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COMPLAINT

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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

**CHRISTOPHER WISE, MICHAEL
MARTINEZ, CHRISTOPHER
DURKEE, and SAVANNAH
GUEST**, individuals,

Plaintiffs,

v.

CITY OF PORTLAND, a municipal
corporation; **OFFICER STEPHEN
B. PETTEY**, in his individual
capacity; **JOHN DOES 1-60**,
individual and supervisory officers of
Portland Police Bureau; **U.S.
DEPARTMENT OF HOMELAND
SECURITY; U.S. MARSHALS
SERVICE; JOHN DOES 61-100**,
individual and supervisory officers of
the federal government,

Defendants.

Case No. 3:20-cv-01193

COMPLAINT

DEMAND FOR JURY TRIAL

COMPLAINT

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Plaintiffs Christopher Wise, Michael Martinez, Christopher Durkee, and Savannah Guest allege as follows:

NATURE OF THE ACTION

1. This is a civil rights action brought on behalf of protest medics who have been providing care and comfort to the hundreds of people protesting nightly in downtown Portland against white supremacy, police violence generally, and police brutality against Black lives specifically.

2. Plaintiffs are protest medics who, in the face of tear gas, rubber bullets, and other munitions, exercise their rights to free speech through their service to the cause of equal treatment and absolute equality under the law, but more fundamentally, they exercise their rights by creating a safer environment for citizens to continue to express their desire for change.

3. As the protests continue, these protest medics have put their safety at risk in order to keep protesters safe. They share a strong belief that the protests are necessary to effectuate change in our community, and our country, and that their service as protest medics is an expression of their commitment to these ideals.

4. The police and federal law enforcement officers, however, have engaged in violent tactics in an effort to suppress the protests advocating massive changes in the way we police in America. Despite clear expression to the police and federal officers that these protest medics are there to assist others, and are not violent in any way, the police and their federal counterparts have targeted medics with rubber bullets, shoved them, sprayed tear gas at close range, arrested them, and taken their property.

5. Plaintiffs seek monetary damages and prospective injunctive relief so that they can continue their efforts to aid protesters.

PARTIES

6. Plaintiff Michael Martinez is an individual residing in Multnomah County, Oregon. He is a graduate student at Oregon Health & Sciences University (“OHSU”), pursuing his doctorate degree in Medical and Molecular Genetics. He serves as a protest medic at the Portland Protests.

7. Plaintiff Christopher Wise is an individual residing in Washington County, Oregon. He maintains a full-time day job and, at night, uses his skills as a former emergency medical technician (“EMT”) to render medical aid to protesters in Portland.

8. Plaintiff Christopher Durkee is an individual residing in Lane County, Oregon. He is a mental-health professional and trained EMT. He, with his partner Plaintiff Guest, serves as a volunteer medic at many protests throughout Oregon, including the Portland Protests.

9. Plaintiff Savannah Guest is an individual residing in Lane County, Oregon. She maintains a full-time day job and, with her partner Plaintiff Durkee, serves as a volunteer medic at many protests throughout Oregon, including the Portland Protests.

10. Defendant City of Portland is a municipality incorporated in the State of Oregon. As a local governmental entity, the City of Portland is a juridical entity under 42 U.S.C. § 1983. The Portland Police Bureau is a department or division of the City.

11. Officer Stephen B. Pettey is a police officer with the Portland Police Bureau. Upon information and belief, he is the officer who wrongfully arrested Plaintiff Martinez. He is sued in his individual capacity.

12. Defendants John Does 1-20 are police officers employed by the City who directly assaulted Plaintiffs. They are sued in their individual capacity.

13. Defendants John Does 21-30 are supervisory officials whose liability could include their own culpable action or inaction in the training, supervision, or control of their subordinates, their acquiescence in the constitutional deprivations alleged here, or conduct showing a reckless or callous indifference to the rights of Plaintiffs. They are sued in their individual capacity.

14. Defendants John Does 31-60 are individual and supervisory officers of other law enforcement agencies, including but not limited to: the Clackamas County Sheriff's Office; Clark County Sheriff's Office; Multnomah County Sheriff's Office; Washington County Sheriff's Office; Port of Portland Police; Gresham Police; Vancouver Police; Washougal Police; Oregon State Police; and the Oregon National Guard, who are working under the Portland Police Bureau's direction and control pursuant to Portland Police Bureau Directive 635.10 § 7 ("The Bureau may request assistance from other law enforcement agencies . . . The Bureau [Incident Commander] shall maintain the authority to determine tactical objectives; direct the overall police response (all agencies); and determine, when objectively reasonable, how and when force may be used and when to deploy less lethal munitions to address civil disturbance and/or disperse the crowd."). Does 31-60 are acting in concert with and agents of the City and Does 1-30. They are sued in their individual capacity.

15. The Municipal Doe Defendants¹ (which includes Does 1-60) have concealed their identities and their names or they are not yet fully known to

¹ Plaintiffs refer to Does 1-60 as the "Municipal Doe Defendants." The Municipal Doe Defendants, Defendant City of Portland, and Defendant Pettey are collectively referred to as the "Portland Police."

Plaintiffs. On information and belief, Does 1-60 are responsible for the conduct alleged herein.

16. Defendant U.S. Department of Homeland Security (“DHS”) is a federal agency of the United States. DHS contains the United States Customs and Border Protection, Immigration and Customs Enforcement, the Transportation Security Administration, the Coast Guard, and the Federal Protective Service. On information and belief, federal officers from these parts of DHS perpetrated some of the injuries alleged below.

17. Defendant U.S. Marshals Service (“USMS”) is a federal agency within the United States Department of Justice.

18. Defendants John Does 61-80 are individual and supervisory law-enforcement officers employed by USMS and DHS who directly assaulted Plaintiffs and otherwise violated their rights as articulated below. They are sued in their individual capacity.

19. Defendants John Does 81-100 are supervisory officials whose liability could include their own culpable action or inaction in the training, supervision, or control of their subordinates, their acquiescence in the constitutional deprivations alleged here, or conduct showing a reckless or callous indifference to the rights of Plaintiffs. They are sued in their individual capacity.

20. The Federal Doe Defendants (which includes Does 61-100)² have concealed their identities and their names or they are not yet fully known to Plaintiffs. On information and belief, Does 61-100 are responsible for the conduct alleged herein.

² Plaintiffs refer to Does 61-100 as the “Federal Doe Defendants.” The Federal Doe Defendants, Defendant USMS, and Defendant DHS are collectively referred to as the “Federal Defendants.”

JURISDICTION AND VENUE

21. This Court has subject matter jurisdiction over Plaintiffs' claims that Defendants have violated Plaintiffs' federal constitutional rights under 28 U.S.C. §§ 1331 and 1343, because Plaintiffs' causes of action arise under 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2202.

22. Venue is proper in the U.S. District Court for the District of Oregon under 28 U.S.C. § 1391(b), because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in the District of Oregon and because Defendants are subject to personal jurisdiction in the District of Oregon.

ALLEGATIONS

A. Minneapolis police officer Derek Chauvin murdered George Floyd, sparking worldwide protests against systemic racism in American policing.

23. On May 25, 2020, Minneapolis police officer Derek Chauvin kneeled on George Floyd's neck for 8 minutes and 46 seconds, as Mr. Floyd repeatedly pleaded for his life: "I can't breathe." "I can't breathe." "I can't breathe." "I can't breathe." More than twenty times. Officer Chauvin's colleagues stood by and did nothing to intervene. Mr. Floyd's murder was caught on video, and that footage quickly circulated nationally and internationally.

24. Mr. Floyd's murder occurred around two months after police officers in Louisville, Kentucky burst into Breonna Taylor's home and murdered her, shooting her eight times while she laid in her own bed. Ms. Taylor was an EMT and aspiring nurse.

25. Ms. Taylor and Mr. Floyd were the latest among many dozens of Black people murdered or wrongfully killed by America's police in just the last few years. Widely-known victims include Michael Brown, Sandra Bland, Eric Garner, Philando

Castile, Freddie Gray, Tamir Rice, Elijah McClain, and more. There also are victims whose names and stories are not amplified enough—primarily Black women and Black transgender Americans—such as India Kager, Aiyana Stanley-Jones, Layleen Polanco Xtravaganza, Tanisha Anderson, Monika Diamond, Reikia Boyd, Miriam Carey, Tony McDade, and Darnisha Harris. The names continue.

26. Of course, death is not the only potential consequence Black Americans disproportionately face in America’s criminal legal system: Nationally, and in Portland specifically, Black, Indigenous, and People of Color, are more likely to be profiled, stopped, arrested, charged, convicted, and imprisoned, and they often receive longer and harsher sentences.

B. In the wake of George Floyd’s murder, protesters in Portland have maintained a vigilant effort against police brutality in any form.

27. The protest movement that erupted after George Floyd’s murder has served as an indictment of racist and brutal policing practices, and it has forced states, cities, and non-Black citizens to reckon—in many cases, for the first time—with their history of participating in, and perpetuating, white supremacy. Indeed, in the words of Black-studies educator and writer Walidah Imarisha, “Oregon was founded as a racist white utopia.”³

28. The history of this State is steeped in racism, having been founded as a whites-only territory. Oregon’s founders implemented Black exclusionary laws designed to prevent Black people from living here. When Oregon became a state, these Black exclusionary laws—which provided that Black people outside Oregon were not permitted to “come, reside, or be within” the State, prevented Black

³ Tiffany Camhi, *A Racist History Shows Why Oregon Is Still So White*, Or. Public Broadcasting (June 10, 2020 11:12 AM), <https://www.opb.org/news/article/oregon-white-history-racist-foundations-black-exclusion-laws/>.

Oregonians from owning land or entering contracts, and prescribed punishment for those who, employed, “harbor[ed],” or otherwise helped them—were enshrined in the Oregon Constitution. They remained in the Oregon Constitution until 2002—only 18 years ago—and even then, around 30% of Oregonians voted to *keep* the racist clause.

29. By their conduct, the Portland Police are no exception to the systemic racism inherent in policing nationwide, as local police officers have committed disproportionate violence against Black lives. In 2003, Portland police officers shot 21-year-old Kendra James during a traffic stop. In 2004, they shot James Jahar Perez. In 2006, they beat James Chasse Jr. to death while he was experiencing a mental-health crisis in their custody. In 2010, they shot 25-year-old Aaron Campbell. In 2011, Darris Johnson. In 2017, they shot 17-year-old Quanice Hayes. And in 2018, they shot 27-year-old Patrick Kimmons.

30. The protests in Portland came within days of Mr. Floyd’s murder. Protesters took to the streets of Portland in large number, beginning on May 29, 2020. They have continued every night since—or for more than 50 days, as of the date of filing this Complaint. The protesters are dedicated to real change and show no sign of being deterred by the police violence described herein. In fact, the police violence only serves to strengthen their resolve, as is memorialized in the familiar protest chant: “No Justice? No Peace!”

31. Protests have primarily occurred at places symbolic of Oregon’s racist history, specifically as it relates to criminal justice and police brutality. Though demonstrations have taken place at the Portland police-union headquarters in North Portland and the Multnomah County Sheriff’s Office in East Portland, they have for the most part been held downtown in Chapman and Lownsdale Squares,

City parks surrounded by institutions of governance: Multnomah County Justice Center, Mark O. Hatfield Federal Courthouse, Portland City Hall, and the Multnomah County Courthouse.

32. For nearly as many nights as the protests have occurred, the Portland Police have responded with outsized displays of force that affect hundreds, and sometimes thousands, of peaceful protesters. Figure 1 depicts the Portland Police, ready to face protesters on a typical night of peaceful protests.



Figure 1: Portland Police officers in riot gear and a cloud of tear gas, taken by John Rudoff on June 19, 2020.

33. Clad in riot gear, the Portland Police bull-rush crowds of people, shoving protesters to the ground, and hitting them with clubs and other instruments until, in spite of pain or injury, they get up. Videos:

- <https://twitter.com/MrOlmos/status/1284417770973626371?s=20>

- <https://twitter.com/tuckwoodstock/status/1284734198926852097?s=20>

34. They shoot protesters with rubber bullets and other impact munitions. They beat them with truncheons. They pull their masks down and spray bear mace in their eyes at dangerously close ranges.

35. The Portland Police have perpetrated many of these assaults after they already have drenched protesters, and much of their surrounding area, in thick clouds of tear gas.

36. The Portland Police's indiscriminate use of pepper spray, bear mace, and tear gas is especially concerning in light of the COVID-19 pandemic. That is because those weapons all are designed to make peoples' eyes water and burn, to make people spit, cough, choke, retch, vomit, and to make mucous pour from their noses. Those are all ways COVID-19 can spread.

37. The Portland Police drive riot vans with officers lined on running boards around downtown Portland, collecting slower (often injured) protesters and arresting them without probable cause.

38. The Portland Police also tackle protesters riding their bikes away from the protest area in broad daylight, running up and giving them a knee to the gut for extra measure. Video:

<https://twitter.com/DanMcKATU/status/1283748895600721920?s=20>

C. The President deploys federal officers, including the Federal Defendants, to "quell" Portland protests.

39. About a month after the protests began, President Trump issued an Executive Order on Protecting American Monuments, Memorials, and Statues and

Combating Recent Criminal Violence (the “Executive Order”).⁴ In it, he vilified the protesters’ political views, stating that many of them “have explicitly identified themselves with ideologies — such as Marxism — that call for the destruction of the United States system of government.”

40. Incredibly, the President also declared that state and local governments had, in the face of mass protests, “lost the ability to distinguish between the lawful exercise of rights to free speech and assembly and unvarnished vandalism.” The President of the United States also asserted that State and local governments’ sometimes brutal and militaristic police response to the protests had so far been inadequate, representing an “abdication of their law enforcement responsibilities in deference to [the protesters’ alleged] violent assault” and a “surrender[] to mob rule.”

41. Purportedly acting under color of the Executive Order, DHS and the USMS deployed or operationalized special forces in Portland. Upon information and belief, this occurred soon before the July 4 protests.

42. The agencies for whom these forces worked was initially a mystery to many in Portland. Upon information and belief, they are rapid response teams that include members of the USMS, as well as DHS’s Customs and Borders Protection (CBP), Immigration and Customs Enforcement (ICE), the Transportation Security Administration (TSA), the Coast Guard, and the Federal Protective Service (FPS). They include specially trained tactical units such as the Border Patrol Tactical Unit (BORTAC), which is normally tasked with investigating violent drug smuggling organizations.

⁴ <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-american-monuments-memorials-statues-combating-recent-criminal-violence/>

43. The majority of DHS's and USMS's teams wear either black or camouflage military garb, without clear identification of the agency with which they are associated. There also is no discernible identifying information about the officers. They stand, upon arrival, ready only for combat. (See Figure 2.)



Figure 2: Federal Officers brandish their weapons at protesters, taken by John Rudoff on June 16, 2020.

44. DHS's and USMS's officers use many of the same weapons against protesters that the Portland Police deploy.

45. Some also carry AR-15 rifles, stocked with what appears to be live ammunition.



Figure 3: Federal Officer on left is carrying an AR-15 with what appears to be live ammunition. Photo by John Rudoff.

46. When DHS's and USMS's federal troops arrived, they turned the Mark O. Hatfield Federal Courthouse into a quasi-bunker. They built walls surrounding the front courthouse windows and most doors. The walls have functioning cut-out doors, as well as eye-level retractable cut-outs from which they can shoot weapons or direct the long-range acoustic device (LRAD)—a speaker system and sound energy weapon developed in the early 2000s for use by the U.S. military in foreign wars—at Oregonians. An LRAD has a maximum range of 8,900 meters. At 20 meters, it has an output of 110-130 dB, which can cause pain. At 1 meter, it has an output of 162 dB. Hearing loss, prolonged pain, and ringing have been reported as a

result of LRAD use. Video depicting the sound:

<https://twitter.com/MrOlmos/status/1282194215481430016?s=20>

47. Those, such as Plaintiffs, who have been subjected to the federal tear gas describe it as “spicier” than the Portland Police’s tear gas. Regardless, DHS’s and USMS’s officers use a lot of it, engulfing city blocks in opaque, chemical clouds. A video from this week’s protests:

<https://twitter.com/tuckwoodstock/status/1285482965707837440?s=20>

48. They also have creative, medieval-seeming ways of distributing tear gas across large groups of protesters seeking to have their voices heard. Video:

<https://twitter.com/tuckwoodstock/status/1284017726487314433?s=20>

49. Protesters exposed to the Federal Defendants’ tear-gas attacks have complained of long-lasting effects beyond the immediate physical symptoms. There have been reports of persistent mental fog, drowsiness, grogginess, nausea, diarrhea, loss of appetite, sustained asthma flare-ups, and increased or interrupted menstrual cycles—many of which symptoms Plaintiffs themselves have experienced.

50. On the night of July 11, following one such tear gas attack, several individuals began walking back toward the federal courthouse to continue the protests. The Federal Defendants remained on guard outside. A 26-year-old named Donovan La Bella stood on the City sidewalk in front of the federal courthouse and, with two arms, raised a boom box above his head. Federal officers shot a tear gas canister in his direction. He tried to lightly kick it away from his immediate vicinity and, when his kick proved too gentle, he tossed it away with insufficient force to come anywhere near the federal officers. As he raised his stereo again, an officer of one of the Federal Defendants shot him in the head with an impact munition. Mr.

La Bella has been hospitalized since. He suffered catastrophic injury as a result of the officer's action, requiring facial reconstruction surgery, and potentially suffering permanent brain damage.

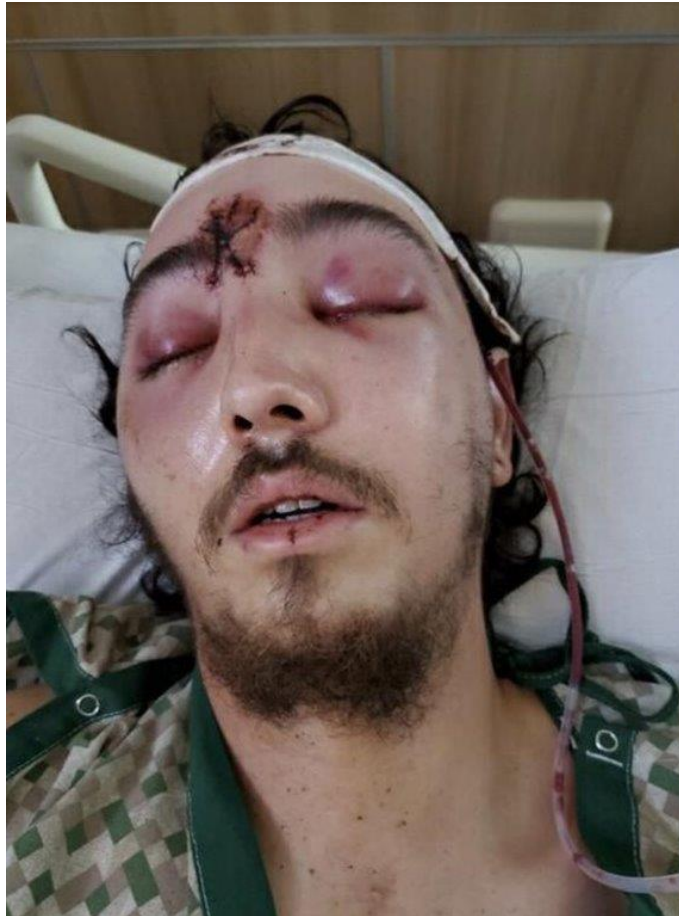


Figure 4: La Bella, one week after recovery.

51. Days later, reports began surfacing of federal officers in unmarked uniforms in unmarked vehicles abducting suspected protesters who were walking away from the protest area on the sidewalk. *See Declaration of Mark Pettibone, Rosenblum v. John Does 1-10 et al*, No. 3:20-cv-01161 (D. Or. July 20, 2020), ECF No. 7 (“Pettibone Decl.”) ¶¶ 2-3. At least one of the abductees had his hat pulled over his eyes as he was placed by two officers of the Federal Defendants into the unmarked van and whisked away. He was taken somewhere for questioning and

then released. Video:

<https://twitter.com/sparrowmedia/status/1283436911307218948?s=20>.

52. Aside from the bizarre vehicular kidnappings, DHS's and USMS's officers also violently tackle and arrest protesters suspected of minor offenses and drag them into the federal courthouse. On information and belief, these arrests are not supported by probable cause, given the number of protesters, the lack of light, and the general bustle of the crowd. Video:

<https://twitter.com/LindseyPSmith7/status/1282237570475155456?s=20>

D. The Municipal and Federal Defendants' stated justification for their violence.

53. The Portland Police has attempted to justify their treatment of the protesters, and Plaintiffs (as Protest Medics), by claiming that protesters have thrown objects, including soda cans and small rocks, at its officers.

54. Acting Secretary of Homeland Security Chad Wolf has also published the Federal Defendants' supposed rationale for waging war on Portland's citizens protesting widespread police brutality. Those reasons: graffiti, more graffiti, and protesters tossing "animal seed" (pig feed) at riot-gear clad officers. Figure 5 depicts some highlights from the Federal Defendants' justifications.⁵



Figure 5: Screenshot of a since-deleted Tweet from Acting Secretary Wolf dated July 17, 2020.

E. Protest medics play a central role in the ongoing protests.

55. Amid the nightly violence wrought by the Portland Police and Federal Defendants, protest medics like Plaintiffs play a vital role in giving voice to the

⁵ <https://www.dhs.gov/news/2020/07/16/acting-secretary-wolf-condemns-rampant-long-lasting-violence-portland>

protesters. In the face of often violent police action, these medics deliver medical care in furtherance of the anti-racist ideals at the core of the protests.

56. Protest medics offer a range of services, among them: distributing eye wash and eye wipes to protesters in anticipation of tear gas attacks, offering personal protective equipment so that protesters can observe COVID-19 physical distancing protocols, ensuring that protesters remain adequately hydrated and fed, and rendering direct care when police injure protesters.

57. Protest medics have different degrees of first-aid training and a variety of backgrounds. Some are nurses, others graduate students, others medical residents, and others still are people who hold day jobs and have basic first-aid training or former EMT experience. The protest medics coordinate with one another to discern who has credentials to provide higher levels of care, and they ensure that they only provide the care they are qualified to provide.

58. The protest medics view what they do as an act of protest, and a form of speech and expression. By their presence, they send a message to all protesters, journalists, and neutral legal observers that someone will be there to care for them, even when the Portland Police and the Federal Defendants are actively harming them. The protest medics work to prevent all who attend the demonstrations from developing illness or injury, so they can continue protesting, documenting the protests, or providing legal observation at the protests.

59. The protest medics' aid is necessary to provide a relatively safer environment for protesters to exercise their rights to free speech. The police-inflicted injuries that protest medics have treated include, among other things:

- a. traumatic brain injuries;
- b. trauma-induced seizures;

- c. five lacerated scalps;
- d. a lacerated hand with a visible tendon;
- e. broken bones, including a finger, a pinkie toe, and metatarsals;
- f. a lacerated foot;
- g. abrasions and avulsions;
- h. contusions;
- i. an ankle sprain;
- j. eye and skin irritation;
- k. and asthma attacks.

60. Given the degree of risk that merely attending a protest presents to protesters, journalists, neutral legal observers, and even other protest medics, on nights when there are few or no protest medics, many would-be protest attendees choose not to participate, or leave earlier than they wish to, for fear that they will not have access to care in the likely event the police hurt them.

61. Aside from coordinating about their relative training levels at the beginning of each night, the protest medics work to communicate with one another on a regular basis throughout the protest. Many of them carry walkie-talkies so they can call for help and let each other know where they are needed. They also use a “buddy system” whenever possible, not necessarily always working together, but at least keeping track of their “buddy’s” whereabouts and remaining in the same general vicinity as one another. They work to share supplies and different techniques they develop as the protests go on.

F. The police’s pattern of intentionally targeting and retaliating against the protest medics.

62. While they work as protest medics, Plaintiffs often are left in the impossible position of complying with the orders of law enforcement while rendering

aid to injured protesters, journalists, and legal observers. Since the beginning of the protests, the Portland Police have indiscriminately attacked, and at times have specifically targeted protest medics, including Plaintiffs, during their service to the protests.

63. Since the Federal Defendants arrived in Portland, they have done the same thing.

64. The Portland Police's and Federal Defendants' conduct has intimidated medics or otherwise worn them so thin that they feel they cannot continue attending protests with the frequency required to protect the health and safety of protesters. Defendants' conduct is part of a longstanding pattern of assaulting and threatening protest medics to prevent them from rendering aid to protesters, journalists, neutral legal observers, and their fellow protest medics.

1. The Portland Police repeatedly injure Plaintiff Wise.

65. Plaintiff Wise is a former EMT and one of the few Black men serving as a protest medic in Portland. He has attended the Portland Protests nearly every night since May 29, with the exception of Sundays and days on which he was too injured by police to continue to render adequate aid.

66. When serving as a protest medic, Plaintiff Wise wears, and has always worn, a black, waxed denim jacket with the words "medic" and the medic symbol painted in red across the back, as well as brightly colored duct-taped medic symbols on both upper arms and the chest. He quite openly carries medical supplies on his person at all times.

67. He does not interfere with the police or federal agents when he is at the protests, either when he is rendering aid or standing by "on call" for a medical need to arise. At times, he directs jokes at officers to diffuse tension between

protesters and officers—he has found that making protesters laugh can give them a sense of calm in otherwise fraught moments.

68. Plaintiff Wise often renders aid by attempting to prevent injury altogether. He tries to clear paths for cars to drive safely through protest areas. He advocates for protesters to not throw objects toward officers in retaliation to the officers' actions. In other words, he practices a form of “preventive medicine” by working to promote civil disobedience and peaceful assembly.

69. Nevertheless, the Portland Police and Federal Defendants have severely injured him multiple times and have threatened him with physical harm essentially every night he has attended the protests.

a. The Portland Police shoot Plaintiff Wise with a rubber bullet.

70. Plaintiff Wise served as a protest medic in his usual medic garb, on June 2, a night later referred to by protesters as “Tear Gas Tuesday.”

71. While standing close to the sidewalk near a group of protesters in the road, Plaintiff Wise saw a tear gas canister on the ground in the middle of the road and then a cloud of tear gas appeared. During this tear-gas attack, Plaintiff Wise attempted to pull a fallen protester out of the cloud of tear gas and helped move the protester to safety on a nearby bench. Plaintiff Wise then examined the protester's minor injuries.

72. As Plaintiff Wise tended to the protester, one of the Municipal Doe Defendants (a Portland Police officer) shot him in the shin with a rubber bullet. The bullet penetrated his skin through his pants, all the way to his shin bone.

73. Plaintiff Wise cleaned his wound, but it later became infected. He sought medical attention and took a seven-day course of antibiotics. To date, the wound still has not closed, let alone healed.



Figure 6: An image of Wise's leg taken immediately after his injury was sustained on June 2, 2020 (left), and an image of Wise's leg taken June 29, 2020 after the resulting infection cleared following a 10-day course of antibiotics (right).

b. The Portland Police throw a flash-bang grenade at Plaintiff Wise's foot.

74. Plaintiff Wise also served as a protest medic on June 21, again dressed in his medic attire.

75. As he stood in a tear-gas filled street with both hands raised, one of the Municipal Doe Defendants (a Portland Police officer) threw a flash bang that struck his foot.

76. It burned a hole through his shoe and sock and sprained his foot.

c. The Portland Police spray bear mace in Plaintiff Wise's eyes.

77. Plaintiff Wise served as a protest medic on June 28, wearing his medic clothes as usual.

78. Plaintiff Wise witnessed a wall of protesters develop in front of police officers. He then saw police officers push the wall of protesters back. As the protesters reluctantly complied with the officers' requests, Plaintiff Wise witnessed police officers begin to bear mace protesters and hit them with batons.

79. After 10pm that evening, Plaintiff Wise watched a Portland Police officer, at close range, spray a protester's eyes with bear mace. Plaintiff Wise rushed to the protester to pull them out of harm's way and administer necessary medical aid to the protester.

80. As Plaintiff Wise reached the protester, one of the Municipal Doe Defendants (the Portland Police officer) turned the bear mace on Plaintiff Wise, spraying him directly in the eyes at a distance of no more than 6 inches. As he felt his eyes burn, and struggled to see, Plaintiff Wise sought shelter with the help of others and flushed his eyes for 45 minutes. Thereafter, despite the injuries to his face and body, Plaintiff Wise continued his service to the protests later that night.

d. The Portland Police "bull rush" Plaintiff Wise.

81. Plaintiff Wise also served as a protest medic at the protests in downtown Portland on the evening of July 4, a night a of explosive violence perpetrated by the Portland Police. Upon information and belief, federal USMS agents also participated in crowd-control activities that evening and contributed to the violence.

82. A few protesters, out of around 1,000 protest attendees, shot fireworks in the area, including at nearby buildings. The Portland Police declared a "riot,"

tear gassed the crowd, and formed a riot line and began pushing protesters away from the Justice Center to the north, toward East Burnside.

83. Plaintiff Wise stayed toward the front of the protest line, about two or three rows back from the riot line. He walked backward, facing the police, to watch for any potential injuries. That day, as he did each time he served as a protest medic, Plaintiff Wise displayed a brightly colored cross on the back, chest, and both sleeves of his jacket, and wore medical supplies around his waist.

84. Plaintiff Wise noticed that one officer had Number 67 in place of a name tag. He made a joke directed at Officer No. 67 (one of the Municipal Doe Defendants in this Complaint), to the effect of the officer not understanding why kids like the delicious taste of Cinnamon Toast Crunch.

85. Suddenly, and without any notice or provocation, Officer No. 67 brushed past two protesters and charged at Plaintiff Wise from a distance between 10 and fifteen feet. At speed, Officer No. 67 forcefully shoved Plaintiff Wise to the ground.

86. Plaintiff Wise's glasses flew off his face and his cell phone, which remained in his back pocket, shattered from the force of his impact to the ground.

87. Plaintiff Wise suffered a sprained shoulder and a wound the size of a quarter on his palm. For the rest of the evening, he was hindered from providing medical aid because he was profusely bleeding from one hand and had reduced mobility in his shoulder.

88. As a result of the shoulder injury, Plaintiff Wise was unable to go to his regular job for over a week.

e. Some of the Federal Doe Defendants shoot Plaintiff Wise with pepper balls.

89. Plaintiff Wise served as a protest medic at the Portland protests on July 14.

90. When the Portland Police began “kettling” the protest attendees—tear gassing protesters at all angles, thereby eliminating paths for them to escape—Wise stood in the middle of Lownsdale Square to watch for any potential medical complications protesters might experience from tear gas, such as severe asthma attacks. Lownsdale Square is not on, and does not contain, any federal property.

91. As he stood there, some of Federal Doe Defendants repeatedly shot him in the legs with pepper balls.

92. Plaintiff Wise experienced temporary pain from the pepper balls, which hit him in the shin above guards that Wise tied around his leg to protect the open wound that was still present from a month and a half earlier.

f. The remaining police violence blurs together.

93. Aside from those more severe injuries, the Portland Police and Federal Defendants have thrown or shot flashbang grenades and teargas canisters directly at Plaintiff Wise.



Figure 7: Wise, with hands raised, nearly hit with a tear gas canister shot in his direction.

94. On at least one of those occasions, Plaintiff Wise had not had the opportunity to don his gas mask, and the tear gas caused him to have a severe asthma attack.

95. On another night, the Portland Police used the LRAD at full volume and at an improper distance from where Plaintiff Wise and other protest attendees were.

2. The Portland Police wrongfully arrest Plaintiff Martinez.

96. Plaintiff Martinez is a graduate student at OHSU, pursuing a doctorate degree in Cellular and Molecular Genetics. Specifically, he studies gene editing for phenylketonuria (PKU), an inborn error of metabolism that results in decreased metabolism of the amino acid phenylalanine. Infants are tested for PKU shortly after birth and there currently is no genetic cure.

a. Plaintiff Martinez first attended the protests as a “civilian” protester, and then determined he needed to use his skills, voice and affiliation with OHSU to serve as a protest medic.

97. Plaintiff Martinez began attending the Portland protests as a “civilian” protester on June 2, Tear Gas Tuesday. He participated in the protests that night with another OHSU graduate student.

98. The June 2 protest began in Pioneer Square and was peaceful, with the crowd chanting and a few people addressing the protesters on a megaphone. Around 9:10 p.m., the protesters marched as a group a couple of blocks east to Third Avenue.

99. Portland Police met them in full riot gear around 9:25 p.m. The police formed lines surrounding the protesters to the east and south.

100. Plaintiff Martinez was not engaged in any conduct that presented a danger or threat to public safety, and he also did not see any other protesters engaged in conduct in any way threatening to any police officer.

101. The protest had been peaceful up to this point. Given the stark contrast between the peaceful protest, and the officers in full riot gear, the protesters chanted: “Take off your riot gear! We don’t see no riot here!”

102. Suddenly—and only within about five minutes of their arrival to the demonstration—the Portland Police began indiscriminately shooting tear gas and munitions into the crowd, for no apparent reason.

103. After ingesting the tear gas, Plaintiff Martinez had difficulty breathing and seeing, his eyes burned, and he suffered from confusion and general grogginess, among other symptoms.

104. The Portland Police struck Plaintiff Martinez’s OHSU colleague, with a rubber bullet or similar munition on her upper thigh, causing her pain and extensive bruising that lasted for days.

105. The police violence Plaintiff Martinez witnessed—and experienced firsthand—strengthened his belief that protesting police brutality was necessary and important. So, after recovering from Tear Gas Tuesday, he resumed attending the protests on June 5, at the Justice Center.

106. That night, the Portland Police used the “kettling” tactic to tear gas the peaceful protesters from all angles—cutting off any path for escape. Among the protesters he saw trying to escape the police violence that night was a mother with her baby in a stroller near the Multnomah County Courthouse. The mother could not move quickly enough away from the police and sought shelter near the courthouse wall. Yet again, witnessing this strengthened Plaintiff Martinez’s belief that the police were not protecting the City or its citizens from anything—they were just retaliating against protesters for decrying their violent policing tactics.

107. Every night thereafter, the Portland Police alleged some minor violation of the law to declare an “unlawful assembly” and, based on those supposed “infractions,” weakly justify the discharging of tear gas and other “less lethal” munitions at Plaintiff Martinez and the hundreds of other protesters.

108. The Portland Police used tear gas against the protesters nearly every night until this Court entered an injunction in the Don't Shoot PDX case on June 9, 2020.

109. The same week that Plaintiff Martinez was attending the protests as an active protester, some graduate students and faculty members at OHSU organized a group of volunteers to regularly serve as protest medics.

110. Plaintiff Martinez decided to join this group of protest medics, because it was important for him to take a tangible stand against the nightly police brutality he was witnessing and experiencing.

111. He also believed that a large group of protest medics affiliated with OHSU, one of the most respected teaching hospitals in the nation, would lend credibility to the protests and help people who were not attending them understand that they were not full of "violent anarchists" and lawless "mobs," as Defendants falsely portrayed them to be.

112. Plaintiff Martinez also wanted to send a message that protesters have a right to protest safely and without fear of police violence. And, because he had witnessed many nights of Defendants freely discharging tear gas or "less lethal" munitions against protesters, he wanted to do his part as a participant in the protests by helping to ensure that injured protesters had the ability to obtain basic first aid and other healthcare, and to suffer as little harm as possible from Defendants.

113. By his presence, he also wanted to express to protesters that someone was there for them and they would have access to care if they needed it.

b. The OHSU volunteer medic group is organized.

114. To that end, Plaintiff Martinez began serving as a protest medic with the OHSU group on June 8.

115. For the first couple of nights, the group carried backpacks and distributed food and water to protesters.

116. Eventually, on June 11, they set up a table in Chapman Square. The table was clearly marked as a medics' station—it had a banner draped across it displaying the OHSU logo and was under a tent marked with a medic symbol and other first-aid signs.

117. The protest medics clearly marked the space as an OHSU medic's station for a few reasons. First, they wanted people to be able to find the medics quickly. Second, they wanted to be visible to provide the protesters with some assurance that help was close at hand. Finally, the medics wanted the police to be able to identify who they were, so that the police understood the medics were there to render aid to people in need of urgent medical attention.

118. The OHSU medics kept (and still keep) a variety of supplies at the OHSU medics' station. This includes medical supplies such as gauze, bandages, antibiotic ointments, tape, ear plugs, and over-the-counter pain medications. They also offer wipes and saline solution or other eye wash to help rinse peoples' eyes following a tear gas attack.

119. Beyond medical supplies, the OHSU medics keep the table stocked with snacks and water to ensure that protesters remain sufficiently nourished.

120. And given the current pandemic, they offer personal protective equipment such as masks, gloves, and hand sanitizer—so that protesters and other medics can observe recommended safety measures.

121. Their supplies are largely donated from community members and local businesses.

122. As the OHSU volunteer group became more organized, they developed roles for two different kinds of medics: (1) those who stay at the table and hand out supplies to other medics and protesters, and (2) those who go “into the field” to provide support to other medics or direct care to protesters wherever that care is needed.

123. The medics also came to learn that the Portland Police were recommending that ambulances not enter the protest area, even when someone was seriously wounded and needed to be treated at a hospital. So, on nights that police are expected to be particularly violent, OHSU volunteer medics turn their personal cars into makeshift ambulances.

124. Plaintiff Martinez has basic first-aid training, so he typically does not provide direct physical care to protesters. Instead, he assists other medics who have higher levels of training by making sure they have adequate supplies. He also makes sure that protesters have eye wipes, eye solution, and other supplies they need to feel safe when the police begin using force.

c. The Portland Police arrest Plaintiff Martinez for standing at the OHSU medics’ station and unlawfully seize the OHSU medics’ supplies.

125. On June 13, Plaintiff Martinez worked as a protest medic at the OHSU station beginning around 9:00 p.m.

126. The medics’ station was at its usual location near the corner of Fourth Avenue and Madison Street in Chapman Square.

127. The crowd of protesters was mainly congregated in front of the federal courthouse, adjacent to Chapman Square.

128. Around 10:30 p.m., the Portland police used the LRAD to make an announcement. The LRAD was positioned around Second Avenue and Main Street, which was not in direct earshot of Plaintiff Martinez or the other OHSU volunteer medics. They could not quite hear the announcement until the LRAD repositioned.

129. Plaintiff Martinez eventually was able to discern their announcement: The Portland police had declared an “unlawful assembly” and were ordering protesters to disperse or else be subject to crowd-control munitions, tear gas, or arrest.

130. In the past, the police had typically given protest attendees about a 30-minute warning before using crowd-control munitions. Plaintiff Martinez and the other OHSU volunteer medics therefore spent about five minutes handing out eye wash and wipes to as many protesters as they could, in anticipation of the likely imminent tear-gas attack. They then began packing up their supplies, which usually took them around 20 minutes. About five minutes after they started packing their supplies, the Portland Police stormed the crowd.

131. Plaintiff Martinez saw a line of police coming directly towards the OHSU medics’ tent, so he started filming the scene. Filming police encounters was a safety protocol recommended for all OHSU volunteer medics. The OHSU medics’ tent was still standing and it was clear that it was a medics’ station. Plaintiff Martinez stood in front of the tent, closest to the police, while the other OHSU volunteers moved quickly to break down the station. When the police approached, the OHSU medics explained that they were packing up their supplies, after which they would immediately clear the area. The police told them to leave without their supplies and directed them to move west.

132. Plaintiff Martinez still stood between the officers and the OHSU volunteers, continuing to film, as the volunteers began complying with the officers' orders. Plaintiff Martinez also began complying with the officers' orders, moving to the west, and walking backwards to keep the camera trained on the officers. After he started to walk, an officer pointed at him and said, "Arrest that guy. Arrest him."

133. An officer (who Plaintiff Martinez later learned was Defendant Officer Stephen B. Pettey) then arrested him. Zip ties were placed around his wrists. Plaintiff Martinez did not resist arrest and, in fact, told the officers that one of the zip ties had slipped off his wrist because they hadn't tightened it enough. Plaintiff Martinez was wearing a CamelBak backpack, and the police cut the straps to remove it from his person.

134. They then took him to the Justice Center, where he was detained until the National Lawyers Guild arranged with the PDX Defense Fund for bail to be posted on his behalf. The Portland Police released Plaintiff Martinez from the Justice Center at approximately 5:30 a.m.

135. As Plaintiff Martinez was being arrested, the Portland Police ordered the other OHSU volunteer medics to continue moving to the west, leaving behind their supplies. The Portland Police confiscated their tent, table, medical and other supplies, and banner.

136. Though the Portland Police denied having confiscated their supplies, and even told the volunteer medics that they should have known their supplies would be "stolen" because the area was a "war zone," the OHSU volunteer medics eventually recovered their table and supplies from the Portland Police Bureau's outgoing trash. To this day, they have not received their tent or banner. They have since had a new banner made, but they operate without a tent now.

d. Plaintiff Martinez and the OHSU medics change their practices to avoid further police brutality.

137. Following Plaintiff Martinez's arrest, the OHSU volunteer group was forced to limit its operations to protect the medics' safety from police violence and arrest.

138. For example, they usually would start packing up their tent and supplies by 11:00 p.m., because, in their experience, the police tended to declare an "unlawful assembly" and began using tear gas and making arrests around 11:30 pm. On some nights, however, the police would surprise them and begin exerting aggressive crowd-control tactics even earlier than expected, forcing them to stop providing services to the protesters, pack up their tent and supplies, and leave much earlier than they wanted.

139. Given the message of support the medics were trying to give to the protesters (and public at large), they would have stayed much later on those nights and continued offering services to the protesters if they did not fear physical violence or arrest by the police.

140. They also started keeping roll of all OHSU volunteer medics and instituted a buddy system for medics to watch over one another.

141. Plaintiff Martinez, especially, has dramatically decreased his attendance at the protests since the night of his arrest, as a direct result of his interactions with the Portland Police.

142. In the weeks leading to his arrest, he had attended the protests nearly every night. After June 13, he scaled his service as a medic to only two or three nights a week.

143. He also has to be much more alert when he attends the protests, to avoid police interaction. This is out of fear that another (wrongful) arrest could

detract from the OHSU volunteer medics' credibility as a group and complicate Plaintiff Martinez's defense against his pending criminal charges.

3. The Federal Defendants beat Plaintiffs Durkee and Guest for trying to render medical aid.

144. Plaintiffs Durkee and Guest live in Lane County and initially participated in the 2020 Black Lives Matter protests in Eugene. Those protests have included essentially no police violence.

145. Plaintiff Durkee is trained as an EMT and is also a mental-health professional.

146. Plaintiff Guest is a former emergency medical services (EMS) volunteer.

147. While they were participating in the Eugene protests, Plaintiffs Durkee and Guest watched live-stream footage and followed other social-media updates about the Portland protests. They were appalled by the repeated police violence they saw, especially considering that the protesters themselves appeared to be demonstrating peaceably.

148. Plaintiffs Durkee and Guest decided to get involved in the Portland protests as protest medics, not only because they felt strongly that systemic racism exists and has repeatedly led to police brutality against Black people, but also because they knew that their medical training could assist both the protesters and the larger movement.

149. When they attend the protests, and with the intent of clearly identifying themselves as protest medics, they wear dark-colored clothes with high-gloss, red duct tape in the shape of crosses on their front and back. They also wear dark backpacks and helmets with the same red crosses, and wear shoulder patches

with red crosses. The crosses are identifiable during the day and at night and can be seen from any angle.

a. The Portland Police and Federal Defendants tear gas and physically assault Plaintiffs Durkee and Guest.

150. Their first night serving as medics at the Portland protests was July 4.

151. Upon information and belief, both the Portland Police and Federal Defendants engaged in law-enforcement activities associated with the protests that night.

152. That night, the Portland Police and Federal Defendants employed violence indiscriminately, including against members of the press, legal observers, and medics.

153. One of the Municipal Doe Defendants or Federal Doe Defendants shot Plaintiff Guest with a projectile and another officer checked her in the shoulder with his baton. During both those incidents, Plaintiff Guest was complying with the officers' orders to disperse and was not interfering with law-enforcement activities.

154. The Portland Police forcibly pushed both Plaintiffs Durkee and Guest, again, while they were attempting to comply with the officers' orders to disperse.

155. Finally, the Portland Police or Federal Defendants deployed tear gas indiscriminately that evening. Because Plaintiffs Durkee and Guest position themselves near the police line to keep a watchful eye for potential injured protesters, they experienced the brunt of the tear gas. Although they could not see and had difficulty breathing, they tried to remain calm to avoid creating a panic. They were concerned that if protesters saw medics panicking, then they too would start panicking.

b. The Federal Defendants assault Plaintiffs Durkee and Guest for attempting to render medical aid.

156. Plaintiffs Durkee and Guest also served as protest medics on the night of July 11 and into the morning of July 12. They wore their usual medics' gear.

157. That night, one of the Federal Doe Defendants shot Donavan La Bella in the head. Plaintiff Durkee was one of the first responders, and he stayed with Mr. La Bella, applying pressure to his head and maintaining him in the recovery position until an ambulance arrived. Plaintiff Durkee's hand is visible in this video, applying pressure to Mr. La Bella's head:

<https://twitter.com/sparrowmedia/status/1283869468658147336?s=20>

158. Despite the horrific injury the Federal Defendants inflicted on Mr. La Bella, they fired impact munitions at protesters later that night.

159. Plaintiffs Durkee and Guest cared for people who had extensive injuries from rubber bullets that prevented them from walking. As they moved injured people out of the protest and away from the activity, they had to walk toward federal agents, who were approaching from multiple directions. Some of the Federal Doe Defendants responded by firing pepper balls at Plaintiffs Durkee and Guest, as well as the injured protesters they were attempting to help.

160. Additionally, as Plaintiff Guest was clearly kneeling down to help an injured protester, she locked eyes with another Federal Doe Defendant. That Defendant then threw a tear gas canister at her and the injured protester. It landed on the ground near them. Plaintiff Guest then lightly kicked the tear gas canister away from her and the injured protester, at which point the Defendant began shooting her with rubber bullets. They hit her several times, leaving abrasions and bruises on her feet and ankles.

161. That night, the Federal Defendants tear gassed the area on Third Avenue in front of the federal courthouse, including Lownsdale Square and surrounding streets, at least five or six separate times. Each time, the protesters would clear the area until the tear gas dissipated, and then return to continue their demonstrations.

162. Around 2:00 a.m. on July 5, the Federal Defendants made a large push to clear the area and keep protesters away for good. They deployed so much tear gas that Lownsdale Square became engulfed in an essentially opaque cloud.

163. Nearly simultaneously, the Portland Police brought their LRAD to the corner of Third Avenue and Main Street and announced that protesters needed to clear the area. They began pushing protesters in the same direction as the federal agents were directing them.

164. Plaintiffs Durkee and Guest were on Southwest Broadway, between Main and Salmon streets, when they heard someone yell for a medic from across Broadway.

165. As they crossed the street to provide aid, they noticed several protesters attempting to carry a person who appeared to be houseless—and not a protester—to safety. The protesters stayed with the person until Plaintiffs Durkee and Guest reached them.

166. Before Plaintiffs Durkee and Guest even had time to check on the person, some of the Federal Doe Defendants began rushing them. Plaintiff Guest said loudly enough for the Defendants to hear that a civilian, and not a protester, was injured and needed assistance. The civilian appeared to have been severely negatively affected by tear gas exposure.

167. Those federal agents continued to move toward Plaintiffs Durkee and Guest, who raised both hands and continued to plead with the agents to allow them to provide medical care to the clearly ailing person. The agents refused, instructing them to move to the north, toward Pioneer Square.

168. Plaintiff Durkee walked backwards heading north, while Plaintiff Guest faced frontwards. This is a tactic they use for all movement, to ensure they have eyes on all things surrounding them.

169. As Plaintiff Durkee walked backwards with his arms raised, one of the Federal Doe Defendants forcefully shoved him, causing both him and Plaintiff Guest to fall. Plaintiff Guest struck her arm on the ground. Some of the Federal Doe Defendants then beat both of them with truncheons multiple times. Video:

<https://twitter.com/stoggrd/status/1282432033533210625?s=20>

170. Their resulting injuries prevented them from serving as protest medics the next evening, even though they wished to do so.

171. As Plaintiff Durkee and Plaintiff Guest reflected on that evening, they understood that simply attending a protest, no matter what conduct you engage in, is to put your life at grave risk. They did not attend another Portland protest until July 18, after they were able to purchase helmets and other protective gear.

G. Plaintiffs are suffering and will continue to suffer irreparable harm.

172. Plaintiffs fear for their safety from the Portland Police's violence. Protest medics who attend and provide medical aid at the protests are at risk of being hit with tear gas, rubber bullets, police batons, arrested, and more. Even medics who remain at medical stations or at the rear of crowds are at risk of injury and arrest. Those medics who do remain at the rear of crowds cannot provide

medical assistance without injury because the police use strategies like the “kettling” employed against Plaintiffs on June 5, July 14, and many other nights.

173. For these same reasons, Plaintiffs fear for their safety from the Federal Defendants’ violence. Since President Trump ordered federal agents to go to Portland to quell protests, the Federal Defendants have been coordinating with the Portland Police to violently disperse demonstrators, neutrals, and medics standing behind a medical-supply table. The Federal Defendants use the same types (or worse) of force—chemical irritants, rubber bullets, batons—as the Portland Police. And they have emerged from unmarked vehicles clad in unmarked uniforms to abduct suspected protesters.

174. Plaintiffs wish to continue attending protests to provide medical treatment when Defendants indiscriminately injure protesters, journalists, and neutral legal observers. They want to offer support and comfort that when the outpouring of violence from the police begins, those present will be cared for. Defendants have prevented Plaintiffs and other medics from providing aid when police have dispersed protesters and have repeatedly told medics that they will be arrested and assaulted if they fail to stop administering first aid to injured demonstrators, journalists, and neutral legal observers.

175. On information and belief, countless others would serve as protest medics and volunteer their time to provide medical assistance, but for fear that they would be subject to violence from Defendants, have chosen to stay away.

176. There are no signs that the violence showcased towards Plaintiffs will end. As long as demonstrations persist, and Defendants continue to use the same levels of force, Plaintiffs and other medics will need to administer medical aid. In fact, Acting Secretary Wolf has said on several occasions that the Federal Defendants “will never surrender” and that they “will prevail” against “violent extremists” and “violent anarchists.” See Figures 8 and 9 below.



Figure 8: Acting Secretary Wolf's since-deleted Tweet from Portland visit, July 17, 2020.



Figure 9: Acting Secretary Wolf's since-deleted Tweet from Portland visit, July 17, 2020.

177. No matter how peaceful the protests are, Defendants will remain in Portland and Plaintiffs will be at risk of injury. President Trump declared that if the protests start[] again, we'll quell it again very easily. It's not hard to do if you know what you're doing."⁶ Defendants' use of force has and will continue to cause irreparable harm to Plaintiffs.

178. Plaintiffs fear for their safety from police violence because they have been attacked and injured repeatedly and without warning throughout the last approximately 50 days. Plaintiffs, as protest medics, are at risk of being hit with

⁶ <https://www.cbsnews.com/news/portland-protests-tear-gas-oregon-officials-call-for-federal-authorities-to-leave/>.

tear gas, rubber bullets, truncheons, arrest, and more. Even protest medics who remain apart from the crowd cannot carry out their humanitarian mission without serious risk of harm because officers specifically target them and their property.

179. Plaintiffs wish to continue supporting the protests by serving as protest medics. They wish to continue treating protester injuries and doing their part to create a safer protest environment. They do so because they believe in the anti-racism message at the heart of the protests, and because they believe creating a safer environment will amplify that message.

180. The protests in Portland are growing in size and strength in opposition to the growing presence of anonymous federal troops on the streets of Portland.⁷ Groups not traditionally associated with confronting police violence have begun to form. For example, a group of women recently stood before the Portland Justice Center with locked arms and chanted: “Feds stay clear. Moms are here.”⁸

181. Targeting protest medics limits their ability to support protesters with medical care. Even a temporary deprivation of the Fourth and First Amendment freedoms, including the right to free speech, unquestionably constitutes irreparable injury.

⁷ See *Violent protest clashes turned Portland into a ‘right-wing’ boogeyman.* Here’s how it happened, Washington Post, July 21, 2020, <https://www.washingtonpost.com/nation/2020/07/21/portland-feds-protests/> (describing de-escalation by late June, and swelling of protest size in direct response to presence of federal officers in early July).

⁸ *From Antifa to Mothers in Helmets, Diverse Elements Fuel Portland Protests*, New York Times, July 19, 2020, <https://www.nytimes.com/2020/07/19/us/portland-protests.html> (describing disparate groups of families, businesspeople, political leaders, and young people)

CAUSES OF ACTION

FIRST CAUSE OF ACTION

(Violation of the First Amendment, 42 U.S.C. §1983, Against the Portland Police Officially and the Municipal Doe Defendants Individually)

182. Plaintiffs incorporate all paragraphs above by reference as if fully set forth herein.

183. Plaintiffs engaged in constitutionally protected speech, as active participants in the Black Lives Matter protests in Portland, Oregon. Plaintiffs sought to protest in support of Black lives and against systemic racism and police brutality.

184. Plaintiffs engaged in constitutionally protected expressive conduct through their works as protest medics, by creating a safer environment for protesters. Plaintiffs provided medical services, supplies, and treatment to fellow protesters. Plaintiffs intended to convey a particularized message that protesters have a right to engage in constitutionally protected speech without fear of violence, and Plaintiffs served as protest medics to take a stand against federal and law enforcement officials who have injured protesters. The likelihood is great that Defendants understand Plaintiffs' particularized message, since Plaintiffs established themselves as medics with clearly-identifiable statements, clothing, equipment, and insignia.

185. Defendants' physical violence and deployment of chemical irritants and munitions against Plaintiffs and other protesters would chill a person of ordinary firmness from continuing to participate in protests as demonstrators and medics. Defendants' actions caused grave, physical injuries and psychological trauma to Plaintiffs.

186. Defendants indiscriminately unleashed chemical irritants, deployed munitions, and engaged in physical violence against Plaintiffs, establishing that Plaintiffs' protected activities—and their overall message against police brutality—were a substantial motivating factor in Defendants' conduct.

187. Given that Defendants' actions would chill a person of ordinary firmness from engaging in constitutionally-protected speech, and that Plaintiffs' protected activities were a substantial motivating factor in Defendants' conduct, Defendants retaliated against Plaintiffs in violation of the First Amendment to the U.S. Constitution.

188. As a direct result of harm that Plaintiffs have suffered, they seek prospective injunctive relief against the Portland Police and damages in an amount to be proven at trial against the individual Municipal Doe Defendants.

SECOND CAUSE OF ACTION

(Violation of the Fourth Amendment, 42 U.S.C. §1983, Against the Portland Police Officially and the Municipal Doe Defendants Individually)

189. Plaintiffs incorporate all paragraphs above by reference as if fully set forth herein.

190. Plaintiffs were seized by the Portland Police when their officers intentionally, through chemical irritants, bullets, and physical force terminated their freedom of movement.

191. Plaintiffs were present at the protests to provide medical assistance. Plaintiffs did not commit any crimes, pose any threat to any officers or any other person, or resist arrest.

192. Using chemical weapons, semi-lethal projectiles, and riot batons against parties who are not engaged in criminal activity and pose no threat to

anyone's safety is an unconstitutionally excessive use of force. The Portland Police's seizure of Plaintiffs, thus, was objectively unreasonable. The Portland Police, under color of state and federal law, subjected or caused Plaintiffs to be subjected to the deprivation of rights secured by the Fourth Amendment to the United States Constitution.

193. The Portland Police seized Plaintiffs' property when officers confiscated from Plaintiffs their medical supplies and medics' table materials, including a tent, banner, and table, without a warrant.

194. Plaintiffs used the medical supplies and medics' table materials to provide injured protesters with medical care.

195. The Portland Police had no probable cause to associate the medical supplies and medics' table materials with criminal activity. The Portland Police's seizures of Plaintiffs' property, thus, was objectively unreasonable. Under color of state and federal law, the Portland Police subjected or caused Plaintiffs to be subjected to the deprivation of rights secured by the Fourth Amendment to the United States Constitution.

196. It was the City of Portland's policy, practice, or custom, as well as its failure to train and supervise its employees and agents and issue corrective instructions after violations were brought to light, that caused the Fourth Amendment violations.

197. The City of Portland's failure to supervise and train its employees and agents with respect to the Fourth Amendment rights of Plaintiffs, including a failure to investigate and discipline officers for Fourth Amendment violations, amounts to deliberate indifference to the rights of Plaintiffs.

198. The pattern of similar constitutional violations against Plaintiffs demonstrates the City of Portland's deliberate indifference to Plaintiffs' Fourth Amendment rights.

199. In light of the multiple constitutional violations documented above, the need for more supervision or training was so obvious, and the inadequacy of the training and supervision so likely to result in the violation of constitutional rights, that the City of Portland demonstrated its deliberate indifference to the need for such training and supervision.

200. Plaintiffs reasonably fear further retaliation in the future in violation of the Fourth Amendment if they continue to participate in constitutionally protected activity.

THIRD CAUSE OF ACTION

(Violation of the First Amendment Against the Federal Doe Defendants in their Official and Individual Capacities)

201. Plaintiffs incorporate all paragraphs above by reference as if fully set forth herein.

202. This action arises under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

203. Regardless of the existence of an implied cause of action under *Bivens*, the federal courts have inherent authority to grant injunctive relief to direct compliance of the federal government and individual federal officials with the First Amendment.

204. Plaintiffs have a constitutionally protected right under the First Amendment, which prohibits the federal government from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." When the

federal government violates that right, the victim is entitled to sue the responsible officers. *Mendocino Environmental Center v. Mendocino County*, 14 F.3d 457, 464 (9th Cir. 1994).

205. Plaintiffs provide medical services to protesters as an act of expression and a form of speech. By their presence, they send a message to all protesters, journalists, and neutral legal observers that someone will be there to care for them, even when the Portland Police and Federal Defendants (who have their own medics that exist only to assist their own), and their agents, are actively harming them. The likelihood is great that the Federal Doe Defendants understand Plaintiffs' particularized message, since Plaintiffs established themselves as medics with clearly-identifiable statements, clothing, equipment, and insignia.

206. The Federal Doe Defendants, acting under color of federal authority, which includes, but is not limited to, the Executive Order, violated Plaintiffs' rights under the First Amendment, by intentionally abridging through violence and intimidation, the abilities of Plaintiffs to express themselves as described above.

207. For example, the Federal Doe Defendants intentionally violated Plaintiffs' First Amendment rights as alleged above, by, among other things, firing tear gas and pepper balls specifically at Plaintiffs Durkee and Guest, while those Plaintiffs moved injured protesters out of the way and to safety. They also forcefully shoved Plaintiff Durkee while he walked backwards with his arms raised, causing both him and Plaintiff Guest to fall. Some of the Federal Doe Defendants then beat both of them with truncheons multiple times.

208. The Federal Doe Defendants also fired tear gas and rubber bullets directly at Plaintiff Guest, while she attempted to provide first aid to a protester.

209. And with respect to Plaintiff Wise, the Federal Doe Defendants shot him in the legs with pepper balls, as he stood in clearly marked “red-cross” clothing in a park that did not contain any federal property.

210. Each of those constitutional violations caused Plaintiffs direct harm, including, but not limited to, respiratory damage, abrasions, and bruising.

211. Each of the Plaintiffs would like to continue to render aid to protest participants in future protests. Each of them is in fear that the Federal Defendants will take actions and perform operations to violate their First Amendment rights, as they have been doing night after night.

212. Any available statutory remedy that the Plaintiffs might have to redress their harm does not provide a meaningful remedy.

213. Therefore, Plaintiffs are entitled to damages in an amount to be proven at trial.

FOURTH CAUSE OF ACTION

(Violation of the Fourth Amendment Against the Federal Doe Defendants in their Official and Individual Capacities)

214. Plaintiffs incorporate all paragraphs above by reference as if fully set forth herein.

215. This action arises under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

216. Regardless of the existence of an implied cause of action under *Bivens*, the federal courts have inherent authority to grant injunctive relief to direct compliance of the federal government and individual federal officials with the Fourth Amendment.

217. Plaintiffs have a constitutionally protected right under the Fourth Amendment, which guarantees citizens the right “to be secure in their persons . . . against unreasonable . . . seizures.” That right includes freedom from excessive force by federal law enforcement officers.

218. The Federal Doe Defendants, acting under color of federal authority, which includes, but is not limited to, the Executive Order, violated Plaintiffs’ rights under the Fourth Amendment, by using excessive force.

219. For example, the Federal Doe Defendants intentionally violated Plaintiffs’ Fourth Amendment rights as alleged above, by, among other things, firing tear gas and pepper balls specifically at Plaintiffs Durkee and Guest, while those Plaintiffs moved injured protesters out of the way and to safety. They also forcefully shoved Plaintiff Durkee while he walked backwards with his arms raised, causing both him and Plaintiff Guest to fall. Some of the Federal Doe Defendants then beat both of them with truncheons multiple times.

220. The Federal Doe Defendants also fired tear gas and rubber bullets directly at Plaintiff Guest, while she attempted to provide first aid to a protester.

221. And with respect to Plaintiff Wise, the Federal Doe Defendants shot him in the legs with pepper balls, as he stood in clearly marked “red-cross” clothing in a park that did not contain any federal property.

222. Each of those constitutional violations caused Plaintiffs direct harm, including, but not limited to, respiratory damage, abrasions, and bruising.

223. Each of the Plaintiffs would like to continue to render aid to protest participants in future protests. Each of them is in fear that the Federal Defendants will take actions and perform operations to violate their Fourth Amendment rights, as they have been doing night after night.

224. Any available statutory remedy that the Plaintiffs might have to redress their harm does not provide a meaningful remedy.

225. Therefore, Plaintiffs are entitled to damages in an amount to be proven at trial.

FIFTH CAUSE OF ACTION

(Administrative Procedures Act (“APA”) Against the Federal Defendants)

226. Plaintiffs incorporate all paragraphs above by reference as if fully set forth herein.

227. As authorities of the United States Government, the Federal Defendants are “agencies” as defined under the federal APA.

228. Under the APA, the Federal Defendants are prohibited from acting in ways that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” and “contrary to constitutional right.” 5 U.S.C. § 706.

229. The Executive Order authorizes the Federal Defendants to provide law-enforcement services in Oregon, solely for the purpose of “providing assistance for the protection of federal monuments, memorials, statues, and property.”

230. Additionally, ORS 133.245 authorizes federal law enforcement officers to “arrest a person” in Oregon for violations of state law.

231. Notwithstanding the limitations of the Executive Order and ORS 133.245, the Federal Defendants have adopted a policy and have given direction to federal officers to engage in generalized anti-protest law enforcement, including dispersal of crowds with uses of force such as deployment of chemical irritants and munitions to quell protest activity. Federal officials’ public statements indicate that the anti-protest law enforcement authorized and directed pursuant to these policies

and directives are without regard to the location or other nexus with federal monuments, memorials, statues, and property.

232. Through the above-described policies and directions, and with implementation of those policies and directions against the individual Plaintiffs and others, the Federal Defendants have acted arbitrarily and capriciously, abused their discretion, and not in accordance with the Executive Order and ORS 133.245.

233. Plaintiffs have suffered a legal wrong because of the Federal Defendants' actions; they have been adversely affected or aggrieved by those actions; and they will continue to be adversely affected by them night after night. Plaintiffs are thus entitled to judicial review thereof and injunctive relief.

234. Therefore, Plaintiffs request that the Court hold the Federal Defendants' actions unlawful, pursuant to the APA, and grant all appropriate relief.

SIXTH CAUSE OF ACTION

(Declaratory Judgment)

235. Plaintiffs incorporate all paragraphs above by reference as if fully set forth herein.

236. Plaintiffs intend to continue rendering aid to protest attendees in Portland as a show of their solidarity and support for the protesters' message, the Black Lives Matter movement, and for their own message to Defendants that their violence will not deter Oregonians from exercising their free speech rights. Plaintiffs are fearful, however, that they will be subjected to police violence or dispersed without reason. Plaintiffs are also fearful that the police will continue to use "kettling" tactics against protesters that sweep in all protest attendees.

237. As a result of the acts described in the preceding paragraphs, there exists a controversy of sufficient immediacy and reality to warrant issuing a

declaratory judgment that threatening Plaintiffs with arrest, arresting them, and targeting them for uses of force, while they were engaged in constitutionally protected acts of speech and expressive conduct during protests, including rendering first aid to protest attendees, violates the First Amendment.

238. As a result of the acts described in the preceding paragraphs, there exists a controversy of sufficient immediacy and reality to warrant issuing a declaratory judgment that threatening Plaintiffs with arrest, arresting them, and targeting them for uses of force, while they were engaged in constitutionally protected acts of speech and expressive conduct during protests, including rendering first aid to protest attendees, violates the Fourth Amendment.

239. A judicial declaration is necessary and appropriate so that Plaintiffs may ascertain their rights to engage in constitutionally protected acts of speech and expressive conduct during protests, including rendering first aid to protest attendees.

240. Plaintiffs are entitled to a declaratory judgment that Defendants may not threaten them with arrest, arrest them, or target them for uses of force, while they are engaged in constitutionally protected acts of speech and expressive conduct during protests, including rendering first aid to protest attendees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief against Defendants as follows:

- A. Declaratory relief;
- B. Injunctive relief;
- C. Compensatory damages;
- D. Punitive damages;
- E. An award of pre-judgment interest;

F. An award of attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and the Equal Access to Justice Act;

G. Any other relief the Court deems proper.

DATED: July 22, 2020

PERKINS COIE LLP

By: /s/ Rian Peck

Rian Peck, OSB No. 144012

Thomas R. Johnson, OSB No. 010645

Misha Isaak, OSB No. 086430

Nathan Morales, OSB No. 145763

Shane Grannum, *pro hac vice* pending

Sarah Mahmood, *pro hac vice* pending

Zachary Watterson, *pro hac vice* pending

PERKINS COIE LLP

Kelly K. Simon, OSB No. 154213

AMERICAN CIVIL LIBERTIES UNION

FOUNDATION OF OREGON

Attorneys for Plaintiffs

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

DEFENDANTS**I. (a) PLAINTIFFS**

CHRISTOPHER WISE, MICHAEL MARTINEZ, CHRISTOPHER DURKEE, and SAVANNAH GUEST, individuals,

(b) County of Residence of First Listed Plaintiff Multnomah

(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Rian Peck, OSB No. 144012

Perkins Coie LLP

1120 NW Couch, 10th Floor, Portland, OR 97209 (503) 727-2000

CITY OF PORTLAND, a municipal corporation; OFFICER STEPHEN B. PETTEY, in his individual capacity; JOHN DOES 1-60, individual and supervisory officers of Portland Police Bureau; U.S. DEPARTMENT OF HOMELAND SECURITY; U.S. MARSHALS SERVICE; JOHN DOES 61-100, individual and supervisory officers of the federal government,

County of Residence of First Listed Defendant Multnomah

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692) <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input checked="" type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation - Transfer
- ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
42 USC Section 1983

Brief description of cause:

First Amendment free speech; Fourth Amendment unreasonable search/seizure

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

To be determined

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

07/22/2020

SIGNATURE OF ATTORNEY OF RECORD

/s/ Rian Peck

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
 - (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
 - (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
- United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
- Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
- Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
- Original Proceedings. (1) Cases which originate in the United States district courts.
- Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
- Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
- Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
- Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
- Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
- Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
- PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7.** Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
- Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
- Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Oregon

CHRISTOPHER WISE, MICHAEL MARTINEZ,
CHRISTOPHER DURKEE, and SAVANNAH
GUEST, individuals,

Plaintiff(s)

v.

CITY OF PORTLAND, a municipal corporation; OFFICER STEPHEN B.
PETTEY, in his individual capacity; JOHN DOES 1-60, individual and
supervisory officers of Portland Police Bureau; U.S. DEPARTMENT OF
HOMELAND SECURITY; U.S. MARSHALS SERVICE; JOHN DOES
61-100, individual and supervisory officers of the federal government;

Defendant(s)

Civil Action No. 3:20-cv-01193

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* City of Portland
Office of the City Attorney
1221 SW 4th Avenue, Room 430
Portland, OR 97204

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Rian Peck
Perkins Coie LLP
1120 NW Couch Street, 10th Floor
Portland, OR 97209

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. 3:20-cv-01193

PROOF OF SERVICE*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* _____
 was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____
 _____ on *(date)* _____; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____
 _____, a person of suitable age and discretion who resides there,
 on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is
 designated by law to accept service of process on behalf of *(name of organization)* _____
 _____ on *(date)* _____; or

☐ I returned the summons unexecuted because _____; or

☐ Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Oregon

CHRISTOPHER WISE, MICHAEL MARTINEZ,
CHRISTOPHER DURKEE, and SAVANNAH
GUEST, individuals,

Plaintiff(s)

v.

CITY OF PORTLAND, a municipal corporation; OFFICER STEPHEN B.
PETTEY, in his individual capacity; JOHN DOES 1-60, individual and
supervisory officers of Portland Police Bureau; U.S. DEPARTMENT OF
HOMELAND SECURITY; U.S. MARSHALS SERVICE; JOHN DOES
61-100, individual and supervisory officers of the federal government;

Defendant(s)

Civil Action No. 3:20-cv-01193

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Officer Stephen B. Pettey
4919 NE 109th St., Vancouver, WA 98686-5984
AND:
c/o City Attorney Tracy Reeve, City of Portland, Office of the City Attorney, 1221 SW
4th Avenue, Room 430 Portland, OR 97204

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Rian Peck
Perkins Coie LLP
1120 NW Couch Street, 10th Floor
Portland, OR 97209

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. 3:20-cv-01193

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☐ I personally served the summons on the individual at *(place)* _____
 _____ on *(date)* _____ ; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____
 _____, a person of suitable age and discretion who resides there,
 on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is
 designated by law to accept service of process on behalf of *(name of organization)* _____
 _____ on *(date)* _____ ; or

☐ I returned the summons unexecuted because _____ ; or

☐ Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00 .

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Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

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GUEST, individuals,

Plaintiff(s)

v.

Civil Action No. 3:20-cv-01193

CITY OF PORTLAND, a municipal corporation; OFFICER STEPHEN B.
PETTEY, in his individual capacity; JOHN DOES 1-60, individual and
supervisory officers of Portland Police Bureau; U.S. DEPARTMENT OF
HOMELAND SECURITY; U.S. MARSHALS SERVICE; JOHN DOES
61-100, individual and supervisory officers of the federal government;

Defendant(s)

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* John Does (Portland Police)
City of Portland
Office of the City Attorney
1221 SW 4th Avenue, Room 430
Portland, OR 97204

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Rian Peck
Perkins Coie LLP
1120 NW Couch Street, 10th Floor
Portland, OR 97209

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. 3:20-cv-01193

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☐ I personally served the summons on the individual at *(place)* _____
 _____ on *(date)* _____; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____
 _____, a person of suitable age and discretion who resides there,
 on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is
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 _____ on *(date)* _____; or

☐ I returned the summons unexecuted because _____; or

☐ Other *(specify)*:

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Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

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CITY OF PORTLAND, a municipal corporation; OFFICER STEPHEN B.
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supervisory officers of Portland Police Bureau; U.S. DEPARTMENT OF
HOMELAND SECURITY; U.S. MARSHALS SERVICE; JOHN DOES
61-100, individual and supervisory officers of the federal government;

Defendant(s)

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* United States Department of Homeland Security
ATTN: Billy J. Williams
The United States Attorney's Office
District of Oregon
1000 SW Third Ave., Ste. 600
Portland, OR 97204

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Rian Peck
Perkins Coie LLP
1120 NW Couch Street, 10th Floor
Portland, OR 97209

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. 3:20-cv-01193

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☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____
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 on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is
 designated by law to accept service of process on behalf of *(name of organization)* _____
 _____ on *(date)* _____; or

☐ I returned the summons unexecuted because _____; or

☐ Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12) Summons in a Civil Action

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Plaintiff(s)

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CITY OF PORTLAND, a municipal corporation; OFFICER STEPHEN B.
PETTEY, in his individual capacity; JOHN DOES 1-60, individual and
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HOMELAND SECURITY; U.S. MARSHALS SERVICE; JOHN DOES
61-100, individual and supervisory officers of the federal government;

Defendant(s)

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* United States Marshal Service
ATTN: Billy J. Williams
The United States Attorney's Office
District of Oregon
1000 SW Third Ave., Ste. 600
Portland, OR 97204

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Rian Peck
Perkins Coie LLP
1120 NW Couch Street, 10th Floor
Portland, OR 97209

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. 3:20-cv-01193

PROOF OF SERVICE*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* _____
 was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____
 _____ on *(date)* _____; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____
 _____, a person of suitable age and discretion who resides there,
 on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is
 designated by law to accept service of process on behalf of *(name of organization)* _____
 _____ on *(date)* _____; or

☐ I returned the summons unexecuted because _____; or

☐ Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Oregon

CHRISTOPHER WISE, MICHAEL MARTINEZ,
CHRISTOPHER DURKEE, and SAVANNAH
GUEST, individuals,

Plaintiff(s)

v.

Civil Action No. 3:20-cv-01193

CITY OF PORTLAND, a municipal corporation; OFFICER STEPHEN B.
PETTEY, in his individual capacity; JOHN DOES 1-60, individual and
supervisory officers of Portland Police Bureau; U.S. DEPARTMENT OF
HOMELAND SECURITY; U.S. MARSHALS SERVICE; JOHN DOES
61-100, individual and supervisory officers of the federal government;

Defendant(s)

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* John Does (Federal Police)
William P. Barr, Attorney General of the United States, U.S. Department of Justice,
950 Pennsylvania Avenue NW, Washington, DC 20530-0001
AND BY HAND:
US Attorney's Office, District of Oregon 1000 SW Third Ave., Ste. 600 Portland, OR
97204

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Rian Peck
Perkins Coie LLP
1120 NW Couch Street, 10th Floor
Portland, OR 97209

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. 3:20-cv-01193

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☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____
 _____, a person of suitable age and discretion who resides there,
 on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is
 designated by law to accept service of process on behalf of *(name of organization)* _____
 _____ on *(date)* _____; or

☐ I returned the summons unexecuted because _____; or

☐ Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

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MOTION FOR TEMPORARY RESTRAINING ORDER
AGAINST MUNICIPAL DEFENDANTS

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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

**CHRISTOPHER WISE, MICHAEL
MARTINEZ, CHRISTOPHER
DURKEE, and SAVANNAH
GUEST**, individuals,

Plaintiffs,

v.

CITY OF PORTLAND, a municipal
corporation; **OFFICER STEPHEN
B. PETTEY**, in his individual
capacity; **JOHN DOES 1-60**,
individual and supervisory officers of
Portland Police Bureau; **U.S.
DEPARTMENT OF HOMELAND
SECURITY; U.S. MARSHALS
SERVICE; JOHN DOES 61-100**,
individual and supervisory officers of
the federal government,

Defendants.

Case No. 3:20-cv-01193-IM

**PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW
CAUSE WHY PRELIMINARY
INJUNCTION SHOULD NOT
ENTER AGAINST MUNICIPAL
DEFENDANTS; MEMORANDUM
OF LAW IN SUPPORT THEREOF**

Pursuant to Fed. R. Civ. P. 65

ORAL ARGUMENT REQUESTED

EXPEDITED HEARING REQUESTED

MOTION FOR TEMPORARY RESTRAINING ORDER
AGAINST MUNICIPAL DEFENDANTS

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MOTION

Plaintiffs Christopher Wise, Michael Martinez, Christopher Durkee, and Savannah Guest (collectively, “Plaintiffs” or “Protest Medics”) hereby move for a Temporary Restraining Order (“TRO”) against Defendants City of Portland, Officer Stephen B. Pettey, and John Does 1-60 (collectively, “Defendants”), pursuant to Rule 65 of the Federal Rules of Civil Procedure, to protect them from further violations of their constitutional rights under the First and Fourth Amendments to the U.S. Constitution. This Motion is supported by the enclosed Memorandum of Law; the Declarations of Christopher Wise, Michael Martinez, Christopher Durkee, Savannah Guest, Peyton Hubbard, Jiri Rivera, Jessica Shifflett, and others being collected and signed at the time of filing this motion.

Plaintiffs specifically seek an order enjoining Defendants and their agents, employees, representatives, and servants, from directly targeting any Protest Medics in the manners that follow:

1. To facilitate the Defendants’ identification of Protest Medics protected under this Order, the following shall be considered indicia of being a Protest Medic: visual identification as a medic, such as by carrying medical equipment or supplies identifiable as such or wearing distinctive clothing that identifies the wearer as a medic. Examples of such visual indicia include any clothing or medical equipment that (1) clearly displays the word “medic” in red in an unobstructed manner or (2) clearly displays any universally recognized emblems for medics, such as the red cross, in an unobstructed manner. These indicia are not exclusive, and a person need not exhibit every indicium to be considered a Protest Medic under this Order. Defendants shall not be liable for any unintentional violations of this Order caused by the failure of an individual to wear or carry any indicia of being a Protest Medic.

2. The Portland Police Bureau and its agents, employees, and all persons acting under the direction of or in concert with the Portland Police Bureau,¹ are enjoined from arresting, threatening to arrest, or using physical force (as described in number 3, below) directed against any person who they know or reasonably should know is a Protest Medic (as described in number 1, above), unless authorized under Or. Rev. Stat. § 133.235.

3. The Portland Police are further enjoined from using physical force directly or indirectly targeted at a Protest Medic (as described in number 1, above) when the medic is providing medical care to an individual and poses no threat to the lives or safety of the public or the Portland Police. Physical force includes, but is not limited to, the use of tear gas, pepper spray, bear mace, other chemical irritants, flash-bang devices, rubber ball blast devices, batons, rubber bullets, and other impact munitions.

4. For purposes of this Order, the Portland Police are enjoined from requiring such properly-identified (*see supra*, number 1) Protest Medics to disperse or move with demonstrators following the issuance of an order to disperse or move—including moving from the street to the sidewalk—when a medic is providing or attempting to provide medical care to an individual. Further, if a Protest Medic is providing medical care to an individual, the Portland Police shall not use the Protest Medic’s decision to not disperse or move with demonstrators following the issuance of an order to disperse or move as any basis, including either

¹ Plaintiffs refer to the City of Portland, the Portland Police Bureau, their agents and employees, and all persons acting under the direction of or in concert with the Portland Police Bureau, collectively, as “the Portland Police.”

“reasonable suspicion” or “probable cause,” to establish that the medic is or has committed a crime. Such persons shall, however, remain bound by all other laws.

5. The Portland Police are further enjoined from seizing any medical equipment, first aid supplies, or other materials necessary for the Protest Medics to administer medical care, if the Portland Police know or reasonably should know that those materials are the property of a Protest Medic (as described in number 1, above), and unless the Portland Police also are lawfully seizing the Protest Medic to whom the materials belong.

6. The Portland Police are further enjoined from ordering a Protest Medic to stop treating an individual; or ordering a Protest Medic to disperse or move when they are treating or attempting to treat an individual, unless the Portland Police also are lawfully seizing that person consistent with this Order.

7. For purposes of this Order, the Portland Police shall not be liable for harm from tear gas, flashbangs, or smoke grenades, if a Protest Medic was incidentally exposed to, and not targeted with, those crowd-control devices.

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

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

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

This Motion—with its supporting materials—confirms that Plaintiffs’ requested TRO is necessary, because “immediate and irreparable injury, loss or damage will result to the movant[s] before the adverse party can be heard in

opposition.” Fed. R. Civ. P. 65(b)(1)(A). As their enclosed Memorandum of Law details, Plaintiffs have established that (i) Plaintiffs are likely to succeed on the merits of their claims; (ii) Defendants’ conduct has caused and threatens irreparable harm to Plaintiffs; (iii) the balance of harms weighs in favor of granting the TRO; and (iv) the public interest favors issuing a TRO. Thus, Plaintiffs respectfully request that the Court grant Plaintiffs’ Motion and enter the requested TRO.

MEMORANDUM OF LAW

I. INTRODUCTION

Plaintiffs ask this Court to enjoin the Portland Police from exerting threats and violence against Protest Medics, who are providing care and comfort to the hundreds, and sometimes thousands, of people protesting nightly in downtown Portland over the murder of George Floyd and against police brutality against Black, Indigenous, and Brown lives generally.

Plaintiffs are volunteer protest medics who, in the face of tear gas, rubber bullets, and other “less lethal” munitions, exercise their constitutional rights of free speech by providing care and support to the protesters demonstrating for the cause of equal treatment and absolute equality under the law. Plaintiffs also exercise their free-expression rights by helping create and facilitate an environment where protesters can more securely and freely exercise their own free-speech rights.

In response, the Portland Police have continuously used excessive force—targeting protest medics, preventing them from administering medical care to protesters, and seizing their medical supplies—in violation of well-established First and Fourth Amendment rights. The Portland Police’s conduct is causing Plaintiffs and the public irreparable harm. As demonstrated in the attached declarations, the Portland Police are continuing to use excessive force to retaliate against Plaintiffs

and numerous other protest medics for providing medical aid to protesters who the police themselves injure.

Targeting individuals only for engaging in protected expressive activities violates the First and Fourth Amendments, and the Portland Police's unlawful conduct should be enjoined immediately. This is because that conduct is causing irreparable, immediate harm. Daily protests continue and show no sign of abating. And each day that passes without relief further denies Plaintiffs and other protest medics their constitutional rights to support those demonstrating by providing medical care and to be free from unlawful searches and seizures. The requested TRO is necessary to ensure that protest medics can care for others without fear of retaliatory police violence.

II. FACTS

A. **Volunteer medics begin to attend the Portland protests, to create a safer environment for protesters seeking to protest police violence.**

Minneapolis police officer Derek Chauvin murdered George Floyd on May 25, 2020. Only two months prior, police officers in Louisville, Kentucky, murdered Breonna Taylor as she lay in her own bed. Ms. Taylor and Mr. Floyd were the latest among many dozens of Black citizens killed by police officers in the United States in just the last few years. The murders of Mr. Floyd and Ms. Taylor sparked national and international protests in support of Black lives and against systemic racism in American policing—including in Portland, where protests have been ongoing for more than 80 days and show no sign of slowing down. Declaration of Christopher Wise in Support of Plaintiffs' Motion for Temporary Restraining Order (ECF 6) ("Wise Decl.") ¶¶ 3-4.

Although the media and law enforcement may portray it differently, protests in Portland have been generally peaceful. *See* Declaration of Michael Martinez in Support of Plaintiffs’ Motion for Temporary Restraining Order (ECF 9) (“Martinez Decl.”) ¶¶ 7-8, 14-17; Declaration of Dr. Catherine Morgans in Support of Plaintiffs’ Motion for Temporary Restraining Order (ECF 7) (“Dr. Morgans Decl.”) ¶¶ 3-7. Yet, on many nights, the Portland Police have responded with violent force. They have shoved protesters to the ground, beaten them with riot batons, shot them in the head with rubber bullets and other impact munitions, and sprayed them in their eyes with bear mace at dangerously close ranges. *See, e.g.*, Wise Decl. ¶¶ 25; Martinez Decl. ¶ 28. Since the protests began, it has been a rare night when Defendants do not deploy tear gas or impact munitions into crowds ranging from dozens to hundreds of people. Declaration of Christopher Durkee in Support of Plaintiffs’ Motion for Temporary Restraining Order (ECF 5) (“Durkee Decl.”) ¶ 17; Martinez Decl. ¶ 15; *see also* Supplemental Declaration of Michael Martinez in Support of Plaintiffs’ Motion for Temporary Restraining Order (“Martinez Suppl. Decl.”) ¶ 5 (“I feel lucky that I have not yet been injured” by Portland Police using crowd control devices.).

As the protests in Portland have continued, groups of protesters, including Plaintiffs, organized in teams and loose associations to provide medical aid to the protesters as they exercised their free expression rights. *See* Declaration of Jeffrey Paul in Support of Plaintiffs’ Motion for Temporary Restraining Order (“Paul Decl.”) ¶11 (“The protest medics who assisted me that evening were extremely helpful. I witnessed them helping other protesters who were injured by tear gas and other projectiles shot by the officers”); *see also* Dr. Morgans Decl. ¶ 17 (discussing the sophisticated systems protest medics have implemented to better protect volunteer

safety). Plaintiffs, themselves passionate about the cause of eliminating brutality against Black lives at the hands of police, decided to exercise their free expression rights through their assistance to others. Declaration of Savannah Guest in Support of Plaintiffs' Motion for Temporary Restraining Order (ECF 11) ("Guest Decl.") ¶¶ 5, 8; Durkee Decl. ¶ 10; Martinez Decl. ¶ 19; Wise Decl. ¶ 4. They gathered medical supplies, clearly identified themselves as citizens offering aid to injured protesters, Martinez Decl. ¶ 23-24; Durkee Decl. ¶ 9; Guest ¶ 10, and took to the streets to have their own voices heard through their service to others. Martinez Decl. ¶ 22; Durkee Decl. ¶¶ 9-11; Guest Decl. ¶¶ 9-10.

B. After reviewing the violent tactics being used by the Portland Police, this court intervened and issued a temporary restraining order enjoining the Portland Police from using excessive force against protesters.

Because of the Portland Police's excessive use of violent force, this Court had to intervene and issue an injunction. On June 9, 2020, Chief Judge Marco Hernandez issued a temporary restraining order against the Portland Police. *Don't Shoot Portland v. City of Portland*, No. 3:20-cv-00917-HZ, 2020 WL 3078329 (D. Or. Jun. 9, 2020). In that order, Judge Hernandez held that, because there was no evidence that the plaintiffs (protesters) had engaged in "criminal activity" and "only engaged in peaceful and non-destructive protest," the use of tear gas against them by the Portland Police likely resulted "in excessive force contrary to the Fourth Amendment." *Id.* at *3. Therefore, Judge Hernandez enjoined the Portland Police from using tear gas against peaceful protesters unless "the lives or safety of the public or the police are at risk." *Id.* at *4. Judge Hernandez later expanded the order to enjoin the Portland Police from using other crowd control agents, including "less lethal" munitions, against peaceful protesters.

C. Federal Officers Arrive in Portland

In an apparent attempt to circumvent Chief Judge Hernandez’s order, the Portland Police began to rely on federal law enforcement for tear-gas (and other crowd-control devices) deployment. *See* Durkee Decl. ¶19 (describing an especially violent, tear-gas filled night). Starting around July 4, protest attendees have had to contend with violence from federal officers of the Department of Homeland Security (“DHS”) and the U.S. Marshals Service (“USMS”).² *See* Durkee Decl. ¶ 23 (describing distinctive uniform of Federal Officers). Purportedly acting under the color of Executive Order 13933, which declared that DHS would provide personnel to “assist with the protection of Federal monuments, memorials, statues, or property,” DHS and the USMS have deployed special forces in Portland, or otherwise created policing units for deployment to Portland. These Federal Officers use many of the same weapons and tactics against protesters that the Portland Police had already been deploying for over a month, some of which were restricted by Chief Judge Hernandez’s order. *See* Guest Decl. ¶ 12 (describing tear gas deployment by Federal Officers).

D. This Court intervened again and issued a temporary restraining order enjoining the Portland Police and Federal Officers from using excessive force against journalists.

In light of the Portland Police’s seeming attempts to avoid Chief Judge Hernandez’s order, on July 23, 2020, Judge Michael Simon granted a group of legal observer and journalist plaintiffs a temporary restraining order. *Index Newspapers*

² *See* Press Release, Department of Homeland Security, DHS Announces New Task Force to Protect American Monuments, Memorials, and Statues, (July 1, 2020) *available at* <https://www.dhs.gov/news/2020/07/01/dhs-announces-new-task-force-protect-american-monuments-memorials-and-statues#>; *see also* Press Release, Department of Homeland Security, Federal Protective Service Statement on Portland Civil Unrest, (July 5, 2020), *available at* <https://www.dhs.gov/news/2020/07/05/fps-statement-portland-civil-unrest>.

LLC v. City of Portland, No. 3:20-cv-1035-SI, 2020 WL 4220820 (D. Or. Jul. 23, 2020). In that case, which is similar to this one, the Court found that the plaintiffs, by showing that “they were identifiable as press, were not engaging in any unlawful activity or protesting, were not standing near protesters, and yet were subject to violence by federal agents,” had “provide[d] sufficient evidence of retaliatory intent to show, at the minimum, serious questions going to the merits” of the plaintiffs’ First Amendment retaliation claim. *Id.* at *6. Therefore, the Court enjoined the defendants’ direct attacks on journalists and legal observers. *Id.* at *1.

E. The Federal Officers reduce their presence in Portland, but the Portland Police then resume their violence against protest medics.

Because of the violent tactics used by the Federal Defendants against protest medics, Plaintiffs filed for a temporary restraining order, enjoining the Federal Defendants and the Portland Police from continuing to target protest medics. (ECF 4.) Shortly thereafter, on or around August 1, 2020, the Federal Defendants agreed to reduce their presence in Portland, if the Oregon State Police and the Portland Police resumed primary responsibility for policing the protests.³ Soon after that happened, the Portland Police resumed their unconstitutional treatment of targeting protest medics for violence. For example:

- On August 4, 2020, protest medic Jessica Shifflett, who goes by the name of Phoenix, attended the Portland protests. Declaration of Jessica Shifflett in Support of Plaintiffs’ Motion for Temporary Restraining Order (“Shifflett Decl.”) ¶ 12. While doing so, she clearly identified herself as a medic, and stood next to journalists and legal observers until she witnessed the Portland Police tackle a journalist, who was simply sitting down on a curb. *Id.* ¶¶ 7-8, 12. The journalist

³ See Willamette Week, As Federal Police Withdraw, Portland Protests Take Newly Gentle Tone, (August 1, 2020) *available at* <https://www.wweek.com/news/2020/08/01/as-federal-police-withdraw-portland-protests-take-newly-gentle-tone/>.

immediately began vomiting on himself and convulsing. *Id.* In response, Phoenix identified herself verbally as a medic, and asked the officers if she could provide emergency care. *Id.* Instead of allowing her to care for the journalist, however, the Portland Police pushed and hit her with their batons multiple times. *Id.* Then, (despite the beating) Phoenix pleaded with the officers to, at minimum, allow her to provide basic care or turn the journalist on his side, so he did not choke on his vomit. *Id.* But, instead, the officer sprayed Phoenix directly in the face with mace from only a couple feet away. *Id.* The mace leaked through Phoenix's mask filter, causing her great physical pain, burns, and breathing problems. *Id.*

- On Friday, August 7, 2020, protest medic Peyton Hubbard attended the Black Lives Matter protest at the Multnomah County Sheriff's Office, near 47th Avenue and East Burnside. Supplemental Declaration of Peyton Dully Hubbard in Support of Plaintiffs' Motion for Temporary Restraining Order ("Hubbard Suppl. Decl.") ¶ 3. While there, Hubbard clearly identified themselves as a medic through clothing and equipment. *Id.* Shortly after 1:00 a.m., the Portland Police declared an unlawful assembly and ordered protesters to move east, which Hubbard complied with. *Id.* ¶ 5. Suddenly, an officer tackled Hubbard from behind, without any provocation. *Id.* ¶ 6. Once Hubbard was on the ground, multiple officers surrounded Hubbard and beat them several times with batons and fists, causing serious bruising and injury. *Id.* ¶¶ 6, 10. Hubbard immediately started yelling out that they were not resisting arrest. An officer replied that "they didn't give a fuck." *Id.* Ultimately, the Portland Police handcuffed Hubbard and detained them at a loading dock where other protesters were being detained. *Id.* ¶ 8. On the way to the loading dock, an officer pushed Hubbard, tried to trip them repeatedly, and tried to rip Hubbard's backpack off, all while in Hubbard was in handcuffs. Video of multiple officers at this incident beating Hubbard while they were on the ground are available here:

<https://perkinscoie.hosted.panopto.com/Panopto/Pages/Viewer.aspx?id=7bbc4be0-83ed-4263-b2f5-ac1d0134d743>

<https://perkinscoie.hosted.panopto.com/Panopto/Pages/Viewer.aspx?id=db57057c-b780-415c-9277-ac1d0134d6de>

- On August 8, 2020, protest medic and U.S. Air Force veteran Jiri Rivera attended the Portland protests. Declaration of Jiri Rivera in Support of Plaintiffs’ Motion for Temporary Restraining Order (“Rivera Decl.”) ¶ 11. While there, Rivera clearly identified himself as a medic through clothing and equipment. *Id.* ¶¶ 10, 12. At around 11:40 pm, the Portland Police declared an unlawful assembly, and began “kettling” the protesters. *Id.* ¶ 14-15. As the crowd began to move, Rivera suddenly found himself on the ground being detained by the Portland Police. *Id.* ¶ 18. Other veterans informed the police that Rivera was there serving as a medic and asked them to let him go. *Id.* Despite those pleas, however, the officers zip-tied Rivera and shoved his gas mask into his mouth, restricting his ability to breathe. *Id.* As a military veteran, Rivera would like to believe that the Portland Police did not specifically target him as a medic. *Id.* ¶ 19. But given the number of targeting incidents that he has seen, and the fact that he was a highly visible medic in a line of veterans dressed in military attire and white shirts, Rivera ultimately believes that the Portland Police targeted him specifically because he had a red cross on his vest:



Photo courtesy of John Rudoff

- In the early hours of this morning, August 21, Portland Police arrested Plaintiff Chris Wise when he was clearly marked as a medic. Supplemental Declaration of Christopher Wise in Support of

Plaintiffs’ Motion for Temporary Restraining Order (“Wise Suppl. Decl.”) ¶ 4. Once again, Plaintiff Wise was clearly marked as a medic in several places. *Id.* ¶ 3. As he was complying with the Portland Police’s orders to disperse, two Portland Police officers walked past other protesters and grabbed Plaintiff Wise’s arms from either side, informing him that he was under arrest. *Id.* ¶¶ 4-5. Plaintiff Wise was released this morning around 8:45 am. *Id.* ¶ 4. Videos of Plaintiff Wise being arrested and patted down are available here:

<https://twitter.com/MasonLakePhoto/status/1296768985405390849>

<https://twitter.com/MaranieRae/status/1296736119246086144>

F. Plaintiffs peacefully offer aid to protest attendees and, despite clearly identifying themselves as providing medical aid, are targeted by the Portland Police.

Plaintiffs are all protest medics who have routinely attended the Portland protests to provide medical care to protesters and condemn racist police violence. Plaintiffs’ very presence at the protests is an act of peaceful resistance: They seek to make people feel safe while attending lawful demonstrations, demanding change. Plaintiffs express that “protesters have a right to protest safely and without fear of police violence.” Martinez Decl. ¶ 19; *see* Rivera Decl. ¶ 6; Shifflett Decl. ¶ 6. Plaintiffs’ service as protest medics also sends a clear message to the police: We will not allow your violence to prevent people from protesting your violence. Martinez Decl. ¶ 19; Durkee Decl. ¶ 10.

Protest medics offer a range of services that empower protesters to keep standing up for their values, journalists to keep reporting on the protests, and other medics to keep rendering aid at the protests. They equip protest attendees with eye wash and eye wipes in anticipation of tear-gas attacks, offer personal protective equipment so protest attendees can observe COVID-19 physical-distancing protocols, feed and hydrate protest attendees, and render medical aid when police injure protest attendees. Declaration of Peyton Dully Hubbard in Support of

Plaintiffs’ Motion for Temporary Restraining Order (ECF 10) (“Hubbard Decl.”) ¶ 7; Paul Decl. ¶¶ 6, 9; Martinez Decl. ¶¶ 20, 23-24.

To ensure that the Portland Police and protesters recognize them, protest medics wear clothing designed to communicate and demonstrate that they are there to render aid to injured protesters. For example, protest medics wear clothing with the word “medic” and the red-cross medic symbol painted across the back, as well as brightly colored duct-taped medic symbols on both upper arms and the chest. Wise Decl. ¶ 9; Guest Decl. ¶7; Durkee Decl. ¶¶ 9-10; Shifflett Decl. ¶ 7. The crosses are identifiable during the day and at night and can be seen from any angle. Hubbard Decl. ¶ 5; Guest Decl. ¶7; Durkee Decl. ¶ 9. Additionally, many protest medics openly carry medical supplies on their persons at all times. *See* Wise Decl. ¶ 9; Durkee Decl. ¶ 13 (carrying large backpack holding trauma kit); Guest Decl. ¶ 10 (same); Shifflett Decl. ¶ 7 (same).

Though protest medics engage in nonviolent behavior and pose no threat to the public, officers, or city or federal property, the Portland Police have repeatedly intimidated, harassed, and assaulted them, including each Plaintiff. While attempting to render medical aid to those in need, Plaintiffs have been tear gassed by the Portland Police—including having tear gas canisters shot or thrown in their direction. Wise Decl. ¶¶ 20-30; Guest Decl. ¶¶ 12; Durkee Decl. ¶¶ 17; Martinez Decl. ¶ 32. Defendants also have shot protest medics with rubber bullets, while they were rendering or attempting to render aid. Wise Decl. ¶¶ 22, 28. Hubbard Decl. ¶ 10.

Despite Plaintiffs wearing identifying clothing, officers have specifically targeted them and other protest medics. For example:

- A Portland Police officer sprained Plaintiff Chris Wise’s shoulder by shoving him into the ground, as Wise (while wearing identifiable clothing) was complying with the officer’s orders to move from the area by walking backwards with his hands raised. Wise Decl. ¶¶ 9, 26.
- A Portland Police officer arrested Plaintiff Michael Martinez while he was standing at a medics’ station organized by students at Oregon Health & Science University (“OHSU”). Martinez Decl. ¶¶ 33-41.
- Portland Police officers targeted and arrested Plaintiff Chris Wise when he was the only medic among a group of other protesters. Wise Suppl. Decl. ¶¶ 3-5.
- Portland Police officers targeted and arrested Jiri Rivera when he was the only medic standing among a group of other protesters. Rivera Decl. ¶¶ 11-19.
- Portland Police severely maced Phoenix, giving her chemical burns in her throat, because she asked for permission to render aid to a prone member of the press who was in so much pain after police tackled him that he was convulsing and laying in a pool of his own vomit.⁴ Shifflett Decl. ¶ 12. Phoenix has experienced similar incidents over the last couple months. *Id.* ¶¶ 10-11, 13.
- Portland Police have repeatedly beaten and shot Peyton Hubbard, despite the facts that Hubbard always wears identifying clothing, stands to the side of the protests unless someone needs assistance, and has not violated any police orders or committed any crimes. Hubbard Decl. ¶¶ 5-12; Hubbard Suppl. Decl. ¶¶ 3-14.

In each of these incidents, it was clear that the visibly identifiable protest medics were actively rendering medical aid or standing by “on call,” ready to provide aid. It also is clear that, at the time of these assaults, Plaintiffs posed no risk to the lives or safety of the public or officers. And this use of force has had a clear chilling effect: Despite their desire to continue serving as protest medics each day, Plaintiffs have

⁴ Because Portland Police prevented EMTs from timely responding, the press member lay there for around 12 minutes before an ambulance arrived to help him. Phoenix could have offered him immediate help if the Portland Police hadn’t forcibly prevented her from doing so. Shifflett Decl. ¶ 12.

been prevented from attending protests or have chosen to attend them less frequently, in response to the very real possibility that they may be arrested or seriously injured by Defendants. Guest Decl. ¶¶ 23-31; Durkee Decl. ¶¶ 29-37; Hubbard Decl. ¶ 14; Shifflett Decl. ¶ 14.

III. ARGUMENT

The evidence here justifies entry of a TRO to protect Plaintiffs as protest medics. The standard for issuing a TRO is “substantially identical” to the standard for issuing a preliminary injunction. *Stuhlbarg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001).

Under the traditional four-factor test for a TRO or preliminary injunction, this Court must grant Plaintiffs’ motion if they show that (1) Plaintiffs are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) the requested injunction is in the public interest. *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 738 (9th Cir. 2014) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Although not dispositive by itself, the first of these factors—likelihood of success on the merits—is the “most important.” *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc). But with respect to the relationship between factors (1) and (2), in the Ninth Circuit, plaintiffs who show that the balance of hardships tips “sharply” in their favor need only raise “serious questions” going to the merits. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011); *see also Warsoldier v. Woodford*, 418 F.3d 989, 993-94 (9th Cir. 2005). In other words, “the greater the relative hardship to [Plaintiffs], the less probability of success must be shown.” *Warsoldier*, 418 F.3d at 994 (quoting *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir. 1999)). Here, Plaintiffs satisfy either bar.

A. Plaintiffs are likely to succeed on the merits of their First Amendment claim.

The First Amendment to the U.S. Constitution “reflects a ‘profound national commitment’ to the principle that ‘debate on public issues should be uninhibited, robust, and wide-open.’” *Boos v. Barry*, 485 U.S. 312, 318 (1988) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Government officials—here, local law enforcement officers—may not retaliate against an individual for engaging in constitutionally protected speech. See *Hartman v. Moore*, 547 U.S. 250, 256 (2006).

To succeed on their First Amendment retaliation claims, Plaintiffs must show that (1) they engaged in constitutionally-protected speech; (2) Defendants’ actions would “chill a person of ordinary firmness” from continuing to engage in constitutionally-protected speech; and (3) Plaintiffs’ engagement in protected speech was a “substantial motivating factor” in Defendants’ conduct. *O’Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016); *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 770 (9th Cir. 2006); *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999). In so doing, however, Plaintiffs “need only show that the defendant[s] ‘intended to interfere’ with the plaintiff[s]’ First Amendment rights and that [they] suffered some injury as a result; the plaintiff[s] are] not required to demonstrate that [their] speech was actually suppressed or inhibited.” *Ariz. Students Ass’n v. Ariz. Bd. of Regents*, 824 F.3d 858, 867 (9th Cir. 2016) (citing *Mendocino*, 192 F.3d at 1300)). Here, Plaintiffs establish a high likelihood of success on the merits as to all three elements of their First Amendment claim.

1. Plaintiffs engaged in constitutionally protected speech while serving as volunteer protest medics.

Plaintiffs have met the first element for establishing a First Amendment claim—engagement in constitutionally protected speech. Specifically, under the facts of this case, Plaintiffs have shown that, as protest medics, they exercise their

constitutional right to protest and engage in expressive conduct by providing medical assistance to those taking part in the large and continuing demonstrations in Portland. Plaintiffs have engaged in constitutionally protected speech as participants in protests for Black lives. Those protests began in the wake of the murders of George Floyd, Breonna Taylor, Ahmaud Arbery, Monika Diamond, and countless others. Plaintiffs and protesters attend the protests to express their support for eradicating “systemic racism, especially as it pertains to policing and police violence.” Martinez Decl. ¶ 3; *see also* Wise Decl. ¶ 4; Durkee Decl. ¶ 4, 7, 10; Guest Decl. ¶ 3, 5, 8; Paul Decl. ¶ 4, Dr. Morgans Decl. ¶ 8; Shifflett Decl. ¶ 6. Since they started protesting in May and June 2020, Plaintiffs have fought for justice for Black people across the United States.

Protesting is protected speech. The “classically protected” right to protest lies at the heart of the First Amendment, *Boos*, 485 U.S. at 318, and, thus, activities “such as ‘demonstrations, protest marches, and picketing’” are forms of speech protected under the Constitution, *Black Lives Matter Seattle-King Cty. v. City of Seattle et al.*, No. 2:20-cv-00887-RAJ, 2020 WL 3128299, at *2 (W.D. Wash. June 12, 2020) (quoting *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1996)). The recent protests have been passionate and emotional, as protesters nationwide seek to radically change the way policing is conducted in our communities and country, all while actively opposed by the very group they are attempting to challenge with their voices. *See generally City of Houston, Tex. v. Hill*, 482 U.S. 451, 461 (1987) (explaining that yelling obscenities and threats at a police officer is still protected speech under the First Amendment).

In addition to traditional protesting, rendering medical aid to support and advance a protest is itself a form of constitutionally protected expression: The

“constitutional protection for freedom of speech ‘does not end at the spoken or written word.’” *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1240 (11th Cir. 2018) (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989)). Certain expressive conduct constitutes a protected form of speech under the First Amendment, “when ‘it is intended to convey a ‘particularized message’ and the likelihood is great that the message would be so understood.” *Corales v. Bennett*, 567 F.3d 554, 562 (9th Cir. 2009) (quoting *Nunez v. Davis*, 169 F.3d 1222, 1226 (9th Cir. 1999)); *see also Johnson*, 491 U.S. at 404. Applying those principles, courts have recognized that providing services, supplies, or support to individuals as part of a movement for political, policy, and social change, is expressive conduct and, thus, constitutionally protected speech. *See, e.g., Fort Lauderdale Food Not Bombs*, 901 F.3d at 1240-41 (ruling that a nonprofit organization’s sharing of food in visible spaces intended to convey a particular message that collective food sharing helps to eradicate hunger and poverty); *Abay v. City of Denver*, No. 20-cv-01616-RBJ, 2020 WL 3034161, at *3 (D. Colo. June 5, 2020) (finding that protesters, including protest medics who “attempt[ed] to render treatment to injured protest[e]rs,” as part of an “organized political protest” against police brutality, engaged in constitutionally protected speech).⁵

⁵ In their original motion, Plaintiffs relied on *Abay* in support of their First Amendment claims. In response, the City of Portland tried, but failed, to distinguish that case from the facts here. In *Abay*, the plaintiffs included a protest medic and similarly-situated individuals who sought to participate in organized political protests against police brutality in Denver, Colorado. 2020 WL 3034161, at **1, 3. The plaintiffs alleged that the Denver Police “specifically targeted medics wearing red crosses attempting to provide care and treatment to those injured by the Police’s wanton use of force . . . [including] while [medics] attempt to administer care to people prone on the ground.” Compl. ¶¶ 32-33, *Abay*, 2020 WL 3034161. The court did not, however, hold that the protest medics’ conduct was protected only because it occurred in the context of the larger demonstration, as argued by the City. Rather, after acknowledging that the plaintiff medics participated in the protests as part of an “attempt to render treatment to injured protest[e]rs,” the

Although an undeniably clear message is sufficient to establish First Amendment protections, the Supreme Court has clarified that a “narrow, succinctly articulable message is not a condition of constitutional protection” for expressive conduct, because such a narrow conception would prevent the First Amendment from “reach[ing] the unquestionably shielded painting of Jackson Pollack, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 556, 569 (1995) (citing *Spence v. Washington*, 418 U.S. 405, 411 (1974)). Thus, the appropriate question is “whether the reasonable person would interpret [conduct] as *some* sort of message, not whether an observer would necessarily infer a *specific* message.” *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) (emphasis in original) (citing *Hurley*, 515 U.S. at 569). Indeed, “[i]f explanatory speech is necessary to explain the conduct, then that is strong evidence that the conduct at issue is not so inherently expressive that it warrants protection.” *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 66 (2006).

In furtherance of their expression, Plaintiffs render medical aid to support and advance the voices of the other protesters. They engage in expressive conduct protected under the First Amendment by lending medical services, supplies, and treatment to other protesters in order to “send a message [] that protesters have a right to protest safely and without fear of police violence.” Martinez Decl. ¶ 19; *see* Wise Decl. ¶ 6 (“I serve as a medic to further the protests themselves, including the overall purpose and message of the protests”); Durkee Decl. ¶ 7 (“I decided to get involved in the Portland protests as a medic for the protesters, not just because I

court ruled that the medics’ activities—as well as those of other protesters participating in different capacities—were protected under the First Amendment. *Abay*, 2020 WL 3034161, at *3.

feel strongly that systemic racism exists and leads to police brutality against Black people, but because I knew that my medical training could assist both the protesters and the larger movement”); Guest Decl. ¶ 5 (“I was concerned that the protesters in Portland were very unprepared to treat the types of injuries that the police were inflicting on them . . . [so] I decided to get involved . . . as a medic for the protesters . . . because I knew that my medical training could assist both the protesters and the larger movement”); Shifflett Decl. ¶ (“By serving as a protest medic, I hope to send a message to protesters and law-enforcement officers that people should be able to keep showing up and exercising their rights without fear of physical harm, knowing that medical aid will be readily available to them.”)

Plaintiffs are engaging in constitutionally protected speech because, as protest medics, they intend to convey “a particularized message.” *Corales*, 567 F.3d at 562. Plaintiffs began organizing as protest medics “to take a tangible stand against the nightly police brutality [they] witness and experience” in Portland. Martinez Decl. ¶ 19; *see* Shifflett Decl. ¶ 6 (“I serve as a protest medic because I believe that people should be able to exercise their First Amendment right to peaceably assemble and to speak freely—even when criticizing their own government—and to not be subject to state-sponsored violence when doing so. Additionally, I believe that Black Lives Matter and that police brutality is horrific.”). In particular, Plaintiffs serve as protest medics “to send a message that protesters have a right to protest safely [] without fear of violence” and to “make sure victims have access to care and suffer as little harm as possible.” Martinez Decl. ¶ 19; Shifflett Decl. ¶ 6. They know that their “medical training [can] assist both the protesters and the larger movement” for Black lives. Durkee Decl. ¶ 7. Plaintiffs have witnessed Portland Police unleash “tear gas, pepper spray, and other

police violence” on protesters and it is their understanding that Portland Police sometimes are even “instructing ambulances not to enter [] protest area[s].”

Martinez Decl. ¶ 20; Dr. Morgans Decl. ¶ 20. Thus, they espouse the political belief that—in lieu of trusting law enforcement officials to ensure the safety of protesters exercising their First Amendment rights—they must establish and maintain a community to aid, replenish, and support protesters themselves. Martinez Decl. ¶ 19; Durkee Decl. ¶ 7; Wise ¶ 6. As protest medics, they do this in part by:

- Providing direct care to protesters and support to other medics who care for and treat protesters, Wise Decl. ¶¶ 12-17, Martinez Decl. ¶¶ 26, 30; Durkee Decl. ¶¶ 10-11;
- Carrying and distributing to protesters medical supplies, such as gauze, bandages, antibiotic ointments, tape, ear plugs, and over-the-counter pain medications, Martinez Decl. ¶ 23, Wise Decl. ¶ 9, Dr. Morgans Decl. ¶ 11; Durkee Decl. ¶ 13; Guest Decl. ¶ 10;
- “[C]arr[ying] backpacks and distribut[ing] food and water to protesters,” Martinez Decl. ¶ 22; Durkee Decl. ¶ 13; Guest Decl. ¶ 10;
- Establishing a “medics’ station” in Chapman Square in downtown Portland “under a tent [clearly] marked with a medic symbol and other first aid signs,” Martinez Decl. ¶ 22, Dr. Morgans Decl. ¶ 14;
- Offering protesters “wipes and saline solution or other eye wash to help rinse peoples’ eyes following a tear gas attack,” Martinez Decl. ¶ 23;
- Offering protesters “personal protective equipment such as masks, gloves, and hand sanitizer” to ensure protesters can “observe recommended safety measures” during the COVID-19 pandemic, Martinez Decl. ¶ 23; and
- Attempting to “deescalate situations that could or have turned violent” and “diffuse tensions,” including when an automobile driver plowed their car through a group of protesters and fired gunshots, Wise Decl. ¶¶ 18, 26; *see also* Durkee Decl. ¶ 10 (keeping morale high).

Further, the context of and circumstances surrounding Plaintiffs' participation in the protests clearly establish that a reasonable person would interpret their activities as protest medics as intended to convey some particularized message. *See Fort Lauderdale Food Not Bombs*, 901 F.3d at 1241 (“[T]he circumstances surrounding an event help set the dividing line between activity that is sufficiently expressive and similar activity that is not.”).⁶ The *context* of Plaintiffs' participation as medics is clear. Night after night, police brutality and violence against protesters in downtown Portland is on full display for all of the city, Oregon, the nation, and the world to see—on social media, the local news, in newspapers, and for some Portland residents who live near these protests, right outside of their windows. Furthermore, as Plaintiffs have stated—and quite significantly, the City of Portland has not contested—ambulances and medical first responders often do not have access to or decline to come to protest sites to treat injured protesters, before, during, or after the Portland Police issue allegedly “lawful” dispersal orders. *See, e.g., Wise Decl.* ¶ 15 (describing “ambulances and first responders unwilling to come to [protesters]”); *Shifflett Decl.* ¶ 12 (explaining that it can take anywhere from 15-20 minutes, generally, when police call for an ambulance).

Surrounding circumstances make Plaintiffs' participation clear, as well. Plaintiffs' message at the protests is one that is particularized and specific to protest medics, as a discrete category of individuals attending the protests.

⁶ *See also Hurley*, 515 U.S. at 568 (using context to differentiate “marchers [in a parade] who are making some sort of collective point” from “bystanders along the way”); *United States v. Grace*, 461 U.S. 171, 176 (1983) (using context and surrounding circumstances to differentiate walking from “peaceful picketing and leafletting”); *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (using context and surrounding circumstances to distinguish between Black Americans playing a game and conducting a sit-in at a library to protest segregation).

Plaintiffs have clearly established themselves as medics within a community that attends the protests to aid and support protesters, and protesters recognize them as such. *See* Paul Decl. ¶ 11. Medics stations like the one Martinez attended are stocked with medical supplies like gauze and bandages and are clearly marked with indicia that they are there to render first aid. Martinez Decl. ¶ 22. Plaintiffs and other protest medics wear clearly-identifiable clothing, equipment, and insignia as they traverse demonstrations across Portland to care for protesters. Guest Decl. ¶ 7; Durkee Decl. 10; Wise Decl. ¶ 9; Shifflett Decl. ¶ 7. Protest medics have been an unmistakable presence at protests each night, verbally identifying themselves as medics, carrying medical supplies and rendering care and treatment to protesters injured by tear gas, pepper spray, rubber bullets, and other chemical irritants and munitions deployed by law enforcement officials. *See* Wise Decl. ¶¶ 9, 13-17; Guest Decl. ¶¶ 11-12; Shifflett Decl. ¶ 12.

The context of Plaintiffs' activities as protest medics and surrounding circumstances should lead any reasonable observer—and certainly a Portland Police officer, who is presumably trained and required to contextualize situations and observe their surroundings—to understand that Plaintiffs seek to convey a particularized message by participating as protest medics. Further, the context and surrounding circumstances establish that the likelihood is great that this message would be understood. Therefore, Plaintiffs have established the likelihood of success on the merits that they engaged in constitutionally-protected expressive conduct as protest medics.

2. Defendants’ actions would chill a person of ordinary firmness from continuing to engage in constitutionally protected speech.

Plaintiffs also establish a likelihood of success on the merits as to the second element of their First Amendment retaliation claim—that Defendants’ actions would chill a person of ordinary firmness—because (as should come to no one’s surprise) physical violence and deployment of chemical irritants and munitions by law enforcement would chill a person of ordinary firmness from continuing to participate in protests as medics. “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 [their] protected activity.’” *Black Lives Matter-Seattle*, 2020 WL 3128299, at *3 (quoting *Mendocino*, 192 F.3d at 1300). Here, although Plaintiffs have continued, and will continue, to serve as protest medics, under the applicable objective standard, the Portland Police’s continuous targeting of protest medics almost certainly would chill any medic of ordinary firmness from participating in the protests.

This Court and others have repeatedly confirmed that what Plaintiffs endure nightly from Defendants would chill the First Amendment rights of a person of ordinary firmness:

- A police officer’s deployment of pepper spray caused a protester severe anxiety, and thus would chill the protester’s rights, *Drozd v. McDaniel*, No. 3:17-cv-556-JR, 2019 WL 8757218, at *5 (D. Or. Dec. 19, 2019);
- Law enforcement officials’ use of “crowd control weapons” like tear gas and pepper spray would chill person of ordinary firmness from protesting, *Black Lives Matter-Seattle*, 2020 WL 3128299, at *3;
- A police force’s use of “physical weapons and chemical agents” against protesters would chill speech by creating in demonstrators a “legitimate and credible fear of police retaliation,” *Abay*, 2020 WL 3034161, at *3; and

- A police officer's deployment of tear gas would chill a person of ordinary firmness from engaging in protected activities under the First Amendment, *Quraishi v. St. Charles Cty., Mo.*, No. 4:16-CV-1320 NAB, 2019 WL 2423321, at *6 (E.D. Mo. June 10, 2019).

Because of the chilling effect that an indiscriminate use of force presents, “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 [violent] conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure.” *Collins v. Jordan*, 110 F.3d at 1372 (citing *Cox v. Louisiana*, 379 U.S. 536, 551 (1965); *Kunz v. New York*, 340 U.S. 294-95 (1951)). The Portland Police have repeatedly done just the opposite.

The Portland Police have unquestionably engaged in conduct that would chill a person of ordinary firmness from continuing to participate in protests as medics. As in the cases cited above, the Portland Police have deployed tear gas, pepper spray, and other chemical irritants directly on Plaintiffs at close range. Martinez Decl. ¶ 12; Wise Decl. ¶ 28; Dr. Morgans Decl. ¶¶ 3-4; Shifflett Decl. ¶ 12. These irritants are deeply invasive and painful, causing the eyes, nose, and (sometimes) even the skin to burn and swell.⁷ Protest medics exposed to these irritants find it hard to breathe, feel burning or pain in their chest and lungs, and experience difficulty seeing, *see id.*, as was the case for Plaintiffs. Martinez Decl. ¶ 9; Wise Decl. ¶ 25; Guest Decl. ¶ 13; Shifflett Decl. ¶ 12; Durkee Decl. ¶ 12, 18, 34 (“We decided not to attend the protest because we wanted more protective gear before going out”). Those internal biological reactions alone prevent Plaintiffs from performing their work as protest medics.

⁷ See Ctrs. for Disease Control & Prevention, Facts About Riot Control Agents (Apr. 4, 2018), [https://emergency.cdc.gov/agent/riotcontrol/factsheet.asp#:~:text=Riot%20control%20agents%20\(sometimes%20referred,to%20be%20riot%20control%20agents.](https://emergency.cdc.gov/agent/riotcontrol/factsheet.asp#:~:text=Riot%20control%20agents%20(sometimes%20referred,to%20be%20riot%20control%20agents.)

Defendants also have deployed munitions—such as rubber bullets and flash bangs—directly against protest medics, sometimes while they were rendering care and treatment to protesters and bystanders. Wise Decl. ¶¶ 22, 28. Especially when deployed in close contact, these munitions bruise and even puncture the skin, fracture bones, and cause blindness. The Portland Police have repeatedly attacked, beaten, clubbed, and harassed Plaintiffs and other protest medics. *See* Wise Decl. ¶¶ 22, 24-26, 28-30; Shifflett Decl. ¶ 12. This conduct has caused grave, physical injuries. *See* Wise Decl. ¶¶ 22-23 (“[A] Portland police officer shot me in the shin with a rubber bullet . . . penetrat[ing] my skin and expos[ing] my shin bone . . . [and] [m]y wound later became infected . . . [that] still has not closed, let alone healed”); Shifflett Decl. ¶¶ 10-14 (“PPB officers pushed me and hit me with their batons multiple times . . . result[ing] in multiple bruises on my body . . . [and shortly thereafter] sprayed me directly in the face with mace from only a couple feet away . . . [which] leaked through my mask filter, causing me great physical pain, chemical burns in my throat, and breathing problems”). Those injuries have forced protest medics to stay home and heal, instead of continuing to serve as protest medics (as they desire to do). Wise Decl. ¶ 27; Hubbard Decl. ¶¶ 14; Shifflett Decl. ¶ 14. Furthermore, witnessing Defendants’ use of chemical irritants, munitions, and long-range acoustic devices commonly deployed by the United States Armed Forces against enemy combatants in foreign wars, against Americans on domestic soil, has caused lasting physical and emotional trauma for protest medics. *See* Durkee Decl. ¶ 19 (“The indiscriminate brutality of the police and federal agents—especially the shooting of [protester] Donovan La Bella [by law enforcement]—has had a significant negative impact on my ability to continue to serve as a medic . . . I could possibly lose my life”). For those reasons, Plaintiffs have established a high

likelihood that Defendants' actions would chill a person of ordinary firmness from continuing to engage in constitutionally protected speech.

3. Plaintiffs' protected activities were a substantial motivating factor in Defendants' conduct.

Plaintiffs also establish a high likelihood of the existence of the third and final element of their First Amendment retaliation claim—that their protected activities were a substantial and motivating factor in the Portland Police's conduct. This element requires a “nexus between [Defendants'] actions and an intent to chill speech.” *Cantu v. City of Portland*, No. 3:19-cv-01606-SB, 2020 WL 295972, at *7 (D. Or. June 3, 2020) (quoting *Ariz. Students Ass'n*, 824 F.3d at 867). Plaintiffs may establish that element through either direct or circumstantial evidence: “The use of indiscriminate weapons against all protesters—not just [] violent ones—supports the inference that [law enforcement officials'] actions were substantially motivated by Plaintiffs' protected First Amendment activity.” *Black Lives Matter-Seattle*, 2020 WL 3128299, at *4; *Ulrich v. City & Cty. of San Francisco*, 308 F.3d 968, 979 (9th Cir. 2002) (citing *Allen v. Iranon*, 283 F.3d 1070, 1074 (9th Cir. 2002)).

Here, because (1) Plaintiffs consistently wore distinctive and visible markings identifying them as medics, (2) did nothing to threaten the safety of the public or police, and (3) despite those facts, the Portland Police nonetheless specifically targeted Plaintiffs for violence, the Court may infer that the Portland Police did so with an intent to prevent Plaintiffs from expressing themselves as protest medics. *See Index Newspapers*, 2020 WL 4220820, at *6 (holding that the plaintiffs established a sufficient nexus and showing to grant a restraining order because they (1) “were identifiable as press,” (2) were not engaging in any threatening activity, and (3) “yet were subject to violence by federal agents”).

Plaintiffs wear clothing with markings clearly identifying them as providing medical aid and “yet [are] subject to violence” by the Portland Police. *Id.* From that, it is reasonable to infer that Plaintiffs’ message of opposing police brutality in a tangible way is a substantial and motivating factor in the excessive and indiscriminate use of force. Plaintiffs have engaged in protests that specifically seek to eradicate police brutality and fundamentally transform the role that law enforcement plays in our society, and they have chosen to express their views through their particular service. Durkee Decl. ¶ 3; Guest Decl. ¶¶ 3-4; Wise Decl. ¶ 4-6; Shifflett Decl. ¶ 6; Rivera Decl. ¶¶ 6, 8. That message, if successful, is one that ultimately will have a negative impact on the authority and power that Defendants wield. Given that Plaintiffs are clearly identified, have not engaged in any threatening behavior, and that Defendants have used direct force to suppress the speed at which Plaintiffs perform their medical services or Plaintiffs’ ability to render aid altogether, it is reasonable to infer that Defendants sought, and seek, to suppress Plaintiffs’ particularized form of speech. Defendants acts to target Plaintiffs as they assist others and to prevent them from rendering aid in the first place leads to but one conclusion: Plaintiffs’ protected activities were a substantial motivating factor in Defendants’ conduct.

The Portland Police’s rationale for why its officers shot, fired at, beat, and injured clearly-marked and clearly-identifiable protest medics—the overall chaotic environment of the Portland protests—does not at all defeat Plaintiffs’ claims that the Portland Police unconstitutionally targeted them for violence. That is for two reasons. First, in making that argument, the Portland Police have mischaracterized the exact nature of Plaintiffs’ theories. Although Plaintiffs do rely on important contextual evidence showing that the Portland Police indiscriminately

use tactics such as kettling and the broad dispersal of tear gas on the entire Portland protests, that is not the crux of their claims. Instead, as in this motion for TRO, Plaintiffs' gravest concern is the harm caused to them and other protest medics (not protesters generally) by the Portland Police's "direct targeting" of medics: *i.e.*, the use of force directly targeted at a protest medic; such as, macing a clearly identified protest medic in the face from a few feet away when they are providing or attempting to provide medical care; Wise Decl. ¶ 25; Martinez Decl. ¶ 28; Shifflett Decl. ¶ 12; aiming a gun directly at, shooting, and then laughing at a clearly identified protest medic who is standing to the side of the protests waiting to help someone; Hubbard Decl. ¶¶ 5-12; beating a clearly identified protest medic with batons, while they are screaming to help another injured protester; Hubbard Suppl. Decl. ¶ 6. And the overall chaotic environment of a protest has little to no bearing on those decisions by the Portland Police to identify the medics out of a crowd of protesters and specifically target them for violence.

Second, under the U.S. Constitution and its own internal agency directives, the Portland Police have an obligation to distinguish and detain only criminal and violent actors in a protest, but not others who serve important functions while caught in the crossfire of that violence. Contrary to the Portland Police's assertions, the U.S. Constitution does not somehow allow law enforcement officers to fire directly or indiscriminately at people (such as Plaintiffs) peacefully exercising their constitutional rights and then blame the damage to those individuals on a few other actors who actually engaged in violent behavior. *See Don't Shoot Portland*, 2020 WL 3078329 at *3 (holding that the Portland Police could not rely on the chaotic environment of protests to justify their excessive force under the Fourth Amendment, so long as the individual Plaintiffs did not actually pose a safety or

criminal risk). Constitutional uses of force may result in unintended consequences, but the Portland Police's targeting of clearly marked medics and subjecting them to violent force can hardly be characterized as unintended. *See, e.g.*, Wise Decl. ¶ 25 (being bear maced by a PPB officer from a distance of six to eight feet away, risking permanent, severe damage to Wise's eyes); Shifflett Decl. ¶ 12 (describing being maced directly in the face from a few feet away); Hubbard Suppl. Decl. ¶ 6 (describing being beaten by multiple officers while on the ground). Similarly, the Portland Police's own internal directives require officers to distinguish between actors while responding to demonstrations and protests. Under PPB Directive 0635.10, a police officer's "response should be commensurate to overall crowd behavior, and members should differentiate between groups or individuals who are engaging in criminal behavior or otherwise posing a threat to the safety of others and those in the crowd who are lawfully demonstrating." Therefore, the fact that these events took place in a generally chaotic environment does not make otherwise targeted unconstitutionally violent behavior suddenly constitutional.

B. Plaintiffs also are likely to succeed on the merits of their Fourth Amendment claim.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Here, Plaintiffs are likely to succeed on the merits of their claims that the Portland Police violated the Fourth Amendment by using excessive force against Plaintiffs and by unlawfully seizing their medical equipment.

1. The Portland Police have used, and continue to use, excessive force against Plaintiffs.

Plaintiffs have established a high likelihood that the Portland Police used excessive force against them, in violation of the Fourth Amendment. A seizure occurs when an “officer by means of physical force or show of authority terminates or restrains [a person’s] freedom of movement through means intentionally applied.” *Nelson v. City of Davis*, 685 F.3d 867, 875 (9th Cir. 2012) (quoting *Brendlin v. California*, 551 U.S. 249, 254 (2007)). And, a law enforcement officer’s use of force is excessive and violates the Fourth Amendment when it was “objectively unreasonable in light of the facts and circumstances confronting the officer.” *Graham v. Connor*, 490 U.S. 386, 397 (1989). To determine whether use of force was unreasonable, courts balance “the nature and quality of the intrusion on the individual’s Fourth Amendment interests” against the “countervailing governmental interests at stake.” *Id.* at 396. “The force which was applied must be balanced against the *need* for that force; it is the need for force which is at the heart of the consideration” of the reasonableness inquiry. *Alexander v. City & Cty. of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994) (emphasis in original). In this case, the Portland Police’s seizures through use of force against Plaintiffs was not objectively reasonable.

a. Plaintiffs were seized under the Fourth Amendment.

The Portland Police have continuously “seized” Plaintiffs under the Fourth Amendment by using force to terminate their movements. Under the Fourth Amendment, an officer’s intent to specifically target an individual is irrelevant; so long as the use of force that terminates an individual’s movement is intentional, a seizure occurs even where there is “an absence of concern regarding the ultimate recipient of the government’s use of force.” *Nelson*, 685 F.3d at 876. The Portland

Police not only terminate protest medics', including Plaintiffs', movements by shooting them with tear gas, rubber bullets, and stun grenades, and beating them with batons, *see* Martinez Decl. ¶ 32-40; Wise Decl. ¶ 22, 24-26, 28-30; Hubbard Decl. ¶¶ 7-8, 10; Hubbard Suppl. Decl. ¶ 6; Shifflett Decl. ¶ 12, but they also target protest medics both as individuals and as members of a crowd, Wise Decl. ¶¶ 21-28, 30; Hubbard Suppl. Decl. ¶¶ 5; Rivera Decl. ¶ 15; Shifflett Decl. ¶ 8. Because the officers intentionally targeted and used force against Plaintiffs, inhibiting their movement, Plaintiffs were seized.

b. The Portland Police use excessive force against Plaintiffs.

The Portland Police violated Plaintiffs' Fourth Amendment rights by effecting a seizure (as described above) through the use of excessive force. The Ninth Circuit has held that the use of only pepper spray is a serious intrusion into an individual's Fourth Amendment rights, "due to the immediacy and 'uncontrollable nature' of the pain involved." *Nelson*, 685 F.3d at 878 (citations omitted); *see U.S. v. Neill*, 166 F.3d 943, 949 (9th Cir. 1998) (holding that pepper spray is dangerous weapon "capable of inflicting death or serious bodily injury"). Accordingly, deploying chemical irritants such as pepper spray to disperse protesters can constitute unreasonable, excessive force where it is "unnecessary to subdue, remove, or arrest the protestors," even if the protesters have failed to heed a police warning. *Young v. Cty. of L.A.*, 655 F.3d 1156, 1167 (9th Cir. 2011) (citation omitted).

The Portland Police have injured Plaintiffs and other protest medics with chemical irritants and impact munitions, which inflicted immediate and uncontrollable pain. As Plaintiffs and other protest medics cared for wounded protesters, officers temporarily blinded them with tear gas and bear mace and shot rubber bullets that cut through their skin. Wise Decl. ¶¶ 22-30; Shifflett Decl. ¶ 12.

When protest medics hung back, and asked officers if they could provide medical care, officers responded by macing them and shoving them with riot batons.

Shifflett Decl. ¶ 10-12. When protest medics did not disperse fast enough, they were singled out from the crowd and tackled or violently arrested. Wise Decl. ¶¶ 22, 24-28; Wise Suppl. Decl. ¶¶ 4-6; Martinez Decl. ¶¶ 37-40; Hubbard Suppl. Decl. ¶¶ 5-6; Rivera Decl. ¶¶ 15-18.

As a result of this police brutality, Plaintiff Wise suffered a sprained shoulder and was forced to take medical leave from work; Shifflett suffered chemical burns to her throat and had trouble eating; and several protest medics have been otherwise bruised and battered. Wise Decl. ¶¶ 26-27; Shifflett Decl. ¶ 12; Hubbard Decl. ¶¶ 7-8, Guest Decl. ¶ 15; Durkee Decl. ¶ 20. The Portland Police's actions and the resulting injuries have caused Plaintiffs "immediate" and "uncontrollable" pain. Thus, consistent with *Nelson*, the Portland Police repeatedly have used excessive force on Plaintiffs, contravening the guarantees of Plaintiffs' Fourth Amendment rights.

c. The use of force against Plaintiffs was not justified.

Plaintiffs should prevail on their Fourth Amendment claims because the Portland Police had no valid justification for reacting with such extreme displays of force. In assessing the need for force against an individual, the Ninth Circuit considers factors such as "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Hopkins v. Andaya*, 958 F.2d 881, 885 (9th Cir. 1992) (per curiam) (quoting *Graham*, 490 U.S. at 396). Not one of these factors is even implicated, let alone met.

The existence and, thus, severity of any crimes committed by Plaintiffs was nil. Where individuals are not engaged in “serious criminal behavior,” that “significantly reduce[s] the governmental interest involved” in the use of force against them. *Nelson*, 685 F.3d at 880. This holds true even where the use of force takes place under circumstances of “general disorder,” because the relevant inquiry is whether the targeted individual had engaged in criminal activity. *Id.* at 883. Thus, even if others in the immediate areas are engaging in criminal activity but the *actual plaintiffs* are not, then using force against the plaintiffs is not justified under the Fourth Amendment. See *Don’t Shoot Portland*, 2020 WL 3078329 at *3 (granting a TRO on Fourth Amendment grounds because, even though others at the Portland Protests were engaged in criminal activity, “there is no dispute that *Plaintiffs* engaged only in peaceful and non-destructive protest.” (Emphasis in original.)).

Here, Plaintiffs and protest medics did not engage in any criminal activity. Instead, they actually attempted to de-escalate activities that would lead to further police agitation. Wise Decl. ¶¶ 18, 26; Guest Decl. ¶¶ 14, 17, 19; Durkee Decl. ¶¶ 10, 24; Rivera Decl. ¶ 11. Therefore, under the first factor, the Portland Police’s use of force on protest medics is not justified.

Regarding the second factor, Plaintiffs did not pose any immediate threat to officer safety. Law enforcement officers may not justify use of force against an individual who does not pose an immediate threat to officers’ safety merely because of the underlying “tumultuous circumstances.” *Nelson*, 685 F.3d at 881. As just explained, Plaintiffs and protest medics did not pose a threat to anyone’s safety, and were subjected to violence even while retreating or attempting to leave the protest altogether. Durkee Decl. ¶¶ 14, 24 (describing need to walk backward so

that officers do not strike with batons with backs turned); Guest Decl. ¶¶ 11, 19 (same); Hubbard Decl. ¶ 8; Shifflett Decl. ¶¶ 7-13. In fact, quite the opposite is true: *as protest medics, they were working to ensure and increase public safety*. Therefore, Defendants' use of force against Plaintiffs was not justified by any threat to officers' public safety.

Third and finally, Plaintiffs did not resist or attempt to evade any valid arrest. Where an officer orders a crowd to disperse, a failure to comply immediately does not amount to actively resisting arrest, but "only rise[s] to the level of passive resistance," which "neither rises to the level of active resistance nor justifies the application of a non-trivial amount of force." *Nelson*, 685 F. 3d at 881; *see also Headwaters Forest Def. v. Cty. Of Humboldt*, 276 F.3d 1125, 1130 (9th Cir. 2002) (protesters that remained seated in a congressman's office despite officers' orders to disperse had not actively resisted). To the extent that Plaintiffs may not have complied immediately with an officer's order to disperse because they were packing up their medical supplies or attempting to render aid to an injured protester, that does not rise to the level of active resistance that would justify the application of a non-trivial amount of force, particularly when they did not resist arrest. Wise Suppl. Decl. ¶¶ 4-6; Martinez Decl. ¶ 39; Hubbard Suppl. Decl. ¶ 6; Rivera Decl. ¶¶ 17-18.

As Plaintiffs were not engaged in any criminal behavior, creating a threat to officers' safety, or actively resisting arrest, it was not reasonable for officers to use any force against them, much less the chemical irritants, rubber bullets, and physical force that officers wrought upon them. Plaintiffs have therefore shown that they will likely succeed on the merits of their Fourth Amendment excessive force claim.

2. Plaintiffs are likely to establish that law enforcement officers unlawfully seized their property in violation of the Fourth Amendment.

The Portland Police also unlawfully seized Plaintiffs’ medical equipment and materials. “Seizure of property occurs when there is some meaningful interference with an individual’s possessory interests in that property.” *U.S. v. Jacobsen*, 466 U.S. 109, 113 (1984). Such interference violates the Fourth Amendment when it is unreasonable. With limited exceptions, “[a] seizure conducted without a warrant is *per se* unreasonable under the Fourth Amendment.” *U.S. v. Hawkins*, 249 F.3d 867, 872 (9th Cir. 2001) (quoting *Minn. v. Dickerson*, 508 U.S. 366, 372 (1993)). Further, seizure of property without a warrant is reasonable only when “there is probable cause to associate the property with criminal activity.” *Soldal v. Cook Cty., Ill.*, 506 U.S. 56, 69 (1992). Whether probable cause exists depends on the totality of the circumstances within an officer’s knowledge. *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983).

Here, law enforcement officers violated the Fourth Amendment by unreasonably seizing Plaintiffs’ medical supplies and medics’ station materials. For example, to provide protesters with medical assistance, Plaintiff Martinez, with the OHSU for Black Lives Matter group, had set up a medics’ station for several days at the protests with a table, tent, and banner that prominently displayed medic symbols, first aid signs, and the logo for OHSU. Martinez Decl. ¶ 22; Dr. Morgans Decl. ¶ 14. Protest medics and community members brought medical supplies to the medics’ station, including wipes and saline solution to rinse protesters’ eyes after a tear gas attack, gauze and bandages, and personal protective equipment to help protesters observe public health measures, such as masks, gloves, and a hand sanitizer. Martinez Decl. ¶¶ 23-24. On June 13, 2020, law enforcement officers confiscated from the OHSU for Black Lives Matter group’s table, tent, banner, and

medical supplies and did not return those items. Martinez Decl. ¶ 41; Dr. Morgans Decl. ¶¶ 14-16; *see also* Shifflett Decl. ¶ 11 (describing an incident where the Portland Police “dumped [Shifflett’s] medical-supply bag into the street” before physically detaining her). They managed to recover their table and some medical supplies from the Portland Police’s outgoing trash, but have not yet received their tent, banner, or the remainder of their medical supplies. Martinez Decl. ¶ 41; Dr. Morgans Decl. ¶ 16. While OHSU owns some of this property, such as the banner, Plaintiff Martinez’s possessory interest in the property is sufficient for him to have suffered an injury when the property was seized. *Jacobsen*, 466 U.S. at 113 (defining “seizure” as the interference with an individual’s *possessory*, not ownership, interests).

The officers had no plausible reason to associate the medical supplies and medics’ table materials with criminal activity, let alone one sufficient to provide probable cause. The medic symbols, first-aid signs, and the logo for OHSU made clear that the table, banner, and tent were part of a medics’ table to promote public health and safety. The supplies were also plainly items for medical assistance. Further, the OHSU group had established and maintained the medics’ station at the protests for several days, without causing any concern of criminal activity. Thus, per the totality of the circumstances within the officers’ knowledge, the medical supplies and medics’ table materials were not associated with criminal activity, but with public safety and health instead. The officers’ seizure of the medical supplies and medics’ table materials was therefore unreasonable.

As such, Plaintiffs have clearly established a likelihood of success on the merits that law enforcement officers violated the Fourth Amendment by unlawfully seizing Plaintiffs’ property.

3. Defendants continue to violate Plaintiffs' Fourth Amendment rights.

The Portland Police have shown no sign of refraining from using excessive force and unlawfully arresting protest medics. Martinez Decl. ¶¶ 33-40; Wise Decl. ¶¶ 22-28; Wise Suppl. Decl. ¶¶ 4-6; Hubbard Suppl. Decl. ¶¶ 3-15; Shifflett Decl. ¶¶ 9-13; Rivera Decl. ¶¶ 11-18. Nearly every day that protest medics have participated in the protests, Portland Police have beat them, shot them with bullets, or sprayed them with chemical irritants. As a result, protest medics reasonably fear that the Portland Police will continue to target them with excessive force for rendering medical assistance to protesters. Durkee Decl. ¶ 31 (Defendants' "objective appears to be to inflict so much pain on the protesters, and those trying to medically provide for the protesters, that the protesters and medics like myself forget that we have a right to peacefully protest or forgo that right in favor of safety"); *see* Hubbard Decl. ¶ 14 ("I have had to stay home on some nights due to injuries I have suffered"); Guest Decl. ¶ 26 (noticing dwindling number of protest medics); Shifflett Decl. ¶ 14 ("Because I fear for my physical and emotional safety, I will continue to serve as a protest medic, but I am sure that doing so will result in additional physical harm to me and my fellow protest medics.").

Defendants' ongoing violation of the Fourth Amendment has chilled Plaintiffs' efforts at providing medical aid. Martinez Suppl. Decl. ¶¶ 4-6 ("I have had to take a significant amount of time off from serving as a medic at the protests."); Wise Dec. ¶¶ 32-33 ("I am afraid that continued aggression against medics will force protest medics to choose between either adhering to their training as medical professionals by helping injured individuals (if they are willing and able to), or not intervening to provide care simply because of the fear of suffering their own physical injuries at the hands of police and federal agents. I am concerned

about this because it is already happening”); Guest Decl. ¶ 27 (“The brutality of the police and federal officers has had a chilling effect on me. It feels targeted toward medics, to make sure that we are punished for taking care of protesters”); Durkee Decl. ¶ 34 (“[t]he shooting of Donovan La Bella . . . gave us pause, as the stakes of attending the Portland protests became clearer.”); Shifflett Decl. ¶ 14 (“Although I attend the protests in Portland regularly, the violence by law enforcement has resulted in me needing to take more days off and to take longer breaks while serving.”); Hubbard Suppl. Decl. ¶ (“I have not been back to the protests since my arrest even though I want to be out there showing my support as a protest medic.”). As a result, although Plaintiffs would like to continue attending the protests daily, the Portland Police’s actions have severely constrained Plaintiffs’ efforts. And every day that Plaintiffs miss a protest, more protesters suffer from the Portland Police’s abuses, without the assistance of a protest medic.

As discussed below, the Portland Police’s continual use of excessive force against Plaintiffs and other protest medics has consequences beyond just the medics’ ability to engage in expressive conduct by rendering care at nightly protests. By reducing the availability of on-site medical care, the Portland Police’s targeting of protest medics also chills the nightly protests themselves, by creating an unsafe environment that potential protesters must think twice about before joining.

C. Plaintiffs will suffer irreparable harm without the Court’s intervention.

With each passing night where Plaintiffs are inhibited and intimidated from exercising their First Amendment rights, they suffer irreparable injury. That is, each time protest medics like Plaintiffs experience violence, are unlawfully seized, and have their medical supplies taken or destroyed, they suffer irreparable injury.

Because Plaintiffs have, at a minimum, raised colorable claims that the exercise of their constitutionally protected right to provide medical aid to demonstrators has been infringed, the irreparable injury (violations of their First and Fourth Amendment rights) is met.

“Anytime there is a serious threat to First Amendment rights, there is a likelihood of irreparable injury.” *Warsoldier*, 418 F.3d at 1001-02; *see Don’t Shoot Portland*, 2020 WL 3078329 at *3-4 (finding a likelihood of irreparable harm where the plaintiffs established “a likelihood of success on the merits of their Fourth Amendment claim and at least a serious question as to whether they have been deprived of their First Amendment rights”). As long as the Portland Police are free to target medics with munitions, beat them back with riot batons, and otherwise unlawfully seize them, Plaintiffs’ exercise of their First Amendment rights will “surely [be] chilled,” *Black Lives Matter-Seattle*, 2020 WL 3128299, at *3, and their Fourth Amendment rights will be deprived.

Not only have Plaintiffs shown an overwhelming likelihood of success on their claims, they also have demonstrated continuous immediate and threatened irreparable harms—including their inability to render aid to protest attendees due to police interference. As a result, Plaintiffs have already been injured. All protest medics attending these demonstrations, including those who do not leave the medical stations, fear for their safety in light of the excessive tactics the police have used over the past 80 days. Wise Decl. ¶¶ 31-33; Martinez Suppl. Decl. ¶ 5; Durkee Decl. ¶¶ 30-32; Guest Decl. ¶¶ 23-25; Hubbard Decl. ¶ 12; Shifflett ¶ 14. Some of them have had to decrease their attendance to recover physically and emotionally. Durkee Decl. ¶¶ 34-35; Wise Decl. ¶ 27; Martinez Suppl. Decl. ¶¶ 4-6; Hubbard Decl. ¶ 14; Hubbard Suppl. Decl. ¶ 15; Guest Decl. ¶¶ 26-28; Shifflett Decl. ¶ 14.

The harm is ongoing. Protests continue. The protest medics want to attend as the Portland Police meet the protests with more and more violence. Durkee Decl. ¶ 37; Wise Decl. ¶¶ 34; Wise Suppl. Decl. ¶ 7; Dr. Morgans Decl. ¶¶ 23-24; Martinez Suppl. Decl. ¶ 7; Hubbard Decl. ¶ 15; Guest Decl. ¶ 31; Shifflett Decl. ¶ 14; Rivera Decl. ¶ 23. Protest medics want to ensure that when the inevitable happens—protesters are injured by police violence—those suffering will be cared for even if it means the protest medics themselves will be harmed. But that does not have to be so. For all the above reasons, the irreparable injury requirement is met.

D. The public’s interest and balance of equities weigh strongly in Plaintiffs’ favor.

1. The public has an unassailable interest in free speech and medical care.

Courts have “consistently recognized the significant public interest in upholding First Amendment principles” when considering requests for preliminary injunctions. *Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (internal quotations omitted). For, “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) (internal quotations omitted). And, as Chief Judge Hernandez recently wrote: “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.” *Don’t Shoot Portland*, 2020 WL 3078329 at *4.

Plaintiffs are volunteer medics providing comfort and care to protesters engaged in demonstrations of worldwide concern, to members of the press documenting the protests, to other protest medics rendering aid at the protests, and to bystanders who are harmed by the Portland Police’s indiscriminate displays of force. The Portland Police, in response, have targeted protest medics, singling them

out for arrest, shooting them with munitions when they are trying to render aid, and retaliating with bear mace to the face when they ask for permission to help people prostrate in pain.

By engaging in these unconstitutional acts, the Portland Police have attempted to quash Plaintiffs' message: that demonstrators can feel safe working to counter the otherwise chilling impact of the Portland Police's own violence. But Plaintiffs will not go quietly. Where so many protesters have been left battered, beaten, and traumatized by the police, there is a significant public interest that those injured may receive medical treatment.

The interest at stake here, however, is not just Plaintiffs' own interest in engaging in expressive conduct by rendering medical care (although, that interest surely is at stake). It is not just the interest of victims of violence perpetrated by law enforcement at protests to receive prompt medical care (although, that interest, also, clearly is at stake). The greater *public* interest at stake here is in being free to participate in Portland protests safely and with the knowledge that medics are onsite and able to render care in an emergency. If the First Amendment is to mean anything, it must mean that Oregonians are free to join voices in solidarity with the Black Lives Matter movement, to demand that the government take steps to redress systemic racism and—with the strongest vehemence—violent, draconian, and excessive policing. By targeting protest medics, Defendants do not burden only Plaintiffs' rights and those of the individuals to whom they care; rather, the Portland Police make the entire protest less safe by reducing the number of medics present and able to render care. And Oregonians who wish to join the protests, or who already are there and wish to stay later, are chilled from doing so when they perceive that the protests are unsafe as a result of the Portland Police's actions.

In the context of the Portland Police’s violent, riotous actions in recent months, the public’s interest in having a frontline provider of first aid is obvious and cannot reasonably be questioned. The work of Plaintiffs as protest medics is necessary to facilitate a safe protest. In this critical moment in history, this Court must ensure the continued ability of the public to gather and express itself by protecting Plaintiffs’ ability to provide care and safety to all demonstrators. The public interest demands it.

2. The balance of equities tips sharply in Plaintiffs’ favor.

Plaintiffs have “raised serious First [and Fourth] Amendment questions.” *Cnty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007) (internal quotations omitted). The balance of hardships therefore “tips sharply in [their] favor.” *Id.* Plaintiffs’ evidence shows that they have not presented any danger to public, to property, or to the Portland Police. To the contrary, they mitigate dangers that befall protest attendees and bystanders—they render medical aid and proactively work to diffuse tension and de-escalate thorny situations. Plaintiffs’ evidence also shows, however, that the Portland Police have exercised their discretion in a retaliatory fashion to punish protest medics for rejecting the police’s own violence. The Portland Police have substantially and irreparably harmed Plaintiffs.

On the other side of the scale, any harm to the Government would be negligible. The Government might have an interest in protecting buildings and property, but that interest is not served by using excessive force against individuals who are serving as volunteer medics. Protest medics present no threat to the police or to the public.

To protect the protest medics—and ultimately, the public at large—this Court should enjoin the police from targeting and injuring medics in retaliation for their administration of aid. Although limiting the use of force in certain situations could impede an officer’s ability to protect themselves against potential violence from demonstrators, here, any marginal risk of harm in limiting only the Portland Police’s use of force to directly target protest medics is wholly outweighed by the irreparable harm that Plaintiffs—engaged in peaceful expression—will endure. Accordingly, the balance of equities weighs in Plaintiffs’ favor.

E. Plaintiffs’ requested relief is reasonable.

In crafting the relief that they request in this Motion, Plaintiffs have, consistent with Judge Simon’s Temporary Restraining Order in *Index Newspapers*, 2020 WL 4220820, narrowly tailored their request for relief to ensure that it enjoins only unconstitutional activity targeted at protest medics:

- Recognizing that law enforcement officers sometimes operate when visibility is diminished, and at times when they must make quick decisions, Plaintiffs’ requested relief includes an adequate description of the distinctive markings they will wear so that Defendants can clearly identify protest medics.
- Plaintiffs’ proposed order states that Defendants would not be liable for indirect and unintended exposure to crowd-dispersal munitions following the issuance of a lawful dispersal order.
- The proposed order also contains sufficiently clear standards, so that Defendants will easily be able to determine what, when, and how their activity is prohibited. For example, in one of the requests for relief, Plaintiffs rely on existing Oregon statutes, Or. Rev. Stat. § 133.235, which regulates the use of force by law enforcement officers in Oregon, for the applicable standard.

See id. at *9-10 (issuing an order similar to that sought here); *see also* Opinion and Order Granting Preliminary Injunction at 44, *Index Newspapers LLC v. City of*

Portland, No. 3:20-cv-1035-SI (D. Or. Aug. 20, 2020) (ECF 157) (noting that City of Portland stipulated to preliminary injunction protecting press and legal observers, providing “compelling evidence” that the TRO was workable for Portland Police to follow). Thoughtful and narrowly crafted relief limiting only the ability of the Portland Police to target protest medics is more than reasonable in light of the serious constitutional violations resulting from the Portland Police’s attacks.

IV. CONCLUSION

These protests have continued for more than 80 days, and the Plaintiffs continue to put their health and safety on the line helping others. Based on the record presented here, Plaintiffs have established the basis for the requested relief. For the foregoing reasons, Plaintiffs respectfully request that this Court grant their Motion for a Temporary Restraining Order.

DATED: August 21, 2020

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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

**CHRISTOPHER WISE, MICHAEL
MARTINEZ, CHRISTOPHER DURKEE,
and SAVANNAH GUEST, individuals,**

Plaintiffs,

v.

CITY OF PORTLAND, a municipal corporation; **OFFICER STEPHEN B. PETTEY**, in his individual capacity; **JOHN DOES 1-60**, individual and supervisory officers of Portland Police Bureau; **U.S. DEPARTMENT OF HOMELAND SECURITY; U.S. MARSHALS SERVICE; JOHN DOES 61-100**, individual and supervisory officers of the federal government,

Defendants.

3:20-cv-01193-IM

**DEFENDANTS CITY OF PORTLAND
AND OFFICER STEPHEN B. PETTEY'S
RESPONSE TO PLAINTIFFS' MOTION
FOR TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW CAUSE
WHY PRELIMINARY INJUNCTION
SHOULD NOT ENTER AGAINST
MUNICIPAL DEFENDANTS;
MEMORANDUM OF LAW IN SUPPORT
THEREOF**

Oral Argument Scheduled
Tuesday, September 1, 2020 at 10:00 a.m.

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I. PLAINTIFFS' DELAY SHOWS NO IRREPARABLE HARM

Over 30 days ago on July 24, 2020, Plaintiffs filed their Motion for Temporary Restraining Order and Order to Show Cause Why Preliminary Injunction Should Not Issue (ECF No. 4.) ("First Motion."). The Court scheduled a hearing on Plaintiffs' First Motion, originally on Thursday, July 30, 2020. (ECF No. 12.) With Plaintiffs' agreement, the Court rescheduled that hearing to Monday, August 3, 2020 (ECF No. 23.) On Sunday afternoon, August 2, 2020, Plaintiffs informed the Court they were withdrawing their First Motion, "without prejudice to their right to seek emergency relief as necessary in the future." The Court granted Plaintiffs' request. (ECF No. 24.) Now, on Friday, August 21, 2020, without any conferral with the City or Officer Pettey's counsel, Plaintiffs have filed a second motion, Motion for Restraining Order Against Municipal Defendants, renewing their arguments and contentions. (ECF No. 35) ("Second Motion.")

In that First Motion, which was directed at all Defendants, Plaintiffs represented to the Court that "[w]ith each passing night where Plaintiffs are inhibited and intimidated from exercising their First Amendment rights, they suffer irreparable injury." (First Motion, ¶ 35.) "Each time protest medics like Plaintiffs experience violence, are unlawfully seized, and have their medical supplies taken or destroyed, they suffer irreparable injury." (First Motion, ¶ 36.) They further claimed "Plaintiffs have already been injured." (Id.)

As this Court and Plaintiffs well know, "[a] temporary restraining order is an "extraordinary and drastic remedy." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). A TRO "should be restricted to serving [its] underlying purpose of preserving the status quo and

preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.”

Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cty., 415 U.S. 423, 438–39 (1974).

Plaintiffs’ decision to withdraw their First Motion and their month long delay in filing their Second Motion to pursue a TRO belies their contention they have or will suffer irreparable harm. Their renewed legal arguments that, by virtue of the first-aid they provide during crowd control events, they are imbued with special First Amendment protection that exempts them from the State of Oregon’s criminal laws, do not change that fact. Their renewed and new declarations, where their factual contentions of retaliation and excessive force are mixed in with their refusal to obey lawful orders to disperse and their active interference with peace officers, do not change that fact.

When a litigant without excuse or explanation delays seeking a TRO, courts recognize there is no irreparable harm necessitating a TRO. *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (“Plaintiff’s long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm.”) (See also *Newcomb et al. v. City of Portland*, 3:20-cv-00294-SI, Minute Order dated 2/27/2020, (ECF No. 19) denying plaintiffs’ motion for a TRO “solely on the grounds that the Plaintiffs’ delay before seeking a motion for temporary restraining order implies a lack of urgency and lack of irreparable harm.”)

Similarly, in this case, Plaintiffs’ delay shows there is a lack of urgency requiring a TRO. Plaintiffs acknowledge that the protests related to their motion seeking a TRO “...have been going on for more than 80 days...” (Second Motion, page 5.) Yet, only now are they filing this

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TRO, claiming, among other factors, that Portland Police Bureau's ("PPB") conduct against protest medics is causing "irreparable, immediate harm." (Second Motion, page 39.) This is a case with disputed facts, appropriate solely for a remedy, if any, in damages. For Plaintiffs' unexcused delay alone, the Court should deny Plaintiffs' Second Motion.

II. FACTUAL BACKGROUND

Thousands of Portlanders have joined with millions around the country to protest the injustices of police brutality and racism, highlighted by the police killing of George Floyd, an African-American man, by a white Minneapolis police officer on May 25, 2020. These protests are clearly protected First Amendment expression, subject to the lawful time, place and manner restrictions, associated with all protected expression. In fact, the City agrees with Plaintiffs that peaceful protests are essential to advancing a long overdue need for meaningful reform and restorative justice.

The undeniably important message of these protests is not in dispute. This case does not relate to those thousands of people who have powerfully expressed these important values. Rather, the case involves the PPB and Federal Defendants' response to a much smaller number of people who have not peaceably assembled, but have instead engaged in violent, destructive, life-threatening, criminal activity. Initially, that coordinated lawlessness was focused principally in the area around the Multnomah County Justice Center, the Mark O. Hatfield United States Courthouse, and PPB's Central and North Precinct. More recently, that coordinated lawlessness has migrated to Multnomah County's Penumbra Kelly Building at 4735 E. Burnside and to the PPB's East Precinct at 737 SE 106th Avenue, both locations ensconced in or surrounded by

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residential neighborhoods. (See Supplemental Declaration of Craig Dobson (“Suppl. Dobson Decl.”), ¶ 9.)

To some degree, Plaintiffs separate their conduct from those engaged in violence and destruction. In this regard, Plaintiffs’ case is no different than other protest-related litigants: Plaintiffs allege they have suffered injuries because law enforcement officers have chilled protected speech, and because the police have used excessive force against them in the context of crowd management and control. (See Complaint (ECF No. 1), ¶¶ 65-88, 96-106, 150-155.) One Plaintiff, Mr. Martinez, alleges he¹ was wrongfully arrested by a Portland police officer. (Complaint, ¶¶ 125-134.). These are claims typically resolved in an action for damages.

On the other hand, a plain reading of Plaintiffs’ declarations shows or reasonably suggests the police had have probable cause to arrest them for Interfering with a Peace Officer, ORS 162.247. Plaintiff Wise explains that on June 28 he was subject to police pepper spray as he² “was attempting to pull a protestor away from a PPB officer...” (Declaration of Christopher Wise in Support of Plaintiffs’ Motion for Temporary Restraining Order (ECF No. 6), ¶ 25.) (“Wise Decl.”). Plaintiff Martinez explains that on the night of June 13, despite dispersal orders from the police, warnings he might be arrested, and at least several minutes to comply, he “stood between officers and the OHSU volunteers, continuing to film, as the volunteers began

¹ Defendants’ Response to Motion for Temporary Restraining Order uses the pronouns “he”, “his”, or “him” for Plaintiff [Michael Martinez] consistent with the pronouns indicated in Plaintiffs’ Motion for Temporary Restraining Order.

² Defendants’ Response to Motion for Temporary Restraining Order uses the pronouns “he”, “his”, or “him” for Plaintiff [Christopher Wise] consistent with the pronouns indicated in Plaintiffs’ Motion for Temporary Restraining Order.

complying with the officers' orders." (Declaration of Michael Martinez in Support of Plaintiffs' Motion for Temporary Restraining Order (ECF No. 9), ¶¶ 33-37.) ("Martinez Decl."). Mr. Rivera notes that on August 8-9, protestors set "fires in the middle of the street," that were "large enough to prevent any vehicles from driving through" that the police had "declared the [street] gathering an unlawful assembly" and "ordered all protestors to disperse the area." (Declaration of Jiri Rivera in Support of Plaintiffs' Motion for Temporary Restraining Order (ECF No. 36), ¶¶ 13, 14.) ("Rivera Decl."). Apparently, Mr. Rivera took issue with the police decision to order the dispersal, and he did not immediately disperse. (Id. at ¶¶ 16, 17.) In any event, a police officer's report shows there was probable cause to arrest Mr. Rivera that evening. (See Suppl. Dobson Decl., ¶ 25, Ex.1.)

In addition, a plain reading of Plaintiffs' declarations in support of their First and Second Motions also show they place themselves in situations where they are more likely to be subject to police use of force. Plaintiff Durkee explains that protest medics deliberately place themselves between the police line and demonstrators. (Declaration of Christopher Durkee in Support of Plaintiffs Motion for Temporary Restraining Order (ECF No.5), ¶¶ 14, 15 ("Durkee Decl.").) Plaintiff Durkee discusses "strategic[]" "front line" and "back line" positioning of protest medics. (Id.). Protest medic Hubbard states she places herself in the "literal front line between protestors and officers." (Declaration of Peyton Dully Hubbard in Support of Plaintiffs' Motion for Temporary Restraining Order (ECF No. 10), ¶ 6.) ("Hubbard Decl."). Similarly, Mr. Rivera explains that he wears body armor "which signals that I am ready and willing to offer protection to people." (Rivera Decl., ¶ 10.)

Plaintiffs and the other protest medics’ admitted refusal to comply with ORS 162.247, and their deliberate interjection into the middle of police tactical operations, should inform this Court about the legitimacy and viability of Plaintiffs’ claims of retaliatory targeting and excessive force. “The presence of probable cause [for an arrest] should generally defeat a First Amendment retaliatory arrest claim.” *Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019). In a crowd control event, reasonable force includes physical pushing and baton strikes because the government is not required to permit “organized lawlessness.” *Felarca v. Birgeneau*, 891 F.3d 809, 818 (9th Cir. 2018).

Clearly, Plaintiffs seek an exemption from an Oregon criminal statute, ORS 162.247, and other laws implicated by crowd management events, such as Disorderly Conduct in the Second Degree, 166.025. (See Rivera Decl., ¶ 20.) (See Second Motion, pages 2-3, Nos. 3, 4 and 6.) They request this Court grant them special First Amendment status beyond other persons because Plaintiffs are providing first aid to injured protestors in the middle of police tactical operations. (Complaint, ¶ 184.) Plaintiffs claim the time, place and manner of that first aid is protected speech, and apparently, claim that “speech” is not subject to government regulation. (Id.) Moreover, in part because of their alleged heightened and special First Amendment status, Plaintiffs claim they are entitled to the “extraordinary and drastic remedy” of a temporary restraining order. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). (See First Motion at pages 1-4; Second Motion at pages 1-4.) Plaintiffs are wrong.

Instead Plaintiffs, like all demonstrators, are equal in the eyes of the First Amendment, and they are unlikely to show success on either their First or Fourth Amendment claims. Nor

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have they shown irreparable harm. Significantly, at least with respect to Defendants City of Portland and Officer Stephen B. Pettey, Plaintiffs have failed to show why the existing restrictions on PPB's use of force are inadequate to provide the protection they seek.

III. CONTINUING RESTRICTIONS ON PPB USE OF FORCE

Plaintiffs' First Motion complained about PPB's use of tear gas and less lethal munitions. (See First Motion, page 25.) Notably, they argued that "[t]he most common police-inflicted injuries we see, by far, are from exposure to tear gas." (Declaration of Savannah Guest in Support of Plaintiffs' Motion for Temporary Restraining Order, ¶12.) ("Guest Decl.") (See also Declaration of Dr. Catherine Morgans in Support of Plaintiffs' Motion for Temporary Restraining Order, ¶¶ 2-3, ("Morgans Decl.") (describing June 2, 2020 as "Tear Gas Tuesday.")

Defendants City and Pettey filed a response to Plaintiffs' First Motion. (Defendants City of Portland and Officer Stephen B. Pettey's Response to Motion for Temporary Restraining Order and Order to Show Cause Why Preliminary Injunction Should Not Enter (ECF No. 18).) ("First Response".) In their First Response, Defendants pointed out the existing restrictions of PPB's use of force, including tear gas and less lethal munitions. (First Response, pages 2-6.) Defendants will not repeat that discussion here, other than noting that the two restraining orders issued by Chief Judge Marco Hernandez, in *Don't Shoot Portland v. City of Portland*, No. 3:20-cv-00917-HZ ("*Don't Shoot Portland*"), Mayor Wheeler's directive regarding the use of tear gas, and HB 4208, the new Oregon state law regarding tear gas, all remain in effect. (Suppl. Dobson Decl., ¶24.) Defendants also point out that PPB's crowd management policy, Directive No. 635.10, and its more general use of force policy, Directive No. 1010.00 (see First Response,

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pages 2-3), have been for over eight years, and continue to be, subject to review and oversight by the United States Department of Justice. (See Declaration of Craig Dobson (ECF No. 19), ¶ 15.) (“Dobson Decl.”.)

Perhaps now realizing that PPB’s use of CS tear gas and less lethal munitions are already regulated, -- and as a result removes any urgency for a TRO from this Court, -- Plaintiffs have switched their excessive force theories of liability. Now they simply complain that the police push and shove them, or arrest them, when the police have ordered a dispersal. (See Rivera Decl., ¶¶ 17, 22; Declaration of Jessica Shifflett in Support of Plaintiffs’ Motion for Temporary Restraining Order (ECF No. 37), (“Shifflet Decl.”), ¶ 10; Supplemental Declaration of Christopher Wise in Support of Motion for Temporary Restraining Order and Order to Show Cause Why Preliminary Injunction Should Not Enter (ECF No. 38), (“Suppl. Wise Decl.”), ¶ 4.) In order to breathe any legitimacy into this theory, Plaintiffs double down on their argument that, when they provide first aid during the middle of a police tactical operation, they are engaged in protected speech, and furthermore, they do not have to obey any dispersal order by the police, and are immune from arrest for violating ORS 162.247 or ORS 166.025.

IV. PLAINTIFFS CANNOT MEET THE TEST FOR A TEMPORARY RESTRAINING ORDER IN THIS CASE

As noted earlier, a temporary restraining order is an “extraordinary and drastic remedy.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). A TRO “should be restricted to serving [its] underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.” *Granny Goose Foods, Inc.*, 415 U.S. at 438–39.

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“[T]he standards for issuance of a temporary restraining order are at least as exacting as those for a preliminary injunction.” *Pohlman v. Hormann*, 2014 WL 5425502, at *1 (D. Or. Oct. 20, 2014) n. 1 (D. Or. Oct. 20, 2014) (citing *L. A. Unified Sch. Dist. v. U.S. Dist. Ct.*, 650 F.2d 1004, 1008 (9th Cir. 1981)). Like a TRO, a preliminary injunction is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Barnett v. BAC Home Loan Servicing, L.P.*, 772 F. Supp. 2d 1328, 1333 (D. Or. 2011) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). The Supreme Court established in *Winter* that “[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.” *Winter, supra*, at 20.

Alternatively, a preliminary injunction is available where there are “serious questions going to the merits and a hardship balance that tips sharply toward the plaintiff[s],” but only if plaintiff also “shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

In either case, Courts “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Winter*, 555 U.S. at 24 (internal citations omitted). Significantly, Plaintiffs bear the burden of proving each of the elements. *Klein v. City of San Clemente*, 584 F.3d 1196, 1201 (9th Cir. 2009); *see also Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (“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.”). The requirement for a plaintiff, on a motion for preliminary injunctive relief “for substantial proof is much higher” than even what is required in connection with summary judgment.

Mazurek, 520 U.S. at 972.

A. Plaintiffs Cannot Demonstrate a Likelihood of Success on the Merits.

“To prevail, plaintiffs must first show that they likely will succeed on the merits of their constitutional claims.” *Campbell v. City of Oakland*, 2011 WL 5576921, at *3 (N.D. Cal. Nov. 16, 2011) (citing *Winter*, 555 U.S. at 20).

1. First Amendment Claims³

a. Providing Medical Care is not Expressive Conduct.

Certainly, the First Amendment protects not simply the written or spoken word from government interference, but also certain forms of expressive conduct. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Significantly though, a person’s mere subjective intent to express an idea through conduct, does not necessarily merit First Amendment protection. *See United States v. O’Brien*, 391 U.S. 367, 376 (1968) (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”); *see also Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (“It is possible to find some kernel of expression in almost every activity a person undertakes ... but such a

³ In their First Response, Defendants pointed out the framework for evaluating a claim that expressive conduct is protected by the First Amendment. (See First Response, pages 9-13.) That discussion is repeated and augmented here.

kernel is not sufficient to bring the activity within the protection of the First Amendment.”)

Rather, whether certain conduct might possibly receive First Amendment protection, depends on two factors:

Whether “[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.”

Texas, 491 U.S. at 404 (quoting *United States v. O'Brien*, 391 U.S. 367, 410–411 (1968).)

To be sure, Plaintiffs are not required to show “a narrow, succinctly articulable message...as a condition of constitutional protection.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995).⁴ However, “First Amendment protection [extends] only to conduct that is inherently expressive.” *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006). Significantly, if explanatory speech is necessary to explain the conduct, then that is “strong evidence that the conduct at issue is not so inherently expressive that it warrants protection under [the First Amendment.]” *Id.* See also *Hightower v. City & Cty. of San Francisco*, 77 F. Supp. 3d 867, 876–877 (N.D. Cal. 2014).

Here, Plaintiffs’ conduct of rendering medical aid during a police tactical operation is not “inherently expressive.” That conduct fails to convey any “particularized message.” In fact, they concede their “message” is simply derivative of the larger group of protestors. Plaintiffs render medical aid “to support and advance the voices of the other protestors.” (First Motion, page 15.)

⁴ *Hurley* involved the extent to which local officials may properly set conditions for the content and locations of parades and protests. *Hurley* did not address whether the First Amendment protects an otherwise illegal act as symbolic speech, which is the issue in the present case (i.e., Plaintiffs’ failure to disperse).

In this regard, Plaintiffs’ purported expressive conduct is no different than the conduct and presence of the thousands of other non-medic protestors. Plaintiff Wise declares he “serve[s] as a medic to further the protests themselves, including the overall purpose and message of the protests.” (Id.) He more recently declared that he attends the protests to provide care and show his support for the protestors. (Suppl. Wise Decl., ¶ 7.) Plaintiff Durkee declares he⁵ decided to “get involved in the Portland protests as a medic for the protestors...because I knew my medical training could assist both the protestors and the larger movement.” (Durkee Decl., ¶ 7.) Plaintiff Guest makes a similar declaration. Ms. Guest serves “as a medic because I think it helps amplify the voices around me.” (Guest Decl., ¶ 8.) (See First Motion, page 16.) (See Second Motion, pages 19-21, describing Plaintiffs’ “send a message” explanation of their presence.)

In addition, Plaintiffs need to offer explanatory speech to imbue their conduct with any kind of understandable message. *See Rumsfeld, supra*. Plaintiff Martinez contends his mere presence with identifying medical insignia “send[s] a message that protestors have a right to protest safely and without fear of police violence.” While more particularized than the other plaintiffs, Mr. Martinez’s subjective belief about his message is not likely to be understood by those viewing it. Rather, a more reasonable understanding is that Mr. Martinez has identified himself as a person willing and able to provide some form of medical care to persons injured, whether the injured are peaceful protestors or hard-core criminals. In this regard, Mr. Martinez’s medical services are no different than the other persons he describes providing services during the

⁵ Defendants’ Response to Motion for Temporary Restraining Order uses the pronouns “he”, “his”, or “him” for Plaintiff [Christopher Durkee] consistent with the pronouns indicated in Plaintiffs’ Motion for Temporary Restraining Order.

protests, e.g. the barbecue restaurant providing free food, those assisting others filling out job applications, and barbers giving free haircuts. (Martinez Decl., ¶ 29.) “Thus, the care that street medics provide is only one piece of the puzzle when it comes to community support for protesters and non-protesters alike.” (Id.) These generalized support services are not inherently expressive meriting First Amendment protection.

Ms. Shifflett also needs explanatory speech to explain her message. “By serving as a protest medic, I hope to send a message to protestors and law-enforcement officers that people should be able to keep showing up and exercising their rights without fear of physical harm, knowing that medical aid will be readily available to them.” (Shifflett Decl., ¶ 6.) Ms. Shifflett’s subjective interpretation of her presence is not likely to be understood by those viewing her presence. Her subjective interpretation also assumes those persons injured were lawfully exercising their rights. Like Mr. Martinez, she fails to distinguish between peaceful protestors and violent criminals that have caused so much destruction and disruption in our community. (See Suppl. Dobson Decl., ¶¶ 19-23.) Notwithstanding this failure, she, Plaintiffs, and the other protest medics continue to insist they have a fundamental constitutional right to interject themselves into the middle of police tactical operations.

Plaintiffs note that context matters when interpreting expressive conduct. (Second Motion, pages 22-23.) No doubt this is true, as it is for all forms of communication. But context means the complete context, not a one-sided view that ignores Plaintiffs’ responsibility to obey police orders to disperse, ignores (or minimizes), the violence caused by other protestors around them, and ignores that the police are not required to permit “organized lawlessness.” *Felarca*, 891 F.3d

at 818

Plaintiffs cite *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235 (11th Cir. 2018). (Second Motion, page 18.) Plaintiffs argue that “providing services, supplies, or support to individuals as part of a movement for political, policy, and social change, is expressive conduct and, thus, constitutionally protected speech.” *Id.* In *Fort Lauderdale Food Not Bombs*, the non-profit organization held weekly free food sharing events at a public park with a table, banners, and literature with the intent of conveying its message “that [] society can end hunger and poverty if we redirect our collective resources from the military and war...” *Fort Lauderdale Food Not Bombs*, 901 F.3d at 1238.

In concluding that the food sharing activity was expressive conduct, the court considered several factors, including the location of the activity, a public park that was “an undisputed public forum, ...known in the community where the homeless tend to congregate,” and had “...traditionally been a battleground over the City’s attempts to reduce the visibility of homelessness.” *Id.* at 1238, 1242. Perhaps most significantly however, the court explained that “the history of a particular symbol or type of conduct is instructive in determining whether the reasonable observer may infer some message when viewing it.” *Id.* at 1243. The court explained that [l]ike the flag, the significance of sharing meals with others dates back millennia.” *Id.*

In the present, Plaintiffs’ act of providing first aid is no more inherently expressive than getting a haircut, or receiving a dental cleaning. There is no significant likelihood that third parties viewing Plaintiffs’ conduct would understand Plaintiffs’ subjective message. Providing first aid has no history associated with any particular or general message, it conveys nothing other

than someone needs medical assistance.

Plaintiffs cite *Abay v. City of Denver*, 2020 WL 3034161 (D. Colo.), arguing the provision of medical care is expressive conduct. (First Motion, page 15.) There, the court was evaluating the plaintiffs claim of police retaliation, and noted the force used against journalists and medics as possible evidence suggesting retaliatory motives. *Id.* at *3. Any suggestion of that the medics’ conduct was a protected activity was only because it occurred in the context of the larger demonstration, not that the activity itself was inherently expressive. Plaintiffs argue defendants have misread *Abay*. (Second Motion, page 19, No. 5.) Plaintiffs are wrong. Nowhere in *Abay* does the court say acting as a protest medic is expressive conduct protected under the First Amendment. Instead, the court merely held that the constitutionally protected activity at issue was “organized political protests.” *Abay* at *3.

b. Expressive Conduct can be Regulated.

However, even assuming conduct is sufficiently particularized to create a great likelihood that it will be understood by those viewing it, - in other words “sufficiently imbued with elements of communication” to implicate the First Amendment (*see Texas*, 491 U.S. at 406), - the government may still proscribe that conduct.

[W]hen ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government;

if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, supra, 391 U.S. at 376–77.

In *O'Brien*, Mr. O'Brien burned his Selective Service Certificate in violation of federal law on the steps of a courthouse in Boston. *O'Brien*, 391 U.S. at 369. He did this “in demonstration against the [Vietnam] war and against the draft.” *Id.* at 376. On appeal of his criminal conviction, O'Brien argued the federal law prohibiting the knowing destruction of the certificate violated his First Amendment rights. The Court rejected that argument in adopting the eponymous four-part *O'Brien* test: Legitimate governmental regulations that advance important interests are constitutional, if they are unrelated to the suppression of speech and only incidentally restrict First Amendment freedoms. *Id.* at 377. *See also Hightower, supra* at 880–881 (applying four-part *O'Brien* test).

In the present case, PPB's authority to declare an unlawful assembly in accordance with ORS 131.675, coupled with the existing restrictions on PPB's use of force described above at pages 2-6, clearly meet the *O'Brien* test. The declarations of Captains Dobson and Passadore, and Lieutenant Schoening, referenced in Defendants' First Response, (see First Response, page 16), speak to the compelling governmental interests involved in managing the 80 nights of riots and protests. (See Dobson Don't Shoot Portland TRO Decl. (ECF No. 19), ¶¶ 22-26; Dobson Don't Shoot Portland PI Decl. (ECF No. 113), ¶¶ 20-32, 34-39, 41-46, 51-59, 64-69, 72-73, 79-86, 90-96, 99-109, 111-112; Schoening Don't Shoot Portland TRO Decl. (ECF No. 18), ¶115;

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Passadore Don't Shoot Portland Decl. (ECF No. 111), ¶¶ 18-20, 27-28, 31-36, 40, 51-58; Dobson Decl., ¶¶ 10-14.) PPB's dispersal orders regulate criminal conduct; they have no effect on legitimate expressive conduct. Moreover, as shown by the City's declarants, those dispersal orders are essential to further the City's compelling governmental interests.

In other words, even assuming Plaintiffs' provision of medical services is somehow protected expressive conduct, Plaintiffs must nonetheless heed lawful dispersal orders issued by PPB. Otherwise, at a minimum, they are committing the crime of Interfering with a Peace Officer. (ORS 165.247.)

c. Plaintiffs Have Failed to Explain why They Need to Interfere with Police Operations.

Assuming a protest medic should have some enhanced rights compared to other protestors, Plaintiffs have failed to provide an adequate explanation of why they need to interject themselves into the middle of a police tactical operation. Notably, Dr. Morgans explained that some protest medics are "tablers" and provide assistance away from the police tactical operation. (Morgans Decl. ¶ 11.) Therefore, to extent providing first aid is "speech," then using a table away from police operations is a sufficient, alternative means to communicate that "speech." This is especially so when "[t]he most common police inflicted injuries we see, *by far*, are from exposure to tear gas."). (Emphasis added.).

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d. Protest Medics are not like Journalists or Legal Observers.

Plaintiffs clearly seek the same status and exemption from lawful dispersal orders that

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Judge Simon has recently provided to journalists and legal observers. (See *Index Newspaper et al. v. City of Portland, et. al.* (“*Index Newspaper*”), 3:20-vc-1035-SI, ECF No. 33.) However, journalists and legal observers are more integral to a robust First Amendment than a medical professional. (See *Id.* at pages 5-7.) Generally, one profession is about observation and reporting for the benefit of the public; the other about provision of a personal service exclusively for the benefit of the individual.

In addition, Judge Simon clearly noted that the media’s right to access was a “qualified right,” which could be overcome by showing that lack of access is essential for some compelling reason. (*Id.* at page 7.) For example, without doubt, a journalist or legal observer has no right to accompany a SWAT team into a school while the team searches for a school shooter. In the present case, Plaintiffs demand exactly that type of access. Finally, the role of a journalist or legal observer is inherently passive. On the other hand, a protest medic, at least as described by Plaintiffs interjecting themselves between protestors and police, is inherently active. In other words, by observing the journalist does not interfere; by standing between the police and protestors and rushing to injured people, the protest medic inherently interferes.

e. Plaintiffs Must Follow Dispersal Orders or be Subject to Reasonable Force.

Plaintiffs argue that deployment of tear gas and less lethal munitions would deter a person of ordinary firmness in continuing to participate as a protest medic. (Second Motion, page 24.). This may be. However, Plaintiffs assume acting as a protest medic is protected speech. It is not for the reasons argued above. Plaintiffs’ deterrence argument is premised on

the fallacy that they do not have to obey the law.

Consequently, if Plaintiffs fail to disperse, or interfere with the police crowd control efforts, they can be subject to reasonable police uses of force, including tear gas and pain compliance techniques. *United Steelworkers of Am. v. Milstead*, 705 F. Supp. 1426, 1430, 1437 (D. Ariz. 1988) (tear gas); *Forrester v. Forrester v. City of San Diego*, 25 F.3d 804, 805–07 (9th Cir. 1994) (pain compliance).

f. Plaintiffs Have Failed to Show Defendants Were Motivated to Act Because of Protected Conduct.

Plaintiffs’ retaliatory targeting theory is premised on the same logical fallacy as above: because they allegedly wear distinctive clothing, and “yet [are] subject to police violence,” then, defendants must be targeting them with uses of force to retaliate against their “protected speech.” (Second Motion, page 28.) Plaintiffs own declarations show there is no targeting. Persons other than medics are arrested. (Suppl. Wise Decl., ¶ 4.) (“[The police] transported me and other arrestees to the Justice Center.”). Persons other than medics are subject to being pushed along by the police. (Rivera Decl., ¶ 17.) (Shifflett Decl., ¶10.)

Furthermore, Plaintiffs overlook their own concessions that they deliberately place themselves between the police and protestors, thereby increasing their risk of physical contact with the police. (Durkee Decl., ¶¶ 14, 15.) (Hubbard Decl., ¶ 6.) In fact, Mr. Rivera seems to seek such contact as he wears body armor “to offer protection to people.” (Rivera Decl., ¶ 10.) Plaintiff Wise describes his interference with the arrest of another protestor. (Wise Decl., ¶ 25.)

The Court should especially treat Mr. Rivera’s proffered testimony on Plaintiffs’ Second Motion with a high degree of skepticism. Mr. Rivera says that on August 8-9 he attended a

protest and that he “dressed like a medic.” (Rivera Decl., ¶ 12.) Mr. Rivera says he was complying with the dispersal orders the best he could, but then he was suddenly on the ground and then arrested. (Id. at ¶¶ 17, 18.) Officer Oliphant’s police report tells a different story. Officer Oliphant arrested Mr. Rivera only after refused to stop shining an industrial grade flashlight into police officers’ eyes from a distance of less than 10 feet. (See Suppl. Dobson Decl., ¶ 25, Ex. 1.)

Finally, Plaintiffs’ declarations suggest the police had probable cause to arrest many of the protest medics for Interfering with a Peace Officer, ORS 162.247, Disorderly Conduct in the Second Degree, ORS 166.025, or in Mr. Rivera’s case, Harassment, 166.065. Probable cause generally defeats a First Amendment retaliatory arrest claim. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019).

2. Fourth Amendment Claims

a. Excessive Force

Plaintiffs allege PPB officers have committed excessive force in violation of the Fourth Amendment. (See Complaint, ¶¶ 189-200.) (First Motion, pages 23-30.) (Second Motion, pages 30-35.) Plaintiffs are wrong.

Importantly, under the Fourth Amendment, a seizure results in a constitutional violation only if it is unreasonable. *Graham v. Connor*, 490 U.S. 386, 395 (1989). The determination of reasonableness requires an examination of “whether the totality of the circumstances justified [the] seizure.” *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985). In other words, context matters. “When the governmental interests at stake are substantial, a greater intrusion upon the Fourth

Amendment rights of persons may be justified.” *Nelson v. City of Davis*, 685 F.3d 867, 878 (9th Cir. 2012).

The analysis of use of force is a fact-specific inquiry which looks, in part but not exhaustively, at (1) the severity of the crime, (2) the immediacy of the threat to the safety of the officers or others, and (3) whether the suspect was resisting arrest or attempting to evade arrest. *Graham*, 490 U.S. at 396. Importantly, the “reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *See Terry v. Ohio*, 392 U.S. 1, 20–22 (1968). “The reasonableness analysis must make ‘allowance for the fact that police officers are forced to make split second judgments – in circumstances that are tense, uncertain, and rapidly evolving –about the amount of force that is necessary in a particular situation.” *Hadley v. City of Beaverton*, 2010 WL 1257609, at *12 (D. Or. Feb. 16, 2010) (quoting *Graham*, 490 U.S. at 396). Plaintiffs bear the burden of proving that the force used was unreasonable. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 922 (9th Cir. 2001).

It is well-settled law that the City has a “legitimate interest in quickly dispersing and removing lawbreakers with the least risk of injury to police and others.” *Forrester v. City of San Diego*, 25 F.3d 804, 807 (9th Cir. 1994). More specifically, the government has a safety interest in controlling a group of people, and force can be justified when protestors substantially outnumber officers and refuse to obey commands to disperse. *See Jackson v. City of Bremerton*, 268 F.3d 646, 652–53 (9th Cir. 2001). Even if the potential for criminal activity involves only low-level misdemeanors, the government has a significant interest when the occurrence is wide-

spread. *See Forrester*, 25 F.3d at 807. The government is not required to permit “organized lawlessness.” *Felarca v. Birgeneau*, 891 F.3d 809, 818 (9th Cir. 2018).

Looking at the use of pepper spray, the Ninth Circuit has held that it does not constitute excessive force when used on an arrestee who was interfering with an officer’s arrest of a third party. *Jackson*, 268 F.3d at 651–53. The Court has also compared the use of pepper spray to police dogs, saying “the use of such weapons (e.g., pepper spray; police dogs) may be reasonable as a general policy to bring an arrestee under control[.]” *LaLonde v. Cty. of Riverside*, 204 F.3d 947, 961 (9th Cir. 2000). Moreover, some courts have found that mere exposure to pepper spray does not even amount to a seizure under the Fourth Amendment. *See Logan v. City of Pullman*, 392 F. Supp. 2d 1246, 1259–60 (E.D. Wash. 2005) (plaintiffs who suffered secondary exposure to pepper spray were not seized within the meaning of the Fourth Amendment because the officer’s act was not willful); *Buck v. City of Albuquerque*, 2007 WL 9734037, at *29–31 (D.N.M. Apr. 11, 2007) (finding plaintiffs were not seized when exposed to tear gas at a protest because plaintiffs were free to leave and did indeed leave); *See also Jurkowski v. City of Seattle*, 2017 WL 4472859, at *9 (W.D. Wash. Oct. 5, 2017) (finding question of fact existed as to whether protestor was seized when blast ball grenade deployed as she was able to retreat).

Plaintiffs cite *Young v. Cty. of Los Angeles*, 655 F.3d 1156 (9th Cir. 2011). (Second Motion, page 32.). Plaintiffs incorrectly suggest that PPB’s use of pepper spray to lawfully disperse certain protestors constitutes “unreasonable, excessive force...even when protestors have failed to heed a police warning.” (*Id.*). In *Young*, the court held that a police officer used excessive force after beating an individual with a baton and using pepper spray after being pulled

over and exiting the vehicle for a minor traffic violation. The plaintiff then passively refused to reenter his car by sitting on the sidewalk after being instructed by the officer to reenter his vehicle. The court noted an important factor in concluding the officer used excessive force was that the officer pepper sprayed the plaintiff “before even providing him with a warning that he could be arrested for his noncompliance.” *Young* at 1166.

Here, PPB’ RRT officers have used pepper spray when lawfully effectuating dispersal orders after declaring an unlawful assembly. Unlike what occurred in *Young*, prior to using any force, by PPB Directive 635.10, PPB orders the dispersal and generally provides at least two warnings to the crowd that they can be arrested for noncompliance. With respect to the incidents put at issue with Plaintiffs’ recent declarations, PPB has given multiple dispersal orders and warnings prior to taking crowd control operations. (See Suppl. Dobson Decl., ¶¶ 19-23.)

Plaintiffs rely on *Nelson*, *supra*, and *Headwaters Forest Def. v. Cty. of Humboldt*, 276 F.3d 1125 (9th Cir. 2002), apparently to suggest any failure by them to obey the lawful dispersal orders given by the police during the unlawful assemblies described by Captains Dobson and Passadore is “passive resistance,” and does not support the use of pepper spray. (See Second Motion, page 34-35.) However, these cases are distinguishable from situations described by Dobson and Passadore, and are even distinguishable by Plaintiffs’ own evidence contained in their declarations. In *Nelson*, the crowd was at a party, and the party posed no threat to public safety, nor showed any unwillingness to comply with police orders. *Nelson* at 879-81. The crime involved was trespass, not the physical assault on law enforcement and destruction of public and private property described by Dobson and Passadore. The facts in *Headwaters* are similarly

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distinguishable, as the protestors in that case were “sitting peacefully” while officers applied pepper spray with Q-tips to the protestors’ eyes. *Headwaters Forest Defense*, 276 F.3d at 1130.

Oregon law authorizes the police to disperse unlawful or riotous assemblies. ORS 131.675. Whether or not a gathering or assembly of people has become unlawful is determined by whether the conduct of persons within the group presents a “clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order...” *City of Portland v. Hemstreet*, 119 Or. App. 239, 242 (1993)(quoting *Cantwell v. State of Connecticut*, 310 U.S. 296, 308 (1940)). *See also Feiner v. New York*, 340 U.S. 315, 320 (1951) (“This Court, respects, as it must, the interests of the community in maintaining peace and order on its streets.”) “It is the tenor of the demonstration as a whole that determines whether the police may intervene; and if it is substantially infected with violence or obstruction the police may act to control it as a unit.” *Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107, 120 (D.C. Cir. 1977).

The declarations of Captains Dobson and Passadore, and Lieutenant Schoening provide the context for the police use of force alleged by Plaintiffs. The continuous, violent, life-threatening attacks on police officers and other persons at the Justice Center, the Federal Courthouse and PPB’s North and Central Precincts, and the migration of that violence to Multnomah County’s Penumbra Kelly Building and PPB’s East Precinct, easily meets the *Hemstreet* standard. (See Dobson Don’t Shoot Portland TRO Decl., ECF No. 19, ¶¶ 22-26; Dobson Don’t Shoot Portland PI Decl., ECF No. 113, ¶¶ 20-32, 34-39, 41-46, 51-59, 64-69, 72-73, 79-86, 90-96, 99-109, 111-112; Schoening Don’t Shoot Portland TRO Decl., ECF No. 18,

¶115; Passadore Don't Shoot Portland Decl., ECF No. 111, ¶¶ 18-20, 27-28, 31-36, 40, 51-58; Dobson Decl., ¶¶ 10-14.) (Suppl. Dobson Decl., ¶¶ 19-23.)

Plaintiffs' own declarations speak to the dangerous disorder in which their Fourth Amendment claims will be evaluated. Plaintiff Wise states that on July 9, 2020, an automobile driver "nearly hit several protestors." The "driver pulled out a gun and fired five or six shots in the air." (Wise Decl., ¶18.) On June 16, another protestor was actually hit by a car and apparently suffered a serious injury. (Hubbard Decl., ¶ 9.) Plaintiff Wise concedes that protestors are "throwing projectiles at the police and federal agents." (Wise Decl., ¶19.) Mr. Rivera casually discusses the protestors "start[ing] a couple of fires in the middle of the street" "large enough to prevent any vehicles from driving through..." (Rivera Decl., ¶ 13.)

Plaintiffs insist they "did not engage in any criminal activity." Instead, they argue their presence "actually attempted to de-escalate activities that would lead to further police agitation." (Second Motion, page 34.). Plaintiffs have a misguided understanding of their actions. Their failure to immediately disperse after a police order is the misdemeanor crime of Interfering with a Peace Officer, ORS 162.247. Their refusal to disperse is not de-escalation; rather it is direct interference in a police tactical operation. (See Suppl. Dobson Decl., ¶¶ 14-15.)

The totality of the circumstances in which Plaintiffs may have suffered physical force by PPB show that Plaintiffs cannot demonstrate a likelihood of success on the merits of their Fourth Amendment claim.

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b. Wrongful Seizure

Plaintiffs complain about the alleged seizure of the OHSU Black Lives Medical Tent on June 13-14, as the police moved through Chapman Square, after several minutes of dispersal orders. (Second Motion, pages 36-37.) (See Martinez Decl., ¶¶ 33-35.) Unless they had a permit, the OHSU group had no legal right to place their tent in the park. See Portland City Code (“PCC”) 20.12.080. As such, the police had the legal authority to remove it as they cleared the park as part of the dispersal. The alleged seizure of the medical tent does not demonstrate the plaintiffs have a substantial likelihood of success on the merits.

B. Plaintiffs Cannot Show Irreparable Harm if No TRO Issues.

To obtain a temporary restraining order, Plaintiffs must show that they will suffer *immediate and irreparable injury* in the absence of the requested relief. *Hodgers-Durgin v. Gustavo de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (“The equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff[s] will be wronged again – a ‘likelihood of substantial and immediate irreparable injury.’”). “The propriety of a temporary restraining order, in particular, hinges on a significant threat of irreparable injury that must be imminent in nature.” *Gish v. Newsom*, 2020 WL 1979970, at *3 (C.D. Cal. Apr. 23, 2020) (citing *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999); *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). “[A] federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional.” *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

As argued above in the preliminary comments, Plaintiffs delay in seeking a TRO shows they cannot show an immediate and irreparable injury. In fact, Plaintiffs can continue to provide first aid to protestors. They simply need to comply with the law like all other protestors.

C. Plaintiffs Have Not Established and Cannot Establish that the Balance of Equities Weighs in Their Favor or that a TRO is in the Public Interest.

A plaintiff seeking a preliminary injunction or temporary restraining order must establish not only that he is likely to succeed on the merits and is likely to suffer irreparable harm in the absence of preliminary relief, but also that the balance of equities tips in his favor, and that an injunction is in the public interest. *Winter*, 555 U.S. at 20. “In exercising their sound discretion, courts of equity should pay particular regard for the public . . . consequences in employing the extraordinary remedy of injunction.” *Id.* at 24 (internal citations omitted).

Here, the balance of equities now tips in favor of the City. As discussed herein, PPB is operating under several TROs. Chief Judge Hernandez, in *Don’t Shoot Portland* granted a TRO restricting PPB’s use of tear gas on June 9, 2020, and he also entered a stipulated additional TRO restricting PPB’s use of certain crowd control munitions on June 26, 2020. These TROs are currently in effect and have been extended until further order of the Court. As a result, to the extent Plaintiffs continue to complain about the police use of tear gas and less lethal munitions (see Second Motion, page 32), the restrictions already imposed on PPB by this Court readily address the concerns of medic Plaintiffs in this case.

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Moreover, a TRO for Plaintiffs is not in the public interest. Rather, such a TRO is in Plaintiffs' special interest. The public has an interest in its criminal statutes being enforced so that law enforcement can safely manage crowd control events. Plaintiffs, on the other hand, seek a special exemption from those laws. (See Second Motion, pages 2-3.)

V. CONCLUSION

For all these reasons, the Court should deny the Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.

Dated: August 26, 2020

Respectfully submitted,

/s/William W. Manlove

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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

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GUEST**, individuals,

Plaintiffs,

v.

CITY OF PORTLAND, a municipal
corporation; **OFFICER STEPHEN
B. PETTEY**, in his individual
capacity; **JOHN DOES 1-60**,
individual and supervisory officers of
Portland Police Bureau; **U.S.
DEPARTMENT OF HOMELAND
SECURITY; U.S. MARSHALS
SERVICE; JOHN DOES 61-100**,
individual and supervisory officers of
the federal government,

Defendants.

Case No. 3:20-cv-01193

**REPLY IN SUPPORT OF
PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW
CAUSE WHY PRELIMINARY
INJUNCTION SHOULD NOT
ENTER**

ORAL ARGUMENT REQUESTED

REPLY IN SUPPORT OF MOTION FOR TEMPORARY
RESTRAINING ORDER AND ORDER TO SHOW CAUSE
WHY PRELIMINARY INJUNCTION SHOULD NOT ENTER

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Plaintiffs Christopher Wise, Michael Martinez, Christopher Durkee, and Savannah Guest (collectively, “Plaintiffs” or “Protest Medics”) respectfully submit this Reply in support of their motion for a temporary restraining order (“TRO”).

INTRODUCTION

In these tumultuous times at a critical juncture in the nation’s history, law enforcement is under great stress. Regardless of the burdens placed upon the government, the restraints of our nation’s laws and the Constitution cannot be disregarded. The Bill of Rights—and, more generally, the Constitution itself—limit the power of government. No principle is more fundamental to our constitutional order. Charged with enforcing the Constitution’s restrictions, the judiciary scrutinizes burdens on constitutional rights and requires government officials to minimize, or narrowly tailor, those burdens.

In the instant case, the City of Portland (the “City”) turns these basic principles on their head. It recasts the role of this Court as referee between two rival factions in a nightly street fight between Portland Police, on the one hand, and violent, “hard-core criminals” on the other hand. The City’s opinion about the message of these protests reflects the apparent view of the Portland Police: The City openly argues that these protests are somehow not real protests, but are instead “coordinated lawlessness.” In Plaintiff Chris Wise, the City sees a young Black man, not fighting desperately for his life to matter in the eyes of his own government officials, but, instead, choosing to put himself in harm’s way every night to support white criminals hellbent on wreaking havoc. Similarly, in protest medic Jiri Rivera, the City sees a Latinx Air Force veteran, not standing in solidarity with Black lives and to uphold protesters’ First Amendment rights that he fought to protect, but, instead, as a criminal flashlight wielder, seeking to thwart the Portland Police’s

tactical operations. If these two do not qualify as legitimate protesters in the eyes of the City and the Portland Police, who does?

In its response, the City seeks this Court's sympathy for the plight of the Portland Police, all while excusing and obfuscating their own violent conduct by focusing on the police's need to fight against rock-throwers, arsonists, and wielders of eye-burning flashlights and lasers. That side of the story, however, omits that it is the Portland Police's violent response to these protests that has multiplied their size and ferocity. Of course it has; if this case presents a contest of narratives between feuding factions, this fact does not help the City.

But, this is not a contest of narratives; it is a civil rights action. The plight of government agents, although relevant context, is not truly at issue here; the legitimacy of their exercises of force is. The question implied again and again in the City's brief—*how can Portland Police possibly be expected to distinguish one protester from another*—is readily answered when one recalls that the Constitution and the Portland Police's own internal directives demand no less. If individuals present a threat to officer or public safety, pick them out of the crowd and arrest them. But if, as here, individuals are engaged only in peaceful protest, civil disobedience, or passive resistance, the Constitution requires the government to narrowly tailor its violent response to Plaintiffs' expressive conduct.

ARGUMENT

I. Plaintiffs' request for a temporary restraining order is not too late.

The City argues that Plaintiffs have inexcusably waited too long to file their TRO motion, which, it asserts, definitively proves that Plaintiffs are not at risk of suffering irreparable harm. (ECF 42 ("City's Second Response") at 2-3.) That gross mischaracterization of how this case has unfolded disregards the vast changes in

which the Portland Police and other law enforcement officials have shifted primary responsibility for responding to the protests each night.

It began with the Portland Police at the end of May. About one month later, on June 26, this Court entered a TRO in *Don't Shoot Portland v. City of Portland*, No. 3:20-cv-00917-HZ (ECF 43) (“*Don't Shoot Portland*”), prohibiting the Portland Police from using indiscriminate force against peaceful and non-peaceful protesters alike. Less than a week later, before anyone had much opportunity to assess how the protests would take form following the court-ordered de-escalation of the Portland Police’s violence, the Federal Defendants arrived on the scene.¹

Plaintiffs filed their complaint on July 22. (ECF 1.) They filed their first motion for temporary restraining order—against both the City and Federal Defendants—two days later (“First TRO Motion”). (ECF 4.) In response to Plaintiffs’ First TRO Motion, the City argued that the Federal Defendants—who had assumed primary responsibility for responding to the protests for about three weeks—were to blame for Plaintiffs’ recent injuries and, to the extent Plaintiffs’ evidence involved the Portland Police, that evidence pre-dated the *Don't Shoot Portland* TRO. City’s Second Response at 2-5. That TRO, the City contended, was sufficient to protect protest medics, who are no different from any other protester. *Id.* at 2-4.

The day that Plaintiffs’ reply in support of their First TRO Motion was due, Governor Brown announced that Department of Homeland Security Acting

¹ See Press Release, Department of Homeland Security, DHS Announces New Task Force to Protect American Monuments, Memorials, and Statues, (July 1, 2020) available at <https://www.dhs.gov/news/2020/07/01/dhs-announces-new-task-force-protect-american-monuments-memorials-and-statues#>; see also Press Release, Department of Homeland Security, Federal Protective Service Statement on Portland Civil Unrest, (July 5, 2020), available at <https://www.dhs.gov/news/2020/07/05/fps-statement-portland-civil-unrest>.

Secretary Chad Wolf and the State of Oregon had reached an agreement for the Federal Defendants to withdraw from Portland and rely on state and local police to respond to the Black Lives Matter protests, beginning on Thursday, July 30.² The parties all agreed to defer hearing on Plaintiffs' First TRO Motion until just a few days later, to give themselves and this Court the opportunity to observe how the Federal Defendants' reduction in presence would play out. (ECF 22.) The Federal Defendants did not leave Portland that weekend, but they did decrease their presence at the Black Lives Matter protests. Having been at least temporarily satisfied that the Federal Defendants' presence was dissipating, Plaintiffs withdrew their First TRO Motion on Sunday, August 2. (ECF 24.) Plaintiffs did so out of, among other things, a hope that the Portland Police would act in good faith and cease their violent targeting of protest medics.

In doing so, Plaintiffs gave the City and the Portland Police a chance to show that the representations they made in the City's First Response were truthful, and that the *Don't Shoot Portland* TRO was sufficient to protect Plaintiffs and other protest medics from being targeted by the Portland Police. But assurances from the City and the Portland Police proved empty. Thus, Plaintiffs began gathering additional facts to demonstrate that the *Don't Shoot Portland* TRO is ineffective at protecting them. And as soon as Plaintiffs had gathered facts to support a new TRO motion, they filed. Therefore, all protest medics, including Plaintiffs, currently continue to fear for their safety at the protests, as the Portland Police continue to use the same excessive and unconstitutional tactics that they used before the Federal Defendants arrived, and in the recent weeks following the reduced federal

² @OregonGovBrown, Twitter (June 29, 2020, 8:31 a.m.)
<https://twitter.com/OregonGovBrown/status/1288497308733018113?s=20>.

involvement in the nightly protests. Declaration of Christopher Durkee (“Durkee Decl.”) (ECF 5) ¶¶ 29-35; Declaration of Christopher (“Wise Decl.”) (ECF 6) ¶¶ 31-34; Supplemental Declaration of Michael (“Martinez Suppl. Decl.”) (ECF 39) ¶¶ 5-7; Declaration of Jessica Shifflett (“Shifflett Decl.”) (ECF 37) ¶ 14; Supplemental Declaration of Peyton Dully Hubbard (“Hubbard Suppl. Decl.”) (ECF 41) ¶ 16. Under those facts, Plaintiffs have not delayed the filing of this TRO in a manner that evidences a lack of irreparable harm.

In any event, courts in the Ninth Circuit are “loath to withhold relief solely on [the] ground” of a purported delay in seeking preliminary relief. *Arc of Cal. v. Douglas*, 757 F.3d 975, 991 (9th Cir. 2014) (citing *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1214 (9th Cir.1984)). Particularly in cases where the harm is ongoing and worsening over time, it is “prudent rather than dilatory” to wait to file a request for preliminary relief. *Id.* The Court should not deny Plaintiffs’ motion on this basis.

II. Plaintiffs are likely to succeed on the merits of their First Amendment claim.

In keeping with the foundational principle that constitutional rights must remain inviolate, to show a likelihood of success on the merits of their First Amendment claim, Plaintiffs need only “mak[e] a colorable claim that their First Amendment rights have been infringed, or are threatened with infringement.” *Doe v. Harris*, 772 F.3d 563, 570 (9th Cir. 2014). Then, the City bears the burden of justifying its restriction on Plaintiffs’ speech. *Id.* But the City has not done that.

A. Protest medics’ conduct is inherently expressive.

The City contends that providing medical care at a protest is not expressive conduct because it “conveys no particular or general message” other than that “someone needs medical assistance.” City’s Second Response at 14. In that way,

according to the City, Plaintiffs' conduct is "no more inherently expressive than getting a haircut, or receiving a dental cleaning." *Id.* That may be so of providing medical care in a sterile environment such as a hospital or doctor's clinic, or even in the back of an ambulance responding to a 911 call. But it is not so in the context of protests against police brutality.

The City recognizes that a "narrow, succinctly articulable message is not a condition of constitutional protection" for expressive conduct. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 569 (1995) (citing *Spence v. Washington*, 418 U.S. 405, 411 (1974)). Indeed, "in determining whether conduct is expressive, [courts] ask whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message." *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235 (11th Cir. 2018) ("*Food Not Bombs*") (citing *Hurley*, 515 U.S. at 569; *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 66 (2006) ("*FAIR*")).

In its response, the City attempts to distinguish *Food Not Bombs*, a case on which Plaintiffs rely, but, in so doing, fails to acknowledge the roles that context and surrounding circumstances play in that case and how analogous they are to this case: Both context and circumstances critically inform a reasonable person's ability to interpret protest medics' conduct as conveying some particularized message. "[T]he circumstances surrounding an event help set the dividing line between activity that is sufficiently expressive and similar activity that is not." *Id.* at 1241.

The *Food Not Bombs* court pointed to three critical pieces of context that supported a conclusion that Fort Lauderdale Food Not Bombs (FLFNB) was engaged in protected expressive conduct when it shared free meals with all who gathered at a public park. *Id.* at 1242. First, FLFNB "set[] up tables and banners,"

and provided informational pamphlets, which “distinguish[ed] its sharing of food with the public from relatives or friends simply eating together in the park.” *Id.* Plaintiffs do that here. Declaration of Michael Martinez (“Martinez Decl.”) (ECF 9) ¶¶ 22-24, 26-27 (describing OHSU medics’ station and how medics hand out chemical wipes and other supplies, educating protesters on how to provide self-care following tear gas or other chemical agent attacks); Shifflett Decl. ¶ 7 (“I carry a sign with me, which reads: ‘First aid for all.’”).

Second, FLFNB shared free meals with “all who [were] present,” which supported the organization’s message that redirecting funds from warfare to community meals served the public good. *Food Not Bombs*, 901 F.3d 1241. Plaintiffs and protest medics, similarly, provide medical care to protest attendees and bystanders who police injure during protests against police violence. The message from that is apparent: Police brutality in all forms is unacceptable, and it certainly will not be a tool that police can use to prevent protesters from demonstrating against their brutality. Martinez Decl. ¶ 19 (“protesters have a right to protest safely and without fear of police violence”); Wise Decl. ¶ 5 (police violence “could be a tactic to quell the protests,” so Wise “decided to put [his] training and education to good use, so that protest attendees could keep coming back and make their voices heard and their demands known without fear that they will not receive medical care”); Durkee Decl. ¶ 5, 7 (“in Portland, the biggest fear and danger protesters faced was police violence,” so Durkee used his medical skills to support the movement); Declaration of Dr. Catherine Morgans (“Dr. Morgans Decl.”) (ECF 7) ¶ 8 (“if the public and protesters saw a visible OHSU presence at the protests, they would feel safer to attend the demonstrations, to exercise their right to freedom of assembly and freedom of speech”).

Third and finally, there was the location: FLFNB served meals in a public park, which was a “traditional public forum,” “near city government buildings.” *Id.* The same is true of Plaintiffs and protest medics. They go where the demonstrations are—in public parks surrounded by courts, City Hall, and jails, and in front of police precincts and the police union building. There are no better emblems of policing practices and the criminal justice system than these places. Thus, viewing Plaintiffs’ service as protest medics in light of the context and surrounding circumstances, as the First Amendment so demands, Plaintiffs’ conduct is “an act of political solidarity meant to convey,” and that is understood as conveying, a particularized message. *See id.* at 1238.

B. Portland Police target protest medics precisely because of the message they send as protest medics.

The City argues that Plaintiffs have not sufficiently shown that the Portland Police are targeting them in retaliation for their protected speech. City’s Second Response at 19-20. As Plaintiffs already have established, they may prove a likelihood of success on the intent element of their claim through circumstantial evidence, including evidence that the Portland Police regularly engaged in conduct that would chill a reasonable person’s speech, without a sufficient non-retaliatory reason for doing so. *Mendocino Env’tl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300-01 (9th Cir. 1999). Plaintiffs have met that standard.

The City claims that Plaintiffs cannot prove intent to retaliate because: (1) Portland Police arrest and shove other protesters, meaning they do not single protest medics out; (2) protest medics are asking for it; and (3) protest medics are criminals. City’s Second Response at 19-20. But those claims are not borne out by the evidence. Plaintiffs have submitted numerous examples of the Portland Police shooting them with impact munitions when they are caring for injured protesters,

macing or arresting them when they engage in acts of passive resistance, and cherry-picking clearly marked protest medics for arrest as they and other protesters are attempting to comply with dispersal orders. The list is long:

- Portland Police shot Wise with a rubber bullet, exposing his shin bone, because he assisted a protester who fell in a cloud of tear gas, Wise Decl. ¶ 22;
- Portland Police threw a flash bang grenade at Wise's foot for no apparent reason, *id.* ¶ 24;
- Portland Police bear maced Wise at close range because he pulled a peaceful protester away from bear mace, *id.* ¶ 25;
- Portland Police passed several protesters and tackled Wise to the ground as he was attempting to comply with their dispersal order, *id.* ¶ 26;
- Portland Police threw tear gas canisters and flashbang grenades at Wise, *id.* ¶ 30;
- Portland Police bypassed several non-medical protesters, singling Wise out for arrest as he was attempting to comply with their dispersal order, Supplemental Declaration of Christopher Wise ("Wise Suppl. Decl.") (ECF 38) ¶¶ 4-5;
- Portland Police bypassed several non-medical protesters, tackled 19-year-old Peyton Hubbard to the ground, beat them with riot batons as they were attempting to comply with the police's dispersal order, and then sexually assaulted them and laughed about it before loading them into the police van, Hubbard Suppl. Decl. ¶¶ 5, 6, 12;
- Portland Police approached the OHSU medics' tent, denied Martinez's request to finish packing up medical supplies, ordered Martinez to disperse and, when he attempted to comply, arrested him, then ransacked the OHSU medics' tent, table, and medical supplies, Martinez Decl. ¶¶ 33-41;
- Portland Police hit Jessica Shifflett repeatedly with riot batons because she was helping an elderly protester who they threw to the ground, Shifflett Decl. ¶ 10;
- Portland Police shoved Shifflett, dumped her medical supplies, and threatened to arrest her because she was caring for an injured protester, *id.* ¶ 11;
- Portland Police maced Shifflett, giving her chemical burns in her throat, because she asked to provide medical attention to an arrestee

who was in so much pain that he was convulsing and vomiting on himself and who no one was helping, *id.* ¶ 12;

- Portland Police targeted Jiri Rivera for arrest, singling him out as the only medic among the wall of veterans, and, as if ironically, shoved his face mask in his mouth so he literally could not express himself, Declaration of Jiri Rivera (“Rivera Decl.”) (ECF 36) ¶ 11-19; Supplemental Declaration of Jiri Rivera (“Rivera Suppl. Decl.”) ¶ 6.

The only one of these instances that the City attempts to meaningfully address is Jiri Rivera’s arrest. City’s Second Response at 19-20. Specifically, Officer John Oliphant claims that Rivera was wielding an industrial strength flashlight at Oliphant and other officers, blinding police, and rendering it “impossible to see the crowd” and even nearby objects.³ (ECF 43-1 at 2.) Officer Oliphant is not the one who identified Rivera as the alleged flashlight wielder. (*Id.*) Officer Oliphant allegedly lost positive control over the offending flashlight after arresting Rivera. (*Id.*) Officer Oliphant did not supplement the report with evidence of the offending flashlight. (*Id.* at 2-3.)

Rivera, for his part, does not recall using any form of light that evening. Rivera Suppl. Decl. ¶¶ 4-5. He did wear a headlamp around his helmet and have a pen light and a mini mag light. *Id.* ¶ 4. He did not carry an “industrial strength” flashlight. *Id.* Rivera—who suffered a traumatic brain injury during his time serving in the Air Force—hesitates to say with 100% certainty that he did not use any of those lights to illuminate his surroundings that evening. *Id.* He can, however, say with 100% certainty that he did not use flashlights to blind officers. *Id.* And his friend, another veteran who stood next to him before he was arrested, confirms that Rivera did not use his headlamp or flashlights at all. Declaration of Dustin Chilton (“Chilton Decl.”) ¶¶ 5-6. In fact, in the moments leading to his

³ Surprisingly (or maybe not), the City does not cite any legal authority that authorized them to arrest Rivera for wielding a flashlight.

arrest, Chilton recalls that Rivera was holding a box of donuts with two hands, and he had his back to the Portland Police, which would have rendered it nearly impossible for him to blind them with a flashlight. *Id.*; *see also* Rivera Decl. ¶ 5. Officer Oliphant’s report should thus be viewed “with a high degree of skepticism.” City’s Second Response at 19.

The City also disregards the multiple instances in which Portland Police have tackled and arrested protest medics who were doing nothing but trying to comply with the police’s dispersal order. When the City does address the other instances of targeting, it appears to argue that protest medics who render care to injured protesters are somehow interfering with the police’s “tactical operations.” City’s Second Response at 19. It is not clear how. Notably, the only instance above in which it was apparent that police were actually attempting to make an arrest, protest medic Jessica Shifflett asked for permission to care for the arrestee and ultimately obeyed the officer’s orders to not approach the arrestee. Shifflett Decl. ¶ 12.

The other instances of alleged “interference” with “tactical operations” appear to be the protest medics’ reticence to disperse immediately after police issue a dispersal order. City’s Second Response at 20. The City admits that Portland Police use of “pain compliance techniques” to force protesters to comply with their demands. City’s Second Response at 19. These pain compliance techniques include injuring protesters and then walking away, leaving them lying in the street or stumbling, blinded by mace, trying to find their way to help. Rivera Suppl. Decl. ¶ 7; Chilton Decl. ¶ 9; Martinez Decl. ¶ 17. This is the very behavior that protest medics protest: the police’s repeated justifications for meeting minor infractions (e.g., failing to disperse) with immense displays of force. And, these displays of force

reflect the conduct that gave rise to these protests in the first place: police killing Black people for using a suspected counterfeit \$20 bill,⁴ or sleeping in a bed,⁵ or jaywalking,⁶ or looking “suspicious,”⁷ or being 12 years old and playing with a toy gun,⁸ or selling single cigarettes to get by.⁹ Or the police conduct that has happened since the protests began: police killing Black people for feeding protesters,¹⁰ or for walking away from them,¹¹ for trying to break up a fight.¹²

If protest medics do not immediately disperse, then their failure to do so is hardly surprising. They stick with the crowd, often near the police lines, to watch for protesters injured by police and, if they see one and can render aid without interfering with the police, they do. Wise Decl. ¶ 26; Shifflett Decl. ¶ 8; Durkee Decl.

⁴ George Floyd. *See How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020).

⁵ Breonna Taylor. *See Amina Elahi, ‘Sleeping While Black’: Louisville Police Kill Unarmed Black Woman*, NPR (May 13, 2020).

⁶ Michael Brown. *See Max Ehrenfreund, The risks of walking while black in Ferguson*, WASH. POST (Mar. 4, 2015).

⁷ Elijah McClain. *See Claire Lampen, What We Know About the Killing of Elijah McClain*, THE CUT (July 5, 2020).

⁸ Tamir Rice. *See Zola Ray, This is the Toy Gun that Got Tamir Rice Killed 3 Years Ago Today*, NEWSWEEK (Nov. 22, 2017).

⁹ Eric Garner. *See Assoc. Press, From Eric Garner’s death to firing of NYPD officer: A timeline of events*, USA TODAY (Aug. 20, 2019).

¹⁰ “BBQ Man,” David McAtee. *See Christopher Brito, Louisville Man Shot and Killed During Protests*, CBS NEWS (June 4, 2020).

¹¹ Trayford Pellerin. *See Ashley White & Andrew Capps, Lafayette mayor apologizes for his response to police shooting of Trayford Pellerin: ‘I recognize the pain.’*, USA Today (Aug. 25, 2020).

¹² Jacob Blake. *See Shayndi Raice, Jacob Blake Shooting: What Happened in Kenosha, Wisconsin?*, WALL STREET JOURNAL (Aug. 27, 2020). Also since these protests began, Phoenix police killed 28-year-old Ramon Timothy Lopez by holding him on 160-degree pavement for over six minutes, because they suspected him of being on drugs. *See Keith Griffith, Bodycam footage shows Phoenix police held man on hot asphalt for nearly six minutes with temperatures up to 160 degrees before he died while being arrested for stealing a drink and fighting with the cops*, DAILY MAIL (Aug. 19, 2020).

¶¶ 14-15. And most physical injuries to protesters that need medical care occur after the issuance of a dispersal order. Durkee Decl. ¶ 14; Declaration of Savannah Guest (“Guest Decl.”) (ECF 11) ¶ 11. This meets the Portland Police’s own definition of “passive resistance,” which is “[a] person’s non-cooperation with [an officer] that does not involve violence or other active conduct by the individual.” Portland Police Bureau Directive 0635.10. Passive resistance is not a crime under Oregon law. ORS 162.247(3)(b).

The Portland Police have no valid reason to single out and tackle or arrest protest medics who are complying with their orders to disperse. They have no valid reason to beat protest medics with riot batons, to shoot impact munitions at them, or to throw tear gas canisters or flashbangs at them, when they are passively resisting by standing up to police violence and rendering medical aid to those police injure and leave behind. Truly, there is no explanation other than intimidation and retaliation.

C. Protest medics are distinguishable from other protesters and do not interfere with police operations.

Plaintiffs and other protest medics decorate themselves and their equipment with the universally recognized red-cross medic symbol. These crosses are high visibility and can be seen from multiple angles. Wise Decl. ¶ 9; Martinez Decl. ¶ 22; Durkee Decl. ¶¶ 9-10; Guest Decl. ¶ 7; Shifflett Decl. ¶ 7; Declaration of Peyton Dully Hubbard (“Hubbard Decl.”) (ECF 10) ¶ 5; Rivera Decl. ¶¶ 10, 12, 18; Declaration of Nathan Cohen (“Cohen Decl.”) (ECF 15) ¶ 8-9. They are unmistakable. While the City plays up the fears that violent criminals will dress up as medics and infiltrate their lines, Plaintiffs’ requested relief does not seek to protect camouflaged agitators. And to be clear, the City only suspects this may

happen; it has provided no evidence that protesters have disguised themselves as protest medics.

The City also spends a great deal of effort arguing Plaintiffs are not special and thus not due the protection they seek—*i.e.*, they are not due any more protection than any other protester is entitled to. City’s Second Response at 18. However, under the First Amendment, every citizen is equally entitled to exercise their rights and be free from retaliation and targeting. It is clear that no one should be harmed for expressing their varied viewpoints and modes of expression. Though, when Plaintiffs and other medics are specifically targeted for their expressive conduct—performing medical care on those injured—the Plaintiffs’ First Amendment rights are uniquely violated in a manner different than the typical protester is harmed.

Moreover, as protest medics, Plaintiffs serve a critical function that affords them unique protections under the First Amendment and the opportunity to temporarily continue rendering aid to injured protesters not under arrest following the issuance of lawful dispersal orders. Plaintiff Kit Durkee notes that, after the issuance of a dispersal order especially, it is likely that protesters will be injured by police or trampled while trying to escape riot guns shooting rubber bullets and clouds of tear gas and pepper spray. Durkee Decl. ¶ 14.

Plaintiffs’ role is all the more important given that Defendants appear not to make the protest area accessible to medical first responders and ambulances. Supplemental Declaration of Craig Dobson (“Dobson Suppl. Decl.”) (ECF 43) ¶ 8. Donavan La Bella is one high-profile example of how critical protest medics have been to serve gravely injured protesters. A federal officer shot Donavan La Bella in the head when he stood in front of the courthouse with a boombox over his head.

Neither federal officers nor Portland Police responded to provide aid; instead, Plaintiffs Wise and Durkee were the first responders. Durkee Decl. ¶ 21; Wise Decl. ¶ 15. La Bella bled from his brain, choking on his own blood and soft tissue pouring from his nostrils. Durkee Decl. ¶ 21; Wise Decl. ¶ 15. Even still, he had to walk from the front of the courthouse to where an ambulance was willing to park. Wise Decl. ¶ 15. Portland Police shoot protesters in the head, too. Wise Decl. ¶ 16. Without the assistance of protest medics, many gravely injured protesters like La Bella will not have access to emergency first responders who provide them life-saving medical care. And, despite the City's suggestion to the contrary, no one—not peaceful protesters, not rock-throwers, not egg-throwers, not soup can throwers, not laser wielders, not fire-starters—deserves to go without life-saving medical treatment after police gravely injure them.

The protest medics serve such a critical—and potentially life-saving—function that they should be permitted to temporarily continue to render services, supplies, and treatment after the issuance of lawful dispersal orders, without facing violence at the hands of Portland Police.

III. Plaintiffs are likely to succeed on the merits of their Fourth Amendment claims.

The City's arguments concerning the Fourth Amendment similarly fail. With respect to Plaintiffs' excessive-force claim, the City argues that the force used by the Portland Police on the protest medics is not unconstitutionally excessive because (1) random unidentified protesters have engaged in "the physical assault on law enforcement and destruction of public and private property" and (2) the medics have failed "to immediately disperse after a police order." City's Second Response at 29, 31. Thus, the City argues, those alleged facts justify the use of violence against the protest medics articulated in Plaintiffs' declarations. But that logic misconstrues

the applicable Fourth Amendment case law and the factual circumstances of this case.

The City's argument that the violence used against the protest medics was justified because other unidentified protesters have assaulted law-enforcement officers is legally misguided. As Plaintiffs have argued and cited repeatedly, the relevant consideration is not whether other individuals committed crimes at the protests. Rather, the courts consider whether the *victim* of force by law enforcement officers (here, the protest medics) committed any crime, and, if so, the severity of that crime. *See, e.g., Don't Shoot Portland v. City of Portland*, No. 3:20-cv-00917-HZ, 2020 WL 3078329, at *3 (D. Or. Jun. 9, 2020) (holding that the Portland Police could not rely on the chaotic environment of protests to justify their excessive force under the Fourth Amendment, so long as the individual Plaintiffs did not actually pose a safety or criminal risk). Here, the protest medics did not engage in any criminal activity and, even if they did, their activity did not justify the level of force used by the Portland Police.

The Portland Police present a wholly inadequate justification for their use of force against protest medics: that those medics allegedly have failed “to immediately disperse after a police order.” That argument is incorrect for two reasons. First, it mischaracterizes the facts in this case. The City has not produced any specific evidence that Plaintiffs or other protest medics have failed to sufficiently comply with a dispersal order. And when looking at Plaintiffs' declarations, it is clear that, to the extent it was possible to do so without harming others, they did comply with the dispersal orders. For example:

- When the Portland Police tackled, beat, and detained protest medic Peyton Hubbard, Hubbard was “mov[ing] east to comply with the dispersal order.” Hubbard Suppl. Decl. ¶¶ 5-10.

- When the Portland Police detained Plaintiff Christopher Wise, he “was working to comply with the Portland Police’s orders to disperse to the North.” Wise Suppl. Decl. ¶ 4.
- When the Portland Police shot and hit Plaintiff Savannah Guest, Guest and Plaintiff Christopher Durkee “were trying to comply with the officers’ orders.” Guest Decl. ¶ 15.

Thus, contrary to the City’s assertions, the evidence in the record does not establish that the protest medics have failed to immediately disperse after a police order. Accordingly, the asserted failure to disperse cannot justify the Portland Police’s use of force on the protest medics.

Similarly, even if the protest medics were not complying with a valid dispersal order, that action alone does not justify the level of direct force used on them by the Portland Police. Under the relevant case law, to determine whether the level of force used by the Portland Police was excessive, this Court must weigh the severity of the alleged crime being committed by the protest medics against the degree of force used against them. *See Nelson v. City of Davis*, 685 F.3d 867, 883 (9th Cir. 2012) (“The factors that justify the use of force must be weighed against the degree of intrusion posed by the particular type of force to determine if the use in the particular instance was reasonable.”) That means that there is a spectrum of allowable force, which increases and decreases depending on the severity of the alleged crime at issue. Accordingly, low-level crimes like failing to respond to a dispersal order, should have correspondingly lower levels of police violence attached to them. But in this case, for the protest medics’ alleged failure only to “immediately” follow a dispersal order, the Portland Police beat the medics with batons, maced the medics directly in the face from a few feet away, and shot the medics with pepperballs and tear-gas cannisters. Wise Decl. ¶¶ 9, 26, 20-30; Guest

Decl. ¶ 12; Durkee Decl. ¶ 17; Shifflett Decl. ¶¶ 7-8, 10-11, 12-13; Hubbard Decl. ¶¶ 5-12; Hubbard Suppl. Decl. ¶¶ 3-14. That level of violence in response to an alleged failure to run quickly enough is completely unjustified, excessive, and unconstitutional. Therefore, Plaintiffs have sufficiently established a likelihood of success on their Fourth Amendment excessive force claim.

The same holds true for Plaintiffs Fourth Amendment seizure claim. In response to that claim, the City argues that the Portland Police were justified in confiscating Plaintiffs' property, which included a table, tent, banner, first-aid signs, medical wipes, saline solution, gauze, bandages, and COVID-19 personal protective equipment. Martinez Decl. ¶¶ 22-24. To support that argument, the City relies solely on Portland City Code ("PCC") section 20.12.080, as legal authority for seizing Plaintiffs' property. That section provides, in its entirety:

[In the absence of a permit], no person shall excavate for, erect, install or place, or do any act as part of or commencement of excavation, erection, installation or placement of any permanent or temporary structure or facility in or on any Park. This Section does not prohibit the mere carrying of any item in or through a Park, nor does it prohibit the use or placement of personal accessories, such as purses, backpacks or bags, or the use or placement of wheelchairs, walkers or baby carriages or child strollers in any Park, except in areas where those items are prohibited by the Director.

Contrary to the City's assertions, nothing in that section authorized the police to confiscate *and then throw away in a dumpster* Plaintiffs' property. Martinez Decl. ¶ 41; Dr. Morgans Decl. ¶ 16. As an initial matter, that section applies only to the unpermitted placement of a "structure or facility" in a park. Therefore, it does not apply to, and did not authorize, the Portland Police's confiscation of Plaintiffs' banner, first-aid signs, medical wipes, saline solution, gauze, bandages, and personal protective equipment. Additionally, it also is not at all clear whether

Plaintiffs’ portable tent constitutes a “structure or facility” under that provision. But regardless, even if it does apply to the tent, it did not authorize the Portland Police to throw that tent away in a dumpster. Accordingly, Plaintiffs also have established a likelihood of success on that the Portland Police unlawfully seized Plaintiffs’ property.

IV. The balance of equities weighs in Plaintiffs’ favor.

The public always has a significant interest in free speech and upholding constitutional rights. Here, Plaintiffs, and protest medics more broadly, are exercising their constitutional right to free expression by providing medical care. The Portland Police have attempted to suppress that right and continue to do so. The public not only has an interest in protecting Plaintiffs’ rights, it also has an interest in freely and safely attending the protests with the knowledge that there are medics on site who can provide medical care. This interest is particularly important given the numerous injuries the Portland Police cause.

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The City's arguments that injunctive relief is not in the public interest and that the balance of equities favors Defendants are unpersuasive. The City repeats its argument that the police are already subject to use-of-force restrictions. But, as shown above, the Portland Police have continued to use excessive force and violate Plaintiffs' constitutional rights. The City also asserts that Plaintiffs seek to create heightened First Amendment protections for protest medics that would "complicate" the job of the Portland Police. Plaintiffs, however, only seek the First Amendment rights to which they are entitled under the Constitution. And the police cannot deprive medics, or anyone, of constitutional rights on the grounds that upholding those rights would be difficult.

DATED: August 28, 2020

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

**CHRISTOPHER WISE, MICHAEL
MARTINEZ, CHRISTOPHER DURKEE,
and SAVANNAH GUEST**

Plaintiffs,

v.

**CITY OF PORTLAND, OFFICER
STEPHEN B. PETTEY, JOHN DOES 1-60,
UNITED STATES DEPARTMENT OF
HOMELAND SECURITY, UNITED
STATES MARSHALS SERVICE, JOHN
DOES 61-100,**

Defendants.

Case No. 3:20-cv-01193-IM

OPINION AND ORDER

IMMERGUT, District Judge.

Before this Court is Plaintiffs’ Motion for a Temporary Restraining Order (“TRO”) pursuant to Rule 65 of the Federal Rules of Civil Procedure. Plaintiffs are four individuals who serve as “protest medics” at demonstrations against racial violence in downtown Portland. They seek an order with respect to the City of Portland, Officer Stephen B. Pettey, and John Does 1-60 (“Municipal Defendants”) that shall expire fourteen days after entry, unless extended by a

stipulation of the parties or by further order of the court. The requested order would enjoin the Municipal Defendants from:

- (1) arresting, threatening to arrest, or using physical force directed against any person they know or reasonably should know is a protest medic, unless authorized under Or. Rev. Stat. § 133.235 or Or. Rev. Stat. § 133.245;
- (2) using physical force directly or indirectly targeted at a protest medic when the medic is providing medical care to an individual and poses no threat to the lives or safety of the public or police;
- (3) requiring properly identified protest medics to disperse or move with demonstrators following the issuance of an order to disperse or move when the medic is providing medical care to an individual, and prohibiting Municipal Defendants from using the protest medic's decision not to disperse or move as any basis to establish that the medic has committed a crime;
- (4) seizing any medical equipment or other materials necessary for the protest medics to administer medical care, unless Municipal Defendants are lawfully seizing the protest medic; and
- (5) ordering a protest medic to stop treating an individual, or ordering a protest medic to disperse or move when they are treating an individual, unless Municipal Defendants are lawfully seizing that person. ECF 35 at ¶¶ 2–6.

On September 1, 2020, this Court held oral argument. After considering the pleadings, declarations, exhibits and arguments of counsel, this Court finds Plaintiffs have failed to show sufficient facts and adequate legal support to warrant providing protest medics unique exemptions from lawful dispersal orders, or specialized treatment different from that of their

fellow protesters. Further, the particular TRO sought in this case is unworkable when considering the totality of the chaotic circumstances that have been described by all parties in this case. In finding that Plaintiffs have not met their burden to obtain the extraordinary remedy of a mandatory injunction, this Court does not seek to discredit or diminish the efforts of the protest medics, or question their right to participate in the protests. Nor is this Court ruling on the merits of Plaintiffs' underlying claims, which will be further developed through discovery.

For the reasons that follow, Plaintiffs' Motion for a Temporary Restraining Order, ECF 35, is DENIED.

BACKGROUND

George Floyd's tragic killing on May 25, 2020 sparked national and international protests in support of Black lives and against systemic racism in American policing. In Portland, these protests have continued for almost one hundred days. While thousands of protesters have remained peaceful, a smaller number of protesters have engaged in vandalism, destroyed property, and committed acts of violence. Russell Decl., ECF 17-1 at ¶ 3; *see also Don't Shoot Portland v. City of Portland*, No. 3:20-cv-00917-HZ, 2020 WL 3078329 (D. Or. June 9, 2020), Passadore Decl., ECF 118 at ¶¶ 25–60 (describing destructive and violent acts by protesters on June 25, 2020 and June 30, 2020). Over the past few months, various crowd dispersal tactics have been used at the protests, including rubber bullets, impact munitions, and other forms of force. *Id.* at ¶¶ 8, 9. Although the City of Portland initially used tear gas as a dispersal technique, that dispersal method was limited by a temporary restraining order issued on June 9, 2020 in *Don't Shoot Portland v. City of Portland*, No. 3:20-cv-00917-HZ, 2020 WL 3078329 (D. Or. June 9, 2020). Those restrictions remain in effect today.¹

¹ On July 14, 2020, based on a joint request by the parties, Chief United States District Judge Marco A. Hernandez extended the temporary restraining order restrictions in their current

Plaintiffs are “protest medics” who attend public demonstrations in Portland to provide support, comfort, and medical aid to protesters. Plaintiffs hail from a diverse array of backgrounds and medical training.² Protest medics, as defined in the TRO, have no required uniform or dress, but identify themselves as medics through marks on their clothing—such as painting the word “medic” on their backs, or affixing a red-cross symbol with duct-tape to their arms and chest. *See* ECF 35 at ¶ 1. They often also carry medical supplies on their person and in backpacks.

The protest medics provide a range of services, including rendering basic medical aid to injured protesters, carrying injured persons to safety, providing water and food, and providing moral support. Durkee Decl., ECF 5 at ¶¶ 10 (dancing to keep spirits high), ¶ 13 (dressing lacerations), ¶ 21 (applying pressure to injured protester Donovan LaBella’s wound until the arrival of an ambulance); Wise Decl., ECF 6 at ¶ 15 (wrapping injured protester Donovan LaBella’s wound with gauze before helping to transport him to an ambulance); Paul Decl., ECF 8 at ¶ 9 (cleaning eye wound); Hubbard Decl., ECF 10 at ¶ 7 (washing out the eyes of protester who was pepper sprayed); Guest Decl., ECF 11 at ¶ 12 (providing eye wash to protesters after exposure to tear gas); Shifflett Decl., ECF 37 at ¶ 10 (attempting to carry an injured protester out of harm’s way). Protest medics also hand out supplies such as eye wash and eye wipes in anticipation of tear gas, and masks, gloves, and hand sanitizer to protect against COVID-19. Martinez Decl., ECF 9 at ¶ 23. The most common police-inflicted injuries the protest medics have seen in the Portland protests is exposure to tear gas. Guest Decl., ECF 11 at ¶ 12.

form until further order of the court. *Don’t Shoot Portland v. City of Portland*, No. 3:20-cv-00917-HZ, ECF 133.

² Based on the declarations provided, none of the plaintiffs appear to currently be licensed medical professionals in the state of Oregon.

Plaintiffs allege Municipal Defendants violated the First and Fourteenth Amendments by targeting them in retaliation for serving as protest medics, using excessive force against Plaintiffs, and unlawfully seizing the property of protest medics. ECF 1 at ¶¶ 4, 186–87. Additionally, Plaintiffs contend that supporting protesters as protest medics constitutes expressive conduct protected by the First Amendment, and Municipal Defendants infringe on their right of free speech by ordering Plaintiffs to leave an area pursuant to lawful dispersal orders while they provide medical aid. *Id.* at ¶ 184. Plaintiffs have not challenged the lawfulness of the dispersal orders. Plaintiffs therefore raise the narrow issue of whether protest medics, as defined by the TRO, should effectively receive special dispensation under the First Amendment to remain in areas where police have issued lawful dispersal orders.

Plaintiffs previously filed for a TRO against both Federal and Municipal Defendants on July 24, 2020. ECF 4. Before this Court held a hearing on the motion, Federal Defendants announced an intention to reduce their presence in Portland. Shortly thereafter, Plaintiffs withdrew their TRO motion. ECF 24. On August 21, 2020, Plaintiffs filed this second motion for a TRO solely against Municipal Defendants. ECF 35.³

A. Plaintiffs

Plaintiff Christopher Wise completed training at Southwestern Oregon Community College to be an emergency medical technician (“EMT”). Wise Decl., ECF 6 at ¶ 2. Although not certified as an EMT, Plaintiff Wise has certifications for Basic Life Support (“BLS”) and CPR for Healthcare Workers. *Id.* Since June 2, 2020, Plaintiff Wise has regularly attended

³ At oral argument, Plaintiffs and Municipal Defendants agreed the Court can consider the supporting declarations for the initial TRO in evaluating Plaintiffs’ second TRO as well as those filed in *Don’t Shoot Portland v. City of Portland*, No. 3:20-cv-00917-HZ, 2020 WL 3078329 (D. Or. June 9, 2020).

demonstrations as a protest medic. *Id.* at ¶ 7. While serving as a medic, Plaintiff Wise displays bright orange or pink duct-taped crosses on his outermost layer of clothing on his chest and each of his shoulders. *Id.* at ¶ 9. He also has the word “medic” spray painted in red lettering across his back. *Id.*

Plaintiff Michael Martinez has been a graduate student at Oregon Health & Sciences University (“OHSU”) since the fall of 2019, in a doctoral program for Medical and Molecular Genetics. Martinez Decl., ECF 9 at ¶ 2. He has attended the Portland protests several times as a protest medic with a group organized by OHSU faculty and graduate students. *Id.* at ¶¶ 19, 21, 22. The OHSU group sets up a medic station with a variety of medical supplies including gauze, bandages, antibiotic ointments, tape, ear plugs, over-the-counter pain medications, and eye wash solutions. *Id.* at ¶ 23. The station also offers snacks, water, and COVID-19 related supplies such as masks, gloves, and hand sanitizer. *Id.* Because Plaintiff Martinez has only basic first aid training, he generally assists medics with higher levels of training by providing supplies. *Id.* at ¶ 26. He has also provided food and water to protestors as part of his role as a protest medic. *Id.* at ¶ 22.

Plaintiff Christopher Durkee previously worked in Los Angeles County as an EMT and emergency dispatcher for five years. Durkee Decl., ECF 5 at ¶ 2. He has also worked at a psychiatric hospital in some capacity. *Id.* at ¶ 2. Plaintiff Durkee serves as a protest medic with a partner, Plaintiff Savannah Guest. *Id.* at ¶ 12; Guest Decl., ECF 11 at ¶ 9. Plaintiff Guest previously worked as a volunteer emergency medical responder for emergency medical services in Powhatan, Virginia for 1.5 years. Guest Decl., ECF 11 at ¶ 2. She is not trained as an EMT, but she is CPR, First Aid, and Automated External Defibrillator (“AED”) certified. *Id.* While attending the protests, both Plaintiffs Durkee and Guest wear dark-colored clothes with high-

gloss, red duct tape in the shape of crosses on the front and back of their clothing. Durkee Decl., ECF 5 at ¶ 9; Guest Decl., ECF 11 at ¶ 7. They also wear shoulder patches with crosses and display the word “medic” on their backpacks. Durkee Decl., ECF 5 at ¶ 9; Guest Decl., ECF 11 at ¶ 7.

B. Protests

The Portland protests initially centered around the downtown area near the Multnomah County Justice Center, the Portland Police Bureau’s North and Central Precincts, and the Mark O. Hatfield United States Courthouse. Dobson Supp. Decl., ECF 43 at ¶ 9. Demonstrations have also occurred near the Portland Police Association Union Hall in Northeast Portland and the Immigration and Customs Enforcement Building in Southwest Portland. *Id.* Most recently, demonstrations have also been held at Multnomah County’s Penumbra Kelly Building and the Portland Police Bureau’s East Precinct. *Id.* Several of these buildings are in or near residential neighborhoods. *Id.*

Although many demonstrators have peacefully assembled, declarations submitted by the parties demonstrate that the protests have regularly escalated into dangerous scenarios for the community, law enforcement, as well as protesters, particularly during the late hours of the night and into the early mornings.⁴ *See* Dobson Supp. Decl., ECF 43 at ¶ 9. For example, Federal Defendants allege that in the early morning hours of July 3, 2020, a group of individuals smashed the glass in the doors of the Mark O. Hatfield Courthouse, threw balloons containing an

⁴ Both law enforcement officers and protesters have been injured during altercations at the protests. Most recently, although not part of the declarations submitted, the protests turned deadly when someone was shot and killed in downtown Portland on August 29, 2020. Eder Campuzano, *1 man shot, killed near downtown Portland protests Saturday*, THE OREGONIAN (Aug. 30, 2020), <https://www.oregonlive.com/portland/2020/08/1-person-shot-killed-near-downtown-portland-protests-saturday.html>.

accelerant liquid into the lobby, then fired commercial fireworks towards the accelerant in an apparent attempt to start a fire. Russell Decl., ECF 17-1 at ¶ 6.

Federal Defendants also describe further violence which occurred on July 11, 2020. That night there were approximately 300 protesters around the Courthouse. *Id.* at ¶ 8. A barrier of police tape was placed across the front of the Hatfield Courthouse and protesters were ordered not to trespass onto federal property. *Id.* When an individual refused to comply with that command, federal officers deployed and made an arrest for trespass. *Id.* While the officers were making the arrest, a crowd of individuals swarmed them. *Id.* Officers deployed less-lethal projectile rounds into the crowd, and the crowd responded by throwing rocks, glass bottles, and fireworks at the officers. *Id.* Tear gas was then deployed as officers withdrew to the courthouse. *Id.*

On the night of July 19, 2020, a crowd of over 1,000 protesters demonstrated in the downtown area near the Hatfield Courthouse. *Id.* at ¶ 12. Federal Defendants allege the protesters removed fencing from around the courthouse and again attempted to set fire to the building. *Id.* Additionally, protesters are alleged to have shot commercial grade fireworks at law enforcement. *Id.* Officers used dispersal tactics to move the crowd off federal property. *Id.*

More recently, on the night of August 4, 2020, a protest of approximately 200 individuals marched from Peninsula Park to the Portland Police Association located in Northeast Portland. Dobson Supp. Decl., ECF 43 at ¶ 19. Protesters allegedly lit a large dumpster on fire near the Portland Police Association office while chanting that they wanted to burn down the building. *Id.* Municipal Defendants further allege protesters attempted to break into the building several times and lit a Molotov cocktail. *Id.* Furthermore, one protester allegedly pulled out a firearm and shot it several times after engaging in a fist fight with another protester. *Id.*

Protesters again marched from Peninsula Park to the Portland Police Association on August 8, 2020. *Id.* at ¶ 21. Members of the crowd of roughly 500 protesters moved dumpsters onto the street and lit them on fire. *Id.* Municipal Defendants allege demonstrators attempted to break into the Portland Police Association office that night by breaking windows and disabling the security cameras. *Id.*

On the night of August 20, and the early morning August 21, 2020, roughly 200 to 250 protesters gathered around the ICE building, located near a residential neighborhood. Municipal Defendants allege members of the crowd threw rocks, hammers, and fireworks at law enforcement officers. *Id.* at ¶ 22. Protesters also allegedly sprayed graffiti, kicked doors, and broke windows. *Id.*

Yet another night, on August 23, 2020, there was a demonstration near the Portland Police Bureau's North Precinct with over 200 protesters. *Id.* at ¶ 23. Municipal Defendants allege members of the crowd threw rocks, bottles, and other projectiles at law enforcement officers. Municipal Defendants also allege some members of the crowd "threw a commercial mortar on to the North Precinct roof, and lit the [northwest] corner awning of the Precinct building on fire." *Id.*

During the demonstrations, officers protecting the municipal and federal properties allege they have been "subject to threats, rocks and ball bearings fired with wrist rockets, improvised explosives, aerial fireworks, and commercial grade mortars, high intensity lasers targeting officer's eyes, thrown rocks, full and empty glass bottles, and balloons filled with paint and other substances such as feces." Russell Decl., ECF 17-1 at ¶ 4. One protester is alleged to have struck an officer in the head and shoulder with a two-pound sledgehammer when the officer tried to prevent the protester from breaking into the Hatfield Courthouse. *Id.*

Over the course of the past few months, the Portland Police Bureau (“PPB”) has frequently declared protests in Portland to be unlawful assemblies. *See, e.g.*, Dobson Supp. Decl., ECF 43 at ¶¶ 19–23; *Don’t Shoot Portland v. City of Portland*, No. 3:20-cv-00917-HZ, 2020 WL 3078329 (D. Or. June 9, 2020), Dobson Decl., ECF 105. Since July 25, 2020, the Portland Police Bureau (“PPB”) has declared a riot under state law eight times. *Id.* at ¶ 11. Once an unlawful assembly or riot has been declared, the PPB has authority under Oregon law to disperse the group, and arrest those who fail to comply with police orders. *See* Or. Rev. Stat. § 131.675. Once dispersal orders have been given, it is important for the safe management of crowd control operations that protesters comply. Dobson Supp. Decl., ECF 43 at ¶ 14. When people fail to disperse, they are potentially interfering with a police tactical operation. *Id.*

Plaintiffs provide declarations that describe the police response to the protests. Plaintiffs allege they and other medics suffered injuries from crowd control tactics such as chemical irritants and less-lethal munitions deployed by Defendants.⁵ *See, e.g.*, Martinez Decl., ECF 9 at ¶ 32; Durkee Decl., ECF 5 at ¶ 20; Guest Decl., ECF 11 at ¶ 15; Wise Decl., ECF 6 at ¶¶ 22–26, 28, 30. They argue these injuries evince an effort on the part of law enforcement to target the medics. The harms Plaintiffs allege they experienced have generally happened in the aftermath of a dispersal order while officers are trying to clear the area.

For example, Plaintiff Wise alleges on June 2, 2020, he was shot in the shin with a rubber bullet while attempting to pull another fallen protester out of a recently deployed cloud of tear gas. Wise Decl., ECF 6 at ¶ 22. Plaintiff Wise also alleges a Portland police officer forcefully shoved him down on the night of July 4, 2020, injuring his shoulder and hand. *Id.* at ¶ 26.

⁵ It is unclear whether some of the alleged harms described in Plaintiffs’ declarations are attributed to Federal or Municipal Defendants.

Plaintiff Guest alleges on July 4, 2020, she was shot with a projectile, checked in the shoulder with a baton, and forcibly pushed by law enforcement officers. Guest Decl., ECF 11 at ¶ 15.

Plaintiff Durkee alleges that an officer checked him from behind with a baton on that same night. Durkee Decl., ECF 5 at ¶ 20. Plaintiff Guest also alleges she was shot three times with rubber bullets on July 19, 2020 while trying to approach a protester suffering from tear gas exposure. Guest Decl., ECF 11 at ¶ 29.

Plaintiff Durkee alleges on July 11, 2020, and into the early morning of July 12, 2020, he and Plaintiff Guest were attempting to move injured people out of the street and away from incoming federal officers, who responded by firing tear gas canisters and pepper balls at them. Durkee Decl., ECF 5 at ¶ 22. Plaintiff Guest alleges she was also pushed by those federal officers and struck with their batons that same night after they refused to allow her to provide aid to someone lying on the ground during a dispersal order. Guest Decl., ECF 11 at ¶¶ 19–20.

Plaintiffs Martinez and Wise also allege they were unlawfully singled out and arrested by Municipal Defendants. Plaintiff Martinez alleges that on June 13, 2020, he was arrested while working at the OHSU medic station after starting to film the officers while they attempted to clear the area. This occurred after a dispersal order was announced. Martinez Decl., ECF 9 at ¶¶ 33–39. Plaintiff Wise alleges that while serving as a protest medic on August 20, 2020, through the early morning of August 21, 2020, he was unlawfully arrested while walking among a group of protesters who were complying with a police dispersal order. Wise Supp. Decl., ECF 38 at ¶ 4.

STANDARD

In deciding whether to grant a motion for a temporary restraining order, courts look to substantially the same factors that apply to a court’s decision on whether to issue a preliminary injunction. *See Stuhlberg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). 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. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Like a preliminary injunction, a temporary restraining order is an “extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Id.* at 22.

The Ninth Circuit applies a “sliding scale” approach in considering the factors outlined in *Winter*. A stronger showing of one element of the preliminary injunction test may offset a weaker showing of another. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–32 (9th Cir. 2011). Thus, “when the balance of hardships tips sharply in the plaintiff’s favor, the plaintiff need demonstrate only ‘serious questions going to the merits.’” *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 992 (9th Cir. 2019) (quoting *All. for the Wild Rockies*, 632 F.3d at 1135).

Finally, the already high standard for granting a TRO or preliminary injunction is further heightened when the type of injunction sought is a “mandatory injunction.” *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (noting that the burden is “doubly demanding” for a mandatory injunction). To obtain a mandatory injunction, a plaintiff must “establish that the law and facts *clearly favor* her position, not simply that she is likely to succeed.” *Id.* (emphasis in original). As explained by the Ninth Circuit:

A preliminary injunction can take two forms. A prohibitory injunction prohibits a party from taking action and preserves the status quo pending a determination of the action on the merits.” A mandatory injunction orders a responsible party to take action. A mandatory injunction goes well beyond simply maintaining the status quo pendente lite and is particularly disfavored. In general, mandatory injunctions are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages.

The *status quo ante litem* referenced in *Chalk* means the last, uncontested status which preceded the pending controversy.

Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 878–79 (9th Cir. 2009) (quotation marks and citation omitted) (alterations in original).

DISCUSSION

A. TRO Factors

1. Likelihood of Success on the Merits

a. First Amendment Claim

Plaintiffs’ First Amendment claim alleges Municipal Defendants unlawfully retaliated against them for serving as protest medics. ECF 1 at ¶¶ 182–188, 201–213. The First Amendment prohibits governmental officials from retaliating against individuals for engaging in constitutionally protected speech. *Hartman v. Moore*, 547 U.S. 250, 256 (2006). In order to prevail on a First Amendment retaliation claim, Plaintiffs must show that: (1) they engaged in a constitutionally protected activity; (2) the Municipal Defendants’ actions would “chill a person of ordinary firmness” from continuing to engage in the activity; and (3) Plaintiffs’ engagement in protected speech was a “substantial or motivating factor” in the Municipal Defendants’ conduct. *O’Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016).

Plaintiffs allege that rendering medical aid to protesters is a constitutionally protected form of expressive conduct. ECF 1 at ¶ 184. To be sure, First Amendment protection of speech “does not end at the spoken or written word.” *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Constitutional protection extends also to expressive conduct. *Rumsfeld v. Forum for Acad. & Inst’l Rights, Inc.*, 547 U.S. 47, 66 (2006). But to merit First Amendment protection, the conduct must be “inherently expressive.” *Id.* Whether expressive conduct constitutes a protected form of speech depends on whether the conduct “is intended to convey a ‘particularized message’ and the likelihood is great that the message would be so understood.” *Corales v. Bennett*, 567 F.3d 554, 562 (9th Cir. 2009) (quoting *Nunez v. Davis*, 169 F.3d 1222, 1226 (9th Cir. 1999)). Expressive

conduct need not convey a specific message. *Hurley v. Irish-Am., Gay, Lesbian & Bisexual Group of Boston, etc.*, 515 U.S. 557, 569 (1995). The critical question is whether a reasonable observer would interpret the conduct as *some* sort of message. *Id.*

Plaintiffs contend that they exercise their right of free speech by “providing care and support to the protesters demonstrating for the cause of equal treatment and absolute equality under the law.” ECF 35 at 12. Certainly, participating in a protest is expressive conduct “clearly protected by the First Amendment,” *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1996), but Plaintiffs assert the novel position that “rendering medical aid to support and advance a protest is itself a form of constitutionally protected expression.” ECF 35 at 25. Additionally, Plaintiffs ask this Court to allow them to essentially disregard dispersal orders so they may provide aid to injured protesters. Although Plaintiffs’ goal of providing aid to protesters is undoubtedly admirable, this Court has found no legal authority for affording protest medics, as defined by Plaintiffs, unique recognition under the First Amendment beyond that afforded any individual who attends a protest.⁶ Protest medics may continue to protest, and provide medical aid during the protests. They simply have no unique status under the First Amendment that allows them to disregard lawful orders.

⁶ Plaintiffs primarily rely on two cases—*Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235 (11th Cir. 2018) and *Abay v. City of Denver*, 445 F. Supp. 3d 1286 (D. Colo. 2020)—for their assertion that serving as a protest medic is expressive conduct. Neither of these cases are precedential to this Court. Furthermore, these cases have not made clear that acting as a protest medic, as described in this case, constitutes expressive conduct. In *Abay*, the district court grouped the analysis of the alleged excessive force used against protesters, protest medics, and journalists. 445 F. Supp. 3d at 1292. Nowhere did the court recognize that participating in a protest as a medic is a distinct type of expressive conduct. In *Food Not Bombs*, the Eleventh Circuit concluded that an organization’s act of providing free food to the public constituted expressive conduct after noting that the group posted signs and distributed literature at the events which distinguished its food sharing from every day activities. 901 F.3d at 1242. Accordingly, the facts in that case are not sufficiently analogous to the issues before this Court.

Regardless, Plaintiffs have not demonstrated that the Municipal Defendants' actions were motivated by their status as protest medics sufficient to satisfy the third prong of a First Amendment retaliation claim. Plaintiffs argue that Municipal Defendants "indiscriminately, and at close range, unleashed chemical irritants, deployed munitions, and engaged in physical violence specifically against them," despite visible markings identifying them as medics. ECF 4 at 30–31. But Plaintiffs admittedly lack a distinct uniform, instead identifying themselves primarily with crosses taped or painted onto ordinary clothing. This lack of uniformity cuts against the proposition that protest medics are readily identifiable, especially when considering the chaotic situations where officers must distinguish between protest medics and other protesters through split-second judgments.

Plaintiffs also concede that they often position themselves right next to protesters in areas which pose the most risk of harm, rather than standing apart from the crowd. *See* Durkee Decl., ECF 5 at ¶¶ 14–15 (stating that Plaintiff Durkee and Plaintiff Guest work in the "front line" during stationary moments and the "back line" during dispersals because those areas present a clear danger of injury); Wise Decl., ECF 6 at ¶ 29 (describing that declarant was standing behind "a group of protestors who formed a line with physical shields" facing "federal law enforcement officers"); Rivera Decl., ECF 36 at ¶ 15 (relating declarant's participation in forming a wall between protesters and police with other non-medic, military veteran protesters after the PPB made an unlawful assembly announcement).

Furthermore, in many of the described instances of harm, the protest medics were not in the act of providing medical aid such that their unique role would be obvious to the outside observer. *See, e.g.,* Wise Decl., ECF 6 at ¶ 25 (describing a PPB officer spraying "bear mace" at declarant in close proximity while declarant was attempting to pull a protester away from another

PPB officer), ¶ 29 (stating that declarant was standing behind “a group of protestors who formed a line with physical shields” facing “federal law enforcement officers” when a law enforcement officer “shot a tear gas canister at [declarant’s] head”); Guest Decl., ECF 11 at ¶¶ 19–20 (describing being pushed and jabbed with a baton while federal agents were dispersing an area). Accordingly, on balance, Plaintiffs have not shown they were retaliated against because they exercised a First Amendment Right.

Many, if not all, of the instances of alleged targeting appear to occur when protest medics refuse to follow police dispersal orders. *See, e.g.*, Guest Decl., ECF 11 ¶¶ 18–20 (being pushed while federal agents were dispersing an area after deciding to “stand our ground to try to assist the injured person, despite the incoming federal officers”); Durkee Decl., ECF 5 at ¶ 25 (stating a federal law enforcement officer struck him with a baton and another tackled him from the side while agents were trying to disperse the area). It is well established that protected speech can be regulated. Regulation of speech is justified “if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *United States v. O’Brien*, 391 U.S. 367, 376–377 (1968). As previously noted, under Oregon law, Portland police have authority to disperse unlawful or riotous assemblies and arrest those who do not immediately comply. Or. Rev. Stat. § 131.675. Portland police are entitled to use some level of reasonable force under the circumstances to effectuate the dispersal. *See Barney v. City of Eugene*, 20 F. App’x 683, 685 (9th Cir. 2001).

In sum, Plaintiffs have not demonstrated a likelihood of success on the merits of their First Amendment claim, let alone shown that “the law and facts *clearly favor* [their] position,” as required to obtain a mandatory injunction. *Garcia*, 786 F.3d at 740 (emphasis in original).

b. Fourth Amendment Claim

Plaintiffs’ central Fourth Amendment claim alleges Municipal Defendants used excessive force in targeting the protest medics.⁷ ECF 35 at 12–13 (“the Portland Police are continuing to use excessive force to retaliate against Plaintiffs and numerous other protest medics for providing medical aid to protesters who the police themselves injure”); *id.* at 39–43. All claims of excessive force are analyzed under the Fourth Amendment’s “reasonableness” standard, using the framework the Supreme Court set forth in *Graham v. Connor*, 490 U.S. 386, 396 (1989). The objective reasonableness standard balances: (1) the nature and quality of the intrusion on the individual’s Fourth Amendment interests against (2) the countervailing governmental interests at stake. *Id.* “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Id.* Further, to obtain an injunction, Plaintiffs must show law enforcement’s use of force was targeted against

⁷ Plaintiffs also claim the PPB unlawfully seized medical equipment and materials from a medic station at which Plaintiff Martinez was volunteering on June 13, 2020. ECF 35 at 44–45. Even assuming Plaintiffs have stated a Fourth Amendment unlawful seizure claim, this appears to be at most one of two isolated incidents in which protest medic property was seized over the course of several months. *See* Shifflett Decl., ECF 37 at ¶ 11 (alleging on July 4, 2020, a police officer “dumped [declarant’s] medical-supply bag into the street.”). This Court finds that Plaintiffs have not met their burden to demonstrate any future risk of irreparable injury related to the unlawful seizure of property. Plaintiffs’ claims for equitable relief on this basis fail.

them because they were protest medics, and therefore they are likely to suffer irreparable harm. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).

Plaintiffs allege they experienced multiple injuries at the hands of Municipal Defendants from crowd control tactics such as chemical irritants and less-lethal munitions. Martinez Decl., ECF 9 at ¶ 32; Durkee Decl., ECF 5 at ¶ 20; Guest Decl., ECF 11 at ¶ 15; Wise Decl., ECF 6 ¶¶ 22–26, 28, 30. A Fourth Amendment excessive force analysis is a highly particularized inquiry to be determined by assessing the “totality of the circumstances,” *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985), with consideration of the surrounding context of each interaction, *Nelson v. City of Davis*, 685 F.3d 867, 886 (9th Cir. 2012).

While some of these alleged instances do raise serious questions about the merits of the excessive force claims, Plaintiffs have not demonstrated that “the law and facts *clearly favor* [their] position,” as required to obtain a mandatory injunction at this time. *Garcia*, 786 F.3d at 740 (emphasis in original). Many of the alleged instances of excessive force occurred while police were attempting to clear an area through a dispersal order. *See, e.g.*, Wise Decl., ECF 6 at ¶ 22 (describing being shot in the shin with a rubber bullet while attempting to pull another fallen protester out of a recently deployed cloud of tear gas). In other allegations, the context of the surrounding circumstances is entirely unclear. *See* Martinez Decl., ECF 9 at ¶ 32 (explaining that “[w]hile serving as a protest medic, [declarant has] been shoved, shot at, and tear gassed” without providing any further context). Plaintiffs claim they were targeted, but as previously mentioned, their appearance would not make them obviously distinguishable from others, particularly in the dark amongst a large crowd. Further, Plaintiffs often position themselves directly between law enforcement and other protesters during dispersals. *See* Durkee Decl., ECF 5 at ¶¶ 14–15.

Finally, in some circumstances, there are directly competing narratives about what transpired on the ground. *See* Dobson Supp. Decl., ECF 43–1 (explaining declarant Rivera’s arrest occurred because he repeatedly shined a high-powered flashlight directly at police officers’ eyes in an alleged attempt to obscure their vision); Rivera Supp. Decl., ECF 46 at ¶¶ 3–5 (refuting allegations declarant ever possessed a high-powered flashlight or shined it at officers). A determination of excessive force in this context is better suited through litigation of the underlying Complaint, upon fuller development of the record. This Court cannot make the credibility determinations necessary to find for the Plaintiffs on the merits of their Fourth Amendment claims at this stage.

2. Irreparable Harm

Plaintiffs must also “demonstrate that irreparable injury is likely in the absence of an injunction.” *Winter*, 555 U.S. at 22. To satisfy this factor, Plaintiffs must show a “real or immediate threat that [Plaintiffs] will be wronged again.” *Lyons*, 461 U.S. at 111. In general, mandatory injunctions “are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages.” *Marlyn Nutraceuticals, Inc.*, 571 F.3d at 879 (quoting *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1980) (internal quotation marks omitted)).

As previously discussed, Plaintiffs have not raised sufficient evidence to suggest that they are being systematically targeted by law enforcement for their medical assistance at protests. The protest medics are a loosely organized group, united through an “informal network.” Wise Decl., ECF 6 at ¶ 12. They do not wear a particular uniform; instead, they each make their own. Because of their varied backgrounds and training, they do not offer uniform types of aid. While some utilize trauma kits, Durkee Decl., ECF 5 at ¶ 13, others hand out food, water, and basic

medical supplies, Martinez Decl., ECF 9 at ¶¶ 22–23. In other words, the protest medics are not obviously distinguishable from other protesters.

Moreover, as described previously, in many of the incidents of alleged targeting described, the protest medics were not in the act of providing medical aid. *See, e.g.*, Wise Supp. Decl., ECF 38 at ¶ 4 (recounting two PPB officers arresting him while “walking among a group of protesters”). The Municipal Defendants deny any targeting of protest medics in their use of force. *See* Dobson Supp. Decl., ECF 43 at ¶ 12 (“PPB and its [Rapid Response Team] squads do not target medics for application of Riot Control Agents . . . or other forms of physical force.”). Further, with regard to the alleged unlawful arrests, Municipal Defendants raise at least the plausible contention that rather than targeting protest medics without reason, there was probable cause to arrest them. *See, e.g.*, Dobson Supp. Decl., ECF 43–1 (explaining declarant Rivera was arrested after allegedly refusing to stop shining an industrial grade flashlight into police officers’ eyes from less than ten feet away). These incidents raise further doubts that the protest medics were targeted for their activity as medics.

Additionally, the dynamic and evolving circumstances governing Municipal Defendants’ interactions with protesters caution against the likelihood of future similar injury to these Plaintiffs, particularly with regard to tear gas and less lethal munitions. *See City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982) (noting a defendant’s cessation of a challenged practice is an important factor bearing on the question of whether a court should exercise its power to enjoin the defendant from renewing the practice). For instance, the PPB has several new restrictions on the use of tear gas, including: (1) an Executive Order issued by Mayor Wheeler on June 6, 2020, directing the PPB to only use CS gas (a form of tear gas) when there is “a serious and immediate threat to life safety, and there is no other viable alternative for

dispersal,” ECF 18 at 8; Dobson Supp. Decl., ECF 43 at ¶ 24; (2) a TRO issued by Chief Judge Hernandez prohibiting the PPB’s use of tear gas to “to disperse crowds where there is no or little risk of injury,” ECF 18 at 9; Dobson Supp. Decl., ECF 43 at ¶ 24; and (3) a new law signed by Governor Kate Brown on June 30, 2020, restricting Oregon law enforcement agencies’ deployment of tear gas to circumstances constituting a riot under Or. Rev. Stat. § 166.015, and only after announcements are made and sufficient time is allowed for persons to leave the area, ECF 18 at 9; Dobson Supp. Decl., ECF 43 at ¶ 24.

Moreover, on June 26, 2020, Chief Judge Hernandez entered a stipulated TRO restricting PPB’s use of certain crowd control munitions and aerosol restraints. ECF 18 at 10. For example, Rubber Ball Distraction Devices of the type Plaintiff Wise alleges he was targeted with on June 21, 2020, by a PPB officer, Wise Decl., ECF 6 at ¶ 24, can now only be used in situations where the lives or safety of the public or police are at risk, and cannot be used to disperse crowds where there is no or little risk of injury. ECF 18 at 26. The TRO is currently operative and has been extended by the court until further notice. *Id.* at 10.

Finally, Plaintiffs’ nearly one-month delay in seeking equitable relief following the withdrawal of the First Motion for a TRO further undercuts their argument that such an extraordinary or drastic remedy is needed at this time. *See Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) (“A delay in seeking a preliminary injunction is a factor to be considered in weighing the propriety of relief.”). Plaintiffs have not shown that “irreparable injury is likely in the absence of an injunction.” *Winter*, 555 U.S. at 22.

3. The Public Interest and the Balance of the Equities

A plaintiff seeking a preliminary injunction or temporary restraining order must also establish not only that he is likely to succeed on the merits and is likely to suffer irreparable harm

in the absence of preliminary relief, but also that the balance of equities tips in his favor, and that an injunction is in the public interest. *Winter*, 555 U.S. at 20. “In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Id.* at 24 (internal citations omitted).

This Court acknowledges the significance of this moment in our nation’s history, and the crucial role of peaceful assembly in preserving American democracy. *See Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (noting the important public interest in upholding First Amendment principles). However, there is also a strong public interest in maintaining order and public safety.

In their request for relief, the protest medics essentially ask for special status. They seek an exemption from generally applicable dispersal orders. However, doing so may impose irreparable harm and undue hardship on law enforcement, creating an unworkable distinction between the ordinary protestor, who is subject to dispersal orders, and the protest medics, who are not.

Based on the facts presented to this Court, the line between protester and protest medic is not sufficiently clear such that granting them the relief they request would not sow confusion or create additional risks. The protest medics wear no particular uniform, offer no particular type of aid, and possess no particular level of medical training. When they attend the protests, many deliberately stand in the spaces between law enforcement and the protesters, or even enmesh themselves with other protesters. *See, e.g.,* Rivera Decl., ECF 36 at ¶ 15 (describing declarant’s participation in forming a wall between protesters and police with other non-medic, military veteran protesters after the PPB made an unlawful assembly announcement). The protest medics’ actions and appearance would not obviously distinguish them from a diverse crowd of protesters.

Upon consideration of the record before this Court, at this time, Plaintiffs have failed to demonstrate that the public interest and the balance of equities support their position. Certainly, the safety of all protesters is clearly in the public interest. However, that safety is not the responsibility of these volunteers alone.⁸ These factors weigh against Plaintiffs' request for injunctive relief.

CONCLUSION

In so ruling, this Court does not seek to diminish or devalue the efforts of the protest medics in keeping others safe, nor does this Court question the protest medics right to continue engaging in the protests and offering medical support to protestors. Like ordinary protesters, however, the protest medics must abide by lawful police orders. Plaintiffs' Motion for a Temporary Restraining Order, ECF 35, is DENIED.

IT IS SO ORDERED.

DATED this 2nd day of September 2020.

/s/ Karin J. Immergut
Karin J. Immergut
United States District Judge

⁸ Portland Fire & Rescue Medics have also been present at the protests to assist with injured protesters and law enforcement. *See Don't Shoot Portland v. City of Portland*, No. 3:20-cv-00917-HZ, 2020 WL 3078329 (D. Or. June 9, 2020), Simmons Decl., ECF 94 at ¶ 6 (stating as of July 3, 2020, Portland Fire & Rescue Medics had assisted 42 protesters and 32 officers).

Complaints and Other Initiating Documents

[1:20-cv-02040 DON'T SHOOT PORTLAND et al v. WOLF et al](#)

U.S. District Court

District of Columbia

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Case Name: DON'T SHOOT PORTLAND et al v. WOLF et al

Case Number: [1:20-cv-02040](#)

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DON'T SHOOT PORTLAND
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Document Number: [1](#)

Docket Text:

COMPLAINT against MATTHEW T. ALBENCE, WILLIAM BARR, KEN CUCCINELLI, FEDERAL PROTECTIVE SERVICE, MARK A. MORGAN, L. ERIC PATTERSON, U.S. CUSTOMS AND BORDER PROTECTION, U.S. DEPARTMENT OF HOMELAND SECURITY, U.S. DEPARTMENT OF JUSTICE, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. MARSHALS SERVICE, DONALD W. WASHINGTON, CHAD F. WOLF (Filing fee \$ 400 receipt number ADCDC-7389318) filed by LISA KIPERSZTOK, WALL OF MOMS, DON'T SHOOT PORTLAND, DANIALLE JAMES, BEVERLEY BARNUM, SABRINA CERQUERA, DEMETRIA HESTER. (Attachments: # (1) Civil Cover Sheet, # (2) Summons to Chad F. Wolf, # (3) Summons to Ken Cuccinelli, # (4) Summons to Mark A. Morgan, # (5) Summons to Matthew T. Albence, # (6) Summons to L. Eric Patterson, # (7) Summons to U.S. Department of Homeland Security, # (8) Summons to U.S. Customs and Border Protection, # (9) Summons to U.S. Immigration and Customs Enforcement, # (10) Summons to Federal Protective Service, # (11) Summons to William Barr, # (12) Summons to Donald W. Washington, # (13) Summons to U.S. Department of Justice, # (14) Summons to U.S. Marshals Service)(O'Neil, David)

1:20-cv-02040 Notice has been electronically mailed to:

David A. O'Neil daoneil@debevoise.com, mao-ecf@debevoise.com

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Original filename:suppressed

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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Plaintiffs,

Civil Action No.

v.

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KEN CUCCINELLI, in his official capacity
as the purported Senior Official Performing
the Duties of the Deputy Secretary of
Homeland Security and the purported Senior
Official Performing the Duties of the Director
of U.S. Citizenship and Immigration Services,
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MATTHEW T. ALBENCE, in his official
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Senior Official Performing the Duties of the
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U.S. DEPARTMENT OF JUSTICE,
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Washington, DC 20530,

U.S. MARSHALS SERVICE,
950 Pennsylvania Avenue, NW,
Washington, DC 20530,

Defendants.

COMPLAINT

1. Plaintiffs are a diverse group of women-founded organizations and individual women in Portland, Oregon, who are leading, participating, and standing in solidarity with historic lawful protests against police brutality and in support of Black Lives Matter. Since the police killing of George Floyd on May 25, 2020, Plaintiffs have joined together to exercise their First Amendment rights to call for social change and an end to systemic racism. Plaintiff Don't Shoot Portland, a Black-led community-driven organization, has coordinated mutual aid to support peaceful protesters in the city. Plaintiff Wall of Moms sprang to life to participate in lawful protests and protect others from being injured by federal law enforcement. Individual Plaintiffs Bev Barnum (organizer of Wall of Moms), Sabrina Cerquera, Demetria Hester, Danialle James, and Dr. Lisa Kipersztok have all participated in peaceful protests.

2. The movement for Black lives of which Plaintiffs are part has gained broad support across the United States, due to the power of the protesters' message and the courage of their actions. Plaintiffs' exercise of their First Amendment rights to speak and assemble to advocate for a more just and equal country epitomizes the highest values of our constitutional democracy.

3. Defendants are the Department of Homeland Security, its purported leaders, its components, and other agencies of the federal government. Rather than protect and defend Plaintiffs' constitutional rights, as they are bound to do by law and their Oaths of Office, Defendants have implemented an unlawful policy to quash Plaintiffs' speech and end their protests.

4. Beginning on or around July 4, 2020, Defendants launched "Operation Diligent Valor": an unprecedented deployment of federal agents to (in Defendants' words) "quell"

protests against police brutality by “tak[ing] over” Portland. At Defendants’ direction, federal agents—dressed in military fatigues and toting military gear—have tear-gassed peaceful protesters, including Plaintiffs; made unlawful arrests without probable cause; and otherwise used violence in an effort to stamp out peaceful and constitutionally protected protests.

5. Plaintiffs who have been exercising their lawful rights have been repeatedly injured by U.S. Department of Homeland Security (“DHS”) agents on the streets of their city. They have been tear-gassed night after night, left vomiting and unable to eat or sleep because of the toxic poison blasted at them. They have been shot at over and over—with rubber bullets, bean bags, pepper spray, and a range of other projectiles fired at close range and with brutal effect. They have had flash-bang explosive devices detonated right in front of them. They have been forced to speak and assemble in fear of not just bodily harm, but the possibility of sudden arrest without probable cause.

6. In addition to violating Plaintiffs’ well-established constitutional rights to freedom of speech and assembly, freedom from unreasonable seizures, and due process, Defendants’ actions betray a foundational principle of American democracy: that the federal government exercises only the powers the Constitution authorizes. Other powers, including the general police power, are reserved to the states and their subdivisions. The U.S. Constitution does not permit a federal domestic security or police force. Consistent with those limits, Congress has authorized federal law enforcement officials to fulfill only limited functions, where there is a tight nexus to a specific federal interest.

7. As set forth below, Operation Diligent Valor exceeds the bounds of what the law authorizes. According to the White House press secretary and other sources, the asserted authority for the DHS agents’ presence and actions in Portland is 40 U.S.C. § 1315, which allows

federal officials to protect federal property. But Defendants’ statements, a recently revealed internal DHS memorandum, and the conduct of DHS officers on the ground far from the federal courthouse make clear that Operation Diligent Valor actually furthers a separate DHS policy: to intimidate and silence protesters because of their message. Because Defendants’ policy is not in furtherance of protecting federal property, their invocation of § 1315 is purely pretextual.

8. Defendants’ unlawful policy has been directed by Defendant Wolf, who purports to be Acting Secretary of Homeland Security but is not legally serving in this role. He has not received Senate confirmation, and, indeed, President Trump has not even nominated him—reflecting his preference for “acting” officials and avoiding the oversight and accountability that the confirmation process ensures.

9. Plaintiffs ask this Court to protect them and vindicate their constitutional rights by declaring unlawful and enjoining Defendants’ unlawful policy.

PARTIES

10. Plaintiff Don’t Shoot Portland is a nonprofit nonpartisan organization with a mission of providing community support for activists and organizers working to eradicate gross inequalities in our society. It was founded in 2014. In furtherance of its mission, it provides “mutual aid” to activists and organizers through education and facilitating the collection and distribution of community resources. It has 501(c)(3) status under the Internal Revenue Code.

11. Plaintiff Wall of Moms is an unincorporated association with a mission to end racism, heal historic and ongoing wrongs, and do the hard work of healing society from the legacies of colonialism, racism, and white supremacy. It was founded in July 2020.

12. Plaintiff Bev Barnum is a resident of Portland, Oregon. She organized Wall of Moms in July 2020 and has regularly attended Black Lives Matter demonstrations in Portland since July 18, 2020.

13. Plaintiff Sabrina Cerquera is a resident of Portland, Oregon. She has joined many demonstrations throughout Portland in May, June, and July 2020.

14. Plaintiff Demetria Hester is a resident of Gresham, Oregon. She has been attending protests almost every night since late May 2020.

15. Plaintiff Danialle James is a resident of Portland, Oregon. She has been attending protests almost every night since May 27, 2020.

16. Plaintiff Lisa Kipersztok is a resident of Portland, Oregon, who demonstrated peaceably before federal law enforcement agents were deployed to Portland.

17. Defendant Chad F. Wolf is the purported Acting Secretary of DHS and is sued in his official capacity. Defendant Wolf is responsible for “protect[ing] the buildings, grounds, and property that are owned, occupied, or secured by the Federal Government . . . and the persons on the property” under 40 U.S.C. § 1315.

18. Defendant Kenneth T. Cuccinelli is the purported Acting Deputy Secretary of the DHS and Senior Official Performing the Duties of the Director, U.S. Citizenship and Immigration Services (“USCIS”), and is sued in his official capacity.

19. Defendant Mark A. Morgan is the purported Senior Official Performing the Duties of Commissioner for U.S. Customs and Border Protection (“CBP”), and is sued in his official capacity.

20. Defendant Matthew T. Albence is the purported Deputy Director and Senior Official Performing the Duties of the Director, U.S. Immigration and Customs Enforcement (“ICE”), and is sued in his official capacity.

21. Defendant L. Eric Patterson is the Director of the Federal Protective Service (“FPS”), and is sued in his official capacity.

22. Defendant the Department of Homeland Security is the executive branch agency of which FPS, CBP, and ICE are part. DHS is an “agency” within the meaning of the Administrative Procedure Act (“APA”), *see* 5 U.S.C. § 551(1), and its headquarters are in Washington, D.C.

23. Defendant U.S. Customs and Border Protection is an operational component of DHS, and is responsible for enforcing laws concerning the flow of goods and persons entering or exiting the United States. *See* 6 U.S.C. § 211. CBP is an “agency” within the meaning of the APA, *see* 5 U.S.C § 551(1), and its headquarters are in Washington, D.C.

24. Defendant U.S. Immigration and Customs Enforcement is an operational component of DHS, and is responsible for preventing cross-border crime and illegal immigration. *See* 8 U.S.C § 1357. ICE is an “agency” within the meaning of the APA, *see* 5 U.S.C § 551(1), and its headquarters are in Washington, D.C.

25. Defendant the Federal Protective Service is an operational component of DHS, and is responsible for protecting federal property. *See* 40 U.S.C. § 1315. FPS is an “agency” within the meaning of the APA, *see* 5 U.S.C § 551(1), and its headquarters are in Washington, D.C.

26. Defendant William Barr is the Attorney General of the United States. He is sued in his official capacity.

27. Defendant Donald W. Washington is the Director of the U.S. Marshals Service (“USMS”), and is sued in his official capacity.

28. Defendant the Department of Justice (“DOJ”) is the executive branch agency of which the U.S. Marshals Service is a part. The Department of Justice is an “agency” within the meaning of the APA, *see* 5 U.S.C. § 551(1), and its headquarters are in Washington, D.C.

29. Defendant the U.S. Marshals Service is a federal agency within the Department of Justice that provides security for the federal courts, *see* 28 U.S.C. §§ 561, 566(a). Defendant USMS is an “agency” within the meaning of the APA, *see* 5 U.S.C. § 551(1), and its headquarters are in Arlington, Virginia.

30. For clarity, we refer to defendants Wolf, Cuccinelli, Morgan, Albence, Patterson, Barr, and Washington as “individual Defendants,” and defendants DHS, CBP, ICE, FPS, DOJ, and USMS as “agency Defendants.”

JURISDICTION AND VENUE

31. This Court has federal question jurisdiction under 28 U.S.C. § 1331 because this action arises under the U.S. Constitution, the Administrative Procedure Act (“APA”), and other federal statutes.

32. The Court is authorized to award the requested declaratory and injunctive relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, the APA, 5 U.S.C. § 706, and its equitable powers.

33. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(1) and (e)(1). Defendants DHS, CBP, ICE, FPS, and DOJ reside in the District of Columbia. 28 U.S.C. § 1391(c)(2).

FACTUAL ALLEGATIONS

A. Led by Plaintiff Don't Shoot Portland, Plaintiffs and the Portland Community Lawfully Engage in Black Lives Matter Protests

34. After the police killing of George Floyd on May 25, Portland organizers began to mobilize to protest in support of Black Lives Matter. Portland protesters have shown up, night after night amid the staggering COVID-19 pandemic, to exercise their First Amendment rights to call for social change that ends systemic racism. Since July 4, they have been repeatedly attacked by an army of over 100 camouflage-clad federal agents.

35. Don't Shoot Portland, a Black-led and community-driven organization that is the lead Plaintiff in this lawsuit, has a crucial role in sustaining the movement for Black lives in Portland. Don't Shoot Portland was founded in 2014 by Teresa Raiford, building upon years of work organizing to facilitate care and support for families who had lost loved ones and to help people become civically engaged to further the Black Lives Matter movement with inclusivity.

36. Don't Shoot Portland's mission is to support the Black Lives Matter movement by providing "mutual aid" to activists, organizers, and other individuals wishing to exercise their First Amendment rights to organize, protest, and create art for social change. "Mutual aid" is the voluntary reciprocal exchange of resources for the benefit of all involved. It is how Don't Shoot Portland expresses its support for Black Lives Matter; it is the organization's free speech.

37. Since George Floyd's murder, Don't Shoot Portland has organized mutual aid to support the Black Lives Matter protests in Portland and the Black community enduring trauma from the event. Public health and safety have been the focus of its mutual aid. Don't Shoot Portland distributes protective equipment like face masks and hand sanitizer, first aid kits, baking soda, and other resources that provide relief from tear gas, along with water, food, and assistance with hotel and temporary housing costs and transportation.

38. Don't Shoot Portland understands, based on scientific research that it facilitated, that tear gas is extraordinarily dangerous to deploy during a pandemic outbreak of a respiratory virus like COVID-19. Because of racism and its impact on economic and health disparities, Black people, Indigenous people, and people of color are more likely to develop, suffer, and face complications from COVID-19 than their white counterparts.

39. Since Operation Diligent Valor started, federal officers have harmed Don't Shoot Portland's mission by destroying its mutual aid supplies with tear gas and through other means.

40. Plaintiff "Wall of Moms" was organized by Bev Barnum.

41. On July 17, 2020, Ms. Barnum watched from her home, in horror, a video on social media showing unidentified and armed federal officers in military uniforms grabbing a protester and putting them in an unmarked van. She saw news coverage of the federal officers beating, gassing, and shooting protesters with "less-lethal" weapons. She never thought something like that could happen in the United States of America. She felt compelled to do something as a mother, as a Portlander, and as an American who believes in the right to protest.

42. Ms. Barnum wrote a post in a working moms Facebook group, calling for moms to join the protests the next day and to form a "Wall of Moms" to protect protesters, especially the youth, from the federal officers' assaults. Within an hour, seventy moms had responded and were eager to stand up for those protesting police violence against Black Americans. The number kept growing.

43. Ms. Barnum reached out to Don't Shoot Portland for guidance on organizing the beginning of a movement of moms standing for racial justice.

44. The first night that Wall of Moms formed, July 18, the Moms attended a vigil organized by Don't Shoot Portland for Shai'India Harris, a young Black woman whose murder was never investigated because Portland police claimed they were too busy policing the protests.

45. Wall of Moms then went to the street outside the Mark O. Hatfield U.S. Courthouse to form a human barrier for the young protesters who were giving speeches. The Moms did not throw anything or threaten officers in any way; they just shouted, "Leave the kids alone!" They hoped that the presence of mothers in regular clothing would remind the federal officers that these protesters were young people calling for social change. That hope met a brutal reality when federal officers, dressed for war, blasted everyone, including Ms. Barnum and Wall of Moms linked arm-in-arm, with tear gas, flash-bang grenades, and other munitions.

46. No matter how much harm her body suffers each night, Ms. Barnum goes back to the protests to exercise her First Amendment rights and protect others doing the same to further the movement for Black lives. Wall of Moms attends the protests in solidarity with Portlanders calling for racial justice, withstanding violence from federal law enforcement every night.

47. Among the protesters peacefully exercising, or wishing to exercise, their free speech rights in Portland are Plaintiffs Sabrina Cerquera, Demetria Hester, Danialle James, and Lisa Kipersztok.

48. Ms. Cerquera is a 22-year-old Brown woman who has witnessed and experienced systemic racism. She feels strongly compelled to stand up for her Black and Brown peers to end police brutality and white supremacy. After police officers killed George Floyd on May 25, she joined demonstrations in Portland to protest the violence and death Black Americans disproportionately suffer. Between May 29 and June 23, Ms. Cerquera protested eight times. She was tear-gassed by Portland police for the first time on May 31, and was traumatized by the

experience. Having seen the assault of federal officers on protesters, Ms. Cerquera's fear for her safety restrained her from participating in protests for a full month, but the killings of Black Portlanders Dominique Dunn and Shai'India Harris inspired her to rejoin the protests. Over multiple nights, she has been hit with pepper spray that federal agents deploy to violently disperse gathered demonstrators.

49. Ms. Hester is a Black mother and grandmother who has been joining protests to fight against the legacy of white supremacy. George Floyd's killing came almost three years exactly after Ms. Hester was assaulted in Portland by Jeremy Christian, who made racist statements during the assault. The day after that assault, Christian stabbed and killed two men who were protecting two young Black women from Christian's attacks on a Portland light rail train. Ms. Hester has suffered injury from the federal officers' teargassing.

50. Ms. James is a Black mother who has been peacefully demanding justice and accountability not only for the death of George Floyd, but the innumerable other victims of police brutality in Portland, since late May. Ms. James has suffered injury from the federal officers' use of tear gas and projectile munitions such as paint balls, pepper-spray balls, and rubber bullets.

51. Dr. Kipersztok is a Portland family physician who cares for underserved community members facing personal discrimination. She is motivated to join the Black Lives Matter protests out of a desire to dismantle the structural racism against Black Americans in healthcare and throughout our society. Dr. Kipersztok participated in peaceful demonstrations for racial justice in June. In mid-July, Dr. Kipersztok learned that the federal government had dispatched federal law enforcement agents in Portland, and that the federal agents were deploying tear gas to disperse crowds—mere weeks after protesters had won a court victory

restricting local police officers' ability to use the chemical weapon. Dr. Kipersztok initially intended to exercise her right of protest against this show of federal force against fellow Portlanders. After watching live feeds of the downtown protests and reading reports, however, she feared that she could only attend these demonstrations at serious risk of debilitating injury at the federal agents' hands.

B. President Trump Seeks to Create a Federal Police Force

52. The brutality that Plaintiffs have faced at the hands of federal agents is the result of an unlawful policy that Defendants have established to quell lawful protest and intimidate protesters.

53. This reflects President Trump's desire, dating back to the earliest days of his administration, to "take over" America's cities. Five days after his inauguration, he threatened on Twitter to "send in the feds" to Chicago to deal with rising homicide rates there. This year, President Trump, in consultation with Defendant Barr, Defendant Wolf, and others, has seized on nationwide civil rights protests against police brutality as an opportunity to use federal forces—not to defend civil rights, but to quell the protests.

54. On May 29, three days after protests began in Minneapolis, the president Tweeted: "Either the very weak Radical Left Mayor, Jacob Frey, get his act together and bring the City under control, or I will send in the National Guard & get the job done right."¹ He continued, "These THUGS are dishonoring the memory of George Floyd, and I won't let that happen. . . . Any difficulty and we will assume control but, when the looting starts, the shooting starts."²

¹ Donald J. Trump (@realDonaldTrump), Twitter (May 29, 2020, 12:53 a.m.), <https://twitter.com/realDonaldTrump/status/1266231100172615680>.

² Donald J. Trump (@realDonaldTrump), Twitter (May 29, 2020, 12:53 a.m.), <https://twitter.com/realDonaldTrump/status/1266231100780744704> ("This Tweet violated the

55. President Trump's response to the civil rights protests, and specifically his insistence that they be shut down, stands in sharp contrast to his response to anti-quarantine protesters earlier this year. When armed protesters objecting to COVID-19 quarantine measures rallied in the Michigan state house, President Trump called them "very good people" and urged Michigan Governor Gretchen Whitmer to "give a little" in response to the protesters' objections.

56. Throughout the next month, President Trump, with backing by Attorney General Barr and others, continued to reinforce his willingness to override local law enforcement, notably during his address to the nation on June 1: "I am your President of law and order If a city or a state refuses to take the actions that are necessary to defend the life and property of their residents, then I will deploy the United States military and quickly solve the problem for them."

57. Minutes later, the president previewed his strategy at Lafayette Square, near the White House. Just after the speech, federal law enforcement and the D.C. National Guard forcibly removed thousands of peaceful protesters from Lafayette Square with pepper-spray balls, smoke canisters, flash-bang grenades, shields, and horses. After the protesters were cleared, President Trump, Attorney General William Barr, Secretary of Defense Mark Esper, and others walked from the White House through Lafayette Park for a photo opportunity at St. John's Episcopal Church.

58. It is not coincidental that the president's threats to deploy the military and armed federal officers have been aimed at liberal and progressive cities that he views as home to his political opponents.

Twitter Rules about glorifying violence. However, Twitter has determined that it may be in the public's interest for the Tweet to remain accessible.").

59. On June 3, he claimed that “super-liberal mayors” in cities like Minneapolis were undermining local law enforcement, requiring his administration to bring in the National Guard to “[take] care of it.”

60. And on July 20, President Trump told reporters his administration was taking action “[b]ecause we’re not going to let New York and Chicago and Philadelphia and Detroit and Baltimore and all of these—Oakland is a mess. We’re not going to let this happen in our country. All run by liberal Democrats. All run, really, by the radical left.”

C. President Trump Unlawfully Places Allies in Leadership Roles at the Department of Homeland Security Without Senate Confirmation

61. The Department of Homeland Security is the nation’s largest law enforcement agency, with more than 60,000 law enforcement agents working under its auspices.

62. But President Trump has installed an unprecedented number of top officials at DHS without seeking the advice and consent of the Senate, as the Constitution and federal law require. Instead, his hand-picked individuals lead this crucial agency without any opportunity for Congress to vet or approve their selection.

63. The last Senate-confirmed DHS Secretary, Kirstjen Nielsen, resigned in April 2019. The current purported Acting Secretary of the Department of Homeland Security, Defendant Wolf, is the second consecutive person to serve in that role in an acting capacity, without going through Senate confirmation for the post. There has been no Senate-confirmed Secretary of Homeland Security for nearly 500 days. During that time, President Trump has not nominated a candidate to serve as the Secretary.

64. As detailed in paragraphs 125-151 below, Defendant Wolf’s appointment as Acting Secretary violates federal law.

65. Defendant Cuccinelli is the Senior Official Performing the Duties of the Deputy Secretary of Homeland Security and the Senior Official Performing the Duties of the Director of U.S. Citizenship and Immigration Services. Cuccinelli has never been confirmed by the Senate to any senior position within DHS.

66. A judge in the U.S. District Court for the District of Columbia recently held that Cuccinelli's appointment at USCIS violates the Federal Vacancies Reform Act ("FVRA"), one of the federal laws governing the use of acting officials. *See L.M.-M. v. Cuccinelli*, __ F. Supp. 3d __, No. 1:19-cv-02676(RDM), 2020 WL 985376 (D.D.C. Mar. 1, 2020).

67. Defendant Morgan is the Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection. Morgan has never been confirmed by the Senate to any senior position within DHS.

68. Defendant Albence is the Senior Official Performing the Duties of the Director of Immigration and Customs Enforcement. Albence has never been confirmed by the Senate to any position within DHS. ICE has not had a Senate-confirmed director during the entirety of President Trump's time in office.

69. The large number of acting officials at DHS, and throughout the Trump administration, is part of a deliberate strategy, as the president explained in 2019: "I like 'acting' because I can move so quickly. It gives me more flexibility."

70. But the president's reliance on acting officials deprives Congress of its constitutional role to oversee appointments to key positions within the government, and removes a crucial check on the president's exercise of power. The consequences are now playing out on the streets of Portland.

D. Defendants Develop a Pretextual Scheme to Deploy Federal Agents as a National Police Force in Portland and Other Cities to Quash Protests for Black Lives

71. As President Trump made repeated threats to send federal law enforcement to “take over” American cities in June and July, Defendants sprang into action to carry them out.

72. On June 26, President Trump issued an executive order on “Protecting American Monuments, Memorials, and Statutes and Combating Recent Criminal Activity.” The executive order purports to respond to “[s]tate and local public officials’ abdication of their law enforcement responsibilities” with respect to the nationwide protests against police brutality. The order directs the Secretary of Homeland Security to provide “personnel to assist with the protection of Federal monuments, memorials, statues, or property.”

73. Pursuant to President Trump’s executive order, Defendant Wolf announced on July 1 the formation of the Protecting American Communities Task Force (PACT) within DHS. PACT was charged with “conduct[ing] ongoing assessments of potential civil unrest or destruction and allocat[ing] resources to protect people and property,” including “potential surge activity to ensure the continuing protection of critical locations.”

74. Defendants selected Portland, Oregon, for the first deployment of PACT resources.

75. On or about July 4, Defendant Wolf ordered federal officers from FPS, ICE, and CBP—all components of the DHS—to Portland, in what Defendants have termed Operation Diligent Valor. Since the protests began in May, the Hatfield courthouse and other nearby buildings have had graffiti written on them and suffered property damage such as broken windows. This damage would become the purported justification for the deployment of more than one hundred federal agents to Portland—an unprecedented use of DHS agents to police an American city.

76. Ordinarily, responsibility for protecting federal property lies with the FPS, which has over 1,000 law enforcement officers and investigators.

77. In addition, the Secretary of Homeland Security may transfer other DHS employees to the Federal Protective Service specifically “for duty in connection with the protection of” federal property. 40 U.S.C. § 1315(b)(1). DHS employees designated as FPS agents and officers are limited to actions only “to the extent necessary to protect the property and persons.” *Id.*

78. Defendant Wolf designated approximately 114 ICE and CBP agents as FPS agents for purposes of Operation Diligent Valor.

79. Those agents include members of the Border Patrol Tactical Unit (“BORTAC”), an elite unit that typically serves high-risk warrants and raids stash houses. BORTAC agents are trained to use weapons ranging from pistols to sniper rifles, but they are not trained to police mass protests protected by the First Amendment.

80. Upon information and belief, as part of Operation Diligent Valor, DHS established a policy bore little connection to the limited purpose of the protection of federal property. Specifically, DHS established a policy to intimidate and deter protesters because of their views and beliefs through a number of means: surveillance; the use of militarized and unidentified force; the excessive deployment of crowd-control measures such as tear gas, pepper-spray balls, and less-lethal munitions; and warrantless arrests or custodial detentions without probable cause (“the Policy”).

81. U.S. Marshals Service officers were also present in Portland, operating side-by-side with DHS agents. Upon information and belief, Defendants Barr and Washington directed USMS agents to follow the DHS Policy.

82. Statements by White House and administration officials reveal that Operation Diligent Valor and the Policy are intended to quell lawful protests, not to protect federal property.

83. At a White House event on July 13, President Trump claimed that “[f]ar-left mayors are escalating the anti-cop crusade, and violent crime is spiraling in their cities.” He pledged to be “very strong on law enforcement” by sending federal officers to “liberally run” jurisdictions—“even if we have to go in and take over cities.”

84. President Trump admitted that federal agents were deployed to Portland specifically to quell protests: “We’ve done a great job in Portland. Portland was totally out of control, and they went in and, I guess, we have many people right now in jail. And we very much quelled it. And if it starts again, we’ll quell it again very easily.”

85. In a Fox News interview on July 17, Defendant Cuccinelli asserted that President Trump is determined “to help restore peace to these beleaguered cities,” including Portland.

86. On July 20, Defendant Cuccinelli told CNN, “We will maintain our presence,” and admitted, “When that violence recedes and those threats recede, that is when we would ratchet back down to what I would call normal presence defending and protecting federal facilities.”

87. At times, federal officials have suggested that they need permission from local and state governments to send agents to the cities. At his July 13 event, President Trump acknowledged that the federal government is “supposed to wait for [cities] to call, but they don’t call.”

88. Similarly, in a Fox News interview on July 6, Defendant Wolf reiterated that DHS needed “to be invited and have those state and local authorities ask for the federal government’s help.”

89. But Portland officials did not request the deployment of federal law enforcement officers, and have demanded that they leave the cities.

90. On July 14, Oregon Governor Kate Brown asked Defendant Wolf to withdraw the federal officers from the city, saying that “it’s like adding gasoline to a fire.”

91. Five days later, Portland Mayor Ted Wheeler said that the federal presence in the city is exacerbating the situation. Federal officers “are not wanted here,” he said. “We haven’t asked them here. In fact, we want them to leave.”

92. Portland City Commissioner Jo Ann Hardesty also called on federal officers to leave, saying that they had “escalated tensions and put countless Portlanders exercising their First Amendment rights in greater danger.”

93. Not only have Defendants refused to end the deployment of federal agents to Portland, they have promised to send federal agents from DHS and DOJ to a number of other cities, including Seattle and Chicago. Senior administration officials reportedly told reporters that they expect to send federal agents anywhere there is unrest, and that they expect the unrest to last until the November 2020 presidential election.

E. Federal Agents Attempt to “Quell” Lawful Protests in Portland

94. Pursuant to the Policy, since on or around July 4, federal agents have engaged in an all-out effort to “quell” the Portland protests in violation of the First, Fourth, and Fifth Amendments. This conduct demonstrates that their mission far exceeds the stated purpose of protecting federal property.

95. In accordance with the Policy, DHS personnel have engaged in a program of surveillance, unlawful arrests, and excessive force designed to intimidate and deter protesters.

96. Federal agents have extended their operations far from the immediate vicinity of the courthouse. Plaintiff James has seen the federal agents drive the protesters as far as five blocks away from the courthouse, using clubs and batons to force them to move.

97. On July 24, federal agents assaulted protesters outside the federal courthouse with tear gas, flash grenades, and pepper-spray balls, and drove the crowd more than two blocks away from the courthouse, declaring, “This is an unlawful assembly.” When the agents’ advance stopped, the courthouse was out of view.

98. According to a Department of Homeland Security briefing memorandum prepared for Defendant Wolf, the DHS personnel assigned to Operation Diligent Valor “do not specifically have training in riot control or mass demonstrations. *Moving forward*, if this type of response is going to be the norm, specialized training and standardized equipment should be deployed to responding agencies” (emphasis added).

Widespread Surveillance of Protesters

99. As referenced above, in connection with President Trump’s June 26 executive order, DHS launched an expansive program of domestic surveillance that goes far beyond the limited need to protect federal property. Pursuant to an internal unclassified DHS policy document, the DHS Office of Intelligence & Analysis has authorized its intelligence officers to surveil protesters if the agency determines that they pose “[t]hreats to damage or destroy an

public monument, memorial, or statue”—“*regardless of whether such structures are situated on Federal property*” (emphasis added).³

100. The DHS intelligence directive further indicates that DHS analysts can collect information about “individuals or groups” whom they “reasonabl[y] belie[ve]” threaten to damage or destroy any public monument, including “their tactics, techniques, or procedures,” and “information that otherwise informs an overall assessment that threats to [monuments] will materialize.”

101. In other words, Defendants are operating under a directive that minor property damage to a non-federal monument or statue—a “threat” the agency for the first time characterizes as a matter of homeland security—justifies a significant expansion of the sweep of the federal government’s authority to collect intelligence on its residents.

Unlawful Warrantless Arrests

102. Upon information and belief, the Policy authorizes agents to arrest or detain protesters without probable cause, in retaliation for their participation in protests against police brutality. Many of these arrests have been made by agents in unmarked military-style camouflage uniforms, operating out of unmarked vans. That bears no resemblance to the usual *modus operandi* of federal courthouse protective services.

103. For example, at approximately 2 a.m. on Wednesday, July 15, Mark Pettibone and Conner O’Shea were walking home from a peaceful protest in Portland when an unmarked van stopped near them, two blocks away from the Mark O. Hatfield federal courthouse.

³ Steve Vladeck & Benjamin Wittes, *DHS Authorizes Domestic Surveillance to Protect Statues and Monuments*, Lawfare (July 20, 2020), <https://www.lawfareblog.com/dhs-authorizes-domestic-surveillance-protect-statues-and-monuments>.

104. According to O'Shea, agents "in camo jump[ed] out and start[ed] charging at [them]." The men were not wearing badges or other identifying insignia on their uniforms.

105. The men, who have since been identified as CBP officers, arrested Pettibone, searched him, and took him to the Hatfield courthouse, where he was detained in a holding cell. Officers read him his Miranda rights. After he declined to answer their questions, he was released. Officers never charged Pettibone with a crime or explained why he had been stopped.

106. In its own account of one such warrantless arrest on July 15, the federal government admitted that the federal agents never had probable cause.

107. The video of the July 15 arrest shows two combat-uniformed, masked, and helmeted federal officers grabbing a man from a sidewalk outside of federal property and pushing him into an unmarked van, which the officers then drive away.

108. As FPS Deputy Director Richard "Kris" Cline described in a July 21 press conference, the two CBP officers had followed the man and forcibly removed him to another location to question him.

109. Cline admitted that the officers were interested in the man because they had seen him among a crowd that included an individual aiming a laser at officers' eyes. But they had no specific reason to believe that he had aimed the laser pointer.

110. The officers never had probable cause to detain the man. Standing near another individual who may have broken the law cannot provide reasonable grounds for law enforcement officers to arrest someone. And, indeed, after nearly twenty minutes of interrogation, Cline admitted that the officers "released the individual because they did not have what they needed"—namely, probable cause.

Use of Excessive Force Against Peaceful Protesters

111. Also pursuant to the Policy, federal agents have committed physical assaults against peaceful protesters who pose no threat to federal property, including the repeated use of tear gas, flash-bang grenades, and other munitions against groups of protesters in downtown Portland.

112. Tear gas causes irritation to the area of contact within seconds of exposure, including eye burning, excessive tearing, blurred vision, and redness; runny nose and nasal burning and swelling; mouth burning, irritation, difficulty swallowing, and drooling; chest tightness, coughing, choking sensation, wheezing, and shortness of breath; and burns and skin rash. Some people experience nausea and vomiting. All of these symptoms can last for weeks after exposure.

113. The use of tear gas is, by its very nature, indiscriminate. Anyone in the area will breathe it in and be harmed by the gas.

114. Federal agents in Portland use tear gas in a predictable pattern. In her near-nightly attendance at the protests, Plaintiff James has observed that federal agents begin to fire tear gas between 11:30 p.m. and 1:00 a.m. to disperse the crowd, even when there has been no indication of protester violence or property damage, and even when federal agents are located safely behind a fence outside the courthouse. She has witnessed federal agents shoot protesters with rubber bullets, pepper-spray balls, and other munitions even when they have not been engaged in acts of violence and even when they have stood blocks away from the federal courthouse and posing no threat to the courthouse.

115. Federal agents have also assaulted multiple protesters directly, on several occasions leading to serious injuries.

116. For example, on July 11, federal officers from the U.S. Marshals Service shot and severely injured a protester, Donovan LaBella, with a less-lethal impact munition while he was peacefully protesting across the street from the Hatfield federal courthouse. LaBella was rendered unconscious and bleeding from the assault.

117. LaBella was only recently released from the hospital. His skull was fractured, and he underwent facial reconstructive surgery in the hours after the encounter. LaBella also had a tube in his skull to drain blood and had vision problems in one eye from the injuries sustained. He continues to have difficulty with impulse control, which may be a permanent brain injury.

118. In another incident in the early hours of July 18, a wall of heavily armed federal agents, wearing gas masks and helmets, fired pepper-spray balls at an unarmed and unprotected nude protester.

119. So-called “pepper-spray balls” are projectiles that release a powdered substance that has effects similar to pepper spray. They therefore carry the dangers inherent in any projectile that is shot at someone, as well as the dangers of pepper spray.

120. At least one graphic video shows a dozen federal agents shooting pepper-spray balls in quick succession at the unnamed protester, dubbed “Naked Athena,” as she walked toward the agents standing guard at an intersection in downtown Portland. “Athena” was wearing nothing but a face mask and stocking cap.

121. Later the same day, U.S. Naval Academy graduate Christopher David attended his first-ever protest in front of the Hatfield federal courthouse. He planned to ask the officers about the oaths they had sworn to the Constitution, which he believed they were violating.

122. As David approached the U.S. Marshals in front of the courthouse, he stayed in the middle of the street and did not step onto federal property. Nonetheless, federal officers pushed him back, and when he did not retreat, they began beating him with batons.

123. An officer pepper-sprayed his face from point-blank range. The pepper spray burned David's eyes and blurred his vision. As he sought shelter, he walked into a cloud of gas that "made him cough and retch." David, a former member of the Navy's Civil Engineer Corps, believes that he "was walking through a giant cloud of CS gas."

124. David later learned at the hospital that the officers had broken his right hand in two places. He will need reconstructive surgery and as a result of the beating is no longer going out to protest.

F. Defendant Wolf Was Unlawfully Purporting to Serve as Department of Homeland Security Secretary When He Enacted the Policy and Ordered the Deployment of Federal Agents

125. Defendant Wolf has enacted the Policy and designated ICE and CBP agents as FPS agents for purposes of Operation Diligent Valor despite the fact that he has no legal authority to do so. Defendant Wolf's exercise of the functions and duties of the Office of the DHS Secretary violates the Constitution and other applicable federal laws.

126. Defendant Wolf has purported to be Acting Secretary of the Department of Homeland Security since November 13, 2019, but he has no legally valid claim to that title. He therefore lacked authority to promulgate the Policy or to designate and deploy DHS employees as FPS agents. Those actions are thus illegal and void.

Legal Background

127. The Appointments Clause of the U.S. Constitution provides that the president shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme

Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

128. The Secretary of Homeland Security is a “principal” (rather than “inferior”) Officer, and thus the Appointments Clause requires that the person holding that office be appointed by the President “with the Advice and Consent of the Senate.” *Id.*

129. And federal statutory law explicitly requires the Secretary of Homeland Security to be nominated by the president and confirmed by the Senate. *See* 6 U.S.C. § 112(a)(1).

130. The Federal Vacancies Reform Act, 5 U.S.C. § 3345 *et seq.* (“FVRA”), is the “exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency . . . for which appointment is required to be made by the President, by and with the advice and consent of the Senate,” unless a statute provides otherwise. 5 U.S.C. § 3347(a). Among its many provisions, the FVRA limits the time during which an office may be filled by an acting official. In general, “the person serving as an acting officer . . . may serve in the office . . . for no longer than 210 days beginning on the date the vacancy occurs.” *Id.* § 3346.

131. The misuse of acting officials, in violation of the Advice and Consent Clause, has been a chronic abuse of the Trump administration, including at the U.S. Department of Justice.

132. In the case of the DHS, an agency-specific statute—the Homeland Security Act (“HSA”)—rather than the FVRA, governs the order of succession for the position of Acting Secretary of Homeland Security when the office of the Secretary is vacant. *See* 6 U.S.C.

§ 113(a)(1)(A), (g). Thus, when the Office of the DHS Secretary is vacant, the president lacks the authority to select an acting officer under the FVRA.

133. Specifically, the HSA provides that vacancies in the Office of the Secretary of Homeland Security are to be filled by the Deputy Secretary of Homeland Security and then, if that Office is likewise vacant, by the Under Secretary for Management. *Id.* § 113(a)(1)(A), (g)(1). Where the Offices of both the Deputy Secretary of Homeland Security and Under Secretary for Management are vacant, the HSA provides the option of a secretary-established order of succession. *Id.* § 113(g)(2).

134. The DHS has established multiple orders of succession and/or delegations pertaining to the Office of the Secretary and other DHS positions. Those documents are contained in a broader directive, entitled *DHS Orders of Succession and Delegations of Authorities for Named Positions*, Dep’t of Homeland Sec., Delegation No. 00106, Revision No. 08.5 (Dec. 15, 2016) (“DHS Orders”).

135. From at least December 15, 2016, through and beyond April 11, 2019, Section II.A of the DHS Orders stated in full that: “In case of the Secretary’s death, *resignation*, or inability to perform the functions of the Office, *the orderly succession of officials is governed by Executive Order 13753*, amended on December 9, 2016.” *Id.* (emphases added).

136. Executive Order 13753, in turn, set the order of succession at DHS in cases of resignation of the Secretary. That order establishes that succession to the Acting Secretary role must be, in order:

- i. Deputy Secretary of Homeland Security;
- ii. Under Secretary for Management;
- iii. Administrator of the Federal Emergency Management Agency;

- iv. Under Secretary for National Protection and Programs;
- v. Under Secretary for Science and Technology;
- vi. Under Secretary for Intelligence and Analysis; and
- vii. Commissioner of U.S. Customs and Border Protection.

137. From at least December 15, 2016, through and beyond April 11, 2019, Section II.B of the DHS Orders additionally provided: “I [Secretary of Homeland Security] hereby delegate to the officials occupying the identified positions *in the order listed ([at] Annex A)*, my authority to exercise the powers and perform the functions and duties of my office, to the extent not otherwise prohibited by law, *in the event I am unavailable to act during a disaster or catastrophic emergency.*” DHS Orders § II.B (emphases added).

138. As of April 10, 2019, Annex A, which applied *only* when the Secretary is “unavailable to act during a disaster or catastrophic emergency,” placed the Commissioner of U.S. Customs and Border Protection third, behind the Deputy Secretary of Homeland Security and the Under Secretary for Management. DHS Orders, Annex A. If, however, the Secretary of Homeland Security resigned, the Commissioner of U.S. Customs and Border Protection remained seventh in the standard order of succession. *See* Exec. Order No. 13753 § 1.

*Secretary Nielsen’s Resignation and Installation of
Kevin McAleenan as Purported Acting Secretary*

139. The last Senate-confirmed Secretary of Homeland Security, Kirstjen Nielsen, resigned her position effective no later than April 10, 2019.

140. On or about April 9 or 10, 2019, Nielsen issued an amendment to Annex A of the DHS Orders (“April 2019 Amendment”). Again, by its explicit terms Annex A only applies when the Secretary is “unavailable to act *during a disaster or catastrophic emergency.*” The only action directed by the April 2019 Amendment was to “stri[k]e the text of such Annex [A] in its

entirety and insert” a different list of positions “in lieu thereof.” The inserted text listed the Commissioner of U.S. Customs and Border Protection third behind the Deputy Secretary of Homeland Security and Under Secretary for Management. The Amendment to Annex A labeled and identified the Annex not as an “order of succession,” but instead as an “order for delegation of authority.”

141. Annex A did not—and does not—apply to succession in the case of resignation of the Secretary of Homeland Security. The April 2019 Amendment did not direct any changes to the text of Section II.A of the DHS Orders. Thus, after faithfully and fully applying the April 2019 Amendment, Section II.A of the DHS Orders still required following the order of succession specified in Executive Order 13753 in the event of a Secretary’s resignation.

142. Despite the order of succession, on April 11, 2019, Kevin McAleenan, who was then serving as CBP Commissioner, purported to assume the position of Acting Secretary.

143. Under the DHS Orders, however, two other Senate-confirmed individuals were ahead of McAleenan to succeed to that Office: Christopher Krebs, who then served as the Senate-confirmed Under Secretary for National Protection and Programs, and David Glawe, who then served as the Senate-confirmed Under Secretary for Intelligence and Analysis.

144. Because McAleenan’s purported succession was unlawful under the HSA and DHS Orders of Succession and Delegations, he had no valid legal claim to the Office of Acting DHS Secretary and could not lawfully exercise the authority of that office.

*McAleenan’s Resignation and Defendant Wolf’s Purported Succession
to the Office of Acting DHS Secretary*

145. On November 8, 2019, the 211th day of McAleenan’s purported tenure, he issued a directive attempting to amend the order of succession for the Secretary of Homeland Security to elevate Under Secretary for Strategy, Policy, and Plans to be fourth in line to lead the agency.

Unlike Secretary Nielsen's April 2019 Amendment, Mr. McAleenan *did* purport to change Section II.A of the DHS Orders such that, like Section II.B, it would now rely upon Annex A to establish the order of succession; thus Annex A for the first time would apply in the case of resignation by the Secretary of Homeland Security. *See* Amendment to the Order of Succession for the Secretary of Homeland Security. Mr. McAleenan's attempted change would have been superfluous if Annex A had otherwise already applied in the case of resignations.

146. Mr. McAleenan likewise purported to change the order of the positions listed in Annex A, moving the position of Under Secretary for Strategy, Policy, and Plans to fourth in line, behind only the then-vacant Offices of Deputy Secretary of Homeland Security and Under Secretary for Management, as well as the Office then held by Mr. McAleenan, Commissioner of U.S. Customs and Border Protection. *Id.*

147. Mr. McAleenan's attempted directive was without force of law because Mr. McAleenan was invalidly serving under the applicable DHS order of succession. Furthermore, even if McAleenan was appointed under the FVRA, he had exceeded the 210-day time limit for acting-official service set forth in that statute.

148. Mr. McAleenan thereafter resigned. On November 13, 2019, relying on Mr. McAleenan's invalid succession directive, Defendant Wolf, who had been confirmed as Under Secretary for Strategy, Policy, and Plans on that same day, purported to become Acting Secretary of Homeland Security.

149. Mr. Wolf could not have served as Acting Secretary of Homeland Security, however, because Mr. McAleenan was without authority to make changes to DHS's succession order.

150. Furthermore, Mr. Wolf could not have served as Acting Secretary under the FVRA because the 210-day limit on such service expired before he purported to assume the Office. On November 6, 2019, the Office of the DHS Secretary had been vacant for 210 days since April 10, 2019, the date that former Secretary Nielsen purported to leave office. After November 6, 2019, at the latest, the FVRA required the office to “remain vacant” until the president submitted a new nominee for Senate confirmation. 5 U.S.C. § 3348(b)(1). Defendant Wolf began serving as Acting DHS Secretary on November 13, 2019, after the 210-day period under the FVRA had passed. Defendant Wolf has never been nominated by the president to serve as Secretary of Homeland Security.

151. After November 6, 2019, at the latest, and continuing to today, no officer or employee could perform the functions and duties of the Office of the DHS Secretary under the FVRA, unless and until the president submitted a new nominee for Senate confirmation. Since Secretary Nielsen left office, and as of the filing of this Complaint, President Trump has not submitted a new nominee for the position of DHS Secretary to the Senate for confirmation.

G. The Unlawful Policy Directed by Defendant Wolf and other Defendants Has and Continues to Injure Plaintiffs

152. Defendants’ unlawful policy has injured each of the Plaintiffs in concrete ways. Defendants have frustrated Don’t Shoot Portland’s core organizational mission of advocating for its views about police mistreatment of Black people. Defendants have also forced the organization to divert resources in order to address and respond to the challenged federal policy. In addition, the members of Wall of Moms and individual Plaintiffs have suffered actual bodily injury from Defendants and continue to fear additional bodily injury. They have suffered economic injury in required expenses to protect themselves from Defendants and medical costs.

And they have suffered constitutional injury through violation of their First, Fourth and Fifth Amendment rights.

Don't Shoot Portland's Mission Is Frustrated and It Is Forced to Divert Substantial Resources

153. As set forth above, the mission of Don't Shoot Portland is to advocate and provide support for individuals wishing to exercise their First Amendment rights to organize, protest, and create art for social change. In addition, a substantial activity of Don't Shoot Portland is to provide mutual aid and support to Black Lives Matter protesters to enable them to engage in First Amendment activity in safe and healthy ways.

154. A particular focus of the organization has been to supply Black Lives Matter organizers with materials to protect protesters during the COVID-19 pandemic. In particular, it provides organizers with personal protective equipment like facemasks and hand sanitizer; first aid kits; baking soda and other items to provide relief from tear gas; as well as food, water, temporary shelter, and transportation. The supplies provided by Don't Shoot Portland are all lawful and used to protect the health of peaceful protesters.

155. The unlawful deployment of federal officers has made it substantially more difficult for Don't Shoot Portland to advance its mission of facilitating and supporting First Amendment activity in support of Black lives. As a result of the Policy, participating in lawful protests has become more difficult and dangerous.

156. Defendants' unlawful policy has also caused the damage and destruction of Don't Shoot Portland's property. Since federal troops have come to Portland, Don't Shoot Portland receives calls from organizers at the protest at least twice per week requesting that supplies be replenished because they have been destroyed by federal officers, either directly or through the

excessive use of tear gas and other chemical munitions contaminating supplies and rendering them unusable.

157. In addition, Don't Shoot Portland has been required to divert and expend thousands of dollars of funds and extensive time as a result of the Policy. Additional purchases and labor are required to find and replace supplies destroyed by Defendants.

*Wall of Moms Members and Other Individual Plaintiffs
Suffer Physical, Economic, and Constitutional Harms*

158. The Policy has also injured the members of Wall of Moms and other individual plaintiffs.

159. While Ms. Barnum and other Wall of Moms members have been engaged in peaceful protest, federal officials acting pursuant to the Policy have attacked Wall of Moms members on multiple consecutive nights. In particular, Ms. Barnum and others have been shot with flash-bangs at a close distance; repeatedly tear-gassed; and shot at with additional projectiles (including rubber bullets, bean bag rounds, and rock salt).

160. These attacks on Ms. Barnum by Defendants have caused severe and prolonged bodily injury and trauma. Federal agents' tear gas has made Ms. Barnum repeatedly vomit (including on herself and others) and caused burning eyes. Even a day after being gassed, she feels like she is in a toxic cloud, and the after-effects of tear gas prevent eating and sleeping in more than two-hour increments. The weapons that federal agents have shot at Ms. Barnum have caused pain in her jaw, ears, neck, and skin. These attacks have also caused substantial trauma and fear of repeated injury for exercising her lawful rights to peacefully protest.

161. Ms. James has also been assaulted by federal agents implementing the Policy including through being shot at with paint balls and pepper-spray balls, and then shot with rubber

bullets on different days. Being shot directly with these items caused Ms. James substantial pain. It has also caused emotional distress, as she fears she will be kidnapped by federal agents.

162. Ms. Hester has been repeatedly subjected to tear gas from federal agents at the protests, which have caused her face and skin to burn for hours after she returns home. She feels nauseated and congested the days after she protests, and her symptoms from the previous night do not subside before the next night of protests arrives.

163. Ms. Cerquera has suffered similar injuries from being tear-gassed and sprayed with pepper-spray balls. The federal agents' presence at the protests has also caused emotional distress, as she fears she will be kidnapped by federal agents.

164. In addition to these physical and emotional injuries, Plaintiffs have suffered economic harm. They have been forced to purchase protective and medical supplies to mitigate their injuries. They have also had substantial personal property damaged or destroyed by federal agents acting pursuant to the Policy.

165. In addition to the physical and economic injuries they have suffered, Wall of Moms members and individual Plaintiffs have all been deprived of or chilled in the exercise of their constitutional and civil rights. Plaintiffs have been forced by federal agents' use of tear gas and other munitions to leave the lawful protests. Federal agents have thus violated Plaintiffs' First and Fourth Amendment rights. Each fears that they will be shot, tear-gassed, or otherwise assaulted for participating in peaceful speech and association protected by the First Amendment, because of the viewpoint they espouse. Plaintiffs also fear they will be subject to unlawful and arbitrary arrest without probable cause. Notwithstanding the Policy to silence them, most of Plaintiffs have continued to place themselves at risk of further injury to continue to engage in First Amendment protected activity.

166. But not all. Dr. Kipersztok is being denied her right to participate in peaceful protest because Defendants' Policy has created a chilling effect. Before the arrival of federal agents, Dr. Kipersztok, an obstetrician and family physician, participated in lawful protest. After federal agents were deployed under Operation Diligent Valor, she intended to continue to exercise her right of protest against this show of federal force against fellow Portlanders. However, after watching reports of the federal agents' use of force, she reasonably fears that attending these demonstrations would put her at serious risk of debilitating injury from federal agents. News coverage has made clear to her that the federal officers have used tear gas and less-lethal weapons indiscriminately at the crowd—even against peaceful protesters who are not on federal property. Dr. Kipersztok understands that she risks being shot or tear-gassed by federal agents, which could lead her to be hospitalized and therefore unable to care for her patients. Dr. Kipersztok cannot risk her own health—and therefore the health of so many others—in this way.

167. Dr. Kipersztok also fears that by attending a protest in federal officers' presence, she would be arrested without probable cause and taken away in an unmarked van, which would both prevent her from caring for her patients and would cause professional and reputational harm. Dr. Kipersztok wishes to continue to attend in-person demonstrations to stand up for equal rights for all and fight for her patients' right to live—but she cannot do so for fear of serious physical injury or unlawful arrest.

168. In sum, the Policy has caused serious and ongoing injuries, in many forms, to each of the organizational and individual Plaintiffs. They come to this Court seeking relief for these ongoing harms so that they may exercise their constitutional rights without fear of physical injury, arrest—or worse.

CLAIMS FOR RELIEF

COUNT I

(Violation of the Administrative Procedure Act by Violations of 40 U.S.C. § 1315 — DHS, CBP, ICE, FPS, Wolf, Cuccinelli, Morgan, Albence, Patterson)

169. Plaintiffs reallege and incorporate by reference all other paragraphs as if set forth fully herein.

170. The APA requires courts to hold unlawful and set aside any agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(A), (C).

171. An agency action “includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” *Id.* § 551(13).

172. Defendants DHS, FPS, CBP, ICE, Wolf, Cuccinelli, Morgan, Albence, and Patterson (the “DHS Defendants”) have acted outside of their statutory authority in violation of 40 U.S.C. § 1315 and therefore in violation of the APA.

173. Under 40 U.S.C. § 1315(b)(1), the Secretary of Homeland Security may designate employees of the Department of Homeland Security, including employees transferred to the Department from the Office of the Federal Protective Service . . . as officers and agents for duty in connection with the protection of property owned or occupied by the Federal Government and persons on the property, including duty in areas outside the property to the extent necessary to protect the property and persons on the property.

174. The statute does not authorize these “designate[d] employees” to act as officers or agents to act beyond “the extent necessary” to protect federal property and persons on the property.

175. Upon information and belief, the DHS Defendants have deployed these employees “designate[d]” as FPS “officers and agents” according to a policy to intimidate and

deter protesters because of their views and beliefs through surveillance; the use of militarized and unmarked force; the excessive deployment of crowd-control measures such as tear gas, pepper-spray balls, and less-lethal munitions; and warrantless arrests or custodial detentions without probable cause (“the Policy”). This policy exceeds statutory authority, which permits the deployment of DHS employees as FPS officers and agents only “to the extent necessary to protect the property and persons on the property.” 40 U.S.C. § 1315(b)(1).

176. Defendant Wolf’s establishment of the Policy, designation of ICE and CBP employees to serve as FPS officers, and deployment of those officers to Portland, are final agency actions in excess of statutory authorities.

177. These “officers and agents” have conducted arrests and seizures—including warrantless arrests and seizures without probable cause—that are not “in connection with the protection of property owned or occupied by the Federal Government and persons on the property.”

178. Statements from government officials, including the president, have made it clear that these arrests are in accordance with the Policy and intended to intimidate and deter protesters because of their views and belief, not to protect federal property. The president stated in a press conference, in reference to Portland, “We very much quelled it, and if it starts again, we’ll quell it again very easily. It’s not hard to do, if you know what you’re doing.”⁴

179. The DHS Defendants have therefore acted outside of their lawful authority, in a manner “not in accordance with law” in violation of 5 U.S.C. § 706(2)(A) and “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” in violation of 5 U.S.C. § 706(2)(C).

⁴ Katie Shepherd and Mark Berman, *‘It Was Like Being Preyed Upon’: Portland Protesters Say Federal Officers in Unmarked Vans Are Detaining Them*, Wash. Post (July 17, 2020), <https://www.washingtonpost.com/nation/2020/07/17/portland-protests-federal-arrests/>.

180. Through their actions as described in this Complaint, the DHS Defendants have violated the substantive requirements of the APA. The DHS Defendants' violations inflict ongoing harm upon Plaintiffs.

COUNT II

(Violation of the Administrative Procedure Act by Arbitrary & Capricious Agency Action — DHS, CBP, ICE, FPS, Wolf, Cuccinelli, Morgan, Albence, Patterson)

181. Plaintiffs reallege and incorporate by reference all other paragraphs as if set forth fully herein.

182. The APA requires courts to hold unlawful and set aside any agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

183. The DHS Defendants have acted arbitrarily and capriciously and therefore in violation of the APA.

184. Under 40 U.S.C. § 1315(b)(1), the designation of DHS employees as FPS officers and agents is limited to duty “in connection with the protection of” federal property and persons on that property.

185. The DHS Defendants intend to, by deploying officers who are operating pursuant to the Policy, quell protests against police brutality and systemic racism.

186. The only justification that DHS Defendants have put forth for adoption of the Policy is a pretext, and therefore their adoption of the policy is arbitrary and capricious, and therefore in violation of the APA.

187. Through their actions as described in this Complaint, Defendants have violated the substantive requirements of the APA by acting arbitrarily and capriciously. Defendants' violations inflict ongoing harm upon Plaintiffs.

COUNT III
(Violation of the First Amendment Freedoms of Speech, Assembly, and Petition — All Individual Defendants)

188. Plaintiffs reallege and incorporate by reference all other paragraphs as if set forth fully herein.

189. Defendants' practice of deploying physical force against demonstrators to remove them from places in which they have gathered with others to express their political opinions, as manifest by their actions against Plaintiffs and other protesters in Portland in July 2020 and by their repeated threats to deploy violence against protesters demonstrating against racial injustice generally and in Portland specifically, and by President Trump's statements at ¶¶ 54, 56, 83-85, violates Plaintiffs' First Amendment rights of freedom of speech and assembly.

190. First, the individual Defendants have threatened violence against protesters engaged in public demonstrations, a form of core First Amendment-protected conduct; the retaliatory violence would be sufficient to deter a person of ordinary firmness in Plaintiffs' positions from speaking again; and the threatened violence would be causally related to Plaintiffs' exercise of their constitutional rights. *See Aref v. Lynch*, 833 F.3d 242, 258 (D.C. Cir. 2016). Among other things, Defendants have enacted a policy of arresting protesters without probable cause in retaliation for their First Amendment-protected activity. *See Nieves v. Bartlett*, 139 S. Ct. 1715 (2019); *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018).

191. Second, Defendants' violent actions, and threats of future violent actions, are based on the viewpoint being expressed by the demonstrators—namely, opposition to police brutality and systemic racism. *See Bible Believers v. Wayne County*, 805 F.3d 228 (6th Cir. 2015).

192. By depriving Plaintiffs of the opportunity to express their views, retaliating against them for their expressive activities, and discriminating against them on the basis of their viewpoints, Defendants have violated Plaintiffs' First Amendment rights and are imposing ongoing irreparable harm upon those Plaintiffs.

COUNT IV
(Violation of the Fourth Amendment Right to Freedom from Unreasonable Seizure — All Individual Defendants)

193. Plaintiffs reallege and incorporate by reference all other paragraphs as if set forth fully herein.

194. Defendants have adopted a practice of deploying physical force, without provocation or legal grounds to do so, to compel demonstrators to move.

195. The use of physical force, including but not limited to tear gas and pepper-spray balls, to force Plaintiffs to leave the protest area without a warrant or probable cause to arrest them, violated Plaintiffs' rights under the Fourth Amendment to the U.S. Constitution to be free from unreasonable seizures.

196. Through their actions as described in this Complaint, the individual Defendants have violated the Fourth Amendment. Defendants' violations inflict ongoing harm upon Plaintiffs.

COUNT V
(In the Alternative to Count IV, Violation of the Fifth Amendment Right to Due Process — All Individual Defendants)

197. Plaintiffs reallege and incorporate by reference all other paragraphs as if set forth fully herein.

198. In the alternative to the Plaintiffs' claims under the Fourth Amendment, through their actions as described in this Complaint, the individual Defendants have violated the Fifth Amendment.

199. Defendants have adopted a practice of deploying physical force, without provocation, warning, or legal grounds to do so, against peaceful protesters.

200. Using physical force, including but not limited to tear gas and pepper-spray balls, against Plaintiffs while they are engaged in peaceful protests, including for the purpose of forcing Plaintiffs to leave the protest area, violates Plaintiffs' rights under the Fifth Amendment to the U.S. Constitution to be free from arbitrary government action. *See City of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998).

201. Defendants' violations inflict ongoing harm upon Plaintiffs.

COUNT VI
(Violation of the Administrative Procedure Act by Violation of the Constitution — All Defendants)

202. Plaintiffs reallege and incorporate by reference all other paragraphs as if set forth fully herein.

203. The APA requires courts to hold unlawful and set aside any agency action that is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B).

204. Upon information and belief, the DHS Defendants have adopted a Policy of deploying these employees "designate[d]" as FPS "officers and agents" in a manner not authorized by statute: namely, to intimidate and deter protesters because of their views and beliefs through surveillance; the use of militarized and unmarked force; the excessive deployment of crowd-control measures such as tear gas, pepper-spray balls, and less-lethal munitions; and warrantless arrests or custodial detentions without probable cause.

205. Defendants have made clear they intend to continue following this Policy, including the extreme and obvious ongoing Fourth Amendment violations of unlawful warrantless arrests without probable cause. The Fourth Amendment permits warrantless arrests or “detention for custodial interrogation—regardless of its label”—only where the arresting officer has probable cause to believe that the person being arrested or detained has committed a crime. *Dunaway v. New York*, 442 U.S. 200, 216 (1979).

206. Similarly, upon information and belief, Defendants DOJ, USMS, Barr, and Washington have adopted a policy of deploying U.S. Marshals to intimidate and deter protesters because of their views and beliefs through surveillance; the use of militarized and unmarked force; the excessive deployment of crowd-control measures such as tear gas, pepper-spray balls, and non-lethal munitions; and warrantless arrests or custodial detentions without probable cause, which is not authorized by statute, 28 U.S.C. § 566.

207. Defendants’ adoption of these policies are final agency actions.

208. These final agency actions violate the First, Fourth, and Fifth Amendments, as explained in paragraphs 188-201 above.

209. The Agency Defendants’ actions are therefore “contrary to constitutional right, power, privilege, or immunity” in violation of the APA. 5 U.S.C. § 706(2)(B).

210. Through their actions as described in this Complaint, all agency Defendants have violated the substantive requirements of the APA by violating the U.S. Constitution. Defendants’ violations inflict ongoing harm upon Plaintiffs.

COUNT VII
(Violation of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2 — Defendant Wolf)

211. Plaintiffs reallege and incorporate by reference the preceding paragraphs of this Complaint as if fully set forth herein.

212. The Secretary of Homeland Security is a principal officer of the United States whose appointment requires presidential nomination and Senate confirmation.

213. Defendant Wolf is performing the functions and duties of the Secretary even though he has not been confirmed by the Senate to hold that office and there is no legal basis for him to exercise the functions and duties of that office.

214. Defendant Wolf's exercise of those functions and duties without having been confirmed by the Senate or otherwise having the legal authority to exercise them violates the Appointments Clause. His purported change to DHS policy is therefore invalid and void.

COUNT VIII
(Unlawful Appointment Under 6 U.S.C. §§ 112-113 and/or the Federal Vacancies Reform Act — Defendant Wolf)

215. Plaintiffs reallege and incorporate by reference the preceding paragraphs of this Complaint as if fully set forth herein.

216. The Secretary of Homeland Security may be appointed by the president only with the advice and consent of the Senate. 6 U.S.C. § 112(a)(1).

217. When the Office of the Secretary is vacant, the order of succession is governed by 6 U.S.C. § 113 and relevant agency succession orders.

218. Pursuant to those authorities, Defendant Wolf is not legally authorized to hold the position of Acting Secretary or perform the functions and duties of that office.

219. Furthermore, even if the FVRA governed—which it does not—Defendant Wolf would still not be legally authorized to hold the position of Acting Secretary or perform the functions and duties of that office, because the applicable time limit has expired (and had already expired at the time that Defendant Wolf purported to assume the role of Acting Secretary).

220. Because Defendant Wolf is performing the functions and duties of the Secretary of Homeland Security without having been nominated by the president or confirmed by the Senate, and without any other legal authority to do so, his purported change to DHS policy is invalid and void.

COUNT IX
(Violation of the Administrative Procedure Act, 5 U.S.C. § 706(2) — Defendant Wolf)

221. Plaintiffs reallege and incorporate by reference the preceding paragraphs of this Complaint as if fully set forth herein.

222. Because Defendant Wolf has been unlawfully serving as Acting Secretary of Homeland Security since November 13, 2019, and has had no authority to take any actions in that capacity, his purported change to DHS policy violates the APA and is invalid and void.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court:

- A. Declare that
 - a. Congress has only authorized DHS to operate pursuant to specific statutory authorities, as relevant here to protect federal property as set forth in 40 U.S.C § 1315;
 - b. DHS policies, orders, and directives that purport to direct DHS assets deployed to Portland under the auspices of the Federal Protective Service to operate pursuant to a policy to intimidate and deter protesters because of their views and beliefs through surveillance; the use of militarized and unmarked force; the excessive deployment of crowd-control measures such as tear gas, pepper-spray balls, and less-

lethal munitions; and warrantless arrests or custodial detentions without probable cause are unlawful; and

- c. USMS policies, orders, and directives that purport to direct U.S. Marshals to operate for purposes other than those laid out in 28 U.S.C. § 566 and in a manner not authorized by the Constitution are unlawful; and
- d. Defendant Wolf is not lawfully serving as Secretary of the Department of Homeland Security and any policies, orders, or directives he issues are void;

- B. Enter such preliminary and permanent injunctive relief as is necessary to ensure compliance with the Constitution and laws; and
- C. Award such additional relief as the interests of justice may require.

[Signature Block on Following Page]

Dated: July 27, 2020

By: /s/ David A. O'Neil

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

ANGELICA CLARK, ELLEN GASS,
NATHANIEL WEST, and ROWAN MAHER,
Individually and on behalf of all similarly-
situated individuals

Plaintiffs

Civil Action No.

v.

CHAD WOLF, Acting Secretary United States
Department of Homeland Security;
KENNETH T. CUCCINELLI, Senior Official
Performing the Duties of the Deputy Secretary
United States Department of Homeland
Security; JOHN DOES 1-200, agents of the
U.S. Marshals Service, Federal Protective
Service, U.S. Department of Homeland
Security and U.S. Customs and Border
Protection, acting in concert and in their
Individual capacities,

Defendants.

CLASS ACTION ALLEGATION
COMPLAINT

Bivens Fourth Amendment Unlawful
Arrest, Excessive Force

JURY TRIAL DEMANDED

CLASS ACTION ALLEGATION COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff brings this complaint herein alleging as follows:

INTRODUCTORY STATEMENT

“We cannot understand our present moment without recognizing the lasting damage caused by allowing white supremacy and racial hierarchy to prevail . . .” Bryan Stevenson, Director Equal Justice Initiative.

1.

On May 25th, 2020, a Black man named George Floyd was murdered in Minneapolis, MN, by Officer Derek Chauvin. Chauvin held his knee to Floyd's neck for at least eight minutes and 46 seconds while his fellow police officers stood by and casually watched Floyd die. Floyd's final words were, "I can't breathe." Chauvin and his fellow officers ignored the pleas for mercy coming from bystanders, including the teenage girl whose footage alerted the world to this particular instance of police brutality.

2.

Following George Floyd's gruesome public murder, protests erupted nationwide in support of the Black Lives Matter (BLM) movement and against systemic racism, police brutality and use of excessive force. Police met these protests with violence, brutality and excessive force.

3.

On May 28th, thousands of people began months of sustained protests in Portland. Portland Police Bureau officers met these protests with excessive force in the form of generalized violence, including the use of batons, pepper balls, sonic weapons and, most notably, tear gas, in the midst of a global pandemic that attacked respiratory systems.

4.

Between June 9, 2020 and June 30, 2020, emergency court orders, city directives, and new police reforms in state law placed limitations on the use of tear gas and other force.

5.

On June 26th, 2020, in reaction to the measures taken by state and local actors to de-escalate police violence against protesters, medics, legal observers, press, and the public,

President Trump issued Executive Order 13933, to unlawfully deploy federal agents to Portland. Following the deployment, unidentified agents in military fatigues emerged for the first time from the federal courthouse and engaged with members of the public as enemy combatants.

6.

On July 6, 2020, Kevin Sonoff, spokesperson for the Portland U.S. Attorney Billy Williams, indicated that the ostensible purpose of the deployment was to protect federal property and personnel.¹ However, immediately following their arrival, federal agents acted to quell nonviolent protesters by engaging in crowd-dispersal operations, deploying tear gas and impact munitions well beyond the immediate surroundings of federal property.

7.

Over the month of July, at the directive of President Trump, Acting DHS Secretary Chad Wolf, and Senior Official Performing the Duties of the DHS Deputy Secretary Kenneth Cuccinelli, the federal government unleashed unprecedented, sustained violence and intimidation on the people of Portland. Since their arrival, federal agents have escalated violence on a nightly basis by targeting nonviolent and non-resisting individuals for injury, assault, or arrest without probable cause. Federal agents chased down protesters, observers, medics, journalists, and even bystanders through the streets, pursuing them as many as ten blocks beyond federal property while simultaneously firing potentially lethal munitions including Pepper-spray balls, rubber bullets and flashbang grenades. Federal agents blanketed numerous blocks of Portland public streets surrounding the courthouse in toxic tear gas and chemical agents during a global pandemic, concealing or blocking the pathways for protestors to safely disperse. On their own

¹ <https://www.opb.org/news/article/federal-law-enforcement-agencies-deployed-to-portland-protests-federal-buildings-personnel/>

behalf and on behalf of others similarly situated, plaintiffs bring this action for declaratory relief and damages.

JURISDICTION

8.

This action is brought pursuant to the Fourth Amendment to the United States Constitution and *Bivens v. Ten Unnamed Federal Officers*, 403 U.S. 388 (1971), for violations of Constitutional rights held by all citizens.

9.

This court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

10.

Plaintiffs are in the process of filing Form 95, giving notice under the Federal Tort Claims Act of intention to sue the United States for damages.

11.

Venue is proper under 28 U.S.C. § 1391(b), because all or a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in the District of Oregon, because defendants are subject to personal jurisdiction in the District of Oregon

PARTIES

12.

Plaintiffs and similarly situated individuals ("class members") attended one or more protests described in this lawsuit.

13.

Plaintiffs and class members gathered in downtown Portland near the Hatfield Courthouse to protest police violence in support of the Black Lives Matter movement. The class

consists of people who, between July 1 and July 30, 2020, lawfully gathered in an area bounded by SW Taylor St. on the north, SW 2nd Ave. on the east, SW Madison St. on the south, and SW 4th Ave. (“protest zone”) on the west to protest police violence, who were exposed to teargas (“Tear Gas Class”). The following people are excluded from the class: defendants, class counsel and their employees, any judge who sits on this case and their judicial staff, and any juror appointed to serve on the jury that will hear and decide this case.

14.

In addition to the class, there are two subclasses. The first subclass consists of members of the Tear Gas Class who were also hit by munitions in or near the protest zone, including less-lethal munition, tear gas cannisters, and sonic grenades (“Shooting Subclass”). The second subclass consists of members of the Tear Gas Class who were beaten by defendants in or near the protest zone (“Truncheon Subclass”).

15.

Defendant Wolf is the Acting Secretary of the Department of Homeland Security. Defendant Cuccinelli is the Senior Official Performing the duties of the Deputy Secretary of the Department of Homeland Security. Based on information and belief, neither defendant Wolf nor Defendant Cuccinelli were lawfully appointed to their positions.

16.

The Doe Defendants have concealed their identities and their names and/or they are not yet fully known to plaintiff. On information and belief, Does 1-200 are federal agents dispatched to Portland, Oregon as part of “Operation Diligent Valor” in furtherance of the Executive Order of June 26, 2020 “On Protecting American Monuments, Memorials, and Statues and Combatting Recent Criminal Violence” pertaining to protection of federal property. Based on information

and belief, no more than three of defendants Does 1-200 are authorized to make arrests for non-federal offenses in Oregon nor to enforce state law. At least 197 of defendants Does 1-200 lack authority to enforce state law or to make arrests for non-federal offenses in Oregon. Each of said defendants is responsible for and integral participants with one another in the conduct alleged herein.

17.

Defendant John Does 1-50 are individual and supervisory officers of the U. S. Marshals Service, sued in their individual capacities. At all times material, said defendants were acting within the scope of their employment and under color of law.

18.

Defendant John Does 51-100 are individual and supervisory officers of the Federal Protective Service, sued in their individual capacities. At all times material, said defendants were acting within the scope of their employment and under color of law.

19.

Defendant John Does 101-150 are individual and supervisory officers of the U.S. Department of Homeland Security, sued in their individual capacities. At all times material, said defendants were acting within the scope of their employment and under color of law.

20.

Defendant John Does 151-200 are individual and supervisory officers of the U.S. Customs and Border Protection, sued in their individual capacities. At all times material, said defendants were acting within the scope of their employment and under color of law.

21.

Plaintiff reserves the right to amend and add additional Defendants as discovery proceeds, including without limitation, any supervisor or individual involved in the events alleged in this complaint.

CLASS ALLEGATIONS

22.

Based on media reports, thousands gathered in the protest zone in evenings between July 1, and July 30, 2020, and the gathered crowds were exposed to teargas. Based on media reports, the class is so numerous that joinder is impracticable (Fed. R. Civ. P. 23(a)(1)).

23.

There are questions of law or fact common to the class (Fed. R. Civ. P. 23(a)(2), including:

- A. The identities of Does 1-200;
- B. The employers of Does 1-200;
- C. The legal authority under which Does 1-200 acted;
- D. Whether use of tear gas for crowd control violated the 4th Amendment rights of members of the Tear Gas Class;
- E. The use of force policies under which Does 1-200 operated;
- F. The use of force training provided to Does 1-200;
- G. The use of force practices employed by Does 1-200;
- H. The crowd control policies under which Does 1-200 operated;
- I. The crowd control training provided to Does 1-200;
- J. The crowd control practices employed by Does 1-200;

- K. The authority under which Does 1-200 were operating at the time they were deployed to Portland, including their authority to use force beyond the perimeter of federal buildings and their authority to pursue, gas, beat, shoot, and arrest protesters beyond the perimeter of federal buildings;
- L. Whether Does 1-200 were authorized to use tear gas and fire munitions at plaintiffs and members of the class who posed no threat to Does 1-200;
- M. Whether each of Does 1-200 who deployed crowd control weapons and munitions were trained and certified in the use of those weapons and munitions;
- N. Whether, and under what circumstances, plaintiffs and members of the class are entitled to obtain and review protest zone surveillance information and data pertaining to members of the class;
- O. Whether Does 1-200 have in fact withdrawn from Portland;
- P. Whether plaintiffs and members of the classes are entitled to declaratory relief;
- Q. Whether qualified immunity is an available defense to the damages claims;
- R. Whether if qualified immunity is an available defense, the legal effect of the proceedings and injunction issued in in *Don't Shoot Portland, et al v. City of Portland*, US District Court Case No. 20-cv-917-HZ (D. Or.);
- S. The legal effect of the temporary restraining order, preliminary injunction, and proceedings in *Index Newspapers LLC, et al v. City of Portland, et al*, US District Court Case No. 20-cv-1035-SI (D. Or.);
- T. The admissibility of statements made by President Trump;
- U. The admissibility of statements made by certain federal officials;

V. Whether plaintiffs and members of the classes state claims for which relief may be granted Fed. R. Civ. P. 12(b)(6); and

W. Whether plaintiffs and members of the classes are entitled to recover money damages.

24.

The claims or defenses of the representative parties are typical of the claims or defenses of the classes, in that all suffered similar injuries from the same conduct, and all seek the same relief.

25.

The representative parties will fairly and adequately protect the interests of the class, in that they have identical claims, they have no disabling conflicts of interest, and they have retained counsel with decades of experience handling class actions, mass torts, police misconduct cases, civil rights cases, and personal injury cases. Class counsel includes counsel with extensive experience, including trial, appeal, and settlement of class actions and complex cases in federal and state courts, police misconduct cases, civil rights cases, and injury cases.

26.

A class action may be maintained because defendants have acted or refused to act on grounds that apply generally to the class, so that declaratory relief is appropriate. Fed. R. Civ. P. 23(b)(2). As well, a class maintained because common questions of law or fact predominate over any questions affecting only individual members, and a class action is superior to other available methods of fairly and efficiently adjudicating the controversy (Fed. R. Civ. P. 23(b)(3)), in that:

A. The vast majority of class members have little interest in individually controlling the prosecution of separate actions;

- B. As to these proposed classes, counsel are unaware of any other class actions for damages and know of only a few potential cases that may be filed individually, the bulk of which involve protesters with serious and permanent physical injuries from shootings;
- C. The harms giving rise to this litigation occurred in or near a zone adjacent to Hatfield courthouse. It is desirable to concentrate the litigation in Oregon; and
- D. The likely difficulties in managing a class action arise from issues of confirmation of class membership. However, that issue may be largely resolved by using government surveillance from the protest zone to confirm class members' identities, to the extent that is necessary. As well, issues related to actual injury and extent of injury may be managed through a claims or administrative process.

GENERAL FACTS

George Floyd Death May 25, 2020

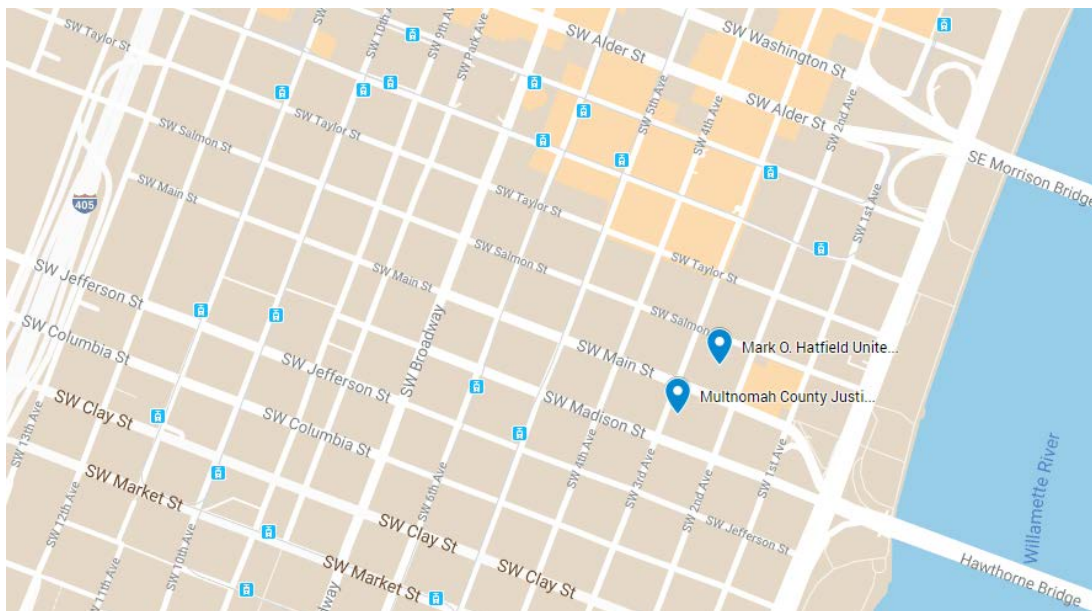
27.

Protests across the country have been met with a police system which has become highly militarized, heavily armed and completely distant from the communities they serve. The police response to many of the protests involve needless beatings, use of extreme measures by officers in gear which appear to be more like soldiers than police officers.



28.

Protests in Portland, Oregon in reaction to Mr. Floyd's death commenced in May 2020 and have continued each night for more than 88 nights, as of the date filing. While protests have been held all over the City of Portland, in July demonstrators have tended to merge and gather into the evenings around the United States Courthouse on S.W. 3rd Avenue in downtown Portland and the three park blocks directly west of the courthouse; as well as the Multnomah County Justice Center to the south. Protesters report being chased or followed by federal agents as far west as I-405, approximately ten blocks from the Mark O. Hatfield Federal Courthouse.



Incursion of Federal Agents

29.

On July 1, 2020, the Trump administration deployed federal law enforcement officers and agents to Portland, Oregon. According to a statement made by Kevin Sonoff, spokesperson for the Portland U.S. Attorney, Billy Williams, on July 6, 2020, the ostensible purpose of the

deployment was to protect federal property and personnel.² However, immediately following their arrival, federal agents engaged in crowd-dispersal operations, deploying tear gas and impact munitions well beyond the immediate surroundings of federal property and with the apparent purpose of quelling lawful protests in support of Black lives rather than protecting federal property.

30.

It appears all or most of the federal agents deployed to Portland are not adequately trained in the First Amendment rights to assemble and protest, nor mass demonstrations, crowd control and riot control.³

31.

Since their arrival, federal agents have failed to employ de-escalation strategies or tactics to mitigate violence and protect the rights of peaceable assembly and protest. Instead, federal agents have escalated violence on a nightly basis by targeting peaceful and lawfully dispersing individuals for injury or assault without probable cause, pursuing protesters, observers and journalists through the streets blocks beyond federal property while simultaneously firing Pepper-spray balls, rubber bullets and other munitions at them, and blanketing several blocks of Portland streets surrounding the courthouse in tear gas and flashbang devices, concealing the pathways for protestors to safely disperse.

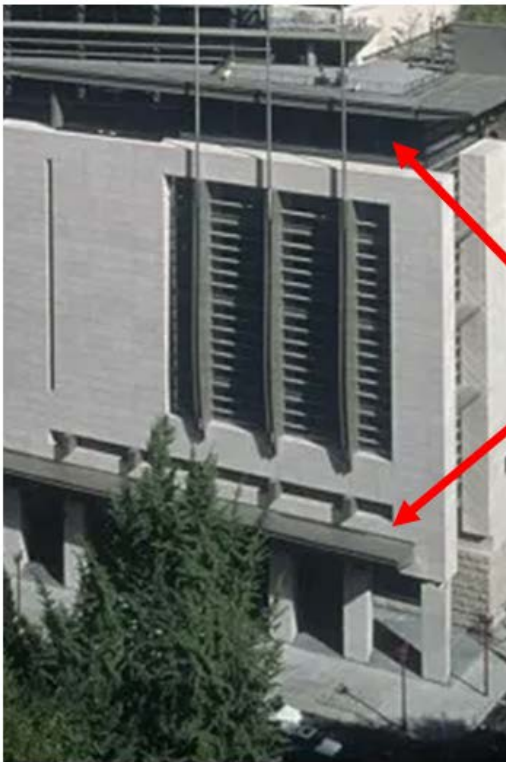
32.

On or after July 22, the federal agents built a chain link fence around the courthouse and reinforced it with plywood and concrete blocks. The ferocity, frequency, and amount of force

² <https://www.opb.org/news/article/federal-law-enforcement-agencies-deployed-to-portland-protests-federal-buildings-personnel/>

³ <https://www.nytimes.com/2020/07/18/us/portland-protests.html>

used against members of the public escalated. At the direction of supervisors, federal agents also fired munitions from within the safety of the fenced-in portion of the front steps of the courthouse and from safe positions several stories up in the federal courthouse into crowds of nonviolent, passively resistant protestors and others.



Tear gas deployed from elevated positions while crowd is standing below.

33.

On July 23, 2020, United States District Judge Michael Simon issued a temporary restraining order (“TRO”) in *Index Newspapers, LLC, et al v. City of Portland, et al*, USDC Case No. 20-cv-1035-SI, exempting journalists and legal observers from orders to disperse and restraining federal defendants U.S. Department of Homeland Security and U.S. Marshals Service from arresting, threatening to arrest, or using physical force directed against any person who they know or reasonably should know is a journalist or legal observer. The TRO anticipates,

consistent with the U.S. Constitution and federal law, that “lawful crowd-dispersal orders” will be issued prior to the deployment of crowd-control devices.

34.

On or about July 23, 2020, following the entry of a temporary restraining order against federal officials involved in the July protest response, defendant Cuccinelli sent an email to Defendant Wolf in reference to the TRO, saying, “It’s offensive, but shouldn’t affect anything we’re doing.”

35.

Indeed, the federal defendants did not alter their behavior and deployed and directed excessive force at plaintiffs and members of the class.

36.

Federal agents have used tear gas in a predictable and frequently unlawful pattern. Nightly, between approximately 11:30 p.m. and 1:00 a.m., federal agents emerge from the federal courthouse and fire tear gas and toss and launch flashbang grenades into SW Third Street, Lownsdale Park and SW Fourth Street, sometimes without any prior warning and regardless of whether there have been triggering acts of protester violence, property damage or threats (tossed bottles and fireworks) toward federal agents (all of whom are wearing gas masks and full protective riot gear and located either safely inside the courthouse or behind a fence and other protective barriers outside the courthouse).

37.

After an initial volley of tear gas and flashbang grenades, federal agents commence firing pepper balls through and over the fencing at protestors and flood the street, shooting protestors with rubber bullets, pepper-spray balls, and other impact munitions regardless of whether they

have been engaged in acts of violence, or are peacefully dispersing or leaving the area or are in retreat, and even when they are moving away from federal property or standing blocks away from the federal courthouse and posing no possible threat to federal property, federal agents or others.

Right to Protest

38.

Demonstrations, protest marches, and picketing are clearly protected by the First Amendment. People have a right to demonstrate and protest the actions of government officials, including police officers, without fear for their safety and “[i]t has been clearly established since time immemorial that city streets and sidewalks are public fora.” *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir 1996).

39.

The government may not prohibit angry or inflammatory speech in a public forum unless it is (1) directed to inciting or producing imminent lawless action *and* (2) likely to incite or produce such action. *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 1829, 23 L.Ed.2d 430 (1969) (per curiam). Speech that stirs passions, resentment or anger is fully protected by the First Amendment. *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 896, 93 L.Ed. 1131 (1949) (“[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”).

Status of Protestor Rights Prior to Incursion of Federal Agents

40.

On June 9, 2020, Judge Marco Hernandez issued a temporary restraining order in *Don’t*

Shoot Portland, et al v. City of Portland, US District Court Case No. 20-cv-917-HZ, prohibiting the City of Portland, Portland Police Bureau, from use of tear gas except when lives or safety of the public or the police are at risk. In entering the order, Judge Hernandez specifically found:

[T]here 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.

41.

On June 26, 2020, pursuant to stipulation, Judge Hernandez extended the restraining order entered in *Don't Shoot Portland* through July 24, 2020 and expanded its scope to restrict use of the following munitions in connection with crowd control:

- (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.

42.

On June 30, 2020, Governor Brown signed House Bill 4208 into law, which prohibits the use of teargas on a crowd absent circumstances that constitute a “riot” and absent fair notice, consisting of: a) an announcement of the agency’s intent to use tear gas; b) allowance of sufficient time for individuals to evacuate the area; and c) a second announcement of intent to use tear gas immediately before its use.

43.

Every night of July 2020, Defendants attacked nonviolent, non-resisting protesters.

44.

On July 28, 2020, and in direct response to the federal agents’ unlawful actions, the Index Newspapers plaintiffs filed a Motion for Contempt and Sanctions Against Federal Defendants, which is now pending.

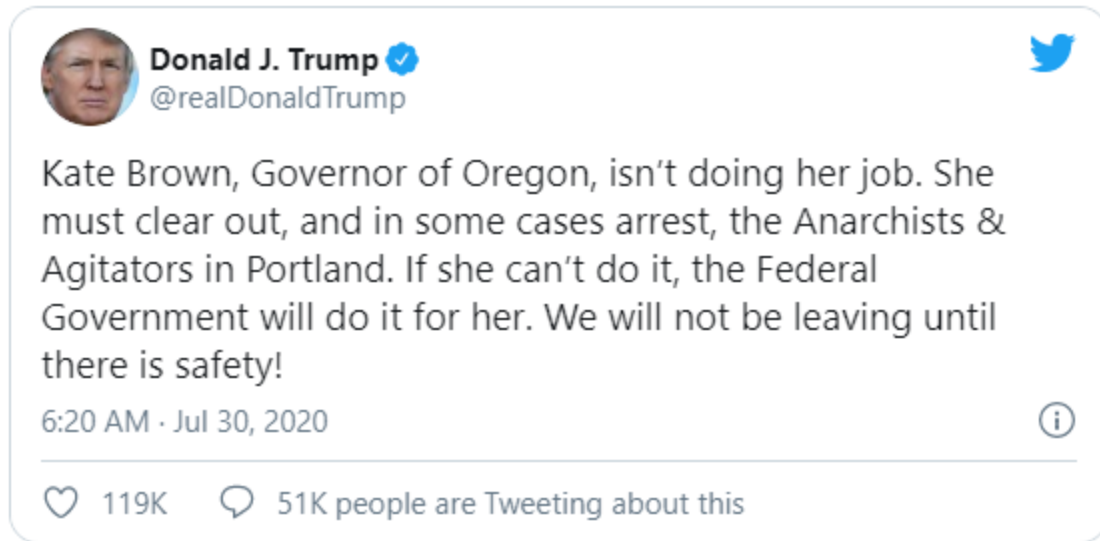
45.

On July 29, 2020, Governor Kate Brown announced she had reached an agreement with the United States to withdraw all federal agents from the Portland protest effort no later than August 4, 2020.⁴

46.

On July 30, 2020, President Trump Tweeted:

⁴ . <https://www.opb.org/article/2020/07/29/oregon-portland-deal-announced-federal-officers-phased-removal/>



<https://twitter.com/realDonaldTrump/status/1288826742539464707?s=20>

47.

The day of Governor Brown’s announcement, the federal agents still occupying the federal courthouse in Portland reportedly increased their use of force and appeared to be defiantly ignoring any efforts or attempts to reduce violence and unlawful use of force.⁵

Characteristics of Crowd Control Devices Deployed by Federal Agents

A. Chemical Agents

48.

“Tear gas” is a group of chemical compounds that temporarily make people unable to function by causing irritation to the eyes, mouth, throat, lungs and skin.⁶ It is a form of poison. People may experience some or all of the following symptoms immediately after exposure:

⁵ <https://www.theguardian.com/us-news/2020/jul/30/federal-agents-portland-oregon-trump-troops>

⁶ <https://emergency.cdc.gov/agent/riotcontrol/factsheet.asp>

excessive tearing, burning, blurred vision and redness of the eyes, runny nose, burning and swelling within the nose, difficulty swallowing and drooling, chest tightness, coughing, choking sensation, wheezing, shortness of breath, burns and rash on the skin, nausea and vomiting. It can bring on an asthma attack. Prolonged exposure or a large dose of gas may cause blindness, glaucoma, or immediate death due to severe chemical burns to throat and lungs and respiratory failure. There is also anecdotal evidence that tear gas may cause reproductive health concerns for people with uteruses including miscarriages.⁷

49.

“Pepper-spray” and “OC” (oleoresin capsicum) aerosols are chemical compounds derived from chilli peppers. Capsaicin is the compound that makes chili peppers spicy hot. There are powder forms of these compounds, as well. Pepper-spray, similar to tear gas, attacks mucous membranes in the eyes and respiratory system, forcing eyes to close and flood with tears and generating coughing fits and difficulty in breathing. Pepper-spray also induces an intense burning sensation. The immediate effects can last anywhere from 15 minutes to one hour or more.

50.

“Pepper-spray balls” are round plastic projectiles that release a powdered substance on impact that has effects similar to pepper spray. Pepper-spray balls are fired from a pistol or AR-15 like “launcher” using compressed air. Some varieties of launchers allow for adjustable kinetic impact. In addition to the dangers of pepper spray, pepper-spray balls carry the dangers inherent in any projectile that is shot at someone up to and including blindness, cuts, abrasions, bruising,

⁷ <https://www.salon.com/2020/07/28/experts-alarmed-at-reports-of-expired-tear-gas-being-sprayed-on-protesters/>

skin welts and concussion. Their accuracy declines over relatively short distances, creating a high risk of bystander injury.

B. Kinetic Impact Projectiles

51.

“Rubber bullets or pellets,” “baton rounds,” “sponge rounds” and “bean bag” rounds are lightweight, high-speed kinetic impact projectiles fired from a rifle-like “launcher” or shotgun at velocities similar to live ammunition, but their design causes a rapid slowdown during flight. They are loosely designed to duplicate the impact of a baton strike from a distance at or beyond 60 feet. The rounds deliver the same kinetic force as a 90 mile per hour major league baseball pitch. If struck in the head, face, eye, neck, kidney or groin, they can produce grievous injuries or death.⁸ Their accuracy declines over relatively short distances creating a high risk of bystander injury.

C. Disorientation Devices

52.

“Disorientation devices” or “flashbangs” or “stun grenades” create a loud explosion and/or a very bright flash of light. They are made of both metal and plastic parts that may fragment during the explosion and carry risks of blast injuries and hearing loss. They may be deployed by hand or by a launcher. Explosions in close proximity to a person can cause or lead to amputation, fractures, burns, blindness and other serious injuries. It is impossible to control exactly where a grenade detonates.

⁸ <https://phr.org/wp-content/uploads/2018/09/lethal-in-disguise.pdf>

Surveillance of Protesters

53.

Based on information and belief, government agencies, defendants, and Does 1-200 obtained surveillance of protesters in and around the protest zone, including video and data images from fixed and mobile cameras, cell phone data, drone footage, and other digital media. This surveillance information provides independent confirmation of class membership. In addition, it provides important evidence of the conduct of defendants and proof of the claims of plaintiffs and the class.

Defendants' Violations of Plaintiff's Constitutional Rights

54.

Plaintiffs Clark, Gass, West, and Maher attended the Black Lives Matter protests in July 2020 and were exposed to tear gas on one or more occasions as set out in more detail below. In addition, plaintiffs Clark, Gass, and Maher were struck by munitions, plaintiff West was harmed by a concussion grenade, and plaintiff Maher was beaten.

55.

Defendants violated plaintiffs and class members Fourth Amendment rights in one or more of the following ways:

- A. Defendants repeatedly used tear gas indiscriminately on plaintiffs and class members, who at all material times were engaged in peaceful, lawful protests;
- B. Defendants departed federal property and entered municipal streets and parks while chasing protesters and spraying them with tear gas, lobbing percussion grenades, firing impact munitions, and generally assaulting the protesters without lawful purpose or objective; and

C. One or more of defendants' supervisors or authorized representatives have communicated via social media, press releases and press conference they are aware their activities lack probable cause and they are ordered to use force and make arrests despite the lack of legal authority and justification.

56.

Plaintiff Clark attended demonstrations and was exposed to tear gas in the protest zone on July 25-26, 2020. As a result of exposures to the tear gas, plaintiff Clark suffered pain, discomfort, respiratory distress, temporary blindness, and temporary loss of mobility. In addition, on July 26, 2020, at approximately 2:00 am, plaintiff Clark was struck in the hand by munitions fired while she was standing near the corner of SW 4th Ave. and Salmon St. The munitions caused pain, bruising, blistering, and fear. At all times, plaintiff Clark lawfully and peacefully protested on behalf of Black lives and the Black Lives Matter movement.

57.

Plaintiff Gass attended demonstrations and was exposed to tear gas in the protest zone on July 24, 2020. As a result of exposures to the tear gas, plaintiff Gass suffered pain, discomfort, mental distress, respiratory distress, temporary blindness, and temporary loss of mobility. In addition, on the same day, plaintiff Gass was struck in the left foot by impact munitions fired while standing in the protest zone among a group of nonviolent, peaceful protesters. Plaintiff Gass was also struck by pepper-spray balls in the head and face causing pain and discomfort. The impact munitions broke plaintiff Gass's great toe, causing pain and suffering, and interference with normal activities of daily life. At all times, plaintiff Gass lawfully and peacefully protested on behalf of Black lives and the Black Lives Matter movement.

58.

Plaintiff West attended demonstrations and was exposed to tear gas in the protest zone on the following days: July 21, 22, 24, and 25. As a result of exposures to the tear gas, plaintiff West suffered pain, discomfort, mental distress, respiratory distress, temporary blindness, and temporary loss of mobility. In addition, on July 25, one or more defendants fired stun grenades close to plaintiff West, which detonated close to him, causing hearing loss, pain, and disorientation. At all times, plaintiff West lawfully and peacefully protested on behalf of Black lives and the Black Lives Matter movement.

59.

Plaintiff Maher attended demonstrations and was exposed to tear gas in the protest zone on the following days: July 21-22, July 23-24, July 25-26, and July 29-30. As a result of exposures to the tear gas, plaintiff Maher suffered pain, discomfort, respiratory distress, temporary blindness, and temporary loss of mobility. In addition, plaintiff Maher suffered the following additional harms:

- A. On July 22, at approximately 12:30-1:00 am, a federal agent wearing military camouflage fatigues beat plaintiff Maher with a baton while she was walking away from the federal courthouse near Lownsdale Square. As a result of this beating, plaintiff Maher suffered pain, bruising, and fear.
- B. On July 22, at approximately 2:00-3:00 am, plaintiff Maher was struck in the head by munitions fired while standing on SW Main St. between 5th and 6th Ave. The munition was a “pepper-spray ball,” which impacted her bike helmet and remains lodged within.

As a result of this shooting, plaintiff Maher suffered fear and concern for her safety. At all times, plaintiff Maher lawfully and peacefully protested on behalf of Black lives and the Black Lives Matter movement.

60.

Defendants used and applied force against plaintiffs and members of the class without a clearly communicated warning, without a lawful determination and announcement that plaintiffs and members of the class were unlawfully assembled, and without first clearly communicating a lawful order to disperse.

FIRST CLAIM FOR RELIEF: Unreasonable Use of Force

Bivens - Fourth Amendment

61.

Plaintiffs reallege all previous paragraphs as if fully set forth herein.

62.

Plaintiffs and members of the class are entitled to be free from unlawful seizure of their person pursuant to the parameters of the 4th Amendment to the United States Constitution. Plaintiffs and members of the class are also entitled to be free from undue, unreasonable, and deadly force, including:

- A. The use of tear gas without lawful justification, for the sole purpose of crowd dispersal, or as a pain compliance tool;
- B. The shooting of pepper-spray balls indiscriminately or directly at their person, including when displaying no violence or resistance, or when their back is turned while attempting to retreat or obey an order to disperse;
- C. The spraying of pepper spray to inhibit their ability to see;

- D. The beating of their person with batons, fists, or other weapons;
- E. Arrest without probable cause, and
- F. Exploding grenades designed to disorient and confuse rather than to rebut force, effect a custodial arrest or preserve life and safety.

63.

The defendants did not have, at any time, a legally valid basis to seize plaintiffs and members of the class and, at all times material, lacked an objectively reasonable belief that plaintiffs and members of the class presented an imminent and serious danger to themselves or others. As such, Defendants' use of force violated the Fourth Amendment restriction on use of force.

64.

The defendants unlawfully seized plaintiffs and members of the class by means of excessive physical force, including the use of chemical agents, kinetic impact munitions and diversionary devices as described above.

65.

The defendants had no warrants authorizing any seizure of plaintiffs and members of the class.

66.

Each of the defendants failed to intervene to prevent the other defendants from violating the constitutional rights of plaintiffs and members of the class and is liable for their failure to act to protect protesters.

67.

Defendants failed to ascertain or ignored all reasonable and objective facts and their acts and omissions were objectively unreasonable in light of the circumstances confronting them for reasons which, based on information presently known to plaintiffs and members of the class, include the following:

- A. Defendants gave no or inadequate warning of their intention to use force, even though it was reasonably feasible for them to do so;
- B. Defendants gave no directions or instructions to plaintiffs or members of the class as to how or in what direction to safely evacuate the area;
- C. Defendants lacked reasonable cause to believe that plaintiffs or members of the class had committed a crime, posed a threat to the safety of the defendants or others, or were resisting arrest or attempting to evade arrest by flight;
- D. Defendant lacked reasonable cause to believe that plaintiffs or members of the class had displayed aggression or engaged in violent conduct;
- E. Defendants gratuitously inflicted pain on plaintiffs and members of the class in a manner that was not a reasonable response to the circumstances;
- F. Defendants intentionally used and applied force that was capable of causing serious and permanent injury and was grossly disproportionate to any threat presented by plaintiffs and members of the class;
- G. When defendants used and applied force, defendants knew the weapons and munitions they were using were capable of causing serious and permanent injury, were inaccurate and unreliable at the distances from which they were deploying them and could not be deployed without risk of hitting individuals in vulnerable areas nor

endangering persons, such as plaintiffs and members of the class, against whom no such use of force was reasonable nor sanctioned under the Fourth Amendment;

- H. Upon information and belief, defendants failed to follow the federal government's own policy and training regarding preservation of First Amendment rights and use of force in connection with crowd control and riot tactics and ignored well-established legal principles regarding the use of force;
- I. Defendants recklessly or deliberately created their own exigency when none would otherwise have existed;
- J. Defendants used inaccurate information or ignored information to justify using force against plaintiff; and
- K. Defendants failed to de-escalate and in fact escalated their use of force without probable cause or justification.

68.

At all times material, the law was clearly established that defendants' use of force, in the manner and under the circumstances used against plaintiffs and members of the class, was objectively unreasonable and any reasonable federal agent defendant would have known that the force used against plaintiffs and members of the class was unreasonable and violated their clearly established Fourth Amendment rights. Defendants' conduct was well-defined by law and each defendant knew or should have known that their conduct was not only well below the standard prescribed by law, but illegal *per se*.

69.

If defendants claim to have declared an unlawful assembly and given fair warning to disperse, which plaintiff denies, defendants failed to use reasonable means to amplify their

voices so that they could be heard by nonviolent, passively resisting protestors, journalists, legal observers and others. Defendants did not provide instructions how plaintiffs and members of the class should comply with dispersal orders and did not allow plaintiffs and members of the class a reasonable amount of time to comply before defendants commenced use of force.

70.

As a direct and proximate result of defendants' unconstitutional and retaliatory acts, plaintiffs and members of the class suffered physical injury and mental harms, outrage, betrayal, offense, indignity and insult causing damage in amounts to be determined at trial.

71.

Plaintiffs and members of the class are entitled to an award of punitive damages against defendants to punish and deter them and others from similar deprivations of constitutional rights in the future.

SECOND CLAIM FOR RELIEF: *Unlawful Arrest or Detention*

Bivens - Fourth Amendment

72.

Plaintiffs reallege all previous paragraphs as if fully set forth herein.

73.

Plaintiffs and members of the class have the right under the Fourth Amendment of the United States Constitution to be free from unlawful arrest or detention that is not based on a probable cause belief that the particular person is committing a crime or about to commit a crime. Plaintiffs and members of the class are entitled to be free from unwarranted detention absent probable cause.

74.

As a result of defendants' conduct, plaintiff and members of the class were detained by the defendant federal agents in that they were immobilized by tear gas.

75.

At all times material, the law was clearly established that defendants' seizure of plaintiffs and class members in the manner and under the circumstances was unreasonable and any objectively reasonable federal agent defendant would have known that the seizure of plaintiffs and class members violated their clearly established Fourth Amendment right. Defendants' conduct was well-defined by law and each defendant knew or should have known that their conduct was not only well below the standard prescribed by law, but illegal *per se*.

76.

As a direct and proximate result of defendants' unconstitutional and retaliatory acts, plaintiffs and class members suffered physical injury and mental harms, outrage, betrayal, offense, indignity and insult causing damage in amounts to be determined at trial.

77.

Plaintiffs and members of the class are entitled to an award of punitive damages against defendants to punish and deter them and others from similar deprivations of constitutional rights in the future.

THIRD CLAIM FOR RELIEF--DECLARATORY JUDGMENT

78.

Based on information and belief, defendants remain in Oregon and, based on statements of President Trump and others, may again use similar force in Portland against protesters like plaintiffs and members of the class. Plaintiffs and members of the class intend to continue

exercising their free speech rights and rights of association in support of the Black Lives Matter movement.

79.

There exists a controversy of sufficient immediacy to warrant issuing a declaratory judgment that indiscriminate use of tear gas on peaceful protesters engaged in protected acts of assembly, speech, and expression violates the First Amendment rights of peaceful protesters.

80.

A judicial declaration is necessary and appropriate so that plaintiffs and members of the class may be assured that their rights to engage in constitutionally protected speech, assembly, and expressive conduct remain intact and that they do not risk physical harm, excessive force, or unlawful seizure by engaging in such protected activities.

81.

Plaintiffs and members of the class are entitled to a declaratory judgment that defendants may not indiscriminately use tear gas, shoot, or beat them while they are engaged in constitutionally protected assembly, speech, and expressive conduct.

WHEREFORE plaintiff prays for judgment against defendants, and each of them, as follows:

1. For compensatory noneconomic and economic damages in an amount to be determined by a jury and for prejudgment interest on said sums;
2. For punitive damages;
3. For a declaratory relief;
4. For plaintiff's costs and such other and further relief as the Court may deem just and equitable; and

5. Plaintiff demands a jury trial for all matters triable of right to a jury.

DATED this August 24, 2020.

Respectfully submitted,

/s/ David F. Sugerman
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