STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20-CVS 8563

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE CHARLOTTE-MECKLENBURG BRANCH NO. 5376, JUSTIN LAFRANCOIS, AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA, WILLIAM G. ADAMS, TEAM TRUBLUE, CHARLOTTE UPRISING, JAMIE MARSICANO, SOUTHEAST ASIAN COALITION, LINDSAY CARLEE

Plaintiffs,

v.

CITY OF CHARLOTTE, KERR PUTNEY, in his official capacity as Chief of Charlotte-Mecklenburg Police Department; and JOHNNY JENNINGS, in his official capacity as Chief of Charlotte-Mecklenburg Police Department.

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

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PRELIMINARY STATEMENT

This action challenges the Defendants' unconstitutional use of force and chemical agents against peaceful protesters in Charlotte. On June 2, 2020, members of the Charlotte Mecklenburg Police Department ("CMPD") trapped—or "kettled"—approximately 350 peaceful protesters as they walked up 4th Street between Tryon and College Streets, launching without warning a fusillade of tear gas, flash bang grenades and rubber and pepper bullets. Video footage from multiple sources shows the actions of CMPD and the abject terror they inflicted on the unsuspecting and peaceful marchers, and the marchers' desperate and chaotic efforts to flee the assault.[1] Though this incident was uniquely horrific, it reflects a pattern and practice of CMPD using chemical munitions against peaceful protesters without justification. This pattern includes a series of incidents in the days of protest preceding June 2, 2020, sparked by George Floyd's video-taped death in Minneapolis, as well as similar CMPD action against protesters in 2016, after the CMPD shot and killed Keith Lamont Scott. The events in 2016 led to a similar federal lawsuit,[2] spurred several citizens to run for and be elected to the City Council on calls for police reform, and led Defendants to commission an outside review of CMPD's actions.

Defendants have shown time and again they are unwilling to change. In short, they will repeat their transgressions absent Court intervention. At a TRO hearing on June 19, 2020, in advance of the NAACP Juneteenth rally that evening, CMPD was defiant in its defense that its actions towards protesters were fully justified. The Superior Court, at that hearing, entered a TRO to restrict CMPD's use of munitions against peaceful protesters unless violence necessitates such

[1] A video compilation of that footage us submitted as an exhibit with this brief. The vast majority of that footage was provided by local news sources, Plaintiffs or affiants.
[2] *See Winston v. Charlotte*,16-CV-729 (Oct. 21, 2016).

action. On June 26, 2020, the Court, citing the need to continue to protect protesters, extended the TRO until a date could be set for the preliminary injunction hearing.

Plaintiffs have filed this action for equitable relief to protect their state constitutional rights to assemble, to freedom of speech, and their right to due process before they are subjected to chemical weapons and brute force. Irreparable harm will result without a preliminary injunction. As demonstrated by CMPD's continued assertion that such undeniably excessive and punitive actions were justified, the continued threat of such violence and the pattern of police misconduct this year and in 2016 warrants injunctive relief to protect the right of protesters to engage in peaceful expressive activity without fear of reprisal.

This Court should grant injunctive relief for three reasons. First, Plaintiffs are likely to succeed on the merits of their claims under the North Carolina Constitution Article I, Section 12, the right to assembly; Section 14, the right to freedom of speech; and Section 19, the right to due process. The CMPD's use of chemical weapons and physical force to control and suppress the demonstrations chills Plaintiffs' rights to free speech and assembly. And the lack of justified or reasonably communicated dispersal orders threatens Plaintiffs' due process rights by failing to provide notice that they may, at any moment, be violently attacked and punished for protesting police conduct.

Second, Plaintiffs are likely to suffer irreparable harm if an injunction does not issue. Indeed, irreparable harm has already occurred in the form of suppression of speech and physical injury. As the written, photographic, and video evidence submitted with this memorandum shows, CMPD's actions have the continued effect of preventing demonstrators from fully exercising their rights. CMPD's actions and subsequent statements, promising to continue to use chemical munitions, have further served to chill Plaintiffs' prospective exercise of their rights.

Plaintiffs ask the Court to help stop a cycle of violence that has chilled and will continue to threaten their freedom to assemble and protest against police brutality in the weeks, months, and years to come. Former CMPD Chief Kerr Putney refused to ban CMPD's use of tear gas on peaceful protesters, leading the Charlotte City Council to prohibit its purchase this fiscal year. But CMPD retains a stock of chemical munitions that it is expressly willing to use. The TRO has protected peaceful protesters in Charlotte. If that relief is not extended, CMPD's threat to continue to use force on peaceful protesters would be sanctioned by the Court.

Third, the balance of equities and public interest tilt decisively in favor of issuing a preliminary injunction. This balance must always be struck in favor of preventing a violation of constitutional rights, especially where the challenged action harms not just the Plaintiffs, but others similarly situated. Nothing in the relief sought restricts CMPD from controlling violent riots. An injunction will delineate the very limited circumstance in which munitions can be used. The relief sought is simply an order that CMPD must act lawfully towards those who protest against it, as it has repeatedly failed to do so in the past.

FACTS

Plaintiffs are member organizations and individuals who have joined a series of ongoing protests in Charlotte against police brutality that began in late May following the death of George Floyd in Minneapolis. Mr. Floyd, a forty-six-year-old father, son, brother and Black man, was strangled in a knee hold for over eight minutes by an indifferent police officer who had detained him for a minor offense. Mr. Floyd's horrific death, captured in a bystander's video, sparked massive street protests in over 100 cities around this country and the world, including Charlotte.

Such protests are not new to Charlotte. The killing of another Black man, Keith Lamont Scott, by CMPD officers in 2016, resulted in widespread protests spanning many days. Over the

course of those protests, CMPD used excessive force, chemical weapons, and issued unlawful dispersal orders. Following that wave of protests, the City and CMPD hired an outside consulting group to assess the use of chemical agents and force on peaceful protesters, with factual findings similar to the recent CMPD abuse.[3] The *Advancing Charlotte* report, in attempt to prevent future excessive force and unconstitutional police action, issued a number of recommendations to the CMPD.[4] Yet, these same issues persist.

Starting on May 29, 2020, groups of demonstrators in Charlotte, including Plaintiffs, began to organize and protest systemic injustice perpetrated by law enforcement against Black people in the United States. These protests are planned to continue indefinitely. To date, almost 200 citizens[5] have been arrested, and countless others have been physically abused while peacefully protesting in Charlotte.

May 29 CMPD Abuse of Peaceful Protesters

On Friday night, May 29, 2020, members of the NAACP and other Plaintiffs, gathered to protest police brutality at the CMPD precinct on Beatties Ford Road. *See* Affidavit of Kristie Puckett-Williams ¶ 7, Jun. 23, 2020. Kristie Puckett-Williams, the statewide Campaign Manager at

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[3] Police Foundation, *Advancing Charlotte*, Final Report, February 2018 at 13-14 (internal citations omitted) ("At 10:30 p.m. [the night Mr. Scott was killed], the [CMPD] Operations Commander used the bus's public address (PA) system to issue a dispersal order and warn the crowd that chemical agents would be deployed if individuals within the group did not stop throwing rocks and bottles. Many individuals in the crowd were confused and frustrated by the dispersal order, *as they had not violated the First Amendment, and did not disperse.* Some demonstrators observed that the officers appeared to be uncoordinated and unorganized as they attempted to evacuate and relied on their less lethal devices to regain control. After the group did not disperse, the CEU deployed a "stinger grenade" immediately followed by a Triple Chaser CS canister to clear the crowd in front of the bus . . . After CMPD grenadiers—the officers, "responsible for the delivery of chemical agents, ballistic breaching, and less-lethal munitions"— threw multiple munitions out in front of the CEU, they were able to pull back from the crowd. At 11:25 p.m., the CEU issued another dispersal order using a patrol vehicle's PA system . . . CEU officers deployed crushable foam-nosed munitions that delivered oleoresin capsicum (OC) powder . . . CEU also used a 40-mm muzzle blast to deploy CS powder, and hand-tossed smoke and CS gas munitions.").

[4] *Id.* at 88.

[5] Praveena Somasundarum, *"The Worst Experience," Charlotte Groups Demand DA Drop Protest-Related Charges*, WBTV, June 22, 2020, *at* https://www.wbtv.com/2020/06/22/worst-experience-charlotte-groups-demand-da-drop-protest-related-charges/.

the ACLU of North Carolina, arrived at the Beatties Ford protest to serve as a legal observer of the interactions between protesters and police and try to ensure that protesters remained safe. *Id.* In an effort to disband the peaceful protesters, CMPD officers used rubber bullets, tear gas, pepper spray, and flash bang grenades, without giving clear and loud dispersal orders or reasonable opportunities for the protesters to disperse. *Id.* Numerous protesters were arrested without cause. *Id.*

CMPD tear gassed Ms. Puckett-Williams and shot her with rubber and pepper bullets and flash bang grenades as she peacefully observed the protests. *Id.* A CMPD officer threw a flash bang grenade at her sandaled feet, injuring them and causing her to be temporarily blinded and disoriented. *Id.* Shortly after 10 p.m., as Ms. Puckett-Williams pleaded with officers not to shoot her, a CMPD officer suddenly charged at her, threw her to the ground and arrested her for no apparent reason. *Id.*

May 31 CMPD Abuse of Peaceful Protesters

On Sunday night, May 31, 2020, there were multiple peaceful marches throughout the City to protest police brutality. *See* Affidavit of Justin LaFrancois ¶ 9. Around 6:00 p.m., CMPD began to follow a group of protesters as they marched through uptown. *Id.* ¶ 10. Plaintiff Justin LaFrancois, the editor and publisher of the online newspaper Queen City Nerve, joined the protesters to document the demonstration for his publication. *Id.* ¶ 14. At approximately 6:55 p.m., as the crowd marched south on Brevard Street toward Stonewall Street, CMPD police blocked the path of protesters on Stonewall Street and corralled them into Novel Stonewall Station. *Id.* ¶¶ 12-13. CMPD Crowd Enforcement Unit ("CEU") Officers arrived on a Charlotte Area Transit System ("CATS") bus and began firing pepper balls at the protesters in an apparent attempt to first corral

and then disperse them. *Id.* ¶ 15. Plaintiff LaFrancois was hit by a pepper ball in his right leg. A protester immediately beside him was also hit. *Id.* ¶ 16.

June 2 CMPD Abuse of Peaceful Protesters

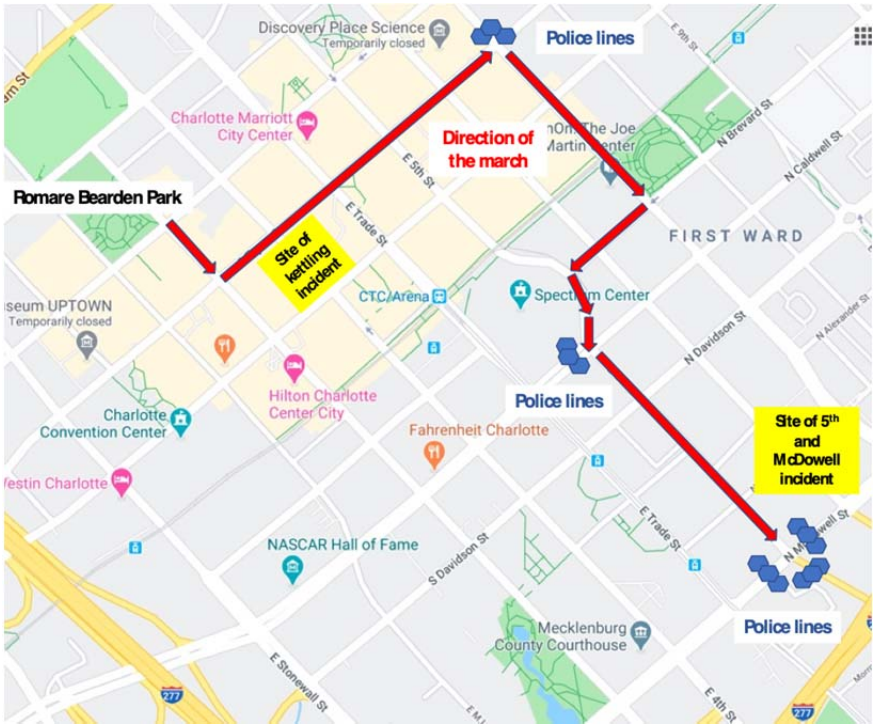
On June 2, 2020, Plaintiff NAACP organized a protest march that convened outside the Charlotte-Mecklenburg Government Center at approximately 5:00 p.m. *See* Affidavit of Lindsay Curlee ¶¶ 4-5 ("Curlee Aff."). The protest began with speeches, followed by a peaceful march against police brutality, and drew families with children.

Approximately 6,000–8,000 people attended the NAACP protest. *See* Affidavit of Lucille Puckett ¶ 4. After several speeches, the crowd marched peacefully through uptown Charlotte. As they had during the previous nights of protests in Charlotte, LaFrancois and Puckett-Williams each live-streamed this event on social media, as did other protesters. *See, e.g.*, LaFrancois Aff. ¶ 7; Puckett-Williams Aff. ¶ 6; Justin McElrain Aff. ¶ . Officers in uniforms, with Body Worn Cameras ('BWCs'), were present at this time, and CMPD Sergeant Brad Koch walked at the front of the march to facilitate traffic control. *See* Puckett Aff. ¶ 5.

At around 6:00 p.m., the marchers stopped at CMPD Headquarters. *See* Curlee Aff. ¶ 6. Several speakers addressed the crowd at this location without incident or unruly or disorderly conduct, and police presence was minimal. *See* Puckett Aff. ¶ 6. As one protester put it, "[p]eople were all peaceful and in good spirits." *Id*. At approximately 6:20 p.m. the march continued without incident and reached Romare Bearden park at approximately 8:00 p.m. Some speakers addressed the crowd, which now numbered in the 800s. *See, e.g.*, Curlee Aff. ¶¶ 7-8; Puckett-Williams Aff. ¶ 9. The protest remained peaceful. *See, e.g.*, Hahn Aff. ¶¶ 11, 15; Puckett-Williams Aff. ¶ 40.

At about 8:45 p.m., a group of approximately 350 protesters left Romare Bearden Park and marched down 5th Street toward North McDowell Street. *See* Puckett-Williams Aff. At ¶ 11. At

different points in this segment of the march, they were interrupted by groups of police and directed to change course. *See* LaFrancois Aff. ¶ (video).



When the protesters marched down 5th Street and reached North McDowell Street, a group of 40–50 police officers dressed in riot gear were waiting on the east side of North McDowell Street, blocking the entrance ramp to Independence Boulevard. *See, e.g.*, Hahn Aff. ¶ 1; Puckett-Williams Aff. ¶ 12. At approximately 9:03 p.m. CMPD officers, without provocation, suddenly threw a Triple Chaser CS Canister ("tear gas canister")[6] and flash bang grenades into the crowd, upsetting the marchers who then began to argue with the police. *See, e.g.*, Hahn affidavit ¶ 9; Curlee Affidavit ¶ 10. Reverend Justin Martin, standing at the front of the crowd and dressed in full pastoral garb, asked what the officers wanted the crowd to do. Instead of receiving an answer, he was pepper sprayed. *See, e.g.*, Martin Aff. ¶¶ 20-22; Puckett-Williams Aff. ¶ 14. He fell to the

[6]*See*, Ex. 17, Report authored by the State Bureau of Investigation ("SBI Inquiry") at 1.

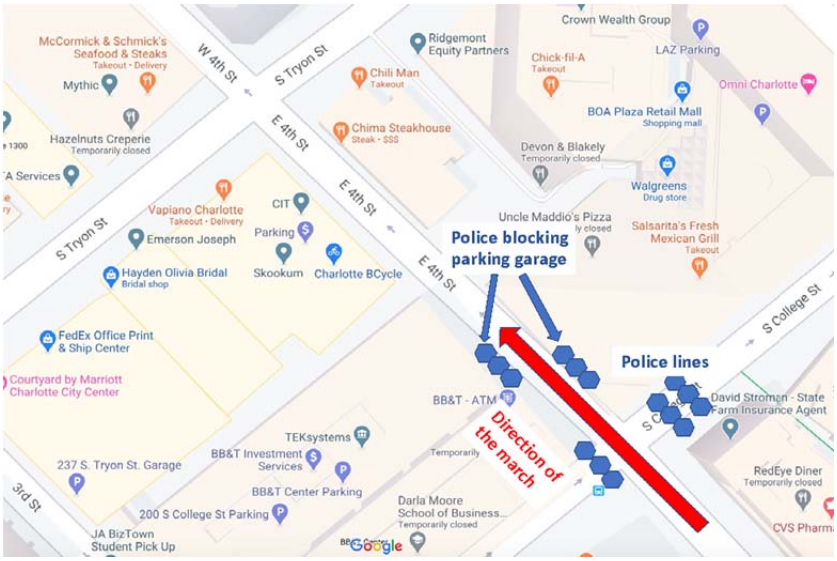
ground, disabled, and eventually was able to leave the march after calling for assistance. *See* Martin Aff. ¶¶ 20-29. He suffered from burns to his feet that lasted a week. *Id.* ¶¶ 35-38. Plaintiff LaFrancois, live-streaming the event as a member of the press, was hit with a flash bang grenade fragment and witnessed the police pepper spray another member of the press. Lafrancois Aff. ¶¶ 27-29.

CMPD has claimed that they were forced to launch tear gas into the crowd—while in full riot gear—because a protester threw a bottle, but that justification is disputed by the Plaintiffs. *See, e.g.,* Affidavit of Melody Rogers ¶ 12 ("Rogers Aff."); Affidavit of Kaitlin Rothweiler ¶ 15 ("Rothweiler Aff."). There is no evidence of any repeated or widespread bottle throwing, or other behavior directed at police that warranted use of chemical munitions against peaceful protesters. CMPD Chief Putney would later claim in press statements that a dispersal order was also issued at this time, but no such order can be heard on any of the live stream broadcasts, and none of the individual Plaintiffs or witnesses heard such an order. *See, e.g.*, Curlee Aff. ¶ 1; Rothweiler Aff. ¶ 14.[7] That alleged dispersal order was used as the legal basis upon which the police later kettled and forcibly dispersed the entire protest. After the police threw the tear gas canister, the march dispersed briefly and then coalesced to move back up 5th Street toward uptown. *See* Hahn Aff. ¶¶ 10-13. Many had their hands up and were chanting, "hands up, don't shoot." As the march moved uptown, police on bicycles began to block off intersections, forcing the marchers onto 4th Street. *See, e.g.,* Hahn Aff. ¶ 14.

According to LaFrancois' live-stream, at 9:28 p.m., some 25 minutes after the alleged dispersal order was issued, the protesters marched up 4th Street across College Street. *See* Rogers

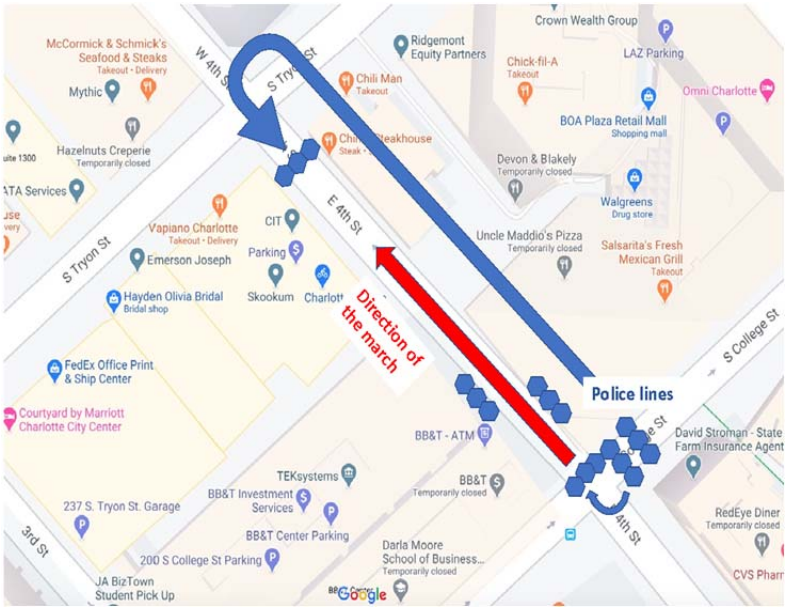
[7] On every other night, Plaintiff LaFrancois announced the issuance of a dispersal order in his previous live streams; in this instance, he did not announce the alleged dispersal order despite being only several feet away from the police line.

Aff. ¶ 15. As the protesters reached the intersection, two large lines of CMPD officers—one on bikes and the other in riot gear—blocked both sides of College Street, funneling the protesters up 4th Street towards Tryon Street. *See, e.g.*, Curlee Aff. ¶ 15; Hahn Aff. ¶ 14. McElrain Aff. ¶¶ `15-18; LaFrancois Aff. and videos.



CMPD officers also lined the block where the protesters were soon to be trapped, cutting off possible avenues of escape. One line stood guard along 4th Street at the entrances to two parking garages, and another blocked an alley containing a BB&T ATM Machine. *See, e.g.*, Hahn Aff. ¶¶14-21; Puckett Aff. ¶ 8; McElrain Aff. ¶¶ 15-18; LaFrancois Aff. ¶. The marchers can be seen on video filing peacefully past the officers on College Street, chanting and holding their hands up. McElrain Aff. ¶ 17; LaFrancois Aff. As one protester put it, "the protesters were energetic yet committed to our peaceful protest mission." *See* Puckett Aff. ¶ 7.

As the protesters reached Tryon Street, a contingent of officers rushed out in front of the protesters without warning and blocked their advance. Rodgers Aff. ¶ 2. The CMPD officers lined up across 4th Street, completely stopping the marchers. *Id.*



Immediately, one of the officers lined up across Tryon Street threw a canister of tear gas at the protesters and another threw a flash bang grenade.[8] *See, e.g.,* Hahn Aff. ¶ 22; Curlee Aff. ¶ 18. The tear gas and grenade explosion caused the protesters in the front of the march to panic and flee backwards down 4th Street. *See* Curlee Aff. ¶ 20. The two images below show the tear gas deployed by CMPD police on 4th Street and South Tryon Street in front of the protesters, cutting off their path forward.[9]

However, as they tried to flee, the officers on College Street stepped in behind the protesters and threw three tear gas canisters to block their exit—one on the right side of 4th Street, a second on the left side, and a third down the middle and right into the panicked crowd of protesters.[10] *See, e.g.*, Curlee Aff. ¶ 20*;* Puckett-Williams Aff. ¶¶ 29-31; Puckett Aff. ¶ 8; LaFrancois Aff. ¶¶ 36-49. The protesters were now trapped entirely in a tactic known as kettling.[11]

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[8] *See* Ex. 17, the SBI Report states that at 9:30 Riot Control Agents ("RCAs") were "deployed by the assigned Grenadier."

[9] The photographs cited in this brief are screen shots taken from the live stream video footage of Justin Lafrancois and Kristie Puckett-Williams.

[10] *See* Ex. 17, The SBI Inquiry states that video shows "some RCA's appear to hit protesters running to exit 4th Street toward S College Street."

[11] Ben Zimmer, *Kettling From German Military Tactics to U.S. Streets*, WALL STREET JOURNAL, June 12, 2020 ("The word derives from the German word 'kessel'—literally a cauldron, or kettle—to describe an encircled army about to be

The two images below show the tear gas deployed by CMPD police on 4th Street and College Street, down the very path the protesters were attempting to flee.

Trapped by the tear gas and officers on both sides of 4th Street, along with buildings on the other two sides, ***officers stationed on the second floor*** of a parking deck alongside of 4th Street began to shoot at the protesters with pepper balls and rubber bullets, hitting some of the protesters directly in the face. *See, e.g.*, LaFrancois Aff. ¶¶ 41-47; Rothweiler Aff. ¶¶ 36-43. Someone began to yell, "[t]hey're shooting at us, they're shooting at us." *See* Curlee Aff. ¶ 29. Video footage shows one protester with a bright red welt right below his eye where he had been struck by a pepper ball in the face; he was reportedly shot six times. *See* LaFrancois Aff. ¶ 56.

annihilated by a superior force," the BBC reported in 2010. 'For soldiers within the kettle the situation would soon become unbearably hot. . . 'The German army in World War II became known for a battle tactic called 'Keil und Kessel, 'translated as 'wedge and trap 'in a 1942 U.S. Army report by an infantry instructor, Carrol A. Edson, who wrote, 'the enemy is in the kettle, or as we would say, in the pot, or, more colloquially, 'in the bag.'").

These videos show the terror of the protesters as they scream and gasp for air. *See* Puckett-Williams Aff. ¶ 36. Many can be seen removing COVID-protective masks in desperation or falling to their knees and huddling together for protection. *See, e.g.*, Puckett Aff. ¶¶ 9-10; Curlee Aff. ¶¶ 31-32. Some protesters found it so hard to breathe from the tear gas that they fell to the ground, overwhelmed and had to be helped up. *See*, *e.g.*, Hahn Aff. ¶¶ 25-27; Curlee Aff. ¶ 36. Some vomited and others briefly lost consciousness. *Id.* Some of the officers acted amused at the chaos, *see* Curlee Aff. ¶ 20, as the crowd desperately tried to find ways to escape. Some forced open the gate of a parking garage high enough for people to crawl under. *See* Puckett-Williams Aff. ¶ 35. As the tear gas started to dissipate, some ran through it towards College Street, coughing, gagging and crying. *See* LaFrancois Aff. ¶¶ 41-46. Others escaped through the alleyway by the BB&T ATM, which police blocked at first. One protester crawled through that alleyway on her hands and knees. *See* Puckett Aff.

Another protester was shot in the back of the head with a projectile as she escaped down 4th Street, causing her to fall to her knees. *See* Rothweiler Aff. ¶¶ 50–52.

Plaintiff Lindsay Curlee witnessed the police then hunt down protesters for a time after the incident. *Id.* ¶ 38. During the entire incident, none of the protesters witnessed any violent, disorderly, or riotous behavior by any protester. *See, e.g.*, Rothweiler Aff. ¶¶ 50–52; Puckett Aff. ¶ 11; Puckett-Williams Aff. ¶ 40.

The kettling was widely reported by the news media and sparked outrage about CMPD's actions, including among City council members and government officials. Mayor Vi Lyles stated: "Most of you are aware there was a video of the protest action that took place last night. And on that video it appeared to be a situation that there are probably not the words to describe the way that it appeared and how it acted and turned out ... Last night was one of those times that none of us can be proud of—that none of us would want to see happen in our city. But it did. And I hope everyone is aware that that's not the kind of department we want to have for policing. lt's not the kind of reputation that we want to have nationally or locally."[12]

At the Charlotte City Council meeting the following Monday, the City's annual budget was on the agenda for approval. Council member Braxton Winston, who legally challenged the use of tear gas in 2016, and who had been arrested during the current protests, moved to block any funds

[12] *City of Charlotte Hosts Community Forums After Incident Between Protesters and Police*, WCNC, June 4, 2020, *at* https://www.wcnc.com/article/news/local/charlotte-news-conference-wednesday/275-08b7983a-7f46-4f1c-a006-890768d10035.

being used to acquire or maintain CMPD's tear gas supplies. The Charlotte City Council voted 9-2 to cease funding *future* purchases of tear gas for the 2021 fiscal year.

CMPD expressly opposed this vote.[13] In response to this decision, Chief Putney publicly refused to discontinue the use of tear gas on demonstrators, instead saying officers "will be forced to use batons to break skin and bones." Putney claimed that, without chemical agents, the Charlotte protests will be similar to the Civil Rights era, stating "Birmingham, Alabama . . . All day long."[14]

Putney requested an investigation by the North Carolina State Bureau of Investigation ("SBI") into CMPD's actions on June 2, 2020. His request to the SBI, however, only sought to justify CMPD's actions and support its unwillingness to recognize its violent misconduct toward peaceful protesters. The SBI report states that Putney had asked the agency to assess CMPD "response" to the "riots" on 4th Street.[15] The videos prove unequivocally that CMPD created the chaos and attacked and terrorized a group of peaceful demonstrators.

Tear Gas is a "Nerve Agent" Banned in International War

Tear gas has been banned in international warfare, yet CMPD has routinely used it on peaceful protesters whose message includes police reform. *See* Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571 (hereinafter Geneva Protocol); *see also* Affidavit of Dr.

[13] *Charlotte City Council Bans CMPD from Buying Tear Gas for Crowd Control*, WBTV, June 8, 2020, *at* https://www.wbtv.com/2020/06/08/charlotte-council-bans-cmpd-buying-tear-gas-crowd-control/.
[14] Steve Harrison, *CMPD Chief Says Tear Gas Ban Would Lead To Officers Using Brute Force, With Shields And Batons*, WFAE 90.7, June 8, 2020, *at* (https://www.wfae.org/post/cmpd-chief-says-tear-gas-ban-would-lead-officers-using-brute-force-shields-and-batons#stream/0.)
[15] *See* Ex. 17, SBI Inquiry at 1.

Sven-Eric Jordt[16] ¶¶ 12-21 ("Dr. Jordt Aff."). Numerous recent studies, including by the U.S. Department of Defense, have shown that a single exposure to tear gas can increase risk of bronchitis, pneumonia, influenza and cause permanent lung damage. Dr. Jordt Aff ¶¶ 11-21. The United Nations Human Rights Guidance on Less Lethal Weapons in Law Enforcement warns of significant health risks when tear gas is deployed in enclosed areas and *behind* protesters.[17] And the Scientific Advisory Board of the Organization for the Prohibition of Chemical Weapons has determined that tear gas agents are likely safe only in "scenarios involving the dispersal of relatively low concentrations of the chemicals and unrestricted movement after the people would first perceive sensory irritation."[18]

Moreover, pepper balls or bullets contain "formulations of highly concentrated and potent pepper extracts (OC, Oleoresin Capsicum)" the safety of which "has not been investigated and it is unknown whether they generate toxic combustion products." *Id.* ¶¶ 25-26. "Pressurized air-propelled pepper projectile launching systems often lose target accuracy over time, and have caused severe facial and brain injuries and even deaths, as in the case of Ms. Victoria Snelgrove who was killed by a pepper projectile by Boston police in 2004."[19] *Id.*

Plaintiffs Fear Continued CMPD Abuse

Plaintiffs are physically and psychologically traumatized. One protester sustained physical injuries to her legs and feet from CMPD's use of flash bang grenades and pepper bullets, *See* Puckett-Williams Aff. ¶ 7, 39; some have asthmatic lungs that still hurt weeks later, *See* Hahn Aff.

[16] Dr. Jordt, Associate Professor of Anesthesiology, Pharmacology & Cancer Biology at Duke University School of Medicine and former Chair of the Terrorism and Inhalation Disaster (TID) Section of the American Thoracic Society (ATS), reviewed footage of the June 2 kettling incident and provided the attached affidavit to Plaintiffs. ¶ 22.
[17] Available at https://www.ohchr.org/Documents/HRBodies/CCPR/LLW_Guidance.pdf
[18] Available at https://pubs.rsc.org/en/content/articlelanding/2018/ra/c8ra08273a#!divAbstract.
[19] Shelley Murphy, *Snelgrove Family Settles Lawsuit*, BOSTON GLOBE, July 14, 2006, *at* http://archive.boston.com/news/local/massachusetts/articles/2006/07/14/snelgrove_family_settles_lawsuit/.

; and most, if not all, are fearful and afraid every time they see police. *See, e.g.*, Hahn Aff.; Curlee Aff. ¶¶ 41-42. One Plaintiff has had recurring nightmares and must sleep with the lights on. Curlee Aff. ¶ 43. Multiple Plaintiffs testify that they continue to attend protests but now bring "precautionary gear," such as goggles, baking soda, milk of magnesia, water, change of clothes, and other provisions in order to protect themselves from future chemical munitions and police violence. *Id.* These are Charlotte citizens that now prepare for chemical assaults in order for exercising their constitutional rights. Ms. Puckett-Williams described the continued fear and acts of retaliation Plaintiffs have endured from the CMPD:

> CMPD has been parking in front of my neighbors 'house since June 9, 2020 in marked police vehicles. I have lived here for a couple of years and very rarely see police in the neighborhood and now I see them quite often. Marked and unmarked cars follow me when I leave the uptown area to intimidate me. CMPD officers ask me tauntingly how my feet are, letting me know that they have purposely aimed for my feet when I am out documenting their behaviors. Everytime I see them, I am reminded of the many injuries and injustices I have witnessed at the hands of CMPD against me and others. Since the protests began on May 29, I have been shot with rubber bullets by CMPD while sitting on the sidewalk and not involved in any protest but taking a break from walking. On June 1, CMPD officers on bicycles physically pushed me and others while we were eating food purchased from a street vendor uptown -- there were no protesters around and CMPD was telling us to move even though there was no curfew in effect. As a result of all that I have witnessed, I am very leery of law enforcement officials. I do not believe I will ever be the same after experiencing and witnessing all the things I have since the protests began.

Puckett-Williams Aff. ¶ 39.

ARGUMENT

Defendants have caused irreparable harm by suppressing Plaintiffs' rights of free speech, of assembly, and by violating their right to due process. Defendants also indiscriminately and unconstitutionally applied North Carolina's dispersal order statute over the course of the ongoing protests. Irreparable harm will continue without an order from this Court enjoining Defendants ' unconstitutional acts.

A. Injunctive Relief Standard

A preliminary injunction is "an extraordinary measure taken by a court to preserve the status quo of the parties during litigation and will issue: (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is *likely* to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 701 (1977). In determining the likelihood for irreparable harm, courts "weigh the equities" for and against a preliminary injunction. *Holmes v. Moore*, 840 S.E.2d 244, 265 (N.C. Ct. App. 2020). In First Amendment cases, "likelihood of success on the merits will often be the determinative factor." *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) (quoting *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012), *cert. denied*, 568 U.S. 1027 (2012)).

B. Plaintiffs Are Likely to Succeed on the Merits Because the City's Actions Violate the North Carolina Constitution

The North Carolina State Constitution provides more protection that its federal corollary. *Corum v. Univ. of N. Carolina*, 330 N.C. 761, 783 (1992) ("Our Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens. . . . We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property.") North Carolina state courts will thus look to First Amendment case precedent for merely *minimum* standards for freedom of assembly and speech claims brought under the North Carolina Constitution. *See, e.g., N. Carolina Council of Churches*, 120 N.C. App. at 90 ("Given th[e] scarcity of case precedent, we turn to factually similar cases decided under the First Amendment to the United States Constitution for guidance."); *State v. Callum*, 13-CR-217450

(Wake Cty. Aug. 19, 2014) (finding arrests of protesters an unconstitutional violation of the right to assembly under Art. I Sec. 12 and the First Amendment) (Attached as Exhibit 22).

i. The City's Actions Violate the Right to Assemble

The attacks on peaceful protesters with chemical munitions and continued use of unconstitutional dispersal tactics violates Plaintiffs' rights to assemble under the North Carolina Constitution. "The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances." N.C. Const. Art. I, § 12. State courts have found this provision to apply to the right to demonstrate. *State v. Frinks*, 284 N.C. 472 (1974).

In 2014, after mass arrests during the Moral Monday protests, Wake County District Court Judge Anne Salisbury interpreted the protections under Article I Section 12 and the First Amendment by scrutinizing whether the police actions at issue burdened the right to assemble. Ex. 22, *State v. Callum*, 13-CR-217450 (Wake Cty. Aug. 19, 2014). Hundreds of protesters gathered at the General Assembly to sing, chant, clap and pray when they were ordered to disperse and were then arrested after they failed to do so. *Id.* at 3-6. The court held that the state's actions constituted an "unconstitutional burden upon [the protesters] right to peacefully assemble." *Id.* at 9. There is little appellate case law applying Article I, Section 12 to protest marches, but Judge Salisbury's application of Section 12 was consistent with federal guidance on the right to assemble. The right to freedom of assembly is protected as a bedrock of a free society. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) ("From the outset, the right of assembly was regarded not only as an independent right but also as a catalyst to augment the free exercise of the other First Amendment rights with which it was deliberately linked by the draftsmen."); *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967) ("We start with

the premise that the rights to assemble peaceably and to petition for a redress or grievances are among the most precious of the liberties safeguarded by the Bill of Rights."); *De Jonge v. State of Oregon*, 299 U.S. 353 (1937) ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.").

Government restrictions of demonstrations can only be justified if the assembly presents a "clear and present danger" to the public interest. *See, e.g. Thomas v. Collins*, 323 U.S. 516 (1945) ("[W]hatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) (holding that police may only disperse public protests where a "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears"); *Edwards v. South Carolina*, 372 U.S. at 232, 237 (1963) (holding that a "clear and present danger" means more than annoyance, inviting dispute or slowing traffic).

The Supreme Court has repeatedly found that protesters' rights to assemble were unconstitutionally violated after government officials dispersed or arrested demonstrators engaging in political speech. *See, e.g., Edwards*, 372 U.S. at 233 (holding peaceful protesters 'rights to assemble were violated when officials initiated arrests for breach of the peace after issuing a dispersal order without any clear or present danger); *Coates v. Cincinnati*, 402 U.S. 611 (1971) (upholding students 'right to protest in a labor dispute because the ordinance they were arrested under was too vague in prohibiting assembly of persons on sidewalks); *Gregory v. City of Chicago*, 394 U.S. 111 (1969) ("Petitioners' march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment."); *Brown v. State of Louisiana*, 383 U.S. 131 (1966)

(holding that the application of a "breach of the peace" statute was "deliberately and purposefully applied solely to terminate the reasonable, orderly, and limited exercise of the right to protest the unconstitutional segregation of a public facility."); *Cox I*, 379 U.S. at 546–47 (finding that a group of protesters who provoked a visceral, angered response and slowed traffic did not jeopardize their right to assembly).

CMPD has attempted to justify its attack on 350 peaceful marchers as a response to alleged isolated incidents of disorderly conduct by specific individuals. But "the right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982).

This case is no different. In Charlotte, on multiple occasions from May 29 through June 2, peaceful protesters, exercising their rights to freedom of assembly, were unduly and unlawfully victimized by forceful police tactics that brought the demonstrations to a premature halt and literally brought protesters to their knees. The allegation that a few protesters may have engaged in unruly behavior—almost an hour prior and blocks away—does not, in precedent or in equity, present the "clear and present danger" that would override Plaintiffs' undeniable and fundamental rights to freedom of assembly and warrant violent attacks on hundreds demonstrating peaceably. .

ii. The City's Actions Violate the Right to Freedom of Speech

Article I, Section 14 of the North Carolina Constitution states that "[f]reedom of speech and the press are two of the great bulwarks of liberty and, therefore, shall never be restrained, but every person shall be held responsible for their abuse." The City's continued suppression of speech (1) is so burdensome that it amounts to an unconstitutional restriction of Plaintiff's protected speech, and (2) amounts to retaliation for protected speech under the North Carolina

State Constitution.

While the standards for freedom of speech claims under the "North Carolina Constitution are substantially identical to those for free-speech claims under the federal constitution," when interpreting a provision of the North Carolina Constitution that parallels a provision of the United States Constitution, "the only significant issue . . . will always be whether the state Constitution guarantees additional rights to the citizen above and beyond those guaranteed by the parallel federal provision." *Munn-Goins*, 658 F. Supp. 2d at 730 (full cite); *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 475 (1999) (quoting *State v. Jackson*, 348 N.C. 644, 648 (1998)). The federal constitution's free speech protection is a floor; the North Carolina Constitution remains free to provide more expansive interpretations of that protection under Article 1, Section 14. *See State v. Petersilie*, 334 N.C. 169 (1993) ("We have also recognized that 'in construing provisions of the Constitution of North Carolina, this Court is not bound by opinions of the Supreme Court of the United States construing even identical provisions in the Constitution of the United States.'") (quoting *State v. Arrington*, 311 N.C. 633, 642, 319 S.E.2d 254, 260 (1984).

At a minimum, then, the federal courts have declared that the First Amendment reflects a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open." *See, e.g., N. Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The central importance of protecting speech on public issues cannot be gainsaid; *Connick v. Myers*, 461 U.S. 138, 145 (1983); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Texas v. Johnson*, 491 U.S. 397 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Carey v. Brown*, 447 U.S. 455 ("[S]peech

concerning public affairs is more than self-expression; it is the essence of self-government.").

Activities such as demonstrations, protest marches, and picketing are undoubtedly a protected expressive activity, and parks, streets, and sidewalks have long been held to be traditional public fora. *See, e.g., Edwards v. South Carolina,* 372 U.S. 229 (1963); *Thornhill v. Alabama,* 310 U.S. 88 (1940)*; Boos v. Barry,* 485 U.S. 312, 318 (1988) (calling organized political protest "classically political speech" which "operates at the core of the First Amendment"); *Hill v. Colorado,* 530 U.S. 703 (2000) ("public sidewalks, streets, and ways affected by the statute are quintessential public forums for free speech"); *Hague v. CIO,* 307 U.S. 496 (1939) (holding that streets and parks "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"). In such instances like a political protest on a public sidewalk or street, as is the case here, the government's ability to regulate speech is "very limited." *United States v. Grace,* 461 U.S. 171 (1983).

1. The City's Restrictions on Protesters Political Expression Violate the Right to Freedom of Speech

North Carolina courts apply strict scrutiny to government conduct that restricts protected expressive activity in public fora. *See, e.g., North Carolina Council of Churches v. State,* 120 N.C. App. 84 (1995) (holding that "[r]egulations of expressive activity in a public forum, in contrast, must be narrowly drawn to achieve a compelling state interest"); *Hest Technologies, Inc. v. state ex rel. Perdue,* 366 N.C. 289 (2012) ("Regulation of so-called pure speech, a term that most often refers to political advocacy, must pass strict scrutiny: the government must show a compelling interest in the regulation, and the regulation must be narrowly tailored to achieve that interest.").

Under the strict scrutiny standard, the burden is on the government to show that its restriction on speech was "narrowly tailored to achieve a compelling state interest" and was the least restrictive means of achieving that interest. *See, e.g., Ashcroft v. ACLU*, 542 U.S. 656 (holding that in regulations of protected speech "the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives"). That standard is only heightened when the speech regulated is both protected political speech and in a public forum, as it is here. *Boos v. Barry*, 485 U.S. 312, 318 (1988) ("Our cases indicate that as a *content-based* restriction on *political speech* in a *public forum*, must be subjected to the most exacting scrutiny.")

Because the City's actions targeted peaceful protesters, they must show a compelling interest in quelling their right to expression. The City's actions did not serve a compelling or "overriding state interest," *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334 (1995), "interests of the highest order," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), or an "unusually important interest," *Goldman v. Weinberger*, 475 U.S. 503 (1986). Rather, CMPD had only a selfish interest: shutting down speech that was aimed at police conduct.

Further, the City's actions in attacking a peaceful crowd was not narrowly tailored to serve any alleged compelling interest. The Defendants must show that CMPD's attack did not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S., at 799. Forcing protesters entirely from traditionally public fora without an alternative way to communicate their message violates the narrowly tailored prong. *See, e.g. Cox v. State of La.*, 379 U.S. 536 (1965); *Warren v. Fairfax County*, 196 F.3d 186 (4th Cir. 1999); *see McCullen v. Coakley*, 573 U.S. 464 (2014) (holding that, while "maintaining public safety on streets and sidewalks" by imposing buffer zones around an abortion clinic does serve the government's

legitimate interests, they have "effectively stifled petitioners' message" to an unconstitutional degree).

To pass the least restrictive means test, the Defendants must show that they had no alternative way to attain their objectives that would have been at least as effective. The government's burden is "not merely to show that a proposed less restrictive alternative has some flaws; its burden is to show that it is less effective." *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004). In this case, CMPD's trapping, tear gassing, and attacking protesters with pepper bullets constitutes a flagrant use of excessive force against an overwhelmingly peaceful protest. CMPD had clear alternatives. If it had concerns about specific individuals, it could have focused containment efforts on them rather than violently dispersing an entire protest and depriving them of their protected speech. That is the essence of the relief sought here.

Faced down with an encroaching wall of poisonous gas, pelted with pepper bullets, and trapped between two lines of police officers in riot gear, Plaintiffs faced a situation so terrifying and physically and psychologically painful as to give anyone great pause before engaging in that protected activity again. Other courts, addressing similar police tactics across the country, have held that such actions chill the expression of protected speech and likely rise to First Amendment retaliation. *See, e.g., Abay v. City of Denver*, ---F.Supp.3d----, 2020 WL 3034161 (D. Col. 2020) ("[D]efendant's use of excessive force likely caused injury sufficient to chill a person of ordinary firmness from continuing to engage in that political protest. Officers used physical weapons and chemical agents to prevent not just peaceful demonstration, but also the media's ability to document the demonstrations and plaintiffs 'and third parties 'ability to offer aid to demonstrators. Peaceful demonstrators 'legitimate and credible fear of police retaliation is silencing their political speech").

Finally, as demonstrated above, the evidence shows that CMPD's actions were premeditatedly planned to prematurely end the protest, and that their violent use of force was designed to punish the plaintiffs for protesting police violence.[20] "It is hard to conceive of a more direct assault on the First Amendment than public officials ordering the immediate arrests of their critics." *Lacey v. Maricopa Cty*., 693 F.3d 896, 917 (9th Cir. 2012).

2. CMPD's Response to this Suit Challenging Its Power

CMPD has denigrated these proceedings and further sought to undermine and harm Plaintiffs' peaceful protestations. In an ostensibly neutral, independent study of the June 2 incident, CMPD directed the SBI to open an inquiry into its "response" to the "riots on 4th Street." Ex. 17, SBI Inquiry, June 12, 2020. Notably, that inquiry found that there was no Body Worn Camera ("BWC") footage available from the hundreds of CMPD officers who kettled, gassed and shot peaceful protesters. *Id.* at 4. The lack of BWC footage was in direct violation of CMPD directive guide 400-006, which requires all officers wearing a BWC to "ensure the BWC is powered on for the duration of" their shift. *Id.* at 4.

iv. The City's Actions Violate Due Process

The North Carolina Constitution's due process clause, Article I, Section 19, states, "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." CMPD violated this guarantee by kettling and shooting peaceful protesters with chemicals and pepper bullets without providing proper notice of a dispersal order.

[20] In a press release announcing the temporary restraining order, CMPD exaggerated the order's limits in an attempt to inflame public sentiment. Such spreading of misinformation has been held by other courts to be sufficient circumstantial evidence of intent to inhibit protected speech. *See Mendocino Env'l Ctr. V. Mendocino County*, 192 F.3d at 1302 (holding that the FBI's spreading of misinformation to the media to create a negative impression of the plaintiffs "permits the inference of an improper motive for such conduct").

At approximately 9:30 p.m. on June 2, 2020, over half an hour after the alleged dispersal order was issued, protesters peacefully sang and chanted as they marched up 4th Street. Suddenly and without warning, protesters were hit on both sides by tear gas and sprayed with pepper bullets. Defendants claim this was done in effort to cause the "unlawful" demonstrators to disperse.

The Supreme Court has emphasized time and again that "[t]he touchstone of due process is protection of the individual against arbitrary action of government . . . whether the fault lies in a denial of fundamental procedural fairness . . . or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998) (internal citations omitted). "[T]he Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing [its] power, or employing it as an instrument of oppression." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115 (1992). "Engrained in our concept of due process is the requirement of notice." *Lambert v. People of the State of California*, 355 U.S. 225, 228 (1957).

CMPD failed to provide notice that protesters needed to disperse, or they would be arrested and subject to imminent attack and bodily harm. This arbitrary and oppressive government action violated Plaintiffs' due process rights under the North Carolina Constitution.

v. Declaratory Judgment

There exists a real and justiciable controversy between the parties as to the application of N.C. Gen. Stat. § 14-288.5. Police are authorized to issue a dispersal order when "a riot or disorderly conduct by an assemblage of three or more persons[] is occurring." *Id.* On June 2, if any dispersal order was given, it was not given until *after* the police used munitions, a flagrant violation of the statute. None of the Plaintiffs brutalized by the kettling incident heard a dispersal order or had forewarning of the violence planned for them. Thus, Plaintiffs were given no notice of any

amount of time to disperse or to where they could disperse. Plaintiffs were quickly trapped between two clouds of quickly encroaching tear gas. As set forth above, as applied, this terrifying episode amounted to a violation of due process under Article I, Section 19 of the North Carolina Constitution. *See Lambert*, 355 U.S. at 228 (1957) (requiring notice before unreasonable government action).

Plaintiffs seek a declaration from this Court pursuant to Rule 57 of the North Carolina Rules of Civil Procedure and the North Carolina Declaratory Judgment Act, N.C. Gen. Stat. § 1-253, et seq. declaring that the manner and method employed by Defendants, as alleged herein, in implementing a dispersal order was woefully inadequate, unlawful, and violated Plaintiffs rights to notice as a due process right under Article I, Section 19.

C. Plaintiffs Will Suffer Irreparable Harm Unless this Court Grants Injunctive Relief

Peaceful protests in Charlotte, and across the country, have continued. Peaceful protests are planned throughout the week and beyond. The current climate and context is one in which numerous demonstrations for racial justice are ongoing and evolving, and they will likely increase as we approach the fall election. Plaintiffs will suffer imminent and irreparable injury if the City and Chief Putney are permitted to continue to violate their civil rights. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

To support a grant of preliminary injunction, "[t]he danger sought to be enjoined must be real and immediate. There must be at least a reasonable probability that the injury will be done if no injunction is granted." *Asheville Mall, Inc. v. Sam Wyche Sports World*, 97 N.C. App. 133, 135 (1990). This threat continues. CMPD Chief Putney has refused to discontinue the use of tear gas on demonstrators, instead stating that without chemical munitions CMPD "will be forced to use batons

to break skin and bones." Putney claims that without chemical agents the Charlotte protests will be similar to the Civil Rights era stating "Birmingham, Alabama . . . All day long."[21] The fact that Chief Putney retired on July 1, 2020, is of no consequence. CMPD's refusal to renounce the tactics set forth above cannot be evidence that CMPD plans to do anything substantively different.

In a similar federal case, during the Ferguson protests in 2014, the Defendants claimed that they were no longer involved in policing the protests and were no longer issuing an unconstitutional dispersal order where they were instructing demonstrators only to "keep-moving" before arresting them. In granting injunctive relief the Court found:

> Defendants argue that plaintiff cannot show that he is threatened with irreparable harm because they are no longer in charge of keeping order in Ferguson. They also assert that they stopped using the keep-moving strategy. As discussed above, the evidence was conflicting about whether the policy was still in effect, and there has been no assurance that it would not be implemented again as the protests continue . . . Plaintiff has shown that he will suffer irreparable harm if the injunction is not issued.

Abdullah v. Cty. of St. Louis, Mo., 52 F. Supp. 3d 936, 947–48 (E.D. Mo. 2014). More recently, a federal court in Denver granted a temporary restraining order, citing the need to protect free speech:

> The demonstrations in Denver are ongoing, likely even as this opinion is written. The demonstrations will likely continue tonight and at least into the weekend. If immediate relief is not granted, plaintiffs 'speech would be chilled and outright denied over the next several days or weeks of demonstrations. Indeed, irreparable harm has already occurred in the form of physical injury and the suppression of speech; there is no reason such harm would not otherwise continue if this relief were denied. Officers would continue to use force, secure in the knowledge that retrospective claims take a significant amount of time, effort, and money to pursue.
>
> Significantly, plaintiffs also note that their "speech is deeply rooted in the [current] time and context." . . . I recognize the importance of shielding and uplifting this ongoing, nationwide movement. As such, I find that irreparable harm would occur were I to deny this relief.

[21] Harrison, *supra* note 14.

Abay v. City of Denver, No. 20-CV-01616-RBJ, 2020 WL 3034161, at *4 (D. Colo. June 5, 2020).

The use of kettling, tear gas, and unlawful dispersal orders is not new to Charlotte. These actions by CMPD have occurred as recently as 2016 and have now repeated themselves over the past month as the city continues to grapple with police violence against Black people. Because there is a "reasonable probability" that, without judicial intervention, these unconstitutional acts "will be resumed" this Court should enter a preliminary injunction. *See Barrier v. Troutman*, 231 N.C. 47, 50, 55 (1949).

D. The Equities Favor Injunctive Relief

This Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). The threat of continuing constitutional harm shifts the balance decidedly in the favor of Plaintiffs. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Holmes v. Moore*, 840 S.E.2d 244, 265 (N.C. Ct. App. 2020) (holding that enjoining unconstitutional Voter ID provisions furthers the "public interest."); *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007) ("The fact that [Plaintiffs] have raised serious First Amendment questions compels a finding that . . . the balance of hardships tips sharply in [Plaintiffs'] favor."); *m. Beverage Ass'n v. City & Cty. of S.F.*, 916 F.3d 749, 758 (9th Cir. 2019) ("it is always in the public interest to prevent the violation of a party's constitutional rights.").

As noted above, Defendants have argued in the press that an injunction could lead to potential harm to officers and property interests. As stated in the federal TRO order from Denver, this "is a hypothetical harm, especially given the fact that officers have access to many other types of non-lethal weapons that they use on a daily basis, including tasers. The unlikelihood of such harm to officers is outweighed by the very real harm that has already been caused to plaintiffs."

Abay v. City of Denver, No. 20-CV-01616-RBJ, 2020 WL 3034161, at *4 (D. Colo. June 5, 2020).

The court went further in discussing the alleged potential for property damage:

> Although I do not agree with those who have committed property damage during the protests, property damage is a small price to pay for constitutional rights—especially the constitutional right of the public to speak against widespread injustice. If a store's windows must be broken to prevent a protester's facial bones from being broken or eye being permanently damaged, that is more than a fair trade. If a building must be graffiti-ed to prevent the suppression of free speech, that is a fair trade. The threat to physical safety and free speech outweighs the threat to property.

Abay v. City of Denver, No. 20-CV-01616-RBJ, 2020 WL 3034161, at *4–5 (D. Colo. June 5, 2020).

Plaintiffs have shown irreparable harm through Defendants ' actions which continue to impede on demonstrators ' rights under the North Carolina Constitution. In contrast, the speculative harms alleged by Defendants are not borne out by the numerous protests that have occurred without injury to police or property and without the need to resort to chemical munitions or mass unconstitutional arrest.

CONCLUSION

For the reasons set forth above, Plaintiffs request that this Court issues a preliminary injunction prohibiting CMPD from kettling, gassing shooting, and using warfare tactics against peaceful protesters.

Respectfully submitted July 7, 2020

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