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UNITED STATE DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

J.T., through her father and guardian SAMER TAWASHA; L.R., through her mother and guardian GWEN LEE; C.L., through her mother and guardian NAOMI LOPEZ; S.H., through his mother and guardian SUZANNE SCHAEFER; and JACK BRUNDAGE; ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO, WILLIAM SCOTT, THOMAS HARVEY, MATT SULLIVAN, and DOES 1-100,

Defendants.

Case No. 23-cv-06524-LJC

[PROPOSED] AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA

Date: June 4, 2026
Time: 3:00 p.m.
Courtroom: G, 15th Floor

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INTRODUCTION

The Constitution is built on a framework of reinforcing rights and liberties. Where protection for one freedom ends, another begins. This case involves such an interplay between the First and Fourth Amendments. On July 8, 2023, officers relied on a "group probable cause" theory to mass arrest a group of children and young adults near a skateboarding event by Dolores Park. Doing so violated the Fourth Amendment, which mandates that probable cause be assessed individual by individual—or, kid by kid, as it were. These protections are all the more critical where, as here, they safeguard incursion into First Amendment freedoms. Although there is no longer an independent First Amendment claim in this case, the associational and free assembly rights it protects animate why Plaintiffs' Fourth Amendment claims deserve exacting scrutiny, and ultimately, deliberation by a jury.

The American Civil Liberties Union of Northern California ("ACLU") submits this amicus curiae brief to explain how arresting Plaintiffs *en masse* was unlawful and why Defendants' conduct veered sharply into a policing model that both the First and Fourth Amendment reject. The ACLU anchors this brief in the longstanding recognition that "guilt by association is a philosophy alien to the traditions of a free society." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 932 (1982). And the brief further highlights how, "[e]ven outside the context of protected First Amendment expressive association, 'a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause.'" *Santopietro v. Howell*, 73 F.4th 1016, 1025 (9th Cir. 2023) (quoting *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979)).

Finally, based on the ACLU's survey of the case law, this brief concludes by offering the Court a framework for evaluating when (if ever) mass arrests are lawful—specifically suggesting that the inquiry turn on (1) whether those arrested had reasonable notice of a dispersal order and opportunity to comply; (2) if the group exhibited an intent to act as a unit; and (3) whether there was a reasonable nexus between the group who acted unlawfully and those ultimately arrested. Because many of these elements are disputed in the present case, the ACLU respectfully joins Plaintiffs in urging the Court to deny Defendants' Summary Judgment Motion. A jury should determine if Defendants cast too wide a net by arresting all the young people in the vicinity of Dolores Park. Anything less will enable law

enforcement to make sweeping presumptions of probable cause that erode fundamental constitutional principles for all.

ARGUMENT

I. Fourth Amendment Claims Must Be Given Special Attention When First Amendment Freedoms Are Implicated

Courts have long recognized the interrelationship between the preservation of First Amendment liberties and the Fourth Amendment's individualized probable cause requirement. And while there is no longer a First Amendment claim at issue in this case, its implication warrants careful review of Plaintiffs' existing claims. For, as the Supreme Court opined: "[T]he First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive." *City of Houston, Tex. v. Hill*, 482 U.S. 451, 472 (1987).

In particular, free association and assembly both "lie at the foundation of a government based upon the consent of an informed citizenry—a government dedicated to the establishment of justice and the preservation of liberty." *Bates v. City of Little Rock*, 361 U.S. 516, 522-23 (1960). Freedom of assembly is especially fundamental because it is "by collective effort" that "individuals can make their views known, when individually, their voices would be faint or lost." *N.A.A.C.P.*, 458 U.S at 907-08; *see also Edwards v. South Carolina*, 372 U.S. 229, 235-38 (1963) (recognizing that public demonstration is "an opportunity essential to the security of the Republic" and vacating convictions for breach of peace where arrests violated group's First Amendment rights); Nick Robinson & Elly Page, *Protecting Dissent: The Freedom of Peaceful Assembly, Civil Disobedience, and Partial First Amendment Protection*, 107 Cornell L. Rev. 229, 237 (2021); Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. Rev. 543, 547, 586–89 (2009) (on the distinct political origins and functions of the right to assembly).

The rights of free association and assembly cannot be undercut—either directly or indirectly—by government action. This maxim governs even when unlawful conduct is intermingled with protected conduct at a public assembly. As the Supreme Court has explained, the "right to associate does not lose all constitutional protection merely because some members of the group may have participated in

1 conduct or advocated doctrine that itself is not protected." *N.A.A.C.P.*, 458 U.S. at 908. "For liability to
2 be imposed by reason of association alone, it is necessary to establish that the group itself possessed
3 unlawful goals and that the individual held a specific intent to further those illegal aims." *Id.* at 920.
4 Ninth Circuit precedent develops this line of cases yet further, making clear that neither
5 "prophylactic" nor sweeping crowd control measures will survive scrutiny if First Amendment freedoms
6 are at stake. In *Index Newspapers LLC v. U.S. Marshals Service*, for example, the court ruled that the
7 "many peaceful protesters, journalists, and members of the general public" at a demonstration which
8 escalated into violence and property destruction could not "be punished for the violent acts of others."
9 977 F.3d 817, 834 (9th Cir. 2020); *see also Collins v. Jordan*, 110 F.3d 1363, 1372-73 (9th Cir. 1996)
10 (recognizing that the protection of First Amendment activity is paramount even when "potential and
11 actual violence" is occurring); *see also Santopietro*, 73 F.4th at 1025 (same).

12 **II. Mass Arrests at Public Assemblies Carried Out on a Group Probable Cause Theory Raise**
13 **Significant Constitutional Concerns**

14 Given the weight of the foregoing authorities, good reason exists for this Court to be skeptical of
15 Defendants' application of group probable cause theory and their reliance on a guilt by association
16 model. It is true that neither the First Amendment nor California law protects violent or otherwise
17 unlawful activity at a demonstration. Law enforcement may, of course, respond to "advocacy [that] is
18 directed to inciting or producing imminent lawless action[s] and [which] is likely to incite or produce
19 such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). But when officers do so act, they must
20 exercise restraint and then arrest only those for whom probable cause exists.

21 **A. Law enforcement has limited authority to declare an assembly unlawful.**

22 California law defines an unlawful assembly as "[w]henever two or more persons assemble
23 together to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner." Cal.
24 Pen. Code § 407. The provision therefore has two prongs: persons assembled to do an *unlawful* act, on
25 the one hand, and persons assembled to do a *lawful* act albeit in a violent, boisterous, or tumultuous
26 manner, on the other hand. To harmonize the crime of unlawful assembly with the constitutional right of
27 free speech, the California Supreme Court has narrowed the lawful-act prong of the statute, noting the
28 section 407's proscription "on assemblies to do a *lawful act* must be limited to assemblies which are

violent or which pose a clear and present danger of imminent violence." *In re Brown*, 9 Cal.3d 612, 623 (1973) (emphasis added).

Once an unlawful assembly is declared, law enforcement is authorized to arrest "[e]very person remaining present at the place of any riot, rout, or unlawful assembly, after the same has been lawfully warned to disperse." Cal. Pen. Code § 409. Arrests should be intended to "de-fuse riotous situations." *People v. Cipriani*, 18 Cal. App. 3d 299, 309 (1971).

Federal courts, interpreting California's laws, have summarized that law enforcement may disperse groups only if "they are violent[,] pose a clear and present danger of imminent violence[,] or they are violating some other law in the process." *Collins*, 110 F.3d at 1371 (citing *In re Brown*, 9 Cal. 3d at 623 (cleaned up)). The "lawlessness must be evaluated under an objective standard, rather than based on the subjective apprehensions of the officers." *Puente v. City of Phoenix*, 123 F.4th 1035, 1062 (9th Cir. 2024). "[I]n assessing whether a sufficient clear and present danger justifies dispersal of a crowd," the Ninth Circuit has opined, "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." *Id.* (citations omitted).

B. If an unlawful assembly is declared, law enforcement must still act with restraint and arrest only those engaging in the unlawful acts.

Notwithstanding that law enforcement may have authority to declare an assembly unlawful, officers do not have broad, unfettered powers to conduct mass arrests after such a declaration. While "procedure by presumption is always cheaper and easier than individualized determination," due process is required. *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972). Officials may not employ means that "broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

Individual probable cause serves to safeguard these liberties. Probable cause exists when, "under the totality of the circumstances known to the arresting officers," or within the knowledge of the other officers at the scene, a prudent person would believe the suspect had committed a crime. *United States v. Garza*, 980 F.2d 546, 550 (9th Cir.1992). "Guilt is personal," and for punishment to be imposed on "conduct" related to "concededly criminal activity . . . that relationship must be sufficiently

substantial . . . to withstand attack under the Due Process Clause of the Fifth Amendment." *Scales v. United States*, 367 U.S. 203, 224-25 (1961).

At a protest or public assembly, "the police are at least required to differentiate between the participants and innocent bystanders" unless there is a threat of imminent violence. *Dubner v. City & Cnty. of San Francisco*, 266 F.3d 959, 967-68 (9th Cir. 2001); *see also Index Newspapers*, 977 F.3d at 834. Whether there is probable cause "to believe that *some people* present" have "committed arrestable offenses" is not the same as "probable cause for detaining *everyone* who happened to be at [the location]." *Barham v. Ramsey*, 434 F.3d 565, 573 (D.C. Cir. 2006) (emphasis in original); *see also Vodak v. City of Chicago*, 639 F.3d 738, 750 (7th Cir. 2011) (observing that it is common "for mass arrests in riots or demonstrations to net a sizable percentage of innocents").

III. A Survey of Case Law Presents Key Factors that Courts Consider to Determine Whether Mass Arrests Are Justified Under a Group Probable Cause Theory

The ACLU has conducted a survey of case law across circuits to develop a framework for analyzing the limited conditions in which mass arrests might be justified under a theory of group probable cause. This inquiry illuminates three pivotal elements that are required for a determination of group probable cause: (1) whether those arrested had reasonable notice of a dispersal order and opportunity to comply; (2) if the group exhibited an intent to act as a unit; and (3) whether there was a reasonable nexus between the group who acted unlawfully and those ultimately arrested.

A. Group probable cause is not justified unless those arrested were given reasonable notice and opportunity to comply.

Court decisions across circuits have generally required that, once an unlawful assembly is declared, people must receive reasonable notice of an order to disperse and have the ability to comply with that order before probable cause exists to arrest them for violating the dispersal order.

The D.C. Circuit has issued particularly instructive decisions. In *Washington Mobilization Committee v. Cullinane*, the court determined that group probable cause existed only once individuals remained at the scene after "reasonable notice and opportunity to disperse." 566 F.2d 107, 121 (D.C. Cir. 1977). Nearly four decades later, in *Barham v. Ramsey*, the D.C. Circuit reaffirmed this holding. 434 F.3d at 573. There, as here, law enforcement officers faced a fluid situation with individuals moving

1 freely in and out of the arrest zone. *Id.* The D.C. Circuit ruled: "when compelling circumstances are
2 present, [law enforcement] may be justified in detaining an undifferentiated crowd of protesters, *but only*
3 after providing a lawful order to disperse followed by a reasonable opportunity to comply with that
4 order." *Id.* at 575 (emphasis added).

5 The Seventh Circuit has also focused on notice and the opportunity to comply, concluding that
6 each can be insufficiently provided when law enforcement makes confusing or contradictory orders. In
7 *Vodak v. City of Chicago*, the court held that, before law enforcement officers can "start arresting
8 peaceable demonstrators for defying their orders[,] they ha[ve] to communicate the orders to the
9 demonstrators." 639 F.3d at 745. What officers cannot "lawfully do," *Vodak* stated, is arrest people who
10 the officers have "no good reason to believe knew they were violating a police order" in "circumstances
11 that were not threatening to the safety of the police or other people." *Id.* at 746 (reversing motion on
12 summary judgment).

13 The Ninth Circuit addressed a similar concern in *Ramirez v. Zimmerman*, a case involving the
14 dispersal of a mass protest. No. 20-56117, 2021 WL 5104371 (9th Cir. Nov. 3, 2021). Although the
15 lower court's grant of summary judgment was upheld, the concurrence aptly discussed the fundamental
16 concern created by ambiguous orders leading to mass arrests, observing that "a dispersal order
17 specifying a point at which officers could allow people to deviate from the trek down [the street] would
18 have avoided considerable confusion for everyone—including the officers on the ground—and may
19 have avoided the[] arrests and follow-on litigation." *Id.* at *3 (Christen, J., concurring). "Instead," the
20 concurrence continued, "the open-ended dispersal order exposed defendants to allegations that they
21 committed constitutional violations by arresting people who had departed from the area in compliance
22 with the order to disperse." *Id.*

23 Conversely, in *Lyons v. City of Seattle*, the Ninth Circuit held that, if circumstances establish a
24 "fair probability" that a crowd heard at least one dispersal order, and voluntarily disobeyed, then law
25 enforcement could justifiably make arrests because they chose not to disperse. 214 Fed. App'x 655, 657
26 (9th Cir. 2006). Thus, district courts within the Ninth Circuit have generally ruled that—unlike the
27 situation in the present case—probable cause can exist where it is undisputed that arrestees heard the
28 dispersal orders and nevertheless chose not to comply. *See, e.g.*, *Wood v. City of Sacramento*, 2023 WL

415143, at *6 (E.D. Cal. Jan. 25, 2023); *Bidwell v. Cnty. of San Diego*, 607 F. Supp. 3d 1084, 1099 (S.D. Cal. 2022); *Amaral v. City of San Diego*, No. 3:17-CV-2409-L-LL, 2021 WL 1226419, at *1 (S.D. Cal. Mar. 31, 2021), *aff'd*, No. 21-55420, 2022 WL 1686681 (9th Cir. May 26, 2022); *Hickey v. City of Seattle*, No. C00-1672 MJP, 2006 WL 3692658, at *9 (W.D. Wash. Dec. 13, 2006); *but see Dinler v. City of New York*, No. 04 CIV. 7921 RJS JCF, 2012 WL 4513352, at *11 (S.D.N.Y. Sept. 30, 2012) (holding that there was no probable cause for defying a police order when the dispersal order was confusing and no time was given to comply).

B. Group probable cause cannot be found absent a group's exhibited intent to act as a unit presenting an imminent danger.

Critical to establishing a valid theory of group probable cause during an unlawful assembly is—in the words of the D.C. Circuit—whether law enforcement reasonably believed that the group acted as a "cohesive unit." *Carr v. D.C.*, 587 F.3d 401, 407 (D.C. Cir. 2009). Picking up on this thread, the D.C. Circuit in *Barham* also explained that where law enforcement had "no basis for suspecting that all of the occupants of [a park] were then breaking the law or that they had broken the law before entering the park[,]" it was not appropriate to apply a theory of group probable cause. 434 F.3d at 575-76.

Courts across circuits have evaluated whether a group has acted as a "cohesive unit" based on whether there is a shared basis for their presence in the location. The Eighth Circuit, for example, considered a scenario in which law enforcement issued a lawful dispersal order to a large crowd at the Capitol. *Dunn v. Does 1-22*, 116 F.4th 737, 747 (8th Cir. 2024). The court held that there was no probable cause for mass arrests where the plaintiff-protesters "did not move as a unit primed for confrontation—they were among the many people 'freely entering and exiting the area.'" *Id*. Another Eighth Circuit case also observed that, when people are free to enter an area after an order of dispersal intended to clear it, and law enforcement make no attempt to separate the subset of people engaged in unlawful acts from innocent bystanders who join the crowd, it becomes inappropriate for law enforcement to assume probable cause for the group as a whole and make mass arrests. *Baude v. Leyshock*, 23 F.4th 1065, 1073 (8th Cir. 2022). As the Eighth Circuit explained, officers cannot escape scrutiny "by alleging that 'the unlawful acts of a small group' justif[ed] the arrest of the mass." *Id.* (internal citation omitted).

In contrast, when law enforcement officers are faced with a crowd that "chanted in unison, lined up directly across from the police, donned gasmasks and other face coverings as if preparing for a confrontation, and were otherwise acting or moving as a unit or group," the Eighth Circuit ruled that officers did have group probable cause to make mass arrests. *Dunn*, 116 F.4th at 747; *see also Bernini v. City of St. Paul*, 665 F.3d 997 (8th Cir. 2012).

C. Applications of group probable cause must be limited to cases with a reasonable nexus between the group who acted unlawfully and those ultimately arrested.

Caselaw also suggests that the circumstances giving rise to an arrest must create a clear relationship between the crowd that engages in unlawful behavior (i.e., those who choose not to disperse) and those that are ultimately arrested (i.e., those swept up in the mass arrests). For example, turning back to *Vodak*, the Seventh Circuit concluded that law enforcement had erred when officers issued a dispersal order in one area, but then—at a different location blocks away—conducted mass arrests of individuals for failure to disperse per the order. 639 F.3d at 750 (mass arrests lacked probable cause where law enforcement ordered dispersal and then arrested hundreds several blocks away).

By comparison, the situation was materially different in *Lyons*. 214 Fed. App'x at 657. There, again unlike here, a mass arrest was justified by probable cause because officers made three announcements, each at an exit point at which protestors could leave. *Id.* Anyone who chose not to comply was "boxed in" and were separated from general bystanders. *Id.* Similarly, the district court in *Saccoccio v. City of Phoenix* found arrests to be justified where extenuating circumstances gave rise to probable cause—including three nights of protests turning violent and law enforcement's knowledge that thirty minutes prior, rioters in that specific alleyway had vandalized property and assaulted law enforcement officers. No. CV-20-01141-PHX-DJH CDB, 2024 WL 5317421, at *11 (D. Ariz. Dec. 16, 2024); *see also In re Wagner*, 119 Cal. App. 3d 90, 103 (1981) (arrestees refused to disperse and were reasonably identified as demonstrators who assaulted officers or otherwise part of the unlawful act).

IV. Under the Framework Embraced by Courts, a Factfinder Should Determine Any Material Disputes About the Circumstances of An Arrest Based on Group Probable Cause

Defendants bear the high burden to demonstrate "facts and circumstances within their . . . knowledge" suggesting that individuals participated in a riot or unlawful assembly. *Brinegar v. United*

States, 338 U.S. 160, 175-76 (1949); *see also Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) (standard for determining whether probable cause exists "depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest").

Under the framework articulated *supra*, the parties present fundamental disputes warranting review by a factfinder as to the events leading up to the mass arrests on July 8, 2023. Where, as here, factual disputes exist as to the key circumstances giving rise to a mass arrest, granting summary judgment would be premature. "Standing alone," a police officer's "lack of individualized suspicion" does not make a " search[] or seizure[] unlawful," for it is the trier of fact who must decide what was "reasonable in light of the circumstances." *Lyall v. City of Los Angeles*, 807 F.3d 1178, 1194 (9th Cir. 2015). Sister circuits have ruled similarly. *See, e.g.*, *Carr*, 587 F.3d at 409 (where law enforcement and protesters have disputed accounts of the proceedings leading up to a mass arrests, "that is an issue for the jury"); *Bernini*, 665 F.3d at 1003 ("The touchstone of the Fourth Amendment is reasonableness under the particular circumstances presented."); *Gonzalez v. City of Elgini*, 578 F.3d 526, 537 (7th Cir. 2009) ("[A] jury must determine the existence of probable cause" because there is no "room for a difference of opinion concerning the facts or the reasonable inferences to be drawn from them.").

First, numerous disputes exist as to whether the officers' dispersal orders were clear and left open a path to Plaintiffs for compliance. Plaintiffs allege that dispersal orders were initially issued in different locations with no clear instructions and that significant lapses of time across these different areas occurred. ECF No. 275, pp. 2-5. Numerous individuals who were arrested allege that they were never in the vicinity of the dispersal orders or aware of the unlawful assembly declarations. *Id.*, pp. 5-7. Relatedly, a genuine material dispute exists as to whether individuals had the opportunity to comply. Plaintiffs allege that they were funneled toward an intersection where they were arrested, even though they were following officer instructions to move in that direction. *Id.* at pp. 8-9. Thus, even if sufficient notice had been provided, whether there was opportunity to comply is contested.

Second, as to intent to act as a cohesive unit, a dispute exists as to whether newcomers intermingled with others in the crowd who had been present for longer and whether the individuals caught up at the event were there for a shared purpose. *Id.*, pp. 14-15, 23 (citing Whent Decl., Ex A, 10). The young people arrested were not all wearing common clothing, nor were they chanting together or

staying together as a group throughout the evening. *Id.* A genuine factual dispute over whether the group was a cohesive unit further weighs toward allowing a jury to determine these issues.

Finally, as to the nexus between those who act unlawfully and those ultimately arrested, Plaintiffs have noted that there was a large, nebulous geographic scope for the unlawful assembly and a gap in time between the dispersal orders, creating serious disputes of material fact as to whether the group present for the dispersal orders actually matched those who were ultimately arrested. Plaintiffs have also contended that officers arbitrarily allowed certain individuals to bypass the area, while selectively choosing others to be arrested. *Id.* at 9.

CONCLUSION

For the foregoing reasons, the ACLU respectfully urges the Court to deny Defendants' Motion for Summary Judgment. The questions presented herein are relevant to the Fourth and First Amendment rights of all, and should be fully evaluated during a trial on the merits of this case.

Dated: May 12, 2026

Respectfully submitted,

ACLU FOUNDATION OF
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