IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPEAL NO. 07-2196

ASOCIACION DE PERIODISTAS DE PUERTO RICO, et als.
Plaintiffs-Appellants,

v.

ROBERT MUELLER, et als.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

BRIEF FOR APPELLEES

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TO THE HONORABLE COURT:

COME NOW appellees, herein represented through the undersigned attorneys, and very respectfully submit the following Brief for Appellees:

STATEMENT OF ISSUE ON APPEAL

I. **Whether The District Court Erred In Granting Summary Judgment In Favor Of Appellees**[1]

[1] The appellants' arguments are consolidated into one argument in this brief.

STATEMENT OF JURISDICTION

The plaintiffs filed their notice of appeal within sixty (60) days of the order appealed from, as required by Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure (Fed.R.App.P.). See (DE 66-68).

STATEMENT OF THE CASE

Plaintiffs, Asociación de Periodistas de Puerto Rico, Overseas Press Club of Puerto Rico, Normando Valentín, Victor Sánchez, Joel Lago Ramón, Cossette Donalds Brown, Victor Fernández, Annette Alvarez, and their respective conjugal partnerships, brought the present action for injunction relief and damages against defendants Robert Mueller and other agents of the Federal Bureau of Investigation ("FBI"). DE 1. Plaintiffs alleged that defendants violated their First and Fourth Amendment rights by assaulting them and other members of the media in an attempt to prevent plaintiffs from reporting on the execution of a search warrant on the home of an alleged pro-independence political activist, which the district court himself had previously authorized.[2] Id.

Defendants moved for summary judgment on the basis of qualified immunity pursuant to Federal Rule of Criminal Procedure 56. DE 37. Plaintiffs opposed, DE 49, and defendants replied to the opposition, DE 64. The district court granted the defendants' motion for summary judgment, and dismissed the complaint. DE 66-67.

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[2] The search warrant relates to an internal terrorism investigation and the possible involvement of certain pro-independence groups, including the "Ejército Popular Boricua" (Popular Boricua Army), also known as "Los Macheteros."

STATEMENT OF THE FACTS[3]

1. At approximately 10:00 a.m. on February 10, 2006, FBI agents executed a search warrant issued under seal by the U.S. District Court for the District of Puerto Rico. (DE 39, Exhibit 1). Before the operation began, Special Agent Keith Byers, who served as the FBI media representative[4] for the operation, distributed a draft handout entitled "Media Information San Juan Division" to participating agents. (DE 39, Exhibit 1, ¶ 5 DE 39, Exhibit 2).

2. The handout instructed agents to establish a perimeter,[5] but reminded agents

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[3] The facts herein are presented in the same manner in which they were submitted for the district court's consideration, and they address material objections that the plaintiffs raised in their opposition before the district court.

[4] The plaintiffs dispute that Byers ever identified himself as media representative. But the defendants' statement does not state that Byers identified himself as such. Furthermore, he did not have to. Any reasonable person could have seen, based on his actions discussed below, that Byers was the FBI's liaison with the media on that day. For example, he was the only FBI agent who came out to speak to the media – something he did on several occasions. In any case, as discussed below, whether or not Byers actually identified himself as media rep is immaterial.

[5] The plaintiffs contend that, whether the agents established a perimeter, is a material fact in controversy. However, although the sworn statements submitted by the plaintiffs summarily conclude that the agents did not establish a perimeter, the discussion of the remaining uncontested facts below will show clearly that the plaintiffs' own statements establish that a perimeter had indeed been delineated, separating the crowd and the press from the area where the agents were executing the warrant. In any case, this is an immaterial fact, as the lack of a perimeter would not have excused the reporters' trespass onto the 444 De Diego Ave.

that "the media has the right to do anything outside the perimeter that does not interfere with the operation and/or safety of the agents and the public." (DE 39, Exhibit 2). The handout also reminded agents that media representatives could photograph, film, or eavesdrop on them. The instructions advised agents who did not wish to be photographed to opt out of the operation. Otherwise, concerned agents could wear ball caps and sunglasses. (Id.).[6]

3. FBI agents executed the warrant at the residence of Lilian Laboy-Rodriguez: Apartment 63, 444 De Diego Avenue. The apartment is located in a multiple-unit

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Building, a private property. Simply put, defendants had no right, let alone obligation, to permit plaintiffs to enter onto private property during the execution of a search warrant, even in the absence of a clearly identifiable perimeter. See Wilson v. Layne, 526 U.S. 603, 604 (1999) ("It violates the Fourth Amendment rights of homeowners for police to bring members of the media or other third parties into their home during the execution of a warrant when the presence of the third parties in the home was not in aid of the warrant's execution.").

[6] The plaintiffs allege that, whether the agents actually followed these instructions is a material fact in controversy. However, this particular statement by the defendants does not state that the agents followed every instruction in the handout; and the plaintiffs do not deny that the above instructions were part of the handout. Although the plaintiffs also contend that the handout was but a copy or "draft": they point to nothing on the record to support said allegation; even if their allegation was indeed true, the plaintiffs do not claim that what the agents themselves received on February 10, 2006 was not itself the same copy/draft of the handout, or an identical copy of such; and they fail to explain what difference, if any, it would make that only a copy/draft was provided. In any case, as discussed below, this is ultimately another immaterial fact that does not change the outcome of the case.

condominium building with gated and controlled access. Ordinarily, a security guard controls access to the building, prohibiting the general public from entering without proper authorization.[7] The guard booth is located next to a vehicle access gate as well as a locking pedestrian gate. (DE 39, Exhibit 1, ¶ 6).

4. FBI agents established a perimeter on the day of the search by closing the vehicle gate. Agents also instructed the guard controlling the pedestrian gate to permit only residents and those having legitimate business at the building to enter. Throughout the day, residents and building staff members entered and exited the building and parking lot area, while the general public and media were restricted from doing so. (DE 39, Exhibit 1, ¶ 7); compare DE 39, ¶ 4 with DE 50, ¶ 3-4.

The plaintiffs objected, as they did with many of the defendant's statements, almost strictly on the basis of the FBI allegedly not establishing a perimeter. For starters, the defendants once again submit that whether a perimeter was actually established is not a material fact that would, in any way, change the outcome of this case. See n. 5, supra. Regardless, the uncontested facts here easily support that a perimeter was indeed

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[7] In their opposing statement of material facts filed before the district court, the plaintiffs denied that there was a security guard prohibiting the general public from entering the property without authorization. But the plaintiffs' own pleading and the statements cited in their opposition support that only Laboy's relatives and attorneys were allowed access, and even this happened after 2 p.m. (by which time the FBI had finished their search). See DE 50, ¶ 3.

established.

In addition to Byers's statement that the FBI set up a perimeter, DE 39, Exhibit 1, ¶ 7, the plaintiffs directly admitted that FBI agents instructed the security guard to forbid anyone to go in or out of the building premises. See DE 50, ¶ 3. Furthermore, the plaintiffs' own sworn statements say that: "the press was kept at bay and provided only with the information that a search was being conducted" (Joint Appendix, p. 78, ¶ 7); reporters and the general public gathered outside the building's access gate, from where they could observe FBI agents in the parking lot on the other side of the gate entering and exiting the building; that Byers came out to the gate and informed reporters that the FBI was executing a search warrant, but was unable to provide more information; Laboy's attorneys told the gathered media that the FBI had denied them communication with their client (Joint Appendix: p. 83, ¶ 3; p. 88, ¶ 3-5; p. 93, ¶ 4). The above leaves no doubt that, at the very least, the reporters knew that the FBI was executing a search warrant, and that neither they nor the general public was allowed inside.

5. In addition, FBI agents positioned themselves near the pedestrian gate throughout the day.[8] Other agents maintained positions in the parking lot adjacent to the vehicle gate. (DE 39, Exhibit 1, ¶ 7); compare DE 39, ¶ 5 with DE 50, ¶ 5.

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[8] The plaintiffs denied this, but the statements upon which they rely refer to events after 2 p.m. (by which time the FBI had finished their search). See DE 50, ¶ 5; see also (Joint Appendix: p. 94, ¶ 9-10; p. 89, ¶ 7; pp. 83-84, ¶ 5-6).

6. SA Byers was available to speak with reporters.[9] When in the lobby, SA Byers assisted FBI personnel by asking persons entering the lobby if they were a resident and what floor they wanted to visit. Whenever residents desired to visit the sixth floor, where Ms. Laboy resided, an FBI employee accompanied them. (DE 39, Exhibit 1, ¶ 8); compare DE 39, ¶ 6 with DE 50, ¶ 6.

7. Within an hour of the agents' arrival, members of the press began to gather at the pedestrian gate. SA Byers and other SAs did not interfere with media coverage of the search warrant's execution and did not prohibit media representatives from filming agents as they entered and exited the building.[10] (DE 39, Exhibit 1, ¶ 9); compare DE 39, ¶ 7 with DE 50, ¶ 7.

8. In fact, SA Byers repeatedly spoke to members of the media on camera, identifying himself, and explaining that the agents were executing a search warrant as

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[9] The plaintiffs denied this, based only on their allegation that Byers – although he did approach the gate on various occasions to speak with reporters – refused to provide information that was accurate or useful. See DE 50, ¶ 6. The plaintiffs do not say: what information provided by Byers was inaccurate, what their basis for that allegation is, what useful information was in Byers' possession that he did not disclose, what their basis for that allegation is, why Byers would have had a legal obligation to provide such information, and, how any of this is material to the issues on summary judgment.

[10] The plaintiffs denied that the agents did not interfere. However, even under the plaintiffs' own version of facts, any interference or altercation did not occur until much later – not within an hour of the agents' arrival, when the press began to gather at the gate. See Joint Appendix, pp. 76-97.

part of an ongoing investigation. After SA Byers conducted interviews outside the perimeter, the security guard "buzzed" him in, and he returned inside the perimeter.[11] (DE 39, Exhibit 1, ¶ 10); compare DE 39, ¶ 8 with DE 50, ¶ 8.

9. Over the course of the warrant's execution, additional media representatives, students, and members of the public gathered around the perimeter. Because of the growing crowd, SA Byers stopped conducting interviews outside the perimeter. Instead, he conducted both television and radio interviews from inside the perimeter while reporters remained outside of it.[12] (DE 39, Exhibit 1, ¶ 13); compare DE 39, ¶ 9 with DE 50, ¶ 9.

10. At approximately 12:40 p.m., SA Byers and Assistant Special Agent In Charge ("ASAC") José Figueroa Sánchez responded to queries from Roxana Badillo and Jan Sussler, who identified themselves as attorneys representing Liliana Laboy. They demanded to be allowed to come inside the perimeter so that they could speak with her.[13]

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[11] The plaintiffs essentially objected based on their dissatisfaction with the information provided by Byers. See DE 50, ¶ 8. This matter is addressed above. See ¶ 6, supra; see also n. 9, supra.

[12] The plaintiffs objected on grounds of their dissatisfaction with the information provided by Byers and their allegation that the FBI did not establish a perimeter. This matter is addressed above. See ¶ 6, supra; see also n. 9, supra; ¶ 4-5, supra.

[13] The plaintiffs denied that Laboy's attorneys demanded to be allowed inside, but their reference to the record does not support this allegation. See DE

They also clarified with SA Byers that Ms. Laboy was not under arrest. (DE 39, Exhibit 1, ¶ 16); compare DE 39, ¶ 10 with DE 50, ¶ 10.

11. After ASAC Figueroa departed the area and entered the building, the front vehicle exit gate opened. Ms. Sussler and Ms. Badillo violated the FBI perimeter by scurrying through the gate and towards the building's lobby.[14] (DE 39, Exhibit 1, ¶ 17); compare DE 39, ¶ 11 with DE 50, ¶ 11.

12. SA Byers positioned himself between Ms. Sussler and Ms. Badillo and immediately instructed them to return to outside the perimeter. Both women refused. ASAC Figueroa returned to the front parking lot area and motioned for Ms. Badillo and Ms. Sussler to follow him. ASAC Figueroa and SA Byers then escorted them to the rear of the condominium where Ms. Laboy was waiting.[15] (DE 39, Exhibit 1, ¶ 17-18); compare DE 39, ¶ 12 with DE 50, ¶ 12.

13. In an effort to finish the search as quickly as possible and avoid problems with

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50, ¶ 10; see also Joint Appendix, p. 88, ¶ 5.

[14] To the extent that the plaintiffs claim a perimeter was never established, they deny that the perimeter was violated. As mentioned numerous times before, the issue of the perimeter has been discussed above.

[15] To the extent that the plaintiffs claim a perimeter was never established, they deny the statement. As mentioned numerous times before, the issue of the perimeter has been discussed above.

a growing number of protestors outside the perimeter, additional personnel were requested from an FBI command post. Subsequently, members of a Quick Response Force arrived at the search location via helicopter. (DE 39, Exhibit 1, ¶ 19); compare DE 39, ¶ 13 with DE 50, ¶ 13.

14. Before the search's conclusion, agents moved evidence from Ms. Laboy's apartment to the building's lobby. During this process, SA Byers directed Ms. Sussler, Ms. Badillo, and Ms. Laboy, as well as a gentleman wearing a black shirt and khaki pants, to wait outside the lobby. SA Byers also closed a side lobby door to prevent entry from the side of the parking lot where the evidence was to be placed in government vehicles. Various FBI agents and personnel then loaded evidence into government vehicles parked in the driveway area adjacent to the building's lobby. (DE 39, Exhibit 1, ¶ 20); compare DE 39, ¶ 14 with DE 50, ¶ 14.

15. Three persons, later identified by the FBI as Natalia Hernández Laboy, María de los Angeles Laboy, and Francisco Rodriguez Burns, an English language reporter from Primera Hora, passed SA Byers in the driveway. Because SA Byers had spoken with Mr. Rodriguez earlier in the day, he realized that Mr. Rodriguez was not a resident. (DE 39, Exhibit 1, ¶ 21); compare DE 39, ¶ 15 with DE 50, ¶ 15.

16. When SA Byers asked Hernández Laboy in Spanish if she was a resident of the building, she became confrontational. She identified herself as Lilian Laboy's

daughter, and stated that it did not matter whether she was a resident. SA Byers told Mr. Rodriguez that he could not enter the building or stay in the parking lot even if agents allowed the two women to remain inside the perimeter. Hernández Laboy insisted that Mr. Rodriguez had a right to accompany them. SA Byers again insisted that Mr. Rodriguez honor the perimeter, and asked Hernández Laboy to stop speaking to him rudely.[16] (DE 39, Exhibit 1, ¶ 22-23).

17. After a short amount of time had elapsed, SA Byers noticed that Mr. Rodriguez had not exited the parking lot as instructed and once more insisted that he return to the perimeter.[17] Instead, more reporters violated the perimeter by pushing through the gate.[18] SA Byers told these reporters to return to the perimeter and leave the parking lot area numerous times. Despite SA Byers' efforts to escort these reporters from the parking lot, they physically resisted his efforts to do so and ignored his commands. (DE 39, Exhibit 1, ¶ 24).

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[16] The plaintiffs do not deny these statements, but object to them as "conclusory or self serving ... [or] hearsay testimony." See DE 50, ¶ 16.

[17] Once again, the plaintiffs denied the existence of a perimeter.

[18] The plaintiffs claim that they were invited by Hernández to come in through the gate. DE 50, ¶ 17. While that may be true, the plaintiffs did not deny the defendants' statement that Hernández, who is not a resident of 444 De Diego Ave., extended her apparent invitation only after some media members had already violated the perimeter. See ¶ 18, infra.

18. SA Byers attempted to advise other agents as to what was happening. As still more media representatives violated the perimeter, SA Byers observed Hernández Laboy motioning with her arm as if signaling media members and protesters to enter the parking lot.[19] (DE 39, Exhibit 1, ¶ 24-25).

19. FBI agents approached the pedestrian gate and attempted to prevent more persons from violating the perimeter. However, those already past the gate refused to return to outside of it, and resisted the agents' instructions that they leave the parking lot. Agents observed some members of the crowd outside of the perimeter carrying stones.[20]

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[19] The plaintiffs alleged that Hernández only invited media representatives to come through the gate; however, while the plaintiff's reference to the record supports that the press was invited by Hernández, it does not support that they were the **only ones** invited. See DE 50, ¶ 18; see also Joint Appendix, p. 94, ¶ 9, p. 84, ¶ 6, p. 89, ¶ 8.

[20] The plaintiffs claimed that, as soon as they passed the gate, FBI agents approached media members and, without warning, began to violently push them back toward the exit, even though none of the reporters represented any risk or threat to the FBI. The plaintiffs add that they were unable to exit right away because the pedestrian access gate was too narrow. See DE 50, ¶ 19. Despite these allegations, it remains undisputed that: the reporters did not exit immediately; that there was a warning – the plaintiffs' own statement, as well as the references cited, talk about a "requirement to exit" from the FBI; that the FBI's attempt to push the crowd outside of the perimeter happened only after the crowd did not exit when asked to do so; although the plaintiffs' sworn statements mention batons used to push them back, they do not describe the FBI's attempts to push or their use of batons as "violent." See (DE 39, Exhibit 1, ¶ 25); compare DE 39, ¶ 19 with DE 50, ¶ 19; see also Joint Appendix, pp. 84-85, ¶ 7-8, pp. 89-90, ¶ 8, 10, pp. 95-96, ¶ 11, 13. The allegation that none of the reporters was a danger to the FBI agents is conclusory and self-serving, and refuted by the remaining

(DE 39, Exhibit 1, ¶ 25); compare DE 39, ¶ 19 with DE 50, ¶ 19.

20. At least one member of the crowd spat or threw something onto an agent's face.[21] Meanwhile, FBI agents continued to implore the crowd, yelling "Don't push! Don't push!"[22] Compare DE 39, ¶ 20 with DE 50, ¶ 20.

21. Crowd members continued to oppose the FBI agents' efforts to remove them from the parking lot. In fact, the crowd continued to surge forward past the perimeter. Meanwhile, reporters pushed their microphones and cellular telephones into the faces and bodies of FBI personnel.[23] Compare DE 39, ¶ 21 with DE 50, ¶ 21.

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statements below. Furthermore, the plaintiffs do not deny that people other than members of the media posed a risk of safety to the agents.

[21] The plaintiffs simply stated that none of the reporters engaged in this type of conduct, but they did not deny that an unruly member of the crowd gathered at 444 De Diego Ave. did assault an FBI agent. See DE 50, ¶ 20.

[22] The plaintiffs alleged that they implored the FBI not to push or hit them. DE 50, ¶ 20. Even if true, the plaintiffs' references to the record do not refute that the agents asked the crowd not to push. See Joint Appendix, p. 95, ¶ 11, pp. 89-90, ¶ 8.

[23] As with many of the defendants' statements, the plaintiffs make a general denial of the statement, but their explanation fails to refute the specific facts contained in the defendants' statement; instead, the plaintiffs typically offer additional immaterial facts that are not inconsistent with, or do not affect, the truth of the defendants' statement. For example, compare DE 39, ¶ 21 with DE 50, ¶ 21 (plaintiffs' response to statement # 21 was that the reporters were stuck in the gate trying to exit while the FBI kept pushing them; it does not deny that reporters pushed their microphones and cellular telephones into the faces and bodies of FBI personnel). Also of importance, for many of these statements, including # 21, the plaintiffs deny the defendants' statement only insofar as it applies to them, without

22. Agents initially did not respond to the crowd's provocations with force. Instead, agents continued to instruct the crowd to disperse and return to outside the perimeter. The agents issued these instructions for more than a full minute. Meanwhile, the crowd continued to surge against the agents.[24] Compare DE 39, ¶ 22 with DE 50, ¶ 22.

23. At no time did agents attempt to stop media representatives from filming the incident. In fact, during the standoff, an agent actually picked up a dropped microphone and handed it back to a reporter.[25] Compare DE 39, ¶ 23 with DE 50, ¶ 23.

24. As individuals continued to surge forward, some members of the crowd were in danger of being crushed against the perimeter gates. In order to defuse this growing danger, a SA took out a cannister of Oleoresi Capsicum, or pepper spray, and displayed

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denying that other people from the gathered crowd engaged in the conduct described in the defendants' statements.

[24] Once again, the plaintiffs deny the defendants' statement insofar as it applies to them, without denying that other people from the gathered crowd engaged in the conduct described in the defendants' statement. The plaintiffs repeat the same objection previously addressed in n. 20, supra.

[25] The plaintiffs claim that FBI agents – in addition to pushing the reporters and their equipment – affirmatively tried to seize the reporters' equipment. Not true. The reference to the record cited by the plaintiffs only supports: that **one** agent tried to seize **one** reporter's equipment, and, that the equipment was tossed over the access gate – not seized. See DE 50, ¶ 23; see also Joint Appendix, pp. 94-95, ¶ 8, 11-12.

it above his head.[26] Compare DE 39, ¶ 24 with DE 50, ¶ 24.

25. The SA advised the crowd that he would deploy the pepper spray if the crowd did not return to outside the perimeter. He also shook the cannister for several seconds so that members of the crowd could see it clearly. Among those closest to the front of the crowd were plaintiffs Normando Valentin and Cosette Donalds Brown.[27] Compare DE 39, ¶ 25 with DE 50, ¶ 25.

26. When the SA displayed the pepper spray, some members of the crowd finally appeared to accept that they should move back towards the perimeter. However, other members of the crowd either could not or would not permit this. In fact, those nearest the perimeter fence continued to surge forward, pushing against the SAs as well as those attempting to exit the perimeter.[28] Compare DE 39, ¶ 26 with DE 50, ¶ 26.

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[26] Although denied by the plaintiffs, nothing in their explanation refutes, or is inconsistent with, the defendants' statement. Compare DE 39, ¶ 24 with DE 50, ¶ 24.

[27] The plaintiffs deny that the SA advised them that he would deploy the pepper spray; they do not deny that the SA warned members of the general public. In any case, the plaintiffs do not deny that he shook the cannister for several seconds, but they simply argue that the reason for it was unclear. The rest of the paragraph is admitted. See DE 50, ¶ 25.

[28] The plaintiffs deny the statement based on their contention that whether the crowd accepted that they had to move back "goes to the state of mind[.]" See DE 50, ¶ 26. The defendants submit that such state of mind can easily be inferred from the fact that the crowd did start to move back, something which the plaintiffs do not deny happened.

27. When displaying the pepper spray failed to eliminate this growing danger, the SA fired several short bursts. In addition to hitting crowd members, the spray made contact with several agents.[29] Compare DE 39, ¶ 27 with DE 50, ¶ 27.

28. The pepper spray was effective in inducing crowd members to return to outside the perimeter. While retreating, members of the crowd shoved against and stepped over one another. Agents guided crowd members, including Ms. Donalds and Mr. Valentin, back through the pedestrian gate. Clearly, no media representatives were seriously injured, disabled in any way, or in great distress.[30] Compare DE 39, ¶ 28 with DE 50, ¶ 28.

29. The crowd did knock over a reporter wearing sunglasses and a short sleeve brown shirt. Defendants believe this reporter to be plaintiff Joel Lagos. An SA pulled Mr. Lagos beyond the perimeter after he fell. Mr. Lagos then got to his feet, spoke to

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[29] Although denied by the plaintiffs, nothing in their explanation refutes, or is inconsistent with, the defendants' statement. Compare DE 39, ¶ 27 with DE 50, ¶ 27. For example, the plaintiffs attempt to deflect attention from the material issues in the statement by adding immaterial facts or facts that do not refute the defendants' statement, such as: who created the dangerous situation, and whether the use of pepper spray can be characterized as "eliminat[ing] the growing danger."

[30] Denied on the basis of purely legal conclusions, such as "[t]he use of pepper spray represented an excessive use of force." DE 39, ¶ 28. In any case, the plaintiffs did not deny that the crowd, including members of the media, returned outside after the pepper spray was used.

others, and cleaned his face with water.[31] Compare DE 39, ¶ 29 with DE 50, ¶ 29.

30. Following their return to outside the perimeter, crowd members tossed items at the agents. When the agents departed a few minutes later, crowd members struck and kicked FBI vehicles, and threw stones at them. The crowd damaged at least two FBI vehicles, and a hurled rock broke the rear window of an FBI van.[32] Compare DE 39, ¶ 30 with DE 50, ¶ 30.

[31] Yet again, a statement is denied only insofar as to immaterial facts: in this case, that it was the FBI that created the situation above. See DE 39, ¶ 29.

[32] Denied only as to the reporters' alleged lack of involvement in the attack of the FBI agents. See DE 50, ¶ 30.

SUMMARY OF ARGUMENT

The plaintiffs have no First Amendment claim because there is no constitutional right to gather news in a private property. In this context, plaintiffs cannot invade private homes, no matter how newsworthy the subject.

Nor was there a Fourth Amendment violation here, where plaintiffs offer no evidence that FBI agents "seized" or "searched" their persons at any time. Here, the reporters were free to leave their encounter with agents at any time, and, in fact, did leave their encounter with agents when they finally decided to retreat to outside of the access gate. Because the agents did not restrain the plaintiffs' liberty, there was no seizure.

Even if the Court analyzes the plaintiffs' argument applying the standard appropriate under the Fourth Amendment, it is clear that plaintiffs' claims cannot survive. Given the circumstances of this case, in which an unruly crowd resisted law enforcement instructions and there was an immediate threat to officer and public safety, the force the FBI used to defuse the situation was not excessive. Nor did the agents' use of pepper spray violate the Fourth Amendment. It is well established that it is appropriate and legal for law enforcement officers to use pepper spray in situations similar to the facts of this case.

In sum, the defendants did not act unreasonably in using pepper spray against plaintiffs; nor did they use excessive force in violation of the Fourth Amendment.

Therefore, the plaintiffs have not satisfied the first prong of the qualified immunity test that requires them to prove that their allegations, if true, establish a constitutional violation. Thus, defendants were entitled to summary judgment on the basis of qualified immunity.

In the complaint, plaintiffs also requested an injunction barring the FBI from further interfering with plaintiffs' exercise of their First Amendment rights. Specifically, plaintiffs sought an injunction prohibiting the use of chemical agents (pepper spray) during future media coverage of FBI actions. Plaintiffs lack standing to pursue this prospective relief since they failed to allege a real and immediate threat of injury. Here, plaintiffs have not demonstrated that a further deployment of chemical agents by defendants against any one of them is imminent. Therefore, plaintiffs would not directly benefit from an injunction or declaratory judgment entered against defendants.

ARGUMENT

I. The District Court Properly Granted Summary Judgment In Favor Of Appellees

The Claim

The appellants argue that the defendants were not entitled to summary judgment, and the district court should not have dismissed the civil action. According to the appellants, there is a factual dispute at the center of this case that precludes summary judgment: whether those who entered the condominium complex grounds were unruly. The appellants say that, absent a conclusion that plaintiffs were unruly, the court could not have held that "it was necessary to use physical force against members of the crowd that included kicking, punching and hitting plaintiffs."

The appellants add that the district court committed additional errors with regard to plaintiffs' First Amendment claims: first, it failed to address whether pointing a rifle at a reporter in a threatening manner, or kicking, punching and pepper spraying reporters doing their job, interferes with the right to gather the news; second, the district court rejected plaintiffs' claims because plaintiffs did not point to a factually identical case; if the district court had credited plaintiffs' view of the facts, it would have been apparent that defendants are not entitled to qualified immunity. As to their Fourth Amendment claim, the appellants argue that, at the time of the incident, a reasonable

officer would have known that it was excessive force to kick, punch, hit and pepper spray peaceful professional journalists reporting on a news event; that same reasonable officer would have known that it violated the First Amendment to assault journalists in this manner, as well as to prevent a journalist from asking questions by physically pushing him away and then raising an automatic rifle and pointing it at the journalist.

Lastly, the appellants claim that they have standing to pursue injunctive relief because of their well-founded belief that their planned attempts to report on future FBI actions will be met with the same types of interference and physical force.

Standard of Review

This Court reviews the grant of summary judgment *de novo*. Napier v. F/V Deesie, Inc., 2006 WL 1892244, *3 (1st Cir. July 11, 2006); Pagano v. Frank, 983 F.2d 343, 347 (1st Cir. 1993). "[W]e are authorized to reverse the lower court if, after viewing the facts and making all inferences in favor of the non-moving party, the evidence on record is 'sufficiently open-ended to permit a rational fact finder to resolve ... the [] issue in favor of either side.' " Napier, 2006 WL 1892244 at *3 (quoting Coyne v. Taber Partners I, 53 F.3d 454, 457 (1st Cir. 1995)).

Discussion

The standard for summary judgment is straightforward and well-established. A district court should grant a motion for summary judgment "if the pleadings, depositions,

and answers to the interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A factual dispute is "genuine" if it could be resolved in favor of either party, and "material" if it potentially affects the outcome of the case. Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 19 (1st Cir. 2004).

The moving party carries the burden of establishing that there is no genuine issue as to any material fact; however, the burden "may be discharged by showing that there is an absence of evidence to support the nonmoving party's case." See Celotex Corp. v. Catrett, 477 US 317, 325, 331 (1986). The burden has two components: (1) an initial burden of production, which shifts to the non-moving party if satisfied by the moving party; and (2) an ultimate burden of persuasion, which always remains on the moving party. See id. at 331.

The non-moving party "may not rest upon the mere allegation or denials of the adverse party's pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). Summary judgment exists "to pierce the boilerplate of the pleadings and assess the proof in order to determine the need for trial." Euromodas, Inc. v. Zanella, 368 F.3d 11, 17 (1st Cir. 2004) (citing Wynne v. Tufts Univ. Sch. Of Med., 976 F.2d 791, 794 (1st Cir. 1992)). Therefore, the nonmoving party may

not defeat a properly supported motion for summary judgment by merely underscoring the "existence of some alleged factual dispute between the parties; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986) (emphasis in original); Goldman v. First Nat'l Bank of Boston, 985 F.2d 1113, 1116 (1st Cir. 1993). In addition, "factual disputes that are irrelevant or unnecessary will not be counted." Anderson, 477 U.S. at 248.

The defendants argued for, and the district court granted, summary judgment based on qualified immunity and the plaintiffs' lack of standing to request injunctive relief.

A. Qualified Immunity

Qualified immunity protects government officials from the burden of standing trial or facing other onerous aspects of litigation. Saucier v. Katz, 533 US 194, 200 (2001). "The reach of this doctrine is long, but not infinite." Pagan v. Calderon, 448 F.3d 16, 31 (1st Cir. 2006). The test to determine whether defendants are entitled to qualified immunity has three parts: (1) "whether the plaintiff's allegations, if true, establish a constitutional violation; (2) "whether the constitutional right at issue was clearly established at the time of the putative violation;" and (3) "whether a reasonable officer, situated similarly to the defendant, would have understood the challenged act or omission to contravene the discerned constitutional right." Id. Qualified immunity, thus,

"safeguards even unconstitutional conduct if a reasonable officer at the time and under the circumstances surrounding the action could have viewed it as lawful." Jordan v. Carter, 428 F.3d 67, 71 (1st Cir. 2005).

Against this backdrop, the plaintiffs allege violations of (1) their First Amendment rights to freedom of speech and the press and (2) the Fourth Amendment's protection against the use of excessive force.

1. First Amendment

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. Amend. I. Before the district court, the plaintiffs asserted that defendants have a First Amendment "obligation to accommodate the press' efforts to gather and report the news" and that "the First Amendment strictly limits the authority of law enforcement personnel to interfere with or prevent the gathering and reporting of news, particularly where the news is being reported live from a public location." DE 49. Plaintiffs also stated that "in the absence of any claimed interference or other security consideration, the police do not have the authority [to] deny the press access to the investigatory scene or facts." Id.

To support these assertions, plaintiffs relied – just as they do now on appeal – on cases that proclaim a general, but qualified, right of the press to gather news. DE 49; Appellant's Brief, pp. 43-47, 52-55. (Citing Richmond Newspapers v. Virginia, 448 US

555, 578 (1980) (finding that the press may exercise their First Amendment rights on streets, sidewalks, and in parks); Branzburg v. Hayes, 408 US 665, 681 (1972) (finding that the press should be afforded some type of First Amendment protection); Daily Herald Co. v. Munro, 838 F.2d 380, 384 (9th Cir. 1988) (finding exit polling to be a protected activity when it occurs on public streets, sidewalks and parks); CBS, Inc. v. Smith, 681 F. Supp. 794, 803 (S.D. Fl. 1988) (same); Channel 10, Inc. v. Gunnarson, 337 F. Supp. 634, 638 (D. Minn. 1972) (finding that the media has a right to be present in "public places and on public property")). Contrary to the plaintiffs' assertions, these cases do not establish specific rights of the press during the recording of live events from public locations or at an investigatory scene. See id.

Plaintiffs argued that defendants violated their First Amendment rights when they "intentionally interfered with the gathering of information and news" by "violently knock[ing] aside microphone and cameras in an attempt to prevent the event from being recorded." DE 34. Plaintiffs also alleged that one agent "used his hand to block a video camera lens." DE 49.

Plaintiffs relied on Connell v. Town of Hudson, 733 F. Supp. 465 (D.N.H. 1990), to support their theory that these actions represent First Amendment violations. DE 49. In Connell, police instructed a photographer to move away from the scene of a car accident and, even after he retreated to the second floor of a house further away from the

scene, threatened to arrest him if he continued taking pictures. 733 F. Supp. at 466. The court found that the police violated Connell's First Amendment rights by threatening to arrest him because Connell obediently followed police instructions and was taking pictures some distance from the scene. Id. at 470. In contrast to the facts in Connell, here plaintiffs did not contend that law enforcement instructed them to stop recording the event or that the agents threatened to arrest him. See DE 34, 49. Plaintiffs also did not allege that the agents asked plaintiffs to turn over their cameras or film in violation of the First Amendment. See Gunnarson, 337 F. Supp. at 637 (finding that the police seizure of a reporter's camera constituted an improper restraint in violation of the First Amendment). Plaintiffs have not cited any case where a First Amendment violation was found based on law enforcement agents pushing away a microphone or temporarily seeking to obstruct a recording by placing a hand in front of a camera.

In addition to being able to proclaim only a general right of the press to gather news, the cases cited by the plaintiffs in support of their argument address situations involving the right of the press to gather news in a **public** setting or **public** property. See DE 49; see also Appellant's Brief, pp. 43-47, 52-55 (citing Richmond Newspapers, 448 US 555; Branzburg, 408 US 665; Munro, 838 F.2d 380; Smith, 681 F. Supp. 794; Gunnarson, 337 F. Supp. 634)). In other words, the plaintiffs are unable to point to any legal authority – and they would be hard-pressed to find any – to support their claim that

they had constitutional right to gather news in a **private** property.

In fact, there is no such First Amendment right in private property. In this context, "[p]laintiffs [cannot] [invade] private homes, no matter how newsworthy the subject." Demarest v. Athol/Orange Community Television, 188 F.Supp.2d 82, 94 (D.Mass. 2002); see generally Strahan v. Frazier, 62 Fed.Appx. 359, *1 (1st Cir. 2003) (unpublished). What is more, "[i]t violates the Fourth Amendment rights of homeowners for police to bring members of the media or other third parties into their home during the execution of a warrant when the presence of the third parties in the home was not in aid of the warrant's execution." Layne, 526 U.S. at 604; see Hanlon v. Berger, 526 U.S. 808, 810 (1999).

Lastly, the defendants point out that Hernández's invitation for the reporters to come in through the gate does not change anything. For starters, the plaintiffs did not deny the defendants' statement that Hernández, who is not a resident of 444 De Diego Ave. – and, therefore, not authorized to allow people inside – extended her apparent invitation only after some media members had already violated the perimeter. See ¶ 18, supra; see also n. 18, supra.

Furthermore, even a valid invitation to come into private property cannot create a First Amendment right where none existed. See Strahan v. Frazier, 156 F.Supp.2d 80, 91-92 (D.Mass. 2001) ("Given that there is no First Amendment right to petition in a

private shopping mall, police involvement in removing individuals who attempt to do so cannot create a First Amendment right when none existed before."); see also Cape Cod Nursing Home Council v. Rambling Rose Rest Home, 667 F.2d 238, 243 (1st Cir. 1981).

In Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), the Supreme Court considered whether individuals have a First Amendment right to distribute handbills in a private shopping mall. Id. at 552. The Court rejected the proposition that a private shopping mall, by being open to the public, somehow morphs into an area available for public use and hence subject to the First Amendment. Id. at 569-570 ("Nor does property lose its private character merely because the public is generally invited to use it for designated purposes.").

Therefore, plaintiffs did not allege a violation of their First Amendment rights. Because plaintiffs do not meet the first prong of the test for qualified immunity in regard to their First Amendment allegations, the Court need not proceed to the second and third prongs. See Pagán, 448 F.3d at 31.

Fourth Amendment

Plaintiffs alleged that defendants violated their Fourth Amendment rights by using excessive force against them. DE 34. Specifically, plaintiffs allege that "it was an excessive use of force to spray (plaintiffs) with pepper spray and shove them backward through a security gate." DE 49.

The Fourth Amendment protects people "against unreasonable searches and seizures." U.S. Const. Amend. IV. Plaintiffs offer no evidence that FBI agents "seized" or "searched" their persons at any time. And, the "Fourth Amendment covers only 'searches and seizures,' neither of which took place here." County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998). Seizure of a person occurs only if, "in view of all of the circumstances surrounding the incident," a person reasonably believes he or she is not "free to leave" an encounter with a government official. Mich. v. Chesternut, 486 U.S. 567, 573 (1988).

Here, the reporters were free to leave their encounter with agents at any time, and, in fact, did leave their encounter with agents when they finally decided to retreat to outside of the access gate. See Statement of Facts, supra. Because the agents did not restrain the plaintiffs' liberty, there was no seizure. See Cal. v. Hodari, 499 U.S. 621, 625-25 (1991) (an encounter with an officer does not constitute a "seizure" unless the officer restrains the individual's liberty); see also United States v. Smith, 423 F.3d 25, 31 (1st Cir. 2005) (no seizure when defendant attempted to flee because this indicated that he had not submitted to police authority).

Even if the Court analyzes the plaintiffs' argument applying the standard appropriate under the Fourth Amendment, it is clear that plaintiffs' claims cannot survive. "To establish a Fourth Amendment violation based on excessive force, a

plaintiff must show that the defendant [agent] employed force that was unreasonable under the circumstances." Jennings v. Jones, 479 F.3d 110, 119 (1st Cir. 2007). Reasonableness is judged "from the perspective of a reasonable officer on the scene." Graham v. Connor, 490 U.S. 386, 396 (1989).

The defendants submit that FBI agents acted reasonably, considering the situation they faced. A summary follows of the circumstances encountered by the agents.

At the very least, the reporters and the gathered crowd knew that the FBI was executing a search warrant, and that they were not allowed inside. Statement of Facts, ¶ 4-5. Because of the growing crowd of media representatives, students, and members of the public gathered during the course of the warrant's execution, SA Byers had to stop conducting interviews outside the perimeter; instead, he conducted both television and radio interviews from inside the perimeter while reporters remained outside of it. Statement of Facts, ¶ 9-10. Sometime after 12:40 p.m., Liliana Laboy's attorneys violated the FBI perimeter despite Byers' instruction to them to return outside. Statement of Facts, ¶ 11-12. In an effort to finish the search as quickly as possible and avoid problems with a growing number of protestors outside the perimeter, the FBI was forced to request the presence of additional personnel. Statement of Facts, ¶ 13.

Next, it was Natalia Hernández, María de los Angeles Laboy, and Francisco Rodriguez Burns, a newspaper reporter, who violated the perimeter. Statement of Facts,

¶ 15. When SA Byers asked Hernández if she was a resident of the building, she became confrontational. She identified herself as Lilian Laboy's daughter, and stated that it did not matter whether she was a resident. SA Byers told Mr. Rodriguez that he could not enter the building or stay in the parking lot even if agents allowed the two women to remain inside the perimeter. Hernández Laboy insisted that Mr. Rodriguez had a right to accompany them. SA Byers again insisted that Mr. Rodriguez honor the perimeter, and asked Hernández Laboy to stop speaking to him rudely. Statement of Facts, ¶ 16.

After a short amount of time had elapsed, SA Byers noticed that Mr. Rodriguez had not exited the parking lot as instructed and once more insisted that he return to the perimeter. Instead, more reporters violated the perimeter by pushing through the gate. SA Byers told these reporters to return to the perimeter and leave the parking lot area numerous times. Despite SA Byers' efforts to escort these reporters from the parking lot, they physically resisted his efforts to do so and ignored his commands. Statement of Facts, ¶ 17.

SA Byers attempted to advise other agents as to what was happening. As still more media representatives violated the perimeter, SA Byers observed Hernández Laboy motioning with her arm as if signaling media members and protesters to enter the parking lot. Statement of Facts, ¶ 18. FBI agents approached the pedestrian gate and attempted to prevent more persons from violating the perimeter. However, those already past the

gate refused to return to outside of it, and resisted the agents' instructions that they leave the parking lot. Agents even observed some members of the crowd outside of the perimeter carrying stones. Statement of Facts, ¶ 19.

At least one member of the crowd spat or threw something onto an agent's face. Meanwhile, FBI agents continued to implore the crowd, yelling "Don't push! Don't push!" Statement of Facts, ¶ 20. Crowd members continued to oppose the FBI agents' efforts to remove them from the parking lot. In fact, the crowd continued to surge forward past the perimeter. The reporters pushed their microphones and cellular telephones into the faces and bodies of FBI personnel. Statement of Facts, ¶ 21.

Agents initially did not respond to the crowd's provocations with force. Instead, agents continued to instruct the crowd to disperse and return to outside the perimeter. The agents issued these instructions for more than a full minute. Meanwhile, the crowd continued to surge against the agents. Statement of Facts, ¶ 22. At no time did agents attempt to stop media representatives from filming the incident. In fact, during the standoff, an agent actually picked up a dropped microphone and handed it back to a reporter. Statement of Facts, ¶ 23.

As individuals continued to surge forward, some members of the crowd were in danger of being crushed against the perimeter gates. In order to defuse this growing danger, a SA took out a cannister of pepper spray, and displayed it above his head.

Statement of Facts, ¶ 24. The SA advised the crowd that he would deploy the pepper spray if the crowd did not return to outside the perimeter. He also shook the cannister for several seconds so that members of the crowd could see it clearly. Among those closest to the front of the crowd were plaintiffs Normando Valentín and Cosette Donalds Brown. Statement of Facts, ¶ 25.

When the SA displayed the pepper spray, some members of the crowd finally accepted that they should move back towards the perimeter. However, other members of the crowd either could not or would not permit this. In fact, those nearest the perimeter fence continued to surge forward, pushing against the SAs as well as those attempting to exit the perimeter. Statement of Facts, ¶ 26. When displaying the pepper spray failed to eliminate this growing danger, the SA fired several short bursts. In addition to hitting crowd members, the spray made contact with several agents. Statement of Facts, ¶ 27.

The pepper spray was effective in inducing crowd members to return to outside the perimeter. While retreating, members of the crowd shoved against and stepped over one another. Agents guided crowd members, including Ms. Donalds and Mr. Valentín, back through the pedestrian gate. Clearly, no media representatives were seriously injured, disabled in any way, or in great distress. Statement of Facts, ¶ 28.

Following their return to outside the perimeter, crowd members tossed items at the

agents. When the agents departed a few minutes later, crowd members struck and kicked FBI vehicles, and threw stones at them. The crowd damaged at least two FBI vehicles, and a hurled rock broke the rear window of an FBI van. Statement of Facts, ¶ 30.

Given these circumstances, in which an unruly crowd resisted law enforcement instructions and there was an immediate threat to officer and public safety, the force the FBI used to defuse the situation was not excessive. Isom v. Town of Warren, 360 F.3d 7, 11 (1st Cir. 2004).

"[O]fficers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation." Graham v. Connor, 490 U.S. 386, 396 (1989). It is impossible to gauge exactly what measure of force would have been necessary to control the crowd at 444 De Diego Avenue and to maintain peace in the face of a potentially escalating situation.[33] What is clear is that "'[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment." Id. (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

Nor did the agents' use of pepper spray violate the Fourth Amendment. It is well

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[33] In this context, it is important to note that neither Mr. Lago nor Mr. Valentín contradicted SA Byers's claim that plaintiffs failed to obey FBI instructions to leave the premises. In fact, Mr. Lago does not even deny SA Byers's account that Mr. Lago fiercely resisted FBI agents' efforts to move him back outside the security gate and even tried to take a swing at an FBI agent.

established that it is appropriate and legal for law enforcement officers to use pepper spray in situations similar to the facts of this case. For example, in Jackson v. City of Bremerton, 268 F.3d 646, 653 (9th Cir. 2001), the U.S. Court of Appeals for the Ninth Circuit affirmed a district court's grant of summary judgment where police applied pepper spray to break up a "melee" at a park, where officers attempted to arrest a suspect among 30 to 50 of his friends. The circuit court noted that:

> officers, who were substantially outnumbered, were faced with a group that refused to obey the officers' commands to disperse; they shouted at the officers; and then] engaged the officers in verbal and physical altercations. The safety interest in controlling the group increased further when the group was warned by police that a chemical irritant would be used if they did not move back from the area and the group refused to comply.

Id. at 652-53.

The circuit court held that, under the circumstances, no Fourth Amendment violation occurred, and "the force applied was reasonable and necessary to control a rapidly evolving and escalating situation." Id. (citation omitted).

Similarly, other courts have found the use of pepper spray to be appropriate to reestablish order or to subdue unruly individuals resisting legitimate orders from law enforcement officials. In so holding, courts have noted that pepper spray is "especially noninvasive," may be "very safe and effective" and "ordinarily causes only temporary discomfort." McCormick v. City of Fort Lauderdale, 333 F.3d 1234, 1245 (11th Cir.

2003) (affirming summary judgment where officer used pepper spray to subdue suspect).

In sum, the defendants did not act unreasonably in using pepper spray against plaintiffs; nor did they use excessive force in violation of the Fourth Amendment. Therefore, the plaintiffs have not satisfied the first prong of the qualified immunity test that requires them to prove that their allegations, if true, establish a constitutional violation. Pagan, 448 F.3d at 31. Thus, defendants are entitled to summary judgment on the basis of qualified immunity.

In the complaint, plaintiffs also requested an injunction barring the FBI from further interfering with plaintiffs' exercise of their First Amendment rights. Specifically, plaintiffs sought an injunction prohibiting the use of chemical agents (pepper spray) during future media coverage of FBI actions.

Plaintiffs lack standing to pursue this prospective relief since they failed to allege a real and immediate threat of injury; therefore, there is no case and controversy within the meaning of Article III of the constitution. Pursuant to Article III of the Constitution, federal courts only have jurisdiction over actual cases or controversies. See U.S. Const. Art. III; Am. Postal Workers Union v. Frank, 968 F.2d 1373, 1374 (1st Cir. 1992). "[S]tanding . . can be one of the controlling elements in the definition of a case or controversy under Article III," Asarco Inc. v. Kadish, 490

U.S. 605, 613 (1989), and "[s]tanding 'is perhaps the most important of [the jurisdictional] doctrines'." FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) (internal citation omitted). "If a party lacks standing to bring a matter before the court, the court lacks jurisdiction to decide the merits of the underlying case." United States v. AVX Corp., 962 F.2d 108, 113 (1st Cir. 1992). "[I]t is the burden of the 'party who seeks the exercise of jurisdiction in his favor' 'clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute'." FW/PBS, Inc., 493 U.S. at 231 (internal citations omitted).

"Curiously, the doctrine of standing, though vitally important for federal courts, remains a morass of imprecision." N.H. Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 12 (1st Cir. 1996); see also Erwin Chemerinsky, Federal Jurisdiction 56 (3d ed. 1999) (observing that standing is one of the most confused areas of the law).

> To establish standing, . . . plaintiffs must show: (1) that they have suffered or are in danger of suffering some injury that is both concrete and particularized to them; (2) that this injury is fairly traceable to the allegedly illegal conduct of the defendant; and (3) that a favorable decision will likely redress the injury.

Becker v. Fed. Election Comm'n, 230 F.3d 381, 385 (1st Cir. 2000).

Plaintiffs clearly have not met their burden demonstrating that it is "certainly

impending" that defendants will use pepper spray against them in the future. Furthermore, plaintiffs have not demonstrated sufficient likelihood that any one of them in particular will be affected by defendants' use of pepper spray. None of the plaintiffs was ever subjected to pepper spray before. Therefore, it is entirely conjectural that any of the plaintiffs will be affected by the FBI's use of pepper spray in the future. Lyons, supra, 461 U.S. at 108 (Plaintiff did not have standing to pursue an injunction where five months had elapsed between the date of the alleged police brutality and the filing of the complaint.).

"[A] plaintiff must demonstrate standing separately for each form of relief sought." Friends of the Earth, Inc. v. Laidlaw Envtl. Srvs., Inc., 528 U.S. 167, 185 (2000). While a plaintiff who has suffered past injury has standing to bring a lawsuit for damages, past injury alone is insufficient to establish standing in an action for equitable relief. Am. Postal Workers Union, 968 F.2d at 1376.

A plaintiff requesting injunctive or declaratory relief has the burden of showing "that the 'threatened injury [is] certainly impending'." Friends of the Earth, 528 U.S. at 190 (internal citation omitted). An individual does not have standing in an action for equitable relief if she would not directly benefit from the injunction or declaratory judgment. See Chemerinsky, at 66. Here, plaintiffs have not demonstrated that a further deployment of chemical agents by defendants against any one of them is

imminent. Therefore, plaintiffs would not directly benefit from an injunction or declaratory judgment entered against defendants. "[A] prospective remedy will provide no relief for an injury that is, and likely will remain, entirely in the past." Am Postal Workers Union, 968 F.2d at 1376.

CONCLUSION

For the foregoing reasons and authorities, the district court's judgment should be affirmed, and the present appeal should be summarily dismissed.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 16th day of January, 2008.

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United States Court of Appeals
FOR THE FIRST CIRCUIT

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Appeal No. 07-2196

ASOCIACION DE PERIODISTAS, et als.,
PLAINTIFFS - APPELLEES,
v.
ROBERT MUELLER, et als.,
DEFENDANTS - APPELLANTS.

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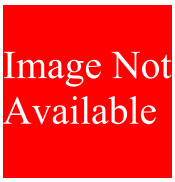

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January 16, 2008

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RE: **First Circuit Local Rule 31.1**

Dear Mr. Donovan:

Pursuant to First Circuit Rule 31.1, enclosed please find a CD Rom containing the entire text of appellee's brief, Appeal No.: 07-2196.

With nothing further, I remain,

Sincerely,

Germán A. Rieckehoff
Assistant United States Attorney

Enclosure

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