



INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER

Statement of Mary B. McCord

I am a senior litigator at the Institute for Constitutional Advocacy and Protection (ICAP) and a visiting professor of law at Georgetown University Law Center. I previously was the Acting Assistant Attorney General for National Security at the U.S. Department of Justice from 2016–2017, the Principal Deputy Assistant Attorney General for National Security from 2014–2017, and an Assistant U.S. Attorney in the U.S. Attorney’s Office for the District of Columbia for nearly two decades. ICAP is a small constitutional impact litigation organization within Georgetown Law, focused on issues of public interest. I recently led successful litigation on behalf of the City of Charlottesville, Virginia, and local small businesses and neighborhood associations to prevent a recurrence of militaristic violence in the public square, as had occurred at the August 2017 Unite the Right rally during which one person was killed and dozens injured.

I make this statement today on behalf of ICAP and with regard to Portland’s proposed ordinance to “Authorize the Commissioner in Charge of the Police Bureau to Order Content-Neutral Time, Place, and Manner Regulations for Demonstrations Held in the City” (“the ordinance”). I appreciate that some observers have expressed concern about the constitutionality of the proposed ordinance. In our view, a facial constitutional challenge to the ordinance under the First Amendment to the U.S. Constitution would stand little chance of succeeding. The ordinance instead serves the laudable goal of ensuring public safety during large demonstrations, thereby creating the conditions for freer and more peaceful expression.

I express no view on the constitutionality of the ordinance under the Oregon Constitution or other Oregon law, nor do I express any view on the constitutionality of any particular applications of the ordinance, which would depend on the particular facts. Further, this statement does not address the constitutionality of any potential penalty for violation of the ordinance.

The Proposed Ordinance Comports with First Amendment Principles

Governmental restrictions of speech on the basis of content or viewpoint pose unique concerns in a free society. The U.S. Supreme Court has therefore long subjected such restrictions to a rigid standard known as strict scrutiny. But this does not mean that people may express themselves “at all times and places or in any manner that may be desired.” *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981); *see also Menotti v. City of Seattle*, 409 F.3d 1113, 1138–39 (9th Cir. 2005) (rejecting the view that “protestors have an absolute right to protest at any time and at any place, or in any manner of their choosing”).

Accordingly, under well-settled First Amendment principles, regulations of the time, place, or manner of public expression are subject to a less demanding form of review. Such regulations are constitutional as long as they (1) “are justified without reference to the content of the regulated speech,” (2) “are narrowly tailored to serve a significant governmental interest,” and

(3) “leave open ample alternative channels for communication of the information.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

The ordinance’s stated purpose is to authorize the issuance of “Content-Neutral Time, Place, and Manner Regulations for Demonstrations Held in the City.” Consistent with this professed constraint, the ordinance does *not* empower the Commissioner in Charge (“the Commissioner”) to control what people may say. It merely enables the Commissioner—when certain conditions are met—to issue written orders concerning when and where people may demonstrate, and what weapons, if any, they are prohibited from carrying when they do so. Such generalized restrictions “have nothing to do with content.” *Boos v. Barry*, 485 U.S. 312, 320 (1988). Nor do the ordinance’s well-documented justifications for imposing them.

Because the ordinance allows the Commissioner to limit only the time, place, and manner of certain demonstrations, the sole remaining question is whether the ordinance satisfies the more lenient three-part test described above. I will first discuss the *Ward* test’s second and third prongs, and then conclude by analyzing whether the ordinance would actually enable content-based speech restrictions, contrary to its stated purpose.

First, the governmental interests served by the ordinance are undoubtedly significant. Among the ordinance’s core objectives are to protect the safety of demonstrators, prevent property damage, minimize congestion on public property, and reduce the mass diversion of police resources. Courts have repeatedly recognized the importance of such interests. *See, e.g., Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 768 (1994) (“The State . . . has a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting the property rights of all its citizens.”); *Heffron*, 452 U.S. at 651 (characterizing as “substantial” the government’s “interest in the orderly movement of a large crowd and in avoiding congestion”); *Menotti*, 409 F.3d at 1131 (“No one could seriously dispute that the government has a significant interest in maintaining public order; indeed this is a core duty that the government owes its citizens.”).

Second, there is no plausible argument that the ordinance violates the *Ward* test’s tailoring prong. Although a time, place, or manner regulation must be “narrowly tailored” to serve a significant governmental interest, it “need not be the least restrictive or least intrusive means of doing so.” *Ward*, 491 U.S. at 798. *Ward*’s tailoring requirement is satisfied as long as the relevant governmental interest “would be achieved less effectively absent the [challenged] regulation.” *Id.* at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). A regulation will be invalidated for this reason only if its restrictions are “substantially broader than necessary to achieve the government’s interest.” *Id.* at 800.

The ordinance contains structural safeguards designed to ensure the satisfaction of this standard. For example, the ordinance requires the Commissioner to issue written “findings demonstrating the necessity” for any time, place, or manner restrictions imposed. And it specifies that the Commissioner’s written orders must “establish that other alternative regulations were considered and that no other less restrictive means were practicable under the circumstances.” In this way, the ordinance *overprotects* demonstrators’ constitutional rights by erecting more barriers to regulation than the First Amendment requires. If any protestors’ rights are violated by the

application of this ordinance in the future, it will be despite—and not because of—this carefully crafted feature.

Third, the ordinance also hews closely to *Ward*'s requirement that any restriction preserve ample alternative channels for expression. This command rarely will be violated unless the government “foreclose[s] an entire medium of public expression across the landscape of a particular community or setting.” *Menotti*, 409 F.3d at 1138. After all, the First Amendment requires that “individuals retain the ‘ability to communicate effectively,’” *id.* at 1138 n.48 (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984)), not “the *most* effective means of communication,” *id.* (emphasis added).

Under the conditions specified in the ordinance, if the Commissioner orders the relocation of a public demonstration, “[a]ny such redirection shall be to a location that is reasonably close to, sufficiently approximates, or reaches substantially the same audience as the original location.” This provision faithfully tracks the applicable law. And the ordinance grants no authority to impair demonstrators’ ability to convey their messages effectively in a public setting. Put another way, “the limited nature of the prohibition makes it virtually self-evident that ample alternatives remain.” *Frisby v. Schultz*, 487 U.S. 474, 483 (1988). Any violations that might occur in the course of implementing concrete time, place, or manner regulations would be attributable not to the ordinance—which facially comports with First Amendment doctrine—but to separate acts that purport to exercise authority *beyond* what the ordinance provides.

Fourth, the ordinance does not authorize content-based restrictions of speech. A content-based regulation is one that “target[s] speech based on its communicative content”—in other words, “because of the topic discussed or the idea or message expressed.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226–27 (2015). Laws that draw such distinctions “on [their] face” qualify as content-based. *Id.* at 2227 (quoting *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 563 (2011)). So do facially content-neutral laws that “cannot be ‘justified without reference to the content of the regulated speech,’” or that were adopted “‘because of disagreement with the message [the speech] conveys.’” *Id.* (quoting *Ward*, 491 U.S. at 791) (alteration in original).

None of the five types of regulations contemplated in subsection (d) of the ordinance references the communicative content of speech. Each is a paradigmatic time, place, or manner regulation, one that would “apply equally to all demonstrators.” *Hill v. Colorado*, 530 U.S. 703, 719 (2000). And subsection (c), which sets out the conditions under which the Commissioner “is authorized to take action by written order,” steers a decidedly content-neutral course. It aims at preventing the outbreak of violence between groups that have clashed before, regardless of those groups’ respective beliefs. The ordinance’s detailed recitation of past “injury and property damage” ascribes no views to these antagonistic groups, identifying them only as “demonstrators” and “counter-demonstrators.” In short, the ordinance draws no content-based distinctions on its face; it is fully justified by content-neutral considerations; and there is no indication that its true purpose is to suppress speech on certain topics or to stifle particular viewpoints. *See Menotti*, 409 F.3d at 1129 (restricted zone established by mayor’s order “applied equally to persons of all viewpoints”).

To be sure, there is a superficial resemblance between the ordinance—specifically, its focus on obviating anticipated violence—and the permitting scheme deemed to be content-based in

Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992). In *Forsyth County*, an administrator was empowered to increase the fee paid by permit applicants to compensate for the expected cost of maintaining order at permitted events. To assess such a fee, the Supreme Court reasoned, the administrator would have to examine the content of an applicant’s message and predict the likely response of onlookers. The resulting fee would depend on “the amount of hostility likely to be created by the speech based on its content.” *Id.* at 134. The rule of *Forsyth County*—that “[l]isteners’ reaction to speech is not a content-neutral basis for regulation,” *id.*—is often referred to as the “heckler’s veto” principle.

The D.C. Circuit reached the same result for the same reason in *Christian Knights of the KKK v. District of Columbia*, 972 F.2d 365 (D.C. Cir. 1992). In that case, the government sought to limit a planned Klan march to four blocks rather than the requested eleven—a “place” restriction—for the sake of better “control[ling] the outbreak of violence it anticipated.” *Id.* at 373. Such a restriction, the court held, would necessarily be predicated on “what point [the Klan] would be trying to make, and how much antagonism, discord and strife this would generate.” *Id.* The government’s proposed location restriction was therefore content-based.

By contrast, the ordinance does not oblige the Commissioner to anticipate listeners’ reactions. Although subsection (c)(3) of the proposed ordinance requires a showing of “a substantial likelihood of violence at the planned demonstrations” for the Commissioner’s authority to be activated, because subsection (c)’s three factors are listed in the conjunctive, the Commissioner need not forecast how onlookers are likely to react to the utterance of any particular message. Instead, a “substantial likelihood” showing would presumably be anchored by a documented history of violence between multiple groups planning to demonstrate at the same time. The presence of such a history—that two groups have skirmished in the past and will likely do so again—would provide a standard for the Commissioner to administer irrespective of the content of any group’s or speaker’s message. *Cf. Christian Knights of the KKK*, 972 F.2d at 372 (noting that “the Klan were not expected to engage in violence,” and that any disorder would result from onlookers’ hostile reactions to the Klan’s message).

The Seventh Circuit’s decision in *Potts v. City of Lafayette*, 121 F.3d 1106 (7th Cir. 1996)—decided after *Forsyth County*—illustrates this exact principle at work. In *Potts*, a police order forbade all persons from bringing weapons to an upcoming rally. The order justified this “manner” restriction in light of the expected attendance of “groups . . . who have been violent toward the [demonstrators] in the past, and who have been violent toward one another.” *Id.* at 1111. In the court’s view, the police order targeted “the possibility that attendees who had been violent at previous rallies would injure themselves, others, or property,” and “not . . . the content of the views aired at the rally.” *Id.* The record contained “[n]othing . . . suggest[ing] that the [government] disagreed with the content of the message of the [demonstrators] or other groups expected to attend the rally.” *Id.* The same is true here. As Section 1 of the ordinance painstakingly demonstrates, the City of Portland is endeavoring to counteract “a pattern of escalation, injury and property damage”—regardless of what each set of antagonists says or believes.

Importantly, the ordinance is not directed to a permitting process or the establishment of permitting conditions, and instead applies when multiple groups have announced an intention to demonstrate simultaneously. It does not purport to name such “groups” in advance or even limit

its applicability to “groups” that are formal or informal named organizations. Any time, place, and manner regulations resulting from application of the terms of the ordinance would apply equally to *all* persons attending those events, not just to a single person or group. As the Supreme Court has explained, regulatory evenhandedness “is evidence against there being a discriminatory governmental motive.” *Hill*, 530 U.S. at 731; *see also Heffron*, 452 U.S. at 649 (concluding that a “place” restriction was not content-based because it “applie[d] evenhandedly to all”). The Court has also suggested that generally applicable time, place, and manner regulations categorically fall outside the “heckler’s veto” doctrine. *See Hill*, 530 U.S. at 734 (concluding that such a restriction “does not provide for a ‘heckler’s veto’ but rather allows every speaker to engage freely in any expressive activity communicating all messages and viewpoints subject to the narrow place requirement).

The Ninth Circuit has explicitly endorsed this view. It is the law of the circuit that speech restrictions are subject to the “heckler’s veto” doctrine only when a speaker or message is singled out for disfavor, as often occurs when conditions are attached to permits. “The prototypical heckler’s veto case is one in which the government silences *particular* speech or a *particular* speaker ‘due to an anticipated disorderly or violent reaction of the audience.’” *Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1293 (9th Cir. 2015) (quoting *Rosenbaum v. City & Cty. of San Francisco*, 484 F.3d 1142, 1158 (9th Cir. 2007)). To date, “every appellate decision” applying that doctrine has “involved the restriction of *particular* speech due to listeners’ actual or anticipated hostility to *that* speech.” *Id.* (emphases added). But when a “generally applicable regulation” does “not single out [any] speech,” it is “not the stuff of a traditional heckler’s veto,” and must therefore be deemed content-neutral. *Id.* at 1294; *see also id.* (“We would expand the heckler’s veto doctrine significantly . . . if we held here that the doctrine applies to neutral regulations that do not target particular speech . . .”).

As a matter of historical reality, the ordinance was drafted against the backdrop of violence committed by groups of demonstrators and counter-demonstrators with discernible ideological commitments. These recent patterns of conflict in downtown Portland show few signs of abating. As a result, the restrictions contemplated by the ordinance will likely fall most heavily on these groups—at least in the near term. But that fact is irrelevant for First Amendment purposes.

To understand why, consider *McCullen v. Coakley*, 134 S. Ct. 2518 (2014). *McCullen* involved a speech restriction that applied only outside clinics where abortions were performed. Naturally, the act “ha[d] the inevitable effect of restricting abortion-related speech more than speech on other subjects.” *Id.* at 2531. As the Court explained, however, “a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics.” *Id.*; *see also Menotti*, 409 F.3d at 1129 (“That Order No. 3 predominantly affected protestors with anti-WTO views did not render it content based.”). The relevant inquiry is simply “whether the law is ‘justified without reference to the content of the regulated speech.’” *McCullen*, 134 S. Ct. at 2531 (quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)). Here, the ordinance rests on a content-neutral foundation, even though it may have “an incidental effect on some speakers or messages but not others.” *Ward*, 491 U.S. at 791.

Put simply, the ordinance “ha[s] everything to do with the need to restore and maintain civic order, and nothing to do with the content of [anyone’s] message.” *Menotti*, 409 F.3d at 1129.

And it creates a framework under which vital governmental interests will be pursued with precision. For these reasons, the ordinance stands on solid constitutional footing. In the event that in any future application the Commissioner exceeds the authorities conferred by the ordinance, the proper remedy would be “to seek re[lief] through as-applied challenges.” *Id.* at 1145.

It Is Proper to Consider Past Incidents of Violence

It is our understanding that some critics have argued that it is improper to consider past patterns of lawbreaking in promulgating time, place, and manner restrictions. Bedrock First Amendment principles belie that claim. A robust factual record is precisely what establishes that an asserted governmental interest is worth advancing. Otherwise, expressive activity could be foreclosed based on “mere speculation about danger.” *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1228 (9th Cir. 1990).

Unsurprisingly, then, courts routinely examine relevant prior conduct in assessing the validity of time, place, and manner restrictions. In *Menotti*, for example, the Ninth Circuit acknowledged that “violent protestors had established a pattern.” 409 F.3d at 1132 n.33. When confronted with such a history, the court concluded, a city need not “wait for further violence to occur” before instituting time, place, and manner restrictions. *Id.* at 1136 n.43; *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2532 (2014) (noting a record of “recurring problems,” including “crowding, obstruction, and even violence”); *Schenk v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 377 (1997) (stating that “a record of abusive conduct” can “make[] a prohibition on classic speech in limited parts of a public sidewalk permissible”); *Potts*, 121 F.3d at 1111 (considering the history of “groups . . . who ha[d] been violent toward one another” in assessing the validity of a “manner” regulation); *cf. City of Charlottesville v. Pa. Light Foot Militia*, No. CL 17-560, 2018 WL 4698657, at *10 (Va. Cir. July 7, 2018) (refusing to require a city to “react[] after the fact” to anticipated violence—“after someone else is beaten, stabbed, shot, or killed.”).

It is of course true that “a *complete* ban on First Amendment activity cannot be justified simply because past similar activity led to violence.” *United States v. Baugh*, 187 F.3d 1037, 1043–44 (9th Cir. 1999) (citing *Collins v. Jordan*, 110 F.3d 1363, 1371–72 (9th Cir. 1996)). But the ordinance does not authorize anything resembling a complete ban on protected activity. It represents an appropriately limited effort to comply with the Ninth Circuit’s admonition: “[O]nce multiple instances of violence erupt, with a breakdown in social order, a city must act vigorously . . . to restore order for all of its residents and visitors.” *Menotti*, 409 F.3d at 1137.

The Ordinance Does Not Vest a Single Decisionmaker with Unbridled Authority

Finally, we understand that the proposed ordinance has been criticized on the ground that it would authorize a single official to restrict protected speech in his sole (and unappealable) discretion. This criticism does not appear to be well founded based on the language of the ordinance, and is irrelevant to the ordinance’s constitutionality in any event.

First, as long as a time, place, or manner restriction pursues a sufficiently important interest with adequate precision, First Amendment doctrine does not constrain *which* governmental actor may enact the restriction. We are aware of no case, state or federal, in which an otherwise-valid time,

place, or manner restriction has been struck down on the ground that a multimember body did not promulgate it. In fact, multiple decisions with which we are familiar have upheld speech restrictions issued by a single governmental official. *See Menotti*, 409 F.3d at 1124 (mayor’s order); *Potts*, 121 F.3d at 1109 (police captain’s order); *Hobbs v. Cty. of Westchester*, 397 F.3d 133, 143 (2d Cir. 2005) (county executive’s order).

Second, the ordinance would not grant the Commissioner unfettered authority. Under the First Amendment, government officials may not be endowed with “unbridled discretion” in issuing time, place, or manner restrictions. *Forsyth Cty.*, 505 U.S. at 133. An authorizing regulation must “contain adequate standards to guide the official’s decision and render it subject to effective judicial review.” *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002). The ordinance easily satisfies that test. Written orders issued by the Commissioner must include “findings demonstrating the necessity” for each regulation imposed. Those orders must also establish that all other less-restrictive means were deemed impracticable under the circumstances. And within 30 days after a demonstration governed by a written order, the Commissioner must issue a written report assessing the regulations’ efficacy and identifying any “lessons that might be learned for future written orders.” This multi-layered process does not leave the choice of restrictions “to the whim of the administrator.” *Forsyth Cty.*, 505 U.S. at 133.

Third, there is no constitutional right to an administrative appeal of generally applicable speech regulations. Any orders issued under the terms of the ordinance would apply equally to all persons who attend an affected demonstration. The proper way to “appeal” such an order would be to file a suit for injunctive relief in advance of the scheduled event.

* * *

In summary, we at ICAP see no facial constitutional infirmity in the ordinance proposed. Applied consistently with its terms, the ordinance authorizes reasonable time, place, and manner regulations designed to *facilitate*, rather than thwart, opportunities for persons to engage in First Amendment–protected activity, regardless of their views, by mitigating the potential for violence during public demonstrations and protests.

Dated: November 12, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOSEF HABER, an individual; PATRICK
GARRISON, an individual; JENNIFER
NICKOLAUS, an individual; CHRIS
WHALEY, an individual; JADE STRURMS,
an individual; on behalf of themselves and
all others similarly situated,

Plaintiffs,

v.

CITY OF PORTLAND, a municipal
corporation; MAYOR TED WHEELER, in
his individual capacity; retired PORTLAND
POLICE CAPTAIN LARRY GRAHAM,
in his individual capacity; PORTLAND
POLICE OFFICE RYAN LEE, in his
individual capacity; PORTLAND POLICE
OFFICER CHRIS LINDSEY, in his
individual capacity; PORTLAND POLICE
OFFICER JEFFREY MCDANIEL, in his
individual capacity, and PORTLAND
POLICE OFFICER JOSEPH SANTOS, in
his individual capacity,

Defendants.

RUSSO, Magistrate Judge:

Plaintiffs Josef Haber, Patrick Garrison, Jennifer Nickolaus, Chris Whaley, and Jade Strums filed this class action against defendants the City of Portland (“City”), Ted Wheeler, Larry Graham, Ryan Lee, Chris Lindsey, Jeffrey McDaniel, and Joseph Santos alleging claims

Case No. 3:17-cv-01827-JR

FINDINGS AND
RECOMMENDATION

under [42 U.S.C. § 1983](#) and state law arising out of a group detention effectuated by the Portland Police Bureau (“PPB”), in conjunction with other law enforcement agencies, on June 4, 2017. Defendants move for summary judgment pursuant to [Fed. R. Civ. P. 56](#). Plaintiffs filed a partial cross-motion for summary judgment as to their claim under the Oregon Constitution. For the reasons set forth below, defendants’ motion should be granted, plaintiffs’ motion should be denied, and this case should be dismissed.

BACKGROUND¹

I. Events Leading up to the June 4, 2017, Protest

On May 14, 2017, Joey Gibson, the leader of Patriot Prayer, a far-right group often associated with white supremacy, white nationalism, and xenophobia, obtained a federal permit to hold a rally in downtown Portland at Terry Schrunk Plaza. The Patriot Prayer rally was scheduled for June 4, 2017 from 2:00 p.m. to 5:00 p.m. Graham Decl. ¶ 5 ([doc. 89](#)). Three adjacent counter-protests were scheduled in response to the Patriot Prayer rally – labor unions were anticipated in front of the Edith Green-Wendell Wyatt building, Portland Stands United Against Hate was anticipated in front of City Hall, and Rose City Antifa was anticipated in Chapman Square. Pls.’ Resp. to Mot. Summ. J. 2 ([doc. 113](#)).

As the PPB’s community liaison, Sergeant Jeffrey Niiya attempted to contact and form relationships with each protest group planning on participating in this event. Graham Decl. Ex. 3, at 1 ([doc. 89](#)); Niiya Decl. ¶¶ 4-5 ([doc. 97](#)). During these communications, Niiya expressed

¹ The Court generally cites to defendants’ evidence except when referring to the non-duplicative information produced by plaintiffs. To the extent plaintiffs and defendants attack each other’s recitation of facts, this Court is not bound by either party’s characterization of the evidence and instead independently reviews the record to determine whether summary judgment is appropriate. [Scott v. Harris, 550 U.S. 372, 380 \(2007\)](#). This is especially true where, as here, the events in question are captured on videos that are not alleged to have been doctored or altered. [Id. at 381](#). As such, only the facts borne out by the record are recounted herein.

concern that previous events hosted by Patriot Prayer had resulted in violence. Niiya Decl. ¶¶ 5-9 ([doc. 97](#)). He encouraged all groups to be vocal, but not violent, and reminded everyone that the police were neutral and not allied with any group. *Id.* The Patriot Prayer rally organizers told Niiya that they intended to march through the streets, which he discouraged because a significant number of people would be downtown, including persons attending the City Fair at Waterfront Park, as part of the City's Rose Festival celebrations. *Id.* at ¶ 6.

On May 26, 2017, three persons were stabbed and two killed on a MAX train in Portland, Oregon. First Am. Compl. ¶ 19 ([doc. 45](#)). The suspect arrested for the stabbings had previously attended a rally organized by Gibson and was associated with Patriot Prayer online. Wilker Decl. Ex. B, at 56 ([doc. 87-2](#)); Manlove Decl. Ex. 5, at 132 ([doc. 94-5](#)). As City Mayor, Wheeler publicly asked Gibson to cancel the June 4, 2017, Patriot Prayer rally and alternatively asked the federal government to revoke his permit; both requests were denied. Manlove Decl. Ex. 6, at 26-29 ([doc. 94-6](#)). PPB and members of the plaintiffs' class were concerned about the prospect of violence erupting due to heightened tensions between the groups. Manlove Decl. Ex. 5, at 72 ([doc. 94-5](#)); Manlove Decl. Ex. 6, at 27-29 ([doc. 94-6](#)); Manlove Decl. Ex. 7, at 25-26 ([doc. 94-7](#)); Manlove Decl. Ex. 9, at 13 ([doc. 94-9](#)); Manlove Decl. Ex. 10, at 11 ([doc. 94-10](#)); Niiya Decl. ¶ 10 ([doc. 97](#)).

The Federal Protective Service was largely responsible for managing the events at Terry Schrunk Plaza, whereas the PPB, in conjunction with other law enforcement agencies, were responsible for managing the three counter-protests. Wilker Decl. Ex. A, at 33-34 ([doc. 87-1](#)); Terry Decl. ¶ 5 ([doc. 100](#)). Graham was selected as the PPB Crowd Management Incident Commander for the June 4, 2017, event, meaning that he was the police official with authority and overall responsibility for managing the demonstrations. Graham Decl. ¶ 3 ([doc. 89](#));

Manlove Decl. Ex. 4, at 43-44 ([doc. 94-4](#)). As Graham's Operations Section Chief, Lee was responsible for coordinating police resources during the event and communicating Graham's orders to officers on the ground, including Lindsey, McDaniel, and Santos. Lee Decl. ¶ 3 ([doc. 91](#)).

II. Early Afternoon Events of June 4, 2017

From approximately 12:30 p.m. until 1:00 p.m., the PPB sound truck made numerous announcements informing protesters that the streets were open to vehicular traffic and instructing them to stay out of the streets or be subject to arrest for disorderly conduct. Dale Decl. ¶ 4 & Ex. 1 ([doc. 86](#)); Manlove Decl. Exs. 11-12 ([doc. 94](#)). The announcements also advised protesters to stay within their respective parks. Dale Decl. ¶ 4 & Ex. 1 ([doc. 86](#)). At approximately 1:00 p.m., the PPB sound truck warned protesters that offensive actions may result in park closures. *Id.* at ¶ 5 & Ex. 1. Announcements directing the parties to remain in their respective parks and warning that offensive actions may result in park closures continued until 2:45 p.m. *Id.*

During the first few hours of the events on June 4, PPB's Emergency Operations Center ("EOC"), which was located off-site on the 15th Floor of the Justice Center,² received numerous reports of people attending or attempting to attend the protests with weapons, including wrist rockets, shields, police batons, crow bars, knives, brass knuckles, marbles, accelerants, bricks, and fireworks. Graham Decl. ¶ 8 ([doc. 89](#)); Manlove Decl. Ex. 7, 87-88 ([doc. 94-7](#)); Michaelson Decl. ¶¶ 7, 16-17, 21-22, 25-26, 34 & Ex. 40 ([doc. 96](#)). The EOC also received information that physical conflicts were planned or occurring between the groups in Chapman Square and Terry Schrunk Plaza. Michaelson Decl. ¶¶ 18, 22, 29-30, 33 & Ex. 40 ([doc. 96](#)). Officers were required

² Graham and Lee were at the EOC at all relevant times. Wilker Decl. Ex. A, at 39 ([doc. 87-1](#)); Graham Decl. ¶ 8 ([doc. 89](#)). Deputy City Attorney Jason Loos and Multnomah County Deputy District Attorney Haley Rayburn were also present. Graham Decl. ¶ 8 ([doc. 89](#)).

to separate the groups and Niiya asked Patriot Prayer's lead security person to move people into the interior of Terry Schrunk Plaza where they could no longer antagonize counter-protestors. Niiya Decl. ¶¶ 11-12 ([doc. 97](#)). Oregon State Police ("OSP") Officer Kenneth Terry also asked an organizer of the Patriot Prayer rally to move the group towards the center of Terry Schrunk Plaza in an effort to "de-escalate the situation." Terry Decl. ¶ 6 ([doc. 100](#)).

During the afternoon, projectiles (such as bricks, ball bearings shot from wrist rockets, rocks, fireworks, used tampons, water bottles, and water balloons filled with feces and urine) were continuously being thrown from Chapman towards Terry Schrunk Plaza. *Id.* at ¶¶ 6-7; Hughes Decl. Exs. 41-42 ([doc. 90](#)); Manlove Decl. Ex. 7, at 87-89 ([doc. 94-7](#)); Manlove Decl. Ex. 15, at 39-41, 46 ([doc. 94-15](#)); Niiya Decl. ¶¶ 13-14 ([doc. 97](#)); Bailey Decl. ¶ 6 ([doc. 99](#)). Shortly after 3:00 p.m., officers along Southwest Madison Street saw individuals climb on top of the restroom in Chapman Square, unloading bricks out of backpacks to hang a banner. Manlove Decl. Ex. 17 ([doc. 94-17](#)); McDaniel Decl. ¶ 4 ([doc. 95](#)); Pool Decl. ¶ 5 ([doc. 98](#)); Terry Decl. ¶ 7 ([doc. 100](#)).

At 3:17 p.m., Graham directed PPB officers to close the south half of Chapman Square due to criminal activity including throwing various items at the police. Manlove Decl. Ex. 4, at 94 ([doc. 94-4](#)); Michaelson Decl. ¶ 37 ([doc. 96](#)); Bailey Decl. ¶ 7 ([doc. 99](#)); Terry Decl. ¶ 8 ([doc. 100](#)). The goal was to provide a greater distance between the Patriot Prayer rally and the counter-protestors located in Chapman. Graham Decl. Ex. 3, at 2 ([doc. 89-3](#)); Manlove Decl. Ex. 4, at 68-70, 73-74 ([doc. 94-4](#)); Manlove Decl. Ex. 7, at 96 ([doc. 94-7](#)); Manlove Decl. Ex. 15, at 49 ([doc. 94-15](#)); Pool Decl. ¶ 6 ([doc. 98](#)). The PPB sound truck began announcing the closure of the south side of Chapman Square and directing protesters to move to the center of the park. Dale Decl. ¶ 8 & Ex. 1 ([doc. 86](#)); Terry Decl. ¶ 8 ([doc. 100](#)). Because many protesters did not respond to this

order within several minutes, despite indicating they had heard the order by “yelling obscenities and waving their hands” or booing, police officers on the ground began to slowly move the police line north through the park. Manlove Decl. Ex. 7, at 97 ([doc. 94-7](#)); Manlove Decl. Ex. 21 ([doc. 94](#)); Michaelson Decl. ¶¶ 37, 39-41 ([doc. 96](#)); Terry Decl. ¶ 8 ([doc. 100](#)).

While some protesters moved back, and others dispersed away from the park, a number within the crowd actively resisted police efforts and/or directed projectiles towards officers, including bricks, fireworks, pipes, bottles, rocks, and full soda cans. Manlove Decl. Ex. 7, at 100 ([doc. 94-7](#)); Manlove Decl. Ex. 15, at 53 ([doc. 94-15](#)); Michaelson Decl. ¶¶ 42-45 ([doc. 96](#)); Pool Decl. ¶ 7 & Ex. 49 ([doc. 98](#)); Bailey Decl. ¶ 8 ([doc. 99](#)); Terry Decl. ¶ 9 ([doc. 100](#)). In response, police deployed “long baton techniques” and fired pepper balls and flashbangs into the crowd. Wilker Decl. Ex. D, at 39 ([doc. 87-4](#)); Wilker Decl. Ex. E, at 43 ([doc. 87-5](#)); Manlove Decl. Ex. 21A ([doc. 94](#)); Bailey Decl. ¶ 10 ([doc. 99](#)); Terry Decl. ¶ 9 ([doc. 100](#)).

At 3:34 p.m. the EOC received information that persons in the crowd at Chapman were forming a human shield in the middle of the park. Manlove Decl. Ex. 7, at 103-04 ([doc. 94-7](#)); Michaelson Decl. ¶ 46 & Ex. 40 ([doc. 96](#)).

Graham resolved that the assembly had become unlawful, ordering that the park be closed, and the crowd dispersed. Manlove Decl. Ex. 4, at 68, 73-74 ([doc. 94-4](#)); Manlove Decl. Ex. 7, at 100, 103 ([doc. 94-7](#)); Bailey Decl. ¶ 11 ([doc. 99](#)); Terry Decl. ¶ 10 ([doc. 100](#)). Between 3:28 p.m. and 3:44 p.m., the PPB sound truck announced “that the assembly had become unlawful” 20 times. Dale Decl. ¶¶ 9-10 & Ex. 1 ([doc. 86](#)); Terry Decl. ¶ 10 ([doc. 100](#)). Subsequently, the sound truck announced that Chapman Square was closed and directed people to disperse the area or be subject to arrest. Dale Decl. ¶¶ 9-12 & Ex. 1 ([doc. 86](#)). When the police

line reached the edge of Chapman Square at Southwest Main Street, the officers stopped. Bailey Decl. ¶ 12 ([doc. 99](#)); Terry Decl. ¶ 11 ([doc. 100](#)).

The EOC received information that large numbers of protesters still had not dispersed the area, some of whom were placing objects and barricades in the street and continuing to throw projectiles and objects at the police. Hughes Decl. ¶ 7 & Ex. 44 ([doc. 90](#)); Michaelson Decl. ¶¶ 48, 50-53 & Ex. 40 ([doc. 96](#)). Graham made the decision to close Lownsdale Square. Manlove Decl. Ex. 4, at 68 ([doc. 94-4](#)); Manlove Decl. Ex. 7, at 113 ([doc. 94-7](#)); Terry Decl. ¶¶ 10-11 ([doc. 100](#)).

At 3:55 p.m., the PPB sound truck announced that both Lownsdale and Chapman Squares were closed, and individuals were directed to disperse to the north or be subject to arrest. Dale Decl. ¶ 13 & Ex. 1 ([doc. 86](#)); Terry Decl. ¶¶ 10-11 ([doc. 100](#)); Wilker Decl. Ex. R, at 4 (doc 114-1). The PPB sound truck made this announcement 10 times between 3:55 p.m. and 4:14 p.m. Dale Decl. ¶ 13 & Ex. 1 ([doc. 86](#)). While many people followed this directive and exited via the “passable” sidewalks, hundreds remained gathered in and around Lownsdale Square. [Id.](#); Terry Decl. ¶¶ 11-12 ([doc. 100](#)). Graham requested that these individuals be detained and arrested, however, both the OSP and PPB indicated that there were not enough police resources at that time to surround the park and effectuate arrests. Manlove Decl. Ex. 7, at 101 ([doc. 94-7](#)); Terry Decl. ¶ 11 ([doc. 100](#)).

III. The March and Subsequent Mass Detention³

Just after 4:00 p.m., the EOC received reports that people were trying to motivate the crowd to march. Michaelson Decl. ¶ 56 & Ex. 40 ([doc. 96](#)). Shortly thereafter, many individuals left Lownsdale and took to the street; officers paralleled the group. Manlove Decl. Ex. 7, at 121 ([doc. 94-7](#)); Manlove Decl. Ex. 15, at 67 ([doc. 94-15](#)); McDaniel Decl. ¶ 5 ([doc. 95](#)); Bailey Decl. ¶¶ 12, 14 ([doc. 99](#)); Terry Decl. ¶ 13 ([doc. 100](#)). This group of 80 to 100 people initially walked in the middle of Southwest 2nd Avenue before looping back towards the park and ultimately heading west up Southwest Salmon Avenue at approximately 4:13 p.m., at which point some of the plaintiffs joined the crowd. Hughes Decl. Exs. 45-46 ([doc. 90](#)); Manlove Decl. Ex. 9, at 53 ([doc. 94-9](#)); Manlove Decl. Ex. 10, at 63, 65 ([doc. 94-10](#)); Manlove Decl. Exs. 23-24 ([doc. 94](#)); Manlove Decl. Ex. 25, at 68-69 ([doc. 94-25](#)); Michaelson Decl. ¶¶ 57-60 & Ex. 40 ([doc. 96](#)); Bailey Decl. ¶ 12 ([doc. 99](#)). A police blockade at Southwest 5th Avenue and

³ While plaintiffs argue that disputed issues of material fact exist concerning whether “the detention became an arrest,” the Court finds that, given the particular facts of this case, no arrest occurred. Pls.’ Resp. to Mot. Summ. J. 23 ([doc. 113](#)); see also [United States v. Sharpe](#), 470 U.S. 675, 686 (1985) (rejecting “a hard-and-fast time limit for a permissible” stop and instead indicating that courts should consider “whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly”). Significantly, as discussed below, officers did not draw or display their weapons, acted as expeditiously as possible given the number of detainees, and released individuals as soon as identification was provided; plaintiffs’ class was also free to move around the area, use their phones, and speak with others present. Although not dispositive, the record intimates that plaintiffs subjectively understood they were not being arrested. See, e.g., Manlove Decl. Ex. 9, at 90 ([doc. 94-9](#)); Manlove Decl. Ex. 34 ([doc. 94-34](#)). As such, the Court employs the term “detention” or “kettle” consistently throughout this Findings and Recommendation in order to describe defendants’ allegedly unlawful act, and also applies the reasonable suspicion standard, which requires “a particularized and objective basis for suspecting the particular person stopped of criminal activity . . . Although a mere ‘hunch’ does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence,” and obviously less than is necessary for probable cause.” [Navarette v. California](#), 572 U.S. 393, 396-37 (2014) (citations and internal quotations omitted).

Southwest Salmon Street rerouted the individuals back to Southwest 4th Avenue.⁴ Manlove Decl. Exs. 23-25A ([doc. 94](#)).

At 4:14 p.m., the EOC received information that a large group of people were headed north on Southwest 4th Avenue. Michaelson Decl. ¶ 62 & Ex. 40 ([doc. 96](#)). Between 4:16 p.m. and 4:19 p.m., the EOC received information that 200 to 300 people were marching in the street on Southwest 4th Avenue between Southwest Yamhill and Taylor Streets. *Id.* at ¶¶ 63-64; Hughes Decl. Ex. 47 ([doc. 90](#)); Manlove Decl. Exs. 24, 27 ([doc. 94](#)).

Given that “no person or organization had obtained a permit to march in any City street on June 4, 2017,” Graham directed officers on the ground to detain the individuals who were marching in the street in order to investigate the disorderly conduct stemming from the purported violence in the parks and unpermitted street march. Graham Decl. ¶¶ 10-14, 17 ([doc. 89](#)); Manlove Decl. Ex. 4, at 74-75, 83-84, 130-31 ([doc. 94-4](#)); Bailey Decl. ¶ 15 ([doc. 99](#)); Terry Decl. ¶¶ 13-14 ([doc. 100](#)). OSP officers formed a line across Southwest 4th Avenue at Southwest Alder Street and PPB officers formed a line across Southwest 4th Avenue at Southwest Morrison Street.⁵ Manlove Decl. Ex. 15, at 68 ([doc. 94-15](#)); Terry Decl. ¶¶ 13-14 ([doc. 100](#)). A few

⁴ Although all roads in the downtown core technically remained open to vehicular traffic, PPB had closed off two lanes of Southwest 4th Avenue in front of City Hall and police and protestor-made blockades existed on portions of Southwest 2nd, 4th, and 5th Avenues. Wilker Decl. Ex. A, at 72 ([doc. 87-1](#)); Manlove Decl. Ex. 4, at 104 ([doc. 94-4](#)); Manlove Decl. Ex. 7, at 116-17 ([doc. 94-7](#)); Manlove Decl. Ex. 25, at 66-67, 78 ([doc. 94-25](#)); Terry Decl. ¶ 13 ([doc. 100](#)); Wilker Decl. Ex. S, at 72 ([doc. 114-2](#)); Wilker Decl. Ex. X, at 34, 40 ([doc. 114-7](#)); Wilker Decl. Ex. Y, at 114 (114-8); *see also* Wilker Decl. Ex. W, at 51-53 ([doc. 114-6](#)) (Lindsey testifying that traffic was “fairly light” on Southwest 2nd Avenue, Southwest 4th Avenue, and Southwest Main Street due to the police presence surrounding the protests).

⁵ Terry made the tactical decision to stop and detain the crowd at this location. Terry Decl. ¶ 16 ([doc. 100](#)). Graham was not involved in this determination. Graham Decl. ¶ 18 ([doc. 89](#)); Manlove Decl. Ex. 15, at 71 ([doc. 94-15](#)). To the east there was a parking garage; to the west, at the northern end of the block, there was a business that seemed to be closed. Terry Decl. ¶ 16 ([doc. 100](#)). Although there was a Starbucks at the southwest corner of the block, Terry did not recall seeing anyone exit that establishment and thought it was unlikely that they would “detain

individuals attempted to escape the kettle through the adjacent parking garage; police fired pepper balls at and used “long batons to strike” these individuals. Wilker Decl. Ex. E, at 94 ([doc. 87-5](#)); Bailey Decl. ¶ 17 ([doc. 99](#)); Terry Decl. ¶ 19 ([doc. 100](#)).

At 4:20 p.m., approximately 400 people were detained.⁶ Michaelson Decl. ¶ 66 ([doc. 96](#)). At 4:23 p.m., the PPB sound truck announced that people were being detained to investigate disorderly conduct and arrests would be based on probable cause. Dale Decl. ¶ 14 & Ex. 1 ([doc. 86](#)); Bailey Decl. ¶ 18 ([doc. 99](#)). While kettled, plaintiffs were not handcuffed and remained free to walk within the area, speak with friends or legal observers, and use their phones. Manlove Decl. Ex. 9, at 82, 84-85 ([doc. 94-9](#)); McDaniel Decl. ¶ 6 ([doc. 95](#)). PPB officers supplied water. Manlove Decl. Ex. 4, at 113-14 ([doc. 94-4](#)). A number of those detained abandoned weapons and clothing into the street and onto the sidewalk. Manlove Decl. Ex. 17A, at 87-89; Manlove Decl. Ex. 9, at 86-87 ([doc. 94-9](#)); Manlove Decl. Ex. 28, at 154-55 ([doc. 94-28](#)); Manlove Decl. Exs. 29-30 ([doc. 94](#)); Michaelson Decl. ¶ 70 & Ex. 40 ([doc. 96](#)); Bailey Decl. ¶ 19 ([doc. 99](#)); Terry Decl. ¶ 22 ([doc. 100](#)).

Between 4:30 p.m. and 5:12 p.m., the PPB sound truck announced: “Everyone being detained for disorderly conduct will be identified. Please have your identification ready and you will be processed three at a time following orders from the officers. Your cooperation will speed the process.” Dale Decl. ¶ 15 & Ex. 1 ([doc. 86](#)).

persons unassociated with the group coming from the parks and marching in the street” at this location. [Id.](#) At one point a car exited the parking garage, and Terry and his squad allowed the car to leave the area. [Id.](#)

⁶ The City’s Independent Police Review report (“IPR Report”) states there were 389 people detained. Wilker Decl. Ex. Z, at 9 ([doc. 114-9](#)). Yet the deposition and other evidence suggests the number may have been as high as 435. [See, e.g.,](#) Manlove Decl. Ex. 28, at 86 ([doc. 94-28](#)).

Twelve PPB officers were involved in the simultaneous processing of the detainees. Manlove Decl. Ex. 28, at 108 ([doc. 94-28](#)). This was accomplished by photographing individual persons, their identification, and their clothing, rather than writing down and recording everyone's information.⁷ *Id.* at 78-81; Terry Decl. ¶ 20 ([doc. 100](#)). None of the plaintiffs were searched and no further investigation was conducted beyond identifying the individuals present. Wilker Decl. Ex. J, at 56 ([doc. 87-10](#)); Manlove Decl. Ex. 9, at 92 ([doc. 94-9](#)); Manlove Decl. Ex. 17A, at 97 ([doc. 94-17](#)); Manlove Decl. Ex. 22, at 120 ([doc. 94-22](#)); Manlove Decl. Ex. 25, at 110 ([doc. 94-25](#)); Terry Decl. ¶ 20 ([doc. 100](#)).

After approximately an hour, all the detainees had been processed and left the area. Graham Decl. Ex. 3, at 2 ([doc. 89-3](#)); Manlove Decl. Ex. 9, at 91 ([doc. 94-9](#)); McDaniel Decl. ¶ 6 ([doc. 95](#)); Michaelson Decl. ¶ 72 ([doc. 96](#)); Terry Decl. ¶ 21 ([doc. 100](#)). Four or five individuals were arrested based on their behavior at the detention site or other offenses committed at Chapman or Lownsdale Squares. Graham Decl. Ex. 3, at 2 ([doc. 89-3](#)); Terry Decl. ¶ 21 ([doc. 100](#)).

IV. Proceedings Before This Court

On November 15, 2017, plaintiffs initiated this lawsuit. On May 31, 2018, the Court certified plaintiffs' class as follows:

All individuals who were assembled on Southwest Fourth Avenue between Southwest Morrison Street and Southwest Alder Street in Portland, Oregon on the afternoon of June 4, 2017, and who were contained and prevented from leaving

⁷ The decision to process detainees in this manner was made by Santos and Terry. Manlove Decl. Ex. 28, at 78-81, 137-38 ([doc. 94-28](#)); Terry Decl. ¶ 20 ([doc. 100](#)). Graham was not involved in that decision and learned of it after the fact. Graham Decl. ¶ 18 ([doc. 89](#)). Santos and Terry believed that photographing the person and their identification could save time and be used by PPB investigators to review video taken of the crowd in Chapman and Lownsdale Squares, in the street marching, or for other criminal conduct observed elsewhere in the day by PPB detectives. Manlove Decl. Ex. 28, at 138 ([doc. 94-28](#)); Terry Decl. ¶ 20 ([doc. 100](#)).

by officers of the Portland Police Bureau, along with other law enforcement officers.

Order 1-2 ([doc. 39](#)).

Plaintiffs filed an amended complaint on August 24, 2018, alleging: (1) deprivation of Fourth Amendment rights in violation of [42 U.S.C. § 1983](#) against Wheeler and the individual PPB officers; (2) violation of the Oregon Constitution, Article I, Section 9’s prescription against unreasonable seizures against Wheeler and individual PPB officers; (3) unconstitutional policy, custom, or practice of depriving Fourth Amendment rights in violation of [42 U.S.C. § 1983](#) against the City; and (4) unconstitutional policy, custom, or practice of violating the Oregon Constitution, Article I, Section 9’s prescription against unreasonable seizures against the City.⁸ First Am. Compl. ¶¶ 47-57 ([doc. 45](#)). Plaintiffs seek declaratory relief as to all claims, in addition to compensatory or nominal damages in regard to their first claim. *Id.*

During the beginning of 2020, it appeared as though the parties had at least preliminarily settled their dispute. However, due to breakdowns in the settlement process and the resurgence of protests surrounding the death of George Floyd, the parties decided to proceed in this case on the merits. *See, e.g.*, Notice of Termination of Settlement Negotiations 1-2 ([doc. 76](#)).

On August 21, 2020, the parties filed the present summary judgment motions. Briefing on those motions was completed on October 16, 2020.

⁸ Plaintiffs’ also assert their [42 U.S.C. § 1983](#) claims under the Fourteenth Amendment’s Due Process Clause. First Am. Compl. ¶¶ 49, 54 ([doc. 45](#)); Pls.’ Resp. to Mot. Summ. J. 9 ([doc. 113](#)). However, it is well-established that, if a constitutional claim “is covered by a specific constitutional provision,” it should not be analyzed under due process. [United States v. Lanier, 520 U.S. 259, 272 n.7 \(1997\)](#); *see also* [Picray v. Sealock, 138 F.3d 767, 770 \(9th Cir. 1998\)](#) (“the validity of an arrest must be analyzed under Fourth Amendment standards, not due process standards”).

STANDARD OF REVIEW

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file, if any, show “that there is no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law.” [Fed. R. Civ. P. 56\(a\)](#). Substantive law on an issue determines the materiality of a fact. [T.W. Elec. Servs., Inc. v. Pac. Elec. Contractors Ass’n](#), 809 F.2d 626, 630 (9th Cir. 1987). Whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party determines the authenticity of the dispute. [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. [Celotex Corp. v. Catrett](#), 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. [Id.](#) at 324.

Special rules of construction apply when evaluating a summary judgment motion: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. [T.W. Elec.](#), 809 F.2d at 630.

DISCUSSION

This dispute centers on whether defendants violated plaintiffs’ state and federal constitutional rights. In regard to plaintiffs’ declaratory relief claims, defendants argue they are not justiciable. Defs.’ Mot. Summ. J. 28-32 ([doc. 84](#)). Defendants assert that, even if subject matter jurisdiction exists, plaintiffs’ claims fail because there is no underlying unconstitutional policy, custom, or practice, and the individual officers’ conduct was reasonable or, alternatively, the right at issue was not clearly established. [Id.](#) at 34-62.

Plaintiffs oppose defendants' motion on the basis that myriad purported issues of material fact exist. Pls.' Resp. to Mot. Summ. J. 10-32 ([doc. 113](#)). In addition, plaintiffs contend they are entitled to summary judgment on their claim under state law because the Oregon Constitution requires "individual reasonable suspicion" in order to effectuate a detention or arrest, which was lacking in this case. Pls.' Partial Mot. Summ. J. 6-7 ([doc. 85](#)).

I. Preliminary Matters

Before reaching the substantive merits of city defendants' motion, the Court must address three preliminary matters: plaintiffs' evidentiary objection, whether Wheeler is a proper defendant, and the lawfulness of defendants' decision to close Chapman and Lownsdale Squares.

A. Plaintiffs' Evidentiary Objection

Plaintiffs "object to and move to strike the declarations and supporting exhibits of Kelsey Lloyd and Tiffany Lynn" because neither "were identified as witnesses as required by [Fed. R. Civ. P. 26\(a\)](#) or (e)." Pls.' Resp. to Mot. Summ. J. 6 ([doc. 113](#)).

Defendants initially argue that plaintiffs failed to confer in regard to their evidentiary objections pursuant to LR 7-1(a)(1)(A). However, because Local Rule 56-1(b) authorizes a party to "address the objection in its reply memorandum," which defendants have done here, the Court declines to deny plaintiffs' evidentiary objection on this basis. In any event, without "waiving their objections under LR 7-1(a)(1)(A) or any future objections," defendants agree to withdraw the Lloyd and Lynn declarations.⁹ Defs.' Reply to Mot. Summ. J. 16 ([doc. 124](#)). Accordingly, plaintiff's evidentiary objection is denied as moot.

⁹ Defendants re-introduce the exhibits to the Lynn declaration as part of Terry's supplemental declaration, because he also had personal knowledge of the videos in question. Suppl. Terry Decl. ¶¶ 5-6 ([doc. 125](#)); see also [United States v. Taibi](#), 2012 WL 553143, *4 (S.D. Cal. Feb. 21, 2012) (court may consider evidence, even new evidence, that rebuts arguments raised by the plaintiff in her opposition to the defendant's summary judgment motion); [Schiewe v. Serv.](#)

B. Defendant Ted Wheeler

Defendants argue that “Wheeler did not participate, approve, or have any opportunity to intervene in the decision to detain the plaintiff class,” such that the claims against him should be dismissed. Defs.’ Mot. Summ. J. 1 ([doc. 84](#)).

Plaintiffs’ opposition is silent as to this issue and, in fact, does not address Wheeler’s purported actions at any point, other than to note briefly as part of their recitation of facts that he was more concerned about the Patriot Prayer rally “in light of the MAX murders” and “was present in the command center during the protests.” Pls.’ Resp. to Mot. Summ. J. 2-3 ([doc. 113](#)); see also [Justice v. Rockwell Collins, Inc.](#), 117 F.Supp.3d 1119, 1134 (D. Or. 2015), aff’d, 720 Fed.Appx. 365 (9th Cir. 2017) (“if a party fails to counter an argument that the opposing party makes . . . the court may treat that argument as conceded”) (citation and internal quotations and brackets omitted).

In any event, the unrefuted evidence of record demonstrates that Wheeler was present in the EOC during the early part of the protest but did not have any involvement in Graham’s decision-making process or the events on the ground. See [Walsh v. City of Portland](#), 2018 WL 5621959, *3-4 (D. Or. Oct. 30, 2018) (claims against Wheeler in his individual capacity were not plausible where the plaintiff did “not specifically allege that Wheeler personally took part in the alleged deprivation of his rights [on June 4, 2017], or that Wheeler knew of the alleged deprivations and failed to prevent them”).

In fact, the testimony is consistent that Wheeler was present solely as an observer and spent most of his time in a room adjacent to the EOC. Manlove Decl. Ex. 6, at 9, 11, 34-35, 39-

[Emp’rs Int’l Union Local 503](#), 2020 WL 4251801, *4 n.5 (D. Or. July 23), adopted by 2020 WL 5790389 (D. Or. Sept. 28, 2020) (“there are no hearsay concerns where, as here, the affiant is testifying from personal knowledge”) (citing [Calmat Co. v. U.S. Dep’t of Labor](#), 364 F.3d 1117, 1124 (9th Cir. 2004)).

40, 47-48 ([doc. 94-6](#)). He exchanged brief pleasantries with some of the individuals present but did not talk strategy and played no decision-making role. *Id.*; Manlove Decl. Ex. 4, at 40 ([doc. 94-4](#)); Manlove Decl. Ex. 7, at 72-73 ([doc. 94-7](#)). Graham was not sure whether Wheeler was informed of the decision to effectuate the detention or was even present at the time that decision was made. Manlove Decl. Ex. 4, at 122-123 ([doc. 94-4](#)); *see also* Manlove Decl. Ex. 6, at 45, 64 ([doc. 94-6](#)) (Wheeler testifying that he was not aware police had detained plaintiffs' class at the time he left the EOC and read about it after the fact). Defendants' motion should therefore be granted in this regard and Wheeler should be dismissed as a defendant from this action.

C. Lawfulness of Closing Chapman/Lownsdale and Rendering Dispersal Orders

While not central to their claims given the class' confines, plaintiffs repeatedly question the lawfulness of defendants' decision to close Chapman and Lownsdale Squares. *See, e.g.,* Pls.' Resp. to Mot. Summ. J. 3 ([doc. 113](#)). Because this event serves as important background leading up to plaintiffs' detention, the Court briefly addresses this argument.

Plaintiffs' contention appears to be premised on the fact that none of the plaintiffs threw objects, and some did not even observe projectiles being thrown from Chapman Square. Manlove Decl. Ex. 25, at 58-59 ([doc. 94-25](#)); Wilker Decl. Ex. T, at 32 ([doc. 114-3](#)); Nickolaus Decl. ¶ 8 ([doc. 115](#)); Garrison Decl. ¶ 5 ([doc. 116](#)); Whaley Decl. ¶ 5 ([doc. 117](#)); Haber Decl. ¶ 5 ([doc. 118](#)); Sturms Decl. ¶ 2 ([doc. 119](#)); *see also* Manlove Decl. Ex. 22, at 60-61 ([doc. 94-22](#)) (Haber testifying that he did not immediately comply with police orders to disperse because "I hadn't witnessed any of the illegal acts the police were saying were committed, I felt the order was bogus, and I was there to protest that kind of action"). Plaintiffs also suggest that defendants' decision to close Chapman and Lownsdale Squares evinces favoritism towards the

Patriot Prayer rally.¹⁰ See Pls.’ Resp. to Mot. Summ. J. 3, 24, 30 ([doc. 113](#)) (the “true purpose of detaining the Class for an hour was not to investigate anything, but to make time for Terry Schrunk Plaza to clear”).

Yet, as defendants correctly note and as described at length above, “[t]he anti-police violence at Chapman is undisputed and well documented.” Defs.’ Reply to Mot. Summ. J. 29 ([doc. 184](#)). Similarly, the evidence showing that many protestors failed to move back once the southern portion of Chapman Square was closed is undisputed and well documented. See, e.g., Manlove Decl. Ex. 7, at 100 ([doc. 94-7](#)); Manlove Decl. Ex. 15, at 53 ([doc. 94-15](#)); Michaelson Decl. ¶¶ 42-45 ([doc. 96](#)); Pool Decl. ¶ 7 & Ex. 49 ([doc. 98](#)); Bailey Decl. ¶ 8 ([doc. 99](#)); Terry Decl. ¶ 9 ([doc. 100](#)).

Given these circumstances, the fact that plaintiffs may not have thrown any objects or witnessed any objects being thrown is insufficient to meaningfully contest the propriety of defendants’ actions in closing half, and then all, of the park and ordering protestors therein to disperse. See Or. Rev. Stat. § 131.675 (“[w]hen any five or more persons, whether armed or not, are unlawfully or riotously assembled [police] shall go among the persons assembled, or as near to them as they can with safety, and command them in the name of the State of Oregon to disperse. If, so commanded, they do not immediately disperse, the officer must arrest them or

¹⁰ The only evidence that plaintiffs cite in support of this proposition is a “Situation Status Report” from the day in question, which states, amongst a list of “Current Actions as of 1530 hours”: “Patriot group being encouraged to leave Schrunk while anarchist group being distracted.” Wilker Decl. Ex. A, at 127 ([doc. 87-1](#)); Wilker Decl. Ex. O, at 2 ([doc. 87-15](#)). Given the other evidence of record, this sole reference, which appears to pertain to a period approximately 50 minutes prior to the kettle, is inadequate to establish an ulterior motive. Cf. Devenpeck v. Alford, 543 U.S. 146, 153-54 (2004) (“an arresting officer’s state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause . . . the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer’s action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action”) (citations and internal quotations omitted).

cause them to be arrested”). Stated differently, irrespective of whether the Court or plaintiffs take exception to defendants’ decisions surrounding Chapman and Lownsdale on the day in question, because the police were acting well within their authority, these facts cannot (and, in fact, do not based on the operative pleading)¹¹ form a basis of liability. By extension, however, any purported reasonable suspicion related to the events that transpired in Chapman or Lownsdale does not support plaintiffs’ detention, which was temporally and geographically distinct.

I. Declaratory Relief Claims

With the exception of portions of their first claim, plaintiffs seek exclusively declaratory relief related to the events that occurred on June 4, 2017. Specifically, plaintiffs’ first and second claims seek declarations that one or more of the individual defendants violated the rights of the class under the Fourth Amendment of the U.S. Constitution and/or Article I, Section 9, of the Oregon Constitution. Plaintiffs’ third and fourth claims seek identical relief, except in regard to an allegedly unconstitutional City policy, custom, or practice.

Defendants maintain that plaintiffs lack standing to pursue retrospective declaratory relief because the harm has ceased and is not capable of repetition by these individual officers, and any prospective declaratory relief is moot for the same reasons.¹² Defs.’ Mot. Summ. J. 28-32 ([doc. 84](#)).

¹¹ Indeed, while plaintiffs repeatedly decry the lawfulness of defendants’ decision to close the park and employ force therein, they are quick to note that “[s]ome of the Class members were never even in Chapman Park on June 4, 2017.” Pls.’ Resp. to Mot. Summ. J. 10 ([doc. 113](#)); but see Manlove Decl. Ex. 9, at 56-59, 61 ([doc. 94-9](#)) (Garrison testifying that the “people comprised of the march” were “primarily people that were originally from Chapman and Lownsdale”).

¹² Plaintiffs do not address the justiciability of their third and fourth claims premised on an unconstitutional policy, custom, or practice. See generally Pls.’ Resp. to Mot. Summ. J. ([doc. 113](#)); see also [Madlaing v. JPMorgan Chase Bank, N.A.](#), 2013 WL 2403379, *16 (E.D. Cal. May 31, 2013) (the plaintiff’s failure “to address defendants’ points as to his lack of standing to seek

Plaintiffs, in contrast, assert that “the possibility of recovering damages [in regard to their first claim under federal law] does not make declaratory relief superfluous” and state that standing exists because they have a “legally protected interest in not being subject to unreasonable seizure.” Pls.’ Resp. to Mot. Summ. J. 6-7 ([doc. 113](#)). Additionally, plaintiffs contend “[d]eclaratory relief on the first claim for relief is particularly appropriate here because of the possibility that Defendants might be entitled to qualified immunity for their actions and thus escape liability for damages.” *Id.* at 7. Concerning their second claim under state law, plaintiffs argue that [Or. Rev. Stat. § 14.175](#) confers justiciability by “provid[ing] for an exception to mootness for cases of public importance that were capable of repetition yet evading review.” *Id.* at 8-9 (citing [Pendleton School Dist. 16R v. State](#), 345 Or. 596, 200 P.3d 133 (2009); and [Couey v. Atkins](#), 357 Or. 460, 355 P.3d 866 (2015)).

Declaratory relief is generally appropriate: “(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.” *Bilbrey by Bilbrey v. Brown*, 738 F.2d 1462, 1470 (9th Cir. 1984) (citation and internal quotations omitted). However, federal courts are courts of limited jurisdiction, such that, in order to proceed in this forum, the plaintiff’s claims must present an active case or controversy. [Lujan v. Defenders of Wildlife](#), 504 U.S. 555, 560-61 (1992) (citations and internal quotations omitted). To meet this requirement, the plaintiff bears the burden of “demonstrat[ing] that the requisite threat of future harm actually exists.” [Nelsen v. King Cty.](#), 895 F.2d 1248, 1251 (9th Cir. 1990) (citations and internal quotations omitted). Namely, “throughout the litigation, the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant

declaratory relief” can be construed as a “concession that he lacks standing to seek declaratory relief”).

and likely to be redressed by a favorable judicial decision.” [Spencer v. Kemna](#), 523 U.S. 1, 7 (1998) (citation and internal quotations omitted); see also [Summers v. Earth Island Inst.](#), 555 U.S. 488, 493 (2009) (in order to be redressable, the injury in fact must be both “actual and imminent,” and not conjectural or hypothetical) (citation omitted).

Thus, claims for equitable relief are not justiciable “if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” [Rosebrock v. Mathis](#), 745 F.3d 963, 971 (9th Cir. 2014) (citation and internal quotations omitted); see also [Alaska Ctr. for Env’t v. U.S. Forest Serv.](#), 189 F.3d 851, 854-55 (9th Cir. 1999) (narrow “capable of repetition yet evading review” exception to the mootness doctrine applies only if, amongst other criteria, “there is a reasonable expectation that the plaintiffs will be subjected to [the challenged conduct] again”); [Spencer](#), 523 U.S. at 18 (federal courts “are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong”); [Bayer v. Neiman Marcus Grp., Inc.](#), 861 F.3d 857, 868 (9th Cir. 2017) (“[a] declaratory judgment merely adjudicating past violations of federal law – as opposed to continuing or future violations of federal law – is not an appropriate exercise of federal jurisdiction”).

In short, a federal court is not empowered to issue “retrospective declaratory relief with respect to allegedly unconstitutional conduct that has ended” or prospective declaratory relief with respect to allegedly unconstitutional conduct that is not sufficiently likely to reoccur. [Rodriguez v. Tilton](#), 2015 WL 3507126, *2 (E.D. Cal. June 3, 2015); see also [City of L.A. v. Lyons](#), 461 U.S. 95, 107 n.8 (1983) (“[i]t is the reality of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff’s subjective apprehensions”) (emphasis removed).

Here, plaintiffs’ request for declaratory relief against the individual defendants and the City is not intended to and cannot address ongoing or future violations of federal or state law. Rather, plaintiffs’ briefing makes clear that they are asking the Court for a retroactive opinion that the individual officers or the City previously violated their rights, irrespective of any additional claim for damages or the potential availability of qualified immunity for the individual officers. See Pls.’ Resp. to Mot. Summ. J. 6-7 ([doc. 113](#)) (plaintiffs’ identifying their “injury in fact [as the moment] when the individual Defendants violated their legally protected interest in not being subject to unreasonable seizure” on June 4, 2017); see also [Nat’l Audubon Soc’y, Inc. v. Davis](#), 307 F.3d 835, 847 n.5 (9th Cir. 2002) (declaratory relief is “retrospective to the extent that it is intertwined with a claim for monetary damages that requires [courts] to declare whether a past constitutional violation occurred . . . declaratory relief [in such a situation] is superfluous in light of the damages claim”) (citation and internal quotations omitted); [Tarhuni v. Holder](#), 8 F.Supp.3d 1253, 1267-68 (D. Or. 2014) (“a plaintiff who has standing to seek damages for a past injury . . . does not necessarily have standing to seek prospective relief such as a declaratory judgment,” such that “[i]t is necessary for a plaintiff to demonstrate standing separately for each form of relief sought”) (citations and internal quotations omitted).

Yet, given the well-established precedent cited above, this Court lacks authority to render any such relief. The case that plaintiffs rely on – i.e., Bilbrey – does not dictate a different result, as it involved potential future harm and therefore did not address the constitutional requirements of standing for declaratory actions. Bilbrey, 738 F.2d at 1464-65, 1471; see also [Vietnam Veterans of Am. v. Cent. Intelligence Agency](#), 2010 WL 291840, *6 (N.D. Cal. Jan. 19, 2010) (explaining that Bilbrey did not involve “a challenge to the plaintiffs’ standing to seek declaratory relief; instead, [it] inquired into whether the district courts properly exercised their

discretion in denying such relief”); [Lujan](#), 504 U.S. at 564 (“[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding [equitable relief] if unaccompanied by any continuing, present adverse effects”) (citation and internal quotations omitted).

Regarding plaintiffs’ argument concerning their second claim, it is axiomatic that “standing in federal court is a question of federal law.” [Hollingsworth v. Penny](#), 570 U.S. 693, 715 (2013); see also [Lee v. Am. Nat’l Ins. Co.](#), 260 F.3d 997, 1001-02 (9th Cir. 2001) (“a plaintiff whose cause of action is perfectly viable in state court under state law may nonetheless be foreclosed from litigating the same cause of action in federal court, if he cannot demonstrate the requisite injury”); [Taylor v. Nike, Inc.](#), 2017 WL 663056, *3 (D. Or. Feb. 17, 2017) (the plaintiff lacked standing to pursue injunctive relief in federal court even where state law expressly granted such a remedy). Plaintiffs cite no authority that belies this conclusion¹³ or otherwise suggests that Oregon cases or statutes can create jurisdiction in the federal court where none otherwise exists. Accordingly, state law is inapplicable to the Court’s analysis of plaintiffs’ standing in this forum.

Moreover, plaintiffs have not provided any basis for prospective declaratory relief. In fact, plaintiffs do not meaningfully address defendants’ argument concerning this issue. See generally Pls.’ Resp. to Mot. Summ. J. ([doc. 113](#)). At most, portions of the record not cited by

¹³ The precedent cited by plaintiffs involved Oregon courts evaluating their own jurisdiction under Oregon law. In any event, both cases are factually distinct: [Pendleton](#) concerned the confines of a current constitutional provision and [Couey](#) involved election-based claims that were capable of repetition yet evading review. See [Pendleton](#), 345 Or. at 606 (“[t]he issue whether Article VIII, section 8, imposes a duty on the legislature to fund the public school system at a specified level every biennium presents a set of present facts regarding the interpretation of a constitutional provision; it is not simply an abstract inquiry about a possible future even”); [Couey](#), 357 Or. at 467-522 (although speculative, the plaintiff’s otherwise moot declaratory judgment claim could proceed under Or. Rev. Stat. § 14.175).

plaintiffs in their opposition indicate that some members of the class “remain very concerned about the Portland Police Bureau targeting [them] and other protestors for detention or arrest without probable cause or reasonable suspicion for exercising [their] state and federal constitutional rights to freedom of speech and freedom of assembly.” Nickolaus Decl. ¶ 10 ([doc. 115](#)); Garrison Decl. ¶ 6 ([doc. 116](#)); Sturms Decl. ¶ 3 ([doc. 119](#)); but see Keenan v. Allan, 91 F.3d 1275, 1279 (9th Cir. 1996) (district court need not “scour the record in search of a genuine issue of triable fact” and instead “the nonmoving party [must] identify with reasonable particularity the evidence that precludes summary judgment . . . if the nonmoving party fails to discharge [its duty] by remaining silent – its opportunity is waived and its case waged”).

Initially, the mere fact that plaintiffs intend to attend future protests is insufficient to confer standing. See MacNamara v. City of N.Y., 275 F.R.D. 125, 132-41 (S.D. N.Y. 2011) (the plaintiffs in a putative class action challenging “indiscriminate mass arrests without individualized probable cause” during political demonstrations lacked standing to pursue declaratory relief where their evidence demonstrated only “that the alleged arrest and detention policies are ongoing [and] several class representatives plan to attend demonstrations in New York in the future”) (citation and internal quotations omitted)

Even so, plaintiffs’ evidence is too generalized to establish that the class, or even protestors more generally, are realistically threatened with a mass detention or kettling again in the future. Cf Lyons, 461 U.S. at 108 (assessing the “odds” that plaintiff would again be subject to precisely the same wrongful conduct – i.e., an illegal chokehold following a routine traffic stop – in evaluating subject matter jurisdiction); see also Index Newspapers LLC v. U.S. Marshals Serv., 977 F.3d 817, 825 (9th Cir. 2020) (“[a] plaintiff may not rely on mere conjecture about possible governmental actions to demonstrate injury, and must instead present concrete

evidence to substantiate their fears”) (citation and internal quotations omitted); [Prasco, LLC v. Medicis Pharm. Corp.](#), 537 F.3d 1329, 1339 (Fed. Cir. 2008) (“a case or controversy must be based on a real and immediate injury or threat of future injury that is caused by the defendants – an objective standard that cannot be met by a purely subjective or speculative fear of future harm”) (emphasis removed).

Because plaintiffs abandoned any argument concerning past kettling events, there is simply no evidence in the record before the Court concerning any other mass detention situation involving the PPB. But see [Nelsen](#), 895 F.2d at 1250-54 (“what a plaintiff must show is not a probabilistic estimate that the general circumstances to which the plaintiff is subject may produce future harm, but rather an individualized showing that there is a very significant possibility that the future harm will ensue,” such that, where courts “have found standing to exist for a threat of future harm, it has consistently been determined that some systematic pattern, repetition or relationship exists”) (citation and internal quotations omitted).

As a result, the undisputed evidence of record evinces no adequate “injury-in-fact” surrounding these individual defendants. This is especially true given that, since June 4, 2017, PPB has not engaged in any mass detentions or arrests, despite continuous nightly protests beginning on May 29, 2020, some of which involved violent, destructive activity. Dobson Decl. ¶¶ 6-8 ([doc. 88](#)); see also [Index Newspapers](#), 977 F.3d at 821 (denoting protests in Portland, Oregon, following George Floyd’s death have largely been peaceful, “but some have become violent [with] incidents of vandalism, destruction of property, looting, arson, and assault” and that “state and local authorities in Oregon have actively monitored the protests and engaged in crowd control measures”). The decision to employ a mass detention or arrest “requires significant officer resources” and is based on the specific facts confronting the Incident

Commander. Dobson Decl. ¶¶ 4, 9 ([doc. 88](#)); see also Wilker Decl. Ex. Z, at 21 ([doc. 114-9](#)) (City’s response to IPR Report indicating PPB was in the process of revising its policies to prevent mass detentions or arrests not based on individualized reasonable suspicion/probable cause, and that PPB agrees “that mass detentions should only be carried out in extraordinary circumstances and at the direction of the Incident Commander”); [Pub. Util. Comm’n of Cal. v. Fed. Energy Regulatory Comm’n](#), 100 F.3d 1451, 1460 (9th Cir. 1996) (“[w]hen resolution of a controversy depends on facts that are unique or unlikely to be repeated, the action is not capable of repetition and hence is moot”) (citation omitted).

Further, the individual defendant that made the decision to detain plaintiffs – i.e., Graham – is no longer: (1) employed by the City, (2) working as a police officer, or (3) residing in Oregon. Graham Decl. ¶ 19 ([doc. 89](#)). Similarly, Lee is no longer employed by the City or residing in Portland, and the remaining individual defendants – McDaniel, Lindsey, and Santos – are no longer members of the Rapid Response Team, the body responsible for crowd management, nor do they participate in arrests at crowd control events. Lee Decl. ¶¶ 1-2 ([doc. 91](#)); Manlove Decl. Ex. 28, at 17-18 ([doc. 94-28](#)); McDaniel Decl. ¶ 7 ([doc. 95](#)).

Given these uncontested facts, plaintiffs do not demonstrate a disputed issue concerning whether there is a realistic likelihood that they would experience an unlawful mass detention or kettle by Graham or one of the other individual defendants, who acted at the direction of Graham. See Nelsen, 895 F.2d at 1251 (“no matter how important the issue or how likely that a similar action will be brought, a court is without jurisdiction [to issue prospective declaratory relief] if there is not a sufficient likelihood of recurrence with respect to the party now before it”). In particular, because plaintiffs have produced no evidence to show the specific conduct challenged in this action presently affects them or can reasonably be expected to affect them in

the future, the Court finds that intervening circumstances have forestalled any occasion to address plaintiffs' injury via declaratory relief. Defendants' motion should be granted as to plaintiffs' second, third, and fourth claims, as well as to the portions of their first claim that seek declaratory relief, and plaintiffs' partial motion as to their second claim should be denied.

III. Federal Declaratory Relief Claim Premised on a City Policy, Custom, or Practice

Even assuming it was justiciable, plaintiffs' third claim fails. A government entity may not be held vicariously liable for the unconstitutional acts of its employees under [42 U.S.C. § 1983](#). [Monell v. Dep't of Soc. Servs. of the City of N.Y.](#), 436 U.S. 658, 692-94 (1978). To establish municipal liability, the plaintiffs must demonstrate that: (1) they were deprived of a constitutional right; (2) the municipality had a policy, custom, or practice; (3) the policy, custom, or practice amounted to deliberate indifference of the plaintiffs' constitutional rights; and (4) the policy, custom, or practice was the "moving force" behind the constitutional violation. [Dougherty v. City of Covina](#), 654 F.3d 892, 900 (9th Cir. 2011) (citation omitted).

A plaintiff may establish that the policy, custom, or practice was the cause of injury in three ways: (1) "a city employee committed the alleged constitutional violation pursuant to [either] a formal governmental policy or a longstanding practice or custom which constitutes the standard operating procedure of the local governmental entity"; (2) "the individual who committed the constitutional tort was an official with final policy-making authority and that the challenged action itself thus constituted an act of official governmental policy"; or (3) "an official with final policy-making authority ratified a subordinate's unconstitutional decision or action and the basis for it." [Gillette v. Delmore](#), 979 F.2d 1342, 1346-47 (9th Cir. 1992) (citations and internal quotations omitted).

Plaintiffs initially based their third claim on prior alleged incidents of unconstitutional PPB kettling. First Am. Compl. ¶¶ 16, 53 ([doc. 45](#)). In their opposition, however, plaintiffs abandoned this theory. Instead, although not explicit, plaintiffs appear to advance a theory of ratification based solely on six lines of Lee’s deposition testimony. See Pls.’ Resp. to Mot. Summ. J. 33 ([doc. 113](#)) (asserting that “the City in fact had a policy allowing officers to assess reasonable suspicion or probable cause on a group rather than individual basis”) (citing Wilker Decl. Ex. V, at 35 ([doc. 114-5](#))).

The specific testimony cited by plaintiffs is as follows:

Q: Was the conclusion in the after-action analysis that all of the police conduct on June 4th was consistent with Bureau policy?

A: Yes, sir.

Q: Was the conclusion that all of the police conduct on June 4th was lawful and constitutional?

A: Yes, sir.

Wilker Decl., Ex. V, at 35 ([doc. 114-5](#)).

Thus, Lee’s testimony does not cite or discuss any particular PPB policy, nor does it identify any City or policy-making authority who conducted the “after action analysis.” The only after-the-fact investigation before the Court that actually evaluates PPB’s actions related to the June 4, 2017, detention (as opposed to those that merely summarize the events of the day) is the City’s IPB Report from May 2018, which made clear that, at the time of plaintiffs’ detention, PPB had “no written policy governing stops or other forms of temporary detention, including mass detentions [and] also does not have a mass arrest policy.” Wilker Decl., Ex. Z, at 15 ([doc. 114-9](#)).

Furthermore, within the Ninth Circuit, an officer’s “lack of individualized reasonable suspicion,” “[s]tanding alone [does] not make the searches and seizures unlawful.” [Lyll v. City of L.A.](#), 807 F.3d 1178, 1194 (9th Cir. 2015) (citation and internal quotations omitted). This is because, in the mass detention context, “individualized suspicion as to each person in the group . . . would impose ‘an impossible burden’ on police.” *Id.* (quoting [Carr v. Dist. of Columbia](#), 587 F.3d 401, 408 (D.C. Cir. 2009)); see also [Bernini v. City of St. Paul](#), 665 F.3d 997, 1003 (8th Cir. 2012) (“[t]he touchstone of the Fourth Amendment is reasonableness under the particular circumstances presented. What is reasonable in the context of a potential large-scale urban riot may be different from what is reasonable in the relative calm of a tavern with a dozen patrons”) (internal citations omitted).¹⁴

As a result, the Court has no basis to conclude Lee’s testimony is indicative of a City of PPB policy, custom, or practice allowing officers to assess group reasonable suspicion or probable cause in an unconstitutional manner. This is especially true given that plaintiffs have not put forth argument or evidence relating to any other mass detention or kettling event, constitutional or otherwise. See [Trevino v. Gates](#), 99 F.3d 911, 918 (9th Cir. 1996) (“[I]liability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded

¹⁴ Other courts examining this precise question have reached a different conclusion based on the same caselaw. See [Dinler v. City of N.Y.](#), 2012 WL 4513352, *6 (S.D. N.Y. Sept. 30, 2012) (“Carr and Bernini do not endorse a theory of collective or group liability, nor do they reflect a departure from the rule of individualized probable cause. They merely offer a method of reaching individualized probable cause in a large, and potentially chaotic, group setting. Individualized probable cause remains the lodestar in these cases”). Although plaintiffs advocate for a wholesale rejection of Lyll’s holdings, this Court is bound by that decision as it is clearly on-point and remains good law. See Pls. Resp. to Mot. Summ. J. 27 ([doc. 113](#)) (“the Court should decline to apply Lyll to these facts” and instead find that “clearly established precedent requires individualized reasonable suspicion for their detention, which Defendants did not have”).

upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy”).

In sum, Lee’s broad statements, without more, are insufficient to establish that a final policy-maker made a deliberate choice to endorse Graham’s decision and the basis for it. See Sheehan v. City & Cty. of S.F., 743 F.3d 1211, 1231 (9th Cir. 2014), rev’d in part on other grounds sub nom., 135 S.Ct. 1765 (2015) (ratification “generally requires more than acquiescence,” especially where “[t]here is no evidence in the record that policymakers made a deliberate choice to endorse the officers’ actions”) (citation and internal quotations omitted). For this additional reason, defendants’ motion should be granted as to plaintiffs’ Monell claim.

III. Federal Damages Claim Against the Individual Officers

To prevail on a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate that: (1) the conduct complained of deprived him or her of an existing federal constitutional or statutory right; and (2) the conduct was committed by a state actor or a person acting under color of state law. West v. Atkins, 487 U.S. 42, 48 (1988) (citations omitted). It is undisputed that the individual police defendants qualify as state actors for the purposes of 42 U.S.C. § 1983.

Qualified immunity shields government officials from civil liability “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (citations omitted). To determine whether a government actor is entitled to qualified immunity, the court evaluates, in no particular order, whether: (1) the alleged misconduct violated a right; and (2) that right was clearly established at the time of the alleged misconduct. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

Here, the Court declines to evaluate whether plaintiffs’ Fourth Amendment rights were violated because the latter issue is dispositive. A right is clearly established if its contours are

“sufficiently clear that a reasonable official would understand that what he is doing violates that right.” [Hope v. Pelzer](#), 536 U.S. 730, 739 (2002) (citation and internal quotations omitted). “[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.” [Id.](#) at 741. The dispositive inquiry is whether the officers had “fair warning” that the detention was unlawful given the “particularized facts of the case.” [Id.](#) at 740 (citation omitted); [White v. Pauly](#), 137 S.Ct. 548, 552 (2017); see also [Mullenix v. Luna](#), 136 S.Ct. 305, 308 (2015) (“[w]e do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate”) (citation and internal quotations omitted).

It is undisputed that Graham, the sole decision-maker on the day in question, gave the order to detain marchers for disorderly conduct pursuant to [Or. Rev. Stat. § 166.025](#)¹⁵ based on real time reports from multiple officers directly observing conditions on the ground, as well as contemporaneous media reports, video footage from PPB’s airplane, and open sources such as YouTube and Twitter.¹⁶ Wilker Decl. Ex. A, at 76-77, 84-85 ([doc. 87-1](#)); Graham Decl. ¶¶ 12-

¹⁵ A person commits disorderly conduct “if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof,” he or she “[o]bstructs vehicular or pedestrian traffic on a public way.” [Or. Rev. Stat. § 166.025\(1\)\(d\)](#). “Recklessly” is defined, in relevant part, as: “a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.” [Or. Rev. Stat. § 161.085\(9\)](#); see also [State v. Ausmus](#), 336 Or. 493, 502-03, 85 P.3d 864 (2003) (applying § 161.085’s definition of recklessness to § 166.025(1)).

¹⁶ At various points throughout their briefing, plaintiffs intimate that Graham had no possible basis for the detention because he never actually observed conditions on the ground. See, e.g., Pl.’s Resp. to Mot. Summ. J. 2-3 ([doc. 113](#)). However, the collective knowledge doctrine “allows courts to impute police officers’ collective knowledge to the officer conducting a stop, search, or arrest.” [United States v. Villasenor](#), 608 F.3d 467, 475 (9th Cir. 2010). This doctrine applies to “aggregate the facts known to each of the officers involved . . . [w]hen there has been communication among agents” or “where an officer (or team of officers), with direct personal

13, 15-16 ([doc. 89](#)); Hughes Decl. ¶¶ 3, 8-11 & Exs. 45-48 ([doc. 90](#)); Lee Decl. ¶¶ 4, 6-7 ([doc. 91](#)); Manlove Decl. Ex. 4, at 74-75, 83-84, 130-31 ([doc. 94-4](#)); Manlove Decl. Ex. 7, at 121 ([doc. 94-7](#)).

The evidence Graham relied on plainly demonstrates that, from the time protestors left Chapman Square, many were openly and consciously violating the law. Graham Decl. ¶ 13 ([doc. 89](#)); Manlove Decl. Ex. 7, at 121-23 ([doc. 94-7](#)); Michaelson Decl. ¶¶ 57, 63 & Ex. 40 ([doc. 96](#)); see also Manlove Decl. Ex. 9, at 56-59, 61 ([doc. 94-9](#)) (Garrison testifying that there were not very many people on the sidewalk but many people in the street, such that traffic was impeded).

In particular, the video evidence shows hundreds of individuals walking in unison in the street, some of whom were holding banners, and periodically chanting together – e.g. “Whose streets? Our Streets!” or “All police are bastards!” Hughes Decl. ¶¶ 8-11 & Exs. 45-48 ([doc. 90](#)); Manlove Decl. Exs. 23-24, 27 ([doc. 94](#)); Manlove Decl. Ex. 26 ([doc. 94-26](#)). OSP and PPB officers observed the group first-hand interfering with traffic; the front of the march evinced “a dozen persons wearing all black clothing, walking in the street,” immediately followed by “a group of people walking in the street holding a banner” and then “hundreds of people walking in the street.” Manlove Decl. Ex. 15, at 72 ([doc. 94-15](#)); Terry Decl. ¶ 14 ([doc. 100](#)). To the extent people were observed on the sidewalk, they “appeared . . . to be a part of the march” and officers understood, based on past experience, that protestors fluidly moved between the street and the

knowledge of all the facts necessary to give rise to reasonable suspicion or probable cause, directs or requests that another officer, not previously involved in the investigation, conduct a stop, search, or arrest.” [United States v. Ramirez](#), 473 F.3d 1026, 1032-33 (9th Cir. 2007) (citation and internal quotations omitted). As such, the fact that Graham remained in the EOC for the duration of the underlying events does not, in-and-of-itself, undermine the legitimacy of his decisions given the record before the Court.

sidewalk.¹⁷ Manlove Decl. Ex. 7, at 124 ([doc. 94-7](#)); Manlove Decl. Ex. 9, at 57 ([doc. 94-9](#)); Terry Decl. ¶ 14 ([doc. 100](#)); Suppl. Terry Decl. Exs. 65-66 ([doc. 125](#)).

Some of plaintiffs’ testimony similarly confirms that they joined marchers in the street in an effort to continue protesting, irrespective of vehicular traffic or public transportation, or the existence of a permit. Manlove Decl. Ex. 10, at 78, 86, 106 ([doc. 94-10](#)); Manlove Decl. Ex. 17A, at 73 ([doc. 94-17](#)); Manlove Decl. Ex. 22, at 73, 80-82 ([doc. 94-22](#)). Notably, the video and other evidence suggests that plaintiffs and other protestors knew that they did not have permission to walk in the streets. See, e.g., Manlove Decl. Exs. 23-24, 27 ([doc. 94](#)); Terry Decl. ¶ 15 ([doc. 100](#)). Prior to and during the earlier parts of the protests, PPB gave explicit instructions about what conduct would not be allowed and/or subject to arrest, including unpermitted street marches. Dale Decl. ¶¶ 4-13 & Ex. 1 ([doc. 86](#)); Niiya Decl. ¶¶ 6-9 ([doc. 97](#)).

Plaintiffs nonetheless intimate that PPB played a part in “funnel[ing]” individuals into the street or that protestors were, in fact, lawfully dispersing at the time of their detention. See, e.g., Wilker Decl. Ex. E, at 92-93 ([doc. 87-5](#)); Manlove Decl. Ex. 10, at 65-66 ([doc. 94-10](#)); Manlove Decl. Ex. 25, at 63, 80, 93 ([doc. 94-25](#)); Nickolaus Decl. ¶ 9 ([doc. 115](#)); Garrison Decl. ¶ 4 ([doc. 116](#)); Whaley Decl. ¶ 6 ([doc. 117](#)); Haber Decl. ¶ 6 ([doc. 118](#)); see also Pls.’ Resp. to Mot. Summ. J. 22, 28 ([doc. 113](#)) (requisite intent under [Or. Rev. Stat. § 166.025\(1\)\(d\)](#) was lacking because “many, if not most or all, of the Class Plaintiffs who walked north on Fourth Avenue did so . . . with an intent to comply with the police’s instructions”). The unrefuted evidence reflects that police ordered protestors in Chapman and Lownsdale Squares to disperse to the north after the demonstrations occurring therein were declared an unlawful assembly. Dale Decl. ¶ 13 & Ex.

¹⁷ Based on the aforementioned facts, several officers testified that they believed individual reasonable suspicion existed in regard to the vast majority, if not all, of those detained. See, e.g., Wilker Decl. Ex. I, at 46 ([doc. 87-9](#)); Wilker Decl. Ex. J, at 33 ([doc. 87-10](#)).

1 ([doc. 86](#)). As Lee denoted, “a lawful dispersal requires immediately leaving the area, and do so in compliance with all traffic rules and regulations.” Lee Decl. ¶ 8 ([doc. 91](#)); see also Manlove Decl. Ex. 28, at 126 ([doc. 94-28](#)) (Santos testifying that “the sidewalks were not blocked, so, I mean, anybody could just leave the area lawfully”).

No serious argument can be made that plaintiffs reasonably believed that walking in the street (first west up Southwest Salmon Street – in contravention of police orders to disperse to the north – and finally north down Southwest 4th Avenue once they encountered a police blockage on Southwest Fifth Avenue) was permitted or consented to merely because the police attempted to divert a large and raucous crowd away from both the waterfront (wherein Rose Parade festivities were occurring) and the other lawful protests. Graham Decl. Ex. 3, at 2 ([doc. 89-3](#)); Manlove Decl. Ex. 7, at 101, 117 ([doc. 94-7](#)).

Indeed, the majority of plaintiffs testified that they were never instructed to walk in the street, and Garrison and Nickolaus indicated that they could have dispersed from the park via the sidewalk at any point. Manlove Decl. Ex. 9, at 60, 62-63 ([doc. 94-7](#)); Manlove Decl. Ex. 10, at 70, 76 ([doc. 94-10](#)); Manlove Decl. Ex. 17A, at 60-61 ([doc. 94-17](#)); Manlove Decl. Ex. 22, at 81 ([doc. 94-22](#)); Manlove Decl. Ex. 25, at 65-66, 78 ([doc. 94-25](#)). In addition, Nickolaus, Whaley, and Haber testified that they walked in the street intending to effectuate “civil disobedience” and the video evidence confirms their testimony. Manlove Decl. Ex. 17A, at 72 ([doc. 94-17](#)); Manlove Decl. Ex. 22, at 80 ([doc. 94-22](#)); Manlove Decl. Ex. 25, at 79 ([doc. 94-25](#)).

Nevertheless, plaintiffs are correct that PPB officers made “no effort to distinguish between” those potentially acting unlawfully and innocent bystanders before effectuating the detention. The Court is certainly troubled by defendants’ actions, in that the record raises serious questions concerning whether the detention was based on a reasonable suspicion surrounding the

march, as opposed to the events that transpired earlier at Chapman and Lownsdale Squares (namely, throwing dangerous objects at officers). Pls.’ Resp. to Mot. Summ. J. 4 ([doc. 113](#)); see also Wilker Decl. Ex. Z, at 9, 13 ([doc. 114-9](#)) (IPR Report finding there was “no record of a dispersal order or warning being given at Southwest 4th and Morrison” and “little documentation by the [PPB] describing the evidence supporting officers’ reasonable suspicion of disorderly conduct prior to the mass detention,” given the lack of “videos or reports showing that marchers obstructed vehicles or pedestrians or any other elements required by the disorderly conduct statute”).

However, given the undisputed evidence of record, defendants are nonetheless entitled to qualified immunity given the totality of the circumstances. See Carr, 587 F.3d at 408-09 (rejecting plaintiffs’ contention that “the police could not lawfully complete the mass arrest without first ordering the crowd to disperse and then giving plaintiffs an opportunity to comply” and further denoting that “[p]olice witnesses must only be able to form a reasonable belief that the entire crowd is acting as a unit . . . A requirement that the officers verify that each and every member of a crowd engaged in a specific riotous act would be practically impossible”); see also Dist. of Columbia v. Wesby, 138 S.Ct. 577, 588 (2018) (lower court erred by not “considering the facts as a whole [and instead taking] them one by one,” and “dismiss[ing] outright any circumstances that were susceptible of innocent explanation”) (citations and internal quotations omitted).

That is, Graham, at a minimum, reasonably but mistakenly could have believed that reasonable suspicion existed to detain the group present on Southwest 4th Avenue for parading without a permit or disorderly conduct considering: (1) the boisterous and rapidly evolving events on the day in question; (2) law enforcements’ past experience with marchers; (3) the sheer

number of people involved (rendering it logistically impossible for officers to stop those directly observed in the street on an individual basis); and (4) other evidence tending to show that those detained were behaving as a unit, irrespective of whether all detainees actually were. See Lyall, 807 F.3d at 1195 (“[i]f a group or crowd of people is behaving as a unit and it is not possible (as it was in Ybarra) for the police to tell who is armed and dangerous or engaging in criminal acts and who is not, the police can have reasonable suspicion as to the members of the group”); see also Illinois v. Gates, 462 U.S. 213, 243 n.13 (1983) (probable cause “requires only a probability or substantial chance of criminal activity, not an actual showing of such activity,” such that even “innocent behavior [can] provide the basis for a showing of probable cause”). By extension, it was objectively reasonable for Lee, McDaniel, Santos, and Lindsey to believe that Graham had reasonable suspicion to issue the detention order based on the circumstances described herein.

Critically, plaintiffs have not cited to any authority even arguably indicating that defendants were on fair notice that their actions violated a clearly established law and the weight of relevant, persuasive authority is to the contrary. See Bernini, 665 F.3d at 1004-05 (granting qualified immunity to police officers in regard to innocent bystanders who “became intermingled [with unlawful protestors acting as a unit and who] were ultimately detained or arrested” as part of a kettle of approximately 400 people in a park); Burbridge v. City of St. Louis, 430 F.Supp.3d 595, 610-11 (E.D. Mo. Dec. 20, 2019) (granting qualified immunity on an unreasonable seizure claim where the plaintiffs, as media members, were present in the vicinity of a group of protestors in the street who had previously been dispersed from an unlawful assembly); see also Garcia v. Does, 779 F.3d 84, 96 (2015) (“[w]hether or not a suspect ultimately turns out to have a defense, or even whether a reasonable officer might have some idea that such a defense could exist, is not the question. An officer still has probable cause to arrest, and certainly is entitled to

qualified immunity, so long as any such defense rests on facts that are so unclear, or a legal theory that is not so clearly established, that it cannot be said that any reasonable officer would understand that an arrest under the circumstances would be unlawful”) (internal citations omitted).

Finally, it is undisputed that Graham’s detention decision was premised, at least in part, on the legal advice he obtained from the City Attorney and Multnomah County Deputy District Attorney, who were present for consultation in the EOC and indicated that the detention could proceed lawfully for “blocking traffic.” Graham Decl. ¶¶ 8, 15, 17 ([doc. 89](#)); Lee Decl. ¶ 4 ([doc. 91](#)); Manlove Decl. Ex. 4, at 151-52 ([doc. 94-4](#)); Manlove Decl. Ex. 36A, at 99-101 ([doc. 94-36](#)); see also [Ewing v. City of Stockton](#), 588 F.3d 1218, 1231 (9th Cir. 2009) (“[a]lthough following an attorney’s advice does not automatically cloak officers with qualified immunity, it can show the reasonableness of the action taken”) (citations and internal quotations and brackets omitted). In sum, the Court cannot find that it would have been clear to an officer confronting an analogous situation in 2017 that his or her actions were “plainly incompetent or [a knowing violation of] the law.” [Malley v. Briggs](#), 475 U.S. 335, 341 (1986). Therefore, the individual officers are entitled to qualified immunity and defendants’ motion should be granted.

RECOMMENDATION

For the reasons stated herein, defendants’ Motion for Summary Judgment ([doc. 84](#)) should be granted and plaintiffs’ Partial Motion for Summary Judgment ([doc. 85](#)) should be denied. The parties’ requests for oral argument should be denied as unnecessary. Judgment should be prepared dismissing this case.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate

Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determination of the Magistrate Judge will be considered as a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to this recommendation.

DATED this 4th day of December, 2020.

/s/ Jolie A. Russo
Jolie A. Russo
United States Magistrate Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 20-cv-1616-RBJ

AGAZI ABAY,
GABRIEL THORN,
AMY SCHNEIDER, and
MICHAEL McDANIEL, on behalf of themselves
and other similarly situated individuals,

Plaintiffs,

v.

CITY AND COUNTY OF DENVER,

Defendant.

STIPULATION

The parties agree and stipulate during the pendency of this litigation to the following:

1. The requirements of C.R.S. § 24-31-905(1)(a-c) regarding law enforcement action in response to protests are effective as of June 19, 2020. As provided therein:
 - (1) In response to a protest or demonstration, the Denver Police Department and any person acting on behalf of DPD shall not:
 - a. discharge Kinetic Impact Projectiles (“KIPs”) and all other non- or less-lethal projectiles in a manner that targets the head, pelvis, or back;
 - b. discharge KIPs indiscriminately into a crowd;
 - c. use chemical agents or irritants, including pepper spray and tear gas, prior to issuing an order to disperse in a sufficient manner to ensure the order is heard and

repeated if necessary, followed by sufficient time and space to allow compliance with the order.

2. In addition to the requirements of C.R.S. § 24-31-905, Denver agrees:
 - a. DPD will not use chemical agents or KIPs unless an on-scene supervisor at the rank of Sergeant or above specifically authorizes such use of force in response to specific acts of violence or destruction of property that the Sergeant has personally witnessed or learned about from a fellow officer, absent exigent circumstances. Exigent circumstances include but are not limited to situations where the Sergeant could not be immediately present and delay would be unreasonable.
 - b. All officers deployed to the demonstrations or engaged in the demonstrations must have their body-worn cameras recording any and all acts of confrontation between police officers and others. Officers shall not intentionally obstruct the camera or recording.
3. Non-Denver officers shall not use any weapon beyond what Denver itself authorizes for its own officers. All non-Denver officers shall comply with Colorado law regarding the use of force and responses to protests or demonstrations.

On behalf of the Plaintiffs:

s/ Ross Ziev

Ross Ziev, Esq.
Help in Colorado, Ross Ziev, PC
Email: ross@helpincolorado.com

On behalf of the City and County of Denver:

s/Melanie Lewis

Melanie Lewis, Assistant City Attorney
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THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF 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,

Defendant.

No. 2:20-cv-00887-RAJ

**ORDER GRANTING
STIPULATED CLARIFICATION
OF PRELIMINARY INJUNCTION**

The Parties, Plaintiffs Black Lives Matter Seattle-King County, Abie Ekenezar, Sharon Sakamoto, Muraco Kyashna-Tocha, Alexander Woldeab, Nathalie Graham, and Alexandra Chen (“Plaintiffs”) and Defendant, City of Seattle (“the City”) hereby stipulate to and propose the following, subject to approval by the Court:

FINDINGS

1. On June 12, 2020, the Court granted Plaintiffs' motion for a temporary restraining order enjoining the City from using chemical irritants and projectiles against peaceful protesters. *See* ECF 34.

2. The temporary restraining order enjoined the City from "employing chemical irritants or projectiles of any kind against persons peacefully engaging in protests or demonstrations." ECF 34 ¶ 1. It noted that individual officers could take "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" but that chemical irritants and projectiles could not be "deployed indiscriminately into a crowd" and, "to the extent reasonably possible, they should be targeted at the specific imminent threat" justifying their deployment. *Id.*

3. On June 17, 2020, the parties stipulated to a preliminary injunction with terms identical to the TRO extending the injunction through September 30, 2020. *See* ECF 42. The Court entered the agreed preliminary injunction.

4. On June 26, 2020, the Seattle City Council passed Ordinance 119805 banning the crowd control irritants at issue in this suit ("the CCW Ordinance").

5. In the evening of Friday, July 24, 2020, the Honorable James Robart granted an emergency motion by the Department of Justice to temporarily enjoin implementation of Ordinance 119805 until it could be reviewed under the terms of the consent decree entered in *United States v. City of Seattle*, No. 12-cv-01282-JLR (W.D. Wash). In granting the DOJ's motion for a TRO, Judge Robart identified that this Court's order "is the current *status quo*" with respect to crowd control weapons "and remains in effect." ECF 630, *United States v. City of Seattle*, No. 12-cv-01282-JLR (W.D. Wash).

6. The parties agree to **AMEND** the preliminary injunction (ECF 42) to include the following terms:

1 1. The City of Seattle, including the Seattle Police Department and any other officers,
2 departments, agencies, or organizations under the Seattle Police Department's control
3 (collectively, "the City"), are enjoined from:

- 4 a. Using chemical irritants or projectiles of any kind to re-route a protest, unless such
5 re-routing is necessary to prevent specific imminent threat of physical harm to
6 themselves or identifiable others, or to respond to specific acts of violence or
7 destruction of property;
- 8 b. Using chemical irritants or projectiles of any kind without, when feasible, first
9 issuing a warning that is reasonably calculated to alert attendees in the area where
10 the weapons are to be deployed and allowing them reasonable time, space, and
11 opportunity under the circumstances to leave the area;
- 12 c. Targeting with chemical irritants or projectiles any individual displaying clear
13 indicia as a Journalist or Legal Observer, as defined in sections 2 and 3, below,
14 respectively, at such time(s) as the individual is acting lawfully and in a capacity
15 such that the City knows or reasonably should know of their status. However,
16 incidental exposure of these individuals which is related to allowable uses of these
17 tools is not enjoined.

18 2. To facilitate the City's identification of Journalists protected under this
19 Order, the term "Journalist" shall be synonymous with "news media" defined as
20 follows: (a) Any newspaper, magazine or other periodical, book publisher, news
21 agency, wire service, radio or television station or network, cable or satellite station
22 or network, or audio or audiovisual production company, or any entity that is in the
23 regular business of news gathering and disseminating news or information to the
24 public by any means, including, but not limited to, print, broadcast, photographic,
25 mechanical, internet, or electronic distribution; (b) Any person who is or has been an
26 employee, agent, or independent contractor of any entity listed in (a) above, who is or

1 has been engaged in bona fide news gathering for such entity, and who obtained or
2 prepared the news or information that is sought while serving in that capacity; or (c)
3 Any parent, subsidiary, or affiliate of the entities listed in (a) or (b). The following
4 shall be considered indicia of being a Journalist: visual identification as a member of
5 the press, such as by displaying a professional or authorized press pass or wearing a
6 professional or authorized press badge or some distinctive clothing that identifies the
7 wearer as a member of the press. The City shall not be liable for unintentional
8 violations of this Order in the case of an individual who does not carry a press pass or
9 wear a press badge or distinctive clothing that identifies the wearer as a member of
10 the press.

- 11 3. To facilitate the City's identification of Legal Observers protected under this Order,
12 the following shall be considered indicia of being a Legal Observer: wearing a green
13 National Lawyers' Guild issued or authorized Legal Observer hat and/or vest (a green
14 NLG hat and/or black vest with green labels) or wearing a blue ACLU issued or
15 authorized Legal Observer vest.
- 16 4. At such time(s) as they are acting lawfully and in a capacity such that the City knows
17 or reasonably should know of their status, individuals with medical training who are
18 actively providing medical assistance will be classified as "Medics" and will
19 generally fall under the protections available under this Order to peaceful protesters.
20 The following shall be considered identifying garb of Medics under this Order:
21 wearing a blue or white vest or hat with the word "Medic" clearly displayed on the
22 vest or hat or wearing medical scrubs (typically blue). The City shall not be liable for
23 unintentional violations of this Order in the case of an individual who is not wearing
24 the identifying garb of Medics or not acting in the capacity of a Medic as described in
25 this Order.
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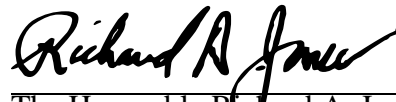
- 1 5. The City shall not be liable for violating this Court's Preliminary Injunction (ECF 42)
2 or the provisions of this Order if blast balls are used for reasons consistent with this
3 Order or the Court's Preliminary Injunction but directed to an open space near the
4 target individual(s) rather than at individuals.
- 5 6. The City shall ensure that a copy of this order is distributed via an ALL SPD e-mail
6 to every Seattle Police Department officer within 24 hours of the issuance of this
7 Order and certify to the Court that it has done so.
- 8 7. Declaring a protest to be an unlawful assembly or a riot does not exempt the City
9 from its obligation to comply with this Order, where individual officers may take
10 necessary, reasonable, proportional, and targeted action to protect against a specific
11 imminent threat of physical harm to themselves or identifiable others or to respond to
12 specific acts of violence or destruction of property. To the extent that chemical
13 irritants or projectiles are used in accordance with this paragraph, they shall not be
14 deployed indiscriminately into a crowd and to the extent reasonably possible, they
15 should be targeted at the specific imminent threat of physical harm to themselves or
16 identifiable others or to respond to specific acts of violence or destruction of property.
- 17 8. These provisions clarify the terms of this Court's Preliminary Injunction (ECF 42)
18 and are hereby added to that Preliminary Injunction, the entirety of which remains
19 fully in effect. To the extent that there is any apparent conflict between this Order and
20 the Preliminary Injunction (ECF 42), the terms of this Order shall govern.
- 21 9. The parties further agree to stay all proceedings in this case, including case deadlines
22 and all discovery, pending the review by the court in *United States v. City of Seattle*
23 of the CCW Ordinance's validity and effect. The stay in this case will expire when
24 Judge Robart issues an order with such ruling; within 24 hours of such order being
25 issued the parties will jointly advise this Court of it. The parties further agree that the
26 Preliminary Injunction, as amended by this Order, shall remain in effect for 90 days

1 after the stay in this case is lifted, unless otherwise vacated by the Court. Either party
2 may move to amend or vacate the preliminary injunction after the stay is lifted.

3 10. The Stay does not affect Plaintiffs' ability to seek enforcement of the preliminary
4 injunction, as amended by this Order.

5 11. Plaintiffs' Motion for Order to Show Cause is DISMISSED WITHOUT
6 PREJUDICE, and the evidentiary hearing scheduled for August 26, 2020, is vacated.

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8 IT IS SO ORDERED by the Court this 10th day of August, 2020.

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11 The Honorable Richard A. Jones
12 United States District Judge
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANTI POLICE-TERROR PROJECT, et al.,

Plaintiffs,

v.

CITY OF OAKLAND, et al.,

Defendants.

Case No. 20-cv-03866-JCS

PRELIMINARY INJUNCTION

Re: Dkt. No. 13

Having considered the arguments and evidence submitted by the parties in connection with the pending motion for a preliminary injunction, the parties' agreement that a preliminary injunction may issue and their agreement as to some of the terms of that injunction, and for the reasons that will be set forth in a written order to follow the issuance of the instant Order, the Court enters the following preliminary injunction. This Order provides that certain crowd control tactics and munitions shall not be used except in very limited circumstances. This Order should not be read as permission to use these tactics and munitions. The Court in this Order does not conclude that the use of these tactics and munitions in the limited circumstances addressed below is either lawful or advisable. Indeed, uses of force in specific instances, even if such force is not expressly prohibited by this Order, may or may not be lawful depending upon the circumstances at the time and existing precedent. The Court does not address that question at this time. The Court only determines that use of these crowd control techniques outside of the limited circumstances listed herein will be prohibited during the pendency of this action. As recognized in the Oakland Police Department's ("OPD") Crowd Control Policy, it remains incumbent upon OPD to "uphold the 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."

It is hereby ORDERED that, unless and until this Order is modified or vacated by the Court, Defendants City of Oakland (“the City”), OPD, Police Chief Susan E. Manheimer, and all officers and employees of OPD, shall comply with the following restrictions during protests and demonstrations in Oakland:

I. TRAINING BULLETIN III-G

Except as modified in this order, OPD shall adhere to Training Bulletin III-G, OPD Crowd Control and Crowd Management (2013), attached as Exhibit A.

II. BADGES

Each OPD officer shall 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.

III. BODY CAMERAS

All OPD officers shall utilize their Personal Digital Recording Device (“PDRD”) in accordance with DGO I-15.1, Portable Video Management System. In addition, all OPD officers deployed to demonstrations in Oakland shall have their PDRDs activated and recording at all times while engaged in active policing activities. They shall also have their PDRDs activated and recording when ordered to do so by a supervisor or commander.

IV. POLICE VEHICLES AND MOTORCYCLES

Motorcycles and police vehicles may not be used for crowd dispersal but may be used for purposes of observation, visible deterrence, traffic control, transportation, and area control during a crowd event.

V. TACTICS AND LESS LETHAL MUNITIONS

1. OPD officers are prohibited from using stinger grenades, wooden bullets, rubber or rubber-coated bullets, pepper balls, or similar munitions.
2. Chemical agents (including orthochlorobenzalmalononitrile), flashbang grenades, and foam-tipped projectiles shall be deployed only when (a) there is an imminent threat of physical harm to a person or significant destruction of property; and (b) other techniques, such as simultaneous arrests or police formations, have failed or are not reasonably likely

to mitigate the threat. The use of such munitions must be authorized by an OPD Operations Commander or Incident Commander. None of these devices shall be deployed on peaceful protestors or indiscriminately into a crowd. They may only be targeted at the specific imminent threat justifying the deployment. Flash bang grenades and gas canisters must be deployed at a safe distance from the crowd to minimize the risk that individuals will be struck and injured by those devices. When chemical agents are used, only the minimum amount of chemical agent necessary to obtain compliance may be used, in accordance with OPD's Department General Order K-3, USE OF FORCE.

3. Except where an immediate risk to public safety or of significant property damage makes it impossible to do so, before any of the devices listed in Section V(2) are deployed to disburse a crowd, OPD must have made at least two announcements to the crowd asking members of the crowd to voluntarily disperse and informing them that, if they do not disperse, they will be subject to arrest. These announcements must be made using adequate sound amplification equipment in a manner that will ensure that they are audible to the crowd and must identify at least two means of escape/egress. OPD must also allow the crowd sufficient time to disperse after making these announcements before deploying any of the devices in Section V(2).

VI. MUTUAL AID

The OPD Incident Commander shall be responsible for ensuring that the requirements listed below are met by mutual aid agencies providing assistance to OPD under a mutual aid agreement, unless exigent circumstances prevent the fulfillment of these obligations:

- i. The Incident Commander shall ensure that the mutual aid agency has been briefed and is 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;
- ii. The Incident Commander shall ensure that the mutual aid agency has been briefed on OPD's policy on prohibited weapons and force;
- iii. The Incident Commander shall ensure that the officers of the mutual aid agency who

1 provide assistance to OPD do not bring or use any weapons or force prohibited under
2 OPD's policy;

3 iv. The Incident Commander shall ensure that the mutual aid agency has been provided a
4 copy of OPD's Crowd Control Policy and Use of Force policies;

5 v. The Incident Commander shall ensure that officers of the mutual aid agency who
6 provide assistance to OPD are not assigned to front-line positions or used for crowd
7 intervention, control or dispersal unless there is a public safety emergency;

8 vi. The Incident Commander shall ensure that the officers of the mutual aid agency who
9 provide assistance to OPD complete required reports prior to being released from duty.

10 Agencies should provide the following documents/reports when they are applicable: Use of
11 force report, arrest report, crime report, injury report, equipment damage report and list of
12 responding personnel.

13 These provisions do not prohibit an OPD or mutual aid officer from taking reasonable action or
14 using reasonable or necessary force as allowed by law against an individual in self-defense or in
15 defense of another person or officer. OPD personnel shall endeavor to assume front line positions
16 between mutual aid officers and demonstrators.

17 **VII. TRAINING**

18 By November 1, 2020, OPD shall conduct a special training session for OPD Incident
19 Commanders, Operations Commanders, and Tango Team members concerning Training Bulletin
20 III-G and this agreement. Plaintiffs' counsel may attend this training session. Further, Plaintiffs'
21 counsel may conduct part of the training subject to scope and time parameters agreed to in
22 advance by the parties.

23 **VIII. FACE MASKS AND GLOVES**

24 During the pendency of the state of emergency declared by either the President of the
25 United States, or the Governor of the State of California, due to the COVID-19 pandemic, all OPD
26 officers and employees deployed to demonstrations in Oakland must wear face masks and gloves
27 whenever they interact with members of the public.
28

IX. AFTER-ACTION REPORT

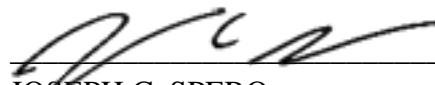
Subject to protective orders in this case, the Federal Rules of Civil Procedure, and the Federal Rules of Evidence, the City shall produce the After-Action Report on the subject protests — occurring from May 29, 2020 through June 1, 2020 —within 30 days of the entry of this Order.

X. ENFORCEMENT

If Plaintiffs contend that OPD violates Training Bulletin III-G or any of this Order's provisions at a future protest or demonstration, Plaintiffs may request a hearing to seek relief, including a modification of this Order. Unless the parties agree to a different briefing schedule, Defendants will have seventy-two hours to respond to Plaintiffs' request.

IT IS SO ORDERED.

Dated: July 29, 2020



JOSEPH C. SPERO
Chief Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF 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

ORDER

HERNÁNDEZ, District Judge:

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.

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.

¶ 8; Kruszewski Decl. ¶ 9; Khalsa Decl. ¶ 13.² But they also offer evidence that, in certain incidents, officers fired cannisters 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 protestors attempting to comply with officers’ orders to leave the areas at issue. Wilbanks Decl. ¶¶ 14, 15; Bezdek Decl. ¶¶ 20, 23.

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 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 *Stuhlbarg Int’l Sales Co., Inc. v. John D. Brushy & 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

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>.

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’n 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 (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 (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. 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. 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.*

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 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 (1971). Organized political protest is a form of “classically political speech.” *Boos v. Barry*, 485 U.S. 312, 318 (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. “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 (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 (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 (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”).

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.

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 (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 Cuiello 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.

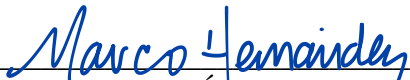
This order will expire in 14 days unless extended, superseded, or vacated by a subsequent order. Plaintiffs are not required to post security.

CONCLUSION

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

IT IS SO ORDERED.

Dated: June 9, 2020.



MARCO A. HERNÁNDEZ
United States District Judge

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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

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, MICHELLE "MISHA" BELDEN, in an individual capacity and on behalf of themselves and all others similarly situated, ALEXANDRA JOHNSON, in an individual capacity and on behalf of themselves and all others similarly situated,

PLAINTIFFS,

v.

CITY OF PORTLAND, a municipal corporation, and MULTNOMAH COUNTY, a political subdivision of the State,

DEFENDANTS.

3:20-cv-00917-HZ

**STIPULATED ADDITIONAL
TEMPORARY RESTRAINING ORDER**

The parties hereby jointly stipulate to the following modification to the Temporary Restraining Order entered by this Court on June 9, 2020 (Dkt# 29), and extended through July 24, 2020 (Dkt #34)

PPB is restricted in using the following munitions in connection with crowd control as follows:

(1) FN303s and 40MM less lethal launchers with or without OC payload are limited to use as outlined in PPB Use of Force Directive 1010, and in addition shall not be used where people engaged in passive resistance are likely to be subjected to the force.

(2) Rubber Ball Distraction Devices (“RBDD”) shall be limited to use as outlined in PPB Use of Force Directive 1010. In addition, use of RBDD shall be limited to situations in which the lives or safety of the public or the police are at risk and shall not be used to disperse crowds where there is no or little risk of injury.

(3) Aerosol restraints (handheld OC or “pepper spray”) shall not be used against persons engaged in passive resistance, and consistent with PPB Use of Force Directive 1010, members shall minimize exposure to non-targeted persons.

(4) Long Range Acoustical Devices (“LRAD”) shall be prohibited for use as a warning signal or distraction tactic and shall be used for announcements only.

“Passive resistance” as used above means a person’s non-cooperation with a member that does not involve violence or other active conduct by the individual.

This order shall remain in effect until July 24, 2020 or until the Court orders otherwise, or by agreement of the parties.

So stipulated:

/s/ J. Ashlee Albies

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Juan C. Chavez, Alex Meggitt, Jesse
Alan Merrithew, Brittney Plessner,
Viktoria Safarian and Whitney Stark
Attorneys for Plaintiffs

/s/ J. Scott Moede

J. Scott Moede
Naomi Sheffield
Robert Yamachika

Attorneys for Defendant City of Portland

The Court adopts the above Stipulated Additional Temporary Restraining Order in this action.

IT IS SO ORDERED.

DATED: June 26, 2020



Honorable Marco A. Hernandez

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

**INDEX NEWSPAPERS LLC d/b/a
PORTLAND MERCURY; DOUG
BROWN; BRIAN CONLEY; SAM
GEHRKE; MATHIEU LEWIS-ROLLAND;
KAT MAHONEY; SERGIO OLMOS;
JOHN RUDOFF; ALEX MILAN TRACY;
TUCK WOODSTOCK; JUSTIN YAU; and
those similarly situated,**

Plaintiffs,

v.

**CITY OF PORTLAND; JOHN DOES 1-60;
U.S. DEPARTMENT OF HOMELAND
SECURITY; and U.S. MARSHALS
SERVICE,**

Defendants.

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

**OPINION AND ORDER GRANTING
PRELIMINARY INJUNCTION
AGAINST FEDERAL DEFENDANTS**

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Michael H. Simon, District Judge.

“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). “When wrongdoing is underway, officials have great incentive to blindfold the watchful eyes of the Fourth Estate.” *Id.* at 900. “The free press is the guardian of the public interest, and the independent judiciary is the guardian of the free press.” *Id.* This lawsuit tests whether these principles are merely hollow words.

Plaintiffs Index Newspapers LLC doing business as Portland Mercury, Doug Brown, Brian Conley, Sam Gehrke, Mathieu Lewis-Rolland, Kat Mahoney, Sergio Olmos, John Rudoff, Alex Milan Tracy, Tuck Woodstock, and Justin Yau (collectively, “Plaintiffs”) bring this putative class action against: (1) the City of Portland (the “City”); (2) 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; (3) the U.S. Department of Homeland Security (“DHS”); and (4) the U.S. Marshals Service (“USMS”). The Court refers to DHS and USMS collectively as the “Federal Defendants.” Plaintiffs are journalists and authorized legal

observers. They 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 seek declaratory and injunctive relief and money damages.

Before the Court is Plaintiffs' motion for preliminary injunction against the Federal Defendants. Plaintiffs allege that agents of the Federal Defendants from around the United States, specially deployed to Portland, Oregon to protect the federal courthouse, have repeatedly targeted and used physical force against journalists and authorized legal observers who have been documenting the daily Black Lives Matter protests in this city. These federal agents include special tactical units from U.S. Customs and Border Protection under the U.S. Department of Homeland Security ("BORTAC") and other special tactical units from the U.S. Marshals Service under the U.S. Department of Justice ("Special Operations Group" or "SOG").

Although these federal agents are highly trained in some areas of law enforcement, Plaintiffs contend that neither these agents nor their commanders have any special training or experience in civilian crowd control. Plaintiffs allege that some of these officers have intentionally targeted and used physical force and other forms of intimidation against journalists and authorized legal observers for the purpose of preventing or deterring them from observing and reporting on unreasonably aggressive treatment of lawful protesters. In response, the Federal Defendants argue that they are merely protecting the federal courthouse and its personnel from potential or actual violence and that any interference with protected First Amendment activity is merely incidental.

The Ninth Circuit has stated:

Demonstrations can be expected when the government acts in highly controversial ways, or other events occur that excite or arouse the passions of the citizenry. The more controversial the occurrence, the more likely people are to demonstrate. Some of

these demonstrations may become violent. The courts have held that 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.

Collins v. Jordan, 110 F.3d 1363, 1372 (9th Cir. 1996) (citation omitted). Here, the actions of the Federal Defendants, or at least some of their officers, prevent, deter, or otherwise chill the constitutionally protected newsgathering, documenting, and observing work of journalists and authorized legal observers, who peacefully stand or walk on city streets and sidewalks during a protest. As further explained by the Ninth Circuit in *Collins*:

It has been clearly established since time immemorial that city streets and sidewalks are public fora. Restrictions on First Amendment activities in public fora are subject to a particularly high degree of scrutiny.

Id. at 1371 (citations and quotation marks omitted).

The Federal Defendants also argue that Plaintiffs are seeking special protections for journalists and legal observers under the First Amendment but that journalists and legal observers are entitled to no greater rights than those afforded to the public generally. In support, the Federal Defendants cite *Branzburg v. Hayes*, 408 U.S. 665, 680-82 (1972), which held that although the First Amendment protects news gathering, it does not provide a reporter's privilege against testifying before a grand jury. In that case, the Supreme Court noted: "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Id.* at 684; *see also Cal. First Amendment Coal. v. Calderon*, 150 F.3d 976, 981 (9th Cir. 1998) (same). The Federal

Defendants argue, in essence, that Plaintiffs’ requested preliminary injunction violates the traditional “nondiscrimination” interpretation of the First Amendment’s Press Clause.¹

At first glance, one might think that the journalists and legal observers here are seeking protection against having to comply with an otherwise lawful order to disperse from city streets after a riot has been declared, when the public generally does not have that protection. When local law enforcement lawfully declares a riot and orders people to disperse from city streets, generally they must comply or risk arrest. The question of whether journalists have any greater rights than the public generally, however, is not actually presented in the pending motion for preliminary injunction. That is because the *Federal Defendants* are not asserting that *they* have the legal authority to declare a riot and order persons to disperse from the city streets in Portland; nor does the authority they cite for their presence and actions in Portland so provide.² It is only

¹ This traditional interpretation may be undergoing a reevaluation. *See, e.g.*, Sonja R. West, *Favoring the Press*, 106 CAL. L. REV. 91, 94 (2018) (“The nondiscrimination view of the Press Clause is deeply flawed for the simple reason that the press is different and has always been recognized as such.”). “Barring the government from recognizing the differences between press and non-press speakers threatens to undermine the vital role of the Fourth Estate.” *Id.* (footnote omitted). “It is, therefore, entirely in keeping with the text, history, and spirit of the First Amendment’s Press Clause for the government to, at times, treat press speakers differently.” *Id.* at 95. “Rather than lump the press together with other speakers, the Supreme Court has historically done just the opposite.” *Id.*

² The Federal Defendants cite 40 U.S.C. § 1315 and its implementing regulations. That statute authorizes DHS to “protect the buildings, grounds, and property that are owned, occupied, or secured by the Federal Government.” § 1315(a). The governing regulations prohibit, as relevant here: (1) disorderly conduct for persons “entering in or on Federal property,” 41 C.F.R. § 102-74.390; (2) persons “entering in or on Federal property” from improperly disposing of rubbish on property, willfully damaging property, creating a hazard on property, or throwing articles at a building or climbing on any part of a building, 41 C.F.R. § 102-74.380; and (3) requiring that “[p]ersons in and on property” must obey “the lawful direction of federal police officers and other authorized individuals.” 41 C.F.R. § 102-74.385. This latter regulation, although not specifically stating on “federal” property, has been construed as including this requirement, that the persons be on federal property. *See United States v. Baldwin*, 745 F.3d 1027, 1029 (10th Cir. 2014) (then-Circuit Judge, now Justice Gorsuch) (“The first says ‘[p]ersons in and on [Federal] property must at all times comply . . . with the lawful direction of Federal police officers and other authorized individuals.’” (alterations in original) (quoting 41

state and local law enforcement that may lawfully issue an order declaring a riot or unlawful assembly on city streets. That is simply part of a state or city's traditional police power.

Here, Plaintiffs and the City have already *stipulated* to a preliminary injunction that provides that the Portland Police will not arrest any journalist or authorized legal observer for failing to obey a lawful order to disperse. Thus, the question of whether an otherwise peaceful and law-abiding journalist or authorized legal observer has a First Amendment right not to disperse when faced with a general dispersal order issued by state or local authorities does not arise in this motion.³

C.F.R. § 102-74.385); *see also United States v. Estrada-Iglesias*, 425 F. Supp. 3d 1265, 1270 (D. Nev. 2019). Thus, 40 U.S.C. § 1315 and its regulations give federal officers broad authority *on federal property*. They do not, however, give federal officers broad authority *off federal property*. The authority granted off federal property is limited—to perform authorized duties “outside the property to the extent necessary to protect the property and persons on the property.” § 1315(b)(1). These authorized duties include enforcing federal laws (which as relevant here are laws limited to persons on federal property), making arrests if federal crimes are committed in the presence of an officer, and conducting investigations on and off the property for crimes against the property or persons on the property. § 1315(b)(2). None of these powers include declaring a riot or an unlawful assembly on the streets of Portland, closing the streets of Portland, or otherwise dispersing people off the streets of Portland (versus dispersing people off federal property).

The Federal Defendants appear to acknowledge this limitation in their powers. DHS Operation Diligent Valor commander Gabriel Russell states in his declaration that in response to violent protests, Federal Protective Services (“FPS”) officers warned protesters to “stay off federal property,” used tear gas to “push protesters back from the [federal] courthouse,” contacted the PPB who were about to declare an unlawful assembly, the Portland Police “arrived and closed all roads in the vicinity of the facilities[,] . . . declared an unlawful assembly and began making arrests for failure to disperse,” and the FPS only “made dispersal orders on federal property and cleared persons refusing to comply with these orders.” ECF 67-1 at 2. He also testified at deposition that generally FPS does not have authority to enforce a dispersal order against an unlawful assembly on Fourth Street, one block from the federal courthouse. ECF 136-1 at 22 (63:12-18). The Federal Defendants also cite to statutes and regulations that authorize the USMS to protect federal courthouses and other federal property, including 28 U.S.C. § 566(a), 28 U.S.C. § 566(i), 28 C.F.R. § 0.111(f). As with the statutes and regulations governing DHS’s authority, these authorities focus on federal property, not on city streets or state or local property.

³ Someday, a court may need to decide whether the First Amendment protects journalists and authorized legal observers, as distinct from the public generally, from having to comply with

Plaintiffs and the Federal Defendants have stipulated that an evidentiary hearing with live witness testimony is unnecessary and that the Court may base its decision on the written record and oral argument of counsel. For the reasons that follow, the Court GRANTS Plaintiffs’ motion for preliminary injunction against the Federal Defendants.

STANDARDS

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 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).

an otherwise lawful order to disperse from city streets when journalists and legal observers seek to observe, document, and report the conduct of law enforcement personnel; but today is not that day.

BACKGROUND

A. Procedural History

Plaintiffs filed their original Complaint against the City on June 28, 2020. On June 30th, Plaintiffs moved for a TRO. On July 2nd, the Court entered a TRO against the City. On July 14th, Plaintiffs moved to file a Second Amended Complaint (“SAC”), adding the Federal Defendants to this lawsuit. On July 16th, the Court entered a stipulated preliminary injunction against the City. On July 17th, the Court granted Plaintiffs’ motion to file the SAC. Later that day, Plaintiffs filed their SAC and moved for a TRO against the Federal Defendants, which the City supported shortly thereafter. On July 23rd, the Court granted Plaintiffs’ motion for a TRO against the Federal Defendants, including many of the same terms contained in the TRO and stipulated preliminary injunction entered against the City. The TRO against the Federal Defendants was set to expire by its own terms on August 6th. On July 28th, Plaintiffs moved for a finding of contempt and imposition of sanctions against the Federal Defendants, alleging several violations of the Court’s TRO. On July 30th the Federal Defendants moved for reconsideration of the TRO, requesting that it be dissolved. On July 31st the Court stayed briefing on Plaintiffs’ contempt motion. On August 4th, Plaintiffs moved to extend the TRO against the Federal Defendants for an additional 14 days. On August 6th, after finding good cause, the Court granted Plaintiffs’ motion and extended the TRO against the Federal Defendants through August 20th and denied the Federal Defendants’ motion for reconsideration.

B. Plaintiffs

Plaintiff Index Newspapers LLC doing business as Portland Mercury (“Portland Mercury”) is an alternative bi-weekly newspaper and media company. It was founded in 2000 and is based in Portland, Oregon. ECF 53, ¶ 21.

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; ECF 53, ¶¶ 22, 97; ECF 55, ¶ 2.

Plaintiff Brian Conley has been a journalist for twenty years and has trained journalists in video production across a dozen countries internationally. He founded Small World News, a documentary and media company dedicated to providing tools to journalists and citizens around the world to tell their own stories. ECF 53, ¶ 131.

Plaintiff Sam Gehrke has been a journalist for four years. He previously was on the staff of the *Willamette Week* as a contractor. He is now 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 for the purpose of documenting and reporting on them, and he wears a press pass from the *Willamette Week*. ECF 10, ¶¶ 1-3; ECF 53, ¶ 23.

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 contributor to *Eleven PDX* and listed on its masthead. After the Court issued its TRO directed against the City, he began wearing a shirt that said “PRESS” in block letters on both sides. He also wears a helmet that says “PRESS” on several sides, and placed reflective tape on his camera and wrist bands. ECF 12, ¶¶ 1-2; ECF 53 ¶ 24; ECF 77, ¶ 1, 3.

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 26, ¶ 3; ECF 75, ¶¶ 1-2.

Plaintiff Sergio Olmos has been a journalist since 2014, when he began covering protests in Hong Kong. He has worked for *InvestigateWest* and *Underscore Media Collaboration*, and as a freelancer. His work has been published in the *Portland Tribune*, *Willamette Week*, *Reveal: The Center for Investigative Reporting*, *Crosscut*, *The Columbian*, and *InvestigateWest*. He has attended the protests in Portland as a freelance journalist for the purpose of documenting and reporting on them. He wears a press badge and a Kevlar vest that says “PRESS” on both sides. He carries several cameras, including a film camera, in part so that it is unmistakable that he is present in a journalistic capacity as a member of the press. ECF 15, ¶¶ 1-3; ECF 53, ¶ 26.

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 two months for the purpose of documenting and reporting on them. Since this lawsuit began, he has been published in *Rolling Stone*, *The Nation*, and on the front page of the *New York Times*. 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 and vest that is clearly marked “PRESS.” ECF 17, ¶¶ 1-3; ECF 53, ¶ 27; ECF 59, ¶¶ 1, 3.

Plaintiff Alex Milan Tracy is a journalist with a master’s degree in photojournalism. His photographs have been published by CNN, ABC, CBS, *People Magazine*, *Mother Jones*, and *Slate*, among others. He has covered many of the recent protests in Portland over George Floyd

and police brutality. He carries a press badge and three cameras, and wears a helmet that is marked “PRESS” on the front and back. ECF 60, ¶¶ 1, 3.

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 have 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 wear a press pass from the *Portland Mercury* that states “MEDIA” in large block letters and a helmet that is marked “PRESS” on three sides. At all times during police-ordered dispersals, they hold a media badge over their head. ECF 23, ¶¶ 2-3; ECF 76, ¶¶ 1, 3.

Plaintiff Justin Yau is a student at the University of Portland studying communications with a focus on journalism. He previously served in the U.S. Army, where he was deployed to the Middle East. He has covered protests in Hong Kong and Portland. His work has been published in the *Daily Mail*, *Reuters*, *Yahoo! News*, *The Sun*, *Spectee* (a Japanese news outlet), and *msn.com*. He has attended the protests in Portland as a freelance and independent journalist for the purpose of documenting and reporting on them. He wears a neon yellow vest marked with reflective tape and a helmet that are marked “PRESS,” and carries his press pass around his neck. He carries a large camera, a camera gimbal (a device that allows a camera to smoothly rotate), and his cellphone for recording. ECF 56, ¶¶ 1-3.

C. Plaintiffs’ Alleged Harm

Plaintiffs and other declarants have provided numerous declarations describing events in which they assert that employees, agents, or officers of the Federal Defendants targeted journalists and legal observers and interfered with their ability to engage in First Amendment-protected activities. As discussed below, Plaintiffs provide many compelling examples in the record, some from before the Court entered the TRO against the Federal Defendants and some

after. The following are just several examples selected by the Court from the extensive evidence provided by Plaintiffs. There are more.

1. Before the TRO was Issued

On July 15, 2020, Plaintiff Justin Yau asserts that, while carrying photojournalist gear and wearing reflective, professional-looking clothing clearly identifying him as press, he was targeted by a federal agent and had a tear gas canister shot directly at him. ECF 56, ¶¶ 3-6. Two burning fragments of the canister hit him. *Id.* ¶ 6. At the time he was fired upon, he was taking pictures with his camera and recording with his cell phone while standing 40 feet away from protesters to make it clear that he was not part of the protests. *Id.* ¶ 5. Mr. Yau notes that from his experience covering protests in Hong Kong, “Even Hong Kong police, however, were generally conscientious about differentiating between press and protesters—as opposed to police and federal agents in Portland.” *Id.* ¶ 7.

Declarant Noah Berger has been a photojournalist for more than 25 years. ECF 72, ¶ 1. He has been published nationally and internationally, including for coverage of protests in San Francisco and Oakland. *Id.* On July 19, 2020, he covered the protests on assignment for the Associated Press. He notes that the response he has seen and documented from the federal agents in Portland is markedly different from even the most explosive protests he has covered. *Id.* ¶ 3. He carries two large professional cameras and two press passes. *Id.* He states that without any warning he was shot twice by federal agents using less lethal munitions. *Id.* ¶ 4. Later, as federal agents “rushed” an area he was photographing, he held up his press pass, identified himself as press, stated he was leaving, and moved away from the area. *Id.* ¶ 7. While holding his press pass and identifying himself as press, he was hit with a baton by one federal agent. *Id.* ¶ 8. Two others joined and surrounded him, and he was hit with batons three or four times. *Id.* One agent then deployed pepper spray against Mr. Berger from about one foot away. *Id.* ¶ 9. He was given no

warning. *Id.* ¶ 11. He states that he was not demonstrating or protesting, was leaving the area, and was clearly acting as a journalist. *Id.* ¶¶ 3, 11.

Late July 19th or early July 20th, Declarant Nathan Howard, a photojournalist who has been published in *Willamette Week*, *Mother Jones*, Bloomberg Images, Reuters, and the Associated Press, was covering the Portland protests. ECF 58, ¶¶ 1, 4. He was standing by other journalists, and no protesters, as federal agents went by. *Id.* ¶ 4. The nearest protester was a block away. *Id.* Mr. Howard held up his press pass and repeatedly identified himself as press. *Id.* ¶ 5. A federal agent stated words to the effect of “okay, okay, stay where you are, don’t come closer.” *Id.* ¶ 6. Mr. Howard states that another federal agent, who was standing immediately to the left of the agent who gave Mr. Howard the “okay,” aimed directly at Mr. Howard and fired at least two pepper balls at him at close range. *Id.* ¶ 7.

Declarant Jungho Kim is a photojournalist whose work has been published in the *San Francisco Chronicle* and *CalMatters*, among others. ECF 62, ¶ 1. He wears a neon yellow vest marked “PRESS” and a white helmet marked “PRESS” in the front and rear. *Id.* ¶ 2. He has covered protests in Hong Kong and California. He has experience with staying out of the way of officers and with distinguishing himself from a protester, such as by not chanting or participating in protest activity. *Id.* ¶ 3. He had never been shot at by authorities until covering the Portland protests on July 19, 2020. *Id.* During the protest, federal agents pushed protesters away from the area where Mr. Kim was recording. He was around 30 feet away from federal agents, standing still, taking pictures, with no one around him. *Id.* ¶¶ 5-7. He asserts that suddenly and without warning, he was shot in the chest just below his heart with a less lethal munition. *Id.* ¶ 7. Because he was wearing a ballistic vest, he was uninjured. He also witnessed, and photographed, federal agents firing munitions into a group of press and legal observers. *Id.* ¶ 9.

Declarant Nate Haberman-Ducey is a law student at Lewis and Clark Law School.

ECF 61, ¶ 1. He completed training with the National Lawyers Guild (“NLG”) and attended the protests several times as a legal observer. *Id.* He states that on July 19, 2020, while wearing his green, NLG-issued authorized legal observer hat, he was shot in the hand with a paint-marking round by a federal agent, while walking his bicycle through the park across from the federal courthouse. *Id.* ¶¶ 3-4. At the time, there were no other protestors or other people around Mr. Haberman-Ducey at whom the federal agent might have been aiming. *Id.* ¶ 5. The pain from injury to Mr. Haberman-Ducey’s right hand was so severe that he had to stop observing the protests and go to the emergency room, where doctors put his broken hand in a splint. *Id.* ¶¶ 7-8. He would like to keep observing the protests but is concerned that residue from tear gas fired by the federal agents will contaminate his splint, which he has to wear for four to six weeks. *Id.* ¶ 9.

Declarant Amy Katz is a photojournalist whose work has been published in the *Wall Street Journal*, the *New York Daily News*, the *Guardian*, *TIME*, *Mother Jones*, the *Independent*, the *New York Times*, and has been featured on Good Morning America and ABC News. ECF 117, ¶ 1. While covering the protests, she wears a hat and tank top marked with “PRESS” in bold letters and carries a camera with a telephoto lens. *Id.* ¶ 2. Early in the morning of July 21st, she was filming from the side while federal agents dispersed protestors. *Id.* ¶ 4-6. Several agents tried to disperse her, but she displayed her press pass and they left her alone. *Id.* ¶ 6. She asserts that a federal agent approached and motioned for her to disperse again a few minutes later. *Id.* ¶ 7. Ms. Katz again held up her press pass, but before she could process what was happening another agent fired pepper balls or similar munitions at her. *Id.* The first agent then dropped a tear gas grenade directly at her feet as Ms. Katz ran away, yelling that she was press. *Id.* She notes that there were no protestors the agents could have been aiming at because the protestors

had already dispersed. *Id.* ¶ 8. The effects of the tear gas forced her to stop reporting and return to her hotel. *Id.* ¶ 9. The next day her eyes and lips burned, sunlight hurt her eyes, her tongue was swollen, and she had diarrhea. *Id.*

Declarant Sarah Jeong is an attorney, a columnist for *The Verge*, and a contributing writer to the *New York Times* Opinion section. ECF 116, ¶ 1. She attended the protests solely as a journalist, wore her press badge, and wore a helmet with “PRESS” in black letters on a white background on three sides. *Id.* ¶ 4. On the night of July 21st, Ms. Jeong was covering the protests from the steps of the courthouse when federal agents emerged from the building and charged the crowd. *Id.* ¶ 5. Ms. Jeong walked slowly backward, holding her press pass up in one hand and her phone in the other. *Id.* ¶ 6. With no warning and for no apparent reason, a federal agent shoved Ms. Jeong so forcefully that both her feet left the ground. *Id.* ¶ 7. She kept reporting that night but left much earlier than she had planned. *Id.* ¶ 8. Although she plans to keep covering the protests, she is fearful for her safety. *Id.*

Declarant James Comstock is a legal observer with the NLG. ECF 63, ¶ 1. On July 19th, a few minutes before midnight, he was watching the protests from the park across the street from the protests. *Id.* ¶ 2-3. He was wearing the standard NLG-issued green hat provided to legal observers. *Id.* ¶ 2. As protestors started to push the fence, he put on his gas mask and started to move away from the courthouse because he did not want to get tear gassed. *Id.* ¶ 3. He stopped on the opposite side of 4th Avenue, about 375 feet away from the front door of the courthouse. *Id.* He went to speak to a press member standing on the intersection of SW 4th and Main. *Id.* ¶ 4. After finishing his conversation with the press member, Mr. Comstock was standing in the same location alone with his back up against the wall. *Id.* Without warning, a federal agent shot Mr. Comstock in the hand with an impact munition while he was making notes on his phone. *Id.* ¶ 5.

There were no protestors around and he was at least 6 feet from the reporter with whom he had just been speaking. *Id.* ¶ 6. Mr. Comstock states that he would like to keep attending the protests as a legal observer but that he is afraid of injury and fearful that he will be wrongfully arrested, endangering his job as a criminal defense investigator. *Id.* ¶¶ 8-9.

Early morning on July 22nd, Plaintiff Alex Milan Tracy was standing in the street and filming a group of federal officers who were standing on the sidewalk in front of the courthouse. ECF 74, *Id.* ¶ 4. Two of the officers from that group waved their batons at him and gestured for him to move back. *Id.* He retreated, and one of the officers briefly charged at him. Mr. Tracy then moved back farther into the middle of the street. *Id.* A few minutes later, he was filming the same group of federal officers from the same spot in the middle of the street. *Id.* ¶ 6. Agents from that same group raised their weapons and launched a flashbang at Mr. Tracy and another journalist, hitting them both. *Id.* ¶ 7. Mr. Tracy continued documenting the scene but finally left because the federal officers kept looking and pointing directly at him. *Id.* ¶¶ 7, 10. He was “genuinely terrified” of standing in front of the federal officers. *Id.* ¶ 10.

2. After the TRO was Issued

Plaintiff Brian Conley has worked in war zones such as Iraq, Afghanistan, Libya, and Burundi. ECF 87, ¶ 1. He also has covered protests for many years in places such as Beijing, New York, Washington, D.C., Miami, Quebec City, and Oaxaca, Mexico. *Id.* He has encountered agents of the Federal Defendants in Portland on multiple days. At all times he was wearing a photographer’s vest with “PRESS” written on it and a helmet that said “PRESS” in large block letters across the front. *Id.* ¶ 2. He was also carrying a large camera with an attached LED light and telephoto lens. *Id.*

Early in the morning of July 24th, Mr. Conley filmed federal agents seizing a woman who was dancing with flowers in front of the officers. *Id.* ¶ 3-4. At that point, the crowd was

mostly press and a few individual protestors. *Id.* ¶ 3. Federal agents launched tear gas into the streets, and Mr. Conley yelled that he was press to avoid being further tear gassed. *Id.* ¶ 6. Mr. Conley was then shot with impact munitions in the chest and foot. *Id.* ¶ 7. Video of this event shows that the situation grew tense as a protester attempted to interfere with the agents’ seizure of the woman. As the agents finalized the seizure of the woman and the interfering protester and retreated into the federal courthouse with the woman and the interfering protester, they laid sweeping cover fire into the remaining crowd, which included Mr. Conley and other press members, even though no protester was near Mr. Conley at the time. After the officers were safely within the building, Mr. Conley continued recording. The video shows that Mr. Conley was outside next to another photographer. A medic and his protector were behind a shield on one side several yards away and a protester yelling taunts was on the other side several yards away. As Mr. Conley was filming, a federal agent on the other side of the courthouse fence shone a bright light at Mr. Conley. Shortly thereafter, without warning, a federal agent shot a tear gas canister above Mr. Conley’s head. Mr. Conley also describes this in his declaration. *Id.* ¶ 9.

Mr. Conley took the next two nights off and returned to cover the protests the night of July 27th. *Id.* ¶¶ 17, 18. He was documenting a line of federal agents advancing on a group of six protestors with shields who were standing behind him. *Id.* ¶ 18. He yelled that he was press, but the federal agents unleashed a barrage of munitions at him. *Id.* ¶ 19. He moved to the side, away from the protestors, and continued to yell that he was press. *Id.* ¶ 20. The federal agents briefly stopped firing, one shone a flashlight at him, and resumed fire directly at him, striking him multiple times—although by this point there was nobody else near him. *Id.* Another federal agent threw a flashbang grenade directly at him. *Id.* Mr. Conley could “barely walk” after the events of July 27-28. *Id.* ¶ 25.

Mr. Conley was covering the protests again just before midnight on July 29th. ECF 115, ¶ 4. He had replaced the “PRESS” lettering on his helmet because the concussion and flashbang grenades thrown at him the night before had blown off one of the letters. *Id.* ¶ 2. He was filming federal agents on SW Salmon Street between SW 2nd and SW 3rd Avenue. *Id.* ¶ 4. There was one other photographer between him and the small group of agents. *Id.* One of the agents shone a light on Mr. Conley and fired a munition just beside him. *Id.* Another federal agent with an assault rifle approached Mr. Conley and told him to stay on the sidewalk. *Id.* ¶ 5. Later that night, without warning, federal agents pepper sprayed Mr. Conley at point blank range. *Id.* ¶ 6. Video of this event shows that while Mr. Conley was filming a line of federal officers moving down the street pepper spraying peaceful protesters, including spraying a woman in the face at point blank range who was on her knees with her hands up in the middle of the street, an officer pepper sprayed Mr. Conley at point blank range along with indiscriminately pepper spraying other press and the protesters. Mr. Conley states that he fears for his safety but plans to keep covering the protests because he believes “it is critically important to do so.” *Id.* ¶ 11.

Declarant Amy Katz again covered the protests on the early morning of July 27th. ECF 117, ¶ 10. She witnessed a federal agent push a man down a flight of stairs while arresting him and photographed the incident. *Id.* An agent physically blocked her and tried to stop her from photographing the arrest. *Id.* When she stepped to the side to get another angle, the federal agent physically shoved her away. *Id.* Later that night, she approached a group of federal officers with a group of press, all of whom had their press badges up and their hands in the air. *Id.* ¶ 12. The video of this event shows that many of the group were calling out “press.” Ms. Katz describes that she and the group of press were at least 75 feet away from most of the protestors when federal agents bombarded their group with munitions, hitting her in the side and causing a

large contusion. *Id.* The video shows the group of press moving together off to the far side of the sidewalk, holding their passes up along with cameras, shouting press and saying “hold your passes up.” The group is moving toward the federal officers, recording events, when they are fired upon with various munitions. Ms. Katz stopped covering the Portland protests after that incident because of how the federal agents treated her. *Id.* ¶ 15.

Declarant Rebecca Ellis is a staff reporter for Oregon Public Broadcasting (“OPB”). ECF 88, ¶ 1. She attended the protests the night of July 23rd wearing her OPB press pass, which shows her name, her photograph, and the OPB logo. *Id.* ¶ 2-3. Around 1:30 a.m. she was in a small group of press members filming federal agents exiting the federal courthouse. *Id.* ¶ 3. One agent fired a munition directly at her, hitting her in the hand. *Id.* Video of this incident shows that she is hit when agents advance in a group and fire multiple munitions. Ms. Ellis appears to be in the middle of the street when she is hit. There are also persons crossing in front of Ms. Ellis, who appear also to be press, at the time she is shot. It is unclear who is behind her when she is hit. Ten minutes later, however, federal agents forced her and other press to disperse from near the courthouse. *Id.* ¶ 5. One agent walked towards them shouting “MOVE, MOVE” and “WALK FASTER” in their faces while another agent kept pace next to him, holding his gun. *Id.* Video of this dispersal shows that it is directed at press, in an intimidating manner, despite a press person stating, “You can’t do that.” The video does not seem to support that the press were in the way or otherwise impeding law enforcement actions. Ms. Ellis states that the federal agents prevented her from doing her job and reporting on what was going on behind them. She intends to keep covering the protests but is fearful for her safety. *Id.* ¶ 6.

Declarant Kathryn Elsesser is a freelance photographer whose photographs of the Portland protests have been published by Bloomberg, CBS News, and Yahoo, among others,

including many international publications. ECF 89, ¶ 1. She covered the protests the night of July 24th on assignment from a French news agency. *Id.* ¶ 2. She carried a large camera, wore a press pass from the American Society of Media Photographers, and wore a helmet with “PRESS” written in big letters across the front. *Id.* Around 2 a.m. on July 25th, Ms. Elsesser decided to end her coverage early because she did not have a bullet-proof vest and was afraid federal agents would hurt her. *Id.* ¶ 4. She was standing by herself, across the street from the courthouse, at the edge of the park. *Id.* There was nobody else near her. *Id.* A federal agent shot her in the arm with an impact munition as she was walking away. *Id.* ¶ 5. She believes that the federal agents targeted her because she was taking photographs. *Id.* ¶ 6. Ms. Elsesser states that she would refuse to cover the protests again unless she had a bullet-proof vest because she is afraid that federal agents will injure her or worse. *Id.* ¶ 13.

Declarant Emily Molli is a freelance photojournalist whose photographs have been published in the *New York Times*, the *Wall Street Journal*, the *Guardian*, *ProPublica*, and others. ECF 118, ¶ 1. She is experienced in covering civil unrest, riots, and other dangerous situations. She has reported on the protests in Hong Kong over the course of six months, the “Yellow Vests” in France over the course of a year, the Catalan independence movement, and the protests and riots in Greece. *Id.* ¶ 2. She understands the risk of getting hit by less lethal munitions while standing with protesters, but she objects to federal officers targeting press, which she states she has witnessed happening in Portland. *Id.* She wears a helmet with “PRESS” in big block letters and carries two press passes and a large professional-grade video camera. *Id.* ¶ 3. Early in the morning of July 27, 2020, after getting shot and injured when she had been approximately 75 yards from protesters, Ms. Molli decided to stick with a group of only journalists. *Id.* ¶¶ 7-8. The video of this event shows that they were holding their press passes up, mostly staying together as

a group, and staying toward the side of a street that appears otherwise empty. Federal officers fired munitions at the group of journalists. *Id.* ¶ 8. On July 29, 2020 and into the early morning of July 30th, Ms. Molli recorded another encounter between journalists and federal officers on SW Main Street. *Id.* ¶ 10. Video of this event shows that there were numerous law enforcement personnel, several journalists, and no protesters on that section of the street. Journalists are taking pictures and video of a tear gas canister that had been fired by federal agents when a federal agent fires another tear gas round at the journalists. Ms. Molli intends to keep covering the protests, but she fears for her safety because she has seen the federal agents disobey a court order. *Id.* ¶ 11.

Declarant Daniel Hollis is a videographer for VICE News. ECF 91, ¶ 1. He has covered many chaotic and dangerous situations, including conflict zones in Iraq and Syria, former Taliban areas in Pakistan, child sex-trafficking raids in the Philippines, Iranian militias, gangs, mafia, domestic terrorism, and armed militias. *Id.* He covered the Portland protests for two nights. *Id.* ¶ 2. During the protests, he carried a VICE press pass and a helmet with “PRESS” on it in bright orange tape. *Id.* He also carried a large, professional video-recording camera. *Id.* On July 26th, Mr. Hollis was filming wide-angle footage of a mass of protestors in front of the courthouse. *Id.* ¶ 4. The people closest to him were press and legal observers—the nearest protestors were several yards behind him. *Id.* ¶ 7. He then turned to record a group of federal agents massed outside the courthouse. *Id.* ¶ 5. Almost immediately, the agents shot at him, striking him just to the left of his groin. *Id.* He turned to run away, and another munition hit him in the lower back. *Id.* ¶ 6. Video of this event shows that Mr. Hollis was positioned between the federal agents and those few protesters (not the mass of protesters who were around the building), but the video does not reflect any violent or riotous behavior by anyone near Mr.

Hollis. After the federal agents shot him, Mr. Hollis went back to his hotel. *Id.* ¶ 8. He states that he is more concerned for his personal safety than he was during the month he spent covering ISIS sleeper cells in Northern Syria. *Id.* ¶ 9. He states: “I have been around heavily armed soldiers, militias, and gangs countless times, but have never had weapons aimed or discharged directly at me. The federal agents I have seen in Portland have been less willing to distinguish between press and putative enemies than any armed combatants I have seen elsewhere.” *Id.*

Declarant Jonathan Levinson is an Oregon resident who lives in Portland. ECF 93, ¶ 1. He is a staff reporter for OPB. His work also has appeared on NPR and ESPN, and in the *Washington Post*, the *Wall Street Journal*, and *Al Jazeera*. *Id.* He has experience in conflict zones. He spent five years as an infantry officer in the U.S. Army, with two deployments to Iraq. *Id.* ¶ 2. As a reporter, he has covered the Libyan civil war and done work in Afghanistan, Yemen, Gaza, and the West Bank. *Id.* He has covered the Portland protests for a majority of the nights. When covering the protests, he wears his press pass issued by OPB, which contains his name, photograph, the OPB logo, and the word “MEDIA.” *Id.* ¶ 3. He also wears a helmet that says “PRESS” in large letters on the front and back and carries two professional cameras. *Id.* At around 1:00 a.m. on July 24th, the federal agents had cleared the area next to the courthouse so he decided to take pictures of the agents through the courthouse fence. *Id.* ¶ 4. There were very few protesters anywhere nearby. As he was trying to focus his professional camera, he could see a federal agent raise and aim his weapon and fire several rounds directly at Mr. Levinson. *Id.* ¶ 5. His camera and lens were covered in paint from the agent’s rounds. Mr. Levinson states that he intends to continue covering the protests because he believes they are of historic significance, but that he is fearful for his safety because within hours of the Court issuing its restraining order, he “saw federal agents brazenly violate it.” *Id.* ¶ 7.

D. Declarations of Plaintiffs' Expert Witness Gil Kerlikowske⁴

Plaintiffs submitted two declarations from Mr. Gil Kerlikowske, whom the Court finds to be a qualified, credible, and persuasive expert witness. ECF 135, 145. Mr. Kerlikowske is a former Commissioner of U.S. Customs and Border Protection, and he was confirmed by the U.S. Senate. Mr. Kerlikowske also served as the Chief of Police in Seattle, Washington from 2000 through 2009, and the Police Commissioner in Buffalo, New York. He has worked in law enforcement for 47 years. He served in the United States Army and Military Police from 1970 through 1972, where he began training in crowd control, riots, and civil disturbances. He also has served as the Director of the Office of National Drug Control Policy and as Deputy Director of the U.S. Department of Justice, Office of Community Oriented Policing Services. He has been an IOP Fellow at Harvard Kennedy School of Government and teaches as a distinguished visiting fellow and professor of the Practice in Criminology and Criminal Justice at Northeastern University. During his tenure as Chief of Police in Seattle, Mr. Kerlikowske led and orchestrated the policing of hundreds of large and potentially volatile protests, many of which were considerably larger than the recent protests in Portland. He did the same thing when he was Police Commissioner in Buffalo. Mr. Kerlikowske has had substantial training and experience with crowd control and civil unrest in the context of protests, use of force in that context, and use of force generally.

⁴ After oral argument, the Federal Defendants filed the Declaration of Chris A. Bishop, the "Acting Director/Deputy Director," for the U.S. Department of Homeland Security, U.S. Customs and Border Protection (CBP). ECF 152. The Federal Defendants offer this declaration as an expert rebuttal to the two declarations of Mr. Kerlikowske. Plaintiffs have moved to strike Mr. Bishop's declaration as untimely. ECF 154. The Court denies Plaintiffs' motion to strike. The Court finds the declaration of Mr. Kerlikowske to be more persuasive than the declaration of Mr. Bishop.

Plaintiffs asked Mr. Kerlikowske to evaluate whether the relief stated in the TRO against the Federal Defendants is both safe and workable from a law enforcement perspective, whether the force that federal authorities used against journalists and legal observer complainants was reasonable, and whether it is advisable to prominently mark federal agents with unique identifying letters or numbers. First, Mr. Kerlikowske opined that the prohibitions contained in the TRO are safe for law enforcement personnel. Defending the federal courthouse in Portland mainly involves establishing a perimeter around the building, and there is no reason to target or disperse journalists from that position. Additionally, to the extent officers leave federal property, the TRO is also safe for federal law enforcement officers, according to Mr. Kerlikowske.

Second, Mr. Kerlikowske stated his expert opinion that the TRO is workable. He states that trained and experienced law enforcement personnel are able to protect public safety without dispersing journalists and legal observers and can differentiate press from protesters, even in the heat of crowd control. He adds that any difficulties that may be faced by federal authorities arise from their lack of training, experience, and leadership with experience in civil disturbances and unrest.

Third, Mr. Kerlikowske explains that based on his review of the record evidence virtually all the injuries suffered by the complaining journalists were the result of improper use of force, including shooting people who were not engaged in threatening acts and misuse of crowd-control munitions by federal law enforcement personnel. For example, Mr. Kerlikowske opines that tear gas canisters and pepper balls should not be fired directly at people. He also opines that rubber bullets should not be shot above the waist, and certainly not near the head. He further opines that in these circumstances, it is inappropriate to shoot someone in the back because at that point they are not a threat.

Finally, Mr. Kerlikowske asserts that in his expert opinion a key duty and responsibility of law enforcement is to be properly and easily identifiable specific to the organization and the individual. He notes that if a decision is made to remove a name tag, it must be replaced with some other identifying label, badge, or shield number. Mr. Kerlikowske explains that such markings increase accountability and act as a check and deterrent against misconduct. He adds that camouflage uniforms are inappropriate for urban settings.

As noted, the Court finds Mr. Kerlikowske to be a well-qualified expert whose opinions are relevant, helpful, and persuasive.

E. The Situation Faced by Law Enforcement

After the killing of George Floyd on Memorial Day, there have been consistent protests against racial injustice and police brutality in Portland. ECF 67-1, Russell Decl. ¶ 3. The protesters generally are peaceful, particularly during the day and early evening. *See* ECF 113-3, Jones Decl. ¶ 7. Late at night, however, there are incidents of vandalism, destruction of property, looting, arson, and assault. ECF 67-1, ¶ 3. While protestors originally gathered outside the Justice Center (PPB headquarters), some protestors soon directed their attention to the Mark O. Hatfield Federal Courthouse, across the street from the Justice Center. After additional federal officers were deployed to Portland to support existing Federal Protective Service (“FPS”) and USMS personnel, the protests grew larger and more intense, and the federal courthouse became a focus of attention. *Id.* at ¶ 5.

In early July, a group of people broke the glass doors at the entryway of the federal courthouse. *Id.* Members of this group used accelerant and commercial fireworks in an apparent attempt to start a fire inside the courthouse. *Id.* On other nights in July, various objects were thrown at law enforcement, such as rocks, glass bottles, and frozen water bottles. *Id.* at ¶ 6; ECF 101-6, CBP NZ-1 Decl. ¶ 8. Assistant Director for the Tactical Operations Division of the

USMS Andrew Smith describes the environment of the protests as “extremely chaotic and dynamic” and emphasizes that law enforcement must make split-second decisions. ECF 101-1, Smith Decl., ¶ 6. A DHS Public Affairs Specialist identified as CBP PAO #1 states that he observed a person holding a Molotov cocktail. ECF 101-2, ¶ 7. Officers have had to extinguish fires and flaming debris, some of which has been thrown over the fence in officers’ direction. *See* ECF 106-1, Smith Am. Decl. ¶ 15; ECF 101-3, FPS No. 824 Decl. ¶ 5.

The situation has been dangerous for federal agents, in addition to protesters, journalists, and legal observers. Gabriel Russell, FPS Regional Director for Region 10 and commander of DHS’s Rapid Deployment force for Operation Diligent Valor in Portland, notes that as of his declaration submitted on July 29th, 120 federal officers had experienced some kind of injury, including broken bones, hearing damage, eye damage, a dislocated shoulder, sprains, strains and contusions. ECF 101-5, ¶ 4. The Patrol Agent in Charge of Customs and Border Protection, U.S. Border Patrol, identified as CBP NZ-1, describes agents being hit with rocks and ball bearings from sling shots, improvised explosives, commercial grade aerial fireworks, high intensity lasers targeting officer’s eyes, thrown rocks, full and empty glass bottles, frozen water bottles, and balloons filled with paint and feces. ECF 101-6, ¶ 8. He notes that one officer was hit by a projectile that caused a wound that required multiple stitches and one officer was struck in the head and shoulder by a protester wielding a sledgehammer when the officer tried to prevent the protester from breaking down the courthouse door. *Id.* Another federal officer states that he has suffered numerous injuries during the protests, including being struck in the shins by tear gas canisters, suffering temporary hearing loss from commercial fireworks, and suffering temporary blindness from lasers. ECF 101-3, FPS No. 824 Decl. ¶ 6. The Federal Defendants do not assert

that journalists or legal observers caused these injuries. *See, e.g.*, ECF 136-3 at 10-11, CBP NZ-1 Dep. Tr. 72:10-73:1.

The Federal Defendants, however, do assert that some persons wearing the indicia of press have engaged in violent or unlawful behavior. Mr. Smith states that USMS personnel witnessed a person with a helmet marked “press” use a grinder to attempt to breach the fence surrounding the courthouse. ECF 106-1, ¶ 10. Another person wearing a press helmet entered courthouse property, either by climbing the perimeter fence or crossing when the fence was breached. *Id.* ¶ 11. A different person with press clothing helped a protestor climb the perimeter fence. *Id.* at ¶ 14. Mr. Smith also received a report that a staff member was kicked by someone wearing clothing marked “press.” *Id.* at ¶ 15.

Mr. Russell submitted links to several videos purporting to show improper conduct by persons with indicia of press. ECF 101-5, ¶ 8. The Court reviewed those videos and did not find persuasive evidence of any wrongdoing related to persons wearing indicia of press with two exceptions. The first are the videos of Mr. Brandon Paape, who admits that he is not press but is wearing clothing marked “press” because he was assaulted by federal agents and hoped wearing clothing that indicates he is press would protect him from further violence. *Id.* ¶ 8(e), (f). The videos, however, do not provide evidence that Mr. Paape did anything unlawful. He masqueraded as press for personal protection. Additionally, shortly thereafter, he posted on Twitter that he will no longer wear indicia of press. *See* ECF 123 at 12. The videos of Mr. Paape do show, however, that persons other than actual journalists have worn indicia of press. The second is the video of a person wearing a “press” helmet who entered courthouse property and encouraged others to join. ECF 101-5, ¶ 8(h). He states: “They can’t arrest us all.” This, however, is the same person from Mr. Smith’s photograph, ECF 106-1 ¶ 11 (Exhibits B and C).

The Federal Defendants also provide additional declarations describing further conduct. A man wearing a vest stating “press” threw a hard object toward police. ECF 101-3, FPS No. 824 Decl., ¶ 5. Another such person shielded from police a woman who was shining strobe lights into the eyes of an officer. *Id.* One person with handwritten markings reading “PRESS” directed a powerful flashlight at a law enforcement helicopter overhead but was not filming or taking photos or notes. ECF 101-2, CBP PAO #1 Decl. ¶ 9. A photo of this man depicts him standing very close to another man holding a camera. *Id.* It is unclear if the man with the powerful light was lighting for the cameraman or was masquerading as press to use light as a law enforcement irritant. Another federal officer states that on one occasion he witnessed persons wearing press indicia shield other persons who were throwing objects at law enforcement. ECF 101-4, FPS No. 882 Decl. ¶ 5. Finally, CBP PAO #1 notes that people self-identified as press are frequently in the midst of crowds near individuals breaking laws, which makes it difficult to disperse protestors without dispersing journalists as well. ECF 101-2, ¶ 12. The Federal Defendants also consistently note that press intermingle with protesters and stand by (or perhaps record) when protesters engage in purportedly wrongful conduct.

DISCUSSION

A. Standing

The Federal Defendants argue that Plaintiffs do not have standing to request injunctive relief. The Federal Defendants concede that “the standing inquiry is focused on the filing of the lawsuit” but then assert that standing must be proven at “successive stages of the litigation” and make the same standing arguments that they made during the TRO. In issuing the Temporary Restraining Order Enjoining Federal Defendants, the Court rejected the Federal Defendants’ arguments regarding standing and found that Plaintiffs had Article III standing. *See Index Newspapers LLC v. City of Portland*, --- F.3d ---, 2020 WL 4220820, at *4-5 (D. Or. July 23,

2020). To the extent the Federal Defendants request reconsideration of that decision, arguing that based on facts as they existed at the time of the filing of the Complaint Plaintiffs do not have standing, reconsideration is denied.⁵ The Federal Defendants provide no compelling basis for the Court to modify its previous determination.

To the extent the Federal Defendants argue that Plaintiffs must continue to prove standing as this lawsuit continues and the facts evolve, the Federal Defendants misunderstand the doctrines of standing and mootness. Article III standing is evaluated by considering the facts as they existed at the time of the commencement of the action. *See Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (noting that “we have an obligation to assure ourselves that FOE had Article III standing at the outset of the litigation”); *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 838 (9th Cir. 2007) (“The existence of standing turns on the facts as they existed at the time the plaintiff filed the complaint.”).

Whether standing and the other requirements for a live case or controversy exists throughout the entirety of a case is considered under the doctrine of mootness. *See Barry v. Lyon*, 834 F.3d 706, 714 (6th Cir. 2016) (“To uphold the constitutional requirement that federal courts hear only active cases or controversies, as required by Article III, section 2 of the federal constitution, a plaintiff must have a personal interest at the commencement of the litigation (standing) that continues throughout the litigation (lack of mootness).”); *Vasquez v. Los Angeles*

⁵ The Federal Defendants offer no authority for the notion that this Court must repeatedly litigate the same issue. The Federal Defendants are bound by the “law of the case” doctrine for determinations made by this Court, absent reconsideration or changed circumstances such as if new Plaintiffs were added who the Federal Defendants contended did not have standing. At any appeal stage of this litigation, however, “the standing requirement therefore must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.” *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019) (simplified).

Cty., 487 F.3d 1246, 1253 (9th Cir. 2007) (noting that mootness is the doctrine under which courts ensure that “a live controversy [exists] at all stages of the litigation, not simply at the time plaintiff filed the complaint”); *Becker v. Fed. Election Comm’n*, 230 F.3d 381, 386 n.3 (1st Cir. 2000) (noting that *Lujan* “clearly indicat[es] that standing is to be ‘assessed under the facts existing when the complaint is filed’” and that evaluating standing thereafter “conflates questions of standing with questions of mootness: while it is true that a plaintiff must have a personal interest at stake throughout the litigation of a case, such interest is to be assessed under the rubric of standing at the commencement of the case, and under the rubric of mootness thereafter”); *McFalls v. Purdue*, 2018 WL 785866, at *8-10 (D. Or. Feb. 8, 2018) (discussing the difference between standing and mootness). Therefore, the Federal Defendants’ arguments that Plaintiffs must demonstrate standing at “all stages of the litigation,” fail to do so now, and thus fail to present a case or controversy are more appropriately raised under the doctrine of mootness, to which the Court now turns. *See, e.g., Barry*, 834 F.3d at 714; *Vasquez*, 487 F.3d at 1253; *Becker*, 230 F.3d at 386 n.3; *Tellis v. LeBlanc*, 2020 WL 1249378, at *5 (W.D. La. Mar. 13, 2020); *Rhone v. Med. Bus. Bureau, LLC*, 2019 WL 2568539, at *3 (N.D. Ill. June 21, 2019); *Fancaster, Inc. v. Comcast Corp.*, 2012 WL 815124, at *5 (D.N.J. Mar. 9, 2012).

B. Mootness

The Federal Defendants do not specifically argue that Plaintiffs’ claims are moot based on any new facts or circumstances. Because the Federal Defendants appear to argue that Plaintiffs now lack standing based on changed circumstances, the Court considers whether the Federal Defendants’ voluntary change in enforcement tactics moots Plaintiffs’ claims. The augmented force of federal enforcement officers currently remain in Portland, ready to deploy whenever ordered, but have recently deployed only in limited circumstances and have not

recently engaged in the crowd control tactics that supported the Court’s original TRO in this case.

For a short time, the Oregon State Police took the lead in enforcing crowd control in Portland. That appears to have ended, and the Portland Police have now resumed performing that role. The out-of-town agents and officers of the Federal Defendants who have been deployed to Portland, however, and whose actions were the basis of the Court’s TRO, remain in Portland. Further, they have no scheduled date of departure.

To determine mootness, “the question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be *any* effective relief.” *Nw. Env’tl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1244-45 (9th Cir. 1988) (emphasis in original) (quoting *Garcia v. Lawn*, 805 F.2d 1400, 1403 (9th Cir. 1986)). If a course of action is mostly completed but modifications can be made that could alleviate the harm suffered by the plaintiff’s injury, the issue is not moot. *Tyler v. Cuomo*, 236 F.3d 1124, 1137 (9th Cir. 2000). A case becomes moot “only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.” *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quotation marks omitted). The party alleging mootness bears a “heavy burden” to establish that a court can provide no effective relief. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (quoting *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006)).

Further, voluntary cessation of conduct moots a claim only in limited and narrow circumstances. As explained by the Supreme Court:

The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave the defendant free to return to his old ways. A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to

recur. Of course it is still open to appellees to show, on remand, that the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary. This is a matter for the trial judge. But this case is not technically moot, an appeal has been properly taken, and we have no choice but to decide it.

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 n.10 (1982) (simplified); *see also* *F.T.C. v. Affordable Media*, 179 F.3d 1228, 1238 (9th Cir. 1999) (“A case may become moot as a result of voluntary cessation of wrongful conduct only if ‘interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.’” (quoting *Lindquist v. Idaho State Bd. of Corr.*, 776 F.2d 851, 854 (9th Cir. 1985))). The Ninth Circuit has noted that “an executive action that is not governed by any clear or codified procedures cannot moot a claim.” *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015). The Ninth Circuit also advises courts to be “less inclined to find mootness where the new policy could be easily abandoned or altered in the future.” *Rosebrock v. Mathis*, 745 F.3d 963, 972 (9th Cir. 2014) (simplified).

The Federal Defendants’ voluntary change in enforcement tactics does not moot Plaintiffs’ claims. There remains effective relief that the Court can provide for Plaintiffs. Further, the change in enforcement tactics is not part of any clear or codified procedures. It could easily be abandoned or altered in the future. Indeed, the Federal Defendants have stated that they specifically intend to abandon or alter in the future the current posture and become actively involved again if local police do not perform in a manner acceptable to the Federal Defendants or are otherwise unable to secure the federal courthouse in Portland in a manner acceptable to the Federal Defendants.⁶ Whether this current and potentially temporary change in enforcement tactics affects Plaintiffs’ likelihood of irreparable harm is addressed in Section D.2 below.

⁶ *See, e.g.*, ECF 147-1 at 3 (USMS responding to a Request for Admission that it would no longer police Portland protests by stating: “USMS cannot know whether state law

C. Factors for Preliminary Injunctive Relief

1. Likelihood of Success on the Merits

Plaintiffs allege both First Amendment retaliation and a violation of their First Amendment right of access.⁷ Plaintiffs must show a likelihood of success on the merits (or at least substantial questions going to the merits) on at least one of these two claims. Plaintiffs satisfy this requirement.

a. First Amendment Retaliation

To establish a claim of First Amendment retaliation, Plaintiffs must show that: (1) they were engaged in a constitutionally protected activity; (2) the Federal Defendants' actions would chill a person of ordinary firmness from continuing to engage in the protected activity; and

enforcement efforts will continue or whether those efforts will sufficiently protect federal property” and providing a nearly identical response in denying a request for admission that USMS would not engage with journalists or legal observers at a Portland protest); ECF 147-2 at 3 (USMS responding to an interrogatory regarding its plans to remove the additional support personnel sent to Portland: “With respect to the withdrawal of additional personnel deployed to Portland, their withdrawal will depend on unknown future circumstances in Portland and presence of any threat to the federal judiciary or property.”); ECF 147-3 at 3 (DHS providing nearly identical responses to the similar Requests for Admission); ECF 147-4 at 4 (DHS responding that the “cessation of Operation Diligent Valor will depend on unknown future circumstances in Portland. . . . The other DHS officers and agents deployed to Portland to assist FPS in the protection of the Hatfield U.S. Courthouse and federal facilities in Portland will remain in Portland until the Department makes an operational security determination that their presence is no longer required to protect federal facilities there.”); ECF 147-4 at 3 (DHS affirming as truthful the statements in the press release filed with the Court in ECF 124-1, including the statement from Acting Secretary Chad Wolf that “the increased federal presence in Portland will remain until [DHS] is certain the federal property is safe and a change in posture will not hinder DHS’s Congressionally mandated duty to protect it. While the violence in Portland is much improved, the situation remains dynamic and volatile, with acts of violence still ongoing, and no determination of timetables for reduction of protective forces has yet been made. Evaluations remain ongoing.”).

⁷ Plaintiffs also allege claims under the Fourth Amendment and Oregon’s state Constitution, but did not argue those claims in their motion for preliminary injunction. Thus, the Court only considers Plaintiffs’ likelihood of success on their First Amendment claims.

(3) the protected activity was a substantial or motivating factor in the Federal Defendants' conduct. *Pinard v. Clatskanie Sch. Dist.* 6J, 467 F.3d 755, 770 (9th Cir. 2006). For the first factor, Plaintiffs have shown that they are engaged in constitutionally protected activity under the First Amendment. Plaintiffs are engaged in newsgathering, documenting, and recording government conduct. *See, e.g., Leigh*, 677 F.3d at 898 (recognizing First Amendment protection for "the press and public to observe government activities"); *United States v. Sherman*, 581 F.2d 1358, 1360 (9th Cir. 1978) (noting that the "ability to gather the news" is "clearly within the ambit of the First Amendment"). The Federal Defendants do not dispute this factor.

Regarding the second factor, the Federal Defendants argue that Plaintiffs' assertion that they intend to continue to cover the protests in Portland or that they have a continuing fear of future physical force or threat by the Federal Defendants is subjective and insufficient. The Court rejects that argument. The enforcement tactics of the Federal Defendants would chill a person of ordinary firmness from continuing to engage in the protected activity. "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). Before the TRO was in place, Plaintiffs submitted numerous declarations, photographs, and videos describing and depicting instances when journalists and legal observers were targeted. This includes Mr. Howard being shot at close range despite complying with a federal officer's order to stay where he was. It also includes Mr. Kim and Mr. Yau being shot when they were not near protesters. It further includes Mr. Berger being beaten with a baton.

The Court also has reviewed all of the testimony and videos submitted by Plaintiffs after the Court issued its TRO. Although some of that evidence is ambiguous or less persuasive, some

of it describes or shows conduct that appears to target journalists and legal observers, as opposed to incidentally or inadvertently reaching them as part of reasonable crowd control or enforcement against violent offenders. This evidence includes a federal officer forcing reporter Ms. Ellis to disperse on July 24, 2020 in a manner that would be intimidating to a reasonable person, despite the Court's TRO providing that press shall not be required to disperse. It also includes a federal officer spraying mace or pepper spray directly into the faces of clearly marked legal observers from only a few feet away. The evidence further includes a federal officer shooting a less lethal munition on July 23rd directly at Mr. Conley and another photographer, both clearly identifiable as press, after shining a bright light on them to identify them, and when the person nearest to them was a clearly identified medic standing behind a shield several feet away. It also includes video from Ms. Molli in the early morning of July 30, 2020, one week after the TRO was issued, showing law enforcement agents firing on a group of journalists when only other law enforcement agents were nearby.

The declarations submitted both before and after the TRO also describe that because of the Federal Defendants' conduct, journalists and legal observers were forced to stop newsgathering, documenting, and observing for minutes, hours, or days due to injury and trauma. This includes Mr. Haberman-Ducey being unable to observe due to his broken hand, Mr. Rudoff being unable to return for two days due to being shot in the leg, Mr. Conley having to take some time away because he could "barely walk" after his injuries, Ms. Elsesser stating that she would refuse further assignments in Portland unless she was provided with a bullet proof vest because of her injuries, Mr. Hollis leaving early after he was shot, and Ms. Jeong leaving earlier than she had planned.

Indeed, some journalists decided never to return because of fear for their personal safety. *See, e.g.*, ECF 81 at 4 (Mr. Steve Hickey stating: “I do not intend to continue covering the protests in Portland after tonight, in part because I am fearful that federal agents will injure me even more severely than they did on the night of July 19 and morning of July 20 when they intentionally shot at my face, twice, when I was not even near any protestors.”); ECF 117 at 5 (Ms. Katz stating: “Because of how federal agents treated me, I have stopped covering the Portland protests.”). Most of the declarants, however, emphasize that they intend to continue covering or observing the protests despite their fear of continued injury or targeting by the Federal Defendants. This fear is not unreasonable or speculative. Plaintiffs and the other declarants were repeatedly subject to violent encounters with federal officers when covering the Portland protests. It is not hypothetical or mere conjecture. Instead, it is likely that they and other journalists and legal observers will face such treatment again if they cover protests in Portland policed by agents of the Federal Defendants. Moreover, the mere threat of harm, without further action, can have a chilling effect. *Brodheim v. Cry*, 584 F.3d 1262, 1270 (9th Cir. 2009).

The Court recognizes that that there are some violent individuals at these protests, including some who throw dangerous items at law enforcement officers, such as rocks, frozen water bottles, fireworks, and Molotov cocktail-type devices. Law enforcement also face arson events, including in dumpsters and debris being piled and set on fire. The situation can be dangerous and difficult for law enforcement. The fact that there are some violent offenders, however, does not give the Federal Defendants carte blanche to attack journalists and legal observers and infringe their First Amendment rights. *See Black Lives Matter Seattle-King Cty. v. City of Seattle, Seattle Police Dep’t*, 2020 WL 3128299, at *3 (W.D. Wash. June 12, 2020). Further, many declarants note that they have covered protests in war zones around the world and

in areas with riotous protests such as Hong Kong, Oakland, and Seattle, and have never been subjected to the type of egregious and violent attacks by law enforcement personnel as they have suffered in Portland. If military and law enforcement personnel can engage around the world without attacking journalists, the Federal Defendants can respect Plaintiffs' First Amendment rights in Portland, Oregon.

In addition, the change in enforcement tactics does not serve to remove the chilling effect of the Federal Defendants' conduct for the same reason it does not moot Plaintiffs' claims. It is subject to change without notice and whenever the Federal Defendants assert that it is needed. It also has been the subject of conflicting public statements, which would not give a person of ordinary firmness confidence that the Federal Defendants are not poised and ready to return to the streets of Portland at any moment and to continue with the previous *modus operandi*.

Regarding the third factor, the Federal Defendants argue that Plaintiffs fail to show that any protected activity was a substantial or motivating factor in any purported conduct. The Federal Defendants assert that in every video submitted by Plaintiffs after the TRO went into effect, every journalist or authorized legal observer who was purportedly targeted was standing between law enforcement officers and protesters and sometimes also standing next to or behind protesters. Thus, argue the Federal Defendants, legal observers and journalists were not being intentionally targeted but merely were "inadvertently" hit. The Federal Defendants conclude that the circumstantial evidence does not support any retaliatory intent, and Plaintiffs have not shown a likelihood of success on the merits.

The Court reaches a different conclusion from the evidence. The issue is not as simple as whether a legal observer is standing "between" law enforcement personnel and protesters. For example, the Court's view of the two videos showing the pepper spray or mace attack on the

legal observers reveals that this evidence supports the finding that journalists or legal observers were targeted and not inadvertently hit. They were standing together along the fence protecting the courthouse. There may have been protesters at some point standing behind them, although not close behind them, based on the video. Thus, the journalists or legal observers may have been “between” the law enforcement at the fence and some set of protesters further back from the fence. But based on the video, it is clear that the pepper spray was not aimed at protesters standing further back from the fence. The spray appears to have been intentionally directed at close range into the faces and eyes of the journalists or legal observers.

Additionally, from the Court’s review, there are videos showing journalists not standing in between law enforcement and protesters, yet they also appear to have been targeted by agents of the Federal Defendants. For example, the video from Mr. Conley from July 24, 2020, from the time count of approximately 6:30 to 7:40, supports the finding that he was targeted. Federal agents fired on him when he was not near protesters, after he had repeatedly identified himself as press, after many federal officers had returned to the courthouse and were safe from the volatile situation of apprehending the woman and the man who had attempted to interfere with the woman’s apprehension, and after the pan of Mr. Conley’s camera showed that the nearest person was another photographer. The next two nearest people were yards away and were on one side a medic behind a shield and on the other side a single protester yelling taunts. A federal officer shone a bright light at Mr. Conley, making his and his neighboring photographer’s press status even more identifiable, and then fired at Mr. Conley.

The Court also finds it to be a reasonable interpretation⁸ that Ms. Ellis and another journalist were targeted when on July 24, 2020, they were forced to disperse, despite the TRO and their clearly identifiable status as press. Further, the Court finds that the video posted by Ms. Molli from early morning on July 30th supports a finding of targeting. This video shows journalists taking video and pictures of a munition that had been fired by federal officers. There were only a handful of journalists and many law enforcement officers, no protesters. Suddenly, one officer fired a less-lethal munition directly at the journalists recording the events.

Moreover, there are declarations that do not have video. The Federal Defendants do not address these. For example, Ms. Elsesser states that on July 25th she was standing by herself, across the street from the courthouse, with no protesters around when she was shot with a munition in the back of her arm. Ms. Katz states that on July 27th she was attempting to photograph the arrest of a protester when a federal agent physically blocked her. When she took a step to the side to get another angle, he physically shoved her away. These videos and declarations are all circumstantial evidence supporting retaliatory animus.

The Federal Defendants cite two unpublished Ninth Circuit decisions in support of their argument that in responding to some violent offenders in protesting crowds, any incidental burden on the First Amendment rights of journalists and legal observers is acceptable. These unpublished—and thus non-precedential—cases are unpersuasive. The Court follows published Ninth Circuit precedent, including *Collins*, which instructs that the proper response to violence is to arrest the violent offenders, not prophylactically suppress First Amendment rights. *See Collins*, 110 F.3d at 1372.

⁸ The Court makes no determination regarding clear and convincing evidence needed for a finding of contempt.

The Federal Defendants also argue that they have a formal policy of supporting First Amendment rights and contend that Plaintiffs fail to show otherwise. The Federal Defendants may not, however, hide behind a formal policy if in practice they do not conform to that policy. *See Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1075 n.10 (9th Cir. 2016) (en banc) (noting that a defendant cannot escape its “actual routine practices” by “pointing to a pristine set of policies”). At this stage of the litigation, the Court is persuaded by the number of alleged acts and the expert testimony of Mr. Kerlikowske that the conduct of the federal officers has not been reflective of a policy or practice of respecting First Amendment rights. Mr. Kerlikowske opines that the federal officers repeatedly have engaged in excessive force against journalists and legal observers, have not used appropriate crowd control tactics, and improperly have fired at the head, heart, and backs of journalists and legal observers when such conduct is generally not permitted. Even the Federal Defendants’ own witnesses have conceded that shooting persons in such a manner is inappropriate. *See, e.g.*, ECF 136-2 at 13, FPS 824 Dep. Tr. 34:14-21 (testifying that shooting a person in the back who is not doing anything violent is not appropriate); ECF 136-3 at 8, CBP NZ-1 Dep. Tr. 37:18-25 (testifying that shooting a person in the back is not something that an agent or officer should do). Mr. Kerlikowske also opines that the augmented federal force deployed in Portland does not have the appropriate training for policing urban protests and crowd control and does not have the appropriate supervision and leadership. The Court finds these opinions persuasive, and they provide further circumstantial evidence of retaliatory intent.

In sum, Plaintiffs provide substantial circumstantial evidence of retaliatory intent to show, at the minimum, serious questions going to the merits. Plaintiffs submit numerous declarations and other video evidence describing and showing situations in which the declarants

were identifiable as press, were not engaging in unlawful activity or even protesting, were not standing near protesters, and yet were subjected to violence by federal agents under circumstances that appear to indicate intentional targeting. Contrary to the Federal Defendants’ arguments, this evidence does not show that the force used on Plaintiffs was merely an “inadvertent” consequence of otherwise lawful crowd control. Also, Plaintiffs submit expert testimony opining about repeated instances of excessive force being used against journalists and legal observers and failures of training and leadership with the augmented federal force sent to Portland, which is further circumstantial evidence supporting Plaintiffs’ claim. Thus, Plaintiffs’ have shown the elements of First Amendment retaliation.

b. Right of Access to Public Streets and Sidewalks

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*, 408 U.S. at 681 (“[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.”).

As the Ninth Circuit has explained: “the Supreme Court has long recognized a qualified right of access for the press and public to observe government activities.” *Leigh*, 677 F.3d 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, 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, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 949 (1992) (alteration in original) (“[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.”)).

The Federal Defendants argue that journalists have no right to stay, observe, and document when the government “closes” public streets. This argument is not persuasive. First, the Federal Defendants are not the entities that “close” state and local public streets and parks; that is a local police function.⁹ Second, the point of a journalist observing and documenting government action is to record whether the “closing” of public streets (*e.g.*, declaring a riot) is lawfully originated and lawfully carried out. Without journalists and legal observers, there is only the government’s side of the story to explain why a “riot” was declared and the public streets were “closed” and whether law enforcement acted properly in effectuating that order. Third, the Federal Defendants have not shown that any journalist or legal observer has harmed any federal officer or damaged any federal property, and if any journalist, legal observer, or person masquerading as a journalist or legal observer were to attempt to do so, the preliminary injunction would not protect them. Thus, the stated need to protect federal property and the safety of federal officers is not directly affected by allowing journalists and legal observers to stay, observe, and record events.

The Federal Defendants argue that Plaintiffs improperly rely on *Press-Enterprise Co. v. Superior Court* (“*Press-Enterprise II*”), 478 U.S. 1 (1986), to articulate the standard to apply in

⁹ See n.2, *supra*.

evaluating likelihood of success in Plaintiffs’ claim of right of access. The Court rejects this argument.

In *Press-Enterprise II*, the Supreme Court established a two-part test for a claim of violation of the right of access. First, the court must determine whether a right of access attaches to the government proceeding or activity by considering whether the place and process have historically been open to the press and general public and 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, sidewalks, and parks historically have been open to the press and general public,¹⁰ and public observation of law enforcement activities in these public fora plays a significant positive role in ensuring conduct remains consistent with the Constitution.

The Federal Defendants argue that they have a strong and overriding government interest in protecting federal property. The Court agrees that protecting federal property is a strong

¹⁰ The Federal Defendants argue that the proper question is whether there historically was access after the closure order that is at issue—the unlawful assembly declaration and dispersal order. The Court disagrees that access is evaluated after the closure that is challenged. Access is considered before the closure that is challenged to determine whether the closure is unduly burdening First Amendment rights. For example, the Supreme Court in *Press-Enterprises II* did not evaluate whether the press and public had access to preliminary criminal proceedings that were subject to a legitimate closure order, but whether they had access to preliminary criminal proceedings generally. 478 U.S. at 10. Even if the Federal Defendants’ assertion of how to frame the first question in *Press-Enterprises II* is correct, however, as noted above, it is not at issue in this motion because the City previously has stipulated that even after it has declared an unlawful assembly and issued a lawful dispersal order on state and local property, journalists and authorized legal observers may remain.

government interest, but the Federal Defendants must craft a narrowly tailored response to achieve that government interest without unreasonably burdening First Amendment rights. The Federal Defendants simply assert that dispersing everyone is as narrowly tailored as possible and to allow anyone to stay after a dispersal order is not practicable or workable. The record, however, belies this assertion.

The City, by stipulated preliminary injunction, does not require journalists and authorized legal observers to disperse, even when there has been an otherwise lawful general order of dispersal. After issuing the first TRO directed against the City, the Court specifically invited the City to move for amendment or modification if the original TRO was not working or to address any problems at the preliminary injunction phase. Instead, the City *stipulated* to a preliminary injunction that was nearly identical to the original TRO, with the addition of a clause relating to seized property. The fact that the City did not ask for any modification and then stipulated to a preliminary injunction is compelling evidence that exempting journalists and legal observers is workable.¹¹ Moreover, the City supports Plaintiffs' request for an injunction against the Federal Defendants, both the TRO and this preliminary injunction. Additionally, as discussed previously, Plaintiffs' expert witness Mr. Kerlikowske provides qualified, relevant, and persuasive testimony

¹¹ At oral argument, counsel for the City noted that the City might request from Plaintiffs a possible modification to the stipulated preliminary injunction. The City noted it had encountered some issues with persons with "press" markings intermingling with protesters and interfering with law enforcement. The Federal Defendants argue that this is "proof" that the preliminary injunction is "unworkable." Whether the City might request a modification at some point in the future, however, is not evidence of unworkability. Additionally, the City's stipulated preliminary injunction does not contain the indicia of journalists and legal observers that they "stay to the side" and not intermix with protesters, which is included in the preliminary injunction below, and does not contain the express prohibition on press and legal observers impeding, blocking, or interfering with law enforcement activities, which also is included below. Further, the fact that there might be room for improvement of a preliminary injunction does not make it unworkable. The Court is mindful not to let the perfect be the enemy of the good.

showing that the relief provided in the TRO against the Federal Defendants is workable. He also explains that during his tenure in Seattle, law enforcement did not target or disperse journalists and there were no adverse consequences. Numerous declarants also testified that they were not dispersed during protests in other locations. Thus, it is workable and feasible to disperse protesters generally but not require the dispersal of journalists and authorized legal observers. The Federal Defendants' blanket assertion that federal officers must disperse everyone is rejected.

Further, the Federal Defendants' objections to the workability of the TRO primarily focus on concerns regarding when journalists and legal observers "intermingle" with protesters. The first concern is that federal officers will violate the injunction if a journalist or legal observer is subject to crowd control tactics when mixed with the crowd. The preliminary injunction contains protections for this scenario. It adds, different from the TRO, the indicia of a journalist and legal observer that they stay to the side of the protest and not intermix with protesters. It also retains the protection for law enforcement that the incidental exposure of journalists and legal observers to crowd control devices is not a violation of the injunction.

The Federal Defendants' second concern with the intermingling of journalists and legal observers and protesters is that journalists and legal observers may interfere with law enforcement, particularly if allowed to stay after dispersal order. The preliminary injunction, however, retains the TRO's instruction that journalists and legal observers must comply with all laws other than general dispersal orders. For further clarity, the preliminary injunction expressly adds the provision that journalists and legal observers may not impede, block, or otherwise interfere with the lawful conduct of the federal officers.

The Federal Defendants also express concern that persons may disguise themselves as press and commit violent or illegal acts. The preliminary injunction, however, does not protect anyone who commits an unlawful act. The Federal Defendants have the same authority to arrest or otherwise engage with persons who commit unlawful acts, regardless of their clothing. Moreover, most of this concern expressed by the Federal Defendants focuses on persons self-identifying as press who are mixed with protesters or interfering with law enforcement. The preliminary injunction's addition of the indicia of press as staying to the side and not intermixing with protesters and express prohibition on interfering with law enforcement further addresses this concern. Further, Mr. Kerlikowske's declarations containing his expert opinions are persuasive in discounting this possibility.

The Federal Defendants also argue that requiring federal officers to wear larger unique identifying markings is not workable and is not connected to Plaintiffs' claims in this case. The Federal Defendants assert that such markings will interfere with an officer's ability to reach necessary equipment and are unnecessary because most officers already wear some unique identifying number somewhere on their uniform. The Federal Defendants were unable, however, to identify specific officers from videos when asked to do so by the Court. The current identifying markings are not of sufficient visibility. The Court does not find it credible that there is no possible location on the helmet or uniforms on which more visible markings can be placed. The Court is persuaded by Mr. Kelikowske's expert opinion that unique identifying markings are feasible, important, and will not interfere with the federal officers' ability to perform their duties. The Court also finds that such a requirement is related to Plaintiffs' claims because, as noted by Mr. Kerlikowske, these markings would deter the very conduct against which Plaintiffs have filed suit.

At this stage of the lawsuit, there are at least serious questions regarding Plaintiffs’ right of access, whether the government will be able to meet its burden to overcome that right of access, the federal officers’ tactics directed toward journalists and other legal observers, and whether restrictions placed upon them by the Federal Defendants are narrowly tailored. Thus, Plaintiffs’ meet this factor for their claim alleging a violation of their right of access.

2. Irreparable Harm

Plaintiffs also must show that they are “likely to suffer irreparable harm in the absence of preliminary relief.” *See Winter*, 555 U.S. at 20. The Ninth Circuit has explained that “speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction. A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief.” *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016) (emphasis in original) (simplified).

The Federal Defendants argue that Plaintiffs face no threat of immediate injury, particularly because of the changed enforcement tactics. The Federal Defendants assert that Plaintiffs have provided no evidence that the chances of encountering a federal officer at a protest is higher in August 2020 than it was in August 2019 or August 2018.

The Federal Defendants’ latter assertion is without merit. The Federal Defendants have sent numerous additional federal officers to Portland with the stated mission to protect federal property and persons. Plaintiffs provide evidence that these officers routinely have left federal property and engaged in crowd control and other enforcement on the streets, sidewalks, and parks of the City of Portland. Plaintiffs’ expert Mr. Kerlikowske opines that the federal officers and supervisors have insufficient and improper experience and leadership to handle the conditions during the Portland protests. Additionally, Plaintiffs provide evidence that the

augmented federal police force has remained in Portland, that it will stay in Portland ready to deploy at any moment, and that there are no plans for any officers to withdraw from Portland, at least not until it is “certain” that federal property is “safe.” This provides significant evidence that journalists and legal observers are more likely to encounter a federal officer during a protest in August 2020 than in 2019 or 2018, when there was no augmented federal police force or Operation Diligent Valor.

Regarding the Federal Defendants’ argument that the voluntary change in tactics has decreased the immediacy of any claim of injury, thereby mitigating irreparable harm, the Ninth Circuit has rejected a similar argument. In *Boardman*, the defendants argued that there was no immediate danger of harm because the defendants had voluntarily ceased certain conduct. 822 F.3d at 1023. The defendants had voluntarily terminated a disputed merger and entered into a stipulation not to enter into a purchase transaction while the Oregon Attorney General’s investigation was ongoing. *Id.* The stipulation was terminable upon 60-days’ notice to the District Court and the Oregon Attorney General. The Ninth Circuit concluded that the District Court did not abuse its discretion in finding irreparable harm. *Id.*

The Ninth Circuit focused on the fact that the voluntarily stipulation was terminable with 60-days’ notice, the defendants had a history of negotiating in secret, the stipulation was limited to a “purchase transaction” and the transaction could take other contractual forms, and the exclusive marketing agreement between the two defendants had expired (thereby incentivizing a merger). *Id.* The Ninth Circuit noted: “A threat of irreparable harm is sufficiently immediate to warrant preliminary injunctive relief if the plaintiff ‘is likely to suffer irreparable harm before a decision on the merits can be rendered.’” *Id.* (quoting *Winter*, 555 U.S. at 22). For the plaintiff to be injured in *Boardman*, the defendants would have had to give 60-days’ notice and then not

have the district court otherwise intervene, or negotiate in secret and reach a form of deal not considered a “purchase agreement,” or other steps that arguably were attenuated or provided the plaintiffs some opportunity to request emergency relief. Nonetheless, the Ninth Circuit agreed that the potential injury was immediate and irreparable for purposes of preliminary injunctive relief.

Plaintiffs’ irreparable injury here is not nearly as attenuated as *Boardman* and indeed is much more immediate because it could happen without any prior notice to the Court. The Court has already found that Plaintiffs face irreparable harm from the Federal Defendants’ conduct.¹²

¹² The Federal Defendants cite *Rendish v. City of Tacoma*, 123 F.3d 1216, 1226 (9th Cir. 1997), for the proposition that claims alleging First Amendment retaliation are not entitled to a presumption of irreparable harm. *Rendish* involved a public employee who was terminated and alleged First Amendment retaliation. *Id.* at 1218. The district court found that the plaintiff was *not* likely to succeed on the merits of her claim. *Id.* at 1226. The Ninth Circuit concluded: “Because the district court’s assessment that Rendish did not show a likelihood of success was accurate, it did not abuse its discretion in finding no irreparable harm based on a loss of her constitutional rights.” *Id.* The court rejected the plaintiff’s argument that despite the district court’s conclusion that the plaintiff would not have succeeded on the merits, the district court was required to presume irreparable harm, noting that there is no such presumption. *Id.*

Rendish provides no support for the contention that when a court concludes that plaintiffs *are* likely to succeed on the merits of a claim that their constitutional rights have been violated, the plaintiffs are not entitled to a presumption of irreparable harm. Indeed, the opposite is true. *See, e.g., Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) (“A ‘colorable First Amendment claim’ is ‘irreparable injury sufficient to merit the grant of relief.’” (quoting *Warsoldier v. Woodford*, 418 F.3d 989, 1001 (9th Cir. 2005)) (affirming grant of preliminary injunction)); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (“It is well established that the deprivation of constitutional rights ‘unquestionably constitutes irreparable injury.’” (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976))); *Assoc. Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (noting that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury” and reversing and remanding for entry of preliminary injunction (alteration in original) (quoting *Elrod*)); *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009) (“Both this court and the Supreme Court have repeatedly held that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” (simplified) (reversing and remanding for entry of preliminary injunction)); *Black Lives Matter Seattle-King Cty. v. City of Seattle, Seattle Police Dep’t*, 2020 WL 3128299, at *4 (W.D. Wash. June 12, 2020) (citing *Melendres* and *Otter* and finding irreparable harm for First Amendment retaliation claims because “[t]he use of less-lethal, crowd control weapons has

After the Court’s initial finding of irreparable harm to support the TRO, Plaintiffs provided even more evidence that journalists’ First Amendment rights have been chilled, including declarations in which journalists describe being subject to less lethal munitions that required the journalist to stop covering the protests for the night or for some period of time, or chilled the journalist from returning to cover the protests in the future. *See, e.g.*, ECF 88 at 2 (Ellis Decl. ¶ 6, “Federal agents prevented me from doing my job twice on the night of July 23-24.”); ECF 89 at 4 (Elsesser Decl. ¶ 13, “If I am asked to cover the protests again, I would refuse unless I had a bulletproof vest (which are in short supply in Portland at the moment) to wear because I am fearful that federal agents would injure me or worse.”); ECF 91 at 3 (Hollis Decl. ¶ 8, “After the federal agents shot me, I turned and ran and returned to my hotel.”); ECF 116 at 3 (Jeong Decl. ¶¶ 7-8, noting that because she was shoved down to the ground by a federal officer she “ultimately left much earlier than I had planned” with respect to covering that night’s protest); ECF 117 at 5 (Katz Decl. ¶ 15, “Because of how federal agents treated me, I have stopped covering the Portland protests.”).

already stifled some speech even if momentarily”); *Freedom for Immigrants v. U.S. Dep’t of Homeland Sec.*, 2020 WL 2095787, at *5 (C.D. Cal. Feb. 11, 2020) (“Because FFI has demonstrated that DHS’s conduct likely contravenes its First Amendment rights, FFI satisfies the irreparable harm requirement for preliminary injunctive relief.”); *Nat’l Rifle Ass’n of Am. v. City of Los Angeles*, 441 F. Supp. 3d 915, 938-39 (C.D. Cal. 2019) (“In this case, Plaintiffs have sufficiently demonstrated that they are likely to be deprived of their First Amendment rights—the deprivation of which is ‘well established’ to constitute irreparable harm. Defendants’ primary argument to the contrary is that Plaintiffs have not provided admissible evidence of irreparable harm. But Plaintiffs have provided ample evidence of a likely First Amendment violation, which is enough to satisfy the *Winter* standard.” (citations omitted) (granting preliminary injunction)); *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.”). Plaintiffs have demonstrated that they are likely to be deprived of their First Amendment rights and that is sufficient to show irreparable harm.

The only change is the Federal Defendants’ “agreement” with Oregon Governor Kate Brown and voluntarily cessation of certain enforcement tactics. This change in enforcement is replete with caveats. It is terminable at any time and without any notice to this Court or Plaintiffs if the Federal Defendants believe that federal property or persons are not secure. *See* n. 6, *supra*. It is also subject to the federal officers being able to leave the building at any time for a specific incident of enforcement, even if the agreement itself has not changed. For example, although the federal officers’ modified enforcement role was announced on July 29, 2020, to begin the next day, Plaintiffs have submitted testimony and video evidence from that night (to be precise, from the early morning on July 30, 2020), of federal officers firing tear gas and flash bang munitions at journalists. *See* ECF 118 at 4. There was no one nearby on the street but numerous federal enforcement officers and six journalists when the munitions were deployed.

Moreover, the Federal Defendants have emphatically and repeatedly denied that they have engaged in any wrongful or unlawful conduct. Thus, there is no indication that their crowd control tactics, which the Court has already found to support both a finding of success on the merits and likelihood of irreparable harm, and which Plaintiffs’ expert has characterized as including excessive force, would change if they re-engage in crowd control enforcement and the Court’s injunctive relief is no longer in place.

Indeed, the Court has serious concerns that the Federal Defendants have not fully complied with the Court’s original TRO. The Court has reviewed all of the testimony and videos submitted by Plaintiffs after the Court issued its TRO, and although some of the evidence is ambiguous or less persuasive, some of the evidence describes and shows at least some conduct that appears to target journalists and legal observers, as opposed to incidentally or inadvertently reaching them as part of crowd control or enforcement against violent offenders.

Further, the Court does not agree with the Federal Defendants that given the magnitude of irreparable injury at stake in this case, the Court is required to wait until new and additional irreparable injury is inflicted on Plaintiffs to issue prospective injunctive relief. As the Ninth Circuit emphasized in *Boardman*, a threat of irreparable injury is sufficiently immediate if it is likely to occur before a decision on the merits can be issued. *Boardman*, 822 F.3d at 1023. Given the Federal Defendants’ public statements and discovery responses relating to Operation Diligent Valor, the current situation relating to the protests in Portland, and the current situation regarding the local police presence in Portland, the Court finds that it is sufficiently likely that federal officers will re-engage in “protecting federal property and persons” and will return to enforcement tactics before a decision on the merits in this case can be issued. Thus, Plaintiffs have sufficiently shown irreparable injury.

Moreover, the Court takes guidance from the Supreme Court and Ninth Circuit’s discussions regarding the Court’s authority relating to issuing injunctions generally and predicting future violations in this context. The Supreme Court has noted that in addition to a court retaining the ability to hear a case after voluntarily cessation (considerations of mootness), “the court’s power to grant injunctive relief survives discontinuance of the illegal conduct.” *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). “The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.” *Id.* In making this determination, the district court’s “discretion is necessarily broad and a strong showing of abuse must be made to reverse it. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations.” *Id.* The Ninth Circuit has

discussed “the factors that are important in predicting the likelihood of future violations” as follows:

the degree of scienter involved; the isolated or recurrent nature of the infraction; the defendant’s recognition of the wrongful nature of his conduct; the extent to which the defendant’s professional and personal characteristics might enable or tempt him to commit future violations; and the sincerity of any assurances against future violations.

Fed. Election Comm’n v. Furgatch, 869 F.2d 1256, 1263 n.5 (9th Cir. 1989). These factors are in addition to “the commission of past illegal conduct, [which] is highly suggestive of the likelihood of future violations.” *Id.*

Considering these factors, whether as articulated by the Supreme Court in *W.T. Grant* or the Ninth Circuit in *Furgatch*, the Federal Defendants’ voluntary cessation of conduct¹³ does not demonstrate effective discontinuance and serious questions remain with respect to the likelihood of Plaintiffs’ future injury. In addition, under the *W.T. Grace* factors, there has been no expressed intent by the Federal Defendants to comply with the Court’s TRO. To the contrary, the Federal Defendants have stated that the order is “offensive” and that it “shouldn’t affect anything [the Federal Defendants are] doing” in Portland. ECF 147-6 at 3 (statement by Acting Deputy

¹³ The Federal Defendants argue that they have not voluntarily ceased conduct because they dispute that they have engaged in any unlawful conduct. Regardless of how they characterize the lawfulness of their conduct, however, their argument is that because of the changed circumstances, Plaintiffs can no longer show irreparable injury. The changed circumstances on which the Federal Defendants rely, however, is the agreement between state and federal authorities that the federal officers would “stay in the building” and state and local police would take over more direct policing. The specifics of this agreement have been redacted by the Federal Defendants. *See* ECF 147-8 at 2. According to White House Senior Advisor Stephen Miller, however, the agreement does not include a “phased withdrawal.” ECF 147-5 at 2. Nonetheless, this agreement and the Federal Defendants’ voluntary change in enforcement as a result of the agreement is the voluntary cessation triggering the changed circumstances on which the Federal Defendants rely. Thus, the Court must analyze whether it supports the Federal Defendants’ assertion that there no longer exists a cognizable risk of recurrent violations.

Secretary Ken Cuccinelli). Also, as reflected in Plaintiffs' motion for contempt, despite the issuance of the TRO, the Federal Defendants appear to have engaged in at least some conduct that continues to target journalists and legal observers in violation of the Court's TRO. This raises concerns regarding future conduct if there is no injunction in place, because even with a Court order in place, improper conduct appears to have continued. Regarding the effectiveness of the Federal Defendants' stated discontinuance, as discussed above, it is not very effective while the out-of-town federal agents remain in Portland because the discontinuance is terminable at will by the Federal Defendants and, thus, only temporary. Finally, the character of the recent past violations by the Federal Defendants in Portland is particularly egregious.

Considering the Ninth Circuit's *Furgatch* factors, first, the Federal Defendants' past violations are highly suggestive of future harm. Second, the degree of scienter involved is high for violations triggering the requested injunctive relief, because it relates to targeting of journalists and legal observers and not merely incidental harm to them during crowd control. Further, because Plaintiffs agreed to the modification to the injunction that journalists and legal observers stay to the side, the risk of incidental targeting is diminished. Third, the occurrences were not isolated—Plaintiffs provided significant evidence of numerous journalists and legal observers who were targeted by the Federal Defendants. Indeed, several of the witnesses have experience reporting in war zones around the world and at violent protests in Hong Kong, Oakland, and Seattle. They emphasize how they have never been shot at or tear gassed until coming to Portland. Fourth, the Federal Defendants have not recognized the wrongful nature of their conduct but instead assert that they have only engaged in lawful conduct. They have not disciplined any federal agent or officer for any conduct. They moved to dissolve the TRO after Plaintiffs moved for contempt. The Federal Defendants, unlike the City of Portland, also did not

stipulate to preliminary injunctive relief. Fifth, given the disdainful comments publicly made by the highest officials at the Federal Defendants with respect to journalists, legal observers, Plaintiffs, protesters, and the City of Portland, the professional and personal characteristics of the Federal Defendants show that they are likely to be enabled or tempted to engage in future violations. Finally, there have not been sincere assurances given against future violations. Accordingly, considering these factors, the Court finds that Plaintiffs have made a sufficient showing of threatened future violations by the Federal Defendants causing sufficiently likely irreparable injury to Plaintiffs before a decision on the merits can be issued.

3. Public Interest and Balance of the Equities

When the government is a party, the last two factors of the injunction analysis merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). 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). Regarding balancing the equities, when a plaintiff has “raised serious First Amendment questions,” 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) (alterations in original) (quotation marks omitted).

The Federal Defendants argue that the normal evaluation of these factors in favor of a plaintiff who is likely to succeed on a First Amendment claim does not apply in this case because the government’s countervailing interests outweigh Plaintiffs’ First Amendment concerns. The Federal Defendants assert the government’s interest in protecting federal property, ensuring the

safety of federal officers and other personnel, maintaining public order on federal property, and securing the federal courthouse so that it remains open and accessible to the public. The first three relate to protecting the courthouse and federal officers, and the final interest relates to providing access to the public.

Regarding protection of the courthouse and officers, the Federal Defendants rely on evidence that persons self-identifying as press have engaged in purported misconduct. The Court has reviewed all the video and other evidence submitted by the Federal Defendants in support of their contentions relating to alleged misconduct of persons self-identifying as press after the issuance of the TRO on July 23, 2020. Much of this evidence is ambiguous or shows that persons self-identifying as press have intermixed with protesters, have run toward the fence around the federal courthouse and stopped, have not actually been press but merely donned clothing (for one night) marked “press” hoping to avoid violence by federal officers, or simply have stood by while unlawful conduct was engaged in by others. This is not unlawful conduct.

There is evidence, however, that a few individual persons wearing press indicia on their clothing or hats or helmets (often handwritten), who generally are described by the Federal Defendant declarants as not otherwise engaging in any conduct such as reporting, notetaking, photographing, or recording, have engaged in the following activities: entering courthouse property after the fence was breached and encouraging others to do the same; helping another person to breach the fence; shining a flashlight at a police helicopter; kicking a police officer; shielding protesters from law enforcement; and throwing an object at law enforcement. This is inappropriate conduct, and much of it may be unlawful. The Court shares the Federal Defendants’ concerns for the safety of federal officers, particularly considering the more than 100 injuries that have been sustained by federal offices to date. But as discussed above in the

context of workability, the preliminary injunction does not protect unlawful conduct, and federal officers may arrest anyone, even persons with indicia of press, who are engaging in such conduct.

Further, the preliminary injunction has provisions that expressly address these concerns, including providing that one indicia of press or authorized legal observer status is that they stay to the side and do not intermix with protesters and that press and legal observers may not impede, block, or interfere with law enforcement. Concern over potential unlawful conduct thus does not alter the analysis of traditional public interest factors or the balance of equities.

Moreover, the Court must balance and weigh the equities and public interest. The fact that a few people may have engaged in some unlawful conduct does not outweigh the important First Amendment rights of journalists and legal observers and the public for whom they act as surrogates. Further, there is no evidence that any of the named Plaintiffs engaged in any of the purported unlawful conduct described by the Federal Defendants.

The Federal Defendants' final argument is that the government's interest in preserving physical access to courts outweighs Plaintiffs' interests. That argument also is without merit. The relevant protests are happening after business hours, and there is no indication that allowing journalists and legal observers to stay despite a general dispersal order interferes with public access. Thus, none of the government's proffered interests outweigh the public's interest in receiving accurate and timely reporting, video, and photographic information about the protests and how law enforcement is treating protestors. There also is no need to alter the traditional analysis recognizing the significant public interest in First Amendment rights and that in such cases the balance of the equities tips sharply in favor of the plaintiff. *See Otter*, 682 F.3d at 826; *Cnty. House*, 490 F.3d at 1059.

4. Conclusion

The Court GRANTS Plaintiffs' motion for preliminary injunction against the Federal Defendants (ECF 134) and Orders as follows:

PRELIMINARY INJUNCTION

1. The Federal Defendants, their agents and employees, and all persons acting under their direction 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 Federal Defendants 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. No Journalist or Legal Observer protected order this Order, however, may impede, block, or otherwise physically interfere with the lawful activities of the Federal Defendants.

2. The Federal Defendants, their agents and employees, and all persons acting under their direction 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 the Federal Defendants are also lawfully seizing that person consistent with this Order. Except as expressly provided in Paragraph 3 below, the Federal Defendants must return any seized equipment or press passes immediately upon release of a person from custody.

3. If any Federal Defendant, their agent or employee, or any person acting under their direction seize property from a Journalist or Legal Observer who is lawfully arrested

consistent with this Order, such Federal Defendant shall, as soon thereafter as is reasonably possible, make a written list of things seized and shall provide a copy of that list to the Journalist or Legal Observer. If equipment seized in connection with an arrest of a Journalist or Legal Observer lawfully seized under this Order is needed for evidentiary purposes, the Federal Defendants shall promptly seek a search warrant, subpoena, or other court order for that purpose. If such a search warrant, subpoena, or other court order is denied, or equipment seized in connection with an arrest is not needed for evidentiary purposes, the Federal Defendants shall immediately return it to its rightful possessor.

4. To facilitate the Federal Defendants' 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, carrying professional gear such as professional photographic equipment, or wearing a professional or authorized press badge or other official press credentials, or distinctive clothing, that identifies the wearer as a member of the press. It also shall be an indicium of being a Journalist under this Order that the person is standing off to the side of a protest, not engaging in protest activities, and not intermixed with persons engaged in protest activities, although these are not requirements. These indicia are not exclusive, and a person need not exhibit every indicium to be considered a Journalist under this Order. The Federal Defendants shall not be liable for unintentional violations of this Order in the case of an individual who does not carry or wear a press pass, badge, or other official press credential, professional gear, or distinctive clothing that identifies the person as a member of the press.

5. To facilitate the Federal Defendants' 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. It also shall be an indicium of being a Legal Observer protected under this Order that the person is standing off to the side of a protest, not engaging in protest activities, and not intermixed with persons engaged in protest activities, although these are not requirements.

6. The Federal Defendants are not precluded by the Order from issuing otherwise lawful crowd-dispersal orders for a variety of lawful reasons. The Federal Defendants shall not be liable for violating this injunction 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 of an otherwise lawful dispersal order.

7. Plaintiffs and the Federal Defendants shall promptly confer regarding how the Federal Defendants can place unique identifying markings (using numbers and/or letters) on the uniforms and/or helmets of the officers and agents of the Federal Defendants who are specially deployed to Portland so that they can be identified at a reasonable distance and without unreasonably interfering with the needs of these personnel. Based on the Court's understanding that Deputy U.S. Marshals and Courtroom Security Officers stationed in Portland who are under the direction of the U.S. Marshal for the District of Oregon are not part of the force that has given rise to events at issue in the lawsuit, they are exempt from this requirement. Agents wearing plain clothes and assigned to undercover duties also are exempt from this requirement. If the parties agree on a method of marking, they shall submit the terms of their agreement in writing to the Court, and the Court will then issue a modified preliminary injunction that incorporates the parties' agreement. If the parties cannot reach agreement within 14 days, each party may submit its own proposal, and each side may respond to any other party's proposal

within seven days thereafter. The Court will resolve any disputes on this issue and modify this preliminary injunction appropriately.

8. To promote compliance with this Preliminary Injunction, the Federal Defendants are ordered to provide copies of the verbatim text of the first seven provisions of this Preliminary Injunction, in either electronic or paper form, within 14 calendar days to: (a) all employees, officers, and agents of the Federal Defendants currently deployed in Portland, Oregon (or who later become deployed in Portland, Oregon while this Preliminary Injunction is in force), including but not limited to all personnel in Portland, Oregon who are part of Operation Diligent Valor, Operation Legend, or any equivalent; and (b) all employees, officers, and agents of the Federal Defendants with any supervisory or command authority over any person in group (a) above.

9. Plaintiffs need not provide any security, and all requirements under Rule 65(c) of the Federal Rules of Civil Procedure are waived.

10. The Court denies the oral motion by the Federal Defendants to stay this preliminary injunction.

IT IS SO ORDERED.

DATED this 20th day of August, 2020.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge