Case No. 20-35739

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INDEX NEWSPAPERS LLC, et al.,

Plaintiffs-Appellees,

v.

UNITED STATES MARSHALS SERVICE, et al.,

Defendants-Appellants.

On appeal from the United States District Court for the District of Oregon,
Case No. 3:20-cv-1035-SI, Hon. Michael H. Simon

APPELLEES' OPPOSITION TO MOTION FOR STAY

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Plaintiffs-Appellees Index Newspapers LLC, Doug Brown, Brian Conley, Mathieu Lewis-Rolland, Kat Mahoney, Sergio Olmos, John Rudoff, Alex Milan Tracy, Tuck Woodstock, and Justin Yau respectfully submit this opposition to Defendants-Appellants U.S. Department of Homeland Security's and U.S. Marshals Service's ("Appellants") motion to stay their own appeal.

INTRODUCTION

Based on established First Amendment principles, the district court issued a preliminary injunction preventing Appellants from assaulting and dispersing journalists and legal observers reporting on Black Lives Matter protests in Portland. In a 70-page published opinion, this Court denied the government's emergency motion to stay the injunction pending its appeal. *Index Newspapers v. U.S. Marshals Serv.*, 977 F.3d 817 (9th Cir. 2020). This Court held that "the Federal Defendants have not shown the general dispersal orders they issued were lawful, much less essential or narrowly tailored." *Id.* at 834 (citing *Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1, 9 (1986)).

After this Court issued its opinion, Appellants asked to take their fully-briefed appeal off-calendar to discuss settlement. But instead of settling, they have now moved the Court, without citing any legal authority,

to stay their appeal while they attempt to relitigate the injunction in district court. The appeal, however, is not a placeholder, and Appellants do not meet any of the requirements for staying their own case. Nor is this appeal moot.

Appellants admit that protests in Portland are still ongoing, that their officers are involved in these protests, and that their policy regarding dispersing journalists has not changed. This falls well short of proving that it is "impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (quotations omitted). This is especially true given that Appellants seek to preserve their ability to violently prevent journalists from reporting on what federal officers are doing to break up the protests. *See id*. ("since the union continues to defend the legality of the Political Fight–Back fee, it is not clear why the union would necessarily refrain from collecting similar fees in the future"). The only thing that really has changed is that this Court published a detailed and well-reasoned decision rejecting the government's arguments.

Appellants also take the self-contradictory position that "issues addressed in this appeal should not be decided on the basis of circumstances that have substantially changed since the preliminary

injunction was issued." (Mot. ¶ 6.) But if this is true, they should dismiss their appeal rather than bookmark it while they attempt a gambit in district court, and if that fails, turn around and argue that this Court really should decide its appeal on the existing record.

Having already litigated and briefed the issues, Appellants should not be allowed to avoid the merits of their own appeal. They should either dismiss their appeal and continue in district court, or proceed herein.

BACKGROUND

The district court enjoined Appellants from assaulting and dispersing journalists and legal observers reporting and observing the government's conduct at protests. The injunction prevented Appellants from forcing reporters to leave when the government was breaking up protests, which is the point in time when the free press is needed most, both as a check against government power and to provide an independent perspective on the government's account of events.

As this Court has found, the injunction is supported by "extensive and thorough factual findings" that Appellants were retaliating against journalists and legal observers and that Appellants' policy of dispelling the press when breaking up protests does not advance any government interest.

Index Newspapers LLC v. U.S. Marshals Service, 977 F.3d 817, 827, 833-34, 838 (9th Cir. 2020); (ER 20-31, 43-48, 53-55).

The injunction is grounded on basic First Amendment principles and the right of access set forth in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"), and *Leigh v. Salazar*, 677 F.3d 892 (9th Cir. 2012). Public streets, sidewalks and demonstrations have always been open to the public, and "the press has long been understood to play a vitally important role in holding the government accountable." *Index Newspapers*, 977 F.3d at 830-31. Because "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" (ER 51), Appellants' blanket dispersal policy is not narrowly tailored to achieve any government interest, much less an "overriding" one. *Index Newspapers*, 977 F.3d at 831, 834.

In their fully-briefed appeal, Appellants do not show that the district court's factual findings of retaliation and lack of tailoring are clear error. They argue that the district court improperly created a special right for journalists and legal observers. (AOB 2, 15-16.) But as this Court explained, "the district court did not grant a special exemption to the press;

it found that dispersing the press was not essential to protecting the government's interests." *Index Newspapers*, 977 F.3d at 831.

Appellants' arguments about the workability of the injunction and the supposed danger to law enforcement are also foreclosed by the findings and evidence below. This includes over 23 pages of findings by the district court, predicated on (i) over 35 unrefuted declarations and videos from journalists and legal observers, (ii) the unrebutted expert declaration of Gil Kerlikowske, the former Senate-approved Commissioner of Customs and Border Protection and former police chief of Seattle, who policed hundreds of chaotic protests without attacking or dispersing the media, and (iii) the fact that the Portland police had been safely and effectively operating under an identical injunction for over a year (as, now, have Appellants). (ER 33, 35-36, 52, 55.)

After this Court issued its published Opinion denying Appellants' motion to stay the district court's injunction pending appeal, and after the expedited appeal was fully briefed, Appellants asked to stay their own appeal pending settlement discussions. (Dkt. 73.) Thereafter, however, Appellants refused to settle the case and filed the instant motion.

As Appellants admit in their concurrently filed briefing in district court, during the pendency of this appeal, Appellants have continued to

engage with protesters, reporters, and legal observers. (*E.g.*, Dist. Ct. Dkt. 207 ¶ 7 (discussing purported incident in "March 2021," where "individuals wearing 'press' insignia got within an arm's length of the officers"); Dkt. 204 ¶ 9 (describing incident on March 11, 2021 where Federal Protective Service responded to protests).) In other incidents Appellants do not mention, federal agents arrested a protester on May 28, 2021,[1] shot a protester at point blank range on May 29, 2021,[2] and came out the ICE Building on June 4, 2021, to pepper spray an individual recording their activities.[3]

ARGUMENT

Appellants do not explain what legal standard applies to their motion. Where a party seeks the extreme measure of staying its own appeal, it should have to satisfy all the equitable factors for a stay, *i.e.*, it must make a "strong showing that [it] is likely to succeed on the merits," that irreparable injury is likely to occur," that "issuance of the stay will [not] substantially injure the other parties interested in the proceeding," and that the public interest favors granting a stay. *Nken v. Holder*, 556 U.S. 418,

[1] https://twitter.com/Claudio_Report/status/1398491206112317441.

[2] https://twitter.com/cozca503/status/1398589584808628232.

[3] https://twitter.com/cozca503/status/1400893293202866179.

433-35 (2009). Appellants do not come close to meeting that standard, or any other test, because their appeal lacks merit, they suffer no cognizable injury from litigating it, and it is a misuse of judicial resources to use this appeal as a put while they try to proceed in a different court.

I. APPELLANTS FAIL TO SHOW WHY THEIR APPEAL SHOULD BE STAYED

Appellants argue that supposed "changed circumstances" should lead to a different result than this Court reached in denying their motion to stay the injunction and that the case is moot. These arguments are incorrect, and to the extent they had any merit, the appropriate course would be to dismiss this appeal.

A. The Supposed Changed Circumstances Are Not Part of the Appellate Record and Do Not Provide a Basis for Appellants Seeking to Stay Their Own Appeal

Appellants' theory for staying their own appeal is their contention that "changed circumstances" exist. (Add. at 15.) But none of those supposed circumstances is in the appellate record, which remains the same as it has been since December 7, 2020, when this appeal became fully briefed. To the extent Appellants believe that changed circumstances render their appeal moot, they should dismiss their appeal. To the extent that Appellants contend that the supposed changed circumstances do not affect their fully-briefed appeal, there is no reason this appeal cannot proceed.

Indeed, Appellants take the position that if their efforts to obtain reconsideration in the district court fail, this Court could and should then reach the "merits" of their appeal. This position only underscores that there is no legitimate basis for staying the appeal, other than giving Appellants a second bite at the apple, which would actually be their third bite, given this Court's ruling denying their last stay motion.

B. The Appeal Is Not Moot

Appellants' underlying premise, which is more fully explained in their district court filing, is that this case is moot because protests in Portland are less frequent, and the federal presence has diminished. (Add. at 15.) Their papers, however, fall well short of meeting their heavy burden of proving that the conduct at issue could never recur. *Knox*, 567 U.S. at 307 (case only becomes moot where it "impossible for a court to grant any effectual relief whatever to the prevailing party").[4]

The key facts have not changed. Appellants have not changed their written policies regarding how they treat journalists and legal observers (Add. at 21 ["Federal Defendants have not claimed any change in a policy

[4] While it is inappropriate to argue the merits of Appellants' new briefing below on a motion, much of their arguments are plainly incorrect. For example, Appellants argue that the voluntary cessation standard does not apply to them. (Add. at 21.) But whether and how they police the protests that they admit are ongoing is entirely up to them.

or practice at issue in this lawsuit"]), contend that they can subject reporters and legal observers to general dispersal orders to prevent them from reporting and observing what the government is doing (*id*. at 28), assert that they can leave federal property if they want to (*id*. at 16 ["DHS retains its mandate to protect federal property and its occupants under 40 U.S.C. § 1315 and will continue to do so as threats arise"], *id*. at 28), and concede that protests are still ongoing and that they will continue to police them as they see fit. (*Id*. at 10 [noting DHS has used force at protests at least 20 times since November 1, 2020].) Nothing they have submitted shows that Appellants have identified the officers involved in the misconduct giving rise to the injunction, much less disciplined them.[5]

Appellants also suggest that with the change in administration, they should be trusted to do the right thing. (Add. at 18.) But that is not how

[5] The only legal authorities Appellants cite to support their argument are two district court decisions that dealt with entirely different circumstances. In *Western States Ctr. Inc. v. Department of Homeland Security*, Case No. 20-cv-1175, 2021 WL 1896965, *1 (May 11, 2021), the court stated that the recurrence of the government conduct was a result of "tweets" by the Executive, which were no longer occurring. In *Wise v. City of Portland*, Case No. 20-cv-1193-IM, 2021 WL 1950016 (D. Or. May 15, 2021), the court never issued any injunction, held that plaintiffs lacked standing, and found that "changes to written federal policy undermine any credible threat of future injury." *Id*. at *9. Here, this Court found that Plaintiffs have standing, and Appellants admit they have not made any policy changes.

constitutional rights work. The First Amendment guarantees Plaintiffs' right to report and observe government activities. That Appellants seek to preserve their ability to prevent the media from reporting on how law enforcement engages with protesters is further proof that the case is not moot. *Knox*, 567 U.S. at 307 ("since the union continues to defend the legality of the Political Fight–Back fee, it is not clear why the union would necessarily refrain from collecting similar fees in the future").

In sum, Appellants admit that protests have not ceased and that they will not do anything differently in policing them. They have not proven that the merits of Plaintiffs' First Amendment claims have in any way diminished, or that the balance of equities has changed.[6]

II. ALL OTHER EQUITABLE FACTORS MILITATE AGAINST A STAY

Appellants have not shown how a stay would be equitable or efficient in any way. Nor have they shown that the public interest is served by allowing Appellants to use this Court as an option in a hedge strategy while they attempt to make headway in a preferred forum. To the contrary, this Court granted Appellants expedited review given the importance of the

[6] Still absent from Appellants' filing is any account of any law enforcement officer, federal or municipal, being harmed as a result of the district court's injunction during the 15 months it has been in effect.

issues in this case, and the public will benefit from having this appeal resolved.

CONCLUSION

For the reasons above, Appellants' motion to stay their own appeal should be denied.

Dated: June 21, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this opposition complies with the requirements of Federal Rule of Appellate Procedure 27, Circuit Rule 27-1(1)(d), and Circuit Rule 32-3(2) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and it contains 2210 words according to the count of Microsoft Word.

Dated: June 21, 2021

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