

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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Jared Goyette, Craig Lassig, Katie Nelson,  
Tannen Maury, Stephen Maturen, and The  
Communications Workers of America,  
*On behalf of themselves and other  
similarly situated individuals,*

Court File No. 20-cv-01302  
(WMW/DTS)

Plaintiffs,

v.

**POST-HEARING MEMORANDUM  
OF LAW IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION**

City of Minneapolis; Minneapolis Chief of  
Police Medaria Arradondo *in his  
individual and official capacity*;  
Minneapolis Police Lieutenant Robert  
Kroll, *in his individual and official  
capacity*; Minnesota Department of Public  
Safety Commissioner John Harrington, *in  
his individual and official capacity*,  
Minnesota State Patrol Colonel Matthew  
Langer, *in his individual and official  
capacity*; John Does 1-10, *in their  
individual and official capacities*;

Defendants.

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**INTRODUCTION**

On July 28, 2021 this Court heard directly from witnesses that Plaintiffs and other members of the press continue to need an injunction to protect them from the unconstitutional acts of State Defendants and their agents, Minnesota State Patrol Troopers.<sup>1</sup>

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<sup>1</sup> The words “State Patrol,” “State Troopers,” “Minnesota State Patrol Troopers,” and “Troopers” are used interchangeably in this memorandum.

The testimony was compelling: journalist witnesses described being targeted by State Troopers with threats, profanity, intimidation, and violence. They explained how the Troopers prevented them from engaging in First Amendment protected activity and chilled them from reporting as events unfolded.

State Defendants' witnesses did not lessen the impact of this powerful testimony. To the contrary, the State Defendants' witnesses confirmed that State Troopers: (1) intentionally destroyed relevant emails and text messages despite knowing this litigation was pending; (2) concocted false reports to justify the arrest, assault, and use of less-lethal weapons against journalists; and (3) ignored the Governor's order exempting journalists from curfew restrictions. Not one Trooper has been disciplined or reprimanded for their misconduct. Instead, at the very highest levels, State Defendants have turned a blind eye to the Troopers' illegal acts.

This matter has been briefed and argued multiple times. The TRO reflects the Court's careful consideration and application of the *Dataphase* factors. And the TRO is working. Before the TRO issued, State Defendants acted with impunity and intentional disregard for the constitutional rights of journalists and the interests of the public. They should not be allowed to do so again.

While the legal analysis underlying the TRO remains unchanged, the robust factual record now before the Court makes the grounds for continued injunctive relief extraordinarily clear. Plaintiffs ask the Court to convert the TRO to a Preliminary Injunction remaining in effect through final resolution of this matter.

## FACTS

### **I. State Defendants Targeted Journalists at the George Floyd Protests.**

The State Patrol's targeting of journalists covering the George Floyd protests in May 2020 is well-documented and horrifying. Troopers shot journalists with flash bang grenades,<sup>2</sup> projectiles,<sup>3</sup> and tear gas,<sup>4</sup> pepper-sprayed them in the face at close range,<sup>5</sup> arrested them for no reason,<sup>6</sup> and ordered them to cease reporting and disperse although they had violated no lawful order.<sup>7</sup>

The experience of Ed Ou, a renowned photojournalist and documentary filmmaker<sup>8</sup> who spent most of his career covering the Middle East<sup>9</sup> exemplifies the State Troopers' antagonism towards journalists. Ou was working for NBC News in May 2020,<sup>10</sup> covering the protests that erupted following the May 25 police murder of George Floyd.<sup>11</sup> Ou arrived in Minnesota on May 30,<sup>12</sup> the day after CNN Reporter Omar Jimenez and his crew were arrested while broadcasting live at the protests. With conspicuous professional gear in tow, Ou began covering the events at the Fifth Precinct in Minneapolis,<sup>13</sup> working with and near

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<sup>2</sup> ECF No. 203, July 28, 2021 Hr'g Tr. ("Tr.") 28:7–11. A copy of this transcript, redacted per the State Defendants' request at ECF No. 207, is attached as Exhibit A to the Declaration of Kevin C. Riach ("Riach Dec."), submitted in support of Plaintiffs' Motion.

<sup>3</sup> ECF No. 31-3, ¶ 28.

<sup>4</sup> ECF No. 31-2, ¶ 20.

<sup>5</sup> Tr. 29:14–16.

<sup>6</sup> Pl. Ex. 68.

<sup>7</sup> Tr. 117:5–10.

<sup>8</sup> Tr. 11:7–10.

<sup>9</sup> Tr. 15:6–16:7.

<sup>10</sup> Tr. 20:16.

<sup>11</sup> Tr. 20:12–14.

<sup>12</sup> Tr. 20:17–18.

<sup>13</sup> Tr. 20:17–23; 22:4–9.

numerous journalist colleagues.<sup>14</sup> He described the mood at this event as initially “pretty calm . . . people were mostly giving speeches and most people, except for the people who were speaking up on this mini podium thing, they were mostly sitting down and . . . cheering on the people who were giving speeches.”<sup>15</sup>

However, the mood changed abruptly when a push alert notified the crowd of the upcoming curfew.<sup>16</sup> The State Patrol formed a line across Nicollet Avenue<sup>17</sup> and announced, just minutes after the curfew went into effect: “THIS IS THE MINNESOTA STATE PATROL. YOU ARE IN VIOLATION OF THE MINNEAPOLIS CITY ORDINANCE FOR CURFEW VIOLATION. PLEASE DISPERSE, OR YOU WILL BE ARRESTED.”<sup>18</sup> The dispersal order, repeated multiple times, was expressly intended to enforce the curfew,<sup>19</sup> from which journalists were exempt.<sup>20</sup> Ou heard the dispersal orders and understood that, as a journalist, they did not apply to him.<sup>21</sup> The State Patrol did not share that view. Rather, Troopers unleashed a torrent of less-lethal munitions and chemical

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<sup>14</sup> Tr. 23:1–4.

<sup>15</sup> Tr. 24:9–14.

<sup>16</sup> Tr. 24:20–22; 25:1

<sup>17</sup> Tr. 25:3–8.

<sup>18</sup> Pl. Ex. 14, at 0:00 – 0:17; Tr. 25:24 (admitting Pl. Ex. 14). Major Dwyer, who personally provided the briefing to the Troopers before they deployed on May 30, did not instruct that press was exempt from the curfew or confirm that such an instruction was given. Tr. 281:15–282:21.

<sup>19</sup> Tr. 224:1–10.

<sup>20</sup> EMERGENCY EXECUTIVE ORDER NO. 20-65 (May 29, 2020), <https://www.leg.mn.gov/archive/execorders/20-65.pdf>, (last visited Sept. 2, 2021).

<sup>21</sup> Tr. 71:13–72:5.

weapons directly at individuals whose identification badges,<sup>22</sup> large cameras, and other gear clearly identified them as press. Several journalists were injured.<sup>23</sup>

There is no evidence that journalists attacked the State Patrol or interfered with their work before the Troopers began their attack. Nor were the protesters looting or behaving violently at that point.<sup>24</sup> Put simply, the State Patrol attacked clearly identifiable journalists without provocation.

Ou and other journalists had clustered together so that they could be easily distinguished from the protesters, and together they moved to an alcove that was off to the side to give them cover as they continued reporting.<sup>25</sup> As the Troopers marched north on Nicollet Avenue, they turned their fire on the journalists in the alcove. A concussion grenade struck Ou in the head and exploded, disorienting and wounding him.<sup>26</sup> Before Ou could get his bearings, a State Trooper pepper-sprayed him directly in the face.<sup>27</sup> The

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<sup>22</sup> Pl. Ex. 12.

<sup>23</sup> Los Angeles Times reporters Molly Hennessy-Fiske and Carolyn Cole were both injured, as was freelance photojournalist Mike Shum on assignment for the New York Times, among others. Molly Hennessy-Fiske, *Times reporter recounts being hit with rubber bullets by Minnesota police*, LOS ANGELES TIMES (May 30, 2020), <https://www.latimes.com/world-nation/story/2020-05-30/la-reporter-tear-gas-police>; Carolyn Cole, *'They came toward us firing pepper spray and rubber bullets,' photographer says*, LOS ANGELES TIMES (June 1, 2020), <https://www.latimes.com/world-nation/story/2020-06-01/they-came-toward-us-firing-pepper-spray-and-rubber-bullets>; *Videographer hit by police projectiles in Minneapolis' Fifth Precinct*, U.S. PRESS FREEDOM TRACKER (May 29, 2020), <https://pressfreedomtracker.us/all-incidents/videographer-hit-by-police-projectiles-in-minneapolis-fifth-precinct/>.

<sup>24</sup> Tr. 28:2–4.

<sup>25</sup> Tr. 28:14–21.

<sup>26</sup> Tr. 29:9–13.

<sup>27</sup> Tr. 29:14–16.

Troopers continued throwing concussion grenades at the journalists' feet.<sup>28</sup> Ou assumed the attack would cease once the Troopers passed the alcove full of journalists.<sup>29</sup> He was wrong. In fact, the State Troopers were targeting the journalists, forcing them into the crowd of protesters and ordering all present to disperse.<sup>30</sup>

Troopers shoved Ou, who was now bleeding, disoriented and blinded by pepper spray, out of the alcove, corralling him and other journalists north toward 31st Street.<sup>31</sup> They pushed the journalists into a fenced-off area, continuing to throw concussion grenades at the journalists and ordering them to leave, although there was nowhere for them to go.<sup>32</sup> Several journalists climbed over a wall to escape the attack, but Ou, who was injured and carrying heavy equipment, determined it was too dangerous to attempt to scale the high wall.<sup>33</sup>

After another concussion grenade was thrown, someone grabbed Ou.<sup>34</sup> He heard the person – apparently law enforcement – ask: “What do you want me to do with *this*?” as he held onto Ou.<sup>35</sup> Ou wanted to escape from the alcove and needed help.<sup>36</sup> Blood was streaming down his face<sup>37</sup> and he was in considerable pain.<sup>38</sup> He begged law enforcement

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<sup>28</sup> Tr. 29:16–18.

<sup>29</sup> Tr. 29:20–23.

<sup>30</sup> Tr. 29:23–30:6.

<sup>31</sup> Tr. 41:17–25.

<sup>32</sup> Tr. 42:16–19.

<sup>33</sup> Tr. 43:24–44:8.

<sup>34</sup> Tr. 45:8–10.

<sup>35</sup> Tr. 46:9–10 (emphasis added); Pl. Ex. 14 at 3:46 – 3:52.

<sup>36</sup> Tr. 45:15–18.

<sup>37</sup> Pl. Exs. 10, 12.

<sup>38</sup> Tr. 46:23–24.

officers filing past for help, but they ignored him.<sup>39</sup> Ou eventually found a colleague and friend who helped him.<sup>40</sup> They were targeted again with concussion grenades and ran for cover at a nearby bus depot.<sup>41</sup> Ou later received four stitches to close the wound on his head.<sup>42</sup>

Ou tried to continue reporting with a fellow journalist the next day<sup>43</sup> but was cautious and fearful. Ou saw that a lot of State Troopers were present while he was filming an ongoing demonstration near a highway.<sup>44</sup> Still shaken and afraid from the previous night's attack, Ou "pulled back" and "kept [his] distance."<sup>45</sup> He explained, "I didn't know how to act around the police or just law enforcement in general because what happened the night before really . . . caught me off guard and I just didn't know how they would react to us."<sup>46</sup>

Ou was not the only journalist severely injured during this attack on May 30. For example, Los Angeles Times reporters Molly Hennessy-Fiske and Carolyn Cole have filed their own standalone lawsuit against the State Patrol based on the significant injuries inflicted on them by the State Patrol that day. *See Complaint Cole, et al. v. Does, et al.*, Case No. 0:21-cv-01282 (PJS-JFD) (ECF No. 1) (filed May 25, 2021).

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<sup>39</sup> Pl. Ex. 14 at 3:46 – 3:51; Tr. 47:6–11.

<sup>40</sup> Tr. 48:3–6.

<sup>41</sup> Tr. 48:14–23.

<sup>42</sup> Tr. 49:7.

<sup>43</sup> Tr. 51:3–7.

<sup>44</sup> Tr. 51:13–25.

<sup>45</sup> Tr. 51:22–25.

<sup>46</sup> Tr. 52:2–6.

**II. State Defendants Destroyed Evidence and Falsified Reports Following the George Floyd Protests.**

The George Floyd protests lasted into the first week of June 2020. Plaintiffs filed this action on June 2, 2020,<sup>47</sup> and served State Defendants on June 3, 2020.<sup>48</sup> State Defendants filed their opposition on June 5, along with a Declaration from Colonel Langer.<sup>49</sup> Despite State Defendants’ duty to preserve potentially discoverable evidence triggered by the pending litigation, on or around June 7, 2020, Major Joseph Dwyer of the Minnesota State Patrol, who was at the protests and served as a commander of the Troopers’ Mobile Response Team,<sup>50</sup> along with “a vast majority”<sup>51</sup> of State Troopers, manually purged their emails and text messages related to the May 2020 protests.<sup>52</sup>

Dwyer testified:

Q. . . . You purged your records sometime immediately after the George Floyd protests, correct?

A. I deleted my e-mails and text messages, correct.

Q. . . . Do you know of anyone else who deleted their e-mails and text messages immediately after the George Floyd protests?

A. Yes, I do.

[ . . . ]

Q. Who else deleted their e-mails and text messages?

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<sup>47</sup> ECF No. 1.

<sup>48</sup> ECF No. 20.

<sup>49</sup> ECF No. 28.

<sup>50</sup> Tr. 210:10–11.

<sup>51</sup> Tr. 262:21–23.

<sup>52</sup> Tr. 259:17–260:10; 264:14–21.



A. So I will, I guess, offer speculation. I don't – didn't actually see them delete them, but I do believe a vast majority of the agency.<sup>53</sup>

Dwyer attempted to explain the mass destruction of evidence by characterizing it as a routine part of “a recommended practice” of the Minnesota State Patrol.<sup>54</sup> The purge was neither accidental, automated, nor routine.<sup>55</sup> The purge did not happen because of a file destruction or retention policy.<sup>56</sup> No one reviewed the purged communications before they were deleted to determine whether the materials were relevant to this litigation.<sup>57</sup>

The impact of this purge is compounded by the fact that during the protests Troopers were either directed not to complete use of force reports or told that such reports were not required.<sup>58</sup> Dwyer testified that, to his knowledge, after that instruction was given, not a single use of force report about the protests was completed.<sup>59</sup> The absence of both contemporaneous communications and documentation makes it nearly impossible to track the State Patrol's behavior, apparently by design.

The official reports that do exist are not credible. Major Dwyer personally completed an official summary report that he referred to as a “commander's report,”<sup>60</sup> in which he lied about the events of May 30, 2020. In that document, Dwyer reported that on May 30, 2020, Troopers were “taking large amounts of projectiles” hurled by a riotous

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<sup>53</sup> Tr. 262:4–23.

<sup>54</sup> Tr. 261:5–6; 262:2–3 (“It was a common practice through the agency, not just my records.”).

<sup>55</sup> Tr. 261:1–6.

<sup>56</sup> Tr. 263:10–17.

<sup>57</sup> Tr. 264:11–13.

<sup>58</sup> Tr. 266:3–18.

<sup>59</sup> Tr. 267:12–15.

<sup>60</sup> Tr. 267:16–19.

crowd before firing less-lethal weapons into the crowd.<sup>61</sup> He testified that this included rocks, bricks, fireworks, water bottles, glass bottles, construction debris, and metal.<sup>62</sup> Dwyer testified that the Troopers responded to the “large amounts” of incoming debris by issuing dispersal orders, followed by the use of munitions, and then the line of Troopers moved forward.<sup>63</sup> But the video that captured the event shows no construction debris, no water bottles, no rocks, no metal, and no spent fireworks prior to the issuance of the dispersal order, the use of less-lethal munitions, or the Troopers advancing on and assaulting the group of journalists huddled in the alcove.<sup>64</sup> When asked to explain, Dwyer retreated from the narrative in his report<sup>65</sup> and eventually admitted that State Defendants had developed a plan to disperse the crowd toward the Kmart parking lot to conduct a mass arrest even before the Troopers arrived on the scene.<sup>66</sup>

### **III. The State Patrol Targeted Journalists at the Daunte Wright Protests.**

Eerily echoing the George Floyd protests, the State Patrol again targeted journalists during the protests following the April 11, 2021 police killing of Daunte Wright. Plaintiffs were forced to return to this Court to seek emergency relief as the State Patrol continued its attacks on clearly-identifiable journalists—harassing and threatening them, forcing

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<sup>61</sup> Def. Ex. 7 at 3.

<sup>62</sup> *Id.*; Tr. 269:22–271:4.

<sup>63</sup> Tr. 271: 20–22.

<sup>64</sup> Pl. Ex. 14 at 0:25 – 1:11.

<sup>65</sup> Tr. 272:25–278:12.

<sup>66</sup> Tr. 278:15–280:11.

them to their knees to be photographed,<sup>67</sup> arresting them for no reason, and ordering them to disperse and cease their work.<sup>68</sup>

On the evening of Tuesday, April 13, 2021, State Troopers dispersed a protest outside the Brooklyn Center Police Department.<sup>69</sup> The Troopers' dispersal orders explicitly included members of the press although news media remained exempt from the curfew orders issued by Governor Walz and the Mayor of Brooklyn Center.<sup>70</sup> State Troopers commanded that "Media need to leave the area."<sup>71</sup>

Chris Tuite, a freelance journalist who was covering the protest, testified that State Troopers "started rushing, running after people, and . . . chased everyone down."<sup>72</sup> As Tuite observed, "the state troopers were . . . tackling people, grabbing them, saying, 'Get on the ground,' arresting people before they could actually disperse."<sup>73</sup> Tuite, along with photographer Josh McFadden attempted to leave, getting a ride with a Good Samaritan.<sup>74</sup> But State Troopers surrounded the car, weapons drawn, screaming "Get out of the vehicle, get out of the vehicle."<sup>75</sup> Tuite and McFadden, both wearing press badges and carrying

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<sup>67</sup> Pl. Exs. 1, 5, 6.

<sup>68</sup> Tr. 55:22–24, 56:17–19; 55:10-15; Tr. 117:5-10.

<sup>69</sup> Tr. 101:5–15.

<sup>70</sup> EMERGENCY EXECUTIVE ORDER 21-18, [https://mn.gov/governor/assets/EO%2021-18%20Final\\_tcm1055-476249.pdf](https://mn.gov/governor/assets/EO%2021-18%20Final_tcm1055-476249.pdf) (last visited Sept. 2, 2021); Liz Navratil & Katie Galioto, *Minneapolis, St. Paul, Brooklyn Center, other suburbs impose curfews after Wright killing, unrest*, STAR TRIBUNE (April 13, 2021), <https://www.startribune.com/minneapolis-st-paul-brooklyn-center-other-suburbs-impose-curfews-after-wright-killing-unrest/600045549/>.

<sup>71</sup> Tr. 101:16–18.

<sup>72</sup> Tr. 102:22–23.

<sup>73</sup> Tr. 103:20–23.

<sup>74</sup> Tr. 104:1–9.

<sup>75</sup> Tr. 104:9–12.

multiple cameras, yelled “Press!” at least 50 times.<sup>76</sup> Troopers nonetheless pulled them out of the car.<sup>77</sup>

One Trooper threw McFadden “up into the car.”<sup>78</sup> When asked why State Troopers treated McFadden more harshly, Tuite testified: “He did the same thing I did. All I can tell you is that I am white and he is black, and we are covering social justice protests.”<sup>79</sup> The State Troopers eventually released Tuite and McFadden, but their work that evening was over.<sup>80</sup> Tuite and McFadden were eventually escorted back to McFadden’s vehicle by National Guard Troops. Tr. 108:1–14. But they had to keep their arms raised and press credentials visible and were not able to engage in any reporting. Tr. 108:15–20.

State Troopers’ treatment of journalists only got worse as the protests continued. Shortly after 10 p.m. on April 16, 2021, State Troopers and other law enforcement agents moved in to arrest the protesters.<sup>81</sup> Tuite saw nothing that would justify a mass—or even an individual—arrest.<sup>82</sup> Instead, Tuite’s impression was that law enforcement acted solely to “quell future protests” and “scare people from coming back.”<sup>83</sup> The Troopers ordered Tuite to stop documenting the arrests in no uncertain terms: “Media, get the fuck out of

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<sup>76</sup> Tr. 104:12–19.

<sup>77</sup> Tr. 104:14–15.

<sup>78</sup> Tr. 104:15–16, 106:9–12.

<sup>79</sup> Tr. 108: 15–20.

<sup>80</sup> Tr. 107:9–11, 108:18–20.

<sup>81</sup> Tr. 112:3–8.

<sup>82</sup> Tr. 111:10–14.

<sup>83</sup> Tr. 111:11–23.

here now.”<sup>84</sup> Tuite briefly pushed back,<sup>85</sup> but multiple Troopers repeatedly, aggressively, and profanely ordered him to leave immediately.<sup>86</sup>

As Tuite was leaving, he saw a fellow journalist, Tim Evans, pinned to the ground by law enforcement.<sup>87</sup> Tuite stopped for a few seconds and photographed the encounter.<sup>88</sup> Seeing this, a Trooper grabbed Tuite from behind, pulling him with enough force to rip his shirt, and shouted, “You’re under arrest.”<sup>89</sup> Multiple Troopers then escorted Tuite away from the mass arrest.<sup>90</sup> One shouted directly in Tuite’s face, “What the fuck did you not hear? I told you to leave.”<sup>91</sup> Another Trooper “put pepper spray in [Tuite’s] face”<sup>92</sup> and told him, “You had your fucking free pass. What, are you stupid? We told you to fucking leave the area.”<sup>93</sup> Tuite was released outside the mass arrest area, but from this vantage point, he could not see much of anything because a line of Troopers “obstruct[ed] [journalists’] view completely of what was happening inside” the mass-arrest area.<sup>94</sup>

Eventually, Troopers forced Tuite and other journalists to “[g]o two blocks up to the gas station on the corner.”<sup>95</sup> From there, they could not document or even see the mass

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84 Tr. 116:6–7.  
 85 Tr. 117:8.  
 86 Tr. 117:5–10.  
 87 Tr. 117:11–16.  
 88 Tr. 117:11–16.  
 89 Tr. 117:18–20.  
 90 Tr. 117:22–25.  
 91 Tr. 118:3–4.  
 92 Tr. 118:4–5.  
 93 Tr. 118:5–6.  
 94 Tr. 118:14–17.  
 95 Tr. 119:16–22.

arrests.<sup>96</sup> Troopers ordered the journalists to “get into a line . . . [and] have [their] faces photographed, [their] media credentials, as well as [their] IDs.”<sup>97</sup> Tuite tried to take a photo, but a Trooper told him to “[g]et back in line. You are not allowed to document. Get back in line.”<sup>98</sup> Journalists were not allowed to leave until the State Patrol had finished photographing them.<sup>99</sup>

Tuite has covered protests and other news events across the United States.<sup>100</sup> In his experience, “The [Minnesota] state troopers . . . were by far the most aggressive and intimidating” law enforcement agency he has encountered.<sup>101</sup> Tuite testified that based on the State Patrol’s misconduct, “I didn’t feel safe. I didn’t feel that we would be allowed to do our jobs.”<sup>102</sup>

Nor did Ed Ou feel safe. In light of the attacks he suffered from Troopers during the George Floyd protests, he decided that for his own safety he would primarily cover the Daunte Wright protests from inside a family’s nearby apartment.<sup>103</sup> While he was in the apartment, he heard the State Patrol ordering the crowd to disperse and directing the media to leave.<sup>104</sup> Ou understood that the dispersal order did not apply to him, both because he was exempt from the curfew order and because he was conducting interviews and filming

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<sup>96</sup> Tr. 120:1–3.

<sup>97</sup> Tr. 120:5–7.

<sup>98</sup> Tr. 120:7–11.

<sup>99</sup> Tr. 120:17–19.

<sup>100</sup> Tr. 125:4–14.

<sup>101</sup> Tr. 125:18–19.

<sup>102</sup> Tr. 126:13–14.

<sup>103</sup> Tr. 55:7–15.

<sup>104</sup> Tr. 55:22–24, 56:17–19.

inside a private residence.<sup>105</sup> Again, law enforcement saw things differently. An officer – Ou could not identify which agency – threatened Ou through the window, pointing something at him and saying: “‘Go away, go away,’ like ‘Back off, back off.’”<sup>106</sup> Ou left, not wanting to put the apartment’s residents in jeopardy.<sup>107</sup> He then put his camera down and stayed out of sight because he was afraid that he would again be attacked without being in the way of law enforcement.<sup>108</sup> Ou was incredulous that law enforcement believed they could order him to stop working in a private home: “. . . in what open, free society would the police tell me that I couldn’t be in someone’s private property at that moment?”<sup>109</sup>

In one particularly egregious incident involving the State Patrol, State Troopers assaulted and arrested CNN producer Carolyn Sung even though Sung had repeatedly identified herself as a member of the press. Troopers threw her to the ground unprovoked and yelled at her – Sung is an Asian-American – “DO YOU SPEAK ENGLISH?!”<sup>110</sup>

According to Sung’s lawyer:

Sung, whose primary language is English, was placed in a prisoner-transport bus and sent to the Hennepin County Jail, where she was patted down and searched by a female officer who put her hands down Sung’s pants and in her bra, fingerprinted, electronically body-scanned, and ordered to strip and put on an orange uniform before attorneys working on her behalf were able to locate her and secure her release, a process that took more than two hours.<sup>111</sup>

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<sup>105</sup> Tr. 60:1–9.

<sup>106</sup> Tr. 60:10–19.

<sup>107</sup> Tr. 60:12–19, 61:10–62:6.

<sup>108</sup> ECF No. 123, ¶ 28.

<sup>109</sup> Tr. 87:20–22.

<sup>110</sup> Riach Dec. Ex. B.

<sup>111</sup> Riach Dec. Ex. B.

Again, as with Dwyer's fabricated report about the events of May 30, 2020, State Troopers lied in their official reports about Sung to justify their misconduct. Specifically, Sgt. Andrew Derungs of the State Patrol wrote in the Statement of Probable Cause used to detain Sung:

Sung defied several dispersal orders (four) in the City of Brooklyn Center and was part of an antagonistic crowd outside the Brooklyn Center Police Dept. Sung was actively defiant, refused to leave the area, participated in vandalizing and rioting activity and ultimately had to be restrained by several officers.<sup>112</sup>

These *sworn* statements by Derungs were wholly, knowingly false and a fabricated pretext to arrest and detain Sung in violation of the First Amendment.<sup>113</sup> Sung was not violent, defiant, part of an antagonistic crowd, or a participant in any rioting or vandalizing. She was reporting.

Dwyer testified about Sung at the hearing and sought to minimize the constitutional violations inflicted on her, claiming she had been briefly detained then reunited with her reporting team.<sup>114</sup> Again, this was patently untrue. The knowingly false statements made by State Patrol leaders in official reports, from Dwyer's report on the May 30, 2020 incident to the arrest of Carolyn Sung in April 2021, suggest a deeply embedded culture of mendacity at the agency that is highly troubling.

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<sup>112</sup> Riach Dec. Ex. C.

<sup>113</sup> See Riach Dec. Ex. B at 2.

<sup>114</sup> Tr. 290:16-294:13



#### **IV. State Defendants Have Buried Their Heads In the Sand Regarding State Troopers' Misconduct.**

State Defendants have not held State Troopers accountable or even investigated episodes of well-documented and outrageous misconduct. John Harrington, the Minnesota Commissioner of Public Safety, is a cabinet-level official who reports directly to the Governor.<sup>115</sup> He oversees the Minnesota State Patrol and other law enforcement and public safety agencies in the state.<sup>116</sup> Also under his command is the Internal Affairs Division of the Department of Public Safety, a division separate from the State Patrol.<sup>117</sup> He testified, “We believe that an independent review of cases brought where there was an allegation of misconduct ensures an independent and thorough investigation. We also believe it increases the transparency for the public when they have a complaint about any member of the Department of Public Safety staff.”<sup>118</sup>

Despite this lofty statement, Commissioner Harrington confirmed that virtually nothing has been done to hold anyone accountable for the misconduct related to the George Floyd or Daunte Wright protests, even when the misconduct was broadcast live on national television and well known to state leaders. Nor have State Defendants been transparent, as their leaders destroyed information that would have shed light on the conduct of the State Troopers.

Specifically, Commissioner Harrington testified that:

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<sup>115</sup> Tr. 147:15–18.

<sup>116</sup> Tr. 149:4–12.

<sup>117</sup> Tr. 149:13–18.

<sup>118</sup> Tr. 149:20–25.

1. No Minnesota State Patrol trooper has been disciplined for arresting a journalist;<sup>119</sup>
2. No Minnesota State Patrol trooper has been disciplined for using force against a journalist;<sup>120</sup> and
3. No Minnesota State Patrol trooper has been disciplined for using chemical weapons against a journalist.<sup>121</sup>

When CNN reporter Omar Jimenez and his crew were arrested live on national television,<sup>122</sup> Governor Walz apologized, taking responsibility for the misconduct. He said that if community members see “a reporter being arrested, their assumption is something's going to happen that they don't want to be seen so that is unacceptable. The protection and security and safety of journalists covering this is a top priority, not because it's a nice thing to do, but because it is a key component of how we fix this.”<sup>123</sup>

Commissioner Harrington testified that he did not recall seeing the video of Omar Jimenez's arrest on May 30, 2020 and that he did not recall the arrest,<sup>124</sup> but that he did recall clearly hearing from Governor Walz “his displeasure at having news media arrested.”<sup>125</sup> Commissioner Harrington professed concern about the arrests of journalists,

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<sup>119</sup> Tr. 185:19–22.

<sup>120</sup> Tr. 185:23–186:1.

<sup>121</sup> Tr. 186:2–5.

<sup>122</sup> Michael M. Gynbaum & Marc Santora, *CNN Crew Is Arrested on Live Television While Covering Minneapolis Protests*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/business/media/cnn-reporter-arrested-omarjimenez.html>.

<sup>123</sup> MINNESOTA GOVERNOR: I TAKE FULL RESPONSIBILITY FOR CNN ARRESTS (May 29, 2020), <https://www.cnn.com/videos/us/2020/05/29/minnesota-governor-tim-walz-omar-jimenez-arrest-vpx.cnn> (last visited Sept. 2, 2021).

<sup>124</sup> Tr. 187:21–188:2.

<sup>125</sup> Tr. 188:14–19.

testifying that “even in the context of what was a fairly massive amount of civil unrest, it still was concerning that it happened,”<sup>126</sup> but he also testified that no internal investigation had been conducted concerning Jimenez’s arrest.<sup>127</sup> Commissioner Harrington’s rationale for the lack of any investigation of this internationally notorious event was that CNN did not file a formal complaint.<sup>128</sup> The agency’s failure to conduct even a cursory investigation of this unconstitutional arrest – which was so obvious and extreme it required an immediate apology from Governor Walz on national television – speaks volumes about its lack of seriousness with respect to addressing the misconduct against journalists by State Troopers.

When shown a video of Jimenez’s arrest<sup>129</sup> and asked if it was consistent with the Department’s Principle Two, Rule 4: “Peace officers shall take no action knowing it will violate the constitutional rights of any person,” Commissioner Harrington demurred, saying he did not know the full context of the incident.<sup>130</sup> And when asked whether any State Trooper had reported the arrest, as required by Department Rule 6, he stated that no Trooper had done so.<sup>131</sup> And still no Trooper has been disciplined for failing to make a report or for knowingly violating the constitutional rights of journalists.<sup>132</sup>

Unfortunately, nearly a year after the George Floyd protests and the day after the TRO issued, Governor Walz again had to apologize for law enforcement’s mistreatment of

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<sup>126</sup> Tr. 189:15–16.

<sup>127</sup> Tr. 189:24–190:1.

<sup>128</sup> Tr. 189:21–23.

<sup>129</sup> Pl. Ex. 68.

<sup>130</sup> Tr. 196:17–197:3

<sup>131</sup> Tr. 197:12–22.

<sup>132</sup> Tr. 185:19-186:5; 197:12–22.

journalists in Brooklyn Center, stating that such misconduct is “unacceptable in every circumstance.”<sup>133</sup> He continued, “Democracy cannot thrive without a free and fair and safe press. . . . These individual incidents will be looked into. They just need to make sure they don't happen in the first place.”<sup>134</sup>

Yet contrary to the lip service paid by State Defendants to the Constitution and their written policies professing to uphold it, they have not demonstrated an understanding of or respect for media and press protections under the First Amendment. Rather, they have failed to investigate or discipline the State Troopers who committed egregious and flagrantly illegal acts, instead relying on falsehoods and after-the-fact rationalizations, and promoting the leaders who oversaw the misconduct.

#### **V. State Troopers and Other Law Enforcement Agencies Continue to Respond to Protests.**

When Plaintiffs filed their motion for preliminary injunction on May 5, 2021, the Twin Cities were in a moment of relative quiet. That tense calm was broken on June 3, 2021, when Hennepin County Sheriff's deputies shot and killed Winston Smith, a Black man, in the Uptown area of Minneapolis.<sup>135</sup> Protests erupted and have continued ever since.

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<sup>133</sup> Ryan Faircloth, *Gov. Tim Walz calls assault, detention of journalists covering protests 'unacceptable'*, STARTRIBUNE (Apr. 17, 2021), [https://www.startribune.com/gov-tim-walz-calls-assault-detention-of-journalists-covering-protests-unacceptable/600047293/?utm\\_campaign=04\\_25\\_2021&utm\\_medium=email&utm\\_source=tpfp\\_newsletter&utm\\_content=star\\_tribune\\_article](https://www.startribune.com/gov-tim-walz-calls-assault-detention-of-journalists-covering-protests-unacceptable/600047293/?utm_campaign=04_25_2021&utm_medium=email&utm_source=tpfp_newsletter&utm_content=star_tribune_article).

<sup>134</sup> *Id.*

<sup>135</sup> MPR News Staff, *Vigil, protests held over man killed by Minnesota deputies*, MPR NEWS (June 5, 2021), <https://www.mprnews.org/story/2021/06/05/protest-erupts-again-over-man-killed-by-minnesota-deputies>.

Indeed, several events in Uptown, such as the Uptown Art Fair and Greek Fest, have been canceled because of the expectation of continued “unrest” in the area.<sup>136</sup>

The ongoing protests are no longer limited to Minneapolis, Brooklyn Center, or even Hennepin County. Just last week, protests against the Enbridge Pipeline, Line 3, and against mandatory masking took place on the grounds of the State Capitol in St. Paul.<sup>137</sup> The Line 3 protest, which started on Tuesday, August 24, 2021, continued into Friday, August 27, when law enforcement—including Minnesota State Patrol—began arresting protesters to make way for the anti-mask protest scheduled for following day.<sup>138</sup> The Line 3 protests drew more than 2,000 protesters.<sup>139</sup> Before the protests, State Defendants temporarily closed the Capitol building and constructed a security fence around the property.<sup>140</sup> Hundreds of law enforcement officers, including agents of the State

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<sup>136</sup> *Minneapolis Greek Festival cancels 2021 event due to Uptown unrest*, FOX9 (Aug. 6, 2021), <https://www.fox9.com/news/minneapolis-greek-festival-cancels-2021-event-due-to-uptown-unrest>; Susan-Elizabeth Littlefield, *‘We Need Art’: Artists, Organizers Lament Cancellation of Uptown Art Fair*, WCCO (July 7, 2021), <https://minnesota.cbslocal.com/2021/07/07/we-need-art-artists-organizers-lament-cancellation-of-uptown-art-fair/>.

<sup>137</sup> Melissa Turtinen, *Planned demonstrations prompt State Capitol to close to the public*, BRING ME THE NEWS (Aug. 24, 2021), <https://bringmethenews.com/minnesota-news/planned-demonstrations-prompt-state-capitol-to-close-to-the-public>.

<sup>138</sup> Tim Pugmire, *Line 3 protesters removed from Minnesota Capitol grounds, 4 arrested*, MPR NEWS (Aug. 27, 2021), <https://www.mprnews.org/story/2021/08/27/line-3-protesters-arrested-on-minnesota-capitol-grounds>.

<sup>139</sup> Zoe Jackson & Mike Hughlett, *2,000 protest Line 3 at Minnesota Capitol*, STARTRIBUNE (Aug. 25, 2021), <https://www.startribune.com/2-000-protest-line-3-at-minnesota-capitol/600090928/>.

<sup>140</sup> Melissa Turtinen, *Planned demonstrations prompt State Capitol to close to the public*, BRING ME THE NEWS (Aug. 24, 2021), <https://bringmethenews.com/minnesota-news/planned-demonstrations-prompt-state-capitol-to-close-to-the-public>.

Defendants, guarded the Capitol grounds, donning riot gear.<sup>141</sup> And there will surely be protests keyed to the upcoming trial of Kim Potter, who killed Daunte Wright, which is scheduled to begin in November 2021<sup>142</sup> and the trials of the three former officers complicit in George Floyd’s murder scheduled for early 2022.<sup>143</sup>

Thus, intermittent protests will continue in the Twin Cities for the foreseeable future. Fortunately, the TRO has curbed State Patrol attacks on the press covering these protests. But testimony adduced at the July 28 hearing reinforces that the Court’s continued intervention is as necessary today as it was the day it issued its TRO. The Court should convert its TRO into a preliminary injunction to remain in effect through final determination of this matter.

## ARGUMENT

### **I. Plaintiffs Are Entitled to an Adverse Inference as to the Purged Emails and Text Messages.**

Days after being served with this lawsuit, the “vast majority” of the State Defendants’ agents manually purged all of their emails and text messages, including those related to and sent during the May 2020 protests. This purge was not done automatically

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<sup>141</sup> Zoe Jackson & Mike Hughlett, *2,000 protest Line 3 at Minnesota Capitol*, STARTRIBUNE (Aug. 25, 2021), <https://www.startribune.com/2-000-protest-line-3-at-minnesota-capitol/600090928/>.

<sup>142</sup> Tommy Wiita, *Former officer who fatally shot Daunte Wright to have trial start on Nov. 30*, KSTP (Aug. 5, 2021), <https://kstp.com/news/trial-for-former-brooklyn-center-police-officer-kim-potter-who-fatally-shot-daunte-wright-moved-up-one-week-to-start-on-november-30-2021/6197886/>.

<sup>143</sup> Alexandra Simon, *Trial date set for three other officers charged in George Floyd’s murder*, KARE11 (June 13, 2021), <https://www.kare11.com/article/news/local/george-floyd/trial-date-set-thao-lane-kueng-george-floyd/89-5499cd10-64a6-4583-a42f-edd136bda42d>.

or pursuant to any file destruction or retention policy. And it was not done after a careful review to ensure that records relevant to this case were preserved. Rather, as Dwyer testified, the “vast majority” of the State Defendants’ agents simply decided that shortly after the May 2020 protests and the initiation of this lawsuit was a good time to “delete their e-mail basket and then go into another layer of the deleted folders and then remove [the e-mails] from that server.”<sup>144</sup> As a result, Dwyer and the vast majority of the State Defendants’ agents do not possess any text or email messages predating June 8, 2020. This spoliation of evidence entitles Plaintiffs to an adverse inference under Federal Rule of Civil Procedure 37(e) and the Court’s inherent authority to govern discovery. *See Cenveo Corp. v. S. Graphic Sys., Inc.*, No. CIV. 08-5521 (JRT/AJB), 2010 WL 3893680, at \*9 (D. Minn. June 18, 2010), *report and recommendation adopted*, No. CIV. 08-5521 (JRT/AJB), 2010 WL 3893709, at \*4 (D. Minn. Sept. 30, 2010).

**A. State Defendants Committed Spoliation of Evidence by Purging Discoverable Records After Notice of this Lawsuit.**

“Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.” *Nicollet Cattle Co., Inc. v. United Food Grp., LLC*, No. CIV. 08-5899 (JRT/FLN), 2010 WL 3546784, at \*4 (D. Minn. Sept. 7, 2010) (citation omitted). When faced with potential spoliation, the Court must initially determine when the duty to preserve evidence was triggered. *E\*Trade Sec. LLC v. Deutsche Bank AG*, 230 F.R.D. 582, 587 (D.

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<sup>144</sup> Tr. 261:18–21, 263:10–24.

Minn. 2005). “The obligation to preserve evidence begins when a party knows or should have known that the evidence is relevant to future or current litigation.” *Id.* at 588.

Major Dwyer admitted that he was aware of the current litigation when he, and other agents of State Defendants, purged their e-mail inboxes and text messages on or about June 7, 2020.<sup>145</sup> Plaintiffs filed this lawsuit on June 2, 2020 (ECF No. 1), and by June 5, 2020, State Patrol Col. Matthew Langer had already filed a declaration in this case (ECF No. 28). Because State Defendants purged their records after the duty to preserve was triggered, Plaintiffs need only show that the State Defendants “destroyed potential evidence, that the evidence was discoverable, and that the loss of evidence prejudiced the [Plaintiffs].” *Nicollet Cattle Co.*, 2010 WL 3546784, at \*4. Plaintiffs “need not demonstrate bad faith or willful intent to destroy.” *E\*Trade Sec. LLC*, 230 F.R.D. at 589; *The Valspar Corp. v. Millennium Inorganic Chems., Inc.*, No. CIV. 13-3214 (ADM/LIB), 2016 WL 6902459, at \*9 (D. Minn. Jan. 20, 2016) (“When the destruction of evidence occurs after the duty to preserve documents is triggered, the Court may impose an adverse inference instruction without making a finding of bad faith.”).

Major Dwyer’s testimony establishes that State Defendants committed spoliation of evidence. First, it is undisputed that the State Defendants purged e-mails and text messages that contained evidence relevant to State Defendants’ conduct during the May 2020 protests.<sup>146</sup> Second, the purged evidence was discoverable. In May 2020, Dwyer was a

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<sup>145</sup> Tr. 264:14–21.

<sup>146</sup> Tr. 262:4–23.



captain and commander of the Minnesota State Patrol's Mobile Response Team.<sup>147</sup> He testified that he used his iPhone to take photos during the protests,<sup>148</sup> and that he communicates with his supervisors via cell phone when out in the field.<sup>149</sup> In interrogatory responses, State Defendants confirmed that State Troopers communicated via telephone and email during the George Floyd protests.<sup>150</sup> Yet Dwyer testified that he deleted all of his contemporaneous text messages and emails<sup>151</sup> related to the protests, and that he did so without due regard for the relevance of the subject records.<sup>152</sup> Dwyer's personal conduct resulted in the destruction of relevant records. That the "vast majority" of the Department's agents also destroyed e-mails and text messages directly related to this case only makes matters worse.

Plaintiffs are prejudiced by the loss of the purged records. Yet, while "[t]he party moving for sanctions bears the burden of demonstrating prejudice," "the burden placed on the moving party to show that lost evidence would have been favorable to it ought not be too onerous, lest the spoliator be permitted to profit from its destruction." *The Valspar Corp.*, 2016 WL 6902459, at \*6 (citation omitted). Here, "[t]he requisite element of prejudice is satisfied by the nature of the evidence destroyed in this case." *Stevenson v. Union Pacific R. Co.*, 354 F.3d 739, 748 (8th Cir. 2004). These deleted emails and text

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<sup>147</sup> Tr. 210:4–11.

<sup>148</sup> Tr. 213:23–214:2.

<sup>149</sup> Tr. 296:18–23.

<sup>150</sup> Riach Dec. Ex. D at 4.

<sup>151</sup> Tr. 256:10–17, 262:4–23.

<sup>152</sup> Tr. 264:8–13 (testifying that nobody reviewed the deleted records to determine whether they were relevant to this case).

messages would have provided evidence of the Troopers' coordination, plans, and strategy concerning the media during the protests, a material component of Plaintiffs' case. Therefore, there is a "reasonable probability that the loss of the evidence . . . has materially prejudiced the plaintiffs in their case against" the State Defendants. *E\*Trade Sec. LLC*, 230 F.R.D. at 592. This "substantial and complete nature of the destruction of the evidence . . . justifies a finding of prejudice." *Id.*

**B. Plaintiffs Are Entitled to Adverse Inferences.**

When spoliation occurs, the Court "may draw the inference that [the] evidence destroyed was unfavorable to [the] party responsible for its spoliation." *E\*Trade Sec. LLC*, 230 F.R.D. at 587; *id.* at 586. The Court should draw the following adverse inferences against State Defendants based on their spoliation of relevant e-mails and text messages:

1. That communications between State Patrol personnel evinced hostility toward members of the media and that such hostility motivated their treatment of the press;
2. That the State Patrol's use of force against journalists and protesters on May 30, 2020 was pre-planned, willful and not triggered by debris or other items being thrown at law enforcement;
3. That the State Patrol's conduct was motivated by Plaintiffs' and other journalists' exercise of their First Amendment rights; and
4. That the State Patrol's destruction of emails and text messages after the George Floyd protests was an attempt to cover up their unlawful conduct.

## II. Plaintiffs Satisfy the *Dataphase*<sup>153</sup> Factors.

### A. Plaintiffs Remain Likely to Succeed on the Merits.

The Court has held that Plaintiffs are likely to prevail on the merits of both their First and Fourth Amendment claims.<sup>154</sup> The testimony elicited at the preliminary-injunction hearing on July 28, 2021, reinforces what the Court has already concluded.

#### 1. First Amendment Claims

“[T]he First Amendment prohibits government officials from subjecting an individual [engaged in protected activity] to retaliatory actions.” *Peterson v. Kopp*, 754 F.3d 594, 602 (8th Cir. 2013) (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006)).

Ed Ou covered the May 2020 protests as a staff journalist with NBC News.<sup>155</sup> While on the job, engaged in protected First Amendment activity, State Troopers retaliated against him by launching a concussion grenade which exploded in front of face, and pepper spraying him directly in the face.<sup>156</sup> Naturally, State Defendants’ behavior had a chilling effect on Ou. When he went out the next day to continue reporting, he was scared and shaken by the events of the day before and unsure how to act.<sup>157</sup>

The chill was not short lived. Ou returned to Minnesota to cover the Chauvin trial and April 2021 protests.<sup>158</sup> Instead of directly documenting the protests, Ou “stayed back” in a nearby apartment. He did so *because* he “just really didn’t want to get targeted, so I

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<sup>153</sup> *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981).

<sup>154</sup> ECF No. 105, at 12, 13.

<sup>155</sup> Tr. 20:12–16.

<sup>156</sup> Tr. 29:9–19.

<sup>157</sup> Tr. 51:9–52:8.

<sup>158</sup> Tr. 53:23–54:7.

decided to be somewhere safer.”<sup>159</sup> Plaintiffs have thus established that first two elements of their First Amendment claim. *Peterson*, 754 F.3d at 602.

That State Defendants’ unconstitutional conduct was motivated, at least in part, by Plaintiffs’ exercise of their First Amendment rights is established by the overwhelming evidence already before this Court. Further evidence to support this element was provided at the preliminary injunction hearing. For example, Dwyer, who personally briefed the troopers before they deployed on May 30, did not instruct troopers that media were exempt from the 2020 curfew order.<sup>160</sup> Dwyer’s disinterest in protecting media is indicative of his motivation. Ou testified that he was easily recognizable as a journalist—wearing an NBC press pass and carrying professional equipment, was grouped with other recognizable journalists, and standing away from any protesters.<sup>161</sup> There was no reason for Troopers to attack him and his colleagues except that they were press doing their jobs.

State Defendants’ response to the Brooklyn Center protests was also motivated by retaliation. Troopers issued repeated orders specifically directing the press to leave the area.<sup>162</sup> Tuite testified that he was easily recognizable as press and that Troopers ordered him to cease his reporting. Tuite testified that as he was photographing an arrest, a Trooper ordered: “Media, get the fuck out of here now.”<sup>163</sup> Later in the evening as Tuite was waiting for his face and identification to be photographed by Troopers, a Trooper prohibited him

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<sup>159</sup> Tr. 55:14–15.

<sup>160</sup> Tr. 281:15–282:21

<sup>161</sup> Tr. 20:15–18; 22:4–9.

<sup>162</sup> Tr. 101:17–18.

<sup>163</sup> Tr. 116:6–7.

from photographing the scene, “Get back in line. You are not allowed to document. Get back in line.”<sup>164</sup> The images Tuite captured before being sent away from the area paint a grim and telling picture of State Defendants’ disregard for the First Amendment and its protections for freedom of the press:



See Pl. Ex. 1 (depicting press with visible credentials and equipment in kettle).<sup>165</sup>

But the best evidence of State Defendants’ motivation for their conduct was intentionally destroyed while this litigation was pending. Given State Defendants’ spoliation of evidence, *see* Argument, Section I, *supra*, Plaintiffs are entitled to an adverse inference that State Defendants’ conduct was motivated by the press’s First Amendment

<sup>164</sup> Tr. 120:7–11.

<sup>165</sup> Tr. 119:4–6 (admitting Ex. 1).

activities. Even without this inference, Plaintiffs have again established that they are likely to succeed on the merits.<sup>166</sup>

## 2. Fourth Amendment Claims

Plaintiffs are also likely to succeed on the merits of their Fourth Amendment claims. The Fourth Amendment protects individuals from seizure through the use of excessive force by a law enforcement officer. *See Graham v. Connor*, 490 U.S. 386, 394-95 (1989). State Defendants violated the Fourth Amendment by launching pain-inducing chemicals, impact munitions, and flash-bang munitions at visually identifiable journalists, intentionally pepper spraying (or threatening to spray) journalists in the face, issuing sharply-worded commands and threats to media to leave the area, sneering that press exhausted their “free pass,” ignoring pleas for help, and more.<sup>167</sup> Each of these uses of force constitutes an unreasonable restraint on “the movement of the press throughout the protests,”<sup>168</sup> and a gross violation of their Fourth Amendment rights to be free from unreasonable seizure and excessive force.

### B. The Threat of Irreparable Harm Is Real and Ongoing.

In its TRO, the Court correctly recognized that the threat of irreparable harm to Plaintiffs is real. “The harm is no longer speculative or a mere possibility. Rather, the

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<sup>166</sup> The Court has already correctly determined that Plaintiffs established the only remaining element of their First Amendment claim: that State Defendants’ conduct was motivated, at least in part, by Plaintiffs’ exercise of their First Amendment rights. *Peterson*, 754 F.3d at 602. The intentional destruction of relevant evidence only bolsters the Court’s conclusion.

<sup>167</sup> Tr. 29:9–19, 41:17–25, 47:6–11, 56:17–19, 60:12–15, 104:9–19, 108:1–20, 116:6–7, 117:17–20, 118:3–6, 120:5–11.

<sup>168</sup> ECF No. 105, at 13.

protests have continued and the harm exists.”<sup>169</sup> This is undeniable. If the Twin Cities metro area has learned any lesson in the last sixteen months, it is that protests will endure.

“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Plaintiffs have demonstrated several instances of deprivation of their First Amendment rights, establishing imminent harm. Contrary to State Defendants’ assertion that “the violence in Brooklyn Center is over and no current large-scale unrest situations are imminent,”<sup>170</sup> protests continue and are not likely to abate. As described above, there have been large-scale protests as recently as the week of August 23, 2021, and more are expected as the trials for the police murders of George Floyd and Daunte Wright approach. These are just the events that can be predicted today. The unfortunate reality is that no one can predict when more will occur.

The Court’s TRO is working. Despite continuing demonstrations, the targeting and attacks on the press that prompted Plaintiffs to seek emergency relief from this Court have not recurred. This too favors the Court’s continued intervention. To strip away the protection of the TRO, when it is working as intended, would be “throwing away your umbrella in a rainstorm because you are not getting wet.” *Shelby Cty. v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J. dissenting).

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<sup>169</sup> ECF No. 105, at 14–15.

<sup>170</sup> ECF No. 143, at 40.

**C. The Public Interest and the Balance of Harms Favor Plaintiffs.**

It serves the public interest to convert the TRO into a preliminary injunction. At stake are not only Plaintiffs' First Amendment and Fourth Amendment rights, but the public interest because "[w]hen reporting on government conduct, the press serves as 'surrogates for the public.'"<sup>171</sup> Thus, what is in the press's interests is necessarily in the public's interest. And "it is always in the public interest to prevent the violation of a party's constitutional rights."<sup>172</sup> Accordingly, the public interest strongly favors the Plaintiffs.

The balance of harms also favors Plaintiffs. As the Court has already held, "When, as here, a plaintiff raises a legitimate constitutional question, the balance of hardships tips sharply in the plaintiff's favor."<sup>173</sup> Considering the evidence before the Court, "Plaintiffs have demonstrated both irreparable harm and likelihood of success on the merits of their First and Fourth Amendment claims."<sup>174</sup> Plaintiffs have raised legitimate constitutional questions, tipping the scale sharply in their favor. Conversely, there is no harm to State Defendants in simply complying with the Constitution. State Defendants claim that "[a] preliminary injunction in this matter would also be difficult to implement."<sup>175</sup> But State Defendants have shown over the past several months that they are able to do so.

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<sup>171</sup> ECF No. 105, at 7 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980)).

<sup>172</sup> *Id.* at 16 (quoting *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)).

<sup>173</sup> *Id.* at 15 (citing *Cnty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007)).

<sup>174</sup> *Id.* at 16.

<sup>175</sup> ECF No. 143, at 42.



### III. The Court Should Convert Its TRO into a Preliminary Injunction with Two Modifications.

The TRO has been in effect since in April 2021, and despite continued protests in the Twin Cities, State Defendants have complied with the Court’s Order, demonstrating that the TRO is both effective and workable,<sup>176</sup> despite their alleged concerns about protestors pretending to be journalists.<sup>177</sup>

Plaintiffs seek just two modifications to the existing TRO: broadening it to beyond Brooklyn Center and incorporating the “in active concert” language of Fed. R. Civ. P. 65(d).

First, the TRO requires that State Defendants provide copies of the TRO to “all employees, officers, and agents of the State Defendants *currently deployed in Brooklyn Center, MN.*”<sup>178</sup> As Commissioner Harrington testified, the Department of Public Safety and the Minnesota State Patrol are statewide agencies, whose personnel could be deployed anywhere in the state.<sup>179</sup> Indeed, protests have spread beyond Minneapolis, Brooklyn Center, and Hennepin County in recent weeks.<sup>180</sup> For this reason, Plaintiffs respectfully request that any preliminary injunction issued not be limited to Brooklyn Center.

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<sup>176</sup> The Minnesota Board of Peace Officer Standards and Training (“POST Board”) agrees that the TRO is a workable standard, having in large part incorporated it into a model policy governing public assemblies and the First Amendment using substantially identical language. The model policy, admitted as Court Exhibit 71, is being advanced for review as a mandatory policy for Minnesota law enforcement agencies. *See* MINNESOTA BOARD OF PEACE OFFICER STANDARDS TRAINING, JULY 22, 2021 BOARD MEETING AGENDA, <https://dps.mn.gov/entity/post/meetings/Documents/Board%20Agenda%20and%20Materials%207-22-21.pdf> (last visited Sept. 2, 2021).

<sup>177</sup> Tr. 308:16–309:8.

<sup>178</sup> ECF No. 105, at 21–22, ¶ 6 (emphasis added).

<sup>179</sup> Tr. 148:21–23, 151:18–19, 153:17–154:1.

<sup>180</sup> *See* Facts, Section V, *supra*.

Second, Plaintiffs respectfully submit that if the Court enters a Preliminary Injunction, it should incorporate the “in active concert or participation” language of Fed. R. Civ. P. 65(d)(2)(c). In pertinent part, the Rule provides:

*Persons Bound.* The [injunction] binds only the following who receive actual notice of it by personal service or otherwise:<sup>[181]</sup>

- (A) the parties;
- (B) the parties’ officers, agents, servants, employees, and attorneys; and
- (C) other persons who are *in active concert or participation* with anyone described in Rule 65(d)(2)(A) or (B).

(emphasis added). “The essence of this rule is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not” the subject of the injunctive proceedings. *Indep. Fed’n of Flight Attendants v. Cooper*, 134 F.3d 917, 920 (8th Cir. 1998).

Plaintiffs ask for a recitation of Rule 65(d)(2) in the body of the Court’s Order in recognition that various agencies work with State Defendants because, in some cases, an event is “too big for any one department to be able to handle on its own.”<sup>182</sup> A reference to Rule 65(d)(2) is well founded in light of Commissioner Harrington’s testimony that Operation Safety Net is a “unified command [that] brings the senior staffs of [the several law enforcement agencies that comprise it] together so that they can *work in concert and in a coordinated fashion*,”<sup>183</sup> and the State Defendants’ acknowledgement that “[t]his

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<sup>181</sup> Plaintiffs have served all known agencies that may have acted in concert with State Defendants actual notice of the injunction, including a copy of the Court’s TRO, and will do the same with the Court’s Order should it issue a Preliminary Injunction.

<sup>182</sup> Tr. 172:2–3.

<sup>183</sup> Tr. 172:10–11 (emphasis added); *see also* Tr. 240:23–25 (describing Minnesota State Patrol working with its Operation Safety Net partners “cooperatively, [and]

TRO, while issued against DPS/MSP, is a declaration of what the law is in Minnesota more broadly, and therefore all OSN and law-enforcement partners must comply with it.”<sup>184</sup>

### **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that the Court convert its TRO into a Preliminary Injunction lasting through final resolution of this case with only the modifications described above.

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collaboratively”), 219:16–17 (describing Minnesota State Patrol working with Minneapolis Police Department to effect mass arrest on May 30, 2020).

<sup>184</sup> ECF No. 121-1, at 40.

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