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; MEMORANDUM OF LAW IN SUPPORT THEREOF

Pursuant to Fed. R. Civ. P. 65

ORAL ARGUMENT REQUESTED

EXPEDITED HEARING REQUESTED

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

TABLE OF CONTENTS

Page

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

TABLE OF CONTENTS
(continued)

Page

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

TABLE OF AUTHORITIES

Page

CASES

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

TABLE OF AUTHORITIES
(continued)

Page

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

TABLE OF AUTHORITIES
(continued)

Page

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

OTHER AUTHORITIES

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

TABLE OF AUTHORITIES
(continued)

Page

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

MOTION

Plaintiffs Christopher Wise, Michael Martinez, Christopher Durkee, and Savannah Guest (collectively, "Plaintiffs" or "Protest Medics") hereby move for a Temporary Restraining Order ("TRO"), 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, 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 behaving towards 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. Defendants and their agents and employees, including but not limited to the Portland Police Bureau and all persons acting under the direction of or in

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

concert with the Portland Police Bureau (the "Portland Police"); and the Department of Homeland Security and all persons acting under the direction of or in concert with the Department of Homeland Security, and the U.S. Marshals Service and all persons acting under the direction of or in concert with the U.S. Marshals Service (collectively, the "Federal Officers"),[1] are enjoined from arresting, threatening to arrest, or using physical force (as explained below) directed against any person who they know or reasonably should know is a Protest Medic (as explained above), unless authorized under Or. Rev. Stat. § 133.235 or Or. Rev. Stat. § 133.245.

3. The Police are further enjoined from using physical force directly or indirectly targeted at a Protest Medic (as explained 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 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 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, when a medic is providing medical care to an individual. Further, if a Protest Medic is providing medical care to an individual, the 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 "reasonable suspicion" or "probable

---

[1] Plaintiffs refer to all Defendants collectively as "the Police."

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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

5. The 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 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 Police also are lawfully seizing the Protest Medic to whom the materials belong.

6. The 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 an individual, unless the Police also are lawfully seizing that person consistent with this Order.

7. For purposes of this Order, the Police shall not be liable for harm from any crowd-control devices, if a Protest Medic was incidentally exposed to 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

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

details, Plaintiffs have established that (i) Defendants' conduct threatens irreparable harm to Plaintiffs; (ii) Plaintiffs are likely to succeed on the merits of their claims; (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 City of Portland, the Portland Police Bureau, and their agents and employees (collectively, the "Portland Police"), the Department of Homeland Security, the U.S. Marshals Service, and their agents and employees (collectively, the "Federal Officers"), from exerting threats and violence against protest medics who are providing care and comfort to the hundreds, and many times thousands, of people protesting nightly in downtown Portland over the murder of George Floyd and against police violence generally.

Plaintiffs are volunteer protest medics who, in the face of tear gas, rubber bullets, and other 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 and the Federal Officers have employed excessive force, targeting protest medics, preventing them from administering medical care to protesters, and seizing Plaintiffs' supplies—in violation of well-established First and Fourth Amendment rights. Defendants' conduct is causing Plaintiffs and the public irreparable harm. As demonstrated in the attached

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

declarations, the police are using excessive force to retaliate against Plaintiffs and numerous other protest medics for providing medical aid to protesters injured by police and federal officers.

Targeting individuals for engaging in protected expressive activities violates the First Amendment, and the Defendants' unlawful conduct should be enjoined immediately. This is because Defendants' 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 medics their constitutional rights to support those demonstrating 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 police violence.

II. FACTS

A. Protest Medic Groups Formed to Create a Safer Environment for Protesters Seeking to Peacefully Protest

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 50 days and show no sign of slowing down. Declaration of Christopher Wise in Support of Plaintiffs' Motion for Temporary Restraining Order ("Wise Decl.") ¶¶ 3-4.

Protests in Portland have been largely peaceful. *See* Declaration of Michael Martinez in Support of Plaintiffs' Motion for Temporary Restraining Order

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

("Martinez Decl.") ¶ 7-8, 14-17; Declaration of Dr. Catherine Morgans in Support of Plaintiffs' Motion for Temporary Restraining Order ("Dr. Morgans Decl.") ¶¶ 3-7. Yet, on many nights, Defendants have responded with violent force. They have shoved protesters to the ground, beaten them with truncheons, 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. *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 into crowds ranging from dozens to hundreds of people. Declaration of Christopher Durkee in Support of Plaintiffs' Motion for Temporary Restraining Order ("Durkee Decl.") ¶ 17; Martinez Decl. ¶ 15.

As the protests in Portland have continued, groups of protesters, including Plaintiffs, organized in teams and groups to provide medical aid to the protesters as they exercised their free expression rights. *See* Declaration of Jeff Paul in Support of Plaintiffs' Motion for Temporary Restraining Order ("Paul Decl.") ¶11; *see also* Dr. Morgans Decl. ¶ 17. 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 ("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 went downtown to have their own voices heard through their service to others. Martinez Decl. ¶ 22; Durkee Decl. ¶¶ 9-11; Guest Decl. ¶¶9-10.

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

B. This Court Intervenes and Issues a Temporary Restraining Order, Enjoining the Portland Police From Using Excessive Force Against Protesters

Because of the excessive use of violent force by the Portland Police, 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.

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

[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.

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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 Intervenes Again and Issues a Temporary Restraining Order, Enjoining the 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 LLC v. City of Portland*, No. 3:20-cv-1035-SI (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 protestors, 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.* Therefore, the Court enjoined the defendants' direct attacks on journalists and legal observers. *Id.*

E. Plaintiffs Offer Aid and Are Targeted by 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.

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

Plaintiffs express that "protesters have a right to protest safely and without fear of police violence." Martinez Decl. ¶ 19. 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.

As protest medics, Plaintiffs 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. *See* Paul Decl. ¶¶ 6, 9; *see also* Hubbard Decl. ¶ 7; Martinez Decl. ¶¶ 20, 23-24.

To ensure that Defendants and protesters recognize Plaintiffs as protest medics, they wear clothing designed to communicate that they are there to render aid to injured protesters. For example, Plaintiffs 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. 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, Plaintiffs 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).

Though Plaintiffs engage in nonviolent behavior and pose no threat to the public, officers, or city or federal property, each Plaintiff has been repeatedly intimidated, harassed, and assaulted by Defendants. While attempting to render

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

medical aid to those in need, Plaintiffs have been tear gassed by the Portland Police and the Federal Officers—including having tear gas canisters shot or thrown in their direction. Wise Decl. ¶¶ 20-30; Guest Decl. ¶¶ 17-21, 29; Durkee Decl. ¶¶ 22-26; Martinez Decl. ¶ 32. *See also* Hubbard Decl. ¶ 8. Defendants also have shot Plaintiffs with rubber bullets, while Plaintiffs fulfilled their duties as volunteer protest medics. 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. In addition, Wise, after verbally identifying himself as a medic, was aimed at and shot with a tear gas canister that struck him in the head. *Id.* at ¶ 29.

- While standing off to the side of a group of protesters, Peyton Dully Hubbard was targeted by at least three agents after the officers gestured to one another to aim their laser sights at her and fired at least six rubber bullets at her, injuring her. Hubbard Decl. ¶ 10. Hubbard, even while draped in contrasting high-gloss, red duct tape crosses has been shot at so many times that a fellow protester provided her with a makeshift shield. *Id.* at ¶¶ 5, 11. Hubbard was also nearly struck by a Portland Police car when she attempted to ask the police for help after a protester had been struck by a car and was severely injured. *Id.* at ¶9.

- 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. ¶¶ 33-40.

- Multiple Federal Officers ganged up on and (while being videotaped) assaulted Plaintiffs Kit Durkee and Savannah Guest. Video here: https://twitter.com/stoggrd/status/1282432033533210625. As is apparent from the video, during that incident, one Federal Officer stabbed Durkee's chest with a riot baton while another shoved Durkee

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

> to the ground while she was retreating. Guest Decl. ¶¶ 17-21; Durkee Decl. ¶¶ 22-26. A Federal Officer also threatened to hit Guest after she fell down and was attempting to pick up her medical supplies. *Id.* Another Federal Officer struck Guest in the hip and knee with a riot baton. Guest Decl. ¶ 20. More recently, Federal Officers targeted Savannah Guest and Kit Durkee with tear gas cannisters and pepper balls as they helped wounded protesters move off the streets and out of the way of advancing Officers. Durkee Decl. ¶ 12; *see* Guest Decl. ¶ 23 (describing feelings of despondency and mistrust after being targeted).

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.

In addition to specifically targeting Plaintiffs as protest medics, the Portland Police and Federal Officers routinely use indiscriminate force against entire crowds of people—which includes protest medics, but also children, babies, journalists, legal observers, the nearby houseless population, people in nearby homes and places of work, bystanders, and moms and dads coming out to have their voices heard. And this use of force has had a clear chilling effect: Despite their desire to continue serving as protest medics each day, Plaintiffs have 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.

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).

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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, federal and 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).

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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 exercised 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 downtown 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

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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. 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*,

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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).

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 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

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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").

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[ed] and experienc[ed]" in Portland. Martinez Decl. ¶ 19. 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." *Id.* They know that their "medical training [can] assist both the protesters and the larger movement" for Black lives. Durkee Decl. ¶ 7. Plaintiffs have witnessed federal and local law enforcement officials unleash "tear gas, pepper spray, and other police violence" on protesters and it is their understanding that these officials sometimes are "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-

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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).

Plaintiffs' message at the protests is one that is particularized and specific to protest medics, as a discrete category of individuals attending the protests. 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. The OHSU medics' station Martinez attends is stocked with medical supplies like gauze and bandages and is clearly marked with an OHSU banner and first aid signs. Martinez Decl. ¶ 22. Wise, Durkee, and Guest 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. Plaintiffs, in their role as protest medics, have been an unmistakable presence at protests each night, verbally identifying themselves as

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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.

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, Defendants' repeated behavior almost certainly would chill a person 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);

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

- 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)).

Defendants 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, Defendants have deployed tear gas, pepper spray, and other chemical irritants on Plaintiffs at close range, using tactics like "kettling" to "tear gas protesters from all angles" and "cut[] off any path for escape." Martinez Decl. ¶ 12; Wise Decl. ¶ 28; Dr. Morgans Decl. ¶¶ 3-4. These irritants are deeply invasive and painful, causing the eyes, nose, and (sometimes) even the skin to burn and swell. *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. Protest

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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; 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.

Defendants have also deployed munitions—such as rubber bullets and flash bangs—directly against Plaintiffs, sometimes while they were rendering care and treatment to protesters and bystanders. Guest Decl. ¶¶ 13-14; Durkee Decl. ¶ 15; Martinez Decl. ¶¶ 32; Wise Decl. ¶¶ 22. Especially when deployed in close contact, these munitions bruise and even puncture the skin, fracture bones, and cause blindness. Plaintiffs have been attacked, beaten, clubbed, and harassed by federal and local law enforcement officials. *See* Wise Decl. ¶¶ 22, 24-26, 28-30; Durkee Decl. ¶¶ 18, 19-28, Guest Decl. ¶¶ 13, 15-22. 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"); Guest Decl. ¶¶ 29-31. Those injuries have forced Plaintiffs to stay home and heal, instead of continuing to serve as protest medics (as they desire to do). Wise Decl. ¶ 27; Durkee Decl. ¶ 32, 34; Guest Decl. ¶ 28. 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 Plaintiffs. *See* Durkee Decl. ¶ 19 ("The indiscriminate brutality of the police and federal agents—especially the shooting of [protester]

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

Donavan 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 protected activities were a substantial and motivating factor in Defendants' 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, Defendants nonetheless specifically targeted Plaintiffs for violence, the Court may infer that Defendants did so with an intent to prevent Plaintiffs from expressing themselves as protest medics. *See Index Newspapers*, No. 3:20-cv-1035-SI, at 12, ECF 84 (D. Or. July 23, 2020) (holding that the plaintiffs established a sufficient nexus and showing to grant a restraining

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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, who wear clothing with markings clearly identifying them as providing medical aid, cite numerous instances in which federal and local law enforcement officials indiscriminately, and at close range, unleashed chemical irritants, deployed munitions, and engaged in physical violence specifically against them. *See* Wise Decl. ¶¶ 22, 24-26, 28-30; Durkee Decl. ¶¶ 10, 19-28; Guest Decl. ¶¶ 13, 15-22; *see also* Hubbard Decl. ¶ 8 (officer dropping tear gas canister and flash bang grenade into small enclosed space). From that, it is reasonable to infer that the protests, and their overall message of opposing police brutality, are 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. 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, it is reasonable to infer that Defendants sought, and seek, to suppress Plaintiffs' particularized form of speech. Defendants' use of indiscriminate weapons against Plaintiffs directly, and their acts to target Plaintiffs as they assist others, establishes a high likelihood that Plaintiffs' protected activities were a substantial motivating factor in Defendants' conduct. Therefore, the Court should grant Plaintiffs' motion for a TRO.

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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 clearly establish a likelihood of success on the merits that federal and city law enforcement officers violated the Fourth Amendment by using excessive force against the Plaintiffs and by unlawfully seizing their medical equipment.

1. Defendants used excessive force against Plaintiffs.

Plaintiffs have established a high likelihood that Defendants used excessive force against them, in violation of the Fourth Amendment. "A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer by means of physical force or show of authority terminates or restrains his 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). 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 the 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,

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

Defendants' seizure through use of force against Plaintiffs was not objectively reasonable.

a. Plaintiffs were seized under the Fourth Amendment.

Defendants "seized" Plaintiffs under the Fourth Amendment by shooting them with tear gas, rubber bullets, and stun grenades, and beating them with batons—that is, 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." *See Nelson*, 685 F.3d at 876 (explaining that a plaintiff was seized under the Fourth Amendment where he had been hit by a projectile intentionally fired towards a group of which he was a member, although plaintiff had not been the specific object of the force). Here, not only did Defendants terminate 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; Durkee Decl. ¶¶ 15, 19-28; Guest Decl. ¶¶ 13, 15-22; Hubbard Decl. ¶¶ 7-8, 10, but Defendants also targeted Plaintiffs both as individuals and as members of a crowd. *See, e.g.,* Guest Decl. ¶¶ 11, 13-14; Durkee Decl. ¶¶ 14-15. Since the officers intentionally targeted and used force against Plaintiffs that inhibited Plaintiffs' movement, Plaintiffs were seized.

b. Law enforcement officers used excessive force against Plaintiffs.

Defendants violated Plaintiffs' Fourth Amendment rights by affecting 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

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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).

Here, Defendants injured Plaintiffs with chemical irritants and munitions, which caused Plaintiffs immediate and uncontrollable pain. As Plaintiffs cared for wounded protesters, officers temporarily blinded Plaintiffs with tear gas and bear mace and shot rubber bullets that cut through Plaintiffs' skin. Wise Decl. ¶¶ 22-30; Guest Decl. ¶¶ 11, 13, 17, 20; Durkee Decl. ¶¶ 13, 15, 22, 25, 29. When Plaintiffs asked officers if they could provide medical care, officers responded by throwing Plaintiffs to the ground and beating them with batons. Guest Decl. ¶¶ 15, 17-22. As a result of their injuries, Plaintiff Wise suffered a sprained shoulder and was forced to take medical leave from work. Wise Decl. ¶ 26-27. Defendants' actions and the resulting injuries clearly subjected Plaintiffs to immediate and uncontrollable pain. Thus, consistent with *Nelson*, Defendants repeatedly have used excessive force on Plaintiffs, in violation of the Fourth Amendment.

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

Plaintiffs have a high likelihood of prevailing on their Fourth Amendment claims because Defendants had no valid justification for taking the extreme actions they did. 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

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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). Consideration of each of the three factors makes clear that no use of force was warranted against Plaintiffs.

First, the existence and, thus, severity of any crimes 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," as the relevant inquiry is whether the individual who was targeted had engaged in criminal activity. *See id.* at 883 (finding that although there were other individuals engaging in violent behavior, because plaintiff himself was not among them, the application of force to plaintiff could not be "justified by the government's interest in stopping any and all disorderly behavior"). Additionally, even if others in the immediate areas are engaging in criminal activity, if the *actual plaintiffs* are not, then a heightened use of force 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 did not engage in any criminal activity. Instead, Plaintiffs 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. Therefore, under the first factor, Defendants' use of force was not justified.

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

As to the second factor, Plaintiffs did not pose any immediate threat to the safety of the officers. 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 (holding that "the general disorder of the complex cannot be used to legitimize the use of pepper-ball projectiles against non-threatening individuals"). Here, as just explained, Plaintiffs did not pose a threat to anyone's safety, and were subjected to violence even while retreating. 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). 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). In such circumstances, the use of force, including the use of pepper spray, is unreasonable. *Nelson*, 685 F.3d at 882 (internal citations omitted).

Here, Plaintiffs were not engaging in any criminal behavior when they were targeted by the officers. Rather, they were engaging in activity that is protected under the First Amendment: peaceably exercising their right to free speech. Wise

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

Decl. ¶¶ 3-4, 6, Durkee Decl. ¶ 10; Guest ¶ 8. Further, instead of posing a threat to anyone's safety, Plaintiffs were protecting protesters by providing medical care. *E.g.*, Durkee Decl. ¶¶ 16-17. In fact, Plaintiffs deliberately wore clothes with medical symbols to communicate to law enforcement officers that Plaintiffs were providing medical assistance. Wise Decl. ¶ 9; Hubbard Decl. ¶ 5; Guest Decl. ¶ 7; Durkee Decl. ¶9-10. Yet officers beat Plaintiffs with batons after Plaintiffs asked to provide a wounded man with medical care. Guest Decl. ¶¶ 18-20; Durkee Decl. ¶¶ 23-26. 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, 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. Martinez Decl. ¶ 39; Guest Decl. ¶ 20; Durkee Decl. ¶ 25.

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 Plaintiffs, let alone the chemical irritants, bullets, and physical force that officers unleashed against them. Plaintiffs have therefore clearly established a likelihood of success on the merits that law enforcement officers violated the Fourth Amendment by using excessive force against Plaintiffs.

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

Defendants 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

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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. *Ill. 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. To provide protesters with medical assistance, Plaintiffs 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. Plaintiffs 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 Plaintiffs their table, tent, banner, and medical supplies and did not return the items to Plaintiffs. Martinez Decl. ¶ 41; Dr. Morgans Decl. ¶¶ 14-16. Plaintiffs managed to recover their table and some medical supplies from the Portland Police Bureau'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, Plaintiffs' possessory interest in the property is sufficient for them to have suffered an injury when the

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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, Plaintiffs 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.

Defendants continue to use excessive force against Plaintiffs. Wise Decl. ¶ 29; Guest Decl. ¶ 29. Nearly every day that Plaintiffs have participated in the protests, Defendants have beat them, shot them with bullets, or sprayed them with chemical irritants. As a result, Plaintiffs reasonably fear that Defendants 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

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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).

Defendants' ongoing violation of the Fourth Amendment has chilled Plaintiffs' efforts at providing medical aid. Martinez Decl. ¶ 43 ("I have dramatically decreased my attendance [at the protests]. . . . as I know from first-hand experience, the police do not need a justifiable reason to arrest any medic—or shoot any medic in the head"); 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 Donavan La Bella . . . . gave us pause, as the stakes of attending the Portland protests became clearer."). As a result, although Plaintiffs would like to continue attending the protests daily, Defendants' actions have severely constrained Plaintiffs' efforts. And every day that Plaintiffs miss a protest, more protesters suffer from Defendants' abuses, without the assistance of a protest medic.

As discussed below, Defendants' 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, Defendants' targeting of protest medics also

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

chills the nightly protests themselves, by creating an unsafe environment that potential protesters must think twice about before joining.

C. The Court can and should grant the relief sought by Plaintiffs.

1. This case does not present any sovereign immunity issues.

The Court has jurisdiction over Plaintiffs' claims for injunctive relief against the federal Defendants because the federal government, through the Administrative Procedure Act ("APA"), has waived its defense of sovereign immunity against these claims:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702. The APA is dispositive. With the enactment of 5 U.S.C. § 702, Congress sought to "eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity." *E.V. v. Robinson*, 906 F.3d 1082, 1092 (9th Cir. 2018) (quoting H.R. Rep. No. 94-1656, at 9 (1976)). Sovereign immunity does not apply in this instance, and even if it did, it has been statutorily waived. The United States Department of Homeland Security, the United States Customs and Border Protection, the United States Marshals Service, and the Federal Protective Service are all federal agencies. Their agents wreaking havoc on the city streets of Portland, Oregon, are all officers or employees of these federal agencies. Plaintiffs challenge Defendants' unlawful actions made in their official capacities. Pursuant to the APA, sovereign immunity can serve as no bar. Thus, the Court has jurisdiction over Plaintiffs' claims for injunctive relief.

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

2. The Court has the inherent power to grant equitable relief.

The Court also has the inherent power to grant the limited injunctive relief sought in this Motion. Federal courts may exercise the traditional powers of equity in cases within their jurisdiction to enjoin violations of constitutional rights by government officials. In *Ex parte Young*, the Supreme Court first articulated the principle that state government officials may be sued for acting unconstitutionally, even if an ensuing injunction would bind the state. 209 U.S. 123 (1908). In *Philadelphia Co. v. Stimson*, the Supreme Court applied that principle to suits against federal officials. 223 U.S. 605, 620 (1912) (finding that "in case of injury threatened by his illegal action, the [federal] officer cannot claim immunity from injunction process."). Subsequent cases have affirmed the rule that federal officials can be sued for their unbecoming conduct. *See Dalton v. Specter*, 511 U.S. 462, 472 (1994) (holding that "sovereign immunity would not shield an executive officer from suit if the officer acted either 'unconstitutionally or beyond his statutory powers.'") (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949)). This principle is the "constitutional exception to the doctrine of sovereign immunity." *Malone v. Bowdoin*, 369 U.S. 643, 647 (1962). Plaintiffs here raise constitutional challenges to their harsh treatment at the hands of the Portland Police and Federal Officers. Sovereign immunity has been waived by the APA and it is within this Court's inherent power to grant the relief sought by Plaintiffs.

3. Plaintiffs have clear causes of action under the First and Fourth Amendments.

In addition, Plaintiffs clearly have a cause of action to bring such a claim. When equitable relief is sought to ameliorate unconstitutional behavior, courts will reach the merits without even "discussing whether a cause of action existed to challenge the alleged constitutional violation." *Sierra Club v. Trump*, 929 F.3d 670,

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

694-95 (9th Cir. 2019) (citing *Trump v. Hawaii*, 138 S. Ct. 2392, 2416-17 (2018)) (collecting cases); *Sierra Club v. Trump*, 2020 WL 3478900, at *11-12 (9th Cir. June 26, 2020) (finding plaintiffs "ha[ve] a cause of action to enjoin the [federal government's] unconstitutional actions" under the courts' "historic [power] of equitable review."). If this Court cannot grant Plaintiffs relief under the APA, it can and should through its traditional power to grant relief.

Beyond the federal government's waiver of sovereign immunity in 5 U.S.C § 702 and the Court's power to grant equitable relief, the First and Fourth Amendments offer Plaintiffs an independent source of jurisdiction. 28 U.S.C. § 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

In this Motion, Plaintiffs request equitable relief to enjoin Defendants from arresting, threatening, or using physical force against protest medics in Portland. Plaintiffs simply seek relief to stop the continued infringement of their First and Fourth Amendment rights. The First and Fourth Amendments provide Plaintiffs with an implied cause of action and 29 U.S.C. § 1331 vests this Court with jurisdiction. In *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, the Supreme Court first upheld the proposition that the Constitution itself provides an implied cause of action for claims against federal officials. 403 U.S. 388, 389 (1999). In 2017, the Supreme Court held that federal courts should not extend a *Bivens* remedy into new contexts if there exist any "special factors counseling hesitation." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017). However, there is no corresponding limitation on the Constitution as a cause of action to seek injunctive or other equitable relief, which is what Plaintiffs seek here. *Id.* at 1862 (declining to

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

extend *Bivens* to a condition of confinement claim, but noting that "Respondents...challenge large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners . . . . [and] [t]o address those kinds of decisions, detainees may seek injunctive relief."). That is because there is a "presumed availability of federal equitable relief against threatened invasions of constitutional interests." *Am. Fed'n of Gov't Emps. Local 1 v. Stone*, 50 F.3d 1027 (9th Cir. 2007) (citations and internal quotation marks omitted) (quoting *Hubbard v. U.S. Envtl. Prot. Agency.*, 809 F.2d 1, 11 (D.C. Cir. 1986)) (finding that plaintiffs-appellants were entitled to seek relief based on the alleged violation of their First Amendment rights). The federal courts have long had the power to grant equitable relief for constitutional violations. *See Osborn v. United States Bank*, 22 U.S. 738 (1824); *see also Ex parte Young*, 209 U.S. at 156. And the Court should exercise that power here.

In this Motion, Plaintiffs seek only injunctive relief. Accordingly, they can bring their claims under the First and Fourth Amendments. The court has jurisdiction to hear the claims under 28 U.S.C. § 1331.

Plaintiffs seek to enjoin state and federal agents from violating their First and Fourth Amendment rights. They have multiple equitable causes of action to seek relief. There is a statutory waiver of any claim of sovereign immunity that may be brought by the federal defendants. Therefore, there is no jurisdictional bar or procedural bar to granting Plaintiffs the equitable relief they seek here.

D. 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. "Anytime there is a serious threat to First Amendment rights, there is a likelihood of

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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 and the Federal Officers are free to target medics with munitions and unlawfully seize them, Plaintiffs' exercise of their First Amendment rights will "surely [be] chilled." *Black Lives Matter-Seattle*, 2020 WL 3128299, at *3. Additionally, each time Defendants engage in that same behavior, they deprive Plaintiffs of their Fourth Amendment rights, which also constitutes continuing irreparable harm.

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. Not only have Plaintiffs shown an overwhelming likelihood of success on their claims, they also have demonstrated immediate and threatened irreparable harms—including severe physical and emotional injuries. Protests continue. More protest medics want to attend as the Defendants act more and more violently. Protest medics want to ensure that when the inevitable happens—protesters injured by police violence—those suffering may be cared for even if it means they too will be harmed.

Plaintiffs have already been injured. All 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 employed over the past fifty or

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

more days. Speech has been chilled. Medics have been directly targeted and injured by excessive force. Property has been unlawfully seized. For all the above reasons, the irreparable injury requirement is met.

E. The public's interest and balance of equities weigh strongly in favor of plaintiffs.

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). In addition, "it is always in the public interest to prevent the violation of a party's constitutional rights," which includes both the First and Fourth Amendments. *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotations omitted) (granting an injunction under the Fourth Amendment). And as Chief Judge Hernandez stated, "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.

Here, Plaintiffs are volunteer medics providing comfort and care for protesters engaged in demonstrations of worldwide concern. In so doing, they are exercising their constitutional right to free expression. But in an attempt to stifle that expression, Defendants have violated the constitutional rights of peaceful protest medics, who have done nothing but ensure and promote public safety. In so doing, Defendants have attempted to quash Plaintiffs' message: that demonstrators can feel safe working to counter the otherwise chilling impact of Defendants' violence. But Plaintiffs will not go quietly. Where so many protesters have been left

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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' 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 go to downtown Portland to participate in protests safely and with the knowledge that medics are present 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, Defendants make the entire protest less safe by reducing the number of medics present and able to render care. And Oregonians who wish to go to downtown Portland 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 Defendants' actions.

In the context of the violent, riotous actions by the police in recent weeks, 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

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

Plaintiffs' ability to provide care and safety to all demonstrators. The public interest demands it.

2. The balance of equities weighs strongly in favor of plaintiffs.

Because Plaintiffs have "raised serious First Amendment questions," the balance of hardships "tips strongly in [Plaintiffs'] favor." *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007) (internal quotations omitted). Plaintiffs' clearly demonstrate that police have abused their authority by punishing medics for administering medical care to protesters. Plaintiffs risk life and limb to provide aid. In contrast, any harm to the Government would be negligible. The Government has no interest in preventing protest medics from treating injured demonstrators. The Government might have an interest in protecting federal buildings and property, but that interest is not served by using excessive force against individuals who are serving as volunteer medics. Medics present no threat to the police or the public.

The balance of equities weighs overwhelmingly in favor of Plaintiffs. 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 Defendants' use of force on 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.

F. 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*

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

LLC et al. v. City of Portland et al., 3:20-cv-1035-SI, narrowly tailored their request for relief to ensure that it only enjoins 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 and Or. Rev. Stat. § 133.245, which regulate the use of force by peace and federal officers in Oregon, for the applicable standard.

Thoughtful and narrowly crafted relief limiting only the ability of Defendants to target protest medics is more than reasonable in light of the serious constitutional violations resulting from Defendants' attacks.

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

IV. CONCLUSION

These protests continue, 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 Motion for a Temporary Restraining Order is granted.

DATED: July 24, 2020

PERKINS COIE LLP

By: */s/ Nathan Morales*

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

Clifford S. Davidson, OSB No. 125378
csdavidson@swlaw.com
SNELL & WILMER L.L.P.
One Centerpointe Drive, Suite 170
Lake Oswego, OR 97035
Telephone: (503) 624-6800
Facsimile: (503) 624-6888

Kelly H. Dove (*pro hac vice* to be filed)
kdove@swlaw.com
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Telephone: (702) 784-5200
Facsimile: (702) 784-5252

Andrew M. Jacobs (*pro hac vice* to be filed)
ajacobs@swlaw.com
SNELL & WILMER L.L.P.
400 East Van Buren Street, Suite 1900
Phoenix, AZ 85004
Telephone: (602) 382-6000
Facsimile: (602) 382-6070

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

WESTERN STATES CENTER, INC., an Oregon public benefit corporation; THE FIRST UNITARIAN CHURCH OF PORTLAND, OREGON, an Oregon religious nonprofit corporation; SARA D. EDDIE, an individual; OREGON STATE REPRESENTATIVE KARIN A. POWER, an elected official; and OREGON STATE REPRESENTATIVE JANELLE S. BYNUM, an elected official,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES CUSTOMS AND BORDER PROTECTION; FEDERAL PROTECTIVE SERVICE; and UNITED STATES MARSHALS SERVICE

Defendants.

Case No. 3:20-cv-01175

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

1. This lawsuit concerns the rights of the people of Portland, and of Oregon, in the face of a Federal Government that, while extoling the nation's Founders and the statues erected to them, disregards the history and laws that established federal government in the first place.

2. The Bill of Rights to the United States Constitution – insisted upon as a condition of entry into the Union by many who opposed federal government in the 1780s – protects liberty in its Tenth Amendment by allocating powers between the Federal Government, on one hand, and the states and the people, on the other. Every power that the Constitution does not specifically grant to the Federal Government, or forbid to the states, is reserved to the states and to the people. That mattered to the Framers of our Constitution, and it matters on the streets of Portland, Oregon right now.[1]

3. The point is this: whether, and how, to police is left to the states and their municipalities. Presidents cannot change that.

4. One long-recognized reason the police power is left to state and local officials is to permit communities to adopt the policing policies of their choosing—subject to certain limitations contained in the Constitution, such as the Fourth Amendment's protections against unreasonable searches and seizures, the First Amendment's protections of free speech, and the Fourteenth Amendment's protections against discrimination. Oregonians have adopted such policies. For example, Oregon's laws prevent racial profiling, establish training standards and provide certain immunities to law enforcement.

---

[1] Indeed, the President himself has described the constitutional structure that the Framers created as "the culmination of thousands of years of western civilization and the triumph not only of spirit, but of wisdom, philosophy, and reason . . . ." https://www.whitehouse.gov/briefings-statements/remarks-president-trump-south-dakotas-2020-mount-rushmore-fireworks-celebration-keystone-south-dakota/ (accessed 07/18/2020).

Snell & Wilmer
One Centerpointe Drive Ste 170
Lake Oswego, Oregon 97035
503.624.6800

5. One benefit of leaving the police power to the states, as the Framers of the Constitution wisely did, is that it makes law enforcement accountable to the people. Because Oregon and its municipalities control and direct policing, communities being policed may in turn control how and by whom laws are enforced. And, those communities may do so much more directly with respect to their local or state police than they could through Congress or federal agencies.

6. Unwilling to accept the Framers' constitutional constraints on his power, the President last week fulfilled his promise to deploy militarized federal law enforcement personnel to "quickly solve," "for" local authorities, the supposed "problem" of protesters. As they were ordered to do, defendants descended upon Portland. Though sent in the guise of bringing order to Portland's streets, their arrival has made things much worse for Portlanders.

7. Although the federal government is entitled to protect federal property and personnel, and to enforce federal law in a lawful manner, defendants have far exceeded these constitutional limitations. Without first obtaining arrest warrants, they have undertaken to pluck Portlanders off the street, stuff them into vans, secrete them to unknown locations, and release them—merely for walking home or protesting peacefully, and away from federal property.

8. Defendant Department of Homeland Security has stated publicly that the Federal Government plans to expand its militarized presence throughout the United States. *See* https://www.npr.org/2020/07/17/892393079/dhs-official-on-reports-of-federal-officers-detaining-protesters-in-portland-ore (accessed July 20, 2020);[2] https://www.chicagotribune.com/news/criminal-justice/ct-chicago-police-dhs-deployment-20200720-dftu5ychwbcxtg4ltarh5qnwma-story.html (accessed July 20, 2020) (quoting the

[2] Also in that interview, the federal official refused to state whether there had been more than one abduction from the streets of Portland, using unmarked vehicles and unidentified federal officers.

Snell & Wilmer
One Centerpointe Drive Ste 170
Lake Oswego, Oregon 97035
503.624.6800

President: "I'm going to do something that I can tell you, because we're not going to leave New York and Chicago and Philadelphia, 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 . . . . We're going to have more federal law enforcement, that I can tell you . . . . In Portland, they've done a fantastic job. They've been there three days and they really have done a fantastic job in a very short period of time, no problem.")

9. The purpose of this lawsuit is to stop the federal government, its officials, and any others who have acted in concert with them, from depriving Portlanders of the right to be policed solely by those the Constitution permits, and who are accountable to Portlanders and Oregonians.

10. Another purpose of this lawsuit is to vindicate the First Amendment rights of a church whose religious practice includes activism and protest in the face of injustice.

JURISDICTION AND VENUE

11. This case arises under the laws of the United States—specifically, the Federal Constitution and 28 U.S.C. § 2201, the Declaratory Judgments Act. The Court therefore has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331.

12. Venue is proper under 28 U.S.C. § 1391(e)(1) because the defendants are agencies of the United States and officers of the United States acting in their official capacity, and (1) at least one plaintiff resides in this district; or (2) a substantial part of the events or omissions giving rise to the claims occurred in this district.

13. Alternatively, venue is proper in this district, pursuant to 28 U.S.C. § 1391(b)(2), because a substantial part of the events or omissions giving rise to the claims alleged herein occurred in this district.

14. Venue lies in the Portland Division of the District of Oregon, pursuant to LR 3-2, because a substantial part of the events or omissions giving rise to the claims occurred in

Snell & Wilmer
One Centerpointe Drive Ste 170
Lake Oswego, Oregon 97035
503.624.6800

Multnomah County, Oregon.

A. Western States Center

15. Plaintiff Western States Center, Inc. ("WSC") is an Oregon public benefit corporation headquartered in Portland. Its mission is to strengthen the organizing capacity of often marginalized communities; to provide training, leadership development and organizational capacity to social movements and leaders; to promote peaceful protest and reconciliation; and to defend democracy and democratic engagement. WSC teaches peace, de-escalation and reconciliation. During the protests in Portland throughout 2018 and 2019, WSC worked closely with the City of Portland to deescalate conflict between protesters and Portland Police Bureau. WSC sponsored one of the first intentional non-violent rallies in front of Portland City Hall in 2018.

16. Defendants' overreach into the affairs of local law enforcement has caused WSC to suffer injury. Beginning on May 26, 2020, when George Floyd was killed in Minneapolis, WSC devoted significant resources to deescalating conflict between the Portland Police Bureau and protesters, and was making progress in this regard. Then the Federal Government arrived and began to undertake purported law enforcement actions on the streets of Portland. Defendants harmed WSC by inserting itself into the policing of Portland, which disrupted WSC's efforts and frustrated its mission. This required WSC to divert resources away from other programs in order to address the chaos the defendants caused when they overstepped the constitutional bounds limiting their authority to engage in purported law enforcement activities. Unless defendants are enjoined, WSC will have to continue diverting resources to address defendants' unlawful acts.

17. Defendants' unlawful actions in Portland have necessitated additional expenditures, including but not limited to the following: (1) WSC spent funds from its communications retainer to issue statements and disseminate information to the public and to

Snell & Wilmer
One Centerpointe Drive Ste 170
Lake Oswego, Oregon 97035
503.624.6800

WSC's supporters; (2) the executive director has spent approximately 70-percent of his time, over the past four days, addressing the disruption defendants' police practices have caused; (3) the executive director involved two other staff members in his efforts; and (4) WSC has had to retain a second communications firm. Unless defendants are enjoined, WSC will have to continue diverting, and expending, resources to address defendants' continued unlawful acts.

B. First Unitarian Church of Portland

18. Plaintiff The First Unitarian Church of Portland, Oregon ("First Unitarian") is a domestic religious nonprofit corporation located in Portland. Founded in 1866, First Unitarian draws upon a long heritage of social activism. In fact, activism and social justice are central tenants of the church; its stated mission is, among other things, "to act for social justice." First Unitarian has organized a Social Justice Council and a Police Accountability Team.

19. First Unitarian also has assembled a protest witness group, the purpose of which is to equip congregants to observe and monitor protests and the police response to them. It is part of First Unitarian's social justice mission—a fundamental aspect of religious life and practice—to encourage protest against unjust laws and government actions. The congregation has been quite active in the George Floyd protests. Moreover, First Unitarian's witnessing activities are themselves a form of expression and assembly separately protected by the First Amendment. Because defendants began policing the streets of Portland, and throwing suspected protestors into unmarked vehicles even when peaceful, participation in the protest witness group has dropped and First Unitarian's social justice mission has been harmed. There was not a similar drop when Portland Police Bureau maintained their role as the police in Portland, and federal law enforcement limited itself to protecting federal facilities and personnel.

20. First Unitarian is hesitant to encourage its congregants to protest even though such protesting is peaceful, because defendants' unconstitutional targeting of peaceful protestors

Snell & Wilmer
One Centerpointe Drive Ste 170
Lake Oswego, Oregon 97035
503.624.6800

increases both the risk of bodily harm to congregants and the likelihood of the church's civil liability to congregants who are injured or traumatized in the course of abduction by federal law enforcement. Through their unconstitutional overreach into general policing, defendants have thwarted First Unitarian's pursuit of social activism as a tenet of faith.

21. Furthermore, the Tenth Amendment reserves to First Unitarian Portland, a Portland resident, the right to be policed only by Portland Police Bureau or state authorities when appropriate—and by federal authorities only to the extent authorized by valid federal law, federal regulation or the Federal Constitution.

C. Sara Eddie

22. Plaintiff Sara Eddie is an individual residing in Portland. She is a legal observer volunteer with the ACLU of Oregon. As a neutral legal observer, she attends and observes demonstrations and protests, and documents what she sees—including any police abuses or any violence or vandalism by protestors. Since approximately June 1, 2020, Ms. Eddie has acted as a legal observer at numerous protests in the aftermath of the killing of George Floyd. Ms. Eddie views objective, neutral legal observing as an important way to give back to the community and to protect civil rights. Defendants' overreaching police activities, including abductions of peaceful protestors off the streets of Portland, have caused Ms. Eddie to cease her service as a legal observer downtown, where the largest and most turbulent protests occur. She does not want to risk being "disappeared," especially because she cares for her 96-year-old grandfather and has two children.

23. Defendants' unconstitutional overreach has caused Ms. Eddie damage. Because of defendants' actions in connection with protests and the understandable concern they have caused her, she has refrained from exercising her First Amendment right to observe law enforcement and from undertaking her meaningful volunteer work. As the largest, most frequent, and most turbulent protests occur downtown, defendants' unconstitutional acts in downtown Portland have

Snell & Wilmer
One Centerpointe Drive Ste 170
Lake Oswego, Oregon 97035
503.624.6800

constrained her ability to contribute meaningfully as a legal observer. She will continue to refrain from legal observing until the Court enjoins defendants' unconstitutional conduct.

24. Furthermore, the Tenth Amendment reserves to Ms. Eddie, a Portland resident, the right to be policed only by Portland Police Bureau or state authorities when appropriate—and by federal authorities only to the extent authorized by valid federal law, federal regulation or the Federal Constitution.

D. Oregon State Representative Karin Power

25. Representative Karin A. Power is the duly-elected representative of Oregon's 41st House District, which encompasses Milwaukie, Oak Grove and parts of Southeast Portland. She is the Vice-Chair of the House Judiciary Committee, which oversees, creates and modifies state civil and criminal laws; oversees the judicial system; and sets the certification and licensure requirements for criminal justice public safety professionals, including Portland police officers. As a legislator, she makes and enacts laws, including on issues of law enforcement. Defendants' violations of the Tenth Amendment frustrated her right and ability to set state law enforcement policy applicable in Portland and throughout the state of Oregon. By infringing upon the sovereignty of the State of Oregon, defendants have diminished Representative Power's ability to establish law enforcement policy as her constituents direct.

26. Furthermore, in her capacity as a citizen, Representative Power has the right to be policed solely by state and local authorities—and by federal authorities only to the extent authorized by valid federal law, federal regulation or the Federal Constitution.

E. Oregon State Representative Janelle Bynum

27. Representative Janelle S. Bynum is the duly-elected representative of Oregon's 51st House District, which encompasses East Portland, Damascus, Gresham, Boring, North Clackamas and Happy Valley. She is the mother of four Black children, two of whom are male. She fears

Snell & Wilmer
One Centerpointe Drive Ste 170
Lake Oswego, Oregon 97035
503.624.6800

terribly for their safety while federal law enforcement are present, especially given that federal law enforcement is not subject to Oregon's anti-profiling legislation and other policing policies, and her family's freedom of movement through Portland now is severely restricted.

28. Representative Bynum also is the Chair of the House Judiciary Committee, which oversees, creates and modifies state civil and criminal laws; oversees the judicial system; and sets the certification and licensure requirements for criminal justice public safety professionals, including Portland police officers. As a legislator, she makes and enacts laws, including on issues of law enforcement. She also has introduced and shepherded significant law enforcement legislation. Defendants' violations of the Tenth Amendment frustrated her right and ability to set state law enforcement policy applicable in Portland and throughout the state of Oregon. By infringing upon the sovereignty of the State of Oregon, defendants have diminished Representative Power's ability to establish law enforcement policy as her constituents direct.

29. Furthermore, in her capacity as a citizen, Representative Bynum, and her children, have the right to be policed solely by state and local authorities—and by federal authorities only to the extent authorized by valid federal law, federal regulation or the Federal Constitution.

F. Defendants

30. Defendant United States Department of Homeland Security is a Cabinet-level department of the Federal Government. Its stated missions involve anti-terrorism, border security, immigration and customs. It was created in 2002, combining 22 different federal departments and agencies into a single Cabinet agency.

31. Defendant United States Customs and Border Protection is an agency within the Department of Homeland Security. Its stated mission is: "[t]o safeguard America's borders thereby protecting the public from dangerous people and materials while enhancing the Nation's global economic competitiveness by enabling legitimate trade and travel."

Snell & Wilmer
One Centerpointe Drive Ste 170
Lake Oswego, Oregon 97035
503.624.6800

32. Defendant Federal Protective Service is another agency within and under the control of the Department of Homeland Security. Its stated mission on its website is "To prevent, protect, respond to and recover from terrorism, criminal acts, and other hazards threatening the U.S. Government's critical infrastructure, services, and the people who provide or receive them."

33. Defendant United States Marshals Service is an agency within and under the control of the United States Department of Justice. According to a Fact Sheet on its website, "it is the enforcement arm of the federal courts, involved in virtually every federal law enforcement initiative."

GENERAL ALLEGATIONS

34. On May 26, 2020, a Minneapolis police officer killed George Floyd while three other police officers watched and did nothing.

35. That same day, protests erupted across the United States. Most of the protesters acted peacefully. Some of them did not.

A. Local Authorities, Accountable to Local People, Address the George Floyd Protests.

36. The protests have continued since May 26. The vast majority of the hundreds-of-thousands of protesters across the county have acted peacefully.

37. The situation in Portland has been no different. Tens of thousands of Portlanders have protested peacefully, while some have resorted to vandalism. Portland Police Bureau also has alleged that some of the protestors have committed acts of violence.

38. With respect to the vandalism and alleged violence: local law enforcement, aided by the Oregon State Police and other state agencies, have been handling the situation.

39. The law enforcement response has been (until now) an Oregon-based response accountable to Oregonians. Indeed, over the course of the protests of the past several weeks, the

Snell & Wilmer
One Centerpointe Drive Ste 170
Lake Oswego, Oregon 97035
503.624.6800

Portland Police Bureau and state agencies have altered their approaches in response to local criticism and to the concerns of the citizens of Portland and Oregon.

40. That is how democracy works in our Federal Republic. The Tenth Amendment reserves to the States and their people the right to self-govern absent the legitimate exercise of federal power:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

41. This foundational principle—that the states and the Federal Government share power—is called federalism.

42. Justice Kennedy, writing for a unanimous Supreme Court and affirming that individuals may invoke the Tenth Amendment to challenge federal laws and actions, described the purpose of federalism:

> "The federal system rests on what might at first seem a counterintuitive insight, that freedom is enhanced by the creation of two governments, not one. The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived . . . . [F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.
>
> Some of these liberties are of a political character. The federal structure allows local policies more sensitive to the diverse needs of a heterogeneous society, permits innovation and experimentation, enables greater citizen involvement in democratic processes, and makes government more responsive by putting the States in competition for a mobile citizenry. Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power.
>
> [. . . .]

Snell & Wilmer
One Centerpointe Drive Ste 170
Lake Oswego, Oregon 97035
503.624.6800

> By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake."

Bond v. United States, 564 U.S. 211, 220-22 (2011) (quotations and citations omitted)

B. The Federal Government Tries to Arrogate to Itself the Power to Police Cities.

43. Without Congressional authorization, and without invoking any specific power granted to him, the President of the United States decided to use the power of the federal government to quell protests occurring throughout the country, including in Portland.

44. On June 1, 2020, the President clearly warned of the militarizing of the streets of Portland, Oregon that soon followed:

> "Mayors and governors must establish an overwhelming law enforcement presence until the violence has been quelled . . . . If a city or 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."

https://www.whitehouse.gov/briefings-statements/statement-by-the-president-39/ (accessed 07/18/2020).

45. At a June 21, 2020 rally in Tulsa, Oklahoma, the President complained:

> "Two days ago, leftist radicals in Portland, Oregon ripped down a statue of George Washington and wrapped it in an American flag and set the American flag on fire."

46. At his July 4, 2020 rally at Mt. Rushmore, the President announced that he was "deploying federal law enforcement to protect our monuments, arrest the rioters, and prosecute offenders to the fullest extent of the law." https://www.whitehouse.gov/briefings-statements/remarks-president-trump-south-dakotas-2020-mount-rushmore-fireworks-celebration-keystone-south-dakota/ (accessed 07/18/2020). The context of that statement makes clear that he

Snell & Wilmer
One Centerpointe Drive Ste 170
Lake Oswego, Oregon 97035
503.624.6800

was referring generally to statues and symbols "of our national heritage" more broadly, and not to federal property.

47. The President's officials have indulged the President's whim. Based on media reports, a sworn declaration filed in the Oregon Attorney General's lawsuit also pending before this Court, and comments made by federal officials, plaintiffs are informed and believe, and on the basis of such information and belief allege, that federal law enforcement agencies and personnel, including but not limited to the defendants in this action, began abducting suspected protesters off of Portland streets—even though such protestors were acting peacefully.

48. The abducting officials did not identify themselves or their agencies, and obscured identifying markers such as badges or name tags.

49. These abductions occurred outside the jurisdiction of federal law enforcement.

50. Those abducted were not attacking federal property or personnel.

51. Those abducted were not on federal property at the time they were abducted. In fact, those abducted reportedly were walking home, on city streets, after having peacefully protested.

52. To plaintiffs' knowledge, defendants have not obtained arrest warrants prior to abducting Portlanders.

53. Plaintiffs do not challenge defendants' authority to guard lawfully federal property and personnel. Rather, plaintiffs ask the Court to honor and restore the balance of power the Framers put in place through the Tenth Amendment.

54. Thus, while the federal government may protect its property and personnel, the federal government is constrained by the Constitution from policing the City of Portland broadly speaking, and there is no positive delegation of authority in any law that makes the federal government's recent forays into general policing in Portland either legal or constitutional. The

Snell & Wilmer
One Centerpointe Drive Ste 170
Lake Oswego, Oregon 97035
503.624.6800

Court should enjoin the defendants from conducting law enforcement activities unless defendants lawfully are enforcing a validly-enacted federal law, or unless they are acting within the immediate vicinity of federal facilities in order to protect those facilities. If defendants wish to seize someone, then they must obtain a warrant, have probable cause, and otherwise comply with the Fourth Amendment.

FIRST CLAIM FOR RELIEF

(Violation of Tenth Amendment)

(By all plaintiffs against all defendants)

55. Plaintiffs reallege, and incorporate by reference, the allegations of the foregoing paragraphs.

56. By conducting traditional law enforcement activities on the sidewalks and streets of Portland—as opposed to within the vicinity, or on the premises, of government property—defendants have encroached upon powers explicitly reserved to the State of Oregon, and to Oregon's citizens, pursuant to the Tenth Amendment.

57. Defendants conducted such law enforcement activities under color of federal law.

58. Each plaintiff has standing to bring this claim because each has suffered cognizable injuries that are redressable through injunctive relief, and the Tenth Amendment confers a substantive, personal right. *See, e.g. Bond v. United States*, 564 U.S. 211, 220-22 (2011).

59. There is no adequate remedy under state law.

SECOND CLAIM FOR RELIEF

(Violation of First Amendment Right of Free Exercise)

(By First Unitarian Portland against all defendants)

60. First Unitarian realleges, and incorporates by reference, the allegations of paragraphs 1 to 54.

Snell & Wilmer
One Centerpointe Drive Ste 170
Lake Oswego, Oregon 97035
503.624.6800

61. Defendants have deprived Portlanders the right to protest peacefully, and to transit peacefully to and from protest locations. Defendant have done so through, among other things, unwarranted seizures and detentions, including stuffing people into unmarked vehicles, performed under color of federal law.

62. Defendants have not indicated that they will stop this practice.

63. There is no adequate remedy under state law.

64. As alleged previously in this Complaint, protest is a key aspect of First Unitarian's faith, mission and religious practice.

65. By abducting people peacefully protesting, or transiting to or from protests, in Portland, defendants have chilled, and will continue to chill, First Unitarian's pursuit of its religious mission and faith, and the exercise of that faith by First Unitarian's congregants.

THIRD CLAIM FOR RELIEF

(28 U.S.C. § 2201—Declaratory Judgment)

(By all plaintiffs against all defendants)

66. Plaintiffs reallege, and incorporate by reference, the allegations of the preceding paragraphs.

67. There is an actual controversy among the parties, inasmuch as one or more of the defendants has engaged in actions violating plaintiffs' civil rights and none of the defendants has either acknowledged such actions or agreed to stop them. In fact, defendants have stated that they intend to continue such actions.

68. Plaintiffs therefore are entitled to a declaration that defendants' actions are, or have been, unconstitutional, and to an injunction against committing the acts alleged herein in the future.

/ / /

Snell & Wilmer
One Centerpointe Drive Ste 170
Lake Oswego, Oregon 97035
503.624.6800

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for relief as follows:

A. A judgment declaring that defendants are violating the Tenth Amendment, and Free Exercise Clause of the First Amendment, through the conduct alleged in this Complaint;

B. An injunction permanently restraining defendants, and any persons working in concert with them, from (1) engaging in law enforcement activities other than in the immediate defense of federal personnel or property, and only to the extent necessary to remove an imminent threat or arrest someone observed violating federal law, and (2) seizing or arresting individuals within the jurisdiction of this Court without either probable cause to believe that a federal crime has been committed, or a warrant, consistent with the requirements of the Federal Constitution;

C. Attorney fees and expenses pursuant to 28 U.S.C. § 2412(b); and

D. Such other relief as this Court deems just and proper.

Dated: July 21, 2020

SNELL & WILMER L.L.P.

By /s/ Clifford S. Davidson
Clifford S. Davidson, OSB No. 125378
Kelly H. Dove (*pro hac vice* to be filed)
Andrew M. Jacobs (*pro hac vice* to be filed)

Attorneys for Plaintiffs

Snell & Wilmer
One Centerpointe Drive Ste 170
Lake Oswego, Oregon 97035
503.624.6800

Rian Peck (they/them), OSB No. 144012
RPeck@perkinscoie.com
Thomas R. Johnson (he/him), OSB No. 010645
TRJohnson@perkinscoie.com
Misha Isaak (he/him), OSB No. 086430
MIsaak@perkinscoie.com
Nathan Morales (he/him), OSB No. 145763
NMorales@perkinscoie.com
PERKINS COIE LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Telephone: 503.727.2000
Facsimile: 503.727.2222

Shane Grannum (he/him), *pro hac vice* pending
SGrannum@perkinscoie.com
Sarah Mahmood (she/her), *pro hac vice* pending
SMahmood@perkinscoie.com
PERKINS COIE LLP
700 13th Street, NW, Suite 800
Washington, D.C. 20005-3960
Telephone: 202.654.6200
Facsimile: 202.654.6211

Zachary Watterson (he/him), *pro hac vice* pending
ZWatterson@perkinscoie.com
PERKINS COIE LLP
3150 Porter Drive
Palo Alto, CA 94304-1212
Telephone: 650.838.4300
Facsimile: 650.838.4350

Kelly K. Simon (she/her), OSB No. 154213
ksimon@aclu-or.org
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF OREGON
P.O. Box 40585
Portland, OR 97240
Telephone: 503.227.6928

Attorneys for Plaintiffs

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; MEMORANDUM OF LAW IN SUPPORT THEREOF

Pursuant to Fed. R. Civ. P. 65

ORAL ARGUMENT REQUESTED

EXPEDITED HEARING REQUESTED

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

TABLE OF CONTENTS

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

TABLE OF CONTENTS
(continued)

Page

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

TABLE OF AUTHORITIES

Page

CASES

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

TABLE OF AUTHORITIES
(continued)

Page

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

TABLE OF AUTHORITIES
(continued)

Page

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

OTHER AUTHORITIES

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

TABLE OF AUTHORITIES
(continued)

Page

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

MOTION

Plaintiffs Christopher Wise, Michael Martinez, Christopher Durkee, and Savannah Guest (collectively, "Plaintiffs" or "Protest Medics") hereby move for a Temporary Restraining Order ("TRO"), 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, 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 behaving towards 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. Defendants and their agents and employees, including but not limited to the Portland Police Bureau and all persons acting under the direction of or in

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

concert with the Portland Police Bureau (the "Portland Police"); and the Department of Homeland Security and all persons acting under the direction of or in concert with the Department of Homeland Security, and the U.S. Marshals Service and all persons acting under the direction of or in concert with the U.S. Marshals Service (collectively, the "Federal Officers"),[1] are enjoined from arresting, threatening to arrest, or using physical force (as explained below) directed against any person who they know or reasonably should know is a Protest Medic (as explained above), unless authorized under Or. Rev. Stat. § 133.235 or Or. Rev. Stat. § 133.245.

3. The Police are further enjoined from using physical force directly or indirectly targeted at a Protest Medic (as explained 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 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 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, when a medic is providing medical care to an individual. Further, if a Protest Medic is providing medical care to an individual, the 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 "reasonable suspicion" or "probable

---

[1] Plaintiffs refer to all Defendants collectively as "the Police."

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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

5. The 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 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 Police also are lawfully seizing the Protest Medic to whom the materials belong.

6. The 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 an individual, unless the Police also are lawfully seizing that person consistent with this Order.

7. For purposes of this Order, the Police shall not be liable for harm from any crowd-control devices, if a Protest Medic was incidentally exposed to 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

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

details, Plaintiffs have established that (i) Defendants' conduct threatens irreparable harm to Plaintiffs; (ii) Plaintiffs are likely to succeed on the merits of their claims; (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 City of Portland, the Portland Police Bureau, and their agents and employees (collectively, the "Portland Police"), the Department of Homeland Security, the U.S. Marshals Service, and their agents and employees (collectively, the "Federal Officers"), from exerting threats and violence against protest medics who are providing care and comfort to the hundreds, and many times thousands, of people protesting nightly in downtown Portland over the murder of George Floyd and against police violence generally.

Plaintiffs are volunteer protest medics who, in the face of tear gas, rubber bullets, and other 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 and the Federal Officers have employed excessive force, targeting protest medics, preventing them from administering medical care to protesters, and seizing Plaintiffs' supplies—in violation of well-established First and Fourth Amendment rights. Defendants' conduct is causing Plaintiffs and the public irreparable harm. As demonstrated in the attached

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

declarations, the police are using excessive force to retaliate against Plaintiffs and numerous other protest medics for providing medical aid to protesters injured by police and federal officers.

Targeting individuals for engaging in protected expressive activities violates the First Amendment, and the Defendants' unlawful conduct should be enjoined immediately. This is because Defendants' 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 medics their constitutional rights to support those demonstrating 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 police violence.

II. FACTS

A. Protest Medic Groups Formed to Create a Safer Environment for Protesters Seeking to Peacefully Protest

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 50 days and show no sign of slowing down. Declaration of Christopher Wise in Support of Plaintiffs' Motion for Temporary Restraining Order ("Wise Decl.") ¶¶ 3-4.

Protests in Portland have been largely peaceful. *See* Declaration of Michael Martinez in Support of Plaintiffs' Motion for Temporary Restraining Order

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

("Martinez Decl.") ¶ 7-8, 14-17; Declaration of Dr. Catherine Morgans in Support of Plaintiffs' Motion for Temporary Restraining Order ("Dr. Morgans Decl.") ¶¶ 3-7. Yet, on many nights, Defendants have responded with violent force. They have shoved protesters to the ground, beaten them with truncheons, 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. *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 into crowds ranging from dozens to hundreds of people. Declaration of Christopher Durkee in Support of Plaintiffs' Motion for Temporary Restraining Order ("Durkee Decl.") ¶ 17; Martinez Decl. ¶ 15.

As the protests in Portland have continued, groups of protesters, including Plaintiffs, organized in teams and groups to provide medical aid to the protesters as they exercised their free expression rights. *See* Declaration of Jeff Paul in Support of Plaintiffs' Motion for Temporary Restraining Order ("Paul Decl.") ¶11; *see also* Dr. Morgans Decl. ¶ 17. 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 ("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 went downtown to have their own voices heard through their service to others. Martinez Decl. ¶ 22; Durkee Decl. ¶¶ 9-11; Guest Decl. ¶¶9-10.

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

B. This Court Intervenes and Issues a Temporary Restraining Order, Enjoining the Portland Police From Using Excessive Force Against Protesters

Because of the excessive use of violent force by the Portland Police, 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.

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

[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.

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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 Intervenes Again and Issues a Temporary Restraining Order, Enjoining the 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 LLC v. City of Portland*, No. 3:20-cv-1035-SI (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 protestors, 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.* Therefore, the Court enjoined the defendants' direct attacks on journalists and legal observers. *Id.*

E. Plaintiffs Offer Aid and Are Targeted by 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.

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

Plaintiffs express that "protesters have a right to protest safely and without fear of police violence." Martinez Decl. ¶ 19. 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.

As protest medics, Plaintiffs 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. *See* Paul Decl. ¶¶ 6, 9; *see also* Hubbard Decl. ¶ 7; Martinez Decl. ¶¶ 20, 23-24.

To ensure that Defendants and protesters recognize Plaintiffs as protest medics, they wear clothing designed to communicate that they are there to render aid to injured protesters. For example, Plaintiffs 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. 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, Plaintiffs 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).

Though Plaintiffs engage in nonviolent behavior and pose no threat to the public, officers, or city or federal property, each Plaintiff has been repeatedly intimidated, harassed, and assaulted by Defendants. While attempting to render

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

medical aid to those in need, Plaintiffs have been tear gassed by the Portland Police and the Federal Officers—including having tear gas canisters shot or thrown in their direction. Wise Decl. ¶¶ 20-30; Guest Decl. ¶¶ 17-21, 29; Durkee Decl. ¶¶ 22-26; Martinez Decl. ¶ 32. *See also* Hubbard Decl. ¶ 8. Defendants also have shot Plaintiffs with rubber bullets, while Plaintiffs fulfilled their duties as volunteer protest medics. 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. In addition, Wise, after verbally identifying himself as a medic, was aimed at and shot with a tear gas canister that struck him in the head. *Id.* at ¶ 29.

- While standing off to the side of a group of protesters, Peyton Dully Hubbard was targeted by at least three agents after the officers gestured to one another to aim their laser sights at her and fired at least six rubber bullets at her, injuring her. Hubbard Decl. ¶ 10. Hubbard, even while draped in contrasting high-gloss, red duct tape crosses has been shot at so many times that a fellow protester provided her with a makeshift shield. *Id.* at ¶¶ 5, 11. Hubbard was also nearly struck by a Portland Police car when she attempted to ask the police for help after a protester had been struck by a car and was severely injured. *Id.* at ¶9.

- 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. ¶¶ 33-40.

- Multiple Federal Officers ganged up on and (while being videotaped) assaulted Plaintiffs Kit Durkee and Savannah Guest. Video here: https://twitter.com/stoggrd/status/1282432033533210625. As is apparent from the video, during that incident, one Federal Officer stabbed Durkee's chest with a riot baton while another shoved Durkee

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

> to the ground while she was retreating. Guest Decl. ¶¶ 17-21; Durkee Decl. ¶¶ 22-26. A Federal Officer also threatened to hit Guest after she fell down and was attempting to pick up her medical supplies. *Id.* Another Federal Officer struck Guest in the hip and knee with a riot baton. Guest Decl. ¶ 20. More recently, Federal Officers targeted Savannah Guest and Kit Durkee with tear gas cannisters and pepper balls as they helped wounded protesters move off the streets and out of the way of advancing Officers. Durkee Decl. ¶ 12; *see* Guest Decl. ¶ 23 (describing feelings of despondency and mistrust after being targeted).

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.

In addition to specifically targeting Plaintiffs as protest medics, the Portland Police and Federal Officers routinely use indiscriminate force against entire crowds of people—which includes protest medics, but also children, babies, journalists, legal observers, the nearby houseless population, people in nearby homes and places of work, bystanders, and moms and dads coming out to have their voices heard. And this use of force has had a clear chilling effect: Despite their desire to continue serving as protest medics each day, Plaintiffs have 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.

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).

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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, federal and 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).

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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 exercised 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 downtown 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

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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. 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*,

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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).

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 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

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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").

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[ed] and experienc[ed]" in Portland. Martinez Decl. ¶ 19. 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." *Id.* They know that their "medical training [can] assist both the protesters and the larger movement" for Black lives. Durkee Decl. ¶ 7. Plaintiffs have witnessed federal and local law enforcement officials unleash "tear gas, pepper spray, and other police violence" on protesters and it is their understanding that these officials sometimes are "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-

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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).

Plaintiffs' message at the protests is one that is particularized and specific to protest medics, as a discrete category of individuals attending the protests. 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. The OHSU medics' station Martinez attends is stocked with medical supplies like gauze and bandages and is clearly marked with an OHSU banner and first aid signs. Martinez Decl. ¶ 22. Wise, Durkee, and Guest 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. Plaintiffs, in their role as protest medics, have been an unmistakable presence at protests each night, verbally identifying themselves as

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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.

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, Defendants' repeated behavior almost certainly would chill a person 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);

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

- 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)).

Defendants 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, Defendants have deployed tear gas, pepper spray, and other chemical irritants on Plaintiffs at close range, using tactics like "kettling" to "tear gas protesters from all angles" and "cut[] off any path for escape." Martinez Decl. ¶ 12; Wise Decl. ¶ 28; Dr. Morgans Decl. ¶¶ 3-4. These irritants are deeply invasive and painful, causing the eyes, nose, and (sometimes) even the skin to burn and swell. *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. Protest

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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; 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.

Defendants have also deployed munitions—such as rubber bullets and flash bangs—directly against Plaintiffs, sometimes while they were rendering care and treatment to protesters and bystanders. Guest Decl. ¶¶ 13-14; Durkee Decl. ¶ 15; Martinez Decl. ¶¶ 32; Wise Decl. ¶¶ 22. Especially when deployed in close contact, these munitions bruise and even puncture the skin, fracture bones, and cause blindness. Plaintiffs have been attacked, beaten, clubbed, and harassed by federal and local law enforcement officials. *See* Wise Decl. ¶¶ 22, 24-26, 28-30; Durkee Decl. ¶¶ 18, 19-28, Guest Decl. ¶¶ 13, 15-22. 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"); Guest Decl. ¶¶ 29-31. Those injuries have forced Plaintiffs to stay home and heal, instead of continuing to serve as protest medics (as they desire to do). Wise Decl. ¶ 27; Durkee Decl. ¶ 32, 34; Guest Decl. ¶ 28. 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 Plaintiffs. *See* Durkee Decl. ¶ 19 ("The indiscriminate brutality of the police and federal agents—especially the shooting of [protester]

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

Donavan 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 protected activities were a substantial and motivating factor in Defendants' 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, Defendants nonetheless specifically targeted Plaintiffs for violence, the Court may infer that Defendants did so with an intent to prevent Plaintiffs from expressing themselves as protest medics. *See Index Newspapers*, No. 3:20-cv-1035-SI, at 12, ECF 84 (D. Or. July 23, 2020) (holding that the plaintiffs established a sufficient nexus and showing to grant a restraining

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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, who wear clothing with markings clearly identifying them as providing medical aid, cite numerous instances in which federal and local law enforcement officials indiscriminately, and at close range, unleashed chemical irritants, deployed munitions, and engaged in physical violence specifically against them. *See* Wise Decl. ¶¶ 22, 24-26, 28-30; Durkee Decl. ¶¶ 10, 19-28; Guest Decl. ¶¶ 13, 15-22; *see also* Hubbard Decl. ¶ 8 (officer dropping tear gas canister and flash bang grenade into small enclosed space). From that, it is reasonable to infer that the protests, and their overall message of opposing police brutality, are 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. 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, it is reasonable to infer that Defendants sought, and seek, to suppress Plaintiffs' particularized form of speech. Defendants' use of indiscriminate weapons against Plaintiffs directly, and their acts to target Plaintiffs as they assist others, establishes a high likelihood that Plaintiffs' protected activities were a substantial motivating factor in Defendants' conduct. Therefore, the Court should grant Plaintiffs' motion for a TRO.

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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 clearly establish a likelihood of success on the merits that federal and city law enforcement officers violated the Fourth Amendment by using excessive force against the Plaintiffs and by unlawfully seizing their medical equipment.

1. Defendants used excessive force against Plaintiffs.

Plaintiffs have established a high likelihood that Defendants used excessive force against them, in violation of the Fourth Amendment. "A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer by means of physical force or show of authority terminates or restrains his 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). 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 the 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,

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

Defendants' seizure through use of force against Plaintiffs was not objectively reasonable.

a. Plaintiffs were seized under the Fourth Amendment.

Defendants "seized" Plaintiffs under the Fourth Amendment by shooting them with tear gas, rubber bullets, and stun grenades, and beating them with batons—that is, 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." *See Nelson*, 685 F.3d at 876 (explaining that a plaintiff was seized under the Fourth Amendment where he had been hit by a projectile intentionally fired towards a group of which he was a member, although plaintiff had not been the specific object of the force). Here, not only did Defendants terminate 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; Durkee Decl. ¶¶ 15, 19-28; Guest Decl. ¶¶ 13, 15-22; Hubbard Decl. ¶¶ 7-8, 10, but Defendants also targeted Plaintiffs both as individuals and as members of a crowd. *See, e.g.,* Guest Decl. ¶¶ 11, 13-14; Durkee Decl. ¶¶ 14-15. Since the officers intentionally targeted and used force against Plaintiffs that inhibited Plaintiffs' movement, Plaintiffs were seized.

b. Law enforcement officers used excessive force against Plaintiffs.

Defendants violated Plaintiffs' Fourth Amendment rights by affecting 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

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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).

Here, Defendants injured Plaintiffs with chemical irritants and munitions, which caused Plaintiffs immediate and uncontrollable pain. As Plaintiffs cared for wounded protesters, officers temporarily blinded Plaintiffs with tear gas and bear mace and shot rubber bullets that cut through Plaintiffs' skin. Wise Decl. ¶¶ 22-30; Guest Decl. ¶¶ 11, 13, 17, 20; Durkee Decl. ¶¶ 13, 15, 22, 25, 29. When Plaintiffs asked officers if they could provide medical care, officers responded by throwing Plaintiffs to the ground and beating them with batons. Guest Decl. ¶¶ 15, 17-22. As a result of their injuries, Plaintiff Wise suffered a sprained shoulder and was forced to take medical leave from work. Wise Decl. ¶ 26-27. Defendants' actions and the resulting injuries clearly subjected Plaintiffs to immediate and uncontrollable pain. Thus, consistent with *Nelson*, Defendants repeatedly have used excessive force on Plaintiffs, in violation of the Fourth Amendment.

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

Plaintiffs have a high likelihood of prevailing on their Fourth Amendment claims because Defendants had no valid justification for taking the extreme actions they did. 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

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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). Consideration of each of the three factors makes clear that no use of force was warranted against Plaintiffs.

First, the existence and, thus, severity of any crimes 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," as the relevant inquiry is whether the individual who was targeted had engaged in criminal activity. *See id.* at 883 (finding that although there were other individuals engaging in violent behavior, because plaintiff himself was not among them, the application of force to plaintiff could not be "justified by the government's interest in stopping any and all disorderly behavior"). Additionally, even if others in the immediate areas are engaging in criminal activity, if the *actual plaintiffs* are not, then a heightened use of force 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 did not engage in any criminal activity. Instead, Plaintiffs 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. Therefore, under the first factor, Defendants' use of force was not justified.

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

As to the second factor, Plaintiffs did not pose any immediate threat to the safety of the officers. 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 (holding that "the general disorder of the complex cannot be used to legitimize the use of pepper-ball projectiles against non-threatening individuals"). Here, as just explained, Plaintiffs did not pose a threat to anyone's safety, and were subjected to violence even while retreating. 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). 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). In such circumstances, the use of force, including the use of pepper spray, is unreasonable. *Nelson*, 685 F.3d at 882 (internal citations omitted).

Here, Plaintiffs were not engaging in any criminal behavior when they were targeted by the officers. Rather, they were engaging in activity that is protected under the First Amendment: peaceably exercising their right to free speech. Wise

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

Decl. ¶¶ 3-4, 6, Durkee Decl. ¶ 10; Guest ¶ 8. Further, instead of posing a threat to anyone's safety, Plaintiffs were protecting protesters by providing medical care. *E.g.*, Durkee Decl. ¶¶ 16-17. In fact, Plaintiffs deliberately wore clothes with medical symbols to communicate to law enforcement officers that Plaintiffs were providing medical assistance. Wise Decl. ¶ 9; Hubbard Decl. ¶ 5; Guest Decl. ¶ 7; Durkee Decl. ¶9-10. Yet officers beat Plaintiffs with batons after Plaintiffs asked to provide a wounded man with medical care. Guest Decl. ¶¶ 18-20; Durkee Decl. ¶¶ 23-26. 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, 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. Martinez Decl. ¶ 39; Guest Decl. ¶ 20; Durkee Decl. ¶ 25.

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 Plaintiffs, let alone the chemical irritants, bullets, and physical force that officers unleashed against them. Plaintiffs have therefore clearly established a likelihood of success on the merits that law enforcement officers violated the Fourth Amendment by using excessive force against Plaintiffs.

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

Defendants 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

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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. *Ill. 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. To provide protesters with medical assistance, Plaintiffs 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. Plaintiffs 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 Plaintiffs their table, tent, banner, and medical supplies and did not return the items to Plaintiffs. Martinez Decl. ¶ 41; Dr. Morgans Decl. ¶¶ 14-16. Plaintiffs managed to recover their table and some medical supplies from the Portland Police Bureau'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, Plaintiffs' possessory interest in the property is sufficient for them to have suffered an injury when the

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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, Plaintiffs 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.

Defendants continue to use excessive force against Plaintiffs. Wise Decl. ¶ 29; Guest Decl. ¶ 29. Nearly every day that Plaintiffs have participated in the protests, Defendants have beat them, shot them with bullets, or sprayed them with chemical irritants. As a result, Plaintiffs reasonably fear that Defendants 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

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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).

Defendants' ongoing violation of the Fourth Amendment has chilled Plaintiffs' efforts at providing medical aid. Martinez Decl. ¶ 43 ("I have dramatically decreased my attendance [at the protests]. . . . as I know from first-hand experience, the police do not need a justifiable reason to arrest any medic—or shoot any medic in the head"); 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 Donavan La Bella . . . . gave us pause, as the stakes of attending the Portland protests became clearer."). As a result, although Plaintiffs would like to continue attending the protests daily, Defendants' actions have severely constrained Plaintiffs' efforts. And every day that Plaintiffs miss a protest, more protesters suffer from Defendants' abuses, without the assistance of a protest medic.

As discussed below, Defendants' 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, Defendants' targeting of protest medics also

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

chills the nightly protests themselves, by creating an unsafe environment that potential protesters must think twice about before joining.

C. The Court can and should grant the relief sought by Plaintiffs.

1. This case does not present any sovereign immunity issues.

The Court has jurisdiction over Plaintiffs' claims for injunctive relief against the federal Defendants because the federal government, through the Administrative Procedure Act ("APA"), has waived its defense of sovereign immunity against these claims:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702. The APA is dispositive. With the enactment of 5 U.S.C. § 702, Congress sought to "eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity." *E.V. v. Robinson*, 906 F.3d 1082, 1092 (9th Cir. 2018) (quoting H.R. Rep. No. 94-1656, at 9 (1976)). Sovereign immunity does not apply in this instance, and even if it did, it has been statutorily waived. The United States Department of Homeland Security, the United States Customs and Border Protection, the United States Marshals Service, and the Federal Protective Service are all federal agencies. Their agents wreaking havoc on the city streets of Portland, Oregon, are all officers or employees of these federal agencies. Plaintiffs challenge Defendants' unlawful actions made in their official capacities. Pursuant to the APA, sovereign immunity can serve as no bar. Thus, the Court has jurisdiction over Plaintiffs' claims for injunctive relief.

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

2. The Court has the inherent power to grant equitable relief.

The Court also has the inherent power to grant the limited injunctive relief sought in this Motion. Federal courts may exercise the traditional powers of equity in cases within their jurisdiction to enjoin violations of constitutional rights by government officials. In *Ex parte Young*, the Supreme Court first articulated the principle that state government officials may be sued for acting unconstitutionally, even if an ensuing injunction would bind the state. 209 U.S. 123 (1908). In *Philadelphia Co. v. Stimson*, the Supreme Court applied that principle to suits against federal officials. 223 U.S. 605, 620 (1912) (finding that "in case of injury threatened by his illegal action, the [federal] officer cannot claim immunity from injunction process."). Subsequent cases have affirmed the rule that federal officials can be sued for their unbecoming conduct. *See Dalton v. Specter*, 511 U.S. 462, 472 (1994) (holding that "sovereign immunity would not shield an executive officer from suit if the officer acted either 'unconstitutionally or beyond his statutory powers.'") (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949)). This principle is the "constitutional exception to the doctrine of sovereign immunity." *Malone v. Bowdoin*, 369 U.S. 643, 647 (1962). Plaintiffs here raise constitutional challenges to their harsh treatment at the hands of the Portland Police and Federal Officers. Sovereign immunity has been waived by the APA and it is within this Court's inherent power to grant the relief sought by Plaintiffs.

3. Plaintiffs have clear causes of action under the First and Fourth Amendments.

In addition, Plaintiffs clearly have a cause of action to bring such a claim. When equitable relief is sought to ameliorate unconstitutional behavior, courts will reach the merits without even "discussing whether a cause of action existed to challenge the alleged constitutional violation." *Sierra Club v. Trump*, 929 F.3d 670,

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

694-95 (9th Cir. 2019) (citing *Trump v. Hawaii*, 138 S. Ct. 2392, 2416-17 (2018)) (collecting cases); *Sierra Club v. Trump*, 2020 WL 3478900, at *11-12 (9th Cir. June 26, 2020) (finding plaintiffs "ha[ve] a cause of action to enjoin the [federal government's] unconstitutional actions" under the courts' "historic [power] of equitable review."). If this Court cannot grant Plaintiffs relief under the APA, it can and should through its traditional power to grant relief.

Beyond the federal government's waiver of sovereign immunity in 5 U.S.C § 702 and the Court's power to grant equitable relief, the First and Fourth Amendments offer Plaintiffs an independent source of jurisdiction. 28 U.S.C. § 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

In this Motion, Plaintiffs request equitable relief to enjoin Defendants from arresting, threatening, or using physical force against protest medics in Portland. Plaintiffs simply seek relief to stop the continued infringement of their First and Fourth Amendment rights. The First and Fourth Amendments provide Plaintiffs with an implied cause of action and 29 U.S.C. § 1331 vests this Court with jurisdiction. In *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, the Supreme Court first upheld the proposition that the Constitution itself provides an implied cause of action for claims against federal officials. 403 U.S. 388, 389 (1999). In 2017, the Supreme Court held that federal courts should not extend a *Bivens* remedy into new contexts if there exist any "special factors counseling hesitation." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017). However, there is no corresponding limitation on the Constitution as a cause of action to seek injunctive or other equitable relief, which is what Plaintiffs seek here. *Id.* at 1862 (declining to

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

extend *Bivens* to a condition of confinement claim, but noting that "Respondents...challenge large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners . . . . [and] [t]o address those kinds of decisions, detainees may seek injunctive relief."). That is because there is a "presumed availability of federal equitable relief against threatened invasions of constitutional interests." *Am. Fed'n of Gov't Emps. Local 1 v. Stone*, 50 F.3d 1027 (9th Cir. 2007) (citations and internal quotation marks omitted) (quoting *Hubbard v. U.S. Envtl. Prot. Agency.*, 809 F.2d 1, 11 (D.C. Cir. 1986)) (finding that plaintiffs-appellants were entitled to seek relief based on the alleged violation of their First Amendment rights). The federal courts have long had the power to grant equitable relief for constitutional violations. *See Osborn v. United States Bank*, 22 U.S. 738 (1824); *see also Ex parte Young*, 209 U.S. at 156. And the Court should exercise that power here.

In this Motion, Plaintiffs seek only injunctive relief. Accordingly, they can bring their claims under the First and Fourth Amendments. The court has jurisdiction to hear the claims under 28 U.S.C. § 1331.

Plaintiffs seek to enjoin state and federal agents from violating their First and Fourth Amendment rights. They have multiple equitable causes of action to seek relief. There is a statutory waiver of any claim of sovereign immunity that may be brought by the federal defendants. Therefore, there is no jurisdictional bar or procedural bar to granting Plaintiffs the equitable relief they seek here.

D. 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. "Anytime there is a serious threat to First Amendment rights, there is a likelihood of

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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 and the Federal Officers are free to target medics with munitions and unlawfully seize them, Plaintiffs' exercise of their First Amendment rights will "surely [be] chilled." *Black Lives Matter-Seattle*, 2020 WL 3128299, at *3. Additionally, each time Defendants engage in that same behavior, they deprive Plaintiffs of their Fourth Amendment rights, which also constitutes continuing irreparable harm.

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. Not only have Plaintiffs shown an overwhelming likelihood of success on their claims, they also have demonstrated immediate and threatened irreparable harms—including severe physical and emotional injuries. Protests continue. More protest medics want to attend as the Defendants act more and more violently. Protest medics want to ensure that when the inevitable happens—protesters injured by police violence—those suffering may be cared for even if it means they too will be harmed.

Plaintiffs have already been injured. All 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 employed over the past fifty or

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

more days. Speech has been chilled. Medics have been directly targeted and injured by excessive force. Property has been unlawfully seized. For all the above reasons, the irreparable injury requirement is met.

E. The public's interest and balance of equities weigh strongly in favor of plaintiffs.

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). In addition, "it is always in the public interest to prevent the violation of a party's constitutional rights," which includes both the First and Fourth Amendments. *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotations omitted) (granting an injunction under the Fourth Amendment). And as Chief Judge Hernandez stated, "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.

Here, Plaintiffs are volunteer medics providing comfort and care for protesters engaged in demonstrations of worldwide concern. In so doing, they are exercising their constitutional right to free expression. But in an attempt to stifle that expression, Defendants have violated the constitutional rights of peaceful protest medics, who have done nothing but ensure and promote public safety. In so doing, Defendants have attempted to quash Plaintiffs' message: that demonstrators can feel safe working to counter the otherwise chilling impact of Defendants' violence. But Plaintiffs will not go quietly. Where so many protesters have been left

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

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' 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 go to downtown Portland to participate in protests safely and with the knowledge that medics are present 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, Defendants make the entire protest less safe by reducing the number of medics present and able to render care. And Oregonians who wish to go to downtown Portland 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 Defendants' actions.

In the context of the violent, riotous actions by the police in recent weeks, 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

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

Plaintiffs' ability to provide care and safety to all demonstrators. The public interest demands it.

2. The balance of equities weighs strongly in favor of plaintiffs.

Because Plaintiffs have "raised serious First Amendment questions," the balance of hardships "tips strongly in [Plaintiffs'] favor." *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007) (internal quotations omitted). Plaintiffs' clearly demonstrate that police have abused their authority by punishing medics for administering medical care to protesters. Plaintiffs risk life and limb to provide aid. In contrast, any harm to the Government would be negligible. The Government has no interest in preventing protest medics from treating injured demonstrators. The Government might have an interest in protecting federal buildings and property, but that interest is not served by using excessive force against individuals who are serving as volunteer medics. Medics present no threat to the police or the public.

The balance of equities weighs overwhelmingly in favor of Plaintiffs. 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 Defendants' use of force on 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.

F. 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*

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

LLC et al. v. City of Portland et al., 3:20-cv-1035-SI, narrowly tailored their request for relief to ensure that it only enjoins 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 and Or. Rev. Stat. § 133.245, which regulate the use of force by peace and federal officers in Oregon, for the applicable standard.

Thoughtful and narrowly crafted relief limiting only the ability of Defendants to target protest medics is more than reasonable in light of the serious constitutional violations resulting from Defendants' attacks.

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

IV. CONCLUSION

These protests continue, 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 Motion for a Temporary Restraining Order is granted.

DATED: July 24, 2020

PERKINS COIE LLP

By: */s/ Nathan Morales*

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

Matthew Borden, Admitted *pro hac vice*
borden@braunhagey.com
J. Noah Hagey, Admitted *pro hac vice*
hagey@braunhagey.com
Athul K. Acharya, OSB No. 152436
acharya@braunhagey.com
Gunnar K. Martz, Admitted *pro hac vice*
martz@braunhagey.com
BRAUNHAGEY & BORDEN LLP
351 California Street, Tenth Floor
San Francisco, CA 94104
Telephone: (415) 599-0210

Kelly K. Simon, OSB No. 154213
ksimon@aclu-or.org
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF OREGON
P.O. Box 40585
Portland, OR 97240
Telephone: (503) 227-6928

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

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

Plaintiffs,

v.

CITY OF PORTLAND, a municipal corporation; **JOHN DOES 1-60**, officers of Portland Police Bureau and other agencies working in concert; **U.S. DEPARTMENT OF HOMELAND SECURITY**; and **U.S. MARSHALS SERVICE**,

Defendants.

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

PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AGAINST DEFENDANTS U.S. DEPARTMENT OF HOMELAND SECURITY AND U.S. MARSHALS SERVICE

EXPEDITED HEARING REQUESTED

MOTION FOR TEMPORARY RESTRAINING ORDER

AND PRELIMINARY INJUNCTION

Plaintiffs Index Newspapers LLC ("Portland Mercury"), Doug Brown, Brian Conley, Sam Gehrke, Mathieu Lewis-Rolland, Kat Mahoney, Sergio Olmos, John Rudoff, Alex Milan Tracy, Tuck Woodstock, and Justin Yau hereby move for a temporary restraining order and preliminary injunction. This motion is based on Federal Rule of Civil Procedure 65 and the First and Fourth Amendments to the United States Constitution. Plaintiffs support this motion with the accompanying memorandum of law and the declarations of Mathieu Lewis-Rolland and Garrison Davis and others in the process of being collected and signed at the time of filing of this motion.

Plaintiffs specifically seek an order enjoining Defendant Department of Homeland Security ("DHS"), Defendant U.S. Marshals Service ("USMS"), and their agents and employees (collectively, the "federal agents") as follows:

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

2. The federal agents are further enjoined from seizing any photographic equipment, audio- or video-recording equipment, or press passes from any person whom they know or reasonably should know is a Journalist or Legal Observer (as explained below), or ordering such person to stop photographing, recording, or observing a protest, unless the federal agents are also lawfully seizing that person consistent with this injunction. The federal agents must return any seized equipment or press passes immediately upon release of a person from custody.

3. To facilitate the federal agents' identification of Journalists protected under this injunction, the following shall be considered indicia of being a Journalist: visual identification as

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

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

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

The materials submitted in support of this motion demonstrate that "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). They demonstrate a threat of irreparable harm to Plaintiffs and those similarly situated, that Plaintiffs are likely to succeed on the merits, that the balance of this harm against any harm the TRO may inflict on other parties weighs in favor of granting the TRO, and that the public interest favors issuing a TRO. If the Court grants the requested relief, Plaintiffs seek an expedited hearing under Federal Rule of Civil Procedure 65(b)(3). For the reasons argued in the memorandum of law, the Court should enter an order granting this relief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

MEMORANDUM OF LAW

Plaintiffs Index Newspapers LLC ("Portland Mercury"), Doug Brown, Brian Conley, Sam Gehrke, Mathieu Lewis-Rolland, Kat Mahoney, Sergio Olmos, John Rudoff, Alex Milan Tracy, Tuck Woodstock, and Justin Yau respectfully submit this memorandum in support of their motion for a temporary restraining order and preliminary injunction.

INTRODUCTION

Plaintiffs respectfully seek to enjoin Defendant Department of Homeland Security ("DHS"), Defendant U.S. Marshals Service ("USMS"), and their agents and employees (collectively, "federal agents") from assaulting news reporters, photographers, legal observers, and other neutrals who are documenting Defendants' violent response to protests over the murder of George Floyd. The Court has issued an identical TRO enjoining the Portland police from engaging in identical conduct.[1] The federal agents are aware of the Court's TRO, but have taken the position that they need not comply, which has once again placed press and legal observers in peril.

After the Court issued its TRO, journalists and legal observers enjoyed a respite from the violence and intimidation that gave rise to this lawsuit. Unfortunately, in the days that followed, President Trump sent federal agents into Portland to suppress protests and subject Portland to the same indiscriminate violence that he used to clear Lafayette Square of peaceful protesters, stating that "[t]he locals couldn't handle it" because "[l]ocal law enforcement has been told not to do too much."[2] President Trump added that his shock troops were "handling it very nicely"—by which he meant, apparently, that they were successfully subjugating protesters and carrying out his longstanding vendetta against the press.

---

[1] The Court's TRO covered "Defendants and their agents and employees, including but not limited to the Portland Police Bureau and all persons acting under the direction of the Portland Police Bureau." (Dkt. 33 at 8 ¶ 1.)

[2] Conrad Wilson & Jonathan Levinson, *President Trump Says Portland Police Are Incapable of Managing Protests*, OPB (July 10, 2020), https://www.opb.org/news/article/president-trump-portland-police-are-incapable-of-managing-protests/.

In the early hours of July 12, 2020, federal agents shot at least two journalists, including Plaintiff Mathieu Lewis-Rolland. (Declaration of Mathieu Lewis-Rolland ("Lewis-Rolland Decl."), Dkt. 44 ¶¶ 13-16; Declaration of Garrison Davis ("Davis Decl."), Dkt. 43 ¶¶ 13-14.) Mr. Lewis-Rolland wore a shirt stating "PRESS" on large letters on the front and back and was photographing the protests with professional camera equipment. Nevertheless, federal agents shot him 10 times in the back and side—all above the waist. (Lewis-Rolland Decl. ¶¶ 2-3, 13.) They also shot journalist Garrison Davis, even though he too was clearly marked as press and was prominently displaying his press pass. (Davis Decl. ¶¶ 4, 13-14.) They also chased away legal observers affiliated with the National Lawyers' Guild by threatening to beat them with batons. (Davis Decl. ¶ 16.) The next day, the President announced: "We very much quelled it. If it starts again, we'll quell it again, very easily. It's not hard to do."[3] In the days that followed, federal agents have continued attacking journalists and legal observers and using indiscriminate military violence to chill Plaintiffs' protected activities.

As the Court has already ruled, such conduct raises "a serious threat to [Plaintiffs'] First Amendment rights," and therefore poses "a likelihood of irreparable injury." (Dkt. 33 at 7.) As members of the media and legal observers, Plaintiffs have a right to witness important public events and recount them to the world. Their newsgathering, observing, and recording activities are at the core of what the First Amendment protects. *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012) ("The free press is the guardian of the public interest"). Federal agents' efforts to intimidate and suppress reporting on their own misconduct violate clearly established First Amendment law and are causing irreparable harm to Plaintiffs and the public. Federal agents are not above the law. They cannot attack media and legal observers for trying to document and observe law-enforcement activities—that is the hallmark of a totalitarian regime. For the reasons the Court issued the TRO against the police, the Court should issue identical relief against

[3] @keaton_thomas, Twitter (July 13, 2020, 11:47 A.M.), https://twitter.com/keaton_thomas/status/1282748500782899200.

federal agents, prohibiting them from assaulting people they know or reasonably should know are journalists or legal observers.

FACTUAL BACKGROUND

The factual background for this motion is largely the same as the background for the TRO the Court issued 15 days ago. What is new is that even as Portland police comply with the TRO, the federal government has begun attacking journalists and legal observers in their stead. These facts are detailed below.

A. Portland's Demonstrations Over the Murder of George Floyd

The Minneapolis police murdered George Floyd on May 25, 2020. His killing prompted protests worldwide, including in Portland. Since his murder, thousands of people have gathered every night in Portland to protest and mourn Mr. Floyd's murder and insist that our institutions start ensuring that Black lives matter. These protests continue to the present day. (Declaration of Doug Brown ("Brown Decl."), Dkt. 9 ¶ 8.)

B. The Court Issues a TRO Against the Police

As detailed in Plaintiffs' previous motion for a TRO, over a month of protests, the police had repeatedly retaliated against journalists and legal observers and forcibly prevented them from covering the protests. (Dkt. 7 at 3-6.) On June 30, Plaintiffs moved for a TRO. (Dkt. 7.) On July 2, the Court granted a TRO enjoining the police from "arresting, threatening to arrest, or using physical force directed against any person whom they know or reasonably should know is a Journalist or Legal Observer," along with certain indicia to facilitate the police's identification of journalists and legal observers. (Dkt. 33 at 8-10.)

C. Federal Agents Attack Journalists and Legal Observers

After court issued TRO, journalists and legal observers enjoyed a brief respite and were able to report on protests without threat of reprisal. But then President Trump decided to move in federal agents to "quell" the protests.

1. Federal Agents Shoot Plaintiff Lewis-Rolland

In the early hours of July 12, Mr. Lewis-Rolland was at the protests near the federal courthouse, documenting the protesters and their interaction with federal officials. (Lewis-Rolland Decl. ¶¶ 4, 6.) He was carrying bulky camera equipment, wearing a t-shirt that said "PRESS" in big block letters, and staying in well-lit areas to make sure officials could see that he was there in a journalistic capacity. (*Id.* ¶¶ 3-4.)

Around 1:54 a.m., federal agents began rushing out of the federal courthouse to eject protesters and neutrals alike from the area with tear gas, impact projectiles, and physical force. (*Id.* ¶¶ 5-7.) The agents were from "more than a half-dozen federal law enforcement agencies and departments" under the purview of DHS, including the Federal Protective Service.[4] Mr. Lewis-Rolland took the following video that documents much of what ensued: https://www.facebook.com/MathieuLewisRolland/videos/10218671503762415/. (Lewis-Rolland Decl. ¶ 5.)

Soon after the federal agents emerged from the courthouse, one shoved Mr. Lewis-Rolland, shouting "GET BACK! GET BACK!" (*Id.* ¶ 7.) About a minute later, an agent from the Federal Protective Service, Agent Doe, took aim at Mr. Lewis-Rolland but ultimately did not shoot at that time. (*Id.* ¶ 9.) Mr. Lewis-Rolland began moving west, complying with the agents' orders. (*Id.* ¶ 10.) About three minutes after the agents began their offensive, Mr. Lewis-Rolland had moved almost all the way to SW 4th Avenue, well past the boundary of federal property. (*Id.* ¶ 11.) Nevertheless, federal agents, including Agent Doe, continued to chase him and the crowd. (*Id.*) A few seconds later, Agent Doe or other federal agents next to him shot Mr. Lewis-Rolland in the side and back ten times. (*Id.* ¶ 13.) They riddled him with hard plastic bullets launched with enough force to put bullet holes in his "PRESS" t-shirt (*id.* ¶ 18):

---

[4] Ben Fox & Gillian Flaccus, *Homeland Security Deploys Officers In Portland Under Trump Monument Order*, OPB (July 10, 2020), https://www.opb.org/news/article/portland-oregon-homeland-security-officers-protests-trump-monument-order/.

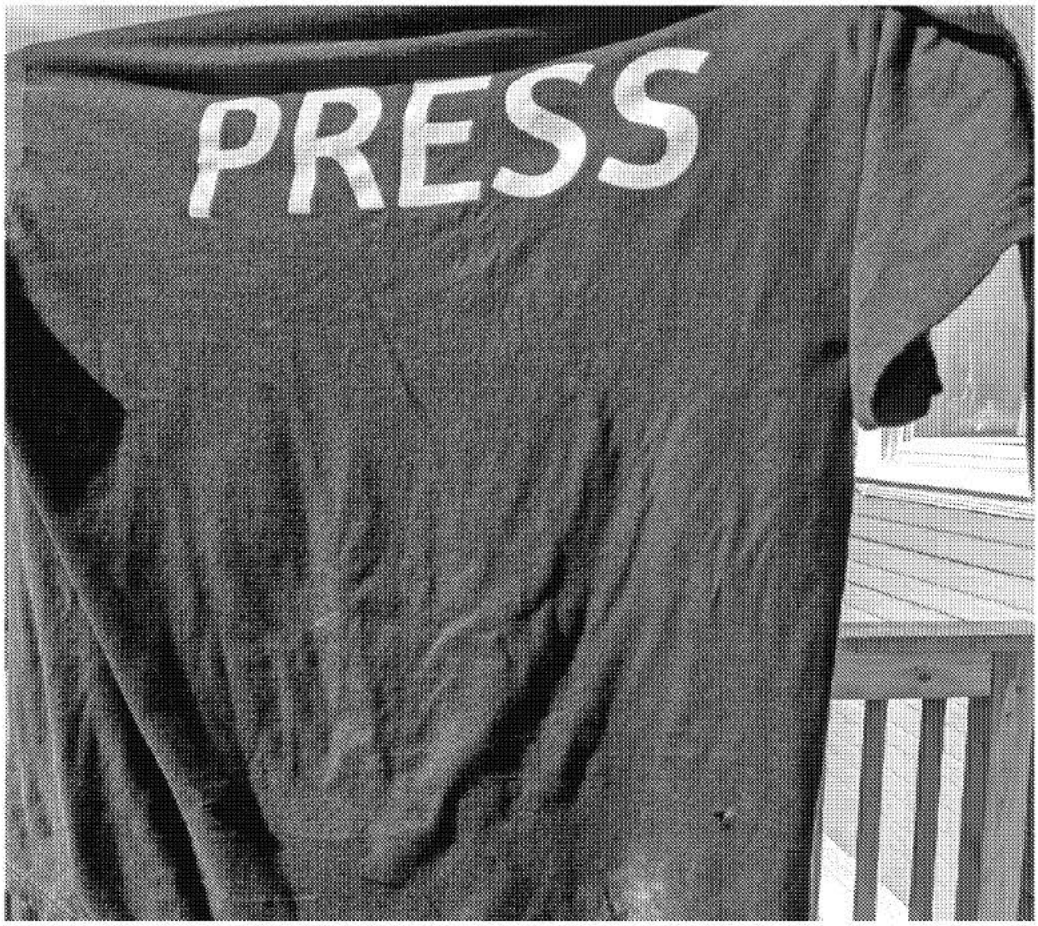

Figure 1: Federal agents' bullets ripped Mr. Lewis-Rolland's t-shirt at the bottom left and bottom right corners.

Mr. Lewis-Rolland posed no threat to any federal agent or anyone else. (*Id.*) He was only documenting what officers and protesters were doing. (*Id.*) He was performing an essential function of the Fourth Estate. For his trouble, he suffered several wounds, lacerations, and contusions (*e.g.*, *id.* ¶ 15):

Figure 2: Two of the ten times federal agents shot Mr. Lewis-Rolland. More pictures in Lewis-Rolland Decl. ¶¶ 14-16.

2. Federal Agents Shoot Journalist Garrison Davis and Assault Legal Observers

Journalist Garrison Davis was also covering the protests on the night of July 11 and the early morning of July 12. (Davis Decl. ¶¶ 1, 3.) Like Mr. Lewis-Rolland, Mr. Davis was clearly there as press: He wore a helmet that said "PRESS" on it in big block letters, held his press pass in one hand and his iPhone in the other, and did not participate in protests. (*Id.* ¶¶ 4-5.)

Shortly after midnight, the federal agents issued what they called a "last warning." (*Id.* ¶ 12.) They then launched a tear-gas offensive, engulfing the entirety of the steps of the courthouse, SW 3rd Avenue, and Lownsdale Square in tear gas. (*Id.*) They also started shooting munitions into the crowd. (*Id.*) As Mr. Davis moved backward, one Government agent shot him in the back with a tear gas canister. (*Id.* ¶ 13.) The canister fell into Mr. Davis's bag and

inundated him with tear gas until people nearby helped him remove it. (*Id.*) Government agents also shot directly at him with pepper bullets and other munitions, even though he was no threat to them or anyone else. (*Id.* ¶ 14.) Mr. Davis also saw Government agents chase, truncheons swinging, after legal observers who were clearly affiliated with the National Lawyers' Guild. (*Id.* ¶ 17.)

3. Federal Agents' Violent Attacks Continue Even as Legal Action Is Threatened

After this Court issued a preliminary injunction preventing the police from retaliating against and dispersing journalists and legal observers, and even after Plaintiffs moved to add the federal officers as parties to this litigation, the federal agents continued their attacks on journalists and legal observers. (Declaration of Doug Brown ("Brown Decl.") ¶¶ 11-15.) These attacks included indiscriminately shooting and tear-gassing them for no cause whatsoever. (*Id.*; Declaration of Justin Yau ("Yau Decl.") ¶¶ 5-6.)

ARGUMENT

Under the traditional four-factor test, plaintiffs may obtain a preliminary injunction if they show that (1) they 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 tip in their favor; and (4) an injunction is in the public interest. *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 738 (9th Cir. 2014). Alternatively, 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) ("[T]he greater the relative hardship to [plaintiff], the less probability of success must be shown." (quotation marks omitted)). Here, Plaintiffs easily meet either bar.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR FIRST AMENDMENT CLAIMS

The First Amendment prohibits any law "abridging the freedom of speech, or of the press." U.S. Const. amend. I. To obtain a preliminary injunction, 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). After that, the Government bears the burden of justifying the restriction on Plaintiffs' speech. *Id.*

Federal agents retaliated against Plaintiff Lewis-Rolland and have illegally denied access to journalists and legal observers trying to document and record what Defendants are doing to protesters. The substantive First Amendment issues here are therefore essentially the same as those the Court decided in granting the TRO against the City. And there is no jurisdictional or procedural bar to granting Plaintiffs the same relief against the federal agents. Thus, Plaintiffs satisfy the likelihood-of-success prong and the Court should enjoin the federal agents from arresting, threatening to arrest, or using physical force directed against any person whom they know or reasonably should know is a journalist or legal observer.

A. Federal Agents Unlawfully Retaliated Against Plaintiff Lewis-Rolland

The First Amendment prohibits government officials from retaliating against individuals for engaging in protected speech. *Hartman v. Moore*, 547 U.S. 250, 256 (2006). To state a First Amendment retaliation claim, a plaintiff must allege (1) that he or she was engaged in a constitutionally protected activity; (2) that the officers' actions would chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the protected activity was a substantial or motivating factor in the officers' conduct. *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300-01 (9th Cir. 1999). These elements are easily satisfied here.

1. Mr. Lewis-Rolland Was Engaged in Constitutionally Protected Activities

Mr. Lewis-Rolland easily satisfies the first prong of a retaliation claim because he was engaged in the core First Amendment activities of newsgathering and recording federal agents at a protest.

Because freedom of the press lies at the heart of the First Amendment, "newsgathering is an activity protected by the First Amendment." *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978) (citing *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)). That principle applies with greater force when the media reports on "the proceedings of government," because the media then acts as "surrogates for the public." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975); *Leigh*, 677 F.3d at 900 (quotation marks omitted). Here, at the time federal agents shot him, Mr. Lewis-Rolland was doing just that: reporting on protests against the government and government agents' dispersal of the protesters. (Lewis-Rolland Decl. ¶¶ 2-4.)[5]

Mr. Lewis-Rolland's activity was constitutionally protected for a separate and independent reason: For 25 years, the Ninth Circuit has recognized that people have the right to film "public officials performing their official duties in public." *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995). *Fordyce* itself involved facts remarkably similar to those here—a plaintiff who was "assaulted and battered by a Seattle police officer" in retaliation for videotaping and audio-recording a protest in the streets of Seattle. 55 F.3d at 439. In the decades since *Fordyce*, courts have continued to recognize this clearly established right. *See, e.g.*, *McComas v. City of Rohnert Park*, 2017 WL 1209934, at *7 (N.D. Cal. Apr. 3, 2017) (holding that there is a clearly established right against retaliation for "peacefully filming [an] officer"); *Barich v. City of Cotati*, 2015 WL 6157488, at *1 (N.D. Cal. Oct. 20, 2015) (same); *see also Adkins v. Limtiaco*, 537 F. App'x 721, 722 (9th Cir. 2013) (allowing retaliation claim for photographing police officers to proceed even when plaintiff directed "a significant amount of verbal criticism and challenge" at officers (quoting *City of Houston v. Hill*, 482 U.S. 451, 461 (1987))).

Here, Mr. Lewis-Rolland was gathering news, recording public demonstrations on the streets of Portland, and documenting protest activities and police conduct, just as Jerry Fordyce

[5] As explained in Plaintiffs' motion for a temporary restraining order, all of the Plaintiffs attend protests to record and observe events, not to protest. (Dkt. 7 at 8.)

did 25 years ago on the streets of Seattle. (Lewis-Rolland Decl. ¶¶ 2-4.) For this reason, Mr. Lewis-Rolland was engaged in a constitutionally protected activity. *Fordyce*, 55 F.3d at 439.

2. Federal Agents' Use of Violent Force Has Chilled Mr. Lewis-Rolland from Exercising His First Amendment Rights

Federal agents shot Mr. Lewis-Rolland ten times because he was filming them. (Lewis-Rolland Decl. ¶¶ 13-16.) They shot him with hard plastic bullets that ripped his shirt and left him covered in bruises and lacerations. (*Id.* ¶¶ 13-18.) On the same night, they shot Mr. Davis with a tear gas canister, pepper bullets, and other munitions, and they threatened to beat legal observers. (Davis Decl. ¶¶ 13-14, 16.)

This is easily enough to chill a reasonable person's speech. *Mendocino*, 192 F.3d at 1300-01. Courts have repeatedly held that similar uses of force would deter a person of ordinary firmness from exercising their constitutional rights. *See, e.g.*, *Black Lives Matter Seattle—King Cty. v. City of Seattle*, 2020 WL 3128299, at *3 (W.D. Wash. June 12, 2020) (holding that using tear gas, pepper spray, and rubber bullets would "surely chill[] speech"); *Abudiab v. Georgopoulos*, 586 F. App'x 685, 686 (9th Cir. 2013) (denying qualified immunity for retaliation where officer pepper-sprayed and punched plaintiff); *Barich v. City of Cotati*, 2015 WL 6157488, at *1 (N.D. Cal. Oct. 20, 2015) ("No reasonable trier of fact could doubt that a person of ordinary firmness would be deterred by the threat of arrest.").

Indeed, similar uses of force by PPB have actually deterred Plaintiffs from continuing to cover protests. (Dkt. 7 at 11-12.) Mr. Lewis-Rolland himself stated, before this Court's first TRO, that he had "ceased covering the protests in part because the actions of the police ha[d] made [him] apprehensive about [his] safety." (Declaration of Mathieu Lewis-Rolland in Support of Plaintiffs' Motion for Temporary Restraining Order, Dkt. 12 ¶ 13.) Relying on the protection conferred by the Court's TRO, Mr. Lewis-Rolland returned to his reporting. (Lewis-Rolland Decl. ¶ 1.) If federal agents can do what the Court has forbidden the police to do, he will be chilled once again.

3. Mr. Lewis-Rolland's Newsgathering and Reporting Was a Substantial Motivating Factor in Federal Agents' Conduct

The last element of a retaliation claim is that a plaintiff's protected activity must be "a substantial motivating factor" in federal agents' conduct—that is, there must be some "nexus between [federal agents'] actions and an intent to chill speech." *Ariz. Students' Ass'n v. Ariz. Bd. Of Regents*, 824 F.3d 858, 867 (9th Cir. 2016). "As with proof of motive in other contexts, this element of a First Amendment retaliation suit may be met with either direct or circumstantial evidence." *Ulrich v. City & Cty. of S.F.*, 308 F.3d 968, 979 (9th Cir. 2002). Plaintiffs easily meet this standard here.

First, federal agents plainly knew Mr. Lewis-Rolland was newsgathering and reporting when they fired upon him. He was carrying a large, professional camera, with a long telephoto lens, and his phone was attached to the top via hotshoe. (Lewis-Rolland Decl. ¶ 3.) He was wearing a t-shirt that said "PRESS" in big block letters on both sides. (*Id.*) He was staying in well-lit areas so that it would be clear he was there only to document the protesters and their interaction with federal officials. (*Id.* ¶ 4.) He was not protesting. (*Id.*) Federal agents knew full well that he was reporting when they shot him.

Second, the agent who most likely shot Mr. Lewis-Rolland, Agent Doe, actually took aim at Mr. Lewis-Rolland a few minutes earlier, but he lowered his weapon when he realized Mr. Lewis-Rolland was capturing him on camera. (*Id.* ¶ 9.) Agent Doe then followed Mr. Lewis-Rolland as he moved to stay ahead of the skirmish line, waited until Mr. Lewis-Rolland's camera was turned away from him, and only then lit Mr. Lewis-Rolland up with a rapid succession of hard plastic bullets. (*Id.* ¶¶ 12-13.) This too shows that Agent Doe specifically targeted Mr. Lewis-Rolland for participating in protected First Amendment activity.

Third, the federal agents shot Mr. Lewis-Rolland in the back and side. (*Id.* ¶¶ 13-16.) He was not even facing them and therefore could not have been posing any risk to them. (*Id.* ¶ 13.) They also shot him multiple times, which was plainly excessive and not commensurate with any risk. Moreover, they shot him all ten times above the waist, risking damage to major organs,

rather than take aim at the large muscle groups of the buttocks and thighs.[6] All of these facts strongly suggest an intent to chill speech.

Finally, the federal agents' attack on Mr. Lewis-Rolland took place against the backdrop of their attacking press and legal observers generally. On the same night, federal agents shot another journalist with a tear-gas canister, pepper bullets, and other munitions. (Davis Decl. ¶¶ 13-14.) They also prevented legal observers in green National Lawyers' Guild hats from observing their activities by chasing them away with batons and threats of beatings. (Davis Decl. ¶ 16.) Taken together, all this is insurmountable proof that federal agents intended to deprive Mr. Lewis-Rolland of his constitutional rights.

B. For Reasons the Court has Already Explained, Federal Agents Have Unlawfully Denied Access to Journalists and Legal Observers

As the Court previously recognized, Plaintiffs seek a right of access. They assert the right to observe, record, and report on how Defendants enforce their dispersal orders. To vindicate that right, Plaintiffs must show (1) that the place and process to which they seek access have historically been open to the press and general public and (2) that public access plays a significant positive role in the functioning of the particular process in question. *Press-Enterprise Co. v. Superior Court* ("*Press-Enterprise II*"), 478 U.S. 1, 8-9 (1986).

Both elements are met here: "[P]ublic streets historically have been open to the press and general public, and public observation of police activities in the streets plays a significant positive role in ensuring conduct remains consistent with the Constitution." (Dkt. 33 at 7.) Permitting Plaintiffs to observe and report on how federal agents disperse crowds will have a salutary effect by facilitating federal agents' accountability to the public. *Cox Broad. Corp.*, 420 U.S. at 490-91 ("[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the

[6] The same night, federal agents shot a protester in the head causing severe injuries. Jonathan Levinson, *Federal Officers Shoot Portland Protester In Head With 'Less Lethal' Munitions*, OPB (July 12, 2020), https://www.opb.org/news/article/federal-officers-portland-protester-shot-less-lethal-munitions/.

press to bring to him in convenient form the facts of those operations."). And Plaintiffs have no "alternative observation opportunities" other than remaining at the scene where federal agents are using violent force against the people. *Reed v. Lieurance*, 863 F.3d 1196, 1211-12 (9th Cir. 2017). Thus, Plaintiffs have a qualified right of access.

Defendants can defeat that right only if they show "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise II*, 478 U.S. at 9. But Defendants have no legitimate interest, much less an "overriding interest," in shooting people clearly marked as press or legal observers, who are committing no crime but simply documenting how federal agents interact with protesters. Federal agents might have a valid interest in protecting public safety, preventing vandalism or looting, or protecting themselves—but media and neutral observers present no such threat. To the contrary, as the Ninth Circuit explained in *Leigh*:

> By reporting about the government, the media are "surrogates for the public." When wrongdoing is underway, officials have great incentive to blindfold the watchful eyes of the Fourth Estate. If a government agency restricts public access, the media's only recourse is the court system. The free press is the guardian of the public interest, and the independent judiciary is the guardian of the free press. Thus, courts have a duty to conduct a thorough and searching review of any attempt to restrict public access.

677 F.3d at 900 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980)); *see also* Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 Stan. L. Rev. 927, 949 (1992) ("[W]hen the government announces it is excluding the press for reasons such as administrative convenience, preservation of evidence, or protection of reporters' safety, its real motive may be to prevent the gathering of information about government abuses or incompetence.").

As for narrow tailoring, the Court has already held that "there are at least serious questions" about whether it is narrowly tailored for law enforcement to exclude journalists and legal observers. (Dkt. 33 at 7.) Effecting that exclusion with the kind of extreme violence federal agents used against Mr. Lewis-Rolland can never be narrowly tailored. (Lewis-Rolland Decl.

¶¶ 13-18.) Mr. Lewis-Rolland posed no threat to federal officers, so shooting him ten times at close range was not tailored at all.

C. The Court Can Grant Equitable Relief Against the Federal Government

The Court has jurisdiction over Plaintiffs' claim for injunctive relief against the federal agents because the federal government has waived its immunity against such claims:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702. In enacting that sentence, Congress "eliminate[d] the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity." *E.V. v. Robinson*, 906 F.3d 1082, 1092 (9th Cir. 2018) (quoting H.R. Rep. No. 94-1656, at 9 (1976)). Plaintiffs seek only equitable relief against the federal agents. Thus, sovereign immunity is no bar and the Court has jurisdiction over Plaintiffs' claim.

Plaintiffs plainly also have a cause of action to bring such a claim. When plaintiffs seek equitable relief under the First Amendment, courts often reach the merits without even "discussing whether a cause of action existed to challenge the alleged constitutional violation." *Sierra Club v. Trump*, 929 F.3d 670, 694-95 (9th Cir. 2019) (citing *Trump v. Hawaii*, S. Ct. 2392, 2416-17 (2018)) (collecting cases); *Sierra Club v. Trump*, 2020 WL 3478900, at *11-12 (9th Cir. June 26, 2020) (explaining plaintiffs "ha[ve] a cause of action to enjoin the [federal government's] unconstitutional actions" under courts' "historic [power] of equitable review").

Because Plaintiffs seek to enjoin federal agents from violating their First Amendment rights, they have an equitable cause of action to seek relief. Thus, there is no jurisdictional or procedural bar to granting Plaintiffs the same relief as the Court granted against the federal agents. (*See* Dkt. 33 at 8-10.)

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM WITHOUT THE COURT'S INTERVENTION

"[A]nytime there is a serious threat to First Amendment rights, there is a likelihood of irreparable injury." (Dkt. 33 at 7 (citing *Warsoldier v. Woodford*, 418 F.3d 989, 1001-02 (9th Cir. 2005)).) Because Plaintiffs have, at minimum, raised a colorable claim that the exercise of their constitutionally protected right to record Government activity in public has been infringed, they have satisfied the irreparable-injury requirement. (*See id.*) As long as the Government is free to shoot and arrest journalists and legal observers, Plaintiffs' exercise of their First Amendment rights will "surely [be] chilled." *Black Lives Matter*, 2020 WL 3128299, at *3; *Barich v. City of Cotati*, 2015 WL 6157488, at *1 (N.D. Cal. Oct. 20, 2015) ("No reasonable trier of fact could doubt that a person of ordinary firmness would be deterred by the threat of arrest.").

What is more, in the newsgathering context. the Ninth Circuit has recognized that time is of the essence and that any delay or postponement "undermines the benefit of public scrutiny and may have the same result as complete suppression." *Courthouse News Serv. v. Planet*, 947 F.3d 581, 594 (9th Cir. 2020) (quoting *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994)). Thus, every minute that Plaintiffs are inhibited and intimidated from exercising their First Amendment rights, they suffer irreparable injury. (Dkt. 33 at 7.)

III. THE PUBLIC'S INTEREST AND BALANCE OF EQUITIES WEIGH STRONGLY IN FAVOR OF PLAINTIFFS

A. The Public Has an Unassailable Interest in a Free Press

"Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles." *Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (quotation marks omitted). Furthermore, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quotation marks omitted) (granting an injunction under Fourth Amendment).

Plaintiffs are journalists and observers reporting on public demonstrations of worldwide interest. As members of the news media, they were given express permission by the Mayor's

curfew order to be at the protest sites so they could provide live, up-to-date coverage of the activities of protesters and demonstrators, and also monitor the conduct of law enforcement.[7] This express permission is an acknowledgement of the uniquely significant public interest in press coverage in this case. In the context of the violent, destructive events of recent weeks, the public's interest in having information of this nature in a timely manner is obvious and constitutionally unassailable.

It would be difficult to identify a situation in which the public has a greater interest in unbiased media coverage of police and Government conduct than this one. The protests are rooted in an incident of shocking police brutality, and how the police and Government agents respond to the protesters is of critical importance to how and whether the community will be able to move forward. Although the protests began in Minneapolis, they have now spread across the country and the globe. The public interest in press coverage of these events cannot reasonably be questioned.

"The Free Speech Clause exists principally to protect discourse on public matters." *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 790 (2011). It reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. at 270. It is "[p]remised on mistrust of governmental power." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). "[I]t furthers the search for truth," *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (citation omitted), and "ensure[s] that . . . individual citizen[s] can effectively participate in and contribute to our republican system of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982). Unless the constitutional rights of journalists are protected, the public's ability to participate meaningfully as citizens in a constitutional democracy will be severely diminished.

---

[7] Emergency Executive Order Declaring an Emergency and Implementing a Temporary Nighttime Curfew in the City of Portland Oregon (May 30, 2020), https://www.portland.gov/sites/default/files/2020-05/5.30.20-mayors-state-of-emergency-.pdf.

B. The Balance of Equities Weighs Strongly in Favor of Plaintiffs

Because Plaintiffs have "raised serious First Amendment questions," the balance of hardships "tips sharply in [Plaintiffs'] favor." *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007) (quotation marks omitted). Plaintiffs' evidence—both video and testimony—shows that officers have exercised their discretion in an arbitrary and retaliatory fashion to punish journalists for recording Government conduct and that their unlawful policy is aimed toward the same end. In contrast to the substantial and irreparable injuries to Plaintiffs, any harm to the Government would be negligible. The Government no interest in preventing journalists from reporting on what it is doing to protesters. While the Government might have an interest in protecting federal buildings and property, that interest is not served by using force against individuals who are identified as journalists, or who are merely recording events and present no threat of harm to police or the public.

The balance of equities weighs heavily in favor of Plaintiffs.

* * *

The Government's attempts to shield its violence against protesters from public scrutiny by targeting press and legal observers shows, once again, that "[w]hen wrongdoing is underway, officials have great incentive to blindfold the watchful eyes of the Fourth Estate." *Leigh*, 677 F.3d at 900. But just as the "free press is the guardian of the public interest," so "the independent judiciary is the guardian of the free press." *Id.* To protect the press—and ultimately, the public's power to govern its public servants—this Court should enjoin the police from dispersing and retaliating against press and legal observers.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Motion for a temporary injunction and preliminary injunction be granted.

Dated: July 17, 2020

Respectfully Submitted,

By: /s/ Matthew Borden
Matthew Borden, *pro hac vice*
J. Noah Hagey, *pro hac vice*
Athul K. Acharya, OSB No. 152436
Gunnar K. Martz, *pro hac vice*
BRAUNHAGEY & BORDEN LLP

Kelly K. Simon, OSB No. 154213
ACLU FOUNDATION OF OREGON

Attorneys for Plaintiffs