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11
12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN FRANCISCO DIVISION**

15 ANTI POLICE TERROR PROJECT, et al.)
16 Plaintiffs,
17 v.
18 CITY OF OAKLAND, et al.,
19 Defendant(s).

20 Case No. 20-cv-3866 JCS (LB)
21 **CITY OF OAKLAND'S BRIEF**
22 **CONCERNING MUTUAL AID**
23 **Re Dkt. No. 52**

OVERVIEW

1
2 Citing the preliminary injunction, OPD’s mutual aid partners informed the
3 City that they can no longer provide mutual aid during protests in Oakland. This
4 poses a significant risk of avoidable harm to the people of Oakland, protestors, and
5 officers. The City’s priorities are always to promote the exercise of free speech—
6 consistent with Oakland’s long and proud tradition of social activism—and to protect
7 public safety. The City has attempted to meet these goals with minimal police
8 intervention and work through its mutual aid partners’ concerns about the order.
9 Yet as things stand, mutual aid remains unavailable, the elections loom, and the
10 City should be prepared for potential mass protests next month.

11 The City thus respectfully requests that the Court modify the preliminary
12 injunction by striking—or at least suspending for next month—Section VI(i)-(vi), and
13 allowing *Training Bulletin III-G*, as it stands, to govern mutual aid requests.
14 Alternatively, the City respectfully requests an order finding that a memorandum of
15 agreement between OPD and mutual aid partners—with key terms laid out in this
16 brief—would (1) not violate the preliminary injunction, and (2) pursuant to Cal.
17 Gov’t Code § 8618, make the mutual aid agency *not bound* by preliminary injunction.
18 Option two is a new idea, which the City *has not* proposed to anyone.

19 The City is open to yet any other idea, guidance, or order to help resolve this
20 issue. The City appreciates the Court’s ongoing, thoughtful consideration of all the
21 issues in this case. The City also appreciates its law enforcement partners’
22 willingness to generously provide mutual aid in the past. To facilitate free speech
23 and protect the people of Oakland, protestors, and officers, the City seeks to make
24 mutual aid again available.

FACTUAL BACKGROUND

I. THE PRELIMINARY INJUNCTION

26 On July 29, 2020, the Court issued a preliminary injunction concerning crowd
27 control during protests in Oakland. Dkt. No. 52. Before then, the parties negotiated
28

1 in good faith about the terms of a preliminary injunction and found some common
2 ground. Dkt. No. 54, at 2. But the parties fundamentally differed on “the
3 substantive limits that would be placed on OPD tactics and munitions in conducting
4 crowd control” and “the degree to which the mutual aid partners would be bound by
5 the preliminary injunction.” *Id.* at 31.

6 After carefully considering these issues and others, the Court ordered that
7 OPD officers “are prohibited from using stinger grenades, wooden bullets, rubber or
8 rubbercoated bullets, pepper balls, or similar munitions.” Dkt. No. 52, at 2. Mutual
9 aid officers are bound by the terms of the preliminary injunction, the Court further
10 ordered. *Id.* at 3-4.

11 **II. MUTUAL AID PARTNERS’ RESPONSE**

12 Two days later, OPD sent the Regional Mutual Aid Coordinator the order
13 along with a cover letter summarizing key terms. Yu Decl., ¶ 3 & Ex. A (OPD
14 letter). In response, OPD’s mutual aid partners informed the City that they will no
15 longer provide mutual aid during protests. *Id.* at ¶¶ 4-5 & Exs. B through G.

16 On August 63, 2020, for instance, the Alameda County Sheriff’s Office, which
17 coordinates mutual aid for the region and supplies its own officers, sent the City a
18 letter on this issue. Yu Decl., Ex. B. “I am writing to you today with a heavy heart,
19 to advise you that I will not be providing mutual aid assistance to the City of
20 Oakland through the deployment of members of the Alameda County Sheriff’s
21 Office,” Sheriff Ahern wrote. *Id.*

22 Sheriff Ahern explained his decision as follows:

23 The inability to utilize effective and safe less-lethal
24 munitions, places all peace officers at risk, and reduces the
25 options available to deal with violent incidents. Peace
26 officers would be limited, essentially, to hand-to-hand
27 combat with specific individuals within potentially large
crowds. I am not willing to expose my staff to this degree
of danger without providing them with the proper
equipment and support, most of which is prohibited by the
Preliminary Injunction.

28 Our units are trained in crowd control and response to

1 unlawful assemblies. They are trained to utilize widely
2 accepted munitions and less-lethal tools to protect the
3 lives of residents, the lives of sworn staff and other
4 individuals on scene. Our units are trained with the
5 FN303, stingball grenades, and 37 mm launchable rubber
6 .60 caliber pellets, along with 40 mm launchable rubber
7 .60 caliber pellets. Our units also utilize tear gas to
8 disburse unlawful riot activities when violence and
9 extreme vandalism is the crowd's intent or to create a safe
10 distance between Law Enforcement and those committed
11 to assaulting them.

12 The use of these less lethal tools, in combination, is what
13 allows our units to be successful. The elimination of these
14 widely accepted tools and methods places my members at
15 risk. The only available tool that my deputies are trained
16 with, and would be allowed to utilize, is the 40 mm exact
17 sponge impact munitions. This less lethal tool alone is
18 easily defeated by any type of makeshift shield. In my
19 opinion, this alone would not be sufficient to protect my
20 deputies from injury, nor would it be effective in stopping
21 a crowd from continuous illegal activities.

22 In recent mutual aid responses, several of my sworn
23 personnel have been injured. One Command Staff
24 member, [redacted], was struck in the head with a brick
25 thrown from a distance of over twenty yards. One
26 detective, [redacted], sustained second degree burns from
27 an ignited Molotov cocktail thrown from a distance of
28 about ten yards. This attack also burned two other sworn
members who were positioned next to [redacted]. Another
sworn member, [redacted], was doused in the face with an
accelerant, in an apparent attempt to burn and disfigure
her. Officers and deputies assigned to these events were
subjected to having fireworks launched at them from
among the crowds. These attacks took place even with our
members deploying some of the tools prohibited by the
Injunction. The cowards that utilized these dangerous
weapons against my staff concealed themselves in a
riotous crowd, or from behind barricades, to prevent
identification and utilized the element of surprise to
further their violent agenda.

I want to make it clear that my staff does not use force
against those lawfully exercising their First Amendment
rights. While it is not possible to predict when, or if, a
peaceful protest will devolve into a riot, it is generally
conceded that some individuals and groups may utilize the
cover of a peaceful protest to foment violence and chaos.
The Preliminary Injunction was apparently crafted with
the intent to protect individuals engaged in peaceful
protests, however, a possibly unintended consequence
appears to provide exactly the type of support necessary
for violent, destructive behaviors to occur almost virtually
unchecked. I cannot, in good conscience, assign members

1 of my agency to participate in the efforts to reduce or
2 eliminate the chaos and violence which may occur, under
the conditions imposed by the Preliminary Injunction.

3 *Id.* at 2-3.

4 Consistent with the preliminary injunction, the Sheriff's policies on less-lethal
5 munitions require targeted deployment by specially trained deputies. Pereda Decl.,
6 Ex. A, ACSO General Orders 1.21 and 3.02. Further, deputies must report the use
7 of these tools. *Id.*

8 Like the Sheriff's Office, Fremont, San Leandro, Union City, Newark, and San
9 Mateo County have concluded that they can no longer provide aid during protests.
10 Yu Decl., ¶ 5. One of these agencies said this:

11 [I]f the "protest" event turns into a "riot" our
12 deputies/officers will not have immediate access to their
13 needed munitions to deal with the quickly evolved event.
14 Per the court order, and the comments attached below, if
15 the event changes deputies/officers would have the
opportunity to make independent decisions per our own
policies. However, they would be without the appropriate
gear to support changing event (Protest to Riot).

16 I would also like to add, we are a multiple agency Mutual
17 Aid team, responding for Mutual Aid per Oakland's
18 request. San Mateo County would need the support and
19 buy in from all chiefs in our county to support this request,
which has a court order limiting the decision making of
our deputies/officers.

20 Yu Decl., Ex. F.

21 All combined, these agencies supplied approximately 55% of the mutual aid
22 officers on May 29, 2020 and 40% of the mutual aid officers on May 30, 2020. *Id.* at ¶
23 6. This data excludes the California Highway Patrol, which addresses activity on
24 state highways. *Ibid.*

25 No agency has notified OPD that it would provide mutual aid during protests.
26 *Id.* at ¶ 7.

27 Hoping to resolve or narrow this issue, the City Attorney's Office has
28 conferred with counsel for some of these agencies, including counsel for the Sheriff's

1 Office. Pereda Decl., ¶ 2. These agencies' position—including the Sheriff's—have
2 not changed. *Id.*

3 The Sheriff and others have raised similar worries in the past. Dkt. No. 36-
4 13. The U.S. Marshal, for instance, explained that mutual aid was needed to
5 preserve the crime scene at the federal courthouse. *Id.* Further, he said this:

6
7 If the City of Oakland refuses to allow the use of chemical
8 agents as a last resort to quell rioting and violence, I will
9 advise the Chief Judge and United States Attorney, that
10 the Oakland Court House & Federal Building, and it's
11 occupants, cannot be sufficiently protected during civil
12 unrest, and recommend that all court proceedings be
13 transferred to San Francisco or San Jose Court Houses for
14 an indeterminate period. Employees in the Oakland
Federal building and United Court House rely on our
Federal Protective Service, and the Oakland Police
Department as first responders. The safety of our
employees, and members of the public is paramount.
Banning the use of chemical agents/tear gas hampers our
efforts to protect our employees and members of the public
from rioters and violence. It also undermines the rule of
law and administrator [sic] of justice.

15 *Id.*

16 **III. MUTUAL AID IS ESSENTIAL**

17 Mutual aid is essential for enabling protests and ensuring public safety. Dkt.
18 No. 36-1, at ¶¶ 11-13. To meet these objectives, OPD must constantly assess a crowd
19 and be prepared to utilize various methods, such as quickly increasing or reducing
20 officers' presence. Allison Decl. ¶ 5.

21 Crowds vary widely. *Id.* at ¶ 6. A crowd may be peaceful and require a small
22 officer presence to help facilitate the crowd's First Amendment activity. *Ibid.* Or a
23 large crowd may require a larger officer presence to help facilitate the crowd's
24 movement or to address individuals or subgroups within the crowd who are risking
25 the safety of protestors, officers, or other members of the public. *Ibid.* Further, a
26 small crowd could require a large officer presence if, for example, persons among the
27 crowd are acting destructively. *Ibid.* At any moment, a crowd may splinter or
28 change dramatically in tone and temperament. *Id.* at ¶ 7.

1 To assess a crowd—and thus assess the best approach for facilitating the
2 exercise of free speech and protecting public safety—officers must observe the crowd,
3 attempt to coordinate with the crowd’s leaders, and gather information. *Id.* at ¶ 8.
4 During a crowd event, law enforcement may have to adjust its approach according to
5 the evolving crowd dynamics and activity. *Ibid.*

6 Having mutual aid present or at least available at the outset of protests—
7 especially when large crowds or destructive subgroups are anticipated—is the most
8 efficient way to use mutual aid and best manages risk. *Id.* at ¶ 9. This allows for
9 staging, better coordination, deterrence of criminal activity, less officer fatigue, and
10 quicker responses. *Ibid.* It is suboptimal for mutual aid to arrive only after a riot or
11 widespread criminal activity has erupted. *Ibid.*

12 The City has attempted to minimize the need for officer intervention and
13 mutual aid during protests by, among other things, erecting barriers and removing
14 potential vandalism targets at various locations, including at the Police
15 Administration Building. *Id.* at 10. Further, many businesses and residents have
16 boarded up their doors and windows. *Ibid.* In recent protests, these protective items
17 have still been targeted and damaged. *Ibid.*

18 To respond to recent protests—knowing that mutual aid is unavailable—OPD
19 has widely cancelled officers’ days off. *Id.* at ¶ 11. This practice can lead to harmful
20 officer fatigue and reduce resources for other service needs. *Ibid.*; *see also* Bryan
21 Vila, Tired Cops: The Importance of Managing Police Fatigue, (Washington, DC:
22 Police Executive Research Forum, 2000); Mora L. Fiedler, Officer Safety and
23 Wellness: An Overview of the Issues (Washington, DC: Office of Community
24 Oriented Policing Services, 2011), 4, (<http://cops.usdoj.gov/pdf/OSWG/e091120401-OSWGReport.pdf>).

26 In future protests, there is a risk that the people of Oakland could suffer loss
27 and damage that could be prevented if mutual aid were available. Allison Decl., ¶
28 12.

1 IV. THE CITY RELIES ON MUTUAL AID

2 As the Court summarized, the City relied heavily on mutual aid during
3 protests from May 29, 2020 through June 1, 2020:

4
5 According to Assistant Police Chief Allison, “[e]specially
6 during the first four days of protests—May 29, 2020
7 through June 1, 2020—the City relied heavily on mutual
8 aid from the Alameda County Sheriff’s Office, the
9 California Highway Patrol, the U.S. United States
10 District Court Northern District of California Marshals
11 Service, and police departments from across the Bay Area
12 and state.” Allison Decl. ¶ 11. Assistant Chief Allison
13 states that “[t]he City has around 733 law enforcement
14 personnel and can deploy only so many of them at any
15 given time. On nights such as May 29 and June 1, when
16 the OPD is at once attempting to facilitate mass protests
and to respond to mass looting and violence throughout
the City, mutual aid is critical.” Id. A chart in his
declaration reflects that on the night of May 29, 2020, 215
OPD officers and 508 mutual aid officers were deployed.
Id. ¶ 13. On May 30, 2020, the number of OPD officers
deployed had increased to 380 but they were still
outnumbered by mutual aid officers, whose numbers had
also increased, to 550. Id. On May 31 and June 1, OPD
maintained the number of officers deployed at 380 while
the number of mutual aid officers dropped to 200 (May 31)
and 222 (June 1). Id.

17 Dkt. No. 54, at 19-20 (citing Dkt. No. 32-1, Allison Decl. (June 24, 2020)).

18 V. OAKLAND HAS SUFFERED HARM

19 Over the same days, two Federal Protective Service officers were shot (by a
20 man with suspected ties to the boogaloo movement). Dkt. No. 54, at 10. Over 200
21 businesses suffered vandalism, theft, or other damage. This occurred all throughout
22 Oakland, including in East Oakland, Chinatown, the Lake Merritt area, Downtown,
23 and Uptown. Hinkle Decl., ¶ 4. East Oakland—which is home to some of the City’s
24 most vulnerable communities with the fewest resources—was hard hit. For
25 instance, due to looting and vandalism, La Clinica de La Raza was unable to provide
26 certain essential services to the community. Dkt. No. 36-15. In short, the City and
27 its officers faced extraordinarily challenging conditions. Dkt. No. 54, at 9-12.

1 So, too, during recent nighttime protests.¹ For instance, the City’s
 2 Department of Economic & Workforce Development received reports of the following
 3 damage at local businesses and residential units, including affordable housing,
 4 during protests on August 26, 2020: several fires, including inside a state courthouse
 5 and at a construction site; seventy punctured or broken building windows; twelve
 6 broken doors; and theft and vandalism within businesses. Hinkle Decl., ¶ 5. The
 7 event started at City Hall and continued through Downtown Oakland and the Lake
 8 Merritt area. People at the front of the crowd had shields, which were used to block
 9 officers from making targeted arrests and to assault officers. “SOLIDARITY
 10 MEANS ATTACK,” was the message urged by the large, lead banner. *See Pullen*
 11 *Decl., Ex. A*
 12 (<https://www.dropbox.com/s/6kuipwa6fsjhmno/ProtestVideoClips%2026Aug20%2020-042337%20%281%29.mp4?dl=0>).

14 DISCUSSION

15 It is prudent for the City to anticipate and prepare for significant, extended
 16 protests next month. To begin with, there are widespread reports that due to delays
 17 caused by the pandemic or legal challenges, the election’s outcome may not be
 18 certain for some time. Further, President Trump’s tweets and remarks about the
 19 elections and his acceptance of their results—such as his comments at the recent
 20 debate—are of concern and could incite mass protests.

21 Further, the people of Oakland have suffered harm in protests this year. *See*
 22 *Section V* above. And as Assistant Chief Allison and others have explained, mutual
 23 aid is essential. Allison Decl., ¶¶ 2-12.

24 I. RESTORING TRAINING BULLETIN III-G

25 Against that backdrop, the City seeks to make mutual aid available. OPD’s
 26 mutual aid partners will not come if the preliminary injunction applies to them. At

27 ¹ The City strongly disagrees with Plaintiffs’ characterizations of recent events and
 28 OPD’s response, Dkt. No. 63; the City will address Plaintiffs’ allegations in the City’s
 its filing due on October 19, 2020.

1 this point, the City thus respectfully requests that the Court modify the preliminary
2 injunction by striking—or at least suspending for next month—Section VI(i)-(vi), and
3 allowing *Training Bulletin III-G*, as it stands, to govern mutual aid requests.

4 **II. MEMORANDUM OF AGREEMENT**

5 Alternatively, the City respectfully requests an order finding that a
6 memorandum of agreement between OPD and mutual aid partners would (1) not
7 violate the preliminary injunction, and (2) pursuant to Cal. Gov't Code § 8618, make
8 the mutual aid agency *not bound* by the preliminary injunction.

9 The Emergency Services Act provides that “[u]nless otherwise expressly
10 provided by the parties, the responsible local official in whose jurisdiction an
11 incident requiring mutual aid has occurred shall remain in charge at such incident,
12 including the direction of personnel and equipment provided him through mutual
13 aid.” Cal. Gov't Code § 8618.

14 Citing this law, the Court held that “[b]ecause no mutual aid partners have
15 been named as defendants, the Court does not have the authority to issue injunctive
16 relief that is binding on the mutual aid partners. Nonetheless, California law
17 provides that when OPD requests assistance from mutual aid partners, OPD officers
18 are to “remain in charge . . . including the direction of personnel and equipment
19 provided him through mutual aid.” Dkt. No. 54, at 32 (citing Cal. Gov't Code §
20 8618).

21 But if different terms about equipment and direction were “expressly provided
22 by the parties,” then, by the same authority and reasoning, the preliminary
23 injunction would not apply to mutual aid officers.

24 In thinking through this new, potential solution, the City has in mind the
25 following terms:

26 Equipment

- 27 ▪ Pursuant to Cal. Gov't Code § 8618, each responding mutual aid agency shall
28 decide the equipment the agency will bring to render mutual aid to OPD.

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Dated: October 12, 2020

Respectfully submitted,

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CITY OF OAKLAND