No. 20-35739

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants,

and

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

Defendants.

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

BRIEF OF AMICI CURIAE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 60 NEWS MEDIA ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-APPELLEES

[Caption continued on next page]

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The News Guild – CWA is an unincorporated association. It has no parent and issues no stock.

NYP Holdings, Inc. is a Delaware corporation, with its principal place of business in New York, and is the publisher of the New York Post. News Corporation, a publicly held company, is the parent of NYP Holdings, Inc. News Corporation has no parent company and no publicly held company owns more than 10 percent of its shares.

Online News Association is a not-for-profit organization. It has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

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

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

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

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

PEN American Center, Inc. has no parent or affiliate corporation.

No publicly held corporations own any stock in the Philadelphia Inquirer, PBC, or its parent company, the non-profit Lenfest Institute for Journalism, LLC.

POLITICO LLC's parent corporation is Capitol News Company. No publicly held corporation owns 10% or more of POLITICO LLC's stock.

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

Radio Television Digital News Association is a nonprofit organization that has no parent company and issues no stock.

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

Sinclair Broadcast Group, Inc. is a Maryland corporation which is publicly traded on NASDAQ under the symbol SBGI.

The Society of Environmental Journalists is a 501(c)(3) non-profit educational organization. It has no parent corporation and issues no stock.

Society of Professional Journalists is a non-stock corporation with no parent company.

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

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

Time USA, LLC is a privately held limited liability company. No publicly held corporation owns 10% or more of its stock.

The Tully Center for Free Speech is a subsidiary of Syracuse University.

Vox Media, LLC has no parent corporation. NBCUniversal Media, LLC, a publicly held corporation, owns at least 10% of Vox's stock.

WNET is a not-for-profit organization, supported by private and public funds, that has no parent company and issues no stock.

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press (the "Reporters Committee"), ALM Media, LLC, The Associated Press, The Atlantic Monthly Group LLC, BuzzFeed, California News Publishers Association, The Center for Investigative Reporting (d/b/a Reveal), Committee to Protect Journalists, Courthouse News Service, Cox Media Group, The Daily Beast Company LLC, Dow Jones & Company, Inc., The E.W. Scripps Company, Eugene Weekly, First Amendment Coalition, Forbes Media LLC, Freedom of the Press Foundation, Fundamedios Inc., Gales Creek Journal, Gannett Co., Inc., The Guardian U.S., Inter American Press Association, International Documentary Assn., Investigative Reporting Workshop at American University, KPTV-KPDX Broadcasting Corporation, Los Angeles Times Communications LLC, Malheur Enterprise, The McClatchy Company, LLC, The Media Institute, MediaNews Group Inc., MPA - The Association of Magazine Media, National Geographic Partners, LLC, National Journal Group LLC, National Newspaper Association, National Press Photographers Association, The New York Times Company, The News Leaders Association, News Media Alliance, News-Register Publishing Co., The NewsGuild - CWA, NYP Holdings, Inc., Online News Association, Oregon Association of Broadcasters, Oregon Newspaper Publishers Association, Oregon

Public Broadcasting, The Oregonian, PEN America, The Philadelphia Inquirer, POLITICO LLC, Portland Business Journal, Radio Television Digital News Association, Salem Reporter, Sinclair Broadcast Group, Inc., Society of Environmental Journalists, Society of Professional Journalists, Society of Professional Journalists, Oregon Territory Chapter, TEGNA Inc. / KGW-TV (Portland), TIME USA, LLC, Tully Center for Free Speech, Vox Media, LLC, and WNET (collectively, "amici").

As news entities and organizations representing the interests of journalists and media outlets actively engaged in newsgathering and reporting on the ongoing protests throughout the country, amici have a pressing interest in ensuring the news media's ability to safely and accurately report on what occurs during those demonstrations, including the manner in which law enforcement officers enforce dispersal orders. Accordingly, amici have a strong interest in the affirmance of the district court's preliminary injunction, an order that safeguards journalists from arrest and physical harm. Plaintiffs-Appellees and Defendants-Appellants have consented to the filing of this brief, and Defendant City of Portland does not object.

Amici write to explain why crowd-control tactics must be tailored to preserve the crucial role played by the news media in this context, where the public

interest in accurate information about the actions of the government and protestors is at its apex. Rigorous protection for the newsgathering rights of journalists covering protests is not only compelled by the First Amendment, it is essential if the press is to fulfill its constitutional obligation to ensure the government is accountable to the people.

For the reasons herein, amici respectfully urge the Court to affirm the preliminary injunction.

SOURCE OF AUTHORITY TO FILE

Counsel for Plaintiffs-Appellees and Defendants-Appellants have consented to the filing of this brief, and Defendant City of Portland does not object. *See* Fed. R. App. P. 29(a)(2).

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

Amici declare that:

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

INTRODUCTION

This case presents a question at the heart of the Constitution's protections for a free press: Whether the right to gather the news, including the right to record police activity in public, vanishes whenever law enforcement shouts "disperse." Notably, this year's protests against systemic racism and police brutality were sparked by an exercise of that right to record—a citizen's video of the killing of George Floyd. Over the months that followed, exercising their right to report on law enforcement activity in public, journalists have worked tirelessly to provide the public with an understanding of the protests, often capturing evidence that the initial official account of an event was incomplete. The question presented now is whether law enforcement officers may criminalize coverage of their activities by dispersing those reporters, journalists engaged in lawful newsgathering in public.

They may not. As this Circuit recognizes, and as the stay panel reiterated in this very case, "the proper response to potential and actual violence [at a protest] 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." *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 834 (9th Cir. 2020) (quoting *Collins v. Jordan*, 110 F.3d 1363, 1372 (9th Cir. 1996)). As a result, dispersal orders are of doubtful

constitutionality whenever applied to journalists who have not committed an unlawful act other than failure to disperse—and virtually *per se* unconstitutional when they operate as a complete ban on press coverage of policing in public.

To hold otherwise would make dispersal orders a profound First Amendment anomaly. It is a bedrock protection for the free press, free speech, and free assembly that individuals lawfully exercising those constitutional rights may not be punished for the unintended and uncoordinated violence of third parties. *See, e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 925 & n.69 (1982) (rejecting the theory that a protest organizer has a duty to "disassociate" himself from others' unlawful acts to avoid liability). In other words, in our system, "guilt by association" is "a thoroughly discredited doctrine." *Uphaus v. Wyman*, 360 U.S. 72, 79 (1959). But on Defendants-Appellants' view, dispersal orders validly give rise to guilt by assembly: journalists may be arrested, charged, and prosecuted for failure to disassociate from individuals that they were never associated with in the first place, individuals they do not know and cannot control.

The practical upshot of this position is that the press can be stopped from covering law enforcement officers' dispersal of a protest, while, as Plaintiffs-Appellees note, the government may deploy public affairs staff to tell its side of the story. And while press scrutiny of government activity is essential at all times, it is

especially important when the government is the target of criticism—times when it may "have great incentive to blindfold the watchful eyes of the Fourth Estate." *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012). Thankfully, the First Amendment does not permit the unfettered use of dispersal orders to interfere with lawful newsgathering. Just as "[t]he free press is the guardian of the public interest," so too is "the independent judiciary . . . the guardian of the free press." *Id.* In keeping with that role, this Court should reject Defendants-Appellants' dangerous theory; make clear that dispersal orders cannot be applied to those engaged in lawful reporting; and affirm the district court's preliminary injunction.

ARGUMENT

I. Crowd-control tactics must be narrowly tailored to accommodate First Amendment rights, including the right to report on policing in public.

Defendants-Appellants treat the central issue in this case as a light-switch: Law enforcement officers either do or do not have the power to issue dispersal orders in response to violence at a protest. *See* Defs.-Appellants' Br. 15–16; *id.* at 20 ("[T]his Court need not consider whether such orders are narrowly tailored."). That is not the law. Crowd-control tactics at a protest, like any other restriction on newsgathering in a public forum, must be tailored to accommodate the lawful exercise of First Amendment rights by the press. *Cf. Menotti v. City of Seattle*, 409

F.3d 1113, 1136 n.45 (9th Cir. 2005) (explaining that the degree of violence "is essential to assessing" whether a government response is "narrowly tailored").

As a result, whether crowd-control tactics shutter a forum entirely, *see Index Newspapers*, 977 F.3d at 830, or operate as time, place, and manner restrictions on its continued use, *see id.* at 849 n.8 (O'Scannlain, J., dissenting), law enforcement officers are not entitled to ignore the burden that their actions impose on lawful reporting. On either fact pattern, while the precise test may differ, the First Amendment always measures the fit between the government's asserted interest and the government's preferred means. *Compare Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 9 (1986) (holding that closure must be "essential to preserve higher values and . . . narrowly tailored to serve that interest" (quoting *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510 (1984)), *with Menotti*, 409 F.3d at 1130.[1]

[1] One unpublished order of this Court has suggested that the time, place, and manner framework is inapposite when reviewing "discretionary acts of the police." *Barney v. City of Eugene*, 20 F. App'x 683, 684 n.1 (9th Cir. 2001). But the Ninth Circuit does, in fact, require tailoring of such discretionary actions, *see Reed v. Lieurance*, 863 F.3d 1196, 1211–12 (9th Cir. 2017) (order to move), and courts in other circuits do the same, *see Zalaski v. City of Hartford*, 723 F.3d 382, 388 (2d Cir. 2013) (order to move); *Edrei v. City of New York*, 254 F. Supp. 3d 565, 578 (S.D.N.Y. 2017), *aff'd sub nom. Edrei v. Maguire*, 892 F.3d 525 (2d Cir. 2018) (use of less-lethal weapon). The Court should take this opportunity to clarify that *Barney* does not state the correct framework. *Cf. Wise v. City of Portland*, No. 3:20-cv-01193-IM, 2020 WL 5231486, at *7–8 (D. Or. Sept. 2, 2020) (citing *Barney* in reviewing Portland's use of less-lethal weapons against protest medics).

Dispersal orders are not an exception to that principle. *See Sabel v. Stynchcombe*, 746 F.2d 728, 731 (11th Cir. 1984) (reversing failure-to-disperse conviction as insufficiently tailored where law enforcement could have addressed risk of violence by enforcing generally applicable laws). If anything, such orders must run an especially demanding gauntlet of tests to pass constitutional muster.

For one, police may not act in the first place unless those assembled "are violent or . . . pose a clear and present danger of imminent violence . . . or they are violating some other law in the process." *Collins*, 110 F.3d at 1371 (internal quotation and citation omitted); *accord Jones v. Parmley*, 465 F.3d 46, 57 (2d Cir. 2006) (Sotomayor, J.). Yet even where some degree of violence has unlocked law enforcement's ability to respond, "[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct . . . that itself is not protected." *Claiborne Hardware*, 458 U.S. at 908. Instead, a police response must "target[] and eliminate[] no more than the exact source of the 'evil' it seeks to remedy." *Menotti*, 409 F.3d at 1130 (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)). To that end, an order to disperse must leave open "ample alternative channels" for newsgathering. *Reed*,

863 F.3d at 1211 (internal citation omitted).[2] Finally, when the crowd-control tactics applied are so drastic that they effectively ban—as opposed to burdening—an entire category of First Amendment activity, they amount to a closure. *See Index Newspapers*, 977 F.3d at 830.[3] As a result, dispersal orders come before a

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[2] Some courts and commentators have suggested that newsgathering is, under some circumstances, entitled to heightened protection relative to other First Amendment activities. *See Index Newspapers LLC v. City of Portland*, No. 3:20-cv-1035-SI, 2020 WL 4883017, at *2 n.1 (D. Or. Aug. 20, 2020) (citing Sonja R. West, *Favoring the Press*, 106 Calif. L. Rev. 91, 94 (2018)); *State v. Lashinsky*, 404 A.2d 1121, 1128 (N.J. 1979) (inquiry into validity of a police order must "tak[e] into account the special role performed by the press"). But as Plaintiffs-Appellees explain, the injunction at issue here does not rest on that distinction. *See* Pls.-Appellees' Br. 47–49. A government action must leave open alternative channels for *each* First Amendment activity affected. It hardly favors the press to say that law enforcement cannot defend a ban on reporting by insisting that it leaves open opportunities for protest.

[3] The stay-stage dissent was mistaken, then, to suggest that this Circuit has applied the right-of-access and time-place-and-manner frames inconsistently. *See Index Newspapers*, 977 F.3d at 844 n.5 (O'Scannlain, J., dissenting) (citing *Reed*, 863 F.3d at 1211). In protest-policing cases, the lenses will often compete: Law enforcement will point to facts suggesting that their tactics left open ample alternatives, such that they should both be considered time, place, and manner restrictions *and* found to be valid. Plaintiffs, meanwhile, will argue no such alternatives existed, such that the response was both a *de facto* closure and a presumptively invalid one. *Cf. Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 n.17 (1982) (distinguishing the scrutiny applied to closures from the standard for "limitations on the right of access that resemble 'time, place, and manner' restrictions on protected speech"). Ultimately, however, a dispersal authority that in operation permits law enforcement to halt lawful newsgathering and the recording of government activity in public will fail under both frames.

court with the scales tilted heavily against validity, particularly where, as here, they operate to shut down entirely reporting on matters of paramount public interest.

II. Dispersal orders are rarely adequately tailored as applied to individuals who have not committed an unlawful act other than failing to disperse.

The demands of narrow tailoring do not permit the application of a dispersal order to a journalist engaged in lawful newsgathering whose own conduct presents none of the risks the government would have the right to prevent. *Cf. Healy v. James*, 408 U.S. 169, 186 (1972) ("'[G]uilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government,' is an impermissible basis upon which to deny First Amendment rights." (quoting *United States v. Robel*, 389 U.S. 258, 265 (1967)). Otherwise, the elaborate body of constitutional doctrine that guards individuals against punishment for others' lawbreaking would be useless. Journalists would routinely confront the risk of prosecution for covering events that may become violent, and dispersal orders would offer an end-run around First Amendment first principles.

Journalists should be able to document tumultuous, unpredictable events without fear that others' violent, unlawful conduct will be imputed to them. Thankfully, in case after case, the Supreme Court has made clear that the Constitution prevents the government from restricting one person's rights because a stranger wants to break the law nearby. A demonstrator, for instance, may not be

held liable for violence she did not authorize or incite, *see Claiborne Hardware*, 458 U.S. at 927; members of an association with lawful aims may not be prosecuted for *un*lawful ones they lack the intent to further, *see Scales v. United States*, 367 U.S. 203, 222 (1961); and a speaker may not be charged the bill for a heckler's reaction, *see Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992).[4] These and similar rules distinguish *strictissimi juris*, "according to the strictest law," between a person's own First Amendment activities and any unlawful third-party conduct unfolding down the street. *Claiborne Hardware*, 458 U.S. at 919 (quoting *Noto v. United States*, 367 U.S. 290, 299 (1961)). The same principles apply with full force to reporters exercising the right to gather the news.

Were it otherwise, journalists could not safely report on civic unrest for fear that they would be subject to arrest or the use of force for being in the place they need to be to do their job. Fortunately, the rule protecting lawful bystanders has deep roots in our legal tradition; the common law of unlawful assembly reflects the same principles. Historically, "the true gravamen of the offense" of rioting was the

[4] While the idea of a 'heckler's veto' usually arises where a violent crowd disagrees with an assembly's message, all the same risks of suppressing First Amendment activity are present where law enforcement disperses a peaceful assembly because of violent sympathizers. *See Goldhamer v. Nagode*, 611 F. Supp. 2d 784, 788–94 (N.D. Ill. 2009), *rev'd on other grounds*, *Schirmer v. Nagode*, 621 F.3d 581 (7th Cir. 2010). Certainly the impact on reporters—who attend protests neither to support nor undermine them—is identical in each case.

fact that those assembled shared an unlawful intent, "for that is what made the entire group, rather than just the actual and direct perpetrators of the violent or tumultuous behavior, guilty of the offense." *Schlamp v. State*, 891 A.2d 327, 332 (Md. 2006). And "[w]ith few exceptions, the common law's rule that intentional presence at the scene of a riot is not a crime remains the law in the United States." Owen Healy, Comment, *Group Liability and Riot Acts: Can a Non-Opponent Wield a Heckler's Veto?*, 91 Temp. L. Rev. 107, 127 (2018). That rule is a critical safeguard for reporters who attend protests not to take sides but to capture the facts. And, again, this tradition reflects an insight about tailoring that should be common sense. Compared to the option of "suppress[ing] legitimate First Amendment conduct as a prophylactic measure," the Constitution requires a less intrusive alternative: "to ensure an adequate police presence . . . and to arrest those who actually engage in [unlawful or violent] conduct." *Collins*, 110 F.3d at 1372.[5]

[5] Early theories of dispersal liability were rooted squarely in the inadequacy of police resources: Bystanders were needed to grab ahold of the rioters. *See* John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. Rev. 2, 11 (2017); Francis Wharton, A Treatise on the Criminal Law of the United States 345 (8th ed., Phila. Kay & Brother 1880), https://perma.cc/XCS5-LWXS ("In riotous and tumultuous assemblies, all persons who are present and not actually assisting in their suppression may *prima facie* be inferred to be participants."). Such a theory is now plainly unconstitutional. *Claiborne Hardware*, 458 U.S. at 908. To the extent that approach ever reflected narrow tailoring, it is as anachronistic in a world of professional police as is criminalizing a constable's failure to arrest.

As applied to journalists engaged in lawful newsgathering, dispersal orders turn these principles on their head. They place on journalists an affirmative duty to disassociate themselves from an assembly they had not joined, where no such duty previously existed. *Contra Claiborne Hardware*, 458 U.S. at 925 n.69 (explaining that a duty to repudiate others' conduct "cannot arise unless, absent the repudiation, an individual could be found liable for those acts"). Often, they operate to criminalize First Amendment activities that—but for the bare fact of the order—could not have been criminalized by a preexisting statute. *Cf. Gregory v. City of Chicago*, 394 U.S. 111, 111–13 (1969) (concluding that violation of an order to disperse predicated on others' conduct could not constitutionally be punished as a breach of the peace, where failure to obey a lawful order had not been separately charged). And while the Supreme Court has never squarely resolved the First Amendment framework that governs dispersal orders *simpliciter*, *see* Frederick Schauer, *Free Speech Overrides*, U. Chi. Legal F. 16 n.77 (forthcoming 2020), https://perma.cc/T3D3-Y4MU, it has hardly suggested that such orders are always and "indisputably" constitutional, Defs.-Appellants' Br. 15.

On the contrary, the Court has, on one ground or another, routinely invalidated the misuse of law enforcement orders to suppress protected activities. *See, e.g.*, *Cox v. Louisiana*, 379 U.S. 536, 542–43 (1965) (anti-segregation

protest); *Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (same); *Gregory*, 394 U.S. at 111–12 (same); *Bachellar v. Maryland*, 397 U.S. 564, 566–67 (1970) (anti-war protest). It has consistently rejected constructions of failure-to-obey statutes that would provide "for government by the moment-to-moment opinions of a policeman on his beat." *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965) (quoting *Cox*, 379 U.S. at 579 (Black, J., concurring in part and dissenting in part)). And the Court has distinguished orders predicated on pure First Amendment activity from orders to cease conduct that could, itself, be sanctioned under a narrowly drawn statute. *See, e.g.*, *Bachellar*, 397 U.S. at 571 (hypothetical order to stop intentionally and completely obstructing sidewalk); *Colten v. Kentucky*, 407 U.S. 104, 108–10 (1972) (order to cease interference with traffic investigation where defendant had "no bona fide intent to exercise a constitutional right" and interference exposed police and bystanders to "the risk of accident").

Reading these cases in harmony with the Court's precedents on liability for third-party violence, the clear import is that an 'order' to disperse adds nothing to law enforcement's authority over a journalist whose underlying conduct could not constitutionally be punished. "Obviously," after all, "one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution." *Wright v. Georgia*, 373 U.S. 284, 291–92 (1963). At most,

dispersal is a lesser-included power where—and only where—authority to sanction already otherwise exists. *Cf. United States v. Stansell*, 847 F.2d 609, 614 (9th Cir. 1988) (construing the regulation requiring compliance with orders of the Federal Protective Service, in response to an overbreadth challenge, as "circumscribed by the circumstances encompassed within the *other* regulations" governing use of federal property (emphasis added)). Indeed, it may be a category error to think of announcing intent to disperse as a 'power' at all, as opposed to a procedural hurdle law enforcement *must* clear before taking actions that burden the exercise of First Amendment rights. *See Jones*, 465 F.3d at 60 (holding that failure to give notice of an impending police action can be an independent First Amendment violation).

This Circuit's law is not to the contrary. In fact, Defendants-Appellants' authorities on this point stand for the proposition just explained: Law enforcement may order a reporter to move if that reporter is already in violation of a valid restraint on her conduct. *See United States v. Christopher*, 700 F.2d 1253, 1255–56 (9th Cir. 1983) (order to cease violating regulation against presence on government property after hours); *Menotti*, 409 F.3d at 1150–51 (order to cease violating mayoral order restricting access to the WTO conference site). To be sure, the *Menotti* Court justified the Mayor's underlying exclusion order, in part, on the basis that "it was unrealistic to expect police to be able to distinguish . . . protestors

with benign intentions and those with violent intentions." *Menotti*, 409 F.3d at 1134. But that was a judgment of fact about Seattle in 1999, not a transubstantive statement of constitutional law—an application of narrow tailoring, not a repudiation of it. *Id.* Importantly, the plaintiffs in that case did not dispute that "[t]he impeding or 'buffer' effect of peaceful protestors" had prevented law enforcement from arresting those committing acts of violence. *Id.* at 1132 n.36. No one disputes that parties who could validly be arrested because their own intentional conduct poses an imminent risk to public safety, *see Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), may also, as an alternative, be asked to move.

But cases in which lawful reporting poses such a risk will be the very rare exception, not the rule. *Cf. Leigh*, 677 F.3d at 900 ("[A] court cannot rubber-stamp an access restriction simply because the government says it is necessary."). The way these arrests consistently play out in reality reflects that fact. While curfew violations and lawful-order charges were by far the most common offenses deployed against journalists this summer, such charges have a way of disappearing under scrutiny. *See* Meryl Kornfield et al., *Swept up by Police*, Wash. Post. (Oct. 23, 2020), https://perma.cc/W7LK-BJDJ; *Vodak v. City of Chicago*, 639 F.3d 738, 750 (7th Cir. 2011) ("Nothing is more common than for mass arrests in riots or demonstrations to net a sizable percentage of innocents."). In the meantime,

though, the harm to press freedom has already been done: A lawsuit cannot put reporters back on the scene if an unconstitutional order or arrest drives them away.

III. Dispersal orders are never adequately tailored if they leave open no other adequate means of reporting on the police response to a protest.

At the very bare minimum, as Plaintiffs-Appellees have explained, *see* Pls.-Appellees' Br. 57–59, dispersal orders cannot constitutionally be applied where doing so will prevent all reporting on the law enforcement response to a protest. To hold otherwise—to permit law enforcement to decide when it is a crime to report on their own activities and operations—would be an egregious violation of the principle that no one shall be a judge in his own case. *See Gregory*, 394 U.S. at 120 (Black, J., concurring) ("To let a policeman's command become equivalent to a criminal statute comes dangerously near making our government one of men rather than of laws."). The predictable result would be a systematic gap in the public's knowledge—obtained by way of the press—of protests and policing.

"[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." *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975). For just that reason, states and municipalities routinely exempt reporters from otherwise-applicable emergency regulations, including curfew orders, *see Reporters Committee Tracks Curfew*

Orders in Wake of Nationwide Protests, Reporters Comm. for Freedom of the Press (June 1, 2020), https://perma.cc/S6ZZ-G3HY; natural disaster restrictions, *see, e.g.*, Cal. Penal Code § 409.5(d); and, indeed, dispersal orders, *see, e.g.*, Ark. Code Ann. § 5-71-206. Without reporters on the scene, the public's understanding of a whole range of consequential government activities would be incomplete.

This year in particular, the press has played an exceptionally important role in documenting the police response to demonstrations against systemic racism and police brutality. Exercising their right to record, reporters have routinely brought accurate information about police activity to the public. In Los Angeles County, for instance, sheriff's deputies violently arrested KPCC reporter Josie Huang while she recorded their response to a nearby protest. *See Reporters Committee Letter Condemns Arrest of Journalist Josie Huang, Calls for LA County Sheriff's Department to Drop Obstruction Charge*, Reporters Comm. for Freedom of the Press (Sept. 16, 2020), https://perma.cc/8DAZ-S8MR. The Sheriff's Department cited Ms. Huang for obstruction, initially claiming that she did not comply with the deputies' instruction to give them space and did not identify herself as a member of the press. Video taken by other journalists at the scene, however, made clear that neither claim was true, *id.*, sparing Ms. Huang the baseless prosecution she might have faced if the deputies' initial account had been the only one publicly available.

This is neither a novel nor an isolated concern. The Kerner Commission, empaneled by President Johnson to study unrest in the 1960s, concluded that the government's control over information about the reality of the riots had contributed to a misleading public sense of the extent of violence. *See* Report of the Nat'l Advisory Comm'n on Civil Disorders 202 (1968), https://perma.cc/D3J2-SFGQ (noting that official estimates left "an indelible impression of damage up to more than 10 times greater than actually occurred"). In one incident, journalists able to reach a scene themselves realized that what police had characterized as "nests of snipers" were, in fact, "the constituted authorities shooting at each other." *Id.* at 205. Across the board, where reporters were forced to rely on "police and city officials [as] their main—and sometimes only—source of information," coverage was skewed in favor of those sources. *Id.* at 207. "But more first-hand reporting in the diffuse and fragmented riot area," the Commission concluded, could have "temper[ed] easy reliance on police information and announcements." *Id.*

Defendants-Appellants' position renews all these same, old risks. The Administration has, for instance, promoted images, videos, and other accounts of the events in Portland that it believes capture the facts on the ground more accurately than the press coverage. *See, e.g.*, Press Briefing by Press Secretary Kayleigh McEnany (July 24, 2020), https://perma.cc/FL6H-6QLD (sharing a video

during a White House press briefing because "I want it to be real what is happening right now in Portland" and charging that "some in the media continue to ignore reality"); Pls.-Appellees' Br. 58. Were law enforcement able to issue dispersal orders without reference to their effect on newsgathering, it would entrench that informational asymmetry—to the detriment of an informed public.

The Constitution condemns that result. Law enforcement tactics that operate as a flat ban on newsgathering in a public place, like any other state action "that foreclose[s] an entire medium of expression," will virtually always violate the First Amendment, whether or not such tactics discriminate on the basis of content or viewpoint and regardless of the interest the government claims in muzzling journalism. *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1064 (9th Cir. 2010). Otherwise, media could not workably play their role as "surrogates for the public" in holding up to the light the operations of government. *Leigh*, 677 F.3d at 900 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980)). This Court should affirm the injunction and ensure that the press can continue to play that role in Portland.

CONCLUSION

For the foregoing reasons, amici respectfully urge the Court to affirm the preliminary injunction.

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Respectfully submitted,

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