UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Elizabeth Ferris, et al. ***Plaintiffs,*** **v.** **District of Columbia, et al.** ***Defendants.***	**Civil Action No. 1:23-cv-00481-RCL**

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Plaintiffs, by and through undersigned counsel, respectfully submit this Memorandum of Points and Authorities in opposition to Defendants' Motion to Dismiss Plaintiffs' Amended Complaint. Plaintiffs respectfully request the Motion be denied in full, and state in support:

BACKGROUND

In response to the murder of George Floyd by police, people came out into the streets, sidewalks, and parklands of Washington, D.C. day after day to protest racist policing, as millions of others also did around the country. The D.C. MPD assaulted demonstrators with barrages of inherently indiscriminate weapons such as sting ball grenade munitions and also indiscriminately used less lethal projectiles against the groups of demonstrators, including those who were completely peaceful, such as Plaintiffs. They did so repeatedly, without warning, without giving directives or orders, suddenly subjecting persons who were peacefully exercising their First Amendment rights to pain, injury, and suppression of their constitutionally protected activities.

This lawsuit brings claims against the municipality and individual officers for the illegal and indiscriminate deployment of projectile weapons into the midst of peaceful protests including without warning or dispersal order.

The justification for this indiscriminate use of dangerous[1] weaponry against peaceful protestors, as can be seen by Defendants' Motion to Dismiss, is the claim that *some* other protestors *somewhere* or *elsewhere,* including at different times or locations, engaged in misconduct. The Defendants' argument is telling, inappropriately using extrinsic and inadmissible hearsay from cherry-picked portions of articles to describe misconduct at places as far away as Tenleytown and Georgetown, at completely different times, treating all protestors interchangeably, generically, and indiscriminately — just as the police did in the underlying events and as a matter of practice.

[1] By definition, less lethal projectiles can cause blunt force trauma, bodily injury, and death. It is extremely common for less lethal weapons to cause contusions, abrasions, hematomas, and internal injuries. Am. Comp. ¶55.

The Defendants do not even seek to justify their use of weapons against any of the Plaintiffs individually and notably never identify any action of any Plaintiff that could possibly justify the use of force against them. Defendants' generic treatment of all persons based on their protected political activity, regardless of temporal or geographic proximity to allegedly unlawful acts, is revealing. Defendants' core argument is that any and all protestors were rightfully subject to indiscriminate barrages of dangerous "less lethal" weapons without warning and at the whim of officers and command officials based on their being protestors at these protests.

Plaintiffs were engaged in peaceful non-violent protest and were surrounded by persons similarly engaged. Yet, they, or the assemblies they were in, were targeted for a barrage of less lethal projectile weapons deployment. For example, the protestors at the May 31, 2020, incident involving Elizabeth Ferris were taking a knee, hands raised, chanting "Hands Up, Don't Shoot" in the moments before the MPD assaulted them with projectile weapons. They were as demonstrably peaceful as could be. That didn't protect them.

The law has long been clearly established that there is no guilt by association and that the authority to seize one person does not give rise to the authority to seize another based on propinquity or perceived political association. Yet the MPD routinely and *within policy* deployed inherently indiscriminate weapons, such as sting ball grenade munitions and flash-bang devices, right into the midst of crowded protests. This cannot be legally justified by claims that someone, somewhere, or someone, elsewhere, committed misconduct. Just as telling as the use of inherently indiscriminate weapons is the MPD's systemic failure to issue warnings, directives, or orders to disperse before the deployment of such weapons, creating a shooting gallery where protestors remained assembled and unaware that they were about to be assaulted.

These are not situations where split-second decisions are at issue. The decision to use indiscriminate weapons generally against protestors, including against assemblies clearly containing peaceful individuals, and the decision to never issue a warning or dispersal order, are systemic decisions, policies, and practices of the MPD that endured regardless of circumstance.

The D.C. MPD repeatedly has failed to conduct itself within professional standards regarding less lethal weapons. In 2017, after the first widespread use of projectile less lethals by the MPD, the

Office of Police Complaints (OPC) identified severe defects in the MPD's standard operating procedures for less lethal use in the context of First Amendment assemblies. Despite being on notice that inaction would lead to more constitutional violations and indiscriminate weapons use, the MPD did nothing. The events herein, consequently, ensued.

FACTS

I. Plaintiffs Were Engaged in Peaceful Protest and Associational Activity

The Plaintiffs were each peacefully present at racial justice demonstrations and were in the midst of multitudes of other peaceful protestors. First Amended Complaint ("Am Comp.") ¶ 3; *see also id.* ¶¶ 1–7, 19, 22–24, 83, 86, 88, 116, 119, 125, 141, 143, 147, 181, 189, 191–92, 216–17, 224, 241–42, 255, 293, 300 (referencing peacefulness and lawfulness of protestors targeted by less lethal weapons). Plaintiffs also allege that their four incidents are mere exemplars, "not isolated incidents, but only four of many incidents that occurred" during the George Floyd protests. *Id.* ¶ 8; *see also id.* ¶ 2 (similar incidents of indiscriminate weapons use occurred "repeatedly, over many months").

A. Elizabeth Ferris (May 31 and August 30–31 incidents)

On May 31, 2020, Ms. Ferris was participating in a racial justice protest march against police misconduct that had been proceeding for some time. She was also present as an independent member of the media, livestreaming events and narrative to raise awareness in her community back home of policing outside of their confines. Am. Comp. ¶¶ 179–80. At approximately 7:15 p.m., with the peaceful march proceeding eastward, a line of MPD officers stopped the march within the 1400 block of H Street, N.W. *Id.* ¶¶ 181, 184–85, 188. Protestors held signs over their heads protesting police brutality. *Id.* ¶¶ 182, 190. A chant directed at the police line arose: "Hands Up, Don't Shoot!" *Id.* ¶ 191. Many of the protestors, loosely assembled in the roadway, took a knee and raised their hands facing the police line in a non-aggressive statement against racism and racist police violence memorialized by Colin Kaepernick's taking of a knee at the start of football games. *Id.* ¶ 192.

Suddenly, without provocation, the police line moved forward. Officers used batons and pepper spray against the peaceful protestors. Am. Comp. ¶¶ 198 – 201. Individual Defendants targeted the

protestors with projectile less lethal weapons, indiscriminately shooting to injure anyone who happened to be within the assemblage. *Id.* ¶¶ 202–04. They loaded and re-loaded their weapons and kept shooting into the crowd. *Id.* ¶ 202. A sting ball grenade munition, an inherently indiscriminate munition,[2] exploded near Ms. Ferris brutally shooting at least nine projectiles into her right leg causing bruising, welts, bleeding, and injury. *Id.* ¶¶ 210–16, 228–30.

Three months later, on August 30, 2020, and into the following day, Ms. Ferris was accompanying a march calling to "Abolish the police" in the wake of the police shooting of Jacob Blake, who was shot seven times, including four bullets to his back, and the subsequent murder by Kyle Rittenhouse of three men at a racial justice protest. Am. Comp. ¶¶ 282–83. Ferris was at Black Lives Matter Plaza, a so-called "safe gathering space," where protestors were milling about in the aftermath of the march. *Id.* ¶¶ 285–87. She could see some sort of police presence and activity toward the south. *Id.* ¶ 291. The street around Ferris was closed to traffic and filled with peaceful persons moving about and mostly looking southward toward the distant bustle of apparent activity. *Id.* ¶ 293.

Without warning or orders, the police assaulted the Plaza with smoke or gas devices. *Id.* ¶¶ 294–96. As Ferris was moving north, away from the police, without warnings or orders, they shot her with a projectile weapon, leaving a welt and contusion on her torso. *Id.* ¶¶ 301–05. Officers can be seen standing at the southern border of BLM Plaza, less lethal weapons upraised, shooting repeatedly directly into the Plaza, turning it into a shooting gallery. *Id.* ¶ 309 (image). After shooting at persons present, officers began tackling persons in the Plaza. An officer attempted to arrest Ferris but became distracted with the arrest of another person and she walked away, peaceably, hands raised. *Id.* ¶¶ 319–22.

B. Hazie Crespo

On August 29, 2020, around 11:30 p.m., Hazie Crespo went to Black Lives Matter Plaza, which she knew to be associated with support for the BLM movement and anti-racism issues. Am. Comp.

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[2] Plaintiffs use the term inherently indiscriminate to describe weapons, such as sting ball munitions and flash-bang grenades, that cannot target any particular individual and injure randomly. They are pyrotechnic munitions which explode. Sting ball grenade munitions explode shooting hard rubber balls randomly in an area of up to 7,800 square feet. They can also carry pepper spray or tear gas. *See* Am. Comp. ¶¶ 52-55. Flash-bang stun grenades are pyrotechnic munitions that explode with a loud explosion greater than 175 decibels, and which convey shrapnel and concussive force sufficient to cause major injuries to those in proximity. *Id.* ¶ 57.

¶ 239. The scene was calm and unremarkable, with protestors milling about. *Id.* ¶ 242. Suddenly, police used a police line to clear the Plaza, using batons and pushing out the people who had been peaceably therein. *Id.* ¶¶ 243–45. Crespo became separated from her friends and arranged by phone to meet at an easily visible music truck. *Id.* ¶ 247. They were standing in the intersection of 16th & K Streets, N.W., which was filled with peaceful protestors. *See id.* ¶¶ 254–55 (images). Suddenly, without warning or orders to disperse, Individual Defendants threw multiple less lethal projectile weapons, sting ball grenade munitions, directly into the midst of the crowded intersection filled with peaceful protestors. *Id.* ¶¶ 249–56. One exploded next to Crespo, burning her, lacerating her leg, and leaving two bleeding open wounds and five additional wounds continuing up her leg and thigh. *Id.* ¶¶ 256–63. The pain was practically indescribable. *Id.* ¶ 258. Crespo entered a van to be transported to the hospital for treatment. En route, at a stop light, a group of MPD bicycle officers stopped the van, took the keys for the vehicle despite pleas that they were going to the hospital, and Crespo had to wait another 60 – 90 minutes for treatment before an ambulance arrived at the scene. *Id.* ¶¶ 265–69.

C. Katherine Crowder

On May 30, 2020, Katherine Crowder joined thousands of peaceful others in protest and march throughout the day demanding an end to racist police violence. Am. Comp. ¶¶ 111–12, 116. At approximately 10:00 p.m., peaceful marchers encountered a police line at the intersection of 17th & K Streets, N.W. *Id.* ¶ 117. The intersection became filled with peaceful protestors. *Id.* ¶ 119. Without lawful basis, an officer began pepper spraying peaceful protestors who were trying to film police. *Id.* ¶ 121. Perceiving that police were targeting Black protestors with pepper spray in particular, Crowder verbally challenged the police, telling an officer words to the effect of "Why did you do that? He did nothing to you! Show some self-control!" *Id.* ¶ 123. While she was standing several feet away from police, Individual Defendants launched projectile weapons into the tightly packed crowd, with one launched to explode against Crowder. *id.* ¶¶ 125–29 (including image). The shrapnel from the weapon caused cuts, bruising, contusions, and injury to her arm. *Id.* ¶¶ 151–52. There had been no orders to

disperse, no warnings to alert to the risk of weapons deployment into a protest assembly. *Id.* ¶¶ 136–40. Upon being struck by the first weapon, Crowder turned and ran to her right to get away. A second explosive device was propelled at her feet. *Id.* 135 (images).

II. Defendants Used Indiscriminate Projectile Weapons to Target Peaceful Protestors, to Include Plaintiffs, Without Warning or Notice to Disperse

As above, in each of the four underlying incidents, Defendants indiscriminately deployed less lethal projectile weapons targeting the assembly of protestors. That the force was indiscriminate is most clearly manifested by their use of sting ball grenade munitions, which blast up to 180 rubber balls randomly over a 7,800 square foot area, Am. Comp. ¶¶ 15, 53, and which can cause death or serious bodily injury, *id.* ¶ 53.

In each underlying event, each Plaintiff was peaceful and law-abiding, surrounded by peaceful others, and subject to less lethal weapon attack without warning, notice, or order to disperse. There were never *any* orders to disperse, not before, during, or after weapons deployment. *See* Am. Comp. ¶¶ 136 – 40 (Crowder), ¶¶ 207 – 11 (Ferris, May event), ¶¶ 249 – 50 (Crespo), ¶¶ 289 – 90, 302 – 04 (Ferris, August event). No legitimate government interest was furthered by such indiscriminate force. No legitimate government interest was advanced by use of such force without any warning, directive, or order.

STANDARD OF REVIEW

"To survive a [Rule 12(b)(6)] motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also VoteVets Action Fund v. McDonough*, 992 F.3d 1097, 1104 (D.C. Cir. 2021).

The court must consider the whole complaint, accepting all factual allegations as true, "even if doubtful in fact." *Twombly*, 550 U.S. at 555; *see also Atchley, et al., v. AstraZeneca UK Limited, et al.*, 22 F.4th 204, 210–11 (D.C. Cir. 2022). The court must "treat the complaint's factual allegations as true and must grant plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'"

Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1113 (D.C. Cir. 2000) (internal citation omitted) (quoting *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979)). Therefore, the court must construe a complaint liberally in the plaintiff's favor. *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994).

While a complaint need not contain "detailed factual allegations." *Iqbal*, 556 U.S. at 678, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. A pleading must offer more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, at 678.

"There is no heightened pleading standard in a case alleging municipal liability for a civil rights violation." *Faison v. District of Columbia*, 907 F. Supp. 2d 82, 85 (D.D.C. 2012) (citing *Leatherman v. Tarrant Cnty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993)). "Nevertheless, [a] Complaint must include some factual basis for the allegation of a municipal policy or custom." *Faison v. Dist. of Columbia*, at 85 (cleaned up).

THE EXTRINSIC AND HEARSAY MATERIALS PRESENTED BY DEFENDANTS MAY NOT BE CONSIDERED ON MOTION TO DISMISS

In considering a motion to dismiss, a court "may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [a court] may take judicial notice." *E.E.O.C. v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997).

Defendants' references to extrinsic material not attached to or incorporated in the Complaint is immaterial for purposes of the instant Motion. The Defendants do not, nor can they, request the Court to take judicial notice to its multiple references to selected portions of *Washington Post* articles, offered for the truth of the matter therein, which are both outside the four corners of the Complaint and are also inadmissible hearsay. *See U.S. v. Phillip Morris Inc.*, 116 F. Supp. 2d 131, 154 (D.D.C. 2000) (court may not consider newspaper articles on motion to dismiss). These article portions, using hearsay to focus on other alleged events at other times throughout the District, are offered by Defendants as an

inappropriate request to the Court to disregard the well-pled allegations of peacefulness surrounding Plaintiffs in the Complaint. Inappropriate references to other extrinsic information are made throughout their filing.

ARGUMENT

I. Plaintiffs Adequately Allege Violation of Their Constitutional Rights

Plaintiffs allege violations of their First, Fourth, and Fifth Amendment rights.

A. Plaintiffs Adequately Allege Violation of their First Amendment Rights

1. First Amendment Retaliation

Plaintiffs allege that the District of Columbia and its MPD maintained a policy or practice of using inherently indiscriminate less lethal projectile weapons or indiscriminately deploying such weapons to target protestors who were peacefully protesting against police on public space. MPD did so also without even a warning or command or order to disperse.

To establish a retaliation claim under the First Amendment, a plaintiff must demonstrate "(1) that he engaged in protected conduct; (2) that the government took some retaliatory action sufficient to deter a person of ordinary firmness in plaintiff's position from speaking again; and (3) that there exists a causal link between the exercise of a constitutional right and the adverse action taken against him." *Doe v. District of Columbia*, 796 F.3d 96, 106 (D.C. Cir. 2015) (citations omitted); *Goodwin v. District of Columbia*, 579 F. Supp. 3d 159, 174 (D.D.C. 2022); *Black Lives Matter D.C. v. Trump*, 544 F. Supp.3d 15, 46 (D.D.C. 2021).

Defendants do not dispute that Plaintiffs have adequately pled the first two prongs. Instead, Defendants challenge only Plaintiffs' showing of a causal link between their protected speech and the use of force.

However, as one district court opined regarding causation,

> Courts around the country, flooded with First Amendment claims pleaded on similar facts following the May 2020 protests, have agreed that the use of force against non-violent protestors can support the inference that officers meant to intimidate protestors and deter antipolice messaging. See e.g.,[*Green v. City of St. Louis*, 583 F. Supp.3d 1225 (E.D. Mo.

> 2022))]; *Goodwin v. D.C., No. 21-cv-806*, 2022 WL 123894, at *11 (D.D.C. Jan. 13, 2022); *Molina [v. City of St. Louis]*, 2021 WL 1222432, at *7; *Alsaada v. City of Columbus*, 536 F. Supp.3d 216 (S.D. Ohio 2021), *modified sub nom. Alsaada v. City of Columbus, Ohio, No. 20-cv-3431*, 2021 WL 3375834 (S.D. Ohio June 25, 2021); *Black Lives Matter D.C. v. Trump*, 544 F. Supp. 3d 15, 44 (D.D.C. June 21, 2021); *Abay v. City of Denver,* 445 F. Supp. 3d 1286, 1292 (D. Colo. June 5, 2020); *Detroit Will Breathe v. City of Detroit,* 484 F. Supp. 3d 511, 518 (E.D. Mich. Sept. 4 2020) *order clarified, No. 20-cv-12363*, 2020 WL 8575150 (E.D. Mich. Sept. 16, 2020).

Huffman v. City of Boston, No. 21-CV-10986-ADB, 2022 WL 2308937, at *6 (D. Mass. June 27, 2022).

Direct evidence of retaliatory animus is not necessary. *Goodwin*, 579 F. Supp. 3d at 174; *Black Lives Matter D.C.*, 544 F. Supp. 3d at 46–47; s*ee also Index Newspapers LLC v. United States Marshals Serv.*, 977 F.3d 817, 827 (9th Cir. 2020) ("[Animus] element of a First Amendment retaliation claim may be met with either direct or circumstantial evidence, and we have said that it involves questions of fact that normally should be left for trial.")

i. Causation is Inferred as a Response to the Content of the Anti-Police Messaging

The messaging of racial justice activists challenged the operations of police as racist and brutal. Am. Comp. ¶¶ 4, 12, 17, 47, 111, 114, 178, 192. Protest messages included calling for the defunding of police and an end to systemic racist violence by police. *Id.* ¶¶ 87, 282 (protest march was under the slogan "Abolish the police"). The demand was for police accountability and change to the system of policing, *id*. ¶ 1, of which the D.C. MPD is part and parcel.

The message was also directed at the officers they encountered. In the May 31, 2020, incident involving Elizabeth Ferris, protestors *en masse* took a knee in front of a row of MPD officers, chanting "Hands Up, Don't Shoot!" Am. Comp. ¶¶ 191, 192 (image). Moments later, the Individual Defendants without provocation violently attacked these very protestors. *Id.* ¶¶ 198 – 215.

On May 30, 2020, Katherine Crowder, standing a reasonable distance away from a line of officers, challenged as racist and unjustified their use of pepper spray, particularly against Black protestors who had been filming police. Am. Comp. ¶¶ 121 – 24. Moments later, police deployed two projectile weapons at her. *Id*. ¶¶ 129, 135 (images).

Protestors' messaging was directed specifically at police, including the D.C. MPD, and was a sharp political challenge to their practices, funding, and even organizational existence.

ii. Causation is Inferred from Temporal Proximity of the Use of Weaponry to the Speech

The use of force was contemporaneous with protest against police brutality with the apparent if not obvious intent to intimidate, deter, chill, suppress, or cause the cessation of such activity. Causation may be inferred where the use of force is temporally proximate to the protected activity. *Goodwin,* 579 F. Supp. 3d at 174–75; *Black Lives Matter D.C.,* 544 F. Supp. 3d at 46–47 ("causation may be inferred … when the retaliatory act follows close on the heels of the protected activity"); *see also Singletary v. District of Columbia*, 351 F.3d 519, 525 (D.C. Cir. 2005) ("a close temporal relationship may alone establish the necessary causal connection").

iii. Causation is Inferred from the Indiscriminate Nature of the Weaponry, Targeting Protestors Challenging Policing Generally

The indiscriminate nature of the weapons deployment against peaceful protestors reflects that police did not care who they injured so long as they were police misconduct protestors.

Indiscriminate weapons use against non-violent protestors evidences that such use of force is caused by protected activity, by the protest itself. *Detroit Will Breathe*, 484 F. Supp.3d at 518 ("the indiscriminate use of tear gas and physical violence against peaceful protestors . . . may alone be enough to support the inference that the police officers were at least in part motivated by Plaintiffs' protected activity"); *Don't Shoot Portland v. City of Portland*, 465 F. Supp.3d 1150, 1157 (D. Or. 2020) (although there was criminal conduct by some, inference of retaliation raised where "officers indiscriminately used force against peaceful protestors on multiple occasions"); *Black Lives Matter Seattle-King Cnty. v. City*

of Seattle, Seattle Police Dep't, 466 F. Supp.3d 1206, 1214 (W.D. Wash. 2020) ("The use of indiscriminate weapons against all protesters – not just the violent ones – supports the inference that SPD's actions were substantially motivated by Plaintiff's protected First Amendment activity").

As Defendants note, the use of force was not against the public generally, but only against groups of protestors. Defs.' Mem. 10 (citing Am. Comp. ¶ 17). Defendants argue that Plaintiffs' claim of retaliation is weakened by the fact that police did not attack *all* police brutality protests all the time, every single minute that any protestors were present on District land. This argument defies logic as it suggests that any First Amendment retaliation may be absolved if short of constant actions without relent. *See Black Lives Matter Seattle-King Cnty*, 466 F. Supp. 3d at 1214 (rejecting similar argument).

Plaintiffs need only show that retaliation was a substantial motivation or cause. Indeed, the government language of "outside agitators" suggests a jury could view the police conduct within a more nuanced rubric: That police acknowledged the substantial presence of peaceful protestors and sought to justify violence against them by alleging misconduct by a few "outside agitators," to let loose with indiscriminate weaponry targeting *all* anti-police protestors.

Defendants cite *Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107, 120 (D.C. Cir. 1977) for the proposition that if a demonstration "is substantially infected with violence or obstruction the police may act to control it as a unit." The Circuit in the very next paragraph is clear that the Fourth Amendment is particularized to the individual and that peaceful demonstrators cannot be subject to seizure based on the misconduct of others.

> We do not suggest of course that one who has violated no law may be arrested for the offenses of those who have been violent or obstructive. As we have seen however the police may validly order violent or obstructive demonstrators to disperse or clear the streets. If any demonstrator or bystander refuses to obey such an order after fair notice and opportunity to comply, his arrest does not violate the Constitution even though he has not previously been violent or obstructive.

Cullinane, 566 F.2d at 120.

So long as a protest group contains peaceful protestors, even if there is misconduct by some, the police cannot "deal with a crowd as a unit" without "invoking a valid legal mechanism for clearing the

area and then providing an opportunity for affected persons to follow an order to disperse." *Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006) (citing *Cullinane*, 566 F.2d at 120) (denying Newsham qualified immunity). Just as police cannot arrest peaceful protestors for the misconduct of some others, they can't shoot them either.[3]

The police did not issue any orders or directives to the crowd subject to its force that they should disperse or clear the streets, nor any warnings in advance of unleashing barrages of projectile and explosive weapons against these groups of protestors. They just simply, and repeatedly, unleashed munitions against peaceful protestors. Nothing in *Cullinane* authorizes the abusive, retaliatory and unconstitutional uses of force at issue here.

iv. Causation is Inferred from the Use of Force Against Peaceful Protestors Without Warning or Orders to Disperse

Each of the Plaintiffs were engaged only in lawful and peaceful activity. That lawful activity is targeted gives rise to the inference that it is the content of their messaging and not their conduct that has caused the use of force.

Ultimately, at a trial, a reasonable juror could find that the conduct of police, as a matter of consistent policy and practice, to <u>not</u> issue warnings or orders to disperse was a calculated retaliatory tactic showing intent to retaliate, punish, suppress, chill, and deter protected activity on District streets and failed to serve any legitimate law enforcement purpose. Plaintiffs had not been ordered to take some action with which they failed to comply. The defining act was that they were protesting police misconduct. Not ordering anyone to disperse or providing warnings before weapons were used also

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[3] The misconduct of some does not authorize police to seize another. *Barham v. Ramsey*, 434 F.3d 565, 573 (D.C. Cir. 2006) (citing *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979)).

A mass arrest of a group, by way of example, is not permissible absent dispersal order except where every member of "an entire crowd is engaged in or encouraging" criminal misconduct. *See Carr v. District of Columbia*, 587 F.3d 401, 410 (D.C. Cir. 2009) (opining that a dispersal order might well be necessary, even in the face of substantial violence, except where every group member was engaging in or encouraging a riot). *Carr* involved a cohesive and well-delineated group of seventy, that started together at a D.C. church where bandanas and vinegar were handed out and torches were lit, which travelled as a unit down Pennsylvania Avenue, breaking windows and cheering, and every one of the group was observed to engage in or incite a riot, according to an officer. Such uniform cohesion is in sharp distinction to the case at bar, where peaceful protestors were everywhere.

ensured that the police could catch peaceful protestors off guard and target them while they remained in place. The police never issued warnings or orders to disperse, not before, during, or after the use of indiscriminate projectile weapons. *See* Am. Comp. ¶¶ 136–40, 147–48, 150, 207–08, 220, 224, 250, 273–74, 290, 302–04, 313–14.

This is not a situation where fast-moving events prevented dispersal orders, but where dispersal orders or warnings or any directives were systematically eschewed as a matter of policy and practice. *See* Am. Comp. ¶¶ 11, 75c, 75d, 76, 88. The District's police department has amplification and even long-range acoustic devices at its disposal for just this purpose, but they intentionally never issued warnings or orders to disperse. They just shot at racial justice activists challenging the institution of policing.

2. Abridgment of Free Speech in Violation of the First Amendment

The use of projectile weapons against peaceful protestors without warning or order is, axiomatically, an abridgment of free speech rights under the First Amendment.

> Claims under the Free Speech Clause of the First Amendment are analyzed in three steps: First, "we must . . . decide whether [the activity at issue] is speech protected by the First Amendment, for, if it is not, we need go no further." *Cornelius v. NAACP Legal Def. Educ. Fund, Inc*., 473 U.S. 788, 797, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). Second, assuming the activity "is protected speech, we must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Id.* And third, we must assess whether the government's justifications for restricting speech in the relevant forum "satisfy the requisite standard."

Boardley v. U.S. Dep't of the Interior, 615 F.3d 508, 514 (D.C. Cir. 2010).

i. Plaintiffs' Activities Constituted Core Political Speech

Gathering in the streets to protest policing and its attendant brutality, raising voices collectively to create social and political change, is at the core of First Amendment protected activity. *See Edwards*

v. South Carolina, 372 U.S. 229, 238 (1963); *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940); *Terry v. Reno*, 1010 F.3d 1412, 1421–22 (D.C. Cir. 1996) ("Protest, picketing, and other like activities lie at the core of free speech guaranteed by the First Amendment").

Speech that is passionate or outraged is fully protected by the First Amendment. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."). Plaintiffs' speech is no less protected because the object of their protest is the police themselves, the system of policing, and even the very police confronting them in the streets. *City of Houston, Tex. v. Hill*, 482 U.S. 451, 461 (1987) (the First Amendment "protects a significant amount of verbal criticism and challenge directed at police officers").

ii. Plaintiffs' Protests Occurred on Quintessential Public Fora

Plaintiffs' activities took place in traditional public fora, the sidewalks and streets of Washington, D.C., even at Black Lives Matter Plaza, cordoned off from traffic to permit such assembly and protest. Such fora have "immemorially been held in trust for use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939); *Price v. Garland*, 45 F.4th 1059, 1069 (D.C. Cir. 2022). These are quintessential public fora. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Hodge v. Talkin*, 799 F.3d 1145, 1147 (D.C. Cir. 2015).

Defendants reference reasonable time, place, and manner restrictions in their Motion. However, their acts as alleged in Plaintiffs' Amended Complaint cannot be properly classified as reasonable time, place, and manner restrictions on speech.

iii. The Use of Weaponry Against Plaintiffs Fails as a Content-Based Restriction on Speech

Plaintiffs have adequately alleged, as referenced above, that the use of the weaponry was motivated by the anti-police or anti-police brutality messaging of the crowds. "A content-based

restriction must meet strict constitutional scrutiny to stand, *i.e.*, the restriction must be 'necessary to serve a compelling state interest … [and be] narrowly drawn to achieve that end.'" *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 898 F.Supp.2d 73, 80 (D.D.C. 2012) (quoting *Perry*, 460 U.S. at 45).

The Defendants do not assert a government interest compelling enough to justify restricting protest speech on the basis of its message. "Further, when a restriction on speech is content-based, the burden is on the government to prove that the restriction is the least restrictive alternative to achieve its compelling interest." *Am. Freedom Def. Initiative*, 898 F.Supp.2d at 81 (citing *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 665–668 (2004)). The burden is on the government to meet these elements, *id.*, which it cannot do.

iv. The Use of Weaponry Against Plaintiffs Fails as a Content-Neutral Restriction on Speech

A reasonable time, place, and manner restriction on expression can be imposed when a restriction is content-neutral, provided that any restriction is narrowly tailored to serve a significant government interest and leaves open ample alternative channels for communication. *Am. Freedom Def. Initiative*, 898 F. Supp. 2d at 80 (citing *Perry*, 460 U.S. at 45); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Were the restriction on use of the streets through deployment of less lethal munitions considered content-neutral and were the Plaintiffs to assume without conceding that the government had a significant interest to restrict speech (as they have not asserted any in their opening brief), the manner of restriction is unreasonable and fails to be narrowly tailored to satisfy any purported interest.

a. Targeting Peaceful Protestors with Weaponry is Inherently Unreasonable

There is nothing reasonable about using weapons against peaceful protestors who were engaging in no unlawful activity. "[T]he right to be free from government violence for the peaceful exercise of

protected speech is so fundamental to our system of ordered liberty that it is 'beyond debate.'" *Black Lives Matter D.C. v. Trump*, 544 F. Supp.3d at 47 (quoting *District of Columbia v. Wesby*, 138 S.Ct. 577, 589 (2018)).

It is inherently unreasonable for police to use their weapons, rather than their words, to impose a "reasonable" time, place, and manner restriction on speech where the crowd is known to contain hundreds of peaceful protestors to whom no dispersal order or restriction on speech has been conveyed. This suggestion that the police were enforcing time, place, and manner restrictions fails at any level, given that as there were no directives or commands or conveyed restrictions, there was nothing to enforce. The weapons were fired without any identified enforcement purpose.

b. Use of Indiscriminate Weapons is Not a Narrowly Tailored Approach to Advance any Purported Government Objective

Even *if* the government had a basis to arrest or act against *some* individuals who had engaged in misconduct, the use of inherently indiscriminate weapons or the indiscriminate use of weapons against peaceful protestors is violently overbroad.

Inherently indiscriminate weapons or indiscriminate use of weapons targets peaceful protestors, and has no way not to when they are deployed in the midst of peaceful protest activity. It is a form of collective punishment. It most certainly is not a constitutional manner of policing, including during times of protest, challenge, and dissent.

"The courts have held that the proper response to potential and actual violence is for the government to ensure an adequate police presence and to arrest those who actually engage in such conduct, rather than suppress legitimate First Amendment conduct as a prophylactic measure." *Collins v. Jordan*, 110 F.3d 1363, 1372 (9th Cir. 1996) (citations omitted).

It is overbroad and not narrowly tailored for the police to use force that causes pain, suffering, injury, including risking serious injury, when the police have not attempted to disperse or issue a directive to the peaceful protestors using a verbal warning, notice, order, or *anything* indicating that actions need to be taken or orders complied with to avoid pain and injury.

c. The Defendants Failed to Leave Open Ample Alternative Channels for Communication

The completely unpredictable and unprovoked use of weapons fails to leave open ample alternative channels for communication. Plaintiffs had no idea where they were supposed to go when the police were suddenly deploying weapons without notice or explanation. Were they to clear the streets and go home, giving up their right to continued expression? Were they to move in a particular direction? Were they to stop doing some particular thing or start doing some other particular thing? It is not clear *where* the police were permitting or prohibiting protest or what the nature of any ostensible restriction precisely was. As such, no street was truly safe from unlawful and sudden police violence. Not even Black Lives Matter Plaza.

B. Plaintiffs Adequately Allege Violation of their Fourth Amendment Rights

Plaintiffs were all seized when the police used force to restrain each's freedom of movement. Plaintiff Ferris, in the August incident, was additionally and distinctively seized because she was shot by a projectile weapon ancillary to an attempt to arrest her. Am. Comp. ¶¶ 316–21.

1. Plaintiffs Were Seized When Officers Used Force to Restrain or Terminate Each's Freedom of Movement

The uses of force in the four incidents meet the Supreme Court's definition of a Fourth Amendment seizure: (1) an application of physical force (2) with the intent to restrain. *See Torres v. Madrid*, 141 S.Ct. 989, 998 (2021).

The second element, intent to restrain, does not require the full termination of an individual's freedom as Defendants imply. The Supreme Court has expressly rejected the notion that the Fourth Amendment applies "only when there is a governmental termination of freedom of movement." *Id.* at 1001. "[T]he application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued." *Id.* at 1003. The inquiry about intent to restrain is objective and does not look to the subjective motivations of police. *Id.* at 998.

In *Torres*, the Supreme Court addressed the issue of whether the application of physical force to a suspect the police are trying to arrest is a seizure if the force fails to stop them. *Id*. at 995. The Court held that a woman was seized when officers shot her, despite her failure to yield to that force, as it amounted to a seizure by force given the officers' intent to restrain. *Id.* at 998–99. The appropriate inquiry with regard to a seizure by force is whether the challenged conduct *objectively* manifests an intent to restrain. *Id.* at 998. The Court relied on its prior decision in *California v. Hodari D.*, 499 U.S. 621 (1991), in which it distinguished between a seizure that results from a show of authority as opposed to an application of physical force. *Torres*, at 995. With respect to a seizure by a show of authority, a seizure occurs only if the subject yields to the authority. *Hodari D.*, 499 U.S. at 626. In contrast, the "slightest application of physical force," is sufficient to constitute a seizure for the duration of the application of force, even if the suspect is then able to escape. *Id.* at 625. Justice Scalia explained, "The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful." *Id.* at 626. Thus, in a seizure by physical force, the seizure occurs at the instant physical force is applied, even if the subject then leaves. *Torres,* 141 S.Ct. at 999.

A seizure through physical force occurs "when an officer . . . terminates *or restrains* [a person's] freedom of movement through means intentionally applied." *Brendlin v. California*, 551 U.S. 249, 254 (2007) (internal citations and quotations omitted) (emphasis added); s*ee also Brower v. Cnty. of Inyo*, 489 U.S. 593, 597 (1989).

In *Florida v. Bostick*, 501 U.S. 429 (1991), the Court recognized that the "free to leave" test to define a seizure is not always appropriate. Indeed, the Court concluded that the Florida Supreme Court in that case had "erred ... in focusing on whether [defendant] was 'free to leave' rather than on the principle that those words were intended to capture." 501 U.S. at 435. The Court explained that the "crucial test" is "whether, taking into account all the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Id.* at 437 (citing *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)).

Termination or restraint of freedom of movement is not limited to full apprehension. A seizure arises from use of force that "'in some way restrain[s] the liberty' of the person." *Torres*, 141 S.Ct. at 995 (quoting *Terry v. Ohio*, 392 U.S. 1, 19, n.16 (1968)); *see also Pearce v. City of Portland*, 2023 WL 315913 (D. Or. January 18, 2023)) ("intent to restrain may include intent to control movement, even if the officers do not intend to detain the person"); *Alsaada v. City of Columbus*, 536 F. Supp.3d 216, 264 (S.D. Ohio 2021), modified, 2021 WL 3375834 (S.D. Ohio 2021) ("what is required is that a person's freedom of movement had been terminated, not that the person's movement itself had been terminated").

Thus, courts have found a seizure where officers use less lethal weapons against a person or crowd without effort to arrest/apprehend. In *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012), the court found a seizure where a campus police officer shot plaintiff in the eye with a pepper ball projectile fired to disperse partying students from an apartment complex. 685 F.3d at 877–878. In *Ciminillo v. Streicher*, 434 F.3d 461 (6th Cir. 2006), the court held that a plaintiff was seized when he was shot with a beanbag during a riot while walking toward the officer with his hands over his head. 434 F.3d at 466; *see also Pearce v. City of Portland*, 2023 WL 315913, at *4 (use of less lethal projectiles constituted seizure where protestor was not detained and police asserted intent was to disperse); *Johnson v. City of San Jose*, 591 F. Supp.3d 649, 662–63 (N.D. Cal. 2022) (firing a less lethal projectile at protestor constituted seizure, intent to restrain movement established where projectile impact impaired movement, rejecting defendants' argument that intent to disperse failed to constitute intent to restrain); *Alsaada*, 536 F. Supp. 3d at 265 (protestors were seized where less lethal weapons used for dispersal constituted a restraint on free movement); *Anti Police-Terror Project v. City of Oakland*, 477 F. Supp.3d 1066, 1086–87 (N.D. Cal. 2020) (using chemical agents and less lethal projectiles to disperse protestors); *Black Lives Matter Seattle-King Cnty*, 466 F. Supp. 3d at 1214–15 (less lethal projectiles, flash-bangs, pepper spray and tear gas against protestors analyzed under Fourth Amendment); *Jennings v. City of Miami, No. 07–23008-CIV*, 2009 WL 413110, at *9 (S.D. Fla. Jan. 27, 2009) (herding demonstrators by firing chemical agents and less lethal projectiles constituted a seizure); *Rauen v. City of Miami, No. 06–211182-CIV*, 2007 WL 686609, at *8 (S.D. Fla. Mar. 2, 2007) (moving protesters from one area into another by means of batons, chemical agents, and projectiles constituted seizure); *Coles v. City of Oakland, No. C03–2961 TEH*, 2005 WL 8177790, at *5 (N.D. Cal. Apr. 27, 2005) (finding seizure

where police used less lethal weapons to move protestors along dispersal route without intent to arrest because "a person may be seized without becoming completely immobile or being forced to remain in one location"); *Otero v. Wood*, 316 F.Supp.2d 612, 626 (S.D. Ohio 2004) (firing into an unruly crowd and striking plaintiff with a projectile weapon constituted Fourth Amendment violation); *Marbet v. City of Portland, No. CV 02–1448-HA*, 2003 WL 23540258, at *10 (D. Or. Sept. 8 2003) (firing pepper spray and rubber bullets at protestors constituted seizure, rejecting argument that because protestors were able to walk away there was no seizure).

United States v. Veney, cited by Defendants, deals with seizure by a show of authority, not by physical force. 45 F.4th 403, 404–405 (D.C. Cir. 2022). Thus, where the criminal defendant in *Veney* continued walking when told not to by the officer, there was no seizure because the defendant did not submit to the show of authority. *Id.* at 406. "For purposes of the Fourth Amendment a seizure occurs when physical force is used to restrain movement *or* when a person submits to an officer's show of authority." *Id*. at 405 (emphasis added). And the instant case is a far cry from *Jones v. District of Columbia*, Case No. 21–836, 2021 U.S. Dist. LEXIS 216137, 2021 WL 5206207 at *14 (D.D.C. Nov. 9, 2021), also cited by Defendants, because in *Jones*, the officers harassed the plaintiff, but did not use the serious level of force alleged in the instant case.[4]

That a seizure may interfere with the freedom to remain as well as the freedom to leave has been recognized by a number of courts. *See Pollreis v. Marzolf*, 66 F.4th 726, 731 (8th Cir. 2023) (pointing taser and directing person to return to house rather than remain outside is seizure); *Youkhanna v. City of Sterling Heights*, 934 F.3d 508, 523 (6th Cir. 2019), cert. denied, 140 S. Ct. 1114 (2020) (ejection of person from a public meeting amounted to a seizure); *Heaney v. Roberts*, 846 F.3d 795, 804–05 (5th Cir. 2017) (same); *Salmon v. Blesser*, 802 F.3d 249, 254 (2d Cir. 2015) (allegations that police officer removed plaintiff from courthouse with excessive force were sufficient to plead a Fourth Amendment seizure); *Bennett v. City of Eastpointe*, 410 F.3d 810, 834 (6th Cir. 2005) ("Fourth Amendment jurisprudence suggests a person is seized not only when a reasonable person would not feel free to leave

[4] Similarly, *United States v. Scott*, Case No. 21-51084, 2022 U.S. App. LEXIS 32887, at *7 (5th Cir. Nov. 29, 2022), *Pinto v. Collier Cnty*., Case No. 21-13064, 2022 U.S. App. LEXIS 17453, at *10 n.7 (11th Cir. June 24, 2022), and *Clark v. Edmunds*, 513 F.3d 1219, 1222 (10th Cir. 2008), cited by Defendants at fn. 10 of their Memorandum, all involve minimal force, rather than the high level of force alleged here.

an encounter with police, but also when a reasonable person would not feel free to remain somewhere, by virtue of some official action"); *Wallace by Wallace v. Batavia School Dist. 101*, 68 F.3d 1010, 1014–15 (7th Cir. 1995) (teacher seized student when grabbing a student's elbow and wrist to remove her from classroom); *Kernats v. O'Sullivan*, 35 F.3d 1171, 1180–81 (7th Cir. 1994) (demand that tenants vacate premises can be seizure).

Each of the uses of projectile weapons in the instant case objectively manifests an intent to restrain or terminate the freedom of a person to come, go, or remain as they had desired. Police launched an explosive munition at Plaintiff Crowder, striking her arm, cutting and bruising her and causing her to turn and run away from the police line and protest, while police caused a second device to explode near her feet. Am. Comp. ¶¶ 126 – 35, 151 – 52. When police hit Ferris with a sting ball munition, it caused her to stop in her tracks and made it painful to walk. *Id.* ¶ 214. The multiple projectiles broke through the skin of her leg and hobbled her movement. *Id.* ¶ 229. Police struck Crespo with a sting ball munition that tore into the flesh of her leg. She had to be carried to medical care. *Id.* ¶¶ 256–60. Police hit Ferris at a subsequent (August) demonstration, causing her to cry out in pain and move away. *Id.* ¶¶ 301, 306–07, 311.

2. Plaintiffs Were Targeted by Police and Were Not Accidental Victims of Secondary Exposure

To the extent that Defendants argue that the shootings were not Fourth Amendment seizures because they state they did not intend to strike the specific Plaintiffs, the Supreme Court has made clear that a seizure can occur even when an unintended person or thing is the object of the detention or taking. *See Hill v. California*, 401 U.S. 797, 802–05 (1971); *see also Brendlin*, 551 U.S. at 254. The mere fact that a use of force may have been directed at a third party, or at a crowd in general, does not bar an unintended victim from bringing a Fourth Amendment claim, so long as the police action was "not ... the consequence of an unknowing act." *Brendlin*, 551 U.S. at 254.

Defendants cite *Logan v. City of Pullman*, 392 F.Supp.2d 1246, 1260 (E.D. Wash. 2005), but in that case, when police discharged pepper spray on the first floor of a building, the court ruled that the incidental wafting of pepper spray to others did not constitute a seizure. In contrast, in Plaintiffs' claims,

the police deliberately targeted Plaintiffs or the protest groups within which Plaintiffs were located and associated. An individual is the intended object of a seizure where police target a group which contains that person. For example, in *Nelson*, an officer took aim and intentionally shot pepper spray projectiles targeting a group of students in an attempt to disperse them, and hit the plaintiff in the eye, severely injuring him. 685 F.3d at 874. Like Defendants here, the *Nelson* defendants argued that there could be no liability because "Nelson was not individually targeted by officers, and therefore his shooting was unintentional and incapable of causing a Fourth Amendment violation." *Id*. at 876. The Ninth Circuit disagreed, relying on the Supreme Court's *Brendlin* and *Brower* decisions in holding that "for an act to be unintentional, the government conduct must lack the element of volition; an absence of concern regarding the ultimate recipient of the government's use of force does not negate volition." *Id.* The Court distinguished *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 843–844 (1998) as involving unintentional police conduct.

> Regardless of whether Nelson was the specific object of governmental force, he and his fellow students were the undifferentiated objects of shots intentionally fired in the direction of that group. Although the officers may have intended that the projectiles explode over the students' heads or against a wall, the officers' conduct resulted in Nelson being hit by a projectile that they intentionally fired towards a group of people of which he was a member. Their conduct was intentional, it was aimed towards Nelson and his group, and it resulted in the application of physical force to Nelson's person as well as the termination of his movement.

Id. at 877.

3. Ferris in the August Incident Was Struck by a Projectile in Order to Facilitate Her Arrest

Defendants argue that "Plaintiffs do not allege any force was used with the purpose of arresting Plaintiff Ferris" in the August incident. *See* Defs.' Mem. 14. Plaintiffs do so allege. *See* Am. Comp. ¶ 316 ("A purpose of this use of force was to incapacitate those struck to facilitate custodial false

arrest."); *Id.* ¶¶ 318 – 21 (officers rushed in, tackling persons for arrest, and one ordered Ferris to the ground for purpose of arrest). As discussed above, that Ferris escaped apprehension doesn't negate the seizure when she was shot.

4. The Amount of Force Used Was Unreasonable Under *Graham v. Connor* as Each Plaintiff Was Peaceful, Accused of No Crime, Posed No Threat to Others, and Was Not Actively Resisting Arrest or Evading

Excessive force claims under the Fourth Amendment are governed by a reasonableness standard. *Graham v. Connor*, 490 U.S. 386, 396 (1989). To assess the reasonableness of a seizure, courts must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. In so doing, courts must give "careful attention to the facts and circumstances of [the] particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Johnson v. District of Columbia*, 528 F.3d 969, 974 (D.C. Cir. 2008) (quoting *Graham,* 490 U.S. at 396).

None of the Plaintiffs were committing a crime, posing a threat, resisting arrest, or attempting to evade arrest. Where there is no need for force, *any* force used is constitutionally unreasonable. *Headwaters Forest Def. v. Cnty. of Humboldt,* 240 F.3d 1185, 1199 (9th Cir. 2000) *cert. granted, judgment vacated on other grounds*, 534 U.S. 801 (2001) (emphasis in original).

The cases cited by Defendants are inapposite. All three involve force used to detain and arrest a criminal suspect, including active resisters. In *Oberwetter v. Hilliard*, the plaintiff admitted twice refusing an officer's orders before he pulled her arm behind her back and pushed her up against a stone column while arresting her. 639 F.3d 545, 555 (D.C. Cir. 2011). She had no bruise or injury. *Id.* In *Rogala v. District of Columbia.,* an officer pulled a woman out of a car by the arm after she was placed under arrest, refused to get out and resisted the officer's efforts to remove her from the car. 161 F.3d 44, 54–55 (D.C. Cir. 1998). *Martin v. Malhoyt* held that force was justified to detain and arrest an individual, given rapidly unfolding events and safety concerns. 830 F.2d 237, 262 (D.C. Cir. 1987) (issued prior to articulation of *Graham* factors).

In contrast in the instant case, the Plaintiffs were each subjected to a high level of force, an explosive munition that caused significant injuries, when each had received no orders or warnings, they were not resisting or disobeying the officers, they were not suspected of a crime, they did not present a threat, and they were not arrested. Under the *Graham* factors, given the events as alleged by Plaintiffs, the use of force was objectively unreasonable.

C. Plaintiffs Adequately Allege Violation of Due Process

Plaintiffs have alleged that the MPD's standard operating procedures (SOPs) authorize the deployment of projectile weapons against peaceful protestors without prior warning or dispersal order. Am. Comp. ¶ 71 (actions were pursuant to SOPs for handling First Amendment Assemblies and other demonstrations); ¶¶ 72, 74 (expressly authorize less lethal projectile weapons including sting ball grenades in the context of protests); ¶ 73 (expressly authorize use of less lethal weapons in the context of non-violent protest activity or crowd control); ¶ 68 (SOPs do not require warnings in advance of deployment); ¶ 75 (alleging policy, practice, and custom of deploying less lethal weapons against peaceful protestors without warning or dispersal order); ¶ 76 (resulting in absence of clear or intelligible directions to protestors as to what to do, including to avoid being subject to use of force).

Courts have held that such circumstances violate due process rights to fair notice. *See Dayton v. City & Cnty. Of Denver, Colorado*, No. 22-CV-00841-CMA-MEH, 2023 WL 112491, at *6 (D. Colo. Jan. 5, 2023), (use of projectile less lethal weapons without warning or first giving dispersal orders gives rise to due process claim under § 1983); *Ahmad v. City of St. Louis, Missouri, No. 4:17 CV 2455 CDP*, 2017 WL 5478410, at *15 (E.D. Mo. Nov. 15, 2018) (due process clause violated where police issued vague, inaudible dispersal orders followed by use of less lethal chemical agents).

In *Dayton*, an injured protestor sued under § 1983 after police deployed a flash-bang into a crowd protesting police brutality without prior orders to disperse. The court permitted due process claims to proceed. The court reasoned "[t]his kind of policy that furnishes discretion to officers 'encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do' in order to avoid being subject to use of force." *Dayton*, 2023 WL 112491, at *7 (quoting *Kolender v. Lawson*, 461 U.S. 352, 361 (1983)).

The *Ahmad* court issued an injunction mandating clear dispersal order issuance upon evidence that police issued no, inaudible, or non-specific dispersal orders prior to use of chemical agents and police interventions. *Ahmad*, 2017 WL 5478410 at *15.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). A law or policy may be challenged if it is "impermissibly vague." *Id.*

Due process vagueness considerations address two connected but discrete concerns. "[F]irst, that regulated parties should know what is required of them so they may act accordingly" and, second, that "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* at 253. A law "may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). In the context of free speech, "rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *Fox Television*, 567 U.S. at 253–54.

The standard operating procedures which permit use of projectile weapons without warning or orders, the practices of using projectile weapons without warning, and the use of projectile weapons against Plaintiffs without warning or orders in each of the underlying events, failed to provide Plaintiffs with any notice that they would be fired upon or any intelligible command as to what they needed to do to avoid being the object of violent police action. This regulation of free speech activity is wholly arbitrary. Officers' discretion to use projectile weapons against protestors is practically unbounded under the SOPs.

To the extent that Defendants claim there is a communicative element to shooting someone with a projectile weapon, that message is entirely vague. It could be a message to move back. Or to remain for detention. Or to disperse. Is it a wordless declaration that the entire assembly and all protest is now deemed unlawful? Or it may simply be a message of animus against these protestors' anti-police brutality messaging, punishment for speaking. This whole scheme of using projectile weapons without warning or orders is vague "not in the sense that it requires a person to conform his conduct to an

imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Morales*, 527 U.S. at 60 (quoting *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971)).

Defendants argue that the D.C. Circuit held in *Carr v. District of Columbia* that dispersal orders are not required before every mass arrest. *Carr* is clear that, even in the face of violent misconduct, dispersal orders are required where a demonstration group is known to not be acting as a unit. *Carr,* 587 F.3d at 408–410. Defendants knew that the streets were filled with peaceful protestors coming and going and that any alleged misconduct could not be imputed to *all* protestors or to protestors in general. This is exactly the type of situation where dispersal orders are required before police act against protestors as a group, even if police believe some have engaged in misconduct.

II. Plaintiffs Have Stated Viable Claims for Municipal Liability Against the District

There are several ways in which a plaintiff may successfully allege the existence of the necessary municipal policy or custom for *Monell* liability:

> Specifically, she may point to (1) "the explicit setting of a policy by the government that violates the Constitution," (2) "the action of a policy maker within the government," (3) "the adoption through a knowing failure to act by a policy maker of actions by his subordinates that are so consistent that they have become 'custom,'" or (4) "the failure of the government to respond to a need (for example, training of employees) in such a manner as to show 'deliberate indifference' to the risk that not addressing the need will result in constitutional violations."

Blue v. District of Columbia, 811 F.3d 14, 18–19 (D.C. Cir. 2015) (quoting *Baker v. District of Columbia*, 326 F.3d 1302, 1306 (D.C. Cir. 2003).

"A showing under any of these four theories suffices to sustain a claim on Monell liability." *Goodwin*, 579 F. Supp. 3d at 168 (citations omitted); see also *Blue*, 811 F.3d at 20; *Crudup v. District of Columbia,* No. 20-CV-1135 (TSC), 2023 WL 2682113, at *9 (D.D.C. Mar. 29, 2023).

A. Plaintiffs Allege Official Policies Caused the Violations

Despite Defendants' argument to the contrary, Plaintiffs have identified an "official municipal policy of some nature [that] caused the constitutional tort." *See Goodwin*, 579 F. Supp. 3d at 169 (*quoting Hurd v. District of Columbia*, 997 F.3d 332, 337 (D.C. Cir. 2021)).

1. The District's Defective Standard Operating Procedures Authorized and Caused the Constitutional Violations Alleged Herein

"Defendants' actions . . . were pursuant to the District of Columbia's specific standard operating procedures for handling First Amendment assemblies and other large-scale demonstrations." Am. Comp. ¶ 71.

The SOPs for the handling of mass demonstrations expressly authorize the use of less lethal weapons in the context of non-violent protests, to include inherently indiscriminate munitions such as sting ball grenade munitions. *See* Am. Comp. ¶ 72 (SOPs contained "an express policy generally authorizing the use of less lethal weapons specifically in the context of First Amendment protected assemblies and demonstrations"); *Id.* (SOPs "expressly authorized the use of less lethal weapons in the context of conduct which may be non-violent, such as allegedly blocking traffic. . . or crowd control"); *Id.* ¶ 73 (SOPs "expressly authorized . . . inherently indiscriminate weapons, such as sting ball munitions, in the context of protest activity").

Notwithstanding such express authorizations, the SOPs are painfully vacant and provide no guidance whatsoever to limit when or the manner in which such indiscriminate weapons can be used in the midst of peaceful protests. At the heart of the violations, these SOPs are defective and fall far below minimum professional standards for policing. With authorization for less lethal weapons, but no guidelines or restraints, constitutional violations are a near certainty.

The municipality has long been on notice of the defects of the SOP. The D.C. Office of Police Complaints (OPC) in a report observing indiscriminate uses of less lethal weapons at the 2017 Inauguration, identified specific policy and training defects, including that while the SOP

> permits the use of less than lethal weapons at First Amendment assemblies, it does not provide a specific procedure to follow for their use. . . . The SOP is silent as to whether a

> warning is required in advance of deploying a less than lethal weapon. It is evident that this lack of direction in the SOP led to widespread use of the weapons on inauguration day, and they appeared to be deployed as a means of crowd control, and not necessarily in response to an unlawful action.

Am. Comp. ¶ 68 (*quoting*, D.C. Office of Police Complaints, *OPC Monitoring of the Inauguration, January 20, 2017, Report and Recommendations of the Police Complaint Board to Mayor Muriel Bowser, the Council of the District of Columbia, and Interim Chief of Police Peter Newsham* (Feb. 27, 2017) at 7).

The OPC made policy and training recommendations, which went unheeded, expressly warning that specificity was needed in the SOPs to prevent indiscriminate less lethal weapon use.

> The Standard Operating Procedure for Handling First Amendment Assemblies should be reviewed and updated to include that warnings should be given when practical for all uses of less than lethal weapons in a crowd control situation, and there should be written guidance on the proper deployment and use of each less than lethal weapon. OPC monitors observed multiple instances over the course of several hours where less than lethal weapons were used and no warning or commands to the crowd preceded their use. The SOP gives very little direction on when and how to deploy less than lethal weapons for crowd control, and there should be more guidance in place to ensure that their use is not indiscriminate or unreasonably dangerous.

Am. Comp. ¶ 68c (quoting OPC Report at 10).

The District was additionally on notice of these defects from litigation. *See e.g., Harris v. Gov't of District of Columbia*, No. CV 18–2390 (ABJ), 2019 WL 3605877, at *5 (D.D.C. Aug. 6, 2019) ("Courts in this jurisdiction have found that litigation about the claim at issue gives rise to knowledge."). The complaint in *Horse, et al. v. District of Columbia, et al.*, No. 17-cv-1216 (D.D.C), alleged failure to train, and the misuse and firing of sting ball munitions and flash-bang grenades at crowds of peaceful demonstrators. *See* Am. Comp. ¶ 69 (referencing litigation generally).

Plaintiffs allege that the effect of these SOP authorizations without constitutional constraint or guidance is that the District has a policy, practice, and custom effectively authorizing the discharge of less lethal weapons, including projectiles and flash-bang, stun, and shrapnel grenades:

- for the purpose of controlling, or suppressing, or handling First Amendment protected assemblies and mass demonstrations;
- against persons engaging in non-violent conduct and into groups of persons containing persons peacefully participating in demonstration activity or assembly;
- into groups containing peaceful protestors in the absence of audible warnings that it intended to do so or providing any notice or direction to protestors as to what a person should do to avoid being subject to force, pain, and injury;
- into groups containing peaceful protestors in the absence of any lawfully issued orders to disperse the area of impact followed by meaningful opportunity to disperse.

Am Comp. ¶ 75.

The District argues that the SOPs cannot be held against it because a proviso directs that officers use "the minimum force that the objectively reasonable officer would use." This general statement begs the question of what the MPD is training its officers *is* the objectively reasonable amount of force to be used against peaceful protestors. *See also Daskalea v. District of Columbia*, 227 F.3d 433, 442 (D.C. Cir. 2000) ("a 'paper' policy cannot insulate a municipality from liability where there is evidence . . . that the municipality was deliberately indifferent to the policy's violation.").

The District also points out that it has a general policy statement recognizing "the right to organize and participate in peaceful First Amendment assemblies" subject to reasonable restrictions. Here, too, this broad statement does not surmount the problems posed by the specific authorizations of less lethal projectile munitions against peaceful protests.

2. Chief Newsham's Policy Stripping Assemblages of Protections if a Few Individuals Were Alleged to Have Committed Misconduct Also Caused the Violations Herein

Plaintiffs allege that, of his own initiative or edict,

> Chief NEWSHAM effectuated a policy, practice, and custom whereby, upon allegation unlawful conduct by individuals, an entire assemblage was deemed to lose all protections (including, but not limited to, those afforded by the First Amendment Assemblies Act), and would be subject to use of less lethal projectile weapons and resultant pain and injury without warning, notice, or demand for dispersal. This policy countenanced use of such force notwithstanding the known presence within the assemblage of peaceful persons who had not engaged in unlawful conduct.

Am. Comp. ¶ 79; *see also id.* ¶¶ 13, 80–83.

A consequence of this policy, aside from causing the violations complained of, was the intentional use of projectile weapons

> against groups of protestors without regard to the rights of the peaceful individuals within those groups to be free from police seizures and violence; without warnings; and failing to distinguish persons engaged in non-violent and legal conduct from any persons against whom police may have a lawful basis to act.

Am. Comp. ¶ 82.

The District was on notice to this practice including from prior *Horse* litigation against it alleging that in connection with the 2017 Inauguration, police declared a march to be a “riot” and then acted against protestors generally, including with excessive force and less lethal munitions against persons who had broken no law. *Id*. ¶ 69 (also noting that none of 234 arrestees were convicted of the purported charge of rioting).

This edict was, effectively, a “No Holds Barred” policy, of which Chief Newsham was the architect and which gave license to officers to indiscriminately use force against non-violent protestors including by using allegations that some persons, somewhere, or elsewhere, had committed misconduct, as similarly asserted here by Defendants to justify their assaults against Plaintiffs. Notably, there was no related obligation to issue an order to disperse, to declare an unlawful assembly, to essentially “read the Riot Act” or otherwise provide any notice to peaceful protestors that their lawful presence or constitutionally protected activities now subjected them to police use of force or arrest.

B. Plaintiffs Allege the Personal Participation of Policymaker Newsham in Causing the Violations

The District does not dispute that Chief Newsham was a policymaker for the purposes of Section 1983, but it contends that his "high-level involvement" is insufficient to have caused the alleged violations and that Plaintiffs do not "allege that the specific actions of Chief Newsham as a policymaker . . . caused" the violations.

The District raised similar arguments in *Goodwin* regarding Chief Newsham, which were rejected. 579 F. Supp. 3d at 170. These arguments should be rejected here in light of Plaintiffs' Amended Complaint.

Plaintiffs allege that "repeatedly, over many months," Am. Comp. ¶ 2, the MPD "deployed [less lethal munitions] into crowds of people indiscriminately", *id.*, and "did so with the knowledge and authorization of the highest municipal policymakers including . . . the Chief of Police," *id.* ¶ 4. For all these events, Chief Newsham "was the commanding officer overseeing police activities against demonstrators." *Id.* ¶ 62. By regulation, in the event of "any riot, tumultuous assemblage, or other unusual occurrence," he is to "take command of the force and direct its efforts in the work at hand." 4 D.C.M.R. § 800.4. Newsham did just that.

Newsham is alleged to have "supervised, ordered, directed, authorized, and/or caused the violations alleged herein." Am. Comp. ¶ 26. To that end, he was in the Joint Operations Command Center throughout the day. *Id.* ¶ 100. "From within the JOCC, Chief NEWSHAM commanded, supervised, and directed the actions of the police in the field." *Id.* ¶ 103. Plaintiffs allege "at each of the incidents herein, Chief NEWSHAM was in the command center or on the scene monitoring events and engaging in command supervision and directives." *Id.* ¶ 104. He "directed and/or authorize the use of less lethal projectile weapons and was responsible for the officers' response on the scene as he monitored and commanded over events." *Id.* ¶ 105.

The defective SOPs, described above, were authorized by Newsham acting as the Chief of Police. *Id.* ¶ 26. Newsham personally effectuated his policy or edict against protestors, in which upon allegation of misconduct by a few individuals an entire assemblage would become subject to use of less lethal projectile weapons, described above. *Id.*¶ 79; *see also id.* ¶¶ 13, 80–83.

The specific uses of force against Plaintiffs are alleged to be "[p]ursuant to the District's policies and/or directives of Chief NEWSHAM." *Id.* ¶ 149.

Defendants argue that because incident commander Glover was responsible for implementing Newsham's directives, that precludes argument that Newsham himself caused the violations. Defs.' Mem. 29. This misses the point. Newsham personally issued the directives and Glover acted consistent with and implemented his directives. That Glover may have jointly or concurrently caused the harm does not change Newsham's liability for his own actions.

At a Council oversight hearing, Newsham ratified the police conduct in May and August 2020, as justified and within policy and law. Am. Comp. ¶ 110. He specifically was aware of charges that munitions were used indiscriminately and continued to defend police actions. *Id.* ¶¶ 107 - 09. Defendants' extrinsic quotation of Newsham saying, in the abstract, he would not support an officer who "did unnecessarily deploy munitions in a first amendment assembly" skirts the issue and defies the facts: He approved of the uses of force during this particular period as justified or "necessary." He didn't find any unnecessary deployment of munitions and defended the police in the face of charges of indiscriminate use of force.

The District contends that Newsham did not expressly ratify the very specific uses of force against each of four Plaintiffs. However, viewing the Complaint in the most favorable to Plaintiffs, he had actual or constructive knowledge of the underlying events in which the injuries occurred. This is a fair inference from his immediate command function and his "close situational awareness of MPD deployments, practices and customs regarding the mass demonstrations throughout the subsequent months as events unfolded," *id.* ¶ 101, and also where he did "after action[]" reports to review and assess police conduct "whenever we have an instance like this," referencing forceful police activity during protests. *Id.* ¶ 100. These were not one-off events likely to occur under the radar and outside the awareness of the Chief. These events complained of here were repeated, ratified practices, unconstitutional uses of force carried out with Chief Newsham in situational awareness, in command and pursuant to, and a result of, his policies, practices and control of the force under his command.

C. Plaintiffs Adequately Allege a Knowing Failure of Policymakers to Act in the Face of Actions Sufficiently Consistent to be Deemed Custom

In many ways, this third and the fourth avenue (deliberate indifference) for establishing *Monell* liability converge or at least rely on a similar body of facts.

To establish a knowing failure to act by a policy maker, Plaintiffs must show that a "District policymaker's ignoring of a practice was 'consistent enough to constitute custom.'" *Harvey v. District of Columbia*, 798 F.3d 1042, 1052–53 (D.C. Cir. 2015) (quoting *Warren v. District of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004)).

No numerical standard controls how many underlying incidents are required to comprise a custom or policy. *See Carter v. District of Columbia*, 795 F.2d 116, 124 (1986) ("Egregious instances of misconduct, relatively few in number but following a common design, may support an inference that the instances would not occur but for municipal tolerance of the practice in question.")

Plaintiffs alleged a custom manifest with a common design, that when less lethal weapons are used in the context of protest, they are used indiscriminately against peaceful protestors, targeting those associated with protest generally and without warning, thereby causing constitutional injury. Am. Comp. ¶¶ 10 – 12, 75; *see also id.* ¶¶ 1, 2, 6, 15 – 20, 46 – 49, 82.

This custom was manifest at the 2017 Presidential Inauguration, which gave rise to an OPC report sharply critical of MPD standard operating procedure, Am Comp. ¶ 68, and also litigation, *id.* ¶ 69. The four incidents in the Amended Complaint, which occurred over a three-month period, are not isolated incidents, but are alleged to reflect a custom persistent over the many months of George Floyd anti-police brutality protests in 2020. *Id.* ¶ 2 ("repeatedly, over many months"), ¶ 4 ("time and again" attacked peaceful protestors), ¶ 8 ("were not isolated incidents"), ¶¶ 39, 83 (repeated occasions).

Policymakers' "acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity" can be the basis for liability. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989); *Triplett v. District of Columbia*, 108 F.3d 1450, 1453 (1997) ("inaction giving rise to or endorsing a custom" can establish liability).

The District's policymakers were faced with actual or constructive knowledge that its officers would violate constitutional rights through the indiscriminate use of less lethal weapons against protestors, including from:

- The prior indiscriminate use of less lethal weapons without warning in connection with the 2017 Presidential Inauguration, Am. Comp. ¶ 68;
- A related D.C. Office of Police Complaints report that provided actual notice to policymakers "that less than lethal weapons were used indiscriminately and without adequate warnings," *id*. ¶ 68a;
- The specific identification by the OPC report that MPD Standard Operating Procedures were obviously defective, including by "failing to provide a specific procedure to follow for [the] use" of less lethal weapons and by being "silent" as to any requirement of a warning, *id.* ¶ 68b;
- Recommendations by the OPC that SOPs be amended to include "written guidance on the proper deployment and use of each less than lethal weapon," *id*. ¶ 68c;
- Litigation arising from the 2017 Presidential Inauguration alleging indiscriminate use of sting ball munitions and flash-bang grenades against peaceful protestors, including failure to train, *id*. ¶ 69;
- The existence of express MPD policies authorizing use of less lethal weapons in the context of First Amendment Assemblies, *id*. ¶ 72, including in the context of non-violent protest-related conduct, *id.* ¶ 73, without constitutional constraints;
- The existence of express MPD policies authorizing use of inherently indiscriminate weapons, such as sting ball munitions, in the context of First Amendment Assemblies, *id*. ¶ 74;
- Multiple occasions in connection with the 2020 Floyd protests in which MPD repeatedly used less lethal weapons against groups containing peaceful demonstrators without warning or order to disperse, *id*. ¶ 83;
- Knowledge by the D.C. Council of instances of indiscriminate use of less lethal projectile weapons so as to cause the Council in June, 2020, to enact a limited and insufficient prohibition against use of less lethal weapons to disperse First Amendment Assemblies, *id*. ¶¶ 84 - 85;

- Knowledge by Mayor Muriel Bowser of indiscriminate less lethal weapon use, *id.* ¶¶ 99 – 100 (awareness of sting ball use against First Amendment assemblies), *id.* ¶ 108 (reporter questions Mayor about "indiscriminate police response" in which D.C. residents "are getting caught up in"), *id.* (Mayor admits that police are failing to "distinguish between them all"), *id.* ¶¶ 99 – 101, 108–09 (Mayor routinely informed of information about police tactics during the George Floyd protests and participated in press conferences regarding the same); *id.* ¶ 109 (Mayor present at press conference where Newsham defends against charges that "police indiscriminately used munitions against" protestors);
- Knowledge by Chief Newsham of indiscriminate less lethal weapon use. *Id.* ¶ 99 (May 31, 2020, press conference defending police actions including sting ball use), *id*. ¶¶ 101 – 04 (Chief maintains close situational awareness, command, and control of police response against protestors), *id.* ¶ 105 (Newsham directed and/or authorized officers' response at the scenes), *id.* ¶ 107 (Newsham defends stripping of assemblies of protections, "that is not a protest, those are not protestors"), *id.* ¶ 108 (August, 2020, press conference where reporter challenges officials on "indiscriminate police response" and Mayor admits "it is hard to distinguish between them all"), *id.* ¶ 109 (Newsham defends against charges that "police indiscriminately used munitions against" protestors), *id.* ¶ 110 (at October, 2020, D.C. Council hearing, Newsham admits "we have heard those claims as well" that peaceful protestors were being "assaulted with chemicals or rubber bullets or other projectile" and defends police conduct);
- The four underlying incidents of indiscriminate use of projectile weapons in this case, which are alleged to be exemplars of a general practice. *See id*. ¶ 8.

The District minimizes the import of the OPC report in its filing, just as it ignored the report's recommendations in practice, characterizing the OPC as expressing just a little concern about a few isolated incidents. Defs.' Mem. 30. The report speaks for itself. *See supra* at pp. 28, 33-34 (quoting report). The quantity and severity of the precedent incidents were sufficient to rise to the OPC's attention and identify in the report. The report by this D.C. agency was issued to then-Interim Chief Newsham, the Mayor, and D.C. Council.

The District alleges that the OPC report declared MPD's actions as professional generally in the 2017 Inauguration. Defs.' Mem. 30. This, too, misses the point. If, overall, looking at situations where less lethal force was *not* used the MPD looked professional, that does not change the identified problem, that when less lethal weapons *were* used, they were used indiscriminately, that is, consistent with an SOP which authorizes weapons use against peaceful protestors without warning and with virtually no

constitutional restraints, guidelines, or procedures. Had Newsham, to whom the OPC report was delivered, made changes to the SOPs, which are issued by *his* authority, Am. Comp. ¶ 26, the violations in the George Floyd protests would or may not have occurred.

D. Plaintiffs Adequately Allege Deliberate Indifference in the Failure to Train and/or Failure to Supervise Officers

A municipality's inaction, including its failure to train or supervise its employees adequately, can constitute deliberate indifference to the constitutional rights of those affected. *Daskalea* , 227 F.3d at 441 (*citing City of Canton v. Harris*, 489 U.S. 378, 388–89 & n.7 (1989)). Both failure to train and failure to supervise are alleged by Plaintiffs. Am. Comp. ¶¶ 340, 356, 372, 388.

1. The District Failed to Train Officers in the Necessary Constitutional Restraints Against Indiscriminate Use of Less Lethal Weapons, As Was Brought to Their Knowledge by Prior Incidents, the OPC Report, Litigation, and the Ongoing Use of Indiscriminate Force During the George Floyd Protests

Deliberate indifference can be established with reference to an established pattern and practice of violations that was ignored, but that is not the only means nor is it a prerequisite.

Notice about a problem can be established through multiple means, including litigation, D.C. Council hearings, and oversight reports. *See Harris,* 2019 WL 3605877 at *5.

The District argues that Plaintiffs have failed to allege that it was "faced with actual or constructive knowledge that its agents will probably violate constitutional rights," and "adopt[ed] a policy of inaction." Defs.' Mem. 33. For reasons set forth, above, this is precisely what is alleged. The OPC report specifically identified the SOP as defective and warned that failure to follow its recommendations regarding reform of the SOP could lead to constitutional violations, specifically the indiscriminate use of less lethal weapons. That is exactly what happened.

There are situations, although rare, where the "unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983" without prior or constructive knowledge of a problem. *Connick v. Thompson*, 563 U.S. 51, 64 (2011).

This is such a situation, analogous to the that which the Supreme Court has decsribed:

> The Court posed the hypothetical example of a city that arms its police force with firearms and deploys the armed officers into the public to capture fleeing felons without training officers in the constitutional limitation on the use of deadly force.

Connick, 563 U.S. at 63 (citing *Canton*, 489 U.S. at 390 n. 10).

Here, the District arms officers with "less lethal" weapons, including indiscriminate weapons, and deploys the armed officers into the midst of crowded protests *with* the authority to use such weapons against non-violent protestors without warning/dispersal order and *without* identifying any constitutional restraints in the SOP. The need for more specific policies and training to prevent constitutional rights violations — just as the OPC advised — is obvious.

The District argues that after the first two Plaintiff assaults in May 2020, and before the final two in August 2020, the D.C. Council enacted a limited proscription to restrict use of less lethal weapons to disperse First Amendment assemblies. That intervention was glaringly insufficient, especially where the Chief deems such events where less lethal projectiles are used not to be First Amendment assemblies to strip them of protection so that less lethal force can be used without warning. *See*, *e.g.*, Am. Comp. ¶¶ 79, 107 (defending the use of munitions because "that is not a protest, those are not protestors. Those are people who violated the law and the police are allowed to protect themselves and restore order when those things happen."). The Council could have barred less lethal weapons against protestors for all purposes. It could have mandated warnings before use of less lethal projectile weapons in conformity with the OPC recommendation. Instead, deferring to the police, it acted only in a limited manner that was more circumscribed in scope than the actual problem. Foreseeably, it did not stop the recurring indiscriminate use of projectile weapons against peaceful protestors.

2. Newsham's Inaction During the Underlying Events Constitutes Deliberate Indifference and Failure to Supervise

Plaintiffs allege that Chief Newsham was in command and directing police actions, typically through the Joint Operations Command Center. The necessary corollary to such allegations is that, while

in communication with the incident commander about unfolding events on the ground, Newsham failed to restrain the use of indiscriminate weapons against peaceful protestors or groups containing peaceful protestors.

It bears reminder, the Chief knew that the vast majority of George Floyd protestors were peaceful (as evidenced in part by the allegation that any misconduct was caused by a limited few "outside agitators") and he knew he was directing and authorizing the use of indiscriminate less lethal projectile weapons without warnings, notice, or dispersal orders. He knew that peaceful protestors were being injured by munitions through indiscriminate use. *See* Am. Comp. ¶¶ 107–110 (repeated public discussions as to the indiscriminate use of less lethal weapons). It was incumbent upon him to exercise his supervisory authority and restrain such acts, which with a near certainty would injure peaceful protestors, and which were in fact injuring peaceful protestors, which he declined to do. As the final policymaker for Section 1983 purposes, his deliberate indifference is attributable to the municipality.

III. Individual Defendants Are Not Entitled to Qualified Immunity

"In assessing a claim of qualified immunity, the facts must be taken 'in the light most favorable to the party asserting the injury.'" *Corrigan v. Dist. of Columbia*, 841 F.3d 1022, 1035 (D.C. Cir. 2016) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

The clearly established standard does not require a case with "materially similar" facts, but only that "the state of the law [at the time of the incident] gave [the officer] fair warning that [his alleged misconduct] . . . was unconstitutional." *Johnson*, 528 F.3d at 976 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)); *see also Ashcroft v. Al-Kidd*, 563 U.S. 731, 741 (2011) (does "not require a case directly on point").

Even in novel factual circumstances, such as emerging technologies, "[t]here can be the rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *Wesby*, 138 S.Ct. at 590 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam)).

A. Defendants Do Not Claim Qualified Immunity with Respect to the First Amendment Claims

Defendants do not move to dismiss the First Amendment claims on qualified immunity grounds. This, standing alone, should end the qualified immunity analysis.

B. The Fourth Amendment Claims Arise Under Clearly Established Law

Defendants advance only one argument in their Fourth Amendment qualified immunity section, that "[i]t is not clearly established whether the use of less lethal weapons for a purpose other than intent to restrain is a Fourth Amendment violation." Defs.' Mem. 23.

It is clearly established that use of force for the purpose of restraining or terminating freedom of movement *is* a Fourth Amendment seizure. Cases cited, pp. 17-20 supra, establish that courts have applied this long-existing standard to find Fourth Amendment seizures and violations where such weapons have been used to disperse, to move, to hobble, to temporarily incapacitate, or detain individuals.

Defendants cite *Black Lives Matter D.C. v. Trump* in support of their contention, but that case involved used of tear gas and not projectile weapons, and the *Black Lives Matter* plaintiffs had not "pointed to a case clearly establishing that attempting to move members of a crowd (rather than keep them in a location) can constitute a seizure." 544 F. Supp. 3d at 49. The cases cited, pp. 19-20 supra, hold that use of less lethal projectile weapons to move or disperse crowds constitutes a seizure regardless of whether individuals are ultimately arrested. For decades, the Supreme Court has made clear that the application of physical force to restrain movement effects a seizure even if the subject then leaves or is not apprehended. *See Hodari D.*, 499 U.S. at 625–26; *Torres*, 141 S.Ct. at 995.

Furthermore, it is clearly established that the use of force that furthers no governmental interest is unconstitutional. *Johnson v. District of Columbia,* 528 F.3d at 976. Likewise, this Circuit has held that use of force against non-violent and non-resisting persons is unconstitutional. *Rudder v. Williams*, 666 F.3d 790, 795 (D.C. Cir. 2012) (use of baton "unprovoked, and without warning"); *Lash v. Lemke*, 786 F.3d 1, 7 (D.C. Cir. 2015) ("The use of a Taser against a person who is not resisting arrest or merely passively resisting may violate that person's rights."); *Norris v. District of Columbia*, 737 F.2d 1148,

1152 (D.C. Cir. 1984) (reversing summary judgment against plaintiff where defendants "maced, beat, and kicked" plaintiff without cause); *see also Nelson*, 685 F.3d at 885 (clearly established violation where officers used pepperball projectile to shoot individual who was suspected of no crime, at most passively resisted officers, and posed a minimal risk of harm); *Fogarty v. Gallegos*, 523 F.3d 1147, 1162 (10th Cir. 2008) (officers who deployed pepper balls at peaceful protestor who was committing the offense of disorderly conduct violated clearly established rights); *Headwaters Forest Def. v. Cnty. Of Humboldt*, 276 F.3d 1125, 1131 (9th Cir. 2002) (use of pepper spray against nonviolent protestors who disobeyed an order but otherwise posed no threat "was plainly in excess of the force necessary under the circumstances, and no reasonable officer could have concluded otherwise").

To the extent that the Defendants claim to have attacked non-violent protestors as a response to the conduct of others, such as "agitators," Chief Newsham should be keenly aware that the Fourth Amendment requires individual particularity. In *Barham v. Ramsey,* the D.C. Circuit denied Newsham qualified immunity where he argued that he could seize and arrest *other* protestors based on the scattered alleged unlawful behavior by *some* protestors, improperly "refer[ing] generically to what some 'demonstrators' were seen doing." 434 F.3d at 573. "[A] search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another." *Id.* (citing *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979); *see also Maryland v. Pringle*, 540 U.S. 366, 370–71 (2003) ("the belief of guilt must be particularized with respect to the person to be searched or seized.").

IV. Plaintiffs Have Adequately Alleged Claims of Negligence and Negligence *Per Se.*

A. Negligence

Defendants contend that there is a single deficiency in Plaintiffs' four negligence claims (Counts 3, 6, 9, 12): that Plaintiffs only alleged intentional conduct in deploying the less lethal munitions that struck Plaintiffs, not negligent conduct. Plaintiffs properly pled both excessive force and negligence counts as separate and distinct claims. Am. Comp. ¶¶ 347, 363, 379, 395.

A plaintiff may assert alternative theories of intentional and negligent conduct in separate claims in the same pleading. *Moore v. D.C.*, 79 F. Supp.3d 121, 146 (D.D.C. 2015). Claims for excessive force and for negligence may be pled separately in the same pleading and submitted together to the jury, so long as the negligence claim is based upon at least one factual scenario that presents an aspect of negligence apart from the use of excessive force itself and violative of a distinct standard of care. *Id*. (citing *District of Columbia v. Chinn,* 839 A.2d 701, 705 (D.C. 2003); *Scales v. District of Columbia*, 973 A.2d 722, 731 (D.C. 2009)).

Thus, in *Moore*, while plaintiffs alleged that an officer deliberately tackled Mrs. Moore, the defendants testified about alternative versions of what occurred such as that Mrs. Moore was knocked down unintentionally, supporting an alternative negligence claim. 79 F. Supp. 3d at 147. Excessive force and negligence claims arising from a single incident have been allowed to go to a jury as separate claims in cases where (1) a police regulation was invoked that established a standard of care distinct from the excessive force standard; (2) there was a negligent act before the trigger was pulled, and (3) the presence of "alternate scenarios in at least one of which a distinct act of negligence, a misperception of fact, may have played a part in the decision" to use force. *See Chinn*, 839 A.2d at 710 (collecting cases). A plaintiff stated a plausible negligence claim where he alleged the officer "either purposefully or negligently" failed to announce that the police were present before knocking down plaintiffs' door. *Sherrod v. McHugh, No. CV 16–0816 (RC)*, 2017 WL 627377, at *7 (D.D.C. Feb. 15, 2017). The *Sherrod* court held that although plaintiffs did not formally identify the duty element in their complaint, they claimed, like Plaintiffs here, that the officer owed plaintiffs a duty of reasonable care under the circumstances and that he breached that duty. *Id*. at *6. An officer's failure to warn before using force can state a claim for negligence independent of excessive force. *See, e.g.*, *Thurman v. District of Columbia,* 282 A.3d 564, 573–74 (D.C. App. 2022).

Here, Plaintiffs alleged, respecting Defendants' discharge of the less lethal munitions that injured Plaintiffs, that the Defendants: failed to provide announcements or warnings, Am. Comp. ¶¶ 67, 68, 75c-e, 88a, 92, 136 – 40, 148, 221, 249 – 53, 273 – 74, 289 – 90, 302 – 05; failed to distinguish between peaceful protestors and those they claim they had cause to subject to force, *id.* ¶¶ 11 – 13, 52, 74, 81, 88c-d, 92, 93, 107–08, 143, 147, 204, 216, 218 – 20, 254 – 55, 271; deployed munitions too close to

peaceful protestors, *id.* ¶¶ 88e, 125 – 26, 129, 216, 228, 255, 272; all in deviation from applicable standards of care; and that their conduct was either "intentional or negligent," *id.* ¶¶ 347, 363, 379, 395. These allegations state plausible claims for negligence. Whether Defendants' actions were negligent or intentional is best left for the factfinder, and the Defendants' Motion to Dismiss should be denied as to the negligence claim. *See Poola v. Howard University*, 147 A.3d 267, 276 (D.C. 2016) (quoting *Twombly*, 550 U.S. at 556) (explaining that the plausibility pleading standard "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of" the defendants' misconduct).

B. Negligence *Per se*

Plaintiffs allege negligence *per se* in that Defendants violated the specific standards in the First Amendment Assemblies Act (FAAA) that require (1) that police "shall issue at least one clearly audible and understandable order to disperse using an amplification system or device" and provide opportunity to disperse (D.C. Code § 5–331.07(e)(1) (2020)) and "shall issue multiple dispersal orders" unless there is imminent danger of either personal injury or significant property damage (D.C. Code § 5–331.07(e)(2)), and (2) that for the two August events "less lethal projectiles shall not be used by MPD to disperse a First Amendment assembly," (D.C. Code § 5–331.16(c)(1)). *See* Am. Comp. ¶¶ 401 – 07.

District of Columbia law permits negligence *per se* liability based on the standard of care in a statute if (1) "the statute is meant to promote safety," (2) "the plaintiff is a member of the class to be protected by the statute," and (3) "the defendant is a person upon whom the statute imposes specific duties." *Night & Day Mgmt., LLC v. Butler*, 101 A.3d 1033, 1039 (D.C. 2014). "The key question [in the third factor] is not whether the regulation contains certain words or phrases, but whether it allows a factfinder to determine whether it has been violated without resorting to a common law reasonable care analysis." *Sibert-Dean v. Washington Metro. Area Transit Auth.*, 721 F.3d 699, 703 (D.C. Cir. 2013) (quoting *Chadbourne v. Kappaz*, 779 A.2d 293, 297 (D.C. 2001)) (internal quotations omitted).

The District does not dispute the applicability of the first two factors, only the third.

The District first argues that the FAAA provides unstated discretion to officers to determine that an assembly is not a First Amendment assembly entitled to its protections, which control officers' conduct. The definition of a First Amendment assembly, is any "demonstration, rally, parade, march, picket line, or other similar gathering for the purpose of persons expressing their political, social, or religious views". D.C. Code § 5–331.02(1). Defendants take the position that an unarticulated definitional exception applies to allow them to declare that an assembly meeting that definition may be deemed to be a "riot" as defined by D.C. Code § 22–1322 and that all protections and requirements for police conduct under the FAAA no longer apply. No such exception was stated by the text of the FAAA and none can be inferred.

The statutory definition of a First Amendment assembly is clear and does not require consideration of a reasonable care standard. The FAAA, recognizing the heightened need to protect the rights of persons engaged in First Amendment assembly, requires in its sub-provisions, that police issue a dispersal order including where there is "imminent danger of personal injury or significant property damage." D.C. Code § 5–331.07(e)(2). It clearly does not countenance the extra-textual exception urged by Defendants.

Any issue as to whether the underlying assemblies were First Amendment assemblies would be a factual issue for the jury and not a bar to a negligence per se claim as a matter of law. "The question is not whether the regulation deals with a specific set of circumstances, but what sort of behavior it prescribes for the circumstances that it governs." *Sibert-Dean*, 721 F.3d at 704; *see Jarrett v. Woodward Bros.*, 751 A.2d 972, 987 n.25 (D.C. 2000) (whether a patron was "visibly intoxicated" when served liquor, in violation of statute, was question of fact and not a basis to dismiss a negligence per se claim as a matter of law).

Regarding Defendants' failure to give dispersal orders as required by § 5–331.07(e)(1), Defendants urge this Court to follow unpublished oral rulings by Judge Jackson finding that the dispersal order requirements of the FAAA involve application of a reasonable care standard. *See* Defs.' Mem. 21. However, in a later, published decision, Chief Judge Howell concluded that, although the FAAA's dispersal provisions began with a threshold discretionary decision as to whether an assembly should be dispersed, once this decision was reached, the statute places clear specific duties on the police:

> (1) If and when the MPD determines that a First Amendment assembly, or part thereof, should be dispersed, the MPD *shall issue* at least one clearly audible and understandable order to disperse using an amplification system or device, and *shall provide* the participants a reasonable and adequate time to disperse and a clear and safe route for dispersal.
>
> (2) Except where there is imminent danger of personal injury or significant property damage, the MPD *shall issue* multiple dispersal orders and, if appropriate, *shall issue* the order from multiple locations. The orders *shall inform* persons of the route or routes by which they may disperse and *shall state* that refusal to disperse will subject them to arrest.

Goodwin, 579 F. Supp. 3d at 175–76 (citing D.C. Code §§ 5–331.07(e)(1)-(2)) (emphasis in original).[5]

The statutory text is clear. If dispersal is to occur, police *shall issue* at least one clearly audible amplified order and, absent imminent dangers, *shall issue* multiple dispersal orders. This is an "unambiguous, nondiscretionary protocol." *Id*. at 176 (allowing negligence *per se* claims to proceed against defendants).

This is not a case challenging the method or efficacy of the provision of a dispersal order and the opportunity and clear route to disperse – no order was issued at all. No resort to a reasonable care analysis is required. The District argues that there is a threshold determination of whether there is imminent danger, citing D.C. Code § 5–331.07(e)(2), and that this requires a reasonable care assessment, yet omits that this is subordinate to the duty without any such qualification or determination, in D.C. Code § 5–331.07(e)(1), to issue at least one order to disperse. The question as to D.C. Code § 5–331.07(e)(2) would be whether the regulation provides specific directions that go beyond a mere admonition of reasonable care, as the FAAA clearly does. *See Sibert-Dean*, 721 F.3d at 704. Whether an imminent danger existed would be a matter for the fact-finder but that is not necessary to assess. The absence of "at least one clearly audible and understandable [amplified] order" establishes negligence *per se*.

Defendants do not contend that the violation of the specific duty that "less-lethal projectiles shall not be used to disperse a First Amendment Assembly" does not constitute negligence *per se*, as plead,

[5] The above-cited provision reflects the text of the FAAA at the time of the underlying events.

under the emergency legislation in effect at the time of the August events, D.C. Code § 5–331.16(c)(1). Am. Comp. ¶¶ 406 - 07. The alleged use of less lethal projectiles violates this non-discretionary protocol. *Id.* ¶ 407.

Defendants argue, finally, that the FAAA § 5–331.07 does not impose specific duties on individual police officers, but only on the Department in the abstract or in the whole. There is nothing in the FAAA that creates such an exception. The Defendants' argument disregards that

> [t]he provisions of [the FAAA] are intended to protect persons who are exercising First Amendment rights in the District of Columbia, and the *standards for police conduct* set forth in this subchapter *may be relied upon by such persons in any action alleging violation of statutory or common law rights*.

D.C. Code § 5–331.17 ("Construction") (emphasis added).

The text of the Construction provision as to intentions and uses of the FAAA references the standards set forth therein as applying to "police conduct," a reference which encompasses individual officers. *See id.* The Construction delineates "police conduct" and states that the standards may be relied upon in "*any action*" alleging violations of rights and is not restricted in construction to actions against the District solely as a municipality. *See id.*

Therefore, Plaintiffs have stated claims for negligence per se.

CONCLUSION

For the reasons stated above, Defendants' Motion should be denied.

Respectfully submitted,

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