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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

INDEX NEWSPAPERS, LLC, *et al.*,

Plaintiffs.

v.

CITY OF PORTLAND, *et al.*,

Defendants.

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

**FEDERAL DEFENDANTS'  
OPPOSITION TO PLAINTIFFS'  
MOTION FOR TEMPORARY  
RESTRATINING ORDER AND  
PRELIMINARY INJUNCTION**

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## INTRODUCTION

Plaintiffs seek the extraordinary remedy of a temporary restraining order and preliminary injunction that would hinder the ability of federal law enforcement officers to protect federal property that has been repeatedly damaged after weeks of violent protests in Portland. Plaintiffs base their request for emergency injunctive relief on alleged violations of their First Amendment rights, including the freedom of the press. Their request fails for several reasons.

First, Plaintiffs lack standing to seek emergency relief. It is well-established that a plaintiff lacks standing to obtain prospective injunctive relief for alleged future injuries based on allegations of prior harm. *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). Yet that is Plaintiffs' gambit here—they seek to have the Court enter an emergency injunction based on alleged past encounters involving federal law enforcement officers, but have not demonstrated that similar incidents will take place in the future, much less that these *particular* plaintiffs will again experience the same alleged conduct by federal law enforcement officers. Because Plaintiffs cannot demonstrate a certainly impending injury, they lack standing to seek injunctive relief. For many of these same reasons, Plaintiffs also cannot show a likelihood of irreparable harm, a prerequisite for granting emergency injunctive relief.

Second, the relief that Plaintiffs seek is entirely improper. Plaintiffs seek a sweeping injunction that would be unworkable in light of the split-second judgments that federal law enforcement officers have to make while protecting federal property and themselves during dynamic, chaotic situations. By granting immunity to journalists and observers from lawful orders to disperse, the injunction would effectively grant those individuals immunity from otherwise applicable legal requirements and would improperly bind the hands of law enforcement, including by preventing them from taking appropriate action when individuals are engaging in criminal conduct. The proposed injunction is also unworkable from a practical

standpoint. It would require law enforcement officers responding to a violent situation threatening public safety to draw fine distinctions among a crowd based on who is wearing press identification badges and different colored hats, all under the threat of potential contempt.

Third, and finally, the balance of the equities and the public interest counsel against granting Plaintiffs' request. Freedom of the press is not being threatened by the actions of the federal defendants in protecting federal property. Equally important is the public interest in public safety, including protecting federal property, which has already been substantially damaged as a result of weeks of violent protests, as well the protection of officers and the general public against imminent threats of serious bodily injury. Simply put, the federal government has the legal obligation and right to protect federal property and federal officers, and the public has a compelling interest in the protection of that property and personnel. The press is free to observe and report on the destruction of that property, but it is not entitled to special, after-hours access to that property in the face of lawful order to disperse.

### **BACKGROUND**

#### **I. Recent Destruction of Federal Property and Assaults on Federal Officers in Portland**

For nearly two months, Portland has witnessed daily protests in its downtown area. *See* Declaration of Gabriel Russell ¶ 3, Federal Protective Service (FPS) Regional Director, (Exhibit 1). These daily protests have regularly been followed by nightly criminal activity in the form of vandalism, destruction of property, looting, arson, and assault. *See id.*

Federal buildings and property have been the targets of many of these attacks, including the Mark O. Hatfield Federal Courthouse, the Pioneer Federal Courthouse, the Gus Solomon Federal Courthouse, the U.S. Immigration and Customs Enforcement (ICE) Building, and the Edith Green Wendall Wyatt Federal Office Building. *See* Russell Decl. ¶ 4. For example, on

May 28, 2020, the ICE Portland Field Office was targeted by a Molotov Cocktail. *See* Affidavit of Special Agent David Miller ¶ 5 (July 4, 2020), *United States v. Olsen*, 20-mj-00147 (D. Or) (Exhibit 2). The Mark O. Hatfield Courthouse has experienced significant damage to its façade and building fixtures, including the vandalism and theft of building security cameras and access control devices. *Id.* The most recent repair estimate for the damage at the Hatfield Courthouse is in excess of \$50,000. *Id.*

Officers protecting these properties have also been subject to threats, rocks and ball bearings fired with wrist rockets, improvised explosives, aerial fireworks, commercial grade mortars, high intensity lasers targeting officers' eyes, full and empty glass bottles, and balloons filled with paint and other substances such as feces. Russell Decl. ¶ 4. The most serious injury to an officer to date occurred when a protester wielding a two-pound sledgehammer struck an officer in the head and shoulder when the officer tried to prevent the protester from breaking down a door to the Hatfield Courthouse. *Id.* In addition, an officer was hit in the leg with a marble or ball bearing shot from a high-powered wrist rocket or air gun, resulting in a wound down to the bone. *Id.* To date, 28 federal law enforcement officers have experienced injuries during the rioting. Injuries include broken bones, hearing damage, eye damage, a dislocated shoulder, sprains, strains, and contusions. *Id.*; *see* Acting Secretary Wolf Condemns The Rampant Long-Lasting Violence in Portland (July 16, 2020) (Exhibit 3) (listing over 75 separate incidents of property destruction and assaults against federal officers between May 29, 2020 and July 15, 2020).

In response to the damage to federal property and assaults on federal law enforcement officers, DHS deployed federal officers to Portland for the purposes of protecting federal buildings and property. Russell Decl. ¶ 5. There are currently 114 federal law enforcement

officers from the FPS, ICE, U.S. Customs and Border Protection (CBP), and the U.S. Marshals Service (USMS) protecting federal facilities in downtown Portland. *Id.* From May 27 until July 3, officers were stationed in a defensive posture intended to de-escalate tensions by remaining inside federal buildings and only responding to breach attempts or other serious crimes. *Id.* This attempt to de-escalate was unsuccessful and an increasingly violent series of attacks culminated in a brazen effort to break into and set fire to the Hatfield Courthouse in the early morning hours of July 3, 2020. *Id.* A group of individuals used teamwork and rehearsed tactics to breach the front entry of the Courthouse by smashing the glass entryway doors. *Id.* The individuals threw balloons containing an accelerant liquid into the lobby and fired powerful commercial fireworks towards the accelerant in an apparent attempt to start a fire. *Id.*

The violence against federal officers and federal property over the Fourth of July holiday weekend resulted in the necessity of arrests of multiple individuals:

- On July 2-3, 2020, Rowan Olsen used his body to push on and hold a glass door at the Hatfield Courthouse closed, preventing officers from exiting the building and causing the door to shatter. With the door broken, a mortar firework entered the courthouse, detonating near the officers. The officers used shields and their bodies to block the open doorway for approximately six hours until demonstrators dispersed.
- On July 4, 2020, Shat Singh Ahuja willfully destroyed a closed-circuit video camera mounted on the exterior of the Hatfield Courthouse.
- On July 5, 2020, Gretchen Blank assaulted a federal officer with a shield while the officer was attempting to arrest another protester.
- On July 5-6, 2020, four men assaulted federal officers with high intensity lasers. At the time of his arrest, one of the men also possessed a sheathed machete.

*See Seven Arrested, Facing Federal Charges After Weekend Riots at Hatfield Federal Courthouse* (July 7, 2020) (Exhibit 4). In response to the increasingly violent attacks, DHS implemented tactics intended to positively identify and arrest serious offenders for crimes such

as assault, while protecting the rights of individuals engaged in protected free speech activity. Russell Decl. ¶ 5.

Plaintiffs' motion primarily focuses on the response by federal officials to a violent protest near the Hatfield Courthouse that occurred on the evening of July 11 into the early morning of July 12. *See* Pls.' Mot. at 4–7. During that time the crowd of protesters near the Hatfield Courthouse grew to approximately 300 people. Russell Decl. ¶ 6. A barrier of police tape was established across the front of the Hatfield Courthouse and protesters were ordered not to trespass on federal property but refused to comply with that command. *Id.* Commands were made using a long-range acoustic device that is audible even with loud crowd noises. *Id.* As a joint team of FPS, CBP, and USMS officers deployed and made an arrest for trespass, protesters swarmed the officers. *Id.* FPS officers deployed less-lethal projectile rounds to allow the arrest team to safely withdraw from federal property. *Id.* The protesters responded by throwing items that posed a risk of officer injury, including rocks, glass bottles, and mortar-style fireworks, and by pointing lasers at law enforcement personnel. *Id.* One protester encroached on a police barrier, refused to leave, and became combative while detained. *Id.* A crowd of protesters swarmed the officers and tear gas was deployed to protect officers as they withdrew to the Hatfield Courthouse. *Id.*

FPS gave protesters additional warnings to stay off federal property, and to cease unlawful activity. Russell Decl. ¶ 7. Tear gas was deployed again to push protesters back from the Hatfield Courthouse. *Id.* FPS contacted the Portland Police Bureau (PPB), who were preparing to declare an unlawful assembly. *Id.* By this time the size of the group had diminished to approximately 100 people. *Id.* Federal law enforcement teams from the Hatfield Courthouse and the Edith Green Federal Building pushed the crowd towards the park across from the

building. *Id.* The PPB arrived and closed all roads in the vicinity of the facilities. *Id.* There were multiple attacks throughout the night involving hard objects including rocks and glass bottles and commercial-grade lasers directed at officers' eyes. *Id.* Federal officers made seven arrests including three for assault on an officer and others for failure to comply with lawful orders. *Id.* The PPB declared an unlawful assembly and began making arrests for failure to disperse. *Id.* FPS also issued dispersal orders on federal property and cleared persons refusing to comply with these orders at the same time. *Id.*

## **II. Legal Authority to Protect Federal Property**

FPS, a component of the Department of Homeland Security, is the federal agency charged with protecting federal facilities across the country. *See* Federal Protective Service Operation, at <https://www.dhs.gov/fps-operations>. Congress authorized DHS to “protect the buildings, grounds, and property that are owned, occupied, or secured by the Federal Government.” 40 U.S.C. § 1315(a). While engaged in their duties, FPS officers are authorized to conduct a wide range of law enforcement functions:

- (A) enforce Federal laws and regulations for the protection of persons and property;
- (B) carry firearms;
- (C) make arrests without a warrant for any offense against the United States committed in the presence of the officer or agent or for any felony cognizable under the laws of the United States if the officer or agent has reasonable grounds to believe that the person to be arrested has committed or is committing a felony;<sup>1</sup>
- (D) serve warrants and subpoenas issued under the authority of the United States;
- (E) conduct investigations, on and off the property in question, of offenses that may have been committed against property owned or occupied by the Federal Government or persons on the property; and

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<sup>1</sup> *See, e.g.*, 18 U.S.C § 111 (assaulting a federal officer).



(F) carry out such other activities for the promotion of homeland security as the Secretary may prescribe.

40 U.S.C. § 1315(b)(2).

Additionally, the Secretary of Homeland Security may designate DHS employees “as officers and agents for duty in connection with the protection of property owned or occupied by the Federal Government and persons on the property, including duty in areas outside the property to the extent necessary to protect the property and persons on the property.” 40 U.S.C. § 1315(b)(1).

Congress also delegated authority to DHS to issue regulations “necessary for the protection and administration of property owned or occupied by the Federal Government and persons on the property.” 40 U.S.C. § 1315(c). Current regulations may include “reasonable penalties,” including fines and imprisonment for not more than 30 days. 40 U.S.C. § 1315(c)(2). The regulations cover many activities, including prohibiting disorderly conduct on federal property (41 C.F.R. § 102-74.390); failing to obey a lawful order (41 C.F.R. § 102-74.385); and creating a hazard on federal property (41 C.F.R. § 102-74.380(d)). *See United States v. Christopher*, 700 F.2d 1253 (9th Cir. 1983) (affirming convictions on charges of being present on federal property after normal work hours in violation of 41 C.F.R. §§ 101–20.302 and 101–20.315).

In exercising its authority to protect federal property, FPS follows DHS policy on the use of force. *See* DHS Policy on the Use of Force (Sept. 7, 2018) (Exhibit 5). Consistent with guidance from the Supreme Court, *see Graham v. Connor*, 490 U.S. 386 (1989), DHS policy authorizes officers to “use only the force that is objectively reasonable in light of the facts and circumstances confronting him or her at the time force is applied,” recognizing that officers are “often forced to make split-second judgments, in circumstances that are tense, uncertain, and

rapidly evolving.” DHS Policy at 1–2. The policy states that officers “should seek to employ tactics and techniques that effectively bring an incident under control while promoting the safety of [the officer] and the public, and that minimize the risk of unintended injury or serious property damage.” *Id.* at 3. DHS components must conduct training on “less-lethal use of force” at least every two years and incorporate decision-making and scenario-based situations. *Id.* at 5.

Further, officers must demonstrate proficiency with less-lethal force devices, such as impact weapons or chemical agents, before using such devices. *Id.* DHS policy emphasizes “respect for human life,” “de-escalation,” and “use of safe tactics.” *Id.* at 3.

DHS has also emphasized to its employees the importance of respecting activities protected by the First Amendment. *See* DHS Memo re: Information Regarding First Amendment Protected Activities (May 17, 2029) (Exhibit 6). “DHS does not profile, target, or discriminate against any individual for exercising his or her First Amendment rights.” *Id.* at 1.

In addition to DHS’s authority to protect federal property, the United States Marshals Service, a component of the Department of Justice, provides security inside federal courthouses in each of the 94 federal judicial districts and in the District of Columbia Superior Court. *See* U.S. Marshals Service, Court Security, at [www.usmarshals.gov/duties/courts.htm/](http://www.usmarshals.gov/duties/courts.htm/). The Marshals Service protects judges and other court officials at over 400 locations where court-related activities are conducted. *Id.* As set forth in 28 U.S.C. § 566(a), “[i]t is the primary role and mission of the United States Marshals Service to provide for the security and to obey, execute, and enforce all orders of the United States District Courts, the United States Courts of Appeals, the Court of International Trade, and the United States Tax Court, as provided by law.” The regulations governing the duties of the Marshals Service further authorize it to provide “assistance in the protection of Federal property and buildings.” 28 C.F.R. § 0.111(f); *see also*

28 U.S.C. § 566(i) (requiring the Director of the United States Marshals Service to consult with the Judicial Conference of the United States concerning, *inter alia*, “the security of buildings housing the judiciary” and stating that the “United States Marshals Service retains final authority regarding security requirements for the judicial branch of the Federal Government.”).

The Marshals Service’s actions to protect the federal judiciary are guided by an agency-wide use of force policy. *See* United States Marshals Service, Policy Directive 14.15, Use of Force (Sept. 24, 2018) (Exhibit 7). Pursuant to that policy, the use of force must be objectively reasonable and Deputy Marshals may use less-than-lethal force only in situations where reasonable force, based upon the totality of the circumstances at the time of the incident, is necessary to, among other things, protect themselves or others from physical harm or make an arrest. *See id.* Deputy Marshals are not authorized to use less-than-lethal devices if voice commands or physical control achieve the law enforcement objective. *See id.* Further, they must stop using less-than-lethal devices once they are no longer needed to achieve its law enforcement purpose. *See id.* And in all events, less-than-lethal weapons may not be used to punish, harass, taunt, or abuse a subject. *See id.*

### **STANDARD FOR EMERGENCY RELIEF**

The standard for a temporary restraining order is generally the same as for a preliminary injunction. *Pac. Kidney & Hypertension, LLC v. Kassakian*, 156 F. Supp. 3d 1219, 1222 (D. Or. 2016). A preliminary injunction is “an extraordinary and drastic remedy” that should not be granted “unless the movant, by a clear showing, carries the burden of persuasion.” *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012). A plaintiff must show that (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest.

*Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).<sup>2</sup> “Likelihood of success on the merits is the most important factor” and if a plaintiff fails to meet this “threshold inquiry,” the court “need not consider the other factors.” *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018). Because standing is a prerequisite to the Court’s exercise of jurisdiction, *see Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014), the plaintiff’s claims on the merits have no likelihood of success if the plaintiffs cannot establish standing. *Id.* at 158 (“The party invoking federal jurisdiction bears the burden of establishing’ standing and must do so “the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.”) (internal quotations and citations omitted).

Plaintiffs must meet an even higher standard in this case because they seek a mandatory injunction that would alter the status quo and impose affirmative requirements on law enforcement officers as they carry out their duties. *See Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (mandatory injunctions are “particularly disfavored” and the “district court should deny such relief unless the facts and law clearly favor the moving party.”) (internal quotations omitted). As explained below, Plaintiffs cannot meet this demanding standard.

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<sup>2</sup> Alternatively, “serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (citation omitted).

## ARGUMENT

### **I. PLAINTIFFS LACK STANDING TO OBTAIN AN INJUNCTION AGAINST FEDERAL DEFENDANTS**

“[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Art. III of the Constitution by alleging an actual case or controversy.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). One of the “landmarks” that differentiates a constitutional case or controversy from more abstract disputes “is the doctrine of standing.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). And the first requirement of standing is that “the plaintiff must have suffered an ‘injury in fact’ – an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) ‘actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Id.* at 560.

Where, as here, a party seeks prospective equitable relief, the complaint must contain “allegations of future injury [that are] particular and concrete.” *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 109 (1998). While allegations of past injury might support a remedy at law, prospective equitable relief requires a claim of imminent future harm. *Lyons*, 461 U.S. at 105; *see also Nelsen v. King Cty.*, 895 F.2d 1248, 1251 (9th Cir. 1990) (“[P]ast exposure to harm is largely irrelevant when analyzing claims of standing for injunctive relief that are predicated upon threats of future harm.”); *United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1381 (D.C. Cir. 1984) (past harm suffered by plaintiff does not support declaratory and injunctive relief).

It is therefore well-established that a plaintiff lacks standing to obtain prospective injunctive relief for alleged future injuries based on allegations of prior harm. *Lyons*, 461 U.S. at 101–02; *Nelsen*, 895 F.2d at 1251. As the Supreme Court held in *Whitmore v. Arkansas*, 495 U.S. 149 (1990), allegations of possible future injury do not satisfy the requirements of Article

III. A threatened injury must be “certainly impending” to constitute injury in fact. 495 U.S. at 158 (quoting *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979)). As a result, in order to invoke Article III jurisdiction, a plaintiff in search of prospective equitable relief must show a significant likelihood and immediacy of sustaining some direct injury. *Updike v. Multnomah Cty.*, 870 F.3d 939, 947 (9th Cir. 2017) (“[S]tanding for injunctive relief requires that a plaintiff show a ‘real and immediate threat of repeated injury.’” (quoting *O’Shea v. Littleton*, 414 U.S. 488, 496 (1974))). And standing cannot be presumed or deferred just because this case is currently being considered on a TRO and preliminary injunction posture; standing is “an indispensable part of the plaintiff’s case” that “must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.” *Lujan*, 504 U.S. at 561.

For a plaintiff to have standing, an alleged injury must be “concrete” and “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Lyons*, 461 U.S. at 101–02. Even where a plaintiff establishes that his rights were violated in past incidents, he nonetheless lacks standing to obtain prospective injunctive relief absent a “real and immediate threat” that he will suffer the same injury in the future. *Id.* at 105. “[P]ast wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy.” *Id.* at 103 (citing *O’Shea v. Littleton*, 414 U.S. 488, 494 (1974) and *Rizzo v. Goode*, 423 U.S. 362, 372 (1976)). *See also Nelsen*, 895 F.2d at 1251. This “imminence requirement ensures that courts do not entertain suits based on speculative or hypothetical harms.” *Lujan*, 504 U.S. at 564. Thus, a plaintiff “who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.” *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982).

Moreover, the plaintiff seeking injunctive relief must show not just that the predicted *injury* will reoccur, but also that the plaintiff himself will suffer it. *See, e.g., Updike*, 870 F.3d at 948 (holding that the plaintiff lacked standing for injunctive relief because his evidence was “insufficient to establish that any such wrongful behavior is likely to recur against him”); *Blair v. Shanahan*, 38 F.3d 1514, 1519 (9th Cir. 1994) (holding that a plaintiff seeking declaratory or injunctive relief must “establish a personal stake” in the relief sought). In other words, plaintiffs cannot show an entitlement to injunctive relief unless they show that they themselves are likely to suffer injury from the allegedly unlawful activities. That other individuals might suffer future harm does nothing for a plaintiff’s own standing.

The facts and reasoning of *Lyons* are instructive. At issue in *Lyons* was a civil rights action against the City of Los Angeles and several police officers who allegedly stopped the plaintiff for a routine traffic violation and applied a chokehold without provocation. In addition to seeking damages, the plaintiff sought an injunction against future use of the chokehold unless deadly force was threatened. The Supreme Court held that plaintiff lacked standing to seek prospective relief because he could not show a real or immediate threat of future harm.

That Lyons may have been illegally choked by the police . . . , while presumably affording Lyons standing to claim damages . . . does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part.

*Lyons*, 461 U.S. at 104; *see also O’Shea*, 414 U.S. at 495-96 (“Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.”); *Rizzo*, 423 U.S. at 372 (holding that plaintiffs’ allegations that police had engaged in widespread unconstitutional conduct aimed

at minority citizens was based on speculative fears as to what an unknown minority of individual police officers might do in the future).

Courts in this Circuit have applied *Lyons* and *O'Shea* in similar contexts to hold that plaintiffs lack standing to pursue prospective injunctive relief where they were subject to past law enforcement practices but could only speculate as to whether those practices would recur. *See, e.g., Eggar v. City of Livingston*, 40 F.3d 312, 317 (9th Cir. 1994) (plaintiff who had previously been repeatedly detained, charged, and convicted of offenses without court-appointed counsel despite her indigence lacked injunctive standing because whether she “will commit future crimes in the City, be indigent, plead guilty, and be sentenced to jail is speculative”); *Murphy v. Kenops*, 99 F. Supp. 2d 1255, 1259–60 (D. Or. 1999) (plaintiffs lacked standing because it was highly speculative “that the Forest Service will exercise its discretion to issue future closure orders, that the closure orders will violate the First Amendment, that plaintiffs will violate those closure orders, and that plaintiffs will be arrested because of those closure orders”). *See also Curtis v. City of New Haven*, 726 F.2d 65, 68 (2d Cir. 1984) (vacating an injunction that had been entered against police use of mace, because the plaintiffs had not shown a “likelihood that these plaintiffs will again be illegally assaulted with mace”); *Williams v. Birmingham Bd. of Educ.*, 904 F.3d 1248, 1267 (11th Cir. 2018) (plaintiff alleging that a school resource officer employed by the police unconstitutionally used an incapacitating chemical spray on her lacked standing to pursue injunctive relief, because she did not show that a likelihood that the resource officer would again unconstitutionally spray her).

Nor can plaintiffs create standing for injunctive relief by alleging that their own fear of future government action has “chilled” their willingness to engage in First Amendment activities. When a plaintiff contends that injunctive relief is supported by such an alleged “chilling effect,”



the analysis is unchanged from the *Lyons* inquiry—the supposed chilling effect will not provide standing for injunctive relief if it is “based on a plaintiff’s fear of future injury that itself was too speculative to confer standing.” *Munns v. Kerry*, 782 F.3d 402, 410 (9th Cir. 2015); *see also Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 416 (2013) (plaintiffs “cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending”). In other words, where a plaintiff’s request for injunctive relief lacks any non-speculative basis for finding a likelihood of future harm, the plaintiff cannot circumvent Article III merely by saying that he or she is *afraid* of future harm.

Plaintiffs’ motion fails under these standards. Plaintiffs’ support their requested relief is seven declarations from individual plaintiffs that focus entirely on past events. They recount episodes involving alleged conflicts between protesters and law enforcement officers on particular dates (July 11, 12, 16, and 19)—and describe injuries they or others allegedly suffered (e.g., bruising from a nonlethal plastic round). Dkt. 43 (Davis Decl.);<sup>3</sup> Dkt. 44 (Lewis-Rolland Decl.); Dkt. 55 (Brown Decl.); Dkt. 56 (Yau Decl.); Dkt 58 (Howard Decl.); Dkt 59 (Rudoff Decl); Dkt. 60 (Tracy Decl.).<sup>4</sup> But these threadbare accounts of isolated incidents fail to provide any basis for concluding that plaintiffs face certainly impending injury. Indeed, the declarations make no showing that Plaintiffs are in imminent danger of again being subjected to similar events in the future. For example, the Plaintiffs would need not only to establish that “they would have another encounter with the police but also to make the incredible assertion” that the same series of events would transpire again. *See Lyons*, 461 U.S. at 106 (stating that “[i]n order to establish an actual controversy in this case” *Lyons* would have to allege that “*all* police

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<sup>3</sup> Garrison Davis is not a plaintiff and thus cannot sustain standing in this case, but his declaration also fails to support a finding of imminent danger to any Plaintiff.

officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter”) (emphasis in original). They have not and cannot make such a showing. And since courts may not simply assume that the circumstances that gave rise to an alleged constitutional violation will recur, the absence of such evidence is fatal to their request for relief. *See, e.g., Nelsen*, 895 F.2d at 1251; *Updike*, 870 F.3d at 947; *Murphy*, 99 F. Supp. 2d at 1259–60.

**II. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS BECAUSE THEY WILL NOT SUFFER A FIRST AMENDMENT VIOLATION AND THE INJUNCTION THEY SEEK IS LEGALLY IMPROPER.**

**A. Plaintiffs Have Not Demonstrated that Federal Defendants Violated Their Constitutional Rights, Much Less that They Will Continue To Do So.**

Plaintiffs complain of two First Amendment violations. First, Plaintiffs seek an injunction based on a claim that Federal Defendants retaliated against Mr. Lewis-Rolland, a journalist, for engaging in newsgathering activities protected by the First Amendment. *See* Pls.’ Mot. at 8–12. Plaintiffs devote substantial attention to undisputed propositions of law that newsgathering is a protected First Amendment activity that may be exercised in public places, subject to reasonable time, place and manner restrictions. But the key question in a First Amendment retaliation claim is whether the plaintiff has established that “by his actions the defendant deterred or chilled the plaintiff’s political speech and such deterrence was a substantial or motivating factor in the defendant’s conduct.” *Mendocino Env’tl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

Plaintiffs have not carried their burden to establish that the use of force was “anything other than the unintended consequence of an otherwise constitutional use of force under the circumstances.” *Barney v. City of Eugene*, 20 F. App’x 683, 685 (9th Cir. 2001) (rejecting First Amendment retaliation claim where “protesters were warned repeatedly to clear the street or tear

gas would be deployed, and there is no dispute that a small group of the crowd became violent”); *see also Mims v. City of Eugene*, 145 F. App’x 194, 196 (9th Cir. 2005) (holding that use of a crowd control team “in full riot gear was not a disproportionate response and does not indicate preexisting hostility toward the protestors’ views”). Given the chaotic circumstances presented by the violent protests, Plaintiffs have not established that Defendants would not have used force “but for” a retaliatory motive. *Capp v. City of San Diego*, 940 F.3d 1046, 1059 (9th Cir. 2019). As the Ninth Circuit has recognized, the unlawful actions of a few may impair the ability of others to exercise their rights:

In balancing desired freedom of expression and the need for civic order, to accommodate both of these essential values, a measure of discretion necessarily must be permitted to a city, on the scene with direct knowledge, to fashion remedies to restore order once lost. It may be that a violent subset of protesters who disrupt civic order will by their actions impair the scope and manner of how law-abiding protesters are able to present their views.

*Menotti v Seattle*, 409 F.3d 1113, 1155 (9th Cir. 2005) (declining “to hold unconstitutional the City’s implementation of procedures necessary to restore safety and security” when confronted by protesters with “violent and disruptive aims” that “substantially disrupt civic order”).

Second, Plaintiffs also contend that Federal Defendants have denied Plaintiffs a right of access to observe how Federal Defendants enforce their dispersal orders. *See* Pls.’ Mot. at 12–14. It is important to clarify at the outset, however, that Plaintiffs appear to be requesting only a right to observe from public streets. Thus, even under their proposed injunction, they still must not come so close as to trespass on federal property. Plaintiffs accordingly recognize from the beginning that they have no right to be wherever protesters are. The government may certainly prohibit a public presence on its property outside of its ordinary hours of operation—an interest rooted in part in protecting that property—and an interest in First Amendment activities does not permit violation of those rules. *See Christopher*, 700 F.2d at 1259-61 (upholding conviction for

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trespassing for soliciting signatures on government property outside of normal business hours). This is true even if the property functions as a traditional public forum during the hours when it is open. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 299 (1984) (upholding prohibition on overnight sleeping to prevent damage to park); *Occupy Sacramento v. City of Sacramento*, 878 F. Supp. 2d 1110, 1120 (E.D. Cal. 2012) (granting dismissal and rejecting injunction on claim against regulation closing park overnight in order to protect it).

Plaintiffs nevertheless argue that they have a right to continued presence on public streets surrounding the federal property, even if a lawful order to disperse has been given—indeed, they are pointedly seeking a right to ignore a lawful order to disperse and to remain in place. *See* Pls.’ Mot. at 1. Yet Plaintiffs provide absolutely no support whatsoever that the press has a special right to remain in or access a location that has been lawfully closed to the general public, and in particular a place that has been lawfully closed to protesters. They argue that cases supporting press access in other contexts, specifically the Supreme Court’s decision in *Press-Enterprise Co. v. Super. Ct. of Cal.*, 478 U.S. 1 (1986) (“*Press-Enterprise II*”), support their right of access here. But that case is inapposite.

*Press-Enterprise II* involved a dispute over media access to a criminal judicial proceeding and that context framed the way in which the Supreme Court analyzed whether access was appropriate: whether there is a tradition of public access and whether that public access plays a significant positive role in the functioning of the particular process. *Id.* at 8-9 (noting the questions were specific to “this setting” of an in-court criminal judicial proceeding). Here, although public streets have been traditionally open to the public, the specific context is public property that has been lawfully closed to the public for the execution of law enforcement functions, including protecting against the destruction of federal property and making lawful

arrests. There is no tradition of public access to a closed forum under such circumstances—and mandating public access under such circumstances would impede achieving the important public goals of protecting public property and the safety of law enforcement personnel. *Cf. Perry v. Los Angeles Police Dep’t*, 121 F.3d 1365, 1369 (9th Cir. 1997) (“A government interest in protecting the safety and convenience of persons using a public forum is a valid government objective.”). The press may have the rights of access of the general public, but they have no special rights of access to closed fora. *See California First Amendment Coal. v. Calderon*, 150 F.3d 976, 981 (9th Cir. 1998) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) (“[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”)).

Even assuming, however, that the *Press-Enterprise II* standard applies, it establishes only a qualified right of access that may be overcome where “closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Press Enterprise II*, 478 U.S. at 9. As an initial matter, it is not at all clear that Plaintiffs have even been denied sufficient “access.” Although they argue that they have no “alternative observation opportunities,” Pls.’ Mot. at 13, they have not provided any argument that the vantage points they have had, much less the ones they would have in the future absent the injunction, would be insufficient. No Plaintiff asserts that any press or legal observer was unable to observe any activities merely because of the dispersal order. And there are no allegations that federal agents advanced, in an attempt to disperse rioters, more than a few blocks away from federal property. Thus, it is not at all clear why reporters and observers could not see sufficiently even if moved by an order to disperse, except for the use of crowd control munitions that could still be used under the proposed injunction. *See* Pls.’ Mot. at 3 (no liability “if a Journalist or Legal Observer is incidentally

exposed to crowd-control devices after remaining in the area where such devices were deployed”).

Moreover, even if Plaintiffs could demonstrate that they have been denied sufficient “access” to a “particular proceeding,” *United States v. Doe*, 870 F.3d 991, 997 (9th Cir. 2017), they would fail the balancing test of *Press Enterprise II*. Preserving order, life, and property are important values that may be preserved consistent with the First Amendment. Police thus may, for example, impose restrictions to “contain or disperse demonstrations that have become violent or obstructive.” *Washington Mobilization Committee v. Cullinane*, 566 F.2d 107, 119 (D.C. Cir. 1977) (stating that it is “axiomatic” that “the police may, in conformance with the First Amendment, impose reasonable restraints upon demonstrations to assure that they be peaceful and not obstructive”); *see also Madsen v Women’s Health Center*, 512 U.S. 753, 768 (1994) (finding the government “has a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks.”).

Requiring journalists and legal observers to disperse along with protesters and rioters is also narrowly tailored because allowing them to remain is not a practicable option. There is no dispute that protesters who do not disperse after a lawful order is given may be arrested. Having an unspecified number of people who lawfully may remain, however, will not only greatly complicate efforts to clear an area and restore order, it will also present a clear risk to safety. Under the proposed injunction, there is no consistent scheme for quickly identifying individuals authorized to be present. Plaintiffs propose a list of “indicia” that “are not exclusive,” which may be as small as a press pass displayed somewhere on their body and as vague as “visual identification” or “distinctive clothing” indicating that they are press. Pls.’ Mot. at 2-3. Additionally, the proposed injunction suggests that some of these, such as press passes, are only

valid if “professional or authorized,” while other items, such as a shirt that simply says “press” somewhere, may be sufficient. Pls.’ Mot. at 3. Similarly, identifying “legal observers” by the color of their hats when they are comingled in a large crowd at night with many others wearing face and head coverings is impractical. Searching each person who does not disperse for such indicia will be difficult, if not impossible, under the conditions causing an order to disperse to be given (*e.g.*, lasers, projectiles, and pyrotechnic mortars being used against federal officers), and such a search will also distract federal officers from protecting themselves against those same conditions. It would be even more impracticable to verify which of those remaining actually has “professional or authorized” credentials. Yet the risk of not verifying such individuals is grave—protesters have already attempted to interfere with arrests by federal officers, including by assaulting them, and federal officers cannot simply turn their backs to people who have “press” written somewhere on them. Leaving press and legal observers in place would present security risks to all and would severely distract from the critical mission of restoring order and protecting life and property. Accordingly, even under the inappropriate, stringent standard that Plaintiffs invoke, they are unlikely to succeed on any claim to have a right to remain in place.

**B. The Legally Improper Injunction Plaintiffs Seek is Overbroad and Unworkable.**

There is no basis for the Court to grant Plaintiffs’ request for an overbroad and unworkable injunction that would micromanage the manner in which federal law enforcement officers respond to dynamic and chaotic situations involving violent protesters seeking to damage federal property and harm federal officers. “It is not for this Court to impose its preferred police practices on either federal law enforcement officials or their state counterparts.” *United States v. Patane*, 542 U.S. 630, 642 (2004). Yet that is precisely what Plaintiffs’ requested injunction would do here. The federal officers protecting federal property in Portland

are doing so under difficult circumstances and must make “split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.” *Graham*, 490 U.S. at 397. Those judgments should not be encumbered by the potential threat of contempt of court from a vague, overbroad, and—at bottom—legally improper injunction. Indeed, Plaintiffs identify no other case in which federal or state officers responding to large-scale, ongoing incidents by violent opportunists have been enjoined in the manner Plaintiffs propose here.

It is a basic principle of Article III that “a plaintiff’s remedy must be limited to the inadequacy that produced his injury in fact.” *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) (quotation omitted). “An injunction must be narrowly tailored to remedy the specific harm shown.” *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019) (internal quotations omitted); see *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir.1991). It “should be no more burdensome to the defendant than necessary to provide complete relief.” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

Plaintiffs’ proposed injunction is legally improper in several respects. The injunction would exempt “Journalists” and “Legal Observers” from the requirements of following a lawful order to disperse, but Plaintiffs provide no authority that members of the press or legal observers are somehow immune from such a lawful order.<sup>5</sup> The First Amendment allows the police to impose reasonable restrictions upon demonstrations, including the right to “contain or disperse demonstrations that have become violent or obstructive.” *Cullinane*, 566 F.2d at 119 (stating that it is “axiomatic” that “the police may, in conformance with the First Amendment, impose reasonable restraints upon demonstrations to assure that they be peaceful and not obstructive”);

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<sup>5</sup> Plaintiffs’ proposed injunction provides that “such persons shall not be required to disperse following the issuance of an order to disperse, and such persons shall not be subject to arrest for not dispersing following the issuance of an order to disperse.” See Pls.’ Mot. at 1.



*see Feiner v. New York*, 340 U.S. 315, 320 (1951) (“This Court respects, as it must, the interest of the community in maintaining peace and order on its streets.”); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) (“When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious.”). Members of the press and legal observers who choose to observe the violent activities of nearby protesters are not exempt from a lawful command to disperse. *Cf. Branzburg v. Hayes*, 408 U.S. 665, 684–85 (1972) (“Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded”); *id.* at 684 (“the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”).

The injunction would also prohibit law enforcement personnel from seizing any photographs or recordings from journalists or legal observers for any reason, even if probable cause exists to arrest them. *See* Pls.’ Mot. at 1. Further, the injunction would require that any such property be returned immediately upon release from custody, regardless of whether the individual has been charged with a crime. Plaintiffs cite no legal authority for such a provision and their motion does not even allege that federal officers have arrested any journalists, media members, or legal observers, let alone seized any equipment from them.

Additionally, Plaintiffs request that the Court enjoin federal officers from arresting or using physical force against a journalist or legal observer, unless probable cause exists to believe that such individual has committed a crime. *See* Pls.’ Mot. at 1. But that proposed remedy is the type of vague, “follow the law” injunction that is disfavored because it does not comply with Rule 65(d)’s specificity requirement. *See CuvIELLO v. City of Oakland*, 2009 WL 734676, at \*3 (N.D. Cal. Mar. 19, 2009) (holding unenforceable an injunction that “basically states that

Defendants are permitted to make only lawful arrests of Plaintiffs” and are “barred from interfering with Plaintiffs’ free speech rights”). As numerous courts have recognized, “[i]njunctive orders that broadly order the enjoined party simply to obey the law . . . are generally impermissible.” *NLRB v. USPS*, 486 F.3d 683, 691 (10th Cir. 2007); *see Burton v. City of Belle Glade*, 178 F.3d 1175, 1200-01 (11th Cir. 1999); *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 240-41 (2d Cir. 2001).

Such an injunction is particularly inappropriate and unmanageable in this case where law enforcement officers are responding to a dynamic situation involving a consistent barrage of violent activity targeted against federal property and officers. DHS, the Marshals Service, and their officers should not potentially be subject to charges of contempt for violating a vague injunction in these circumstances. As the Supreme Court has emphasized, courts must “take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing.” *United States v. Sharpe*, 470 U.S. 675, 686 (1985).

### **III. PLAINTIFFS CANNOT DEMONSTRATE IRREPARABLE HARM**

Plaintiffs argue that, because they have raised a First Amendment issue, they have necessarily demonstrated the likelihood of irreparable injury. But the Ninth Circuit has held that “no presumption of irreparable harm arises in a First Amendment retaliation claim.” *Rendish v. City of Tacoma*, 123 F.3d 1216, 1226 (9th Cir. 1997). Regardless of the nature of the alleged injury, however, to be likely irreparable any harm must be likely to occur. Separate from any Article III standing concerns, where “there is no showing of any real or immediate threat that the plaintiff will be wronged again,” there is no irreparable injury supporting equitable relief. *Lyons*, 461 U.S. at 111; *see Olagues v. Russoniello*, 770 F.2d 791, 797 (9th Cir. 1985). As shown

above, and for the same reasons that Plaintiffs lack standing to seek a an injunction in the first instance, Plaintiffs’ future injuries are speculative and, therefore, also insufficient to demonstrate the likelihood of irreparable injury.

#### **IV. BOTH THE BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST WEIGH AGAINST GRANTING AN INJUNCTION**

Plaintiffs argue that there is a strong public interest in First Amendment principles generally, and a free press in particular. Both are true. But Plaintiffs have not established any violation of these First Amendment rights and, in any event, they fail to explain how the many countervailing public interests involved in the federal response to the Portland protests must be weighed. Those interests in fact outweigh other First Amendment equities.<sup>6</sup> Some of these interests are recognized in the merits of the First Amendment claims themselves, but there are many other interests weighing against the requested injunction.

Federal agents have deployed to protect various federal properties, including the Hatfield Federal Courthouse and the Edith Green Federal Building, in response to violent rioting. Rioters have vandalized and threatened to severely damage those buildings, and they have assaulted the responding federal officers. Plaintiffs all but concede that the government has “a valid interest in protecting public safety, preventing vandalism or looting, or protecting [federal officers].” Pls.’ Mot. at 13. All of these public interests are substantial and can outweigh First Amendment interests premised on access to public property. The government has a comprehensive interest in maintaining public order on public property. *Feiner v. New York*, 340 U.S. 315, 320 (1951) (“This Court respects, as it must, the interest of the community in maintaining peace and order on its streets.”). There is an even more pointed public interest when disorder threatens the

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<sup>6</sup> The balance of the equities and the public interest are analyzed together here because, when the government is a party, these last two factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

integrity of that public property. *See United States v. Griefen*, 200 F.3d 1256, 1260 (9th Cir. 2000) (“The clear purpose of the order . . . was for reasons of health and safety, and for the protection of property . . . . These are compelling reasons . . . and certainly represent significant government interests.”). Congress has recognized such interests, including by making the destruction of federal property and the assault of federal officers felonies punishable by up to ten and twenty years of imprisonment respectively.. 18 U.S.C. §§ 111, 1361. Additionally, there is a fundamental First Amendment right of access to the courts, *see, e.g., Ringgold-Lockhart v. Cty. of Los Angeles*, 761 F.3d 1057, 1061 (9th Cir. 2014), which is jeopardized by the breach and destruction of a federal court building; it is in the public interest to prevent the violation of *these* rights, too. Moreover, the federal government, just as any other property owner, has an interest in “preserv[ing] the property under its control for the use to which it is lawfully dedicated”; for government buildings, those uses are of course public uses that are in the public interest. *Int’l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679-680 (1992).

On balance, it is clearly in the public interest to allow federal officers, to disperse violent opportunists near courthouses and federal buildings when those events have turned and may continue to turn violent. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (“[W]here demonstrations turn violent, they lose their protected quality as expression under the First Amendment”); *Griefen*, 200 F.3d at 1260 (upholding the relocation of protesters who “had already shown by their destructive conduct that they presented a clear and present danger to the safe completion of the construction project, both to other persons as well as to themselves”); *Bell v. Keating*, 697 F.3d 445, 457-58 (7th Cir. 2012) (“[O]therwise protected speech may be curtailed when an assembly stokes—or is threatened by—imminent physical or property damage.”).

Plaintiffs have not contested that the federal government has both the right and the obligation to restore order and protect federal property—an obligation that is all the more critical with respect to a federal courthouse, which must remain operational to ensure the rights of litigants including the very parties to this suit. Instead, Plaintiffs have held up the general public interest in a free press. Pls.’ Mot. at 16. Yet, as discussed in above, the courts have already thoroughly weighed the interest of public access to a free press and found it no greater than that of the public generally. *See, e.g., Branzburg*, 408 U.S. at 684–85 (“Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded”); *Calderon*, 150 F.3d at 981.

Plaintiffs provide no rationale for why their equities are any greater or more deserving of protection than those of any member of the public exercising their First Amendment rights. And Plaintiffs make no argument at all why special protection of legal observers is even in the public interest, much less how their interests are to be distinguished from anyone else. Plaintiffs do argue that covering the police response in Portland is of unique public interest and importance. Pls.’ Mot. at 16 (“It would be difficult to identify a situation in which the public has a greater interest in unbiased media coverage of police and Government conduct than this one.”). It is not at all clear that it is appropriate for the Court to weigh the importance of press coverage of this protest compared to others—or how one should weigh the importance of protesting versus newsgathering—but if it were, it would also be necessary to weigh the unique danger present here of over 50 nights of protests that have routinely descended into violence and the destruction of federal property and harm to federal law enforcement officers, including the attempted destruction of the *interior* of the federal courthouse.

Additionally, the hardships the injunction would impose clearly weigh against granting it. As discussed above, Plaintiffs have failed to demonstrate that the injunction would tangibly benefit their newsgathering. By contrast, federal officers would be seriously distracted from defending themselves from attack and from restoring order and protecting property.

Accordingly, both the public interest and the balance of the equities weigh in favor of denying the injunction.

### **CONCLUSION**

For the foregoing reasons, Plaintiffs' motion for a Temporary Restraining Order and Preliminary Injunction should be denied.

Dated: July 21, 2020

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DECLARATION OF GABRIEL RUSSELL

I, Gabriel Russell, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. This declaration is based on my personal knowledge and information made available to me in the course of my official duties.
2. I am the Federal Protective Service (FPS) Regional Director for Region 10. In that role, I supervise the Federal Protective Service in the states of Washington, Oregon, Idaho, and Alaska. I also command the US Department of Homeland Security (“DHS”) Rapid Deployment Force for Operation Diligent Valor in Portland Oregon.
3. Protests have been ongoing regularly in downtown Portland since May 26, 2020. These daily protests have regularly been followed by nightly criminal activity in the form of vandalism, destruction of property, looting, arson, and assault.
4. Federal buildings and property have been the targets of many of these attacks, including the Mark O. Hatfield Federal Courthouse, the Pioneer Federal Courthouse, the Gus Solomon Federal Courthouse, the Immigration and Customs Enforcement (“ICE”) Building, and the Edith Green Wendall Wyatt Federal Office Building. Officers protecting these properties have also been subject to threats, rocks and ball bearings fired with wrist rockets, improvised explosives, aerial fireworks, and commercial grade mortars, high intensity lasers targeting officer’s eyes, thrown rocks, full and empty glass bottles, and balloons filled with paint and other substances such as feces. The most serious injury to date occurred when an officer was struck in the head and shoulder by a protestor wielding a two-pound sledgehammer when the officer tried to prevent the protestor from breaking down a door to the Hatfield Courthouse. In addition, an officer was hit in the leg with a marble or ball bearing shot from a high-powered wrist rocket or air gun, resulting in a wound down to the bone. To date, twenty-eight federal law enforcement officers have experienced injuries during the rioting to include broken bones, hearing damage, eye damage, a dislocated shoulder, sprains, strains and contusions.
5. In response to this increase in damage to federal property and assaults on federal law enforcement officers, DHS deployed more officers to Portland for the purposes of protecting federal buildings and property. There are currently one hundred and fourteen federal law enforcement officers from the FPS, ICE, Customs and Border Protection (CBP), and the US Marshals Service (USMS) protecting federal facilities in downtown Portland. From May 27th until July 3rd officers were stationed in a defensive posture intended to de-escalate tensions by remaining inside federal buildings and only responding to breach attempts or other serious crimes. This attempt to de-escalate was unsuccessful and an increasingly violent series of attacks culminated in a brazen attack to break into and set fire to the Hatfield Courthouse in the early morning hours of July 3, 2020. A team of violent individuals used teamwork and rehearsed tactics to breach the front entry of the Courthouse by smashing the glass entryway doors. The individuals threw balloons containing an accelerant liquid into the lobby and fired powerful commercial fireworks towards the accelerant in an apparent attempt to start a fire. In response to the increasingly violent attacks, on the morning of July 4th, the DHS Rapid



Deployment Force implemented tactics intended to positively identify and arrest serious offenders for crimes such as assault, while protecting the rights of individuals engaged in protected free speech activity.

6. On the evening of July 11, 2020 into the early morning of July 12, 2020, protesters near the Hatfield Courthouse grew to approximately 300 people. A barrier of police tape was established across the front of the Hatfield Courthouse and protesters were ordered not to trespass on federal property but refused to comply with that command. Commands were made utilizing a long-range acoustic device that is audible even with loud crowd noises. A joint team of FPS, CBP, and USMS deployed and made an arrest for trespass and protesters swarmed the officers. FPS officers deployed less-lethal projectile rounds to allow the arrest team to safely withdraw from federal property. The protestors responded by throwing items that posed a risk of officer injury, including rocks, glass bottles, and mortar-style fireworks, and pointing lasers at law enforcement personnel. One protester encroached on a police barrier, refused to leave, and became combative while detained. A crowd of protesters swarmed the officers and tear gas was deployed to protect officers as they withdrew to the Hatfield Courthouse. Another protester trespassed on the steps of the Hatfield Courthouse and when engaged by officers the subject swallowed a large number of narcotics. The subject began to convulse, and EMS was requested to treat the subject.
7. FPS gave protesters more warnings to stay off federal property, and to cease unlawful activity. Tear gas was deployed again to push protestors back from the Hatfield Courthouse. FPS contacted the Portland Police Bureau ("PPD") who informed us they were preparing to declare an unlawful assembly. By this time the size of the group had diminished to approximately 100 people. Federal law enforcement teams from Hatfield Courthouse and Edith Green Federal Building pushed the crowd towards the park across from the facilities. The PPD arrived and closed all roads in the vicinity of the facilities. There were multiple attacks throughout the night of commercial grade lasers against officers' eyes, thrown hard objects including rocks and glass bottles. Federal officers made seven arrests including three for assault on an officer and others for failure to comply with lawful orders. The PPD declared an unlawful assembly and began making arrests for failure to disperse. FPS also made dispersal orders on federal property and cleared persons refusing to comply with these orders at the same time.
8. All DHS law enforcement officers engaged in protecting federal facilities within Portland are doing so under the Secretary of Homeland Security's authority provided in 40 U.S.C. § 1315.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: July 21, 2020

*Gabriel Russell*

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GABRIEL RUSSELL

## UNITED STATES DISTRICT COURT

for the

District of Oregon

United States of America  
v.ROWAN M. OLSEN,  
aka KEIFER ALAN MOORE,

Case No. 3:20-mj-00147

Defendant(s)

**CRIMINAL COMPLAINT  
BY TELEPHONE OR OTHER RELIABLE ELECTRONIC MEANS**

I, the complainant in this case, state that the following is true to the best of my knowledge and belief.

On or about the date(s) of July 2, 2020 in the county of Multnomah in the  
District of Oregon, the defendant(s) violated:

<i>Code Section</i>	<i>Offense Description</i>
41 C.F.R. § 102.74.380(d);	Count 1: Creating a Hazard on Federal Property
41 C.F.R. § 102.74.390; and	Count 2: Disorderly Conduct on Federal Property
41 C.F.R. § 102.74.385	Count 3: Failing to Obey a Lawful Order

This criminal complaint is based on these facts:

See Attached Affidavit of Federal Protective Service SeniorSpecial Agent David Miller


☒ Continued on the attached sheet.

/s/ Signed IAW Fed. R. Crim. P. 4.1

Complainant's signature

David Miller, Special Agent, FPS

Printed name and title

Attested to by the applicant in accordance with the requirements of Fed. R. Crim. P. 4.1 by  
telephone at 5:44 ~~xxxx~~/p.m.Date: July 4, 2020

Judge's signature

City and state: Portland, Oregon

HON. YOULEE YIM YOU, U.S. Magistrate Judge

Printed name and title

1. I am employed as a Special Agent (SA) with the Federal Protective Service (FPS) and have been employed by FPS since October 2009. I have participated in several investigations relating to the protection of federal facilities and personnel. I am currently assigned to Region 10 in Portland, Oregon as a general crimes agent and in the capacity of a part time Task Force Officer for the United States Marshals Service (USMS) Pacific Northwest Violent Offender Task Force, part time investigator for the FPS Office of Internal Investigations (OII) and liaison for the Federal Bureau of Investigation (FBI) Joint Terrorism Task Force (JTTF) . I was previously a Special Agent with the Naval Criminal Investigative Service (NCIS) serving as a member of the Major Crimes Response Team (MCRT) and Foreign Counterintelligence agent from April 2006 until October 2009. I am a former Special Agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) in Yakima, Washington having been employed from September 2002 until April 2006. Before the positions listed, I have been a former Federal Air Marshal, ATF Inspector, Honolulu Police Officer, Salina Police Officer and Great Bend Police Officer and started my law enforcement career in 1991. I graduated from the FPS Advanced Individual Training Program in November 2009. I graduated from the NCIS Advanced Individual Academy in 2006. I graduated from the ATF National Academy in June of 2003. I graduated from the Federal Law Enforcement Training Center Criminal Investigator Course in March of 2003. I graduated from the Federal Law Enforcement

Training Center Civil Aviation Security Specialist Course in February of 2002 and the ATF Inspector Course in January of 2001. I graduated from the Honolulu Police Department Academy in June of 1999 and the Kansas Law Enforcement Training Academy in January of 1994. I graduated from the U.S. Army Military Intelligence Officer Basic Course in August of 1996 and the U.S. Army Military Intelligence Enlisted Course in February of 1988. I received a bachelor's degree in Social Sciences at Emporia State University in 1992 and an Associate Degree in Criminal Justice at Barton County Community College in 1995. As a result of training and experience as an FPS Special Agent, I am familiar with Federal laws.

2. I submit this affidavit in support of a criminal complaint and arrest warrant for Rowan M. Olsen (OLSEN). As set forth below, there is probable cause to believe, and I do believe, that OLSEN committed the following offenses: Creating a Hazard on Federal Property in violation of 41 C.F.R. § 102.74.380(d), Disorderly Conduct on Federal Property in violation of 41 C.F.R. § 102.74.390, and Failing to Obey a Lawful Order in violation of 41 C.F.R. § 102.74.385.

3. The facts set forth in this affidavit are based on the following: my own personal knowledge, knowledge obtained from other individuals during my participation in this investigation, including other law enforcement officers, interviews of witnesses, my review of records related to this investigation, communication with others who have knowledge of the events and circumstances described herein, and information gained through my training and experience. Because this affidavit is submitted for the limited purpose of establishing probable cause in support of the application for an arrest warrant, it does not set forth each fact that I or others have learned during this investigation.

**Applicable Law**

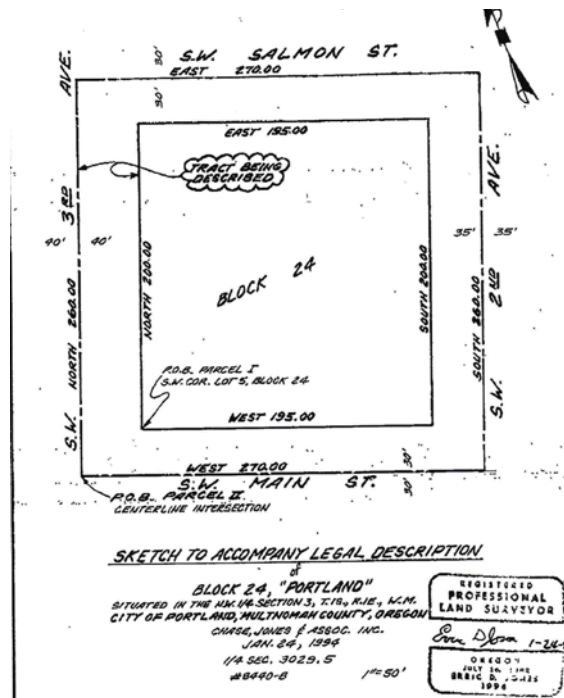
4. Subject Offenses: I believe probable cause exists that Rowen M. Olsen committed the following offenses:

- 41 C.F.R. 102-74-380(d) (Creating a Hazard on Federal Property): provides that all persons on federal property are prohibited from creating any hazard on property to persons and things.
- 41 C.F.R. 102-74.390(a), (b) and (c) (Disorderly Conduct): provides that all persons on federal property are prohibited from loitering, exhibiting disorderly conduct or exhibiting other conduct on property that (a) creates loud or unusual noise or nuisance; (b) unreasonably obstructs the usual use of entrances, foyers, lobbies, corridors, offices, elevators, stairways or parking lots; and (c) otherwise impedes or disrupts the performance of official duties by Government employees.
- 41 C.F.R. 102-74.385 (Failing to Obey a Lawful Order): provides in pertinent part that persons in and on federal property must at all times comply with the lawful direction of Federal police officers and other authorized individuals.

**Statement of Probable Cause**

5. Since on or about May 26, 2020, protesters have gathered in Portland public areas to protest. Three of these public areas are Lownsdale Square, Chapman Square and Terry Schrunk Plaza. The Portland Justice Center, housing Portland Police Bureau's (PPB) Central Precinct and the Multnomah County Detention Center (MCDC), border these parks, as does the

Mark O. Hatfield United States Federal Courthouse<sup>1</sup>. The United States of America owns the entire city block (Block #24) occupied by the courthouse building depicted below:



Daily protests have regularly been followed by nightly criminal activity in the form of vandalism, destruction of property, looting, arson, and assault. Most violent of these impacting federal property occurred on May 28, 2020, when the Portland Field Office for the Immigration and Customs Enforcement (ICE) was targeted by a Molotov Cocktail. The Mark O. Hatfield Courthouse has experienced significant damage to the façade and building fixtures during the six weeks following this incident. Additionally, mounted building security cameras and access control devices have been vandalized or stolen. The most recent repair estimate for the damage at the Mark O. Hatfield Courthouse is in excess of \$50,000. Other federal properties in the area

<sup>1</sup> As part of my duties, I am familiar with the property boundaries for federal facilities in the Portland Oregon area. The federal government owns the entire city block occupied by the Mark O. Federal Courthouse. Easements have been granted for the sidewalks surrounding the facility. The property boundary extends past the sidewalks and into the streets surrounding the courthouse.

routinely being vandalized include the historic Pioneer Federal Courthouse, the Gus Solomon Courthouse, and the Edith Green Wendall Wyatt Federal Office Building. FPS law enforcement officers, US Marshal Service Deputies and other federal law enforcement officers working in the protection of the Mark O. Hatfield Courthouse have been subjected to threats, aerial fireworks including mortars, high intensity lasers targeting officer's eyes, thrown rocks, bottles and balloons filled with paint, and vulgar language from demonstrators while performing their duties.

6. On July 2, 2020, OLSEN obstructed, impeded, and interfered with FPS and USMS during the performance of their official duties in protecting federal property, namely the Mark O. Hatfield Federal Courthouse. OLSEN entered onto the federal property and used his body to push on and hold a door being used by officers closed preventing the officers from exiting the building. These actions contributed to the glass door breaking, injuring a Deputy US Marshal, and compromised the security integrity of the Federal Courthouse. With the door broken, officers were subject to projectiles from demonstrators, to include a mortar firework which detonated amongst them. Officers used a riot shield and their bodies to block the open doorway for approximately six hours until the demonstrators were dispersed, and the broken door replaced with plywood.

7. On July 3, 2020, at approximately 1:44 a.m., Special Agents (SAs) David Miller and Micah Coring interviewed Deputy United States Marshal (DUSM) Alexander Penvela at the Hatfield USCH. DUSM Penvela related he was at the front glass door entrance of the Hatfield Courthouse at approximately 11:38 p.m. with other DUSMS and officers of the Federal Protective Service. Protestors had begun coming to the door and attempted to pull on the door and interfere with operations. DUSM Penvela was holding onto the door and an unknown white

male, later identified as OLSEN, was tugging on the glass door. Another unknown subject placed a 2"x4" wood board into the glass doorway during the standoff and the door completely shattered. It was several minutes before any attempt was made to arrest OLSEN due to the agitated crowd outside the courthouse entrance. When it became safe, an arresting team went outside and grabbed OLSEN, with all of them ending up on the ground. OLSEN was kicking his legs in an apparent attempt to get up and escape. DUSM Penvela grabbed OLSEN'S legs while two other DUSMs handcuffed him and carried OLSEN'S upper torso. OLSEN was carried into the courthouse and subsequently placed into a USMS detention cell. OLSEN was surprisingly quiet and did not utter any words during the arrest. DUSM Penvela sustained small lacerations on both hands and arms from the shattered glass door.

8. On July 3, 2020, at approximately 4:50 a.m., SA Miller and SA Coring interviewed DUSM Mitchell V. Batty at the Hatfield USCH. DUSM Batty related he was on the arrest team and OLSEN had been identified as the subject who had shattered the front glass door. Due to the aggressive crowd and safety concerns, the arrest team waited approximately 30 to 60 minutes after the door had been shattered before arresting OLSEN. When the command was given, the arrest team went outside and DUSM Batty put his arms around OLSEN and they subsequently ended up on the ground. DUSM Batty helped handcuff the subject and bring OLSEN into the building.

9. On July 3, 2020, at approximately 5 a.m., SA Miller and SA Coring interviewed DUSM Troy Gangwisch at the Hatfield USCH. DUSM Gangwisch related it was extremely chaotic due to the aggressive crowd and fireworks being shot towards the law enforcement personnel. DUSM Gangwisch described a wrestling match at the front glass door between the



USMS and protestors. He saw a shirtless white male, later identified as OLSEN, at the glass door when it shattered. OLSEN left the immediate area but later returned. A female FPS officer (Inspector Stephanie Blasingame) pointed out OLSEN as the person responsible for shattering the glass. The arrest team went outside and grabbed OLSEN. OLSEN initially resisted by refusing to place his arms behind his back with DUSM Gangwisch placing OLSEN's left arm behind his back and OLSEN then allowed his right arm to go behind his back. OLSEN was handcuffed and brought into the courthouse and was subsequently taken to a USMS holding cell on the fourth floor for processing.

10. On July 3, 2020, at approximately 5:30 a.m., SA Miller interviewed Protective Security Officer (PSO) David Ide at the Hatfield USCH. PSO Ide related he observed several protestors attacking the front glass door of the USCH and a tug of war ensued between protestors and DUSMs. PSO Ide believes he saw a white shirtless male possibly wedge a skateboard between the glass door and glass wall which caused the glass door to shatter. The DUSMs subsequently went outside and arrested the subject and brought him inside the USCH.

11. On July 3, 2020, at approximately 10:33pm, Federal Protective Service (FPS) Inspector Stephanie Blasingame provided a typed narrative to SA Miller which is summarized below:

At approximately 2330 hours, she observed a male subject, later identified as OLSEN, wearing camouflage pants, no shirt and carrying a skateboard. He walked on to Federal property and approached the entrance doors closest to the north side of the building. OLSEN walked up to the entrance and began yelling "Fuck you" and other unintelligible words at the officers standing inside the entrance. FPS Inspector O'NEAL gave several trespass warnings to OLSEN and

dispersed him from the property using the Pepper ball Launcher System (PLS). OLSEN ran west towards Lonsdale Park after being dispersed but returned minutes later. OLSEN again approached the building entrance doors and began to yell at officers through the glass doors. He then placed his right arm on the door, attempting to force the door to stay closed. A few moments later, an unidentified female subject approached the doorway and slid a long wooden 2" x 4" into the bottom portion handles of the door attempting to barricade the door shut and prevent the law enforcement officers from egressing the courthouse. Simultaneously, a USMS Deputy Marshal was pushing on the handle of the door from the interior attempting to open the door and prevent the placement of the 2" x 4". OLSEN continued to keep his right arm on the right side of the door and attempted to hold it shut to ensure the female subject could barricade the door. The pressure between the 2" x 4" placement, the door being pushed from the inside, and OLSEN's attempt to keep the door shut caused the door to crack under the pressure and shatter completely. OLSEN along with the female subject and two other unknown subjects who were on property ran west towards the park. A few minutes later, OLSEN returned to the property. At that time, the USMS determined that they were going to exit the building to take OLSEN into custody. At approximately 2340 hours, the USMS, along with FPS, exited the facility. The USMS took custody of OLSEN while FPS provided perimeter security. The DUSMs subsequently transported OLSEN to the holding cell.

12. On July 3, 2020, at approximately 5:55am, SA Miller and SA Coring identified themselves to OLSEN with their agency issued credentials, who was being held in a USMS detention cell on the 4th floor of the Hatfield USCH. SA Miller asked OLSEN if he was willing to provide a statement and he stated he did wish to provide a verbal statement.

SA Coring activate his agency issued Olympus Digital Voice Recorder model WS-500M and read the preamble to OLSEN. SA Miller then verbally advised OLSEN of his Miranda Rights. OLSEN again agreed to provide a verbal statement.

OLSEN verbally identified himself as Kiefer Alan Moore with a date of birth of May 5, 1996 and had possession of an Oregon drivers license of Moore but contained a photograph that did not match OLSEN. OLSEN's statement is summarized below:

He is a peaceful person who has been victimized by law enforcement in the past. He did not touch the glass door of the USCH at any time nor was he near enough to the door to affect it in any way but did have to get back from the same glass door to insure he was not injured by the door. He stated a cop tried to push a door out and he didn't want to be hit by the door. He did want to get close enough to speak to the officers. SA Miller asked if he heard any verbal warnings to leave federal property and OLSEN stated he could not hear due to the masks the officers were wearing. OLSEN related he believed an officer inside the courthouse purposely broke the glass door. OLSEN motioned a punch with a closed fist and stated the officer was probably frustrated and punched out the glass door. OLSEN showed the back of both his hands and complained of being injured but was not going to sue. SA Miller observed a small amount of dried blood on some of OLSEN'S fingers and back of his hand with minor scratches. SA Miller asked OLSEN how he had been injured on his hands and OLSEN related it happened when he was arrested and slammed to the ground with broken glass on the ground. SA Miller observed no other injuries, lacerations or blood anywhere else on OLSEN'S body and OLSEN did not indicate any other injuries besides the back of his hands.

13. The U.S. Federal Courthouse has an extensive video surveillance system that records many parts of the Hatfield Courthouse. I was able to review some of the security footage from this incident. From my review of the footage, the timestamp of the surveillance shows 11:38pm when OLSEN engages with USMS Deputies at the lobby entrance. The video is from above and behind three subjects facing the glass doors to the building's lobby. The three subjects are attired in dark or black clothing. One subject is holding a camera to the glass, a second is kneeling and using a skateboard as a shield, and a third pointing an open black umbrella at the glass doors. Bright flashing strobe lights and green laser beams are being shined on the front doors and the officers inside. The following photos are screen captures from the Hatfield security cameras from the night of the incident:

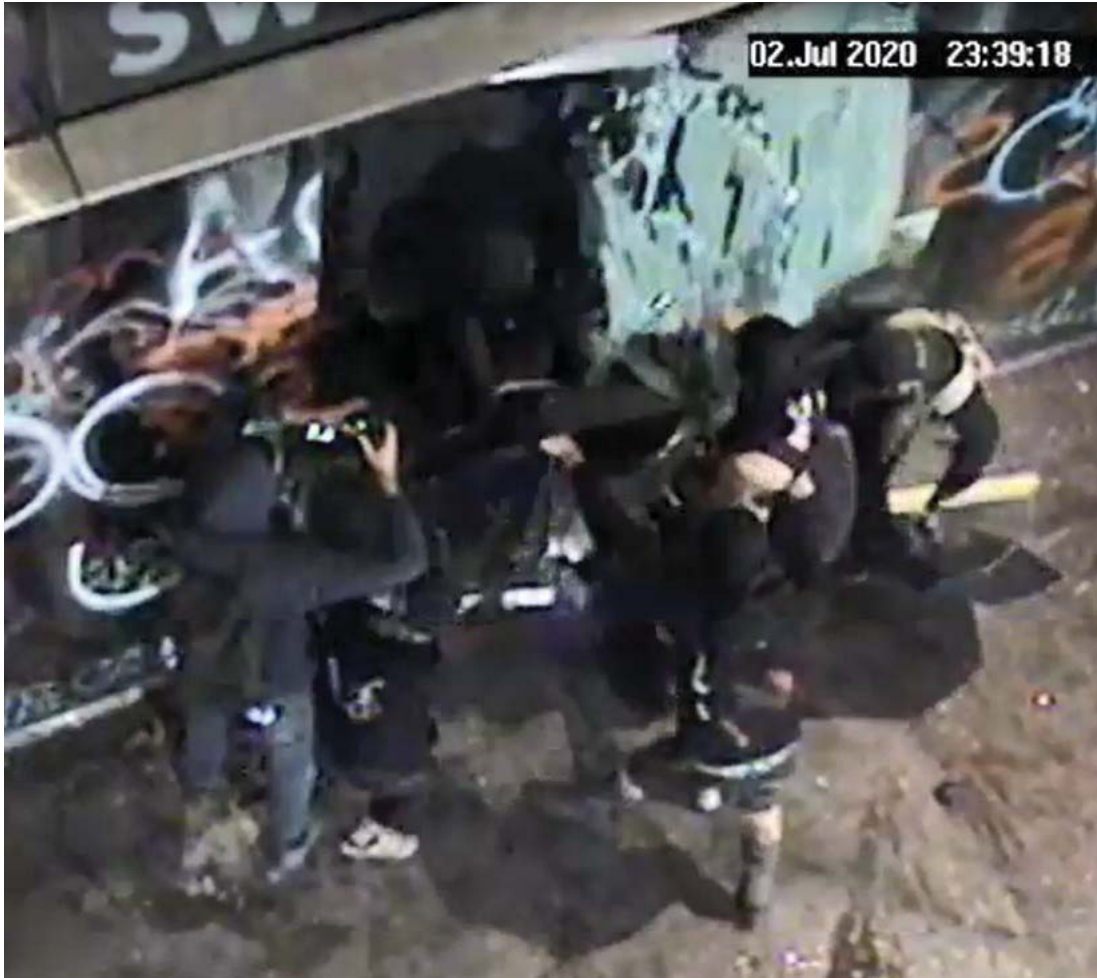


*Flashing strobe lights and green lasers aimed at officers*

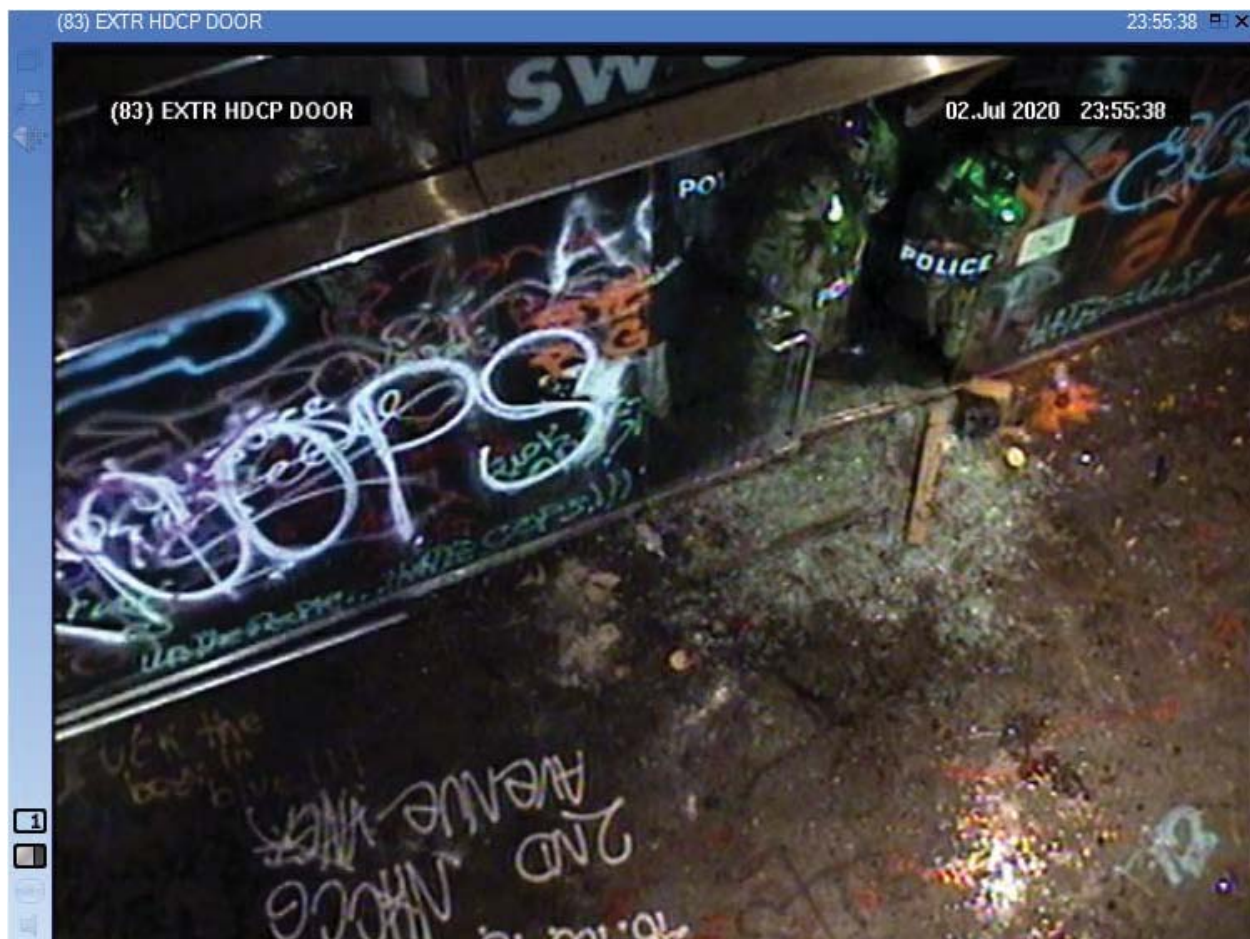


*Olsen (second from right) is shirtless holding the doors shut as the wood is placed to bar the doors closed*





*Door shatters*



*Officers standing the in the entry securing the facility with their bodies and riot shields*

From the video, OLSEN approaches the front doors. He is shirtless, wearing a black backpack, carrying a guitar and skateboard. An officer inside the building pushes OLSEN back with the door twice. OLSEN places his right hand to the door and shortly after, his right forearm in an apparent attempt to keep officers from opening the door. A second person in dark clothing with a camera joins the group at the front doors, shining a bright light on the glass and officers inside. A fifth person wearing dark clothing enters the video from the south carrying a 2" x 4" piece of lumber which they push along the bottom of the door. Officers and OLSEN begin pushing back and forth on the door and the door shatters seconds later. During the next 10 minutes of video, a

mortar firework is thrown into the lobby and detonates amongst the officers, strobe lights and green lasers continue to be employed by demonstrators. OLSEN is seen moving in and out of the area, appearing to yell and point at officers. At times OLSEN is within 20-30 feet of officers. With the door now breached, the officers were exposed to commercial grade fireworks that were launched from the crowd at the entry of the Courthouse:



*Commercial grade fireworks launched into the entry of the Courthouse*

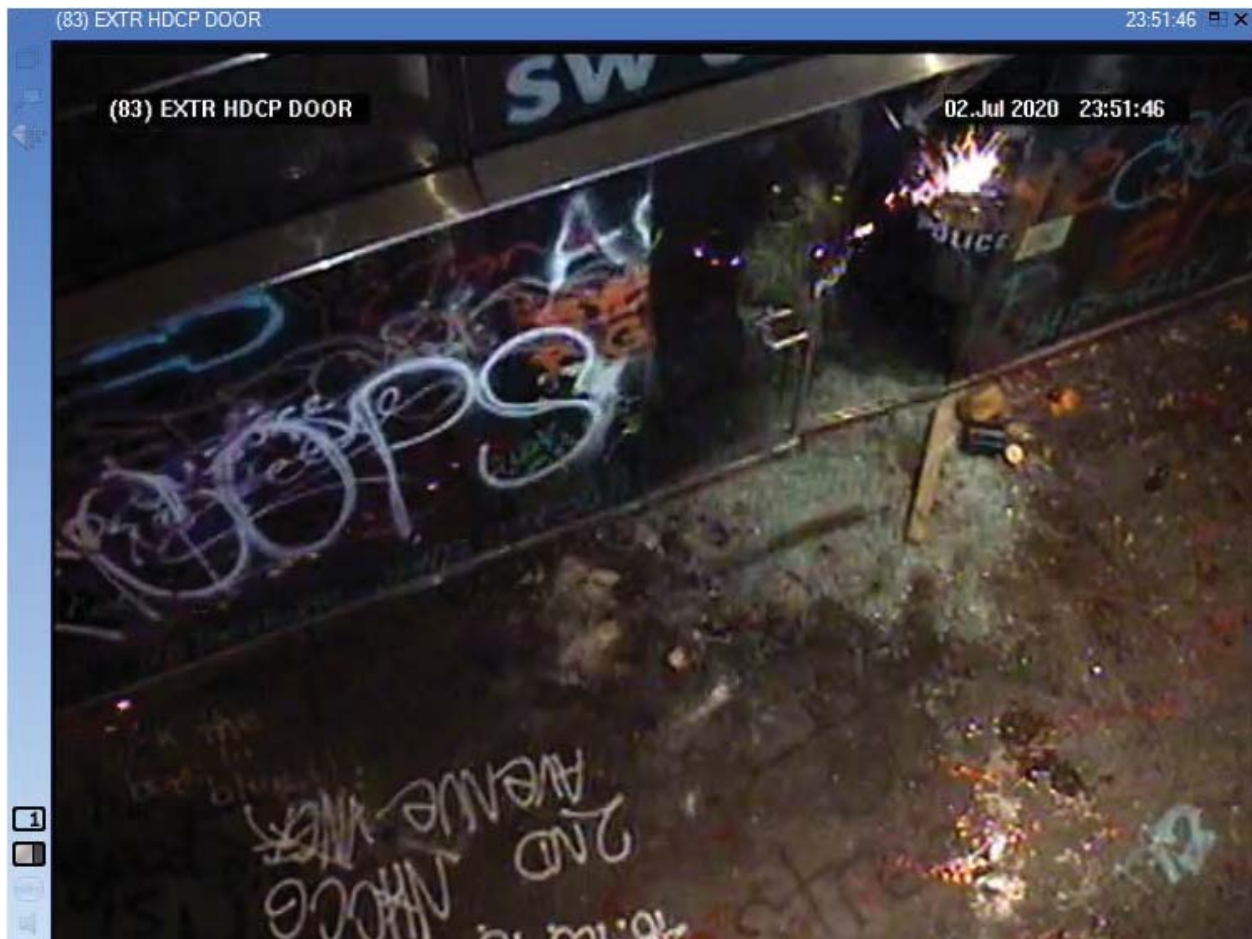




*Fireworks detonating in the entryway*



*Fireworks launched into the open doorway detonating inside the Courthouse*



*Roman candle detonating at the officers with shields in the doorway*





*Individual with camera pointed at officers standing in the doorway as a Roman candle detonates at the officers*

At timestamp 11:48 p.m., officers using a shield and deploying less-lethal weapon systems, move out of the lobby and take OLSEN into custody.

### **Conclusion**

14. Based on the foregoing, I have probable cause to believe, and I do believe, that Rowan M. OLSEN committed the following offenses: Creating a Hazard on Federal Property in violation of 41 C.F.R. § 102.74.380(d), Disorderly Conduct on Federal Property in violation of 41 C.F.R. § 102.74.390, and Failing to Obey a Lawful Order in violation of 41 C.F.R.

§ 102.74.385. I therefore request that the Court issue a criminal complaint and arrest warrant for Rowan M. OLSEN.

15. Prior to being submitted to the Court, this affidavit, the accompanying complaint and the arrest warrant were all reviewed by Assistant United States Attorney (AUSA) Paul T. Maloney, and AUSA Maloney advised me that in his opinion the affidavit and complaint are legally and factually sufficient to establish probable cause to support the issuance of the requested criminal complaint and arrest warrant.

*/s/ Sworn to by telephone*  
*In accordance with Fed. R. Crim. P. 4.1*  
 David MILLER  
 Senior Special Agent  
 Federal Protective Service

Sworn to by telephone or other reliable means at 5:44 ~~xxx~~/p.m. in accordance with Fed. R. Crim. P. 4.1 this 4th day of July 2020.

*Youlee Yim You*  
 \_\_\_\_\_  
 HONORABLE YULEE YIM YOU  
 United States Magistrate Judge

DISTRICT OF OREGON                 )  
County of Multnomah               ) ss: AFFIDAVIT OF SENIOR SPECIAL AGENT  
DAVID MILLER

# Affidavit in Support of a Criminal Complaint and Arrest Warrant

I, David Miller, being duly sworn, do hereby depose and state as follows:

## Introduction and Agent Background

1. I am employed as a Special Agent (SA) with the Federal Protective Service (FPS) and have been employed by FPS since October 2009. I have participated in several investigations relating to the protection of federal facilities and personnel. I am currently assigned to Region 10 in Portland, Oregon as a general crimes agent and in the capacity of a part time Task Force Officer for the United States Marshals Service (USMS) Pacific Northwest Violent Offender Task Force, part time investigator for the FPS Office of Internal Investigations (OII) and liaison for the Federal Bureau of Investigation (FBI) Joint Terrorism Task Force (JTTF) . I was previously a Special Agent with the Naval Criminal Investigative Service (NCIS) serving as a member of the Major Crimes Response Team (MCRT) and Foreign Counterintelligence agent from April 2006 until October 2009. I am a former Special Agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) in Yakima, Washington having been employed from September 2002 until April 2006. Before the positions listed, I have been a former Federal Air Marshal, ATF Inspector, Honolulu Police Officer, Salina Police Officer and Great Bend Police Officer and started my law enforcement career in 1991. I graduated from the FPS Advanced Individual Training Program in November 2009. I graduated from the NCIS Advanced Individual Academy in 2006. I graduated from the ATF National Academy in June of 2003. I graduated from the Federal Law Enforcement Training Center Criminal Investigator Course in March of 2003. I graduated from the Federal Law Enforcement

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2. I submit this affidavit in support of a criminal complaint and arrest warrant for Rowan M. Olsen (OLSEN). As set forth below, there is probable cause to believe, and I do believe, that OLSEN committed the following offenses: Creating a Hazard on Federal Property in violation of 41 C.F.R. § 102.74.380(d), Disorderly Conduct on Federal Property in violation of 41 C.F.R. § 102.74.390, and Failing to Obey a Lawful Order in violation of 41 C.F.R. § 102.74.385.

3. The facts set forth in this affidavit are based on the following: my own personal knowledge, knowledge obtained from other individuals during my participation in this investigation, including other law enforcement officers, interviews of witnesses, my review of records related to this investigation, communication with others who have knowledge of the events and circumstances described herein, and information gained through my training and experience. Because this affidavit is submitted for the limited purpose of establishing probable cause in support of the application for an arrest warrant, it does not set forth each fact that I or others have learned during this investigation.

### **Applicable Law**

4. Subject Offenses: I believe probable cause exists that Rowen M. Olsen committed the following offenses:

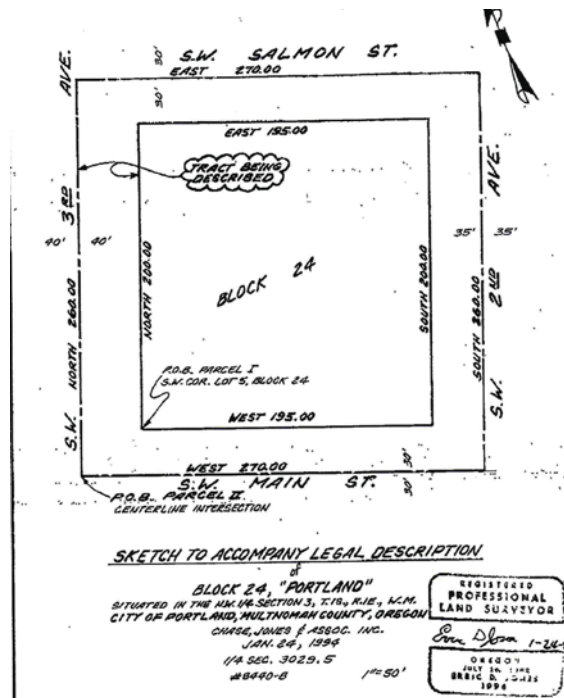
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### **Statement of Probable Cause**

5. Since on or about May 26, 2020, protesters have gathered in Portland public areas to protest. Three of these public areas are Lownsdale Square, Chapman Square and Terry Schrunk Plaza. The Portland Justice Center, housing Portland Police Bureau's (PPB) Central Precinct and the Multnomah County Detention Center (MCDC), border these parks, as does the



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<sup>1</sup> As part of my duties, I am familiar with the property boundaries for federal facilities in the Portland Oregon area. The federal government owns the entire city block occupied by the Mark O. Federal Courthouse. Easements have been granted for the sidewalks surrounding the facility. The property boundary extends past the sidewalks and into the streets surrounding the courthouse.

routinely being vandalized include the historic Pioneer Federal Courthouse, the Gus Solomon Courthouse, and the Edith Green Wendall Wyatt Federal Office Building. FPS law enforcement officers, US Marshal Service Deputies and other federal law enforcement officers working in the protection of the Mark O. Hatfield Courthouse have been subjected to threats, aerial fireworks including mortars, high intensity lasers targeting officer's eyes, thrown rocks, bottles and balloons filled with paint, and vulgar language from demonstrators while performing their duties.

6. On July 2, 2020, OLSEN obstructed, impeded, and interfered with FPS and USMS during the performance of their official duties in protecting federal property, namely the Mark O. Hatfield Federal Courthouse. OLSEN entered onto the federal property and used his body to push on and hold a door being used by officers closed preventing the officers from exiting the building. These actions contributed to the glass door breaking, injuring a Deputy US Marshal, and compromised the security integrity of the Federal Courthouse. With the door broken, officers were subject to projectiles from demonstrators, to include a mortar firework which detonated amongst them. Officers used a riot shield and their bodies to block the open doorway for approximately six hours until the demonstrators were dispersed, and the broken door replaced with plywood.

7. On July 3, 2020, at approximately 1:44 a.m., Special Agents (SAs) David Miller and Micah Coring interviewed Deputy United States Marshal (DUSM) Alexander Penvela at the Hatfield USCH. DUSM Penvela related he was at the front glass door entrance of the Hatfield Courthouse at approximately 11:38 p.m. with other DUSMS and officers of the Federal Protective Service. Protestors had begun coming to the door and attempted to pull on the door and interfere with operations. DUSM Penvela was holding onto the door and an unknown white

male, later identified as OLSEN, was tugging on the glass door. Another unknown subject placed a 2"x4" wood board into the glass doorway during the standoff and the door completely shattered. It was several minutes before any attempt was made to arrest OLSEN due to the agitated crowd outside the courthouse entrance. When it became safe, an arresting team went outside and grabbed OLSEN, with all of them ending up on the ground. OLSEN was kicking his legs in an apparent attempt to get up and escape. DUSM Penvela grabbed OLSEN'S legs while two other DUSMs handcuffed him and carried OLSEN'S upper torso. OLSEN was carried into the courthouse and subsequently placed into a USMS detention cell. OLSEN was surprisingly quiet and did not utter any words during the arrest. DUSM Penvela sustained small lacerations on both hands and arms from the shattered glass door.

8. On July 3, 2020, at approximately 4:50 a.m., SA Miller and SA Coring interviewed DUSM Mitchell V. Batty at the Hatfield USCH. DUSM Batty related he was on the arrest team and OLSEN had been identified as the subject who had shattered the front glass door. Due to the aggressive crowd and safety concerns, the arrest team waited approximately 30 to 60 minutes after the door had been shattered before arresting OLSEN. When the command was given, the arrest team went outside and DUSM Batty put his arms around OLSEN and they subsequently ended up on the ground. DUSM Batty helped handcuff the subject and bring OLSEN into the building.

9. On July 3, 2020, at approximately 5 a.m., SA Miller and SA Coring interviewed DUSM Troy Gangwisch at the Hatfield USCH. DUSM Gangwisch related it was extremely chaotic due to the aggressive crowd and fireworks being shot towards the law enforcement personnel. DUSM Gangwisch described a wrestling match at the front glass door between the

USMS and protestors. He saw a shirtless white male, later identified as OLSEN, at the glass door when it shattered. OLSEN left the immediate area but later returned. A female FPS officer (Inspector Stephanie Blasingame) pointed out OLSEN as the person responsible for shattering the glass. The arrest team went outside and grabbed OLSEN. OLSEN initially resisted by refusing to place his arms behind his back with DUSM Gangwisch placing OLSEN's left arm behind his back and OLSEN then allowed his right arm to go behind his back. OLSEN was handcuffed and brought into the courthouse and was subsequently taken to a USMS holding cell on the fourth floor for processing.

10. On July 3, 2020, at approximately 5:30 a.m., SA Miller interviewed Protective Security Officer (PSO) David Ide at the Hatfield USCH. PSO Ide related he observed several protestors attacking the front glass door of the USCH and a tug of war ensued between protestors and DUSMs. PSO Ide believes he saw a white shirtless male possibly wedge a skateboard between the glass door and glass wall which caused the glass door to shatter. The DUSMs subsequently went outside and arrested the subject and brought him inside the USCH.

11. On July 3, 2020, at approximately 10:33pm, Federal Protective Service (FPS) Inspector Stephanie Blasingame provided a typed narrative to SA Miller which is summarized below:

At approximately 2330 hours, she observed a male subject, later identified as OLSEN, wearing camouflage pants, no shirt and carrying a skateboard. He walked on to Federal property and approached the entrance doors closest to the north side of the building. OLSEN walked up to the entrance and began yelling "Fuck you" and other unintelligible words at the officers standing inside the entrance. FPS Inspector O'NEAL gave several trespass warnings to OLSEN and

dispersed him from the property using the Pepper ball Launcher System (PLS). OLSEN ran west towards Lonsdale Park after being dispersed but returned minutes later. OLSEN again approached the building entrance doors and began to yell at officers through the glass doors. He then placed his right arm on the door, attempting to force the door to stay closed. A few moments later, an unidentified female subject approached the doorway and slid a long wooden 2" x 4" into the bottom portion handles of the door attempting to barricade the door shut and prevent the law enforcement officers from egressing the courthouse. Simultaneously, a USMS Deputy Marshal was pushing on the handle of the door from the interior attempting to open the door and prevent the placement of the 2" x 4". OLSEN continued to keep his right arm on the right side of the door and attempted to hold it shut to ensure the female subject could barricade the door. The pressure between the 2" x 4" placement, the door being pushed from the inside, and OLSEN's attempt to keep the door shut caused the door to crack under the pressure and shatter completely. OLSEN along with the female subject and two other unknown subjects who were on property ran west towards the park. A few minutes later, OLSEN returned to the property. At that time, the USMS determined that they were going to exit the building to take OLSEN into custody. At approximately 2340 hours, the USMS, along with FPS, exited the facility. The USMS took custody of OLSEN while FPS provided perimeter security. The DUSMs subsequently transported OLSEN to the holding cell.

12. On July 3, 2020, at approximately 5:55am, SA Miller and SA Coring identified themselves to OLSEN with their agency issued credentials, who was being held in a USMS detention cell on the 4th floor of the Hatfield USCH. SA Miller asked OLSEN if he was willing to provide a statement and he stated he did wish to provide a verbal statement.

SA Coring activate his agency issued Olympus Digital Voice Recorder model WS-500M and read the preamble to OLSEN. SA Miller then verbally advised OLSEN of his Miranda Rights. OLSEN again agreed to provide a verbal statement.

OLSEN verbally identified himself as Kiefer Alan Moore with a date of birth of May 5, 1996 and had possession of an Oregon drivers license of Moore but contained a photograph that did not match OLSEN. OLSEN's statement is summarized below:

He is a peaceful person who has been victimized by law enforcement in the past. He did not touch the glass door of the USCH at any time nor was he near enough to the door to affect it in any way but did have to get back from the same glass door to insure he was not injured by the door. He stated a cop tried to push a door out and he didn't want to be hit by the door. He did want to get close enough to speak to the officers. SA Miller asked if he heard any verbal warnings to leave federal property and OLSEN stated he could not hear due to the masks the officers were wearing. OLSEN related he believed an officer inside the courthouse purposely broke the glass door. OLSEN motioned a punch with a closed fist and stated the officer was probably frustrated and punched out the glass door. OLSEN showed the back of both his hands and complained of being injured but was not going to sue. SA Miller observed a small amount of dried blood on some of OLSEN'S fingers and back of his hand with minor scratches. SA Miller asked OLSEN how he had been injured on his hands and OLSEN related it happened when he was arrested and slammed to the ground with broken glass on the ground. SA Miller observed no other injuries, lacerations or blood anywhere else on OLSEN'S body and OLSEN did not indicate any other injuries besides the back of his hands.

13. The U.S. Federal Courthouse has an extensive video surveillance system that records many parts of the Hatfield Courthouse. I was able to review some of the security footage from this incident. From my review of the footage, the timestamp of the surveillance shows 11:38pm when OLSEN engages with USMS Deputies at the lobby entrance. The video is from above and behind three subjects facing the glass doors to the building's lobby. The three subjects are attired in dark or black clothing. One subject is holding a camera to the glass, a second is kneeling and using a skateboard as a shield, and a third pointing an open black umbrella at the glass doors. Bright flashing strobe lights and green laser beams are being shined on the front doors and the officers inside. The following photos are screen captures from the Hatfield security cameras from the night of the incident:



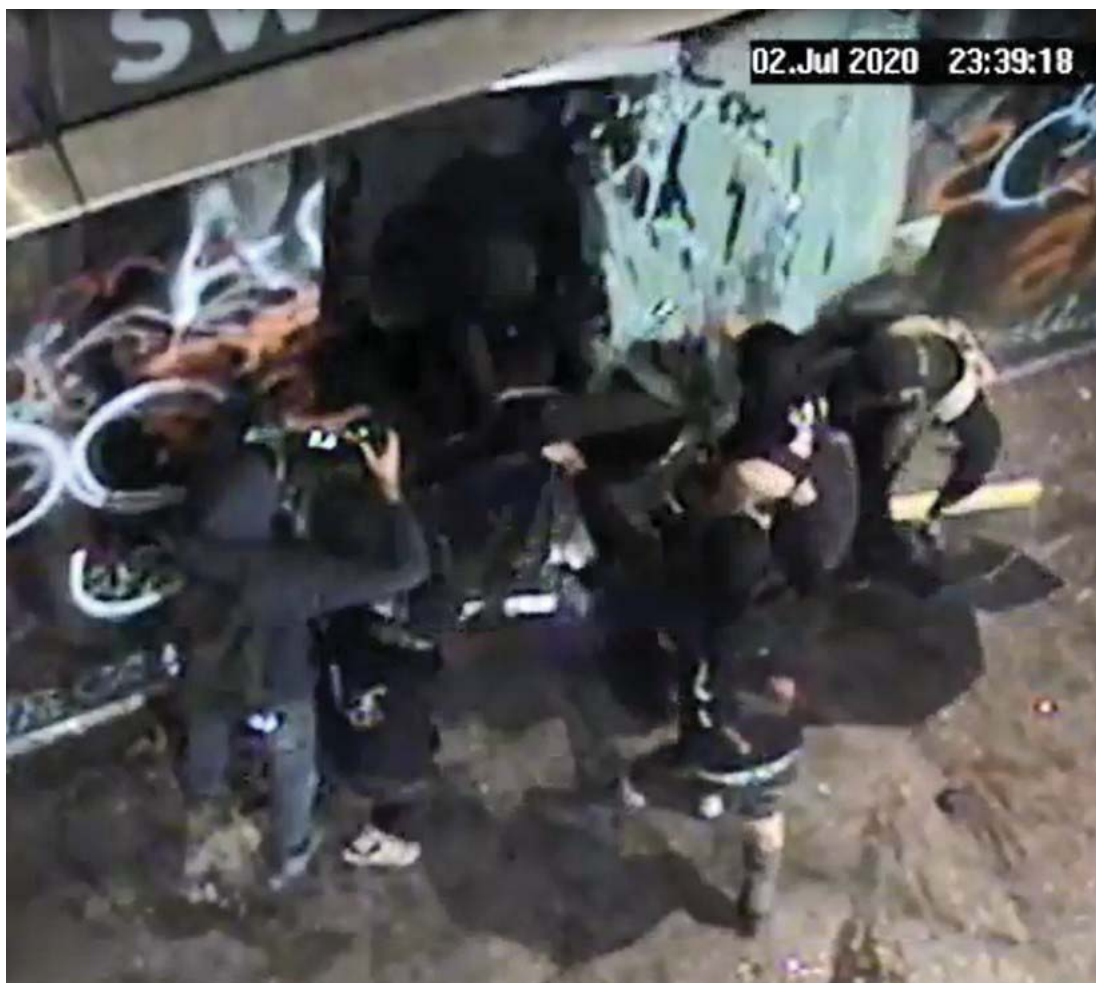
*Flashing strobe lights and green lasers aimed at officers*





*Olsen (second from right) is shirtless holding the doors shut as the wood is placed to bar the doors closed*





*Door shatters*



*Officers standing the in the entry securing the facility with their bodies and riot shields*

From the video, OLSEN approaches the front doors. He is shirtless, wearing a black backpack, carrying a guitar and skateboard. An officer inside the building pushes OLSEN back with the door twice. OLSEN places his right hand to the door and shortly after, his right forearm in an apparent attempt to keep officers from opening the door. A second person in dark clothing with a camera joins the group at the front doors, shining a bright light on the glass and officers inside. A fifth person wearing dark clothing enters the video from the south carrying a 2" x 4" piece of lumber which they push along the bottom of the door. Officers and OLSEN begin pushing back and forth on the door and the door shatters seconds later. During the next 10 minutes of video, a

mortar firework is thrown into the lobby and detonates amongst the officers, strobe lights and green lasers continue to be employed by demonstrators. OLSEN is seen moving in and out of the area, appearing to yell and point at officers. At times OLSEN is within 20-30 feet of officers. With the door now breached, the officers were exposed to commercial grade fireworks that were launched from the crowd at the entry of the Courthouse:



*Commercial grade fireworks launched into the entry of the Courthouse*

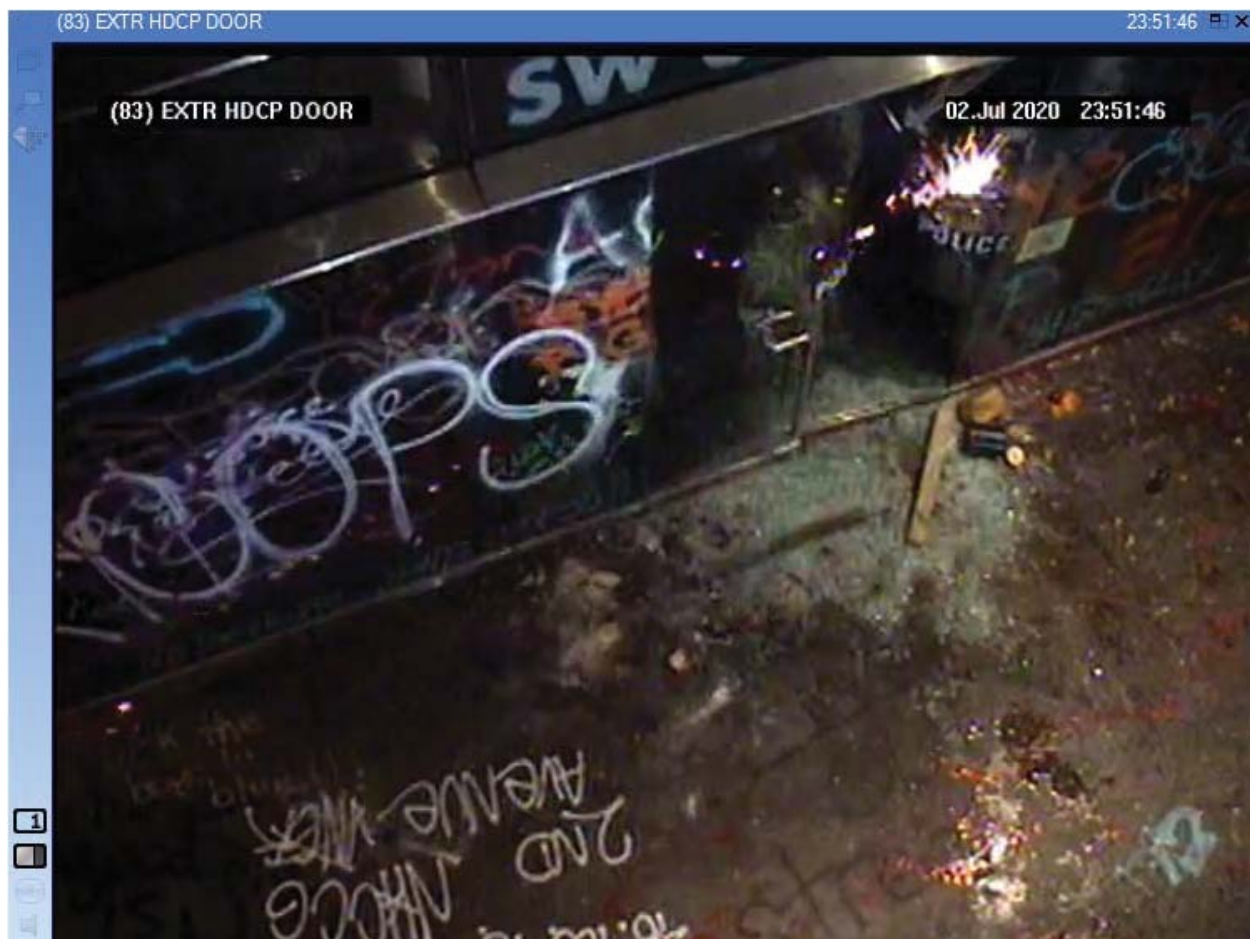




*Fireworks detonating in the entryway*



*Fireworks launched into the open doorway detonating inside the Courthouse*



*Roman candle detonating at the officers with shields in the doorway*





*Individual with camera pointed at officers standing in the doorway as a Roman candle detonates at the officers*

At timestamp 11:48 p.m., officers using a shield and deploying less-lethal weapon systems, move out of the lobby and take OLSEN into custody.

### **Conclusion**

14. Based on the foregoing, I have probable cause to believe, and I do believe, that Rowan M. OLSEN committed the following offenses: Creating a Hazard on Federal Property in violation of 41 C.F.R. § 102.74.380(d), Disorderly Conduct on Federal Property in violation of 41 C.F.R. § 102.74.390, and Failing to Obey a Lawful Order in violation of 41 C.F.R.

§ 102.74.385. I therefore request that the Court issue a criminal complaint and arrest warrant for Rowan M. OLSEN.

15. Prior to being submitted to the Court, this affidavit, the accompanying complaint and the arrest warrant were all reviewed by Assistant United States Attorney (AUSA) Paul T. Maloney, and AUSA Maloney advised me that in his opinion the affidavit and complaint are legally and factually sufficient to establish probable cause to support the issuance of the requested criminal complaint and arrest warrant.

*/s/ Sworn to by telephone*  
*In accordance with Fed. R. Crim. P. 4.1*  
David MILLER  
Senior Special Agent  
Federal Protective Service

Sworn to by telephone or other reliable means at 5:44 ~~xxx~~/p.m. in accordance with Fed. R. Crim. P. 4.1 this 4th day of July 2020.

*Youlee Yim You*  
\_\_\_\_\_  
HONORABLE YULEE YIM YOU  
United States Magistrate Judge





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THE UNITED STATES ATTORNEY'S OFFICE  
DISTRICT *of* OREGON

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**Department of Justice**

U.S. Attorney's Office

District of Oregon

FOR IMMEDIATE RELEASE

Tuesday, July 7, 2020

## **Seven Arrested, Facing Federal Charges After Weekend Riots at Hatfield Federal Courthouse (Photo)**

PORTLAND, Ore.—U.S. Attorney Billy J. Williams announced today that seven people have been arrested and face federal charges for their roles in weekend riots at the Mark O. Hatfield U.S. Courthouse in Portland.

According to court documents, since May 26, 2020, protests in downtown Portland have regularly been followed by nightly criminal activity including assaults on law enforcement officers, destruction of property, looting, arson, and vandalism.

Rowan Olsen, 19, of Portland, is charged with disorderly conduct, creating a hazard on federal property, and failing to obey a lawful order; Shant Singh Ahuja, 28, of Oceanside, California, is charged with destruction of federal property; and Andrew Steven Faulkner, 24, of Beaverton, Oregon; Gretchen Margaret Blank, 29, of Seattle, Washington; Christopher Fellini, 31, of Portland; Cody Porter, 28, of Portland; and Taimane Jame Teo, 24, of Eugene, Oregon, are charged with assaulting federal officers.

The Hatfield Federal Courthouse has been a repeated target of vandalism, sustaining extensive damage. U.S. Marshals Service deputies and officers from the Federal Protective Service, Homeland Security Investigations, and U.S. Customs and Border Protection working to protect the courthouse have been subjected to threats; aerial fireworks including mortars; high intensity lasers targeting officers' eyes; thrown rocks, bottles, and balloons filled with paint from demonstrators while performing their duties.

On July 2-3, 2020, Olsen is accused of using his body to push on and hold a glass door at the Hatfield Courthouse closed, preventing officers from exiting the building and causing the door to shatter. With the door broken, a mortar firework entered the courthouse, detonating near the officers. The officers used shields and their bodies to block the open doorway for approximately six hours until demonstrators dispersed.

On July 4, 2020, Ahuja is accused of willfully destroying a closed-circuit video camera mounted on the exterior of the Hatfield Courthouse.

On July 5, 2020, Blank is accused of assaulting a federal officer with a shield while the officer was attempting to arrest another protestor.

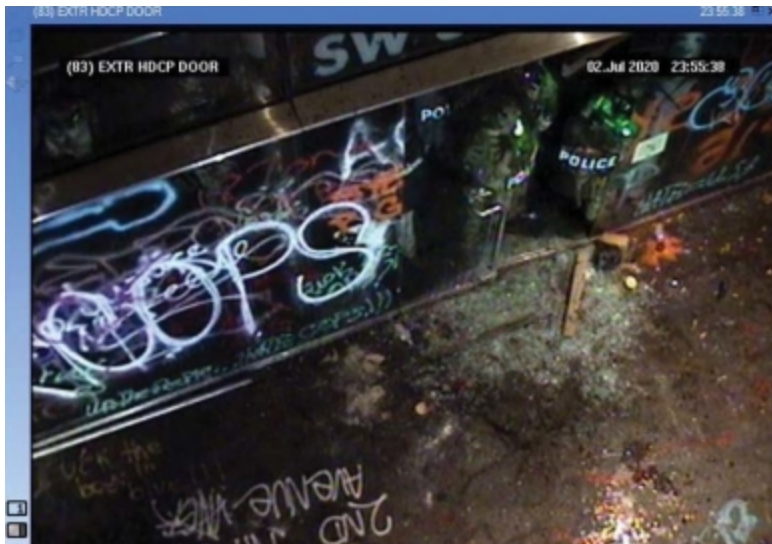
On July 5-6, 2020, Faulkner, Fellini, Porter, and Teo are accused of assaulting federal officers with high intensity lasers. At the time of his arrest, Faulkner also possessed a sheathed machete.

All seven defendants made their first appearances in federal court on July 6, 2020 and were released pending trial.

A criminal complaint is only an accusation of a crime, and a defendant is presumed innocent unless and until proven guilty.

These cases are being investigated jointly by the U.S. Marshals Service; FBI; U.S. Bureau of Alcohol, Tobacco, Firearms, and Explosives; Federal Protective Service; U.S. Customs and Border Protection; and Homeland Security Investigations.

The year 2020 marks the 150th anniversary of the Department of Justice. Learn more about the history of our agency at [www.Justice.gov/Celebrating150Years](http://www.Justice.gov/Celebrating150Years).



Glass courthouse door broken by Olsen



Pyrotechnic mortar exploding in courthouse lobby after glass door was broken by Olsen



Fellini possessions seized during arrest



Front of shield used by Blank to assault federal officer



Back of shield use by Blank to assault federal officer

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**Topic(s):**

Violent Crime

**Component(s):**

USAO - Oregon

Updated July 7, 2020

 Official website of the Department of Homeland Security



U.S. Department of  
Homeland Security

# Acting Secretary Wolf Condemns The Rampant Long- Lasting Violence In Portland

Release Date: July 16, 2020

“The city of Portland has been under siege for 47 straight days by a violent mob while local political leaders refuse to restore order to protect their city. Each night, lawless anarchists destroy and desecrate property, including the federal courthouse, and attack the brave law enforcement officers protecting it.

“A federal courthouse is a symbol of justice - to attack it is to attack America. Instead of addressing violent criminals in their communities, local and state leaders are instead focusing on placing blame on law enforcement and requesting fewer officers in their community. This failed response has only emboldened the violent mob as it escalates violence day after day.

“This siege can end if state and local officials decide to take appropriate action instead of refusing to enforce the law. DHS will not abdicate its solemn duty to protect federal facilities and those within them. Again, I reiterate the Department’s offer to assist local and state leaders to bring an end to the violence perpetuated by anarchists,” said Acting Secretary Chad Wolf

Below is a snapshot of the lawless destruction and violence of the past several weeks that Department of Homeland Security and its subcomponents of Immigration and Customs Enforcement, Customs and Border Protection, and Federal Protective Service have faced:

05/29/2020

- Violent anarchists broke a front window at the Hatfield Courthouse.
- Violent anarchists graffitied the Hatfield Courthouse.
- Overall, the cost of damages on federal property done by the violent mob this first night was estimated at \$5,000.

05/30/2020

- Violent anarchists graffitied the BPA Building.
- Violent anarchists graffitied the Hatfield Courthouse.
- Violent anarchists graffitied the Edith Green-Wenell Wyatt Building.
- Violent anarchists graffitied the Terry Schrunk Plaza.
- Violent anarchists graffitied the 911 Federal Building.
- Violent anarchists graffitied the Pioneer Courthouse.
- Violent anarchists graffitied the Gus J. Solomon Courthouse.

06/01/2020

- Violent anarchists graffitied the Hatfield Courthouse.
- Violent anarchists graffitied Terry Schrunk Plaza.
- Violent anarchists graffitied The Pioneer Courthouse.
- Violent anarchists graffitied The Gus J Solomon Courthouse.

06/02/2020

- Violent anarchists graffitied the U.S. Custom House.

06/06/2020

- Violent anarchists destroyed fencing surrounding federal property.

06/07/2020

- Violent anarchists damaged and breached the fence around the Hatfield Courthouse.



- Portland Police were forced to deploy crowd control spray to disperse a crowd that was throwing animal seed at officers.

06/08/2020

- Violent anarchists broke a window at the Hatfield Courthouse while pelting the building with objects.
- Violent anarchists cut a hole in the fence surrounding Hatfield Courthouse.

06/10/2020

- Violent anarchists removed the entire fence around Hatfield Courthouse and graffitied its front columns.
- Violent anarchists attempted to remove wooden barriers from a window on the Hatfield Courthouse.

06/11/2020

- Violent anarchists dismantled a section of the fence protecting the Edith Green-Wenell Wyatt Federal Building.

06/13/2020

- Violent anarchists destroyed the card reader at the Hatfield Courthouse by ripping it off its mount.
- Violent anarchists destroyed the fence at the Hatfield Courthouse.
- Violent anarchists threw metal pipes at the Hatfield Courthouse, causing Portland Police to issue a disbursal warning for unlawful assembly.

06/17/2020

- Violent anarchists graffitied the Hatfield Courthouse.

06/20/2020

- Among a group of over 400 protesters marching in front of the Pioneer Courthouse, violent anarchists attempted to cause eye damage to officers with commercial grade lasers.
- Violent anarchists graffitied the Gus J. Solomon Courthouse.

06/25/2020

- Violent anarchists vandalized an FPS camera at the Hatfield Courthouse.
- Violent anarchists breached the fence of the Justice Center, adjacent to the courthouse.

06/30/2020

- Violent anarchists ripped down plywood covering the windows at the Edith Green-Wenell Wyatt Building, before breaking the windows.

7/01/2020

- Violent anarchists graffitied new plywood covering the windows at the Hatfield Courthouse and ripped down plywood on the other side of the building.
- A group of over 200 violent anarchists blocked access to the building and proceeded to launch aerial fireworks at federal property.

07/02/2020

- Violent anarchists broke a front window to the Hatfield Courthouse and attempted to enter the building.
- Violent anarchists refused orders to vacate the Hatfield Courthouse area, and instead launched fireworks and threw objects at officers, while attempting to cause eye damage with lasers. One explosive firework was shot into the courthouse.
- FPS law enforcement officers were forced to utilized crowd control measures for safety.

07/03/2020

- After ongoing riots around the Hatfield Courthouse, crowds were dispersed only to make a return later into the night.
- Violent Anarchists broke the front window of the Hatfield U.S. Courthouse and shot fireworks into the building.
- Violent anarchists firebombed the building. Federal law enforcement extinguished the fire.

07/04/2020

- Around 1,000 violent anarchists spray painted, threw rocks, and shot fireworks (including mortar style fireworks) at the Hatfield Courthouse. They also destroyed a security camera at the facility.
  - A CBP team supporting FPS at the courthouse arrested suspects from the graffiti and camera vandalism incidents.
  - The mob continued to throw rocks and paint-filled balloons, while attempting to breach the doors.
  - Teams were forced to utilize crowd control measures for safety.
- Multiple individuals were seen carrying rifles, including the driver of a vehicle who attempted to strike a Portland Police Bureau officer with his car in front of the Hatfield Courthouse.

07/05/2020

- A hostile crowd of about 250 violent anarchists returned to the vicinity of Hatfield Courthouse to vandalize and attack numerous facilities and police, while failing to comply with dispersal order.
- Violent anarchists surrounded and blocked law enforcement from the area as extremists proceeded to attack police with thrown projectiles and large mortar style fireworks.
- Two Portland Police Bureau officers were injured by the crowd (possible concussion).
- Portland Police Bureau took five into custody for directing lasers against aircraft.
- Violent anarchists set fires in front of Hatfield Courthouse and Chapman park.

- At the entrance of Hatfield Courthouse, Violent Anarchists fired large fireworks and threw other dangerous objects toward the entrance and the personnel protecting it.
- The mob was pushed completely out of the area of Hatfield Courthouse; FPS made two arrests during push.
- Portland Police made multiple arrests and found a loaded weapon on one subject.
- Two more violent anarchists were arrested, and one was found to be carrying what appears to be a pipe bomb.
- Violent anarchists assaulted construction crews by targeting them with fireworks while they repaired Hatfield Building.
- A joint team had to be deployed to create buffer between violent anarchists and construction crew to protect construction workers.

07/06/2020

- Violent anarchists attempted to cause vision damage to personnel with lasers. Five arrests were made for assaulting law enforcement.

07/07/2020

- Violent anarchists held a “Night of Rage,” in which a 400-500-person protest devolved into riots, assaulting law enforcement officers and federal property.
- Approximately 200 violent anarchists began pursuing law enforcement officers to disrupt enforcement actions, assaulting them with rocks and bottles.
- Around 150 violent anarchists in front of the Justice Center began attacking personnel with lasers and peppered the area with fireworks.
- Three violent anarchists were arrested for attacking law enforcement.

07/08/2020

- Approximately 200 violent anarchists attacked DHS law enforcement officers while apprehending a subject who was wanted for property damage.
- One arrest was made after three law enforcement officers were injured.

- Law enforcement officers' personal information was publicly exposed, including FPS, ICE, and CBP personnel.
- Violent anarchists continued to attack officers with lasers.

07/09/2020

- Violent anarchists attacked DHS law enforcement officers while apprehending a subject who was wanted for property damage.
- A violent anarchist graffitied the Hatfield courthouse.
- An unidentified subject fired several shots from a gun into the air from the rear seat of a passing white SUV.

07/10/2020

- Crowds of approximately 300 violent anarchists vandalized federal property and cameras with spray paint, blocked roadways, and assaulted law enforcement officers.
- Three were arrested for Assault on a Federal Officer.
- Violent anarchists attempted to ambush Portland Police Department PD during their shift change, but a DHS team was deployed and able to prevent any attacks.

07/11/2020

- DHS law enforcement officers supported local police to help a violent anarchist who overdosed.
- Four violent anarchists were arrested, including one who attempted to assault an officer with a hammer.
- Violent anarchists sieged the barricade of the courthouse and tried to damage it with a large hammer.
- A law enforcement officer was assaulted with blows from a hammer. Violent anarchists fought officers while they were arresting those responsible.

07/12/2020

- Six violent anarchists were detained and cited.

- A mob of 300 refused to comply with directions not to trespass on federal property.
- Another mob of 200 individuals armed with sledgehammers, tasers and/or stun guns, gathered in Chapman Park across from the Hatfield Courthouse.
- Violent anarchists launched fireworks, threw fecal matter and large objects, and pointed lasers at federal law enforcement officers.
- Violent anarchists deployed a plywood blockade while graffitiing the Edith Green-Wenell Wyatt Federal Building, before firing wrist rockets at the facility.
- When an arrest team was deployed to apprehend a rioter who encroached on a police barrier and refused to leave, they were assaulted by violent anarchists.
- A rioter trespassed on the steps of the Hatfield Courthouse and was confronted by federal law enforcement Officers, then swallowed a large amount of narcotics. Law enforcement called medical services after the individual started to convulse.
- Despite more orders to stay off of federal property and to cease unlawful activity, FPS was forced to push back violent anarchists. The Portland Police Bureau declared the mob an unlawful assembly.

07/13/2020

- Violent anarchists released personal information of federal law enforcement officers to the public, publishing names of those in Portland.
- Violent anarchists continued to assault law enforcement officers with lasers, slingshots and fireworks. Others were armed with sledge hammers, tasers, and stun guns, and dragged flaming debris into the scene.

07/14/2020

- Violent anarchists set a container of liquid on fire at the Terry Schrunk Plaza.
- Violent anarchists jumped a fence and attempted to breach the Edith Green Federal Building.

- Violent anarchists assaulted federal law enforcement officers with cans and other hard objects while they attempted to unblock the entrance of the Edith Green Federal Building.

07/15/2020

- Violent anarchists doxed members of federal law enforcement.
- Violent anarchists attempted to damage the Hatfield Courthouse by throwing objects at it and spray painting it. Numerous fireworks were also lit.
- Violent anarchists trespassed on federal property and destroyed a card reader at the Justice Center.

Topics: [Secretary of Homeland Security \(/topics/secretary-homeland-security\)](/topics/secretary-homeland-security)

Keywords: [Acting Secretary Chad Wolf \(/keywords/acting-secretary-chad-wolf\)](/keywords/acting-secretary-chad-wolf) , [Law Enforcement \(/keywords/law-enforcement\)](/keywords/law-enforcement)

Last Published Date: July 16, 2020



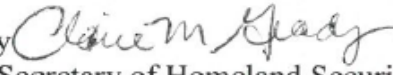


# Homeland Security

Issue Date: September 7, 2018

## Policy Statement 044-05

MEMORANDUM FOR: Component Heads

FROM: Claire M. Grady   
Acting Deputy Secretary of Homeland Security and  
Under Secretary for Management

SUBJECT: **Department Policy on the Use of Force**

### I. Purpose

Pursuant to the Secretary's authority under Title 6, United States Code (U.S.C.) § 112, this policy articulates Department-wide standards and guidelines related to the use of force by Department of Homeland Security (DHS) law enforcement officers and agents (LEOs) and affirms the duty of all DHS employees to report improper uses of force. All DHS Components employing LEOs are directed to implement this guidance, including investigation and documentation practices, through Component-specific policy, procedure, and training.

This memorandum supersedes the Memorandum from Secretary Tom Ridge, "Department of Homeland Security Policy on the Use of Deadly Force" (June 25, 2004).

### II. Use of Force Standard

#### A. Introduction

In determining the appropriateness of a particular use of force, the Department is guided by constitutional law, as interpreted by the U.S. Supreme Court.<sup>1</sup> The Fourth Amendment supplies a constitutional baseline for permissible use of force by LEOs in the course of their official duties; law enforcement agencies may adopt policies that further constrain the use of force. This policy describes the governing legal framework and articulates additional principles to which the Department will adhere.

#### B. General Statement

Unless further restricted by DHS Component policy, DHS LEOs are permitted to use force to control subjects in the course of their official duties as authorized by law, and in defense of themselves and others. In doing so, a LEO shall use only the force that is **objectively reasonable** in light of the facts and circumstances confronting him or her at the time force is applied.

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<sup>1</sup> See, e.g., *Graham v. Connor*, 490 U.S. 386 (1989), and *Tennessee v. Garner*, 471 U.S. 1 (1985).

### C. Discussion: The Fourth Amendment “Reasonableness” Standard

1. The Supreme Court has ruled that “all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard.”<sup>2</sup> This standard is an objective one that, in the context of use of force policy and practice, is often referred to as “objective reasonableness.”

2. Because this standard is “not capable of precise definition or mechanical application,” its “proper application requires careful attention to the facts and circumstances of each particular case.”<sup>3</sup> The reasonableness of a LEO’s use of force must be judged “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”<sup>4</sup> In determining whether the force a LEO used to effect a seizure was reasonable, courts allow for the fact that LEOs are often forced to make split-second judgments, in circumstances that are tense, uncertain, and rapidly evolving.

3. Consequently, there may be a range of responses that are reasonable and appropriate under a particular set of circumstances.

4. Once used, physical force<sup>5</sup> must be discontinued when resistance ceases or when the incident is under control.

## III. General Principles

### A. Respect for Human Life

All DHS personnel have been entrusted with a critical mission: safeguarding the American people, our homeland, and our values. In keeping with this mission, respect for human life and the communities we serve shall continue to guide DHS LEOs in the performance of their duties.

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<sup>2</sup> *Graham*, 490 U.S. at 396. The Court has further determined that a Fourth Amendment “seizure” of a person occurs when an officer, “by means of physical force or show of authority, terminates or restrains his freedom of movement *through means intentionally applied* (emphasis in original).” *Brendlin v. California*, 551 U.S. 249, 254 (2007)(citations omitted).

<sup>3</sup> *Graham*. (citing *Garner*, 471 U.S. at 8-9: “[T]he question is ‘whether the totality of the circumstances justifie[s] a particular sort of . . . seizure’”). The “totality of the circumstances” refers to all factors surrounding a particular use of force. In *Graham*, the Court lists three factors, often referred to as the “*Graham* factors,” that may be considered in assessing reasonableness: the severity of the crime/offense at issue, whether the subject poses an immediate threat to the safety of the LEO or others, and whether the subject is actively resisting arrest or attempting to evade arrest by flight. Other factors include, but are not limited to: the presence and number of other LEOs, subjects, and bystanders; the size, strength, physical condition, and level of training of the LEO(s); the apparent size, strength, physical condition, and level of training of the subject(s); whether an individual is forcibly assaulting, resisting, opposing, impeding, intimidating, or interfering with a LEO while the LEO is engaged in, or on account of the performance of, official duties; proximity and type of weapon(s) present; criminal or mental health history of the subject(s) known to the LEO at the time of the use of force; and the perceived mental/emotional state of the subject.

<sup>4</sup> *Id.*

<sup>5</sup> Other than the force reasonably required to properly restrain a subject and safely move him or her from point to point. That is, once the subject is secured with restraints, a LEO may maintain physical control of the subject via the use of “come-along or other control techniques” to safely and securely conclude the incident.

## B. De-escalation

To ensure that DHS LEOs are proficient in a variety of techniques that could aid them in appropriately resolving an encounter, DHS Components shall provide use of force training that includes de-escalation tactics and techniques.

## C. Use of Safe Tactics

DHS LEOs should seek to employ tactics and techniques that effectively bring an incident under control while promoting the safety of LEOs and the public, and that minimize the risk of unintended injury or serious property damage. DHS LEOs should also avoid intentionally and unreasonably placing themselves in positions in which they have no alternative to using deadly force.

## D. Additional Considerations

1. DHS LEOs are permitted to use force that is reasonable in light of the totality of the circumstances. This standard does not require LEOs to meet force with equal or lesser force.
2. DHS LEOs do not have a duty to retreat to avoid the reasonable use of force, nor are they required to wait for an attack before using reasonable force to stop a threat.

## E. Warnings

1. When feasible, prior to the application of force, a DHS LEO must attempt to identify him- or herself and issue a verbal warning to comply with the LEO's instructions. In determining whether a warning is feasible under the circumstances, a LEO may be guided by a variety of considerations including, but not limited to, whether the resulting delay is likely to:
  - a. Increase the danger to the LEO or others, including any victims and/or bystanders;
  - b. Result in the destruction of evidence;
  - c. Allow for a subject's escape; or
  - d. Result in the commission of a crime.
2. In the event that a LEO issues such a warning, where feasible, the LEO should afford the subject a reasonable opportunity to voluntarily comply before applying force.

F. Exigent Circumstances

In an exigent situation, for self-defense or the defense of another, DHS LEOs are authorized to use any available object or technique in a manner that is reasonable in light of the circumstances.

G. Medical Care

As soon as practicable following a use of force and the end of any perceived public safety threat, DHS LEOs shall obtain appropriate medical assistance for any subject who has visible or apparent injuries, complains of being injured, or requests medical attention. This may include rendering first aid if properly trained and equipped to do so, requesting emergency medical services, and/or arranging transportation to an appropriate medical facility.

H. Duty to Intervene In and Report Improper Use of Force

1. The Department is committed to carrying out its mission with honor and integrity, and to fostering a culture of transparency and accountability. As such, DHS law enforcement Components will ensure that their policies and procedures unambiguously underscore the following:

**The use of excessive force is unlawful and will not be tolerated. Those who engage in such misconduct, and those who fail to report such misconduct, will be subject to all applicable administrative and criminal penalties.**

2. DHS LEOs have a duty to intervene to prevent or stop a perceived use of excessive force by another LEO—except when doing so would place the observing/responding LEO in articulable, reasonable fear of death or serious bodily injury.

3. **Any DHS employee** with knowledge of a DHS LEO's improper use of force shall, without unreasonable delay, report it to his or her chain of command, the internal affairs division, the DHS Office of Inspector General, and/or other reporting mechanism identified by Component policy or procedure.

4. Failure to intervene in and/or report such violations is, itself, misconduct that may result in disciplinary action, with potential consequences including removal from federal service, civil liability, and/or criminal prosecution. DHS Components shall ensure that all personnel are aware of these obligations, as well as the appropriate mechanism(s) by which such reports should be made.

#### **IV. Less-Lethal Force and Less-Lethal Devices**

- A. All DHS Components employing LEOs shall have appropriate written policies and procedures regarding the use of authorized control tactics or techniques; authorized less-lethal devices; and necessary training and certifications—both initial and recurring.
- B. DHS Components shall conduct less-lethal use of force training no less than every two years and incorporate decision-making and scenario-based situations in these training programs.
- C. DHS LEOs are prohibited from carrying any unauthorized less-lethal device for duty use.
- D. LEOs shall demonstrate proficiency, in accordance with established Component standards, for each less-lethal device that they are authorized and certified to carry. If a certification or valid waiver expires, a LEO is prohibited from carrying that device for duty use until he or she meets the requirements for recertification on that device.

#### **V. Warning Shots and Disabling Fire**

##### **A. General Prohibition**

Except in the limited circumstances described in Section V.B., “Exceptions,” DHS LEOs are prohibited from discharging firearms solely:

- 1. As a warning or signal (“warning shots”) or
- 2. To disable moving vehicles, vessels, aircraft, or other conveyances (“disabling fire”).

##### **B. Exceptions**

- 1. **Warning Shots**
  - a. Maritime Law Enforcement Operations: Authorized U.S. Coast Guard (USCG), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE) personnel conducting maritime law enforcement operations may use warning shots only as a signal to a vessel to stop, and only after all other available means of signaling have failed. Such warning shots are classified as less-lethal force.

b. Aviation Law Enforcement Operations: Authorized USCG, CBP, and ICE personnel conducting aviation law enforcement operations may use warning shots only as a signal to an aircraft to change course and follow direction to leave the airspace, and only after all other available means of signaling have failed. Such warning shots are classified as less-lethal force.

2. Disabling Fire

a. Maritime Law Enforcement Operations: Authorized USCG, CBP, and ICE personnel, when conducting maritime law enforcement operations, may discharge firearms to disable moving vessels or other maritime conveyances. Such disabling fire is classified as less-lethal force.

b. Physical Protection: Authorized United States Secret Service (USSS) personnel exercising USSS's protective responsibilities, and other authorized and appropriately trained DHS LEOs assigned to assist USSS in exercising these responsibilities, may discharge firearms to disable moving vehicles, vessels, and other conveyances, and such disabling fire is classified as less-lethal force—EXCEPT: Aircraft in Flight: Disabling fire against an aircraft in flight is permitted only if the use of deadly force against the occupants of the aircraft, or in response to the threat posed by the aircraft, itself, is otherwise authorized under this policy. This is classified as a use of deadly force.<sup>6</sup>

C. Safety Considerations

1. Warning shots and disabling fire are inherently dangerous and, when authorized under this policy, should be used with all due care. DHS LEOs must exercise good judgment at all times and ensure that safety is always the primary consideration.

2. When authorized LEOs deem warning shots or disabling fire warranted, each shot must have a defined target.

## VI. Deadly Force

A. General Guidelines

1. As with any use of force, a LEO's use of deadly force must be reasonable in light of the facts and circumstances confronting him or her at the time force is applied.

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<sup>6</sup>As a use of deadly force, this is not mere "disabling fire," which by definition is not intended to cause bodily injury.

2. A DHS LEO may use deadly force only when the LEO has a reasonable belief that the subject of such force poses an imminent threat of death or serious bodily injury to the LEO or to another person.<sup>7</sup>

a. Fleeing Subjects: Deadly force shall not be used solely to prevent the escape of a fleeing subject. However, deadly force is authorized to prevent the escape of a fleeing subject where the LEO has a reasonable belief that the subject poses a significant threat of death or serious physical harm to the LEO or others and such force is necessary to prevent escape.<sup>8</sup>

## B. Discharge of Firearms

### 1. General Guidelines

a. Discharging a firearm against a person constitutes the use of deadly force and shall be done only with the intent of preventing or stopping the threatening behavior that justifies the use of deadly force.

b. The act of establishing a grip, unholstering, or pointing a firearm does not constitute a use of deadly force.

### 2. Moving Vehicles, Vessels, Aircraft, or other Conveyances

a. DHS LEOs are prohibited from discharging firearms at the operator of a moving vehicle, vessel, aircraft, or other conveyance unless the use of deadly force against the operator is justified under the standards articulated elsewhere in this policy.<sup>9</sup> Before using deadly force under these circumstances, the LEO must take into consideration the hazards that may be posed to law enforcement and innocent bystanders by an out-of-control conveyance.

b. Firearms shall not be discharged solely as a warning or signal or solely to disable moving vehicles, vessels, aircraft, or other conveyances, except under the limited circumstances described in Section V., Warning Shots and Disabling Fire.

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<sup>7</sup> For more detailed discussion of the use of force standard and the “reasonableness” determination, see Section II., Use of Force Standard.

<sup>8</sup> See *Garner*, 471 U.S. at 11-12. To further illustrate a “threat of serious physical harm,” the *Garner* Court explained: “...if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.” *Id.* The Supreme Court has further explained that this “necessity” refers not to preventing the flight, itself, but rather the larger context: the need to prevent the suspect’s potential or further serious physical harm to the LEO or other persons.

<sup>9</sup> Here, a distinction is drawn between firing at the operator, i.e., targeting the operator with the intent to cause serious physical injury or death, and firing at a moving vehicle or other conveyance solely as a warning or signal or to disable the vehicle, and with no intent to injure (see section V., Warning Shots and Disabling Fire).



## **VII. Reporting Requirements and Incident Tracking**

A. Uses of force shall be documented and investigated pursuant to Component policies.

B. It is a Department priority to ensure more consistent Department-wide reporting and tracking of use of force incidents. More consistent data will enable both the Department and Components to more effectively assess use of force activities, conduct meaningful trend analysis, revise policies, and take appropriate corrective actions.

C. DHS Components employing LEOs shall establish internal processes to collect and report accurate data on Component use of force activities. At a minimum, Components shall report the following as a “use of force incident” when resulting from a use of force:

1. A less-lethal device is utilized against a person (except when the device is deployed in a non-striking control technique);
2. Serious bodily injury occurs;
3. Deadly force is used against a person, to include when a firearm is discharged at a person; or
4. Death occurs.

D. Components shall report this data to the Deputy Secretary, through the Deputy Assistant Secretary for Law Enforcement Policy, on no less than an annual basis (in accordance with a process and timeline to be determined) and to others as required for official purposes.

## **VIII. Departmental Review and Oversight**

A. Each DHS Component employing LEOs will establish and maintain a use of force review council or committee to perform internal analysis of use of force incidents from the perspective of training, tactics, policy, and equipment; to identify trends and lessons learned; and to propose any necessary improvements to policies and procedures.

B. The Office of Strategy, Policy, and Plans, working in consultation with DHS Components employing LEOs, shall establish the DHS Use of Force Council to provide a forum by which Components can share lessons learned regarding use of force policies, training, and oversight. The DHS Use of Force Council will be chaired by the Office of Strategy, Policy, and Plans and comprised of one executive-level representative from each of the following DHS Components:

1. Office of the Under Secretary for Management
2. National Protection and Programs Directorate

3. United States Customs and Border Protection
4. United States Coast Guard
5. United States Secret Service
6. Federal Emergency Management Agency
7. Transportation Security Administration
8. United States Immigration and Customs Enforcement
9. Office of the General Counsel
10. Federal Law Enforcement Training Centers
11. Office for Civil Rights and Civil Liberties
12. Privacy Office

C. Representatives of affected DHS Components will be responsible for reporting on use of force-related trends, developments, and lessons learned within their respective Components.

## **IX. Military Activities**

This policy shall not apply to the United States Coast Guard when operating under the Standing Rules of Engagement, or to other DHS personnel when they fall under Department of Defense control as civilians accompanying the force.

## **X. No Right of Action**

This policy is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

## **XI. Definitions**

A. **Deadly Force**: Any use of force that carries a substantial risk of causing death or serious bodily injury (see “Use of Force” and “Serious Bodily Injury”). Deadly force does not include force that is not likely to cause death or serious bodily injury, but unexpectedly results in such death or injury. In general, examples of deadly force include, but are not limited to, intentional discharges of firearms against persons, uses of impact weapons to strike the neck or head, any strangulation technique, strikes to the throat, and the use of any edged weapon.

B. **De-Escalation**: The use of communication or other techniques during an encounter to stabilize, slow, or reduce the intensity of a potentially violent situation without using physical force, or with a reduction in force.

C. **Disabling Fire**: Discharge of a firearm for the purpose of preventing a non-compliant moving vehicle, vessel, aircraft, or other conveyance from operating under its own power, but not intended to cause bodily injury.

D. **Less-Lethal Device**: An instrument or weapon that is designed or intended to be used in a manner that is not likely to cause death or serious bodily injury (see “Serious Bodily Injury”). Examples include, but are not limited to, conducted electrical weapons/electronic control weapons, impact weapons, and certain chemical agents. These are also commonly referred to as “intermediate force” or “less-than-lethal” weapons or devices.

E. **Less-Lethal Force**: Any use of force that is neither likely nor intended to cause death or serious bodily injury (see “Use of Force” and “Serious Bodily Injury”). Also known as “non-deadly,” “intermediate,” or “less-than-lethal” force.

F. **Lessons Learned**: Information gleaned through internal review and analysis of use of force incidents that is sufficiently significant or critical to consider a change to policies, procedures, or training standards. Lessons learned may include, for example, information that can enhance law enforcement personnel skills; identify gaps in current training; identify current unique criminal trends being experienced in the field; provide information on new equipment recommendations or gaps; identify concerns with standard less lethal equipment/tactics; or any information that can prevent harm to the community, law enforcement, or arrestees.

G. **Serious Bodily Injury**: Physical injury that involves protracted and obvious disfigurement; protracted loss or impairment of the function of a bodily member, organ, or mental faculty; or a substantial risk of death.

H. **Use of Force**: The intentional application by law enforcement of any weapon, instrument, device, or physical power in order to control, restrain, or overcome the resistance, or gain compliance or custody, of another.

I. **Warning Shot**: Discharge of a firearm as a warning or signal, for the purpose of compelling compliance from an individual, but not intended to cause bodily injury.

Distribution:

Under Secretary for Science and Technology  
Under Secretary for Management  
Under Secretary for National Protection and Programs Directorate  
Under Secretary of Intelligence and Analysis  
Commissioner, U.S. Customs and Border Protection  
Commandant, United States Coast Guard  
Director, United States Secret Service  
Director, U.S. Citizenship and Immigration Services  
Administrator, Federal Emergency Management Agency  
Administrator, Transportation Security Administration  
Assistant Secretary, U.S. Immigration and Customs Enforcement  
General Counsel  
Inspector General  
Director, Federal Law Enforcement Training Centers  
Assistant Secretary of Countering Weapons of Mass Destruction Office  
Under Secretary for Strategy, Policy, and Plans Policy  
Assistant Secretary for Legislative Affairs  
Assistant Secretary for Public Affairs  
Assistant Secretary for Partnership and Engagement  
Director, Operations Coordination  
Officer for Civil Rights & Civil Liberties  
Chief Privacy Officer  
Citizenship and Immigration Services Ombudsman  
Military Advisor to the Secretary  
Director, Community Partnerships  
Executive Secretary


Secretary  
U.S. Department of Homeland Security  
Washington, DC 20528



**Homeland  
Security**

May 17, 2019

MEMORANDUM FOR: All DHS Employees

FROM: Kevin K. McAleenan  
Acting Secretary 

SUBJECT: Information Regarding First Amendment Protected Activities

I am proud of the work you do every day to protect our Homeland. You serve as America's Frontline and your commitment to the highest ethical and moral principles is a testament to each of you, the founding values of our Department, and our nation. It is in this spirit that I write to you today to emphasize – as you all know – that the privilege of administering and enforcing federal laws carries with it the responsibility for upholding the principles of professionalism, impartiality, courtesy, and respect for civil rights and civil liberties.

DHS does not profile, target, or discriminate against any individual for exercising his or her First Amendment rights.<sup>1</sup> Under the Privacy Act of 1974, all DHS personnel<sup>2</sup> are prohibited from maintaining records that describe how a U.S. citizen (USC) or alien lawfully admitted for permanent residence (LPR)<sup>3</sup> exercises his or her First Amendment rights, “unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity.”<sup>4</sup>

Information, in any form, regarding how an individual exercises First Amendment rights shall include (among other things):

1. Information about an individual's religious beliefs and practices;
2. Information about an individual's political or personal beliefs or associations, academic or scientific inquiries, or the expressions thereof;

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<sup>1</sup> The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend. I.

<sup>2</sup> For purposes of this memorandum, “DHS personnel” includes all DHS employees, including those who are law enforcement agents and officers and those in the intelligence community, as well as those performing work on behalf of DHS employees, such as contractors.

<sup>3</sup> To the extent that a person's status is unknown or unclear, for the purposes of this policy that person shall be treated as an “individual” covered by the Privacy Act. 5 U.S.C. § 552a(a)(2).

<sup>4</sup> 5 U.S.C. § 552a(e)(7).

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3. Information about an individual's (including journalists, attorneys, academics, representatives of non-governmental organizations, etc.) reporting activities and documentation; or,
4. Information about an individual's associations with others for lawful purposes, including participation in protests or other non-violent demonstrations against government policy or actions.

Individuals' First Amendment rights are protected regardless of the medium of their communications. These principles apply to communications such as oral or written speech (both in paper and electronic form); non-verbal communications such as art works; and, in some instances, to commercial speech and gestures (such as physical rituals associated with prayer).

With those First Amendment rights in mind, I direct that DHS personnel shall not collect, maintain in DHS systems, or use information protected by the First Amendment *unless* (a) an individual has expressly granted their consent for DHS to collect, maintain, and use that information; (b) maintaining the record is expressly authorized by a federal statute; or (c) that information is relevant to a criminal, civil, or administrative activity relating to a law DHS enforces or administers. In addition, DHS personnel should not pursue by questioning, research or other means, information relating to how an individual exercises his or her First Amendment rights unless one or more of the same conditions applies.

### **Express Statutory Authorization**

DHS agencies may collect and maintain records regarding First Amendment activity when doing so is *expressly authorized by statute*. As explained in longstanding guidance from the Office of Management and Budget (OMB), a statute need not specifically address the maintenance of records of First Amendment activities if it references activities that are relevant to a determination concerning an individual.<sup>5</sup> Thus, for example, DHS personnel may collect information on First Amendment protected activity when that activity is relevant to the granting or denial of a pending application.

### **Consent of the Individual**

Records on First Amendment activity may be maintained if the individual voluntarily provides it, thereby consenting to its use by DHS. For example, "if an individual volunteers information on civic or religious activities in order to enhance his chances of receiving a benefit, such as

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<sup>5</sup> Privacy Act Implementation, Guidelines and Responsibilities, 40 Fed. Reg. 28,948, 28,965 (July 9, 1975) (hereinafter OMB Guidelines). The Guidelines specifically cite to the Immigration and Nationality Act (INA) as an example: "[S]ince the Immigration and Nationality Act makes the possibility of religious or political persecution relevant to a stay of deportation, the information on these subjects may be admitted in evidence, and therefore would not be prohibited by [subsection (e)(7)]." OMB Guidelines, at 28,965. Many other INA provisions potentially involve consideration of First Amendment activity. *E.g.*, 8 U.S.C. 1101(a)(43) (definition of refugee, for purpose of refugee and asylum eligibility determinations, includes persecution based on membership in social group, religion, or political opinion); 8 U.S.C. 1182(a)(3)(B) (inadmissibility of any alien who, inter alia, "endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization"); 8 U.S.C. 1182(a)(3)(D) (ground of inadmissibility for membership or affiliation with the Communist or other totalitarian party); 8 U.S.C. 1182(a)(3)(F) (ground of inadmissibility for association with terrorist organizations); 8 U.S.C. 1227(a)(4)(B) (deportability of aliens admitted to the United States if described in terrorism-related grounds of inadmissibility); 8 U.S.C. 1424 (prohibition upon the naturalization of persons opposed to government or law, or who favor totalitarian forms of government).



executive clemency, the agency may consider information thus volunteered.”<sup>6</sup> As applied to DHS, individuals may voluntarily provide consent in submitting their associations and beliefs when applying for naturalization pursuant to filing USCIS Form N-400<sup>7</sup> or may proactively provide information in written materials, including correspondence, or during an inspection or encounter.

### **Relevant to Law Enforcement Activity**

If the use of information regarding First Amendment protected activities is not otherwise covered by one or both of the exceptions discussed above (explicit statutory authority and consent), DHS personnel may include such information in DHS systems if the information is pertinent to and within the scope of an authorized criminal, civil, or administrative law enforcement activity.<sup>8</sup>

For example, information about First Amendment protected activities is pertinent to and within the scope of DHS’s administration or enforcement of a statute, regulation, or executive order when all DHS personnel:

1. Document questions and responses relating to an individual’s occupation, purpose for international travel, or any merchandise the individual seeks to bring across the border;
2. Document questions, responses, or other information to validate information supplied by an individual or determine whether potential criminal, civil, or administrative violations exist relating to the laws that DHS enforces or administers;
3. Document journalistic or scientific research, academic inquiry, and/or analysis or questions and responses relating to information regarding an individual indicating a potential violation of a law DHS enforces or administers, or a threat to border security, national security, officer safety, or public safety;
4. Document research and/or analysis relating to activities protected by the First Amendment to the extent that it may facilitate an individual’s travel by, for example, verifying information provided by the individual —(e.g., validating a visa based on a religious purpose); or,
5. Take into account information regarding religion in order to identify whether a reasonable accommodation for an individual’s religious beliefs would be appropriate. This may include subsequent documentation of relevant information in DHS records regarding the action (for example, noting that a certain action was undertaken as an accommodation or noting that an accommodation was requested or deemed appropriate).

Each of us is called to do an extraordinarily important job for our nation. In executing this mission, it is my job to ensure that you are empowered to do so in accordance with our highest moral, ethical, and legal obligations. To this end, I have tasked the DHS Office for Civil Rights and Civil Liberties and the DHS Privacy Office to review existing guidance and develop new

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<sup>6</sup> OMB Guidelines, at 28965.

<sup>7</sup> It must be noted that DHS/USCIS may also collect this information pursuant to its statutory authority in determining whether the applicant comes under section 313 of the INA’s (8 U.S.C. 1424) prohibition upon the naturalization of persons opposed to government or law, or who favor totalitarian forms of government. Thus, collecting and maintaining this information is lawful both because of express statutory authorization as described above, and because the applicant consented to providing it by signing and filing the application.

<sup>8</sup> DHS may still maintain records consistent with 552a(e)(7) even if there is no ongoing or current law enforcement investigation.



guidance, where appropriate, to assist the operational components in implementing this memorandum.<sup>9</sup>

As you execute your mission each day, our Privacy and Civil Rights and Civil Liberties colleagues stand by to assist with any further questions or concerns you may have on this topic. Please contact Jonathan R. Cantor, Acting Chief Privacy Officer and Peter Mina, CRCL Deputy Officer for Programs and Compliance, and their staffs with those questions. Please contact your Component Counsel Offices with any legal questions.

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<sup>9</sup> Nothing in this policy memorandum or tasking otherwise impairs the statutory or delegated authorities and responsibilities of the Privacy Office or the Office for Civil Rights and Civil Liberties, including the authority to “investigate complaints and information indicating possible abuses of civil rights or civil liberties” under 6 U.S.C. § 345 or investigate noncompliance DHS privacy policies under 6 U.S.C. § 142.



## United States Marshals Service POLICY DIRECTIVES

### TRAINING

#### 14.15 USE OF FORCE

**A. Proponent:** Training Division.

**B. Purpose:** This directive provides United States Marshals Service (USMS) policy and procedures concerning the use of force. This policy is not intended to and does not create any right or benefit, substantive or procedural, enforceable at law or in equity, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. Deviations from this policy may be made only with the Director's approval.

**C. Authority:** The Director's authority to establish a use of force policy is contained in 28 U.S.C. § 561(g), 18 U.S.C. § 3053, and 28 U.S.C. § 566(d). On July 1, 2004, the Attorney General approved a revised Deadly Force Policy for the Department of Justice (DOJ), which applies to all DOJ components. On April 21, 2011, the Attorney General approved the DOJ Policy Statement on Use of Less-Than-Lethal Devices, which applies to all DOJ components.

**D. Policy:** The use of force by a Deputy United States Marshal (DUSM) must be objectively reasonable and may range from verbal commands to the use of deadly force.

##### 1. Reporting:

- a. DUSMs will report all intentional and all unintentional incidents involving the use of firearms, less-than-lethal devices, or physical force greater than minor restraint (b) (7)(E) Task Force Officers (TFOs), or DUSMs acting on their behalf, will report deployment of less-than-lethal devices (b) (7)(E)
- b. Districts and task forces should become familiar with the policies and procedures of state/local agencies that participate on USMS-led task forces regarding the release of supporting documentation (e.g., photos, reports of injuries, etc.). When agencies' policies and procedures allow TFO submissions regarding a Use of Force Incident, the submission should include all available supporting documentation.

##### 2. Use of Less-Than-Lethal Force:

- a. DUSMs are authorized to use only those less-than-lethal devices that are approved for use by the USMS and that they are trained to use.
- b. DUSMs may use less-than-lethal force only in situations where reasonable force, based upon the totality of the circumstances at the time of the incident, is necessary to:
  - 1) Protect themselves or others from physical harm;
  - 2) Restrain or subdue a resistant prisoner or suspect;

- 3) Make an arrest;
  - 4) Prevent a prisoner from escaping; or
  - 5) Otherwise obtain lawful compliance from a subject.
- c. DUSMs are not authorized to use less-than-lethal devices if voice commands or physical control achieve the law enforcement objective. DUSMs using a less-than-lethal device must stop using the device once it is no longer needed to achieve the law enforcement purpose for which it is being used. Less-than-lethal weapons may not be used to punish, harass, taunt, or abuse a subject.
  - d. **Prohibited Techniques:** The following acts or techniques associated with the use of less-than-lethal force are prohibited absent exigent circumstances:
    - 1) Choke holds, carotid-control holds, or other neck restraint;
    - 2) Use of baton to apply choke or "come-along" holds to the neck area; and
    - 3) Intentional strikes with a baton to the head, face, groin, solar plexus, neck, kidneys, or spinal column.
3. **Deadly Force:** DUSMs may use deadly force only when necessary; that is, when the DUSM has a reasonable belief that the subject of such force poses imminent danger of death or serious physical injury to the DUSM or to another person.
- a. Deadly force may not be used solely to prevent the escape of a fleeing suspect or an escaping USMS detainee. A DUSM may use deadly force against a fleeing suspect or escaping USMS detainee only when the DUSM has a reasonable belief that the suspect or detainee poses an imminent danger of death or serious physical injury to the DUSM or to another person.
  - b. Firearms may not be fired solely to disable moving vehicles.
  - c. If feasible, and if doing so would not increase the danger to the DUSM or others, a verbal warning to submit to the authority of the DUSM shall be given prior to the use of deadly force.
  - d. DUSMs will be trained in alternative methods and tactics for handling resisting subjects, which must be used when the use of deadly force is not authorized by this policy.
  - e. Warning shots are not permitted outside of the prison context.
4. **Medical Attention:** In all use of force incidents, DUSMs must make necessary medical assistance available to subjects as soon as practicable. Any injury to USMS personnel or another party must be documented and reported (b) (7)(E)

#### E. Responsibilities:

- 1. United States Marshals (USMs), Chief Deputy United States Marshals (CDUSMs), and Assistant Directors must ensure that all employees authorized to use force comply with the reporting and training requirements and demonstrate proficiency with approved devices and firearms.

2. Regional Fugitive Task Force Commanders, USMs, and CDUSMs will be responsible for notifying their TFOs about this policy and their responsibilities under the policy.
3. The Office of Professional Responsibility will be responsible for preparing annual reports detailing use of force incidents.

**F. Procedures:** None.

**G. Definitions:**

1. **Deadly Force:** Any force that is likely to cause death or serious physical injury.
2. **Less-Than-Lethal Force:** Force that is neither likely nor intended to cause death or serious physical injury.
3. **Serious Physical Injury:** Bodily injury that is likely to cause death or serious/permanent disfigurement or loss of function of a body part or organ.
4. **Deputy United States Marshal:** All operational employees assigned to the 082, 1801, 1802, and 1811 job series (including Inspectors, Supervisory Deputy United States Marshals, and CDUSM); employees who have a valid special deputation; and employees whom the USMS has authorized to carry a firearm as a requirement of their duty assignments.
5. **Less-Than-Lethal Devices** include, but are not limited to:
  - a. Conducted Energy Devices (e.g., electronic immobilization, control, and restraint devices);
  - b. Impact Devices (e.g., batons, bean bag projectiles); and
  - c. Chemical Agents (e.g., pepper spray).

**H. References:**

1. Department of Justice Policy Statement on Less-than-Lethal Devices.
2. (b) (7)(E)

**I. Cancellation Clause:** This policy directive remains in effect until superseded or cancelled.

**J. Authorization and Date of Approval:**

**By Order of:**

**Effective Date:**

/S/  
Stacia A. Hylton  
Director  
U.S. Marshals Service

04/12/2013