

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

North Baton Rouge Matters; Black Youth Project 100;
New Orleans Workers' Center for Racial Justice; American
Civil Liberties Union of Louisiana; Louisiana Chapter of
the National Lawyers Guild,

Plaintiffs,

-vs-

City of Baton Rouge; Baton Rouge Police Department;
Carl Dabadie, Jr., in his official capacity as Chief of the
Baton Rouge Police Department; Louisiana Department of
Public Safety; Louisiana State Police; Col. Michael
Edmonson, in his official capacity as Superintendent of the
Louisiana State Police; East Baton Rouge Sheriff's
Department; Sid J. Gautreaux III, in his official capacity as
Sheriff of the East Baton Rouge Sheriff's Department; Kip
Holden in his official capacity as the Mayor-President of
East Baton Rouge Parish; Hillar C. Moore, III, in his
official capacity as District Attorney for East Baton Rouge
Parish,

Defendants.

CIVIL ACTION
NO.:

**Motion for Temporary
Restraining Order and
Preliminary Injunction**

*Oral Argument
Requested*

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

I. INTRODUCTION

Our Nation and the hard-fought liberties found in our Constitution are built on a foundation of free speech, dissent, and protest. Since our very founding, the American people have taken to the streets and sidewalks to make their voices heard. The residents of Baton Rouge have every right to engage in this proud tradition, and have good reason to do so. On July 5,

2016, a Black Baton Rouge resident named Alton Sterling—a man who had committed no crime—was tackled, tasered, incapacitated, and fatally shot at point blank range by two white Baton Rouge police officers.

Plaintiffs, and others like them, have since attempted to engage in peaceful protest on the streets and sidewalks of Baton Rouge—the very places which the Supreme Court has described as having “immemorially been held in trust for the use of the public and [which], time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

But in Baton Rouge, citizens exercising their constitutional rights have been met by police dressed in full riot or paramilitary gear. Defendants have shown naked hostility to the constitutional rights of the citizens they are tasked to serve. Plaintiffs and other protestors have been arrested for being present on public sidewalks where they have every right to be. They have received confusing and conflicting demands from law enforcement officers. They have been arrested—or threatened with arrest—for peaceably gathering in public fora, and these arrests have been effected with unconstitutional excessive physical force. In short, law officers on the ground in Baton Rouge have done nothing to facilitate the constitutional rights to which they have each sworn an oath. Instead, they have met words with weapons, and peace with violence. General Russell Honore, a notable figure in Louisiana, has stated “something is not right in that department [Baton Rouge Police Department] in terms of amount of equipment and amount of training,” in regards to the current situation.¹ The Baton Rouge Police Department has

¹ Quigley, Bill. “Baton Rouge: ‘Put Those Damn Weapons Down!’” *The Huffington Post*. 12 July 2016 <http://www.huffingtonpost.com/entry/baton-rouge-put-those-damn-weapons-down_us_57856ae4b0e7c8734f0639>.

continually escalated a nonviolent protest into a full-scale conflict, with the attendant risk of physical injury and irreparable loss of constitutional freedoms.

The defendants' actions constitute an all-out assault on the constitutional rights of their own citizens. Alton Sterling will be buried on Friday, July 15, 2016. Plaintiffs wish to continue to protest throughout this coming week and especially on Friday. However, Plaintiffs fear that if they exercise their constitutional right to gather and peacefully protest the wrongful killing of Alton Sterling they will be faced with violence and unlawful arrests by the Defendants. Defendants have repeatedly shown over the past week that First amendment rights will not be respected and that peaceful protestors will be illegally threatened, detained, searched, chased, tackled, tased, beaten and bloodied and then denied care in the jail while being overcharged if not illegally arrested on false charges. Plaintiffs seek the Court's immediate assistance to prevent the Defendants from further eroding Plaintiffs' constitutional rights.

It is also worth noting that the suspension of constitutional rights in Baton Rouge does much more than silence speech on a matter of public concern. Intimidating, arresting, and injuring those who have done no wrong and seek nothing more than achieving justice through peaceful means confirms the community's view of the police as an autocratic and racist entity. This latest suppression of constitutional rights is difficult to separate from the history of law enforcement officials treating communities of color as a problem rather than an indispensable part of the solution.

II. FACTS

The Baton Rouge City Police, East Baton Rouge Sheriff's Department, and Louisiana State Police have repeatedly interfered with peaceful protests on public sidewalks and private property. On the evening of July 10 at approximately 5:40 pm, police confronted peaceful protestors -- some of whom were leaving a youth-led march² -- on Government Street. They blocked the protestors path with numerous police vehicles and officers in full riot gear and assault rifles.³ According to protestor Jenna Finkle, she saw "lines of police in riot gear, and other officers in green with what looked [to me] to be automatic assault rifles."⁴ Marcher Colleen Harrigan recalls that "there were so many police I could see them all the way to the horizon."⁵ The police forced the protestors onto East Boulevard.⁶ Police initially blocked the street but left the sidewalks open.⁷ Police told the protestors that they would be arrested if they did not get off the street and gave them ten minutes to move several hundred people to the sidewalks.⁸

People were not sure what to do so they proceeded on East Boulevard towards France Street.⁹ Professor Bill Quigley, an attorney and law professor at Loyola University New Orleans, introduced himself to one officer and was directed to talk with an officer who was said to be in charge.¹⁰ When Professor Quigley asked the officer how he could help he was told to tell people they had to clear the street in ten minutes or they were going to start arresting

² See Decl. of Colleen Harrigan, ¶¶ 4-5.

³ See Decl. of Hannah Adams, ¶ 6; Decl. of Adina Marx-Arpadi, ¶ 3.

⁴ See Decl. of Jenna Finkle, ¶ 5.

⁵ See Decl. of Colleen Harrigan, ¶ 5.

⁶ See Decl. of Jenna Finkle, ¶ 5; Hannah Adams, ¶ 6; Decl. of Adina Marx-Arpadi, ¶ 3.

⁷ See Decl. of Adina Marx-Arpadi, ¶ 3 and 4; Decl. of Alissa Luis, ¶ 6.

⁸ See Decl. of Bill Quigley, ¶ 4.

⁹ See Decl. of Hannah Adams, ¶ 3; Decl. of Adina Marx-Arpadi, ¶¶ 4-5.

¹⁰ See, Decl. of Bill Quigley, ¶ 4.

people.¹¹ As Professor Quigley and another legal observer relayed this information to the protestors, they began to leave the street.¹² The protestors gathered around a porch of a house and the sidewalk around it.¹³

Around 6pm, NLG legal observers saw police staging at the end of Europe Street.¹⁴ At approximately 6:10 pm, approximately 40 to 50 police officers formed a military formation on France Street, including an armored vehicle with an officer with a rifle.¹⁵ The police proceeded down France Street towards East Boulevard in line formation across the road, with the armored vehicle, assault rifles, rubber bullet guns, gas masks, shields up, and what appeared to be a “long-range acoustic device” (“LRAD”), which creates a painfully loud transmission.¹⁶ The protestors were now surrounded except for the opposite direction on France Street (towards Maxmillian Street). The crowd was tense and uncertain how to lawfully react to law enforcement, but not violent.¹⁷ As police began to advance they also began arresting people, lunging at and grabbing them and throwing them to the ground.¹⁸

During these initial arrests NLG legal observer Andrew McDaniel was arrested by police as he stood taking notes on the sidewalk on the corner of Government and East Boulevard.¹⁹ His legal observing partner Tarana Lawrence said “Andrew started recording [protester] Michael Martin’s arrest. Another police officer came up behind Andrew and arrested him. Andrew was

¹¹ *Id.*

¹² *See* Decl. of Bill Quigley, ¶ 5.

¹³ *See* Decl. of Adina Marx-Arpadi, ¶ 6; Decl. of Marquita Christy, ¶ 10.

¹⁴ *See* Decl. of Hannah Adams, ¶ 5; Decl. of Sarah Marcello, ¶ 4.

¹⁵ *See* Decl. of Hannah Adams, ¶ 6; Decl. of Sarah Marcello, ¶ 6-7.

¹⁶ *Id.*

¹⁷ *See* Decl. of Hannah Adams, ¶ 7.

¹⁸ *See* Decl. of Sarah Marcello, ¶ 8; Decl. of Hannah Adams, ¶ 7.

¹⁹ *See* Decl. of Andrew McDaniel, ¶ 7; Decl. of Tarana Lawrence, ¶ 7.

also standing on the sidewalk. The officer would not tell either of us why Andrew was being arrested.”²⁰ At approximately 6:22pm, four police officers came aggressively from Government Street and targeted a well-dressed Black man walking down France Street.²¹ When the police reformed the riot line and used the LRAD, another Black man ran and tried to leave but was chased by police, tackled and Tasered.²² There were hundreds of police officers on lawns, in the street, and on the sidewalks, including plain clothes officers and officers on bicycles.²³ The protestors were confused, and many who wanted to leave were scared to cross the police lines or interact with police.²⁴

Ms. Lisa Batiste, who lives on the corner of France and East Boulevard, invited more than 100 protestors to take shelter in her yard, on her porch and in her home.²⁵ According to protestor Crystal Williams:

They [protesters] were blocked in, surrounded, and bombarded on Government st. Many protestors froze when the police started arresting folks. That is when people went into the lady’s yard and froze in place because they didn’t know where to go. People were afraid to move or even walk by police arresting others.²⁶

Other protestors remained on the Maxmillian side of East Blvd on the sides of the road and sidewalk. At this point, the police removed their masks and things calmed down momentarily. The protestors were peacefully chanting at police and the sidewalks were passable.²⁷ The police were lined up along East Blvd in groups from France to Government Street and there was a

²⁰ See Decl. of Tarana Lawrence, , ¶ 7.

²¹ See Decl. of Emily Ratner, ¶ 12; Decl. of Lily Ann Ritter, ¶ 12.

²² See Decl. of Sarah Marcello, ¶ 8.

²³ See *id.* at ¶ 5.

²⁴ See Decl. of Lily Ann Ritter, ¶ 19; Decl. of Alison McCrary, ¶ 47; Decl. of Shani Mandisa Moore-O’Neal, ¶ 17.

²⁵ See Decl. of Adina Marx-Arpadi, ¶ 11; Decl. of Jenna Finkle, ¶ 4; Decl. of Hannah Adams, ¶ 8; Decl. of Shaena Johnson, ¶ 8.

²⁶ See Decl. of Crystal Williams, ¶ 9.

²⁷ See Decl. of Adina Marx-Arpadi, ¶ 6; Decl. of Hannah Adams, ¶ 4.

police presence at East Blvd and Europe Street. The protestors were blocked in with no place to go.²⁸ According to Vice President of the Louisiana Chapter of the National Lawyers Guild Shani Mandisa Moore O’Neal, “It was clear to me that legal observers and protestors were being boxed in.”²⁹ The police, using a sound system that was often inaudible, gave conflicting instructions, telling protestors to disperse because their assembly was now unlawful, and that people in the street and on sidewalks would be arrested.³⁰ Alison McCrary, president of the Louisiana NLG and a trained mediator and negotiator, tried to meet with the ranking officers and explain that the warnings could not be heard on the sound system but her attempts at dialogue were rejected.³¹

At approximately 7:30 p.m., police advanced from France Street and from Government Street down East Boulevard brandishing batons and assault rifles, and closed off the sidewalk, leaving protestors without access to that space—either to protest or leave the area.³² A large number of police in riot gear advanced on the protestors, driving many off of the sidewalk, including onto neighboring private property.³³ Police grabbed and pushed some protestors to the ground. According to legal observer Hannah Adams “It was extremely chaotic and frightening. While we ran I could see officers tackling and arresting people at random.”³⁴

A large group of officers in riot gear then entered and remained on Ms. Batiste’s property without permission or a warrant, where they pointed their guns at protestors, ordered protestors to leave the property, used force on protestors, including tackling and pushing some to the

²⁸ See Decl. of Hannah Adams, ¶ 10; Decl. of Jenna Finkle, ¶ 5; Decl. of Crystal Williams, ¶ 9; Decl. of Sabrina Carter, ¶ 15; Decl. of Marquita Christy, ¶ 20.

²⁹ See Decl. of Shani Mandisa Moore-O’Neal, ¶ 17.

³⁰ See Decl. of Hannah Adams, ¶¶ 8-10; Decl. of Marquita Christy, ¶¶ 16-17.

³¹ See Decl. of Alison McCrary, ¶¶ 28-37.

³² See Decl. of Hannah Adams, ¶ 10; Decl. of Adina Marx-Arpadi, ¶ 7.

³³ See Decl. of Jenna Finkle, ¶ 6; Decl. of Hannah Adams, ¶ 10; Decl. of Adina Marx-Arpadi, ¶ 12-13.

³⁴ See Decl. of Hannah Adams, ¶ 10.

ground, and arrested a number of protestors.³⁵ Police were informed by both Ms. Batiste and by protestors that the protestors had permission to be on the property.³⁶ At one point, at least a dozen police crowded onto Ms. Batiste's porch, where they grabbed and pushed protestors standing inside the home's open doorway and forced them out of the house and off the porch.³⁷ Vice President of the Louisiana Chapter of the National Lawyers Guild Shani Mandisa Moore-O'Neal stated "They started pulling people out of the crowd, dragging them, tackling them, and arresting them. I saw them enter the home and also saw them throw people off of the porch and the property. I would deem this use of force excessive."³⁸ Police also arrested protestors standing or walking on the public sidewalk abutting Ms. Batiste's property. The police continued to advance down France Street.³⁹

Throughout the protests, police have used aggressive tactics to interfere with protestors' First Amendment rights, including using an armored vehicle to direct extremely loud sound waves at protestors using what appears to be an LRAD, which can create painfully loud sound transmissions.⁴⁰ One of these vehicles was seen moving towards protestors, advancing upon them.⁴¹ Police have also brandished and pointed assault rifles and batons at protestors and pushed them off private property.⁴² Police have used force on protestors who were standing and chanting peacefully, including tackling, pushing, hitting, dragging them, and kneeling on

³⁵ See Decl. of Jenna Finkle, ¶ 6; Decl. of Hannah Adams, ¶ 10; Decl. of Adina Marx-Arpadi, ¶ 12-13.

³⁶ See Decl. of Alissa Luis, ¶ 11.

³⁷ See Decl. of Alison McCrary, ¶ 53; Decl. of Shani Mandisa Moore-O'Neal, ¶ 19; Decl. of Emily Ratner, ¶¶ 22-24.

³⁸ See Decl. of Shani Mandisa Moore-O'Neal, ¶ 19.

³⁹ See Decl. of Adina Marx-Arpadi, ¶ 14; Decl. of Hannah Adams, ¶ 12.

⁴⁰ See Decl. of Sarah Marcello, ¶ 7; Adina Marx-Arpadi, ¶ 7; Decl. of Hannah Adams, ¶ 6.

⁴¹ See Decl. of Hannah Adams, ¶ 6.

⁴² See Decl. of Allison McCrary, ¶¶ 16, 47; Decl. of Shani Mandisa Moore-O'Neal, ¶ 9; Decl. of Adina Marx-Arpadi, ¶¶ 12-13; Decl. of Hannah Adams, ¶ 10; Decl. of Alissa Luis, ¶ 17; Decl. of Emily Ratner, ¶ 23.

people's backs.⁴³ Protestors have been bloodied and injured by this force.⁴⁴ The Police repeatedly refused attempts by experienced attorneys, legal observers and negotiators to deescalate the situation.⁴⁵ Sister Alison McCrary, the president of the Louisiana chapter of the National Lawyers Guild who has extensive experience conducting police mediation, says she is "terrified to try and negotiate with the police again in Baton Rouge."⁴⁶ Police have also refused to identify themselves, many officers in riot gear had their names taped.⁴⁷

In addition, Police have interfered with the rights of reporters covering the protests, including on July 9 ordering reporters into a small 10-foot-wide area, and then ordering those reporters without credentials out of the area and threatening to arrest any who stepped into the street.⁴⁸ At least three reporters were arrested on July 9, including WWNO reporter Ryan Kailath⁴⁹ and WAFB assistant news director Chris Slaughter. Slaughter was standing on the sidewalk along Airline Highway videoing protestors across the street.⁵⁰ When he placed one foot on the roadway to get a better angle, police ran across the highway and arrested him.⁵¹ On the evening of July

⁴³ See Decl. of Jenna Finkle, ¶ 6; Decl. of Sarah Marcello, ¶ 8; Decl. of Marquita Christy, ¶ 26; Decl. of Ricky Coston, ¶ 6, Decl. of Alissa Luis ¶ 17.

⁴⁴ See Decl. of Alissa Luis, ¶ 18; Decl. of Marina Sparagna, ¶ 15; Decl. of Alison McCrary, ¶ 54.

⁴⁵ See Decl. of Bill Quigley, ¶ 4; Decl. of Alison McCrary, ¶¶ 28-37.

⁴⁶ See Decl. of Alison McCrary, ¶ 63.

⁴⁷ See Decl. of Alissa Luis, ¶ 3.

⁴⁸ Zack Kopplin, *Baton Rouge Cops Throw protestors Into Street, Arrest Them for Being There*, THE DAILY BEAST (Jul. 11, 2016), <http://www.thedailybeast.com/articles/2016/07/11/baton-rouge-cops-throw-protesters-into-street-arrest-them-for-being-there.html> (last visited July 11, 2016).

⁴⁹ Melinda Morris, *WWNO Radio Reporter Arrested in Baton Rouge Protest*, THE TIMES-PICAYUNE (Jul. 10, 2016), http://www.nola.com/crime/index.ssf/2016/07/wwno_radio_reporter_arrested_i.html (last visited July 11, 2016).

⁵⁰ WAFB Staff, *WAFB Employee Among Journalists Arrested at Baton Rouge Protest*, WAFB (Jul. 10, 2016), Available at <http://www.wafb.com/story/32410837/wafb-employee-among-journalists-arrested-at-baton-rouge-protest> (last visited July 11, 2016).

⁵¹ *Id.*

10, Juvenile Justice Information Exchange reporter Karen Savage was arrested without being told why and despite identifying herself as a member of the press.⁵²

There are ongoing protests still continuing in Baton Rouge. There are large protests planned for Friday, the day that Alton Sterling's funeral is scheduled for.⁵³ Several protestors and legal observers have said that they would have liked to continue protesting and observing, but are afraid to do so due to the treatment of protestors and observers over the past week.⁵⁴ Even an experienced policed mediator said she is "terrified" to interact with the Baton Rouge Police Department again.⁵⁵ Approximately 200 people have been arrested so far, and reports of jail conditions are deplorable.⁵⁶ This has a chilling effect on future protests.

III. LEGAL ARGUMENT

a. Standards Governing the Issuance of a Temporary Restraining Order

A preliminary injunction or temporary restraining order should be granted when a plaintiff has shown "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury . . . , (3) that the threatened injury . . . outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009); *Clark v. Prichard*, 812 F.2d

⁵² Daryl Khan, *JJIE Reporter Arrested in Baton Rouge While Covering Protest*, Juvenile Justice Information Exchange (Jul. 11, 2016), <http://jjie.org/savage-arrested/276664/> (last visited July 11, 2016).

⁵³ Rebekah Allen, *Public funeral set for Alton Sterling this Friday at Southern University*, The Advocate (July 11, 2016) http://www.theadvocate.com/baton_rouge/news/alton_sterling/article_7dcd97d1-0d48-5001-aeb7-f21901a2bc9c.html

⁵⁴ See Decl. of Caressa Chester, ¶ 24; Decl. of Alison McCrary, ¶¶ 63-66; Decl. of Sarah Marcello, ¶ 17; Decl. of Adina Marx-Arpadi, ¶ 15; Decl. of Hannah Adams, ¶ 15; Decl. of Lily Ann Ritter, ¶ 31.

⁵⁵ See Decl. of Alison McCrary, ¶ 63.

⁵⁶ See Decl. of Karen Savage, ¶¶ 24-31; Decl. of Jenna Finkle, ¶¶ 9-19; Decl. of Andrew McDaniel, ¶¶ 10-11; Decl. of Marina Sparagana, ¶¶ 13-18; Decl. of Christopher Brown.

991, 993 (5th Cir. 1987). When analyzing the degree of “success on the merits” that a movant must demonstrate to justify injunctive relief, the Fifth Circuit employs a sliding scale involving the balancing of the hardships associated with the issuance or denial of an injunction with the degree of likelihood of success on the merits. *See SAS Overseas Consultants v. Benoit*, 2000 WL 140611 at *4 (E.D. La., Feb. 7. 2000) (*quoting Florida Medical Ass’n v. United States*, 601 F.2d 199, 203 n.2 (5th Cir. 1979). When “a serious legal question is involved and . . . the balance of equities weighs heavily in favor of” relief. *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983).

Plaintiffs are entitled to a preliminary injunction under this test. There is no question that this case involves a serious legal question—no less than the enforcement of rights that lie at the core of the First Amendment. And both the balance of equities and the public interest weigh heavily in favor of ensuring that the government respects those rights.

In addition, Plaintiffs have a strong likelihood of success on the merits. Defendants have restricted constitutionally-protected speech, and forced Plaintiffs to choose between fear and self-censorship, or protest and the possibility of criminal prosecution. Defendants’ actions threaten the public interest, impose irreparable injury, and tip the balance of equities heavily in favor of granting a restraining order.

b. Plaintiffs are substantially likely to prevail on their constitutional claims.
First Amendment

The First Amendment reflects “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Speech on matters of public concern “occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” *Connick*

v. Myers, 461 U.S. 138, 145 (1983). The protests in Baton Rouge involve questions about how law enforcement agencies engage with the populations they are charged with protecting and serving. That the protests here involve matters of public concern is self-evident, and such speech lies at the very core of the constitution's protection. *See Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011).

The protests in Baton Rouge are subject to heightened protection for the additional reason that they are peaceful and conducted on public streets and sidewalks. "Consistent with the traditionally open character of public streets and sidewalks, [the Supreme Court] ha[s] held that the government's ability to restrict speech in such locations is 'very limited.'" *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014). The government is "sharply circumscribed" in its authority to restrain expressive activity in "places which by long tradition or by government fiat have been devoted to assembly and debate." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Public places, such as streets and sidewalks, that are associated with the free exercise of expressive activities "are considered, without more, to be 'public forums.'" *United States v. Grace*, 461 U.S. 171, 177 (1983); *see also Snyder*, 131 S. Ct. at 1218 (observing that the Supreme Court has "repeatedly referred to public streets as the archetype of a traditional public forum"); *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009) (noting "government entities are strictly limited in their ability to regulate private speech" in "such 'traditional public fora'" as public streets and parks); *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (finding that courts need not make any "particularized inquiry into the precise nature of a specific street" because "all public streets are held in the public trust and are properly considered traditional public fora").

The enforcement of even any law impacting speech in public forum space thus merits serious scrutiny from this Court. Specifically, any government act to silence speech may not “burden substantially more speech than is necessary to further the government’s legitimate interests.” *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989). In Baton Rouge, it is clear that defendants are in fact burdening “substantially more” speech than necessary to protect those interests.

The vast majority of arrests that have occurred in Baton Rouge—and the threatened arrests of plaintiffs for the continued exercise of their rights—have involved two charges: 1) obstruction of a roadway and 2) the designation of a peaceful protest as an unlawful assembly, effectively banishing all assembled off of a public forum space (and then arrest, if they do not disperse in time—which, as noted above, was all but impossible). Defendants cannot use these charges as a pretext to an outright ban peaceful protest in public forum spaces. As the Supreme Court has stated:

The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; **but it must not, in the guise of regulation, be abridged or denied.**

Hague, 307 U.S. at 515-16 (emphasis added); *see also Vodak v. City of Chicago*, 639 F.3d 738, 749 (7th Cir. 2011) (“A city couldn’t without violating freedom of speech and assembly flatly ban groups of people from spontaneously gathering on sidewalks or in public parks in response to a dramatic news event.”). Here, defendants have used available statutes to do precisely that—totally deny citizens the use of public forum space, including streets and sidewalks, for expressive activity.

While there is no question that the state may properly use an obstruction statute to counter actual obstruction; and may use valid dispersal orders when an assembly creates an imminent risk of serious harm, *neither* of these charges may be levied as an *ad hoc* method of criminalizing nonviolent speakers on public sidewalks and streets. Indeed, a flat ban on assembly and protest is precisely what defendants have used the obstruction statute and *ad hoc* dispersal orders to accomplish. Particularly on public forum space, where the public must have access to adequate means of public communication and assembly, the government may not apply content-neutral rules in a manner that goes beyond the state's interest in public safety. *See Watchtower Bible & Tract Society v. Village of Stratton*, 536 U.S. 150, 168 (2002) (explaining that an ordinance requiring a permit for all door-to-door solicitation was “not tailored to the Village’s stated interests” because despite the state’s interest in preventing fraud, “that interest provides no support for its application to petitioners, to political campaigns, or to enlisting support for unpopular causes”); *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) (“The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. It can do so through the enactment and enforcement of ordinances *directed with reasonable specificity toward the conduct prohibited.*” (emphasis added)).

The same is true here; the use of obstruction rules and dispersal orders clearly burdens more speech than necessary when it is used *to outright ban spontaneous group demonstrations* on public forum property. While the government may properly regulate the actual harms of obstruction, it may not apply obstruction statutes to protected protest activity when no actual obstruction has occurred. Similarly, defendants may not validly order a crowd to disperse

without circumstances of the highest order, and a full opportunity for individuals to respond and disperse. The alternative is the criminalization of protesting—precisely the end to which Supreme Court has said such content-neutral rules may *not* be used.

The enforcement of obstruction and dispersal makes plain that the police have used their power to shut down nonviolent protest activity. Indeed, there is a strong inference here that protestors were arrested not despite their speech and assembly, but *because* of it. Here, where the protestors' message involves criticism of law enforcement itself, the prospect of retaliatory action by police is enormously high. And the defendants' robust enforcement of the anti-obstruction ordinance (in the absence of actual obstruction), and the broad use of dispersal orders (without exigent circumstances, and without affording those targeted to freely disperse) give rise to a fair inference that the plaintiffs have been targeted *because* of the message they seek to share. If the government acts to criminalize speech because of its content, the First Amendment is nearly always violated. "Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660 (2004). Such prohibitions and regulations "cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984).

Federal courts have applied careful scrutiny to state action that serves as a pretext to exclude controversial viewpoints—as some law enforcement officers may find protestors' messages to be. *See Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (striking down as unconstitutional a permitting fee assessed by official's estimate of the amount of hostility likely to be engendered by the speech); *Robb v. Hungerbeeler*, 370 F.3d 735, 740

(8th Cir. 2004) (state’s continued attempts to exclude KKK from Adopt-A-Highway program were unconstitutional; policy of limiting participation to groups “for whom state or federal courts have not taken judicial notice of a history of violence” was overbroad and likely pretext). Such careful scrutiny is warranted in this case.

In sum, the defendants’ arrest of protestors for nonviolent protest in public forum space—and in response to breaking news of immense public concern—faces the highest form of constitutional scrutiny. The defendants’ actions are not tailored to accomplish legitimate government interests, and clearly penalize vastly more speech than necessary to accomplish valid law enforcement objectives. Defendants’ overbroad application of misdemeanor charges has far surpassed the government’s valid interest in preventing obstruction, and veered fully into an all-out ban on activity at the core of the First Amendment.

Due Process/Vagueness

Defendants’ policy of designating peaceful gatherings *ad hoc* as unlawful assemblies, followed with dispersal orders that provide “cause” for arrest, violates the constitution for an additional reason: it grants officials unbridled discretion regulating constitutionally protected speech and assembly. Neither the First Amendment nor the Due Process Clause of the Fifth Amendment permits boundless and standardless discretion in criminalizing private speech.

“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The requirement of clarity is especially stringent when a criminal law interferes with free speech rights, because vague laws create an acute risk of self-censorship. *See Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (“Because First Amendment freedoms need breathing space

to survive, government may regulate in the area only with narrow specificity.”); *see also Reno v. American Civil Liberties Union*, 521 U.S. 844, 872 (1997) (“The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.”); *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982) (“If . . . the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.”).

This Court has consistently required criminal penalties on speech to include clear guidelines to ensure that officials do not regulate speech in an *ad hoc* fashion. As the Supreme Court has noted, “the absence of express standards makes it difficult to distinguish, *as applied*, between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power.” *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 758, 108 S. Ct. 2138, 2144, 100 L. Ed. 2d 771 (1988). A seminal case establishing the right to be free from *ad hoc* revocation of an individual’s access to public forum space by law enforcement involves very similar facts.

Defendants’ use of the obstruction and dispersal statutes is unconstitutionally vague. Defendants have established a clear practice of arresting protestors even when their presence adjacent to a road—a place specifically identified by the Supreme Court as a traditional venue for exercising one’s rights—creates no risk of actual obstruction. This provides officers with a free-floating pretext to arrest any protestor close to a road. And that provides an unconstitutional level of discretion to law enforcement:

Literally read, therefore, the second part of this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration. It ‘does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat.’ *Cox v. Louisiana*, 379 U.S. 536, 559, 579 (1965) (separate opinion of Black, J.). Instinct with its ever-present potential for

arbitrarily suppressing First Amendment liberties, that kind of law bears the hallmark of a police state.

Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90-91 (1965) (internal citations omitted). Just as the Court found Alabama's ordinance to violate the principles of due process, so too does defendants' arbitrary application of the obstruction and dispersal statutes.

Plaintiffs have thus demonstrated a substantial likelihood of success on their claims.

c. Plaintiffs will suffer irreparable harm absent an injunction; the public interest favors an injunction, and the balance of hardships tips heavily in Plaintiffs' favor.

In First Amendment cases, a court's decision on the "remaining injunction factors" typically "follows from the initial determination that [Plaintiffs] likely will succeed at trial." *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 (5th Cir. 1993). "The question of irreparable injury does not focus on the significance of the injury, but rather whether the injury, irrespective of its gravity, is *irreparable*-that is, whether there is any adequate remedy at law for the injury in question." *Sierra Club v. Martin*, 71 F. Supp. 2D 1268, 1327 (N.D. Ga. 1996), *rev'd on other grounds*, 110 F.3d 1551 (11th Cir. 1997); *Canal Auth. v. Florida*, 489 F. 2d 567, 575 (1974). There is no amount of money that can compensate for having been wrongfully silenced by one's government. Accordingly, in the Fifth Circuit, once plaintiffs have demonstrated a likelihood of success on First Amendment claims, the Fifth Circuit also finds grounds for irreparable injury. *See Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 958 (5th Cir. 1981) (finding irreparable injury based on likelihood of success on First Amendment claim); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Injunctions to protect First Amendment rights, moreover, are squarely in the public interest. *See, e.g., Fla. Businessmen*, 648 F.2d at 959 (“The public interest does not support . . . attempting to enforce an ordinance that may well be held unconstitutional.”); *Seattle Audubon Soc’y v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991) (enforcing government lawfulness invokes a public interest in the highest order). And finally, when balancing hardships, the prospect of First Amendment injury tilts the scale heavily in favor of an injunction—especially where, as here, arbitrary and heavy-handed enforcement of the criminal law against peaceful speakers escalates community tensions and dramatically increases the likelihood of injury and chaos. *Fla. Businessmen*, 648 F.2d at 959 (“Given appellants’ substantial likelihood of success on the merits . . . , the harm . . . from delaying enforcement is slight.”).

Finally, the defendants will not suffer harm if an injunction is issued. Defendants are all agents of the government, and harm to the government is *de minimis* when an injunction orders compliance with federal law.

d. Bond Should Not Be Required

Federal Rule of Civil Procedure 65(c) provides that security for the issuance of preliminary relief should be required. It is well established that in public interest cases, there is no need for the plaintiff to post such bonds, because of the potential chilling effect on litigation to protect the public interest. Federal courts have consistently waived the bond requirement in public interest litigation, or required only a nominal bond. *See, e.g., Davis v. Mineta*, 302 F.3d 1104, 1126 (10th Cir. 2002) (where a party is seeking to uphold the public interest, a minimal bond amount should be considered); *People ex rel. Van de Kamp v. Tahoe Reg’l Planning*

Agency, 766 F.2d 1319 (9th Cir. 1985) (no bond); *Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972) (no bond); *Sierra Club v. Block*, 614 F. Supp. 488 (D.D.C. 1985) (bond of \$20).

IV. CONCLUSION

For the above reasons, this Court should grant plaintiffs' application for a temporary restraining order forthwith and without bond.

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Respectfully Submitted,

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