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Mass Demonstrations and Preliminary Injunctions: Rapidly Responding with Narrative and Case Law

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Mass Demonstrations and Preliminary Injunctions:

Rapidly Responding with Narrative and Case Law

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All mass demonstrations can present unique issues for law enforcement agencies, but the demonstrations that turn to rioting are peculiarly dangerous. This is particularly so if the demonstration is in response to an officer-involved shooting. In the hours and days after an officer-involved shooting in Charlotte, peaceful and violent demonstrations sprang up around the city. In today's world of sue first and ask questions later, a handful of protestors filed suit against the Charlotte-Mecklenburg Police Department attempting to enjoin it from relying on traditional law enforcement practices used to quell two days of disturbance.

Many trials occur after months—often years—of preparation, fact-gathering, and after a motion for summary judgment is heard. However, in the era of social media and smart phones, conclusions are drawn by the crowd based, in many cases, on incomplete facts and raw emotions. When tensions spill over into violent rioting, law enforcement agencies must be able to respond in accordance with the First and Fourth Amendments.

When that agency is then served with a complaint seeking a temporary restraining order or a preliminary injunction for their practices in crowd control, in many ways the defense's response is a conflation of trial techniques and motion practice. This conflation occurs over a dramatically reduced time period and without the benefit of discovery. The alternative though—an overly broad injunction can have deleterious effects on law enforcement's ability to use professional judgment in responding to riotous conditions during the pendency of the judicial order. As such, being prepared to thoroughly, accurately, and quickly tell your client's story serves an important public safety purpose.

This paper will make suggestions on how to craft such a response efficiently and effectively. The standard of review for both TROs and preliminary injunctions will be reviewed, as will the issue of standing. There will be a brief section on using live video feed from social media as real-time fact-checker for both the plaintiff(s) and the client department. Finally, there will be a case law discussion on the merits of common claims made against law enforcement in these situations, concluding with a brief note on the balance of equities in mass demonstration cases.

I. Standard of Review

a. Temporary Restraining Order

Rule 65(b) of the Federal Rules of Civil Procedure allows for a temporary restraining order to be issued to a party "only if… specific facts in an affidavit or verified complaint clearly show that immediate and irreparable injury, loss or damage will result to the movant *before the adverse party can be heard in opposition*…" (Emphasis added.) Therefore, under the plain language of the rule, the purpose of temporary restraining orders is to provide immediate relief from irreparable harm when formal notice to the adverse party is not possible.

If a complaint requests an 'emergency hearing' in the form of a TRO, but then does not obtain that immediate hearing, the plaintiff is really seeking a preliminary injunction. In practice, if you have time to brief a TRO, then the TRO should not issue, given the terms of the federal rule. If briefing what has been styled as a Complaint for a TRO, the defense practitioner should note Rule 65(b), but then proceed with a preliminary injunction analysis.[1]

b. Preliminary Injunction

"Preliminary injunctions are extraordinary remedies," whose "traditional office… is to *protect the status quo* and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits." In re Microsoft Corporation Antitrust Litigation v. Microsoft Corporation, 333 F.3d 517, 524-25 (4th Cir. 2003) (emphasis added), *abrogated on other grounds related to copyright law*, eBay Inc. v. MercExchange, LLC, 547 U.S. 388 (2006).

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008). All of these factors must be established for an injunction to issue.

Moreover, the U.S. Supreme Court is reticent to permit the imposition of injunctive relief against law enforcement agencies tasked with enforcing state laws.

> "We decline the invitation… [in] recognition of the need for a proper balance between the state and federal authority counsels restraint in the issuance of injunctions against sate officers engaged in the administration of the states' criminal laws in the absence of irreparable injury which is both great and immediate."

City of Los Angeles v. Lyons, 461 U.S. 95, 112 (1983). As the language used in the foregoing case law demonstrates, a complaint seeking injunctive relief against a police department should face a rigorous review from the Court.

The public policy reason for this steep climb makes sense. An inflexible judicial order interposed in place over the professional judgment of law enforcement official would have deleterious effects on law enforcement's ability to fulfill its mission of providing for the public safety and welfare. Such an order would invite individuals seeking to perpetuate mayhem by taking advantage of the perceived anonymity of the crowd.

As long as the order is in place, the police would be required to second-guess an otherwise lawful use of force in the midst of tense and evolving circumstances, with the risks of being held in contempt of court for a use of force later to be determined in violation of the order. Law enforcement agencies cannot be stripped of their authority to use such force as is reasonably necessary to quell a gathering riot.

[1] Of course, a preliminary injunction hearing is required after the issuance of a TRO anyway.

c. Weight of Affidavit Testimony in Preliminary Injunctions

Though the approach of this paper is to respond to a preliminary injunction like a rushed motion for summary judgment in a complaint for damages, the comparison should neither be taken literally or too far. Crucially, the difference in weight given to affidavit testimony is distinct and favorable to the defense.

Plaintiffs seeking injunctive relief are not entitled to have their complaint, or any affidavits submitted in support thereof, viewed in a light most favorable to their position. Rather, "the weight to be accorded affidavit testimony is within the discretion of the court, and statements based on belief rather than personal knowledge may be discounted." Imagine Medispa, LLC v. Transformations, Inc., 999 F.Supp.2d 862, 869 (S.D. W.Va. 2014), *citing* Federal Practice & Procedure § 2949.

A court will only be reversed on appeal from an order on a preliminary injunction[2] for abuse of discretion. "A district court abuses its discretion when it denies a preliminary injunction motion only if it bases its decisions on an erroneous legal standard or clearly erroneous factual findings." WV Ass'n of Club Owners & Fraternal Servs. Inc. v. Musgrave, 553 F.3d 292, 298 (4th Cir. 2009).

II. Addressing Standing

An early assessment in responding to a complaint for injunctive relief is to assess whether the plaintiff even has standing to make such a request. Often, a complaint for damages is the appropriate remedy in response to a specific harm, instead of one for injunctive relief to projected future harms.

To have initial standing, Plaintiffs "must show that [they have] sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" City of Los Angeles v. Lyons, 461 U.S. 95, 101-102 (1983) (internal citations omitted).

Despite frequent criticism,[3] Lyons continues to be the seminal case on standing in cases seeking relief from law enforcement uses of force—primarily on the basis of its emphasis on the requirement of a showing of a likelihood of future harm. As complaints relating to police responses to mass demonstrations are often couched in use of force terms, it continues to be a helpful case to have in the defense practitioner's quiver.

As the reader will note in the Lyons analysis, establishing a pattern and practice sufficient to hold a municipality liable for damages under § 1983 is *not* the standard by which one obtains and sustains standing to bring a complaint for injunctive relief on the same practices.

In Lyons, a young man was assaulted by a police officer by being held in a chokehold until he passed out as a result of a mere traffic stop in which he was indisputably compliant with

[2] This paper will not address the interlocutory nature of such an appeal.

[3] *See, e.g.*, Chemerinsky, Erwin, Federal Jurisdiction, Aspen Publishers, 5th Ed., pp. 65-69 (2007).

the officer's commands. 461 U.S. 95, 97-98. He presented evidence of a series of unconstitutional applications of the chokehold by the Los Angeles Police Department. Id., at 98. Mr. Lyons sought damages under § 1983 as well as an injunction against the use of chokeholds by LAPD.

The Court concluded that, while he certainly had standing to seek damages under § 1983, he did not have standing to bring a petition for injunctive relief:

> "In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either, (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning or, (2) that the City ordered or authorized police officers to act in such a manner."

461 U.S. 95, 105-106 (emphasis in original). It has been the author's anecdotal observation that many complaints for injunctive relief against law enforcement agencies risk running awry of the standing jurisprudence established by Lyons.

For example, in a case in which the author was involved, plaintiffs acting as administrators of an estate sought "to permanently enjoin the Charlotte-Mecklenburg Police Department from its continued usage of TASER's by its officers…" or, in the alternative, "temporarily enjoin officers…from using TASER's without a material alteration in the procedures, policies and customs of the Defendant Charlotte-Mecklenburg Police Department…" after the decedent died of a TASER discharge.

In a motion to dismiss and motion for judgment on the pleadings, the defendant argued that, to use the Supreme Court's own syllabus that the plaintiff would have had not only to allege that *they* would have an encounter with the police but also to make the incredible assertion either, (1) that *all* police officers in Charlotte *always* tase any citizen with whom they happen to have an encounter, or (2) that the City ordered or authorized police officers to act in such manner. The Court agreed and dismissed that portion of the Complaint for lack of standing. *See*, McCarthy v. City of Charlotte, 2013 WL 5525745, 13-14 (W.D.N.C. 2013).

However, in the context of mass demonstrations, plaintiffs will surely allege that they plan on engaging in further putatively protected activity that has been met with unconstitutional interference by law enforcement. While this is surely a more concrete allegation relating to likelihood of future harm than in most singular use of force cases, time again becomes a key ally to the defense. As time passes without incident between police and demonstrators—particularly in a municipality without a past history of police/demonstrator clashes—the future irreparable harm becomes, in the words of Lyons, increasingly 'conjectural' or 'hypothetical.'

III. Addressing Substance

Turning to the factual and legal substance of preliminary injunction requests in relation to mass demonstrations, the defense is put in the position of rapidly responding to a narrative without the luxury of 21-60 days to respond to an answer, nor likely will depositions and other discovery tools be employed.

Thus, harmonizing old school 'eyes on the ground' with new school 'eyes on social media,' is imperative in preparing a quick response to the facts. On the legal response, nothing replaces old fashioned case law research, brief writing, and coffee—though electronic research services certainly makes a more complete response much more feasible in a shorter turnaround.

a. 'Insta-Trial': Storytelling

As just mentioned, the plaintiff will obviously have the first opportunity to put their perspective of the events out into the public. Unlike a motion to dismiss, the defense practitioner is not confined by the pleadings in responding to a motion for preliminary injunction. Moreover, as many times mass demonstrations are covered by at least local media, placing forth the client's version of the facts quickly and coherently, while also dispelling any mistruths in the plaintiff's retelling. What emerges before the Court is almost a mini-trial on the merits.

Reviewing real-time video feed from social media accounts is becoming an imperative in responding to many claims, but particularly claims involving mass demonstrations.[4] Many social media sites now allow for live video feeds to be broadcast from user's accounts and often remain posted after the event.[5] Many social media users—more than one might expect—leave their content completely open to the public.[6] Relying too heavily unauthenticated video in a prepared response for the Court—even at a more relaxed (for evidentiary purposes) posture—can be a pitfall. However, video is a compelling medium for storytelling. This is particularly so if the plaintiff has posted live video on social media and that video does not match the lawsuit's version of the facts.

Even if unused in briefing or before the Court at a preliminary injunction hearing, social media video provides underlying context and can inform the defense's response to the motion for preliminary injunction. Immediate review of the video can also be used to guide one's conversation with a commanding officer on the ground, one's eventual discovery inquiries of the plaintiff, and direct knowledge of whether a plaintiff has posted something from the event and then later taken it down as the lawsuit proceeds.

If time can at all permit, obtaining an accurate and documented timeline in the form of an affidavit from a commanding officer provides a competing perspective—*i.e.*, a perspective of a dedicated law enforcement professional versus the perspective of the layman plaintiff. Rushed affidavits, however, can obviously hurt the case down the line if what is recalled by the witness is able to be impeached on cross-examination. It is critical that the affiant have a broad view of what happened on the night in question, how and when orders were given, as well as

[4] Please note that there are ethical issues associated with obtaining non-public posts without a formal discovery request. This portion of the discussion assumes that the posting individual has left the post open for public consumption on the social media platform.

[5] Though the focus of this paper is responding to a preliminary injunction, one should note that the user can take down a video post after the fact. Practitioners should be sure to ask plaintiffs during discovery whether they took a video and/or posted a video—live on social media or not—of the event in question.

[6] Again, by way of anecdotal observation, individuals who want to draw attention to a cause understandably want to reach as big of an audience as possible. Thus, they leave their social media posts publically available.

documentation and collective officer knowledge to corroborate the information provided. Sworn testimony is committed testimony for the pendency of the action.[7]

b. 'Insta-MSJ': Historical Case Law

If dueling factual summations provide the opportunity for a mini-trial to emerge, either in the briefing or in a hearing before the Court, the briefing itself takes on a very 'summary judgment feel,' with sworn testimony being submitted at such an early stage in the proceedings.

As referenced *supra*, the first and most substantive element of a motion for preliminary injunction is whether the plaintiff has a likelihood of success on the merits. What follows is sample case law from demonstration lawsuits that may serve useful in responding to common claims made by the plaintiff in these cases.

First and Fourth Amendment: Response to Riotous Conditions in Mass Demonstrations

The First Amendment protects mass demonstrations, but does not protect riots. Tear gas and other crowd control tactics are entirely constitutional uses of force and the law does not require that police single each individual rioter out from a crowd that has become, on the whole, unruly and violent. "[T]here is no federally protected right to engage in a riot." Frinks v. North Carolina, 468 F.2d 639, 641 (4th Cir. 1972).

Citing to riot and dispersal statutes set the foundation for the case law analysis to follow. Otherwise peaceful demonstrators have broken the law if they fail to obey a lawful dispersal order in the face of riotous conditions.

Generally, law enforcement officers are permitted to issue dispersal commands when they have reasonable belief that a riot or disorderly conduct of three or more individuals is occurring. Establishing the timeline of dispersal orders via affidavit—including whether and how they were amplified—provides a rebuttal to allegations that the plaintiff(s) could not hear the order(s).

When clear and present danger of riot, disorder, interference with traffic upon the public streets, or order, appears, the power of the State to prevent or punish is obvious. For example, in North Carolina, a riot is defined as:

> [A] public disturbance involving an assemblage of three or more persons which by disorderly and violent conduct, or the imminent threat of disorderly and violent conduct, results in injury or damage to persons or property or creates a clear and present danger of injury or damage to persons or property.

N.C. Gen. Stat. § 14-288.2(a). When has a demonstration crossed the line peaceful protest to a violent riot? The following case law from just before and during the Civil Rights Era helps provide context and set parameters. Some of the cases where so-called 'riots' or 'disturbances of

[7] This warning runs both ways. In the event that there are multiple affidavits submitted in the support of the motion for preliminary injunction by the plaintiff(s), look carefully for discrepancies in their affidavits—and conspicuous omissions at critical moments.

the peace' were broken up with police force were farcical. In those cases, the police—typically in the Jim Crow South—were clearly and unambiguously the aggressor.

> However, it is axiomatic however that the police may, in conformance with the First Amendment, impose reasonable restrains upon demonstrations to assure that they be peaceful and not destructive… And by the same token the First Amendment permits the police to contain or disperse demonstrations that have become too violent or obstructive.

Washington Mobilization Committee v. Cullinane, 566 F.2d 107, 119 (D.C. Cir. 1977).

Cullinane is instructive because the D.C. Circuit examined the constitutionality of applied police mass demonstration procedures in the Nation's capital—specifically mass arrests resulting from demonstrations that had turned violent. Plaintiffs were peaceful protestors that were arrested as a result and sought to enjoin the D.C. Police from being able to disperse crowds in this way. The Court rejected the "unrealistic" expectation that police prune each individual bad actor from a crowd.

> It is the tenor of the demonstration as a whole that determines whether the police may intervene; and if it is substantially infected with violence or obstruction the police may act to control it as a unit. 'Where demonstrations turn violent, they lose their protected quality as expression under the First Amendment…' Confronted with a mob the police cannot be expected to single out individuals; ***they may deal with the crowd as a unit***.

566 F.2d 107, 120 (emphasis added), *quoting in part*, Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

Similarly, in Barney v. City of Eugene, the Ninth Circuit concluded that, as a matter of law, Plaintiff was not entitled to relief under § 1983 for deprivations of her First Amendment rights. 20 Fed. Appx. 683 (9th Cir. 2001). Law enforcement deployed a tear gas canister at a peaceful protestor while participating in a growingly riotous protest. Id., at 684. At the conclusion of discovery, there was no material dispute of fact that the demonstration had turned violent and there was no forecasted evidence that "her exposure to tear gas and any effect on her First Amendment activities were anything other than the unintended consequence of an otherwise constitutional use of force under the circumstances." Id., at 685.

When possible, prior to the use of chemical weapons, providing notice is preferred, as the purpose is to gain compliance and not the use of force as an end in itself. However, it is not a condition precedent to their use. In Dalrymple v. U.S., 460 F.3d 1318 (11th Cir. 2011), the use of a gas gun against demonstrators outside the home where INS agents were executing warrants to remove a child was found to be objectively reasonable when the demonstrators attempted to interfere and threw objects at the agents.

Two decisions of the U.S. Supreme Court from the 1960's, related to the unconstitutional breaking up of peaceful demonstrations, provide vivid contrast to cases where demonstrations have become infested with violence and mayhem.

In Edwards v. South Carolina, the Court held that law enforcement violated the First Amendment rights of African American students engaged in a peaceful demonstration who were arrested for breach of the peace. 372 U.S. 229 (1963). The demonstration numbered about 187

protestors marching on the state capitol grounds "in an orderly way." Id., at 231. There were approximately 200-300 onlookers that gathered over the course of over about a half hour. "There was no evidence to suggest that these onlookers were anything but curious… There was no obstruction of pedestrian or vehicular traffic…" Id., at 231-32. Police presence was sufficient. After about forty-five minutes, the demonstrators were advised "they would be arrested if they did not disperse in 15 minutes." Id., at 232. The demonstrators did not disperse and they were arrested. The Court noted that, "There was no violence or threat of violence on their part, or on the part of any member of the crowd watching them. Police protection was ample." Id.

In Cox v. Louisiana, the Court was presented with the question of whether a group of supposedly threatening bystanders warranted the discharge of tear gas by law enforcement to break up a peaceful demonstration and to arrest the demonstrators. 379 U.S. 536, 550 (1965). In a resounding 'no,' the Court noted, *inter alia*, that "[i]t is virtually undisputed… that the students [*i.e.*, demonstrators] were not violent and threatened no violence. The fear of violence appears to have been based upon the reaction of white citizens looking on from across the street…" and said citizens were separated by dozens of police officers. Id.

First Amendment: Public Participation Ordinances

Up to this point in the paper, most of the discussion has assumed that a mass demonstration has taken place in a municipality, turned violent, the law enforcement agency responded with crowd control force, and now a plaintiff or plaintiffs have filed for a preliminary injunction to prevent the municipality from responding with crowd control force to another mass demonstration. This subsection briefly explores the likelihood of success on the merits when, rather, a demonstration has not yet taken place, and the plaintiff(s) seek an injunction to prevent the enforcement of a municipal public participation ordinance.

Every content neutral restriction on protected expression must be narrowly tailored to further a significant government interest. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 (1984). An entire paper—indeed an entire book—could be committed to the contours of each of these requirements, but the focus of this section will be the 'significant governmental interest' part of the equation, due mostly to the 'security' component involved with any mass demonstration.[8]

For example, security is obviously a significant government concern for local governments hosting a major political convention. However, the First Circuit provides an example of a court's skepticism when a local government summarily labels its significant government interest in interposing a restriction on protected expression. In its consideration of Boston's security restrictions during the 2004 Democratic National Convention, the Court stated,

[8] The U.S. Supreme Court seems to interchange "significant" with "legitimate" when considering time, place, and manner restrictions. While it is technically conceivable that a putative governmental interest could be described as both 'significant' and 'illegitimate,' or vice versa, it is unlikely that a court would find the minor syntactical confusion between the two words to be founding to the U.S. Supreme Court's intent that a significant governmental interest be necessarily legitimate and, again, vice versa.

"the City's overall goal was to maintain security at the Convention. But security simpliciter is too broad a rubric to be useful in this analysis. Security is not a talisman that the government may invoke to justify *any* burden on speech (no matter how oppressive)." Bl(a)ck Tea Soc'y v. City Of Boston, 378 F.3d 8, 13 (1st Cir. 2004).

Four years after the Boston convention, the significance of the governmental interests were not challenged at the 2008 Democratic National Convention, where the City of Denver identified particularized and plausible security concerns: (i) protect the convention site, surrounding buildings and the persons inside the site and the buildings from biological, chemical, or radiological attacks, (ii) protect civilians and law enforcement against terrorist attacks and violent demonstrations, and (iii) maintaining public order and preventing traffic and sidewalk obstructions. *See*, ACLU of Colorado v. Denver, 569 F. Supp. 2d 1142, 1176 (D. Colo. 2008); *see also*, Bl(a)ck Tea Soc'y, 378 F.3d at 14. ("The question is not whether the government may make use of past experience—it most assuredly can—but the degree to which inferences drawn from past experiences are plausible.")

Many public participation ordinances forward more urbane, yet every bit as significant, government interests. "We have consistently recognized that a city 'has a legitimate interest in maintaining the safety, order, and accessibility of its streets and sidewalks.'" Green v. City of Raleigh, 523 F.3d 293, 301 (4th Cir. 2008), *quoting*, Cox v. City of Charleston, 416 F.3d 281, 284 (4th Cir. 2005). In Green, the Fourth Circuit held that an ordinance requiring large groups of picketers to provide notice to the City was forwarded the significant government of safety and order "by permitting the Raleigh Police Department to allocate resources and assign officers to the site of a protest in order to protect the safety, order, and First Amendment rights of both demonstrators and bystanders." 523 F.3d 293, 301.

Maintaining aesthetic value of public property is a significant governmental interest as well, so long as that aesthetic preference does not prefer one type of speech of the other and restricts no more speech than necessary to achieve the purpose. Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 810 (1984).

Even on the National Mall—perhaps the quintessential symbol of traditional public fora—the U.S. Park Service was held to have a "substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 296.

Finally with regard to significant government interests, it is worth noting that protection of a policy behind the First Amendment—protection of a marketplace of ideas, not a marketplace of noise, numbers, and provocateurs—is an implicit significant governmental interest.

In upholding an ordinance that required groups larger than ten to give the Raleigh Police Department notice of their demonstration, the Fourth Circuit noted that "[t]he City must ensure that even during such demonstrations, *each set of protestors can exercise its First Amendment rights without impinging on the rights of others* and that potentially heated speech by rival groups does not go beyond mere words." Green, 523 F.3d 293, 304. (Emphasis added.) In other words, some time, place, and manner restrictions on First Amendment activity endeavor to prevent one single group from 'occupying' public fora on a full-time basis.

Again, there is far more analysis required for time, place, and manner restrictions. The purpose of this section was to provide a brief overview of one of the requirements of such a restriction and to warn that acting in response to mass demonstrations on a vague notion of 'security' is not sufficient. Maintaining security is certainly a significant governmental interest, but said security must be particularized.

A Note on Undercover Police in Demonstrations

If the defending law enforcement agency has placed undercover police in demonstrations, or subgroups of a demonstration, a plaintiff may seek to enjoin the agency's ability to do so.

The Supreme Court addressed a request for similar injunctive relief in Socialist Workers Party v. Attorney General of U.S., 419 U.S. 1314 (1974). The Court acknowledged the risk of abuse, "[b]ut our abhorrence for abuses of governmental investigative authority cannot be permitted to lead to an indiscriminate willingness to enjoin undercover investigation of any nature, whenever a countervailing First Amendment claim is raised." Id., at 1319. Clearly, the Court is wary of law enforcement's ability to plant undercover police in demonstrations. Therefore, and similar to the significant governmental interest discussed *supra*, the legitimate government interest should be defined at more than an abstract level in responding to a plaintiff's petition.

ii. *Conclusion: Balancing of the Equities, Irreparable Harm, and Public Interests*

Though much of the legal analysis is done in the above 'likelihood of the success on the merits' section, there remains three other requirements for a preliminary injunction to issue. The central theme for the plaintiffs will likely be the importance of their First Amendment right to free speech and assembly. That the First Amendment is of paramount importance to the American fabric is unquestionable and irrefutable. For the cynical, this would be why the plaintiff makes such an obvious declaration. The declaration is also entirely devoid of nuance. As detailed above, the First Amendment does not protect violence. If the municipality is engaged in Edwards v. South Carolina and Cox v. Louisiana, discussed *supra*, the defense is not likely in a good legal position anyway.

Rather, the defending municipality in response to these requirements will often be that a judicial injunction is an extreme limitation to place on a police department tasked with responding to evolving circumstances on the ground. "The Court respects, as it must, the interest of the community in maintaining peace and order on its streets." Feiner v. New York, 340 U.S. 315, 320 (1951). Law enforcement should not be tasked with hoping that cooler heads will prevail amongst the participants of the next demonstration nor fear that, if they act to stop a riot in progress they will be subjected to contempt of a court order.

An undertone of this entire discussion is blackletter use of force case law: "The reasonableness… must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989). This notion of not relying on hindsight should be especially protected in the context of injunctive relief as a result of mass demonstrations. People's lives may depend on the intervention of law enforcement in that a scenario.