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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

INDEX NEWSPAPERS LLC, a Washington limited-liability company, dba **PORTLAND MERCURY**; **DOUG BROWN**; **BRIAN CONLEY**; **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, a municipal corporation; **JOHN DOES 1-60**, officers of Portland Police Bureau and other agencies working in concert; and **JOHN DOES 60-200**, federal agents,

Defendants.

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

PLAINTIFFS' RESPONSE TO CITY OF PORTLAND'S MOTION TO DISMISS

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INTRODUCTION

Plaintiffs are journalists and legal observers who brought this § 1983 action to challenge the City of Portland's unlawful policy of dispersing them during protests. This policy violates the First Amendment because it unnecessarily denies Plaintiffs access to public proceedings at the time the Fourth Estate is needed most—and at the same time that police video crews remain to record the City's version of events.

The City analogizes itself to the federal agents that President Trump "surged" into Portland as part of "Operation Valor." After Operation Valor ended, the government withdrew the federal agents, the administration changed, and the Black Lives Matter protests of 2020 abated, the Court held that Plaintiffs' claims as to the federal agents were moot. But that is not the case for the City. Unlike the federal agents, the Portland Police Bureau remains in Portland and retains responsibility for policing the protests that occur. The City's leadership has not changed. Nor can the City alter its long history of attacking reporters and legal observers who are trying to cover protests, including many of the named Plaintiffs—who were assaulted by PPB when recording protests long before the police attacked them at the BLM protests in 2020. Moreover, unlike the DOJ's vague policy that simply requires law enforcement to abide by the First Amendment, the City follows an express written policy that requires police to disperse everyone, including reporters, once the police unilaterally decide that an assembly is "unlawful."

Plaintiffs' jobs require them to cover protests in Portland. Plaintiff Index Newspapers has been doing so for over two decades that have seen variegated protests, whose only commonality has been a violent police response that has resulted in federal injunctions, some of which are being enforced by this Court, and not all of which the City has obeyed.

Under such circumstances, the City has not met its heavy burden of proving that Plaintiffs' claims are moot, i.e., that there is no possibility that Court could issue any meaningful relief whatsoever, such as a declaration that the City's policy is unlawful. And even it could, this is a dispute capable of repetition, especially given the long history and future collision course between the parties. Accordingly, the City's motion to dismiss should be denied.

FACTUAL BACKGROUND

The facts of this case are stated in the Court's Injunction, reiterated the Ninth Circuit's Opinion affirming this Court's Injunction, *Index Newspapers LLC v. U.S. Marshals Serv*. ("*Index II*"), 977 F.3d 817 (9th Cir. 2020), and detailed in Plaintiffs' Third Amended Complaint (Dkt. 276). They are briefly summarized below.

A. The Events Giving Rise to this Litigation

This case began because the Portland Police Bureau was violently dispersing journalists and legal observers during the Black Lives Matter protests in the summer of 2020. Pursuant to the City's stated policy, unless reporters or legal observers embedded with the police, after PPB issued a dispersal order, PPB would indiscriminately and violently attack any journalists or legal observers who tried to remain at the protests to report on what the police were doing. (Dkt. 7 (6/30/20 Motion for TRO) at 1-2.) "[R]egarding interactions between the police and journalists," the City's policy stated, "unlawful [assembly] orders apply to everyone, without exception." (Declaration of Matthew Borden ("Borden Decl.") Ex. 1) Journalists who fail to "follow[] the lawful orders given by the sound truck, officers and social media" face "arrest or altercation." *Id.* The only other option was to "imbed" with PPB. *Id.* At the same time it was dispersing third-party media, PPB personnel recorded their own version of the events. (Declaration of Craig Dobson ¶¶ 47, 61, 62, 70, *Don't Shoot Portland v. City of Portland*, No. 3:20-cv-00917-HZ (July 6, 2020), Dkt 73.)

On July 2, 2020, this Court issued a Temporary Restraining Order enjoining PPB and other municipal and state law enforcement working with PPB from dispersing individuals marked as journalists and legal observers, who were recording and observing the protests, and obeying the law (other than dispersal orders). (Dkt. 33.)

A few days later, federal agents that had been "surged" into Portland began engaging in similar violent conduct toward the media. Plaintiffs amended their complaint, and the Court issued a similar TRO against the federal agents. (Dkt. 84.)

While the TRO was in effect, PPB continued to successfully police the protests without any danger to law enforcement. Accordingly, the City stipulated to a preliminary injunction. (Dkt. 48.) That injunction remains in effect. (Dkt. 183 ¶ 8.)

B. The City Has Not Changed the Policies Giving Rise to this Litigation

In its motion, the City outlines PPB's voluntary changes in protest-policing techniques, changes to Oregon law, and orders entered in other cases against the City, in an argument that the legal landscape has so thoroughly changed that relief in this case is no longer necessary. (Mot. at 12–20.) For the reasons set forth infra at Part II.A, none of those changes is material to whether Plaintiffs can reasonably expect to suffer injury at PPB's hands again. But what's telling in the City's litany of changes is the dog that didn't bark: Nowhere does the City claim that it has reversed its policy that once it declares an unlawful assembly, it will violently disperse journalists and legal observers along with everyone else.

ARGUMENT

I. THE DOCTRINE OF MOOTNESS

The City's recitation of the applicable legal standard (Mot. at 4–6) relies on cases that are no longer good law and does not fully explain the law regarding mootness. Under current Ninth Circuit law, once a plaintiff gets over the hurdle of Article III standing, their claims do not become moot simply because an injury may no longer be imminent. Rather, in cases like this one, where an injury may recur, it becomes the defendant's burden to prove that there is no possible relief that a court could issue.

A. Because Standing and Mootness Operate Differently, a Case Does Not Become Moot if the Injury Giving Rise to Standing May Recur

Standing is directed to whether a plaintiff has suffered an immediate injury, such that the dispute is adequately defined, and the parties are incentivized to litigate the claim. In contrast, the question at the center of "all mootness problems" is whether "changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief." *Meland v. Weber*, 2 F.4th 838, 849 (9th Cir. 2021) (quotation marks omitted); *West v. Sec'y of*

Dep't of Transp., 206 F.3d 920, 925 n.4 (9th Cir. 2000). If an injury is dealt and finished—"completely executed"—then it is "impossible for a court to grant any effectual [prospective] relief whatever to the prevailing party." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 61 (2016) (quotation marks omitted); *S. Pac. Terminal Co. v. Interstate Com. Comm'n*, 219 U.S. 498 (1911). If the only way for the plaintiff to obtain redress is in damages, the request for prospective relief is said to be moot. By the same token, if an injury is imminent or ongoing, a grant of injunctive relief can prevent harm or at least mitigate it. In such cases, the plaintiff's request for prospective relief is "very much alive." *Chafin v. Chafin*, 568 U.S. 165, 173 (2013)

Plaintiffs' claims lie between these two poles. They concern what the Ninth Circuit has called "recrudescent" injuries—injuries that were ongoing or certainly impending when the suit was filed, ceased during the litigation of the case, and may yet recur. *Arc of Washington State Inc. v. Braddock*, 129 F. App'x 348, 350 (9th Cir. 2005). Recrudescent injuries can be further subdivided into three types. Some are paused because of a change in the plaintiff's conduct. Such cases are rarely moot. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007). Others are paused because of a change in the defendant's conduct. Whether such cases are moot usually depends on whether the defendant changed its conduct voluntarily. *West Virginia v. E.P.A.*, 142 S. Ct. 2587, 2607 (2022). Still others are paused not due to any party's conduct but because of external factors. That describes Plaintiffs' claims here. *Index Newspapers LLC v. City of Portland* ("*Index IV*"), 2022 WL 4466881, at *6–7 & n.1 (D. Or. Sept. 26, 2022).

For such injuries, the differences between standing and mootness become critical. Before 2000, courts often reasoned that standing and mootness require "essentially the same" interests of litigants. (Mot. at 4 (quoting *Nelsen v. King Cty.*, 895 F.2d 1248, 1250 (9th Cir. 1990)).) In 2000, however, the Supreme Court decided a pair of cases that upended this view of mootness. It explained that sometimes, "the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing" at the outset of a case, but "not too speculative to overcome mootness" once litigation is underway. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000); *Adarand Constructors, Inc. v.*

Slater, 528 U.S. 216, 224 (2000) (per curiam). Since then, courts have recognized that "a careful analysis should distinguish the two doctrines." *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 733 (9th Cir. 2007). Thus, earlier cases on which the City relies heavily, like *Nelsen* (Mot. at 4), are of limited utility.

On the Ninth Circuit's present view, "sometimes a case may not be moot even if the plaintiff would not have standing to bring it today." *Planned Parenthood v. U.S. Dep't of Health & Hum. Servs.*, 946 F.3d 1100, 1109 (9th Cir. 2020). In other words, the penetrating search for an injury-in-fact found in cases like *City of Los Angeles v. Lyons* and *O'Shea v. Littleton*—an injury that is "real and immediate" and "not conjectural or hypothetical"—is an element of *standing*, not of mootness. *Compare, e.g.*, *Lyons*, 461 U.S. 95, 102 (1983) (quotation marks omitted); *O'Shea*, 414 U.S. 488, 494 (1974), *with Karuk Tribe v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012); *Lozano*, 504 F.3d at 733.[1]

B. Once A Case is Underway, the Focus Shifts from "Certainly Impending" Injury to "Meaningful Relief"

Once the plaintiff shows a "certainly impending" injury to begin a suit, Article III does not require that reinjury continue to be impending throughout the lifetime of the litigation. *Laidlaw*, 528 U.S. at 190 (quotation marks omitted). Instead, the focus shifts to whether the possibility of "meaningful relief" has for some reason been obviated. *See Meland*, 2 F.4th at 849 (quotation marks omitted). That is why the Supreme Court has stated repeatedly that "[a] case becomes moot . . . *only* when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Campbell-Ewald*, 577 U.S. at 161 (quoting *Knox v. Serv. Emps. Int'l Union*, 567 U.S. 298, 307 (2012)) (emphasis added); *Chafin*, 568 U.S. at 172 (same); *United States v. Washington*, 142 S. Ct. 1976, 1983 (2022) ("A case is not moot . . . unless it is

[1] Even in *Lyons*, the Court held that if Adolph Lyons had had standing initially, the City of Los Angeles's open-ended, temporary moratorium on chokeholds would not have mooted his claim for injunctive relief. *Laidlaw*, 528 U.S. at 190 (explaining the distinction); *Lyons*, 461 U.S. at 101 ("We agree with the City that the case is not moot, since the moratorium by its terms is not permanent. Intervening events have not 'irrevocably eradicated the effects of the alleged violation.'").

impossible for us to grant any effectual relief." (cleaned up)). That is also why the Ninth Circuit has emphasized that "courts must be careful to appraise the full range of remedial opportunities" before declaring a case moot. *West*, 206 F.3d at 925 n.4 (quoting 13A Federal Practice and Procedure § 3533.3 at 268 (1984)).

Different cases express the test for "meaningful relief" in different ways. Some ask whether the alleged violations can "reasonably be expected to recur." *Ruiz v. City of Santa Maria*, 160 F.3d 543, 549 (9th Cir. 1998) (per curiam) (quotation marks omitted). Others ask whether the plaintiff can "reasonably be expected to benefit" from injunctive relief. *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 864 (9th Cir. 2017). Still others ask: Does the plaintiff still have some "personal stake" in the outcome of the litigation? *Campbell-Ewald*, 577 U.S. at 160–61 (quotation marks omitted).[2] But however it is phrased, the test favors the plaintiff: Dismissing a case for mootness "is justified only when it is 'absolutely clear' that the litigant no longer has 'any need of the judicial protection that it sought.'" *Karuk Tribe*, 681 F.3d at 1017 (quoting *Adarand*, 528 U.S. at 224).

C. The Burden Also Shifts to the Defendant

The defendant has the burden of proving that it is absolutely clear that the plaintiffs no longer have any need of the judicial protection they sought. *Id.* In cases involving other justiciability doctrines, courts sometimes have asserted broadly that the plaintiff bears the burden of establishing the existence of subject-matter jurisdiction in motions under Federal Rule of Civil

[2] This "personal stake" locution, sometimes cast as a "legally cognizable interest," is mootness's counterpart to standing's injury requirement. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980); *Clark v. City of Lakewood*, 259 F.3d 996, 1011 n.7 (9th Cir. 2001). In an earlier phase of this litigation, this Court drew a distinction between whether effective relief is possible and whether a party continues to have enough of a personal stake or "injury." *Index III*, 2022 WL 4466881, at *6 & n.1. The Supreme Court has generally treated the two not as separate requirements but as different formulations of a single requirement. *See* n.2, *supra*. Thus, an "effectual" remedy is one that "redresses [the plaintiff's] injury." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021). But even if the Court is inclined to view injury as a separate requirement, the key point is that it is a significantly more "flexible" requirement in the mootness context—and the City has the burden to show its nonexistence. *Karuk Tribe*, 681 F.3d at 1017.

Procedure 12(b)(1). (Mot. at 6.) For questions of standing and ripeness, that's true. *See Lozano*, 504 F.3d at 733; *Meland*, 2 F.4th at 849. But when mootness is at issue, the Ninth Circuit and the Supreme Court have been clear: The defendant bears the burden of proof. *West Virginia*, 142 S. Ct. at 2607; *Lozano*, 504 F.3d at 733; *Meland*, 2 F.4th at 849. And it is a "heavy" burden. *Karuk Tribe*, 681 F.3d at 1017 (quotation marks omitted); *West*, 206 F.3d at 924. If the defendant fails to carry it, the court must fulfill its "virtually unflagging" obligation to hear and decide the case. *Meland*, 2 F.4th at 849 n.7 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014)).

II. PLAINTIFFS' CLAIMS FOR INJUNCTIVE RELIEF AGAINST THE CITY ARE NOT MOOT

As detailed above, if a plaintiff's injury can "reasonably be expected to recur," or if a plaintiff can "reasonably . . . expect[] to benefit" from injunctive relief—even if those expectations are somewhat "speculative"—the case is not moot. *Ruiz*, 160 F.3d at 549; *Bayer*, 861 F.3d at 864–65; *cf. Laidlaw*, 528 U.S. at 190. A few examples will help illustrate the line between reasonable and unreasonable expectations. In *Clark*, the defendant city argued that the expiration of the plaintiff's license to operate an adult cabaret mooted his challenge to its ordinance regulating such businesses. 259 F.3d at 1011. The Ninth Circuit disagreed because the plaintiff's "stated intention" was to return to business, and applying for a new license was "not an insurmountable barrier." *Id.* at 1012. By contrast, in *Southern California Painters & Allied Trades v. Rodin & Co.*, the agreement at the center of the dispute had not only expired but the defendant had gone out of business four years earlier. 558 F.3d 1028, 1035 (9th Cir. 2009). That was enough, the court held, to moot the dispute. *Id.*

In *Center for Biological Diversity v. Lohn*, the defendant agency had not only issued the final rule sought to be enjoined, but had in fact listed the Southern Resident killer whale as an endangered species, granting the plaintiff's "ultimate objective." 511 F.3d 960, 964 (9th Cir. 2007). So that claim was moot. *Id.* In *Lozano*, by contrast, the plaintiff's request for an injunction against AT&T's "out-of-cycle billing" practice was not moot, even though AT&T had refunded

Lozano the charges he incurred due to the practice. 504 F.3d at 723, 733. The Ninth Circuit held that Lozano faced a "realistic threat" that AT&T would "continue to charge him for out-of-cycle calls," *id.* at 733, even though, for that to occur, (1) Lozano would have to "roam" outside his coverage area; (2) he would have to make a phone call through a third-party provider while there; (3) that provider would have to notify AT&T in a different month; and (4) AT&T would have to bill Lozano in a month when he was close to, but not over, his allotted minutes, so that the out-of-cycle billing would cause him to incur overage charges. *See id.* at 722–23. *Lozano* shows that the threat of a repeated injury can be quite "speculative" indeed and still be sufficient to "overcome mootness." *Cf. Laidlaw*, 528 U.S. at 190.

Plaintiffs recognize that the Court has held the claims against the Federal Defendants moot. But when it comes to the City, several crucial facts are different. Unlike the Federal Defendants, the City has a written policy of violently dispersing journalists and legal observers. The Portland Police Bureau has a long history—much longer than the 2020 protests—of following that policy. And there has been no change in administration to ameliorate these qualities. Together, these facts show that Plaintiffs can reasonably expect to benefit from injunctive relief against the City.

A. The City Has a Written Policy of Violently Dispersing Journalists and Legal Observers

Unlike the Federal Defendants, PPB has a written, public policy, never rescinded, of violently dispersing journalists and legal observers along with the public. (Borden Decl. Ex. 1 (containing PPB's policy on dispersing journalists and observers and emphasizing that "unlawful [assembly] orders apply to everyone, without exception").) The City argues that it has "materially changed its crowd-management practices." (Mot. at 17.) But on inspection, *none* of the changes addresses this written policy. Instead, they address what devices police may use to disperse crowds; what tactics police will use before dispersing a crowd; training on unspecified "legal issues related to protest responses"; revisions to use-of-force reporting; hiring an outside

entity to perform a "critical assessment"; hiring a "civilian" to direct training;[3] performing an investigation into which commanders authorized force forbidden by the Bureau's internal directives; and implementing the use of body-worn cameras. (Mot. at 17–19.) None of these measures repeals or even addresses PPB's policy that "unlawful [assembly] orders apply to everyone," including journalists, on pain of "arrest or altercation."

The City also points out that state law has changed. (Mot. 12–16.) But these changes too do not override PPB's policy. The legislature changed trivial, irrelevant details in the definition of a riot (Mot. at 12 (citing 2021 Or. Laws, ch. 250)); removed refusal to obey a police order from the definition of interfering with a police officer (Mot. at 13 (citing 2021 Or. Laws, ch. 254)); passed a bill restricting the use of chemical incapacitants and rubber bullets for crowd control (Mot. at 13–14 (citing 2021 Or. Laws, ch. 540)); and then promptly watered those restrictions down (Mot. at 14–15 (citing 2022 Or. Laws, ch. 40)).

These legislative moves may contain some salutary changes. Specifically, refusing to obey a dispersal order is no longer a crime, ORS 162.247, and police appear no longer to be permitted to use "kinetic impact projectiles" indiscriminately for crowd control or to target them at someone who is not committing a crime. ORS 181A.708(4)(a),(5).[4] But these changes are not reflected in PPB's operating directives, which still permit the use of "special impact munitions" for crowd control. PPB Directive 0635.10(9.2);[5] *see also* PPB Directive 1015.00(3) (noting state-

[3] This supposed reform provides a window into PPB's good faith, vel non. The "civilian" who PPB chose was, in fact, a 20-year veteran of the Los Angeles Police Department who was still a sworn police officer when he was hired. Jamie Parfitt, *Portland rescinds job offer to police 'civilian dean of training' candidate*, KGW (July 20, 2022), https://www.kgw.com/article/news/local/portland-police-datro-dean-of-training-job-offer-dropped/283-aac2ab9b-aaad-40cc-9595-87de57776d35. (The offer was rescinded after public outcry.)

[4] Then again, see ORS 181A.708(5) (permitting the use of rubber bullets whenever justified under ORS 161.195 to 161.275); ORS 161.200(1)(a) (justifying conduct whenever "necessary as an emergency measure to avoid an imminent public or private injury").

[5] https://www.portlandoregon.gov/police/article/649358.

law restrictions only on impact munitions that carry "chemical payloads").[6] More importantly, nothing in these state-law changes prohibits officers from using the myriad other types of force at their disposal to disperse journalists and legal observers, including batons,[7] targeted canisters of tear gas,[8] flash-bang grenades,[9] pepper balls, paint marker rounds, and other physical violence, all of which they have used against journalists and legal observers. (*See, e.g.*, Dkt. 17 ¶¶ 4, 7 (pepper balls, truncheon); Dkt. 9 ¶ 7 (flash-bang grenade); Dkt. 12 ¶¶ 9, 11 (targeted canisters of tear gas); Dkt. 15 ¶¶ 6–7 (flash-bang grenade, truncheon); Dkt. 22 ¶¶ 9 (paint marker round); Dkt. 26 ¶¶ 9, 13 (truncheon); Dkt. 197 (various forms of physical violence, including dislocating Plaintiff Kat Mahoney's shoulder).[10])

In sum, PPB's voluntary changes in procedure do not affect its written policy of violently dispersing journalists and legal observers.[11] Nor, for the most part, do changes to state law. So PPB's written policy remains in effect. A showing that a plaintiff's injury "stems from" a defendant's "written policy" is sufficient to pass the rigorous test for standing to seek injunctive relief. *Nordstrom v. Ryan*, 762 F.3d 903, 911 (9th Cir. 2014) (quotation marks omitted). It follows that the same showing is sufficient to defeat a defendant's bid for mootness. *See, e.g.*, *Animal*

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[6] https://www.portlandoregon.gov/police/article/801102.

[7] *See* PPB Directive 1015.00(2).

[8] ORS 181A.708(3) (permitting the use of tear gas for crowd management with no restrictions on targeting); *see also* ORS 181A.708(1)(g) (describing tear gas as "administered by any shell, cartridge or bomb capable of being discharged or exploded").

[9] *See* PPB Directive 1015.00(6).

[10] *See also, e.g.*, https://twitter.com/TheHannahRay/status/1292697471991201793 (physically preventing a journalist from reporting on an arrest); https://twitter.com/MaranieRae/status/1293132003357859841 (throwing journalist Maranie Staab to the ground); https://twitter.com/IwriteOK/status/1293812356640735232 (slamming reporter Robert Evans into a stop sign).

[11] Even if the City were to change its policy or make some other voluntary change that called the policy's continuing effect into question, that would not make injunctive relief moot. *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015) (defendant has "heavy" burden of proving that voluntarily ceased conduct "cannot reasonably be expected to start up again" (quoting *Laidlaw*, 528 U.S. at 189)); *see also id.* at 1025 ("[A]n executive action that is not governed by any clear or codified procedures cannot moot a claim.").

Legal Def. Fund v. U.S. Dep't of Agric., 933 F.3d 1088, 1092 (9th Cir. 2019); *Sanchez v. Edgar*, 710 F.2d 1292, 1294 (7th Cir. 1983). The City's written policy alone is enough to deny its motion; the Court's analysis can end here.

B. The Portland Police Have a Long History of Attacking Journalists and Legal Observers

There are more reasons that Plaintiffs' claims against the City differ from Plaintiffs' claims against the Federal Defendants. The bulk of the federal agents' campaign in Portland lasted just under a month, from July 4 to July 29, 2020. FAC ¶ 203; *Index II*, 977 F.3d at 822. By November 15, the U.S. Marshals' Service was "no longer responding to protests," and by August 11, 2021, the Department of Homeland Security's presence in Portland had returned to a "steady state." *Index Newspapers LLC v. City of Portland* ("*Index III*"), 2022 WL 72124, at *4 (D. Or. Jan. 7, 2022).

The Portland Police Bureau, of course, has gone nowhere. When protests happen in Portland, it is PPB that polices them. This is the same PPB that celebrated "christen[ing] [protesters'] heads with hickory" long before 2020 and concealed the evidence of its malevolence long after 2020.[12] And PPB's history of attacking journalists at protests, too, goes back much farther than 2020:

- When Plaintiff Doug Brown covered protests in 2017 for the *Portland Mercury*, police beat him with a truncheon and shot at him with flash-bang grenades. (Dkt. 9 ¶ 5.)
- In 2018, Mr. Brown was again beaten by the police while covering a protest. (*Id.* ¶ 6.) This time, the police beat Donovan Farley, too. (*Id.*) Both were clearly displaying press passes or holding obviously professional cameras. (*Id.*[13]) Infamously, the police

[12] *See* Tess Riski, *Portland Police Included "Prayer of the Alt Knight" Meme in Protest Training Presentation*, Willamette Week (Jan. 14, 2022), https://www.wweek.com/news/2022/01/14/portland-police-include-prayer-of-the-alt-knight-meme-in-protest-training-presentation/.

[13] https://tinyurl.com/BrownBeaten18.

again brutalized Mr. Farley in 2020. (TAC ¶ 159(a).) They assaulted Mr. Brown again as well. (Dkt. 9 ¶¶ 10–26.)

- At the same protest in 2018, police hit KATU reporter Ric Peavyhouse with a rubber bullet and documentary filmmaker Michelle Fawcett with a flash-bang grenade. (Dkt. 9 ¶ 7.)
- The Portland police similarly attacked Plaintiff John Rudoff in 2015, 2016 or 2017, and 2018. (Declaration of John Rudoff in Opposition to Defendant City of Portland's Motion to Dismiss ("Rudoff Decl.") ¶¶ 3-5.)
- The Portland police shot and kettled ACLU observers in 2018, and repeatedly blocked access to legal observers in 2019. (Declaration of Kat Mahoney in Opposition to Defendant City of Portland's Motion to Dismiss ("Mahoney Decl.") ¶¶ 4-5.)
- After the Court issued its Injunction in this case, the Portland Police attacked and arrested Plaintiff Kat Mahoney (before releasing her uncharged), dislocating her shoulder and leaving her with permanent scars. (*Id*. ¶ 9.)

PPB also continued to attack journalists after the federal presence in Portland started winding down. Several salient examples from late 2020 can be found the parties' Stipulation in Lieu of Contempt Motion, including the brutal arrest of Plaintiff Mahoney. (Dkt. 197.) And as late as April 2021, notwithstanding the Court's Injunction, a PPB officer assaulted journalist Melissa Lewis.[14] According to PPB, that is very nearly the last time PPB declared an unlawful assembly, civil disturbance, or riot in connection with a protest. (Dkt. 280 ¶ 30.[15]) Put differently, when protests occur, PPB attacks the journalists who cover them.

[14] https://www.youtube.com/watch?v=HbkiJGwsZ2s.

[15] In fact, this is not quite right. PPB declared an unlawful assembly in July 2022. Zane Sparling, *Police declare 'unlawful assembly' in North Portland Friday after marchers break windows*, The Oregonian (July 2, 2022), https://www.oregonlive.com/portland/2022/07/police-declare-unlawful-assembly-in-north-portland-friday-after-marchers-break-windows.html.

C. No Change in Administration Has Changed the City's Approach to Protests

When the Court indicated that it would dissolve the preliminary injunction against the Federal Defendants, it noted that "the federal government's approach to protests . . . changed at the highest levels" when President Joe Biden took office in January 2021. *Index III*, 2022 WL 72124, at *4. An "intervening change in administration" can moot a case when the facts do not show that the successor will "continue the practices of his predecessor." *Mayor of City of Phil. v. Edu. Equal. League*, 415 U.S. 605, 622 (1974). But the City of Portland has seen no meaningful change in administration: Ted Wheeler is still mayor, Chuck Lovell still runs the Portland Police Bureau.[16] So this, too, differentiates Plaintiffs' claims against the City from Plaintiffs' claims against the Federal Defendants.

* * *

When this Court dismissed Plaintiffs' claims against the Federal Defendants, it explained that the "unique set of circumstances" that obtained when it granted that injunction—"sustained nightly protests"; a president who chose to "make an example" out of Portland; and "out-of-state federal officers" who "moved well beyond federal property" to disperse "protesters, journalists, and legal observers from City streets, sidewalks, and parks"—had abated. *Index IV*, 2022 WL 4466881, at *7–8.

But when it comes to the City, the behavior from which Plaintiffs seek judicial protection—which this Court enjoined prior to enjoining the Federal Defendants—is "endemic." *Arc of Washington*, 129 F. App'x at 350. When a protest next takes place, Plaintiffs have "stated [their] intention" to cover it, and "Portland Mercury will always send reporters to cover protests in Portland" given that "as an alternative paper that promotes free speech and progressive journalism, covering protests is foundational to [the] paper's mission." (Dkt. 221 ¶ 19; Dkt. 222 ¶¶ 9–10; Dkt. 224 ¶ 7; Mahoney Decl. ¶ 11; Rudoff Decl. ¶ 6; Declaration of Steven Humphrey in Opposition to Defendant City of Portland's Motion to Dismiss ¶ 4.); *cf. Clark*, 259 F.3d at

[16] *See* https://www.portland.gov/wheeler; https://www.portland.gov/police/chiefs-office/ppb-bios#toc-chief-chuck-lovell.

1012.[17] From there, for injury to recur, PPB need only (1) declare an unlawful assembly and (2) adhere to its written policy of violently dispersing journalists and legal observers along with the public. That is at least as likely as the four-event sequence in *Lozano*. 504 F.3d at 722–23.

When that happens, if the Court's preliminary injunction remains in place—or if the Court grants a permanent injunction after a trial on the merits—Plaintiffs will have some protection from PPB's unlawful written policy. If not, they will have to choose between abdicating their journalistic duties to the public and putting themselves in danger of "arrest or altercation." So Plaintiffs very much retain a "personal stake" in the outcome of the litigation. *Cf. Campbell-Ewald*, 577 U.S. at 160–61.[18]

To prove that Plaintiffs' claims are moot, the City must show that it is "absolutely clear" that Plaintiffs no longer "have any need of the judicial protection" that they sought. *Cf. Karuk Tribe*, 681 F.3d at 1017 (quotation marks omitted). In effect, the City would have to prove that police will never again declare an unlawful assembly in Portland. That it cannot do. The City refuses to agree that the police will not arrest, threaten to arrest, or use physical force against any person whom they know or reasonably should know is a journalist or legal observer, unless they have probable cause to believe that that person has committed a crime, and seeks to regain the ability to do so by filing this motion. Under such circumstances, it has not met its "heavy" burden to prove mootness. *Id.* (quotation marks omitted). Plaintiffs have a live claim for injunctive relief.

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[17] *See also Bayer*, 861 F.3d at 865 (explaining that because the plaintiff had not "declared his intent" to engage in acts that would trigger the defendant's "conduct alleged as the basis for his claim," such conduct could not "reasonably be expected to recur as to him").

[18] The Court's opinions in *Wise v. City of Portland* and *Western States Center, Inc. v. DHS* are not to the contrary. The *Wise* plaintiffs were ad hoc protest medics, 539 F. Supp. 3d 1132, 1137 (D. Or. 2021), and the *Western States* plaintiffs were protesting individuals and organizations, 2021 WL 1535376, at *1 (D. Or. Jan. 27, 2021). Such plaintiffs are differently situated from Portland-based newspapers and professional journalists, who must as a matter of institutional mission or as a condition of employment attend and report on protests. In addition, no written policy guarantees that the *Wise* and *Western States* plaintiffs will be subjected to violence by the City in the future.

III. PLAINTIFFS' CLAIMS ARE CAPABLE OF REPETITION YET EVADING REVIEW

Despite the "flexible character of the Art. III mootness doctrine," a claim may be recrudescent yet still seemingly moot. *See Geraghty*, 445 U.S. at 400. If such a claim is also of a sort that will regularly evade review, there is an exception to mootness. It has two elements: (1) the plaintiff must "reasonably expect to be subject to the same injury again" and (2) the injury must be of a type that, "in its regular course, resolves itself without allowing sufficient time for appellate review." *Planned Parenthood*, 946 F.3d at 1109–10; *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1173–74 (9th Cir. 2002). If a claim that satisfies those requirements, the "purpose of the 'personal stake' requirement" is met: "[V]igorous advocacy can be expected to continue" and "the case [will remain] in a form capable of judicial resolution." *Geraghty*, 445 U.S. at 398, 403. Moreover, deciding the question of law presented—and, recall, the stringent requirements of standing to present that question were necessarily met at the outset—"might serve to guide the municipal body when again called upon to act in the matter." *S. Pac.*, 219 U.S. at 516.

A. Plaintiffs Can Reasonably Expect to be Violently Dispersed by PPB Again

The first element of the repeatable-claims exception is similar to the ordinary test for whether a claim in a lull has become moot. *Compare Planned Parenthood*, 946 F.3d at 1109 (whether the plaintiff can "reasonably expect to be subject to the same injury again"), *with Bayer*, 861 F.3d at 865 (whether the injury can "reasonably be expected to recur as to [the plaintiff]"). So the reasons stated in Part II above also apply here to explain why Plaintiffs can reasonably expect to be subject to the same injury again at the hands of the City. Two more cases, however, show with particular salience that Plaintiffs satisfy the test as it is applied in this context.

First, in *Ward v. City of Portland*, two officers who fatally shot a member of the public complained that they were questioned without the benefit of legal counsel, in accordance with PPB's policy at the time. 857 F.2d 1373, 1374 (9th Cir. 1988). Because they had complied with the policy and had not been punished for their conduct, the district court concluded that their

request for injunctive relief was moot. *Id.* at 1375. The Ninth Circuit reversed. It held that the officers' claim was not moot because

(1) it was "quite predictable that there will be instances of fatal shootings in the future";

(2) it was also "quite predictable" that "after such incidents occur, officers will want to consult with [counsel] before submitting reports";

(3) the City had "a policy of not allowing officers to consult counsel in such situations"; and

(4) "there is no indication that the City will discontinue its policy."

Id. at 1377. That reasoning applies almost verbatim here:

(1) it is "quite predictable that there will be [protests] in the future";

(2) it is also "quite predictable" that when "such incidents occur, [journalists will want to report on them without being dispersed]"—in fact, it is certain, because Plaintiffs have so declared (Humphrey Decl. ¶ 4; Mahoney Decl. ¶ 11; Rudoff Decl. ¶ 6);

(3) the City has "a policy of [violently dispersing journalists] in such situations"; and

(4) "there is no indication that the City will discontinue its policy."

See id. It is *at least* as "predictable" that there will be protests as that there will be "instances of fatal shootings" by the police. *See id.* Indeed, there is a causal relationship between the one and the other. On basis of that predictability, the Ninth Circuit concluded that "this case presents us with a justiciable controversy." *Id.* So, too, here.

A second case is, if possible, even closer to home. When this Court granted its temporary restraining order against the City, it did so on the basis of the First Amendment right of access announced in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986). *See Woodstock v. City of Portland* ("*Index I*"), 2020 WL 3621179, at *3 (D. Or. July 2, 2020). The denial of access in that case was *itself* an example of an injury that was "capable of repetition, yet evading review." *Press-Enterprise*, 478 U.S. at 6 (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982); *Gannett Co. v. DePasquale*, 443 U.S. 368, 377–78 (1979)). So too with *Globe* and *Gannett*, right-of-access cases that led up to *Press-Enterprise*. The Court held that all three cases

were not moot because they were brought by the publishers of newspapers serving the cities of New York, Boston, and Riverside, respectively. *Gannett*, 443 U.S. at 377–78; *Globe*, 457 U.S. at 603; *Press-Enterprise*, 478 U.S. at 5.

As before, the Court's reasoning could apply verbatim here: "It can reasonably be assumed that Globe, as the publisher of a newspaper serving the Boston metropolitan area, will *someday* be subjected to another order relying on § 16A's mandatory closure rule." *Globe*, 457 U.S. at 603 (emphasis added). It can also "reasonably be assumed" that Index Newspapers, as the publisher of a newspaper serving the Portland metropolitan area, will "someday be subjected" to a dispersal order relying on the City's mandatory-dispersal-for-all policy. *Cf. id.* The same can also be said of the other Plaintiffs, nearly all of whom are still reporters or legal observers in the Portland area.

It did not matter, in *Ward*, that the officers could not say when they would next be questioned about a police shooting without counsel—the "predictab[ility]" that a shooting would occur sufficed. 857 F.2d at 1377. It did not matter, in *Globe*, that the newspaper could not predict when it would next be excluded from a criminal trial—"someday" sufficed. *Id.*[19] If the officers could "reasonably expect to be subject" to uncounseled questioning again, and the Globe could "reasonably expect to be subject" to courtroom closure again, Plaintiffs can "reasonably expect to be subject" to violent dispersal while reporting on protests again. *See Planned Parenthood*, 946 F.3d at 1109.

[19] For a few more examples of courts finding injuries sufficiently likely to recur despite certainty as to when or even if that might happen, see also *Wolfson v. Brammer*, 616 F.3d 1045, 1054–55 (9th Cir. 2010) (election-related injury capable of repetition where plaintiff "expresse[d] an intention to seek judicial office in the future," even though he did not intend to do so "in the *next* election," and could not say when he would); *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1020 (9th Cir. 2010) (defendant's running out of funds to complete a challenged project does not moot challenge, where the defendant retains some funds and could use them in the challenged way "once the economic situation improves"); *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835 (9th Cir. 2002) (claim that trapping ban is preempted by federal law falls within exception where subject species "can shift locations away" from present location, or "predators can appear" in new locations, especially because "[i]n such cases, migratory birds could be killed by predators faster than courts could react and permit trapping").

B. Protests Regularly Resolve Without Allowing Sufficient Time for Appellate Review

The second element of the repeatable-claims exception concerns the length of time between the infliction of an injury and when it typically becomes moot. The Ninth Circuit has "repeatedly held" that "actions lasting only one or two years evade review." *Karuk*, 681 F.3d at 1018; *see also Biodiversity*, 309 F.3d at 1173 ("a year is not enough time for judicial review"); *S. Pac.*, 219 U.S. at 514 (two-year-long injuries evade review). That is because judicial review, in this context, is not just review in the trial court; it also encompasses "full consideration" in both the court of appeals and the Supreme Court. *Johnson*, 623 F.3d at 1019 ("The duration of a challenged action is 'too short' where it is 'almost certain to run its course before either this court or the Supreme Court can give the case full consideration.'" *Id.* (quoting *Biodiversity*, 309 F.3d at 1173)). For "full litigation," not even *three* years is long enough. *Id.*; *Biodiversity*, 309 F.3d at 1173.

What that means here is that even if protests in Portland had continued without interruption from June 2020 to May 2023—two years and eleven months—Plaintiffs' claims would satisfy this requirement. And of course they would—very few cases are fully litigated through a final decision in district court, an as-of-right appeal, and a petition for writ of certiorari in three years. *See, e.g.*, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 594 n.6 (1999) (claims were justiciable when plaintiffs were institutionalized several times, for periods lasting multiple years, but apparently never for long enough to obtain merits review). The Montgomery bus boycotts, one of the longest protests in American history, lasted 13 months.[20] Even fewer cases are fully litigated in that amount of time. And, of course, most protests rarely last more than a few days. No case can see full litigation in that amount of time.

Portland's protests were on the long side. That can muddy the waters and make it seem more likely that a hypothetical case *could* see full litigation within the duration of the injury. *Cf.*

[20] *Montgomery Bus Boycott*, The Martin Luther King, Jr., Research and Education Institute, https://kinginstitute.stanford.edu/encyclopedia/montgomery-bus-boycott (last visited Dec. 21, 2022).

Index IV, 2022 WL 4466881, at *8. But the Supreme Court has warned against that sort of analysis:

> [T]he great majority of economic strikes do not last long enough for complete judicial review of the controversies they engender. A strike that lasts six weeks, as this one did, may seem long, but its termination, like pregnancy at nine months and elections spaced at yearlong or biennial intervals, should not preclude challenge to state policies that have had their impact and that continue in force, unabated and unreviewed. The judiciary must not close the door to the resolution of the important questions these concrete disputes present.

Super Tire Eng'g Co. v. McCorkle, 416 U.S. 115 (1974) (citations omitted). So too here. If Plaintiffs' claims are moot, then they are capable of repetition yet evading review.

IV. DECLARATORY RELIEF IS NOT MOOT

Plaintiffs' claims for declaratory relief are separately not moot. They are not moot, first, because the point of declaratory relief is to permit review of an ongoing policy even where injunctive relief would be unavailable; and second, because declaratory judgment is also available as retrospective relief.

A. Declaratory Relief May Be Available Even Though an Injunction Is Not

It is blackletter law that different standards of justiciability apply to different forms of relief. That is why, for example, the City has not claimed that Plaintiffs lack standing to seek damages. Changed circumstances "will frequently moot only some forms of relief, leaving other useful forms available." *West*, 206 F.3d at 925 n.4 (quotation marks omitted). That is also why, under the Declaratory Judgment Act of 1934, 28 U.S.C. § 2201, "declaratory relief may be available even though an injunction is not." *Green v. Mansour*, 474 U.S. 64, 72 (1985).

When a federal court is considering whether declaratory relief remains available, "different considerations" apply. *Steffel v. Thompson*, 415 U.S. 452, 469 (1974) (quotation marks omitted). Declaratory judgments are less intrusive than injunctions. *Id.* Indeed, Congress intended declaratory relief to be "an alternative to the strong medicine of the injunction," and specifically enacted it for use to "test the constitutionality" of state and local law "in cases where

injunctive relief would be unavailable." *Id.* at 466. If the same threat of injury were required for granting declaratory relief as for granting an injunction, "the Federal Declaratory Judgment Act would have been *pro tanto* repealed." *Id.* at 471 (quotation marks omitted). That is why the Supreme Court has repeatedly held that federal district courts must "decide the appropriateness and the merits of [a] declaratory request" even if they conclude an injunction would be improper. *Super Tire*, 416 U.S. at 121 (collecting cases). Thus, even if a request for an injunction is "rendered moot" during the litigation, the action is not moot if "a declaratory judgment would nevertheless provide effective relief." *Forest Guardians v. Johanns*, 450 F.3d 455, 462 (9th Cir. 2006); *Super Tire*, 416 U.S. at 121.

A declaratory judgment would provide Plaintiffs with effective relief. Absent a ruling on Plaintiffs' injunctive relief claim, when next a protest occurs and is declared an unlawful assembly, Plaintiffs will face a Sophie's choice: either risk "arrest or altercation" by continuing to report, or disperse—and abdicate their journalistic duty to "function[] as surrogates for the public." *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (opinion of Burger, J.); *cf. Steffel*, 415 U.S. at 468 n.18 ("The court, in effect, by refusing an injunction informs the prospective victim that the only way to determine whether the suspect is a mushroom or a toadstool, is to eat it."). But a declaration that the City's mandatory-dispersal policy violates the right of access contained in the First Amendment would alleviate that threat. It would dissipate the "continuing and brooding presence" of the City's policy. *Super Tire*, 416 U.S. at 122. It would "ensure that similar violations would not occur in the future." *Forest Guardians*, 450 F.3d at 462. It is exactly the type of situation for which the Declaratory Judgment Act was intended. *Steffel*, 415 U.S. at 468 n.18. Plaintiffs' request for prospective declaratory relief is not moot.

B. The Court Can Also Grant Retrospective Declaratory Relief

Declaratory relief can be prospective or retrospective: Courts can "declare the rights and other legal relations of any interested party seeking such declaration" with respect to past facts as well as potential future scenarios. § 2201; *Skysign Int'l, Inc. v. City & Cnty. of Honolulu*, 276

F.3d 1109 (9th Cir. 2002) (courts may consider whether statute is enforceable as applied to "past conduct"); *Collins v. Daniels*, 916 F.3d 1302, 1314 (10th Cir. 2019) (plaintiff's claim is "not moot" insofar as she seeks "retrospective declaratory judgment that her constitutional rights were violated").

The City argues to the contrary on the basis of *Green* and *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), but its analysis is mistaken. (Mot. at 5–6, 21–22.) *Green* does not state that retrospective declaratory relief is unavailable; it states that retrospective declaratory relief is unavailable *against states*, because *no* retrospective relief is available against states. 474 U.S. at 73 (explaining that because retrospective declaratory relief would have "much the same effect as a full-fledged award of damages or restitution," the Eleventh Amendment prohibits federal courts from issuing such relief against states). The City makes the same mistake as to *Idaho Tribe*. The full sentence from which the City quotes is: "A federal court cannot award retrospective relief, designed to remedy past violations of federal law." 521 U.S. at 288; (Mot. at 22). Out of context, that is—of course—nonsense. Federal courts award retrospective relief all the time. But not against *states*—which is why the Court cited *Green v. Mansour*, addressed above, and *Edelman v. Jordan*, a hornbook classic on retrospective relief and the Eleventh Amendment. *See* 521 U.S. at 288.

Retrospective declaratory relief is barred only when it amounts to an "end run" around the Eleventh Amendment. *Nat'l Audubon Soc'y*, 307 F.3d at 848. The City is not protected by the Eleventh Amendment, *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.54 (1978), so retrospective declaratory relief is not barred against it.

V. OREGON CAUSE OF ACTION

Given the authorities cited by the City with respect to Plaintiffs' claim under the Oregon Constitution, Plaintiffs stipulate to dismissal of that claim.

CONCLUSION

For all these reasons, the Court should deny the City of Portland's motion to dismiss.

Dated: January 3, 2023

Respectfully Submitted,

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