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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HASHEEM BOUDJERADA; DAMON COCHRAN-SALINAS; ERIN GRADY; TYLER HENDRY; and KIRTIS RANESBOTTOM, Plaintiffs, v. CITY OF EUGENE; SARAH MEDARY; WILLIAM SOLESBEE; SAMUEL STOTTS; BO RANKIN; TRAVIS PALKI; MICHAEL CASEY; ANTHONY VIOTTO; and RYAN UNDERWOOD, Defendants.	Case No. 6:20-cv-1265-MK PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ORAL ARGUMENT REQUESTED

LR 7-1(a) CERTIFICATION

Counsel for plaintiffs certifies they have conferred in good faith with defendants' counsel regarding this motion through a telephone conference, discussing each issue that is the subject of this motion, and the parties have been unable to resolve the issues presented herein.

INTRODUCTION

On May 31, 2020, six days after the murder of George Floyd, Eugene's City Manager Pro Tem, Sarah Medary, implemented a curfew order covering the downtown area of Eugene from

9:00 pm May 31 through 6:00 am on June 1. With only six minutes notice, the order was expanded citywide, starting at 11:00 p.m. As explained herein, the Court should rule that, as a matter of law, the 11 pm citywide curfew ("the curfew order"), and the manner in which it was implemented, were illegal.

The expanded citywide curfew order and its implementation were unconstitutional on three grounds. First, the curfew order violated the First Amendment by constituting an unreasonable time, place, or manner restriction on expressive conduct, because it was not narrowly tailored and it did not allow ample alternatives for free expression. Second, the curfew order facially violated the First Amendment's overbreadth doctrine by prohibiting a substantial amount of protected expression. Finally, the implementation of the curfew order violated the Fourth Amendment of the U.S. Constitution, because there was no probable cause to make arrests.

FACTUAL BACKGROUND

As the rationale for the curfews, the May 31 curfew orders cited "safety of the public" and preventing "reoccurrence" of violence and property damage that allegedly occurred two days earlier, on May 29. Exhibit 2 at 1; Exhibit 4 at 1. On May 30, Medary had declared a state of emergency, citing the May 29 events. Exhibit 6. The May 29 events that were cited occurred just west of the downtown core after a day of protests sparked by the murder of George Floyd in Minneapolis and the scourge of other extreme cases of police brutality.[1]

The alleged May 29 unlawfulness described in the Administrative Order occurred within

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[1] *See* https://www.indy100.com/news/a-complete-timeline-of-the-2020-black-lives-matter-movement-b1777733; and https://www.britannica.com/topic/Black-Lives-Matter/Subsequent-protests-George-Floyd-Ahmaud-Arbery-and-Breonna-Taylor (summarizing the timeline of the summer 2020 uprisings).

a relatively small area downtown, while most of Eugene was free from any unlawful conduct. *See* Exhibits 7 and 8. The area which required police response was a small business complex at 7th Avenue and Washington Street and nearby businesses within a block or so of that complex. Exhibits 7 and 8.

As the local newspaper noted, the Sunday, May 31 marches were peaceful and "dwarfed in size the march that took place in Eugene on Friday night." Exhibit 12. Chief Skinner, when deposed, identified only a concern about protecting the businesses in the downtown core:

> The *downtown core* had been the victim of a lot of damage from the prior two days, and so it's my recollection that we attempted to try and create or identify a boundary in the *downtown core* mostly around uninhabited businesses as a place to impose the curfew in an attempt to keep people out of that downtown core that we were concerned about further – further damage and violence.

Exhibit 11 at 4-5 (Skinner Dep. 20:19 to 21:6) (emph. added).[2]

In response to that localized concern, the citywide curfew that lasted from 11 pm May 31 through 6 am June 1 banned almost all public presence within more than 40 square miles, affecting about 175,000 residents as well as anyone visiting from out of town. https://en.wikipedia.org/wiki/Eugene,_Oregon (last visited February 6, 2023). During the seven hours of citywide curfew, people were "not allowed to travel on any public street or in any public place" within those 44 square miles, including by "automobile, bicycle, foot, public transit and any other mode of personal transportation." Exhibit 4 at 1.

The first curfew order issued on May 31 covered only the downtown area of Eugene, from 9:00 pm May 31 through 6:00 am on June 1. Exhibit 2. However, at 10:54 p.m. on May 31, with only six minutes notice, the order was expanded citywide, starting at 11:00 p.m. Exhibits 3

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[2] Even the assertion that the "downtown core" was affected is an exaggeration; as noted *supra*, the alleged unruly behavior and property damage were in fact limited to only a couple of blocks.

and 4; Exhibit 5 at 13-14 (transcript at 33:6 to 34:12).

Although defendant Medary issued those curfew orders, they were requested by defendant police chief Skinner, and Medary immediately acquiesced to his requests without meaningful review or consideration of the relevant facts. Exhibit 5 at 4-5, 8, 10, 21 (tr. at 21:20 to 22:21, 28:16-24, 30:17-19, 54:3-13). Medary made the decision to expand the curfew citywide due to a phone call with Skinner that came just a few minutes before issuing the citywide order. Exhibit 5 at 13-14 (tr. at 33:6 to 34:12). As Medary explained in deposition, she deferred completely to the Chief because "I don't have any sort of public safety certifications. I'm a landscape architect." Exhibit 5 at 8 (tr. at 28:22). Later in the deposition, when asked, "So every time the chief asked you for a curfew you gave him the curfew he had requested including the location and the exact times he had asked for?" she responded, "I relied on his public safety expertise, yes." *Id*. at 21-22 (tr. at 54:22 to 55:3).

Defendant Skinner and the individual police officer defendants then implemented the illegal curfew by overseeing, ordering, allowing, and carrying out the arrests of plaintiffs Hendry, Grady, and Boudjerada, and shooting of projectile weapons at plaintiff Cochran-Salinas and at the home of plaintiffs Cochran-Salinas and Ranesbottom.

I. THE CITYWIDE CURFEW ORDER WAS AN UNREASONABLE TIME, PLACE, AND MANNER RESTRICTION ON EXPRESSIVE CONDUCT, BECAUSE IT CLOSED OFF ANY POSSIBILITY OF FIRST AMENDMENT EXPRESSION IN THE CITY OF EUGENE FOR SEVEN HOURS

The First Amendment firmly holds that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. The First Amendment applies to the states by the Due Process Clause of the Fourteenth Amendment. *Gitlow v. New York,* 268 U.S. 652, 666 (1925).

Demonstrations, assemblies, protests, and marches are critical to the expression of free speech in this country and require protection. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

The protections afforded by the First Amendment are nowhere stronger than in traditional public fora, such as streets and sidewalks. *Berger v. City of Seattle*, 569 F.3d 1029, 1035-36 (9th Cir. 2009); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S 37, 45, 103 S. Ct. 948 (1983); *Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d 1010, 1021 (9th Cir. 2008). The government's ability to regulate speech in a traditional public forum is "sharply circumscribed." *Perry Educ. Ass'n*, 460 U.S. at 45. *See also Askins v. US Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018).

The citywide curfew order issued in Eugene the night of May 31, 2020, represented an unconstitutional restriction on the residents of Eugene and other people who assembled in public that night, the overwhelming majority of whom did nothing to justify this police crackdown and militarized lockdown, as discussed herein.

The government may enact a restriction on the time, place, or manner of protected speech only if the restriction satisfies every prong of a three-part test. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2753 (1989). First, the restriction must be justified without reference to the content of the speech. *Id*. Second, it must be narrowly tailored to achieve a significant governmental interest. *Id*. Last, the restriction must leave open ample alternative channels for legitimate expression. *Id*.

Prior restraint -- preventing or prohibiting First Amendment activities before demonstrators pose a clear and present danger –is presumptively a First Amendment violation.

Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 180-81, 89 S. Ct. 347, 351-52 (1968). To avoid violating the Constitution, the government must wait, and punish illegal behavior after it occurs, rather than banning the First Amendment activity prior to its occurrence. *Id*.; *Kunz v. New York*, 340 U.S. 290, 294, 71 S. Ct. 312, 315 (1951).

On its face, the curfew was not a reasonable time, place, and manner restriction because, even if arguably content-neutral, it was not narrowly tailored to a significant government interest, and it did not leave open ample alternatives for expression.[3] Even content-neutral "time, place, or manner restrictions . . . are subject to 'an intermediate level of scrutiny.'" *Jacobson v. US Dep't of Homeland Sec.*, 882 F.3d 878, 882 (9th Cir. 2018). Intermediate scrutiny means the rule "must not burden substantially more speech than is necessary to further the government's legitimate interests," and "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *McCullen v. Coakley*, 573 U.S. 464, 477 (2014) (internal quotations omitted).

A. The Citywide Order Was Not Narrowly Tailored Because It Was Based on a Localized Instance of Property Damage, There Were Other Laws the Police Could Have Enforced, and It Contained No First Amendment Exception

The citywide curfew order was not sufficiently narrowly tailored – first, because it failed to provide exceptions for First Amendment protected activity. In *Nunez by Nunez v. City of San Diego*, the Ninth Circuit rejected even a juvenile curfew, noting that "the City did not create a robust, or even minimal, First Amendment exception to permit minors to express themselves during curfew hours . . . , apparently preferring instead to have no First Amendment exception at

[3] Bodycam video from the arrests of plaintiffs Boudjerada, Hendry, and Grady demonstrates that the implementation of the curfew was in fact not content-neutral, because it applied only against people leaving the protest area. Exhibit 1 (Stotts bodycam, submitted under seal). However, the curfew and its implementation fail even intermediate scrutiny under the content-neutral analysis.

all." 114 F.3d 935, 951 (9th Cir. 1997).

The same is even more true in the instant case. The curfew order included exceptions for credentialed members of the media and for "people seeking emergency care, fleeing dangerous circumstances, sheltering in place, traveling to and from employment, or making commercial deliveries." Exhibit 4. But it included no First Amendment exception whatsoever (nor did it provide an exception for people returning to their homes pursuant to the curfew order). People who wanted to exercise their First Amendment rights publicly in the Eugene city limits after 11:00 p.m. on May 31, 2020, had no outlet or forum to do so without fear of arrest and assault by police.

Tailoring is not sufficiently narrow when a government (even temporarily) orders the dispersal of all public gatherings based on the belief that speech similar to that being restrained has led to unlawful activity in the past. As the Ninth Circuit noted in *Collins v. Jordan*:

> As a matter of law, it was clear at that time, as it is today, that the occurrence of limited violence and disorder on one day is not a justification for banning all demonstrations, peaceful and otherwise, on the immediately following day (or for an indefinite period thereafter). . . . [T]he law is clear that First Amendment activity may not be banned simply because prior similar activity led to or involved instances of violence.

110 F.3d 1363, 1372 (9th Cir. 1996) (rejecting broad emergency orders issued in the wake of the Rodney King-related rioting).[4]

In *Collins*, the court addressed an emergency order authorizing police to disperse and

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[4] It is true that the *Collins* decision distinguished the targeted emergency orders addressed in that case from broader curfews. However, as explained in this brief, the Eugene citywide curfew was unconstitutionally broad, given its huge geographic scope, the way it was implemented, the lack of notice in the face of the nationwide outrage against Mr. Floyd's murder and other police brutality, and the special importance of nighttime vigils in that context. Furthermore, as discussed in this brief, in *Nunez*, the Ninth Circuit made clear that a curfew order that does not provide an exception for First Amendment activity violates the constitution.

prevent gatherings in the aftermath of the Rodney King verdict that acquitted two of the officers charged with beating him severely while a bystander recorded the brutality.[5] The City attempted to justify its actions based on the disorder and violence of the protests that occurred the day before. *Id*. The court held the emergency order to be facially unconstitutional, because "the law is clear that First Amendment activity may not be banned simply because prior similar activity led to or involved instances of violence." *Id*. The prior day's disorder included "a few injuries to people, none of them extensive or life-threatening," damage to property within a four-block radius, and "some isolated instances of looting and vandalism"; and notably, the record reflected that "most of the city was free from any form of unlawful conduct." *Id.*

The *Collins* court noted that "demonstrations can be expected when the government acts in highly controversial ways, or other events occur that excite or arouse the passions of the citizenry." Moreover, the court emphasized that it is important that people be able to "engage in spontaneous First Amendment activity . . . in response to controversial events." *Id*. The court additionally noted, "the proper response to potential and actual violence is for the government to ensure an adequate police presence, and to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure." *Id*. In other words, "preventing First Amendment activities before demonstrators have acted illegally or before the demonstration poses a clear and present danger is presumptively a First Amendment violation." *Id*. at 1371.

Here, the Eugene citywide curfew order fails the narrow tailoring test, because, as in

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[5] As many may remember, Rodney King was severely beaten by LA police officers, who were later criminally prosecuted. Three of the police officers were acquitted by a mostly white jury in 1992, which resulted in six days of civil unrest and mass movement protests decrying racial injustice at the hands of police and the legal system. https://en.wikipedia.org/wiki/Rodney_King.

Collins, it authorized police to disperse and prevent *all* gatherings by *all* people in the *entire* city of Eugene, based on the property damage during protests two days prior in a small area just west of downtown. The sudden 11:00 p.m. expansion of the curfew zone on May 31 from downtown to citywide authorized police to disperse all demonstrations throughout the city, without meaningful notice. *See* Exhibit 9 at 4 (transcript at 35:6-25). The city doubled down on its unconstitutional decision to shut down all public dissent within the Eugene city limits, by sending out marauding bands of police officers to enforce the curfew order with SWAT, using Bearcats (tank-like vehicles) and other SWAT vehicles, tear gas, and projectile weapons, arresting protesters as they walked east away from downtown, and later shooting projectile weapons at people and at the Campbell Club residence. Exhibit 1 (Stotts bodycam, submitted under seal); Decl. of Boudjerada at 3-5; Decl. of Grady at 2-3; Decl. of Hendry at 2-3; Decl. of Ranesbottom at 2-3; Decl. of Howanietz at 2-3. City Manager *pro tem* Medary stated in deposition that she did not know that SWAT would be used, but that, when she learned it had, she was not concerned because she deferred to the Chief's decision as to what "tools" to use. Exhibit 5 at 17 (transcript at 50:16-23).

The police who arrested and shot at protesters leaving downtown did so primarily near the University of Oregon campus, more than a mile away from the area of downtown that had experienced property damage two nights earlier. Ex. 9 at 4 (tr. At 35:20-23); Exhibits 13-15; Decl. of Ranesbottom; Decl. of Howanietz.

Similar to *Collins*, the City's justification for the curfew order, arrests, and assaults was the destruction that occurred two days earlier (even more remote than the protests and riots which occurred only *one* day before the *Collins* emergency orders). The alleged May 29 property damage described in the emergency declaration was akin to that in *Collins*. Exhibit 6. As

discussed *supra*, as in *Collins*, the unlawfulness described in the Administrative Order occurred only within a relatively small area downtown, while most of Eugene was free from any unlawful conduct.

As City Manager Medary acknowledged in a public statement issued a few days after the incidents, "The boundary limits of the [initial, downtown] curfew were intended to focus on the area most at risk, and most recently victimized, by the [May 29] Friday evening riots." Exhibit 10. As noted *supra*, the area affected on May 29 was only about one city block. The May 31 citywide curfew two days later was a massively overbroad prior restraint, rationalized only by that small area of prior destruction. As the Ninth Circuit stated in *Collins*, "As a matter of law, it was clear at that time, as it is today, that the occurrence of limited violence and disorder on one day is not a justification for banning all demonstrations, peaceful and otherwise, on the immediately following day (or for an indefinite period thereafter)." 110 F.3rd at 1372. The citywide curfew order was not narrowly tailored to pass intermediate scrutiny under *Collins*.

Tailoring is not sufficiently narrow when the government has other laws at its disposal that it could enforce to achieve its goals. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949-50 (9th Cir. 2011). In *Comite de Jornaleros*, the Court held that an ordinance barring the roadside solicitation of day-labor workers was not narrowly tailored, because the City of Redondo Beach could have simply enforced laws it already had against jaywalking and obstructing the normal movement of traffic. *Id*. Here, the City of Eugene could have enforced other laws at its disposal against the minority of protestors who allegedly caused property damage downtown, such as Disorderly Conduct and Criminal Mischief. *See* Eugene Code §§ 4.780 and 4.725 (2021) (available at https://eugene.municipal.codes/EC/4); Or. Rev. Stat. §§ 166.015, 166.023, and 164.365.

The curfew was far from narrowly tailored, and a substantial portion of its burden on speech did not advance the curfew's purported goals.

B. The Curfew Did Not Allow Ample Alternatives for Expression Because It Closed off the Entirety of Eugene's Public Fora to First Amendment Expression

On its face, the citywide curfew order was an unreasonable restriction on the time, place, and manner of plaintiff's First Amendment expression, because, even if content-neutral, it did not allow ample alternatives for protesters to exercise their right to assemble. *See McCullen,* 573 U.S. at 477. Alternative modes of communication may be constitutionally inadequate if the speaker's "ability to communicate effectively is threatened." *Id*. (quoting *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812, 104 S. Ct. 2118, 2133 (1984)).

An alternative is not adequate if it prevents the speakers from expressing their views where that expression depends in whole or part on the chosen location, or "the speaker is not permitted to reach the 'intended audience.'" *U.S. v. Baugh*, 187 F.3d 1037, 1044 (9th Cir. 1999) (citing *Bay Area Peace Navy v. United States*, 914 F.2d 1224 (9th Cir. 1990)). In *Baugh*, the court held that ordering protestors to demonstrate 150 to 175 yards away from a visitor center -- where the intended audience for the message was located -- did not leave open ample alternative means of communicating the protesters' message and was unconstitutional under the First Amendment. 187 F.3d at 1044. Similarly, in *Bay Area Peace Navy*, the Court held that requiring a 75-yard security zone between demonstrators and the people to whom they directed their message did not leave open ample alternative means of communicating the message. 914 F.2d at 1229.

Here, the citywide curfew order went far beyond the unconstitutional 75-yard to 175-yard

no-protest perimeters in *Baugh* and *Bay Area Peace Navy* -- protest was prohibited across the entirety of Eugene. As noted in the timelines cited *supra* at 2 fn 1, uprisings in response to the killing of George Floyd a few days earlier were taking place in almost every city around the country, and it was critical to the nationwide character of their message for residents of Eugene to express their outrage without having to leave their city.

In particular, demonstrations that last into the night send a distinct message about the persistence and omnipresence of First Amendment protestors to make their voices heard about a given issue. A vigil -- a period of purposeful wakefulness at night -- has long been a religious tradition and more recently an important method of group mourning, remembrance, and protest. https://en.wikipedia.org/wiki/Vigil. In particular, murders of BIPOC people by police regularly lead to nighttime vigils. *See, e.g.*, https://www.azpm.org/p/home-articles-news/2020/6/2/174072-tucson-candlelight-vigil-for-george-floyd-draws-hundreds/ (George Floyd vigils); https://doublesidedmedia.com/2023/01/30/tyre-nichols-remembered-with-candlelight-vigil-and-march/ (reporting on the recent vigil at Kesey Square in Eugene for Tyre Nichols).

"Protests frequently occur in response to topical events, and their effectiveness may depend on both their immediacy and the forum where they take place." *NAACP, W. Region v. City of Richmond*, 743 F.2d 1346, 1350 (9th Cir. 1984). To carry out a massive protest throughout the day and into the night is a powerful statement in itself. Additionally, nighttime protests allow for First Amendment expression by people whose daytime schedule is dedicated to work, family, or school duties. Allowing First Amendment activity only during the daytime does not provide ample alternatives for the specific, unique message conveyed by a nighttime protest connected to a nationwide movement.

The curfew order and its lack of ample alternatives to nighttime protesting created a

dramatic chilling effect on the local Black Lives Matter movement. Due to its timing, the citywide curfew (allegedly meant to neutrally halt all public presence) in fact criminalized only protests that were related to the movement for Black Lives. As such, the curfew was by nature in fact a content-based restriction, and the police response was particularly retaliatory and vengeful toward those who dared to critique police power and impunity,

The 11:00 p.m. citywide expansion of the May 31, 2020, citywide curfew order was not narrowly tailored and did not allow for ample alternatives for First Amendment expression. Thus, the citywide curfew fails the time-place-manner test for constitutionally regulating First Amendment activity.

II. THE CITYWIDE CURFEW ORDER WAS UNCONSTITUTIONALLY OVERBROAD

The Constitution protects against overbroad laws which "chill speech within the First Amendment's vast and privileged sphere." *Ashcroft v. Free Speech Coalition*, 535 U.S 234, 244, 22 S. Ct. 1389 (2002). The overbreadth doctrine allows a person to challenge a statute "not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Okla.*, 413 U.S. 601, 612, 93 S. Ct. 2908 (1973). A law is overbroad and "unconstitutional on its face if it prohibits a substantial amount of protected expression." *Ashcroft*, 535 U.S. at 244.

In *Nunez*, the Ninth Circuit struck down a San Diego law which made it unlawful for any minor to "loiter, idle, wander, stroll or play" in public areas during nighttime hours. The Court found the law unconstitutionally overbroad on its face because it unreasonably restricted minors' legitimate exercise of their First Amendment rights. 114 F.3d at 950. Interpreting *Broadrick*, the Court noted that the First Amendment is implicated when the rule (1) imposes a disproportionate

burden on those engaged in First Amendment activities; or (2) constitutes governmental regulation of conduct with an expressive element. *Id*. In striking down the ordinance, the Court reasoned the law "significantly restricts expression in all forums for one-third of each day" and "the curfew ordinance has an integral effect on the ability of minors to express themselves," and therefore rejected the curfew, despite the city's interest in reducing juvenile crime and victimization *Id*. at 939, 950-51.

Here, the citywide curfew order imposed an undue burden on expressive conduct. The order disproportionately burdened those engaged in First Amendment activities, because it did not target criminal behavior for enforcement. Rather, the curfew denied all residents of Eugene access to "travel on any public street or in any public place" for nearly one-third of the 24-hour day. Far exceeding the City's alleged interest in preventing property damage downtown, the curfew impacted the ability of *all* Eugene residents to express themselves, by prohibiting *all* public First Amendment expression in public *anywhere* within city limits – using a chainsaw to cut butter. To ban nearly every citizen in a city of 175,000 from leaving their home for one third of the day in the midst of a week of outrage, in order to deter a small handful of property crimes, is the very definition of overbroad and smacks of authoritarian overreach.

III. THE IMPLEMENTATION OF THE CITYWIDE CURFEW ORDER VIOLATED THE FOURTH AMENDMENT BECAUSE PLAINTIFFS HAD ONLY A FEW MINUTES TO COMPLY AND EUGENE OFFICERS LACKED PROBABLE CAUSE FOR BELIEVING THE ARRESTEES HAD *MENS REA*

Because of the lack of notice, and the Catch-22 presented by a curfew order that does not include an exception for heading home, plaintiffs lacked the requisite *mens rea* to support probable cause that a crime was committed.

The Fourth Amendment guarantees "[t]he right of the people to be secure . . . against unreasonable searches and seizures." U.S. Const. amend. IV. The Fourth Amendment is made

applicable to the states by the Due Process Clause of the Fourteenth Amendment. *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 61, 113 S. Ct. 538 (1992). To satisfy the requirements of the Fourth Amendment, an arrest must be supported by probable cause that the arrestee has committed a crime. *Allen v. City of Portland*, 73 F.3d 232, 236 (9th Cir. 1995), *as amended* (Jan. 17, 1996). Probable cause must be based on "reasonably trustworthy information sufficient to warrant a prudent person in believing that the accused had committed or was committing an offense." *Id*. at 237. By definition, probable cause can exist only in relation to criminal conduct. *Id*. No probable cause existed with regard to the plaintiffs in this case.

Plaintiffs Boudjerada and Hendry were charged with violating Eugene Code 2.1055(4)(5) and (6). Exhibits 16, 17. Plaintiff Grady appears to have been charged only with violating Eugene Code 2.1055(4)(f). Exhibit 15.

Section 2.1055(4)(f) states:

> Upon the declaration of a state of emergency, in addition to other powers granted to the city manager elsewhere in this code or the city charter, the city manager may: Establish a curfew for the designated emergency area which fixes the hours during which all persons other than officially authorized personnel may not be upon the public streets or other public places.

Exhibit 18 at 3. That section does not describe a crime of any sort, nor have plaintiffs' counsel been able to locate any provision in the Eugene Code that provides a penalty for violation of that section.

Eugene Code § 2.1055(6) states: "No person shall knowingly violate any emergency measure, regulation or lawful order of an authorized city employee or agent taken pursuant to this section." *Id*. That section requires a "knowing" violation of an emergency measure.[6]

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[6] The only penalty assigned anywhere in the Eugene Code regarding the Emergency Code and its curfew power is found in § 2.1990(10) (2008). https://eugene.municipal.codes/EC/2.1990. That

Plaintiffs did not knowingly violate an emergency order, because, as discussed herein, they were not given proper notice before being arrested, nor were they given time to comply. Plaintiffs lacked the requisite *mens rea* to support probable cause that a crime was committed, and had no opportunity to comply. Eugene police officers could not have thought otherwise at the time of the arrests. Therefore, the defendants lacked probable cause to arrest the plaintiffs on the basis of their mere public presence during a hastily imposed citywide curfew.

The situation was similar to that in *Hickey v. City of Seattle*, 236 F.R.D. 659 (W.D. Wash. 2006), where officers assumed everyone in a "restricted" area during the World Trade Organization protests was violating curfew. The *Hickey* court held that such a presumption, without findings of individualized probable cause, was not sufficient to support an arrest for curfew violation. The same is true here.

Similarly, courts have ruled against short notice dispersal orders issued to crowds. For example, in *Cervantes v. San Diego Police Chief Shelley Zimmerman*, the Southern District of California held that probable cause for arrest for failure to disperse exists only where the dispersal order was lawful and arrestees had a chance to disperse. No. 17-CV-01230-BAS-AHG, 2020 WL 5759752 (S.D. Cal. Sept. 28, 2020), *aff'd sub nom*. *Ramirez v. Zimmerman*, No. 20-56117, 2021 WL 5104371 (9th Cir. Nov. 3, 2021). *See also United States v. Huizar*, 762 F. App'x 391 (9th Cir. 2019) (reversing conviction for failure to obey lawful order because appellant was not given "a reasonable opportunity to comply with the order" to leave the

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section states that "[v]iolation of section 2.1055(7) of this code is punishable by a fine not to exceed $500 or confinement in jail not to exceed 100 days, or both fine and imprisonment." *Id*. Viewing the code charitably, the reference subsection (7) instead of (6) was perhaps a typo; if so, perhaps this code was intended to criminalize violation of section 2.1055(6). Plaintiffs do not concede that point, but for purposes of this brief, will assume that that was the intent of the code.

premises); *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012) (use of force to disperse a crowd is reasonable only if the crowd is given "sufficient warning and means of egress").

Here, there was neither sufficient warning nor reasonable opportunity to comply with the citywide curfew order. As discussed *supra*, the curfew was signed by Medary only six minutes before its 11:00 p.m. implementation. A news release was issued only one minute before the curfew expanded citywide. Exhibit 19. Officers on the street first informed people who were out in public about the curfew only three minutes before its implementation. Dkt 80, Answer to Second Amended Complaint ¶ 50. At that time, plaintiffs Boudjerada and Hendry were in the parking lot of the Whole Foods on East Broadway. Boudjerada Decl. at 2-3; Hendry Decl. at 2. It takes about nine minutes to walk from Whole Foods to the 1200 block of Patterson Street, where plaintiffs were arrested. Exhibit 20.

The arrests began about 11:06 pm according to Sergeant Stotts' bodycam time stamp -- only six minutes after the citywide curfew took effect, nine minutes after officers first began informing people at the Whole Foods about the citywide curfew. Exhibit 1 (video submitted under seal, at 23:06); Exhibit 14 at 2. People were arrested despite the fact that they were making good time headed away from downtown and towards their homes. For instance, Mr. Boudjerada was arrested even though he explained that he was heading back to his car so he could go home, and the person walking near him similarly told the officers they were headed to home and how close home was, but was arrested anyway. Exhibit 1 (at 23:06:26 time stamp). Plaintiffs were arrested before they could have reasonably reached their homes given the citywide curfew's inadequate notice.

Police never provided plaintiffs with any instruction on how to comply with the curfew order, yet the police immediately (within a shorter period of time than plaintiffs would have

physically needed to reach their homes) applied a non-trivial amount of force and arrested them. Indeed, instead of explaining how people could somehow comply, defendant Stotts gleefully yelled to the crowd, right before 11:00, "The curfew is for the entire city, sidewalk included. There is no boundary. Citywide. If you are in the cit-tee [enunciating] you are violating the curfew, even on the sidewalk! . . . If you're on the side of the road there, on the sidewalk, you're in violation of curfew." Exhibit 1 (at timestamp 22:58).

As in *Hickey*, the Eugene police decreed that everyone on the sidewalks and streets was violating the curfew, even those headed away from downtown, even those who explained where they lived and that they were heading there; and they took no steps to determine if the people they arrested fit into any of the enumerated exceptions in the curfew order. As a matter of law, there was no probable cause to arrest plaintiffs.

CONCLUSION

The citywide curfew order and its implementation were unconstitutional, 1) as a time, place, and manner restriction not narrowly tailored to its purposes and without ample alternatives for free expression; 2) because it was overbroad; and 3) because no reasonable officer could believe there was probable cause for arrest.

Respectfully submitted February 7, 2023.

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