Case No. 26-1609

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACK DICKINSON (a.k.a. "the Portland Chicken"), LAURIE ECKMAN, RICHARD ECKMAN, MASON LAKE, HUGO RIOS, *on behalf of themselves and those similarly situated,*
Plaintiffs-Appellees

v.

DONALD TRUMP, President of the United States, *in his official capacity*; KRISTI NOEM, Secretary, U.S. Department of Homeland Security (DHS), *in her official capacity*; UNITED STATES DEPARTMENT OF HOMELAND SECURITY,
Defendants-Appellants

On Appeal from the United States District Court for the District of Oregon, Case No. 3:25-cv-02170 (SI)
Honorable Michael H. Simon

PLAINTIFFS-APPELLEES' OPPOSITION TO MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

Plaintiffs-Appellees are nonviolent protesters and journalists who exercise their First Amendment rights at ongoing protests at the ICE Building in Portland. As part of what it calls Operation Skip Jack, Defendant-Appellant Department of Homeland Security is surging agents to Portland, placing them under the unified command of Federal Protective Service, and repeatedly bombarding Plaintiffs with crowd-control weapons in retaliation for them exercising their First Amendment rights. After a three-day hearing, The District Court certified a class and issued a preliminary injunction prohibiting Defendants from assaulting nonviolent protesters and journalists at the ICE Building at 4310 Southwest Macadam in Portland.

The Court heard testimony from nine protesters and press witnesses, two Portland Police Bureau commanders, an Oregon State Police captain, and expert Gil Kerlikowske, a former Customs and Border Protection ("CBP") Commissioner, received depositions of eight line agents and three supervising agents, reviewed 61 declarations from civilians, and analyzed extensive video and photo evidence. Defendants presented no live witnesses or videos, and no evidence that they had reprimanded any agent for any of the hundreds of documented acts of unnecessary violence, including admitted violations of agency policies. Defendants asked no questions of their line officers or declarant Cantu and only asked minimal, cursory

questions to two other supervisors during their depositions, none of which they rely on in their papers. Defendants relied solely on two declarations, one based entirely on reports (not personal knowledge), some of which the DHS agents involved testified were not accurate.

On this record, Defendants cannot show that the Court's findings were clear error, much less meet all the *Nken* stay factors.

Foremost, Defendants cannot prove irreparable harm. Defendants offer no evidence that the injunction ever harmed them in the last seven weeks and ignore that FPS Region 10 Director testified that he is not aware of any harm resulting from the injunction and that it is "by all means" safe to comply with at the current level of activities.

Nor can Defendants prove a strong likelihood of success on the merits. They recycle the same standing arguments that this Court has rejected (Mot. at 6-10), and ignore the District Court's findings that they engaged in a pattern of retaliation that is likely to recur, which is chilling Plaintiffs from exercising their rights. Defendants offer no explanation for any of hundreds of acts of unnecessary violence documented in the record, such as why agents teargassed three named Plaintiffs while they were standing far from the building in a crowd of peaceful thousands, including children and elderly people; why they shot 84-year-old Plaintiff Laurie Eckman in the head; or why they targeted munitions under the

walker of 83-year-old Plaintiff Richard Eckman as he tried to escape a cloud of teargas. This is "exceptionally strong" evidence of retaliation, notwithstanding the written policies they cite (Mot. at 8). *Index Newspapers LLC v. United States Marshals Serv.*, 977 F.3d 817, 829 (9th Cir. 2020). Defendants do not dispute that their line agents were trained to attack people engaged in passive resistance, that their supervisors reviewed all their uses of force, that they never reprimanded any of their agents for violating their written policies, and that their Regional Director testified that Defendants' tactics were praised by Secretary Noem.

Defendants also assert that *Puente v. City of Phoenix*, 123 F.4th 1035 (9th Cir. 2024), allows them to assault peaceful protesters with chemical munitions. But that was not this Court's First Amendment analysis. *Puente* upheld the district court's findings that police lacked retaliatory intent during a single violent event. 123 F.4th at 1063. It did not involve a sustained course of misconduct like *Index* or this case.

In asserting that the injunction is unsafe and unworkable (Mot. at 2), Defendants fail to prove that it was clear error for the Court to accept the testimony of their own Region 10 Director, the Portland Police Bureau, Oregon State Police, and expert testimony from former Commissioner of CBP that the injunction is safe, tracks Defendants' own policies, and is easy for properly trained officers to follow.

Defendants liken this case to others Defendants have had to defend outside this Circuit. (Mot. at 1.) The injunction shares none of the features those courts disagreed with; it is limited in scope to the Portland ICE Building and the officers under the unified command structure who are ostensibly guarding it, and it is less detailed than the terms of other injunctions this Court has declined to stay. *See Los Angeles Press Club v. Noem*, No. 25-5975 (9th Cir.), Dkt.66 at 2.

For these reasons, neither the Injunction, nor the remaining claims below should be stayed.

BACKGROUND

The District Court found that Plaintiffs are nonviolent protesters and reporters who were needlessly assaulted by Defendants. (Dkt.155 at 6-11.) These findings were based on substantial evidence, including three days of testimony, eleven depositions, and 61 civilian declarations. (Mar. 2 Tr. at 164-74, 181-89, 198-202, 219-228; Mar. 3 Rough at 5-23, 43-51, 64-80, 90-104, 205-212; Dkts.12-32, 36, 50-52, 54, 56, 58-59, 64, 94-07-94-14, 94-16, 126-01-126-20, 118, 141.) "Plaintiffs provided numerous videos, which were received in evidence and unambiguously show DHS officers spraying OC Spray directly into the faces of peaceful and nonviolent protesters engaged in, at most, passive resistance and discharging teargas and firing pepper-ball munitions into crowds of peaceful and

nonviolent protestors." (Dkt.155 at 11; *see also id*. n.5 (finding the videos to be "unambiguous and disturbing" and urging this Court to review them).)

The Court also found that "Plaintiffs present strong evidence from both law enforcement and former law enforcement experts." (Dkt.155 at 21.) It credited the testimony of Portland Police Bureau Commander Franz Schoening, who "testified that it was his impression that the amount of force used by federal officers at the Portland ICE Building is not a good indication of the level of violence or unrest caused by protests at that location." (*Id*.) "Commander Schoening called the DHS force used on one specific occasion that he personally observed 'startling' and remarked that it certainly departed from what he would describe as best practice or legal. Commander Schoening also described another occasion when PPB Officers were struck by munitions fired by federal officers despite Commander Schoening not seeing any violent conduct or behavior that would have otherwise precipitated that use of force." (*Id*. at 21-22; see also Mar. 2 Tr. at 25-27, 36-48.)

The Court likewise credited the testimony of expert, Gil Kerlikowske, the former Commissioner of CBP, including his opinion "that DHS has shown a repeated pattern of excessive force against those present at the Portland ICE Building." (Dkt.155 at 22.) It found that Mr. Kerlikowske "identified a myriad of misuses of crowd control munitions at the Portland ICE Building, including federal officers using teargas on a peaceful crowd, shooting munitions from a roof into a

crowd, using munitions on persons who posed no threat, using munitions or non-trivial force on people who were not actively resisting, using volleys of munitions in a grossly disproportionate manner, failing to provide warnings and failing to engage in de-escalation approaches before using force, shooting pepper balls or teargas at people directly, targeting a person in the head (which, he noted, can be lethal), shooting at people across long distances (which, he noted, is dangerous due to loss of accuracy),[1] and using munitions to retaliate against First Amendment activity." (*Id.*; *see also* Dkt.34 ¶¶17-67; Dkt.126-23 ¶¶5, 10-24; Mar. 3 Rough at 129-32, 135-41.)

Defendants disregard the District Court's findings and instead cite exclusively to their own hearsay declarations. (Mot. at 3.) They offered no video evidence or live witnesses in the proceedings below.

STANDARD OF REVIEW

On a stay motion, the Court "review[s] the district court's findings of fact for clear error, its legal conclusions de novo, and the injunction's scope for abuse of discretion." *Index*, 977 F.3d at 824 (citing *Armstrong v. Brown*, 768 F.3d 975, 979 (9th Cir. 2014)).

[1] Defendants admitted this. (Hrg. Ex.25 at 251-52.)

When reviewing findings of fact, "clearly erroneous" means that the finding is "illogical, implausible, or without support in inferences that may be drawn from the record." *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc). "This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985).

LEGAL STANDARD

Staying a preliminary injunction pending appeal is an "extraordinary remedy." *United States v. Mitchell*, 971 F.3d 993, 999 (9th Cir. 2020) (quotation omitted). The movant bears the burden of proving all four factors in *Nken v. Holder*, 556 U.S. 418, 426, 433-34 (2009).

ARGUMENT

I. DEFENDANTS HAVE NOT PROVEN THEY WILL BE IRREPARABLY HARMED

Defendants offer a single paragraph about "remaining equitable factors." (Mot. at 21.) The two sentences mentioning irreparable harm fail to carry their burden.

Irreparable harm must be shown to be likely "during the period before the appeal is decided." *Index*, 977 F.3d at 824 (quotation omitted). Defendants cannot meet this "demanding standard." *Id.* When a party fails to carry its burden to show

irreparable harm, "then a stay may not issue." *Doe #1 v. Trump*, 957 F.3d 1050, 1058 (9th Cir. 2020).

The District Court found "no likelihood of irreparable damage to Defendants during the pendency of any appeal … Defendants have complied with the Court's Temporary Restraining Order for 28 days without problem or prejudice, let alone any risk of irreparable harm." (Dkt.155 at 34.) Defendants have not shown this finding was clearly erroneous or offered any evidence of harm since the injunction has been in place—over seven weeks. *See Al Otro Lado v. Wolf*, 952 F.3d 999, 1007 (9th Cir. 2020) (denying stay when DHS failed to submit evidence of *actual* harm after being subject to injunction for three weeks and, instead relied on "estimates, assumptions, and projections"); *Index*, 977 F.3d at 836 (government denied stay when it offered no proof that injuries were "more severe or more frequent" under injunction or that injunction resulted in actual injuries).

Moreover, Defendants' speculation is contrary to the testimony from law enforcement that the District Court credited, including CBP's former Commanding Officer, two Portland Police Bureau Commanders who were personally familiar with the situation on the ground, and an Oregon State Police Captain. (Dkt.34 ¶¶68-74; Dkt.126-23 ¶¶25-34; Mar. 2 Tr. at 29-36, 49-56, 59, 124-137; Mar. 3 Rough at 135, 153-157.) It is also contrary to the testimony of Defendants' Director of FPS Region 10:

> Q: Based on your training and experience, is it possible to safely comply with the temporary restraining order?
>
> A: With the current level of activity, if that continues, then, yes, by all means it's safe to comply.

(Hrg. Ex.25. at 234.)

For this reason alone, Defendants have failed to meet their burden, and their motion should be denied.

II. DEFENDANTS HAVE NOT MADE A STRONG SHOWING OF LIKELIHOOD OF SUCCESS

Defendants' standing and retaliation arguments fail to provide the "strong showing" of likelihood of success on the merits that *Nken* requires.

A. The District Court Correctly Determined Plaintiffs Have Standing

The District Court correctly held that Plaintiffs may establish standing by showing "either 'continuing, present adverse effects due to [their] exposure to defendants' past illegal conduct or 'a sufficient likelihood that [plaintiffs] will again be wronged in a similar way.'" (Dkt.155 at 15 (brackets in original, quotations omitted).) The District Court properly found both.

First, it was not clear error to find that "All Class Representatives currently are suffering First Amendment chill." (Dkt.155 at 16; Mar. 2 Tr. at 174-75, 187-89, 203-06, 231-32, Mar. 3 Rough at 49-51).) For example, the Court found that the Eckmans and Mr. Rios had "modified their 'speech and behavior' to avoid being assaulted" and that "Mr. Rios's 'self-censorship' is hampering his newsgathering."

(Dkt.155 at 17.) The Court further found that "Plaintiffs have presented 'concrete evidence to substantiate their fears' that Defendants' conduct will continue." (*Id*.)

Second, the Court separately found that Plaintiffs faced a realistic likelihood of recurrent injury. (Dkt.155 at 18 ("the evidence received" is "powerful evidence of the … ongoing, sustained pattern of conduct that resulted in numerous injuries to members of the press and peaceful protestors after the complaint was filed") (quoting *Index*, 977 F.3d. at 826 (ellipses in original, quotations omitted)).) Indeed, Defendants attacked four of the five named Plaintiffs on multiple dates, at different events.[2]

Defendants argue that *Lyons* precludes standing. (Motion at 6-7.) *Lyons* was a Fourth Amendment case that turned on a speculative chain of causation—plaintiff committing another crime, being arrested, resisting arrest, and being put in an illegal chokehold. In the First Amendment retaliation context "the injury-in-fact element is commonly satisfied by a sufficient showing of self-censorship, which

[2] *See* Feb. 2, 2026 Tr. at 14 (admitting they repeatedly assaulted Plaintiffs Dickinson and Lake). Defendants are incorrect that they only attacked the Eckmans once. On October 4, 2025, Defendants shot Mrs. Eckman in the head and assaulted Mr. Eckman as he was attempting to leave. (Dkts.13-14.) On January 31, 2026, while the TRO was pending, Defendants teargassed the Eckmans when they attended a protest with their church group. (Dkts.50-51.) The injunction Order recounted inaccurate dates for the Eckmans' injuries, which are correctly described in the TRO Order. (Compare Dkt.155 at 8 with Dkt.68 at 2-3, 10.)

occurs when a claimant is chilled from exercising his right to free expression." *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1174 (9th Cir. 2022) (quotation omitted).

Defendants' citation to *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013) (Mot. at 8), is inapt. *Clapper* was a pre-enforcement challenge. It does not apply where the government goes beyond mere threat of action to conduct an ongoing operation that repeatedly uses violence to silence the speech of Plaintiffs and thousands of class members. *See id.* at 418 (acknowledging Supreme Court cases holding that constitutional claims may arise from chilling effects "fairly traceable" to government action).

Finally, Defendants argue that there is no likelihood of recurring retaliation by claiming that their declarations give a "fuller description," asserting that the Court only found that they had retaliated against Mr. Dickinson four times, and by pointing to their policy prohibiting retaliation. (Mot. at 7-9.) But they do not show that the District Court's findings are clear error. *Mayfield v. United States*, 599 F.3d 964, 970 (9th Cir. 2010) (Court "will affirm a district court's ruling on standing when the court has determined that the alleged threatened injury is sufficiently likely to occur, unless that determination is clearly erroneous or incorrect as a matter of law."); *Anderson*, 470 U.S. at 575. Defendants ignore, for example, that the District Court credited the testimony of Mr. Kerlikowske, who reviewed their declarations and reports, and found that they were compelling proof of a pattern of

misconduct (Dkt.126-23 ¶¶4-5, 10-24), and fail to address the evidence in Section B below, supporting the District Court finding an *unwritten* policy contradicting Defendants' written one. (Dkt.155 at 13.) The District Court properly found that Plaintiffs presented evidence of a pattern and policy as was sufficient to establish standing in *Index*, where this Court found that First Amendment chill conferred standing on plaintiffs, some of whom had been attacked by DHS multiple times, rejected defendants' arguments that the same written policies here precluded a finding of standing, and found that defendants' repetitive acts of unnecessary violence were "exceptionally strong" evidence of retaliation. (Dkt.155 at 20.)[3]

B. Defendants Fail to Make a Strong Showing They Are Likely to Win on Plaintiffs' Retaliation Claims

Defendants fail to prove that the District Court's findings supporting Plaintiffs' retaliation claims were clearly erroneous. (Dkt.155 at 6-13, 20-23.)[4]

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[3] Defendants incorrectly argue *Index* is not binding. (Mot. at 10.) This Court has cited *Index* as precedent. *Sanderlin v. Dwyer*, 116 F.4th 905, 910-11 (9th Cir. 2024). *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 656 (9th Cir. 2021), addressed whether a decision by a motions panel is law of the case for a later merits panel in the same case. It does not negate that published motions panel decisions are "binding circuit authority." *Hart v. Massanari*, 266 F.3d 1155, 1172 (9th Cir. 2001).

[4] Defendants' argument that Plaintiffs only provided evidence regarding a "handful of incidents" (Mot. at 11) is doubly incorrect. First, the declarations, testimony and videos showed hundreds of incidents of violence and indiscriminate force against entire crowds. Second, as Defendants stated on the record, the discovery was supposed to be a "representative sample" of the universe of evidence given the compressed timeframe. (Feb. 23, 2026 Tr. at 14-15.)

First, Defendants are incorrect that there was no direct evidence of retaliation. (Mot. at 11.) DHS posted a false video about Portland protesters, and its officials repeatedly sanctioned violence against protesters. (Dkt.94 at 16; Dkt.126 at 27; Dkt.130 at 2-3.) The only training materials specifically provided to officers sent to Portland for Operation Skip Jack focus on using force and portray protesters using an image from 2020. (Hrg. Ex.23.)[5]

Defendants repeat that their written policies prohibit retaliation. (Mot. at 11.) This argument does not overcome the District Court's finding that Defendants had an unwritten policy of retaliation. (Dkt.155 at 13.)

The Court's finding is also supported by evidence that agents repeatedly violated Defendants' written policies without correction (*e.g.* Hrg. Ex.7 at 114-16; Hrg. Ex.11 at 28-32, 51; Dkt.155 at 23 ("[A]gents involved were not put on leave and do not appear to have been held accountable in any way," which "allows them and others to continue to use excessive force without correction.")); Defendants' procedures require them to immediately remove anyone who misuses force even before investigations (Dkt.160 at 287); Defendants' supervisors reviewed every use-of-force report from Operation Skip Jack (Hrg. Ex.25 at 124-25); and

[5] Other direct evidence exists. For example, Helena Bartkowski was arrested and told the citation may be thrown out because, as the DHS officer explained, "it is just to encourage you not to come back." (Dkt.155 at 11 (internal quotation marks omitted).)

Defendants' ultimate supervisor was unaware of any reprimands for any of the misconduct in the record. (*Id*. at 133, 245; Mar. 3 Rough. at 123:1-7; Dkt.160 at 245.) In their depositions, DHS line officers and supervisors did not understand the difference between active resistance (where their policies allow some uses of force) and passive resistance (where their policies prohibit use of force)—with Mr. Cantu stating that "going limp" constitutes active resistance. (Hrg. Ex.18 at 3-4; Hrg. Ex.25 at 207-08.)

Supervisors' depositions further revealed that policymakers like the DHS Secretary approved Operation Skip Jack. (Dkt.155 at 23 (finding that "[r]ather than reprimanding DHS violence against protesters, senior officials have publicly condoned it"); Mar. 3 Rough. at 120-26; Hrg. Ex.25 at 57-58.) It was not clear error to conclude there was an institutional motivation to retaliate, rather than an individual one. *Menotti v. City of Seattle*, 409 F.3d 1113, 1148 (9th Cir. 2005) (policy or custom of retaliation can be inferred from "evidence of repeated constitutional violations and the absence of evidence that [] officers were discharged or reprimanded") (quotation omitted).

Defendants' arguments also ignore other overwhelming evidence of retaliatory intent. Plaintiffs and class members were "directly targeted with force in the head and other areas of the body without warning and despite posing no threat nor creating a driveway obstruction." (Dkt.155 at 20.) Other protesters were "shot

while standing apart from others … attacked after verbally engaging with officers, or [had] their cameras or recording equipment hit directly by officers." (*Id*.) Officers were "shooting into nonviolent crowds from dangerous angles like the roof of the Portland ICE Building." (*Id*. at 21.) The Court also credited testimony from local police, whom Defendants also struck with munitions, and from Mr. Kerlikowske who categorized repeated violations. (*Id*. at 22.) It noted that Defendants gave counterprotesters preferential treatment (*id*. at 7-9, 11), and that "officers regularly apply pepper-ball, teargas, and OC Spray munitions to broader crowds of people that include peaceful, nonviolent putative class members—for example, by launching canisters of teargas behind groups of peaceful protesters attempting to leave without first issuing dispersal warnings and thus not giving them any practical way to avoid these chemical irritant munitions." (Dkt.154 at 14.) "This practice, Mr. Kerlikowske testified, gives officers no legitimate tactical benefit. Quite the contrary, it can trap and further aggravate a crowd and make it more difficult for officers (federal, state, and local) to identify individuals within crowds who may be violating the law and target them for arrest." (*Id*.; *see also* Mar. 3, Rough at 129-32.)

Against this record, Defendants claim that *Puente* gives them carte blanche to use chemical munitions to disperse protesters, and that their conduct is better judged under the Fourth Amendment. (Mot. at 11-12.) But *Puente* affirmed only a

district court's finding of no retaliatory intent at a single protest, where plaintiffs argued that it was retaliatory to disperse them and pointed to a "commemorative coin" a few officers had created afterward expressing animus toward protesters. 123 F.4th at 1063. Unlike *Index*, it did not involve multiple instances of misconduct over an extended period. The district court found a "clear and present danger" in *Puente* based in part on the need to physically protect President Trump. Here, the District Court found no clear and present danger for the instances at issue—such as spraying people passively sitting on the side of the driveway. (Dkt.155 at 6-7.)

C. The Injunction's Scope Is Not an Abuse of Discretion

This Court reviews the scope of an injunction for "abuse of discretion" and any factual findings in support for "clear error." *Index*, 977 F.3d at 824 (9th Cir. 2020) (citing *Armstrong v. Brown*, 768 F.3d 975, 979 (9th Cir. 2014) and *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998)).

Defendants fail to show that the District Court abused its "considerable discretion" in crafting the injunction. *See City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1245 (9th Cir. 2018). Defendants ignore that three unrebutted experts, whose testimony the District Court credited, found the injunction safe and workable, and that the injunction's terms largely track Defendants' use-of-force policies and those safely followed by other law enforcement. (Dkt.155 at 12-13.)

Even the Region 10 FPS Director admitted that the injunction, as modified by the Court to loosen restrictions regarding pepper spray, generally tracked FPS use-of-force policies (Hrg. Ex.25 at 238-42), and that the injunction is safe and workable. (*Id*. at 234.)

Defendants' three arguments against the breadth and workability of the injunction lack merit:

First, Defendants argue that the injunction gives relief to people other than the named Plaintiffs. (Mot. at 13.) This argument fails because the Court certified a class. Defendants' reliance on the partial stay in *LA Press Club* is misplaced. (Mot. at 14.) At the time of appeal, no class allegations had been made there.

Without addressing the standard of review, Defendants argue in a single paragraph that the Court should not have found commonality under Rule 23(a)(2). (Mot. at 14-15.) They are incorrect. Where, as here, an extensive factual record establishes that law enforcement actions are part of an ongoing, unified government operation governed by an unwritten policy, the lawfulness of that policy is "plainly suitable for classwide resolution." *See Gonzalez v. United States Immigr. & Customs Enf't*, 975 F.3d 788, 809 (9th Cir. 2020) (distinguishing between "totality of the circumstances" analysis that applies to probable cause and classwide questions raised by government's reliance on database to establish probable cause) (quotation omitted); *Parsons v. Ryan*, 754 F.3d 657, 682 (9th Cir.

2014) ("In a civil rights suit such as this one ... commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members. Under such circumstances, individual factual differences among class members pose no obstacle to commonality.") (alteration in original, quotation omitted).

The District Court found that "Plaintiffs have shown by a preponderance of evidence that, under unified FPS command, Defendants have an unwritten policy" that permits using crowd control munitions to suppress speech by nonviolent protesters at the Portland ICE Building (Dkt.154 at 7) based on evidence regarding the use of less lethal munitions, inadequate training, and lack of investigations following the use of force. (*Id*. at 8-9.) Defendants have not challenged any of these findings, let alone shown them to be clearly erroneous.

Defendants argue that the class includes people who have not been attacked and people who were "disruptive." (Mot. at 14.) Defendants cite no case for the distinctions they attempt to draw, and rely instead on *Black Lives Matter Los Angeles v. City of Los Angeles*, 113 F.4th 1249, 1258-60 (9th Cir. 2024). *Black Lives Matter* did not reach any conclusions as to commonality; it held that the district court failed to "conduct any analysis" on commonality and remanded the

issue. *See id*. at 1260.[6] Plaintiffs' injury arises from the chilling effect of Defendants' retaliation, which is assessed objectively, *see Index*, 977 F.3d at 827, and all class members are subject to the risk of retaliation. (Dkt.154 at 7-8.) *Parsons*, 754 F.3d at 678.

***Second*,** Defendants claim that the injunction operates like a "detailed law-enforcement manual" that is unmoored from Plaintiffs' claims. (Mot. at 16.) This characterization disregards the terms of the injunction here. The injunction contains only three prescriptions on use of force (Dkt.156 ¶1(a)-(c)), and three savings provisions. (*Id*. ¶¶2-4.) It is far less detailed than the injunctions in *Index* and *LA Press Club*, the terms of which this Court refused to stay, and less detailed than injunctions other appellate courts have stayed.[7]

Nor is the injunction untethered to Defendants' conduct. Force is the primary mechanism Defendants use to retaliate against Plaintiffs and class members. Thus,

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[6] Defendants' reliance on *Puente* is ironic because the district court there held in granting certification that multiple officers' use of teargas on a large number of protesters under the control of a unified command structure gave rise to "factual and legal questions" that "predominate[d] over any individual questions." *Puente v. City of Phoenix*, No. CV-18-2778-PHX-JJT, 2019 WL 4849613, *7 (D. Ariz. Sept. 30, 2019).

[7] Defendants are incorrect that the injunction mirrors the one in *Chicago Headline Club*. (Mot. at 17.) The injunction here does not enjoin an "expansive range of defendants" including the President and DOJ, nor "require[] the enjoined parties to submit for judicial review all current and future internal guidance, policies, and directives," "establish[ing] the district court as supervisor of all Executive Branch activity."

limiting how Defendants deploy it is necessary to remove the fear their conduct has created. Such relief easily falls within a court's broad remedial powers. A court may even "order relief that the Constitution would not of its own force initially require if such relief is necessary to remedy a constitutional violation." *Toussaint v. McCarthy*, 801 F.2d 1080, 1087 (9th Cir. 1986) (citing *N.C. State Bd. of Ed. v. Swann*, 402 U.S. 43, 46 (1971) and *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15–16 (1971)).

Third, Defendants argue that the injunction is unworkable. (Mot. at 17-21.) But as noted above, three police experts—two of whom were not retained by Plaintiffs—all opined otherwise. (Dkt.34 ¶¶68-74; Dkt.126-23 ¶¶25-34; Mar. 2 Tr. at 29-36, 49-56, 59, 124-137; Mar. 3 Rough at 135, 153-157.) It was not clear error for the District Court to credit this expert testimony and discount Defendants' declarations from two DHS supervisors who are not experts in public order policing, one of whom admitted that he is "not a use of force expert." (Mar. 3 Rough at 122.) The evidence Plaintiffs submitted specifically refutes the supposed safety concerns Defendants raise. (*See*, *e.g.*, Mar. 3 Rough at 157 (explaining that Defendants' split-second decision argument (Mot. at 20) is not a concern "Because police officers follow rules and regulations particularly on use of force and they make split second decisions all the time").)

Defendants also speculate that the injunction is "ripe for abuse" (Mot. at 18) but offer no evidence that any abuse actually occurred. The unrefuted testimony is that no such evidence exists. (Mar. 3 Rough at 158-59.) Defendants argue that they should not be constrained from using crowd control weapons to disperse or move people engaged in speech they want to suppress as a form of "deterring escalation." (Mot. at 18-19.) This is also contrary to the testimony in the record establishing that Defendants can successfully accomplish their legitimate objectives without teargas and that their use of teargas has escalated violence. (Mar. 3 Rough at 132-35; Mar. 2 Tr. at 48, 71, 82-85; Dkt.155 at 25 (Court's findings).) Defendants cannot rely on "undifferentiated fear or apprehension of disturbance ... to overcome the right to freedom of expression." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

Defendants' claim that they should be able to teargas people for trespassing or for passive refusal to comply with dispersal orders (Mot. at 17-19) only underscores why injunctive relief is necessary. *See Nelson v. City of Davis*, 685 F.3d 867, 881 (9th Cir. 2012) ("[A] failure to fully or immediately comply with an officer's orders neither rises to the level of active resistance nor justifies the application of a non-trivial amount of force.").

Defendants finally assert that stopping them from violating Plaintiffs' First Amendment rights would violate the separation of powers. (Mot. at 20-21.)

Defendants' argument is premised on hypothetical micromanagement that has never occurred. Moreover, the function of courts is to protect First Amendment rights. *See Twitter, Inc. v. Garland*, 61 F.4th 686, 699 (9th Cir. 2023) ("'[w]e do not defer to the Government's reading of the First Amendment, even when' national security interests are at stake.") (alteration in original, citation omitted).

III. PLAINTIFFS, CLASS MEMBERS, AND THE PUBLIC WILL BE SUBSTANTIALLY INJURED BY A STAY

In one conclusory sentence, Defendants argue that Plaintiffs failed to show irreparable harm. (Mot. at 21.) The District Court, however, found that some Plaintiffs and class members suffer "complete loss of First Amendment freedom[s]." (Dkt.155 at 24.)[8] Other undisputed evidence highlighted the dangers to Plaintiffs and class members. (Dkt.33 (unrefuted expert declaration discussing dangers of misusing crowd-control weapons). And it is always in the public interest to uphold First Amendment rights. *See, e.g., Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949); *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012).

IV. THERE IS NO REASON TO STAY THE ENTIRE CASE BELOW

The Court should deny Defendants' request to stay the proceedings below. (Mot. at 22.) Their lone authority is an appeal of an injunction on the only claim in

[8] The injunction is in Defendants' interest because it avoids escalating crowds and enhances public trust and officer safety. (Mar. 3 Rough at 157-58; Mar. 2 Tr. at 91-95.)

the case that was determinative of the whole case. *Friends of the Everglades, Inc. v. Secretary of U.S. Dep't of Homeland Sec.*, 2025 WL 2598567, *13 (11th Cir. Sep. 4, 2025). Here, Plaintiffs have several claims independent of this appeal.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion.

[Signature on the following page.]

Dated: March 27, 2026

Respectfully submitted,

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Matthew Borden

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 27(d)(2)(A) and 32(a)(5)-(6), and Circuit Rules 27-1(d) and 32-3, the attached opposition is proportionately spaced, has a typeface of 14 points or more, and contains 5,169 words.

Dated: March 27, 2026

Respectfully submitted,

BRAUNHAGEY & BORDEN LLP

By: */s/Matthew Borden*
Matthew Borden

ADDENDUM

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JACK DICKINSON, et al., Plaintiffs,	)	3:25-cv-02170
vs.	)	February 2, 2026
DONALD TRUMP, President of the United States, in his official capacity, et al., Defendants.	)	Portland, Oregon

(Telephonic Motion Hearing)

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL H. SIMON

UNITED STATES DISTRICT COURT JUDGE

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Motion hearing 4

(February 2, 2026)

P R O C E E D I N G S

(In chambers; roll call taken; telephone conference:)

THE COURT: Good morning, everyone. Thank you for calling in.

I'll just say that this is a public hearing. Anyone is welcome to call in and listen. I will ask, everyone other than Ms. Simon, Mr. Borden, and Mr. Warden, to put your phones on mute so we don't hear any background noises. Of course, I will remind everyone that court rules prohibit the audio recording of this conference. If anyone needs a record, we do have a record being maintained by our court reporter, Mr. Apodaca.

I very much appreciate plaintiffs' status report, Docket 49, that was filed yesterday. I've read that as well as the supplemental declarations that were filed as Dockets 50 through 59. I appreciate that, and I've read those materials.

Mr. Borden, I don't know if you filed anything. The last time I checked was, give or take, 15 minutes ago, and I didn't see anything then. I assume you have not filed anything; am I correct?

MR. BORDEN: We haven't filed anything further.

THE COURT: I said Borden, and I meant Warden.

I'm sorry.

MR. WARDEN: Judge, Andrew Warden. Sorry. I got the "B" and the "W" mixed up there.

THE COURT: Me too.

MR. WARDEN: The defendants have not filed a response.

THE COURT: Very good.

All right. So with respect to the TRO, I really do appreciate everyone's efforts in seeing if we could avoid the need for a TRO and proceed directly to a preliminary injunction hearing set for March 2nd, which that date will remain the same. I appreciate everyone's efforts. But as I see in the status report, it looks like we can't avoid a ruling on the TRO one way or the other.

So what I propose in a few minutes, since I've already read all of defendants' submissions, I will give Mr. Andrew Warden for the defendants, an opportunity orally to say anything that he wishes to say with respect to plaintiffs' motion for a temporary restraining order, and then both to be fair to defendants but also to respect the need to move quickly, I will hold the record open and let defendants file anything they want to file today in writing. But then my plan would be to issue a written decision one way or another on the temporary restraining order tomorrow and release it tomorrow.

So as I said, in a few moments, I'll turn the floor over to Mr. Warden. I will then let plaintiffs' counsel briefly orally rebut anything that Mr. Warden says, if plaintiffs' counsel wishes to do so.

But before we get to any of that, I do want to address some of the other issues in the status report, and that is, with respect to the protective order, as I said, folks, just keep working on it. If you can find a stipulation, send it to me, and I'll enter it. If you can't find a stipulation, and you've reached the end of your discussion, each side can send in their proposed protective order and their brief written argument for why the other side's proposal is insufficient or inadequate or should not be granted. Then I'll make a written decision quickly.

But I don't want the absence of a signed protective order to slow down discovery, so here is what we are going to do in the meantime: With respect to discovery issues that plaintiffs seek, as identified on pages 4 and 5 of their status report, I would like you all to move forward with that. And if there is any written documentation, or even a deposition that takes place before a protective order is entered, I'm just going to order right now, until we have a protective order entered, that discovery may take place, but it will be attorneys' eyes only, so that plaintiffs can

see the documents that defendant provides -- not plaintiffs -- sorry -- plaintiffs' counsel can see the documents that defendant provides. Defendants' counsel can see the document that plaintiffs provide. If there are any depositions, you can take depositions, but only counsel can appear at those depositions, and no one can publicly release or disseminate or even disclose what happens at any deposition or what's in the contents of any documents, unless they're already publicly available and you all agree to that. But it will be attorneys' eyes only until we get a protective order in place, which I'm hopeful can be either by the end of this week or early next week.

But I don't want that to slow down discovery, and the discovery does look reasonable, including arranging for the deposition of the person that plaintiff requests, as identified in the photograph of Exhibit E. So go forward with that. But as I said, only counsel can appear at the deposition, and copies of any deposition transcript or what is revealed at the deposition cannot be made publicly available except after we have a protective order and then obviously pursuant to the terms of a protective order. It may or may not be protected, but let's apply this protection until we get a protective order in place.

Before we get to the TRO portions, does anybody want to be heard on anything I've said just so far?

I'll start with Mr. Warden for defendants.

MR. WARDEN: Thank you, Judge.

On the protective order, I expect we should be able to get a proposal over to plaintiffs today, so we are moving expeditiously on that.

As for the discovery, we did receive plaintiffs' request over the weekend. We started consultations with our clients. We need to have some further discussions with them here today, so I expect we should be able to start some conferrals as early as tomorrow to try to work through those issues, but I appreciate the Court's comments and the entry of the temporary "attorneys' eyes only" order, and we will also endeavor to get those use of force reports to the Court. We are currently gathering those, and we will get those pursuant to the "attorneys' eyes only" production and get those out as soon as we can.

Thank you.

THE COURT: Thank you, Mr. Warden.

Let me ask Ms. Simon or Mr. Borden, plaintiffs' counsel, do you want to be heard on anything I've just said other than the TRO issue?

MR. BORDEN: This is Mr. Borden. Thank you, Your Honor.

We appreciate the efforts to kind of pave the way to get the discovery. I think there's one -- maybe one

addendum that I would like. I just did the math on sort of the calendaring of the way this is all going to work. I've also had the experience of having done this before in Index Newspapers.

I'm just very concerned that defendants -- if we get responses that we don't like or if the responses are sort of heavily redacted and other things like that, then we'd have to raise it with the Court. So our goal is to try to get as much discovery going this week as immediately as possible.

I think there are two other things that I've thought about that maybe we could try to get going this week. One is if we came up with by the end of the day some very narrow and targeted interrogatories, if we could get responses to those within five days, I think that would give us enough time to get answers and have materials that we can use both in our TRO and in our class cert. motion, which we intend to file as soon as we get some limited discovery.

The other thing that might help us is -- I think we want to take depositions of sort of a sampling of the line agents, if they come from different components, but we don't have a lot of information about this. So it might be useful if defendants were to produce some rosters or other things that would identify people who were there at protests on different days.

THE COURT: Hold on. One second.

Mr. Borden, hold on.

Let me tell everybody else who is not speaking -- and this means everybody other than Kelly Simon and Matthew Borden and Andrew Warden -- put your phone on mute or hang up. That is a court order. Do it now.

Back to you, Mr. Borden.

MR. BORDEN: I was just thinking that if we had maybe some lists of people from different components that were there on different days, we could randomly select a couple people. These are short depositions, but I think it would be useful for purposes of getting the discovery done quickly if we could get some kind of list or roster in conjunction with a handful of questions that we pointed out on pages 4 and 5 of the status report.

Those are just my two additional requests or thoughts about discovery.

THE COURT: Thank you, Mr. Borden.

I don't think I need to hear from Mr. Warden now, because I'm not making any rulings. I'm going to say the following: In theory or in concept, that sounds like a perfectly reasonable request, but I'll leave it to plaintiffs' counsel and defense counsel to discuss these issues with each other. I will say that if you need to get some of those rosters or lists before we have a protective

order in place, anything like that that is exchanged among the parties is subject to attorneys' eyes only, at least until we get a protective order in place. So that should give adequate protection really primarily for defendants' benefit. That should give adequate protection to everyone.

I will also say -- at least Ms. Simon, Mr. Borden, and Mr. Warden -- I have seen you all in cases before me before. I have tremendous respect for all three of you. I know that you are all very professional, follow the appropriate rules of court, rules of law, and I just really have tremendous respect really for both sides' counsel in the case. I'm quite confident that both sides appreciate the need to move this issue promptly and quickly, and both sides will act reasonably in doing so.

So step No. 1 then: Confer with each other early and often and regularly. If you need to produce some documents, you may do it under attorneys' eyes only until we get the protective order in place. If anyone has any disputes on what's covered under the protective order or not until the order is in place, contact my courtroom deputy, and we will resolve it promptly.

In addition, if anybody wants the assistance of the Court on any issues, contact my courtroom deputy, and I'll make myself available essentially 24/7. I have some hearings scheduled throughout this week, but I'll make

myself available for you all. You also are always welcome to send me emails, although keep in mind that if you send an email to me, it won't make it in the appellate record unless you actually put it in the appellate record. So if you want to send me an email, that's fine. If you want it in the appellate record, then just put on a cover sheet and say, "Emails exchanged with the Court." Then file it in our electronic case file, and then it will be in the appellate record.

If you need to file something under seal, I trust your judgment. Both sides are authorized to file matters under seal, if need be. If there's ever a dispute or even a request from a third party about unsealing something, we will deal with that in due course. But I want to move promptly and quickly.

That's my response to what Mr. Borden just said.

Now I'll invite any comments from Mr. Warden on that issue or anything I've just said.

Mr. Warden.

MR. WARDEN: Nothing further, Judge. We will confer promptly with plaintiffs and try to work things out as best we can.

THE COURT: Very good. Thank you.

All right. Now what I think we should do is hear from Mr. Warden any substantive arguments in opposition to

the pending motion for temporary restraining order. Let me say, I want to try to be fair to defendants as well. Since we didn't have this scheduled as an oral argument on the TRO, I will definitely let you supplement anything that you say now with anything that you want to submit in writing by the end of today, and, frankly, "by the end of day" probably means by 9:00 a.m. tomorrow morning. So if you want to supplement anything you want to say now with anything in writing, you have leave to do so.

With that said, I look forward to defendants' argument in opposition to the plaintiffs' motion for temporary restraining order.

Mr. Warden, the floor is yours.

MR. WARDEN: Thank you, Judge.

Defendants do oppose the motion for temporary restraining order. I think it's important at the outset to just set the scene for what this case is and is not at this stage.

So right now there are five named plaintiffs. No class has been certified. No motion for class certification has been filed. There are no organizational or associational plaintiffs in this case, and so we simply have five individuals.

First, the Court would have to find that these plaintiffs have standing to seek prospective injunctive

relief, consistent with the Supreme Court's decision in City of Los Angeles v. Lyons and its progeny. Effectively that case stands for the proposition that plaintiffs cannot establish standing for injunctive relief based on incidents that occurred in the past. And here, we think that many of the plaintiffs can only speculate that harm will occur in the future.

Two of the plaintiffs, Laurie and Richard Eckman, the record currently cites one incident on October 4th. No other recurrence of any incidents with them. Hugo Rios discusses one incident that occurred all the way back on September 1st. No other incidents with respect to him. So I don't think those three plaintiffs have established any kind of standing under the Lyons line of cases.

We acknowledge Mr. Dickinson and Mr. Lake have discussed repeated incidents; we will not challenge their standing right now at this stage. But because the plaintiffs' standing derives from allegations of this past alleged retaliation, at most, for those two plaintiffs that have standing, would require a narrow injunction that would prohibit retaliation only against those plaintiffs who have standing. I think comes through from the Supreme Court's decision in CASA, which prohibited nationwide injunctions and relief beyond the named plaintiffs, as well as the Ninth Circuit's recent stay order in the LA Press Club case,

where they stayed an injunction very similar to what the plaintiffs seek here.

To the extent it applies to nonparties, I think the fact that there are putative class claims here does not allow the courts to grant classwide relief here at the TRO stage. That's what the Eighth Circuit decided in the Tincher case, and that decision, we think, explains correctly why that is so; that under both CASA and the Supreme Court's AARP decision, courts can grant an injunctive relief to members of the putative class simply based on class allegations in the complaint. There is nothing here that classwide relief is necessary to protect the Court's jurisdiction, as was the case in the AARP decision.

So we think whether -- the claims related to the First and Fourth Amendments depend on very fact-specific inquiries for each particular plaintiff with respect to particular incidents, and certainly does lend itself to any kind of broad, classwide, semi district-wide relief.

In addition to narrowing any injunction to the named plaintiffs, any injunction should include a safe harbor provision similar to what Your Honor ordered in the Index News case. I believe that was in paragraph 6 of the preliminary injunction in that case. In fact, the Government does not violate a court order if there is some

type of incidental exposure or an otherwise lawful order or use of force.

To the extent there is an order that extends beyond named plaintiffs, we would note our position that nonparties would have no standing to enforce that injunction; that, again, no class has been certified, and only parties would be in a position to seek any kind of enforcement of the injunction.

So with those comments, I would ask the Court to deny the preliminary injunction. Certainly any injunction that's issued should be narrowed according to the limitations set forth just now.

Thank you.

THE COURT: Thank you, Mr. Warden.

Let me just ask one follow-up to confirm my understanding, and you probably know the LA Press Club better than I do. But it is my understanding that when the Ninth Circuit said what it said about the LA Press Club injunction and recognizing the scope of the injunction that would be allowed, it had before it a complaint that was not a putative class action.

Now, since later in that case, the plaintiffs filed a first amended complaint adding class actions, but at the time that the District Court in LA Press Club entered their TRO -- or preliminary injunction -- it was not a

putative class case. And when it went before the Ninth Circuit recently, it was not a putative class case.

Am I correct in that? If you know.

MR. WARDEN: Andrew Warden, Judge. Yes, that is correct. Mr. Borden was on that case. He can correct me if I'm wrong, but I do not believe that there were class claims that were at issue at the time it went up on appeal.

THE COURT: Okay. Then one more follow-up before I turn to plaintiffs for any reply, and I will, of course, give you an opportunity for surreply if you want.

As you know and may remember in my Index Newspapers case, I did discuss this issue of standing and relief available to a putative class. I'm not aware of any Ninth Circuit decisions since then. I am aware of the Tincher decision out of circuit.

But are you aware of any Ninth Circuit decisions that relate to the issue of whether classwide or putative classwide relief is or is not available under similar circumstances that I discussed in Index Newspapers? Are you aware of anything in the Ninth Circuit one way or the other?

MR. WARDEN: Judge, no. Andrew Warden again. No, not off the top of my head. I'm not aware of that.

I do think that the CASA decision changes the landscape significantly, I think, since the Index News decision, at least as far as how the Supreme Court views

equitable relief to broader classes of individuals. I do think that what the Court made clear there was nationwide relief is off the table, and that it was a colloquial means, to the extent we're granting relief to nonparties. And there, the Supreme Court pointed in the direction of classwide relief.

But I don't think, for the reasons explained in the Tincher decision, courts can sort of evade Rule 23(a) strictures and grant putative classwide relief without at least considering those factors and going through a Rule 23 analysis, particularly in terms of relief at issue here and sort of for the reason explained and the kinds of claims at issue here -- the particular parties and particular uses of force on particular dates will vary widely across factual scenarios and make that sort of classwide relief unavailable here for the plaintiffs for the reasons the Eighth Circuit explained.

THE COURT: I understand your position. And, of course, I will guarantee you that I'm not going to enter nationwide relief. I'm not planning on entering district-wide relief, because the way I read the pending motion, they are only asking for relief for protests at the Portland, Oregon ICE facility, which also means nothing I say here will have any binding effect on what happens in Eugene, for example. That's not before me. That's not

requested.

So the tough legal question is going to be: If I do think that some relief is appropriate at the Portland, Oregon ICE office, whether it should apply only to the named plaintiffs or a subset of them, or whether it also can apply to putative class members who wish to protest at the Portland, Oregon office, and that's a legal question I'm still struggling with. I understand your position.

All right. Let me turn to Ms. Simon or Mr. Borden for plaintiffs.

Anything you want to briefly say in reply to Mr. Warden's arguments?

MR. BORDEN: Sure. This is Mr. Borden. And I will be brief, because I think -- my friend implicitly says that some type of injunction seems appropriate with the things that we are seeing. They're teargassing children. They're teargassing elderly people. They're teargassing families. And this is all when we have a TRO pending and when people were filming them.

So to take defendants' points in order, the standing point, I think, has two aspects: One is a legal one; the second one is a factual one.

The legal point that the Court made in Index and which the Ninth Circuit found in Index is that there are really two types of standing issues here. One is this

likelihood of recurrence, which they seem to concede as far as -- at least for purposes of this TRO, as far as Mr. Dickinson and Mr. Lake.

But the other is chill and First Amendment chill and the fact that this is a different kind of injury than the Fourth Amendment injury. I think when you see people getting teargassed, when you see people getting shot in the head, when you see people getting even killed or having their eyes shot out, it creates a pall on everybody who wants to go to these protests, including the plaintiffs, and that's one of the major injuries that everybody is experiencing, including all five of the named plaintiffs.

In terms of the Eckmans, my friend's statement that they only had this one incident is not accurate, because they went out last night with their interfaith group, and they were relatively far away from the facility to try to avoid anything, and they still ended up being teargassed. So they fall definitely within the same type of fact pattern that this Court in Index Newspapers found to be -- you know, deceived Lyons, which the same plaintiffs are injured more than once. I mean, it's pretty brave of them at 84 years of age to come out there, after they've been victimized once, and then have it happen again.

So I think that is the standing point.

In terms of the class point, my friend was correct

that I am counsel in the LA Press Club case, and we didn't have class allegations in that complaint, and we filed it because -- it was filed two weeks before the CASA decision, and so what went up to the Ninth Circuit didn't have class allegations. We have those now.

In terms of the reliance on Tincher, the order issued by the Eighth Circuit, it was a different injunction. As Your Honor pointed out, this is a very narrow and limited injunction and TRO that we're seeking -- that's really just limited to the ICE facility in Portland. One of the problems that the Eighth Circuit had in Tincher was the fact that it was really going to apply to the whole state of Minnesota, and so I think that differentiates that decision.

Then this last point about CASA and can the Court issue interim relief on behalf of the putative class, the answer to that is yes. The AARP case by the United States Supreme Court, which was issued a month before CASA, said just that. And I believe we've cited the portions and the language in our TRO briefing.

THE COURT: You have.

MR. BORDEN: I don't have the decision sitting before me.

THE COURT: You have. And I've read it.

MR. BORDEN: Okay. That's our understanding. So I think the case for certifying class in this case, I think

it is a high likelihood, given the narrowness of what we're asking for, the unity of the response by defendants, and the patterns that we've seen. It has continued over a course of time. I do think that it's part of a broader pattern nationwide that we are seeing across the agency and the components, and that's one of the things that we would like to have some targeted discovery on.

If the Court has further questions, I'm happy to answer them, but I think a TRO, along the lines of what we've asked for, is very appropriate.

THE COURT: Thank you.

I do have one question for both of you and Mr. Warden, but it is on a slightly different point.

Let me give Mr. Warden, if he wishes, to do anything by way of sur-response right now.

MR. WARDEN: Just three quick points, Judge.

I think on the chill allegations and that theory of standing, I'd point the Court towards the Supreme Court's decision in Clapper and Laird v. Tatum. I think those cases show that sort of self-chilling is not sufficient for standing, and I think the fact that some plaintiffs may have refrained from engaging in activities is not sufficient. So I would point the Court to those decisions that support of our view on that.

Second, on the AARP, I would just make two points

that distinguish that case from here. I think, first, the Supreme Court made clear that the temporary relief in a putative class context was necessary to preserve the Court's jurisdiction. Had the Court not granted classwide relief, then the putative class members would have been removed from the country, and any plaintiffs as well, depriving the Court to hear the case. I don't think we have that situation here.

Second, the underlying legal question regarding the citizenship status was the same and identical for the plaintiffs and the purported class members. But here, again, we have a variety of unique factual situations -- different dates, different times, different events -- that each of the plaintiffs and the supplemental nonparty declarants have put forth that make AARP distinguishable.

And finally, to be clear, we do oppose a TRO. If the Court enters any relief, we think the proposal we put forth that they appended to their status report would be appropriate and sufficient and aligns with DHS's policy. So we would ask if an injunction is entered, it be limited to that. But if the Court rejects that position, then it should be appropriately narrowed for the reasons we've explained here today.

Thank you for your consideration.

THE COURT: Very good. Thank you, Mr. Warden.

My last question, and I apologize in advance for the almost triviality of this question, but it is really a question of terminology.

I have been on the bench now 15 years. Back before that, when I was practicing, I did both trial work and appellate work, and I just don't recall this issue ever coming up when I was in practice, and I have not seen it as a judge.

Mr. Borden referred to the Index Newspapers decision from the Ninth Circuit as "affirming" my preliminary injunction. But what it really was was "declining to stay" -- by a divided decision, "declining to stay" the preliminary injunction, if I recall correctly. I think you were both involved in that.

What is the correct way to refer to that Ninth Circuit decision in Index Newspapers: Is it "affirming" my previous opinion, or should I be more precise and say that it was simply "declining to stay," or is there some other more appropriate appellate terminology for that? Does anybody know the answer to that?

I'll start with Mr. Borden for plaintiff.

MR. BORDEN: Yes. I would say that your characterization, Your Honor, is more precise. That is the correct procedural posture in Index Newspapers. It went up on a stay motion. The Ninth Circuit issued its 70-page

opinion. The written opinion, in our view, is binding precedent. It has been cited by other Ninth Circuit panels as binding precedent, so for whatever that's worth.

THE COURT: I'll let the Ninth Circuit decide "whatever that's worth." I think I will refer to it as "declining to stay lower court decision."

Do you want to be heard on that issue, Mr. Warden, for defendants?

MR. WARDEN: I think that's accurate, Judge. We did go up on a motion to stay. I think what the Ninth Circuit was looking at there was a predictive analysis of whether there was a likelihood of success on appeal, because it was a motion for stay pending appeal. So I think technically what they decided was that the Government, in resolving that stay motion, these two judges found that we did not have a likelihood of success on the merits of the pending appeal of the preliminary injunction.

THE COURT: Yes. Then it became moot before it needed to have a substantive decision. So I'm not going to refer to what the Ninth Circuit did as affirming that.

Thank you all very much.

As I said, defense may submit any additional written materials -- whether that be argument or evidence -- today. But it is my expectation -- I'm not going to issue a written decision today, but it is my hope and expectation to

issue a written decision one way or the other sometime tomorrow.

Thank you all so much for calling in.

Again, if you need me for anything else, don't hesitate to call my courtroom deputy or send me an email.

Thank you, everyone.

(End of proceedings.)

--oOo--

I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/ Dennis W. Apodaca February 4, 2026
DENNIS W. APODACA, RDR, RMR, FCRR, CRR DATE
Official Court Reporter

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JACK DICKINSON, et al.,	)	
	)	
Plaintiffs,	)	3:25-cv-02170
	)	
vs.	)	February 23, 2026
	)	
DONALD TRUMP, President of the United States, in his official capacity, et al.,	)	Portland, Oregon
	)	
	)	
Defendants.	)	

(Telephonic Status Conference)

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL H. SIMON

UNITED STATES DISTRICT COURT JUDGE

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Telephonic status conference 4

(February 23, 2026)

P R O C E E D I N G S

(In chambers; telephone conference:)

THE CLERK: Good morning, Counsel. This is the time set for a telephone conference in Case No. 3:25-cv-2170-SI. Dickinson, et al. versus Trump, et al.

I would like to find out who is going to be speaking for plaintiff this morning.

MR. BORDEN: Good morning. This is Matt Borden. It is going to be me and my colleague, Kimberly Hutchison.

MS. HUTCHISON: Good morning.

THE COURT: And counsel for defendants. Do we have counsel for defendants on the line? If you are speaking, you might be on mute.

Do we have Mr. Warden on the line?

MR. ROSENBERG: Sorry. This is Brad Rosenberg from the Department of Justice, Civil Division, Federal Programs Branch, and I will be taking the lead for defendants today.

THE CLERK: Thank you. Do we have anybody on the line for City of Portland?

MS. WOODARD: Good morning. This is Beth Woodard.

THE CLERK: Thank you. And how about for the State of Oregon?

MR. KENNEDY: Good morning. This is

Scott Kennedy.

THE CLERK: Counsel, there is a court reporter with us, so please be sure to state your name before you speak, and here's Judge Simon.

THE COURT: Good morning, everyone. Thank you for calling in.

Congratulations, Mr. Rosenberg, on being on the outer edge of the snow storm. It looks like D.C. is not that badly affected, but, wow, it's bad in New York and north.

MR. ROSENBERG: That is correct, Your Honor, but I will say, being originally from New Jersey, my family has been affected. It has been incredible.

THE COURT: I'm sorry to hear that, and I wish them the best. I've got family in New York right now.

All right. On my agenda, but not necessarily in this particular order, I have plaintiffs' motion to compel that was filed yesterday. That's Docket 119. I have Mr. Borden's email from this morning. I have my own questions about how things are going to proceed next week at the hearing. In particular, I've got some questions about some witnesses. Well, that's enough for right now.

Should we start with the motion to compel? Really what I want to ask, in the beginning, Mr. Rosenberg, since it was just filed yesterday, would you like to respond in

writing? And if so, I would like you to respond by the end of today. Or are you satisfied that you can just respond orally now? What's your preference?

MR. ROSENBERG: Your Honor, I think I can address the motion to compel orally, and so I would like to proceed that way. Of course, at the end of our discussion, if the Court has any questions or follow-up concerns, then we can address that and how to proceed there.

THE COURT: All right.

MR. ROSENBERG: I'm prepared to address the motion to compel today.

THE COURT: Thank you. That sounds fine.

Then let me ask, Mr. Borden or Ms. Hutchison, I think we should address the motion to compel first before we address the points in your email from Mr. Borden's email this morning, but I do note that in the motion to compel there was the representation that, among other things, that plaintiffs would not be requesting deponents to produce documents for deposition. That's at the top of page 9, the first full paragraph. But things appear to have changed, in light of that recent discovery of the screenshot that you attached to your email from this morning.

So should we discuss the motion to compel first and separately? Should we discuss your email first? Or should we discuss them together?

MS. HUTCHISON: This is Ms. Hutchison.

I think we should discuss the motion to compel first. And just to be clear about the tension there, during our meet-and-confer efforts, we had affirmatively agreed not to make individual requests for productions within the notices of deposition. So the conversation in the email is for requests separate from the deposition. So in other words, we are not asking individual deponents to come with their own messages. We think that there's another way that they should be searching for those, and that can be discussed after the motion to compel.

THE COURT: Let's talk about the motion to compel. I know for the portion of the motion where plaintiff is asking for depositions from eight employees of defendants identified by name, you've not provided me with their names in the public filing. We don't have a protective order yet in place. I do at some point want to ask what's the status of the protective order. I don't think I need to know their names. I understand their descriptions well enough from the motion. I understand from the motion why they appear to be relevant.

So let me ask Mr. Rosenberg first, of those eight that have already been named, are you now willing to produce any of those folks for deposition this week?

MR. ROSENBERG: The short answer to the Court's

question is no, but there is, I think, a lot of context that is missing from plaintiffs' motion to compel. So I don't know if the Court wants to hear from me on that now.

THE COURT: Yeah, I think I do. But let me also say too, with respect to the point of whether or not they're outside the subpoena power, I think they probably are outside the subpoena power to get a subpoena to come to the hearing in Portland next week, but I don't think they're outside the subpoena power for Rule 45 for a deposition, a discovery deposition. That's nationwide.

Am I misunderstanding something, Mr. Rosenberg, on that point? Then I'll let you give me the broader context.

MR. ROSENBERG: No, Your Honor, you're not. Our view on the subpoenas is that for an individual to be subpoenaed to testify in court at a hearing, they have to be within the subpoena power. Some of the witnesses probably are and others aren't. There are a few that are located in Oregon, but there are some that are located across the country.

Among other things, one of the logistical challenges that we have on our end is we have to consult with the potential witness to get their authorization to even be able to accept a subpoena on their behalf before we even get to a question of the validity of the subpoena for purposes of a hearing.

If it's a question of a deposition, we have been proceeding using notices of depositions, as we've already done for one of the witnesses that has already been deposed. I think the Court is correct that we are not contesting the ability of plaintiffs to serve process regarding a deposition. We just object to the scope of depositions that plaintiffs are proposing.

THE COURT: Understood. I assume that all eight are current employees of one or more of the defendants, correct?

MR. ROSENBERG: That is correct.

THE COURT: All right. So as I've said, I have read plaintiffs' motion to compel, so I have their side of it. I would love to hear your side of it now, please.

MR. ROSENBERG: Sure. Again, this is Brad Rosenberg from the Department of Justice.

Where I would like to start, I would like to set the table, because as plaintiffs' motion notes, they've already taken one deposition of an FPS inspector. We have also agreed to allow them to take two deposition of our two primary declarants, whose declarations that we've submitted. This is Mr. Cantu and Mr. Sullivan with our opposition brief.

There are two other declarants from ICE who discuss the placement of the numbers on the uniforms. We

are having discussions regarding whether those depositions are necessary, but I understand the Court's order and the way they would like to proceed is that if we have a declaration, then an individual needs to be made available either for a deposition or at a hearing.

Plaintiffs have also asked for a deposition of a supervisor who we have not used as a declarant, and we are in discussion with plaintiffs regarding whether that deposition is necessary. And we have also already agreed to allow plaintiffs to take the depositions of three agents. Actually all eleven of these individuals work for the Federal Protective Service. They are all at FPS. Their title, I believe, is inspector, and so I may refer to them as "inspectors" or "agents."

So in context, it's not about whether plaintiff should be permitted to take eight inspector depositions. It's whether they should be able to take eight inspector depositions on top of the three inspector depositions that are already scheduled for this week, as well as the inspector deposition that they've already taken, as well as the two presumably all-day depositions of the supervisors whose declarations we've submitted, as well as the deposition of a supervisor, whose declaration we haven't submitted, and we have no intent to call as a witness at the hearing. And that sets aside the question of whether

plaintiffs can also take a Rule 30(b)(6) deposition, which we are in the process of discussing and cautiously optimistic that we will have a workaround that.

That's a lot of depositions, Your Honor. Since only one has taken place so far, that is a lot to take place in the next four days, which is functionally what we have.

I would like to go back to plaintiffs' original motion for expedited discovery, which is ECF No. 41. At that time plaintiffs' motion respectfully moved the Court for an order allowing what they described as "targeted expedited discovery." And they specifically said that they were seeking the depositions of two officers who have deployed munitions and/or chemical irritants in response to protests at the Portland ICE building. That's at ECF No. 41 at page 10. Then elsewhere they noted that they're seeking a total of three depositions -- one being the 30(b)(6) and two being the officer depositions, the agent depositions.

So plaintiffs asked for two. We have already agreed to make five agents available for depositions. We've agreed to more than twice as many depositions as plaintiffs originally thought that they needed when they began this process of seeking expedited discovery.

So in that sense we're deeply concerned that the scope of depositions that plaintiffs are seeking runs far beyond what was contemplated by this Court or by plaintiffs

at the time that we began this discovery process. I will also note if you add up the number of depositions that we have already agreed to or that are likely to take place, we are at ten depositions, which is the presumptive limit in the Federal Rules of Civil Procedure, and that's a presumptive limit for the entire litigation. And here, we haven't even had a Rule 26 meeting to talk about the scope of discovery yet. And this is supposed to be very narrow, targeted discovery. And I don't think anything has substantially changed since plaintiffs moved for targeted discovery.

To be sure, we have produced various incident reports to plaintiffs, and that's the basis for why they say that they need all of these depositions now. But that's what they contemplated when they filed their motion for discovery, because they said they would identify the two officers who they would like to depose based on the written discovery requests.

So we've provided the written discovery requests, and the only basis we have now from plaintiffs is, "Well, they wrote them." If that was the case, then they should have said when they filed their motion for targeted discovery that they would want depositions of anyone who is involved in preparing an incident report for any one of the number of different incidents that plaintiffs challenge in

this case.

So in terms of what the Court has ordered, and just applying plaintiffs' motion to the Court's order, the number of depositions that plaintiffs contemplate are far beyond what's required by the Federal Rules of Civil Procedure and far beyond what this Court ordered when it granted expedited discovery.

But there are other problems with plaintiffs' request as well. More generally, plaintiffs seem to have the view that they are entitled at the preliminary injunction stage to as much discovery as possible to make as perfect a record as possible for them. But the very nature of this four-week expedited discovery that we're engaged in -- and as a practical matter, it's really less than four weeks from the time that the Court entered the TRO and the time we are going to begin this hearing one week from today -- requires some compromise. And that's what is contemplated by Rule 26 when you look at the discovery burdens and what's proportionate to the needs at the time.

Plaintiffs in their filing have noticed repeatedly that they already have piles of evidence, and I referenced that last week when I referred to their PI motion. But even their current motion to compel seems to imply that they already have a thorough and complete evidentiary record, because on page 9 of their motion to compel, they say what

they want is a more thorough and complete record, and that implies, of course, that they already have a thorough and complete record on top of all the piles of evidence they say they have.

In an ideal world, the Court would like as complete a record as possible. I'm not going to dispute that. But the question is, what's practical in the limited amount of time that we have with the hearing starting next week? And then also look at the context of the discovery here versus the discovery that was allowed in the Index News case. In that case I believe there were three depositions total. There was a robust written record. And there is no suggestion there that the record was insufficient. It's unclear why plaintiffs need in excess of a dozen depositions. I think the total number would be up to 17 or 18 by the time they're done, with all but one of them taking place in the next four days, for a preliminary injunction motion. We are not even at merits discovery.

I will note by giving plaintiffs three agents on top of the agent that we already gave, we're giving them a representative sample, and they were able to pick the three individuals they wanted as priority individuals for depositions -- for these individuals we are making available. So they should have a representative sample that should be more than sufficient for the discovery purposes

for the preliminary injunction hearing.

I'll also note that limiting the depositions, as plaintiffs have proposed, two hours and making them virtual, does not solve all of the logistical difficulties that we face. As I've already indicated, many of these witnesses are scattered across the country. They would all have to take place virtually. We are going to have to prepare them. So even if the deposition is limited to two hours, we still need to meet with each of the witnesses in advance of the deposition, and that takes time and resources.

They're all at the same component within DHS. They are all FPS witnesses. I will note that there is only one agency counsel we are working at FPS, and FPS is a relatively small component within DHS. Many of these inspectors that plaintiffs want to depose are the only inspectors in their office, and they're responsible for all the federal buildings in their area, and so this is a substantial burden for these individuals. And we also have a lean team, to be honest, at the Department of Justice. So having individuals defend all these overlapping depositions at the same time, when it's far beyond the targeted discovery plaintiffs have asked for, is just not feasible.

I would finally note that we do not plan to call any of these individuals as witnesses at the hearing, and we haven't submitted declarations for any of these individuals.

My understanding -- and I know we had a colloquy about this in the past -- the purpose of the depositions is to allow plaintiffs to test the declaration testimony of individuals that we use in support of our position in opposing the preliminary injunction motion.

We submitted a declaration from Mr. Cantu. Plaintiffs will have an opportunity to depose Mr. Cantu. Plaintiffs have expressed some concerns about Mr. Cantu's testimony. But to the extent they're concerned about Mr. Cantu's testimony, I believe that's our problem. That's something we have to address.

Plaintiffs have been videotaping all of these depositions. They can certainly submit Mr. Cantu's testimony to the Court for review, and it can roll the tape and evaluate Mr. Cantu's testimony on its own.

To the extent Mr. Cantu is not able to adequately address plaintiffs' concerns, that is something that the defendants have to bear. At the same time, plaintiffs are also in a position to be able to get as much as testimony as they want from their own witnesses. They were all there. So it's unclear to us why they need all of this cumulative deposition testimony from individuals that we don't plan to call and for individuals who are beyond the subpoena power of this court, and the number of depositions is far beyond anything contemplated.

For these reasons, we don't think that any of these depositions are necessary or appropriate, and we actually think we've gone far beyond what plaintiffs and the Court contemplated in making witnesses available.

THE COURT: Thank you, Mr. Rosenberg.

I have two follow-up questions for you before I go to plaintiffs' counsel.

No. 1. Do you know for these eight folks that plaintiffs have named -- given you their names -- which ones are in Oregon and which ones are out of state? Really which ones are in Portland and which ones are out of state?

MR. ROSENBERG: Yes.

THE COURT: Have you given that information to plaintiff?

MR. ROSENBERG: We have literally been collecting that information. I received an update just earlier this morning. We can get it to plaintiff. We are not opposed to that.

THE COURT: Okay. Got it.

Second question: I did read your memorandum in opposition to the motion for preliminary injunction, and I note that one of the arguments that you make is that these were isolated acts -- even assuming plaintiffs' declarants are speaking accurately and truthfully about what they observed and what they saw, your response is that these are

isolated acts by individual officers, who may have acted contrary to the written policies, the official written policies of defendants, and that is insufficient to show essentially that defendants engaged in intentional retaliation. And as I understand it, plaintiffs are wanting to get more people to show that these were not isolated; and therefore, one or two depositions might not have the same evidentiary value to respond to the point that you've raised that there is nothing more than just perhaps isolated acts of violations or retaliation by individual inspectors.

What's your response to that?

MR. ROSENBERG: I think there are three responses, Your Honor. The first is plaintiffs are ignoring all of the evidence that they have; that they can submit. Again, this is a case where they were there. That's the whole point of this case. They claim that they were subject to these acts, and they can certainly testify, or have individuals testify how, that is how they believe they were treated.

So their own evidence, to the extent they believe it is necessary to prove up their theory, is the type of evidence that can be used in support of their theory and they shouldn't need any information.

THE COURT: Mr. Rosenberg, can I interrupt for a second and ask a follow-up, because I'm not understanding your point, and here's why: Let's assume that these

plaintiffs will testify what they experienced and what their perceptions were. As I read your response, your response is, well, even if their perceptions are correct, those were just isolated incidents by maybe a handful of officers. We are not even sure how many officers. It could have been the same officer running around retaliating against these folks, as far as the evidence goes, and therefore, your response is, even accepting everything that these plaintiffs say, that these declarants say, it doesn't show anything more than isolated and sporadic violations of official policy by a handful or fewer of the defendants' agents. And as I understand the motion to compel, they are looking for evidence to respond to that defense.

MR. ROSENBERG: So that brings me to my second point, which is the extent that plaintiffs want to show a broader or consistent pattern. The way that they can do that is by deposing Mr. Cantu, who's our declarant on this issue and who can testify regarding these topics. He would be in a position to be able to address those issues because he, as you know from his declaration, addresses the various incidents that plaintiffs are challenging. So it's unclear why plaintiffs need the individual depositions.

But then the third point, Your Honor, even if the Court is inclined to agree that plaintiffs need more than the representative sample that we've already provided, which

is four depositions of inspectors -- again, twice as many as what plaintiffs indicated they needed when they filed their motions for discovery -- it's unclear why they need eleven. That seems like an excessive number, especially in light of the extremely compressed time window that we have, that number is just not feasible.

THE COURT: Understood.

All right. Ms. Hutchison or Ms. Borden.

MS. HUTCHISON: Yes, Your Honor. This is Ms. Hutchison.

You have precisely identified why these depositions are so important to plaintiff. They are a response to the Government's position that these are isolated and sporadic violations by individuals. The Government's position now, I think is in a little bit of tension with what we discussed over the meet-and-confers. We have been asking for these depositions for weeks now. You may recall, I think it was three weeks ago that we were first asking for the deposition of that first agent, and it took them two weeks to have him show up.

The agreement for the additional three officers came late Friday when we were saying we had to file this motion to compel. Part of what we explained in that meet-and-confer is that we need to be able to talk to a variety of officers so that they can explain what they did,

whether their belief is consistent with policy based on their training, whether they received any kind of discipline for that in the past. So that testimony directly from the individuals who were involved in the use of force is what is going to prove our claim here.

The suggestion that that can be replaced by the deposition of Mr. Cantu is inaccurate. Mr. Cantu's declaration expressly explains that he was not there during many of these incidents. He's relying on incident reports for what happened and sort of relaying the information we already have. The one deposition we've done where we were able to test the reliability of what was in that report revealed that those reports are not reliable. And I would note that individual officer had never even heard of one of the policies that Mr. Cantu is saying everybody is trained on and everybody knows how to follow.

So we need to be able to talk to the individual officers to show that perhaps Mr. Cantu does not accurately represent what individual officers are being told from up high. And that's essential, because we are seeking this relief on behalf of the putative class. We need to show that this is an overall policy and practice that all individual officers are following from directions on high.

THE COURT: All right.

MS. HUTCHISON: I also want to highlight that

Mr. Rosenberg made a point about how this is different than what we requested in the motion for expedited discovery. That was because of our meet-and-confer efforts. The motion for expedited discovery specifically included a request for the 30(b)(6) witness.

THE COURT: I understand.

MS. HUTCHISON: Okay. Those are ongoing. We limited this motion to compel to these individual agents because at this point, frankly, they have not provided us the information in other ways. We tried to make ourselves available. I'm sure you saw in our emails the numerous spots that we were offering for these depositions. For the Government to complain now about the short time frame left to do these is really unfair, when the only reason there's such a short time frame is because of their unwillingness to set them at the earlier dates we offered.

THE COURT: Understood.

Let me ask you a follow-up question or two, Ms. Hutchison. From my review of the evidence submitted so far, including some of the videotapes, it looked like there were at least dozens -- several dozens of officers involved. Why and how did you now narrow your motion to compel to eight?

MS. HUTCHISON: Great question. So when we originally were asking for these individual officers, we

didn't have any of the use of force reports from them. We were -- you may recall -- sending pictures of who we wanted to talk to.

THE COURT: Yes.

MS. HUTCHISON: During early meet-and-confer efforts, counsel for the defendants asked us if we could try to limit our discovery requests in ways that would be doable on those ends. The two reductions they asked for was for us to identify dates that we could focus on, and so we identified nine dates for them. Then with respect to these reports, they asked if we would agree to limit the use of force reports to those nine dates, and that was their representation that -- giving us everything in the relevant time period, which was not going to be possible during the expedited discovery period. We then looked at the reports that they gave us and named the individuals who authored those reports.

That's another point I should have mentioned. The Government takes the position that eleven is too many, and I have repeatedly told them we actually think that we should be able to do more. Those reports contain the names of other officers that were present when the force was used. I would be very interested in talking to those other individuals, particularly because they've seen the same activity, if not themselves, engaged in the use of force.

The suggestion that we are getting all of the discovery that we want so that we can have a perfect record is inaccurate. If I could get everything I wanted, I would want to talk to all of those officers. But in an effort to be reasonable, we agreed to limit it to the authors of the use of force reports on those nine dates.

THE COURT: All right. Understood.

Anything further, Mr. Rosenberg, on the motion to compel?

MR. ROSENBERG: Just a couple of points, Your Honor. I'll note that plaintiffs did send trial subpoenas this morning for the eleven Federal Protective Service officers, plus, I believe, they served a notice of deposition for Mr. Johnson. Wherever the Court lands on this, our position is it has to be one or the other for these individuals. If an individual is deposed, then they shouldn't be required to appear at a court hearing.

Also, I do want to respond -- I think we've had a very productive working relationship with plaintiffs' counsel. We have tried as best we can to resolve our disputes in a pragmatic way and to be as nimble as possible in light of the extremely expedited time frame that we've had for discovery. I think, again, it's worth emphasizing that this is for a preliminary injunction hearing that will begin next week. So by necessity -- and this goes a little

bit to the email that the Court received this morning -- we have had to focus on getting plaintiffs the core information that is essential in their view to be able to litigate this case at the preliminary injunction stage.

There will be time for merits discovery. There will be time -- if the Court gets there -- for plaintiffs to take additional depositions. But the question is, how do we keep this case on track, in a pragmatic way, so that it can hold its preliminary injunction hearing next week, and we think that eleven depositions on top of -- rather, eight additional depositions on top of the depositions to which we have already agreed, and which is far broader than anything that plaintiffs contemplated, is not appropriate and is not practical.

THE COURT: Thank you, Mr. Rosenberg.

Ms. Hutchison, I assume you agree that it should be an either/or. If you get to depose them this week, they don't have to come to the court hearing. If they agree to the court hearing, then there is no need to depose them this week. I assume plaintiffs can agree with that; am I right?

MS. HUTCHISON: Yes, Your Honor. When we spoke on Friday, I told Mr. Rosenberg that I would be sending those subpoenas over so that he knew which officers we were talking about and he could individually speak to them. Even though we had already given the names, we thought giving

them documents they could send their way might be helpful for that. But we agree: If they are available for depositions this week, we don't expect them at the trial.

THE COURT: All right.

MS. HUTCHISON: I have one clarification on the trial point.

THE COURT: Yes.

MS. HUTCHISON: I think we put this on that motion to compel. I understand the Government's question on whether there is subpoena power to get them to testify live in person at the hearing, but I think it's within this court's power to command remote testimony live at the testimony as well, and that would be perfectly fine with us.

THE COURT: Okay. Thank you.

I think both sides raise some very fair points, especially since we are trying to keep everything on track for a preliminary injunction hearing beginning next Monday.

I also note, too, that this is not the normal situation where you deal with a preliminary injunction. Whichever way that goes, you then go to merits discovery, and that could take an awful long time before you get to a trial on the merits. It's different, because here we have a putative class. I note that either in the motion to compel or in plaintiffs' motion in support of preliminary injunction -- I can't remember which right now -- plaintiff

said that shortly after next week, you intend to move promptly for class discovery, and then promptly thereafter, for class certification. I think that's an important thing as part of the life progress of this lawsuit.

So we will do the appropriate activity needed for preliminary injunction, which I'll describe in a few moments. But then whatever additional depositions that plaintiff needs -- whether that be of all the folks named in the various incident reports, whether it be a fairly robust, although painstakingly defined Rule 30(b)(6) notice, there will be plenty of time for all of that when you do your class discovery immediately after the preliminary injunction decision issues. One way or the other, you will need to move to your class discovery.

I'll expect both sides to be moving promptly and efficiently on that, because I do think it's very, very important in this litigation -- in this lawsuit -- to decide as soon as we reasonably can whether class certification is or is not appropriate.

So I'll want class discovery to move promptly on both sides. I will want class certification briefing to move promptly after each side has had appropriate class discovery. And I also note that here, because of the nature of some of the claims, including an informal policy of First Amendment retaliation and standing issues, I do think

class discovery issues will merge with merits discovery issues by and large. So we are not going to separate class discovery and merits discovery. I think they're the same. And I'll want everybody to move fairly promptly on that. And to whatever additional discovery you all need and want, I'm going to probably allow it.

By the way, I'll just state right now: I'm lifting the limit of ten depositions. Given at what's at stake here, the important public issues, the nature of the defenses raised by the defendants, including standing and no official policy retaliation, I think that a limit of ten is not realistic. So I'm waiving the limit of ten. Whether I impose another limit or whether I impose a new limit down the road, we will talk about later when we do a more thorough case management conference and after you all do your Rule 26(a) conference. But I'm lifting the Rule 30(a)(2)(A)(i) limit of ten.

Now that said, I really do appreciate the need that you all this week need to both prepare for the preliminary injunction hearing and do additional discovery. As much as it pains me to do something that looks like I'm splitting the baby, that's what I'm going to do. I'm going to grant the motion to compel in part and order four of the eight additional depositions.

I'm hearing what Mr. Rosenberg says; that eight is

just too burdensome in the remaining four days essentially -- four business days here. But I'm also sympathetic to plaintiffs' position that they want to dig deeper into some of these incident reports and their authors.

So of the eight named folks that plaintiffs seek in their motion to compel, you may have four of them. Plaintiff gets to choose which four. Mr. Rosenberg has offered -- and we will take him up on his offer -- immediately after this call, Mr. Rosenberg will let plaintiffs' counsel know, of those eight, who are in the Portland metro area now, who are out of state, and maybe where they are. So plaintiff can factor that into their decision in terms of who they want to depose, although my best guess is that plaintiffs will want to focus on the substance of the incident reports more than the location of the deponents, but I'll let plaintiffs make the decisions.

So that's the ruling on the motion to compel. Plaintiff may have four of the named folks at plaintiffs' choice but not all eight. But, of course, as I said, I fully expect that the remaining four, if plaintiff still wants them -- as well as a whole host of other people -- will be allowed during class discovery. So that takes care of the ruling on the motion to compel.

Does anyone have any questions before we move on?

I'm hearing no questions.

MR. ROSENBERG: This is Brad Rosenberg.

THE COURT: Go ahead.

MR. ROSENBERG: One question or one point. Thank you for the decision.

When we confer with plaintiffs regarding that, I'll also note that we have tried to identify witness availability. So I'll note that some potential witnesses have better availability than others. I anticipate that's something we can work out with plaintiffs, but I just want to make that note for the Court now.

THE COURT: Understood. By the way, for something like this, my expectation is that if a witness is only available at ten o'clock at night on a certain evening, that's when plaintiffs will take him.

MR. ROSENBERG: The clarifying question, I think I understand the Court's order, but just to make sure: So the four who are not going to be deposed, they also do not need to appear at the hearing; is that correct?

THE COURT: That is correct, with the proviso that you're not planning on submitting a declaration from them.

MR. ROSENBERG: That is correct. We do not plan to submit declarations from any of these individuals.

THE COURT: Yes. By the way, if you work it out with plaintiff -- if plaintiffs and defendants agree on any

of these four, if you both agree that they can appear at a hearing in lieu of a deposition this week, that's fine with me. But yes, you are correct. With respect to their motion to compel either the deposition or the live testimony of eight, I'm splitting it in half and allowing them four right now, and then we will deal with others in class certification discovery.

Any further questions on the motion to compel ruling?

Okay. Go ahead, Ms. Hutchison.

MS. HUTCHISON: Thank you.

My only question, we did have some mention of a supervisor that we requested who did not submit a declaration. That person would not be included in these four, right? These are about the eight that we've identified, and we are still working about the other supervisor. Am I correct on that?

THE COURT: That's correct. You've identified eight specifically named people in your motion to compel for either deposition or live testimony. This ruling simply says they have to make four of those eight available at your choice, but they need not make the other four available at their choice unless they plan on submitting a declaration, and that's that.

MS. HUTCHISON: I have one comment based on

Your Honor's comment, and it's more of a heads-up for Your Honor.

THE COURT: Sure.

MS. HUTCHISON: We are trying to put together a motion for provisional class certification for consideration prior to the end of the hearing on March 4th. That's just so you know we are trying to do that.

THE COURT: Sure.

MS. HUTCHISON: Prior to the full class discovery that you mentioned here.

THE COURT: That's fine. You know, I don't want to assume any particular results, but whether that's granted or not, we really do need to move expeditiously after the hearing for a class certification motion, and I do understand plaintiffs' desire to do class discovery before that certification motion has been filed, but I intend to make you do it promptly and efficiently.

MS. HUTCHISON: Perfect. Thank you, Your Honor.

THE COURT: Okay.

MR. ROSENBERG: Your Honor, before we turn the page --

THE COURT: Sure.

MR. ROSENBERG: -- and I apologize. If I may, since we have the Court here, and I realize this issue may not be fully ripe, but I do want to raise it. In splitting

the baby and in recognizing plaintiffs' arguments that it's really the individual agents' depositions that are -- at least in the plaintiffs' view important to their case -- they had noticed the deposition of Mr. Johnson, who is Mr. Cantu's supervisor, and he is not somebody that we are relying upon in any way in our case. He has not submitted a declaration. We do not plan to submit a declaration from him, and we do not plan to call him as a witness at the evidentiary hearing.

So it does raise the question, if we're trying to keep this case on track and get ready for next week's hearing, about the propriety of having that deposition of a non-declarant supervisor go forward. I recognize that plaintiffs haven't filed a motion to compel. We haven't filed a motion for protective order. But it might be useful to get the Court's thoughts on that issue now --

THE COURT: Sure.

MR. ROSENBERG: -- and figure out how to proceed.

THE COURT: That's fair.

As long as defendants are continuing to maintain that there was no official policy -- written or unwritten -- to basically retaliate and make life miserable for protesters in order to discourage even lawful and nonviolent protesters, as long as the position of defendants, I'm going to allow discovery, including Mr. Cantu's supervisor if that

were to come to me.

But obviously if you were to change your position and say, "All right, fine. We will concede that, but we will rely on other defenses," then it's probably not going to be relevant.

MR. ROSENBERG: Thank you, Your Honor.

THE COURT: Okay. Now can we move on to this morning's email?

Mr. Borden or Ms. Hutchison -- I guess, Mr. Borden, you sent the email, but you or Ms. Hutchison can speak first about it. What exactly are you asking me, if anything, right now?

MR. BORDEN: Sure, Your Honor. I think Ms. Hutchison was going to address this, but I am happy to proceed if she is not.

THE COURT: Okay. Ms. Hutchison, did we lose you?

MS. HUTCHISON: Oh, no, I'm here.

THE COURT: Then I'll let the two of you choose who addresses it.

MS. HUTCHISON: So the concern that we have -- I think to sort of answer your question upfront, we are not asking you to make any decision today with respect to this. We are really flagging it because it came to our attention in this last production here. In our conversations to date about discovery, we have not received any internal

communications --

THE COURT: Okay.

MS. HUTCHISON: -- any emails or reports, but we've been told that's just an impossible request. We saw from the body-worn camera that was sent over, that there appears to be a unified WhatsApp chat that probably a lot of these individuals were participating in. Like I said, we have not met and conferred with defendants about this at this point. We intend to talk to them about the availability for them to uncover that information for us. We do think that's going to be very important for the same reasons that we were talking about before -- for refuting the idea that these are individual actors that are un-unified in their purpose.

THE COURT: Understood. And since you are not asking me to make a decision right now, I won't. I make no decision ahead of its time. So thank you for that heads-up on that.

I assume, Mr. Rosenberg, you have nothing you need to say about that issue right now?

MR. ROSENBERG: Not at this point, Your Honor, other than -- not at this point.

THE COURT: Okay. Let's move on to a little bit about next week, because as I've said, I've read plaintiffs' memorandum. I've read defendants' memorandum. I have read

the two briefs from the amicus State of Oregon and the amicus City of Portland. As we talked about in our last phone call, I think it would be very, very helpful to me to understand the issues, including some of the defendants' positions about the workability or unworkability of the requested relief, to consider the views of Commander Craig Dobson from the Portland Police Bureau, Commander Franz Schoening from the Portland Police Bureau, and Captain Cameron Bailey from the Oregon State Police. But as I said when we spoke last time, I don't want to consider evidence, especially adjudicative fact evidence submitted by an amicus.

So I was wondering whether or not plaintiffs plan on submitting those declarations, or even better, because then they would have to submit those folks for depositions to defendants, even better, whether they're planning on calling those witnesses at the hearing.

And as I said, I'm fine with everybody trying to find an efficient way of doing things that protects both sides' rights. So if plaintiffs want to call Commander Dobson, Commander Schoening, and Captain Bailey, hand them their declaration and ask if they are true and correct, to the best of the witness's knowledge and belief. And if they say "yes," then plaintiffs offer those declarations and then tenders the witness for

cross-examination, that's fine with me. That's a very efficient way to do things.

But I do want to be able to consider and hear from those three folks when I'm also considering and hearing from defendants' witnesses on many of the same issues.

So what's plaintiffs' plan in that area?

MR. BORDEN: Thank you, Your Honor. This is Mr. Borden.

We have been in communication with our amici about these issues, and we intend to present testimony from at least some of the witnesses. I think there is some logistical difficulties. I think both of them are in training at the time of the hearing, and so we may need to present them remotely or by some other means. We are still trying to work out the logistics of that.

THE COURT: Sure. As I said, if you want to file them as supplemental plaintiffs' declarations and just make them available this week for deposition by defendants, that would work too.

MR. BORDEN: Okay. Thank you, Your Honor.

We will consider that possibility too. I like presenting them live, if we can. We will do whatever we can to get that testimony, because I agree with the Court that it's important.

THE COURT: I assume that Mr. Kerlikowske will be

live; am I correct?

MR. BORDEN: That's correct, Your Honor.

THE COURT: All right. That answers my questions about next week.

As of right now I'm reserving all day Monday, Tuesday, and Wednesday. If you tell me that you all need, or might need Thursday and Friday, I will move some of my other matters for you. If we don't need all of Monday, Tuesday, and Wednesday, that's fine. I'm not going to ask you that now though. If you think you might be needing Thursday and Friday, maybe you can tell me that now, and we will start working on moving some things, at least those things scheduled for Thursday.

Does either side anticipate going into a fourth day?

I will start with plaintiff and then defendant.

MR. BORDEN: Plaintiffs do not anticipate going into the fourth day, Your Honor.

THE COURT: Thank you.

Mr. Rosenberg.

MR. ROSENBERG: Defendants do not anticipate going into a fourth day either.

Taking a step back, we may very well rely upon the declarations that we've submitted and any deposition testimony that plaintiffs may take of those declarants for

purposes of the PI hearing, and so it is a possibility that we may not affirmatively call any witnesses, but we haven't made a final decision on that.

THE COURT: Sure. That's fine.

MR. ROSENBERG: Also, though, it would be helpful as we prepare for next week's hearing -- this really is primarily plaintiffs' case. It is plaintiffs' burden on the PI motion. It would be helpful to receive a witness list soon from plaintiffs, and that might help guide our collective discussions about how long this hearing may take, because I would anticipate the bulk of the testimony that the Court will hear will be from plaintiffs' witnesses or deposition testimony that the Court, of course, can review on its own. It would be helpful to get some guidance soon as to how plaintiffs would like to proceed.

THE COURT: Sure. I would make that mutual. I think it's perfectly reasonable to ask both sides to file -- I'm thinking by Sunday, but by Saturday. If both of you want to do it on Friday, that's fine. But certainly no later than, let's say Sunday at noon, an anticipated witness list so that you will tell us who you plan on calling in person; who you plan on calling on video to the hearing. I'll assume that any declarations that have already been submitted will be fair game, because I've not heard from anybody that either side is unwilling to make a declarant

available for deposition. So in the absence of hearing that type of objection, I'll consider all declarations filed by plaintiffs and by defendants, but I think it would be a good idea for both sides to file by mid-day on Sunday your anticipated witness list. Let us know who you think would be in court; who you think would be by video.

I won't rigidly preclude you from calling an additional witness, provided that there is good cause why you didn't list them on your list on Sunday, if something new comes up from one side or the other. Perhaps if plaintiffs' witnesses say something that prompts the need for an additional witness in defendants' case, if defendants' witness says something that prompts the need for an additional witness in rebuttal by plaintiffs, that's totally understandable.

My perception is that both sides are being very professional with each other, very reasonable. I do not perceive gamesmanship going on, and so I'm not going to play "gotcha" with anybody, but I think that's not a bad idea.

Since it was Mr. Rosenberg's request, let me ask plaintiffs' counsel, does that sound reasonable to you -- submitting a witness list by both sides no later than Sunday at noon. If you guys want to agree to something earlier, that's fine with me too.

Plaintiffs' position.

MR. BORDEN: Thank you, Your Honor. Sunday by noon is fine with us.

THE COURT: Okay. Does that will work for you, Mr. Rosenberg, too? Both sides?

MR. ROSENBERG: Yes, it does, with one caveat. Because this is plaintiffs' case to which we have to respond, it would be helpful at least to get from plaintiffs an informal witness list or proposed witness list during the workweek so we have time to evaluate and figure out -- for example, some of our witnesses are not in Oregon.

THE COURT: Yeah.

MR. ROSENBERG: So we need to be able to determine whether we need -- if we do want to present live testimony, whether we need to fly them there. So it would be helpful at least to have a proposed witness list or maybe like a may call/will call witness list from plaintiffs earlier in the week, perhaps mid-week.

That will also affect our staffing. Most of the attorneys in this case are based out of Washington, D.C. So knowing whether plaintiffs are going to call, for example, three live witnesses or ten live witnesses will affect how many attorneys we need to send to Oregon next week. I think we need at least something from plaintiffs during the workweek -- maybe by Wednesday if at all possible -- that is a proposed witness list so we can start to think about what

our defense is going to look like and how we manage the witnesses.

THE COURT: Sure. Then to keep things mutual, I assume if you get a tentative witness list from plaintiff middle of the week, you can the following day submit a tentative witness list from defendants?

MR. ROSENBERG: Sure.

THE COURT: Mr. Borden and Ms. Hutchison, is it fair for me to just assume that you will work informally and professionally with Mr. Rosenberg to make something like that happen?

MR. BORDEN: Yes, Your Honor. We will work informally and professionally.

I can say right now that we plan to call all of our plaintiffs. As I indicated, we intend to call Mr. Kerlikowske. I think we can give them notice for defendants' witnesses who we intend to call as well. I think, as you've heard, there is a lot of fur flying still and things are very much in flux. I think it would be that and some subset of the deponents --

THE COURT: Sure.

MR. BORDEN: -- and that's going to be our universe.

THE COURT: Figure out too in the next few days what you're going to do about Commander Dobson,

Commander Schoening, and Captain Bailey and let them know that.

MR. BORDEN: Absolutely.

THE COURT: I'll look forward to seeing a filed proposed witness list no later than Sunday at noon. File it earlier if you want.

MR. ROSENBERG: This is Brad Rosenberg. If I may. And I apologize.

THE COURT: No apology needed.

MR. ROSENBERG: I thought I heard my good friend on the other side say the witnesses -- "defendants' witnesses that plaintiff intends to call." And I may misheard that because of the poor audio connection we are on. But I just want to maybe have a better understanding of what plaintiffs are contemplating there, because that obviously directly affects us. And it may be inconsistent with the Court's understanding that if we offer a witness through deposition, we don't need to offer them live.

THE COURT: Mr. Borden.

MR. BORDEN: Sure, Your Honor. I mean, if we don't, for example, take the deposition of Mr. Cantu, then we would want to call him live so that he could be at the hearing. So that would be one example. I know this has been sort of more Ms. Hutchison's bailiwick, but it does seem like there is some tension between whether they are

going to give us him or Eric Johnson. I think our preference is to take the deposition of Mr. Johnson and then have Mr. Cantu testify live. I think that kind of thing is still being worked out between the parties.

THE COURT: All right. I think that answers Mr. Rosenberg's question for now. I'll let the parties discuss it further.

The last item on my agenda was to ask whether you thought it would be helpful to have another telephone call, another telephone status conference with me toward the later part of this week, either Thursday or Friday, just to make sure that everything is moving smoothly. If everything is moving smoothly, the call does not need to take a full hour, but I think it's not a bad idea. What do you all think? Maybe on Friday or even on Thursday. You tell me what you recommend.

MR. BORDEN: This is Mr. Borden.

I do think that it definitely can't hurt to have another check-in, even if we just say a very brief "hi" and then "see you on Monday." There is some possibility that I will be -- I haven't figured it out yet, but I may be on an airplane, but there are plenty of people on the team that are capable of addressing any last-minute concerns.

THE COURT: By the way, if both sides agree there is no need for a call -- if we schedule one now and both

sides agree there is no need for a call, send an email to my courtroom deputy that you both agreed on that, and we will cancel it.

Mr. Rosenberg, any views?

MR. ROSENBERG: No particular views other than if the Court is deciding between Thursday and Friday, for me personally Thursday probably works better because I anticipate I will be defending a deposition on Friday.

THE COURT: All right.

MR. ROSENBERG: I'm including plaintiffs a little bit as to who will be defending one the depositions that have been scheduled.

I did have one other housekeeping matter I wanted to raise.

THE COURT: We will do that in a moment.

Will 9:00 a.m. Pacific Time on Thursday, the 26th, work for everybody?

For plaintiffs' side?

MR. BORDEN: It works for me, Your Honor. I don't know about my co-counsel.

THE COURT: Ms. Hutchison?

MS. HUTCHISON: Well, I'm hopefully going to be in a lot of depositions this week, but I would note the deposition that is scheduled for Friday is scheduled to start at 10:00 a.m. We could do a 9:00 a.m. on Friday if it

is quick. I will probably not be available on Thursday.

THE COURT: But if Mr. Rosenberg wants to be preparing his witness an hour before the deposition, that's not the most unreasonable request I've ever heard.

MR. ROSENBERG: I am trying to think -- and I have to think through time zones here, because there are three time zones involved, and I have to look at where -- give me one moment. I'm sorry.

THE COURT: I can move things around and try to accommodate.

Mr. Rosenberg.

MR. ROSENBERG: I guess what I'm saying, I'm not necessarily opposed to doing a hearing before the deposition on Friday, if that's everyone's preference.

Ms. Hutchison, can you remind me, was it scheduled to begin at 10:00 a.m. Pacific Time?

MS. HUTCHISON: Yes.

MR. ROSENBERG: We could adjust that potentially too. I'm not opposed to doing a status conference at 9:00 a.m. Pacific Time if that works for everyone.

THE COURT: Ms. Hutchison.

MS. HUTCHISON: I believe that will work for us. All I was going to say is we can certainly schedule depositions for Thursday around whatever time we set the conference on Thursday. Those haven't been set yet.

THE COURT: It sounds like Friday 9:00 a.m. Pacific Time will work best for everybody.

Did I hear that right, or did I hear that incorrectly?

MR. ROSENBERG: That works for the Government, Your Honor. We can always start the deposition a bit later if the status runs long, but hopefully it won't.

MS. HUTCHISON: Perfect.

THE COURT: I'll schedule another status conference Friday, 9:00 a.m. Pacific Time, February 27th.

I think Mr. Rosenberg had another issue he wanted to raise.

MR. ROSENBERG: Yes. I just want to give the Court an update on the protective order. We did send a revised draft to plaintiffs' counsel with some edits. We are going back and forth on that. We haven't heard back from plaintiffs' counsel yet. But I would just propose that the Court continue for now the interim from-the-bench protective order that it has entered so we can work out any remaining issues.

THE COURT: That's fine with me.

Any objection from plaintiffs?

MR. BORDEN: No, Your Honor. That's fine. I think we are down to two issues.

THE COURT: Okay.

MR. BORDEN: It might be that we have to submit competing versions at some point, but hopefully we won't have to do that.

THE COURT: That's fine. Although let's try to get that finished this week, if we can, please.

MR. BORDEN: Yes, Your Honor.

THE COURT: Anything further from plaintiffs?

MR. BORDEN: This is Mr. Borden.

Not from me, Your Honor.

Thank you.

THE COURT: Anything further, Mr. Rosenberg?

MR. ROSENBERG: Nothing from the Government, Your Honor.

THE COURT: Let me add one more thing then. I did want to note that when we begin on Monday, please be assured that I will have read at least several times everybody's memoranda, probably even the declaration several times, and so I don't think we will need much of an opening statement from plaintiffs' counsel and defense counsel. But if you want to do an opening statement that sort of helps frame the issues for what we will specifically be hearing about during the hearing next week, my best estimate would be 20 to 30 minutes for plaintiff and 20 to 30 minutes for defendant would suffice. I will let you do a much more thorough closing arguments after we're done with all the evidence.

I will also say that I know there was a request from at least one, maybe both amici, to provide oral argument. My plan right now is to not to allow that for opening statement, but to allow both amici to argue at the end of the evidentiary hearing.

I know there was an objection by defendants to that, but I think I overruled that in my last order. But what I would like to see is a moderately brief opening statement, if you all want to. If you want to waive it, that's fine too. But opening statements only from plaintiffs' counsel and defense counsel.

We will then call the witnesses. Then when we are done with the evidence, we will have closing argument. I think the way that closing argument should go would be plaintiffs' counsel, and then since both amici right now are supporting plaintiff, both amici, if they want to argue, then defendants' counsel, and then plaintiffs' rebuttal.

That's how I'm tentatively envisioning it right now. If you want to be heard about that later, if you have any objections, you can raise them now, you can raise them later. This is not a waiver. But that's how I tentatively think things will go most efficiently and effectively.

Any comments right now?

MR. BORDEN: Not from plaintiff.

Thank you, Your Honor.

That all sounds reasonable to us. And I know you read the papers.

THE COURT: Okay.

Mr. Rosenberg, do you want to say anything about that now? I know you've objected, but I overruled that objection.

MR. ROSENBERG: Understood, Your Honor. Nothing else from the Government.

THE COURT: All right. Have a good day, everybody.

Again, if you need me before we speak on Friday at this week at 9:00 a.m., don't hesitate to contact my courtroom deputy, and I will make myself available to you all.

Have a good day, everybody.

COUNSEL: Thank you, Your Honor.

(End of proceedings.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/ Dennis W. Apodaca February 24, 2026
DENNIS W. APODACA, RDR, RMR, FCRR, CRR DATE
Official Court Reporter

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JACK DICKINSON, et al.,	)	
	)	
Plaintiffs,	)	3:25-cv-02170
	)	
vs.	)	March 2, 2026
	)	
DONALD TRUMP, President of the UNITED STATES, in his official capacity, et al.,	)	Portland, Oregon
	)	
	)	
Defendants.	)	

(Preliminary Injunction Hearing)

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL H. SIMON

UNITED STATES DISTRICT COURT JUDGE

(Appearances)

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(March 2, 2026)

P R O C E E D I N G S

(Open court:)

THE COURT: Good morning, everyone.

We are here in the case of Dickinson, et al., versus Trump, et al.; Case No. 3:25-cv-2170.

I believe we have a number of people, not only in this courtroom but also in an overflow courtroom down the hall as well as listening on a listen-only line. I'll remind everyone -- I was going to say "who is not in this courtroom," but I will remind everyone that federal court rules prohibit the audio or video recording of these proceedings. If anyone needs or wants an official transcript of what goes on, we have our official court reporter who will be taking everything down.

At this time I will invite appearances from counsel for plaintiffs.

You may proceed.

MS. SIMON: Good morning, Your Honor. Kelly Simon on behalf of plaintiffs.

MS. ALBIES: Good morning, Your Honor. Ashlee Albies on behalf of plaintiffs.

MS. HUTCHISON: Good morning, Your Honor. Kimberly Hutchison on behalf of plaintiffs.

MR. FLEMING: Good morning, Your Honor. Mark Fleming on behalf of plaintiffs.

MS. HALLETT: Good morning, Your Honor. Lucy Hallett on behalf of plaintiffs.

MR. BORDEN: Good morning, Your Honor. Matt Borden on behalf of plaintiffs.

MS. MOISAN: Good morning. Jane Moisan on behalf of plaintiffs.

MS. ROOD: Hadley Rood on behalf of plaintiffs:

MR. MARRINAN: Good morning, Your Honor. Taylor Marrinan on behalf of plaintiffs.

MS. ANDRIOLA: Good morning, Your Honor. Eri Andriola on behalf of plaintiffs.

MR. PANGARES: Good morning, Your Honor. Zachary Pangares on behalf of plaintiffs.

THE COURT: Good morning.

All right. I will now invite appearances for counsel for defendants.

MR. BAILEY: Good morning, Your Honor. John Bailey, United States Department of Justice, for defendants.

MR. ROSENBERG: Good morning, Your Honor. Brad Rosenberg from the Department of Justice, on behalf of the defendants.

MR. YUN: Good morning, Your Honor. Alexander Yun, Department of Justice, on behalf of defendants.

THE COURT: Good morning.

All right. Do we have anyone here representing

Amicus State of Oregon?

MR. KENNEDY: Good morning, Your Honor. Scott Kennedy for Amicus State of Oregon.

THE COURT: Good morning.

And representing Amicus City of Portland.

MR. VANNIER: Good morning, Your Honor. Denis Vannier representing the City of Portland.

THE COURT: All right. We are here primarily on plaintiffs' motion for preliminary injunction. That's Docket 106. I also note that over the weekend -- I believe on Saturday -- plaintiffs filed a motion for provisional class certification, Docket 130. As I previously discussed with all counsel, I would appreciate seeing any written response defendants might wish to make to the motion for provisional class certification by midnight tonight, if feasible. I don't anticipate hearing argument on that until the closing arguments of the motion for preliminary injunction.

So with that, are there any preliminary matters from either side before I invite a brief opening statement from plaintiffs' counsel followed by a brief opening statement by defendants' counsel? Only preliminary matters.

First for plaintiffs.

MS. SIMON: Not on behalf of plaintiffs, Your Honor.

THE COURT: Defendants.

MR. ROSENBERG: Your Honor, pursuant to Federal Rule

of Evidence 615, we would ask that any witnesses that plaintiffs plan to call be excluded. When I say "from this courtroom," I mean either in this courtroom or the overflow courtroom or from listening to any of the testimony until such time as they actually testify.

THE COURT: Sure. I'll tell you, my standard practice, consistent with the rule, obviously that does apply to parties themselves who are natural persons. Also, I have the authority to say it doesn't apply to expert witnesses. I believe Mr. Kerlikowske is an expert witness.

Does plaintiff plan on presenting testimony from any other expert witnesses -- people that will be giving testimony pursuant to 702?

MS. SIMON: No, Your Honor.

THE COURT: All right. Then do plaintiffs have any objection to excluding, pursuant to 615, everyone who will be giving testimony other than the parties and the expert witnesses?

MS. SIMON: No, we don't, Your Honor.

THE COURT: All right. Are there any witnesses in this courtroom right now?

I really thought the officers would be giving expert opinions. I read their declarations. Those aren't opinions?

One second, Officer.

MS. ALBIES: Your Honor, yes, based on their training

and experience, there are questions we will be asking them based on their training and experience. I think I was thinking of them more as fact witnesses based on that training and experience.

THE COURT: That's fine.

MS. ALBIES: It's one of those -- it's like treating doctor-type witnesses.

THE COURT: Let me ask defendants, do you plan on objecting, under 702, to any opinion testimony that will be presented either by Commander Schoening, Commander Dobson, or Captain Bailey?

MR. ROSENBERG: We might, Your Honor, because whatever expertise or opinions they may hold as to operations of the Portland Police Bureau or the State of Oregon don't necessarily apply to Defendants DHS. I will note that, even though plaintiffs are calling these witnesses, they are, in fact, witnesses that have submitted declarations on behalf of the amici. So I don't know what the amici's position is as to the nature of their own witnesses' testimony.

THE COURT: Sure. Although as we discussed pretrial on the record, although the declarations were originally filed by the amici, I invited plaintiffs to file those declarations as declarations of plaintiffs' witnesses, which plaintiffs have done. But I do understand that you may be objecting under 702 either to relevance, applicability, or the like. Since

plaintiffs are not offering them as expert witnesses on behalf of plaintiffs, I will ask Commander Schoening, Commander Dobson, and Captain Bailey to excuse themselves until they are called as a witness. Thank you.

Of course, this applies to any witnesses that may be listening remotely by telephone or to anyone who will be watching or observing the proceedings in the overflow courtroom. So those witnesses may not listen to any testimony or receive reports of what other folks have said, at least until after they have testified.

Is that clear, Plaintiffs?

MS. SIMON: Yes, Your Honor.

THE COURT: In that case, I'll now invite plaintiffs' counsel to deliver a brief opening statement if you wish, followed by the same invitation going to defense counsel. Then we'll call the first witness after.

MS. SIMON: Thank you, Your Honor. Good morning. Kelly Simon on behalf of plaintiffs.

THE COURT: And for the record, no relation to the Court.

MS. SIMON: I was going to throw it in there if you didn't beat me to it, but you got me. No relation, Your Honor.

Kelly Simon on behalf of plaintiffs and the First Amendment right to protest. We are here to ask the Court to protect protesters and journalists at the Portland ICE

building.

THE COURT: The microphone is very sensitive, and you're welcome to step an inch or two inches back.

MS. SIMON: Is that better?

We are here to ask the Court to protect protesters and journalists at the Portland ICE building from defendants' ongoing pattern of retaliation. Plaintiffs have already put into the record statements from the top of the DHS chain of command, including Defendants Trump and Noem, down through the line-level inspectors, officers, and agents, showing direct evidence of the retaliatory animus infecting Operation Skip Jack, the name of the FPS response to protests at the Portland ICE building.

Plaintiffs have also already put in a significant amount of evidence of the pattern of harm resulting from these statements at the ground level, as evidenced by the over 50 declarations that have been submitted regarding the numerous events since the start of Operation Skip Jack that have chilled the First Amendment activity of many Portlanders.

These declarations show several types of evidence of retaliation, including targeting the messages of people themselves, shooting at signs, pushing out of the building to take signs down, targeting non-threatening people, sometimes when they're standing apart from the crowd, and a large number of misuses of munitions, including uses that defendants' own

policy would deem deadly force.

While plaintiffs have already put before the Court that Operation Skip Jack is animated by a policy of retaliation, a question underlying both plaintiffs' likelihood of success on the merits and plaintiffs' satisfaction of Rule 23(a)(2), we plan to use our time with the Court this week to do two things: One, further expose how Operation Diligent Valor's pattern of retaliation is driven by this policy of retaliation; and two, explore the workability and safety of plaintiffs' requested relief.

Plaintiffs will present to you five types of evidence: First, plaintiffs will present the declarations and live testimony of three local law enforcement officers -- Franz Schoening, Craig Dobson, and Cameron Bailey, who will testify about their observations of defendants' conduct.

Second, plaintiffs will present the live testimony of victims of defendants' retaliation, including our five clients and five of the putative class members who have submitted declarations to the Court already. We understand the Court has read these declarations, so each class member will testify to dimensions of their experiences that were not captured fully in their declarations, including how these experiences continue to chill their First Amendment activity.

Third, plaintiffs will present video-recorded deposition testimony of some of defendants' employees who have

worked for Operation Skip Jack, including seven FPS inspectors and one CBP officer -- a group of officers that defendants have already stated to this Court provides you a representative sample of DHS employees working as part of Operation Skip Jack.

Plaintiffs intend to provide the Court with full transcripts and full-length videos of each officer's deposition, which run about two to three hours each. However, with our time together in person, and thanks to the technological genius of Attorney Lucy Hallett, plaintiffs have selected a series of short video clips from each deposition to play for the Court. Some of these deposition video vignettes will be coupled with video events being discussed in the depositions.

You will hear consistent testimony from the DHS line officers. You will hear officers explain that DHS agency leaders train them to use chemical munitions, even on people engaged in passive resistance. You will hear officers' stated belief that they and the officers they work alongside acted within policy.

You will hear that no officer has faced consequences or correction for their actions, and you will hear officers confirm that if they had it to do all over again, they would do the exact same thing.

These second and third categories of evidence, the testimony of class members and DHS officers, will be presented

side by side. Plaintiffs intend to alternate between live witness testimony and the video depositions. Hopefully, our goal is to pair them by date, but our scheduling restrictions may make that a little bit off. Hopefully, we will try to get that pattern going for you.

The fourth type of evidence, plaintiffs will present the video-recorded testimony of FPS leaders and commanding officers tasked with carrying out Operation Skip Jack. Again, plaintiffs will submit to the Court full-length transcripts and videos and will only present short video clips. This testimony will describe to the Court Operation Skip Jack's unified chain of command, a structure that FPS leads and directs, while cross-designating officers from other DHS components to exercise FPS authority. This testimony will also confirm that the line officers' conduct has been ratified, not only by the regional FPS leadership, but also from the very top of the chain of command, Secretary Noem.

Finally, plaintiffs will present the testimony of expert Gil Kerlikowske. Mr. Kerlikowske was both the former police chief in Seattle and Commissioner of Customs and Border Protection. Mr. Kerlikowske will provide the Court with his opinions about defendants' pattern of violence against people who have dared to speak out against them.

What all this evidence will show is that the purpose of Operation Skip Jack is to use pain and fear to chill the

First Amendment activity of an entire class of nonviolent people who disagree with defendants' policies and practices. This evidence will show that the class-wide relief is urgently needed and justified, and this evidence will show that Your Honor's current order, with some slight modifications that we will share with Your Honor, is a safe, workable, and measured way to balance the interests of the public in both the rule of law and the fundamental freedoms that safeguard our democracy.

Thank you, Your Honor. We look forward to presenting our case to you today.

THE COURT: Counsel, one brief question. From the written materials that you've already submitted, I believe I understand what is referred to as Operation Skip Jack. But you also mentioned in your opening comments "Operation Diligent Valor."

Will you remind them what that is and how that relates to what we're talking about in this hearing?

MS. SIMON: I can clarify that for Your Honor. Operation Diligent Valor was the operation conducted in 2020. Operation Skip Jack is the current operation. That was a misstatement from myself, as I was involved in cases from that time.

THE COURT: Living in the past. I recall.

Thank you very much. I appreciate that

clarification.

All right. I will invite a brief opening statement from defendants' counsel.

MR. BAILEY: Good morning, Your Honor. John Bailey for the United States. May it please the Court.

Plaintiffs allege that federal law enforcement officers have misused crowd control devices while protecting the Portland ICE building and the federal personnel who work there, but it's important at the outset to be clear about what the focus of this hearing is and what it is not.

Plaintiffs do not seek preliminary relief under the Fourth Amendment. They do not ask the Court to determine whether particular uses of force were excessive, mistaken, or inconsistent with internal agency policy. We are here today on a single claim: First Amendment retaliation. That means that this evidentiary hearing turns on a single question. It is not whether individual officers, or even whether DHS as an agency, deploys crowd control munitions in a manner that is out of policy or somehow excessive. Instead, the question we're here to resolve is why DHS has deployed crowd control munitions outside the Portland ICE facility.

To establish a claim for First Amendment retaliation, plaintiffs must show, among other things, that the protected activity was a substantial or motivating factor behind the challenged Government action.

Plaintiffs, therefore, must prove that DHS acted because of protected conduct; that it was plaintiffs' participation in First Amendment activity itself that motivated DHS's response outside the facility. And because plaintiffs seek a prospective programmatic injunction against DHS as an agency, not relief tied to any single encounter or officer, plaintiffs' burden is far greater. They must establish an inference of retaliatory intent attributable to DHS as an institution; that is, they must show that DHS maintains a policy or custom of responding to protest activity with unconstitutional retaliation.

Over the course of this hearing, plaintiffs will not be able to make that showing. Indeed, the record will demonstrate just the opposite. To start, the record will confirm that DHS has adopted a formal written policy that expressly forbids personnel from profiling, targeting, or discriminating against anyone for exercising his or her First Amendment rights.

DHS separately imposes a duty on officers and agents to report improper uses of force by other personnel. And the evidence will show that DHS personnel operating at the Portland ICE facility have acted consistently with those directives.

When crowd control devices were deployed, DHS was not responding to protesters' message or viewpoint. Officers were carrying out a separate and independent obligation imposed by

federal law: Protecting federal property, safeguarding federal employees, and maintaining safe access to an operating federal facility.

Of course, understanding causation requires understanding the environment officers often confronted. Since approximately June 2025, protesters have demonstrated outside the Portland ICE facility on nearly a daily basis. The number of protesters outside the facility varies, as does the character of the demonstrations on any given day.

Many of these demonstrations have been peaceful. In those circumstances, federal officers monitored events and took no enforcement action, because none was required. That fact is extremely significant. If DHS was carrying out a policy or custom of retaliation for First Amendment activity, crowd control munitions would be deployed as a matter of course in response to this sort of activity. But that's not alleged here, and the evidence will show that did not happen.

Defendants have submitted testimony from Robert Cantu, Deputy Regional Director for Region 10 of the Federal Protective Service. Mr. Cantu has had firsthand experience at the facility in Portland, having served as incident commander on several occasions and as recently as last month. He's also reviewed the FPS incident reports associated with the days the parties have focused on in expedited discovery. His testimony captures an important reality that is

reflected throughout the evidentiary record.

As Mr. Cantu explains, "There have been many instances since June 2025 when the actions of protesters remained peaceful and did not require a law enforcement response from FPS. It was only in specific instances when the character of the protests changed and presented a threat to the safety and security of federal property and personnel that FPS was required to take action to address potentially harmful situations." That's from his declaration submitted with our opposition.

The other documentary evidence produced in discovery confirm that officers routinely monitored demonstrations without intervention when protest activity remained lawful, non-obstructive, and otherwise manageable. The evidence will also show that at certain points conditions changed in ways that prompted officers to act, not because of what the protesters were saying, but because of what was occurring at the facility itself. On multiple occasions organized groups moved on to restrict the federal property and attempted to breach the gates and damage security infrastructure. Federal officers at the facility have been struck with rocks and bottles and targeted with high-intensity lasers and flashlights capable of impairing vision.

Even more commonly, groups refused repeated lawful dispersal orders and obstructed federal operations by blocking

secured entrances and exits, preventing vehicles and personnel from safely entering or leaving the facility, and when crowd control measures were ultimately deployed in response to those conditions, officers frequently encountered escalating resistance: Individuals kicking or throwing deployed munitions back towards officers or into the surrounding crowd.

The significance of this evidence is not to relitigate each operational decision by each individual officer over the past nine months, nor is the United States in this hearing attempting to prove that every decision made and dynamic circumstances was, with the benefit of 20/20 hindsight, perfect.

That is not the constitutional inquiry before the Court. The inquiry is motive, not of an individual officer, but of the agency. The evidence will reflect a consistent causal relationship. Enforcement action followed changes in crowd behavior and safety conditions, not disagreement of protesters' speech or viewpoint or presence.

Put simply, when protesters remained peaceful and unobstructive, DHS did nothing. When safety risks emerged, DHS responded to those risks. That pattern is fundamentally incompatible with the existence of an agency policy or practice of First Amendment retaliation.

The Court will also consider evidence explaining why the crowd control used by DHS exists in the first place. As

both Mr. Cantu and Chief Sullivan explained, OC spray, pepper ball launchers, and similar munitions are designed to obtain compliance while avoiding close physical confrontation, reducing the likelihood of injury to officers and members of the public alike. They reduced the need for hands-on force. When a crowd is surging or blocking the driveway or surrounding officers during a targeted arrest, the most dangerous outcome for everyone is physical melee.

Officers can either wade in and start grabbing people or using shields, batons, risking injuries on all sides, or they can use intermediate less-lethal options to create space, and there's more control. Those tools can be uncomfortable, if exposed to that, as FPS officers are when they go through academy. But those tools are often the safest way to prevent escalation, and that is the pattern that will be shown by the record here. Crowd control devices were used as a de-escalation measure to avoid close-quarters force, not as punishment for speech.

We will also hear from the plaintiffs themselves this week. I expect their testimony will understandably focus on what their exposure to crowd-control munitions felt like and what its effects were. But exposure is not the same thing as targeting, and it is not proof of retaliation. In any crowd-control setting, it's entirely foreseeable that individuals who are not the immediate focus of enforcement,

including protesters, bystanders, and journalists, may incidentally be exposed to reasonable crowd-control measures. It is not because officers have singled them out for their speech. It is because crowd-control devices are designed to influence a crowd to movement and behavior in a defined area in conditions that are often chaotic, congested, and unpredictable.

And here, the evidence will supply the obvious alternative explanation for plaintiffs' claim of targeting. Officers were doing their level best to attempt to enforce a law in the face of obstructive and often violent conduct. When crowds refused lawful orders to move locked-in ingress or egress, damage property, or escalated towards violence, officers used crowd-control techniques to restore control and reduce the need for hands-on force.

Plaintiffs will not be able to show a likelihood of success on their First Amendment claim. In any event, to receive prospective injunctive relief, it is not enough for plaintiffs to show violation of the First Amendment in the past. The plaintiffs must also clear a threshold requirement, Article III standing to obtain forward-looking injunctive relief.

Plaintiffs rely largely on a handful of past encounters spread over approximately nine months. But standing for prospective injunction requires more than past exposure and

a generalized fear of reoccurrence. Plaintiffs must show a real and immediate likelihood that they themselves will again suffer the same alleged constitutional injury: Here, retaliatory force used to protect (indiscernible). Because plaintiffs will be unable to show that it is likely DHS has an unwritten policy of unconstitutional retaliation, plaintiffs will fail to establish their standing to seek a prospective injunction the first place.

At the end of the day, plaintiffs may disagree with particular judgments made by individual officers charged with protecting the Portland ICE building. But they cannot meet their burden to prove an agency-wide policy of unconstitutional retaliation, one that would be directly contrary to the written, express policies of DHS here.

For those reasons, after the Court hears the testimony and views the full record, my colleague, Mr. Rosenberg, will ask the Court to deny the motion.

Thank you.

THE COURT: Thank you, Mr. Bailey.

Plaintiffs may call the first witness.

MS. ALBIES: Plaintiffs call Franz Schoening.

Your Honor, may I remain seated for questioning?

THE COURT: Wherever you want. Frankly, move your microphone a bit closer to you so that folks that might be listening in remotely can hear you, please.

I'll ask our courtroom deputy to swear in the witness.

(The witness was duly sworn.)

THE WITNESS: My name is Franz Schoening. S-C-H-O-E-N-I-N-G.

DIRECT EXAMINATION

BY MS. ALBIES:

Q Good morning, Commander Schoening. How are you currently employed?

A I am currently a commander with the Portland Police Bureau. I'm assigned to the Specialized Resources Division.

Q What is the Specialized Resources Division?

A So it's basically anything that's not designed to respond to calls for service and patrol operations or do major crime investigation, so our tactical teams, our Special Emergency Response Team, our Rapid Response Team, which does our public order operations, our K-9 Unit, Air Support, the Explosive Disposal Unit, Traffic, Narcotics and Organized Crime, our Focused Intervention Team, our Enhanced Community Safety Team. I think that's most of it.

Q How long have you been in that position?

A Two years now.

Q Prior to being commander of the Specialized Resources Division, what position were you in with the Police Bureau?

A I was a captain assigned to the Training Division.

Q How long were you in that position for?
A I want to say just under a year-and-a-half.
Q How long have you been a sworn officer?
A With Portland, since January of 2002. I was a police officer in Valdez, Alaska, for five years prior to that, from 1997 to 2002.
Q In your role as captain of the Training Division, what were your job duties there?
A I oversaw the delivery and evaluation training curriculum, both the Advanced Academy for our new hires and also In-Service Academy for our tenured members.
Q Did that include training for public order events?
A To a certain extent. A lot of our specialized teams develop and deliver their own training, because of the expertise involved. But we do look at their lesson plans and make sure they're consistent with Police Bureau directives and procedures.
Q You have provided a sworn declaration in this case dated February 12th of 2026, right?
A I did.

MS. ALBIES: That is in the docket, Your Honor, 126.

THE COURT: I have it in front of me.

MS. ALBIES: Great.

BY MS. ALBIES:
Q Did you review it before testifying this morning?

A I did.
Q And are the statements that you gave in that declaration consistent with your current experience?
A Yes.
Q And have you reviewed the temporary restraining order that was entered in this case?
A Not for a while, no.
Q But you did review it at some point?
A When it first came out in the media, yes.

MS. ALBIES: Your Honor, I move to admit, as Exhibit 1, the temporary restraining order opinion in this case, which is at Docket No. 68.

THE COURT: Any objection?

MR. ROSENBERG: No objection, Your Honor.

THE COURT: Received.

BY MS. ALBIES:
Q Commander Schoening, I want to direct your attention to the screen. I would like to put the declaration on the screen.

Is this the declaration that you signed for this case?

Sorry. Can you put up the declaration?

THE COURT: I think I signed it.

MS. ALBIES: Yes. I would agree with that.

BY MS. ALBIES:
Q I believe you can scroll through it. Can you scroll

through this declaration and make sure it is the declaration that you signed in this case. We can scroll. You can draw. That's your exhibit that you signed?

A Yes, it is.

Q The declaration that you signed. Excuse me.

MS. ALBIES: Plaintiffs move to admit this declaration as Exhibit 2.

THE COURT: Are there going to be any objections to specific exhibits?

MR. ROSENBERG: Your Honor, it is tough to predict in advance whether there would be objections, but since these are already filed on the docket, I'm not sure that they actually need to be separately admitted.

THE COURT: Let's see if we can agree on this procedure to expedite things: If any document has already been submitted in support of or in opposition to the motion for temporary restraining order or the motion for preliminary injunction, I'm just going to receive them. I've already talked specifically about the extra exhibits submitted by the amici. We're not talking about that.

But if plaintiffs or defendants have already filed exhibits or documents in support of or in opposition to the TRO motion or the PI motion, I think it's already part of the record. It doesn't need to be formally offered. If anyone wants to object to it or ask for it to be excluded, you're

welcome to do that as a separate and explicit matter, but I don't think we need to offer those exhibits.

Is that procedure acceptable to plaintiffs?

MS. ALBIES: Yes, Your Honor.

THE COURT: Is that procedure acceptable to defendants?

MR. ROSENBERG: Yes, Your Honor.

MS. ALBIES: Do we still need to mark them?

THE COURT: No. Just identify them either clearly what they are and/or by ECF number. I will tell you that I have in front of me a notebook of all of the declarations of all of the plaintiffs' witnesses that you notified me by email that you intend to call. You can just identify them and let me know if they've already been submitted. If not, then we will talk about offering them. But if they have been submitted, they're already in.

MS. ALBIES: Thank you, Your Honor. I believe they are already in the record, so that will make it easier.

Thank you.

BY MS. ALBIES:

Q Commander Schoening, can you tell the Court a little bit about your background and training with respect to public order operations.

A Sure. So it's fairly extensive. I'll start with the Incident Command System. So we manage public order using the

Incident Command System, which is part of the National Incident Management System.

THE COURT: If you could speak into the microphone and more slowly, please.

THE WITNESS: Okay. So we use the Incident Command System, which is part of the National Incident Management System, to manage public order events. They're typically frequently large, complex events involving a lot of resources, and so we find that's a good management structure to use. It's also mandated by the federal government when we're doing response to incidents.

So I've had training in the Incident Command System, and classes, including the ICS 100, 200, 300, 400, 700, 800. I've been to Management 314, which is unified command operations with public safety entities, including fire, police, medical, public works. I've taken a class for position-specific training, including the operations section chief class. There is probably some that I'm leaving out, but that's the basic foundation of my Incident Command System training.

For public order training specifically -- so when I became a member of the Rapid Response Team, I attended the basic State of Oregon Rapid Response Team/Mobile Response Team training. It's a three-day training held at Camp Rilea in conjunction with the Oregon State Police and the Oregon Air

National Guard. It's basic foundational public order training -- tactics, scenario-based training, decision-making use of force, documentation, that sort of stuff.

Beyond that, I've attended the Public Order Management Academy public order command course. I have attended the National Tactical Officers Association Public Order Command Certification Course. I've attended national and international conferences related to public order; a conference put on by the Royal Canadian Mounted Police in Ottawa back in 2018 and 2019. I've traveled to Vienna, Austria, and attended conferences there. I spent a week with the London Met looking at their public order operations and how they run protest management over there.

I am a member of the National Tactical Association Instructor Group, so I teach public order command at the National Tactical Association. I was part of the group that wrote the national standards that the NTA put out for public order response for the industry.

What else? There's something I am sure I forgot, but that's the basic foundation.

BY MS. ALBIES:

Q And as part of your role with Portland Police Bureau, do you keep up on the currents standards that apply -- national standards or best practices that apply to public order policing?

A I do. Just as recently as this last fall, I attended the National Executive Forum on Public Order Policing that was put on by the D.C. Metro Council of Governments. There were agencies from all over the U.S. there at the executive level talking about best practices for public order policing.

Q I'll direct your attention to paragraph 7 in your declaration that's in front of you. Now, you referred to Directive 635.10, and that is the Portland Police Bureau directive that applies to public order events, correct?

A Correct.

Q Can you explain what the policy of Directive 635 is?

A So it basically lays out how the Police Bureau will plan for and respond to public order events, which predominantly are First Amendment events, but not exclusively. So it delineates really at a high-level philosophically what our strategic approach is and our core values around First Amendment events. As you can see there, it talks about upholding the rights of individuals engaged in First Amendment activity and free expression, but also balancing that with maintaining public safety, peace, and order.

It talks about how we would respond to spontaneous events and also how you plan for and respond to planned events, if we know they're coming. It also does discuss at a more operational or tactical level some of the constraints or restrictions around what types of things incident commanders

can or should do, if it comes to broad-based crowd control tools, like mass detentions, dispersals, the use of chemical agents. So it does really kind of go through everything from a strategic level all the way down to the operational and tactical level.

Q You write in paragraph 7, "The way police officers show up and respond at public order events can significantly impact those goals." What do you mean by that?

A Sure. So it's pretty well-established crowd science, and my practical experience has demonstrated, the way we show up -- and that's everything from the uniform and equipment we are showing up in, whether it's standard police uniform like I'm wearing today, to a bicycle uniform, which is the black and yellow with bike helmets, to full protective equipment, including ballistic helmets and face shields and batons, can send a message to people who are out there, and people perceive that presence of the police as either legitimate or illegitimate based on what conduct they're experiencing or witnessing and how we show up. If we show up with a couple of officers engaging in conversation versus a platoon of officers in a formation wearing a lot of tactical equipment, that can send a very different message to people engaged in a First Amendment event.

Q When you say "a different message," what do you mean by that?

A So when people are out there engaging in assembly and speech, whether they're actively engaged in speech or just there to observe and participate, they see and hear things, and then perceive -- their experience is very individual. You can have -- particularly in a large crowd, you can have people engaged in isolated acts of criminal conduct that do merit a police response and intervention, but that may not be perceived by somebody who is 10 or 15 people back in a crowd. So when the police do show up, and they're prepared to intervene, if they don't see that response as being proportional to their own personal experience, it perceives -- it can drive that sense of -- if they see the police as legitimate or illegitimate, it can drive -- I am getting a little bit into the science there -- a shift from an individual's social identity to a collective social identity or group social identity, where they start to look at the people around them as part of their group and the police as an outside group. And if they perceive that outside group as illegitimate or responding disproportionately, their willingness to engage in different behaviors may change.

Q Now, you've described your training and experience with public order operations and public order policing. Have you applied that experience dealing with crowds and protests here in Portland?

A Yes.

Q How long have you been employed with the Portland Police

Bureau?
A Since 2002, so 24 years.
Q So 24 years. And you've seen a lot of protests in Portland in that 24 years?
A A lot.
Q Would you say that Portland is a pretty politically active city?
A Yes.
Q And when there are protests at federal buildings or on federal property, do you have any kind of engagement or interaction with the federal government?
A Yes, we do.
Q What's the nature of that communication or interaction?
A I mean, it has evolved over 24 years. When we look back to the 2000-teens, particularly the Occupy protests and then to the first term in office with President Trump, we had a lot pretty active protests. Some did target federal facilities. Some were environmental protests also targeting federal facilities because of the permitting of their organizations -- the agencies.

We have got a pretty well-established relationship and cooperate quite a bit with the Federal Protective Service. They are the uniform entity that maintains and manages security for public buildings largely. So back into the 2000-teens, we would train with the Federal Protective Service. They did

participate in the State of Oregon basic Rapid Response Team and Mobile Response Team training for a while. Now, we would talk with them regularly about protests that focus on federal buildings.

Frequently, particularly in our jurisdiction, dealing with city streets and the city at large kind of interfaced with protest activity that affected their buildings, we would deploy operationally and frequently in the field in pretty close proximity to each other and coordinate effectively.

I would say as we went through the 2000-teens, with President Trump in office, there was some protest activities on the ICE facility back then. That was a little bit of a challenging dynamic that, again, we are going through now where it a little bit challenging how we respond to protests at the ICE facility.

In 2020, we had obviously a pretty extensive period of civil unrest here in Portland where the focus shifted from the Justice Center to the federal courthouse and back. There was initially a lot of coordination with the Federal Protective Service, elected officials, and different court rulings made that were more complex in many ways.

There was a time where we weren't allowed to talk to or cooperate or coordinate with federal agencies deployed under President Trump's Executive Order. So then we move into this current day, where we've obviously got Oregon and City of

Portland sanctuary laws that are restraining what we can or can't do around immigration enforcement. And so as the protest activity kind of consolidated and focused on the ICE facility down on South Waterfront, it has been a little bit of an evolving experience on how much and when we coordinate with the federal government on that.

Q But you have an establishment relationship with at least incident commanders with the federal government to talk about particular incidents?

A Yes.

Q I would like to turn your attention a paragraph 12 -- as an initial matter, you also attached Directive 635 to your declaration, correct?

A Yes.

Q Is it your understanding that that Directive 635 tracks with Oregon law?

A Yes.

Q On crowd control, munitions in particular?

A Yes.

Q So I would like to turn to paragraph 15 of your declaration, please. So you describe in paragraph 15(a) an incident on October 4th. Now, this information is already in the record, so I don't need to have you go into too much detail, but can you just review paragraph 15(a) briefly, please. Can you describe very briefly for the Court what

happened on October 4th that is the subject of this paragraph.
A Very briefly, we had resources assigned to be prepared to intervene during this protest event. We witnessed criminal activity. There was a gathering; a march down to the ICE facility. I was the incident commander, I believe, this day, and so I was in the command post watching video of the event, livestream and Air Support video and also hearing updates from the field.

I witnessed the crowd move in front of the ICE facility. A small number of people trespassed onto the driveway. Federal officers came out. There was an interaction. They went back in. They came back out and almost immediately deployed tear gas on the folks who were standing out there. We hadn't seen any violent criminal conduct, and some of our folks had to move out of the area because of the tear gas.

That's the short synopsis.

Q Thank you. In about the middle of the paragraph, you described "at that time we had seen no violent criminal conduct -- at most, passive trespassing and civil disobedience-type conduct."

What do you mean by "civil disobedience-type conduct"?

A We seen people sitting in the driveway down there, standing in a driveway, engaging in passive conduct. It's

really illegal. You put people on notice that there's a blue line in the driveway that demarcates it's federal property, so that they know that's criminal conduct when they're engaging in passive conduct when they commit that crime, and so I would say it's passive civil disobedience.

THE COURT: Commander, when you use the word "passive," I assume that's in distinction to "active," correct?

THE WITNESS: Correct.

THE COURT: What's the difference? How do we tell between "active" versus "passive" resistance?

THE WITNESS: That's a fair question. I mean, there's certainly an amount of activity that goes into taking a step.

THE COURT: Slower.

THE WITNESS: There's a certain amount of active conduct involved in taking a step over the line into the driveway. But once they're there, and they're not engaging in additional criminal conduct, they're not throwing things -- in speaking specifically about this event, there has obviously been different circumstances where there was active conduct. But simply standing there or sitting there, waiting to be arrested, basically to me, is passive. If you're running around, if you're engaging in other criminal conduct, if you resist law enforcement officers' attempts to remove you from the property, that would shift into active conduct, in my

opinion.

THE COURT: Is yelling or even cursing at an officer active or passive?

THE WITNESS: I guess you could say it's active, but it's not active criminal conduct, if that makes sense.

THE COURT: Then on occasion a protester may get arrested, including for trespassing. Are you familiar with expression or the term "going limp"?

THE WITNESS: Yes.

THE COURT: So if a protester is arrested by an officer for trespassing and "goes limp," is that considered either active or passive resistance or active or passive criminal conduct?

THE WITNESS: I would consider that passive.

THE COURT: Why?

THE WITNESS: They're not exerting any motion or muscular resistance to the activity of the intervention of federal officers.

THE COURT: Thank you.

Back to you, Counsel.

BY MS. ALBIES:

Q Based on what you saw on October 4th, you described the federal agents using tear gas that day, and you did not see any violent conduct. Is it your belief that the -- well, was the federal government's use of tear gas on that day consistent

with Portland Police Bureau policy?
A It was not.
Q Is that because -- did you see any imminent threat of harm?
A I did not.
Q Did you see any objectively dangerous or unlawful situation?
A I did not.
Q And did you have any communications with the federal incident commander about the use of tear gas on October 4th?
A I would need to look at my incident summary to say definitively. I don't recall during the daytime event, other than sharing with them that we recovered and deployed a tear gas canister that was left on the pavement after their first deployment. I don't recall any conversations about the deployment of tear gas.
Q After the incident, did you have any communications with federal incident command to help determine why they used tear gas on this event?
A Are we talking about the daytime or evening event?
Q The evening event.
A After the evening event, yes. Again, as the event shifted into the evening hours, there were people -- there was still a crowd there, smaller than the daytime event. There was people had moved up towards the driveway. At some point federal law

enforcement officers came out of the facility, pushed the crowd away from the driveway, which was not unusual at that point, when they're clearing the driveway for vehicles to come and go. That was pretty typical. But they pushed them east on Bancroft away from the facility and then turned and pushed the crowd north on South Moody -- and they pushed them for quite a ways. At least when we were watching the videos, it was a significant departure from our experience with what they had done operationally.

So we had a liaison in the command post. I worked through our liaison to get ahold of the Federal Protective Service incident commander and try to determine what they were seeing or experiencing or trying to accomplish with pushing the crowd that far to the north.

There was a significant amount of crowd control munitions deployed. Again, our members in the field and myself, looking at the video, hadn't seen much in terms of violent criminal conduct -- certainly not to the extent that it would explain what we were seeing. And we asked the incident commander why they were trying to push the crowd that far from the facility, and the response was, "I don't know why."

Q I will direct your attention to paragraph 15(b) of your declaration, where you describe an incident on October 18th of 2025. Similar to the last paragraph, can you give a brief overview of what you observed on October 18th.

A Sure. So this was -- this was all after the fact. I don't believe I was incident commander for October 18th, but I did speak with Rapid Response members who were deployed on the 18th, and I also watched the video from the 18th. In summary, there was a crowd gathered there in front of the --

MR. ROSENBERG: Objection. This is potentially hearsay. It's unclear what records, if any, the witness has relied upon in submitting this information other than discussions with his colleagues.

THE COURT: A brief response to the hearsay objection.

MS. ALBIES: Well, we are in a hearing on a preliminary injunction motion. It doesn't have to be admissible in the same way as if we were in trial.

THE COURT: Sustained -- no, excuse me. My mistake; overruled.

MS. ALBIES: Thank you.

THE WITNESS: So with what the video showed and what our officers experienced and told me, and also in looking at police reports from that date, there was a crowd gathered there in front of the ICE facility. There was a bike squad present in the proximity, again, to intervene if there was any criminal conduct that we observed. We didn't witness -- they didn't witness any violent criminal behavior that would have explained the use of CS gas. Munitions were deployed.

One of our sergeants was struck by a crowd-control munition. Based on that exposure to CS gas and also the impact munitions, our members had to move away from the area, which did limit their ability to intervene in any additional criminal conduct that would have occurred.

When I watched the video, it appeared that there was a federal officer who deployed a 40-millimeter launcher, munition that skipped off the driveway and up onto the roof of the ICE facility. Almost immediately following that, federal officers on the roof the facility deployed a significant amount of tear gas and crowd control munitions, which are the ones that struck our officer -- or sergeant. And again, that was the only context I could see or observe or that was reported by our officers that would have justified or explained the use of crowd control munitions.

BY MS. ALBIES:

Q I would like to direct your attention to what has been submitted as Exhibit D to the Albies Declaration at Docket 35 as part of the TRO motion.

(Video was played in open court.)

BY MS. ALBIES:

Q At the front of your screen, there are people with helmets and yellow shirts that we see. Can you comment on that.

A Those are members of the Rapid Response Team deployed on a bicycle squad with Sergeant Spencer Scharf.

Q And there with the Portland Police Bureau?
A Correct.
(Video was played in open court.)
BY MS. ALBIES:
Q Was this one of the videos that you reviewed?
A It was. Yes.
Q And did the officers hear any warning that tear gas was going to be deployed?
A They did not.
Q I would like to show you what has been marked as Exhibit E attached to the Albies Declaration at Docket No. 35 as well.
(Video was played in open court.)
BY MS. ALBIES:
Q There is a red oval on the screen. What is that depicting or highlighting?
A It has got a few different people captured there, but I believe it's focused on what appears to be a federal agent holding a 40-millimeter launcher.
Q Is this the federal agent that you observed on the video shooting something on the ground and then went up to the ICE building?
A Yes.
(Video was played in open court.)
BY MS. ALBIES:
Q Commander Schoening, this was a close-up and slowed down

version of Exhibit D, which is what you described earlier a moment ago with a federal officer firing into the ground and going up to the ICE building. This is what you understood to precipitate the federal response with tear gas and other crowd-control munitions?

A That was the only activity that I saw that could have explained the deployment of crowd-control munitions.

Q And you described the use of crowd-control munitions prompting the Portland Police Bureau bicycle officers to leave the area. And once they leave the area, what's the impact of that in terms of engaging in public order policing?

A Sure. So as we've said before, and I'll say it again, our folks are -- when they go down there, they are there to address public-safety concerns and facilitate First Amendment events. But they're also there to intervene when criminal conduct occurs. We do have limitations around facilitating immigration enforcement under the sanctuary laws. But there's clarity that when there's property crimes or in-person crimes occurring, including assaults on federal officers, we are prepared and willing to engage and make arrests for those crimes, and we have.

In this circumstance, because the way the crowd-control munitions are deployed, we had to remove ourselves from the area, which limits our ability to witness any ongoing criminal activity, including property crimes or

in-person crimes targeting that federal facility.
Q When you described that an officer was struck by an impact munition -- I believe it was in the shoulder; is that correct?
A Sergeant Scharf reported that, yes.
Q And does he know where that shot came from?
A He doesn't. The presumption is it came from the federal facility.
Q The officers that were shooting impact munitions were on the roof of the facility shooting down into the crowd. Is that consistent with your observation?
A Yes.
Q I direct your attention to paragraph 15 of (c), which describes an event on October 20th. Can you briefly describe to the Court that incident on October 20th of 2025?
A Sure. So again, this is a video that was captured and actually disseminated on social media. It depicted, really, people standing in the proximity of the ICE facility; mostly standing on street corners, not necessarily in the street per se.

It showed some members standing, I think on the northwest corner of Moody and Bancroft, if I'm not mistaken, shining flashlights at what appeared to be -- shining flashlights at federal officers on the roof of the ICE facility across the street.

It depicted federal officers deploying what appear to

be pepper ball munitions towards those people. They fled across the street -- across Moody to the northeast corner. They ran behind several Portland Police Bureau Rapid Response Team bicycle officers who were sitting on the northeast corner. They stood back there for a brief time. At some point federal officers came out of the ICE facility and approached our bicycle officers and basically told them they needed to intervene or get out of the way. It was a very brief, heated conversation, and then the video ended.

Q Why didn't -- well, did Portland Police Bureau make any arrests?

A Not during that incident.

Q Why not?

A Because shining flashlights at somebody who is a block-and-a-half or a block away up on a roof isn't a crime under Oregon Revised Statute.

Q Using the pepper balls in the manner that the federal agents did that day, is that consistent with Portland Police Bureau's policy?

A It is not.

Q Did you ever talk to federal incident command about this incident?

A Myself and then-Assistant Chief Dobson met with Federal Protective Service incident commanders and representatives the following day, mostly to just talk to them

about how that interaction on the street happened and to question that. They expressed that they were unfamiliar with the incident, despite the fact that it had been submitted on social media and circulated pretty widely.

Q Did it help you understand the rationale for using pepper balls against these people?

A No.

Q I want to go back briefly to October 18th. I didn't ask you this question. I meant to. This was with respect to the tear gas and the officer who had been shot in the shoulder. Was this use of force and this use of crowd-control munitions consistent with Portland Police Bureau's policy?

A No.

Q And you've been monitoring the protests at the ICE facility since at least last year more closely, correct?

A Correct.

Q Based on your training and your experience and your observations, have you seen Federal Protective Services able to clear the driveway of the ICE building when people are there trespassing?

A Yes.

Q And they have been able to move people out of the driveway?

A Yes.

Q I want to look at the injunction in this case, which is

Docket 68, page 20.

Portland Police Bureau -- I want to ask questions about -- do you believe that the injunction that has been entered in this case, with respect to tear gas, do you believe that's consistent with Portland Police Bureau policy?

MR. ROSENBERG: Objection. Both on relevance -- it's unclear what relevance Portland Police Bureau's policies have to do with the federal government's policies. Also, I object to the extent that this line of questioning may be calling for an expert opinion, which I understand plaintiffs have disavowed.

THE COURT: On the first point, what's the relevance of whether or not it's consistent with Portland Police policy?

MS. ALBIES: The workability of the TRO and the consistency with Portland Police -- one of the questions I will be asking is whether Portland Police Bureau's policy on crowd control and crowd management is workable for the department.

THE COURT: Overruled.

Thank you.

THE WITNESS: So again, it has been a while since I read this or looked at this.

Is there a particular paragraph you want me to look at?

BY MS. ALBIES:

Q Sure. Specifically with respect to tear gas, looking at

1A, "No enjoined person may direct or use chemical or projectile munitions, including but not limited to kinetic impact projectiles, pepper ball or paint ball guns" -- we are focusing on tear gas here -- "unless the specific target of such a weapon or device poses an imminent threat of physical harm to a law enforcement officer or other person."

And then, "No enjoined person may fire any munitions or any weapons" -- and again, this is specific to tear gas -- "at the head, neck, or torso of any person, unless the officers are legally justified in using deadly force against that person.

"(C). No enjoined person may target any individual with a less-lethal munition if doing so would endanger any other individual who does not pose an imminent threat of physical harm to a law enforcement officer or other person.

"For purposes of illustration only, no enjoined person may use chemical or projectile munitions in response to trespassing, refusal to move, or refusal to obey a dispersal order."

And then there's nothing in this order that "enjoins a person from making an otherwise lawful arrest if there is probable cause," and that person being arrested has committed the crime.

Then there's also nothing in the order "shall prevent an enjoined person from using proportional force, including

less-lethal weapons, on any individual who poses an imminent threat of physical harm to a law enforcement officer or other person."

Is that consistent with Portland Police Bureau policy on use of tear gas?

A It's more broad and in some ways more specific than Portland Police Bureau policy. Our policy is largely framed now on the Oregon Revised Statute constraints on use of tear gas. "Tear gas" is also a pretty broad term. It can be anything from -- we would consider the use of PepperBall if it's not being used as an impact munition, if it's being used to spread chemical irritant to an area. Under Oregon Revised Statute, we would consider that tear gas, or at least in consultation with our attorneys, we would say that.

You've got compressed air/vapor-based chemical irritants, vapor OC, which is basically a canister that has chemical irritant, along with compressed air. When it goes off, it pushes the chemical irritant out with just pressurized air. That spreads chemical irritant or tear gas, but it's a much more localized area.

So I would say -- to the extent to the use of those versions of tear gas, I think this injunction would still allow us to do that in a way that's consistent with Portland Police Bureau policy. When it comes to pyrotechnic tear gas agents, just by their nature, they spread to a pretty broad area. So

to the extent that we would say, yes, we're targeting a crowd that's engaged in riotous conduct or an objectively dangerous situation, then, yes, I would say it is workable.

That part of it -- and this is the challenge with injunctions and court directions -- to the extent that we all understand the language to mean the same thing, it's tough. We train with Bureau policy to our members. We have a lot of conversations with legal advisors around how to construct that language and then train our members how to meet that standard.

Taking a document and stratify it through a third party and trying to interpret it and train our members, it becomes more challenging. So I guess it would be a question of whether, when specifically targeting people engaged in dangerous conduct, can you specifically target an entire crowd of people if you've reached a point where it's an objectively dangerous situation and a riot is declared? If the answer is "yes," and, then, yes, we can work with this.

Q Well, does Portland Police Bureau policy require certain steps be taken before tear gas is deployed? Right?

A Yes.

Q What are those steps?

A So it requires the incident commander to authorize it, and that's one of the most important pieces. First and foremost, when you start talking about, again, pyrotechnic chemical agents that impact a large area, when you talk about managing a

very complex event with potentially hundreds or thousands of people present in an area that also has residential buildings, schools, that sort of stuff. It really is something that a decision should be made by someone at a strategic level, not operationally at the ground level. So there's that.

We are also required to provide notices to the people who are out there -- a warning -- at least two warning announcements; one for a dispersal order. We have to give them a reasonable amount of time to comply with that warning and provide time that they need to leave the area before they could potentially be impacted by chemical agents and then a second warning. There are additional considerations, but those are the big ones.

Q Is there a requirement that de-escalation or other de-escalation techniques or alternatives to force have been used?

A Yes.

Q And why is that?

A Again, chemical agents are not -- shouldn't be the first resort. There are significant impacts to community. There are significant impacts to what would otherwise be a constitutionally protected First Amendment event; people who are there not engaging in criminal conduct. There could be an impact to media; people who are observing. I think there is a certain expectation that we've gone through all the different

alternatives to try to address and intervene in criminal conduct in a more differentiated way before we use broad-based tools like tear gas.

Q Have you found the Portland Police Bureau policy related to tear gas workable?

A Yes.

Q In the Portland Police Bureau crowd control policy, there's also a component about kinetic impact projectiles and hand-held chemical incapacitants.

A Yes.

Q What is the parameters around the KIPs and hand-held chemical incapacitants?

A So for kinetic impact projectiles and hand-held chemical incapacitants, they're covered under three different directives There is Directive 1010, which covers the use of force broadly speaking. There is Directive 1015, which covers the use of less-lethal tools. It's sort of an add-on layer for Directive 1010. Then Directive 635.10 talks specifically about those tools being used in a crowd-management context.

So each one has different considerations. 1010 speaks globally around de-escalation requirements, force warnings, that sort of stuff. Directive 1015, which covers less-lethal tools, talks about when you cannot use hand-held chemical incapacitants, like the driver of a moving vehicle and that sort of stuff. Then Directive 635.10 is a prohibition

against using hand-held chemical incapacitants for the purposes of crowd management, which is basically to disperse an entire crowd or just broadcast spraying pepper spray, but it still allows for the use of hand-held chemical incapacitants on specific individuals engaged in conduct that would otherwise justify the use of force.

Q That would be within the crowd. If there's an individual in the crowd that use force is justified, you can use the hand-held chemical incapacitant?

A Correct.

Q And where is that directed at a person?

A When you use pepper sprays, which is the most common hand-held chemical incapacitant, we generally target the face.

Q For kinetic impact projectiles, the same kind of thing? You can use those on an individual in a crowd, but not to disperse the crowd; is that correct?

A Correct.

Q What about where chemical impact projectiles can be directed?

A So for impact projectiles, we target the beltline and below.

Q But not above the beltline? Not the head or neck?

A Not unless deadly force is authorized.

Q And with hand-held chemical incapacitants and non-chemical impact munitions, is there any kind of requirement with respect

to bystanders?
A Yes. You are required to minimize exposure to bystanders.
Q And so looking at the temporary restraining order, page 20, at paragraph B -- well, I guess I want to just make sure that we're clear that the use of OC spray, as you just testified, is not permissible under Portland Police Bureau's crowd-control policy or crowd-management policy to use that to disperse a crowd, so spraying OC spray in kind of a wide manner, but you can target an individual who is subject -- or that has been engaging in conduct that would make use of force acceptable under Portland's use of force policy, correct?
A Yes.
MR. ROSENBERG: Objection. That's a confusing question. It is unclear whether she's asking about just the use of force policy generally or Provision B of the TRO.
THE COURT: No. 1, I agree with you. But No. 2, I'll let you clear that up on cross.
It is a little confusing, Ms. Albies.
MS. ALBIES: Understood. I'll try to clarify.
BY MS. ALBIES:
Q Using OC spray is permissible in crowd-control settings if you're targeting an individual, correct, under Portland Police Bureau policy?
A Yes.
Q Do you have any concern that the federal government's use

of force during these crowd-control incidents that we've talked about might impact Portland Police Bureaus relationship with the communities that you serve?

A Yes.

Q And what impact does using disproportionate force in a crowd-control setting have on public safety?

A Well, it's very broad-ranging. In the moment, again, our ability to be present, or indeed any kind of operations, if another party is engaged in use of crowd-control munitions in a way that violates ORS, we can't coordinate or be present in that same space without running afoul of Oregon Revised Statute.

When you talk about the overall trajectory of the event, again, as I discussed, if people were gathered there for what they see as a legitimate purpose, experience disproportionate or unjust policing techniques or procedures, including the use of crowd-control munitions, the science has shown that it drives that shift from an individual's social identity, where you may have your own pre-held beliefs and behavioral norms, more towards that group's collective identity and social identity where you aligned yourself more closely with the group of people around you who are being impacted by that unjust (indiscernible) policing and accept and condone -- sometimes engage in resistive behavior and collective action that you otherwise wouldn't have done. We have witnessed that

down around the ICE facility.

We have had our dialogue officers have pretty good luck in communicating and engaging in de-escalation and negotiation when people who are down there gathered to protest. There are times when we have been able to get them to move out of the street, because I think we largely have held that having traffic flow on Bancroft uninterrupted is safer for the community and is also necessary for the residential and commercial traffic down there.

So I think that ability to engage people and get compliance voluntarily has changed markedly following the deployment of crowd-control munitions by the federal government. So in moments, it has become more challenging. We've experienced more resistant behavior for our officers when they have to go in and make arrests eventually. We've found that we've had to use more force and officers have been assaulted more frequently following that deployment of crowd-control munitions by the federal government.

And then more broadly speaking, the community doesn't always differentiate between the federal government and Portland Police Bureau officers. At the moment and more broadly speaking, we get questions and condemnation about why we're not intervening to address what people see as unconstitutional behavior or illegal behavior and trying to explain the limitations we face with the federal government and

our ability to intervene both in the moment or the longer term is challenging, and so our relationship suffers.

Q Thank you. Going back to the TRO (B), where it says, "No enjoined person may fire any munitions or use any weapons (including those described above) at the head, neck, or torso of any person unless the officer is legally justified in using deadly force against that person," we just talked about that with respect the kinetic impact weapons.

But with OC spray, is that provision overly broad with respect to OC spray in terms of how you use OC spray?

A Yes.

Q And do you believe there should be a carve-out for OC or pepper spray to allow targeting an individual near the face, if circumstances justify the use of force but not deadly force?

A Yes.

Q Now, earlier, when the judge was asking you questions about whether yelling and cursing was active or passive conduct, you said that it was active but not criminal.

Do you remember that testimony?

A Yes.

Q And is it consistent with Portland Police Bureau policy to use force in response to somebody yelling or cursing at a police officer?

A No, it is not.

MS. ALBIES: No further questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. ROSENBERG:

Q Brad Rosenberg from the Department of Justice.

First of all, Commander Schoening, let me thank you for being here today. I understand that you may have had to rearrange your schedule a little bit, so thank you for appearing in court.

A Certainly.

Q I would like to start at a very high level. You acknowledge that there has been individuals who have engaged in criminal activity surrounding the Portland ICE building?

A Yes.

Q And you've also testified a few times regarding specific dates that you didn't observe any criminal activity on those dates. Is that fair?

A Yes.

Q But the fact that you didn't observe criminal activity doesn't mean that criminal activity didn't take place on those particular dates, does it?

A No, it does not.

Q In many cases your observations were not based on you personally being there, but were based on your review of the various security videos?

A There are different dates that I testified about, and I

would say my involvement differed. Some dates, I was the incident commander, and so I was both watching live contemporaneous video and also hearing contemporaneous radio traffic, and there was an expectation that any information relevant to our policing operations would be shared with me.

Q Right. And video may not capture all of the events that are taking place on a given day?

A No.

Q Even if you were there in person, you may not see all the activity that's taking place on a given day?

A Correct.

Q And the radio traffic that you are hearing may not capture all of the activity that's taking place on a given day?

A Correct.

Q In terms of the ICE building itself, the Portland Police Bureau's role is different than from the roles of the Federal Protective Service and the other federal agencies that are protecting that building. Isn't that fair?

A Yes.

Q And so they may be observing things that the Portland Police Bureau isn't observing?

A Yes.

Q In fact, in many cases they may have a better vantage point, at least regarding the facility itself, because they are in the facility, and Portland Police Bureau is not?

A I wouldn't characterize it as "better" or "worse." They have different camera systems they monitor. But on the other hand, we've got an airplane frequently in the sky, which gives us a little more broad perspective. So our perspective is more broad and focused on the exterior. They have different systems they have access to.

Q Fair. But their cameras are focused on the building itself?

A I believe so.

Q So if somebody were trespassing on the building property, they would be able to see that?

A I would assume so, yes.

Q And the Portland Police Bureau might not necessarily be able to see that?

A Again, with our airplane looking down overhead, we generally see the trespassing pretty clearly when it happens. Again, for the most part, when there is significant protest activity happening down there, the livestream video provides a lot of different perspectives from the exterior. So I would say, particularly when it comes to trespassing, we generally see that when it's happening.

Q And trespassing is crime activity, isn't it?

A It is.

Q And trespassing has taken place at that Portland ICE building?

A Yes.
Q And civil disobedience?
A Yes.
Q And you've seen federal law enforcement officers leave the ICE facility to clear the driveway of trespassers?
A Yes.
Q And have had to push people out of the driveway area in order to allow access and egress from the building?
A Yes. I have seen it happen a lot of times. Sometimes they're able to come out, and the crowd is pretty compliant and moves back out of their way. I have seen uses of force, chemical munitions, and impact munitions. I would say less frequently I've seen physical pushing, if you will, but there has been some.
Q Is there potentially less pushing because of the use of other means to allow accessing egress from the building?
A I don't know that I would characterize it that way, no.
Q And you did not personally observe or witness the events of October 18th, did you?
A No. Again, I watched video and spoke to people involved and have read police reports.
Q You did not personally observe the events of October 20th; is that right?
A I don't recall testifying to October 20th today.
Q Okay. If I were to tell you that in your declaration you

noted that you observed video and spoke to officers regarding the incidents on October 20th, would that help?
A Yes. Sorry.
Q So when you say you observed video and spoke to officers, can we presume from that that you were not -- you did not personally observe any of the events on that day?
A Correct.
Q At a higher level, in terms of requests for -- based on what you have observed, requests for individuals to clear the streets surrounding the Portland ICE building, have there been circumstances where, despite those requests, people have not complied?
A Yes.
Q Has that happened often?
A No, I would say it has not happened often. Again, I pointed out, particularly October 4th, I think it was, it became very challenging for us to get them to voluntarily move out of the street following the deployment of tear gas by the federal government. October 18th -- I would have to look at the declaration and the dates. But the day with the large event with the crowd that gathered in front of the driveway and tear gas was deployed, our talented officers were trying to get people to move out of the street and couldn't get compliance. Generally speaking, more broadly, we have been able to get compliance.

Q Okay. I would like to turn to what you, I think, euphemistically described as the City's evolving experience in terms of coordination with the federal government. Is Portland -- I'm going to use the term "sanctuary city." Do you know what I mean when I use that term?

A We have sanctuary laws and rules, but I don't know what you mean.

Q What is your understanding of Portland's laws as they may relate to that?

A So we don't participate in immigration enforcement. We don't share information about immigration-related information. We don't engage in conduct prohibited under Oregon Revised Statutes under the sanctuary laws -- things like traffic control and that sort of stuff. Yeah, I would say that's a very high-level summary.

Q What do you mean by "traffic control"?

A We don't set up a traffic perimeter. I think it's specifically called out in the sanctuary laws, if I'm not mistaken.

Q When you say "traffic perimeter," are you referring to a traffic perimeter around the Portland ICE building?

A I can't speculate or say on what elected officials meant when they drafted the language. I assume it meant, if you're doing an immigration enforcement operation, we're not going to provide traffic perimeters around that operation. Yes, it can

impact enforcement at the immigration building as well.
Q Right. That's what I want to talk about. So there have been circumstances where there have been protesters who have stood outside of the ICE building's driveway, right?
A Yes.
Q And that has meant that ICE vehicles have not been able to access or leave the building if the driveway is being blocked?
A Without intervention by the federal officers, yes.
Q And that has been fairly common since June of 2025?
A Yes.
Q And I think you've said this before, but I just want to make sure that I'm remembering. If the protesters are physically on the ICE facility driveway, on federal property, that's trespassing, right?
A Yes.
Q But there have also been protesters who have been blocking traffic in front of the ICE building?
A Yes.
Q On Portland city streets?
A Yes.
Q And as I understand what you just testified just now, Portland's policy is that it won't provide any -- it won't clear the streets in front of protesters in front of the ICE building; is that right?
A Not so federal vehicles can come and go, no.

Q So if there was an ICE vehicle that was attempting to leave the building pursuant to -- for whatever reason it may be -- and it was being blocked by protesters on the city streets, the Portland Police Bureau would not take any steps to clear its own streets to allow that vehicle to exit the facility?

A No.

Q So the federal agents, if they want to be able to exit the building -- whether it is Federal Protective Service or other federal agencies -- would need to take action in order to allow their vehicles to exit the building and access Portland city streets?

A Yes.

Q And the reason that Portland Police Bureau cannot remove people blocking its own city streets is because of its policies on immigration enforcement?

A To be clear, that was an overbroad statement. We do keep people out of city streets, and we have largely kept people off of Bancroft on a nightly basis, mostly through voluntary compliance. But we have gone down there and made arrests for people who are standing in the street blocking general vehicular traffic when it's appropriate. When it comes to federal vehicles specifically coming and going from the Immigration and Customs Enforcement Building, it does become challenging to determine whether or not they're engaged in

immigration-related activities. So our position has been not to remove people in front of federal vehicles as they're coming and going.

Q So the Portland Police Bureau's policy is to act as a gatekeeper, picking and choosing which vehicles may access its own streets for any given purpose?

A No.

Q But it will clear the city streets for vehicles except for ICE vehicles?

A Again, A, we have a large amount of discretion when and how we conduct enforcement. That's just broadly speaking about policing in general. B, we have immigration -- or sanctuary laws in the Oregon Revised Statute and also the City of Portland that prohibit us from facilitating immigration-related activity or enforcement. So when it comes to this particular issue, it has become challenging how you navigate that and how you balance public safety responsibility in general and keeping streets open to vehicular traffic, but not doing it in a way that specifically facilitates immigration enforcement. And this is the way we try to balance those competing needs. It's nobody's favorite solution, but it's the one that we've found is legally defensible, and so that's what we do.

Q So as a result of nobody's favorite solution of not allowing federal vehicles -- particularly ICE vehicles -- to access and exit the building, it's basically up to the federal

government and the Federal Protective Service to ensure that their vehicles access and exit the building; is that right?

A Yes.

Q Now, just to wrap this line of questioning up, if individuals were protesting in front of a private business and blocking access to that private business, the Portland Police Bureau would have no problem with removing them from city streets, right?

A Again, we would do an analysis of the overall situation. We would still retain discretion on where and how we intervene and whether we make arrests or not, but we wouldn't have the complexity of the sanctuary laws in that decision-making process.

Q I think you mentioned early in your testimony that there can be challenges for law enforcement agencies when complying with injunctions. I'm not referring to the specific question that my good friend on the other side asked about the TRO that has been entered in this case. But my recollection is you talked about -- around the 2020 time period, there were some court orders that were issued surrounding the protests in Portland, and I think you said something to the effect of, "There are challenges when you have courts issuing orders that affect how law enforcement agencies operate."

Am I recalling that correctly?

A To a certain extent, yes.

Q So what did you mean by that?
A So as I discussed in my earlier testimony, when an injunction comes out, you have to train your members on what the injunction says. Part of that is consulting with your legal advisors and doing the best you can to interpret the language of the injunction and then training members to a standard that you expect them to operate in the field. When it comes to Portland Police Bureau policy, largely we own the interpretation of that. If our members depart from that standard, we can investigate them and hold them accountable, and we're the ones who determine whether or not they violated that policy. When it comes to a court injunction, we see it as a third party that's coming in and exerting authority to decide whether or not we violated the language in that injunction. So to the extent we have to interpret that, train our members, and then, I guess, operate in that, it can be challenging.
Q That's because an injunction carries with it the pain of contempt, right?
A Certainly.
Q If you violate a court order, you have to answer to the Court, and, in fact, that can be difficult when attempting to apply a policy in an on-the-ground-tactical situation?
A Yes.

MR. ROSENBERG: One moment, Your Honor.

I have one or two more questions.

BY MR. ROSENBERG:

Q In preparing for your testimony today, other than any conversations that you've had with counsel for the City of Portland, have you spoken with anyone about this case?

A No.

MR. ROSENBERG: Commander Schoening, again, thank you very much for your time.

THE WITNESS: You're welcome.

THE COURT: Ms. Albies, any redirect?

REDIRECT EXAMINATION

BY MS. ALBIES:

Q Commander Schoening, when a property is closed, that's considered trespassing when someone is on that property without authorization, correct?

A Yes.

Q But not when somebody is on property at any time? That wouldn't be considered trespassing, right?

A Correct.

Q Just to be clear on the testimony you just gave, you've seen FPS clear the ICE building's driveway without the use of chemical munitions, correct?

A I have seen that yes.

MS. ALBIES: No further questions.

THE COURT: Any further questions on recross, Mr. Rosenberg? Within the scope, please.

RECROSS-EXAMINATION

BY MR. ROSENBERG:

Q One question on that very last question that my good friend asked you. You testified that you've seen the facility being cleared without the use of chemical munitions. Don't circumstances dictate the type of response that's necessary in order to gain an objective such as clearing a driveway?

A They should.

MR. ROSENBERG: Thank you.

THE COURT: Anything further, Ms. Albies?

MS. ALBIES: No, Your Honor.

THE COURT: Commander Schoening, thank you very much for rearranging your schedule. Thank you for being here, sir. You may step down.

Dennis, do you want a break?

THE COURT REPORTER: Yes.

THE COURT: Will ten minutes be sufficient?

THE COURT REPORTER: Yes.

THE COURT: Counsel. Who will be the next witness?

MS. ALBIES: Craig Dobson.

THE COURT: Thank you.

(Recess.)

THE COURT: All right. The plaintiffs may call the next witness.

MS. ALBIES: Your Honor, a matter for the Court. We

would like to designate and move to admit Commander Schoening as an expert under 702.

THE COURT: Did you confer with defense counsel?

MS. ALBIES: Yes.

THE COURT: I take it it's opposed?

MR. ROSENBERG: Yes, Your Honor. I guess we conferred a moment or two ago, and I'll confess I'm a little bit confused.

THE COURT: Let me interrupt there then just to save time. I am too. I don't quite understand what the motion is for, because there was no objection to a question or answer as beyond the scope of the witness's testimony. Typically I would expect that if someone asks a lay witness an opinion question, and the other side objects, then the response would either be that it's proper lay opinion or that it's proper expert opinion. If the response is it's proper expert opinion, then we can talk about whether 702 applies or doesn't apply or has been satisfied. But there was no objection to any question to Commander Schoening on the basis that it violates 702, so I don't quite know what your motion is asking me to do.

Do you want to clarify that? Because I just don't see what you are asking me to do.

MS. ALBIES: Just covering my bases, Your Honor.

THE COURT: Okay. I'm going to deny the motion, simply because I don't think it's necessary. I have made my

evidentiary rulings on everything that Commander Schoening has said. The one time where I accidentally said "sustained" and meant "overruled," the record is clear on that. By the way, I also didn't quite understand that objection, because you were objecting to Commander Schoening talking about things that he heard from others folks and commenting about incident reports that he read, but that's exactly what Mr. Cantu did in your declarations. So be it.

Go ahead.

MR. ROSENBERG: I think I drew a distinction there. There was no foundation established that he had actually read incident reports. His testimony was that it was based on what he heard, whereas Mr. Cantu's declaration was based on a review of official government records -- incident reports.

THE COURT: And I'm gleaning primarily from what I read in Commander Schoening's declaration. But in any event, the evidence rules are relaxed here. I don't find any reason to question the reliability, frankly, of any of the witnesses so far that I've seen.

I don't think I need to rule on your motion. I'm going to receive everything that Commander Schoening has said, unless there was an objection that I sustained. The rest will go to weight, not admissibility.

Mr. Rosenberg.

MR. ROSENBERG: Nothing else, Your Honor.

THE COURT: All right. Plaintiffs may call the next.

MS. ALBIES: Plaintiffs call Craig Dobson.

THE COURT: Commander Dobson.

(The witness was duly sworn.)

THE CLERK: Thank you. Please be seated. Would you please state your name for the record, spelling your last.

THE WITNESS: Craig Dobson. D-O-B-S-O-N.

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MS. ALBIES:

Q Good morning, Commander Dobson. Can you please tell the Court how you are employed.

A I'm employed with the Portland Police Bureau.

Q What is your job title there?

A Commander.

Q Of which precinct?

A Central Precinct.

Q How long have you been a commander of the Central Precinct?

A Total time, approximately five-and-a-half years.

Q And prior to that, what was your role?

A In what aspect?

Q How long have you been with the Portland Police Bureau?

A For 27 years.

Q And prior to being in the position of commander of the

Central Precinct, how were you employed with the Portland Police Bureau?
A So I started as an officer. I became a sergeant. I then moved on to be a lieutenant. From lieutenant, I was a captain. From captain, I was a commander. I sat in the chief's office as an assistant chief for approximately 18 months. Then I'm now a commander again of Central Precinct.
Q Do you play any role with respect to public order events with the Portland Police Bureau?
A I do.
Q And can you describe for the Court what role that is.
A So currently I'm a CMIC, which is a Crowd Management Incident Commander. I also instruct our incident commanders and new incident commanders how to be incident commanders within crowd management. I also work to determine, based on a risk assessment, whether or not we need to have an incident management team up for events.
Q What sort of training did you receive to fill this role and these duties?
A So I received over 200 hours of ICS-specific training in positions and specific training for training how to manage incidents as well as approximately a hundred hours of crowd management or public order training.
Q And does that training take place here only in Oregon?
A No.

Q Where does it take place?
A So I have taken classes here in Portland where we've brought in folks from FEMA to teach us as well as other outside contract courses that I've taken. One was in South Carolina.
Q And do you conduct any training in terms of -- do you provide any training?
A In what way?
Q You yourself. Are you an educator or teacher for any training?
A So I do instruct and have instructed courses in crowd management as well as command courses as well as help to develop a dialogue course here in Portland.
Q And how many years or how much time have you been doing that for?
A I've been an instructor of various topics since approximately 2010.
Q And you provided a declaration for this case, correct?
A Correct.
Q I will put it up on the screen for you. Did you have the chance to review the declaration before testifying here today this morning?
A I did.
Q And is everything in that declaration still consistent with your memory and with your position?
A Yes.

Q I want to turn to paragraph 4. Let's back up. Paragraph 4 describes your crowd management experience from your roles within Portland Police Bureau. Can you tell the Court briefly -- just go over those experiences.

A So I was part of our Rapid Response Team from its inception in 2001 to approximately 2015. I was the special events sergeant from 2010 to 2013. And if I can back up, within the Rapid Response Team, I was an officer as well as a grenadier as well as a sergeant while I was on that team.

As a special event sergeant from 2010 to 2013, my role was to evaluate all special events -- parades, festivals, protests -- within the City of Portland and determine the needs and resources for those.

In 2017 to approximately 2019, as the lieutenant, I was in the Inspector's Office, where I reviewed uses of force -- all uses of force.

Then from basically 2020 to 2024, I have been one of the main Incident Commanders that manages public order events.

Q Thank you. Looking at paragraph 5 of your declaration, you talk about PPB making considerable changes to its approach to public order policing following the protests of 2020. Can you describe for the Court some of the different tactics or the changes that were made.

A So once the team was dissolved and we rebuilt the team, we took a hard look at what we were doing and changed it so that

we took a more dialogue-focused approach. Basically it's a layered approach that allows us to provide different levels of policing based on what's happening at the event or the incident. It starts at the very lowest level of having dialogue officers available to interact with the public. That gives us a dynamic risk assessment to allow us to understand what's going on within the crowd and what threats might be there.

With that, we have a bicycle unit that is attached to that that can interject, trying to identify where those points of tension are so that possibly bad actors, people who are committing crimes, so we can remove those people and bring it back to a level of what we would call normalcy within a crowd so that we have a very laser-focused approach in removing problems so that we aren't affecting the entire crowd. That's roughly the first two layers of that.

If there is significant criminal activity or concerns about criminal activity, we will put plainclothes officers into the crowd to observe that and to be able to track those individuals so that we can then arrest them while trying not to affect the rest of the crowd that's peacefully or lawfully there to protest or demonstrate.

Q And you described arresting people to kind of just minimize the impact on the crowd. Has the Portland Police Bureau arrested people who've violated the law within crowds at

a date later than the time they commit the crime?
A We can. Again, that's part of the risk assessment of making those arrests to ensure that we do it in a way that's safest for ourselves as well as those individuals around us. So if we have probable cause, oftentimes we will allow that person to leave the area or to get to a certain degree out of the area and make that arrest in a place where it's safe for everyone.
Q You also write in your declaration: "Since implementing these changes, PPB has had fewer force incidents and PPB has received considerable support from the community."
Is that consistent with your experience?
A That is correct.
Q So is it fair to say that these tactics that you've just described to the Court are feasible for public order policing?
A We believe that this is the model that we are trying to get nationwide.
Q So that would be, yes, you think it's feasible?
A Yes.
Q Thank you. I want to turn your attention -- well, let me ask this question: When was the last time that Portland Police Bureau used tear gas in the city?
A I believe it was fall of 2020.
Q And that was for a crowd-control situation?
A Correct.

Q And in 2020, there were significant protests in the city?
A Correct.
Q How did those compare to those at ICE building that we're seeing now?
A I would judge them to be different circumstances, different intensity that's going on in the events that we saw in 2020 versus today.
Q How so?
A The amount of criminal activity and violence that was occurring in 2020, the amount of fires set, the amount of improvised devices that were thrown, projectiles being thrown is far different than what we are seeing today.
Q "Different," meaning you're not seeing that conduct by members of the crowd today?
A There is less, yes. Far less now.
Q I would like to turn your attention to paragraph 7 of your declaration. You described in paragraph 7, "In 2020, the federal government increased protest activity by using indiscriminate force tools on criminal actors and peaceful protesters alike." And you wrote, "Quite simply, their presence and their tactics made the situation worse."

What did you mean by that?

A In observing 2020, what we saw was, in the late part of June, crowd sizes had decreased. Criminality had decreased. With the announcement from the President, the directive of --

and I don't remember exactly what the directive was -- increasing the presence of federal officers in the area, we saw the number of protesters go from approximately 100 to 150 a night to over 2,000, in that area, at that time.

As that occurred, many of the individuals there were there simply to protest, but there was also criminal activity going on within that group as well. Their response to that was oftentimes to use tear gas to kind of push the crowd away, which then affected not only those that were committing crimes, but also for the individuals who were there peacefully protesting.

Q And you wrote in paragraph 7 as well: "Currently, the federal officers are using tools and tactics that PPB would not use, and this includes tear gas, chemical, and indiscriminate munitions."

What is the impact of the federal government using tear gas, chemical, and indiscriminate munitions currently?

MR. BAILEY: Objection. Lacks foundation.

THE COURT: I'll sustain that and ask you to lay a foundation about where he gets that knowledge from.

BY MS. ALBIES:

Q You described 2020 and the federal agents' use of indiscriminate force on criminal actors and peaceful protesters alike. You described the crowds kind of growing in size in response to those tactics, right?

A Correct.
Q Have you had the opportunity to observe the current federal response to protesters at the ICE building?
A I have.
Q And what is your perspective on that? What have you observed?
A So I have been at the facility on three different occasions to observe our officers. We are currently working with a DOJ grant where we brought in an expert in crowd psychology and this new approach that we're using so that we can observe to see how well it is being -- how well our officers are utilizing it as well as understanding reactions of the crowd to how we are operating.

In those three instances I did observe at the ICE facility federal officers deployed tear gas into the crowd in those three times that I was down there. And largely while I was down there, I saw mostly -- the majority of the group down there in each of those instances was peacefully protesting. There were small groups that were up near the gate of the facility. I couldn't see what kind of activity they were doing, but I assume that was what was the impetus for the tear gassing at that point in time, but it was very similar to the activities of using a blunt tool to address criminality.
Q Based on your experience in 2020 and what you observed in 2025, do you have concerns that the federal government's use of

indiscriminate weapons could escalate the crowd's response?
A So my personal observations were that oftentimes when they would use tear gas, the folks that were not involved in criminal activity would become upset. And if you look at crowd theory, if you go with crowd theory and the elaborated social identity model --

MR. BAILEY: Objection, Your Honor. At this point I think we are straying into expert testimony.

THE COURT: Fine. I think he's qualified. Overruled.

Go ahead.

THE WITNESS: Okay. If you look at the elaborated social identity model, within it -- to give you an example, if you're at, say, a soccer match or a professional baseball game, and an individual in that group is acting out, and the group around it is there -- they're all there for the sporting event, but that individual is not behaving themselves, and it's affecting the rest of the group, that group will ask for that person to be removed. So if security goes in and removes that person, the group will maintain normalcy -- what they consider normalcy. The group will go back to enjoying the event.

If, however, security goes in and knocks people over and uses an over-excessive amount of force on that individual, the crowd itself -- because of the group dynamics -- will then find that offensive and actually come to the aid of that

individual. We've seen it on soccer matches. You can watch on YouTube different events where there will be an incursion onto the field of someone that wants to run around naked or whatever, and how the police or how security reacts to that, if they do it in a way that the crowd finds legitimate or valid and not excessive, nothing happens.

But in other cases, you will see that happen. And if they use excessive force on that or what's perceived as excessive force on that individual, more individuals will actually end up on the pitch or on the field to help try to defend that person.

And so taking that theory down by the ICE facility, those individuals that are uninvolved, or they are to simply voice their concerns about what they think is happening, if they are then -- if force is used on them in the form of tear gas or in the form of some other munition, they are going to take offense to that and find that offensive, and they will then be upset and offended, and now you've got not only individuals doing criminal activity, but now you've got other people who are now upset with the actions that have been taken because they have been violated themselves or feel violated.

THE COURT: Commander Dobson, do you have an opinion about whether or not these views that you just expressed are generally now understood and known among the law enforcement community within the United States? Do you have an opinion on

that?

THE WITNESS: So currently that's one of the directions that the folks that understand it are trying to push out. Unfortunately, the theories that most law enforcement focus on was developed in the 1800s, and that has carried over, unfortunately, for decades now. Over a hundred years, it has carried over.

Up until 2015 or '16, when I was teaching at FEMA's CDP, which is the Center for Domestic Preparedness, they still referred to the old theory of crowd mob mentality and that crowds could lose their ability to have cognitive thinking, and it would affect -- that there was fear of crowds. And that has carried over.

You still hear chiefs -- you still hear different individuals who haven't studied and prepared themselves in the science to still refer to "mob mentality." So it is prevalent here in the United States. It is far more accepted in Europe at this point in time. It is bleeding over now. I think since 2020, we have seen a large push to actually educate ourselves better, but it is still prevalent, unfortunately.

THE COURT: Very interesting. Thank you.

Back to you.

BY MS. ALBIES:

Q You described having this crowd psychologist expertise as part of a DOJ grant. Is that the federal Department of

Justice?
A Yes.
Q Do they have access to the information you're learning and access to this expert?
A They will. It's required that we will have a paper when it's done.
Q But they're aware that this study and this expertise is being conducted and shared with the Portland Police Bureau?
A Yes. It's very similar to what Columbus, Ohio, did a year or two ago.
Q And do you know whether there was any federal Department of Justice involvement in the Columbus, Ohio, situation?
A I don't know.
MR. BAILEY: Objection. Relevance.
THE COURT: Overruled.
THE WITNESS: I guess I don't understand your question.
BY MS. ALBIES:
Q You described this process as being part of a federal Department of Justice grant and being similar to what happened in Columbus, Ohio, and so I guess I'm just trying to understand whether the Columbus, Ohio, study or work they're doing is related to or in conjunction with the federal Department of Justice at all, if you know.
A I wouldn't be able to explain it.

Q Okay. Thank you.

Going back to your declaration and the tactics that you just described, the federal government's use of tear gas and chemical and indiscriminate munitions, does that have any kind of impact on Portland Police Bureau officers who are present for public order policing at the ICE building?

A It has, yes.

Q What is that impact?

A In the instances that I have been down there, when they have used tear gas, it has been -- it appears that our officers are unaware of it. They don't have their gear, and it has required of us, as well as the State Police, to have to leave the area, much like those that are unprepared that don't have gas masks, to leave the area and, therefore, we can't police the crowds.

Q Looking at paragraph 8 of your declaration, you describe in your observations and impressions of the federal officers at the ICE facility, that they lack effective command and control in their attempt to perform public order policing.

What made you write that?

A There was two conversations. One, Commander Schoening and I had, where he was there on one of the nights and had a conversation with their command, and they had explained to him that they didn't know where their people were or why they were doing what they were doing. There was another incident where

there was a negative interaction between federal officers and Portland police officers that I went to their command and spoke to them about, and they were unaware of that as well.

Q Would you expect -- based on your training and experience with crowd control and public order policing, would you expect that they have an understanding of those experiences?

MR. BAILEY: I am going to object. It calls for speculation.

THE COURT: Overruled. You may cross-examine.

THE WITNESS: My understanding of the incident commander, or at least my understanding in the conversations that I had with FPS, was that they were incident commanders but were unaware of at least the situation that I just described of the bad interaction between the police and FPS officers, which surprised me. As an incident commander, your overall -- your objective within ICS, you're the person that's overall in charge of those events and should have awareness of situational awareness of what is occurring.

BY MS. ALBIES:

Q Aside from that one night that you are talking about, were there other incidents that gave you concern about the chain of command and the effect of commander control by the federal government in public order policing at the ICE facility?

A I saw different methodologies being used in the same evenings, which made me question who or what -- what were they

trying to accomplish by doing different things -- if that answers your question.

Q Can you expound on that a little bit more about that. Please.

A Sure. There were times when you would have FPS officers in blue be able to go out into the crowd and be able to accomplish their goal, not causing any inert bad interaction or negative interaction with the crowd. Then the next interaction would be what appears to be a different group of officers or a different type of officer go in and use munitions in a similar situation and have a very different reaction.

Q And you describe in paragraph 8, on October 18th, at the location, in person, observing PPB operations and were exposed to chemical munitions. So you described that there were three incidences when you were there, correct?

A Correct.

Q What was the crowd doing -- did you see anything in the crowd that you believe justified that type of response?

A So I -- not as a whole.

Q What do you mean by that?

A Well, I'm sure there was something that happened that caused them to elicit their response. But from where I was at, what I saw was largely almost a festive atmosphere -- with dance, folks in costumes, dancing on the perimeter.

Q Did you ever have communications or follow-up

conversations with anybody from the federal government about their use of tear gas and their justification for it?
A On that night?
Q Yes.
A No.
Q Or any of the three incidents?
A No.
Q And moving to paragraph 9 -- well, going back to what you just testified about, different groups using kind of different tactics, why is that concerning to you?
A So one of the principles of public order is to be consistent. Consistency is important so that you can build trust and legitimacy within the community you're working within. So by doing drastically different actions, you're not building any kind of consistency.
Q Why is consistency important? You said to build trust and legitimacy, but why is that important?
A Again, when you're dealing in public order, the principles that you want are to educate, communicate, facilitate, and differentiate. Part of that is consistency so that the crowd can understand and know what to expect from you, as a law enforcement agency, so that they know where those lines exist so that they don't cross those lines as well. So when you give wildly different approaches, it makes it hard for the community or the individuals out there to understand what you were doing

or why you were doing it.

THE COURT: And where the lines are, right?

THE WITNESS: And where the lines are.

BY MS. ALBIES:

Q Turning to paragraph No. 9, this paragraph talks about your opinion that these actions and other actions, such as masking and not wearing identification, undermine public trust in government and law enforcement.

What makes you say that?

A So the DOJ after-action from Michael Brown in 2014 highlighted this. Officers that are involved in public order should have some type of identifier, whether it be a name or a unique identifier on, so that you would have legitimacy as well as accountability and transparency within your operations. Again, it goes back to public trust.

Q And from your perspective, do you see the federal agents that are at the ICE facility identifiable?

A At times it's hard to identify, or at least in my experience when I was there, it was hard to identify whether they had markings or not on them.

Q Were they wearing masks to cover their faces?

A At times, yes.

Q And were those tear gas masks or other kinds of masks?

A Mostly a balaclava-style mask.

Q Is that part of the aspect that gives you concern about

the legitimacy of policing at the ICE facility?
A It can. We've heard the same concerns from the community about our own officers and wearing masks.
Q Portland Police Bureau officers, do they wear masks?
A At times, yes.
Q For what purpose?
A It depends on what type of mask they're wearing. It can be environmental. So it could be due to the cold. It could be due to fire hazard. So there are different types of masks that we wear for different circumstances.
Q Does Portland Police Bureau use masks to hide their facial characteristics or identities?
A It is not -- the purpose of wearing the mask isn't to identify -- hide your identity. But the perception is that you are hiding your identity by wearing a mask or a face covering.
Q Have you heard feedback from the community? I believe you heard feedback from the community about that. What concerns does that raise for you as a public safety officer?
A Again, it's that building of the trust and legitimacy within the community. As we work with our community, we want them to be able to trust us, and it's hard to build that when it appears that you're hiding -- you're trying to hide your identity.
Q In your experience, do members of the public distinguish between federal law enforcement and Portland law enforcement?

A Oftentimes, if you look historically across the United States, if there's an incident, whether it be any law enforcement agency has a bad incident, there's stereotyping that oftentimes will happen, and so it will carry over into your own community.
Q And that's true in Portland as well?
A Correct.
Q In looking at paragraph 10 of your declaration, you note that there have been times when have you been present at the Portland protests outside the ICE facility since June of 2025, and you observed the response of the crowd to the deployment of tear gas by the federal government. Can you explain to the Court a little bit more about your observations.
A Like I talked about just a few minutes ago, when you're deploying munitions or things on people who believe they're legitimately out there for a legitimate purpose -- whether that be First Amendment or whatever -- and you are using force on them that they find illegitimate, it angers them. They feel like they've been taken advantage of or violated. So in those observations while I was out there, those individuals that are out there dancing or being out there peacefully and then having to leave, there is some anger. It's like if you were at a concert and suddenly -- you paid to go to a concert, and say you've got to leave, and they turn the lights out before the end of the concert, you're going to have some upset customers.

It's very similar to this.
Q So you describe it as -- you saw people leave the area. When they left the area, they weren't able to continue expressing their First Amendment protest rights, correct?
A It was if -- my opinion was that folks left because they felt either unsafe by the activities and couldn't continue, or it was just not worth it for them, or they were affected by the tear gas.
Q And you described this as a chilling effect, right?
A It could be, yes.
Q Turning to paragraph 11 of your declaration, you described an incident on January 31st of 2026. Can you tell the Court briefly about that day and what you observed.
A Sure. I was the incident commander for that event for PPB, or Portland Police Bureau. We had a union-directed protest or demonstration that was going to occur at Liz Caruthers Park. We knew there would be a march in that. I contacted FPS and made them aware of this event that was occurring. I believed it was going to be largely peaceful. Because it was union led, they would likely have a large variety of people in it.

During that event there was a small group of people who approached the fence or the gate of ICE -- the ICE facility. Something caused the federal officers to deploy tear gas. This was while thousands of people were marching

basically across the street. They were turning and moving around. There was about 3- to 4,000 people who were peacefully marching. It ended up ultimately affecting a large portion of that crowd that was not -- that was there but not in front of the gate.

Q In that large crowd, were there children there?

A There was.

Q Was there elderly people there?

A Yes.

Q Did you observe people with physical disabilities present?

A I couldn't tell you about that, but it was a large swath of people there.

Q Was the federal government's use of tear gas on January 31st of 2026 consistent with Portland Police Bureau policy on use of tear gas?

A No.

Q Why not?

A Several reasons. One, it would have fallen outside of our ability -- Oregon state statute would not have allowed us to do that. The totality of the circumstances -- based that it was in a neighborhood, based that you had 3- to 4,000 people peacefully marching that would have been affected would have limited our ability to use that tool.

Q And based on that experience, were you concerned about the impact of that use of force on Portland Police Bureau's

relationship with the community?
A So we were concerned about the impact on the protesters themselves. We ended up shutting down traffic on Macadam to ensure that not only the protesters -- if they needed to go or demonstrators needed to go a different direction, that they would be able to get up onto Macadam. Also, because of how the gas set, we didn't want traffic driving through the gas as well and causing an accident, because of the environmental -- basically the atmosphere allowed it to basically just sit in that area for about a two-block area.

But one of the concerns that we had was, many of the officers that were on the ground that day had citizens come to them and complain to them and were angry with them for not stopping FPS from that deployment of tear gas.

Q As incident command, were you aware of whether any warnings were given, or did any of your bureau members report whether any warnings were given?
A I did not hear whether there were or not.

MS. ALBIES: No further questions.

THE COURT: Before we go to cross, Commander Dobson, you were asked some questions by Ms. Albies about alphanumeric identifiers on the officers. I want to follow up on that.

Am I correct that there is at least two different benefits that come from conspicuous, unique, alphanumeric identifiers worn by law enforcement officers? On the one hand,

when the officers know they have unique alphanumeric identifiers, they are more likely to understand that they will be held accountable for their actions, because they can be identified, and they're more likely then to conform their actions to appropriate law enforcement policies.

In addition, the public can see that these folks, these officers, have unique alphanumeric identifiers, and so they will have more confidence in the legitimacy of the law enforcement operation as a whole, because they know folks can be disciplined if they violate appropriate policies, and that gives the public more confidence.

Am I correct in that conclusion?

THE WITNESS: That is correct.

THE COURT: Thank you. Cross-examination.

CROSS-EXAMINATION

BY MR. BAILEY:

Q Good morning, Commander Dobson.

A Good morning.

Q My name is John Bailey. I'm an attorney with the United States Department of Justice. I have just a few questions for you this morning. I want to say first, thank you first for being here. I recognize you have a very busy schedule, and so we appreciate you coming to court for your testimony.

So I'm mostly going to be asking you about the

declaration that you submitted in this case. You claim that federal officers' crowd control tactics have interfered with PPB's ability to implement public order policing in the vicinity of the ICE facility, right?

A Correct.

Q For example, you claim that, under state law, PPB cannot continue policing the crowd when federal officers deploy tear gas?

A Correct.

Q But even if federal officers do not deploy tear gas, PPB is limited in its ability to police a crowd at the ICE facility, right?

A In what way, sir?

Q Well, again, assuming no tear gas, PPB is not able to help police a crowd that's impeding a vehicle from entering the ICE facility driveway, right? Let's say an ICE vehicle.

A Correct.

Q And that's because Oregon's sanctuary laws generally prohibit state officers from assisting federal immigration enforcement officers and agents?

A Correct.

Q So state officers would not be permitted to remove debris from ICE property under your understanding of the policy?

A Correct.

Q And I understand that you were assistant chief prior to

your current position; is that right?
A Yes, sir.
Q And when you were assistant chief, you actually gave guidance to PPB officers that they're not to engage in removal of debris from the ICE facility driveway, right?
A Correct.
Q And more generally, you would agree with me that PPB instructs officers to only assist ICE when there is a life-threatening situation, an actual physical injury, or something like that?
A That would depend on where is this occurring.
Q Thank you for the clarification, Commander Dobson.

So if we are talking about an incident at the Portland ICE facility, FPS, for instance, the Federal Protective Service is reporting an incident occurring on the facility driveway, unless there is a life-threatening situation or an actual physical injury, PPB guidance to its officers is that they are not to respond, right?
A So in the gate area, yes. But if there was probable cause that FPS provided us regarding a crime that had occurred, we would be able to arrest them for other than blocking the driveway.

THE COURT: Let me make sure I understand that. So if FPS gave you credible evidence that there was probable cause to believe that one of the demonstrators or protesters were

assaulting an officer, throwing rocks at an officer, things like that, if Portland Police Bureau had credible evidence to support probable cause that that crime has been committed, you would have authority to arrest?

THE WITNESS: Yes.

THE COURT: I don't want to stray too much into hypotheticals, but I assume, under appropriate circumstances, you would arrest?

THE WITNESS: Yes.

THE COURT: Okay. Back to you.

BY MR. BAILEY:

Q Commander Dobson, just a couple more questions on this point. So I guess I would like to know if there was a protester that was reported to be throwing objects at officers in the vicinity of the ICE building, but they didn't actually hit any officers, is that the kind of situation that PPB is permitted to respond to, based on your understanding of the sanctuary policies?

A Again, we would have to evaluate that. That's kind of hypothetically -- a little squishy.

Q So there are some situations in which PPB wouldn't be permitted to respond to individuals throwing projectiles at officers?

A So are you saying they're throwing them at the officers but not hitting them?

Q Correct.
A In the vicinity? What are you saying, sir?
Q I appreciate the clarification. I guess I'm imagining -- let's say they're standing in the driveway, they're throwing projectiles, and they hit the gate but no officer has been hit.
A If they were throwing them at officers, yes, we would go and arrest that person if we could, based, again, on the circumstances.
Q So I guess that's what I'm getting at -- based on the circumstances. There are some circumstances in which you wouldn't?
A We are going to do an assessment -- a risk assessment on whether or not it is safe for us to be able to go into that crowd and arrest that person, whether that arrest is going to be effective at that moment in time, or it's safer to put eyes on that person and then arrest them as they leave the crowd so that we can do it in a safer manner.
Q So I would like to talk about January 31st next. You were the incident commander for PPB that day?
A That is correct.
Q And so you were monitoring the situation at the facility, right?
A Yes.
Q You have a general understanding of what happened that day?

A Yes.
Q How did you learn about what happened at the facility on January 31st?
A In what fashion, sir?
Q I guess in your capacity as incident commander. Were you on the ground, or were you watching videos, or something else?
A I was watching a downlink from our airplane as well as getting feedback from my officers and the dialogue officers that were on the ground.
Q If you know, how frequently is this surveillance airplane that you've mentioned in the sky?
A In what capacity, sir?
Q Does PPB always have a surveillance airplane in the sky for purposes of police monitoring?
A Not always.
Q In what circumstances, if you know, do you have that capability to view from the plane?
A Again, it's one of those pieces, as we assess the threat or the concerns that we have, we will tap into whether or not we are going to use the airplane that day or not.
Q Are you able to give me a sense if it's rather infrequently that that capability is used? Is it something that you see monthly? Weekly?
A It just kind of depends on the size of the crowd. It depends on what we are anticipating. It depends.

Q Understood, sir. So returning back to January 31st, in your declaration, you characterized the federal response as "excessive." Do you remember writing that? You claim that it lacked -- here, I am quoting: "Lacked an awareness of the totality of the circumstances present."

Do you remember writing that?

A Yes.

Q Did you have an awareness of the totality of the circumstances from your office as incident commander or at the incident command post?

A In what way, sir?

Q As an incident commander, the information you were receiving from the surveillance plane or from your officers, did you believe that you had an awareness of the totality of the circumstances at the ICE facility?

A I had awareness that we had 30 to 50 people at the gate of the ICE building. I don't know what they were doing to elicit the response that happened, and that we had 3- to 4,000 peaceful protesters in the area as well marching. When I saw the tear gas deployed, it surprised me, one, the amount of tear gas that was deployed for a group of 30 to 50 individuals.

Based on the fact that you're in a neighborhood, you've got the neighbor -- sorry -- you have an apartment building full of people as well as other people on the ground, the amount of tear gas did not seem proportionate to the group

of people that were on the ground that might have been doing some kind of criminal activity.

Q Commander Dobson, I guess I'm just interested in the question, in your view, did you have an awareness of the totality of the circumstances of what was going on outside the facility?

A I can't testify to what was going on exactly in front of the ICE facility. If there was criminal activity there, I would -- how do I want to say this? Based on what I saw, the response wasn't what I would have expected.

Q So if you don't know what the individuals were doing at the gate, the 30 to 50 individuals, is it fair to say that you at least don't have a complete awareness of the totality of the circumstances that day?

A My opinion would have been, if it wasn't a life safety issue, where someone's life was going to die, that amount of tear gas was not appropriate.

Q You mentioned in your declaration that it was reported that individuals at the gate were trying to secure the gate with a rope and attacking the plywood.

Do you recall writing that?

A Yes.

Q So a moment ago you told me you didn't know what would happen at the gate, and so I take it that it was reported to you what the individuals were --

A It was after the fact.
Q After the fact.
A Yes, sir.
Q So understanding it was after the fact, what was reported to PPB after the fact? Had it not been after the fact -- had it been in the moment, is that the sort of situation under the Oregon sanctuary laws that you would be permitted to respond to?

MS. ALBIES: Objection. Calls for speculation.

THE COURT: Overruled.

THE WITNESS: I don't understand your question, sir, please.

BY MR. BAILEY:
Q Let me put it more directly. So on January 31st, had PPB received a call -- let's say a call from FPS -- about the individuals attacking the plywood and attempting to tie up the gate, does that sort of situation that was reported, does that reach the threshold necessary that would allow PPB officers to respond under Oregon's sanctuary laws?
A Yes.

THE COURT: In what way and why?

THE WITNESS: So earlier that day, we had an individual -- I believe it was that day that we had an individual who was using a laser, a green laser, that we were actually looking for -- maybe it was later in the evening. We

were looking for a -- pointing it at federal officers that we were trying to arrest. Unfortunately, that person disappeared. We couldn't track that person down in that way.

Does that answer your question, sir?

THE COURT: Well, no, because you were talking about the tying of the ropes or the tying of the gate, trying to damage the plywood, and I think the question that I heard was: Had your officers known that at the time, would you have been allowed to intervene and make arrests? I heard you say "yes."

THE WITNESS: I did.

THE COURT: I was curious. Tell me more about why.

THE WITNESS: Sure. The structural integrity of the building, the plywood on the outside of it, is always a concern. That's one of the areas that we would go and assist on there. The tying of the rope, again, we can speculate on that piece of who's tying the rope? What is it causing? Is it something -- can we just go cut the rope and make it no longer an issue on the gate? If they were actually trying to destroy the gate, that is an area that we would then respond and try to assist in that piece.

THE COURT: All right. But in your opinion, under those types of activities, Portland Police Bureau would be allowed, under your understanding of the sanctuary laws that apply, to go in and assist?

THE WITNESS: The tying of the gate closed, maybe

not, because, again, it has to do with the entryway. But the plywood, I would have, yes.

THE COURT: Okay. Back to you, Mr. Bailey.

BY MR. BAILEY:

Q Thank you, Commander.

I would like to shift gears here for a second here. In your declaration, you kind of generally opine that federal officers are using tools and tactics that PPB would not use, right?

A Correct.

Q You talk about tear gas and chemical and indiscriminate munitions?

A Correct.

Q But you would agree that, in public order policing, if you are in a so-called "serious disorder situation" -- in other words, a riot -- it may be necessary to use indiscriminate force, right?

A It could be, yes.

Q So even under Portland policing standards, there are sometimes situations that appropriately call for indiscriminate force?

A For tear gas, yes.

Q It might be necessary to use that kind of force in order to bring things under control, right?

A Yes.

Q It might be necessary to use that kind of force to restore order, right?
A Yes.
Q It's also sometimes necessary for law enforcement officers to use chemical munitions, right, not just indiscriminate ones?
A Yes.
Q I apologize if that was a confusing question. I recognize you were talking about indiscriminate force, which could include some chemical munitions. I guess I want to know -- just thinking about chemical munitions as opposed to physical projectiles, there is appropriate uses for those in law enforcement, right?
A Yes.
Q Indeed, PPB still uses chemical munitions, right?
A We have the ability to use them under certain circumstances within the state statutes, yes.
Q And to your knowledge, does the Portland Police Bureau in practice still use chemical munitions?
A We have not since 2020.

MR. BAILEY: Your Honor, I would like to put this up on the ELMO, if I can. I can represent this is a press release from the Portland Police Bureau website. I have copies if it would be easier.

THE COURT: Sure. Give a copy to plaintiffs' counsel. If you have one, you can give it to my courtroom

deputy for me, please. You're welcome to put it up on the screen. It looks like you have marked this as Defense Exhibit 1.

You may proceed.

MR. BAILEY: Thank you, Your Honor.

BY MR. BAILEY:

Q Commander Dobson, are you able to see what is in front of you?

A I am.

Q I recognize you have the hard copy.

Are you familiar with the Portland Police Bureau website?

A I am.

Q Does this appear to be a printout of a press release from that website?

A It does.

Q And feel free to quickly flip through the pages. Are you familiar with this particular press release?

A I am not.

Q I'm not going to spend a lot of time asking you questions about it then. I would like to -- if we could go to the second page, I'm going to read the pertinent part of the description. It is the second-to-last paragraph beginning with "Officers."

"Officers breached a wall between the vacant apartment and the suspect's apartment. Officers utilized a

small unmanned aircraft system (a drone) designed to give them a view of the apartment, but the suspect knocked the drone to the ground, damaging it. Officers prepared another strategy/safety to resolve the situation: Plan the use of irritant gas to try to prompt him to surrender. But they first took the time to evacuate the residents on the floor in order to minimize the risk of exposure to gas.

"At 5:55 a.m., over 35 minutes after the initial knock-and-announce, officers deployed two kinds of munitions into the apartment, including orthochlorobenzylidene malononitrile (CS gas) and oleocapsicum releasing vapor."

Did I read that correctly?

A Yes, sir.

Q If you could just go back to that first page. I apologize. I should have started here.

This is dated -- here, it says, "Published February 5th, 2026"?

A Correct.

Q And it says, "Updated February 19th, 2026"?

A Correct.

Q Do you have any reason to doubt the accuracy of the description that I just read from the PPB website?

A No.

Q So it's fair to say that PPB has quite recently used CS gas?

A So that is a SERT callout, which is not public order callout. It's very different circumstances there.

THE COURT: By the way, what does "SERT" stand for?

THE WITNESS: Special Emergency Reaction Team. So they deal with hostage situations and barricaded subjects and that kind of thing. So they regularly used CS gas and chemical munitions to ferret someone out of a building versus public order uses of chemical munitions, which is in open-air circumstances.

BY MR. BAILEY:

Q That's fair. I appreciate that explanation.

So CS gas os -- you can even use it in residential settings then?

A Are we talking public orders, sir? Or are we talking in a different circumstance?

THE COURT: It might be clearer if you would simply tell us when -- and I don't want to intrude on any confidential techniques, so be sensitive to that. Just let me know if we are getting into that area. But when is it appropriate for law enforcement -- Portland Police Bureau -- to use CS gas?

THE WITNESS: So there are two different -- how do I want to say it? I don't want to say cadres -- two different disciplines, if you will, of public order. That's the realm I work in. That's when it's open air, and it's in public. We have very specific rules about when we can use tear gas or

chemical munitions.

The other discipline being our special reactionary teams -- SWAT -- is what most people understand those to be is a different discipline. They have other rules that are not bound by state law that allow them to use it in circumstances where they have negotiated -- and again, I'm not an expert in this realm. But after they have tried to de-escalate through other means of using negotiation and other ways, they will use it in very discreet fashions to, again, try to get someone to come out of a building. So they use a limited scope of it in a controlled setting.

THE COURT: Is that primarily to protect person, property, life?

THE WITNESS: Yes.

BY MR. BAILEY:

Q To the best of your understanding, the federal government isn't bound by state law, right?

A Correct.

Q I would like to back up a week and talk about January 24th, another date from your declaration.

A Okay.

Q On January 24th, you were physically present in the vicinity outside the ICE facility, right?

A Correct.

Q There was a crowd outside the facility?

A Yes, sir.
Q You were also there with your wife and son?
A Yes, sir.
Q And you saw federal law officers deploy munitions on two different occasions on that afternoon or day?
A Yes, sir.
Q After the first deployments, you described as being "exposed" to the gas?
A Yes, sir.
Q And colloquially, you would call this tear gas?
A Correct.
Q Your wife and son also appeared to be exposed?
A Yes.
Q Based on your experience that day, and more generally, is it your impression that you were exposed to munitions because you were engaging in First Amendment activities outside the facility?
A Is your question was I there to protest?
MS. ALBIES: Objection.
BY MR. BAILEY:
Q No, sir. My question is, was it your impression that the federal officers that deployed munitions were retaliating against you for your conduct?
THE COURT: By "you," do you mean by this witness in particular, or do you mean the crowd generally? What do you

mean by "you"?

MR. BAILEY: Thank you, Your Honor.

BY MR. BAILEY:

Q Here, I generally mean you. Commander Dobson, do you believe that you, Commander Dobson, were being retaliated against?

THE WITNESS: I don't think they knew I was there.

BY MR. BAILEY:

Q So it's fair to say that sometimes exposure to crowd control suffices as incidental?

A Yes.

Q And is it your impression that the federal officers were more broadly retaliating against the crowd?

A I wouldn't be able to speak to that.

Q But you do claim that the use of force was improper, right?

A It appeared to be, yes.

Q So you are able to speak to that?

A Based on what I saw within the crowd, the large majority of the crowd was not focused on ICE, not in the driveway or near the driveway, and were out and about -- again, almost like a festive atmosphere that were impacted by the tear gas.

Q But you can't speak to whether federal officers intended to retaliate against anyone?

A I cannot talk to what their intention was.

Q So then you would agree with me that there is a difference between an improper use of force and a retaliatory use of force?

A It could be one and the same, I suppose.

Q Are they always the same?

A Probably not.

Q It was also your impression that the munitions were deployed in response to groups of individuals encroaching on federal property, right?

A There was something obviously that precipitated the use of chemical munitions, and I don't know what that was.

Q When you saw chemical munitions be deployed -- both times -- that was close in time to when individuals encroached on federal property?

A Again, I knew that there was a group in front of -- in that area that was in front of their little blue line on the driveway. I don't know what they did that precipitated that. Again, I was observing the crowd and my officers, so I don't know what caused that to happen.

Q Do you remember individuals at the front of the crowd encroaching on federal property?

A Again, I can't testify to what they were actually doing. I just know I was aware that there was a group of people in front of the driveway and the rest of the crowd. I wasn't in or up near an area where I could watch specifically what was

happening that would cause that encroachment or whatever happened to have that tear gas deployed.

Q I'm going -- you don't have your declaration in front of you, do you, Commander Dobson?

A I do not.

THE COURT: I can hand it to him if you want me to, but mine has highlighting all over.

Do you want me to?

(Laughter.)

MR. BAILEY: I defer to the Court on that, Your Honor.

MS. ALBIES: Your Honor, we can put it up on the screen.

THE COURT: The one with my highlighting?

(Laughter.)

MS. ALBIES: Counsel, we have it up on the screen.

THE COURT: If it is easier to see a hard copy, why don't you give it to him.

BY MR. BAILEY:

Q If we could go to page 4, please. I'm interested in the paragraph that starts with "On January 24," I guess midway through that very long paragraph.

Commander Dobson, do you see the line that starts "On January 24, 2026"?

A Yes, sir.

Q If you could just read this passage to yourself.

A Okay.

Q So that third sentence here -- the fourth sentence. Apologies. It says, "On two separate occasions, a group of individuals encroached on federal property. Each time a large amount of chemical munitions was deployed across a large area dispersing the entire crowd."

Did I read that right?

A Yes.

MR. BAILEY: Thank you for your time, Commander Dobson.

Apologies. Let me confer with co-counsel.

THE COURT: You may.

BY MR. BAILEY:

Q I promise I'm almost wrapped up this time. Just a couple more questions.

In preparing for your -- in leading up to today, did you talk to anyone to prepare for today besides attorneys with the City of Portland?

A No.

Q Have you reviewed any of the declarations submitted by defendants' witnesses in this case?

A No.

MR. BAILEY: Your Honor, we would ask to move the PPB press release from February 5 into evidence marked as DX1.

THE COURT: Any objection?

MS. ALBIES: None.

THE COURT: Received.

MR. BAILEY: Thank you, Commander Dobson. I have no further questions.

THE COURT: Any redirect examination, Ms. Albies?

REDIRECT EXAMINATION

BY MS. ALBIES:

Q Looking at Defendants' Exhibit 1, Commander Dobson, understanding, as you testified, that the use of indiscriminate weapons is different for individualized spaces versus in the public order policing setting, looking at page 2 of this press release, this was for an individualized situation, right?

A Correct.

Q And even for an individualized situation, Portland Police Bureau gave force warnings?

A I believe so, yes.

Q Look at the second-to-last paragraph. This press release shows that officers also used de-escalation and person-centered communication techniques?

A That is the standard procedures.

Q In an effort to give the suspect a way to communicate with officers and to get him into custody safely?

A Correct.

Q And looking at this press release -- I guess it's the last

full paragraph -- it also notes that officers evacuated the residents on the floor in order to minimize the risk of exposure to gas, correct?

A Yes.

Q And that's consistent with Bureau policy?

A Yes.

MS. ALBIES: Thank you. No further questions.

THE COURT: Anything further, Mr. Bailey?

MR. BAILEY: No, Your Honor. Thank you.

THE COURT: Commander Dobson, thank you very much. You may be excused.

I'll take that. Thank you, sir. And thank you for coming.

All right. Would 45 minutes be sufficient for everyone for a lunch break?

MS. ALBIES: Yes.

THE COURT: Okay. We will take a 45-minute recess. Then who will be the witness for the plaintiffs after that?

MS. ALBIES: We will be calling Captain Bailey.

THE COURT: Let's start at 10 minutes to 1:00, please.

(Recess.)

(Afternoon session; open court:)

THE COURT: All right. Are we ready to proceed?

MS. ALBIES: Yes.

THE COURT: Plaintiffs may call the next witness.

MS. ALBIES: Plaintiffs call Captain Cameron Bailey.

THE COURT: Good afternoon.

(The witness was duly sworn.)

THE CLERK: Thank you. Would you please state your name for the record, spelling your last.

THE WITNESS: Cameron Bailey. B-A-I-L-E-Y.

DIRECT EXAMINATION

BY MS. ALBIES:

Q Good afternoon, Captain Bailey. My name is Ashlee Albies. I'll be asking you some questions this afternoon. Can you please tell the Court how you are employed.

A I am currently employed by the Oregon State Police. I presently serve as the criminal division captain.

Q And what are you responsible for as the criminal investigations division captain?

A I oversee the criminal division, which includes major crimes detectives, drug enforcement detectives, digital forensics evidence, arson detectives, explosives unit, and analysts. My responsibility is more on the resource side than operationally.

Q Do you also play any role with Oregon State Police's

Mobile Response Team?
A Yes.
Q Please tell the Court about that role.
A Okay. I used to be on the team for 16 years. About four of those years I was the assistant team commander. My last two years, I was the team's commander. I have just over a hundred hours in commanders level public order training. I previously held instructor-level certifications on the pepper ball unit, less-lethal munitions, impact munitions, chemical agents, police mountain bike certified, field force extrication certified. I have been an instructor at the State's basic crowd control course for probably ten years -- a little over. Now my role is to sit in that command post during larger events.
Q Is that the same thing as an incident commander?
A Similar. In the case under mutual aid specifically with the City of Portland, I'm not the incident commander. I'm more of an agency representative in the command post.
Q Can you tell the Court what does that mean -- your mutual aid relationship between Oregon State Police and Portland Police Bureau with respect to public order policing?
A Sure. We don't have a formal mutual aid signed agreement between the agencies. It's a case-by-case as I understand it.
Q So if the Portland Police Bureau -- what are the circumstances where Oregon State Police provides support to

Portland Police Bureau for public order events?
A I think it would be the same for any agency in the state. If there's an event, festival -- it could be anything or a number of things. If it likely could exceed the local agency's capabilities, and they make a request for assistance. It could be a handful of other variables, but that's usually the most common.
Q You described some of your background with a hundred hours of commander-level training and some other training. Is there other training you haven't already identified specific to crowd management, crowd control, or public order policing?
A There is some conferences that I've been to. There was some trainings that Portland Police has hosted that I've attended. I can't recall if there is a formal name for them or not, but, yes, that's not included in the hundred hours that I mentioned.
Q What is the mission of Oregon State Police's Mobile Response Team?
A It's a multidisciplinary team. Public order is probably the primary role of that team. But the team has been used for a lot of different missions. We assist detectives in search warrant services, marijuana field eradication, bicycle operations, foot patrols, patrol saturations for events or festivals.
Q In your role, do you have oversight over the

Mobile Response Team in your role as captain?

A No.

Q Those are separate duties?

A Yeah. There is a new team commander, and ultimately the major of operations would have the final say.

Q You provided a declaration for purposes of this case, correct?

A Yes.

Q And did you have the chance to review your declaration before coming here to testify this afternoon?

A Yes.

Q Is everything in that declaration still accurate?

A Yes.

Q I want to direct your attention to the declaration that you provided. We will put it up on the screen in front of you. We will take you through it and make sure that this is the declaration that you signed.

Does that look accurate?

A Yes.

Q Attached to your declaration, you also provided the Oregon State Police's Mobile Response Team policies, correct?

A Yes.

Q Has that policy -- did you play any role in developing or changing that policy?

A Yes.

Q Can you tell the Court about that.
A At the time, I want to say mid-2022, after the legislative session, we made some changes -- really, updates to our policy, if I recall correctly, hadn't been updated in ten or more years, bringing it up to the current language that's in the statute and then other minor internal changes.
Q And this is the policy that governs the Oregon State Police Mobile Response Team members when they respond to crowd situations or public order policing situations?
A Correct.
Q Can you tell -- generally, this governs the use of tear gas?
A Yes.
Q Can you explain to the Court the procedures that govern the use of tear gas and what has to happen before tear gas can be used.
A Sure. It's very similar, if it's not almost word for word from the statute. The use of tear gas is limited to threats to life or imminent physical injury or events that are objectively dangerous and unlawful. It has to be authorized by the incident commander. You have to provide an announcement or admonishment to the crowd warning that the use can be used, provide a reasonable amount of time for people to comply with that order, give another admonishment, and then you can deploy tear gas.

Q Is there any requirement to attempt other methods of de-escalation before using tear gas?
A Yes.
Q What is that requirement?
A It's when feasible; attempts to de-escalate have been made and have failed.
Q With respect to OC spray, what are the limitations, if any, on using OC spray or hand-held chemical agents in a crowd setting.
A So the definition for OC spray both in policy and statute falls under the "tear gas" definition. You still -- you can't spray a crowd of people to get them to move. It has to be specifically targeted at an individual justifying that level of force.
Q So what is the justification? How do you train your troopers as to how they determine whether there is a justification to use OC spray on an individual?
A Through use of force training. Most of that's covered in your academy and then some continuing training throughout your career. Our members on MRT don't carry the large cans. They only carry a personal can that they would carry in their daily duties as patrol troopers.
Q So what's the nature of a threat that a person must pose in order for troopers to use OC spray in a crowd setting?
A I hate to speculate, but --

Q If it is helpful, I can direct your attention to paragraph 4 of (G) on page 7 of the policy in front of you.

MR. ROSENBERG: Which subsection?

MS. ALBIES: (G).

THE COURT: The bottom of page 7 of 9?

MS. ALBIES: Paragraphs 3 and 4 is where I'm looking.

BY MS. ALBIES:

Q Paragraph 3. This is consistent with what you just said, that hand-held spray for crowd management is prohibited?

A Yes.

Q And why is that?

A Because it falls under the same definition of "tear gas."

Q As a practical matter, you train troopers that they can't use OC spray in crowd situations indiscriminately?

A Correct.

Q Looking at 4, it says that sworn officers may use the hand-held OC spray during civil disturbances or demonstrations if such use is only against individual persons --

A Correct.

Q -- and only if the employee is justified to use physical force under your policy and under the law. Is that correct?

A Yes.

Q And then it sets out Standards A, B, and C. And what do those encompass?

A A is the individual poses an imminent threat of physical injury to the employee or a third person, if the employee reasonably believes the use of OC spray is necessary to prevent the physical injury.

B is the employee has probable cause to believe the individual has committed a crime, and the employee reasonably believes it is necessary to use OC spray to effect an arrest of the individual.

Or C, the employee has probable cause to believe the individual has committed a crime, and the employee reasonably believes it is necessary to use OC spray to prevent the individual's escape from custody.

Q Then at the bottom, there is another clause there. Can you explain what that means. What must troopers consider before they use OC spray on an individual?

A "If reasonable and feasible, given the circumstances, alternatives to deploying hand-held chemical incapacitants must be considered. A warning must be made to the individual, and the individual must be provided with reasonable opportunity to comply before the deployment of a hand-held chemical incapacitant."

Q Based on your training and experience, if there is a public order situation and people are protesting, passively resisting, sitting in a space, holding signs, is it permissible under this policy for troopers to use OC spray?

A No.
Q And in terms of kinetic impact projectiles, can you explain to the Court the limitations around use of kinetic impact projectiles during a public order policing situation or during a crowd situation?
A It's going to follow a lot of the same language that I just read. If you could bring it up here.
Q Sure. So can you explain to the Court the similarities --
A Sure.
Q -- and limitations?
A "Employees may use a kinetic impact projectile during demonstration or civil disturbance operations only against an individual engaged in conduct otherwise justifying the use of physical force under the department's use of force policy and Oregon Revised Statutes ORS 161.195 and 161.275 because of the following."

THE COURT: Technically it's not really an "and," but it's "through."

THE WITNESS: Yes. "Through 161.275."

"A. The individual poses an imminent threat of physical injury to the employee or a third person, if the employee reasonably believes the use of the kinetic impact projectile is necessary to prevent the physical injury;

"B. The employee has probable cause to believe the individual has committed a crime, and the employee reasonably

believes it is necessary to use the kinetic impact projectile to effect the arrest; or

"C. The employee has probable cause to believe the individual has committed a crime, and the employee reasonably believes use of the kinetic impact projectile is necessary to prevent the individual's escape from custody."

BY MS. ALBIES:

Q Is there a further restriction on where troopers can use a kinetic impact projectile with respect to the body of the subject? Can you explain to the Court that limitation.

A Sure. In statute, we cannot target the head of an individual with a kinetic impact projectile unless we're justified to use deadly physical force.

Q And with kinetic impact projectiles similar to OC spray, do officers have to give a warning?

A Yes.

Q Is it fair to say that use of OC spray and the use of kinetic impact munitions can't be used to punish or deter speech?

A Did you say "cannot be"?

Q Cannot be used.

A Correct.

Q And is it your understanding -- do you have an understanding of whether troopers using OC spray or kinetic impact projectiles are expected to consider the non-target of

that use of force?
A Yes.
Q Can you explain that, please.
A Yes. There is some language in the statute that -- I might mess the language up a little bit -- but "shall take" -- I'm trying to remember how it's worded. Essentially take measures to prevent incidental impact.
Q So limit the impact on other people?
A Yes.
Q And have you found in your role as captain and your role with the MRT that these limitations on the use of chemical incapacitants and kinetic impact projectiles are workable?
A Yes.
Q I want to turn your attention back towards your declaration. I'm looking at Exhibit 9 -- I'm looking at paragraph 11. You describe being the incident commander on several occasions when Portland Police Bureau asked OSP to provide assistance at the ICE facility.
A Yes.
Q Do you recall how many occasions you have served in that role?
A I want to say, between June and January, maybe eight to ten times I think we have been downtown.
Q In paragraph 12 in particular, you describe being the incident commander on October 18th.

A Yes.
Q Can you explain to the Court briefly what happened during that event?
A There was a No Kings rally at the facility. Mutual aid was requested by Portland Police Bureau, which we honored. I don't remember now, off the top of my head, how many troopers we sent, but probably around 18 to 24 is pretty normal. I was sitting in the command post. I think there was another State Police captain with me that night.

At some point during the evening we were watching some livestream video from people on the ground -- not law enforcement. So you get some video and you get some information passed from the radio into the command post as well. At some point agents within the building began to deploy tear gas.

The sergeant at the time for State Police -- on the ground -- calls me on the radio and says that this is happening. Tear gas is being deployed. I can see it, confirm it, on the live feed. Then he informs me that they are feeling some of the effects of the tear gas. When they're on a bicycle, they have a gas mask to don, and so they had to ride out of the area until that gas had dissipated to the point where they could come back in.
Q Did they report hearing any warnings?
A No.

Q Did they report being surprised?
A Yes.
Q Did your troopers report any behavior or conduct of the crowd that they felt -- that you felt justified that response?
A Nothing that I recall that I saw or was reported to me over the radio.
Q And what is the purpose of giving warnings when deploying chemical munitions in a crowd situation?
A I think it is critically important to notify the public. If you're seeing something that you might end up taking action on, you want to notify them and give them the opportunity to maybe stop the conduct, stop the behavior, kind of let them know where we stand, where they stand -- a "no promises/ no surprises" kind of a scenario. If you get into the point where it's escalating towards a riot and you're providing use of force warnings -- I'm sorry.
Q I wanted to make sure, you finished your answer?
A Yeah.
Q There is a definition of "riot" in the MRT policy, correct?
A Yes.
Q And what is that definition?
A I believe it mirrors state statute. I wish I could recite it from memory.
Q We will pull it up for you. We won't make you do that.

Let me know when you can see it.
A "Riot is a crime committed by a person if that person, in concert with five or more other persons, engages in tumultuous or violent conduct and intentionally or recklessly creates a grave risk of causing public alarm. Also ORS 166.015."
Q To your understanding, is there a process or procedure when a riot is declared?
A Yes.
Q What is that procedure, if you know?
A Well, it starts with a lot of warnings. Officer presence. How you manage the crowd initially makes a difference or could make a difference. I think when it gets to the point -- not using the state statute to declare a riot, but the definition that's in 181A.708 -- when it becomes objectively dangerous and unlawful, I think you're hitting that benchmark to declare the event a riot.
Q But if there are -- if a riot is declared, that doesn't automatically justify using tear gas?
A Correct.
Q There are still the procedures that we have already discussed that have to be followed?
A Yes.
Q So going back to October 18th, you described your troopers reported to you that they did not hear warnings, and they were impacted -- were they impacted by tear gas?

A They felt the effects of it. To what degree? Enough where they felt like they had to leave the area for their safety.

Q Did they have gas masks with them?

A Not while on bicycles, no.

Q When they left the area, did all of the OSP troopers that were responding to this event have to leave the area?

A No. I believe there was about six or seven.

Q Did the officers that had to leave the area, did this create a concern for you?

A Yes.

Q Why?

A Because in my role as the commander overseeing their operations on the ground, they are there for a reason. And when something like this occurs that is unexpected or otherwise, where they have to leave the area -- now you're trying to accomplish the same or similar mission with less people, it puts both the public and my troopers at risk.

Q You've already talked about the MRT policy on chemical incapacitants and impact weapons, and I believe I asked you this, but just to be clear, those mirror state law?

A I think it's pretty close from policy to statute, yeah.

Q And is it fair to say that those provide limitations on crowd-control munitions?

A Yes.

Q Do you feel that those limitations are workable?
A Yes.
Q And you reviewed the temporary restraining order that's entered in this case?
THE COURT: You mean the one that was proposed by the plaintiff? Oh, the temporary restraining order. I'm sorry.
MS. ALBIES: Yes.
BY MS. ALBIES:
Q Did you review the temporary restraining that was entered in this case?
A I did review pages 20 through 22.
Q Okay. We will put that back up on the screen for you.
Thank you.
In general, do you believe that these limitations in the temporary restraining order are workable?
A Yes.
MR. ROSENBERG: Objection.
THE COURT: Basis?
MR. ROSENBERG: It calls for speculation and it's leading, to the extent that the witness's testimony has been entirely about the application of Oregon state law, but this case involves the application of the temporary restraining order since the federal defendants are not bound by Oregon state law.
THE COURT: The question right now is, does he

believe that the temporary restraining order is workable? That doesn't call for the application of Oregon state law. He may use it by analogy, if he wants. But I don't see anything objectionable about the question.

Am I missing something?

MR. ROSENBERG: I think the context of his testimony has been about crowd control in general and the application of state law, including, for example, the definition of "riots" in the context of crowd control, but it has not been about anything specific to the facility. So when he is being asked questions about whether this injunction is workable in the context of this federal facility, he has not testified about anything specific regarding this facility other than a handful of events that we dispute.

THE COURT: I think that goes to weight, not admissibility. Overruled.

You may inquire on cross.

MR. ROSENBERG: Thank you.

BY MS. ALBIES:

Q Your answer was yes?

A Yes.

MS. ALBIES: No further questions.

THE COURT: We can now have cross.

MR. ROSENBERG: Splendid.

THE COURT: Mr. Rosenberg, at your convenience.

CROSS-EXAMINATION

BY MR. ROSENBERG:

Q Captain Bailey, my name is Brad Rosenberg. I am an attorney with the Department of Justice representing the United States in this case. Thank you for being here to testify today. I would like to start by discussing your background for just a bit. You've worked your entire career for the Oregon State Police. That's my understanding; is that correct?

A Yes. Law enforcement.

Q Law enforcement with the State of Oregon?

A Correct.

Q So you've never worked for the Department of Homeland Security or any of its components obviously? And you've never been trained on any of the Department of Homeland Security's policies regarding the use of weapons or crowd control, have you?

A I have not.

Q When I say "Department of Homeland Security's policies," you are aware, I assume, that the Department of Homeland Security has various components, like Federal Protective Service, Immigration and Customs Enforcement?

A Yes.

Q So when I say you have not been trained on any of their policies, I'm referring to you have not been trained on any of

the components' policies either, have you?
A No, I haven't.
Q Your declaration states, "The Oregon State Police stands ready to assist the Portland Police Bureau and other state law enforcement agencies with crowd management." That's, I assume, your testimony today as well?
A Yes.
Q Your declaration doesn't say that the Oregon State Police stands ready to assist federal law enforcement agencies with crowd management, does it?
A It does not.
Q And there are limits under state law as to the extent that the Oregon State Police can provide assistance to federal law enforcement; isn't that right?
A Yes.
Q So, for example, the Oregon State Police does not respond to requests for assistance from ICE, does it?
A No.
Q And the Oregon State Police cannot assist ICE with immigration enforcement, can it?
A Correct.
Q These limitations on the Oregon State Police's ability to assist with ICE, or the inability to assist ICE, stem from Oregon state law; is that right?
A Yes.

Q And those laws make it difficult for the Oregon State Police to play any role in protecting ICE facilities, does it not?

A Yes. I think it does.

Q Okay. And that's because the Oregon State Police is barred from assisting federal immigration authorities?

A With immigration enforcement, yes.

Q We will get to that in a minute. The Oregon State Police does not directly communicate with federal law enforcement about crowd control operations at ICE facilities, does it?

A I haven't, to my knowledge. I don't know if there's someone else within my organization that has.

Q Are you aware of anyone in your organization that communicates with federal law enforcement about crowd control operations at ICE facilities?

A No.

Q And the Oregon State Police has never told the Portland Police Bureau to coordinate with federal law enforcement on crowd control operations at ICE facilities, has it?

A I don't know.

Q Okay. From June 1st of last year, June 1st of 2025, until February 1st of this year, has the Oregon State Police ever responded to a protest at the Portland ICE facility without first receiving a request for help from the Portland Police Bureau?

A No.
Q And in responding and providing assistance to the Portland Police Bureau, does the Oregon State Police follow the Portland Police Bureau's guidance?
A Yes, to a degree. When you operate under mutual aid or following incident command structure, we would operate at the direction and discretion of the incident commander, which is typically Portland Police Bureau.
Q Help me understand. In that scenario, if Portland Police Bureau policy prevents the Portland Police Bureau from dealing with a particular crowd control event in the area around the Portland ICE building, then the Oregon State Police wouldn't be able to deal with that event either; is that right?
MS. ALBIES: Objection. Vague.
THE COURT: Overruled.
THE WITNESS: I don't know if I understand your question. Can you rephrase it?
BY MR. ROSENBERG:
Q Sure. Let me see if I can really simplify it. Basically the Oregon State Police follows the Portland Police Bureau's lead?
A Operationally.
Q Yes. Do you know between June 1st of 2025 and February 1st of 2026 -- I think you actually testified to this. I think you said "about" -- Oregon State Police responded to a

protest event at the Portland ICE facility, I think you said, about ten times; is that right?
A I believe. Eight to ten.
Q Eight to ten. Okay. So for the past majority of days, the Oregon State Police was not at the ICE building?
A Correct.
Q And from July of 2025 to September of 2025 -- I'm talking about a narrower date range now -- just to make sure we are on the same page here -- Oregon State Police did not respond to any Portland Police Bureau request for assistance at the facility, right?
A I don't know if there were requests made or not. I don't believe we were there in July.
Q Or August?
A Or August.
Q Or September?
A Yes.
Q Okay. I'm just curious, I'm going to switch the dates up on you, so I apologize for that. But between June 1st of 2025 and February 21st of 2026 -- basically this bigger time period -- on how many days were you personally present for protest activity at the Portland ICE facility?
A So do you mean on the ground or the command post?
Q Let's do both. Let's start with on the ground.
A Zero.

Q What about the command post?
A I think I only missed a couple of nights, so six to eight.
Q Six to eight out of the eight to ten?
A Yeah. I think I only missed a couple of nights, if I remember.
Q So thinking of the total number of days that we've been talking about on this broader time horizon from June 1st until February 1st, it's fair to say that you have limited personal knowledge of what's happening at that ICE facility on most days?
A Sure.
Q Let's change gears for a moment. Obviously you work for the Oregon State Police, and every organization has its own constraints. You don't know about resource constraints that the federal government faces in policing activities, do you?
A No.
Q You don't know about specifically resource constraints that DHS and its components face?
A No.
Q And you would agree with me that resource constraints are an important consideration for law enforcement, aren't they?
A Yes.
Q And in your declaration, you report that you were the incident commander over the Oregon State Police's response to a rally at the Portland ICE facility on October 18th. I believe

that's one of the days that we discussed just now; is that right?
A Yes.
Q And that night, there were about 300 people at the ICE facility? Does that seem about right?
A I don't remember.
Q Does it seem about right?
A Sure.
Q Would you be surprised if your declaration indicated that there were about 300 people there that night?
A Would it be surprising? No.
Q All right. About a hundred people were blocking the driveway at the ICE facility. Are you aware of that?
A I think that's pretty typical -- sorry.
Q I apologize. I have to correct something that I said, for the interest of candor with the Court. When I said "your declaration," it wasn't your declaration. It was a deposition that you previously gave in another matter. So I want to be clear with the Court and with you.

But the 300 number wouldn't surprise you if you said that in a deposition?
A Right.
Q Okay. And if about a hundred people were blocking the driveway at the ICE facility that night, would that surprise you?

A It wouldn't.
Q And with a hundred people there, that would block vehicles from coming in and out of the facility, wouldn't it?
A Yes.
Q And you're aware that the Portland Police Bureau does not clear protesters out of the ICE facility driveway, right?
A I have not see them do it.
Q It's not their property, so they wouldn't do it. It's the responsibility of Federal Protective Service or some other component of DHS, right?
A Yes.
Q Obviously then the Portland Police Bureau did not clear protesters out of the driveway on October 18th, right?
A Right.
Q And I'm going to state the obvious, but I would like you to confirm: Oregon State Police is also not responsible for clearing protesters out of the driveway, is it?
A We did not that night, no.
Q And you're not responsible for it?
A No.
Q Okay. Let's take a step away from the driveway and onto the public streets of Portland itself. You're aware that the Portland Police Bureau generally doesn't clear protesters out of the street to facilitate traffic into and out of the ICE building, are you not?

A I have not seen them do it for traffic, no.
Q And the Oregon State Police doesn't clear protesters out of the street in front of the ICE facility to facilitate traffic into and out of the facility, does it?
A No.
Q And when I say "facilitate traffic," I mean allowing government vehicles to enter and exit the building.
Do you understand that?
A Yes.
Q Are you aware that on or about 7:00 p.m. on October 18th, 2025, there were about 600 people in the crowd -- protesters -- at the ICE facility?
A I don't recall crowd numbers.
Q Would it surprise you?
A At a No Kings rally, it is -- typically you get more people there, so 600 sounds reasonable.
Q You were in the command post on October 18th?
A Yes.
Q That was one of the days -- I'm curious, were you physically there or in the command post?
A In the command post.
Q Okay. Thank you. So you weren't on the front lines?
A No, sir.
Q And you spoke earlier about the deployment of tear gas, but you understood that the deployment of the tear gas would be

to allow vehicles to enter and exit the facility, do you not?

A Can you --

Q Let me put it to you this way, let me be clearer. It is my job to be clear.

Tear gas was deployed to allow ICE vehicles to enter and exit the ICE building, right?

A I don't know what the justification was. If you're telling me they deployed it to allow vehicles to come in and out, that would be news to me.

Q Do you recall giving a deposition in the case of Oregon versus Trump?

A Yes.

Q Mr. Bailey, my colleague, is going to hand you a copy of that deposition transcript to which we just referred. Let me know once you have it.

A I have it, sir.

Q I'm going to ask you to turn to page 72 of that transcript, and I'm going to read to you starting at line 19 of the transcript. I'm going to ask you to just read along silently with me as I read this out loud.

A Did you say page 72?

Q Page 72, starting at line 19.

MS. ALBIES: Your Honor, objection. If it's refreshing memory, he's not to read it into the record. It's to allow the witness to read it.

THE COURT: It's to refresh memory; maybe he's doing it possibly to impeach. We will see what it says. At some point I am going to want to know what is he referring to when he refers to the next bullet, but I'll let you do that in due course.

BY MR. ROSENBERG:

Q So I'm going to read page 72 starting at line 19:

"QUESTION: And the next bullet says, 'At 7:30 p.m., federal officers came out to allow vehicles to leave and deploy a heavy amount of CS gas and pepper balls,' right?

"ANSWER: Yes."

Was that your testimony?

A Yes.

THE COURT: Counsel, do you know or can you present to me what that document was that he's referring to when he's responding to the question about the document that says that the next bullet says such and such?

MR. ROSENBERG: Yes.

THE COURT: Is that something that he said? That someone else said? Let's take a look at that.

MR. ROSENBERG: Give me just one moment.

THE COURT: Absolutely. Take your time.

(Pause.)

MR. ROSENBERG: So my understanding -- and we can prove this up -- he was being asked in this deposition about an

email that he wrote -- the witness wrote on October 18th, 2025.

THE COURT: Does that email explain the basis of the knowledge that he's representing or passing on? Did he hear that from someone else? Did he hear it from the feds? Did he hear it from state folks? Do you have that document?

MR. ROSENBERG: I would have to look for it.

THE COURT: Whenever you look for it, whenever you find it, I would like to see it, because I will tell you right now, so far, because of that missing piece, I don't see anything probative. I'll let you pull it together at your convenience.

MR. ROSENBERG: Thank you, Your Honor.

MS. ALBIES: I would also like to see it.

THE COURT: Anything he shows me, you get to see.

BY MR. ROSENBERG:

Q So based on that, you understood that officers came out to enable vehicles to leave the ICE facility, right?

A Yes. I mean, I guess that's what I answered in my deposition.

Q Okay. And that night no Oregon state police officers were injured from federal law enforcement's deployment of tear gas; is that right?

A Right.

Q I'm done with the deposition transcript, so you can put that away if you would like.

THE COURT: You can hand it back to me.

BY MR. ROSENBERG:

Q Are you ready?

A Am I ready?

Q We were just shuffling some papers. I just wanted to make sure you were ready for the next question. I was consulting with my colleague, Mr. Bailey. We decided just before we began this cross-examination, it would be far too confusing if my colleague, Mr. Bailey, cross-examined Captain Bailey. So that's why I am this here.

THE COURT: By the way, I did once have -- when I was a trial lawyer -- a witness whose name was Michael Simon, and I was cross-examining that witness. Fortunately, there was nothing that material that the witness had to say, because I was not looking forward to closing argument when I would have to tell the jury that they should really disregard everything Michael Simon said.

(Laughter.)

MR. ROSENBERG: It would probably have read very differently on the cold transcript in court, and so that's what we are trying to avoid here, Your Honor.

THE COURT: Fine.

BY MR. ROSENBERG:

Q Let's go back to the events of that day. Portland Police Bureau did arrest some people at the rally that night, didn't

they?
A I don't recall at the moment. I'm trying to remember if it was in a report or in my -- I don't remember.
Q Would it surprise you if they did?
A On the nights that I was there -- I mean, they didn't make an arrest every night, but they did make some arrests, so --
Q Are you aware that they made some arrests for assault?
A If that was the same -- I'm sorry. It's kind of running together on me. I think that might have been the same night where they had a bicycle officer assaulted -- I'm sorry -- being assaulted and then made some arrests.
Q Okay. Now, you were the incident commander for a public order event at the ICE facility on June 14th, 2025, right?
A I think the incident commander piece is a little misleading, but I was a State Police agency representative. I was not "the" incident commander.
Q What's the difference?
A The incident commander is from Portland Police Bureau. I guess, if we are saying incident commander for Oregon State Police. But I'm more of an agency representative in the command post.
Q Thank you. So it seems like it's a difference in title, but functionally it's similar.
That night -- again, we are talking about June 14th, 2025, there was a crowd of about 400 people protesting at the

Portland ICE building.

Does that seem right to you?

A I do remember there being a large crowd that night.

Q And about a hundred of those people were wearing what is called black bloc?

A That sounds right.

Q And black bloc is where protesters dress in all black clothing; is that right?

A Yes.

Q And black bloc sometimes can include armor, right?

A It can.

Q And it would be hard to distinguish between individuals who were wearing all black?

A Yes.

Q And the Portland Police Bureau declared a riot that evening, didn't it?

A Yes, they did.

THE COURT: Would you remind me what date we are talking about?

MR. ROSENBERG: Sure. It was June 14th, 2025.

THE COURT: Thank you.

BY MR. ROSENBERG:

Q And I just asked you about whether the Portland Police Bureau declared a riot that evening, and you said yes. And that was because of a high level of criminal activity, wasn't

it?
A I believe so.
Q And after that riot was declared, the Portland Police Bureau didn't intervene for hours, did it?
A Yes.
Q Yes, it did?
A I'm sorry. They did not intervene for hours.
Q Is that because they didn't have enough resources to do so?
A I believe there was enough resources.
Q And the Oregon State Police didn't intervene for hours, did it?
A No, it did not.
Q And so federal law officers had to intervene, didn't they?
A Yes.
Q And when law enforcement officers entered the area of that riot, there were assaults on police officers, weren't there?
A On?
Q Police officers.
A Federal or local?
Q Well, you tell me.
A I do remember a report of an agent being injured. I'm trying to remember if there was any from Portland. I don't recall.
Q Would it surprise you to know that objects were being

thrown at officers?
A On that night?
Q Yes.
A No.
Q And did you know that protesters pepper-sprayed officers?
A I don't remember if I heard that or not, but on that night it probably wouldn't have surprised me.
Q And did you know that during that period of time, when neither the Portland Police Bureau or the Oregon State Police were intervening, protesters threw objects at the ICE facility?
A Was your question did I know? Or did it surprise me?
Q Fair. Did you know?
A Yeah. Yes.
Q And protesters kicked at the doors of the ICE facility?
A Yes. I do remember there being damage to the building and the windows, cameras. I don't remember kicking at the door, but in general.
Q And the Portland Police Bureau made arrests for felonies that night?
A I don't recall if there were arrests that night. I believe later in the evening there were some arrests. I'd have to go back and look.
Q Let me ask it this way: Were you aware that the Portland Police Bureau was not making any arrests for crimes below a felony?

A Yeah. That came out in the briefing. It was a very high threshold that night for arrests.
Q To what briefing are you referring?
A Pre-operational briefing.
Q Pre-operational briefing following the events of that night?
A No.
Q I'm a little confused.
A There is a briefing before an operation; during the briefing before the operation.
Q So is it that during the briefing before the operation a decision was made not to make any arrests below a felony level?
A To my recollection, the threshold that night were felony person crimes, felony level property crimes, and there was a third one that I'm drawing a blank on.
Q But below the felony level, a decision was made not to make any arrest?
A No. Below the felony level, it was going to have to be cleared by the incident commander first. Officers didn't really have discretion to make those arrests, again, if I'm recalling correctly.
Q Are you aware of any incident commanders providing clearance to make arrests below a felony level?
A I don't remember what the arrests were for that night -- if they were felonies or misdemeanors.

Q But you're not aware of any arrests below a felony level, are you?
A No.
Q Let's turn to June 15th, 2025. On that day, I believe you were deployed to a public order event at the Portland ICE facility?
A Yes.
Q So that means you were physically there?
A I was in the command post.
Q Okay. So you weren't there physically?
A I was not on the ground. No, sir.
Q There was a crowd of about a hundred people there; is that right?
A A much smaller group than the night before.
Q But a hundred?
A Probably.
Q Okay. Of that hundred, about 40 of those people were in black bloc?
A It sounds right.
Q And late that night people were throwing objects at the facility; is that right?
A I don't remember that. I remember the next night being drastically different than the previous night; much calmer.
Q Okay. And going back to June 16th again, so we're talking the same time frame, but I want to be clear, June 16th?

A June 14th?
Q Sorry. It might be June --
THE COURT: A few minutes ago you were talking about June 14th. Now you were talking about June 15th.
MR. ROSENBERG: Right.
BY MR. ROSENBERG:
Q So now I'm talking about June 16th, the next day.
The Oregon State Police, did they respond to a public order event on that day?
A I don't believe we did.
Q Okay.
A I seem to remember we were there for the 14th and 15th.
Q Okay. Give me one moment.
Okay. I am talking about June 16th. So let me just go back. Are you aware that the Oregon State Police was deployed to the ICE building on June 16th?
A I'm trying to remember. I remember the 14th and the 15th. Maybe the 16th, if we were, was a night I wasn't there.
Q I think that's right. I think -- I don't believe that you were there, and I appreciate that it is hard to remember specific dates. I'm not trying to quiz you on that. I don't know that I would have necessarily remembered them if I were in your shoes.
Let me ask you this though -- and maybe we can clean this up a little bit by just talking about the events around

June 14th, 15th, and 16th generally, because I have a couple of questions.

Are you aware that around this time frame that there were some protesters who were equipped with homemade shields?

A I believe there were some reports maybe on the 14th.

Q One of these dates?

A Yes.

Q There were homemade shields on one of these dates in June?

A I believe so.

Q Okay. And that federal law officers used riot shields to respond to the protesters who had their own shields. Are you aware of that?

A I'm trying to remember. I want to say I do remember seeing some federal agency at that building with shields, because I feel like I made a comment once, like, "I haven't seen that before," but I don't know if it was specifically on one of those days in June.

Q Are you aware that federal law officers made multiple arrests in that time frame?

A I do, yes. I don't know how many. It seems kind of sporadic.

MR. ROSENBERG: Just one moment.

BY MR. ROSENBERG:

Q Just a couple of additional questions. Actually, hold on one second.

Other than attorneys for the State of Oregon, in preparing for your testimony today, did you discuss your testimony with anyone else?

A My wife.

Q Okay. Have you discussed this case with anyone other than your spouse and attorneys for the State of Oregon?

A No. My supervisor knows I'm here and why I'm here, but I haven't gone into details.

Q You haven't discussed your testimony with him or her.

MR. ROSENBERG: Thank you very much for your time, Captain Bailey. We appreciate it.

THE COURT: Any redirect?

MS. ALBIES: Just one, Your Honor.

REDIRECT EXAMINATION

BY MS. ALBIES:

Q Captain Bailey, you described a fairly high threshold for arrests on June 14th and the directive that you would need incident command's permission to make any arrests or officers on the ground would need incident command's permission to make an arrest for anything below a felony level. That was your testimony?

A Yeah.

Q And that limitation no longer exists, right?

A Not to my knowledge, it does not.

MS. ALBIES: Nothing further.

THE COURT: Any further questions, Mr. Rosenberg, within the scope?

MR. ROSENBERG: Nothing further, Your Honor.

Just two housekeeping matters: We would move DX2, which is the transcript. I would like to move that into evidence. We also -- I don't have a printout of it handy, but we do have a copy of the underlying email to which we were referring. We can provide that to the Court. I don't know if we should label that as DX3 and move that into evidence as well, but we would need to provide it to plaintiffs' counsel and the Court.

THE COURT: With respect to the transcript, am I correct in assuming that really the only portion of DX2 that you are moving into evidence is page 72, lines 19 through 22?

MR. ROSENBERG: That's a good catch, Your Honor. Yes, just for the impeachment purpose.

THE COURT: I assume no objection to that, right?

MS. ALBIES: No objection to that, Your Honor.

THE COURT: Received.

MR. ROSENBERG: Do we need to re-file that with the Court with the excerpt, or will you ignore everything else?

THE COURT: I will ignore everything but that. And I'm on the verge of ignoring that until I see the email.

MR. ROSENBERG: We will get that printed out and provide that to the Court no later than tomorrow morning.

THE COURT: That's fine.

Thank you.

Captain Bailey, thank you very much for being here. I appreciate it. You may be excused.

Plaintiff may call the next witness.

MS. SIMON: Thank you, Your Honor. We call Laurie Eckman.

THE COURT: Good afternoon.

(The witness was duly sworn.)

THE CLERK: Would you please state your name for the record, spelling your last.

THE WITNESS: Laurie Eckman. E-C-K-M-A-N.

DIRECT EXAMINATION

BY MS. SIMON:

Q Laurie, before we get started, I just want to confirm that you can hear me okay?

A Yes.

MS. SIMON: Your Honor, is it okay if I stay seated?

THE COURT: Of course.

MS. SIMON: Thank you.

BY MS. SIMON:

Q Ms. Eckman, you're a plaintiff in this case, correct?

A Right.

Q Did you submit declarations to the Court about your experiences at protests in Portland over the last year?

A I did.
Q Okay. Prior to 2025, had you attended any protests before?
A Yes. If you want to go back to the '60s, I did join some anti-war protests when I lived in Princeton, New Jersey.
Q Is that the Vietnam War?
A Yes.
Q How about in 2025? When did you attend your first protest in 2025?
A In 2025, it would have been October -- oh, no. The two No Kings rallies we were part of.
Q Okay. Did you attend a protest on October 4th, 2025?
A I did.
Q So why did you decide to protest that day?
A Well, we really had no plan to protest. We live about two blocks from the ICE building. We noticed some people gathering in Elizabeth Caruthers Park.
Can you hear me all right?
Q Yeah. We hear you great.
A It is very staticky here.
Q We hear you really well.
A We noticed some people gathering in the park below our apartment. They were carrying signs. We could see that from the signs they were protesting the treatment of immigrants, and there also seemed to be some veterans among the group that were

protesting or objecting to calling up of the Oregon National Guard to do policing in the city of Portland, which we were very opposed to. So we decided, well, let's join them and make our voices heard also. So Richard grabbed his walker, and I grabbed my sign from the No Kings rally, and we joined the group.

Q You mentioned that some of the signs had messages about immigration policy?

A Right.

Q Is that issue important to you?

A Very important.

Q Why so?

A I think I just grew up with an appreciation of immigrants, because there were certainly many immigrants in my own family. Then when I was a child, my parents befriended a family from Taiwan. We eventually fostered their little baby for about seven years while they got settled in the United States. So it has sort of been a value in our family all this time. And then more recently, some of our adopted kids have married immigrants from Taiwan, from the Dominican Republic, and from Korea.

Q Eventually, at that protest, did you end up at the ICE building?

A We did. We walked to the ICE building.

Q Do you remember just generally about what time of day that was?

A Early afternoon, it was.
Q And how would you describe the demeanor of the crowd once you were at the ICE building?
A It was relaxed, friendly, casual.
Q At some point did you see federal officers come out of the gates of the driveway?
A Yes. At one point a row of officers marched out of the building. They stood there for a minute, and then they went back in again and closed the gates.
Q And prior to that moment, had the crowd's demeanor changed at all?
A No. I think they were curious about what that was about. And then shortly after that, all of a sudden, a whole group of agents, all dressed in their battle gear and their helmets and masks and weapons, came charging out of the gate into the crowd, knocked some people. The tear gas was, all of a sudden, everywhere. I couldn't see anything, but all of a sudden I felt this really hard projection onto my head right here. I was totally disoriented. I did not know what way to go. Some people on either side of me took hold of me and led me out of the group across the street to the Gray's Landing building and sat me down on the sidewalk and gave me first aid.
Q What was that experience like for you?
A It was kind of terrifying. Because I was so disoriented, I couldn't think of what is the common sense thing to do right

now. I couldn't see how to get out of it by myself. I had no clue where my husband Richard was. And I couldn't see.

Q I'm going to show you a video. I think this will be Plaintiff's Exhibit -- this is already in the record for defendants. Your Honor, it is at document No. 25, Declaration of Chad Lucero. It is Exhibit A to that document.

(Video was played in open court.)

BY MS. SIMON:

Q Ms. Eckman, did you observe yourself in that video?

A Yes. I'm bending over like this, covering my eyes (indicating).

THE COURT: One second. Counsel, if we could rewind that to that portion. Turn off the sound. I don't need the sound. I would like you to freeze frame so she can identify on the screen and show me where she was and who she is.

(Video was played in open court.)

THE WITNESS: There I am.

THE COURT: Covering your eyes right there with the little hat on?

THE WITNESS: Wearing the blue hat.

THE COURT: Is that a sign that you're holding in your left hand?

THE WITNESS: I had a sign. That big one is not it. I think I dropped it somewhere, and I have never seen it again.

THE COURT: Do you remember what your sign said?

THE WITNESS: Yes. On one side it said, "No Kings." On the other side it said sort of crudely, "Will swap 10,000 immigrants for one little king Donald."

THE COURT: One second. Ten thousand -- say it again. Will swap what?

THE WITNESS: "Will swap 10,000 immigrants for one little king Donald."

THE COURT: One second. I have another question.

That's what your sign said?

THE WITNESS: Yes.

THE COURT: Were you holding that sign at the time that you felt the projectile hit your head?

THE WITNESS: Yes, I was.

THE COURT: Okay. Back to you.

BY MS. SIMON:

Q Does this seem like an accurate depiction of what you experienced on October 4th?

A Yes.

Q Really quickly, you said that you were there early afternoon. Were you there after, say, 4:00 p.m.?

A No.

THE COURT: What was the date of this again? October 4th?

MS. SIMON: Correct, Your Honor.

BY MS. SIMON:

Q Is it your understanding that a federal officer shot you in the head at this event?

A Yes. I didn't at the time know what exactly they shot me with. I didn't at the time know what a pepper ball was, but I do know now.

Q Before you were shot in the head, did the federal officers present, or anybody present, warn you at all that munitions may be deployed?

A No.

Q What would you have done if you heard that?

A I think we would have backed off and gone home.

Q Did you throw anything at the officers that day?

A No.

Q Did your see anybody else throw anything at the officers?

A No, I didn't.

Q Did you threaten any officers that day?

A No.

Q Did you hear anybody else threaten any officers that day?

A No, I did not.

Q Did you step onto federal property that day?

A No. We were on the sidewalk well behind the property.

Q Were you violent that day?

A No.

Q Okay. Did you observe anybody else being violent that

day?
A I didn't.
Q Did you observe law enforcement be violent that day?
A No.
Q You did not observe law enforcement be violent that day?
A If you mean the federal agents? Absolutely.
Q I see. You're distinguishing between the Portland Police Bureau type law enforcement and federal agents.

Okay. Did the federal agents' violence impact you that day?
A Yes. It was totally unexpected. It was way over the top of what needed to be done to -- well, there wasn't anything that I could see that they needed to come stop. So it seemed like -- it was hard to understand why they were charging like that and using the tear gas except to intimidate the people who were there.
Q You felt intimidated?
A I certainly did feel intimidated.
Q Are there other ways -- other than being shot in the head and feeling intimidated, are there any other impacts that you experienced from the federal agents' violence that day?
A Well, what was done to my head did not stop there. There was a whole series of events that were caused by that one event, and that's what I'm dealing with now.
Q Can you tell me more about that.

A I'm sorry. I'm getting --
Q Are you getting feedback in your ear?
A Wait a minute. I think it's all right now.
Q Can you hear me okay now?

THE COURT: Ms. Simon, you might want to back away from the microphone so you're not quite so loud. It's a very sensitive microphone.

You're doing fine.

THE WITNESS: So what happened was, the wound caused a lot of bleeding, which I was not aware of until I went home. We did walk home, the two blocks to our apartment. I took off my jacket, and my clothes were covered with blood. Then the blood wouldn't stop. And so we decided maybe we better go to the emergency room, and so Richard drove me up to OHSU ER. I got a CAT scan, and they treated the wound, gave me instructions about how to treat a concussion, we went home, and thought that was the end of it. However, about two days later, I got a black eye -- what they call raccoon eye -- from the wound.

Then I began to experience breathing problems, shortness of breath, a horrible cough, and then a fever, and then I was diagnosed with pneumonia. So my doctors treated me for the pneumonia. That took about a month.

But after that, the symptoms of the shortness of breath and the terrible cough stayed with me. So now I'm in

the process of -- they're trying to culture the particulate matter that I aspirated into my lungs from the pepper ball. My doctors explained to me that when that happens, it damages the tissues, and then bacteria grow in the tissues inside your lung, which is what's happening.

They have to culture it, see what kind of bacteria it is, and then decide what the treatment is, which I understand is long-term and has some side effects. In addition to that, I now have to use portable oxygen at home for a short time each day. And I can no longer do my long walks.

BY MS. SIMON:

Q You mentioned you aspirated the pepper ball dust. How do you know that happened?

A I could actually feel the particulate matter. It feels like coarse dust, and I could actually feel myself breathing it in.

Q So after this day, did you continue protesting in any regular manner?

A A couple of months later, on January 31st, our church sent an invitation to families, who are family-friendly, for a silent walk to ICE headquarters in memory of the two people who had died in Minneapolis and in support of immigrants. So we are active at Trinity Church, and so we decided to join that group.

At the same time the Portland labor unions had

brought all their families to join the group too, and so it turned out to be thousands of people. So we walked -- not all the way to ICE. We walked down Moody towards the ICE building. We stopped a half a block away, and Richard and I stood there with some other people.

Q I'm going to show you a document.

MS. SIMON: I have one copy. I did not bring three, and so I apologize. We can get this -- we can display it for everybody and get copies as quickly as possible.

Can everybody see the document currently? This would be Plaintiffs' Exhibit 2.

BY MS. SIMON:

Q Laurie, is the invitation that you received to attend the protest on January 31st, 2026?

A Yes, it is.

Q So why did you decide to go back out that day?

A I think because we wanted to stand with the rest of the people in our faith group. We had no clue that they would actually deploy -- excuse me --

THE COURT: Would you like a glass of water?

THE WITNESS: -- any munitions against a group like that, that was filled with families with their children, toddlers in strollers, their dogs. I even saw a baby in a carriage. It never occurred to us that they would ever pour out of the ICE building.

THE COURT: Ms. Eckman, would you like a glass of water?

Mary, would you please pour her one.

MS. SIMON: Thank you, Mary.

THE WITNESS: Thank you very much. I appreciate it.

BY MS. SIMON:

Q So did you attend this protest with other people?

A We didn't -- we never did meet up with the people that we knew were going to be there, because there were so many people.

Q The people that were walking -- were other people walking around you at least? It sounds like there were a lot of people?

A There were so many people that we could sort of shuffle towards the building.

Q And how were the people around you feeling about the protest that day?

A Very upbeat. I think they -- they thought that the issues were very important obviously, but it was also a nice day. And it was good to feel all the other people around you that also cared about First Amendment rights.

Q Did you change anything about how you protested on January 31st based on your experience on October 4th?

A Yes. We stayed far away from the building.

Q Okay. At some point, on January 31st, were you subjected to some sort of munition again?

A All of a sudden, with no warning -- we did notice that some of the federal agents had come out of the building onto their balcony, and they were sort of standing there with their weapons looking down at the crowd and the crowd looking up at them. Then there was no verbal warning, but all of a sudden the whole place was filled with tear gas and flash bangs and whatever else they were firing.

It was so much thicker and more widespread than on October 4th. So people were really overcome, because there were so many of us. There was no way to really get out easily. We turned around, but most of us couldn't see. Our eyes were running. We were holding on to each other. People were gagging and coughing and even throwing up. They were panicked.

I thought that if -- I was really having trouble. And I thought that if I could only get to the cross-street, which is Lowell, that I could turn off and get away from the gas, because there was a little streetcar shelter there, and I knew if I could just get there and sit down, I could catch my breath and not pass out.

Unfortunately, the gas was there too. It was everywhere. You couldn't get away. They were lobbing the tear gas not just behind the crowd, but over the crowd, all the way into the front of the crowd so that people couldn't leave without going through successive clouds of tear gas.

So I did finally get to Lowell. I turned right. I

couldn't get away from it, but someone had opened the door to the Gray's Landing building, even though it is usually kept locked for all but residents. A lot of people crowded in their little lobby and tried to treat each other with pouring water in their eyes.

Q When you were trying to escape, what was going through your mind?

A It was just unthinkable that this would be happening.

Q Did this experience changed your life at all?

A Well, yes, in that I can't walk in my -- I don't feel secure enough to do my usual loop walk, which is really important -- when you get to be my age, you have to walk every day just to maintain some level of fitness. My usual walk was right next to the ICE building, then down to the river walk, and then back again to the Ross Island Bridge. But not only could I physically not do that now, but I would feel very insecure going anywhere close to the ICE headquarters.

Q "Insecure." What do you mean by that?

A I find it so unpredictable what they did to peaceful neighbors, peaceful protesters, that I don't know what to expect of them. So I don't want to put myself in a position to interact with them in any way.

Q Would you go back to a protest at the Portland ICE building again?

A No.

Q What if you could be absolutely certain that you would not be exposed to any kind of munitions? Would you do it again?
A I don't know how I would -- how would I know that would not happen again?
Q It's hard to trust? Is that what you are saying?
A Yes. I'm saying that I would not trust that that wouldn't happen again.
Q Do you know if your experiences have impacted anybody else who has wanted to protest?
A Well, I meet with a book group every week, and they say, "You know, we really wanted to be there with you, but seeing what happened to you, I don't think so."
Q Ms. Eckman, I'm sorry for what happened to you. I appreciate your testimony today. Is there anything else you would like the judge to know about what you experienced on October 4th or January 31st?
A I think just that I'm really concerned that if this becomes normalized, if people think they are going to be labeled domestic terrorists for standing up for their First Amendment rights, I think that that's a huge step away from democracy.

MS. SIMON: Thank you, Ms. Eckman. I have no more questions.

THE COURT: Ms. Eckman, before I invite the lawyers for defendants to ask you some questions, when we were watching

the video of the October 4th incident, I saw a couple of other signs. I saw a sign, I think it read, "We are your neighbors, not your enemies. Join us."

Did you happen to see that sign?

THE WITNESS: I did see that.

THE COURT: I think I also saw another sign that said "Abolish ICE." Did you see that sign?

THE WITNESS: I did.

THE COURT: Questions from defendants.

CROSS-EXAMINATION

BY MR. YUN:

Q Good afternoon, Ms. Eckman.

A Good afternoon.

Q My name is Alex Yun, and I am here on behalf of the United States. I have a few questions for you.

First of all, I think you testified that there is nothing that -- excuse me -- on October 4th -- I'm talking about October 4th. I think you testified that there is nothing that you could see that justified the use of less-than-lethal munitions; is that correct?

A That is correct.

Q But it is possible that were incidents that you did not see potentially?

A It's possible.

Q And you also testified that you did not hear any verbal

warnings that less-lethal munitions be used?
A I absolutely did not hear that.
Q But again, it's possible that you did not hear the warnings, or they weren't issued?
A I think I would have heard them. I was pretty close to the front of that group.
Q Just to clarify, during your direct examination, I think you had an issue on one point where you couldn't hear us.
Are you wearing a hearing aid today?
A I am.
Q Do you ever have any issues where those malfunction potentially?
A I suppose that can happen. I could certainly hear the people who were leading the chants from right close to the blue line where they were standing. So if anyone had come out and issued any kind of directions to leave, I would have heard them.
Q You mentioned "chants." There was a lot of commotion around you during this protest?
A The commotion started when the munitions started being fired.
Q So prior to the munitions, it was quiet?
A As I remember, it was pretty quiet until the second time the agents came out of the building.
Q So it's your testimony that there is nothing that would

have inhibited you from hearing any verbal warning?
A It is certainly possibly I didn't hear, but I can tell you that I heard other things of the same level of loudness, and I did not hear anything from the agents.
Q Just turning briefly to the January 31st protest, you testified that there were thousands of individuals at this rally with you?
A Yes.
Q And you were in the midst of those individuals?
A Yes.
Q So would you say that it was difficult to see out of the crowd towards the ICE facility?
A On that occasion, I would not have been able to see really close to the building. However, I knew that there were families with little kids up in the front there.
Q And just to clarify, you couldn't see the front of the ICE facility?
A I couldn't see clearly what was happening.
Q So you don't know if any protesters potentially went to the front of the ICE facility and were performing acts of violence?
A I don't know that.
MR. BAILEY: Nothing further, Your Honor.
THE COURT: Anything further, Ms. Simon?
MS. SIMON: No, Your Honor.

THE COURT: All right. Mrs. Eckman, thank you very much for being here. Thank you for your courage. Thank you for your dedication to our constitutional democracy.

THE WITNESS: Thank you, Your Honor.

THE COURT: Mary, would you help Ms. Eckman down the stairs. She doesn't need help.

THE WITNESS: I'm fine.

THE COURT: Okay. Plaintiffs may call the next witness.

MS. SIMON: Plaintiffs call Richard Eckman.

THE COURT: Let me ask, as Mr. Eckman is approaching, we have a couple of steps up here. We can move a chair.

THE WITNESS: I can do it.

THE COURT: All right. If she can do it, you can do it. All right, but be careful.

(The witness was duly sworn.)

THE CLERK: Would you please state your name for the record, spelling your last.

THE WITNESS: Richard Eckman. E-C-K-M-A-N.

DIRECT EXAMINATION

BY MR. BORDEN:

Q Mr. Eckman, are you aware that you are a plaintiff in this case?

A Yes.

Q And you submitted a couple of declarations?

A That's correct.
Q You just took an oath. Have you taken an oath before?
A Shoot -- yes, I have -- to the Constitution.
Q Do you remember that oath?
A I swear to uphold the laws of the United States, so help me God. I don't have it committed to memory today.
THE COURT: When did you do that?
THE WITNESS: When I enlisted in the Naval Reserve in 1961.
THE COURT: Thank you.
BY MS. SIMON:
Q Before 2025, had you attended any protests before?
A Let's see. No, I hadn't. I was on the opposite end of the protests in the '60s.
Q You were in the Vietnam War while Laurie was protesting it. Is that what you're telling us?
A That's correct.
Q When in 2025 did you attend your first protest?
A The No Kings down here in the Park blocks.
Q And did you also attend a protest on October 4th --
A Yes, we did.
Q -- in 2025?
Why did you decide to protest on October 4th, 2025?
A Well, as you heard from Laurie, we saw the group gathering in the park. Then we saw the signs about veterans and don't

mobilize the National Guard, and I was very strong about that -- not wanting the Guard mobilized, because I looked at it partly as an administrative thing, simply because I had worked with the Army Reserve as what they call a technician. And if they mobilized the Guard, they were going to eat up the Guard's budget in three months without even doing any training or anything. So it was an administrative thing. And the other piece is that the Guard is supposed to belong to the governor, not to the President.

Q Did you decide to wear anything special that day?

A Yeah. I left my training aid -- I wore my Vietnam Vet cap to the protest.

Q Can you describe to me what that hat looked like?

A It has got a copy of the Vietnam service ribbon and the Vietnam campaign medal on it.

Q What is the significance?

A It means that I served there in the Navy on two separate occasions.

Q Why was it important to you to wear that hat that day?

A To say that speaking out as a veteran, we need to not use the Guard in inappropriate uses, and I see a lot of that taking place.

Q And eventually did you end up at the Portland ICE building on October 4th, 2025?

A Yes, I did.

Q Do you remember approximately what time that was?
A Somewhere close to noon.
Q Okay. And were you there after, say, 4:00 p.m.?
A No.
Q Okay. I want to play a video for you. This would be a video that we have provided to defendants. That would be Plaintiffs' Exhibit 3.

(Video was played in open court.)

BY MS. SIMON:
Q Did you take that video, Mr. Eckman?
A Yes, I did, as a matter of fact.
Q And is that an accurate depiction of the crowd at the Portland ICE building that day?
A Yes.
Q To your best estimate, about how long after you took that video did the agents fire their munitions?
A Probably less than ten minutes.

THE COURT: Was this October 4th?

MS. SIMON: Correct, Your Honor.

THE WITNESS: Yes.

BY MS. SIMON:
Q Can you describe to me where you and Laurie were standing based on this view?
A We were in -- that was obviously me, and she was just to my right. We were together at that point.

Q That was obviously you behind the camera? Is that what you are telling me?
A Yes.
Q All right. I'm going to play another video for you. This would be Plaintiffs' Exhibit 4.
(Video was played in open court.)
BY MS. SIMON:
Q Do you see yourself in this video, Mr. Eckman?
A Yes. Almost dead center.
THE COURT: The gentleman with the walker, I assume?
THE WITNESS: Yes.
MS. SIMON: You can keep playing.
(Video was played in open court.)
BY MS. SIMON:
Q Does that seem like an accurate depiction of what you experienced on October 4th?
A Even more than what I experienced, because I didn't -- the so-called agent that was behind me shooting under my walker.
THE COURT: Will you rewind that. I want to see that again.
THE WITNESS: That startled me.
(Video was played in open court.)
THE COURT: Do you see the agent now? There he is. Do you see the agent, Mr. Eckman?
THE WITNESS: Right there.

THE COURT: Use your finger and draw a circle around him. It might not work with a video. It works with documents. Can you put your finger on the screen and push.

So where is the agent?

That's what I thought. Got it.

Mary, can you clear those marks, please.

THE WITNESS: That stuns me here sitting here seeing it.

THE COURT: So it looks to me like there's an agent in full gear probably, it looks to me, like maybe 6, 7 feet right behind you.

Does that sound about right?

THE WITNESS: Yes.

THE COURT: And that agent, you believe, shot some munitions? What did you see or feel?

THE WITNESS: Well, there was gas everywhere. I thought I had gotten hit -- shot at directly, but I didn't realize it was that close. When they came out the gate up here, I saw one look at me, and I pointed to my Vietnam hat, and I thought that would make him at least find another target --

THE COURT: Yeah.

THE WITNESS: -- and obviously he didn't.

THE COURT: Let me ask, Counsel, I know that you're offering this.

THE WITNESS: I don't want people saying that I made it up out of thin air.

THE COURT: Understood.

Counsel, I know that you're offering PX4 as a video. If there's any way technologically in the next day or so you can get a screenshot of this particular picture that will show -- a still shot, a screenshot -- Mr. Eckman with his walker and the agent a few feet behind him. Then offer that as an exhibit. If you want to call it PX4A or PX5, whatever you want. But I would like to see that offered as a hard copy screenshot, not just a video.

MS. SIMON: Your Honor, I mentioned that technological genius/attorney on our team, Lucy Hallett, already has that available. We will get that to you.

THE COURT: Excellent.

MS. SIMON: We will mark it Exhibit 4A.

THE COURT: I assume you are offering PX3, PX4, and when we get to, PX4A.

Any objection from defendants?

MR. YUN: No objection.

THE COURT: Received.

BY MS. SIMON:

Q Mr. Eckman, you were mentioning some of the feelings that came up for you when you watched this video. Can you tell me more about that.

A I was even -- I'm trying to not let my personal feelings about ICE get into this, but I have really strong feelings that they are unqualified for the job they're doing -- period; end of conversation.
Q And were you warned at all before you were subjected to munitions on October 4th?
A No.
Q What do you think you would have done if you heard a warning that you may be subjected to munitions?
A I probably would have backed off.
Q Did you throw anything at the officers that day?
A Surely, you jest.
Q Did you see anybody else throw anything?
A No, I did not.
Q Did you threaten any officers that day?
A No.
Q Did you hear anybody else threaten any officers that day?
A No, I did not.
Q Did you say anything to the officers that day?
A No. The only thing was the verbal thing to the hat.
Q And what do you remember the officers' response was when you were saying the verbal thing to the hat?
A He opened up on me.
Q And do you remember your wife being injured on October 4th?

A Yes, I do. And when we got home, we didn't realize how serious it was until she took off the sweatshirt that she was wearing, which was dark blue, which the blood didn't show through, but her blouse was covered with blood. So we took a picture of it just to -- because we were going to need that later on. It struck me right away.

Q I have that picture. We can pull it up for up. Can you pull up Laurie Eckman, Docket No. 13. This is Exhibit 8 to Docket No. 13.

Is that the picture you are talking about?

A That's it.

Q What was it like to see your wife covered in blood?

A It was stunning to see that. They had -- the people that organized the protest had done such a good job of cleaning her up that we weren't even aware how bad it had been.

Q Did you keep protesting after October 4th?

A We did get involved in the one on October -- January 31st, because of the invitation from Trinity Church.

Q Why did you decide to go back out on January 31st?

A Because I think -- the freedom of assembly is an important addition to the Constitution in Amendment No. 1, and I don't want to see that quelled by sheer fear or terror.

Q Why were you worried about it being quelled by fear or terror?

A I'm sorry?

Q Why are you worried about it being quelled by fear or terror?
A Because the kind of police tactics that ICE wants to use are terror tactics to keep people in line, and they can step from beyond the ICE building to almost anywhere.
Q On January 31st, did you change anything about how you protested based on what you experienced on October 4th?
A I'm afraid at this point we're going to stay away from protests that involve the ICE building.
Q Do you remember being subjected to munitions on January 31st?
A Yes.
Q What do you remember about that experience?
A Well, before the munitions went off, we looked up on the balcony of the ICE building, and there were people in their combat gear and weapons ready to be fired. I sort of thought that this is a bad sign, but surely they're not going to do that after all they've been through.

And I was genuinely surprised when they fired multiple weapons. And they fired them in a high arc so that they would go beyond the crowd as it existed so that they could confuse the crowd. They wanted to hurt people.

Q And were you able to get away from those munitions very easily on January 31st?
A Not easily. The wind -- there was a lack of wind, so the

gas was not going anywhere.
Q What did it feel like to be in the cloud of gas again?
A A certain sense of panic. And where do I go from here? We were half a block away from the ICE building anyway, but we tried to get into the next street -- Lowell, I think it is. We were able to get into Gray's Landing office, but that was the only thing that saved us.
Q You mentioned seeing officers in combat gear. What did that seem to signal or communicate to you?
A As a military person from a long time ago, I see the combat gear as more image than it is about reality.
Q What do you mean by that?
A Well, the kind of gear that they're wearing is not -- some of it is protective. They may have armor underneath, but they don't need to have all of that field gear hanging on them so that they look like they're going somewhere.
Q Did the experiences that you had on October 4th and January 31st change your life at all?
A Well, the biggest thing that changed is now we have to turn on the oxygen for Laurie in the morning so she can sort of catch her breath again.
Q Do you plan to protest at the ICE building again?
A I would be hard pressed to be talked into it at this point.
Q Why is that?

A Because they are dangerous.
Q When you say "they are dangerous," who you referring to?
A The ICE agents.
Q And when you say "the ICE agents," do you mean the people -- who do you mean?
A Well, I'm not sure what they mean. They call themselves "police," but I'm not convinced.
Q Is there anything else that you would like the judge to know about what you experienced on October 4th or January 31st?
A I don't think about them specifically, but I do think about the First Amendment to the Constitution and freedom of speech, freedom of assembly, that those are things that we, as people, should be entitled to, and we shouldn't be afraid of going somewhere and having a government agency terrorize us.

MS. SIMON: Thank you, Mr. Eckman. I'm sorry for what happened to you.

I have no more questions, Your Honor.

THE COURT: Mr. Yun, you may inquire.

MR. YUN: Nothing from the Government, Your Honor. I would just like to thank Mr. Eckman for his service.

THE COURT: Mr. Eckman, I want to thank you for your service on two occasions: First, in 1961, but also today.

Thank you, sir.

Mary, will you help him down, please. You probably don't need help, but I want her there anyway.

MS. SIMON: Your Honor, can we take a quick break by chance?

THE COURT: Who will be the next witness? Do you know? If you don't know, you can tell me in 15 minutes.

MS. HUTCHISON: Yes, Your Honor. We were planning on playing some deposition videos now, but we have been in conversation with the Government about those portions, and so it will depend on where those land.

THE COURT: That's fine. I look forward to being surprised in 15 minutes.

(Recess.)

(Open court; proceedings resumed:)

THE COURT: Plaintiffs' counsel, what should we do next?

MR. FLEMING: Your Honor, we will be calling Ms. Teressa Barsotti to the stand.

(The witness was duly sworn.)

THE CLERK: Thank you. Would you please state your name for the record, spelling your last.

THE WITNESS: Teressa Barsotti. B-A-R-S-O-T-T-I.

MR. FLEMING: Your Honor, with the Court's permission, may I remain seated while I question?

THE COURT: Please. And make sure that the microphone can pick up what you're saying for the folks that are listening in remotely.

MR. FLEMING: Okay. Thank you.

DIRECT EXAMINATION

BY MR. FLEMING:

Q Good afternoon, Ms. Barsotti.

A Hi.

Q We are going to be speaking today about some events that transpired on the 31st of January of this year. Are the events of that afternoon clear in your mind?

A Yes.

THE COURT: I'm sorry. What was the date?

MR. FLEMING: The 31st of January.

BY MR. FLEMING:

Q Did you participate on that day in a rally known as the Labor Against ICE Rally here in Portland?

A Yes, I did.

Q All right. Did you, in fact, prepare a declaration setting forth some of the facts as you recall them occurring that day?

A Yes.

MR. FLEMING: Your Honor --

THE COURT: It is at Docket 126-18, and I've read it.

MR. FLEMING: Thank you.

THE COURT: It is in front of me now.

MR. FLEMING: Thank you.

BY MR. FLEMING:

Q Did you have an opportunity to recently review your declaration?

A I did. Yes.

Q And are the facts contained in your declaration still accurate, based on your memory?

A Yes.

Q What we are going to do today, as His Honor has just said he has already read your declaration, we are going to cover some of the events of the day, and I'll have you expand on some of what's contained in there. Okay?

A Okay.

Q Let's start with the rally itself. Was there any particular reason why you wanted to attend the rally on that day?

A Yeah. I was looking forward to it. So my understanding is that it was a labor gathering that multiple unions -- union members would be gathering as an expression of solidarity with immigrants that are being targeted by ICE, and that was meaningful to me, because I come from a union family. My dad and my brother are both in the same union. My dad is a retired pipefitter. My brother is a plumber. I was raised to see unions as a very positive force in our society.

And I also knew that historically workers have been pitted against each other; specifically that workers who are

citizens have been told that immigrants are trying to take their jobs or are a threat in some way. So the fact that this event was multicultural and bringing people together, that was exactly the kind of political education that I wanted my daughter to be a part of, who I took with me, and just what I needed as a person, as a citizen who is upset about things that are happening.

Q Would it be a fair characterization to say that you were intent on attending the rally as a way of expressing your First Amendment rights of free speech and expression?

A Yeah. I was raised to see demonstration and protest as part of a civic duty; that not everybody needs to, but it's one of the ways that we get involved with our communities and try to make things better; that our representatives, our elected leaders, need us to gather and express ourselves. It's part of what we do. We make phone calls and write postcards. It's just part of it.

Q You mentioned your daughter. You decided that you would bring your daughter along. Could you tell His Honor how old was your daughter back in January?

A She was and is still 13. She is about to turn 14.

Q Thinking back on that day, do you recall explaining to your daughter in any way what it was that you were about to do?

A Yeah. We talk a lot about what's happening in the news. I sort of see my role as a parent as sort of a filter, you

know, like trying to make sense of the world, but not give them as much detail as I'm consuming.

So she definitely knew what I wanted us to get out of it, and she herself was excited because she thought one of her teachers -- she is an eighth grader. She thought one of her teachers might be there. It turns out that she was at some different event. We didn't see her, but we did see a lot of teachers; we saw quite a few members of the Portland Teachers Union there.

Q Is it right that you and your daughter, 13 years old, took the bus to attend the rally?

A Uh-huh. Yeah. We live near 205. We got on the bus and had seats. But pretty soon the bus filled up, and it was standing-room only. There were lots of people with signs talking about where they were headed. And so we were feeling that sort of collective enthusiasm and pride long before we even reached the park.

Q Thank you. Did you have any signs?

A No. We came empty-handed. We didn't even pack snacks. Usually, as a mom, I've got gear with me, but we just -- we traveled light.

Q We will get into this in a little bit. But at some point did you stop at a store and pick up some snacks and some water?

A We did. So we arrived at Caruthers Park, and we're just taking it all in, walking around, reading signs, seeing what

was what. As usual, we couldn't really hear the speakers, which is always frustrating, because I really wanted to hear what they were saying, and so we were kind of moving around the park, trying to find different places to stand where we could hear what was going on.

My daughter got hungry, and so we stopped in the convenience store that's right across from the park, got some snacks, and a bottle of water, which we were really glad to have when we encountered tear gas later and needed that water.

Q You were mentioning a little bit about the crowd on the bus and the people heading to the event and then when you arrived at the park scene, which sounds to me, and correct me if I'm wrong, a festive, community-based kind of a feel to it. Is that fair to say?

A Yeah. I mean, up until things went wrong, it was exactly what I was hoping for, you know. It was multigenerational. It was multiethnic. We saw a lot of different opinions expressed in a way that felt good and that I feel like I need in these times. I need to be able to gather with neighbors and know that I'm not alone, when I'm at home reading the news and crying or feeling anger about what's happening in the world, like, that doesn't feel good or right, you know. But being able to gather with others and just know these are not just people who care about things that we care about, but these are other people who are willing to do something about it, you

know, to take time out of their lives and show up and make some noise.

Q You mentioned intergenerational?

A Yeah.

Q Could you give His Honor a sense of the ages that you saw there. Let's focus on around 3:00 to 4:00 p.m. Is that about the time where the rally kicked off?

A Yeah. So we arrived at about 3:00. We were at the rally for more than an hour before the march actually started. And it was very multigenerational -- babies in strollers, and being worn by their parents, and elders, including -- at some point I figured out that my dad was there. My dad is one of my role models when it comes to being a civically minded person. And I didn't think he was going to be there, because he had been out of town. But I got a text from my mom to look out for him. So then I started texting my dad.

So there are elders and babies, but young workers and middle-age people like me and also people of different ethnicities. You could tell, like, there were more radical political beliefs and more middle-of-the-road political beliefs. It felt great.

Q So at the beginning here of the rally, that first hour that you are now describing, did you see any protesters, at least from your vantage point, acting violently toward any -- let's start with law enforcement officers? Did you see

anything like that?
A Definitely not. The only uncomfortable thing that happened were who I believed to be counter-protesters who walked down the street making very unpleasant sounds. They had a recording, I think, of lots of different whistles playing at a really high volume. It was scary to hear. It didn't escalate. There were maybe less than a dozen men, it looked like.

My daughter and I kind of backed up. We had just came out of the convenience store, and we sort of backed away from the street, so I didn't get a great view. But there were people being a little bit loud, saying like "We love ICE. We love Trump," and then nothing happened. You know, like somebody de-escalated or they ignored them, or I'm not sure. There was that uncomfortable moment.

But otherwise, we were in a sea of, like, neighborly, kind, engaged people. The only officers I saw at all -- after we started marching, we were on Moody and Abernathy, up the hill on Macadam, I saw two Portland police vehicles and a couple of people standing next to them. But I don't think I ever saw federal agents. Those were the only officers I noticed at all.
Q At some point in time that afternoon did the -- what you are describing as, it sounds like a fun, community-based event, did something happen? Did you hear a loud noise that changed

the direction of that afternoon?

A Yeah. Right about 4:30. This is when I'm texting with my dad -- I just realized that he's there, and we're trying to find each other -- my daughter and I heard loud bangs and didn't know what they were. But that's when we were on Abernathy, and it seemed to be coming from ahead of us toward Lowell or beyond. I heard some loud bangs, and I got a text from my dad. He said, "Did you hear the bangs?" He said, I think, "I am up on Moody and Lowell." So we were about a block away from each other.

Right around then, I also saw clouds of smoke a block or two ahead of us. And this was sort of strange, because initially they looked like orange clouds. Then I've seen pictures later that showed only gray smoke. I don't know if the color dissipates. I mean, it's my first experience, so I don't really know what I saw. But there were clouds of orange smoke. That was pretty unnerving. But I was confused. I didn't know what was happening.

And it also seemed far enough away -- two blocks away. I thought we were safe where we were. So at that point my concern was locating and connecting with my dad, who is 76 years old. And all three of us have asthma actually, but my dad is the one who has it worse. So once I saw smoke, and we weren't yet with him, my main concern is that we connect with each other.

Q Did the smoke cloud that you're describing now, did that cloud eventually envelope the area that you were standing in?
A Yeah. And it was subtle enough that I didn't know what was happening until -- until my daughter spoke up and said that her eyes were burning. So up until then, I think the air was getting kind of cloudy, but it wasn't -- I didn't really notice, like I was focused on getting my dad out of an area that seemed unsafe; like, I thought we were safe. And then before I knew it, my daughter said, "Can you smell it? I think I can smell it." And then she said, "My eyes are burning." And I looked at her, and I could see that her eyes had started to stream, and I said, "Okay, let's go."

I grabbed her, and we went from Abernathy and Moody over to Bond. So we passed through what looked like an apartment complex courtyard -- like two apartment buildings and the street. It looked like it was not for cars, but we walked through that way.

Did that answer your question?

Q It does. So at this point in time were you able to see whether the effects of whatever it was -- the smoke that was now enveloping you and your daughter -- whether that was having any effect on people -- protesters or passersby -- in your area? And if so, would you please describe what you recall.
A Yeah. All around us -- so when we got to a place that seemed safer, we got our water bottle out, and I started

rinsing my daughter's eyes. And I really didn't know what I was doing. And I remember saying, like, "Okay, I hope I'm doing this right." And more than one person said, "Yeah, you've got it," like tilt her head a little bit like that. You know, there was support from strangers. And as I looked around, there were multiple people rinsing their eyes. There were lots of people checking in with each other, offering each other water. I didn't get a close look at anybody's faces really, because at that point I was focused on my daughter. And then as soon as we got her eyes rinsed, then I'm back on my phone locating my dad, who we then met up with.

Q At some point did you personally feel the effects of what you later learned was some type of chemical agent that had been dispersed?

A Yeah. As we were moving from where we were on Abernathy and Moody towards Bond, I inhaled some smoke, I guess, and there was a sharp burning pain in my lungs. It didn't last real long, but it was scary. I was like, "Oh, no," like I just took a deep breath of something terrible. I didn't feel it so much in my eyes. My dad and I both wear glasses. I don't know if that would have provided any protection. But my daughter doesn't, and she definitely got it worse in her eyes. But I felt it in my eyes later. They were dry and kind of achy. Both my dad and I both needed eyedrops. My dad also needed his inhaler -- his albuterol.

The chest pain lingered, I think more for my dad than for me, but I had swollen lymph nodes for two or three days and felt overall crummy, kind of like what it was to be outside at all in 2020 during the wildfires. It felt like that. The headaches lasted maybe three days.

Q At some point were you able to determine that the smoke or the chemical agents that you were inhaling, whether those had been fired off by federal agents?

A I mean, I never saw the agents, but I did -- on our way home -- so we finally connected with my dad, and he had driven. So we started walking out of there towards his car. We saw -- at that point we were feeling safer. I'm looking around more and seeing more people affected, including my cousin, who we ran into on the way out, who looked terrible, like her eyes looked awful -- very red and swollen and still streaming. And she had her own way home, and so we left her there.

But then we got in the car, and we are driving home. I'm Googling what we should do, like if we need medical attention or how to take care of ourselves, and saw right away that there was a statement from the Portland Police Bureau saying, "It wasn't us." So that was my only information really about what happened, is that they said it was -- that they had nothing to do with deploying the tear gas, and so it was definitely the federal agents.

Q Can you approximate distance between where you were

standing when you first felt the effects of the chemical agent and where the ICE facility is located?

A I think it was two blocks. So we only got as far as Abernathy and Moody. You know, we came from Caruthers Park just up a couple of blocks. We hadn't been marching for very long. It was a huge crowd, so we weren't moving real fast. And my dad, like I said, he was closer to the ICE building, maybe at Lowell. I think the ICE building is one more block up, but I never saw it, so I can't really recall.

But there were hundreds of people around us that also weren't yet at the ICE building. My understanding of the path is that we were meant to go from the park up to -- I guess up to the ICE building and then back on Bond back to the park. That was the route we were supposed to take.

Q That was the intention had this event not happened; is that right?

A Yeah.

Q So just to follow-up on that, we were talking earlier about the excitement that you shared with your daughter about going to this rally and expressing your First Amendment rights. Do you believe that your ability to do that on that day -- that is, to exercise your First Amendment rights with your daughter and your father -- were they brought to an end due to the chemical agents that were dispersed in the air?

A Yeah. I mean, we would have stayed longer. We would have

connected with my dad, and my daughter would have learned from him about the different unions that were represented. We would have had great conversations about what was happening and what we were there for. I don't know if my dad got there in time, but he would have been wanting to listen to the speeches as well. We would have talked about that.

I felt -- you know, I felt shame when my daughter's eyes started streaming, because I had been so focused in my dad being in a vulnerable position, like closer to the smoke and being concerned about him and being an elder with asthma. You know, like, that seemed the priority at the time, that we find him. And when my daughter's eyes I started streaming, I realized, like, oh, we are in danger; my kid is in danger.

Yeah -- and I don't ever want to be around the ICE building again. And I don't know that my daughter -- I've been bringing her to demonstrations her whole life. We were at the Women's March. We marched for climate justice. I don't know that she wants -- she hasn't said that she doesn't want to do this kind of thing again. But she's 13 years old and just got tear gassed by her government, and so I don't know what that is going to look like.

Q You described your physical reactions and the pain that you suffered after the exposure. Can you talk a little bit more about the lasting -- not the physical harm -- but if there's any other type of effect psychologically or emotionally

that you yourself experienced or you can speak to what you may have seen from your father or daughter. Can you please talk to that.

MR. BAILEY: Your Honor, I am going to object insofar as the question is directed to what her daughter or father were thinking or feeling.

THE COURT: The evidence rules are relaxed for a preliminary injunction hearing. As of right now, I've not heard anything that I think is unreliable. I am going to overrule the objection and let you inquire about it on cross.

You may proceed.

THE WITNESS: Well, I can stick with what they expressed, because it is hard to know for sure what someone else is thinking or feeling.

THE COURT: Especially a 13-year-old.

(Laughter.)

THE WITNESS: She has been a bit reticent, you know. She hasn't really wanted to process the whole thing as much as me and my husband. But my dad and I, as soon as we saw each other and felt the relief of reconnecting, we both expressed anger with each other. And I don't need to quote and use profanities, but there were profanities, you know. We were so angry and shocked by what had happened.

And since then, I think we've been confused. I've wondered what I did wrong. And then I sort of had a

counter-thought that we didn't do anything wrong. There was no reason to think that should have happened to us.

One of the really striking things that came up afterwards is my younger child, who was sleeping at a friend's that night -- so we didn't want to tell him what happened when he wasn't with his family. So the next day, when we're back with him, I'm like, "Hey, something happened yesterday that I want to tell you about." You know, I don't want to upset him, so I'm not giving a lot of details. "But we were at this event, and this thing happened." He really didn't say much, but he said, "So you were just assaulted by our government." And that changed how I felt about it. I was worried about what I had done wrong and how I could keep my family safer better, and he got right away that something had happened to us, you know.

BY MR. FLEMING:

Q I see. This incident that you went through, has it in any way made you more reluctant in the future to express your First Amendment rights in a similar way at a protest? At a rally?

A I don't want to be near the ICE building. I'm not a particularly risky person. I'm still masking against COVID, you know. I'm not a big risk taker. And I actually feel badly about that, because, you know, people are being kidnapped and killed right now, and I'm pretty comfy because I'm just

prioritizing keeping myself and my family safe.

I don't think I'm going to be quiet. That wasn't how I was raised. But also, I certainly can't do anything that I feel like is putting my kid in danger, which I didn't think that I was. But now I feel like protesters are being targeted, you know; that we are being seen as bad guys, even though we're trying to do what's right and trying to stand up for people.

Q The last question for you: If there was some way where you could get a guarantee or a near guarantee that if you were to go out and protest out in public again at a rally, with the level of assurance that this wouldn't happen again, that you wouldn't be subjected to chemical munitions for simply going out and expressing your First Amendment rights, would that make -- have any impact on whether or not you would go attend another rally?

A You know, I think because I am a fairly cautious person, I wouldn't say "return to the ICE building immediately." I think I would want to see other braver people show up and not be attacked there before I would want to join them. But as long as the current administration is behaving illegally and immorally and attacking our neighbors, I think we should all do what we can. But, yeah, I'm not rushing back to anything that feels dangerous. I don't think we should have to put ourselves in danger in order to speak up, but I would like to continue speaking up.

MR. FLEMING: I want to thank you for your testimony today, and I want to tell you how sorry I am that you went through what you did with your family.

I have no further questions, Your Honor.

THE COURT: Thank you, Mr. Fleming.

Mr. Bailey.

CROSS-EXAMINATION

BY MR. BAILEY:

Q Good afternoon, Ms. Barsotti. My name is John Bailey with the U.S. Department of Justice. I have a few quick follow-up questions for you.

I understand that the rally you attended on January 31st was in support of unions and workers?

A Uh-huh.

Q Do you know if any of the federal agencies that help protect the ICE building, do you know if any of those agencies are unionized?

A I don't.

Q At about 4:33 p.m., that's when you heard a couple of loud bangs; is that right?

A A few loud bangs, yeah.

Q And you saw smoke?

A Yeah.

Q And it was one to two blocks away when you saw it?

A Yeah. I'm not totally sure. The crowd was large enough

that I couldn't quite tell how far away it was. Yeah, at least a block.

Q And I think you said a moment ago on direct that there were -- just around you -- hundreds of people, right?

A Yeah.

Q So you couldn't see what precipitated the smoke you were exposed to?

A No, not at all. I couldn't hear anything beyond the bangs either.

Q You also mentioned seeing a group earlier in the afternoon that -- I think you said were maybe pro-ICE or appeared to be?

A Yeah.

Q And you said that group was raucous and eventually they seemed to dissipate or split up?

A Yeah. I don't know what happened. I just was hearing them and seeing them, and then I didn't hear or see them.

Q You didn't see them engage in any assaults on officers?

A Nope. I didn't really see officers. And I didn't see anyone engaged with those guys that I assumed were protesters.

Q When you were able to see that group that we're talking about, you didn't see them obstruct the driveway to the facility?

A We were still at Caruthers Park when I saw them. We were outside of the convenience store -- I don't know what it's called -- but that's right across the street from the park. I

just saw them walking down the street. The most unsettling think about it was whatever recording they were playing that sounded awful.

MR. BAILEY: Thank you, Ms. Barsotti. No further questions.

THE COURT: Thank you, Mr. Bailey.

Anything further within the scope, Mr. Fleming?

MR. FLEMMING: No, Your Honor. Thank you.

THE COURT: Thank you, Ms. Barsotti. You may step down. Thank you so much.

Plaintiffs may call the next witness.

MS. MOISAN: Your Honor, Jane Moisan for plaintiffs. I am calling plaintiff Hugo Rios.

THE COURT: Very good.

MS. MOISAN: Your Honor, may I sit for questioning?

THE COURT: Of course. Folks, you don't need to ask that anymore. You're welcome to, but thank you for asking.

(The witness was duly sworn.)

THE CLERK: Would you please state your name for the record, spelling your last.

THE WITNESS: Hugo Rios. H-U-G-O, R-I-O-S.

THE COURT: Ms. Moisan, you may proceed.

DIRECT EXAMINATION

BY MS. MOISAN:

Q Good afternoon, Mr. Rios. You are a plaintiff in this

case, correct?
A Yes.
Q And as the Court is aware, you planned to appear remotely today. We appreciate your being here with us in the courtroom. If you do need to ask for a break, just let us know and make the request.
A Yes. Thank you for the approval of that. I appreciate it.
Q You also submitted a declaration in this case?
THE COURT: That's Docket 20.
MS. MOISAN: Docket 20, correct.
BY MS. MOISAN:
Q That declaration, you've had a chance to review it?
A Yes, I have.
Q Does it remain correct today?
A It does.
Q Okay. Thank you.
Could you tell the Court just a little bit about yourself: Where you're from and your background?
A I like to kind of summarize myself a little bit as a disabled Afro-Indigenous Latino veteran. That kind of summarizes my life and being born in Puerto Rico. I went to college in Syracuse, Upstate New York, and ended up here in Portland, thanks to the U.S. Air Force. I was veteran and served for seven years. I ended up here in 1996, and I love it

here.

My career has been pretty diverse from location and places where I worked and stuff like that. But there has been one pretty amazing thing that happened to me when I was seven years old. I was at my dad's orthodontist. I was in the waiting room. The orthodontist came out and gave me a 1969 Minolta SRT 101. Sorry. I remember exactly what it was, and I still have one.

Ever since that day I have been photographing ever since, mixed in with my career as adult learning professional. I've been covering all kinds of -- I've been doing all kind of photography -- art, landscape, people -- I tried weddings. I wouldn't do them again. A lot of corporate events and journalism -- a lot of journalism that I have seen that kind of related to me as Puerto Rican.

Q You said photography and journalism that relate to you as a Puerto Rican. Can you talk about that a little bit.

A Yeah. Well, I was born and raised in Puerto Rico. Then I moved over here when I was 17. And seriously, like from the moment I landed in the mainland, my citizenship has been questioned over and over and over again. Having to explain it and being in places that are even strange, it keeps getting questioned, and it influenced a lot how I look at even protests and what do I cover.

And it reflects a lot about my own upbringing and who

I am and even my family. I have two kids, four grandkids -- five -- sorry. I forgot the girl. She was just born a little bit ago. And they're part Mexican also. So I've been covering a lot of that -- protests in Puerto Rico; protests here. It has been one of those things that really connected me.

Q And did you begin at some point documenting or photographing protests at the ICE building?

A Yes, I did. At the beginning of August, I started going over there. I was actually kind of -- I don't know -- during that time, like, I wasn't -- I was hearing things through social media and things like that, but I was not hearing anything in the real media out there.

It was kind of strange to me, and it was, like, you know, this is an opportunity for me. I was actually trying to find -- because of my disability, I haven't been able to work. And when I'm with a camera, it is so much easier for me. So I went to cover the events that were happening in August. It was something that I thought I needed to do and along the line of what I could do and my skills.

Q And you said it is easier for you to do this with a camera. Can you explain that.

A Yeah. So I'm autistic, I have ADHD, and I have PTSD. One of the things that I have a lot of trouble with is being in a social environment with a lot of people. When I'm with a camera, especially my video rig, it's -- I have to hold it with

both hands. I look at the screen, I look at the monitor, and my brain can actually not feel overwhelmed by the social aspect, and I can focus on that. I can pay attention to what's happening around me very clearly and everything by kind of focusing my vision on the screen. So it helps me a lot. It actually is probably one of the best ways that I can be in a social environment. I use it as a tool all the time for that.

Q Did you begin documenting protests at the ICE building in order to engage in violence?

A No.

Q Did you go there intending to damage property?

A Absolutely not.

Q How many times did you document at the ICE building when there were protests?

A There were seven separate days that I went down there to document.

Q And September 1st was one of those days; is that right?

A Yes. That was actually the last time I was there.

Q And what was your purpose in attending on the September 1st, 2025?

A I wanted to capture it. I wanted to see what was going on. I had been there like a week before, and I had witnessed and recorded an incident. And I was like, wow, this is pretty bad. So I decided to come back again that day to actually record it -- to record what was going on and be more -- capture

a more complete story, because there was a march that started at the park on Moody that actually ended up -- once they closed, and they were speaking and everything, I captured that. I was capturing them moving, marching down to the ICE facility on Bancroft. It was just very peaceful, very cool, and it was a great opportunity to actually see everything -- from speaking to actually protesting in front of the facility.

Q What were you wearing that day? What gear did you have with you?

A So I was wearing my pants, a shirt. I had a cover shirt. It was just chilly that day. I was wearing my "PRESS" Velcro label, and I was holding my Canon R6 video rig. It's rather expensive.

THE COURT: So I understand, you had a label that said "PRESS" on your chest?

THE WITNESS: Yes.

THE COURT: All capital letters?

THE WITNESS: Capital letters.

THE COURT: Approximately what was the height of the letters?

THE WITNESS: They are -- the patch is approximately about nine to ten inches long and about three or four inches high.

THE COURT: Three or four inches high. What color were the letters?

THE WITNESS: White on black background.
THE COURT: Thank you.
BY MS. MOISAN:
Q About what time did you get there on the 1st of September?
A I can't remember exactly, but it was somewhere, I think, around four o'clock p.m. is when I got to Caruthers Park if I'm not mistaken, that's what it is called. I think it was still like six o'clock when we actually got to the -- the march moved over, and I actually moved to the ICE facility -- in front of the ICE facility.
Q How would you characterize the crowd?
A Oh, the crowd was -- it was amazing. It was very lively. Yeah, there was protesting. There were -- especially when we got there in front of the ICE facility, there was a DJ set up. There was music. There was dancing. There was very clearly nobody actually crossing that -- there is a blue line that says "Government Property," or something like that on the sidewalk there on the driveway actually. There was nobody over there. Everybody on the street and everything. There was cars that would come by down Bancroft. Everybody would clear up for them. It was very, very friendly. Very -- I was -- I don't know. I would characterize it as a celebration of freedom at the same time a protest. It was very, very joyful.
Q About what time frame is it that you would describe the crowd as friendly and joyful?

A All the way up to about 10:20 p.m.
Q During that time frame had you seen any law enforcement?
A No. I had seen some law enforcement actually in the building above on the higher part of the building obviously scoping out -- they actually had -- I just remember they actually had kind of a spotlight, and they even shined it on me when I was standing there just looking for the right angle and stuff like that, but that was it.
Q Had you seen anyone attempting to damage federal property in that time frame?
A No, I did not. I did not see anybody around the facility actually doing that -- damaging property.
Q Did you see anybody making any verbal threats to anyone else?
A I didn't hear anybody actually making any verbal threats to anybody really.
Q In your seven years' experience in the law enforcement sector, was there anything that popped out to you as a threat?
A No. Absolutely not. Just to clarify, I was in the Air Force, and I was a law enforcement specialist in the Air Force for seven years.
MS. MOISAN: I would like to offer Plaintiffs' Exhibit 5.
THE COURT: What is it? What is 5?
MS. MOISAN: This is a video taken by Mr. Rios on

September 1st at about 10:20 p.m.

THE COURT: All right. Any objection?

MR. YUN: No objection.

THE COURT: Received.

(Video was played in open court.)

MS. MOISAN: Your Honor, we are trying to access the audio for the video.

THE COURT: Mr. Rios, this is a video that you took on September 1, 2025, correct?

THE WITNESS: That is correct.

THE COURT: Okay.

MS. MOISAN: Your Honor, we do want to request a little break while we sort out the tech.

THE COURT: No. That is not the way to keep things moving.

MS. MOISAN: You don't know what she does for us.

THE COURT: Move on. Ask him more questions. I have read his declaration a couple of times. I have even highlighted some things in it. Let's bring out what he wants to say. If you want him to tell us what is on the video, he can tell us, but we're keeping things moving.

MS. MOISAN: Thank you, Your Honor.

THE COURT: You're welcome.

BY MS. MOISAN:

Q Do you know about what time this video begins?

A Yes. About 10:20, 10:24, somewhere around there that evening.

Q Were you able to see a bit of that video?

A Yes.

Q And do you recall where you were standing when you began filming?

A Yes. I was actually across the street directly in front of the gated area -- their entry. I was actually sitting on the sidewalk filming from the ground towards the facility.

Q How long had you been sitting in that spot -- or in that spot?

A I had been sitting there filming and just waiting for probably about half-an-hour to 45 minutes.

Q In that time had you heard any LRAD announcements?

A Yes. I heard some automated LRAD announcements that I heard every time I was there warning that they might deploy gas and talking about how trespassing was illegal and things like that, but that was it.

Q And had you heard any announcements with instructions to disperse?

A No.

Q Had you heard any verbal instructions to the crowd coming from law enforcement?

A Definitely absolutely not.

Q And who were you standing with? Who were you near?

A So at the moment I was actually right there in that area with my partner, who was also taking photographs. There was just -- really around that area there was mostly just other photographers and media people actually trying to cover the event and streaming live -- streaming and stuff like that.

MS. MOISAN: Your Honor, the Court will be able to review the video. We have sound. Right now, the Court will be able to.

THE COURT: I knew you could do it.

(Video was played in open court.)

BY MS. MOISAN:

Q At the time where we paused this video, were there protesters remaining in front of the ICE building?

A No. They had actually moved down Moody -- down Bancroft towards Moody and further down Moody.

Q So we're at the bottom of the screen. Can you tell us what you might have noticed in the last few seconds?

A A canister; smoke getting thrown over.

Q Where was the canister directed?

A It was directed right at us -- at the people who were actually filming.

Q Again, was there anybody in that area? Any protesters in that area?

A No.

Q It was only media right there?

A Yes. All the protesters had moved down to Moody and Bancroft.

THE COURT: Were there other people besides yourself standing near you that also had some type of "PRESS" insignia?

THE WITNESS: Yes. There was at least one other.

(Video was played in open court.)

BY MS. MOISAN:

Q Now, in this segment of the video where the protesters had already been moved away from the front of the building, do you know how far away they had been moved?

A As you can tell from the smoke, it was pretty difficult to tell how far they were. The smoke was really, really thick. It was very thick even around the agents.

Q During this portion of the video, where were munitions being fired?

A Interestingly, they were being fired from right there to the agents there. I think you may have noticed this in the video. But for some reason they were firing towards themselves from the one level -- the mezzanine kind of area of the building, they were up there. There were a couple of agents up there, and they were firing into the smoke right there to the other agents.

(Video was played in open court.)

THE COURT: I assume that was you?

THE WITNESS: It was me. Sorry for my language at

the time. But yeah, it was actually pretty jolting for them to physically attack me during that time.

BY MS. MOISAN:

Q It was not what you were expecting?

A No, not at all. Not at all. Especially, as a journalist, one of the first things that you do, you do not want to interfere with them. So you stay to the side. I never moved anywhere out of that sidewalk on Bancroft across the side -- across the building.

THE COURT: You were on the public sidewalk --

THE WITNESS: Yes.

THE COURT: -- across the street, with the ICE facility building on the other side of the street?

THE WITNESS: That is correct.

THE COURT: Okay. Back to you.

BY MS. MOISAN:

Q Again, no protesters in between you and the facility?

A There were no protesters left anywhere in front of the facility at all. The sweeping team, as you saw before -- there was a sweeping team that came from Macadam out of nowhere, they shoved me as they were trying to push through. They were expecting -- I don't know really what they were doing, because they just marched through and then joined the others that were down by Moody.

So, yeah, it was not expected at all, especially

physically hitting me like four times and hitting my camera. They hit my camera. That specific individual hit my camera several times directly, trying to push me down to the ground and even loosened the connections on my camera. I actually lost power to the camera, and I wasn't able to record with my professional-level camera, which is why we're using this iPhone video, because I had both connected on the same mount, to make sure I had one as a backup. And thankfully I did. So the other one actually stopped recording a few moments later.

THE COURT: Mr. Rios, when you say that the law enforcement officer hit your camera, hit it with his hands? Hit it with munitions? Hit it with something else?

THE WITNESS: Hit it with his hands. Then he hit it with -- there was something physically that he had. I think it was his -- the pepper ball that he used to actually hit the camera.

THE COURT: Basically with a portion of the weapon that he was holding.

THE WITNESS: Yes.

THE COURT: He wasn't firing at your camera. He hit it with his hands and then with his weapon?

THE WITNESS: Yes.

THE COURT: Got it. Back to you.

BY MS. MOISAN:

Q Did you hear any specific instructions on where you

supposed to be?
A No.
Q Could we play 614 to 619, please.
(Video was played in open court.)
MS. MOISAN: Could we play that again?
BY MS. MOISAN:
Q Do you know which direction the officers are moving in this clip?
A So they are facing the corner of Moody and Bancroft, and they are stepping back up Bancroft towards Macadam towards their facility.
Q Had protesters advanced upon the agents?
A I did not witness any protester advancing at them.
Q Had you seen any threatening behavior on the part of the protesters?
A Absolutely not. And the distance between them -- between protesters and these officers -- was at least 15 feet.
Q Thank you. Could we please play 619 to 638.
(Video was played in open court.)
BY MS. MOISAN:
Q Mr. Hugo, what did you hear in that last clip?
A A lot of shots and more gas canisters being thrown over there.
Q Just to clarify, as of this moment, the crowd had not advanced on the officers?

A No, they had not.
Q You had not witnessed any violence from the crowd?
A No.
Q Had you heard protesters threatening officers?
A No, I did not hear any threat.
Q Did you see protesters throwing things at officers?
A No.
Q Did you see protesters brandishing weapons?
A No.
Q Could we please place 639 to 656.

(Video was played in open court.)

BY MS. MOISAN:
Q Mr. Rios, could you describe the gas and smoke as you witnessed it?
A It was pretty intense. There was really a wall of smoke that was in front of almost every single protester out there, and there was over a hundred. Visibility was, like, maybe a foot after that smoke started. It was very, very thick.
Q You said there were close to a hundred protesters?
A Yes.
Q Within that cloud?
A Yes.
Q Those shots that we hear, are they being fired at the ground?
A I did not see any shots actually at that moment being

fired, like, to the ground specifically. It was pretty much, as you saw, some of the firearms were actually aimed higher. They were shooting into the smoke.

Q Please play 657 to 722.

(Video was played in open court.)

THE COURT: Rewind that a little bit. I want to see that last piece again. There we go.

BY MS. MOISAN:

Q What happened in that clip?

A As they were retreating, that gentleman there actually threw a gas canister right at my feet. I was still on the sidewalk, by the way.

Q Were there protesters in your vicinity?

A None.

Q Who were you standing with at that point?

A Nobody. There was nobody else around me that I knew of.

Q Play 723 to 733.

(Video was played in open court.)

MS. MOISAN: I would like to move to admit this video as Plaintiffs' Exhibit 5.

THE COURT: You already did. There was no objection. It was received.

MS. MOISAN: Thank you, Your Honor.

BY MS. MOISAN:

Q Mr. Rios, can you explain what we just saw.

A Yes. So they threw a canister at me at my feet -- towards my feet. It stopped really just, like inches, because of the sidewalk, the curb. And when I looked down to see where it was to make sure I was safe, that I was not going to burn up or anything, that's when I first -- when I started feeling being shot at with pepper balls and what I'm sure was non-lethal munition.

I was shot a lot of times -- over 20 times. And I couldn't even count how many shots were fired at me. They were only firing at ME at that moment. They hit my feet, my shins, my thighs, my head, my stomach, my shoulder. They hit my camera to a point where they actually dented the battery pack I had on it. They hit the camera a couple of times. It was pretty intense. I had to pretty much use my $10,000 camera to kind of protect myself.

THE COURT: Mr. Rios, in this video, there are a few officers there with their weapons raised in your direction. Did you see any either numeric or alphanumeric identifying numbers on any portion of their uniforms so that we can identify who those folks were?

THE WITNESS: I did not. I mean, they had some, but I've actually been looking at it, and I can't see anything clearly in there. Maybe if I spent more time, I can actually identify them.

THE COURT: Thank you.

BY MS. MOISAN:
Q In essence, you were holding your camera up to protect yourself?
A Yes. It was -- I mean, I was in the military for seven years. I was right in the middle of -- during the first Gulf War conflict. Honestly, I wouldn't have expected this even there. It was -- it just -- it was really rough. It was really rough to be there, standing there, and just getting hit so many times in a short period of time and for nothing -- for nothing. I was just standing there filming.
Q How did you -- go ahead.
A That's okay.
Q How did you get out of this situation?
A So I paused. I mean, as they retreated, I actually tried to -- I went and positioned myself somewhere else, somewhere safer. I continued to film a little bit and -- sorry.
Q Take your time.
A Sorry. Repeat the question.
THE COURT: How did you get out of it?
THE WITNESS: So I just kept moving up Bancroft to get out of the way to make sure that I was not being targeted again. At the same time I was keeping an eye on them, and they were actually retreating back to their spot.
THE COURT: You were walking backwards to keep an eye on them?

THE WITNESS: Yes.
BY MS. MOISAN:
Q Tell us, after getting out of there, what you noticed -- what it was like, realizing what had happened.
A It was -- it was traumatic as hell. Being really attacked in that way for just filming, not having anything else to resemble a firearm, not even saying a single word was just -- I really felt like I was nobody; like I was a frickin' target to them. And it really, really upset me. Honestly, I served my country for seven frickin' years to get this sitting there -- standing there -- just filming? That's ridiculous.

To this day, even preparing for this and looking at this, I just feel the rounds hitting me, and it was absurd. I don't think any other -- honestly, I don't think any other reporter -- any other journalists there that day got hit the way that I did. And it made me feel very angry, because, here I am, a journalist, who is trying to cover this, because the main-stream media is not covering it. I already had one -- I submitted a prior video to one of the media distribution organizations, and they had even blocked it. They told me I couldn't sell it to any other media there in the organization.

And here I am, and it just shut me down. They disabled my camera. They just -- it really destroyed me for a while emotionally and shooting down my best way to actually try to make some money, because I can't work, because I'm in the

whole process of disability that has taken already at least a year, and I'm looking at another year for that. It's ridiculous --

Q What about physically?

A I was -- immediately after that, I had to actually go to the car. And I was lucky that my partner and I had gone on a vacation trip, and I had an extra set of clothes. But I had to -- in the middle of Moody -- actually strip myself down very, very carefully, because it was covered -- covered in pepper powder. The powder -- I was in pain from all the shots. I couldn't -- I didn't even realize that until that moment my camera had been shot so many times.

It was -- it was pretty drastic that I had to actually take everything off, put it in the car, put stuff in bags, and put it in the trunk, and then go home. And I had to leave it there until the next day, because getting it out of there was impossible. My throat was, like, in bad shape, and my eyes and everything, for at least another 24 hours, and I was wearing goggles and a mask.

It was -- and the pain from it -- I mean, I had -- the bruises were like clear three weeks later. Still a month later, I still -- every now and then, a particular shot that they hit me in the knee hurt when I walked. The one on my shoulder actually hurt for the full time, like, for over a month.

Q After this experience, do you feel safe covering protests at the ICE building?
A Heck no.
Q Do you intend to return to the ICE building?
A I do not. Unless it's safe somehow, there's no way. I mean, after what was done to me when I was actually doing everything by the book, I thought -- at least I thought. I don't know. I looked at them wrong? I don't know what happened.
Q I know you have talked about a lot of upsetting things. I want to ask you about what it means to you not to be able to return to document the protests.
A You know, after you heard me describe that I'm Latino, I'm from Puerto Rico, my family is mixed with Mexicans, my law enforcement background, even military background, my background covering protests, it is kind of -- it is kind of rough to think back at that and that I was stopped from doing something that I think is very necessary.

People need to know what is happening out there. My people need to know, you know. My brothers and sisters from Latin America need to know that, you know what, in this country, we're not just standing there doing nothing about it. And I want to cover that and share it with the world. I really would love to. I can't. But I would really like to do that for everybody else.

Q Is it fair to say that if you could do so and be ensured safety, that you would?
A Absolutely.
MS. MOISAN: No more questions. Thank you, Mr. Rios.
THE COURT: Mr. Rios, before we go to questions by defendants' counsel, I was reading your declaration. There was some time when the officer -- one of the DHS officers who were attacking your camera -- I think you said something to him that you were just filming.
Do you recall that?
THE WITNESS: Yes.
THE COURT: Tell me what you said and then tell me what you recall that officer said in response to you, please.
THE WITNESS: I said, "I'm just filming," and that officer said, "I don't care." And that's when he proceeded to push.
THE COURT: And that's what I see in paragraph 7 of your declaration.
Also, you told us about the number of times you were hit. You were hit in the knees. Did I hear you also say that you were hit above the waist? Hit in the shoulder?
THE WITNESS: Yes.
THE COURT: With the pepper spray less-lethal munition?
THE WITNESS: Yes. I was actually hit on my waist on

my shoulder, and my camera. The way that I hold it is like this (indicating). And my camera was hit. So it was -- the shots actually hit about that.

THE COURT: So you were holding the camera above your waist as well.

THE WITNESS: Yes. Correct. Always.

THE COURT: And at least one of those munitions hit your shoulder you said?

THE WITNESS: Yes.

THE COURT: All right. Defendants may inquire.

MR. YUN: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. YUN:

Q Good afternoon, Mr. Rios. My name is Alex Yun. I'm here on behalf of the Department of Justice. I have a few questions for you.

I would like to begin with your physical appearance while you were documenting these protests. You mentioned that you always attend wearing an indication marked "PRESS" on your chest?

A Yes.

Q And is it also true that you wear a helmet and goggles?

A Yes.

Q And you also mentioned that when you hold your camera -- you hold it like this in front of your chest?

A Yes.
Q Or your iPhone?
A It is right on the front of my torso.
Q And same thing for when you're holding the iPhone?
A The iPhone is actually connected on the same actual mount. So when I'm holding the camera, the phone is actually mounted right there to it, so both hands on the handles, and it has both cameras there.
Q So you hold the camera, and you hold the iPhone with the exact same part of your chest?
A Yes.
Q So would it be true to say that when you're holding your camera, you're blocking the "PRESS" indication on your chest from being visible?
A Not necessarily, because if it's -- when I have the "PRESS" up here, like I said, the camera is held not in front of my chest necessarily, but my torso. So if I actually put it right on my chest, the monitor will be too high for me to see. So I actually incline it, and I actually put it, like, almost at my waist so that "PRESS would actually be seen very clearly.
Q But you are holding something in front of your chest?
A Yes.
Q So at certain angles that might be able to block the indication of "PRESS" on your chest?
A It might be.

Q I would like to turn to your time videoing the protests at the ICE building. You mentioned that you started videoing in the beginning of August 2025?
A Correct.
Q And you mentioned that you attended seven different protests during that time?
A Correct.
Q But you only mentioned that on September 1st, 2025, you were subjected to less-than-lethal munitions?
A That's correct.
Q So would it be a true statement that on six of the seven days that you attended, you were not subject to less-than-lethal munitions?
A Yes.
Q And on those six out of seven days, the protests were peaceful and no incidents?
A They were peaceful. The protesters were peaceful in every instance I was there. But there was -- the week before, there was an incident there that I captured where they actually came in to clear them -- to clear the road to let a car out. They backed in, no conflict, no challenge, no physical confrontation, or anything. They backed up toward the gate, and then they rushed out and actually attacked the protesters. And I do have -- I was there and captured it.
Q But you were not affected at that time by that at all?

A No.
Q I would like to turn to the announcements that you heard. You mentioned that every time you were at one of the protests, you heard announcements from the ICE building stating things like, "Clear this facility" or "This building is closed," things like that?
A Yes.
Q That was every single time that you were at a protest?
A Yes.
Q And you also mentioned that those announcements contained warnings that gas may be used?
A That's correct.
Q That was every time you were at a protest?
A I would not say that it was every time. I cannot say for certainty if it was.
Q So your testimony is that you heard announcements every time, but not all those announcements contained the mention of gas?
A The announcements actually, every now and then, changed suddenly. So there was -- in essence, there was announcements that were general and broad recorded.
Q I would like to turn to the September 1st, 2025, protest. You mentioned that you attended almost the entire day?
A Yes.
Q Approximately when did you begin attending?

A I went over there somewhere in the mid-afternoon to Caruthers Park. Then I moved over in front of the ICE facility at some time when it was closer to dusk, when they marched over to the ICE facility down Moody.
Q And approximately when did you leave the protests?
A When did I leave the protests?
Q Yes.
A Like minutes after I actually got shot.
Q I'm asking about timing. Was it like 11:00 p.m.? Midnight?
A It was probably somewhere around, I would say 11:30 or so.
Q So you were in attendance approximately in the beginning of the afternoon until 11:30 p.m.?
A Probably. I can't be certain about what time I left, but it was shortly after I was actually assaulted.
Q In that time frame we just identified, you were present the entire time? You never left?
A No. I did leave for a break, and it was earlier on. I can't recall exactly right now. I had it written down somewhere.
Q Can you approximate -- sorry.
A Go ahead.
Q Approximately how long were you gone from the premises?
A I think it was only like half an hour to get something to eat and then come back. I could tell you more accurately if I

can look at the videos that I have, because it will tell me the time I'm not filming.

Q But your approximation right now is you were gone for approximately half an hour?

A Yeah.

Q During that time you don't know what occurred at the ICE building?

A Can you repeat that again?

THE COURT: While you were on your dinner break, do you know what was happening at the ICE building?

MR. YUN: Thank you, Your Honor.

THE WITNESS: No. Sorry.

THE COURT: That's okay.

BY MR. YUN:

Q While you were -- when you returned, did you have a good vantage point to view the entire facility?

A I need you to be more clear, because, first of all, I'm autistic. Right now, you are asking me if I had an aerial view of the whole facility. No, I don't.

THE COURT: I think what he is asking simply is -- and I understand. When you came back from your dinner break, from that point forward, were you able to see, let's say, the front of the ICE building the whole time?

THE WITNESS: I was able to see the front of the ICE building, and I was able to see also parts of the west -- the

east side of the building by the train tracks and part of -- on the west side, because I was on the sidewalk on Bancroft right where most of the media work with all the cameras just walking up and down.

BY MR. YUN:

Q Were there any portions of the ICE facility that you were not able to see?

A Yeah.

THE COURT: You don't really mean to ask it that way, do you? You mean like the back side? Things back there?

Let's be more efficient, please.

BY MR. YUN:

Q Were there any portions of the front of the building where the protest was occurring that you could not see?

A I'm still finding that question a little too vague for me to answer correctly, because there was over a hundred people. I could see from my view -- even my camera -- a lot of what was going on even in the front of the line there with the people there.

Q So you just mentioned that there were a lot of people. I assume that means a lot of activity was happening all at once?

A Yes.

Q I mean, just being human, you probably couldn't keep track of everything that was happening at the same time?

A No, I probably couldn't. But I could keep track of

everything that was happening -- probably through my camera especially -- for about 90 percent of the front of that building. Please understand that I'm also autistic, and I have ADHD, and my brain can capture a lot of stuff that's going around.

Q I would like to just mention one more thing that you mentioned on direct examination. I think you stated something -- and correct me if I'm misquoting you. You said something like you didn't interact or try to engage with the ICE officers.

A I did not say I didn't try to engage, because I did. I actually -- in the video you can actually see, after I got pushed and shot by that officer, I was in that corner, and I was next to another officer. And I told them very specifically, "Can you please watch my back," which is customary for me to tell somebody when I don't have access to what's happening behind me, and I don't want to be in their way. I was not trying to be in their way. At that point I did interact with them, and he didn't understand what I said. And I said, "Okay. Never mind."

Q We were also watching a video in which you interacted with another officer and used vulgar language, shall we say?

THE COURT: Something about the way you treat a veteran. Do you remember that?

THE WITNESS: Oh, yeah. I remember that. Uh-huh.

THE COURT: What's your question?

BY MR. YUN:

Q So you would admit then that you did interact with the officers in a potentially volatile way?

A I'm sorry?

THE COURT: That's a very vague way -- we heard exactly what he said. We heard how he said it. Ask an appropriate question.

MR. YUN: I have no further questions.

THE COURT: Anything further, Ms. Moisan?

MS. MOISAN: No. Thank you, Your Honor.

THE COURT: Thank you very much, Mr. Rios. Let me tell you we do allow people to testify remotely by video conference, but sometimes it's just much more effective and powerful when a witness comes in and testifies in person. I thank you for the courage in doing that.

THE WITNESS: I really appreciate the flexibility you gave me initially. I'm really glad I had the courage and the support to actually make it in person.

THE COURT: Thank you, sir. You may step down.

Plaintiffs may call the next witness.

MS. HUTCHISON: Your Honor, our next intention is to play portions of the deposition transcripts.

THE COURT: You may.

MS. HUTCHISON: The defense has a dispute with us as

to whether portions that we want to play should be confidential. I think we can handle it very quickly at sidebar.

THE COURT: Sure. Although let me ask you this: As long as we don't mention any agents' names, why do we need to discuss that procedural question at the sidebar as opposed to on the record? If you tell me we really do, I'll trust you. But I don't see why we need to discuss that procedural issue at sidebar as long as no one mentions agents' names.

What am I missing?

MS. HUTCHISON: That's fine with me. I defer to the Government.

MR. ROSENBERG: Your Honor, we received plaintiffs' identification to the portions of the deposition transcripts they want to play, and we're good with the vast majority of it. In one transcript, there are six lines that we believe is law enforcement sensitive. In another transcript, there are two lines that we believe involve that.

THE COURT: All right. Why don't you tell me at sidebar what those lines are.

(Discussion was held off the record at sidebar.)

THE COURT: All right. We just had a discussion sidebar off the record. I think that plaintiffs' counsel is going to make some adjustments to the videos they plan on showing. It should take a few minutes to make those

adjustments. With those adjustments, I understand defendants have no objection then to the videos being shown, correct?

MR. ROSENBERG: That is correct, Your Honor.

THE COURT: Take your time then. Make the adjustments and let me know when you're ready.

MS. HUTCHISON: Your Honor, if you would like, while she is working on that, we also have another dispute with the defense about whether the use of force policies themselves should remain confidential. We could use that time now for the Government --

THE COURT: I reviewed them. My best estimate is that portions of the use of force policies that I think are relevant to this case probably are not confidential, and we can talk about those maybe tomorrow morning before we start. But there are portions of the use of force policies that I think probably should be kept confidential under a law enforcement protection. But I don't think they're relevant to this case. So why don't you see if either you can redact out the portions to which there are objections, or if it is easier in the other direction, just show me the excerpts or present in open court tomorrow morning the excerpts of the use of force policies that are most relevant to this case, which I don't think are going to be subject to any proper objection. Why don't you confer among yourselves.

I'll tell you what, if there is any remaining

disagreement, send them to me by email this evening, and I'll give you rulings in the morning. I looked at the use of force policies and the portions that I think are most relevant to the issues before us. I don't think they're subject to a law enforcement protection objection.

There are other things, as I said, that probably would be, but I just don't think they are that relevant. So confer further. Let me know by email tonight. Copy everybody, of course. And I'll make rulings by first thing tomorrow morning.

MS. HUTCHISON: Thank you.

MR. ROSENBERG: Thank you.

THE COURT: All the pressure is on Ms. Hallett.

Would it make your lives much easier if we just adjourn for the day?

MS. HUTCHISON: It might, Your Honor.

THE COURT: All right. Fine.

We will pick up at nine o'clock in the morning. Please let me know if there are objections I can rule on. I'll be glad to look at them at email almost 24/7. So let me know by email. Then we will keep things moving tomorrow. We will start at 9:00 a.m. sharp tomorrow.

Thank you.

(Court adjourned.)

--oOo--

I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/ Dennis W. Apodaca March 11, 2026
DENNIS W. APODACA, RDR, RMR, FCRR, CRR DATE
Official Court Reporter

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"ANSWER: [1] 1:148/11
BY MR. BAILEY: [13] 1:98/16 1:101/11 1:106/13 1:108/4 1:110/6 1:112/10 1:113/15 1:114/20 1:115/3 1:115/8 1:117/19 1:118/14 1:208/8
BY MR. BORDEN: [1] 1:179/21
BY MR. FLEMING: [4] 1:192/3 1:192/12 1:192/25 1:206/16
BY MR. ROSENBERG: [11] 1:60/3 1:71/1 1:72/2 1:138/2 1:141/18 1:148/6 1:149/15 1:150/23 1:152/22 1:157/6 1:158/23
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Rough draft transcript - Dickinson v. Trump

March 3, 2026

P R O C E E D I N G S

(Open court:)

THE COURT: Good morning, everyone.

COUNSEL: Good morning Your Honor.

THE COURT: First, I thank defendants' counsel. My guess it is Mr. Warden den for filing the class certification brief. I will tell plaintiffs' counsel if you would like to be heard in writing on that, as well as closing argument, I would love to see your reply by midnight tonight. So with that said, plaintiffs may proceed.

MS. HUTCHISON: Your Honor, we were anticipating discussing our respective positions on whether the use of force policies could be made public today. We sent our request to the Government last night, and I believe we are still waiting for their response on that, but I could check in with Mr. Rosenberg now.

THE COURT: All right. Well, with all consideration of the need of the public to see and understand what's going on, the highest priority I have right now is making a correct decision on the correct facts. So until we have resolved that and when you hear back from them we will talk about it during our lunch break, let's proceed and just refer to them confidentially. I've got the documents. I have got access to

all of the sealed records. Tell me what to look at and when to look at it and I'll follow you. And then maybe by mid-morning break up hear back from the Government on their position then we will talk about it if we need to at lunch. Will defendants be able to communicate their position by the mid-morning break to plaintiffs please.

MR. ROSENBERG: Correct, Your Honor. Over night we cleared about a half dozen deposition transcripts for plaintiffs to show in court. We are in the process of reviewing and redacting what we believe are the sensitive portions of the policies so as much of it can be shown to the public as possible.

We recognize that there may still be some areas of disagreement but we are actively working to narrow those as much as possible.

THE COURT: Thank you.

MS. HUTCHISON: My apologies Your Honor. We were planning on playing a video. But we can't play it on this exchange so we're going to.

THE COURT: I look forward to siege that video some time today.

MS. HUTCHISON: Excellent.

MS. MOISAN: Good morning Your Honor. Jane my son for plaintiff. I would like to call Jack Dickinson.

THE COURT: Very good.

Good morning sir.

(The witness was duly sworn.)

THE CLERK: Would you please state your name for the record, spelling your last.

THE WITNESS: Jack Dickinson. D-I-C-K-I-N-S-O-N.

DIRECT EXAMINATION

BY MS. MOISAN:

Q Good morning, Mr. Dickinson. Are there any other names people have come to know you by?

A I have been known as the Portland chicken.

Q Are you aware you are a class representative in it case?

A I am.

Q What does that mean to you?

A You know I think it is a really -- the first thing I know about it is I'm really proud to represent this group of people that I'm representing. I think over the course of the last year as I have been engaging in these activities I have met some of the most kind, smart, funny people and I'm glad to be able it to bring there case on their behalf. I also think when I look at my -- I think what I bring as well is it complements well with the other plaintiffs in this case.

Q What do you understand to be your responsibility as the class representative?

A I think it is to be an articulator to experiences that people felt. I think it is meant to bring forward testimony

that other people may not be comfortable bringing forward in a certain way.

Q And representing their interests?

A Yes. Representing their interests.

Q You submitted two declarations in this case under docket entries 26 and 58?

A I assume those docket numbers are correct. Yes I submitted two.

Q Have you had a chance top review those recently?

A I have.

Q Do you affirm those?

A I do.

Q Thank you. Can you tell the Court a little bit about your background?

A Yeah. So I grew up in Portland. I graduated in 2022 with a bachelor's in mathematics from Oregon state university. And then in May of 2025 I graduated with a master's in economics from the Stockholm school of economics.

Q What have you been doing still May?

A Since May I have been prioritizing the work that I have become known for. I spend on average about 50 to 20260 hours a week attending and organizing protests, many of them at the Macadam facility.

Q How do you support yourself?

A I'm very support to be financially supported by my

parents. That's something not a lot of people get to say. It is a privilege that I do not take for granted and I'm very appreciative of them. I think this is a country where we have a lot of people where one or two paychecks away from homelessness, and I think those are people many of them I know would like to be out protesting more and simply don't have the ability to.

Q And when did you get involved?

A At the ICE facility early April.

Q Why did you get involved?

A So at the time -- I had been tracking a lot of what the administration was doing. At the time there were two big events that focused my attention there. The first was the video of the abduction of Rümeysa Öztürk and subsequently the way that the pretty innocuous co-authoring in an op-ed spun into inciting domestic terrorism. The second was the treatment of individuals like Kilmar Obrego Garcia who were sent to a foreign -- sort of blurs the line between a concentration camp and a death camp.

Q Did you go to protesting to engage in violence?

A No.

Q Did you go there to engage or to damage property?

A I did not.

Q Did you ever do either of those things?

A No.

Q Since you began participating in April, how often have you participated?

A There is a little bit of fluctuation but between four to six times per week would be where I put it, yeah.

Q And have you gotten out a calculator and do you know how many times that means you have attended protests?

THE COURT: He is a math mainly. He can do it in his head.

THE WITNESS: My best estimation is it is about 150.

BY MS. MOISAN:

Q Have you ever participated in a protest at the ICE building that could fairly be categorized as a violent crowd?

A No.

Q After the 150 or so times that you have participated, have you ever seen a protester hurt an officer?

A No.

Q Have you ever seen a protester throwing things at an officer?

A No.

Q On the other hand how frequently have you witnessed officers deploying chemical munitions on the crowd?

A Again, this is something that fluctuates based off of the time period but generally what I have it penciled in as you can expect one a week, typically on the weekends and sometimes you would see multiple during a week. I should note that when it

happens on a given day it typically happens multiple times and I think it is important to note that when munitions, especially pepper balls are deployed, the residue remains in the area for a long time so there are effects of it from deployment.

Q You have seen officers attempt to disperse the protests?

A Right.

Q What have your learned it to expect of law enforcement's response to protests?

A I have learned that it is hard to predict. Yeah that would be my answer.

Q Is there a time that you recall as when you started to see force being used?

A I started to witness force being used in June.

Q In June. Is there anything you noticed about that force and how it was being used?

Were there any patterns that you noticed about when it was being used and how?

A And as far as patterns go, I sort of -- again, this is something -- there is a lot -- there is a lot of things that have changed over the course of the last eight months with different areas. But there were two periods of time in which I was able to recognize patterns in the behavior. The first was from roughly July through -- excuse me -- the end of September, shortly before the war ravaged tweet. It was during this time that the behavior I noticed from the agents was that what

appeared to be training exercises; that they were bringing in crews of agents every two to three weeks and that the conduct that they were doing seemed not at all dictated by the tenor of the crowd but rather predetermined concepts for how they chose to engage on that day.

Q When you say it didn't seem to depend on the tenor of the crowd, can you say more about that?

A So one example of the behavior that was very common among the agents was you know pushing out and holding the line, holding the driveway. During this period of time we would see -- or I would see 30 or so agents come out and do it regardless of if there were one hundred people in the crowd or 5 people in front of the building.

Q Did the energy of the crowd seem to factor into that?

A A little bit. I think -- I tended to notice that there was more aggressive use of force during periods of time when the crowd was energetic but not in a combative way. It was usually that they were energetic in a joyful way.

I can recall multiple instances where tear gas was deployed during the middle of protestors attempting to dance to the Cha cha Slide. Yeah there was a lot of, it felt like we were being punished for bringing joy.

Q Was there anything about the officers specifically that you recall having an impact on the use of force.

A So when I think about how the officers' behavior dictated

the force. If I talk about this era where there were you know crews coming in for two or three weeks, typically it would be the case that we would get a pretty heavy gassing at the beginning of one of those deployments. My speculation was that it was giving them an introduction to how they might be able to behave. Yeah.

Q What about how they were using force changed over time that made you feel that way?

A Yeah. So I think when -- it felt much more aggressive from agents that had been there a short time. It seemed to me that -- we know that there was a very particular image painted about Portland from top administration officials and I believe that that narrative played through into how some of the agents perceived Portland upon their arrival or prior to their arrival. And as they spent more time, it felt like they reassessed maybe what the tenor of the protests were.

THE COURT: One moment. I'm a little confused about something. Yeah many of these officers, at least when I look at the video, it is hard to identify them by facial features. They are often wearing masks. I don't see particularly distinct and conspicuous alphanumeric identifiers. So how do you know that these were new officers as opposed to the same people that you saw three or four weeks ago?

THE WITNESS: So it is very hard to identify them on first glance, but you can -- you are able to identify body

shapes, skin color, certain aspects of characteristics that you may not be able to identify the person individually but you can definitely tell I've not seen that person before or this person that I've become familiar with interacting with is no longer here.

THE COURT: And that's how you tell it is sort of a new group coming in.

A Correct.

THE COURT: Maybe you can't identify the individuals but this looks like a new set of for example.

A Correct.

THE COURT: Back to you Ms. Moisan.

MS. MOISAN: It thank you.

BY MS. MOISAN:

Q Are and was there are there details about the frequency or the number of uses of force that also led you to that conclusion?

A Sorry. Can you ask that one more time.

Q Are there details about the for example the quantities of munitions or the frequency of rounds being used, that type of thing that led you to that conclusion?

A So the other thing that I perceived when we would have one of these new rounds of agents coming in, they would be very aggressive with the use of force. They would be firing a lot of munitions and based off of chatter that I heard from them

when they were conversing with each other, it appeared -- it seemed like they were excited to play with these new toys that they were given.

Q And was there a time when you realized you couldn't predict the level of officer violence?

A Yeah. So there are two moments that are reflected in my declaration that I think really highlight that and really threw me off in terms of what I could predict. I'm referring to August 16th and August 23rd.

August 16th was the day that I was struck in the respirator with a pepper ball and had the legs of my chicken suit singed. I was very confused as to why I was shot in the head. I was not attempting to pose any threat to the agents. I was -- I was confused as to that one. Then on the 23rd, that was the incident where I was standing off of federal property, a location they told us to essentially retreat to multiple times and was shoved by an agent halfway across the street and then shot from the roof with pepper balls.

Q Were you aware of any reason that you believe might have triggered that?

A For the event on the 23rd, I have no clue what was going through that agent's head whether or not that was coordinated or someone going rogue.

The 16th, I don't think there is anything -- I can't think of anything that justified it. It might have been --

they might have perceived where I was standing as a threat, but I don't know.

Q And are there other examples, other days that you recall where the force just did not correlate to the protest activity later on?

A Plenty of times, yes.

Q Were there times when they would push out when you couldn't tell why?

A Yeah. So i talked about this sort of -- I guess not knowing why is maybe a little bit incorrectly -- incorrect way to word it. But there were -- what occurred after the war ravaged tweet we saw more people sent into Portland was a certificating of camera equipment. So these were crews that were embedded behind the DHS officers or up on the roof and it seemed that the level of chemical munitions and force that were used correlated with how many cameras they had present.

Q Are you saying that it appeared that things were done for the benefit of the camera?

A That is what I'm saying, yes.

Q And were you aware of whose cameras those were and who was taking footage?

A Some of them, no. Some of these were individuals who liked the agents themselves were masked. So and not wearing any sort of insignia. So I don't know if they were private contractors or members of one of the departments. Some of them

were recognizable because they were relatively well known right wing content creators that had been invited into the facility either on to the roof or as part of the line of agents to take footage.

Q Did you notice officers deploying munitions in areas that were confusing to you during that time?

A Yes.

Q Where was that?

A So there is one day in particular that I'm reminded of when twice in relatively short succession, probably 15 minutes apart, agents dropped a can of red smoke at their own feet as they were backing up into the facility. The first time this happened, I thought it was an accident and that one of the agents had just you know maybe not fastened it tight enough to their belt and so you know kind of laughed at them. When they came out and did it a second time and I was noticing that there were cameras on the roof filming, I could not draw any other conclusion than they wanted an action shot of agents walking through a cloud of smoke.

Q Do you remember this do you remember about what time this was?

A This would have been early October.

Q Do you remember there being a difference in the appearance in the gas and smoke?

A Yes. So -- are you talking about individual instances of

gas? Because there were multiple colors of it used.
Q For the incident where you saw conservative media filming it from the roof, on that particular instance were there different colors of gas and smoke being used?
A As I said, so it was red smoke used on that day, which is pretty uncommon. As far as I understand anytime I have been exposed to the red smoke, it is smoke, it is not it's not tear gas. So i it the colors would vary from time to time, yeah.
Q Okay not necessarily correlating to cameras being out?
A Not something that I picked up.
Q Thank you. And was there a change in how warnings were given or instructions were given?
A Uh-huh. So during this -- the first era where it was I felt like it was training routines, it was very consistent that any time they came on the LRAD and made an announcement they would push out, maybe with force, maybe not. But near a hundred percent of the time come out of the building and hold some sort of formation or use some sort of force.

That changed very much again. There is this pivot point that happened down there which is the war ravaged Portland tweet. After that happened, it became much less predictable.

THE COURT: When approximately was that war ravaged Portland tweet.

THE WITNESS: I believe it was August -- or

September 28th.

THE COURT: Thank you.

BY MS. MOISAN:

Q Was it common for officers to respond to protesters regarding the protesters' viewpoints?

A Yes.

Q And how would they do that?

A Well, it appeared that there was a lot of use of force and retaliation but i you know we would also see, for example, agents as they were backing up and a protester might say something regarding ICE policy or DHS policy or something about the federal government and you'd see the agent would do something like this. Or as they are backing up, they're sort of waving mocking protesters.

THE COURT: One moment. He when you just gestured, I want to do this for the record. When you just record, did I correctly perceive that what you were doing when you said the agents were doing something like this, you were with your right hand, rubbing your eye as if in like a mocking tear?

THE WITNESS: A mocking tear. Exactly.

THE COURT: I want to make sure the record accurately reflects what you just demonstrated.

BY MS. MOISAN:

Q How frequently would you see that type of response?

A It was a pretty common. It sort of just -- it is hard to

say the exact number because it sort of faded into the background in the sense that it is just it's how I expected them to behave at a certain point.

Q I think you mentioned something about how officers would respond to protesters who were dancing. Can you say a little bit more about that?

A That was just a piece of consistent behavior that I noticed.

Q A typical response would be a use of force?

A Yeah. Again, this is not going to be every single time. But yeah that was a p pattern that I felt like it was common.

Q Have you witnessed counter protesters, right wing media being present. I know you said kind of embedded with officers but being present surrounding the protests?

A Yes. There were three individuals that we would see regularly starting in June and then sense the war ravaged tweet the numbers jumped significantly and usually there is a large number of presence of them on Fridays and Saturdays now.

Q How are you able to identify those individuals?

A Well, oftentimes they're wearing hats or shirts that pretty clearly identify themselves. For a period of time most of them were wearing pins that said antifa and had a line through it. You know MAGA hats. But also they were -- the language that they used was very different. They were much more supportive of ICE.

Q Yeah did you notice a difference in how officers used force with respect to those counter protesters?

A Yes. There were a lot of instances where the counter-protesters would use the federal property as sort of a shield. There were plenty of instances where they would step on to federal property -- this is something that I've seen pepper balls shot at for protestors commonly, but they would do it and no action would be taken. What was frustrating was that they would use this bias to attempt to good and enrage protesters try to lure them over the line or step over on to federal property and kind of -- it seemed that they were very aware that they were not going to get shot by ICE at least for this kind of conduct.

Q Have you ever seen officers use force on someone you knew to be a counter-protester?

A No.

Q Out of curiosity, are there other protesters that you have seen regularly down at the protests?

A Yes.

Q Of those people you have seen regularly, have any of them not been subjected to force?

A I guess I can't say for certain, but no, I do not believe so.

Q After the President tweeted about Portland being a war zone, did the presence of counter-protesters change?

A Yes, it did.
Q How so?
A They increased in number. They increased prior to the war ravaged tweet. It was they were more covert filming footage trying not to draw attention to themselves. That very much changed after the war ravaged tweet. We got a lot more loud personalities that there were in doing more to intentionally antagonize the protesters.
Q And you may have answered this a bit already but are there patterns of types of conduct that seem to be interpreted by officers or misinterpreted by officers as threat?
A Yeah. So there are -- I think chanting is perceived as a threat. There is one day that I can recall that really reinforces that for me which is October 5th. There was an event -- there was a consistent protest that was happening that day and at one point it was dark. I don't remember the exact time. But there was an ambulance that was brought in. There was recently a few protesters that had been detained and taken back into the building. And so we saw the ambulance go in. We saw it pull into the garage and the lights were still on. We saw it start to pull out of the garage and then it stopped.

And the crowd was wondering what was happening with the ambulance. We assumed that it was a protester inside of it because I've never seen -- I've never seen an agent seriously injured in any way that would require an ambulance. So my

assumption was that it was a protester.

Regardless, the tenor of the crowd was wanting the ambulance to be let out. That was one of the things that we were chanting and there were a couple of things that we chanted over the course of the ten minutes that the ambulance was still in the facility but the one that we were chanting the loudest and the most frequently was let them out. That was we were telling -- we cleared the driveway. We were telling the agents to let the ambulance out. Later I -- we learned from reporting what had happened inside the building that had prompted that. There are a couple -- there were a couple of articles that covered it. And one of the things that stuck out to me is how the agents described the tenor of the crowd in that moment as violent and that we were the reason why they could not let the ambulance out. And that really solidified to me that they will perceive almost anything as a threat.

Q Did that offend you that you had been --

A Immensely.

Q Have you witnessed officers clearing the driveway without using force?

A Yes.

Q Have i have officers been able to provide clear instructions to protesters and successfully clear the driveway and protesters move?

A Yes.

Q Has there been a time when the crowd didn't move and -- excuse me. So they when vehicles are coming out and you haven't seen like chemical munitions being used, is that something that you have seen frequently?
A Yes. I see that most of the time.
Q Okay. And when you have seen vehicles going in and out, and you have seen uses of force, during those times, had protesters received clear instructions?
A Sometimes yes; sometimes no.
Q Can you describe when they haven't received clear instructions and what instructions were given versus -- I'm sorry. I'm being very confusing with this. When -- do they always play an LRAD announcement to clear the drive?
THE COURT: I didn't hear that. Did they always what.
MS. MOISAN: And play an LRAD announcement to clear the driveway, for vehicles.
A Most of the time, yes. I believe there have been instances when they have not.
BY MS. MOISAN:
Q And when -- has that always worked to clear protesters out of the driveway?
A Most of the time, yes.
Q When that hasn't worked, have officers come out and successfully given verbal instructions?

A Yeah. So there is kind of a tenor that happens down there with the crowd which is a little bit of a performance and a little bit of a show. So you know it is less -- it is not that people are blockading traffic with the intent to stop a vehicle. It is that they are going to sort of performatively move a little slowly out of the way. That kind of thing i think pretty common civil disobedience.

Q And is there a time when you haven't seen that work?

A There have been a couple of times where the crowd is very large and hasn't really moved that much.

Q Okay. So I want to just ask broadly, when did you start wearing your chicken suit?

A Early June. I wore it for the first time on June 14th which was the first No Kings protest.

Q Why a chicken suit?

A It was a combination of a couple of things happening at the same time. I wanted to do a costume or something a little extra for that first No Kings protest. Part of the philosophy of that day was it was president trump's birthday and he was also throwing a military parade. And so part of the strategy I was attempting to employ was mockery of the would of the would be authoritarian, trying to stand up to someone who wants to be perceived as a strong man.

The reason for the chicken itself was because at the time we had been dealing with the fallout of the initial

implementation of the tariff policies and there was a term that had been coined on Wall Street called TACO Trump. Trump always chickens out, which was meant to indicate that when he put tariffs on, the market kind of stopped reacting to it because we were very commonly run with them.

Q Is it true that DHS was consistent in having a negative response to anti-ICE protesters?

A Yes.

Q With behavior that makes it unpleasant to remain in the area of the ICE building?

A Yes.

Q And that's true from June until today?

A Yes.

Q Has the use of force changed how you protest?

A It has changed -- it has certainly changed my internal comfort level. I'll tie this back in a little bit with the question that you asked me about class certification and kind of the representative nature of representing the class. I think there are a lot of people who, in response to this conduct, make the decision to not return to the building. It is something that Laurie and Richard testified to. Something that Hugo testified to. I intend and plan to continue protesting. I've had to lessen my ability to do that simply in response to physical reactions to some of the chemicals and sort of an emotional toll, but I think I partially represent

you know a relatively defiant group of people who recognize that it is important even in the face of this level of force to continue exercising our First Amendment rights.

Q Are there ways that you had to adapt?

A Yes.

Q That could be mentally?

A Well I have devoted a lot more time in therapy to talking about this for sure. You know, I've had -- I think what's important to understand about me is that I've been able to come to peace with whatever happens to me personally. I've had to think a lot about the fact that the work that I'm doing right now is likely going to have -- or could have some severe consequences. I'm very worried about the impacts of the chemicals on my liver and lung. That's one of the things that is really scary about these munitions is that we don't know a ton about the long-term effects and what we do know is concerning. I've also had to mentally prepare for an instance in which something very serious happens.

MS. MOISAN: Thank you, Mr. Dickinson. That's all the questions from me.

THE COURT: Before we go to defendants questions, Mr. Dickinson about four weeks ago today I issued my temporary restraining order. Have you been to any of the protests -- have you been to the ICE building since then.

THE WITNESS: I have.

THE COURT: About how many times.

THE WITNESS: Roughly five times. I've been I was sick earlier in the month so I didn't attend. I think about five times.

THE COURT: And during those five times have you observed frankly any what you consider to be violations of my temporary restraining order.

THE WITNESS: No.

THE COURT: Have you observed any interference with the operations of the ICE facility, what DHS needs to do? Have you observed any interference with their ability to do their jobs.

THE WITNESS: No.

THE COURT: How old are you.

THE WITNESS: 27.

THE COURT: Thank you. All right. Defense questions.

MR. YUN: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. YUN:

Q God morning, Mr. Dickinson. My name is Alex un. I'm here on behalf of the Government. I'll be asking a few questions to follow-up on your previous testimony.

I would like to begin by discussing some particular instances where you were at the ICE building protesting. These

instances were in your declarations and you recall submitting those declarations?

A I do.

Q I would like to talk about January 19th, 2026. Do you recall that day?

A I do.

Q And on that day, you, along with a group of protesters, staged a sit-in on the ICE driveway?

A Yes.

Q And once you entered the driveway, you heard an announcement telling you to vacate the driveway?

A I did. Yes.

Q And you disobeyed that order and remained in the driveway?

A Yes.

Q As you continued sitting in the driveway in disobedience of the order of ICE agents then began shooting pepper balls in your vicinity?

A Correct.

Q But you continued to remain in the driveway?

A That is correct.

MS. MOISAN: Your Honor, I want to note for the Court if I may there are pending violations for this day. So the Court is aware, Mr. Dickinson, is not asserting his Fifth Amendment rights here. Just to make the Court aware of that.

THE COURT: Okay.

BY MR. YUN:
Q Okay and as a result you were arrested and charged with violations?
A Yes.
Q Moving on to another day, January 24th, 2026, do you recall attending a protest that day?
A I do.
Q You attended approximately from 4:00 to 5:00 p.m. and left for a time and then returned around 8:00?
A If that's what is reflected in my declaration, yes.
Q Is that what you recall generally, is you attend for a time, left and came back?
A Yes, that is what I recall.
Q So you weren't present at the facility for several hours?
A Correct.
Q And during the time you were gone, you don't know if protesters flooded the facility and attempted to breach it?
A No. I wasn't there.
Q And you don't know if protesters attempted to barricade the gate?
A No.
Q All right moving on to January 25th, 2026, do you recall attending a protest that day?
A I believe -- correct me if I'm wrong. That was the day in my declaration, that was the day that I attended for about 45

minutes.
Q Correct.
A Okay yes, I do recall that day.
Q And during that 45 minute interval, you don't recall any interventions from ICE?
A No. I had arrived what I believed -- weigh learned was shortly after an instance of munitions being deployed. I was affected by the residue of those and had to leave. But during that period of time I did not witness any additional interventions.
Q And you mentioned that there were munitions deployed before you arrived. You don't know the reason for why those munitions were deployed?
A No.
Q You don't know if protesters were behaving violently towards ICE officers?
A I don't.
Q You don't know if I saw excuse me you don't know protesters were attempting to block the driveway of the ICE facility?
A No. I was not there.
Q Moving on to January 30th, 2026, do you recall attending a protest that day?
A January 30th? Yeah.
Q And you attended a protest that day for approximately

three hours?
A That sounds right, yes.
Q And during that time you never witnessed any interventions from ICE agents?
A I don't believe I did.
Q Moving on to January 31st, do you recall attending protests that day?
A I do. That was the day of the march.
Q you were in the courtroom yesterday when we heard testimony from other witnesses regarding this day?
A Yes.
Q And on that day, you heard some speakers at a nearby park?
A I did not hear the speakers. I was going around interacting with the crowd. I knew there were speakers.
Q And then you proceeded to march toward the ICE facility?
A That is correct, yes.
Q You were in the front of the march?
A I think I was probably in the middle of it, but I walk fast so I might have caught up to the front a little bit.
Q Under most of the protesters were on a route that went by the ICE facility, but not in front of the ICE facility?
A Correct. So there is a road that when it reaches BANCROFT, you can turn right and that put you right in front of the facility the march route went left and went back to Elizabeth Caruthers.

Q But you and a group of p protesters decided to go in front of the ICE facility?
A I would characterize it a little bit differently than that, but yes.
Q How would you please characterize it?
A I would say that there were a group of protesters who were in that area already and I had planned to protest in sort of that area prior.
Q So just to clarify, you were part of the march but then you diverged from the march to join the other protesters?
A I think what I'm -- I think it is just the intent was a little bit different than how it was -- how I interpreted the question. But, yes, that's what happened.
Q Understood. And you would say the crowd in front of the ICE facility was around 20 individuals including you?
A Are we -- no, there was probably in that area there were probably a hundred people.
Q Okay. And of those hundred people, multiple of them were crossing the blue line on to federal property?
A Yeah. That happened a couple of minutes after I arrived there.
Q And you then heard a verbal warning to leave the federal property?
A I believe I did, yes.
Q But the protesters on federal property did not comply?

A Yeah.
Q After which ICE agents began firing less than lethal munitions near them?
A So what happened was the gate opened. The agents began to push out. The crowd was retreating and while the crowd was retreating, that's when less lethal munitions were deployed. The first one that I witnessed was a tear gas canister lobbed over the head of some of the protesters.
If it is helpful for reference, I was standing -- there is a video from Kevin Foster, I was standing basically right there.
Q So I would like to turn to a more broad discussion of your time at protests?
A Sure.
Q You testified that you started attending protests in April of last year and continued to do so through the present?
A Yeah. April being the first time I attended protests at the ICE facility.
Q So that's over the around ten to eleven months you have been a consistent protester at the ICE building?
A Yeah.
Q That span covers maybe 300 days, nearly a year?
A Your math checks out.
THE COURT: You don't mess with a math major.
MR. YUN: Yes, Your Honor.

BY MR. YUN:

Q You testified that you generally attend protests for four to six times a week?

A Yeah. Again, it will be based off of conditions, but yeah.

Q Sure. In your declaration you approximate about six days a week?

A I think in my declaration I approximated four to six if I recall correctly.

Q In your declaration you testified that of the six days a week that you protest, you think you are exposed to chemical munitions about a third of the time?

A Yes.

Q I think just now on the stand you testified that you think you are exposed to chemical munitions one time per week?

A So the once a week was -- the rule of thumb for the expectation of how many -- how frequently we would expect the use of chemical munitions. The one-third reflects as well the high frequency of times where munitions would not be deployed on a day but that there would still be significant residue that was impacting protesters and residents.

Q But that residue wasn't from the same day that they were deployed?

A It could have been in some instances. There might have been times where I arrived after a gassing occurred. I can

recall many times where I know it was from a previous night. That was particularly a problem in the summer before we had rain to help us clean it up.

Q Sure. So you testified that one maybe two times a week you are exposed to chemical munitions. On the remaining days, you are not?

A Yeah. I would say -- I would stand by kind of the one-third of the time.

Q One-third. So two thirds you're not exposed to chemical munitions?

A Sure. Yeah.

Q So on those days you are allowed to basically protest with no intervention?

A There have been other uses of force, but broadly speaking, yes.

Q I think you testified a moment ago that you have you've never seen a protester use force against an agent?

A That is correct.

Q That's true but you have witnessed protesters trespass on to federal property?

A Yes. Yeah.

Q You have witnessed them block the driveway leading into the ICE facility?

A Again, I would not -- yes, though knowing what I know about the crowd, I knew that the blocking was performative.

That people were going to part ways with relatively little intervention at the time.

Q You didn't testify a moment ago that oftentimes protesters may comply very slowly however?

A Yeah. I'm thinking there is one individual -- as an example, there is one individual who dressed in a sloth costume and would kind and would slowly meander out of the way. It was just -- it was part of the tactics we were using.

THE COURT: Thank goodness no one wears a snail costume.

BY MR. YUN:

Q So if a vehicle was trying to get into the facility to become very difficult for them to get in considering what the crowd around blocking the driveway?

A I don't think that accurately reflects what the situation was the majority of the time.

Q It is your testimony today that protesters don't block the ICE driveway?

A Protesters stand -- the word I'm hung up on is block, just because for me when I hear block, that seems to indicate active impediment. I think the vast majority of the time if a vehicle is present, there may be protesters in the way but they part.

THE COURT: They don't prevent or obstruct the ingress or egress of DHS vehicles when there is a need for those vehicles to come in or out. The protesters stand aside,

you're telling me, but when they don't observe vehicles needing to enter or exit, they may very well be standing in front of the gates.

THE WITNESS: That is the general pattern, yes.

THE COURT: Understood.

BY MR. YUN:

Q Just to clarify, Mr. Dickinson, it is your testimony that there has never been an instance where protesters were told to clear the driveway and they have not complied?

A No. I would don't I would not say that.

Q So there have been times when they have blocked the driveway, ICE agents told them to clear the driveway and they did not comply?

A Yes.

THE COURT: On occasion you have seen people not following orders.

THE WITNESS: Yes.

BY MR. YUN:

Q Finally, Mr. Dickinson, I think you testified a moment ago that despite the experiences you have had at the ICE facility, you plan to continue protesting?

A Correct.

Q You have no intention of stopping at any point?

A I would happily stop protesting if the situations of what's happening in our country no longer justified it or

required it. I also can anticipate a world in which I'm no longer able to protest because of injury sustained. But given the trajectory we are on currently as a nation and given that I intend to continue protesting for a while.

MR. YUN: No further questions.

THE COURT: Anything further Ms. My son.

MS. MOISAN: No, Your Honor.

THE COURT: Mr. Dickinson, thank you very much sir. I appreciate it. Plaintiff may call the next witness.

MS. HUTCHISON: Your Honor, at this time we will be playing our first deposition video.

THE COURT: Very good.

MS. HUTCHISON: The way that we will be marking these for Your Honor's understanding is Exhibit 6 is the full video with the full transcript which we are only giving to the Court. Exhibit 6A is what we are playing which is these excerpts and this has been approved by the Government.

THE COURT: Very good. So I will receive in evidence but under seal the full transcript Exhibit 6 any objection to that from defendants.

MR. ROSENBERG: No objection Your Honor.

THE COURT: I'll receive that. Just make sure you get that to my courtroom deputy at some point or you can file it under seal.

Since we are watching a video my typical product

practice is not to ask our Courter to report on the things that are said or heard during a video. If somebody has an objection or somebody needs to speak, then we will go back on the record. Is that acceptable to plaintiff.

MR. FLEMMING: Yes, Your Honor.

THE COURT: Acceptable it to defendant.

MR. ROSENBERG: Yes, Your Honor.

MS. HUTCHISON: And for full explanation the 6A we are submitting includes the transcript separately as a written document. So there will be a record of everything said.

THE COURT: Excellent. You may proceed.

MS. ALBIES: Your Honor, may I watch from the jury box?

THE COURT: Yes. Defense counsel may as well. You know there are monitors in the jury box.

Can I stop you for a second. So make sure we're on the same page am I going to be hearing the questions and answers audibly or just reading the transcript.

MS. HUTCHISON: You'll be hearing everything.

THE COURT: Okay. Then I'll wait. Okay and by the way, before we do this and to make it easier for everyone, can you describe without revealing specific identity what witness we are listening to? Is this a protestor. Is this a federal agent. From which agency. Don't reveal identifying information but what I'm going to be watching a deposition of.

MS. HUTCHISON: Yes your honor this is an FPS inspector and -- the deposition was taken on February 23rd. I have in formed the Government privately the individual's name.

THE COURT: Very good. Thank you.

(The video was played it in open court.)

MS. HUTCHISON: Thank you, Your Honor. Next we will play plaintiff's Exhibit 7, we will use the same structure that Exhibit 7 will be the full video and the full transcript and Exhibit 7A will be the full video clips we are playing here as well as the transcript of the videos.

THE COURT: Any objection to that procedure.

MR. ROSENBERG: No objection, Your Honor.

THE COURT: How long is this video?

MS. HALLETT: Your Honor this comes in five parts because we have two exhibits spliced in the center. Overall it is maybe 15 or 20 minutes.

THE COURT: How many more videos do we have after this.

MS. HUTCHISON: One more.

THE COURT: In this preliminary injunction hearing.

This is not the most efficient way to do this. How many more do we have.

MS. HUTCHISON: Well, Your Honor, let me count them.

THE COURT: You estimated it would take two days for plaintiff to present their case. I assume you are still on

track.

MS. HUTCHISON: We absolutely here. The reason we created these videos. That was the longest one. We cut most of them be ten to 15 minutes.

THE COURT: Based on your representation that we are still on track that plaintiffs rest their case.

MS. HUTCHISON: I do want to make one point of clarification been resting the case today that Mr. Rosenberg and I talked about. We took several depositions on Friday. Those videos weren't prepared immediately. Some of those supervisors won't be available until tomorrow. Mr. Rosenberg and I talked if we have to go out of order that evidence will be presented tomorrow and we hope top close tomorrow. Thank you.

THE COURT: All right. You may proceed.

MS. HUTCHISON: And we are giving Your Honor clarity, this is another FPS officer.

(The video was played in open court.)

THE COURT: All right. We have our court reporter we will go back on the record Mr. Rosenberg.

MR. ROSENBERG: Your Honor, as you know, the Court has ordered that identifying information be removed from any information played in the courtroom and so we would like to reiterate the importance of not having any identifying information.

THE COURT: Was there any identifying information that we saw.

MR. ROSENBERG: I believe so yes.

THE COURT: Response.

MS. HUTCHISON: Neither did I, Your Honor. We had really made efforts to comply with that request. We used initials to refer to people. We have blurred faces. We have sent the portions that we sent over. I did represent when sending those portions that we had done that. I understand from what Mr. Rosenberg just told me that we apparently missed one reference to a name in the question that was just played. But we will check all of our pictures to make sure we bleep it out.

THE COURT: All right. That will be sustained. You may continue.

MS. HUTCHISON: Thank you.

On be removed from any information that's played in the courtroom, and so we'd like to reiterate the importance of not having any identifying information. Was there any identifying information that we're about to see or that we saw? Pardon me. I didn't see it response.

MS. HUTCHISON: Your Honor, so we have really made efforts to comply with that request, we've used initials to refer to people . we've blurred faces . we've sent the portions that we sent over . but I did represent when sending those

portions that we had done that . and I understand from what Mr. Rosenberg just told me , that we apparently missed one reference to a name in the question that was just played, but we will check all of our futures to make sure that we make sure that we delete that out.

THE COURT: We can continue.

(Video continued to be played in open court.)

MS. HUTCHISON: Your Honor, for reference and I meant to say this before that portion of the video played. As you watch this later. You can see this was January 19th. You can see Mr. Dickinson in the top left corner of the video. This is one of the incidents he testified about.

THE COURT: Thank you.

All right. Plaintiffs may continue.

THE COURT: We are still back on 7?

MS. HUTCHISON: Yes.

MR. ROSENBERG: Your Honor, just to be clear. I understand the court reporter is not separately transcribing what's in the transcript of the deposition.

THE COURT: Or the sounds we are hearing on the video.

MR. ROSENBERG: I want to make sure to the extent that XXX was identified it remains under seal.

THE COURT: Yes. It did not end up in our record.

(Video was played in open court.)

MS. HUTCHISON: Your Honor, we would now enter Exhibit 8 using the same procedure that we have here, what we are playing is 8A and for the Government's knowledge, this is the if officers who initials are XX.

THE COURT: I take it there is no objection to this procedure.

MR. ROSENBERG: No objection, Your Honor.

THE COURT: You may proceed.

(Individual why played in open court.)

MS. HUTCHISON: Thank you, Your Honor. We are moving pack to a live witness now.

MR. ROSENBERG: Your Honor, can we take a short break.

THE COURT: Is ten minutes sufficient or do you want more.

MR. ROSENBERG: Ten minutes.

THE COURT: Ten minute recess.

(Recess.)

(Proceedings resumed:)

THE COURT: Are would I ready to proceed. Plaintiff may call the next witness.

MS. ANDRIOLA: Good morning, Your Honor. Eri Andriola. Plaintiffs call Helena Bartkowski.

THE COURT: Very good.

Counsel, I'll tell you, I have read Ms. Bartkowski's

declaration, docket 94-9. Including paragraphs 9 and 14.

MS. ANDRIOLA: Thank you, Your Honor.

(The witness was duly sworn.) sworn.

THE CLERK: Thank you. Please be seated. Would you please state your name for the record, spelling your last.

THE WITNESS: My name is Helena Bartkowski. B-A-R-T-K-O-W-S-K-I.

MS. ANDRIOLA:

DIRECT EXAMINATION

BY MS. ANDRIOLA:

Q Good morning, where do you live?

A I live in Deer Island.

Q What do you do?

A I'm a student.

Q And did you submitted a declaration in this case; is that right?

A Yes.

Q Now, when did you first start attending protests at the Portland ICE building?

A In 2025.

Q And why did you decide to attend?

A I had been siege news reports and videos for a while by then of ICE raids and detentions, people's windows being broken, people being pulled out of their cars and I was really disturbed. And I wanted to voice my opposition to that kind of

conduct.
Q And when you attended the protests, what kinds of messages were you trying to express?
A I wanted to put faces and names to all of the numbers. I really wanted to showcase the humanity of the people who were being most affected by the immigration surge. So I brought different signs, different art pieces that showed photos of people who had been detained and deported along with descriptions of their stories.
Q And you know at a typical day at a protest, how did you choose to address?
A Yeah. So I just wore my regular clothes, stuff I had in my closet for a long time. I understood very quickly why some people chose to protect themselves, protect their identities and protect their bodies, and I respect and appreciate that approach and the reasoning behind it. I just chose a different one. I wanted to show up as myself and I thought that if I showed up just wearing my plain regular clothes, if I was obviously not a threat of any kind, I would be less likely to be subjected to any kind of physical violence or force, which did not turn out to be the case.
Q Were you subjected to chemical munitions?
A Yes, on many occasions.
Q Now I would like to direct your attention to July 20th of 2025. Were you present at the Portland ICE Building that day?

A Yes.
Q And you described in your declaration an incident from that day where you were pepper sprayed. Is that accurate?
A Yes.
Q Okay now, was there anything else that stood out to you from that day?
A Yes. I was also detained that day.
Q Okay. And can you describe what happened leading up to that?
A Yeah. So at some point in the evening I was sitting on that concrete wall kind of to the left of the building. And I heard one of the agents from behind the gate yell at me to get off the wall, so I got off the wall and then sometime later I sat back down. I was yelled at to get off the wall, so I got off the wall and I heard one of the agents say from behind the gate. That's the same female and then sometime after that, maybe ten minutes later, they gathered up and came out from the gate and grabbed me on the sidewalk.
Q So you were standing on the sidewalk when you were grabbed; is that right?
A Yes.
Q And you described sitting on a wall. Can you tell us a little bit more about where that wall was?
A Yeah, it is to the left of the driveway if you are facing the building. Yeah it is like right behind -- like right next

to the sidewalk.
Q Were you blocking the driveway by sitting on the wall?
A No.
Q From what you could tell, were federal agent trying to let vehicles in and out of the gate at that time that you were sitting on the wall?
A No.
Q Were you given a warning by federal agents that you might be arrested for sitting there?
A No.
Q Okay. And at that time do you recall if the blue line was there by the driveway?
A No. Not at that time.
Q And you are familiar with the blue line?
A Yes.
Q Okay and did you hear any announcements over a loudspeaker around that time?
A Not that I can recall.
Q Okay. And can you tell us about what happened after the federal agents came and grabbed you while you were on the sidewalk?
A Yeah. So one man from the Federal Protective Service in like the blue uniform grabbed my left arm and then a woman in like camo fatigues grabbed my right arm and walked me into the driveway, and I was holding something in my right hand. You

usually have like a bouquet of like plastic flowers and I often had different signs and art pieces. I couldn't say exactly what it was at that time. I went through so many iterations of the same art pieces. They were often taken or damaged or destroyed. But I was walking to the driveway and the objects in my hand were taken out of my hand and I was brought into this room, I guess, almost like a garage space. They p asked for my information, you know took any like loose belongings I had on me and then brought me to another room with a bunch of the Federal Protective Service people. And they put my information up on a whiteboard and I over heard some conversation -- it seemed like there was some debate about who would be my arresting officer on the paperwork. It seemed like the guy who grabbed me didn't want to be the arresting officer and I over heard one of the other agents say, you know you catch him, you skin them.

So after that was figured out they took a photo of my tattoos and they took a photo of me in front of the white board with my information; like I guess like mugshot style. Like a front facing photo, or side facing photo. But it looked like they were using like an iPhone camera. And then they took a photo of me with my arresting officer in front of the white board.

Q Okay. Did you receive a citation?

A I did, yes.

Q And what was that citation for?
A Failure to comply with official signs and directions.
Q Did the agents explain that citation to you?
A Yeah. So after they brought me out of the holding cell, they talked to me a little bit about the citation. They said that I would be receiving a notice to appear in court in the mail after sometime and that I should go to Court and I could either pay the fine or contest the citation. And then the officer said, well, that's if the judge doesn't throw it out right away. I said you are giving me a citation that you think won't hold up in court. And another agent responded, it is just to encourage you not to come back.
Q Now, how did that make you feel when the agent said it was to encourage you not to come back?
A Honestly I thought it was pretty galling, I was pretty shocked to hear him say that, yeah.
Q Yeah. Did being told that change at all how you showed up at the protests after that?
A Well, yeah. I mean, I had never been arrested before. It wasn't a particularly pleasant experience and I certainly wasn't interested in you know being subjected to more court appearances, and it seemed like they were feeling pretty liberal with the citations that they were handing out. So, yeah, I definitely watched my behavior more closely. I didn't come back for i think nearly a week after that experience. And

when I did, it was definitely more constrained.
Q And what was the outcome of your citation?
A Well, I came to Court because I got the Court summons and their was some considerable confusion on the day that I was there. I wasn't on the docket. They didn't have the paperwork for me. You know the clerk said I was where I was supposed to be and I was in the system but nobody could seemed to figure out what was going on with my case. And eventually I was told two things. I was told the charges were dropped and I told the charges were dismissed with prejudice. I never got any clarification about which it was and what exactly happened and I never received any paperwork confirming any of those details.
THE COURT: Ms. Bartkowski, when you said you went to Court, was that federal court or state court.
THE WITNESS: Federal.
THE COURT: This building.
THE WITNESS: Yes.
BY MS. ANDRIOLA:
Q Did they provide you with a probable cause statement?
A No. I never received a probable cause statement or a copy the citation. The charges just seemed like they never materialized.
Q You mentioned earlier that when you were arrested, you were holding signs. I believe you also stated that you couldn't remember exactly what you were holding because there

were different iterations?
A Uh-huh.
Q Can you tell us a little bit more about the different iterations of signs that you had?
A Yeah. So I had lots of posters and signs, again, with like photos and stories and over time they were taken off the public sidewalk at times when they tear gassed us so heavily that you know we had to back all the way down. I left some of those items on the public sidewalk and they were taken from there. You know, I had some of them just kind of destroyed, stepped on, shot at, and when they took what I was holding from my hands, I actually had to ask for it back when they were trying to row lease me. They said I could go ahead and go. And I asked for my stuff and they actually had to go and check the security cameras and check the footage to see what happened with the belongings that I had when I was arrested. And they yeah that they finally did manage to locate them and bring them back to me. But I was told that anybody had been seized for public property before that time was gone and I wouldn't be able to get it back.
Q Now when was the last time you protested at the ICE building?
A It would be January 19th.
Q Of this year?
A 2026, yeah.

Q Do you intend to continue protesting?
A No.
Q Why not?
A I -- it has been too much. I don't have any plans to go back. I wasn't even going to go back on the 19th. I hadn't been back since October. But I was asked to bring some art displays, so I brought them. But no, I don't have any plans to go back.
Q Is there anything else that that you would like the Court to know about your experience at the ICE building?
A Yes. I came to those protests because I had read the stories of people like Moises Sotelo and Jorge Luis Reynaldo and Heidi Sanchez and so many others, and I kept going back to those protests because of people like Jack and the Eckmans and teacher and everybody who continued to show up despite everything that we experienced. I wanted to be there in solidarity with them. I didn't want to have them face that alone. And over the course of the five or so months that I was there, I did witness a tremendous amount of excessive disproportionate, unwarranted violence and brutality and. Even after so many of those experiences, it never got easier. It was always very painful and I experienced a lot of that myself. You know, I was shoved and hit with a shield and shot with munitions and intimidated and mocked all while standing on public property and all by law enforcement officials who

claimed to be protecting me and supporting me. I don't think any words I have could fully express what it was like to experience what I experienced at those protests. But what I can tell you is that after all of that, I will never be the same.

Q If you had some assurance that you federal agents can just use force at the Portland ICE protests, would you go back?

A Honestly probably not. It is really difficult for me to even drive by there. It is just -- you know, I'm so tired and it was just such a painful experience and I can't -- I don't think I can put myself back there regardless.

Q I'm so sorry for what has happened to you. Thank you so much for your plaintiffs.

Nothing further from plaintiffs.

THE COURT: Ms. Andriola, I read the declaration of Ms. Bartkowski that plaintiffs filed in support of the motion for preliminary injunction. It is docket 94-9, Exhibit 9, is there a reason why we should not hear from this witness about what she related in paragraphs 9 and 14?

MS. ANDRIOLA: Just for efficiency Your Honor and not to repeat what's in her declaration.

THE COURT: Okay since I get to be the judge of efficiency, I'm going to ask you about that. In your declaration, you talked about an event that happened on June 28th, 2025, at about 7:30 p.m. You witnessed some federal

officers stay behind after other officers went inside. You saw one younger federal officer turn to the crowd and do something. Women you tell us about that.

THE WITNESS: Yeah. Sure. So this was right after all of them had come out. I think it was to let vehicles out and after they you know completed that task they row treated. They went back behind the gate and back into the building. And most of the FPS agents went right inside the building. But one of them stayed behind and he performed a Nazi salute.

THE COURT: The other issue I want to ask you about, I believe you said on multiple occasions in June and July of 2025, you heard officers interact and do things with protesters. There was one that the officers called somebody teach or hey teach. Tell us what about that and then what another officer said about anticipating something.

THE WITNESS: Yeah. Can I say an explicative.

THE COURT: Yes you can. Okay I'm the judge of that, and yes you can.

THE WITNESS: Okay well yeah. So you know there were several of us outside. This was during the daytime and one of the officers was you know walking behind the gate and he pointed out somebody who was standing next to me; someone who everybody there i guess including the officers called teach. And he said hey teach. And teach was like yeah, what. And he said: Hey, teach, hey, teach. Fuck you. And then walked

away.

And then another time another agent was I guess in conversation with a protester who was angry and belligerent and I can't remember what they were saying but the agent responded: Yeah, that's okay, that's all right. I'm so you tonight.

THE COURT: Thank you. Before we go to defense counsel. Anything further Ms. Andriola.

MS. ANDRIOLA: Nothing further from plaintiffs, Your Honor.

THE COURT: Defendants may inquire.

MR. YUN: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. YUN:

Q Good morning Ms. Bartkowski. My name is Alex YUN. I'm here on behalf of the Government?

A Good morning.

Q I have a few questions for you. I just want to follow-up on your accounts of the July arrest that you recounted. First of all, just to clarify, you did not include an account of this in your declaration that you submitted for the Court?

A That's correct.

Q It seems like a pretty significant thing that happened to you. Why didn't you include it?

A Well, yeah, there were a lot of details that for the sake of brevity, I just didn't have the space to include in the

declaration and I had already spoken to a reporter with OPB about my experience being arrested so I thought I would keep the details to things that were not already in the public record.

Q And just regarding the specifics of the event, you said that you were sitting on a wall on the federal property; is that correct?

A Uh-huh.

Q And you were told to get off of the wall?

A Yes.

Q And then at some point later on you got back on to the wall?

A Yes.

Q And you were cited for disobeying an order?

A Yes.

Q And you did disobey an order?

A Well, I was cited for failure to comply.

Q And you agree with me that you did fail to comply with the order to get off the wall?

A Oh, I did get up when I was asked to get up.

Q And then you returned to the wall?

A I did, yes.

Q And during this entire event no munitions were deployed at any time?

A Not that I recall during that time, no.

MR. YUN: No further questions Your Honor.
THE COURT: Anything further from the plaintiffs.
MS. ANDRIOLA: No, Your Honor.
THE COURT: All right. Ms. Bartkowski thank you very much for being here. I appreciate you coming.
THE WITNESS: Thank you.
THE COURT: Can I call the next witness.
MS. HUTCHISON: Thank you Your honor before we do, I just want to focus Your Honor's attention on docket 12, which was a declaration submitted by Mr. Miller.
THE COURT: One moment.
MS. HUTCHISON: You don't need to read it now. I can give you the context.
THE COURT: Of why I'm stating it I have it right in front of me.
MS. HUTCHISON: Great so Mr. Miller has left the United States. He lives in Europe now. He was prepared to testify remotely. For reasons of our scheduling and attempts to be efficient here, we are not going to call him. But the reason we focus there is because his declaration, similarly to Ms. Bartkowski captures his experience of being detained and held in prolonged detention, getting a citation but ultimately not having criminal charges pursued against him.
THE COURT: Thank you.
MS. HUTCHISON: Excuse me my correction. He never

actually got the citation which is reflected in the declaration. But he was detained and ultimately no charges.

THE COURT: All right. Thank you.

MR. ROSENBERG: Your Honor, I'm going to interpose an objection on that one. It is unclear what the relevance of that declaration is in the context of these proceedings and this case, which is about the deployment of munitions, not about whether somebody has been arrested. Indeed it seems like --

THE COURT: Let me ask you a question then. When we take Ms. Bartkowski's testimony and the officer arrests her and I understand your objection, I think, but the officer says, then why did you do and she says to the officers, then why did you do that. And he says just to encourage up not to come back. Is that circumstantial evidence of an intent to chill a protester's attendance.

MR. ROSENBERG: I think it may be hearsay because it depends on what the actual intent of the statement is.

THE COURT: Let's take things one step at a time. If it is hearsay, why isn't it a non hearsay because it is a statement of an agent of a party-opponent namely DHS acting within the scope and course of scope of his or her duties.

MR. ROSENBERG: If there may be an exception there.

THE COURT: So let's get back to the relevance portion. With respect to Ms. Bartkowski and I get your

objection about Mr. Miller. I'm not inclined to consider anything in Mr. Miller's declaration. But since you raised this objection about relevance generally in connection with Bartkowski and Miller, when Ms. Bartkowski tells us that this agent of a party-opponent, an officer says, the reason she was arrested was "quote just to encourage you not to come back." Quote isn't that circumstantial evidence -- a brick if you will -- isn't that circumstantial evidence that supports plaintiffs' argument maybe not definitively, maybe not conclusively, but supports plaintiffs' argument that there was an intent to discourage protest?

MR. ROSENBERG: No.

THE COURT: Why?

MR. ROSENBERG: Because not coming back could very well mean not returning to trespass on federal property, which is where she was at the time and may be the reason why she was issued the citation. At the time that she was issued the citation, she was trespassing on federal property by sitting on that wall. And the statement may very well mean that she should not be trespassing on federal property again.

THE COURT: Very good. That's a very fair point. And as I consider the evidence, I will consider whether it is significant that the officer said, just to encourage you not to come back versus just to encourage not top trespass or disobey my orders again. I will consider that. But thank you but I'm

not going to consider Mr. Miller.

MS. HUTCHISON: Thank you well your Honor, on a point of clarification for that. It was my understanding that Your Honor was considering every declaration that was submitted in support of our preliminary injunction motion and our reply.

THE COURT: Only if there was an opportunity given to the defendants to either cross-examine before the hearing or during the hearing.

MS. HUTCHISON: I was to be clear that he was available for a deposition prior to the hearing. We never received a request from the Government.

THE COURT: Did you affirmatively tell the Government that Mr. Miller will be made available for deposition.

MS. HUTCHISON: So we -- in conversations with the Government we represented desires to know who they wanted to depose. It was my understanding that it was clear from Your Honor's instructions that anyone who submitted a declaration was available for deposition or live testimony upon request. And so if the position that the Court is taking -- that is happening now is that a declaration will not be considered unless we specifically offered a deposition by name, we may need to call more live witnesses.

THE COURT: Maybe I misunderstood the objection. That you are telling me that you made available to the defendants for deposition anyone for whom you offered a

declaration.

MS. HUTCHISON: Correct.

THE COURT: Okay. So is there an objection then to me considering the declaration of Mr. Miller other than potentially a relevance objection.

MR. ROSENBERG: We are resting on the relevance objection, Your Honor.

THE COURT: Fine. I will take a look at the declaration of Mr. Miller and he I will decide later whether or not it is relevant. But I will consider it.

MS. HUTCHISON: Thank you, Your Honor.

THE COURT: Let's take a lunch break. Who will plaintiffs be calling this afternoon after our lunch break.

MS. HUTCHISON: I can tell Your Honor the rest of the plan if it would be helpful. Excellent we have immediately following, we will have two very short videos from FPS agents. Then we will have our live witness, Mason, one of the named plaintiffs. We will have another short video of an FPS agent. A live witness, Ms. Hellman. A live witness, Mr. Rudiger. A short video of the last FPS agent, a short video that combines several of the agents on a single topic, and then we will call our expert Mr. Kerlikowske, who will be our last witness.

THE COURT: Very good. What's your definition of a short video.

MS. HUTCHISON: I think most of these run in the ten

to 12 minutes.

THE COURT: That's fine. What do you all want for lunch. 45 minutes or an hour.

MS. HUTCHISON: Any preferences I think 45 minutes is fine for the plaintiff.

MR. ROSENBERG: Maybe return at 1245.

I also do have a house keeping matter for the Court.

THE COURT: Absolutely.

MR. ROSENBERG: Yesterday during the cross-examination of captain Bailey, the Court may recall there was an a email that was referenced in the transcript that we indicated that we would mark as defense Exhibit DX3 I now have a copy of that.

THE COURT: Excellent.

MR. ROSENBERG: To provide to the Court and plaintiffs' counsel.

THE COURT: Any objection from plaintiffs to receiving GX3.

MS. HUTCHISON: I haven't received it prior to this moment.

THE COURT: Well then why don't you receive it a take a look and see if you have any objection.

MR. ROSENBERG: And so the record is clear, we are going to move DX3 into evidence.

THE COURT: Understood.

Mary, can I have Mr. Bailey's transcript. Captain Bailey.

MS. ALBIES: Your Honor, if we had this yesterday during the cross-examination --

THE COURT: Give me one second, please. (Go ahead. I'm listening.

MS. ALBIES: I think if we had been provided this yesterday during cross-examination, I might have had follow up. It is hard to say without putting myself back and I don't have a time traveling machine. So I don't have an objection except I might have had follow-up.

THE COURT: Why don't we do this. Why don't you feel free to work with counsel for the State, get in touch with captain Bailey. Then let me know whether or not you would have had follow up. And then by way of an offer of proof in support of an objection, you can tell me, well, if this would have come up, or this would have been presented at the time of your redirect, you would have asked him the following questions and he would given you the following answers by way of an offer of proof. I am accept that as a representation of counsel, then we will see where we go.

MS. ALBIES: That sounds good. Thank you okay.

THE COURT: In the meantime then I'm going to receive in evidence defense Exhibit 3.

MR. ROSENBERG: Thank you, Your Honor. All right.

We will be back at 12:45 recess.

(Recess.)

(Afternoon session; open court:)

THE COURT: All right. Are we ready to proceed.

MS. HUTCHISON: Yes, Your Honor. Before we play our next video. One point that we conferred with the Government on. Both parties agree that all declarations that have been filed in support of this motion for preliminary injunction and the motion for the temporary restraining order can and should be considered by Your Honor with the sole objection of relevance made as to Mr. Miller's declaration.

THE COURT: Very good.

Acceptable to defendants.

MR. ROSENBERG: Yes, Your Honor.

THE COURT: Thank you so ordered.

All right P you may explain the next video.

MS. HUTCHISON: This is Exhibit 9 in submitted in full to Your Honor. Exhibit 9A will be played to the Court. This is FC, for the Government's knowledge. For everyone's knowledge we are playing it at 1.3 speed to be a little bit quicker. and so this video run time is around 13 minutes. The next two will be much shorter.

(The video was played in open court.)

MS. HUTCHISON: Your Honor, we will now play exhibit 10 which is surveillance video of the incident that was discussed.

THE COURT: Thank you.

(Video played it in open court.)

MS. HUTCHISON: Your Honor, boy way of reminder we had a sidebar yesterday. It was this incident that that was discussing.

THE COURT: Thank you.

MS. HUTCHISON: We will now enter plaintiff's Exhibit 11, Exhibit 11 is the full video and transcript for XX. We will play in Court as well as that video.

MS. ROOD: Good afternoon Your Honor. Hadley Rood for the plaintiffs. The information witness will be Mason Lake.

THE COURT: Very good.

(The witness was duly sworn.)

THE CLERK: Thank you. Would you please state your name for the record, spelling your last.

THE WITNESS: Mason Lake. L-A-K-E.

DIRECT EXAMINATION

BY MS. ROOD:

Q Good afternoon Mr. Lake. Your a plaintiff in this case; is that correct?

A Yes.

Q What do you do for a living?

A I am a video June list.

Q Have you been to some of the protests at the Portland ICE

facility since summer of 2025?
A Yes.
THE COURT: Let's not use 1.3 speed for this.
MS. ROOD: Apologies, Your Honor.
BY MS. ROOD:
Q Did you submit a declaration in this case?
A Yes, I did.
Q Have you had a chance to review that declaration?
A Yes.
Q Did that declaration accurately describe a number of incidents where federal agents assaulted you and interfered with your ability to record events at protests at the Portland ICE Building?
A Again, for the sake of brevity it didn't account for everything, but yes, it did.
Q Why do you go to protests?
A I go to report for my work. I go also to p exercise my First Amendment right.
Q And when you go to exercise my first Amendment right And when you go to report on these protests, are you there on assignment with an organization?
A When I am freelance so it is a case by case situation.
Q How long have you been a freelance reporter?
A A little over five years now.
Q And can you speak a bit to the organizations or

publications that you have been published with?
A I would say I started out with photography being featured in national geographic. For video work, I have been featured in CNN, Seattle times. U.S. Press Freedom Tracker, MSNBC, and Storyful has used some of my footage at various outlets.
Q Do you support -- do you do any other work aside from your journalism work?
A I am an aspiring filmmaker but this is a tough time to be one.
Q How long have you been documenting protests?
A Since 2000 what you referred to as the George Floyd protests.
Q And those began in 2020, right?
A That's correct.
Q Do you specialize in documenting protests?
A I would say I do, yes.
Q About how many protests have you documented?
A Before 2025 I, I've recorded over 150 events Pacific northwest.
Q Okay. And why do you care about documenting proceed it tests?
A I witnessed that there was a need for a more in-depth coverage of events and a follow-through to see how these events played out and I wanted to contribute to keeping that record correct and accurate.

Q Are these -- are protests, do they involve issues that are important to you?

A Yes.

Q Do you when you go to protests to document them, do you identify yourself as press?

A Yes, I do.

Q How?

A I have press badges on me, front and back inside decide on my helmet and on my chest. And then I also have an ID badge with my name on it.

Q And we are going to show a video now that I would offer into the record as plaintiffs' Exhibit 12 -- my apologies a photo. We shared this with a defense counsel previously?

THE COURT: Any objection?

MR. ROSENBERG: I would like to take a look at it.

THE COURT: Go ahead.

We can take a look at it.

MR. ROSENBERG: They can put it up.

THE COURT: Go ahead and put it up.

MR. ROSENBERG: On no objection, Your Honor.

THE COURT: Received.

BY MS. ROOD:

Q Mr. Lake, do you recognize this photo?

A Yes, I do.

Q Is this you in this photograph?

A Yes.
Q And would you say that this is a true and accurate depiction of what you wear when you document protests?
A Yes. That's the good combination of the gear that I'll wear when I go out there, yes.
Q And what can we see in this photograph that you are wearing?
A I'm wearing a bulletproof vest as well as having my camera on the monoplod which I'm holding, and I have a ballistic grade helmet on as well.
Q Is that a press badge you are wearing as well?
A Yes, on the front of my vest there, and my ID with my name on it is below it.
Q I know you mentioned a camera. What kind of equipment do you use to document protests?
A The short answer would be an entry-level cinema camera and I use a professional sporting event lens which would be a white lens that people see at football games and such.
Q I take it you've taken footage of the protests that you have attended?
A Yes.
Q Does this include footage from September 13th, 2025?
A Yes.
Q I'm going to next pull up a video that plaintiffs would offer into evidence as Exhibit 13?

THE COURT: Any objection 0 or do you need to see it first.

MR. ROSENBERG: Yes.

THE COURT: That's fine. Go ahead and show it.

MS. ROOD: We have previously emailed this to defense counsel as well yesterday.

Should we play the video, Your Honor.

THE COURT: Yes. Then I'll ask defense counsel after we see the video if there is any objection.

Mr. Lake, this video we just saw is that something you took on September 13th, 2025.

THE WITNESS: Yes, it is.

THE COURT: Any objection from defendant.

MR. ROSENBERG: No objection, Your Honor.

THE COURT: 13 is ReceivedHonor.

BY MS. ROOD:

Q So, Mr. Lake, you just testified that you took this video; is that correct?

A Yes, I did.

Q I know these events are described in your declaration, so just briefly can you describe what was happening in that video?

A At that point in time that was what we call a shift change which as far as I understand it is when the officers are changing shifts so they clear the driveway as it has been referred to in this case to allow the cars to leave the

facility.
Q And what else did you see officers do?
A As the ritual had become, officers were coming out to ask people to get out of the way. And as the video shows, most were complying with it. In the video it shows I'm standing there on across the street, watching it all, and I'm not quite sure how everything unfolded but what turned into a scuffle slowly turned into a mosh get there in the middle of the street.
Q And so were you attempting to document these events?
A Yes.
Q Were or were you interfering with officers in any way when you were taking this video?
A No.
Q About how far were you from the officers that we saw shooting the less lethal munitions?
A I was across the street when they came out of the driveway. Near the end of the video, I get closer to them in the Rood. I would say I got no closer that five feet.
Q And were you struck with less lethal munitions during this incident?
A I was sprayed with the OC pepper spray.
Q Were you wearing your press gear at this time?
A Yes, I was.
Q And was it the same press gear that you were wearing in

the photograph that we just saw?
A Yes, it was.
Q Were you affected by the OC spray that you were sprayed with?
A I was.
Q In what way?
A The spray liberally covered my upper body and my head and my camera equipment and I did have a mask on at first, but after I took my mask off later on, the solution that was in my hair re-exposed me to it all and it actually caused a pretty much aftershock effect of the symptoms which came on and I needed help from the medics on scene right then.
Q What were those symptoms that you started experiencing?
A Stinging eyes to the point where I could not your views shift from the pain. Swelling of the face. Hotness, sensitivity, disoriented. And pain, to say the lease.
Q I'm sorry that happened to you. I'm going to play if we could just the last maybe five seconds of the video again.
(Video was played in open court.)
Mason, did you see sort of an orange film during that portion of the video?
A Yes.
Q What is that?
A That appears to be solution from the OC pepper cans, which those have a UV dye in it. So that's where the pink reddish

color comes from.
Q And did that spray, coating your camera did that affect your camera or your other equipment?
A Yes, it did. My main camera and secondary needed extensive cleaning to be done. The secondary camera is still a case in progress. My microphone was damaged beyond repair so I still need to get that replaced.
Q So zooming out a little bit, your declaration indicates that you have been hit multiple times with chemical and impact weapons; is that right?
A Yes.
Q Have and have you been struck multiple times since you have begun documenting protests outside the Portland ICE building in the summer of 2025?
A Yes, I have.
Q You testified earlier in your career you covered over 150 protests is that right?
A Yes. Before 2025, I covered over 150 events, yeah.
Q In 2025 -- since then you have covered even more, right?
A Yeah. Obviously since then I have probably covered probably like two dozen times possibly I have been out but I've been doing more remote I have been doing more report reporting And that's typical in my words here. I have been doing more remote reporting and trying to record the scene so I can get the full picture of events, especially when Portland got in

national and international news.
Q Are the protests that you have documented at the Portland ICE building since summer 2025 materially different from other protests that you have documented before then?
A I have seen differences, yes.
Q Can you describe some of those differences?
A Between 2020 and 2025, I saw a little more order I'd say from federal officers and more instances of them following the rules that I have heard spoken about in court, which is to give people a chance to pull away, issue orders and so on.

Now, I have seen an increase in unpredictable behavior not being clear with their intentions and in my own opinion seemingly more vindictive motive behind their actions.
Q And talking a little bit about sort of the unpredictability, what are some of the times when you've you have seen things beyond predictable during your time documenting?
A I would say I have had instances where I'm shot through clouds of gas where I couldn't even be seen and I wasn't doing anything. So I wondered why am I being targeted here. I have seen munitions carelessly thrown around. I have seen munitions used by federal officers set fire to local property and protesters actually had to step in and put out that fire.

I have seen officers allow people who seem to be only civilian content creators allowed in their facility while the

megaphone is saying this building is closed to the public.

So I see a lot of inconsistencies and conflict of interest when before I saw a lot more consistency to the rule of law I would say.

Q And the content creators you mentioned being allowed into the building, do you know what type of content creators they were?

A Yes, they do. They seem to focus on MAGA-related events.

Q You spoke a little bit earlier about some of the rules that go along with protests. Have you learned any rules or strategies in the time documenting protest to avoid being hit by crowd control weapons?

A Yes, I have.

Q What are some of those?

A Well, as everyone chants, I know it is good to walk, not run. It is good not to do erratic behaviors. Don't be waving your hands or gestures towards the officers. Give them their distance. Like I mentioned before, I usually give them a at least a five foot distance I don't see any need to be any closer to that for my recording or my needs to record What's happening on the scene. And what from what I've seen that allows them to be able to do that work.

I have also learned that officers, they can direct press, but they cannot issue blanket orders for me to just go away. As a member of the press, I'm allowed to be there and

document.
Q And is one technique to avoid being hit by crowd control weapons. Is one technique to identify yourself as press?
A Yes.
Q And you testified earlier that's something you do when you document protests, right?
A That is the reason I cover myself so much with badges, to be sure -- yeah, the argument of I did not know you were press is hard to believe.
Q And do you follow the other rules that you just talked about when you document protests?
A Yes, I do.
Q And has this worked to keep you safe from impact munitions and less lethal munitions?
A No.
Q One quick clarifying question. I know you mentioned earlier that you have seen influencers who cover MAGA events being let into the ICE building. Would you say that those influencers will be on the side of supporting ICE in your view?
A That's what I have witnessed based on footage of their own words and their own posts, yes. They seem to be supportive of ICE and working with them. I have even seen them in the car when Kristi Noem came to town and they were on the roof right beside her.
Q So I know you have just spoken about the times that you

have been subjected to force at the ICE building. How have your experiences documenting protests at the Portland ICE building made you feel?

A I would say recent events have changed since I first started reporting. I can even admit in 2020 I was more upset at what was happening and upset what was happening in my community. But now in 2026 and after witnessing what happened in 2025, I can say I'm scared.

Q Can you say more about that? Why are you feeling scared now?

A I'm scared at the implications it means for where my country is heading, the same reactions that the representatives.

Q Are you scared about being subjected to force as well when you document protests?

A Yes.

Q Have those feelings of being scared stayed with you?

A Absolutely.

Q In what way?

A I don't feel safe in my own home anymore.

Q Would you say that's part of the lasting effects of having been subjected to this force?

A Absolutely, yes.

Q Are there any other sort of mental or emotional impacts that these instances have had on you?

A Yes.
Q And can you describe some of those?
A My own doctors have said that they have seen behaviors mimicking those of someone who has seen combat and this is always and this is a topic I put a lot of thought into because no one respects the military branch more than me. And while I don't compare myself to the service of a military member who has seen war, I would say I have seen combat based on some of the days I have been there and the abuse I've had to deal with. I say this because a anecdote in 2020 I had a veteran say this is worse than war because we can't shoot back and I thought that was a p very good point. For someone who is press, it yeah, there is nothing I can do. I have to sit there and just take it, to record it. I can't run away. I many times I was completely tackled for the sake of getting the footage. So I have had subjected my body to this abuse for the sake of getting what I have on record.
Q And talking about needing to subject yourself to force and to violence in order to do your job, have your experiences impacted your ability to do your job?
A Recently yes, it has made it more difficult.
Q In what way?
A Well, not only for mental wellness and my safety, but when it comes to working, anybody I work with now they are worried about their own safety as well. When our government is

claiming people that are against fascism are terrorists and that they can blanketly be associated with one another, not a lot of people want to sign up for that employment and I am currently bottlenecked trying to get my movie made right now. And one person can't get a movie made. It is impossible. And no one feels safe enough to want to work on a project so I can get the truth out about Portland, and not just Portland, but what happened in Portland in 2020 clearly mattered because it tied into this misconception that happened in all last year with "war ravaged portland, which for the record, Portland was never burning down ever.

Q And how does it make you feel knowing that it has been more difficult to do your job since these incidents of force at the ICE building?

A It scares me and it does leave me lost as far as what the future I anticipated to see will be, but I'm someone who doesn't give up and I don't back down, especially when it is an intimidation tactic.

Q And maybe along those lines, do you think you will go out to document again at the Portland ICE building?

A What is required of me to better cover the events and the story that I'm doing right now, if I have to go out, I will. But if I don't have to, I won't, or I'll do what I have been doing which is licensed footage through other journalists. As a movie producer working with various people as I'm to do more

of.
Q And have your experiences at the Portland ice Building changed how you approach going out to get footage now?
A Yes.
Q How?
A I frankly wonder what is the point of ID-ing myself anymore. It seems to just point me out and say, oh, there is press, shoot them so we can get rid of them quickly. I wonder this as well. It doesn't seem -- reporting -- when I first report, I hope to do it to share a truth that people don't know but it doesn't seem like that is lacking anymore. There is no action behind it. So I see, understanding being more important right now than reporting every day, every minute that happens in front of ICE and I see myself as someone who can help add clarity to a situation that is very confusing. And as others have testified, most in this situation don't know heads entails what's going on in it. From my extensive experience from 2020, I would say I have been conditioned to it where I still maintain a level head on me now a days out there.
Q And I know you just mentioned that sometimes you feel like ID-ing yourself as press means that you will -- someone will shoot you or otherwise target you; is that right?
A Yes.
Q Do you feel that it is more dangerous to be -- do you feel that it is dangerous to identify yourself as press?

A Oh absolutely. I feel like it is putting a target right on my back.
Q If you could be assured that you could go back to attend a protest and would not be subjected to the same force that you have been in the past, would that make you more likely to go out to document again?
A Yes.
MS. ROOD: No further questions, Your Honor.
THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. ROSENBERG:
Q Good afternoon, Mr. Lake. My name is Brad Rosenberg, and I'm with the department of justice representing the United States in this matter. Thank you for being here today. I would like to start with your uniform. And we saw a picture of your uniform earlier. Your uniform does have the name press on it, right?
A Uh-huh.
Q But it is a black uniform?
A No. It is blue.
Q Can we pull up the picture actually.
MS. ROOD: Sure. That's Exhibit 12.
BY MR. ROSENBERG:
Q Thank you. Is it a very dark blue?
A Navy blue, yes.

Q This picture was taken at night?
A Yes. I'll point out that my helmet is also bright blue.
Q Look I was actually going to ask you about that. So you wear a helmet as well?
A Yes.
Q And you also typically wear a gas mask?
A If it is required to. I have learned that if the officers come out with a mask on, put the mask on.
Q And you are often in crowds as part of your reporting work, is that understanding correct?
A Not always. Based on my equipment, a lot of the times I'm was standing off to the side so I'm able to record both p sides a little better.
Q Okay. I am going to ask my good friends if actually can we roll the videotape one more time from beginning to end. Exhibit 13.

Is that 13 Yes that's seeing the screen here So I'd like to

(The video was played in open court.)

THE COURT: Before you go on Mr. Rosenberg, one thing I'll note after watching 13. It looks to me like there is about four or five cars that wanted to exit from the ICE facility. They all exited. There didn't seem to be any problem with them driving out. While they were exiting, there was no spraying of OC, pepper spray or anything else, yet my

observation was that all of the spraying took place after the last car was left and driving safely down the street. If I have misunderstood or mis-viewed this, I'll leave it to counsel to point it out to me at the appropriate times but that's what I observed.

MR. ROSENBERG: I would like to build on that, Your Honor.

THE COURT: You may.

BY MR. ROSENBERG:

Q As I was looking at that video for the first eight or nine seconds or so, it seemed like your camera was trained on the cars leaving the facility; is that right. And that's when your camera shot shifted to the right away from the driveway as you were filming the Government vehicles going down the street?

A Uh-huh.

Q So at that point in time obviously your camera was not focused on the actions that were taking place, at least from your perspective to the left side of the driveway, was it?

A I couldn't elaborate my situation I had two cameras on there. So that's the camera with the wide angle. And my A camera is a narrow zoom lens So I am juggling multiple copies as well as my on the I'm on the scene.

Q Right. But I'm only talking about what we just watched And that's the evidence in this case that video is focused on the car was going down the street to the right, while something

else that's not being filmed is happening on the left?
A I mean I saw some stuff happening on the left if we want to review that footage.
THE COURT: Let's see that again. It is not that long. Let's see 13 again.
(Video was played in open court.
BY MR. ROSENBERG:
Q If you can close so at least what I observed in that video is the camera scope is the cars going down the street to the right. Would you agree with me that there were government agents -- officers -- I don't know which agency they were with -- that were in front of the driveway allowing the cars to exit the driveway?
A I guess would you state it once more for what your question is.
Q Right. I mean there was a line of officers who were positioned across the street, when I say across the street, that were lined up across the width of the street between the protesters and the cars that were exiting the driveway.
A There were officers in between the protestors and the vehicles, yes.
Q And at least around I would say the seven or eight second mark, they seemed to be just standing there allowing the cars to exit the facility?
A Uh-huh.

Q But then it's at that point in time your camera shifts back to where the officers are and they seem -- would you agree that they seem to be in very close proximity to the protesters?
A Yes.
Q I believe you said you are not quite sure how everything unfolded at that event, is that your testimony?
A No. But the footage clearly shows the vehicles weren't affected at all. If you are going after someone did something to the vehicles, I didn't see that happen in the video.
Q That wasn't my question. My question was didn't you say earlier this year not quite sure how everything unfolded?
A Yes.
Q And in fact, there appears to be some sort of scuffle between the officers and the protesters. Would you agree with that?
A Uh-huh.
Q And would you describe it as a physical scuffle?
A I would say -- I don't really assume But as you pointed out I did not see it.
Q Well I'm actually talking I'm actually talking about the point in time you are filming at the 17 second mark. Maybe we can roll the tape between maybe around be seconds nine to around second 24.

(Video was played in open court.)

See so those officers were right next to the

protesters, weren't they?
A Uh-huh.
Q And it was a physical scuffle, wasn't it?
A It looks like it.
Q It is at that point in time that some sort of spray is deployed?
A Yes, it looks like it.
Q When they are physically in a confrontation with the protesters?
A Yes.
Q Okay. Now, at this point in time if you appear to be -- are you on the sidewalk across from the ICE facility?
A At in exact frame it looks like I'm beginning to step off the sidewalk into the street.
Q You are getting actually closer to that scuffle, aren't you?
A Yes. I'm trying to report it.
Q I assume that you want to get as close as possible so that you can get the best video that you can?
A Within safety, yes.
Q In fact, you got very, very close to a government official, didn't you?
A Yes, I do.
Q Is that the point in which you got sprayed?
A Yes, it was.

Q And you were wearing dark clothing at the time?
A I was wearing a uniform as we were going over, which was the Navy dark blue press badge and that's the color that the uniforms are for press in war, but it was the official press color. So saying it is black isn't correct.
Q I didn't say it was black. I said dark. So you were wearing a dark uniform at the time were you not?
A That's your opinion.
Q Do you think that Navy is a dark color?
A It is a dark color.
Q So you were wearing a dark uniform. It is night?
A Nighttime.
Q And you were very close to the front to the officers who are already deploying spray, weren't you?
A Yes.
Q So isn't it possible -- and you were wearing a gas mask as well?
A Yes.
Q So isn't it possible that the officers sprayed you because of your proximity to them?
A I mean the giant camera in my hand I thought would be a give away that I'm press.
Q The gas mask would be a give away that you are somebody who's about to assault an officer because of your close proximity, isn't it?

A Why is protective equipment immediately violence in your eyes?
Q That's not what I asked.
A You said attack.
(Last question was read aloud in court.)
BY MR. ROSENBERG:
Q You were right next to him, weren't you?
A I was not next to him. I gave him at least five feet as I stated already.
Q So we're about five feet away from him at the time that he sprayed you?
A I was not next to him. I gave him at least five feet As I stated already.
Q So we're about five feet away from him at the time that he sprayed you?
A Yeah. That's not next to him. Six feet during COVID was the approximate distance We kept from each other so --
Q Can we roll that section of the tape one more time?
THE COURT: Yes.
(Video was played in open court.)
BY MR. ROSENBERG:
Q That officer sprayed you with approximately one or at most two seconds of them turning to face you; is that right?
A It is looking roughly like it. He was walking towards me and mace me as he was walking towards me.

Q He was looking the other way?
A I don't see that.
Q You can roll that one more time.
(Video played in open court.)
BY MR. ROSENBERG:
Q See if you so he was looking down the street, turns, sees somebody approximately five feet away from him and sprays; is that right?
A Yes he's me with a big white camera lens.
Q It in your declaration, you also stated that you -- you have a head lamp?
A Uh-huh.
Q Is that right? And that you have shown or shine let's go with shown. You shown a head lamp at an ICE official; is that right?
A After they were shining at us, yes.
Q What does that have to do with press coverage?
A Well, what does law enforcement have to do with blinding press.
Q That wasn't my question. I asked you what does shining a light at an ICE official or an ICE agent have to do with press coverage? It doesn't have anything to do with it, does it?
A That one, the specific act of it, no.
Q Thank you.
MR. ROSENBERG: Once again I would like to thank you

for coming here to testify today.

THE COURT: Any redirect.

REDIRECT EXAMINATION assault an officer

BY MS. ROOD:

Q One question. Mr. Lake, on September 13th at this time period we are talking about in the video, were the lights on at the ICE facility?

A Yes, they were.

MS. ROOD: Okay. Nothing further, Your Honor. Thank you Mr. Lake.

THE COURT: Anything further Mr. Rosenberg.

MR. ROSENBERG: Nothing Your Honor.

THE COURT: Mr. Lake, thank you very much sir. You may step down. I appreciate you being here.

Back to plaintiffs.

MS. HUTCHISON: The plaintiffs will now play Exhibit 14A, the full video and transcript of this deposition testimony from agent XX will be he submitted to the Court and 14A is what we are playing today and the transcript.

THE COURT: And about how long is it?

MS. HUTCHISON: This one is 12 minutes. In the month And we are running at 1.2 time for this one.

THE COURT: We will find the sweet spot somewhere. f) video was played in open court. Marry.

MR. BARRETT: Thank you Your Honor Barrett the

plaintiffs next witness heater Hellman. (Liam Barrett.

THE COURT: Come on up, Ms. Hellman.

(The witness was duly sworn.)

THE COURT: Please be seated. State your name and spell your last.

THE WITNESS: My name is heater. Hellman. H-E-L-L-M-A-N.

DIRECT EXAMINATION

BY MR. BARRETT:

Q Thank you huh are you?

A Good.

Q Are you currently employed?

A I am.

Q Where are you curretnly employed.

A Multnomah Presbyterian Church.

Q What's your role at Multnomah Presbyterian Church?

A I'm pastor and head of staff there.

Q What drew you to pastoral work?

A I was lucky enough to be a pastor's kid who had a pastor who modeled the love, compassion and servitude of Christ and just something that was in the Genes, I guess.

Q How long have you been in your current position?

A Well, my current position just two years but I have worked for that church for almost 20.

Q Have you attended any protests at the Portland ICE

facility on?
A Yes.
Q Have you submitted a declaration?
A I did.
Q For the record it that's ECF126-5. Approximately how many protests have you attended at the Portland ICE building?
A Too many to count at this point.
Q How frequently do you go?
A I started going once a week in the mornings in October and then a little bit in the nights and I had some health issues from being there in the mornings. My husband had a surgery so I didn't get to go back in the evening until December. Then in January, I started going twice a week every Friday and Saturday.
Q What motivated you to go out to the protests there?
A My faith teaches me that the biggest most important thing we can do is love our neighbors. As a person that follows Jesus and tries to get others to do the same part of that is helping the vulnerable, standing up to injustice. So when I started to hear the stories of what was happening to our I am grant neighbors, it didn't feel like I had any other choice but to stand with them.
Q Up said around October you started going sometimes in the mornings?
A Yes.

Q Do you still attend in the mornings?
A I do not.
Q Why not?
A Right wing agitator was harassing me in the mornings which was compromising of the safety of the people checking in for their appointments.
Q Did any federal agents at the scene ever interact with that ago gators as you phrase it?
A Not that I saw.
Q Would that person have been reasonable visible to agents at the facility?
A Yeah. In the mornings they were doing stuff from their car. Filming me. Posting videos later driving by and leaving But at night they are there.
THE COURT: This may be a silly question. How do you know the agitator was right wing.
A Based on the conversations that I have had with them.
THE COURT: Briefly describe.
THE WITNESS: They came at me one evening in a p pretty defensive manner asking me about why I was down there and how could I support people that were anti ice and that were proceed illegal.
THE COURT: Okay. Back to you.
BY MR. BARRETT:
Q But you still go in the evenings, correct?

A I do.
Q And during the protests you have attended have you witnessed federal agents employing force against protesters?
A I have.
Q Does that include the use of munition flash bangs tear gas pepper balls?
A Yes.
Q Approximately how many times have you witnessed federal agents using force like that against protesters?
A I witnessed the pepper balls, too many to count. I have been present for the tear gas and flash bangs on the 24th and 314th of January.
Q That's this year?
A Yes.
Q Those are the 24th and the 31st of January and I think this year Yes And those are the two incidents that you describe more fully in the your declaration?
A Yes.
Q Have you reviewed your declaration?
A Yes.
Q Does everything in their face we represent you recollection of the events that described?
A I think so.
Q Yes?
A Yes.

Q I think one would have been fine because I think it is pretty well detailed in the record and the Court has a wealth of other information about those events we won't talk about them so much in detail. But you mentioned that on the 24th and the 31st, you witnessed federal agents using munitions. On either of those days prior to the agents deploying munitions, did you witness any violent behavior from protesters to prompt it?

A I didn't witness anything that I would think was proportionate to the response that they gave with the chemical munitions.

THE COURT: That's not quite what he asked though. Did you see any violence from any of the protesters or anything that you think might properly be called violence?

THE WITNESS: I witnessed throwing of water bottles and the smallest dumpster I have ever seen basically like a like our residential trash can turned on its side was pushed at the gates but just bounced or again it was very small. So I don't know to me that wasn't violent but it was something more than just standing there.

THE COURT: Okay. Thank you back to you.

BY MR. BARRETT:

Q To clarify were there any officers between the dumpster and the gates?

A No they were all behind the gate or up on the roof.

Q On and on either of those two days were you struck or directly exposed ammunitions use Yes?

A Yes.

Q Which date?

A On both dates I was the munitions were all around me. And then on the 31st a flash bang I think landed right next to me. When it went off I felt the waves of force.

Q So the 24th, can you describe where in relation to the ICE facility you were standing when you felt the munitions?

A Yeah. We were across the street right by the gray's landing apartment building. And that is when I first experienced the tear gas munitions as they were coming toward Is in that direction as well and then I was in different places that evening as they continued to come out and fire off more munitions.

Q And what about the 31st?

A The 31st I was just down the street when the first gassing started during the labor union. I was with the an interfaith march that was coming from the other direction. I was almost I think right under the apartment building, the glass that fell from the apartment building fell just in front of us. And then at that point I had come prepared to be there later that evening and I had been given a full face gas mask and so at that point I went to the blue line. I just felt that if they are going to gas again, they were going to have to gas the

pastor first and they did.

THE COURT: Were you wearing a collar at the time?

A I was wearing a collar and a stole, yeah. And I had a sign that said Jesus said what you do to them you do to me.

Q You mentioned there was glass that fell, where did it fall from?

A It fell from I believe the third story windows of Gray's Landing.

Q Did you see what caused it to fall?

A A canister of munitions went into the apartment building.

Q Okay. And so the 31st you were at the blue line. On which side of the blue line?

A I was on the side that we're allowed to be.

Q The public side?

A Public side.

Q And you said a flash bang went off. You describe that sensation?

A Yeah. The gas had been going off. But the agents were going inside. And so we just went back to stand and peacefully protest at the blue line and all of a sudden I just felt this major wave like hit my body and it hurt, like my ear hurt in that moment.

Q Did it cause any other effects?

A Yes, I had a concussion.

Q And what were the symptoms of that?

A I am started experiencing brain fog and having trouble with screens that week. I was so busy though I wasn't thinking too much of it. But noises and light started to get really hard to deal with and then that next Sunday morning I got up to give a sermon which is normally not a big challenge and I could not form. I could not do transitions between parts of my sermon. I was losing my train of thought and I realized something was really wrong and that's when we had one of our children had concussions previously so we started thinking that was it and I went to the doctor and they confirmed that I indeed I had a concussion.

Q How long did the effects of that concussion last?

A A few weeks and I still have some sensitivity to light and noise but I had to basically go on green rest that whole rest of the week and not be at work and not being really functioning and to try to let my brain heal.

Q I assume you weren't at work so you weren't able to go to the protests at that time either?

A I skipped one night. But I did go back. I stayed much further away but we had a meal plan that we were supposed to be serving down there.

Q Have So Have you ever encountered -- you said you have encountered (a counter protesters people pro ice protesters down facility. How did they generally behavior in comparison to the anti-ICE protesters?

A A counter protest People pro ice protesters down facility how did they generally behave in comparison to the antibiotics Protesters those are the people that I'm afraid of when I'm down there. They are -- they are openly carrying weapons. They come up very aggressive. They come up saying that they want to hurt us. They come up saying you are the reason that we are here and like there was one night a man had a RWDS patch on his vest along with some weapons and he said this stands for right wing death squad, and then they started referencing Alex Pretty and Nicole Good and said: What's happened to them is going to happen to you.

Q You mentioned that some have displayed weapons, what kind of weapons?

A Knives, guns, they have various forms of mace.

Q Are these folks out visible in public near the protesters?

A Yes.

Q Have you ever witnessed agents intervene against the anti-ICE protesters?

A No.

Q I'm sorry. The pro-ICE protesters?

A I have never witnessed them have any interactions to do anything negative towards the counter protesters.

Q We will stick with counter protesters so we don't confuse ourselves. Have you ever witnessed the agents appearing to interact positively with the counter protesters?

A The evening of the 24th, we were standing somewhere in front of the building but not at the blue line. There were a group of counter protesters that were standing in front of us and they all looked down at their phones at the same time reading, I'm assuming they were reading a text message. At that moment after they looked down at their phones, they all left. And within a minute they started deploying chemical munitions again.

THE COURT: There was a whole bunch of pronounce there. Can I hear it that without the pronounce please. They started firing munitions.

THE WITNESS: The counter protesters were standing there. Again we could tell because of what they were saying and the things that they were doing. And they all looked down at their screen at the same time. The counter protesters looked at their screen at the same time and then the counter protesters walked away.

THE COURT: And then what happened from the federal officers.

THE WITNESS: Within a minute the federal officers started more chemical munitions.

THE COURT: What date was this.

THE WITNESS: The 24th of January.

THE COURT: Back to you.

BY MR. BARRETT:

Q Thank you, Your Honor. Have you attended any protests or been to the ICE facility since February 3rd, 2026?

A Yes.

Q Have you noticed anything different in nature about after that date compared to before that date?

A There is a lot less people.

Q Have you witnessed any munitions used?

A I think there might have been pepper balls used. But I have not witnessed any gas. Again the pepper balls happen so frequently that I lose track.

Q Have you witnessed any protesters act violently towards officer since February 3rd, 2026?

A Other than maybe throwing water bottles at the gate, no.

Q And when those occasions have occurred have officers seemingly been able to handle the scene without deploying tear gas, flash bangs?

A Yes.

Q Thank you. Are you aware of any specific individual who has expressed concern here about the safety in attending protests at the Portland ICE building?

A We had a big faith action there on December 1st. We had a lot of people attending. And then we had scheduled to start these community meals with different churches would bring food down on the first Saturday of the month. And it was supposed

to start in February. People were really excited about that and wanted to know in the next week factions are going to be. We're asking for more events to come together at night. And then after the gassing, people are not wanting to show up. They will prepare crockpots of chili for me to take, but they will not show up down there.

Q During the dates -- rewinding a little bit. During the dates where you experienced munitions. Did you notice anything specific about the demeanor of the officers?

A There are times when it appears that they are enjoying what they are doing.

Q How so?

A When someone smiles and their eyes smile and sometimes they come out without masks and you can see a smile. I have seen them laughing with each other as they are firing pepper balls at people. It definitely appears that some of them enjoy what they are doing.

Q And turning to a different track, I understand that some of these protesters or some of these protests draw large crowds a wide variety of people. Have you ever interacted with protesters shouting or saying things that you find personally distasteful?

A All the time.

Q Do you have any concrete examples?

A Kill yourself. I don't agree with shouting that at

anybody.
Q Have these interactions with other protesters at all affected your willingness to attend protests?
A No.
Q Why not?
A I'm not responsible for what they are doing. I can only model peaceful none violent protests with my own action.
Q Has it changed your believes about the rightfulness of the protests at all?
A No.
Q Why not?
A They are still expressing themselves in a way that seems to be permissible by the law.
Q Uh-huh. And what about the use of munitions that you have experienced. Is that affected your willingness to attend protests at all?
A It resulted in a lot of conversations with my family and my congregation about what was safe and what I was willing to do. It did make me rethink what I was willing to do, just the risk of getting another concussion and what that could do, the risk of my husband often goes down with me at night just to be a lockout and the risk of my kids losing both their parents, it has made us question quite a bit what we are doing and why we are still doing it.
Q Do you plan to keep attending protests?

A I do.

Q Why?

A Because I care about what's happening in our country right now. I care about our neighbors that are being taken and deported. I care about these people who are down there protesting. They have become like a second congregation to me. And so again, as someone who is trying to follow Jesus and have people do the same I think it is my responsibility to be there.

MR. BARRETT: Thank you.

THE COURT: Pastor Hellman before we go to defense counsel, I want to go back to January 24th, 2026. If I have got this right, you saw that testimony or several of the counter protesters were looking at either their phones or to communication devices And about the same time. They left and within a minute or so federal agents if I heard you right fired munitions at the crowd.

A Yeah.

THE COURT: What type of munitions if you remember. Was there tear gas or chemical irritants.

A Was the tear gas and the flash bangs.

THE COURT: I was looking at your declaration filed on or signed on February 19th. I suggest a fairly small paragraph really two paragraphs relating to January 24th, paragraph 6 and 7. If you want to look at it. I didn't see this mentioned the story about the counter protesters. Any

understanding why not.

THE WITNESS: I was still suffering from the concussion at the point that Liam was talking to me. I was doing my best to recall what was happening but I was still having trouble just getting all my thoughts out I think at that point.

THE COURT: So when did you first remember this issue about the counter protesters looking at their phones or communications devices?

THE WITNESS: On Sunday when we were going through prep.

THE COURT: This past Sunday as you were preparing for this testimony.

THE WITNESS: Yeah, As I was thinking back.

THE COURT: I have seen that before. No problem. Thank you. Defense cross-examination.

MR. YUN: Nothing from the Government, Your Honor.

THE COURT: All right. Gentlemen thank you so much Thank you for being here.

MR. BARRETT: Thank you your Honor, now that she has finished testifying. May have she take a seat in the gallery.

THE COURT: She is welcome to remain absolutely. When someone is done testifying they are welcome to remain.

MR. ROSENBERG: Your Honor, can we take a short recess.

MS. HUTCHISON: Sure. Just briefly before we do just so I can paint a picture for Your Honor here.

THE COURT: Yes.

MS. HUTCHISON: I'm sure you noticed how late in the game my firm joined the effort to prepare for this hearing. I can represent to you that we had many, many law clerks helping us to gather the declarations we made our best efforts to get these law clerks who are not attorneys together all relevant information and we have used the last several weeks to try to make sure we didn't really any important parts of testimony. Since that question has come up a few times now I want to let you know the process here and why some things may not make it into a declaration.

THE COURT: I'm not concerned. I want to get all the facts on the record.

Thank you. Before we take the recess, let me just ask. How long do the plaintiffs anticipate for the examination of Mr. Rudiger.

MR. MERRINAN: Your Honor, Taylor marry it ten to 15 minutes.

THE COURT: And then how long are the two brief videos.

MS. HUTCHISON: Approximately well your Honor, we go in a different order now. Mr. Kerlikowske has a flight tomorrow morning. So we would want to call him at as close to

three o'clock as we can to allow for plenty of time for the Government to question him.

THE COURT: How long do you anticipate for the direct of Mr. Kerlikowske.

MR. BORDEN: Probably about an hour, Your Honor.

THE COURT: Okay. Let's take a ten minute recess.

(Recess.)

(Open court; proceedings resumed:)

THE COURT: Plaintiffs may proceed.

MR. BORDEN: Good afternoon Your Honor. Plaintiffs would like for that call Gil Kerlikowske.

THE COURT: Good afternoon, sir.

THE WITNESS: Good afternoon.

(The witness was duly sworn.)

THE CLERK: Would you please state your name for the record, spelling your last.

THE WITNESS: Gil Kerlikowske.

K-E-R-L-I-K-O-W-S-K-E.

DIRECT EXAMINATION

BY MR. BORDEN:

Q Good afternoon Mr. Kerlikowske. You prepared two declarations in this case; is that correct?

A I did.

Q Those declarations accurately reflect your opinions in this case?

A They do.
Q Before we get to your opinions, I would like to talk a little bit about your qualifications and your background. You have attached a CV to your did he. Is that an accurate Customs and Border Protection of your CV?
A It is.
Q How many years have you been in law enforcement?
A About 47.
Q Where did you start?
A I started in the St Petersburg Florida after I got out of the Army. And I was an MP and the army in nineteen seventy to seventy two and to St Petersburg Police Department.
Q What was your position there?
A I rose through the ranks to be the commander of the criminal investigation division and then went on to be a police chief.
Q And where did you go from Saint Petersburg.
A Port Saint Lucie Florida as a police chief or three years and fort pierce Florida After that. And then I think I made a mistake and went from Florida to buffalo New York.
Q And you were the police chief in buffalo?
A I was.
Q How long did you hold that position?
A Five years.
Q And where did you go after that?

A I went to the department of justice to the community oriented policing service in Washington DC.
Q How long did you hold that position?
A Two years.
Q And where did you go from there?
A To the Seattle Washington as the chief where I was a police chief for nine years.
Q How about after that?
A I was the president Obama drug policy advisor for the almost a little over the first half of the administration. And then I was confirmed as commissioner of customs and border protection for the last three years of the administration.
Q Do you consider yourself to be an expert on policing protest?
A I do.
Q Do you also call that public order policing?
A Yes.
Q When you say public order policing, what exactly do you mean by that.
A Well it's a unique form of policing oftentimes because you're dealing with a lot of people who are expressing their first amendment rights. They're not committing crimes but there is the potential for problems. There's the potential volatility. And so it takes a level of knowledge and experience along with countless hours of training to police

public order events.

Q What training and experience do you have that makes you an expert in public order policing?

A Well, I started in 1970 a 20 year old military police officer going through Fort Gordon, Georgia, And they had built a mock city to train in -- at that time it was called riot control because of the Vietnam War protests. Later, when I went back to the St. Petersburg Police Department, after the Army after two years, the city had experienced a sanitation workers strike, So there were issues there.

I've been to numerous conferences as president of an organization of major city chiefs association, the 60 largest police departments and sheriffs departments in the United States and Canada. We would meet regularly on protest issues. Particularly my time at the FBI Academy on three different occasions, These were all examples. And Commander Schoening mentioned the that you're going through as commander And you've mentioned the Nims training the National Incident Management System and ICE's training when I was the police chief in Seattle, we convened people from Portland, Vancouver, and Seattle recently because all three West Coast cities experience protests and demonstrations of different kinds. We wanted to make sure that we were up to speed with at least the latest techniques to manage those in a safe way.

BY MR. BORDEN:Did you have any experience policing

protests when you were the chief in buffalo?
A I did. There were antiabortion protests where people would block the entrances to clinics and that would result in oftentimes arrests or somewhat dispersal of those people But oftentimes they ask and wanted to be arrested.
Q I would like to read to you from page 33 of defendants opposition brief that says. Mr. Kerlikowske's opinions derived from his personal experience with protests that occurred a decade ago or earlier. The declarations does not say whether Mr. Kerlikowske the has ever been faced with the type of situations that DHS officers currently confront in Portland.

Have you ever been responsible for policing protests that are similar to the ones that are occurring in this litigation?
A Very much so. Seattle, For nine years, I was the second longest serving chief in the history of the department. Seattle is well known for protests Public television WGBH, the Associated press have all done lengthy articles about this long history of protest in Seattle, and they've taken on a wide variety of protests from levels of violence, people fighting with police officers to people repelling off a bridge to keep the Japanese whaling vessels from leaving in Seattle. People that would handcuffed themselves inside of a PVC pipe so that you'd have to be very careful if you're going to try and get them out from under that things that were done or they can hang

themselves on makeshift scaffolds that if you were attempting to take them down, They could actually get seriously physically hurt.

So it was a very wide range of protest.

Q About how many protests did you police in Seattle?

A We have reached about 15 to 20 Fairly good size a major protests a year. Oftentimes there were others that were smaller over a particular incident.

Q How big was the biggest protest?

A The visit of the Dalai Lama in about 65,000 people into the Indian end of the city but anti-immigration anti-war war protests could easily number of 15 to 20,000 people.

Q Were people doing anything violent at these protests?

A Sometimes they were. Yes.

Q What types of things were they doing?

A Well, Seattle was known for the battle of Seattle in 1999, the world trade organization in November. The chief resigned shortly thereafter or and I became the chief in August of the following year in 2000. So I dealt with all of the litigation, the after action reports, the investigations of WTO. But there were pow owe there was going to be an anniversary of WTO and only in Seattle would they hold an anniversary for it. But they did. And it became quite volatile. One of our captains was struck in the eye with a steel ball bearing that was shot from inside the crowd. We made I think that night about 75

arrests of people that continue to protest that continued to protest not listen to the dispersal orders that were being given And they were physically arrested. We had some property damage. And that was my first introduction just a few months after becoming chief.

Q Did you ever deal with situations where people were throwing things and then they would go back and hide in a crowd?

A Quite often. To use a phrase that officers would use, were people that were dressed in black. But sometimes they were much more clever than would dresses as one officer called them They dressed like republicans in a blue button down shirt and khaki pants but they keep their black outfit in a backpack or something They disappear into an alley and then come out all dressed in black ready to create havoc and caused destruction.

Q In terms of volatility and chaos, How did the protests that you policed in Seattle compared to the ones that we have in Portland currently in this litigation that you've seen?

A Well there are two main differences One is that quite often those protests in Seattle would go through a wide number of streets. People would break off and go down alleys and other areas and create property destruction and break things. That could happen. And policing a protest that is constantly evolving and moving from location to location, as one large protest went through the downtown, stopped at the INS building

or the federal building to move to protest and then moved on, Those are difficult to police. Protecting an individual structure or a building is a little bit -- a little bit easier.

Q Is there anything else that you have done to deepen your understanding of protest policing or public order policing that's not in your CV?

A Well, I stay in touch with a number of my colleagues, both current police chiefs, but also former chiefs. And I teach at the university of Chicago. I teach at the senior management institute for police, the DC police leadership academy and also the Charles of the Charleston Police leadership institute So each year I'm in contact with a number of people that are very active at the command and police chief level of these different communities and cities. And next month, I'll be going to the police executive research forum annual conference of Chiefs in Los Angeles.

Q Did you police any protest when you were the commissioner of CBP?

A No.

Q Did CBP offer training on protest policing while you were there?

A Not that I know of.

Q I think at this point I would like to qualify Mr. Kerlikowske as an expert on public order policing?

THE COURT: I generally don't do that. I basically

wait for there's a question. Typically an opinion question. If there is an objection to the qualifications of the witness to answer it, then I will make a ruling. Most federal courts at least in this district do not prequalify or advance qualify experts.

MR. BORDEN: Okay.

BY MR. BORDEN:

Q While we are on the subject of expertise, Mr. Kerlikowske, I want to talk about Mr. Cantu and Mr. Sullivan. You have reviewed some of their declarations -- you reviewed their declarations, correct?

A I did.

Q And how about deposition testimony?

A I did.

Q Is either of them an expert in public order policing in your opinion?

A Not from what I read, I did not see them as experts in that area.

Q Why do you say that?

A Well, because Mr. Cantu stated that his first experience in protests was coming here last year and I did not have an opportunity to read Mr. Sullivan's deposition. I don't think it was quite ready. But from what I read, he is a border patrol official and of course the border patrol is not trained or experienced or knowledgeable about policing protests.

Q Okay. I would like to move on to your first opinion that you have, which is that there has been a pattern of excessive force at these protests at the Portland ICE Building. Can you pull up a PowerPoint slide 2, please, Lucy.

Are these generally the reasons behind your opinion, Mr. Kerlikowske?

A They are.

Q What is significant about the declarations that you reviewed?

A Well, I reviewed dozens of declarations and information that had been provided from people had felt that their First Amendment rights were being violated or that they had been assaulted or harmed during their time attending the protests at the ICE building.

Q And what about the videos stood out to you?

A I looked at a number of the videos. And what stood out to me particularly is this unbelievable ragtag fashion of walking out with a lot of less lethal technology and looking away and just indiscriminately firing, whether it is OC spray or pepper ball and certainly tear gas and smoke. To see that over and over again, you know, frankly knowing hundreds of the people -- not here -- but hundreds of the people that I worked with at Customs and border protection, siege the way they treated immigrants that were children coming across the border in 2014 and to see what's happening now tugs at my heartstrings.

Q Did you look at videos provided by both sides?
A I did.
Q How about the use of force reports, what stood out to you from those?
A They seemed pretty pro forma, and they didn't seem to be overly concerned that when there was passive resistance that they would turn to munitions, oftentimes pepper spray in different canisters. Those force reports and then being concerned, like where you are filling out a use of force report, what is the follow-through.
Q Okay. And how about training? What was significant to you about training in forming your opinions?
A So I attended and gone through and been briefed at the federal law enforcement training center in Georgia, so I was very familiar with the kind of training that the Customs and border protection officers have. Those are the people in blue uniforms that work at the Ports of entry but they are also part of special response teams, et cetera.

I also went to Artesia New Mexico to the border patrol academy. I had replaced the border patrol Academy Lead and significant changes were being made on use of force. The use of force by the Border Patrol And I became commissioner was a significant problem brought up by the senate foreign Relations Committee, and non governmental organizations, and certainly the press. And we had to -- we made a number of

changes, including changing leadership of the border patrol academy to begin to address those use of force issues.

Q In your view have the people that have been policing these protests than given adequate training for public order policing jobs?

A Not at all.

Q Why do you say that?

A Well, I know that the Department of Homeland Security has a training program through FEMA on public order policing, But I don't know people within the Department of Homeland Security that have actually attended some of the instruction on the use of batons and the traditional methods that actually can be quite effective And yet I don't see anything except turning to munitions more than they need to do.

Q We will probably get back to that a little more. But just generally, what about in the deposition testimony that he saw influenced your opinion?

A Well, the leadership is important. I mean, to be experienced and knowledgeable about policing in the city is very different than policing on the border. When the border patrol is called the Border Patrol for a reason. They're very good on the border They know what they're doing they're experienced And I was a huge defender and was always very supportive of the work they did on the border or usually within 25 miles of the border.

They are not the organization, they are not trained. They are not the people to parachute in to cities like Chicago or portland or Los Angeles, et cetera, and then say why don't you do public order policing or city policing. That takes a great deal of experience and knowledge and skill to be successful in that environment. And I don't think the city police chief or a city officer would be particularly good at trying to understand and work the border.

Q Just to put a finer point on it. Is it your view that sort of lack of good leadership is affecting the way that people behave down to the line agent level?

A Very much so, yes.

Q And okay I didn't mean it to skip over leadership. But what about in the testimony that you saw. Is there anything in particular that stood out to you?

A Well, listening to the testimony of not only some of the testimony today but looking at some of the other testimony, when you can use less lethal weaponry, and we use you know we use that we throw that term around a lot, like less lethal, life or whatever, it is not a big deal. And yet we know of course a woman that was killed with pepper ball around We know that these can be really dangerous levels on use of force.

We know that with tear gas, and we know certainly know that with other things like soft nose rounds and things like that quite frankly CBP wouldn't even have this equipment

if I hadn't given it to of them. Maybe I should take that back right now.

But the we gave it to them because of the use of force, and the only thing that a Border Patrol agent really had to rely on was a sidearm or a long gun that was inside their vehicle that was with them. And their use of deadly force their shootings was very high, And it had really gotten the attention of every level of government. The chief of the border patrol had ordered an independent review of use of force that was produced just after I was confirmed as commissioner. And so we took that on head on changing the policy which was outdated on use of force and providing them these other tools, pepper ball, soft knowed rounds, not so much teargas because riot issues just were not a significant problem. But those other tools could be much more effective, including I don't believe we introduced Tasers, but I think later on, Tasers or these electronic devices were also. And by the time we did a lot of training, we implemented an internal affairs section with what's called 1811 criminal investigators, the first time that CBP had that. And within about a year the level of force used by the Border Patrol was reduced significantly. That continued on after I left. It continued on with the confirmed commissioner that came after me because they paid attention to force, and they paid attention to accountability.

Q Is it your view that's no longer happening?

A The view that I see, especially with turning in the reports about use of force, and then trying to figure out where they go, who's looking at them, and what type of follow up is being done. But literally if you have a lot of uses of force and you don't find any problems then you have a problem.

Q So the Court has already read your declarations in detail, so I thought it might be helpful at this point to do a little bit deeper on a couple of issues. I wanted to start with a video. And so this is Exhibit C to the declaration of Bennett hazard Hazelton It's docket 17 This was a video taken on October 2d and I would like to plate after that for the Court.

(Video was played in open court.

So Mr. Kerlikowske in your view is this excessive force?

A Unnecessary and excessive force. No reason to use that on those two individuals.

Q And why did you select this video?

A Well, because I think it showed the amount of munitions that are being used really indiscriminately. So she has a bullhorn or he. I couldn't quite tell that. And the other person appears to have nothing in her hands. And so this gratuitous use of this brought back my time in Seattle in which two young women during the world trade organization.

MR. BAILEY: Drove objection to relevance.

THE COURT: Overruled.

BY MR. BORDEN:

Q You may continue witness?

A They drove up to Capitol Hill in a car during the WTO. I was not there, but I certainly did the did a lot of the follow-up work on all of that. They roll down the window to ask two king county deputy sheriffs because WTO was so large that they had to use mutual aid bringing in agents from the Washington state patrol, king county, etc., which creates a lot of other logistical and communication problems when you try to combine those forces. But they roll down the window to say how can we get out of here, we don't want to go downtown which is where all the disturbance are. And the deputy sheriffs filled the car with OC spray. By the way both deputy sheriffs were investigated and discipline by the sheriff's department for that gratuitous use of spray for no reason.

Q In your view, when you have something that appears to be a blatant misuse of force like this, should there be some type of investigation and discipline?

A Yes.

Q And what happens in a police department when you don't investigate and discipline events like this that occurred on October 2nd?

A If you don't pay attention to those details and you don't do the follow-up and the accountability, one, unlike a federal agency where you are going to get transferred out, and you are

going to leave the area, if you are a police chief and you are a police officer in a community, you are there. You have to answer to that community. You have to be accountable and have you to be responsible to them, which is what you would hope that all law enforcement agencies would do. But if you don't address those issues, you could end up having a policy on one hand that says be very careful about your use of force and then you can have an unwritten policy that essentially said, you know what, that's okay.

Q I'm going to read a passage from the deposition of Robert Cantu who is the person -- who is the Commander for operation Skipjack. This starts at line 21 of page 159 and goes to page 160.

"QUESTION: When a person completes this form 10, use of force report, they submit it to their direct supervisor; is that correct.

"ANSWER: Answer no. We have a use of force packet that we put together with all the supplemental information and evidence and it goes to a use of force review board that reviews it and then it either gets accepted or, you know, either decline for corrections or for, you know needing more, more evidence or more substance. Not part of the use of force board. I'm not a use of force expert. So we export those to use of force boards or a board that reviews these.

And then it goes to the bottom of page 163 on to 164.

"QUESTION: Okay. Up said that part of the use of force Board's review is to determine whether the use of force was consistent with policy. What is your understanding of what happens if the use of force board determines that the use of force reflected in this report was not consistent with policy?

"ANSWER: I have not run into that situation yet.

So my question to you is what conclusions if any have you drawn from this testimony.

A So first that's a system that's turned on its head. If you are the supervisor, the team letter, the IC of this group of people you kind of own those people. You are responsible for those people. You are responsible for their actions. If they fell out of use of force form and you get it as the supervisor and you review it and you say you know this is out of compliance, this doesn't align with our policies, et cetera, you would want that first level of people that understand that this is not right to take corrective action and to take corrective action as quickly as possible.

You can have the use of force board also with the technical use of force experts, the less lethal trainers because there may be lessons learned. There may be other things that they could determine. But you can't escape the accountability of being in charge of this group of people, reviewing their use of force recognizing that it is outside of the policies and practices of that organization and then turn

around and say, well, you know, I'm not responsible.
BY MR. BORDEN:What about the fact this they haven't found any violations during the entirety of operation Skipjack? Does that influence your opinions in any way?
A Yeah, In police work we call that a clue. There is -- That's absolutely ridiculous that you have lots of split second decisions being made on use of force and everyone is correct and everyone is within policy and there is no corrective action being taken, et cetera. That just makes no sense.
Q Now, is it your understanding that use of force reports, the E star reports generated by CBP are separately reviewed by a CBP board?
A That's my understanding, yes.
Q And what is your opinion about having two separate review boards reviewing different use of force reports about the same event?
A Well, you've co-designated during this time both people from CBP or the border patrol but also under the auspices under the authority of the federal protective service. So it doesn't seem to make a lot of sense that one organization has tear gas, another part of the organization, they are both policing the same thing. They don't have tear gas. They don't use tear gas. If an FPS person uses a use of force, there is one direction. If the border patrol agent or ICE agent or a CBP agent uses force, if goes to a different part of the

organization. That's just -- it is a lack of communication, a lack of coordination, a lack of understanding of the basic principles of when you need to bring people together for different parts of an organization. You remember that the DHS is well 250,000 people. Customs and border protection alone had 60,000 personnel. But you want to try and align them as much as you can on policy, on training, on reporting, et cetera, because they are all doing the same task.

Q Is it your understanding that CBP also has not found any violations of its use of force policy with regard to operation skip Jack?

A I have not heard of any violations of the policy.

Q I would like to show you another video?

THE COURT: Before we do that, I want to pin down something that I heard him say. I want to make sure I understand it correctly. We want just a few minutes. Ultimately I am going to ask you, a clue of what. But I heard you say a moment or two before that, that without discipline and accountability you can have written policies but without discipline and accountability regarding violations of written policies, that shows that there is likely an unwritten policy to do something else. Did I hear you correctly.

THE WITNESS: You're correct, Your Honor.

THE COURT: Then we moved over to the Cantu deposition and the comment was, what conclusions do you draw

from the fact that Cantu found no violations or that CBP found no violations. You said implies work we call that a clue. I just want to pin down a clue of what. What does that clue show.

THE WITNESS: A clue that you have hundreds of these reports filed on the use of force and you find absolutely no problems with -- and it doesn't have to include discipline, it can include corrective behavior. It can include a pattern of perhaps there is additional training. Here is those are the kinds of clues I'm talking about, Your Honor.

THE COURT: Are those clues, as you said that there may be written policies but there really is an unwritten policy to the contrary.

THE WITNESS: Yes, sir.

THE COURT: Thank you. Back to you.

BY MR. BORDEN:

Q Well given the number of violations of and instances of excessive force that you have indicated in your declarations, does it surprise you that none of these violations were detected by any of the people reviewing these use of force reports?

A That's correct.

Q Okay. Now I would like to move on to the second video I would like to show. This is a document that was produced by defendants. It is Bates No. 1689. I think we are on Exhibit

14. So I would like to have it marked. I don't know that it has to be introduced into evidence. But this is a video -- 15. Thank you.

This is a video from January 31st, 2026. It is about 4:30 in the afternoon. You can see the time stamp. It says 19: 32 but I believe that's east coast time because of the amount of light in the sky in Portland. And just for the record, I saved the first two minutes off of this video with a discussion with my colleagues on the other side so that we are not showing the inside of the facility. And other thing I would say is we have heard a lot of testimony thus far about January 31st, because that's the second time that the Eckmans got tear gassed. Is that one of the reasons up chose this video?

A Yes.

THE COURT: This is the roof of the ICE building, right.

MR. BORDEN: This is on the inside of the ICE facility.

THE COURT: But not the roof.

MR. BORDEN: This is not the roof. This is the gate is --

THE COURT: I see. I see it now.

MR. BORDEN: Can you start playing it, please.

(Video was played in open court.

BY MR. BORDEN:

Q So you see the person in the closest to you. It looks like -- can you tell what he was doing?

A It looks like he has some type of munition in his right hand. And he is.

Q And he is getting it ready, right, as the gates open?

A Correct.

Q Is that significant to you?

A Well, what was significant is I didn't see any real where they were formed together where and maybe this happened before, where a team leader is saying okay, we are going to go out. Here is what we are going to do. Here is our objective whether it is to clear the driveway or to keep people from blocking the driveway, etc., and we are going to go out in a uniform discipline, focused fashion and this is what our objective is. So I didn't see that.

Q Are they in a proper formation in your view?

A No, not at all. And it would not give the public that sees them coming out any sense of confidence as DHS policy clearly states about posture and the way people are formed and the way they look. So it wouldn't -- and they are in different uniforms. It wouldn't bring a lot of confidence to a group of people that are out there that this is a part of an organization that is focused on doing -- making sure that things are done in a safe and effective way, not just safely

for the protest people, but safely for your own officers and agents.

Q Okay. Can we let it play a little more, please.

(Video played in open court.)?

BY MR. BORDEN:

Q We're redirecting the funds all right so what conclusions did you draw from what we have seen thus far?

THE COURT: Before that, what did we just see.

THE WITNESS: Well, I think they might have wanted to clear and I'm speculating it. I think they maybe wanted to clear the driveway. But what I saw is that they went nuclear, when you could actually escalate the force.

THE COURT: And what did we see that was nuclear? I mean for example, I saw a spherical canister that's a stinger then we saw the two silver or aluminum looking cylindrical canisters one. What are those.

THE WITNESS: It looks like it's both some type of smoke but also some type of tear gas that is being used along with all of the rounds being fired by the people in front. And what I couldn't quite figure out is, that if you did have to use tear gas, you're walking out. The crowd is in front of you. And yet when I saw the first canister of whatever it was, it was thrown over them. So now you have got the gas or smoke on one side. The crowd on the other and the uniform agents on the other. If you are going to use that you want to force them

to leave, not trap them between gas smoke and the agents.

THE COURT: And so that conclusion one of the people who are drawing that there was some purpose other than simply wanting to have the crowd dispersed or leave.

THE WITNESS: You know, Your Honor, I don't think I would go that far and put that in there.

THE COURT: What conclusions do you draw.

THE WITNESS: I draw conclusions that they are poorly trained. That they are in an environment that they are clearly not experienced or knowledgeable in. That they have incredibly poor leadership and that they are using tactics far outside the standards and practices of professional policing in this country.

THE COURT: Well, maybe a little bit later Mr. Borden is going to get to some evidence that we heard in the trial about some tear gas canisters being lobbed over the head of the crowd behind the crowd Why would anyone do that.

THE WITNESS: It wouldn't make a lot of sense. I don't understand the whole smoke issue either. If you have bad actors and you could clearly have some bad actor in those crowds, why give them anonymity in with smoke and tear gas when in fact you may want to target them for arrest or you may given the level of the threat, you may want to use pepper ball on their lower extremity.

THE COURT: That makes sense. So why would you use

one.

THE WITNESS: I don't know.

THE COURT: Back to you Mr. Borden.

BY MR. BORDEN:

Q So I guess a couple of things. One is, is this video so far consistent with Mr. Dickinson's testimony that the crowd was backing up when the officers came out and began deploying munitions?

A When I first saw it before the smoke, it looked like the crowd was moving away.

Q And then secondarily, the Court just mentioned, you know, lobbing of a tear gas canister over the crowd. Maybe we can rewind the video a bit and see if we can actually see that in the video -- I think it is more towards the beginning. Maybe a little bit more. You can slow it down. The reverse of officer testimony.

BY MR. BORDEN:

Q So you see that in the middle of the screen being long shot, is that consistent with the Eckmans testimony that there was tear gas shot far beyond the crowd up in the air where it would land behind the people that are immediately in front of the facility?

A It looked like it was -- there were two eyes detected two canisters. But it was over the heads of the people.

Q Continue on, please. Yeah you can keep it slow. I think

there is going to be more.
BY MR. BORDEN:
Q How about that one. Those two lungs that explode in the sky. Are those tear gas too?
A I don't know.
Q But there is certainly munitions that have been locked up far beyond the people that are in the front of the facility, right?
A It appears that way, yes.
Q In terms of the evidence that you reviewed, was using tear gas to clear the driveway in front of the ICE building It's something that you saw frequently?
A Yes.
Q Do you agree with the testimony that we heard from the Portland Police commanders that using tear gas to clear the driveway needlessly subjects peaceful protestors to harm?
A I agree.
Q We heard Mr. Dickinson testify that there were a couple of times where there was a big crowd of people but they were resisting into moving and they didn't want to move. What are the appropriate steps that you would take as a police officer or a person guarding this building to ensure that people move out from in front of the building?
A To get them to move, you could use a skirmish line. That was the training I got as a 20-year-old MP. I know that it is

still used widely. It is still very effective and I saw it used at the Broadview ICE facility in outside of Chicago in which after the border patrol was not doing a very good job of clearing the street. The Illinois State Police were brought in. And if you contrast the two have videos of how they cleared the street, the gates opened just like they did here Commander Bovino comes out in this random group of camouflaged officers, agents, with pepper spray and he looks around and he gives a command light them up, which I've never actually heard that command a demonstration management or policing of this type of thing. They began shooting pepper ball on to the grown, on to the tree, lawn, et cetera. But they hadn't been effective. The next time the Illinois State Police show up. They are uniformed. They are disciplined, all the things that DHS policy talks about that they should be. They are focused. They are together shoulder to shoulder. They are wearing campaign has, the soft drill instructor hats, et cetera. They are wearing their uniform. They have a gas mask I think on their side and they have a long baton and they handle that crowd so appropriately, nobody got across. Nobody went into the street. And I saw them make one arrest. Three troopers grabbed this person and pinned their arms to their side that way if they had a weapon they couldn't extract the weapon and they were able to arrest that person and take them out. Those videos are the difference between night and day about the way

these kinds of demonstrations should be handled and can be handled safely and effectively versus what I have been siege here.

Q And how exactly does the skirmish line with the arrest teams work?

A So the skirmish line is a group of officers that have been trading they work together they usually have a long baton or along baton and shields. They usually carry a gas mask and they were shoulder to shoulder and no one breaks ranks. No one goes out ahead of the other. If because if someone went out ahead of the other and got themselves in trouble, Everybody else would be trying to figure out well let's protect that person, et cetera. So they don't break ranks. They give the order that people need to leave. Here is a dispersal order. If you don't leave, you'll be subject to arrest, et cetera. Then they come out and they march together. And they push. They push against the crowd. Now as I understand it, I keep hearing this logic or lack of logic that if we use less lethal munitions we won't have to go hand to hand. There is actually nothing wrong at times with having to go hand to hand because people will attempt for some of these, So they will attempt to grab that baton or they will want to wrestle with the officer. Right behind that skirmish line, you have arrest teams. And so if you are and I are standing shoulder to shoulder and this person grabs the baton, the people right behind us grab that

person behind us and make the physical arrest. These are all the things that could and should be done here and that are not being done.

Q We may have touched on this a little bit. But in terms of keeping the driveway clear if they want to or defending a building, is there ever any need to use tear gas to do that?

A I don't know of any need to use tear gas when you have all of these other options.

Q Is it important to you in any way that FPS doesn't even use tear gas and they are the ones that are responsible for maintaining the safety of these federal buildings?

A Yeah, I think the experience and knowledge of the FPS and we work with them at the federal buildings and the facilities in Seattle, the fact that they -- that it is their responsibility and their experience in protecting a building and they don't use tear gas It tells me that they know of other measures that can be taken and other measures that could be taken here.

Q When is the last time the police in Chicago used tear gas?

MR. BAILEY: Objection to relevance.

THE COURT: Overruled.

THE WITNESS: Ten years ago, I believe.

BY MR. BORDEN:

Q Okay. Can we see slide 5, please, Lucy.

So slide 5 is ex setters from use of force reports.

The Bates numbers of the documents are put down in the corner of the slide. I just want to go excerpt by excerpt and ask you about why you selected what you did and what it teaches us. Starting with the first excerpt, it says: As we started walking in formation toward the crowd, I through a CS triple chaser ammunition at the crowd that was on federal property to move them off. Is this excessive force in your view

A It wouldn't make sense because they are out pushing this group away it from the driveway and why complicate the situation by using tear gas.

BY MR. BORDEN:And I think we have kind of discussed that previously T how about the second one. It says: I deployed one riot control CS device in the direction of the objects being thrown approximately 15ft.?

A So if somebody is throwing things at you, you have a much more accurate weapon in pepper ball. It is not tremendously accurate and if you can identify the individual that is actually committing that act and the individual is not all is not ensconced with a number of other people but you can actually target that individual you could target that individual from fifteen feet. If they are in close proximity to others, given the fact that it is not the most accurate weapon, that you would probably defer. But you can certainly use your photography and arrest that person later which has been done dozens and dozens -- hundreds of times especially

after the insurrection of J-6.
Q It looks to me that somebody threw something at the officer. Why can't they just throw some tear gas back at them?
A Because you are tear gassing the entire group. Quite often a number of those people are not engaged in a threat and. It is just not that uncommon in those some of those situations to have somebody doing some illegal act, doing some violent act and then try to hide or blend into the crowd. Quite often, though, if the crowd believes that the police are acting in a way that is also protected of them, they are not that interested in protecting a person that's doing harm and going to cause problems for the entire hopefully what will be their entire peaceful demonstration.
Q Going back to this point of the driveway for a moment, I've seen in various parts of reports that some of the agents say that people were threatening the building or that they suspected that people were going to try to break into the building. But what do you make of that?
MR. BAILEY: I'm just going to object here Your Honor, if I may.
THE COURT: On one second. Where's that other sound coming from Please turn it off and keep it off go ahead Mr. Bailey. From the beginning.
MR. BAILEY: It is unclear to me what sections of the many incidents reports that we produced in discovery that

opposing counsel is referring to.

THE COURT: And could you please clear that up, Mr. Borden.

MR. BORDEN: Sure.

THE COURT: Something in the bottom right-hand corner. But go ahead. Let's make sure you have identified this accurately so that defendants can fairly identify where these are coming from.

BY MR. BORDEN:

Q Also if you look at the third -- I'm going to move on from that because I'll pull up a document. But I don't have one in front of me. But did in your review of the use of force reports, see references to people trying to break into the ICE building?

A I don't recall that specificity because I'm not quite sure why you would break into a building with a bunch of police.

Q So let's go to the third item in here. I won't read it to you. Already I'll let you read it. Well, I'll read it. At approximately 8:05 I deployed multiple munitions through a pepper ball system monitoring system fails to assist in crowd control during this incident. I deployed the PLA to deter the agitators from accessing the property to destroy it or to cause harm to the law enforcement working there. This deployment was placed in the direction of people crossing the quote blue line onto the property. The impact of the pepper balls landed on

the concrete approximately five feet in front of the agitators. I deployed six volleys of six projectiles the deployment was carried out in compliance with agency policy and was intended to de-escalate the rapidly evolving and violent situation.

Why did you pick this example?

A Well one, because it is rapidly evolving or more become and it might become violent It doesn't give you the authority to use chemical munitions, etc. It's. It is not a threat -- it is not an action until they actually take some action. This whole -- I'm going to deter them from accessing the property, et cetera, which I actually was a little unclear, were they across the blue line and then they were trying to access down into the driveway or some other part of the property. But I'm just not siege a lot of benefit in public order policing for taking action because you think something bad is going to happen.

Q Even if they had been on federal property, is it permissible to use chemical munitions to stop trespassing?

A No.

Q I want to talk about warnings for one second. We heard some testimony yesterday from the Portland Police commanders about having clear communications and setting expectations with protestors. Do you remember that?

A I do.

Q And as part of that process, giving warnings before you

deploy force?

A Yes, it is.

Q I'm going to read to you from Mr. Cantu's deposition beginning at page 141 and going down to page 142:

"QUESTION: But at the Portland ICE Building, there is only one message that's being played over the LRAD, correct.

"ANSWER: To the best of my knowledge, it has only been one message."

Then page 246 of his deposition he was played his warning and here is his testimony:

"QUESTION: Question what I heard in that warning was the individuals who don't company ply may be subject to arrest, correct.

"ANSWER: That's what I heard.

"QUESTION: Question and it didn't -- and I did not hear a specific warning that they may be subject to the use of force or chemical munitions, right?

"ANSWER: Answer correct."

Now is a warning that you may be subject to an arrest an adequate warning that chemical munitions may be deployed

A Well, you would want to both. You would want to tell them that it is an unlawful assembly that they're failing to disperse could result in their arrest, that they are failing to disperse could result in we are going to be using some type of chemical munitions because of the hazard and concern around

that. I mean, tear gas is not something that isn't dangerous. It can be very dangerous. When tear gas is deployed by a police department, if and when -- and it is a rater -- you would want to ensure that you have EMS, or emergency medical services close by. If you look to see where there are schools or nursing homes or other things, what is the wind direction and what is the power of the wind. But in these deployments of munitions in these instances, I don't see any consideration for any of those basic steps.

BY MR. BORDEN:Is part of it also that you -- we heard the testimony from the Eckmans yesterday how if they had actually heard that there was going to be tear gas, they would have left?

A Yeah I think that's very helpful because you are telling them we are going to arrest you if we can't arrest you, we are going to deploy munitions. And it is also helpful to tell them, you know, to repeat that message several times and to tell them where they should leave, what direction they should leave safely. If you look at the Los Angeles police department, their standards on making an announcement are very, very specific. It has to be recorded. It has to be in multiple languages. Have you to provide all of these things and you do it for a lot of reasons, not just to clear the area. You do it because your officers are going to be safer if they don't have to engage in this. If the people actually leave.

Q And is this also am part of what we heard from the Portland Police Commanders yesterday about having fair and open communications with the people that you are protesting and setting expectations and things like that?

A It is very helpful but it can be really challenging. There are a number of protest groups that take great pride in saying we have no leader. We are leaderless. But then I look at the January 31st thing organized by labor unions. All of those labor unions have presidents. They have accessible phone numbers if you were the incident commander or you were at this facility and you knew, and hopefully you should have known that this is going to occur, you would call a day or two days in advance and talk to the presidents of those unions. I am a person. This is my authority. I'm in charge here. We want to make sure that things are done safely and effectively so it isn't like that group couldn't have been contacted well in advance and maybe made things much easier for that p January 31st protest.

Q Maybe that's a good place to turn the corner and start talking about your opinions about sort of safety and workability of this injunction. I just want to start with the broad principle along the lines of what the Portland Police Commanders and captain Bailey were talking about yesterday. But what is the goal of public order policing?

A The first goal as a police chief and the first goal is of

commissioner of Customs and border, the first goal is to make sure that your personnel are safe, to make sure that you are not putting them in harm's way. I have lost too many officers in the line of duty where I presented the flag to the widow and you really do have great concern, great compassion to make sure that they are safe. Then you want to make sure that the protesters are safe and that they are not going to be harassed by others as we heard by counter protesters, et cetera. You want to make sure that they can then exercise freely and fairly their First Amendment rights, and although I know some people would disagree saying well wait my first goal is to make sure my officers are going to be safe, that would be my first goal and then the others would follow.

Q You touched on this a little bit earlier when you were talking about sort of preemptively keeping people off of the driveway. What is the difference between a risk and a threat.

A Well, police work, law enforcement is inherently risky And. You have see officers at risk all the time, whether it is everything from making arrests and getting stuck with a needle to being hurt or wounded to being involved in an accident. Those are all very risky things. You want to train and put policies and equipment and things in place to reduce that risk, but you can't use -- you can't say, well, this is a risk and -- potential risk and then I'm going to use some type of force to mitigate the risk. You actually really do have to wait until

it moves to the threat level, not the risk level.

THE COURT: If I were was going to use those terms in a decision, how would I define risk, how would I define threat.

A So the risk would be that the person for instance at these protests is screaming, they're yelling obscenities to you, et cetera. They are threatening you. You know we hate what you're doing. Et cetera. That's a risk. But you can't just go out and then take some universal action.

THE COURT: I totally get that. Here is what I don't need help with. I'm trying to explain to a middle school or high school student the difference. This is what a risk is and not just part of the job. This is what a threat is and that's what we can take action. And then the student says to me well what exactly how do you define risk and how do you define threat. What's the difference. Can you help me there.

THE WITNESS: I'll do my best. As a middle school student, that was a long time ago for me. But I would say that the risk is that you have painted a picture about what your job is, what your responsibilities are and what goes along with that.

THE COURT: Inherent danger.

THE WITNESS: What are the dangers that come along with that. And those are risks. And you want to put policies and programs and things in place that reduce the risk, or that perhaps then give you, if the risk becomes an action, a threat,

you have got programs and things in place that can actually deal with that. You like to prepare.

THE COURT: I get that the risk is the inherent dangers of the job. What's a threat.

THE WITNESS: So the threat is more than just telling someone we are going to get you. We hate your guts. Police officers make arrests all the time and are threatened and I looked at our refrigerator in Seattle most people have pictures of their kids or their grandchildren. In my case on it. We have pictures of everyone that we had a restraining order on or had threatened me, et cetera.

THE COURT: I have the same.

THE WITNESS: I bet you do, Judge.

THE COURT: Let me ask you this. If a person is coming towards a protestor police officer and hits them with a stick, that's a threat. What if they are walking and they are ten feet away carrying a stick, is that a threat.

THE WITNESS: No judge.

THE COURT: Five feet away is that a threat.

THE WITNESS: If the if it is raised and there are things that they are doing, saying, I'm going to attack, et cetera, and they are five feet away with that stick, that's a threat.

THE COURT: So then there is some continuum, where at some point where it becomes a risk factor that's inherent in

the job, can actually elevate to a threat but there needs to be some level of imminence or immediacy of causing hearing typically physical harm to an officer to actually rise to the level of a threat. Certainly you know words and cursing don't do it. Maybe holding a stick at your side, ten feet is not a threat. But running towards someone with a raised stick, that's a threat. Do I have it right.

THE WITNESS: You have it right.

THE COURT: I'll go talk to I'll go try to talk to some middle school students More serious back to you Mr. Borden.

BY MR. BORDEN:

Q Well, one of the risks, for example, at a protest is that somebody might throw something at you, right?

A Yes.

Q And it is fair to say is a risk is something that might happen whereas a threat is more eminent along the lines of what Judge Simon was just saying?

THE COURT: Correct A clear and present danger.

MR. BORDEN: Yes.

BY MR. BORDEN:

Q What are some of the techniques that public order police people to to make sure -- to try to mitigate risk as much as possible?

A I think you could do a number of things particularly with

ICE and this facility, et cetera. So you could use social media to let people know what are the ground rules, what are the guard rules and identify who is in charge. You could post a phone number that if people have questions or they have complaints. You could put it on your public facing website. You could actually do what police chiefs do all the time. You could hold a press conference and you could say I'm Commander so and so of this facility, You know we have a duty to enforce the law. That's what we are being. We are going to do it as fairly and impartially and as safely as possible. You could do a host of things that I have not seen at all. And you could do what the Broadview facility did, was they erected much larger steel fencing right in front of their -- right in front of their facility. So the street could be blocked and they don't have that sanctuary law issue. But the street might end up getting blocked but it was pretty clear that the Illinois State Police had no trouble keeping that street clear. And up had this of this large steel fencing that could be opened in closed instead of a painted blue line.

Q What about some of the things that the Portland Police Commanders were talking about yesterday, like the liaison officers, the bike officers, are those risk management techniques?

A They are all good management techniques. Bicycle officers are experts. Seattle was the city that trained bicycle

officers across the country on how to use the bicycle squads to handle demonstrations has, to handle public order, to handle public order policing. You could have undercover people You can have plainclothes people. That can be inherently risky but if you are siege some real potential for threats or violent behavior, you can have them within there. You could also have your expert photographers being able to photograph the individual and if the probable cause exists and you have a warrant, you can execute that warrant at a later many date. As an incident Commander, as a police chief, quite often time is on your side. Your officers at the protest are going to be well fed, they're well clothed. They 're going to get breaks, on and on. The protesters aren't in quite the same position. It is going to be wet and cold at times, et cetera. If you don't have to move, if you don't have to do certain things, have you got time on your side and you should use it. It is not -- you are not showing cowardice. You are showing probably being wise.

THE COURT: But you also mentioned a something a few minutes ago about have said about social media and also communicating with a the protesters. I heard that. Were you in the courtroom earlier this afternoon when Pastor Hellman described the situation of some counter-protesters as getting a message all about the same time on their digital device or on their electronic devices. Did you hear that.

THE WITNESS: Yes, Your Honor. I heard it.

THE COURT: What I heard about the same time a group of counter-protesters that she identified as pro-ICE or pro-DHS all received the message at about the same time They left at the same time and within a minute started tear gas started coming out after they left.

How does this fit into this analysis, if at all, of communicating with protesters, communicating with folks about what is going on. Did you draw any conclusions from that testimony.

THE WITNESS: You know, I didn't want -- I was thinking, is this just a terrible coincidence and this all of a sudden happened and a few minutes later, I think on my conspiracy theorist side and I would think that somebody and it doesn't have to be a policy or a protocol. It could be something that it could be a friend of somebody inside with said Hey we're going to be doing this, etc. But the goal is for policing, you need to treat people absolutely impartially regardless of what side they're on.

THE COURT: And that's why cleaning it, if they are going to throw tear gas out there. They should say more to disperse we are going to throw tear gas in a few minutes. Hopefully of lots of people will leave and then you deal with whatever is left. Am I right.

THE WITNESS: You're right judge.

BY MR. BORDEN:

Q A couple more. I guess we heard a lot of testimony about this already yesterday from the three police witnesses that we had. Do you generally agree with their testimony?

A I do.

Q The judge asked a question yesterday of Commander Dobson and he asked whether this kind of thinking about protests as a way to mitigate risk, are these new, are these sort of cutting edge, or people are starting to adopt these. What's your view on that?

THE WITNESS: I wasn't familiar that familiar with when Commander Dobson talked about the psychologists and the psychology of studying mobs. There is a recent report a few years now from the university of Arizona about the best way. And this was shortly after George Floyd was murdered and we had riots everywhere including where I live Charleston South Carolina that hadn't had a ripe on the in a hundred years. Then all of a sudden crowd control crowd management public order policing becomes front and center. And so I really you know I really -- I probably couldn't comment much more on that other than I thought those three individuals -- I mean if you police Portland for 22 years, or if you police Seattle, et cetera, you know something about protests and psychology and people and I was extremely impressed with their level of professionalism and their assessment of just what is going on.

THE COURT: Though some of the things they talked about was how protests -- rather, the crowd control activities really have evolved from what they saw and did in Portland in 2020 to what they are doing more recently. That was very interesting, I found.

THE WITNESS: It is. There is a recent article within the last year. I'm sure everybody at FPS and DHS et cetera has read it in the police chief magazine about all the different types of crowd control. After WTO went terribly side ways, I September people to the IMF, to the WTO, the G8 Northern Ireland etc. to learn everything they could about the way that law enforcement should operate and it's.

It is very different around the world.

THE COURT: Yeah, but they explained how public order policing has evolved even just in the last five years in Portland and I found that interesting.

THE WITNESS: I did too.

BY MR. BORDEN:

Q I'm going to go to another area that p got asked about before, but I just want to get your views on this, the difference between passive and active resistance. Going limp, is that active p resistance or passive resistance?

A Passive.

Q How about trespassing, Is that active or passive?

A Passive.

Q How about disobeying an order from the police. Is that active or passive?
A Passive.
Q So another issue in this case has to do with use of force policies and whether they should be public or not. I know that you were the commissioner for CBP for a while. It seems like CBP use of force policies are fully public. Is there a reason for that?
A The reason was that when we redid. The use of force policy, implemented less lethal and implemented a whole series of trainings, etc., if you look at the website of almost every major city police department in the country, their use of force policy is predominantly displayed. It is not a secret. Our general counsel out of the 1200 or so lawyers, our general counsel said that while this should remain confidential and the New York Times they asked me after I released it, they said well how did you do that and I said we had a disagreement and I want.
Q Why did you want it to be public?
A You have to be accountable and transparent to the public you serve. My heavens, you are public servants and you have to -- if they don't know what you're thinking, what you're training in, police departments have citizen academies where they let citizens go and learn for sometimes weeks at a time all the fundamentals about a police department, how it works,

what decisions are being made, what's being done. I mean all of these things could truly benefit DHS to a great extent. What's confidential and what is top secret and secret, etc. That's one thing. The rest of this stuff, it is like with law enforcement sensitive information, if it is out, DHS at five o'clock in the afternoon, it is in the Washington Post the next morning.

Q Okay. I would like to go to your last -- the last part of your opinion, which is the workability and safety of this injunction. In your view is this injunction safe and workable for law enforcement?

A It is.

Q Why do you say that?

A Well one it has been safe and workable for the last 30 days.

THE COURT: 28.

THE WITNESS: 28.

THE COURT: 28 literally.

THE WITNESS: The injunction in Los Angeles has been in existence for a number of months. But frankly everything that you read about, and almost everything that you read in it, pretty much mirrors not only FPS has all the right language. They say all the right things in their policy. But follow your policies and do that. And police departments operate in this way all the time. So it is purely -- it is truly workable.

BY MR. BORDEN:So what about the prohibition against shooting into crowds. It seems like it could be dangerous to police if there is some kind of violence individual out there in the middle of a protest and you can't shoot a less lethal at them?

A It is dangerous. That's why if you're you know you are experiencing those things, you would want helmets. You would want shields, et cetera. But you don't want to try and take that shot and strike that person. And pepper Well can wound you. It can certainly harm you. But the much more accurate weapon would be the soft nose weapon, et cetera. But if they are in the crowd, if they are with others, then you don't want to take that risk. You certainly want to try to get their picture and the rest of them later or you want to have plainclothes people follow them out and as they move away from the crowd make that apprehension. Make that arrest.

The one thing that has been totally lacking in almost everything I have seen besides skirmish lines and tried and traditional is make an arrest. When you have five people trying to stop a car and you put handcuffs on three or four of them. It has a chilling effect on the others.

Q Talk about that a little bit more. If you are trying to clear an area and you start arresting people, are you saying that other people would see that and sort of follow?

A I would say that other people would see that the arrests

are being made and that they would choose to not be a protests at the Portlander of that and to leave. You know if an agent or an officer uses the kind of force that we have seen in these videos, pepper spray, et cetera, shooting somebody with pepper ball, et cetera. If an officer uses that level of force on an individual, there should be an arrest and there should be an arrest report that goes along with this. This random indiscriminate spraying and then letting everybody wander away is not is not good.

Q What about flash bangs as a method of crowd control?

A I remember flash bangs being used in Seattle. I remember tear gas being used in Seattle also. But I don't open owe the flash bang, the whole design of the flash bang was that you were doing these high risk search warrants, particularly for drugs. It might not -- and there were times when there were no knock search warrants those have pretty much fallen out of favor. But you would throw the flash bang into the house to startle and alert people and then announce your search warrant and then go in. I don't p really recall too many instances of where a flash bang was being used to move a crowd.

Q Is it part of your view that a flash bang like tear gas is kind an in discriminate device that it impacts a wide range of people as opposed to a targeted one?

A Yes.

Q In terms of using flash bangs or tear gas to clear after

driveway I believe up said earlier that you didn't think it was necessary and gave all the reasons. Is your testimony with regard to flash bangs the same as it is with regard to tear gas?

A Yes.

Q So I have another scenario that we have heard in some of these cases, which is if you don't have enough people in inside the building and you want to clear the driveway, shouldn't you be allowed to use chemical munitions at that point to get the people off because you don't have enough officers top physically get the job done?

A No, you shouldn't use the chemical munitions. One, you may want it wait. If you don't need to move cars or do something immediately. And time is on your side, you may want to -- this is what I'm quite don't understand because it is check Colin Powell theory of war in many ways that you go in with overwhelming force but if you don't have enough people to have that skirmish line to have the arrests teams, to have in which the Grenadiers, if you don't have them, my gosh, 60,000 employees worked at CBP and then the summer of 2014 we surged hundreds of border patrol agents to throughout the summer to with 68,000 unaccompanied children Why DHS can't surge two or three hundred people here to augment if that's what's needed to move people why they can't do that I don't know. I mean, there's a the federal government has TDY, temporary duty, which

is pretty common.

Q As part of successful public order policing having enough officer there so that they can do the job?

A Correct.

Q So another criticism that we have heard is split second decisions. Does this injunction inhibit the split second decision making of police in your view. Does that make it too impossible for them to follow it?

A Because police officers follow rules and regulations particularly on use of force and they make split second decisions all the time. And if they feel like well there is a chilling effect because this is an injunction, well, a rule and regulation about unnecessary or excessive use of force can result in discipline also. So if I was looking at that injunction and I have been trained in it as an officer and given that information, I think probably about the last thing in the world I'd be concerned about is being held in contempt of court.

Q I guess a couple of final questions for you, Mr. Kerlikowske, and we heard a little bit of testimony about this yesterday too. But in your opinion, is the conduct by these defendants you undermining public trust in the police?

A It absolutely is because they have police in many ways written on their -- on the information. So every year the Gallup Poll looks at different professions and rates trust and

credibility and among the professions -- nurses are always number one. But law enforcement really took a nosedive after the murder of George Floyd. And my friends and colleagues have police departments across the country engage nonstop 24 seven to try and rebuild trust and credibility, particularly with minority communities. And lo and behold, by 2024, especially among Black Americans they have regained the trust and credibility pre the murder of George Floyd. That was very impressive. And that 2025 happened and that gallup poll is down seven percent. Well, we didn't have a Rodney King. We didn't have another George Floyd. We didn't have another Michael Brown at that level. I attribute that 7 percent 7% decrease in trust and credibility to law enforcement to what ice has been doing.

Q In your view would comply with this injunction and make the federal officers more safe?

A It would make them more safe. The rules in the injunction almost universally align with much of what FPS does and much of what FPS says in their rules and you are following that conduct and the same way that when we listen to all the different people testifying. If they knew what the rules of the Rood are, when it comes to the police using force and it is much more transparent, I think it is good for law enforcement and I think it is good for the community.

Q Now, you've worked on a number of these cases. In terms

of all of your experience, have you ever heard of an injunction similar to the one in this TRO causing any injury to any federal agent at any point?

A No, I have never heard of that. I know even in Seattle, particularly with press, press would often be allowed behind the lines of the law enforcement and we have never ever experienced nor had I ever heard from my colleagues anybody experience that a person from the press is sneaking in behind to try and hurt them. Most of the times you want to get as much access and the press is very different today. You want to give as much access to them as possible.

Q How about the other terms in this injunction regarding use of force. Have you ever -- I know that there is one in Los Angeles that's very similar, the Court issued one in Chicago. The Court issued one in Minnesota, all those there were stayed relatively quickly. But have you ever heard of any officer being hurt as a result of this injunction and the terms of it?

A No.

MR. BORDEN: Nothing further from plaintiffs, Your Honor.

THE COURT: Before we go to Mr. Bailey, and I don't know if Mr. Borden is going to object to this question or not. But any improvements you suggest I make to the injunction order?

THE WITNESS: I don't have any in particular, but I think it may be a good idea to look at the pepper spray issue. I think we have kind of lumped tear gas and pepper spray together as an expert witness I would be happy to help.

THE COURT: Well but we got to do it in their presence. Yes what should I do differently if I were to unlocked them uncomfortable What should I be doing.

THE WITNESS: I think pepper spray particularly with the small almost all of the many officers used to carry it but it's still pretty widely available. The pepper spray can be quite useful it's not particularly harmful. It isn't being used coming out of the large canister at the March 7th etc. I would think that you might want to examine that.

THE COURT: But let me share this with you if you have a reaction One of the things when I looked at all of the evidence submitted in the temporary restraining order and this conclusion has only been reinforced from the evidence I've seen in this hearing. I see people engaged in passive resistance, sitting down, maybe trespassing, maybe just holding up a sign that some folks don't like, but not doing anything threatening, and an officer walks by and sprays them with pepper spray in the face. What's the appropriate way to order the that not occur If I believe that the reason for that occurring is because they either don't like that message, they don't like that person being here they don't want that person to come back

tomorrow.

THE WITNESS: Your Honor, I think the message would be that there would have to be an active resistance. People sitting there whether it was at UC Davis or other places just being sprayed is not particularly -- so active resistance.

THE COURT: So that's the distinction we should make -- I should think about is no pepper spray without active resistance but on the tear gas that would require the reasonable showing of imminent threat to life and the way a phrase in general.

THE WITNESS: I would agree with that. The other part I still never understood is when they're in the driveway, can't you just pick them up and arrest them? Can't you just charge them with trespassing and arrest them. That's I shouldn't ask you questions judge.

THE COURT: Thank you.

MS. HUTCHISON: Your Honor, we have one final live witness who unfortunately is not available tomorrow.

THE COURT: Then after -- is your flight tonight or tomorrow morning.

THE WITNESS: Tomorrow morning.

MS. HUTCHISON: The Government agreed if it is okay to the Court.

THE COURT: You can go to mid night.

Mr. Bailey seven hours of questioning.

(Recess.)

THE COURT: All right. Mr. Bailey at your sleeps.

CROSS-EXAMINATION

BY MR. BAILEY:

Q Good afternoon Mr. Kerlikowske?

A Hello.

Q My name is John Bailey. I'm an attorney with the United States Department of Justice I'll be asking you some questions. For both our sakes. We will be out of here by midnight?

THE COURT: Speak slowly.

BY MR. BAILEY:

Q Mr. Kerlikowske, you are here to give your expert testimony, right?

A Correct.

Q Have you published any scholarly articles in the field of public order policing?

A No.

Q Are you being compensated for your testimony here today?

A I am.

Q How much are you being paid?

A My expert witness fee is six hundred an hour but doing this to help ICE is the real benefit.

Q The real benefit more a passion project?

A That paid six I commanded these people for three years. I

am pretty disappointed what's occurring, if it can be helped, I would love to do that.

Q Am I right that you left the federal government in 2017?

A I did.

Q Since then, you have testified in various lawsuits, right?

A I have testified and I have taught and I have been at northeastern university, the university of South Carolina teaching graduate school.

Q In several of these lawsuits, you provided testimony in support of the plaintiffs against the federal government; is that right?

A Correct.

Q And going back to 2020, you provided testimony in the index newspaper case?

A I did.

Q And last year you provided expert testimony against DHS and the Los Angeles press club case?

A Correct.

Q And you also provided expert testimony against DHS in Chicago headline club; is that right?

A Right.

Q These cases concern DHS' interactions with protesters and legal observers broadly speaking?

A Broadly speaking yes you're right.

Q Is it fair to say you gave similar opinions in those

cases?
A It is.
Q And since leaving the Government you have also given testimony and provided declarations in lawsuits against the Government that didn't involve protests, right?
A I don't remember in particular those. I might have been involved in something, but the vast amount of work going back to index newspapers was involving DHS.
Q Do you recall participating in a lawsuit captioned and -- apologies for the pronunciation -- Montages Georges versus CBP in the Southern District of California?
A I don't recall that.
Q What about a case captioned the initials PJES v. Wolf?
A I don't recall the particulars on that either.
Q Do you recall being involved?
A I don't.
Q Mr. Borden asked you about the broad categories of the things that you reviewed in preparing your declarations in this case. Do you recall that?
A I do.
Q And one of those bullet points was videos, right?
A Correct.
Q I think he asked you what stood out about the videos that you reviewed, and I believe one of the things that you said was that the agents use of munitions and I wrote this down. I

thought it was interesting, munitions were deployed in "a rag tag fashion, did I get that right?

A I would characterize it when they came out in Illinois, when they come out here, the agents themselves are in a rag tag fashion. They are not disciplined, They're not organized. They are not focused. They just come out indiscriminately using that munitions. So that's the way I was looking at them.

Q So what your looking at it rag tag fashion. Were those the words you used this afternoon to describe DHS conduct in Portland?

A I viewed it I think in Portland but also in Chicago.

Q I just want to make sure I'm clear about my question. Your answers to Mr. Borden earlier that was the language that you used, right?

A Correct.

Q I understand you are saying that you also used that same description with respect to DHS's conduct in Illinois?

A Correct.

Q You have made public statements critical of the Trump administration generally, right?

A Correct.

Q You recall back in 2018 participating in a PBS news hour discussion?

A I don't recall that one in particular, but I appeared on PBS a number of times.

Q Would it surprise you if in one of these PBS news hours back in 2018 you described CPB's handling of the border as heart breaking and an ineffective defer rent?

A No, that wouldn't surprise me at all.

Q Do you recall in June of 2020 writing an op-ed for Slate entitled Trump's Stands for Law and Order all For Show?

A Vaguely remember that. I published a lot of op-eds and appeared on a lot of media interviews.

Q Would it surprise you in that op ed you said that President Trump "quote engaged in behavior that tolerates white supremacy?

A I was a part of the after action report that Governor Mcauliffe did in Charlottesville where president trump said there were good people on both sides, and that was after the tragedy in Charlottesville, so I'm not sure if that was around the same time or not.

Q So it wouldn't surprise me if you said that?

A It wouldn't surprise me.

Q What surprised you if you said the president trump or exposed officers to Covid 19?

A I don't recall that I think the criticism was more when he told law enforcement officers don't put your hand on top of somebody's head when you're putting them. In the car You don't have to be that gentle the former FBI chief of staff and I were both critical of that comment I don't really remember the other

one All.

Q Right Well I want to keep things moving here So I guess I'll just asked would you be surprised if those were the words you use back then?

A It wouldn't surprise me.

Q Thank you, sir. Do you recall being quoted in a New York Times article as stating with respect it President Trump, there hasn't been one thing that he has demonstrated that was supportive of law enforcement except to shake hands and pat them on the back and tell them no matter what they are doing they are fine and right?

A I think that's correct.

Q Thank you, sir. And now I'm thinking of an article from November of 2025, a little bit more fair to ask you about.

Do you recall stating it's abhorrent to me to see taxpayer dollars being used in this way in propaganda and show with respect to DHS actions?

A But I remember that particularly around the recruiting efforts that were being done and where the money was being spent.

Q I take it you are aware President Trump is a defendant in this case?

A Yes.

Q Mr. Carney if we could go to the first declaration paragraph 17. I was planning on going walking through some of

the paragraphs in your declaration and showing it on the screen I think that's you have some printed out Copy it?

THE COURT: His declaration it in it case, I have it in front of me. Right which one the first one or the second. Mr. Bailey, the first one or second one.

MR. BAILEY: The first one, Judge.

THE COURT: Okay. I have got it in front of me. If you want a hard copy. Just let me know.

MR. BORDEN: Could I have a hard copy.

THE COURT: Do you have another hard copy.

MR. BAILEY: For him I was going to give one to Mr. Borden.

THE COURT: I have highlighting on mine, I will take mine back.

THE WITNESS: Thank you.

BY MR. BAILEY:

Q Thank you for your patience, Mr. Kerlikowske. I have got up here on the screen, I'm looking at paragraph 17 which is on page 8, the top right page pagination. Do you see where I'm at?

A I do.

Q And I'm happy to jump around the first page if it would be helpful. But do you recall signing this declaration around January 27th?

A I do.

Q When you wrote this declaration, at that point no discovery in this litigation had been produced to you, right?
A Only the discovery that was produced, but not from the Government's side.
Q In this declaration you are looking at of 17, this says my review of the materials I have seen shows that DHS appears it have engaged in widespread use of exclusivity and unnecessary force against protesters and other people present at protest that right?
A Yes.
Q Sorry I would like to focus in here on what you meant by in that sentence "appears to have engaged." When you prepared your declaration, and you didn't speak to any of the DHS officers or agents involved in protecting the facility, did you?
A I did not.
Q Did you personally witness any of the events that were described in the amended complaint?
A I did not.
Q Have you ever been physically present outside the Portland ICE facility on any of the days that plaintiffs' witnesses have discussed during this hearing this week?
A I have not.
Q Have you interviewed any of the plaintiffs about their experiences?

A I have only worked with the attorneys and looked at the videos and declarations for this declaration that was supplied to me and of course looking at media articles and others that I had looked at myself.

Q So you looked at the plaintiffs' declaration. You didn't actually speak to them or ask them questions?

A I did not.

Q I take it you didn't ask to interview any of the third party declarations, the witnesses?

A I did not.

Q And I understand that and I apologize for not remembering exactly when in this fast moving schedule you produced these materials, but at some point up got access to some to the materials that defendants had produced in discovery, am I right, in this case?

A You're correct.

Q So those were incident reports from the various DHS components?

A E star reports, form 10s, those things, yes.

Q You also received somebody worn camera footage?

A Yes.

Q There was also some of the pool cam footage that you had access to?

A I don't remember the whole cam footage but I did get to see from the defendants' side other information that I did not

have at the time of this first declaration.
Q Are you aware that the plaintiffs have deposed over a dozen officers and agents over the past two-weeks in this case?
A Yes, I am.
Q Were you provided with access to those materials?
A I was given quite a bit of that information, but I'm sure I didn't have in the last couple of weeks that ability or time to read everything, but I did go through quite a bit of it.
Q I understand that, Mr. Kerlikowske. Nothing you saw in discovery changed any of your opinions though, right?
A It has not.
Q So I would like to talk about those opinions and I think we did just touch on the first one here, in this or one of them here in paragraph 17. You analyzed Ms. Eckman's experience outside the facility on October 4th; is that right?
A I did.
Q And your opinion is that the munition that struck Ms. Eckman was improperly deployed, right?
A I believe that she, as testified, was probably struck by a pepper ball round that struck her in the head.
Q And you believe that the round she was struck by was improperly deployed, right?
A When I just saw some of the recent testimony and they talked about well I unintentionally did this, I think it was an FPS person talking about striking someone in the back

unintentionally, I don't know if it was intentional to Ms. Eckman. I know that firing a pepper ball is an incredibly dangerous if you are firing -- and I went through the training at Harpers Ferry is incredibly dangerous if it is fired at a person. But I don't know that it was intentional to strike her in the head.

Q When you were at Harpers Ferry -- I am just curious -- did you volunteer to be exposed to pepper balls to see what it was like?

A No. I fired -- I've been tasered twice. I have been exposed OC spray. I went through the training. I fired the pepper ball. I fired the soft nose rounds. I went through the shoot/don't shoot scenarios that we had purchased all of the things that were done to change use of force issues.

Q So if I'm understanding your testimony about what Ms. Eckman stated during this hearing, you are not sure if the munition that hit her was intentional, whether it was intentional for her to be hit?

A I'm not sure.

Q So then is it fair to say that you are not sure if DHS has retaliated against her in some way?

A I don't think I can make that statement. I would think that I would hope to heaven that it wasn't intentional but you know you have to be so careful with this. One of the FPS individuals testified well I didn't ever know of anybody ever

being hurt and we of course we know that Victoria Snelgrove was killed by being shot in the eye with a pepper ball. So when we talk about these munitions and less lethal they can be incredibly dangerous.

Q So the Victoria Snelgrove incident that was from 2004?

A Right in Boston, yes.

Q And that was you cited that in your declaration when you believe that the munition striking Ms. Eckman was improper in some way, right?

A You shouldn't fire, as some of the testimony from FPS talked about, you shouldn't fire above the waist.

Q All right. So it sounds to me like this one should be easy. You agree there is difference between negligent and intentional conduct, right?

A I believe so.

Q M AT&T, if we could go to paragraph 35 of this declaration. Thank you, docket 34. So looking at paragraph 35. At the time that you prepared your initial declaration, it was your opinion that it was at least more likely than not that excessive force was used on the day that Ms. Eckman was struck, right?

A Yes.

Q Mr. Carney if we could scroll down, please, stay with us. . So I'm looking at this first bullet point here it says: Pepper balls should not be firing at people They should be

fired near target wrongdoers that kind of rage inside the pepper ball. Did I read that right?

A Yes.

Q Is that still your opinion?

A Yes.

Q Mr. Carney please mark as DX4 I believe the CBP 2014 policy excerpts. If you could put that up on the screen as well. Just one moment, Mr. Kerlikowske. We will get this up for everyone to see.

While we wait. What you have in front of you does this appear to be a portion of the use of force policy guidelines for Customs and border protection from 2014?

A It does.

Q And if you could go to the second page here, this is the forward from the commissioner, just the page right after the title. It is also on your screen sir?

A Yes.

Q All right so at the time you were the commissioner, right?

A I was the commissioner beginning in March of 2014.

Q That's your signature on the bottom of this forward?

A It is.

Q I'm looking to the middle of this foreword, just one sentence that starts with authorized officers and agent. It says: Authorized officers and agents for electronic use of force issues in the field that are not addressed in this

handbook are expected to exercise reasonable judgment?
A I see that, yes. I agree.
Q Mr. Carney if we could please go to page 23. All right. So here this appears to be the chapter of Chapter four. guidelines and procedures on use of less lethal force?
A Yes.
Q Sir I did give you a bit I have this whole chapter if at any point you would like to look at the remainder, feel free to do so?
A Thank you.
Q Paragraph 3, that lists different less lethal devices and techniques, right?
A Yes.
Q And paragraph 3 small E says compressed air launchers e.g., PLS, FN303. Do you see that?
A Yes.
Q Remind me what PLS, your understanding is what that stands for?
A It is the launcher of the pepper ball system, pepper ball launch system, I think, something like that.
Q What is FN303?
A It is the similar weapon, firing pepper ball.
Q You said they are similar. Would you say that they work the same?
A I'm not the expert and I have never admitted to being the

technical expert or the less lethal use of force. I was the CEO, I was the commissioner, so I over saw policy, training, equipment, et cetera, but I would certainly rely on the technical experts for what would be the type of less lethal munition that we should be providing to the border patrol in order to give them a tool in addition to their firearm.

Q I totally can appreciate that when you are CBP you are here today though to be an expert right?

A I'm here today to be an expert on this policy on policy, training, viewing what I see but I have never purported to be a technical expert. I have never trained people in the use of particular less lethal, et cetera, but I know from a CEO perspective commissioner and police chief perspective what would be the proper use of these types of weapons.

Q Do you consider yourself an expert in excessive force?

A I consider myself an expert as an executive in understanding how force should be applied, whether it is outside the guidelines or the training that's being provided. I would consider myself an expert in that particular area.

Q So what we're generally speaking you are not a use of force expert?

A Generally speaking, from the perspective I just gave you, I'm a use of force expert. I would end up being at different levels as a police chief, etc., I would end up being a decider on whether the use of force was authorized, whether it was in

compliance, et cetera, whether as a police chief, but now I mean a Customs and border protection with that number of people, there would be other people in the hierarchy that would be much more involved with that.

Q I did hear you say that you consider yourself a use of force expert, right?

A At the level I described, yes.

Q Maybe it is a bit unclear to me what that is. But at the level that you are thinking of, you would agree to testify accurately as it whether force was exclusivity or improper you would need to have an understanding of exactly what the force is that we are talking about, right?

A You would have to understand what action was taken, what weapon was utilized and what was the result and whether it would align with the rules and regulations.

Remember, too, this was 2014. Mark Morgan issued a new policy in 2021.

Q So I did hear you say that it is important to know what kind of weapon we are talking about, right?

A Generally, yes. You are right.

Q Could you please explain to me how a pepper ball launching system, PLS and FN303 are different?

A I couldn't give you the technical description of the difference.

Q Are you aware that at least it this 2014 policy has

different limitations on an FN303 versus a pepper ball?
A I don't remember the policy from 2014 but I'll certainly be happy to --
Q You reviewed the current policy, right?
A The 2021 policy?
Q Yes. Thank you sir?
A I have looked at the 2021 policy that mark Morgan issued.
Q And does it treat FN303s and PLSs the same?
A I don't recall. I don't remember that specificity.
Q Mr. Carney, I believe if we could go to the top of the next page. No, that's not right. Go to 31, please.

Mr. Kerlikowske, sir, I'm looking at paragraph F small F at the top of your screen on page 31. Do you see that?
A I do.
Q And this says: Authorized officers/agents may use PLS on subjects between 3 and 60 feet away as a kinetic impact device. Do you see that?
A I see that.
Q And you understand that PLS to be the pepper ball launching system that we are talking about?
A Yes.
Q And kinetic impact in this context, that means that the munition is deployed to impact and strike the individual Right?
A Right.
Q To shoot at them?

A Yes.
Q So I would like to go back to the Victoria Snelgrove incident from 2004 that you mentioned in passing. Do you know if Ms. Snelgrove was struck with a pepper ball or FN303?
A I don't remember. I believe it might have been FN 303 difference Just I don't. I mean certainly the Boston didn't report, the Boston police commissioner report and the actions that commissioner O'Toole took were pretty well documented, but And I don't remember the technical weapon that was used.
Q And so to you it is not significant exactly what kind of weapon was used?
A It is not particularly significant when someone is being struck, especially if they are not, as Victoria Snelgrove wasn't a threat standing up in a parking garage.
Q So is it fair to say that you essentially treat all LLMs the same?
A No. There's very different. But as far as FN303 and pepper ball, I just don't have that technical expertise. The less lethal instructors at Harpers Ferry and others would.
Q So you just don't know?
A I just don't know.
Q How are you able to assess whether an FN303 was deployed outside the facility identified and we start reported was somehow improper?
A Because you don't shoot people with any of these things

unless they're an active threat to the individual. The area saturation is mentioned. And if the person is an active threat depending on what you have in your hands You could use that. But it's you're going to you are trying to pin me down on these technical differences and you don't shoot people with this stuff.

Q Technical differences just don't matter?

A They I'm sure they do matter it if you are a technical less lethal instructor expert. I'm sure that when a person is struck it probably doesn't matter to them which one they got hit by and whether they were doing anything that would be seen as an active threat.

Q Mr. CARNEY, at this point could be go to the second --

THE COURT: Before you leave this document.

MR. BAILEY: I was going to.

THE COURT: Before you leave this document let's go back one page. If you started up at the top of thirty one under f. which is part of section six let's go to six a and b. I have a question. Take a look at six A under A same section page before for compressed air launchers that include for example both PLS and the FN303, 6A says: A compressed air launcher may be used for area saturation against subjects who, at a minimum, demonstrate active resistance. You have told us what active resistance is.

So how does that relate to what Mr. Bailey was

showing you in subsection F, 6 small F from the next page? But I also note that B reads compressed air launcher may be used as a kinetic impact delivery system on subjects who at a minimum demonstrate assaultive resistance.

My first question is what's the difference between active resistance and assaultive resistance?

THE WITNESS: So inactive resistance are the individuals. They were sitting passively, and now you're going to -- you're not going to spray. That's passive. Then you say look, we are arresting you and you get them up. And you get them up and they start resisting arrest. I'm not putting my hands behind my back. Path I'm going to wrestle with you I'm going to fight with you assaulted resistance then moves to and now I'm going to try and punch you Or I'm going to try and reach for a weapon in my pocket or my waistband that would be assaulted that's the way I would define it.

THE COURT: Got it. Comparing 6A and 6F on the next page we see in the 2014 policy a compressed air launcher may be used for area saturation against subjects who at a minimum demonstrate active resistance and F says that the authorized officers may use PLS. It doesn't say FN303. But may use PLS on subjects at a certain distance as a kinetic impact device. And then I see that officers may use PLS on subjects 150 feet away as an area saturation device. So how is does how is F understood in the context of both 6A and 6B as well.

A What I can certainly see the use of the area sat ration. When I went to harper's ferry and we first got that and I'm sure there are differences between this type of technology from 2014 and now 12 years later. But when I went, the training for the use of a pepper ball was that we're using this on the border. So there was a person coming across the border wall and agents didn't have any other weapons except for side arms and long guns. But with the pepper ball, they could fire the pepper ball as the person is coming over the wall and hit the wall. Fire it at the wall, disperse the powder and therefore deter the person from entering the country illegally. And that was the pretty much the sum and extent of the training that was being given then and what the use would be, not area saturation. That was the specific.

THE COURT: All right. You can go back to the declaration if you wish, Mr. Bailey.

BY MR. BAILEY:

Q Actually I'll go back to paragraph F. The second sentence says. Officers/agents may use the PLS on subjects up to 150 feet away as an area of saturation. Right?

A I see that.

Q Now Mr. Carney I would like to go to the supplemental declaration paragraph 15 please.

Looking at this bottom paragraph, 15, it is Mr. Cantu declaration also contains several phrases many of which are

repeated in defendants use of force Reports that show misuse of crowd control weapons. This includes terms such as area denial munitions Paragraph eleven, 11 and area dispersal, paragraph twenty 20, which show that federal agents were using force for either trespassing or disobeying a dispersal order do you see that I do?

A I do.

Q Do you still hold that opinion?

A Can you give me a little bit more context to that, to what you are asking me.

Q Sure. If you were to -- if you were to prepare a report today or prepare a new declaration, would you still include that detail. Do you still think that detail is relevant?

A I think the detail to being able to use pepper fall to keep without striking someone who's not being assaulted or being this direct threat using the pepper ball and the o.c. powder to deter them from coming over the wall or to deter them from entering a particular area could be useful as long as you're not striking them and as long as they're not as long as they're doing something that leads to assaultive or assertive behavior.

If it's just merely trespassing on the front of the driveway, and you've done the other things that we talked about, or that I mentioned in my first in the earlier testimony, then those are important -- Those are important

tactics.
Q Let me try the question a different way. Do you still think it is problem I can that Mr. Cantu declaration contains the phrases area in his area denial munitions area dispersal?
A I do.
Q Now we just looked at a policy that you approved that allowed PLS as area saturation, right?
A Correct.
Q And when you saturate an area with chemical munitions you would expect that to disperse the crowd, right?
A Remember that this was done in the context of the border. And if you look at the even the 2021 report that Mr. Morgan answered, so much of the discussion is all about where the border patrol works and where CBP works. They don't work in these urban areas. They don't police in this manner. They don't do public order policing. And so all of this was designed to reduce the force and to give the border patrol agents and certain CBPOs something other than a firearm to be able to use.
Q So that wasn't my question. When you say an area with chemical munitions, you would expect that has the affect of dispersing people in the area, correct?
A No. I wouldn't because I'm talking about how it was used and how it was dispersed.
Q I'm not asking about the policy. I'm asking if you

saturate an area with chemical munitions would you expect a crowd to disperse, yes or no?

A You could use the chemical munitions to keep a crowd from reoccupying or coming into a area that had already done something far more than just trespassing or failing to follow a dispersal order. Otherwise, days there would have been no reason to use the munitions in this manner.

Q I'll take that as a yes. One of your opinions in this case is that the injunction is workable, right?

A Correct.

Q And you are aware that -- let me start here. You're aware that Mr. Cantu referred in the declaration, he is the deputy regional director for Region time of the federal protective service?

A Correct.

Q And up are aware that he testified in his declaration that the injunction was harm to law enforcement, right?

A Correct.

Q And you are also aware that chief Sullivan has testified that the injunction is dangerous and unworkable?

A Correct.

Q And you're aware that deputy regional director Cantu has a time served as the incident Commander on the ground in Portland at the facility, right?

A Yeah, he came top get his first experience a few months

ago ever with in Portland with protest policing, or dealing with the disorder management.

Q Did you read DR Cantu's testimony in the National Guard trial?

A I did not.

Q So were you there listening in person?

A I wasn't.

Q So you are not aware -- you are not if DR Cantu has public order policing experience going all the way back to the WTO riots in 2000?

A I don't know that.

Q You just think he came here a few months ago for the first time?

A Well I think in the declaration he just kind of been brought here and this was the first urban work that he had done. That's what I recall. And if I was wrong about that, then I apologize.

Q You're aware that Chief sullivan also has experience on the ground in Portland during operation skip Jack?

A I do.

Q You do not?

A No, I was aware that he was here.

Q Thank you sir but you do not have on the ground experience at the facility?

A Correct. I'm sorry. I misunderstood your question.

Q When I say chief Sullivan, your aware that is referring to chief patrol agent of CBP special operations group?
A Yes.
Q Mr. CARNEY, if we could go to paragraph 29 of this declaration. So looking at the second to last sentence of paragraph 29, it says these statements by defendants' employees are not based on any expertise, evidence or experience. Did I read that right?
A You do.
Q When you say defendants' employees, are you referring to deputy regional director Cantu?
A Yes.
Q Are you also referring to chief Sullivan?
A Yes.
Q I will move on from that one. The last sentence hearsays, they are simply conjecture that ignores their own use of force standards and the empirical evidence. Did I read that right?
A You did.
Q What empirical evidence did you compile in this case?
A Looking at the empirical evidence of what all of the different tactics and strategies and effective uses of law enforcement, both technical and also psychological, listening to Commander Schoening and law enforcement officials who are experienced in policing in an urban in an urban particular area, I would say that that's the empirical evidence that I

would be talking about. Because I didn't see any of the work being done to try and arrest people, to try and put handcuffs on them or to do any of the things that would actually end up making a difference before you may have to take other action.

Q What do you understand it empirical evidence to mean?

A Evidence based upon knowledge, experience, the university of Arizona report on demonstration policing, the international association of police chiefs article on the changes in demonstration management and public order policing. I would call those things empirical evidence.

Q Mr. Kerlikowske, I understand your opinion is that DHS has engaged in a pattern of misconduct, right?

A Correct.

Q I believe you described it as consistent, right?

A Yes.

Q So what empirical evidence did you compile to support your conclusion that this was misconduct is a consistent pattern?

A Looking -- reading the declarations, looking at the videos and all of that information, a tremendous amount, that would show that these continuing lack of the proper procedures that could be used to deescalate the situation. I mean calling tear gas and pepper ball and OC a deescalation technique is a huge misnomer.

Q So is it fair to say then that you didn't attempt to determine how many days since June 2025 there have been

protesters at the facility?
A I did not.
Q You did not attempt to determine on how many days at the facility protesters were exposed to munitions?
A I did not.
Q Mr. CARNEY if you scroll down a bit. We are going to paragraph 34. So looking at this the last sentence of this bottom -- actually apologies. I think we should start with the first sentence. So that says: Contrary to the defendants but to the contrary to the statements in defendants' opposition, the terms of the injunction do not restrain law enforcement from using force legitimately to target wrongdoers and protect against.

Upon that your opinion when you wrote your declaration?
A It was canceled was.
Q Is that your opinion today?
A Yes.
Q And that's one of the reasons why you believe the terms of the injunction in effect now are workable, right?
A And because they are so similar to what FPS has in their policies along in alignment with that.
Q You have been here throughout the course of the hearing this week, right?
A I have.

Q So you were here for the testimony of Commander Schoening?
A Yes.
Q And.
Do you remember Ms. Albies asking Commander Schoening if the injunction was "overly broad with respect to the limitations regarding OC spray?
A I don't remember that question. I don't.
Q You don't remember Mr. Schoening answering yes?
A I don't.
Q Okay.
Mr. CARNEY, can we please pull up the terms of the injunction, I think it is 68 that will have it on 22 maybe.
THE COURT: It begins on page 20. 20 to 22.
MR. BAILEY: Thank you, Your Honor.
BY MR. BAILEY:
Q Let's just do this Mr. Kerlikowske. You are familiar with the terms of the injunction in effect in this case, right?
A I am.
Q So you familiar with the restriction regarding the direction of less legal devices at the head or above the torso unless there is an imminent threat of harm, right?
A Yes.
Q Is that the provision that you were thinking of when Judge Simon asked you if there was anything that could be modified?

A No. I was thinking of on the pepper spray that it is the possibility that in discussion that could be relaxed and I think that was Commander Schoening's discussion.

THE COURT: And that's 1A.

BY MR. BAILEY:

Q Thank you we are having trouble pulling it up. I am going to try to move on?

THE COURT: Do you want to borrow my copy. Do you want me top read you 1A. If you want. It is up to you.

MR. BAILEY: Sure, Your Honor. Please.

THE COURT: No enjoined person may direct or use chemical or projectile munitions, comma including but not limited to kinetic impact projectiles comma, pepper ball or paintball guns comma, pepper or oleo resin capsicum spray, tear gas or other chemical camera irritants, soft nose rounds, comma forty millimeter or thirty seven millimeters r launchers comma less lethal shotguns comma and flashbang comma stinger comma or rubber ball grenades comma, unless the specific target of such a weapon or device poses an imminent threat of physical harm to a law enforcement officer or other person And that's where I think we heard this that testimony that Pepper or O'Leary resin capsicum spray probably doesn't belong in that grouping. Understood.

THE WITNESS: Thank you Your Honor Mr. Bailey, you are putting me in a lot of difficulty with the judge.

MR. BAILEY: Sentence but again I just try top stay employed, Mr. Kerlikowske.

BY MR. BAILEY:

Q So while we have it up, I'm going to I am going to look at this 1B that says no enjoined person may fire any munitions or use any weapons including those described about at the head neck or torso Person unless the officer is easily justified in using deadly force against that person?

A Correct.

Q So do you understand the terms of this provision to prevent an officer from directing pepper spray at a individual's let's say head unless they are justified in using deadly force?

A The way it is written in this injunction, I understand that, but I think we have had discussion that about thinking that further.

Q So you think it's overbroad?

A On pepper spray. I would not disagree with Commander Schoening on that being overbroad when.

Q You are the expert sir, do you think it's overbroad?

A I think that pepper spray is probably something that could be put somewhere else in this and not at the deadly force level.

THE COURT: If I heard you correctly you still said though it should be limited only to folks that are engaged in

active resistance or maybe even for worse like assaultive resistance.

THE WITNESS: Exactly, Judge.

BY MR. BAILEY:

Q So looking at 1B here, I'm hearing you saying that the terms of the injunction are restraining -- looking at 1B here, this particular term is restraining some force that could be legitimate, right, some uses of pepper spray?

A It is.

Q Mr. Carney if we could now go back to the supplemental declaration, paragraph 44. I thank the Court's indulgence on the technology.

So we have already talked about the first sentence of paragraph 34 at the bottom here. Now I want to talk about the second. As they can with any set of rules officers can be trained to for him the injunction's terms and should be trained in that manner already. Did I read that right

A You did.

BY MR. BAILEY:And so this is one of the reasons why you believe the requested injunction is workable, right?

A Given all of the discussion we have had around pepper spray, yes.

Q I promise I'll leave that one alone. So do you remember Commander Schoening in his colloquy with Ms. Albies when he was asked about the workability of the injunction more broadly?

A I don't remember the specifics but please refresh me.
Q We don't have -- I did my best to write this down accurately. So if you don't remember, I under. I heard Mr. Schoening -- Commander Schoening say that the challenge with injunctions and Court's directions. Did you hear him say?
A That I don't remember that but I wouldn't disagree.
Q So you agree then that there are some challenges when it comes with law enforcement agencies understanding the term of an injunction that was crafted by someone outside of the agency?
A I under the challenges, but then when you look at the Court orders that have come through across the country, the Court decisions, etc., going back to Miranda, officers are trained to deal with these changes and adapt to them, given the proper guidance.
Q That guidance would have to come from the Court, right?
A I think that you could easily take the injunction and aid in training materials and provide it to your personnel and allow them to ask questions about, well, what does this mean and is this going to happen, et cetera, and you have got your legal advisors there to help them through that. I just I don't see that as a huge challenge.
THE COURT: That's the whole point is really once. You can explain what the judge meant.
MR. BAILEY: I'm working on my mind are you still

every day.

BY MR. BAILEY:

Q So you would agree, in your experience, law enforcement agencies, they don't generally get to pick the terms of the injunction they are subject to?

A Correct. The same way that justice issued so many consent decrees of multiple pages across the country. There was a lot of work to get those department since those officers and others to work through consent decrees, far more complicated than this injunction.

Q And that differs from an agency's internal policy, right?

A It does.

Q Generally if an officer violates the agency's internal policy you wouldn't expect them to be subject to contempt of Court, correct?

A Correct.

Q Your opinion is that local law enforcement is far better equipped to handle protests than the federal agents that have been doing so in Portland, right?

A I agree.

Q You are aware of Oregon sank ware laws?

A I am.

Q You were here for the testimony of captain Bailey too, right?

A I was.

Q And up heard him testify about the difficulties that those laws pose to PPB's ability to police crowds outside the facility?
A Correct.
Q Were you here for the testimony of Commander Dobson?
A Yes.
Q You heard him testify about the difficulties that those laws pose to PPB's ability to police crowds outside the ICE facility?
A Yes.
Q The same is true for Commander Schoening?
A Yes.
Q I assume nothing about their testimony changes your initial opinion here?
A Well, I think that the injunction it can be quite workable. I think people can be trained in that. I think the sanctuary laws in this state and the City of Portland make it particularly as Schoening testified multiple times particularly challenging about what they could do and about what they could not do. But you know you have to live with -- you live with that. And it looks to me like they have done a pretty fair job of being on the fence and making those decisions where they want We're going to arrest law breakers, they weren't going to allow people to be hurt. And but you are right. It is that is a challenge.

Q Mr. Kerlikowske we can put aside the workability piece for a second. Okay I'm here I'm more focused on your opinion that local law enforcement is better equipped to handle protest outside facility. I want to just make sure after everything you have heard in the course of this evidentiary hearing your opinion is that exactly the same?

A Absolutely. We had 22 years of experience policing a city like portland or a city like Seattle or others. These are cities of protest. These are politically volatile cities and you don't parachute people in from the federal government and say, okay, you figure out how to do this, etc. You would have to rely on the expertise and experience of those people. And remember, after the federal government evacuates the City, as they will and as they did in Minneapolis, that local police department and local police chief are there to have to pick up the pieces.

Q As long as you are not in the driveway of the ICE building, right?

A Correct.

Q I would like to briefly talk about your discussion of hands-on tactics. You had an exchange with Mr. Borden about the risk associated with police using hands-on tactics. Do you remember that?

A I do.

Q And my understanding of your testimony is that your view

is that officers should deploy -- genuine question a formation or seizure line?

A Skirmish line.

Q Thinking that they should deploy in a skirmish line and then at that point they can engage in hands-on tactics and the skirmish line will allow them to say a effectuate an arrest with relatively low risk?

A Well, quite often the skirmish line and the fact that people are giving an order and the people and the people on the skirmish line appear to be as DHS policy talks about have good posture look professional etc. and the people are given this order to disperse, you may never have anyone going hands on where somebody tries to grab a baton or tries to wrestle with a shield. You may but even then you have these other tactics to be able to make an arrest with the arrest teams just behind the skirmish line.

Q To you talk about the frequency with which bad actors might retreat into the crowd for cover. Do I have that right?

A You don't you do.

Q Is it fair to say that you couldn't conduct a targeted arrest of an individual in the interior of the crowd with a?

A A.

The skirmish line the skirmish line isn't designed to do that and extraction team is designed to do that, to be able to -- to especially if there toward the front and they have

already violated the law and have you probable cause to arrest them. So that you would not use the that you skirmish line because you don't want to break rank and you don't want to lose that ability to move people etc. So an extraction team but even then the extraction team that may be a bit too hazardous. So you take a picture. And you're or you have people follow that individual out and once he or she leaves that area, that area they make the physical arrest.

Q So if it's two hazardous, the federal officers are supposed to just kind of wait for the chaos that I to die down?

A Well, I think quite often the time is on your side in the skirmish line is going to move people but if there's somebody in there as we had at the WTO anniversary firing or risk rocket Lucille Ball bearings, hitting one of our captain's, being able to arrest that person as they filtered out or left the crowd is the most effective way to do it. Trying to fire something inside the crowd can lead to a lot of other unintended consequences.

Q I heard you say time is on your time a few times now. So I guess what I'm wondering, is it your view if there is an obstructive crowd that cannot be moved, the appropriate response is just to wait?

A Well, you can wait if you don't have the proper resources. That's why if DHS has not surged enough resources here to be able to do that effectively, then that's somewhat falls back on

DHS. It is not like they don't have tens of thousands of employees and billions of dollars and you wanted to put in an additional two hundred people here to support the existing resources so that you could use those tactics I talked about. That would make more sense. Is.

Q I believe you also said that at a certain point you didn't understand why smoke would be used in the interior of a crowd with respect to a video you were showed during your testimony. Do you remember that?

A Yeah, I do.

Q Could it be that smoke is deployed to provide cover for an agent making a targeted arrest?

A That's ridiculous. Why would you even do that. If you have got targeted law breakers in there why give them anonymity by giving them smoke. Why put your own agents in a position where suddenly if they see something and it is flighting through the smoke, et cetera, how do you know you are going to have friendly fire. I have never heard of smoke grenades being used to as a crowd deployment. I doubt if you will find any other police commander in the country that would tell you that's an effective method.

Q So if the incident reports that you reviewed, if officers talked about using smoke to provide cover during targeted arrest, what's your reaction to that? It didn't happen?

A No, I would say that if you -- how do you know where the

person is once the smoke is all over. I have never heard and I don't know of any competent experienced commander that would talk about we are going to deploy smoke into a crowd and use that as a way to affect our own people. You could end up with essentially a blue on blue situation where one of your own agents targets or strikes someone else. And remember, too, we have already seen the Portland Police or the Chicago police gassed already. So using smoke and tear gas just is not going it be very effective and I think that's been well shown here.

Q I'm thinking about January 31st now and the large demonstration and talked about on direct. One of your opinions was that good policing requires trying to get in contact with the organizers of a large protest in advance for coordination. Do I have that about right?

A You're right.

Q It is fair to say though that the organization the Government organization would need some kind of reasonable notice before they could actually reach out to that protest group, right?

A Right.

Q Do you know if the federal protective service had notice of the January 31st incident?

A I have no idea. But I know I'm sure on site if they monitored social media the way professional agency should, they would know that this is coming up.

Q But you are not sure whether they did that or not?
A If they didn't do it, then I would say that's a mistake on their part.
Q They are supposed to broadly monitor social media?
A Police departments but monitor social media all the time and they also use it to get out their own message. So if you suddenly have this January 31st and you are struck by this as some kind of a surprise, kind of shame on DHS.
Q I know we have already talked a little bit about your work in LA press club and Chicago headline cases, I just would like to confirm though, are you aware of the terms of the injunction that was issued in LA press club?
A I remember them from September. I couldn't go through every detail and I'm sure there is some differences than this.
Q Totally fair?
A Okay.
Q I think you talked about how the injunction had been in effect since September as one of the reasons that you thought the injunction here was workable, right?
A The basic the basics of the injunction seem to be effective in Los Angeles, but I didn't do a side by side comparison with this injunction.
Q Are you aware that in December, or the terms of that injunction were stayed pending appeal as to everybody except the named plaintiffs?

A Almost everything has been stayed.

MR. BORDEN: Objection. Misstates the injunction.

THE COURT: It sure does. He can handle it himself. I know what that injunction says. I know what stay says. You can talk about it and talk about it at closing argument. I'm going to overrule the objection.

THE WITNESS: What do you want me to answer. What's your question I was just wondering.

BY MR. BAILEY:

Q You talked about how some of the details back if September. I'm so I'm just wondering if you are aware in December that many of those terms were stayed to some degree?

A I'm not aware of the specifics of what was stayed, what parts of it were stayed. Sorry.

MR. BAILEY: Thank you Mr. Kerlikowske. I have nothing further.

THE COURT: Do you have anything further Mr. Borden.

MR. BORDEN: I have a couple short questions.

REDIRECT EXAMINATION

BY MR. BORDEN:

Q The first has to do with the review of materials. and I just wanted to make sure that the record was clear on this. You wrote you reviewed the materials that are indicated in your declarations, both of them, correct?

A Yes.

Q And did you also review some additional materials afterwards, in addition to the testimony that you took in at the trial?

A Yes.

Q And what materials were those?

A Of some segments of Mr. Cantu's deposition. I did not review and I think I mentioned that chief Sullivan's was not available. But I did look at other pieces.

Q Did you look at all at Mr. Johnson's deposition.

So there was a question to you about sank ware laws and if the sanctuary laws prevented local law enforcement from helping the federal agents with protests all together, would that change any of your views about the amount of force that federal agents are allowed to use to police the protests themselves?

A If they couldn't help in any circumstances, even a request from the federal agency, I would think he would have to review what's being done and also the resources that the federal government is devoting to this.

THE COURT: You are welcome to use initials. If he doesn't know the initials. You can show him something. I want to be sensitive about people's names.

MR. BORDEN: I'm sorry about that, Your Honor. Did you review any other deposition testimony without saying anybody's names.

A Not that I recall right now.

MR. BORDEN: Okay.

Nothing further.

THE COURT: Anything further Mr. Bailey within the scope.

MR. BAILEY: No, Your Honor thank you.

THE COURT: Mr. Kerlikowske, good siege you and thank you sir. I appreciate it.

I understand that plaintiff has one more live witness. And now that you have been able to really condense your direct examination. You will be incredible efficient.

MR. MERRINAN: Yes. At this time plaintiffs call Brian Rudiger.

THE COURT: And I have read Mr. Rudiger declaration.

(The witness was duly sworn.)

THE CLERK: Would you please state your name for the record, spelling your last.

THE WITNESS: Brian Rudiger.

DIRECT EXAMINATION

BY MR. MERRINAN:

Q Good evening, Mr. Rudiger, I understand you wrote a declaration in this case, right?

A Correct.

Q And it was a summary of what you experienced at the labor union march on January 31?

A That's correct.
Q Are you had a chance to review that any time recently?
A Yes, I did last week.
Q Was everything in there correct?
A Yes.
Q So I just want to start out by asking you before you went to the labor union march, was there any particular reason why you wanted to go?
A Well, like a lot of people I was pretty horrified by the murder of Alex pretty the week before. Although I will say that would in the be my first time protesting in the last few years and I think I'm largely motivated by my own family history which makes me sympathetic to what immigrants and other people are going through.
Q Speaking of family, in your declaration, you brought your family with you to the march, your wife, your sons, your brother and your nephews, can you please tell the Court how old your sons and nephews are?
A My two sons are 15-and-a-half, he would want me to say and eleven. And my nephews I'm pretty sure 16 and 13.
Q Before you p went to the labor union march, did you have conversations with your sons about what to expect?
A I did. I mean they have been to many protests in their lives. I am a union organizer by trade so we have been to lots of protests and we talked about what to expect there.

Q Now you said that you are a union organizer by trade. Did you have any involvement on organizing the march on January 31st?

A No.

THE COURT: Which union?

THE WITNESS: SEIU and ASFME in the past.

BY MR. MERRINAN:

Q So you and your family arrive at Caruthers park. Can you describe for us what you see How many people are there at Caruthers park for the march?

A Yeah when we got there about three o'clock it was already very crowded but it continued to fill up after we arrived. I saw a lot of people that I knew, people who were there with their spouses and some of them there with their kids and obviously people I didn't know. Lots of people on bikes. I saw lots of families. I have this particular image of a younger kid with his trombone. There are lots of people with musical instruments there, hand made signs and a fair number of older people. Period.

Q So I want to skip to when the ten year old musicians were used. In your declaration you said you heard loud explosions. When you were standing across the street from the ICE building. How far away from the ICE building are you standing when you hear the explosions?

A I would estimate a hundred or maybe -- I would estimate a

hundred feet.
Q When you are a hundred feet away from the ICE building where is your family at?
A Right next to me.
Q Are you all reacting when these explosions go off?
A When I first when I heard the first loud bang, I immediately turned to my left and my youngest son looked up at me and immediately grabbed me around the waist and I said -- do you want me to continue. And I said, it is okay, it is okay. And you could feel -- I was afraid. You could feel the fear around us and my initial concern at that point was actually about a stampede because it was like toe to toe packed like if you are leaving a sports arena after a game. And I was very concerned about that and we were right up against the apartment building there that's on the northeast corner of that intersection and so we just -- we -- everybody around us was trying to figure out what to do and then the pretty quickly thereafter we started to see canisters of tear gas appearing -- launched -- thrown -- I don't know how they were delivered but coming out from the top of the building and landing among protesters.
Q In your declaration you write that the crowd was peaceful and positive at Caruthers park?
A Yes.
Q Once the tear gas starts going off how does the tenor of

the crowd change?
A It remained peaceful but it became very afraid and you know almost immediately everyone around us started to proceed back north up Moody, but because it was so gridlocked it was very slow and almost pretty quickly thereafter, a very dense cloud of tear gas reached out, at which point, as we saw that it was sort of becoming denser and then moving very quickly towards us, we sent my wife and I said to our sons, cover your mouth and don't open your eyes no matter what. And we grabbed them in front of us and just joined the throng trying to go north But it was just agonizingly slow because of how many people there were. There was no way to escape at that point. The Cloud came to us.
Q In your declaration something I want to follow-up with you on, you said that at one point you briefly lost contact with your family while you are moving away. Can you tell us what happened with is that?
A We -- as I said, it was really slow to get north and everybody was just trying to go as fast as we could, but it was slow. And as we finally reached the next intersection, you know that entire time everybody around us, myself including my kids is retching and throwing up and out or mucus or whatever And It was getting harder and harder to breathe. Each breath was more difficult than the one before it. As we came in and kind of rounded the corner, I stumbled and kind of went down to

one knee. In part I think because it was very difficult to breathe and I looked up and I didn't see my wife or my sons anymore and it was -- the fog was still quite thick there. And I think it was at that moment that I really thought that there was a chance that we might not survive. I had never experienced tear gas before. So and shortly thereafter my eldest sort of emerged back towards me from -- and grabbed me by the arm and said, you know, we have to keep going.

Q Your oldest son?

A My oldest son.

Q In your declaration when you talk about injuries you sustained, having to do with burning eyes and breathing difficulty breathing. Have you had any lasting physical effects from ingesting tear gas that day?

A I wouldn't describe it as lasting. I had about three weeks of a chest cold that I could -- I had chest congestion that I could not kick. I finally did last week.

Q What about with your family physically or otherwise how have the events of January 31st affected them?

A Physically as far as I'm aware, everyone else is fine. Within a couple of days the redness and the shortness of breath was relieved. You know, I think emotionally every all of us are still processing and processing it. We have tried -- we have been intentional about having family discussions with my sons to are help them understand it and contextualize it and

talk about how they felt, particularly because my eldest being older, I think was able to sort of situate what was happening in a broader context of what's happening in our country. But my youngest was just inconsolable afterwards and could not understand why that had been done to him. So we have really tried to have -- we have had a number of family conversations as just both top legitimatize how they are feeling and how my wife and I am feeling too.

Q Is there anything about what you experienced that would make you reluctant in the future to go back to a protest at the ICE building with your family?

A Yes. I mean, I will not bring my kids to another protest during the term of this administration where there is a chance that they are going to come up where we may intersect with federal officers. I will continue to go to protests that may have that. And despite an absolute commitment to peaceful assembly, I will bring a tear gas mask.

Q It sounds like a change you would make is bring a tear gas mask in the future?

A Yes for myself and I would not bring my kids if there is a chance of intersecting with federal officers.

Q Is there anything else that you want the Court to know about what happened and what you experienced?

A I mean, I could speak at length about it but I won't. I think what I would just say is I -- we -- that march was like

any other big labor march, families peaceful not taking the bait of counter plaintiffs, and I felt comfortable bringing my kids and my wife and to the last minute my 81-year-old mother was going to join us. I felt comfortable with that because I was under perhaps the naive belief that the peaceful protesters would be dealt with appropriately and so I'm frankly still struggle with that decision and feel a degree of guilt and sadness about that and what my kids that had to go through.

Q I'm sorry you went through that. And thank you for waiting all afternoon to testify?

THE COURT: We are not quite done. Cross-examination.

MR. YUN: Actually nothing from the defense.

THE COURT: You are done. I appreciate you being here. Thank you.

Already. Let's just talk about scheduling and that's it for the night.

As I understand it, we have two relatively brief videos to watch tomorrow morning; is that right.

MS. HUTCHISON: That is right and we do have the videos from the supervisor or DHS employees which we are trying our very best to prepare this evening and make it suck sing.

THE COURT: Give me a rough estimate of how long you anticipate we will be watching p videos tomorrow morning.

MS. HUTCHISON: Well the two that are left -- the two

that we were already prepared to play are 12 minutes and 9.5 minutes -- one is 12 and one is 9.

THE COURT: Okay.

MS. HUTCHISON: The supervisors we are making tonight. If you have a recommendation we will certainly try to stay within that amount.

THE COURT: That you're 20 minutes I'm sorry 20 minutes.

MS. HUTCHISON: 20 minutes for each.

THE COURT: The supervisor how many supervisors.

MS. HUTCHISON: So there are three supervisors, One of the things we were thinking about playing one supervisor But it would have to be longer.

THE COURT: I'm it not going to artificially limit on what you do. Be sensitive that we don't need cumulative evidence.

MS. HUTCHISON: Absolutely.

THE COURT: So my plan and then then plaintiff rest.

MS. HUTCHISON: Correct.

THE COURT: Then I'll invite after that defendants to present their case. A little bit earlier this afternoon they told me that they don't plan on calling any live witnesses. If that changes, let us all know by email tonight. Otherwise I will ask plaintiffs to present their case tomorrow. If they rest, we will probably take a very short recess and move right

into closing arguments. As we discussed previously, I envision closing arguments to be plaintiffs and then I'll give an opportunity for each of the amicus to argue, the state and the City. Then we will go to the defendants and then I'll give plaintiffs a rebuttal and that's what we will do. Okay. Have a good evening.

MR. ROSENBERG: One question, Your Honor. We also have the out standing class certification motion.

THE COURT: I think we should combine the oral arguments such that plaintiff will address the motion for preliminary injunction and the class setter he -- and the motion for provisional class certification and I'll let you argue. I'll let defendants argue in opposition to the motion for preliminary injunction in opposition to the motion for provisional class certification, especially since it is not a jury trial and there are two distinct motions if you all both sides want to split-up among more than one lawyer who addresses what, that's fine with me. I'm not worried about that. I'm more fussy when we have a jury. So do whatever you want to do on that. I think we should hand many it all together because I do think part of the issue on preliminary injunction is the scope of relief requested and that means whether it is solely for the named plaintiffs, whether it includes a putative class and there is plenty of precedent on that or whether we should also grant a provisional class certification and then if there

is preliminary injunctive relief it should go to the entire propose visionally certified class. So it all goes together. So plaintiffs argue on both motions. Then I'll hear from the state or the City, whichever one you want to go first, you let me know tomorrow. Then we will hear from the others and let defendants argue on both motions and go to plaintiffs' rebuttal. Thank you all have a food evening everyone.

COUNSEL: Thank you, Your Honor. Recess.

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/ Dennis W. Apodaca *** DATE

DENNIS W. APODACA, RDR, RMR, FCRR, CRR
Official Court Reporter

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ROUGH DRAFT TRANSCRIPT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JACK DICKINSON, et al.,	)	
	)	
Plaintiffs,	)	3:25-cv-02170
	)	
vs.	)	March 4, 2026
	)	
DONALD TRUMP, President of the United States, in his official capacity, et al.,	)	Portland, Oregon
	)	
	)	
Defendants.	)	

(Preliminary Injunction Hearing)

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL H. SIMON

UNITED STATES DISTRICT COURT JUDGE

ROUGH DRAFT TRANSCRIPT

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ROUGH DRAFT TRANSCRIPT

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Motion hearing 4

(March 4, 2026)

P R O C E E D I N G S

(Open court:)

MS. HUTCHISON: Two brief matters. We had a discussion yesterday about the email it that Mr. Dobson was asked about during impeachment. We have no objection.

THE COURT: Very good. Received.

MS. HUTCHISON: We also -- you may have noticed during when Mr. Kerlikowske was on the stand I was talking to the Government. That was because we hadn't talked about the FPS region 10 directors flame could be said on the record. So we didn't ask Mr. Kerlikowske at the time if he had reviewed that individual's deposition. Over night we come to an agreement we can say his name and also and they will stipulate it that Mr. Kerlikowske reviewed portions of that prior to his testimony after writing a separation and it did not change his opinions.

THE COURT: Very good. I assume defendants agree.

MR. ROSENBERG: Yes, Your Honor.

THE COURT: Go ahead.

MS. HUTCHISON: By way of preview, Your Honor, I will can just lay out for you, we will have three short videos this morning. The total of all three of those videos is 25 minutes.

We then have some exhibits to enter into the public record which are redacted versions of use of force poll sills

that we have come to an agreement with the Government about. Then we have two deposition videos from the supervisors that I referenced one of which is a under three minute video and one that is barely over 20 minutes. That's what we have got for them this morning.

THE COURT: Very good.

MS. HUTCHISON: We can begin with Exhibit 15, which is --

THE COURT: By the way. When we are done with all that evidence, even if defendant has any case to put on, we will take a short break before we go straight to closing arguments.

MS. HUTCHISON: Thank you, Your Honor. My apologies. We are on Exhibit 16 now. So Exhibit 16 is FPS inspector with initials XX. The full video and transcript of the deposition will be provided to the Court. We are playing a portion that will be marked 16A that is the video being played and the transcript of the video.

THE COURT: All right. Without objection it will be received.

MR. ROSENBERG: No objection.

THE COURT: Thank you.

(16A was played in open court.) protesters, protester,

MS. HUTCHISON: Thank you. Plaintiffs will now move

Exhibit 17 into evidence. This is a montage of several different FPS officers discussing counter protesters.

THE COURT: Any objections.

MR. ROSENBERG: No objection, Your Honor.

THE COURT: Received.

(Video 17A was played in open court.)

MS. HUTCHISON: Plaintiffs now offer Exhibit 17.

THE COURT: That was 17.

MS. HUTCHISON: I'm sorry. Exhibit 18.

THE COURT: We just watched 17.

MS. HUTCHISON: This is 18. This is another montage. It is the two FPS supervisors that were deposed Mr. Robert Cantu and his supervisor FPS for region ten Eric Johnson and it is discussing their understanding of the phrase passive resistance.

THE COURT: Any objection to Exhibit 18?

MR. ROSENBERG: No objection, Your Honor.

THE COURT: Received.

(Exhibit 18A was played in open court.)

MS. HUTCHISON: We knew have a few documents that we would like to enter as exhibits.

THE COURT: Very good. I'll take some copies too.

MS. HUTCHISON: Well, actually I think it is probably not an efficient use of time to go through all of those documents. These are the use of force policies. So for

clarity.

THE COURT: Just identify them for the record.

MS. HUTCHISON: Perfect. The first one is a screenshot that we will pull up on the screen.

This is Exhibit 19 we are going to do that one later because there was a redaction request Do we have an input.

So we will do Exhibit 19. This is the FPS public order policing policy with redactions.

Exhibit 20 is the FPS weapons and use of force policy with redactions.

And for clarity that's Bates Dickinson 145, the public order policing policy is Dickinson one twenty 128.

Exhibit 21 is the ICE firearms and use of force directive with redactions, Dickinson 38.

Exhibit 22 is the ICE firearms and use of force handbook, Dickinson 1, with redactions.

This one we will pull up, Exhibit 23. It is the operation skip Jack training slides, Dickinson 402 with redactions

THE COURT: Is that already in the docket? Is the unredacted portion of this document already filed under seal?

MS. HUTCHISON: No, not yet.

THE COURT: Okay.

MS. HUTCHISON: I will have Ms. Hall let scroll through this document. The reason we pull it up is to

reflect -- this is a PowerPoint slide specifically for operation skip Jack which you will hear and it focuses only on the use of force with no mention of the First Amendment.

THE COURT: Can you back up to the last one for a moment please. The active versus passive column. Give me one second here. Okay. Thank you.

MS. HUTCHISON: Now we will focus on the ninth page of those slides. I can represent that we have deposition testimony that the image in the bottom left corner there, as well as the center image, so I'm speaking of the one with the agents holding with the time and the peace sign are from Portland from 2020.

THE COURT: I recognize the background.

MS. HUTCHISON: I thought you might. And your Honor we do have the full video related to the left image if Your Honor would like it to see that.

THE COURT: I don't need that.

MS. HUTCHISON: We will play our next video which is Exhibit 24.

THE COURT: Am I going to get these other thumb drive hard if, hard copies or something and also with maybe an exhibit list.

MS. HUTCHISON: Yes we can definitely do that. We had held off on filing things under seal until we could do it a all at once.

THE COURT: So that we knew exactly what was coming sometime today then.

MS. HUTCHISON: Yes. This video is from Mr. Sullivan who submitted the declaration, he is from CBP and it is only about three minutes long.

THE COURT: That's fine.

MS. HUTCHISON: For clarity of the record and Exhibit 24 is the full deposition video and transcript for Mr. Sullivan. We are playing Exhibit 24A which is --

THE COURT: Before you do that, I understand there is no objections to 19, 20, 21, 22, 23, and 24, am I correct.

MR. ROSENBERG: You are correct, Your Honor. No objection.

THE COURT: Thank you. Received.

(Video 24A was played in open court.)

MS. HUTCHISON: And our final video of the day will be the full deposition transcript and video for Regional Director for FPS Region 10, Eric Johnson. He is the person who sits just above Mr. Cantu in the chain of command. And Exhibit 25 is what we are playing in Court today, both the video and the transcript.

THE COURT: Thank you. I take it no objection.

MR. ROSENBERG: No objection.

THE COURT: Received. Thank you.

(Video 25A was played in open court.)

MS. HUTCHISON: Your Honor, just for context. We didn't say which video it this was. This is the video with the individuals sitting on the edge of the driveway holding signs.

THE COURT: Thank you.

(Video resumed.)

MS. HUTCHISON: For reference Your Honor, this is a video we previously seen with the woman standing in the street who is sprayed in the face.

THE COURT: Thank you.

In additional personnel and that's when it becomes a named operation and mainly for funding or to get additional assets resources in you said once we requested additional personnel who made that request Specifically I made the I made I personally made the request to our deputy director of operations that we would need additional personnel for three main agencies that are involved are FPS, CBP, and ICE; Is that correct?

That is correct.

Occasionally you do have other agencies like BOP or the FBI, correct.

Correct, yes.

Do you know the requirements for being cross designated into the US for Operation Skipjack.

I do not know the exact requirements that I do know There is required training that they complete.

Do you know what that training covers?

I do not know I have never attended it or seen the actual training.

Or policing policy is an FPS policy, correct.

That is correct yes.

Do you know if any specific training is provided on the subject of public order policing That I do not know AFP's operations skipjack slides why did you create them so we provide a brief for the duty teams that we call them waves The deployed personnel when they come in we have a day dedicated to training and basically orientation groups this is provided to only AFP's personnel cease use of force Overview slides and what is it this is the slide deck for the Use of Force overview presentation that we provide all the new personnel that come in video resumed.) hutch for Your Honor's understanding this is during a push when they are coming out of the gate and there is a crowd coming out in front of them.

THE COURT: Thank you.

(Video resumed.)

MS. HUTCHISON: Our final exhibit will be Exhibit 26. This is the screenshot I referred to earlier with redactions. You can see on the screen. It is blurry. Is it says Portland 2.0. This is a screenshot from body worn camera provided in discovery. With that plaintiffs rest.

THE COURT: Thank you. Before we go to a break --

one second.

All right. Before we go to a break, let me inquire of defendants. Do defendants have any evidence they wish to present in their case.

MR. ROSENBERG: So, Your Honor, the defendants do not intend to present any live witness testimony or play deposition excerpts today as part of this hearing. Our understanding of the way these procedures have been structured is that everything that is part of the PI briefing in this case is part of the evidentiary record that the Court can consider. So of course we have submitted our opposition to the preliminary injunction that attached various declarations that the Court considers as part of the record, all the materials that have been in front of the Court for the last two and a half days are also part of the evidentiary record. As the Court is aware there has been extensive discovery in a very short period of time and our understanding and I would just like to confirm this is on the record is that plaintiffs intend to submit under seal the entirety of all of the depositions that they have taken as part of the discovery in this case and that is also part of the evidentiary record that the Court can consider.

THE COURT: That makes good sense to me Mr. Rosenberg. Do plaintiffs agree.

MS. HUTCHISON: Agree with one caveat we are doing that for purposes of the preliminary hearing. We do not agree

it is necessarily appropriate for the entirety of these depositions to remain confidential after we enter a protective order and can go through that process of determining what qualifies for protected treatment under that order.

MR. ROSENBERG: I appreciate counsel reminding me that we still have the issue of the out standing protective order to work out. We have all been working diligently to present our case to the Court. I think as one of my colleagues indicated there is agreement in large part on the protective order but there may be a few out standing issues we may need to follow-up on and I anticipate we can do so after these proceedings conclude. But at this time I do want to confirm, because I will confess that I have lost track of all of the exhibits and I know the Court suggested an exhibit list. I want to confirm that the entirety of the deposition transcripts will be submitted.

MS. HUTCHISON: Yes, they will. Mr. Rosenberg and I spoke and met and conferred about references to portions of the transcript that were not publicly presented. We are going to work together so we know what portions we might refer to in our closings.

THE COURT: Go ahead.

MR. ROSENBERG: So the Court is aware, what we are planning to do for our closing is that we do intend to cite to some of the deposition transcripts that have not previously

been presented to the Court as part of this evidentiary hearing, because the Court will have the deposition transcripts on which it can rely, so we intend to inform the Court of those portions of the transcripts that we think are helpful to the Government's side of this case, recognizing of course that plaintiffs ultimately have the burden on a preliminary injunction. Earlier this morning, I did send to plaintiffs counsel a list of the deposition transcript citations that will appear on our PowerPoint deck that we intend to use as part of the closing argument and so they now have access in advance of our closing argument to the citations to the deposition transcripts that we intend to include as part of that PowerPoint deck. We will of course rely on and cite other materials such as declarations or the last couple of days of testimony as part of our closing argument.

I'll also note that at the conclusion of proceedings today, we do intend to file on the docket a copy of the PowerPoint deck so that the Court and the parties have access to the citations that we are including as part of our closing argument. That's not an exhibit, of course, but we view that as being akin to --

THE COURT: It's an illustrative aid and it's perfectly appropriate. I was even going to ask you if you could give me, one for me and one for my lead law clerk a hard copy before closing because it is helpful for me to make my

notes right on your PowerPoint deck as we are looking at it. If it is not convenient, if you can't do that so be it But if you can it would be much appreciate it Same for plaintiffs if you are going to use any illustrative aids, I would love to receive them before closing argument so I can make notes directly on that. If that's not easily accessible to you that's fine too.

MS. HUTCHISON: Your Honor, just not to belabor the point.

THE COURT: Belabor away.

MS. HUTCHISON: Foreign clarity of the record we received those citations at 920 after Court started we are trying the best we can to understand what the government will be referencing and its closing prior to doing our own, But that's a little bit of an impossible task on timing so I just want to flag for you that our rebuttal may have to address things that we're not addressed in the closing.

THE COURT: Well as long as the rebuttal addresses what they raise in their closing, that's fine for rebuttal.

MS. HUTCHISON: That's true. I was anticipating it would be much longer than we thought.

THE COURT: Don't worry about I'm not going to close time limits But I will listen have some questions in a moment on that And.

MR. ROSENBERG: Can I just respond on that I think

that they are actually at an advantage because they have received our citations, the materials on which we rely before their case-in-chief had rested. Had we presented this in court, they wouldn't even have those citations yet.

THE COURT: Absent objection, which I do not hear, I'm not worried about a thing.

I take it that everything that Mr. Rosenberg said by way of procedure is fine with me. I'll ask plaintiffs in a moment if there is any objection for that. With respect to the protective order, I understand that you have been putting your priority/time preparing for this hearing. I get that. P let's see if we can resolve this protective order maybe next week apartment the latest, please.

Also, if there is a stipulation among the parties to remove the confidential designation from some exhibits, from some transcripts, just send in that stipulation and we will lift the sealing on those. If some things remained sealed and some things aren't and you want to file a new exhibit that contains some of the previous redactions now unredacted, keeping some redactions, that's fine too. You have leave to do that. And if you disagree, if the parties disagree on whether something should or shouldn't be -- remain sealed, just file a motion.

Confer of course, but then file a motion. We will get on the phone and resolve that.

With all of that p said, any objections from plaintiffs to these procedures.

MS. HUTCHISON: No, Your Honor.

THE COURT: All right. Before we take a break and I'm not going to impose any time limits at all. I understand that these are just rough estimates. What is plaintiffs' rough estimate for the length of time for your closing. I won't ask you about rebuttal.

MS. HUTCHISON: Your Honor, I will desperately try to stay under an hour.

THE COURT: Let me go to the state and the City. Does the State of Oregon wish to make any oral comments But during closing argument as amicus.

MR. KENNEDY: Yes, Your Honor. Scott Kennedy for the State of Oregon. We would love to be heard after plaintiffs. As Your Honor anticipated. I would expect my comments to be at around ten minutes Your Honor.

THE COURT: Thank you does the City of Portland as amicus wish to be heard. Van.

MR. VANNIER: Yes, Your Honor. I expect my remarks will take about ten minutes.

THE COURT: Thank you and rough approximation for defendants closing argument length of time.

MR. ROSENBERG: I think it will be less than an hour.

THE COURT: That's fine. Then here is what I would

like to do given the timing now. It is 10:30. Let's take a ten minute recess now. I would like to adjourn for a lunch break at a few minutes before noon, with the right timing, which means let's do plaintiffs closing. Is the state going before the City or what have you decided.

MR. VANNIER: Your Honor, we conferred the City will be going first.

THE COURT: Let's go to plaintiffs' opening, depending upon the time if it is enough time to complete before noon, we will go to the City. Then if there is time to complete before noon we will go to the state. If not we will pick up with the state right after lunch. And after lunch we will conclude with defendants' closing and plaintiff's rebuttal will that work for everyone.

MS. HUTCHISON: Yes, Your Honor.

Recess.

(Proceedings resumed:)

THE COURT: Do you happen to have a copy of your PowerPoint slides.

MR. BORDEN: I was about to email a PDF to everybody. We don't have the ability to print them out.

THE COURT: How long are they.

MR. BORDEN: I think there are six slides.

THE COURT: If you email that to Mary, she can print out a set for me, a set for Margaret and defense counsel and if

you want one.

MR. BORDEN: We will email the group.

MS. HUTCHISON: For clarity, Your Honor, that's towards the end of our closing statement.

THE COURT: That's fine.

While you are doing that now, email them now. Perfect. I'll take a moment or two on something else.

MR. BORDEN: I just pushed send.

THE COURT: Do you have them Mary?

THE CLERK: Not yet.

MS. HUTCHISON: It might help for understanding, I will be addressing the majority of the argument about why we are entitled to relief. But Mr. Borden will come in at the end for the explanation as to the scope of the relief we are seeking and the workability.

THE COURT: Will one of you address also the issues of provisional certification.

MS. HUTCHISON: I will, Your Honor.

THE COURT: Excellent. Mary do you have it.

THE CLERK: I have it.

THE COURT: You hit hint. Mary print five sets if they are not that long at least.

Mile she is doing that, I will tell you an incredibly silly pun that is marginally relevant. I heard this recently: That is, two sisters are talking. One says to the other, do

you know what the right thing to do is when you have accidentally locked yourself out of your house. The other one says no, what the person says, speak clearly, speak slowly, speak calmly because good communication is the key. God I hope that's not on the record. If it is, that's okay.

Court reporter: I want that on the record.

THE COURT: Fine.

(Pause.)

THE COURT: All right. Thank you all very much. Ms. Hutchison, at your convenience whenever you wish.

MS. HUTCHISON: Thank you, Your Honor.

Plaintiffs have provided evidence that they are entitled to the preliminary injunction requested in this case as well as provisional class certification. Because the analysis on certain issues doesn't change from when you previously did it in analyzing a request for a temporary restraining order, I do not intend to focus any of my argument on standing or on the three prongs of the preliminary injunction test: Focusing on the likelihood to suffer irreparable harm, The balance of equities, or whether the injunction is in the public interest. That analysis is identical from the TRO order.

I will focus instead on plaintiffs likelihood to succeed on the merits of our First Amendment retaliation claim. As you know, a First Amendment retaliation claim requires us to

prove three things: That plaintiffs were engaged in constitutionally protected activity; that the but the defendants actions would chill a person of ordinary firmness from continuing to engage in a protected activity; and that the protected activity was a substantial or motivating factor in the defendants conduct.

I intend to address these largely in turn. Beginning with whether the plaintiffs were engaged in protected activity. This does not seem to be genuinely contested. All of the plaintiffs who fit into our class definition went to the ICE building in Portland in order to express their anti-ICE or antiadministration feelings and engaged in protected activity that was peaceful. None of our class members engaged in violent behavior or did anything that would take them outside of the realm of what is protected buy the First Amendment.

But it is notable that the officers who were working as a part of operation skip Jack do not seem to have a clear understanding of what qualifies as First Amendment protected activity. You heard earlier today about the slides that are presented during operation skipjack when officers arrive in Portland.

That training didn't contain anything on the First Amendment. And while you may hear some evidence of other references to other trainings where the First Amendment comes up, it is notable that the training that's chosen to be given

to the people who are coming to Portland for the purpose of operation Skipjack, which is a known crowd control situation did not get any basic training to remind them of any previous training that they had about First Amendment protected activity.

You also heard yesterday that there were some confusion from FPS inspectors during depositions about whether certain activity was protected. One particularly notable example that we showed you was an FPS inspector who was unsure for if burning the flag was protected activity because in his words "things have changed."

In the full deposition submitted to the Court, you will see other officers discussing whether certain activity was protected under the First Amendment, including a supervisor, Mr. Cantu, when has some hesitation and was less than clear about whether certain particularly offensive speech, such as racial slurs or telling officers to kill themselves qualifies as peaceful and protected activity.

So while here in court the Government attorneys do not seem to contest this point, it is a point of confusion on the ground. So what have the defendants' actions been that we are challenging here? We have strong evidence of an utter lack of training on policies. The deposition testimony shows that representative officers, which is how the Government has classified the agents that we have testified -- that we have

deposed in the last two-weeks, those representative officers are largely not even aware of the FPS public order policing policy. That is the exact policy that covers crowd control and First Amendment activity.

When you look at that policy at the top, it describes the scope of what it covers. Section 1A explains that it covers First Amendment activity but also crowd situations that go outside of protected First Amendment activity. When things go into the area of civil disturbance or civil disobedience.

The policy itself in Section 1B also says that this public order policing policy should be shared with other agencies that come into FPS and its efforts. Yet regional direct Eric Johnson doesn't know if the other agencies who came to portland as a part of operation skipjack were trained on this policy.

And again, the slides that are used to train FPS officers focus on the use of force, not this public order policing policy. Given that the entire reason that federal personnel were coming to Portland for operation skip Jack was crowd control, it is an egregious failure in training to not address the very issue they were going to be working on.

Additionally, considering their own attorneys have been arguing that it is hard to understand use of force rules that are written by someone else, it is an unconscionable failure that is inevitably going to lead to the improper use of

force when they do not train their officers on what their written policies require and what the language means.

They can't hide behind the language of written policies when their officers are not trained to know what those policies mean. In fact, there is strong evidence of directly wrong training of all federal personnel that are in Portland for operation skip Jack. For example, using chemical munitions on passive resistance is contrary to written policy, yet representative officers uniformly testified that these actions were consistent with their policies and training. For example, using OC spray to the face for passive resistance, like those individuals who were sitting in the driveway with signs.

I would encourage Your Honor, if you haven't already noticed, to rewatch that video. Those individuals were detained. When they were detained a few of them were dragged away to be taken into custody, as they went limp and remained passively resistant. We do not challenge that action taken by federal personnel. It is the OC spray to the face of those individuals that were just sitting as a form of protest that we challenge.

Additionally, the written policies prohibit the use of chemical munitions indiscriminately into a crowd, yet representative officers uniformly testified that these actions, like lobbing projectiles over a crowd, or shooting from the roof, were consistent with policy and training. And I would

encourage Your Honor to look apartment the deposition testimony of Mr. Johnson where there is some discussion about the accuracy of the tools that were being used.

He acknowledges that the greater distance that projectiles are used, the less accurate it is. In other words when you are firing from far away, you are more likely to miss your target. He explained that was due to environmental factors like wind that would be present when firing from the roof like that. And he said in normal circumstances it would be safe to conclude that a person who was hit with a projectile was the intended target.

So one of two things is true: Either the individuals who were hit, who you heard testimony from, and who you see in declarations were the intended target and that was consistent with policy; or the firing was so indiscriminate into the crowds that it was inaccurate and ended up hitting them, and that, according to representative officers was also consistent with policy.

I could go on and on with examples of the things that the representative officers and supervisors testified were entirely consistent with their policies and training which actually contradict the plain language of those written policies. One area that I know Your Honor has seen is the testimony about the difference between active and passive resistance. You heard a couple of officers say -- in fact it

was supervisor Cantu say that was never defined in a policy. There was some discussion about what that means and that definition seemed to vary between officers.

Mr. Cantu himself, who is the second to top supervisor for FPS on the ground for Portland testified that passive resistance includes the body going limp when arrested. He also showed some hesitation about whether civil rights icon Rosa Parks exhibited passive or active resistance when she stayed on the bus.

He seems to have some belief that your body doing anything other than actively complying is actively resisting, and that's not the plain language of the policies, and it is reflective of why this Court can't rely on those policies to understand what is actually happening on the ground across the board under a uniform system of command.

The other way Your Honor can know this is because we have testimony that there has never been an improper -- a finding of improper use of force during the entirety of operation skip Jack.

During Mr. Johnson's deposition testimony, you heard him explain that he has seen every single form 10 that has been submitted during operation skip Jack. By way of reminder, that is the form that documents every use of force. While he did say that he doesn't do an exhaustive review of the contents when reviewing these, he does have the ability to read them.

If I saw something improper in there, he, under the policies, has an obligation to report that.

THE COURT: What do I do with the testimony that there were -- that there are four investigations currently proceeding. I don't recall any evidence of how long an investigation typically takes let alone when those began. What do I do with that information.

MS. HUTCHISON: I was just turning there, Your Honor. So a few responses. First, you will see in the fuller videos that those investigations are supposed to happen immediately and promptly.

There is also an indication that if the initial review shows a potentially improper use of force that the officers should be immediately notified, the a lease a talking to, and potentially taken out of work when he does that.

There was unfortunately no testimony as to the entire how long it would take for the region time use of force review board to come to a conclusion. But there was some testimony that you heard today about two of those purported four incidents that are being investigated. Now, I would just offer to Your Honor at a previous -- in a previous case Mr. Cantu testified about four incidents being investigated. Those descriptions largely line up with the two that were discussed today with one notable exception.

So there was a -- you may recall that one of the FPS

inspectors that we deposed talked about that incident with the individual sitting in the driveway. He was the one who sprayed a woman in the face who didn't have a mask on. And when Mr. Johnson was asked about this, he was unwilling to reach a conclusion as to whether that was improper or not. But he did say that he believed that was one that was being reviewed. And when I clarified if he meant by the use of force board or internally, he clarified it was the internal affairs review, not just the traditional review.

Well, what's notable about that is they said if that happens, the officer is spoken to or the inspector is spoken to and there may be some informal way of discussing this without a complete finding of discipline to make sure behavior changes. When that particular officer was deposed, he was asked whether he had ever been spoken to about this event. He had not. As far as he knew, nobody thought that was improper, and he was allowed to continue working during skipjack. I would also just note you heard when Mr. Dick son was on the stand, who was sitting on the other side of the driveway, that was actually an incident where he received a citation and so the case is under review by the U.S. Attorney's Office which means these circumstances were known to a different part of the federal government, the U.S. Attorney's Office and yet it appears as of his deposition there had been no communication to that particular officer about his potentially improper behavior.

The other investigation that is supposedly happening was the woman standing in the street who has the verbal exchange with the officers and then is sprayed in the face and there are several officers standing there. Mr. Johnson was also asked about that. He said that incident was looked into after the video came to light. That's a quote. Now in the policies that are binding on FPS, there is a requirement both to intervene in the moment during an improper use of force and also to report a potentially improper use of force. That sort of self-policing is what shows if there has been proper training so that there is an understanding of expectation of how force is used. Yet this latest incident of an improper use of force was not reported or investigated until after it became a part of public conversation because it was in the public domain. That is reflective of a failure to self-police, a failure to properly investigate all the uses of force, and an attempt to cover up those failures by looking into incidents once they are directly he called out by the public.

As Mr. Kerlikowske said, the fact that there has not been a single finding of an improper use of force during nine months of operation Skipjack, when there are these spur of the moment decisions being made, even if not discipline but a bit of follow up suggesting to a change in behavior, that is what I think he called a police clue of an unwritten policy.

It is somewhat like raising a child. If you tell

everyone in public that you know screen time is bad and that's why you have a house rule not to watch any screen time on work nights but after dinner as you are watching the dishes you here the TV and do nothing about it, there is not a house rule of no screen time. Screen time is allowed under the rules.

And just because your child doesn't turn the TV on every night, that doesn't mean that the unwritten Rule of TV time doesn't exist.

Now I want to turn to how these actions by the defendants is strong evidence of retaliatory animus, And here we do need to remind the court that this is a first Amendment retaliation claim. It is not an excessive force claim. And the reason that matters is the injury here that plaintiffs and class members suffer is the chilling of their first amendment rights.

The government in many of its filings suggests that these are individual physical injuries that need to be analyzed on an individual basis. That is not the harm that we're talking about. Although the physical injuries are substantial and deserving of their own attention, That's not this case. This case is talking about the chilling of first amendment activity through the defendants actions.

For that reason, the court can consider other examples of retaliation and animus that do not necessarily meet the prong for the test for a First Amendment retaliation claim.

For example, taking down one sign that shows anti-ICE sentiment ripping it down or destroying it, that's unlikely to deter a person of ordinary firmness from returning to the area Although it may on repeated actions, but a single time doesn't have the same impact as the kind of physical harm that we're discussing through these chemical munitions.

The chemical munitions are the tools that they are repeatedly using to chill first amendment rights, And that's why our relief is focused on controlling those. Another indication of retaliatory animus is the one that was discussed by Ms. Bartowski when she was detained and issued a citation that the officer in the moment said was not likely to be held up in court or may not hold up in court And he told her it was just to get her not to come back.

She is not the only person who has received a citation that was not ever pursued, or the only person who has been detained and prolonged detention and for nothing to come of it, and that's when we discussed Mr. Miller's experience, which he has filed his own declaration.

That kind of directed behavior towards individuals who are engaged in First Amendment activity has another check, because there are criminal charges that could be thrown out if another judge looks at it and determines that there was no basis for that behavior. This use of chemical munitions and force needs a check from this court, And that is why we're so

largely focused on this, But why Your Honor can also look at these other indications of retaliatory intent and animus.

It's also important here, when thinking of the government's arguments that these are isolated incidents, that's not what their own officers and agents say. Numerous representative officers testified in their depositions that this was Groundhog Day; that it was the same thing every day; They had trouble distinguishing videos because everything was so similar. One of them talked about how to resolve to advancing outside the ICE building, how it was typically the same type of crowd And although there were some testimony about ebbs and flows in size the general activity has occurred on a daily basis since as early as the end of May even though operations skip Jack technically began in June.

Mr. Johnson himself said it was basically the same thing every day protesters would behave the same and the officers and agents would respond to the same. So when we're talking about the agents' actions, we're not talking about actions on a particular day. We're talking about their overall unwritten and policy of how and when they will use force against protesters.

THE COURT: But I thought I heard some evidence that not every time there were protesters there engaged in peaceful, nonviolent behavior, not every time were they met with chemical munitions, what do I do with that.

MS. HUTCHISON: That's what I was somehow talking about the what I was talking about on the TV time earlier honor if your child is not what watching TV every single night, then that doesn't mean the rule changes on those nights. There may not be the misbehavior the deviation from that written rule of their TV just because you choose not to use to TV that night.

But what is happening is the Government suggests, as I understand their argument, that the munitions are really only done to clear the driveway when necessary. I will note in other deposition testimony if there is another driveway, another entrance. But choosing to respond to such minor instructions with such major force is a coverup of the reality that they will use as much as force as possible for pain compliance from the crowd: Don't show up here, or you will be next. If what they were really looking for was the compliance to move, they would give a warning that if you do not move chemical munitions will be used. If they want an actual compliance, You give an opportunity for actual compliance, and only after that compliance doesn't happen, do you move on to the chemical munitions that you've warned about.

THE COURT: So are you saying that if chemical munitions were always and regularly used in response to certain events, then perhaps even then the crowd might be able to figure out how to avoid that. But if the chemical munitions are only occasionally and unpredictably used against protest

activity, that might create a greater disincentive for the crowds to appear and coming off because they won't know you know if you always had chemical munitions on Fridays and Saturday nights There may be a crowd might show up on a Thursday night or a Tuesday night or Tuesday day But if you never know when the chemical munitions are going to be used sometimes they are and sometimes they're not, that once you have experienced like that, like some of our witnesses, like some of your plaintiffs, there is a greater likelihood that they will be deterred and chilled because they really won't know whether they are likely to be used if they show up at this particular protest. Does that make sense?

MS. HUTCHISON: Yes. I have three responses to that. First, I think Your Honor is absolutely correct but the unpredictability is part of the trauma, and that is part of what is deterring. But in your question you suggested maybe if it was only going to happen on Monday and Thursday nights, people could just avoid that would also be first amendment retaliation.

THE COURT: I agree with that Okay that.

MS. HUTCHISON: What I was trying to say about the warnings is I don't think -- one of the things that should be done that would show a more genuine effort -- a more genuine intent consistent with what the Government is suggesting is if there was a warning prior to the use of chemical camera

munitions because they are essentially saying we had to do this there was nothing else we could do to get compliance. But they didn't even try saying if you don't comply We will use chemical munitions in this area. That's not for a lack of ability to do so. They have their long range acoustic device.

And I do just want to touch on that when you listen when you listen to the other testimony, that language that is used in that warning will be in front of Your honor. There are three supposed recordings that could be used only one of them mentions chemical munitions But Mr. Cantu testified as to the one that was regularly played. It does not mention chemical munitions even though one that does mention chemical munitions suggests they would only be used against those that are engaging in unlawful acts I believe its aggressive behavior.

THE COURT: Remind me what Mr. Cantu said about that.

MS. HUTCHISON: So Mr. Cantu it was actually a contrast between Mr. Cantu and Mr. Johnson. Mr. Cantu said there was only one possible warning to play on the LRAD and that warning was consistent with what I played in a video. And you can hear that it is only saying you could be subject to arrest for trespass.

Mr. Johnson later testified that there were actually three potential warnings, one of which -- there are two that do not can he mention chemical munitions. The last one does but says it will only be used if you are engaged if you are an

imminent threat to federal agents as I recall.

But the reason I bring this up is because this argument from the Government that they just needed to do something to get compliance is not very persuasive when they didn't make any efforts to get compliance paired with a warning of what would happen if there was no compliance. That's where Ms. Hellman's testimony is particularly interesting about those counter protesters who looked at their phones and then left the area prior to the chemical munitions.

People don't want to be exposed to these. Think that was universally stated by our declarations and plaintiffs, that if they knew that something was going on that there was going to be chemical munitions they would have left the area. And I don't want to overstate it. That wasn't universal but that was many of our average protesters who showed up so that if they knew that it was going to that level, they would have left the area. So a warning like that would get the compliance with the government is supposedly looking for without this improper use of force that is indiscriminately affecting peaceful protesters.

I want to circle back to what -- when I'm talking about in this compliance. That's where there is a significant indication of retaliatory intent of the reason they are doing this. If all they wanted was actual compliance they could get it this way. What they get by using chemical munitions is in

compliance. That's something people want top avoid. That's what would keep people from coming back. People aren't going to stop coming to protests because they might be asked to leave. They will stop coming to protest because they might be exposed to harmful chemical munitions, Panic, lasting physical effects.

I mentioned it briefly, but the different treatment of counter-protesters that's consistent testified to by our declarations-plaintiffs and the federal officers is another indication of the retaliatory animus of these officers.

You heard a montage today of several officers talking about how the counter-protesters from their personal experience we're not subjected to the use of force or chemical munitions. We spoke of Ms. Hellman's anecdotal evidence that they may possibly be getting warnings. Even if not official, They may have some friends inside the building.

You also heard on our montage today the a right-wing affiliate in person who was permitted to come inside the ice building and other testimonies later on or we'll see will show that person was allowed up on the roof next to Secretary Noem and given very different treatment than not only the protesters but the members of the press.

I do anticipate that the Government will point out an arrest of a counter protester. This information is in the public domain, but that was the arrest by PPB

THE COURT: I know. I am dealing with that in another case.

MS. HUTCHISON: Yeah Okay So for the benefit of those who may not know this already that was an arrest by PPD and it shows that the federal government intervened in that process open an investigation into it and alleged it was viewpoint discrimination. So that particular treatment of a counter-protesters certainly cannot be credited to the federal government.

All of this evidence of retaliatory animus is what shows that the First Amendment activity that these individuals were engaging in was a substantial and motivating factor on the use of force.

So then this court must ask: Would the defendants actions chill a person of ordinary firmness from continuing to engage in the protected activity? Here, I would point Your Honor, I would point Your Honor to docket 33 That is expert Dr. Rahimi Haar. That expert testimony which has been uncontested by the government discusses how tear gas is prohibited in international warfare. It goes into great detail of the lasting physical effects of tear gas. There's some tendency to use terms like "less lethal" or "smoke" or to talk about how it dissipates within three minutes and that really diminishes the long term effects of the chemicals that we're talking about here.

Gratefully we did get to hear from of that from our live witnesses and our clearance and that information is included in a lot of declarations. Ms. Eckman particular story of her on going harms is not unique to her. And even individuals who are a bit younger or maybe didn't have as close of exposure to these chemical munitions as Ms. Eckman talked about them lasting for three weeks. That was Mr. Rudiger, and they also talk about their impact in the moment. Ms. Barssoti talked about her own child's eyes getting red in the moment and how difficult it was -- each breath was more difficult than the last.

And so when we're talking about this tear gas we just encourage Your Honor to look at those long term potential major health effects. I do also note that was something Mr. Dickinson talked about as something that he's wrestled with on whether he should put himself in risk in this way and that Ms. Hellman talked about having discussions with your family about.

Even region ten Director Eric Johnson that he would not go into an area with chemical munitions without a mask because he knows their effect. He knows the impact. There's also some testimony in the depositions that your honor will look at, and this was Mr. Cantu get and that's for Mr. Cantu This was actually public in his prior testimony in the National guard trial. That early on FPS had to coordinate with those

other agencies to make sure they weren't sending off chemical munitions without telling us FPS so that they could protect themselves and also add that.

THE COURT: I would add that we had some testimony and individual why that some Portland Police officers who were there to try to protect the streets, couldn't be there if they didn't have a mask once the chemical ammunition started saturating the area.

MS. HUTCHISON: You read my mind. That's my next point. Our last point is talking about the numerous witnesses answers to the question about whether they would go back to the ICE building. Some of those individuals talked about how they would go but only with a mask. Many of them said that they would go even with a mask but they wouldn't bring their family members. They wouldn't bring people that they felt they needed to protect and we heard a lot of that from parents who had gone with their children about the guilt that they felt for going to a peaceful activity and exposing their children to this kind of physical harm and emotional trauma.

The Eckmans.

THE COURT: Let me ask you about that for a second. One second. All right. There may be some as Supreme Court of class certification and standing issues that say that every class member has to have individual standing for a particular claim, such as the injunction. There is other standing law

that talks about redress ability. If we have some folks in the class who say they wouldn't go back at all, whether with a mask or even without family, but they are just not going back, talk to me for a moment please about whether they have standing and in particular how a Court order would satisfy the redressability requirement under standing, please.

MS. HUTCHISON: Yes, Your Honor. Well as for standing in particular most. Of the individuals when pressed on this issue were expressing a lack of trust in the Government abiding by the terms. So it is not so much that they -- I think with the exception of perhaps Ms. Bartkowski, it wasn't so much that they didn't feel comfortable going back to the area and participating in protest as that going back to the area without some real evidence of compliance by the federal government is not something that they would consider. The point there, I think, they all testified that this was on its face unconstitutional to them. It was a clear improper use of force, many times analogizing to war. And so the idea that they would be immediately comforted by saying, well, now it is not legal so they won't do it might not immediately hit because they already had an understanding that this was illegal.

Some of them talked about waiting a little bit to see if others with more fortitude went there and didn't have problems and then reconsidering coming back. So I think as a general matter for the vast majority of declarations and

plaintiffs the redress ability is possible through put protections from the preliminary injunction by restricting these and knowing that there was an enforcement mechanism through this court.

And so we didn't have any testimony about any of them being aware of what happens when there's an injunction, what happens when there's a violation and how enforcement can happen. But I do think the sentiment from all of these individuals is that the hesitation comes from a fear of noncompliance and not so much that they couldn't possibly participate in this activity and no matter what.

THE COURT: There has to be something wrong with a conclusion that says: If there was constitutionally protected activity, if a substantial or motivating factor was to retaliate against or to deter or chill that constitutionally protected activity, and if that chilling effect was so strong and so successful that a number of people have been thoroughly and completely chilled, that they are not going back, there has to be something wrong with a conclusion from courts that says, oh, in that case, they can't be part of the class because you have to have standing to be part of a class. You have to have redress ability to are standing and there is no redress ability here because the Court here can't do anything for you. There has to be something wrong with that conclusion but I would like a little bit more natural analytic assistance in explaining

what that wrong thing is.

MS. HUTCHISON: Well, Your Honor, I'm not trying to be cute here. But I think if you refer back to Index Newspaper you might see some analytical assistance from yourself.

THE COURT: I know. But I'm worried about a little bit of the development from either the Ninth Circuit or the Supreme Court in redress ability comments and standing comments that have come from since index newspapers, and I'm trying to anticipate issues.

MS. HUTCHISON: I certainly understand that effort. I do think what that reflects is that the injury is ongoing and chilling, And so perhaps we can put some thought into redress ability for those individuals and how that could be included in the terms of an injunction So we will certainly give it some thought, but we think that the analysis in Index Newspaper applies equally here on this question.

THE COURT: Thank you.

MS. HUTCHISON: Speaking even more about that chilling effect, we talked about the ones who had such a chilling effect that they are concerned about going back. But we do also need to consider those who said, really, without much hesitation that they are going to continue going. The ones I would call out by name are Mr. Dickinson and Ms. Hellman and even Mr. Lake suggested he would continue going and for a while Ms. Bartskowski did actually continue going.

The reason I want to call them out is that does not take away the conclusion that this would chill a person of ordinary firmness.

THE COURT: And that's an objective standard anyway.

MS. HUTCHISON: Exactly.

THE COURT: I'm not worried about that.

MS. HUTCHISON: It is clear from their testimony that they feel a really strong sense of duty.

THE COURT: I'm not worried about that because it is an objective standard.

MS. HUTCHISON: And even just to close the loop on that, I would point out that even coming back, they testify about the continuing negative effects of going back. They testified, each of them, about the need to have very personal conversations with their families about the risks that they were taking themselves, not only with their own well being but even particularly after January and the deaths of others a real concern that their lives may be at risk by continuing to engage in this activity.

So the continuing to go back is actually resulting in additional injury to them on a personal level.

Now we need to also recognize why this was happening. There may be some suggestion that this is individual poorly trained officers who are getting a little too excited of the opportunity to use these tools that they don't have the

opportunity to use very often in their day-to-day missions. But the mission is very clear from the very top. It comes all the way from President Trump who referred to Portland as war ravaged, and we heard that 2022 was a tweet was a pivotal moment in operation skip Jack, where activities increased violence by officers increased media attention increased. The narrative that is being put into the public domain by the president himself and his highest members of his staff is completely inconsistent with the reality in Portland.

THE COURT: I agree. But let me ask this. I got confused when I read this in your opening motion papers. I agree it is completely, as one of my colleagues said untethered from reality. I agree. However one way of interpreting this is, well, if that's what the president says, then we have some officers who believe it and that may prompt them to over react, especially because they are poorly trained.

How does this war ravaged lack of tethered to reality point in any way show that the intent here really was to discourage First Amendment protected speech and activity and journalism. Well that's what I'm missing that connection.

MS. HUTCHISON: Yeah well part of that is because of the completely false information that was supporting it that they passed on to the officers on the ground. So you may recall the training slides from today, that's a welcome to Portland for operation skip Jack. Let's show up what's

happening, citing to something five for six years ago.

THE COURT: What you are saying if I'm hearing this right and I'll combine it with that false or misleading photograph in the training slide. If the highest ranks of the Government is falsely referring to Portland as war ravaged, if they're showing in their training slides and slides that really were from 2020 and what was going on right outside this in 2020, building in 2020 they are trying to whip up a frenzy among the lower level officers And then you combine that with insufficient training on what is protected under the first Amendment, and that is circumstantial evidence that the intent here is let's let these officers loose and go after the protesters So we don't have protests in our streets, Maybe like the people the government in Iran try to stop the protesters there like we've seen in China like we've seen in places in north Korea, We don't want protests like that in our street, So from the very highest levels we will give them false information, We will give them inadequate training on what is protected under our First Amendment, And therefore, if they go out and get too excited as you put it and overreact and violate their policies, first of all, we won't investigate or we won't make findings that they did something wrong. We won't talk to them We won't council them We'll let them continue to do all of that, And you're saying that is evidence of retaliatory animus against First Amendment protected protest by individual

officers but systemic by the policy by the defendants here including the department of homeland security.

MS. HUTCHISON: Absolutely and very articulately said. The only thing I would add to that is that it's not only that these slides showed twenty 2020 to get them riled up it's that they then focus all the training on use of force.

THE COURT: Right.

MS. HUTCHISON: It is saying what you are going to encounter here is going to be responded to with force. That's what we want you to do That is what is appropriate for you to do And We know that all they were going to encounter generally was largely peaceful crowds.

THE COURT: But let me ask you one more question, and I find what I'm looking for. As long as we are on that tangent. Here it is.

I'm a little bit concerned, what we have in this case are three defendants: President Trump, secretary Noem and Homeland security. In the defendants' opposition papers, they point to some law -- some Supreme Court decisions that are not a hundred percent on point but they really do point in the direction that because of tensions with separation of powers and coequal branches, the president of the United States should not be enjoined by a Court. And I've looked at Mississippi and Johnson, Franklin V Massachusetts from the Supreme Court. I looked at swan V Clinton from the D.C. Circuit and it seems to

me that they have a point there. It is not absolutely clear or an absolute rule but it does seem that as long as adequate relief can be obtained by an injunction against an official below the level of the chief executive, such as the secretary of Homeland security, then a Court should not and I think one of the phrases from the Supreme Court, the Court should have raised judicial eyebrows at the risk of enjoining the president. That makes some sense to me. It seems to me that adequate relief can be obtained by an injunction against secretary Noem and DHS. Do you agree.

MS. HUTCHISON: Yes Your Honor Your eyebrows can remain at the normal level We are only asking for an injunction against DHS.

THE COURT: And the secretary.

MS. HUTCHISON: And the secretary. Since we are talking about the secretary, I would point to though to that testimony we heard today about her visit. And that was Mr. Johnson talking about when she here in October of 2025 and there were two different visits And I know you've heard it all but the overall message was encouragement for everything that is happening on the ground in portland as a part of operation skipjack. That comes from at least the secretary Noem in that conversation, but he also said that never in the entirety of Operation Skipjack including through 2026 has we received anything but positive encouragement of his chain of command.

Not only has he not been asked to change anything, but he has on several occasions so many you couldn't give an exact number that he is doing a good job with respect to operation skip Jack.

THE COURT: Was that Mr. Joint or Mr. Johnson.

MS. HUTCHISON: Mr. Johnson. And you'll see that in his larger testimony the numerous higher officials that he has regular contact with FPS and beyond.

I'll briefly touch that Mr. Johnson as well as every other law enforcement officer we have heard from has acknowledged that the language in the temporary restraining order is workable and safe.

THE COURT: If I granted preliminary injunction, I do intend to modify the use of, at least the hand-held oleoresin.

MS. HUTCHISON: That's the part that Mr. Borden is going to address. More than I will turn that So everything that we've discussed until now covers why the preliminary exception is likely to see it should be granted because we are likely to succeed on the merits of our first amendment retaliation claim. Again, remembering that this is a claim focusing on the chilling of First Amendment activity and not any particular physical injuries or fourth amendment claim.

I will turn now briefly to that to be brief, if you want to talk longer. I wanted to talk about our motion for provisional class certification.

THE COURT: That's fine. What I would really would like to really hear about, if you can do it is explain to me what the word provisional means in this context.

MS. HUTCHISON: Again, that's where I was starting.

THE COURT: Perfect So I like when lawyers can read my mind.

MS. HUTCHISON: You have made it clear in prior conferences so it makes it easier you know I think the term provisional is somewhat confusing it can leave an impression that were we're somehow lowering the standard of Rule 23.

THE COURT: We're not we can't do that.

MS. HUTCHISON: We cannot do it and we are not asking you to do it. We understand that we need to provide evidence to support each of the requirements of Rule 23. To wrap up the record on this, that is why the timing of the motion was when it happened because based on the government not allowing us to depose its witnesses for approximately three weeks, we conducted nine depositions in a single week, three of which were on Friday. Two of the Friday ones being supervisors and another supervisor on Wednesday.

And so what we needed for this motion to have legs, to be able it to satisfy our burden, was more testimony about the unified chain of command about how this all is actually a very unified operation under FPS. FPS is running the show. FPS is responsible for making sure that all other agencies are

complying with particularly the public order policing policy.

But that's why it was filed late there. The reason why it is provisional is just because of its limited time that it may be in place. So Your Honor knows the complaint we filed here has several other claims that are not part of our motion for a preliminary injunction. When we finish this hearing, Your Honor has already indicated an intent to let us do expedited discovery on the very issue of class certification. It is our understanding that will be class certification and as to all of our claims. So there will be much more robust discovery on different issues and I anticipate state that the motion for class certification that may follow will have potentially different definitions, potentially some classes. There may be some changes based on that new evidence.

That doesn't mean that certification now is inappropriate. We are just trying to indicate to Your Honor this is a temporary thing in our mind.

THE COURT: And let me add something and ask you if you agree or disagree. I also think since this concept of provisional class certification really typically and almost exclusively comes up in the context of preliminary injunction orders, and we all know that preliminary injunction orders oftentimes are done on an expedited basis. Frankly that's why the rules of evidence are relaxed as confirmed by a number of appellate courts. It is an expedited basis. We have got to

move quickly. And although I can't relax in any way and I'm not going to the rule 23 standards for deciding whether a class should or shouldn't be certified, there is a recognition that it is done on an expedited discovery basis and further discovery might warrant some changes: Either changes to class if a class is certified, it might warrant changes to the definition as additional class certification discovery continues. Maybe even if I do certify a class provisionally, as discovery continues, it might even be a basis for a defense motion to argue that the class should now be decertified based on some additional discovery that was not available or that the parties didn't find in this expedited process, and that's why it really means provisional. It is a reminder on two fronts: One that I can't relax class 23 -- rule 23 standards, but also we haven't really had vigorous class certification discovery and that may end up with plaintiffs either moving to modify a class definition or even defendants moving to decertify a class or to redefine a class, and it is provisional in that sense. That's how I'm viewing that word. Your views.

MS. HUTCHISON: That is entirely consistent with how far we intended it, Your Honor.

THE COURT: Okay. Thank you.

MS. HUTCHISON: As for those Rule 237 requirements, I think Numerosity is not realistically contested. Their own agents have talked about the very consistent presence of

protesters and crowds well above the forty number that is naturally acceptable for class treatment and all the way into the thousand.

THE COURT: I don't think you need to spend much time on either the twenty three a factors or the B two factors.

MS. HUTCHISON: Great.

THE COURT: I was worried about what does provisional mean That's what I was worried about and I've been thinking about it for the last couple of days and I'm still thinking about redress ability to. That's what is worrying me.

MS. HUTCHISON: Unless Your Honor wants me to speak about it. I do think the commonality in typicality really folds quite neatly and with what we've already discussed in an unwritten policy.

THE COURT: I agree.

MS. HUTCHISON: Adequacy is very clear in the declarations. I would say their challenge seems to be based on using the same line in a declaration that attorneys wrote, which that's very normal, and also Mr. Dickinson added a little bit of testimony on this point. I'll make more comments on this later but I think the quality of legal representation by both sides of and advocates but really by plaintiff and defendant have been super more than adequate truly super superb I'll make more comments on that later on both sides like plaintiffs and defendants both sides are quite expertly and

zealously representing the after the interests of their respective clients.

If you're if you have no further questions for me on these points, I will yield the floor to Mr. Borden to talk about scope.

THE COURT: And you can he can hit me in the face with some was it only a rescue Yes.

MR. BORDEN: Thank, Your Honor. And I think you predicted our point about the pepper spray. And if you could just pull up slide 2 for me, Lucy. This is our proposed modification to the injunction that is now in place it to account for what Mr. Kerlikowske talked about yesterday. In the version that we have on the screen --

THE COURT: Nothing is on the screen yet. Mary, if you could clear from some of the markings.

MR. BORDEN: It will be a second. But you actually have the proposal in front of you.

THE COURT: It is very close to what I have had already drafted except I was going to add some examples of what it means to passively resist.

MR. BORDEN: I think that's fine with us. I think the testimony has been pretty clear about what that is and what that isn't.

THE COURT: And I just think it would be helpful to ensure compliance if I go in this direction. If I grant a

preliminary injunction I really would like to be more explicit hit by giving some examples of what is passive resistance and maybe what is not but certainly so it will be easier for training purposes and easier for compliance purposes and then hopefully this will be an abstract point hopefully to deal with any contempt issues.

MR. BORDEN: Sure, thank you Your Honor. I think that that's that is perfectly fine with us. And so if you would go to slide 3 now, please.

THE COURT: All right.

MR. BORDEN: So with this new kind of envisioned injunction that we have, it really tracks the policies that already exist. And this is from the public order policing policy that we have been talking about, and you can see that this is what their policy already requires. It is what they already train on. So I don't think that this should pose any kind of workability problem. And so if you go to the next slide please, and I'm trying to go quickly through this since it seems like a lot of this stuff is already there.

This is the use of impact weapons and I think that the use of impact weapons that we are talking about in the injunction also tracks their policy. This is from the training deck for operation Skipjack And. It is basically saying don't shoot at people unless they are a very active threat. Don't shoot at people unless you can differentiate them from the

peaceful protesters.

THE COURT: Yes. By the way, let me just tell you and defense counsel, if I do decide to enter a preliminary injunction, it is my standard practice to fully welcome from anybody -- well, I take it back, from any party in the lawsuit suggested modifications to it as we proceed. If something that I've entered turns out to be unworkable, turns out to have an error there it somehow, I am never opposed to receiving a motion it from plaintiffs or from defendants that request a modification to the specific language or terminology if I have created some unintended consequences. That does not in my opinion have to satisfy the more narrow standards of motions for reconsideration. If people think that something I've put in a preliminary injunction policy should be refined to make it more workable and improved to accomplish the right objective, I welcome motions to that effect from either side of the case. I will listen to the other side, of course, and then we will make a prompt decision. By way of example, I think it was last week I entered a moderately complex decision involving environmental law in salmon and the operation of the hydroelectric dams on the Columbia River and snake rivers. There was a motion by the plaintiffs to make a few modest corrections to that. There was some statement by defendants they didn't object to those corrections but they wanted me to make another adjustment, and I did modify it a little bit and then wrote an opinion that

came out on Monday of this week explaining that. So I want to let everybody know: This is complicated injunctive language. This is important. It is not my intention to micro manage any type of law enforcement including federal law enforcement. It is, if I do grant a preliminary injunction, my intention top remedy a constitutional violation. If I've done something inadvertently that makes things either harder to remedy the violation or harder -- or makes the order less workable, I encourage both sides to let me know with a motion for modification or for consideration whenever you want and I will look at it promptly and after considering and Consulting with both sides. So but this is helpful. Thank you.

MR. BORDEN: Thank you, Your Honor. Two very brief points in response to that. We understand that a preliminary injunction is like a class certification order, one of those orders that a Court may consistent modify without the reconsideration standard. The second point is, and I'm looking at Mr. Vannier now.

THE COURT: No, December going to be after lunch.

MR. BORDEN: Well in index newspapers I think the injunction in that case was something that we worked together on and workshop considerably to make sure that it was workable and it has proven to be the gold standard for the whole country now. So I think it's I think it is a good idea.

I think the probably the biggest piece of this

injunction is the tear gas point. And if we could see slide 5 please.

This is the testimony from Mr. Kerlikowske from yesterday. This is what he said. In terms of keeping the driveway clear if they want to or defending a building is there ever a need to use tear gas to do that. I don't know of any need to use tear gas when you have all of these other options and you heard his testimony about when you are defending a building you built you can use a perimeter, a skirmish line of people who come and push people off the driveway without subjecting all of these crowds to unnecessary force.

You also heard that there was no tear gas used by the City of Portland for the last six years, no tear gas used by the State of Oregon for the last six years, no tear gas used by Chicago. There was also a colloquy with Commander Schoening that I think is probably important because there was some discussion about, you know this PLS, the pepper ball gun, you can use it to shoot at the ground to make a kind of the tear gas Rice up. What he testified at page 50 of the rough transcript is: Tear gas is also a pretty broad term. It can be anything from -- we would consider the use of a pepper ball if it is not being used as an impact munition if it is being used to spread chemical irritant to an area under oregon by statute we would consider that to be tear gas.

And so that's why we've lumped pepper ball and tear

gas all of that into the first part of the injunction, is because those are it is effectively tear gas, it is an indiscriminate weapon. And so that's why we have done it.

Can you please go to the next slide.

This slide is the PPB directive and the one from the State of Oregon is similar. I won't belabor it. Obviously this is what PPB and the state do and it is workable for them. There are a few different requirements than what we have in the injunction. There is a disjunctive provision where it says you can't use it unless there is a threat of life or threat to life or serious bodily injury. That's our injunction. Then there is a disjunctive provision and it says to bring an objectively dangerous or unlawful situation safely and effectively under control. And it has a number of other added requirements. Those added requirements deal with the procedures for tear gas none of which the defendants follow in terms of giving warnings and we have heard all of that testimony.

I feel like objectively dangerous is not a good term for an injunction. And obviously the Portland Police and the state construe this narrowly because they haven't found a situation where this would be applicable. So even if you had a situation where tear gas had any valid purpose, I don't think in a case for retaliation you would create an exception that could swallow up the hole where they might be able to say well somebody threw a bottle. There was a big crowd of people.

Therefore it was objectively dangerous and we had to tear gas everybody.

And I think that was also testified to by Commander Schoening and this is at page 51 of the rough transcript where he talks about if you have that kind of thing in an injunction, it could be difficult

THE COURT: And it is not currently in the general injunction, is it.

MR. BORDEN: It is not. We made a blanket prohibition. That's why we have the language in the second slide. There is also the safety point, which I think the Government will probably want to talk about. It is always their argument in these cases but FPS is the component that is charged with protecting these buildings. They don't use tear gas. They don't train on tear gas. They don't have it in their policy. It is not one of the weapons they use. That goes back to what Mr. Kerlikowske said. You don't need tear gas to do this. And this testimony was echoed in terms of the safety that Mr. Kerlikowske is of the opinion that this is safe. He has policed very difficult and complex things involving 65,000 people. You had three other people who I would consider to be experts: Commander Schoening, Commander Dobson, captain Bailey. They all said it was workable. These are the people who have to answer for the safety of their officers and they had no problem with the safety of this.

I think there is also some support just for the workability already in the record and the safety of this injunction, I think Your Honor asked Mr. Dickinson about his experience since the pro was issued. He said that he hadn't seen any difficulties. Same thing with Mr. Johnson. He hadn't seen any injuries to officers.

I think all of this counsels in favor of the safety of this.

Then the contrary is, we haven't seen any evidence from the Government that this is actually unworkable. They just have these conjectural declarations by Mr. Cantu. He is not an expert on use of force. He is not an expert on public order policing. Portland was the first time he has ever been a Commander in this type of situation. I may have been, as they pointed out in Mr. Kerlikowske's cross-examination, he may have been a line officer on some protests. But this is his first position of responsibility. He is not an expert. Neither is Mr. Sullivan. So there is really no contrary expert to deal with the opinions of four people who have probably more experience on this than almost anyone on the planet.

THE COURT: So I'm conscious that you're too much So why don't you plan on concluding after we resume from the lunch break.

MR. BORDEN: I think I'm almost done. I think the last thing that they said was split second decision but split

second decisions are the kind of things that officers make all the time. And that's what Mr. Kerlikowske testified to. They trained on this in index. They trained on that And that worked successfully It worked for the city of portland They adopted it into their police directives eventually. So these are the kind of judgments that officers make. They make more difficult judgments than whether to use force indiscriminately on a crowd.

THE COURT: Frankly my understanding is that it is easier to make correctly make split second judgments when you've been properly trained on precisely what you may do and what you may not do. And then those other things will be the judgment calls. And what we're trying to do here is make it very clear you may not do certain things under certain conditions.

MR. BORDEN: That absolutely correct, Your Honor.

THE COURT: Yeah. Do you want to finish after lunch or do you want to finish now.

MR. BORDEN: I think I'm finished unless there are other questions that the Court has.

THE COURT: Of course plaintiffs can have a rebuttal.

MR. BORDEN: Thank you, Your Honor.

THE COURT: When we resume from our lunch break, I will hear from the city, followed by the State, followed by defendants 'arguments and then rebuttal by the plaintiffs.

Could we please pick up at 1:20 thank you all.

(Recess.)

(Afternoon session; open court:)

THE COURT: Thank you all. Are we ready for argument from the City.

MR. VANNIER: We are, Your Honor.

THE COURT: Mr. Vannier, you may proceed.

MR. VANNIER: Thank you, Your Honor. For the record. Denis Vannier, deputy city attorney for the City of Portland.

As Benjamin Franklin once said, freedom of speech is the principle pillar of free government. When this support is taken away, the Constitution of a free society is dissolved and tyranny is erected on its ruins.

Once again, this federal executive is using unjustified, disproportionate and indiscriminate force against the people of Portland in retaliation for exercising their constitutional rights to freedom of speech and assembly ended in an attempt to ignite violence on our streets. But Portland did not take the bait, Your Honor. No doubt to defendants surprise instead of igniting violence, defendants sparked an outpouring of joyful resolve and courageous Quincy, representing the best Portland tradition, a giant please chicken.

THE COURT: Surrounded by frogs.

MR. VANNIER: And lines of dancing frogs and an emergency naked bike ride.

THE COURT: That part, I didn't see.

MR. VANNIER: But that did not stop defendants. They gassed the frogs, the chicken, and Portland police officers, Oregon State Police troopers. They shot munitions at innocent bystanders. Masked federal agents charged at groups of protesters who had the gall of simply being standing on public sidewalks. This is because defendants' actions have little to do with actual law enforcement. But a really part of a nationwide campaign against civil dissent.

Defendants attempt to point to occasional low level violations of the law as justifications for their actions should be seen as the pretextual figure leaf that they are. As one other judge on this Court recently noted, the presumption of regularity that has previously been extended to the federal executive that it could be taken at its word. With little doubt about its intentions and stated purposes it no longer hold.

So do here, Your Honor.

The present administration has made no secret of its loathing for the people and city of Portland. Like Los Angeles, like Chicago, like Minneapolis, portland embodies and proclaims values that are antithetical to the political beliefs of the present executive. And that is why repeatedly and openly this administration has broadcast its retaliatory intent for all people to hear. As laid out in the City's amicus brief, defendant Trump and we have heard to this in

court to has referred to war ravaged Portland where our ICE facilities are under siege from attacks by for other domestic terrorists. He has compared living in Portland to living in hell and has repeatedly threatened to carry out unconstitutional funding cuts to Portland and other cities that do not share his political priorities. Defendant No has referred to portland officials as a bunch of pansies and she has threatened to send four times the amount of federal officers if Portland did not align its law enforcement priorities of those with this executive.

As set out in plaintiffs own motion defendant Noem and others have repeatedly encouraged federal officers it to act violently towards those who disagree with this administration's priorities Indeed the Vice President has even suggested that officers who engage in such violence enjoy absolute immunity from criminal prosecution, Your Honor.

So there is no secret what the defendants actions are really about. They are about punishing and retaliating against political speech critical of defendants and they are part of a national campaign to punish and chill political dissent and crucially, Your Honor that campaign is not just directed at individuals but at entire jurisdictions that happen to not share defendants' political priorities. And that larger picture must be kept in mind when considering the harms and the public interests at issue in this case.

Because defendants retaliatory campaign is so extensive in its scope, defendants' actions have harmed not just the plaintiffs in this case, and not just the members of the putative class at issue in this case, but the City of Portland itself p, its Police Bureau, and the people of Portland as a whole.

And Your Honor has heard ample evidence of that over the last few days. Both Commander Dobson and Commander Schoening testified about defendants unprovoked, disproportionate and indiscriminate uses of force against peaceful protesters on numerous occasions.

To pick just a few examples. On October 4th of last year federal officers came out of the ICE facility and pushed the crowd away quite a distance from the facility all the while using crowd control munitions and large amounts of tear gas. And Commander Schoening testified that he could see nothing that could have explained that push. Just a few days later on October 18th, defendant responded to a question of protest that involved music, dancing and costumes with chemical munitions. Portland police officers were exposed to chemical munitions. In fact, as you heard, a Portland Police sergeant was shocked with an impact munition as he was trying to leave the area with his squad.

More recently in January, defendants deployed chemical munitions against an entire crowd of protesters that

included families with children, because of some unidentified side issue near the gate of the ICE facility. As Commander Dobson testified those kinds of actions, combined with federal agents masking and not wearing identification, undermine public trust in government and law enforcement. Some members of the public are unable to tell who is a federal agent and who is Portland Police. Other members of the public can't understand why Portland police officers are unable to arrest federal agents.

All of this threatens to negatively affect the Portland police's relationship with the local community, and this in turn, Your Honor, has severe downstream effects on general public safety in Portland. Everyone in Portland is affected.

As this Court is aware, the City and the Portland Police Bureau have worked extremely hard over the last several years to reform and improve their approach to policing including public order policing and to regain the trust of the public. Commander Dobson testified to this and I don't need to repeat his testimony here, but defendants actions undermine all of that progress, and those actions have helped generate and feed a climate of fear and distrust in the broader community. The impact of those harms cannot be over stated.

As detailed in the city's amicus brief, the mayor and city counselors have received hundreds of messages from members

of the community's community expressing horror and concern regarding the use of tear gas and other indiscriminate munitions near the ICE facility. Those concerns come from protestors who worry about returning to the area to lawfully exercise their First Amendment rights. Those concerns come from residents of the South Waterfront neighborhood who have repeatedly experienced tear gas seeping into their residences.

Those concerns come from local businesses who worry that people will not visit them because of the danger in the area created by defendants. Those concerns come from doctors, nurses, other medical professionals who work and serve patients in buildings near the ICE facility and who worry for both themselves and the medically fragile individual whom they treat.

And those concerns finally come from members of the general Portland community who are not otherwise connected with the ICE facility or these protests or even this area of town but who learn that their friends, their neighbors, their family have been subjected to violence simply for standing up for their political and ethical beliefs.

In sum, the harms inflicted by defendants actions on the people and the City of Portland are extensive. They are deep. They are persistent, and they are supported by the evidence in the record.

As Your Honor noted in its TRO opinion, there is a

strong public interest in free speech, courage news gathering, and nonviolent protest. By contrast I feel I shouldn't have to point out that there is no legitimate governmental interest in retaliation against political speech, in suppression of dissent, and in the use of unjustified disproportionate and indiscriminate force. And yet everything defendants have done and said to date points to one unavoidable conclusion. Unless restrained by this Court, defendants will continue to violate Portlanders' fundamental freedoms.

This is the 250th year since the founding of this nation, and yet in this anniversary year, Your Honor, our nation stands at the edge of a precipice. Far from taking care that the laws be faithfully executed, the present administration has become a chief impediment to the rule of law in America.

Only the federal judiciary remains it to uphold the fundamental freedoms upon which this country was founded against an executive branch cocksure of its own impunity. By enjoining this federal administration means unlawful use of force this court can vindicate the guarantees of our Constitution and Bill of rights and demonstrate in this 250th year since the founding, those guarantees are not yet forgotten.

Thank you, Your Honor

THE COURT: Thank you, Mr. Vannier, I will tell you

that the Court appreciates the participation in this case as an amicus by the City of Portland. So thank you.

MR. VANNIER: Thank you very much, Your Honor.

Mr. Kennedy.

MR. KENNEDY: Good afternoon, Your Honor. Scott Kennedy for the State of Oregon. I want to thank you for giving the State an opportunity to be heard this afternoon in its capacity as an amicus an thanks the parties for putting together the record they have on such a tight time frame. I would like to briefly expand on a few of the issues that the state raised in its amicus brief which pertain I think to the equitable factors it that the Court needs to analyze in it proceeding.

Those include briefly the potential benefits of the injunctive relief that has been requested by the plaintiffs in this case, the absence, in our view of the harm to any defendants flowing from that relief if it is entered, and then lastly the harms to the public, especially to Oregonians that will flow from defendants challenged conduct in the absence of that relief.

So to focus for a moment on the relief itself, again, the relief requested by plaintiffs, defendants briefing characterizes that relief as sweeping, intrusive, dangerous and wholly unworkable for law enforcement. But the Court has heard at length now in briefing and in testimony that the principles

outlined in the relief sought by plaintiffs really broadly aligned with principles from multiple sources and I'm not going to belabor those because the courts familiar with the testimony But just to review, we've heard about law specifically ORS 181-8708 We've heard about other state statutes at least in the papers including in California and Massachusetts to list two examples.

We've heard about Oregon State Patrol and portland police bureau policies. And we've even heard about federal policies, including for example the us park service policy which was cited in our amicus brief but also FPS' policy itself.

All of these sources employ different language and you could quibble at the margins about what they mean but I think there are a few broad principles that all of them stand for. I think those are worth emphasizing here.

The first one of those is that they reflect as it relates especially to indiscriminate munitions like tear gas, that those kinds of weapons should only be used and only justified when they are in response to a legitimate threat to officers or others safety. That's No. 1.

No. 2, I think we have seen the principle outlined in these authorities that their use should be preceded by audible warnings that give people a meaningful chance to clear the area. And again, I'm referring here to especially

indiscriminate less lethal weapons such as tear gas.

Three I think these sources stand for the proposition that every effort should be made by law enforcement to avoid harming innocent bystanders.

And four, just as importantly, I think they stand for the proposition that other options at law enforcement's disposal should be tried and exhausted first. In other words, these kinds of weapons are more of a last resort than a first resort.

And the successful and the successful and I want to emphasize the voluntary introduction of restrictions like these by states and police forces throughout the country speaks volumes. And it's not like we only seen these restrictions implemented in jurisdictions where public order policing is easy. I'm including, of course, places like Oregon and California that encompass major cities that are no strangers to large scale demonstrations that can be loud and that can be energetic.

All of this doesn't scare with defendants' characterization version of the proposed preliminary injunction is dangerous, intrusive, unprecedented, or unworkable to law enforcement.

But beyond all that I think the contemporary research on police practices some of which was introduced in the state's materials, and the combined decades of experience that we heard

about in the testimony of Commanders Dobson, Schoening, and captain Bailey in this proceeding show that these kinds of constraints are not just workable, they actually promote public safety and public order when they are used correctly. As those three witnesses explained in the declarations and live testimony they offered in discriminate force when used needlessly and excessively in a public order situation can actually cause a peaceful situation to become more volatile by shifting what commander dobson referred to as the crowd dynamics.

And I especially like the metaphor he used that I think bears repeating about routing span threats using routing spans at a soccer game. He explained the tactics like these can actually lead members of the crowd to feel the need to protect one another from police Instead of feeling that they can work with police by allowing police to isolate and arrest any individuals who might be committing a crime in the crowd.

These kinds of principles I alluded to earlier are also supported and their efficacy is supported by modern police practices research. Of all the information that was highlighted and cited in the State's amicus brief, I'd encourage the court to take a look at a Rand Corporation research project that we cited. The title of that was improved protest policing. The rand corporation there did an extensive review of both quantitative data and qualitative studies and

they found that police "quote when police rely on clear patient communication instead of early aggressive intervention in public order policing they experience less conflict during protests on average."

The authors also emphasize that before a protest even begins Training officers on de-escalation, proportionality, and crowd dynamics, Some of the very principles that commander dobson emphasize, is key to maintaining calm. And they found that law enforcement can better maintain calm, a sense of legitimacy among the public, and safety when they "quote focus enforcement on the individuals causing harm." End quote And then maintain consistency in their enforcement and present for what it's worth the non militarized appearance which can avoid antagonizing the crowd and creating fear.

There is one other thing in that study I want to emphasize and I apologize because this is adjacent to an issue relating to the merits but I think it bears some emphasis here because I think I found it very interesting. The authors in that study I think on page 18 took a look at 35 years of policing from an era that they character sized as an earlier era in law enforcement that I think ended in 1995. They called it an era of escalatory enforcement and force tactics employed by police in public order situations.

A little bit like the approach that I think and that the expert testimony in this case showed is still employed by

DHS agencies here. The And the Rand authors found that when law enforcement were using that older model of civic order, again, this escalated force model, if protests were focused on the conduct of law enforcement officers themselves those law enforcement officers were more likely to respond to the protest In the first instance and they were far more likely to use force on protesters compared to protest on other subjects.

Now here of course from the testimony we've heard defendants agencies and their agents were themselves the subjects of many of the protests outside the ICE facility That does not by itself show that defendants reacted to those protests with retaliatory animus, But in my mind it does lend a lot more credibility to all the evidence from this proceeding which plaintiffs highlighted earlier of retaliatory animus.

And after all, that's because nobody likes criticism. And the federal agents and agencies here are no different. Therefore, I think it is tempting for an agent who's been given a weapon with inadequate training inadequate instruction, inadequate restrictions from their supervisors, and inadequate systems of accountability for the officers using those weapons to then point those weapons at someone who is saying something we're doing something that agent finds offensive.

So this really shows I think part of the problem with the escalatory force approach that's been employed by the defendants here, where force is more of a first resort, and

communication and de-escalation are absent from the approach. And it's another reason why many police forces including PPB and OSP have increasingly embraced de-escalation tactics better training, and tighter restrictions on indiscriminate weapons, like tear gas in public or policing it helps protect protesters first amendment rights and it helps make everybody safer.

So imposing constraints like the ones I described earlier and like the ones proposed injunction may not just protect Oregonians right of speech and assembly but I really do think they will and I'll get to that in a moment. We can actually hope that it might also lead DHS and its component agencies to update their approach and embrace the police practices of the future while stepping away from the old techniques of crowd management that has Commander Dobson explained to us a few days ago date from the 19th century.

And in all these ways the constraints defendants oppose here are not just workable, they benefit everyone, and they promote the public interest in all these ways.

Just a few more comments, Your Honor. I want to emphasize for a moment the conduct of defendants as it relates to the topic of this proceeding. Given the videos that were introduced during the witness testimony here, it may be a little unsurprising frankly that the president in the now infamous social media post described portland as a war zone. Like him, we have all seen plenty a video including the sounds

of explosions and weapons fire and smoke. The problem is I think he omitted that all that was coming from federal agents not from the Oregonians outside the ice facility who were exercising their first amendment rights.

And I mention that because it relates to a larger pattern by the defendants here, specifically DHS and the president, that bears on the equitable factors the court needs to consider. And specifically that's that the President and DHS have a history in Oregon of helping to create the conditions they propose to resolve with what the president calls full force.

In 2020, they did this in their response to Portland's 2020 protests, when a surge of DHS agents reignited and inflamed unrest that until that time had largely self extinguished According to the report of the Independent Monitor highlighted in our amicus brief. They did it again in seeking to federalize and deploy Oregon's National Guard in late September.

The testimony we heard in this proceeding showed that the president's federalization directive on September 27th triggered an increase in demonstrations, and more importantly, that surge in DHS agents using aggressive escalatory force techniques that follow created the veneer of a warlike appearance for the social media influencers Some of whom were invited by defendants onto the roof of the ice

facility By the way and for national TV audiences. And the defendants are doing it now by violently punishing demonstrators in all the ways that we heard.

So I think this all of this is material because it tends to undermine the federal government's claims of horror here, because frankly the warlike atmosphere that the president and Secretary Noem have complained about in our public spaces is coming from their agents. So we just need those agents to stop.

Now everything I discussed so far shows why the defendants won't suffer any harm from a preliminary injunction in this proceeding and may in fact benefit from it.

On the other side of the ledger the harms to the public in the absence of an injunction are bleak. Like the city, The attorney general received a wave of input and comments and complaints from alarmed And afraid and angry or Oregonians and those comments were specifically emphasizing defendants conduct on January 31st and February 1st which are just two examples of the kind of conduct plaintiffs elicited testimony about in this proceeding and I think in their briefing especially in discussing the equitable factors, defendants really gloss over the habit from federal agents conduct like on 31st And as we heard on that date like others innocent people expressing their first amendment rights, some of whom are in this courtroom today, experienced a law

enforcement response that would make almost anyone hesitate to exercise their First Amendment rights again.

I think we're going to live by the principle that the democracy is only as strong as its tolerance for dissent, and the willingness of ordinary citizens like teachers and health care providers and parents and military veterans and spiritual pastors and a lot of others, Their willingness to express disagreement with government is I think essential to a functioning republic. And so on that, plaintiffs are correct, And I think the record shows unequivocally both with direct and circumstantial evidence that defendants repeated use of needless indiscriminate force, in all the circumstances discussed in this hearing, shows that their efforts were designed in a retaliatory fashion to punish and deter that kind of first amendment expression.

And for all those reasons the state joins the plaintiffs in urging the court to adopt a preliminary injunction.

THE COURT: Thank you very much Mr. Kennedy. Thank you Your Honor As I said to you city's counsel Vannier, the court very much appreciates the participation of the State of Oregon as an amicus.

Let me ask defense counsel, if you would like a few minutes for a recess you are welcome. Your choice.

MR. ROSENBERG: I think we are ready to proceed. We

may need a minute or two to get everything set up.

THE COURT: Sure.

MR. ROSENBERG: We do have copies of the PowerPoint that we will get.

Does everyone have their copies.

All right. My name is Brad Rosenberg with the Department of Justice on behalf of defendants. I will be addressing the evidence and likelihood of success on the merits. That includes evidence as we discussed previously that we have heard at the last several days of this Court's hearing as well as the other evidence that the Court will be considering as part of plaintiff's motion for a preliminary injunction.

My colleague, Mr. Bailey, will be addressing the workability of the injunction, the class certification issues and scope of relief. So please save any hard questions for my colleague Mr. Bailey.

THE COURT: You are welcome to phone a friend.

MR. ROSENBERG: I would like to start off -- I'm going to set the table in a couple of different ways, because when you are in an evidentiary hearing like this, it is possible to lose site of what some of the overarching legal issues are and what some of the overarching factual issues are. I am going to set the table a couple of different times. Think of it like a multi course meal.

So let's stop and think about what this case is a about. And it's not this case. It's about one particular claim in this lawsuit and that's plaintiff's first amendment retaliation claim. That's the claim that's before this court on plaintiff's motion for preliminary injunction.

And as the court knows, it is an extraordinary form of relief for the court to grant a preliminary injunction. And to be sure courts do grant summary injunctions with some regularity, But nonetheless, the legal standard is a higher one.

THE COURT: I agree.

MR. ROSENBERG: So candidly, plaintiffs have not made that showing. As my colleague Mr. Bailey indicated during his opening statement plaintiffs are going to have to demonstrate rate why -- they're going to demonstrate that D H S maintains a policy or custom of responding to protest activity with unconstitutional retaliation.

Now the time period in this case as we go back to the first Amendment amended complaint is from June 1st to the present. So that means that plaintiffs are going to have to show that course of conduct over an entire time period, over that time period.

THE COURT: The ones that why is that? Why isn't it from the moment they filed their motion for preliminary injunction? Because they filed the complaint early on. They

didn't see a need to file the motion for preliminary injunction. Then they filed a motion for preliminary injunction presumably because they saw a need. Really they filed the motion for TRO because they saw a need. So why isn't the relevant time period essentially from the time shortly before they filed the motion for TRO?

MR. ROSENBERG: Because plaintiffs of the masters of their own complaint and the complaint sets the framework for how this Court should evaluate any form of relief that plaintiffs ultimately hope to achieve in this lawsuit.

And so in their amended complaint plaintiffs have alleged a course of conduct over the course of many months. That's their theory. Their theory isn't there was one bad a day of bad conduct and as a result the Court should grant a programmatic injunction that precludes DHS and its components on a going forward basis from using less than lethal tactics in defending the ICE building.

THE COURT: But they filed their first amended complaint December 10th. And they even it then did not -- I think the motion for TRO was filed about the same time. That was filed on January 27th. So they filed the amended complaint December 10th. Presumably from when they originally filed the complaint from December 10th, they didn't see a need for interlocutory relief. They were seeking permanent injunctive relief granted. But come December 10th they filed a first

amended complaint and they still don't even file a motion for temporary restraining order. And so apparently even under their first amended complaint, they are looking for permanent injunctive relief. They don't need interlocutory relief. And apparently something happens between when they file that on December 10th and when they file their motion for TRO on January 27th that says, you know what, we can't wait for the end of this lawsuit. We can't wait for permanent injunctive relief. We need interlocutory relief now.

So why doesn't that inform the relevant time frame.

MR. ROSENBERG: I think the Court could look at the testimony that it has heard over the last few days because the relevant time frame that plaintiffs have chosen to focus on actually goes back until June.

THE COURT: I mainly heard things in October and November. But the most detail has been in December and January.

MR. ROSENBERG: I think there has been quite a bit a detail from June and October as well. And actually I'm going 20 get to in just a moment the examples that plaintiffs have provided which they have referred to as representative samples. But in fact, we are going to demonstrate and we believe that the evidence will demonstrate that those samples were hand curated by plaintiffs not to order to present a particular picture.

So at the end of the day, Your Honor, we don't believe that the evidence demonstrates that the plaintiffs have met their burden and it is their burden to show that DHS maintains a policy or custom of unconstitutional retaliation against First Amendment activity. In fact, some of the evidence that is already in the record demonstrates that DHS does have a formal policy guidance that forbids retaliation or discrimination against individuals engaged in first Amendment activity.

And the court can look back to our opposition brief, Exhibit 5, which is a DHS memo addressing First Amendment activity it. The Court can also look generally at both the Johnson and Cantu declarations that we submitted with our PS opposition brief and those -- and those -- the Johnson deposition -- sorry -- the Johnson deposition we think he is clear that FPS affirmatively works to protect first Amendment rights for everyone And Mr. Cantu submitted a declaration. Paragraph 6 in his declaration addresses First Amendment activity.

So that's sort of the appetizer. Let's turn to the first course. With that, Mr. Carney

THE COURT: I thought the first course is an a permanent injunctive Taser.

MR. ROSENBERG: First substantive course.

THE COURT: All right.

MR. ROSENBERG: What I have on the PowerPoint, on the screen, is a quote from the first day of this hearing. And we are going to quote the rough transcript.

THE COURT: That will be fine.

MR. ROSENBERG: But you may recall the phrase Portland's quote "evolving experience on how much and when we coordinate with the federal government.

If there were an award for euphemism of the year, This would certainly be a contender, because what Portland describes as an evolving experience in cooperation with the federal government "in fact means no cooperation with the federal government when it comes to matters of immigration enforcement, And that directly affects the issues in this case And the ability of the federal government to carry out its statutory mission.

So what does it mean for the City of Portland to not participate in immigration enforcement. It is not simply that they refuse to lend a helping hand on immigration enforcement. It means as the Court may recall that the City won't set up a traffic perimeters And it's not just traffic perimeters around locations of targeted enforcement operations, It's traffic perimeters around the ICE building itself.

And you heard testimony and in each of these slides we have provided source information to either the testimony that this Court has heard or the deposition transcripts or the

declarations that have been submitted in it case so the Court can refer to those later. But that means that in order for federal officials to access or exit the federal building, they are essentially on their own. "Quote without intervention by the federal officers," unquote ICE vehicles have not been able it to access or leave the building.

That is an established fact. That's because Portland refuses to do anything to clear its own streets and we are going to get to that in a minute. And it is also an established fact that has been a fairly common occurrence since June of 2025.

So here is the kicker, you may remember a line of questioning at the very beginning of this evidentiary hearing and that line of questioning during my cross-examination led to I think a fair conclusion that protesters cannot legally block a public street in Portland unless it happens to involve defendants. In that case, they can, because the City of Portland won't do anything to clear public streets. So there was a question that I asked of Commander Schoening. So if there was an ICE vehicle that was attempting to leave the building pursuant to -- for whatever reason it may be -- and it was being blocked by protesters on city streets, the Portland Police Bureau would not take any steps to clear its own streets to allow it that recollect to exit the facility

"ANSWER: Answer no.

BY QUESTIONER:Now, this is not for lack of asking on behalf of the defendants. So one piece of evidence that this Court has not heard in this hearing but that's available in the deposition transcript of the witness XX and we are using initially for the witnesses whose confidentiality is being preserved, is that the XX testified that we, on the regular, would contact Portland Police Bureau to advise them that -- that people were blocking streets and that there were local crimes occurring. Again, that's not something that we were enforcing, but, yes, we would regularly let them know that -- through our dispatch mostly.

So what's the response that the federal defendants received from the city of Portland when they want to be able to access public streets in front of the ICE building? Well, we heard that response essentially during that first day of the evidentiary hearing. "Well we do keep people out of city streets and we have largely kept people off Bancroft on a nightly basis mostly through voluntary compliance with but we have gone down here and made a rest for people who are standing in the street blocking general vehicular traffic when it is appropriate. When it comes to federal vehicles specifically coming and going from the immigration and Customs enforcement building, it does become challenging to determine whether or not they are engaged in immigration or related activities. And

so our position has not been to remove people from federal vehicles -- it is a rough transcript. So I think there might be a clarification there when they are coming and going.

So they will remove people from the street unless a federal vehicle needs to access or exit the building.

Your Honor that's an untenable sentence?

THE COURT: Would you repeat that last sentence that you just said.

MR. ROSENBERG: The Portland Police Bureau -- the Portland Police Bureau is prepared to remove people from the streets blocking general vehicular traffic but it becomes challenging to determine for when it comes to federal vehicles trying to access the street in front of the building, it becomes challenging to determine whether or not they are engaged in immigration enforcement.

THE COURT: So the way I'm reading this last sentence. And I know it is rough is that Portland Police has said it has been their position not to remove people from the streets when federal vehicles that they believe are engaged in immigration enforcement are coming or going from before thanksgiving. I think that's how you read it.

MR. ROSENBERG: That's how I read it. Ultimately it matters how the Court reads it. That's why we included the citations to the transcript. We think the testimony speaks for itself and I believe as I said in one of my questions on that

first day, that's discriminatory. If these are public streets, everyone should have equal access to those public streets. And the Government should not be picking and choosing which vehicles can access those streets in order to be able to access their own buildings.

And that is part of what has created the problem less-lethal that the United States government is facing and the problem that this Court is facing, because the setup is not one that is candidly workable. And so if there were more cooperation -- I'll argue -- if there was more cooperation from the City of Portland at least to be able it to allow access on public streets to and from that building, then we might not have the situation notion that the Court is currently grappling with.

THE COURT: And I understand that point, and it is not an unfair point. I'm deliberately using the double negatives. But it is not an unfair point. But that's not the claim that we have here now. If you want to bring a counterclaim that'll be a very interesting counter claim. But and frankly you would have to bring it against the City.

But I understand the problem that that phenomenon is putting on the federal defendants here. But let's just take for example they haven't had difficulty accessing the building since I entered the TRO for weeks ago, nothing's changed in terms of this issue, So what's your response to that? I get

that there are some inconveniences that are placed on the federal defendants by the City of Portland, by the Portland Police, which and the Oregon State Police, which probably are acting pursuant to state and local sanctuary laws, which they may or may not be correctly interpreting and applying it. I get that creates problems for the federal defendants.

But to some extent I'm curious about those problems haven't been occurring in the last 28 days. Is there then any conclusions to be drawn from that? First of all in terms of workability. Okay. I'll save that for.

MR. DENNIS: Bailey. Fine.

MR. ROSENBERG: So on my next slide we won't go there yet. I will make the point. Plaintiffs have repeatedly referred to individual events in which protest activity has resulted in the use of force.

That's almost all of what we have heard for the last two and a half days.

So I went back when I was thinking about this case and this issue and the June 1st date. And I tried to figure out how many days has it been since June 1st or at least it from June 1st until the date that the Court entered the TRO because the Court's entry of the TRO does change the dynamic. We are enjoined. But at least the relevant time period in terms of figuring out what is the dynamic on the ground that the plaintiffs are asking the Court to enjoin is a 248 day.

THE COURT: Seven months.

MR. ROSENBERG: Yeah. It is a long time. And we have been focused on events over the course of approximately nine days out of that 248 day period. So in answer to the Court's question, on any given span of days, maybe it is a week. Maybe it is several weeks. Maybe it is a couple of months. There might not be any use of force. I mean -- I don't recall -- I'm not good with dates. I don't recall all of the dates that we have been focused on. But for example, I don't recall any specific dates in August.

So during the month of August -- I don't believe there was. There might be one or two.

THE COURT: I do recall siege a footnote in somebody's pleadings, the plaintiffs, that said the parties did agree given the expedited nature of expedited discovery for this hearing to really just focus on about a ten or eleven particular days. So I don't really know what happens in August. You haven't had discovery. Again, that's what prompts me to be more concerned with they filed their complaint in June. They didn't ask for a TRO. They filed their complaint an amended complaint in December -- early December -- they still didn't ask for a TRO. Some things happened in the fall at an escalating pace and a more dramatic case They filed a motion in late January but I agree that there have been many days apparently where there have been either no protests or

protests with no use any type of retaliatory force. But I'm not quite sure though what that proves. What does that prove.

MR. ROSENBERG: What that proves is that there is not a pattern or practice of retaliation, because if retaliation were the motive one would expect there to be retaliation on a regular basis.

THE COURT: That's an assumption and I was talking when Ms. Hutchison son was giving plaintiffs argument that I don't see it that way Let me tell you how I was looking at it you tell me why you disagree.

I think it would be probably the height of foolishness for someone who wants to retaliate to retaliate every single day, because it would be so darn obvious that someone is retaliating whereas if one picks and chooses and does it arguably maybe to some extent at random, that's going to deter or chill people from wanting to go out and protest because they won't know what they might be facing what they might be happening.

You know, you can't deny, we heard lots of testimony from people who were not committing any acts of violence, and they were traumatized and physically injured by the tear gas and some of the other chemical munitions. They're not they don't want to go back there again or if they don't want to bring their other family members, And I think that's probably an effect of the randomness of it. If we had retaliation every

tuesday well people would go protest on Wednesdays but not come back on Tuesdays. If we had retaliation every single day, of don't ask have obvious and we wouldn't be having I think a three day evidentiary hearing on that. Instead we have it occasionally periodically and almost at random and that creates a very serious chilling effect.

Now what I'm what I was expecting to hit when I thought I heard from your opening statement or your colleagues opening statement is that shows more that we have a few rogue officers occasionally misbehaving. I get that. And that's why I was listening for the evidentiary hearing to what do we have beyond that? But I think the fact that we don't have retaliation every single day doesn't really prove the point that I think You think it proves. Am I looking at it incorrectly.

MR. ROSENBERG: I do think we see that we see things differently. For the rogue officers when you're dealing with an agency that has many employees these individuals may make individual decisions to take action that one can examine. And there are I have been here for the last two and a half days so I have seen some of the same evidence that the court has seen. And I know that you had a colloquy with my good friend on the other side I mean there are some incidents that are under investigation. But at the same time the fact that there may be individual officers who are making these decisions does not

indicate that DHS as a government agency he has a policy or custom and in fact we think that the evidence shows that when there is a use of force, in the vast majority of cases, there is some precipitating event or some violence and I'm going to step through some of the evidence of some of the violence that has been directed at individual officers or at the ICE building, I'm not talking about people yelling it at officers because that's clearly First Amendment protected activity. But I'm talking about throwing rocks.

THE COURT: I agree. And you want to arrest people for throwing rocks or even getting an officer You go right ahead. But we both seeing the videos on a number of occasions of someone either sitting -- not even in the middle of the driveway up on the side -- granted their trespassing want to arrest them. But they're sitting there on the side and an officer comes right up to them and raise them with the chemical munitions right in their face, or they're standing holding a sign, or they're leaving the demonstration as Mr. Eckman was, and an officer fires at him from eight feet behind. That's disturbing evidence.

MR. ROSENBERG: Well part of why I am here is to bring to the Court's attention some of the other evidence that has not been presented in the Court today. I would like to talk about the representative sample because we have had a very short period of time in which to engage in discovery. I

believe it has been just over a month or so. And just for the Court's awareness we have produced approximately 1618 pages of documents. We produced approximately 122 videos, either a body worn camera videos or videos from video cameras at the facility itself. And I believe plaintiffs have taken eleven depositions. They noted that many of those depositions have taken place in the last week. Another way to look at it is depositions filled approximately the last third or so or maybe the last quarter or so of the entire discovery period which is what the way these things oftentimes work.

But how did we land on this representative sample of approximately nine days, because it was never going to be feasible for us to be able to provide information across the eight or so month time period in the discovery context for plaintiffs in a preliminary injunction so the parties had to pick and choose.

And plaintiffs chose the dates, they chose the nine dates that they wanted to focus on. They had to identify those dates. And then once they identified those dates, the Government used various use of force reports from DHS the DHS components to plaintiffs and then based on those use of force reports and this is I think laid out in some of our status reports as well as the motion to compel, plaintiffs identified a number of witnesses that they wanted to depose. And that's a very feasible and practical way to move through the discovery

process, and I'll say that we've had a good working relationship with opposing counsel throughout this process but it's not a random sample of the dates. It is plaintiffs best case. It is the dates that they chose and they know the dates that they were or that they allege that they were subject to the use of force. So they're already aware of what dates they want to focus on. They pick the dates they then get the use of force reports They review the use of force reports and then they decide who they want to depose. That's all well and good but I just want to be clear that when plaintiffs have presented their case to the court, it's not as though the dates of regarding the use of force are some random assortment of dates.

THE COURT: I totally get it is not randomly selected date but we had a number of people, five people, who complained about what happened to them. They became the named plaintiffs. We have a handful of others that approached the lawyers for the plaintiffs. They complained about what happened to them and on the dates of those things that happened to them they wanted to find out who was that officer that was spraying someone right in the face and why did that officer do it. I But I totally get and I agree with you We do not have a random selection here.

MR. ROSENBERG: Let's build on that for a moment. Your Honor Yes Let me thank the Court It doesn't even have to look at how the discovery in this case evolved out of

necessity. It can look at the testimony that it has heard. So you have heard two of the named plaintiffs, both Mr. Rios and Mr. Dickinson testify that on the vast majority of days less than lethal tools were not deployed. That's their testimony.

THE COURT: I recall that.

MR. ROSENBERG: The Cantu declaration and we have a citation to the paragraph on that also notes the numerous days of protests without law enforcement response. Plaintiffs' counsel cited what has to be one of my favorite movies groundhog day, and I agree with them in part that there is a groundhog day element, and some of the officers I believe testified that there's this groundhog Day element, because they're out there every de viewing protesters the.

Mr. Dickinson is out there not every day I think certainly most days there are protests at the facility most days and that's what those officers are viewing. Whatever the form those protests may take from their perspective that is Groundhog Day. But that's not the use of force. The use of force is not Groundhog.

Day According to plaintiffs themselves use of force is a relatively rare occurrence. So that in that circumstance you have what may be I don't think there are a series of random events There are a series of triggering events. And so as you can see on this slide sometimes times the use of force was necessary.

So for example on June 14th, the Portland Police Bureau declared a riot due to a high level of criminal activity. Officers were injured Objects were thrown at officers And the next building the ice building was damaged. There's also testimony either through the hearing that this court has held or through some of the deposition transcripts that the court has access to that protesters have used Shields and what we would call impact or slugging devices. That's significant. Officers have been assaulted and persons have been charged with assault.

And so there has been a lot of testimony about these events are I think I've heard the phrase family friendly, and maybe some of them aren't. But the court needs to be careful to recognize that there is peaceful assembly and First Amendment protected activity, but then there has been circumstances where these protests have turned volatile and that anger in terms of physical assault and in terms of attacks have been directed at defendants.

So let's talk what my favorite part of this case because I thought this case about a person in a chicken suit but actually when I heard that there was a slot involved, that I thought that was very, very interesting. So the slide is called the driveway and the slot. Remember the slot. The reason the Court should remember the slot. The Court should remember Mr. Dickinson's testimony. His testimony when

protesters were blocking the driveway which is the main way that people can access and exit that building, which can present a life and safety issue if people don't have adequate access to an exit from a building is that people would be in the driveway and the crowd is large and it doesn't move that much. Then Mr. Dickinson said, and I perked up when I heard this. It is part of the tactics that we are using. And I thought the use of the term tactics was an interesting one because it is normally thought of an action, strategy carefully planned to achieve a specific end. The specific end here is to block the Government from being able to access its own building. And as a result these individuals who are trespassing, who are breaking the law by blocking access to the ICE facility.

THE COURT: I have no problem if you want to arrest them.

MR. ROSENBERG: Apparently plaintiffs do because one of the issues they were raising in this case is that an individual was issued a summons for sitting on the wall at the facility and then she left and she came back and she was arrested.

THE COURT: No, I don't think they were complaining about the fact that she was arrested. They were using what the officer said to her when they implied that the charges will likely be dropped as when she said, then why did you arrest me

because we just don't want you to come back and you may have interpreted that as we don't want you to trespass anymore. But that's not what I heard. What I heard was we don't want you to protest anymore.

MR. ROSENBERG: Well I think that is a statement that is subject to different interpretations. But certainly the interpretation of the statement in the context of somebody who chooses to trespass on federal property, is told to leave and they do leave, and then they choose affirmatively to come back and trespass again, it is certainly a fair reading of that statement that that individual was issued a summons so as to avoid them from continuing to return to that federal property.

Certainly the first time in the person left, that could have been that. And in that regard, that person received an adequate warning, but they chose to return --

THE COURT: Then why weren't charges filed. When she was on the stand I looked it up on the name and our federal court records and want to go outside the record too much But no charges were ever filed in this court against her.

MR. ROSENBERG: Or perhaps because she hasn't since returned to that property Okay.

THE COURT: Okay. Normally charges are filed like within 24 to 48 hours after an arrest is made.

MR. ROSENBERG: I don't think there was a dispute that she was trespassing.

THE COURT: I don't disagree with you.

MR. ROSENBERG: So in that regard, the fact that charges may not have been or were not filed, and the fact that the Government had chose not to pursue that should not be used against the Government to imply that even though there was a valid charge there for somebody returning to the property after they were told to leave is somehow -- somehow lends insight into the Government's perspective. If anything, it should be complimented for not charging.

THE COURT: I'm not going to use the fact that she wasn't charged as anything. I'm still pondering what to do with the officers statement to her. But I agree, I'm not making any use of the fact that she wasn't charged.

By the way finally when these folks are leaving even if they're leaving slowly whether they slowly, whether they leave quickly. What's the legitimate point and purpose of sending the chemical munitions over their head behind them to the point where they're you want them to walk to and towards, what's the point of doing that.

MR. ROSENBERG: I don't want to speculate on that because I don't have any particular evidence that I can rely on for that.

THE COURT: All right. I'll tell you this, because I was wondering that question. I heard no evidence in this evidentiary hearing that would offer a legitimate purpose for

that, and therefore I'm really tempted to draw the inference that in the absence of any evidence of a legitimate purpose, there was no legitimate purpose and it was just part of retaliation and making sure that everybody in that protest -- not only the trespassers up front but everybody would feel the effects of the chemical munitions. You are welcome to show me why that's a wrong inference.

MR. ROSENBERG: I don't have an I don't have evidence to support that at this stage, Your Honor. I mean I can think of a couple of things which would be there could be a large protest and even though -- less than lethal tactics might be shot behind people who are immediately in front of the building, due to the need to clear the street in order to allow vehicles to ultimately exit it might be necessary to use those munitions farther afield. It could be the case that those munitions are being fired so that they are farther away from the people who might nonetheless disperse because of the way that the gas is dispersed, but they wanted to shoot them so that they're not directly into the crowd so as to minimize the direct impact while ultimately achieving the goal of trying to clear the driveway and the street in front of the building.

There are lots of reasons in the short period of time that we have had for a preliminary injunction. We have not had an opportunity to fully explore that. But and here is the thing. Again, it is plaintiffs burden on the preliminary

injunction. And so to the extent that there is a lack of evidence on that, that's on plaintiffs.

THE COURT: Okay.

MR. ROSENBERG: One of the areas that my good friends on the other side have addressed is the First Amendment. Obviously that's at the core of this case. I think that the testimony that the Court has received during this evidentiary hearing has been selective on the training that individuals received regarding First Amendment And so you will see a very long string cite at the bottom of this slide. And I would invite the Court to review the various deposition transcripts and declarations itself but at a high level of witnesses for the Government understand that burning the American flag is protected First Amendment activity. There may be an instance where a witness gave testimony that is a little bit squishy on that issue, but repeatedly other witnesses have stated as much. Witnesses understand that recording officers is protected First Amendment activity. Witness officers receive First Amendment training and Mr. Cantu in his declaration has explicitly stated that at no time are officers under my command directed to threaten or assault any member of the public engaged in lawfully exercising their First Amendment rights.

THE COURT: What do I do with the evidence like we heard from Mr. Rios that one of the officers would see him. He has got his press sign on. He has got his press helmet on He's

got cameras in front of him And the officers used first with their hands to try to break his camera equipment and then with the a portion of their handheld weapon to break this camera equipment.

Why are they breaking as camera equipment if they understand that journalists are entitled to the film these things?

MR. ROSENBERG: I mean the Court can evaluate that evidence on its own. I think that might be one incident. I also don't believe that Mr. Rios on his' camera necessarily captured the entirety of that event. So there could be circumstances outside that event that, again, in the compressed time frame that we have had for this case, the Court may be limited in the amount of evidence that it is able to evaluate on that particular issue. But that also is one particular issue. And it should look at the totality of the circumstances in order to determine whether there is this practice that plaintiffs allege.

THE COURT: I agree but I have also seen no evidence that the officer that did that was reprimanded was basically had his own actions corrected by any supervisors, that there going to be findings that he shouldn't have done that. I didn't see any evidence of that either.

BY MR. ROSENBERG:I am just note and I don't know if it has any bearing on it that particular incident. So I'm

not going to I'm not going to speak to that particular incident but I'll never note that -- and as the court is aware, there are four open investigations, and we are very sensitive to make sure that in terms of privileges involved with those investigations to make sure that we don't encourage on any investigatory privileges or law or law enforcement related privileges in order to allow those investigations --

THE COURT: And that's fine, But we have heard from some of supervisors, Cantu, Sullivan, Johnson, and others that there were no findings made, no conclusions reached, that any of these officers or any of the things in the record violated policies. We know about those four investigations, but no findings. The officers weren't removed and they weren't even told about any corrections. So I understand. We're going to respect the investigative privilege.

MR. ROSENBERG: Thank you.

So I would like to turn to plaintiffs expert, Mr. Kerlikowske. Because again this may be a quote that due to the rough nature of the transcript, it may not be captured quite perfectly.

THE COURT: The Court you are welcome to rephrase it in a way that you think makes sense consistent with our collective recollections.

MR. ROSENBERG: It is tricky for me as an attorney

standing here to try to place myself in the shoes of the Court. But the Court asked a question of plaintiffs expert. And so that conclusion one of the people are drawing that there was some purpose other than simply wanting to have the crowd dispersed or leave. I think you asked a question.

THE COURT: I hope I was more articulate than that. But we will see it in the final.

MR. ROSENBERG: Fair enough.

The gist of it I think the Court was getting at is there was some retaliatory intent involved. And Mr. Kerlikowske said. You know, Your Honor, I don't think I would go that far and put that in there.

THE COURT: Well what I gleaned from him, is he is not going to draw an inference of retaliatory intent p from a single incident that might otherwise not have a good explanation.

MR. ROSENBERG: I think it is fair to say that the some of his testimony was that he at least believes that many of these officers are poorly trained, at least that's his view. We obviously disagree with that. We are going to turn to training in just a moment. But whatever Mr. Kerlikowske his views are regarding training on law enforcement techniques is not relevant to whether there is this retaliatory intent on behalf of the agency. And I fear that these issues have gotten conflated.

THE COURT: You draw the conclusion and I do recall him saying this, that from a number of the events that he has described, including the lack of training as well as other things, there was an unwritten policy. There was the written policy by FPS that was all well and good, but he did draw the conclusion that there was an unwritten policy. To disagree the jots and titles of the written policy.

MR. ROSENBERG: I think the testimony here it is inconsistent with that view that the Court believes that Kerlikowske.

THE COURT: I recall this question and answer although I hope I wasn't that inarticulate. The way I recall, I was asking about one incident and it might have actually been about the statement from the officer that we just wanted you to not come back. And whatever it was, it was one incident I was asking about and he said he wouldn't go there and draw that conclusion from that one incident. Fine. And I understand that. Frankly I don't think I'm going to draw any conclusions from a single incident. But I do clearly recall him talking about an inference of an unwritten policy to disregard the written policy. I'll go back and look at the transcript for that. I also put it in my notes. That's how I recall it.

MR. ROSENBERG: Understood, Your Honor.

THE COURT: Okay.

MR. ROSENBERG: Even though it is not in the

government's view not directly relevant to this case, let's talk about crowd control for a moment.

THE COURT: Sure.

MR. ROSENBERG: Some of this testimony I believe is not been before the Court before, but, again, it is part of the record and we are providing some cites as to the type of training that FPS officers received. So one FPS officer described three months of training down at the federal law enforcement training center. They cover a broad topic of use of force, whether it is clash in time scenarios, and then three months worth of FPS side of that, and then yearly annual training regarding use of force. And every time you go on deployment, I believe you have a use of force class to be taken.

THE COURT: Do you mind starting that from the beginning.

MR. ROSENBERG: I read that section. I think the Court can read it for itself. And there are other elements of testimony in the record such as a week of public order training for riots, line formation, and also some less lethal utilization, as well as in person training in Portland for my officers.

So I know the Court has heard some testimony today including in plaintiffs argument about a lack of training. I want to make the Court aware that if it reviews the transcripts

in particular these portions of the transcripts, there is in fact evidence supporting the view that federal officers received training on crowd control.

So let's talk about warnings. Because that has been a big issue in this case. You have heard the testimony of Ms. Eckman that she didn't hear warnings. But there was a line of questioning that just because one doesn't hear warnings doesn't mean that a warning is not given. One might be too far. Out might be noisy. There are lots of reasons why. And Ms. Eckman conceded that it is certainly possible it that she didn't hear warnings.

But I would like to turn again to Mr. Rios' testimony. He testified that every single time he heard announcements from the ICE building to clear the facility. And his recollection was maybe more generally, not quite every single time. His recollection generally, I think it is fair to say, was that the announcements also contained warnings that gas may be used. I believe he said he wasn't a hundred percent certain about that. But the Court can review the transcript on that.

So certainly if somebody affirmatively can say that they heard warnings every single time, that does help to establish that warnings were regularly given.

Mr. Dickinson, as well, who was there most of the time, all its every day indicated that at least most of the

time there are announcements to clear the driveway. But again, just like Ms. Eckman, the fact that he is saying most of the time there are announcements to clear the driveway, that's a floor, it is not a ceiling. If up hear announcements most of the time, that doesn't take into account the circumstances where there might be announcements and you don't hear T so I think the record pretty clearly establishes that warnings, including warnings regarding the use of less lethal less than lethal tactics are regularly given.

The issue of counter protesters has come up and I think it is an incomplete picture that the Court currently has before it. There is testimony in the deposition transcripts to which the Court has access that officers didn't really see them much in front of the blue line, unlike the anti-ICE demonstrators. By the way that intuitively makes sense, right. If you are opposed to ICE, your goal is to block access to the facility. If you support ICE, you presumably don't want to block access to the facility, right. You are not going to be standing in front of the blue line as a general matter. You are probably not going to be trespassing on the property as a general matter because you are out there supporting the Government's position and there is all different points of view regarding policies and everyone is entitled to their point of view and everyone to be crystal clear is entitled to express their point of view.

However, there were a few times where both groups would be in front of the blue line and that would mostly be they were in conversations or arguments. I think conversation is perhaps a euphemism but certainly folks were probably engaged in terms of representing their points of view. But there were sometimes where the counter protestors would block the driveway and when they did, they were subject to less than lethal tools.

Again, the deposition transcripts demonstrate this. So

"QUESTION: Question did you see any pro-government protesters have any of the same types of munitions deployed against them, in your personal experience there?

"ANSWER: Answer I can remember maybe one time where we had to push out -- and there was a crowd -- and the people deployed with the 303 pepper ball would area saturate the line, and both sides were there."

So what does that tell the Court

THE COURT: It depends on what both sides were there means.

BY MR. ROSENBERG:Well I think it is clear from that deposition transcript that anti-ICE and proceed ICE protesters were in front of the ice building and munitions were deployed in a manner that it affected both sets of protesters.

So what does that tell the court It tells the court a lot It tells the court that those munitions were deployed in order to allow access to and exit from the facility they weren't picking and choosing who to use those munitions against they were using the munitions in order to be able to get into or out of the building.

There has been again, and I'll note on this slide, there is a very long string cite that I would invite the Court to review the testimony before issuing a decision. Numerous officers have testified that the motivating purpose for the use of crowd control devices was to remove trespassers from federal property and to prevent damage to the ICE facility. We provided a couple of snippets here such as they were blocking the driveway. People are blocking the driveway and "persons inside the building were trapped".

"They were refusing to leave property. They were in the driveway." "People were throwing rocks and we pushed the crowd away from the driveway

THE COURT: Before we leave it that And you're right that's a very long string site Did you either you or miss Hutchison remind me Where do I find these transcripts of they already been filed am I going to get them a hard copy or a thumb drive Or how do I find them?

MS. HUTCHISON: Your Honor when we spoke to Mary we said by the end of today we could try to get them to you on a

hard drive. We will also file them in CM/ECF under seal.

THE COURT: Today.

MS. HALLETT: Mary already has them.

THE COURT: Wonderful those are the ones Okay And so you put them in the G drive and those include the these transcripts.

THE CLERK: The last thumb drive you gave me.

MS. HALLETT: From yesterday too or the first day.

THE COURT: I don't remember siege lots of transcripts. So I have not looked at anything that came in today.

MS. HUTCHISON: If I could sort of big on behalf of our support staff to have until at the end of the day tomorrow to file them officially on CM/ECF.

THE COURT: Totally fine, especially as long as we have already have them on the thumb drive, that's totally fine.

Okay back to you Mr. Rosenberg, back to you.

MR. ROSENBERG: A couple of closing thoughts before I turn it over to my colleague Mr. Bailey for the desert The When you're looking at the evidence I just want to make sure that the court appreciates that we've had this two and one half day evidentiary hearing, but there is a lot of information that the parties have gone to great efforts to put in front of the court through discovery. And there is information that's a supports the government's position in this case that that there is not a

pattern or practice to retaliate against first amendment activity but instead there are specific precipitating events that have led to the use of force on a relatively small handful of dates.

And we think that when the court reviews the entirety of the record that's been assembled to date, recognizing that is still at a preliminary stage, we don't think the plaintiffs have met their burden, And certainly because of the constraints that have been placed on the federal government by the city of portland and state of oregon policies, it has put the government in this difficult position of having to ensure access to its building when at least in some circumstances it is confronted by violent protesters.

Violent protests are not taking place every day. On the vast majority of days, we agree with plaintiffs that they are peaceful protests, and the united States government supports peaceful protests. It supports First Amendment activity. But there have been circumstances where that activity has crossed a line into criminality or has interfered with the government's ability the united states government's ability to carry out it statutes and its laws and the use of less than the lethal tactics is a necessary tool for the Government to be able to use in order to be able to ensure that people can continue to access that building.

That is an issue that my colleague Mr. Bailey will

discuss with the Court now as well as class certification issues and scope of relief.

THE COURT: Very good. Thank you very much Mr. Rosenberg. Mr. Bailey at your convenience.

MR. BAILEY: Thank you, Your Honor. I'm before I get to workability which I do plan on touch on briefly, the Court was asking earlier about why a chemical munition might be deployed into a crowd behind the line of people you are trying to move.

THE COURT: No I didn't say into the p crowd. I said why a chemical munition would be post tossed or shot over the heads of the crowd so it lands behind them and blocking the most obvious way in which you want that crowd to move and leave. That's what I was asking. I apologize if My question wasn't clear.

MR. BAILEY: I'm certain I misstated it, Your Honor. I would like to just like to direct the court's attention to a portion of the deposition of Mr. Johnson that I think provides a helpful excellent tactical explanation for why he has a similar technique might be used.

And that would be page 227, line 2, to line 15.

THE COURT: What does he say there.

MR. BAILEY: And so I understand that this question is in reference to a video that we have also seen in court over the past few days.

MS. HUTCHISON: It wasn't played in court.

MR. BAILEY: I take that back. Apologies.

THE COURT: What part do you take back. Should I look at that transcript or not.

MS. HUTCHISON: We didn't explain the video but we did play this part of his testimony.

THE COURT: If you want me to look at the testimony you can summarize for me now or read it, your choice. What does it say. I don't remember by that number.

"QUESTION: Okay. So here is what I don't understand. This video appears to be an attempt to get people to walk out of the driveway right.

Correct. I would assume, yes.

"QUESTION: So what is the tactical reason that chemical munitions would then be deployed behind the people that you are trying to get to move in that direction.

"ANSWER: Answer the tactical decision I would assess would be that with the size of the crowd that I was there, if you just push directly from the front, you are just going to -- they are not going to have anywhere to go and it is going to sandwich if the crowd is not -- if there is not movement in the crowd directly behind or adjacent to the individuals you are trying to move."

That was the only portion I identified at this point. I wanted to note it for the record as I remembered it

THE COURT: Thank you.

MR. BAILEY: So as for workability, the deputy regional director of the FPS name Mr. Cantu Federal Protective Service Mr. Cantu the declaration or declaration and he testified that waiting for an imminent threat it removes the ability to escalate earlier And of course his hands on engagement. Sullivan explained as this as well as legal tools are used before a crowd becomes physically dangerous. And commander shaming or the police bureau even he admits that the requested injunction or I guess the request the proposed injunction the TRO injunction is overly broad at least in some respects similarly with Mr. Kerlikowske.

THE COURT: I get that. And if I do issue a preliminary injunction, I will address those issues and address the issues and correct the issues that Mr. Schoening and Mr. Kerlikowske identified. With respect to Mr. Cantu and Mr. Sullivan when I read their declarations before the hearing began, I have got to tell you I was looking forward to hearing their testimony, hearing the cross-examination, which is as you know, the engine of truth. I might have had some questions for them. But so be it. So I have their declaration, I have their deposition excerpts. I will look at them. But I really was looking forward to hearing their testimony both direct and cross and maybe even asking a few questions of my own. But it is what it is.

MR. BAILEY: I understand, Your Honor. We had some difficult litigation decisions to make given the compressed timeline.

THE COURT: And try to do our best but I also want to make sure for the record that you understand and I'll make you. I was willing to accept remote testimony. You know video conference testimony. You understood that, right.

MR. BAILEY: Yes, Your Honor.

THE COURT: All right. You may proceed.

MR. BAILEY: So I would like to -- I don't think we need to pull it up. I have the slide show, Mr. Borden's slide show in front of me. And this is slide to. This has the proposed injunction with the red lines.

THE COURT: Yes let me get that in front of me.

All right. I have got it.

MR. BAILEY: And your Honor, I think it is clear at this point that we don't think any injunction should issue for all the reasons that Mr. Rosenberg gave. But the modification that I see here, it is a step in the right direction. I don't think it goes far enough with respect to OC spray given our conversations, I would just like to draw the Court's attention to how I understand what's here.

THE COURT: Sure.

MR. BAILEY: I do believe. That I'm looking at bum let B, it was my understanding that this is what Commander

Schoening was also addressing. I could be mistaken. But my point is that I understand B to still capture OC spray because it would fall under any weapons. And so I think to the extent the Court is inclined to enjoin an injunction based off of the testimony here, I think that B would need a slight modification or it would otherwise continue to acquire deadly force.

THE COURT: Sure. Let me ask you this question. If you compare B with A, do you see how in A Mr. Borden is proposing that I delete pepper or olio resin capsicum spray. Do you see that.

MR. BAILEY: Yes, Your Honor.

THE COURT: Then B, where it says no enjoined person may fire any munitions or use any weapons (including those described above), firearm including those described above I view that as now not including pepper or oleo resin to pack capacitance spray but I suppose it says any weapons. Would it be consistent with what your position is, although I know your ultimate position is no preliminary injunction. But would it be helpful and solve this problem if I put in some type of parenthetical sentence after B: This paragraph this subsection or subsection B does not include pepper or oleo resin capsicum spray?

MR. BAILEY: I think that might be a helpful clarification to better effectuate the court's intention.

THE COURT: And that makes sense to me And we'll hear

in rebuttal whether there's any objection to that but that makes sense to me.

MR. BAILEY: I think this kind of gets at another aspect of Commander Schoening's testimony that there are challenges with complying with injunctions in the policing context and these sorts of technicalities when officers are considering them under pain and contempt and fast moving situations that are often dangerous, it does pose real obstacles to law enforcement.

I'll also note as we explained in our papers that we don't think the request for -- and I don't see it here on this slide 2. But the request for an identification requirement for an or individual officers -- I don't think there is fully basis for that. As a factual and legal matter we submitted declarations from all three of the components that are the ICE facility here in Portland. They have all testified that officers and agents have identification of their agency as well as numerical identifiers at least on a shoulder patch and separately and independently we don't think that form of relief is sufficiently connected to the actual injury alleged here.

THE COURT: I'll look forward to any comments from plaintiff in rebuttal. And if they agree we don't have an issue. If they disagree I would like to hear why.

MR. BAILEY: One thing, a factual thing I would like it to clarify. I think it was this slide 4 -- apologies --

slide 6, the Portland Police Bureau policy, my friend on the other side was describing how they understand tear gas and what they understand tear gas to mean which can be somewhat of an imprecise term.

And at some point I believe my colleague said FPS doesn't even use tear gas or not even authorized to use it. I understand the plaintiffs to be using tear gas to include the pepper ball launching system and the FN303. I think that's something they said. I want to be clear for the record that FPS is authorized and does trained and deploy their officers if they are sufficiently certified to use the pepper ball launching system and the FN303.

THE COURT: That's the way I heard it too. If plaintiffs agree they can tell me that in rebuttal. If they disagree they can go into that further. And if there's a need I'll give you certain level.

MR. BAILEY: Thank you, Judge. I think at this point unless the Court has further questions on workability, I am happy to answer briefly any questions on class certification.

THE COURT: The only class certification question I have is, would you like to give me your insight as to what the word provisional means in some of these later cases that we have been siege from the Ninth Circuit from the recent decision from judge Chris continue also the reference to provisional certification that we see in the supreme court's decision and

AARP or the Rubinstein treatise. What is provisional mean. I get I cannot weaken the standards or fight under Rule 23. So what does provisional mean.

MR. BAILEY: I think happily we might all be in agreement on this. I think provisional, as I understand the plaintiffs to acknowledge it still requires that the revision of Rule 23 be met. It's helped me to think about this area of law as essentially all class certifications are provisional until final judgments, as any certification of a class may be modified until final judgment. And so for that reason, whether it comes on in day two after the complaint or whether it comes two days before final judgment it is still provisional. Because I'm understanding the agreement as to far as the application of Rule 23's requirements I'm not sure if the label has particular significance here.

THE COURT: And.

MR. BAILEY: Your Honor, the last box I would like to check, given the fulsome briefing, and the fulsome argument we have had, the presentation of witnesses, the consideration of the evidence, I would like to at this point as we also note in our opposition. We request that the Court stay any injunction pending appeal and at a minimum issue an administrative seven solicitor general time to decide.

THE COURT: Let's talk about that for a minute because I'll tell you right now if I grant a preliminary

injunction, I'm not going a full stay. I'm still thinking about the seven day administrative stay. But I don't see how the Government has it shown that you meet the criteria for an administrative stay of likelihood of irreparable harm. I base that on the fact things have been working just fine for 28 days. What's another 7 days? Assume that I issue my decision early next week. Assume that I do enter a preliminary injunction. I absolutely positively will not stay it for the entire course of an appeal. I'm still thinking about whether a seven day administrative stay is appropriate. But I look at the factors and one of the factors is, what, if I don't stay this, there is a risk of irreparable injury to the Government. Well, if I don't stay it for seven days, then -- sorry -- if I decline to stay it for a seven day period, then all that's going to happen is that we have the same thing that we had under the last 28 days with one exception: Under the last 28 days, the federal defendants have been acting under and pursuant and in compliance with my it TRO and nothing bad has happened. I think the TRO expires today. So if I issue a decision and let's assume I issue a decision granting a preliminary injunction of some form let's say early next week, maybe even Monday. Fine they are no longer subject to the TRO, then given that it has worked just fine for 28 days without a problem, why would I need to give them another seven days after Monday to avoid the risk of irreparable injury when there has

been no irreparable injury even close to that for the last 28 days. Your response.

MR. BAILEY: I appreciate the Court's question. I have two reactions. The first one Sure I would just like to say I don't think that it's been established that everybody has been fine at the facility for the past month. From the deposition transcripts that I have had a chance to meaningful review or sit through, I understand that Mr. Johnson and Mr. Cantu said to the best of their knowledge they weren't aware of any injuries occurring to officers or any situation where they had to use chemical munitions. But I think back to Mr. Kerlikowske's opinion that the right thing for the Government to do is just to sit and wait. So this is argument here, Your Honor, as we do not as we did not develop this testimony. It is not our burden to. But I would expect that there has been a lot of sitting around and waiting at the facility while things may be going on because of these restrictions. And our view is that if the Government is effectively enjoined from being able to effectively carry out its obligations that would be irreparable harm.

THE COURT: Although let me respond to that in the form of a question. And it is partially rhetorical, but it is also evidentiary and evidentiary basis, and that is: I get, as Mr. Rosenberg so articulately described, that one of the main purposes -- one of the main needs of the facility there is to

make sure that their cars can go in and out safely and timely. I get that. I assume that if there would have been any difficulty during this 28 day period in which the TRO was operating, that they were having difficulty getting their cars into or out of that facility in a timely fashion, I assume I would have heard about that from some evidence presented by the Government. You all have you all are out standing lawyers. You have done a superb job here. But I assume if you had any evidence that under my TRO that has been going on for four weeks there was any difficulty getting cars in or out in a timely fashion, you would have called the witness and shed showed me that which would be very strong proof that my TRO is not workable because the FPS and the DHS are unable to fulfill their functions but I have not received the evidence of that and I do think it is the proper evidentiary matter to conclude from the absence of that evidence there has been no interference, no problem in getting those cars into and out of the facility in a timely fashion. Therefore or I don't see so what another seven days of living under what will probably be essentially an identical injunctive provision, although cleaning up the pepper spray and the aerial spray issue, cleaning up those issues, I just don't see where the risk of irreparable injury will be for that additional seven day period. That's why if I grant a preliminary injunction, and really against even granting an administrative stay but that's

what I would like you to tell me what I'm missing.

MR. BAILEY: Sure I'm happy to follow up on the first point. I have do have a second more I think significant one that might help explain the emphasis that we have chosen to make in this litigation. Frankly, Your Honor on this highly expedited timeline we had difficult decisions to make about what evidence we want to put on to emphasize. To get back to it I would like to know whether Mr. Johnson has experienced that when he was at the fillets we can and I wish I would have asked him. I don't think it is a fair inference to say that because we have not put on evidence of delays getting there and out of the building or obstructions that everything has been working fine at the building.

THE COURT: But there is plenty of appellate case law that says in the absence of evidence of fact X it is perfectly reasonable for a fact finder to conclude not X.

MR. BAILEY: I understand, Your Honor. I was hoping to get to my second and more important point.

THE COURT: You may.

MR. BAILEY: Go ahead and this is what was emphasized in Mr. Cantu and Mr. Chief Sullivan's declarations The. There is a high risk that exists outside this facility or spontaneous demonstrations or planned demonstrations that could spontaneously turn violent turn into a riot. We don't know what might happen in the world that might precipitate that We

don't know that. So I understand the Court's view that in the past 28 days there have been no problems. Every single day there is a risk that officers protecting that facility are confronted with the very dangerous situation in which they are air forced to decide under the pain of contempt whether they reach the threshold of this Court's injunction to use crowd control devices and crowd control techniques and there is a very real possibility that a situation could escalate and things could get out of control. And that risk every single day, not just seven days is very high.

THE COURT: I guaranty you if someone is engaged in violence or other lawful illegal activity including trespass and if defendants arrest that person and charge them with a crime, whether it be assault on a federal officer or trespass or several other things, if they are engaged in violence or even I am legal behavior and they arrest them for that, that women not be a violation either of the TRO or what I anticipate very likely will be a PI.

MR. BAILEY: I understand, Your Honor. I think the last thing I'll say is that if we were mr. councilors world where officers are in a sit and wait situation with the product type facility because they don't have the resources to go in and make those target address that crowd keeps growing and officers keep waiting, at what point a situation might arise where munitions might need to be deployed, where the missions

that we do deployed or area saturation tactics duty to use or there's a clear and present danger, I can't tell the world with any confidence if or when that will happened but I can tell the court that there's a high risk of it and I think the evidence supports that.

THE COURT: I understand that position but I don't think a seven day window makes a difference. I understand that's going to be an argument if we're go in this direction But why there should be a stay pending full appeal. But I just don't see that a supporting an administrative stay that way would last seven days. Go ahead.

MR. BAILEY: So I hope really the.

(The last question was read in open court.) last thing I have we would ask you if you decide to deny a stay pending appeal that we have that on the record.

THE COURT: Absolutely. If I go that direction it will be in the written order with an explanation.

MR. BAILEY: Thank you.

(Recess.)

THE COURT: Plaintiffs' rebuttal.

MS. HUTCHISON: Thank you.

First, I'd like to clear up the representations made about why these dates were focused on and the limited discovery that was available. You have in support of our motion to compel an email exchange that reflects that plaintiffs offered

57 slots for depositions. The Government offered eleven deponents, three of which were firm on Friday. We focused on the nine dates at that request and obviously the testimony that we have shown is selective. But we have entered it 0 all for you to look at.

THE COURT: I'm not worried at that issue at all. Here is what I would like you to address. I think defendants are probably right that there were many days where there were protests but no munitions -- chemical munitions used. Assuming that if you agree with that, if you disagree with that, you can tell me. If that is correct, what's the relevance, if any, of that fact.

MS. HUTCHISON: And I think we covered this in my first closing, Your Honor, where the relevance of that fact goes to the unpredictability and it goes to the fact that this was in compliance, trying to get individuals to stay away, knowing that at any point chemical munitions might be fired. And that turns to actually the warnings that they referred to. The Government's closing indicated that there were warnings that chemical camera munitions would be used. Now I think when you look at Mr. Cantu's testimony he does not think that was the LARD warning that was being used. I want to read into the record the only warning of the three that mentions chemical munitions. The exact language used. It says: Be advised that any individual who engages in imminently dangerous behavior or

actions directed at federal law enforcement officers or others may be subject to the use of chemical or impact munitions in addition to detention or arrest as authorized by law.

THE COURT: Where do I find that in the record.

MS. HUTCHISON: That's Mr. Johnson's testimony.

THE COURT: What page?

MS. HUTCHISON: He read all three of the warnings in order.

So even the LRADs that were given were not talking about area dispersal or chemical munitions that might affect others.

I would like to address their point about the training that was received that the government suggested now that First Amendment training was received by everyone when you look at the full deposition testimony, you will see the referring to and we will training for the most part that there is some annual training that includes the first amendment.

Specific testimony from FPS officers indicates that the training that they received on the ground in operation Skipjack was specific to the use of force. That's in MB's testimony who said when asked to tell in as much detail as he could what specific Portland assignment training was, but it was an hour long class on the use of force.

Now CBP Sullivan, when asked about First Amendment training said -- the question was what do you recall remember

what was said about those First Amendment protections. The answer: I think essentially that they -- you know, the First Amendment protections exist. Other than that, I don't remember anything specific.

When given the opportunity to recall if there are any other details, he said, I don't recall.

When asked if agents had any materials they could refer back to, he said there was nothing issued to us.

So the training for operation Skipjack was not about the First Amendment that was other training.

Finally -- we have the LARD reading. It is at transcript page 105.

THE COURT: Say that again.

MS. HUTCHISON: Transcript page 105 starting at line 21.

THE COURT: Thank you very much.

MS. HUTCHISON: It goes through to the next page. Thank you.

Finally, we thought about your questions about redressability, Your Honor. We really have two answers to that. The first is, as I think you were sort of suggesting, that lead canon of absurd results. Now there's plenty of case law that says individuals who are class members don't have to independently satisfy the requirements of showing redress ability.

But let's think about what happens if people who experienced the worst out of the government's treatment would lose their standing in a lawsuit like this. It would encourage the government to behave in the most egregious behavior to avoid any kind of accountability in a civil case, That is an absurd result. I'd also like to point to the more specific testimony that Ms. Barkowski said that led to this question and she was the one I think everyone in the room palpably felt how the effect on her was given her great hesitation about ever returning to that nice building And we were sort of talking about that as a determined fact that she would never go back to be actual words were When asked if she would ever return with guarantees: Honestly probably not. It is really difficult for me to even drive by there. It is just -- you know, I'm so tired and it was such a painful experience. I can't. I don't think I can put myself back there regardless.

That sort of caveated language is indicative of someone who is really feeling the emotional impact of what she felt. It is not saying that there is no way that she would ever go back there and an injunction wouldn't help her to recover from this and to participate in the First Amendment activity that means so much to her. I think her prior it p testimony really shows how much she believes in these issues. And I'm hopeful that if Your Honor can create a permanent injunction that shows that people can be safe when they go

there, that people like Helena will see that and women feel again the freedom that this country is supposed to give to every person to express their disagreement with the government.

We don't celebrate harm to anyone -- members to the public or law enforcement officers. Our class definition is limited to those who protest none violently. Perhaps there will be less violence against law enforcement officers consistent with the terms of the preliminary injunction as the law officers testified predicted that with less chaos, there could be less conflict and less harm to everyone.

And truly my final point before I turn it to Mr. Borden, it is their burden to show that there is irreparable harm without a stay. We really do need this preliminary injunction today because of exactly what Your Honor recognized is the expiration of the TRO and I know that is an extremely deadline to ask of the Court but I would be doing a disservice to our clients if we didn't make the request. We do believe that this protection is needed.

THE COURT: I understand. I got confused by one thing you just said. I think it is plaintiffs' burden in a motion for a preliminary injunction to show a likelihood of irreparable harm absent a preliminary injunction. If I grant a preliminary injunction, then it would be defendant's burden to show a likelihood of irreparable harm if a stay, including an administrative stay were not to be issued. Do you agree.

MS. HUTCHISON: That's what I was inartfully saying.

THE COURT: Wait a minute. Either you or Mr. Borden can address this. You can pass it on to him if you want. But I'm curious about the rebuttal it to Mr. Bailey's point about the alphanumeric codes. I'll got to tell you I accept the representation that it's on their shoulder Patches but when I looked at the videos and I looked at the still pictures, I did not see visible and conspicuous alphanumeric code to these officers. I'll accept them It's on their shoulder patch, But I don't think it's the sort of thing that people can see. So is it necessary for this preliminary injunction, would it be helpful for this preliminary injunction, if so, why, And keeping in mind that I think that might be a mandatory and injunction subject to a higher standard. Tell me why you think if it is necessary why it satisfies that standard then you can either handle that or pass the baton your choice.

MR. BORDEN: So maybe I'll do a little of both like a relay race. That is the reason why we requested the identification. Obviously it was rolling discovery but from all the videos we have seen it is very difficult for us to see the identification that they purport is required and maybe and I don't know. Why it could be the equipment they are wearing. That's why we asked for it. The reason we haven't focused on it in this hearing is because frankly I do think that's very important for enforcing an injunction but it is not an

emotional and physical harm in the same way as the chemical munition so we did wanted to use our limited time to focus on those terms.

THE COURT: But we do still think it's do you agree though that if I were to affirmatively order that, that would require the burden of prove needed for a mandatory in junction.

MS. HUTCHISON: I'll pass my baton now, Your Honor.

MR. BORDEN: Thank you, Your Honor. I agree that with the things that Ms. Hutchison just said. That's why we asked for it. And it also looks to us from the videos and images that they have the ability to Velcro these things sort of on and off. And if they could make a bigger one, I think it would be a lot easier for everybody to see who they are. I think it has some purpose for accountability beforehand in addition to the sort of post hock who did somebody do something wrong. But in terms of it being mandatory or prohibitory, those are -- are they prohibited from not identifying themselves in big enough letters, I think there are a lot of different ways to think about it. But I think the idea behind it is good and it is not one that we are -- it is one that we still want as part of the relief. It is secondary to the bigger harms that we are talking about, protecting people from physical harm, protecting people from being terrorized there when he they go to protest.

THE COURT: I mean I was thinking about the videos or

the stills that we saw of the person just walking right up to a person who was holding a sign or maybe sitting and trespassing but sitting quietly and spraying them right in the face. I think that might not happen if they had very distinct, number at least numbers on their chest so everybody knows that officer 123 just did that and that could either be reported up to their supervisors, reported up the chain even before lawsuits are filed. I think that might serve a very important purpose.

MR. BORDEN: I do. But if you recall, Your Honor, that officer we took his deposition, the person who did the spraying. He testified that he was doing exactly what he was trained to do. His report went up to his superiors. It was reviewed all the way up to the top. So --

THE COURT: I understand but they did not have the benefit at that time of the TRO or what might be a PI.

MR. BORDEN: Absolutely.

I guess there is one -- now I want to turn to the thing that my friend raised about the -- not spraying chemical OC spray to the face. I think if you modify the language in our proposed part B -- and this is -- the first slide entitled proposed injunction that you have in front of you. So it says no enjoined person may fire any munitions or use any weapons. And you could just say described in part A at the head, neck, or torso because part A is being modified to exclude pepper spray.

THE COURT: Right.

MR. BORDEN: So I think that's the workaround for that issue. I mean in terms of workability, I didn't really hear that much more to respond to. But to Your Honor's point, there has been a pattern of retaliation here and there has been no explanation from the other side, where is the person who came to this hearing and said, you know, I shot Ms. Eckman in the head. I am a highly trained marksman but it was a mistake. Who is the person who came here and apologized. Where is the person who came here at all. And I think that's an important thought in terms of our takeaways on retaliation. Thank you.

THE COURT: Any surrebuttal within the scope.

MR. BAILEY: Yes, Your Honor briefly.

THE COURT: Of course.

MR. BAILEY: On this identification piece, as Your Honor may recall from the index newspapers litigation there are tremendous complexities associated with changing law enforces uniform these are specially designed is certainly not as easy as just slapping on any patch.

THE COURT: Fair enough. Do you know what I did in index newspaper I basically directed the parties to confer present a joint proposal of the court within a certain number of days If they couldn't agree they could each present their own proposals and then I deal with it that way And my recollection is they worked out an agreement.

MR. BAILEY: So your Honor I think of course if the court enters a pie to comply I think if there were any potential compliance issues I'm sure you made aware of that and so that's what I proposed at that point we could confer and figure out how to move forward with.

THE COURT: Makes sense.

All right. Is it called is your-surrebuttal.

MR. BORDEN: I'm sorry. One more point. I neglected to mention it when I was up here before. It goes to the stay. I think we would like the opportunity to be heard before there is any ruling on a stay so that we can see the contours of the order, see what they are asking for and see if there is -- at least have the opportunity to be heard before anything would be stayed in terms of protecting this class.

THE COURT: Well let me ask defense counsel on this and we will put it in a hypothetical. But if I enter a preliminary injunction and give that say on Monday, you can very quickly file a motion for a stay including an administrative stay as fast as you want. I would then give the plaintiffs one business day to respond. Then I'll rule the very next day. Does that give you sufficient protection?

MR. ROSENBERG: I think Your Honor, as you know, the decision on whether to appeal and whether to seek a stay pending appeal is a decision of the solicitor of the United States. As I understood what the Court previously said,

if it is going to enter a preliminary injunction, notwithstanding our request for a stay pending appeal, it intends to deny our motion for a stay pending appeal.

THE COURT: Well, I did he definitely would deny a stay pending appeal. But I haven't made a final decision on if I go that route is a seven day administrative stay.

MR. ROSENBERG: I think we have set forth our arguments regarding an administrative stay as well. They basically overlap with the arguments that we have made in opposition to plaintiffs' preliminary injunction motion. We don't have an objection if plaintiffs wish to file a supplemental brief.

THE COURT: Let's do this. Mr. Borden will this satisfy your interest?

MR. BORDEN: Obviously if I even deny in writing in the order an administrative stay, you don't need to file anything, right.

That would be true. Yes, Your Honor.

THE COURT: And I'm not going -- if I do issue a preliminary injunction, I'm not going to stay it pending full appeal.

If I decide to stay anything, it would only be for the seven days. Why don't up just file in writing by tomorrow -- frankly by tomorrow, by midnight tomorrow night anything you want me to think about if you want me to think

about why I should deny an administrative seven day stay.

Then defendants can respond by midnight on Friday night if they want you to, if there is anything you want to do. Would that satisfy your needs.

MR. BORDEN: Can I beg you for an extra day.

THE COURT: Yes. File it by the end of the day Friday. But I will tell you, on as of right now, I don't see the point in even doing an administrative stay for seven days, because I just don't see how they have satisfied the legal requirement of likelihood of irreparable harm by the entry of a PI.

MR. BORDEN: I agree with you.

THE COURT: Then there is no need to file anything.

MR. BORDEN: Well, maybe that's the case. But you know -- and you are right. The burden flips onto them under McCann. I want to make sure that we have the opportunity to be heard on the stay issue before any kind of decision that could adversely affect us would be made.

THE COURT: Why don't we do this. If I deny the administrative stay, it won't adversely affect you. If I grant the administrative stay and I will do it Monday morning. Very promptly file a motion for reconsideration on that point.

MR. BORDEN: Okay.

THE COURT: Then we will seep where we go. I don't know how quickly solicitor general would want to make decisions

but they have got other things on their plates too. We women see about that. Anything further.

MR. BORDEN: No, Your Honor. Thank you.

THE COURT: I do want to address Ms. Hutchison's point. If I'm hearing you correctly. You want me to orally grant the motion for preliminary injunction now with an opinion to follow. But the defendants have made a very fair point it that a lot of new information has come in today. They have given me the cites in their illustrative aid and in all fairness I want it give both sides a it full and fair hearing, so I'm not going to orally rule right now.

You have heard, and I'm really not I'm not that subtle about this. Up heard where I'm leaning I think different issues. But I want to be thorough and fair and give the defendants a fair read of what they want me to additionally consider. I have read all of your briefs and many of the exhibits before. But the new things that are coming in today I have not looked at obviously. So I'm going to be issuing a decision probably no later than Monday, maybe earlier but probably not. But no later than Monday. And I think that defense counsel are wise enough that they will be advising their client that even if there is no temporary restraining order in place as of the end of tonight, so there is no temporary restraining order in place Thursday, Friday, Saturday, and Sunday, it would be very unwise in the future of

this litigation, because this litigation is not done with. We still have a lot of other claims. We still have additional possibilities to modify a preliminary injunction, if one gets issued or to do other things with it. It would be very unwise, I would think to do something in the next four days that they haven't needed to do in the last 28 days. And if they do something inappropriate, I would be open to a motion from the plaintiffs for an evidentiary hearing on why did you do that in 48 -- in the last four days when you hadn't needed to to something in the last 28 days. They would not have the risk of contempt hanging over them because the total expires at the end of today. But if they do something in the next four days that would otherwise be prohibited by the TRO, I would find it fascinating to understand why they felt they needed to do it. I would be open to opening the evidentiary record on this motion to take that into consideration, and unless they had a darn good reason why they did something like that, I think that would be a very strong evidence of retaliatory animus that would be used against them in many different ways, even if they don't have the risk of a contempt citation hanging over them. So for that reason I'm denying the request to orally move right now. Do you have the right to -- federal courts are open 365 days a year, 24 hours. You have a right to file a motion it to have me reconsider that if something bad happens and there is a need for that and I'll act very, very promptly. But I just

don't think that's the right thing to do now given that there has been some additional evidence submitted today. I request that consider it before making a final decision. I think that's the right way to proceed.

MS. HUTCHISON: I certainly respect Your Honor's reasoning and I'm grateful for you saying it for the members of the public. I would be remiss if I wouldn't ask the Court to ask an extension of the temporary restraining order until such time as you enter and order on this motion for.

THE COURT: I'm staying out of that discussion. You may ask them they may answer. I'm staying out of.

MR. BAILEY: We do not.

MS. HUTCHISON: All right.

THE COURT: I take it you heard what I said that if they move to reopen this hearing for an evidentiary hearings to find out what just happened and why did it happen, I will want to be granted that and ordering witnesses to appear and giving explanations. You understand that.

MR. ROSENBERG: We understand everything the Court has just explained.

THE COURT: I have no doubt. On this matter the most the two pending motions. The motion for preliminary injunction and the motion for provisional class certification are taken under advisement. I will get a decision out no later than Monday morning and I again commend all of the lawyers in this

case, and the technical assistance for very competent and professional advocacy. You have all done an excellent job of zealously and professionally representing the interests of your respective clients. It hasn't made my job any easier, but to some extent I really appreciate the professionalism that you all have shown. Again I appreciate the participation of the two counsel for the amicus, 0 for the State of Oregon and for the City of importantly. This matter is under advisement have a good day everyone.

(Court adjourned.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/ Dennis W. Apodaca *** DATE
DENNIS W. APODACA, RDR, RMR, FCRR, CRR
Official Court Reporter

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