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Via Email Only

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RE: Sacramento Police Department's Handling of Recent Protests

Dear Chief Hahn, Mayor Steinberg, and City Manager Chan:

The ACLU Foundation of Northern California and the Lawyers' Committee for Civil Rights of the San Francisco Bay Area represent activists and individuals who were tear gassed, shot with rubber bullets, cited with charges of failure to disperse, and beaten by police in Sacramento since May 2020. It has come to our attention that the City and County plan to continue to use imprudent force during protests as the country reckons with more murders of Black people and shootings across the country.¹ This is evidenced by shocking displays of unnecessary and excessive force in response to rallies, demonstrations, and protests since May. Recently, on August 28, 2020 a city police officer violently pushed a young woman against a wall and then to the ground, and shortly after broke her phone while refusing to provide his badge number.²

We have also learned that Sacramento's Crowd and Riot Manual ("Manual"), which directs Sacramento Police Department ("the Department") officers during protests, is riddled with constitutional violations and preemptively seeks to terminate protests *before* anything

¹ "At the same time, we will hold those who destroy property fully accountable. We will encourage our Sacramento law enforcement authorities to do everything they can to prevent the destruction or damage to hard working businesses, including arrests on the spot where it safe for the officers and the public." Statement of Mayor Darrell Steinberg (August 27, 2020), available at <https://engagesac.org/blog-civic-engagement/2020/8/27/9lpid172zte1508rz3els3zmcpodln>; "There are two protests being scheduled tonight at Cesar Chavez Plaza in Downtown Sacramento. A peaceful one at 5:30pm, and a potentially dangerous one at 8:30pm. I support the right to peacefully protest, but organizers of the 8:30pm protest are asking individuals to 'Mask Up, Wear Black, No Logos, Bring Friends, Don't Snitch, No Good Cops, No Peace Police'." Statement of Supervisor Sue Frost (August 27, 2020), available at <https://www.facebook.com/308349223421220/posts/645278033061669/?d=n>.

² Molly Sullivan, "Complaint Says Sacramento Police Officer Pushed Protester, Damaging Cellphone." SacBee (Updated September 2, 2020 5:43pm), <https://www.sacbee.com/news/local/crime/article245422555.html>.

remotely approaching violence or a clear and present danger of imminent violence has occurred. To make matters worse, the Department regularly asks other law enforcement agencies such as the California Highway Patrol (“CHP”)³, the Federal Bureau of Investigation (“FBI”), Davis Police Department, and others, to help carry out these directives to quell protests. The Manual presents an incorrect view of free speech rights and is unconstitutional, giving officers unfettered discretion to suppress free speech with unnecessary force and mass arrests during constitutionally protected protests. As one officer put it to a protester in late May 2020 – cleanly capturing how the Department aims to chill individuals exercising their free speech rights – “I’m not doing you any favors, you’re out here protesting against us.”

Sacramento Police Chief Daniel Hahn recently penned an Op-Ed in The Sacramento Bee acknowledging that an aggressive police response to protests “only invites more violence.”⁴ We agree. The City of Sacramento has a responsibility to design and implement policies that prevent police violence and protect the most basic civil liberties of the City’s residents. We recommend that the City recognize that a protest is not, in and of itself, a threat to public safety, does not require police response, and does not warrant severe force. If the City sees that protest activities necessitate intervention and/or interruption, the Department should only respond if there are specific articulated criteria for enacting such interruptions. And given the dangerous health risks of police intervention, law enforcement should only ever be deployed if there is an articulable violent threat that cannot be mitigated with other city personnel, such as a mediator or a mental health care provider.

We also recommend that the Sacramento Police Department ban the use of chemical agents, rubber bullets, and other munitions to control crowds. Finally, the City must take full responsibility for the physical and psychological injuries that Sacramento residents have sustained as a result of the violent police response to recent protests and, in concert with community-led commissions, develop solutions to remedy the harms as soon as possible.

I. Sacramento’s Crowd and Riot Manual Unconstitutionally Prohibits Free Speech Guaranteed under the First Amendment

As courts have found, a policy that “[e]njoin[s] or prevent[s] First Amendment activities before demonstrators have acted illegally or before [a] demonstration poses a clear and present danger is presumptively a First Amendment violation.”⁵ The Manual does exactly that.

³ As it stands, it is our understanding that there are times that CHP could act under its own authority. That authority is not clear to our clients as it seems that CHP often is aligned with the Department.

⁴ Daniel Hahn, “Sacramento Police Chief: ‘Tough’ Tactics Can Escalate Police Violence. Let’s Do Better.” SacBee (September 3, 2020, 4:41pm), <https://www.sacbee.com/opinion/california-forum/article245480980.html>.

⁵ *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1996).

The Manual actively discourages free speech on public fora despite the law clearly indicating that this violates fundamental constitutional rights. Most protests and demonstrations that have taken place in Sacramento since the end of May 2020 have happened on public streets and sidewalks. Public streets and sidewalks are traditional public fora. “Consistent with the traditionally open character of public streets and sidewalks,”⁶ the Supreme Court has held that the ability of governments to restrict speech in these locations is extremely limited.⁷

Yet, the Manual states that police need only “anticipate” resistance to use crowd dispersal techniques.⁸ The Manual exhorts officers to “never underestimate the rioters” as though the police should treat activists as hostile from the beginning of their interaction.⁹ The Manual gives police free reign to make “selective” arrests to gain a “psychological and tactical advantage” (as though the presence of police force does not in itself create that advantage).¹⁰

1. The Manual frames protesters as a threat and serves as the type of censorship that is prohibited under the First Amendment.

The law is clear: to restrain free speech before the speech occurs is presumptively invalid under the First Amendment.¹¹ The Manual prompts police to violate that right by directing police to stop protected speech if they “anticipate” resistance.¹² The Manual also permits police to speculate how many arrests can be made over the course of a demonstration to decide what type of tactic to employ when engaging with the crowd of people.¹³ So, it appears that under Department policy, fear of possible disorder allows the officers to suppress free speech. The result is that people who arrive at a public forum may not be able to exercise their rights, because the police have “anticipated” resistance.

This is exactly what happened earlier this summer: our client Mackenzie Wilson reported that, upon arriving to downtown Sacramento on May 29 (the first day of the George Floyd protests), police had preemptively blocked off every exit in downtown Sacramento to prevent individuals from attending the protest that day. The Manual also offers no guidance regarding how the police will “anticipate” the number of arrests nor does it offer guidance regarding how

⁶ *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014).

⁷ *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014); *See NAACP Western Region v. City of Richmond*, 743 F.2d 1346, 1355 (1984) (Restricting First Amendment speech in public fora are “subject to a particularly high degree of scrutiny.”).

⁸ CRM at 6.

⁹ *Id* at 7.

¹⁰ *Id* at 7.

¹¹ *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1021 (2009).

¹² CRM at 6.

¹³ *Id* at 6.

to “anticipate” resistance. This, among other tactics, gives way to clear prior restraint of protected free speech.

2. The Manual has overly vague and broad terms that authorize police to violate people’s free speech rights

The Manual fails to provide “narrow, objective, and definite standards” for crowd control.¹⁴ Although, the standards should be sufficient to “render [the official's decision] subject to effective judicial review,”¹⁵ the Manual currently includes “broad invitation to subjective or discriminatory enforcement.”¹⁶

Jam-packed with terms that broadly invite subjective and discriminatory enforcement, the Manual permits an officer to interpret many decisions they make to be necessary even when their decisions contravene the law. In the Manual, the officer decides when it is “necessary” to use chemical agents.¹⁷ In making these this decision, the Manual only reads that “careful consideration” must be given to whether an officer decides to disperse a protest.¹⁸ In giving an order to disperse, the Manual reads that an officer must “go as close to the crowd as possible” to give a dispersal warning.¹⁹ Additionally, the Manual reads that the officer shall assess whether a crowd is “violent or non-violent” when deciding how to create a crowd control plan.²⁰ Moreover, the Manual reads that if deadly force is not necessary, a baton can be used at any point for purpose of the crowd control plan.²¹

Throughout, the Manual casts protesters as potential threats, uses militaristic language, and urges police to be hyper-vigilant while policing a crowd. Below are a few examples:

- The Manual defines a “spontaneous event” as carrying a potential threat “to public health and safety.”²²

¹⁴ *Forsyth County v Nationalist Movement*, 505 U.S. 123, 131 (1992) Citing *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969) [In *Forsyth County*, the Supreme Court of the United States found that to curtail the risk of government regulation that allows arbitrary application, “a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license” must contain “narrow, objective, and definite standards to guide the licensing authority.”].

¹⁵ *Chambers v. Municipal Court*, 65 Cal.App.3d 904, 910 (1977).

¹⁶ *Id.*

¹⁷ CRM at 6.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 21.

²¹ *Id.* at 24.

²² *Id.* at 1.

- The Manual repeatedly refers to protests – especially spontaneous events – as “disturbances.”²³ Again, spontaneous events are protected under the Constitution, yet the Manual uses this language to depict spontaneous events as potentially unlawful assemblies.
- “The Manual refers to people victimized by protesters as “citizens.”²⁴ This is the only time the word “citizen” appears. The distinction between protesters (often referred to collectively as “the crowd”) and “citizens” is stark.

This type of language, when combined with the history of police involvement in protests in Sacramento, make this Manual and its implementation a clear recipe for disaster and discrimination.

II. The Crowd Control and Riot Manual Actively Discourages Speech and Protests

1. The Department indiscriminately uses tear gas and other chemical agents, rubber bullets, and other supposedly less than lethal force to discourage speech and protests

Sacramento Police Department regularly uses chemical agents, rubber bullets, and other egregious tactics to discourage protests, assembly, and demonstrations and violates basic free speech rights. The Sacramento Police Department Chemical Agent Manual does not include the protocol on deciding when to deploy chemical agents, other than simply saying “Before making a tactical commitment to the use of a chemical agent, other factors must be considered: (1) Tactical capabilities of the team, squad, or platoon, (2) Crowd conditions, (3) Weather conditions, (4) Environmental hazards.”²⁵ The Manual specifically reads that the chemical agents should be used to disperse crowds. It likewise only vaguely reads that there should be “careful consideration” before police officers are free to use chemical agents at a whim at protests, demonstrations, and assemblies.²⁶

In *Keating*, the court made clear “that peaceful demonstrators have a First Amendment right to engage in expressive activities” and that the officers could not use “less-lethal” force to disperse their right to engage in that activity.²⁷ And recently, in *Anti Police-Terror Project v. City of Oakland*, the District Court ordered a temporary restraining order against the City of

²³ *Id* at 1.

²⁴ *Id* at 13.

²⁵ Sacramento Police Department Chemical Agent Manual at 24.

²⁶ CRM at 6.

²⁷ *Keating v. City of Miami*, 598 F.3d 753, 767 (11th Cir. 2010).

Oakland to enjoin their indiscriminate use of tear gas, flashbangs, and less-lethal weapons against peaceful protestors.²⁸

Our clients have experienced the rash and indiscriminate decisions by the Department to use chemical agents during or after a protest. On May 30, 2020, at approximately 8:00 PM, our client Ms. Kaylee Renaud, a 21-year-old Black woman, was in a crowd with numerous other protesters in Cesar Chavez Park when Department officers suddenly fired tear gas indiscriminately into the crowd. The officers did not provide any notice before using force and Ms. Renaud could not see any justification for the sudden use of chemical agents. As she ran to safety, she choked heavily on the air and struggled to breathe. Other clients expressed that police began spraying tear gas less than a minute after a dispersal notice at a May 31, 2020 protest. Another client, Ms. Josanne English, a Filipina woman, recounts fleeing a protest with her 11-year-old child because the Department began spraying tear gas into an open crowd. Christopher MacDonald, a 33-year old white trans person, was tear-gassed multiple times on May 31. They never heard any warnings before Department officers used force. For the next three days, Christopher lost their voice and struggled with shortness of breath because of the tear gas.

The use of rubber bullets mirrors these accounts. Mr. Austin Aponte, a 23-year-old Indigenous man saw the Department fire rubber bullets into a crowd on May 30, 2020 at around 6:00 PM without warning. Ms. Rachelle Colvin, a 34-year-old Black woman noticed at a June 1, 2020 protest that the police not only were firing rubber bullets indiscriminately into the crowd, but targeted people – particularly Black people – who were getting into their cars to leave the protests. Ms. Colvin witnessed officers fire rounds at people as they pulled their car windows up. Other protesters provided corroborating stories of the severe injuries caused by rubber bullets: Mr. Earris Norman II, a 28-year-old Black man, and Mr. Ryan McClinton, a 34-year-old Black man, both witnessed Department officers fire at protesters who were kneeling in the street with their hands up on May 30. Neither heard any warnings before the officers fired, hitting some of the protesters in the head. After Mr. Norman ran to help a protester who had been knocked unconscious by the rubber bullets, he too was hit by the officers' indiscriminate firing – even though he was clearly dressed as a medic at the time.

Protesters likewise shared other troubling stories of Department officers engaging in wanton, unnecessary force simply to cow and bully protesters. Mr. Norman reported that, when he was walking home on May 31, he saw a car of Department officers pull up to a group of teenage protesters, fire pepper balls out of their vehicle at the protesters with no warning, and then jump out and violently arrest the protesters, who appeared to be headed home at the time. Mackenzie Wilson, a 31-year-old white trans person, was batoned by officers outside the

²⁸ *Anti Police-Terror Project v. City of Oakland*, 2020 WL 4584185 (2020).

Sacramento Jail, who neither warned them before using force nor gave them any opportunity to escape the blows.

These stories are common narratives regarding the Department and other law enforcement in Sacramento's deployment of chemical agents. Given the City and County of Sacramento's recent statements authorizing force at protests that are happening in solidarity with continued police shootings and murders of Black people, we are concerned that these accounts will only worsen.²⁹

From the accounts of our clients, the Department continues to deploy harmful tactics on people of color, including tear gas, a chemical agent so sinister that it has been precluded from use in warfare. It most frequently causes intense burning sensations, skin irritation, chest pain, and difficulty in breathing. For vulnerable people, like children or those with asthma, these effects are exacerbated to an even more dangerous degree. Reports show that tear gas can cause stillbirths and miscarriages, damage to major organs and even death, due to either the chemical or the physical impact of the canister. Psychological harm like flashbacks or hyper-vigilance may also arise because of being gassed. And due to a higher prevalence of asthma in the Black population, Black people are at a higher risk of harm from tear gas.³⁰ Furthermore, the use of tear gas is made it exponentially more dangerous during the ongoing respiratory, coronavirus pandemic—and compounds the risk of disparities for Black residents in Sacramento.³¹

2. The City uses Failures to Disperse to have a chilling effect on protected free speech activity

To put it simply, the City and County's statements and policies give marching orders to chill free speech. Moreover, the Department cites people with failures to disperse based on vague terms and rarely follows its own policy outlined in the Manual. It uses these citations to chill fundamental free speech rights.

²⁹ See, e.g., Statement of Mayor Darrell Steinberg (August 27, 2020), available at <https://engagesac.org/blog-civic-engagement/2020/8/27/9lpid172zte1508rz3els3zmcpodln>.

³⁰ People with asthma face a greater danger when faced with tear gas and pepper spray, according to Dr. Sporn, who notes that 8% of the overall U.S. population suffers from asthma, and that it is "more common and often more severe in African Americans than the majority population in the U.S." *Anti Police-Terror Project v. City of Oakland* 2020 WL 4584185 at 11 (2020). Therefore, "launching tear gas or pepper spray at large crowds inevitably places dozens of hundreds of individuals with asthma and other respiratory conditions in grave danger" and "places [B]lack individuals in targeted crowds at especially high risk of respiratory harm." *Ibid.*

³¹ See, e.g., Lisa Song, Tear Gas is Way More Dangerous Than Police Let On—Especially During the Coronavirus Pandemic, ProPublica (June 4, 2020 12:25 PM)("[E]xperts say, the widespread, sometimes indiscriminate use of tear gas on American civilians in the midst of a respiratory pandemic threatens to worsen the coronavirus, along with racial disparities in its spread and who dies from it."), <https://www.propublica.org/article/tear-gas-is-way-more-dangerous-than-police-let-on-especially-during-the-coronavirus-pandemic>.

The Department regularly chooses to implement its decision to terminate the activists' protests with police clad in riot gear, who quickly used batons, pepper spray, and other force on activists do not pose a threat of harm. The Department's broad discretion and actions, such as enforcing a curfew order in response to demonstrations to raise awareness regarding Black murders at the hands of police, has disproportionately harmed Black activists and individuals who are working to dismantle racism and police brutality against Black people. Indeed, Department officers said to our client Walker Townsend, who was cited with a Failure to Disperse under Penal Code 409, "No matter what you do, you'll never stop racism or police brutality, it's always going to happen." Mr. Townsend tried to plead with the officer to bring his wife the car keys, which he still had, but the officer refused and told him "I'm not doing you any favors, you're out here protesting against us." The officer also told him that he should not have brought his wife's son to the protest and that they would call Child Protective Services to have him taken away.

3. The failure to disperse policies allow for police to cite individuals broadly and indiscriminately

Likewise, while the Manual states that "[a]nnouncements to a crowd to disperse must be based on reasonable and articulable factors justifying the order", it does not explain what such factors could be.³²

California courts have interpreted section 409 of the California Penal Code, which deals with failure to disperse, to "require a clear and present danger of imminent violence before bystanders can be arrested along with participants in an unlawful assembly."³³

In addition to the regulations in the Manual loosely defining what constitutes a failure to disperse, the procedures also:

- Do not require that police provide protesters with any set amount of time to disperse. Instead, the Manual only vaguely states that the police must provide "the crowd with an adequate period of time and a clear and safe route to disperse."³⁴
- Allows the police to disperse crowds where "only scattered individuals are violent."³⁵

³² CRM at 6.

³³ *Dubner v. City and County of San Francisco*, 266 F.3d 959, 967 (2001).

³⁴ CRM at 6.

³⁵ *Id.*

- Directs officers to make arrests of a non-violent yet unlawful crowd as an “effective” way to control a crowd.³⁶
- Cynically focuses on recording the dispersal order (likely for use in court) rather than assuring that protesters can hear the order: “Officers shall broadcast the order over the appropriate radio channel, and if possible, send an officer to the far side of the crowd to tape record the order.”³⁷

Our clients have witnessed and experienced the Department and other law enforcement agencies’ failure to follow the Manual’s protocol and a failure to meet basic Penal Code requirements to issue a failure to disperse. This is likely because the protocol is problematic in its inception. It is also important to note that law enforcement cannot command individuals to disperse if the assembly is lawful.

Mr. Townsend attended a protest on May 31, 2020 with his child and spouse and the Department failed to give any commands that he could hear to disperse the protest. The Department arrested Mr. Townsend for failing to disperse before even issuing a public announcement to disperse. When the Department made a public announcement to disperse—more than thirty minutes after they issued the citation, police officers simulatenously deployed tear gas and shot rubber bullets into the crowd. Similarly, Mr. Norman was arrested on May 29, 2020 on charges of obstructing a police officer; he received no warning before his arrest. In instances where the police have given orders to disperse, we have witnessed the police surrounding activists so they cannot actually disperse.

Likewise, another client of ours, was arrested by Department officers on August 29, 2020 and charged with rioting and resisting arrest while leaving a protest at Cesar Chavez Park. He did not receive any sort of warning, dispersal order, or declaration of a riot from Department officers at any point prior to his arrest – either immediately before his arrest or in the hours leading up to it. In fact, this client reported that Department officers failed to issue any warning or announcement whatsoever on August 29, 2020 before making arrests.

These types of actions are unconstitutional. The Supreme Court has made clear that police may not interfere with a protest because they disagree with the message or fear possible disorder.³⁸

³⁶ *Id* at 6.

³⁷ *Id*.

³⁸ *Abay v. City of Denver*, 445 F.Supp.3d 1286 (2020).

4. The Police in turn use these broad policies to cite individuals with failure to disperse to chill free speech

Individuals need not demonstrate that their speech was actually inhibited or suppressed, merely that defendants “*intended* to interfere with [plaintiffs’] First Amendment rights.”³⁹ And the Department regularly cites individuals with failures to disperse for the purpose of suppressing their speech.

Sacramento Police Department regularly cites individuals with failures to disperse even though it is unlikely that they will be prosecuted. However, the tactic has been successful at chilling free speech. Many of our clients have expressed that they fear participation in protests and demonstrations because they may be cited with a failure to disperse. Ms. Colvin, for example, is a Black womxn with two sons. Because of the Department and their mutual aid from other law enforcement arrests of Black people and use of rubber bullets during protests, she fears attending future protests. The Department told Mr. Bailey Kirschten that attending future protests could get him arrested again after they arrested him at a protest. Mr. Victor Seballos, a Latinx man, also stopped attending protests for some time after being arrested at a protest. And Ms. Renaud, a Black womxn, said that she attended a protest to make a difference and exercise her free speech. But because she was arrested, she fears exercising her protected free speech moving forward.

The Manual does not clearly delineate how to gauge a lawful assembly. This likely adds to why Sacramento police officers use arrest to suppress lawful free speech.⁴⁰

The City and the Department must adopt policies that center residents’ right to free speech and deemphasize the role of police and appropriateness of police intervention during protests.

III. The Department Uses Excessive Force During Protests

The Manual fails to adequately address the use of excessive force. The Fourth Amendment prohibits the use of excessive force, even on people who may have engaged in illegal conduct. As noted above, the Department regularly uses lethal force against protesters in a manner that violates their free speech rights. When force is used against protesters or others exercising their First Amendment rights, this prohibition “must be applied with scrupulous

³⁹ *Mendocino Env’l Ctr. v. Mendocino County*, 14 F.3d 457, 464 (9th Cir. 1994).

⁴⁰ The intent to inhibit speech “can be demonstrated either through direct or circumstantial evidence.” *Mendocino Env’l Ctr. v. Mendocino County*, 192 F.3d 1283, 1301 (9th Cir. 1999) *citing Crawford-El v. Britton*, 93 F.3d 813, 826 (D.C. Cir. 1996), *vacated* on other grounds.

exactitude.”⁴¹ The primary factors to consider in determining whether the force used was reasonable or excessive are: “whether the suspect poses an immediate threat to the safety of the officers or others,” “the severity of the crime at issue” and “whether he is actively resisting arrest or attempting to evade arrest by flight.”⁴² Even when there is a need for some force, it is “least justified against nonviolent misdemeanants who do not flee or actively resist arrest.”⁴³ To be clear, if a protester is shot with rubber bullets or sprayed with tear gas based solely on their presence, that is likely excessive force.⁴⁴

The law governing the use of batons and pepper spray is not in doubt. It is clearly unconstitutional to use pepper spray on nonviolent protesters.⁴⁵ Similarly, “a baton is a deadly weapon that can cause deep bruising as well as blood clots capable of precipitating deadly strokes, and ... should therefore be used ‘only as a response to aggressive or combative acts.’”⁴⁶ In the Manual, however, batons are available for officers to use at their disposal at basically any point.⁴⁷

The Department, the FBI, CHP, and other law enforcement agencies continue to violate fundamental rights in these instances. Our client Leeza Soto, for example, on May 30, 2020, told the cops “we’re going home, leave us alone” and held up a traffic cone, which was in self-defense. The Department then yelled at them to drop the cone, grabbed them, and forced them to the ground. The Department cut off their backpack by its straps, straddled their back, and cuffed them up. Leeza was then put in a police van and taken to the Cal Expo, where they were questioned by both the Sacramento Police and the FBI, who each read them a different version of rights. On May 30, 2020, the police broke Mr. Robert Yannacone’s arm as CHP wildly swung a baton that was meant to hit another individual. On June 1, 2020, Christopher MacDonald saw CHP pushing activists and protesters on an on ramp and firing flash grenades at them nearly every 30 seconds. They witnessed the protesters trying to leave the scene, but CHP creating an environment filled with flash bang grenades with no real exit.

Other protesters provided corroborating accounts that paint a clear picture of the needless, excessive force used by Department officers during the George Floyd protests in late May and early June 2020. For instance, Earris Norman II shared that he watched Department officers fire rubber bullets directly into the stomach of a young Black protester from point-blank range on May 29, 2020. Francisco Kuhl, a Latinx man, recounted being tear-gassed multiple

⁴¹ *Lamb v. City of Decatur*, 947 F.Supp.1261, 1263 (C.D. Ill. 1996) (quoting *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978)).

⁴² *Glenn v. Washington County*, _F.3d_, 2011 WL 6760348 * 6 (9th Cir. Dec. 27, 2011).

⁴³ *Buck v. City of Albuquerque*, 549 F.3d 1269, 1289 (10th Cir. 2008).

⁴⁴ *Abay v. City of Denver*, 445 F.Supp.3d 1286 (2020).

⁴⁵ See *Headwaters Forest Defense v. County of Humboldt*, 276 F.3d 1125, 1130 (9th Cir. 2002).

⁴⁶ *Young v. County of Los Angeles*, 655 F.3d 1156, 1162 (9th Cir. 2011).

⁴⁷ CRM at 24.

times by Department officers with little to no warning. Other protesters shared nigh-identical accounts.

The use of excessive force on peaceful protesters also violates the First Amendment because it interferes with the right to protest.⁴⁸ Indeed, there could be no more effective means of silencing protest than to break it up with excessive force.

In short, the City violated the activists First and Fourth Amendment rights when it broke up the protests preemptively, restraining speech and assembly before any harm had materialized and on protesters who posed no immediate threat. To the extent that police response is ever necessary for a protest, the City and Department must prohibit use of force beyond what is minimally necessary to interrupt a violent incident.

IV. Recommendations

The City of Sacramento and Sacramento Police Department must adopt and implement policies that support and encourage all forms of free speech.

1. The City of Sacramento must adopt policies that support and encourage robust debate and protest.

The City of Sacramento and the Sacramento Police Department's role should never be to censor or discourage speech and expressive activity. The City should therefore adopt policies that:

- a) Support and encourage residents who seek to exercise their right to speak, protest, and assemble;
- b) Recognize state and federal constitutional protections for speech and assembly as the floor and not the ceiling for protecting activists, journalists, and residents;

⁴⁸ See, e.g., *Keating v. City of Miami*, 598 F.3d 753, 767 (11th Cir. 2010) (officers “violated [Plaintiffs’] clearly established First Amendment rights ... by directing and failing to stop subordinate officers to use less-than-lethal weapons to disperse a crowd of peaceful demonstrators”); *Buck v. City of Albuquerque*, 549 F.3d 1269, 1292 (10th Cir. 2008) (affirming district court’s “determination that [defendant] violated plaintiffs’ First Amendment rights, when he authorized the use of [excessive] force to break up the protest”); *Jones v. Parmley*, 465 F.3d 46, 53, 60 (2d Cir. 2006) (affirming denial of qualified immunity on First Amendment claim, where law enforcement responded to protest with excessive force); *Houser v. Hill*, 278 F.Supp. 920, 926 (D. Ala. 1968) (finding police to have “unlawfully interfer[ed], through the use of force and intimidation, with the peaceful and lawful assemblies of Negro citizens”); *Cottonreader v. Johnson*, 252 F.Supp. 492, 496, 497 (D. Ala. 1966) (“using unnecessary and excessive force” against African Americans picketing against Jim Crow laws “interfere[d] with ... the right to assemble peacefully ... and to petition for redress of grievances”); *Schnell v. City of Chicago*, 407 F.2d 1084, 1085 (7th Cir. 1969) (reversing dismissal of suit seeking injunction against police department’s use of force against news photographers), overruled on other grounds, *City of Kenosha v. Bruno*, 412 U.S. 507, 513 (1973).

- c) Prohibit surveillance and intelligence gathering by the Police Department during free speech activity;
- d) Recognize that protests do not inherently pose a threat to public safety;
- e) Recognize that protests do not automatically require police response;
- f) Recognize that protests, in and of themselves, even where violation of property has been reported, never warrant lethal force
- g) Articulate clear criteria for the unique and unusual circumstances when the City will intervene and interrupt protests;
 - i. Clarify that mere technical violations of City policies, without more, do not warrant police interruption of a protest;
 - ii. Require reliance on reliable, concrete information in assessing whether a particular protest represents a violent threat warranting police intervention, and adopt protocols that ensure that responses to protests are not shaped by fears about protests that are unsupported by actual facts;
- h) For those cases that satisfy the specified criteria for intervention,
 - i. Identify a menu of different methods for intervening, prioritizing options that do not involve the use of police, such as mediation;
 - ii. Commit to using the least intrusive, least forceful means necessary for intervening and require any methods used to be commensurate to the harm at issue;
- i) Recognize that intervention through the least forceful means necessary may be tedious and time-consuming and that the selection of methods should not be driven exclusively by what will achieve expedient results;
- j) Designate specific decisionmakers who will decide whether a particular protest satisfies the articulated criteria for intervention and who will select the method(s) for intervening, with an emphasis on civilian decision-making;
- k) Require, within 3 days of any decision to terminate a protest, the decisionmakers to explain in a written report, that shall be available to the public, the specific criteria and information that led to the decision and the reasons why the method(s) of intervening were selected.

2. The Sacramento Police Department must adopt policies that deemphasize the role of police and appropriateness of police intervention during protests, prohibit use of force beyond what is minimally necessary to interrupt a violent incident, and provide officers with specific guidance on the types of force that can no longer be employed.

The Department's existing Manual does not address crowd control issues uniquely related to protest and the exercise of free speech. The Manual provides insufficient guidance on the use of force and is particularly defective in that it fails to direct officers to use the absolute least amount of force necessary in any given circumstance. In many instances, the Manual defers to an officer's authority and discretion to use force, which has historically invited unconstrained bias in police actions.

While officers clearly need to understand the breadth and limitations of their discretion and authority, such policies can be misconstrued as an invitation to use force. The Manual also articulates standards that simply conflict with the City's constitutional obligations.

The Department should therefore draft policies to include only very limited circumstances where any force may be appropriately exacted on Sacramento residents, to delineate the circumstances where use of force is prohibited—such as indiscriminately into crowds of people, and to eliminate certain weapons and all chemical agents from the Department's arsenal entirely. In particular, the Department should enact policies that ban the deployment of tear gas and "less lethal" munitions against protesters.

The Sacramento Police Department should therefore adopt policies that:

- a) Articulate clear criteria, at least as protective as the state and federal constitutions, for the unique and unusual circumstances when assemblies may lawfully be dispersed;
- b) Require reliance on the minimal use of force;
- c) Articulate specific protocols to ensure officers will use the minimum force necessary:
 - i) Identify a very minimal range of tactics for responding;
 - ii) Require officers to engage in strategies for de-escalation and to avoid tactics and conduct that are likely to escalate tensions or confrontation;
 - iii) Permit escalation to more forceful tactics only when less intrusive alternatives have failed or there is a specific articulable basis to believe that they will not succeed.

- d) Provide officers with specific guidelines about when force should not be used, rather than simply articulating general standards of “reasonableness”;
- e) Those guidelines should distinguish between the types of threats a suspect may present, in particular, the difference between threats to persons and threats to property as well as the difference between different types of threats to property (arson v. chalking);
- f) Those guidelines should make clear that certain types of weapons can only be used when specified criteria are met;
- g) Review all weapons in the Department’s arsenal and consider weapons and chemical agents that should be eliminated;
 - i) Prohibit direct strikes with batons
- h) Emphasize that crowds are heterogeneous, and adopt protocols to ensure that officers may not indiscriminately use force on members of a crowd simply because others may present a safety risk;
- i) Ensure that officer identification is plainly visible on the exterior of all uniforms, including riot gear;
- j) Grant media and legal observers access to observe police actions from a reasonable distance, even after dispersal orders have been given;
- k) Adopt protocols to ensure that officers adhere to the spirit and letter of cite and release booking requirements.

3. The City of Sacramento must adopt policies regarding the extremely limited circumstances where law enforcement mutual aid services may be appropriate during protests.

The incidents endured and recounted by your residents in Sacramento also show the need for the City to create and implement policies and protocols that ensure law enforcement mutual aid agencies comply with City policies.

The City should adopt policies that:

- a) Articulate criteria for deciding when mutual aid from an outside law enforcement agency is to be called, with an emphasis on the minimal police intervention necessary;

- b) Designate specific decisionmakers who will decide whether a particular protest satisfies the articulated criteria for calling in law enforcement mutual aid, with an emphasis on civilian decision-making;
- c) Require, within 3 days of any decision to terminate a protest, the decisionmakers to explain in a written report, that shall be available to the public, the specific criteria and information that led to the decision to call in law enforcement mutual aid;
- d) Adopt protocols to ensure that outside law enforcement mutual aid agencies are trained in City crowd control and use of force policies, comply with those policies, and held accountable when they violate said policies.

4. The City of Sacramento must remedy the harm experienced by its residents and begin to build trust.

As Sacramento residents gathered together to protest police brutality after the public and heinous killing of George Floyd, according to a witness, the City of Sacramento and its law enforcement agents lined up “like a firing squad” and indiscriminately fired their weapons into crowds of panicked people. The actions of the City left hundreds of people with enduring, expensive, and untreated injuries.

For example, our client Mackenzie Wilson has not been the same since the protests. They are navigating symptoms of psychological trauma, are unable to sleep, have repeated manic and irritable episodes, and have invasive thoughts about the sound of munitions and helicopters, as is typical after living through gun violence. Mackenzie is also coping with the stress and anxiety from watching Sacramento police shoot their friends in the head with rubber bullets. Mackenzie is so fearful of continued police violence that they bought a helmet and ballistic backpack to protect themselves. Their work has been negatively affected, too. They cannot concentrate or be as effective as they once were. Mackenzie has stepped back from work while they seek psychiatric support to cope with the events and is now living on unemployment.

Mackenzie’s story is not unique; it is typical. The short- and long-term physical and psychological impacts of aggressive and violent policing are well-known and alarming.⁴⁹ Indeed, other protesters have reported similar symptoms of psychological distress and trauma since experiencing police violence at the protests in May and June 2020. Another protester who was seriously injured by CHP officers reported experiencing frequent dreams where he sees widespread police violence against peaceful protesters. A third protester, who was arrested for

⁴⁹ *E.g.*, Amanda Geller et al., Aggressive Policing and the Mental Health of Young Urban Men. *Am. J. Public Health.* (2014); . *See also* Extreme Crowd Control Takes Its Toll on Mental Health, VeryWellMind, (June 17, 2020), available at <https://www.verywellmind.com/experiencing-trauma-during-protests-5024898>.

allegedly breaking curfew on June 1, 2020, reported that she quit her job working in downtown Sacramento because she would have to pass by officers after curfew each day. Other protesters shared similar stories of anxiety, sleep loss, and flashbacks stemming from the Department's actions against them and other protesters.

The City of Sacramento must take responsibility, adopt policies, and develop a process to redress the harms it caused and rebuild trust with its residents. The remedial measures should include:

- a) Mental health screenings and trauma-informed treatment for people who were present at the protests;
- b) Compensation for medical bills and loss of income;
- c) Allocation of resources to implement these measures;
- d) Establishment of community-staffed commission to design and implement additional, appropriate restorative measures.

5. The City of Sacramento and its Police Department must invest in the implementation of its new policies.

The process of strategic implementation is an imperative component of successful policy development; the best policies on paper are meaningless if they do not reflect the institution's practice. The City and Department must adopt strategies for ensuring that policies are implemented and practiced as intended and identify benchmarks for measuring progress toward implementation.

The present situation demands transparency. We list our request for the immediately release of public documents that would further the public's understanding of the last weeks' events in an attached California Public Records Act Request. This request is made pursuant to the California Public Records Act (PRA) and Article I § 3(b) of the California Constitution.

V. Conclusion

The City of Sacramento and the Department has violated the fundamental rights of Sacramento residents. If it is true that, as Police Chief Hahn has stated: the Department wants to "partner with communities of color, not disparage them," and as Mayor Darrell Steinberg has proffered: the City would like to "lead change that is essential for real justice and for healing," the City must prioritize an overhaul of its practices and policies that suppress free speech and target people who are protesting persistent police violence against Black people. We, along with community partners listed below, welcome a conversation with the City to make these essential



changes. We would appreciate your earliest attention to our recommendations, and a reply no later than September 28, 2020.

Sincerely,

Abre' Conner
Dylan Verner-Crist
Ardalan Raghian
ACLU Foundation of Northern California

Tifanei Ressler-Moyer
Lawyers' Committee for Civil Rights
of the San Francisco Bay Area

Community Partners

- Anti Police-Terror Project, Sacramento
- Black Justice Sacramento
- Black Lives Matter- Sacramento
- Decarcerate Sacramento
- Justice2Jobs Coalition
- Law Enforcement Accountability Directive
- Law Office of Mark Merin
- Mental Health First
- National Lawyers Guild Sacramento Chapter
- NorCal Resist
- Poor People's Campaign Sacramento
- Sacramento ACT
- Sacramento CopWatch for the People
- Sacramento Homeless Organizing Committee
- Sacramento Homeless Union
- Sacramento Justice League
- Sacramento Regional Coalition to End Homelessness
- Sacramento Tenants Union
- Safe Ground Sacramento
- STREAT Team

CC:

- Warren Stanley, Commissioner, California Highway Patrol
- Scott Jones, Sherriff, Sacramento County Sheriff's Office

Via Email Only

Sacramento Police Department
Attn: Records Report Requests
5770 Freeport Blvd., Suite 100
Sacramento, CA 95822
pio@pd.cityofsacramento.org

RE: Public Record Act Request Related to the Sacramento Police Department's Handling of the Sacramento Protests in Response to the Police Killing of George Floyd.

Dear Sacramento Police Department Public Records Act Unit,

I am writing on behalf of the ACLU of Northern California to submit the following request for records pursuant to the California Public Records Act and Article § 3(b) of the California Constitution. The term “record” used in this request includes “public records” and “writings” as those terms are defined in Government Code § 6252(e) & (g).

In particular, we seek the following records:

1. A complete inventory of “less-lethal” munitions/ Specialty Impact Munitions/ Kinetic Impact Projectiles used between May 29, 2020 and June 5, 2020, including: the specific brands and types of munitions used; all serial numbers and other identifying numbers associated with all such specific rounds, cartridges, ammunition, casings, and weapons; and the identity, including rank and badge number, of the officer(s) who fired each round, and the basis for each use.
2. A complete inventory of crowd control chemical agents used between May 29, 2020 and June 5, 2020, including: the specific brands and types of chemical agents used; all serial numbers and other identifying numbers associated with all such chemical agents; and the identity, including rank and badge number, of the officer(s) who used such chemical agents, and the basis for each use.
3. A complete inventory of pyrotechnic grenades (including, but not limited to, flash-bangs, CS Blasts, Stinger grenades, and similar devices) used between May 29, 2020 and present, including: the specific brands and types of devices used; all serial numbers and other identifying numbers associated with all such devices; and the identity, including rank and badge number, of the officer(s) who used the pyrotechnic gas dispersal devices, and the basis for each use.
4. Records identifying the Sacramento Police Department (SPD) chain of command for each demonstration from May 29, 2020 through present.

5. Records identifying the SPD officer(s) assigned to each Outside Agency providing mutual aid during each demonstration from May 29, 2020 through present.
6. For each dispersal order that was given for each demonstration from May 29, 2020 to the date of this request, records identifying the name of the individual making the dispersal order, the date/time each such order was given, and the basis for each such order.
7. Records identifying the supervisor(s) or commander(s) who approved the use of batons at each demonstration from May 29, 2020 through present, and the basis for each such use.
8. Records identifying the supervisor(s) or commander(s) who approved the use of “less lethal” munitions / Specialty Impact Munitions/ Kinetic Impact Projectiles at each demonstration from May 29, 2020 to present, and the basis for each such use.
9. Records identifying the supervisor(s) or commander(s) who approved the use of chemical agents at each demonstration from May 29, 2020 through present, and the basis for each such use.
10. All records, including but not limited to written reports and video recordings, detailing the use by the Sacramento Police of “less lethal” munitions, crowd control chemical agents, and pyrotechnic grenades (including, but not limited to, flash-bangs, CS Blasts, Stinger grenades, and similar devices) at each demonstration from May 29, 2020 through present.
11. All use of force logs and reports pertaining to each demonstration from May 29, 2020 through present.
12. All operations plans, planning documents, incident reports, crime reports, mass arrest reports, after action reports, injury reports, supplemental reports, property damage reports, documents referencing field contacts, detentions, and citations, and other reports pertaining to each demonstration from May 29, 2020 through present.
13. All individual officers’, operations center and command center logs, other logs, notes, or chronologies prepared pertaining to each demonstration from May 29, 2020 to present.
14. All records pertaining to requests for Mutual Aid and responses to requests for Mutual Aid for each demonstration from May 29, 2020 through present.
15. A list of all participating law enforcement agencies, including the number of officers deployed from each agency, that provided mutual aid to the Sacramento Police for each demonstration from May 29, 2020 through present.

16. All general orders, bulletins, briefings, presentations, training outlines, memoranda, and other documents concerning the following Sacramento Police policies: crowd management and crowd control, use of force, use of force reporting, “less lethal” munitions / SIM / KIP, crowd control chemical agents, pyrotechnic grenades, and all other policies related to public demonstrations from January 1, 2017 to the date of this request.
17. All briefings, presentations, memoranda, and communications concerning Sacramento Police policies, including but not limited to Crowd Control Policy, Use of Force policy, “less lethal” munitions policy, crowd control chemical agents policy, and pyrotechnic grenade policy, that were provided to agencies providing mutual aid at any of the demonstrations from May 29, 2020 through present.
18. All records reflecting the nature and amount of crowd control chemical agents, “less lethal” munitions, and pyrotechnic grenades brought by each law enforcement agency that provided mutual aid to the Sacramento Police for each demonstration from May 29, 2020 through present, and the nature and amount of such weapons used at each such demonstration.
19. All records pertaining to the assignments given to Mutual Aid agencies for each demonstration from May 29, 2020 through present.
20. All reports prepared by mutual aid agencies pertaining to each demonstration from May 29, 2020 through present, including but not limited to, use of force reports, crime reports, injury reports, equipment damage reports and lists of responding personnel.
21. The number of Sacramento Police officers deployed for each demonstration from May 29, 2020 through present.
22. All records of requests made for medical aid during each demonstration from May 29, 2020 through present.
23. All records pertaining to the destruction of property or protection of property between May 26, 2020 to present.
24. A list of all individuals cited or arrested for Failure to Disperse under Penal Code 409 or for violating the City of Sacramento’s Curfew Order, including the date of violation, the name of the individual, the race of the individual, the gender of the individual, and all charges against the individual.



Northern
California



We ask that you release the documents requested above to us without delay, and within the 10-day deadline mandated by the PRA.⁵⁰ If portions of the documents are exempt from disclosure, please provide the non-exempt portions, as per Gov't. Code Section 6253(a). Please provide complete documents, even if some of them do not appear to be responsive to this request. If the documents are available in electronic format, please email them to dvernercris@aclunc.org.

The ACLU of Northern California is a non-profit organization dedicated to public service and has concerns about the conduct of the Sacramento Police Department and agencies providing mutual aid in connection with demonstrations in reaction to the police killing of George Floyd. We therefore request that you waive any fees that would normally be applicable to a Public Records Act request, as there is a great public interest in knowing more about how the Sacramento Police Department handled and is currently handling its response to the demonstrations.

If you have any questions regarding the scope of this request, anticipate the cost of production will exceed \$100, or that the time needed to copy records will delay their release, please contact Dylan Verner-Crist at dvernercris@aclunc.org or 916-252-7930 to arrange for inspection of these documents.⁵¹ Otherwise, please send them as soon as possible and on a rolling basis if necessary.

Additionally, we write to ensure that the SPD preserve any and all evidence relating to the SPD enforcement actions connected to each demonstration from May 29, 2020 through June 5, 2020, including but not limited to all of the records that are requested above in our PRA request. This demand for preservation of evidence includes, but is not limited to, any and all communications, documents, and recordings of any kind, including, but not limited to, all radio communications, computer communications, telephone communications, dispatch communications, CAD reports, dispatch logs, video recordings, including mobile in-car video systems, dash cams and body cameras. Please be advised that we are making this demand for the preservation of all of the recordings and other documentary materials relating to these events and to any subsequent investigation(s) of said events in anticipation of potential criminal and civil litigation arising from enforcement actions relating to each demonstration from May 29, 2020 through June 5, 2020. Under California law, such potential evidence may not be destroyed until the resolution of all claims and litigation.⁵² Therefore, all of the above-referenced records and evidence must be preserved until the final resolution of any and all civil, criminal and/or other

⁵⁰ Gov. Code, § 6253(c)

⁵¹ Gov. Code, § 6253.1

⁵² Gov. Code, § 34090.6; Pen. Code, § 135



investigative proceedings arising from any SPD enforcement actions relating to each demonstration from May 29, 2020 through present.

Thank you in advance for your compliance with this request.

Sincerely,



Dylan Verner-Crist

CC: Abre' Conner
Ardalan Raghian
Tifanei Ressel-Moyer