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7 Attorney for Plaintiffs
8 Mandy Lien and Erin Smith

9 UNITED STATES DISTRICT COURT

10 SOUTHERN DISTRICT OF CALIFORNIA

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13	MANDY LIEN, an individual; and) Case No. 21-CV-00224-MMA-WVG
14	ERIN SMITH, an individual;)
15	Plaintiffs,) Judge: Hon. Michael M. Anello
16) Magistrate: Hon. William V. Gallo
17	v.) DECLARATION OF ATTORNEY
18	CITY OF SAN DIEGO and) BRYAN PEASE
19	DOES 1-25;)
20	Defendants.)
21)
22)

1 I, Bryan Pease, Esq., declare:

2 1. I am an attorney licensed to practice before all federal and state courts in
3 California and am attorney of record for Plaintiffs in the above-captioned case. I state the
4 following of my own personal knowledge.

5 2. On January 9, 2021, which was three days after the Capitol Insurrection in
6 which supporters of Donald Trump launched a narrowly failed coup to stop the peaceful
7 transfer of power in Washington, D.C., alt-right insurrectionists held a violent protest
8 march in San Diego facilitated by the San Diego Police Department (SDPD).

9 3. In discovery, Defendants produced a special bulletin from the San Diego
10 County Sheriff identifying a “subject of an ongoing Joint Terrorism Task Force
11 Investigation” who was seen throwing “an unknown burning munition canister (likely
12 military type smoke, CS, or CN grenade)” from the “Pro-Trump” side of the police line
13 at the counter-protester group to the north, of which Plaintiffs were a part.

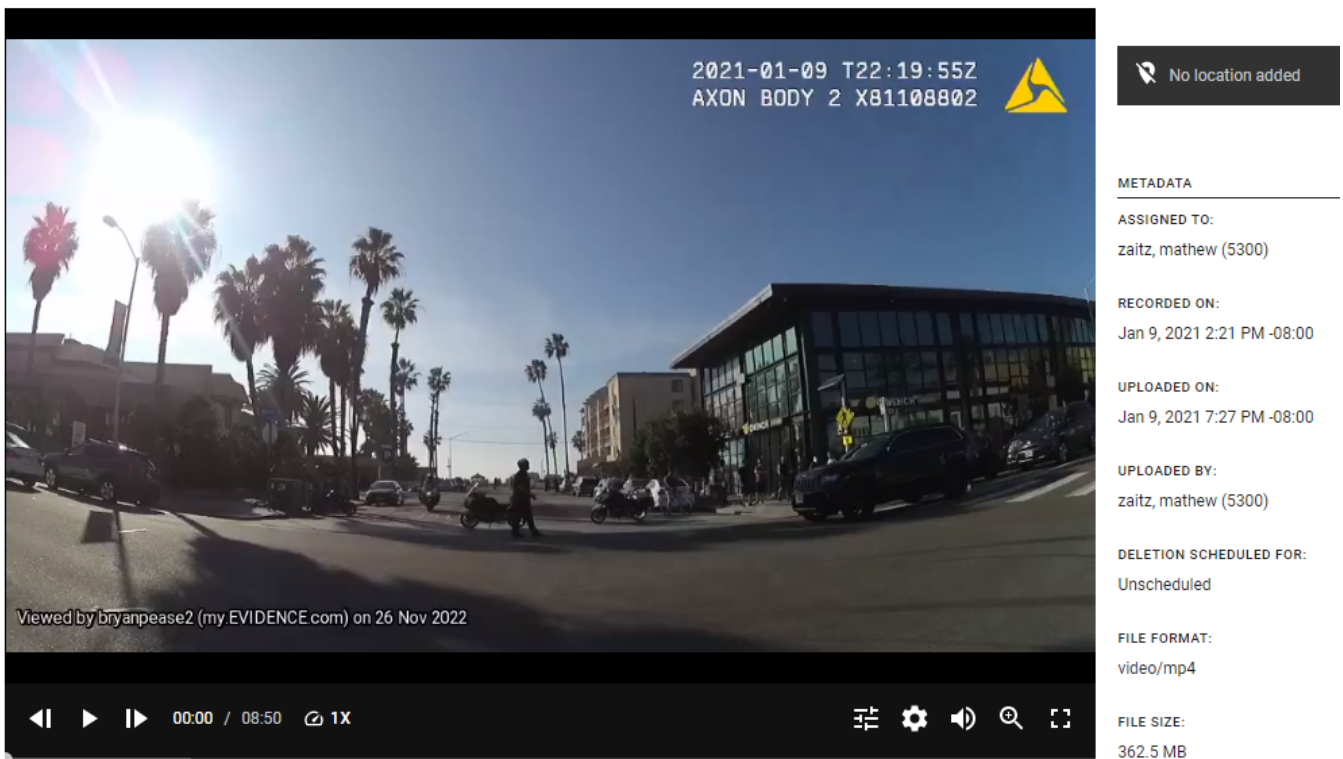
14 4. Defendants redacted the name of this individual and prevailed in a motion
15 to compel brought by Plaintiffs to release the name. In opposing the motion, Defendants
16 filed the document with the Court. (ECF No. 31-1, p.8.)

17 5. Nonetheless, Plaintiffs have learned the identity of this individual through
18 other sources. His name is Chad Alvarez, as seen in the San Diego Union Tribune article
19 attached hereto as Exhibit 1. Alvarez is a 47-year-old man from Lakeside who was
20 featured on a San Diego County website teaching a fishing class, until it was noticed that
21 he was wearing a t-shirt expressing support for “an outlaw White Supremacist biker
22 gang,” as explained in the article.

23 6. The Sheriff’s bulletin states that Alvarez fled on foot after throwing the
24 smoke bomb. This is incorrect. He remained the entire time behind the police line,
25 occupying the south side of Mission Boulevard with other insurrectionists, with full
26 police protection after throwing his smoke bomb, and long after police declared an
27 “unlawful assembly” at the same intersection, which police only applied to the pro-
28 democracy marchers on the north side of the intersection, of which Plaintiffs were a part.

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2 7. Defendants provided 402 police bodycam videos from this event in
3 discovery.

4 8. Lodged as Video Exhibit A is a true and correct copy of the Matthew Zeitz
5 bodycam video from 2:21 p.m. The timestamp in the upper right of the video shows it
6 starting at “T22:19:55Z.” However, the evidence.com system on which SDPD maintains
7 these videos and provided the videos to me shows it was recorded at 2:21 p.m. A true
8 and correct screenshot of the beginning of the video in the evidence.com system
9 showing the timestamp as well as the actual “recorded on” time is below:



24 9. Thus, the 22:19:55 timestamp is approximately 7 hours and 58 minutes
25 ahead, as it should read 14:21:55 for 2:21 p.m.

26 10. At 2:23 p.m. in this video, the alt-right insurrectionists can be seen taking
27 over the middle of the intersection of Mission Boulevard and Hornblend in Pacific
28 Beach, wearing bulletproof vests, furling up their flags to do battle, and brandishing the

1 flag poles as weapons. A true and correct screenshot of this scene is below:



16 11. Also in the middle of the intersection is Chad Alvarez, the smoke bomb
17 thrower, wearing a blue shirt and bulletproof vest, seen in the below screenshot also
18 from 2:23 p.m. in the same video, walking past a police officer standing next to a police
19 motorcycle stopped in the intersection:
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12. In the next minute of the same video, at 2:24 p.m., Alvarez can be seen walking south on Mission toward the spanning line of police, who are facing south toward the approaching pro-democracy protesters, who were there to protest the alt-right insurrectionists marching in Pacific Beach to overturn the 2020 Presidential Election, of which Alvarez was a part.

13. I have circled Alvarez with a red circle in the screenshot on the next page, showing him walking toward the police line and about to throw a military grade smoke bomb at the pro-democracy protesters:

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14. In the two screenshots on the next page, also at 2:24 p.m., Alvarez can be seen standing next to the police line and throwing the smoke bomb at the pro-democracy protesters. I did not make any markings on these screenshots. The smoke bomb thrower is directly below the arrow in the yellow pedestrian crosswalk sign.

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1 15. The Sean Harn bodycam video starting at 2:22 p.m. shows the same scene.
2 A true and correct screenshot of the beginning of the Harn video from evidence.com
3 showing the beginning timestamp of “T22:20:11Z” and the “recorded on” time of 2:22
4 p.m. is below:



20 16. Thus, the timestamp on the Harn video is similarly 7 hours and 58 minutes
21 behind the true time.

22 17. A true and correct copy of this video is lodged as Exhibit B.

23 18. At 2:24 p.m. in the Harn video, the smoke bomb just thrown by Alvarez at
24 the pro-democracy crowd can be seen sailing through the air with a cloud of green
25 smoke behind it, and landing on the ground in front of the pro-democracy crowd. On the
26 next page are two screenshots from the Harn video showing this, in which I have drawn
27 red arrows pointing to where the smoke bomb is in these screenshots.
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1 19. The Samuel Garcia bodycam video starting at 2:23 p.m. also shows Alvarez
2 next to the police line, with Lt. Scott walking back and forth directing the police line and
3 walking right past Alvarez while doing nothing.

4 20. A true and correct copy of the Garcia video is lodged as Exhibit C.

5 21. A true and correct screenshot from the beginning of the Garcia 2:23pm
6 video from evidence.com showing the timestamp in the video beginning at
7 “T22:21:15Z” is below:



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24 22. This video also has location information, which not all of the videos have,
25 and shows the location as the corner of Mission and Hornblend.

26 23. The timestamp in the video of “T22:21:15Z” and the “recorded on” time
27 listed of 2:23 p.m. shows that this video is also timestamped 7 hours and 58 minutes
28 ahead of the actual time.

1 24. For several seconds prior to throwing the smoke bomb, Alvarez can be seen
2 pacing back and forth menacingly right next to the police line, with another alt-right
3 insurrectionist wearing a motorcycle helmet and brandishing a furred-up flagpole, as
4 seen in the below true and correct screenshot from the Garcia video:



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20 25. Thirty seconds later, Lt. Scott walks right up to Alvarez and other alt-right
21 insurrectionist and does nothing, simply continuing to direct the police line to space out
22 a certain way as the pro-democracy crowd approaches, as seen in the true and correct
23 screenshot on the next page:

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26. Five seconds after Lt. Scott walks right past, Alvarez launches the smoke bomb at the pro-democracy crowd approaching, as seen in the below true and correct screenshot from the Garcia video:



1 27. The green smoke trail can be seen crossing the palm tree in the foreground
2 and landing, in the below true and correct screenshots from the same video:
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1 28. Six seconds later, a cloud of smoke from the smoke bomb blows back at the
2 line of officers:



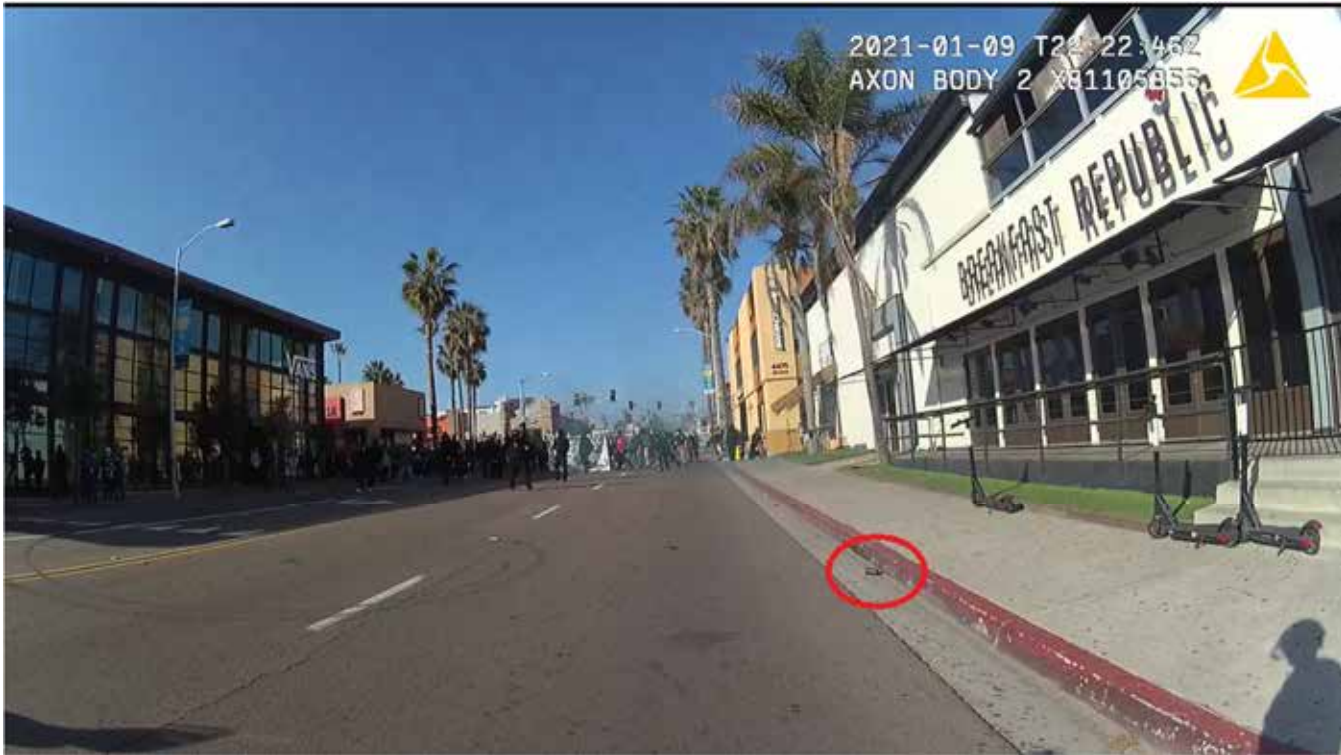
17 29. Six seconds after that, police simply kick the empty cannister to the curb, as
18 seen in the screenshot on the next page in which I have circled the cannister with a red
19 circle right after it has been kicked back by the officers:

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30. The cannister then lands at the curb as seen below, again circled in red:



1 31. The Thomas Cairns bodycam video has a good view of what happens next.
2 A true and correct screenshot of the beginning of the Cairnes video is below:



19 32. The timestamp of “T22:13:32Z” at the beginning of this 2:15 p.m. video
20 again shows the timestamp on the video is 7 hour sand 58 minutes ahead of real time.

21 33. Lodged as Exhibit D is a true and correct copy of this video beginning at
22 2:25 p.m.

23 34. From 2:25 through 2:26 p.m., this video shows the alt-right insurrectionists
24 lined up in the middle of Mission Boulevard wearing tactical gear, carrying unfurled
25 flags on flag poles like weapons, and pacing back and forth menacingly, screaming
26 “fuck Antifa” and gesturing. True and correct screenshots of this scene from the Cairns
27 video are on the next two pages:
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35. Cairns then turns north and faces the approaching pro-democracy group. A true and correct screenshot of the pro-democracy crowd at 2:27 p.m. is below:



1 36. The pro-democracy crowd is entirely peaceful as it approaches. Other than
2 someone on that side having tossed the empty smoke grenade cannister back three
3 minutes earlier, there is nothing at all being thrown from the pro-democracy side.

4 37. The Erik Skyhar video from 2:24 p.m. shows the munitions team arriving
5 and pointing pepperball guns at the peaceful protesters from behind the police line, as
6 seen in the below screenshot:



21 38. At 2:27 p.m., based on the menacing police formation and SWAT elements
22 with pepperball rifles forming behind the spanning line of riot police, the pro-democracy
23 side voluntarily retreats north, as seen in the Cairns video and below screenshot from
24 2:28 p.m., viewed from the exact same location as the screenshot on the previous page:



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15 39. There has been no announcement or communication at all from police that
16 anyone needed to disperse at this point. The crowd simply does not want to be attacked
17 or pepperballed by SDPD.

18 40. However, after police keep a spanning line of police across Mission
19 Boulevard at Hornblend, and allow the alt-right insurrectionists to continue taking over
20 the entire CVS parking lot and south end of Mission, the pro-democracy side reasonably
21 believes it can return to protest on the north side of the same intersection, with spanning
22 lines of police separating the two sides. Thus, the pro-democracy side returns to the
23 police line, as seen in the below screenshot from the Cairns video at 2:31 p.m.:



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15 41. Again, nothing has been thrown from the pro-democracy side. This can
16 clearly be seen in the Cairns video facing them the entire time. The crowd is entirely
17 100% peaceful and is simply voicing their displeasure with the police allowing alt-right
18 insurrectionists to take over an entire intersection.

19 42. At 2:35 p.m. in the Andres Sanchez video, Alvarez the smoke bomb
20 thrower can be seen standing next to the sleeveless shirt, bulletproof vest, MAGA hat
21 man still taking over the south side of the intersection, with another insurrectionist in the
22 right side of the frame wearing a motorcycle helmet and brandishing a furled-up flag on
23 a flagpole, as seen in the true and correct screenshot on the next page:
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13 43. A true and correct copy of the Sanchez video is lodged as Exhibit F.

14 44. At 2:36 p.m., police make the first unlawful assembly announcement using
15 a small megaphone pointed only at the pro-democracy side, causing this group to
16 become very vocal, but again not at all violent, as seen in the Cairns video. They remain
17 100% peaceful. Nothing is being thrown or has been thrown by this side at all at this
18 point, other than having returned the empty smoke grenade cannister 12 minutes earlier.

19 45. This unlawful assembly announcement directed at *only* the peaceful pro-
20 democracy side that had just had a smoke grenade thrown at it by the violent
21 insurrectionists still right behind the police line—who were at that moment brandishing
22 furred up flags on flag poles as weapons and pacing back and forth menacingly and
23 screaming while taking over an entire intersection and parking lot with full police
24 protection—violated Plaintiffs’ First, Fourth, and Fourteenth Amendment rights as well
25 as Cal. Civil Code §§ 51.7 and 52.1.

26 46. A true and correct copy of the Michael Rundgren bodycam video is lodged
27 as Exhibit G.

28 47. The full video began at 2:25 p.m., as seen in the below screenshot from

evidence.com showing the “recorded on” time:

2021-01-09 T22:23:24Z
AXON BODY 2 X81070990

Viewed by bryanpease2 (myEVIDENCE.com) on 26 Nov 2022

00:00 / 19:22 1X

1m 3m 5m 7m 9m 11m 13m 15m 17m

Location data begins at 00:02:02

METADATA

ASSIGNED TO:
Rundgren, Michael (7985)

RECORDED ON:
Jan 9, 2021 2:25 PM -08:00

UPLOADED ON:
Jan 9, 2021 7:58 PM -08:00

UPLOADED BY:
Rundgren, Michael (7985)

48. Based on the video timestamp and the “recorded on” time in evidence.com, the timestamp on this video is 7 hours and 58 minutes ahead, just like the others.

49. At 2:36 p.m., which is exactly the same time police were making the “unlawful assembly” announcement directed at the pro-democracy crowd to the south, the same sleeveless shirt, bulletproof vest, MAGA hat wearing insurrectionist seen before is still standing with the other insurrectionists directly to the north of the police line on Mission, pointing and yelling “me and you, over there,” over and over, pointing to someone on the pro-democracy side repeatedly and then to a side street where he apparently wanted to fight this person. Police facing him just feet away do nothing.

50. A true and correct screenshot of this is on the next page:

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51. The Sanchez video at 2:36 p.m. also shows the smoke bomb thrower and other alt-right insurrectionists pacing menacingly on one side of the police line while the unlawful assembly announcement is being given to the other side.

52. The announcement itself states it is directed toward “all those assembly at Mission and Hornblend.” However, the police are only directing it at the pro-democracy protesters. They are not applying it to the many bystanders at the corner outside Breakfast Republic, or to the insurrectionists directly behind them, as seen in the screenshot on the next page from the Sanchez video at 2:36 p.m.:

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53. Police then tape off the street to delineate that people on Hornblend to the north of Mission are fine, but they will be dispersing any pro-democracy protesters who remain on the north side of Mission, as seen in the screenshot on the next page from 15 seconds later:



54. Importantly, the unlawful assembly announcement included a threat to use chemical weapons on the pro-democracy side if it remained. This is heard on the Deshney Allahwardy video. “If you refuse to move, chemical agents and other weapons will be used.” (T22:35:00Z).

55. A true and correct copy of the Allahwardy video is lodged as Exhibit H.

56. The announcement can also be heard at 2:36 p.m. in the Francisco Ortiz video, who is facing the alt-right insurrectionist side, who do not move at all.

57. A true and correct copy of the Ortiz video is lodged as Exhibit I.

58. This constituted a threat of physical violence due to political identification as well as to force the pro-democracy side to stop exercising its First Amendment rights, in violation of Cal. Civil Code §§ 51.7 and 52.1, as well as 42 U.S.C. § 1983, as it was only being directed at the pro-democracy crowd despite this crowd being entirely peaceful, while not applying it to the alt-right insurrectionists who were making threats right on the other side of the police line and had just hurled a smoke bomb at the pro-

1 democracy side minutes earlier.

2 59. At 2:37 p.m., the pro-democracy side then *fully complied*, apparently
3 actually believing that the police would be dispersing *both* sides and not just their side,
4 even though only the alt-right insurrectionist side had acted violently by throwing a
5 smoke bomb at them. The duration of the Cairns video is the pro-democracy side
6 peacefully walking away to the north without incident.

7 60. The below screenshot at 2:37 p.m. shows the pro-democracy side retreated:



22 61. Thus, the Cairns video shows, from start to finish, the alt-right
23 insurrectionists violently posturing and screaming obscenities (2:25 p.m.), the pro-
24 democracy side approaching at the same time and then voluntarily dispersing two
25 minutes later, then returning two minutes after that (2:29 p.m.), the unlawful assembly
26 announcement being made (2:36 p.m.), and the pro-democracy side fully retreating one
27 minute later. The Cairns video also shows the pro-democracy side remaining entirely
28 peaceful and nonviolent this entire time.

1 62. At 2:38 p.m., after the pro-democracy side has fully complied with the
2 dispersal order, the alt-right insurrectionists are still taking over the entire south side of
3 the intersection, with the police line protecting them. This can be seen in the Michael
4 Rundgren bodycam video. In the below screenshot at 2:38 p.m., one of the alt-right
5 insurrectionists standing in the middle of Mission Boulevard directly behind the police
6 line that had just dispersed the pro-democracy side is wearing a t-shirt that says “Fight
7 like a Flynn,” referring to disgraced former military general, traitor to the United States,
8 Q-Anon conspiracy theorist, and election denier Michael Flynn:
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23 63. Once the pro-democracy side had dispersed, the insurrectionists begin
24 singing the Bananarama hit song, “Na Na Na Na, Hey Hey Hey, Goodbye,” while
25 continuing to pace back and forth across Mission Boulevard menacingly with their
26 furled up flagpoles, as seen at 2:38 p.m. in the Rundgren bodycam video.

27 64. At 2:40 p.m., police tape off the south side of Mission Boulevard, allowing
28 the alt-right insurrectionists to continue taking over the CVS parking lot and the entire

1 span of Mission Boulevard south of Hornblend:
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16 65. The City also provided aerial footage from the police helicopter, but it
17 focuses entirely on the pro-democracy side, not showing the alt-right insurrectionist side
18 of the intersection at all except for two split second frames. One such frame is on the
19 next page, taken at 2:40 p.m., corresponding with the above photo of the south side of
20 Mission being taped off for the insurrectionists, while police in riot formation face north
21 toward the pro-democracy side that has already complied with the unlawful order and
22 dispersed:
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66. In the above screenshot, Hornblend is running vertically, with up being west, and Mission is running horizontally with left being south. The edge of the CVS parking lot and CVS sign can be seen in the lower left.

67. At 2:41 p.m., one minute after the above screenshot, Defendant Captain Novak can be seen and heard on the Adams video instructing Defendant Lt. Rick Aguilar to have the line of riot police march forward, and “just go 15 to 20 yards, then stop.” A true and correct copy of the Adams video beginning at 2:25 p.m. is lodged as Exhibit J.

68. The line of riot police then begin marching north, toward the pro-democracy crowd that has already dispersed, and allowing the alt-right insurrectionists to remain at the same intersection to the south.

69. At 2:44 p.m., Adams turns around briefly, so that at this moment, both the pro-democracy side that has dispersed to a block away can be seen, juxtaposed with the alt-right insurrectionists to the south, who have not been moved at all, with police having

1 taped off Mission Boulevard for them to take over the whole area with their
2 insurrectionist signs and flags, can be seen just seconds apart:
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1 70. At 2:47 p.m., with the pro-democracy side having completely dispersed, the
2 riot police begin to peel off the spanning line that had been facing north, and turn around
3 and walk back south, as seen in the below screenshots from the Adams video:



1 71. As the alt-right insurrectionists are being allowed to continue demonstrating
2 at the same intersection, the pro-democracy demonstrators return again, and the line of
3 riot police again faces them.

4 72. At 3:05 p.m. in the Sanchez video, the alt-right insurrectionists can be seen
5 still completely taking over the south side of Mission and CVS parking lot, being
6 allowed to stand on utility boxes, and waiving Trump and “Fuck Joe Biden” flags in the
7 middle of Mission Boulevard:



22 73. At this same time, police on the north side have pushed up a block and are
23 readying yet another unlawful assembly announcement directed at only the pro-
24 democracy side, as seen in the Adams video.

25 74. At 3:08 p.m., a commanding officer asks Adams if he has the unlawful
26 assembly announcement. Bryant hands it to him.

27 75. At 3:10 Adams finally moves up to the line and announces again.

28 76. At 3:11, they talk about the volume of Adams’ megaphone not being loud

1 enough for the crowd to hear. Adams then turns around again and sees the alt-right
2 insurrectionist side still unmoved.

3 77. At 3:13 Adams makes another unlawful assembly announcement toward the
4 pro-democracy side. An officer asks if it worked, and he says “I don’t know.” The pro-
5 democracy crowd does move back. Nothing is being thrown. Adams turns around again
6 and the alt-right insurrectionists are still in the same position.

7 78. At 3:14 Simon says to other officers, “an unlawful assembly has been
8 declared, you can grab ‘em if you need to.”

9 79. At 3:21 p.m., as seen in the Duarte video, a man walks over from the
10 sidewalk and kicks and shoves to the ground a woman who is writing on the sidewalk in
11 chalk. A true and correct copy of the Duarte video beginning at 2:22 p.m. is lodged as
12 Exhibit K. A screenshot of this is below, in which I have circled the man kicking and
13 shoving the protester in a red circle:



1 80. Then in a video taken from within the crowd, the man who kicked the
2 woman chalking confronts the protesters, the police line moves up, and a protester
3 guides him to the police line:



1 The man then walks through the police line and is embraced:
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1 Officers then shake his hand and send him on his way:
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1 81. The police line pushes forward several feet, and the protesters fall back
2 another 30 yards or so. The incident that Defendants repeatedly refer to as a basis for
3 their violent reaction then occurs, which was a protester hitting a soda can on the ground
4 with a bat. The can only went a few feet toward the curb, and not toward the police line,
5 as seen on the Downing video at 3:16 p.m.

6 82. A true and correct copy of the Downing video is lodged as Exhibit M.

7 83. I have circled the soda can in red in the below screenshot from this video:



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22 84. Meanwhile, one block south on the other side of Hornblend, the alt-right
23 insurrectionists are still being allowed to completely take over Mission Boulevard and
24 the CVS parking lot with their “Fuck Biden” flag and other insurrectionist flags, as seen
25 in this screenshot from the Zacgary Zusueta bodycam video on the next page:
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85. Despite repeatedly describing the bottle hitting with the baseball bat as one of the most terrifying incidents that happened all day, police do not react to this incident *at all*. They simply stand in position for the next several minutes. Then they march forward a few feet and wait several more minutes. Finally, they march forward again and this time do not stop until they plow right into the peaceful crowd, shoving them back with batons.

86. Plaintiff Erin Smith is one of those shoved back with a baton while she is standing peacefully on the sidewalk, as seen in the Allahwardy video at 3:34 p.m., with true and correct screenshots on the next page:

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1 Smith falls to the ground, and Plaintiff Mandy Lien rushes over to try to help her
2 up:



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16 An officer violently shoves Lien back with his baton, seen on the right side:



1 Plaintiff Lien falls back after being struck by the baton:
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15 Lien and Smith walk away while officers fire on them with pepperball guns:
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87. The Boudreaux video at 3:35 p.m. also shows police firing directly at protesters with pepperball guns, striking their legs:



1 88. A true and correct copy of the Boudreaux video starting at 3:09 p.m. is
2 lodged as Exhibit N.

3 89. Screenshots below show Erin Smith being fired on in the red circle:
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20 90. The Justin Dryer video also shows this scene at 3:35 p.m. A True and
21 correct copy of the Dryer video starting at 2:37 p.m. is lodged as Exhibit O.

22 91. The below screenshot from 3:35 p.m. again shows police firing pepperballs
23 directly into the peaceful crowd without warning:
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Plaintiff Lien is on the sidewalk to the right trying to leave while being shot at:



1 92. The Swankoski video shows the same scene at 3:36 p.m.:



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1 93. The Downing video also shows Smith being shot as she runs away after
2 getting up. I have circled the shooter on the left and Smith running on the right:



16 94. After violently dispersing Plaintiffs and the other pro-democracy protesters,
17 police then allow the alt-right insurrectionists to march wherever they want to, and even
18 close down the boardwalk to incoming pedestrians just so these insurrectionists can have
19 their march, terrorizing anyone who happened to be on the boardwalk or the adjoining
20 businesses at that time.

21 95. At 4:30 p.m., which is a full hour after Plaintiffs were forcefully dispersed,
22 police announce on the radio that the insurrectionist group has been “hijacked by Proud
23 Boys, who are very anti-police and won’t go with the program.” This can be heard on
24 the aerial footage lodged as Exhibit Q.

25 96. On October 6, 2022 The U.S. Department of Justice issued a press release
26 regarding a former leader of the Proud Boys pleading guilty to seditious conspiracy in
27 efforts to stop the peaceful transfer of power following the 2020 election.

28 <https://www.justice.gov/opa/pr/former-leader-proud-boys-pleads-guilty-seditious->

1 [conspiracy-efforts-stop-transfer-power](#)). The press release states, “According to court
2 documents, the Proud Boys describe themselves as members of a ‘pro-Western fraternal
3 organization for men who refuse to apologize for creating the modern world, aka
4 Western Chauvinists.””

5 97. In the first 2020 Presidential Debate, when asked whether he condemned
6 white supremacists and military groups, President Trump responded, “Proud Boys —
7 stand back and stand by,” for which he came under heavy criticism.

8 (<https://www.nytimes.com/2020/09/29/us/trump-proud-boys-biden.html>)

9 98. However, instead of dispersing the insurrectionist march that has now been
10 “hijacked by Proud Boys,” Defendants decide it would be a better idea to accommodate
11 them wherever they march, and force ordinary citizens to move out of the way or not use
12 the area. This included a group that was forced to leave Garnet because one of them was
13 wearing a Black Lives Matter shirt, which irritated the Proud Boys, as seen in the
14 Becerra video at 4:36 p.m.:



1 99. A true and correct copy of the Becerra video starting at 4:36 p.m. is lodged
2 as Exhibit R.

3 100. Screenshots of police forcing the small group of bystanders to disperse
4 simply because one of them is wearing a “Black Lives Matter” shirt are below and on
5 the next page:



1 Police force these individuals to walk a block east to the Mission/Hornblend
2 intersection, which is still taped off, and go through the tape to the middle area occupied
3 by police, which had previously been separating the two protest groups before police
4 dispersed the pro-democracy crowd to the north, and then facilitated the alt-right
5 insurrectionists' march around Pacific Beach:
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1 The officer turns around from within the taped off area where these individuals
2 have been forced to, and the line of police can be seen now blocking off the boardwalk
3 *to ordinary citizens*, so that the insurrectionists can march along the boardwalk without
4 anyone bothering them:
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22 101. At 4:48 p.m., the Proud Boys invade the Beach Club on the boardwalk and
23 start fighting with patrons, as captured on the aerial footage, which Incident Command
24 describes as “some jaw jacking going on,” as heard in Exhibit Q:
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1 102. The Sean Aaland video at 4:47 p.m. shows the insurrectionists terrorizing
2 two young women on the boardwalk:



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19 The bike police who had fallen back to watch the insurrectionists march and
20 terrorize the boardwalk finally catch up to what is happening at the Shore Club:

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103. The Capron video at 4:59 p.m. shows the bike police arriving after the Shore Club patrons and employees already had to fend for themselves driving the insurrectionists out, who are now screaming at them with a megaphone pointed directly into the establishment as the insurrectionists have taken over the boardwalk:

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104. Police now give the Proud Boys an escort along the boardwalk, warning back members of the public who had just been assaulted:



1 105. At 5:15 p.m., the insurrectionist march returned to taking over the CVS
2 parking lot entrance, where police still had Mission roped off for them:



16 106. This was nearly two full hour after police had dispersed Plaintiffs and the
17 other pro-democracy demonstrators by deploying overwhelming force and chemical
18 weapons. Defendants’ claim that “both sides then dispersed” is false.

19 107. Attached hereto as Exhibit 2 is a true and correct copy of a July 13, 2022
20 email sent to me by defense counsel with new SDPD Policy 4.17.

21 108. Attached hereto as Exhibit 3 is a true and correct copy of SDPD Policy 4.17
22 implemented a month after this protest, on which I have highlighted provisions
23 Defendants violated, showing the City took post-incident remedial measures.

24 109. Attached hereto as Exhibit 4 is a true and correct copy of a May 25, 2022
25 memo from SDPD responding to the Commission on Police Practices comments to new
26 Policy 4.17.

27 110. Attached hereto as Exhibit 5 is a true and correct copy of SDPD Policy 4.17
28 further revised as of August 2022.

Table of Exhibits

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Exhibit 1: December 1, 2021 San Diego Union Tribune article 000002
Exhibit 2: July 13, 2022 email from city attorney 000006
Exhibit 3: February 17, 2021 SDPD Policy 4.17..... 000008
Exhibit 4: May 25, 2021 City of San Diego Memorandum 000024
Exhibit 5: August 17, 2022 SDPD Policy 4.17 changes..... 000045
Exhibit 6: March 7, 2017 SDPD Policy 4.16..... 000066
Exhibit 7: December 18, 2020 SDPD Policy 1.36..... 000074

Exhibit 1

ections

The San Diego Union-Tribune



This photo with Chad Alvarez, a Lakeside man wearing a "Support Peckerwoods" T-shirt, was published on San Diego County's website promoting a 2019 fishing class. The Peckerwoods are an outlaw White supremacist biker gang. (Courtesy of San Diego County)

The 2016 photo was featured on a page promoting an August 2019 fishing class

BY ANDREW DYER

OCT. 1, 2021 9:40 AM PT

SAN DIEGO — San Diego County featured a photo of a man wearing a T-shirt referencing a notorious White supremacist motorcycle gang on its news website for two years before deleting it Wednesday after a Union-Tribune inquiry, a county spokesperson said.

The photo, which showed the man, two women and six children holding a string of fish, was featured on an event page advertising a 2019 fishing class.

A county spokesperson said the photo was from a 2016 fishing event in which the man participated.

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“The image shows participant in a 2016 event, not county staff,” said Michael Workman, a county spokesperson, in an email. “We have removed the event listing and deleted the image file.”

The man in the image was identified by journalist and researcher Chad Loder on Twitter as Chad Alvarez, 46, of Lakeside. In the photo, Alvarez is wearing a T-shirt that says “Support Peckerwoods.” The Peckerwoods were founded in 2005 in East County, according to the U.S. Justice Department. Its members wear regalia affiliated with the neo-Nazi movement, such as iron crosses and SS bolts — the emblem of the SS in Nazi Germany.

Alvarez did not respond to messages left by the U-T at a phone number and email addresses associated with him.

Loder is part of a [network of researchers](#) on social media who use open-source research to identify members of hate groups and other people who engage in street violence — including those who stormed the U.S. Capitol on Jan. 6.

In a 2011 report called “Bigots on Bikes,” the Anti-Defamation League described the Peckerwoods as a “White supremacist outlaw motorcycle club.” Its leaders were the subject of a federal drug operation in 2007 that saw several members of its leadership charged with drug and assault offenses.

This year, the Temecula-based president of the Riverside County chapter of the Peckerwoods was sentenced to 15 years in prison for conspiracy to distribute methamphetamine.

Alvarez has become a fixture among the East County-based extremists who organized last year in opposition to the national protest movement launched in reaction to the killing of George Floyd by a Minneapolis police officer. In July, Alvarez was among the group of extremists who fought with black-clad anti-fascist protesters in El Cajon in a short, violent confrontation on the city’s Main Street during the “We Are Israel” rally.

Workman said the photo was likely uploaded to the county’s website by a volunteer unfamiliar with the Peckerwoods or its affiliations.

Exhibit 2



Bryan Pease <bryan@peaselaw.org>

Lien/Smith v. COSD

1 message

Richardson, Catherine <CRichardson@sandiego.gov>
To: Bryan Pease <bryan@peaselaw.org>

Wed, Jul 13, 2022 at 4:10 PM

Bryan, take a look at the attached SDPD procedure that went into effect in February 2021. I think it addresses all of the issues you raised when we spoke.

Cathy

Catherine A. Richardson

Senior Chief Deputy City Attorney

Office of the City Attorney

Civil Litigation Division

1200 Third Avenue, Suite 1200

San Diego, CA 92101

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 **SDPD 4.17.pdf**
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Exhibit 3

**SAN DIEGO POLICE DEPARTMENT
PROCEDURE**

DATE: FEBRUARY 17, 2021

NUMBER: 4.17 – LEGAL

SUBJECT: FIRST AMENDMENT ACTIVITY FACILITATION AND
MANAGEMENT

RELATED POLICY: N/A

ORIGINATING DIVISION: HOMELAND SECURITY / CIMU

NEW PROCEDURE:

PROCEDURAL CHANGE:

SUPERSEDES: NEW PROCEDURE

I. PURPOSE

This Department procedure establishes guidelines for the coordination, facilitation and management of First Amendment Activities.

II. SCOPE

This procedure applies to all members of the Department.

III. BACKGROUND

The First Amendment to the Constitution of the United States of America states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

Article 1, sections 1 through 3, of the California Constitution also guarantees the rights to life, liberty, acquiring and possessing property, pursuing safety, happiness, and privacy, as well as the rights to speak freely, to freedom of the press, to petition the government for redress of grievances, and to assemble freely to consult for the common good.

The San Diego Police Department supports all people's fundamental right to peaceably assemble and their right to freedom of speech and expression.

The goal of police involvement at peaceful First Amendment Activities is to preserve the peace, prevent criminal activity, control traffic, and facilitate the safe exercise of an individual or group's First Amendment rights.

In furtherance of these rights, and to facilitate the safe and peaceful exercise of an individual or group's First Amendment rights, the Department will act swiftly and with resolve to protect human life, property, and maintain peace when confronted with violence, threats of violence, assaults, or other criminal acts.

IV. DEFINITIONS

- A. Authorized News Media – representatives are those persons possessing current, valid credentials issued by SDPD or any bona fide law enforcement agency, or other identification establishing regular news media affiliation or employment. (DP 1.30 & 8.09)
 - 1. "Freelance" reporters or photographers possessing a valid San Diego Police Department media credential will be deemed as authorized news media representatives, or other identification establishing regular news media affiliation or employment. (DP 8.09)
- B. Crowd Control - Crowd control is defined as those techniques used to address unlawful public assemblies, including crowd containment or movement, dispersal tactics, and arrests.
- C. Crowd Management - Techniques used to manage public assemblies before, during, and after an event, to maintain public safety, preserve the peace, prevent criminal activity, and facilitate the event's lawful status.
- D. Designee - A Designee is a Department member designated by the Incident Commander to carry out a specific task. The Incident Commanders may delegate their authority, but not their responsibility.
- E. First Amendment Activity/Activities - First Amendment Activities include all forms of speech and expressive conduct used to convey ideas or information, express grievances, or otherwise communicate with others, including verbal and non-verbal expression. First Amendment Activities may include public displays of a group's or individual's feeling(s) toward a person(s), idea, or cause, and includes, but is not limited to, marches, protests, student walk-outs, assemblies, and sit-ins. Such events and activities usually attract a crowd of persons, including participants, onlookers, observers, media, and other persons who may agree or disagree with the activity's point of view.

Common First Amendment Activities include, but are not limited to, speeches, demonstrations, vigils, picketing, distribution of literature, displaying banners or signs, using puppets to convey a message, and other artistic forms of expression. These activities involve the freedom of speech, association, assembly, and the right

to petition the government, as guaranteed by the United States Constitution and the California Constitution.

All persons have the right to peacefully march, demonstrate, protest, rally, or perform the other activities protected by the First Amendment of the United States Constitution and California Constitution.

The government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are content-neutral, without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

- F. Incident Commander - The Incident Commander is responsible for all incident/event activities. The Incident Commander should be of the rank appropriate for the event. The Incident Commander may change throughout an evolving incident.
- G. Lawful Assembly - A First Amendment Activity, involving two or more persons, which abides by relevant statutory laws and does not involve violence or criminal acts.
- H. Riot - Any use of force or violence, disturbing the public peace, or any threat to use force or violence, if accompanied by the immediate power of execution, by two or more persons acting together, and without the authority of law, is a Riot. (404 PC)
- I. Rout - Whenever two or more persons, assembled and acting together, make any attempt or advance toward the commission of an act which would be a riot if actually committed, such assembly is a Rout. (406 PC)
- J. Supplemental Video Team (SVT) – The Supplemental Video Team is a resource available to the Incident Commander during First Amendment Activity covered under this procedure. The SVT will consist of personnel from the Media Services Unit. The objective will be to use video cameras to capture images, video and audio recordings to supplement information captured from officers’ Body Worn Cameras (BWCs). The SVT will adhere to Department Procedure 3.26- Media Evidence Recovery and Impounding/Preserving Procedures.
- K. Unified Command - Unified Command is a procedure that allows all agencies with the significant geographical, legal or functional responsibility over an incident to avoid operational conflicts, economize resources by collocating at a single Incident Command Post or communicate their operational goals and strategies to each other during structured planning meetings.
- L. Unlawful Assembly - Whenever two or more persons assemble to do an unlawful act or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an Unlawful Assembly. (407 PC)

V. PLANNING FOR FIRST AMENDMENT ACTIVITIES:

A. Pre-planned events

1. When appropriate, and consistent with Department Procedure, 8.04, the Incident Commander shall be responsible for developing a written contingency or incident action plan, consistent with the Department's goals and objectives to minimize harm, honor constitutional rights, communicate with the event participants, and facilitate First Amendment Activity. This plan may be in a Department Memorandum format or the ICS 201 format. All or parts of the contingency or incident action plan may be exempt from public disclosure pursuant to the California Public Records Act. Each plan shall be marked accordingly.
2. The Incident Command System shall be appropriately used when managing First Amendment events.
3. The Incident Commander or designee shall immediately notify the affected Service Area Lieutenant and Division Captain of potential First Amendment Activities.
4. Consider engaging allied agencies (CHP, SDSO, Fire-Rescue etc.) if the First Amendment Activity could likely affect other jurisdictions or if assistance may become necessary.
5. Stakeholder involvement is essential to the overall success of managing First Amendment Activities. When knowledge exists that a First Amendment Activity may occur, the Incident Commander or designee shall proactively make reasonable attempts to establish and maintain communication and cooperation with representatives or the First Amendment Activity leaders.
6. If communication is established, the Incident Commander or designee shall make reasonable efforts to identify the event's representatives or leaders and identify a primary police liaison. The primary police liaison should be requested to be in continuous contact with an assigned police representative designated by the Incident Commander.
7. In planning for First Amendment Activity, Incident Commanders, or their designees, should consider the following factors in determining the appropriate resources and level of preparation necessary:
 - a. What type of First Amendment Activity is expected to occur? (Press conference, demonstration, protests, static event, labor strike, picket line, march, caravan, sit-in/dine-in, etc.)
 - b. What is the goal of the First Amendment Activity? (Raise awareness, disrupt a target location, counter another demonstration, engage in criminal activity, etc.)

- c. When will the First Amendment Activity occur? (Day of the week, holiday, time of day/traffic patterns, daytime/nighttime, conflict with other events at the same time.)
 - d. Will there be an organizing individual/group, or will this be a crowd without identified leadership?
 - e. Has the Department previously worked with the organizers? Have prior First Amendment Activities been lawful ?
 - f. Where will the First Amendment Activity likely occur? Will the event affect critical infrastructure like police stations, jails, courthouses, freeways, government buildings, etc.? Will the effect be deliberate or collateral?
 - g. If the group intends to be mobile, what will the predicted or planned route(s) be? (First Amendment Activity participants may not provide their own traffic control.)
 - h. What will be the projected size of the First Amendment Activity event?
 - i. What will the composition of the group be? (Juveniles, students, labor unions, known local groups, known groups from outside the area, unified as to a single cause, or diverse causes and points of view within the group, etc.)
 - j. Will the hosting group provide its own marshals or monitors?
 - k. Will an opposing group attend the First Amendment Activity event?
 - l. Is there a likelihood of improvised or conventional weapons?
 - m. Are arrests likely? Will prisoner processing be necessary?
 - n. Is civil disobedience planned or likely?
 - o. Is unlawful assembly planned or likely?
 - p. Is riot planned or likely?
8. The operations plan created to address a First Amendment Activity event should anticipate various scenarios and devise a police contingency plan. All plans shall include de-escalation considerations in compliance with Department Procedure 1.55.
 9. The Incident Commander shall balance any anticipated level of disruption to traffic against the goal of facilitating First Amendment Activity, including the practicality of relegating the crowd to sidewalks or an alternate route, the expected duration of the disruption, and the traffic disruption expected in making a mass arrest if demonstrators refuse to leave the street. This balancing

does not mean First Amendment Activity participants will be allowed to disrupt commuter traffic and bridge approaches deliberately.

10. Department-Issued ID Only Name Tags

- a. ID only name tags may only be worn during a Mobile Field Force (MFF) event with Incident Commander approval, consistent with Department Procedure 5.10.

B. Spontaneous Events

1. Spontaneous First Amendment Activities, which occur without prior planning or prior notice to the police, present less opportunity for planning and mitigation efforts. The same policies and procedures concerning crowd management, crowd control, and police responses to criminal activity described below apply to a spontaneous First Amendment Activity.
2. Unless unavailable, a supervisor shall respond to the scene of spontaneous events and assume the role of Incident Commander until relieved by a ranking officer.
3. The Incident Commander shall notify the Watch Commander and, if appropriate, the Service Area Lieutenant.
4. An immediate assessment of the situation is essential for an effective police response. The Incident Commander should evaluate the spontaneous First Amendment Activity using the factors listed above for planned events.

VI. LAWFUL ASSEMBLY, DEMONSTRATION OR PROTEST

- A. The goal of police involvement at peaceful First Amendment Activities is to preserve the peace, prevent criminal activity, control traffic, and facilitate the safe exercise of an individual or group's First Amendment rights.
- B. Officers shall remain professional when exposed to the content of the opinions being expressed regardless of the race, gender, sexual orientation, physical disabilities, appearances, or affiliation of anyone exercising their lawful rights. Officers shall be courteous in compliance with Department Policy 9.20.
- C. During peaceful First Amendment Activity, officers may find the occasional individual who engages in criminal conduct that is not reflective of the larger group. In these cases, when feasible, officers should address the individual offender in compliance with other Department procedures while minimally disrupting the larger assembly.

VII. UNLAWFUL ASSEMBLY

- A. An unlawful assembly is defined by California Penal Code 407 as "Whenever two or more persons assemble together to do an unlawful act or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly."
- B. When First Amendment Activity results in unlawful acts or violence, the Incident Commander shall consider the following in determining whether to declare the assembly unlawful:
 - 1. The threat to people or property.
 - 2. The number and nature of unlawful acts within the crowd.
 - 3. The number and nature of violent acts within the crowd.
 - 4. Whether the unlawful or violent acts result from one or two individuals or the larger crowd in general.
 - 5. Whether separate crowds have merged and now the group has internal conflict between participants.
 - 6. Whether contact with the police liaisons/event leaders to negotiate a resolution of the situation is appropriate and effective.
 - 7. Evaluation of whether arresting individuals will be more appropriate than dispersing the entire crowd.
 - 8. Determination if sufficient police resources are available on-scene to manage the incident effectively.
 - 9. The mere failure to obtain a permit, such as a parade permit or sound permit, is not a sufficient basis to declare an unlawful assembly.
 - 10. The sole fact that some of the demonstrators or organizing groups have previously engaged in violent or unlawful acts is not grounds for declaring an assembly unlawful.
- C. Declaration of Unlawful Assembly
 - 1. If the Incident Commander deems it is appropriate to declare an unlawful assembly, dispersal orders must be given.
 - 2. For a dispersal order to be valid, a public officer must direct the persons assembled to immediately disperse in the name of the People of the State. (726 PC) The officer is not required to use any particular words. However, the terms used must be sufficient to inform a reasonable person that the officer is acting in an official capacity and ordering people to leave the area. Additionally, the officer must communicate the order in a reasonable way that ensures that the

order is heard. (Judicial Council of California Criminal Jury Instructions 2020, Instruction Number 2686).

3. Dispersal orders should not be given until officers are in a position to support/direct crowd movement. Members of the crowd should be given ample means of egress. The dispersal order shall be given at least three (3) times, and when safe, with audible confirmation from officers behind the crowd.
4. The dispersal order shall be given in English and Spanish.
5. The Incident Commander should ensure video recording occurs during unlawful assemblies, consistent with Department Procedures 1.49 and 3.26.
6. Officers shall activate their Body Worn Cameras before dispersal orders begin, consistent with Department Procedure 1.49.
7. Officers shall use the following dispersal order:

I am (your name and rank), a Police Officer of the City of San Diego. I hereby declare this to be an unlawful assembly, and in the name of the People of the State of California, I command all those assembled at (give specific location) to immediately disperse. You may move to (give a suitable location for crowd destination). If you do not do so, you will be arrested. If you refuse to move, chemical agents and other weapons will be used. (Provide the chemical agent/projectile warning only if their use is anticipated.)

Yo soy (name and rank) un oficial del departamento de policia de San Diego. Por Medio de la presente declaro que esta es una asamblea ilegal y en el nombre del gobierno del estado de California, les ordeno a todos aquellos reunidos (give specific location) que se retiren inmediatamente. Usted puede moverse (give specific locations and best route). Sino hacen eso, ustedes seran arrestados. Si usted rehusa moverse se usara gas lacrimojeno y otras armas. (Provide the chemical agent/projectile warning only if their use is anticipated.)

8. Emergency Medical Services personnel should be staged before the use of crowd dispersal techniques defined below unless exigent circumstances exist.
9. Unless exigent circumstances exist, crowd dispersal techniques shall not be initiated until the Incident Commander has ensured dispersal announcements have been made to the crowd.

10. These dispersal announcements must be made using adequate sound amplification equipment to ensure that they are audible over a sufficient area. The dispersal orders should be repeated after the commencement of the dispersal operation so that persons not present at the original broadcast will understand that they must leave the area. Consider using a bullhorn, vehicle Public Address (PA) system, Long-Range Acoustical Device (LRAD), or ABLE.
11. The Incident Commander should ensure that the name of the individual making the dispersal order and the date, time(s), and location(s) each order was given is recorded.
12. Officers shall document the details of the dispersal order in their probable cause declarations and arrest reports when charging 407/408 PC - Unlawful Assembly or 409 PC - Failure to Disperse.
13. Unless an immediate risk to public safety exists or significant property damage occurs, a reasonable time will be allowed for a crowd to comply with police commands before taking action.
14. The Incident Commander should note if all or part of the crowd responds to the dispersal order and attempts to leave, or whether there is an unwillingness to comply or willful defiance of the dispersal order.
15. If orders to disperse do not result in voluntary movement/compliance by the crowd, the Incident Commander may elect to use crowd dispersal techniques described in section IX of this procedure.
16. When a command decision is made to employ crowd dispersal techniques, continue attempts to obtain voluntary compliance and cooperation through announcements and negotiation. The Incident Commander shall suspend crowd dispersal techniques when a crowd reasonably appears to be dispersing. Crowd dispersal techniques may be re-employed if compliance ceases.
17. When a crowd disperses pursuant to a declaration of unlawful assembly, and the participants subsequently assemble at a different geographic location outside the dispersal area, and are engaged in non-violent and lawful First Amendment Activity, the new assembly cannot be dispersed until the Incident Commander has determined that a new unlawful assembly is occurring. At such time, the Incident Commander will follow the steps outlined above for declaring an unlawful assembly.
18. If unlawful or violent activity continues as the crowd moves, the event should be treated as a continuous unlawful assembly.

VIII. RIOT

- A. California Penal Code section 404(a) states, "Any use of force or violence, disturbing the public peace, or any threat to use force or violence, if accompanied by the immediate power of execution, by two or more persons acting together, and without the authority of law, is a riot."
- B. California Penal Code section 404.6(a) states, "Every person who with the intent to cause a riot does an act or engages in conduct that urges a riot, or urges others to commit acts of force or violence, or the burning or destroying of property, and at a time and place and under circumstances that produce a clear and present and immediate danger of acts of force or violence or the burning or destroying of property, is guilty of incitement to riot."
- C. California Penal Code section 410 states, "If a magistrate or officer, having notice of an unlawful or riotous assembly, mentioned in this Chapter, neglects to proceed to the place of assembly, or as near thereto as he can with safety, and to exercise the authority with which he is invested for suppressing the same and arresting the offenders, he is guilty of a misdemeanor."
- D. In order to reasonably comply with P.C. 410, it is imperative that the Incident Commander assesses the situation on an ongoing basis to determine if the level of behavior of the crowd rises to the level of a riot. If the Incident Commander determines the elements of a riot have been met, the Incident Commander shall, as reasonable circumstances permit, implement strategies as described in Section VII- Unlawful Assembly, as well as Section IX- Crowd Dispersal Strategies, Objectives and Techniques.

Some factors to consider when responding to a riot include, but are not limited to: the size of the riotous crowd versus available officers, weapons being used by those involved in the riot as compared to those possessed by officers, and capable defensive measures officers may be able to use while interacting with the riotous crowd.

IX. CROWD DISPERSAL STRATEGIES, OBJECTIVES AND TECHNIQUES

- A. Crowd dispersal strategies and techniques shall be consistent with the Department's objectives to minimize harm, honor constitutional rights, communicate with the event participants, and facilitate peaceful First Amendment Activity.
- B. Should negotiation and verbal announcements to disperse not result in the crowd's voluntary movement, officers may employ additional crowd dispersal techniques, but only after orders from the Incident Commander or their designees.
- C. Reasonable force under the totality of the circumstances will be used consistent with DP 1.04.

Some of the permissible techniques to disperse or control a non-compliant crowd

includes the following (not in any specific order of use):

1. Display of police officers
 - a. A police formation may be moved as a unit to an area within the crowd's view to assist with crowd management. If a display of police officers, motorcycles, police vehicles, and mobile field forces, combined with a dispersal order, is ineffective, other techniques may be employed.
 - b. Generally, officers should be assigned to teams of sufficient size to be effective.
2. Containment and Arrest for Violent Criminal Activity
 - a. If violent criminal activity is occurring, and the crowd has failed to disperse after the required announcements, officers may contain the crowd or a portion of the crowd for purposes of making multiple, simultaneous arrests.
 - i. As described below, this technique shall not be used in response to non-violent civil disobedience.
 - ii. This technique shall not be used simply to disperse a crowd after an unlawful assembly declaration.
 - b. Officers should not be sent into a hostile crowd solely to communicate with them. Officers should not penetrate a crowd for an individual arrest unless the targeted individual is involved in criminal conduct which endangers persons or property. The decision to move into the crowd should generally be under the direction of the Incident Commander or designee.
 - c. Persons who make it clear that they seek to be arrested (e.g., sitting down, locking arms) shall be arrested and not subjected to other dispersal techniques.
 - d. Arrests of non-violent persons shall be accomplished by verbal commands and persuasion, handcuffing, lifting, carrying, or the use of lesser controlling force, such as control holds, pressure point techniques, and the bent-wrist control hold or the use of OPNs, consistent with Department Procedure 1.04 - Use of Force.
 - e. Where remaining demonstrators have been advised that they will be subject to arrest if they choose to remain and still refuse to disperse, a member of the arrest team shall individually advise each demonstrator that he or she is under arrest before the application of any force to remove locking devices or to move the demonstrators.
 - f. In the event control holds are necessary, precautions should be taken to assure that arrestees are not injured or subjected to unnecessary or excessive pain, consistent with Department Procedure 1.04.

- g. The decision to use control holds, and the reasons for applying force shall be documented on all appropriate forms and in Blue Team, consistent with Department Procedure 1.04.
 - h. On occasion, persons involved in a riot or unlawful assembly go mobile and commit criminal acts such as assault, vandalism, theft, etc., while actively fleeing or avoiding law enforcement. In these dynamic situations, officers may use techniques that are reasonable and compliant with existing policy, procedure, and law to encircle/contain such groups and affect the appropriate arrests.
3. Police Formations and Use of Batons
- a. If a crowd refuses to disperse after the required announcements, mobile field force formations may be used to move or disperse the crowd.
 - b. Batons may be visibly displayed and held in a ready position during formations.
 - c. Batons shall only be used as specified in DP 1.04 – Use of Force.
4. Use of Munitions
- a. Unlawful assemblies are created when some or all involved in the assembly begin to violate local, state, or federal laws. It poses a unique situation for law enforcement to potentially control or arrest a large group of people, acting in concert.
 - b. In these situations, less lethal tools may be a force multiplier, making it safer for all involved following the declaration of an unlawful assembly in moving/dispersing the riotous crowd and/or making arrests.
 - c. Use of Specialty Munitions (DP 1.36) – Use of specialty munitions shall comply with Department Procedure 1.36. Generally, munitions 1-4, listed below, may be used while on the line and should be a coordinated effort directed by an Incident Commander. Munitions 1-4 may generally be used in coordination with the SWAT Munitions Team.

Authorization for munitions 5 and 6, listed below, shall be obtained by an Assistant Chief level officer and carried out by the SWAT munitions Team Leader

- 1. OC spray (Oleoresin Capsicum)
- 2. 40 mm foam baton rounds
- 3. Pepperballs (OC)
- 4. Flashbangs
- 5. CS gas grenades
- 6. Rubber Sting Balls- defensive maneuver for law enforcement personnel when faced with overwhelming aggression placing

officers in immediate physical risk of serious bodily injury or death.

This directive does not prohibit officers' abilities to use appropriate force options to defend themselves or others as defined in Department Procedure 1.04.

5. Arrests

- a. The Prisoner Processing Unit should be consulted before the event should mass arrests be anticipated.
- b. All arrests shall be based upon probable cause and conducted in compliance with existing Department Procedure 6.02 – Booking Procedures.
- c. All persons subject to arrest during a demonstration or crowd event shall be handcuffed per Department Procedure 6.01 – Handcuffing, Restraining, Searching, and Transporting Procedures.
- d. Officers should be cognizant that flex-cuffs may tighten when arrestees' hands swell or move, sometimes merely in response to pain from the cuffs themselves.
- e. Each unit involved in detention or transportation of arrestees with flex-cuffs should have a flex-cuff cutter and adequate supplies of extra flex-cuffs readily available. When arrestees complain of pain from overly tight flex-cuffs, members shall examine the cuffs to ensure proper fit.

6. Video Recording by Department Members

- a. The goal of police involvement at peaceful First Amendment activities is to preserve the peace, prevent criminal activity, control traffic, and facilitate the safe exercise of an individual or group's First Amendment rights.
- b. Consistent with Department Procedures 1.49 and 3.26, Department members should refrain from video recording or photographing lawful First Amendment Activity. During lawful First Amendment Activity, officers should operate Body-Worn Cameras (BWCs) in the buffering/Stand-by mode. If officers witness crimes occurring among the demonstrators or believe an arrest is likely, they should begin recording in the Event mode, consistent with Department Procedure 1.49.
- c. When there is a reason to believe that a planned event has the potential for unlawful activity, the Incident Commander should contact the Media Services Unit to coordinate with the Supplemental Video Team (SVT), consistent with Department Procedure 3.26
- d. Refer to the Media Services Unit Operations Manual for further details regarding the use of the Supplemental Video Team.

- e. If the Incident Commander or designee determines that a lawful assembly has turned into an unlawful assembly, officers should be directed to place BWCs in Event mode to begin recording the unlawful activity. Additionally, the Incident Commander or designee should coordinate with the Supplemental Video Team (SVT) to provide supplemental video documentation of the event.
- f. Any video captured by either Body Worn Camera or the Supplemental Video Team will be properly preserved per Department Procedures 1.49 and 3.26.

X. RESOURCES

- A. Appropriately managing First Amendment Activity can be resource-intensive. Several units within the San Diego Police Department can lend special skills and equipment to facilitate safe First Amendment Activities and a safe resolution to unlawful assemblies and riot scenarios. Each unit abides by Department Directives and the Unit's Operations Manual. Some of these resources include:
 - 1. Air Support Unit
 - 2. Bicycle Teams
 - 3. Criminal Intelligence Unit
 - 4. Emergency Medical Services (Fire-Rescue)
 - 5. Homeland Security / Critical Incident Management Unit
 - 6. Information Services and Data Systems
 - 7. In-Service Training Unit
 - 8. Legal Advisors
 - 9. Media Services Unit
 - 10. Mobile Field Force-Bravo and Delta Platoons
 - 11. Mobile Field Force "Alpha" deployments.
 - 12. Mobile Field Force Wave deployments.
 - 13. Motors Unit
 - 14. Operational Support Administration
 - 15. Prisoner Processing Unit
 - 16. Special Event Traffic Controllers (SETCs)
 - 17. SWAT
 - 18. SWAT Munitions
 - 19. Traffic Division
 - 20. Unmanned Aerial Systems (UAS) Unit
 - 21. Volunteer Services

XI. PUBLIC INFORMATION AND THE MEDIA (DPs 1.30, 1.31 and 8.09)

- A. The media have a right to cover First Amendment Activity, including the right to record the event on video, film, photographs, and other mediums.

- B. The media shall never be targeted for dispersal or enforcement action because of their media status.
- C. Police Department members shall accommodate the media, to the extent possible and reasonable, per Department Procedure 1.30.
- D. Members of the media may not interfere with arrests, assault officers, or commit acts that qualify as criminal violations under local, state, or federal law. Any criminal offenses by a media member shall be thoroughly documented, detailing specific facts, witnesses, and evidence.
- E. Even after a dispersal order has been given, clearly identified media shall be permitted to carry out their professional duties unless their presence would unduly interfere with the enforcement action.

XII. MUTUAL AID REQUESTS

- A. Refer to Department Procedure 8.10, Critical Incidents - Mutual Aid.

XIII. AFTER ACTION REPORTS

- A. Refer to Department Procedure 8.11, Incident Report Procedures.

Exhibit 4



THE CITY OF SAN DIEGO

M E M O R A N D U M

DATE: May 25, 2021

TO: David Nisleit, Chief of Police
via Chris McGrath, Executive Assistant Chief

FROM: Jeffrey Jordon, Captain, Chief's Office/Special Projects

SUBJECT: Responses to Commission on Police Practices – Department Procedure 4.17

Introduction:

The San Diego Police Department (SDPD or Department) implemented Department Procedure (DP) 4.17, First Amendment Activity Facilitation and Management, and the intent was to give officers a roadmap to protect and facilitate the safe expression of First Amendment rights in cooperation with all community members.

This procedure was also intended to be completely transparent, so the public has a clear understanding of how and why SDPD makes public safety decisions relating to First Amendment activities.

In drafting DP 4.17, the San Diego Police Department researched case law, solicited subject matter expert input, reviewed after-action reports from around the country, and examined existing policies from other law enforcement agencies.

The California Commission on Peace Officer Standards and Training (POST) released a document in April of 2021 titled, "POST Guidelines Crowd Management, Intervention, and Control." While the document does not list "best practices," it provides a number of examples, discussions, and considerations. Many of the considerations in the POST document were already present in DP 4.17.

As with previous collaborations, SDPD believes the Commission on Police Practices' (CPP) recommendations are an opportunity to assess its current procedure, participate in an open dialogue, and provide clarity to its decisions and ongoing efforts to meet community expectations.

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This memorandum addresses CPP’s recommendation in three parts. In Part I, SDPD outlines the recommendations where there is immediate agreement to modify DP 4.17 to address expressed concerns.

In Part II, SDPD reviews the recommendations from CPP which DP 4.17 appears to either largely incorporate or are addressed through pre-existing Department Procedures. SDPD highlights these procedures within this memorandum. Additionally, SDPD welcomes discussion with CPP to fully explore remaining concerns and determine how they should be addressed.

In Part III, SDPD identifies CPP recommendations which are operationally or legally problematic for SDPD to include within DP 4.17. Part III also offers a detailed explanation examining the potential impact of these recommendations more thoroughly.

The Department anticipates its responses will generate further discussion and looks forward to participating in this process with CPP to answer additional questions, enhance understanding, and determine where additional solutions might be found.

Part I: Accepted Recommendations

CPP Recommendation – Penal Code 407:

“The procedure references the verbiage of California Penal Code 407 in the definition of an unlawful assembly. However, we would like assurances that a protest will not be declared unlawful simply because it is “boisterous.” The policy should be clear that per case law, there must be a clear and present danger to persons or property before an unlawful assembly can be declared.”

SDPD Response:

This is correct and the procedure will be amended accordingly.

CalCrim 2685 Participating in an Unlawful Assembly (Pen. Code, §§ 407, 408) states in the Bench Notes:

Penal Code section 407 defines an ‘unlawful assembly’ as two or more people assembled together ‘to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner.’ The Supreme Court has held that “the proscriptions of sections 407 and 408 on assemblies to do a lawful act must be limited to assemblies which are violent or which pose a clear and present danger of imminent violence.’ (*In re Brown* (1973) 9 Cal.3d 612, 623 [108 Cal.Rptr. 465, 510 P.2d 1017]; see *Collins v. Jordan* (9th Cir. 1996) 110 F.3d 1363, 1371.)

Because the assembly must in fact be violent or pose an immediate threat of violence, an assembly that is ‘boisterous or tumultuous’ does not establish a violation of the statute.

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CPP Recommendation – Mobility Issues:

“Clarify “ample means of egress,” factoring in considerations like participants which may have mobility issues.”

SDPD Response:

SDPD will add inclusive language regarding this consideration.

CPP recommendation – Enhanced Communication:

“For pre-planned protest activities, add communication options to include languages other than English and Spanish. For example, traffic signage to assist those that may be hearing impaired.”

SDPD Response:

SDPD will amend DP 4.17 to include the POST recommended considerations. Per POST, methods that may be used to deliver and document dispersal orders include (not in priority order):

- Loud speech
- Amplified sound
- Ensuring that the order is heard in remote areas
- Using unmanned aircraft equipped with amplified sound flown to inaccessible areas
- Pre-recorded unlawful assembly messages in multiple languages as appropriate
- **Display of signage, including electronic signage and billboards, indicating unlawful assembly, dispersal and clearly identified routes of egress**
- Gaining the attention of the crowd and documenting affirmative responses of crowd members prior to the declaration of unlawful
- Positioning law enforcement personnel to the rear of a crowd to confirm and document hearing the transmission of the dispersal order
- Acquiring multiple-language capability
- Community alert system(s)
- Provide easy to understand directions that help the crowd disperse so that they clearly understand the desired response
- Using video/audio recording equipment for documentation of the dispersal order, the crowd response and their ability to hear
- Use of social media platforms to send out alerts to specific areas

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CPP Recommendation - EMS:

“When staging for EMS, require that EMS providers have proper materials on-hand for the situation. For example, ample water shall be available to decontaminate participants that have had OC utilized on them per existing policy 1.06.”

SDPD Response:

While SDPD does not exercise authority over Fire/EMS service, SDPD will add appropriate language that cooperative pre-planning with SDFD is recommended to ensure adequate resources are available to address potential situations involving decontamination.

Part II: Recommendations Currently Addressed in Existing Department Procedures

SDPD strives to publish clear and concise procedures. Care is taken not to duplicate pre-existing procedures. All officers are responsible for abiding by all SDPD policies and procedures.

Department Policy 1.01 – Department Policies, Procedures, Orders, Communications, and Correspondence, states:

Department directives (e.g., Legal Updates, Orders, Policies, Procedures and Training Bulletins) are written directives that convey the same authority. All members of the Department will be held responsible for abiding by the information contained in Legal Updates, Orders, Policies, Procedures and Training Bulletins.

Department Policy 9.03 – Obedience to Rules Policy, states:

Members shall not commit any acts nor fail to perform any acts that constitute a violation of the policies, procedures, directives or orders of the Department, the City of San Diego Administrative Regulations, the Personnel Regulations Manual, the Civil Service Rules, or the City Charter.

The CPP provided a number of additional recommendations which DP 4.17 appears to already incorporate. In some cases, the CPP recommendations are covered by other, pre-existing Department Procedures.

SDPD will present additional details, beyond this memorandum, at a mutually acceptable time with CPP to explore whether the current DP 4.17 and related procedures adequately address the recommendations in this section and seek guidance on where further modifications are warranted.

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CPP Recommendation – Pre-Protest Planning:

“Include in the policy, SDPD’s existing guidelines regarding pre-protest planning with event organizers. As it currently stands, the new policy reads more strictly as crowd control, rather than facilitation of First Amendment protected activities.”

SDPD Response:

DP 4.17 includes extensive sections on facilitation and cooperation, specifically:

Section V.A.1: When appropriate, and consistent with Department Procedure, 8.04, the Incident Commander shall be responsible for developing a written contingency or incident action plan, consistent with the Department’s goals and objectives to minimize harm, honor constitutional rights, communicate with the event participants, and facilitate First Amendment Activity. This plan may be in a Department Memorandum format or the ICS 201 format. All or parts of the contingency or incident action plan may be exempt from public disclosure pursuant to the California Public Records Act. Each plan shall be marked accordingly.

Section V.A.5: Stakeholder involvement is essential to the overall success of managing First Amendment Activities. When knowledge exists that a First Amendment Activity may occur, the Incident Commander or designee shall proactively make reasonable attempts to establish and maintain communication and cooperation with representatives or the First Amendment Activity leaders.

Section V.A.6: If communication is established, the Incident Commander or designee shall make reasonable efforts to identify the event's representatives or leaders and identify a primary police liaison. The primary police liaison should be requested to be in continuous contact with an assigned police representative designated by the Incident Commander.

Section V.A.7: In planning for First Amendment Activity, Incident Commanders, or their designees, should consider the following factors in determining the appropriate resources and level of preparation necessary:

What type of First Amendment Activity is expected to occur? (Press conference, demonstration, protests, static event, labor strike, picket line, march, caravan, sit-in/dine-in, etc.)

What is the goal of the First Amendment Activity? (Raise awareness, disrupt a target location, counter another demonstration, engage in criminal activity, etc.)

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When will the First Amendment Activity occur? (Day of the week, holiday, time of day/traffic patterns, daytime/nighttime, conflict with other events at the same time.)

Will there be an organizing individual/group, or will this be a crowd without identified leadership?

Has the Department previously worked with the organizers? Have prior First Amendment Activities been lawful?

Where will the First Amendment Activity likely occur? Will the event affect critical infrastructure like police stations, jails, courthouses, freeways, government buildings, etc.? Will the effect be deliberate or collateral?

If the group intends to be mobile, what will the predicted or planned route(s) be? (First Amendment Activity participants may not provide their own traffic control.)

What will be the projected size of the First Amendment Activity event?

What will the composition of the group be? (Juveniles, students, labor unions, known local groups, known groups from outside the area, unified as to a single cause, or diverse causes and points of view within the group, etc.)

Will the hosting group provide its own marshals or monitors?

Will an opposing group attend the First Amendment Activity event?

Is there a likelihood of improvised or conventional weapons?

Are arrests likely? Will prisoner processing be necessary?

Is civil disobedience planned or likely?

Is unlawful assembly planned or likely?

Is riot planned or likely?

CPP Recommendation – Protest Safety:

“We would also like to see a section that discusses protecting the safety of peaceful protesters.”

SDPD Response:

SDPD is committed to the safety of all persons present, even those who are criminal suspects.

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SDPD uses de-escalation techniques (DP 1.55), requires officers to report misconduct (DP 9.33) and requires officers to intervene in unreasonable force (DP 1.56). SDPD also uses appropriate escalation measures to maintain order and tactics intended to isolate and address individual offenders based on their level of criminal conduct and resistance:

DP 4.17, Section III: Background states:

Article 1, sections 1 through 3, of the California Constitution also guarantees the rights to life, liberty, acquiring and possessing property, pursuing safety, happiness, and privacy, as well as the rights to speak freely, to freedom of the press, to petition the government for redress of grievances, and to assemble freely to consult for the common good.

The San Diego Police Department supports all people's fundamental right to peaceably assemble and their right to freedom of speech and expression.

The goal of police involvement at peaceful First Amendment Activities is to preserve the peace, prevent criminal activity, control traffic, and facilitate the safe exercise of an individual or group's First Amendment rights.

In furtherance of these rights, and to facilitate the safe and peaceful exercise of an individual or group's First Amendment rights, the Department will act swiftly and with resolve to protect human life, property, and maintain peace when confronted with violence, threats of violence, assaults, or other criminal acts.

CPP Recommendation – Restatement of Policies and Procedures:

“Clearly restate that existing policies and procedures remain in full force and effect during protest activities. Specifically, body worn camera (1.49), de-escalation (1.55), duty to intervene (1.56), and identification of officers (5.10 and 9.19).”

SDPD response:

All SDPD officers are responsible for abiding by all SDPD rules and regulations at all times (DP 1.01, DP 9.03).

CPP mentions several specific sections, which are referenced in DP 4.17 as listed below:
Body Worn Camera (BWC) Policy is referenced in section IV.J:

Supplemental Video Team (SVT) – The Supplemental Video Team is a resource available to the Incident Commander during First Amendment Activity covered under this procedure. The SVT will consist of personnel from the Media Services Unit. The objective will be to use video cameras to capture images, video and audio recordings to supplement information captured from officers' Body Worn

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Cameras (BWCs). The SVT will adhere to Department Procedure 3.26- Media Evidence Recovery and Impounding/Preserving Procedures.

BWC Policy is referenced in section VII.C.6:

Officers shall activate their Body Worn Cameras before dispersal orders begin, consistent with Department Procedure 1.49.

BWC Policy is referenced in section IX.6.B:

Consistent with Department Procedures 1.49 and 3.26, Department members should refrain from video recording or photographing lawful First Amendment Activity. During lawful First Amendment Activity, officers should operate Body-Worn Cameras (BWCs) in the buffering/Stand-by mode. If officers witness crimes occurring among the demonstrators or believe an arrest is likely, they should begin recording in the Event mode, consistent with Department Procedure 1.49.

BWC Policy is referenced in section IX.6.B:

Any video captured by either Body Worn Camera or the Supplemental Video Team will be properly preserved per Department Procedures 1.49 and 3.26.

BWC Policy is referenced in section IX.6.F:

Any video captured by either Body Worn Camera or the Supplemental Video Team will be properly preserved per Department Procedures 1.49 and 3.26.

De-Escalation Policy is referenced in section V.A.8:

The operations plan created to address a First Amendment Activity event should anticipate various scenarios and devise a police contingency plan. All plans shall include de-escalation considerations in compliance with Department Procedure 1.55.

The Identification Policy, 5.10, is referenced in section V.A.10:

ID only name tags may only be worn during a Mobile Field Force (MFF) event with Incident Commander approval, consistent with Department Procedure 5.10.

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CPP Recommendation - Juveniles:

“Address how juveniles are treated during protest activities in line with existing procedures, for example, handcuffing or detention of minors.”

SDPD Response:

Officers are responsible for abiding by all existing SDPD rules and regulations, including the following, which apply to both juveniles and adults: DP 1.04 – Use of Force, DP 1.06 – Use of Liquid Chemical Agents, DP 1.07 – Use of Tasers, 1.36 – Use of Specialty Munitions, DP 3.06 – Juvenile Procedures, DP 4.01 – Stop, Detention, and Pat-Down Procedures, DP 6.01 – Handcuffing, Restraining, Searching, and Transporting Procedures, etc.

CPP Recommendation – Preservation of Life:

“Include in the policy, a statement that preservation of life shall take precedence over protecting property.”

SDPD Response:

This is interwoven into SDPD’s Vision Values and Mission Statement, as well as multiple Department Procedures. The very first value is Human Life:

Human Life: Our efforts will be oriented toward the goal of protecting human life and ensuring everyone has the opportunity to thrive.

This is followed by:

Integrity: Our actions will be guided by the highest level of virtue and ethical practice through open communication and transparency.

Partnerships: We will work collaboratively with our community to resolve challenges, protect individual rights, and promote prosperity.

Diversity: We embrace and appreciate the unique experiences and backgrounds that provide strength and unity to our organization.

Compassion: We will strive to show genuine concern for one another in both our interactions with the community and within our organization. We recognize that the complexities of life compel us to do nothing less.

Innovation: We are committed to leading the law enforcement community through innovative practices in order to maintain our position at the forefront of policing.

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Courageous Justice: We will be undeterred in our pursuit of fairness, peace, and a genuine well-being for all people.

Department Policy 1.04 – Use of Force states:

Members shall only use force in accordance with law and established Department procedures. Members shall not use more force than is reasonably necessary under the circumstances. Department policy places a greater value on the preservation of life than on the apprehension of criminal offenders. Deadly force shall be used only when all reasonable alternatives have been exhausted or appear impractical. Members shall not mistreat persons who are in custody. Members shall handle such persons in accordance with all laws and established Department Procedures.

Department Policy 9.01 – General Duties Policy states:

Officers on duty shall at all times, lawfully protect life and property, detect and arrest violators of the law, prevent crime, preserve the public peace and enforce the laws of the state of California and the ordinances of the City of San Diego...

... When within the State of California, officers shall assist any law enforcement officer who appears to be in need of immediate assistance and shall assist in the prevention of the commission of any felony or in the apprehension of any felon. Officers shall also take appropriate action where a serious threat to life or property exists...

CPP Recommendation – BWC Activation:

“Specifically related to the issuance of dispersal orders once an unlawful assembly has been declared: Require officers to have their body worn cameras activated in Event Mode to record the circumstances in which created an unlawful assembly order.”

SDPD Response:

This is covered in DP 4.17, IX.C.6.b:

Consistent with Department Procedures 1.49 and 3.26, Department members should refrain from video recording or photographing lawful First Amendment Activity. During lawful First Amendment Activity, officers should operate Body-Worn Cameras (BWCs) in the buffering/Stand-by mode. If officers witness crimes occurring among the demonstrators or believe an arrest is likely, they should begin recording in the Event mode, consistent with Department Procedure 1.49.

This is further covered in DP 4.17, IX.C.6.e:

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If the Incident Commander or designee determines that a lawful assembly has turned into an unlawful assembly, officers should be directed to place BWCs in Event mode to begin recording the unlawful activity. Additionally, the Incident Commander or designee should coordinate with the Supplemental Video Team (SVT) to provide supplemental video documentation of the event.

SDPD has to balance recording unlawful acts or lawful acts done in a violent manner or in a manner where violence is imminent against unnecessarily recording lawful First Amendment activity.

CPP Recommendation – Dispersal Orders:

“Require that the Officer making the dispersal order shall have their BWC activated to record the dispersal order as well as an Officer stationed behind the protest participants to ensure audible commands were able to be heard.”

SDPD Response:

This is covered in DP 4.17, VII.C.3.5 and 6:

Dispersal orders should not be given until officers are in a position to support/direct crowd movement. Members of the crowd should be given ample means of egress. The dispersal order shall be given at least three (3) times, and when safe, with audible confirmation from officers behind the crowd.

The Incident Commander should ensure video recording occurs during unlawful assemblies, consistent with Department Procedures 1.49 and 3.26.

Officers shall activate their Body Worn Cameras before dispersal orders begin, consistent with Department Procedure 1.49.

CPP Recommendation - Scripts:

“Section VII. C. 2. states “the officer is not required to use any particular words,” however, this conflicts with 7 which provides a detailed script to be used. We recommend the specific script be used.”

SDPD Response:

DP 4.17, VII.C.2 references the legal standard under California law.

DP 4.17, VII.C.7 refers to Department Policy, which is far more restrictive.

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If an Incident Commander does not have a printed version of the SDPD language, they may still give the order and be within legal guidelines, even if they are out of compliance with Department Procedures.

CPP Recommendation – Timing of Dispersal Orders:

“State that the dispersal order must be given at least three times, with one minute between each order and the script must include a clear time requirement for participants to depart the scene (for example, participants have five minutes to depart, but not less than three minutes).”

SDPD Response:

SDPD is unable to find a resource suggesting this as a best practice. Additionally, DP 4.17 is more restrictive than both law and POST guidelines.

POST states, “Dispersal orders should be repeated.”

DP 4.17, VII.C.3 states:

Dispersal orders should not be given until officers are in a position to support/direct crowd movement. Members of the crowd should be given ample means of egress. The dispersal order shall be given at least three (3) times, and when safe, with audible confirmation from officers behind the crowd (emphasis added).

The CPP-proposed one-minute interval does not allow for officers to make rolling announcements or to play a recording on a loop. Rolling or looping announcements allows for multiple messages in multiple languages and gives a wider audience the chance of hearing the order.

POST says, “Provide sufficient time to disperse after the order,” and the intent of a dispersal order is to give people an opportunity to voluntarily leave. Voluntary compliance is always preferred to physical confrontation.

However, there might be a time when a crowd is especially violent, and a person needs to be rescued/extricated, or there is an exigent circumstance requiring swift action.

In re Wagner, 119 Cal. App. 3d 90, 103 (1981) states: “If a person is a participant in a lawful assembly which becomes unlawful, he has an immediate duty upon learning of the unlawful conduct to disassociate himself from the group.”

CalCrim 2686: Refusal to Disperse includes as a required element of failure to disperse: “The defendant willfully remained present at the location...after the order to disperse.”

A person must leave the unlawful assembly immediately after being ordered to disperse.

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Explicitly giving people a time to linger gives criminal actors a window to prepare/brace for police action. It explicitly gives people permission to remain at the scene longer, even though they are required to leave the area immediately.

In an “example dispersal order” POST does include a timeframe. However, POST does not list providing a timeframe for people to leave as a “consideration” under “Dispersal Orders.”

CPP Recommendation OC Spray:

“Reiterate that use of OC spray is prohibited at this stage of resistance (passive).”

SDPD Response:

This is already covered in DPs relating to use of force and chemical agents.

DP 1.06 – Use of Liquid Chemical Agents States:

OC may only be used on a person who is engaged in active resistance, assaultive behavior, or life threatening behavior. Department Procedure 1.04, Use of Force, describes the various levels of resistance and assaultive behaviors.

Generally, OC should not be used to disperse a crowd without the approval of the on-scene field supervisor or the incident commander. In a crowd control situation, it is imperative that officers respond in a coordinated manner.

DP 1.04 – Use of Force mirrors DP 1.06 – Use of Liquid Chemical Agents by listing Chemical Agents under “Active Resistance.”

CPP Recommendation – Flex-Cuffs:

“In the utilization of flex-cuffs procedure, specify that officers shall replace flex-cuffs should they tighten, by using the existing DP 6.01 procedures.”

SDPD Response:

This is already written in 4.17:

IX.C.5.e: Each unit involved in detention or transportation of arrestees with flex-cuffs should have a flex-cuff cutter and adequate supplies of extra flex-cuffs readily available. When arrestees complain of pain from overly tight flex-cuffs, members shall examine the cuffs to ensure proper fit.

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CPP Recommendation – BWC Retention Periods:

“Add a new section for BWC retention periods for peaceful protest activities (no arrests, no complaints).”

SDPD Response:

There is a demonstration/protest retention category for BWC. The retention period is designed to maintain footage in case of a complaint or city claim, which may be filed years after an event. It is not uncommon for a person to make a complaint when no force was used and no arrest was made. The BWC showing the absence of police intervention is valuable in these cases.

CPP Recommendation – BWC and Legal Protest Activities:

“Add a clear statement that any BWC of protest activities shall or must not be used, stored, logged or cataloged to document or create a database of individuals participating in legal protest activities.”

SDPD Response:

DP 4.17 section IX.C.6.b addresses this:

Consistent with Department Procedures 1.49 and 3.26, Department members should refrain from video recording or photographing lawful First Amendment Activity. During lawful First Amendment Activity, officers should operate Body-Worn Cameras (BWCs) in the buffering/Stand-by mode. If officers witness crimes occurring among the demonstrators or believe an arrest is likely, they should begin recording in the Event mode, consistent with Department Procedure 1.49.

CPP Recommendation – Audio/Video Recording:

“Officers shall not request nor require media or other members of the public to stop, pause or discontinue audio or video recording.”

SDPD Response:

This is already covered in DP 3.26 – Media Evidence Recovery and Impounding/Preserving Procedures in section IV.B.1. states:

- B. Video Recording, Audio Recording, and Photographing by Third Parties
 - 1. Recording and Photographing of Police Activity

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- a. The general public has a First Amendment right to video record, and/or photograph Department members while they are conducting official business or while acting in an official capacity in any public space, unless such recordings interfere with police activity.
- b. A bystander has the same right to take photographs or make recordings as a member of the media as long as the bystander has a legal right to be present where he or she is located—public or private property; including an individual’s home or business, and common areas of public and private facilities and buildings.
- c. Members shall not threaten, intimidate, or otherwise discourage an individual from recording police enforcement activities or intentionally block or obstruct cameras or recording devices.
- d. The fact a bystander has a camera or other recording device does not, however, entitle the bystander to cross a police line, to enter an area that is closed to the public, or to enter any designated crime scene.
- e. A person may record public police activity unless the person engages in actions that jeopardize the safety of the officer, the suspect, or others in the vicinity, violate the law, incite others to violate the law, or interfere with police activity. Interference consists of conduct, threats, actions or activities that prevent or hinder, or purport to prevent or hinder, members from doing their job.
- f. A person’s recording of members’ activity from a safe distance, and absent any action that obstructs the activity or threatens the safety of the member(s), does not constitute interference. Criticism of the police or the police activity being observed also does not amount to interference.
- g. Members are encouraged to provide ways in which individuals can continue to exercise their First Amendment rights, as officers perform their duties.

CPP Recommendation – Officer Identification:

“Include an unambiguous prohibition of officers obstructing their badge, name and/or ID numbers as well as a clear prohibition of providing false identification details.”

SDPD Response:

This is covered in DP 9.19:

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Officers shall furnish their names and Department member identification numbers to any person requesting this information when they are on duty or while representing the Department in an official capacity, except when the withholding of such information is necessary for the performance of police duties or is authorized by the proper authority.

When a Mobile Field Force (MFF) activation takes place, the Incident Commander may authorize the use of ID only name tags. When this occurs, officers will only be required to furnish their Department identification number to any person requesting their name, ID number and/or badge number.

CPP Recommendation – ID Numbers:

“Reconsider the policy of allowing only ID numbers to be given during protest activities.”

SDPD Response:

Allowing ID numbers protects officers from the growing threats against them, which includes doxing. Doxing has been defined an act of publishing personal information of a person to harass, threaten, or incite violence against them, and doxing against law enforcement officers is well-documented. ID numbers, BWCs, and Vehicle Locators/GPS, not to mention citizen-provided-video, all provide ample ability to identify officers accused of misconduct.

CPP Recommendation – Officer Mobility and Monitoring:

“Consider addressing how officers deal with individuals participating in peaceful civil disobedience such as officers using bicycles as weapons or shields and using “follow cars” during protest activities.”

SDPD Response:

The use of police bicycles to form a fence is not a reportable use of force.

If a group aggresses/assaults a bicycle officers, officers may respond with an appropriate level of force under DP 1.04.

The use of a bicycle to push back a crowd is no different than the use of a baton to push back a crowd.

A bike officer must maintain control of their police bike. They must not let the bike be taken or used against them. This leaves officers with limited force options other than the bicycle when holding or moving a line.

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The use of police bikes in this manner is a reasonable and widely-used tactic. Additionally, follow cars have become a necessity after Charlottesville when a suspect drove through a protest in a malicious attack. https://en.wikipedia.org/wiki/Charlottesville_car_attack

Vehicle attacks have spiked over the last 12 months. Thirty-nine people were charged across the country with maliciously hitting protestors with their vehicles.

<https://www.usatoday.com/story/news/nation/2020/07/08/vehicle-ramming-attacks-66-us-since-may-27/5397700002/>

The purpose of follow-cars is to control vehicular traffic and prevent accidental and intentional physical harm to those exercising their First Amendment rights.

Part III: Recommendations with Operational or Legal Challenges

CPP provided some recommendations that are operationally or legally problematic for SDPD.

CPP Recommendation – Mutual Aid:

“Require that if outside law enforcement agencies participate in City of San Diego protests under mutual aid agreements, such outside agencies should be subject to SDPD policies and procedures.”

SDPD response:

Every agency is responsible for its own employees and enforcement of its policies and procedures. SDPD has no authority to discipline any officer/deputy from another agency.

CPP Recommendation – Rights of Legal Observers:

“Add a new section that addresses the status and rights of legal observers and/or non-participants. Legal observers should be clearly identified and shall not be specifically targeted by officers.”

SDPD Response:

POST does not provide any guidance on this topic, and this is a developing area of law.

Until there is a published legal opinion or guidance from POST, SDPD must rely upon existing law. Sections governing unlawful assembly, riot, rout, and dispersal orders do not provide any special considerations for “non-participants” or “legal observers.”

By being present at an unlawful assembly/rout/riot, a person becomes a participant in the event. *In re Wagner*, 119 Cal. App. 3d 90, 103 (1981) states: “If it were necessary that each member of

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an unlawful assembly commit an unlawful act before that member could be convicted, then there would be no necessity to make participation in an unlawful assembly a crime.”

Officers must assess their actions and responses according to individual citizen conduct. Officers should not specifically target anyone except for those engaged in criminal conduct.

It is incumbent upon officers to exercise sound judgment based upon specific articulable facts.

CPP Recommendation – Passive Resistance:

“We do not believe those individuals exhibiting “passive resistance” should be subject to the use of “impact weapons, impact weapon control holds, pain compliance or pressure points” which would technically be permitted under the existing Use of Force Matrix per 1.04. “

SDPD Response:

This issue has been litigated in *Forrester v. City of San Diego*, 25 F.3d 804, 807-08 (9th Cir. 1994). These techniques are minimally-invasive, lesser controlling force options that result in temporary discomfort.

Without these methods, there are virtually no other ways of addressing passively resistant individuals refusing to obey a lawful order. Arrestees are legally obligated to comply with lawful arrests. See California Penal Code section 834a.

CPP Recommendation – Reasonable Time to Disperse:

“Define ‘a reasonable time.’ The procedure needs to be clear as to what a reasonable time is for a crowd to disperse. We propose this time be not less than three minutes.”

SDPD Response:

The courts have consistently used the “reasonableness” standard. The courts have never imposed a time limit. Moreover, nothing in the POST guidelines references any sort of specific timeline.

SDPD must also be mindful not to establish “three minutes” as an absolute standard. Many times, more than three minutes is appropriate. During exigent circumstances, such as extreme violence, rescue, extrication, etc., three minutes may be unreasonable and dangerous.

CPP Recommendation – Flex-Cuff Identification:

“Officers shall write their ID number on the flex-cuffs of each individual they take into custody. Officers shall mark the flex-cuffs indicating initial placement to assist in visually observing if flex-cuffs unexpectedly tighten.”

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SDPD Response:

As noted below, the Department recognizes the legitimate concerns about the use of flex-cuffs to restrain persons. However, writing ID numbers onto a set of flex-cuffs would likely be impractical during the chaotic reality of an unlawful assembly situation. Additionally, Officers would have to have the means (e.g., permanent marker) with them at all times when using flex-cuffs to write their names and mark the “notch” of the cuffs, and the texture of flex-cuffs results in the markings smearing and becoming illegible.

Additionally, the marking of the flex-cuffs may indicate if the flex-cuffs tightened after application, but it does not remove the obligation of the officer to check the tightness of the flex-cuffs per DP 4.17 as detailed in section IX.C.5 of the current procedure:

- c. All persons subject to arrest during a demonstration or crowd event shall be handcuffed per Department Procedure 6.01 – Handcuffing, Restraining, Searching, and Transporting Procedures.
- d. Officers should be cognizant that flex-cuffs may tighten when arrestees' hands swell or move, sometimes merely in response to pain from the cuffs themselves.
- e. Each unit involved in detention or transportation of arrestees with flex-cuffs should have a flex-cuff cutter and adequate supplies of extra flex-cuffs readily available. **When arrestees complain of pain from overly tight flex-cuffs, members shall examine the cuffs to ensure proper fit.**

CPP Recommendation – Incident Commander:

“Require officers to provide the name and ID number of the incident commander.”

SDPD Response:

Incident commanders may change throughout an event. Members of the public can file a complaint, even anonymously, and IA will determine who the commander of record was at the time of the complaint.

CPP Recommendation – Specialty Munitions:

“In the section regarding the use of specialty munitions, list options to be utilized in order of escalation by munition type as well as have clear and significant descriptions as to when and how they are utilized, handled and removed.

40 mm foam baton rounds should be utilized only as a last resort.

CS gas grenades and rubber sting balls need to have clear and explicit references as to when use is permissible.”

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SDPD Response:

These concepts are covered in both DP 4.17 and DP 1.36 – Use of Specialty Munitions.

DP 4.17 section IX.C.3.c states:

Use of Specialty Munitions – Use of specialty munitions shall comply with Department Procedure 1.36. Generally, munitions 1-4, listed below, may be used while on the line and should be a coordinated effort directed by an Incident Commander. Munitions 1-4 may generally be used in coordination with the SWAT Munitions Team. Authorization for munitions 5 and 6, listed below, shall be obtained by an Assistant Chief level officer and carried out by the SWAT munitions Team Leader

1. OC spray (Oleoresin Capsicum)
2. 40 mm foam baton rounds
3. Pepperballs (OC)
4. Flashbangs
5. CS gas grenades
6. Rubber Sting Balls- defensive maneuver for law enforcement personnel when faced with overwhelming aggression placing officers in immediate physical risk of serious bodily injury or death. This directive does not prohibit officers' abilities to use appropriate force options to defend themselves or others as defined in Department Procedure 1.04.

Conclusion:

The San Diego Police Department has carefully considered every recommendation made by CPP and views this response as part of a process. We look forward to meeting with CPP to provide additional details, answer questions, and further explore these recommendations.

Respectfully,

Captain Jeff Jordon
Special Projects/Legislative Affairs

Exhibit 5

**SAN DIEGO POLICE DEPARTMENT
PROCEDURE**

DATE: AUGUST 17, 2022
NUMBER: 4.17 – LEGAL
SUBJECT: FIRST AMENDMENT ACTIVITY FACILITATION AND
MANAGEMENT
RELATED POLICY: N/A
ORIGINATING DIVISION: CRITICAL INCIDENT MANAGEMENT UNIT
NEW PROCEDURE:
PROCEDURAL CHANGE: **MAJOR CHANGES**
SUPERSEDES: DP 4.17 - 02/17/2021

I. PURPOSE

This Department procedure establishes guidelines for the coordination, facilitation and management of First Amendment Activities.

II. SCOPE

This procedure applies to all members of the Department.

III. BACKGROUND

The First Amendment to the Constitution of the United States of America states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

Article 1, sections 1 through 3, of the California Constitution also guarantees the rights to life, liberty, acquiring and possessing property, pursuing safety, happiness, and privacy, as well as the rights to speak freely, to freedom of the press, to petition the government for redress of grievances, and to assemble freely to consult for the common good.

The San Diego Police Department supports all people's fundamental right to peaceably assemble and their right to freedom of speech and expression.

The goal of police involvement at peaceful First Amendment Activities is to preserve the peace, prevent criminal activity, control traffic, and facilitate the safe exercise of an individual or group's First Amendment rights.

In furtherance of these rights, and to facilitate the safe and peaceful exercise of an individual or group's First Amendment rights, the Department will act swiftly and with resolve to protect human life, property, and maintain peace when confronted with violence, threats of violence, assaults, or other criminal acts.

IV. DEFINITIONS

- A. Authorized News Media – representatives are those persons possessing current, valid credentials issued by SDPD or any bona fide law enforcement agency, or other identification establishing regular news media affiliation or employment. (DP 1.30 & 8.09)
 - 1. "Freelance" reporters or photographers possessing a valid San Diego Police Department media credential will be deemed as authorized news media representatives, or other identification establishing regular news media affiliation or employment. (DP 8.09)
- B. Crowd Control - Crowd control is defined as those techniques used to address unlawful public assemblies, including crowd containment or movement, dispersal tactics, and arrests.
- C. Crowd Management - Techniques used to manage public assemblies before, during, and after an event, to maintain public safety, preserve the peace, prevent criminal activity, and facilitate the event's lawful status.
- D. Designee - A Designee is a Department member designated by the Incident Commander to carry out a specific task. The Incident Commanders may delegate their authority, but not their responsibility.
- E. First Amendment Activity/Activities - First Amendment Activities include all forms of speech and expressive conduct used to convey ideas or information, express grievances, or otherwise communicate with others, including verbal and non-verbal expression. First Amendment Activities may include public displays of a group's or individual's feeling(s) toward a person(s), idea, or cause, and includes, but is not limited to, marches, protests, student walkouts, assemblies, and sit-ins. Such events and activities usually attract a crowd of persons, including participants, onlookers, observers, media, and other persons who may agree or disagree with the activity's point of view.
 - 1. Common First Amendment Activities include, but are not limited to, speeches, demonstrations, vigils, picketing, distribution of literature, displaying banners or signs, using puppets to convey a message, and other artistic forms of expression. These activities involve the freedom of

speech, association, assembly, and the right to petition the government, as guaranteed by the United States Constitution and the California Constitution.

2. All persons have the right to peacefully march, demonstrate, protest, rally, or perform the other activities protected by the First Amendment of the United States Constitution and California Constitution.
3. The government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are content-neutral, without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

- F. Incident Commander - The Incident Commander is responsible for all incident/event activities. The Incident Commander should be of the rank appropriate for the event. The Incident Commander may change throughout an evolving incident.
- G. Lawful Assembly - A First Amendment Activity, involving two or more persons, which abides by relevant statutory laws and does not involve violence or criminal acts.
- H. Riot - Any use of force or violence, disturbing the public peace, or any threat to use force or violence, if accompanied by the immediate power of execution, by two or more persons acting together, and without the authority of law, is a Riot. (404 PC)
- I. Rout - Whenever two or more persons, assembled and acting together, make any attempt or advance toward the commission of an act which would be a riot if actually committed, such assembly is a Rout. (406 PC)
- J. Supplemental Video Team (SVT) – The Supplemental Video Team is a resource available to the Incident Commander during First Amendment Activity covered under this procedure. The SVT will consist of personnel from the Media Services Unit. The objective will be to use video cameras to capture images, video and audio recordings to supplement information captured from officers’ Body Worn Cameras (BWCs). The SVT will adhere to Department Procedure 3.26 - Media Evidence Recovery and Impounding/Preserving Procedures.
- K. Unified Command - Unified Command is a procedure that allows all agencies with the significant geographical, legal or functional responsibility over an incident to avoid operational conflicts, economize resources by collocating at a single Incident Command Post or communicate their operational goals and strategies to each other during structured planning meetings.
- L. Unlawful Assembly - Whenever two or more persons assemble to do an unlawful act or do a lawful act in a violent, boisterous, or tumultuous manner, such

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assembly is an Unlawful Assembly. (407 PC) This section applies to assemblies which are violent, or which pose a clear and present danger of imminent violence. Because the assembly must in fact be violent or pose an immediate threat of violence, an assembly that is “boisterous or tumultuous” does not establish a violation of the statute.

V. PLANNING FOR FIRST AMENDMENT ACTIVITIES:

A. Pre-planned events

1. When appropriate, and consistent with Department Procedure, 8.04, the Incident Commander shall be responsible for developing a written contingency or incident action plan, consistent with the Department’s goals and objectives to minimize harm, honor constitutional rights, communicate with the event participants, and facilitate First Amendment Activity. This plan may be in a Department Memorandum format or the ICS 201 format. All or parts of the contingency or incident action plan may be exempt from public disclosure pursuant to the California Public Records Act. Each plan shall be marked accordingly.
2. The Incident Command System shall be appropriately used when managing First Amendment events.
3. The Incident Commander or designee shall immediately notify the affected Service Area Lieutenant and Division Captain of potential First Amendment Activities.
4. Consider engaging allied agencies (CHP, SDSO, Fire-Rescue etc.) if the First Amendment Activity could likely affect other jurisdictions or if assistance may become necessary.
5. Stakeholder involvement is essential to the overall success of managing First Amendment Activities. When knowledge exists that a First Amendment Activity may occur, the Incident Commander or designee shall proactively make reasonable attempts to establish and maintain communication and cooperation with representatives or the First Amendment Activity leaders.
6. If communication is established, the Incident Commander or designee shall make reasonable efforts to identify the event's representatives or leaders and identify a primary police liaison. The primary police liaison should be requested to be in continuous contact with an assigned police representative designated by the Incident Commander.
7. In planning for First Amendment Activity, Incident Commanders, or their designees, should consider the following factors in determining the appropriate resources and level of preparation necessary:

- a. What type of First Amendment Activity is expected to occur? (Press conference, demonstration, protests, static event, labor strike, picket line, march, caravan, sit-in/dine-in, etc.)
- b. What is the goal of the First Amendment Activity? (Raise awareness, disrupt a target location, counter another demonstration, engage in criminal activity, etc.)
- c. When will the First Amendment Activity occur? (Day of the week, holiday, time of day/traffic patterns, daytime/nighttime, conflict with other events at the same time.)
- d. Will there be an organizing individual/group, or will this be a crowd without identified leadership?
- e. Has the Department previously worked with the organizers? Have prior First Amendment Activities been lawful ?
- f. Where will the First Amendment Activity likely occur? Will the event affect critical infrastructure like police stations, jails, courthouses, freeways, government buildings, etc.? Will the effect be deliberate or collateral?
- g. If the group intends to be mobile, what will the predicted or planned route(s) be? (First Amendment Activity participants may not provide their own traffic control.)
- h. What will be the projected size of the First Amendment Activity event?
- i. What will the composition of the group be? (Juveniles, students, labor unions, known local groups, known groups from outside the area, unified as to a single cause, or diverse causes and points of view within the group, etc.)
- j. Will the hosting group provide its own marshals or monitors?
- k. Will an opposing group attend the First Amendment Activity event?
- l. Is there a likelihood of improvised or conventional weapons?
- m. Are arrests likely? Will prisoner processing be necessary?
- n. Is civil disobedience planned or likely?
- o. Is unlawful assembly planned or likely?
- p. Is riot planned or likely?

8. The operations plan created to address a First Amendment Activity event should anticipate various scenarios and devise a police contingency plan. All plans shall include de-escalation considerations in compliance with Department Procedure 1.55.
9. The Incident Commander shall balance any anticipated level of disruption to traffic against the goal of facilitating First Amendment Activity, including the practicality of relegating the crowd to sidewalks or an alternate route, the expected duration of the disruption, and the traffic disruption expected in making a mass arrest if demonstrators refuse to leave the street. This balancing does not mean First Amendment Activity participants will be allowed to disrupt commuter traffic and bridge approaches deliberately.
10. Department-Issued ID Only Name Tags
 - a. ID only name tags may only be worn during a Mobile Field Force (MFF) event with Incident Commander approval, consistent with Department Procedure 5.10.

B. Spontaneous Events

1. Spontaneous First Amendment Activities, which occur without prior planning or prior notice to the police, present less opportunity for planning and mitigation efforts. The same policies and procedures concerning crowd management, crowd control, and police responses to criminal activity described below apply to a spontaneous First Amendment Activity.
2. Unless unavailable, a supervisor shall respond to the scene of spontaneous events and assume the role of Incident Commander until relieved by a ranking officer.
3. The Incident Commander shall notify the Watch Commander and, if appropriate, the Service Area Lieutenant.
4. An immediate assessment of the situation is essential for an effective police response. The Incident Commander should evaluate the spontaneous First Amendment Activity using the factors listed above for planned events.

VI. LAWFUL ASSEMBLY, DEMONSTRATION OR PROTEST

- A. The goal of police involvement at peaceful First Amendment Activities is to preserve the peace, prevent criminal activity, control traffic, and facilitate the safe exercise of an individual or group's First Amendment rights.

- B. Officers shall remain professional when exposed to the content of the opinions being expressed regardless of the race, gender, sexual orientation, physical disabilities, appearances, or affiliation of anyone exercising their lawful rights. Officers shall be courteous in compliance with Department Policy 9.20.
- C. During peaceful First Amendment Activity, officers may find the occasional individual who engages in criminal conduct that is not reflective of the larger group. In these cases, when feasible, officers should address the individual offender in compliance with other Department procedures while minimally disrupting the larger assembly.

VII. UNLAWFUL ASSEMBLY

- A. An unlawful assembly is defined by California Penal Code 407 as "Whenever two or more persons assemble together to do an unlawful act or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly."
- B. When First Amendment Activity results in unlawful acts or violence, the Incident Commander shall consider the following in determining whether to declare the assembly unlawful:
 - 1. The threat to people or property.
 - 2. The number and nature of unlawful acts within the crowd.
 - 3. The number and nature of violent acts within the crowd.
 - 4. Whether the unlawful or violent acts result from one or two individuals or the larger crowd in general.
 - 5. Whether separate crowds have merged and now the group has internal conflict between participants.
 - 6. Whether contact with the police liaisons/event leaders to negotiate a resolution of the situation is appropriate and effective.
 - 7. Evaluation of whether arresting individuals will be more appropriate than dispersing the entire crowd.
 - 8. Determination if sufficient police resources are available on-scene to manage the incident effectively.
 - 9. The mere failure to obtain a permit, such as a parade permit or sound permit, is not a sufficient basis to declare an unlawful assembly.

10. The sole fact that some of the demonstrators or organizing groups have previously engaged in violent or unlawful acts is not grounds for declaring an assembly unlawful.

C. Declaration of Unlawful Assembly

1. If the Incident Commander deems it is appropriate to declare an unlawful assembly, dispersal orders must be given.
2. For a dispersal order to be valid, a public officer must direct the persons assembled to immediately disperse in the name of the People of the State. (726 PC) The officer is not required to use any particular words. However, the terms used must be sufficient to inform a reasonable person that the officer is acting in an official capacity and ordering people to leave the area. Additionally, the officer must communicate the order in a reasonable way that ensures that the order is heard. (Judicial Council of California Criminal Jury Instructions 2020, Instruction Number 2686).
3. Dispersal orders should not be given until officers are in a position to support/direct crowd movement. Members of the crowd should be given ample means of egress. The Incident Commander should consider persons with mobility issues when evaluating ample means of egress. The dispersal order shall be given at least three (3) times, and when safe, with audible confirmation from officers behind the crowd.
4. The dispersal order shall be given in English and Spanish.
5. The Incident Commander should ensure video recording occurs during unlawful assemblies, consistent with Department Procedures 1.49 and 3.26.
6. Officers shall activate their Body Worn Cameras before dispersal orders begin, consistent with Department Procedure 1.49.
7. Officers shall use the following dispersal order:

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I am (your name and rank), a Police Officer of the City of San Diego. I hereby declare this to be an unlawful assembly, and in the name of the People of the State of California, I command all those assembled at (give specific location) to immediately disperse. You may move to (give a suitable location for crowd destination). If you do not do so, you will be arrested. If you refuse to move, (describe force, e.g. chemical agents and other weapons will be used. Provide the chemical agent/projectile warning only if their use is anticipated.)

Yo soy (name and rank) un oficial del departamento de policia de San Diego. Por Medio de la presente declaro que esta es una asamblea ilegal y en el nombre del gobierno del estado de California, les ordeno a todos aquellos reunidos (give specific location) que se retiren inmediatamente. Usted puede moverse (give specific locations and best route). Sino hacen eso, ustedes seran arrestados. Si usted rehusa moverse se usara gas lacrimojeno y otras armas. (Provide the chemical agent/projectile warning only if their use is anticipated.)

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8. Incidents commanders shall consider the following methods that may be used to deliver and document dispersal orders (not in priority order):
 - a. Loud speech
 - b. Amplified sound
 - c. Ensuring that the order is heard in remote areas
 - d. Using unmanned aircraft equipped with amplified sound flown to inaccessible areas
 - e. Pre-recorded unlawful assembly messages in multiple languages as appropriate
 - f. Display of signage, including electronic signage and billboards, indicating unlawful assembly, dispersal and clearly identified routes of egress
 - g. Gaining the attention of the crowd and documenting affirmative responses of crowd members prior to the declaration of unlawful assembly
 - h. Positioning law enforcement personnel to the rear of a crowd to confirm and document hearing the transmission of the dispersal order
 - i. Acquiring multiple-language capability
 - j. Community alert system(s)
 - k. Provide easy to understand directions that help the crowd disperse so that they clearly understand the desired response
 - l. Using video/audio recording equipment for documentation of the dispersal order, the crowd response and their ability to hear
 - m. Use of social media platforms to send out alerts to specific areas

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9. Emergency Medical Services personnel should be staged before the use of crowd dispersal techniques defined below unless exigent circumstances exist. While SDPD does not have jurisdiction over San Diego Fire-Rescue personnel, officers may suggest EMS have proper materials on-site for the situation. For example, officers may suggest ample water be available for decontamination if the use of chemical agents is anticipated.
10. Unless exigent circumstances exist, crowd dispersal techniques shall not be initiated until the Incident Commander has ensured dispersal announcements have been made to the crowd.
11. These dispersal announcements must be made using adequate sound amplification equipment to ensure that they are audible over a sufficient area. The dispersal orders should be repeated after the commencement of the dispersal operation so that persons not present at the original broadcast will understand that they must leave the area. Consider using a bullhorn, vehicle Public Address (PA) system, Long-Range Acoustical Device (LRAD), or ABLE.
12. The Incident Commander should ensure that the name of the individual making the dispersal order and the date, time(s), and location(s) each order was given is recorded.
13. Officers shall document the details of the dispersal order in their probable cause declarations and arrest reports when charging 407/408 PC - Unlawful Assembly or 409 PC - Failure to Disperse.
14. Unless an immediate risk to public safety exists or significant property damage occurs, a reasonable time will be allowed for a crowd to comply with police commands before taking action.
15. The Incident Commander should note if all or part of the crowd responds to the dispersal order and attempts to leave, or whether there is an unwillingness to comply or willful defiance of the dispersal order.
16. If orders to disperse do not result in voluntary movement/compliance by the crowd, the Incident Commander may elect to use crowd dispersal techniques described in section IX of this procedure.
17. When a command decision is made to employ crowd dispersal techniques, continue attempts to obtain voluntary compliance and cooperation through announcements and negotiation. The Incident Commander shall suspend crowd dispersal techniques when a crowd reasonably appears to be dispersing. Crowd dispersal techniques may be re-employed if compliance ceases.
18. When a crowd disperses pursuant to a declaration of unlawful assembly, and the participants subsequently assemble at a different geographic location outside the dispersal area, and are engaged in non-violent and

lawful First Amendment Activity, the new assembly cannot be dispersed until the Incident Commander has determined that a new unlawful assembly is occurring. At such time, the Incident Commander will follow the steps outlined above for declaring an unlawful assembly.

19. If unlawful or violent activity continues as the crowd moves, the event should be treated as a continuous unlawful assembly.

VIII. RIOT

- A. California Penal Code section 404(a) states, "Any use of force or violence, disturbing the public peace, or any threat to use force or violence, if accompanied by the immediate power of execution, by two or more persons acting together, and without the authority of law, is a riot."
- B. California Penal Code section 404.6(a) states, "Every person who with the intent to cause a riot does an act or engages in conduct that urges a riot, or urges others to commit acts of force or violence, or the burning or destroying of property, and at a time and place and under circumstances that produce a clear and present and immediate danger of acts of force or violence or the burning or destroying of property, is guilty of incitement to riot."
- C. California Penal Code section 410 states, "If a magistrate or officer, having notice of an unlawful or riotous assembly, mentioned in this Chapter, neglects to proceed to the place of assembly, or as near thereto as he can with safety, and to exercise the authority with which he is invested for suppressing the same and arresting the offenders, he is guilty of a misdemeanor."
- D. In order to reasonably comply with P.C. 410, it is imperative that the Incident Commander assesses the situation on an ongoing basis to determine if the level of behavior of the crowd rises to the level of a riot. If the Incident Commander determines the elements of a riot have been met, the Incident Commander shall, as reasonable circumstances permit, implement strategies as described in Section VII- Unlawful Assembly, as well as Section IX- Crowd Dispersal Strategies, Objectives and Techniques.

Some factors to consider when responding to a riot include, but are not limited to: the size of the riotous crowd versus available officers, weapons being used by those involved in the riot as compared to those possessed by officers, and capable defensive measures officers may be able to use while interacting with the riotous crowd.

IX. CROWD DISPERSAL STRATEGIES, OBJECTIVES AND TECHNIQUES

- A. Crowd dispersal strategies and techniques shall be consistent with the Department's objectives to minimize harm, honor constitutional rights,

communicate with the event participants, and facilitate peaceful First Amendment Activity.

- B. Should negotiation and verbal announcements to disperse not result in the crowd's voluntary movement, officers may employ additional crowd dispersal techniques, but only after orders from the Incident Commander or their designees.
- C. Reasonable force under the totality of the circumstances will be used consistent with DP 1.04.
- D. Some of the permissible techniques to disperse or control a non-compliant crowd includes the following (not in any specific order of use):
 - 1. Display of police officers
 - a. A police formation may be moved as a unit to an area within the crowd's view to assist with crowd management. If a display of police officers, motorcycles, police vehicles, and mobile field forces, combined with a dispersal order, is ineffective, other techniques may be employed.
 - b. Generally, officers should be assigned to teams of sufficient size to be effective.
 - 2. Containment and Arrest for Violent Criminal Activity
 - a. If violent criminal activity is occurring, and the crowd has failed to disperse after the required announcements, officers may contain the crowd or a portion of the crowd for purposes of making multiple, simultaneous arrests.
 - (1) As described below, this technique shall not be used in response to non-violent civil disobedience.
 - (2) This technique shall not be used simply to disperse a crowd after an unlawful assembly declaration.
 - b. Officers should not be sent into a hostile crowd solely to communicate with them. Officers should not penetrate a crowd for an individual arrest unless the targeted individual is involved in criminal conduct which endangers persons or property. The decision to move into the crowd should generally be under the direction of the Incident Commander or designee.
 - c. Persons who make it clear that they seek to be arrested (e.g., sitting down, locking arms) shall be arrested and not subjected to other dispersal techniques.

- d. Arrests of non-violent persons shall be accomplished by verbal commands and persuasion, handcuffing, lifting, carrying, or the use of lesser controlling force, such as control holds, pressure point techniques, and the bent-wrist control hold or the use of OPNs, consistent with Department Procedure 1.04 - Use of Force.
 - e. Where remaining demonstrators have been advised that they will be subject to arrest if they choose to remain and still refuse to disperse, a member of the arrest team shall individually advise each demonstrator that he or she is under arrest before the application of any force to remove locking devices or to move the demonstrators.
 - f. In the event control holds are necessary, precautions should be taken to assure that arrestees are not injured or subjected to unnecessary or excessive pain, consistent with Department Procedure 1.04.
 - g. The decision to use control holds, and the reasons for applying force shall be documented on all appropriate forms and in Blue Team, consistent with Department Procedure 1.04.
 - h. On occasion, persons involved in a riot or unlawful assembly go mobile and commit criminal acts such as assault, vandalism, theft, etc., while actively fleeing or avoiding law enforcement. In these dynamic situations, officers may use techniques that are reasonable and compliant with existing policy, procedure, and law to encircle/contain such groups and affect the appropriate arrests.
3. Police Formations and Use of Batons
- a. If a crowd refuses to disperse after the required announcements, mobile field force formations may be used to move or disperse the crowd.
 - b. Batons may be visibly displayed and held in a ready position during formations.
 - c. Batons shall only be used as specified in DP 1.04 – Use of Force.
4. Use of Munitions
- a. **See Section X of this Procedure for limitations on the use of munitions.**
 - b. Unlawful assemblies are created when some or all involved in the assembly begin to violate local, state, or federal laws. It poses a unique situation for law enforcement to potentially control or arrest a large group of people, acting in concert.

NEW

- c. In these situations, less lethal tools may be a force multiplier, making it safer for all involved following the declaration of an unlawful assembly in moving/dispersing the riotous crowd and/or making arrests.
- d. Use of Specialty Munitions (DP 1.36) – Use of specialty munitions shall comply with Department Procedure 1.36. Generally, munitions 1-4, listed below, may be used while on the line and should be a coordinated effort directed by an Incident Commander. Munitions 1-4 may generally be used in coordination with the SWAT Munitions Team.

Authorization for munitions 5 and 6, listed below, shall be obtained by an Assistant Chief level officer and carried out by the SWAT munitions Team Leader

- (1) OC spray (Oleoresin Capsicum)
- (2) 40 mm foam baton rounds
- (3) Pepperballs (OC)
- (4) Flashbangs
- (5) CS gas grenades
- (6) Rubber Sting Balls- defensive maneuver for law enforcement personnel when faced with overwhelming aggression placing officers in immediate physical risk of serious bodily injury or death.

5. Arrests

- a. The Prisoner Processing Unit should be consulted before the event should mass arrests be anticipated.
- b. All arrests shall be based upon probable cause and conducted in compliance with existing Department Procedure 6.02 – Booking Procedures.
- c. All persons subject to arrest during a demonstration or crowd event shall be handcuffed per Department Procedure 6.01 – Handcuffing, Restraining, Searching, and Transporting Procedures.
- d. Officers should be cognizant that flex-cuffs may tighten when arrestees' hands swell or move, sometimes merely in response to pain from the cuffs themselves.

- e. Each unit involved in detention or transportation of arrestees with flex-cuffs should have a flex-cuff cutter and adequate supplies of extra flex-cuffs readily available. When arrestees complain of pain from overly tight flex-cuffs, members shall examine the cuffs to ensure proper fit.
6. Video Recording by Department Members
- a. The goal of police involvement at peaceful First Amendment activities is to preserve the peace, prevent criminal activity, control traffic, and facilitate the safe exercise of an individual or group's First Amendment rights.
 - b. Consistent with Department Procedures 1.49 and 3.26, Department members should refrain from video recording or photographing lawful First Amendment Activity. During lawful First Amendment Activity, officers should operate Body-Worn Cameras (BWCs) in the buffering/Stand-by mode. If officers witness crimes occurring among the demonstrators or believe an arrest is likely, they should begin recording in the Event mode, consistent with Department Procedure 1.49.
 - c. When there is a reason to believe that a planned event has the potential for unlawful activity, the Incident Commander should contact the Media Services Unit to coordinate with the Supplemental Video Team (SVT), consistent with Department Procedure 3.26
 - d. Refer to the Media Services Unit Operations Manual for further details regarding the use of the Supplemental Video Team.
 - e. If the Incident Commander or designee determines that a lawful assembly has turned into an unlawful assembly, officers should be directed to place BWCs in Event mode to begin recording the unlawful activity. Additionally, the Incident Commander or designee should coordinate with the Supplemental Video Team (SVT) to provide supplemental video documentation of the event.
 - f. Any video captured by either Body Worn Camera or the Supplemental Video Team will be properly preserved per Department Procedures 1.49 and 3.26.

NEW X. **USE OF ENERGY PROJECTILES AND CHEMICAL AGENTS TO DISPERSE A CROWD (ASSEMBLY BILL 48)**

- A. Use of kinetic energy projectiles and chemical agents shall not be used to disperse an assembly, protest, or demonstration, except as authorized by AB 48, which added Section 13652 to the Penal Code. **All sworn members of the Department**

shall comply with the requirements and standards set forth in Penal Code section 13652.

B. Penal Code section 13652 reads as follows:

- (a) Except as otherwise provided in subdivision (b), kinetic energy projectiles and chemical agents shall not be used by any law enforcement agency to **disperse** any assembly, protest, or demonstration.
- (b) Kinetic energy projectiles and chemical agents shall only be deployed by a peace officer that has received training on their proper use by the Commission on Peace Officer Standards and Training for crowd control if the use is objectively reasonable to defend against a threat to life or serious bodily injury to any individual, including any peace officer, or to bring an objectively dangerous and unlawful situation safely and effectively under control, and only in accordance with all of the following requirements:
 - (1) De-escalation techniques or other alternatives to force have been attempted, when objectively reasonable, and have failed.
 - (2) Repeated, audible announcements are made announcing the intent to use kinetic energy projectiles and chemical agents and the type to be used, when objectively reasonable to do so. The announcements shall be made from various locations, if necessary, and delivered in multiple languages, if appropriate.
 - (3) Persons are given an objectively reasonable opportunity to disperse and leave the scene.
 - (4) An objectively reasonable effort has been made to identify persons engaged in violent acts and those who are not, and kinetic energy projectiles or chemical agents are targeted toward those individuals engaged in violent acts. Projectiles shall not be aimed indiscriminately into a crowd or group of persons.
 - (5) Kinetic energy projectiles and chemical agents are used only with the frequency, intensity, and in a manner that is proportional to the threat and objectively reasonable.
 - (6) Officers shall minimize the possible incidental impact of their use of kinetic energy projectiles and chemical agents on bystanders, medical personnel, journalists, or other unintended targets.
 - (7) An objectively reasonable effort has been made to extract individuals in distress.
 - (8) Medical assistance is promptly provided, if properly trained personnel are present, or procured, for injured persons, when it is reasonable and safe to do so.

- (9) **Kinetic energy projectiles shall not be aimed at the head, neck, or any other vital organs.**
- (10) **Kinetic energy projectiles or chemical agents shall not be used by any law enforcement agency solely due to any of the following:**
 - (A) **A violation of an imposed curfew.**
 - (B) **A verbal threat.**
 - (C) **Noncompliance with a law enforcement directive.**
- (11) If the chemical agent to be deployed is tear gas, only a commanding officer at the scene of the assembly, protest, or demonstration may authorize the use of tear gas.
- (c) This section does not prevent a law enforcement agency from adopting more stringent policies.
- (d) For the purposes of this section, the following terms have the following meanings:
 - (1) “Kinetic energy projectiles” means any type of device designed as less lethal, to be launched from any device as a projectile that may cause bodily injury through the transfer of kinetic energy and blunt force trauma. For purposes of this section, the term includes, but is not limited to, items commonly referred to as rubber bullets, plastic bullets, beanbag rounds, and foam tipped plastic rounds.
 - (2) “Chemical agents” means any chemical that can rapidly produce sensory irritation or disabling physical effects in humans, which disappear within a short time following termination of exposure. For purposes of this section, the term includes, but is not limited to, chloroacetophenone tear gas, commonly known as CN tear gas; 2-chlorobenzalmalononitrile gas, commonly known as CS gas; and items commonly referred to as pepper balls, pepper spray, or oleoresin capsicum.
- (e) This section does not apply within any county detention facility or any correctional facility of the Department of Corrections and Rehabilitation.

NOTE: This directive does not prohibit officers’ abilities to use appropriate force options to defend themselves or others as defined in Department Procedure 1.04.

XI. RESOURCES

- A. Appropriately managing First Amendment Activity can be resource intensive. Several units within the San Diego Police Department can lend special skills and equipment to facilitate safe First Amendment Activities and a safe resolution to unlawful assemblies and riot scenarios. Each unit abides by Department Directives and the Unit's Operations Manual. Some of these resources include:
1. Air Support Unit
 2. Bicycle Teams
 3. Criminal Intelligence Unit
 4. Emergency Medical Services (Fire-Rescue)
 5. Homeland Security / Critical Incident Management Unit
 6. Information Services and Data Systems
 7. In-Service Training Unit
 8. Legal Advisors
 9. Media Services Unit
 10. Mobile Field Force-Bravo and Delta Platoons
 11. Mobile Field Force "Alpha" deployments
 12. Mobile Field Force Wave deployments
 13. Motors Unit
 14. Operational Support Administration
 15. Prisoner Processing Unit
 16. Special Event Traffic Controllers (SETCs)
 17. SWAT
 18. SWAT Munitions
 19. Traffic Division
 20. Unmanned Aerial Systems (UAS) Unit
 21. Volunteer Services

XII. PUBLIC INFORMATION AND THE MEDIA (DPs 1.30, 1.31 and 8.09)

- A. The media have a right to cover First Amendment Activity, including the right to record the event on video, film, photographs, and other mediums.
- NEW B. The media shall never be targeted for dispersal or enforcement action because of their media status. Officers shall not request nor require media or other members of the public to stop, pause, or discontinue audio or video recording.
- NEW C. Police Department members shall accommodate the media, to the extent possible and reasonable. When the immediate area surrounding a command post, police line, or rolling closure at the site of First Amendment Activity has been closed, California Penal Code section 409.7 allows duly authorized members of the media access to the closed area. This access applies to a “duly authorized representative” of any news service, online news service, newspaper, or radio or television station, or network.
 - 1. If access is granted to closed areas, members of the media are still not permitted entry into a command post or allowed to move through police lines and interfere with police actions. These violations may be cause for removing a journalist from a closed area or charging an offense not precluded by 409.7 PC. **Refer to DP 1.30 for further details regarding classification as a duly authorized media representative and PC 409.7.**
 - a. Even after a dispersal order has been given, clearly identified members of the media shall be permitted to carry out their professional duties unless their presence would unduly interfere with enforcement action. A member of the media shall not be cited for the failure to disperse, a violation of a curfew, or a violation of Penal Code section 148(a)(1) for gathering, receiving, or processing information.
 - b. Persons with a known history of participating and coordinating activities at events, interfering with police operations, or engaging in criminal conduct should be referred to a supervisor if they identify themselves as a journalist or member of the media and request access to closed areas.
- NEW D. Members of the media may not interfere with arrests, assault officers, or commit criminal acts under local, state, or federal law. Any criminal offenses by a media member shall be thoroughly documented, detailing specific facts, witnesses, and evidence.

XIII. MUTUAL AID REQUESTS

Refer to Department Procedure 8.10, Critical Incidents - Mutual Aid.

XIV. AFTER ACTION REPORTS

Refer to Department Procedure 8.11, Incident Report Procedures.

Exhibit 6

**SAN DIEGO POLICE DEPARTMENT
PROCEDURE**

DATE: MARCH 7, 2017

NUMBER: 4.16 - LEGAL

SUBJECT: PROCEDURES FOR HANDLING INCIDENTS
INVOLVING EXPRESSIVE ACTIVITY AND FIRST
AMENDMENT RIGHTS

RELATED POLICY: N/A

ORIGINATING DIVISION: OPERATIONAL SUPPORT

NEW PROCEDURE:

PROCEDURAL CHANGE:

SUPERSEDES: DP 4.16 - 10/09/2012

I. PURPOSE

This Department procedure establishes guidelines for officers responding to calls for service related to the exercise of First Amendment rights. Collectively, the many forms of expression are referred to as “expressive activity.”

II. SCOPE

This procedure applies to all sworn members of the Department.

III. BACKGROUND

A. The First Amendment of the United States Constitution guarantees the freedom of speech and the freedom of assembly. While the United States Constitution provides minimum protections that no state can infringe upon, a state may offer more protections than the United States Constitution.

California is one of the states whose constitution expands traditional First Amendment rights. As a result of this expansion of rights, the California Supreme Court (and later the United States Supreme Court) has ruled that the modern day shopping mall has assumed the function of the town square where people used to meet and discuss the issues of the day. These gatherings

sometimes disturb the orderly conduct of business at malls and other commercial properties. Property owners and managers often call for police assistance.

- B. The majority of these calls involve disputes that are civil in nature. Therefore, officers should keep in mind the following points when responding to calls for service involving expressive activity:
1. While private business owners may create reasonable time, place, and manner restrictions for the use of their property, these rules are not law. Therefore, police officers have no lawful authority to enforce them.
 2. Non-compliance with these restrictions, by itself, is not a crime. A person who is merely on the privately owned property of a business for the purpose of engaging in expressive activity, in violation of the business owner's rules, is therefore not committing a crime.
 3. A person who is merely on the privately owned property of a business for the purpose of engaging in expressive activity, in violation of the business owner's rules, does not become a trespasser by virtue of his continued presence, unless he engages in activity that genuinely obstructs the business or interferes with or intimidates the business' employees or customers.
 4. A business owner seeking to remove or restrict persons engaged in expressive activity must obtain a restraining order, or injunction, from a civil court. A person engaged in expressive activity who remains on the property in violation of such a court order would then be subject to arrest and removal.
 5. Labor activity is a form of expressive activity that is lawfully authorized by both Federal and State law. People engaged in lawful labor actions are specifically excluded from the trespassing statutes that pertain to certain types of property.
 6. Disputes between property owners and persons wishing to use the property for expressive activity are civil disputes. The sole purpose of police officers at these disputes is to preserve the peace.

IV. DEFINITION

Expressive Activity - any protest, proselytization, propagandizement, or other communication or conveyance of an idea or ideas, or message or messages, to a general audience, the effect, propensity, or intent of which is to express an idea or belief, or draw or attract a crowd or onlookers. These activities may be commercial, political, personal, or labor-related in nature.

V. **EXPLANATION OF PROPERTY RIGHTS AND ISSUES**

The courts recognize the right of property owners to control and use their own property. They also recognize the rights of citizens to exercise their constitutional rights. In their attempt to balance these sometimes-competing rights, the courts have ruled that “private property rights are not absolute and may be subordinated to the rights of society.”

The issue is not whether the property is privately owned, but whether, and to what extent, the owner has opened it up for public use. If the property is open for public use and that public use resembles the town hall function of a public meeting place, then the public’s right to engage in activities similar to a town hall outweighs the property owner’s right to the absolute control of the property.

A. Nature of the Property

1. One factor in determining the right of the public to enter property for purposes of expressive activity is the nature, purpose, and primary use of the property itself. As case law evolves in this area, it appears that a continuum has developed in terms of the types of property and the owner’s rights to control the property, versus the right of the public to engage in expressive activity there.
2. Shopping malls contain theaters, plazas, walkways, courtyards, food courts and, in some cases, even stages for public use. The extent and nature of the public’s invitation to use the property goes beyond merely making a purchase and leaving. Malls invite and encourage patrons to congregate and spend time together. These factors make them a modern “town center” and “town hall.” These are the properties where expressive activity has been upheld. Examples might include University Town Center and Fashion Valley malls.
3. Individual retail businesses, such as stand-alone businesses with their own parking facilities, separate from other businesses, do not possess the attributes of a “town hall” public forum. They do not offer the same inducements to congregate as the “town square.” Examples of these types of businesses might include convenience stores, grocery stores, gas stations, car dealers and even “big box” stores, if they are separated from surrounding businesses, where the invitation to the public is to come in and conduct business or purchase merchandise (as opposed to congregating for other purposes). It should be noted that these type of properties MAY be able to pursue a case for civil trespass followed up by a restraining order, however, rarely will these actions rise to the level of criminal trespass.

B. Reasonable Time, Place, and Manner Restrictions

While the courts have opened up some properties for expressive activity, they have also allowed property owners to adopt “reasonable” regulations to ensure that expressive activities do not interfere with normal business operations. Allowable regulations or restrictions fall into the following categories:

1. Time restrictions - property owners can restrict people wishing to use their property for expressive activity by limiting their activities to hours when the property is open for business.
2. Place restrictions - expressive activities can be limited to places generally open to the public. Those wishing to use the property for expressive activity may be excluded from areas used for deliveries (if they are not open to the public), office areas, or areas only open to employees of the mall or the stores in the malls.
3. Additionally, in stand-alone businesses, such as a “big box” store, further restrictions may be placed as to where expressive activity may take place on the property. To balance the rights of all, the business must still provide an area where those engaging in expressive activity are close enough to those using the store to have their message heard.
4. Manner restrictions - private ownership of property, and the sidewalks leading to it, does not operate to strip members of the public of their rights to exercise First Amendment privileges on the sidewalk at, or near, the place of entry to the establishment. In utilizing the sidewalk for such purposes, those seeking to exercise such rights may not do so in a manner that obstructs or unreasonably interferes with free ingress and egress to or from the business. Therefore, property owners may enact and enforce reasonable restrictions on the manner of the expressive activity to prevent obstructions or unreasonable interference with ingress or egress of the business.
5. Conduct that disrupts the business, such as excessively loud noise, particularly where it is not meant to communicate an idea or where it incites disruptive, intimidating or criminal activity, can be restricted.

C. Content Restrictions

While property owners may be able to impose reasonable time, place, and manner restrictions, they cannot restrict the content of the message being communicated, even if that message may harm the property or store owner’s business interests. For instance, they cannot prohibit the use of pickets or the passing out of leaflets, even when the pickets or leaflets urge a boycott of the shopping center or stores within the center.

D. Businesses Not Open to the Public

Most of the cases discussing expressive activity involve retail establishments. There are many other types of businesses, such as office buildings, and manufacturing and research facilities, which are not open to the public. They are not the equivalent of a public forum and expressive activity, with the exception of labor activity, could be prohibited on those properties. Incidents of trespassing that occur on these properties is generally described in Penal Code section 602(o).

VI. PROCEDURES

A. Initial Response

1. When responding to calls for service regarding expressive activity, officers should keep in mind that, depending on the nature of the expressive activity, emotions can be very inflamed. Upon arrival, it may be useful to stand back and observe the parties involved, taking note of whether those engaged in expressive activity are peaceful or not. If they are peaceful, they are not trespassing, even if they are in violation of the property owner's regulations.
2. Note any activity that might be considered obstructive or interfering with the business. If this occurs, those engaged in expressive activity lose the protection of their exemptions from the trespassing statutes and may be subject to arrest and removal.
3. When contacting the parties, officers shall remain fair and impartial.

B. Review of Documents

1. Property owners and those wishing to use the property for expressive activities are often sophisticated enough to arm themselves with legal advice about why their interests should prevail. Both parties may request that responding officers review their documents.
2. Business owners may ask officers to read and/or enforce their policies for expressive activity or legal opinions supplied by their counsel. While it would be appropriate for a police officer on the scene to attempt to mediate a resolution acceptable to both parties, it is **NOT** the place of the police officer to attempt to determine if the time, place, and manner restrictions are reasonable. Only a court can make those determinations. Therefore it is appropriate to decline to review these documents. The officer's sole determination for taking action is whether or not a crime has been committed; not whether the property owner's rules have been violated.

3. Likewise, those engaged in expressive activity may ask officers to read cases or opinions provided by their counsel purporting to authorize their presence. Again, declining to do so is appropriate.

C. Citizen's Arrest

1. In some instances, the property owner or their agent will insist that they have the authority to make a citizen's arrest based on a violation of their time, place, and manner restrictions. As discussed above, their restrictions are not law and therefore a violation of them cannot result in an arrest.
2. Making an arrest or accepting a citizen's arrest should be considered as a last resort. Absent extenuating circumstances, it is best to advise the parties to consult their legal counsel and to pursue civil remedies through the courts.
3. For a citizen's arrest to be appropriate the following elements should exist:
 - a. The activity of those engaged in expressive activity must have obstructed or interfered with the operation of the business, or interfered with or intimidated the employees or patrons of the property or the businesses on the property. It is not enough that an employee or patron was annoyed by having to pass those engaged in the expressive activity or that the patron did not agree with their message. There must have been some conduct that made them afraid to or discouraged their use of the property. This information must be obtained from the patron, not the property manager.
 - b. The crime must have occurred in the presence of the person making the arrest. It is not enough that the property owner or agent is aware of and has cause to believe that a crime has occurred. The statutory requirement is that the crime occurred in their presence. If it did not, they cannot make an arrest.
 - c. There must have been an actual criminal violation of any statute. If a crime has been committed, and the person(s) committing the crime refuses to leave after being requested to do so and the property owner or agent makes a citizen's arrest, an officer may accept the arrestee from the citizen making the arrest. After accepting the arrest, the officer can issue a misdemeanor citation to the person(s) arrested. If one or more of the exceptions to the misdemeanor citation release requirement is present, the officer can book the arrestee into county jail. As an alternative, the officer may complete a request for a notify warrant.

D. Court Orders

1. Disputes between property owners and those engaging in expressive activity are civil in nature. Therefore, relief sought by any party against the other must come from a civil court in the form of a restraining order or injunction.
2. When presented with a court order by either party, officers should handle them as they would any other court order. The officer should verify the validity of the order and whether or not it has been properly served. Officers can verify the order by calling the Sheriffs warrant division. Refer to Department Procedure 4.05, Protective Orders, for details.
3. In the event that a party named in the court order is present, in violation of the order, the officer should review the requirements of the order with the person and offer an opportunity to comply with the order.
4. If the person refuses to comply with the order, he/she is in violation of Penal Code section 166(4) which is a misdemeanor. Officers may then proceed in accordance with the procedures for making a misdemeanor arrest.

Exhibit 7

**SAN DIEGO POLICE DEPARTMENT
PROCEDURE**

DATE: DECEMBER 18, 2020

NUMBER: 1.36 – ADMINISTRATION

SUBJECT: USE OF SPECIALTY MUNITIONS

RELATED POLICY: 1.04, 1.05, and 1.06

ORIGINATING DIVISION: OPERATIONAL SUPPORT (SRT/SWAT)

NEW PROCEDURE:

PROCEDURAL CHANGE: **MAJOR CHANGES**

SUPERSEDES: DP 1.36 – 03/25/2016

I. PURPOSE

This Department procedure establishes guidelines for the authority and use of specialty munitions.

II. SCOPE

This procedure applies to all sworn members of the Department.

III. DEFINITIONS

Specialty munitions – munitions used during high-risk situations and civil unrest. Special Weapons and Tactics (SWAT) Officers, who have special training, use these munitions to assist others in critical incidents. Specialty munitions include:

NEW

A. Chemical agents – compounds, devices, and delivery systems utilized by SWAT and not covered by Department Procedure 1.06, Use of Liquid Chemical Agent. Compounds can include irritants such as Chlorobenzalmalononitrile (CS) or an inflammatory agent such as Oleoresin Capsicum (OC) or Pava (synthetic OC). Chemical agents can be liquid, powder, or gaseous. Delivery systems can be pyrotechnic, blast dispersion, OC Fogger, or aerosol.

NEW

B. Diversionary devices – canisters that emit a loud noise and bright light. They are intended to temporarily distract, confuse, and disorient subjects. They can also be used as “attention-getting” devices.

- C. Extended-range impact ammunition – designed to be used when “hard impact” weapons, such as a flashlight, PR-24, or OPN, would be reasonable, but impractical. Extended-range impact ammunition includes: 40MM foam rubber rounds and 12-gauge bean bag rounds.
- D. Frangible slugs – commonly referred to as Avon rounds, are designed to break into a powder upon impact with a solid object. They are fired from a 12-gauge shotgun and are used primarily to breach locked doors. They may be used in other situations as determined by the SWAT Commander.
- E. Pepper Ball – munitions system that employs paint ball launchers to fire “pepper balls” that contain powdered OC in place of the paint. Pepper Ball munitions also include glass breaking rounds and marking rounds.
- F. Sting Ball munitions – canisters that are designed to emit loud noise, bright light, and rubber projectiles.

IV. PROCEDURES

- A. Only SWAT personnel who have completed an approved training course and annual refresher training are authorized to deploy specialty munitions. Non-SWAT personnel who have completed an approved training course are authorized to deploy the extended range impact weapon system per Department Procedure 1.38 – Extended Range Impact Weapon System.
- B. Specialty munitions may be used in situations that include, but are not limited to:
 - 1. A violent subject who is armed with a non-traditional weapon, such as a baseball bat, crowbar, shovel, or any other object capable of inflicting injury;
 - 2. Jail or civil disturbances (to include Mobile Field Force (MFF) munitions team deployments);
 - 3. A subject who is armed with an edged weapon;
 - 4. A suicidal person armed with a dangerous weapon, or who is attempting to force officers into shooting him or her; and,
 - 5. An active or passive resistive subject reasonably believed to possess or have immediate access to a deadly weapon.
- C. Patrol supervisors may request the use of all specialty munitions and may authorize the use of extended range impact weapons and pepper balls; however,

NEW

the final decision for the deployment of specialty munitions only available to SWAT personnel rests with the SWAT operator deploying the munition. Except in emergencies involving the immediate threat of serious bodily injury or death, specialty munitions only available to SWAT personnel shall not be used without prior authorization of a SWAT supervisor.

NEW

D. Use of Munitions in a Mobile Field Force (MFF) activation

1. Unlawful assemblies are created when some or all involved in the assembly begin to violate local, state or federal laws. It poses a unique situation for law enforcement in the need to potentially control or arrest a large group of people, acting in concert.
2. In these situations, less lethal tools may be a force multiplier, making it safer for all involved following the declaration of an unlawful assembly in moving/dispersing the crowd and/or making arrests.

NEW

- E. Use of Specialty Munitions – Generally, munitions 1-4, listed below, may be used while on the line and should be a coordinated effort directed by an Incident Commander. Munitions 1-4 may generally be used in coordination with the SWAT Munitions Team.

Authorization for munitions 5 and 6, listed below, shall be obtained by an Assistant Chief level officer and carried out by the SWAT Munitions Team Leader.

1. OC spray (Oleoresin Capsicum)
2. 40 mm foam baton rounds
3. Pepperballs (OC)
4. Flashbangs
5. CS gas grenades
6. Rubber Sting balls - defensive maneuver for law enforcement personnel when faced with overwhelming aggression placing officers in immediate physical risk of serious bodily injury or death.

F. Safety Considerations

1. Generally, specialty munitions should not be deployed without a tactical plan and a cover officer;
2. Only factory-loaded ammunition will be used during operations;
3. Specialty munitions should not be used when the subject is in danger of falling from a significant height;
4. The SWAT operator using specialty munitions shall inspect their gear prior to being deployed to ensure proper condition and application; and,

NEW

5. Consideration shall be given to the fire hazard associated with deployment of diversionary devices and other pyrotechnic devices.

V. **MEDICAL TREATMENT**

NEW

A. An individual who has been struck by a specialty round shall be examined by paramedics, excluding the pepper ball munitions. Pepperballs can be used for area saturation. In this instance, an individual may be exposed to the Pava/OC agent and not have been struck by the munition. The kinetic energy of a pepperball impact is minor in relation to other extended range impact weapons. An individual struck by a pepperball round on bare skin typically experiences some minor redness or abrasions. An individual that was struck by a pepperball and sustains a more significant injury as a result of being impacted shall be examined by paramedics. This does not include merely exposure to the Pava/CS Agent.

B. It may be necessary to transport individuals to the nearest medical facility in compliance with Department Procedure 6.12, Paramedic Procedures and Emergency Treatment.

NEW

C. During any incident that requires the use of chemical agents, which includes exposure to Pepper ball rounds, the following medical treatment shall be administered:

1. Once the subject is taken into custody the Incident Commander or Mission Leader must ensure the subject's eyes are flushed with large amounts of water;
2. Expose the subject's face and eyes to fresh air;
3. If contact lenses are worn, have the subject or qualified medical personnel remove them;
4. Avoid rubbing the contaminated area; and,
5. Do not apply creams, salves, oils, or lotions as they may trap the agent on the skin.

NEW

D. First aid treatment shall be rendered as soon as possible. It shall be done within 30 minutes of applying the chemical agent unless exigent circumstances make the treatment impractical or the subject is not in police custody. If the subject voices objection or physically resists, a reasonable attempt will be made to persuade the subject to allow decontamination prior to transporting from the scene.

- E. The Mission Leader shall document, in the SWAT Incident Report, the type of chemical agent used and the first aid administered.

VI. REPORTING PROCEDURE

Whenever specialty munitions are deployed, appropriate documentation shall be completed. A SWAT Incident report, if appropriate, shall be prepared by the PRT leader. The deploying officer shall complete the following:

- A. SWAT Incident Report; and/or,
- B. Arrest Report or Officer's Report, and Use of Force, BlueTeam entry as described in Department Procedure 1.04. In addition to the elements required in that Department Procedure, the report shall also contain:

1. Date of incident;
2. Time;
3. Location;
4. All officers present at the time of deployment;
5. The subject's name and date of birth;
6. The name of the medical personnel treating the subject and the results of that examination; and,
7. The effectiveness of the specialty munitions deployed at the incident.

- C. Photographs shall be taken to document the existence or absence of injury to the subject, officers, or other persons. Photographs shall also be taken of any damage to the clothing or personal property of the subject, officers, or other persons at the scene, for evidentiary and investigative purposes. The officer taking the photographs shall note the date and time the photographs were taken and include his/her name and ID number in the report. Photographs taken at the scene shall be impounded in accordance with Department Procedure 3.02.

- D. Report Routing

1. The SWAT Incident Report shall be retained by the SWAT/SRT Unit for a minimum of two years.

2. The original Arrest Report(s) and/or Officer's Report(s) will be routed to Records Division.
3. Copies of the Arrest Report(s) and/or Officer's Report(s), as well as the photos taken, shall be routed to the appropriate investigative unit(s) for follow-up.

VII. NOTIFICATION

- A. Whenever a person has been struck by specialty munitions, the officer who deployed the munitions shall notify a SWAT supervisor, or field supervisor in the case of 40mm, beanbag, or pepper ball.
- B. The SWAT supervisor shall respond to the scene and evaluate the circumstances surrounding the incident.
- C. When appropriate, the SWAT supervisor shall notify the Watch Commander of the incident, in accordance with Department Procedure 1.04, Use of Force.

VIII. REVIEW PROCESS

The SWAT Commanding Officer shall review the use of specialty munitions as soon as practical following each incident or operation. The review will determine if the munitions functioned properly and were used in accordance with Department Procedure.