

MARGARET HENIGE

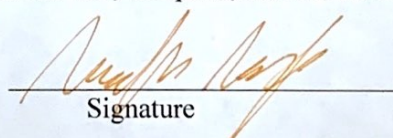
Print name WHAT I WITNESSED ON SATURDAY THE 22ND OF 2020

- I WAS DRAGGED BY MY FEET &/OR LEGS (WHILE ON MY BACK) (DOWN WOODWARD)
- I ASKED THE OFFICER HOLDING ME WHILE CUFFED IF HE COULD PUT ON HIS MASK, HE REFUSED, & I ASKED IF HE WOULD ~~PLEASE~~ PULL MINE BACK DOWN & FINALLY HE DID
- I WAS KNOCKED DOWN AT THE BEGINNING BY THEM TRYING TO GET ME ~~OFF THE BUS~~
- I WAS PROTECTING MY FACE BEFORE THEY CUFFED ME (W/ METAL CUFFS) AFTER BEING DRAGGED, THEN REALIZED THEY JUST WANTED MY HANDS TO CUFF, I WAS WORRIED ABOUT BLOWS TO MY HEAD BECAUSE OF MY PRIOR CONCUSSION (BY DPD)
- I SAW ~~THE~~ ^{SOMEONE} (WHO I COULDN'T AT FIRST IDENTIFY) W/ MULTIPLE OFFICERS ON TOP OF HIM, WE ALL SCREAMED, LEADING FOR THEM TO GET OFF OF HIM (HE ENDED UP IN THE HOSPITAL) ^{FOR}
- THEY WERE MISGENDERING PEOPLE, PLAYING THOSE WHO IDENTIFIED AS FEMALE W/ THE MALES, JOKING ABOUT IT ALL ^{STRIKES ON HIS FACE WHICH WAS COVERED IN BLOOD WHEN I FINALLY IDENTIFIED HIM}
- I SAW THEM ARREST LEGAL OBSERVERS, PRESS, & ALSO MANY MEDICS, WHO I SAW BEING TARGETED.
- ONE MEDIC WAS BROUGHT TO THE BACK OF THE BUS & WAS OBVIOUSLY NOT DOING WELL. WE PLEADED THAT HE BE SENT TO THE HOSPITAL. FINALLY ^(IN 20 MINUTES) THEY BROUGHT THEM OFF BECAUSE THEY SEEMED TO BE SLIPPING IN & OUT OF CONSCIOUSNESS. ^{THEY HAD A COLLAPSED LUNG.}
- ONE PERSON'S CUFFS WERE SO TIGHT (THEY WERE DOUBLE ZIPTIED) THAT THEIR HANDS WERE CHANGING COLOR, TEARS STREAMED DOWN THEIR FACE AS THEY SOBBED WE FINALLY GOT THE OFFICERS TO TAKE THEM OUT OF THE BUS TO CUT & REMOVE THEM. IT TOOK MINUTES, & THE HAUNTING SCREAMING & PLEADING THEY LET OUT AS THEY COULDN'T GET THE CUTTERS ~~UNDER~~ UNDER THEM HAUNT ME STILL
- 11 PEOPLE WERE ON A PADDY WAGON, & NOT GIVEN MASKS
- THE BIG BUS WAS OUT OF MASKS & ~~WE~~ WE HAD TO PLEAD FOR NEW ONES, OUR MEDICS WERE AT FIRST YELLED AT WHEN TRYING TO PULL OUT NEW MASKS
- MANY OF THE OFFICERS (EVEN! ESPECIALLY IN THE ENCLOSED ~~AREA~~ & FULLY PACKED BUS) WERE NOT WEARING MASKS & WERE REFUSING TO PUT THEM ON
- AN OFFICER CAME OVER W/ A BAG OF SNACKS WHILE WE WERE KEPT OUTSIDE OF MOUND (WE WERE ONLY ALLOWED TO GO INTO PEE, WHEN THE SUN CAME OUT PEOPLE GOT SUN BURNS & BURNS FROM GASSES LINGERING ON THEIR SKIN) & OFFERED SNACKS, PLACING THE BAG IN FRONT OF ME BEFORE PULLING IT AWAY, LAUGHING AT ME
- THE OFFICER WHO REMOVED MY CUFFS ASKED ME SERIOUSLY IF I KNEW WHO/WHAT THE OFFICER LOOKED LIKE WHO PUT THEM ON BECAUSE MY HANDS CIRCULATION WAS CUTTING & MY WRISTS HAD BLUE LINES FROM BEING TOO TIGHT

I, MARGARET HENIGE, have personal knowledge of the facts stated in this affidavit and, if called as a witness, I am competent to testify accordingly. I declare under penalty of perjury that the above and foregoing statement are true, complete, and correct to the best of my information, knowledge, and belief.

8/25/20

Date


Signature

Lauren Rosen
Print name

I was present with Detroit Will Breathe during the events of 8/22/20

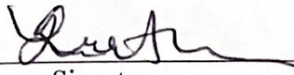
I witnessed riot police beat, tear gas, ^{xx + arrest} baton protesters in response to a peaceful, non-violent action at Woodward + John R. There was no property damage or destruction or violence.

It was clear that riot police took joy + amusement in causing major bodily damage + pain to protesters. Even when protesters were already in custody, they were being struck + pepper sprayed purely for torture.

I have been marching with DWB since about day #2 and can confirm this is a pattern with Detroit Police Department.

I, Lauren Rosen, have personal knowledge of the facts stated in this affidavit and, if called as a witness, I am competent to testify accordingly. I declare under penalty of perjury that the above and foregoing statement are true, complete, and correct to the best of my information, knowledge, and belief.

8/25/20
Date


Signature

Caylee Arnold

CRA On August 22 / August 23, 2020

I was beaten, pepper sprayed, and detained in the first wave of attacks by Detroit Police. Upon the first rush, I was left standing. I noticed a can of tear gas smoking into a fellow protesters face who was being pinned down by several officers. I attempted to remove it from the protester's face, but the canister was stuck in the Q-Line rail. I had no other intent but to move the canister so that it was no longer sparking into the protester's face. While doing so, I was knocked to the ground by police from behind. I was knocked onto my stomach. When I looked up and opened my eyes, I saw another protester, Bre (unsure of the spelling of her name) laying a few feet away. I reached for her hand as she started looking for her friends, verbally confirming that she was doing so. I told her we had to leave. We helped each other up and began walking towards the intersection John R and Woodward, holding hands.

As we held hands, stumbling together, a police officer began pushing us from behind with his shield. He was saying things, but I could not understand what he was shouting. At this point, Bre (again, unsure of the spelling of her name) and I were separated. I put my hands in the air, shouting, "I am leaving," and "I am trying to walk away," as the officer continued to shove me in the back with their shield. I naively thought that he may not have heard what I was saying, so with my hands still raised, I turned only my head to the left so he could hear what I was saying. It was at this point that he raised his baton and hit me several times in the back of the thighs, and left knee area. I assume he thought that this would incapacitate me; however, I remained standing with my hands in the air. It was at this point that I was tackled to the ground by several officers. After I was pinned to the ground, I felt pepper spray being sprayed directly into my face for what felt like a very long time. I remember wondering why I was being pepper sprayed while I was already incapacitated and detained.

I was sprayed so much so that my mask and goggles had to be removed because both were filled with pepper spray. I was left gagging and unable to see, especially from my left eye, for an extremely long time. Once I was handcuffed and hoisted into a standing position, I was brought to the curb with two other female protesters who had been detained. Police poured water on my face, but this only made the burning worse. I sat on this curb for a few moments before we were brought to the other side of Woodward to be sat with the rest of the protesters that had been detained.

When I got to this side of the curb where the other protesters were being detained, I saw medics that had been severely hurt and were being denied medical attention. I saw people with blood caked on their face. I saw people with blood on them that wasn't theirs. I saw Jae Bass screaming in agony, somehow shirtless. I saw police officers smiling, high-fiving, and "bro hugging" each other. The officers looked at us like we were their prey. While I sat on the curb, I felt like I was a zoo animal and the officers were the zoo-goers, ogling at us. Officers serially misgendered protesters and when officers finally began using proper pronouns, it was undermining and in a jeering way. Officers continually tried to provoke protesters who were already detained and sitting on the curb. Officers also denied medical attention to almost anyone that asked for it until the group of detained protesters made a collective effort to ensure that medical attention was given to those that needed it. Medical attention was still denied to some until it became disturbingly clear that the individuals needed it; for example, I witnessed a medic writhing on the ground in pain while officers looked at him and laughed, shaking their heads.

Officers then loaded most (but not all) of the female detainees onto a transport van where the driver told us he should have been a fireman and asked us if we had any jokes to tell. We

were driven to the Detroit Public Safety Headquarters where we were loaded onto a DDOT bus where a handful of detainees were already being kept. We remained on this DDOT bus for several hours. During which time, officers removed Ethan Lucas from the bus. Detainees were further denied bathroom breaks, and medical assistance until it became disgustingly clear that the bathroom was needed or that medical was needed, respectively. For example, one protester was loaded onto the DDOT bus and froze. She doubled over and wailed in pain. I have never heard another human make a noise like I heard her make. It was guttural and it brought tears to my eyes. Once she was finally able to speak, she told us it was her zip ties that were causing her so much pain. When she showed us her hands, her hands were somewhere between grey, blue, and purple. The officers finally agreed to replace them. Her zip ties were so tight that it took them several minutes to cut them off. This poor young woman continued to cry out in pain the entire time. It's a sound I won't ever forget. Furthermore, officers did not give masks to those that had lost theirs and did not make any effort to get us masks for quite some time. Of the officers themselves, only some wore their masks consistently. Some did not have them on at all.

Officers took our information so many times that I lost count. One officer told another detained protester that her name was strange and difficult to spell even though she was spelling it *very* clearly to him. This same officer (his name was covered) yelled at another detained protester (who clearly had a head injury – she told me she was dropped on her head by police – she also had blood caked onto her face) who was having trouble spelling the name of her street. I watched this detained protesters eyes roll around in her head and watched her head sway as she tried to spell Adelaide.

After hours of sitting on the DDOT bus, we were transported to the Detroit Detention Center (DDC) where our information was taken several more times. We were told we were being ticketed. Officers continued to taunt and provoke us. One officer asked me to help him pronounce the names on the tickets because he was “illiterate” (this is in quotes because I am directly quoting this officer). Eventually, officers began calling us off the bus and bringing detained protesters into the gated front yard at the Intake area of the DDC. We were kept in this outside area all night. Once in the yard, our information and IDs were taken many more times. Officers continued to jeer at and taunt us. Many officers engaged in conversations with detained protesters, stating that protesters were throwing rocks and protesters should have just listened when the occupation was told by police to disband. I did not personally see any rocks thrown (or anything else being thrown for that matter) and I was unable to hear the calls to disband.

Over the course of the night, the taunting and jeering from police began to subside. Detainees were eventually told that officers had run out of zip ties, even though detainees were in pain due to their current ones. When asked, officers refused to use their personal handcuffs. I eventually fell asleep in the yard. I was released around 7:50 am on Sunday morning.

I, Caylee Arnold, have personal knowledge of the facts stated in this affidavit and, if called as a witness, I am competent to testify accordingly. I declare under penalty of perjury that the above and foregoing statement are true, complete, and correct to the best of my information, knowledge, and belief.

8-29-2020
Date

Caylee Arnold
Signature

Andrew Kaplowitz
Print name

In defense
of Black Lives

On Saturday, August 22nd I attended a protest against police brutality where I was personally brutalized by police. ^{the movement} stopped ~~at~~ Woodward ^{the movement} intersection. ~~we~~ announced the zone liberalized and proceeded with an amicable ~~to~~ celebrations.

During

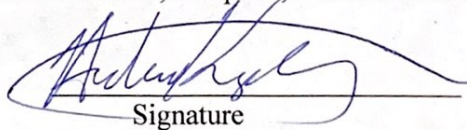
After some time police in riot gear, backed up by armored vehicles, approached our crowd. The police ~~approached~~ destroying public property that impeded their progress. The police never addressed the crowd, immediately ~~approach~~ I saw them assault people next to ~~me~~ who were not resisting. Police hit me with riot shields and batons. I have defensive wounds on both arms, (lacerations), and bruised ribs. Police also pulled my mask off to mace me. Police pulled my shirt over my head and restrained me as they continued to spray mace through the hole of the shirt.

They forced fear
got into the
crowd.

A comrade grabbed my waist and pulled me away from the police. Police pursued us as we tried to seek refuge and I saw them swing at my comrade. I retreat through the crowd before the full effect of the mace took effect. Blinded or secured comrade led me to medical treatment and then away from the carnage.

I, Andrew Kaplowitz, have personal knowledge of the facts stated in this affidavit and, if called as a witness, I am competent to testify accordingly. I declare under penalty of perjury that the above and foregoing statement are true, complete, and correct to the best of my information, knowledge, and belief.

8/23/2020
Date


Signature

BENJAMIN KENJIRO SAGINAW

PRINTED NAME

My name is Benjamin Kenjrio Saginaw. I am a 12 year Detroit resident and could not be more proud. I have marched with Detroit Will Breath since June 3, almost every single day. After seeing a lot of my friends get arrested and brutalized on June 2 for exercising their constitutional rights, there was no other option than to be in the streets every day to reinforce that the struggles people have gone through in this country to uphold our constitution were not in vain and were not a myth.

In the 80 something days since that night we have been marching, learning and growing together. I have seen nothing but radical love and care. We did not break the city we love. We did not damage the city we love. We went through the streets cleaning trash and chanting for justice, equality and the removal of long standing oppressive systems.

Saturday was no different. We were occupying a space with music and dancing. We were occupying a space that is often occupied by white sports fans after events in downtown. We were occupying a space highlighting the gentrification, displacement and mistreatment of black and brown bodies. We were peacefully holding space. And then the line of riot police started to advance on our sit in.

Conveniently waiting until the restaurants had closed around us, they advanced toward us and immediately targeted a medic car. The individuals in the car were attempting to leave and follow their orders. They were violently pulled from their car and arrested. The driver was my friends mother. She is with us every day and provides waters and rides and anything anyone needs and they targeted her first.

They continued to advance and began shooting canisters of gas at us. We attempted to hold our line in the confusion and chaos that was ensuing. I was on the right side of our line, arms locked with my friend Gio, who is a 17 year old born and raised Detroit, and someone we did not know but felt was our family. We all looked at each other for courage bc what we saw coming at us was not a group of people who wanted to arrest us (which we were ready for and would not fight against) but faceless armored bodies wielding shields and charging with raised batons. They were coming to brutalize us. And we could not have been more peaceful. Our line of people was plowed through and we were all knocked to the concrete. At this point i lose Gio and am just trying to get to my feet in the cloud of gas. I look around and see people I love getting beaten with batons. Getting pushed into the ground by 3 to 4 officers per one person. A 4' 11" woman who has also been with us since June was repeatedly beaten in the face and is now streaming blood. I have never seen anything like this. I was present on July 10 and this was a new type of horror. A new energy of destruction from the line of police beating us. I'm looking around to see who is around me and who is safe. I see Claire our live stream coordinator directly in front of me and then a giant man checks her with all his force behind his shield into me and to the ground. I lift her up and she is reaching for her phone which fell and he lifts his baton and hits her in the side of her body and then checks her again, this time nothing is there to interfere with the fall and it looks like her head hits the concrete. I lift her up again and the same officer checks an even smaller girl next to claire to the ground. All around us people are being hit, shoved to the ground, piled on by multiple officers.

At this point i take another visual check to see who is safe, who is around and who is in need. The riot cops had taken all but two of our medics. They targeted them and detained (and beat) them so that we were cut off from any support. I didn't know this at the time but it explains why i could not see any medics. Before we were attacked i was given a spare bag with ice packs and water and other supplies. So i began to find people who were visibly suffering from tear

gas or pepper spray, providing bottles to wash their eyes and faces. I gave Claire an icepack for her head and find other recipients for the rest. We were regrouping and recovering and the riot line had formed back up in front of us. One of our chanters was on the mega phone and asked why they were doing this. We were not being violent why were they doing this to us.

They shot more gas and canisters and violently pushed against us again. at this point we did not have the numbers to hold an effective line anymore, they had detained or injured too many of us. After a series of more retreats we end back up at the lot where a lot of our cars were. i got a ride to my vehicle in Corktown and came back to provide rides. In the amount of time it took me to leave and come back the police had rushed the parking lot and began detaining people who were attempting to leave, which were their orders. Thankfully i was able to pick up and transport to safety 4 people. After that mission i returned to downtown and headed to michigan and third where they had loaded everyone onto a bus.

my fellow blocker called me and asked if i could provide a ride to the hospital for an injured person. my friend and i picked them and another friend up bc we were around the corner and headed to Henry Ford. The person we were transporting was one of our medics. He was released and not processed bc he was too injured. He could hardly walk to the car and get in. He was going in for X rays to find out how badly (I later find out that he had a broken rib and a partially collapse lung)

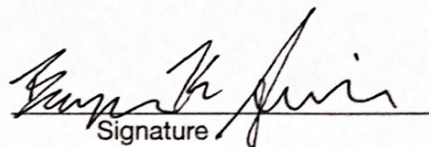
After that mission was complete we went to mound to await the people making bail. We arrived and everyone was still on the bus. Eventually they let them off the bus into a barbed wire enclosure, still zip tied. we found out later that more than one person had their zip ties on so tight that they had to be removed and put back on bc their hands were blue. Some of our people were not present because their injuries were so bad they had to go to the hospital before processing. They let people out one by one, over a 16 hour period. Some people had to wait in that caged area, when the sun had risen and began beating on them, with no water for 12-16 hours. They were humiliated in that cage, they were ridiculed, they were photographed with personal phones and we were forced to be on the other side of the lot so they felt as alone and helpless and not human as possible. If the treatment on Woodward was not horrible enough, they made sure to solidify the inhumanity with this elongated, intentionally painful process.

We waited until 4:30 pm sunday when the last of our people was released (that could be, because Ethan is still being held on erroneous and ridiculous charges) and we headed out to decompress and process. Which is still happening. I am still remembering things i had forgotten and feelings i had not known i had. I am discovering pain from the injuries of saturday in my neck and shoulder that i didn't know i had received. I am traumatized by seeing how we were responded to for peacefully holding space and what i saw happening to people i love and care about all around me by the hands of the state. We are citizens of this country and this city and should not have been attacked with militarized tactics and and lower than military morals. It was disgusting.

I, Benjamin Kenjiro Saginaw, have personal knowledge of the facts stated in this affidavit and, if called as a witness, I am competent to testify accordingly. I declare under penalty of perjury that the above and foregoing statement are true, complete, and correct to the best of my information, knowledge, and belief.

08/25/20

Date


Signature

Statement from Catherine L. Sumblar:

A friend and I were in my car at Woodward & Grand River at approx. 12:25am attempting to leave the area and could see the riot line on the other side of Grand River. I pulled my car away from the curb to leave but was blocked by the street blockade so I stopped my car and put it in park, so the cops could see I was not trying to drive through them. Moments later when the line of police reached my car, several surrounded it and yelled at me to get out of the car.

I told them I was trying to follow their order to disperse but could not leave the area because of the blockade in front of me. One officer (red short hair, beard, I believe his last name is Cole?) that I recognized from photos of the July 10 incidents screamed "Bullshit! You're the reason that blockade is there. I saw Ethan removing the blockade from your car!" (Note: My car never contained any blockade materials, nor has Ethan ever placed anything in or removed anything from my car in the entire time I've attended DWB events. I only know him in passing, from social media, etc.) I told them that was not true, again reiterating that I was attempting to follow their order to disperse.

The officer nearest me opened my driver's side door and grabbed my left arm to try to pull me out of the car, he twisted my left wrist backwards, causing intense pain, as several other officers pulled me from the car. I was caught in my seat belt, which was still around my shoulder and neck area, and the cops yelled to stop resisting. I told them I was caught in the seatbelt and they continued to pull on my twisted arm to drag me out of my vehicle. I was able to get the seatbelt off with my other arm and tried to grab my phone from my dashboard so I would have it with me, but it fell to the street outside the car. I reached down for it and saw an officer kick it away toward the front of the vehicle. (I have not been able to retrieve that phone, I called DPD third precinct and was told it is not in their possession.)

Once I was removed from the vehicle several officers painfully forced my arms behind my back and applied plastic zip-tie cuffs so tightly that my left hand started to become numb after several minutes. We were taken to a DPD van to be moved to Michigan & 3rd for processing, while waiting to depart the scene I was able to get an officer to change the cuffs to normal metal ones to relieve the pain from the too-tight zip ties.

The van transported us to Michigan and 3rd where we were transferred to a city bus. Several of the people on bus had lost their masks during their arrests but the bus driver and police officers ignored requests to provide masks. As many of the detainees on the bus were medics, we were able to work together, (with our hands zip-tied behind our backs), to get masks out of their backpacks and applied to the faces of our comrades.

We were on the bus for several hours as additional vans of arrested protesters arrived and were brought on to the bus. During those hours, several people informed police officers that their zip ties were causing pain and requested that they be changed or loosened. One person brought on the bus in tears, had their zip ties so tight that her hands were literally blue from

lack of circulation. It took repeated requests from multiple medics on the bus before the police removed that person and proceeded to attempt to remove the cuffs. Because they were so tight it took them several minutes to cut them off, causing the arrestee intense pain when they tried to get the scissors or other cutting devices between the plastic and their arms. We could hear her screaming in agony for minutes at time.

Another medic had their arms bound behind their back, around a completely full backpack with the weight of the pack resting on the zip ties, increasing the pain and pressure on their wrists. Several of us attempted to help this medic by removing items from their pack to try to relieve the pain, but officers reboarded the bus during this time and told us to sit down. We explained the situation and requested that they recuff this person so that the pack was not bearing down on the cuffs, but they refused to do so. This person remained in that painful situation for hours.

When another van arrived with several more arrestees, one was a medic who was unable to stand in an upright position as they boarded the bus. He was curled over in a hunchback position and clearly in great pain. Repeated requests to the officers that this person needed medical assistance were ignored. Eventually other medics on the bus screamed for officers to call an ambulance for this person and one finally appeared and he was removed from the bus. We could not see whether he was taken into the ambulance or not, and he never returned to the bus. I have since found out he is in the hospital on a breathing tube with a broken rib and collapsed lung.

Another person on the bus with us was a trans-woman who was repeatedly misgendered by police, even after correcting them. The officers often used a mocking tone when using the "her" pronoun to refer to her. She later shared with me that when she was being "sorted" (by repeatedly groping her genital area) to determine which van to be transported in, upon notifying the officers that she was a trans-woman they replied "Nope, you have a penis" and was placed with the male arrestees.

Once the bus transported us to the detention center, we remained on the bus outside of the building for a few more hours while multiple officers made several passes through the bus collecting our names and identification. They were incredibly disorganized and repeatedly requested the same info from us multiple times. When they brought tickets to the bus to handout to us, they were frequently for people who were not on our bus.

Eventually, we all received our paper tickets and were removed from the bus and placed into a fenced area outside of the intake doors of the detention center. This area was concrete and grass, with very little shade and nothing to sit on but the ground. We were not provided with an opportunity to make a phone call; our Miranda rights were never read to us and requests for water went ignored. After several hours, as the sun came up and the heat became more intense, we clustered in the few bits of shade to avoid sunburn and heatstroke. A couple of officers walked out the front of the detention center to approach the people waiting outside (our friends/family that were there to bail us out, drive us home, etc.) and those people were able to convince them to take some cases of bottled water that they had and provide it to us.

By that time, however, at least one person in our group was showing signs of heatstroke to the point where she was not speaking coherent sentences and was passing in and out of consciousness. Some of the arrested medics had instant ice packs in their bags so we attempted to cool her down with those while repeatedly requesting medical assistance from the police officers supervising us. We asked them if they could at least move her up in whatever order they were processing us so she could receive aid sooner. They eventually agreed to bring her inside the building, and I believe she was processed and released shortly after. I do not know if they provided any medical assistance or just fast-tracked her out quickly to avoid responsibility.

While we were in this outdoor holding area, a couple of the officers supervising us were seen using their personal cell phones taking photos/videos of us. When we told them to stop taking pictures/video, they denied that they were doing that all while still holding their phones out above them with the cameras pointed at us. We were also mocked, laughed at and bullied by nearly every one of the officers that were interacting with us throughout the entire time we were in custody.

After several more hours, I was eventually processed and released after bail was posted by the NLG fund. The only paperwork I received was my citation/ticket and a receipt for bail. I was never provided with any information about my vehicle or informed that it was impounded.

I, Catherine L Sumbler, have personal knowledge of the facts stated in this affidavit and, if called as a witness, I am competent to testify accordingly. I declare under penalty of perjury that the above and foregoing statement are true, complete, and correct to the best of my information, knowledge, and belief.

Date: 8/25/2020

Signature: 

Kayleigh Waterman

Print Name

This is my personal statement regarding the events of the morning of August 23rd, 2020. I believe it will be most effective to describe these events point by point with direct corroboration to the personal video footage that I took during the events. These are saved videos from me streaming live to my Instagram account. Please note the first numbers will correspond with the time stamps of these videos, with my description following it.

Video 1: 9 minutes, 26 seconds.

1. 0:00-2:14 Myself and the other protesters stood in line in solidarity chanting "we don't see no riots here, why are you in riot gear", with no intention of moving forward towards the police officers in front of us and made no actions that could have been interpreted as much.
2. 2:14-2:32 Police began to approach us and charged at us. This is also when they administered the first flash bomb, and possibly tear gas bombs upon the protesters.
3. 2:33-9:26 Police reached the crowd and began to use their bodies, shields and batons to assault the line of protesters, pushing many people down. It appeared that there was no intention to detain the protestors but to instead inflict harm upon us. During this range of time there continued to be several canisters of tear gas being deployed into the crowd by the officers.
 - a. 2:35 Officer uses shield to assault male protester in white t-shirt
 - b. 2:39 Officer on right side of the frame assaults protesters with his baton
 - c. 2:45 Officer on right side of the frame assaults protesters with his baton
 - d. 2:50 I was pushed down and trampled by protestors that were being pushed by officers in front of me
 - e. 3:00 Officer is seen grabbing young woman with dark red hair, but did not show any intention of detaining her for arrest.
 - f. 3:20 An officer approached Jae Bass and moved his shield to the side to attack him with their baton.
 - g. 3:23 Not visible in the video, but a male officer had pushed down a young woman in a black t shirt and dark brown hair onto the pavement, just to walk away without detaining her.
 - h. 3:27 The same officer proceeds to beat the same woman who had managed to get up with his baton (visible in the middle/right side of the frame). He then proceeds to push her with full force over the curb and onto the pavement where her body bounces from the amount of force he inflicted.
 - i. 3:34 An officer is shown to use his shield to push a protestor.
 - j. 3:41 The tear gas has started to affect me physically in full effect. I could not breathe and showed familiar symptoms of an asthma attack. I had to climb over debris in the street to get out of it and was chased by officers. The affect of the tear gas effected me throughout the remainder of the videos as well as after leaving.
 - k. 3:52 Many protesters are walking away and the officers continued to follow and harass and push them, including an elderly gentleman and women.
 - l. 3:54 Several officers are seen cornering and physically assaulting Jae Bass, his shirt is ripped and he disappears off frame.
 - m. 4:09 Two women are attempting to walk away from the police officers and another officer comes from the right side of the video to target them directly and push them.
 - n. 4:51 Officers deploy an explosive that emits red gas.
 - o. 5:57 Officers start to bang their batons against their shields to intimidate our peaceful line of protestors.

- p. 6:30 At this time, there is more visibility that the police were surrounding the intersection from, not only where they approached us on Woodward and Grand River, but also from Broadway.
- q. 7:07 There is audible sounds of dogs barking. I believe this is a recording being played by the police to increase intimidation.
- r. 8:05 A gentleman in a green t shirt, who I have never seen at a Detroit Will Breathe event walks across the frame between the protesters and the police. I believe this man to be a bystander.

Video 2: 7 minutes, 38 seconds.

1. 00:27 Not visible in the video but I look behind me to see protesters, many of which trying to medically treat each others injuries and console each other.
2. 0:46 Another protester is seen to be coughing, being injured by the gasses inflicted upon us.
3. 1:44 I am shown addressing the viewers of the video giving a verbal description of what has happened so far. There is an audible bang, which I presume to be another flash bang used by the police. My video cuts because I opened a text message on my phone which causes the live stream to pause in the Instagram app.
4. 2:27 Another loud bang occurs from the police and an explosive device is thrown into the crowd by the officers. Verbally identified by myself as teargas.
5. 2:36 An explosive omitting a red gas is thrown at the protesters, that caused respiratory issues and burning sensations. After research, I presume this to be CN gas which according to the National Institutes of Health, is a "toxic lacrimator and at high concentrations has caused corneal epithelial damage and chemosis. It has accounted for at least five deaths, which have resulted from pulmonary injury and/or asphyxia. CS is a 10-times more potent lacrimator than CN but is less systemically toxic." During this time, the officers approaching towards the crowd a second time.
6. 2:27 Man mentioned earlier in green shirt is visible again, presumed to be bystander.
7. 3:11 Officers continue to deploy noxious gasses into the crowd who is walking and running away.
8. 3:21 Officers start to run towards protesters, including a young woman with an injured leg who is attempting to get away on a medical scooter.
9. 3:29 More gas is deployed into crowd. One even right next to me.
10. 3:54 More gas is deployed into the crowd, who are trying to escape to physical safety towards the starting point of the earlier evening's march where many peoples cars are parked.
11. 4:13 Officers are seen running towards us again.
12. 5:25 Officers are seen running towards us again.
13. 6:06 The video is shaky because I am trying to reach behind me into the pocket of my backpack to grab my Abuterol inhaler to treat my asthma. I'm later shown sharing with another protestor who suffers from the same condition, and who was also experiencing symptoms of an asthma attack.
14. The remainder of the video depicts the officers in the distance, seemingly leaving us alone which is taken as an interpretation that we are able to get to our vehicles for safety. I later found out this was 100% a misinterpretation and after the video ends and I was able to escape, the officers cornered, attached and abused the remainder of protesters to detain and arrest them.

Follow up of accounts not shown in videos:

I arrive at the detention center, that it is presumed to be where the arrested protesters will be held. This includes my mother, Catherine Sumblor and her friend Kaeshona Austern who

I assumed to be arrested but have had no way to contact them to know for sure. I later found out that they were physically pulled from my mother's car and assaulted before being arrested. They told the officers multiple times that they were just trying to follow their orders to disperse and leave the area. This was apparently right before the officers charged at the line of protesters.

When the bus finally arrives, the arrested are held there for an hour or more before being let into an outdoor fenced-in area next to the detention center, still in zippered handcuffs. Officers from the center do not let us approach the area to check on the identities of these individuals or their physical condition. They tell us that we must stay on the far side of the parking lot and that waiting in the parking lot that is closer to the detained individuals is illegal. I don't believe that statement of theirs to be true. During this time, I met two women who were celebrating their anniversary with their husbands downtown that evening. Their husbands were abused and detained with the protestors, even though they were not involved at all. As the sun began to rise, it became excruciatingly hot. It was obvious that the detained were being subjected to the same conditions, many of which presumably still covered in noxious chemicals and exposed to the elements. We later find out that these chemicals, when mixed with sunlight and heat, triggered a chemical reaction which caused even more burning to the skin and anywhere it was. Still before anyone was released, an officer approaches the group of people waiting to pick up their loved ones and states that they do not have water to give those arrested and asked if he could take our own cases of water to give them. I later find out from those who were arrested that the officers certainly had access to their own disposable water bottles and refused to administer their own to the detained. The officers taunted them with the water while the detained begged over and over for water, and medical care. Especially for an individual who was experiencing advanced stages of heat stroke.

We waited for hours until the first people were released. They seemed to be releasing individuals one at a time with at least a half hour in-between them. It seemed like the process was intentionally slowed down or made to be less efficient than it should be to inflict more pain not only on those who were arrested, but their loved ones who were scared and waiting for them.


I am sure there's more that I may recall at a later time, once I am mentally more stable after this traumatic experience.

Video 1: https://www.instagram.com/tv/CEOA9-uHheJ/?utm_source=ig_web_copy_link

Video 2: https://www.instagram.com/tv/CEOCmoBHhVU/?utm_source=ig_web_copy_link

I, Kayleigh Waterman, have personal knowledge of the facts stated in this affidavit and, if called as a witness, I am competent to testify accordingly. I declare under penalty of perjury that the above and foregoing statements are true, complete, and correct to the best of my information, knowledge, and belief.

Date: 8/25/20

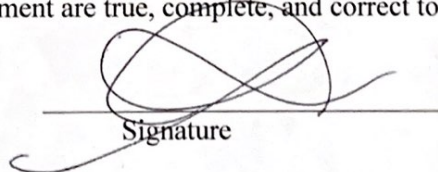
Signature: 

Alston Loper
Print name

I was present yesterday, August 22 on Woodward Avenue when cops were called in to disperse our group. They walked up to us in a line and stood there watching us ~~back~~ in complete riot gear. At ~~the~~ some point their line broke ~~and they came~~ as they shot tear gas canisters at us. ~~They~~ They came through the smoke and started smashing their shields in to protesters. They were spraying this red liquid out of a fire extinguisher-type thing directly into protesters faces. I saw them attacking the medics. I saw the person in front of me hit with a baton on their knee. I was hit on the top of my thigh and then pushed back with

I, Alston Loper, have personal knowledge of the facts stated in this affidavit and, if called as a witness, I am competent to testify accordingly. I declare under penalty of perjury that the above and foregoing statement are true, complete, and correct to the best of my information, knowledge, and belief. →

08/23/2020
Date


Signature

a shield. I was just standing still. I didn't touch any officer nor did I throw anything ~~back~~ and yet an officer singled me out and sprayed my face with the red liquid (pepper spray). The look in this man's face was pure anger and hatred. He was ~~acting~~ acting out of emotion. When I turned around to find water for my eyes I could see several officers on top of one protester. The protester was not fighting back - rather they were face down on the pavement yet there were 3 or 4 officers "restraining" and spraying this poor person in their face with mace.

Fadel Ali Muthana

Print name

My name is Fadel Muthana, a Hamtramck native, Americorp member for DPS, a Wayne State University student, a military person who served, and organizer for multiple communities.

MLK justified civil disobedience as a peaceful method that could be used to get attention to the injustice facing ~~just~~ ^{just from 2020} communities that face injustice. Having said that, the protest yesterday was to catch attention to the (long term injustices that our communities (people of color, black ect.) have faced.

It was around 12:00pm ^(grand jury) when the police who have not been even present in the protest march towards us, crashing us moments later. They hit bystanders, medics, journalists, justice organizations. Blood was spilled, injuries were done, excessive force justified "oh, it's our jobs."

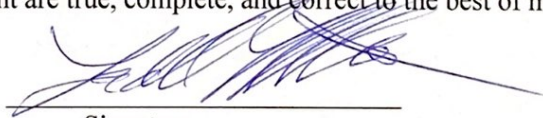
I had a prior injury from military training, being in the front lines, pushed by five police forces for peace protest, banged on my head, hands cuffed, and hitting my back 3 times even when I asked to stop "It hurts" .. Please stop. "The protectors" of cities become the offensive and stopping our voices and civil engagement. By the way, organizing and doing petitions "zok" through motion didn't help.

I, Fadel Ali Muthana have personal knowledge of the facts stated in this affidavit and, if called as a witness, I am competent to testify accordingly. I declare under penalty of perjury that the above and foregoing statement are true, complete, and correct to the best of my information, knowledge, and belief.

→ back

08/23/2020

Date



Signature

The aspect that police force was used shows that the police do not care for the citizens that they claim to protect. Showing their strength and brutality for unarmed protesters and having back injuries extended (pictures will be provided to the evidence bank) in the spinal cord (after having 2 lumbar fusion surgery (L4-L6). Being injured and asking for help, one officer spit and said "you volunteered, you deserve it." Oh, so peace protests (1st amendment is now a evil act." Then being detained, phone taken, pushed to the grounds multiple times was not enough, sprayed with pepper spray to the eyes like your threat and for one reason was crazy and unjustified then being held in the detention yard and harassed ~~for~~ from the time we arrived to the time we let was uncalled for. An officer even threatened me (recruiter I believe) and another officer sexually making comments by saying "stop protesting or we will fuck you up" and pointing to his private part (location like what the hell.

fm232020

Other information:
 Stood in the front of the protest. When the police came down on us. Five people officers. Having no arrest record (clean 100%) was terrorizing and made me feel threatened for next time however I will not stop as I believe injustice anywhere, is injustice everywhere (mk).
 Also getting hit in my legs just didn't make sense. Why do so when you could just cuff us. When you're already on the ground and still beaten shows up as a terror act by the police.

fm232020

Brianna Vanderkelen

Print name

On 08/22/2020, I participated in a non-violent demonstration that sought to peacefully occupy a section of Woodward for the purpose of calling for federal agents to be stopped from occupying Detroit under 'Operation Legend'. About an hour or so into this "occupation", which included music, dancing, conversation, spirited chants, and a pending meal delivery, we caught word that Detroit police officers - armed in riot gear - were heading our way on foot. ~~Our~~ Our group faced the direction they came from, clustered together for unity and safety, and continued peacefully chanting. I am told three warnings to clear the area were given. I cannot say for sure whether or not this is true, all I can say is I did not hear, or would not hear any of these orders. I saw riot police line up momentarily. And then suddenly, without any provocation, without an object being thrown, or anything but chanting from our protest group, police began advancing towards us, without hesitation. I saw nobody on the riot line reach for a zip tie, attempt to take a protester's arm, or turn anyone around to make an arrest. The first and only actions I saw on their approach where riot shields and batons hitting still non-violent protesters. DPD launched multiple canisters of tear gas and other chemical agents at us that we have not been able to identify to my knowledge, because officers began picking them up. In fact, I was reaching for one of these unfamiliar canisters to inspect when I was backed hard to the ground by an officer's riot shield, and directly into a cloud of smoke. I was immediately blinded and felt several feet trample and trip over me in the fog before I was able to regain my footing. When I did, I continued in the direction I believed was the one I was heading.

I, Brianna Vanderkelen, have personal knowledge of the facts stated in this affidavit and, if called as a witness, I am competent to testify accordingly. I declare under penalty of perjury that the above and foregoing statement are true, complete, and correct to the best of my information, knowledge, and belief.

08/23/2020
Date

Brianna Vanderkelen
Signature

pointed in. Though I could not see, and the street was covered in smoke. I must have been going the wrong direction, I thought, because I was physically wrapped and thrown to the ground again by another officer, who I still could not see. "Go home! Get up and leave!" I was told. I stood up and tried to continue in another direction, but before I could fully get to my feet still choking on tear gas, I was slammed to the ground by another riot shield. A fellow protester took me by the hand and began to lead me in the direction we were asked to go. Then THAT person was grabbed by the arm by an officer who began beating her with a baton. I screamed and protested as we were "complying", and he then dragged her to the ground and continued beating her. I moved to protest again, and another officer grabbed me and threw me to the ground. This time, I went limp for a moment on the street. While I was lying face down and crumpled on the street, another officer rolled me over with a foot or a baton and maced me directly in the eyes. I tried to stop this and ended up being maced all over my ~~body~~ body, full of open wounds now. I heard a voice say "put a tie on her" and was zip-tied, and set on the sidewalk with other detained protesters. While on the sidewalk, I witnessed police blatantly ignore clear medical emergencies, even as protesters begged for a medic or EMS, as ours were arrested. I personally witnessed DPP repeatedly misgender a trans woman, and ask her direct questions about her genitalia while discussing accommodations for her at the jail. I was then placed in a van, and driven to a D-Dot bus where I was held with other detainees for 3 hours - from 1 am to 4 am. We then were transported to Detroit Detention Center, where we were kept in the front yard of the facility for hours - some until 11:45^{am} - 12 pm. We were not given or offered water from at least 4 am - 9³⁰ am, when I was released. We were processed and released slowly, 1-2 people at a time every 20-30 minutes. It was agonizing and uncomfortable. About 5 hours into wearing my behind-the-back zip ties, I felt my shoulder giving out. I managed to free a hand and try to re-insert it in front of me, I couldn't. I left my hands together in my lap. When I told an officer I was wristless, he laughed and made no attempt to re-zip me. This was not about an arrest. This was about suffering.

The Detroit News

DETROIT

Chief: Detroit police prevented 'Seattle zone of lawlessness'

George Hunter The Detroit News

Published 4:58 p.m. ET Aug. 24, 2020 | Updated 5:31 p.m. ET Aug. 24, 2020

Detroit — Officers used force to prevent protesters from setting up a "Seattle zone of lawlessness" during demonstrations that turned violent Saturday, the city's police chief said Monday.

Detroit police chief James Craig made the comment while there are multiple internal investigations to determine whether any officers acted improperly during the skirmishes.

"I am not going to let any group set up a Seattle zone of lawlessness here in the city of Detroit," Craig said. "That is non-negotiable."

In Seattle, authorities allowed protesters to occupy several blocks for about two weeks until clearing the area in late June. There were at least two people killed and a sexual assault in the zone.

Craig said officers made 44 arrests Saturday after the group Detroit Will Breathe blocked the intersection of John R and Woodward and refused to leave following at least eight warnings. The police officers told the crowd to disperse because the gathering in the middle of the street constituted an illegal assembly, he said.

Sixteen of those arrested were Detroiters, Craig said. The others came from the Metro Detroit suburbs and Ann Arbor. One man who was arrested is from California. All but one were released as of Monday, the chief said.

The police response has been criticized by some on social media who posted videos claiming to show wrongdoing by officers, although Craig said much of the information being put out is a "false narrative."

In one video, it was claimed that officers hit a man with a baton while his hands were tethered behind his back with a zip-tie. Craig said a review found that no baton was used.

In another video, an officer is seen spraying a man who was being held down by other cops.

Craig said the incidents are being investigated, although he stressed, "If a person is restrained by a zip tie and he's still actively resisting, it could be proper to take him to the ground.

"I've never seen a use of force that looks good," Craig said. "But when we tried to effect arrests, the officers were met with resistance. Was force used? Absolutely. But there's a difference between force being used and a determination if the force was excessive."

The police department's Professional Standards Section has launched at least three internal investigations into whether officers acted properly Saturday, although Craig said he didn't see any violations in the material he's reviewed.

"If we find wrongdoing, we'll take action," Craig said,

Tristan Taylor, a spokesman for Detroit Will Breathe, did not return phone calls Monday seeking comment. But he made a statement on Sunday.

"We were standing in the middle of the street and they arrested us," Taylor told a crowd of about 50 people. "The issue isn't that they arrested us. The issue is the brutality. When you do something to get arrested, you expect arrest, but not brutally beaten. We weren't doing anything to get brutally beaten."

The goal of people who blocked the Woodward intersection Saturday appeared to be to set up a Seattle-type zone, Craig said, vowing during a press conference at Public Safety Headquarters that he would prevent that from happening.

Craig said an effort last month to block East Grand Blvd. and create a "cop-free zone" was quelled within an hour.

"The bottom line is, we're not going to have a Seattle here," Craig said.

Detroit Will Breathe's Saturday gathering was to protest Operation Legend, a local-federal task force that aims to combat violence in the city. Craig and U.S. Attorney General William Barr, who was in Detroit last week to review the initiative, insist the federal agents working with the task force will have nothing to do with protests.

The group on Saturday posted a social media message announcing: "Detroit Will Breathe is occupying the intersection of Woodward and John R. to demand the immediate end to Operation Legend and the withdrawal of federal agents sent to Detroit by the Trump

administration to criminalize and terrorize black and brown communities. We aren't leaving until the feds leave."

Craig said as officers tried to move the protesters from the intersection, someone in the crowd pointed a green laser at his officers and a police helicopter pilot.

"It was not pointed at (the pilot's) eyes, or we'd be talking about a tragedy," he said.

The chief said police were unable to locate whoever pointed the laser. One of the men arrested, an Ann Arbor resident, was still in custody Monday. Craig said the man had an asp, a small telescoping baton, and that he wore body armor, which is illegal to wear during the commission of an alleged felony.

"He's a regular," Craig said of the protester, whom he identified as Ethan Lucas. "I was told he was trying to incite a riot, although that doesn't mean he'll be charged with that."

Although Craig said no projectiles were thrown at officers Saturday, as happened in previous protests, he said police spotted a red "supply vehicle, which has been an MO ... they follow and equip protesters with projectiles. But the only thing that was deployed (Saturday) was some gas the protesters were in possession of."

During Monday's press conference, Craig chided some reporters for "never acknowledging that there are times where protesters are very aggressive, armed with wooden sticks ... and hammers ... throwing boulders and other projectiles at officers.

"Let's not take light the dangers our men and women face every day," he said. "I'm proud of the job they're doing."

Deputy Chief Todd Bettison said he spoke with several local activists Saturday, who told him they don't support Detroit Will Breathe's tactics.

"To Detroit Will Breathe: You're not welcome," Bettison said. "Go. It's just not working."

Detroit activist the Rev. W.J. Rideout of the group Defenders of Truth & Justice echoed Bettison's remarks.

"Detroit Will Breathe does not represent us," Rideout said. "The way they protest, throwing things at the police and fighting with them, does not represent how the people in Detroit feel. I have tried to bring peace between Detroit Will Breathe and DPD, but Detroit Will Breathe has a political agenda, and they're not interested in solutions.

"This is not a city where the police are going around shooting people of color," Rideout said. "I have protested suburban police departments where there is racism, but I've not seen Detroit Will Breathe at any of those protests, which tells me they're not trying to fight racism — they have another agenda."

ghunter@detroitnews.com

(313) 222-2134

Twitter: @GeorgeHunter_DN

36TH DISTRICT COURT



Return

Register of Action

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STATE OF MICHIGAN		CASE NO: 2005878601 D01 FY	
36TH JUDICIAL DISTRICT	REGISTER OF ACTIONS		
ORI820365J		STATUS: WRNT	
PIN: 2006050109			

JUDGE OF RECORD: ARCHER, ROBERTA C., P-58996

JUDGE: ECHARTEA, LAURA A., P-41489

STATE OF MICHIGAN v

CTN: 822071302301

DEBONO/DANIEL/JOSEPH

TCN:

6409 WEDDELL

SID:

TAYLOR MI 48180

ENTRY DATE: 07/20/20

OFFENSE DATE: 05/31/20 1230 AM

ARREST DATE:

VEHICLE TYPE:

VPN:

DOB: 10/11/1987 SEX: M RACE: B

CDL: U

VEH YR: VEH MAKE:

PAPER PLATE:

OFFICER: MADERA ADAM

DEPT: 0349030

PROSECUTOR: HOLMAN, JOSHUA COOPE

P-71971

HERALD/SETH/HAT

CNT: 01 C/M/F: F 75082

PACC#750.82

ASSAULT WITH DANGEROUS WEAPON (FELONIOUS ASSAULT)

ARRAIGNMENT DATE:

PLEA:

PLEA DATE:

FINDINGS:

DISPOSITION DATE:

SENTENCING DATE:

FINE	COST	ST.COST	CON	MISC.	REST	TOT FINE	TOT DUE
0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

JAIL SENTENCE:

PROBATION:

VEH IMMOB START DATE:

NUMBER OF DAYS:

VEH FORFEITURE:

CNT: 02 C/M/F: F 75082

PACC#750.82

ASSAULT WITH DANGEROUS WEAPON (FELONIOUS ASSAULT)

ARRAIGNMENT DATE: PLEA: PLEA DATE:

FINDINGS: DISPOSITION DATE:

SENTENCING DATE:

FINE	COST	ST.COST	CON	MISC.	REST	TOT FINE	TOT DUE
0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

JAIL SENTENCE: PROBATION:

VEH IMMOB START DATE: NUMBER OF DAYS: VEH FORFEITURE:

CNT: 03 C/M/F: F 75082

PACC#750.82

ASSAULT WITH DANGEROUS WEAPON (FELONIOUS ASSAULT)

ARRAIGNMENT DATE: PLEA: PLEA DATE:

FINDINGS: DISPOSITION DATE:

SENTENCING DATE:

FINE	COST	ST.COST	CON	MISC.	REST	TOT FINE	TOT DUE
0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

JAIL SENTENCE: PROBATION:

VEH IMMOB START DATE: NUMBER OF DAYS: VEH FORFEITURE:

DATE	ACTIONS, JUDGMENTS, CASE NOTES	INITIALS
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05/31/20

1	ORIGINAL CHARGE	ASSAULT	848
2	ORIGINAL CHARGE	ASSAULT	848
3	ORIGINAL CHARGE	ASSAULT	848

NAME: DEBONO/DANIEL/JOSEPH

CASE NO: 2005878601 PAGE 2

DATE	ACTIONS, JUDGMENTS, CASE NOTES	INITIALS
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07/20/20

	FILING DATE	072020	848
1	AUTHORIZATION OF COMPLAINT DATE		848
	PROS HOLMAN, JOSHUA COOPE		P-71971 848
	COMPLAINT ISSUANCE DATE		848
	MAG ECHARTEA, LAURA A.,		P-41489 848
	WARRANT ENTRY REQUESTED	72020 354P	548
	SYSIDNO (20:) GENERATED BY LEIN		
		47975259	548
	WARRANT ENTERED INTO LEIN		548
	LEIN 2ND PARTY CHECK DONE FOR WARRANT ENTRY		553

***** END OF REGISTER OF ACTIONS ***** 07/22/20 11:50

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Black Lives Matter Seattle-King County v. City of Seattle, et al., --- F.Supp.3d ---- (2020)

2020 WL 3128299

2020 WL 3128299

Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Seattle.

BLACK LIVES MATTER SEATTLE-KING
COUNTY, Abie Ekenezar, Sharon Sakamoto,
Muraco Kyashna-Tocha, Alexander Woldeab,
Nathalie Graham, and Alexandra Chen, Plaintiffs,

v.

CITY OF SEATTLE, SEATTLE POLICE
DEPARTMENT, Defendant.

Case No. 2:20-cv-00887-RAJ

|
Signed 06/12/2020

Attorneys and Law Firms

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M. McMillan](#), Mallory Gitt Webster, Nitika Arora, Paige
L. Whidbee, [David A. Perez](#), Perkins Coie, [Robert
Seungchul Chang](#), Ronald a Peterson Law Clinic Seattle
University School of Law, Seattle, WA, for Plaintiffs.

Carolyn U. Boies, Ghazal Sharifi, Seattle City Attorney’s
Office, Seattle, WA, for Defendant.

Synopsis

Background: Protestors protesting police brutality brought action against city and city police department, alleging First Amendment retaliation and excessive force in violation of the Fourth Amendment, arising from alleged use of force by law enforcement during protests. Protestors moved for temporary restraining order (TRO).

Holdings: The District Court, [Richard A. Jones, J.](#), held that:

protestors established likelihood of success on the merits of First Amendment retaliation claim, as required for grant of TRO;

protestors established likelihood of success on the merits of Fourth Amendment excessive force claim, as required for grant of TRO;

protestors demonstrated irreparable harm, as required for grant of TRO;

balance of hardships weighed in favor of grant of TRO; and

public interest weighed in favor of grant of TRO.

Motion granted in part and denied in part.

Procedural Posture(s): Motion for Temporary Restraining Order (TRO).

ORDER GRANTING IN PART MOTION FOR
TEMPORARY RESTRAINING ORDER

[Richard A. Jones](#), United States District Judge

I. INTRODUCTION

*1 The city and nation are at a crisis level over the death of George Floyd. One would be missing the point to conclude that the protests that are the subject of this motion are only about George Floyd. His death just happens to be the current tragic flashpoint in the generational claims of racism and police brutality in America. The global strength of the Black lives movement and the obvious commitment to change are a clear indication—not just to this Court, but globally—that these protests will not be short-lived, and the protestors have made it clear that their determination will be relentless until change and police reform is made.

What brings the parties to this Court today are peaceful protestors desiring to engage in their rights guaranteed by the Constitution, the freedom of assembly without fear of retaliation or disruption by Seattle police officers’ use of tear gas, pepper spray, flash bang devices, or foam-tip bullets.

The First Amendment guarantees that all citizens have the

Black Lives Matter Seattle-King County v. City of Seattle, et al., --- F.Supp.3d ---- (2020)

2020 WL 3128299

right to hold and express their political beliefs through peaceful protests. Police cannot interfere with orderly, nonviolent protests because they disagree with the content of the speech. At the same time, this Court must balance these interests when violent offenders choose to disrupt constitutionally protected activity.

For the reasons below, Plaintiffs' Motion for Temporary Restraining Order (Dkt. # 6) is **GRANTED in part**.

II. BACKGROUND

On May 25, 2020, George Floyd died in the custody of four Minneapolis police officers. Since then, nationwide outrage and protest has ensued. Protests in Seattle began on May 29, 2020, just days after his death and continue to this day. Indeed, within moments of this Order a statewide walkout and march is set to begin.

The tale of the protests is cloudy. The parties agree that the protests have been largely peaceful. Dkt. # 6 at 13; Dkt. # 29 at 7-9. But on some occasions, the protestors and the Seattle Police Department ("SPD") have exchanged bottles, rocks, and fireworks for tear gas, pepper spray, and blast balls. Dkt. # 19 ¶ 4; Dkt. # 27 ¶¶ 12-25. On June 5, 2020, the SPD banned the use of tear gas, subject to some exceptions. Dkt. # 27 ¶ 21. Days later, SPD deployed tear gas again. Dkt. # 8 ¶¶ 6, 11-12.

Plaintiffs sued Defendant City of Seattle ("City") in this Court, alleging that the City violated their rights under the First and Fourth Amendments. Dkt. # 1. Plaintiffs allege that during the George Floyd protests, the SPD deployed "less-lethal" weapons including "chemical irritants, batons, kinetic impact projectiles, and weapons intended to stun with light and sound." *Id.* ¶ 15. Chemical irritants include tear gas ("CS gas") and oleoresin capsicum spray ("OC" or "pepper" spray). *Id.* ¶ 16. The use of these weapons, Plaintiffs say, deprived them of their right to protest and to be free from excessive force. *Id.* ¶¶ 140-47.

Hours after they filed their complaint, Plaintiffs moved for a temporary restraining order ("TRO"), seeking to enjoin the City from "deploying chemical weapons or projectiles of any kind for the purpose of crowd control at protests or demonstrations ... includ[ing] prohibitions on[] (1) any chemical irritant such as CS Gas ('tear gas') or OC Spray ('pepper spray') and (2) any projectile such as flash-bang grenades, 'pepper balls,' 'blast balls,' and rubber bullets." Dkt. # 6-1 at 2; *see also* Dkt. # 6. The

City opposed that motion but, in the interest of compromise, proposed revisions to the injunction that it is willing to stipulate to. Dkt. # 29 at 12-14.

*2 The Court has reviewed the evidence supplied by the parties, but, of course, the record is limited at this stage. Based on the Court's review, the video and testimonial evidence show that on some occasions the SPD has in fact used less-lethal weapons disproportionately and without provocation. *See, e.g.*, Dkt. # 9 ¶ 3; Dkt. # 12 ¶¶ 3-4, 6-8; Dkt. # 19 ¶¶ 3-4.

III. LEGAL STANDARD

Like a preliminary injunction, issuance of a TRO is "an extraordinary remedy never awarded as of right." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015). Under Federal Rule of Civil Procedure 65(b), a party seeking a TRO must make a clear showing (1) of a likelihood of success on the merits, (2) of a likelihood of suffering irreparable harm in the absence of preliminary relief, (3) that the balance of hardship tips in her favor, and (4) that a temporary restraining order is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (articulating standard for preliminary injunction); *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001) (noting that preliminary injunction and temporary restraining order standards are "substantially identical").

IV. DISCUSSION

A few words to start: First, as other courts have recently expressed,¹ people have a right to demonstrate and protest government officials, police officers being no exception. Their right to do so, without fear of government retaliation, is guaranteed by the First and Fourth Amendments. Second, to protect person and property, police officers must make split-second decisions, often while in harm's way. Third, the Court hopes that the parties see the kinship in their arguments—not all protestors seek destruction; not all officers seek violence. Finally, like previous courts, this Court recognizes the difficulty in drawing an enforceable line that permits

police officers to use appropriate means in response to violence and destruction of property but that also does not chill free speech or abuse those who wish to exercise it.

Here, Plaintiffs request a TRO on their First and Fourth Amendment claims. Dkt. # 6. They seek to enjoin the City of Seattle, including the SPD, from deploying “chemical weapons or projectiles of any kind for the purpose of crowd control at protests or demonstrations.” Dkt. # 6-1 at 1. The Court analyzes Plaintiffs’ request under the four [Winter](#) factors and addresses each in turn.²

A. Likelihood of Success on the Merits

Plaintiffs argue that the SPD’s use of less-lethal, “crowd control” weapons violates their First Amendment right to protest and their Fourth Amendment right to be free from excessive force.

i. First Amendment Claim

To establish a First Amendment retaliation claim, plaintiffs must show that (1) they were engaged in a constitutionally protected activity, (2) the defendant’s actions would chill a person of ordinary firmness from continuing to engage in the protected activity, and (3) the protected activity was a substantial or motivating factor in the defendant’s conduct. [Pinard v. Clatskanie Sch. Dist.](#), 6J, 467 F.3d 755, 770 (9th Cir. 2006). At this stage, Plaintiffs have made a clear showing of all three elements.

*3 First, the right to protest—including activities such as “demonstrations, protest marches, and picketing”—is clearly protected by the First Amendment. [Collins v. Jordan](#), 110 F.3d 1363, 1371 (9th Cir. 1996). Since “time immemorial,” city streets and sidewalks have been deemed public fora, and as such any First Amendment restrictions placed on them are “subject to a particularly high degree of scrutiny.” [Id.](#) “Speech that stirs passions, resentment or anger is fully protected by the First Amendment.” [Id.](#) (citing [Terminiello v. Chicago](#), 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131 (1949)). Indeed, the First Amendment “protects a significant amount of verbal criticism and challenge directed at police officers.” [City of Houston, Tex. v.](#)

[Hill](#), 482 U.S. 451, 461, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987) (explaining that yelling obscenities and threats at a police officer is still protected under the First Amendment). The law is clear that the government may not prohibit angry or inflammatory speech in a public forum, unless it is both “directed to inciting or producing imminent lawless action” and “likely to incite or produce such action.” [Collins](#), 110 F.3d at 1371.

Plaintiffs show that they were engaged in the constitutional right to protest police brutality. They exercised their right on public fora. The video evidence reveals that many of these protests occurred on Seattle streets, often right outside the police precinct on Capitol Hill. Dkt. # 8 ¶¶ 2, 6, 11-12 (videos of June 8 protest); Dkt. # 19 ¶¶ 3-4 (videos of June 1 and June 2 protests). On this record, their protests have been passionate but peaceful, and they must thus be protected even if they stand in opposition to the police. The video and testimonial evidence reveal as much. *See, e.g.*, Dkt. # 9 ¶ 3; Dkt. # 12 ¶¶ 3-4, 6-8; Dkt. # 19 ¶¶ 3-4.

Both parties agree that some protesters did launch objects at the police, ranging from rocks, bottles, fireworks, traffic cones, traffic flares, and more. Dkt. # 9 ¶ 3; Dkt. # 12 ¶ 11; Dkt. # 27 ¶¶ 12-25. Moreover, the City represents that SPD confronted “significant arson events, assaults on civilians and officers, as well as wide-spread looting and property destruction,” among other criminal activities. Dkt. # 29 at 7. This, no doubt, poses a serious threat to officer life and safety. *Id.* at 19. But, as to these protestors, the Court agrees with Plaintiffs’ reading of [Collins](#): “the proper response to potential and actual violence is for the government to ensure an adequate police presence, and to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure.” [110 F.3d at 1372.](#)

Reiterating its initial remarks, the Court acknowledges that it is difficult to balance these public safety concerns and constitutional rights. But the Court holds that the balance here tips in favor of Plaintiffs, and other peaceful protestors, who were engaging in and may continue to engage in their constitutional right to protest.

Second, SPD’s actions would chill a person of ordinary firmness from continuing to protest. “Ordinary firmness” is an objective standard that will not “allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity.” [Mendocino Envtl. Ctr. v. Mendocino Cty.](#), 192 F.3d 1283, 1300 (9th Cir. 1999).

Black Lives Matter Seattle-King County v. City of Seattle, et al., --- F.Supp.3d --- (2020)

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The mere threat of harm, without further action, can have a chilling effect. [Brodheim v. Cry](#), 584 F.3d 1262, 1270 (9th Cir. 2009).

SPD's use of less-lethal, crowd control weapons have surely chilled speech. To start, exposure to tear gas and pepper spray is "excruciating." Dkt. # 10 ¶¶20-31 ("Imagine the hottest chile pepper you ever ate, then imagine an even hotter one that you would never eat, and then imagine touching that pepper and inadvertently sticking your finger in your eye. That is what a small dose of pepper spray is like."). The same is true for the projectiles that SPD fires into crowds, which can cause intense pain and bruising. *Id.* ¶¶ 38-47. Dkt. # 25 ¶¶ 6-7, Exs. A & B. Though "less lethal," these devices have been sufficiently lethal to deter some protestors from protesting again. *See, e.g.*, Dkt. # 9 ¶¶ 12-13 ("I do feel anxious though, especially about protesting because of police presence at the protests."); Dkt. # 17 ¶ 11 ("[E]very day I participate in demonstrations where the Seattle Police Department are present, my anxiety undoubtedly increases. I begin to worry and prepare for the same suffocating feeling I experienced because of their use of extreme force and violence against peaceful protestors."). The Court holds that SPD's use of these weapons would chill a person of "ordinary firmness" from protesting.

*4 Finally, Plaintiffs have shown that the protests were a substantial or motivating factor in SPD's conduct. Plaintiffs contend that SPD indiscriminately threw an excessive amount of chemical agents at peaceful protests over police brutality. Dkt. # 6 at 25. They argue that this reveals that a "substantial or motivating purpose" of the force was Plaintiffs' exercise of their First Amendment rights. *Id.* The Court agrees. The use of indiscriminate weapons against all protesters—not just the violent ones—supports the inference that SPD's actions were substantially motivated by Plaintiffs' protected First Amendment activity. The City objects, however, arguing that the protestor's message has been constant while the SPD's use of less-lethal weapons has decreased over time. Dkt. # 29 at 16. Thus, they suggest, SPD's actions were not motivated by Plaintiffs' protest. *Id.* But it is not clear to the Court that, under the third prong of the retaliation analysis, Plaintiffs must show that they were retaliated against every time they exercised their First Amendment rights. The law clearly requires only that the SPD's actions be substantially motivated by Plaintiffs' conduct.

In sum, Plaintiffs have made a clear showing of a likelihood of success on the merits on their First Amendment claim.

ii. Fourth Amendment Claim

"A Fourth Amendment claim of excessive force is analyzed under the framework outlined by the Supreme Court in [Graham v. Connor](#)." [Davis v. City of Las Vegas](#), 478 F.3d 1048, 1053-54 (9th Cir. 2007) (quoting [Smith v. City of Hemet](#), 394 F.3d 689, 700 (9th Cir. 2005) (en banc)). Under the objective reasonableness standard, a court must balance the "nature and quality of the intrusion on a person's liberty with the countervailing governmental interests at stake to determine whether the force used was objectively reasonable under the circumstances." *Id.* (quoting [Smith](#), 394 F.3d at 701) (internal quotation marks omitted). "Reasonableness" of a given use of force must be measured from the perspective of a reasonable officer on the scene and must appreciate the "split-second judgments" that officers must often make. [Graham v. Connor](#), 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The Ninth Circuit has held that it is unreasonable to use pepper spray, projectile bean bags, and pepper ball projectiles against individuals "who were suspected of only minor criminal activity, offered only passive resistance, and posed little to no threat of harm to others." [Nelson v. City of Davis](#), 685 F.3d 867, 885 (9th Cir. 2012)

Both testimonial and video evidence establish that SPD likely violated Plaintiffs' Fourth Amendment rights. Plaintiffs testify that they were peacefully protesting (or reporting on the protests) when they fell victim to the weapons at issue. Dkt. # 9 ¶¶ 3-4 (tear gassed); Dkt. # 12 ¶ 5 (tear gassed); Dkt. # 14 ¶ 4 (pepper sprayed); Dkt. # 17 ¶¶ 3-4 (tear gassed). And the video evidence supports these accounts. A video of a June 1, 2020 protest in Capitol Hill suggests that SPD exerted excessive force without provocation—the protesters were largely peaceful, SPD changed its posture by replacing frontline officers on bicycles with officers donning gas masks, and then SPD deployed a battery of pepper spray, flash-bang grenades, and tear gas. Dkt. # 19 ¶ 3; *see also id.* ¶ 4 (June 2, 2020 Capitol Hill protest). At most, this evidence shows that Plaintiffs, and many protesters alike, were engaging in minor property crime and offered only passive resistance at the time they were attacked.

The Court is satisfied that, on this record, Plaintiffs have shown a likelihood of success on their Fourth Amendment claim.

B. Likelihood of Suffering Irreparable Harm

“It is well established that the deprivation of constitutional rights ‘unquestionably constitutes irreparable injury.’ ” [Melendres v. Arpaio](#), 695 F.3d 990, 1002 (9th Cir. 2012) (quoting [Elrod v. Burns](#), 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)). Further, “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” [Associated Press v. Otter](#), 682 F.3d 821, 826 (9th Cir. 2012) (quoting [Elrod](#), 427 U.S. at 373, 96 S.Ct. 2673).

Plaintiffs have established a threat of immediate, irreparable harm in the absence of a TRO. They have shown a likelihood of success on their First and Fourth Amendment claims, demonstrating that irreparable injury has already occurred. The use of less-lethal, crowd control weapons has already stifled some speech even if momentarily. And the protests are live. In fact, a statewide walkout is set to commence moments after this Order is entered. Dkt. # 6 at 20. Without a TRO, Plaintiffs may face the same constitutional deprivation that they experienced in days past.

C. Balance of Hardships and Public Interest

*5 When the government is a party, the last two prongs of the injunction analysis merge. [Drakes Bay Oyster Co. v. Jewell](#), 747 F.3d 1073, 1092 (9th Cir. 2014) (citing [Nken v. Holder](#), 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009)). As to the balance of hardships, “serious First Amendment questions compel[]” a finding that the “balance of hardships tips sharply in [the plaintiffs’] favor.” [Cnty. House, Inc. v. City of Boise](#), 490 F.3d 1041, 1059 (9th Cir. 2007) (second alteration in original) (internal quotation marks omitted) (quoting [Sammartano v. First Judicial Dist. Court](#), 303 F.3d 959, 973 (9th Cir. 2002)). And as to public interest, “it is always in the public interest to prevent the violation of a party’s constitutional rights.” [Melendres](#), 695 F.3d at 1002 (internal quotation marks omitted).

The City concedes that Plaintiffs’ “constitutional rights weigh heavily on the Plaintiffs’ side of the scale” and notes that SPD’s policies aim to facilitate and support free

speech, not stifle it. Dkt. # 29 at 19. But, it says, Plaintiffs fail to address other interests here, such as the life and safety of the public and officers or the need to protect public and private property. *Id.* It is true, Plaintiffs do not offer the Court any other interests to weigh. And this Court appreciates that officers sometimes, especially in the circumstances we find ourselves in, carry on a thankless job. That said, the last two prongs still favor an injunction.

The balance of hardships favors an injunction. As discussed, there are serious First Amendment questions here, tipping the balance in Plaintiffs’ favor. What is more, the City has already conceded that “safety was shattered for many by the images, [of] sound and gas more fitting of a war zone.” Dkt. # 6 at 32. In fact, at one point, the Seattle Mayor and Chief of Police both announced a temporary ban on tear gas. Dkt. # 1 ¶ 62. These actions strongly suggest that the City has overstepped, causing protesters undue hardship.

The public interest favors an injunction. First, Plaintiffs make a strong showing of past and future constitutional violations, which under the case law is always in the public interest to prevent. Second, these protests occur during a pandemic, the spread of which may be exacerbated by chemical irritants such as tear gas and pepper spray. Dkt. # 6 at 29 n.7; Dkt. # 10 ¶¶ 20, 28, 48-55. Third, the weapons are indiscriminate, used on entire crowds of peaceful protestors without targeting any single agitator or criminal. Dkt. # 6 at 24. Because they are indiscriminate, they may even spill into bystanders’ homes or offices as they have done before. *See, e.g.*, Dkt. # 8 ¶¶ 7-8; Dkt. # 13 ¶¶ 3-7. Hence, the public interest would be advanced by an injunction.

Plaintiffs have met their burden on the final two prongs of the injunction analysis.

V. ORDER

For the reasons stated above, the Court **GRANTS in part** Plaintiff’s Motion for Temporary Restraining Order (Dkt. # 6) and temporarily **ENJOINS** the City of Seattle as follows:

- (1) The City of Seattle, including the Seattle Police Department and any other officers, departments, agencies, or organizations under the Seattle Police Department’s control (collectively, “the City”), is

Black Lives Matter Seattle-King County v. City of Seattle, et al., --- F.Supp.3d ---- (2020)

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hereby enjoined from employing chemical irritants or projectiles of any kind against persons peacefully engaging in protests or demonstrations. This injunction includes: (1) any chemical irritant such as and including CS Gas (“tear gas”) and OC spray (“pepper spray”) and (2) any projectile such as and including flash-bang grenades, “pepper balls,” “blast balls,” rubber bullets, and foam-tip projectiles. This Order does not preclude individual officers from taking necessary, reasonable, proportional, and targeted action to protect against a specific imminent threat of physical harm to themselves or identifiable others or to respond to specific acts of violence or destruction of property. Further, tear gas may be used only if (a) efforts to subdue a threat by using alternative crowd measures, including pepper spray, as permitted by this paragraph, have been exhausted and ineffective and (b) SPD’s Chief of Police has determined that use of tear gas is the only reasonable alternative available. The Chief of Police may only authorize limited and targeted use of tear gas and must direct it to those causing violent or potentially life-threatening activity. To the extent that chemical irritants or projectiles are used in accordance with this paragraph, they shall not be deployed

indiscriminately into a crowd and to the extent reasonably possible, they should be targeted at the specific imminent threat of physical harm to themselves or identifiable others or to respond to specific acts of violence or destruction of property.

*6 (2) In the event that Plaintiffs seek relief for an alleged violation of this Order, the City must respond to the motion for relief within 24 hours.

(3) Because this is a non-commercial case, the balance of hardships favors Plaintiffs, and there is no realistic likelihood of harm to the City of Seattle from enjoining its conduct, the Court waives the security bond requirement.

(4) This Order will expire fourteen days after entry unless extended by the Court for good cause. *Fed. R. Civ. P. 65(b)(2)*.

All Citations

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Footnotes

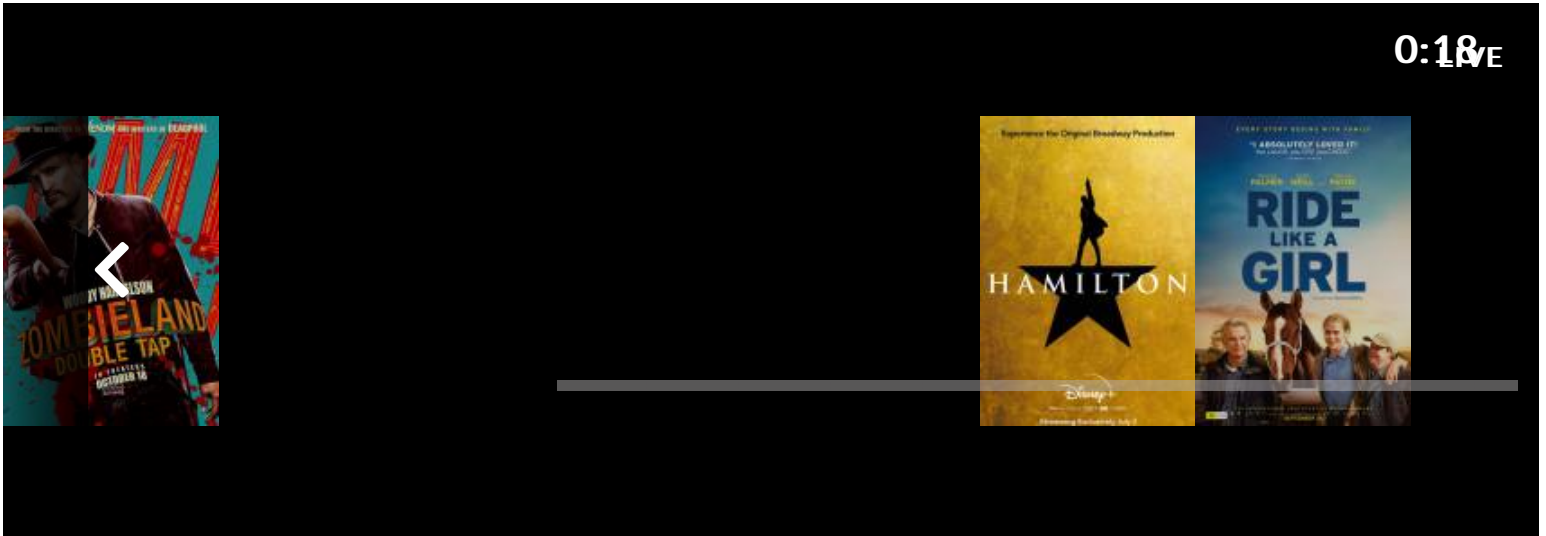
¹ *Abay v. City of Denver*, No. 1:20-cv-01616-RBJ, — F.Supp.3d —, —, 2020 WL 3034161, at *2 (D. Colo. June 5, 2020); *Don’t Shoot Portland v. City of Portland*, No. 3:20-cv-00917-HZ, 2020 WL 3078329, at *1 (D. Or. June 9, 2020).

² The City also argued that Plaintiffs lack standing to bring their claims. The Court has reviewed their brief and has heard oral argument on this issue. Based on that review, it concludes that the standing argument lacks merit.



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NEWS



Mayor Duggan on protests: "Detroit police did a beautiful job in protecting our city"





Detroit Mayor Mike Duggan and Detroit Police Chief James Craig provided an update Monday afternoon addressing weekend protests in the city.



Posted at 11:58 AM, Jun 01, 2020 and last updated 9:17 AM, Jun 03, 2020

DETROIT (WXYZ) — Detroit Mayor Mike Duggan and Detroit Police Chief James Craig provided an update Monday afternoon addressing weekend protests in the city.

 **LIVE: Mayor Duggan speaks <continues>**
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Detroit Mayor Mike Duggan and Police Chief James Craig address weekend protests.

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During the news conference, Mayor Duggan announced that Detroit police will again enforce an 8 p.m. curfew again on Monday night. The curfew does not impact those who need to go to and from work or who need to go out to get necessary goods and services. The mayor says peaceful protests will continue to be supported as protesters voice their outrage over the death of George Floyd at the hands of an officer in Minneapolis.

Sunday night, Detroit police were able to successfully disperse a crowd that was defying the 8 p.m. curfew without major incident. Many protesters left when the 8 p.m. curfew hit, but those who defied were warned multiple times tear gas would be used if instigators did not leave. Dozens of people were arrested, most of whom came from outside of the city, according to Mayor Duggan.

“Detroit police did a beautiful job in protecting our city,” Duggan said.

Both the mayor and Detroit Police Chief James Craig praised the handling of the protests, most of which were peaceful throughout the day.

"I'm encouraged, I'm confident in this department and in this city. We're going to get it done," said Chief Craig. "Hats off to our Detroit Police Department and to our city."

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The chief also discussed that there were some criminals among those arrested. He talked about instigators hurling bricks and fireworks against officers and insisted that would not be tolerated. "We're in a constant state of readiness, Chief Craig. The mayor also announced that the city and police department are still on guard.

"Make no mistake. This is not over," said the mayor.

Community activist "Pastor Moe" also weighed in on the protests as things intensified and made reference to Channel 7 reporter Simon Shaykhet.

"All the activists, and even the reporter, like Channel 7. One guy, me and him sit out there, hand in hand, as it was going down. 'Pastor Moe, hold on I got you.' I said, 'I got you.'" We standing there just on the front line brother, not knowing what's gonna happen, but we was there."

Duggan's address came one day after a [city-wide curfew from 8 p.m. to 5 a.m.](#) that will be in effect until Police Chief James Craig said it is no longer needed.

Protesters and Detroit police clashed over the weekend with protests on Friday night, Saturday night and Sunday night.

[More than 100 people were arrested on Sunday night](#) as police used tear gas to disperse the protesters.

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Dozens more were arrested during separate protests on Friday and Saturday. On Friday, a 19-year-old was also shot and killed in a shooting not involving police. They are looking for suspects in the killing.

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Detroit Police Chief James Craig on why city isn't rocked by riots: 'We don't retreat here'



Detroit Police Chief James Craig said Tuesday, July 28, 2020, his city isn't seeing the riots that are occurring in other major cities across the country, because his police department is supported by the mayor and fellow Detroiters who are ... more >

By Jessica Chasmar - *The Washington Times* - Wednesday, July 29, 2020

Detroit Police Chief James Craig said Tuesday his city isn't seeing the riots that are occurring in other major cities across the country because his police department is supported by the mayor and fellow Detroiters who are "fed up" with the "misguided radicals" fomenting chaos.

Chief Craig made an appearance on Fox News' "Tucker Carlson Tonight," where Mr. Carlson praised Detroit as an "unlikely success story" amid the political violence plaguing the country. The police chief explained that unlike in many other cities, "we don't retreat here in Detroit."

"I am just ecstatic over the men and women in the Detroit Police Department," Chief Craig said. "One thing I learned from my time in Los Angeles: We don't retreat here in Detroit. We're just not gonna do it. You saw the images, Tucker, of streets where there was lawlessness, looting, burning, no sign of police officers. We weren't giving up ground to the radicals. We just didn't do it."

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"Detroiters are fed up with these radical protests," he continued. "I'm not to talking about the peaceful protesters, I'm talking about that core group — these misguided radicals that have tried to incite violence in our city. They said, 'We're not going to put up with it.' And so we got a couple of things. We got a great police department, great leadership, but we have a community that stands with us and by us and said, 'enough is enough.'"

The police chief's comments came after Portland entered its 60th day of riots and other cities such as Seattle and New York continued to face violent protests sparked by the May 25 death of George Floyd.





Detroit saw protests earlier this month after 20-year-old Hakim Littleton was killed in an officer-involved shooting. Within hours of the July 10 shooting, and after the demonstrations had already begun, Chief Craig released a video that allegedly showed Littleton pointing a gun and firing at an officer before he was fatally shot by police.

Chief Craig briefly spoke about the incident Tuesday, saying the “radical fringe” failed at trying to change the narrative.

“Detroiters will have nothing of that,” he said. “So when you talk about what’s different here, we have a city that has stood together and oh, by the way, I know there’s a lot of conversation about the mayors in some of these big cities. Our mayor stands with this police chief, stands with this police department [and] we are not going to tolerate this uptick in violence. That’s key. That’s real key.”

While Detroit hasn't seen the level of political violence as other cities, the Motor City is experiencing the same uptick in violent crime. Chief Craig told reporters Monday that he believes the reasons include low bail for crime suspects and the release of people from jail during the coronavirus pandemic, The Associated Press reported.

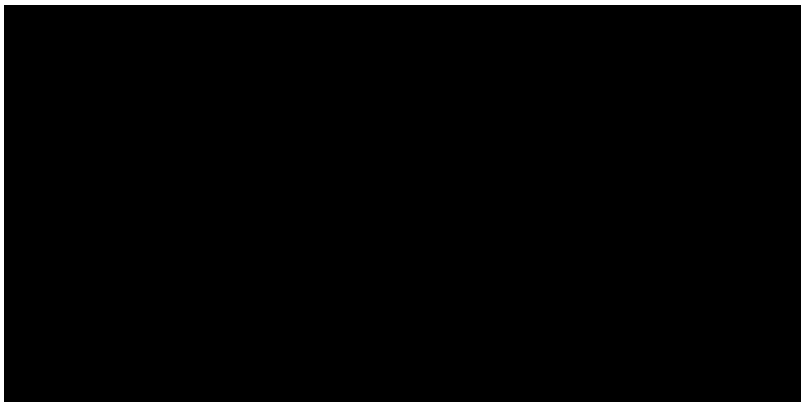
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JMS

29 July, 2020



"Chief Craig released a video that allegedly showed Littleton pointing a gun and firing at an officer". No, not "allegedly". If you look at the video, Hakim Littleton obviously, definitely, clearly pointed the gun at the police officer and obviously, definitely, clearly fired it.

Reply  12 

Truth

29 July, 2020



Detroit Chief of Police described it perfectly..."change the narrative" the marxist democratic way of life currently...like no violence at the protests, it is all made up...

Reply  9 

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2020 WL 4584185

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United States District Court, N.D. California.

ANTI POLICE-TERROR PROJECT, et al.,
Plaintiffs,

v.

CITY OF OAKLAND, et al., Defendants.

Case No. 20-cv-03866-JCS

|
Signed 08/10/2020

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David Alejandro Pereda, Office of The Oakland City Attorney, Oakland, CA, for Defendants.

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR PRELIMINARY INJUNCTION

Re: Dkt. No. 13

JOSEPH C. SPERO, Chief Magistrate Judge

I. INTRODUCTION

*1 This case arises in the midst of ongoing demonstrations and protests sparked by the killing of George Floyd by a Minneapolis police officer. In Oakland, these demonstrations began on May 29, 2020. Plaintiffs allege that starting on that date, and “[o]ver the

course of several days, OPD deployed constitutionally unlawful crowd control tactics including kettling,¹ indiscriminately launching...tear gas and flashbangs into crowds and at individuals, and shooting projectiles at demonstrators.” According to Plaintiffs, OPD “did not act alone[,]” “call[ing] on its mutual aid network of police departments from other municipalities to further carry out its constitutionally violative tactics.” Plaintiffs filed this action on June 11, 2020, requesting that the Court enter a temporary restraining order and then a preliminary injunction that would be in place during the pendency of this case. Based on the agreement of the parties, the Court on June 18, 2020 entered a temporary restraining order (“TRO”) limiting the crowd control tactics and munitions OPD would be permitted to use.

Although the parties subsequently negotiated in good faith in an effort to agree on the terms of a preliminary injunction to replace the TRO, they were unable to resolve certain fundamental disagreements. Accordingly, on July 29, 2020 the Court held a hearing to address Plaintiffs’ request for a preliminary injunction and entered a preliminary injunction on the same date. Dkt. No. 52 (“Preliminary Injunction”). In the Preliminary Injunction, the Court granted some but not all of the injunctive relief requested by Plaintiffs. This Order sets forth the reasons for granting in part and denying in part Plaintiffs’ preliminary injunction motion (“Motion”).²

II. BACKGROUND

A. Allegations in the Complaint

Plaintiff Anti Police-Terror Project (“APTP”) is a “Black-led, multi-racial, intergenerational coalition that seeks to build a replicable and sustainable model to eradicate police terror in communities of color.” Complaint ¶ 16. Plaintiff Community Ready Corps (“CRC”) is “an Oakland-based community organization that combats white supremacy and actively builds and supports Black liberation.” *Id.* ¶ 18. Both APTP and CRC “frequently organize[] and lead[] protests against police misconduct.” *Id.* ¶¶ 16, 18. Plaintiffs allege that “[m]embers and/or supporters of plaintiffs APTP and CRC participated in the protests on May 29, 2020 and June 1, 2020.” *Id.* ¶ 71. Plaintiffs Akil Riley, Ian McDonnell, Nico Nada, Azize Ngo and Jennifer Li are residents of Oakland who allege that they participated in the protests that began May 29, 2020 and were subjected

Anti Police-Terror Project v. City of Oakland, Slip Copy (2020)


to unconstitutional crowd control measures. *Id.* ¶¶ 20-24, 73-79.

Plaintiffs bring a putative class action on behalf of “[a]ll demonstrators who participated and/or intended to participate in the protests beginning on May 29, 2020 in Oakland,” *id.* ¶ 81, against the City of Oakland, OPD Police Chief Susan Manheimer, OPD Sergeant Patrick Gonzales, and OPD Officers Maxwell D’Orso and Casey Fought. Plaintiffs allege that the City of Oakland was and is “responsible for supervising, enacting, and enforcing the OPD’s conduct, policies, and practices; the absence of needed policies and practices; and for the hiring, retention, supervision, and training of employees and agents of the OPD, including” Chief Manheimer, Sergeant Gonzales, Officers D’Orso and Fought, and others yet to be identified. *Id.* ¶ 26. Plaintiffs further allege that the City of Oakland is responsible for the “actions of the to-be-identified members of their mutual aid network including all assisting officers from Contra Costa County Sheriff’s Department, Alameda County Sheriff’s Department, San Mateo County Sheriff’s Department, San Bruno Police Department, Redwood City Police Department, Menlo Park Police Department and California State University Police Department.” *Id.* ¶ 27.

*2 In the Complaint, Plaintiffs allege that over the course of several days, OPD and its mutual aid partners used a variety of impermissible tactics against peaceful protesters, often without adequate warnings, causing physical injuries and trauma and “discourag[ing] members of the Oakland community from participating in lawful protest activities.” *See id.* ¶¶ 17, 19 (alleging that OPD crowd control tactics have had and continue to have a chilling effect on the participation of APTP and CRC members and the Oakland community in peaceful protests); ¶¶ 42-51 (alleging that on May 29, 2020 OPD declared a peaceful protest an unlawful assembly through a loudspeaker that was inaudible, threw a flash bang grenade without warning that hit a protestor and injured her, “threw tear gas canisters and additional flashbang grenades into the crowd, and shot rubber bullets at the demonstrators,” “used stun guns and batons,” and targeted journalists and medics); ¶ 52 (alleging that on May 30, 2020 near the corner of Broadway and 14th Street in Oakland a police officer shot a protestor in the eye with a rubber bullet); ¶¶ 54-65 (alleging that on June 1, 2020 a group of demonstrators who had participated in a peaceful protest that began at the Oakland Technical High School were “kettled” at Washington Street and 8th Street in Oakland, near the Police Administration Building; that their egress was blocked and that OPD police officers “outfitted in full riot gear” “[w]ithout warning and before

the curfew went into effect...tear gassed, threw flashbangs, and started shooting rubber bullets at the confined demonstrators”; that “[m]any demonstrators were shot in the back as they were fleeing the violent measures employed by police, only to be impeded by police lines kettling them from all directions”; that the “indiscriminate use of tear gas continued for an hour or so, forcing demonstrators to intermittently remove their masks to breathe and to clean their faces, making them more vulnerable and susceptible to COVID-19 infections”; that “OPD then arrested demonstrators and applied zip ties to their wrists in lieu of handcuffs” and cited demonstrators “for breaking curfew, including those who otherwise intended to comply but were trapped by OPD”); ¶ 64-65 (alleging that OPD officers were not wearing masks despite being in close contact with demonstrators).

Plaintiffs allege that in using these tactics, OPD “knowingly created a danger to public health by forcing demonstrators to break social distancing rules that are currently in place due to the COVID-19” and “made [them] more vulnerable and susceptible to COVID-19 infections” by using chemical irritants that forced the demonstrators to remove their masks and cough. *Id.* ¶¶ 5, 48. They also allege that while OPD justified these tactics by “claim[ing] demonstrators were inciting violence, throwing Molotov cocktails, assaulting officers, throwing rocks and bottles at officers, and destroying property,” these claims were false and there is “[n]o evidence” to support them. *Id.* ¶ 10. Instead, they allege that this conduct was aimed at “discourag[ing] participation by the public” in the demonstrations. *Id.*

Plaintiffs assert claims under  42 U.S.C. § 1983 based on alleged violations of the First Amendment rights to freedom of speech and assembly; the Fourth Amendment right to be free from the use of excessive force and unlawful seizure; and the Fourteenth Amendment right to substantive due process. *Id.* ¶¶ 94-102. In addition, Plaintiffs bring a claim for supervisory liability under *Monell* against the City of Oakland and Chief Manheim based on alleged unconstitutional customs and practices, namely, failure to adequately supervise and train police officers under their control or to hold them accountable for “interfering with people’s First Amendment rights to freedom of speech, assembly, and association[,]” “punishing people in retaliation for the exercise of” their First Amendment rights and “engaging in excessive force against people exercising their First Amendment rights.” *Id.* ¶¶ 103-108.

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B. Events of May 29 through June 1, 2020**1. Plaintiffs' Evidence**

In support of their request for a temporary restraining order and preliminary injunction, Plaintiffs submitted numerous sworn declarations describing encounters they and other protestors had with police while they were participating in protests in downtown Oakland between May 29 and June 1, 2020. These declarations are summarized below.

a. May 29, 2020

Several declarations offered by Plaintiffs are by individuals who participated in a demonstration that began at Frank Ogawa Plaza, at Broadway and 14th Street, on May 29, 2020 at 8:00 p.m. and proceeded to the Police Department Headquarters on Broadway and 7th Street. *See generally*, Declaration of Ian McDonnell ("McDonnell Decl."); Declaration of Anne Kelson ("Kelson Decl."); Declaration of Melissa Miyara ("Miyara Decl."). Demonstrators held up signs and chanted the names of victims of police violence. Kelson Decl. ¶ 9; Miyara Decl. ¶ 11. They wore masks and attempted to maintain social distance. McDonnell Decl. ¶ 4; Kelson Decl. ¶ 24. Despite what these individuals describe as a peaceful protest, *see* McDonnell Decl. ¶ 6; Kelson Decl. ¶ 3; Miyara Decl. ¶ 11, OPD "kettled" the demonstrators by tear gassing parallel streets, McDonnell Decl., ¶ 7, and began launching concussion grenades into the crowd. Kelson Decl. ¶¶ 8, 10-11. OPD gave a dispersal order, giving demonstrators three minutes to disperse, Kelson Decl. ¶ 13, but the announcement was difficult to hear because the loudspeaker was bad and OPD was still launching concussion grenades into the crowd. Kelson Decl. ¶ 14; Miyara Decl. ¶¶ 12-14; McDonnell Decl. ¶ 20. One demonstrator stated in her declaration that even though she was at the front of the demonstration and could hear that an announcement was being made, she could not make out the words of the announcement because the amplification was bad and people were booing. Miyara Decl. ¶ 14. Another never heard any warning. McDonnell Decl. ¶ 20.

*3 According to these declarants, police officers then began indiscriminately launching tear gas and flashbang grenades and shooting projectiles at the demonstrators.

McDonnell Decl. ¶ 8; Cain Decl. ¶ 5; Kelson Decl. ¶¶ 11, 16; Miyara Decl. ¶¶ 17-18. One demonstrator who has asthma did not bring an inhaler because she did not expect to be tear gassed; she described being "terrified" and unable to breath as she sprinted down Broadway. Miyara Decl. ¶¶ 18-41. Another described the amount of tear gas used as "immense" and described the scene at the lobby of an apartment building where she and other protestors went, "choking for air, applying water and Maalox to wash away the tear gas." Kelson Decl. ¶¶ 17-23. She states that she "would have likely not attended the protest if [she] thought [she] would be tear gassed" *id.* ¶ 7, and that she is still "shocked to the core." *Id.* ¶ 18. Yet another stated that he was "traumatized" and that the experience discouraged him from participating in protests the following day. McDonnell Decl. ¶ 21.

Plaintiffs submitted video footage from this incident showing police officers throwing flashbang grenades and tear gas towards the protestors. Kim Decl. ¶ 4(a)-(c), (f). Time stamps on one of the videos indicate that this occurred before 9:24 p.m.

Plaintiffs also submitted evidence that at 10:28 p.m., a Black couple was forced by police to be fully prone on the sidewalk at the corner of Franklin and 7th Streets. Kim Decl. ¶ 4(h). In addition, they submitted video footage of police using tear gas and flash bang grenades at 10:28 p.m. and 11:08 p.m. on Broadway between 7th and 8th Streets, Kim Decl. ¶¶ 4(d) & (e), and again shortly after midnight (on May 30) on 7th Street between Broadway and Franklin. Kim Decl. ¶ 4(b).

b. May 30, 2020

Plaintiffs offer a declaration by a journalist who states that on May 30, 2020 she went to a protest at Latham Square Plaza to "document events on [her] cell phone and DSLR camera." Declaration of Sarah Belle Lin ("Lin Decl.") ¶¶ 5-6. According to Lin, she had a press pass and was obviously carrying a camera. *Id.* at ¶ 7. Lin heard what sounded to her like rubber bullets being shot by police and then was hit by one on her inner thigh, causing "intense pain." *Id.* ¶¶ 13-20; *see also* Lin Decl. ¶ 28 (picture of large bruise on Lin's thigh). At the time she was hit, she states, there was no one near her. *Id.* ¶ 19. A few minutes later, when she could stand, she went to the sidewalk opposite Latham Square Plaza to recuperate. *Id.* ¶ 22. According to Lin, "[w]ithin one minute, [she] was being roughly shoved by the police using their riot shields

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against [her].” *Id.* ¶ 23. She yelled that she was a journalist and asked why she had been shot but received no response. *Id.* ¶¶ 25-26.

c. May 31, 2020

Plaintiffs offer a declaration by Plaintiff Ian McDonnell describing the police response to a protest in which he participated that began as a car caravan at the Port of Oakland and culminated in a demonstration at Frank Ogawa Plaza. *See* McDonnell Decl. ¶¶ 23-36. They have also submitted video footage from that event. *See* Kim Decl. ¶ 4(i). According to McDonnell, the crowd included many families with young children and the atmosphere was “chill” with “music and nice speeches.” *Id.* ¶¶ 24-25. Even though everything had been peaceful, however, at mid-day about 20 police vans full of police officers and tactical trucks drove “recklessly” into a crowd of people. *Id.* ¶¶ 26- 27. McDonnell states that the police officers “jumped out of the vans and started tear gassing the crowd” and throwing flash bang grenades without giving any warnings. *Id.* ¶¶ 29-31. He states that he assisted some of the demonstrators who had been tear gassed because he had brought eyewash and bandages with him. *Id.* ¶¶ 32-34.

d. June 1, 2020

Plaintiffs have offered the declarations of numerous individuals who participated in a youth-organized protest that occurred on June 1, 2020, beginning at the Oakland Technical High School at 4 p.m. *See generally* Declaration of Christa Artherholt (“Artherholt Decl.”); Declaration of Erica Hruby (“Hruby Decl.”); Declaration of Jennifer Li (“Li Decl.”); McDonnell Decl.; Declaration of Leila Mottley (“Mottley Decl.”); Declaration of Niko Nada (“Nada Decl.”); Declaration of Qiaochu Zhang (“Zhang Decl.”). According to their accounts, at around 5 p.m., the demonstrators received a notification through their phones advising them that the County of Alameda issued a curfew order for 8 p.m. Hruby Decl. ¶ 5; Mottley Decl. ¶ 5. They state that even before that curfew went into effect, however, OPD started kettling demonstrators. McDonnell Decl. ¶¶ 45-46; Hruby Decl. ¶ 32. Demonstrators were wearing masks and attempting to maintain social distance, but because of the kettling, they

were unable to maintain social distancing. Nada Decl. ¶ 8; Hruby Decl. ¶¶ 38-39; Artherholt Decl. ¶¶ 49-51. Many police officers at the scene were not wearing masks. Zhang Decl. ¶ 5.

*4 At some point OPD made an announcement, but the declarants state that it was muffled and hard to hear. Nada Decl. ¶ 9; Li Decl. ¶ 8; Mottley Decl. ¶¶ 10-11; Zhang Decl. ¶¶ 10, 21. They recount that at around 7:40 p.m., OPD fired tear gas, flashbang grenades and projectiles at the demonstrators. McDonnell Decl. ¶ 46; Nada Decl. ¶ 13; Li Decl. ¶¶ 6-9; Artherholt Decl. ¶¶ 10-11; Hruby Decl. ¶ 9; Mottley Decl. ¶¶ 12-13. Participant Jennifer Li states in her declaration that she was hit by a stinger ball and by a flashbang grenade, which exploded on her back and [perforated her eardrum](#), causing her to experience high levels of anxiety and to be scared to participate in further protests. Li Decl. ¶¶ 9-14, 23-24. Plaintiffs have submitted video footage that shows these tactics being used, including footage taken from a helicopter. Artherholt Decl. ¶ 17; Kim Decl. ¶ 4(k); Hruby Decl. ¶¶ 10, 22; Zhang Decl. ¶ 10. According to one participant, even after the majority of demonstrators left the area, OPD fired more tear gas into the small and peaceful crowd of protestors. Artherholt Decl. ¶¶ 12-18. Artherholt submitted video footage of this. *Id.* ¶ 25.

According to the accounts of the participants, demonstrators who had fled the earlier use of tear gas were peacefully gathered at Frank Ogawa Plaza around 8:00 p.m. Artherholt Decl. ¶ 30; Hruby Decl. ¶¶ 23-26. At that point, police made an announcement that there was a curfew and if demonstrators did not leave, they would be arrested. Artherholt Decl. ¶ 32. They state that as demonstrators attempted to comply and leave, police kettled them between 14th and 15th Streets on Broadway. Artherholt Decl. ¶¶ 33-34; Hruby Decl. ¶¶ 28-32; *see also* Artherholt Decl. ¶ 40 (video footage). The Officers then arrested demonstrators by tackling them and/or touching them. Kim Decl. ¶ 4(h); Hruby Decl. ¶¶ 32-37; Artherholt ¶¶ 33-47.

The declaration of Plaintiff Nada indicates that at some point during these events, he heard demonstrators calling for help and that when he tried to pull an officer off a “helpless demonstrator” he was placed in a chokehold by Officer Fought (a defendant in this case), who pushed Nada to the ground and put his knee in Nada’s back using all his weight. *Id.* ¶¶ 26-29. Nada further states that Officer Fought incorrectly used zip-ties on him that went over his thumb and knuckle and were too tight, “roughhoused him,” and did not give Nada his badge number. *Id.* ¶¶ 30-40.

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During these arrests, the police were not wearing masks or facial coverings. McDonnell Decl. ¶¶ 56-59; Nada Decl. ¶¶ 26-27, 41; Hruby Decl. ¶¶ 35-36, 40. According to McDonnell, he was arrested by Defendant Officer D’Orso; when McDonnell commented that Officer D’Orso was not wearing any facial covering, Officer D’Orso laughed. McDonnell Decl. ¶ 58. The declarants state that demonstrators were cited and released for breaking curfew. McDonnell Decl. ¶ 60; Nada Decl. ¶ 39; Hruby Decl. ¶¶ 34, 37.

The declarants who described the events of June 1 stated that when these police tactics were used the protestors were peaceful; many explicitly stated that they observed no illegal activity, including anyone making or throwing Molotov cocktails. Zhang Decl. ¶ 3; Nada Decl. ¶¶ 14-16, 42; Mottley Decl. ¶¶ 9-14; Li Decl. ¶¶ 6-7; McDonnell Decl. ¶ 62; Hruby Decl. ¶¶ 9, 15, 19, 26; Artherholt Decl. ¶¶ 6, 16, 54.

2. Defendants’ Evidence

Defendants have offered two declarations in support of their Opposition to the Motion, one by their attorney, David Pereda, and another by Darren Allison, Interim Assistant Chief of Police at OPD. Neither declaration specifically addresses the incidents described by Plaintiffs in their complaint and in the declarations described above. However, Assistant Chief Allison has submitted activity logs from the Oakland’s Emergency Operations Center covering the period between May 29, 2020 and June 8, 2020. Declaration of Darren Allison (“Allison Decl.”) ¶ 16 & Ex. H (“Activity Logs”). The Activity Logs contain reports by OPD officers of activity related to demonstrations in Oakland, as well as reports of looting, Molotov cocktails being thrown and other illegal activities. Below, the Court summarizes the activity described in the logs for the relevant days:

***5 May 29:** At 8:58 p.m., there was a report that approximately 3,000 demonstrators were congregating near the Oakland Police Headquarters at Broadway and 7th Street and that some demonstrators were throwing bottles at officers. Allison Decl., Ex. H at 2. At 9:04 p.m., there was a report that demonstrators at Broadway and 10th Street were throwing bottles and rocks at officers. *Id.* At 9:21, there was a report that the group of demonstrators had grown to between 5,000 and 6,000, demonstrators and that demonstrators continued to throw rocks and bottles at officers. *Id.* Officers then declared an

unlawful assembly and made announcements for the group to disperse. *Id.* Around this time, there was a report that an additional group of 1,500 to 2,000 protestors approached the main group of demonstrators. *Id.* At 9:24 p.m., there was a report that officers announced additional unlawful assembly orders in English and Spanish. *Id.* at 3. At 9:27 p.m., there was a report that officers deployed tear gas at Broadway and 7th Street and the demonstrators scattered north and east. *Id.* At 9:33 p.m., there was a report that additional tear gas was deployed and demonstrators returned to Frank Ogawa Plaza. *Id.* Officers received reports of vandalism at 9:36 p.m. *Id.* At 9:42 p.m., there was a report that an OPD officer was injured by fireworks.³ *Id.* At 9:48 p.m., there was a report that two Federal Protective Service officers were shot at the federal building at Jefferson Street and 12th Street. *Id.* At 9:57 p.m., there was a report that approximately 1,000 demonstrators remained near Oakland Police Headquarters. *Id.* There were reports of vandalism at City Hall at 10:07 p.m. There were reports that Molotov cocktails were thrown at officers at Franklin and 7th Streets at 10:09 p.m. and at Broadway and 8th Streets at 10:34 p.m. *Id.* Until approximately 1:00 a.m., there were continued reports of vandalism, looting, and fires in Chinatown, City Center, and the Broadway and Telegraph corridors. *Id.* At 12:59 a.m., there was a report that one person had been taken into custody for assaulting an officer with a vehicle. *Id.*

May 30: On May 30, 2020, there were reports of looting in Emeryville that began around 7:30 p.m. and continued until at least 10:00 p.m. *Id.* at 4-5. There was a report after 9:00 p.m. that around 500 demonstrators were gathered near Henry J. Kaiser Park and Broadway and 14th Street. *Id.* at 5. At 9:14 p.m., there was a report that demonstrators threw rocks at officers at Broadway and 12th Street. *Id.* There was a report that a group of demonstrators was moving southbound on Market Street around 9:40 p.m. *Id.* There was at least one report of looting near Broadway and 17th Street at 9:48. *Id.* There was a report that in Emeryville, shots were fired near the Decathlon at 9:55 p.m. *Id.* At 10:09 p.m., California Highway Patrol officers reported taking rocks, bottles, and explosives at Market Street and 6th Street. *Id.* There were reports that at 10:15 p.m., demonstrators had moved into Frank Ogawa Plaza and at 10:28 p.m., some demonstrators began to throw bottles and rocks at officers. *Id.* at 6. There were reports that from approximately 10:30 to 11:45 p.m., groups of demonstrators dispersed in the streets surrounding Frank Ogawa Plaza, and there were reports of fires, looting, and rock, brick, and bottle throwing in the area. *Id.* There were reports that similar unrest along Telegraph and Broadway continued until approximately 2:00 a.m. *Id.* at

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6-8.

May 31: There were reports that between noon and 1:30 p.m., demonstrators gathered at Lake Merritt for a protest that remained peaceful. *Id.* at 9. There were reports that around 1:40 p.m., a caravan of vehicles gathered in a parking lot near Middle Harbor Shoreline Park in the Port of Oakland. *Id.* There were reports that this caravan grew to approximately 5,000 vehicles by 2:23 p.m. and remained peaceful. *Id.* There were reports that around 3:00 p.m., the caravan moved into downtown Oakland and some groups separated from the main caravan and peacefully gathered at Frank Ogawa Plaza. *Id.* at 10.⁴

June 1: There were reports that from 4:00 to 5:00 p.m., a crowd of demonstrators at Oakland Technical High School grew from 2,000 to approximately 5,000 individuals. *Id.* at 15. There were reports that at around 5:20 p.m., the crowd began marching towards Frank Ogawa Plaza and that by 5:34 p.m., the group had grown to approximately 10,000. *Id.* There were reports that by 6:00 p.m. the demonstrators had reached Frank Ogawa Plaza and by 6:30 p.m. the crowd had grown to 15,000 individuals. *Id.* There were reports that at around 7:00 p.m. the demonstrators numbered around 8,000, split into three groups, and at 7:16 p.m. 1,000 demonstrators approached the Police Headquarters. *Id.* There were reports that at 7:36 p.m., the protestors near Police Headquarters began throwing rocks and bottles. *Id.* There were reports that officers then made dispersal announcements and deployed tear gas. *Id.* There were reports that the crowd dispersed in two directions and at around 7:45 p.m. there were reports of an individual with Molotov cocktails at Washington Street and 8th Street. *Id.* There were reports that by 8:02 p.m., around 200 demonstrators had retreated to Frank Ogawa Plaza and another 400 demonstrators had returned to Oakland Technical High School. *Id.* at 15-16. Over the next hour, there were reports that officers detained demonstrators for curfew violations as groups generally dispersed. *Id.* at 16. Police reported that by 9:05 p.m. they could not locate any large crowds. *Id.* After this point, there were various reports of looting, gunshots, and violence, including one Richmond police officer assaulted by a vehicle at Hilltop Mall in Richmond, that continued until approximately 1:00 a.m. *Id.* at 16-17.

***6** Assistant Chief Allison has also supplied the munitions logs for May 29, 2020 through June 4, 2020, which OPD is required to maintain under its Crowd Control Policy, discussed below. Allison Decl. ¶ 17 & Ex. I. These logs show that OPD used some of the listed items during the period discussed above, but they do not contain information about the deployment of munitions by mutual

aid partners.

C. OPD Crowd Control Policy

OPD's crowd management policy is set forth in Training Bulletin III-G. Allison Decl. ¶ 4 & Ex. A (OPD Crowd Control and Crowd Management Policy (hereinafter, "OPD Crowd Control Policy")). It is mandated under the settlement agreements and orders in *Spalding v. City of Oakland*, No. 11-cv-02867 TEH ("*Spalding*"), United States District Court for the Northern District of California and *Campbell, v. City of Oakland*, No. 11-cv-05498 JST ("*Campbell*"), United States District Court for the Northern District of California.⁵

***7** One of the stated policies that underpins the OPD Crowd Control Policy is to "[u]phold constitutional rights of free speech and assembly while relying on the minimum use of physical force and authority required to address a crowd management or crowd control issue." Allison Decl., Ex. A (Crowd Control Policy) § I. The Crowd Control Policy sets forth general principles aimed at meeting this objective in the area of planning, deployment and policing of crowds. *Id.* § III. These general principles include making efforts to establish and maintain contact and communication with event or demonstration planners and considering the type of crowd involved in making crowd control decisions. *Id.* § III.B. The Crowd Control Policy instructs that

"[o]rganized demonstrations in which some engage in coordinated, nonviolent civil disobedience should be distinguished, to the extent possible, from crowds in which substantial numbers of people are engaged in other types of unlawful acts." *Id.* § III.B.7. Likewise, the policy provides that "[i]t is essential to recognize that all members of a crowd of demonstrators are not the same." *Id.* § III.C.7. It recognizes that "[o]nce some members of a crowd become violent, the situation often turns chaotic, and many individuals in the crowd who do not want to participate in the violent or destructive acts may be blocked from leaving the scene because the crowd is so large or because they are afraid they will move into a position of heightened danger." *Id.* In that context, the Crowd Control Policy instructs that "OPD shall seek to minimize the risk that force and arrests may be directed at innocent persons." *Id.*

Under the Crowd Control Policy, OPD uses the Incident Command System to plan for demonstrations and manage crowds and acts of civil disobedience. *Id.* § III.A.3. "Decisions about crowd dispersal and general strategies

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about crowd containment or crowd redirection, multiple simultaneous arrests, planned individual arrests, or planned use of force [are to] be made at the level of the Incident Commander or higher. *Id.* § III.B.1. However, this requirement does “not preclude individual commanders, supervisors, and officers from defending themselves or others from imminent danger when the delay in requesting permission to take action would increase the risk of injury.” *Id.* In addition, the Watch Commander may fill the role of the Incident Commander where it is necessary to respond to “spontaneous events,” at least until relieved by a “ranking officer.” *Id.* § IV.A.1.

The Crowd Control Policy provides that “[s]ufficient resources to make multiple simultaneous arrests should be available at demonstrations where such arrests are a reasonable possibility.” *Id.* § III.C.1. It recognizes, though, that “this need must be balanced against the fact that a large and visible police presence may have a chilling effect on the exercise of free speech rights.” *Id.* Therefore, officers are instructed that they should arrive at the location before event participants, if possible, and that “officers should be positioned at a reasonable distance from the crowd to avoid a perception of intimidation.” *Id.* § III.C.2. The Crowd Control Policy also requires “[e]ach officer [to] wear a badge, nameplate, or other device on the outside of his or her uniform or on his or her helmet which bears the identification number or the name of the officer, as required by [Penal Code § 830.10](#).” *Id.* § III.C.4. In addition, officers are required to “activate their [Personal Digital Recording Devices] whenever taking any enforcement action during a crowd control situation.” *Id.* § X.A.1.

The Crowd Control Policy enumerates “[p]ermissible crowd control and crowd dispersal techniques.” *See generally, id.* § V. This section provides that “[t]he police may not disperse a demonstration or crowd event before demonstrators have acted illegally or before the demonstrators pose a clear and present danger of imminent violence,” at which point the assembly may be declared unlawful. *Id.* § V.F.1. “When the only violation present is unlawful assembly, the crowd should be given an opportunity to disperse rather than face arrest.” *Id.* § V.G.1. In particular, before using crowd dispersal techniques, OPD must make “repeated announcements” to the crowd, using “adequate amplification” “asking members of the crowd to voluntarily disperse and informing them that, if they do not disperse, they will be subject to arrest.” *Id.* These announcements should continue even after the commencement of the dispersal operation and should “specify adequate egress or escape routes.” *Id.* Further, “[u]nless an immediate risk to public safety exists or significant property damage is occurring,

sufficient time [must] be allowed for a crowd to comply with police commands before action is taken.” *Id.* § V.G.2.

*8 If orders to disperse and arrest do not result in “voluntary movement of the crowd,” a police formation may be moved into the view of protestors to create a “forceful presence.” *Id.* § V.H.1. Officers may also use the technique of encirclement and arrest, encircling a portion of the crowd and simultaneously arresting them. *Id.* § V.H.2. The Crowd Control Policy recognizes that this approach “can be effective in dispersing the remaining crowd members wanting to avoid arrest.” *Id.* § VII.A. The policy explains that where this approach is used, there must be probable cause for each arrest and that “the only proper basis for a multiple simultaneous arrest of all the individuals encircled at a demonstration is failure to disperse ([Pen. Code § 409](#)), when the dispersal was properly ordered based on the existence of an unlawful assembly and adequate notice and opportunity to disperse has been given.” *Id.* § VII.A.5. Where such arrests are carried out, the arrestees are to be placed in handcuffs. *Id.* § VII.C. Officers are to be “cognizant that flex-cuffs may tighten when arrestees’ hands swell or move, sometimes simply in response to pain from the cuffs themselves” and “[w]hen arrestees complain of pain from overly tight flex cuffs” they are required to “examine the cuffs to ensure proper fit.” *Id.*

Officer may also use police formations and batons if a crowd refuses to disperse, so long as officers follow the OPD’s policies governing use of force and use of batons and they do not “intentionally strike a person with any baton to the head, neck, throat, kidneys, spine, or groin or jab with force to the left armpit except when the person’s conduct is creating an immediate threat of serious bodily injury or death to an officer or any other person.” *Id.* § V.H.3.

Further, the Crowd Control Policy allows for the use of non-hand held crowd control chemical agents where “other techniques, such as encirclement and multiple simultaneous arrest or police formations have failed or will not accomplish the policing goal as determined by the Incident Commander.” *Id.* § V.H.4. The policy recognizes that such chemical agents can produce “serious injuries or even death” and pose a particular threat to children, the elderly and people with [asthma](#). *Id.* Therefore, the policy requires that OPD use “the minimum amount of chemical agent necessary to obtain compliance.” *Id.* In addition, such weapons may be used only with the authorization of the Incident Commander except when there are “exigent circumstances,” when a supervisor or commander may authorize the immediate

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use of chemical agents. *Id.*

Likewise, “[h]and-thrown chemical agents or pyrotechnic gas dispersal devices” may only be used for crowd control when authorized by the Incident Commander, except when there are exigent circumstances. *Id.* § V.H.5. a. Because such devices “present a risk of permanent loss of hearing or serious bodily injury from shrapnel” they are to be “deployed to explode at a safe distance from the crowd.” *Id.* § V.H.5. b. Further, they are not to be used “for crowd control without first giving audible warnings to the crowd and additional reasonable time to disperse” *id.* § V.H.5. c, and should be used only “if other techniques such as encirclement and mass arrest or police formations have failed or will not accomplish the policing goal as determined by the Incident Commander.” *Id.* § V.H.5.d.

The Crowd Control Policy also prohibits the use of certain types of weapons for crowd control and crowd dispersal. *Id.* § VI. Among other things, canines and fire hoses may not be used for crowd control; nor may OPD uses horses against a non-violent crowd. *Id.* § VI.B - D. Motorcycles and police vehicles may be used only for transportation, observation, traffic control and visible deterrence; they may not be used for crowd dispersal. *Id.* § VI.E. The policy also prohibits the use of wooden dowels and stinger grenades. *Id.* § VI.F.1. Direct Fired Specialty Impact Less-Lethal Munitions (“SIM”) may “not be used for crowd management, crowd control or crowd dispersal during demonstrations or crowd events” “even if some members of the crowd or group are violent or disruptive.” *Id.* Direct Fired SIM may be used only against “a specific individual who is engaging in conduct that poses an immediate threat of loss of life or serious bodily injury to him or herself, officers, or the general public or who is engaging in substantial destruction of property which creates an immediate risk to the lives or safety of other persons.” *Id.* § VI.F.2.a. Even in that scenario, “Direct Fired SIM shall be used only when other means of arrest are unsafe and when the individual can be targeted without endangering other crowd members or bystanders.” *Id.*

*9 The Crowd Control Policy also prohibits the use of “[a]erosol, hand-held, pressurized, containerized chemical agents that emit a stream” from “being used for crowd management, crowd control, or crowd dispersal during demonstrations or crowd events.” *Id.* § VI.H. Like Direct Fired SIM, such chemical agents may only be used “against specific individuals who are engaged in specific acts of serious unlawful conduct or who are actively resisting arrest.” *Id.* Further, they may be used only by officers familiar with the training bulletin that addresses

the use of Oleoresin Capsicum (“OC”). *Id.* “Aerosol chemical agents shall not be used in a demonstration or crowd situation or other civil disorders without the approval of a supervisor or command officer.” *Id.*

The Crowd Control Policy recognizes that “[f]or large demonstrations and mass gatherings, OPD may be required to rely on Mutual Aid agencies for assistance.” *Id.* § IX. Such requests are governed by the “protocols of the Mutual Aid Plan in accordance with the California Emergency Services Act, commencing at [Government Code Section 8550](#).” *Id.* In addition, where mutual aid agencies provide assistance, the Incident Commander is “responsible for ensuring to the extent possible that mutual aid agencies:

1. Are briefed and in agreement with OPD’s Unity of Command structure under which only OPD Commanders may authorize the use of less lethal munitions for crowd control and dispersal;
2. Are briefed on OPD’s policy on prohibited weapons and force;
3. Do not bring or use any weapons or force that is prohibited under OPD’s policy;
4. Are provided a copy of OPD’s Crowd Control Policy and Use of Force policies;
5. Are not assigned to front-line positions or used for crowd intervention, control or dispersal unless there is a public safety emergency;
6. Complete required reports prior to being released from duty.

Id. However, “[t]hese provisions do not [prevent] an OPD or mutual aid officer from taking action or using force against an individual in self-defense or in defense of another person or officer.” *Id.* § IX.7.

Finally, the Crowd Control Policy provides for the completion of an after-action report within thirty days of any incident in which: “1) Mutual Aid is requested; 2) An unlawful assembly is declared; 3) Arrests are made for acts of civil disobedience; 4) Significant police resources are used to control the event; or 5) Chemical agents or SIMS are used.” *Id.* § XI.C. The after-action report must include a copy of the inventory log showing which less lethal munitions were checked out and how many were used by which person during the relevant crowd control event(s). *Id.* § VI.I.

According to Assistant Chief Allison, this after-action

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review is a “key part of OPD’s crowd management policy.” Allison Decl. ¶ 6. He states that pursuant to this section there will be “extensive review and investigations related to the recent mass protests,” “which will include, among other things, ‘lessons learned and training opportunities, as well as an assessment of the effectiveness and quality of the Operations Plans,’ pursuant to Training Bulletin III-G, and the resulting After-Action Report.” *Id.* Assistant Chief Allison also states in his declaration that there will be a review of each use of force pursuant to General Order K-4 and K-4.1 and an Internal Affairs investigations of each complaint pursuant to General Order M-03. Allison Decl. ¶ 6 & Exs. D (General Order K-4, Reporting & Investigating the Use of Force), E (General Order K-4.1, Force Review Boards & Executive Force Review Boards), F (General Order M-03, Complaints Against Departmental Personnel or Procedures). He further anticipates that “the Court’s Independent Monitoring Team in *Allen v. City of Oakland* will observe at least a sample of these processes and resulting reports.” *Id.*

D. Involvement of Mutual Aid Partners

*10 “The California Emergency Services Act [‘ESA’] recognizes and responds to a fundamental role of government to provide broad state services in the event of emergencies resulting from conditions of disaster or of extreme peril to life, property, and the resources of the state. Its purpose is to protect and preserve health, safety, life, and property.” *Martin v. Mun. Ct.*, 148 Cal. App. 3d 693, 696 (1983) (citing Cal. Gov’t Code §§ 8550 et seq.). The ESA “provide[s] for the rendering of mutual aid by the state government and all its departments and agencies and by the political subdivisions” of State and establishes an Office of Emergency Services (“OES”) within the Governor’s office to assist in the organization and assistance of emergency programs, including California’s mutual aid plan. Cal. Gov’t. Code § 8550. Among other thing, the OES publishes manuals for law enforcement agencies describing policies and procedures related to the rendering of mutual aid. *See, e.g.*, Dkt. Nos. 50-1 (Law Enforcement Mutual Aid Plan (2019 Ed.)) (“Blue Book”); 50-2 (Law Enforcement Guide for Emergency Operations (2019 Ed.)) (“Red Book”).

The ESA provides that “[u]nless otherwise expressly provided by the parties, the responsible local official in whose jurisdiction an incident requiring mutual aid has occurred shall remain in charge at such incident, including the direction of personnel and equipment

provided him through mutual aid.” Cal. Gov’t Code § 8618. Defendants have not argued or offered any evidence suggesting that the agencies that offered mutual aid in connection with the events described above have entered into any agreements with OPD or the City of Oakland that modifies this general rule.

There is no dispute that OPD received “crowd control assistance” from its mutual aid partners. *See* Complaint ¶ 70. According to Assistant Police Chief Allison, “[e]specially during the first four days of protests—May 29, 2020 through June 1, 2020—the City relied heavily on mutual aid from the Alameda County Sheriff’s Office, the California Highway Patrol, the U.S. Marshals Service, and police departments from across the Bay Area and state.” Allison Decl. ¶ 11. Assistant Chief Allison states that “[t]he City has around 733 law enforcement personnel and can deploy only so many of them at any given time. On nights such as May 29 and June 1, when the OPD is at once attempting to facilitate mass protests and to respond to mass looting and violence throughout the City, mutual aid is critical.” *Id.* A chart in his declaration reflects that on the night of May 29, 2020, 215 OPD officers and 508 mutual aid officers were deployed. *Id.* ¶ 13. On May 30, 2020, the number of OPD officers deployed had increased to 380 but they were still outnumbered by mutual aid officers, whose numbers had also increased, to 550. *Id.* On May 31 and June 1, OPD maintained the number of officers deployed at 380 while the number of mutual aid officers dropped to 200 (May 31) and 222 (June 1). *Id.*

Assistant Chief Allison states that “OPD attempts to deploy its officers on the front lines when managing crowds along with mutual aid within the City [but that] [t]his becomes challenging when there are multiple events happening at once, in various locations, and circumstances are rapidly changing.” *Id.* ¶ 12. Further, Defendants concede that “[d]uring these days, mutual aid partners reported that among other force options, they deployed CS blasts, Sting balls, smoke, and projectiles.” *Id.* ¶ 14.

According to Assistant Chief Allison, two of OPD’s “[m]utual aid partners have informed the City that if crowd control techniques—including chemical agents—are prohibited, these partners will no longer provide mutual aid.” *Id.* ¶ 15 & Ex. K (emails from Alameda County Sheriff and U.S. Marshal Donald O’Keefe in response to a letter that was sent to the mayor of Oakland, the City Council and Chief Manheimer urging OPD to “immediately halt the use of tear gas for crowd control.”).

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Plaintiffs allege that on June 3, 2020, at a press conference, Chief Manheimer “stated that OPD briefed, instructed, and otherwise controlled the assisting officers, but refused to hold them accountable to Oakland and OPD’s policies.” Complaint ¶ 70.

hundreds of individuals with **asthma** and other respiratory conditions in grave danger” and “places [B]lack individuals in targeted crowds at especially high risk of respiratory harm.” *Id.*

Further, the use of tear gas and pepper spray is particularly dangerous during the COVID-19 pandemic, according to Dr. Sporn. He explains:

E. Health Risks Associated With OPD Crowd Control Tactics Related to COVID-19 Pandemic

*11 Plaintiffs have submitted the declaration of a specialist in **pulmonary disease**, Dr. Peter Sporn, addressing the health risks associated with the use of chemical agents, including tear gas and pepper spray. *See* Declaration of Dr. Peter Sporn in Support of Memorandum of Points and Authorities in Support of Plaintiffs’ Application for a Temporary Restraining Order and/or Order to Show Cause and Preliminary Injunction (“Sporn Decl.”). According to Dr. Sporn, “[w]hile it has been claimed that [tear gas, containing chloroacetophenone (CN) or chlorobenzylidene malononitrile (CS), and pepper spray or pepper balls, containing oleoresin capsicum (OC)] produce only temporary irritation and discomfort, recent studies document that they can cause serious and long-lasting lung problems, skin burns, eye injuries and even death.” Sporn Decl. ¶ 14. In particular, “[a] recent review [that] compiled the results of 31 studies including 5,131 people who suffered 9,261 injuries from exposure to tear gas or pepper spray (Haar et al, BMC Public Health 17:831, 2017) [showed that] 8.7% of the injuries were severe and required professional medical attention, 17% were moderate, and 74% were mild, 58 of the individuals suffered permanent disability and two died of injuries due to the chemical agents.” *Id.* ¶ 15. Furthermore, studies show that “pepper spray is not less harmful or less potentially lethal than tear gas.” *Id.* ¶ 16 (citing Toprak, *et al.*, Journal of Forensic and Legal Medicine 29:36-42, 2015) (autopsies performed on 10 individuals who died as a result of acute exposure to riot control agents showed that the most common mode of death was respiratory failure; that three died after exposure to combinations of tear gas and pepper spray, and that seven died following exposure to pepper spray alone).

Dr. Sporn states that tear gas and pepper spray cause acute respiratory symptoms, posing a particular danger to individuals with **asthma**. *Id.* ¶ 17. He notes that 8% of the overall U.S population suffers from **asthma** and that **asthma** is “more common and often more severe in African Americans than the majority population in the U.S.” *Id.* Consequently, “launching tear gas or pepper spray at large crowds inevitably places dozens or

Because exposure to tear gas and pepper causes severe irritation of the eyes, nose, mouth and respiratory system, exposed individuals rub their eyes, hypersalivate, **cough** uncontrollably, and hyperventilate. This typically forces people to take off the masks they are wearing in order to be able to breathe. By damaging the respiratory epithelium, tear gas and pepper spray increase susceptibility to respiratory infection. All of this greatly increases the risk of disseminating the novel corona virus and of contracting COVID-19. Because African Americans and Latinx individuals experience disproportionately high rates of respiratory failure and death due to COVID-19 (Yancy, JAMA 323:1891-2, 2020), use of tear gas and pepper spray further increases the risk of serious harm to the health of individuals in these groups.

Id. ¶ 18. It is for this reason that the American Thoracic Society issued a statement on June 11, 2020 “stating that the use of tear gas and similar chemical agents by law enforcement during the COVID-19 pandemic is irresponsible and calling for a moratorium on their use.” *Id.* ¶ 20.⁶

*12 Defendants do not directly challenge Dr. Sporn’s opinions about the dangers of exposure to chemical agents during the pandemic or present any evidence contradicting his opinions. They also acknowledge that on June 16, 2020 the Oakland City Council “passed a resolution urging OPD and mutual aid partners to stop using tear gas for crowd control during the COVID-19

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pandemic” and that this resolution has raised “important questions about the unknown relationship between chemical agents and COVID-19.” Response to Motion for Preliminary Injunction (“Opposition”) at 16, 23; *see also* Pereda Decl., Ex. Q (June 16, 2020 “Resolution Urging The City Of Oakland To Immediately Halt The Use Of Tear Gas For Crowd Control During The Covid-19 Pandemic And Requesting The Oakland Police Commission To Immediately Review And Propose Changes To The Oakland Police Department’s Policy In Order To Halt Such Use”). However, they point out that the Health Officer of the Alameda County Health Office has not banned the use of chemical agents, which they insist is notable because of the strict measures that the Alameda County Public Health Department has taken to control the spread of COVID-19. *Id.* at 23.

F. The Motion

Plaintiffs contend OPD’s aggressive and dangerous tactics in dealing with recent and ongoing demonstrations makes it essential that the Court enter a preliminary injunction prohibiting the use of certain tactics and munitions, including tear gas and other chemical agents, by OPD and any officers called in to assist OPD with crowd control under a mutual aid agreement.⁷

Defendants point to incidents of looting and violence during the relevant period to show that its crowd control tactics were justified and that the injunctive relief Plaintiffs seek is inappropriate. At the same time, they argue that Oakland’s policies already emphasize de-escalation and the use of the minimum force necessary for crowd control. *See* Allison Decl. ¶ 8 & Exs. B (General Order K-3) (instructing that “[m]embers are required to de-escalate the force when the member reasonably believes a lesser level or no further force is appropriate.”), A (Crowd Control Policy). Moreover, they contend OPD’s Crowd Control Policy has been successful over the last five years, with OPD facilitating thousands of events, including mass protests and demonstrations, largely without incident. *See* Allison Decl., Ex.G (Crowd Management Reports, 2015-2019).

Defendants acknowledge that chemical agents have been used by OPD on occasion over the last five years but they represent that they have uncovered no “assembly-related” lawsuit filed against the City of Oakland during that period. Opposition at 5. Defendants further contend that any changes to OPD’s policies with respect to crowd control, including whether the use of tear gas should be banned, should be made through the political and

administrative review processes that are already underway. Finally, they warn that if the Court prohibits the use of tear gas and other chemical agents outright some mutual aid partners will likely refuse to offer assistance, posing a threat to Oakland’s ability to ensure adequate crowd control policing in the face of ongoing demonstrations and unrest.

III. ANALYSIS**A. Legal Standards Governing Entry of Preliminary Injunctions**

Plaintiffs seeking a preliminary injunction must establish that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the public interest.

Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (citation omitted). When the government is a party, consideration of the balance of the equities and the public interest merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

*13 “Under *Winter*, plaintiffs must establish that irreparable harm is likely, not just possible, in order to obtain a preliminary injunction.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). In reaching this conclusion, the Supreme Court “disagreed with one aspect of [the Ninth Circuit’s] approach to preliminary injunctions[,]” namely, its holding that “the ‘possibility’ of irreparable harm was sufficient, in some circumstances, to justify a preliminary injunction.” *Id.* The *Winter* decision did not, however, eliminate the “sliding scale” approach to preliminary injunctions employed by the Ninth Circuit. *Id.* at 1134. Rather, the Ninth Circuit has found that *Winter* left in place “the ‘serious questions’ version of the sliding scale test for preliminary injunctions[,]” which provides that “[a] preliminary injunction is appropriate when a plaintiff demonstrates...that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff’s favor.” *Id.* at 1134-35 (citation omitted). Similarly, “a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits.” *Id.* at 1131.

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“Due to the urgency of obtaining a preliminary injunction at a point when there has been limited factual development, the rules of evidence do not apply strictly to preliminary injunction proceedings.” [Herb Reed Enterprises, LLC v. Fla. Entm’t Mgmt., Inc.](#), 736 F.3d 1239, 1250 n. 5 (9th Cir. 2013) (citing [Republic of the Philippines v. Marcos](#), 862 F.2d 1355, 1363 (9th Cir. 1988)).

1. Likelihood of Success on the Merits

Plaintiffs assert their claims under the First, Fourth and Fourteenth Amendment. The Court finds that they have established serious questions going to the merits on all three claims.

a. Fourth Amendment Claim (Excessive Force)

Excessive force claims are governed by the reasonableness standard of the Fourth Amendment. [Graham v. Connor](#), 490 U.S. 386, 395 (1989). “In determining reasonableness, ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests must be balanced against the ‘countervailing government interests at stake.’ ” [Chew v. Gates](#), 27 F.3d 1432, 1440 (9th Cir. 1994) (quoting [Graham](#), 490 U.S. at 396). “In evaluating the government’s interest in the use of force we look to: ‘(1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight.’ ” [Young v. Cty. of Los Angeles](#), 655 F.3d 1156, 1163 (9th Cir. 2011) (quoting [Miller v. Clark Cty.](#), 340 F.3d 959, 964 (9th Cir. 2003)). The ultimate inquiry is not limited to these three factors however, requiring courts to “ ‘addresses whether the totality of the circumstances justifie[s] a particular sort of...seizure.’ ” *Id.* (quoting [Tennessee v. Garner](#), 471 U.S. 1, 8-9 (1985)).

The types of force that was used by OPD against protesters in this case – chemical agents, less lethal projectiles such as rubber bullets and flashbang grenades

– constitute significant force. See [Young](#), 655 F.3d. at 1161 (pepper spray is “ ‘intermediate force’ that, while less severe than deadly force, nonetheless present a significant intrusion upon an individual’s liberty interests.”); [Deorle v. Rutherford](#), 272 F.3d 1272, 1285 (9th Cir. 2001) (holding that beanbag projectile “akin to a rubber bullet” is not deadly force but is “much greater than the force” associated with the use of pepper spray and is “permissible only when a strong governmental interest compels the employment of such force”). Consequently, such force must be justified by a significant government interest. Based on the current record, there are serious questions as to whether that standard is met.

Plaintiffs have submitted sworn declarations and video footage showing that some of the force used by OPD officer, or OPD’s mutual aid partners, was aimed at peaceful protestors who did not pose a threat to the officers or the public at large and were not engaging in illegal activity. As to a number of the incidents described in Plaintiffs’ declarations, it is not clear that the crowd was refusing to disperse as there is evidence that they may have been given insufficient time to respond or no warnings at all, or they could not hear the warnings. There is also evidence that some demonstrators were unable to disperse in order to comply with officers’ commands and/or to avoid violating curfew because they were trapped in an area with no accessible means of egress.

*14 Defendants have countered with evidence that there was looting and violence occurring in Oakland during this period. They have not, however, offered evidence that links the incidents Plaintiffs contend involved inappropriate officer conduct with the looting and violence that is described in the Police Activity Logs.⁸ Moreover, the Court has carefully reviewed the logs and finds that as to at least some of the aggressive crowd control tactics described in Plaintiffs’ declarations and shown in the video footage, the timing and locations of the incidents on the logs does not match the timing and locations of the events described by Plaintiffs and therefore does not establish that the force used by OPD officers was reasonable as to those incidents.

Therefore, the Court finds that Plaintiffs have demonstrated that there are serious questions going to the merits with respect to Plaintiffs’ Fourth Amendment excessive force claim.

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b. First Amendment Claim (Freedom of Speech and Assembly)

The First Amendment “safeguards an individual’s right to participate in the public debate through political expression and political association.” [McCutcheon v. Fed. Election Com’n](#), 572 U.S. 185 203 (2014). The Supreme Court has observed that “[t]he constitutional right of free expression is...designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.” [Cohen v. California](#), 403 U.S. 15, 24 (1971). Thus, “[t]hat the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.” [Id.](#) at 25. “[S]peech on public issues occupies the ‘highest rung of the hierarchy of First Amendment values,’ and is entitled to special protection.” [Connick v. Myers](#), 461 U.S. 138, 145 (1983) (quoting [N. A. A. C. P. v. Claiborne Hardware Co.](#), 458 U.S. 886, 913 (1982) (internal quotations and citation omitted)).

“In order to demonstrate a First Amendment violation, a plaintiff must provide evidence showing that ‘by his actions [the defendant] deterred or chilled [the plaintiff’s] political speech and such deterrence was a substantial or motivating factor in [the defendant’s] conduct.’ ” [Mendocino Env’tl. Ctr. v. Mendocino Cty.](#), 192 F.3d 1283, 1300 (9th Cir. 1999) (quoting [Sloman v. Tadlock](#), 21 F.3d 1462, 1469 (9th Cir.1994) (alterations in original)). There is significant evidence in the record that the tactics used against protestors in Oakland, including the use of projectiles and tear gas, had a chilling effect on the political speech of the protestors and likely deterred some of them from engaging in further protests. They describe being terrified, traumatized and suffering physical injuries and panic attacks. Some said they would not have participated if they had known tear gas would be used against them. In addition, some of the aggressive conduct described in the declarations, such as shooting a reporter with a rubber bullet even though it does not appear she was engaged in illegal activity or posed a threat of any kind, raises a serious question as to whether some of the uses of force described in those declarations was in reaction to the anti-police message of the protests and aimed at intimidating protestors to deter such speech.

*15 Therefore, the Court finds that there are serious

questions going to the merits with respect to Plaintiffs’ First Amendment claim.

c. Fourteenth Amendment Claim (Substantive Due Process)

“It is well established that the Constitution protects a citizen’s liberty interest in her own bodily security.” [Kennedy v. City of Ridgefield](#), 439 F.3d 1055, 1061 (9th Cir. 2006) (citing [Ingraham v. Wright](#), 430 U.S. 651, 673–74 (1977); [Wood v. Ostrander](#), 879 F.2d 583, 589 (9th Cir.1989)). Further, “although the state’s failure to protect an individual against private violence does not generally violate the guarantee of due process, it can where the state action ‘affirmatively place[s] the plaintiff in a position of danger,’ that is, where state action creates or exposes an individual to a danger which he or she would not have otherwise faced.” [Id.](#) (citing [DeShaney v. Winnebago County Dep’t of Soc. Serv.](#), 489 U.S. 189, 197, 201 (1989); [Wood](#), 879 F.2d at 589–90). Thus, for example, in [Wood](#), an officer left the plaintiff stranded in a known high-crime area late at night after arresting the driver and impounding the car and she was later raped when she accepted a ride from a stranger. [Wood](#), 879 F.2d at 586. The court found that the officer had been deliberately indifferent to the plaintiff’s interest in personal security under the Fourteenth Amendment. [Id.](#); see also [Penilla v. City of Huntington Park](#), 115 F.3d 707, 709-710 (9th Cir. 1997) (holding the plaintiff had stated a claim for violation of Fourteenth Amendment due process based on deliberate indifference to medical needs where police officers, after finding a man in grave need of medical care, cancelled a request for paramedics and locked him inside his house); [Munger v. City of Glasgow](#), 227 F.3d 1082 (9th Cir. 2000) (holding that police officers could be held liable for violation of Fourteenth Amendment right to due process where they had ejected the plaintiff from a bar on a bitterly cold night and he later died of hypothermia).

The evidence presented by Plaintiffs supports a likelihood of success on this claim. Despite acknowledging the strict guidance of the Alameda County Public Health Department with respect to the dangers of COVID-19 and offering assurances that OPD takes those dangers seriously, there is no evidence in the record that the OPD took these dangers – and in particular, the danger that chemical agents pose with respect to the spread of

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COVID-19 – into account in planning for or carrying out its crowd control strategies between May 29 and June 1, or that it has adopted any new policies to mitigate those dangers. In addition, there can be no doubt that by the time of the protests the OPD was aware of the mask requirement that was adopted by the Alameda County Health Department in April 2020. Yet all of the declarations and the video footage submitted by both sides are remarkably consistent in showing that officers did not wear masks when conducting crowd control unless they were wearing gas masks. Officer can be seen in close proximity to demonstrators, issuing spoken commands (often loudly) and in some cases placing protestors in handcuffs as they arrested them, all without masks. According to one account, Officer D’Orso laughed when asked about his failure to wear a mask. The Court is also concerned by the accounts of numerous protesters that they were trapped by police officers and unable to either disperse or maintain social distance. Again, there is no evidence that the OPD took into account the heightened danger posed by COVID-19 in using crowd control tactics that did not ensure adequate means of egress.

*16 Based on this conduct, the Court finds that it is reasonably likely that Plaintiffs will be able to show that Defendants acted with deliberate indifference to their personal security under the Fourteenth Amendment.

2. Irreparable Harm

The Court also finds that Plaintiffs have made a strong showing of irreparable harm. “The loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury.”

Associated Press v. Otter, 682 F.3d 821, 826 (9th Cir. 2012) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Plaintiffs have offered evidence that the protests that began on May 29, 2020 are ongoing; unless Defendants are enjoined from engaging in the aggressive crowd control tactics described by Plaintiffs it is likely that Plaintiffs and other members of the public who wish to participate in these protests will be deterred from doing so out of fear that they will be subjected to such tactics. Further, while Defendants urge the Court to allow the various administrative review processes to take their course, that approach does not adequately address the extreme urgency created by the COVID-19 pandemic as every protest in which OPD must manage the crowd

presents a danger of fueling the spread of COVID-19. Therefore, this factor supports the entry of a preliminary injunction.

3. Balance of the Equities and the Public Interest

The Court concludes that the balance of the equities tips sharply in Plaintiffs’ favor and that injunctive relief is in the public interest. As the court in *Black Lives Matter Seattle-King Cty. v. City of Seattle, Seattle Police Dep’t*, noted, “ ‘serious First Amendment questions compel[]’ a finding that the ‘balance of hardships tips sharply in [the plaintiffs’] favor[.]’ ” No. 2:20-CV-00887-RAJ, 2020 WL 3128299, at *5 (W.D. Wash. June 12, 2020) (quoting *Cnty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007) (second alteration in original) (internal quotations and citations omitted)). “And as to public interest, ‘it is always in the public interest to prevent the violation of a party’s constitutional rights.’ ” *Id.* (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)).

B. Scope of Preliminary Injunction

Having found that a preliminary injunction is warranted, the Court turns to the scope of the injunctive relief. As is reflected in the parties’ July 26, 2020 Status Report, Dkt. No. 47, the parties were able to reach agreement as to many of the provision of the preliminary injunction. Except with respect to whether the Preliminary Injunction would cover officers of mutual aid partners, the parties agreed that officers should be bound by Oakland’s Crowd Control Policy, that officers should be required to wear badges identifying them, that officers should be required to have their body cameras on when engaged in crowd control activities, that police vehicles may not be used to disperse crowds, and that special training with respect to OPD’s Crowd Control Policy should be conducted by November 1, 2020. Dkt. No. 47. With respect to face masks and gloves, the parties’ disagreement was only a matter of degree: Defendants agreed to a provision that would have required officers to wear face masks and gloves when interacting with the public “to the extent reasonably possible” whereas Plaintiffs advocated for a requirement that did not include this qualifying language. *Id.*

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*17 The primary disagreements related to: 1) the degree to which the mutual aid partners would be bound by the preliminary injunction; 2) the substantive limits that would be placed on OPD tactics and munitions in conducting crowd control; and 3) whether there should be a provision requiring that protesters who are arrested during protests must be cited and released in Oakland rather than being sent to the County jail.

Because no mutual aid partners have been named as defendants, the Court does not have the authority to issue injunctive relief that is binding on the mutual aid partners. Nonetheless, California law provides that when OPD requests assistance from mutual aid partners, OPD officers are to “remain in charge...including the direction of personnel and equipment provided him through mutual aid.” *Cal. Gov’t Code § 8618*. The evidence submitted by the parties shows that mutual aid partners played a significant role in crowd control in Oakland during the relevant period, with the number of officers from mutual aid partners sometimes outnumbering OPD officers. In light of this evidence, the effectiveness of the injunctive relief awarded by the Court will depend to a large degree on whether officers of mutual aid partners abide by the terms of the preliminary injunction that apply to OPD with respect to the crowd control tactics and munitions they use. Therefore, the Court has included in the Preliminary Injunction provisions designed to ensure that OPD officers will, in fact, remain in charge of the incident, including ensuring that the mutual aid partners do not use tactics or munitions that are inconsistent with the terms of the preliminary injunction or Oakland’s Crowd Control Policy.

With respect to the tactics and munitions that OPD may use for crowd control, the Court finds that the evidence in the record provides a sufficient basis for prohibiting outright the use of stinger grenades, wooden bullets, rubber or rubber coated bullets, pepper balls, and similar munitions. As discussed above, many of these are already prohibited under Oakland’s Crowd Control Policy. The Court has also placed strict limits on the use of chemical agents, flashbang grenades and foam projectiles. It has not banned them outright because Defendants have presented evidence that there may be situations where there is an

imminent threat of physical harm to a person or significant destruction of property and where use of these munitions may pose less of a threat to the public than physical force by police officer aimed at addressing that threat, such as use of batons. Based on the current record, the Court concludes that there is at least a possibility that banning these munitions could not only endanger public safety in general but also increase the dangers faced by protestors. The Court may revisit this question at a later stage of the case, however, after the parties have had an opportunity to conduct discovery. As noted in the preliminary injunction, the Court does not conclude that the use of these tactics and munitions in the limited circumstances permitted under the Preliminary Injunction is either lawful or advisable.

The Court did not include a provision in the preliminary injunction addressing cite-and-release requirements because there was not sufficient evidence in the record to guide the Court’s decision as to whether such an injunction was warranted. Likewise, the Court declined to include the qualifying language proposed by Defendants in the provision requiring that officers wear masks and gloves when interacting with the public because Defendants presented no evidence that imposing such requirements would hamper OPD officers in any way with respect to carrying out their duties. Nor did they raise any arguments that they would.

IV. CONCLUSION


*18 For the reasons stated above, the Motion is GRANTED in part and DENIED in part.
IT IS SO ORDERED.

All Citations

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Footnotes

¹ According to Plaintiffs, “kettling” derives from a “military term referring to an army that is completely surrounded by a much larger force.” Complaint ¶ 66.

² The parties have consented to the jurisdiction of the undersigned magistrate judge pursuant to  28 U.S.C. § 636(c).

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³ At the July 29, 2020 hearing, Defendants' counsel stated that he believed this injury occurred near Oakland Police Headquarters.

⁴ Later that day, there were reports that groups protested on I-580, near the Oakland Police Headquarters, and other parts of downtown Oakland. *Id.* There were reports that the demonstrations were sometimes peaceful, but other times included violence and agitators. *Id.* In addition, there were reports of widespread looting and sporadic fires in Emeryville and Oakland and reports of gunfire that evening. *Id.* at 11-12. All of these activities occurred after the events and alleged police misconduct described by Plaintiffs in their complaint and declarations.

⁵ In *Spalding*, the plaintiffs sued the City of Oakland and the County of Alameda, along with various individual defendants, for alleged constitutional violations based on mass arrests at a protest against police misconduct related to the killing of Oscar Grant by a BART police officer. It was undisputed that the individuals had not been given warnings or an opportunity to disperse. *See* Case No. 11-cv-05498 JST, Docket No. 86-1 (*Spalding* Settlement Agreement) at 1. In the *Spalding* Settlement Agreement, the parties agreed that the Oakland defendants would continue to abide by the crowd control and crowd management policy adopted in two earlier cases, *Coles v. City of Oakland*, No. 03-cv-02961 TEH and *Local 10 ILWU v. City of Oakland*, No. 03-cv-02962 TEH ("the *Coles/Local 10* Settlement Agreement"), which the *Spalding* plaintiffs alleged had been violated by OPD. *Id.* at 7 & Ex. A thereto (*Coles/Local 10* Settlement Agreement); *see also* 03-cv-02961, Docket No. 41 (*Coles/Local 10* Settlement Agreement). The parties in *Spalding* also agreed that the meet-and-confer requirement for amending the policy under the *Coles/Local 10* Settlement Agreement would be satisfied if "[b]efore making any material change to the Crowd Control Policy...or the associated Training Bulletin (OPD TB III-G, issued 28 Oct. 2005), or to associated training outlines, the Oakland Police Department and its counsel will meet and confer with representatives of the National Lawyers Guild - SF Bay Area Chapter, and the ACLU of Northern California, in a good faith effort to reach agreement on such changes." Case No. 11-cv-05498 JST, Docket No. 86-1 (*Spalding* Settlement Agreement) at 7. In *Campbell*, the plaintiffs were participants in the Occupy Oakland protests in the fall of 2011 who alleged that OPD had violated their constitutional rights and the terms of the crowd control policy adopted in the *Coles/Local 10* Settlement Agreement by using excessive force against peaceful protestors. No. 11-cv-05498 JST, Docket No. 1 (Complaint) at 2. The settlement agreement in *Campbell* incorporated the provisions of the *Spalding* Settlement Agreement addressing OPD's crowd control policy. No. 11-cv-05498 JST, Docket No. 86. In particular, under the *Campbell* settlement agreement, the parties agreed that OPD would continue to abide by the crowd control policy adopted under the *Coles/Local 10* Settlement Agreement and that OPD would meet and confer with National Lawyers Guild and the ACLU before making any material changes to the crowd control policy "and its associated Training Bulletin (OPD TB III-G, issued 27 Oct. 2005)." *Id.* at 5. The parties further stipulated "to the Court's retention of jurisdiction to enforce these terms for a four year period, extendable by an additional three years as provided in [the *Spalding* Settlement Agreement], Paragraph III.J.8, and request[ed] that the Court appoint Magistrate Judge Laurel Beeler, who ha[d] overseen settlement in both this matter and *Spalding*, for resolution of any disputes, to facilitate the meet and confer process referenced above, and to issue all appropriate orders concerning the *Spalding* Settlement Agreement and the implementation and enforcement thereof." *Id.* at 5-6. Paragraph III.J.8 of the *Spalding* Settlement Agreement provides that if there is a material breach of the settlement agreement within the initial four-year period, any party may move the court to extend the period of its jurisdiction for an additional three years. There is nothing on the *Campbell* docket indicating that such an extension was ever requested. The parties have also acknowledged that this Court has ongoing oversight of OPD's policies and conduct in *Allen v. City of Oakland*, 00-cv-4599 WHO. That case was brought by a group of African American plaintiffs against the City of Oakland and various individual police officers who were members of a group that called themselves "the Riders" and who were assigned to patrol neighborhoods in West Oakland. The plaintiffs alleged that the Riders engaged in repeated and serious civil rights violations against African American residents and that high-level officials were aware of this misconduct but took no remedial action. That case settled in 2003 but the Court continues to supervise the enforcement of that agreement, holding a status conference as recently as May 27, 2020.

⁶ The June 11, 2020 Statement of the American Thoracic Society states as follows:

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June 11, 2020 -- The American Thoracic Society calls for a moratorium on the use of tear gas and other chemical agents deployed by law enforcement against protestors participating in demonstrations, including current campaigns sparked by the death of George Floyd.

“The use of chemical crowd control agents is outlawed in the time of war. They cause significant short- and long-term respiratory health injury and likely propagate the spread of viral illnesses, including COVID-19,” said ATS President Juan C. Celedón, MD, DrPH, ATSF.

“Recent research calls into question the assumed safety of tear gas such as 2-chlorobenzalmalononitrile (CS), and the highly concentrated pepper oil used in exploding shells and grenades,” said Sven-Eric Jordt, PhD, a leading researcher in tear gas and related [lung injury](#). Those studies have identified chronic [bronchitis](#), compromised lung function, and [acute lung injury](#) (in military recruits) as consequences of tear gas exposure.

The airborne nature of tear gas also makes it impossible to use in a manner that doesn’t endanger uninvolved persons such as innocent bystanders and the media. Tear gas is also a concern to medical personnel exposed when treating protestors, since the agents can contaminate clothing and medical equipment.

In addition to questions about safety, the ATS is concerned that exposure to tear gas may affect COVID-19 transmission. A tear gas-exposed person with asymptomatic COVID-19 would be unable to maintain a safe distance and is likely to spread the virus much more efficiently to bystanders, increasing the risk of infection. Protective masks would have to be discarded due to tear gas contamination, further increasing risks of spreading or contracting the infection.

Outcomes of a study by the U.S. military are a clear warning sign. Recruits exposed to CS tear gas in training just once had a strongly increased likelihood to develop respiratory illnesses such as [influenza](#), [pneumonia](#), or [bronchitis](#), conditions often caused by viral infections. This may also apply to COVID-19. Reactive chemicals such as 2-chlorobenzalmalononitrile, and the combustion products and solvents produced by tear gas shells and grenades, are known to degrade the lungs’ antiviral defenses. COVID-19 patients often report loss of their sense of smell. COVID-19 patients were also found to lose their capability to sense irritants, increasing their risk of inhaling tear gas and developing chemical injuries.

Current events in the U.S. provide evidence of tear gas use escalation domestically. Inadequate training, monitoring, and accountability in use of these weapons contribute to misuse and risk of injury. If used at all, tear gas should be a last resort.

The industry manufacturing tear gas systems have developed advanced launching technologies allowing deployment of much higher amounts of tear gas over longer distances. Much of what we currently know about the health effects of exposure to tear gas and other chemical agents is based on military research conducted in the 50s, 60s, and 70s using young healthy male research participants. These studies do not address the potential health effects for vulnerable populations who are exposed, including children, older adults, and people with underlying health conditions.

Based on the lack of crucial research, the escalation of tear gas use by law enforcement, and the likelihood of compromising lung health and promoting the spread of COVID-19, the American Thoracic Society calls for a moratorium on CS tear gas and OC pepper weapons use”, said Dr. Celedón.

Sporn Decl. ¶ 20 (quoting June 11, 2020 Statement of American Thoracic Society).

⁷ In their Proposed Order, Plaintiffs ask the Court to prohibit the following:

1. Using tear gas or any other chemical weapons against persons taking part in a protest or demonstration;
2. Firing rubber bullets or similar projectiles at persons taking part in a protest or demonstration;
3. Firing flash bang grenades at persons taking part in a protest or demonstration;
4. Failing to maintain their body worn cameras in the “on” position while engaged in policing public protests and demonstrations;
5. Failing to display their name and department badges while engaged in policing public protests and demonstrations; and
6. Kettling persons taking part in or observing public protests and demonstrations.

Proposed Order, Docket No. 13-1.

⁸ The Court notes that while Defendants confirmed at the hearing that all of the entries on the Activity Logs were

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called in by OPD officers, it appears that at least some of the entries describe reports received by OPD officers from third parties rather than activities that the officers themselves observed, raising the possibility that some of the reports in the log may not be accurate. In addition, these second-hand reports from sources other than OPD officers raise questions of admissibility. *Colvin v. United States*, 479 F.2d 998, 1003 (9th Cir. 1973) (“Entries in a police report based on an officer’s observation and knowledge may be admitted, but statements attributed to other persons are clearly hearsay[] and inadmissible[.]”). Further, certain reports – such as reports of Molotov cocktails being thrown – are hotly contested by Plaintiffs and to date have not been documented with a sworn declaration by a first-hand witness. At this stage of the case, when no discovery has occurred, the Court declines to make factual findings as to whether any particular report of looting or violence reflected in the Activity Logs is accurate. Rather, the Court relies on the Activity Logs only to the extent that they reflect that on the dates at issue OPD was facing disturbances in multiple locations that potentially posed a threat to public safety.

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Abay v. City of Denver, 445 F.Supp.3d 1286 (2020)

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445 F.Supp.3d 1286

United States District Court, D. Colorado.

Agazi ABAY, Gabriel Thorn, Amy Schneider, and
Michael McDaniel, Plaintiffs,

v.

CITY OF DENVER, Defendant.

Civil Action No. 20-cv-01616-RBJ

|
Signed 06/05/2020

Synopsis

Background: Citizens brought action in the Denver District Court against city and county, alleging defendants violated their Fourth Amendment right against excessive force, and their First Amendment right to free speech, and sought a temporary restraining order to enjoin city and county from using chemical agents or certain physical force against individuals demonstrating against acts of violence perpetrated by police officers against the African American community, documentation of the demonstration and police activities, or the treatment of injured demonstrators. The case was removed to the United States District Court for the District of Colorado.

Holdings: The District Court, R. Brooke Jackson, J., held that:

citizens showed a substantial likelihood of success on the merits, as element for obtaining a temporary restraining order with regard to their claim that city and county law enforcement officers engaged in excessive force;

citizens showed a substantial likelihood of success on the merits, as element for obtaining a temporary restraining order with regard to their claim that city and county law enforcement officers violated their First Amendment right to free speech;

citizens would suffer irreparable injury, if request for temporary restraining order was denied;

the potential harm to defendants was outweighed by the very real harm that had already been caused to plaintiffs;

it was clearly in the public interest to protect the plaintiffs’ First Amendment right to demonstrate, the media’s ability to document that demonstration, and third

parties’ ability to render aid to demonstrators without threat of excessive force by police; and

the threat to physical safety and free speech outweighed the potential harm to the public interest through a potential increase in property damage.

Motion granted in part.

Procedural Posture(s): Motion for Temporary Restraining Order (TRO).

Attorneys and Law Firms

Edward Milo Schwab, Ascend Counsel LLC, John Michael Guevara, Laura Beth Wolf, Wolf Guevara LLP, Ross I. Ziev, Law Offices of Ross Ziev PC, Denver, CO, for Plaintiffs.

Conor Daniel Farley, Melanie Bailey Lewis, Denver City and County Attorney’s Office, Denver, CO, for Defendant.

ORDER ON PLAINTIFFS’ MOTION FOR TEMPORARY RESTRAINING ORDER

R. Brooke Jackson, United States District Judge

*1 This matter is before the court on plaintiffs Agazi Abay, Gabriel Thorn, Amy Schneider, and Michael McDaniel’s request for an temporary restraining order to enjoin defendant the City and County of Denver (“Denver”)—specifically the Denver Police Department and police officers from other local jurisdictions from whom Denver has requested assistance in responding to the protests that have arisen following the George Floyd incident in Minneapolis—from using chemical agents or certain physical force against individuals engaged in demonstration activities, documentation of the demonstration and police activities, or the treatment of injured demonstrators. ECF No. 10.

For the reasons stated herein, the motion is GRANTED IN PART.

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I. BACKGROUND

On May 28, 2020 citizens of Denver, Colorado joined a nationwide expression of outrage at the death of George Floyd and other acts of violence perpetrated by police officers against the African American community. Though much of the demonstrations have remained peaceful, violence and destruction has occurred at the hands of citizens and police officers alike.

Plaintiffs challenge the Denver Police Department (“DPD”)’s use of chemical agents (including mace/oleoresin capsicum spray or mist/pepper spray/pepper gas, tear gas, skunk, inert smoke, pepper pellets, xylyl bromide) and rubber projectiles on protestors participating in these demonstrations. ECF No. 1. Plaintiffs sue on behalf of themselves and similarly situated individuals, alleging that during these demonstrations the Denver police have in some instances violated their First Amendment right to free speech and their Fourth Amendment right against excessive force by using pepper spray, pepper balls, rubber bullets, flashbang grenades, and tear gas to punish plaintiffs for demonstrating against police brutality.

The Court has reviewed video evidence of numerous incidents in which officers used pepper-spray on individual demonstrators who appeared to be standing peacefully, some of whom were speaking to or yelling at the officers, none of whom appeared to be engaging in violence or destructive behavior. *See* ECF No. 10 at 5. Plaintiffs cite video evidence of officers using projectiles on several journalists in the process of documenting the scene. *Id.* at 6–8. Plaintiffs cite video evidence in which a projectile struck and knocked out a peaceful protestor. After a “medic” protestor attempts to rescue the unconscious protestor the medic is subsequently shot with projectiles. *Id.* at 9. Plaintiffs further cite video evidence of four incidents in which police projectiles struck the eyes of peaceful demonstrators, in some cases resulting in facial fractures, in some cases resulting in permanent loss of vision. *Id.* 9–10. Finally, plaintiffs cite video evidence of three incidents in which officers threw tear gas or shot pepper balls into peaceful crowds. *Id.* at 10–11.

Plaintiffs allege that defendant’s use of such force has resulted in injuries including loss of vision, fractured bones requiring surgery, [deep lacerations](#), loss of eyes, ruptured testicles. *Id.* at 2. They further allege that officers have targeted peaceful protestors, journalists, and protest “medics” and have retaliated against demonstrators for

engaging in demonstrations, and sometimes for expressing anti-law enforcement. *Id.* at 2–3. Plaintiffs allege that this use of force against peaceful protestors and others is sometimes intentional and that officers target projectiles at demonstrators’ heads and groins. *Id.* at 3.

Procedural Background

*2 Plaintiffs filed a complaint in Denver District Court on June 4, 2020. ECF No. 1-1. Defendant removed to this Court. ECF No. 1. Plaintiffs’ complaint alleges two causes of action premised on [42 U.S.C. § 1983](#). ECF No. 1-1 at 21, 23. First, plaintiffs allege that defendant violated their Fourth Amendment right against excessive force. *Id.* ¶¶ 87–97. Second, plaintiffs allege that defendant violated their First Amendment right to free speech. *Id.* ¶¶ 98–108.

This Court heard the parties in an emergency oral argument on the motion for a TRO on June 5, 2020 at 6:00 p.m. ECF No. 13.

II. STANDARD OF REVIEW

In determining whether to grant a TRO, the court must analyze the following factors: (1) whether the movant has a substantial likelihood of success on the merits; (2) whether irreparable harm will ensue if the request for a TRO is denied; (3) whether the threatened injury outweighs the harm that the TRO may cause the defendant; and (4) whether, if issued, the TRO will not adversely affect the public interest. *See* [General Motors Corp. v. Urban Gorilla, LLC](#), 500 F.3d 1222, 1226 (10th Cir. 2007).

III. ANALYSIS

A. Likelihood of Success on the Merits

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In cases in which the deprivation of constitutional rights is at issue, the likelihood of the success on the merits factor is determinative. See [Hobby Lobby Stores, Inc. v. Sebelius](#), 723 F.3d 1114, 1145 (10th Cir. 2013) (quoting [ACLU of Ill. v. Alvarez](#), 679 F.3d 583, 589 (7th Cir. 2012), cert. denied, 568 U.S. 1027, 133 S. Ct. 651, 184 L.Ed.2d 459 (2012)) (“[I]n First Amendment cases, the likelihood of success on the merits will often be the determinative factor.”).

Before turning to these issues, however, I wish to make certain things perfectly clear, as I did during the hearing held earlier this evening. First, people have an absolute right to demonstrate and protest the actions of governmental officials, including police officers. It is one of the many freedoms on which this country was built. Second, police have a very difficult and often thankless job. They frequently are called upon to make split second decisions and to expose themselves to danger while protecting the health and safety of the rest of us. Third, some of the behaviors of what I hope and believe to be a minority of the police officers in Denver and the nation during recent days (and before), not only vis-à-vis persons of color but against peaceful protesters of all backgrounds, have been disgusting. Finally, as I emphasized during the hearing, the difficulty is in trying to draw an enforceable line that permits police officers to use appropriate means to respond to violence and destruction of property without crossing the line into the chilling free speech and abusing those who wish to exercise it.

I analyze the likelihood of success of each of plaintiffs’ two claims.

1. Plaintiffs’ Fourth Amendment Claim

The Fourth Amendment guarantees the right to be free from excessive force. Excessive force claims are analyzed under the objective reasonableness standard of the Fourth Amendment. See [Graham v. Connor](#), 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The reasonableness of an officer’s conduct must be assessed “from the perspective of a reasonable officer on the scene,” recognizing the fact that the officer may be “forced to make split-second judgments” under stressful and dangerous conditions. [Id.](#) at 396–97, 109 S.Ct. 1865. The Fourth Amendment standard requires inquiry into the factual circumstances of every case. See [id.](#) at

396–97, 109 S.Ct. 1865. Relevant factors include the severity of the crime, the potential threat posed by the suspect to the officer’s and others’ safety, and the suspect’s attempts to resist or evade arrest. See [id.](#)

*3 Here, plaintiffs provide video evidence of police conduct at the demonstrations. Those videos show that the officers had ample time for reflection and were not dealing with dangerous conditions. Named plaintiffs were attacked with rubber bullets, tear gas, etc, allegedly solely on the basis of their presence at the demonstrations, their viewpoint, or their attempts to render treatment to injured protestors. Additionally, plaintiffs allege that officers specifically aimed at heads and groins, causing [broken facial bones](#) and ruptured testicles. These are peaceful demonstrators, journalists, and medics who have been targeted with extreme tactics meant to suppress riots, not to suppress demonstrations.

There may later be questions of qualified immunity to grapple with, but plaintiffs have established a strong likelihood that defendant engaged in excessive force contrary to the Fourth Amendment.

2. Plaintiffs’ First Amendment Claim

The First Amendment provides that all citizens have a right to hold and express their personal political beliefs. See [Cohen v. California](#), 403 U.S. 15, 24, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). Organized political protest is a form of “classically political speech.” [Boos v. Barry](#), 485 U.S. 312, 318, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988). “[T]he First Amendment safeguards an individual’s right to participate in the public debate through political expression and political association.” [McCutcheon v. Fed. Election Com’n](#), 572 U.S. 185, 203, 134 S.Ct. 1434, 188 L.Ed.2d 468 (2014). This “reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,” and the Supreme Court has “consistently commented on the central importance of protecting speech on public issues.” [Id.](#) (internal citations omitted) (collecting cases). Thus courts must “scrutinize carefully any restrictions on public issue picketing.” [Id.](#) (citations omitted).

Additionally, the Supreme Court “has repeatedly held that police may not interfere with orderly, nonviolent protests

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merely because they disagree with the content of the speech or because they simply fear possible disorder.”

[Jones v. Parmley](#), 465 F.3d 46, 56 (2d Cir. 2006) (citing [Cox v. Louisiana](#), 379 U.S. 536, 550, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965)). Indeed, “it has long been clearly established that the First Amendment bars retaliation for protected speech and association.” [Buck v. City of Albuquerque](#), 549 F.3d 1269, 1292 (10th Cir. 2008) (quoting [Mimics, Inc. v. Village of Angel Fire](#), 394 F.3d 836, 848 (10th Cir. 2005)).

The Tenth Circuit examines “First Amendment retaliation claims under [Worrell v. Henry](#), 219 F.3d 1197 (10th Cir. 2000),” which requires inquiry into whether (1) plaintiffs were engaged in constitutionally protected activity; (2) defendants caused the plaintiffs to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) defendant’s actions were motivated by plaintiffs’ protected activity. [Id.](#)

Here, first, plaintiffs were engaged in constitutionally protected activity through organized political protest. Second, defendant’s use of excessive force likely caused injury sufficient to chill a person of ordinary firmness from continuing to engage in that political protest. Officers used physical weapons and chemical agents to prevent not just peaceful demonstration, but also the media’s ability to document the demonstrations and plaintiffs’ and third parties’ ability to offer aid to demonstrators. Peaceful demonstrators’ legitimate and credible fear of police retaliation is silencing their political speech—the very speech most highly valued under the First Amendment. Third, it also seems likely that defendant’s actions were motivated by the content of plaintiffs’ demonstrations against police violence. Citizens should never have to fear peaceful protest on the basis of police retaliation, especially not when protesting that very same police violence.

*4 As with plaintiffs’ Fourth Amendment claims, there may later be questions of qualified immunity. For now, however, I find that plaintiffs have established a strong likelihood that defendant violated plaintiffs’ First Amendment right to free speech.

B. Irreparable Harm to the Movant

“The Supreme Court has made clear that ‘the loss of First Amendment freedoms, for even minimal periods of time,

unquestionably constitutes irreparable injury.’ ”

[Heideman v. S. Salt Lake City](#), 348 F.3d 1182, 1190 (10th Cir. 2003) (quoting [Elrod v. Burns](#), 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality)).

The demonstrations in Denver are ongoing, likely even as this opinion is written. The demonstrations will likely continue tonight and at least into the weekend. If immediate relief is not granted, plaintiffs’ speech would be chilled and outright denied over the next several days or weeks of demonstrations. Indeed, irreparable harm has already occurred in the form of physical injury and the suppression of speech; there is no reason such harm would not otherwise continue if this relief were denied. Officers would continue to use force, secure in the knowledge that retrospective claims take a significant amount of time, effort, and money to pursue.

Significantly, plaintiffs also note that their “speech is deeply rooted in the [current] time and context.” ECF No. 10 at 18. I recognize the importance of shielding and uplifting this ongoing, nationwide movement. As such, I find that irreparable harm would occur were I to deny this relief.

C. Balancing Harm to the Nonmovant




Plaintiffs’ motion does not discuss potential harm to the defendant. In theory, the inability to use the complained-of tactics limit the officers’ ability to protect themselves against potential violence from demonstrators. Yet this is a hypothetical harm, especially given the fact that officers have access to many other types of non-lethal weapons that they use on a daily basis, including tazers. The unlikelihood of such harm to officers is outweighed by the very real harm that has already been caused to plaintiffs.

D. Public Interest

The Tenth Circuit has recognized that “it is always in the public interest to prevent the violation of a party’s constitutional rights.” [Hobby Lobby Stores, Inc. v. Sebelius](#), 723 F.3d 1114, 1145 (10th Cir. 2013) (quoting [Awad v. Ziriax](#), 670 F.3d 1111, 1132 (10th Cir. 2012)). The Tenth Circuit has particularly recognized a “strong public interest in protecting First Amendment values.”

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 *Cate v. Oldham*, 707 F.2d 1176, 1190 (10th Cir. 1983). Even where individuals’ constitutional rights come into conflict with other important values or public objectives, the Tenth Circuit has held that those other values must yield to the protection of individuals. For example, in  *Awad v. Ziriya*, the Tenth Circuit noted that “[w]hile the public has an interest in the will of the voters being carried out ... the public has a more profound and long-term interest in upholding an individual’s constitutional rights.”  670 F.3d at 1132.

Here, it is clearly in the public interest to protect plaintiffs’ right to demonstrate, the media’s ability to document that demonstration, and third parties’ ability to render aid to demonstrators without threat of excessive force by police. Plaintiffs’ lawsuit is itself a class action on behalf of “all similarly situated demonstrators and citizens of Denver whose constitutional rights have been, and continue to be, violated by the Denver Police Department.” ECF No. 10 at 2.

*5 Plaintiffs do not expressly discuss the potential harm to the public interest. The most likely potential harm is an increase in property damage. Although I do not agree with those who have committed property damage during the protests, property damage is a small price to pay for constitutional rights—especially the constitutional right of the public to speak against widespread injustice. If a store’s windows must be broken to prevent a protestor’s facial bones from being broken or eye being permanently damaged, that is more than a fair trade. If a building must be graffitied to prevent the suppression of free speech, that is a fair trade. The threat to physical safety and free speech outweighs the threat to property.

E. Conclusion

In issuing this relief I do not seek to prevent officers from protecting themselves or their community. I seek to balance citizens’ constitutional rights against officers’ ability to do their job. However, the time is past to rely solely on the good faith and discretion of the Denver Police Department and its colleagues from other jurisdictions. I believe in everything that Commander Phelan testified during tonight’s hearing about the duty of the police to protect the rights of citizens who demonstrate and protest. However, the Denver Police Depart has failed in its duty to police its own.

ORDER

Plaintiffs’ motion for a temporary restraining order, ECF No. 10, is GRANTED in PART. The Court temporarily enjoins the City and County of Denver, and specifically the Denver Police Department and officers from other jurisdictions who are assisting Denver Police Officers, from employing chemical weapons or projectiles of any kind against persons engaging in peaceful protests or demonstrations. To be better assure that this idealistic order is carried out, the Court temporarily enjoins the Denver Police Department and officers from other jurisdictions working with Denver Police Department officers from using chemical weapons or projectiles unless an on-scene supervisor at the rank of Captain or above specifically authorizes such use of force in response to specific acts of violence or destruction of property that the command officer has personally witnessed. The Court further orders that:

1. Kinetic Impact Projectiles (“KIPs”) and all other non- or less-lethal projectiles may never be discharged to target the head, pelvis, or back.
2. KIPs and all other non- or less-lethal projectiles shall not be shot indiscriminately into a crowd.
3. Non-Denver officers shall not use any demonstration of force or weapon beyond what Denver itself authorizes for its own officers. Any non-Denver officer permitted to or directed to be deployed to the demonstrations shall be considered an agent of Denver such that Denver shall ensure such officer is limiting their use of force to that authorized by the Defendant.
4. All officers deployed to the demonstrations or engaged in the demonstrations must have their body-worn cameras recording at all times, and they may not intentionally obstruct the camera or recording.
5. Chemical agents or irritants (including pepper spray and tear gas) may only be used after an order to disperse is issued.
6. Any and all orders to disperse must be followed with adequate time for the intended audience to comply, and officers must leave room for safe egress. If it appears that the intended audience was unable to hear the order, the order must be repeated prior to the use of chemical agents or irritants.

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Don't Shoot Portland v. City of Portland, --- F.Supp.3d ---- (2020)

2020 WL 3078329

2020 WL 3078329

Only the Westlaw citation is currently available.
United States District Court, D. Oregon.

DON'T SHOOT PORTLAND, a nonprofit corporation, in its individual capacity; Nicholas J. Roberts, in an individual capacity and on behalf of themselves and all others similarly situated; and Michelle "Misha" Belden, in an individual capacity and on behalf of themselves and all others similarly situated, Plaintiffs,

v.

CITY OF PORTLAND, Defendant.

No. 3:20-cv-00917-HZ

Signed 06/09/2020

Attorneys and Law Firms

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[J. Scott Moede](#), [Naomi Sheffield](#), Portland City Attorney's Office, Portland, OR, for Defendant.

ORDER[HERNÁNDEZ](#), District Judge:

*1 Plaintiffs Don't Shoot Portland, Nicholas Roberts, and Michelle "Misha" Belden, on behalf of themselves and all others similarly situated, bring this action against Defendant City of Portland. Compl. 1, ECF 1. Plaintiffs allege that Defendant, through the Portland Police Bureau, violated the First and Fourth Amendments by using oleoresin capsicum ("OC") and orthochlorobenzalmalonitrile ("CS") (collectively, "tear gas") during recent and ongoing Portland protests. Plaintiffs also filed a Motion for a Temporary Restraining Order ("TRO"), asking this Court to prohibit the City of

Portland from using tear gas as a crowd control measure. Pl. Mot. TRO ("Pl. Mot."), ECF 2. For the reasons that follow, Plaintiffs' motion is granted in part.

BACKGROUND

On May 29, 2020, citizens of Portland, Oregon, joined nationwide protests against the death of George Floyd and other acts of violence perpetrated by police officers against the African American community. While many demonstrations have remained peaceful, violence and destruction have occurred. Plaintiffs in this case challenge the Portland Police Bureau ("PPB")'s use of tear gas against protestors participating in these demonstrations.

The Court has reviewed the declarations and video evidence submitted by the parties. Defendant highlights the destruction that occurred on the first night of demonstrations, including a fire instigated by protestors inside the Justice Center.¹ Reese Decl. ¶ 6. Defendant also offers evidence of largely peaceful marches—without any police intervention—and of officers using tear gas in response to individuals shaking fences and throwing projectiles. *See* Sheffield Decl. Plaintiffs do not dispute that, in some instances, officers deployed tear gas after individuals, within a larger crowd of peaceful protestors, threw water bottles and fireworks. Wilbanks Decl. ¶ 8; Kruszewski Decl. ¶ 9; Khalsa Decl. ¶ 13.² But they also offer evidence that, in certain incidents, officers fired canisters of tear gas at protestors without warning or provocation both in front of the Justice Center and elsewhere in downtown Portland. *See, e.g.*, Roberts Decl. ¶¶ 14–15, 22–23; Bezdek Decl. ¶¶ 11, 23, 24; Theus Decl. ¶ 9; Butera-Smith Decl. ¶¶ 8, 9; Rushton Decl. ¶¶ 10, 11. Plaintiffs also recount multiple occasions in which crowds were surrounded by tear gas without available avenues of escape. Roberts Decl. ¶ 15; Theus Decl. ¶ 11; Bezdek Decl. ¶ 23; Butera-Smith ¶¶ 14, 15. Tear gas was also fired at protesters attempting to comply with officers' orders to leave the areas at issue. Wilbanks Decl. ¶¶ 14, 15; Bezdek Decl. ¶¶ 20, 23.

*2 Defendant's use of tear gas is governed by two internal policy directives: Directive 635.10, "Crowd Management/Crowd Control,"³ and Directive 1010.00, "Use of Force."⁴ Additionally, on June 6, 2020, Mayor Ted Wheeler, as Commissioner of the Portland Police Bureau, imposed further limitations on the use of tear gas, directing that "gas should not be used unless there is a

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serious and immediate threat to life safety, and there is no other viable alternative for dispersal.” Dobson Decl. ¶ 13.

STANDARDS

The standard for a temporary restraining order (TRO) is “essentially identical” to the standard for a preliminary injunction. *Chandler v. Williams*, No. CV 08-962-ST, 2010 WL 3394675, at *1 (D. Or. Aug. 26, 2010) (citing *Stuhlberg Int'l Sales Co., Inc. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001)); see also *Daritech, Inc. v. Ward*, No. CV-11-570-BR, 2011 WL 2150137, at * 1 (D. Or. May 26, 2011) (applying preliminary injunction standard to motion for TRO). “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Am. Trucking Ass'ns Inc. v. City of L.A.*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 21, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)). “The elements of [this] test are balanced, so that a stronger showing of one element may offset a weaker showing of another. For example, a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Similarly, serious questions going to the merits, coupled with a balance of equities that tips sharply in a plaintiff's favor, will support the issuance of an injunction if the other elements of the test are met. *Id.* at 1134–35 (internal citations omitted).

DISCUSSION

Before turning to the TRO analysis, there are four points worth addressing. First, as Judge Jackson noted in resolving a similar motion just days ago in the District of Colorado, people have a right to demonstrate and protest the actions of governmental officials, including police officers, without fear for their safety. This right is enshrined in the First and Fourth Amendments of the Constitution. Second, police in this country have difficult,

dangerous, and often traumatic jobs. As the Supreme Court has recognized, officers are often “forced to make split-second judgments [] in circumstances that are tense, uncertain, and rapidly evolving.” *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Third, this case arises in unprecedented times. COVID-19 is a highly contagious and deadly respiratory virus that has taken too many lives and upended communities throughout this country. Finally, like Judge Jackson, the Court recognizes the difficulty in drawing an enforceable line that permits police officers to use appropriate means to respond to violence and destruction of property without crossing the line into chilling free speech and abusing those who wish to exercise it.

I. Likelihood of Success on the Merits

A. Fourth Amendment Claim

The Fourth Amendment prohibits unreasonable searches and seizures. Excessive force claims are analyzed under the objective reasonableness standard of the Fourth Amendment. *Graham*, 490 U.S. at 395, 109 S.Ct. 1865. The reasonableness of an officer's conduct must be assessed “from the perspective of a reasonable officer on the scene,” recognizing the fact that the officer may be “forced to make split-second judgments” under stressful and dangerous conditions. *Id.* at 396–97, 109 S.Ct. 1865. The Fourth Amendment standard requires inquiry into the factual circumstances of every case. *Id.* Relevant factors include the severity of the crime, the potential threat posed by the suspect to the officer's and others' safety, and the suspect's attempts to resist or evade arrest. *Id.*

*3 Here, Plaintiffs provide video evidence and declarations documenting the use of tear gas against protestors. While Defendant points to the destruction that occurred at the Justice Center on May 29, 2020, Plaintiffs offer evidence that tear gas was used indiscriminately in other instances throughout the city. In some of these instances, there is no evidence of any provocation. In others, individuals appear to have shaken fences and thrown water bottles and fireworks at the police. Either way, there is no dispute that *Plaintiffs* engaged only in peaceful and non-destructive protest. There is no record of criminal activity on the part of Plaintiffs. To the contrary, there is even evidence that some protestors were confronted with tear gas while trying to follow police

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orders and leave the demonstrations. Given the effects of tear gas, and the potential deadly harm posed by the spread of COVID-19, Plaintiffs have established a strong likelihood that Defendant engaged in excessive force contrary to the Fourth Amendment.

B. First Amendment Claim

The First Amendment provides that all citizens have a right to hold and express their personal political beliefs. See [Cohen v. California](#), 403 U.S. 15, 23–24, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). Organized political protest is a form of “classically political speech.” [Boos v. Barry](#), 485 U.S. 312, 318, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988). “Activities such as demonstrations, protest marches, and picketing are clearly protected by the First Amendment.” [Collins v. Jordan](#), 110 F.3d 1363, 1371 (9th Cir. 1996). However, “[i]n order to demonstrate a First Amendment violation, a plaintiff must provide evidence showing that ‘by his actions [the defendant] deterred or chilled [the plaintiff’s] political speech and such deterrence was a substantial or motivating factor in [the defendant’s] conduct.’ ” [Mendocino Envtl. Ctr. v. Mendocino Cty.](#), 192 F.3d 1283, 1300 (9th Cir. 1999) (alterations in the original) (quoting [Sloman v. Tadlock](#), 21 F.3d 1462, 1469 (9th Cir. 1994)).

There is a serious question as to whether Plaintiffs will succeed on their First Amendment claim. At this juncture, the parties’ sole dispute is whether Plaintiffs can demonstrate that their protected activity was a substantial or motivating factor in PPB’s conduct. Plaintiffs have submitted evidence demonstrating that officers indiscriminately used force against peaceful protestors on multiple occasions. On a few occasions, officers continued to fire tear gas canisters as people attempted to leave the protest area, effectively blocking their escape. One protestor was subjected to rubber bullets, tear gas, and a flash bang at close range as he was calmly walking towards the waterfront, trying to comply with officers’ orders. Another was confronted by a group of seven officers, who rolled tear gas down the street towards her even as she informed the officers she was trying to go home. These incidents demonstrate that preventing criminal activity near the Justice Center was not the sole purpose of PPB’s use of force. Instead, officers may have been substantially motivated by an intent to interfere with Plaintiffs’ constitutionally protected expression.

II. Irreparable Harm

Plaintiffs must also “demonstrate that irreparable injury is likely in the absence of an injunction.” [Winter](#), 555 U.S. at 22, 129 S.Ct. 365. “Typically, monetary harm does not constitute irreparable harm.” [Calif. Pharmacists Ass’n v. Maxwell-Jolly](#), 563 F.3d 847, 851 (9th Cir. 2009), *vacated and remanded sub nom.* [Douglas v. Indep. Living Ctr. of S. Calif., Inc.](#), 565 U.S. 606, 132 S.Ct. 1204, 182 L.Ed.2d 101 (2012). The deprivation of a constitutional right, however, may constitute irreparable injury. [Melendres v. Arpaio](#), 695 F.3d 990, 1002 (9th Cir. 2012) (affirming the district court’s finding that, in the absence of an injunction, the plaintiffs faced irreparable harm where it was likely they would be unlawfully detained in violation of the Fourth Amendment); *see also* [Elrod v. Burns](#), 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”). *But see* [City of L.A. v. Lyons](#), 461 U.S. 95, 111, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (holding that the plaintiff was not entitled to an injunction without a showing of any “real or immediate threat that the plaintiff will be wronged again”).

*4 Plaintiffs have demonstrated a threat of immediate, irreparable harm in the absence of a TRO. Plaintiffs have shown a likelihood of success on the merits on their Fourth Amendment claim and at least a serious question as to whether they have been deprived of their First Amendment rights. There is a real and immediate threat that Plaintiffs will be deprived of these rights as protests continue. The declarations in this case show that PPB has regularly used tear gas to disperse peaceful protestors. It is likely that it will continue to do so. The risk of irreparable harm is further heightened by the context in which these protests are occurring. Despite the global coronavirus pandemic, Plaintiffs and other protestors throughout the country—frequently wearing protective face coverings—have taken to the streets to protest police brutality and systemic injustice after the killing of George Floyd. But the use of tear gas under these circumstances may put protestors’ health at risk, contributing to the increased, widespread infection of this lethal virus. Without a court order limiting the circumstances in which PPB may use tear gas, Plaintiffs are likely to suffer irreparable physical and constitutional injuries.

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III. Balance of Equities

Under the “balance of equities” analysis, a court must “balance the competing claims of injury” and “consider the effect on each party of the granting or withholding of the requested relief.” [Winter](#), 555 U.S. at 24, 129 S.Ct. 365 (internal quotation marks omitted). Defendant points to harm that includes “the breaking of the windows of the Justice Center and other buildings, setting off fireworks, property destruction, looting, setting fires in the Justice Center and other areas of downtown, throwing and launching deadly projectiles at the police, and attempting to dismantle a fence put up to protect the Justice Center.” Def. Resp. 22.

In theory, limits on the use of tear gas may impede officers’ ability to protect themselves against potential violence from demonstrators. But any harm in limiting Defendant’s use of tear gas is outweighed by the irreparable harm that Plaintiffs—engaged in peaceful protest—are likely to endure. The relief afforded limits but does not eliminate the use of tear gas. Accordingly, the balance of equities weighs in Plaintiffs’ favor.

IV. Public Interest

“The public interest inquiry primarily addresses impact on non-parties rather than parties.” [League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton](#), 752 F.3d 755, 766 (9th Cir. 2014) (internal quotation marks omitted). The Ninth Circuit has found that “it is always in the public interest to prevent the violation of a party’s constitutional rights.” [Melendres](#), 695 F.3d at 1002 (internal citations and quotations omitted); *see also* [Cuvillo v. City of Vallejo](#), 944 F.3d 816, 834 (9th Cir. 2019) (“We have consistently recognized the significant public interest in upholding free speech principles.” (internal quotations and brackets omitted)).

This is a significant moment in time. The public has an enormous interest in the rights of peaceful protesters to assemble and express themselves. These rights are critical to our democracy. The community, however, also has an interest in allowing the police to do their jobs and to protect lives as well as property.

Here, there is evidence that officers have violated the constitutional rights of peaceful protestors, as well as their own department’s internal directives and guidelines.

Limiting the use of tear gas may mean that officers are unable to stop some property damage. But the unconstrained use of tear gas cannot weigh in the public’s interest when this use is likely to exacerbate the transmission of COVID-19, for those engaged in peaceful protest as well as the community at large. The Court therefore finds that the public interest weighs in favor of granting a TRO in this case.

V. Relief

While the Court acknowledges that Mayor Wheeler has issued additional guidance on the use of tear gas during these protests, Defendant has not submitted sufficient evidence to show that this guidance will be effective in preventing its use against peaceful protestors in violation of the First and Fourth Amendment. The Court also notes that a court order offers Plaintiffs additional recourse in the event that these violations continue. The Court therefore orders that PPB be restricted from using tear gas or its equivalent except as provided by its own rules generally. In addition, tear gas use shall be limited to situations in which the lives or safety of the public or the police are at risk. This includes the lives and safety of those housed at the Justice Center. Tear gas shall not be used to disperse crowds where there is no or little risk of injury.

*5 This order will expire in 14 days unless extended, superseded, or vacated by a subsequent order. Plaintiffs are not required to post security.

CONCLUSION

Plaintiffs’ Motion for a Temporary Restraining Order [2] is granted in part.

IT IS SO ORDERED.

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Footnotes

- ¹ According to Defendant, “[t]he Justice Center houses the Multnomah County Detention Center. The Multnomah County Detention Center serves as the initial booking facility for all arrestees in Multnomah County and houses adults in custody for the County, as well as state and federal inmates involved in court matters As of May 29th, the Justice Center held approximately 250 adults in custody.” Def. Resp. 4, ECF 17.
- ² Defendant also asserts that officers have been targeted with other projectiles, including “bricks, full cans of soup, frozen water bottles, full water bottles, rocks, steel sling shot balls, fireworks, bottles, beer cans, flares and many other items.” Schoening Decl. ¶ 15.
- ³ Directive 635.10 is available at: <https://www.portlandoregon.gov/police/article/649358>.
- ⁴ Directive 1010.00 is available at: <https://www.portlandoregon.gov/police/article/751998>.

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United States District Court, D. Oregon.

Tuck WOODSTOCK; Doug Brown; Sam Gehrke;
Mathieu Lewis-Rolland; Kat Mahoney; John
Rudoff; and those similarly situated, Plaintiffs,

v.

CITY OF PORTLAND; and John Does 1-60,
Defendants.

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

|
Signed 07/02/2020

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TEMPORARY RESTRAINING ORDER

[Michael H. Simon](#), District Judge.

*1 Plaintiffs Tuck Woodstock, Doug Brown, Sam Gehrke, Mathieu Lewis-Rolland, Kat Mahoney, and John Rudoff (collectively, “Plaintiffs”) bring this putative class action against the City of Portland (the “City”) and numerous as-of-yet unnamed individual and supervisory officers of the Portland Police Bureau (“PPB”) and other agencies allegedly working in concert with the PPB. As alleged in the Complaint, Plaintiffs seek “to stop the Portland police from assaulting news reporters, photographers, legal observers, and other neutrals who are documenting the police’s violent response to protests over the murder of George Floyd.” Complaint, ¶ 1 (ECF 1).

Plaintiffs assert that “[t]he police’s efforts to intimidate the press and suppress reporting on the police’s own misconduct offends fundamental constitutional protections and strikes at the core of our democracy.” *Id.* Plaintiffs allege violations of the First and Fourth Amendments of the United States Constitution and [Article I, sections 8 and 26 of the Oregon Constitution](#). Plaintiffs request declaratory and injunctive relief and money damages. Pending before the Court is Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction. ECF 7. The Court has reviewed Plaintiffs’ motion and 19 supporting declarations. Although Defendants have not yet formally appeared in this lawsuit or had sufficient time to file any responsive documents, on July 1 and July 2, 2020, the Court heard the respective positions of the parties by telephone conference. For the reasons explained below, Plaintiffs’ motion for a temporary restraining order (“TRO”) is granted in part.

STANDARDS

In deciding whether to grant a motion for TRO, courts look to substantially the same factors that apply to a court’s decision on whether to issue a preliminary injunction. See [Stuhlbarg Int’l Sales Co. v. John D. Brush & Co.](#), 240 F.3d 832, 839 n.7 (9th Cir. 2001). A preliminary injunction is an “extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” [Winter v. Nat. Res. Defense Council, Inc.](#), 555 U.S. 7, 22 (2008). A plaintiff seeking a preliminary injunction generally must show that: (1) he or she is likely to succeed on the merits; (2) he or she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his or her favor; and (4) that an injunction is in the public interest. *Id.* at 20 (rejecting the Ninth Circuit’s earlier rule that the mere “possibility” of irreparable harm, as opposed to its likelihood, was sufficient, in some circumstances, to justify a preliminary injunction).

The Supreme Court’s decision in *Winter*, however, did not disturb the Ninth Circuit’s alternative “serious questions” test. See *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011). Under this test, “serious questions going to the merits” and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two

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elements of the *Winter* test are also met.” *Id.* at 1132. Thus, a preliminary injunction may be granted “if there is a likelihood of irreparable injury to plaintiff; there are serious questions going to the merits; the balance of hardships tips sharply in favor of the plaintiff; and the injunction is in the public interest.” *M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th Cir. 2012).

DISCUSSION

*2 Plaintiff Tuck Woodstock has been a journalist for seven years. Their work has been published in the *Washington Post*, *NPR*, *Portland Monthly*, *Travel Portland*, and the *Portland Mercury*. They has attended the George Floyd protests several times as a freelancer for the *Portland Mercury* and more times as an independent journalist. When they attended these protests, they wears a press pass from the *Portland Mercury* that states “MEDIA” in large block letters. At all times during police-ordered dispersals, They holds a media badge over their head. ECF 23, ¶¶ 2-3.

Plaintiff Doug Brown has attended many protests in Portland, first as a journalist with the *Portland Mercury* and later as a volunteer legal observer with the ACLU. He has attended the George Floyd protests on several nights, wearing a blue vest issued by the ACLU that clearly identifies him as a legal observer, for the purpose of documenting police interactions with protesters. ECF 9, ¶¶ 1-2.

Plaintiff Sam Gehrke has been a journalist for four years. He previously was on the staff of the *Willamette Week* as a contractor. He now is a freelance journalist. His work has been published in *Pitchfork*, *Rolling Stone*, *Vortex Music*, and *Eleven PDX*, a Portland music magazine. He has attended the protests in Portland during the last month for the purpose of documenting and reporting on them, and he wears a press pass from the *Willamette Week*. ECF 10, ¶¶ 1-3.

Plaintiff Mathieu Lewis-Rolland is a freelance photographer and photojournalist who has covered the ongoing Portland protests. He has been a freelance photographer and photojournalist for three years and is a regular contributor to *Eleven PDX*. He is listed on its masthead. ECF 12, ¶¶ 1-2.

Plaintiff Kat Mahoney is an independent attorney and

unpaid legal observer. She has attended the Portland protests nearly every night for the purpose of documenting police interactions with protesters. She wears a blue vest issued by the ACLU that clearly identifies her as an “ACLU LEGAL OBSERVER.” ECF 13, ¶¶ 1-2; ECF 26, ¶ 3.

Plaintiff John Rudoff is a photojournalist. His work has been published internationally, including reporting on the Syrian refugee crises, the “Unite the Right” events in Charlottesville, Virginia, the Paris “Yellow Vest” protests, and the Rohingya Genocide. He has attended the protests in Portland during the past month for the purpose of documenting and reporting on them. While attending the Portland protests, he carries and displays around his neck press identification from the National Press Photographers Association, of which he has been a member for approximately ten years. He also wears a helmet that is clearly marked “Press.” ECF 17, ¶¶ 1-3.

Plaintiffs and other declarants have submitted evidence of PPB officers targeting journalists. For example, Tuck Woodstock reports that on several nights, the police have announced that any members of the press who remain in a specified area “will be arrested alongside protesters.” ECF 23, ¶ 10. In addition, on June 30, 2020, Ms. Mahoney attended the protests in North Portland as a legal observer. She wore a blue ACLU-issued vest that clearly identifies her as a legal observer. Her vest reads “ACLU LEGAL OBSERVER,” in big block letters across the back and smaller lettering on the front. Ms. Mahoney states that a police officer slammed her in the back with a truncheon, striking her diagonally from the base of her right shoulder blade to her lower left side, across her spine and ribcage. Another officer ran up to her, yelled, “MOVE,” and shoved her. She stumbled into a protester and had to be helped to her feet, all while wearing her blue ACLU-issued legal observer vest with the words “ACLU LEGAL OBSERVER” plainly visible. She adds that she also saw the police chase and attempt to beat two other legal observers who also were clearly marked as legal observers. ECF 26, ¶¶ 3, 9, 13.

*3 Declarant Alex Milan Tracy is a journalist with a master’s degree in photojournalism. He reports seeing PPB officers arresting photojournalist Justin Yau and journalists Cory Elia and Lesley McLay after the arresting officers were informed that these people were credentialed members of the press. Declarant Tracy adds that the police removed Ms. McLay’s press badge during her arrest. ECF 28, ¶¶ 1, 8-12. Declarant Tracy also reports that in the early hours of June 16th, he was documenting police officers, when one officer told Mr. Tracy to “get out of here now” or he would be arrested.

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According to Mr. Tracy, the officer added, “I don’t care if you’re press, get out of here right now.” ECF 22, ¶ 12.

The First Amendment prohibits any law “abridging the freedom of speech, or of the press[.]” *U.S. Const., amend. I*. Although the First Amendment does not enumerate special rights for observing government activities, “[t]he Supreme Court has recognized that newsgathering is an activity protected by the First Amendment.” *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978); see *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (“[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.”).

As the Ninth Circuit has explained: “Open government has been a hallmark of our democracy since our nation’s founding.” *Leigh v. Salazar*, 677 F.3d 892, 897 (9th Cir. 2012). Further, “the Supreme Court has long recognized a qualified right of access for the press and public to observe government activities.” *Id.* at 898. By reporting about the government, the media are “surrogates for the public.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (Burger, C.J., announcing judgment); see also *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 490–91 (1975) (“[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations.”). As further described by the Ninth Circuit, “[w]hen wrongdoing is underway, officials have great incentive to blindfold the watchful eyes of the Fourth Estate.” *Leigh*, 677 F.3d at 900 (quoting Timothy B. Dyk, *News gathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 949 (1992) (“[W]hen the government announces it is excluding the press for reasons such as administrative convenience, preservation of evidence, or protection of reporters’ safety, its real motive may be to prevent the gathering of information about government abuses or incompetence.”)).

Addressing the requirements for granting a temporary restraining order, because Defendants have not yet entered a formal appearance or had a sufficient opportunity to respond to the allegations and evidence, it would be unfair at this time for the Court to conclude that Plaintiffs have shown a substantial likelihood of success on the merits. There is, however, nothing unfair in the Court recognizing now that Plaintiffs have shown, at the minimum, serious questions going to the merits. In *Press-Enterprise Co. v. Superior Court* (“*Press-Enterprise II*”), 478 U.S. 1 (1986), the

Supreme Court established a two-part test for right of access claims. First, the court must determine whether a right of access attaches to the government proceeding or activity by considering (1) whether the place and process have historically been open to the press and general public and (2) whether public access plays a significant positive role in the functioning of the particular process in question. *Press-Enterprise II*, 478 U.S. at 8-9. Second, if the court determines that a qualified right applies, the government may overcome that right only by demonstrating “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Id.* at 9 (citation omitted); see also *Leigh*, 677 F.3d at 898 (discussing *Press-Enterprise II*). The public streets historically have been open to the press and general public, and public observation of police activities in the streets plays a significant positive role in ensuring conduct remains consistent with the Constitution. Further, there are at least serious questions regarding the police tactics directed toward journalists and other legal observers and whether restrictions placed upon them by the PPB are narrowly tailored.

*4 Next, anytime there is a serious threat to First Amendment rights, there is a likelihood of irreparable injury. “[U]nder the law of this circuit, a party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim.” *Warsoldier v. Woodford*, 418 F.3d 989, 1001-02 (9th Cir. 2005) (quotation marks omitted); see also 11A Charles Alan WRIGHT, FEDERAL PRACTICE & PROCEDURE, § 2948.1 (2d ed. 2004) (“When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.”).

Regarding the public interest, “[c]ourts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles.” *Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (quotation marks omitted). Further, “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quotation marks omitted) (granting an injunction under the Fourth Amendment). Finally, because Plaintiffs have “raised serious First Amendment questions,” the balance of hardships “tips sharply in [Plaintiffs’] favor.” *Cnty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007) (quotation marks omitted).

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Accordingly, the Court grants in part Plaintiffs' motion for TRO (ECF 7) and Orders as follows:

TEMPORARY RESTRAINING ORDER

1. Defendants and their agents and employees, including but not limited to the Portland Police Bureau and all persons acting under the direction of the Portland Police Bureau (collectively, "the Police"), are enjoined from arresting, threatening to arrest, or using physical force directed against any person whom they know or reasonably should know is a Journalist or Legal Observer (as explained below), unless the Police have probable cause to believe that such individual has committed a crime. For purposes of this Order, such persons shall not be required to disperse following the issuance of an order to disperse, and such persons shall not be subject to arrest for not dispersing following the issuance of an order to disperse. Such persons shall, however, remain bound by all other laws.

2. Defendants and their agents and employees, including but not limited to the Portland Police Bureau and all persons acting under the direction of the Portland Police Bureau (collectively, "the Police"), are further enjoined from seizing any photographic equipment, audio- or video-recording equipment, or press passes from any person whom they know or reasonably should know is a Journalist or Legal Observer (as explained below), or ordering such person to stop photographing, recording, or observing a protest, unless Defendants are also lawfully seizing that person consistent with this Order. Police must return any seized equipment or press passes immediately upon release of a person from custody.

3. To facilitate the Police's identification of Journalists protected under this Order, the following shall be considered indicia of being a Journalist: visual identification as a member of the press, such as by carrying a professional or authorized press pass or

wearing a professional or authorized press badge or distinctive clothing that identifies the wearer as a member of the press. These indicia are not exclusive, and a person need not exhibit every indicium to be considered a Journalist under this Order. The Police shall not be liable for unintentional violations of this Order in the case of an individual who does not carry a press pass or wear a press badge or distinctive clothing that identifies the wearer as a member of the press.

*5 4. To facilitate the Police's identification of Legal Observers protected under this Order, the following shall be considered indicia of being a Legal Observer: wearing a green National Lawyers' Guild issued or authorized Legal Observer hat (typically a green NLG hat) or wearing a blue ACLU issued or authorized Legal Observer vest.

5. The Police may issue otherwise lawful crowd-dispersal orders for a variety of lawful reasons. The Police shall not be liable for violating this Order if a Journalist or Legal Observer is incidentally exposed to crowd-control devices after remaining in the area where such devices were deployed after the issuance by the Police of an otherwise lawful dispersal order.

6. In the interest of justice, Plaintiffs need not provide any security, and all requirements under [Rule 65\(c\) of the Federal Rules of Civil Procedure](#) are waived.

7. This Order shall expire fourteen (14) days after entry, unless otherwise extended by stipulation of the parties or by further order of the Court.

8. The parties shall confer and propose to the Court a schedule for briefing and hearing on whether the Court should issue a preliminary injunction.

IT IS SO ORDERED.

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United States District Court, D. Oregon.

Tuck WOODSTOCK; Doug Brown; Sam Gehrke;
Mathieu Lewis-Rolland; Kat Mahoney; John
Rudoff; and those similarly situated, Plaintiffs,

v.

CITY OF PORTLAND; and John Does 1-60,
Defendants.

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

|
Signed 07/02/2020

Attorneys and Law Firms

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TEMPORARY RESTRAINING ORDER

[Michael H. Simon](#), District Judge.

*1 Plaintiffs Tuck Woodstock, Doug Brown, Sam Gehrke, Mathieu Lewis-Rolland, Kat Mahoney, and John Rudoff (collectively, “Plaintiffs”) bring this putative class action against the City of Portland (the “City”) and numerous as-of-yet unnamed individual and supervisory officers of the Portland Police Bureau (“PPB”) and other agencies allegedly working in concert with the PPB. As alleged in the Complaint, Plaintiffs seek “to stop the Portland police from assaulting news reporters, photographers, legal observers, and other neutrals who are documenting the police’s violent response to protests over the murder of George Floyd.” Complaint, ¶ 1 (ECF 1).

Plaintiffs assert that “[t]he police’s efforts to intimidate the press and suppress reporting on the police’s own misconduct offends fundamental constitutional protections and strikes at the core of our democracy.” *Id.* Plaintiffs allege violations of the First and Fourth Amendments of the United States Constitution and [Article I, sections 8 and 26 of the Oregon Constitution](#). Plaintiffs request declaratory and injunctive relief and money damages. Pending before the Court is Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction. ECF 7. The Court has reviewed Plaintiffs’ motion and 19 supporting declarations. Although Defendants have not yet formally appeared in this lawsuit or had sufficient time to file any responsive documents, on July 1 and July 2, 2020, the Court heard the respective positions of the parties by telephone conference. For the reasons explained below, Plaintiffs’ motion for a temporary restraining order (“TRO”) is granted in part.

STANDARDS

In deciding whether to grant a motion for TRO, courts look to substantially the same factors that apply to a court’s decision on whether to issue a preliminary injunction. See [Stuhlbarg Int’l Sales Co. v. John D. Brush & Co.](#), 240 F.3d 832, 839 n.7 (9th Cir. 2001). A preliminary injunction is an “extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” [Winter v. Nat. Res. Defense Council, Inc.](#), 555 U.S. 7, 22 (2008). A plaintiff seeking a preliminary injunction generally must show that: (1) he or she is likely to succeed on the merits; (2) he or she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his or her favor; and (4) that an injunction is in the public interest. *Id.* at 20 (rejecting the Ninth Circuit’s earlier rule that the mere “possibility” of irreparable harm, as opposed to its likelihood, was sufficient, in some circumstances, to justify a preliminary injunction).

The Supreme Court’s decision in *Winter*, however, did not disturb the Ninth Circuit’s alternative “serious questions” test. See *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011). Under this test, “serious questions going to the merits” and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two

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elements of the *Winter* test are also met.” *Id.* at 1132. Thus, a preliminary injunction may be granted “if there is a likelihood of irreparable injury to plaintiff; there are serious questions going to the merits; the balance of hardships tips sharply in favor of the plaintiff; and the injunction is in the public interest.” *M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th Cir. 2012).

DISCUSSION

*2 Plaintiff Tuck Woodstock has been a journalist for seven years. Their work has been published in the *Washington Post*, *NPR*, *Portland Monthly*, *Travel Portland*, and the *Portland Mercury*. They has attended the George Floyd protests several times as a freelancer for the *Portland Mercury* and more times as an independent journalist. When they attended these protests, they wears a press pass from the *Portland Mercury* that states “MEDIA” in large block letters. At all times during police-ordered dispersals, They holds a media badge over their head. ECF 23, ¶¶ 2-3.

Plaintiff Doug Brown has attended many protests in Portland, first as a journalist with the *Portland Mercury* and later as a volunteer legal observer with the ACLU. He has attended the George Floyd protests on several nights, wearing a blue vest issued by the ACLU that clearly identifies him as a legal observer, for the purpose of documenting police interactions with protesters. ECF 9, ¶¶ 1-2.

Plaintiff Sam Gehrke has been a journalist for four years. He previously was on the staff of the *Willamette Week* as a contractor. He now is a freelance journalist. His work has been published in *Pitchfork*, *Rolling Stone*, *Vortex Music*, and *Eleven PDX*, a Portland music magazine. He has attended the protests in Portland during the last month for the purpose of documenting and reporting on them, and he wears a press pass from the *Willamette Week*. ECF 10, ¶¶ 1-3.

Plaintiff Mathieu Lewis-Rolland is a freelance photographer and photojournalist who has covered the ongoing Portland protests. He has been a freelance photographer and photojournalist for three years and is a regular contributor to *Eleven PDX*. He is listed on its masthead. ECF 12, ¶¶ 1-2.

Plaintiff Kat Mahoney is an independent attorney and

unpaid legal observer. She has attended the Portland protests nearly every night for the purpose of documenting police interactions with protesters. She wears a blue vest issued by the ACLU that clearly identifies her as an “ACLU LEGAL OBSERVER.” ECF 13, ¶¶ 1-2; ECF 26, ¶ 3.

Plaintiff John Rudoff is a photojournalist. His work has been published internationally, including reporting on the Syrian refugee crises, the “Unite the Right” events in Charlottesville, Virginia, the Paris “Yellow Vest” protests, and the Rohingya Genocide. He has attended the protests in Portland during the past month for the purpose of documenting and reporting on them. While attending the Portland protests, he carries and displays around his neck press identification from the National Press Photographers Association, of which he has been a member for approximately ten years. He also wears a helmet that is clearly marked “Press.” ECF 17, ¶¶ 1-3.

Plaintiffs and other declarants have submitted evidence of PPB officers targeting journalists. For example, Tuck Woodstock reports that on several nights, the police have announced that any members of the press who remain in a specified area “will be arrested alongside protesters.” ECF 23, ¶ 10. In addition, on June 30, 2020, Ms. Mahoney attended the protests in North Portland as a legal observer. She wore a blue ACLU-issued vest that clearly identifies her as a legal observer. Her vest reads “ACLU LEGAL OBSERVER,” in big block letters across the back and smaller lettering on the front. Ms. Mahoney states that a police officer slammed her in the back with a truncheon, striking her diagonally from the base of her right shoulder blade to her lower left side, across her spine and ribcage. Another officer ran up to her, yelled, “MOVE,” and shoved her. She stumbled into a protester and had to be helped to her feet, all while wearing her blue ACLU-issued legal observer vest with the words “ACLU LEGAL OBSERVER” plainly visible. She adds that she also saw the police chase and attempt to beat two other legal observers who also were clearly marked as legal observers. ECF 26, ¶¶ 3, 9, 13.

*3 Declarant Alex Milan Tracy is a journalist with a master’s degree in photojournalism. He reports seeing PPB officers arresting photojournalist Justin Yau and journalists Cory Elia and Lesley McLay after the arresting officers were informed that these people were credentialed members of the press. Declarant Tracy adds that the police removed Ms. McLay’s press badge during her arrest. ECF 28, ¶¶ 1, 8-12. Declarant Tracy also reports that in the early hours of June 16th, he was documenting police officers, when one officer told Mr. Tracy to “get out of here now” or he would be arrested.

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According to Mr. Tracy, the officer added, “I don’t care if you’re press, get out of here right now.” ECF 22, ¶ 12.

The First Amendment prohibits any law “abridging the freedom of speech, or of the press[.]” U.S. Const., amend. I. Although the First Amendment does not enumerate special rights for observing government activities, “[t]he Supreme Court has recognized that newsgathering is an activity protected by the First Amendment.” *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978); see *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (“[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.”).

As the Ninth Circuit has explained: “Open government has been a hallmark of our democracy since our nation’s founding.” *Leigh v. Salazar*, 677 F.3d 892, 897 (9th Cir. 2012). Further, “the Supreme Court has long recognized a qualified right of access for the press and public to observe government activities.” *Id.* at 898. By reporting about the government, the media are “surrogates for the public.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (Burger, C.J., announcing judgment); see also *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 490–91 (1975) (“[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations.”). As further described by the Ninth Circuit, “[w]hen wrongdoing is underway, officials have great incentive to blindfold the watchful eyes of the Fourth Estate.” *Leigh*, 677 F.3d at 900 (quoting Timothy B. Dyk, *News gathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 949 (1992) (“[W]hen the government announces it is excluding the press for reasons such as administrative convenience, preservation of evidence, or protection of reporters’ safety, its real motive may be to prevent the gathering of information about government abuses or incompetence.”)).

Addressing the requirements for granting a temporary restraining order, because Defendants have not yet entered a formal appearance or had a sufficient opportunity to respond to the allegations and evidence, it would be unfair at this time for the Court to conclude that Plaintiffs have shown a substantial likelihood of success on the merits. There is, however, nothing unfair in the Court recognizing now that Plaintiffs have shown, at the minimum, serious questions going to the merits. In *Press-Enterprise Co. v. Superior Court* (“*Press-Enterprise II*”), 478 U.S. 1 (1986), the

Supreme Court established a two-part test for right of access claims. First, the court must determine whether a right of access attaches to the government proceeding or activity by considering (1) whether the place and process have historically been open to the press and general public and (2) whether public access plays a significant positive role in the functioning of the particular process in question. *Press-Enterprise II*, 478 U.S. at 8-9. Second, if the court determines that a qualified right applies, the government may overcome that right only by demonstrating “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Id.* at 9 (citation omitted); see also *Leigh*, 677 F.3d at 898 (discussing *Press-Enterprise II*). The public streets historically have been open to the press and general public, and public observation of police activities in the streets plays a significant positive role in ensuring conduct remains consistent with the Constitution. Further, there are at least serious questions regarding the police tactics directed toward journalists and other legal observers and whether restrictions placed upon them by the PPB are narrowly tailored.

*4 Next, anytime there is a serious threat to First Amendment rights, there is a likelihood of irreparable injury. “[U]nder the law of this circuit, a party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim.” *Warsoldier v. Woodford*, 418 F.3d 989, 1001-02 (9th Cir. 2005) (quotation marks omitted); see also 11A Charles Alan WRIGHT, FEDERAL PRACTICE & PROCEDURE, § 2948.1 (2d ed. 2004) (“When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.”).

Regarding the public interest, “[c]ourts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles.” *Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (quotation marks omitted). Further, “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quotation marks omitted) (granting an injunction under the Fourth Amendment). Finally, because Plaintiffs have “raised serious First Amendment questions,” the balance of hardships “tips sharply in [Plaintiffs’] favor.” *Cnty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007) (quotation marks omitted).

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Accordingly, the Court grants in part Plaintiffs' motion for TRO (ECF 7) and Orders as follows:

TEMPORARY RESTRAINING ORDER

1. Defendants and their agents and employees, including but not limited to the Portland Police Bureau and all persons acting under the direction of the Portland Police Bureau (collectively, "the Police"), are enjoined from arresting, threatening to arrest, or using physical force directed against any person whom they know or reasonably should know is a Journalist or Legal Observer (as explained below), unless the Police have probable cause to believe that such individual has committed a crime. For purposes of this Order, such persons shall not be required to disperse following the issuance of an order to disperse, and such persons shall not be subject to arrest for not dispersing following the issuance of an order to disperse. Such persons shall, however, remain bound by all other laws.

2. Defendants and their agents and employees, including but not limited to the Portland Police Bureau and all persons acting under the direction of the Portland Police Bureau (collectively, "the Police"), are further enjoined from seizing any photographic equipment, audio- or video-recording equipment, or press passes from any person whom they know or reasonably should know is a Journalist or Legal Observer (as explained below), or ordering such person to stop photographing, recording, or observing a protest, unless Defendants are also lawfully seizing that person consistent with this Order. Police must return any seized equipment or press passes immediately upon release of a person from custody.

3. To facilitate the Police's identification of Journalists protected under this Order, the following shall be considered indicia of being a Journalist: visual identification as a member of the press, such as by carrying a professional or authorized press pass or

wearing a professional or authorized press badge or distinctive clothing that identifies the wearer as a member of the press. These indicia are not exclusive, and a person need not exhibit every indicium to be considered a Journalist under this Order. The Police shall not be liable for unintentional violations of this Order in the case of an individual who does not carry a press pass or wear a press badge or distinctive clothing that identifies the wearer as a member of the press.

*5 4. To facilitate the Police's identification of Legal Observers protected under this Order, the following shall be considered indicia of being a Legal Observer: wearing a green National Lawyers' Guild issued or authorized Legal Observer hat (typically a green NLG hat) or wearing a blue ACLU issued or authorized Legal Observer vest.

5. The Police may issue otherwise lawful crowd-dispersal orders for a variety of lawful reasons. The Police shall not be liable for violating this Order if a Journalist or Legal Observer is incidentally exposed to crowd-control devices after remaining in the area where such devices were deployed after the issuance by the Police of an otherwise lawful dispersal order.

6. In the interest of justice, Plaintiffs need not provide any security, and all requirements under [Rule 65\(c\) of the Federal Rules of Civil Procedure](#) are waived.

7. This Order shall expire fourteen (14) days after entry, unless otherwise extended by stipulation of the parties or by further order of the Court.

8. The parties shall confer and propose to the Court a schedule for briefing and hearing on whether the Court should issue a preliminary injunction.

IT IS SO ORDERED.

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United States District Court, D. Minnesota.

Jared GOYETTE, Craig Lassig, and The Communications Workers of America, on behalf of themselves and other similarly situated individuals, Plaintiffs,

v.

CITY OF MINNEAPOLIS; Medaria Arradondo, Minneapolis Chief of Police, in his individual and official capacity; Robert Kroll, Minneapolis Police Lieutenant, in his individual and official capacity; John Harrington, Minnesota Department of Public Safety Commissioner, in his individual and official capacity; Matthew Langer, Minnesota State Patrol Colonel, in his individual and official capacity; and John Does, 1-2, in their individual and official capacities, Defendants.

Case No. 20-cv-1302 (WMW/DTS)

Signed 06/09/2020

Attorneys and Law Firms

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ORDER DENYING PLAINTIFF JARED GOYETTE’S MOTIONS FOR CLASS CERTIFICATION AND TEMPORARY RESTRAINING ORDER

Wilhelmina M. Wright, United States District Judge

*1 Plaintiff Jared Goyette, a freelance journalist, filed this putative class-action lawsuit against Defendants, challenging the treatment by law enforcement officers of members of the news media reporting on the events in Minneapolis following the tragic death of George Floyd.¹

Before the Court are Goyette’s Motion to Certify Class and Motion for Temporary Restraining Order. (Dkts. 2, 5.) For the reasons addressed below, Goyette’s motions are denied without prejudice.

BACKGROUND

On May 25, 2020, George Floyd died as a result of an encounter with four officers of the Minneapolis Police Department (MPD). Video of the encounter captured by bystanders shows MPD officers placing Floyd, who is black, in handcuffs and pinning him to the ground face down, while then-officer Derek Chauvin knelt on Floyd’s neck. Floyd and several bystanders pleaded with Officer Chauvin to change his position to allow Floyd to breathe. Officer Chauvin refused and continued to kneel on Floyd’s neck for several minutes after Floyd became unresponsive. Video of the encounter circulated rapidly, and hundreds of justifiably angry citizens began protesting in Minneapolis and Saint Paul, as well as nationally and around the world.

On May 26, 2020, despite mostly peaceful demonstrations, protesters at the MPD’s 3rd Precinct building vandalized police vehicles with graffiti and targeted the precinct building where the officers involved in bringing about Floyd’s death were assigned. Law enforcement officers used foam projectiles and tear gas in an effort to repel some of the protestors. Again, on May 27, 2020, hundreds of people protested in Minneapolis. While covering the protests at the 3rd Precinct, Goyette witnessed a projectile fired by MPD officers near the precinct building hit a young male protester in the head. As Goyette was documenting bystanders assisting the injured protester, Goyette was hit in the head with a projectile. A moment later, a canister of tear gas landed nearby, making it impossible for Goyette to see. Goyette maintains that he was clearly identifiable as a member of the news media as he carried a large camera, monopod, and notebook. That same evening, an auto parts store near the 3rd Precinct building was set on fire, and other nearby stores were looted and vandalized. In total, the Minneapolis Fire Department responded to approximately 30 fires related to the protests that evening, during which some fire trucks attempting to respond were hit with rocks and other projectiles.

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*2 On May 28, 2020, MPD officers abandoned the 3rd Precinct building, which was set on fire by protesters. The fire department was unable to respond the 3rd Precinct building fire, and others nearby, because of safety concerns. The Saint Paul Police Department reported dozens of fires and more than 170 damaged or looted businesses.

On May 29, 2020, Minnesota Governor Tim Walz announce that the state would restore order, calling on the resources of the Minnesota State Patrol, other state agencies, and the Minnesota National Guard. Governor Walz implemented an emergency executive order imposing a nighttime curfew in Minneapolis and Saint Paul. *See* Minn. Exec. Order No. 20-65 (May 29, 2020). All “members of the news media” were exempted from the curfew. *Id.* The curfew was disregarded by many, and individuals hiding among otherwise peaceful protesters continued to commit acts of looting, vandalism, and arson.

On May 30, 2020, the largest deployment of the Minnesota National Guard in state history was mobilized, along with the State Patrol and local law enforcement officers, to restore order. They moved aggressively to disperse protesters who remained out after the curfew. On May 31, 2020, law enforcement officers arrested approximately 150 people near downtown Minneapolis for disregarding the curfew.

Goyette filed this action on June 2, 2020, and contemporaneously moved for a temporary restraining order and for class certification. Goyette’s complaint asserts three causes of action arising under [42 U.S.C. § 1983](#) for alleged violations of the United States Constitution: (1) retaliation for exercising rights protected by the First Amendment, (2) unlawful seizure and excessive force in violation of the Fourth Amendment, and (3) violations of procedural due process rights protected by the Fourteenth Amendment.

In support of his motion for a temporary restraining order, Goyette contends that “the MPD and the State Patrol have engaged in alarming, aggressive tactics to harm and intimidate credentialed, or otherwise identifiable members of the news media providing on-the-scene coverage” of the events following Floyd’s death. Goyette alleges that several members of the news media, after identifying themselves as members of the press, have been arrested, threatened, shot with rubber bullets, or subjected to

chemical irritants. Goyette alleges four specific incidents involving the Minnesota State Patrol and members of the news media, none of which involved Goyette. Goyette alleges twelve specific incidents involving the MPD and members of the news media, including the incident in which Goyette was hit with a projectile on May 27, 2020. Goyette alleges ten additional incidents in which the law enforcement agency involved is ambiguous or unspecified. As a result of these encounters, Goyette argues that members of the news media “have a reasonable fear that Defendants will continue to carry out their unconstitutional customs or policies of deploying less-lethal projectiles and chemical irritants without constitutionally adequate warning.”

According to Minnesota State Patrol Colonel Matthew Langer, the Minnesota State Patrol has not used chemical irritants or less-lethal munitions to try to maintain order and safety since May 31, 2020. Langer also declares that the Minnesota State Patrol does not have a practice or policy of targeting or harassing members of the news media. And, according to Langer, the Minnesota State Patrol gave dispersal orders before deploying chemical irritants or less-lethal munitions during its attempts to secure any area. Likewise, MPD Commander Scott Gerlicher declares that no tear gas or less-lethal munitions have been used by the MPD since May 31. Gerlicher asserts that he did not approve the use of threats, intimidation, or force against any member of the news media specifically because the individual was a member of the news media, nor did any other incident commander. MPD officers have discretion to use “marking rounds” or “foam rounds,” but only in situations in which there is an imminent threat to life or safety. If individuals claiming to be members of the news media were arrested in the process of controlling crowds, the MPD released them once they were identified as members of the news media. Defendants assert that, from June 1, 2020, through Friday, June 5, 2020, there have been no major incidents of rioting, vandalism, looting, or arson.

ANALYSIS**I. Motion for Temporary Restraining Order**

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*3 Goyette seeks to prevent Defendants from taking certain actions against individuals who have “identified themselves as a member of the news media or [when] it is reasonably clear that the individual is engaged in news gathering activities.” Goyette seeks to enjoin Defendants from taking the following actions against such individuals: (1) the use of a chemical agents including but not limited to mace, pepper spray, and tear gas; (2) the use of any physical force, including but not limited to non-lethal projectiles; (3) the arrest, detention, or taking into custody of any person except as justified by probable cause for arrest; and (4) the use of threatening language or gestures to harass or intimidate. The prohibitions that Goyette seeks would not apply to circumstances in which members of the news media present an imminent threat of violence or bodily harm to persons or damage to property.

Federal Rule of Civil Procedure 65 authorizes a district court to grant injunctive relief in the form of a temporary restraining order. When determining whether a temporary restraining order is warranted, a district court considers the four *Dataphase* factors: (1) the threat of irreparable harm to the movant, (2) the probability that the movant will succeed on the merits, (3) the balance between this harm and the injury that an injunction would inflict on other parties, and (4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). The purpose of a temporary restraining order is to maintain the status quo. *Kelley v. First Westroads Bank*, 840 F.2d 554, 558 (8th Cir. 1988). The burden rests with the moving party to establish that injunctive relief should be granted. *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003). Preliminary injunctive relief is an extraordinary remedy that is never awarded as of right. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Because the “failure to show irreparable harm is an independently sufficient ground upon which to deny a preliminary injunction,” *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 893 (8th Cir. 2013) (internal quotation marks omitted), the Court begins its analysis with this *Dataphase* factor.

Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages. *Gen. Motors Corp. v. Harry Brown’s, LLC*, 563 F.3d 312, 319 (8th Cir. 2009). “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality). But to establish the need

for injunctive relief because of irreparable harm, the movant “must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief.” *Novus Franchising*, 725 F.3d at 895 (internal quotation marks omitted); *Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903, 915 (8th Cir. 2015). A mere “possibility of harm” is insufficient. *Roudachevski v. All-American Care Ctrs., Inc.*, 648 F.3d 701, 706 (8th Cir. 2011). “Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Supreme Court’s] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter*, 555 U.S. at 22 (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)).

Here, Goyette moved for a temporary restraining order on June 2, 2020, seeking to enjoin Defendants from arresting and threatening members of the news media, and from using chemical irritants or physical force, including less-lethal munitions, against members of the news media. But Goyette does not allege that any of the conduct that he seeks to enjoin—occurring over a five-day period of unprecedented civil unrest—has occurred since May 31, 2020, or facts that plausibly demonstrate that such conduct is likely to recur imminently. Commander Gerlicher and Colonel Langer have declared that the MPD and Minnesota State Patrol have used neither chemical irritants nor less-lethal munitions since May 31, 2020, and these assertions are uncontroverted.² It is Goyette’s burden to establish the threat of irreparable harm. But Goyette’s brief does not even address this *Dataphase* factor.³ As a result, Goyette has not established that harm is certain and of such imminence that there is a clear and present need for equitable relief.⁴

*4 “[E]quitable remedies are a special blend of what is necessary, what is fair, and what is workable.” *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973). The Court recognizes the gravity of Goyette’s claims. Essential to free government, the freedom of speech and freedom of the press are among our most fundamental rights and liberties. Abridgment of these rights “impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the process of popular government.” *Thornhill v. State of Alabama*, 310 U.S. 88, 741 (1940). The protests in Minnesota, and now around the globe, are rooted in acts of shocking police brutality. The police response to those protests is of exceptional importance to how the

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community moves forward. Media reporting on events like those at issue here enables the public to meaningfully participate as citizens in a constitutional democracy.

Goyette has asserted extensive allegations of egregious conduct by law enforcement directed at members of the news media. Several members of the media were allegedly threatened or subject to unlawful arrests. Others sustained severe, permanent injuries while reporting on events of intense public concern. They deserve better.⁵ Indeed, Governor Walz has publicly condemned some of the conduct highlighted by Goyette. The Minneapolis City Council voluntarily entered into a TRO with the Minnesota Department of Human Rights that accelerates the review of officer conduct and requires the Chief of Police or his designee to expressly authorize any use of crowd-control weapons, such as chemical agents and marking rounds, during protests and demonstrations. And Defendants concede that any member of the media that has been injured by the unlawful conduct of law enforcement has a right to seek redress in court. But Goyette has not established that the “extraordinary” equitable relief he seeks, [Winter](#), 555 U.S. at 7, is necessary at this time. Accordingly, Goyette’s motion for a temporary restraining order is denied without prejudice. *See, e.g.*, [Medtronic, Inc. v. Ernst](#), 182 F. Supp. 3d 925, 934-35 (D. Minn. 2016) (denying temporary restraining order based solely on plaintiff’s failure to demonstrate irreparable harm).

II. Motion for Class Certification

Goyette also moves for an order certifying the following class:

All members of the news media, as the term is used in Emergency Executive Order 20-69, who intend to engage in news gathering or reporting activities in Minnesota related to the protest activities that followed the death of George Floyd and the law enforcement response to those protests.⁶

In order to obtain class certification, a plaintiff has the burden of showing that the class should be certified and that the requirements of [Federal Rule of Civil](#)




[Procedure 23](#) are met. [Coleman v. Watt](#), 40 F.3d 255, 258 (8th Cir. 1994). To obtain class certification under [Rule 23](#), a plaintiff must prove: (1) the class is so numerous that joinder is impracticable; (2) there are common questions of law and fact; (3) the claims and defenses of representative parties are typical of the class; and (4) the representative parties will fairly and adequately protect the class’ interests. [Fed. R. Civ. P. 23\(a\)](#).⁷ To determine whether class certification is proper, the Court must make a “limited preliminary inquiry, looking behind the pleadings.” [Blades v. Monsanto Co.](#), 400 F.3d 562, 566 (8th Cir. 2005). A class action may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of [Rule 23\(a\)](#) have been satisfied. [Gen. Tel. Co of the Sw. v. Falcon](#), 457 U.S. 147, 161 (1982).

*5 Defendants argue that Goyette’s motion for class certification is premature because no discovery has occurred in this case.⁸ “At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.” [Fed. R. Civ. P. 23\(c\)\(1\)\(A\)](#). “Sometimes the issues are plain enough from the pleadings ... and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.” [Falcon](#), 457 U.S. at 160; *see* [Hall v. Equity Nat’l Life Ins. Co.](#), 730 F. Supp. 2d 936, 941 (E.D. Ark. 2010) (“In some instances, a court can decide on certification before any discovery has yet taken place.”). But the propriety of class-action status seldom can be determined on the pleadings alone. [Walker v. World Tire Corp.](#), 563 F.2d 918, 921 (8th Cir. 1977). [Rule 23\(c\)](#) was amended in 2003 to afford more time to engage in discovery prior to certification and make other determinations, rather than deny class certification. [China Agritech, Inc. v. Resh](#), 138 S. Ct. 1800, 1807 (2018) (recognizing that 2003 amendments “raised the standard for certifying a class from an early, conditional ruling to a later, relatively final decision” and “expand[ed] the opportunity for parties to engage in discovery prior to moving for class certification” (quoting Willing & Lee, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation after Ortiz*, 58 U. Kan. L. Rev. 775, 785 (2010))).

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 Rule 23(a) have been satisfied.  *Wal-Mart Stores, Inc. v. Duke*, 564 U.S. 338, 350–51 (2011). At this time, the Court is unable to conduct this rigorous analysis before determining whether Goyette’s claims can be resolved on a class-wide basis. While Goyette’s claims may ultimately be suitable for class-wide resolution, the Court concludes that fact discovery is necessary to determine whether the  Rule 23 requirements can be satisfied.⁹ See *Keech v. Sanimax USA, LLC*, Civ. No. 18-683, 2019 WL 79005, at *5 (D. Minn. Jan. 2, 2019) (“Without discovery in this case, the Court cannot undertake the rigorous analysis required of the class allegations.”); see, e.g., *Jonathan Small & Jotmar, Inc. v. Target Corp.*, Civ. No. 13-1509, 2013 WL 12142545, at *1 (D. Minn. Aug. 23, 2019) (denying motion for class certification because no discovery had yet to occur). This conclusion is particularly warranted in light of the amended complaint Plaintiffs filed on the morning of the hearing, after the parties had fully briefed the pending motion for class certification.

ORDER

Based on the foregoing analysis and all the files, records and proceedings herein, **IT IS HEREBY ORDERED:**

*6 1. Plaintiff Jared Goyette’s Motion for Temporary Restraining Order, (Dkt. 5), is **DENIED WITHOUT PREJUDICE**.

2. Plaintiff Jared Goyette’s Motion for Class Certification, (Dkt. 2), is **DENIED WITHOUT PREJUDICE**.






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Footnotes

¹ Goyette filed an amended complaint on June 8, 2020, the day on which the Court held the hearing on Goyette’s motions for a temporary restraining order and class certification. The amended complaint adds two Plaintiffs: Craig Lassig and The Communications Workers of America. Because Goyette’s motions and accompanying argument are premised on the allegations as stated in the initial complaint, and because Defendants did not have a fair opportunity to address the amended complaint, the Court declines to consider the amended complaint for purposes of the instant motions.

² At the June 8, 2020 hearing, neither party claimed that MPD or Minnesota State Patrol has used chemical irritants or less-lethal munitions since May 31, 2020 against the news media or anyone else for crowd control.

³ Goyette contends that, when a plaintiff’s First Amendment rights are at stake, demonstrating a likelihood of success on the merits is all that is needed to warrant an injunction. See  *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2012) (“When a plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied.” (quoting   *Phelps-Roper v. Troutman*, 662 F.3d 485, 488 (8th Cir. 2011), *vacated on reh’g*, 705 F.3d 845 (8th Cir. 2012))). The cases on which Goyette relies involve movants seeking to enjoin enforcement of a *statute* restricting speech, a circumstance in which demonstrating a likelihood of success on the merits of the movants’ First Amendment claim would generally establish a likelihood of irreparable harm. But that does not obviate the requirement of a movant to show a threat of irreparable harm. “[W]here a duly enacted statute is involved, a likelihood of success on the merits may be characterized as one, but not the only, threshold showing that must be met by a movant for a preliminary injunction.”  *Planned Parenthood Minn. v. Rounds*, 530 F.3d 724, 732 n.5 (8th Cir. 2008); accord  *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506–07 (1959) (“The basis of

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injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.”).

- ⁴ At the June 8, 2020 hearing, Goyette’s counsel argued that Defendants’ alleged unconstitutional tactics could resume if protests become violent again. As an example, counsel referred to the possibility that an acquittal of the former officers involved in Floyd’s death could prompt renewed violent protests in Minneapolis. Such speculative risks of uncertain future events are not a basis for obtaining preliminary injunctive relief. *See, e.g., Chlorine Inst., Inc., 792 F.3d at 915–16* (explaining that speculative harm does not support preliminary injunctive relief).
- ⁵ The Court is acutely aware of the circumstances that law enforcement encountered. Law enforcement has a difficult job under normal circumstances, and “officers 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.” *Plumhoff v. Rickard, 572 U.S. 765, 775 (2014)* (internal quotation marks omitted). This was especially true when Minnesota endured an unprecedented period of rioting, looting, arson, and civil unrest. Notwithstanding, there remain allegations of conduct that no civilized society would condone, even in an uncivilized time.
- ⁶ Notably, Goyette does not offer a definition of news media, and the term is not defined in Executive Order 20-69. Nor does Goyette offer a definition of news gathering or reporting activities. Moreover, Goyette’s proposed class would include *any* news media who merely *intend* to engage in news gathering or reporting activities on the specified subject at some unspecified future time. Consequently, the proposed class likely would require an individualized inquiry into the state of mind of each putative member.
- ⁷ A plaintiff must also demonstrate that a class action is appropriate under *Rule 23(b), Fed. R. Civ. P.*
- ⁸ Goyette implicitly acknowledges that class certification may be premature by stating that the “Court should also bear in mind that an order that grants or denies class certification may be altered or amended before final judgment” and that the “Court remains free to modify the class certification order as necessary in light of further factual development in this case.” *Cf. Klein v. TD Ameritrade Holding Corp., 327 F.R.D. 283, 298 (D. Neb. 2018)* (finding a motion for certification of an injunctive-relief class to be premature when “plaintiff essentially concedes the motion is premature, stating ‘[a]t this stage and before any merits discovery has been undertaken, Plaintiff reserves his right to seek any and all of these remedies on behalf of the Class.’ ”).
- ⁹ The Court is mindful of Goyette’s expedited effort to obtain class certification and prospective injunctive relief for members of the media covering issues of immense public concern, while jeopardizing their own safety in doing so. But “[n]o one benefits when judges are forced to decide premature ... class-certification motions.” *Johnson v. U.S. Bank Nat. Ass’n, 276 F.R.D. 330, 336 (D. Minn. 2011)*. Goyette acknowledges as much. Even when no class is certified, the Court retains equitable jurisdiction to craft injunctions that extend beyond the circumstances of the named plaintiff. *Rodgers v. Bryant, 942 F.3d 451, 458 (8th Cir. 2019)*.