IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

INDEX NEWSPAPERS LLC d/b/a PORTLAND MERCURY; DOUG BROWN; BRIAN CONLEY; SAM GEHRKE; MATHIEU LEWIS-ROLLAND; KAT MAHONEY; SERGIO OLMOS; JOHN RUDOFF; ALEX MILAN TRACY; TUCK WOODSTOCK; JUSTIN YAU; and those similarly situated,

Plaintiffs,

v.

CITY OF PORTLAND; JOHN DOES 1-60; U.S. DEPARTMENT OF HOMELAND SECURITY; and U.S. MARSHALS SERVICE,

Defendants.

Case No. 3:20-cv-1035-SI

OPINION AND ORDER GRANTING PRELIMINARY INJUNCTION AGAINST FEDERAL DEFENDANTS

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Michael H. Simon, District Judge.

"Open government has been a hallmark of our democracy since our nation's founding." *Leigh v. Salazar*, 677 F.3d 892, 897 (9th Cir. 2012). "When wrongdoing is underway, officials have great incentive to blindfold the watchful eyes of the Fourth Estate." *Id.* at 900. "The free press is the guardian of the public interest, and the independent judiciary is the guardian of the free press." *Id.* This lawsuit tests whether these principles are merely hollow words.

Plaintiffs Index Newspapers LLC doing business as Portland Mercury, Doug Brown, Brian Conley, Sam Gehrke, Mathieu Lewis-Rolland, Kat Mahoney, Sergio Olmos, John Rudoff, Alex Milan Tracy, Tuck Woodstock, and Justin Yau (collectively, "Plaintiffs") bring this putative class action against: (1) the City of Portland (the "City"); (2) numerous as-of-yet unnamed individual and supervisory officers of the Portland Police Bureau ("PPB") and other agencies allegedly working in concert with the PPB; (3) the U.S. Department of Homeland Security ("DHS"); and (4) the U.S. Marshals Service ("USMS"). The Court refers to DHS and USMS collectively as the "Federal Defendants." Plaintiffs are journalists and authorized legal

observers. They allege violations of the First and Fourth Amendments of the United States Constitution and Article I, sections 8 and 26 of the Oregon Constitution. Plaintiffs seek declaratory and injunctive relief and money damages.

Before the Court is Plaintiffs' motion for preliminary injunction against the Federal Defendants. Plaintiffs allege that agents of the Federal Defendants from around the United States, specially deployed to Portland, Oregon to protect the federal courthouse, have repeatedly targeted and used physical force against journalists and authorized legal observers who have been documenting the daily Black Lives Matter protests in this city. These federal agents include special tactical units from U.S. Customs and Border Protection under the U.S. Department of Homeland Security ("BORTAC") and other special tactical units from the U.S. Marshals Service under the U.S. Department of Justice ("Special Operations Group" or "SOG").

Although these federal agents are highly trained in some areas of law enforcement, Plaintiffs contend that neither these agents nor their commanders have any special training or experience in civilian crowd control. Plaintiffs allege that some of these officers have intentionally targeted and used physical force and other forms of intimidation against journalists and authorized legal observers for the purpose of preventing or deterring them from observing and reporting on unreasonably aggressive treatment of lawful protesters. In response, the Federal Defendants argue that they are merely protecting the federal courthouse and its personnel from potential or actual violence and that any interference with protected First Amendment activity is merely incidental.

The Ninth Circuit has stated:

> Demonstrations can be expected when the government acts in highly controversial ways, or other events occur that excite or arouse the passions of the citizenry. The more controversial the occurrence, the more likely people are to demonstrate. Some of

> these demonstrations may become violent. The courts have held that the proper response to potential and actual violence is for the government to ensure an adequate police presence and to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure.

Collins v. Jordan, 110 F.3d 1363, 1372 (9th Cir. 1996) (citation omitted). Here, the actions of the Federal Defendants, or at least some of their officers, prevent, deter, or otherwise chill the constitutionally protected newsgathering, documenting, and observing work of journalists and authorized legal observers, who peacefully stand or walk on city streets and sidewalks during a protest. As further explained by the Ninth Circuit in *Collins*:

> It has been clearly established since time immemorial that city streets and sidewalks are public fora. Restrictions on First Amendment activities in public fora are subject to a particularly high degree of scrutiny.

Id. at 1371 (citations and quotation marks omitted).

The Federal Defendants also argue that Plaintiffs are seeking special protections for journalists and legal observers under the First Amendment but that journalists and legal observers are entitled to no greater rights than those afforded to the public generally. In support, the Federal Defendants cite *Branzburg v. Hayes*, 408 U.S. 665, 680-82 (1972), which held that although the First Amendment protects news gathering, it does not provide a reporter's privilege against testifying before a grand jury. In that case, the Supreme Court noted: "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Id.* at 684; *see also Cal. First Amendment Coal. v. Calderon*, 150 F.3d 976, 981 (9th Cir. 1998) (same). The Federal

Defendants argue, in essence, that Plaintiffs' requested preliminary injunction violates the traditional "nondiscrimination" interpretation of the First Amendment's Press Clause.[1]

At first glance, one might think that the journalists and legal observers here are seeking protection against having to comply with an otherwise lawful order to disperse from city streets after a riot has been declared, when the public generally does not have that protection. When local law enforcement lawfully declares a riot and orders people to disperse from city streets, generally they must comply or risk arrest. The question of whether journalists have any greater rights than the public generally, however, is not actually presented in the pending motion for preliminary injunction. That is because the *Federal Defendants* are not asserting that *they* have the legal authority to declare a riot and order persons to disperse from the city streets in Portland; nor does the authority they cite for their presence and actions in Portland so provide.[2] It is only

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[1] This traditional interpretation may be undergoing a reevaluation. *See, e.g.,* Sonja R. West, *Favoring the Press*, 106 CAL. L. REV. 91, 94 (2018) ("The nondiscrimination view of the Press Clause is deeply flawed for the simple reason that the press is different and has always been recognized as such."). "Barring the government from recognizing the differences between press and non-press speakers threatens to undermine the vital role of the Fourth Estate." *Id.* (footnote omitted). "It is, therefore, entirely in keeping with the text, history, and spirit of the First Amendment's Press Clause for the government to, at times, treat press speakers differently." *Id.* at 95. "Rather than lump the press together with other speakers, the Supreme Court has historically done just the opposite." *Id.*

[2] The Federal Defendants cite 40 U.S.C. § 1315 and its implementing regulations. That statute authorizes DHS to "protect the buildings, grounds, and property that are owned, occupied, or secured by the Federal Government." § 1315(a). The governing regulations prohibit, as relevant here: (1) disorderly conduct for persons "entering in or on Federal property," 41 C.F.R. § 102-74.390; (2) persons "entering in or on Federal property" from improperly disposing of rubbish on property, willfully damaging property, creating a hazard on property, or throwing articles at a building or climbing on any part of a building, 41 C.F.R. § 102-74.380; and (3) requiring that "[p]ersons in and on property" must obey "the lawful direction of federal police officers and other authorized individuals." 41 C.F.R. § 102-74.385. This latter regulation, although not specifically stating on "federal" property, has been construed as including this requirement, that the persons be on federal property. *See United States v. Baldwin*, 745 F.3d 1027, 1029 (10th Cir. 2014) (then-Circuit Judge, now Justice Gorsuch) ("The first says '[p]ersons in and on [Federal] property must at all times comply . . . with the lawful direction of Federal police officers and other authorized individuals.'" (alterations in original) (quoting 41

state and local law enforcement that may lawfully issue an order declaring a riot or unlawful assembly on city streets. That is simply part of a state or city's traditional police power.

Here, Plaintiffs and the City have already *stipulated* to a preliminary injunction that provides that the Portland Police will not arrest any journalist or authorized legal observer for failing to obey a lawful order to disperse. Thus, the question of whether an otherwise peaceful and law-abiding journalist or authorized legal observer has a First Amendment right not to disperse when faced with a general dispersal order issued by state or local authorities does not arise in this motion.[3]

C.F.R. § 102-74.385); *see also United States v. Estrada-Iglesias*, 425 F. Supp. 3d 1265, 1270 (D. Nev. 2019). Thus, 40 U.S.C. § 1315 and its regulations give federal officers broad authority *on federal property*. They do not, however, give federal officers broad authority off federal property. The authority granted off federal property is limited—to perform authorized duties "outside the property to the extent necessary to protect the property and persons on the property." § 1315(b)(1). These authorized duties include enforcing federal laws (which as relevant here are laws limited to persons on federal property), making arrests if federal crimes are committed in the presence of an officer, and conducting investigations on and off the property for crimes against the property or persons on the property. § 1315(b)(2). None of these powers include declaring a riot or an unlawful assembly on the streets of Portland, closing the streets of Portland, or otherwise dispersing people off the streets of Portland (versus dispersing people off federal property).

The Federal Defendants appear to acknowledge this limitation in their powers. DHS Operation Diligent Valor commander Gabriel Russell states in his declaration that in response to violent protests, Federal Protective Services ("FPS") officers warned protesters to "stay off federal property," used tear gas to "push protesters back from the [federal] courthouse," contacted the PPB who were about to declare an unlawful assembly, the Portland Police "arrived and closed all roads in the vicinity of the facilities[,] . . . . declared an unlawful assembly and began making arrests for failure to disperse," and the FPS only "made dispersal orders on federal property and cleared persons refusing to comply with these orders." ECF 67-1 at 2. He also testified at deposition that generally FPS does not have authority to enforce a dispersal order against an unlawful assembly on Fourth Street, one block from the federal courthouse. ECF 136-1 at 22 (63:12-18). The Federal Defendants also cite to statutes and regulations that authorize the USMS to protect federal courthouses and other federal property, including 28 U.S.C. § 566(a), 28 U.S.C. § 566(i), 28 C.F.R. § 0.111(f). As with the statutes and regulations governing DHS's authority, these authorities focus on federal property, not on city streets or state or local property.

[3] Someday, a court may need to decide whether the First Amendment protects journalists and authorized legal observers, as distinct from the public generally, from having to comply with

Plaintiffs and the Federal Defendants have stipulated that an evidentiary hearing with live witness testimony is unnecessary and that the Court may base its decision on the written record and oral argument of counsel. For the reasons that follow, the Court GRANTS Plaintiffs' motion for preliminary injunction against the Federal Defendants.

STANDARDS

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 22 (2008). A plaintiff seeking a preliminary injunction generally must show that: (1) he or she is likely to succeed on the merits; (2) he or she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his or her favor; and (4) that an injunction is in the public interest. *Id.* at 20 (rejecting the Ninth Circuit's earlier rule that the mere "possibility" of irreparable harm, as opposed to its likelihood, was sufficient, in some circumstances, to justify a preliminary injunction).

The Supreme Court's decision in *Winter*, however, did not disturb the Ninth Circuit's alternative "serious questions" test. *See All. for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1131-32 (9th Cir. 2011). Under this test, "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Id.* at 1132. Thus, a preliminary injunction may be granted "if there is a likelihood of irreparable injury to plaintiff; there are serious questions going to the merits; the balance of hardships tips sharply in favor of the plaintiff; and the injunction is in the public interest." *M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th Cir. 2012).

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an otherwise lawful order to disperse from city streets when journalists and legal observers seek to observe, document, and report the conduct of law enforcement personnel; but today is not that day.

BACKGROUND

A. Procedural History

Plaintiffs filed their original Complaint against the City on June 28, 2020. On June 30th, Plaintiffs moved for a TRO. On July 2nd, the Court entered a TRO against the City. On July 14th, Plaintiffs moved to file a Second Amended Complaint ("SAC"), adding the Federal Defendants to this lawsuit. On July 16th, the Court entered a stipulated preliminary injunction against the City. On July 17th, the Court granted Plaintiffs' motion to file the SAC. Later that day, Plaintiffs filed their SAC and moved for a TRO against the Federal Defendants, which the City supported shortly thereafter. On July 23rd, the Court granted Plaintiffs' motion for a TRO against the Federal Defendants, including many of the same terms contained in the TRO and stipulated preliminary injunction entered against the City. The TRO against the Federal Defendants was set to expire by its own terms on August 6th. On July 28th, Plaintiffs moved for a finding of contempt and imposition of sanctions against the Federal Defendants, alleging several violations of the Court's TRO. On July 30th the Federal Defendants moved for reconsideration of the TRO, requesting that it be dissolved. On July 31st the Court stayed briefing on Plaintiffs' contempt motion. On August 4th, Plaintiffs moved to extend the TRO against the Federal Defendants for an additional 14 days. On August 6th, after finding good cause, the Court granted Plaintiffs' motion and extended the TRO against the Federal Defendants through August 20th and denied the Federal Defendants' motion for reconsideration.

B. Plaintiffs

Plaintiff Index Newspapers LLC doing business as Portland Mercury ("Portland Mercury") is an alternative bi-weekly newspaper and media company. It was founded in 2000 and is based in Portland, Oregon. ECF 53, ¶ 21.

Plaintiff Doug Brown has attended many protests in Portland, first as a journalist with the *Portland Mercury* and later as a volunteer legal observer with the ACLU. He has attended the George Floyd protests on several nights, wearing a blue vest issued by the ACLU that clearly identifies him as a legal observer, for the purpose of documenting police interactions with protesters. ECF 9, ¶¶ 1-2; ECF 53, ¶¶ 22, 97; ECF 55, ¶ 2.

Plaintiff Brian Conley has been a journalist for twenty years and has trained journalists in video production across a dozen countries internationally. He founded Small World News, a documentary and media company dedicated to providing tools to journalists and citizens around the world to tell their own stories. ECF 53, ¶ 131.

Plaintiff Sam Gehrke has been a journalist for four years. He previously was on the staff of the *Willamette Week* as a contractor. He is now a freelance journalist. His work has been published in *Pitchfork*, *Rolling Stone*, *Vortex Music*, and *Eleven PDX*, a Portland music magazine. He has attended the protests in Portland for the purpose of documenting and reporting on them, and he wears a press pass from the *Willamette Week*. ECF 10, ¶¶ 1-3; ECF 53, ¶ 23.

Plaintiff Mathieu Lewis-Rolland is a freelance photographer and photojournalist who has covered the ongoing Portland protests. He has been a freelance photographer and photojournalist for three years and is a contributor to *Eleven PDX* and listed on its masthead. After the Court issued its TRO directed against the City, he began wearing a shirt that said "PRESS" in block letters on both sides. He also wears a helmet that says "PRESS" on several sides, and placed reflective tape on his camera and wrist bands. ECF 12, ¶¶ 1-2; ECF 53 ¶ 24; ECF 77, ¶ 1, 3.

Plaintiff Kat Mahoney is an independent attorney and unpaid legal observer. She has attended the Portland protests nearly every night for the purpose of documenting police

interactions with protesters. She wears a blue vest issued by the ACLU that clearly identifies her as an "ACLU LEGAL OBSERVER." ECF 26, ¶ 3; ECF 75, ¶¶ 1-2.

Plaintiff Sergio Olmos has been a journalist since 2014, when he began covering protests in Hong Kong. He has worked for *InvestigateWest* and *Underscore Media Collaboration*, and as a freelancer. His work has been published in the *Portland Tribune*, *Willamette Week*, *Reveal: The Center for Investigative Reporting*, *Crosscut*, *The Columbian*, and *InvestigateWest*. He has attended the protests in Portland as a freelance journalist for the purpose of documenting and reporting on them. He wears a press badge and a Kevlar vest that says "PRESS" on both sides. He carries several cameras, including a film camera, in part so that it is unmistakable that he is present in a journalistic capacity as a member of the press. ECF 15, ¶¶1-3; ECF 53, ¶ 26.

Plaintiff John Rudoff is a photojournalist. His work has been published internationally, including reporting on the Syrian refugee crises, the "Unite the Right" events in Charlottesville, Virginia, the Paris "Yellow Vest" protests, and the Rohingya Genocide. He has attended the protests in Portland during the past two months for the purpose of documenting and reporting on them. Since this lawsuit began, he has been published in *Rolling Stone*, *The Nation*, and on the front page of the *New York Times*. While attending the Portland protests, he carries and displays around his neck press identification from the National Press Photographers Association, of which he has been a member for approximately ten years. He also wears a helmet and vest that is clearly marked "PRESS." ECF 17, ¶¶ 1-3; ECF 53, ¶ 27; ECF 59, ¶¶ 1, 3.

Plaintiff Alex Milan Tracy is a journalist with a master's degree in photojournalism. His photographs have been published by CNN, ABC, CBS, *People Magazine*, *Mother Jones*, and *Slate*, among others. He has covered many of the recent protests in Portland over George Floyd

and police brutality. He carries a press badge and three cameras, and wears a helmet that is marked "PRESS" on the front and back. ECF 60, ¶¶ 1, 3.

Plaintiff Tuck Woodstock has been a journalist for seven years. Their work has been published in the *Washington Post*, *NPR*, *Portland Monthly*, *Travel Portland*, and the *Portland Mercury*. They have attended the George Floyd protests several times as a freelancer for the *Portland Mercury* and more times as an independent journalist. When they attended these protests, they wear a press pass from the *Portland Mercury* that states "MEDIA" in large block letters and a helmet that is marked "PRESS" on three sides. At all times during police-ordered dispersals, they hold a media badge over their head. ECF 23, ¶¶ 2-3; ECF 76, ¶¶ 1, 3.

Plaintiff Justin Yau is a student at the University of Portland studying communications with a focus on journalism. He previously served in the U.S. Army, where he was deployed to the Middle East. He has covered protests in Hong Kong and Portland. His work has been published in the *Daily Mail*, *Reuters*, *Yahoo! News*, *The Sun*, *Spectee* (a Japanese news outlet), and msn.com. He has attended the protests in Portland as a freelance and independent journalist for the purpose of documenting and reporting on them. He wears a neon yellow vest marked with reflective tape and a helmet that are marked "PRESS," and carries his press pass around his neck. He carries a large camera, a camera gimbal (a device that allows a camera to smoothly rotate), and his cellphone for recording. ECF 56, ¶¶ 1-3.

C. Plaintiffs' Alleged Harm

Plaintiffs and other declarants have provided numerous declarations describing events in which they assert that employees, agents, or officers of the Federal Defendants targeted journalists and legal observers and interfered with their ability to engage in First Amendment-protected activities. As discussed below, Plaintiffs provide many compelling examples in the record, some from before the Court entered the TRO against the Federal Defendants and some

after. The following are just several examples selected by the Court from the extensive evidence provided by Plaintiffs. There are more.

1. Before the TRO was Issued

On July 15, 2020, Plaintiff Justin Yau asserts that, while carrying photojournalist gear and wearing reflective, professional-looking clothing clearly identifying him as press, he was targeted by a federal agent and had a tear gas canister shot directly at him. ECF 56, ¶¶ 3-6. Two burning fragments of the canister hit him. *Id.* ¶ 6. At the time he was fired upon, he was taking pictures with his camera and recording with his cell phone while standing 40 feet away from protesters to make it clear that he was not part of the protests. *Id.* ¶ 5. Mr. Yau notes that from his experience covering protests in Hong Kong, "Even Hong Kong police, however, were generally conscientious about differentiating between press and protesters—as opposed to police and federal agents in Portland." *Id.* ¶ 7.

Declarant Noah Berger has been a photojournalist for more than 25 years. ECF 72, ¶ 1. He has been published nationally and internationally, including for coverage of protests in San Francisco and Oakland. *Id.* On July 19, 2020, he covered the protests on assignment for the Associated Press. He notes that the response he has seen and documented from the federal agents in Portland is markedly different from even the most explosive protests he has covered. *Id.* ¶ 3. He carries two large professional cameras and two press passes. *Id.* He states that without any warning he was shot twice by federal agents using less lethal munitions. *Id.* ¶ 4. Later, as 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. *Id.* ¶ 7. While holding his press pass and identifying himself as press, he was hit with a baton by one federal agent. *Id.* ¶ 8. Two others joined and surrounded him, and he was hit with batons three or four times. *Id.* One agent then deployed pepper spray against Mr. Berger from about one foot away. *Id.* ¶ 9. He was given no

warning. *Id.* ¶ 11. He states that he was not demonstrating or protesting, was leaving the area, and was clearly acting as a journalist. *Id.* ¶¶ 3, 11.

Late July 19th or early July 20th, Declarant Nathan Howard, a photojournalist who has been published in *Willamette Week*, *Mother Jones*, Bloomberg Images, Reuters, and the Associated Press, was covering the Portland protests. ECF 58, ¶¶ 1, 4. He was standing by other journalists, and no protesters, as federal agents went by. *Id.* ¶ 4. The nearest protester was a block away. *Id.* Mr. Howard held up his press pass and repeatedly identified himself as press. *Id.* ¶ 5. A federal agent stated words to the effect of "okay, okay, stay where you are, don't come closer." *Id.* ¶ 6. Mr. Howard states that another federal agent, who was standing immediately to the left of the agent who gave Mr. Howard the "okay," aimed directly at Mr. Howard and fired at least two pepper balls at him at close range. *Id.* ¶ 7.

Declarant Jungho Kim is a photojournalist whose work has been published in the *San Francisco Chronicle* and *CalMatters*, among others. ECF 62, ¶ 1. He wears a neon yellow vest marked "PRESS" and a white helmet marked "PRESS" in the front and rear. *Id.* ¶ 2. He has covered protests in Hong Kong and California. He has experience with staying out of the way of officers and with distinguishing himself from a protester, such as by not chanting or participating in protest activity. *Id.* ¶ 3. He had never been shot at by authorities until covering the Portland protests on July 19, 2020. *Id.* During the protest, federal agents pushed protesters away from the area where Mr. Kim was recording. He was around 30 feet away from federal agents, standing still, taking pictures, with no one around him. *Id.* ¶¶ 5-7. He asserts that suddenly and without warning, he was shot in the chest just below his heart with a less lethal munition. *Id.* ¶ 7. Because he was wearing a ballistic vest, he was uninjured. He also witnessed, and photographed, federal agents firing munitions into a group of press and legal observers. *Id.* ¶ 9.

Declarant Nate Haberman-Ducey is a law student at Lewis and Clark Law School. ECF 61, ¶ 1. He completed training with the National Lawyers Guild ("NLG") and attended the protests several times as a legal observer. *Id.* He states that on July 19, 2020, while wearing his green, NLG-issued authorized legal observer hat, he was shot in the hand with a paint-marking round by a federal agent, while walking his bicycle through the park across from the federal courthouse. *Id.* ¶¶ 3-4. At the time, there were no other protestors or other people around Mr. Haberman-Ducey at whom the federal agent might have been aiming. *Id.* ¶ 5. The pain from injury to Mr. Haberman-Ducey's right hand was so severe that he had to stop observing the protests and go to the emergency room, where doctors put his broken hand in a splint. *Id.* ¶¶ 7-8. He would like to keep observing the protests but is concerned that residue from tear gas fired by the federal agents will contaminate his splint, which he has to wear for four to six weeks. *Id.* ¶ 9.

Declarant Amy Katz is a photojournalist whose work has been published in the *Wall Street Journal*, the *New York Daily News*, the *Guardian*, *TIME*, *Mother Jones*, the *Independent*, the *New York Times*, and has been featured on Good Morning America and ABC News. ECF 117, ¶ 1. While covering the protests, she wears a hat and tank top marked with "PRESS" in bold letters and carries a camera with a telephoto lens. *Id.* ¶ 2. Early in the morning of July 21st, she was filming from the side while federal agents dispersed protestors. *Id.* ¶ 4-6. Several agents tried to disperse her, but she displayed her press pass and they left her alone. *Id.* ¶ 6. She asserts that a federal agent approached and motioned for her to disperse again a few minutes later. *Id.* ¶ 7. Ms. Katz again held up her press pass, but before she could process what was happening another agent fired pepper balls or similar munitions at her. *Id.* The first agent then dropped a tear gas grenade directly at her feet as Ms. Katz ran away, yelling that she was press. *Id.* She notes that there were no protestors the agents could have been aiming at because the protesters

had already dispersed. *Id.* ¶ 8. The effects of the tear gas forced her to stop reporting and return to her hotel. *Id.* ¶ 9. The next day her eyes and lips burned, sunlight hurt her eyes, her tongue was swollen, and she had diarrhea. *Id.*

Declarant Sarah Jeong is an attorney, a columnist for *The Verge*, and a contributing writer to the *New York Times* Opinion section. ECF 116, ¶ 1. She attended the protests solely as a journalist, wore her press badge, and wore a helmet with "PRESS" in black letters on a white background on three sides. *Id.* ¶ 4. On the night of July 21st, Ms. Jeong was covering the protests from the steps of the courthouse when federal agents emerged from the building and charged the crowd. *Id.* ¶ 5. Ms. Jeong walked slowly backward, holding her press pass up in one hand and her phone in the other. *Id.* ¶ 6. With no warning and for no apparent reason, a federal agent shoved Ms. Jeong so forcefully that both her feet left the ground. *Id.* ¶ 7. She kept reporting that night but left much earlier than she had planned. *Id.* ¶ 8. Although she plans to keep covering the protests, she is fearful for her safety. *Id.*

Declarant James Comstock is a legal observer with the NLG. ECF 63, ¶ 1. On July 19th, a few minutes before midnight, he was watching the protests from the park across the street from the protests. *Id.* ¶ 2-3. He was wearing the standard NLG-issued green hat provided to legal observers. *Id.* ¶ 2. As protestors started to push the fence, he put on his gas mask and started to move away from the courthouse because he did not want to get tear gassed. *Id.* ¶ 3. He stopped on the opposite side of 4th Avenue, about 375 feet away from the front door of the courthouse. *Id.* He went to speak to a press member standing on the intersection of SW 4th and Main. *Id.* ¶ 4. After finishing his conversation with the press member, Mr. Comstock was standing in the same location alone with his back up against the wall. *Id.* Without warning, a federal agent shot Mr. Comstock in the hand with an impact munition while he was making notes on his phone. *Id.* ¶ 5.

There were no protestors around and he was at least 6 feet from the reporter with whom he had just been speaking. *Id.* ¶ 6. Mr. Comstock states that he would like to keep attending the protests as a legal observer but that he is afraid of injury and fearful that he will be wrongfully arrested, endangering his job as a criminal defense investigator. *Id.* ¶¶ 8-9.

Early morning on July 22nd, Plaintiff Alex Milan Tracy was standing in the street and filming a group of federal officers who were standing on the sidewalk in front of the courthouse. ECF 74, *Id.* ¶ 4. Two of the officers from that group waved their batons at him and gestured for him to move back. *Id.* He retreated, and one of the officers briefly charged at him. Mr. Tracy then moved back farther into the middle of the street. *Id.* A few minutes later, he was filming the same group of federal officers from the same spot in the middle of the street. *Id.* ¶ 6. Agents from that same group raised their weapons and launched a flashbang at Mr. Tracy and another journalist, hitting them both. *Id.* ¶ 7. Mr. Tracy continued documenting the scene but finally left because the federal officers kept looking and pointing directly at him. *Id.* ¶¶ 7, 10. He was "genuinely terrified" of standing in front of the federal officers. *Id.* ¶ 10.

2. After the TRO was Issued

Plaintiff Brian Conley has worked in war zones such as Iraq, Afghanistan, Libya, and Burundi. ECF 87, ¶ 1. He also has covered protests for many years in places such as Beijing, New York, Washington, D.C., Miami, Quebec City, and Oaxaca, Mexico. *Id.* He has encountered agents of the Federal Defendants in Portland on multiple days. At all times he was wearing a photographer's vest with "PRESS" written on it and a helmet that said "PRESS" in large block letters across the front. *Id.* ¶ 2. He was also carrying a large camera with an attached LED light and telephoto lens. *Id.*

Early in the morning of July 24th, Mr. Conley filmed federal agents seizing a woman who was dancing with flowers in front of the officers. *Id.* ¶ 3-4. At that point, the crowd was

mostly press and a few individual protestors. *Id.* ¶ 3. Federal agents launched tear gas into the streets, and Mr. Conley yelled that he was press to avoid being further tear gassed. *Id.* ¶ 6. Mr. Conley was then shot with impact munitions in the chest and foot. *Id.* ¶ 7. Video of this event shows that the situation grew tense as a protester attempted to interfere with the agents' seizure of the woman. As the agents finalized the seizure of the woman and the interfering protester and retreated into the federal courthouse with the woman and the interfering protester, they laid sweeping cover fire into the remaining crowd, which included Mr. Conley and other press members, even though no protester was near Mr. Conley at the time. After the officers were safely within the building, Mr. Conley continued recording. The video shows that Mr. Conley was outside next to another photographer. A medic and his protector were behind a shield on one side several yards away and a protester yelling taunts was on the other side several yards away. As Mr. Conley was filming, a federal agent on the other side of the courthouse fence shone a bright light at Mr. Conley. Shortly thereafter, without warning, a federal agent shot a tear gas canister above Mr. Conley's head. Mr. Conley also describes this in his declaration. *Id.* ¶ 9.

Mr. Conley took the next two nights off and returned to cover the protests the night of July 27th. *Id.* ¶¶ 17, 18. He was documenting a line of federal agents advancing on a group of six protestors with shields who were standing behind him. *Id.* ¶ 18. He yelled that he was press, but the federal agents unleashed a barrage of munitions at him. *Id.* ¶ 19. He moved to the side, away from the protestors, and continued to yell that he was press. *Id.* ¶ 20. The federal agents briefly stopped firing, one shone a flashlight at him, and resumed fire directly at him, striking him multiple times—although by this point there was nobody else near him. *Id.* Another federal agent threw a flashbang grenade directly at him. *Id.* Mr. Conley could "barely walk" after the events of July 27-28. *Id.* ¶ 25.

Mr. Conley was covering the protests again just before midnight on July 29th. ECF 115, ¶ 4. He had replaced the "PRESS" lettering on his helmet because the concussion and flashbang grenades thrown at him the night before had blown off one of the letters. *Id.* ¶ 2. He was filming federal agents on SW Salmon Street between SW 2nd and SW 3rd Avenue. *Id.* ¶ 4. There was one other photographer between him and the small group of agents. *Id.* One of the agents shone a light on Mr. Conley and fired a munition just beside him. *Id.* Another federal agent with an assault rifle approached Mr. Conley and told him to stay on the sidewalk. *Id.* ¶ 5. Later that night, without warning, federal agents pepper sprayed Mr. Conley at point blank range. *Id.* ¶ 6. Video of this event shows that while Mr. Conley was filming a line of federal officers moving down the street pepper spraying peaceful protesters, including spraying a woman in the face at point blank range who was on her knees with her hands up in the middle of the street, an officer pepper sprayed Mr. Conley at point blank range along with indiscriminately pepper spraying other press and the protesters. Mr. Conley states that he fears for his safety but plans to keep covering the protests because he believes "it is critically important to do so." *Id.* ¶ 11.

Declarant Amy Katz again covered the protests on the early morning of July 27th. ECF 117, ¶ 10. She witnessed a federal agent push a man down a flight of stairs while arresting him and photographed the incident. *Id.* An agent physically blocked her and tried to stop her from photographing the arrest. *Id.* When she stepped to the side to get another angle, the federal agent physically shoved her away. *Id.* Later that night, she approached a group of federal officers with a group of press, all of whom had their press badges up and their hands in the air. *Id.* ¶ 12. The video of this event shows that many of the group were calling out "press." Ms. Katz describes that she and the group of press were at least 75 feet away from most of the protestors when federal agents bombarded their group with munitions, hitting her in the side and causing a

large contusion. *Id.* The video shows the group of press moving together off to the far side of the sidewalk, holding their passes up along with cameras, shouting press and saying "hold your passes up." The group is moving toward the federal officers, recording events, when they are fired upon with various munitions. Ms. Katz stopped covering the Portland protests after that incident because of how the federal agents treated her. *Id.* ¶ 15.

Declarant Rebecca Ellis is a staff reporter for Oregon Public Broadcasting ("OPB"). ECF 88, ¶ 1. She attended the protests the night of July 23rd wearing her OPB press pass, which shows her name, her photograph, and the OPB logo. *Id.* ¶ 2-3. Around 1:30 a.m. she was in a small group of press members filming federal agents exiting the federal courthouse. *Id.* ¶ 3. One agent fired a munition directly at her, hitting her in the hand. *Id.* Video of this incident shows that she is hit when agents advance in a group and fire multiple munitions. Ms. Ellis appears to be in the middle of the street when she is hit. There are also persons crossing in front of Ms. Ellis, who appear also to be press, at the time she is shot. It is unclear who is behind her when she is hit. Ten minutes later, however, federal agents forced her and other press to disperse from near the courthouse. *Id.* ¶ 5. One agent walked towards them shouting "MOVE, MOVE" and "WALK FASTER" in their faces while another agent kept pace next to him, holding his gun. *Id.* Video of this dispersal shows that it is directed at press, in an intimidating manner, despite a press person stating, "You can't do that." The video does not seem to support that the press were in the way or otherwise impeding law enforcement actions. Ms. Ellis states that the federal agents prevented her from doing her job and reporting on what was going on behind them. She intends to keep covering the protests but is fearful for her safety. *Id.* ¶ 6.

Declarant Kathryn Elsesser is a freelance photographer whose photographs of the Portland protests have been published by Bloomberg, CBS News, and Yahoo, among others,

including many international publications. ECF 89, ¶ 1. She covered the protests the night of July 24th on assignment from a French news agency. *Id.* ¶ 2. She carried a large camera, wore a press pass from the American Society of Media Photographers, and wore a helmet with "PRESS" written in big letters across the front. *Id.* Around 2 a.m. on July 25th, Ms. Elsesser decided to end her coverage early because she did not have a bullet-proof vest and was afraid federal agents would hurt her. *Id.* ¶ 4. She was standing by herself, across the street from the courthouse, at the edge of the park. *Id.* There was nobody else near her. *Id.* A federal agent shot her in the arm with an impact munition as she was walking away. *Id.* ¶ 5. She believes that the federal agents targeted her because she was taking photographs. *Id.* ¶ 6. Ms. Elsesser states that she would refuse to cover the protests again unless she had a bullet-proof vest because she is afraid that federal agents will injure her or worse. *Id.* ¶ 13.

Declarant Emily Molli is a freelance photojournalist whose photographs have been published in the *New York Times*, the *Wall Street Journal*, the *Guardian*, *ProPublica*, and others. ECF 118, ¶ 1. She is experienced in covering civil unrest, riots, and other dangerous situations. She has reported on the protests in Hong Kong over the course of six months, the "Yellow Vests" in France over the course of a year, the Catalan independence movement, and the protests and riots in Greece. *Id.* ¶ 2. She understands the risk of getting hit by less lethal munitions while standing with protesters, but she objects to federal officers targeting press, which she states she has witnessed happening in Portland. *Id.* She wears a helmet with "PRESS" in big block letters and carries two press passes and a large professional-grade video camera. *Id.* ¶ 3. Early in the morning of July 27, 2020, after getting shot and injured when she had been approximately 75 yards from protesters, Ms. Molli decided to stick with a group of only journalists. *Id.* ¶¶ 7-8. The video of this event shows that they were holding their press passes up, mostly staying together as

a group, and staying toward the side of a street that appears otherwise empty. Federal officers fired munitions at the group of journalists. *Id.* ¶ 8. On July 29, 2020 and into the early morning of July 30th, Ms. Molli recorded another encounter between journalists and federal officers on SW Main Street. *Id.* ¶ 10. Video of this event shows that there were numerous law enforcement personnel, several journalists, and no protesters on that section of the street. Journalists are taking pictures and video of a tear gas canister that had been fired by federal agents when a federal agent fires another tear gas round at the journalists. Ms. Molli intends to keep covering the protests, but she fears for her safety because she has seen the federal agents disobey a court order. *Id.* ¶ 11.

Declarant Daniel Hollis is a videographer for VICE News. ECF 91, ¶ 1. He has covered many chaotic and dangerous situations, including conflict zones in Iraq and Syria, former Taliban areas in Pakistan, child sex-trafficking raids in the Philippines, Iranian militias, gangs, mafia, domestic terrorism, and armed militias. *Id.* He covered the Portland protests for two nights. *Id.* ¶ 2. During the protests, he carried a VICE press pass and a helmet with "PRESS" on it in bright orange tape. *Id.* He also carried a large, professional video-recording camera. *Id.* On July 26th, Mr. Hollis was filming wide-angle footage of a mass of protestors in front of the courthouse. *Id.* ¶ 4. The people closest to him were press and legal observers—the nearest protestors were several yards behind him. *Id.* ¶ 7. He then turned to record a group of federal agents massed outside the courthouse. *Id.* ¶ 5. Almost immediately, the agents shot at him, striking him just to the left of his groin. *Id.* He turned to run away, and another munition hit him in the lower back. *Id.* ¶ 6. Video of this event shows that Mr. Hollis was positioned between the federal agents and those few protesters (not the mass of protesters who were around the building), but the video does not reflect any violent or riotous behavior by anyone near Mr.

Hollis. After the federal agents shot him, Mr. Hollis went back to his hotel. *Id.* ¶ 8. He states that he is more concerned for his personal safety than he was during the month he spent covering ISIS sleeper cells in Northern Syria. *Id.* ¶ 9. He states: "I have been around heavily armed soldiers, militias, and gangs countless times, but have never had weapons aimed or discharged directly at me. The federal agents I have seen in Portland have been less willing to distinguish between press and putative enemies than any armed combatants I have seen elsewhere." *Id.*

Declarant Jonathan Levinson is an Oregon resident who lives in Portland. ECF 93, ¶ 1. He is a staff reporter for OPB. His work also has appeared on NPR and ESPN, and in the *Washington Post*, the *Wall Street Journal*, and *Al Jazeera*. *Id.* He has experience in conflict zones. He spent five years as an infantry officer in the U.S. Army, with two deployments to Iraq. *Id.* ¶ 2. As a reporter, he has covered the Libyan civil war and done work in Afghanistan, Yemen, Gaza, and the West Bank. *Id.* He has covered the Portland protests for a majority of the nights. When covering the protests, he wears his press pass issued by OPB, which contains his name, photograph, the OPB logo, and the word "MEDIA." *Id.* ¶ 3. He also wears a helmet that says "PRESS" in large letters on the front and back and carries two professional cameras. *Id.* At around 1:00 a.m. on July 24th, the federal agents had cleared the area next to the courthouse so he decided to take pictures of the agents through the courthouse fence. *Id.* ¶ 4. There were very few protesters anywhere nearby. As he was trying to focus his professional camera, he could see a federal agent raise and aim his weapon and fire several rounds directly at Mr. Levinson. *Id.* ¶ 5. His camera and lens were covered in paint from the agent's rounds. Mr. Levinson states that he intends to continue covering the protests because he believes they are of historic significance, but that he is fearful for his safety because within hours of the Court issuing its restraining order, he "saw federal agents brazenly violate it." *Id.* ¶ 7.

D. Declarations of Plaintiffs' Expert Witness Gil Kerlikowske[4]

Plaintiffs submitted two declarations from Mr. Gil Kerlikowske, whom the Court finds to be a qualified, credible, and persuasive expert witness. ECF 135, 145. Mr. Kerlikowske is a former Commissioner of U.S. Customs and Border Protection, and he was confirmed by the U.S. Senate. Mr. Kerlikowske also served as the Chief of Police in Seattle, Washington from 2000 through 2009, and the Police Commissioner in Buffalo, New York. He has worked in law enforcement for 47 years. He served in the United States Army and Military Police from 1970 through 1972, where he began training in crowd control, riots, and civil disturbances. He also has served as the Director of the Office of National Drug Control Policy and as Deputy Director of the U.S. Department of Justice, Office of Community Oriented Policing Services. He has been an IOP Fellow at Harvard Kennedy School of Government and teaches as a distinguished visiting fellow and professor of the Practice in Criminology and Criminal Justice at Northeastern University. During his tenure as Chief of Police in Seattle, Mr. Kerlikowske led and orchestrated the policing of hundreds of large and potentially volatile protests, many of which were considerably larger than the recent protests in Portland. He did the same thing when he was Police Commissioner in Buffalo. Mr. Kerlikowske has had substantial training and experience with crowd control and civil unrest in the context of protests, use of force in that context, and use of force generally.

[4] After oral argument, the Federal Defendants filed the Declaration of Chris A. Bishop, the "Acting Director/Deputy Director," for the U.S. Department of Homeland Security, U.S. Customs and Border Protection (CBP). ECF 152. The Federal Defendants offer this declaration as an expert rebuttal to the two declarations of Mr. Kerlikowske. Plaintiffs have moved to strike Mr. Bishop's declaration as untimely. ECF 154. The Court denies Plaintiffs' motion to strike. The Court finds the declaration of Mr. Kerlikowske to be more persuasive than the declaration of Mr. Bishop.

Plaintiffs asked Mr. Kerlikowske to evaluate whether the relief stated in the TRO against the Federal Defendants is both safe and workable from a law enforcement perspective, whether the force that federal authorities used against journalists and legal observer complainants was reasonable, and whether it is advisable to prominently mark federal agents with unique identifying letters or numbers. First, Mr. Kerlikowske opined that the prohibitions contained in the TRO are safe for law enforcement personnel. Defending the federal courthouse in Portland mainly involves establishing a perimeter around the building, and there is no reason to target or disperse journalists from that position. Additionally, to the extent officers leave federal property, the TRO is also safe for federal law enforcement officers, according to Mr. Kerlikowske.

Second, Mr. Kerlikowske stated his expert opinion that the TRO is workable. He states that trained and experienced law enforcement personnel are able to protect public safety without dispersing journalists and legal observers and can differentiate press from protesters, even in the heat of crowd control. He adds that any difficulties that may be faced by federal authorities arise from their lack of training, experience, and leadership with experience in civil disturbances and unrest.

Third, Mr. Kerlikowske explains that based on his review of the record evidence virtually all the injuries suffered by the complaining journalists were the result of improper use of force, including shooting people who were not engaged in threatening acts and misuse of crowd-control munitions by federal law enforcement personnel. For example, Mr. Kerlikowske opines that tear gas canisters and pepper balls should not be fired directly at people. He also opines that rubber bullets should not be shot above the waist, and certainly not near the head. He further opines that in these circumstances, it is inappropriate to shoot someone in the back because at that point they are not a threat.

Finally, Mr. Kerlikowske asserts that in his expert opinion a key duty and responsibility of law enforcement is to be properly and easily identifiable specific to the organization and the individual. He notes that if a decision is made to remove a name tag, it must be replaced with some other identifying label, badge, or shield number. Mr. Kerlikowske explains that such markings increase accountability and act as a check and deterrent against misconduct. He adds that camouflage uniforms are inappropriate for urban settings.

As noted, the Court finds Mr. Kerlikowske to be a well-qualified expert whose opinions are relevant, helpful, and persuasive.

E. The Situation Faced by Law Enforcement

After the killing of George Floyd on Memorial Day, there have been consistent protests against racial injustice and police brutality in Portland. ECF 67-1, Russell Decl. ¶ 3. The protesters generally are peaceful, particularly during the day and early evening. *See* ECF 113-3, Jones Decl. ¶ 7. Late at night, however, there are incidents of vandalism, destruction of property, looting, arson, and assault. ECF 67-1, ¶ 3. While protestors originally gathered outside the Justice Center (PPB headquarters), some protestors soon directed their attention to the Mark O. Hatfield Federal Courthouse, across the street from the Justice Center. After additional federal officers were deployed to Portland to support existing Federal Protective Service ("FPS") and USMS personnel, the protests grew larger and more intense, and the federal courthouse became a focus of attention. *Id.* at ¶ 5.

In early July, a group of people broke the glass doors at the entryway of the federal courthouse. *Id.* Members of this group used accelerant and commercial fireworks in an apparent attempt to start a fire inside the courthouse. *Id.* On other nights in July, various objects were thrown at law enforcement, such as rocks, glass bottles, and frozen water bottles. *Id.* at ¶ 6; ECF 101-6, CBP NZ-1 Decl. ¶ 8. Assistant Director for the Tactical Operations Division of the

USMS Andrew Smith describes the environment of the protests as "extremely chaotic and dynamic" and emphasizes that law enforcement must make split-second decisions. ECF 101-1, Smith Decl., ¶ 6. A DHS Public Affairs Specialist identified as CBP PAO #1 states that he observed a person holding a Molotov cocktail. ECF 101-2, ¶ 7. Officers have had to extinguish fires and flaming debris, some of which has been thrown over the fence in officers' direction. *See* ECF 106-1, Smith Am. Decl. ¶ 15; ECF 101-3, FPS No. 824 Decl. ¶ 5.

The situation has been dangerous for federal agents, in addition to protesters, journalists, and legal observers. Gabriel Russell, FPS Regional Director for Region 10 and commander of DHS's Rapid Deployment force for Operation Diligent Valor in Portland, notes that as of his declaration submitted on July 29th, 120 federal officers had experienced some kind of injury, including broken bones, hearing damage, eye damage, a dislocated shoulder, sprains, strains and contusions. ECF 101-5, ¶ 4. The Patrol Agent in Charge of Customs and Border Protection, U.S. Border Patrol, identified as CBP NZ-1, describes agents being hit with rocks and ball bearings from sling shots, improvised explosives, commercial grade aerial fireworks, high intensity lasers targeting officer's eyes, thrown rocks, full and empty glass bottles, frozen water bottles, and balloons filled with paint and feces. ECF 101-6, ¶ 8. He notes that one officer was hit by a projectile that caused a wound that required multiple stitches and one officer was struck in the head and shoulder by a protester wielding a sledgehammer when the officer tried to prevent the protester from breaking down the courthouse door. *Id.* Another federal officer states that he has suffered numerous injuries during the protests, including being struck in the shins by tear gas canisters, suffering temporary hearing loss from commercial fireworks, and suffering temporary blindness from lasers. ECF 101-3, FPS No. 824 Decl. ¶ 6. The Federal Defendants do not assert

that journalists or legal observers caused these injuries. *See, e.g.*, ECF 136-3 at 10-11, CBP NZ-1 Dep. Tr. 72:10-73:1.

The Federal Defendants, however, do assert that some persons wearing the indicia of press have engaged in violent or unlawful behavior. Mr. Smith states that USMS personnel witnessed a person with a helmet marked "press" use a grinder to attempt to breach the fence surrounding the courthouse. ECF 106-1, ¶ 10. Another person wearing a press helmet entered courthouse property, either by climbing the perimeter fence or crossing when the fence was breached. *Id.* ¶ 11. A different person with press clothing helped a protestor climb the perimeter fence. *Id.* at ¶ 14. Mr. Smith also received a report that a staff member was kicked by someone wearing clothing marked "press." *Id.* at ¶ 15.

Mr. Russell submitted links to several videos purporting to show improper conduct by persons with indicia of press. ECF 101-5, ¶ 8. The Court reviewed those videos and did not find persuasive evidence of any wrongdoing related to persons wearing indicia of press with two exceptions. The first are the videos of Mr. Brandon Paape, who admits that he is not press but is wearing clothing marked "press" because he was assaulted by federal agents and hoped wearing clothing that indicates he is press would protect him from further violence. *Id.* ¶ 8(e), (f). The videos, however, do not provide evidence that Mr. Paape did anything unlawful. He masqueraded as press for personal protection. Additionally, shortly thereafter, he posted on Twitter that he will no longer wear indicia of press. *See* ECF 123 at 12. The videos of Mr. Paape do show, however, that persons other than actual journalists have worn indicia of press. The second is the video of a person wearing a "press" helmet who entered courthouse property and encouraged others to join. ECF 101-5, ¶ 8(h). He states: "They can't arrest us all." This, however, is the same person from Mr. Smith's photograph, ECF 106-1 ¶ 11 (Exhibits B and C).

The Federal Defendants also provide additional declarations describing further conduct. A man wearing a vest stating "press" threw a hard object toward police. ECF 101-3, FPS No. 824 Decl., ¶ 5. Another such person shielded from police a woman who was shining strobe lights into the eyes of an officer. *Id.* One person with handwritten markings reading "PRESS" directed a powerful flashlight at a law enforcement helicopter overhead but was not filming or taking photos or notes. ECF 101-2, CBP PAO #1 Decl. ¶ 9. A photo of this man depicts him standing very close to another man holding a camera. *Id.* It is unclear if the man with the powerful light was lighting for the cameraman or was masquerading as press to use light as a law enforcement irritant. Another federal officer states that on one occasion he witnessed persons wearing press indicia shield other persons who were throwing objects at law enforcement. ECF 101-4, FPS No. 882 Decl. ¶ 5. Finally, CBP PAO #1 notes that people self-identified as press are frequently in the midst of crowds near individuals breaking laws, which makes it difficult to disperse protestors without dispersing journalists as well. ECF 101-2, ¶ 12. The Federal Defendants also consistently note that press intermingle with protesters and stand by (or perhaps record) when protesters engage in purportedly wrongful conduct.

DISCUSSION

A. Standing

The Federal Defendants argue that Plaintiffs do not have standing to request injunctive relief. The Federal Defendants concede that "the standing inquiry is focused on the filing of the lawsuit" but then assert that standing must be proven at "successive stages of the litigation" and make the same standing arguments that they made during the TRO. In issuing the Temporary Restraining Order Enjoining Federal Defendants, the Court rejected the Federal Defendants' arguments regarding standing and found that Plaintiffs had Article III standing. *See Index Newspapers LLC v. City of Portland*, --- F.3d ---, 2020 WL 4220820, at *4-5 (D. Or. July 23,

2020). To the extent the Federal Defendants request reconsideration of that decision, arguing that based on facts as they existed at the time of the filing of the Complaint Plaintiffs do not have standing, reconsideration is denied.[5] The Federal Defendants provide no compelling basis for the Court to modify its previous determination.

To the extent the Federal Defendants argue that Plaintiffs must continue to prove standing as this lawsuit continues and the facts evolve, the Federal Defendants misunderstand the doctrines of standing and mootness. Article III standing is evaluated by considering the facts as they existed at the time of the commencement of the action. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (noting that "we have an obligation to assure ourselves that FOE had Article III standing at the outset of the litigation"); *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 838 (9th Cir. 2007) ("The existence of standing turns on the facts as they existed at the time the plaintiff filed the complaint.").

Whether standing and the other requirements for a live case or controversy exists throughout the entirety of a case is considered under the doctrine of mootness. *See Barry v. Lyon*, 834 F.3d 706, 714 (6th Cir. 2016) ("To uphold the constitutional requirement that federal courts hear only active cases or controversies, as required by Article III, section 2 of the federal constitution, a plaintiff must have a personal interest at the commencement of the litigation (standing) that continues throughout the litigation (lack of mootness)."); *Vasquez v. Los Angeles*

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[5] The Federal Defendants offer no authority for the notion that this Court must repeatedly litigate the same issue. The Federal Defendants are bound by the "law of the case" doctrine for determinations made by this Court, absent reconsideration or changed circumstances such as if new Plaintiffs were added who the Federal Defendants contended did not have standing. At any appeal stage of this litigation, however, "the standing requirement therefore must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019) (simplified).

Cty., 487 F.3d 1246, 1253 (9th Cir. 2007) (noting that mootness is the doctrine under which courts ensure that "a live controversy [exists] at all stages of the litigation, not simply at the time plaintiff filed the complaint"); *Becker v. Fed. Election Comm'n*, 230 F.3d 381, 386 n.3 (1st Cir. 2000) (noting that *Lujan* "clearly indicat[es] that standing is to be 'assessed under the facts existing when the complaint is filed'" and that evaluating standing thereafter "conflates questions of standing with questions of mootness: while it is true that a plaintiff must have a personal interest at stake throughout the litigation of a case, such interest is to be assessed under the rubric of standing at the commencement of the case, and under the rubric of mootness thereafter"); *McFalls v. Purdue*, 2018 WL 785866, at *8-10 (D. Or. Feb. 8, 2018) (discussing the difference between standing and mootness). Therefore, the Federal Defendants' arguments that Plaintiffs must demonstrate standing at "all stages of the litigation," fail to do so now, and thus fail to present a case or controversy are more appropriately raised under the doctrine of mootness, to which the Court now turns. *See, e.g.*, *Barry*, 834 F.3d at 714; *Vasquez*, 487 F.3d at 1253; *Becker*, 230 F.3d at 386 n.3; *Tellis v. LeBlanc*, 2020 WL 1249378, at *5 (W.D. La. Mar. 13, 2020); *Rhone v. Med. Bus. Bureau, LLC*, 2019 WL 2568539, at *3 (N.D. Ill. June 21, 2019); *Fancaster, Inc. v. Comcast Corp.*, 2012 WL 815124, at *5 (D.N.J. Mar. 9, 2012).

B. Mootness

The Federal Defendants do not specifically argue that Plaintiffs' claims are moot based on any new facts or circumstances. Because the Federal Defendants appear to argue that Plaintiffs now lack standing based on changed circumstances, the Court considers whether the Federal Defendants' voluntary change in enforcement tactics moots Plaintiffs' claims. The augmented force of federal enforcement officers currently remain in Portland, ready to deploy whenever ordered, but have recently deployed only in limited circumstances and have not

recently engaged in the crowd control tactics that supported the Court's original TRO in this case.

For a short time, the Oregon State Police took the lead in enforcing crowd control in Portland. That appears to have ended, and the Portland Police have now resumed performing that role. The out-of-town agents and officers of the Federal Defendants who have been deployed to Portland, however, and whose actions were the basis of the Court's TRO, remain in Portland. Further, they have no scheduled date of departure.

To determine mootness, "the question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be *any* effective relief." *Nw. Envtl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1244-45 (9th Cir. 1988) (emphasis in original) (quoting *Garcia v. Lawn*, 805 F.2d 1400, 1403 (9th Cir. 1986)). If a course of action is mostly completed but modifications can be made that could alleviate the harm suffered by the plaintiff's injury, the issue is not moot. *Tyler v. Cuomo*, 236 F.3d 1124, 1137 (9th Cir. 2000). A case becomes moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quotation marks omitted). The party alleging mootness bears a "heavy burden" to establish that a court can provide no effective relief. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (quoting *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006)).

Further, voluntary cessation of conduct moots a claim only in limited and narrow circumstances. As explained by the Supreme Court:

> The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave the defendant free to return to his old ways. A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to

> recur. Of course it is still open to appellees to show, on remand, that the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary. This is a matter for the trial judge. But this case is not technically moot, an appeal has been properly taken, and we have no choice but to decide it.

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 n.10 (1982) (simplified); *see also F.T.C. v. Affordable Media*, 179 F.3d 1228, 1238 (9th Cir. 1999) ("A case may become moot as a result of voluntary cessation of wrongful conduct only if 'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" (quoting *Lindquist v. Idaho State Bd. of Corr.*, 776 F.2d 851, 854 (9th Cir. 1985))). The Ninth Circuit has noted that "an executive action that is not governed by any clear or codified procedures cannot moot a claim." *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015). The Ninth Circuit also advises courts to be "less inclined to find mootness where the new policy could be easily abandoned or altered in the future." *Rosebrock v. Mathis*, 745 F.3d 963, 972 (9th Cir. 2014) (simplified).

The Federal Defendants' voluntary change in enforcement tactics does not moot Plaintiffs' claims. There remains effective relief that the Court can provide for Plaintiffs. Further, the change in enforcement tactics is not part of any clear or codified procedures. It could easily be abandoned or altered in the future. Indeed, the Federal Defendants have stated that they specifically intend to abandon or alter in the future the current posture and become actively involved again if local police do not perform in a manner acceptable to the Federal Defendants or are otherwise unable to secure the federal courthouse in Portland in a manner acceptable to the Federal Defendants.[6] Whether this current and potentially temporary change in enforcement tactics affects Plaintiffs' likelihood of irreparable harm is addressed in Section D.2 below.

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[6] *See, e.g.*, ECF 147-1 at 3 (USMS responding to a Request for Admission that it would no longer police Portland protests by stating: "USMS cannot know whether state law

C. Factors for Preliminary Injunctive Relief

1. Likelihood of Success on the Merits

Plaintiffs allege both First Amendment retaliation and a violation of their First Amendment right of access.[7] Plaintiffs must show a likelihood of success on the merits (or at least substantial questions going to the merits) on at least one of these two claims. Plaintiffs satisfy this requirement.

a. First Amendment Retaliation

To establish a claim of First Amendment retaliation, Plaintiffs must show that: (1) they were engaged in a constitutionally protected activity; (2) the Federal Defendants' actions would chill a person of ordinary firmness from continuing to engage in the protected activity; and

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enforcement efforts will continue or whether those efforts will sufficiently protect federal property" and providing a nearly identical response in denying a request for admission that USMS would not engage with journalists or legal observers at a Portland protest); ECF 147-2 at 3 (USMS responding to an interrogatory regarding its plans to remove the additional support personnel sent to Portland: "With respect to the withdrawal of additional personnel deployed to Portland, their withdrawal will depend on unknown future circumstances in Portland and presence of any threat to the federal judiciary or property."); ECF 147-3 at 3 (DHS providing nearly identical responses to the similar Requests for Admission); ECF 147-4 at 4 (DHS responding that the "cessation of Operation Diligent Valor will depend on unknown future circumstances in Portland. . . . The other DHS officers and agents deployed to Portland to assist FPS in the protection of the Hatfield U.S. Courthouse and federal facilities in Portland will remain in Portland until the Department makes an operational security determination that their presence is no longer required to protect federal facilities there."); ECF 147-4 at 3 (DHS affirming as truthful the statements in the press release filed with the Court in ECF 124-1, including the statement from Acting Secretary Chad Wolf that "the increased federal presence in Portland will remain until [DHS] is certain the federal property is safe and a change in posture will not hinder DHS's Congressionally mandated duty to protect it. While the violence in Portland is much improved, the situation remains dynamic and volatile, with acts of violence still ongoing, and no determination of timetables for reduction of protective forces has yet been made. Evaluations remain ongoing.").

[7] Plaintiffs also allege claims under the Fourth Amendment and Oregon's state Constitution, but did not argue those claims in their motion for preliminary injunction. Thus, the Court only considers Plaintiffs' likelihood of success on their First Amendment claims.

(3) the protected activity was a substantial or motivating factor in the Federal Defendants' conduct. *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 770 (9th Cir. 2006). For the first factor, Plaintiffs have shown that they are engaged in constitutionally protected activity under the First Amendment. Plaintiffs are engaged in newsgathering, documenting, and recording government conduct. *See, e.g.*, *Leigh*, 677 F.3d at 898 (recognizing First Amendment protection for "the press and public to observe government activities"); *United States v. Sherman*, 581 F.2d 1358, 1360 (9th Cir. 1978) (noting that the "ability to gather the news" is "clearly within the ambit of the First Amendment"). The Federal Defendants do not dispute this factor.

Regarding the second factor, the Federal Defendants argue that Plaintiffs' assertion that they intend to continue to cover the protests in Portland or that they have a continuing fear of future physical force or threat by the Federal Defendants is subjective and insufficient. The Court rejects that argument. The enforcement tactics of the Federal Defendants would chill a person of ordinary firmness from continuing to engage in the protected activity. "Ordinary firmness" is an objective standard that will not "allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity." *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999). Before the TRO was in place, Plaintiffs submitted numerous declarations, photographs, and videos describing and depicting instances when journalists and legal observers were targeted. This includes Mr. Howard being shot at close range despite complying with a federal officer's order to stay where he was. It also includes Mr. Kim and Mr. Yau being shot when they were not near protesters. It further includes Mr. Berger being beaten with a baton.

The Court also has reviewed all of the testimony and videos submitted by Plaintiffs after the Court issued its TRO. Although some of that evidence is ambiguous or less persuasive, some

of it describes or shows conduct that appears to target journalists and legal observers, as opposed to incidentally or inadvertently reaching them as part of reasonable crowd control or enforcement against violent offenders. This evidence includes a federal officer forcing reporter Ms. Ellis to disperse on July 24, 2020 in a manner that would be intimidating to a reasonable person, despite the Court's TRO providing that press shall not be required to disperse. It also includes a federal officer spraying mace or pepper spray directly into the faces of clearly marked legal observers from only a few feet away. The evidence further includes a federal officer shooting a less lethal munition on July 23rd directly at Mr. Conley and another photographer, both clearly identifiable as press, after shining a bright light on them to identify them, and when the person nearest to them was a clearly identified medic standing behind a shield several feet away. It also includes video from Ms. Molli in the early morning of July 30, 2020, one week after the TRO was issued, showing law enforcement agents firing on a group of journalists when only other law enforcement agents were nearby.

The declarations submitted both before and after the TRO also describe that because of the Federal Defendants' conduct, journalists and legal observers were forced to stop newsgathering, documenting, and observing for minutes, hours, or days due to injury and trauma. This includes Mr. Haberman-Ducey being unable to observe due to his broken hand, Mr. Rudoff being unable to return for two days due to being shot in the leg, Mr. Conley having to take some time away because he could "barely walk" after his injuries, Ms. Elsesser stating that she would refuse further assignments in Portland unless she was provided with a bullet proof vest because of her injuries, Mr. Hollis leaving early after he was shot, and Ms. Jeong leaving earlier than she had planned.

Indeed, some journalists decided never to return because of fear for their personal safety. *See, e.g.*, ECF 81 at 4 (Mr. Steve Hickey stating: "I do not intend to continue covering the protests in Portland after tonight, in part because I am fearful that federal agents will injure me even more severely than they did on the night of July 19 and morning of July 20 when they intentionally shot at my face, twice, when I was not even near any protestors."); ECF 117 at 5 (Ms. Katz stating: "Because of how federal agents treated me, I have stopped covering the Portland protests."). Most of the declarants, however, emphasize that they intend to continue covering or observing the protests despite their fear of continued injury or targeting by the Federal Defendants. This fear is not unreasonable or speculative. Plaintiffs and the other declarants were repeatedly subject to violent encounters with federal officers when covering the Portland protests. It is not hypothetical or mere conjecture. Instead, it is likely that they and other journalists and legal observers will face such treatment again if they cover protests in Portland policed by agents of the Federal Defendants. Moreover, the mere threat of harm, without further action, can have a chilling effect. *Brodheim v. Cry*, 584 F.3d 1262, 1270 (9th Cir. 2009).

The Court recognizes that that there are some violent individuals at these protests, including some who throw dangerous items at law enforcement officers, such as rocks, frozen water bottles, fireworks, and Molotov cocktail-type devices. Law enforcement also face arson events, including in dumpsters and debris being piled and set on fire. The situation can be dangerous and difficult for law enforcement. The fact that there are some violent offenders, however, does not give the Federal Defendants carte blanche to attack journalists and legal observers and infringe their First Amendment rights. *See Black Lives Matter Seattle-King Cty. v. City of Seattle, Seattle Police Dep't*, 2020 WL 3128299, at *3 (W.D. Wash. June 12, 2020). Further, many declarants note that they have covered protests in war zones around the world and

in areas with riotous protests such as Hong Kong, Oakland, and Seattle, and have never been subjected to the type of egregious and violent attacks by law enforcement personnel as they have suffered in Portland. If military and law enforcement personnel can engage around the world without attacking journalists, the Federal Defendants can respect Plaintiffs' First Amendment rights in Portland, Oregon.

In addition, the change in enforcement tactics does not serve to remove the chilling effect of the Federal Defendants' conduct for the same reason it does not moot Plaintiffs' claims. It is subject to change without notice and whenever the Federal Defendants assert that it is needed. It also has been the subject of conflicting public statements, which would not give a person of ordinary firmness confidence that the Federal Defendants are not poised and ready to return to the streets of Portland at any moment and to continue with the previous modus operandi.

Regarding the third factor, the Federal Defendants argue that Plaintiffs fail to show that any protected activity was a substantial or motivating factor in any purported conduct. The Federal Defendants assert that in every video submitted by Plaintiffs after the TRO went into effect, every journalist or authorized legal observer who was purportedly targeted was standing between law enforcement officers and protesters and sometimes also standing next to or behind protesters. Thus, argue the Federal Defendants, legal observers and journalists were not being intentionally targeted but merely were "inadvertently" hit. The Federal Defendants conclude that the circumstantial evidence does not support any retaliatory intent, and Plaintiffs have not shown a likelihood of success on the merits.

The Court reaches a different conclusion from the evidence. The issue is not as simple as whether a legal observer is standing "between" law enforcement personnel and protesters. For example, the Court's view of the two videos showing the pepper spray or mace attack on the

legal observers reveals that this evidence supports the finding that journalists or legal observers were targeted and not inadvertently hit. They were standing together along the fence protecting the courthouse. There may have been protesters at some point standing behind them, although not close behind them, based on the video. Thus, the journalists or legal observers may have been "between" the law enforcement at the fence and some set of protesters further back from the fence. But based on the video, it is clear that the pepper spray was not aimed at protesters standing further back from the fence. The spray appears to have been intentionally directed at close range into the faces and eyes of the journalists or legal observers.

Additionally, from the Court's review, there are videos showing journalists not standing in between law enforcement and protesters, yet they also appear to have been targeted by agents of the Federal Defendants. For example, the video from Mr. Conley from July 24, 2020, from the time count of approximately 6:30 to 7:40, supports the finding that he was targeted. Federal agents fired on him when he was not near protesters, after he had repeatedly identified himself as press, after many federal officers had returned to the courthouse and were safe from the volatile situation of apprehending the woman and the man who had attempted to interfere with the woman's apprehension, and after the pan of Mr. Conley's camera showed that the nearest person was another photographer. The next two nearest people were yards away and were on one side a medic behind a shield and on the other side a single protester yelling taunts. A federal officer shone a bright light at Mr. Conley, making his and his neighboring photographer's press status even more identifiable, and then fired at Mr. Conley.

The Court also finds it to be a reasonable interpretation[8] that Ms. Ellis and another journalist were targeted when on July 24, 2020, they were forced to disperse, despite the TRO and their clearly identifiable status as press. Further, the Court finds that the video posted by Ms. Molli from early morning on July 30th supports a finding of targeting. This video shows journalists taking video and pictures of a munition that had been fired by federal officers. There were only a handful of journalists and many law enforcement officers, no protesters. Suddenly, one officer fired a less-lethal munition directly at the journalists recording the events.

Moreover, there are declarations that do not have video. The Federal Defendants do not address these. For example, Ms. Elsesser states that on July 25th she was standing by herself, across the street from the courthouse, with no protesters around when she was shot with a munition in the back of her arm. Ms. Katz states that on July 27th she was attempting to photograph the arrest of a protester when a federal agent physically blocked her. When she took a step to the side to get another angle, he physically shoved her away. These videos and declarations are all circumstantial evidence supporting retaliatory animus.

The Federal Defendants cite two unpublished Ninth Circuit decisions in support of their argument that in responding to some violent offenders in protesting crowds, any incidental burden on the First Amendment rights of journalists and legal observers is acceptable. These unpublished—and thus non-precedential—cases are unpersuasive. The Court follows published Ninth Circuit precedent, including *Collins*, which instructs that the proper response to violence is to arrest the violent offenders, not prophylactically suppress First Amendment rights. *See Collins*, 110 F.3d at 1372.

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[8] The Court makes no determination regarding clear and convincing evidence needed for a finding of contempt.

The Federal Defendants also argue that they have a formal policy of supporting First Amendment rights and contend that Plaintiffs fail to show otherwise. The Federal Defendants may not, however, hide behind a formal policy if in practice they do not conform to that policy. *See Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1075 n.10 (9th Cir. 2016) (en banc) (noting that a defendant cannot escape its "actual routine practices" by "pointing to a pristine set of policies"). At this stage of the litigation, the Court is persuaded by the number of alleged acts and the expert testimony of Mr. Kerlikowske that the conduct of the federal officers has not been reflective of a policy or practice of respecting First Amendment rights. Mr. Kerlikowske opines that the federal officers repeatedly have engaged in excessive force against journalists and legal observers, have not used appropriate crowd control tactics, and improperly have fired at the head, heart, and backs of journalists and legal observers when such conduct is generally not permitted. Even the Federal Defendants' own witnesses have conceded that shooting persons in such a manner is inappropriate. *See, e.g.*, ECF 136-2 at 13, FPS 824 Dep. Tr. 34:14-21 (testifying that shooting a person in the back who is not doing anything violent is not appropriate); ECF 136-3 at 8, CBP NZ-1 Dep. Tr. 37:18-25 (testifying that shooting a person in the back is not something that an agent or officer should do). Mr. Kerlikowske also opines that the augmented federal force deployed in Portland does not have the appropriate training for policing urban protests and crowd control and does not have the appropriate supervision and leadership. The Court finds these opinions persuasive, and they provide further circumstantial evidence of retaliatory intent.

In sum, Plaintiffs provide substantial circumstantial evidence of retaliatory intent to show, at the minimum, serious questions going to the merits. Plaintiffs submit numerous declarations and other video evidence describing and showing situations in which the declarants

were identifiable as press, were not engaging in unlawful activity or even protesting, were not standing near protesters, and yet were subjected to violence by federal agents under circumstances that appear to indicate intentional targeting. Contrary to the Federal Defendants' arguments, this evidence does not show that the force used on Plaintiffs was merely an "inadvertent" consequence of otherwise lawful crowd control. Also, Plaintiffs submit expert testimony opining about repeated instances of excessive force being used against journalists and legal observers and failures of training and leadership with the augmented federal force sent to Portland, which is further circumstantial evidence supporting Plaintiffs' claim. Thus, Plaintiffs' have shown the elements of First Amendment retaliation.

b. Right of Access to Public Streets and Sidewalks

The First Amendment prohibits any law "abridging the freedom of speech, or of the press[.]" U.S. Const., amend. I. Although the First Amendment does not enumerate special rights for observing government activities, "[t]he Supreme Court has recognized that newsgathering is an activity protected by the First Amendment." *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978); *see Branzburg*, 408 U.S. at 681 ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.").

As the Ninth Circuit has explained: "the Supreme Court has long recognized a qualified right of access for the press and public to observe government activities." *Leigh*, 677 F.3d at 898. By reporting about the government, the media are "surrogates for the public." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (Burger, C.J., announcing judgment); *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 91 (1975) ("[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations."). As further described by the Ninth Circuit, "[w]hen wrongdoing is

underway, officials have great incentive to blindfold the watchful eyes of the Fourth Estate." *Leigh*, 677 F.3d at 900 (quoting Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 949 (1992) (alteration in original) ("[W]hen the government announces it is excluding the press for reasons such as administrative convenience, preservation of evidence, or protection of reporters' safety, its real motive may be to prevent the gathering of information about government abuses or incompetence.")).

The Federal Defendants argue that journalists have no right to stay, observe, and document when the government "closes" public streets. This argument is not persuasive. First, the Federal Defendants are not the entities that "close" state and local public streets and parks; that is a local police function.[9] Second, the point of a journalist observing and documenting government action is to record whether the "closing" of public streets (*e.g.*, declaring a riot) is lawfully originated and lawfully carried out. Without journalists and legal observers, there is only the government's side of the story to explain why a "riot" was declared and the public streets were "closed" and whether law enforcement acted properly in effectuating that order. Third, the Federal Defendants have not shown that any journalist or legal observer has harmed any federal officer or damaged any federal property, and if any journalist, legal observer, or person masquerading as a journalist or legal observer were to attempt to do so, the preliminary injunction would not protect them. Thus, the stated need to protect federal property and the safety of federal officers is not directly affected by allowing journalists and legal observers to stay, observe, and record events.

The Federal Defendants argue that Plaintiffs improperly rely on *Press-Enterprise Co. v. Superior Court* ("*Press-Enterprise II*"), 478 U.S. 1 (1986), to articulate the standard to apply in

[9] *See* n.2, *supra*.

evaluating likelihood of success in Plaintiffs' claim of right of access. The Court rejects this aregument.

In *Press-Enterprise II*, the Supreme Court established a two-part test for a claim of violation of the right of access. First, the court must determine whether a right of access attaches to the government proceeding or activity by considering whether the place and process have historically been open to the press and general public and whether public access plays a significant positive role in the functioning of the particular process in question. *Press-Enterprise II*, 478 U.S. at 8-9. Second, if the court determines that a qualified right applies, the government may overcome that right only by demonstrating "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 9 (citation omitted); *see also Leigh*, 677 F.3d at 898 (discussing *Press-Enterprise II*). The public streets, sidewalks, and parks historically have been open to the press and general public,[10] and public observation of law enforcement activities in these public fora plays a significant positive role in ensuring conduct remains consistent with the Constitution.

The Federal Defendants argue that they have a strong and overriding government interest in protecting federal property. The Court agrees that protecting federal property is a strong

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[10] The Federal Defendants argue that the proper question is whether there historically was access after the closure order that is at issue—the unlawful assembly declaration and dispersal order. The Court disagrees that access is evaluated after the closure that is challenged. Access is considered before the closure that is challenged to determine whether the closure is unduly burdening First Amendment rights. For example, the Supreme Court in *Press-Enterprises II* did not evaluate whether the press and public had access to preliminary criminal proceedings that were subject to a legitimate closure order, but whether they had access to preliminary criminal proceedings generally. 478 U.S. at 10. Even if the Federal Defendants' assertion of how to frame the first question in *Press-Enterprises II* is correct, however, as noted above, it is not at issue in this motion because the City previously has stipulated that even after it has declared an unlawful assembly and issued a lawful dispersal order on state and local property, journalists and authorized legal observers may remain.

government interest, but the Federal Defendants must craft a narrowly tailored response to achieve that government interest without unreasonably burdening First Amendment rights. The Federal Defendants simply assert that dispersing everyone is as narrowly tailored as possible and to allow anyone to stay after a dispersal order is not practicable or workable. The record, however, belies this assertion.

The City, by stipulated preliminary injunction, does not require journalists and authorized legal observers to disperse, even when there has been an otherwise lawful general order of dispersal. After issuing the first TRO directed against the City, the Court specifically invited the City to move for amendment or modification if the original TRO was not working or to address any problems at the preliminary injunction phase. Instead, the City *stipulated* to a preliminary injunction that was nearly identical to the original TRO, with the addition of a clause relating to seized property. The fact that the City did not ask for any modification and then stipulated to a preliminary injunction is compelling evidence that exempting journalists and legal observers is workable.[11] Moreover, the City supports Plaintiffs' request for an injunction against the Federal Defendants, both the TRO and this preliminary injunction. Additionally, as discussed previously, Plaintiffs' expert witness Mr. Kerlikowske provides qualified, relevant, and persuasive testimony

[11] At oral argument, counsel for the City noted that the City might request from Plaintiffs a possible modification to the stipulated preliminary injunction. The City noted it had encountered some issues with persons with "press" markings intermingling with protesters and interfering with law enforcement. The Federal Defendants argue that this is "proof" that the preliminary injunction is "unworkable." Whether the City might request a modification at some point in the future, however, is not evidence of unworkability. Additionally, the City's stipulated preliminary injunction does not contain the indicia of journalists and legal observers that they "stay to the side" and not intermix with protesters, which is included in the preliminary injunction below, and does not contain the express prohibition on press and legal observers impeding, blocking, or interfering with law enforcement activities, which also is included below. Further, the fact that there might be room for improvement of a preliminary injunction does not make it unworkable. The Court is mindful not to let the perfect be the enemy of the good.

showing that the relief provided in the TRO against the Federal Defendants is workable. He also explains that during his tenure in Seattle, law enforcement did not target or disperse journalists and there were no adverse consequences. Numerous declarants also testified that they were not dispersed during protests in other locations. Thus, it is workable and feasible to disperse protesters generally but not require the dispersal of journalists and authorized legal observers. The Federal Defendants' blanket assertion that federal officers must disperse everyone is rejected.

Further, the Federal Defendants' objections to the workability of the TRO primarily focus on concerns regarding when journalists and legal observers "intermingle" with protesters. The first concern is that federal officers will violate the injunction if a journalist or legal observer is subject to crowd control tactics when mixed with the crowd. The preliminary injunction contains protections for this scenario. It adds, different from the TRO, the indicia of a journalist and legal observer that they stay to the side of the protest and not intermix with protesters. It also retains the protection for law enforcement that the incidental exposure of journalists and legal observers to crowd control devices is not a violation of the injunction.

The Federal Defendants' second concern with the intermingling of journalists and legal observers and protesters is that journalists and legal observers may interfere with law enforcement, particularly if allowed to stay after dispersal order. The preliminary injunction, however, retains the TRO's instruction that journalists and legal observers must comply with all laws other than general dispersal orders. For further clarity, the preliminary injunction expressly adds the provision that journalists and legal observers may not impede, block, or otherwise interfere with the lawful conduct of the federal officers.

The Federal Defendants also express concern that persons may disguise themselves as press and commit violent or illegal acts. The preliminary injunction, however, does not protect anyone who commits an unlawful act. The Federal Defendants have the same authority to arrest or otherwise engage with persons who commit unlawful acts, regardless of their clothing. Moreover, most of this concern expressed by the Federal Defendants focuses on persons self-identifying as press who are mixed with protesters or interfering with law enforcement. The preliminary injunction's addition of the indicia of press as staying to the side and not intermixing with protesters and express prohibition on interfering with law enforcement further addresses this concern. Further, Mr. Kerlikowske's declarations containing his expert opinions are persuasive in discounting this possibility.

The Federal Defendants also argue that requiring federal officers to wear larger unique identifying markings is not workable and is not connected to Plaintiffs' claims in this case. The Federal Defendants assert that such markings will interfere with an officer's ability to reach necessary equipment and are unnecessary because most officers already wear some unique identifying number somewhere on their uniform. The Federal Defendants were unable, however, to identify specific officers from videos when asked to do so by the Court. The current identifying markings are not of sufficient visibility. The Court does not find it credible that there is no possible location on the helmet or uniforms on which more visible markings can be placed. The Court is persuaded by Mr. Kelikowske's expert opinion that unique identifying markings are feasible, important, and will not interfere with the federal officers' ability to perform their duties. The Court also finds that such a requirement is related to Plaintiffs' claims because, as noted by Mr. Kerlikowske, these markings would deter the very conduct against which Plaintiffs have filed suit.

At this stage of the lawsuit, there are at least serious questions regarding Plaintiffs' right of access, whether the government will be able to meet its burden to overcome that right of access, the federal officers' tactics directed toward journalists and other legal observers, and whether restrictions placed upon them by the Federal Defendants are narrowly tailored. Thus, Plaintiffs' meet this factor for their claim alleging a violation of their right of access.

2. Irreparable Harm

Plaintiffs also must show that they are "likely to suffer irreparable harm in the absence of preliminary relief." *See Winter*, 555 U.S. at 20. The Ninth Circuit has explained that "speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction. A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016) (emphasis in original) (simplified).

The Federal Defendants argue that Plaintiffs face no threat of immediate injury, particularly because of the changed enforcement tactics. The Federal Defendants assert that Plaintiffs have provided no evidence that the chances of encountering a federal officer at a protest is higher in August 2020 than it was in August 2019 or August 2018.

The Federal Defendants' latter assertion is without merit. The Federal Defendants have sent numerous additional federal officers to Portland with the stated mission to protect federal property and persons. Plaintiffs provide evidence that these officers routinely have left federal property and engaged in crowd control and other enforcement on the streets, sidewalks, and parks of the City of Portland. Plaintiffs' expert Mr. Kerlikowske opines that the federal officers and supervisors have insufficient and improper experience and leadership to handle the conditions during the Portland protests. Additionally, Plaintiffs provide evidence that the

augmented federal police force has remained in Portland, that it will stay in Portland ready to deploy at any moment, and that there are no plans for any officers to withdraw from Portland, at least not until it is "certain" that federal property is "safe." This provides significant evidence that journalists and legal observers are more likely to encounter a federal officer during a protest in August 2020 than in 2019 or 2018, when there was no augmented federal police force or Operation Diligent Valor.

Regarding the Federal Defendants' argument that the voluntary change in tactics has decreased the immediacy of any claim of injury, thereby mitigating irreparable harm, the Ninth Circuit has rejected a similar argument. In *Boardman*, the defendants argued that there was no immediate danger of harm because the defendants had voluntarily ceased certain conduct. 822 F.3d at 1023. The defendants had voluntarily terminated a disputed merger and entered into a stipulation not to enter into a purchase transaction while the Oregon Attorney General's investigation was ongoing. *Id.* The stipulation was terminable upon 60-days' notice to the District Court and the Oregon Attorney General. The Ninth Circuit concluded that the District Court did not abuse its discretion in finding irreparable harm. *Id.*

The Ninth Circuit focused on the fact that the voluntarily stipulation was terminable with 60-days' notice, the defendants had a history of negotiating in secret, the stipulation was limited to a "purchase transaction" and the transaction could take other contractual forms, and the exclusive marketing agreement between the two defendants had expired (thereby incentivizing a merger). *Id.* The Ninth Circuit noted: "A threat of irreparable harm is sufficiently immediate to warrant preliminary injunctive relief if the plaintiff 'is likely to suffer irreparable harm before a decision on the merits can be rendered.'" *Id.* (quoting *Winter*, 555 U.S. at 22). For the plaintiff to be injured in *Boardman*, the defendants would have had to give 60-days' notice and then not

have the district court otherwise intervene, or negotiate in secret and reach a form of deal not considered a "purchase agreement," or other steps that arguably were attenuated or provided the plaintiffs some opportunity to request emergency relief. Nonetheless, the Ninth Circuit agreed that the potential injury was immediate and irreparable for purposes of preliminary injunctive relief.

Plaintiffs' irreparable injury here is not nearly as attenuated as *Boardman* and indeed is much more immediate because it could happen without any prior notice to the Court. The Court has already found that Plaintiffs face irreparable harm from the Federal Defendants' conduct.[12]

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[12] The Federal Defendants cite *Rendish v. City of Tacoma*, 123 F.3d 1216, 1226 (9th Cir. 1997), for the proposition that claims alleging First Amendment retaliation are not entitled to a presumption of irreparable harm. *Rendish* involved a public employee who was terminated and alleged First Amendment retaliation. *Id.* at 1218. The district court found that the plaintiff was *not* likely to succeed on the merits of her claim. *Id.* at 1226. The Ninth Circuit concluded: "Because the district court's assessment that Rendish did not show a likelihood of success was accurate, it did not abuse its discretion in finding no irreparable harm based on a loss of her constitutional rights." *Id.* The court rejected the plaintiff's argument that despite the district court's conclusion that the plaintiff would not have succeeded on the merits, the district court was required to presume irreparable harm, noting that there is no such presumption. *Id.*

Rendish provides no support for the contention that when a court concludes that plaintiffs *are* likely to succeed on the merits of a claim that their constitutional rights have been violated, the plaintiffs are not entitled to a presumption of irreparable harm. Indeed, the opposite is true. *See, e.g.*, *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) ("A 'colorable First Amendment claim' is 'irreparable injury sufficient to merit the grant of relief.'" (quoting *Warsoldier v. Woodford*, 418 F.3d 989, 1001 (9th Cir. 2005)) (affirming grant of preliminary injunction)); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Assoc. Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (noting that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" and reversing and remanding for entry of preliminary injunction (alteration in original) (quoting *Elrod*)); *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009) ("Both this court and the Supreme Court have repeatedly held that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (simplified) (reversing and remanding for entry of preliminary injunction)); *Black Lives Matter Seattle-King Cty. v. City of Seattle, Seattle Police Dep't*, 2020 WL 3128299, at *4 (W.D. Wash. June 12, 2020) (citing *Melendres* and *Otter* and finding irreparable harm for First Amendment retaliation claims because "[t]he use of less-lethal, crowd control weapons has

After the Court's initial finding of irreparable harm to support the TRO, Plaintiffs provided even more evidence that journalists' First Amendment rights have been chilled, including declarations in which journalists describe being subject to less lethal munitions that required the journalist to stop covering the protests for the night or for some period of time, or chilled the journalist from returning to cover the protests in the future. *See, e.g.*, ECF 88 at 2 (Ellis Decl. ¶ 6, "Federal agents prevented me from doing my job twice on the night of July 23-24."); ECF 89 at 4 (Elsesser Decl. ¶ 13, "If I am asked to cover the protests again, I would refuse unless I had a bulletproof vest (which are in short supply in Portland at the moment) to wear because I am fearful that federal agents would injure me or worse."); ECF 91 at 3 (Hollis Decl. ¶ 8, "After the federal agents shot me, I turned and ran and returned to my hotel."); ECF 116 at 3 (Jeong Decl. ¶¶ 7-8, noting that because she was shoved down to the ground by a federal officer she "ultimately left much earlier than I had planned" with respect to covering that night's protest); ECF 117 at 5 (Katz Decl. ¶ 15, "Because of how federal agents treated me, I have stopped covering the Portland protests.").

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already stifled some speech even if momentarily"); *Freedom for Immigrants v. U.S. Dep't of Homeland Sec.*, 2020 WL 2095787, at *5 (C.D. Cal. Feb. 11, 2020) ("Because FFI has demonstrated that DHS's conduct likely contravenes its First Amendment rights, FFI satisfies the irreparable harm requirement for preliminary injunctive relief."); *Nat'l Rifle Ass'n of Am. v. City of Los Angeles*, 441 F. Supp. 3d 915, 938-39 (C.D. Cal. 2019) ("In this case, Plaintiffs have sufficiently demonstrated that they are likely to be deprived of their First Amendment rights—the deprivation of which is 'well established' to constitute irreparable harm. Defendants' primary argument to the contrary is that Plaintiffs have not provided admissible evidence of irreparable harm. But Plaintiffs have provided ample evidence of a likely First Amendment violation, which is enough to satisfy the *Winter* standard." (citations omitted) (granting preliminary injunction)); *see also* 11A Charles Alan Wright, FEDERAL PRACTICE & PROCEDURE, § 2948.1 (2d ed. 2004) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). Plaintiffs have demonstrated that they are likely to be deprived of their First Amendment rights and that is sufficient to show irreparable harm.

The only change is the Federal Defendants' "agreement" with Oregon Governor Kate Brown and voluntarily cessation of certain enforcement tactics. This change in enforcement is replete with caveats. It is terminable at any time and without any notice to this Court or Plaintiffs if the Federal Defendants believe that federal property or persons are not secure. *See* n. 6, *supra*. It is also subject to the federal officers being able to leave the building at any time for a specific incident of enforcement, even if the agreement itself has not changed. For example, although the federal officers' modified enforcement role was announced on July 29, 2020, to begin the next day, Plaintiffs have submitted testimony and video evidence from that night (to be precise, from the early morning on July 30, 2020), of federal officers firing tear gas and flash bang munitions at journalists. *See* ECF 118 at 4. There was no one nearby on the street but numerous federal enforcement officers and six journalists when the munitions were deployed.

Moreover, the Federal Defendants have emphatically and repeatedly denied that they have engaged in any wrongful or unlawful conduct. Thus, there is no indication that their crowd control tactics, which the Court has already found to support both a finding of success on the merits and likelihood of irreparable harm, and which Plaintiffs' expert has characterized as including excessive force, would change if they re-engage in crowd control enforcement and the Court's injunctive relief is no longer in place.

Indeed, the Court has serious concerns that the Federal Defendants have not fully complied with the Court's original TRO. The Court has reviewed all of the testimony and videos submitted by Plaintiffs after the Court issued its TRO, and although some of the evidence is ambiguous or less persuasive, some of the evidence describes and shows at least some conduct that appears to target journalists and legal observers, as opposed to incidentally or inadvertently reaching them as part of crowd control or enforcement against violent offenders.

Further, the Court does not agree with the Federal Defendants that given the magnitude of irreparable injury at stake in this case, the Court is required to wait until new and additional irreparable injury is inflicted on Plaintiffs to issue prospective injunctive relief. As the Ninth Circuit emphasized in *Boardman*, a threat of irreparable injury is sufficiently immediate if it is likely to occur before a decision on the merits can be issued. *Boardman*, 822 F.3d at 1023. Given the Federal Defendants' public statements and discovery responses relating to Operation Diligent Valor, the current situation relating to the protests in Portland, and the current situation regarding the local police presence in Portland, the Court finds that it is sufficiently likely that federal officers will re-engage in "protecting federal property and persons" and will return to enforcement tactics before a decision on the merits in this case can be issued. Thus, Plaintiffs have sufficiently shown irreparable injury.

Moreover, the Court takes guidance from the Supreme Court and Ninth Circuit's discussions regarding the Court's authority relating to issuing injunctions generally and predicting future violations in this context. The Supreme Court has noted that in addition to a court retaining the ability to hear a case after voluntarily cessation (considerations of mootness), "the court's power to grant injunctive relief survives discontinuance of the illegal conduct." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). "The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *Id.* In making this determination, the district court's "discretion is necessarily broad and a strong showing of abuse must be made to reverse it. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations." *Id.* The Ninth Circuit has

discussed "the factors that are important in predicting the likelihood of future violations" as follows:

> the degree of scienter involved; the isolated or recurrent nature of the infraction; the defendant's recognition of the wrongful nature of his conduct; the extent to which the defendant's professional and personal characteristics might enable or tempt him to commit future violations; and the sincerity of any assurances against future violations.

Fed. Election Comm'n v. Furgatch, 869 F.2d 1256, 1263 n.5 (9th Cir. 1989). These factors are in addition to "the commission of past illegal conduct, [which] is highly suggestive of the likelihood of future violations." *Id.*

Considering these factors, whether as articulated by the Supreme Court in *W.T. Grant* or the Ninth Circuit in *Furgatch*, the Federal Defendants' voluntary cessation of conduct[13] does not demonstrate effective discontinuance and serious questions remain with respect to the likelihood of Plaintiffs' future injury. In addition, under the *W.T. Grace* factors, there has been no expressed intent by the Federal Defendants to comply with the Court's TRO. To the contrary, the Federal Defendants have stated that the order is "offensive" and that it "shouldn't affect anything [the Federal Defendants are] doing" in Portland. ECF 147-6 at 3 (statement by Acting Deputy

[13] The Federal Defendants argue that they have not voluntarily ceased conduct because they dispute that they have engaged in any unlawful conduct. Regardless of how they characterize the lawfulness of their conduct, however, their argument is that because of the changed circumstances, Plaintiffs can no longer show irreparable injury. The changed circumstances on which the Federal Defendants rely, however, is the agreement between state and federal authorities that the federal officers would "stay in the building" and state and local police would take over more direct policing. The specifics of this agreement have been redacted by the Federal Defendants. *See* ECF 147-8 at 2. According to White House Senior Advisor Stephen Miller, however, the agreement does not include a "phased withdrawal." ECF 147-5 at 2. Nonetheless, this agreement and the Federal Defendants' voluntary change in enforcement as a result of the agreement is the voluntary cessation triggering the changed circumstances on which the Federal Defendants rely. Thus, the Court must analyze whether it supports the Federal Defendants' assertion that there no longer exists a cognizable risk of recurrent violations.

Secretary Ken Cuccinelli). Also, as reflected in Plaintiffs' motion for contempt, despite the issuance of the TRO, the Federal Defendants appear to have engaged in at least some conduct that continues to target journalists and legal observers in violation of the Court's TRO. This raises concerns regarding future conduct if there is no injunction in place, because even with a Court order in place, improper conduct appears to have continued. Regarding the effectiveness of the Federal Defendants' stated discontinuance, as discussed above, it is not very effective while the out-of-town federal agents remain in Portland because the discontinuance is terminable at will by the Federal Defendants and, thus, only temporary. Finally, the character of the recent past violations by the Federal Defendants in Portland is particularly egregious.

Considering the Ninth Circuit's *Furgatch* factors, first, the Federal Defendants' past violations are highly suggestive of future harm. Second, the degree of scienter involved is high for violations triggering the requested injunctive relief, because it relates to targeting of journalists and legal observers and not merely incidental harm to them during crowd control. Further, because Plaintiffs agreed to the modification to the injunction that journalists and legal observers stay to the side, the risk of incidental targeting is diminished. Third, the occurrences were not isolated—Plaintiffs provided significant evidence of numerous journalists and legal observers who were targeted by the Federal Defendants. Indeed, several of the witnesses have experience reporting in war zones around the world and at violent protests in Hong Kong, Oakland, and Seattle. They emphasize how they have never been shot at or tear gassed until coming to Portland. Fourth, the Federal Defendants have not recognized the wrongful nature of their conduct but instead assert that they have only engaged in lawful conduct. They have not disciplined any federal agent or officer for any conduct. They moved to dissolve the TRO after Plaintiffs moved for contempt. The Federal Defendants, unlike the City of Portland, also did not

stipulate to preliminary injunctive relief. Fifth, given the disdainful comments publicly made by the highest officials at the Federal Defendants with respect to journalists, legal observers, Plaintiffs, protesters, and the City of Portland, the professional and personal characteristics of the Federal Defendants show that they are likely to be enabled or tempted to engage in future violations. Finally, there have not been sincere assurances given against future violations. Accordingly, considering these factors, the Court finds that Plaintiffs have made a sufficient showing of threatened future violations by the Federal Defendants causing sufficiently likely irreparable injury to Plaintiffs before a decision on the merits can be issued.

3. Public Interest and Balance of the Equities

When the government is a party, the last two factors of the injunction analysis merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). Regarding the public interest, "[c]ourts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles." *Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (quotation marks omitted). Further, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quotation marks omitted) (granting an injunction under the Fourth Amendment). Regarding balancing the equities, when a plaintiff has "raised serious First Amendment questions," the balance of hardships "tips sharply in [the plaintiffs'] favor." *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007) (alterations in original) (quotation marks omitted).

The Federal Defendants argue that the normal evaluation of these factors in favor of a plaintiff who is likely to succeed on a First Amendment claim does not apply in this case because the government's countervailing interests outweigh Plaintiffs' First Amendment concerns. The Federal Defendants assert the government's interest in protecting federal property, ensuring the

safety of federal officers and other personnel, maintaining public order on federal property, and securing the federal courthouse so that it remains open and accessible to the public. The first three relate to protecting the courthouse and federal officers, and the final interest relates to providing access to the public.

Regarding protection of the courthouse and officers, the Federal Defendants rely on evidence that persons self-identifying as press have engaged in purported misconduct. The Court has reviewed all the video and other evidence submitted by the Federal Defendants in support of their contentions relating to alleged misconduct of persons self-identifying as press after the issuance of the TRO on July 23, 2020. Much of this evidence is ambiguous or shows that persons self-identifying as press have intermixed with protesters, have run toward the fence around the federal courthouse and stopped, have not actually been press but merely donned clothing (for one night) marked "press" hoping to avoid violence by federal officers, or simply have stood by while unlawful conduct was engaged in by others. This is not unlawful conduct.

There is evidence, however, that a few individual persons wearing press indicia on their clothing or hats or helmets (often handwritten), who generally are described by the Federal Defendant declarants as not otherwise engaging in any conduct such as reporting, notetaking, photographing, or recording, have engaged in the following activities: entering courthouse property after the fence was breached and encouraging others to do the same; helping another person to breach the fence; shining a flashlight at a police helicopter; kicking a police officer; shielding protesters from law enforcement; and throwing an object at law enforcement. This is inappropriate conduct, and much of it may be unlawful. The Court shares the Federal Defendants' concerns for the safety of federal officers, particularly considering the more than 100 injuries that have been sustained by federal offices to date. But as discussed above in the

context of workability, the preliminary injunction does not protect unlawful conduct, and federal officers may arrest anyone, even persons with indicia of press, who are engaging in such conduct.

Further, the preliminary injunction has provisions that expressly address these concerns, including providing that one indicia of press or authorized legal observer status is that they stay to the side and do not intermix with protesters and that press and legal observers may not impede, block, or interfere with law enforcement. Concern over potential unlawful conduct thus does not alter the analysis of traditional public interest factors or the balance of equities.

Moreover, the Court must balance and weigh the equities and public interest. The fact that a few people may have engaged in some unlawful conduct does not outweigh the important First Amendment rights of journalists and legal observers and the public for whom they act as surrogates. Further, there is no evidence that any of the named Plaintiffs engaged in any of the purported unlawful conduct described by the Federal Defendants.

The Federal Defendants' final argument is that the government's interest in preserving physical access to courts outweighs Plaintiffs' interests. That argument also is without merit. The relevant protests are happening after business hours, and there is no indication that allowing journalists and legal observers to stay despite a general dispersal order interferes with public access. Thus, none of the government's proffered interests outweigh the public's interest in receiving accurate and timely reporting, video, and photographic information about the protests and how law enforcement is treating protestors. There also is no need to alter the traditional analysis recognizing the significant public interest in First Amendment rights and that in such cases the balance of the equities tips sharply in favor of the plaintiff. *See Otter*, 682 F.3d at 826; *Cmty. House*, 490 F.3d at 1059.

4. Conclusion

The Court GRANTS Plaintiffs' motion for preliminary injunction against the Federal Defendants (ECF 134) and Orders as follows:

PRELIMINARY INJUNCTION

1. The Federal Defendants, their agents and employees, and all persons acting under their direction are enjoined from arresting, threatening to arrest, or using physical force directed against any person whom they know or reasonably should know is a Journalist or Legal Observer (as explained below), unless the Federal Defendants have probable cause to believe that such individual has committed a crime. For purposes of this Order, such persons shall not be required to disperse following the issuance of an order to disperse, and such persons shall not be subject to arrest for not dispersing following the issuance of an order to disperse. Such persons shall, however, remain bound by all other laws. No Journalist or Legal Observer protected order this Order, however, may impede, block, or otherwise physically interfere with the lawful activities of the Federal Defendants.

2. The Federal Defendants, their agents and employees, and all persons acting under their direction are further enjoined from seizing any photographic equipment, audio- or video-recording equipment, or press passes from any person whom they know or reasonably should know is a Journalist or Legal Observer (as explained below), or ordering such person to stop photographing, recording, or observing a protest, unless the Federal Defendants are also lawfully seizing that person consistent with this Order. Except as expressly provided in Paragraph 3 below, the Federal Defendants must return any seized equipment or press passes immediately upon release of a person from custody.

3. If any Federal Defendant, their agent or employee, or any person acting under their direction seize property from a Journalist or Legal Observer who is lawfully arrested

consistent with this Order, such Federal Defendant shall, as soon thereafter as is reasonably possible, make a written list of things seized and shall provide a copy of that list to the Journalist or Legal Observer. If equipment seized in connection with an arrest of a Journalist or Legal Observer lawfully seized under this Order is needed for evidentiary purposes, the Federal Defendants shall promptly seek a search warrant, subpoena, or other court order for that purpose. If such a search warrant, subpoena, or other court order is denied, or equipment seized in connection with an arrest is not needed for evidentiary purposes, the Federal Defendants shall immediately return it to its rightful possessor.

4. To facilitate the Federal Defendants' identification of Journalists protected under this Order, the following shall be considered indicia of being a Journalist: visual identification as a member of the press, such as by carrying a professional or authorized press pass, carrying professional gear such as professional photographic equipment, or wearing a professional or authorized press badge or other official press credentials, or distinctive clothing, that identifies the wearer as a member of the press. It also shall be an indicium of being a Journalist under this Order that the person is standing off to the side of a protest, not engaging in protest activities, and not intermixed with persons engaged in protest activities, although these are not requirements. These indicia are not exclusive, and a person need not exhibit every indicium to be considered a Journalist under this Order. The Federal Defendants shall not be liable for unintentional violations of this Order in the case of an individual who does not carry or wear a press pass, badge, or other official press credential, professional gear, or distinctive clothing that identifies the person as a member of the press.

5. To facilitate the Federal Defendants' identification of Legal Observers protected under this Order, the following shall be considered indicia of being a Legal Observer: wearing a

green National Lawyers Guild-issued or authorized Legal Observer hat (typically a green NLG hat) or wearing a blue ACLU-issued or authorized Legal Observer vest. It also shall be an indicium of being a Legal Observer protected under this Order that the person is standing off to the side of a protest, not engaging in protest activities, and not intermixed with persons engaged in protest activities, although these are not requirements.

6. The Federal Defendants are not precluded by the Order from issuing otherwise lawful crowd-dispersal orders for a variety of lawful reasons. The Federal Defendants shall not be liable for violating this injunction if a Journalist or Legal Observer is incidentally exposed to crowd-control devices after remaining in the area where such devices were deployed after the issuance of an otherwise lawful dispersal order.

7. Plaintiffs and the Federal Defendants shall promptly confer regarding how the Federal Defendants can place unique identifying markings (using numbers and/or letters) on the uniforms and/or helmets of the officers and agents of the Federal Defendants who are specially deployed to Portland so that they can be identified at a reasonable distance and without unreasonably interfering with the needs of these personnel. Based on the Court's understanding that Deputy U.S. Marshals and Courtroom Security Officers stationed in Portland who are under the direction of the U.S. Marshal for the District of Oregon are not part of the force that has given rise to events at issue in the lawsuit, they are exempt from this requirement. Agents wearing plain clothes and assigned to undercover duties also are exempt from this requirement. If the parties agree on a method of marking, they shall submit the terms of their agreement in writing to the Court, and the Court will then issue a modified preliminary injunction that incorporates the parties' agreement. If the parties cannot reach agreement within 14 days, each party may submit its own proposal, and each side may respond to any other party's proposal

within seven days thereafter. The Court will resolve any disputes on this issue and modify this preliminary injunction appropriately.

8. To promote compliance with this Preliminary Injunction, the Federal Defendants are ordered to provide copies of the verbatim text of the first seven provisions of this Preliminary Injunction, in either electronic or paper form, within 14 calendar days to: (a) all employees, officers, and agents of the Federal Defendants currently deployed in Portland, Oregon (or who later become deployed in Portland, Oregon while this Preliminary Injunction is in force), including but not limited to all personnel in Portland, Oregon who are part of Operation Diligent Valor, Operation Legend, or any equivalent; and (b) all employees, officers, and agents of the Federal Defendants with any supervisory or command authority over any person in group (a) above.

9. Plaintiffs need not provide any security, and all requirements under Rule 65(c) of the Federal Rules of Civil Procedure are waived.

10. The Court denies the oral motion by the Federal Defendants to stay this preliminary injunction.

IT IS SO ORDERED.

DATED this 20th day of August, 2020.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

INDEX NEWSPAPERS LLC d/b/a PORTLAND MERCURY; DOUG BROWN; BRIAN CONLEY; SAM GEHRKE; MATHIEU LEWIS-ROLLAND; KAT MAHONEY; SERGIO OLMOS; JOHN RUDOFF; ALEX MILAN TRACY; TUCK WOODSTOCK; JUSTIN YAU; and those similarly situated,

Plaintiffs,

v.

CITY OF PORTLAND; JOHN DOES 1-60; U.S. DEPARTMENT OF HOMELAND SECURITY; and U.S. MARSHALS SERVICE,

Defendants.

Case No. 3:20-cv-1035-SI

OPINION AND ORDER GRANTING PRELIMINARY INJUNCTION AGAINST FEDERAL DEFENDANTS

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Michael H. Simon, District Judge.

"Open government has been a hallmark of our democracy since our nation's founding." *Leigh v. Salazar*, 677 F.3d 892, 897 (9th Cir. 2012). "When wrongdoing is underway, officials have great incentive to blindfold the watchful eyes of the Fourth Estate." *Id.* at 900. "The free press is the guardian of the public interest, and the independent judiciary is the guardian of the free press." *Id.* This lawsuit tests whether these principles are merely hollow words.

Plaintiffs Index Newspapers LLC doing business as Portland Mercury, Doug Brown, Brian Conley, Sam Gehrke, Mathieu Lewis-Rolland, Kat Mahoney, Sergio Olmos, John Rudoff, Alex Milan Tracy, Tuck Woodstock, and Justin Yau (collectively, "Plaintiffs") bring this putative class action against: (1) the City of Portland (the "City"); (2) numerous as-of-yet unnamed individual and supervisory officers of the Portland Police Bureau ("PPB") and other agencies allegedly working in concert with the PPB; (3) the U.S. Department of Homeland Security ("DHS"); and (4) the U.S. Marshals Service ("USMS"). The Court refers to DHS and USMS collectively as the "Federal Defendants." Plaintiffs are journalists and authorized legal

observers. They allege violations of the First and Fourth Amendments of the United States Constitution and Article I, sections 8 and 26 of the Oregon Constitution. Plaintiffs seek declaratory and injunctive relief and money damages.

Before the Court is Plaintiffs' motion for preliminary injunction against the Federal Defendants. Plaintiffs allege that agents of the Federal Defendants from around the United States, specially deployed to Portland, Oregon to protect the federal courthouse, have repeatedly targeted and used physical force against journalists and authorized legal observers who have been documenting the daily Black Lives Matter protests in this city. These federal agents include special tactical units from U.S. Customs and Border Protection under the U.S. Department of Homeland Security ("BORTAC") and other special tactical units from the U.S. Marshals Service under the U.S. Department of Justice ("Special Operations Group" or "SOG").

Although these federal agents are highly trained in some areas of law enforcement, Plaintiffs contend that neither these agents nor their commanders have any special training or experience in civilian crowd control. Plaintiffs allege that some of these officers have intentionally targeted and used physical force and other forms of intimidation against journalists and authorized legal observers for the purpose of preventing or deterring them from observing and reporting on unreasonably aggressive treatment of lawful protesters. In response, the Federal Defendants argue that they are merely protecting the federal courthouse and its personnel from potential or actual violence and that any interference with protected First Amendment activity is merely incidental.

The Ninth Circuit has stated:

> Demonstrations can be expected when the government acts in highly controversial ways, or other events occur that excite or arouse the passions of the citizenry. The more controversial the occurrence, the more likely people are to demonstrate. Some of

> these demonstrations may become violent. The courts have held that the proper response to potential and actual violence is for the government to ensure an adequate police presence and to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure.

Collins v. Jordan, 110 F.3d 1363, 1372 (9th Cir. 1996) (citation omitted). Here, the actions of the Federal Defendants, or at least some of their officers, prevent, deter, or otherwise chill the constitutionally protected newsgathering, documenting, and observing work of journalists and authorized legal observers, who peacefully stand or walk on city streets and sidewalks during a protest. As further explained by the Ninth Circuit in *Collins*:

> It has been clearly established since time immemorial that city streets and sidewalks are public fora. Restrictions on First Amendment activities in public fora are subject to a particularly high degree of scrutiny.

Id. at 1371 (citations and quotation marks omitted).

The Federal Defendants also argue that Plaintiffs are seeking special protections for journalists and legal observers under the First Amendment but that journalists and legal observers are entitled to no greater rights than those afforded to the public generally. In support, the Federal Defendants cite *Branzburg v. Hayes*, 408 U.S. 665, 680-82 (1972), which held that although the First Amendment protects news gathering, it does not provide a reporter's privilege against testifying before a grand jury. In that case, the Supreme Court noted: "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Id.* at 684; *see also Cal. First Amendment Coal. v. Calderon*, 150 F.3d 976, 981 (9th Cir. 1998) (same). The Federal

Defendants argue, in essence, that Plaintiffs' requested preliminary injunction violates the traditional "nondiscrimination" interpretation of the First Amendment's Press Clause.[1]

At first glance, one might think that the journalists and legal observers here are seeking protection against having to comply with an otherwise lawful order to disperse from city streets after a riot has been declared, when the public generally does not have that protection. When local law enforcement lawfully declares a riot and orders people to disperse from city streets, generally they must comply or risk arrest. The question of whether journalists have any greater rights than the public generally, however, is not actually presented in the pending motion for preliminary injunction. That is because the *Federal Defendants* are not asserting that *they* have the legal authority to declare a riot and order persons to disperse from the city streets in Portland; nor does the authority they cite for their presence and actions in Portland so provide.[2] It is only

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[1] This traditional interpretation may be undergoing a reevaluation. *See, e.g.,* Sonja R. West, *Favoring the Press*, 106 CAL. L. REV. 91, 94 (2018) ("The nondiscrimination view of the Press Clause is deeply flawed for the simple reason that the press is different and has always been recognized as such."). "Barring the government from recognizing the differences between press and non-press speakers threatens to undermine the vital role of the Fourth Estate." *Id.* (footnote omitted). "It is, therefore, entirely in keeping with the text, history, and spirit of the First Amendment's Press Clause for the government to, at times, treat press speakers differently." *Id.* at 95. "Rather than lump the press together with other speakers, the Supreme Court has historically done just the opposite." *Id.*

[2] The Federal Defendants cite 40 U.S.C. § 1315 and its implementing regulations. That statute authorizes DHS to "protect the buildings, grounds, and property that are owned, occupied, or secured by the Federal Government." § 1315(a). The governing regulations prohibit, as relevant here: (1) disorderly conduct for persons "entering in or on Federal property," 41 C.F.R. § 102-74.390; (2) persons "entering in or on Federal property" from improperly disposing of rubbish on property, willfully damaging property, creating a hazard on property, or throwing articles at a building or climbing on any part of a building, 41 C.F.R. § 102-74.380; and (3) requiring that "[p]ersons in and on property" must obey "the lawful direction of federal police officers and other authorized individuals." 41 C.F.R. § 102-74.385. This latter regulation, although not specifically stating on "federal" property, has been construed as including this requirement, that the persons be on federal property. *See United States v. Baldwin*, 745 F.3d 1027, 1029 (10th Cir. 2014) (then-Circuit Judge, now Justice Gorsuch) ("The first says '[p]ersons in and on [Federal] property must at all times comply . . . with the lawful direction of Federal police officers and other authorized individuals.'" (alterations in original) (quoting 41

state and local law enforcement that may lawfully issue an order declaring a riot or unlawful assembly on city streets. That is simply part of a state or city's traditional police power.

Here, Plaintiffs and the City have already *stipulated* to a preliminary injunction that provides that the Portland Police will not arrest any journalist or authorized legal observer for failing to obey a lawful order to disperse. Thus, the question of whether an otherwise peaceful and law-abiding journalist or authorized legal observer has a First Amendment right not to disperse when faced with a general dispersal order issued by state or local authorities does not arise in this motion.[3]

C.F.R. § 102-74.385); *see also United States v. Estrada-Iglesias*, 425 F. Supp. 3d 1265, 1270 (D. Nev. 2019). Thus, 40 U.S.C. § 1315 and its regulations give federal officers broad authority *on federal property*. They do not, however, give federal officers broad authority off federal property. The authority granted off federal property is limited—to perform authorized duties "outside the property to the extent necessary to protect the property and persons on the property." § 1315(b)(1). These authorized duties include enforcing federal laws (which as relevant here are laws limited to persons on federal property), making arrests if federal crimes are committed in the presence of an officer, and conducting investigations on and off the property for crimes against the property or persons on the property. § 1315(b)(2). None of these powers include declaring a riot or an unlawful assembly on the streets of Portland, closing the streets of Portland, or otherwise dispersing people off the streets of Portland (versus dispersing people off federal property).

The Federal Defendants appear to acknowledge this limitation in their powers. DHS Operation Diligent Valor commander Gabriel Russell states in his declaration that in response to violent protests, Federal Protective Services ("FPS") officers warned protesters to "stay off federal property," used tear gas to "push protesters back from the [federal] courthouse," contacted the PPB who were about to declare an unlawful assembly, the Portland Police "arrived and closed all roads in the vicinity of the facilities[,] . . . . declared an unlawful assembly and began making arrests for failure to disperse," and the FPS only "made dispersal orders on federal property and cleared persons refusing to comply with these orders." ECF 67-1 at 2. He also testified at deposition that generally FPS does not have authority to enforce a dispersal order against an unlawful assembly on Fourth Street, one block from the federal courthouse. ECF 136-1 at 22 (63:12-18). The Federal Defendants also cite to statutes and regulations that authorize the USMS to protect federal courthouses and other federal property, including 28 U.S.C. § 566(a), 28 U.S.C. § 566(i), 28 C.F.R. § 0.111(f). As with the statutes and regulations governing DHS's authority, these authorities focus on federal property, not on city streets or state or local property.

[3] Someday, a court may need to decide whether the First Amendment protects journalists and authorized legal observers, as distinct from the public generally, from having to comply with

Plaintiffs and the Federal Defendants have stipulated that an evidentiary hearing with live witness testimony is unnecessary and that the Court may base its decision on the written record and oral argument of counsel. For the reasons that follow, the Court GRANTS Plaintiffs' motion for preliminary injunction against the Federal Defendants.

STANDARDS

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 22 (2008). A plaintiff seeking a preliminary injunction generally must show that: (1) he or she is likely to succeed on the merits; (2) he or she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his or her favor; and (4) that an injunction is in the public interest. *Id.* at 20 (rejecting the Ninth Circuit's earlier rule that the mere "possibility" of irreparable harm, as opposed to its likelihood, was sufficient, in some circumstances, to justify a preliminary injunction).

The Supreme Court's decision in *Winter*, however, did not disturb the Ninth Circuit's alternative "serious questions" test. *See All. for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1131-32 (9th Cir. 2011). Under this test, "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Id.* at 1132. Thus, a preliminary injunction may be granted "if there is a likelihood of irreparable injury to plaintiff; there are serious questions going to the merits; the balance of hardships tips sharply in favor of the plaintiff; and the injunction is in the public interest." *M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th Cir. 2012).

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an otherwise lawful order to disperse from city streets when journalists and legal observers seek to observe, document, and report the conduct of law enforcement personnel; but today is not that day.

BACKGROUND

A. Procedural History

Plaintiffs filed their original Complaint against the City on June 28, 2020. On June 30th, Plaintiffs moved for a TRO. On July 2nd, the Court entered a TRO against the City. On July 14th, Plaintiffs moved to file a Second Amended Complaint ("SAC"), adding the Federal Defendants to this lawsuit. On July 16th, the Court entered a stipulated preliminary injunction against the City. On July 17th, the Court granted Plaintiffs' motion to file the SAC. Later that day, Plaintiffs filed their SAC and moved for a TRO against the Federal Defendants, which the City supported shortly thereafter. On July 23rd, the Court granted Plaintiffs' motion for a TRO against the Federal Defendants, including many of the same terms contained in the TRO and stipulated preliminary injunction entered against the City. The TRO against the Federal Defendants was set to expire by its own terms on August 6th. On July 28th, Plaintiffs moved for a finding of contempt and imposition of sanctions against the Federal Defendants, alleging several violations of the Court's TRO. On July 30th the Federal Defendants moved for reconsideration of the TRO, requesting that it be dissolved. On July 31st the Court stayed briefing on Plaintiffs' contempt motion. On August 4th, Plaintiffs moved to extend the TRO against the Federal Defendants for an additional 14 days. On August 6th, after finding good cause, the Court granted Plaintiffs' motion and extended the TRO against the Federal Defendants through August 20th and denied the Federal Defendants' motion for reconsideration.

B. Plaintiffs

Plaintiff Index Newspapers LLC doing business as Portland Mercury ("Portland Mercury") is an alternative bi-weekly newspaper and media company. It was founded in 2000 and is based in Portland, Oregon. ECF 53, ¶ 21.

Plaintiff Doug Brown has attended many protests in Portland, first as a journalist with the *Portland Mercury* and later as a volunteer legal observer with the ACLU. He has attended the George Floyd protests on several nights, wearing a blue vest issued by the ACLU that clearly identifies him as a legal observer, for the purpose of documenting police interactions with protesters. ECF 9, ¶¶ 1-2; ECF 53, ¶¶ 22, 97; ECF 55, ¶ 2.

Plaintiff Brian Conley has been a journalist for twenty years and has trained journalists in video production across a dozen countries internationally. He founded Small World News, a documentary and media company dedicated to providing tools to journalists and citizens around the world to tell their own stories. ECF 53, ¶ 131.

Plaintiff Sam Gehrke has been a journalist for four years. He previously was on the staff of the *Willamette Week* as a contractor. He is now a freelance journalist. His work has been published in *Pitchfork*, *Rolling Stone*, *Vortex Music*, and *Eleven PDX*, a Portland music magazine. He has attended the protests in Portland for the purpose of documenting and reporting on them, and he wears a press pass from the *Willamette Week*. ECF 10, ¶¶ 1-3; ECF 53, ¶ 23.

Plaintiff Mathieu Lewis-Rolland is a freelance photographer and photojournalist who has covered the ongoing Portland protests. He has been a freelance photographer and photojournalist for three years and is a contributor to *Eleven PDX* and listed on its masthead. After the Court issued its TRO directed against the City, he began wearing a shirt that said "PRESS" in block letters on both sides. He also wears a helmet that says "PRESS" on several sides, and placed reflective tape on his camera and wrist bands. ECF 12, ¶¶ 1-2; ECF 53 ¶ 24; ECF 77, ¶ 1, 3.

Plaintiff Kat Mahoney is an independent attorney and unpaid legal observer. She has attended the Portland protests nearly every night for the purpose of documenting police

interactions with protesters. She wears a blue vest issued by the ACLU that clearly identifies her as an "ACLU LEGAL OBSERVER." ECF 26, ¶ 3; ECF 75, ¶¶ 1-2.

Plaintiff Sergio Olmos has been a journalist since 2014, when he began covering protests in Hong Kong. He has worked for *InvestigateWest* and *Underscore Media Collaboration*, and as a freelancer. His work has been published in the *Portland Tribune*, *Willamette Week*, *Reveal: The Center for Investigative Reporting*, *Crosscut*, *The Columbian*, and *InvestigateWest*. He has attended the protests in Portland as a freelance journalist for the purpose of documenting and reporting on them. He wears a press badge and a Kevlar vest that says "PRESS" on both sides. He carries several cameras, including a film camera, in part so that it is unmistakable that he is present in a journalistic capacity as a member of the press. ECF 15, ¶¶1-3; ECF 53, ¶ 26.

Plaintiff John Rudoff is a photojournalist. His work has been published internationally, including reporting on the Syrian refugee crises, the "Unite the Right" events in Charlottesville, Virginia, the Paris "Yellow Vest" protests, and the Rohingya Genocide. He has attended the protests in Portland during the past two months for the purpose of documenting and reporting on them. Since this lawsuit began, he has been published in *Rolling Stone*, *The Nation*, and on the front page of the *New York Times*. While attending the Portland protests, he carries and displays around his neck press identification from the National Press Photographers Association, of which he has been a member for approximately ten years. He also wears a helmet and vest that is clearly marked "PRESS." ECF 17, ¶¶ 1-3; ECF 53, ¶ 27; ECF 59, ¶¶ 1, 3.

Plaintiff Alex Milan Tracy is a journalist with a master's degree in photojournalism. His photographs have been published by CNN, ABC, CBS, *People Magazine*, *Mother Jones*, and *Slate*, among others. He has covered many of the recent protests in Portland over George Floyd

and police brutality. He carries a press badge and three cameras, and wears a helmet that is marked "PRESS" on the front and back. ECF 60, ¶¶ 1, 3.

Plaintiff Tuck Woodstock has been a journalist for seven years. Their work has been published in the *Washington Post*, *NPR*, *Portland Monthly*, *Travel Portland*, and the *Portland Mercury*. They have attended the George Floyd protests several times as a freelancer for the *Portland Mercury* and more times as an independent journalist. When they attended these protests, they wear a press pass from the *Portland Mercury* that states "MEDIA" in large block letters and a helmet that is marked "PRESS" on three sides. At all times during police-ordered dispersals, they hold a media badge over their head. ECF 23, ¶¶ 2-3; ECF 76, ¶¶ 1, 3.

Plaintiff Justin Yau is a student at the University of Portland studying communications with a focus on journalism. He previously served in the U.S. Army, where he was deployed to the Middle East. He has covered protests in Hong Kong and Portland. His work has been published in the *Daily Mail*, *Reuters*, *Yahoo! News*, *The Sun*, *Spectee* (a Japanese news outlet), and msn.com. He has attended the protests in Portland as a freelance and independent journalist for the purpose of documenting and reporting on them. He wears a neon yellow vest marked with reflective tape and a helmet that are marked "PRESS," and carries his press pass around his neck. He carries a large camera, a camera gimbal (a device that allows a camera to smoothly rotate), and his cellphone for recording. ECF 56, ¶¶ 1-3.

C. Plaintiffs' Alleged Harm

Plaintiffs and other declarants have provided numerous declarations describing events in which they assert that employees, agents, or officers of the Federal Defendants targeted journalists and legal observers and interfered with their ability to engage in First Amendment-protected activities. As discussed below, Plaintiffs provide many compelling examples in the record, some from before the Court entered the TRO against the Federal Defendants and some

after. The following are just several examples selected by the Court from the extensive evidence provided by Plaintiffs. There are more.

1. Before the TRO was Issued

On July 15, 2020, Plaintiff Justin Yau asserts that, while carrying photojournalist gear and wearing reflective, professional-looking clothing clearly identifying him as press, he was targeted by a federal agent and had a tear gas canister shot directly at him. ECF 56, ¶¶ 3-6. Two burning fragments of the canister hit him. *Id.* ¶ 6. At the time he was fired upon, he was taking pictures with his camera and recording with his cell phone while standing 40 feet away from protesters to make it clear that he was not part of the protests. *Id.* ¶ 5. Mr. Yau notes that from his experience covering protests in Hong Kong, "Even Hong Kong police, however, were generally conscientious about differentiating between press and protesters—as opposed to police and federal agents in Portland." *Id.* ¶ 7.

Declarant Noah Berger has been a photojournalist for more than 25 years. ECF 72, ¶ 1. He has been published nationally and internationally, including for coverage of protests in San Francisco and Oakland. *Id.* On July 19, 2020, he covered the protests on assignment for the Associated Press. He notes that the response he has seen and documented from the federal agents in Portland is markedly different from even the most explosive protests he has covered. *Id.* ¶ 3. He carries two large professional cameras and two press passes. *Id.* He states that without any warning he was shot twice by federal agents using less lethal munitions. *Id.* ¶ 4. Later, as 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. *Id.* ¶ 7. While holding his press pass and identifying himself as press, he was hit with a baton by one federal agent. *Id.* ¶ 8. Two others joined and surrounded him, and he was hit with batons three or four times. *Id.* One agent then deployed pepper spray against Mr. Berger from about one foot away. *Id.* ¶ 9. He was given no

warning. *Id.* ¶ 11. He states that he was not demonstrating or protesting, was leaving the area, and was clearly acting as a journalist. *Id.* ¶¶ 3, 11.

Late July 19th or early July 20th, Declarant Nathan Howard, a photojournalist who has been published in *Willamette Week*, *Mother Jones*, Bloomberg Images, Reuters, and the Associated Press, was covering the Portland protests. ECF 58, ¶¶ 1, 4. He was standing by other journalists, and no protesters, as federal agents went by. *Id.* ¶ 4. The nearest protester was a block away. *Id.* Mr. Howard held up his press pass and repeatedly identified himself as press. *Id.* ¶ 5. A federal agent stated words to the effect of "okay, okay, stay where you are, don't come closer." *Id.* ¶ 6. Mr. Howard states that another federal agent, who was standing immediately to the left of the agent who gave Mr. Howard the "okay," aimed directly at Mr. Howard and fired at least two pepper balls at him at close range. *Id.* ¶ 7.

Declarant Jungho Kim is a photojournalist whose work has been published in the *San Francisco Chronicle* and *CalMatters*, among others. ECF 62, ¶ 1. He wears a neon yellow vest marked "PRESS" and a white helmet marked "PRESS" in the front and rear. *Id.* ¶ 2. He has covered protests in Hong Kong and California. He has experience with staying out of the way of officers and with distinguishing himself from a protester, such as by not chanting or participating in protest activity. *Id.* ¶ 3. He had never been shot at by authorities until covering the Portland protests on July 19, 2020. *Id.* During the protest, federal agents pushed protesters away from the area where Mr. Kim was recording. He was around 30 feet away from federal agents, standing still, taking pictures, with no one around him. *Id.* ¶¶ 5-7. He asserts that suddenly and without warning, he was shot in the chest just below his heart with a less lethal munition. *Id.* ¶ 7. Because he was wearing a ballistic vest, he was uninjured. He also witnessed, and photographed, federal agents firing munitions into a group of press and legal observers. *Id.* ¶ 9.

Declarant Nate Haberman-Ducey is a law student at Lewis and Clark Law School. ECF 61, ¶ 1. He completed training with the National Lawyers Guild ("NLG") and attended the protests several times as a legal observer. *Id.* He states that on July 19, 2020, while wearing his green, NLG-issued authorized legal observer hat, he was shot in the hand with a paint-marking round by a federal agent, while walking his bicycle through the park across from the federal courthouse. *Id.* ¶¶ 3-4. At the time, there were no other protestors or other people around Mr. Haberman-Ducey at whom the federal agent might have been aiming. *Id.* ¶ 5. The pain from injury to Mr. Haberman-Ducey's right hand was so severe that he had to stop observing the protests and go to the emergency room, where doctors put his broken hand in a splint. *Id.* ¶¶ 7-8. He would like to keep observing the protests but is concerned that residue from tear gas fired by the federal agents will contaminate his splint, which he has to wear for four to six weeks. *Id.* ¶ 9.

Declarant Amy Katz is a photojournalist whose work has been published in the *Wall Street Journal*, the *New York Daily News*, the *Guardian*, *TIME*, *Mother Jones*, the *Independent*, the *New York Times*, and has been featured on Good Morning America and ABC News. ECF 117, ¶ 1. While covering the protests, she wears a hat and tank top marked with "PRESS" in bold letters and carries a camera with a telephoto lens. *Id.* ¶ 2. Early in the morning of July 21st, she was filming from the side while federal agents dispersed protestors. *Id.* ¶ 4-6. Several agents tried to disperse her, but she displayed her press pass and they left her alone. *Id.* ¶ 6. She asserts that a federal agent approached and motioned for her to disperse again a few minutes later. *Id.* ¶ 7. Ms. Katz again held up her press pass, but before she could process what was happening another agent fired pepper balls or similar munitions at her. *Id.* The first agent then dropped a tear gas grenade directly at her feet as Ms. Katz ran away, yelling that she was press. *Id.* She notes that there were no protestors the agents could have been aiming at because the protesters

had already dispersed. *Id.* ¶ 8. The effects of the tear gas forced her to stop reporting and return to her hotel. *Id.* ¶ 9. The next day her eyes and lips burned, sunlight hurt her eyes, her tongue was swollen, and she had diarrhea. *Id.*

Declarant Sarah Jeong is an attorney, a columnist for *The Verge*, and a contributing writer to the *New York Times* Opinion section. ECF 116, ¶ 1. She attended the protests solely as a journalist, wore her press badge, and wore a helmet with "PRESS" in black letters on a white background on three sides. *Id.* ¶ 4. On the night of July 21st, Ms. Jeong was covering the protests from the steps of the courthouse when federal agents emerged from the building and charged the crowd. *Id.* ¶ 5. Ms. Jeong walked slowly backward, holding her press pass up in one hand and her phone in the other. *Id.* ¶ 6. With no warning and for no apparent reason, a federal agent shoved Ms. Jeong so forcefully that both her feet left the ground. *Id.* ¶ 7. She kept reporting that night but left much earlier than she had planned. *Id.* ¶ 8. Although she plans to keep covering the protests, she is fearful for her safety. *Id.*

Declarant James Comstock is a legal observer with the NLG. ECF 63, ¶ 1. On July 19th, a few minutes before midnight, he was watching the protests from the park across the street from the protests. *Id.* ¶ 2-3. He was wearing the standard NLG-issued green hat provided to legal observers. *Id.* ¶ 2. As protestors started to push the fence, he put on his gas mask and started to move away from the courthouse because he did not want to get tear gassed. *Id.* ¶ 3. He stopped on the opposite side of 4th Avenue, about 375 feet away from the front door of the courthouse. *Id.* He went to speak to a press member standing on the intersection of SW 4th and Main. *Id.* ¶ 4. After finishing his conversation with the press member, Mr. Comstock was standing in the same location alone with his back up against the wall. *Id.* Without warning, a federal agent shot Mr. Comstock in the hand with an impact munition while he was making notes on his phone. *Id.* ¶ 5.

There were no protestors around and he was at least 6 feet from the reporter with whom he had just been speaking. *Id.* ¶ 6. Mr. Comstock states that he would like to keep attending the protests as a legal observer but that he is afraid of injury and fearful that he will be wrongfully arrested, endangering his job as a criminal defense investigator. *Id.* ¶¶ 8-9.

Early morning on July 22nd, Plaintiff Alex Milan Tracy was standing in the street and filming a group of federal officers who were standing on the sidewalk in front of the courthouse. ECF 74, *Id.* ¶ 4. Two of the officers from that group waved their batons at him and gestured for him to move back. *Id.* He retreated, and one of the officers briefly charged at him. Mr. Tracy then moved back farther into the middle of the street. *Id.* A few minutes later, he was filming the same group of federal officers from the same spot in the middle of the street. *Id.* ¶ 6. Agents from that same group raised their weapons and launched a flashbang at Mr. Tracy and another journalist, hitting them both. *Id.* ¶ 7. Mr. Tracy continued documenting the scene but finally left because the federal officers kept looking and pointing directly at him. *Id.* ¶¶ 7, 10. He was "genuinely terrified" of standing in front of the federal officers. *Id.* ¶ 10.

2. After the TRO was Issued

Plaintiff Brian Conley has worked in war zones such as Iraq, Afghanistan, Libya, and Burundi. ECF 87, ¶ 1. He also has covered protests for many years in places such as Beijing, New York, Washington, D.C., Miami, Quebec City, and Oaxaca, Mexico. *Id.* He has encountered agents of the Federal Defendants in Portland on multiple days. At all times he was wearing a photographer's vest with "PRESS" written on it and a helmet that said "PRESS" in large block letters across the front. *Id.* ¶ 2. He was also carrying a large camera with an attached LED light and telephoto lens. *Id.*

Early in the morning of July 24th, Mr. Conley filmed federal agents seizing a woman who was dancing with flowers in front of the officers. *Id.* ¶ 3-4. At that point, the crowd was

mostly press and a few individual protestors. *Id.* ¶ 3. Federal agents launched tear gas into the streets, and Mr. Conley yelled that he was press to avoid being further tear gassed. *Id.* ¶ 6. Mr. Conley was then shot with impact munitions in the chest and foot. *Id.* ¶ 7. Video of this event shows that the situation grew tense as a protester attempted to interfere with the agents' seizure of the woman. As the agents finalized the seizure of the woman and the interfering protester and retreated into the federal courthouse with the woman and the interfering protester, they laid sweeping cover fire into the remaining crowd, which included Mr. Conley and other press members, even though no protester was near Mr. Conley at the time. After the officers were safely within the building, Mr. Conley continued recording. The video shows that Mr. Conley was outside next to another photographer. A medic and his protector were behind a shield on one side several yards away and a protester yelling taunts was on the other side several yards away. As Mr. Conley was filming, a federal agent on the other side of the courthouse fence shone a bright light at Mr. Conley. Shortly thereafter, without warning, a federal agent shot a tear gas canister above Mr. Conley's head. Mr. Conley also describes this in his declaration. *Id.* ¶ 9.

Mr. Conley took the next two nights off and returned to cover the protests the night of July 27th. *Id.* ¶¶ 17, 18. He was documenting a line of federal agents advancing on a group of six protestors with shields who were standing behind him. *Id.* ¶ 18. He yelled that he was press, but the federal agents unleashed a barrage of munitions at him. *Id.* ¶ 19. He moved to the side, away from the protestors, and continued to yell that he was press. *Id.* ¶ 20. The federal agents briefly stopped firing, one shone a flashlight at him, and resumed fire directly at him, striking him multiple times—although by this point there was nobody else near him. *Id.* Another federal agent threw a flashbang grenade directly at him. *Id.* Mr. Conley could "barely walk" after the events of July 27-28. *Id.* ¶ 25.

Mr. Conley was covering the protests again just before midnight on July 29th. ECF 115, ¶ 4. He had replaced the "PRESS" lettering on his helmet because the concussion and flashbang grenades thrown at him the night before had blown off one of the letters. *Id.* ¶ 2. He was filming federal agents on SW Salmon Street between SW 2nd and SW 3rd Avenue. *Id.* ¶ 4. There was one other photographer between him and the small group of agents. *Id.* One of the agents shone a light on Mr. Conley and fired a munition just beside him. *Id.* Another federal agent with an assault rifle approached Mr. Conley and told him to stay on the sidewalk. *Id.* ¶ 5. Later that night, without warning, federal agents pepper sprayed Mr. Conley at point blank range. *Id.* ¶ 6. Video of this event shows that while Mr. Conley was filming a line of federal officers moving down the street pepper spraying peaceful protesters, including spraying a woman in the face at point blank range who was on her knees with her hands up in the middle of the street, an officer pepper sprayed Mr. Conley at point blank range along with indiscriminately pepper spraying other press and the protesters. Mr. Conley states that he fears for his safety but plans to keep covering the protests because he believes "it is critically important to do so." *Id.* ¶ 11.

Declarant Amy Katz again covered the protests on the early morning of July 27th. ECF 117, ¶ 10. She witnessed a federal agent push a man down a flight of stairs while arresting him and photographed the incident. *Id.* An agent physically blocked her and tried to stop her from photographing the arrest. *Id.* When she stepped to the side to get another angle, the federal agent physically shoved her away. *Id.* Later that night, she approached a group of federal officers with a group of press, all of whom had their press badges up and their hands in the air. *Id.* ¶ 12. The video of this event shows that many of the group were calling out "press." Ms. Katz describes that she and the group of press were at least 75 feet away from most of the protestors when federal agents bombarded their group with munitions, hitting her in the side and causing a

large contusion. *Id.* The video shows the group of press moving together off to the far side of the sidewalk, holding their passes up along with cameras, shouting press and saying "hold your passes up." The group is moving toward the federal officers, recording events, when they are fired upon with various munitions. Ms. Katz stopped covering the Portland protests after that incident because of how the federal agents treated her. *Id.* ¶ 15.

Declarant Rebecca Ellis is a staff reporter for Oregon Public Broadcasting ("OPB"). ECF 88, ¶ 1. She attended the protests the night of July 23rd wearing her OPB press pass, which shows her name, her photograph, and the OPB logo. *Id.* ¶ 2-3. Around 1:30 a.m. she was in a small group of press members filming federal agents exiting the federal courthouse. *Id.* ¶ 3. One agent fired a munition directly at her, hitting her in the hand. *Id.* Video of this incident shows that she is hit when agents advance in a group and fire multiple munitions. Ms. Ellis appears to be in the middle of the street when she is hit. There are also persons crossing in front of Ms. Ellis, who appear also to be press, at the time she is shot. It is unclear who is behind her when she is hit. Ten minutes later, however, federal agents forced her and other press to disperse from near the courthouse. *Id.* ¶ 5. One agent walked towards them shouting "MOVE, MOVE" and "WALK FASTER" in their faces while another agent kept pace next to him, holding his gun. *Id.* Video of this dispersal shows that it is directed at press, in an intimidating manner, despite a press person stating, "You can't do that." The video does not seem to support that the press were in the way or otherwise impeding law enforcement actions. Ms. Ellis states that the federal agents prevented her from doing her job and reporting on what was going on behind them. She intends to keep covering the protests but is fearful for her safety. *Id.* ¶ 6.

Declarant Kathryn Elsesser is a freelance photographer whose photographs of the Portland protests have been published by Bloomberg, CBS News, and Yahoo, among others,

including many international publications. ECF 89, ¶ 1. She covered the protests the night of July 24th on assignment from a French news agency. *Id.* ¶ 2. She carried a large camera, wore a press pass from the American Society of Media Photographers, and wore a helmet with "PRESS" written in big letters across the front. *Id.* Around 2 a.m. on July 25th, Ms. Elsesser decided to end her coverage early because she did not have a bullet-proof vest and was afraid federal agents would hurt her. *Id.* ¶ 4. She was standing by herself, across the street from the courthouse, at the edge of the park. *Id.* There was nobody else near her. *Id.* A federal agent shot her in the arm with an impact munition as she was walking away. *Id.* ¶ 5. She believes that the federal agents targeted her because she was taking photographs. *Id.* ¶ 6. Ms. Elsesser states that she would refuse to cover the protests again unless she had a bullet-proof vest because she is afraid that federal agents will injure her or worse. *Id.* ¶ 13.

Declarant Emily Molli is a freelance photojournalist whose photographs have been published in the *New York Times*, the *Wall Street Journal*, the *Guardian*, *ProPublica*, and others. ECF 118, ¶ 1. She is experienced in covering civil unrest, riots, and other dangerous situations. She has reported on the protests in Hong Kong over the course of six months, the "Yellow Vests" in France over the course of a year, the Catalan independence movement, and the protests and riots in Greece. *Id.* ¶ 2. She understands the risk of getting hit by less lethal munitions while standing with protesters, but she objects to federal officers targeting press, which she states she has witnessed happening in Portland. *Id.* She wears a helmet with "PRESS" in big block letters and carries two press passes and a large professional-grade video camera. *Id.* ¶ 3. Early in the morning of July 27, 2020, after getting shot and injured when she had been approximately 75 yards from protesters, Ms. Molli decided to stick with a group of only journalists. *Id.* ¶¶ 7-8. The video of this event shows that they were holding their press passes up, mostly staying together as

a group, and staying toward the side of a street that appears otherwise empty. Federal officers fired munitions at the group of journalists. *Id.* ¶ 8. On July 29, 2020 and into the early morning of July 30th, Ms. Molli recorded another encounter between journalists and federal officers on SW Main Street. *Id.* ¶ 10. Video of this event shows that there were numerous law enforcement personnel, several journalists, and no protesters on that section of the street. Journalists are taking pictures and video of a tear gas canister that had been fired by federal agents when a federal agent fires another tear gas round at the journalists. Ms. Molli intends to keep covering the protests, but she fears for her safety because she has seen the federal agents disobey a court order. *Id.* ¶ 11.

Declarant Daniel Hollis is a videographer for VICE News. ECF 91, ¶ 1. He has covered many chaotic and dangerous situations, including conflict zones in Iraq and Syria, former Taliban areas in Pakistan, child sex-trafficking raids in the Philippines, Iranian militias, gangs, mafia, domestic terrorism, and armed militias. *Id.* He covered the Portland protests for two nights. *Id.* ¶ 2. During the protests, he carried a VICE press pass and a helmet with "PRESS" on it in bright orange tape. *Id.* He also carried a large, professional video-recording camera. *Id.* On July 26th, Mr. Hollis was filming wide-angle footage of a mass of protestors in front of the courthouse. *Id.* ¶ 4. The people closest to him were press and legal observers—the nearest protestors were several yards behind him. *Id.* ¶ 7. He then turned to record a group of federal agents massed outside the courthouse. *Id.* ¶ 5. Almost immediately, the agents shot at him, striking him just to the left of his groin. *Id.* He turned to run away, and another munition hit him in the lower back. *Id.* ¶ 6. Video of this event shows that Mr. Hollis was positioned between the federal agents and those few protesters (not the mass of protesters who were around the building), but the video does not reflect any violent or riotous behavior by anyone near Mr.

Hollis. After the federal agents shot him, Mr. Hollis went back to his hotel. *Id.* ¶ 8. He states that he is more concerned for his personal safety than he was during the month he spent covering ISIS sleeper cells in Northern Syria. *Id.* ¶ 9. He states: "I have been around heavily armed soldiers, militias, and gangs countless times, but have never had weapons aimed or discharged directly at me. The federal agents I have seen in Portland have been less willing to distinguish between press and putative enemies than any armed combatants I have seen elsewhere." *Id.*

Declarant Jonathan Levinson is an Oregon resident who lives in Portland. ECF 93, ¶ 1. He is a staff reporter for OPB. His work also has appeared on NPR and ESPN, and in the *Washington Post*, the *Wall Street Journal*, and *Al Jazeera*. *Id.* He has experience in conflict zones. He spent five years as an infantry officer in the U.S. Army, with two deployments to Iraq. *Id.* ¶ 2. As a reporter, he has covered the Libyan civil war and done work in Afghanistan, Yemen, Gaza, and the West Bank. *Id.* He has covered the Portland protests for a majority of the nights. When covering the protests, he wears his press pass issued by OPB, which contains his name, photograph, the OPB logo, and the word "MEDIA." *Id.* ¶ 3. He also wears a helmet that says "PRESS" in large letters on the front and back and carries two professional cameras. *Id.* At around 1:00 a.m. on July 24th, the federal agents had cleared the area next to the courthouse so he decided to take pictures of the agents through the courthouse fence. *Id.* ¶ 4. There were very few protesters anywhere nearby. As he was trying to focus his professional camera, he could see a federal agent raise and aim his weapon and fire several rounds directly at Mr. Levinson. *Id.* ¶ 5. His camera and lens were covered in paint from the agent's rounds. Mr. Levinson states that he intends to continue covering the protests because he believes they are of historic significance, but that he is fearful for his safety because within hours of the Court issuing its restraining order, he "saw federal agents brazenly violate it." *Id.* ¶ 7.

D. Declarations of Plaintiffs' Expert Witness Gil Kerlikowske[4]

Plaintiffs submitted two declarations from Mr. Gil Kerlikowske, whom the Court finds to be a qualified, credible, and persuasive expert witness. ECF 135, 145. Mr. Kerlikowske is a former Commissioner of U.S. Customs and Border Protection, and he was confirmed by the U.S. Senate. Mr. Kerlikowske also served as the Chief of Police in Seattle, Washington from 2000 through 2009, and the Police Commissioner in Buffalo, New York. He has worked in law enforcement for 47 years. He served in the United States Army and Military Police from 1970 through 1972, where he began training in crowd control, riots, and civil disturbances. He also has served as the Director of the Office of National Drug Control Policy and as Deputy Director of the U.S. Department of Justice, Office of Community Oriented Policing Services. He has been an IOP Fellow at Harvard Kennedy School of Government and teaches as a distinguished visiting fellow and professor of the Practice in Criminology and Criminal Justice at Northeastern University. During his tenure as Chief of Police in Seattle, Mr. Kerlikowske led and orchestrated the policing of hundreds of large and potentially volatile protests, many of which were considerably larger than the recent protests in Portland. He did the same thing when he was Police Commissioner in Buffalo. Mr. Kerlikowske has had substantial training and experience with crowd control and civil unrest in the context of protests, use of force in that context, and use of force generally.

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[4] After oral argument, the Federal Defendants filed the Declaration of Chris A. Bishop, the "Acting Director/Deputy Director," for the U.S. Department of Homeland Security, U.S. Customs and Border Protection (CBP). ECF 152. The Federal Defendants offer this declaration as an expert rebuttal to the two declarations of Mr. Kerlikowske. Plaintiffs have moved to strike Mr. Bishop's declaration as untimely. ECF 154. The Court denies Plaintiffs' motion to strike. The Court finds the declaration of Mr. Kerlikowske to be more persuasive than the declaration of Mr. Bishop.

Plaintiffs asked Mr. Kerlikowske to evaluate whether the relief stated in the TRO against the Federal Defendants is both safe and workable from a law enforcement perspective, whether the force that federal authorities used against journalists and legal observer complainants was reasonable, and whether it is advisable to prominently mark federal agents with unique identifying letters or numbers. First, Mr. Kerlikowske opined that the prohibitions contained in the TRO are safe for law enforcement personnel. Defending the federal courthouse in Portland mainly involves establishing a perimeter around the building, and there is no reason to target or disperse journalists from that position. Additionally, to the extent officers leave federal property, the TRO is also safe for federal law enforcement officers, according to Mr. Kerlikowske.

Second, Mr. Kerlikowske stated his expert opinion that the TRO is workable. He states that trained and experienced law enforcement personnel are able to protect public safety without dispersing journalists and legal observers and can differentiate press from protesters, even in the heat of crowd control. He adds that any difficulties that may be faced by federal authorities arise from their lack of training, experience, and leadership with experience in civil disturbances and unrest.

Third, Mr. Kerlikowske explains that based on his review of the record evidence virtually all the injuries suffered by the complaining journalists were the result of improper use of force, including shooting people who were not engaged in threatening acts and misuse of crowd-control munitions by federal law enforcement personnel. For example, Mr. Kerlikowske opines that tear gas canisters and pepper balls should not be fired directly at people. He also opines that rubber bullets should not be shot above the waist, and certainly not near the head. He further opines that in these circumstances, it is inappropriate to shoot someone in the back because at that point they are not a threat.

Finally, Mr. Kerlikowske asserts that in his expert opinion a key duty and responsibility of law enforcement is to be properly and easily identifiable specific to the organization and the individual. He notes that if a decision is made to remove a name tag, it must be replaced with some other identifying label, badge, or shield number. Mr. Kerlikowske explains that such markings increase accountability and act as a check and deterrent against misconduct. He adds that camouflage uniforms are inappropriate for urban settings.

As noted, the Court finds Mr. Kerlikowske to be a well-qualified expert whose opinions are relevant, helpful, and persuasive.

E. The Situation Faced by Law Enforcement

After the killing of George Floyd on Memorial Day, there have been consistent protests against racial injustice and police brutality in Portland. ECF 67-1, Russell Decl. ¶ 3. The protesters generally are peaceful, particularly during the day and early evening. *See* ECF 113-3, Jones Decl. ¶ 7. Late at night, however, there are incidents of vandalism, destruction of property, looting, arson, and assault. ECF 67-1, ¶ 3. While protestors originally gathered outside the Justice Center (PPB headquarters), some protestors soon directed their attention to the Mark O. Hatfield Federal Courthouse, across the street from the Justice Center. After additional federal officers were deployed to Portland to support existing Federal Protective Service ("FPS") and USMS personnel, the protests grew larger and more intense, and the federal courthouse became a focus of attention. *Id.* at ¶ 5.

In early July, a group of people broke the glass doors at the entryway of the federal courthouse. *Id.* Members of this group used accelerant and commercial fireworks in an apparent attempt to start a fire inside the courthouse. *Id.* On other nights in July, various objects were thrown at law enforcement, such as rocks, glass bottles, and frozen water bottles. *Id.* at ¶ 6; ECF 101-6, CBP NZ-1 Decl. ¶ 8. Assistant Director for the Tactical Operations Division of the

USMS Andrew Smith describes the environment of the protests as "extremely chaotic and dynamic" and emphasizes that law enforcement must make split-second decisions. ECF 101-1, Smith Decl., ¶ 6. A DHS Public Affairs Specialist identified as CBP PAO #1 states that he observed a person holding a Molotov cocktail. ECF 101-2, ¶ 7. Officers have had to extinguish fires and flaming debris, some of which has been thrown over the fence in officers' direction. *See* ECF 106-1, Smith Am. Decl. ¶ 15; ECF 101-3, FPS No. 824 Decl. ¶ 5.

The situation has been dangerous for federal agents, in addition to protesters, journalists, and legal observers. Gabriel Russell, FPS Regional Director for Region 10 and commander of DHS's Rapid Deployment force for Operation Diligent Valor in Portland, notes that as of his declaration submitted on July 29th, 120 federal officers had experienced some kind of injury, including broken bones, hearing damage, eye damage, a dislocated shoulder, sprains, strains and contusions. ECF 101-5, ¶ 4. The Patrol Agent in Charge of Customs and Border Protection, U.S. Border Patrol, identified as CBP NZ-1, describes agents being hit with rocks and ball bearings from sling shots, improvised explosives, commercial grade aerial fireworks, high intensity lasers targeting officer's eyes, thrown rocks, full and empty glass bottles, frozen water bottles, and balloons filled with paint and feces. ECF 101-6, ¶ 8. He notes that one officer was hit by a projectile that caused a wound that required multiple stitches and one officer was struck in the head and shoulder by a protester wielding a sledgehammer when the officer tried to prevent the protester from breaking down the courthouse door. *Id.* Another federal officer states that he has suffered numerous injuries during the protests, including being struck in the shins by tear gas canisters, suffering temporary hearing loss from commercial fireworks, and suffering temporary blindness from lasers. ECF 101-3, FPS No. 824 Decl. ¶ 6. The Federal Defendants do not assert

that journalists or legal observers caused these injuries. *See, e.g.*, ECF 136-3 at 10-11, CBP NZ-1 Dep. Tr. 72:10-73:1.

The Federal Defendants, however, do assert that some persons wearing the indicia of press have engaged in violent or unlawful behavior. Mr. Smith states that USMS personnel witnessed a person with a helmet marked "press" use a grinder to attempt to breach the fence surrounding the courthouse. ECF 106-1, ¶ 10. Another person wearing a press helmet entered courthouse property, either by climbing the perimeter fence or crossing when the fence was breached. *Id.* ¶ 11. A different person with press clothing helped a protestor climb the perimeter fence. *Id.* at ¶ 14. Mr. Smith also received a report that a staff member was kicked by someone wearing clothing marked "press." *Id.* at ¶ 15.

Mr. Russell submitted links to several videos purporting to show improper conduct by persons with indicia of press. ECF 101-5, ¶ 8. The Court reviewed those videos and did not find persuasive evidence of any wrongdoing related to persons wearing indicia of press with two exceptions. The first are the videos of Mr. Brandon Paape, who admits that he is not press but is wearing clothing marked "press" because he was assaulted by federal agents and hoped wearing clothing that indicates he is press would protect him from further violence. *Id.* ¶ 8(e), (f). The videos, however, do not provide evidence that Mr. Paape did anything unlawful. He masqueraded as press for personal protection. Additionally, shortly thereafter, he posted on Twitter that he will no longer wear indicia of press. *See* ECF 123 at 12. The videos of Mr. Paape do show, however, that persons other than actual journalists have worn indicia of press. The second is the video of a person wearing a "press" helmet who entered courthouse property and encouraged others to join. ECF 101-5, ¶ 8(h). He states: "They can't arrest us all." This, however, is the same person from Mr. Smith's photograph, ECF 106-1 ¶ 11 (Exhibits B and C).

The Federal Defendants also provide additional declarations describing further conduct. A man wearing a vest stating "press" threw a hard object toward police. ECF 101-3, FPS No. 824 Decl., ¶ 5. Another such person shielded from police a woman who was shining strobe lights into the eyes of an officer. *Id.* One person with handwritten markings reading "PRESS" directed a powerful flashlight at a law enforcement helicopter overhead but was not filming or taking photos or notes. ECF 101-2, CBP PAO #1 Decl. ¶ 9. A photo of this man depicts him standing very close to another man holding a camera. *Id.* It is unclear if the man with the powerful light was lighting for the cameraman or was masquerading as press to use light as a law enforcement irritant. Another federal officer states that on one occasion he witnessed persons wearing press indicia shield other persons who were throwing objects at law enforcement. ECF 101-4, FPS No. 882 Decl. ¶ 5. Finally, CBP PAO #1 notes that people self-identified as press are frequently in the midst of crowds near individuals breaking laws, which makes it difficult to disperse protestors without dispersing journalists as well. ECF 101-2, ¶ 12. The Federal Defendants also consistently note that press intermingle with protesters and stand by (or perhaps record) when protesters engage in purportedly wrongful conduct.

DISCUSSION

A. Standing

The Federal Defendants argue that Plaintiffs do not have standing to request injunctive relief. The Federal Defendants concede that "the standing inquiry is focused on the filing of the lawsuit" but then assert that standing must be proven at "successive stages of the litigation" and make the same standing arguments that they made during the TRO. In issuing the Temporary Restraining Order Enjoining Federal Defendants, the Court rejected the Federal Defendants' arguments regarding standing and found that Plaintiffs had Article III standing. *See Index Newspapers LLC v. City of Portland*, --- F.3d ---, 2020 WL 4220820, at *4-5 (D. Or. July 23,

2020). To the extent the Federal Defendants request reconsideration of that decision, arguing that based on facts as they existed at the time of the filing of the Complaint Plaintiffs do not have standing, reconsideration is denied.[5] The Federal Defendants provide no compelling basis for the Court to modify its previous determination.

To the extent the Federal Defendants argue that Plaintiffs must continue to prove standing as this lawsuit continues and the facts evolve, the Federal Defendants misunderstand the doctrines of standing and mootness. Article III standing is evaluated by considering the facts as they existed at the time of the commencement of the action. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (noting that "we have an obligation to assure ourselves that FOE had Article III standing at the outset of the litigation"); *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 838 (9th Cir. 2007) ("The existence of standing turns on the facts as they existed at the time the plaintiff filed the complaint.").

Whether standing and the other requirements for a live case or controversy exists throughout the entirety of a case is considered under the doctrine of mootness. *See Barry v. Lyon*, 834 F.3d 706, 714 (6th Cir. 2016) ("To uphold the constitutional requirement that federal courts hear only active cases or controversies, as required by Article III, section 2 of the federal constitution, a plaintiff must have a personal interest at the commencement of the litigation (standing) that continues throughout the litigation (lack of mootness)."); *Vasquez v. Los Angeles*

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[5] The Federal Defendants offer no authority for the notion that this Court must repeatedly litigate the same issue. The Federal Defendants are bound by the "law of the case" doctrine for determinations made by this Court, absent reconsideration or changed circumstances such as if new Plaintiffs were added who the Federal Defendants contended did not have standing. At any appeal stage of this litigation, however, "the standing requirement therefore must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019) (simplified).

Cty., 487 F.3d 1246, 1253 (9th Cir. 2007) (noting that mootness is the doctrine under which courts ensure that "a live controversy [exists] at all stages of the litigation, not simply at the time plaintiff filed the complaint"); *Becker v. Fed. Election Comm'n*, 230 F.3d 381, 386 n.3 (1st Cir. 2000) (noting that *Lujan* "clearly indicat[es] that standing is to be 'assessed under the facts existing when the complaint is filed'" and that evaluating standing thereafter "conflates questions of standing with questions of mootness: while it is true that a plaintiff must have a personal interest at stake throughout the litigation of a case, such interest is to be assessed under the rubric of standing at the commencement of the case, and under the rubric of mootness thereafter"); *McFalls v. Purdue*, 2018 WL 785866, at *8-10 (D. Or. Feb. 8, 2018) (discussing the difference between standing and mootness). Therefore, the Federal Defendants' arguments that Plaintiffs must demonstrate standing at "all stages of the litigation," fail to do so now, and thus fail to present a case or controversy are more appropriately raised under the doctrine of mootness, to which the Court now turns. *See, e.g.*, *Barry*, 834 F.3d at 714; *Vasquez*, 487 F.3d at 1253; *Becker*, 230 F.3d at 386 n.3; *Tellis v. LeBlanc*, 2020 WL 1249378, at *5 (W.D. La. Mar. 13, 2020); *Rhone v. Med. Bus. Bureau, LLC*, 2019 WL 2568539, at *3 (N.D. Ill. June 21, 2019); *Fancaster, Inc. v. Comcast Corp.*, 2012 WL 815124, at *5 (D.N.J. Mar. 9, 2012).

B. Mootness

The Federal Defendants do not specifically argue that Plaintiffs' claims are moot based on any new facts or circumstances. Because the Federal Defendants appear to argue that Plaintiffs now lack standing based on changed circumstances, the Court considers whether the Federal Defendants' voluntary change in enforcement tactics moots Plaintiffs' claims. The augmented force of federal enforcement officers currently remain in Portland, ready to deploy whenever ordered, but have recently deployed only in limited circumstances and have not

recently engaged in the crowd control tactics that supported the Court's original TRO in this case.

For a short time, the Oregon State Police took the lead in enforcing crowd control in Portland. That appears to have ended, and the Portland Police have now resumed performing that role. The out-of-town agents and officers of the Federal Defendants who have been deployed to Portland, however, and whose actions were the basis of the Court's TRO, remain in Portland. Further, they have no scheduled date of departure.

To determine mootness, "the question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be *any* effective relief." *Nw. Envtl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1244-45 (9th Cir. 1988) (emphasis in original) (quoting *Garcia v. Lawn*, 805 F.2d 1400, 1403 (9th Cir. 1986)). If a course of action is mostly completed but modifications can be made that could alleviate the harm suffered by the plaintiff's injury, the issue is not moot. *Tyler v. Cuomo*, 236 F.3d 1124, 1137 (9th Cir. 2000). A case becomes moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quotation marks omitted). The party alleging mootness bears a "heavy burden" to establish that a court can provide no effective relief. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (quoting *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006)).

Further, voluntary cessation of conduct moots a claim only in limited and narrow circumstances. As explained by the Supreme Court:

> The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave the defendant free to return to his old ways. A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to

> recur. Of course it is still open to appellees to show, on remand, that the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary. This is a matter for the trial judge. But this case is not technically moot, an appeal has been properly taken, and we have no choice but to decide it.

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 n.10 (1982) (simplified); *see also F.T.C. v. Affordable Media*, 179 F.3d 1228, 1238 (9th Cir. 1999) ("A case may become moot as a result of voluntary cessation of wrongful conduct only if 'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" (quoting *Lindquist v. Idaho State Bd. of Corr.*, 776 F.2d 851, 854 (9th Cir. 1985))). The Ninth Circuit has noted that "an executive action that is not governed by any clear or codified procedures cannot moot a claim." *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015). The Ninth Circuit also advises courts to be "less inclined to find mootness where the new policy could be easily abandoned or altered in the future." *Rosebrock v. Mathis*, 745 F.3d 963, 972 (9th Cir. 2014) (simplified).

The Federal Defendants' voluntary change in enforcement tactics does not moot Plaintiffs' claims. There remains effective relief that the Court can provide for Plaintiffs. Further, the change in enforcement tactics is not part of any clear or codified procedures. It could easily be abandoned or altered in the future. Indeed, the Federal Defendants have stated that they specifically intend to abandon or alter in the future the current posture and become actively involved again if local police do not perform in a manner acceptable to the Federal Defendants or are otherwise unable to secure the federal courthouse in Portland in a manner acceptable to the Federal Defendants.[6] Whether this current and potentially temporary change in enforcement tactics affects Plaintiffs' likelihood of irreparable harm is addressed in Section D.2 below.

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[6] *See, e.g.*, ECF 147-1 at 3 (USMS responding to a Request for Admission that it would no longer police Portland protests by stating: "USMS cannot know whether state law

C. Factors for Preliminary Injunctive Relief

1. Likelihood of Success on the Merits

Plaintiffs allege both First Amendment retaliation and a violation of their First Amendment right of access.[7] Plaintiffs must show a likelihood of success on the merits (or at least substantial questions going to the merits) on at least one of these two claims. Plaintiffs satisfy this requirement.

a. First Amendment Retaliation

To establish a claim of First Amendment retaliation, Plaintiffs must show that: (1) they were engaged in a constitutionally protected activity; (2) the Federal Defendants' actions would chill a person of ordinary firmness from continuing to engage in the protected activity; and

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enforcement efforts will continue or whether those efforts will sufficiently protect federal property" and providing a nearly identical response in denying a request for admission that USMS would not engage with journalists or legal observers at a Portland protest); ECF 147-2 at 3 (USMS responding to an interrogatory regarding its plans to remove the additional support personnel sent to Portland: "With respect to the withdrawal of additional personnel deployed to Portland, their withdrawal will depend on unknown future circumstances in Portland and presence of any threat to the federal judiciary or property."); ECF 147-3 at 3 (DHS providing nearly identical responses to the similar Requests for Admission); ECF 147-4 at 4 (DHS responding that the "cessation of Operation Diligent Valor will depend on unknown future circumstances in Portland. . . . The other DHS officers and agents deployed to Portland to assist FPS in the protection of the Hatfield U.S. Courthouse and federal facilities in Portland will remain in Portland until the Department makes an operational security determination that their presence is no longer required to protect federal facilities there."); ECF 147-4 at 3 (DHS affirming as truthful the statements in the press release filed with the Court in ECF 124-1, including the statement from Acting Secretary Chad Wolf that "the increased federal presence in Portland will remain until [DHS] is certain the federal property is safe and a change in posture will not hinder DHS's Congressionally mandated duty to protect it. While the violence in Portland is much improved, the situation remains dynamic and volatile, with acts of violence still ongoing, and no determination of timetables for reduction of protective forces has yet been made. Evaluations remain ongoing.").

[7] Plaintiffs also allege claims under the Fourth Amendment and Oregon's state Constitution, but did not argue those claims in their motion for preliminary injunction. Thus, the Court only considers Plaintiffs' likelihood of success on their First Amendment claims.

(3) the protected activity was a substantial or motivating factor in the Federal Defendants' conduct. *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 770 (9th Cir. 2006). For the first factor, Plaintiffs have shown that they are engaged in constitutionally protected activity under the First Amendment. Plaintiffs are engaged in newsgathering, documenting, and recording government conduct. *See, e.g.*, *Leigh*, 677 F.3d at 898 (recognizing First Amendment protection for "the press and public to observe government activities"); *United States v. Sherman*, 581 F.2d 1358, 1360 (9th Cir. 1978) (noting that the "ability to gather the news" is "clearly within the ambit of the First Amendment"). The Federal Defendants do not dispute this factor.

Regarding the second factor, the Federal Defendants argue that Plaintiffs' assertion that they intend to continue to cover the protests in Portland or that they have a continuing fear of future physical force or threat by the Federal Defendants is subjective and insufficient. The Court rejects that argument. The enforcement tactics of the Federal Defendants would chill a person of ordinary firmness from continuing to engage in the protected activity. "Ordinary firmness" is an objective standard that will not "allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity." *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999). Before the TRO was in place, Plaintiffs submitted numerous declarations, photographs, and videos describing and depicting instances when journalists and legal observers were targeted. This includes Mr. Howard being shot at close range despite complying with a federal officer's order to stay where he was. It also includes Mr. Kim and Mr. Yau being shot when they were not near protesters. It further includes Mr. Berger being beaten with a baton.

The Court also has reviewed all of the testimony and videos submitted by Plaintiffs after the Court issued its TRO. Although some of that evidence is ambiguous or less persuasive, some

of it describes or shows conduct that appears to target journalists and legal observers, as opposed to incidentally or inadvertently reaching them as part of reasonable crowd control or enforcement against violent offenders. This evidence includes a federal officer forcing reporter Ms. Ellis to disperse on July 24, 2020 in a manner that would be intimidating to a reasonable person, despite the Court's TRO providing that press shall not be required to disperse. It also includes a federal officer spraying mace or pepper spray directly into the faces of clearly marked legal observers from only a few feet away. The evidence further includes a federal officer shooting a less lethal munition on July 23rd directly at Mr. Conley and another photographer, both clearly identifiable as press, after shining a bright light on them to identify them, and when the person nearest to them was a clearly identified medic standing behind a shield several feet away. It also includes video from Ms. Molli in the early morning of July 30, 2020, one week after the TRO was issued, showing law enforcement agents firing on a group of journalists when only other law enforcement agents were nearby.

The declarations submitted both before and after the TRO also describe that because of the Federal Defendants' conduct, journalists and legal observers were forced to stop newsgathering, documenting, and observing for minutes, hours, or days due to injury and trauma. This includes Mr. Haberman-Ducey being unable to observe due to his broken hand, Mr. Rudoff being unable to return for two days due to being shot in the leg, Mr. Conley having to take some time away because he could "barely walk" after his injuries, Ms. Elsesser stating that she would refuse further assignments in Portland unless she was provided with a bullet proof vest because of her injuries, Mr. Hollis leaving early after he was shot, and Ms. Jeong leaving earlier than she had planned.

Indeed, some journalists decided never to return because of fear for their personal safety. *See, e.g.*, ECF 81 at 4 (Mr. Steve Hickey stating: "I do not intend to continue covering the protests in Portland after tonight, in part because I am fearful that federal agents will injure me even more severely than they did on the night of July 19 and morning of July 20 when they intentionally shot at my face, twice, when I was not even near any protestors."); ECF 117 at 5 (Ms. Katz stating: "Because of how federal agents treated me, I have stopped covering the Portland protests."). Most of the declarants, however, emphasize that they intend to continue covering or observing the protests despite their fear of continued injury or targeting by the Federal Defendants. This fear is not unreasonable or speculative. Plaintiffs and the other declarants were repeatedly subject to violent encounters with federal officers when covering the Portland protests. It is not hypothetical or mere conjecture. Instead, it is likely that they and other journalists and legal observers will face such treatment again if they cover protests in Portland policed by agents of the Federal Defendants. Moreover, the mere threat of harm, without further action, can have a chilling effect. *Brodheim v. Cry*, 584 F.3d 1262, 1270 (9th Cir. 2009).

The Court recognizes that that there are some violent individuals at these protests, including some who throw dangerous items at law enforcement officers, such as rocks, frozen water bottles, fireworks, and Molotov cocktail-type devices. Law enforcement also face arson events, including in dumpsters and debris being piled and set on fire. The situation can be dangerous and difficult for law enforcement. The fact that there are some violent offenders, however, does not give the Federal Defendants carte blanche to attack journalists and legal observers and infringe their First Amendment rights. *See Black Lives Matter Seattle-King Cty. v. City of Seattle, Seattle Police Dep't*, 2020 WL 3128299, at *3 (W.D. Wash. June 12, 2020). Further, many declarants note that they have covered protests in war zones around the world and

in areas with riotous protests such as Hong Kong, Oakland, and Seattle, and have never been subjected to the type of egregious and violent attacks by law enforcement personnel as they have suffered in Portland. If military and law enforcement personnel can engage around the world without attacking journalists, the Federal Defendants can respect Plaintiffs' First Amendment rights in Portland, Oregon.

In addition, the change in enforcement tactics does not serve to remove the chilling effect of the Federal Defendants' conduct for the same reason it does not moot Plaintiffs' claims. It is subject to change without notice and whenever the Federal Defendants assert that it is needed. It also has been the subject of conflicting public statements, which would not give a person of ordinary firmness confidence that the Federal Defendants are not poised and ready to return to the streets of Portland at any moment and to continue with the previous modus operandi.

Regarding the third factor, the Federal Defendants argue that Plaintiffs fail to show that any protected activity was a substantial or motivating factor in any purported conduct. The Federal Defendants assert that in every video submitted by Plaintiffs after the TRO went into effect, every journalist or authorized legal observer who was purportedly targeted was standing between law enforcement officers and protesters and sometimes also standing next to or behind protesters. Thus, argue the Federal Defendants, legal observers and journalists were not being intentionally targeted but merely were "inadvertently" hit. The Federal Defendants conclude that the circumstantial evidence does not support any retaliatory intent, and Plaintiffs have not shown a likelihood of success on the merits.

The Court reaches a different conclusion from the evidence. The issue is not as simple as whether a legal observer is standing "between" law enforcement personnel and protesters. For example, the Court's view of the two videos showing the pepper spray or mace attack on the

legal observers reveals that this evidence supports the finding that journalists or legal observers were targeted and not inadvertently hit. They were standing together along the fence protecting the courthouse. There may have been protesters at some point standing behind them, although not close behind them, based on the video. Thus, the journalists or legal observers may have been "between" the law enforcement at the fence and some set of protesters further back from the fence. But based on the video, it is clear that the pepper spray was not aimed at protesters standing further back from the fence. The spray appears to have been intentionally directed at close range into the faces and eyes of the journalists or legal observers.

Additionally, from the Court's review, there are videos showing journalists not standing in between law enforcement and protesters, yet they also appear to have been targeted by agents of the Federal Defendants. For example, the video from Mr. Conley from July 24, 2020, from the time count of approximately 6:30 to 7:40, supports the finding that he was targeted. Federal agents fired on him when he was not near protesters, after he had repeatedly identified himself as press, after many federal officers had returned to the courthouse and were safe from the volatile situation of apprehending the woman and the man who had attempted to interfere with the woman's apprehension, and after the pan of Mr. Conley's camera showed that the nearest person was another photographer. The next two nearest people were yards away and were on one side a medic behind a shield and on the other side a single protester yelling taunts. A federal officer shone a bright light at Mr. Conley, making his and his neighboring photographer's press status even more identifiable, and then fired at Mr. Conley.

The Court also finds it to be a reasonable interpretation[8] that Ms. Ellis and another journalist were targeted when on July 24, 2020, they were forced to disperse, despite the TRO and their clearly identifiable status as press. Further, the Court finds that the video posted by Ms. Molli from early morning on July 30th supports a finding of targeting. This video shows journalists taking video and pictures of a munition that had been fired by federal officers. There were only a handful of journalists and many law enforcement officers, no protesters. Suddenly, one officer fired a less-lethal munition directly at the journalists recording the events.

Moreover, there are declarations that do not have video. The Federal Defendants do not address these. For example, Ms. Elsesser states that on July 25th she was standing by herself, across the street from the courthouse, with no protesters around when she was shot with a munition in the back of her arm. Ms. Katz states that on July 27th she was attempting to photograph the arrest of a protester when a federal agent physically blocked her. When she took a step to the side to get another angle, he physically shoved her away. These videos and declarations are all circumstantial evidence supporting retaliatory animus.

The Federal Defendants cite two unpublished Ninth Circuit decisions in support of their argument that in responding to some violent offenders in protesting crowds, any incidental burden on the First Amendment rights of journalists and legal observers is acceptable. These unpublished—and thus non-precedential—cases are unpersuasive. The Court follows published Ninth Circuit precedent, including *Collins*, which instructs that the proper response to violence is to arrest the violent offenders, not prophylactically suppress First Amendment rights. *See Collins*, 110 F.3d at 1372.

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[8] The Court makes no determination regarding clear and convincing evidence needed for a finding of contempt.

The Federal Defendants also argue that they have a formal policy of supporting First Amendment rights and contend that Plaintiffs fail to show otherwise. The Federal Defendants may not, however, hide behind a formal policy if in practice they do not conform to that policy. *See Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1075 n.10 (9th Cir. 2016) (en banc) (noting that a defendant cannot escape its "actual routine practices" by "pointing to a pristine set of policies"). At this stage of the litigation, the Court is persuaded by the number of alleged acts and the expert testimony of Mr. Kerlikowske that the conduct of the federal officers has not been reflective of a policy or practice of respecting First Amendment rights. Mr. Kerlikowske opines that the federal officers repeatedly have engaged in excessive force against journalists and legal observers, have not used appropriate crowd control tactics, and improperly have fired at the head, heart, and backs of journalists and legal observers when such conduct is generally not permitted. Even the Federal Defendants' own witnesses have conceded that shooting persons in such a manner is inappropriate. *See, e.g.*, ECF 136-2 at 13, FPS 824 Dep. Tr. 34:14-21 (testifying that shooting a person in the back who is not doing anything violent is not appropriate); ECF 136-3 at 8, CBP NZ-1 Dep. Tr. 37:18-25 (testifying that shooting a person in the back is not something that an agent or officer should do). Mr. Kerlikowske also opines that the augmented federal force deployed in Portland does not have the appropriate training for policing urban protests and crowd control and does not have the appropriate supervision and leadership. The Court finds these opinions persuasive, and they provide further circumstantial evidence of retaliatory intent.

In sum, Plaintiffs provide substantial circumstantial evidence of retaliatory intent to show, at the minimum, serious questions going to the merits. Plaintiffs submit numerous declarations and other video evidence describing and showing situations in which the declarants

were identifiable as press, were not engaging in unlawful activity or even protesting, were not standing near protesters, and yet were subjected to violence by federal agents under circumstances that appear to indicate intentional targeting. Contrary to the Federal Defendants' arguments, this evidence does not show that the force used on Plaintiffs was merely an "inadvertent" consequence of otherwise lawful crowd control. Also, Plaintiffs submit expert testimony opining about repeated instances of excessive force being used against journalists and legal observers and failures of training and leadership with the augmented federal force sent to Portland, which is further circumstantial evidence supporting Plaintiffs' claim. Thus, Plaintiffs' have shown the elements of First Amendment retaliation.

b. Right of Access to Public Streets and Sidewalks

The First Amendment prohibits any law "abridging the freedom of speech, or of the press[.]" U.S. Const., amend. I. Although the First Amendment does not enumerate special rights for observing government activities, "[t]he Supreme Court has recognized that newsgathering is an activity protected by the First Amendment." *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978); *see Branzburg*, 408 U.S. at 681 ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.").

As the Ninth Circuit has explained: "the Supreme Court has long recognized a qualified right of access for the press and public to observe government activities." *Leigh*, 677 F.3d at 898. By reporting about the government, the media are "surrogates for the public." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (Burger, C.J., announcing judgment); *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 91 (1975) ("[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations."). As further described by the Ninth Circuit, "[w]hen wrongdoing is

underway, officials have great incentive to blindfold the watchful eyes of the Fourth Estate." *Leigh*, 677 F.3d at 900 (quoting Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 949 (1992) (alteration in original) ("[W]hen the government announces it is excluding the press for reasons such as administrative convenience, preservation of evidence, or protection of reporters' safety, its real motive may be to prevent the gathering of information about government abuses or incompetence.")).

The Federal Defendants argue that journalists have no right to stay, observe, and document when the government "closes" public streets. This argument is not persuasive. First, the Federal Defendants are not the entities that "close" state and local public streets and parks; that is a local police function.[9] Second, the point of a journalist observing and documenting government action is to record whether the "closing" of public streets (*e.g.*, declaring a riot) is lawfully originated and lawfully carried out. Without journalists and legal observers, there is only the government's side of the story to explain why a "riot" was declared and the public streets were "closed" and whether law enforcement acted properly in effectuating that order. Third, the Federal Defendants have not shown that any journalist or legal observer has harmed any federal officer or damaged any federal property, and if any journalist, legal observer, or person masquerading as a journalist or legal observer were to attempt to do so, the preliminary injunction would not protect them. Thus, the stated need to protect federal property and the safety of federal officers is not directly affected by allowing journalists and legal observers to stay, observe, and record events.

The Federal Defendants argue that Plaintiffs improperly rely on *Press-Enterprise Co. v. Superior Court* ("*Press-Enterprise II*"), 478 U.S. 1 (1986), to articulate the standard to apply in

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[9] *See* n.2, *supra*.

evaluating likelihood of success in Plaintiffs' claim of right of access. The Court rejects this aregument.

In *Press-Enterprise II*, the Supreme Court established a two-part test for a claim of violation of the right of access. First, the court must determine whether a right of access attaches to the government proceeding or activity by considering whether the place and process have historically been open to the press and general public and whether public access plays a significant positive role in the functioning of the particular process in question. *Press-Enterprise II*, 478 U.S. at 8-9. Second, if the court determines that a qualified right applies, the government may overcome that right only by demonstrating "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 9 (citation omitted); *see also Leigh*, 677 F.3d at 898 (discussing *Press-Enterprise II*). The public streets, sidewalks, and parks historically have been open to the press and general public,[10] and public observation of law enforcement activities in these public fora plays a significant positive role in ensuring conduct remains consistent with the Constitution.

The Federal Defendants argue that they have a strong and overriding government interest in protecting federal property. The Court agrees that protecting federal property is a strong

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[10] The Federal Defendants argue that the proper question is whether there historically was access after the closure order that is at issue—the unlawful assembly declaration and dispersal order. The Court disagrees that access is evaluated after the closure that is challenged. Access is considered before the closure that is challenged to determine whether the closure is unduly burdening First Amendment rights. For example, the Supreme Court in *Press-Enterprises II* did not evaluate whether the press and public had access to preliminary criminal proceedings that were subject to a legitimate closure order, but whether they had access to preliminary criminal proceedings generally. 478 U.S. at 10. Even if the Federal Defendants' assertion of how to frame the first question in *Press-Enterprises II* is correct, however, as noted above, it is not at issue in this motion because the City previously has stipulated that even after it has declared an unlawful assembly and issued a lawful dispersal order on state and local property, journalists and authorized legal observers may remain.

government interest, but the Federal Defendants must craft a narrowly tailored response to achieve that government interest without unreasonably burdening First Amendment rights. The Federal Defendants simply assert that dispersing everyone is as narrowly tailored as possible and to allow anyone to stay after a dispersal order is not practicable or workable. The record, however, belies this assertion.

The City, by stipulated preliminary injunction, does not require journalists and authorized legal observers to disperse, even when there has been an otherwise lawful general order of dispersal. After issuing the first TRO directed against the City, the Court specifically invited the City to move for amendment or modification if the original TRO was not working or to address any problems at the preliminary injunction phase. Instead, the City *stipulated* to a preliminary injunction that was nearly identical to the original TRO, with the addition of a clause relating to seized property. The fact that the City did not ask for any modification and then stipulated to a preliminary injunction is compelling evidence that exempting journalists and legal observers is workable.[11] Moreover, the City supports Plaintiffs' request for an injunction against the Federal Defendants, both the TRO and this preliminary injunction. Additionally, as discussed previously, Plaintiffs' expert witness Mr. Kerlikowske provides qualified, relevant, and persuasive testimony

[11] At oral argument, counsel for the City noted that the City might request from Plaintiffs a possible modification to the stipulated preliminary injunction. The City noted it had encountered some issues with persons with "press" markings intermingling with protesters and interfering with law enforcement. The Federal Defendants argue that this is "proof" that the preliminary injunction is "unworkable." Whether the City might request a modification at some point in the future, however, is not evidence of unworkability. Additionally, the City's stipulated preliminary injunction does not contain the indicia of journalists and legal observers that they "stay to the side" and not intermix with protesters, which is included in the preliminary injunction below, and does not contain the express prohibition on press and legal observers impeding, blocking, or interfering with law enforcement activities, which also is included below. Further, the fact that there might be room for improvement of a preliminary injunction does not make it unworkable. The Court is mindful not to let the perfect be the enemy of the good.

showing that the relief provided in the TRO against the Federal Defendants is workable. He also explains that during his tenure in Seattle, law enforcement did not target or disperse journalists and there were no adverse consequences. Numerous declarants also testified that they were not dispersed during protests in other locations. Thus, it is workable and feasible to disperse protesters generally but not require the dispersal of journalists and authorized legal observers. The Federal Defendants' blanket assertion that federal officers must disperse everyone is rejected.

Further, the Federal Defendants' objections to the workability of the TRO primarily focus on concerns regarding when journalists and legal observers "intermingle" with protesters. The first concern is that federal officers will violate the injunction if a journalist or legal observer is subject to crowd control tactics when mixed with the crowd. The preliminary injunction contains protections for this scenario. It adds, different from the TRO, the indicia of a journalist and legal observer that they stay to the side of the protest and not intermix with protesters. It also retains the protection for law enforcement that the incidental exposure of journalists and legal observers to crowd control devices is not a violation of the injunction.

The Federal Defendants' second concern with the intermingling of journalists and legal observers and protesters is that journalists and legal observers may interfere with law enforcement, particularly if allowed to stay after dispersal order. The preliminary injunction, however, retains the TRO's instruction that journalists and legal observers must comply with all laws other than general dispersal orders. For further clarity, the preliminary injunction expressly adds the provision that journalists and legal observers may not impede, block, or otherwise interfere with the lawful conduct of the federal officers.

The Federal Defendants also express concern that persons may disguise themselves as press and commit violent or illegal acts. The preliminary injunction, however, does not protect anyone who commits an unlawful act. The Federal Defendants have the same authority to arrest or otherwise engage with persons who commit unlawful acts, regardless of their clothing. Moreover, most of this concern expressed by the Federal Defendants focuses on persons self-identifying as press who are mixed with protesters or interfering with law enforcement. The preliminary injunction's addition of the indicia of press as staying to the side and not intermixing with protesters and express prohibition on interfering with law enforcement further addresses this concern. Further, Mr. Kerlikowske's declarations containing his expert opinions are persuasive in discounting this possibility.

The Federal Defendants also argue that requiring federal officers to wear larger unique identifying markings is not workable and is not connected to Plaintiffs' claims in this case. The Federal Defendants assert that such markings will interfere with an officer's ability to reach necessary equipment and are unnecessary because most officers already wear some unique identifying number somewhere on their uniform. The Federal Defendants were unable, however, to identify specific officers from videos when asked to do so by the Court. The current identifying markings are not of sufficient visibility. The Court does not find it credible that there is no possible location on the helmet or uniforms on which more visible markings can be placed. The Court is persuaded by Mr. Kelikowske's expert opinion that unique identifying markings are feasible, important, and will not interfere with the federal officers' ability to perform their duties. The Court also finds that such a requirement is related to Plaintiffs' claims because, as noted by Mr. Kerlikowske, these markings would deter the very conduct against which Plaintiffs have filed suit.

At this stage of the lawsuit, there are at least serious questions regarding Plaintiffs' right of access, whether the government will be able to meet its burden to overcome that right of access, the federal officers' tactics directed toward journalists and other legal observers, and whether restrictions placed upon them by the Federal Defendants are narrowly tailored. Thus, Plaintiffs' meet this factor for their claim alleging a violation of their right of access.

2. Irreparable Harm

Plaintiffs also must show that they are "likely to suffer irreparable harm in the absence of preliminary relief." *See Winter*, 555 U.S. at 20. The Ninth Circuit has explained that "speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction. A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016) (emphasis in original) (simplified).

The Federal Defendants argue that Plaintiffs face no threat of immediate injury, particularly because of the changed enforcement tactics. The Federal Defendants assert that Plaintiffs have provided no evidence that the chances of encountering a federal officer at a protest is higher in August 2020 than it was in August 2019 or August 2018.

The Federal Defendants' latter assertion is without merit. The Federal Defendants have sent numerous additional federal officers to Portland with the stated mission to protect federal property and persons. Plaintiffs provide evidence that these officers routinely have left federal property and engaged in crowd control and other enforcement on the streets, sidewalks, and parks of the City of Portland. Plaintiffs' expert Mr. Kerlikowske opines that the federal officers and supervisors have insufficient and improper experience and leadership to handle the conditions during the Portland protests. Additionally, Plaintiffs provide evidence that the

augmented federal police force has remained in Portland, that it will stay in Portland ready to deploy at any moment, and that there are no plans for any officers to withdraw from Portland, at least not until it is "certain" that federal property is "safe." This provides significant evidence that journalists and legal observers are more likely to encounter a federal officer during a protest in August 2020 than in 2019 or 2018, when there was no augmented federal police force or Operation Diligent Valor.

Regarding the Federal Defendants' argument that the voluntary change in tactics has decreased the immediacy of any claim of injury, thereby mitigating irreparable harm, the Ninth Circuit has rejected a similar argument. In *Boardman*, the defendants argued that there was no immediate danger of harm because the defendants had voluntarily ceased certain conduct. 822 F.3d at 1023. The defendants had voluntarily terminated a disputed merger and entered into a stipulation not to enter into a purchase transaction while the Oregon Attorney General's investigation was ongoing. *Id.* The stipulation was terminable upon 60-days' notice to the District Court and the Oregon Attorney General. The Ninth Circuit concluded that the District Court did not abuse its discretion in finding irreparable harm. *Id.*

The Ninth Circuit focused on the fact that the voluntarily stipulation was terminable with 60-days' notice, the defendants had a history of negotiating in secret, the stipulation was limited to a "purchase transaction" and the transaction could take other contractual forms, and the exclusive marketing agreement between the two defendants had expired (thereby incentivizing a merger). *Id.* The Ninth Circuit noted: "A threat of irreparable harm is sufficiently immediate to warrant preliminary injunctive relief if the plaintiff 'is likely to suffer irreparable harm before a decision on the merits can be rendered.'" *Id.* (quoting *Winter*, 555 U.S. at 22). For the plaintiff to be injured in *Boardman*, the defendants would have had to give 60-days' notice and then not

have the district court otherwise intervene, or negotiate in secret and reach a form of deal not considered a "purchase agreement," or other steps that arguably were attenuated or provided the plaintiffs some opportunity to request emergency relief. Nonetheless, the Ninth Circuit agreed that the potential injury was immediate and irreparable for purposes of preliminary injunctive relief.

Plaintiffs' irreparable injury here is not nearly as attenuated as *Boardman* and indeed is much more immediate because it could happen without any prior notice to the Court. The Court has already found that Plaintiffs face irreparable harm from the Federal Defendants' conduct.[12]

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[12] The Federal Defendants cite *Rendish v. City of Tacoma*, 123 F.3d 1216, 1226 (9th Cir. 1997), for the proposition that claims alleging First Amendment retaliation are not entitled to a presumption of irreparable harm. *Rendish* involved a public employee who was terminated and alleged First Amendment retaliation. *Id.* at 1218. The district court found that the plaintiff was *not* likely to succeed on the merits of her claim. *Id.* at 1226. The Ninth Circuit concluded: "Because the district court's assessment that Rendish did not show a likelihood of success was accurate, it did not abuse its discretion in finding no irreparable harm based on a loss of her constitutional rights." *Id.* The court rejected the plaintiff's argument that despite the district court's conclusion that the plaintiff would not have succeeded on the merits, the district court was required to presume irreparable harm, noting that there is no such presumption. *Id.*

Rendish provides no support for the contention that when a court concludes that plaintiffs *are* likely to succeed on the merits of a claim that their constitutional rights have been violated, the plaintiffs are not entitled to a presumption of irreparable harm. Indeed, the opposite is true. *See, e.g.*, *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) ("A 'colorable First Amendment claim' is 'irreparable injury sufficient to merit the grant of relief.'" (quoting *Warsoldier v. Woodford*, 418 F.3d 989, 1001 (9th Cir. 2005)) (affirming grant of preliminary injunction)); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Assoc. Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (noting that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" and reversing and remanding for entry of preliminary injunction (alteration in original) (quoting *Elrod*)); *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009) ("Both this court and the Supreme Court have repeatedly held that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (simplified) (reversing and remanding for entry of preliminary injunction)); *Black Lives Matter Seattle-King Cty. v. City of Seattle, Seattle Police Dep't*, 2020 WL 3128299, at *4 (W.D. Wash. June 12, 2020) (citing *Melendres* and *Otter* and finding irreparable harm for First Amendment retaliation claims because "[t]he use of less-lethal, crowd control weapons has

After the Court's initial finding of irreparable harm to support the TRO, Plaintiffs provided even more evidence that journalists' First Amendment rights have been chilled, including declarations in which journalists describe being subject to less lethal munitions that required the journalist to stop covering the protests for the night or for some period of time, or chilled the journalist from returning to cover the protests in the future. *See, e.g.*, ECF 88 at 2 (Ellis Decl. ¶ 6, "Federal agents prevented me from doing my job twice on the night of July 23-24."); ECF 89 at 4 (Elsesser Decl. ¶ 13, "If I am asked to cover the protests again, I would refuse unless I had a bulletproof vest (which are in short supply in Portland at the moment) to wear because I am fearful that federal agents would injure me or worse."); ECF 91 at 3 (Hollis Decl. ¶ 8, "After the federal agents shot me, I turned and ran and returned to my hotel."); ECF 116 at 3 (Jeong Decl. ¶¶ 7-8, noting that because she was shoved down to the ground by a federal officer she "ultimately left much earlier than I had planned" with respect to covering that night's protest); ECF 117 at 5 (Katz Decl. ¶ 15, "Because of how federal agents treated me, I have stopped covering the Portland protests.").

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already stifled some speech even if momentarily"); *Freedom for Immigrants v. U.S. Dep't of Homeland Sec.*, 2020 WL 2095787, at *5 (C.D. Cal. Feb. 11, 2020) ("Because FFI has demonstrated that DHS's conduct likely contravenes its First Amendment rights, FFI satisfies the irreparable harm requirement for preliminary injunctive relief."); *Nat'l Rifle Ass'n of Am. v. City of Los Angeles*, 441 F. Supp. 3d 915, 938-39 (C.D. Cal. 2019) ("In this case, Plaintiffs have sufficiently demonstrated that they are likely to be deprived of their First Amendment rights—the deprivation of which is 'well established' to constitute irreparable harm. Defendants' primary argument to the contrary is that Plaintiffs have not provided admissible evidence of irreparable harm. But Plaintiffs have provided ample evidence of a likely First Amendment violation, which is enough to satisfy the *Winter* standard." (citations omitted) (granting preliminary injunction)); *see also* 11A Charles Alan Wright, FEDERAL PRACTICE & PROCEDURE, § 2948.1 (2d ed. 2004) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). Plaintiffs have demonstrated that they are likely to be deprived of their First Amendment rights and that is sufficient to show irreparable harm.

The only change is the Federal Defendants' "agreement" with Oregon Governor Kate Brown and voluntarily cessation of certain enforcement tactics. This change in enforcement is replete with caveats. It is terminable at any time and without any notice to this Court or Plaintiffs if the Federal Defendants believe that federal property or persons are not secure. *See* n. 6, *supra*. It is also subject to the federal officers being able to leave the building at any time for a specific incident of enforcement, even if the agreement itself has not changed. For example, although the federal officers' modified enforcement role was announced on July 29, 2020, to begin the next day, Plaintiffs have submitted testimony and video evidence from that night (to be precise, from the early morning on July 30, 2020), of federal officers firing tear gas and flash bang munitions at journalists. *See* ECF 118 at 4. There was no one nearby on the street but numerous federal enforcement officers and six journalists when the munitions were deployed.

Moreover, the Federal Defendants have emphatically and repeatedly denied that they have engaged in any wrongful or unlawful conduct. Thus, there is no indication that their crowd control tactics, which the Court has already found to support both a finding of success on the merits and likelihood of irreparable harm, and which Plaintiffs' expert has characterized as including excessive force, would change if they re-engage in crowd control enforcement and the Court's injunctive relief is no longer in place.

Indeed, the Court has serious concerns that the Federal Defendants have not fully complied with the Court's original TRO. The Court has reviewed all of the testimony and videos submitted by Plaintiffs after the Court issued its TRO, and although some of the evidence is ambiguous or less persuasive, some of the evidence describes and shows at least some conduct that appears to target journalists and legal observers, as opposed to incidentally or inadvertently reaching them as part of crowd control or enforcement against violent offenders.

Further, the Court does not agree with the Federal Defendants that given the magnitude of irreparable injury at stake in this case, the Court is required to wait until new and additional irreparable injury is inflicted on Plaintiffs to issue prospective injunctive relief. As the Ninth Circuit emphasized in *Boardman*, a threat of irreparable injury is sufficiently immediate if it is likely to occur before a decision on the merits can be issued. *Boardman*, 822 F.3d at 1023. Given the Federal Defendants' public statements and discovery responses relating to Operation Diligent Valor, the current situation relating to the protests in Portland, and the current situation regarding the local police presence in Portland, the Court finds that it is sufficiently likely that federal officers will re-engage in "protecting federal property and persons" and will return to enforcement tactics before a decision on the merits in this case can be issued. Thus, Plaintiffs have sufficiently shown irreparable injury.

Moreover, the Court takes guidance from the Supreme Court and Ninth Circuit's discussions regarding the Court's authority relating to issuing injunctions generally and predicting future violations in this context. The Supreme Court has noted that in addition to a court retaining the ability to hear a case after voluntarily cessation (considerations of mootness), "the court's power to grant injunctive relief survives discontinuance of the illegal conduct." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). "The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *Id.* In making this determination, the district court's "discretion is necessarily broad and a strong showing of abuse must be made to reverse it. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations." *Id.* The Ninth Circuit has

discussed "the factors that are important in predicting the likelihood of future violations" as follows:

> the degree of scienter involved; the isolated or recurrent nature of the infraction; the defendant's recognition of the wrongful nature of his conduct; the extent to which the defendant's professional and personal characteristics might enable or tempt him to commit future violations; and the sincerity of any assurances against future violations.

Fed. Election Comm'n v. Furgatch, 869 F.2d 1256, 1263 n.5 (9th Cir. 1989). These factors are in addition to "the commission of past illegal conduct, [which] is highly suggestive of the likelihood of future violations." *Id.*

Considering these factors, whether as articulated by the Supreme Court in *W.T. Grant* or the Ninth Circuit in *Furgatch*, the Federal Defendants' voluntary cessation of conduct[13] does not demonstrate effective discontinuance and serious questions remain with respect to the likelihood of Plaintiffs' future injury. In addition, under the *W.T. Grace* factors, there has been no expressed intent by the Federal Defendants to comply with the Court's TRO. To the contrary, the Federal Defendants have stated that the order is "offensive" and that it "shouldn't affect anything [the Federal Defendants are] doing" in Portland. ECF 147-6 at 3 (statement by Acting Deputy

[13] The Federal Defendants argue that they have not voluntarily ceased conduct because they dispute that they have engaged in any unlawful conduct. Regardless of how they characterize the lawfulness of their conduct, however, their argument is that because of the changed circumstances, Plaintiffs can no longer show irreparable injury. The changed circumstances on which the Federal Defendants rely, however, is the agreement between state and federal authorities that the federal officers would "stay in the building" and state and local police would take over more direct policing. The specifics of this agreement have been redacted by the Federal Defendants. *See* ECF 147-8 at 2. According to White House Senior Advisor Stephen Miller, however, the agreement does not include a "phased withdrawal." ECF 147-5 at 2. Nonetheless, this agreement and the Federal Defendants' voluntary change in enforcement as a result of the agreement is the voluntary cessation triggering the changed circumstances on which the Federal Defendants rely. Thus, the Court must analyze whether it supports the Federal Defendants' assertion that there no longer exists a cognizable risk of recurrent violations.

Secretary Ken Cuccinelli). Also, as reflected in Plaintiffs' motion for contempt, despite the issuance of the TRO, the Federal Defendants appear to have engaged in at least some conduct that continues to target journalists and legal observers in violation of the Court's TRO. This raises concerns regarding future conduct if there is no injunction in place, because even with a Court order in place, improper conduct appears to have continued. Regarding the effectiveness of the Federal Defendants' stated discontinuance, as discussed above, it is not very effective while the out-of-town federal agents remain in Portland because the discontinuance is terminable at will by the Federal Defendants and, thus, only temporary. Finally, the character of the recent past violations by the Federal Defendants in Portland is particularly egregious.

Considering the Ninth Circuit's *Furgatch* factors, first, the Federal Defendants' past violations are highly suggestive of future harm. Second, the degree of scienter involved is high for violations triggering the requested injunctive relief, because it relates to targeting of journalists and legal observers and not merely incidental harm to them during crowd control. Further, because Plaintiffs agreed to the modification to the injunction that journalists and legal observers stay to the side, the risk of incidental targeting is diminished. Third, the occurrences were not isolated—Plaintiffs provided significant evidence of numerous journalists and legal observers who were targeted by the Federal Defendants. Indeed, several of the witnesses have experience reporting in war zones around the world and at violent protests in Hong Kong, Oakland, and Seattle. They emphasize how they have never been shot at or tear gassed until coming to Portland. Fourth, the Federal Defendants have not recognized the wrongful nature of their conduct but instead assert that they have only engaged in lawful conduct. They have not disciplined any federal agent or officer for any conduct. They moved to dissolve the TRO after Plaintiffs moved for contempt. The Federal Defendants, unlike the City of Portland, also did not

stipulate to preliminary injunctive relief. Fifth, given the disdainful comments publicly made by the highest officials at the Federal Defendants with respect to journalists, legal observers, Plaintiffs, protesters, and the City of Portland, the professional and personal characteristics of the Federal Defendants show that they are likely to be enabled or tempted to engage in future violations. Finally, there have not been sincere assurances given against future violations. Accordingly, considering these factors, the Court finds that Plaintiffs have made a sufficient showing of threatened future violations by the Federal Defendants causing sufficiently likely irreparable injury to Plaintiffs before a decision on the merits can be issued.

3. Public Interest and Balance of the Equities

When the government is a party, the last two factors of the injunction analysis merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). Regarding the public interest, "[c]ourts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles." *Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (quotation marks omitted). Further, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quotation marks omitted) (granting an injunction under the Fourth Amendment). Regarding balancing the equities, when a plaintiff has "raised serious First Amendment questions," the balance of hardships "tips sharply in [the plaintiffs'] favor." *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007) (alterations in original) (quotation marks omitted).

The Federal Defendants argue that the normal evaluation of these factors in favor of a plaintiff who is likely to succeed on a First Amendment claim does not apply in this case because the government's countervailing interests outweigh Plaintiffs' First Amendment concerns. The Federal Defendants assert the government's interest in protecting federal property, ensuring the

safety of federal officers and other personnel, maintaining public order on federal property, and securing the federal courthouse so that it remains open and accessible to the public. The first three relate to protecting the courthouse and federal officers, and the final interest relates to providing access to the public.

Regarding protection of the courthouse and officers, the Federal Defendants rely on evidence that persons self-identifying as press have engaged in purported misconduct. The Court has reviewed all the video and other evidence submitted by the Federal Defendants in support of their contentions relating to alleged misconduct of persons self-identifying as press after the issuance of the TRO on July 23, 2020. Much of this evidence is ambiguous or shows that persons self-identifying as press have intermixed with protesters, have run toward the fence around the federal courthouse and stopped, have not actually been press but merely donned clothing (for one night) marked "press" hoping to avoid violence by federal officers, or simply have stood by while unlawful conduct was engaged in by others. This is not unlawful conduct.

There is evidence, however, that a few individual persons wearing press indicia on their clothing or hats or helmets (often handwritten), who generally are described by the Federal Defendant declarants as not otherwise engaging in any conduct such as reporting, notetaking, photographing, or recording, have engaged in the following activities: entering courthouse property after the fence was breached and encouraging others to do the same; helping another person to breach the fence; shining a flashlight at a police helicopter; kicking a police officer; shielding protesters from law enforcement; and throwing an object at law enforcement. This is inappropriate conduct, and much of it may be unlawful. The Court shares the Federal Defendants' concerns for the safety of federal officers, particularly considering the more than 100 injuries that have been sustained by federal offices to date. But as discussed above in the

context of workability, the preliminary injunction does not protect unlawful conduct, and federal officers may arrest anyone, even persons with indicia of press, who are engaging in such conduct.

Further, the preliminary injunction has provisions that expressly address these concerns, including providing that one indicia of press or authorized legal observer status is that they stay to the side and do not intermix with protesters and that press and legal observers may not impede, block, or interfere with law enforcement. Concern over potential unlawful conduct thus does not alter the analysis of traditional public interest factors or the balance of equities.

Moreover, the Court must balance and weigh the equities and public interest. The fact that a few people may have engaged in some unlawful conduct does not outweigh the important First Amendment rights of journalists and legal observers and the public for whom they act as surrogates. Further, there is no evidence that any of the named Plaintiffs engaged in any of the purported unlawful conduct described by the Federal Defendants.

The Federal Defendants' final argument is that the government's interest in preserving physical access to courts outweighs Plaintiffs' interests. That argument also is without merit. The relevant protests are happening after business hours, and there is no indication that allowing journalists and legal observers to stay despite a general dispersal order interferes with public access. Thus, none of the government's proffered interests outweigh the public's interest in receiving accurate and timely reporting, video, and photographic information about the protests and how law enforcement is treating protestors. There also is no need to alter the traditional analysis recognizing the significant public interest in First Amendment rights and that in such cases the balance of the equities tips sharply in favor of the plaintiff. *See Otter*, 682 F.3d at 826; *Cmty. House*, 490 F.3d at 1059.

4. Conclusion

The Court GRANTS Plaintiffs' motion for preliminary injunction against the Federal Defendants (ECF 134) and Orders as follows:

PRELIMINARY INJUNCTION

1. The Federal Defendants, their agents and employees, and all persons acting under their direction are enjoined from arresting, threatening to arrest, or using physical force directed against any person whom they know or reasonably should know is a Journalist or Legal Observer (as explained below), unless the Federal Defendants have probable cause to believe that such individual has committed a crime. For purposes of this Order, such persons shall not be required to disperse following the issuance of an order to disperse, and such persons shall not be subject to arrest for not dispersing following the issuance of an order to disperse. Such persons shall, however, remain bound by all other laws. No Journalist or Legal Observer protected order this Order, however, may impede, block, or otherwise physically interfere with the lawful activities of the Federal Defendants.

2. The Federal Defendants, their agents and employees, and all persons acting under their direction are further enjoined from seizing any photographic equipment, audio- or video-recording equipment, or press passes from any person whom they know or reasonably should know is a Journalist or Legal Observer (as explained below), or ordering such person to stop photographing, recording, or observing a protest, unless the Federal Defendants are also lawfully seizing that person consistent with this Order. Except as expressly provided in Paragraph 3 below, the Federal Defendants must return any seized equipment or press passes immediately upon release of a person from custody.

3. If any Federal Defendant, their agent or employee, or any person acting under their direction seize property from a Journalist or Legal Observer who is lawfully arrested

consistent with this Order, such Federal Defendant shall, as soon thereafter as is reasonably possible, make a written list of things seized and shall provide a copy of that list to the Journalist or Legal Observer. If equipment seized in connection with an arrest of a Journalist or Legal Observer lawfully seized under this Order is needed for evidentiary purposes, the Federal Defendants shall promptly seek a search warrant, subpoena, or other court order for that purpose. If such a search warrant, subpoena, or other court order is denied, or equipment seized in connection with an arrest is not needed for evidentiary purposes, the Federal Defendants shall immediately return it to its rightful possessor.

4. To facilitate the Federal Defendants' identification of Journalists protected under this Order, the following shall be considered indicia of being a Journalist: visual identification as a member of the press, such as by carrying a professional or authorized press pass, carrying professional gear such as professional photographic equipment, or wearing a professional or authorized press badge or other official press credentials, or distinctive clothing, that identifies the wearer as a member of the press. It also shall be an indicium of being a Journalist under this Order that the person is standing off to the side of a protest, not engaging in protest activities, and not intermixed with persons engaged in protest activities, although these are not requirements. These indicia are not exclusive, and a person need not exhibit every indicium to be considered a Journalist under this Order. The Federal Defendants shall not be liable for unintentional violations of this Order in the case of an individual who does not carry or wear a press pass, badge, or other official press credential, professional gear, or distinctive clothing that identifies the person as a member of the press.

5. To facilitate the Federal Defendants' identification of Legal Observers protected under this Order, the following shall be considered indicia of being a Legal Observer: wearing a

green National Lawyers Guild-issued or authorized Legal Observer hat (typically a green NLG hat) or wearing a blue ACLU-issued or authorized Legal Observer vest. It also shall be an indicium of being a Legal Observer protected under this Order that the person is standing off to the side of a protest, not engaging in protest activities, and not intermixed with persons engaged in protest activities, although these are not requirements.

6. The Federal Defendants are not precluded by the Order from issuing otherwise lawful crowd-dispersal orders for a variety of lawful reasons. The Federal Defendants shall not be liable for violating this injunction if a Journalist or Legal Observer is incidentally exposed to crowd-control devices after remaining in the area where such devices were deployed after the issuance of an otherwise lawful dispersal order.

7. Plaintiffs and the Federal Defendants shall promptly confer regarding how the Federal Defendants can place unique identifying markings (using numbers and/or letters) on the uniforms and/or helmets of the officers and agents of the Federal Defendants who are specially deployed to Portland so that they can be identified at a reasonable distance and without unreasonably interfering with the needs of these personnel. Based on the Court's understanding that Deputy U.S. Marshals and Courtroom Security Officers stationed in Portland who are under the direction of the U.S. Marshal for the District of Oregon are not part of the force that has given rise to events at issue in the lawsuit, they are exempt from this requirement. Agents wearing plain clothes and assigned to undercover duties also are exempt from this requirement. If the parties agree on a method of marking, they shall submit the terms of their agreement in writing to the Court, and the Court will then issue a modified preliminary injunction that incorporates the parties' agreement. If the parties cannot reach agreement within 14 days, each party may submit its own proposal, and each side may respond to any other party's proposal

within seven days thereafter. The Court will resolve any disputes on this issue and modify this preliminary injunction appropriately.

8. To promote compliance with this Preliminary Injunction, the Federal Defendants are ordered to provide copies of the verbatim text of the first seven provisions of this Preliminary Injunction, in either electronic or paper form, within 14 calendar days to: (a) all employees, officers, and agents of the Federal Defendants currently deployed in Portland, Oregon (or who later become deployed in Portland, Oregon while this Preliminary Injunction is in force), including but not limited to all personnel in Portland, Oregon who are part of Operation Diligent Valor, Operation Legend, or any equivalent; and (b) all employees, officers, and agents of the Federal Defendants with any supervisory or command authority over any person in group (a) above.

9. Plaintiffs need not provide any security, and all requirements under Rule 65(c) of the Federal Rules of Civil Procedure are waived.

10. The Court denies the oral motion by the Federal Defendants to stay this preliminary injunction.

IT IS SO ORDERED.

DATED this 20th day of August, 2020.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge

No. 20-35739

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INDEX NEWSPAPERS LLC, a Washington limited-liability company, dba PORTLAND MERCURY; DOUG BROWN; BRIAN CONLEY; SAM GEHRKE; MATHIEU LEWIS-ROLLAND; KAT MAHONEY; SERGIO OLMOS; JOHN RUDOFF; ALEX MILAN TRACY; TUCK WOODSTOCK; JUSTIN YAU; and those similarly situated;

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY and U.S. MARSHALS SERVICE,

Defendants-Appellants,

and

CITY OF PORTLAND; JOHN DOES 1-60,

Defendants.

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR A STAY PENDING APPEAL AND FOR AN IMMEDIATE ADMINISTRATIVE STAY PENDING DISPOSITION OF THE STAY MOTION

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 16. Circuit Rule 27-3 Certificate for Emergency Motion

Instructions for this form: http://www.ca9.uscourts.gov/forms/form16instructions.pdf

9th Cir. Case Number(s) 20-35739

Case Name Index Newspapers LLC, et al. v. U.S. Marshals Service, et al.

I certify the following:

The relief I request in the emergency motion that accompanies this certificate is:

(1) immediate administrative stay;
(2) stay pending appeal

Relief is needed no later than *(date)*: Aug 26, 2020

The following will happen if relief is not granted within the requested time:

As the government's motion explains, the preliminary injunction--which is already in effect--is unworkable and imposes irreparable harm on federal officers, who can protect their safety during chaotic and violent protests only by risking contempt of court. The government respectfully requests that the Court enter an immediate administrative stay of the injunction pending disposition of the government's motion. The government further requests that the Court grant the motion for a stay pending appeal at the earliest practicable opportunity, and no later than September 3 (the deadline for the parties to submit proposals to the district court for the court-ordered redesign of federal officers' uniforms).

I could not have filed this motion earlier because:

The district court entered the preliminary injunction on Thursday, August 20, 2020. This motion is being filed as early as possible.

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

I requested this relief in the district court or other lower court: ◉ Yes ○ No

If not, why not:

I notified 9th Circuit court staff via voicemail or email about the filing of this motion: ◉ Yes ○ No

If not, why not:

I have notified all counsel and any unrepresented party of the filing of this motion:

On *(date)*: Aug 24, 2020

By *(method)*: electronic mail

Position of other parties:

Name and best contact information for each counsel/party notified:

Plaintiffs (notified Aug. 24, 2020) oppose the relief requested.
Lead Counsel: Matthew Borden (borden@braunhagey.com)

Defendants City of Portland (notified Aug. 25, 2020) have not responded.
Lead Counsel: Naomi Sheffield (naomi.sheffield@portlandoregon.com)

I declare under penalty of perjury that the foregoing is true.

Signature s/Michael Shih **Date** Aug 25, 2020

(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

INTRODUCTION AND SUMMARY

The Department of Homeland Security (DHS) and the United States Marshals Service respectfully ask this Court to stay the district court's preliminary injunction of August 20, 2020. By exempting self-identified journalists and legal observers from lawful crowd-control measures necessary to protect federal property and personnel from violent attack, the injunction is legally unjustified and practically untenable. It will immediately and irreparably injure federal law-enforcement personnel working to protect public safety. The injunction should therefore be stayed pending appeal, and should be administratively stayed while the Court considers this motion.

Federal officers in Portland, like law enforcement in other parts of the country, are confronting novel and sophisticated forms of mob violence. Violent opportunists have hijacked demonstrations and are now using the veil of protests to conduct direct assaults on federal personnel and property. Shielded by the crowds, which make it difficult for law enforcement to detect or reach them, rioters in Portland have attacked federal officers with explosives, lasers, projectiles, and other dangerous devices. In some cases, purported journalists or legal observers have provided cover for the violent offenders; in others, individuals wearing supposed press badges have themselves attacked federal personnel or trespassed on federal property. As of July 29, 2020, more than 120 federal officers have been injured in Portland.

As federal officials have strived to contain this serious and evolving threat, the district court imposed an extraordinary preliminary injunction. It establishes a highly

reticulated yet hopelessly vague set of *ex ante* constraints on law-enforcement personnel responding to violent protests. To comply with the order, officers must determine whether any given person is carrying "professional gear" or "photographic equipment," is bearing an official press pass, or is wearing sufficiently "distinctive clothing." Doc.157, at 59-60. Officers must then exempt all such persons from dispersal orders and crowd-control tactics. This requirement applies even if a journalist or legal observer is mixing with protesters or actively participating in protests that have turned violent. *Id.* at 59-60. In practical effect, the injunction prevents the federal government from effectively addressing riots using the general crowd-control measures that are required, and it unacceptably increases the risk of serious injury to federal law-enforcement officers. It is fundamentally unfair—and, ultimately, it is untenable—to ask federal law enforcement to carry out their responsibilities under these conditions.

To facilitate contempt proceedings against officers who violate the injunction, the injunction also requires the government to consult with plaintiffs on how to alter officers' helmets and uniforms so each officer can be identified at a distance. This *in terrorem* requirement further injures federal officers, and by extension, the federal property and personnel that they are risking their lives to protect.

Making matters worse, the court issued this intrusive injunction on the ground that the First Amendment exempts journalists and legal observers from lawful dispersal orders. But no such exemption exists. Plaintiffs' claims that officers are

following a policy of using crowd-control tactics in retaliation against plaintiffs for exercising their First Amendment rights are similarly meritless. The agencies unambiguously prohibit officers from singling out protesters or journalists for exercising those rights; train their officers in the lawful use of crowd-control tactics; require that every use of force against a person be documented and investigated; and investigate and appropriately discipline officers who violate these terms. That some plaintiffs were allegedly subjected to crowd-control measures in response to violent protests over several months does not prove that the agencies have purposefully targeted plaintiffs to retaliate for news-gathering or observing.

Because the injunction is flawed in all respects, this Court should stay the district court's unjustified and harmful effort to superintend federal law-enforcement operations in Portland, and enter an immediate administrative stay pending disposition of this motion.

STATEMENT

1. The City of Portland has experienced daily protests for almost three months. The overwhelming majority of protesters have remained peaceful. At night, however, violent opportunists have taken advantage of the protests to commit crimes such as arson, assault, property destruction, looting, and vandalism. Doc.67-1, ¶ 3. Many of these crimes have targeted federal property, including the Mark O. Hatfield Federal Courthouse and the office building nearby. *Id.* ¶ 4. DHS and the Marshals

Service responded to these attacks by deploying additional federal law-enforcement officers to Portland. *Id.* ¶ 5.

Until the end of July, federal officers faced nightly attacks from violent opportunists armed with improvised explosives, aerial fireworks, commercial-grade mortars, high-intensity lasers, glass bottles, projectiles fired from wrist rockets, and balloons filled with paint or feces. Doc.67-1, ¶ 4. From May 26 to July 29, protesters injured over 120 officers. Doc.101-5, ¶ 4. Their injuries include broken bones, hearing damage, eye damage, puncture wounds, lacerations, sprains, strains, and contusions. *Id.* In one case, a protester significantly injured an officer by striking the officer in the head and shoulder with a sledgehammer when the officer tried to stop him from breaking into the Hatfield Courthouse. *Id.* To protect federal property and themselves, federal officers have issued dispersal orders to protesters on federal property, and have enforced those orders with crowd-control tactics when protesters failed to comply.

Until the end of July, the State of Oregon and the City of Portland generally declined to support federal law-enforcement efforts on and around federal property. Indeed, on July 22, the Portland City Council prohibited the Portland Police Bureau from working with federal law-enforcement officers. Doc.138-1, ¶ 6. Their inaction resulted in a substantial increase in violent attacks on federal property and personnel. *Id.* ¶ 7.

The situation changed on July 29, when DHS and the State of Oregon entered into an agreement. For a short time, the Oregon State Police "took the lead in enforcing crowd control in Portland." Doc.157, at 31. "That appears to have ended, and the Portland Police have now resumed performing that role." Doc.157, at 31. When DHS and the Marshals Service determine that federal buildings in Portland are no longer at risk, they will withdraw the additional federal officers deployed to Portland from the city.

2. Plaintiffs are journalists and legal observers who are interested in covering the Portland protests. On June 28, they sued the City of Portland and sixty unnamed Portland police officers, alleging that local police had violated their First Amendment rights. Doc.1. The city and plaintiffs stipulated to a preliminary injunction against the city. Doc.48; Doc.49.

Plaintiffs then amended their complaint to add DHS and the Marshals Service as defendants. Doc.52. The amended complaint alleged that, by issuing generally applicable dispersal orders, federal officers had denied plaintiffs' access to protests in violation of the First Amendment. Doc.53, at 45. The complaint further alleged that the agencies had intentionally "targeted journalists and legal observers" in retaliation for exercising their First Amendment rights. *Id.*[1]

[1] Plaintiffs' Fourth Amendment and state-law claims are not at issue in the preliminary injunction. Doc.157, at 33 n.7.

On July 23—at the height of the violence against federal property and personnel—the district court entered a temporary restraining order against the federal defendants. The order allowed all self-identified journalists and legal observers to ignore lawful dispersal orders, and forbade federal officers from arresting any journalist or observer who refused to comply with such an order. Doc.84, at 18. The order further prohibited federal officers from "arresting, threatening to arrest, or using physical force directed against any person whom they know or reasonably should know is a Journalist or Legal Observer," absent probable cause that the person has committed a crime. *Id.* The order defined "Journalist" as any person bearing a "professional or authorized press pass" or "badge" or "other official press credentials," or wearing "distinctive clothing that identifies the wearer as a member of the press." *Id.* at 19-20. The order defined "Legal Observer" as any person wearing a green National Lawyers' Guild hat or a blue American Civil Liberties Union vest. *Id.* at 20. Finally, the order declared all intentional violations of the temporary restraining order to be "violation[s] of a clearly established constitutional right . . . not subject to qualified immunity" in damages lawsuits that might be brought against individual officers in the future. *Id.*

The government moved for reconsideration, explaining that, after the order was issued, thousands of protesters had continued to gather around the Hatfield Courthouse each evening. Doc.101, at 4. Violent opportunists among those protesters had fired incendiary devices, projectiles, and lasers at federal officers, and

had attempted to penetrate federal defenses with power tools. *Id.* Many protesters had pretended to be journalists to avoid complying with lawful dispersal orders. *Id.* at 4-5. And federal officers had observed other individuals engaging in illegal activity while wearing clothing that would qualify them as journalists or legal observers under the order. *Id.* at 5-6.

The court denied reconsideration, Doc.126, and *sua sponte* invited the parties to brief the question whether the court should require any officer "who leaves the interior of the federal courthouse during a protest" to "wear a clearly visible unique identifying code" "with white numbers or letters not less than eight inches in height against a dark background," and "a further requirement that [defendants maintain] a list matching each" code to an officer, Doc.108.

The government objected to the court's proposal because it would impede the officers' ability to perform law-enforcement activities and because officers already wear unique identifying numbers. Doc.113, at 19-20 & n.6; Doc.138, at 28-29. The government also opposed any extension of the temporary restraining order. *Id.* at 26. On August 6, the court extended the order without modification for another fourteen days. Doc.126.

3. On August 20, the district court entered a preliminary injunction against DHS and the Marshals Service. Doc.157. The injunction differs from the temporary restraining order in two significant respects.[2]

First, the injunction expands the nonexclusive criteria sufficient to qualify an individual as a "Journalist" or "Legal Observer" protected by the injunction. In addition to assessing the color of a person's clothing and the nature of any identification that person may present, federal officers must consider whether the person's "gear" and "equipment" are sufficiently "professional," Doc.157, at 59-60, and whether the person is standing "off to the side of a protest" or is "engaging in protest activities," *id.* "These indicia are not exclusive, and a person need not exhibit every indicium to be considered a Journalist [or Legal Observer]" under the injunction. *Id.* Even someone who actively participates in protests that have turned violent can qualify as a journalist or legal observer if he bears one of the other specified "indicia" in the injunction. *Id.*

Second, the injunction instructs DHS and the Marshals Service to confer with plaintiffs on "how the Federal Defendants can place unique identifying markings (using numbers and/or letters) on the uniforms and/or helmets" of federal officers "so that they can be identified at a reasonable distance." Doc.157, at 60. If plaintiffs

[2] The opinion and order entering the preliminary injunction is attached as an exhibit to this motion.

and defendants cannot agree on how officers' helmets and uniforms should be altered within fourteen days, the court will itself decide what alterations must be made, and "modify th[e] preliminary injunction appropriately." *Id.* at 61.[3]

The district court denied the government's oral motion to stay the injunction pending appeal. Doc.157, at 61; *see* Fed. R. App. P. 8(a)(1). At the court's invitation, the government filed a supplemental written motion on August 24, Doc.159, which the court denied, Doc. 160.

ARGUMENT

This Court should stay the preliminary injunction pending appeal, and enter an immediate administrative stay while it considers this motion. In determining whether to grant a stay, this Court considers "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

All four factors are met here. The district court issued *ex ante* rules—as if it were drafting a policy manual or operational order—to micromanage the conduct of law-enforcement officers responsible for crowd control in unpredictable situations

[3] Unlike the temporary restraining order, the injunction does not attempt to strip individual officers' qualified-immunity defenses in hypothetical future lawsuits.

involving violence. Especially harmful are the unworkable requirements that officers engaged in crowd control identify journalists and legal observers on the basis of their dress and demeanor, and exempt such individuals from crowd-control measures regardless of the feasibility of doing so. The breadth of these requirements is underscored by the court's directive that officers apply the exemption even if journalists and legal observers are actively participating in protests that have turned violent. These requirements impede federal officers' ability to protect federal personnel and property, to the detriment of the public. The balance of harms and the public interest, which merge in cases involving the government, thus decisively favor a stay. *See Nken*, 556 U.S. at 426.

The government also is likely to succeed on the merits. The injunction rests on the mistaken premise that the First Amendment gives journalists and legal observers the right to disregard lawful dispersal orders issued by officers engaged in riot control. No such exception exists. And plaintiffs have failed to demonstrate that DHS and the Marshals Service have a policy of intentionally targeting them for exercising their First Amendment rights, to the extent they even have standing to bring retaliation claims against those agencies, given that the agencies unambiguously prohibit officers from "profil[ing], target[ing], or discriminat[ing] against any individual for exercising his or her First Amendment rights." Doc.67-6, at 1.

A. The Injunction Irreparably Injures The Government And Public

Courts are properly reluctant to micromanage law enforcement officers responding to unpredictable and violent demonstrations. The district court showed no such restraint. The injunction causes direct, irreparable injury to the government by impairing its ability to protect federal property and personnel and by threatening federal officers with grave personal liability.

1. The injunction imposes unmanageable constraints on law-enforcement officers responding to rioting

The injunction irreparably harms the government and undermines the public interest by issuing highly reticulated—yet hopelessly vague—instructions to federal officers engaged in riot control. The injunction requires officers confronted with rioters to quickly determine whether any of them is displaying a "professional or authorized press badge" or "other official press credentials"; is carrying sufficiently "professional gear" or "photographic equipment"; is sufficiently distant from "protest activities"; or is wearing sufficiently "distinctive clothing" (in the case of a journalist) or a qualifying green hat or blue vest (in the case of a legal observer). Doc.157, at 59-60. The injunction forbids officers from enforcing dispersal orders against a person bearing these "indicia," without specifying which or how many are necessary. *Id.* at 59. The injunction also states that such protected journalists and legal observers need not refrain from intermingling with protesters or from participating in protests that have turned violent. *Id.*

There are good reasons why courts should not issue orders of this kind. As the Supreme Court has repeatedly admonished, courts are ill-positioned to second-guess the decisions of officers seeking to disperse a protest that has turned violent. Such occasions present "tense, uncertain, and rapidly evolving" circumstances that force officers "to make split-second judgments." *Ryburn v. Huff*, 565 U.S. 469, 477 (2012) (quoting *Graham v. Connor*, 490 U.S. 386, 396-97 (1989)). Officers must "restore and maintain lawful order while not exacerbating disorder more than necessary." *County of Sacramento v. Lewis*, 523 U.S. 833, 853 (1998). They must "act decisively and to show restraint at the same moment, and their decisions have to be made 'in haste, under pressure, and frequently without the luxury of a second chance.'" *Id.* (quoting *Whitley v. Albers*, 475 U.S. 312, 320 (1986)). The injunction improperly privileges the court's *ex ante* view of appropriate law-enforcement conduct over officers' judgments in the moment.

Illustrating the point, the district court's opinion gave short shrift to the ways in which the injunction will undermine officers' ability to protect public property and themselves. The court improperly discounted evidence that, after the temporary restraining order was issued, protesters began to disguise themselves as journalists to avoid complying with lawful dispersal orders. *E.g.*, Doc.101-2, ¶¶ 10-12; Doc.101-4, ¶ 5; Doc. 101-5, ¶ 8; Doc.101-6, ¶¶ 11-14. For example, one individual at the protest was filmed while describing a plan to distribute press passes to protesters who are not journalists. Doc.101-5, ¶ 8(c). Other "individuals wearing press markings" were

observed "shielding or obscuring other individuals who were throwing heavy projectiles toward federal officers." Doc.101-4, ¶ 5(c).

The court also improperly discounted evidence that, as a practical matter, officers cannot assess each protester's clothing and equipment during "chaotic" and "violent" protests to determine whether that person is covered by the injunction. Doc.101-1, ¶ 6. The injunction thus places officers in an untenable situation: risk their safety or risk contempt. That is not a permissible exercise of the judicial power.

The district court found that the federal government is unlikely to be harmed by the injunction because the City of Portland consented to an injunction with similar terms. Doc.157, at 44. The City's willingness to live with those terms does not suggest that they impose no harm on the federal government, and anyway the injunction against the federal government is both materially different and more onerous. *Compare id.* at 59-61, *with* Doc.49, at 2-4. And the retired law-enforcement officer's declaration on which the court relied (Doc. 157, at 24) fails to consider that, unlike the temporary restraining order, the injunction allows people to claim "journalist" or "legal observer" status even if they actively participate in the protests, and that in fact violent opportunists with press indicia have been hiding in the protest crowds. Indeed, the City informed the court that it—like the federal government—has encountered "issues with persons with 'press' markings intermingling with protesters and interfering with law enforcement." Doc.157, at 44 n.11. Additionally,

several named plaintiffs have contradicted the court's assertion that the injunction against the City is workable. Doc.138, at 41 & n.12 (listing sources).

The district court mistakenly believed that it had addressed the government's concerns by forbidding journalists and legal observers from "physically interfer[ing]" with crowd-control activities, and by permitting officers to arrest journalists and legal observers with probable cause. Doc.157, at 58. This misperceives the injury the government will sustain. The injunction is problematic because it imposes an entirely unworkable scheme in which officers must make snap judgments—on pain of contempt—to exempt self-identified journalists and legal observers from general crowd-control measures. True, the court purported to create a safe harbor for officers who "incidentally expose[]" journalists or legal observers to crowd-control tactics. *Id.* at 60. But given the difficulty of identifying persons protected by the injunction under the court's vague definitions, and the fact that the injunction permits journalists and legal observers to mingle with protesters and participate in protests that have turned violent, *id.* at 59-60, this safe harbor affords little protection.

2. The injunction impermissibly threatens officers with punitive sanctions

The injunction compounds these harms by instructing the government and plaintiffs to agree on placement of "unique identifying markings (using numbers and/or letters) on the uniforms and/or helmets" of federal officers "so that they can be identified at a reasonable distance." Doc.157, at 60. If the parties cannot agree,

the district court will itself decide what markings are sufficient. *Id.* at 60-61. This provision is expressly intended to enable contempt proceedings against individual officers for asserted violations of the court's orders. Add.4-6.[4]

The district court identified no authority permitting the judiciary—much less plaintiffs—to design the uniforms of federal officers. Moreover, the court dismissed evidence that such identifiers could interfere with officers' access to operational gear, expose them to retaliation, and threaten their safety by making it possible to estimate the police force's size. Doc.157, at 46; *but see* Doc.113, at 19 (citing sources). Those harms alone would entitle the government to a stay. But the provision also threatens individual officers—even those who have not done anything wrong—with grave consequences for violating the injunction's unworkable terms. These concerns are not hypothetical. Just five days after the court entered its temporary restraining order, plaintiffs filed a contempt motion against an array of federal officials, from line-level officers to the Acting Secretary of Homeland Security. Doc.85, at 17-18. Although that motion is currently in abeyance, the court already has expressed "serious concerns" that defendants "have not fully complied" with its orders and impugned the "professional and personal" character of DHS and Marshals Service officials. Doc. 157, at 51, 55. The court has even suggested appointing an independent prosecutor to pursue criminal contempt charges against federal officers. Add.10.

[4] Citations in this format refer to the attached addendum containing transcript excerpts. Complete transcripts will be filed in November.

The district court did not cite, and the government is unaware of, any precedent for a preliminary injunction that binds hundreds of officers—who have not violated the law and are not parties to this litigation—in this manner. Such provisions are antithetical to the purpose of a preliminary injunction: to maintain the status quo "pending a determination of the action on the merits." *Boardman v. Pacific Seafood Grp.*, 822 F.3d 1011, 1024 (9th Cir. 2016). That further counsels in favor of a stay.

B. The Government Is Likely To Prevail On Plaintiffs' First Amendment Claims

The government also is likely to prevail on the merits of plaintiffs' First Amendment claims.

1. The First Amendment does not give journalists and legal observers a special right to disobey lawful dispersal orders

The injunction's premise is that the First Amendment allows journalists and legal observers to ignore otherwise lawful dispersal orders. Doc.157, at 58-59. That premise is mistaken. Federal officers indisputably may enforce dispersal orders against the general public. *See United States v. Christopher*, 700 F.2d 1253, 1259-61 (9th Cir. 1983). Even the district court acknowledged that federal officers have the authority to issue "crowd-dispersal orders for a variety of lawful reasons." Doc. 157, at 60. And the First Amendment does not guarantee the press (much less "legal observers") special rights not available to the public. *See California First Amendment Coal. v. Calderon*, 150 F.3d 976, 981 (9th Cir. 1998). It follows that the First Amendment does not give self-identified "journalists" or "legal observers" the right

to disobey a generally applicable dispersal order issued to protect federal property and personnel. Yet under the injunction, members of the press and legal observers "shall not be required to disperse following the issuance of an order to disperse." Doc. 157, at 58. That conferral of special privileges on journalists and legal observers has no basis in the First Amendment.[5]

The district court's error is underscored by its reliance on *Press-Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1 (1986), which held that the government cannot close judicial proceedings that were historically open to the press and public unless "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 8-9. This principle does not remotely suggest that the press has a unique and unqualified right to disregard lawful dispersal orders. In any event, a general dispersal order is the narrowest way to protect government property and personnel when officers are faced with unpredictable and violent

[5] The district court said it was not giving special rights to the press because the government supposedly cannot issue dispersal orders to *anyone* on streets abutting federal property. Doc.157, at 5-6 & n.2. That is incorrect. Federal officers indisputably have authority to issue dispersal orders on federal property. Moreover, DHS officers have authority to "protect[]" federal property "in areas outside the property to the extent necessary to protect the property and persons on the property," 40 U.S.C. § 1315(b)(1), and to "enforce Federal laws and regulations for the protection of persons and property" on and off federal property, *id.* § 1315(b)(2)(A). Similarly, the Marshals Service has "final authority regarding security requirements for the judicial branch," including "the security of buildings housing the judiciary." 28 U.S.C. § 566(*i*). These statutes allow federal officers who have issued dispersal orders on federal property to effectuate those orders off federal property to the extent necessary. *See United States v. Evans*, 581 F.3d 333, 340 (6th Cir. 2009).

protests. Officers cannot effectively respond to violent protests while maneuvering around, and attempting to assess the credentials and equipment of, every person who claims to be a journalist or legal observer. Doc.101, at 5-6 (citing sources).

2. Plaintiffs lack standing to bring their First Amendment retaliation claims, which are in any event meritless

The district court further erred in concluding that officers intentionally used force against plaintiffs to deter them from exercising First Amendment rights.

At the outset, plaintiffs lack Article III standing to assert that retaliation claim, although the Court need not resolve this issue in order to grant a stay. A plaintiff lacks standing to obtain injunctive relief on the basis of past injuries alone. *Updike v. Multnomah County*, 870 F.3d 939, 947 (9th Cir. 2017). That principle applies even when plaintiffs seek to enjoin a practice that a law-enforcement agency condones. In *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), plaintiff alleged that he had been subject to a chokehold, that Los Angeles police officers "routinely appl[ied] chokeholds," and that officers would continue to apply chokeholds in the future. *Id.* at 105. The Supreme Court accepted that "among the countless encounters between the police and the citizens of . . . Los Angeles, there will be certain instances in which strangleholds will be illegally applied," but held that it was speculative that the plaintiff "himself will again be involved in one of those unfortunate instances, or that [plaintiff] will be arrested in the future and provoke the use of [the] chokehold" technique. *Id.* at 108.

Here, plaintiffs' retaliation claims turn entirely on allegations of past injuries over an extended period, which were perpetrated by individual officers whose actions (if they occurred as alleged) are in defiance of express government policy. Such allegations do not prove the "real and immediate threat" of future injury necessary to establish standing. *Updike*, 870 F.3d at 947; *accord JW ex rel. Williams v. Birmingham Bd. of Educ.*, 904 F.3d 1248, 1267 (11th Cir. 2018); *Curtis v. City of New Haven*, 726 F.2d 65, 68 (2d Cir. 1984).

The district court speculated that, in the future, federal officers are likely to deliberately target plaintiffs by virtue of their status as journalists or legal observers. Doc.157, at 32, 36. But that suggestion is indistinguishable from the *Lyons* plaintiff's suggestion that, in the future, Los Angeles police officers were likely to deliberately use chokeholds on arrestees. The court also asserted that "the professional and personal characteristics of the Federal Defendants show that they are likely to be enabled or tempted to engage in future violations." *Id.* at 55. That extraordinary and unfounded accusation cannot substitute for Article III's requirement that a plaintiff demonstrate a threat of future injury that is "*certainly impending*"; "[a]llegations of possible future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (emphasis in original); *cf. United States v. Armstrong*, 517 U.S. 456, 464 (1996) (holding that Executive Branch actions are entitled to a presumption of regularity).

Setting aside standing, the district court identified no direct evidence that the government intentionally retaliated against plaintiffs for being journalists or legal

observers. And the court's conclusion that plaintiffs had presented "substantial circumstantial evidence of retaliatory intent," Doc.157, at 40, lacks foundation. For one thing, the court overlooked the obvious and entirely proper explanation for many of the alleged instances of misconduct: that officers' split-second decisions, made at night in the midst of chaotic circumstances, were intended not to retaliate against plaintiffs but to help control a situation that had turned violent. *See generally* Doc.138, at 16-20; *cf. Armstrong*, 517 U.S. at 464.

Even accepting plaintiffs' characterization of events, plaintiffs have not shown their First Amendment activity was a "substantial or motivating factor" in the government's conduct. *See Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1300-01 (9th Cir. 1999). Their lawsuit names only DHS and the Marshals Service as defendants, and accuses them of maintaining a policy of retaliating against the press. Doc.53, at 49. But plaintiffs have not identified any such policy. Nor could they. Federal policy explicitly prohibits retaliation against anyone—protesters, journalists, and legal observers alike—for exercising First Amendment rights. *E.g.*, Doc.67-6, at 1 (forbidding officers from "profil[ing], target[ing], or discriminat[ing] against any individual for exercising his or her First Amendment rights"); Doc.67-7, at 2 (prohibiting officers from using crowd-control tactics to "punish, harass, taunt, or abuse a subject"). Officers must undergo extensive training in permissible uses of force, Doc.138-2, at 152-61, and all uses of force against a person must be "documented and investigated," *id.* at 159. Officers who intentionally retaliate against

someone for exercising First Amendment rights have violated government policies in a manner wholly antithetical to the values the government is committed to upholding. They will be investigated and subject to appropriate discipline.

To the extent plaintiffs allege that some officers have violated these federal policies, they have supplied no basis for imputing the retaliatory intent of such isolated alleged wrongdoers to the defendant agencies. As this Court has made clear in the related context of § 1983 claims against municipalities, "[l]iability for improper custom may not be predicated on isolated or sporadic incidents." *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996). Plaintiffs must instead identify "practices of sufficient duration, frequency[,] and consistency that the conduct has become a traditional method of carrying out policy." *Id.* Plaintiffs' allegations fall short of that high threshold. For months, federal officers were present every day and night while thousands of people protested outside the Hatfield Courthouse. Yet plaintiffs have not alleged any improper conduct arising from the vast majority of those many thousands of interactions. And the record disproves plaintiffs' assertions that the federal government has intentionally embarked upon an improper campaign of retaliation. Doc.157, at 40 (federal officers confirming that First Amendment retaliation violates agency policies).

CONCLUSION

The Court should (1) stay the preliminary injunction pending appeal, and (2) enter an immediate administrative stay while it considers this motion.

Respectfully submitted,

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AUGUST 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the requirements of Federal Rule of Appellate Procedure 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 5,062 words according to the count of Microsoft Word.

/s/ Michael Shih
MICHAEL SHIH
Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that, on August 25, 2020, I electronically filed the foregoing motion with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.

/s/ Michael Shih
MICHAEL SHIH
Counsel for Appellants

Addendum

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

INDEX NEWSPAPERS, LLC, et al.,	)	
	)	
Plaintiffs,	)	3:20-cv-01035-SI
	)	
vs.	)	July 31, 2020
	)	
CITY OF PORTLAND, et al.,	)	Portland, Oregon
	)	
Defendants.	)	

(Telephonic Motion Hearing)

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL H. SIMON

UNITED STATES DISTRICT COURT JUDGE

APPEARANCES

FOR THE PLAINTIFFS: Matthew Borden
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COURT REPORTER: Dennis W. Apodaca, RDR, FCRR, CRR
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Portland, OR 97204
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to decide anything today. But I do think it is going to be incredibly difficult to identify specific federal officers; and thus, incredibly difficult to know, do we have just one or two or a handful of federal officers who are not complying with the temporary restraining order, or do we have a more widespread problem? I think it is going to be very difficult to identify who might be the federal defendant officers who are disregarding the temporary restraining order and how many there are.

So what I'm tentatively thinking about, if I do authorize or renew, rather, the temporary restraining order, I'm thinking about modifying it as follows, and I might give everybody an opportunity to respond, especially in writing, and not necessarily right now. I will give you an opportunity. We will talk about a schedule for responding next week.

But the thinking I'm having is that every federal defendant officer in Portland, at least those who leave the federal courthouse building, those who step outside the federal courthouse building, they must wear visible, unique, identifying codes. I'm not going to require right now to identify themselves by name. I do understand the risk of doxing, and I want to be very, very careful about not having that come about.

But I do think it might be appropriate to require any federal law enforcement officer who steps out of the federal

courthouse building to wear a unique identifying code. What I'm tentatively thinking about is something like large white numbers against a dark background, perhaps the numbers not being less than eight inches high. I'm taking this very seriously, so I don't mean to diminish the seriousness of this. But I'm kind of thinking about like professional football or professional basketball jerseys, not with their names on it but with numbers on it. Then defendants' counsel will be ordered and required to maintain logs that correlate names with those unique identifying codes. I'm not even at this time inclined to let those logs go to the plaintiffs, and I don't even necessarily want to see them.

But in other words, here is I want to find out: If we see some evidence going forward of some clearly concerning violations of the TRO, is it always going to be -- and I'll just grab a number at random hypothetically. Do we have a number of problems with Officer 30 -- No. 3-0? Do we see Officer 3-0 apparently spraying tear gas or mace or other crowd-control devices directly and intentionally at journalists or legal observers without any apparent provocation or appropriate law enforcement need to do that and in violation of the TRO? Do we see Officer 30 on multiple instances? Or perhaps we will see Officers 30, 40, and 50 are the ones that seem to be the ones causing most of the problems.

Then we bring them in, and we will hear their

testimony. Then we will decide whether or not it is appropriate to provide any further relief by preventing them from stepping outside the federal building or maybe even remaining in the District of Oregon. Maybe we will hear from them whether or not they received authorization -- formally or informally -- from any supervisor or commanding officers to do what they did.

On the other hand, if we learn that most of the problems are caused by many, many different officers wearing many different numbers, then that many will take us in an entirely different direction and perhaps in the direction of contempt against the agency as an agency.

As I said in the beginning, or at least a while ago, I do think that most protesters are here lawfully and most law enforcement officers do their job with integrity and lawfully, and it is only very few protesters that are causing the problem with unlawful conduct, just as there is probably very, very few federal law enforcement officers violating the TRO.

I think the best corrective mechanism might be to put in place something where they would wear unique, identifying codes. That's one thing to think about.

Now, the second thing I'm thinking about to try to make this order more workable on the journalists' side is to treat our journalists like we do our legal observers. Right now under the TRO, the legal observers are only those who are

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

INDEX NEWSPAPERS, LLC, et al.,	)	
	)	
Plaintiffs,	)	3:20-cv-01035-SI
	)	
vs.	)	August 6, 2020
	)	
CITY OF PORTLAND, et al.,	)	Portland, Oregon
	)	
Defendants.	)	

(Telephonic Motion Hearing)

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL H. SIMON

UNITED STATES DISTRICT COURT JUDGE

APPEARANCES

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Now, the only way to enforce an order that federal defendants not target for violence journalists or people whom they reasonably know to be journalists or should know to be journalists, the only way to enforce that is to really understand how many people have been doing that and who they are. If I were to just simply enter a contempt finding and sanction against the federal government generally, if the federal government could not identify who those particular offending officers were, that would not necessarily prevent that from happening in the future.

Similarly, since the order itself applies to each individual agent and employee and officer of the federal defendants, it's entirely possible to look to a contempt sanction, whether it be civil or criminal -- and if it is criminal, maybe with an independent prosecutor -- to ensure that those individual officers not do this again. One potential remedy under a civil contempt theory is to order that those officers are not be allowed -- the specific ones that have been found to violate the TRO -- that they not be allowed to leave the federal building, or maybe if they are not stationed in Oregon, maybe that they not be allowed to remain in Oregon. Those are all possibilities. It is premature to speculate, let alone make any findings on contempt.

But the purpose of these unique identifiers is to ensure that the order that is the subject of the lawsuit can be

Exhibit

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

INDEX NEWSPAPERS LLC d/b/a PORTLAND MERCURY; DOUG BROWN; BRIAN CONLEY; SAM GEHRKE; MATHIEU LEWIS-ROLLAND; KAT MAHONEY; SERGIO OLMOS; JOHN RUDOFF; ALEX MILAN TRACY; TUCK WOODSTOCK; JUSTIN YAU; and those similarly situated,

Plaintiffs,

v.

CITY OF PORTLAND; JOHN DOES 1-60; U.S. DEPARTMENT OF HOMELAND SECURITY; and U.S. MARSHALS SERVICE,

Defendants.

Case No. 3:20-cv-1035-SI

OPINION AND ORDER GRANTING PRELIMINARY INJUNCTION AGAINST FEDERAL DEFENDANTS

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Michael H. Simon, District Judge.

"Open government has been a hallmark of our democracy since our nation's founding." *Leigh v. Salazar*, 677 F.3d 892, 897 (9th Cir. 2012). "When wrongdoing is underway, officials have great incentive to blindfold the watchful eyes of the Fourth Estate." *Id.* at 900. "The free press is the guardian of the public interest, and the independent judiciary is the guardian of the free press." *Id.* This lawsuit tests whether these principles are merely hollow words.

Plaintiffs Index Newspapers LLC doing business as Portland Mercury, Doug Brown, Brian Conley, Sam Gehrke, Mathieu Lewis-Rolland, Kat Mahoney, Sergio Olmos, John Rudoff, Alex Milan Tracy, Tuck Woodstock, and Justin Yau (collectively, "Plaintiffs") bring this putative class action against: (1) the City of Portland (the "City"); (2) numerous as-of-yet unnamed individual and supervisory officers of the Portland Police Bureau ("PPB") and other agencies allegedly working in concert with the PPB; (3) the U.S. Department of Homeland Security ("DHS"); and (4) the U.S. Marshals Service ("USMS"). The Court refers to DHS and USMS collectively as the "Federal Defendants." Plaintiffs are journalists and authorized legal

observers. They allege violations of the First and Fourth Amendments of the United States Constitution and Article I, sections 8 and 26 of the Oregon Constitution. Plaintiffs seek declaratory and injunctive relief and money damages.

Before the Court is Plaintiffs' motion for preliminary injunction against the Federal Defendants. Plaintiffs allege that agents of the Federal Defendants from around the United States, specially deployed to Portland, Oregon to protect the federal courthouse, have repeatedly targeted and used physical force against journalists and authorized legal observers who have been documenting the daily Black Lives Matter protests in this city. These federal agents include special tactical units from U.S. Customs and Border Protection under the U.S. Department of Homeland Security ("BORTAC") and other special tactical units from the U.S. Marshals Service under the U.S. Department of Justice ("Special Operations Group" or "SOG").

Although these federal agents are highly trained in some areas of law enforcement, Plaintiffs contend that neither these agents nor their commanders have any special training or experience in civilian crowd control. Plaintiffs allege that some of these officers have intentionally targeted and used physical force and other forms of intimidation against journalists and authorized legal observers for the purpose of preventing or deterring them from observing and reporting on unreasonably aggressive treatment of lawful protesters. In response, the Federal Defendants argue that they are merely protecting the federal courthouse and its personnel from potential or actual violence and that any interference with protected First Amendment activity is merely incidental.

The Ninth Circuit has stated:

> Demonstrations can be expected when the government acts in highly controversial ways, or other events occur that excite or arouse the passions of the citizenry. The more controversial the occurrence, the more likely people are to demonstrate. Some of

> these demonstrations may become violent. The courts have held that the proper response to potential and actual violence is for the government to ensure an adequate police presence and to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure.

Collins v. Jordan, 110 F.3d 1363, 1372 (9th Cir. 1996) (citation omitted). Here, the actions of the Federal Defendants, or at least some of their officers, prevent, deter, or otherwise chill the constitutionally protected newsgathering, documenting, and observing work of journalists and authorized legal observers, who peacefully stand or walk on city streets and sidewalks during a protest. As further explained by the Ninth Circuit in *Collins*:

> It has been clearly established since time immemorial that city streets and sidewalks are public fora. Restrictions on First Amendment activities in public fora are subject to a particularly high degree of scrutiny.

Id. at 1371 (citations and quotation marks omitted).

The Federal Defendants also argue that Plaintiffs are seeking special protections for journalists and legal observers under the First Amendment but that journalists and legal observers are entitled to no greater rights than those afforded to the public generally. In support, the Federal Defendants cite *Branzburg v. Hayes*, 408 U.S. 665, 680-82 (1972), which held that although the First Amendment protects news gathering, it does not provide a reporter's privilege against testifying before a grand jury. In that case, the Supreme Court noted: "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Id.* at 684; *see also Cal. First Amendment Coal. v. Calderon*, 150 F.3d 976, 981 (9th Cir. 1998) (same). The Federal

Defendants argue, in essence, that Plaintiffs' requested preliminary injunction violates the traditional "nondiscrimination" interpretation of the First Amendment's Press Clause.[1]

At first glance, one might think that the journalists and legal observers here are seeking protection against having to comply with an otherwise lawful order to disperse from city streets after a riot has been declared, when the public generally does not have that protection. When local law enforcement lawfully declares a riot and orders people to disperse from city streets, generally they must comply or risk arrest. The question of whether journalists have any greater rights than the public generally, however, is not actually presented in the pending motion for preliminary injunction. That is because the *Federal Defendants* are not asserting that *they* have the legal authority to declare a riot and order persons to disperse from the city streets in Portland; nor does the authority they cite for their presence and actions in Portland so provide.[2] It is only

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[1] This traditional interpretation may be undergoing a reevaluation. *See, e.g.,* Sonja R. West, *Favoring the Press*, 106 CAL. L. REV. 91, 94 (2018) ("The nondiscrimination view of the Press Clause is deeply flawed for the simple reason that the press is different and has always been recognized as such."). "Barring the government from recognizing the differences between press and non-press speakers threatens to undermine the vital role of the Fourth Estate." *Id.* (footnote omitted). "It is, therefore, entirely in keeping with the text, history, and spirit of the First Amendment's Press Clause for the government to, at times, treat press speakers differently." *Id.* at 95. "Rather than lump the press together with other speakers, the Supreme Court has historically done just the opposite." *Id.*

[2] The Federal Defendants cite 40 U.S.C. § 1315 and its implementing regulations. That statute authorizes DHS to "protect the buildings, grounds, and property that are owned, occupied, or secured by the Federal Government." § 1315(a). The governing regulations prohibit, as relevant here: (1) disorderly conduct for persons "entering in or on Federal property," 41 C.F.R. § 102-74.390; (2) persons "entering in or on Federal property" from improperly disposing of rubbish on property, willfully damaging property, creating a hazard on property, or throwing articles at a building or climbing on any part of a building, 41 C.F.R. § 102-74.380; and (3) requiring that "[p]ersons in and on property" must obey "the lawful direction of federal police officers and other authorized individuals." 41 C.F.R. § 102-74.385. This latter regulation, although not specifically stating on "federal" property, has been construed as including this requirement, that the persons be on federal property. *See United States v. Baldwin*, 745 F.3d 1027, 1029 (10th Cir. 2014) (then-Circuit Judge, now Justice Gorsuch) ("The first says '[p]ersons in and on [Federal] property must at all times comply . . . with the lawful direction of Federal police officers and other authorized individuals.'" (alterations in original) (quoting 41

state and local law enforcement that may lawfully issue an order declaring a riot or unlawful assembly on city streets. That is simply part of a state or city's traditional police power.

Here, Plaintiffs and the City have already *stipulated* to a preliminary injunction that provides that the Portland Police will not arrest any journalist or authorized legal observer for failing to obey a lawful order to disperse. Thus, the question of whether an otherwise peaceful and law-abiding journalist or authorized legal observer has a First Amendment right not to disperse when faced with a general dispersal order issued by state or local authorities does not arise in this motion.[3]

C.F.R. § 102-74.385); *see also United States v. Estrada-Iglesias*, 425 F. Supp. 3d 1265, 1270 (D. Nev. 2019). Thus, 40 U.S.C. § 1315 and its regulations give federal officers broad authority *on federal property*. They do not, however, give federal officers broad authority off federal property. The authority granted off federal property is limited—to perform authorized duties "outside the property to the extent necessary to protect the property and persons on the property." § 1315(b)(1). These authorized duties include enforcing federal laws (which as relevant here are laws limited to persons on federal property), making arrests if federal crimes are committed in the presence of an officer, and conducting investigations on and off the property for crimes against the property or persons on the property. § 1315(b)(2). None of these powers include declaring a riot or an unlawful assembly on the streets of Portland, closing the streets of Portland, or otherwise dispersing people off the streets of Portland (versus dispersing people off federal property).

The Federal Defendants appear to acknowledge this limitation in their powers. DHS Operation Diligent Valor commander Gabriel Russell states in his declaration that in response to violent protests, Federal Protective Services ("FPS") officers warned protesters to "stay off federal property," used tear gas to "push protesters back from the [federal] courthouse," contacted the PPB who were about to declare an unlawful assembly, the Portland Police "arrived and closed all roads in the vicinity of the facilities[,] . . . . declared an unlawful assembly and began making arrests for failure to disperse," and the FPS only "made dispersal orders on federal property and cleared persons refusing to comply with these orders." ECF 67-1 at 2. He also testified at deposition that generally FPS does not have authority to enforce a dispersal order against an unlawful assembly on Fourth Street, one block from the federal courthouse. ECF 136-1 at 22 (63:12-18). The Federal Defendants also cite to statutes and regulations that authorize the USMS to protect federal courthouses and other federal property, including 28 U.S.C. § 566(a), 28 U.S.C. § 566(i), 28 C.F.R. § 0.111(f). As with the statutes and regulations governing DHS's authority, these authorities focus on federal property, not on city streets or state or local property.

[3] Someday, a court may need to decide whether the First Amendment protects journalists and authorized legal observers, as distinct from the public generally, from having to comply with

Plaintiffs and the Federal Defendants have stipulated that an evidentiary hearing with live witness testimony is unnecessary and that the Court may base its decision on the written record and oral argument of counsel. For the reasons that follow, the Court GRANTS Plaintiffs' motion for preliminary injunction against the Federal Defendants.

STANDARDS

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 22 (2008). A plaintiff seeking a preliminary injunction generally must show that: (1) he or she is likely to succeed on the merits; (2) he or she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his or her favor; and (4) that an injunction is in the public interest. *Id.* at 20 (rejecting the Ninth Circuit's earlier rule that the mere "possibility" of irreparable harm, as opposed to its likelihood, was sufficient, in some circumstances, to justify a preliminary injunction).

The Supreme Court's decision in *Winter*, however, did not disturb the Ninth Circuit's alternative "serious questions" test. *See All. for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1131-32 (9th Cir. 2011). Under this test, "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Id.* at 1132. Thus, a preliminary injunction may be granted "if there is a likelihood of irreparable injury to plaintiff; there are serious questions going to the merits; the balance of hardships tips sharply in favor of the plaintiff; and the injunction is in the public interest." *M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th Cir. 2012).

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an otherwise lawful order to disperse from city streets when journalists and legal observers seek to observe, document, and report the conduct of law enforcement personnel; but today is not that day.

BACKGROUND

A. Procedural History

Plaintiffs filed their original Complaint against the City on June 28, 2020. On June 30th, Plaintiffs moved for a TRO. On July 2nd, the Court entered a TRO against the City. On July 14th, Plaintiffs moved to file a Second Amended Complaint ("SAC"), adding the Federal Defendants to this lawsuit. On July 16th, the Court entered a stipulated preliminary injunction against the City. On July 17th, the Court granted Plaintiffs' motion to file the SAC. Later that day, Plaintiffs filed their SAC and moved for a TRO against the Federal Defendants, which the City supported shortly thereafter. On July 23rd, the Court granted Plaintiffs' motion for a TRO against the Federal Defendants, including many of the same terms contained in the TRO and stipulated preliminary injunction entered against the City. The TRO against the Federal Defendants was set to expire by its own terms on August 6th. On July 28th, Plaintiffs moved for a finding of contempt and imposition of sanctions against the Federal Defendants, alleging several violations of the Court's TRO. On July 30th the Federal Defendants moved for reconsideration of the TRO, requesting that it be dissolved. On July 31st the Court stayed briefing on Plaintiffs' contempt motion. On August 4th, Plaintiffs moved to extend the TRO against the Federal Defendants for an additional 14 days. On August 6th, after finding good cause, the Court granted Plaintiffs' motion and extended the TRO against the Federal Defendants through August 20th and denied the Federal Defendants' motion for reconsideration.

B. Plaintiffs

Plaintiff Index Newspapers LLC doing business as Portland Mercury ("Portland Mercury") is an alternative bi-weekly newspaper and media company. It was founded in 2000 and is based in Portland, Oregon. ECF 53, ¶ 21.

Plaintiff Doug Brown has attended many protests in Portland, first as a journalist with the *Portland Mercury* and later as a volunteer legal observer with the ACLU. He has attended the George Floyd protests on several nights, wearing a blue vest issued by the ACLU that clearly identifies him as a legal observer, for the purpose of documenting police interactions with protesters. ECF 9, ¶¶ 1-2; ECF 53, ¶¶ 22, 97; ECF 55, ¶ 2.

Plaintiff Brian Conley has been a journalist for twenty years and has trained journalists in video production across a dozen countries internationally. He founded Small World News, a documentary and media company dedicated to providing tools to journalists and citizens around the world to tell their own stories. ECF 53, ¶ 131.

Plaintiff Sam Gehrke has been a journalist for four years. He previously was on the staff of the *Willamette Week* as a contractor. He is now a freelance journalist. His work has been published in *Pitchfork*, *Rolling Stone*, *Vortex Music*, and *Eleven PDX*, a Portland music magazine. He has attended the protests in Portland for the purpose of documenting and reporting on them, and he wears a press pass from the *Willamette Week*. ECF 10, ¶¶ 1-3; ECF 53, ¶ 23.

Plaintiff Mathieu Lewis-Rolland is a freelance photographer and photojournalist who has covered the ongoing Portland protests. He has been a freelance photographer and photojournalist for three years and is a contributor to *Eleven PDX* and listed on its masthead. After the Court issued its TRO directed against the City, he began wearing a shirt that said "PRESS" in block letters on both sides. He also wears a helmet that says "PRESS" on several sides, and placed reflective tape on his camera and wrist bands. ECF 12, ¶¶ 1-2; ECF 53 ¶ 24; ECF 77, ¶ 1, 3.

Plaintiff Kat Mahoney is an independent attorney and unpaid legal observer. She has attended the Portland protests nearly every night for the purpose of documenting police

interactions with protesters. She wears a blue vest issued by the ACLU that clearly identifies her as an "ACLU LEGAL OBSERVER." ECF 26, ¶ 3; ECF 75, ¶¶ 1-2.

Plaintiff Sergio Olmos has been a journalist since 2014, when he began covering protests in Hong Kong. He has worked for *InvestigateWest* and *Underscore Media Collaboration*, and as a freelancer. His work has been published in the *Portland Tribune*, *Willamette Week*, *Reveal: The Center for Investigative Reporting*, *Crosscut*, *The Columbian*, and *InvestigateWest*. He has attended the protests in Portland as a freelance journalist for the purpose of documenting and reporting on them. He wears a press badge and a Kevlar vest that says "PRESS" on both sides. He carries several cameras, including a film camera, in part so that it is unmistakable that he is present in a journalistic capacity as a member of the press. ECF 15, ¶¶1-3; ECF 53, ¶ 26.

Plaintiff John Rudoff is a photojournalist. His work has been published internationally, including reporting on the Syrian refugee crises, the "Unite the Right" events in Charlottesville, Virginia, the Paris "Yellow Vest" protests, and the Rohingya Genocide. He has attended the protests in Portland during the past two months for the purpose of documenting and reporting on them. Since this lawsuit began, he has been published in *Rolling Stone*, *The Nation*, and on the front page of the *New York Times*. While attending the Portland protests, he carries and displays around his neck press identification from the National Press Photographers Association, of which he has been a member for approximately ten years. He also wears a helmet and vest that is clearly marked "PRESS." ECF 17, ¶¶ 1-3; ECF 53, ¶ 27; ECF 59, ¶¶ 1, 3.

Plaintiff Alex Milan Tracy is a journalist with a master's degree in photojournalism. His photographs have been published by CNN, ABC, CBS, *People Magazine*, *Mother Jones*, and *Slate*, among others. He has covered many of the recent protests in Portland over George Floyd

and police brutality. He carries a press badge and three cameras, and wears a helmet that is marked "PRESS" on the front and back. ECF 60, ¶¶ 1, 3.

Plaintiff Tuck Woodstock has been a journalist for seven years. Their work has been published in the *Washington Post*, *NPR*, *Portland Monthly*, *Travel Portland*, and the *Portland Mercury*. They have attended the George Floyd protests several times as a freelancer for the *Portland Mercury* and more times as an independent journalist. When they attended these protests, they wear a press pass from the *Portland Mercury* that states "MEDIA" in large block letters and a helmet that is marked "PRESS" on three sides. At all times during police-ordered dispersals, they hold a media badge over their head. ECF 23, ¶¶ 2-3; ECF 76, ¶¶ 1, 3.

Plaintiff Justin Yau is a student at the University of Portland studying communications with a focus on journalism. He previously served in the U.S. Army, where he was deployed to the Middle East. He has covered protests in Hong Kong and Portland. His work has been published in the *Daily Mail*, *Reuters*, *Yahoo! News*, *The Sun*, *Spectee* (a Japanese news outlet), and msn.com. He has attended the protests in Portland as a freelance and independent journalist for the purpose of documenting and reporting on them. He wears a neon yellow vest marked with reflective tape and a helmet that are marked "PRESS," and carries his press pass around his neck. He carries a large camera, a camera gimbal (a device that allows a camera to smoothly rotate), and his cellphone for recording. ECF 56, ¶¶ 1-3.

C. Plaintiffs' Alleged Harm

Plaintiffs and other declarants have provided numerous declarations describing events in which they assert that employees, agents, or officers of the Federal Defendants targeted journalists and legal observers and interfered with their ability to engage in First Amendment-protected activities. As discussed below, Plaintiffs provide many compelling examples in the record, some from before the Court entered the TRO against the Federal Defendants and some

after. The following are just several examples selected by the Court from the extensive evidence provided by Plaintiffs. There are more.

1. Before the TRO was Issued

On July 15, 2020, Plaintiff Justin Yau asserts that, while carrying photojournalist gear and wearing reflective, professional-looking clothing clearly identifying him as press, he was targeted by a federal agent and had a tear gas canister shot directly at him. ECF 56, ¶¶ 3-6. Two burning fragments of the canister hit him. *Id.* ¶ 6. At the time he was fired upon, he was taking pictures with his camera and recording with his cell phone while standing 40 feet away from protesters to make it clear that he was not part of the protests. *Id.* ¶ 5. Mr. Yau notes that from his experience covering protests in Hong Kong, "Even Hong Kong police, however, were generally conscientious about differentiating between press and protesters—as opposed to police and federal agents in Portland." *Id.* ¶ 7.

Declarant Noah Berger has been a photojournalist for more than 25 years. ECF 72, ¶ 1. He has been published nationally and internationally, including for coverage of protests in San Francisco and Oakland. *Id.* On July 19, 2020, he covered the protests on assignment for the Associated Press. He notes that the response he has seen and documented from the federal agents in Portland is markedly different from even the most explosive protests he has covered. *Id.* ¶ 3. He carries two large professional cameras and two press passes. *Id.* He states that without any warning he was shot twice by federal agents using less lethal munitions. *Id.* ¶ 4. Later, as 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. *Id.* ¶ 7. While holding his press pass and identifying himself as press, he was hit with a baton by one federal agent. *Id.* ¶ 8. Two others joined and surrounded him, and he was hit with batons three or four times. *Id.* One agent then deployed pepper spray against Mr. Berger from about one foot away. *Id.* ¶ 9. He was given no

warning. *Id.* ¶ 11. He states that he was not demonstrating or protesting, was leaving the area, and was clearly acting as a journalist. *Id.* ¶¶ 3, 11.

Late July 19th or early July 20th, Declarant Nathan Howard, a photojournalist who has been published in *Willamette Week*, *Mother Jones*, Bloomberg Images, Reuters, and the Associated Press, was covering the Portland protests. ECF 58, ¶¶ 1, 4. He was standing by other journalists, and no protesters, as federal agents went by. *Id.* ¶ 4. The nearest protester was a block away. *Id.* Mr. Howard held up his press pass and repeatedly identified himself as press. *Id.* ¶ 5. A federal agent stated words to the effect of "okay, okay, stay where you are, don't come closer." *Id.* ¶ 6. Mr. Howard states that another federal agent, who was standing immediately to the left of the agent who gave Mr. Howard the "okay," aimed directly at Mr. Howard and fired at least two pepper balls at him at close range. *Id.* ¶ 7.

Declarant Jungho Kim is a photojournalist whose work has been published in the *San Francisco Chronicle* and *CalMatters*, among others. ECF 62, ¶ 1. He wears a neon yellow vest marked "PRESS" and a white helmet marked "PRESS" in the front and rear. *Id.* ¶ 2. He has covered protests in Hong Kong and California. He has experience with staying out of the way of officers and with distinguishing himself from a protester, such as by not chanting or participating in protest activity. *Id.* ¶ 3. He had never been shot at by authorities until covering the Portland protests on July 19, 2020. *Id.* During the protest, federal agents pushed protesters away from the area where Mr. Kim was recording. He was around 30 feet away from federal agents, standing still, taking pictures, with no one around him. *Id.* ¶¶ 5-7. He asserts that suddenly and without warning, he was shot in the chest just below his heart with a less lethal munition. *Id.* ¶ 7. Because he was wearing a ballistic vest, he was uninjured. He also witnessed, and photographed, federal agents firing munitions into a group of press and legal observers. *Id.* ¶ 9.

Declarant Nate Haberman-Ducey is a law student at Lewis and Clark Law School. ECF 61, ¶ 1. He completed training with the National Lawyers Guild ("NLG") and attended the protests several times as a legal observer. *Id.* He states that on July 19, 2020, while wearing his green, NLG-issued authorized legal observer hat, he was shot in the hand with a paint-marking round by a federal agent, while walking his bicycle through the park across from the federal courthouse. *Id.* ¶¶ 3-4. At the time, there were no other protestors or other people around Mr. Haberman-Ducey at whom the federal agent might have been aiming. *Id.* ¶ 5. The pain from injury to Mr. Haberman-Ducey's right hand was so severe that he had to stop observing the protests and go to the emergency room, where doctors put his broken hand in a splint. *Id.* ¶¶ 7-8. He would like to keep observing the protests but is concerned that residue from tear gas fired by the federal agents will contaminate his splint, which he has to wear for four to six weeks. *Id.* ¶ 9.

Declarant Amy Katz is a photojournalist whose work has been published in the *Wall Street Journal*, the *New York Daily News*, the *Guardian*, *TIME*, *Mother Jones*, the *Independent*, the *New York Times*, and has been featured on Good Morning America and ABC News. ECF 117, ¶ 1. While covering the protests, she wears a hat and tank top marked with "PRESS" in bold letters and carries a camera with a telephoto lens. *Id.* ¶ 2. Early in the morning of July 21st, she was filming from the side while federal agents dispersed protestors. *Id.* ¶ 4-6. Several agents tried to disperse her, but she displayed her press pass and they left her alone. *Id.* ¶ 6. She asserts that a federal agent approached and motioned for her to disperse again a few minutes later. *Id.* ¶ 7. Ms. Katz again held up her press pass, but before she could process what was happening another agent fired pepper balls or similar munitions at her. *Id.* The first agent then dropped a tear gas grenade directly at her feet as Ms. Katz ran away, yelling that she was press. *Id.* She notes that there were no protestors the agents could have been aiming at because the protesters

had already dispersed. *Id.* ¶ 8. The effects of the tear gas forced her to stop reporting and return to her hotel. *Id.* ¶ 9. The next day her eyes and lips burned, sunlight hurt her eyes, her tongue was swollen, and she had diarrhea. *Id.*

Declarant Sarah Jeong is an attorney, a columnist for *The Verge*, and a contributing writer to the *New York Times* Opinion section. ECF 116, ¶ 1. She attended the protests solely as a journalist, wore her press badge, and wore a helmet with "PRESS" in black letters on a white background on three sides. *Id.* ¶ 4. On the night of July 21st, Ms. Jeong was covering the protests from the steps of the courthouse when federal agents emerged from the building and charged the crowd. *Id.* ¶ 5. Ms. Jeong walked slowly backward, holding her press pass up in one hand and her phone in the other. *Id.* ¶ 6. With no warning and for no apparent reason, a federal agent shoved Ms. Jeong so forcefully that both her feet left the ground. *Id.* ¶ 7. She kept reporting that night but left much earlier than she had planned. *Id.* ¶ 8. Although she plans to keep covering the protests, she is fearful for her safety. *Id.*

Declarant James Comstock is a legal observer with the NLG. ECF 63, ¶ 1. On July 19th, a few minutes before midnight, he was watching the protests from the park across the street from the protests. *Id.* ¶ 2-3. He was wearing the standard NLG-issued green hat provided to legal observers. *Id.* ¶ 2. As protestors started to push the fence, he put on his gas mask and started to move away from the courthouse because he did not want to get tear gassed. *Id.* ¶ 3. He stopped on the opposite side of 4th Avenue, about 375 feet away from the front door of the courthouse. *Id.* He went to speak to a press member standing on the intersection of SW 4th and Main. *Id.* ¶ 4. After finishing his conversation with the press member, Mr. Comstock was standing in the same location alone with his back up against the wall. *Id.* Without warning, a federal agent shot Mr. Comstock in the hand with an impact munition while he was making notes on his phone. *Id.* ¶ 5.

There were no protestors around and he was at least 6 feet from the reporter with whom he had just been speaking. *Id.* ¶ 6. Mr. Comstock states that he would like to keep attending the protests as a legal observer but that he is afraid of injury and fearful that he will be wrongfully arrested, endangering his job as a criminal defense investigator. *Id.* ¶¶ 8-9.

Early morning on July 22nd, Plaintiff Alex Milan Tracy was standing in the street and filming a group of federal officers who were standing on the sidewalk in front of the courthouse. ECF 74, *Id.* ¶ 4. Two of the officers from that group waved their batons at him and gestured for him to move back. *Id.* He retreated, and one of the officers briefly charged at him. Mr. Tracy then moved back farther into the middle of the street. *Id.* A few minutes later, he was filming the same group of federal officers from the same spot in the middle of the street. *Id.* ¶ 6. Agents from that same group raised their weapons and launched a flashbang at Mr. Tracy and another journalist, hitting them both. *Id.* ¶ 7. Mr. Tracy continued documenting the scene but finally left because the federal officers kept looking and pointing directly at him. *Id.* ¶¶ 7, 10. He was "genuinely terrified" of standing in front of the federal officers. *Id.* ¶ 10.

2. After the TRO was Issued

Plaintiff Brian Conley has worked in war zones such as Iraq, Afghanistan, Libya, and Burundi. ECF 87, ¶ 1. He also has covered protests for many years in places such as Beijing, New York, Washington, D.C., Miami, Quebec City, and Oaxaca, Mexico. *Id.* He has encountered agents of the Federal Defendants in Portland on multiple days. At all times he was wearing a photographer's vest with "PRESS" written on it and a helmet that said "PRESS" in large block letters across the front. *Id.* ¶ 2. He was also carrying a large camera with an attached LED light and telephoto lens. *Id.*

Early in the morning of July 24th, Mr. Conley filmed federal agents seizing a woman who was dancing with flowers in front of the officers. *Id.* ¶ 3-4. At that point, the crowd was

mostly press and a few individual protestors. *Id.* ¶ 3. Federal agents launched tear gas into the streets, and Mr. Conley yelled that he was press to avoid being further tear gassed. *Id.* ¶ 6. Mr. Conley was then shot with impact munitions in the chest and foot. *Id.* ¶ 7. Video of this event shows that the situation grew tense as a protester attempted to interfere with the agents' seizure of the woman. As the agents finalized the seizure of the woman and the interfering protester and retreated into the federal courthouse with the woman and the interfering protester, they laid sweeping cover fire into the remaining crowd, which included Mr. Conley and other press members, even though no protester was near Mr. Conley at the time. After the officers were safely within the building, Mr. Conley continued recording. The video shows that Mr. Conley was outside next to another photographer. A medic and his protector were behind a shield on one side several yards away and a protester yelling taunts was on the other side several yards away. As Mr. Conley was filming, a federal agent on the other side of the courthouse fence shone a bright light at Mr. Conley. Shortly thereafter, without warning, a federal agent shot a tear gas canister above Mr. Conley's head. Mr. Conley also describes this in his declaration. *Id.* ¶ 9.

Mr. Conley took the next two nights off and returned to cover the protests the night of July 27th. *Id.* ¶¶ 17, 18. He was documenting a line of federal agents advancing on a group of six protestors with shields who were standing behind him. *Id.* ¶ 18. He yelled that he was press, but the federal agents unleashed a barrage of munitions at him. *Id.* ¶ 19. He moved to the side, away from the protestors, and continued to yell that he was press. *Id.* ¶ 20. The federal agents briefly stopped firing, one shone a flashlight at him, and resumed fire directly at him, striking him multiple times—although by this point there was nobody else near him. *Id.* Another federal agent threw a flashbang grenade directly at him. *Id.* Mr. Conley could "barely walk" after the events of July 27-28. *Id.* ¶ 25.

Mr. Conley was covering the protests again just before midnight on July 29th. ECF 115, ¶ 4. He had replaced the "PRESS" lettering on his helmet because the concussion and flashbang grenades thrown at him the night before had blown off one of the letters. *Id.* ¶ 2. He was filming federal agents on SW Salmon Street between SW 2nd and SW 3rd Avenue. *Id.* ¶ 4. There was one other photographer between him and the small group of agents. *Id.* One of the agents shone a light on Mr. Conley and fired a munition just beside him. *Id.* Another federal agent with an assault rifle approached Mr. Conley and told him to stay on the sidewalk. *Id.* ¶ 5. Later that night, without warning, federal agents pepper sprayed Mr. Conley at point blank range. *Id.* ¶ 6. Video of this event shows that while Mr. Conley was filming a line of federal officers moving down the street pepper spraying peaceful protesters, including spraying a woman in the face at point blank range who was on her knees with her hands up in the middle of the street, an officer pepper sprayed Mr. Conley at point blank range along with indiscriminately pepper spraying other press and the protesters. Mr. Conley states that he fears for his safety but plans to keep covering the protests because he believes "it is critically important to do so." *Id.* ¶ 11.

Declarant Amy Katz again covered the protests on the early morning of July 27th. ECF 117, ¶ 10. She witnessed a federal agent push a man down a flight of stairs while arresting him and photographed the incident. *Id.* An agent physically blocked her and tried to stop her from photographing the arrest. *Id.* When she stepped to the side to get another angle, the federal agent physically shoved her away. *Id.* Later that night, she approached a group of federal officers with a group of press, all of whom had their press badges up and their hands in the air. *Id.* ¶ 12. The video of this event shows that many of the group were calling out "press." Ms. Katz describes that she and the group of press were at least 75 feet away from most of the protestors when federal agents bombarded their group with munitions, hitting her in the side and causing a

large contusion. *Id.* The video shows the group of press moving together off to the far side of the sidewalk, holding their passes up along with cameras, shouting press and saying "hold your passes up." The group is moving toward the federal officers, recording events, when they are fired upon with various munitions. Ms. Katz stopped covering the Portland protests after that incident because of how the federal agents treated her. *Id.* ¶ 15.

Declarant Rebecca Ellis is a staff reporter for Oregon Public Broadcasting ("OPB"). ECF 88, ¶ 1. She attended the protests the night of July 23rd wearing her OPB press pass, which shows her name, her photograph, and the OPB logo. *Id.* ¶ 2-3. Around 1:30 a.m. she was in a small group of press members filming federal agents exiting the federal courthouse. *Id.* ¶ 3. One agent fired a munition directly at her, hitting her in the hand. *Id.* Video of this incident shows that she is hit when agents advance in a group and fire multiple munitions. Ms. Ellis appears to be in the middle of the street when she is hit. There are also persons crossing in front of Ms. Ellis, who appear also to be press, at the time she is shot. It is unclear who is behind her when she is hit. Ten minutes later, however, federal agents forced her and other press to disperse from near the courthouse. *Id.* ¶ 5. One agent walked towards them shouting "MOVE, MOVE" and "WALK FASTER" in their faces while another agent kept pace next to him, holding his gun. *Id.* Video of this dispersal shows that it is directed at press, in an intimidating manner, despite a press person stating, "You can't do that." The video does not seem to support that the press were in the way or otherwise impeding law enforcement actions. Ms. Ellis states that the federal agents prevented her from doing her job and reporting on what was going on behind them. She intends to keep covering the protests but is fearful for her safety. *Id.* ¶ 6.

Declarant Kathryn Elsesser is a freelance photographer whose photographs of the Portland protests have been published by Bloomberg, CBS News, and Yahoo, among others,

including many international publications. ECF 89, ¶ 1. She covered the protests the night of July 24th on assignment from a French news agency. *Id.* ¶ 2. She carried a large camera, wore a press pass from the American Society of Media Photographers, and wore a helmet with "PRESS" written in big letters across the front. *Id.* Around 2 a.m. on July 25th, Ms. Elsesser decided to end her coverage early because she did not have a bullet-proof vest and was afraid federal agents would hurt her. *Id.* ¶ 4. She was standing by herself, across the street from the courthouse, at the edge of the park. *Id.* There was nobody else near her. *Id.* A federal agent shot her in the arm with an impact munition as she was walking away. *Id.* ¶ 5. She believes that the federal agents targeted her because she was taking photographs. *Id.* ¶ 6. Ms. Elsesser states that she would refuse to cover the protests again unless she had a bullet-proof vest because she is afraid that federal agents will injure her or worse. *Id.* ¶ 13.

Declarant Emily Molli is a freelance photojournalist whose photographs have been published in the *New York Times*, the *Wall Street Journal*, the *Guardian*, *ProPublica*, and others. ECF 118, ¶ 1. She is experienced in covering civil unrest, riots, and other dangerous situations. She has reported on the protests in Hong Kong over the course of six months, the "Yellow Vests" in France over the course of a year, the Catalan independence movement, and the protests and riots in Greece. *Id.* ¶ 2. She understands the risk of getting hit by less lethal munitions while standing with protesters, but she objects to federal officers targeting press, which she states she has witnessed happening in Portland. *Id.* She wears a helmet with "PRESS" in big block letters and carries two press passes and a large professional-grade video camera. *Id.* ¶ 3. Early in the morning of July 27, 2020, after getting shot and injured when she had been approximately 75 yards from protesters, Ms. Molli decided to stick with a group of only journalists. *Id.* ¶¶ 7-8. The video of this event shows that they were holding their press passes up, mostly staying together as

a group, and staying toward the side of a street that appears otherwise empty. Federal officers fired munitions at the group of journalists. *Id.* ¶ 8. On July 29, 2020 and into the early morning of July 30th, Ms. Molli recorded another encounter between journalists and federal officers on SW Main Street. *Id.* ¶ 10. Video of this event shows that there were numerous law enforcement personnel, several journalists, and no protesters on that section of the street. Journalists are taking pictures and video of a tear gas canister that had been fired by federal agents when a federal agent fires another tear gas round at the journalists. Ms. Molli intends to keep covering the protests, but she fears for her safety because she has seen the federal agents disobey a court order. *Id.* ¶ 11.

Declarant Daniel Hollis is a videographer for VICE News. ECF 91, ¶ 1. He has covered many chaotic and dangerous situations, including conflict zones in Iraq and Syria, former Taliban areas in Pakistan, child sex-trafficking raids in the Philippines, Iranian militias, gangs, mafia, domestic terrorism, and armed militias. *Id.* He covered the Portland protests for two nights. *Id.* ¶ 2. During the protests, he carried a VICE press pass and a helmet with "PRESS" on it in bright orange tape. *Id.* He also carried a large, professional video-recording camera. *Id.* On July 26th, Mr. Hollis was filming wide-angle footage of a mass of protestors in front of the courthouse. *Id.* ¶ 4. The people closest to him were press and legal observers—the nearest protestors were several yards behind him. *Id.* ¶ 7. He then turned to record a group of federal agents massed outside the courthouse. *Id.* ¶ 5. Almost immediately, the agents shot at him, striking him just to the left of his groin. *Id.* He turned to run away, and another munition hit him in the lower back. *Id.* ¶ 6. Video of this event shows that Mr. Hollis was positioned between the federal agents and those few protesters (not the mass of protesters who were around the building), but the video does not reflect any violent or riotous behavior by anyone near Mr.

Hollis. After the federal agents shot him, Mr. Hollis went back to his hotel. *Id.* ¶ 8. He states that he is more concerned for his personal safety than he was during the month he spent covering ISIS sleeper cells in Northern Syria. *Id.* ¶ 9. He states: "I have been around heavily armed soldiers, militias, and gangs countless times, but have never had weapons aimed or discharged directly at me. The federal agents I have seen in Portland have been less willing to distinguish between press and putative enemies than any armed combatants I have seen elsewhere." *Id.*

Declarant Jonathan Levinson is an Oregon resident who lives in Portland. ECF 93, ¶ 1. He is a staff reporter for OPB. His work also has appeared on NPR and ESPN, and in the *Washington Post*, the *Wall Street Journal*, and *Al Jazeera*. *Id.* He has experience in conflict zones. He spent five years as an infantry officer in the U.S. Army, with two deployments to Iraq. *Id.* ¶ 2. As a reporter, he has covered the Libyan civil war and done work in Afghanistan, Yemen, Gaza, and the West Bank. *Id.* He has covered the Portland protests for a majority of the nights. When covering the protests, he wears his press pass issued by OPB, which contains his name, photograph, the OPB logo, and the word "MEDIA." *Id.* ¶ 3. He also wears a helmet that says "PRESS" in large letters on the front and back and carries two professional cameras. *Id.* At around 1:00 a.m. on July 24th, the federal agents had cleared the area next to the courthouse so he decided to take pictures of the agents through the courthouse fence. *Id.* ¶ 4. There were very few protesters anywhere nearby. As he was trying to focus his professional camera, he could see a federal agent raise and aim his weapon and fire several rounds directly at Mr. Levinson. *Id.* ¶ 5. His camera and lens were covered in paint from the agent's rounds. Mr. Levinson states that he intends to continue covering the protests because he believes they are of historic significance, but that he is fearful for his safety because within hours of the Court issuing its restraining order, he "saw federal agents brazenly violate it." *Id.* ¶ 7.

D. Declarations of Plaintiffs' Expert Witness Gil Kerlikowske[4]

Plaintiffs submitted two declarations from Mr. Gil Kerlikowske, whom the Court finds to be a qualified, credible, and persuasive expert witness. ECF 135, 145. Mr. Kerlikowske is a former Commissioner of U.S. Customs and Border Protection, and he was confirmed by the U.S. Senate. Mr. Kerlikowske also served as the Chief of Police in Seattle, Washington from 2000 through 2009, and the Police Commissioner in Buffalo, New York. He has worked in law enforcement for 47 years. He served in the United States Army and Military Police from 1970 through 1972, where he began training in crowd control, riots, and civil disturbances. He also has served as the Director of the Office of National Drug Control Policy and as Deputy Director of the U.S. Department of Justice, Office of Community Oriented Policing Services. He has been an IOP Fellow at Harvard Kennedy School of Government and teaches as a distinguished visiting fellow and professor of the Practice in Criminology and Criminal Justice at Northeastern University. During his tenure as Chief of Police in Seattle, Mr. Kerlikowske led and orchestrated the policing of hundreds of large and potentially volatile protests, many of which were considerably larger than the recent protests in Portland. He did the same thing when he was Police Commissioner in Buffalo. Mr. Kerlikowske has had substantial training and experience with crowd control and civil unrest in the context of protests, use of force in that context, and use of force generally.

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[4] After oral argument, the Federal Defendants filed the Declaration of Chris A. Bishop, the "Acting Director/Deputy Director," for the U.S. Department of Homeland Security, U.S. Customs and Border Protection (CBP). ECF 152. The Federal Defendants offer this declaration as an expert rebuttal to the two declarations of Mr. Kerlikowske. Plaintiffs have moved to strike Mr. Bishop's declaration as untimely. ECF 154. The Court denies Plaintiffs' motion to strike. The Court finds the declaration of Mr. Kerlikowske to be more persuasive than the declaration of Mr. Bishop.

Plaintiffs asked Mr. Kerlikowske to evaluate whether the relief stated in the TRO against the Federal Defendants is both safe and workable from a law enforcement perspective, whether the force that federal authorities used against journalists and legal observer complainants was reasonable, and whether it is advisable to prominently mark federal agents with unique identifying letters or numbers. First, Mr. Kerlikowske opined that the prohibitions contained in the TRO are safe for law enforcement personnel. Defending the federal courthouse in Portland mainly involves establishing a perimeter around the building, and there is no reason to target or disperse journalists from that position. Additionally, to the extent officers leave federal property, the TRO is also safe for federal law enforcement officers, according to Mr. Kerlikowske.

Second, Mr. Kerlikowske stated his expert opinion that the TRO is workable. He states that trained and experienced law enforcement personnel are able to protect public safety without dispersing journalists and legal observers and can differentiate press from protesters, even in the heat of crowd control. He adds that any difficulties that may be faced by federal authorities arise from their lack of training, experience, and leadership with experience in civil disturbances and unrest.

Third, Mr. Kerlikowske explains that based on his review of the record evidence virtually all the injuries suffered by the complaining journalists were the result of improper use of force, including shooting people who were not engaged in threatening acts and misuse of crowd-control munitions by federal law enforcement personnel. For example, Mr. Kerlikowske opines that tear gas canisters and pepper balls should not be fired directly at people. He also opines that rubber bullets should not be shot above the waist, and certainly not near the head. He further opines that in these circumstances, it is inappropriate to shoot someone in the back because at that point they are not a threat.

Finally, Mr. Kerlikowske asserts that in his expert opinion a key duty and responsibility of law enforcement is to be properly and easily identifiable specific to the organization and the individual. He notes that if a decision is made to remove a name tag, it must be replaced with some other identifying label, badge, or shield number. Mr. Kerlikowske explains that such markings increase accountability and act as a check and deterrent against misconduct. He adds that camouflage uniforms are inappropriate for urban settings.

As noted, the Court finds Mr. Kerlikowske to be a well-qualified expert whose opinions are relevant, helpful, and persuasive.

E. The Situation Faced by Law Enforcement

After the killing of George Floyd on Memorial Day, there have been consistent protests against racial injustice and police brutality in Portland. ECF 67-1, Russell Decl. ¶ 3. The protesters generally are peaceful, particularly during the day and early evening. *See* ECF 113-3, Jones Decl. ¶ 7. Late at night, however, there are incidents of vandalism, destruction of property, looting, arson, and assault. ECF 67-1, ¶ 3. While protestors originally gathered outside the Justice Center (PPB headquarters), some protestors soon directed their attention to the Mark O. Hatfield Federal Courthouse, across the street from the Justice Center. After additional federal officers were deployed to Portland to support existing Federal Protective Service ("FPS") and USMS personnel, the protests grew larger and more intense, and the federal courthouse became a focus of attention. *Id.* at ¶ 5.

In early July, a group of people broke the glass doors at the entryway of the federal courthouse. *Id.* Members of this group used accelerant and commercial fireworks in an apparent attempt to start a fire inside the courthouse. *Id.* On other nights in July, various objects were thrown at law enforcement, such as rocks, glass bottles, and frozen water bottles. *Id.* at ¶ 6; ECF 101-6, CBP NZ-1 Decl. ¶ 8. Assistant Director for the Tactical Operations Division of the

USMS Andrew Smith describes the environment of the protests as "extremely chaotic and dynamic" and emphasizes that law enforcement must make split-second decisions. ECF 101-1, Smith Decl., ¶ 6. A DHS Public Affairs Specialist identified as CBP PAO #1 states that he observed a person holding a Molotov cocktail. ECF 101-2, ¶ 7. Officers have had to extinguish fires and flaming debris, some of which has been thrown over the fence in officers' direction. *See* ECF 106-1, Smith Am. Decl. ¶ 15; ECF 101-3, FPS No. 824 Decl. ¶ 5.

The situation has been dangerous for federal agents, in addition to protesters, journalists, and legal observers. Gabriel Russell, FPS Regional Director for Region 10 and commander of DHS's Rapid Deployment force for Operation Diligent Valor in Portland, notes that as of his declaration submitted on July 29th, 120 federal officers had experienced some kind of injury, including broken bones, hearing damage, eye damage, a dislocated shoulder, sprains, strains and contusions. ECF 101-5, ¶ 4. The Patrol Agent in Charge of Customs and Border Protection, U.S. Border Patrol, identified as CBP NZ-1, describes agents being hit with rocks and ball bearings from sling shots, improvised explosives, commercial grade aerial fireworks, high intensity lasers targeting officer's eyes, thrown rocks, full and empty glass bottles, frozen water bottles, and balloons filled with paint and feces. ECF 101-6, ¶ 8. He notes that one officer was hit by a projectile that caused a wound that required multiple stitches and one officer was struck in the head and shoulder by a protester wielding a sledgehammer when the officer tried to prevent the protester from breaking down the courthouse door. *Id.* Another federal officer states that he has suffered numerous injuries during the protests, including being struck in the shins by tear gas canisters, suffering temporary hearing loss from commercial fireworks, and suffering temporary blindness from lasers. ECF 101-3, FPS No. 824 Decl. ¶ 6. The Federal Defendants do not assert

that journalists or legal observers caused these injuries. *See, e.g.*, ECF 136-3 at 10-11, CBP NZ-1 Dep. Tr. 72:10-73:1.

The Federal Defendants, however, do assert that some persons wearing the indicia of press have engaged in violent or unlawful behavior. Mr. Smith states that USMS personnel witnessed a person with a helmet marked "press" use a grinder to attempt to breach the fence surrounding the courthouse. ECF 106-1, ¶ 10. Another person wearing a press helmet entered courthouse property, either by climbing the perimeter fence or crossing when the fence was breached. *Id.* ¶ 11. A different person with press clothing helped a protestor climb the perimeter fence. *Id.* at ¶ 14. Mr. Smith also received a report that a staff member was kicked by someone wearing clothing marked "press." *Id.* at ¶ 15.

Mr. Russell submitted links to several videos purporting to show improper conduct by persons with indicia of press. ECF 101-5, ¶ 8. The Court reviewed those videos and did not find persuasive evidence of any wrongdoing related to persons wearing indicia of press with two exceptions. The first are the videos of Mr. Brandon Paape, who admits that he is not press but is wearing clothing marked "press" because he was assaulted by federal agents and hoped wearing clothing that indicates he is press would protect him from further violence. *Id.* ¶ 8(e), (f). The videos, however, do not provide evidence that Mr. Paape did anything unlawful. He masqueraded as press for personal protection. Additionally, shortly thereafter, he posted on Twitter that he will no longer wear indicia of press. *See* ECF 123 at 12. The videos of Mr. Paape do show, however, that persons other than actual journalists have worn indicia of press. The second is the video of a person wearing a "press" helmet who entered courthouse property and encouraged others to join. ECF 101-5, ¶ 8(h). He states: "They can't arrest us all." This, however, is the same person from Mr. Smith's photograph, ECF 106-1 ¶ 11 (Exhibits B and C).

The Federal Defendants also provide additional declarations describing further conduct. A man wearing a vest stating "press" threw a hard object toward police. ECF 101-3, FPS No. 824 Decl., ¶ 5. Another such person shielded from police a woman who was shining strobe lights into the eyes of an officer. *Id.* One person with handwritten markings reading "PRESS" directed a powerful flashlight at a law enforcement helicopter overhead but was not filming or taking photos or notes. ECF 101-2, CBP PAO #1 Decl. ¶ 9. A photo of this man depicts him standing very close to another man holding a camera. *Id.* It is unclear if the man with the powerful light was lighting for the cameraman or was masquerading as press to use light as a law enforcement irritant. Another federal officer states that on one occasion he witnessed persons wearing press indicia shield other persons who were throwing objects at law enforcement. ECF 101-4, FPS No. 882 Decl. ¶ 5. Finally, CBP PAO #1 notes that people self-identified as press are frequently in the midst of crowds near individuals breaking laws, which makes it difficult to disperse protestors without dispersing journalists as well. ECF 101-2, ¶ 12. The Federal Defendants also consistently note that press intermingle with protesters and stand by (or perhaps record) when protesters engage in purportedly wrongful conduct.

DISCUSSION

A. Standing

The Federal Defendants argue that Plaintiffs do not have standing to request injunctive relief. The Federal Defendants concede that "the standing inquiry is focused on the filing of the lawsuit" but then assert that standing must be proven at "successive stages of the litigation" and make the same standing arguments that they made during the TRO. In issuing the Temporary Restraining Order Enjoining Federal Defendants, the Court rejected the Federal Defendants' arguments regarding standing and found that Plaintiffs had Article III standing. *See Index Newspapers LLC v. City of Portland*, --- F.3d ---, 2020 WL 4220820, at *4-5 (D. Or. July 23,

2020). To the extent the Federal Defendants request reconsideration of that decision, arguing that based on facts as they existed at the time of the filing of the Complaint Plaintiffs do not have standing, reconsideration is denied.[5] The Federal Defendants provide no compelling basis for the Court to modify its previous determination.

To the extent the Federal Defendants argue that Plaintiffs must continue to prove standing as this lawsuit continues and the facts evolve, the Federal Defendants misunderstand the doctrines of standing and mootness. Article III standing is evaluated by considering the facts as they existed at the time of the commencement of the action. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (noting that "we have an obligation to assure ourselves that FOE had Article III standing at the outset of the litigation"); *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 838 (9th Cir. 2007) ("The existence of standing turns on the facts as they existed at the time the plaintiff filed the complaint.").

Whether standing and the other requirements for a live case or controversy exists throughout the entirety of a case is considered under the doctrine of mootness. *See Barry v. Lyon*, 834 F.3d 706, 714 (6th Cir. 2016) ("To uphold the constitutional requirement that federal courts hear only active cases or controversies, as required by Article III, section 2 of the federal constitution, a plaintiff must have a personal interest at the commencement of the litigation (standing) that continues throughout the litigation (lack of mootness)."); *Vasquez v. Los Angeles*

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[5] The Federal Defendants offer no authority for the notion that this Court must repeatedly litigate the same issue. The Federal Defendants are bound by the "law of the case" doctrine for determinations made by this Court, absent reconsideration or changed circumstances such as if new Plaintiffs were added who the Federal Defendants contended did not have standing. At any appeal stage of this litigation, however, "the standing requirement therefore must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019) (simplified).

Cty., 487 F.3d 1246, 1253 (9th Cir. 2007) (noting that mootness is the doctrine under which courts ensure that "a live controversy [exists] at all stages of the litigation, not simply at the time plaintiff filed the complaint"); *Becker v. Fed. Election Comm'n*, 230 F.3d 381, 386 n.3 (1st Cir. 2000) (noting that *Lujan* "clearly indicat[es] that standing is to be 'assessed under the facts existing when the complaint is filed'" and that evaluating standing thereafter "conflates questions of standing with questions of mootness: while it is true that a plaintiff must have a personal interest at stake throughout the litigation of a case, such interest is to be assessed under the rubric of standing at the commencement of the case, and under the rubric of mootness thereafter"); *McFalls v. Purdue*, 2018 WL 785866, at *8-10 (D. Or. Feb. 8, 2018) (discussing the difference between standing and mootness). Therefore, the Federal Defendants' arguments that Plaintiffs must demonstrate standing at "all stages of the litigation," fail to do so now, and thus fail to present a case or controversy are more appropriately raised under the doctrine of mootness, to which the Court now turns. *See, e.g.*, *Barry*, 834 F.3d at 714; *Vasquez*, 487 F.3d at 1253; *Becker*, 230 F.3d at 386 n.3; *Tellis v. LeBlanc*, 2020 WL 1249378, at *5 (W.D. La. Mar. 13, 2020); *Rhone v. Med. Bus. Bureau, LLC*, 2019 WL 2568539, at *3 (N.D. Ill. June 21, 2019); *Fancaster, Inc. v. Comcast Corp.*, 2012 WL 815124, at *5 (D.N.J. Mar. 9, 2012).

B. Mootness

The Federal Defendants do not specifically argue that Plaintiffs' claims are moot based on any new facts or circumstances. Because the Federal Defendants appear to argue that Plaintiffs now lack standing based on changed circumstances, the Court considers whether the Federal Defendants' voluntary change in enforcement tactics moots Plaintiffs' claims. The augmented force of federal enforcement officers currently remain in Portland, ready to deploy whenever ordered, but have recently deployed only in limited circumstances and have not

recently engaged in the crowd control tactics that supported the Court's original TRO in this case.

For a short time, the Oregon State Police took the lead in enforcing crowd control in Portland. That appears to have ended, and the Portland Police have now resumed performing that role. The out-of-town agents and officers of the Federal Defendants who have been deployed to Portland, however, and whose actions were the basis of the Court's TRO, remain in Portland. Further, they have no scheduled date of departure.

To determine mootness, "the question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be *any* effective relief." *Nw. Envtl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1244-45 (9th Cir. 1988) (emphasis in original) (quoting *Garcia v. Lawn*, 805 F.2d 1400, 1403 (9th Cir. 1986)). If a course of action is mostly completed but modifications can be made that could alleviate the harm suffered by the plaintiff's injury, the issue is not moot. *Tyler v. Cuomo*, 236 F.3d 1124, 1137 (9th Cir. 2000). A case becomes moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quotation marks omitted). The party alleging mootness bears a "heavy burden" to establish that a court can provide no effective relief. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (quoting *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006)).

Further, voluntary cessation of conduct moots a claim only in limited and narrow circumstances. As explained by the Supreme Court:

> The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave the defendant free to return to his old ways. A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to

> recur. Of course it is still open to appellees to show, on remand, that the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary. This is a matter for the trial judge. But this case is not technically moot, an appeal has been properly taken, and we have no choice but to decide it.

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 n.10 (1982) (simplified); *see also F.T.C. v. Affordable Media*, 179 F.3d 1228, 1238 (9th Cir. 1999) ("A case may become moot as a result of voluntary cessation of wrongful conduct only if 'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" (quoting *Lindquist v. Idaho State Bd. of Corr.*, 776 F.2d 851, 854 (9th Cir. 1985))). The Ninth Circuit has noted that "an executive action that is not governed by any clear or codified procedures cannot moot a claim." *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015). The Ninth Circuit also advises courts to be "less inclined to find mootness where the new policy could be easily abandoned or altered in the future." *Rosebrock v. Mathis*, 745 F.3d 963, 972 (9th Cir. 2014) (simplified).

The Federal Defendants' voluntary change in enforcement tactics does not moot Plaintiffs' claims. There remains effective relief that the Court can provide for Plaintiffs. Further, the change in enforcement tactics is not part of any clear or codified procedures. It could easily be abandoned or altered in the future. Indeed, the Federal Defendants have stated that they specifically intend to abandon or alter in the future the current posture and become actively involved again if local police do not perform in a manner acceptable to the Federal Defendants or are otherwise unable to secure the federal courthouse in Portland in a manner acceptable to the Federal Defendants.[6] Whether this current and potentially temporary change in enforcement tactics affects Plaintiffs' likelihood of irreparable harm is addressed in Section D.2 below.

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[6] *See, e.g.*, ECF 147-1 at 3 (USMS responding to a Request for Admission that it would no longer police Portland protests by stating: "USMS cannot know whether state law

C. Factors for Preliminary Injunctive Relief

1. Likelihood of Success on the Merits

Plaintiffs allege both First Amendment retaliation and a violation of their First Amendment right of access.[7] Plaintiffs must show a likelihood of success on the merits (or at least substantial questions going to the merits) on at least one of these two claims. Plaintiffs satisfy this requirement.

a. First Amendment Retaliation

To establish a claim of First Amendment retaliation, Plaintiffs must show that: (1) they were engaged in a constitutionally protected activity; (2) the Federal Defendants' actions would chill a person of ordinary firmness from continuing to engage in the protected activity; and

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enforcement efforts will continue or whether those efforts will sufficiently protect federal property" and providing a nearly identical response in denying a request for admission that USMS would not engage with journalists or legal observers at a Portland protest); ECF 147-2 at 3 (USMS responding to an interrogatory regarding its plans to remove the additional support personnel sent to Portland: "With respect to the withdrawal of additional personnel deployed to Portland, their withdrawal will depend on unknown future circumstances in Portland and presence of any threat to the federal judiciary or property."); ECF 147-3 at 3 (DHS providing nearly identical responses to the similar Requests for Admission); ECF 147-4 at 4 (DHS responding that the "cessation of Operation Diligent Valor will depend on unknown future circumstances in Portland. . . . The other DHS officers and agents deployed to Portland to assist FPS in the protection of the Hatfield U.S. Courthouse and federal facilities in Portland will remain in Portland until the Department makes an operational security determination that their presence is no longer required to protect federal facilities there."); ECF 147-4 at 3 (DHS affirming as truthful the statements in the press release filed with the Court in ECF 124-1, including the statement from Acting Secretary Chad Wolf that "the increased federal presence in Portland will remain until [DHS] is certain the federal property is safe and a change in posture will not hinder DHS's Congressionally mandated duty to protect it. While the violence in Portland is much improved, the situation remains dynamic and volatile, with acts of violence still ongoing, and no determination of timetables for reduction of protective forces has yet been made. Evaluations remain ongoing.").

[7] Plaintiffs also allege claims under the Fourth Amendment and Oregon's state Constitution, but did not argue those claims in their motion for preliminary injunction. Thus, the Court only considers Plaintiffs' likelihood of success on their First Amendment claims.

(3) the protected activity was a substantial or motivating factor in the Federal Defendants' conduct. *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 770 (9th Cir. 2006). For the first factor, Plaintiffs have shown that they are engaged in constitutionally protected activity under the First Amendment. Plaintiffs are engaged in newsgathering, documenting, and recording government conduct. *See, e.g.*, *Leigh*, 677 F.3d at 898 (recognizing First Amendment protection for "the press and public to observe government activities"); *United States v. Sherman*, 581 F.2d 1358, 1360 (9th Cir. 1978) (noting that the "ability to gather the news" is "clearly within the ambit of the First Amendment"). The Federal Defendants do not dispute this factor.

Regarding the second factor, the Federal Defendants argue that Plaintiffs' assertion that they intend to continue to cover the protests in Portland or that they have a continuing fear of future physical force or threat by the Federal Defendants is subjective and insufficient. The Court rejects that argument. The enforcement tactics of the Federal Defendants would chill a person of ordinary firmness from continuing to engage in the protected activity. "Ordinary firmness" is an objective standard that will not "allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity." *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999). Before the TRO was in place, Plaintiffs submitted numerous declarations, photographs, and videos describing and depicting instances when journalists and legal observers were targeted. This includes Mr. Howard being shot at close range despite complying with a federal officer's order to stay where he was. It also includes Mr. Kim and Mr. Yau being shot when they were not near protesters. It further includes Mr. Berger being beaten with a baton.

The Court also has reviewed all of the testimony and videos submitted by Plaintiffs after the Court issued its TRO. Although some of that evidence is ambiguous or less persuasive, some

of it describes or shows conduct that appears to target journalists and legal observers, as opposed to incidentally or inadvertently reaching them as part of reasonable crowd control or enforcement against violent offenders. This evidence includes a federal officer forcing reporter Ms. Ellis to disperse on July 24, 2020 in a manner that would be intimidating to a reasonable person, despite the Court's TRO providing that press shall not be required to disperse. It also includes a federal officer spraying mace or pepper spray directly into the faces of clearly marked legal observers from only a few feet away. The evidence further includes a federal officer shooting a less lethal munition on July 23rd directly at Mr. Conley and another photographer, both clearly identifiable as press, after shining a bright light on them to identify them, and when the person nearest to them was a clearly identified medic standing behind a shield several feet away. It also includes video from Ms. Molli in the early morning of July 30, 2020, one week after the TRO was issued, showing law enforcement agents firing on a group of journalists when only other law enforcement agents were nearby.

The declarations submitted both before and after the TRO also describe that because of the Federal Defendants' conduct, journalists and legal observers were forced to stop newsgathering, documenting, and observing for minutes, hours, or days due to injury and trauma. This includes Mr. Haberman-Ducey being unable to observe due to his broken hand, Mr. Rudoff being unable to return for two days due to being shot in the leg, Mr. Conley having to take some time away because he could "barely walk" after his injuries, Ms. Elsesser stating that she would refuse further assignments in Portland unless she was provided with a bullet proof vest because of her injuries, Mr. Hollis leaving early after he was shot, and Ms. Jeong leaving earlier than she had planned.

Indeed, some journalists decided never to return because of fear for their personal safety. *See, e.g.*, ECF 81 at 4 (Mr. Steve Hickey stating: "I do not intend to continue covering the protests in Portland after tonight, in part because I am fearful that federal agents will injure me even more severely than they did on the night of July 19 and morning of July 20 when they intentionally shot at my face, twice, when I was not even near any protestors."); ECF 117 at 5 (Ms. Katz stating: "Because of how federal agents treated me, I have stopped covering the Portland protests."). Most of the declarants, however, emphasize that they intend to continue covering or observing the protests despite their fear of continued injury or targeting by the Federal Defendants. This fear is not unreasonable or speculative. Plaintiffs and the other declarants were repeatedly subject to violent encounters with federal officers when covering the Portland protests. It is not hypothetical or mere conjecture. Instead, it is likely that they and other journalists and legal observers will face such treatment again if they cover protests in Portland policed by agents of the Federal Defendants. Moreover, the mere threat of harm, without further action, can have a chilling effect. *Brodheim v. Cry*, 584 F.3d 1262, 1270 (9th Cir. 2009).

The Court recognizes that that there are some violent individuals at these protests, including some who throw dangerous items at law enforcement officers, such as rocks, frozen water bottles, fireworks, and Molotov cocktail-type devices. Law enforcement also face arson events, including in dumpsters and debris being piled and set on fire. The situation can be dangerous and difficult for law enforcement. The fact that there are some violent offenders, however, does not give the Federal Defendants carte blanche to attack journalists and legal observers and infringe their First Amendment rights. *See Black Lives Matter Seattle-King Cty. v. City of Seattle, Seattle Police Dep't*, 2020 WL 3128299, at *3 (W.D. Wash. June 12, 2020). Further, many declarants note that they have covered protests in war zones around the world and

in areas with riotous protests such as Hong Kong, Oakland, and Seattle, and have never been subjected to the type of egregious and violent attacks by law enforcement personnel as they have suffered in Portland. If military and law enforcement personnel can engage around the world without attacking journalists, the Federal Defendants can respect Plaintiffs' First Amendment rights in Portland, Oregon.

In addition, the change in enforcement tactics does not serve to remove the chilling effect of the Federal Defendants' conduct for the same reason it does not moot Plaintiffs' claims. It is subject to change without notice and whenever the Federal Defendants assert that it is needed. It also has been the subject of conflicting public statements, which would not give a person of ordinary firmness confidence that the Federal Defendants are not poised and ready to return to the streets of Portland at any moment and to continue with the previous modus operandi.

Regarding the third factor, the Federal Defendants argue that Plaintiffs fail to show that any protected activity was a substantial or motivating factor in any purported conduct. The Federal Defendants assert that in every video submitted by Plaintiffs after the TRO went into effect, every journalist or authorized legal observer who was purportedly targeted was standing between law enforcement officers and protesters and sometimes also standing next to or behind protesters. Thus, argue the Federal Defendants, legal observers and journalists were not being intentionally targeted but merely were "inadvertently" hit. The Federal Defendants conclude that the circumstantial evidence does not support any retaliatory intent, and Plaintiffs have not shown a likelihood of success on the merits.

The Court reaches a different conclusion from the evidence. The issue is not as simple as whether a legal observer is standing "between" law enforcement personnel and protesters. For example, the Court's view of the two videos showing the pepper spray or mace attack on the

legal observers reveals that this evidence supports the finding that journalists or legal observers were targeted and not inadvertently hit. They were standing together along the fence protecting the courthouse. There may have been protesters at some point standing behind them, although not close behind them, based on the video. Thus, the journalists or legal observers may have been "between" the law enforcement at the fence and some set of protesters further back from the fence. But based on the video, it is clear that the pepper spray was not aimed at protesters standing further back from the fence. The spray appears to have been intentionally directed at close range into the faces and eyes of the journalists or legal observers.

Additionally, from the Court's review, there are videos showing journalists not standing in between law enforcement and protesters, yet they also appear to have been targeted by agents of the Federal Defendants. For example, the video from Mr. Conley from July 24, 2020, from the time count of approximately 6:30 to 7:40, supports the finding that he was targeted. Federal agents fired on him when he was not near protesters, after he had repeatedly identified himself as press, after many federal officers had returned to the courthouse and were safe from the volatile situation of apprehending the woman and the man who had attempted to interfere with the woman's apprehension, and after the pan of Mr. Conley's camera showed that the nearest person was another photographer. The next two nearest people were yards away and were on one side a medic behind a shield and on the other side a single protester yelling taunts. A federal officer shone a bright light at Mr. Conley, making his and his neighboring photographer's press status even more identifiable, and then fired at Mr. Conley.

The Court also finds it to be a reasonable interpretation[8] that Ms. Ellis and another journalist were targeted when on July 24, 2020, they were forced to disperse, despite the TRO and their clearly identifiable status as press. Further, the Court finds that the video posted by Ms. Molli from early morning on July 30th supports a finding of targeting. This video shows journalists taking video and pictures of a munition that had been fired by federal officers. There were only a handful of journalists and many law enforcement officers, no protesters. Suddenly, one officer fired a less-lethal munition directly at the journalists recording the events.

Moreover, there are declarations that do not have video. The Federal Defendants do not address these. For example, Ms. Elsesser states that on July 25th she was standing by herself, across the street from the courthouse, with no protesters around when she was shot with a munition in the back of her arm. Ms. Katz states that on July 27th she was attempting to photograph the arrest of a protester when a federal agent physically blocked her. When she took a step to the side to get another angle, he physically shoved her away. These videos and declarations are all circumstantial evidence supporting retaliatory animus.

The Federal Defendants cite two unpublished Ninth Circuit decisions in support of their argument that in responding to some violent offenders in protesting crowds, any incidental burden on the First Amendment rights of journalists and legal observers is acceptable. These unpublished—and thus non-precedential—cases are unpersuasive. The Court follows published Ninth Circuit precedent, including *Collins*, which instructs that the proper response to violence is to arrest the violent offenders, not prophylactically suppress First Amendment rights. *See Collins*, 110 F.3d at 1372.

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[8] The Court makes no determination regarding clear and convincing evidence needed for a finding of contempt.

The Federal Defendants also argue that they have a formal policy of supporting First Amendment rights and contend that Plaintiffs fail to show otherwise. The Federal Defendants may not, however, hide behind a formal policy if in practice they do not conform to that policy. *See Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1075 n.10 (9th Cir. 2016) (en banc) (noting that a defendant cannot escape its "actual routine practices" by "pointing to a pristine set of policies"). At this stage of the litigation, the Court is persuaded by the number of alleged acts and the expert testimony of Mr. Kerlikowske that the conduct of the federal officers has not been reflective of a policy or practice of respecting First Amendment rights. Mr. Kerlikowske opines that the federal officers repeatedly have engaged in excessive force against journalists and legal observers, have not used appropriate crowd control tactics, and improperly have fired at the head, heart, and backs of journalists and legal observers when such conduct is generally not permitted. Even the Federal Defendants' own witnesses have conceded that shooting persons in such a manner is inappropriate. *See, e.g.*, ECF 136-2 at 13, FPS 824 Dep. Tr. 34:14-21 (testifying that shooting a person in the back who is not doing anything violent is not appropriate); ECF 136-3 at 8, CBP NZ-1 Dep. Tr. 37:18-25 (testifying that shooting a person in the back is not something that an agent or officer should do). Mr. Kerlikowske also opines that the augmented federal force deployed in Portland does not have the appropriate training for policing urban protests and crowd control and does not have the appropriate supervision and leadership. The Court finds these opinions persuasive, and they provide further circumstantial evidence of retaliatory intent.

In sum, Plaintiffs provide substantial circumstantial evidence of retaliatory intent to show, at the minimum, serious questions going to the merits. Plaintiffs submit numerous declarations and other video evidence describing and showing situations in which the declarants

were identifiable as press, were not engaging in unlawful activity or even protesting, were not standing near protesters, and yet were subjected to violence by federal agents under circumstances that appear to indicate intentional targeting. Contrary to the Federal Defendants' arguments, this evidence does not show that the force used on Plaintiffs was merely an "inadvertent" consequence of otherwise lawful crowd control. Also, Plaintiffs submit expert testimony opining about repeated instances of excessive force being used against journalists and legal observers and failures of training and leadership with the augmented federal force sent to Portland, which is further circumstantial evidence supporting Plaintiffs' claim. Thus, Plaintiffs' have shown the elements of First Amendment retaliation.

b. Right of Access to Public Streets and Sidewalks

The First Amendment prohibits any law "abridging the freedom of speech, or of the press[.]" U.S. Const., amend. I. Although the First Amendment does not enumerate special rights for observing government activities, "[t]he Supreme Court has recognized that newsgathering is an activity protected by the First Amendment." *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978); *see Branzburg*, 408 U.S. at 681 ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.").

As the Ninth Circuit has explained: "the Supreme Court has long recognized a qualified right of access for the press and public to observe government activities." *Leigh*, 677 F.3d at 898. By reporting about the government, the media are "surrogates for the public." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (Burger, C.J., announcing judgment); *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 91 (1975) ("[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations."). As further described by the Ninth Circuit, "[w]hen wrongdoing is

underway, officials have great incentive to blindfold the watchful eyes of the Fourth Estate." *Leigh*, 677 F.3d at 900 (quoting Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 949 (1992) (alteration in original) ("[W]hen the government announces it is excluding the press for reasons such as administrative convenience, preservation of evidence, or protection of reporters' safety, its real motive may be to prevent the gathering of information about government abuses or incompetence.")).

The Federal Defendants argue that journalists have no right to stay, observe, and document when the government "closes" public streets. This argument is not persuasive. First, the Federal Defendants are not the entities that "close" state and local public streets and parks; that is a local police function.[9] Second, the point of a journalist observing and documenting government action is to record whether the "closing" of public streets (*e.g.*, declaring a riot) is lawfully originated and lawfully carried out. Without journalists and legal observers, there is only the government's side of the story to explain why a "riot" was declared and the public streets were "closed" and whether law enforcement acted properly in effectuating that order. Third, the Federal Defendants have not shown that any journalist or legal observer has harmed any federal officer or damaged any federal property, and if any journalist, legal observer, or person masquerading as a journalist or legal observer were to attempt to do so, the preliminary injunction would not protect them. Thus, the stated need to protect federal property and the safety of federal officers is not directly affected by allowing journalists and legal observers to stay, observe, and record events.

The Federal Defendants argue that Plaintiffs improperly rely on *Press-Enterprise Co. v. Superior Court* ("*Press-Enterprise II*"), 478 U.S. 1 (1986), to articulate the standard to apply in

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[9] *See* n.2, *supra*.

evaluating likelihood of success in Plaintiffs' claim of right of access. The Court rejects this aregument.

In *Press-Enterprise II*, the Supreme Court established a two-part test for a claim of violation of the right of access. First, the court must determine whether a right of access attaches to the government proceeding or activity by considering whether the place and process have historically been open to the press and general public and whether public access plays a significant positive role in the functioning of the particular process in question. *Press-Enterprise II*, 478 U.S. at 8-9. Second, if the court determines that a qualified right applies, the government may overcome that right only by demonstrating "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 9 (citation omitted); *see also Leigh*, 677 F.3d at 898 (discussing *Press-Enterprise II*). The public streets, sidewalks, and parks historically have been open to the press and general public,[10] and public observation of law enforcement activities in these public fora plays a significant positive role in ensuring conduct remains consistent with the Constitution.

The Federal Defendants argue that they have a strong and overriding government interest in protecting federal property. The Court agrees that protecting federal property is a strong

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[10] The Federal Defendants argue that the proper question is whether there historically was access after the closure order that is at issue—the unlawful assembly declaration and dispersal order. The Court disagrees that access is evaluated after the closure that is challenged. Access is considered before the closure that is challenged to determine whether the closure is unduly burdening First Amendment rights. For example, the Supreme Court in *Press-Enterprises II* did not evaluate whether the press and public had access to preliminary criminal proceedings that were subject to a legitimate closure order, but whether they had access to preliminary criminal proceedings generally. 478 U.S. at 10. Even if the Federal Defendants' assertion of how to frame the first question in *Press-Enterprises II* is correct, however, as noted above, it is not at issue in this motion because the City previously has stipulated that even after it has declared an unlawful assembly and issued a lawful dispersal order on state and local property, journalists and authorized legal observers may remain.

government interest, but the Federal Defendants must craft a narrowly tailored response to achieve that government interest without unreasonably burdening First Amendment rights. The Federal Defendants simply assert that dispersing everyone is as narrowly tailored as possible and to allow anyone to stay after a dispersal order is not practicable or workable. The record, however, belies this assertion.

The City, by stipulated preliminary injunction, does not require journalists and authorized legal observers to disperse, even when there has been an otherwise lawful general order of dispersal. After issuing the first TRO directed against the City, the Court specifically invited the City to move for amendment or modification if the original TRO was not working or to address any problems at the preliminary injunction phase. Instead, the City *stipulated* to a preliminary injunction that was nearly identical to the original TRO, with the addition of a clause relating to seized property. The fact that the City did not ask for any modification and then stipulated to a preliminary injunction is compelling evidence that exempting journalists and legal observers is workable.[11] Moreover, the City supports Plaintiffs' request for an injunction against the Federal Defendants, both the TRO and this preliminary injunction. Additionally, as discussed previously, Plaintiffs' expert witness Mr. Kerlikowske provides qualified, relevant, and persuasive testimony

[11] At oral argument, counsel for the City noted that the City might request from Plaintiffs a possible modification to the stipulated preliminary injunction. The City noted it had encountered some issues with persons with "press" markings intermingling with protesters and interfering with law enforcement. The Federal Defendants argue that this is "proof" that the preliminary injunction is "unworkable." Whether the City might request a modification at some point in the future, however, is not evidence of unworkability. Additionally, the City's stipulated preliminary injunction does not contain the indicia of journalists and legal observers that they "stay to the side" and not intermix with protesters, which is included in the preliminary injunction below, and does not contain the express prohibition on press and legal observers impeding, blocking, or interfering with law enforcement activities, which also is included below. Further, the fact that there might be room for improvement of a preliminary injunction does not make it unworkable. The Court is mindful not to let the perfect be the enemy of the good.

showing that the relief provided in the TRO against the Federal Defendants is workable. He also explains that during his tenure in Seattle, law enforcement did not target or disperse journalists and there were no adverse consequences. Numerous declarants also testified that they were not dispersed during protests in other locations. Thus, it is workable and feasible to disperse protesters generally but not require the dispersal of journalists and authorized legal observers. The Federal Defendants' blanket assertion that federal officers must disperse everyone is rejected.

Further, the Federal Defendants' objections to the workability of the TRO primarily focus on concerns regarding when journalists and legal observers "intermingle" with protesters. The first concern is that federal officers will violate the injunction if a journalist or legal observer is subject to crowd control tactics when mixed with the crowd. The preliminary injunction contains protections for this scenario. It adds, different from the TRO, the indicia of a journalist and legal observer that they stay to the side of the protest and not intermix with protesters. It also retains the protection for law enforcement that the incidental exposure of journalists and legal observers to crowd control devices is not a violation of the injunction.

The Federal Defendants' second concern with the intermingling of journalists and legal observers and protesters is that journalists and legal observers may interfere with law enforcement, particularly if allowed to stay after dispersal order. The preliminary injunction, however, retains the TRO's instruction that journalists and legal observers must comply with all laws other than general dispersal orders. For further clarity, the preliminary injunction expressly adds the provision that journalists and legal observers may not impede, block, or otherwise interfere with the lawful conduct of the federal officers.

The Federal Defendants also express concern that persons may disguise themselves as press and commit violent or illegal acts. The preliminary injunction, however, does not protect anyone who commits an unlawful act. The Federal Defendants have the same authority to arrest or otherwise engage with persons who commit unlawful acts, regardless of their clothing. Moreover, most of this concern expressed by the Federal Defendants focuses on persons self-identifying as press who are mixed with protesters or interfering with law enforcement. The preliminary injunction's addition of the indicia of press as staying to the side and not intermixing with protesters and express prohibition on interfering with law enforcement further addresses this concern. Further, Mr. Kerlikowske's declarations containing his expert opinions are persuasive in discounting this possibility.

The Federal Defendants also argue that requiring federal officers to wear larger unique identifying markings is not workable and is not connected to Plaintiffs' claims in this case. The Federal Defendants assert that such markings will interfere with an officer's ability to reach necessary equipment and are unnecessary because most officers already wear some unique identifying number somewhere on their uniform. The Federal Defendants were unable, however, to identify specific officers from videos when asked to do so by the Court. The current identifying markings are not of sufficient visibility. The Court does not find it credible that there is no possible location on the helmet or uniforms on which more visible markings can be placed. The Court is persuaded by Mr. Kelikowske's expert opinion that unique identifying markings are feasible, important, and will not interfere with the federal officers' ability to perform their duties. The Court also finds that such a requirement is related to Plaintiffs' claims because, as noted by Mr. Kerlikowske, these markings would deter the very conduct against which Plaintiffs have filed suit.

At this stage of the lawsuit, there are at least serious questions regarding Plaintiffs' right of access, whether the government will be able to meet its burden to overcome that right of access, the federal officers' tactics directed toward journalists and other legal observers, and whether restrictions placed upon them by the Federal Defendants are narrowly tailored. Thus, Plaintiffs' meet this factor for their claim alleging a violation of their right of access.

2. Irreparable Harm

Plaintiffs also must show that they are "likely to suffer irreparable harm in the absence of preliminary relief." *See Winter*, 555 U.S. at 20. The Ninth Circuit has explained that "speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction. A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016) (emphasis in original) (simplified).

The Federal Defendants argue that Plaintiffs face no threat of immediate injury, particularly because of the changed enforcement tactics. The Federal Defendants assert that Plaintiffs have provided no evidence that the chances of encountering a federal officer at a protest is higher in August 2020 than it was in August 2019 or August 2018.

The Federal Defendants' latter assertion is without merit. The Federal Defendants have sent numerous additional federal officers to Portland with the stated mission to protect federal property and persons. Plaintiffs provide evidence that these officers routinely have left federal property and engaged in crowd control and other enforcement on the streets, sidewalks, and parks of the City of Portland. Plaintiffs' expert Mr. Kerlikowske opines that the federal officers and supervisors have insufficient and improper experience and leadership to handle the conditions during the Portland protests. Additionally, Plaintiffs provide evidence that the

augmented federal police force has remained in Portland, that it will stay in Portland ready to deploy at any moment, and that there are no plans for any officers to withdraw from Portland, at least not until it is "certain" that federal property is "safe." This provides significant evidence that journalists and legal observers are more likely to encounter a federal officer during a protest in August 2020 than in 2019 or 2018, when there was no augmented federal police force or Operation Diligent Valor.

Regarding the Federal Defendants' argument that the voluntary change in tactics has decreased the immediacy of any claim of injury, thereby mitigating irreparable harm, the Ninth Circuit has rejected a similar argument. In *Boardman*, the defendants argued that there was no immediate danger of harm because the defendants had voluntarily ceased certain conduct. 822 F.3d at 1023. The defendants had voluntarily terminated a disputed merger and entered into a stipulation not to enter into a purchase transaction while the Oregon Attorney General's investigation was ongoing. *Id.* The stipulation was terminable upon 60-days' notice to the District Court and the Oregon Attorney General. The Ninth Circuit concluded that the District Court did not abuse its discretion in finding irreparable harm. *Id.*

The Ninth Circuit focused on the fact that the voluntarily stipulation was terminable with 60-days' notice, the defendants had a history of negotiating in secret, the stipulation was limited to a "purchase transaction" and the transaction could take other contractual forms, and the exclusive marketing agreement between the two defendants had expired (thereby incentivizing a merger). *Id.* The Ninth Circuit noted: "A threat of irreparable harm is sufficiently immediate to warrant preliminary injunctive relief if the plaintiff 'is likely to suffer irreparable harm before a decision on the merits can be rendered.'" *Id.* (quoting *Winter*, 555 U.S. at 22). For the plaintiff to be injured in *Boardman*, the defendants would have had to give 60-days' notice and then not

have the district court otherwise intervene, or negotiate in secret and reach a form of deal not considered a "purchase agreement," or other steps that arguably were attenuated or provided the plaintiffs some opportunity to request emergency relief. Nonetheless, the Ninth Circuit agreed that the potential injury was immediate and irreparable for purposes of preliminary injunctive relief.

Plaintiffs' irreparable injury here is not nearly as attenuated as *Boardman* and indeed is much more immediate because it could happen without any prior notice to the Court. The Court has already found that Plaintiffs face irreparable harm from the Federal Defendants' conduct.[12]

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[12] The Federal Defendants cite *Rendish v. City of Tacoma*, 123 F.3d 1216, 1226 (9th Cir. 1997), for the proposition that claims alleging First Amendment retaliation are not entitled to a presumption of irreparable harm. *Rendish* involved a public employee who was terminated and alleged First Amendment retaliation. *Id.* at 1218. The district court found that the plaintiff was *not* likely to succeed on the merits of her claim. *Id.* at 1226. The Ninth Circuit concluded: "Because the district court's assessment that Rendish did not show a likelihood of success was accurate, it did not abuse its discretion in finding no irreparable harm based on a loss of her constitutional rights." *Id.* The court rejected the plaintiff's argument that despite the district court's conclusion that the plaintiff would not have succeeded on the merits, the district court was required to presume irreparable harm, noting that there is no such presumption. *Id.*

Rendish provides no support for the contention that when a court concludes that plaintiffs *are* likely to succeed on the merits of a claim that their constitutional rights have been violated, the plaintiffs are not entitled to a presumption of irreparable harm. Indeed, the opposite is true. *See, e.g.*, *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) ("A 'colorable First Amendment claim' is 'irreparable injury sufficient to merit the grant of relief.'" (quoting *Warsoldier v. Woodford*, 418 F.3d 989, 1001 (9th Cir. 2005)) (affirming grant of preliminary injunction)); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Assoc. Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (noting that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" and reversing and remanding for entry of preliminary injunction (alteration in original) (quoting *Elrod*)); *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009) ("Both this court and the Supreme Court have repeatedly held that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (simplified) (reversing and remanding for entry of preliminary injunction)); *Black Lives Matter Seattle-King Cty. v. City of Seattle, Seattle Police Dep't*, 2020 WL 3128299, at *4 (W.D. Wash. June 12, 2020) (citing *Melendres* and *Otter* and finding irreparable harm for First Amendment retaliation claims because "[t]he use of less-lethal, crowd control weapons has

After the Court's initial finding of irreparable harm to support the TRO, Plaintiffs provided even more evidence that journalists' First Amendment rights have been chilled, including declarations in which journalists describe being subject to less lethal munitions that required the journalist to stop covering the protests for the night or for some period of time, or chilled the journalist from returning to cover the protests in the future. *See, e.g.*, ECF 88 at 2 (Ellis Decl. ¶ 6, "Federal agents prevented me from doing my job twice on the night of July 23-24."); ECF 89 at 4 (Elsesser Decl. ¶ 13, "If I am asked to cover the protests again, I would refuse unless I had a bulletproof vest (which are in short supply in Portland at the moment) to wear because I am fearful that federal agents would injure me or worse."); ECF 91 at 3 (Hollis Decl. ¶ 8, "After the federal agents shot me, I turned and ran and returned to my hotel."); ECF 116 at 3 (Jeong Decl. ¶¶ 7-8, noting that because she was shoved down to the ground by a federal officer she "ultimately left much earlier than I had planned" with respect to covering that night's protest); ECF 117 at 5 (Katz Decl. ¶ 15, "Because of how federal agents treated me, I have stopped covering the Portland protests.").

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already stifled some speech even if momentarily"); *Freedom for Immigrants v. U.S. Dep't of Homeland Sec.*, 2020 WL 2095787, at *5 (C.D. Cal. Feb. 11, 2020) ("Because FFI has demonstrated that DHS's conduct likely contravenes its First Amendment rights, FFI satisfies the irreparable harm requirement for preliminary injunctive relief."); *Nat'l Rifle Ass'n of Am. v. City of Los Angeles*, 441 F. Supp. 3d 915, 938-39 (C.D. Cal. 2019) ("In this case, Plaintiffs have sufficiently demonstrated that they are likely to be deprived of their First Amendment rights—the deprivation of which is 'well established' to constitute irreparable harm. Defendants' primary argument to the contrary is that Plaintiffs have not provided admissible evidence of irreparable harm. But Plaintiffs have provided ample evidence of a likely First Amendment violation, which is enough to satisfy the *Winter* standard." (citations omitted) (granting preliminary injunction)); *see also* 11A Charles Alan Wright, FEDERAL PRACTICE & PROCEDURE, § 2948.1 (2d ed. 2004) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). Plaintiffs have demonstrated that they are likely to be deprived of their First Amendment rights and that is sufficient to show irreparable harm.

The only change is the Federal Defendants' "agreement" with Oregon Governor Kate Brown and voluntarily cessation of certain enforcement tactics. This change in enforcement is replete with caveats. It is terminable at any time and without any notice to this Court or Plaintiffs if the Federal Defendants believe that federal property or persons are not secure. *See* n. 6, *supra*. It is also subject to the federal officers being able to leave the building at any time for a specific incident of enforcement, even if the agreement itself has not changed. For example, although the federal officers' modified enforcement role was announced on July 29, 2020, to begin the next day, Plaintiffs have submitted testimony and video evidence from that night (to be precise, from the early morning on July 30, 2020), of federal officers firing tear gas and flash bang munitions at journalists. *See* ECF 118 at 4. There was no one nearby on the street but numerous federal enforcement officers and six journalists when the munitions were deployed.

Moreover, the Federal Defendants have emphatically and repeatedly denied that they have engaged in any wrongful or unlawful conduct. Thus, there is no indication that their crowd control tactics, which the Court has already found to support both a finding of success on the merits and likelihood of irreparable harm, and which Plaintiffs' expert has characterized as including excessive force, would change if they re-engage in crowd control enforcement and the Court's injunctive relief is no longer in place.

Indeed, the Court has serious concerns that the Federal Defendants have not fully complied with the Court's original TRO. The Court has reviewed all of the testimony and videos submitted by Plaintiffs after the Court issued its TRO, and although some of the evidence is ambiguous or less persuasive, some of the evidence describes and shows at least some conduct that appears to target journalists and legal observers, as opposed to incidentally or inadvertently reaching them as part of crowd control or enforcement against violent offenders.

Further, the Court does not agree with the Federal Defendants that given the magnitude of irreparable injury at stake in this case, the Court is required to wait until new and additional irreparable injury is inflicted on Plaintiffs to issue prospective injunctive relief. As the Ninth Circuit emphasized in *Boardman*, a threat of irreparable injury is sufficiently immediate if it is likely to occur before a decision on the merits can be issued. *Boardman*, 822 F.3d at 1023. Given the Federal Defendants' public statements and discovery responses relating to Operation Diligent Valor, the current situation relating to the protests in Portland, and the current situation regarding the local police presence in Portland, the Court finds that it is sufficiently likely that federal officers will re-engage in "protecting federal property and persons" and will return to enforcement tactics before a decision on the merits in this case can be issued. Thus, Plaintiffs have sufficiently shown irreparable injury.

Moreover, the Court takes guidance from the Supreme Court and Ninth Circuit's discussions regarding the Court's authority relating to issuing injunctions generally and predicting future violations in this context. The Supreme Court has noted that in addition to a court retaining the ability to hear a case after voluntarily cessation (considerations of mootness), "the court's power to grant injunctive relief survives discontinuance of the illegal conduct." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). "The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *Id.* In making this determination, the district court's "discretion is necessarily broad and a strong showing of abuse must be made to reverse it. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations." *Id.* The Ninth Circuit has

discussed "the factors that are important in predicting the likelihood of future violations" as follows:

> the degree of scienter involved; the isolated or recurrent nature of the infraction; the defendant's recognition of the wrongful nature of his conduct; the extent to which the defendant's professional and personal characteristics might enable or tempt him to commit future violations; and the sincerity of any assurances against future violations.

Fed. Election Comm'n v. Furgatch, 869 F.2d 1256, 1263 n.5 (9th Cir. 1989). These factors are in addition to "the commission of past illegal conduct, [which] is highly suggestive of the likelihood of future violations." *Id.*

Considering these factors, whether as articulated by the Supreme Court in *W.T. Grant* or the Ninth Circuit in *Furgatch*, the Federal Defendants' voluntary cessation of conduct[13] does not demonstrate effective discontinuance and serious questions remain with respect to the likelihood of Plaintiffs' future injury. In addition, under the *W.T. Grace* factors, there has been no expressed intent by the Federal Defendants to comply with the Court's TRO. To the contrary, the Federal Defendants have stated that the order is "offensive" and that it "shouldn't affect anything [the Federal Defendants are] doing" in Portland. ECF 147-6 at 3 (statement by Acting Deputy

[13] The Federal Defendants argue that they have not voluntarily ceased conduct because they dispute that they have engaged in any unlawful conduct. Regardless of how they characterize the lawfulness of their conduct, however, their argument is that because of the changed circumstances, Plaintiffs can no longer show irreparable injury. The changed circumstances on which the Federal Defendants rely, however, is the agreement between state and federal authorities that the federal officers would "stay in the building" and state and local police would take over more direct policing. The specifics of this agreement have been redacted by the Federal Defendants. *See* ECF 147-8 at 2. According to White House Senior Advisor Stephen Miller, however, the agreement does not include a "phased withdrawal." ECF 147-5 at 2. Nonetheless, this agreement and the Federal Defendants' voluntary change in enforcement as a result of the agreement is the voluntary cessation triggering the changed circumstances on which the Federal Defendants rely. Thus, the Court must analyze whether it supports the Federal Defendants' assertion that there no longer exists a cognizable risk of recurrent violations.

Secretary Ken Cuccinelli). Also, as reflected in Plaintiffs' motion for contempt, despite the issuance of the TRO, the Federal Defendants appear to have engaged in at least some conduct that continues to target journalists and legal observers in violation of the Court's TRO. This raises concerns regarding future conduct if there is no injunction in place, because even with a Court order in place, improper conduct appears to have continued. Regarding the effectiveness of the Federal Defendants' stated discontinuance, as discussed above, it is not very effective while the out-of-town federal agents remain in Portland because the discontinuance is terminable at will by the Federal Defendants and, thus, only temporary. Finally, the character of the recent past violations by the Federal Defendants in Portland is particularly egregious.

Considering the Ninth Circuit's *Furgatch* factors, first, the Federal Defendants' past violations are highly suggestive of future harm. Second, the degree of scienter involved is high for violations triggering the requested injunctive relief, because it relates to targeting of journalists and legal observers and not merely incidental harm to them during crowd control. Further, because Plaintiffs agreed to the modification to the injunction that journalists and legal observers stay to the side, the risk of incidental targeting is diminished. Third, the occurrences were not isolated—Plaintiffs provided significant evidence of numerous journalists and legal observers who were targeted by the Federal Defendants. Indeed, several of the witnesses have experience reporting in war zones around the world and at violent protests in Hong Kong, Oakland, and Seattle. They emphasize how they have never been shot at or tear gassed until coming to Portland. Fourth, the Federal Defendants have not recognized the wrongful nature of their conduct but instead assert that they have only engaged in lawful conduct. They have not disciplined any federal agent or officer for any conduct. They moved to dissolve the TRO after Plaintiffs moved for contempt. The Federal Defendants, unlike the City of Portland, also did not

stipulate to preliminary injunctive relief. Fifth, given the disdainful comments publicly made by the highest officials at the Federal Defendants with respect to journalists, legal observers, Plaintiffs, protesters, and the City of Portland, the professional and personal characteristics of the Federal Defendants show that they are likely to be enabled or tempted to engage in future violations. Finally, there have not been sincere assurances given against future violations. Accordingly, considering these factors, the Court finds that Plaintiffs have made a sufficient showing of threatened future violations by the Federal Defendants causing sufficiently likely irreparable injury to Plaintiffs before a decision on the merits can be issued.

3. Public Interest and Balance of the Equities

When the government is a party, the last two factors of the injunction analysis merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). Regarding the public interest, "[c]ourts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles." *Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (quotation marks omitted). Further, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quotation marks omitted) (granting an injunction under the Fourth Amendment). Regarding balancing the equities, when a plaintiff has "raised serious First Amendment questions," the balance of hardships "tips sharply in [the plaintiffs'] favor." *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007) (alterations in original) (quotation marks omitted).

The Federal Defendants argue that the normal evaluation of these factors in favor of a plaintiff who is likely to succeed on a First Amendment claim does not apply in this case because the government's countervailing interests outweigh Plaintiffs' First Amendment concerns. The Federal Defendants assert the government's interest in protecting federal property, ensuring the

safety of federal officers and other personnel, maintaining public order on federal property, and securing the federal courthouse so that it remains open and accessible to the public. The first three relate to protecting the courthouse and federal officers, and the final interest relates to providing access to the public.

Regarding protection of the courthouse and officers, the Federal Defendants rely on evidence that persons self-identifying as press have engaged in purported misconduct. The Court has reviewed all the video and other evidence submitted by the Federal Defendants in support of their contentions relating to alleged misconduct of persons self-identifying as press after the issuance of the TRO on July 23, 2020. Much of this evidence is ambiguous or shows that persons self-identifying as press have intermixed with protesters, have run toward the fence around the federal courthouse and stopped, have not actually been press but merely donned clothing (for one night) marked "press" hoping to avoid violence by federal officers, or simply have stood by while unlawful conduct was engaged in by others. This is not unlawful conduct.

There is evidence, however, that a few individual persons wearing press indicia on their clothing or hats or helmets (often handwritten), who generally are described by the Federal Defendant declarants as not otherwise engaging in any conduct such as reporting, notetaking, photographing, or recording, have engaged in the following activities: entering courthouse property after the fence was breached and encouraging others to do the same; helping another person to breach the fence; shining a flashlight at a police helicopter; kicking a police officer; shielding protesters from law enforcement; and throwing an object at law enforcement. This is inappropriate conduct, and much of it may be unlawful. The Court shares the Federal Defendants' concerns for the safety of federal officers, particularly considering the more than 100 injuries that have been sustained by federal offices to date. But as discussed above in the

context of workability, the preliminary injunction does not protect unlawful conduct, and federal officers may arrest anyone, even persons with indicia of press, who are engaging in such conduct.

Further, the preliminary injunction has provisions that expressly address these concerns, including providing that one indicia of press or authorized legal observer status is that they stay to the side and do not intermix with protesters and that press and legal observers may not impede, block, or interfere with law enforcement. Concern over potential unlawful conduct thus does not alter the analysis of traditional public interest factors or the balance of equities.

Moreover, the Court must balance and weigh the equities and public interest. The fact that a few people may have engaged in some unlawful conduct does not outweigh the important First Amendment rights of journalists and legal observers and the public for whom they act as surrogates. Further, there is no evidence that any of the named Plaintiffs engaged in any of the purported unlawful conduct described by the Federal Defendants.

The Federal Defendants' final argument is that the government's interest in preserving physical access to courts outweighs Plaintiffs' interests. That argument also is without merit. The relevant protests are happening after business hours, and there is no indication that allowing journalists and legal observers to stay despite a general dispersal order interferes with public access. Thus, none of the government's proffered interests outweigh the public's interest in receiving accurate and timely reporting, video, and photographic information about the protests and how law enforcement is treating protestors. There also is no need to alter the traditional analysis recognizing the significant public interest in First Amendment rights and that in such cases the balance of the equities tips sharply in favor of the plaintiff. *See Otter*, 682 F.3d at 826; *Cmty. House*, 490 F.3d at 1059.

4. Conclusion

The Court GRANTS Plaintiffs' motion for preliminary injunction against the Federal Defendants (ECF 134) and Orders as follows:

PRELIMINARY INJUNCTION

1. The Federal Defendants, their agents and employees, and all persons acting under their direction are enjoined from arresting, threatening to arrest, or using physical force directed against any person whom they know or reasonably should know is a Journalist or Legal Observer (as explained below), unless the Federal Defendants have probable cause to believe that such individual has committed a crime. For purposes of this Order, such persons shall not be required to disperse following the issuance of an order to disperse, and such persons shall not be subject to arrest for not dispersing following the issuance of an order to disperse. Such persons shall, however, remain bound by all other laws. No Journalist or Legal Observer protected order this Order, however, may impede, block, or otherwise physically interfere with the lawful activities of the Federal Defendants.

2. The Federal Defendants, their agents and employees, and all persons acting under their direction are further enjoined from seizing any photographic equipment, audio- or video-recording equipment, or press passes from any person whom they know or reasonably should know is a Journalist or Legal Observer (as explained below), or ordering such person to stop photographing, recording, or observing a protest, unless the Federal Defendants are also lawfully seizing that person consistent with this Order. Except as expressly provided in Paragraph 3 below, the Federal Defendants must return any seized equipment or press passes immediately upon release of a person from custody.

3. If any Federal Defendant, their agent or employee, or any person acting under their direction seize property from a Journalist or Legal Observer who is lawfully arrested

consistent with this Order, such Federal Defendant shall, as soon thereafter as is reasonably possible, make a written list of things seized and shall provide a copy of that list to the Journalist or Legal Observer. If equipment seized in connection with an arrest of a Journalist or Legal Observer lawfully seized under this Order is needed for evidentiary purposes, the Federal Defendants shall promptly seek a search warrant, subpoena, or other court order for that purpose. If such a search warrant, subpoena, or other court order is denied, or equipment seized in connection with an arrest is not needed for evidentiary purposes, the Federal Defendants shall immediately return it to its rightful possessor.

4. To facilitate the Federal Defendants' identification of Journalists protected under this Order, the following shall be considered indicia of being a Journalist: visual identification as a member of the press, such as by carrying a professional or authorized press pass, carrying professional gear such as professional photographic equipment, or wearing a professional or authorized press badge or other official press credentials, or distinctive clothing, that identifies the wearer as a member of the press. It also shall be an indicium of being a Journalist under this Order that the person is standing off to the side of a protest, not engaging in protest activities, and not intermixed with persons engaged in protest activities, although these are not requirements. These indicia are not exclusive, and a person need not exhibit every indicium to be considered a Journalist under this Order. The Federal Defendants shall not be liable for unintentional violations of this Order in the case of an individual who does not carry or wear a press pass, badge, or other official press credential, professional gear, or distinctive clothing that identifies the person as a member of the press.

5. To facilitate the Federal Defendants' identification of Legal Observers protected under this Order, the following shall be considered indicia of being a Legal Observer: wearing a

green National Lawyers Guild-issued or authorized Legal Observer hat (typically a green NLG hat) or wearing a blue ACLU-issued or authorized Legal Observer vest. It also shall be an indicium of being a Legal Observer protected under this Order that the person is standing off to the side of a protest, not engaging in protest activities, and not intermixed with persons engaged in protest activities, although these are not requirements.

6. The Federal Defendants are not precluded by the Order from issuing otherwise lawful crowd-dispersal orders for a variety of lawful reasons. The Federal Defendants shall not be liable for violating this injunction if a Journalist or Legal Observer is incidentally exposed to crowd-control devices after remaining in the area where such devices were deployed after the issuance of an otherwise lawful dispersal order.

7. Plaintiffs and the Federal Defendants shall promptly confer regarding how the Federal Defendants can place unique identifying markings (using numbers and/or letters) on the uniforms and/or helmets of the officers and agents of the Federal Defendants who are specially deployed to Portland so that they can be identified at a reasonable distance and without unreasonably interfering with the needs of these personnel. Based on the Court's understanding that Deputy U.S. Marshals and Courtroom Security Officers stationed in Portland who are under the direction of the U.S. Marshal for the District of Oregon are not part of the force that has given rise to events at issue in the lawsuit, they are exempt from this requirement. Agents wearing plain clothes and assigned to undercover duties also are exempt from this requirement. If the parties agree on a method of marking, they shall submit the terms of their agreement in writing to the Court, and the Court will then issue a modified preliminary injunction that incorporates the parties' agreement. If the parties cannot reach agreement within 14 days, each party may submit its own proposal, and each side may respond to any other party's proposal

within seven days thereafter. The Court will resolve any disputes on this issue and modify this preliminary injunction appropriately.

8. To promote compliance with this Preliminary Injunction, the Federal Defendants are ordered to provide copies of the verbatim text of the first seven provisions of this Preliminary Injunction, in either electronic or paper form, within 14 calendar days to: (a) all employees, officers, and agents of the Federal Defendants currently deployed in Portland, Oregon (or who later become deployed in Portland, Oregon while this Preliminary Injunction is in force), including but not limited to all personnel in Portland, Oregon who are part of Operation Diligent Valor, Operation Legend, or any equivalent; and (b) all employees, officers, and agents of the Federal Defendants with any supervisory or command authority over any person in group (a) above.

9. Plaintiffs need not provide any security, and all requirements under Rule 65(c) of the Federal Rules of Civil Procedure are waived.

10. The Court denies the oral motion by the Federal Defendants to stay this preliminary injunction.

IT IS SO ORDERED.

DATED this 20th day of August, 2020.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge

FILED

AUG 27 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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.

No. 20-35739

D.C. No. 3:20-cv-01035-SI
District of Oregon,
Portland

ORDER

Before: McKEOWN, MILLER, and BRESS, Circuit Judges.

Order by Judges MILLER and BRESS, Dissent by Judge McKEOWN

We have received appellants' emergency motion at Docket Entry No. 7 seeking to stay the district court's August 20, 2020 order pending resolution of this appeal. Appellants' request for an immediate administrative stay of the district court's August 20, 2020 order pending resolution of the emergency motion is granted. *See Nken v. Holder*, 556 U.S. 418, 426 (2009). Based on our preliminary review, appellants have made a strong showing of likely success on the merits that

the district court's injunction exempting "Journalists" and "Legal Observers" from generally applicable dispersal orders is without adequate legal basis. Given the order's breadth and lack of clarity, particularly in its non-exclusive indicia of who qualifies as "Journalists" and "Legal Observers," appellants have also demonstrated that, in the absence of a stay, the order will cause irreparable harm to law enforcement efforts and personnel. The August 20, 2020 order is stayed, temporarily, pending resolution of the emergency motion. This administrative stay preserves the status quo as it existed before the district court's preliminary injunction and temporary restraining order.

This order does not disturb the portion of the district court's August 20, 2020 order directing the parties to confer regarding identifying markings and directing that the parties submit proposals to the district court within 14 days if the parties cannot reach an agreement. However, the district court shall not issue a final order regarding identifying markings pending this court's resolution of the emergency motion.

Appellees' response to the emergency motion is due by 9:00 a.m. PDT September 2, 2020. Appellants' optional reply is due by 5:00 p.m. PDT September 3, 2020.

McKEOWN, Circuit Judge, dissenting:

I respectfully dissent and would deny the Federal Defendants' request for an administrative stay. The factual conclusions underlying the entry of a preliminary injunction are reviewed for clear error. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). In light of the deferential review accorded to the district court's factual finding at this stage, the district court's extensive factual findings with respect to journalists and legal observers, including the finding that the injunction would not impair law enforcement operations to protect federal property and personnel, and the fact that a temporary restraining order has been in place since July 23, 2020, the government has failed to meet its burden to demonstrate either an emergency or irreparable harm to support an immediate administrative stay. I concur in the order with respect to the markings.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ELLEN F. ROSENBLUM, Oregon Attorney General, Plaintiff, v. JOHN DOES 1-10; the UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES CUSTOMS AND BORDER PROTECTION; the UNITED STATES MARSHALS SERVICE and the FEDERAL PROTECTIVE SERVICE, Defendants.	Case No. 3:20-cv-01161-MO MOTION FOR TEMPORARY RESTRAINING ORDER **ORAL ARGUMENT REQUESTED**

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L.R. 7-1 Certification

Plaintiff conferred on this Motion with counsel for the Defendant agencies by telephone on July 20, 2020, and the parties could not reach an agreement requiring the court to resolve the matter.

I. MOTION

Pursuant to Fed. R. Civ. Pro. 65, Plaintiff Ellen Rosenblum, Attorney General of the State of Oregon, moves this court for a temporary restraining order prohibiting Defendants from taking actions that exceed their authority, misrepresent their authority, and present a clear and present danger to the health and welfare of Oregon citizens and the peace and order of the State, specifically an order requiring that Defendants:

a) Immediately cease detaining, arresting, or holding individuals without probable cause or a warrant; and

b) Identify themselves and their agency before detaining or arresting any person; and

c) Explain to any person detained or arrested that the person is being detained or arrested and explain the basis for that action.

The Attorney General also asks the Court to immediately order Defendants to show cause why a preliminary injunction should not issue to continue each of the above restraints during the pendency of this action.

The Court has jurisdiction to grant a temporary restraining order because the State of Oregon and its inhabitants will suffer irreparable harm if Defendants continue the course of conduct alleged in the Complaint. In support of this motion, the Attorney General relies upon the Complaint, the Declarations of Sheila Potter, Mark Pettibone, Tiffany Chapman, Stephanie Debner, Jennifer Arnold, Terri Preeg-Riggsby, and the following points and authorities.

II. MEMORANDUM OF POINTS AND AUTHORITIES

The Attorney General seeks extraordinary relief from the Court under extraordinary circumstances. In the small hours of the morning last Thursday, an armed group of

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unidentifiable men in an unmarked vehicle snatched Mark Pettibone, a Portland resident, off the Portland streets, without explanation. This did not happen by accident, but pursuant to a federal strategy to terrorize Portland protestors, presumably in an effort to quell ongoing protests. Videos online reflect that Mr. Pettibone is not the only protester forcibly removed from the Portland streets and shoved into an unmarked car, without explanation. The Attorney General of Oregon now asks the federal courts to answer whether the United States Constitution permits federal law enforcement to snatch people in the middle of the night without identifying themselves or explaining the legal basis for their actions. She submits that the answer is no, and asks that this Court immediately enjoin federal officers from assuming the aspect of a disappearance squad.

Federal officers have occupied portions of Portland, Oregon, ostensibly to protect federal property. There is no question that they have the right to protect federal buildings. But these officers have also pursued peaceful, unarmed citizens through city streets and used unlawful intimidation tactics to instill fear of violence and chill the exercise of rights protected by both the Oregon Constitution and the United States Constitution.

These actions, if not restrained, will further escalate and incite violent confrontations with Oregon citizens attempting to exercise their First Amendment rights to assemble and peacefully protest. And these actions open the door to the risk of outright kidnapping of protesters by private citizens, as word spreads that genuine law enforcement agents are engaged in such tactics. The evidence shows that the actions of these federal officers are inconsistent with Constitutional standards and the public statements of federal officials establish that these actions are undertaken for improper political purposes.

A. FACTUAL BACKGROUND

Americans across the country have demonstrated daily for racial justice and in protest against racism and acts of police violence since the death of George Floyd in Minneapolis.

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Protests in Portland have occurred both during daylight hours and at night, many of the protests occurring near and centered around the Justice Center and Mark O. Hatfield Federal Courthouse.

1. Federal troops were detailed to Portland to respond to the city's protests.

Various news sources have reported that federal law enforcement was sent to Portland in or around late June or early July. On June 26, President Donald Trump signed an Executive Order on Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal Violence, fulminating against the protests in American cities, and giving federal law enforcement and military leave to "assist" in protecting federal property for the next six months:

> Upon the request of the Secretary of the Interior, the Secretary of Homeland Security, or the Administrator of General Services, the Secretary of Defense, the Attorney General, and the Secretary of Homeland Security shall provide, as appropriate and consistent with applicable law, personnel to assist with the protection of Federal monuments, memorials, statues, or property. This section shall terminate 6 months from the date of this order unless extended by the President.

Acting Secretary of the Department of Homeland Security Chad Wolf announced on July 3 that DHS was "following [President Trump's] lead in deploying special units to defend our national treasures from rioters." Oregon Public Broadcasting has reported that, beginning July 1, "Federal officers started playing a more obvious and active role during nightly protests in Portland, pulling protesters' attention away from the Multnomah County Justice Center and refocusing it across the street on the Mark O. Hatfield Federal Courthouse. That night, federal officers emerged from the boarded-up courthouse to fire pepper balls at demonstrators who came too close to the building. Their appearance changed the protests." The Willamette Week has reported the presence of federal officers at the protests "since at least July 2."

2. Federal troops begin pulling protesters off the street and putting them in unmarked vehicles.

Beginning last week—the week of July 13, 2020—federal officers appear to have moved beyond merely firing projectiles at demonstrators and begun grabbing protesters, pulling them off the sidewalks of downtown, and shoving them into unmarked vehicles. Mark Pettibone has

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prepared a sworn Declaration detailing his experience with anonymous men who turned out to be federal officers of some kind. (*See* Decl. of Mark Pettibone.)

In his Declaration, Mr. Pettibone explains that he took part in a peaceful Black Lives Matter demonstration the night of July 14 and, while walking home around 2:00 a.m. on the morning of July 15, "[w]ithout warning, men in green military fatigues and adorned with generic 'police' patches, jumped out of an unmarked minivan and approached me. I did not know whether the men were police or far-right extremists, who, in my experience, frequently don military-like outfits and harass left-leaning protesters in Portland. My first thought was to run. I made it about a half-block before I realized there would be no escape from them. I sank to my knees and put my hands in the air." (*See id.* at ¶¶ 2-5.)

The unidentified men forcibly transported Mr. Pettibone to what turned out to be the federal courthouse. He was read his Miranda rights and declined to waive them, after which he was eventually released. No one ever told Mr. Pettibone why he had been detained. To his knowledge no charges were made and no physical record of his arrest or detainment exists. He does not know whether he has been charged with a crime. (*See* id. at ¶¶ 6-7.)

Two other, similar incidents have been captured on videos available online. In one widely circulated video, two men in camouflage military-style uniforms and "POLICE" patches stride across a street and up to a man wearing black standing on a sidewalk, with his hands up. The uniformed men—who do not identify themselves, but are presumed to have been federal officers, due to the resemblance of their uniforms to that of other federal officers out that night—immediately bind the man's hands and without a word lead him to an unmarked minivan, put him in the van, and drive away, as onlookers plead for them to identify themselves or say where they are taking the man.

Defendant U.S. Customs and Border Protection issued a statement on July 17, 2020 that appears to respond to that video and reads in relevant part:

> CBP agents had information indicating the person in the video was suspected of assaults against federal agents or destruction of federal property. Once CBP

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> agents approached the suspect, a large and violent mob moved towards their location. For everyone's safety, CBP agents quickly moved the suspect to a safer location for further questioning. The CBP agents identified themselves and were wearing CBP insignia during the encounter. The names of the agents were not displayed due to recent doxing incidents against law enforcement personnel who serve and protect our country.

The video of that unknown person's detention shows no evidence of a "mob" at all, let alone the agents appearing to note or react to a "large and violent mob" approaching them. Rather, the agents walk up, put the man's hands together over his head, and *immediately* turn and walk him back to their vehicle. The video has sound and does not reflect the agents identifying themselves or saying anything at all. No insignia are visible on the video.

In yet another video, men in street clothes wearing black vests with the word "POLICE," and no visible identifying information haul a woman into the back of their van and drive away, over the screams of onlookers. The video begins with the woman already on her stomach in the street with men kneeling around her. As the video progresses the unidentified armed men yank her onto her feet and force her into a vehicle. Onlookers scream questions at the men, asking who they are, where they are taking the woman, and why they're taking her away. One of the men, pointing what appears to be a gun at the onlookers, shouts "You follow us, you will get shot, you understand me?" The identity of the woman is not known to the Attorney General. The Attorney General must assume the Defendants were responsible, based on the similarity of the tactics in that second video to those in the first, as well as to Mr. Pettibone's report of his seizure and detention. Without the "POLICE" marking on the assailants' vests, the video would appear to be of an armed kidnapping.

3. Defendants' statements indicate intention to continue detentions unabated.

Statements by federal officials, including the Acting U.S. Customs and Border Protection Commissioner, the Acting Secretary of the Department of Homeland Security, the Acting Deputy Secretary of the Department of Homeland Security, and the President indicate Defendants are unlikely to stop these tactics in the absence of a court compelling them to do so.

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The Executive Order issued June 26 directs federal law enforcement and troops to "protect" federal property for a period of six months. That Executive Order reads, in part:

> In the midst of these attacks, many State and local governments appear to have lost the ability to distinguish between the lawful exercise of rights to free speech and assembly and unvarnished vandalism. They have surrendered to mob rule, imperiling community safety, allowing for the wholesale violation of our laws, and privileging the violent impulses of the mob over the rights of law-abiding citizens. Worse, they apparently have lost the will or the desire to stand up to the radical fringe and defend the fundamental truth that America is good, her people are virtuous, and that justice prevails in this country to a far greater extent than anywhere else in the world. Some particularly misguided public officials even appear to have accepted the idea that violence can be virtuous and have prevented their police from enforcing the law and protecting public monuments, memorials, and statues from the mob's ropes and graffiti.
>
> My Administration will not allow violent mobs incited by a radical fringe to become the arbiters of the aspects of our history that can be celebrated in public spaces. State and local public officials' abdication of their law enforcement responsibilities in deference to this violent assault must end.

At a press conference last week, the President is reported to have said, "We've done a great job in Portland… Portland was totally out of control, and they went in, and I guess we have many people right now in jail. We very much quelled it, and if it starts again, we'll quell it again very easily. It's not hard to do, if you know what you're doing."

Willamette Week also reported that, during the same speech, "Trump condemned rising gun violence in liberal cities, which he said was a result of defunding police departments. He vowed to 'take over' if such violence continues to rise…. 'Things are happening that nobody's ever seen happen in cities that are liberally run. I call them radical-lib. And yet they'll go and march on areas and rip everything down in front of them.'"

Likewise, Defendant U.S. Customs and Border Protection issued a statement on Friday July 17, reading:

> While the U.S. Customs and Border Protection (CBP) respects every American's right to protest peacefully, violence and civil unrest will not be tolerated. Violent anarchists have organized events in Portland over the last several weeks with willful intent to damage and destroy federal property, as well as injure federal officers and agents. These criminal actions will not be tolerated.

* * *

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> The Department of Homeland Security (DHS) and its components will continue to work tirelessly to reestablish law and order. The Federal Protective Service (FPS) is the lead government agency that CBP personnel are supporting. CBP personnel have been deployed to Portland in direct support of the Presidential Executive Order and the newly established DHS Protecting American Communities Task Force (PACT). CBP law enforcement personnel have been trained and cross designated under FPS legal authority 40 U.S.C. § 1315."

OPB has reported that Acting U.S. Customs and Border Protection Commissioner Mark Morgan called the protesters criminals on Fox News, and said:

> "I don't want to get ahead of the president and his announcement, but the Department of Justice is going to be involved in this, DHS is going to be involved in this; and we're really going to take a stand across the board. And we're going to do what needs to be done to protect the men and women of this country."

Kenneth Cuccinelli, Acting Deputy Secretary of the Department of Homeland Security, is reported to have told the Washington Post on Sunday, June 19, that "the agency had deployed tactical units from U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection" to Portland and other cities. He told the Post that he and his agency "don't have any plans" to remove officers from Portland:

> "When the violence recedes, then that is when we would look at that," he said. "This isn't intended to be a permanent arrangement, but it will last as long as the violence demands additional support to contend with."

B. LEGAL STANDARD

In a June 9, 2020, Order granting a motion restraining Portland police from using tear gas inconsistently with the Police Bureau's own rules, United States District Judge Marco A. Hernandez set forth the applicable legal rules governing issuance of a temporary restraining Order.

> The standard for a temporary restraining order (TRO) is "essentially identical" to the standard for a preliminary injunction....
>
> "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Am. Trucking Ass'n Inc. v. City of L.A.*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 21 (2008)). "The elements of [this] test are balanced, so that a stronger showing of one element may offset a weaker showing of another. For example, a stronger showing of irreparable harm to plaintiff might offset a lesser

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> showing of likelihood of success on the merits." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

Order at 4, *Don't Shoot Portland v. City of Portland,* No. 20-cv-00917-HZ (D. Or. June 6, 2020), ECF No. 29 (some internal citations omitted for space). The moving party must show a likelihood of success on the merits, the likelihood of irreparable harm without an order of restraint, the balance of equities favors the restraint, and that the relief requested is in the public interest. *Winter,* 555 U.S. at 20.

C. ARGUMENT

Federal officers have demonstrated willingness to circumvent constitutional standards and public statements by federal law enforcement officials have condoned excessive and intimidating tactics widely reported over the past week. The harm to Oregonians lies in both the impact on individuals' free exercise of their constitutional rights, including First Amendment rights of free expression and assembly, Fourth Amendment rights to be free of unreasonable search and seizure, Fifth Amendment due process rights, and in the harm to the State in its sovereign interests in maintaining public safety and order. This Court should grant the restraining order sought here. The Attorney General is likely to succeed on the merits of this case, and the people of Oregon will be irreparably harmed without the restraint sought. The balance of equities and the public interest clearly favor the issuance of an order.

1. Attorney General's authority to act here.

The Oregon Attorney General is compelled to bring this case because the Defendant agencies have made it clear that they intend to continue their conduct in the absence of a court order. It should not be necessary to petition this Court for an order preventing federal officers from grabbing pedestrians off the street, shoving them into cars, and driving away with them, without the officers identifying themselves and their agency, or otherwise taking the steps necessary for a lawful detainment. But Defendants have made it necessary.

The safety and well-being of Oregonians is plainly at risk under the circumstances created by Defendants. There is no way for an individual Oregonian to determine whether she is

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being arrested or kidnapped, when she is seized using the tactics adopted by these Defendants. When federal officers simply walk up, grab someone, and push that person into a car—failing to identify themselves, failing to tell the person why the officers are placing her under arrest, failing to create a paper record to allow her to ever to know what happened to her and who did it—they are duplicating the circumstances of a kidnapping. As a result, not only are the officers violating the law, but they are damaging the State of Oregon in two distinct ways as a result: first, people are at greater risk now of being victimized by genuine kidnappers. And, second, Oregonians are now at greater risk of state violence if they reasonably resist what they believe is a kidnapping.

The State itself is damaged by the Defendants' violence on its streets, and this Court's intervention is urgently needed to redress that damage. Whether federal agencies are acting in a manner permitted by federal law or lawlessly—and thus potentially subject to state regulation—is a federal question that must be answered by this Court. The State is also damaged by the ease with which the tactics now being deployed by federal law enforcement can be mimicked creates an increased risk of horrific crimes being committed by private citizens who oppose the protests. In addition, there is a significant risk that individuals will be shot or beaten on the street by federal agents, for fighting off people they reasonably believed to be criminals.

The federal government has made it clear that it has no intention of withdrawing the officers or changing its tactics. The President has crowed about his perception of his officers' success in Portland. The only way this will end is if this Court orders the officers to obey the law, identifying themselves appropriately and carrying out arrests in a manner consistent with their obligations under the Constitution. The Attorney General asks the Court to do just that.

Beyond the Attorney General's role as the chief legal officer for the State of Oregon, she also has the right to speak for the people of her state. American courts have recognized that states as "*parens patriae*"—the parent of the citizens—have particular interests in the well-being of their populace. *Aziz v. Trump*, 231 F. Supp. 3d 23, 30 (E.D. Va. 2017) (quoting *Alfred L.*

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Snapp & Son., Inc. v. Puerto Rico, 458 U.S. 592, 600 (1982)). The *Aziz* court found that a state could bring a *parens patriae* action against the federal government "when the state has grounds to argue that [an] executive action is contrary to federal statutory or constitutional law." *Id.*

"A state has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general." *Snapp & Son.*, 458 U.S. at 600 (1982) These interests can include protecting its citizens from public nuisances. *See Dep't of Fair Emp't & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728 (9th Cir. 2011). Protection of a state's residents from unconstitutional acts by federal law enforcement also falls within a state's interest in the well-being of its citizenry; the state has more than a nominal interest in bringing an end to such conduct.

The Southern District of Texas noted a line of cases demonstrating that states may sue the federal government *in parens patriae* where the state brought the action to *enforce* the rights guaranteed by a federal statute, rather than to protect its citizens *against* a federal statute:

> Defendants' succinct argument, however, ignores an established line of cases that have held that states may rely on the doctrine of *parens patriae* to maintain suits against the federal government. *See, e.g., Wash. Utilities and Transp. Comm'n v. F.C.C.*, 513 F.2d 1142 (9th Cir. 1975) (state regulatory agency relied on parens patriae to bring suit against F.C.C. and U.S.); *Kansas ex rel. Hayden v. United States*, 748 F. Supp. 797 (D. Kan. 1990) (state brought suit against U.S. under parens patriae theory); *Abrams v. Heckler*, 582 F. Supp. 1155 (S.D.N.Y. 1984) (state used *parens patriae* to maintain suit against the Secretary of Health and Human Services). These cases rely on an important distinction. The plaintiff states in these cases are not bringing suit to *protect* their citizens *from* the operation of a federal statute—actions that are barred by the holding of *Massachusetts v. Mellon*. Rather, these states are bringing suit to *enforce* the rights guaranteed by a federal statute. Id.

Texas v. U.S., 86 F. Supp. 3d 591, 626 (S.D. Tex. 2015) (emphasis in original).

In the present case, Oregon has an interest in the civic and physical wellbeing of its people whose liberty interests are will be restrained by unconstitutional stops and detentions by federal officers roaming its streets. In addition, these stops threaten to create a significant chilling effect upon its citizens' First Amendment rights of free speech, as citizens choose to stay home in fear of being snatched up without warning by federal authorities, rather than exercise their freedoms of speech and assembly by participating in peaceful protests.

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Should the practice of the Defendants continue in Oregon, such that arrests resemble kidnappings, public confidence in constitutional exercise of law enforcement will be diminished. If not restrained, further such actions could also impose post-event investigation and prosecution costs upon the State, which will divert its resources of staff and money from other tasks.

2. Likelihood of success on the merits.

The Attorney General is likely to succeed on the merits of her lawsuit against the federal agencies and John Does. Defendants' conduct runs afoul of First Amendment protections (discussed in section a., below) as well as Fourth Amendment (due process) protections.

a. Defendants' conduct interferes with First Amendment rights.

Oregonians have the right to move about in public places, including but not limited to engaging in activities protected by the First Amendment, without fear of unlawful detention by federal officers concealing their identity, silently grabbing them and shoving them into cars without explanation, seemingly without probable cause for arrests. Defendants have created legitimate reasons for people in Portland to fear for their personal safety and the integrity of their constitutional rights by the conduct of federal agents.

Creating a climate of fear and intimidation associated with exercising First Amendment rights affects vulnerable citizens in particular. Individuals with disabilities, sole earners, single parents, and others may be particularly unwilling to risk the trauma and disruption to their families of being snatched off the streets. People wishing to come to downtown Portland to bear witness and uplift the voices of Black Lives Matter activists would have every reason to be fearful of doing so. (*See* Declarations of Tiffany Chapman, Stephanie Debner, and Terri Preeg-Riggsby.)

The right to assemble and speak out in protest against the actions of governmental actors is one of the foremost rights of American citizens. This Court recently held, in the *Don't Shoot Portland* case, that demonstrations and protests are protected speech:

> Organized political protest is a form of "classically political speech." *Boos v. Barry*, 485 U.S. 312, 318 (1988). "Activities such

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> as demonstrations, protest marches, and picketing are clearly protected by the First Amendment." *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1996).

Order at 6, *Don't Shoot Portland, supra.*

An illustrative case is *Johnson et al. v City of Berkeley et al.*, 2016 WL 928723 (2016). In that case, local law enforcement monitored a protest march. Plaintiffs alleged that they had peacefully participated in the demonstration either as protesters or journalists documenting the march. Law enforcement officers allegedly struck them with batons repeatedly, and in some instances, deployed tear gas. Two plaintiffs were arrested and spent the night in jail although they had done nothing wrong. In a civil case against the officers, the District Court denied the defense motion to dismiss the First Amendment claims because the allegations sufficiently stated a First Amendment violation. The court found that plaintiffs' alleged actions of protesting constituted clear First Amendment activity and that law enforcement's alleged response was clearly intended to have a chilling effect on plaintiffs' freedom of expression. *See also Rodriguez v. Winski*, 973 F. Supp. 2d 411 (S.D.N.Y. 2013) ("[Defendant] arrested [plaintiff] during his participation in a protest. Hence, [plaintiff's] expressive activity was not merely chilled, but was rather completely frustrated for the period of his arrest." *Id.* at 427).

Americans are entitled to express frustration, disapproval, profound disagreement, and even contempt for their government. Defendants may disagree with these sentiments, but they are not entitled to use the power of their office to discourage, intimidate, or retaliate against people expressing them. "[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." *City of Houston v. Hill*, 482 U.S. 451, 461 (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." *Id.* at 462-63. Damage to buildings, of course, may result in criminal charges—the right of expression does not extend to vandalism of county or federal property. But vandalism of federal buildings does not allow Defendants to operate outside their constitutional limitations.

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City of Houston makes clear the notion that conduct can be offensive to and critical of law enforcement and still be constitutionally protected. Moreover "a properly trained officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to "fighting words.'" *Id.* (quoting *Lewis v. City of New Orleans*, 415 U. S. 130, 135 (1974)) (Powell, J., concurring) (citation omitted).

To be sure, a showing of a First Amendment violation requires not only a deterrence but also that such deterrence was "a substantial or motivating factor in [the defendant's] conduct.'" *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999) (alterations in the original) (quoting *Sloman v. Tadlock*, 21 F.3d 1462, 1469 (9th Cir. 1994). The Defendants' response to the Black Lives Matter movement in Portland is not just belligerent but repressive. Oregon residents downtown at night, away from any federal property, now have reason to fear that they may find themselves in an unmarked car, in an unknown location, surrounded by heavily armed individuals. "As a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (brackets and quotation marks omitted). The statements of federal officials, quoted above, mischaracterizing protests and other constitutionally protected assembly in Portland strongly suggest that the Defendants' objective is in fact to disrupt the protests themselves, and to deliver a message to the people of this country that dissent will be met with force.

Officers may be found to have engaged in retaliation for protected speech when arresting people, even if the officer had probable cause for the arrest (and here, nothing indicates that Defendants are in fact establishing probable cause before grabbing pedestrians off the street). Although a plaintiff *ordinarily* cannot bring a retaliatory-arrest claim if the officer had probable cause, "the no-probable-cause requirement [does] not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Id.* at 1727. "For example, at many intersections,

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jaywalking is endemic but rarely results in arrest. If an individual who has been vocally complaining about police conduct is arrested for jaywalking at such an intersection," it is "insufficiently protective of First Amendment rights to dismiss the individual's retaliatory arrest claim on the ground that there was undoubted probable cause for the arrest." *Id.*

The no-probable-cause requirement also does not apply when the retaliatory arrest is part of an "official policy" of governmental intimidation. *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1954 (2018). As the Supreme Court explained in *Lozman*:

> An official retaliatory policy is a particularly troubling and potent form of retaliation, for a policy can be long term and pervasive, unlike an ad hoc, on-the-spot decision by an individual officer. An official policy also can be difficult to dislodge. A citizen who suffers retaliation by an individual officer can seek to have the officer disciplined or removed from service, but there may be little practical recourse when the government itself orchestrates the retaliation. For these reasons, when retaliation against protected speech is elevated to the level of official policy, there is a compelling need for adequate avenues of redress.

Id. at 1948.

Here, governmental intimidation appears to be the entire basis for the Defendants' actions, and their conduct is unlawful and in violation of the First Amendment limitations on them.

b. Defendants' actions violate the Fourth Amendment.

In addition to violating First Amendment protections of free speech and assembly, Defendants' conduct appears to violate of the Fourth Amendment protection against unlawful seizure, through unreasonable concealment of the arresting officers' identity and the agency or authority they serve.

For purposes of the Fourth Amendment, a person is seized when, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry v. Ohio*, 392 U.S. 1, 19 n 16 (1968). *See also Michigan v. Chesternut*, 486 U.S. 567, 573 (1988). The Declaration of

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Pettibone describes being detained by armed men using physical force —a situation where a reasonable person would believe they were "not free to leave." In other words, there can be little doubt it was a seizure pursuant to the Fourth Amendment.

To be Constitutional, an arrest must be supported by probable cause. Probable cause under the Fourth Amendment is an objective standard. As explained in *Ornelas v. United States*, 517 U.S. 690, 696 (1996), probable cause exists "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found[.]" *See also Devenpeck v. Alford*, 543 U.S. 146 (2004). It is a "practical, common sense" determination based upon the "totality of the circumstances." *Illinois v. Gates*, 462 US 213, 238 (1983). Probable cause for an arrest requires a fair probability that an offense has been committed or is being committed by the person who is to be arrested. *See Beck v. Ohio*, 379 U.S. 89, 91 (1964); *Brinegar v. United States*, 338 U.S. 160 (1949). There is no known, credible explanation for the Federal officers' arrest of Mr. Pettibone in this instance. The fact that he was later released without any additional exchange of information, without any paper trail of what had happened to him, and without any understanding of who exactly had grabbed him off the street or what agency they worked for strongly suggests that probable cause never existed.

A person who is likely to be subject to unconstitutional search and seizure, including specifically being stopped by law enforcement without probable cause, has grounds to enjoin such conduct by law enforcement. *See Melendres v. Arpaio*, 695 F.3d 990, 999 (9th Cir. 2012) ("the threatened constitutional injury was likely to occur again, and thus, there was no error in the determination that the Plaintiffs had standing to pursue equitable relief as to their Fourth Amendment claims"). Of course, individuals cannot seek redress against an abuse of law enforcement authority, if the law enforcement officers never tell the individual who they are or who they work for, or why they picked that person up.

Mr. Pettibone's treatment does not stand alone, given the video evidence of other detentions. When there is a persistent pattern of police misconduct, injunctive relief is

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appropriate. In *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939), the Supreme Court affirmed such relief when law enforcement officials restricted labor union activities, interfering with the distribution of pamphlets, preventing public meetings, and running some labor organizers out of town. The Court upheld an injunction that prohibited the police from "exercising personal restraint over (the plaintiffs) without warrant or confining them without lawful arrest and production of them for prompt judicial hearing . . . or interfering with their free access to the streets, parks, or public places of the city." *Id.* at 517.

The reasonableness—and constitutionality—of a seizure may also turn on whether the officer properly identified himself or herself as an officer to the arrestee during the encounter. The heavily armed men detaining Mr. Pettibone never advised under what authority he was being arrested, or by whom. The Seventh Circuit recently stated that "[i]n all but the most unusual circumstances, where identification would itself make the situation more dangerous, plainclothes officers must identify themselves when they initiate a stop." *Doornbos v. City of Chicago*, 868 F.3d 572, 575 (7th Cir. 2017). As the court explained:

> The tactic provokes panic and hostility from confused civilians who have no way of knowing that the stranger who seeks to detain them is an officer. This creates needless risks. Suppose you are walking along a street and are grabbed by a stranger (or three strangers). A fight-or-flight reaction is both understandable and foreseeable. Self-defense is a basic right, and many civilians who would peaceably comply with a police officer's order will understandably be ready to resist or flee when accosted—let alone grabbed—by an unidentified person who is not in a police officer's uniform. Absent unusual and dangerous circumstances, this tactic is unlikely to be reasonable when conducting a stop or a frisk.

Id. at 584-85 (quotation marks and citations omitted). *See also, e.g., Johnson v. Grob*, 928 F. Supp. 889, 905 (W.D. Mo. 1996) ("a seizure outside the home may be unreasonable because the officers involved were not identified or identifiable as such, and the seized person suffers injuries because of the officers' lack of identification."); *Newell v. City of Salina*, 276 F. Supp. 2d 1148, 1155 (D. Kan. 2003) (holding that a seizure, "without having identified themselves as law enforcement officers, may not be objectively reasonable.").

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The Ninth Circuit has reached a similar conclusion in evaluating a use of force situation. In *S.R. Nehad v. Browder*, 929 F.3d 1125, 1138 (9th Cir. 2019), the Ninth Circuit stated "we have also considered as relevant a police officer's failure to identify himself or herself as such . . . . Browder never verbally identified himself as a police officer or activated his police lights or siren. A jury could consider those failures in assessing Nehad's response to Browder and in determining whether Browder's use of force was reasonable."

Finally, this District has also concluded that a failure of police officers to identify themselves can amount to unlawful seizure. In *Child v. City of Portland*, 547 F. Supp. 2d 1161, 1165 (D. Or. 2008), the court considered a case in which Portland police failed to identify themselves before detaining a plaintiff, and concluded that that conduct amounted to a viable claim for illegal seizure that withstood summary judgment:

> The facts in this case, taken together, do not justify the intrusive nature of Defendant Officers' actions at the time of the seizure of Plaintiff. When the Defendant Officers initially saw Plaintiff riding her bicycle without a light, as required by law, they reasonably approached her for purposes of investigation. At this point, however, the officers departed from a course of behavior that permitted them to reasonably detain Plaintiff. First, they pulled up to Plaintiff in an unmarked car, failed to identify themselves as police officers, ignored Plaintiff's requests that they identify themselves, did not use the car lights in a manner that would suggest they were police officers, or otherwise attempt to communicate their purpose in approaching Plaintiff. Under these facts, Plaintiff was reasonably unsure and fearful of their intentions. Defendant Officers did not act reasonably when they chased a frightened woman into her yard and pulled her out of her house by her arm and her hair. Therefore, a reasonable jury could find for Plaintiff and Defendants' motion for summary judgment on the claim of illegal seizure should be denied.

As in the *Child* case, Defendants here are using unmarked vehicles, are not wearing a recognizable police uniform, are not identifying themselves or their agency, and are dragging frightened people into their cars. When these federal officers operate incognito, they cannot be distinguished from lawless militia opposed to the protests, or simply kidnappers out to exploit victims who may believe that they have an obligation to obey their captors. For the safety of everyone, the federal agents on the scene must identify themselves before making an arrest.

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The actions of Defendants in Oregon constitute a direct threat to the individual rights of all Oregonians. Allowing federal agents to roam the streets of an Oregon city detaining individuals in violation of their federal and State constitutional rights harms not just the individuals, but the interests of the State in protecting the constitutional rights of Oregonians. The Attorney General is likely to prevail on her claim for a declaration and injunction that seeks to hold federal officers to basic jurisdictional and constitutional standards.

3. Irreparable harm.

Deprivation of a constitutional right is a harm in and of itself. *See, e.g., Padilla v. U.S. Immig. And Customs Enforcement*, 387 F. Supp. 3d 1219, 1231 (2019) citing *Hernandez v. Sessions*, 872 F. 3d 976, 995 (9th Cir. 2017). The conduct of federal agents chills the exercise of protected First Amendment rights and violates the law governing officers' conduct in light of Fourth Amendment rights. The law strongly favors the Attorney General's goal of preserving the peace of the State and protecting its people from arbitrary and unconstitutional detention.

If the conduct of the past week continues, the people of Oregon and the peace of the State will be irreparably harmed because people walking downtown will fear arbitrary and violent confrontations with persons who may—or may not—be federal officers. And state and local law enforcement officers will be irreparably harmed because the Defendants' unconstitutional tactics will escalate confrontations with law enforcement, and undermine faith in law enforcement.

4. The balance of equities supports issuing an injunction.

Balancing the equities requires the court to identify and consider "competing claims of injury" and how granting or denying the requested restraint will affect the parties. *Winter*, *supra*, 555 U.S. at 24. Because the Attorney General's request seeks maintenance of the lawful bounds of conduct applicable to the federal officers, no injury to defendants' interest is readily apparent. The balance of equities tips in favor of the Attorney General's commitment to protecting the people of the State and the public order. *See W. Watersheds Project v. Bernhardt*, 391 F. Supp. 3d 1002, 1026 (D. Or. 2019) ("Courts also have repeatedly held that when the government does

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not properly follow the law or regulations, balancing the equities favors the plaintiff. *See, e.g., Valle del Sol, Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) ("[i]t is clear that it would not be equitable or in the public's interest to allow the state ... to violate the requirements of federal law, especially when there are no adequate remedies available") (quoting *United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011), aff'd in part, rev'd in part, and remanded by *Arizona v. United States*, 567 U.S. 387 (2012)); *J.L. v. Cissna*, 341 F. Supp. 3d 1048, 1070 (N.D. Cal. 2018) (noting that the balance of equities factor weighs in favor of the plaintiffs 'when plaintiffs have also established that the government's policy violates federal law').").

Defendants have no legitimate claim to continue the conduct sought to be restrained. No public benefit accrues to permitting federal officers to circumvent the Constitution and cause fear and confusion among the people of Oregon.

5. The public interest supports restraining Defendants' conduct.

The public interest inquiry focuses primarily on the impact a restraint will have on non-parties. *See League of Wilderness Def./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014); *Western Watersheds, supra*. As Judge Simon recently noted, "[w]hen the alleged action by the government violates federal law, the public interest factor weighs in favor of the plaintiff." *Western Watersheds*, *supra* (citing to *Valle del Sol*, 732 F.3d at 1029.

The *Don't Shoot Portland* decision recognized the complementary principle that "it is always in the public interest to prevent the violation of a party's constitutional rights." Order at 9, *Don't Shoot Portland*, June 6, 2020, *supra*. This Court went on to explain, in the context of the same public protests in Portland: "This is a significant moment in time. The public has an enormous interest in the rights of peaceful protesters to assemble and express themselves. These rights are critical to our democracy." *Id.* Additionally, as this Court concluded, the public interest is also served by "allowing the police to do their jobs and to protect lives as well as property." *Id.* Here, the requested restraint serves the public interest in both ways. Prohibiting federal

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officers from engaging in the conduct at issue advances the public interest in allowing local authorities to pursue public peace without the incitements engendered by these unlawful acts.

There is no public interest in prior restraints of First Amendment rights, unconstitutional detentions, or arrests without probable cause. There will be a direct impact on people who may be subjected to the same conduct not knowing whether they are being abducted (and may resist with all their might, engaging in self-defense to the fullest extent permitted by law) or are being arrested (such that resisting may be charged as a crime).

III. CONCLUSION

Until the Court can convene a hearing on the Attorney General's request for a preliminary injunction, Defendants should be restrained from engaging in conduct that threatens to irreparably harm the public peace and security of Oregon.

DATED July 20, 2020.

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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

INDEX NEWSPAPERS, LLC, *et al.*,

Plaintiffs.

v.

CITY OF PORTLAND, *et al.*,

Defendants.

Case No. 3:20-cv-1035-SI

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRATINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs seek the extraordinary remedy of a temporary restraining order and preliminary injunction that would hinder the ability of federal law enforcement officers to protect federal property that has been repeatedly damaged after weeks of violent protests in Portland. Plaintiffs base their request for emergency injunctive relief on alleged violations of their First Amendment rights, including the freedom of the press. Their request fails for several reasons.

First, Plaintiffs lack standing to seek emergency relief. It is well-established that a plaintiff lacks standing to obtain prospective injunctive relief for alleged future injuries based on allegations of prior harm. *See City of Los Angeles v. Lyons,* 461 U.S. 95 (1983). Yet that is Plaintiffs' gambit here—they seek to have the Court enter an emergency injunction based on alleged past encounters involving federal law enforcement officers, but have not demonstrated that similar incidents will take place in the future, much less that these *particular* plaintiffs will again experience the same alleged conduct by federal law enforcement officers. Because Plaintiffs cannot demonstrate a certainly impending injury, they lack standing to seek injunctive relief. For many of these same reasons, Plaintiffs also cannot show a likelihood of irreparable harm, a prerequisite for granting emergency injunctive relief.

Second, the relief that Plaintiffs seek is entirely improper. Plaintiffs seek a sweeping injunction that would be unworkable in light of the split-second judgments that federal law enforcement officers have to make while protecting federal property and themselves during dynamic, chaotic situations. By granting immunity to journalists and observers from lawful orders to disperse, the injunction would effectively grant those individuals immunity from otherwise applicable legal requirements and would improperly bind the hands of law enforcement, including by preventing them from taking appropriate action when individuals are engaging in criminal conduct. The proposed injunction is also unworkable from a practical

standpoint. It would require law enforcement officers responding to a violent situation threating public safety to draw fine distinctions among a crowd based on who is wearing press identification badges and different colored hats, all under the threat of potential contempt.

Third, and finally, the balance of the equities and the public interest counsel against granting Plaintiffs' request. Freedom of the press is not being threatened by the actions of the federal defendants in protecting federal property. Equally important is the public interest in public safety, including protecting federal property, which has already been substantially damaged as a result of weeks of violent protests, as well the protection of officers and the general public against imminent threats of serious bodily injury. Simply put, the federal government has the legal obligation and right to protect federal property and federal officers, and the public has a compelling interest in the protection of that property and personnel. The press is free to observe and report on the destruction of that property, but it is not entitled to special, after-hours access to that property in the face of lawful order to disperse.

BACKGROUND

I. Recent Destruction of Federal Property and Assaults on Federal Officers in Portland

For nearly two months, Portland has witnessed daily protests in its downtown area. *See* Declaration of Gabriel Russell ¶ 3, Federal Protective Service (FPS) Regional Director, (Exhibit 1). These daily protests have regularly been followed by nightly criminal activity in the form of vandalism, destruction of property, looting, arson, and assault. *See id.*

Federal buildings and property have been the targets of many of these attacks, including the Mark O. Hatfield Federal Courthouse, the Pioneer Federal Courthouse, the Gus Solomon Federal Courthouse, the U.S. Immigration and Customs Enforcement (ICE) Building, and the Edith Green Wendall Wyatt Federal Office Building. *See* Russell Decl. ¶ 4. For example, on

May 28, 2020, the ICE Portland Field Office was targeted by a Molotov Cocktail. *See* Affidavit of Special Agent David Miller ¶ 5 (July 4, 2020), *United States v. Olsen*, 20-mj-00147 (D. Or) (Exhibit 2). The Mark O. Hatfield Courthouse has experienced significant damage to its façade and building fixtures, including the vandalism and theft of building security cameras and access control devices. *Id.* The most recent repair estimate for the damage at the Hatfield Courthouse is in excess of $50,000. *Id.*

Officers protecting these properties have also been subject to threats, rocks and ball bearings fired with wrist rockets, improvised explosives, aerial fireworks, commercial grade mortars, high intensity lasers targeting officers' eyes, full and empty glass bottles, and balloons filled with paint and other substances such as feces. Russell Decl. ¶ 4. The most serious injury to an officer to date occurred when a protester wielding a two-pound sledgehammer struck an officer in the head and shoulder when the officer tried to prevent the protester from breaking down a door to the Hatfield Courthouse. *Id.* In addition, an officer was hit in the leg with a marble or ball bearing shot from a high-powered wrist rocket or air gun, resulting in a wound down to the bone. *Id.* To date, 28 federal law enforcement officers have experienced injuries during the rioting. Injuries include broken bones, hearing damage, eye damage, a dislocated shoulder, sprains, strains, and contusions. *Id.; see* Acting Secretary Wolf Condemns The Rampant Long-Lasting Violence in Portland (July 16, 2020) (Exhibit 3) (listing over 75 separate incidents of property destruction and assaults against federal officers between May 29, 2020 and July 15, 2020).

In response to the damage to federal property and assaults on federal law enforcement officers, DHS deployed federal officers to Portland for the purposes of protecting federal buildings and property. Russell Decl. ¶ 5. There are currently 114 federal law enforcement

officers from the FPS, ICE, U.S. Customs and Border Protection (CBP), and the U.S. Marshals Service (USMS) protecting federal facilities in downtown Portland. *Id.* From May 27 until July 3, officers were stationed in a defensive posture intended to de-escalate tensions by remaining inside federal buildings and only responding to breach attempts or other serious crimes. *Id.* This attempt to de-escalate was unsuccessful and an increasingly violent series of attacks culminated in a brazen effort to break into and set fire to the Hatfield Courthouse in the early morning hours of July 3, 2020. *Id.* A group of individuals used teamwork and rehearsed tactics to breach the front entry of the Courthouse by smashing the glass entryway doors. *Id.* The individuals threw balloons containing an accelerant liquid into the lobby and fired powerful commercial fireworks towards the accelerant in an apparent attempt to start a fire. *Id.*

The violence against federal officers and federal property over the Fourth of July holiday weekend resulted in the necessity of arrests of multiple individuals:

- On July 2-3, 2020, Rowan Olsen used his body to push on and hold a glass door at the Hatfield Courthouse closed, preventing officers from exiting the building and causing the door to shatter. With the door broken, a mortar firework entered the courthouse, detonating near the officers. The officers used shields and their bodies to block the open doorway for approximately six hours until demonstrators dispersed.

- On July 4, 2020, Shat Singh Ahuja willfully destroyed a closed-circuit video camera mounted on the exterior of the Hatfield Courthouse.

- On July 5, 2020, Gretchen Blank assaulted a federal officer with a shield while the officer was attempting to arrest another protester.

- On July 5-6, 2020, four men assaulted federal officers with high intensity lasers. At the time of his arrest, one of the men also possessed a sheathed machete.

See Seven Arrested, Facing Federal Charges After Weekend Riots at Hatfield Federal Courthouse (July 7, 2020) (Exhibit 4). In response to the increasingly violent attacks, DHS implemented tactics intended to positively identify and arrest serious offenders for crimes such

as assault, while protecting the rights of individuals engaged in protected free speech activity. Russell Decl. ¶ 5.

Plaintiffs' motion primarily focuses on the response by federal officials to a violent protest near the Hatfield Courthouse that occurred on the evening of July 11 into the early morning of July 12. *See* Pls.' Mot. at 4–7. During that time the crowd of protesters near the Hatfield Courthouse grew to approximately 300 people. Russell Decl. ¶ 6. A barrier of police tape was established across the front of the Hatfield Courthouse and protesters were ordered not to trespass on federal property but refused to comply with that command. *Id.* Commands were made using a long-range acoustic device that is audible even with loud crowd noises. *Id.* As a joint team of FPS, CBP, and USMS officers deployed and made an arrest for trespass, protesters swarmed the officers. *Id.* FPS officers deployed less-lethal projectile rounds to allow the arrest team to safely withdraw from federal property. *Id.* The protesters responded by throwing items that posed a risk of officer injury, including rocks, glass bottles, and mortar-style fireworks, and by pointing lasers at law enforcement personnel. *Id.* One protester encroached on a police barrier, refused to leave, and became combative while detained. *Id.* A crowd of protesters swarmed the officers and tear gas was deployed to protect officers as they withdrew to the Hatfield Courthouse. *Id.*

FPS gave protesters additional warnings to stay off federal property, and to cease unlawful activity. Russell Decl. ¶ 7. Tear gas was deployed again to push protesters back from the Hatfield Courthouse. *Id.* FPS contacted the Portland Police Bureau (PPB), who were preparing to declare an unlawful assembly. *Id.* By this time the size of the group had diminished to approximately 100 people. *Id.* Federal law enforcement teams from the Hatfield Courthouse and the Edith Green Federal Building pushed the crowd towards the park across from the

building. *Id.* The PPB arrived and closed all roads in the vicinity of the facilities. *Id.* There were multiple attacks throughout the night involving hard objects including rocks and glass bottles and commercial-grade lasers directed at officers' eyes. *Id.* Federal officers made seven arrests including three for assault on an officer and others for failure to comply with lawful orders. *Id.* The PPB declared an unlawful assembly and began making arrests for failure to disperse. *Id.* FPS also issued dispersal orders on federal property and cleared persons refusing to comply with these orders at the same time. *Id.*

II. Legal Authority to Protect Federal Property

FPS, a component of the Department of Homeland Security, is the federal agency charged with protecting federal facilities across the country. *See* Federal Protective Service Operation, at https://www.dhs.gov/fps-operations. Congress authorized DHS to "protect the buildings, grounds, and property that are owned, occupied, or secured by the Federal Government." 40 U.S.C. § 1315(a). While engaged in their duties, FPS officers are authorized to conduct a wide range of law enforcement functions:

> (A) enforce Federal laws and regulations for the protection of persons and property;
>
> (B) carry firearms;
>
> (C) make arrests without a warrant for any offense against the United States committed in the presence of the officer or agent or for any felony cognizable under the laws of the United States if the officer or agent has reasonable grounds to believe that the person to be arrested has committed or is committing a felony;[1]
>
> (D) serve warrants and subpoenas issued under the authority of the United States;
>
> (E) conduct investigations, on and off the property in question, of offenses that may have been committed against property owned or occupied by the Federal Government or persons on the property; and

[1] *See, e.g.*, 18 U.S.C § 111 (assaulting a federal officer).

(F) carry out such other activities for the promotion of homeland security as the Secretary may prescribe.

40 U.S.C. § 1315(b)(2).

Additionally, the Secretary of Homeland Security may designate DHS employees "as officers and agents for duty in connection with the protection of property owned or occupied by the Federal Government and persons on the property, including duty in areas outside the property to the extent necessary to protect the property and persons on the property." 40 U.S.C. § 1315(b)(1).

Congress also delegated authority to DHS to issue regulations "necessary for the protection and administration of property owned or occupied by the Federal Government and persons on the property." 40 U.S.C. § 1315(c). Current regulations may include "reasonable penalties," including fines and imprisonment for not more than 30 days. 40 U.S.C. § 1315(c)(2). The regulations cover many activities, including prohibiting disorderly conduct on federal property (41 C.F.R. § 102-74.390); failing to obey a lawful order (41 C.F.R. § 102-74.385); and creating a hazard on federal property (41 C.F.R. § 102-74.380(d)). *See United States v. Christopher*, 700 F.2d 1253 (9th Cir. 1983) (affirming convictions on charges of being present on federal property after normal work hours in violation of 41 C.F.R. §§ 101–20.302 and 101–20.315).

In exercising its authority to protect federal property, FPS follows DHS policy on the use of force. *See* DHS Policy on the Use of Force (Sept. 7, 2018) (Exhibit 5). Consistent with guidance from the Supreme Court, *see Graham v. Connor*, 490 U.S. 386 (1989), DHS policy authorizes officers to "use only the force that is objectively reasonable in light of the facts and circumstances confronting him or her at the time force is applied," recognizing that officers are "often forced to make split-second judgments, in circumstances that are tense, uncertain, and

rapidly evolving." DHS Policy at 1–2. The policy states that officers "should seek to employ tactics and techniques that effectively bring an incident under control while promoting the safety of [the officer] and the public, and that minimize the risk of unintended injury or serious property damage." *Id.* at 3. DHS components must conduct training on "less-lethal use of force" at least every two years and incorporate decision-making and scenario-based situations. *Id.* at 5. Further, officers must demonstrate proficiency with less-lethal force devices, such as impact weapons or chemical agents, before using such devices. *Id.* DHS policy emphasizes "respect for human life," "de-escalation," and "use of safe tactics." *Id.* at. 3.

DHS has also emphasized to its employees the importance of respecting activities protected by the First Amendment. *See* DHS Memo re: Information Regarding First Amendment Protected Activities (May 17, 2029) (Exhibit 6). "DHS does not profile, target, or discriminate against any individual for exercising his or her First Amendment rights." *Id.* at 1.

In addition to DHS's authority to protect federal property, the United States Marshals Service, a component of the Department of Justice, provides security inside federal courthouses in each of the 94 federal judicial districts and in the District of Columbia Superior Court. *See* U.S. Marshals Service, Court Security, at www.usmarshals.gov/duties/courts.htm/. The Marshals Service protects judges and other court officials at over 400 locations where court-related activities are conducted. *Id.* As set forth in 28 U.S.C. § 566(a), "[i]t is the primary role and mission of the United States Marshals Service to provide for the security and to obey, execute, and enforce all orders of the United States District Courts, the United States Courts of Appeals, the Court of International Trade, and the United States Tax Court, as provided by law." The regulations governing the duties of the Marshals Service further authorize it to provide "assistance in the protection of Federal property and buildings." 28 C.F.R. § 0.111(f); *see also*

28 U.S.C. § 566(i) (requiring the Director of the United States Marshals Service to consult with the Judicial Conference of the United States concerning, *inter alia*, "the security of buildings housing the judiciary" and stating that the "United States Marshals Service retains final authority regarding security requirements for the judicial branch of the Federal Government.").

The Marshals Service's actions to protect the federal judiciary are guided by an agency-wide use of force policy. *See* United States Marshals Service, Policy Directive 14.15, Use of Force (Sept. 24, 2018) (Exhibit 7). Pursuant to that policy, the use of force must be objectively reasonable and Deputy Marshals may use less-than-lethal force only in situations where reasonable force, based upon the totality of the circumstances at the time of the incident, is necessary to, among other things, protect themselves or others from physical harm or make an arrest. *See id.* Deputy Marshals are not authorized to use less-than-lethal devices if voice commands or physical control achieve the law enforcement objective. *See id.* Further, they must stop using less-than-lethal devices once they are no longer needed to achieve its law enforcement purpose. *See id.* And in all events, less-than-lethal weapons may not be used to punish, harass, taunt, or abuse a subject. *See id.*

STANDARD FOR EMERGENCY RELIEF

The standard for a temporary restraining order is generally the same as for a preliminary injunction. *Pac. Kidney & Hypertension, LLC v. Kassakian*, 156 F. Supp. 3d 1219, 1222 (D. Or. 2016). A preliminary injunction is "an extraordinary and drastic remedy" that should not be granted "unless the movant, by a clear showing, carries the burden of persuasion." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012). A plaintiff must show that (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest.

Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).[2] "Likelihood of success on the merits is the most important factor" and if a plaintiff fails to meet this "threshold inquiry," the court "need not consider the other factors." *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018). Because standing is a prerequisite to the Court's exercise of jurisdiction, *see Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014), the plaintiff's claims on the merits have no likelihood of success if the plaintiffs cannot establish standing. *Id.* at 158 ("The party invoking federal jurisdiction bears the burden of establishing' standing and must do so "the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.") (internal quotations and citations omitted).

Plaintiffs must meet an even higher standard in this case because they seek a mandatory injunction that would alter the status quo and impose affirmative requirements on law enforcement officers as they carry out their duties. *See Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (mandatory injunctions are "particularly disfavored" and the "district court should deny such relief unless the facts and law clearly favor the moving party.") (internal quotations omitted). As explained below, Plaintiffs cannot meet this demanding standard.

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[2] Alternatively, "serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (citation omitted).

ARGUMENT

I. PLAINTIFFS LACK STANDING TO OBTAIN AN INJUNCTION AGAINST FEDERAL DEFENDANTS

"[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Art. III of the Constitution by alleging an actual case or controversy." *City of Los Angeles v. Lyons,* 461 U.S. 95, 101 (1983). One of the "landmarks" that differentiates a constitutional case or controversy from more abstract disputes "is the doctrine of standing." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). And the first requirement of standing is that "the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) 'actual or imminent, not "conjectural' or "hypothetical."'" *Id.* at 560.

Where, as here, a party seeks prospective equitable relief, the complaint must contain "allegations of future injury [that are] particular and concrete." *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 109 (1998). While allegations of past injury might support a remedy at law, prospective equitable relief requires a claim of imminent future harm. *Lyons,* 461 U.S. at 105; *see also Nelsen v. King Cty.*, 895 F.2d 1248, 1251 (9th Cir. 1990) ("[P]ast exposure to harm is largely irrelevant when analyzing claims of standing for injunctive relief that are predicated upon threats of future harm."); *United Presbyterian Church v. Reagan,* 738 F.2d 1375, 1381 (D.C. Cir. 1984) (past harm suffered by plaintiff does not support declaratory and injunctive relief).

It is therefore well-established that a plaintiff lacks standing to obtain prospective injunctive relief for alleged future injuries based on allegations of prior harm. *Lyons*, 461 U.S. at 101–02; *Nelsen*, 895 F.2d at 1251. As the Supreme Court held in *Whitmore v. Arkansas,* 495 U.S. 149 (1990), allegations of possible future injury do not satisfy the requirements of Article

III. A threatened injury must be "certainly impending" to constitute injury in fact. 495 U.S. at 158 (quoting *Babbitt v. United Farm Workers,* 442 U.S. 289, 298 (1979)). As a result, in order to invoke Article III jurisdiction, a plaintiff in search of prospective equitable relief must show a significant likelihood and immediacy of sustaining some direct injury. *Updike v. Multnomah Cty.*, 870 F.3d 939, 947 (9th Cir. 2017) ("[S]tanding for injunctive relief requires that a plaintiff show a 'real and immediate threat of repeated injury.'" (quoting *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974))). And standing cannot be presumed or deferred just because this case is currently being considered on a TRO and preliminary injunction posture; standing is "an indispensable part of the plaintiff's case" that "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561.

For a plaintiff to have standing, an alleged injury must be "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lyons*, 461 U.S. at 101–02. Even where a plaintiff establishes that his rights were violated in past incidents, he nonetheless lacks standing to obtain prospective injunctive relief absent a "real and immediate threat" that he will suffer the same injury in the future. *Id.* at 105. "[P]ast wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy." *Id.* at 103 (citing *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) and *Rizzo v. Goode,* 423 U.S. 362, 372 (1976)). *See also Nelsen*, 895 F.2d at 1251. This "imminence requirement ensures that courts do not entertain suits based on speculative or hypothetical harms." *Lujan*, 504 U.S. at 564. Thus, a plaintiff "who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982).

Moreover, the plaintiff seeking injunctive relief must show not just that the predicted *injury* will reoccur, but also that the plaintiff himself will suffer it. *See, e.g.*, *Updike*, 870 F.3d at 948 (holding that the plaintiff lacked standing for injunctive relief because his evidence was "insufficient to establish that any such wrongful behavior is likely to recur against him"); *Blair v. Shanahan*, 38 F.3d 1514, 1519 (9th Cir. 1994) (holding that a plaintiff seeking declaratory or injunctive relief must "establish a personal stake" in the relief sought). In other words, plaintiffs cannot show an entitlement to injunctive relief unless they show that they themselves are likely to suffer injury from the allegedly unlawful activities. That other individuals might suffer future harm does nothing for a plaintiff's own standing.

The facts and reasoning of *Lyons* are instructive. At issue in *Lyons* was a civil rights action against the City of Los Angeles and several police officers who allegedly stopped the plaintiff for a routine traffic violation and applied a chokehold without provocation. In addition to seeking damages, the plaintiff sought an injunction against future use of the chokehold unless deadly force was threatened. The Supreme Court held that plaintiff lacked standing to seek prospective relief because he could not show a real or immediate threat of future harm.

> That Lyons may have been illegally choked by the police . . . , while presumably affording Lyons standing to claim damages . . . does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part.

Lyons, 461 U.S. at 104; *see also O'Shea*, 414 U.S. at 495-96 ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."); *Rizzo*, 423 U.S. at 372 (holding that plaintiffs' allegations that police had engaged in widespread unconstitutional conduct aimed

at minority citizens was based on speculative fears as to what an unknown minority of individual police officers might do in the future).

Courts in this Circuit have applied *Lyons* and *O'Shea* in similar contexts to hold that plaintiffs lack standing to pursue prospective injunctive relief where they were subject to past law enforcement practices but could only speculate as to whether those practices would recur. *See, e.g.*, *Eggar v. City of Livingston*, 40 F.3d 312, 317 (9th Cir. 1994) (plaintiff who had previously been repeatedly detained, charged, and convicted of offenses without court-appointed counsel despite her indigence lacked injunctive standing because whether she "will commit future crimes in the City, be indigent, plead guilty, and be sentenced to jail is speculative"); *Murphy v. Kenops*, 99 F. Supp. 2d 1255, 1259–60 (D. Or. 1999) (plaintiffs lacked standing because it was highly speculative "that the Forest Service will exercise its discretion to issue future closure orders, that the closure orders will violate the First Amendment, that plaintiffs will violate those closure orders, and that plaintiffs will be arrested because of those closure orders"). *See also Curtis v. City of New Haven*, 726 F.2d 65, 68 (2d Cir. 1984) (vacating an injunction that had been entered against police use of mace, because the plaintiffs had not shown a "likelihood that these plaintiffs will again be illegally assaulted with mace"); *Williams v. Birmingham Bd. of Educ.*, 904 F.3d 1248, 1267 (11th Cir. 2018) (plaintiff alleging that a school resource officer employed by the police unconstitutionally used an incapacitating chemical spray on her lacked standing to pursue injunctive relief, because she did not show that a likelihood that the resource officer would again unconstitutionally spray her).

Nor can plaintiffs create standing for injunctive relief by alleging that their own fear of future government action has "chilled" their willingness to engage in First Amendment activities. When a plaintiff contends that injunctive relief is supported by such an alleged "chilling effect,"

the analysis is unchanged from the *Lyons* inquiry—the supposed chilling effect will not provide standing for injunctive relief if it is "based on a plaintiff's fear of future injury that itself was too speculative to confer standing." *Munns v. Kerry*, 782 F.3d 402, 410 (9th Cir. 2015); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) (plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending"). In other words, where a plaintiff's request for injunctive relief lacks any non-speculative basis for finding a likelihood of future harm, the plaintiff cannot circumvent Article III merely by saying that he or she is *afraid* of future harm.

Plaintiffs' motion fails under these standards. Plaintiffs' support their requested relief is seven declarations from individual plaintiffs that focus entirely on past events. They recount episodes involving alleged conflicts between protesters and law enforcement officers on particular dates (July 11, 12, 16, and 19)—and describe injuries they or others allegedly suffered (e.g., bruising from a nonlethal plastic round). Dkt. 43 (Davis Decl.);[3] Dkt. 44 (Lewis-Rolland Decl.); Dkt. 55 (Brown Decl.); Dkt. 56 (Yau Decl.); Dkt 58 (Howard Decl.); Dkt 59 (Rudoff Decl); Dkt. 60 (Tracy Decl.).[4] But these threadbare accounts of isolated incidents fail to provide any basis for concluding that plaintiffs face certainly impending injury. Indeed, the declarations make no showing that Plaintiffs are in imminent danger of again being subjected to similar events in the future. For example, the Plaintiffs would need not only to establish that "they would have another encounter with the police but also to make the incredible assertion" that the same series of events would transpire again. *See Lyons*, 461 U.S. at 106 (stating that "[i]n order to establish an actual controversy in this case" Lyons would have to allege that "*all* police

[3] Garrison Davis is not a plaintiff and thus cannot sustain standing in this case, but his declaration also fails to support a finding of imminent danger to any Plaintiff.

officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter") (emphasis in original). They have not and cannot make such a showing. And since courts may not simply assume that the circumstances that gave rise to an alleged constitutional violation will recur, the absence of such evidence is fatal to their request for relief. *See, e.g.*, *Nelsen*, 895 F.2d at 1251; *Updike*, 870 F.3d at 947; *Murphy*, 99 F. Supp. 2d at 1259–60.

II. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS BECAUSE THEY WILL NOT SUFFER A FIRST AMENDMENT VIOLATION AND THE INJUNCTION THEY SEEK IS LEGALLY IMPROPER.

A. Plaintiffs Have Not Demonstrated that Federal Defendants Violated Their Constitutional Rights, Much Less that They Will Continue To Do So.

Plaintiffs complain of two First Amendment violations. First, Plaintiffs seek an injunction based on a claim that Federal Defendants retaliated against Mr. Lewis-Rolland, a journalist, for engaging in newsgathering activities protected by the First Amendment. *See* Pls.' Mot. at 8–12. Plaintiffs devote substantial attention to undisputed propositions of law that newsgathering is a protected First Amendment activity that may be exercised in public places, subject to reasonable time, place and manner restrictions. But the key question in a First Amendment retaliation claim is whether the plaintiff has established that "by his actions the defendant deterred or chilled the plaintiff's political speech and such deterrence was a substantial or motivating factor in the defendant's conduct." *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

Plaintiffs have not carried their burden to establish that the use of force was "anything other than the unintended consequence of an otherwise constitutional use of force under the circumstances." *Barney v. City of Eugene*, 20 F. App'x 683, 685 (9th Cir. 2001) (rejecting First Amendment retaliation claim where "protesters were warned repeatedly to clear the street or tear

gas would be deployed, and there is no dispute that a small group of the crowd became violent"); *see also Mims v. City of Eugene*, 145 F. App'x 194, 196 (9th Cir. 2005) (holding that use of a crowd control team "in full riot gear was not a disproportionate response and does not indicate preexisting hostility toward the protestors' views"). Given the chaotic circumstances presented by the violent protests, Plaintiffs have not established that Defendants would not have used force "but for" a retaliatory motive. *Capp v. City of San Diego*, 940 F.3d 1046, 1059 (9th Cir. 2019). As the Ninth Circuit has recognized, the unlawful actions of a few may impair the ability of others to exercise their rights:

> In balancing desired freedom of expression and the need for civic order, to accommodate both of these essential values, a measure of discretion necessarily must be permitted to a city, on the scene with direct knowledge, to fashion remedies to restore order once lost. It may be that a violent subset of protesters who disrupt civic order will by their actions impair the scope and manner of how law-abiding protesters are able to present their views.

Menotti v Seattle, 409 F.3d 1113, 1155 (9th Cir. 2005) (declining "to hold unconstitutional the City's implementation of procedures necessary to restore safety and security" when confronted by protesters with "violent and disruptive aims" that "substantially disrupt civic order").

Second, Plaintiffs also contend that Federal Defendants have denied Plaintiffs a right of access to observe how Federal Defendants enforce their dispersal orders. *See* Pls.' Mot. at 12–14. It is important to clarify at the outset, however, that Plaintiffs appear to be requesting only a right to observe from public streets. Thus, even under their proposed injunction, they still must not come so close as to trespass on federal property. Plaintiffs accordingly recognize from the beginning that they have no right to be wherever protesters are. The government may certainly prohibit a public presence on its property outside of its ordinary hours of operation—an interest rooted in part in protecting that property—and an interest in First Amendment activities does not permit violation of those rules. *See Christopher*, 700 F.2d at 1259-61 (upholding conviction for

trespassing for soliciting signatures on government property outside of normal business hours). This is true even if the property functions as a traditional public forum during the hours when it is open. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 299 (1984) (upholding prohibition on overnight sleeping to prevent damage to park); *Occupy Sacramento v. City of Sacramento*, 878 F. Supp. 2d 1110, 1120 (E.D. Cal. 2012) (granting dismissal and rejecting injunction on claim against regulation closing park overnight in order to protect it).

Plaintiffs nevertheless argue that they have a right to continued presence on public streets surrounding the federal property, even if a lawful order to disperse has been given—indeed, they are pointedly seeking a right to ignore a lawful order to disperse and to remain in place. *See* Pls.' Mot. at 1. Yet Plaintiffs provide absolutely no support whatsoever that the press has a special right to remain in or access a location that has been lawfully closed to the general public, and in particular a place that has been lawfully closed to protesters. They argue that cases supporting press access in other contexts, specifically the Supreme Court's decision in *Press-Enterprise Co. v. Super. Ct. of Cal.*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"), support their right of access here. But that case is inapposite.

Press-Enterprise II involved a dispute over media access to a criminal judicial proceeding and that context framed the way in which the Supreme Court analyzed whether access was appropriate: whether there is a tradition of public access and whether that public access plays a significant positive role in the functioning of the particular process. *Id.* at 8-9 (noting the questions were specific to "this setting" of an in-court criminal judicial proceeding). Here, although public streets have been traditionally open to the public, the specific context is public property that has been lawfully closed to the public for the execution of law enforcement functions, including protecting against the destruction of federal property and making lawful

arrests. There is no tradition of public access to a closed forum under such circumstances—and mandating public access under such circumstances would impede achieving the important public goals of protecting public property and the safety of law enforcement personnel. *Cf. Perry v. Los Angeles Police Dep't*, 121 F.3d 1365, 1369 (9th Cir. 1997) ("A government interest in protecting the safety and convenience of persons using a public forum is a valid government objective."). The press may have the rights of access of the general public, but they have no special rights of access to closed fora. *See California First Amendment Coal. v. Calderon*, 150 F.3d 976, 981 (9th Cir. 1998) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) ("[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.")).

Even assuming, however, that the *Press-Enterprise II* standard applies, it establishes only a qualified right of access that may be overcome where "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press Enterprise II*, 478 U.S. at 9. As an initial matter, it is not at all clear that Plaintiffs have even been denied sufficient "access." Although they argue that they have no "alternative observation opportunities," Pls.' Mot. at 13, they have not provided any argument that the vantage points they have had, much less the ones they would have in the future absent the injunction, would be insufficient. No Plaintiff asserts that any press or legal observer was unable to observe any activities merely because of the dispersal order. And there are no allegations that federal agents advanced, in an attempt to disperse rioters, more than a few blocks away from federal property. Thus, it is not at all clear why reporters and observers could not see sufficiently even if moved by an order to disperse, except for the use of crowd control munitions that could still be used under the proposed injunction. *See* Pls'. Mot. at 3 (no liability "if a Journalist or Legal Observer is incidentally

exposed to crowd-control devices after remaining in the area where such devices were deployed").

Moreover, even if Plaintiffs could demonstrate that they have been denied sufficient "access" to a "particular proceeding," *United States v. Doe*, 870 F.3d 991, 997 (9th Cir. 2017), they would fail the balancing test of *Press Enterprise II*. Preserving order, life, and property are important values that may be preserved consistent with the First Amendment. Police thus may, for example, impose restrictions to "contain or disperse demonstrations that have become violent or obstructive." *Washington Mobilization Committee v. Cullinane,* 566 F.2d 107, 119 (D.C. Cir. 1977) (stating that it is "axiomatic" that "the police may, in conformance with the First Amendment, impose reasonable restraints upon demonstrations to assure that they be peaceful and not obstructive"); *see also Madsen v Women's Health Center,* 512 U.S 753, 768 (1994) (finding the government "has a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks.").

Requiring journalists and legal observers to disperse along with protesters and rioters is also narrowly tailored because allowing them to remain is not a practicable option. There is no dispute that protesters who do not disperse after a lawful order is given may be arrested. Having an unspecified number of people who lawfully may remain, however, will not only greatly complicate efforts to clear an area and restore order, it will also present a clear risk to safety. Under the proposed injunction, there is no consistent scheme for quickly identifying individuals authorized to be present. Plaintiffs propose a list of "indicia" that "are not exclusive," which may be as small as a press pass displayed somewhere on their body and as vague as "visual identification" or "distinctive clothing" indicating that they are press. Pls.' Mot. at 2-3. Additionally, the proposed injunction suggests that some of these, such as press passes, are only

valid if "professional or authorized," while other items, such as a shirt that simply says "press" somewhere, may be sufficient. Pls.' Mot. at 3. Similarly, identifying "legal observers" by the color of their hats when they are comingled in a large crowd at night with many others wearing face and head coverings is impractical. Searching each person who does not disperse for such indicia will be difficult, if not impossible, under the conditions causing an order to disperse to be given (*e.g.*, lasers, projectiles, and pyrotechnic mortars being used against federal officers), and such a search will also distract federal officers from protecting themselves against those same conditions. It would be even more impracticable to verify which of those remaining actually has "professional or authorized" credentials. Yet the risk of not verifying such individuals is grave—protesters have already attempted to interfere with arrests by federal officers, including by assaulting them, and federal officers cannot simply turn their backs to people who have "press" written somewhere on them. Leaving press and legal observers in place would present security risks to all and would severely distract from the critical mission of restoring order and protecting life and property. Accordingly, even under the inappropriate, stringent standard that Plaintiffs invoke, they are unlikely to succeed on any claim to have a right to remain in place.

B. The Legally Improper Injunction Plaintiffs Seek is Overbroad and Unworkable.

There is no basis for the Court to grant Plaintiffs' request for an overbroad and unworkable injunction that would micromanage the manner in which federal law enforcement officers respond to dynamic and chaotic situations involving violent protesters seeking to damage federal property and harm federal officers. "It is not for this Court to impose its preferred police practices on either federal law enforcement officials or their state counterparts." *United States v. Patane*, 542 U.S. 630, 642 (2004). Yet that is precisely what Plaintiffs' requested injunction would do here. The federal officers protecting federal property in Portland

are doing so under difficult circumstances and must make "split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 397. Those judgments should not be encumbered by the potential threat of contempt of court from a vague, overbroad, and—at bottom—legally improper injunction. Indeed, Plaintiffs identify no other case in which federal or state officers responding to large-scale, ongoing incidents by violent opportunists have been enjoined in the manner Plaintiffs propose here.

It is a basic principle of Article III that "a plaintiff's remedy must be limited to the inadequacy that produced his injury in fact." *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) (quotation omitted). "An injunction must be narrowly tailored to remedy the specific harm shown." *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019) (internal quotations omitted); *see Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir.1991). It "should be no more burdensome to the defendant than necessary to provide complete relief." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

Plaintiffs' proposed injunction is legally improper in several respects. The injunction would exempt "Journalists" and "Legal Observers" from the requirements of following a lawful order to disperse, but Plaintiffs provide no authority that members of the press or legal observers are somehow immune from such a lawful order.[5] The First Amendment allows the police to impose reasonable restrictions upon demonstrations, including the right to "contain or disperse demonstrations that have become violent or obstructive." *Cullinane,* 566 F.2d at 119 (stating that it is "axiomatic" that "the police may, in conformance with the First Amendment, impose reasonable restraints upon demonstrations to assure that they be peaceful and not obstructive");

[5] Plaintiffs' proposed injunction provides that "such persons shall not be required to disperse following the issuance of an order to disperse, and such persons shall not be subject to arrest for not dispersing following the issuance of an order to disperse." *See* Pls.' Mot. at 1.

see Feiner v. New York, 340 U.S. 315, 320 (1951) ("This Court respects, as it must, the interest of the community in maintaining peace and order on its streets."); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) ("When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious."). Members of the press and legal observers who choose to observe the violent activities of nearby protesters are not exempt from a lawful command to disperse. *Cf. Branzburg v. Hayes*, 408 U.S. 665, 684–85 (1972) ("Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded"); *id.* at 684 ("the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.").

The injunction would also prohibit law enforcement personnel from seizing any photographs or recordings from journalists or legal observers for any reason, even if probable cause exists to arrest them. *See* Pls.' Mot. at 1. Further, the injunction would require that any such property be returned immediately upon release from custody, regardless of whether the individual has been charged with a crime. Plaintiffs cite no legal authority for such a provision and their motion does not even allege that federal officers have arrested any journalists, media members, or legal observers, let alone seized any equipment from them.

Additionally, Plaintiffs request that the Court enjoin federal officers from arresting or using physical force against a journalist or legal observer, unless probable cause exists to believe that such individual has committed a crime. *See* Pls.' Mot. at 1. But that proposed remedy is the type of vague, "follow the law" injunction that is disfavored because it does not comply with Rule 65(d)'s specificity requirement. *See Cuviello v. City of Oakland*, 2009 WL 734676, at *3 (N.D. Cal. Mar. 19, 2009) (holding unenforceable an injunction that "basically states that

Defendants are permitted to make only lawful arrests of Plaintiffs" and are "barred from interfering with Plaintiffs' free speech rights"). As numerous courts have recognized, "[i]njunctions that broadly order the enjoined party simply to obey the law . . . are generally impermissible." *NLRB v. USPS*, 486 F.3d 683, 691 (10th Cir. 2007); *see Burton v. City of Belle Glade*, 178 F.3d 1175, 1200-01 (11th Cir. 1999); *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 240-41 (2d Cir. 2001).

Such an injunction is particularly inappropriate and unmanageable in this case where law enforcement officers are responding to a dynamic situation involving a consistent barrage of violent activity targeted against federal property and officers. DHS, the Marshals Service, and their officers should not potentially be subject to charges of contempt for violating a vague injunction in these circumstances. As the Supreme Court has emphasized, courts must "take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing." *United States v. Sharpe*, 470 U.S. 675, 686 (1985).

III. PLAINTIFFS CANNOT DEMONSTRATE IRREPARABLE HARM

Plaintiffs argue that, because they have raised a First Amendment issue, they have necessarily demonstrated the likelihood of irreparable injury. But the Ninth Circuit has held that "no presumption of irreparable harm arises in a First Amendment retaliation claim." *Rendish v. City of Tacoma*, 123 F.3d 1216, 1226 (9th Cir. 1997). Regardless of the nature of the alleged injury, however, to be likely irreparable any harm must be likely to occur. Separate from any Article III standing concerns, where "there is no showing of any real or immediate threat that the plaintiff will be wronged again," there is no irreparable injury supporting equitable relief. *Lyons*, 461 U.S. at 111; *see Olagues v. Russoniello*, 770 F.2d 791, 797 (9th Cir. 1985). As shown

above, and for the same reasons that Plaintiffs lack standing to seek a an injunction in the first instance, Plaintiffs' future injuries are speculative and, therefore, also insufficient to demonstrate the likelihood of irreparable injury.

IV. BOTH THE BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST WEIGH AGAINST GRANTING AN INJUNCTION

Plaintiffs argue that there is a strong public interest in First Amendment principles generally, and a free press in particular. Both are true. But Plaintiffs have not established any violation of these First Amendment rights and, in any event, they fail to explain how the many countervailing public interests involved in the federal response to the Portland protests must be weighed. Those interests in fact outweigh other First Amendment equities.[6] Some of these interests are recognized in the merits of the First Amendment claims themselves, but there are many other interests weighing against the requested injunction.

Federal agents have deployed to protect various federal properties, including the Hatfield Federal Courthouse and the Edith Green Federal Building, in response to violent rioting. Rioters have vandalized and threatened to severely damage those buildings, and they have assaulted the responding federal officers. Plaintiffs all but concede that the government has "a valid interest in protecting public safety, preventing vandalism or looting, or protecting [federal officers]." Pls.' Mot. at 13. All of these public interests are substantial and can outweigh First Amendment interests premised on access to public property. The government has a comprehensive interest in maintaining public order on public property. *Feiner v. New York*, 340 U.S. 315, 320 (1951) ("This Court respects, as it must, the interest of the community in maintaining peace and order on its streets."). There is an even more pointed public interest when disorder threatens the

[6] The balance of the equities and the public interest are analyzed together here because, when the government is a party, these last two factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

integrity of that public property. *See United States v. Griefen*, 200 F.3d 1256, 1260 (9th Cir. 2000) ("The clear purpose of the order . . . was for reasons of health and safety, and for the protection of property . . . . These are compelling reasons . . . and certainly represent significant government interests."). Congress has recognized such interests, including by making the destruction of federal property and the assault of federal officers felonies punishable by up to ten and twenty years of imprisonment respectively.. 18 U.S.C. §§ 111, 1361. Additionally, there is a fundamental First Amendment right of access to the courts, *see, e.g.*, *Ringgold-Lockhart v. Cty. of Los Angeles*, 761 F.3d 1057, 1061 (9th Cir. 2014), which is jeopardized by the breach and destruction of a federal court building; it is in the public interest to prevent the violation of *these* rights, too. Moreover, the federal government, just as any other property owner, has an interest in "preserv[ing] the property under its control for the use to which it is lawfully dedicated"; for government buildings, those uses are of course public uses that are in the public interest. *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679-680 (1992).

On balance, it is clearly in the public interest to allow federal officers, to disperse violent opportunists near courthouses and federal buildings when those events have turned and may continue to turn violent. *See, e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) ("[W]here demonstrations turn violent, they lose their protected quality as expression under the First Amendment"); *Griefen*, 200 F.3d at 1260 (upholding the relocation of protesters who "had already shown by their destructive conduct that they presented a clear and present danger to the safe completion of the construction project, both to other persons as well as to themselves"); *Bell v. Keating*, 697 F.3d 445, 457-58 (7th Cir. 2012) ("[O]therwise protected speech may be curtailed when an assembly stokes—or is threatened by—imminent physical or property damage.").

Plaintiffs have not contested that the federal government has both the right and the obligation to restore order and protect federal property—an obligation that is all the more critical with respect to a federal courthouse, which must remain operational to ensure the rights of litigants including the very parties to this suit. Instead, Plaintiffs have held up the general public interest in a free press. Pls.' Mot. at 16. Yet, as discussed in above, the courts have already thoroughly weighed the interest of public access to a free press and found it no greater than that of the public generally. *See, e.g.*, *Branzburg*, 408 U.S. at 684–85 ("Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded"); *Calderon*, 150 F.3d at 981.

Plaintiffs provide no rationale for why their equities are any greater or more deserving of protection than those of any member of the public exercising their First Amendment rights. And Plaintiffs make no argument at all why special protection of legal observers is even in the public interest, much less how their interests are to be distinguished from anyone else. Plaintiffs do argue that covering the police response in Portland is of unique public interest and importance. Pls.' Mot. at 16 ("It would be difficult to identify a situation in which the public has a greater interest in unbiased media coverage of police and Government conduct than this one."). It is not at all clear that it is appropriate for the Court to weigh the importance of press coverage of this protest compared to others—or how one should weigh the importance of protesting versus newsgathering—but if it were, it would also be necessary to weigh the unique danger present here of over 50 nights of protests that have routinely descended into violence and the destruction of federal property and harm to federal law enforcement officers, including the attempted destruction of the *interior* of the federal courthouse.

Additionally, the hardships the injunction would impose clearly weigh against granting it. As discussed above, Plaintiffs have failed to demonstrate that the injunction would tangibly benefit their newsgathering. By contrast, federal officers would be seriously distracted from defending themselves from attack and from restoring order and protecting property.

Accordingly, both the public interest and the balance of the equities weigh in favor of denying the injunction.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a Temporary Restraining Order and Preliminary Injunction should be denied.

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