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16 UNITED STATES DISTRICT COURT  
17 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
18 SAN FRANCISCO – OAKLAND DIVISION  
19

20 TIMOTHY SCOTT CAMPBELL, KERIE  
21 CAMPBELL, MARCUS KRYSHKA, MARC  
22 MCKINNIE, MICHAEL SIEGEL, AMERICAN  
23 CIVIL LIBERTIES UNION OF NORTHERN  
CALIFORNIA,

24 Plaintiffs,

25 v.

26 CITY OF OAKLAND, INTERIM CHIEF OF  
POLICE HOWARD JORDAN,

27 Defendants.  
28

No. **CV 11 5498**  
MEMORANDUM OF POINTS  
AND AUTHORITIES ISO  
TEMPORARY RESTRAINING  
ORDER AND PRELIMINARY  
INJUNCTION

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1 **I. INTRODUCTION**

2 Plaintiffs seek a temporary restraining order to prevent the Oakland Police Department  
3 from continuing to use excessive force on peaceful protesters, deploying tactics that violate  
4 express prohibitions of Oakland Police Department’s Crowd Management/Crowd Control  
5 Policy. Further demonstrations and assemblies are more than likely to occur *later today* and  
6 Court relief is necessary to prevent irreparable harm to constitutional rights to be free from  
7 excessive force and to protest without fear of excessive force.

8 Over the last three weeks, the Oakland Police Department (“OPD”) has spearheaded two  
9 enforcement actions on October 25, 2011 and November 2, 2011, in which law enforcement  
10 attacked peaceful protesters participating in political demonstrations in support of the Occupy  
11 Oakland movement. In an effort to control and disperse the crowds, police indiscriminately fired  
12 flash bang grenades, euphemistically dubbed “bean bags” although they are filled with lead shot,  
13 not beans, other projectiles, and copious amounts of tear gas directly into crowds of peaceful  
14 protesters who had assembled to demonstrate. Such conduct violates the Fourth Amendment by  
15 subjecting protesters who posed no harm to excessive force, and the First Amendment by  
16 interfering with the right to assemble and demonstrate peacefully. OPD consistently relied on  
17 tactics posing a serious risk of injury, rather than first attempting less forceful methods to  
18 disperse the crowds. Defendants’ tactics caused serious injuries to protesters, including a  
19 fractured skull, a ruptured spleen, bruises from projectiles and baton blows, and unnecessary  
20 exposure to chemical agents, in addition to a substantial chill on their right to protest peacefully.

21 What is particularly shocking is that the above-described police actions on those two days  
22 were in plain violation of Oakland’s Crowd Management/Crowd Control Policy. This policy  
23 was adopted in 2004 as part of a negotiated settlement of *Coles, et al. v. City of Oakland and*  
24 *Local 10, International Longshore and Warehouse Union, et al v. City of Oakland*, Nos. C03-  
25 2961 and 2962 TEH. These cases also involved the OPD’s use of indiscriminate force, including  
26 less lethal weapons, against a peaceful demonstration at the Port of Oakland, resulting in  
27 significant injuries to a number of protesters. The Policy embraces the fundamental principle of  
28

1 “minimal reliance on the use of physical force and authority needed to address a crowd  
2 management or crowd control issue.” (Emphasis added.) It includes very specific limitations on  
3 the use of mass arrest and the use of force, including less lethal weapons, for crowd control and  
4 crowd dispersal. Defendants have not merely ignored the standards set forth in this Policy at the  
5 margins. Rather, at two recent Occupy demonstrations, Defendants have flouted the Policy’s  
6 central principle – minimal reliance on the use of physical force – and violated key prohibitions –  
7 for example, against exploding flash bang grenades and tear gas canisters directly into crowds,  
8 rather than a safe distance away.

9       The Occupy movement has been much in the news and raises a wide-range of questions.  
10 The legal issue before this Court, however, is narrow – whether Defendants may use far greater  
11 force than is necessary to control and disperse crowds of political protesters, in violation of the  
12 standards set forth in its own Crowd Control Policy. The Occupy movement concerns political  
13 and social issues of the utmost importance, and has resulted in a heightened and vigorous  
14 engagement by Occupy Oakland supporters in their constitutionally protected rights to rally and  
15 march and demonstrate. It is those First Amendment rights of expression and association that  
16 have been placed at risk by the actions of the OPD, and it is the preservation of those most  
17 fundamental of rights that is the focused goal of this lawsuit.

18       Plaintiffs believe that immediate action by this court in the form of a temporary  
19 restraining order is needed for the following reasons:

20 1.       As has been widely reported, the City of Oakland began removing the Occupy Oakland  
21 encampment this morning. That eviction is sure to be a subject of intense public debate,  
22 including demonstrations and rallies by Occupy supporters. In fact, Occupy Oakland has already  
23 called publicly for supporters to "reconvene" in downtown Oakland 4 p.m. today, presumably to  
24 march back to the Plaza area, as it did on October 25. The TRO and preliminary injunction  
25 sought by plaintiffs would not address whether Oakland may evict the encampment but does  
26 seek to prevent what happened on October 25 and again on the night of November 2-3 – the  
27 indiscriminate and excessive use of police force against peaceful demonstrators who choose to  
28

1 exercise their First Amendment rights to protest the City's actions. Based on its past actions, the  
2 City must be ordered immediately by this Court to stop violating its own Crowd Control Policy.

3 2. As a result of these past actions by police, Plaintiffs and other Occupy supporters have  
4 been physically injured, and are now reluctant or unwilling to participate in future  
5 demonstrations for fear of being subjected to the excessive force that OPD has used against  
6 Occupy rallies. Defendants' conduct have cast a very serious chill on the willingness of persons  
7 to exercise their constitutional rights to protest. The existence of a Policy on the books has  
8 obviously not been enough to date to protect protestors from serious injury and preserve  
9 constitutional rights. Indeed, after the October 25 action, OPD was widely criticized for its use  
10 of force and violating its Crowd Control Policy, but then promptly repeated the same mistakes on  
11 November 2. Only an immediate order by this Court prohibiting Oakland from violating its own  
12 policy will provide protesters with some protection from excessive police force and the First  
13 Amendment that breathing space which it needs to survive.

14 Accordingly, plaintiffs request that this Court issue an interim injunction prohibiting  
15 Defendants City of Oakland and Howard Jordan in his capacity as Interim Chief of the Oakland  
16 Police Department from violating the OPD Crowd Management/Control Policy.

## 17 **II. FACTUAL BACKGROUND**

### 18 **A. Occupy Oakland and their Supporters are Engaged in Multiple Forms of 19 Classic Political Expression**

20 Occupy Oakland ("OO") was inspired by the greater Occupy Wall Street movement, and  
21 seeks to disseminate a message about wealth disparity and economic opportunity. *See, e.g.,*  
22 Siegel at ¶2. Its supporters gather together at general assemblies, at which the Occupy  
23 community discusses matters ranging from neighborhood cleanups to community issues, such as  
24 helping people facing foreclosure. K. Campbell at ¶5. Occupy supporters also plan and  
25 participate in marches and demonstrations, including a recent veterans' march on Veterans' Day  
26 and protests against Wells Fargo for its involvement in immigrant-detention centers. *Id.*

1           **B.       The Crowd Management/Crowd Control Policy**

2           The City of Oakland and its police department have been defendants in numerous cases  
3 involving excessive force, notably, *Spalding et al v. City of Oakland et al.*, C11-02867 TEH,  
4 *Coles, et al. v. City of Oakland and Local 10, International Longshore and Warehouse Union, et*  
5 *al v. City of Oakland, Nos. C03-2961 and 2962 TEH, and Delphine Allen, et al. v. City of*  
6 *Oakland, et al.*, Master File No 00-4599 TEH. *Local 10* led to a historic settlement in which  
7 OPD agreed to adopt a Crowd Management/Crowd Control Policy (“Policy”). See Schlosser ¶2-  
8 4, Exh. A (attaching settlement and incorporated Crowd Management/Crowd Control Policy).  
9 The overarching principle of the Policy is “*minimal* reliance on the use of physical force and  
10 authority needed to address a crowd management or crowd control issue.” Policy at I (emphasis  
11 added).

12           In addition to minimal reliance on force, the Policy establishes other crowd control  
13 principles. This includes ongoing communication with demonstrators. Policy at III-A-5 & III-  
14 A-8. The Policy requires OPD to facilitate First Amendment activity; even where a political  
15 march lacks a permit, for example, officers are to attempt to block traffic and allow the march to  
16 proceed. *Id.* at III-B-5. Further, the Policy recognizes that “all members of a crowd of  
17 demonstrators are not the same. Even when some members of a crowd engage in violence or  
18 destruction of property, there will be other members of the crowd who are not participating in  
19 those acts.” *Id.* at III-B-6.

20           The Policy establishes rigorous standards for when OPD may declare an unlawful  
21 assembly: OPD “may not disperse a demonstration or crowd event before demonstrators have  
22 acted illegally or before the demonstrators post a clear and present danger of imminent  
23 violence.” *Id.* at VI-F-1. If that high threshold is met, dispersal technique “shall not be initiated”  
24 unless audible and repeated dispersal announcements are made.” *Id.* at VI-G-1.

25           Consistent with the Policy’s overarching principle of *minimal* force, it identifies a menu  
26 of crowd control tactics to be explored after the declaration of an unlawful assembly and that  
27 minimize the risk of injury (such as display of police officers, encirclement and arrest). See  
28

1 Policy at V-H. Decisions between crowd dispersal techniques must be made at the Incident  
2 Commander level or higher. *See id.* at III-A-3 & III-9. The Policy recognizes that strong  
3 supervision is necessary, while “[i]mpulsive or independent actions by officers are to be  
4 avoided.” *See id.* at III-A-9.

5 Because “[c]hemical agents can produce serious injuries or even death,” the Policy  
6 *prohibits* their use unless other less dangerous methods have first been exhausted. *Id.* at VI-M-2  
7 & VI-N-4. This determination to escalate to chemical agents must be made by OPD’s Incident  
8 Commander. *Id.* Even then, tear gas may only be used (1) after an audible warning, giving the  
9 crowd a reasonable time to disperse (*id.* at VI-M-5 & VI-N-3), (2) if “deployed to explode at a  
10 safe distance” *away* from the crowd, and not lobbed directly into it (*id.* at VI-N-2), (3) in “the  
11 minimum amount” necessary (*id.* at VI-M-3), (4) under strict command supervision (*id.* at VI-M-  
12 2 & VI-N-1, 4) and (5) if OPD has previously arranged for sufficient medical personnel to treat  
13 to injuries (*id.* at VI-M-6).

14 The Policy also prohibits OPD from firing “flash bang grenades” directly into crowds;  
15 instead they must “be deployed to explode at a safe from the crowd to minimize the risk of  
16 personal injury.” *Id.* at VI-N-2. As with tear gas, OPD must provide audible warnings and a  
17 reasonable opportunity to disperse before such weapons are used because they “present[] a risk  
18 of permanent loss of hearing or serious bodily injury from shrapnel.” *Id.*

19 The Policy prohibits the use of Specialty Impact Less-Lethal Munitions, such as “bean  
20 bags” and other projectiles, “for crowd management, crowd control or crowd dispersal.” *Id.* at  
21 V-F-2. SIM “may never be used indiscriminately against a crowd or group of persons even if  
22 some members of the crowd or groups are violent or disruptive.” *Id.* at V-F-4. Under the Policy,  
23 SIM may only be used against a specific individual who poses an immediate safety threat. *Id.* at  
24 V-F-3.

25 Batons should not be used “indiscriminately against a crowd or group of persons but only  
26 against individuals who are physically aggressive.” *Id.* at VI-L-3.

1           **C.     OPD Responded to Occupy Oakland by Indiscriminately Using Excessive**  
2           **Force on Peaceful Protesters and Systematically Violating Its Crowd Control**  
3           **Policy**

4           As evidenced by its response to two recent OO demonstrations, OPD’s consistent  
5           practice – in wholesale violation of key prohibitions of its Crowd Control Policy – is to apply  
6           indiscriminate force on non-violent crowds and individuals and to resort immediately on  
7           weapons that pose a risk of serious injury.

8                           **1.     October 25, 2011**

9           On October 20, 2011, the City of Oakland presented OO with an eviction notice. Five  
10          days later, on October 25, 2011, it conducted an early morning raid of the encampment, using  
11          flash bang grenades and tear gas. Kryshka ¶¶4-5, 21. A quickly announced afternoon march  
12          drew of OO supporters who opposed the raid, with large crowds assembling downtown  
13          downtown into the night. OPD’s response at every turn was rely on injury-inflicting dispersal  
14          tactics as a first rather than last resort and against *crowds* of protesters, resulting in serious and  
15          predictable injuries, such as the skull fracture suffered by Scott Olsen, a two-tour Iraq war  
16          veteran, who was “standing perfectly still, provoking no one” at the time he was struck with a  
17          projectile.<sup>1</sup>

18                           **(a)     Afternoon March**

19          During the peaceful afternoon march, OPD used batons, contrary to Policy, to beat one  
20          protester who had fallen to the ground and against others who were trapped in a dense crowd and  
21          “unable to disperse or move because of the press of the crowd.” Policy at VI-L-3; *see* Kryshka  
22          at ¶7; Siegel at ¶13.

23          It fired bean bags into a crowd that was “doing nothing more than not moving or not  
24          moving as quickly as the rest of the crowd” after a police request to move away. Kryshka at ¶7;  
25          *see also* Post at ¶7; *but see* Policy at V-F-2 & V-F-4 (prohibiting use of bean bags for purpose of  
26          \_\_\_\_\_

27          <sup>1</sup> Justin Berton & Will Kane, “Hurt protester Scott Olsen was ‘provoking no one,’” SF Chronicle,  
28          Oct. 28, 2011 available at [http://articles.sfgate.com/2011-10-28/news/30335416\\_1\\_protesters-canister-police-and-hundreds](http://articles.sfgate.com/2011-10-28/news/30335416_1_protesters-canister-police-and-hundreds).

1 crowd dispersal or firing “indiscriminately against a crowd or group of persons”). It exploded  
2 flash bang grenades and tear gas *into* crowds and without prior audible warnings of imminent  
3 use. Siegel at ¶12-15; Kryshka at ¶8; *but see* Policy at VI-N-2, VI-N-2 & VI-N-3 & VI-M-5  
4 (requiring explosion of such weapons at safe distance *away* from crowd, audible warnings prior  
5 to use, and reasonable time to disperse).

6 (c) **Evening demonstration**

7 Dispersal orders: OPD repeatedly ordered the assembled crowd to disperse before any  
8 illegal conduct occurred and the protesters had merely assembled. Kryshka at ¶11; *but see*  
9 Policy at VI-F-1 (OPD “may not disperse a demonstration or crowd event before demonstrators  
10 have acted illegally”). In other instances, OPD deployed dispersal tactics before any audible  
11 dispersal announcement. *Compare* Roth at ¶4(b) (“an entire cordon of officers advanced” on a  
12 group that was “quietly sitting ... playing an unamplified acoustic guitar” without any audible  
13 dispersal announcement), *with* Policy at VI-G-1 (dispersal tactics not to be initiated until  
14 reasonably audible dispersal announcement).

15 After deciding to disperse crowds, OPD resorted immediately to tear gas, flash bang  
16 grenades, and projectiles, rather than first attempting less forceful crowd dispersal methods. *See*,  
17 *e.g.*, Post at ¶¶8, 11; Ress at ¶¶4-8; *but see* Policy at VI-M-2 & VI-N-4 (prohibiting such devices  
18 unless other less dangerous techniques have failed).

19 Projectiles: Police fired projectiles indiscriminately at dense crowds of peaceful  
20 protesters. *See, e.g.*, Kryshka at ¶7; Siegel at ¶12, 14, 18; Post at ¶7-8; Roth at ¶5(d),(f), 6, 12;  
21 Freinkel at ¶4; Ress at ¶4-6; Whitacre at ¶6; *but see* Policy at V-F-3 & V-F-4 (prohibiting  
22 projectiles to be fired “indiscriminately” at crowd, even if some members “violent or  
23 disruptive”).

24 In one instance, “the officers launched a barrage of projectiles that blanketed the  
25 assembled group in teargas, and subjected the assembled group to flash-bang grenades and other  
26 projectiles.” Roth at ¶5(d). The catalyst for this was nothing more than a plastic water bottle  
27 thrown toward the police line. *Id.* at ¶5(c); Siegel at ¶17; Whitacre at ¶6. A lone plastic bottle  
28

1 did not justify the reaction. Worse, even people 100 feet away from the source of the bottle who  
2 were chanting at others not to throw things at the police, were barraged. Roth at ¶5(h). No  
3 warning preceded this volley of projectiles. Roth at ¶5(d); Whitacre at ¶6; *but see* Policy at VI-  
4 M-5 & VI-N-3 (requiring audible warnings and reasonable time to disperse before flash bang  
5 grenades and tear gas).

6 One such volley of projectiles fractured the skull of Iraq veteran Scott Olsen, who fell to  
7 the ground. Making things worse, when protesters rushed to assist him, “the police tossed gas  
8 canisters and flashbang grenades *at* this small group of good Samaritans and towards a  
9 wheelchair-bound person who was attempting to leave the area.” Post at ¶8 (emphasis added);  
10 *but see* Policy at VI-N-2 (flash bang grenades must be deployed at a safe distance from the  
11 crowd). The scene is captured on video at <http://www.youtube.com/watch?v=xWXm3cd5S-o>.  
12 Mr. Olsen “was dripping with blood and his entire face was bright red.” Desai at ¶5; *see also*  
13 Linnette Lopez and Robert Johnson, Veteran Scott Olsen Could Be The First Person To Die At  
14 A Wall Street Protest, Business Insider, Oct. 26, 2011; Adam Gabbatt, Scott Olsen ‘cannot talk’  
15 after injury at Occupy Oakland protest, The Guardian, Oct. 28, 2011; Schlosser at ¶5 (citing  
16 other articles).

17 OPD also targeted projectiles such as pepperballs at specific individuals who posed no  
18 risk of harm. Kryshka at ¶12 (officer in police line shot non-threatening protesters who  
19 approached within 8 feet of him); Roth at ¶12; *but see* Policy at V-F-3 (direct fired SIM may  
20 only target specific individuals posing “an immediate threat of loss of life or serious bodily  
21 injury”). One protester, who was hit repeatedly in the back by painful projectiles from the  
22 plastic-bottle-prompted assault, walked past the police line to escape the shooting. When he  
23 asked the police why they were shooting at him, “one or more officers shot [him] again, in the  
24 arm and side of [his] body.” Whitacre at ¶7. He was hit at least 8 times with bean bags, rubber  
25 bullets, or pepperballs, causing pain, swelling, bruising, and bleeding; photographs of his injuries  
26 are attached. *Id.*, Exhibit A. Plaintiff Marc McKinnie had gotten off his bicycle and bent over  
27 on 14<sup>th</sup> and Broadway to pick up some debris from the street, when he heard a popping sound  
28



1 and two or three projectiles hit his bike and ricocheted off his leg. The force knocked over his  
2 bike, and he was also knocked to the ground. McKinnie at ¶5. Mr. McKinnie attempted to  
3 identify who shot him. He saw two officers in the immediate vicinity, one with “a gun that had  
4 what appeared to be shotgun shells” and another with “paintball-container-like canisters.” *Id.* at  
5 ¶6. at the scene had a gun that appeared to have shotgun shells and

6 Flash-bang grenades and tear gas: Throughout the evening, OPD fired flash bang  
7 grenades and tear gas *directly into*, rather than at a safe distance away from, crowds, and without  
8 prior audible warnings, let alone reasonable opportunities to disperse. Kryshka at ¶8, 13, 14;  
9 Ress at ¶4-6, 8; Siegel at ¶12, 14, 18; Post at ¶¶7-8; Roth at ¶¶5(f), 6; Freinkel at ¶4; McKinnie at  
10 ¶¶9, 11; *but see* Policy at VI-M-5, VI-N-2 & VI-N-3. OPD did not attempt less forceful means  
11 of crowd dispersal, before resorting to these tactics. Kryshka at ¶8, 11, 14; Ress at ¶4; Roth at  
12 ¶6; *but see* VI-M-2 & VI-N-4 (prohibiting use of such weapons unless other less dangerous  
13 techniques have failed).<sup>2</sup> Tear gas use was extensive. *See, e.g.*, Siegel at ¶18, 21; Ress at ¶8; *but*  
14 *see* Policy at VI-M-3 (requiring “the minimum amount of chemical agent necessary”).

15 OPD’s use of “teargas, rubber bullets and beanbags against peaceful protesters ...  
16 without provocation made the people who were demonstrating even more angry.” Desai at ¶5.  
17 The scene was one of “chaos created by exploding flashbang grenades and cries of people in  
18 pain.” *Id.* at ¶6.

19 Physical brutality: The night was marred with other physical brutality, as when a San  
20 Francisco Sheriff’s deputy in full riot gear slammed a small, unarmed, apparently mentally ill  
21 woman to the ground.” Roth at ¶4(a).

22 Obscured police identification: Officers at the scene obscured their identification by  
23 wearing vests. McKinnie at ¶7; *contra* Penal Code §830.10; Policy at III-B-3(requiring police to  
24 wear clearly visible identification on the outside of uniforms or helmets “at all times”).

25  
26 <sup>2</sup> Tear gas was hardly deployed under the tightly supervised conditions required by the Policy (at  
27 VI-M-2 & VI-M-4). In the early morning raid of the encampment, for example, OPD caught  
28 even its own officers by surprise by deploying tear gas before they had put on gas masks.  
Kryshka at ¶5.

1                   **2. After October 25, 2011, Defendants knew there were widespread**  
2                   **violations of the Policy**

3                   OPD was heavily criticized for its handling of the October 25 demonstration, particularly  
4 for its systemic violations of its *own* Policy. Schlosser at ¶8. Civil rights organizations  
5 including the ACLU and the National Lawyers Guild (counsel for Plaintiffs in this suit, and for  
6 the Plaintiffs in the *Local 10* suit, which resulted in the Policy’s adoption) were among those  
7 raising concerns about the Policy violations. *Id.* at ¶¶3-4, 7, Exh. B.

8                   Some of the excessive force appears to have been at the hands of other agencies. *See,*  
9 *e.g.,* Roth at ¶4(a). OPD had requested “mutual aid” from almost 20 other agencies.<sup>3</sup>  
10 Under state law, “the responsible local official in whose jurisdiction an incident requiring mutual  
11 aid has occurred *shall remain in charge* at such incident, including the direction of personnel and  
12 equipment provided him through mutual aid,” unless the parties agree otherwise. Gov’t Code  
13 § 8618 (emphasis added).

14                   **3. November 2, 2011**

15                   In response to OPD’s conduct on October 25, OO called for a general strike on  
16 November 2. The day was a peaceful mix of “protest and festivities,” with “thousands of people  
17 walking around, conversing, [and] marching to different destinations.” Siegel at ¶24. Dancers  
18 participated in a “flash mob” and thousands marched to shut down the Port of Oakland. Kryshka  
19 at ¶15. All these events were peaceful and involved no police confrontation. Siegel at ¶24.

20                   Late that evening, however, in downtown Oakland, OPD again repeated the same, grave  
21 mistakes it made on October 25.

22                   Dispersal orders: Dispersal orders, when given, were often unintelligible and failed to  
23 provide protesters with directions as to how to comply. Post at ¶11, 14; *but see* Policy at VI-G-1  
24 (dispersal orders must be reasonably audible). In other instances, OPD trapped protesters, who  
25 went precisely where instructed, in an area with explosions and tear gas canisters flying, only to  
26

27 <sup>3</sup> *See, e.g.,* Matthai Kuruvila, Police Tear Gas Occupy Oakland Protesters, San Francisco  
28 Chronicle, Oct. 26, 2011 at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/10/26/MNUB1LLTC9.DTL&ao=2>.

1 then arrest them with shotguns draw. Ress at ¶¶9-10; *but see* Policy at VI-G-1 (dispersal order  
2 must specify adequate egress or escape routes).

3 Projectiles: OPD again fired all manner of projectiles indiscriminately *into* crowds where  
4 “protesters ... were simply standing in the street.” Post at ¶11; Desai at ¶7; *but see* Policy at V-  
5 F-4.

6 Individuals who posed no safety risk were also targeted for shooting. For example,  
7 citizen journalist and videographer Plaintiff Scott Campbell, started filming a police line, was  
8 told to step back, complied and stepped back 5 to 10 feet, asked “Is this Okay,” received no  
9 response, continued filming the police line while maintaining the same distance and eventually  
10 moving further away, when he was suddenly shot in his right leg with a “bean bag.” T.S.  
11 Campbell at ¶5; *see also* Post at ¶13; *but see* Policy at VI-F-3. The video taken by Mr. Campbell  
12 and depicting this incident is at [http://www.ibabuzz.com/politics/2011/11/07/video-police-fell-](http://www.ibabuzz.com/politics/2011/11/07/video-police-fell-occupy-oakland-videographer/)  
13 [occupy-oakland-videographer/](http://www.ibabuzz.com/politics/2011/11/07/video-police-fell-occupy-oakland-videographer/).

14 The incident was not isolated. Another man “who was simply standing there, not posing  
15 any apparent threat and not engaged in any violence, g[o]t shot three times with bean bags or  
16 some other projectile.” Desai at ¶7. A few minutes later he was “clutching an area on his shirt  
17 where a large patch of blood had developed.” *Id.*

18 Flash-bang grenades and tear gas: As on October 24, OPD fired flash bang grenades at  
19 rather than away from bystanders, who were then pelted with shrapnel. Kryshka at ¶17; Desai at  
20 ¶7; *but see* VI-N-2) (flashbangs to be exploded “at a safe distance from the crowd”). Audible  
21 warnings were not given prior to their use. Kryshka at ¶17; Post at ¶11, 14, Freinkel at ¶7; *but*  
22 *see* Policy at VI-M-5 & VI-N-3. Police fired tear “gas canisters into the midst of the crowd,”  
23 without intelligible warnings, and without first attempting less forceful dispersal tactics.

24 Kryshka at ¶16; Post at ¶11, 14; Freinkel at ¶7; *but see* Policy at VI-M-2 & VI-N-4. OPD’s  
25 wanton use of these injury-inflicting weapons on peaceful protesters caused “panic, chaos, and  
26 fear.” Post at ¶11.

1           Physical brutality: Other incidents of police brutality included four large police officers  
2 knocking a young woman slowly riding her bicycle to the ground. Post at ¶16. Police chased  
3 after a man dressed as a comic book hero and three to five officers, upon catching up to him, beat  
4 him “relentlessly with their batons.” Ress at ¶13.

5           **D. Another Large Political Demonstration is Imminent**

6           After the October 25, 2011 raid, Occupy Oakland set up camp again. K. Campbell at  
7 ¶15. The City on November 11, 2011 provided another eviction notice, as it had done just days  
8 prior to the October 25 raid. Kryshka at ¶21. The City has made clear it wishes Occupy  
9 Oakland to leave the Plaza. *See, e.g.*, “Mayor’s Statement on encampment in Oakland –  
10 November 9, 2011.”<sup>4</sup> Given the short window between the last eviction notice and raid, it was  
11 clear that another OPD raid on OO is imminent. Kryshka at ¶21. And today’s news is that  
12 Oakland has in fact begun to dismantle the encampment. Given the lessons of October 25, a  
13 morning raid is likely to be the precursor demonstrations in support of Occupy and a much larger  
14 police action later in the afternoon and evening today. Indeed, Occupy has already called for a  
15 protest at 4:00 today.

16           **III. LEGAL STANDARD**

17           “The standard for issuing a TRO is the same as that for issuing a preliminary injunction.”  
18 *Walker v. County of Santa Clara*, 2011 WL 4344212 (N.D. Cal. 2011) (citations omitted). “A  
19 plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits,  
20 that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of  
21 equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural Res.*  
22 *Def. Council*, 555 U.S. 7, 20 (2008). If plaintiffs show a “likelihood of irreparable injury and  
23 that the injunction is in the public interest,” a “preliminary injunction is appropriate when a  
24 plaintiff demonstrates that serious questions going to the merits were raised and the balance of  
25 hardships tips sharply in the plaintiff’s favor. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d  
26 1127, 1134-35 (9th Cir. 2011).

27           <sup>4</sup> Available at  
28 <http://www2.oaklandnet.com/oakca/groups/mayor/documents/report/oak032113.pdf>.

1 **IV. ARGUMENT**

2 **A. Plaintiffs Have Shown a Likelihood Of Success On The Merits**

3 1. OPD's Indiscriminate Use of Force Against Peaceful Protesters Violates  
4 The Fourth Amendment

5 The Fourth Amendment's prohibition against unreasonable seizures prohibits the police  
6 from using excessive – meaning unreasonable – force. When force is used against protestors or  
7 others exercising their First Amendment rights, this prohibition “must be applied with scrupulous  
8 exactitude.” *Lamb v. City of Decatur*, 947 F.Supp. 1261, 1263 (C.D.Ill. 1996) (quoting *Zurcher*  
9 *v. Stanford Daily*, 436 U.S. 547, 564 (1978)).

10 The Ninth Circuit has recently examined the use of less-lethal weapons like the ones used  
11 by OPD and has held that “such force, though less than deadly, is permissible only when a strong  
12 governmental interest compels the employment of such force.” *Glenn v. Washington County*, ---  
13 F.3d ----, 2011 WL 5248242, at \*5 (9th Cir. Nov. 4 2011). The strength of this interest “is  
14 evaluated by examining three primary factors: (1) whether the suspect poses an immediate threat  
15 to the safety of the officers or others, (2) the severity of the crime at issue, and (3) whether he is  
16 actively resisting arrest or attempting to evade arrest by flight.” *Id.* at \*6 (citation omitted).  
17 “Other relevant factors include the availability of less intrusive alternatives to the force  
18 employed, whether proper warnings were given.” *Id.*

19 The “most important” factor is whether the specific individual against whom force is  
20 used poses an “immediate threat to the safety of the officers or others,” although the presence of  
21 other threats to the officers' safety may also be a relevant factor. *Mattos v. Agarano*, --- F.3d ----  
22 , 2011 WL 4908374, at \*13, \*14 (9th Cir. Oct. 17, 2011) (en banc) (citation omitted). “[W]here  
23 there is no need for force, any force used is constitutionally unreasonable.” *Logan v. City of*  
24 *Pullman*, 392 F.Supp.2d 1246, 1261 ( E.D.Wash. 2005). And even where there is a need for  
25 some force, it “force is least justified against nonviolent misdemeanants who do not flee or  
26 actively resist arrest.” *Buck v. City of Albuquerque*, 549 F.3d 1269, 1289 (10th Cir. 2008)  
27 (excessive force at protest). The department's “own guidelines” are helpful in determining  
28 whether the use of force violated the Fourth Amendment. *Glenn*, 2011 WL 5248242 at \*9.

1 OPD spent 10 months developing its crowd-control policy, time that included “an  
2 analysis of use of force in crowd control situations.” *Local 10* settlement at 4, attached as  
3 Schlosser Dec., Exhibit A. It promised to train all of its officers on the policy. *Id.* at 5. By  
4 developing and enacting this policy, OPD has made an informed determination of what level of  
5 force is necessary to address the situations covered in the policy and has trained its officers  
6 accordingly. Thus, officers have “clear, reasonable and less intrusive alternatives to” employing  
7 more force than the policy allows – instead they could simply have obeyed the policy, as they  
8 have been trained to do – which “militates against finding the use of force reasonable.” *Glenn*,  
9 *2011 WL 5248242* at \*10; see *Young v. County of Los Angeles*, 655 F.3d 1156, 1162 (9<sup>th</sup> Cir.  
10 2011) (citing departmental baton-use policy in excessive-force analysis).

11 Here, the police employed a variety of weapons against the protestors that the Ninth  
12 Circuit has held to constitute a form of intermediate force that can constitute excessive force in  
13 violation of the Fourth Amendment unless there is a strong governmental need to use them:

- 14
- 15 • so-called “beanbags” which are actually lead shot in a cloth sack fired from a 12-gauge  
16 shotguns and which “can kill a person if it strikes his head or the left side of his chest at a  
range of under fifty feet” *Glenn, 2011 WL 5248242* at \*5; see *id.* at \*12.
- 17 • flash-bang grenades, which are “inherently dangerous,” *Boyd v. Benton County*, 374 F.3d  
18 773, 779 (9<sup>th</sup> Cir. 2004) , and are more accurately described as bombs or concussion  
grenades. *United States v. Jones*, 214 F.3d 836, 837 (7<sup>th</sup> Cir. 2000)
- 19 • pepper balls, *Buck v. City of Albuquerque*, 549 F.3d 1269, 1289-90 (10<sup>th</sup> Cir. 2008)
- 20 • tear gas, the use of which “can be extremely dangerous” when used in excessive  
21 quantities. *Spain v. Proconier*, 600 F.2d 189, 195-96 (9<sup>th</sup> Cir. 1979) (Eighth  
22 Amendment); See *Logan*, 392 F.Supp.2d at 1261.
- 23 • “baton blows ... [which] are considered a form of “intermediate force....” “[A] baton is  
24 a deadly weapon that can cause deep bruising as well as blood clots capable of  
25 precipitating deadly strokes, and ... should therefore be used “only as a response to  
aggressive or combative acts.” *Young*, 655 F.3d at 1162.

26 Moreover, as described above, on both October 25 and November 2, OPD systematically  
27 fired these weapons of intermediate force at *peaceful* protestors, like Plaintiff Scott Campbell,  
28

1 the videographer who was filming the line of police, and dense crowds of peaceful protesters.  
2 See, e.g., T.S. Campbell at ¶5; Kryshaka at ¶7; Siegel at ¶12, 14, 18; Post at ¶7-8; Roth at  
3 ¶5(d),(f), 6, 12; Freinkel at ¶4; Ress at ¶4-6; Whitacre at ¶6; *supra* Part III-C. Firing “inherently  
4 dangerous” flash bang grenades, *Boyd*, 374 F.3d at 79, directly at protesters who posed no  
5 “immediate threat to the safety of the officers or others,” *Mattos*, --- F.3d ----, 2011 WL  
6 4908374, at \*13, \*14, is constitutionally unreasonable.

7 Further, Defendants cannot be heard to complain that the force was reasonable when the  
8 OPD’s enforcement actions on October 25 and November 2 systematically violated key  
9 prohibitions in its own Crowd Control Policy (*see supra* Part II-C) – which necessarily reflects  
10 the agency’s own view of what constitutes reasonable force in responding to crowds. See Glenn,  
11 2011 WL 5248242 at \*9 (looking to department’s “own guidelines” in assessing reasonableness  
12 of force).

13  
14 Defendants’ conduct violated the rights of Plaintiffs and other Occupy supporters to be  
15 free from excessive police force.

16  
17 **2. OPD’S Indiscriminate Use Of Force Against Crowds Of Peaceful**  
18 **Protesters Violates The First Amendment**

19 As one court recently wrote in addressing a similar situation, “[p]laintiffs have alleged  
20 that they were peacefully protesting or demonstrating when they were advanced upon by police  
21 lines and struck with projectiles fired by the police, which ended the peaceful protest. These  
22 allegations are sufficient to state a First Amendment violation.” *Jennings v. City of Miami*, 2009  
23 WL 413110, at \*13 (S.D. Fla. 2009) (citation omitted). OPD’s indiscriminate use of force  
24 against crowds of peaceful protesters engaged in political expression similarly constitutes  
25 impermissible interference with the rights protected by the First Amendment.

26 Because “[e]ffective advocacy of both public and private points of view, particularly  
27 controversial ones, is undeniably enhanced by group association,” *NAACP v. Patterson*, 357 U.S.

1 449, 460 (1958), “[a]ctivities such as demonstrations, protest marches, and picketing are clearly  
2 protected by the First Amendment.” *Collins v. Jordan*, 110 F.3d 1363, 1371 (9<sup>th</sup> Cir. 1997).

3 This means that “governmental actions” that “directly suppress” or have “the practical effect of  
4 discouraging” protests “can be justified only upon some overriding valid interest of the State.”  
5 *Patterson*, 357 U.S. at 460, 461. After all, “[w]hat value would the First Amendment carry if its  
6 demonstrators could be dispersed or intimidated by police brutality or unnecessary force?”  
7 *Lamb*, 947 F.Supp. at 1264.

8 Courts have therefore repeatedly found First Amendment violations where, as here, the  
9 government used excessive force to break-up protests. *See, e.g., Keating v. City of Miami*, 598  
10 F.3d 753, 767 (11<sup>th</sup> Cir. 2010) (officers “violated [Plaintiffs’] clearly established First  
11 Amendment rights ...by directing and failing to stop subordinate officers to use less-than-lethal  
12 weapons to disperse a crowd of peaceful demonstrators.”); *Buck v. City of Albuquerque*, 549  
13 F.3d 1269, 1292 (10<sup>th</sup> Cir. 2008) (affirming district court’s “determination that [defendant]  
14 violated plaintiffs’ First Amendment rights, when he authorized the use of [excessive] force to  
15 break up the protest”); *Jones v. Parmley*, 465 F.3d 46, 53, 60 (2d Cir. 2006) (affirming denial of  
16 qualified immunity on First Amendment claim, where law enforcement responded to protest with  
17 excessive force); *Jennings*, 2009 WL 413110, at \*13; *Houser v. Hill*, 278 F.Supp. 920, 926 (D.  
18 Ala. 1968) (finding police to have “unlawfully interfer[ed], through the use of force and  
19 intimidation, with the peaceful and lawful assemblies of Negro citizens”); *Cottonreader v.*  
20 *Johnson*, 252 F.Supp. 492, 496, 497 (D. Ala. 1966) (“using unnecessary and excessive force  
21 against” African Americans picketing against Jim Crow laws “interfere[d] with ... the right to  
22 assemble peacefully ... and to petition for redress of grievances”); *Schnell v. City of Chicago*,  
23 407 F.2d 1084, 1085 (7<sup>th</sup> Cir. 1969) (reversing dismissal of suit seeking injunction against police  
24 department’s use of force against news photographers), *overruled on other grounds, City of*  
25 *Kenosha v. Bruno*, 412 U.S. 507, 513 (1973).

26 Because none of the Plaintiffs was engaged in violence, their speech and assembly in  
27 support of Occupy was constitutionally protected. *See Collins*, 110 F.3d at 1371. Yet OPD led  
28



1 two enforcement actions, using excessively dangerous and potentially injurious crowd-control  
2 techniques to terminate the peaceful protest activities of Plaintiffs and other Occupy supporters,  
3 thereby interfering with their First Amendment rights to assemble and express their message.  
4 Such excessive police force “may induce members to withdraw from the [Occupy movement and  
5 demonstrations] and dissuade others from joining it because of fear.” *Patterson*, 357 U.S. 463.

6 The prospect of being bombarded with lead shot in a cloth sack (euphemistically  
7 “beanbags”) for “doing nothing more than not moving or not moving as quickly as the rest of the  
8 crowd” (Kryshka at ¶7), or filming a newsworthy event (T.S. Campbell at ¶5), or bombarded  
9 with tear gas while “milling” or “standing around” in a crowd (Kryshka at ¶13-14)  
10 “would chill or silence a person of ordinary firmness from future First Amendment activities.”  
11 *Brodheim v. Cry*, 584 F.3d 1262, 1272 (9<sup>th</sup> Cir. 2009) (internal quotation marks, citation  
12 omitted). That some Occupiers have continued to express themselves in the face of this violence  
13 does not change this. *See id.*

14 OPD cannot justify its use of force on peaceful protesters simply because other members  
15 of the crowd may have been involved in unlawful activity. In *NAACP v. Claiborne Hardware*,  
16 458 U.S. 886 (1982), the Supreme Court found it unconstitutional to impose monetary liability  
17 on participants in a peaceful civil rights boycott, even if some members of the organization had  
18 been violent: “The right to associate does not lose all constitutional protection merely because  
19 some members of the group may have participated in conduct or advocated doctrine that itself is  
20 not protected.” *Id.* at 908.<sup>5</sup> Where First Amendment rights are involved, “precision of  
21 regulation is demanded,” and the OPD “may not employ means that broadly stifle fundamental  
22 personal liberties when the end can be more narrowly achieved.” *Id.* at 916, 920 (internal  
23 quotation marks, citations omitted). OPD has no compelling interest in using indiscriminate  
24 force on crowds of peaceful protesters, and its own Policy – albeit systematically violated on two

25  
26  
27 <sup>5</sup> This principle is even more important when government actions may prevent speech from  
28 occurring at all – a form of prior restraint -- rather than imposing subsequent liability.

1 recent occasions now – shows that OPD can accomplish legitimate law enforcement objectives  
2 through less violent means and force targeted only at individuals creating imminent safety risks.<sup>6</sup>

3 3. OPD’s Actions Violate the *Local 10* Settlement

4 The settlement agreement in *Local 10* (Schlosser, Exh. A) required that OPD adopt the  
5 negotiated Crowd Control Policy. The settlement incorporated the Policy, at p. 4, and this  
6 Court’s approval order in turn incorporated the settlement, at p. 8. This Court retained  
7 jurisdiction to enforce the agreement for three years. *Id.* Although that the three-year period has  
8 now expired, the agreement itself is in full force and effect, and this Court now has supplemental  
9 jurisdiction under 28 U.S.C. § 1367 to adjudicate plaintiffs’ state law claim that defendants are  
10 violating the agreement because that claim derives from a “common nucleus of operative fact” as  
11 the federal claims here asserted and would be tried together. *Kuba v. 1-A Agr. Ass’n*, 387 F.3d  
12 850, 855-56 (9th Cir. 2004).

13 The settlement is a contract, governed by California law, and Defendants have breached  
14 it by violating the crowd-control policy that is an integral part of that settlement. *See Jeff D. v.*  
15 *Andrus*, 899 F.2d 753, 759-60 (9th Cir. 1989) (“The construction and enforcement of settlement  
16 agreements are governed by principles of local law which apply to interpretation of contracts  
17 generally.”). And because the crowd-control policy is intended to benefit everybody who  
18 wishes to participate in demonstrations in Oakland, all such persons may enforce the settlement  
19 to ensure that OPD abides by it. Cal.Civ.Code § 1559; *SEIU Local 99 v. Options*, --- Cal.Rptr.3d  
20 ---, 2011 WL 5387275 at \*4-\*8 (Cal.App.Nov. 9, 2011) (third party could enforce agreement  
21 requiring private entity to comply with open-government laws); *see* Crowd Control Policy §  
22  
23

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24 <sup>6</sup> Plaintiffs do not mean to suggest that it would be acceptable for the government to fire  
25 projectiles on any and all individuals engaged in merely unlawful activity. OPD’s Policy  
26 prohibits firing projectiles against an individual unless he or she “poses an immediate threat of  
27 loss of life or serious bodily injury,” Policy at V-F-3, which someone who throws a plastic bottle  
28 (Roth at ¶5(c)) does not. The First Amendment prohibits shooting projectiles indiscriminately at  
crowds of peaceful protesters chanting non-violent slogans, simply because a person with whom  
the crowd associated (through simultaneous physical presence in a public street) may have  
engaged in unlawful activity.

1 III(A)(1). Thus, Defendants’ numerous breaches of the settlement agreement provides an  
2 additional basis for this Court to issue an immediate injunction to prevent future violations.

3 4. OPD'S Actions Violate Due Process

4 The unwarranted use of force by the police can violate due process. *Porter v. Osborn*,  
5 546 F.3d 1131, 1140-41 (9th Cir. 2008). “More specifically, it is the intent to inflict force  
6 beyond that which is required by a legitimate law enforcement objective that ‘shocks the  
7 conscience’ and gives rise to liability under § 1983.” *Id.* (citation omitted). Thus, the use of  
8 force that is meant to “get even” with a protestor or to “teach him a lesson” or where the “officer  
9 intended to harm” without justification rises to this standard. *Id.* Violations of the Department’s  
10 use-of-force rules may indicate such an impermissible intent. *Id.* at 1142. OPD systematically  
11 used force beyond what was necessary or reasonable, as evidenced by its widespread violations  
12 of its own Crowd Control Policy. Further, there can be no explanation for shooting protesters  
13 who videotaped a police line from the police-requested distance (T.S. Campbell at ¶5), inquired  
14 of the police why they had just sent a volley of projectiles at the crowd (Whitacre at ¶7), or who  
15 merely approached within 8 feet of the police line (Kryshka at ¶12) – other than to teach the  
16 protesters a lesson or getting even with them. Defendants’ conduct also violated due process.

17 **B. Plaintiffs Face Imminent and Irreparable Harm**

18 Absent a TRO and preliminary injunction prohibiting OPD from continuing to  
19 systematically violate its Crowd Control Policy and Plaintiffs’ constitutional rights, Plaintiffs  
20 will suffer imminent and irreparable harm. Given OPD’s now-repeated failure to refrain from  
21 indiscriminate excessive force on peaceful protesters, and the on-going nature of the Occupy  
22 movement, the removal of the encampment this morning, and Occupy’s calls for supporters to  
23 reconvene *later today*, another enforcement action against large crowds of demonstrators is  
24 imminent.

25 The threatened harm is irreparable. “The loss of First Amendment freedoms, for even  
26 minimal periods of time, unquestionably constitutes irreparable injury” as a matter of law. *Elrod*  
27 *v. Burns*, 427 U.S. 347, 373 (1976); *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th  
28

1 Cir. 2009). Indeed, the violence has actually deterred some Plaintiffs and other Occupy  
2 supporters from participating in various Occupy events. T.S. Campbell at ¶13; McKinnie at ¶21;  
3 Post at ¶9; Ress at ¶15-16; Whitacre at ¶14. Plaintiff McKinnie, who would like to bring her  
4 children to one of the demonstrations, is unwilling to expose them to police violence. McKinnie  
5 at ¶14. Defendants’ conduct has also placed Plaintiffs Siegel and Kryshka, and other Occupy  
6 supporters in the impossible position of having to choose between personal safety and expressing  
7 important beliefs. Kryshka at ¶20; Siegel at ¶31; Post at ¶30; Roth at ¶13; Freinkel at ¶10; Desai  
8 at ¶10.

9 Under the Fourth Amendment, too, “the loss of constitutional freedoms, for even minimal  
10 periods of time, unquestionably constitutes irreparable injury” for purposes of a preliminary  
11 injunction. *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009); *see, e.g.*,  
12 *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501-02 (9th Cir. 1996) (affirming  
13 injunction against Fourth Amendment violations); *American Federation of Teachers v. Kanawha*  
14 *County Bd. of Educ.*, 592 F.Supp.2d 883, 905 (S.D. W. Va. 2009) (issuing injunction against  
15 Fourth Amendment violations). Indeed, the harm that plaintiffs will suffer in the absence of an  
16 injunction is much more extreme than that at issue in *Mills* or *Easyriders*, both of which involved  
17 the possibility of brief vehicle detentions: Plaintiffs here face the real possibility that they will  
18 shot, beaten, gassed, and bombed unless the Court intervenes. An injunction is necessary to  
19 prevent what money damages cannot *undo*: the harm done to a person who is sent to the  
20 emergency room after his skull is fractured by a police projectile, or his spleen ruptured by a  
21 police baton. And given the nature of OPD’s conduct, it is extremely likely that such harm will  
22 recur. First, OPD botched the October 25 enforcement action. Despite widespread criticism  
23 including a letter of complaint from the ACLU and National Lawyers Guild (Schlosser, Exh. B),  
24 (who are counsel for Plaintiffs in this action) that it blatantly violated its Crowd Control Policy,  
25 it promptly and extensively violated it again, days later, on November 2. Second, the very nature  
26 of OPD’s violations – indiscriminate use of highly dangerous exploding projectiles into *crowds*  
27 of peaceful protesters – cast a wide and injurious net.

1 Finally, the violation of the *Local 10* settlement agreement merits an injunction for  
2 specific performance, because money damages cannot compensate plaintiffs for being shot,  
3 beaten, gassed, or bombed for exercising the constitutional rights that the crowd control policy  
4 was intended to protect. Cal.Civ.Code § 3384; *Gregory v. Hamilton*, 77 Cal.App.3d 213, 219  
5 (1978) (“money damages could not provide the relief which respondent seeks.... Therefore, the  
6 breach complained of must be remedied in equity”); see *TNT Marketing, Inc. v. Agresti*, 796 F.2d  
7 276, 278 (9th Cir. 1986). Where, as here, specific performance is warranted, a TRO or  
8 preliminary injunction may issue to prevent a contractual breach. See *John Goyak & Associates,*  
9 *Inc. v. Terhune*, 299 Fed.Appx. 739, 740 (9<sup>th</sup> Cir. 2008); *Nike, Inc. v. McCarthy*, 285 F.Supp.2d  
10 1242, 1243-44 (D. Or. 2003) (issuing preliminary injunction against contract violation), aff’d  
11 379 F.3d 576 (9<sup>th</sup> Cir. 2004); *Southern Christian Leadership Conference v. Al Malaikah*  
12 *Auditorium Co.*, 230 Cal.App.3d 207, 224 (1991).

13 **C. The Balance of Equities Tips in Plaintiffs’ Favor and An Injunction Against**  
14 **Excessive Force in Response to Political Demonstrations Serves The Public**  
15 **Interest**

16 When an injunction is sought against the government, these last two prongs “are largely  
17 the same” and can be considered together. *Scott v. Roberts*, 612 F.3d 1279, 1290 (11<sup>th</sup> Cir.  
18 2010). Many courts have recognized the public interest in upholding the constitution. See e.g.  
19 *Klein*, 584 F.3d at 1208 (public interest favors upholding First Amendment); *Giovani Carandola,*  
20 *Ltd. v. Bason*, 303 F.3d 507, 521 (4<sup>th</sup> Cir. 2002) (“upholding constitutional rights surely serves  
21 the public interest”); *Marchwinski v. Howard*, 113 F.Supp.2d 1134, 1144 (E.D. Mich. 2000)  
22 (“Perhaps no greater public interest exists than protecting a citizen's [Fourth Amendment] rights  
23 under the constitution.”) (citation omitted). Thus, federal courts have issued injunctions to stop  
24 the police from interfering with protests. *Houser*, 278 F.Supp. at 926 (enjoining police from  
25 “[u]nlawfully interfering, through the use of force and intimidation, with the peaceful and lawful  
26 assemblies”); *Cottonreader*, 252 F.Supp. at 493, 499 (preliminarily enjoining police from  
27 “[c]ommitting acts of violence upon, or threatening, intimidating, assaulting or harassing any of  
28

1 the plaintiffs and those similarly situated in the exercise of their constitutional rights of free  
2 speech, assembly and petition”).

3 Plaintiffs seek a TRO and preliminary injunction that will prohibit OPD, its employees,  
4 and those acting in concert or active participation with it, from using excessive force in  
5 responding to political protests and, more specifically, from violating its own Crowd Control  
6 Policy. See FRCP 65(d)(2). The government has no legitimate interest in continuing to violate  
7 the First or Fourth Amendments, the Due Process Clause, or the promises it made to settle a  
8 previous case in this Court. Defendants can fulfill both its legitimate public safety interests and  
9 its constitutional duties by following its own its own crowd control policy, which is the only  
10 remedy that Plaintiffs are requesting at this time.

11 There can be no argument that the injunction sought would prevent OPD from addressing  
12 legitimate safety concerns, because it adopted its policy to deal with this precise situation. The  
13 policy is the product of OPD’s own recommendations “from a police ‘best practices  
14 perspective.’” Schlosser, Exh. A at 3:14-15. OPD cannot now be heard to complain that abiding  
15 by its own Crowd Control Policy would interfere with legitimate law enforcement needs.<sup>7</sup>

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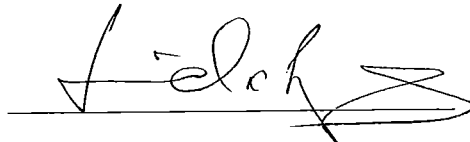
19 <sup>7</sup> No bond is necessary in this case for three separate and independent reasons. First, Plaintiffs  
20 have a strong likelihood of success on the merits. See *Scherr v. Volpe*, 466 F.2d 1027, 1035 (7th  
21 Cir. 1972). “[W]aiving the bond requirement is particularly appropriate where a plaintiff alleges  
22 the infringement of a fundamental constitutional right.” *Complete Angler, LLC v. City of*  
23 *Clearwater*, 607 F. Supp. 2d 1326, 1335 (M.D. Fla. 2009). Here, Plaintiffs allege infringements  
24 of fundamental freedoms to be free from excessive force and to express themselves peacefully  
25 without fear of excessive force. Second, an injunction here would “protect[] [the] public  
26 interest.” See *Pharm. Soc. v. New York State Dept. of Soc. Services*, 50 F.3d 1168, 1175 (2d Cir.  
27 1995) (waiving bond in suit to ensure state complied with federal Medicaid Act). Third, there is  
28 no realistic likelihood of harm to Defendants resulting from issuance of the injunction, which  
merely prohibits it from using excessive force against crowds. See *Jorgensen v. Cassidy*, 320  
F.3d 906, 919 (9th Cir. 1997). Indeed, issuance of the injunction would likely benefits  
Defendants by reducing their prospective monetary liability in excessive force suits. Fourth, the  
“equities of potential hardships to the parties” weighs in favor of Plaintiffs. *Temple Univ. v.*  
*White*, 941 F.2d 201, 220 (3d Cir. 1991). Defendants will not be hamstrung in legitimate law  
enforcement activities, but Plaintiffs will be spared further constitutional violations.

1 **V. CONCLUSION**

2 For the foregoing reasons, the Court should immediately issue interim injunctive relief  
3 against further violations of the Crowd Control Policy.

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5 Dated: November 14, 2011

Respectfully submitted,

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28 Attorneys for Plaintiffs