

Case No. 20-35739

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INDEX NEWSPAPERS LLC, DBA PORTLAND MERCURY, et al.,
Plaintiff-Appellees,

v.

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

and

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

Appeal from the United States District Court
District of Oregon, Portland
Case No. 3:20-cv-0-1035-SI (Honorable Michael H. Simon)

**BRIEF OF *AMICI CURIAE* THE COMMITTEE TO
PROTECT JOURNALISTS, HUMAN RIGHTS WATCH AND
REPORTERS WITHOUT BORDERS IN SUPPORT OF
PLAINTIFFS-APPELLEES AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Committee to Protect Journalists, Human Rights Watch, and Reporters Without Borders state that they have no parent companies, subsidiaries, or affiliates, and that they do not issue shares to the public.

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STATEMENT OF *AMICI CURIAE* PER RULE 29(a)(3), (a)(4)(D)-(E)

Amici Curiae, the Committee to Protect Journalists, Human Rights Watch, and Reporters Without Borders, submit this brief in support of Appellees and urge affirmance.

Amici are non-profit organizations that work tirelessly to expose violations of freedom of expression and press freedom around the world, assist journalists, and advocate for governments to change policies that suppress freedom of expression and press freedom. *Amici* have an interest in Appellants' U.S. Department of Homeland Security and U.S. Marshals Service ("Federal Agents") challenge to the preliminary injunction entered by the district court. Suppression of the press, including violence against journalists, is on the rise globally, including in the United States. To uphold freedom of expression, Federal Agents should be held accountable for intimidating, beating, tear gassing, and shooting journalists and legal observers at the Portland protests. The Federal Agents' appeal seeks to eliminate safeguards against suppression of and attacks on the press. *Amici* have an interest in explaining how vacating the preliminary injunction would undermine the United States' commitment to freedom expression under international law with far-reaching consequences for freedom of expression and the free press worldwide.

The **Committee to Protect Journalists** ("CPJ") is an independent, nonprofit organization that promotes press freedom worldwide. CPJ defends the right of

journalists to report the news without fear of reprisal. CPJ is made up of about 40 experts around the world, with headquarters in New York City. CPJ's research staff documents hundreds of attacks on the press each year. CPJ denounces press freedom violations, meets with heads of state and high-ranking officials, advises on diplomatic efforts, and works to ensure that justice prevails when journalists are imprisoned or killed.

Human Rights Watch ("HRW") is an independent nongovernmental organization that has been dedicated to protecting human rights since 1978. HRW conducts research and advocacy on human rights in more than 90 countries worldwide. One focus of HRW's work is freedom of expression and access to information. From its earliest days, when it was called The Fund for Free Expression, HRW has fought all forms of repression of speech, in all media, around the globe.

Reporters Without Borders ("RSF") is an independent NGO, dedicated to defending media freedom across the world. Based in Paris, RSF has a network of correspondents in 130 countries, and 12 offices worldwide. RSF has consultative status with the United Nations, UNESCO, and the Council of Europe. RSF publishes information about media freedom worldwide, advocates for press freedom with governments, and takes direct action at the political and judicial levels to advance press freedom. RSF also compiles the World Press Freedom

Index every year, which evaluates the level of freedom available to the media in 180 countries.¹

I. SUMMARY OF ARGUMENT

Video footage of the brutal police killing of George Floyd ignited a national reckoning on race and the United States' fraught history of police violence against Black people. Millions across the country protested in support of Black lives, urging justice for George Floyd, Breonna Taylor, Atatiana Jefferson, Elijah McClain, Botham Jean, Philando Castile, Alton Sterling, Tamir Rice, Sandra Bland, and countless others. Federal Agents deployed to Portland attacked the journalists and legal observers reporting on the protests there—tear gassing them, beating them, and shooting them. 1ER 21-31. The district court issued a preliminary injunction to protect the safety of journalists and legal observers, the Appellees here, finding serious questions going to the merits of Appellees' claim that these attacks violated their First Amendment rights of freedom of speech and of the press. *Id.* 42-56. *Amici* respectfully request that the Court affirm the district court's preliminary injunction and deny Federal Agents' appeal for the reasons set

¹ This brief was not authored, in whole or in part, by any party's counsel. No party, counsel, or other person—other than *Amici* and their counsel—contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief. Fed. R. App. P. 29(a)(2).

forth herein, in the Court's October 9, 2020 Order, and in Appellees' brief filed on November 16, 2020 (Dkt. 44).²

The United States enshrined the freedom of expression and freedom of the press in the First Amendment of its Constitution and has repeatedly asserted its commitment to guarding these freedoms under international law and throughout the world. As *Amici* have documented, violence against the press is on the rise, including in the United States. It is crucial that the United States hold accountable those within its own ranks who infringe these fundamental rights.

Amici have seen through their organizations' work that the freedoms of expression and of the press are essential to exposing and holding a government to account for violations of human rights. Indeed, in the context of a democratic society, failure to zealously guard these freedoms erodes the very foundations of democracy. Affirmance of the district court's preliminary injunction is a necessary and appropriate measure to protect the journalists and observers reporting on the protests in Portland and to vindicate essential freedoms that are foundational to democracy, the United States Constitution, and international human rights law.

² On August 27, 2020, a divided panel of this Court granted an administrative stay of the district court's injunction. Dkt. 14. On October 9, 2020, after oral argument and consideration of the briefs submitted, a divided three judge panel denied the Federal Agents' emergency motion for a stay and lifted the administrative stay of the district court's preliminary injunction, pending this appeal. Dkt. 34 at 40.

II. ARGUMENT

A. THE PRESS AND LEGAL OBSERVERS ARE CRITICAL TO DOCUMENTING AND EXPOSING HUMAN RIGHTS VIOLATIONS

1. The racialized history of policing of Black Americans is recognized internationally to be an urgent human rights crisis.

A long, racialized history of police in the United States violating human rights was the genesis for the widespread Black Lives Matter protests. Intergovernmental and international human rights organizations have documented these on-going abuses and the violence against those who protest them. The United Nations' Working Group of Experts on People of African Descent concluded that in the United States “[c]ontemporary police killings and the trauma that they create are reminiscent of the past racial terror of lynching. Impunity for state violence has resulted in the current human rights crisis and must be addressed as a matter of urgency.”³ The Inter-American Commission on Human Rights (“IACHR”) also published a report highlighting that police use of excessive force, especially when rooted in discrimination, may amount to “cruel, inhuman, or degrading treatment or torture under certain circumstances,” and urged the United

³ Human Rights Council, *Report of the Working Group of Experts on People of African Descent on its Mission to the United States of America*, ¶ 68, U.N. Doc. A/HRC/33/61/Add.2 (Aug. 18, 2016), <https://digitallibrary.un.org/record/848570?ln=en>.

States to bring its policing practices into compliance with international standards.⁴

Relying on human rights organizations' and press documentation of protests condemning police conduct, the IACHR expressed its concern over police using force against those who protested police violence against Black people.⁵

The killing of George Floyd was the spark in the tinderbox, drawing millions to protests supporting Black lives and demanding justice for the lives lost to police violence. Yet even as millions protested police violence, there were frequent “incidents of unnecessary and excessive use of force by law enforcement agencies while policing Black Lives Matter protests.”⁶ In multiple incidents, law

⁴ Inter-American Commission on Human Rights, *Police Violence Against Afro-descendants in the United States*, Doc. 156, ¶ 312 (Nov. 26, 2018), <https://www.oas.org/en/iachr/reports/pdfs/PoliceUseOfForceAfrosUSA.pdf>. The Inter-American Commission on Human Rights (IACHR) is an autonomous organ of the Organization of American States (OAS) charged with promoting human rights throughout the region. The United States has signed but not ratified the American Convention on Human Rights, the primary regional human rights treaty, but the IACHR examines the human rights situation in the United States pursuant to the American Declaration of the Rights and Duties of Man of 1948, applying this instrument to all OAS member states.

⁵ *Id.* at ¶¶ 120-129.

⁶ Amnesty International, *USA: The World is Watching*, AI Index AMR 51/2807/2020 at 6 (2020), <https://www.amnesty.org/download/Documents/AMR5128072020ENGLISH.PDF>; Human Rights Watch, *US: New York Police Planned Assault on Bronx Protesters* (Sept. 30, 2020), <https://www.hrw.org/news/2020/09/30/us-new-york-police-planned-assault-bronx-protesters>.

enforcement officials targeted the journalists and legal observers who documented the abuses.⁷

2. The freedom of journalists and others to observe and report on human rights violations is guaranteed under international law.

The press and other observers play an indispensable role in exposing and documenting human rights violations. Essential to that role is the freedom of expression, which includes freedom of the press. Freedom of the press is enshrined in the First Amendment, in international treaties, and in long-established customary international norms.⁸

Freedom of expression has long been recognized across the global community as a foundational right. In the aftermath of World War II, the United Nations (“U.N.”) and its member countries sought to ensure that the horrific human rights violations of the recent past would never be repeated.⁹ The U.N.

⁷ See AI Index AMR 51/2807/2020, *supra*, n.6 at 42-53.

⁸ See *Siderman de Blake v. Republic of Argentina*, 965 F. 2d 699, 719 (9th Cir. 1992) (acknowledging the Universal Declaration of Human Rights “is a powerful and authoritative statement of the customary international law of human rights.”) (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 882–84 (2d Cir.1980)); *Sei Fujii v. State*, 38 Cal. 2d 718, 724 (1952) (“The humane and enlightened objective of the United Nations Charter are, of course, entitled to respectful consideration by the courts and Legislatures of every member nation...The charter represents a moral commitment of foremost importance and we must not permit the spirit of our pledge to be compromised or disparaged in either our domestic or foreign affairs.”).

⁹ United Nations Charter, Preamble (June 26, 1945), reprinted at <https://www.un.org/en/sections/un-charter/preamble/index.html>.

adopted the Universal Declaration of Human Rights—which the United States played a key role in drafting—“as a common standard of achievement for all peoples and all nations.”¹⁰ Article 19 of the Declaration affirms that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”¹¹ In 1966, the International Covenant on Civil and Political Rights (“ICCPR”)—ratified by the United States in 1992—further guaranteed the right to freedom of expression, imposing legal obligations on states to protect freedom of expression and information. Article 19, paragraph (2) of the ICCPR provides: “[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”¹²

¹⁰ G.A. Res. 217 (III)(A), Universal Declaration of Human Rights at 72 (Dec. 10, 1948); *see also* United Nations Charter, Preamble, *supra*, n.9.

¹¹ G.A. Res. 217 (III)(A), Universal Declaration of Human Rights at 74-75.

¹² International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR]. This provision also encompasses freedom of the press. *See* Human Rights Comm., *General Comment No. 34, Article 19: Freedoms of Opinion and Expression*, ¶ 13, U.N. Doc. CCPR/C/GC/34, <https://digitallibrary.un.org/record/715606?ln=en> (Sept. 12, 2011) [hereinafter *General Comment No. 34*] (“The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media
(continued...)”)

The U.N. has also recognized the importance of extending protections to legal observers.¹³ “All persons enjoy the right to observe, and by extension, monitor assemblies,” which includes “not only the act of observing an assembly, but also the active collection, verification and immediate use of information to address human rights problems.”¹⁴ Any non-participant, third-party observing and recording activities taking place at a public assembly qualifies as such a monitor, with ready examples including “[n]ational human rights institutions . . . and civil society organizations[.]”¹⁵ The press plays an important role in this monitoring work.¹⁶ And the government has an obligation to protect the rights of these observers, which “includes respecting and facilitating the right to observe and monitor all aspects of an assembly,” subject to the same narrowly defined restrictions that may apply to the exercise of free expression.¹⁷

able to comment on public issues without censorship or restraint and to inform public opinion.”) The Human Rights Committee is the UN body charged with making authoritative interpretations of the ICCPR.

¹³ G.A. Res. 53/144, Declaration on Human Rights Defenders (Mar. 8, 1999).

¹⁴ Human Rights Council, *Joint Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Proper Management of Assemblies*, ¶ 68, U.N. Doc. A/HRC/31/66 (Feb. 4, 2016), <https://digitallibrary.un.org/record/831673?ln=en> [hereinafter *Special Rapporteurs Joint Report*].

¹⁵ *Id.* at ¶ 69.

¹⁶ *Id.*

¹⁷ *Id.* at ¶ 70.

The United States' commitment to freedom of expression under international law is a reflection of its constitutional commitment to those same protections. The Supreme Court has long recognized that the freedoms expressly guaranteed by the First Amendment “share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980). Indeed, “[t]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.” *Id.* at 575-76. Notably, the Supreme Court has explained:

[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. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceeding of government . . . Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinion on the administration of government generally.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975).¹⁸

¹⁸ As noted by this Court in its October 9, 2020 Order, the right of the press to observe and record law enforcement activity in public is well established. Dkt. 34 at 17 n. 4.

3. International law requires that any restrictions on the right to freedom of expression be limited to only those necessary, provided for by law, and proportionate to a legitimate goal.

To fulfill the function of a free press, the press must *in fact be free to observe, document and report their observations*. International law provides that any restrictions on the press or observers “shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.”¹⁹ These same principles dictate the limited circumstances under which the government can restrict the right to peacefully assemble.²⁰ Any restrictions on free expression and assembly must be not only necessary, but also “the least intrusive among the measures that might serve the relevant protective function. Moreover, they must be proportionate[.]”²¹

But the protections available to those journalists and others who are observing an assembly—as opposed to participating in one—“apply irrespective of

¹⁹ ICCPR art. 19(3), *supra*, n.12.

²⁰ ICCPR art. 21, *supra*, n.12.

²¹ Human Rights Comm., *General Comment No. 37 (2020) on the Right of Peaceful Assembly (Article 21)*, ¶ 40, U.N. Doc. CCPR/C/GC/37 (Sept. 17, 2020), <https://digitallibrary.un.org/record/3884725?ln=en> [hereinafter *General Comment No. 37*]; *see also General Comment No. 34*, *supra*, n.12 ¶ 34.

whether an assembly is peaceful.”²² The U.N. Human Rights Committee explains the crucial importance of journalists and other observers:

The role of journalists, human rights defenders, election monitors and others involved in monitoring or reporting on assemblies is of particular importance for the full enjoyment of the right of peaceful assembly. Those persons are entitled to protection under the Covenant.²³

Because observation is so critical to ensuring the full enjoyment of the right of peaceful assembly, national human rights institutions and non-governmental organizations are encouraged to monitor assemblies.²⁴

Furthermore, the Committee provides clear instruction concerning the rights of observers monitoring assemblies:

They may not be prohibited from, or unduly limited in, exercising these functions, including with respect to monitoring the actions of law enforcement officials. They must not face reprisals or other harassment, and their equipment must not be confiscated or damaged. *Even if an assembly is declared unlawful or is dispersed, that does not terminate the right to monitor.* It is a good practice for independent national human rights institutions and non-governmental organizations to monitor assemblies.²⁵

²² *Special Rapporteurs Joint Report, supra*, n.14 ¶ 70.

²³ *General Comment No. 37, supra*, n.21 ¶ 30.

²⁴ *Id.*

²⁵ *Id.* (emphasis added).

The IAHCR has also described these standards, noting that governments “should formulate specific policies to prevent, investigate and punish” violence against the press in the context of protests because of the role observers play in monitoring government action.²⁶

Contrary to Federal Agents’ assertions, Appellees’ protections do not evaporate if a protest turns violent. AOB (Dkt. 35 at 12). The district court properly recognized this. The preliminary injunction vindicates Appellees’ First Amendment rights while striking the appropriate balance required by the First Amendment and well-established international norms. *See City of Houston v. Hill*, 482 U.S. 451, 472 (1987) (“[T]he First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive.”). The preliminary injunction creates specific policies to protect journalists and legal observers and prohibits Federal Agents from intentionally turning the power of the State against them. Dispersing journalists and legal observers is not necessary to any crowd control effort, as they do not participate in and stand removed from protest activity. Moreover, the violence with which

²⁶ Inter-American Commission on Human Rights, *Protest and Human Rights: Standards on the Rights Involved in Social Protest and the Obligations to Guide the Response of the State*, ¶ 293 (Sept. 2019), <http://www.oas.org/en/iachr/expression/publications/Protesta/ProtestHumanRights.pdf>.

Federal Agents accomplish these unnecessary dispersals is disproportionate in the extreme.²⁷

The record in this case is replete with evidence that Federal Agents repeatedly tear gassed, beat, and shot journalists and legal observers who clearly identified themselves and stood away from protest activity. *See, e.g.*, 2SER 410-411 ¶¶ 3-6 (federal agent shot tear gas cannister directly at photojournalist carrying professional gear and standing 40 feet away from protests); 2SER 370-373 ¶¶ 3, 4, 7-9, 11 (federal agents shot with less lethal munitions photojournalist carrying two large professional cameras then beat him with batons as he retreated while showing his press pass); 2SER 395 ¶¶ 3-4 (legal observer wearing identifiable marker shot with paint-marking round while walking his bicycle alone and across the street from protests). These representative examples further belie Federal Agents' bid to overturn the injunction on grounds that it is unrealistic to expect them to distinguish journalists and legal observers from violent protesters. AOB 21. Instead, these incidents are the basis—along with many others—from which the

²⁷ *Amici* agree with this Court and Appellees that Federal Agents have failed to demonstrate under *Press-Enterprise II* “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” Order (Dkt. 34 at 26) (quoting *Press-Ent. Co. v. Superior Court of Cal.*, 478 U.S. 1, 9 (1986)); Dkt. 44 at 4, 49-50, 55.

district court concluded there is substantial evidence that Federal Agents' violence against Appellees was intentional, targeted, and retaliatory. 1ER 21-31, 49-50.

The press and legal observers play an indispensable role in documenting and exposing human rights violations. Indeed, but for the journalists, observers and protesters documenting the violent actions of the Federal Agents in Portland, there would be no accountability for these abuses. Appellees' freedom to observe and report on protests and these abuses is guaranteed under not only the laws of the United States, but international law and norms to which the United States has long subscribed.

B. STATE VIOLENCE AGAINST THE PRESS AND LEGAL OBSERVERS ERODES THE FOUNDATIONS OF DEMOCRATIC GOVERNMENT

The freedoms of expression and of the press are critical to holding governments accountable to the public, rendering them foundational to a functioning democracy. The Supreme Court has lauded these First Amendment freedoms of speech and the press as the “matrix, the indispensable condition, of nearly every other form of freedom.” *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 145 (1967) (citation and quotations omitted). Without zealously guarding these rights, democracy loses its foothold. Accordingly, it is crucial that courts remain steadfast in their role as guardians of these freedoms.

“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.*

1ER 11.

It has long been established in international law that freedom of expression is foundational to other human rights and the very cornerstone of democracy itself. According to the U.N. Human Rights Committee, “[f]reedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society.”²⁸

The United States, in its own efforts to foster freedom of expression and democratic norms internationally, routinely condemns violence against peaceful protesters and journalists reporting on those protests around the world.²⁹ On

²⁸ *General Comment No. 34, supra*, n.12 ¶ 2; *see also id.* ¶ 4 (“freedoms of opinion and expression form a basis for the full enjoyment of a wide range of other human rights. For instance, freedom of expression is integral to the enjoyment of the rights to freedom of assembly and association, and the exercise of the right to vote.”); *see also id.* ¶¶ 11, 13.

Indeed, as early as 1946, the U.N. General Assembly recognized freedom of information, including the unfettered right to transfer and publish news, as “the touchstone of all freedoms.” G.A. Res. 59(I), at 95 (Dec. 14, 1946), <https://www.worldlii.org/int/other/UNGA/1946/87.pdf>.

²⁹ *See, e.g.*, White House Office of the Press Secretary, *Statement by the Press Secretary on Setbacks to Democracy in Cambodia* (Nov. 16, 2017), <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-setbacks->

(continued...)

August 10, 2020, Secretary of State Mike Pompeo issued a statement expressing his deep concern about the recent elections in Belarus, commenting that “[s]evere restrictions on ballot access for candidates, prohibition of local independent observers at polling stations, intimidation tactics employed against opposition candidates, and the detentions of peaceful protesters and journalists marred the process.”³⁰

Similarly, on May 17, 2020, Secretary Pompeo defended journalists in Hong Kong: “[i]t has recently come to my attention that the Chinese government has threatened to interfere with the work of American journalists in Hong Kong. These journalists are members of a free press, not propaganda cadres, and their valuable reporting informs Chinese citizens and the world.”^{31, 32}

[democracy-cambodia/](#) (“It is becoming increasingly evident to the world that the Cambodian government’s restrictions on civil society, suppression of the press, and banning of more than 100 opposition leaders from political activities have significantly set back Cambodia’s democratic development and placed its economic growth and international standing at risk.”).

³⁰ Press Statement, Michael R. Pompeo, Secretary of State, *Presidential Elections in Belarus* (Aug. 10, 2020), <https://www.state.gov/presidential-elections-in-belarus/>.

³¹ Press Statement, Michael R. Pompeo, Secretary of State, *American Journalists Based in Hong Kong* (May 17, 2020), <https://www.state.gov/american-journalists-based-in-hong-kong/>.

³² Many Plaintiffs in this litigation also covered Hong Kong protests. Photojournalist Justin Yau explains that “[e]ven Hong Kong police, however, were generally conscientious about differentiating between press and protesters—as opposed to police and federal agents in Portland.” 2SER 411 ¶ 7. In Portland, a
(continued...)

Given the importance of these freedoms to the health of democracy, the Ninth Circuit has set forth a high bar for protection of freedom of expression during protests:

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)

(emphasis added). Here, the district court relied on extensive evidence to conclude

federal agent targeted Mr. Yau and shot a tear gas cannister directly at him, striking him with burning fragments of the canister. *Id.* 410-411 ¶¶ 3-6. At the time he was shot, Mr. Yau was wearing a reflective vest and a helmet, each with the word “PRESS” in large block letters. *Id.* 409-410 ¶¶ 2-3. He was standing 40 feet away from protesters to make it clear he was not a participant. *Id.* 411 ¶ 5.

Jungho Kim, also a photojournalist who covered protests in Hong Kong, had never been shot by law enforcement before covering the Portland protests. 2SER 390 ¶ 3. He protects his safety by wearing a reflective vest and white helmet bearing the word “PRESS” in large letters and not participating in any protest activity. *Id.* ¶ 2-3. When crowds are dispersed, Mr. Kim stays away to the side. *Id.* ¶ 3. Federal Agents only 10 meters away from Mr. Kim shot him in the chest with a pink marker round. *Id.* 390-391 ¶¶ 5-7. When they shot him, Mr. Kim was not moving, and there were no protesters near him. *Id.* 391 ¶ 7. Mr. Kim also witnessed and photographed Federal Agents firing some sort of exploding munition into a crowd of press and observers from the National Lawyers Guild. *Id.* 393 ¶ 9.

that Federal Agents violently retaliated against journalists and legal observers and denied them access to public fora in violation of the First Amendment. Given the extensive evidence that Appellees were not participating in any protest activity (violent or otherwise) and their physical separation from the protest activity, Federal Agents' retaliatory conduct constituted precisely the prophylactic measure the First Amendment prohibits. Ensuring that the press and other observers can document government abuses and share them widely vindicates the public's right to receive critical information about their officials and to hold them accountable through the democratic process. This Court should not "rubber-stamp" the Federal Agents' request to vacate the preliminary injunction and allow the Federal Agents to blind the public to their conduct "simply because the government says it is necessary." *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012).

C. VIOLENCE AGAINST THE PRESS IS ON THE RISE, MAKING PROTECTION OF JOURNALISTS MORE CRITICAL THAN EVER

Violence against the press is rising around the globe,³³ jeopardizing the public's access to information about human rights abuses and eroding the

³³ UNESCO, *Intensified Attacks, New Defences: Developments in the Fight to Protect Journalists and End Impunity*, U.N. Doc. CI-2019-WTR-3, at 1 (2019), <https://unesdoc.unesco.org/ark:/48223/pf0000371343> (From 2014-2018, there was an "18% increase in the number of killings, as compared to the preceding five-year period (2009-2013)"); *see also id.* at 2 (In contrast to 2014 and 2015, "in 2017 and 2018 more killings occurred outside conflict regions. This trend reflects the changing nature of violence against journalists, who are increasingly silenced for reporting on issues of corruption, crime and politics.").

foundation of democratic government. Organizations such as *Amici* have worked for decades to protect freedom of expression around the globe through advocacy, data gathering, assistance programs, and reporting on press freedom violations. HRW, CPJ and RSF publish news releases, reports and commentary on freedom of the press, including recent news releases on the excessive use of force and detention of journalists in Belarus,³⁴ muzzling of journalists in Algeria and Morocco,³⁵ and attacks on journalists in Hong Kong.³⁶ CPJ releases annual reports

³⁴ Human Rights Watch, *Belarus: Crackdown on Political Activists, Journalists* (July 30, 2020), <https://www.hrw.org/news/2020/07/30/belarus-crackdown-political-activists-journalists> (“From May through mid-July, police detained people who gathered peacefully in a variety of settings and arrested and beat journalists covering these events.”); Committee to Protect Journalists, *Belarusian Police Continue Beating and Detaining Journalists* (Aug. 13, 2020), <https://cpj.org/2020/08/belarusian-police-continue-beating-and-detaining-journalists/> (“Belarusian authorities should stop the brutal treatment of journalists who have been reporting on post-election protests and allow them to work freely and safely[.]”).

³⁵ Human Rights Watch, *Muzzling Journalists: Morocco and Algeria Can Agree on That* (Aug. 5, 2020) <https://www.hrw.org/news/2020/08/05/muzzling-journalists-morocco-and-algeria-can-agree> (“Algeria’s constitution and Morocco’s 2016 press law trumpet that no press offenses shall result in prison, but both states have just thrown the book at prominent journalists despite the pretense of respect for press freedom.”).

³⁶ Committee to Protect Journalists, *Hong Kong Police Attack and Detain Journalists Covering Protests* (May 11, 2020), <https://cpj.org/2020/05/hong-kong-police-attack-and-detain-journalists-cov-1/> (“The police force’s failure to tolerate working journalists covering demonstrations only further erodes the city’s once-admired reputation for press freedom and the rule of law.”).

on the number of journalists murdered, imprisoned or missing around the world.³⁷

RSF compiles the World Press Freedom Index, which ranks 180 countries worldwide, based on “pluralism, media independence, media environment and self-censorship, legislative framework, transparency, and the quality of the infrastructure that supports the production of news and information.”³⁸

Even before the recent Black Lives Matter protests, CPJ research “show[ed] that press freedom is under attack around the world. The number of journalists imprisoned globally remains near record highs, and journalists are regularly harassed, and sometimes even murdered, simply for doing their jobs.”³⁹ In the context of protests, the U.N. Educational, Scientific and Cultural Organization (“UNESCO”) recently documented “a notable escalation of attacks against the press.”⁴⁰

³⁷ Committee to Protect Journalists, *Our Research*, <https://cpj.org/about/research/>.

³⁸ Reporters Without Borders, *2020 World Press Freedom Index: Methodology*, <https://rsf.org/en/detailed-methodology>; see also, Reporters Without Borders, *2020 World Press Freedom Index: Ranking*, <https://rsf.org/en/ranking#> (2020 World Press Freedom Index ranks the United States 45th out of 180 countries).

³⁹ Committee to Protect Journalists, *CPJ Calls on US Secretary of State Mike Pompeo to Support Press Freedom* (Jan. 29, 2020), <https://cpj.org/2020/01/cpj-calls-on-us-secretary-of-state-mike-pompeo-to/>.

⁴⁰ UNESCO, *Safety of Journalists Covering Protests: Preserving Freedom of the Press During Times of Turmoil*, U.N. Doc. CI-2020-WTR-3, at 2 (2020), <https://unesdoc.unesco.org/ark:/48223/pf0000374206?posInSet=1&queryId=13d0d>

(continued...)

The United States is not immune to these trends. Since the Black Lives Matter protests broke out on May 26, 2020, the U.S. Press Freedom Tracker has received reports of over 960 domestic violations of press freedom.⁴¹ UNESCO found that in the United States between May 26, 2020 and June 3, 2020—the days immediately following the killing of George Floyd—more than 82% of attacks on the press were committed by law enforcement agents.⁴²

But the administration of President Donald Trump celebrates this abusive policing and calls it “law and order.”⁴³ For example, law enforcement agents shot rubber bullets at an MSNBC correspondent reporting on the Minneapolis protests, and President Trump remarked that “[i]t was the most beautiful thing.”⁴⁴ He mocked the reporter, and his supporters laughed.⁴⁵ President Trump, describing another instance of violence against the press, explained that a law enforcement officer grabbed a reporter who identified himself as such and “threw him aside like

[81d-85f9-44ef-bd0e-550e5752a695](https://www.unesco.org/en/press-freedom-aggressions-during-black-lives-matter-protests) [hereinafter *UNESCO Brief*].

⁴¹ U.S. Press Freedom Tracker, *Press Freedom Aggressions During Black Lives Matter Protests* (2020), <https://pressfreedomtracker.us/> (U.S. Press Freedom Tracker brings together more than two dozen press freedom groups, including CPJ, to create a centralized repository for research).

⁴² *UNESCO Brief, supra*, n.40 at 9.

⁴³ Katie Robertson, *Trump Turns Attack on MSNBC Journalist Into Rally Fodder*, N.Y. Times (Sept. 23, 2020), <https://www.nytimes.com/2020/09/23/business/media/trump-ali-velshi.html>.

⁴⁴ *Id.*

⁴⁵ *Id.*

he was a little bag of popcorn.”⁴⁶ And again he concluded, to laughing supporters, that this type of violence is “actually a beautiful sight.”⁴⁷

The world is calling on the United States to protect freedom of expression, including press freedom.⁴⁸ In response to international outrage sparked by the killing of George Floyd, the U.N. Human Rights Council mandated a wide-ranging report on racial justice issues, including “the alleged use of excessive force against protesters, bystanders and journalists” in government responses to anti-racism protests.⁴⁹ At this pivotal moment in history, *Amici* respectfully urge this Court to uphold the United States’ legal and moral commitments to protect freedom of speech and the press under both the First Amendment and international law by affirming the preliminary injunction.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See, e.g., Committee to Protect Journalists, *International Groups Call on Trump to Speak Up for Press Freedom* (June 10, 2020), <https://cpj.org/2020/06/international-groups-call-on-trump-to-speak-up-for-press-freedom/> (“We call on you [President Trump] to send a clear and unambiguous message across the country and around the world about the importance of the press freedom and work of the press.”).

⁴⁹ U.N. News, *Human Rights Council Calls on Top U.N. Rights Official to Take Action on Racist Violence* (June 19, 2020), <https://news.un.org/en/story/2020/06/1066722>.

III. CONCLUSION

This Court should protect the rights of those bearing witness to the abuses of police in the United States. For the reasons above, *Amici* respectfully support the Appellees and urge affirmance of the preliminary injunction.

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