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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

BLACK LIVES MATTER LOS ANGELES, *et al.*,

Plaintiff,

vs.

CITY OF LOS ANGELES, *et al.*,

Defendant.

Case No.: CV 20-5027 CBM (ASx)

**ORDER RE: COURT’S RULING
ON PLAINTIFFS’ APPLICATION
FOR TEMPORARY
RESTRAINING ORDER [53][54]**

Pending before the Court is Plaintiffs’ Ex-Parte Application for Temporary Restraining Order (“TRO”) and Defendants’ Request to Strike Plaintiffs’ Application for TRO and, in the alternative, for additional time to file opposition no later than April 27, 2021. (Dkt. 54.)

BACKGROUND

This putative class action concerns the response of the Los Angeles Police Department (“LAPD”) to protests and demonstrations which occurred throughout Los Angeles in the wake of the death of George Floyd. Subsequently, Plaintiffs’ filed a TRO on June 24, 2020, seeking to enjoin LAPD from using projectiles or baton strikes to disperse or control crowds, limit Defendants’ cite and release time

1 frame to 15 minutes, limit detentions to no more than 30 minutes, and require
2 Defendants to adhere to CDC guidelines when keeping protestors held in buses.

3 Plaintiffs' filed this second TRO in light of recent protests in Echo Park that
4 occurred on March 25, 2021. Plaintiffs allege LAPD "fired on non-violent
5 protestors with 40 mm and 37 mm weapons."¹ Two weeks prior, at the Breonna
6 Taylor solidarity protest, Plaintiffs allege that LAPD struck a member of the press
7 in the back and as a result, he was rendered unconsciousness and suffered a
8 concussion. Plaintiffs seek to enjoin the LAPD's use of 40mm and 37mm less-
9 lethal launchers in public demonstrations except when deployed by officers that
10 are properly trained. Plaintiff also seek to restrict LAPD from aiming the weapons
11 at the upper bodies of demonstrators at close range within five feet.

12 On April 15, 2021, the Court held a status conference. Subsequent to the
13 status conference, as ordered by the Court, Defendants submitted video evidence
14 showing how to load and use the 40mm less-lethal launcher and a video of officers
15 simulating a "skirmish line" while using the 37mm less-lethal launcher.
16 Defendants also submitted LAPD's Use of Force Tactics Directive, which includes
17 the Department's policy and protocols for using the 37mm and 40mm less-lethal
18 launchers. (Dkt. 65.) The Court also considered Plaintiffs' Supplemental filing, a
19 declaration of a journalist that who attended the Echo Park demonstration, that
20 was submitted after the status conference. (Dkt. 68.)

21 JURISDICTION

22 The Court has jurisdiction over this action pursuant to 42 U.S.C. § 1983 and
23 28 U.S.C. § 1343.

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¹ The 37mm Foam Baton Round consists of five foam rubber projectiles that are discharged at once. The 40mm Less-Lethal Launcher has a rifled barrel that uses a single foam projectile. (Exh. 3, p. 73.)

1 **LEGAL STANDARD**

2 The standard for issuing a TRO requires the party seeking relief to show (1)
3 that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable
4 harm in the absence of injunctive relief, (3) that the balance of equities tips in his
5 favor, and (4) that injunctive relief is in the public interest. *See Winter v. Nat. Res.*
6 *Def. Council*, 555 U.S. 7, 20 (2008). Under this standard, “serious questions
7 going to the merits and a balance of hardships that tips sharply towards the
8 plaintiff can support the issuance of a preliminary injunction, so long as the
9 plaintiff also shows that there is a likelihood of irreparable injury and that the
10 injunction is in the public interest.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d
11 1127, 1135 (9th Cir. 2011) (internal quotations omitted). Temporary restraining
12 orders “should be restricted to serving their underlying purpose of preserving the
13 status quo and preventing irreparable harm just so long as is necessary to hold a
14 hearing, and no longer.” *Reno Air Racing Ass’n v. McCord*, 452 F.3d 1126, 1131
15 (9th Cir. 2006).

16 **DISCUSSION**

17 **A. Request for Judicial Notice**

18 Plaintiffs’ request that this Court take judicial notice of three exhibits: 1) An
19 Independent Examination report of the Los Angeles Police Department 2020
20 Protest Response, 2) A report prepared by the National Police Foundation, titled
21 “A Crisis of Trust,” and 3) A report issued by the Los Angeles Police Department
22 titled “Safe LA 2020 Civil Unrest After Action Report.”

23 Exhibit 1 is a report made available on the City of Los Angeles, City Clerk
24 website that analyzed LAPD’s crowd control tactics and compliance with existing
25 departmental policies during the demonstrations resulting from the death of
26 George Floyd. The report indicates that people were “struck in the face and head”
27 by 37 mm and 40 mm munitions, which caused “significant injuries.” Exhibit 2
28

1 summarizes findings and recommendations of LAPD's tactics and policies and
2 Exhibit 3 is a review of the LAPD's action after the June 2020 demonstrations.

3 The City of Los Angeles and Los Angeles Police Department are
4 government entities and the documents Plaintiffs attach as exhibits are publicly
5 available online. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir.
6 2010) (holding that courts may take judicial notice of official information posted
7 on a government website if its accuracy is undisputed). The Court **grants**
8 Plaintiffs' request to take judicial notice of Exhibits 1, 2 and 3.

9 **B. Likelihood of Success on the Merits**

10 Fourth Amendment excessive force claims are analyzed under the
11 framework outlined by the Supreme Court in *Graham v. Connor*, 490 U.S. 386
12 (1989). *Donovan v. Phillips*, 685 Fed. App'x. 611, 612 (9th Cir. 2017). Under
13 *Graham*, all claims of excessive force by law enforcement should be analyzed
14 under the Fourth Amendment's "reasonableness" standard. *Davis v. City of Las*
15 *Vegas*, 478 F.3d 1048, 1054 (9th Cir. 2007). "This analysis requires balancing the
16 nature and quality of the intrusion on a person's liberty with the countervailing
17 governmental interests at stake to determine whether the force used was
18 objectively reasonable under the circumstances." *Id.* (internal quotation marks
19 omitted).

20 "Reasonableness" of a given use of force must be measured from the
21 perspective of a reasonable officer on the scene and must appreciate the "split-
22 second judgments" that officers must often make. *Graham*, 490 U.S. at 396. The
23 Ninth Circuit has held that it was unreasonable to use pepper spray and projectiles
24 against individuals "who were suspected of only minor criminal activity, offered
25 only passive resistance, and posed little to no threat of harm to others." *Nelson v.*
26 *City of Davis*, 685 F.3d 867, 884-87 (9th Cir. 2012)

27 The Plaintiffs provide evidence in the form of declarations and videos that
28 LAPD likely violated Plaintiffs' Fourth Amendment rights by using less-lethal

1 launchers (37mm and 40mm) against Plaintiffs who state that they were peacefully
2 demonstrating (or reporting on the demonstrations) at Echo Park on March 25,
3 2021, and the Breonna Taylor solidarity protest on or around March 11, 2021,
4 when they suffered injuries from less-lethal projectiles.² Dkt. No. 58-7 ¶ 2, Exh.
5 13, 14 (shot by a “less lethal projectile” in the right arm between the elbow and
6 shoulder and partner was shot in the abdomen “at close range”); Dkt. No. 58-3 ¶¶
7 2-3, Exh. 7 (shot by a “less-lethal munition” in the back while filming the
8 demonstration and walking away from the area); Dkt. No. 58-4 ¶ 3, Exh. 8, 9
9 (LAPD firing “less lethal projectiles” at “less than a two feet distance” of the
10 protestors “aim[ed] directly at [their] upper body); Dkt. No. 58-8 ¶ 2, Exh. 15
11 (shot by a “less lethal projectile at the left side of my abdomen at close range”).

12 Defendant’s Use of Force policy states that Less-Lethal force options are
13 only permissible when:

14 An officer reasonably believes that suspects or subjects in a
15 crowd are *violently resisting* a lawful order to disperse or *poses an*
16 *immediate threat of violence or physical harm*. . . . [M]ere non-
17 compliance do[es] not alone justify the use of Less-Lethal force. . . .
18

19 LAPD Use of Force-Tactics Directive.

20 The recommended deployment range for the 37mm launcher is 10 feet to 50
21 feet from the front of the crowd and the recommended deployment range for the
22 40mm is five feet (up to 110 feet for the effective deployment range). *Id.* The
23

24 ² Exhibit 4 is a Declaration of Christina Astorga who participated in a demonstration that
25 occurred on August 21, 2020, who received injuries as a result from the officers use of the less-
26 lethal launchers and Exhibit 5, a video of the demonstration which depicts the officers using
27 less-lethal projectiles.

28 The Declaration of Andrew Guerrero, who participated in a downtown Los Angeles protest on
August 26, 2020, declares that he was injured from the officers’ use of the less-lethal munition
and further states LAPD fired the launcher without “providing any opportunity to disperse.”
(Dkt. No. 58-6 ¶ 3, 4)

1 video evidence shows that the less-lethal launchers were used in close range of the
2 Plaintiffs, which likely caused significant injuries. The Court finds Plaintiffs have
3 shown a likelihood of success on their Fourth Amendment claim.

4 **C. Irreparable Harm**

5 Plaintiffs must demonstrate that they are likely to suffer irreparable harm in
6 the absence of an injunction. Plaintiffs argue that an injunction is warranted “in
7 light of the potential for serious injuries the LAPD continues to cause” and the
8 “potential[] lethal injuries.”

9 Irreparable injury is not presumed by the Court upon a showing of a
10 likelihood of success on the merits. *Herb Reed Enters., LLC v. Fla. Ent. Mgmt.*,
11 736 F.3d 1239, 1248-49 (9th Cir. 2013). A party seeking injunctive relief must
12 proffer evidence sufficient to establish a likelihood of irreparable harm. *Id.* at
13 1251. “To demonstrate irreparable injury as to their Fourth Amendment injury
14 here, Plaintiffs must demonstrate a likelihood, not a mere possibility, of future
15 irreparable injury of the same character.” *Downes-Covington v. Las Vegas Metro.*
16 *Police Dep’t*, 2020 U.S. Dist. LEXIS 240330, at *35 (D. Nev. Dec. 17, 2020).

17 Here, Plaintiffs provide evidence of past and recent demonstrations since
18 the death of George Floyd involving Officer Derek Chauvin, in which Defendants
19 used less-lethal munition on protestors who do not appear to be violently resisting
20 or posing an immediate threat of violence or physical harm. Plaintiffs state that
21 the trial of Derek Chauvin is expected to reach a verdict between April 19, 2021,
22 and April 23, 2021, and as a result, Plaintiffs will plan protest and demonstrations
23 that will likely be widespread and substantial. (Decl. Abdullah ¶ 3.) As of the
24 writing of this Order, closing arguments in the Derek Chauvin case are set for
25 today, Monday, April 19, 2021. It is reasonable to believe that demonstrations will
26 continue. The Court finds that Plaintiffs have shown a likelihood of irreparable
27 injury. *See, e.g., Abay v. City of Denver*, 445 F. Supp. 3d 1286, 1294 (D. Colo.
28 2020) (granting-in-part a TRO and enjoining officers from discharging Kinetic

1 Impact Projectiles (“KIPs”) and all other “non- or less-lethal projectiles” to target
2 the head, pelvis, or back, and from shooting KIPs indiscriminately into a crowd).

3 **D. Balance of the Equities and the Public Interest**

4 In their Motion to Strike, Defendants argue that enjoining officers from
5 using crowd control tools to protect the rights of those who wish to lawfully
6 exercise their First Amendment rights, as well as the safety and security of the
7 public, is harmful. Plaintiffs assert the “balance of interest” tips strongly in their
8 favor because Defendants’ “indiscriminate” use of less-lethal launchers are
9 commonly fired on bystanders or non-violent and distant protestors.³

10 When the government is a party, these last two factors of the standard for
11 issuing a TRO merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th
12 Cir. 2014). Plaintiffs must identify the harm that a TRO might cause a Defendant
13 and weigh it against the injury to a Plaintiffs. *Lavan v. City of Los Angeles*, 2011
14 U.S. Dist. LEXIS 46030, at *13 (C.D. Cal. Apr. 22, 2011). As to public interest,
15 “it is always in the public interest to prevent the violation of a party’s
16 constitutional rights.” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)

17 Here, Plaintiffs’ TRO does not discuss potential harm to Defendants, but the
18 Court considered potential harm to Defendants in issuing this order. There is a
19 strong interest in preserving a person’s First Amendment rights, including the right
20 of peaceful assembly. On balance, Plaintiffs’ requested relief is tailored to
21 restricting LAPD’s use of less-lethal launchers on peaceful protestors and those
22 who are documenting the demonstrations. Plaintiffs’ tailored request does not
23 seek to ban LAPD’s crowd control tactics; their request limits LAPD’s use of the
24 launchers in order to ensure that the safety of the protestors and the officers can
25 both be achieved.

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27 ³ See Los Angeles Times, LAPD Projectiles Fired at Lakers Crowd Causes Severe Injuries (Oct.
28 15, 2020), available at: <https://www.latimes.com/california/story/2020-10-15/lapd-projectiles-gruesome-injuries-lakers-celebration>.

CONCLUSION

Accordingly, Defendants’ Request to Strike Plaintiffs’ TRO and, in the alternative, additional time to file opposition is **DENIED**. The Court **GRANTS-
IN-PART** Plaintiffs’ TRO and orders as follows:

- LAPD is restricted from using the 40mm and 37mm launchers in public demonstrations except by officers who are properly trained and certified to use the less-lethal launchers;
- LAPD must give a verbal warning to disperse consist with the LAPD use of force directive and a reasonable opportunity to comply before deploying a 40mm or 37mm launcher, except when an officer is attacked;
- The 40mm and 37mm less-lethal launcher may only be used on persons who pose a threat of serious bodily harm to others, including law enforcement;
- The 40mm launcher must not be used to target the head, neck, face, eyes, or spine of a person; and
- LAPD is restricted from aiming the launchers at the upper bodies of demonstrators and within five feet.

IT IS SO ORDERED.

DATED: April 19, 2021



CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE