UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAY HORSE, *et al.*, Plaintiffs, v. DISTRICT OF COLUMBIA, *et al.*, Defendants.	No. 1:17-cv-01216 (ABJ)

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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INTRODUCTION

> *"[P]olice arrested everyone who happened to occupy the [area] at a particular, randomly chosen moment. No authority supports the proposition that such an arrest, wholly lacking in particularized probable cause and almost certainly swallowing lawful bystanders, is constitutionally viable."* – Barham v. Ramsey, *434 F.3d 565, 574 (D.C. Cir. 2006).*

> *"I wasn't differentiating who was demonstrating and who was rioting." – MPD Cmdr. Keith Deville, testifying under oath about his conduct on January 20, 2017.*

Plaintiffs Elizabeth Lagesse, Milo Gonzalez, and Gwen Frisbie-Fulton and her ten-year-old son A.S. came to the District of Columbia on Inauguration Day 2017 to exercise their constitutional rights to express disapproval of the new President. Plaintiff Shay Horse, a photojournalist, came to photograph anti-inaugural demonstrations. Plaintiff Judah Ariel served as a legal observer. During one of the demonstrations, several acts of vandalism occurred.

In response, the D.C. Metropolitan Police Department (MPD), at the direction of Chief Peter Newsham, rounded up and arrested hundreds of people — most of whom had engaged in no illegal activity but were merely exercising their First Amendment rights — without any warning, order to disperse, or effort to identify individuals who may have broken the law and separate them from the larger number of peaceful demonstrators. Officers fired pepper spray at demonstrators and detainees who posed no threat. Officers charged into a crowd of peaceful demonstrators, knocking over A.S. and burying him under a pile of bodies. MPD held detained individuals on a D.C. street corner for hours without food, water, or access to toilets, intentionally delayed processing them to maximize their discomfort, and handcuffed two of the Plaintiffs so tightly as to cause bleeding or numbness. One officer searched two of the Plaintiffs in an unjustifiably intrusive manner. *See generally* ECF 29 (amended complaint, or "AC"). In accordance with this Court's minute order of March 29, 2018, this opposition assumes familiarity with Plaintiffs' allegations and will discuss them in further detail as relevant to each claim.

Two errors pervade Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint, ECF 38 ("MTD"), and doom many of their arguments. First, Defendants do not afford Plaintiffs' plausibly pleaded allegations the required presumption of truth and, in some instances, overlook Plaintiffs' allegations altogether. Second, Defendants repeat the error they made in the field on Inauguration Day itself: they lump all the demonstrators, observers, and bystanders together regardless of each person's individual acts. As a result, they erroneously assume that police conduct that might have been justified as to *someone* was justified as to *everyone* they arrested or assaulted that day. The Constitution does not permit guilt-by-association policing absent probable cause to believe that the entire group was acting as a unit such that all members acted unlawfully — a question that Defendant Deville, the on-scene commander, has already admitted under oath that he did not even try to answer on Inauguration Day. For these reasons and the more specific ones that follow, Defendants' motion should be denied.

LEGAL STANDARD

A complaint need only provide "a short and plain statement … showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). When ruling on a motion to dismiss, the Court must accept as true all facts plausibly pleaded in the complaint, drawing all reasonable inferences in plaintiffs' favor. *Hurd v. District of Columbia*, 864 F.3d 671, 678 (D.C. Cir. 2017). "Plausibility does not mean certainty," only that the claim "rises 'above the speculative level.'" *Sandvig v. Sessions*, 2018 WL 1568881, at *4 (D.D.C. Mar. 30, 2018) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To the extent inferences must be drawn to show that the defendant is liable, they must merely be reasonable, *Hurd*, 864 F.3d at 678, and need not be the only possible inferences. *Evangelou v. District of Columbia*, 901 F. Supp. 2d 159, 170 (D.D.C. 2012).

Importantly, plaintiffs are permitted to plead with less specificity, and even "on information and belief," regarding information in defendants' possession to which plaintiffs would not have access prior to discovery, *Kelleher v. Dream Catcher, L.L.C.*, 263 F. Supp. 3d 322, 325–26 (D.D.C. 2017), or where the plaintiff's belief relies on facts that render the allegation plausible, *United States ex rel. Scollick v. Narula*, 2017 WL 3268857, at *10 (D.D.C. July 31, 2017).

Plaintiffs' allegations, which the Court has already observed in its minute order of March 29 are "set out in considerable detail in the amended complaint" easily clear Rule 8's "low bar." *Ortiz-Diaz v. U.S. Dep't of Hous. & Urban Dev.*, 961 F. Supp. 2d 104, 108 (D.D.C. 2013).

ARGUMENT

Plaintiffs will address Defendants' arguments in five categories: (1) constitutional and common-law unlawful arrest claims; (2) constitutional and common-law claims for excessive use of force; (3) constitutional and common-law conditions-of-confinement claims; (4) claims under the First Amendment Assemblies Act (FAAA) or invoking that law as a standard of conduct; and (5) municipal liability. These categories cover Claims 1-15. Claim 16, concerning the search of Plaintiffs Horse and Gonzalez at the MPD Police Academy, is the subject of a separate series of pending motions and is therefore not addressed here. *See* ECF 40 (motion to dismiss and/or for summary judgment on Claim 16); ECF 42 (motion to strike ECF 40).

I. Plaintiffs Have Stated Claims For Unconstitutional Arrest (Claims 1 & 2) And False Arrest (Claim 3).

A. Defendants violated Plaintiffs' Fourth Amendment rights by arresting them without probable cause (Claim 1).

The Supreme Court has long rejected the proposition that probable cause may be founded on guilt by association. *See United States v. Di Re*, 332 U.S. 581, 587 (1948) ("We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his

person to which he would otherwise be entitled."); *id.* at 594 ("Presumptions of guilt are not lightly to be indulged from mere meetings.").

The leading case on this point is *Ybarra v. Illinois*, 444 U.S. 85 (1979), which held that police lacked probable cause to frisk a patron of a bar during a warrant-authorized search of the bar based on probable cause that the bartender was dealing heroin. *See id.* at 88-91, 96. All the police knew about the patron is that he was at a bar open to the public at a time when police reasonably suspected the bartender would have drugs for sale. *Id.* at 91. The Court emphatically rejected the state's theory of probable cause based on proximity: "[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Id.* at 91. Instead, the Court explained, "a search or seizure of a person must be supported by probable cause particularized with respect to that person," and this requirement "cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another … where the person may happen to be." *Id.*

In *Barham v. Ramsey*, 434 F.3d 565 (D.C. Cir. 2006), the D.C. Circuit applied the *Ybarra* requirement of individualized probable cause in circumstances very similar to those here. *Barham* involved protests of the World Bank meeting in 2002; after witnessing acts of vandalism by some demonstrators, including the smashing of a window and overturning of trash containers and newspaper vending machines, *id.* at 569, then-Assistant Chief Peter Newsham ordered that hundreds of demonstrators who had gathered in Pershing Park be cordoned off by police and then arrested, *id.* at 570. In the arrestees' ensuing class action against Newsham and other officials, the court applied *Ybarra*'s rules that probable cause must be "particularized" rather than based on "propinquity" and affirmed the district court's denial of qualified immunity to Newsham: the

"mass arrest … violated the clearly established Fourth Amendment rights of plaintiffs by detaining them without particularized probable cause." *Id.* at 573.

As the court explained, "[e]ven assuming that Newsham had probable cause to believe that *some* people present that morning had committed arrestable offenses, he nonetheless lacked probable cause for detaining *everyone* who happened to be in the park," *id.*, as he had "no basis for suspecting that all of the occupants of Pershing Park were then breaking the law or that they had broken the law before entering the park." *Id.* at 574. The court rejected Newsham's attempt to "excavate probable cause … from the scattered acts of lawlessness that Newsham and others had witnessed that morning." *Id.* at 573. The court explained that "[t]raffic offenses and scattered acts of vandalism by unidentified individuals in the streets … could not have incriminated all of the individuals who happened to occupy the park when Newsham ordered the arrest." *Id.* at 574. The court chided Newsham for making "no effort to ascribe misdeeds to the specific individuals arrested," and instead claiming probable cause by "refer[ring] generically to what 'demonstrators' were seen doing." *Id.* Moreover, the court noted, during the time between the alleged lawbreaking and the arrests, "a diverse crowd entered and exited the park freely"; ultimately, "police arrested everyone who happened to occupy the park at a particular, randomly chosen moment." *Id.* Although the court had "no reason to doubt that unlawful activity might have occurred in the course of the protest," the court concluded that "the simple, dispositive fact here is that appellants ha[d] proffered no facts capable of supporting the proposition that Newsham had reasonable, particularized grounds to believe every one of the 386 people arrested was observed committing a crime." *Id.* Thus, the D.C. Circuit held, "[n]o authority supports the proposition that such an arrest, wholly lacking in particularized probable cause and almost certainly swallowing lawful bystanders, is constitutionally viable." *Id.*

Although *Ybarra* and *Barham* will be sufficient to answer the Fourth Amendment question posed here, other courts also recognize that the *Ybarra*/*Barham* requirement of individualized probable cause applies in the context of a large demonstration. *See Fogarty v. Gallegos*, 523 F.3d 1147, 1158 (10th Cir. 2008) ("The defendants' arguments that the police had probable cause to arrest Fogarty rest only on characterizations of the protest in general, and not on evidence of Fogarty's individual actions. The Fourth Amendment plainly requires probable cause to arrest Fogarty as an individual, not as a member of a large basket containing a few bad eggs. In other words, that Fogarty was a participant in an antiwar protest where some individuals may have broken the law is not enough to justify his arrest."); *Jones v. Parmley*, 465 F.3d 46, 60 (2d Cir. 2006) (Sotomayor, J.) (where a few demonstrators among a group of protestors might have committed a crime by blocking an interstate highway, but none of the officers could identify which demonstrators had done so, officers "could not, then, have reasonably thought that indiscriminate mass arrests without probable cause were lawful under these circumstances"); *Hickey v. City of Seattle*, 2006 WL 3692658, at *7, *10 (W.D. Wash. Dec. 13, 2006) (holding that police lacked probable cause to arrest 200 protestors in a park, because "without individualized investigation, the officers could not distinguish which of the protestors had committed or were committing arrestable offenses"; and rejecting City's argument that "class members' mere presence in Westlake Park while protesting provided officers with probable cause to arrest").

Application of the *Ybarra*/*Barham* rule here is straightforward. As Plaintiffs Lagesse and Horse have alleged in great detail, they were on the streets of the District peacefully exercising their First Amendment rights to protest and to document the protests, respectively, when they were detained and arrested based on the actions of *other* individuals. Plaintiffs specifically allege that they did not engage in any acts of vandalism or other unlawful acts. AC ¶¶ 48, 55, 59, 71-74.

Moreover, police should have distinguished Plaintiffs from those engaging in vandalism: Plaintiff Lagesse was dressed differently and arrived at a different time, AC ¶¶ 53-54, and Plaintiff Horse was also dressed differently and was clearly identifiable as a journalist by the large professional-grade camera he wore around his neck and used, AC ¶¶ 20-23, 47. As in *Barham*, Defendants made no effort to distinguish individuals acting unlawfully from those who were not, nor did they make use of a dispersal order to alert demonstrators who wished to continue exercising their First Amendment rights in a lawful manner that they needed to do so elsewhere. AC ¶¶ 31, 34, 36, 38, 66, 67, 68, 69. As in *Barham*, the fluid movement of individuals to and away from the demonstration made it impossible for the police to assume that everyone on the street was acting together. AC ¶¶ 35, 52. As in *Barham*, then, MPD made arrests "based on the plaintiffs' occupancy of a randomly selected zone, rather than participation in unlawful behavior." 434 F.3d at 574. With no association between Plaintiffs Lagesse or Horse and any unlawful activity, save for their "mere propinquity," police lacked probable cause to arrest them under *Barham* and accordingly violated their Fourth Amendment rights.

To be sure, the Supreme Court and this Court have identified limits to the *Ybarra*/*Barham* principle. First, probable cause can arise in a group setting where the group is so small and the crime so obvious to all present that it is implausible to imagine that any of the handful of individuals present is not associated with the criminal activity. *See Maryland v. Pringle*, 540 U.S. 366 (2003) (distinguishing *Ybarra* and finding probable cause where three men were traveling together in a car in which rolls of cash and bags of cocaine were hidden in multiple places). Second, probable cause can arise with respect to individuals in a group engaging in criminal behavior where the group is acting "as a unit" such that "all members of the crowd violated the law." *Carr v. District of Columbia*, 587 F.3d 401, 408 (D.C. Cir. 2009).

Here, however, the space throughout which the various individuals arrested were found was large — several city blocks in downtown D.C. — not a single automobile as in *Pringle*. And unlike in *Carr*, police did not have probable cause to believe that all the demonstrators on the street were acting "as a unit" such that "all members of the crowd violated the law." Quite the contrary: police admitted that they did not attempt to discern who specifically was violating the law, AC ¶ 68, and that they did not use a dispersal order to attempt to separate lawbreakers from non-lawbreakers, AC ¶ 38. Therefore, the facts fall squarely within the rule of *Ybarra* and *Barham*.

Defendants' contrary arguments as to how the police could have believed probable cause existed regarding Plaintiffs Horse and Lagesse are doubly problematic. First, Defendants mischaracterize the facts in several respects. Plaintiffs Horse and Lagesse were not traveling "within a group that 'engaged in acts of vandalism'" MTD 7 (citing AC ¶ 22). The words "within" and "group" are Defendants' unwarranted additions. Instead, Plaintiff Horse was traveling "alongside" other demonstrators for the purpose of photographing them, AC ¶ 19, but was not part of, nor "within," any "group" — except to the extent he and many other people understandably ran away when the police assaulted demonstrators with pepper spray, AC ¶¶ 50, 59, 60, 72. And Plaintiff Lagesse was in fact not traveling with (much less "within") any "group" at all; she came to be in proximity to individuals who might have been breaking the law only after the police assaulted her along with other demonstrators with chemical irritants and chased and funneled them all together into a kettle. AC ¶¶ 53-55, 59, 60, 74. Thus, to the extent Plaintiff Lagesse was ever even close to anyone whom the Defendants may have had probable cause to arrest, it was only because Defendants' actions drove her there. The MTD also uses selective omission to make Plaintiffs Lagesse's allegations concerning the use of safety goggles and a bandana for protection from chemical irritants sound more suspicious than they were. Defendants' statement that she

donned these items "prior to her arrest," while true, hardly demonstrates probable cause, given that she donned them *in response to a police assault* rather than upon arrival in D.C. or for the purpose of hiding her identity. AC ¶ 58. Defendants' misreading of the amended complaint cannot support dismissal under Rule 12(b)(6), which requires accepting the facts as pleaded.

Beyond Defendants' factual errors, the second (and deeper) flaw in Defendants' probable cause argument is its sweeping nature. Defendants claim probable cause based on essentially three facts: Plaintiffs Horse and Lagesse (1) were in the vicinity of demonstrators acting unlawfully, (2) knew or might have known that unlawful conduct was occurring, and (3) fled from police when bombarded with pepper-spray, stingballs, and frightening noise-emitting devices. MTD 8. Those three facts are likely true of every demonstrator or journalist near Franklin Square around 10:30 a.m. that day. Defendants' legal theory is thus pure guilt by association. In Defendants' view, taking part in a demonstration in which any other demonstrators are breaking the law provides probable cause to arrest. That theory is problematic not only under the Fourth Amendment, which requires individualized probable cause, but for the exercise of First Amendment rights as well. Under the First Amendment no less than the Fourth, "it has been established that guilt by association alone, without establishing that an individual's association poses the threat feared by the Government, is an impermissible basis upon which to deny First Amendment rights. … In this sensitive field, the State may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 919-20 (1982) (citations, source's alteration marks, and internal quotation marks omitted). Only the hardiest or most foolish of demonstrators would risk marching to express their views if unlawful activity by anyone else at the same place and time would expose every demonstrator in the area to arrest. *See e.g. United States v. Robel*, 389 U.S. 258, 265 (1967) (noting that "guilt by

association" has an impermissible "inhibiting effect on the exercise of First Amendment rights"). This Court should decline Defendants' invitation to forsake *Ybarra* and *Barham* and cast a chilling pall on the exercise of basic First Amendment freedoms in the nation's capital.

Defendants are also incorrect that the subsequent grand jury indictment of Plaintiff Lagesse (Plaintiff Horse was never, in fact, indicted by the grand jury, *see* Dkt., United States v. Horse, 2017 CF2 001219 (D.C. Super. Ct.)) demonstrates that her arrest was supported by probable cause. *See* MTD 9. Defendants' one cited authority for this proposition, *Moore v. Hartman*, 102 F. Supp. 3d 35 (D.D.C. 2015), is inapposite, as it concerned whether an indictment provided evidence of probable cause for the purpose of a malicious prosecution claim, not false arrest. *See id.* at 114-15. That is an entirely different question than the one presented here: "'The issue in a malicious prosecution case is not whether there was probable cause for the initial arrest, but whether there was probable cause for the underlying suit.'" *Id.* at 114 (quoting *Amobi v. D.C. Dep't of Corr.*, 755 F.3d 980, 992 (D.C. Cir. 2014)). In fact, "'[p]robable cause to initiate a legal proceeding' is a vastly different legal concept than 'probable cause to arrest.'" *Edmond v. U.S. Postal Serv.*, 727 F. Supp. 7, 10 n.12 (D.D.C. 1989), *aff'd in part, rev'd in part on other grounds*, 949 F.2d 415 (D.C. Cir. 1991). Where, as here, an indictment follows a warrantless arrest, each of the two determinations is made at a different time (arrest versus subsequent indictment) by a different actor (officer in the field versus grand jury) on a different set of facts (those known to the officer versus all evidence gathered and presented to the grand jury). Accordingly, the Supreme Court has evaluated probable cause for arrest based on the circumstances at the time of arrest notwithstanding the fact of a later indictment. *See Rios v. United States*, 364 U.S. 253, 254, 261 (1960). And the Sixth and Eleventh Circuits have explicitly rejected Defendants' position: "A subsequent indictment does not retroactively provide probable cause for an arrest that has already taken place."

Garmon v. Lumpkin Cty., 878 F.2d 1406, 1409 (11th Cir. 1989); *accord Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 307 n.13 (6th Cir. 2005). Therefore, Defendants may rely only on the facts known on January 20 to MPD officials — who admit they made no effort to identify which demonstrators were breaking the law, and therefore had no reason to believe that Plaintiffs Horse and Lagesse specifically were breaking the law.

Finally, the claim that Plaintiffs have failed to allege that Defendants Howden, Rock, Thau, Washington, and Alioto arrested them, MTD 14-15, is belied by the amended complaint and ordinary tort-law principles. Plaintiffs Horse and Lagesse alleged that these five Defendants participated in the establishment of the kettle in which they were held, AC ¶¶ 61-64, and that Defendant Deville declared the kettled detainees to be "under arrest," AC ¶ 78. An arrest occurs when "a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest." 3 LaFave, *Search & Seizure* § 5.1(a), at 12 (5th ed. 2012) (citation and internal quotation marks omitted). Any reasonable person trapped by police in a police-maintained kettle of detainees who are all told by the police commander that they are under arrest would have understood that their freedom of movement was restrained in such a manner as to constitute an arrest. And under ordinary tort-law principles applicable to § 1983 actions, "where several independent actors concurrently or consecutively produce a single, indivisible injury," each is liable. *Wesby v. District of Columbia*, 841 F. Supp. 2d 20, 41 (D.D.C. 2012), *aff'd*, 765 F.3d 13 (D.C. Cir. 2014), *rev'd on other grounds*, 138 S. Ct. 577 (2018). Thus, "[o]ne who … assists an unlawful arrest may be liable." *Id.* (citation and internal quotation marks omitted). Because Defendants Howden, Rock, Thau, Washington, and Alioto acted together to cause the arrest by detaining Plaintiffs in a kettle where they were told they were under arrest, each of them is liable.

Plaintiffs have stated a claim that they were arrested without probable cause in violation of the Fourth Amendment.

B. Defendants violated Plaintiffs' First Amendment rights by arresting them because of their constitutionally protected speech (Claim 2).

From the same facts that demonstrate the absence of probable cause, it follows that Plaintiffs have stated a First Amendment claim as well. Defendants correctly state the elements of the claim: protected speech by Plaintiffs, retaliatory action by Defendants, and a causal link between them. MTD 17 (citing *Doe v. District of Columbia*, 796 F.3d 96, 106 (D.C. Cir. 2015)). Defendants argue both that Plaintiffs' conduct was not protected speech and that they were arrested because of unlawful conduct as opposed to their speech. But each of these propositions depends on the notion that the independent unlawful actions of people *other than the* Plaintiffs can be attributed to the Plaintiffs and that they can be arrested on that basis. As explained above, the Constitution forbids such assumptions.

Further, the First Amendment demands that law enforcement strictly observe the constitutionally significant distinction between unlawful conduct and the lawful exercise of First Amendment rights. "The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct ... that itself is not protected. … When such conduct occurs in the context of constitutionally protected activity … 'precision of regulation' is demanded." *Claiborne Hardware*, 458 U.S. at 908, 916 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)); *accord Healy v. James*, 408 U.S. 169, 186 (1972). As then-Judge Sotomayor explained, demonstrators acting lawfully have "an undeniable right to continue their peaceable protest activities, even when some in the demonstration might have transgressed the law." *Jones v. Parmley*, 465 F.3d 46, 60 (2d Cir. 2006); *see also Santopietro v. Howell*, 857 F.3d 980, 990 (9th Cir. 2017) (quoting *Ybarra* that "a person's mere propinquity to others independently

suspected of criminal activity does not, without more, give rise to probable cause," and noting that "*Claiborne Hardware* and *Healy* make lucidly clear that the 'more' cannot consist of inferences of possible criminal involvement based solely on an individual's First Amendment-protected activities and associations"); *United States v. Dellinger*, 472 F.2d 340, 392 (7th Cir. 1972) ("When the group activity out of which the alleged offense develops … involv[es] both legal and illegal purposes and conduct, and is within the shadow of the first amendment, the factual issue as to the alleged criminal intent must be judged *strictissimi juris* [i.e., in the strictest manner of the law]. This is necessary to avoid punishing one who participates in such an undertaking and is in sympathy with its legitimate aims, but does not intend to accomplish them by unlawful means.").

Without a link between Plaintiffs' lawful conduct and the unlawful conduct of others — other than their shared First Amendment-protected right to be in the same area of the nation's capital at the same time, voicing opposition to the same event — Defendants' arguments that Plaintiffs' arrest was based on probable cause rather than protected speech collapse. Plaintiffs have alleged that they were in fact exercising their First Amendment rights, AC ¶¶ 19, 46-48 (Horse), ¶¶ 5, 53-55 (Lagesse), and that they were arrested for it, AC ¶¶ 71-74. Given that they could not have been validly arrested under the Fourth Amendment in these circumstances, the inference that their First Amendment activity was the reason for their arrest is highly plausible, particularly as the government posits no other lawful justification. Plaintiffs have stated a First Amendment claim.

C. Plaintiffs' Fourth and First Amendment rights at issue here were clearly established prior to January 20, 2017 (Claims 1 & 2).

Qualified immunity must be denied where the defendants violated clearly established rights of which a reasonable person would have known because either controlling authority or "a robust consensus of cases of persuasive authority" placed the constitutional question beyond debate. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589–90 (2018) (citation and internal quotation

marks omitted). Plaintiffs need not identify a precisely on-point precedent; rather, it is sufficient that the law provided "fair warning" to an officer that his conduct violated the Constitution. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

Defendants concede that Plaintiffs have a clearly established First Amendment right to be free from arrest without probable cause based on their speech. MTD 19 (citing *Patterson v. United States*, 999 F. Supp. 2d 300, 310 (D.D.C. 2013), in turn citing *Dellums v. Powell*, 566 F.2d 167, 195–96 (D.C. Cir. 1977)).

Regarding the Fourth Amendment claims, however, Defendants wrongly contend that Plaintiffs' right not to be arrested in the circumstances presented on Inauguration Day was not clearly established. In fact, the right was established with a high degree of specificity. The D.C. Circuit has addressed this precise circumstance — peaceful demonstrators arrested for the acts of other demonstrators. *See Barham*, 434 F.3d at 573-74. It gets even more specific than that: in *Barham*, as here, D.C. police, having witnessed some unlawful acts by some individuals who were demonstrating, cordoned off and arrested a much larger group of demonstrators, including many whom they had no reason to believe had acted unlawfully and whose only association with lawbreakers was their proximity and involvement in the same demonstration. In holding the arrests lacked probable cause, *Barham* placed beyond debate the unconstitutionally of arresting peaceful demonstrators based on probable cause to suspect *other* demonstrators of having engaged in unlawful conduct. As far as providing police officers "fair warning" regarding what conduct violates the Constitution, *Hope*, 536 U.S. at 741, it doesn't get much clearer than this case.

Although *Barham* is controlling authority and therefore sufficient to establish the law, its holding is buttressed by other courts' holdings that clearly established law prohibited officers from carrying out mass arrests in circumstances similar to those here: where some demonstrators are

suspected of breaking the law but police have no reason to believe the same of all the demonstrators they are arresting, the Second and Tenth Circuits have not only found constitutional violations but denied qualified immunity as well. *See Fogarty*, 523 F.3d at 1158-59; *Jones*, 465 F.3d at 60 (Sotomayor, J.). "In determining whether officers strayed beyond clearly established bounds of lawfulness, we look to cases from the Supreme Court and this court, as well as to cases from other courts exhibiting a consensus view." *Johnson v. District of Columbia*, 528 F.3d 969, 976 (D.C. Cir. 2008). And perhaps the most compelling indication that the law is clearly established is that *Barham* itself not only applied the Fourth Amendment to circumstances closely analogous to those here but also denied qualified immunity, finding that it had "no trouble in concluding that plaintiffs' Fourth Amendment rights were clearly established in the circumstances of the mass arrest." 434 F.3d at 573.

In the face of all this clear guidance, Defendants claim that *Carr* provided a basis for Defendants to believe their actions were lawful, but that case in fact reaffirmed *Barham* and recognized an exception that proves the *Barham* rule. In *Carr*, a group of anti-inauguration protestors marched through Adams Morgan; many committed acts of vandalism, and the police arrested the entire group. *See Carr*, 587 F.3d at 403-05. Plaintiffs were protestors who claimed they had been wrongly arrested based on the misconduct of other demonstrators. *See id.* at 404-05. As the case arrived at the D.C. Circuit, the defendants were appealing a grant of summary judgment to the plaintiffs, so — crucially — the court of appeals considered the facts in the light most favorable to defendants. *Id.* at 405, 409. Crediting the testimony of a police officer who said that every single one of the demonstrators had cheered in unison at the breaking of windows by the crowd, *id.* at 404, 407, the court of appeals was compelled to consider the rare circumstance in which police had probable cause to believe that the "entire crowd is acting as a unit and therefore

all members of the crowd violated the law." *Id.* at 408. On the assumption that they were, the court of appeals reversed summary judgment for the plaintiffs, holding that if indeed the officer's testimony was believed (as required on review of summary judgment), the entire group, as a unit, was engaging in criminal activity. *Carr* thus adds no more than a narrow exception to the *Barham* principle: peaceful demonstrators cannot be arrested based on probable cause to suspect nearby demonstrators of misconduct *unless* the police had probable cause to believe that *the entire group was acting unlawfully as a unit*.

Indeed, *Carr* itself acknowledged the continuing validity of *Barham* by distinguishing it and thereby confirming the centrality of the question whether the "entire crowd is acting as a unit and therefore all members of the crowd violated the law." *Id.* The court explained that in *Barham*, unlike in *Carr*, the arrestees "'never operated as a cohesive unit'" and "'the *crowd* exhibited no behavior that could allow a reasonable officer to believe *everyone present* had committed a crime.'" *Id.* at 407 (quoting *Barham*, 434 F.3d at 569, 573; emphasis added by *Carr*). *Carr* reaffirmed that *Barham* had held that "probable cause must be particularized"; *Carr* added only that "that showing is satisfied if the officers have grounds to believe all arrested persons were a part of the unit observed violating the law." *Id.* at 407.

The *Carr* exception casts no doubt on *Barham*'s applicability to this case because the amended complaint plausibly alleges that police could not reasonably have believed that the "entire crowd [was] acting as a unit" and that "all members of the crowd violated the law." *Id.* at 408. Plaintiffs have alleged — in great detail and citing testimony under oath from MPD's on-scene commander — that the demonstrators were not all acting as a unit. Demonstrators joined and left the march, AC ¶ 35, arrived at various times, AC ¶¶ 53-55, and dressed differently than individuals engaging in vandalism, AC ¶¶ 20-23, 54. These allegations are supported by the District's own

Police Complaints Board, which observed that whereas the individuals acting unlawfully "were dressed primarily all in black," "many of those held and arrested[] were visibly wearing items that identified them as not being associated with these protestors." D.C. Police Compl. Bd., *OPC Monitoring of the Inauguration Jan. 20, 2017: Report and Recommendations of the Police Compl. Bd. to Mayor Muriel Bowser* 8 (Feb. 27, 2017) (referenced at AC ¶ 205) ("PCB 2017 Report"); *accord id.* at 7.[1] As MPD's on-scene commander, Defendant Keith Deville, testified, "I wasn't differentiating who was demonstrating and who was rioting." AC ¶ 68.

Under such circumstances, no reasonable officer could have doubted that the rule of *Barham*, not the exception of *Carr*, applied to the arrest of Plaintiffs. Like *Barham*, the possibility that the demonstrators in the vicinity of Franklin Square were acting as a unit was negated by the porous nature of the demonstration and the fact that the MPD on-scene commander did not even try to differentiate lawful demonstrators from "rioters." Under the facts as pleaded, it was "beyond doubt" that *Barham* applied.

One might nonetheless ask how reasonable officers could have constitutionally halted any lawbreaking in the circumstances that they faced on January 20, 2017. Most obviously, they could have use their considerable presence at the scene to focus on identifying and singling out lawbreakers for arrest. And both *Barham* and the D.C. law provide an even simpler solution: attempt to disperse the crowd with at least one audible dispersal order. Although such a step is not required by the Constitution, *Carr*, 587 F.3d. at 410, it *is* required under the First Amendment Assemblies Act, D.C. Code § 5-331.07(e), and — equally important to the police — provides a safeguard against making unconstitutional arrests. As *Carr* counseled:

[1] *Available at*: https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/Inaguration%20Protest%20Monitoring%20Report%20FINAL.pdf. The Police Complaints Board governs the Office of Police Complaints. *See id.* at 1 n.4.

> A dispersal order might well be necessary in a situation in which a crowd is substantially infected with violence, or otherwise threatening public safety, yet officers cannot reasonably believe that the crowd is acting unlawfully as a unit. In that event, a dispersal order might be the only means of distinguishing the wholly innocent from the others. Indeed, that was the situation presented in *Barham* and that is why we thought that officers could only deal with the crowd as a unit by first giving an order to disperse.

587 F.3d at 409–10 (citation and internal quotation marks omitted). A dispersal order and an opportunity to disperse would let law-abiding individuals know they need to leave the area and thereby help police discern who was breaking the law and who was a peaceful demonstrator.

Defendants here gave no such order and allowed no such opportunity. AC ¶ 38. Instead, they chose to violate D.C. law and thereby make practically inevitable that they would unconstitutionally arrest law-abiding demonstrators as to whom they had no probable cause, in violation of clearly established law. That is precisely what happened. Defendants' motion to dismiss the Fourth and First Amendment unlawful-arrest claims should be denied.

D. The lack of probable cause defeats Defendants' argument to dismiss the false arrest claim (Claim 3).

Defendants seek dismissal of the common-law false arrest claims, arguing that probable cause existed to arrest Plaintiffs Horse and Lagesse. However, as the foregoing discussion shows, taking the plausibly alleged facts as true, probable cause was absent. Moreover, in the false arrest context, this question "is a mixed question of law and fact that the trial court should ordinarily leave to the jury." *Enders v. District of Columbia*, 4 A.3d 457, 469 (D.C. 2010). Finally, the individual Defendants' good-faith defense, MTD 16-17, is not appropriate for resolution on a motion to dismiss: where a person has been detained without process, plaintiffs need not negate justification in order to state a false arrest claim; rather, *defendants* must prove good faith as an affirmative defense. *Marshall v. District of Columbia*, 391 A.2d 1374, 1380 (D.C. 1978); *accord Smith v. District of Columbia*, 2018 WL 1568878, at *24 (D.D.C. Mar. 30, 2018).

Accordingly, the motion to dismiss the common-law false arrest claims should be denied.

II. Plaintiffs Have Stated Claims For Unconstitutionally Excessive Force And Assault And Battery (Claims 6, 7, 9, 10 & 11).

A. Plaintiffs were seized under the Fourth Amendment (Claims 6, 9 & 11).

Defendants are mistaken that Plaintiffs have failed to allege that they were seized. *See* MTD 20-22. Defendants' position flows from two errors: misunderstanding what qualifies as a constitutional seizure and failing to take as true plausibly pleaded allegations in the amended complaint.

First, the "application of physical force to restrain movement, even when it is ultimately unsuccessful" is sufficient to constitute a seizure. *California v. Hodari D.*, 499 U.S. 621, 626 (1991); *accord United States v. Brodie*, 742 F.3d 1058, 1061 (D.C. Cir. 2014). Indeed, the Court has recognized that the concept of a seizure encompasses "the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee." *Hodari D.*, 499 U.S. at 624; *accord id.* at 625 (arrest occurs at "the slightest application of physical force, despite the arrestee's escape"). The means to restrain the subject's movement must be "intentionally applied." *Brower v. Cty. of Inyo*, 489 U.S. 593, 596–97 (1989). An arrest need not have resulted. *Kyle v. Bedlion*, 177 F. Supp. 3d 380, 391 (D.D.C. 2016).

The D.C. Circuit and this Court have recognized that even a momentary limitation of a person's freedom of moment (or the person's submission to authority) is a seizure if it results from means intentionally applied. *See Brodie*, 742 F.3d at 1061 (holding that seizure occurred for the moment suspect put his hands on a car as directed by police, even though he subsequently fled); *Kyle*, 177 F. Supp. 3d at 390–92 (holding that a partygoer was seized when she was shoved into a barbeque by police officer, because "a seizure can be accomplished in an instant, and there is no minimum time that a plaintiff's freedom of movement must be terminated in order to establish that

a seizure has occurred" (citation and internal quotation marks omitted)). Other circuits agree. *See Atkinson v. City of Mountain View*, 709 F.3d 1201, 1208–09 (8th Cir. 2013) (where officer's "bull rush" knocked subject ten to fifteen feet backward, "a seizure occurred the moment [the officer] charged into [the subject]"); *Slusher v. Carson*, 540 F.3d 449, 452, 454–55 (6th Cir. 2008) (holding that an officer seized the plaintiff when he momentarily grabbed her hand); *Acevedo v. Canterbury*, 457 F.3d 721, 723–25 (7th Cir. 2006) (holding that a subject was seized by single punch that caused him to fall, in spite of the fact that he got back to his feet; "[t]he fact that the restraint on the individual's freedom of movement is brief makes no difference").

Applying these rules and in light of the serious and physically incapacitating effects of pepper spray, federal courts routinely hold that when an officer intentionally sprays a person with pepper spray, that person is seized, regardless of whether the person halts. *See McCracken v. Freed*, 243 F. App'x 702, 708 (3d Cir. 2007) (plaintiff seized when law enforcement threw pepper spray canisters into her house "with the intent of temporarily debilitating any persons occupying the home" (citation and footnote omitted)); *Bettencourt v. Arruda*, 2012 WL 5398475, at *7-*8 (D. Mass. Nov. 1, 2012) (evidence showed seizure where plaintiff "was subjected to physical force that was applied by [Officer] Arruda for the purpose of restraining his movement" when "Arruda pulled him by the arm and sprayed him with pepper spray," even though it "did not stop him" and plaintiff was able to drive away afterward); *Logan v. City of Pullman*, 392 F. Supp. 2d 1246, 1260 (E.D. Wash. 2005) (plaintiffs seized when pepper-sprayed "because the Defendant Officers dispersed [pepper spray] in an attempt to gain physical control over those individuals"); *Yelverton v. Vargo*, 386 F. Supp. 2d 1224, 1228 (M.D. Ala. 2005) ("Officer Vargo's pepper spraying of McConnell constituted a seizure even though it did not stop him."); *accord Pluma v. City of New York*, 2015 WL 1623828, at *4 (S.D.N.Y. Mar. 31, 2015); *Bernal v. Johnson*, 2014 WL 4976212,

at *4 (N.D. Ill. Sept. 25, 2014); *Hamilton v. City of Olympia*, 687 F. Supp. 2d 1231, 1241 (W.D. Wash. 2009). And courts have specifically held that using pepper spray to redirect demonstrators constitutes a seizure. *See Jennings v. City of Miami*, 2009 WL 413110, at *9 (S.D. Fla. Jan. 27, 2009); *Marbet v. City of Portland*, 2003 WL 23540258, at *10 (D. Or. Sept. 8, 2003).

Plaintiffs all allege that Defendants applied physical force to them to restrain their movement. Plaintiff Horse's spraying by Defendant Murphy and Plaintiff Ariel's spraying by some combination of Defendants were instances of physical force, intentionally applied, with the object of restraining their movement by making them choke and cough and by making their eyes burn. AC ¶¶ 47-49 (Horse); ¶¶ 120, 125-26 (Ariel). (If even by the lenient standard of a motion to dismiss, the amended complaint's allegations are not sufficiently explicit on the point because they merely imply but do not state that Defendants sprayed Plaintiffs Horse and Ariel *to restrain their movement*, Plaintiffs request leave to amend their complaint to state explicitly that the application of the pepper spray was intended to restrain their movement — and in fact did so.) Plaintiff A.S. was knocked to the ground when Defendants Masci and Angulo charged into him. AC ¶¶ 129-35. Plaintiff Frisbie-Fulton's exposure to the pepper spray that various Defendants had fired into the crowd forced her to stop running with A.S. and thus halted both of them. AC ¶¶ 138-44. Plaintiffs Horse, Lagesse, and Gonzalez were, of course, restrained already because they had been or were in the process of being arrested by kettling, AC ¶¶ 79-86, and the Supreme Court has recognized that excessive force during an arrest triggers Fourth Amendment scrutiny. *Tolan v. Cotton*, 134 S. Ct. 1861, 1865–66 (2014); *accord* MTD 20 (acknowledging this principle). Accordingly, all of the Plaintiffs have sufficiently alleged that they were seized.

That Plaintiffs were not in all instances individually targeted by Defendants, but instead were part of a larger group at which Defendants' use of force was aimed, AC ¶¶ 79-86, 120, 125-

26, 129-35, 138-41, does not alter the fact they were seized. Directly on point is *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012), where officers shot projectiles at a group of demonstrating students, and the court of appeals held that a student struck by one of them was seized even if he had not been individually targeted:

> [T]he officers' conduct resulted in Nelson being hit by a projectile that they intentionally fired towards a group of which he was a member. Their conduct was intentional, it was aimed towards Nelson and his group, and it resulted in the application of physical force to Nelson's person as well as the termination of his movement. Nelson was therefore intentionally seized under the Fourth Amendment.

Id. at 876. The same reasoning applies here: by firing pepper spray into the group of kettled detainees that included Plaintiffs Horse, Lagesse, and Gonzalez; by firing pepper spray into the group of peaceful demonstrators and observers that included Plaintiff Ariel and later Plaintiffs Frisbie-Fulton and A.S.; and by charging into the group of peaceful demonstrators including Plaintiffs Frisbie-Fulton and A.S., Defendant officers intentionally applied physical force to restrain their movement. (Plaintiff Horse was the specific target of Defendant Murphy's attack, AC ¶ 47, so there is no question of transferred intent there.)

Plaintiffs have sufficiently alleged that they were seized under the Fourth Amendment.

B. Plaintiffs sufficiently allege that the use of force by Officers Washington, Rock, and Thau was unreasonable (Claim 6).

Even a cursory reading of the amended complaint is sufficient to reject Defendants' challenge to the allegations concerning Officers Washington, Rock, and Thau. MTD 22-23. Specifically, Plaintiffs provide detail about the circumstances of each of these officers' uses of force and allege that they occurred at times when the targeted individuals — who were already detained in the kettle — were not disobeying orders nor posing a threat. AC ¶ 80(a)-(d).

"A police officer's use of force is excessive and therefore violates the Fourth Amendment if it is not 'reasonable,' that is, if 'the nature and quality of the intrusion on the individual's Fourth

Amendment interests' is weightier than 'the countervailing governmental interests at stake.'" *Rudder v. Williams*, 666 F.3d 790, 795 (D.C. Cir. 2012) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). Factors to be considered include the severity of the crime at issue, whether the suspect poses an immediate threat to the officer or others, and whether she is actively resisting arrest or trying to flee. *Johnson v. District of Columbia*, 528 F.3d 969, 974 (D.C. Cir. 2008). Under this standard, "a police officer must have some justification for the quantum of force he uses. … [Although courts] will accord a measure of respect to the officer's judgment about the quantum of force called for in a quickly developing situation, … the state may not perpetrate violence for its own sake. Force without reason is unreasonable." *Id.* at 977 (citation, source's alteration marks, and internal quotation marks omitted).

Because the use of pepper spray on non-resisting, non-threatening detainees is clearly excessive — as police had no interest supporting such a serious intrusion on Plaintiffs' Fourth Amendment interests — Plaintiffs have amply alleged that Officers Washington, Rock, and Thau crossed far beyond the constitutional line.

Defendants' challenge to these claims is wholly meritless.

C. Defendants do not meaningfully contest that Plaintiffs' right to be free from the excessive force applied to them was clearly established (Claims 6, 9 & 11).

Although Defendants invoke the qualified immunity defense as to some of the excessive force claims, MTD 23, they do not actually contend that the right to be free from excessive force in the circumstances alleged here — where Plaintiffs were not threatening anyone or resisting officers, and where (with respect to Plaintiffs Ariel, Frisbie-Fulton, and A.S.) police did not even suspect them of a crime — was not clearly established. Instead, Defendants recite the rule that a reasonable mistake as to the amount of force necessary can entitle an officer to qualified immunity. MTD 23. But Defendants do not and cannot explain why, taking the facts to be true, any mistake

in these circumstances could have been reasonable. *Cf.* PCB 2017 Report 9 ("[Pepper] spray was deployed to move the crowd, without warnings, and in many instances it was used on people who were simply standing in the wrong place."). Defendants cannot seriously argue that pepper-spraying someone without any cause whatsoever constituted a reasonable mistake as to the *amount* of force that was necessary, because *no* amount of force was necessary. If Defendants are trying to claim that the events transpired differently than plausibly alleged by the individuals who experienced them, that of course is a factual dispute not appropriate for a motion to dismiss. Otherwise, Defendants do not justify their argument for qualified immunity.

In any event, the D.C. Circuit has clearly established that the use of force on unresisting or compliant individuals is excessive force. *See Rudder*, 666 F.3d at 795 (plaintiffs stated Fourth Amendment claims where they were beaten after obeying officer's command to return to the sidewalk); *Johnson*, 528 F.3d at 974-75, 977 (reversing summary judgment for plaintiff who claimed officer kicked him repeatedly after he had put his hands up and fallen to the ground). The D.C. Circuit has specifically recognized the unjustified use of chemical agents to be unconstitutionally excessive, albeit in the context of a due process claim by a pretrial detainee. *Norris v. District of Columbia*, 737 F.2d 1148, 1152 (D.C. Cir. 1984) (R.B. Ginsburg, J.).

And there is a "consensus view," *Johnson*, 528 F.3d at 976, both in this Court and among the federal courts of appeals, that the gratuitous use of pepper spray or comparable chemical agents on a person who is not threatening anyone or resisting officers is excessive force. *See, e.g., Tracy v. Freshwater*, 623 F.3d 90, 98–99 (2d Cir. 2010); *Asociacion de Periodistas de Puerto Rico v. Mueller*, 529 F.3d 52, 60–62 (1st Cir. 2008); *Fogarty v. Gallegos*, 523 F.3d 1147, 1161 (10th Cir. 2008); *Henderson v. Munn*, 439 F.3d 497, 502–03 (8th Cir. 2006); *Vinyard v. Wilson*, 311 F.3d 1340, 1348–49 (11th Cir. 2002); *Headwaters Forest Def. v. County of Humboldt*, 276 F.3d 1125,

1128–30 (9th Cir. 2002); *Park v. Shiflett*, 250 F.3d 843, 852–53 (4th Cir. 2001); *Adams v. Metiva*, 31 F.3d 375, 385-86 (6th Cir. 1994); *Cousins v. Hathaway*, 2014 WL 4050170, at *1, *4 (D.D.C. Aug. 15, 2014); *Jones v. Ritter*, 587 F. Supp. 2d 152, 157 (D.D.C. 2008).

Accordingly, courts regularly deny qualified immunity for such conduct. *See Fogarty*, 523 F.3d at 1161-62; *Henderson*, 439 F.3d at 503-04; *Vinyard*, 311 F.3d at 1355; *Headwaters Forest Def.*, 276 F.3d at 1130; *Adams v. Metiva*, 31 F.3d at 387. This court should do likewise.

D. Plaintiffs have stated assault and battery claims (Claims 7 & 10).

Defendants' challenge to Plaintiffs' assault and battery claims as not alleging intentional actions, MTD 24-25, 28, relies on a misreading of the amended complaint and a misunderstanding of basic principles of tort law. Assault requires that defendants intentionally and unlawfully attempted or threatened a harmful or offensive bodily contact; battery requires that defendants' intentional acts in fact caused such contact. *Evans-Reid v. District of Columbia*, 930 A.2d 930, 937 (D.C. 2007). A person need not intend to bring about the precise harm done by the unlawful contact to commit an intentional tort; rather, he need only have intended to "bring about such a contact." *Rogers v. Loews L'Enfant Plaza Hotel*, 526 F. Supp. 523, 529 (D.D.C. 1981) (quoting W. Prosser, The Law of Torts § 10, at 35-37 (4th ed. 1971)), *cited with approval*, *District of Columbia v. Howard*, 588 A.2d 683, 690 (D.C. 1991); *see also Evans-Reid*, 930 A.2d at 937 ("A battery is an intentional act that causes a harmful or offensive bodily contact.").

Plaintiffs have plausibly alleged that Defendants intentionally discharged chemical irritants at them, or charged into a crowd of innocent people, AC ¶¶ 47-49, 79-86, 120, 125-26, 129-35, 138-42, and that these acts caused Plaintiffs injury. AC ¶¶ 49, 84-86, 125-27, 131-34, 140, 142, 144, 175, 182-83, 188-89, 190, 194-95. Contrary to Defendants' contention, MTD 25, it does not matter whether Plaintiffs were specifically targeted or not. *See* Restatement (Second) of Torts §

20(2) (1965) (intentional conduct shown as to plaintiff where defendants had requisite intent to commit assault or battery against a third party), *cited with approval*, *Marshall v. District of Columbia*, 391 A.2d 1374, 1380 (D.C. 1978); *see also Collier v. District of Columbia*, 46 F. Supp. 3d 6, 16 n.6 (D.D.C. 2014) (recognizing that D.C. law "would apply" this doctrine of "transferred intent" if shown on the facts). And contrary to Defendants' claim, Plaintiffs' have plausibly alleged personal involvement by Defendants Newsham, Greene, Deville, Whiteside, and Hill in ordering or supervising the conduct at issue. Defendants Whiteside and Hill directly ordered the tortious conduct at issue. AC ¶¶ 122 & 130. Defendants Newsham, Greene, and Deville ordered the use of chemical irritants generally, AC ¶¶ 41-43, and can be liable for "countenanc[ing] the tortious act," *Eskridge v. Jackson*, 401 A.2d 986, 989 (D.C. 1979); *accord Turner v. District of Columbia*, 532 A.2d 662, 675 (D.C. 1987) — which can be shown by knowledge and failure to take prompt remedial action. *Maniaci v. Georgetown Univ.*, 510 F. Supp. 2d 50, 71 (D.D.C. 2007); *King v. Kidd*, 640 A.2d 656, 666-67 (D.C. 1993). By giving broad orders authorizing the use of chemical irritants and then failing to supervise and restrain their subordinates, Defendants Newsham, Greene, and Deville are liable as supervisors because they condoned the violations.[2]

Defendants' claim of qualified privilege, MTD 25-26, fails for the same reasons their qualified immunity claim fails on the excessive force claims: the use of pepper spray and physical force against non-threatening, non-resisting individuals could not have been thought reasonable. Defendants' invocation of the "hundreds of individuals, at least some of whom were violent and committing criminal acts," MTD 26, is yet another a misguided attempt to justify Defendants' actions as to *Plaintiffs* on the grounds that such actions might have been justified as to *other people*.

[2] Defendants' arguments regarding Defendant Alder on this point are irrelevant, as Plaintiffs have not sued him for assault or battery.

Defendants' motion to dismiss the assault and battery claims should be denied.

E. The presence of a negligence theory in Plaintiffs' First Amendment Assemblies Act chemical-irritants claim does not require dismissal of any other claim.

The fact that Claim 7 pleads an intentional tort (assault and battery) and Claim 8 pleads two alternative theories (a cause of action under the First Amendment Assemblies Act and negligence per se, *see infra* Part IV (discussing these theories in more detail)) one of which sounds in negligence, does not justify dismissal of either. Plaintiffs may plead theories in the alternative, Fed. R. Civ. P. 8(d)(3) ("A party may state as many separate claims or defenses as it has, regardless of consistency."), and this Court has specifically held that D.C. law negligence and intentional-tort claims may be pleaded together in a complaint to allow plaintiffs to discover the facts as to defendants' state of mind; one theory need not give way to the other until trial. *See Harvey v. Kasco*, 109 F. Supp. 3d 173, 178-79 (D.D.C. 2015); *Reed v. District of Columbia*, 474 F. Supp. 2d 163, 173–74 (D.D.C. 2007). Defendants cite three requirements from *Dormu v. District of Columbia*, 795 F. Supp. 2d 7 (D.D.C. 2011), for reconciling intent-based and negligence theories, but these are inapplicable on a motion to dismiss, because they concern whether a plaintiff "may present a negligence claim *to the jury* alongside his assault and battery claims." *Id.* at 31 (emphasis added). That question casts no doubt on Plaintiffs' ability to *plead* in the alternative, as the Federal Rules and D.C. law allow. Accordingly, Claims 7 and 8 can stand together in the complaint.

F. Plaintiffs' injuries from the manner in which they were restrained (Claim 11) were not de minimis.

Defendants' only argument as to Plaintiffs' excessively tight cuffing claim is that their injuries are too minor to state a claim. Circuit precedent forecloses this position on these facts: the D.C. Circuit has held that cuffing a non-dangerous person to the point that she loses feeling in her hands is excessive force. *Hall v. District of Columbia*, 867 F.3d 138, 157 (D.C. Cir. 2017). Here,

both Plaintiffs Horse and Lagesse allege physical injury from their cuffing: Mr. Horse lost feeling in his fingers for months, AC ¶¶ 146, 178, and Ms. Lagesse sustained a cut that drew blood and caused scarring, AC ¶¶ 149, 185. Accordingly, Defendants' argument is without merit.

Regarding Claim 11, Defendants do not invoke the qualified immunity defense, which they have the burden to assert. *E.g., Siegert v. Gilley*, 500 U.S. 226, 231 (1991). In any event, even though *Hall* postdates the events at issue here, this Court has already recognized that no reasonable officer would have believed that cuffing a person so tightly as to cause injuries and then ignoring that person's specific pleas for relief was constitutional. *See Dormu*, 795 F. Supp. 2d at 23-24 ("The consensus … is overwhelming. Almost every Court of Appeals has held that overly tight handcuffing can constitute excessive force, where the handcuffing has resulted in injury or where an individual complains about the overly-tight cuffing." (citing cases from the First, Second, Third, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits)).

The motion to dismiss Claim 11 should be denied.

III. Plaintiffs Have Stated Constitutional And Common-Law Claims As To Their Conditions Of Confinement (Claims 12 & 15).

A. Plaintiffs have sufficiently alleged the involvement of Defendants Newsham, Alder, Carroll, and Niepling in detaining them in unconstitutional conditions (Claim 12).

In seeking dismissal of the conditions-of-confinement claims based on the individual defendants' lack of personal involvement, Defendants once again overlook the allegations of the amended complaint. Plaintiffs specifically allege that Chief Newsham, Assistant Chief Alder, Commander Carroll, and Lieutenant Niepling supervised the continued maintenance of the kettle. AC ¶¶ 87-88. They are able to allege this because of the limited discovery they have already taken and the independent investigation they have undertaken. To the extent Plaintiffs' allegations lack a precise accounting of each Defendant's role, that is a necessary consequence of Plaintiffs' not

having had full discovery at the pleading stage. Recognizing the information asymmetry that exists at the outset of a case, this Court has deemed general allegations and allegations on information and belief to be plausible when the necessary information is in the hands of the Defendants. *See Kelleher v. Dream Catcher, L.L.C.*, 263 F. Supp. 3d 322, 325–26 (D.D.C. 2017); *United States ex rel. Scollick v. Narula*, 2017 WL 3268857, at *10 (D.D.C. July 31, 2017). To require more than what Plaintiffs have alleged thus far would effectively require them to present evidence — a requirement antithetical to the concept of notice pleading. Plaintiffs have plausibly alleged Defendants' individual involvement.

B. Plaintiffs' conditions of confinement violated their clearly established rights (Claim 12).

As a threshold matter, conditions of confinement imposed on individuals during arrest and continuing through transport, processing, and confinement at a detention facility might be analyzed under the Fourth Amendment because of the temporal proximity to the seizure or under the Due Process Clause because of the nature of the constitutional violation. *Compare, e.g.*, *Orem v. Rephann*, 523 F.3d 442, 446 (4th Cir. 2008) (due process analysis, not Fourth Amendment, applied to use of taser against an arrestee during post-arrest transport to jail), *abrogated on other grounds, Wilkins v. Gaddy*, 559 U.S. 34, 37 (2010), *with Austin v. Hamilton*, 945 F.2d 1155, 1160 (10th Cir. 1991) (Fourth Amendment "impose[s] restrictions on the treatment of the arrestee detained without a warrant"), *abrogated on other grounds, Johnson v. Jones*, 515 U.S. 304, 307-09 (1995). This Court has used both standards — depending on how the violation was pleaded, and without determining which standard is more appropriate — in assessing the constitutionality of conditions in the course of and following an arrest. *Compare Robinson v. District of Columbia*, 2005 WL 491467, at *3 (D.D.C. March 2, 2005) (due process analysis of denial of medical care, food, and water during detention immediately following arrest), *with Spencer v. District of Columbia*, 168

F. Supp. 3d 114, 119-20 (D.D.C. 2016) (Fourth Amendment analysis of claim that officers failed to cover arrestee's breasts during arrest, transportation, and detention at the station).

Under either standard, Plaintiffs' treatment was unconstitutional, so the District is liable. *See* Part V, *infra* (explaining basis for municipal liability). Further, the rights violated were clearly established, so the individual Defendants' qualified immunity claim fails.

Under the Due Process Clause of the Fifth Amendment (like its analogue under the Fourteenth for state actors), "pretrial detainees (unlike convicted prisoners) cannot be punished at all." *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2475 (2015); *accord Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). Pretrial detainees can demonstrate that they have been "punished" if the actions taken against them are *either* motivated by an intent to punish, *Kingsley*, 135 S. Ct. at 2473 (citing *Bell*, 441 U.S. at 538), *or* are objectively unreasonable, *see id.* Under the Fourth Amendment, officers' objectively unreasonable conduct during a seizure is likewise unconstitutional. *See Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

The conditions in which Plaintiffs Horse, Lagesse, and Gonzalez were held violate both standards. Defendants' denial of food for 10-16 hours, water for 10-12 hours, and access to toilets for 7-10 hours, AC ¶¶ 152-64, was objectively unreasonable; additionally, Defendants intentionally delayed the processing of Plaintiffs without a legitimate reason in order to punish them with uncomfortable conditions, AC ¶¶ 97-99. *Kingsley* shows that both the intentionally punitive nature and the objectively unreasonable nature of Plaintiffs' treatment violated due process; under *Graham*, the unreasonableness suffices. The authorities below demonstrate, and any reasonable officer would know, that depriving Plaintiffs of food, water, and access to toilets for 7-16 hours without any logistical or other justification violated clearly established rights, based on numerous applications of due process principles and also analogous Eighth Amendment

precedent — because a non-convicted detainee's rights "are at least as great as the Eighth Amendment protections available to a convicted prisoner," *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983); *see also Cty. of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998) (explaining that treatment that would violate a convicted person's Eighth Amendment right a fortiori violates a pretrial detainee's due process right). As also discussed below, Fourth Amendment case law is to the same effect. Where conduct has previously been held to violate the Constitution, the rule is clearly established regardless of the doctrinal label attached to it. *See Russo v. City of Bridgeport*, 479 F.3d 196, 212 (2d Cir. 2007) ("[T]he proper inquiry is whether the *right* itself — rather than its *source* — is clearly established."); *Wilson v. Spain*, 209 F.3d 713, 716 (8th Cir. 2000); *Alexander v. Perrill*, 916 F.2d 1392, 1398 n.11 (9th Cir. 1990).

The D.C. Circuit has identified both sustenance and sanitation as "basic needs" for inmates protected by the Eighth Amendment. *Inmates of Occoquan v. Barry*, 844 F.2d 828, 836 (D.C. Cir. 1988). The Supreme Court has found that an inmate was subjected to cruel and unusual punishment based in part on deprivation of bathroom access. *Hope v. Pelzer*, 536 U.S. 730, 738 (2002).

In addition, a robust consensus of persuasive authority shows that denying these basic needs for prolonged periods of time without good reason and/or in order to punish non-convicted detainees is unconstitutional. Particularly relevant here are cases concerning deprivations of multiple basic needs for periods of between 6 and 15 hours without any justification or with intent to punish. *See Barker v. Goodrich*, 649 F.3d 428, 434-37 (6th Cir. 2011) (reversing grant of qualified immunity to officers on inmate's Eighth Amendment claim for being left handcuffed in a cell without food, water, or access to a toilet for over 12 hours); *Williams v. Benjamin*, 77 F.3d 756, 763–68 (4th Cir. 1996) (reversing summary judgment for officers on inmate's Eighth Amendment claim that officers, after spraying him with mace, confined him for 8 hours without

letting him wash his face or use the toilet); *Gobel v. Maricopa Cty.*, 867 F.2d 1201, 1205–06 (9th Cir. 1989) (pretrial detainee stated due process claim where he was held for 7 hours in van in hot weather without food, water, a toilet, or adequate ventilation), *abrogated on other grounds by Merritt v. County of Los Angeles*, 875 F.2d 765 (9th Cir. 1989); *Anela v. City of Wildwood*, 790 F.2d 1063, 1065, 1069 (3d Cir. 1986) (reversing summary judgment for city on due process claim by pretrial detainees held 12 hours overnight without food or water); *Walker v. Owens*, 2016 WL 320998, at *1-2 (W.D. Va. Jan. 26, 2016) (jury could find that restraint of inmate without meals or bathroom breaks for 15 hours violated Eighth Amendment); *Smith v. Fargo*, 2015 WL 6125709, at *5 (E.D. Va. Oct. 16, 2015) (denying motion to dismiss pretrial detainee's due process claim for denial of water and toilet access for 6 hours); *Willis v. Bell*, 726 F. Supp. 1118, 1122-24 (N.D. Ill. 1989) (reasonable jury could find that detention of pretrial detainee for 12 hours without food or access to a washroom, without legitimate government purpose, could violate due process), *aff'd*, 999 F.2d 284 (7th Cir. 1993).

Additionally, courts have held that plaintiffs have stated viable claims for the denial of toilet access alone for anywhere from 22 minutes to 12 hours without justification. *See Putman v. Gerloff*, 639 F.2d 415, 418–20 (8th Cir. 1981) (reasonable jury could find due process violation where defendants chained pretrial detainees together overnight for 12 hours so as to deny them toilet access); *Thompson v. Spurgeon*, 2013 WL 2467755, at *1, *3 (M.D. Tenn. June 7, 2013) (Eighth Amendment violation based on denial, for less than 30 minutes, of convicted detainee's request to leave therapy class to use a toilet when urgently needed); *DeBlasio v. Rock*, 2011 WL 4478515, at *15-16 (N.D.N.Y. Sept. 26, 2011) (denying summary judgment to defendants on inmate's Eighth Amendment claim for being handcuffed in his cell and denied toilet access for 5 hours); *Glaspy v. Malicoat*, 134 F. Supp. 2d 890, 892-93, 896 (W.D. Mich. 2001) (denial of toilet

access to prison visitor for 22-24 minutes during prisoner lockdown violated due process); *see also Davis v. Wessel*, 792 F.3d 793, 797, 804-05 (7th Cir. 2015) (denying qualified immunity on civil detainee's claim that guards refused to uncuff him to let him use the toilet, causing detainee to soil himself while urinating and to refrain from defecating for 3 hours).

Courts applying the Fourth Amendment have condemned similar conduct as well. *See Heitschmidt v. City of Houston*, 161 F.3d 834, 836-39 (5th Cir. 1998) (reversing qualified-immunity dismissal of plaintiff's Fourth Amendment claim for 4.5-hour detention incident to a search during which plaintiff was denied bathroom access with "minimal justification"); *Carroll v. Vill. of Homewood*, 2001 WL 1467708, at *11 (N.D. Ill. Nov. 15, 2001) (denying qualified immunity where officers caused detainee to urinate on himself after refusing restroom access for 1 hour despite repeated requests). Together, all these cases clearly gave defendants "fair warning" that their conduct was unconstitutional.

Defendants' three authorities, MTD 32-33, do not shake this consensus because they involved the deprivation of food only — not the combined deprivation of food, water, and access to toilets — and also because none of them involved a complete absence of justification or intent to punish. In fact, one of Defendants' authorities was not about due process or unreasonable seizure at all but alleged that the denial of food was based on discriminatory animus against Italian-Americans. *Villari v. Twp. of Wall*, 2009 WL 2998135, at *6-8 (D.N.J. Sept. 15, 2009).

In addition to the "robust consensus" of authority described above, the denial of food, water, and bathrooms to pretrial detainees for 7-16 hours for the purpose of prolonging their discomfort rather than for any legitimate reasons is "so obvious[ly]" unconstitutional that even general principles should have "g[iven] respondents fair warning that their conduct violated the Constitution." *Hope*, 536 U.S. at 741; *see also id.* (noting that qualified immunity can be denied

even in novel factual circumstances); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009) ("The unconstitutionality of outrageous conduct obviously will be unconstitutional, this being the reason … that the easiest cases don't even arise." (citation and internal quotation marks and alteration omitted)). Indeed, in one of the cases most factual similar to this one, involving a 12-hour denial of food, water, and toilet access, the Sixth Circuit not only found that a convicted inmate — who, again, has a lower level of protection than pretrial detainees — stated a claim, but also reversed the grant of qualified immunity. *Barker*, 649 F.3d at 434-37.

Plaintiffs have plausibly pleaded that they were held 7-16 hours without food, water, and access to toilets, and that Defendants intentionally delayed their arrest procedures in order to maximize Plaintiffs' discomfort. Specifically, Plaintiffs allege that MPD had the necessary personnel and vehicles to process kettled detainees within 30-45 minutes of the beginning of the detention, yet MPD deliberately stretched out the process for many hours to maximize detainees' discomfort while denied food, water, and access to toilets and in spite of specific requests for these basic necessities. AC ¶¶ 88-89, 97-99. Detainees urinated on the street and one defecated into a paper bag. AC ¶ 93. That officers taunted the detainees for their discomfort, AC ¶¶ 90, 92, 96, contributes to a plausible inference of punitive intent. A reasonable officer would have known that, because pre-trial detainees may not be constitutionally punished at all, intentionally extending the period during which pre-trial detainees are denied basic needs is unconstitutional.

Defendants' invocation of the *Mendoza-Martinez* factors, MTD 31, is not inconsistent with the above analysis: intent to punish here can be inferred from the fact that deprivation of basic needs has historically been regarded as punishment, *e.g.*, *Hutto v. Finney*, 437 U.S. 678, 682–83 (1978) (limitations on food as punishment); *Ort v. White*, 813 F.2d 318, 320 (11th Cir. 1987) (denial of water as punishment), and that no "alternative purpose to which [the deprivation] may

rationally be connected is assignable for it" and "it appears excessive in relation to" any conceivable alternative purpose. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). Defendants' claim that Plaintiffs' prolonged detention without food, water, or toilet access was attributable to the "non-penal explanation" of logistics, MTD 32, ignores the allegations in the amended complaint that Defendants had the necessary personnel and transport vehicles on hand to move the process along, but instead deliberately slow-walked it for the purpose of maximizing Plaintiffs' discomfort. AC ¶¶ 97-99. To the extent Defendants dispute these facts, that dispute is not appropriate for resolution on a motion to dismiss, when the allegations of the complaint are taken as true and all inferences are drawn in favor of the Plaintiffs.

Defendants' motion to dismiss Claim 12 should be denied.

C. Plaintiff Gonzalez states a claim for intentional infliction of emotional distress (Claim 15).

The elements of intentional infliction of emotional distress are: (1) a defendant's extreme and outrageous conduct that (2) intentionally or recklessly (3) causes the plaintiff to suffer severe emotional distress. *Ortberg v. Goldman Sachs Grp.*, 64 A.3d 158, 163 (D.C. 2013).

Like many of their arguments, Defendants' contention that Plaintiff Gonzalez failed to plead intent is at odds with the amended complaint. Plaintiff Gonzalez alleges that he was held without access to a toilet, in pain and anxiety, for 9-10 hours and was not given privacy ultimately to relieve himself, AC ¶¶ 92-96, 161-63. Plaintiff Gonzalez specifically asked for access to a toilet; he received only mockery. AC ¶¶ 89, 96. And he alleges that MPD had the resources to process him faster but chose not to do so to maximize his discomfort. AC ¶¶ 97-99.

Plaintiff Gonzalez alleges that as a result of this experience, he "experienced pain and discomfort in his midsection as a result of holding his bladder" that the pain persisted after his arrest, and that it took him weeks for his urination system to return to normal. AC ¶ 191. He also

alleges that he had difficulty sleeping and nightmares and that he exhibits physical symptoms of fear around police. AC ¶ 193. Once again, under ordinary tort principles, a plaintiff need show only intent to do the act that caused the harm. *See Rogers*, 526 F. Supp. at 530 (for intentional infliction of emotional distress, "the conduct must have been intentional"). By detaining Plaintiff Gonzalez for hours without access to basic needs, Defendants caused his injuries. They need not have intended his specific manifestations of distress, only the actions that caused them. Plaintiffs have plainly pleaded that Defendants did intend these actions.

Defendants also assert that Plaintiff Gonzalez did not allege "severe emotional distress" in so many words. MTD 68. But he did: paragraph 251 of the amended complaint alleges that Defendants' actions "caused Plaintiff Gonzalez severe emotional distress." Moreover, by alleging pain, persistent physical symptoms, sleeplessness, and other physical symptoms of anxiety, Plaintiff Gonzalez provided plenty of detail sufficient to notify Defendants as to his theory that they are liable for intentional infliction of emotional distress. Those allegations meet the standard for "severe emotional distress," under which the plaintiff "need not prove that he suffered any physical harm," *Homan v. Goyal*, 711 A.2d 812, 821 (D.C. Cir. 1998), only that there was "conduct intended or likely to cause physical illness," *Ortberg*, 64 A.3d at 164 (citation and internal quotation marks omitted). Nerves and difficulty sleeping suffice to support a claim of "severe emotional distress," *see Purcell v. Thomas*, 928 A.2d 699, 713 (D.C. 2007); as do physical symptoms resulting in the need to seek medical attention, *see Harris v. U.S. Dep't of Veterans Affairs*, 776 F.3d 907, 917 (D.C. Cir. 2015).

Defendants' motion to dismiss Claim 15 should be denied.

IV. Plaintiffs Have Stated Claims For Violations Of The First Amendment Assemblies Act (FAAA) Or In The Alternative For Negligence Per Se (Claims 4, 5, 8, 13 & 14).

A. Defendants do not meaningfully contest that Plaintiffs' FAAA rights are redressable via the FAAA itself.

Plaintiffs bring five claims for Defendants' violations of the First Amendment Assemblies Act, and in each one they plead two alternative theories of liability: that Defendants' conduct is directly "redressable under the First Amendment Assemblies Act," and that it also "constitutes negligence per se." AC ¶¶ 217, 221, 232, 246, 249. Although (as discussed in the next two sections) Plaintiffs have stated a claim for negligence per se, their FAAA claims survive anyway, because even on the most generous reading of Defendants' motion, they do not dispute that a violation of the FAAA gives rise to a private cause of action. To be sure, Defendants attempt to preserve unspecified arguments in blanket fashion when they declare in a footnote that they "do[] not waive any arguments that these claims are not properly brought or analyzed under a negligence per se framework." MTD 50 n.5. But this vague and conclusory statement is insufficient to raise a legal argument against the enforcement of the FAAA via a private right of action — a theory that Defendants do not even specifically name. "It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work." *N.Y. Rehab. Care Mgmt., LLC v. N.L.R.B.*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (citation and internal quotation marks omitted).

In any event, a private right of action is available. Whether an implied cause of action exists under D.C. law depends on (1) the Council's intent, (2) whether the plaintiff is one of the group for whose special benefit the statute was enacted, and (3) the underlying purposes of the statute. *Robert Siegel, Inc. v. District of Columbia*, 892 A.2d 387, 392 n.8 (D.C. 2006); *Kelly v. Parents United for D.C. Pub. Schs.*, 641 A.2d 159, 163–65 (D.C. 1994), *amended on reh'g in part*, 648 A.2d 675 (D.C. 1994).

That standard is easily met in this case. Most importantly, the Council clearly intended the FAAA to be privately enforceable. The statute itself manifests this intent by providing, "the standards for police conduct set forth in this subchapter may be relied upon by such persons *in any action alleging violations of statutory … rights*." D.C. Code § 5-331.17 (emphasis added). Given the statute's stated goal "to protect persons who are exercising First Amendment rights in the District of Columbia," *id.; see also* D.C. Council Comm. on the Judiciary, *Report on Bill No. 15-968* at 2 (Dec. 1, 2004) (agreeing with the D.C. Bar that the Council "must protect both citizens of the District and the tens of thousands of other Americans who come to Washington each year to petition their government for redress of grievances"),[3] it is clear that Plaintiffs, as participants in a First Amendment assembly, are precisely whom the Council sought to protect in enacting the FAAA. Likewise, a private right of action is entirely consistent with the purposes of the statute, which seeks to implement "the declared public policy of the District of Columbia that persons and groups have a right to organize and participate in peaceful First Amendment assemblies on the streets, sidewalks, and other public ways, and in the parks of the District of Columbia," D.C. Code § 5-331.03, and to that end provides specific protections for demonstrators such as Plaintiffs. Indeed, the absence of a cause of action would thwart the FAAA's purposes by rendering it no more than hortatory, as no other means is provided for its enforcement. *See Kelly*, 641 A.2d at 165.

In a footnote, this Court once concluded that a provision of the FAAA not involved here, dealing with District approval of demonstration plans and providing an administrative procedure for review of denials, *see* D.C. Code. § 5-331.06, did not confer an implied right of action — in part because of the specific administrative review avenue associated with that provision and in part because the Council rejected a provision that would have provided an express cause of action. *See*

[3] For the Court's convenience, this source is attached as Exhibit A.

Mahoney v. District of Columbia, 662 F. Supp. 2d 74, 94 n.11 (D.D.C. 2009). However, the Court does not appear to have considered the reason *why* the Council decided against including an express cause of action: the D.C. Office of the Attorney General assured the Council that the Act *was already privately enforceable* notwithstanding the absence of an express enforcement provision. *See* D.C. Council Comm. on the Judiciary, *Report on Bill No. 15-968* at 25 (Dec. 1, 2004) (summarizing testimony to the effect that District statutes can be enforced without an explicit right of action and that a violation would also constitute negligence per se). Thus, the Council considered this issue and declined to create an express cause of action only because one was included already.

Accordingly, Plaintiffs' FAAA claims survive because the FAAA itself provides a remedy.

B. Plaintiffs' alternative theory to enforce the FAAA via negligence per se is supported by the common law and by the FAAA itself.

Negligence per se is the doctrine that violation of certain statutory duties constitutes negligence as a matter of law. *Jarrett v. Woodward Bros.*, 751 A.2d 972, 980 (D.C. 2000). Defendants correctly state that it applies where a public safety statute is intended to protect the plaintiff and imposes specific duties on the defendant. *See id.* However, Defendants' argument that this standard doesn't apply here overlooks key aspects of the FAAA.

The best indication that the Council intended the FAAA to be enforceable via negligence per se is that it said so: "the standards for police conduct set forth in this subchapter may be relied upon by such persons in any action alleging violations of statutory *or common law* rights." D.C. Code § 5-331.17 (emphasis added). Based on this unusually explicit statutory text alone, the Council's intent to render the FAAA enforceable via negligence per se is clear.

Moreover, Defendants are wrong that the statute imposes no duties on anyone, imposes duties that are insufficiently specific, and is not a health and safety measure. MTD 51-57, 61-62.

First, Defendants' argument that the FAAA does not impose "specific" duties on "individual defendants" because it places requirements on "MPD" rather than "MPD officers," MTD 52, is formalistic in the extreme, as a police force can act only through its officers. Defendants cite no negligence per se case even discussing, much less relying upon, such a distinction. Moreover, the Council made clear its intent to provide standards to govern police conduct by regulating MPD in practically every section of the FAAA. *See* D.C. Code § 5-331.04 to -331.16. And case law illustrates that negligence per se can be available even when the applicable statutory or regulatory standard does not name the person or even entity to which it applies. *See Leiken v. Wilson*, 445 A.2d 993, 1002 n.16 (D.C. 1982) (traffic regulations stated in the passive voice: vehicles "shall be equipped with service brakes" meeting certain requirements and the brakes "shall be maintained in good working order"); *H.R.H. Constr. Co. v. Conroy*, 411 F.2d 722, 723 n.3 (D.C. Cir. 1969) (building code provisions stated in the passive voice: "structures … shall be securely and safely supported" and "floors shall be … laid tight and securely fastened in place").

Second, Defendants are incorrect that the FAAA is too general to be enforced. The FAAA standards are far more specific than mere reasonable care, instead instructing MPD that particular tactics (the use of chemical irritants or the encircling of demonstrators) are limited to particular circumstances (having to do with subjects' unlawful acts, protection of officers or others, and/or probable cause to arrest identifiable lawbreakers), D.C. Code § 5-331.08 & .16, and that certain measures (prompt processing, adequate food, and dispersal orders) are required in other circumstances, D.C. Code § 5-331.07(e) & .12(a)-(b); *see generally* D.C. Council Comm. on the Judiciary, *Report on Bill No. 15-968* at 2 (Dec. 1, 2004) (agreeing with the D.C. Bar that the law is "useful in providing specific guidance to the District government and the Metropolitan Police Department (MPD) concerning the exercise of free speech rights"). Although Defendants are

correct that the FAAA uses terms that require some exercise of judgment on the part of officers (such as whether they have "probable cause" as to a "significant number" of individuals or have given "adequate" time to disperse), D.C. courts have long applied negligence per se to duties no more specific than these. *See, e.g.*, *Jarrett,* 751 A.2d at 977 (statute prohibited retail licensees to permit consumption of alcohol by "any person of notoriously intemperate habits"); *Leiken,* 445 A.2d at 1002 n.16 (regulation required that vehicle breaks must be "adequate to control the movement of and to stop and hold such vehicle under all conditions of loadings, and on any grade incident to its operation" and "maintained in good working order"); *H.R.H. Constr.*, 411 F.2d at 723 n.3 (safety code required that "temporary structures" be "securely and safely supported to insure safety of persons working thereon" and that "[t]emporary working floors shall be … laid tight and securely fastened in place" meaning able to "withstand such weight or shock as is reasonably expected"); *Whetzel v. Jess Fisher Mgmt. Co.*, 282 F.2d 943, 949 (D.C. Cir. 1960) (housing code required landlords to keep premises "in a clean, safe and sanitary condition" and "in repair"). Thus, negligence per se is not defeated because the statute at issue imposes standards rather than black-and-white rules — as long as the standards, like those of the FAAA, do not "merely repeat the common law duty of reasonable care." *Night & Day Mgmt., LLC v. Butler*, 101 A.3d 1033, 1040 (D.C. 2014) (citation and internal quotation marks omitted).

Third, the FAAA fits comfortably within the definition of a public safety measure. The public safety purpose need not be the only one or the primary one; it is sufficient that this purpose is one among "multiple purposes." *Rong Yao Zhou v. Jennifer Mall Rest., Inc.*, 534 A.2d 1268, 1276 (D.C. 1987). Defendants do not argue, nor realistically could they, that public safety was not one of the purposes of a statute that, among other things, restricts the use of chemical weapons and aggressive tactics by police, requires police to provide a "safe" route for demonstrators to disperse,

and requires that arrestees be given adequate food. In fact, Defendants acknowledge that a statute criminalizing excessive force by police is a public safety measure. MTD 61-62 (describing *District of Columbia v. White*, 442 A.2d 159, 164 (D.C. 1982)). Defendants are thus left to try to pick off the FAAA provision requiring prompt processing as an isolated provision unrelated to safety. But it is not hard to see how prompt processing relates to public safety: the longer individuals are detained, the greater their exposure to exactly the types of injuries Plaintiffs suffered in confinement here, including excessive force, denial of basic needs, and unreasonable searches. Defendants' identification of other interests served by prompt processing, MTD 62, is not inconsistent with a "partial purpose" to promote public safety. *Rong Yao Zhou*, 534 A.2d at 1276.

Finally, it is clear the FAAA can be enforced through negligence per se because the District assured the D.C. Council that it could be. As noted, an attorney from the Office of the Attorney General told the Council "that common law would dictate that if the statute was violated, it would constitute negligence *per se*, and the department would have to defend its conduct." *Report on Bill No. 15-968* at 25.

C. Defendants violated Plaintiffs' rights under the FAAA.

Defendants' other miscellaneous attacks on Plaintiffs' FAAA claim also fail. First, Defendants are wrong about what they term a "causation" argument. In fact, all of the injuries Plaintiffs suffered were caused by FAAA violations; Plaintiffs plead that causal link sufficiently and Defendants do not meaningfully challenge it. *See* AC ¶¶ 38, 72, 79-86, 152-54, 175, 176, 177, 179, 181 (Horse denied dispersal order, kettled, pepper-sprayed unjustifiably, denied prompt processing and food; suffered burning and choking sensations and rash, loss of liberty, economic loss, hunger, emotional distress); AC ¶¶ 38, 74, 79-86, 155-59, 182-84, 186-87 (Lagesse denied dispersal order, kettled, pepper-sprayed unjustifiably, denied prompt processing and food; suffered

choking sensations and peeling skin, loss of liberty, hunger, emotional distress, chill of further protest activity); AC ¶¶ 79-86, 160-64, 190, 191, 193 (Gonzalez pepper-sprayed unjustifiably, denied prompt processing and food; suffered burning and choking sensations, hunger, emotional distress, chill of further protest activity, anxiety); AC ¶¶ 120-27, 188-89 (Ariel denied dispersal order and pepper-sprayed; suffered burning and choking sensations, emotional distress, chill of further protest activity); AC ¶¶ 128-34, 138-44, 194-96 (Frisbie-Fulton and A.S. denied dispersal order and pepper-sprayed; suffered burning and choking sensations, emotional distress, chill of further protest activity).

Defendants instead advance a smorgasbord of theories under the "causation" heading. One is that Plaintiffs were arrested based on probable cause; Plaintiffs rebutted that claim above in Part I. Another is that pepper-spraying Plaintiffs was justified because "the Amended Complaint alleges unlawful acts and attempts to evade arrest." MTD 60. Defendants' careful wording obscures the central flaw in their argument: the "unlawful acts" were committed by *other people*, not Plaintiffs. AC ¶¶ 36, 71-74. Additionally, Defendants' mischaracterize Plaintiffs' attempts to evade *injury* as attempts to evade *arrest*. *See* AC ¶¶ 50, 59, 70. Regardless of whether running at the mere sight of a police officer is suspicious, *cf. Com. v. Warren*, 58 N.E.3d 333, 341 (Mass. 2016) ("[E]vasive conduct in the absence of any other information tending toward an individualized suspicion that the defendant was involved in the crime is insufficient to support reasonable suspicion."), running from an *attack by police* is merely self-preservation. To flee when fired upon is no less than one would expect from any person, innocent or guilty. Defendants' brief once again repeats their fundamental mistake in the field on Inauguration Day: they attempt to justify aggressions against innocent people based on the acts of *other people*. But guilt-by-association arrests and wanton use of chemical weapons are no more consistent with the FAAA than with the Constitution.

Next, still under the heading "causation," Defendants argue that Plaintiffs' injuries were not the types of injuries the FAAA seeks to prevent. MTD 59-60. Although Plaintiffs claim unwarranted restraints on their liberty; pain and suffering from the unwarranted use of chemical irritants; hunger, thirst, anxiety and discomfort; and a chilling effect on their future exercise of their First Amendment rights to attend First Amendment assemblies, Defendants claim that these are not the harms against which the FAAA sought to guard; instead, Defendants demand that Plaintiffs show they were injured *in the course of dispersing*, they were deprived of food in a manner *hazardous to health*, and that the processing delay caused "damage to employment, relationships, and reputation." MTD 60. But Defendants cite no statutory basis for their proffered limitations, and in applying negligence per se, the D.C. Court of Appeals has rejected this type of "shortsighted" view of the protective purpose of a statute. *See Rong Yao Zhou*, 534 A.2d at 1275 (refusing to read the purpose of the Alcoholic Beverage Control Act as protecting public morals alone and recognizing instead that it also sought to prevent car accidents).

A common-sense reading of the FAAA, moreover, shows that Defendants' reading of the statute is implausibly narrow. In light of the statute's protective purpose, the requirement of food "adequate to a person's health" is most sensibly read to require the District reasonably to accommodate detainees' allergies and medical conditions such as diabetes rather than to authorize all but the most extreme deprivations causing health problems. Likewise, nothing in the statute suggests that the dispersal-order or prompt-release requirements are protecting against only one of the several obvious harms that occur when these provisions are violated. The connection between a dispersal order and physical safety from uses of force by police on those who remain is obvious, as is the connection between a prompt release requirement and a person's liberty interest (not just his employment interest). Defendants' cramped reading of the FAAA is untenable.

Defendants also contend that Plaintiffs fail to allege the predicate condition for the FAAA's dispersal-order requirement: that Defendants had determined that the assembly should be dispersed. MTD 59. However, drawing all inferences in Plaintiffs' favor, the amended complaint amply makes that allegation. First, with respect to the First Amendment assembly in which Plaintiffs Horse and Lagesse were exercising their rights prior to being kettled, Plaintiffs allege that Defendant Deville ordered his officers to stop the marchers, AC ¶ 32, and that MPD officers (under the direction of Defendant Deville and other Defendants) tried to scatter and chase away the demonstrations via the use of pepper spray and other munitions, AC ¶¶ 39-51. Each of these allegations gives rise to the reasonable and plausible inference that, at least initially and before the officers began to funnel demonstrators into the kettle at 12th and L Streets NW, Defendants' purpose was to disperse the marchers. Indeed, that inference is directly supported by the sworn testimony of Commander Deville, who testified under oath that before the demonstrators reached Franklin Square his "intent was to try to split the group … to disrupt the group." Tr. of Trial Proceedings 22, *United States v. Macchio*, Nos. 2017 CF2 1183 et al. (D.C. Super. Ct. Nov. 30, 2017) [4] — in other words, to disperse them. *See* Definition of "DISPERSE," Merriam-Webster's Online Dictionary, *at* https://www.merriam-webster.com/dictionary/disperse?src=search-dict-hed (first definition: "to cause to break up"). Second, regarding the assembly the First Amendment assembly that occurred outside the kettle and lasted at least from 1:00pm to 1:45pm and in which Plaintiffs Ariel, Frisbie-Fulton, and A.S. were attacked by various Defendants, Plaintiffs allege that Defendants began to pepper-spray the crowd, charged into members of the crowd, then continued to advance on the retreating crowd, AC ¶¶ 120, 123, 129, 138 — actions that

[4] For the Court's convenience, this source is attached as Exhibit B.

demonstrate a purpose to disperse the demonstrators. Indeed, Defendants have suggested no other plausible purpose for these actions.

Finally, Defendants misread the amended complaint in claiming that Plaintiffs offer only conclusory allegations as to specific Defendants' actions. MTD 63-64. Based on a months-long investigation and two rounds of early discovery, Plaintiffs have taken pains to determine which officers were in charge of the kettle. Unlike in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), where plaintiffs speculated about the involvement of the Attorney General of the United States in imposing detention conditions in a specific facility in Brooklyn, it is more than plausible — in fact, quite likely — that the delay in processing was ordered by the supervisory officers on the scene and the Chief of Police in the command center monitoring the situation, rather than randomly resulting from an assortment of coincidentally uniform decisions by officers on the ground that they should all delay processing, deny the detainees food and water, and provide no toilet access. In fact, given the number of detainees and arrests to be managed, the existence of a "High Volume Arrest" procedure that is to be activated by the "Chief of Police or his or her designee," MPD Standard Operating Procedure 16-01 ("Handling First Amendment Assemblies and Mass Demonstrations") ("SOP-16-01"), Attachment C, § I(A)(3),[5] it would be *less* plausible to imagine that MPD was not coordinating its detention and processing procedures in any way.

The motion to dismiss the FAAA claims should be denied: Plaintiffs have alleged that Defendants violated their rights and demonstrated that these violations are redressable under the FAAA itself (a theory Defendants have failed to challenge) and remediable via negligence per se.

[5] *Available at*: https://go.mpdconline.com/GO/SOP_16_01.pdf.

V. Plaintiffs Have Stated Claims Against The District (Claims 1-8, 10 & 12-15), Including Constitutional Claims (Claims 1, 2, 6, & 12).

A. Defendants do not contest Plaintiffs' respondeat superior theory of liability for all statutory and common-law claims (Claims 3, 4, 5, 7, 8, 10, 13, 14 & 15).

Like any other employer, the District is liable for the wrongful conduct of its employees under the traditional doctrine of respondeat superior. *Evans-Reid v. District of Columbia*, 930 A.2d 930, 937 (D.C. 2007). Defendants do not dispute that this doctrine applies to the non-constitutional claims here. Therefore, the common-law and statutory claims against the District survive for the same reasons, provided above, that each substantive claim survives on the merits. Defendants' dispute about the claims against the District pertains only to Plaintiffs' constitutional claims.

B. Chief Newsham is a final policymaker whose actions constituted a municipal policy that caused the constitutional violations for which Plaintiffs have sued the District (Claims 1, 2, 6 & 12).

Qualified immunity is unavailable to municipalities, *Owen v. City of Independence*, 445 U.S. 622, 657 (1980), so Defendants' qualified immunity arguments cannot protect the District from liability. Instead, Defendants dispute that the District is responsible for the constitutional violations Plaintiffs suffered.

A municipality is liable for constitutional violations caused by a municipal policy or custom. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). The decision of a municipal official who has authority to make final policy in the area at issue qualifies as policy under *Monell*. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (plurality op.). Even a single decision by a municipal policymaker may give rise to municipal liability. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986); *Singletary v. District of Columbia*, 766 F.3d 66, 73 (D.C. Cir. 2014). Plaintiffs have sufficiently pleaded a basis for municipal liability under this theory as to all their constitutional claims.

Plaintiffs specifically and plausibly allege the involvement of Chief of Police Peter Newsham in each of the constitutional violations at issue. Based on his public statements regarding his strategy, MPD procedure regarding First Amendment assemblies, the coordinated nature of MPD actions, and Chief Newsham's position at the command center — which was in constant communication with supervisory officers in the field throughout the events at issue — Plaintiffs have plausibly alleged that Chief Newsham himself directed the violations. *See* AC ¶¶ 198-200.

The Chief of Police is a final policymaker for the District in the area of policing, as numerous sources confirm. First, D.C. Municipal Regulations identify the Chief as the final policymaker regarding all MPD functions. *See* 6-A D.C.M.R. § 800.7 ("Subject to applicable laws, rules, regulations, and orders of the Mayor or directives pursuant to orders of the Mayor, the Chief of Police shall have full power and authority over the department and all functions, resources, officials, and personnel assigned thereto."); *id.* § 800.1 (describing the Chief of Police as "the chief executive officer of the Metropolitan Police Department").

Second and closely related, this Court — relying on one or more of these regulations — has repeatedly concluded that the D.C. Chief of Police is a final policymaker. *Sanders v. District of Columbia*, 85 F. Supp. 3d 523, 530-31 (D.D.C. 2015); *Medina v. District of Columbia*, 718 F. Supp. 2d 34, 41–43 (D.D.C. 2010), *rev'd on other grounds*, 643 F.3d 323 (D.C. Cir. 2011); *O'Callaghan v. District of Columbia*, 741 F. Supp. 273, 277 (D.D.C. 1990). Like this case, *O'Callaghan* concerned the District's liability for police conduct directed by the Chief of Police. *See* 741 F. Supp. at 274, 277. The Court there held unequivocally: "Turner, as Chief of Police, was the MPD's 'final policymaking authority.'" *Id.* at 277. Although *Sanders* and *Medina* concerned employment matters, the D.C. regulations on which this Court relied in those cases do not distinguish between the Chief's administrative and policing authority and therefore apply with

equal force to officers' actions in the line of duty. Indeed, a further regulation recognizes the Chief's authority to direct officers in action. *See* 6-A D.C.M.R. § 800.4 ("The Chief of Police shall, when necessary, immediately proceed to the scene of any riot, tumultuous assemblage, or other unusual occurrence and take command of the force and direct its efforts in the work at hand.").

Third, the District has itself repeatedly acknowledged to this Court that the Chief is its final policymaker. For instance, in a § 1983 case for conduct by MPD officers, the District argued in opposing the plaintiff's motion for summary judgment that the officer who ordered the conduct at issue was not a final policymaker — the Chief of Police was. Defs.' Memo. of Pts. & Auths. (ECF 28), *Bridgeforth v. Bronson*, No. 1:06-cv-02128, at 7 & n.2 (D.D.C. filed May 23, 2008) ("The final policymaker for the police department is Chief Cathy Lanier, not Defendant McLean."). The District viewed this proposition as so obvious that it urged the Court to "take judicial notice that Chief Cathy Lanier is the final policymaker for the D.C. Metropolitan Police Department." *Id.* at 7 n.2; *cf.* Fed. R. Evid. 201(b)(1) ("The court may judicially notice a fact that is not subject to reasonable dispute because it[] is generally known within the trial court's territorial jurisdiction."); *see also* Def.'s Mot. for Summ. J. (ECF 37), *LeFande v. District of Columbia*, No. 1:09-cv-00217, at 11 (D.D.C. filed Aug. 5, 2013) ("In the District, the Chief of Police is considered a policymaker and her policymaking authority is found in District of Columbia Municipal Regulations."). This Court has previously found the District's positions probative on the question of its final policymaker, *see Sanders*, 85 F. Supp. 3d at 531 (citing prior briefing by the District of Columbia in another case to support the conclusion that the Chief is a municipal policymaker), and has indicated that courts may look to the District's custom to determine who its final policymaker is, *Medina*, 718 F. Supp. 2d at 41. Defendants' attempt to back away from the position they have repeatedly espoused should be viewed with skepticism.

Defendants argue that because the Mayor and Council make general rules for police — as they do in all areas of city business — they alone are final policymakers. This sweeping theory would preclude liability for the District based on the actions of *any* officials but the Mayor and Council. Moreover, of Defendants' main authorities for their position, one *avoided* taking a position on the authority of the Chief of Police, *see Miner v. District of Columbia*, 87 F. Supp. 3d 260, 267 (D.D.C. 2015) (speculating in a fraction of a sentence that its decision about authority of assistant chief could "arguably" apply to chief), and the other concerned a body not "authorized to promulgate general rules or other policies," *Singletary*, 766 F.3d at 74. In *Singletary*, the Mayor had delegated final decisionmaking authority to the Chair of the D.C. Parole Board, but the decision at issue was made by the Board as a whole, acting via a three-member quorum that did not include the Chair, *id.* at 73-74; here, by contrast, the Chief of Police *does* promulgate general rules and policies for MPD. *See* D.C. Metro. Police Dep't, Written Directives: General Orders, *at* https://mpdc.dc.gov/node/423092 (listing 219 General Orders, all signed by the Chief of Police).

The fact that the Mayor has the authority to supervise and direct the activities of the Chief is not dispositive; this Court has found numerous D.C. officials, including the Chief of Police, to be D.C. policymakers notwithstanding the supervisory and general legislative roles of the Mayor and Council, respectively. *See, e.g.*, *Sanders*, 85 F. Supp. 3d at 530-31 (Chief of Police was final policymaker regarding employment with MPD); *Barnes v. District of Columbia*, 793 F. Supp. 2d 260, 290–91 (D.D.C. 2011) (Department of Corrections Director was final policymaker regarding strip search policy); *Banks v. District of Columbia*, 377 F. Supp. 2d 85, 91 (D.D.C. 2005) (Department of Health Director was final policymaker regarding employment matters); *see also United States v. Cty. of Maricopa*, 2018 WL 2091242, at *3 (9th Cir. May 7, 2018) (holding that Arizona sheriffs were county policymakers even though county board of supervisors had authority

to supervise and remove the sheriff). Indeed, in *Sanders*, the Court found the Chief to be a policymaker based on the same D.C.M.R. provisions Plaintiffs cite here, including the qualification that the Chief's authority is "[s]ubject to applicable laws, rules, regulations, and orders of the Mayor or directives pursuant to orders of the Mayor." 6-A D.C.M.R. § 800.7, *quoted in Sanders*, 85 F. Supp. 3d at 530-31. Thus, the fact that the District has a Mayor and a Council does not foreclose finding other officials to have final policymaking authority in particular areas.

The D.C. Circuit has recently reiterated that courts may look to local custom or practice to discern the identity of the final policymaker. *See Thompson v. District of Columbia*, 832 F.3d 339, 349 (D.C. Cir. 2016) ("[T]he record is replete with evidence that King exercised his authority over personnel matters without any control by other District officials." (citing *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989))). In addition to the prior positions of the District government itself, local customs and practices of the District of Columbia make clear that authority to oversee a police response to an event as it occurs lies with the Chief. MPD's SOP-16-01 ("Handling First Amendment Assemblies and Mass Demonstrations") places Chief Newsham at the head of the District's response to a First Amendment Assembly: "arrests shall be made in an organized manner by units at the direction of the Chief of Police or his or her designee," SOP-16-01 § II(A); the Chief "as the commanding official of the MPD, shall oversee all police activities during CDU [Civil Disturbance Unit] activation," SOP-16-01 § VII(A); "tactical plans" are prepared "under the direction of the Chief of Police," SOP-16-01 § III(A)(2); and "[t]he determination to activate the High Volume Arrest Prisoner Control System shall be directed by the Chief of Police or his or her designee," SOP-16-01, Attach. C, § I(A)(3). Additionally, with regard to crowd control munitions, the Chief "absent exigent circumstances, shall[] approve the use of crowd control munitions, including chemical and less lethal munitions." General Order HSC-805.01 § IV(K); *see also id.* §

V(C)(7)(c) ("The Chief of Police or his/her designee is responsible for … [a]pproving the use of crowd control munitions, including chemical and other less lethal devices."); *cf.* PCB 2017 Report 4-6 (noting that chemical munitions were used on January 20, 2017). Thus, the District's citation of generalized mayoral authority and the Council's passage of the FAAA does not trump evidence of how the D.C. Chief of Police actually operates — which is, according to the District's own repeated legal claims and its own regulations and policies, as the final policymaker for police deployments.

In an ironic twist given the District's otherwise dim view of the FAAA, the District cites the FAAA as evidence that the Chief is constrained by policies not of his own making, MTD 47, but once again, the District elevates form over function. In fact, the Chief made clear through his orders on Inauguration Day and his subsequent approval of the conduct of his officers that, notwithstanding the FAAA, the conduct alleged here is how the District expects its officers to behave. Specifically, the Chief told WTOP radio that his officers' judgment was "outstanding," and that he was "very, very pleased," and "couldn't be more proud of the way this department responded." AC ¶ 204. To be clear, Plaintiffs are not arguing ratification as an independent basis for liability; instead, Chief Newsham's comments reinforce that his orders on Inauguration Day constituted municipal policy. Ratification of unconstitutional conduct suggests that a subordinate's unlawful actions did not "deviate[] from the official policy, but … effectively carried [it] out." *Harper v. City of Los Angeles*, 533 F.3d 1010, 1026 (9th Cir. 2008); *see also Ware v. Jackson Cty.*, 150 F.3d 873, 882 (8th Cir. 1998) ("[T]he existence of written policies of a defendant are of no moment in the face of evidence that such policies are neither followed nor enforced.").

Defendants' remaining arguments against liability based on the Chief's actions can be quickly dispatched. Defendants argue that Plaintiffs have insufficiently alleged his personal

involvement; once again, Defendants' argument is at odds with the amended complaint, which specifically alleged the Chief's involvement in each of the constitutional violations. AC ¶¶ 29-31, 33, 36, 38, 39, 42, 60, 61, 66, 67, 69, 78, 87, 88, 99, 165, 198-200. To the extent that these allegations are not as specific as others in the amended complaint, that is a natural function of Plaintiffs' lack of information at this stage and is not a basis for dismissal. *See Kelleher*, 263 F. Supp. 3d at 325–26; *Scollick*, 2017 WL 3268857, at *10.

Finally, Defendants are incorrect that *Blue v. District of Columbia*, 811 F.3d 14, 19 (D.C. Cir. 2015), made "deliberate indifference" an element of any claim based on a municipal policymaker's single decision. *Blue* was not about such a decision; instead, plaintiffs there raised theories of municipal liability based on municipal *inaction* (a failure to screen an employee before hiring and a failure to discipline him for misconduct, *see* 811 F.3d at 19) — under which deliberate indifference *is* required. *See Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 411 (1997); *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). Indeed, in the sentence from *Blue* on which Defendants rely, *see* MTD 48, the court was quoting from *Brown*, a leading Supreme Court case on municipal inaction. In contrast to cases seeking to impose liability based on inaction, deliberate indifference has never been a requirement for liability based on a final policymaker's *actions*. *See generally Pembaur*, 475 U.S. 469. Indeed, the year after *Blue*, in *Thompson*, 832 F.3d 339, the D.C. Circuit did not even consider deliberate indifference in reversing the dismissal of a municipal liability claim based on a policymaker's single decision to fire the plaintiff. *Id.* at 347-51.

Because Chief Newsham is a final policymaker for the District, his decisions to order actions that violated Plaintiffs' rights subject the District to liability on the constitutional claims.

C. Defendants do not challenge Plaintiffs' failure-to-supervise theory as to Chief Newsham (Claims 1, 2, 6 & 12).

Because Chief Newsham is a final policymaker for the District, both his actions and his deliberately indifferent failures to act subject the District to liability. In addition to plausibly alleging that Chief Newsham ordered the violations at issue, Plaintiffs plausibly allege in the alternative that to the extent Chief Newsham did not directly order the constitutional violations, he failed to supervise his officers despite knowing they were committing them. AC ¶ 201. "A municipality can be liable 'for inadequately supervising its employees if it was deliberately indifferent to an obvious need for greater supervision.'" *McComb v. Ross*, 202 F. Supp. 3d 11, 17 (D.D.C. 2016) (quoting *Kenley v. District of Columbia*, 83 F. Supp. 3d 20, 34 (D.D.C. 2015)); *accord Smith v. District of Columbia*, 2018 WL 1568878, at *23 (D.D.C. Mar. 30, 2018). A municipality is "deliberately indifferent" where "'the municipality knew or should have known of the risk of constitutional violations' but 'adopt[ed] a policy of inaction.'" *McComb*, 202 F. Supp. 3d at 17 (quoting *Warren v. District of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004)). Defendants do not dispute that Plaintiffs have plausibly alleged that Chief Newsham — to whatever extent he did not order the violations of Plaintiffs' rights through their arrests, the excessive uses of force, and the unlawful conditions of confinement — knew that these violations were occurring and failed to supervise and restrain his officers from continuing to perpetrate them. Specifically, Plaintiffs have alleged that Chief Newsham was in the command center when the decisions about the police actions at issue were being made, was aware of the facts and his officers' conduct, and failed to supervise or restrain MPD officers from engaging in constitutional violations. AC ¶¶ 199, 201. Therefore, Plaintiffs' claims against the District survive both on the theory that Chief Newsham ordered the violations of Plaintiffs' rights and the independent alternative theory that Chief Newsham was deliberately indifferent to the need to supervise his officers.

D. MPD officers' unconstitutional overuse of chemical irritants (Claim 6) reflects the District's deliberately indifferent failure to train its officers regarding the proper use of chemical irritants at demonstrations.

Regarding Claim 6, Plaintiffs have pleaded an additional viable alternative theory of municipal liability: that the District failed to train its officers regarding how to use chemical irritants at demonstrations. Municipalities are liable for constitutional violations caused by failures of training that amount to deliberate indifference on the part of the municipality. *Canton*, 489 U.S. at 388. Deliberate indifference is shown where "in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.* at 390; *accord Baker v. District of Columbia*, 326 F.3d 1302, 1306–07 (D.C. Cir. 2003). The District's failure to train its officers regarding the circumstances they faced on January 20, 2017, meets this standard.

One type of circumstance in which deliberate indifference is shown is where "police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to the need." *Canton*, 489 U.S. at 390 n.10. Independently, deliberate indifference can also exist where "city policymakers know to a moral certainty that their police officers will be required to" engage in a particular task, such as arresting fleeing felons, yet fail to train them for this task. *Id.* Although each of these circumstances can exist independently, here both do.

Contrary to Defendants' arguments, the District should have been on notice, and was in fact on notice, of the need for training regarding chemical irritants. As the nation's capital, the District of Columbia is a particularly significant venue for demonstrations of all kinds, both by individuals wanting to make their voices heard to their national leaders generally and by

individuals who want to protest particular events that occur here (such as Supreme Court decisions, visits by foreign leaders, and, of course, presidential inaugurations). In 2016 alone, 1,224 marches and demonstrations occurred here. *See* Office of D.C. Auditor, *Metro. Police Monitor Nearly 2,500 Demonstrations in 2014-2016 and Report No First Amendment Inquiries* 1 (July 3, 2017).[6] And the District was of course aware that it had issued chemical irritants to its officers policing demonstrations. *See* SOP-16-01, Attach. E, § F(3) & F(5) (discussing uses of "chemical force" and "OC spray dispensers," i.e., pepper spray). Therefore, District officials therefore should "know to a moral certainty" that MPD officers will be required at some point to confront demonstrations at which some unlawful conduct is occurring and will need to determine how and when to deploy (or not deploy) their chemical weapons.

Moreover, the District has a history of responding to the presence of lawbreakers among peaceful demonstrators with excessive force, as the Plaintiffs' amended complaint details. AC ¶ 202(a)-(d). Defendants object that these incidents are too old to put the District on notice that it needs training today. But Defendants' authorities on this point, MTD 41-42, all resolved motions for judgment (summary or otherwise), not motions to dismiss. *See Moore v. District of Columbia*, 79 F. Supp. 3d 121, 123 (D.D.C. 2015); *Dormu v. District of Columbia*, 795 F. Supp. 2d 7, 15 (D.D.C. 2011); *Robinson v. District of Columbia*, 403 F. Supp. 2d 39, 41 (D.D.C. 2005); *Byrd v. District of Columbia*, 297 F. Supp. 2d 136, 138 (D.D.C. 2003). Therefore, the question in those cases was whether plaintiffs had *evidence* of what the District should have known. Prior to discovery, however, such evidence is much harder for plaintiffs to obtain, so less fully developed allegations are acceptable. *Kelleher*, 263 F. Supp. 3d at 325–26; *Scollick*, 2017 WL 3268857, at

[6] *Available at*: http://www.dcauditor.org/sites/default/files/MPD%20FINAL%20Report%20Website_7%203%2017.pdf.

*10; *see also McComb*, 202 F. Supp. 3d at 19 n.1 (noting that pleading a *Monell* claim is "by definition, easier" than prevailing on it at summary judgment). And none of Defendants' authorities imposed a hard-and-fast rule about how recent incidents must be to provide relevant notice. *Cf. Huthnance v. District of Columbia*, 793 F. Supp. 2d 183, 187, 197-99 (D.D.C. 2011) (rejecting judgment as a matter of law for District where plaintiff sued the District over a constitutional violation that occurred in 2005 and relied on a Civilian Complaint Review Board report from 2003 that in turn looked at statistics regarding police conduct from 1995-2000).

Additionally, two of the cases Defendants cite involved attempts to infer a problem from the existence of an agreement between the District government and the U.S. Department of Justice without evidence of specific incidents. *See Robinson*, 403 F. Supp. 2d at 54; *Byrd*, 297 F. Supp. 2d at 140. Here, by contrast, Plaintiffs do provide specific examples — and not just any examples, but examples that led to lawsuits and settlement payments by the District. AC ¶ 202(a)-(d). Moreover, in response to Defendants' temporal proximity concern, Plaintiffs note that the Police Complaints Board (which is the successor to the Civilian Complaint Review Board that this Court has previously recognized to be a "notice-providing entity" for the purposes of a failure to train claim, *Huthnance*, 793 F. Supp. 2d at 198-99),[7] released an 18-page report in 2009 raising concerns about the conduct of both MPD and federal officers at a specific protest that year and recommending training concerning the use of chemical irritants. *See* D.C. Police Compl. Bd., *Monitoring of Apr. 2009 IMF/World Bank Protests: Report and Recommendations of the Police Compl. Bd. to Mayor Adrian M. Fenty* 16 (Sept. 24, 2009).[8]

[7] The name change occurred in 2004. *See* Police Complaints Amendment Act of 2004, D.C. Law 15-194, § 902(b)(1).

[8] *Available at*: https://policecomplaints.dc.gov/sites/default/files/dc/sites/police%20complaints/publication/attachments/Monitoring_of_April_2009_IMF_World_Bank_Protest.pdf.

Plaintiffs acknowledge that even taking into account the 2009 report, these examples are not recent. There are two possible inferences one might draw from that fact: either, as Defendants suggest, these incidents reflect outdated information about a problem the District could reasonably expect to have gone away, or they show a pervasive, tenacious problem that has gone unaddressed or inadequately addressed for more than a decade. Supporting the latter interpretation are Plaintiffs' allegations (taken as true at this stage) of multiple incidents of excessive force via chemical irritants against unresisting demonstrators on Inauguration Day at different times during the day by different officers; in fact, one of the individual Defendants himself reported to his supervisor that the police's use of chemical irritant had been "extremely wild." AC ¶ 81; *see Matthews v. District of Columbia*, 730 F. Supp. 2d 33, 38 (D.D.C. 2010) ("[T]he Court can plausibly infer from the facts animating plaintiffs' allegations that the [violations] were not the result of rogue officers acting contrary to their training. In other words, given the variety of abuses, the number of officers, and time period during which these abuses allegedly took place, plaintiffs have raised an inference that the combination of these factors can demonstrate that the District of Columbia was deliberately indifferent to plaintiff's constitutional rights." (citation, source's alteration marks, and internal quotation marks omitted)). Moreover, the Police Complaints Board's report about Inauguration Day 2017 noted that the SOP for handling First Amendment assembles "gives very little direction" on using less-than-lethal weapons (such as pepper spray) in a "crowd control situation." PCB 2017 Report 10. Although the report acknowledged that officers receive some specific guidance from an MPD General Order, the report nonetheless concluded that "lack of direction in the SOP led to widespread use of [less than lethal] weapons on inauguration day,

and they appeared to be deployed as a means of crowd control, and not necessarily in response to an unlawful action." *Id.* at 8.[9]

These facts suggest a pervasive problem that the Department had failed to fix previously rather than a spontaneous reemergence of a problem that had subsided or that the Department had addressed. These facts also provide far more detail than an allegation of a single instance of unconstitutional conduct followed by conclusory recitation of the municipal liability standard, so Defendants' citation to *Miango v. Democratic Republic of the Congo*, 243 F. Supp. 3d 113, 128 (D.D.C. 2017), is inapposite. Plaintiffs' plausible inference of a persistent and ongoing problem need not be the *only possible* inference to be credited at the motion-to-dismiss stage. *See Evangelou v. District of Columbia*, 901 F. Supp. 2d 159, 170 (D.D.C. 2012).

At summary judgment, of course, Plaintiffs will have to produce evidence and not merely allegations to support their interpretation of the facts, but dismissal on the pleadings is inappropriate. In fact, dismissing failure-to-train claims without discovery based on the age of the incidents cited to demonstrate the problem would create a perverse incentive for municipalities: if they wait long enough to fix a known problem, the problem's longevity itself will become the municipality's shield from accountability. In sum, either because of past violations, the certainty of MPD officers' encountering this circumstance in the future, or both, Plaintiffs have plausibly alleged obvious needs in the face of which the failure to train was deliberately indifferent.

Defendants complain that Plaintiffs do not allege with specificity that training was inadequate, MTD 42-43, but the only allegations a plaintiff is required to plead "with particularity"

[9] Plaintiffs recognize that, in response to Defendants' arguments, they cite reports that could be considered more in the nature of facts than authorities, although they are publicly available and the Defendants have the opportunity to address them in their reply brief. If the Court determines that these materials must be alleged in the complaint, Plaintiffs respectfully seek leave to amend so they may do so.

are "fraud or mistake." Fed. R. Civ. P. 9(b); there is no "heightened pleading standard" for cases alleging municipal liability under 42 U.S.C. § 1983. *Leatherman v. Tarrant Cty. Narcotics Intel. & Coord. Unit*, 507 U.S. 163, 168 (1993). As noted, plaintiffs are permitted to make allegations on information and belief regarding subjects known only to defendants prior to discovery. *Kelleher*, 263 F. Supp. 3d at 325–26; *Scollick*, 2017 WL 3268857, at *10. Defendants contend that Plaintiffs' allegations of a lack of training are implausible in light of the passage of the FAAA, which mandated specific standards and training. MTD 43-44. But a "paper" policy cannot insulate a municipality from liability where there is evidence, as there is here, that the municipality was deliberately indifferent to the policy's violation. *Daskalea v. District of Columbia*, 227 F.3d 433, 442 (D.C. Cir. 2000). And this Court has recognized that orders proscribing the conduct at issue do not render allegations of deliberate indifference implausible. *See Matthews*, 730 F. Supp. 2d at 38 (holding that plaintiff stated municipal liability claim despite MPD general order prohibiting the cavity searches alleged in complaint); *accord McComb*, 202 F. Supp. 3d at 18 (same). The plausibility of the allegations is bolstered by the Police Complaints Board's finding that "lack of direction … led to widespread use of [less than lethal] weapons on inauguration day." PCB 2017 Report 8. Finally, the widespread nature of the constitutional violations at issue here — along with violations of five separate provisions of the FAAA itself — give rise to a plausible inference that Defendants have defaulted in their training obligations. Whether or not they have in fact been deliberately indifferent is a factual question, not a basis for dismissal.

CONCLUSION

Defendants' motion to dismiss should be denied.

Because of the number and complexity of the arguments raised by Defendants' motion, Plaintiffs respectfully request oral argument on this matter.

Respectfully submitted,

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