gales Creek Journal, KPTV-KPDX Broadcasting Corporation, Malheur Enterprise, News-Register Publishing Co., Oregon Association of Broadcasters, Oregon Newspaper Publishers Association, Oregon Public Broadcasting, The Oregonian, Portland Business Journal, Salem Reporter, Society of Professional Journalists, Oregon Territory Chapter, TEGNA Inc. / KGW-TV (Portland), and Underscore.news (collectively, “amici”). A supplemental statement of identity and interest of amici is attached as Appendix A.

As news entities and organizations representing the interests of journalists and media outlets actively engaged in newsgathering and reporting on the ongoing protests in Portland, Oregon, amici have a pressing interest in ensuring the news media’s ability to safely and accurately report on what occurs during those demonstrations, including the manner in which law enforcement officers enforce dispersal orders. Accordingly, amici have a strong interest in the immediate application of the district court’s preliminary injunction order to federal law enforcement—an order that safeguards journalists who are clearly engaged in newsgathering from arrest and physical harm.

Amici write to emphasize the important role played by the news media in

this context, where the public interest in accurate information about the actions of the government and protesters is at its apex. Rigorous protection for the newsgathering rights of journalists covering protests is not only compelled by the First Amendment, it is essential if the press is to fulfill its constitutional obligation to ensure the government is accountable to the people. For the reasons herein, amici urge the Court to deny Defendants-Appellants' Motion for an Emergency Stay.

FED. R. APP. P. 29(A)(4)(E) STATEMENT

Amici declare that:

1. no party's counsel authored the brief in whole or in part;
2. no party or party's counsel contributed money intended to fund preparing or submitting the brief; and
3. no person, other than amici, their members or their counsel, contributed money intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The killing of George Floyd by Minneapolis, Minnesota police on May 25, 2020, spurred widespread protests across the nation; it was estimated in July that between 15 and 26 million people across the country had taken part in those demonstrations demanding racial justice and an end to police violence against Black Americans. Larry Buchanan et al., *Black Lives Matter May be the Largest Movement in U.S. History*, N.Y. Times (Jul. 3, 2020), <https://nyti.ms/2ZqRyOU>. Portland, Oregon, has been the site of especially fervent protests and, while the vast majority of those demonstrations have been peaceful, some have turned violent, prompting responses from law enforcement. *See, e.g.*, Beth Nakamura, *Protest Declared ‘Riot’ in North Portland after Demonstrators, Police Face Off for Hours*, OregonLive (Jul. 14, 2020), <https://perma.cc/CCW3-3TUN>.

As these demonstrations have unfolded, journalists have hastened to the scene in Portland and fanned out across America to document and report on the protests and law enforcement activities, fulfilling their constitutionally recognized role as “surrogates for the public.” *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980)). But instead of protecting—or even permitting—journalists to fulfill this important function, federal law enforcement agents in Portland have repeatedly targeted

journalists with violence, including when those journalists have been clearly identifiable as members of the press and obviously engaged in newsgathering. Dkt.157 at 5–10. The federal government also seeks, in essence, to shut down reporting entirely through purported general “dispersal orders.” Mot. at 2.

The preliminary injunction issued by the district court in this case properly protects the right of the press and public to document the actions of law enforcement in public places—a right this Court has expressly recognized. *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995). It is an appropriately tailored solution to the facts on the ground, balancing the government’s interest in dispersing genuinely unlawful assemblies and the public’s profound interest in monitoring when such dispersal orders are issued and how they are enforced. Given the demonstrable targeting of members of the press by federal agents in Portland, Dkt.157 at 5–10, the preliminary injunction is necessary to ensure that people throughout state of Oregon, and the United States, are fully and accurately informed as to what is occurring on the ground. Accordingly, amici respectfully request that the Court deny Defendants-Appellants’ motion for an emergency stay.

ARGUMENT

I. The district court’s order is an appropriately tailored measure to safeguard the First Amendment rights of the news media.

The government claims that when it determines that an assembly has become “unlawful,” it may issue a dispersal order to disrupt and ultimately bring to an end the assembly, and may then assault or arrest any individual, including members of the press, to effectuate that dispersal order. Mot. at 11–12, 16. As a preliminary matter, the unrestrained use of dispersal orders by government, alone, raises First Amendment concerns. *Cf. Shuttlesworth v. Birmingham*, 394 U.S. 147, 153 (1969) (“Accordingly, although . . . this Court has recognized that a statute may be enacted which prevents serious interference with normal usage of streets and parks, . . . we have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places.” (internal citations omitted)); Garrett Epps, *The Whole Concept of ‘Unlawful Assembly’ is a Mess*, Atlantic (Aug. 9, 2020), <https://perma.cc/W97L-HQ3L>. And, taken to its logical conclusion, the government’s position is that it may arrest or assault any individual clearly engaged in documenting police activity for newsgathering purposes, even when that person is clearly identifiable as a journalist (because she or he is using, for instance, professional recording equipment or wearing a press credential), and

where arresting or assaulting that person would, in no way, serve any reasonable law enforcement interest in the dispersal of an “unlawful” assembly.

This Court has recognized a First Amendment right to record law enforcement activity in public. *Fordyce*, 55 F.3d at 439 (recognizing “First Amendment right to film matters of public interest.”). It has been joined by the First, Third, Fifth, Seventh, and Eleventh Courts of Appeal in recognizing such activity to be constitutionally protected. *See Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017); *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017); *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014); *Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000). Indeed, the United States Department of Justice itself has taken the position that recording law enforcement in public is a crucial First Amendment right. *See* Statement of Interest of the United States, *Sharp v. Baltimore City Police Dep’t*, No. 1:11-cv-02888-BEL (D. Md. filed Jan. 10, 2012) (“[The right to record is] not only required by the Constitution . . . [it is] consistent with our fundamental notions of liberty, promote[s] the accountability of our governmental officers, and instill[s] public confidence in the police officers who serve us daily.”); *see also* Statement of Interest of the United States, *Garcia v. Montgomery County*, No. 8:12-cv-03592-JFM (D. Md. filed March 4, 2013)

(arguing that discretionary charges like disorderly conduct or disturbing the peace should be viewed skeptically when based on recording police activity).

Accordingly, the district court properly recognized that Plaintiffs here, who have been engaged in “newsgathering, documenting, and recording government conduct[,]” have been engaged in First Amendment protected activity. Dkt.157 at 15. Its preliminary injunction effectively stands for one proposition: if an officer knows or has reason to know that an individual is clearly documenting police activity, and is not engaged in unlawful activity, the underlying dispersal order may not be constitutionally applied to permit their arrest or assault. *See id.* at 27–28. It is a tailored solution to the findings of fact in this case, the latter of which are reviewed for clear error. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (quotation and citation omitted).

The preliminary injunction issued by the district court appropriately balances the government’s interest in dispersing assemblies that are genuinely “unlawful” and the public’s powerful interest in monitoring when such dispersal orders are issued and how they are enforced. If anything, by *only* enjoining law enforcement from assaulting and arresting persons who are *clearly* identifiable as journalists, the district court provided an *underinclusive* solution that merely precludes law enforcement from engaging in the most obvious and egregious violations of First

Amendment rights during these protests. *Cf.* Dkt.157 at 5–10 (identifying clear instances of journalists being targeted by federal law enforcement personnel in Portland).

While the government may impose reasonable time, place, and manner restrictions on the exercise of First Amendment rights, *see, e.g., Smith*, 212 F.3d at 1333, a general dispersal order that restricts the ability of individuals who are plainly engaged solely in newsgathering activity is an impermissibly broad intrusion on the First Amendment rights of journalists and the public who depend upon them to receive newsworthy information. Thus, the preliminary injunction at issue is a properly tailored solution that ensures the press is able to fulfill its role in documenting law enforcement activities in public places.

II. There is an overriding public interest in ensuring continued reporting on protests in Portland that the preliminary injunction protects.

In considering whether to grant a stay, this Court is required to evaluate “where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 426 (2009). Here, the public interest weighs heavily and urgently in favor of safeguarding the newsgathering rights of journalists covering the ongoing protests in Portland, Oregon.

Over the course of the last weeks and months, members of the news media, including amici, have worked tirelessly to document the nationwide protests

initially sparked by the police killing of George Floyd on May 25, 2020. *See, e.g., Timeline: Key Events in the Month Since George Floyd's Death*, Reuters, (June 25, 2020, 4:11 AM), <https://reut.rs/2DjGMmO> (collecting stories); Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. Times (Jul. 10, 2020), <https://nyti.ms/3ex6l0y>. News reporting on the response of federal, state, and local law enforcement authorities to those protests has, in particular, provided the public with important context and information about the actions of government. *See, e.g., Dalton Bennett et al., The Crackdown Before Trump's Photo Op*, Wash. Post (Jun. 8, 2020), <https://perma.cc/6VHX-QGUN>; Jonathan Levinson, *Portland Police Under Scrutiny for Dangerous Crowd Control Munitions*, Oregon Public Broadcasting (Jul. 2, 2020), <https://perma.cc/Z2TQ-ED4U?type=image>. Under challenging circumstances, including an ongoing pandemic, journalists have placed themselves at the scene of these mass demonstrations in order to serve as the “watchful eyes” of the public as these events unfold. *Leigh*, 677 F.3d at 897.

The protests have been so widespread that comprehensive reporting by the media is the *only* way for the public to stay informed and abreast of what is occurring in cities and communities across the country. *See Buchanan et al., supra*. And, accurate reporting from local journalists and new organizations in cities like Portland, including amici, have helped counter the spread of dangerous

disinformation about what is actually occurring. *See, e.g.,* Douglas Perry, *How a Bible Burning in Portland Reveals Russia's Efforts to Upend the 2020 U.S. Election*, OregonLive (Aug. 12, 2020), <https://perma.cc/7WUV-GS2Q>; Ali Swenson, *Photos of Injured Police Officers Are Not From Recent Protests*, Associated Press, (Aug. 25, 2020), <https://apnews.com/afs:Content:9258754843> (reporting that photos of injured police officers widely circulating on social media were not from Portland, but Australia between 2006 and 2019); *Navy Vet Beaten by Feds Condemns 'Shocking Attack' on Citizens*, KOIN (Aug. 4, 2020, 12:12 PM), <https://perma.cc/5LZZ-STCD>.

The press, and local journalists and news organizations in particular, have been especially crucial in documenting the activities of, and interactions between, protesters and law enforcement in Portland. *See, e.g.,* Eder Campuzano and Jayatl Ramakrishnan, *Riot Declared as Portland Protesters, Federal Officers Clash in Protest at ICE Building in South Portland*, OregonLive (Aug. 21, 2020), <https://perma.cc/77NG-6BH3>; Nick Budnick, *Rough Justice: Portland Police and Protestors are Locked in a Vicious Cycle*. Underscore (Jul. 22, 2020), <https://perma.cc/H5NE-88SH>; Bryant Clerkley, *'I Had Guns Pointed at Me Several Times': Student Journalist from Salem Covers Protests in Portland*, KGW (Jul. 23, 2020, 7:43 AM), <https://bit.ly/3luVys9>; Jonathan Levinson, et al., *Federal*

Law Enforcement Use Unmarked Vehicles To Grab Protesters Off Portland Streets, Oregon Public Broadcasting (Jul. 16, 2020), <https://bit.ly/2YQL50a>.

Notwithstanding the important work that reporters in Portland and across the United States are doing to report on protests, they have been repeatedly targeted by law enforcement, *even when* clearly identifiable as journalists engaged in newsgathering and reporting. *See, e.g.*, Frances Robles, *A Reporter’s Cry on Live TV: ‘I’m Getting shot! I’m getting shot!’*, N.Y. Times (Aug 10, 2020), <https://nyti.ms/3gCI1fr> (collecting instances). And as the district court found, federal agents in Portland have likewise targeted clearly identifiable members of the press who are simply documenting their actions. Dkt. 157 at 5–10. For example, the district court gave the following description of what occurred to photojournalist Noah Berger, on assignment in Portland for the Associated Press on July 19, 2020:

[A]s federal agents “rushed” an area he was photographing, he held up his press pass, identified himself as press, stated he was leaving, and moved away from the area. While holding his press pass and identifying himself as press, he was hit with a baton by one federal agent. Two others joined and surrounded him, and he was hit with batons three or four times. [] One agent then deployed pepper spray against Mr. Berger from about one foot away. He was given no warning.

Id. (internal citations omitted). Mr. Berger was not demonstrating; he was “clearly acting as a journalist.” *Id.* Indeed, federal agents’ actions in Portland have been so

extreme that even experienced journalists who have covered warzones abroad have stated that they have been shocked by what they have witnessed and experienced. *Id.* at 9–10 (referencing declarations of Daniel Hollis and Jonathan Levinson). At least one photographer said she was so afraid federal agents would injure her that she would refuse to cover the protests again unless she had a bulletproof vest. *Id.* at 9.

As this Court has previously observed, “[t]he free press is the guardian of the public interest, and the independent judiciary is the guardian of the free press.” *Leigh*, 677 F.3d at 900. Protecting the reporters on the ground in Portland from the threat of harm from federal law enforcement—as the preliminary injunction does—is of paramount importance in determining where “the public interest lies.” *Nken*, 556 U.S. at 426.

CONCLUSION

For the foregoing reasons, amici respectfully urge the Court to deny Defendants-Appellees’ Motion for an Emergency Stay.

Dated: September 2, 2020

Respectfully submitted,

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APPENDIX A

Supplemental statement of identity of amici curiae

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

Eugene Weekly, locally owned since 1982, is an alternative news weekly covering news, arts and entertainment in Lane County, Oregon. EW focuses on investigative and solutions journalism that affect the community and the state.

The Gales Creek Journal (formally, Gales Creek Journal LLC) is a news organization headquartered in Gales Creek, Oregon. It publishes the Gales Creek Journal, the Banks Post, and the Salmonberry Magazine.

KPTV-KPDX Broadcasting Corporation owns and operates KPTV (Fox) and KPDX (MyNetwork) in the Portland, Oregon Designated Market Area.

The Malheur Enterprise is a news organization based in Vale, Oregon, that operates a news website and publishes a weekly newspaper primarily serving Malheur County. The Enterprise is represented by its publisher Les Zaitz.

The News-Register Publishing Company, family-owned since 1928, publishes the twice-weekly News-Register community newspaper, in print and online, from offices in McMinnville, OR. We are an active member of Oregon Newspaper Publishers Association, the National Newspaper Association and America's Newspapers, and our journalism interests extend to print services for other newspapers and our own production of specialty publications.

The Oregon Association of Broadcasters ("OAB") is a non-profit trade organization representing approximately 100 radio stations and 25 television stations in Oregon.

Oregon Newspaper Publishers Association is a trade association organized to represent the common interests of Oregon newspapers. One of those interests is to further the public's understanding that strong newspapers are the cornerstone of a democratic society. ONPA represents all the dailies and most of the weeklies in Oregon, currently 96 publications.

Oregon Public Broadcasting (OPB) is a nationally-recognized leader in public media, reaching 1.5 million people across Oregon and southwest

Washington each week through its network of television and radio stations, and robust online programming. With award-winning journalists and original series, OPB's mission is to illuminate the people, places, and issues of the region and put stories into context.

The Oregonian/OregonLive is a news organization based in Portland, Oregon and a division of Advance Local Media LLC. This division publishes The Oregonian newspaper and the website www.oregonlive.com and publishes a variety of digital and mobile news applications. The Oregonian has won Pulitzer Prizes for its journalism, including the award for breaking news reporting in 2007.

The Portland Business Journal, published by American City Business Journals, Inc., is Portland's premier business publication providing comprehensive coverage of the local economic landscape with breaking news, in-depth industry analysis, market leads, and over 35 annual award and networking events.

Salem Reporter is an all-digital news organization based in Salem, Oregon, that operates a news website serving the state's capital city.

The Oregon Territory Chapter of the Society of Professional Journalists ("SPJ Oregon") is dedicated to improving and protecting journalism. It is a chapter of the national Society of Professional Journalists, the nation's most broad-based journalism organization. Founded in 1909 as Sigma Delta Chi, the Society of

Professional Journalists promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists, and protects the First Amendment guarantees of freedom of speech and press. SPJ Oregon maintains a Freedom of Information committee, lobbies on behalf of open records and government transparency and defends press freedom.

TEGNA Inc. owns or services (through shared service or similar agreements) 64 television stations in 52 markets, including KGW-TV, the NBC affiliate in Portland.

Underscore Media Collaboration, Inc., is a nonprofit news organization based in Portland, Oregon. We publish investigative reporting including coverage of Indian Country and disseminate our work by partnering with other media including broadcast, online and print. Our work can be found on our website, underscore.news. Underscore began operations on January 15, 2019.

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