Summer July 13, 2015

Motion for Preliminary Injunction in Challenge to Mass Arrest of Black Lives Matter Protesters

Joseph Mead

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, INC., et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No.: 1:15-cv-1386
CITY OF CLEVELAND, et al.	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

If the First Amendment means anything, it is that the government cannot use handcuffs and jail cells to silence critics. Yet the City of Cleveland, acting through its police force, has undertaken a campaign of flimsy arrests and unnecessarily long detentions of protesters with the design and express purpose (in the Deputy Chief of Police's own words) of preventing protesters from going "back out on the streets to protest again." *See* Rosnick Decl. at ¶ 11; *see also* McNulty Decl. at ¶ 12 ("I heard the guards state that we were being held to avoid our interrupting a Cleveland Indians' game."); Goist Decl. at ¶ 18 ("An officer informed us that we would not get out [on Sunday, May 24] because there was a Cleveland Cavaliers basketball game").

The City's policy of restraint, incapacitation, and retaliation of protesters was on full display throughout Memorial Day weekend, May 23-25, 2015. First, on May 23, police rounded up the scores of individuals who were protesting the acquittal of police officer Michael Brelo by trapping them in an alley, blocking both ends, and arresting them on manufactured low-level misdemeanor charges. *See* McNulty Decl. at ¶¶ 4, 5; Goist Decl. at ¶¶ 11-14; Rodney Decl. at ¶¶ 3-5; Weathers Decl. at ¶¶ 6-8. The charge was "failure to disperse," but *if* any order to disperse

indeed was given (no one heard one), it would have been impossible to comply because the police formed lines intentionally blocking any possible exit. *See* McNulty Decl. at ¶¶ 5, 6; Goist Decl. at ¶ 12; Rodney Decl. at ¶¶ 5, 6; Weathers Decl. at ¶¶ 7, 8. Smith Decl. at ¶3. Then, on May 24, despite the fact that judges, prosecutors, and defense counsel were standing by *in order to* provide prompt judicial process to the arrested protesters, the police purposefully delayed another day and a half before finally allowing the protesters access to the courts – on May 25 – and letting them go. *See* Rosnick Decl. at ¶¶ 8, 9. Even if the police had had probable cause – which they did not – to make the arrests in the first place, the Constitution forbids the police from arresting and detaining individuals based, even in part, on their speech.

No free society should tolerate this coordinated effort by law enforcement to retaliate against, incapacitate, and deter citizens from criticizing the government. It certainly has no place in our constitutional government. The Court should promptly enter a preliminary injunction to prevent this egregious abuse of power to incapacitate and retaliate against protesters, until the merits of plaintiffs' complaint can be fully heard, and a permanent injunction entered.

Without a preliminary injunction, Plaintiffs and hundreds of others face irreparable harm. May 23 will certainly not be the last day of protests in this City. Our community is engaged in a robust debate over how the police treat citizens, and the near future promises events that will stimulate more public expression, both planned and spontaneous. Such occasions may include the ongoing Tamir Rice and Tanisha Anderson investigations, the July 24-26 Movement for Black Lives National Convening, and the first Republican Presidential Candidates' Debate on August 6. The City's manifest zeal to keep protesters off of the street presents protesters *now* with an unconstitutional choice: Stay home and shut up, or risk another weekend in jail.

The City's policy, though recently unleashed, is having its intended chilling effect on speech. Some individuals, like Plaintiff McNulty, have decided that the risk of a baseless arrest and retaliatory detention is too high, and are reluctant to attend protests in the future. McNulty Decl. at ¶ 14, Goist Decl. at ¶ 23, Weathers Decl. at ¶ 12; Rodney Decl. at ¶ 11. Protest organizers have found it difficult to find attendees, as citizens now fear official retaliation. Planned protests have fizzled because of "folks … sympathizing w/protest, but not wanting to join for fear of consequences." *See* Kubit Decl. at p.3; *see also* Smith Decl. at ¶ 5 (Out of 100 individuals who committed to attend a protest at the Quicken Loans Arena on May 24, only 5 showed up); Smith Decl. at ¶ 6 ("Many others who had committed to attend (the Quicken Loans protest on May 24) were spooked and afraid to demonstrate out of fear of being arrested like the protesters the night before."), Kubit Decl. at p.2; ("Asked young woman if she planned to join potential protests downtown tonight. 'No,' she said. 'I can't get arrested. I've gotta (sic) graduate.'").

A preliminary injunction is needed to prevent the City from continuing its heavy handed reprisals against protesters, and to relieve would-be protesters from the fear engendered by the City's actions.

FACTUAL BACKGROUND

Cleveland is a hotbed of controversy surrounding police practices. The citizenry's simmering frustration with police practices escalated on November 29, 2012, with the shooting deaths of Timothy Russell and Malissa Williams following a police chase that culminated in a barrage of police gunfire. Many individuals believed that the couples' deaths were the result of racially motivated and/or unconstitutionally excessive police violence.

Issues surrounding police practices reached another new low with the shooting death of 12 year-old Tamir Rice on November 22, 2014. By this point, Cleveland's citizens had become

increasingly disturbed by what they saw as unconstitutional practices on the part of police. Clevelanders weren't the only ones. In November, 2014, the United States Department of Justice found that Cleveland police "violate individuals' Fourth Amendment rights by subjecting them to stops, frisks, and full searches without the requisite level of suspicion,"[1] and that supervisors routinely approved inadequate reports detailing stops and seizures lacking probable cause, and failed to follow-up with officers after incidents involving use of force.[2]

Against this backdrop came the trial of Michael Brelo, the police officer who fired 49 of the 137 shots into Russell and Williams. After the conclusion of the bench trial, weeks passed as the judge waited for an opportune time to announce his verdict. City leaders took advantage of the delay to prepare and practice the official response to expected protests.[3]

Because protests were anticipated, the City deliberately delayed announcing the verdict until 10 am on the Saturday of a three-day Memorial Day weekend, May 23. To the great dismay of those seeking change, Michael Brelo was acquitted; in the eyes of many, a police officer would once again escape accountability for his actions. As anticipated, the verdict catalyzed community members to come together to speak out against what they saw as the latest in a series of law enforcement abuses. Numerous individuals chose to assemble and peacefully protest.

Among the hundreds who assembled were the four Plaintiffs. Although they set out separately, each with his or her own motivation, the four and about 70 others eventually found themselves herded into Johnson Court, a small alley that extends between West 6th Street and West

---

[1] THE DEPARTMENT OF JUSTICE, INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 6 (December 4, 2014), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf.

[2] *Id.*

[3] *Activists continue march for 'justice' after the Michael Brelo acquittal: The Big Story* (May 24, 2015), http://www.cleveland.com/metro/index.ssf/2015/05/activists_continue_march_for_j.html.

9th Street. McNulty Decl. ¶ 3, Goist Decl. ¶ 10, Weathers Decl. ¶ 6, Rodney Decl. ¶ 3. In the alley, they found themselves in an inescapable trap, where the full force of the Cleveland Division of Police would be on show. Without warning, two rows of riot-clad officers blocked the alley's exits from both ends, trapping the entire group inside without any way to leave. Goist Decl. ¶ 11, Smith Decl. ¶ 3. Video Clip 1 (Ex. 1 to Complaint), Sergeant Report (Ex. 3 to Complaint).

Bewilderment spread through the crowd. Protesters had no idea what was going on, nor why a small army was holding them under siege. Many cried out, "Where are we supposed to go?" "What do we do?" and plead to be set free. Video Clip 2 (Ex. 2 to Complaint); McNulty Decl. ¶4. When the questions and pleas fell on deaf ears, widespread fear encompassed the protesters. Rodney Decl. ¶ 4. Plaintiff Robin Goist shot her hands in the air, fearing that police may open fire. Goist Decl. ¶ 13. A few protesters headed for what they thought was an exit, but instead found themselves placed under arrest.

Eventually, the entire crowd found themselves bound with plastic zip-ties closed tightly around their wrists. McNulty Decl. ¶ 4; Goist Decl. ¶ 14; Rodney Decl. ¶ 4; Weathers Decl. ¶¶ 6, 9. Included in the mass arrest were not only peaceful protesters, but also eyewitnesses, including a newspaper reporter and legal observers who, in a cruel twist, were there to watch for (not personally experience) police misconduct. The pretext for the arrests was "failure to disperse." McNulty Decl. ¶ 5; Goist Decl.¶ 15; Rodney Decl. ¶ 5; Weathers Decl. ¶ 7. Yet no dispersal order was given, or at least, not an order loud enough to have been heard by the protesters. McNulty Decl. ¶ 11; Rodney Decl. ¶ 5; Weathers Decl. ¶ 7; Goist Decl. ¶ 12. But had the police issued an audible order, there was no way for the trapped group to comply, as tight rows of riot-gear clad police had maneuvered to block both exits. Whenever an individual approached the wall of police, officers chanted "get back, get back, get back." Video Clip 1.

Having pushed the protesters into Johnson Court and manufactured a flimsy pretense for their arrest, the officers proceeded to transport them to Burke Lakefront Airport and then to jail. McNulty Decl. ¶ 8; Goist Decl. ¶ 16; Weathers Decl. ¶¶ 10, 11; Rodney Decl. ¶¶ 7, 8.

Plaintiff McNulty was set free late Sunday night, May 24 after his father bailed him out of jail following the filing of charges. McNulty Decl. ¶ 13. McNulty was relatively lucky – he had been held for a "mere" 24 hours. The other protesters, including the three other Plaintiffs, were held in the city jail until Monday, May 25 – almost a full 36 hours after their arrest. Goist Decl. ¶ 21; Weathers Decl. ¶ 11; Rodney Decl. ¶ 9.

Why were these non-dangerous individuals—guilty of, at most, low-level misdemeanors (even if we indulge the City's tale)—held in custody for so long? While protesters languished in jail, the courts had been ready, judges alerted and on call, and prosecutors and public defenders lined up—specifically in order to quickly process and release the protesters. It was the Defendants, however, who, to keep the protesters off the streets, intentionally delayed their release. Multiple officers told the protesters that they would be held throughout Sunday to keep them from protesting during sporting events taking place that day. Goist Decl. ¶¶ 18, 19; McNulty Decl. ¶12. In fact there had been indeed a large planned demonstration for May 24 – one which many of the May 23 protesters had planned to attend. Smith Decl. ¶¶ 5, 6. Weeks later, the Deputy Chief of Police himself would confirm that the protesters were being held to keep them from protesting: "…from my perspective, it doesn't make much sense to cite and release the protesters and let them back out on the streets to protest again." Rosnick Decl. ¶ 11. Meanwhile, as the protesters were being kept in deplorable conditions, a few arrestees who had not been protesting (and thus, by implication, would not be protesting the next day) were released. Rosnick Decl. ¶ 5.

Finally, on the morning of May 25 – with the opportunity to protest on May 24 forever lost, and a day of their lives sacrificed – the protesters' ordeal ended. All of the remaining protesters, including Plaintiffs Rodney, Weathers, and Goist, were finally given a hearing, arraigned, and released. Goist Decl. ¶ 21; Weathers Decl. ¶ 11; Rodney Decl. ¶ 9.

After this nightmarish weekend, the Plaintiffs now fear protesting. They fear that if they attend a protest, even if they again comply with all laws and police orders, they will once again be subjected to detention, arrest, and imprisonment - for an indefinite period of time. They fear that another arrest on their record could derail their bright futures. They fear for their freedom, dignity, safety and well-being. *See* Goist Decl. ¶ 23; McNulty Decl. ¶ 14; Weathers Decl. ¶12; Rodney Decl. ¶ 11.

STANDARD OF REVIEW

In general, a court considers four factors when deciding whether to grant a preliminary injunction: 1) Whether the plaintiff has shown a strong or substantial likelihood or probability of success on the merits; 2) Whether the plaintiff has shown irreparable injury; 3) Whether the issuance of a preliminary injunction would cause substantial harm to others; 4) Whether the public interest would be served by issuing a preliminary injunction. *Newsom v. Norris*, 888 F.2d 371, 373 (6th Cir. 1989) (citation omitted).

However, "[w]hen a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor." *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). Likewise, "[w]hen constitutional rights are threatened or impaired, irreparable injury is presumed." *Ohio State Conference of N.A.A.C.P. v. Husted*, 768 F.3d 524, 560 (6th Cir. 2014) (citations and

internal quotation marks omitted). Thus, when bedrock constitutional freedoms such as the right to free speech and assembly are violated—as is the case here—a preliminary injunction is needed.

The Defendants' policy of arresting and confining protesters in retaliation for their exercise of free speech violates the First Amendment to the United States Constitution. The Defendants' policy of holding protesters in jail for the express purpose of preventing them from going "back out on the streets to protest again" constitutes an unconstitutional prior restraint of speech, also in violation of the First Amendment. The Defendants' policy has been clearly expressed and demonstrated, and would-be protesters are justifiably fearful and chilled. Plaintiffs therefore request a preliminary injunction requiring Defendants to halt this policy immediately - before it does even more violence to the constitutional rights of Cleveland protesters.

ARGUMENT

I. The Court Should Enjoin the Cleveland Division of Police's Unconstitutional Practice of Incarcerating and Retaliating Against Protesters For Their Political Speech

A. The City Has Adopted a Protocol of Arrest and Needlessly Long Detentions In Order to Incapacitate and Deter Protesters

This is one of those "rare" cases with "direct evidence of retaliatory intent." Griffin v. Berghuis, 563 F. App'x 411, 420 (6th Cir. 2014) (internal quotation omitted); *King v. Zamiara*, 680 F.3d 686, 695 (6th Cir. 2012) ("Motive is often very difficult to prove with direct evidence in retaliation cases."). (citation omitted). The bald statement by the Deputy Chief of Police that "it doesn't make much sense to cite and release the protesters and let them back out on the streets to protest again," Rosnick decl. ¶11, is candid confirmation of the reason for the protesters' lengthy detention.

Even without the Deputy Chief's admission, the City's design to get protesters "off of the street" was reflected in the City's carefully choreographed and practiced response to the May 23

protests, video clip 1, including the pretextual basis for the arrests and the gratuitous delay in releasing the protesters. Rosnick Decl. ¶¶ 8, 9, 10.

By directing the protesters down an alley, blocking their exit, and then preventing them from dispersing (assuming that an order to disperse was even given), the City manufactured an excuse to arrest protesters *en masse*. This excuse was then used by the City to place the protesters in custody, and hold them for an inordinate amount of time.

Even assuming that the City could manufacture criminal wrongdoing by arresting individuals for not following an order that was impossible to follow, there was no apparent purpose for the extended detention of the protesters, save the unconstitutional goal to incapacitate and deter those who would have criticized the police department. The 70-plus Johnson Court arrestees were cited only with simple misdemeanors.[4] Except for the possibility that the protesters would resume their public demonstration against police misconduct, these protesters posed no risk to public safety or order.

The Department's treatment of these minor, non-violent offenses stands in sharp contrast to the City's treatment of other offenses. For example, when Michael Brelo was charged with a violent felony (manslaughter), he was neither arrested nor detained.

Not only did the Department refuse to promptly release protesters arrested for minor offenses, but it gratuitously delayed bringing them before judges. The City knew that protests

[4] The crimes for which some protesters were actually convicted—based on no contest pleas entered to avoid the burdens of fighting the (meritless) charges—are minor misdemeanors, a crime for which Ohio law flatly *bans* arrest and incarceration altogether, except in very narrow circumstances not present here. Ohio Rev. Code 2935.26(A) ("When a law enforcement officer is otherwise authorized to arrest a person for the commission of a minor misdemeanor, the officer shall not arrest the person, but shall issue a citation" unless specific conditions are met); Cleveland Municipal Court Local Rule 4.01(K) (severely limiting the time that an individual arrested for a minor misdemeanor may be detained (under the limited circumstances that an arrest can be had)).

were likely, and made extensive preparations for the possibility of arrests. Prosecutors and judges from Cleveland Municipal Court were standing by over the weekend, fully ready to ensure the timely processing (and release) of anyone arrested. Rosnick Decl. ¶¶ 8,9,10. And a network of attorneys was waiting to jump into action to represent anyone arrested. *Id*. ¶7. Rather than take advantage of the judicial process that was deliberately put in place, the Police Department refused to release or grant access to the courts to the vast majority of the protesters until Monday morning, two full nights and a day and a half after the arrests were made.[5]

It is revealing that the City began releasing individuals if they proved, to the Department's satisfaction, that they had *not* been protesting. For instance, a Northeast [6]Ohio Media Group editor covering the protest was arrested because he was unable to comply with law enforcement's inaudible and impossible order to disperse. Once the Department was convinced that he was an observer rather than participant in the protest, he was released. A legal observer/lawyer was released early as well. Rosnick Decl. ¶5. Similarly, the charges against Plaintiff McNulty were promptly dropped after the prosecutor concluded that he was only "taking photographs" rather than cooperating with the protesters.[7]

---

[5] Whether this unnecessary delay violated the protesters Fourth Amendment rights will be an issue litigated later in this case. *See Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) ("Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake."). But even if the delay somehow survived *Fourth* Amendment scrutiny, its purpose and effect to silence speech places it in direct conflict with the First Amendment.

[6] *Northeast Ohio Media Group crime editor arrested during Brelo verdict protest*, Kris Wernowsky, Cleveland.com, (May 23, 2015 at 12:23 AM, updated May 24, 2015 at 1:31 PM) http://www.cleveland.com/metro/index.ssf/2015/05/northeast_ohio_media_group_cri.html

[7] To be sure, the decision not to prosecute McNulty was manifestly correct, as McNulty had violated no law and there was no basis for his arrest. McNulty, however, was hardly unique in this regard. The fact that he was watching people speak rather than joining in the speech is entirely irrelevant to the charge of failure to disperse.

The City's decision to make retaliation a component of its official response to protests is particularly galling, coming on the heels of a Department of Justice report concluding a pattern and practice of, among other things, retaliation through the use of excessive force.[8] Retaliation through arrest and detention is also unlawful.

The City's campaign against protests on May 23 was hardly the act of a few rogue officers. Quite to the contrary, the police response to the protests was carefully choreographed, the product of extensive training and practice. *See*, Video Clip 1. Each synchronized movement of the small army of officers reflects their common purpose. High-ranking officials were on the scene and coordinating from afar. The mayor and the chief were personally involved in the official response as well. See, e.g., Cleveland Division of Police, *Media Update, Chief Williams: May, 24, 2015* (May 24, 2015), https://clevelandpolice.wordpress.com/2015/05/24/media-update-chief-williams-may-24-2015/

The City's design to incapacitate and punish had the intended effects. Locked away, the May 23 protesters were deprived of the opportunity to speak out against the police the following day. And not only were those protesters robbed of this chance, but "many other [protesters] who had committed to attend were spooked and afraid to demonstrate out of fear of being arrested like the protesters the night before." Smith Decl, ¶6. Out of the 100 protesters who had committed to

[8] Dep't of Justice Findings Letter for Investigation of City of Cleveland Division of Police, Dec. 4, 2014, http://www.justice.gov/file/180576/download (finding "[t]he unnecessary, excessive or retaliatory use of less lethal force including tasers, chemical spray and fists. . . . At times, this force appears to have been applied as punishment for the person's earlier verbal or physical resistance to an officer's command."); see also Settlement Agreement, *United States of America v. City of Cleveland*, Case No. 1:15-cv-1046, Doc. 3-1 at PageID #: 97 (N.D. Ohio.) (Oliver, C.J.) ("officers will not use force against persons who only verbally confront them and do not impede a legitimate law enforcement function;" "CDP will explicitly prohibit the use of retaliatory force by officers. Retaliatory force includes, for example… force used to punish an individual for disrespecting officers.").

attend on May 24th, only five people showed up. But 50 to 60 police officers were at the protest site, standing in formation, when the five arrived. Smith Decl. ¶ 7. Kubit Decl. p.4.

By keeping the protesters incarcerated, the City prevented them, and deterred others, from reaching a regional and national audience. The sporting events attracted spectators and a television audience. By keeping the protesters locked up, the City stole their right to express their frustration on a national stage.

The City's actions sent a very clear message to deter other future protesters as well. Activist members of the ACLU are intimidated from attending demonstrations, out of fear of retaliation by the police. Complaint, ¶ 90. There is also "a paucity" of National Lawyers Guild Legal Observers as a "result of worry over the arrests and detainment of … two Ohio NLG legal observers [who were arrested with the protesters] on May 23, 2015." Rosnick Decl. ¶ 6.

B. The First Amendment Prohibits Incarceration to Prevent Speech

"[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 559 (1976). For this reason, even when a government might lawfully impose criminal penalties on a speaker, the First Amendment is deeply hostile to the government preventing speech before it even happens. "Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559, 95 S. Ct. 1239, 1246, 43 L. Ed. 2d 448 (1975); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (citation omitted) ("If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time.").

Most prior restraints are administrative or judicial orders that command a person to be silent. The City's approach here of *physically* locking up individuals to keep them from protesting the next day takes a prior restraint to a shocking new level.

C. The Constitution Prohibits Retaliatory Action Partially Motivated By First Amendment Activity

A prior restraint prevents speech ex ante; retaliation accomplishes the same end by punishing speech after the fact. This, too, is unconstitutional.

A plaintiff establishes a claim for unlawful retaliation if:

> (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by the plaintiff's protected conduct.

Thaddeus-X v. Blatter, 175 F.3d 378, 394 (6th Cir. 1999) (en banc). All of these elements are readily met here.

First, Plaintiffs were engaged in conduct protected by the First Amendment on the evening of May 23.[9] "There is scarcely a more powerful form of expression than the political march," *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 611 (6th Cir. 2005), and speech expressing dissatisfaction with the government is "expression situated at the core of our First Amendment values." *Texas v. Johnson*, 491 U.S. 397, 411 (1989); *see also Connick v. Myers*, 461 U.S. 138, 145 (1983) (citation and internal quotation marks omitted) ("speech on public issues

[9] Even though McNulty did not attend the protest to participate in its expressive purpose, his interests (protected by the First Amendment) in hearing the protesters and documenting an important event directly led to his arrest and detention. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); *Crawford v. Geiger*, 996 F. Supp. 2d 603, 614-15 (N.D. Ohio 2014) ("the right [to film police officers in the open] unquestionably exists under the First Amendment" (collecting cases)).

occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.").

Second, the City's actions of citation, arrest, and detention readily qualify as adverse actions. *See, e.g., Kennedy v. City of Villa Hills, Ky.*, 635 F.3d 210, 219 (6th Cir. 2011) ("Kennedy's right to be free from retaliatory arrest after insulting an officer was clearly established." (collecting cases)); *Greene v. Barber*, 310 F.3d 889, 895 (6th Cir. 2002).

Third, as noted above, the decision to cite, arrest, and detain the protesters was motivated, at least in part, by the fact that they were protesting. The Deputy Chief's comment dispels any doubt on this score, and all of the circumstances confirm the City's purpose.

D. The City's Policy, if not Enjoined, Will Cause Irreparable Injury; the City Faces No Harm From Being Required to Comply with the Constitution, and the Public Interest Sharply Favors the Injunction

The other factors clearly favor an injunction here. Cleveland's near future promises events that will stimulate more public expression, both planned and spontaneous. Such occasions may include the ongoing Tamir Rice and Tanisha Anderson investigations, the July 24-26 Movement for Black Lives National Convening, and the first Republican Presidential Candidates' Debate on August 6. But the Cleveland Division of Police has confronted protesters with an untenable, and unconstitutional, choice: stop protesting, or face the prospect of arrests and prolonged detentions in deplorable conditions. If an injunction is not entered, protesters face irreparable injury. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality). Imposing on protesters a "risk [of] being jailed is antithetical to our traditions, and constitutes a burden on free expression that is more than the First Amendment can bear." *Am.-Arab Anti-Discrimin. Comm. v. City of Dearborn*, 418 F.3d 600, 612 (6th Cir. 2005).

Plaintiffs' risk of unconstitutional injury here is dispositive. The City has no interest in law enforcement tactics of censorship and fear, and "it is always in the public interest to prevent the violation of a party's constitutional rights." *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 412 (6th Cir. 2014) (quotation omitted).

Given the outrageousness of the City's admitted purpose and the intolerable risk of ongoing and future First Amendment harms city-wide, an injunction is clearly warranted. "To do otherwise would be to do less than the First Amendment commands." *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 670 (2004).

CONCLUSION - REQUESTED ORDER

To prevent the City from continuing its obviously unlawful policy and behavior, and to dissipate the fear of future speech-based retaliation that the City's actions have created, the Court should issue a preliminary injunction that:

(1) Prohibits the Police from making any custodial arrests motivated by the suspect's participation in a protest or motivated by the projected likelihood that the suspect will participate in a protest.

(2) Requires the Defendants, pending a full trial on the merits, to provide notifications to the Court and to counsel for the Plaintiffs when individuals are arrested for conduct arising out of a protest. Said reports would provide the basis and charges for each arrest and the length of time each arrestee is held in custody.

Respectfully submitted,

s/ Freda J. Levenson
Freda J. Levenson (0045916)
Trial Attorney for Plaintiffs
Drew S. Dennis (0089752)
Joseph Mead (0091903)
ACLU of Ohio Foundation, Inc.
4506 Chester Avenue

Cleveland, Ohio 44103
Tel: (216) 472-2220
Fax: (216) 472-2210
flevenson@acluohio.org
ddennis@acluohio.org
j.mead@csuohio.edu
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed this 13th day of July, 2015 and served upon Defendants by courier, e-mail, and certified U.S. mail, return receipt requested, at the following address:

Barbara Langhenry
City of Cleveland Department of Law
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114
BLanghenry@city.cleveland.oh.us

s/ Freda J. Levenson
Freda J. Levenson (0045916)
Trial Attorney for Plaintiffs