STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF HENNEPIN **FOURTH JUDICIAL DISTRICT**

State of Minnesota,

Plaintiff,

vs.

ORDER AND MEMORANDUM OPINION ON DEFENDANTS' MOTIONS TO DISMISS AND AMENDED SCHEDULING ORDER

Kandace Montgomery,	27-CR-15-1304
Nekima Levy-Pounds,	27-CR-15-1307
Michael McDowell,	27-CR-15-1320
Catherine Salonek,	27-CR-15-1326
Todd Dahlstrom,	27-CR-15-1331
Adja Gildersleve,	27-CR-15-1335
Amity Foster,	27-CR-15-1346
Jie Wronski-Riley,	27-CR-15-1349
Shannon Bade,	27-CR-15-1350
Mica Grimm,	27-CR-15-1829
Pamela Twiss,	27-CR-15-2766
Kimberly Ann Socha,	27-CR-15-3068
Dakota Ryan Machgan,	27-CR-15-3069
Rose Marie Meyer,	27-CR-15-3072
Nakami Faridah Tongrit-Green,	27-CR-15-3073
Mautaui Kakemwa Alima Tongrit-Green,	27-CR-15-3074
Rahsaan Hansraj Mahadeo,	27-CR-15-3144
Tamera Janae Larkins,	27-CR-15-3491
Andrew Jared Edwards,	27-CR-15-3492
Benjamin Michael Painter,	27-CR-15-3493
Christopher Mark Juhn,	27-CR-15-3494
Imani Christian McCray,	27-CR-15-3495
Aaron Lamar Abram,	27-CR-15-3496
Tadele Kelemework Gebremedin,	27-CR-15-3497
Dua Safaldien Saleh,	27-CR-15-3582
Emmett James Doyle,	27-CR-15-3583
Madeline Cady Jacobs,	27-CR-15-3586
Roxxanne Leigh Rittenhouse, and	27-CR-15-3602
Sarah Jean Gieseke,	27-CR-15-4953

Defendants.

The above-entitled matter came before the undersigned Judge of District Court on September 15, 2015, on motions to dismiss filed by all of the above-named Defendants in the referenced cases with the exceptions of Defendants Rose Marie Meyer (27-CR-15-3072) and Benjamin Michael Painter (27-CR-15-3493), who did not file motions seeking dismissal.

Sandra Johnson, Bloomington City Attorney, and Torrie Schneider, Heather Magnuson, and Jennifer Cross, Assistant Bloomington City Attorneys, appeared on behalf of the State.

Scott Flaherty and Teresa Nelson appeared on behalf of Defendant Kandace Montgomery.

Jordan Kushner appeared on behalf of Defendants Nekima Levy-Pounds, Michael McDowell, Catherine Salonek, Adja Gildersleve, and Rose Marie Meyer.

Nekima Levy-Pounds appeared as co-counsel on her own behalf.

Bruce Nestor appeared on behalf of Defendants Todd Dahlstrom, Jie Wronski-Riley, Amity Foster, Shannon Bade, and Mica Grimm.

Larry Leventhal appeared on behalf of Defendant Pamela Twiss.

Tim Phillips appeared on behalf of Defendant Kimberly Ann Socha.

Andrew Gordon appeared on behalf of Defendants Aaron Lamar Abram, Emmett James Doyle, Andrew Jared Edwards, Tadele Kelemework Gebremedin, Sara Jean Gieseke, Rahsaan Hansraj Mahadeo, Imani Christian McCray, and Benjamin Michael Painter.

Andrea Palumbo and Steven Appelget appeared on behalf of Defendants Madeline Cady Jacobs, Christopher Mark Juhn, Tamera Janae Larkins, Dakota Ryan Machgan, Roxxanne Leigh Rittenhouse, Dua Safaldien Saleh, Mautaui Kakemwa Alima Tongrit-Green, and Nakami Faridah Tongrit-Green.

Based on the files, records, memoranda, and proceedings, the Court makes the following:

ORDER

1. Defendants' motions to dismiss the misdemeanor trespass on the premises of another - refusal to depart charge under Minn. Stat. § 609.605 subd. 1(b)(3) in the following cases are DENIED:

    a. 27-CR-15-3068 (Kimberly Ann Socha),
    b. 27-CR-15-3069 (Dakota Ryan Machgan),
    c. 27-CR-15-3073 (Nakami Faridah Tongrit-Green),
    d. 27-CR-15-3074 (Mautaui Kakemwa Alima Tongrit-Green),
    e. 27-CR-15-3144 (Rahsaan Hansraj Mahadeo),
    f. 27-CR-15-3491 (Tamera Janae Larkins),
    g. 27-CR-15-3492 (Andrew Jared Edwards),
    h. 27-CR-15-3494 (Christopher Mark Juhn),
    i. 27-CR-15-3496 (Aaron Lamar Abram),
    j. 27-CR-15-3497 (Tadele Kelemework Gebremedin),
    k. 27-CR-15-3582 (Dua Safaldien Saleh),
    l. 27-CR-15-3583 (Emmett James Doyle),
    m. 27-CR-15-3586 (Madeline Cady Jacobs), and
    n. 27-CR-15-3602 (Roxxanne Leigh Rittenhouse).

2. Defendant Sara Jean Gieseke's motion in 27-CR-15-4953 to dismiss the misdemeanor trespass, cross into/enter public area cordoned off by police officer charge under Minn. Stat. § 609.605 subd. 1(b)(11) is DENIED.

3. Defendants' motions to dismiss the misdemeanor obstruction of legal process/ interference with a police officer charge under Minn. Stat. § 609.50 subd. 1(2), subd. 2(3) in the following cases are DENIED:

    a. 27-CR-15-3602 (Roxxanne Leigh Rittenhouse), and
    b. 27-CR-15-4953 (Sara Jean Gieseke).

4. Defendant Roxxanne Leigh Rittenhouse's motion in 27-CR-15-3602 to dismiss the gross misdemeanor obstruction of legal process/interference with a police officer accompanied by force, violence or threat charge under Minn. Stat. § 609.50 subd. 1(2), subd. 2(2) is DENIED.

5. Defendants' motions to dismiss the misdemeanor disorderly conduct - offensive/ abusive/noisy/obscene charge under Minn. Stat. § 609.72 subd. 1(3) in the following cases are GRANTED:

    a. 27-CR-15-1304 (Kandace Montgomery),
    b. 27-CR-15-1320 (Michael McDowell),
    c. 27-CR-15-1335 (Adja Gildersleve),
    d. 27-CR-15-3492 (Andrew Jared Edwards), and
    e. 27-CR-15-3496 (Aaron Lamar Abram).

6. Defendants' motions to dismiss the misdemeanor unlawful assembly - intent to disturb/ threat to public peace charge under Minn. Stat. § 609.705(2) in the following cases are GRANTED:

    a. 27-CR-15-1304 (Kandace Montgomery),
    b. 27-CR-15-1307 (Nekima Levy-Pounds),
    c. 27-CR-15-1320 (Michael McDowell),
    d. 27-CR-15-1326 (Catherine Salonek),
    e. 27-CR-15-1331 (Todd Dahlstrom),
    f. 27-CR-15-1335 (Adja Gildersleve),
    g. 27-CR-15-1349 (Jie Wronski-Riley),
    h. 27-CR-15-2766 (Pamela Twiss),
    i. 27-CR-15-3068 (Kimberly Ann Socha),
    j. 27-CR-15-3069 (Dakota Ryan Machgan),
    k. 27-CR-15-3073 (Nakami Faridah Tongrit-Green),
    l. 27-CR-15-3074 (Mautaui Kakemwa Alima Tongrit-Green),
    m. 27-CR-15-3144 (Rahsaan Hansraj Mahadeo),
    n. 27-CR-15-3491 (Tamera Janae Larkins),
    o. 27-CR-15-3492 (Andrew Jared Edwards),
    p. 27-CR-15-3495 (Imani Christian McCray),
    q. 27-CR-15-3497 (Tadele Kelemework Gebremedin),
    r. 27-CR-15-3582 (Dua Safaldien Saleh), and
    s. 27-CR-15-3583 (Emmett James Doyle).

7. Defendants' motions to dismiss the misdemeanor unlawful assembly - disorderly conduct charge under Minn. Stat. § 609.705(3) in the following cases are GRANTED:

    a. 27-CR-15-1304 (Kandace Montgomery),
    b. 27-CR-15-1320 (Michael McDowell),
    c. 27-CR-15-1326 (Catherine Salonek),
    d. 27-CR-15-1331 (Todd Dahlstrom),
    e. 27-CR-15-1335 (Adja Gildersleve),
    f. 27-CR-15-3492 (Andrew Jared Edwards), and
    g. 27-CR-15-3496 (Aaron Lamar Abram).

8. Defendants' motions to dismiss the misdemeanor presence at an unlawful assembly charge under Minn. Stat. § 609.715 in the following cases are GRANTED:

    a. 27-CR-15-3068 (Kimberly Ann Socha),
    b. 27-CR-15-3069 (Dakota Ryan Machgan),
    c. 27-CR-15-3491 (Tamera Janae Larkins),
    d. 27-CR-15-3492 (Andrew Jared Edwards),
    e. 27-CR-15-3582 (Dua Safaldien Saleh), and
    f. 27-CR-15-3583 (Emmett James Doyle).

9. Defendants' motions to dismiss the misdemeanor aiding and abetting trespass on the premises of another - refusal to depart charge under Minn. Stat. §§ 609.605 subd. 1(b)(3), 609.05 subd. 1 charge in the following cases are GRANTED:

    a. 27-CR-15-1304 (Kandace Montgomery),
    b. 27-CR-15-1307 (Nekima Levy-Pounds),
    c. 27-CR-15-1320 (Michael McDowell),
    d. 27-CR-15-1326 (Catherine Salonek),
    e. 27-CR-15-1331 (Todd Dahlstrom),
    f. 27-CR-15-1335 (Adja Gildersleve),
    g. 27-CR-15-1346 (Amity Foster),
    h. 27-CR-15-1349 (Jie Wronski-Riley),
    i. 27-CR-15-1350 (Shannon Bade),
    j. 27-CR-15-1829 (Mica Grimm), and
    k. 27-CR-15-2766 (Pamela Twiss).

10. Defendants' motions to dismiss the misdemeanor aiding and abetting disorderly conduct - offensive/abusive/noisy/obscene charge under Minn. Stat. §§ 609.72 subd. 1(3), 609.05 subd. 1 in the following cases are GRANTED:

    a. 27-CR-15-1304 (Kandace Montgomery),
    b. 27-CR-15-1307 (Nekima Levy-Pounds),
    c. 27-CR-15-1320 (Michael McDowell),
    d. 27-CR-15-1326 (Catherine Salonek),
    e. 27-CR-15-1331 (Todd Dahlstrom),
    f. 27-CR-15-1335 (Adja Gildersleve),
    g. 27-CR-15-1346 (Amity Foster),
    h. 27-CR-15-1349 (Jie Wronski-Riley),
    i. 27-CR-15-1350 (Shannon Bade),
    j. 27-CR-15-1829 (Mica Grimm), and
    k. 27-CR-15-2766 (Pamela Twiss).

11. Defendants' motions to dismiss the misdemeanor aiding and abetting unlawful assembly - intent to disturb/threat to public peace charge under Minn. Stat. §§ 609.705(2), 609.05 subd. 1 in the following cases are GRANTED:

    a. 27-CR-15-1304 (Kandace Montgomery),
    b. 27-CR-15-1307 (Nekima Levy-Pounds),
    c. 27-CR-15-1320 (Michael McDowell),
    d. 27-CR-15-1326 (Catherine Salonek),
    e. 27-CR-15-1331 (Todd Dahlstrom),
    f. 27-CR-15-1335 (Adja Gildersleve),
    g. 27-CR-15-1346 (Amity Foster),
    h. 27-CR-15-1349 (Jie Wronski-Riley),
    i. 27-CR-15-1350 (Shannon Bade),
    j. 27-CR-15-1829 (Mica Grimm), and
    k. 27-CR-15-2766 (Pamela Twiss).

12. Defendants' motions to dismiss the misdemeanor aiding and abetting unlawful assembly - disorderly conduct charge under Minn. Stat. §§ 609.705(3), 609.05 subd. 1 in the following cases are GRANTED:

    a. 27-CR-15-1304 (Kandace Montgomery),
    b. 27-CR-15-1307 (Nekima Levy-Pounds),
    c. 27-CR-15-1320 (Michael McDowell),
    d. 27-CR-15-1326 (Catherine Salonek),
    e. 27-CR-15-1331 (Todd Dahlstrom),
    f. 27-CR-15-1335 (Adja Gildersleve),
    g. 27-CR-15-1346 (Amity Foster),
    h. 27-CR-15-1349 (Jie Wronski-Riley),
    i. 27-CR-15-1350 (Shannon Bade),
    j. 27-CR-15-1829 (Mica Grimm), and
    k. 27-CR-15-2766 (Pamela Twiss).

13. In light of the disposition of the individual charges as set forth in ¶¶ 1-12, the State's Amended Complaints are DISMISSED in their entirety against the following defendants:

    a. Kandace Montgomery (27-CR-15-1304),
    b. Nekima Levy-Pounds (27-CR-15-1307),
    c. Michael McDowell (27-CR-15-1320),
    d. Catherine Salonek (27-CR-15-1326),
    e. Todd Dahlstrom (27-CR-15-1331),
    f. Adja Gildersleve (27-CR-15-1335),
    g. Amity Foster (27-CR-15-1346),
    h. Jie Wronski-Riley (27-CR-15-1349),
    i. Shannon Bade (27-CR-15-1350),
    j. Mica Grimm (27-CR-15-1829),
    k. Pamela Twiss (27-CR-15-2766), and
    l. Imani Christian McCray (27-CR-15-3495).

14. In light of this disposition of the motions to dismiss, the following motions are DENIED AS MOOT:

    a. Kandace Montgomery's July 1, 2015 motion to compel disclosure in Court File No. 27-CR-15-1304 (Docket 34),

    b. Todd Dahlstrom's August 3, 2015 motion for a bill of particulars in Court File No. 27-CR-15-1331 (Docket 35),

    c. Amity Foster's motions, in Court File No. 27-CR-15-1346, filed:

        (i) on July 31, 2015 (Docket 35), to strike the State's amended complaint filed July 7, 2015 (Docket 23), and

        (ii) on August 3, 2015, for a bill of particulars (Docket 38),

    d. Jie Wronski-Riley's August 3, 2015 motion for a bill of particulars in Court File No. 27-CR-15-1349 (Docket 53),

    e. Shannon Bade's motions, in Court File No. 27-CR-15-1350, filed:

        (i) on July 31, 2015 (Docket 40), to strike the State's amended complaint filed July 6, 2015 (Docket 24), and

        (ii) on August 3, 2015, for a bill of particulars (Docket 41),

    f. Mica Grimm's August 3, 2015 motion for a bill of particulars in Court File No. 27-CR-15-1829 (Docket 40), and

    g. Pamela Twiss's August 11, 2015 revised discovery motion in Court File No. 27-CR-15-2766 (Docket 46) (replacing her August 6, 2015 motion for a bill of particulars, Docket 45).

15. The trial in the case of *State v. Kimberly Ann Socha*, 27-CR-15-3068, previously set for December 7, 2015, at 9:00 a.m., pursuant to Ms. Socha's speedy trial demand filed October 8, 2015, will proceed as scheduled on the trespass charge in the State's August 4, 2015 amended complaint.

16. Trials will be scheduled, after consultation with counsel, on the trespass charges in the following cases:

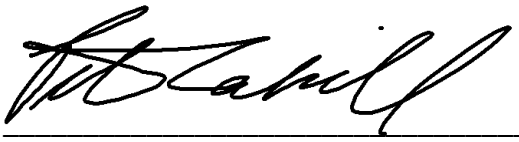
    a. 27-CR-15-3069 (Dakota Ryan Machgan),
    b. 27-CR-15-3073 (Nakami Faridah Tongrit-Green),
    c. 27-CR-15-3074 (Mautaui Kakemwa Alima Tongrit-Green),
    d. 27-CR-15-3144 (Rahsaan Hansraj Mahadeo),
    e. 27-CR-15-3491 (Tamera Janae Larkins),
    f. 27-CR-15-3492 (Andrew Jared Edwards),
    g. 27-CR-15-3494 (Christopher Mark Juhn),
    h. 27-CR-15-3496 (Aaron Lamar Abram),
    i. 27-CR-15-3497 (Tadele Kelemework Gebremedin),
    j. 27-CR-15-3582 (Dua Safaldien Saleh),
    k. 27-CR-15-3583 (Emmett James Doyle), and
    l. 27-CR-15-3586 (Madeline Cady Jacobs).

17. Trial will be also scheduled, after consultation with counsel, in the case of *State v. Benjamin Michael Painter* (27-CR-15-3493), in which no motion to dismiss was filed.

18. The following cases will remain on the pretrial calendar at Division 4 of the District Court at 7009 York Avenue South, Edina, at 8:30 a.m. on the dates indicated below, at which time they will be assigned to the judge presiding over the continued pretrial, who will set a trial date on his or her schedule as necessary.

    a. Roxxanne Leigh Rittenhouse (27-CR-15-3602) – Pretrial December 7, 2015.
    b. Rose Marie Meyer (27-CR-15-3072) – Pretrial December 14, 2015.
    c. Sara Jean Gieseke (27-CR-15-4953) – Pretrial December 21, 2015.

BY THE COURT



DATED: November 10, 2015

Peter A. Cahill
Judge of District Court

MEMORANDUM OPINION

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> Freedom of speech . . . [and peaceable assembly] are fundamental rights . . . . These rights may be abused by using speech . . . or assembly in order to incite to violence and crime. The people through their Legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. . . . It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. . . . Those who assist in the conduct of such meetings cannot be branded as criminals on that score. . . . If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge. -- *De Jonge v. Oregon*, 299 U.S. 353, 364-65 (1937) (citations omitted).

INTRODUCTION AND SUMMARY

These cases arise out of the Black Lives Matter (BLM) demonstration at the Mall of America (MOA) in Bloomington on Saturday, December 20, 2014. The BLM demonstration, while large and at times very loud, was peaceful: there were no reports by MOA management, MOA Security, or the Bloomington Police Department (BPD) of any rioting, fighting, looting, property damage, or physical injuries suffered by any members of the public, demonstrators, law enforcement, or private security officers.

These cases exist because the MOA, which is privately owned, does not allow demonstrations as a matter of general policy. Consistent with that policy, the BLM demonstration was not authorized by MOA management. The Court is, thus, confronted with compelling, but competing and conflicting, public and private interests and rights.

On the one hand, political demonstrators, like many of the Defendants in these cases, advocate for political and social change. Because they are intensely interested in drawing attention to their causes, they may seek venues and employ tactics with a view to attracting

maximum media attention and public exposure. By means of speaking, chanting, singing, holding signs, marching, and conducting symbolic "die-ins," the BLM demonstrators sought to draw attention to BLM causes of "demilitarizing" local police forces and reducing the incidence of fatalities nationwide involving African-Americans interacting with local police and/or in the wake of arrests. As such, the BLM demonstration involved core expressive activities at the heart of the federal First Amendment and the Minnesota Constitution's Bill of Rights.

On the other hand, private property owners have their own First Amendment rights. They may have an interest in not allowing their property to be used by others as a staging ground for advocacy the owners do not themselves endorse and may, in fact, vehemently oppose. Private property owners have the right to control who may be on their property[1] and for what purposes, and to exploit their property for their own commercial or other economic ends. That includes the right to exclude[2] individuals wishing to engage in expressive conduct in support of their political, social, or religious advocacy agenda on the owner's private property, but who lack a legal right to possession or use of the property over the owner's objections.[3]

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[1] The right is not absolute, of course, and remains subject to state regulation falling within the government's legitimate exercise of its police powers, as with anti-discrimination laws, for example.

[2] *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82 (1980) (among the "essential sticks in the bundle of property rights is the right to exclude others").

[3] *See, e.g.*, *Hudgens v. National Labor Relations Board*, 424 U.S. 507, 513, 520-21 (1976) (privately-owned, enclosed shopping mall can bar employees from peaceful picketing in front of employer's store in mall to advertise strike); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567-69 (1972) (private shopping center owner can prohibit anti-Vietnam protestors' handbilling in shopping center); *State v. Wicklund*, 589 N.W.2d 793, 797 (Minn. 1999) (MOA can enforce policy prohibiting all demonstrations to bar anti-fur protestors from conducting peaceful, non-confrontational, speech-related protest at MOA); *State v. Scholberg*, 412 N.W.2d 339, 340, 344 (Minn. App.) (Meadowbrook Women's Clinic can enforce policy prohibiting all protest activity and distribution of unauthorized literature to bar anti-abortion activists from demonstrating and distributing anti-abortion literature on clinic's private property), *review denied* (Minn. Nov. 13, 1987).

Public interests and considerations must also be taken into account. Police and prosecutors are called upon to protect the peace and to enforce the law for the common good and the general public interest. Moreover, few things are as sacrosanct in this country as the rights guaranteed to the people under the First Amendment. The U.S. Supreme Court has recently reminded us that the First Amendment evinces a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" and that we as "a Nation . . . have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[4] Even though a property owner may have the right to exclude demonstrators from engaging in protest activities on its property, speech and other expressive activities falling within the ambit of the First Amendment do not inherently become "unlawful" *per se* -- for purposes of statutes like Minnesota's disorderly conduct and unlawful assembly statutes -- simply because protestors seek to engage in those activities on private rather than public property and the private property owner objects.

Tension exists when the interests of those seeking to demonstrate peacefully clash with the rights of private property owners to control possession and use of their property. Private, non-state actors seeking to control possession and use of their own private property are not constrained by the constitution[5] in the ways state actors seeking to regulate constitutionally-

[4] *Snyder v. Phelps*, 562 U.S. 443, 452, 461 (2011) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), and *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

[5] *Hudgens*, 424 U.S. at 513 ("constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state"); *Cherne Industrial, Inc. v. Grounds & Associates, Inc.*, 278 N.W.2d 81, 94 (Minn. 1979) ("The First and Fourteenth Amendments guarantee against abridgment of speech and expression by state governments; they do not provide protection or redress against abridgment by private individuals or corporations.").

protected speech and expressive activities on public property are[6] when individuals seek to conduct demonstrations on private property rather than public property and the private property owner objects. In the balancing of those clashing rights and interests, the law currently gives priority to the private property owner's right to control who may be on its property and the conduct in which such others may engage while on its property over the desire of individuals to engage in expressive activities on privately-owned property against the owners' wishes.[7]

By virtue of these principles, a private property owner in Minnesota has several remedies available against political protestors who persist over the owner's objections in seeking to demonstrate on private property.

First, under the criminal law, a private property owner may ask the state to prosecute for trespass those who have no legal claim of right to be on the owner's property and who intentionally refuse to depart from the property upon the owner's lawful demand. Indeed, the

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[6] Governmental actors may not ban altogether speech and expressive conduct protected under the federal and Minnesota state bills of rights, as interpreted by the courts, and taking place in quintessential public fora on which such activities have traditionally occurred, based on their dislike for the speaker(s) or the subject matter or substance of the message. *See, e.g., Hudgens*, 424 U.S. at 513; *Scholberg*, 412 N.W.2d at 342. State actors may, however, impose reasonable time, place and manner restrictions in a content-neutral manner regarding the use of public fora, *e.g.*, *Snyder v. Phelps*, 562 U.S. at 456; *Thomas v. Chicago Park District*, 534 U.S. 316, 322 (2002); *The Coalition to March on the RNC and Stop the War v. City of St. Paul*, 557 F.Supp.2d 1014, 1021 (D. Minn. 2008), and may even forbid altogether the use of some public facilities. *Adderley v. Florida*, 385 U.S. 39 (1967) (affirming criminal trespass convictions of student protestors for conducting protest in jail).

[7] *See, e.g., Wicklund,* 589 N.W.2d at 798, 802-03 (rejecting argument that public financing and general invitation to public to come onto MOA's premises for shopping and entertainment sufficed to transform privately-owned property into "public property" for purposes of state action and recognizing MOA's right to prohibit demonstrations); *Scholberg*, 412 N.W.2d at 341-44 (in battle of conflicting rights between demonstrator's free speech rights and private property owner's right to exclude, private property owner's right to exclude takes priority); *accord Lloyd Corp. v. Tanner*, 407 U.S. at 568 (trespassers and uninvited guests have no constitutionally-protected right to exercise general rights of free speech on privately-owned shopping mall used nondiscriminatorily for private purposes over property owner's objection).

MOA and the City of Bloomington City Attorney's Office have successfully pursued trespass prosecutions against protestors who sought to conduct unauthorized protests over the MOA's objection, obtaining convictions in three recent prosecutions, including one arising from the same BLM protest at the MOA from which these cases arise.[8]

Here, the MOA informed all visitors to the mall's east side on December 20 that the MOA is private property. It warned them that the BLM demonstration was unauthorized. It warned that those who participated in the BLM demonstration would be subject to eviction or arrest for trespass. It did not, however, at least during the demonstration's first half hour, issue explicit orders instructing all protestors to leave the MOA immediately nor did it ask the BPD to arrest any protestor who refused a direct, unambiguous order to depart from the MOA immediately. Ultimately, fewer than two dozen of the more than one thousand protestors were arrested at the MOA that afternoon and charged with trespass.

Second, in appropriate circumstances, a private property owner may seek injunctive relief from a court in equity to enjoin unauthorized activities on its property by others.[9] Here, MOA officials knew some of the BLM protest organizers (including some of the defendants in these cases) in the week leading up to the demonstration. Although officials from the MOA, the BPD, and the Bloomington City Attorney's Office informed some of the defendants that the MOA is private property and that MOA management would not grant BLM permission for the planned demonstration at the MOA, the MOA did not seek to enjoin the BLM demonstration.

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[8] *State v. Jem Reyna Crow*, Henn. Cty Ct. File No. 27-CR-14-666 (August 11, 2015 trespass conviction); *State v. Patricia Ann Shepard*, Henn. Cty Ct. File No. 27-CR-14-667 (July 17, 2015 trespass conviction); *State v. Anthony John Nocella*, Henn. Cty Ct. File No. 27-CR-15-3146 (July 2, 2015 trespass conviction).

[9] *Johnson v. Paynesville Farmers Union Co-op. Oil Co.*, 817 N.W.2d 693, 706, 713 (Minn. 2012), *cert. denied*, 133 S. Ct. 1249 (2013).

Finally, a private property owner might also seek damages under civil tort law from those who engage in conduct interfering with the owner's rights over the owner's objection if such conduct results in lost profits, other economic damages, or other compensable damages to any of the bundle of property rights (*e.g.*, possessory rights, rights to use and enjoyment, rights to exploit commercially, *etc.*) the law provides to owners.[10] The MOA could potentially pursue civil tort claims seeking to recover nominal damages and any actual economic damages it could prove were proximately caused by the unauthorized BLM protest at the MOA.

None of the eleven so-called Leader/Organizer Defendants in these cases (the first eleven listed in the caption on page 1) was arrested at the MOA on December 20. Some of them were escorted off MOA property, one before the BLM demonstration even started. Others left the MOA voluntarily, in response to orders by BPD or MOA security officers. And, one of them (so it appears) was not even at the MOA for the BLM demonstration on December 20.[11] None of the Leader/Organizer Defendants is charged with criminal trespass.[12] Instead, each of the Leader/Organizer Defendants faces at least four and as many as seven counts of disorderly conduct, unlawful assembly, and aiding and abetting alleged criminal trespass, disorderly conduct, and unlawful assembly violations by others.

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[10] *See Johnson*, 817 N.W.2d at 701-06, 712-14 (collecting cases, discussing torts of trespass, nuisance, negligence, and negligence *per se* based on violation of statutorily-imposed duties of care).

[11] The State does not allege in its amended complaint that Grimm was present at the MOA for the BLM demonstration. None of the voluminous evidence offered by the State places Grimm at the mall at any time during the BLM demonstration.

[12] In the original January 2015 complaints, the State initially charged all of the Leader/Organizer Defendants with criminal trespass and also charged Montgomery and Levy-Pounds with public nuisance and aiding and abetting public nuisance. However, the State dismissed all of those charges against the Leader/Organizer Defendants in its amended complaints filed in August 2015.

In contrast, all of the eighteen so-called Participant Defendants in these cases (the last eighteen listed in the caption on page 1) were arrested at the MOA on December 20. All of them were initially charged with criminal trespass, and four were also charged with obstruction, based on alleged confrontations with BPD or MOA security officers. In amended complaints filed in August 2015, the State added disorderly conduct or unlawful assembly charges against fourteen of these eighteen defendants and, in three cases, both. Collectively, the Participant Defendants now face eight different charges of criminal trespass, disorderly conduct, unlawful assembly, and obstruction, and a majority of them face at least three counts.

It may be that some within MOA management (or in the Bloomington City Attorney's office) are dissatisfied with the statutory penalties prescribed for criminal trespass. They may believe those prescribed penalties insufficient to provide an effective and meaningful deterrent. That, however, is a matter to be taken up with the state legislature. In addition, there may be countervailing public relations and cost benefit concerns that militate[d] against pursuing the available remedies discussed above more aggressively, whether singly or in the aggregate. The point remains that the MOA and the State have available tools, under existing law, to seek to prevent such unauthorized demonstrations in the first instance by injunctive relief, to bring unauthorized demonstrations once commenced to a halt by evicting the transgressors or having them arrested and charged with criminal trespass, and to hold accountable after the fact those who persist in conducting unauthorized demonstrations at the MOA over the MOA's objections through civil tort actions to recover damages. The State's desire to deter future unauthorized demonstrations at the MOA by charging twenty-five of these twenty-nine defendants with some combination of disorderly conduct, unlawful

assembly, and aiding and abetting criminal trespass, disorderly conduct, and unlawful assembly, given all the particular facts and circumstances of the BLM demonstration at the MOA on December 20, 2014, does not pass constitutional muster.

Accordingly, and for the reasons discussed below in this opinion:

(1) the eleven Leader/Organizer Defendants' and Defendant McCray's motions to dismiss all charges against them are granted and the State's cases against those twelve defendants are dismissed in their entirety;

(2) the motions of eleven of the Participant Defendants to dismiss the disorderly conduct or unlawful assembly charges (and, in two cases, both) against them are granted for the same reasons those charges are being dismissed against the Leader/Organizer Defendants and McCray;

(3) the motions by fifteen of the Participant Defendants to dismiss the criminal trespass and obstruction charges against them are denied, as those charges against those defendants present issues of fact for a jury; and

(4) the State's cases against those fifteen defendants, as well as the cases against defendants Meyer and Painter, who did not file motions to dismiss any of the charges pending against them, will proceed to trial.

FACTUAL BACKGROUND

The factual presentation that follows is drawn from the various amended complaints,[13] affidavits submitted by the State, reports prepared by BPD and MOA security officers, and voluminous other documents and exhibits filed in these cases by the State, as well as from several documents authored by officials at the MOA, the BPD, and the City of Bloomington, including the Bloomington City Attorney's Office, filed in Court File No. 27-CR-15-1304 (*State v.*

[13] The amended complaints filed by the State on August 3-4, 2015 against ten of the eleven Leader/Organizer Defendants contain identical statements of probable cause. The probable cause statement for the other Leader/Organizer Defendant, Michael McDowell, is identical with those of the other ten with a single exception: on the second page, in the fifth line of the second full paragraph, the sentence discussing MOA's management's announcement at 2:03 p.m. in the McDowell probable cause statement ends with the language ". . . ordered all participants to ***disperse***" whereas that sentence in the probable cause statements for the other ten concludes with the language ". . . ordered all participants to ***leave the building***." (Emphasis added to highlight difference.)

Kandace Montgomery) as exhibits to the Flaherty Affidavit. In addition, the Court has viewed many hours of video supplied by the State that document many facets of the BLM demonstration from numerous vantage points both inside and outside the mall during the afternoon of December 20, 2014. Some of the factual presentation is also drawn from or relies upon things that can be observed and/or heard in many of the State's videos.

A. The Defendants

1. The Leader/Organizer Defendants

The State contends that Defendants Kandace Montgomery, Nekima Levy-Pounds, Michael McDowell, Adja Gildersleve, Catherine Salonek, Todd Dahlstrom, Pamela Twiss, Jie Wronski-Riley, Mica Grimm, Amity Foster, and Shannon Bade were among the leaders, planners, and organizers of the BLM demonstration. MOA, BPD, and Bloomington City Attorney's Office officials contend they identified these eleven defendants as exercising leadership, planning, and organizing roles through various means, including correspondence, review of Facebook postings, media interviews, and pre-demonstration meetings.[14] *See* Jan. 5, 2015 Charging Report, Supplemental, of BPD Sgt. Jeff Giles, p. 1 of 8 (Exh. 2 to Potts July 30, 2015 Affidavit); *see also* State's Video Drive: Black Lives Matter 12-20-2014 (with CCTV footage) ➢ BLM PowerPoint ➢ BLM Overview, p. 3. These eleven defendants are sometimes referred to collectively as the "Leader/Organizer Defendants" in this Memorandum Opinion.

2. The Participant Defendants

Defendants Aaron Lamar Abram, Emmett James Doyle, Andrew Jared Edwards, Tadele Kelemework Gebremedin, Sara Jean Gieseke, Madeline Cady Jacobs, Christopher Mark Juhn,

[14] Grimm and McDowell had also been among the organizers of a BLM protest that had partially shut down I-35W in south Minneapolis for more than an hour on December 4, 2014. http://www.startribune.com/police-made-on-the-spot-decision-not-to-arrest-protesters/285309621/

Tamera Janae Larkins, Dakota Ryan Machgan, Rahsaan Hansraj Mahadeo, Imani Christian McCray, Rose Marie Meyer, Benjamin Michael Painter, Roxxanne Leigh Rittenhouse, Dua Safaldien Saleh, Kimberly Ann Socha, Mautaui Kakemwa Alima Tongrit-Green, and Nakami Faridah Tongrit-Green were present at the MOA during the BLM demonstration. These eighteen defendants are sometimes referred to collectively as the "Participant Defendants" in this Memorandum Opinion.

The term "Participant Defendants" is used only for convenience and to distinguish these eighteen defendants from the eleven "Leader/Organizer Defendants" in certain contexts in which it makes sense to focus on their differing roles and involvement in the BLM demonstration. The State has not alleged that any of the Participant Defendants was actively involved in planning for or organizing the BLM demonstration. In contrast to the Leader/Organizer Defendants, none of whom was arrested at the MOA on December 20, 2014, all of the Participant Defendants were arrested at the MOA on December 20, 2014. As is true with the Leader/Organizer Defendants, the Participant Defendants' motions to dismiss feature similar arguments by defendants and the State.

However, use of the term "Participant Defendants" should not be taken as implying that any of these eighteen defendants coordinated their actions with others or with any of the Leader/Organizer Defendants or even that any of them personally knew any of the other defendants. Nor should this term be construed as implying that these defendants came to the MOA on December 20 expressly for purposes of participating in the BLM demonstration. Some may have been at the mall simply for work. For example, MOA Security Officer Megan McDonald's arrest report indicates that Gebremedin stated he worked at Microsoft (Level One,

South) and that Larkins stated she worked at Lady Footlocker (Level Two, East). February 9, 2015 Report by MOA Patrol Captain William Bernhjelm, at pp. 31-32 of 44 (included as part of Exh. 1 to State's July 31, 2015 Mem. In Opp. To Defts' Motions to Dismiss). MOA Security Officer Robert Ritchie's arrest report indicates that Rittenhouse stated she worked at Lush (Level One, East). *Id*., p. 38 of 44.

B. MOA Bans All Forms of Political and Social Group Demonstrations

The MOA grants permission for some categories of promotional, charitable, and entertainment events.[15] Affidavit of Rich Hoge (July 30, 2015) ¶¶ 7-8. It does not, however, grant permission to groups desiring to conduct protests, demonstrations, picketing, handbilling, leafleting, or public speech or debate aimed at organizing political, social, or religious groups at the MOA. All such political, social, and religious activities and demonstrations have always been strictly prohibited at the MOA pursuant to written MOA policy, Hoge Aff. ¶¶ 7-8 & Exh. 1, §§ 2.6, 2.20 & Exh. 2, p. 8,[16] as the MOA Promotional Events Handbook makes clear:

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[15] For example, the record contains MOA Schedules of Events for:

(1) 2015 that includes four events for "Pepsi Product Samplings"; five book tours; a Delta Airlines Block Party; a Red Ribbon Ride to increase AIDS awareness; ten corporate promotional product sampling events; three blood drives by the Red Cross; two Little Box Sauna Art Demonstration Project events; Grand Opening Celebration events for what is known as Phase IC of the MOA; and three events for the Radisson Blu.

(2) 2014 that included all the same events listed above for 2015 but also including an event for the Twin Cities Komen Race for the Cure; a Zumiez Couch Tour skateboard demonstration; one or more outdoor concerts; a Beer Fest; a family event focusing on 4d movies and gaming technology; an Ice Castle event; up to five events for a car dealership "ride and drive"; a Delta Airlines Employee Event "park and ride"; and shuttle services to the Minnesota Street Rod Association and to the Minnesota State Fair.

Affidavit of Sandra Johnson (July 31, 2015), Exh. B to Exh. 4; *see also* Hoge Aff. ¶¶ 7-10.

[16] This page sets out "Mall Rules," including the following rule regarding "Conduct":

- Conduct that is disorderly, disruptive or which interferes with or endangers business or guests is prohibited. Such conduct may include running, loud offensive language, spitting,

> Mall of America, as a private commercial retail center, prohibits all forms of protest, demonstration, public debate and speech aimed at organizing political or social groups. This includes handbills and leafleting. . . .
>
> Mall of America prohibits political activity on its property, including . . . organizing, handbills or leafleting, debates or protests. . . .
>
> Mall of America prohibits religious activity on its property, including . . . organizing, proselytizing, handbills, or leafleting. . . .

Hoge Aff., Exh. 2, p. 9.

C. Planning Activities of the Leader/Organizer Defendants and Their Pre-Demonstration Contacts with the MOA, BPD, and City of Bloomington

1. MOA Learns of the Planned BLM Demonstration

The BLM movement is a decentralized ideological and political movement that seeks to build leadership and power of black people and to dismantle structural racism, particularly what some in the movement perceive as a systemic pattern of anti-black law enforcement violence in the United States. http://blacklivesmatter.com/ BLM arose in the wake of the 2013 acquittal of George Zimmerman for the fatal shooting of Trayvon Martin in Florida and gained additional national impetus after the August 9, 2014 fatal shooting of Michael Brown by police in Ferguson, Missouri. *Id*.

Individuals associated with the BLM movement in Minneapolis planned a large-scale BLM demonstration for the MOA on Saturday, December 20, 2014. A posting on the BLM Facebook about the planned demonstration explained:

> throwing objects, fighting, obscene gestures, gang signs, skating, skateboarding, bicycling, etc.
>
> - Intimidating behavior by groups or individuals, loitering, engaging in soliciting, blocking storefronts, hallways, skyways, fire exits or escalators, and walking in groups in such a way as to inconvenience others is prohibited.
> - Picketing, demonstrating, and distributing handbills is not allowed.

> This is about peace in our community and ensuring an end to police violence in the United States. Showing up at the Mall of America Saturday, December 20th means that you stand in solidarity with Black lives even as large corporations and institutions do not.

See State's Video Drive, Black Lives Matter 12-20-2014 (with CCTV footage) ➢ BLM PowerPoint ➢ "Black Lives Matter Protest" PowerPoint document, p. 18. Grimm elaborated on the thought process behind the selection of the MOA as a venue for the protest:

> [W]e were doing protests that families couldn't participate in and people with day jobs couldn't participate in. So really we wanted a space that was easy for Minnesotans to get to, was indoors and was family friendly.

http://www.mprnews.org/story/2015/02/20/bcst-black-lives-matter-mall-of-america

On December 10, 2014, an intelligence analyst with the Minneapolis Police Department (MPD) notified the MOA of a Facebook posting regarding the BLM demonstration being organized for the MOA. Hoge Aff. ¶ 11; Affidavit of Major Doug Reynolds (July 30, 2015) ¶ 10; State's Pre-Demonstration Timeline, Appendix A. The prospect of that demonstration gave rise to public safety concerns by MOA, City of Bloomington, and BPD officials because, as the last retail shopping Saturday before Christmas, December 20 was expected to be one of the MOA's busiest shopping days of the entire year. Reynolds Aff. ¶ 11; Potts Aff. ¶ 14. After receiving this information from the MPD, the MOA's security department began monitoring social media sites regarding the planned BLM demonstration.[17] Reynolds Aff. ¶ 12.

On December 12, 2014, MOA management sent a letter to McDowell and Grimm (and to a Nicholas Espinosa, whom it appears was never charged in connection with the BLM/MOA

[17] A regular part of the MOA's security process involves the monitoring of various social media sites for any mention of terms or events associated with "Mall of America," "MOA," or derivatives thereof. Reynolds Aff. ¶¶ 8-9.

demonstration). Hoge Aff. ¶ 12 & Exh. 4; Appendix A. This letter advised the BLM demonstration organizers that the MOA:

(1) is a private commercial retail center;

(2) prohibits "all forms of protest, demonstration and public debate," "including political activity aimed at organizing political or social groups"; and

(3) has consistently enforced that policy over the years.

It further advised that any attempt to conduct an unauthorized protest at the MOA would subject demonstrators to removal from the MOA and potential arrest by the BPD. The BLM organizers were advised to contact the City of Bloomington to obtain a permit to use public property immediately adjacent to the MOA at the southeast corner of 24th Avenue/Lindau Lane for the demonstration.[18] The letter did not, however, forbid any specific individual from entering the MOA. This letter was later posted on the BLM Facebook page (*see* Bernhjelm Report, p. 22 of 44) alongside a note stating "We want to make it clear to the public that we will not be intimidated and we will not be silenced." *See* Video, Black Lives Matter 12-20-2014 (with CCTV footage) ➢ BLM PowerPoint ➢ "BLM Overview" PowerPoint document, p. 6.

On December 16, Espinosa wrote to Bloomington City Attorney Sandra Johnson, advising that the planned December 20 BLM demonstration "is happening . . . [at the MOA] and there are not [sic] plans to cancel it." Johnson Aff., Exh. 1, Dec. 16, 2014 1:32 pm email. Espinosa also expressed the view that "the best way to ensure the safety of all involved" would be for the MOA and City of Bloomington to "allow for the peaceful planned event to take place so that everyone can stay safe without any escalation on behalf of the police or security." *Id*.

[18] MOA Corporate Counsel Kathleen Allen, in a December 16, 2014 email to MOA and City of Bloomington officials, noted that MOA was "glad to see we have an additional avenue to communicate with this organization. . . . We also want to work with them and the City to identify a location where they can safely and legally communicate their message." Flaherty Aff., Exh. A, BLOOM-MOA30.

Johnson responded that afternoon. Johnson Aff., Exh. 1, Dec. 16, 2014 3:35 pm email. She suggested the group apply for a permit in order "to plan a peaceful, safe event" at a "very visible space" "adjacent to MOA, across the street" which she opined would be safer, while still facilitating the group's objective of "garner[ing] public attention by being visible to the crowds coming and going from MOA." *Id*. She noted that the MOA is private property and had "never allowed demonstrations." *Id*. She advised that the City of Bloomington "does not control access to the MOA" and had no authority to tell MOA how to manage its property. *Id*. Based on prior experience, she anticipated that MOA officials would order the protestors to depart, and that failure to depart would lead to involvement by the BPD and criminal trespass charges. *Id*. Johnson stressed her goal of trying to ensure safety for protestors and the public and the importance of any demonstration remaining peaceful. *Id*.

The State also contends that some of the BLM organizers announced, apparently via the Black Lives Matter Minneapolis Facebook page, that they would appear on Fox 9 News to talk about the upcoming BLM demonstration at the MOA. Appendix A.

In a December 17 email to Espinosa, McDowell and Grimm, Johnson reiterated that the MOA is private property, referenced *Wicklund*, and stated that she did not know of any occasions on which the MOA had granted permission for a private demonstration at the MOA. Johnson Aff., Exh. 1, Dec. 17, 2014 11:07 am email. She repeated her prior warning that BPD officers would be present to escort protestors off the property and that there could be criminal charges for those who refused to depart upon request. She also noted that her office was

presently prosecuting criminal trespass cases against "Idle No More" protestors who had demonstrated at the MOA in 2013. [19] *Id*.

On December 17, the MOA issued a press release regarding the anticipated BLM demonstration which provided, in pertinent part:

> We are aware of the group and their stated intentions for a Dec. 20 demonstration and protest at Mall of America.
>
> Mall of America is a commercial retail and entertainment center. We respect the right to free speech, but Mall of America is private property and not a forum for protests, demonstrations or public debates. We have consistently and continually prohibited all manner of groups - regardless of cause or message – from protesting and demonstrating on our property. This policy was upheld in the Minnesota Supreme Court decision involving fur protesters on Mall of America; that decision held MOA is private property and cannot be used for demonstrations without the permission of MOA. *State v. Wicklund, 589 N.W.2d 793 (Minn. 1999).*
>
> Any attempt by groups to conduct a protest is a violation of our policies and would subject a group to removal from the property and potential arrest by the City of Bloomington police, in addition to exclusion from Mall of America for one (1) year.
>
> We have made every effort to communicate this position to the Black Lives Matter organization, so that their participants are fully aware of MOA's long standing policy and the consequences of violating the rules against protesting and demonstrating. It's our hope that those efforts will result in the group moving their protest to the public property identified by the City of Bloomington, where they may conduct their protest peacefully and legally. This option would afford the group high visibility while minimizing the risk to public. . . .

[19] In response to assertions made by a Kerry Felder (who represented that she was associated with BLM, but whom it appears, like Espinosa, was never charged in connection with the BLM/MOA protest) during a December 18 conversation that the MOA supposedly had previously allowed demonstrations -- referencing Idle No More in 2012 -- Johnson explained that MOA had not, in fact, granted permission for that demonstration and had prevented a repeat demonstration in 2013 by arresting the organizers upon arrival. Flaherty Aff., Exh. A, BLOOM-MOA23. Johnson also informed Felder, in response to her request that the "City remain passive and not arrest anyone," that the BPD and prosecutors in her office lacked the discretion to "pick and choose between the laws they wish to enforce, particularly in the 'free speech' area because that would result in de facto discrimination." *Id*. Johnson advised that the City of Bloomington "would respond in a calm, respectful manner but people would be charged and prosecuted – please use the alternative site." *Id*.

Flaherty Aff., Exh. A, BLOOM-MOA24-25.

2. The December 17, 2014 Planning Meeting

The BPD learned that some of the BLM protest organizers were conducting a planning meeting to train protestors on the evening of December 17, 2014. Giles Report, p. 1 of 8. As the meeting was open to the public, BPD plain-clothes undercover officers attended. *Id*. According to Sgt. Giles' report, 150 – 200 people attended.[20] *Id*.

The State contends that Montgomery ran the meeting. Giles Report, p. 1 of 8. After mentioning several earlier protests in which she had been involved, Montgomery spoke about the history of direct action protests and explained the structure of the protest. *Id*., pp. 1 and 2 of 8. She expressed preferences for "people of color" to act as "police liaison volunteers" and for "white people" to act as protest marshals who would move the protestors throughout the mall and be responsible for keeping them safe. *Id*., p. 2 of 8. She stressed the importance of participants posting messages on social media, remaining in the public eye, chanting, and making signs to be displayed at the protest. *Id*. She also explained that members of the media had been invited to the planning meeting and had been filming the start of the meeting as an integral part of getting the BLM message out into the public eye. *Id*.

The State contends that McDowell identified himself as one of the BLM protest organizers. Giles Report, pp. 1 and 2 of 8. McDowell told the group that they planned to go ahead with the protest at the MOA even though they had been informed that the MOA is private property and that they had been denied permission to conduct the BLM demonstration at the MOA. *Id*., p. 2 of 8. He mentioned an interview he had given to the media in support of

[20] Another unspecified BPD source indicated only 85 people attended this meeting. *See* Appendix A.

the BLM cause. *Id*. He led some of the participants in his "Christmas carols with a twist" and led the break-out session of about fifty people on sign-making and chanting. *Id*.

The State contends that Salonek discussed legal issues and provided a document from the ACLU discussing legal guidelines for protests and what to do if arrested. Giles Report, p. 2 of 8. According to the State, Salonek also advised participants what to expect from the police and instructed them on tactics "to stall" the police as well as how to prevent arrest. *Id*. Sgt. Giles' charging report acknowledges, though, that Salonek "instructed the group on how to stay calm and efforts to de-escalate police or an angry protestor." *Id*.

The State contends that Gildersleve ran a break-out session[21] on the use of social media and the importance of Twitter, Facebook and other social media sites. Giles Report, p. 2 of 8.

The State asserts that Bade led the break-out session for protest marshals, at which Foster was also present. Giles Report, p. 3 of 8. Bade discussed the marshals' role and diagrammed how they were to move protesters from place to place and "how to stall police by telling them that a police liaison was on the way." *Id*. Bade had groups role-play how to deal with overzealous police officers and angry protestors, and taught the marshals how to "de-escalate" any "angry protestors." *Id*.

Levy-Pounds also attended. Giles Report, pp. 1, 2 and 3 of 8. Although Levy-Pounds sat in the crowd, Sgt. Giles characterized her as an "advisor" to the BLM group -- while admitting it was unknown how much planning and organizing she had been involved in -- and indicated that she answered several questions regarding how the protest events should play out. *Id*., pp. 2

[21] In an interview given after the demonstration at the MOA, Gildersleve was quoted as saying: "We actually took time to train hundreds of people to keep everyone safe." http://www.mprnews.org/story/2014/12/23/moa-protest-charges; *see also* Giles Report, p. 8 of 8.

and 3 of 8. In later media interviews, Levy-Pounds identified herself as a lawyer, a law professor, and an advisor to BLM and spoke about why BLM was not obligated to abide by the MOA's rules regarding protests. *Id*., p. 3 of 8.

At the end of the evening, McDowell and Montgomery led the trainees in chanting. Giles Report, p. 2 of 8.

3. Final Preparations for the BLM/MOA Demonstration

During a December 18 interview with a reporter for WCCO-TV, McDowell indicated that although some of the organizers intended to contact the BPD or Johnson to "try and work together," they were still planning to hold the protest in the MOA's rotunda. Johnson Aff., Exh. 1 (Dec. 18, 2014 email from WCCO reporter Nina Moini to Johnson). That same day, Grimm spoke to a KARE-11 reporter, stating "we're hoping to be inside, it's cold outside and there's a lot of people that like, want to come together and share a moment and we're hoping the Mall of America lets that happen." Bernhjelm Report, at p. 22 of 44.

Also on December 18, BPD Chief Jeffrey Potts wrote to Espinosa, McDowell, and Grimm asking for a meeting to discuss the planned demonstration. Johnson Aff., Exh. 1, Dec. 18, 2014 10:50 am email. He stressed that the BPD was not trying to intimidate them but instead sought to work with their group to make appropriate preparations for a "safe, successful, law abiding and respectful demonstration." *Id*. In response, Salonek asked Potts and then BPD Deputy Chief Hartley for a meeting with them and MOA representatives. Hartley Report, p. 1 (included as part of Exh. 1 to State's July 31, 2015 Mem. in Opp. to Defts' Motions to Dismiss).

In a December 19 email to MOA Director of Security Doug Reynolds, MOA Executive Vice President Rich Hoge, and MOA Corporate Counsel Kathleen Allen, Sandra Johnson noted

that Potts and Hartley were scheduled to meet that afternoon with Salonek. Flaherty Aff., Exh. 1, BLOOM-MOA1. Johnson advised that Potts and Hartley intended to deliver the "message that civil disobedience has its price and the [City of Bloomington] has absolutely no authority to tell MOA how to manage its property." *Id*.

Identifying themselves as BLM protest organizers, Salonek and Dahlstrom met with Potts, Hartley, and Reynolds during the afternoon of December 19. Hartley Report, p. 1; Appendix A. Salonek and Dahlstrom requested that the BLM protest be allowed to proceed "without interference from MOA security or police." Giles Report, p. 3 of 8. Reynolds responded that they were not allowed to protest at the MOA, which is private property. Hartley Report, p. 1. The BPD officials and Reynolds offered the vacant lot adjacent to the MOA as an alternative site. *Id*. Salonek and Dahlstrom asked for three hours in which to hold a program including speakers, chants, singing, and a die-in. *Id*. Reynolds indicated he would not negotiate, stating that he could not condone an unauthorized protest. *Id*. Salonek and Dahlstrom rejected the alternate public venue and explained the role of the protest marshals who would be shepherding the protestors while wearing "high visibility" vests. *Id*.

By December 19, MOA officials learned, from the Black Lives Matter Minneapolis Facebook page, that more than 30,000 people had been invited to the planned BLM demonstration and nearly 3,000 had expressed the intent to attend. Reynolds Aff. ¶ 12. Due to the demonstration's anticipated scale, the MOA partnered with local law enforcement agencies, including the BPD, the Minnesota State Patrol, and the Hennepin County Sheriff's Office, to develop a plan to maximize public safety, minimize the need for mass arrests, and mitigate the demonstration's impact on the MOA. *Id*. ¶ 13; Potts Aff. ¶¶ 14-15. According to Reynolds, this

type of coordinated response involving multiple agencies is standard operating procedure and is necessary in the management of large-scale events that pose a security threat to the MOA's guests, tenants and employees. Reynolds Aff. ¶¶ 13, 20. The MOA's security plan included warnings on each set of common area entrance doors notifying visitors the BLM demonstration was unauthorized, the blockading of certain areas around the rotunda and in the hallways on the mall's east side, the posting of security officers at all east level entrances, three warnings issued over the mall's public address (PA) system, display of those same warnings on the large audio video (AV) screen in the rotunda, and a lockdown of storefronts on the mall's east side. *Id*. ¶ 14.

On December 20, at 12:15 p.m., BLM marshals met at the IKEA food court,[22] with plain-clothes undercover BPD officers again in attendance.[23] Giles Report, p. 3 of 8. Bade identified herself as the "head marshal" and Foster and Wronski-Riley as the backup head marshals in case "something happens to her [Bade]." Bade stated that she would be making the decisions and providing direction to the marshals via text messaging. *Id*. She advised that, after assembling in the MOA rotunda, the demonstrators would protest with signs and chants until receiving the first demand from MOA that they leave. *Id*. The protestors would respond by staging a "die-in" with protestors lying down on the floor. *Id*. The marshals would then guide protestors to the Sears court and renew their chanting and protesting until the next demand from the MOA to leave, at which point they were to stage a second "die-in." *Id*. Sgt. Giles'

[22] During the December 17 planning meeting, Bade had asked the trainees to assemble by the large Christmas trees in the MOA's east rotunda at 1:15 p.m. on December 20. Giles Report, p. 3 of 8. Volunteers who agreed to act as marshals left their cell phone numbers on a list and received a text message on December 19 from a telephone number registered to Salonek advising that the preliminary meeting had been moved to IKEA's food court. Giles Report, p. 3 of 8.

[23] BPD officers who attended the December 17 planning meeting had included a City of Bloomington cell phone number on the list, and received a text message notifying them of the change in this meeting's location.

report explicitly acknowledges that Bade "instructed that on the third request for disbursement all protestors should leave the mall." *Id*. Bade advised the marshals to enter the MOA alone, as a means by which to avoid identification with the protest. *Id*. at pp. 3 and 4 of 8.

Having previously identified Bade as a protest organizer, upon spotting her in the Barnes & Noble café inside the MOA adjoining the east rotunda, MOA security officers escorted Bade off MOA property to the transit station before the protest began. Giles Report, p. 4 of 8. Bade then texted the other marshals, "Been booted out. Follow plan," and advised them to move to the rotunda and find Pamela Twiss and "Jie [Wronski-Riley] arm is in a sling." *Id*.

D. December 20, 2014 BLM Demonstration at the MOA

1. Overview of Command and Control and Security for the BLM Demonstration

On the afternoon of December 20, MOA Director of Security Operations Doug Reynolds was in the Emergency Operations Center (EOC), managing operational decisions related to the BLM demonstration and generally directing the MOA's security force through Patrol Captain Will Bernhjelm. Reynolds Aff. ¶ 17. Reynolds has affirmed that all decisions regarding implementation of the MOA's security plan, as outlined on p. 32, were made solely by the MOA. *Id*. ¶¶ 16-17, 21. The MOA's owners have given the MOA's private security force the authority to order people to leave the MOA and, when necessary, to delegate this authority to law enforcement personnel, as was done for the BLM demonstration. Reynolds Aff. ¶ 21

BPD Chief Jeffrey Potts was also in the EOC, directing BPD officers through Commander Mike Hartley. Reynolds Aff. ¶ 18; Affidavit of Jeffrey Potts (July 30, 2015) ¶ 16. Also in the EOC were key leadership members of the Minnesota State Patrol and Hennepin County Sheriff's Office, each responsible for commanding their own staff, and members of the MOA's management team.

Reynolds Aff. ¶¶ 19, 21. The MOA security force was not responsible for directing law enforcement nor was law enforcement responsible for directing MOA security staff. *Id*.

The MOA deployed its 150-officer private security force for the BLM demonstration. Reynolds Aff. ¶ 3. The BPD dispatched about 120 BPD officers to the MOA to help maintain peace and to enforce any violations of the law. Potts Aff. ¶ 15. The record does not appear to establish how many personnel were on hand from Whelan Security, the Hennepin County Sheriff's Office, or the Minnesota Highway Patrol. Although some protestors claimed that BPD officers were wearing riot gear and gas masks, Potts has stated that BPD officers were wearing protective head gear (as can be observed on some of the videos submitted by the State) but were not in riot gear and did not wear gas masks (although some officers had them available in nylon bags as a precautionary matter). *Id*.

2. The First Half Hour: MOA Management "Locks Down" the Mall's East End, The Main BLM Demonstration, and MOA Security Issues Broadcast and Video Warnings Instructing BLM Protestors to "Disperse."

When visitors arrived at the MOA on Saturday afternoon, December 20, MOA management had posted signs on the MOA's entry doors containing the following warning:

MALL OF AMERICA IS
PRIVATE PROPERTY.
Demonstrations and protests are strictly prohibited. Those violating these rules are subject to eviction and trespass.

Between 1:45 and 2:00 p.m., a crowd -- estimated at between 1,000 and 1,500 by the State[24] but which some individuals associated with BLM touted as being as large as 3,000 -- gathered on the mall's east side for the BLM demonstration. Giles Report, p. 4 of 8. The largest

[24] While this was a significant crowd, the MOA has hosted events with far larger crowds. For example, on December 11, 2014 – nine days before the BLM protest – the MOA had hosted Ryan & Shannon's KS95 for Kids Radiothon, with the "Clouds Choir for a Cause" (*see* Hoge Aff. ¶¶ 7, 9), in which the MOA planned for a crowd of 5,000 in the east rotunda. *Id*., Exh. 3, p. 23 of 76.

group was assembled in the east rotunda on Level One, as can be seen on many of the State's videos. Groups of demonstrators (and, presumably, other onlookers and mall patrons) were also gathered on Levels Two, Three, and Four surrounding the rotunda and looking down on the main group on Level One, as can also be seen on many of the State's videos. In addition, more demonstrators and onlookers can be observed extending down both sides of the hallways in one direction on Levels Two, Three, and Four and looking toward the main group on Level One.

BPD Officer Cullan McHarg observed Foster and Wronski-Riley near the center of the rotunda, talking to each other and several others before the chanting began. McHarg Report, p. 1 of 2 (included as part of Exhibit 1 to State's July 31, 2015 Mem. in Opp. to Defts' Motions to Dismiss). Twiss joined them and, according to Officer McHarg, appeared to be advising Foster and Wronski-Riley. *Id*., p. 2 of 2. Foster moved away and spoke to others, who then began to hold up signs. *Id*. Foster then began marshaling on the north side of the rotunda, fielding questions from the crowd, preventing protestors "from going north towards Sears," and also preventing customers from entering the protestor area. Giles Report, p. 5 of 8.

At 2:00 p.m., the BLM demonstration began in the east rotunda. MOA management decided, when the demonstration began, to "lock down" the east side of the mall, and instructed the approximately 80 retail shops on the mall's east side to close. Reynolds Aff. ¶ 17; Bernhjelm Report, at pp. 22 and 23 of 44; Giles Report, p. 6 of 8; *see also* Appendix B, State's BLM Demonstration Timeline.

Montgomery began speaking and the protestors began chanting. In addition to Montgomery, several other individuals spoke and led the assembled crowd in chanting various refrains. The State has supplied many videos that capture different aspects of the

demonstration throughout the mall over the course of the afternoon. The scene in the east rotunda from the start of the demonstration and continuing for more than half an hour is shown in Black Lives Matter 12-20-2014 (with CCTV footage) ➢ BLM PowerPoint ➢ BLM Protest Videos ➢ BLM YouTube Videos 1, from 18:35 to 52:00. This video will be referred to as the "BLM Main Demonstration Video."

Shortly after the demonstration got underway, at 2:03 p.m., MOA Patrol Captain Bernhjelm read the first of three announcements broadcast over the mall's PA system:

THIS DEMONSTRATION IS NOT AUTHORIZED AND IS IN CLEAR VIOLATION OF MALL OF AMERICA POLICY. WE EXPECT ALL PARTICIPANTS TO DISPERSE AT THIS TIME. THOSE WHO CONTINUE TO DEMONSTRATE WILL BE SUBJECT TO ARREST.

Bernhjelm Report, p. 23 of 44; Giles Report, p. 6 of 8; BLM Main Demonstration Video, at 21:40-21:58; Appendix B. After this announcement, many of the protestors in the rotunda conducted a symbolic "die-in" by lying down on the floor. Giles Report, p. 5 of 8; *see also* BLM Main Demonstration Video, at 23:00 (roughly four and a half minutes into the demonstration).

At 2:10 p.m., the words from Bernhjelm's first broadcast warning were posted on the rotunda's AV screen. Appendix B; Bernhjelm Report, p. 23 of 44; Giles Report, p. 6 of 8. (An image of the screen with this warning is reproduced in Appendix C.) About this time, Bade texted the protest marshals, "Stay Calm. And Calm others" (*see* Giles Report, p. 4 of 8), and Wronski-Riley walked around the rotunda telling the marshals "the protesting would continue for another 20 minutes and then we would all leave." *Id*., p. 5 of 8.

Besides Montgomery, Foster, Wronski-Riley, and Twiss, the State contends that Levy-Pounds was also observed in the center of the rotunda, leading chants. In addition to the

chants, videos offered by the State show hand clapping by the demonstrators, the crowd repeating other refrains at the urging of several speakers, the display of signs, and the singing of lyrics devised for the demonstration set to the tune "Jingle Bells." *See* BLM Main Demonstration Video, from 18:35 to 52:00 (the song set to the Jingle Bells tune appears at 33:25-34:15).

According to the State's timeline, Bernhjelm broadcast the following second warning over the PA system at 2:19 p.m. and also directed that it be posted on the rotunda's AV screen:

> **THIS DEMONSTRATION IS NOT AUTHORIZED AND IS IN CLEAR VIOLATION OF MALL OF AMERICA POLICY. ALL PARTICIPANTS MUST DISPERSE AT THIS TIME. THOSE WHO CONTINUE TO DEMONSTRATE WILL BE SUBJECT TO ARREST.**

Giles Report, p. 6 of 8; Bernhjelm Report, p. 23 of 44.[25] On videos supplied by the State, demonstrators can be heard to begin booing and jeering loudly as Bernhjelm read both announcements, drowning out his voice toward the end of both announcements. (At least this is the impression conveyed by the audio track on the video supplied by the State.)

The videos supplied by the State establish that the main BLM demonstration in the east rotunda on Level One between 2:00 and 2:30 p.m. was peaceful. No rioting can be observed. No physical assaults or fighting broke out. None of the demonstrators is seen attempting to deface or destroy any property in the mall or trying to incite rioting or fighting. None of the police reports describes and none of the video evidence shows any demonstrators acting in a manner so as to shut down any business or prevent access to any shops within the mall. During this time, MOA management at least tacitly permitted the BLM demonstration to go forward: security (from the MOA and Whelan Security) and law enforcement (from the BPD and the

[25] This announcement can also be heard on the BLM Main Demonstration Video, at 30:30-30:47, although, on that video, this second announcement appears to follow the first by only about nine minutes, whereas the State's timeline indicates the announcements were separated by sixteen minutes.

Hennepin County Sheriff's office) officers on site appear to be passively standing around, observing, and acquiescing in the demonstration activities taking place in the east rotunda.

At 2:30 p.m., Captain Bernhjelm broadcast a third and final warning over the PA system and directed that it also be posted as a visual warning on the rotunda's AV screen:

THIS IS A FINAL WARNING.
THIS DEMONSTRATION IS IN CLEAR VIOLATION OF MALL OF AMERICA POLICY. ALL PARTICIPANTS MUST DISPERSE IMMEDIATELY. THOSE WHO CONTINUE TO DEMONSTRATE ARE SUBJECT TO ARREST. THIS IS A FINAL WARNING.

Bernhjelm Report, p. 23 of 44; Giles Report, p. 5 of 8; BLM Main Demonstration Video, at 41:10-41:30; Appendix B. (An image of the screen with this final warning is reproduced in Appendix D.)

3. Clearing of the MOA after the 2:30 P.M. Final Broadcast/Video Warning

After Bernhjelm's final warning, Bade sent a number of texts to the marshals with instructions about moving demonstrators out of the mall. These are discussed in more detail, *infra*, in Part VII.B, at pp. 118. The State's videos also show other marshals exhorting demonstrators to leave the mall to avoid being arrested for trespass. This evidence is discussed in more detail, *infra*, in Part VII.B, at pp. 119-120.

Shortly after Bernhjelm's final 2:30 p.m. warning, the decision was made to force everyone in the mall's east end – demonstrators, mall patrons, onlookers, and, as it turns out, mall retail shop employees who happened to be in the area at that time -- out of the mall. Between about 2:35 and 2:40 p.m., MOA security and BPD officers began pushing the crowd in the east rotunda on Level One toward the east exit doors and into the east parking ramp. Giles

Report, at p. 5 of 8; Bernhjelm Report, at p. 23 of 44; *see also* BLM Main Demonstration Video, at 50:15-52:00. Sgt. Giles's report indicates that BPD and MOA security officers blocked the hallway leading out of the rotunda area heading north toward Sears Court to prevent protestors from moving throughout the mall (*see also* BLM Main Demonstration Video, starting about 46:00), blocked all exits except those leading from the rotunda to the east parking ramp, and continued pushing the crowd out those exit doors. Giles Report, p. 5 of 8.

After clearing Level One, MOA security and BPD officers pushed the protestors on Levels Two and Three out the east doors into the parking ramp. Bernhjelm Report, p. 23 of 44; Giles Report, p. 7 of 8. By 4:00 p.m., the entire east side of the mall had been cleared and MOA security and BPD officers confronted a small group of protesters in the parking ramp immediately outside the skyway. Giles Report, at p. 7 of 8. After orders by several officers directing these remaining protestors to leave mall property proved unavailing, BPD Commander Hartley issued a final order requiring the protestors to leave and informed them they would be arrested for trespassing if they did not leave. Several protestors were arrested when officers at the scene concluded they were determined not to leave and wished to be arrested. By 4:30 p.m., the east end of the mall and the parking ramp had been cleared and the lockdown lifted. Giles Report, at p. 7 of 8; Bernhjelm Report, at p. 23 of 44; Appendix B.

After the demonstration had ended, Montgomery posted on her Twitter account: "We shut down the MOA y'all!" Bade texted: "No one got arrested that I know of . . . escorted out only." Potts. Aff., Exh. 5. According to the State, Grimm gave a media interview in which she

termed the protest "a success . . . nobody can ignore what happened Saturday."[26] Gildersleve and McDowell also later spoke to the media about their roles in the demonstration.

DISCUSSION

I. Standards on Motions to Dismiss

All defendants, except Meyer and Painter, have filed motions to dismiss for lack of probable cause, pursuant to Rules 2.01, 4.03, 10.01, and 11.04 of the Minnesota Rules of Criminal Procedure. The Leader/Organizer Defendants have filed separate motions to dismiss upon various constitutional grounds.

Probable cause exists "where the facts would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that the person under consideration is guilty of a crime." *State v. Trei*, 624 N.W.2d 595, 597 (Minn. App. 2001). The purpose and function of a motion to dismiss for lack of probable cause is "to inquire concerning the commission of the crime and the connection of the accused with it." *State v. Knoch*, 781 N.W.2d 170, 177 (Minn. App. 2010); *see also State v. Florence*, 306 Minn. 442, 445, 239 N.W.2d 892, 896, 899 (1976) (purpose of permitting defendant to challenge probable cause is to "protect a defendant unjustly or improperly charged from being compelled to stand trial"); *State v. Ortiz*, 626 N.W.2d 445, 449 (Minn. App. 2001) (whether, given facts in record, it is fair and reasonable to require defendant to stand trial). To defeat such a motion, the State must have evidence sufficient to support a conviction. *Knoch*, 781 N.W.2d at 177.

[26] Similar quotations attributed to Grimm appeared in an Associated Press wire story reported in *The New York Times* on December 20, 2014. *See* http://www.nytimes.com/2014/12/21/us/chanting-black-lives-matter-protesters-shut-down-part-of-mall-of-america.html?_r=0

A motion to dismiss for lack of probable cause should be denied where the facts appearing in the record, if proved at trial, would preclude the grant of a motion for a directed verdict of acquittal. *State v. Lopez*, 778 N.W.2d 700, 703-04 (Minn. 2010). The Supreme Court has stated that a "motion for acquittal is procedurally equivalent to a motion for a directed verdict," *State v. Slaughter*, 691 N.W.2d 70, 74 (Minn. 2005), the test for which is whether the evidence is sufficient to present a question of fact for the jury when the evidence and all reasonable inferences to be drawn therefrom are viewed in the light most favorable to the State. *Lopez*, 778 N.W.2d at 703-04; *State v. Simon*, 745 N.W.2d 830, 841 (Minn. 2008); *Slaughter*, 691 N.W.2d at 74-75; *Paradise v. City of Minneapolis*, 297 N.W.2d 152, 155 (Minn. 1980); Minn. R. Crim. P. 26.03 subd. 18(1)(a).

Thus, the dispositive issue on defendants' motions to dismiss is whether, on the record before the Court, taking all the specific factual allegations in the State's amended complaints and all the specific evidentiary assertions set forth in the State's affidavits, relevant police reports and other documents filed in these cases as true, with all reasonable inferences that may be drawn therefrom viewed in the light most favorable to the State, the State has sufficient evidence giving rise to a genuine issue of fact with respect to every element of each of the charged offenses against the moving defendants.

II. All Motions Seeking Dismissal of Charges on Constitutional Free Speech, Assembly, and Right to Petition the Government Grounds Are Denied in Light of *Lloyd Corp. v. Tanner*, *Hudgens,* and *Wicklund*.

The Leader/Organizer Defendants seek dismissal of all charges against them, contending they had a legally cognizable right to conduct the BLM demonstration at the MOA under the federal First Amendment and the Minnesota Constitution. They contend the MOA should be

deemed public property, or the MOA sufficiently entangled with the State to be considered a quasi-state actor. They assert the MOA had no more ability or right to preclude them from conducting the BLM demonstration – during which they claim to have been exercising their rights of free speech and expression, peaceable assembly, and petitioning the government for redress of grievances -- at the MOA than any official governmental agency would have had had the BLM demonstration been conducted on public property. Defendant Kimberly Ann Socha, although not joining formally in the Leader/Defendants' motion and supporting memorandum in this regard (*see, e.g., State v. Kandace Montgomery*, Court File No. 27-CR-15-1304, Dk ## 31, 33), seeks dismissal of all charges against her on similar grounds. *See State v. Kimberly Ann Socha*, Court File No. 27-CR-15-3068, Dk ## 8, 9.

A. *Lloyd Corp. v. Tanner* and *Hudgens* Do Not Require Owners of Privately-Owned Shopping Malls to Permit Political Demonstrations as a Matter of Federal Constitutional Law.

The high point for the reach of the First Amendment on privately-owned shopping malls was *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza*, *Inc.*, 391 U.S. 308 (1968). In *Logan Valley Plaza*, the Supreme Court held that a privately-owned shopping mall which served as the "community business block" and which was freely accessible to and open to the public was functionally equivalent to the business block in the privately-owned town in *Marsh*[27] such that peaceful picketing by union members targeting a non-union store in the mall was protected by the First Amendment. *Id*. at 316-19.

[27] In *Marsh v. Alabama*, 326 U.S. 501 (1946), the Court had extended constitutional free speech rights to the distribution of religious literature, over the objection of the town's management, in the business block of a company-owned town in which the company had taken over all municipal functions. According to the *Marsh* Court, "Ownership does not always mean absolute dominion. The more an

Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), involved anti-draft and anti-Vietnam War protestors engaged in distributing handbills within a privately-owned, enclosed retail mall. The mall had a policy prohibiting handbilling for any purpose and also denied permission to all groups seeking to use the mall for political purposes. The Supreme Court rejected the argument that a private shopping mall was the equivalent of a company-owned town and declined to extend the rationale of *Logan Valley Plaza* to encompass a right by members of the public to engage in political protesting unrelated to any purpose for which a shopping mall was built and being used. The Court expressly rejected the protesters' argument that because the mall was open to the public, the First Amendment prohibited the mall's private owners from enforcing their policy against handbilling at the mall for any purpose or cause, 407 U.S. at 564, observing that property does not lose "its private character merely because the public is generally invited to shop there." *Id*. at 569. The Court emphasized that the invitation to the public to come onto the mall was an invitation to do business with the mall's tenants, not an "open-ended invitation to the public to use the [mall] for any and all purposes, however incompatible with the interests of both the stores and the shoppers whom they serve." *Id*.

Four years later, in *Hudgens v. NLRB*, 424 U.S. 507, 518 (1976), the Supreme Court noted that the rationale of *Logan Valley Plaza* did not survive *Lloyd Corp. v. Tanner*, observing that "the ultimate holding in Lloyd amounted to a total rejection of the holding in Logan Valley." In *Hudgens*, the Court rejected a union's claim of unfair labor practice when the owner of a privately-owned enclosed shopping mall threatened to arrest and charge demonstrating

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owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." 326 U.S. at 506.

employees with criminal trespass for peaceful picketing in front of their employer's store in the mall to advertise a strike.

In the wake of *Lloyd Corp. v. Tanner* and *Hudgens*, as a matter of federal constitutional law, the First Amendment does not constrain private property owners' ability to prohibit political or social group protesters from engaging in free speech, other expressive conduct, assembly and petitioning the government on the premises of privately-owned shopping malls, even those as large, complex, and as heavily-trafficked and visited as the MOA. Defendants had no legal right to conduct the BLM demonstration at the MOA over the objections of the MOA's ownership and management based on the federal First Amendment.

B. *Wicklund* Is Binding Precedent on this Court.

State v. Wicklund, 589 N.W.2d 793 (Minn. 1999), is the definitive statement of the law in Minnesota regarding the interplay, under the Minnesota Constitution, between claims of right to engage in constitutionally-protected free speech and expressive activities on privately-owned property and the rights of private property owners to control activities on their property.

Wicklund arose from an "anti-fur" protest in a courtyard area in front of Macy's inside the MOA. Macy's had received notice that protesters would be targeting its stores. The MOA requested contractual police services and six BPD officers were assigned to the MOA on the day of the protest. The *Wicklund* protesters carried placards illustrating cruel treatment of animals in the fur trade and distributed leaflets urging a boycott of Macy's based on its selling of fur products. They also sought to engage passing shoppers in conversation over the ethics of producing and selling fur products. Although the protest was peaceful and non-

confrontational, MOA security guards warned the protesters several times that they were on private property and would be arrested if they continued to protest. Four protesters who refused to leave the mall were arrested and charged with misdemeanor criminal trespass, pursuant to Minn. Stat. § 609.605 subd. 1(b)(3).

The *Wicklund* defendants sought dismissal of the trespass charges, contending the free speech provisions of the United States and Minnesota Constitutions afforded them a claim of right to conduct their protest at the MOA. U.S. Const. Amend. 1; Minn. Const., Art. 1, § 3. The trial court concluded the MOA was public property. It based that conclusion on two lines of reasoning: (i) the general invitation the MOA extends to the public to come to the MOA for shopping and entertainment; and (ii) the nature and extent of the public financing involved in the MOA's development. Consequently, the trial court ruled that the protesters' expressive conduct was protected by Minnesota's constitutional free speech guarantees.

The Minnesota Court of Appeals reversed and, on further appeal, the Supreme Court affirmed the Court of Appeals. Adopting the U.S. Supreme Court's First Amendment analysis in *Lloyd Corp. v. Tanner* and *Hudgens* and applying that analysis to the Minnesota Constitution's free speech guarantees, the Minnesota Supreme Court declined to construe free speech rights more broadly under the Minnesota Constitution than the U.S. Supreme Court has done under the First Amendment.[28] 589 N.W.2d at 798-801, 803.

[28] The results have been different under state constitutions in some other states. *See, e.g.*, *Robins v. PruneYard Shopping Center*, 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979) (construing California's free speech guarantee more expansively than First Amendment's and interpreting California constitution to protect reasonably-exercised speech and petitioning in privately-owned shopping centers), *aff'd sub. nom.*, *PruneYard Shopping Center v. Robins* 447 U.S. 74 (1980) (holding neither mall owners' property rights under federal constitution nor their own First Amendment free speech rights were infringed by California Supreme Court's interpretation of California constitution recognizing state-

The *Wicklund* Court held that the MOA was private property, not a public forum, on which there is no constitutionally-protected right under either the federal or Minnesota state constitutions to engage in peaceful, non-confrontational, speech-related protests. 589 N.W.2d 797. The Court reasoned that private property is not converted to public property simply because it is openly accessible to the public. *Id*. at 798. The Court also concluded that the license extended by the MOA to members of the public to come onto mall property is a limited license only to come to the mall to spend money while shopping, dining, or otherwise being entertained and is revocable at will by the MOA's management. *Id*. at 802.

Although the Leader/Organizer Defendants and Socha contend *Wicklund* was wrongly decided and seek its reversal, they concede it is controlling precedent before this Court. *State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010). Accordingly, the motions by the Leader/Organizer Defendants and Socha seeking dismissal of all charges against them on the grounds that the MOA is a public forum in which neither the MOA nor the City of Bloomington had any authority to curtail the BLM protestors' exercise of their constitutionally-protected rights of free speech, expression, and peaceable assembly at the MOA are denied.

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protected rights of free expression and to petition even on privately-owned shopping malls); *Batchelder v. Allied Stores International, Inc.,* 388 Mass. 83, 445 N.E.2d 590, 595 (1983) (extending protections under Massachusetts constitution to solicitation of signatures in large shopping malls, for purposes of "ballot access" only); *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.,* 138 N.J. 326, 650 A.2d 757, 781 (1994) (extending protection under New Jersey constitution to "leafletting and associate speech in support of, or in opposition to causes, candidates, and parties"); *Lloyd Corp. v. Whiffen,* 315 Or. 500, 849 P.2d 446, 454 (1993) (extending protection under Oregon constitution to persons seeking signatures on initiative petitions in common areas of large shopping centers).

C. The MOA and City of Bloomington Are Not So Entwined as to Render the MOA a Quasi-State Actor Nor Do the Alleged "Changed Circumstances" Defendants Point To at the MOA Since 1999 Serve to Distinguish the BLM Demonstration from the Anti-Fur Protest in *Wicklund*.

In addition to urging that *Wicklund* be overruled, the Leader/Organizer Defendants and Socha also contend that circumstances have changed at the MOA and regarding the nature of the operational and financial relationship between the MOA, the City of Bloomington, and the BPD in the sixteen years since *Wicklund* was decided such that *Wicklund* no longer effectively controls the result in this case on the public property and state actor grounds.

Brennan v. Minneapolis Society for the Blind, Inc., 282 N.W.2d 515, 524, 528 (Minn. 1979), held that federal constitutional restrictions on conduct can be applied against private entities "if the conduct that is formally private has become so entwined with governmental character as to become subject to the constitutional limitations placed upon state action." *Brennan* concluded that a private foundation that had received significant funding from public sources was not a state actor under either the "sufficiently close nexus" test articulated *in Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), or the symbiotic relationship test articulated in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). Under the sufficiently close nexus test, the court looks to whether any nexus between the state and the challenged action of a private, regulated entity is sufficiently close to justify treating the private actor's actions as those of the state. *Jackson*, 419 U.S. at 351. Under the symbiotic relationship test, the court looks to whether the "power, property, and prestige" of the state has in fact been placed behind discriminatory conduct. *Burton*, 365 U.S. at 725.

Relying on *Brennan*, the *Wicklund* Court held that the MOA had not become sufficiently entwined with the City of Bloomington (or other governmental arms of the state), and thus

could not be considered a state actor. 589 N.W.2d at 801-802. The *Wicklund* Court observed that there had been no abrogation of governmental functions to a private entity in the case of the MOA, based on several considerations:

(1) the MOA was managed by a private company;

(2) the MOA paid for its own public services, including police, utilities, fire, and security like any other private company in Bloomington;

(3) the MOA was patrolled by private security guards; and

(4) there was no evidence of entanglement between governmental functions and MOA management with respect to the post office and alternative school that leased space at the MOA.

Id. at 802.

In view of defendants' argument, it is necessary to compare the pertinent circumstances at the MOA both at the time of *Wicklund* and at the present.

1. "That Was Then": Pre-*Wicklund*

An extensive record was developed during a pretrial evidentiary hearing in *Wicklund*. The pertinent facts, as summarized in the opinion, 589 N.W.2d at 795-96, are as follows.

MOA was then the largest shopping mall in the United States, with 4.2 million square feet of space. It comprised four anchor stores, 400 other retail stores, entertainment venues, movie theatres, a wedding chapel, a post office, an alternative school, a substation of the BPD and the country's largest indoor amusement park. The MOA promoted itself as a vacation destination and also sponsored various promotional events aimed at attracting specific groups of consumers to the MOA. It attracted 37.5 million visitors annually.

The Bloomington Port Authority (BPA) had purchased the site of the former Metropolitan Stadium, solicited development proposals, and issued $105 million in tax

increment financing bonds (TIF) used to finance site preparation, including utilities, parking ramps, access roads, and pedestrian bridges linking the parking ramps to the mall. The TIF bonds were scheduled to be repaid from a revenue stream consisting of property taxes and a liquor and hotel tax imposed by the City of Bloomington. In addition to the BPA's TIF bond financing, the Minnesota legislature had authorized the City of Bloomington to issue $80 million in bonds to cover the cost of highway reconstruction surrounding the MOA. The approximate $700 million balance of the construction costs for the MOA was financed by the Mall of America Company, a subsidiary of two privately-owned shopping center development corporations.

In sum, public financing contributed $186 million of the total $886 million cost for the acquisition of property, site and infrastructure development, and construction of the MOA, or roughly 21% of the total development costs. No public entity had a direct ownership interest in the MOA, however, and the public's financial investment in the original development costs of the MOA was to be repaid in full as the bonds were retired over time.

The MOA employed 150 full-time security guards to patrol the common areas of the mall and provide assistance to stores upon request. Their duties also included enforcing the MOA's code of conduct. Although the BPD maintained a police substation at the MOA, at that time, no BPD staff was assigned to the MOA substation. Any patron in violation of MOA policy was informed by an MOA security guard of the violation and given the choice of conforming to the code or leaving the premises and advised they would be arrested otherwise. In case of a refusal, MOA security guards made a "citizen's arrest" and BPD police were summoned.

The MOA also occasionally employed off-duty BPD officers for contracted police services, including traffic control and heightened security. However, those services were

available to any private entity in the City of Bloomington and the BPD was reimbursed for all services in supervising any off-duty BPD officers contracted by the MOA.

2. As Things Are Now

The MOA now includes 520 stores, 50 restaurants, Nickelodeon Universe (the country's largest indoor theme park), Sealife Aquarium, a House of Comedy, a movie theatre complex, a wedding chapel and the American Girl store. Hoge Aff. ¶ 5. The MOA now draws an estimated 42 million visitors annually. *Id*. MOA property includes the enclosed mall, the parking ramps surrounding the mall building, and the skyways connecting the parking ramps to the mall. *Id*. ¶ 1. There has been substantial capital improvement and expansion at the MOA in the sixteen years since *Wicklund*, particularly over the past three years. *Id*. ¶ 2. This includes the addition of the Radisson Blu,[29] and the so-called Phase I-C, which includes a JW Marriott hotel, an office tower, and expanded retail space. *Id*. ¶¶ 3-4.

The MOA still has its own 24-hour private security force, employing about 150 officers, including undercover personnel, uniformed personnel, a "K9" unit, and a bike personnel unit. Reynolds Aff. ¶¶ 2-3, 7. The MOA's private security force is responsible for patrolling the MOA. *Id*. ¶ 4. That force is supervised and maintained separately from local law enforcement agencies and does not otherwise operate under the control of the City of Bloomington or the BPD. *Id*. ¶¶ 4, 7, 21. The MOA's monitoring of social media sites is handled internally and not at the direction of any local law enforcement agency. *Id*. ¶ 9.

As was the case at the time of *Wicklund*, the BPD maintains a substation at the MOA, on Level Two near the East entrance. Potts Aff. ¶ 3. An objective of that substation is to provide

[29] According to Bloomington City Attorney Sandra Johnson, public funding provided less than 14 percent of the total development cost of the addition of the Radisson Blu. Johnson Aff. ¶ 10.

business owners in the mall with training and education on crime prevention, including theft. *Id*. ¶ 4. One thing that has changed since *Wicklund* is that the BPD substation at the MOA is now staffed, during retail hours, by five uniformed BPD officers (including a BPD police detective) and a Homeland Security Coordinator. *Id*. ¶ 5. However, the decision to staff the MOA substation was made by BPD Chief Potts, was not done at the request of the MOA, and was made to reduce response time and generally to improve the efficiency of the BPD's overall operations.[30] *Id*. Although the BPD officers stationed in the MOA work cooperatively with MOA security forces, they remain under the command of their BPD supervisors and do not take orders from MOA management or the MOA's security force. *Id*. ¶¶ 6, 8, 11 & Exh. 1; Reynolds Aff. ¶ 21. The BPD officers working the MOA do not enforce MOA private conduct rules but only Minnesota laws and Bloomington city ordinances. Potts Aff. ¶¶ 7, 10.

The MOA also works with local law enforcement agencies, including the BPD, to ensure that the MOA's patrons, tenants, and employees are protected.[31] Reynolds Aff. ¶¶ 5-6. According to MOA Director of Security Reynolds, coordination with local law enforcement agencies for large-scale protests is standard operating procedure and is central to the MOA's goal of providing a safe and enjoyable shopping and entertainment experience for the MOA's millions of annual visitors. *Id*. ¶ 13. BPD Chief Potts concurs, noting also issues regarding roadway obstruction and potential security threats. Potts. Aff. ¶ 14. The MOA's partnerships with local law enforcement agencies include joint training exercises and coordinated responses to

[30] Prior to 2002, the substation was not staffed and squads were dispatched from patrol on the streets of Bloomington to the MOA when calls were placed. Potts Aff. ¶ 5. According to Chief Potts, that was a very inefficient system, with non-emergency calls being held in pending status for over two hours. *Id*.

[31] The BPD has also coordinated with other outside private venues, such as hotels and entertainment venues, and other law enforcement agencies, including during the Republican National Convention in 2008 and in 2014, when President Obama stayed in a Bloomington hotel. Potts Aff. ¶¶ 2, 14.

unauthorized events and/or significant security threats (*e.g.*, active shooter situations, explosive device discovery, mock mass emergency response training events, tornado evacuation, or hazardous materials release). Reynolds Aff. ¶ 6; Potts Aff. ¶ 8. According to Potts and Reynolds, the BPD and MOA have always shared information about potential threats to public safety at the MOA to be proactive in preventing crime and to ensure that the BPD is adequately staffed to handle potential security threats while also maintaining a presence on Bloomington streets. Reynolds Aff. ¶ 7; Potts Aff. ¶ 11. Such information sharing does not alter the chain of authority within either the MOA or the BPD, and MOA security and the BPD make their own decisions how to respond to and use any such shared information. *Id*. & Exh. 1.

Sandra Johnson notes that the Bloomington City Attorney's Office routinely maintains contact with private entities, like the MOA, in the event of "a large-scale event that holds the potential for mass arrests" because of their responsibility to determine criminal charges that might ensue and how to preserve relevant evidence, identify defendants, and process criminal charges. Johnson Aff. ¶ 4. She also notes that her office and the BPD have worked with MOA security operations to educate them on criminal case submission standards, a primary purpose of which was to increase the efficiency by which non-felony, adult criminal cases are ultimately submitted to and prosecuted by the Bloomington City Attorney's Office. *Id*. ¶ 12. Johnson has also affirmed that the Bloomington City Attorneys' Office has never performed any legal services for the MOA. Johnson Aff. ¶ 2; *see also* Sullivan Aff. (July 31, 2015) ¶ 3 (no contracts for legal services between MOA and City of Bloomington).

The BPD has a contractual overtime program that is available to any private entity in Bloomington, including the MOA. Potts Aff. ¶ 9. The primary purpose of the contractual

overtime program is to offer private entities a police presence for large-scale events. *Id*. Even when performing contractual overtime services to private entities, BPD officers remain under the command of the BPD and the requesting private party pays the City of Bloomington for the overtime costs of the officers. *Id*.

Nothing about these slight differences, in view of the *Wicklund's* Court analysis of the public forum and quasi-state actor issues, warrants a conclusion either that the MOA should now be considered to be a public forum or that the MOA is sufficiently entangled with the City of Bloomington to render it a quasi-state actor. *Wicklund* remains controlling precedent on these issues, under the relevant facts in the record before the Court in these cases.

III. All Motions Seeking Dismissal Of Trespass Charges Are Denied.

A. Trespass, Refusal to Depart on Demand (All Participant Defendants Except Gieseke, McCray and Painter).

Fourteen of the moving Participant Defendants (see *supra* p. 3, Order ¶ 1, for the list) are charged with trespass in violation of Minn. Stat. Ann. § 609.605 subd. 1(b)(3) which provides as follows:

> **Subdivision 1. Misdemeanor.** (b) A person is guilty of a misdemeanor if the person intentionally: . . . (3) trespasses on the premises of another and, without claim of right, refuses to depart from the premises on demand of the lawful possessor;

To secure a conviction for trespass, then, the State must present evidence at trial sufficient to convince the jury that:

(1) each defendant intentionally trespassed on MOA property;

(2) MOA's ownership (through management or a delegee such as a law enforcement or private security officer) demanded that each defendant depart from the MOA;

(3) each defendant refused to leave the MOA in response to such a demand; and

(4) each defendant had no legal claim of right to remain on MOA property.

1. These Participant Defendants Are Not Entitled to Dismissal of the Trespass Charge on the Ground that Their Implied License to Come Onto the MOA Constitutes an Irrevocable Claim of Right.

In *State v. Brechon*, 352 N.W.2d 745, 749-50 (Minn. 1984), the Supreme Court held that "claim of right" is an essential element of the state's *prima facie* case for criminal trespass, not an affirmative defense on which the defendant bears the burden of proof. Under *Brechon*, the State must present evidence from which the jury may reasonably infer that each defendant charged with trespass under this section had no legal claim of right or permission from the MOA to be on mall property at the time the defendant was charged with trespass. 352 N.W.2d at 750. The State can meet that burden by showing that someone other than each defendant had title or the right to possession of the MOA and that each defendant never received permission to be on mall property or that any permission, once given, had been withdrawn. *Id*.

If the State meets its burden, the burden then shifts to each defendant to offer evidence of his or her reasonable belief that he or she had a right, sounding in property law concepts such as owner, tenant, lessee, licensee, or invitee, to be on mall property. *Brechon*, 352 N.W.2d at 750. Subjective reasons a defendant offers "not related to a claimed property right or permission" are irrelevant to the claim of right issue. *Id*.; *State v. Zimmer*, 478 N.W.2d 764, 766 (Minn. App. 1991), *aff'd*, 487 N.W.2d 886 (Minn. 1992), *cert. denied*, 506 U.S. 1051 (1993). Claim of right is a fact issue for the jury, as the *Brechon* Court deemed it fundamental that criminal defendants have a due process right to explain their conduct and motives to a jury. 352 N.W.2d at 750-51; *see also State v. Rein*, 477 N.W.2d 716, 720 (Minn. App. 1991).

Some defendants note that the MOA as a general matter grants an implied license to all members of the public to enter the MOA for shopping and entertainment purposes. They also stress that, although MOA management advised some individuals associated with the BLM movement that a BLM demonstration at the MOA was not authorized and violated mall rules, MOA management never informed anyone in advance that they were not welcome at the MOA on December 20. They seek dismissal on the grounds that they thus had a claim of right to be on MOA property on December 20.

Assuming *arguendo* that both of those propositions are true, neither precludes the possibility that the State could prove that each of the Participant Defendants charged with trespass lacked a legal claim of right to be on mall property at the time of his or her arrest. The Minnesota Supreme Court has held that the implied license a business owner provides to the public to enter the owner's private property for "ordinary business intercourse" with the owner does not afford members of the public, as invitees, a license to "engage in extraordinary activity hostile to the business of the owner." *State v. Quinnell*, 277 Minn. 63, 151 N.W.2d 598, 602 (1967) (affirming trespass conviction for participating in demonstration at privately-owned stockyard protesting stockyard's marketing methods that had completely shut down stockyard operations). That principle was expressly recognized for the MOA in *Wicklund*, where the Court concluded that the license the MOA extends to the public is a limited license only to come to the mall to spend money while shopping, dining, or otherwise being entertained and is revocable at the will of MOA's management. 589 N.W.2d at 802.

The State has alleged in the Statements of Probable Cause, and has offered evidence in the form of police reports and videos of MOA and BPD officers interacting with demonstrators

during the BLM demonstration, that numerous officers informed individuals and groups of demonstrators in various locations throughout the mall's east side that they were being ordered to leave – or "exit" – the mall. Such evidence, if credited by a jury, would suffice to meet the State's burden of proving that each of the moving Participant Defendants charged with trespass lacked a claim of right to be on mall property at the time he or she was arrested and charged with trespass, with such orders revoking any implied license they may have had to come onto the mall on the afternoon of December 20, 2014.

2. These Participant Defendants Are Not Entitled to Dismissal of the Trespass Charge on the Ground that Their Federal and State Constitutional Rights to Free Expression Constituted a Cognizable Claim of Right to Demonstrate at the Privately-Owned MOA Over the Objection of the MOA's Owners and in Contravention of Written MOA Policy Prohibiting All Demonstrations.

All fourteen Participant Defendants charged under this section of the trespass statute who have filed motions to dismiss for lack of probable cause contend they had a cognizable claim of right to be on MOA property for another reason: they argue their speech and expressive conduct during the BLM demonstration are protected under the United States and Minnesota constitutions. Here, again, assuming *arguendo* that the speaking, chanting, singing, sign holding and symbolic "die-ins" in which many of those who attended the BLM demonstration engaged constitute speech and expressive conduct protected by the federal First Amendment and the Minnesota Constitution, such a conclusion does not preclude the State from proving the defendants lacked a claim of right to remain on the privately-owned mall property. With respect to the trespass charge, the State is not prosecuting the demonstrators based on the content of their speech and expression. Rather, it is prosecuting them as a matter of property law, based on their refusal to depart from private property in

response to demands by the MOA that they do so, because the MOA objected to the conduct of an unauthorized political demonstration on mall property, against written MOA policy prohibiting such demonstrations, and over the MOA's repeated written and oral objections.

Forty-year old United States Supreme Court precedents, *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), and *Hudgens v. NLRB*, 424 U.S. 507 (1976), teach that owners and management of privately-held shopping malls are not restrained by the First Amendment from prohibiting demonstrators from engaging in speech and other expressive conduct (and other First Amendment rights, like assembly and petitioning the government to redress grievances) at their malls. *See, supra*, Part II.A, at pp. 43-44. In *Wicklund*, the Minnesota Supreme Court held that the MOA is private property and, following *Lloyd Corp. v. Tanner* and *Hudgens*, that there is no constitutionally-protected right under either the federal or Minnesota Constitutions to engage even in peaceful, non-confrontational, speech-related protests at the MOA over the objections of the MOA's owners or managers. 589 N.W.2d at 797. *See, supra*, Part II.B, at pp. 44-47. *See also State v. Scholberg*, 412 N.W.2d 339, 340, 344 (Minn. App. 1987) (reversing trial court dismissal of trespass charges against anti-abortion activists attempting to distribute anti-abortion literature at Meadowbrook Women's Clinic who had refused demand to leave pursuant to clinic's policy prohibiting all protest activity and distribution of unauthorized literature, holding defendants had no right to demonstrate on clinic's private property over clinic's objections).

Under these federal and state precedents, the constitutional right individuals have to engage in protected expressive activities on public property does not give rise to a cognizable claim of right to engage in unauthorized demonstrations on private property over the property

owner's (or legal possessor's) right to exclude unwanted persons or prohibit undesired activities.

3. These Participant Defendants Are Not Entitled to Dismissal of the Trespass Charge on the Ground that the Three Announcements Broadcast and Posted on the Rotunda's AV Screen in the First Half Hour of the Demonstration Used the Word "Disperse" Rather Than "Depart" or "Leave."

Defendants also seek dismissal of the trespass charge, focusing on the three messages read by Captain Bernhjelm over the PA system and posted on the AV screen in the rotunda between 2:03 p.m. and 2:30 p.m. *See* Appendices C and D; *see also supra*, at pp. 36-38. Defendants contend these warnings did not constitute an explicit and unequivocal demand that they depart from MOA property, a necessary element of the crime of trespass, because they used the word "disperse." Defendants correctly note that "disperse," both in common usage and more formally in dictionary definitions,[32] generally means to scatter about in different directions and is not strictly synonymous with "leave" or "depart." The Court cannot, however, conclude, solely on the basis that those warnings used the word "disperse" rather than explicitly ordering all demonstrators to "depart from" or "leave" the MOA, that the State could not meet its burden at trial of proving that an effective demand was made to each defendant, as required by the trespass statute, ordering departure from the mall.

First, the MOA's December 17 Press Release, which was posted on the BLM Facebook page, and the signs posted on the MOA entry doors on December 20 made clear that the MOA is private property, that demonstrations at the MOA are strictly prohibited, that the BLM demonstration in particular was not authorized, and that anyone violating the mall's rules in

[32] *See, e.g.*, SHORTER OXFORD ENGLISH DICTIONARY (5th ed. 2002); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011).

this regard was subject to eviction or arrest for trespass. There were several hundred private security and law enforcement officers spread throughout the east side of the mall during the BLM demonstration. That evidence, when coupled with the broadcast and written warnings posted on the rotunda's AV screen that any participants would be subject to arrest if they continued to demonstrate, is sufficient to present a question of fact for the jury as to whether the MOA made a legally sufficient demand revoking the limited license by which the demonstrators (and other mall patrons and observers) had been invited onto MOA property, demanding that they depart from the MOA, and warning them that refusal to do so placed them at risk of being arrested and charged with trespass.

Second, defendants' focus merely on the three announcements broadcast over the PA and posted on the AV screen in the rotunda during the first half hour is too narrow. The State's amended complaints in many of these cases allege that BPD and MOA security officers issued numerous oral orders after 2:30 p.m. at various locations on the mall's east side directing everyone within the barricaded section of the mall to leave through the east exit doors and that they would be subject to arrest if they refused. The record contains written reports from several officers as well as many videos recorded at various times throughout the afternoon and at various locations within the mall[33] which establish that numerous orders were issued over bullhorns by

[33] One of the defendants arrested at the MOA and charged with trespass demanded a speedy trial and his case was tried between June 29 and July 2, 2015. *State v. Anthony John Nocella*, Henn. Cty. Ct. File No. 27-CR-15-3146. While the Court has not conducted a detailed comparison between the video evidence submitted by the parties in these cases and that introduced by the parties in *Nocella*, the Court notes that videos entered into evidence in *Nocella* contained numerous oral warnings instructing the protestors to leave the mall – not simply to "disperse" – and that they would be subject to arrest if they did not do so.

security officers[34] instructing individuals and groups of demonstrators in the east end to leave the mall or be arrested for trespassing. *See, e.g.*, Reports by Officers Ben Calhoun, Mike Gallagher, and Tom Williams (all included in Exh. 1 to State's July 31 Mem. in Opp. To Defts' Motions to Dismiss); Bernhjelm Report, at p. 23 of 44; State's Vagueness Memo Videos ➢ Video 4 (from 22:00 to end of recording).

While Defendants are free to argue to the jury at trial the issue of whether they received adequate demand required by the trespass statute that they depart from the mall, the Court cannot conclude on the basis of the evidence in the record in these cases that the State could not meet its burden of proof on this issue.

4. Particularized Factual Showings as to Individual Participant Defendants

Although the State's allegations against Defendant Aaron Lamar Abram largely focus on conduct the State contends is relevant to the disorderly conduct charge against him, the State does allege that Abram was among a group in the parking ramp which had been ordered to leave and that he was arrested after he had refused to leave.

About 3:55 p.m., BPD Officer Lucas observed Defendant Emmett Doyle in the skyway standing in front of the doorway leading back into the MOA at Level Two, through which officers had been ushering protestors out of the mall. Jacob Lucas 12/20/2014 Report. The skyway is part of MOA property. In his report, Lucas states that Doyle placed his body in front of the doors, blocking egress through those doors, stating he was trying to protect the

[34] MOA Director of Security Reynolds has testified that MOA ownership and management had delegated authority to MOA security and BPD officers to instruct individuals to leave the mall. Under Minnesota law, police officers may have the legal right to order individuals off private property. *State v. Quinnell*, 277 Minn. 63, 151 N.W.2d 598, 602-03 (Minn. 1967).

protesters.[35] *Id*. After Doyle refused several requests by officers to move back and make way for people to exit the mall, and resisted officers' attempts to guide him to the side to permit others to leave, Lucas arrested Doyle. *Id.*

At some point after 2:30, the State charges that officers observed Defendant Andrew Jared Edwards on Level Two. MOA security officers approached him and told him three times to leave the MOA. In response, Edwards disappeared into the crowd. A short time later, officers observed Edwards leading a large group of demonstrators chanting. Bernhjelm Report, at p. 40 of 44. According to MOA security officer Melissa Coleman's arrest report, MOA security officers announced to this group being led by Edwards, via megaphone, that MOA is private property and does not allow protesting or demonstrations, instructed the group to head toward the exit, and advised that they would be arrested for trespass if they did not leave the mall. *Id*. BPD officers were also instructing demonstrators in this group to leave the mall. Calhoun Report. Coleman offered Edwards the option of continuing to protest across the street in the parking lot adjacent to the East lot, to which Edwards responded by continuing to shout "No justice, no peace." *Id*. At that point, BPD Sgt. Bitney ordered BPD officer Kiehl to arrest Edwards on charges of trespass and disorderly conduct. *Id*.

Once officers had begun moving the crowd out of the east rotunda area into the skyway, most of the protestors filed out the exits. BPD Sgt. Williams led a group of MOA and BPD officers who formed a security line neat the rotunda elevators on Level Two. Defendant Tadele Kelemework Gebremedin was observed leading a group in this area in chants, while pumping his fist in the air. MOA security and BPD officers began pushing the crowd in this area

[35] In his memorandum in support of his motion to dismiss, Doyle indicates he was one of the protest marshals. *See* Dk # 9 , at p. 3 and Dk # 15, at p. 3, in *State v. Doyle*, 27-CR-15-3583.

out of the mall through the east exit, issuing repeated orders for everyone to leave the mall. In particular, the State notes that Gebremedin can be observed in a group MOA security officer McDonald was ordering to leave the mall. After observing Gebremedin for more than twenty minutes as he continued to lead the crowd in chanting and based on his refusal to cooperate and leave the mall, Sgt. Williams ordered that he be arrested.

While officers were moving a crowd of protestors out the east doors of the mall and into the skyway, BPD Detective Rix observed Defendant Madeline Jacobs with two men not far from the top of the stairway. Jacobs and the men were told to leave or face arrest. When Jacobs refused to leave and remained on MOA property, Detective Rix arrested her.

About 3:00, Defendant Christopher Mark Juhn was among a group on Level Two east. According to MOA security officer Jeffry Workman, MOA Public Relations-Senior Media Strategist Julie Hanson approached MOA security officer Monskey and reported that Juhn was wearing a press badge. Bernhjelm Report, at p. 44 of 44. Monskey informed Juhn that all media and press were only permitted to cover the demonstration from Level 4.[36] *Id*. Juhn allegedly told Monskey that even though he was wearing a press badge, he was not covering the BLM demonstration as a member of the press and refused to move to Level 4. *Id*. When Workman approached him, Juhn removed his press badge, once again indicating that he was not with the press. *Id*. Juhn reaffirmed his refusal to move to Level 4, stating that he had been "covering" the event "all day" but not from Level 4.[37] *Id*. Workman told Juhn he was being

[36] MOA Executive Vice President of Operations, Rich Hoge, testified that media members who had requested access to the MOA to cover the BLM demonstration were restricted to the mall's Level Four for purposes of interviews and filming. Hoge Aff. ¶ 13.

[37] Juhn can be observed on a couple videos supplied by the State -- "DE2C8986" (at 1:15-1:22 & 1:37-2:00) & "DE2C8992", on Black Lives Matter 12-20-2014 (with CCTV footage) ➢ Arrested Protestors ➢

asked to leave the mall based on his refusal to comply with instructions, and that he would be arrested and charged with trespass if he refused to leave. *Id*. Workman told Juhn he could go across the street to cover the demonstration as it continued on public property, could leave the MOA and get on the train to go "cover another story," or "go across the street to get a bite to eat" and return to the MOA "another day." *Id*. About 3:20, while Workman was awaiting a response from Juhn, several BPD officers approached Juhn and placed him under arrest for criminal trespass.[38] *Id*.

While officers were moving a group of protestors toward the exit on Level Two around 4:00 p.m., Defendant Tamera Janae Larkins was leading a crowd of more than 100 in a series of chants and a "die-in," agitating the protestors (according to the State) and making it difficult for officers to move that group off mall property. BPD Officer Matthew Foy Report. The officers instructed Larkins several times to leave the mall, but she refused to leave. *Id.* Larkins eventually moved into the parking ramp facility. *Id.* The parking ramp is also MOA property. While in the parking ramp, BPD officer Foy, in addition to other MOA security and BPD officers, informed Larkins that she would be arrested if she did not leave. *Id.* When Larkins refused to leave, she was arrested. *Id.*

Christopher Juhn -- taking photos and apparently speaking with MOA and BPD officers, although those conversations cannot be heard on the audio on those videos. His arrest by BPD and MOA security officers is also shown, on video "DE2C8995," also on Black Lives Matter 12-20-2014 (with CCTV footage) ➢ Arrested Protestors ➢ Christopher Juhn, but there again the audio does not capture any conversation between Juhn and any of the MOA or BPD officers.

[38] Juhn contests the State's recounting and its interpretation of his conversations with Workman. However, for purposes of Juhn's motion to dismiss, the Court must assume the State's allegations are true and draw all reasonable inferences from the evidence in favor of the State, as the non-moving party. Juhn remains free to testify at trial, if he wishes, to recount his recollection of the conversations and to explain his actions to the jury. Juhn may also move for a judgment of acquittal at trial if in his view the evidence, as it comes in at trial, is legally insufficient to sustain a conviction against him on the trespass charge.

Shortly after 4:00 p.m., the MOA had been cleared and MOA security officers and BPD officers were left facing small groups of protesters in the parking ramp facility immediately outside the skyway on the second floor, one group a half level down on P2 and the other a half level up on P3. Several officers at these locations, including BPD officers Rix and Elliot, had issued instructions directing the remaining protestors to leave or be arrested for trespass. BPD Commander Elliott was with the group on P2. He issued three warnings to this group that they were trespassing and would be arrested if they did not immediately leave. While several of the protestors left in response, several others remained after the passage of several minutes and continued to chant, refusing to leave. Some, including Defendant Dua Safaldien Saleh, approached the police line that had formed to block the doors leading from the parking ramp back into the skyway to the mall. Upon the orders of Commander Elliott, Saleh was arrested by Officer Nybeck. Defendants Dakota Ryan Machgan and Kimberly Ann Socha were in the group on P3. Several officers in this location issued orders instructing the remaining demonstrators to leave. After a few minutes, BPD Commander Hartley issued a final order directing them to leave, advising that they would be arrested for trespassing if they did not leave. When Machgan and Socha refused to leave, they were arrested upon the orders of Commander Hartley (Machgan) and BPD Officer Danner (Socha).

While BPD Sgt. Bitney was supervising officers in an area overlooking the east rotunda on Level Two, a group of protestors was ordered to leave the MOA. Several responded by sitting or lying down on the floor, including Defendants Rahsaan Mahadeo and Mautaui and Nakami Tongrit-Green. Mahadeo also participated in chanting and held up a sign with the words “Black is Beautiful, Not Criminal.” After initially moving with a group toward the exit

doors, the State contends that Mahadeo "doubled back and began protesting again across the hallway." After refusing to leave the mall in response to more commands from MOA security and BPD officers, Sgt. Bitney gave the order to arrest Mahadeo and both Tongrit-Greens.

Defendant Roxxanne Leigh Rittenhouse was at the MOA on December 20. Rittenhouse was an employee at one of the MOA's retail shops, Lush, located on Level One on the mall's east side. She was scheduled to work a shift at Lush beginning at 3:00 p.m. She states she was sitting on a bench on Level Three around 2:15 p.m.[39] According to BPD Officer Gallagher, an MOA security officer instructed Rittenhouse three times to leave, but she remained seated on the bench and stated she was not leaving. *Id*. When Gallagher informed her that she would be arrested for trespass if she refused to leave, she responded "You can't arrest me, you have no power to arrest me." *Id*. She was arrested.

Viewed in the light most favorable to the State, this evidence would suffice to support a jury verdict finding that each of the fourteen moving Participant Defendants charged with trespass – refusal to depart on demand had received legally sufficient orders to leave the mall, effectively revoking their limited license to come onto the MOA that afternoon. Because issues of fact remain as to all fourteen of these defendants on the elements of claim of right and

[39] Rittenhouse's counsel contends that Rittenhouse had been instructed by a BPD officer to sit on the bench and wait further instructions after she had informed him that she was scheduled to work at Lush that afternoon and needed to get to Level One. Rittenhouse's counsel contends it was after this that a MOA security guard and then Gallagher (who was not the BPD officer Rittenhouse alleges told her in the first instance to sit on the bench and await further instructions) ordered her to leave. There is no sworn testimony from Rittenhouse in the record. But, in the procedural posture in which these motions come to the Court, it would not matter anyway: this Court is required to assume the truth of the State's allegations and that a jury could credit testimony by law enforcement consistent with their police reports. Rittenhouse is, of course, free to testify regarding her conversations with the various BPD officers and MOA security guards and as to her belief that her status as a Lush employee scheduled to work that afternoon gave her a claim of right to remain at the mall in order to explain her conduct and actions to a jury at her trial.

whether the MOA had issued legally sufficient orders instructing them to depart, their motions to dismiss this trespass count are denied.

B. Trespass, Cross Into or Enter Public Area Cordoned Off by Police Officer (Gieseke).

Defendant Sara Jean Gieseke is charged with trespass, crossing into or entering a public area cordoned off by police officers, in violation of Minn. Stat. § 609.605 subd. 1(b)(11), which provides:

> (b) A person is guilty of a misdemeanor if the person intentionally: . . . (11) crosses into or enters any public or private area lawfully cordoned off by or at the direction of a peace officer engaged in the performance of official duties. As used in this clause: (i) an area may be "cordoned off" through the use of tape, barriers, or other means conspicuously placed and identifying the area as being restricted by a peace officer and identifying the responsible authority; and (ii) "peace officer" has the meaning given in section 626.84, subdivision 1. It is an affirmative defense to a charge under this clause that a peace officer permitted entry into the restricted area.

The following facts are taken from the Statement of Probable Cause in the State's Complaint against Gieseke and reports by BPD Detectives Barland and Kne.

At about 1:45 p.m., Barland was assigned to a barricade on the north side of the Bloomingdale Court in the southeast corner on Level One of the mall. BPD Det. Doug Barland 12/20/2014 Report, p. 1 of 2. His unit was tasked with preventing anyone from crossing that barricade, either to enter into the east corridor from the south corridor to make their way to the east rotunda for the BLM demonstration, or to prevent anyone already in the east corridor participating in the demonstration from crossing and entering the south corridor of the mall, expanding the demonstration elsewhere in the mall. *Id*. The barricade was a stanchion, placed across the entire hallway, as a physical barrier to block movement in either direction,

BPD Det. Kne Report, and was initially staffed with both BPD and MOA security officers. According to the State, about 200 people remained behind it.

Gieseke approached the barricade and began yelling (and using profanity) at the officers staffing the barricade, demanding that she be allowed to cross. Barland Report, p. 1 of 2; Kne Report. Kne ordered Gieseke not to cross the barricade and the officers at that barricade refused to allow her to cross. Kne Report.

At 2:00 p.m., Barland's and Kne's BPD unit was directed to leave the barricade and move north toward the crowd gathering in the rotunda; after their departure, the barricade remained in place, manned by three or four MOA security officers. Barland Report, p. 1 of 2; Kne Report. Gieseke walked through the barricade, and approached Barland's and Kne's unit as it was walking away, yelling that the police had violated her rights by preventing her free movement. Barland Report, p. 1 of 2; Kne Report. Barland determined that Gieseke presented a security threat to his unit, as her conduct was hindering their efforts to focus on the larger group ahead of them in the rotunda. Barland Report, p. 1 of 2. At the order of BPD Sgt. Williams, Barland and Kne arrested Gieseke and charged her with trespass – crossing into or entering a public or private area cordoned off by peace officer. Barland Report, pp. 1 and 2 of 2; Kne Report.

Assuming the allegations in the Complaint to be true and that a jury could reasonably credit testimony at trial by Detectives Barland and Kne consistent with their police reports, the State has sufficient evidence to meet the required elements of this trespass charge:

(1) the hallway was cordoned off by means of a physical stanchion, staffed by law enforcement and MOA security officers, and conspicuously identified as prohibiting movement into a restricted area by members of the public, as evidenced by the facts that officers were not allowing people to cross the barricade, a couple

hundred people remained behind the barricade, and Gieseke's own conduct in yelling at police to allow her cross the barricade;

(2) the officers were engaged in the performance of their official duties; and

(3) Gieseke intentionally crossed that barricade and entered the lawfully cordoned-off east corridor heading toward the rotunda, in contravention of orders and instructions issued by law enforcement officials at the scene.

Accordingly, Gieseke's motion to dismiss this trespass count against her for lack of probable cause is denied.

IV. Gieseke's and Rittenhouse's Motions Seeking Dismissal of Obstruction Charges Are Denied.

A. Obstruct Legal Process, Interference with Police Officer

Defendants Gieseke and Rittenhouse are also charged with misdemeanor obstruction of legal process, interference with a police officer, in violation of Minn. Stat. § 609.50 subd. 1(2), which provides:

> **Subd. 1. Crime.** Whoever intentionally does any of the following may be sentenced as provided in subdivision 2: (2) obstructs, resists, or interferes with a peace officer while the officer is engaged in the performance of official duties;

In *State v. Krawsky*, 426 N.W.2d 875, 877-78 (Minn. 1988), the Supreme Court interpreted the statutory language requiring intentional obstruction, resistance or interference as requiring physical conduct that substantially frustrates or hinders a peace officer in the performance of his official duties. Conduct that merely "interrupts" an officer or "reduces" an officer's ability to apprehend a suspect, such as fleeing an officer, does not suffice. *Id*.; *State v. Morin,* 763 N.W.2d 691, 697-98 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007).

As noted in Part III.B, Gieseke crossed the stanchion BPD and MOA security officers had erected in the mall's southeast corner at the Bloomingdale Court. That stanchion/barricade was intended to serve two purposes: (i) to prevent passage of mall patrons and demonstrators

into the east corridor from the south corridor in order to join the BLM demonstration being conducted in the east rotunda; and (2) to prevent passage of demonstrators from the east corridor into the south corridor as part of MOA management's plan to manage the BLM demonstration, contain it within the east corridor, and prevent it from spilling out into other areas of the mall. Having crossed that barricade, Gieseke followed Barland's and Kne's BPD unit as it was walking toward the east rotunda where the main BLM demonstration was taking place. The State contends Gieseke then accosted Barland and hindered and interfered with his unit's efforts to respond to their instructions to move toward the rotunda to assess the crowd situation there in order to maintain safety and calm. Barland has indicated that he viewed Gieseke's actions as obstructing and interfering with his efforts to perform his duties and as presenting a security threat.

According to BPD Officer Gallagher's report, Rittenhouse had been "a member of a group causing a civil disturbance at Level 3-East central." Gallagher Report. As noted in Part III.A.4, *supra*, at p. 65, Rittenhouse resisted her arrest for trespass (after she had refused three orders from Gallagher to leave the mall), stating "You can't arrest me, you have no power to arrest me." Gallagher Report. When Gallagher asked Rittenhouse, who was seated on a bench at the time, to stand up, Rittenhouse yelled "No, don't touch me." *Id*. Gallagher grabbed Rittenhouse and lifted her to a standing position, whereupon she continued resisting. *Id*. In response to Gallagher instructing Rittenhouse to stop resisting because she was being placed under arrest, she became more violent and resisted efforts by Gallagher and three other officers to handcuff her. *Id*. After Gallagher forced her to the ground, Rittenhouse continued resisting, trying to prevent the officers from handcuffing her. *Id*. Gallaher eventually

succeeded in grabbing hold of her arms and handcuffing her with her arms behind her back. *Id*. Rittenhouse continued yelling and swearing at officers, calling them "f_ _ king a_ _holes" and other names. *Id*. While Gallagher and another officer escorted Rittenhouse to the lower-level of the MOA for booking, she continued to twist her body and attempt to pull away.

Because this obstruction statute focuses on physical conduct, not verbal criticism, the *Krawsky* Court reasoned that launching profane verbal fusillades at an officer does not constitute obstruction under this statute, so long as such criticism does not actually hinder, obstruct or interfere with the officer's performance of his or her duties. 426 N.W.2d at 877. That Gieseke and Rittenhouse engaged in profanity, while distasteful, cannot serve as the foundation for obstruction under this statute. However, the other physical conduct alleged on the part of both Gieseke and Rittenhouse, while perhaps not overwhelming, is sufficient to give rise to triable issues of fact for a jury whether their actions and conduct substantially frustrated or hindered officers Barland, Kne, Gallaher and others in the performance of any of their official duties at the MOA that afternoon. Accordingly, Gieseke's and Rittenhouse's motions to dismiss this obstruction charge are denied.

B. Obstruct Legal Process, Interference with Police Officer, Accompanied by Force, Violence or Threat.

Rittenhouse is also charged with obstruction of legal process, interference with a police officer, accompanied by force, violence or threat, a gross misdemeanor, in violation of Minn. Stat. § 609.50 subds. 1(2), 2(2), which provide as follows:

> **Subd. 1. Crime.** Whoever intentionally does any of the following may be sentenced as provided in subdivision 2: (2) obstructs, resists, or interferes with a peace officer while the officer is engaged in the performance of official duties;

> **Subd. 2. Penalty.** A person convicted of violating subdivision 1 may be sentenced as follows: (2) if the act was accompanied by force or violence or the threat thereof, and is not otherwise covered by clause (1), to imprisonment for not more than one year or to payment of a fine of not more than $3,000, or both;

In *State v. Engholm*, 290 N.W.2d 780 (Minn. 1980), the Supreme Court affirmed the conviction of two brothers for gross misdemeanor obstruction under this statute. The Court held the following evidence sufficient to sustain the jury verdict that the obstruction was accompanied by force and the threat of violence:

(1) both defendants had engaged in a struggle with two officers to avoid arrest;

(2) one brother, while in the grasp of one of the officers, had attempted to jerk away from that officer to avoid being handcuffed, yelling at him to "keep his hands off";

(3) the other brother had grabbed that officer from behind while the officer was struggling with his brother;

(4) both brothers had helped others to escape from the officers by struggling with the officers and both had themselves sought to escape by running into a house; and

(5) one of the brothers had verbally threatened the officers, yelling "I am going to get a gun and blow your head off."

Id. at 784. Similarly, in *State v. Nelson*, 2011 WL 6141607 (Minn. App. Dec. 12, 2011) (unpublished), an obstruction conviction was affirmed based on defendant's pushing past officers and then flailing, contorting her body, and kicking at officers in an attempt to prevent them from handcuffing her. The Court concluded that force was involved from the fact that it required two officers to subdue her to the point where she could be handcuffed. *Id*. at *5.

The State's allegations regarding the manner in which Rittenhouse physically resisted Gallagher's efforts to place her under arrest for trespass and to handcuff her were previously summarized in Part IV.A, *supra* at pp. 69-70. In addition, the State contends that it required

Gallagher and three MOA security officers to restrain and subdue Rittenhouse sufficiently in order to handcuff her. Under *Nelson*, that evidence is also germane to the issue of force. 2011 WL 6141607 at *5. Even after she had been handcuffed and escorted for booking to the lower level, Rittenhouse continued physically to resist and struggle. The facts as alleged by the State with respect to the circumstances of Rittenhouse's arrest are sufficient to create an issue of fact for the jury as to whether her resistance, obstruction or interference under subd. 1 was accompanied by sufficient force, under subd. 2, in light of *Engholm* and *Nelson*. Accordingly, Rittenhouse's motion to dismiss the gross misdemeanor obstruction charge is also denied.

V. The State's Evidence Is Insufficient to Establish Probable Cause for the Disorderly Conduct Charge Against Defendants Montgomery, McDowell, Gildersleve, Edwards and Abram.

Defendants Montgomery, McDowell, and Gildersleve, among the Leader/Organizer Defendants, and Abram and Edwards, among the Participant Defendants, are charged with disorderly conduct under Minn. Stat. § 609.72 subd. 1(3)[40] which provides:

> Whoever does any of the following in a public or private place, . . . knowing, or having reasonable grounds to know that it will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace, is guilty of disorderly conduct, which is a misdemeanor: (3) engages in offensive, obscene, abusive, boisterous, or noisy conduct or in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others.

Subsection 3 of the disorderly conduct statute has two prongs, one directed against speech and one directed against conduct. Each is taken up in turn.

[40] The disorderly conduct statute was enacted in 1963. The Advisory Committee note indicates there was no distinct crime known as disorderly conduct under the common law and breaches of the public peace had previously been left to municipal ordinances. The Advisory Committee note also indicates that the disorderly conduct statute's general intent was to curtail the kinds of behavior that disrupt and disturb the peace and quiet of the community by various kinds of annoyances such as fighting or causing disturbances which tend to provoke fighting.

A. No Speech by These Defendants During the BLM Demonstration Gives Rise to Potential Criminal Liability for Disorderly Conduct.

On its face, the speech component of the disorderly conduct statute provides that it is a criminal misdemeanor for anyone to engage "in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others" or to "alarm, anger or disturb others or provoke an assault or breach of the peace." Minn. Stat. § 609.72 subd. 1(3).

1. Criminal Statutes Like the Disorderly Conduct Statute That Purport to Regulate Speech and Association Are Subject to More Searching Scrutiny Because of Their Potential to Infringe on Protected First Amendment Rights.

It is one thing for the State to charge under Minnesota's disorderly conduct statute in cases involving actual breaches of the peace caused by fighting or rioting. Here, though, the State seeks to wield the disorderly conduct statute to silence speech and quash expressive conduct that would be constitutionally protected if conducted on public property on the basis that some supposedly found the BLM demonstrators' speech, chanting, and other expressive conduct annoying, disturbing, or alarming. The United States Supreme Court and the Minnesota appellate courts teach that criminal statutes that regulate speech or association, like the disorderly conduct statute, must be more vigilantly scrutinized than those that regulate only conduct. *In re Welfare of S.L.J.*, 263 N.W.2d 412, 417 (Minn. 1978); *see also State v. Klimek*, 398 N.W.2d 41, 42 (Minn. App. 1986) (charges brought under subsection (3) of disorderly conduct statute "must be closely scrutinized"); *accord United States v. Alvarez*, __ U.S. __, 132 S. Ct. 2537, 2543 (2012) ("exacting scrutiny" is required of criminal statutes that suppress or restrict speech); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982) ("more

stringent vagueness test should apply" to criminal statutes that interfere with constitutionally protected free speech and association rights than to statutes that provide only for civil penalties or regulate only economic matters).

When language that some might find offensive, insulting or abusive is the basis of a criminal charge, the courts must consider whether such language is protected speech under the First Amendment. Not only can the disorderly conduct statute not be used in a manner that impermissibly interferes with, or "chills" the exercise of constitutionally-protected free speech rights, *Reno v. American Civil Liberties Union*, 521 U.S. 844, 871-72 (1997), but the Minnesota Court of Appeals has also cautioned against it being used to "combat rudeness or for social engineering." *In re Welfare of M.A.H.*, 572 N.W.2d 752, 757-58 (Minn. App. 1997).

2. The Speech Component of the Disorderly Conduct Statute Has Been Construed as Prohibiting Only "Fighting Words," Personally Abusive Epithets Inherently Likely to Provoke Retaliatory Violence, or Utterances so Offensive, Obscene or Abusive as to be Intended to and Likely to Produce Imminent Lawless Action.

The Minnesota Supreme Court first addressed a constitutional challenge to the disorderly conduct statute in *In re Welfare of S.L.J.*, 263 N.W.2d 412 (Minn. 1978). In reversing the disorderly conduct conviction of a juvenile defendant for saying "f_ _k you pigs" to two police officers who had been questioning her, the Court held that the statutory language prohibiting the use of language "arous[ing] alarm, anger or resentment in others" was overly broad and unduly vague. *Id*. at 418-19. Following the U.S. Supreme Court's lead,[41] the *S.L.J.*

[41] *See, e.g., Lewis v. City of New Orleans*, 415 U.S. 130 (1974) (holding New Orleans city ordinance proscribing the use of "opprobrious" language toward city police facially invalid due to overbreadth); *Gooding v. Wilson*, 405 U.S. 518 (1972) (striking down as unconstitutionally vague and overbroad Georgia statute criminalizing use of "opprobrious words or abusive language"); *Cohen v. California*, 403 U.S. 15 (1971) (striking down conviction under California statute prohibiting malicious and willful

Court construed the disorderly conduct statute narrowly as punishing only so-called "fighting words." *Id*. at 418-20; *see also State v. Sharkey*, 2012 WL 1970057, at *1 (Minn. App. 2012) (conviction for disorderly conduct cannot be predicated solely on speech unless words used constitute "fighting words"). According to *S.L.J.*, "fighting words" are "those personally abusive epithets" which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace or which, given their circumstances, are inherently likely to provoke a violent reaction or which have the immediate tendency to provoke retaliatory violence or tumultuous conduct by those to whom such words are addressed. 263 N.W.2d at 418-20.

In *In re Welfare of M.A.H.*, 572 N.W.2d 752 (Minn. App. 1997), a juvenile had been convicted of disorderly conduct for yelling at police "this is bulls_ _t! This whole thing is f_ _ked up! We can do anything we f_ _ckin' want to do." Surveying caselaw, the *M.A.H.* Court noted that speech-related disorderly conduct convictions have typically been affirmed in Minnesota only where the speech included explicit verbal or physical threats of violence or where victims were placed in fear of imminent physical harm and where defendant's language was directed at and intended to be about a specific person. *Id*. at 757-58. To avoid constitutional problems, the Court construed the disorderly conduct statute as prohibiting only:

> (1) "personal insults whose utterance under the circumstances would be inherently likely to provoke retaliatory violence" by those to whom the insult was directed; or
>
> (2) utterances that were "intended to and likely to produce imminent lawless action" by a crowd to which they were addressed.

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disturbing of the peace by "offensive conduct" of defendant for wearing jacket with the words "F_ _k the Draft" in courthouse intending to protest Vietnam War and the draft).

Id. at 758. Although some undoubtedly would consider the *M.A.H.* defendant's language offensive or abusive, the Court of Appeals reversed his conviction in light of the officers' testimony that they never felt they were losing control of the situation and had not been tempted to retaliate or provoked to violence.

In reversing another conviction for disorderly conduct in *In re Welfare of W.A.H.*, 642 N.W.2d 41, 47 (Minn. App. 2002), the Court of Appeals construed the disorderly conduct statute as requiring not only that the challenged fighting words be so "offensive, obscene or abusive" as to arouse resentment in others but also evidence that such speech actually immediately incited a breach of the peace or provoked retaliatory action by those to whom they were spoken.

3. Defendants' Speech Did Not Rise to the Level of "Fighting Words," Contained No Personal Insults or Offensive and Abusive Epithets, Was Neither Intended to Nor Inherently Likely to Provoke a Violent Retaliatory Reaction or Other Tumultuous Conduct, and Did Not Actually Incite Any Violence or Imminent Lawless Action.

The State contends that Abram engaged in "loud chanting and yelling" on Levels Four and Two. BPD Officer Jeff Giles 12/23/2014 Report, p. 1 of 1. Later, while standing in the parking ramp, Officer Giles' report records Abram as "screaming several times 'fu_k the police." *Id*. The State likewise charges Gildersleve with "engaging in and encouraging yelling, chanting" among a group of protestors on Level Two east.[42] Similarly, the State points to McDowell's role in leading a group of protestors yelling and chanting while they marched throughout the mall. The State does not, however, otherwise specify particular words uttered by Gildersleve or

[42] On one of the State's videos, Gildersleve can be seen in the presence of one of the other BLM marshals, Brianna Brilyahnt, and can be heard speaking with security officers on Level Two, by Things Remembered, shortly after Brilyahnt concluded some remarks. These remarks are discussed in more detail, *infra* at pp. 119-20, in the discussion of aiding and abetting trespass charges against the Leader/Organizer Defendants.

McDowell or any particular words uttered by Abram during his "loud chanting and yelling" that the State contends give rise to criminal liability under the disorderly conduct statute.

The State contends that Edwards instigated a group of demonstrators in loud chanting and yelling, including the refrains, "Hand's up, don't shoot" and "No justice, no peace." Bernhjelm Report, at p. 40 of 44. Officer Coleman's arrest report indicates that Edwards later approached BPD Sgt. Bitney, shouting "Who do you serve? Who do you protect?" *Id*. The State further charges Edwards with having later yelled and sworn at MOA security and BPD officers, including BPD Lt. Coleman. *See* BPD Officer Anthony Kiehl Report. The State contends Edwards can be seen on a video yelling "We gonna shut the sh_t down" and "Fu_k this mall on up." State's Video 2, at 5:10, 13:30.

The State contends that Montgomery led the protestors in "loud, boisterous shouting and chanting" during the main demonstration in the east rotunda. *See* Amended Complaint in 27-CR-15-1304, Statement of Probable Cause, at p. 5; *see also* Giles Report, p. 4 of 8; Bernhjelm Report, p. 23 of 44. Montgomery is shown speaking to the crowd in several of the State's videos. She can be seen, in the BLM Main Demonstration Video, at 2:30-4:25, and 6:50-7:40, speaking to the crowd and leading refrains for several minutes early during the demonstration, before and shortly after Bernhjelm's first announcement at 2:03, and before the main chanting of the slogans started.

While the State has not provided a transcript of Montgomery's address to the crowd assembled in the east rotunda during the main demonstration or of all the chants McDowell was orchestrating while he led his group on their march, BPD Officer Giles's and MOA Patrol Captain Bernhjelm's reports indicate, and review of many videos offered by the State disclose,

that groups of protestors chanted the following slogans at various times during the demonstration:

"Black Lives Matter!"

"Hands up, don't shoot."

"No Justice, no peace."

"Prosecute the police. No justice, no peace."

"I can't breathe."

"While you're on your shopping spree, black people cannot breathe."

"What do we want? Justice. When do we want it? Now."

"Hey Hey Ho Ho. Police Brutality's Got to Go."

"Revolution. Evolution. There is only one solution."

"That's why we're here, no Santa for Tamir."[43]

"The people united will never be defeated."

"We don't die, we multiply."

"MOA. This is our property."

"Whose Mall? Our Mall."

Giles Report, p. 4 of 8; Bernhjelm Report, p. 23 of 44; State's videos labeled "Video 1," "Video 2," "Video 4," "Video 5," "Video 7," "Video 9," and "Video 10," contained in the State's video evidence file labeled "Vagueness Memo Videos"; State's videos labeled "Video 004-Body-X78044781.0009.141220.151816.1802" and "Video 007 GOPRO 033," contained in the State's

[43] The reference is to Tamir Rice, a twelve-year old boy who was shot and killed by police officers in Cleveland on November 23, 2014. *See* http://www.theguardian.com/us-news/video/2014/nov/26/cleveland-video-tamir-rice-shooting-police; http://www.npr.org/sections/thetwo-way/2014/12/12/370396496/tamir-rices-death-ruled-a-homicide-by-medical-examiner

video evidence subfile labeled "Aggressive Behavior" contained in the State's video evidence file labeled "Black Lives Matter 12-20-2014 (with CCTV footage)"; and BLM Main Demonstration Video, at 1:25-1:55, 7:40-9:20, 12:20-12:55, 15:05-15:25, 18:35-52:00, 52:52-1:04:15 (found in "Black Lives Matter 12-20-2014 (with CCTV footage)" ➢ "BLM PowerPoint" ➢ "BLM Protest Videos" ➢ "BLM YouTube Videos 1" (MP4 Video)).

The Court will assume that the State could prove at trial that each of these five defendants led demonstrators in chanting one or more of these slogans at various times and in various locations in the mall during the BLM demonstration. Such proof would not suffice to sustain a conviction under the disorderly conduct statute. None of those slogans and related speech-making could even plausibly be argued by the State as giving rise to a genuine issue of fact for the jury as to whether they constitute fighting words within the meaning of *S.L.J.*, *Sharkey*, *W.A.H.,* and *M.A.H.* Chants like these are mere advocacy slogans, which clearly enjoy First Amendment protection as pure speech.

Having reviewed all the Statements of Probable Cause, numerous reports by MOA security and BPD officers, and many hours of video evidence offered by the State, the Court has seen no evidence of any speeches or words uttered by Montgomery, McDowell, Gildersleve, Abram, or Edwards that even arguably could constitute "fighting words." None of these slogans even remotely approach even the offensiveness or abusiveness of the defendants' words in *S.L.J.*, *W.A.H.* or *M.A.H.* and, in each of those cases, the Minnesota appellate courts held those words insufficient to sustain the defendants' disorderly conduct convictions. Nor is there is any allegation that Montgomery, Gildersleve, or Abram directed any personally abusive or insulting epithets to any particular individuals at any time during the BLM demonstration. While

McDowell, Abram, and Edwards are accused of swearing and uttering vulgar or crass statements directed at MOA security or BPD officers, nothing they are charged with having said exceeds the obscenities and abusive insults the defendants in *S.L.J.* and *M.A.H.* shouted at police officers which were held insufficient grounds upon which to sustain convictions under the disorderly conduct statute.

Even were the State to present testimony from members of the public present at the MOA during the BLM demonstration -- or from MOA security officers, BPD officers, or any members of the MOA's management, for that matter – to the effect that they felt put off by, "alarmed," or "resentful" based on some of the chants uttered by the protestors, that could not save the disorderly conduct charge. In *Terminiello v. Chicago*, 337 U.S. 1 (1949), the defendant had delivered a speech condemning and criticizing the conduct of a group of protestors, described as "angry and turbulent," who had gathered to protest his speech. In reversing defendant's disorderly conduct conviction under a Chicago ordinance that made the making of improper noise tending to breach of the peace a crime, the Supreme Court noted that even speech that is provocative, invites dispute, stirs some to anger, or is annoying to some is protected by the First Amendment:

> The vitality of civil and political institutions in our society depends on free discussion. . . . [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. . . . Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a

> serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our Constitution for a more restrictive view.

337 U.S. at 4-5 (internal citations omitted).

Similarly, in upholding the reversal of a multimillion dollar tort verdict against the Westboro Baptist Church (WBC) for its demonstration and picketing at a gay soldier's funeral to disseminate its message that "God hates fags" and is punishing the United States for its tolerance of homosexuality, particularly in the military, the Supreme Court in *Snyder v. Phelps* noted that "speech cannot be restricted simply because it is upsetting or arouses contempt" or "simply because society finds the idea itself offensive or disagreeable." 562 U.S. at 458 (citation omitted). Notwithstanding the obvious offensiveness and hurtfulness of the WBC members' speech to the soldier's family, the *Snyder* Court noted that the point of the First Amendment is to protect the right to engage in speech the content of which in others' "eyes are misguided, or even hurtful." *Id*.

Here, moreover, none of the chants uttered at the instigation of Montgomery, McDowell, Gildersleve, or Edwards was so abusive or offensive as to be inherently likely to provoke a violent retaliatory action by others present at the MOA that afternoon. Ironically, the main thrust of the BLM demonstration was a protest against violence, particularly alleged excessive and unwarranted violence by police officers in their interactions with African-Americans in other cities across the country. The BLM demonstrators were explicitly rejecting violence, not condoning it. They certainly were not, in any event, inciting it. It is remarkable that a demonstration involving a crowd of more than 1,000 in a very public setting like the MOA on a busy shopping afternoon during the peak of the holiday shopping season resulted in no destruction of property, no physical assaults or fighting, no claims of physical harm or injury,

and no rioting or overt violence. While not itself determinative, the fact that no violence actually erupted in the wake of anything any of these defendants said during the demonstration is properly taken into account in assessing whether the State could meet its *prima facie* case under the disorderly conduct statute, given the narrowing construction placed on that statute by Minnesota appellate courts. *See, e.g., W.A.H.*, 642 N.W.2d at 47; *M.A.H.*, 572 N.W.2d at 757.

Because the State could not withstand a motion for a directed verdict of acquittal at trial on the basis of the speech component of the disorderly conduct statute under the facts here, the disorderly conduct charges against Montgomery, McDowell, Gildersleve, Edwards, and Abram, to the extent predicated on anything they said during the course of the BLM demonstration, are dismissed.

B. None of Montgomery's, McDowell's, or Gildersleve's Conduct in Planning for and Organizing the BLM Demonstration and None of Montgomery's, McDowell's, Gildersleve's, Edwards', or Abram's Conduct During the BLM Demonstration Gives Rise to Potential Criminal Liability for Disorderly Conduct.

On its face, the conduct component of the disorderly conduct statute provides that it is a criminal misdemeanor for anyone to engage "in offensive, obscene, abusive, boisterous, or noisy conduct" "tending reasonably to arouse alarm, anger, or resentment in others" or to "alarm, anger or disturb others or provoke an assault or breach of the peace." Minn. Stat. § 609.72 subd. 1(3).

It does not appear that the State contends, and in any event there is no evidence in the record tending to support the conclusion, that Montgomery, McDowell, Gildersleve, Abram, or Edwards engaged in any conduct (as opposed to isolated incidents of swearing by McDowell,

Abram and Edwards, addressed in the preceding section) that was "offensive," "obscene," or "abusive." Rather, the probable cause statements suggest that the State seeks to ground the conduct component of the disorderly conduct charge on a very literalistic interpretation of the statutory phrase "boisterous, or noisy conduct." Defendants contend that statutory language is too vague to provide them adequate notice of what constitutes criminal conduct and affords the State too much leeway to engage in arbitrary prosecutions.

1. The First Amendment Covers Expressive Conduct as Well as Speech.

As a threshold matter, First Amendment protections extend to some expressive conduct, not merely to spoken words. *State v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998); *Sharkey*, 2012 WL 1970057, at *2; *The Coalition to March on the RNC and Stop the War v. City of St. Paul*, 557 F.Supp.2d 1014, 1020 (D. Minn. 2008) (marching and parades are generally expressive and covered by First Amendment). If speech and conduct are inextricably linked, the narrowing construction the Supreme Court applied to limit Minnesota's disorderly conduct statute only to "fighting words" that tend to provoke retaliatory violence or to incite imminent lawless action applies to expressive conduct as well as to spoken words. *Sharkey*, 2012 WL 1970057, at *2; *see also Baribeau v. City of Minneapolis*, 596 F.3d 465, 475, 477 (8th Cir. 2010) (concluding Minnesota Supreme Court would apply *S.L.J.*'s "fighting words" narrowing construction to expressive conduct as well as to speech). Conduct is sufficiently expressive to warrant First Amendment protection if the actor had "[a]n intent to convey a particularized message . . . and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Machholz*, 574 N.W.2d at 419-20.

2. Standards Applicable to Constitutional Void-for-Vagueness and Overbreadth Analysis

Unduly vague statutes are prohibited by the Due Process Clause of the Fourteenth Amendment, *Hard Times Café, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 171 (Minn. App. 2001), because they afford law enforcement the opportunity to "pursue their personal predilections" and to prosecute only "particular groups deemed to merit their displeasure." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). A penal statute is void for vagueness[44] if it fails to define the criminal offense with sufficient definiteness to provide ordinary persons with fair notice of the specific conduct that is prohibited or if it is so standardless that it authorizes or encourages arbitrary and discriminatory enforcement. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18 (2010); *see also United States v. Williams*, 553 U.S. 285, 304, 306 (2008) ("What renders a statute vague is . . . the indeterminacy of [determining] precisely what [the incriminating] fact is."); *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (provisions of Communications Decency Act prohibiting transmission of "patently offensive" and "indecent," neither of which was statutorily-defined, communications by telecommunications device to minors held facially overbroad and unduly vague and violative of First Amendment

[44] In *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), the Supreme Court articulated the rationale for the "void for vagueness" doctrine as ensuring that laws:

(i) give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly,"

(ii) provide explicit standards for those who apply them to prevent the innocent from being trapped by vague laws that impermissibly delegate basic policy matters to police officers, judges and juries on an "ad hoc and arbitrary basis," and

(iii) not inhibit the exercise of First Amendment freedoms by inducing citizens to "steer far wider of the unlawful zone" "than if the boundaries of the forbidden areas were clearly marked."

free speech rights); *Kolender*, 461 U.S. at 357; *United States v. Dellinger*, 472 F.2d 340, 355 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973); *accord State v. Bussmann*, 741 N.W.2d 79, 83 (Minn. 2007) ("void for vagueness" doctrine requires penal statute to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement," quoting *Kolender*); *Humenansky v. Minnesota Board of Medical Examiners*, 525 N.W.2d 559, 564 (Minn. App. 1994) (statute is void for vagueness if it defines forbidden act in such an indefinite manner that people "must guess at its meaning" or if it "encourages arbitrary and discriminatory enforcement"), *review denied* (Minn. Feb. 14, 1995).

Criminal statutes must also pass muster under the First Amendment overbreadth doctrine. *City of Edina v. Dreher*, 454 N.W.2d 621, 622 (Minn. App. 1990). A statute is overly broad if it deters the exercise of First Amendment rights by punishing unnecessarily a substantial amount of constitutionally-protected activity along with unprotected activity. *Williams*, 553 U.S. at 292; *see also Dellinger*, 472 U.S. at 355-56, 364. The concern is that threat of enforcement of an overbroad law may inhibit people from engaging in their First Amendment rights, inhibiting the free exchange of ideas. *Williams*, 553 U.S. at 292.

3. Loud and Boisterous Conduct, Without More, Is Not Sufficient for Criminal Disorderly Conduct.

In *State v. Peter*, 798 N.W.2d 552 (Minn. App. 2011), defendants were charged with disorderly conduct after engaging in an animal rights protest outside Ribnick Furs and Leather in downtown Minneapolis. The defendants carried signs, chanted loudly, and tried to talk with people. The store's owner testified that the defendants were "very loud and very angry" and that they had been yelling off and on for half an hour before the police arrived, although they

had not sought to enter the store or to prevent any customers from doing so. An employee from a neighboring business testified that the defendants were loud, their tone "very aggressive and angry," and that their yelling had gotten on his nerves and disrupted his work. Several individuals from across the street who spoke to the police claimed the defendants had been harassing customers. The State had conceded at trial that defendants' statements did not constitute fighting words but argued their loud yelling could be separated from the protected content of their speech and prosecuted under Minneapolis' disorderly conduct ordinance.[45]

The Court of Appeals reversed the disorderly conduct convictions, ruling that the defendants' manner of conduct in yelling could not be separated from their protected speech, particularly in a case like this involving political protest. 798 N.W.2d at 554. After noting that "[s]peech on matters of 'public concern' is 'at the heart of the First Amendment's protection' and is 'entitled to special protection'," *id*. at 555, the court concluded that defendants' conduct in holding signs and "shrieking" and yelling in an angry tone which disturbed and annoyed others did not strip their protest of its First Amendment protections and subject them to punishment under the disorderly conduct statute, reasoning that "loud" and even "boisterous" conduct is protected under Minnesota law when that conduct is expressive and inextricably linked to protected speech. *Id*. at 556.

In *Baribeau v. City of Minneapolis*, 596 F.3d 465 (8th Cir. 2010), a small group of protestors had dressed as zombies and danced (as the Court colorfully puts it: lurching in stiff

[45] Section 385.90 of the Minneapolis Code of Ordinances provided:

> **Disorderly conduct.** No person, in any public or private place, shall engage in, or prepare, attempt, offer or threaten to engage in, or assist or conspire with another to engage in, or congregate because of, any riot, fight, brawl, tumultuous conduct, act of violence, or any other conduct which disturbs the peace and quiet of another save for participating in a recognized athletic contest.

fashion) down the Minneapolis streets on a Saturday night during the Aquatennial festival while peacefully broadcasting anti-consumerism statements and playing loud music over a makeshift portable sound system. They occasionally got uncomfortably close to bystanders on the street, some of whom shot weird looks at them. Applying *S.L.J.* and *Machholz*, the Eighth Circuit concluded that the protestors' conduct was sufficiently expressive conduct symbolizing their protests of American's "mindless consumerism" as to be protected from prosecution under Minnesota's disorderly conduct statute, notwithstanding complaints the police had received from members of the public, including a father who reported that his daughter had been frightened by the protestors. *Id*. at 476-78.

City of Edina v. Dreher, 454 N.W.2d 621 (Minn. App. 1990) is also instructive. There, the City of Edina prosecuted defendant under an Edina ordinance that forbade residents from keeping any animal which "by any noise disturb[s] the peace and quiet of any persons in the vicinity." The Court of Appeals noted that the prosecution hinged on the Edina police officer's "personal sense of annoyance" at a barking dog because the ordinance contained no objective standard against which any resident could measure his or her dog's barking to determine if it rose to the level of a violation of the ordinance and offered no guidance to a resident with pets, to neighbors or to the police as to what is allowable barking and what is not. 454 N.W.2d at 623. The Court reversed the conviction, holding the ordinance unconstitutionally vague because it failed to put the defendant on notice of specific conduct that was prohibited and because it invited "arbitrary enforcement" by law enforcement. *Id*.

In *State v. Sharkey*, 2012 WL 1970057 (Minn. App. 2012) (unpublished), the Court of Appeals reversed a disorderly conduct conviction arising from the defendant's disruption and

interference, in a "noisy" and "boisterous fashion," with a Shoreview City Council meeting in which he continuously commented on the proceedings throughout the meeting. The defendant had gotten up to speak at the beginning of the citizen comment portion of a city council meeting. He approached the podium in a "very agitated" manner and spoke with a "raised" voice. After speaking over the mayor, the mayor ruled the defendant out of order and instructed the police to escort defendant out of the meeting. Defendant tried to continue with his comments, refused to stop talking and repeatedly shouted "You're going to have to arrest me" while clinging to the podium, refusing to leave until the officers pried his fingers off the podium and escorted him from the meeting. The Court of Appeals concluded that the defendant's conduct had been inextricably linked to his protected speech after the mayor had called for his removal and could not be punished as disorderly conduct, given that his "loud and boisterous" conduct was intended to address his grievances to the council and his belief that he was being denied an opportunity to speak in a public forum. 2012 WL 1970057, at *3.

4. That Some May Be Annoyed Is Not Sufficient for Criminal Disorderly Conduct.

The State may not enforce criminal statutes whose violation is entirely dependent on whether a police officer or prosecutor is annoyed. *United States v. Williams*, 553 U.S. 285, 306 (2008) ("[W]e have struck down statues that tied criminal culpability to whether the defendant's conduct was "annoying" or "indecent" -- wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings."); *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) (striking down as unconstitutionally vague Cincinnati ordinance making it illegal for three or more persons to assemble on sidewalks and "conduct themselves in a

manner annoying to persons passing by" on grounds it subjected exercise of right of assembly to unascertainable standard); *City of Edina v. Dreher*, 454 N.W.2d at 623.

As the *Coates* Court noted, because conduct that may annoy some people does not annoy others, a statute that specifies no standard of conduct whatsoever is unconstitutionally vague. 402 U.S. at 614. While the *Coates* Court observed that the government is free to prevent people from "blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct" it must do so through statutes directed with "reasonable specificity toward the conduct to be prohibited." *Id*. Moreover, when constitutional rights of free assembly and association are at stake, considerations like "mere public intolerance," "animosity," or resentment by other fellow citizens are not a sufficient basis upon which to abridge those constitutional rights. *Id*. at 615.

In *State v. Korich*, 219 Minn. 268, 17 N.W.2d 497 (Minn. 1945) (reversing disorderly conduct conviction under Minneapolis disorderly conduct ordinance), the defendant, a Jehovah's Witness member, had been going from apartment to apartment distributing Watchtower tracts and playing a recorded Bible sermon on a portable phonograph to tenants who had invited him into their apartments. The apartment building had a "No Solicitors Allowed" sign posted. The apartment's caretaker had also previously ordered the defendant to leave the tenants alone and keep off the premises. The Court observed that the mere fact that some may have been annoyed by the defendant -- as the apartment caretaker and the police in that case had been -- is not sufficient to establish disorderly conduct: "[n]ot every annoyance is born of culpable conduct." 17 N.W. 2d at 498.

5. Defendants' Expressive Conduct at the BLM Demonstration Did Not Actually Incite Any Violence or Breach of the Peace.

The State charges that Montgomery led a "large group of protestors in loud, boisterous shouting and chanting" in the rotunda. It also charges that, after leaving the mall, she led a group of protestors on the east ring road, with "continued shouting, chanting, fist pumping, and waving banners" and "more yelling, singing and chanting." A timeline offered by the State places Montgomery in the rotunda talking to the crowd and leading chants for no more than twenty minutes after the start of the demonstration and then reports her being outside, "directing" the "crowd" on the east ring road, for about fifteen minutes, from about 2:35 until 2:50 p.m. *See* Black Lives Matter 12-20-2014 (with CCTV footage) ➢ Offenders ➢ Kandace Montgomery ➢ Kandace Montgomery Timeline.

At 2:32 p.m., a group of protestors marched through Nickelodeon Universe, emerging on the west side of the mall and then marching east via the south corridor. Giles Report, at p. 6 of 8; State's Timeline, Appendix B. While posted at the Level One South main doors, BPD Sgt. Joseph Spark observed this group, being led by McDowell, chanting "anti police chants" as they marched toward the east, taking the escalator to Level Two, and marching through the hallways there before climbing the stairs up to Level Three. *Id*., p. 7 of 8; Spark Report, at p. 1 of 2 (Potts Aff., Exh. 4). According to the State's timeline, this took place over the course of about twenty minutes, ending about 2:56 p.m. when this group left the mall. *See* Appendix B; *see also* State's Michael McDowell Timeline, on Black Lives Matter 12-20-2014 (with CCTV footage) ➢ Offenders ➢ Michael McDowell (indexing several still photos and video clips showing McDowell leading group out east doors at 2:54:30 to his standing on the fourth level of the parking ramp at 2:56:16). Although Sgt. Spark's report characterizes this group as having a "frantic uncontrolled nature" and as causing "a great

disturbance," Spark Report, at p. 1 of 2, his report does not indicate that any participants in this group damaged any property or harassed or threatened any mall patrons, nor does the report contain any specific facts upon which his characterizations of its "frantic uncontrolled nature" were based,[46] other than his note that, as the McDowell-led group marched through the hallway, they "caus[ed] all people in the way to stop and move out of their way." Spark Report, at p. 1 of 2.

Sgt. Giles's report indicates that Gildersleve was present in the rotunda during the main demonstration where she was observed organizing, chanting and recording police. Giles Report, p. 6 of 8. The State charges that Gildersleve later led a group of chanting protestors who had gathered on Level Two East. Finally, the State contends Gildersleve was later observed assisting in moving protestors into the east parking ramp and was also later seen with a group of protestors on the east ring road. *Id*.; *see generally* Black Lives Matter 12-20-2014 (with CCTV footage) ➢ Offenders ➢ Adja Gildersleve ➢ Adja Gildersleve Timeline.

The State's allegations against Abram relevant here[47] begin up on Level Four, where, according to the State, Abram was engaged in chanting with his fists held up in the air.

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[46] It bears noting that Sgt. Spark's report was not prepared until January 5, 2015 – when the Bloomington City Attorney's Office had decided to charge McDowell and the other Leader/Organizer Defendants – sixteen days after the BLM demonstration at the MOA and specifically at the request of the BPD "CREU" unit. Spark Report, at pp. 1 & 2 of 2. While the Court is not drawing any inferences of credibility, the Court notes that nothing in Sgt. Sparks' report indicates it was based on contemporaneous notes he had made or dictated during the demonstration and his uncertain memory of specifics of the event is manifested explicitly in the report as, for example, when he writes "It should be noted that McDowell may have actually had a "bull-horn" in his hand while speaking to me and leading the march. This would have to be confirmed by video due to the length of time since this was witnessed." *Id*., p. 2 of 2.

[47] The State alleges that Abram interfered with the arrest of Defendant Tamera Larkins by grabbing her and pulling her away from the officers while they were in the process of arresting her. Although the State's original complaint against Abram charged him with obstruction of legal process, lawful execution of legal process in violation of Minn. Stat. § 609.50 subd. 1(1), that obstruction charge was dropped in the amended complaint the State filed against Abram on August 4, 2015, and those allegations are not otherwise pertinent to the substantive charges he now faces in the amended complaint.

According to officers, Abram later attempted to incite a large group on Level Two by means of unspecified "aggressive behavior toward the officers" and by leading chants, yelling and clapping. BPD Officer Jeff Giles 12/23/2014 Report, p. 1 of 1. As the officers moved the group into the skyway, the State alleges that Abram "struck [or "pounded on"] the doors to the mall several times," was "yelling loudly and gesturing wildly at the police officers inside of the MOA," and continued to engage in "loud chanting and yelling" and attempting to incite others in his vicinity. *Id*. Later, while standing in the parking ramp, Officer Giles' report records Abram as moving aggressively towards the lines of officers." *Id*.

At some point after 2:30, the State charges that officers observed Edwards on Level Two engaged in loud chanting and "yelling," including occasional utterances of obscenities. The State also contends he later "thrust[] his fingers towards [MOA security and BPD officers, including BPD Lt. Coleman]," "causing a scene." Bernhjelm Report, at p. 40 of 44. As with others, the State charges that the manner of Edwards' speech was "boisterous and noisy" and that his actions toward MOA security and BPD officers was "aggressive, if not almost violent in nature," constituting the "type of abusive behavior [that] would reasonably provoke alarm, anger, or a breach of the peace."

The State perhaps understandably seeks to characterize these defendants' oral utterances and conduct as "boisterous and noisy," parroting the statutory language of the disorderly conduct statute. The State contends that, at times, the protestors "were screaming and yelling so loudly that they could be heard throughout Nickelodeon Universe and the entire

east side of the mall." Giles Report, p. 5 of 8. The State also contends that officers observed several children and families who "appeared scared and upset" by the protestors.[48] *Id*.

While the audio supplied on many of the State's videos reflects loud chanting and very loud crowd noise at various times during the afternoon, corroborating Sgt. Giles' report, the State's characterizations and the occasional loud volume levels have to be considered in context. The State's videos establish that the main BLM demonstration in the east rotunda between 2:00 and 2:30 p.m. was peaceful. If the scene in the mall during the BLM demonstration was as foreboding as the State seeks to portray it in its amended complaints and dozens of memoranda filed in these cases, it is remarkable that MOA management monitoring the scene from the EOC nevertheless tacitly permitted the demonstration to go forward for thirty minutes and that more than 300 security (MOA security officers and personnel from Whelan Security, another private security firm) and law enforcement (officers from the BPD and the Hennepin County Sheriff's office) personnel on site were rather casually standing around, observing and acquiescing in the demonstration activities taking place in the rotunda for those first thirty minutes. No one viewing videos of the BLM demonstration in the rotunda for the first thirty minutes could come away with an impression that any of the demonstrators, "leader" or "participant," was trying to incite rioting or fighting or other violence or encouraging the defacing or destruction of mall property. The scene was neither tense nor

[48] The State reports that two BPD officers, Detectives Kne and Barland, while working the barricade on Level One on the north side of Bloomingdale's Court, were spit upon by someone overlooking them from the Level Two walkway. Giles Report, p. 6 of 8; *see also* Potts Aff., Exh. 3, Det. Barland report. However, the amended complaints do not identify the perpetrator, allege that the perpetrator was a participant in the BLM demonstration, or suggest that any of these defendants participated in or in any way encouraged or incited that action (or even that they had any contact with the perpetrator, any knowledge of the spitting, or any means of controlling the perpetrator's behavior).

foreboding; no reasonable person viewing videos of the scene in the rotunda during this time would sense the gathering of proverbial dark storm clouds heralding imminent lawless action.

Having viewed many hours of video of various aspects of the BLM demonstration, there is little doubt but that the chanting by protestors occasionally reached high volume levels. Any reasonable juror watching selected segments of the BLM demonstration as captured in the State's videos might well think "boisterous" an apt descriptive adjective for the demeanor and behavior of some of the demonstrators at various times during the demonstration. But, that doesn't change the fact that "boisterous and noisy conduct" is inherently vague and entirely subjective. Context always matters. What constitutes boisterous and noisy at Williams Arena when the Gophers' basketball team is playing a key game down the stretch, or at the old Metrodome stadium in the fourth inning of the first game of the 1987 world series when Dan Gladden hit a grand slam, or in the eleventh inning of game six in the 1991 world series when Kirby Puckett homered to send the series to a decisive seventh game is a far different thing from what constitutes noisy and boisterous when new law school graduates assemble in late July in a St. Paul auditorium to sit for the Minnesota bar exam.

The MOA is neither a cloistered monastery nor a library reading room. As Defendants note, it is a noisy and boisterous place, as can reasonably be expected of the nation's largest in-door shopping mall which attracts an average of more than 115,000 people to its stores, restaurants, amusement park, movie theatres, and other entertainment options every single day of the year. Defendants note that the MOA witnesses innumerable episodes of babies crying, small children running about, individuals arguing and the hubbub to be expected whenever such large numbers of people are brought together in a communal setting.

Allowing the State to seize on the inherently standardless and impossibly vague language of the disorderly conduct statute's use of the words "boisterous" and "noisy" would give the BPD and the City of Bloomington virtually unfettered discretion to seek to criminalize all manner of conduct routinely encountered at the MOA in an essentially and arbitrary manner. *Peter*, *Baribeau*, *City of Edina v. Dreher*, and *Sharkey* make clear that conduct and yelling that is merely loud, even if "angry" or "aggressive," but integrally connected with expressive speech and conduct does not, without more, give rise to criminal disorderly conduct. In addition, *Williams*, *Coates,* and *Korich* establish that the mere fact that a police officer, a prosecutor, or a member of the public may be annoyed by other citizens exercising their rights to expression and assembly is not, again without more, sufficient in itself to establish criminal disorderly conduct. As the Seventh Circuit observed, in reversing convictions of the so-called "Chicago 7" defendants under the federal anti-riot statute in the wake of rioting during the 1968 Democratic National Convention:

> The first amendment is premised upon the value of unfettered speech. Constitutional protection is clearly not to be limited, therefore, to mild or innocuous presentation, and it is unrewarding to search for a formula describing punishable advocacy . . . in terms of fervor or vigor. The real question is whether particular speech is intended to and has such capacity to propel action that it is reasonable to treat such speech as action.

United States v. Dellinger, 472 F. 2d 340, 360 (7th Cir. 1972).

Nowhere in the State's amended complaints, in any of its evidentiary submissions, or in any of the various police reports in the record is there any evidence of any threats or calls to violence or other conduct of a criminal nature. To the contrary: the words of the chants being uttered by protestors at various times during the demonstration, however loudly or "boisterously" they may have been uttered, the signs being held by some of the protestors, the

"die-ins" by some of the protestors, and the marching by other of the protestors are all non-violent, expressive conduct. The entire point of the protest was to denounce violence the protestors believed is wrongly being committed by police forces around the country against African American citizens. Nothing in the volume levels of the chanting or in nature of the expressive conduct -- the marching and "die-ins" -- could reasonably be construed as constituting unlawful threats or inciting riot or other imminent lawless action in breach of the public peace and no such breaches of the peace in fact resulted. *See generally Garner v. Louisiana*, 368 U.S. 157 (1961) (reversing convictions under Louisiana "disturbing the peace" statute based solely on black citizens' lunch counter "sit-ins" in the "white's only" section of racially-segregated private lunch counters where no evidence had been presented of any conduct that foreseeably would disturb or alarm the public).

The exchanges among MOA, BPD, City of Bloomington, and Bloomington City Attorney's Office officials throughout the day on December 22, 2014, the first business day after the BLM demonstration, only serve dramatically to underscore the dangers fraught in condoning prosecutions like these, in the circumstances of the BLM demonstration at the MOA, under such vague and standardless language as the "boisterous, and noisy conduct" language of the disorderly conduct statute. As this correspondence demonstrates, some officials viewed these cases as a vehicle by which to "send a message" to future protestors considering the MOA as a venue by using the criminal justice system to make examples of the Leader/Organizer Defendants and to expose them to "punitive consequences."

Johnson kicked off the discussion on the morning of December 22 as follows:

> In order to deter future mass disturbances at MOA, I discussed with the prosecutors the possibility of our office charging by criminal complaint the

> organizers and the 'on the ground' persons inciting this disorder (if we can ID them) . . . [for] Aiding and Abetting the following crimes: Riot in the 3rd degree; Public Nuisance; Unlawful Assembly; and Disorderly conduct. . . . Our thoughts are that if the organizers have no consequence it is likely another disturbance will occur organized by social media.

Flaherty Aff., Exh. 1, BLOOM-MOA19 (statutory citations omitted).

Kathleen Allen, the MOA's corporate counsel, responded, in pertinent part as follows:

> We fully support all efforts by your office to charge the organizers and key leaders with additional criminal charges. As we discussed last week trespass charges are not enough of a deterrent, especially to activists trying to prove a point. Additionally, after review with our owners, we will be looking at the possibility of pursuing civil actions against the key organizers and leaders. We need to have additional deterrents to prevent individuals from disobeying our rules and creating this kind of havoc with our business.

Id., BLOOM-MOA18. A short while later, Johnson wrote to several MOA and BPD officials, noting: "My fear is that if we do not take a strong stance – it's going to happen again. MOA is just too convenient a venue." *Id*., BLOOM-MOA17.

After several more exchanges among City of Bloomington, MOA, and BPD officials, Johnson wrote to Allen, in pertinent part, as follows:

> In my WCCO interview today, I indicated that the City Attorney's Office will be seeking punitive consequences for all of the organizers and leaders of this demonstration because future demonstrations cannot be tolerated.

Flaherty Aff., Exh. 1, BLOOM-MOA12. Later in the afternoon, Allen responded to Johnson, in pertinent part, as follows:

> They're [referring to the MOA owners] also hesitant about going down the path of pursuing civil actions. If the City pursues these escalated/additional charges against the organizers/leaders of BLM, what are the penalties associated with those charges? I'd like to understand how they differ (and are more severe) than those for trespass.

Id., BLOOM-MOA8. Johnson replied:

> MOA can and should make its own decisions on the trespass. The other charges are more serious but carry the same maximum penalties. The actual sentencing should there be convictions are likely to be higher.

Id. Allen responded, in pertinent part, as follows:

> [W]e need to follow the direction of our owners regardless if the management here would like to pursue additional remedies. . . . The bigger issue for me is pushing them [the MOA owners] to consider civil action. I'm concerned that if these other charges don't carry greater penalties than a trespass charge, we'll be in the same position as last year.

Id., BLOOM-MOA7. Johnson replied, in pertinent part, as follows:

> I agree that you need to have consequences but MOA may wish to await the criminal charges. It's the prosecution's job to be the enforcer and MOA needs to continue to put on a positive, safe face. . . . I do not usually posture in the media, but I want to deter future criminal activity.

Id. Allen ended the email colloquy as follows:

> we would defer any civil action depending on how the criminal charges play out. I think there's just a concern that this is our third year in a row – and our efforts this year were ineffective in shutting it down.

Id.

Because the terminology "boisterous, and noisy conduct" in the disorderly conduct statute is essentially standardless, it provides no objective criteria against which these five defendants -- or the other demonstrators gathered at the MOA on December 20 -- could assess their conduct. *See Snyder v. Phelps*, 562 U.S. at 458 (finding "outrageousness" an impermissibly "highly malleable standard with 'an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression'"). Because such indeterminate, vague, and standardless statutory language provides no effective bounds limiting law enforcement's or a prosecutor's discretion, inviting arbitrary enforcement of the law, that statutory language cannot

constitutionally be applied to criminalize the conduct of these five defendants in light of all the relevant circumstances of the BLM demonstration at the MOA. Because the State could not withstand a motion for a directed verdict of acquittal at trial on the basis of the conduct component of the disorderly conduct statute under the facts here, the disorderly conduct charges against Montgomery, McDowell, Gildersleve, Abram, and Edwards, to the extent predicated on their conduct during the BLM demonstration, are dismissed.

VI. The State's Evidence Is Insufficient to Establish Probable Cause for the Unlawful Assembly Charges.

The State has brought three different unlawful assembly charges in these cases.

Leader/Organizer Defendants Montgomery, Levy-Pounds, McDowell, Salonek, Gildersleve, Twiss, Dahlstrom, and Wronski-Riley and Participant Defendants Doyle, Edwards, Gebremedin, Larkins, Machgan, Mahadeo, McCray, Saleh, Socha, and Mautaui and Nakami Tongrit-Green are charged with unlawful assembly under Minn. Stat. § 609.705(2), which provides:

> When three or more persons assemble, each participant is guilty of unlawful assembly, which is a misdemeanor, if the assembly is: . . . (2) with intent to carry out any purpose in such manner as will disturb or threaten the public peace; or

Leader/Organizer Defendants Montgomery, McDowell, Salonek, Gildersleve, and Dahlstrom and Participant Defendants Abram and Edwards are charged with unlawful assembly under Minn. Stat. § 609.705(3), which provides:

> When three or more persons assemble, each participant is guilty of unlawful assembly, which is a misdemeanor, if the assembly is: . . . (3) without unlawful purpose, but the participants so conduct themselves in a disorderly manner as to disturb or threaten the public peace.

Finally, Participant Defendants Doyle, Edwards, Larkins, Machgan, Saleh, and Socha are charged with presence at an unlawful assembly under Minn. Stat. § 609.715 which provides:

> Whoever without lawful purpose is present at the place of an unlawful assembly and refuses to leave when so directed by a law enforcement officer is guilty of a misdemeanor.

A. Defendants Did Not Participate in an Unlawful Assembly and Conduct Themselves in Such a Manner as to Threaten or Disturb the Public Peace.

Boisterous and loud assemblies are protected by the First Amendment. Statutes that criminalize assemblies based upon disruption of the public peace must be narrowly construed so as to protect constitutional rights. *Cox v. Louisiana*, 379 U.S. 536 (1965) (reversing convictions for breach of peace even though witnesses thought "violence was about to erupt" when student started cheering, clapping and singing); *Edwards v. South Carolina*, 372 U.S. 229, 238 (1963) (in reversing criminal convictions for breach of peace against 187 student defendants for participating in protest against discriminatory actions in South Carolina against African Americans by engaging in what government characterized as "boisterous, loud and flamboyant" conduct involving marching, carrying placards, loud singing, clapping of hands, and stamping of feet, court noted that where there was no violence or threat of violence convictions could not stand when based on nothing more than claims that the assembly "stirred people to anger, invited public dispute, or brought about a condition of unrest").

State v. Hipp, 298 Minn. 81, 213 N.W.2d 610 (Minn. 1973), arose from a demonstration at the University of Minnesota protesting the construction of a "Red Barn" restaurant in Dinkytown. Demonstrators crowded into an existing Red Barn restaurant and announced their intention to remain until the restaurant closed for the day. The demonstrators interrupted

normal business, pasted signs on the restaurant's windows, blocked the restaurant's entrance to non-demonstrators, bent the frames on the restaurant's side doors and tossed the assistant manager's keys into the crowd. After the police had cleared the demonstrators from the restaurant, some of the protestors began picketing in front of the restaurant on the restaurant's driveway and the sidewalk. As the picketing continued and the number of picketers increased several fold, some of the picketers began shouting obscenities, a milk carton was thrown against a large plate glass window, and noise from the demonstrators' shouting and beating on lawn chairs increased. Although officers had asked the demonstrators to limit the pickets to a single line of 12-14 people, a double line had formed, the sidewalk in front of the restaurant had become completely blocked, the street was blocked and, according to the police, "emotions were running high." The trial court dismissed the charges against nine defendants at the close of the State's case, the jury acquitted two defendants and found seven defendants guilty.

Although the Court held the unlawful assembly statute constitutional in *Hipp*, it did so only after applying a limiting construction. 213 N.W.2d at 612, 614, 615. *Hipp* teaches that the unlawful assembly statute does not prohibit "peaceful protest, general obnoxiousness" or activities that are "merely annoying to others" or which invite discriminatory enforcement. *Id*. It regulates only criminal conduct or activities, reaching only assemblies of three or more persons who conduct themselves:

> in such a disorderly manner as to threaten or disturb the public peace by unreasonably denying or interfering with the rights of others to peacefully use their property or public facilities without obstruction, interference, or disturbance. Such disorderly conduct may also take the form of uttering fighting words having an immediate tendency to provoke retaliatory violence or tumultuous conduct by those to whom such words are addressed.

Id. The court reversed the convictions of three defendants, concluding there was insufficient evidence to support their convictions under its limiting construction of the unlawful assembly statute. *Id*. at 617.

The protest in *Hipp* is distinguishable in a number of important ways from the BLM demonstration at the MOA.

For example, in *Hipp*, the unlawful assembly convictions of four defendants were affirmed based in part on evidence they had blocked the public sidewalk entirely, preventing any pedestrians from passing by, and had blocked the street to a sufficient degree to impede vehicular traffic. *See* 213 N.W.2d at 616. Here, the State contends the crowd at the BLM demonstration was so large that mall customers were unable to walk through the rotunda area and were blocked from some hallways,[49] with some mall guests expressing frustration over their inability to reach their destinations within the mall. *See* Giles Report, pp. 4 and 5 of 8. That assertion does not appear to be accurate, though, at least in so far as it relates to the hallways. The State's video evidence shows mall patrons, law enforcement, security personnel, and other demonstrators freely walking about around the perimeter of the crowd assembled in the rotunda as well as in other hallways. As just a couple of such examples, BPD officers can be observed easily moving through the hallway surrounding the rotunda about five minutes into the demonstration (*see* BLM Main Demonstration Video, at 23:45) and a group of protestors can be seen marching freely through the hallways on Level Two almost twenty minutes into the

[49] As defendants note, the rotunda area is where the MOA itself stages events, or allows sponsors to whom it has granted permission to hold events at the MOA to stage their events in order to minimize interference with mall patrons and other commercial activities within the mall. While the BLM demonstration differs from such events in that it, unlike them, was not authorized, the fact remains that visitors to the mall and mall patrons occasionally have to walk around rather than through the rotunda due to the presence of large-scale events being staged in the rotunda.

demonstration. *See id.*, beginning at 37:15. The video evidence does not support a contention that access to any of the hallways or corridors within the MOA was blocked due solely to the size and affirmative conduct of the BLM demonstrators.

It is certainly the case that mall patrons, as well as the demonstrators themselves, were prevented from walking in certain places on the east side of the mall after the BLM demonstration began. But that was due to MOA management's judgment call and business decision to "lock down" the east side of the mall as its chosen means of managing the demonstration, and the resulting actions by MOA security and BPD officers in erecting stanchions and cordons, or forming police lines, to barricade and block access down certain corridors to prevent the demonstration from "spilling over" into other areas of the mall. For example, one report indicates that BPD and MOA Security officers blocked the hallway leading out of the rotunda area heading north toward Sears Court (this can be observed on the BLM Main Demonstration Video, starting about 46:00) to prevent protestors from moving throughout the mall and blocked all exits except those leading from the rotunda to the east parking ramp. Giles Report, p. 5 of 8. Another report notes that, before the demonstration had even begun, "my unit was assigned to a barricade on the north side of the Bloomingdale's Court (first floor). Our job was to prevent anyone from Bloomingdale's Court from entering the East Broadway corridor to the East Rotunda. We were also tasked with preventing anyone on East Broadway from crossing our barricade and entering Bloomingdale's Court." BPD Det. Barland Report, p. 1 of 1 [Potts Aff., Exh. 3].

In contrast to the situation in *Hipp*, then, the State does not point to anything any of the defendants charged with unlawful assembly did in particular to cause any of the walkways and

corridors inside the MOA to be rendered impassable to other mall patrons or to MOA security or law enforcement during the BLM demonstration or otherwise to impede the ability of other mall patrons to gambol about the MOA in unfettered fashion that afternoon.

In *Hipp*, the unlawful assembly convictions of four defendants were affirmed based in part on evidence that they had completely blocked the restaurant's private property. *See* 213 N.W.2d at 616. Here, again in contrast, MOA patrons were prevented from shopping in about 80 shops on the mall's east side between 2:00 and 4:30 p.m. on December 20 due to MOA management's decision to order those shops closed, not because any of the defendants charged with unlawful assembly engaged in any conduct that interfered with the "rights" of other mall patrons to shop in any of those shops on the mall's east side, or anywhere else in the mall, for that matter.

The crowd that gathered at the MOA for the BLM demonstration -- between 1,000 and 1,500 participants (or onlookers), according to the State's estimates -- represents scarcely one percent of the average number of visitors to the mall on every day of the year, and was only twenty to thirty percent the size of the crowd expected by the MOA just ten days earlier for the KS95 for Kids Radiothon.[50] Nothing the BLM protestors did taxed the MOA to overcapacity, in contrast to the situation in *Hipp*, where the group of roughly 150 protestors had crowded into a restaurant having a capacity of only 80.

[50] The 5,000 figure reflected the MOA's pre-event estimate. MOA officials estimated the actual crowd that attended the event, also held in the rotunda, at 7,200 people, meaning it was five to seven times the size of the BLM demonstration. *See Aaron Ziemer*, "*7,200 Gather to Perform Zach Sobiech's 'Clouds' at Mall of America*," (Dec. 11, 2014), http://bringmethenews.com/2014/12/11/5000-gather-to-perform-zach-sobiechs-clouds-at-mall-of-america.

The State has not alleged that any property was damaged or destroyed at the MOA during the BLM demonstration. In contrast, in *Hipp*, evidence showed that the protestors had bent door frames at the restaurant and thrown a milk carton against a window. 213 N.W.2d at 616.

The Court has viewed many hours of video footage supplied by the State in connection with the (i) discovery motions in these cases, (ii) trial in *State v. Anthony John Nocella*, 27-CR-15-3146 (the first MOA/BLM demonstration case to be tried), and (iii) the defendants' motions to dismiss filed in these cases. Those videos provide no evidence of any conduct or speech by any of the defendants charged with unlawful assembly that overtly sought, or had an immediate tendency, to provoke retaliatory violence, "tumultuous conduct" or riotous behavior,[51] conduct that the *Hipp* Court held was necessary to sustain a conviction under the unlawful assembly statute. 213 N.W.2d at 614. These defendants were engaged in conduct that, while unauthorized by MOA management, was expressive, not criminal, in nature.

Nor has the State come forward with any evidence that any of the defendants charged with unlawful assembly physically assaulted other demonstrators, mall patrons, or any employees of the MOA or any of the MOA's retail shops or other commercial tenants at the MOA during the demonstration. While the State contends that the protestors were numerous, engaged in chanting that became loud and "boisterous" at times, engaged in "die-ins," and occupied portions of the MOA for roughly two hours, the evidence in the record evinces a

[51] The State offers evidence that an unidentified person spit on two officers standing on Level One of the mall and also proffers generalized conclusions from some officers claiming to have witnessed mall patrons with children whom they characterized as having been frightened. However, the State has not made any allegations or come forward with evidence of protestors seeking to provoke the crowd of demonstrators to violence by means of unduly threatening and frenzied, rowdy conduct.

remarkably peaceful demonstration. Although some in MOA management, some in the Bloomington City Attorney's Office, and some members of the public at the MOA on December 20 may have been annoyed and notwithstanding that some of the demonstrators may occasionally have done things that some observers might characterize as "general obnoxiousness," the *Hipp* court made clear that such conduct is not criminally prosecutable under the unlawful assembly statute, concluding that the purpose of that statute was only to regulate conduct -- discouraging assemblies that "get out of hand," interfere with the public, disturb public peace, and provoke the commission of other, more serious crimes – not pure speech or peaceful assembly. 213 N.W.2d at 615. In contrast to the situation in *Hipp*, in which the Court sustained the convictions of the four defendants relying in part on evidence that the participating demonstrators were disregarding pleas from several other of the protestors and the police to conduct an orderly demonstration with due regard for public order, *id*. at 616, here, the State has not made any allegations or come forward with evidence of any of these defendants seeking to provoke the crowd of protestors to violence by means of unduly threatening and frenzied, rowdy conduct.

Because the State can point to no evidence tending to show that any of the defendants charged with unlawful assembly engaged in conduct that disturbed or threatened the public peace by provoking the commission of other, serious crimes, the unlawful assembly charges against them must be dismissed.

B. The BLM Demonstration at the MOA Was Not Automatically Rendered Unlawful for Purposes of the Unlawful Assembly Statute Simply Because It Was Unauthorized.

Particularly with respect to the Participant Defendants charged with unlawful assembly, the State proceeds largely on the premise that, because the MOA did not grant permission for the BLM demonstration, the fact that more than 1,000 individuals showed up at the MOA on December 20 for the BLM demonstration rendered the assembly unlawful for purposes of Minnesota's criminal unlawful assembly statute. This is evident by the State's focus, in its memoranda in the cases involving Larkins, Machgan, Mahadeo, McCray, Saleh, and both Tongrit-Greens, among others, on the BLM demonstration at large, rather than anything specific individual Participant Defendants are charged with having done.

For example, the State argues that the Participant Defendants "participated in a protest that caused a greater corrosion of public order than the protest involved in *Hipp*" based on the following claims:

(1) More than 1,000 demonstrators protested on private property;

(2) The demonstration disrupted dozens of businesses and their operations for hours and completely blocked access to portions of MOA private property, including the main rotunda and hallways;

(3) The demonstrators prevented pedestrians from using the sidewalk by the (exterior) ring road;

(4) The demonstrators "engaged in an endless stream of yelling, and a number of protestors used profane language";

(5) The protestors urged bystanders to join the protest and solicited the general public to join the protest via an open Facebook event invitation;

(6) The protestors disregarded pleas by the police and mall officials to disperse and, toward the end of the protest, some of the protestors can be seen to disregard pleas by participants to leave MOA property;

(7) The protestors refused an alternative opportunity to get their message out in a legal manner by conducting the BLM demonstration on City of Bloomington-owned property immediately adjacent to the MOA;

(8) Some of the protestors admitted they intended to "shut [the MOA] down";

(9) Some protestors spit on uniformed officers; and

(10) Some protestors engaged in aggressive and violent behavior, attempting to break through stanchions erected by MOA security.

See, e.g., State's Mem. in Opp. to Dft's [McCray's] Motion to Dismiss for Lack of Probable Cause (July 31, 2015), at pp. 5-6 (27-CR-15-3495, Dk # 9). Because the State takes essentially the same tack with its responses to all the individual Participant Defendants' motions to dismiss the unlawful assembly charges, the Court will single out just one, Imani Christian McCray, as representative of the overall approach. The same basic reasoning applies to the others.

The State argues that McCray "engaged in some of the conduct listed above," referring to his participation in chanting with the crowd in the main rotunda[52] and later out on the ring road.[53] *Id*. at p. 6; *see also* Amend. Compl., Statement of Probable Cause, p. 2. That McCray -- along with the other Participant Defendants -- participated in a peaceful, albeit unauthorized, assembly at the MOA during which they occasionally chanted along with the crowd is not sufficient to create an issue of fact for the jury under the unlawful assembly statute, as that

[52] In one video supplied by the State, McCray can be observed standing in the rotunda, although neither he nor others in the crowd were chanting at the time of that particular video excerpt. State Video Disk ➢ Motions to Dismiss ➢ McCray 27-CR-15-3495 ➢ Video 5. In other videos, McCray can be observed standing in the crowd in the rotunda while Montgomery is leading the crowd in chanting and singing -- in which McCray occasionally joins in -- but the crowd is peaceful and the overall volume levels heard in these excerpts are far from deafening. *See* State Video Disk ➢ Motions to Dismiss ➢ McCray 27-CR-15-3495 ➢ Videos 7-12.

[53] The State supplied a couple videos of the crowd standing outside between the mall and the parking ramp entrance to the Transit Station, with Montgomery speaking and leading the crowd chanting and singing, in which McCray can occasionally be observed, sometimes joining in the chanting. State Video Disk ➢ Motions to Dismiss ➢ McCray 27-CR-15-3495 ➢ Videos 13-14.

statute was limited in *Hipp*. Although the State's amended complaint includes additional factual allegations against McCray, based on later conduct after he had reentered the mall,[54] McCray is currently charged, in the amended complaint, only with unlawful assembly, not trespass[55] or obstruction.

The State also cites *Bernini v. City of St. Paul*, 665 F.3d 997 (8th Cir.) (affirming grant of summary judgment dismissing section 1983 claim against police officers on qualified immunity grounds), *cert. denied*, 133 S. Ct. 526 (2012), for the proposition that the actions of a group, as a whole, are the relevant consideration when assessing probable cause. *Bernini* arose out of a demonstration on the first day of the 2008 Republican National Convention in St. Paul. A group of about 100 protestors had gathered at the intersection of Shepard Road/Jackson Street, facing a group of police trying to prevent them from crossing Shepard to enter downtown St.

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[54] The State contends that, for roughly twenty minutes starting at 3:33 p.m., McCray engaged in discussion with MOA Security Officer Lee, who was part of a police line behind stanchions near The Buckle, on Level Two of the mall's east end, between the rotunda area and Sears. Amended Complaint in 27-CR-15-3495, Statement of Probable Cause, p. 2. McCray asked to get through the blockade in order to pick up "stuff from my locker" at the mall shop at which he worked. *Id*. Officer Lee refused McCray permission to do so, indicating that no one was being allowed past the line into that area. *Id*. Officer Lee also asked McCray several times where he worked, to which McCray responded only "I just work down there," without specifying the store by name. *Id*. (In his original July 1, 2015 motion to dismiss the trespass charge, McCray indicated only that he had asked to retrieve his jacket from a storage locker, but never indicated that his jacket was in one of the mall's retail shops. 27-CR-15-3495, Dk #8, at p. 2.) The State alleges McCray then sought to walk around the end of the line, saying "f_ _k this, I'm going anyway." Statement of Probable Cause, p. 2. The State relates the ensuing back and forth between McCray and Officer Lee in which McCray tried three times to walk through or around the barrier, only to be stopped by Officer Lee moving in front of him to block his path, and telling him to step back or he would be arrested. *Id*. On one of these forays, the State asserts that McCray walked directly into Officer Lee. *Id*. After McCray's third attempt to walk past the police line, Officer Lee arrested McCray. *Id*.

[55] McCray was initially charged only with trespass, refusal to depart on demand, under Minn. Stat. § 609.605.1(b)(3). The trespass charge was dropped in the amended complaint filed on August 3, 2015 -- presumably in light of video evidence McCray had submitted in support of his memorandum to dismiss that charge that showed him asking to be permitted to leave the mall at least a dozen times before he was arrested for trespassing – and replaced with the unlawful assembly charge.

Paul. Police instructed the group to back up. When the group persisted in its attempt to cross Shepard, officers fired blast balls, containing rubber pellets, into the crowd. Some officers reported being pelted, in return, with rocks and feces in bags. After being repelled, the crowd turned and proceeded west along Shepard. The officers moved to contain the crowd, which had grown to about 400 people, in a park adjacent to Shepard at Ontario Street. After announcing that everyone was under arrest, the police sought to determine those who had been at the Shepard/Jackson intersection. That process led to the release of about 200 people and the arrest of about 160 others, who had stayed together as a group segregated from the others in the park.

Bernini does not save the day for the State, for two reasons.

First, *Bernini* was a section 1983 action against six police officers and the City of St. Paul claiming unlawful arrest. *Bernini* did not involve a criminal prosecution of arrested demonstrators for unlawful assembly, the situation in this case. Indeed, the State in *Bernini* had dismissed all of the criminal charges before trial. 665 F.3d at 1002.

Second, the probable cause issue in *Bernini* was not the issue facing the Court here: whether the State possesses probable cause to proceed to trial against individual demonstrators on criminal unlawful assembly charges. Rather the issue in *Bernini* was whether officers possessed qualified immunity[56] against a civil suit for damages, which in turn depended

[56] Police officers in section 1983 actions are "entitled to qualified immunity if they arrest a suspect under the mistaken belief that they have probable cause to do so, provided that the mistake is objectively reasonable" – that is, officers are not liable if they had "arguable probable cause" to make the arrest. 665 F.3d at 1003. The *Bernini* plaintiffs argued the officers had violated their Fourth Amendment rights by conducting a mass arrest when the officers had probable cause only for a subset of the arrestees, relying on *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979), for the proposition that arrest must be supported by probable cause particularized with respect to each arrestee, and cannot generally be

on whether the officers had possessed probable cause to arrest a mass group of demonstrators, based upon reasonable grounds to believe the group had been acting as a unit in attempting to break through a police line.

Because the State can point to no evidence tending to show that any of these defendants engaged in conduct that disturbed or threatened the public peace by provoking the commission of other serious crimes, the unlawful assembly charges against them are dismissed.

VII. The State's Evidence Is Insufficient to Establish Probable Cause for the Aiding and Abetting Charges.

A. General Principles of Aiding and Abetting Liability

All of the Leader/Organizer Defendants are charged with four counts of aiding and abetting alleged criminal conduct by others at the MOA during the BLM demonstration. The aiding and abetting charges are brought pursuant to Minn. Stat. § 609.05 subd. 1, sometimes referred to as the accomplice liability statute, which provides:

> A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.

Aiding and abetting liability is a specific intent crime. *State v. Charlton*, 338 N.W.2d 26, 30 (Minn. 1983). Aiding and abetting liability requires the State to prove "'some knowing role in the commission of the crime' by a defendant who 'takes no steps to thwart its completion,'" *State v. Merrill*, 428 N.W.2d 361, 367 (Minn. 1988) (quoting *State v. Ulvinen*, 313 N.W.2d 425, 428 (Minn. 1981)), or that the defendant encouraged the principal to "take a course of action

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supported by probable cause sufficient to justify the arrest of others. Relying on *Carr v. District of Columbia*, 587 F.3d 401 (D.C. Cir. 2009), the Eighth Circuit concluded the officers in *Bernini* had reasonable grounds to believe that the protestors at the Shepard/Jackson intersection had been acting as a unit attempting to break through a police line in order to gain access to downtown St. Paul.

which he might not otherwise have taken." *State v. Russell*, 503 N.W.2d 110, 114 (Minn. 1993). "Mere presence at the scene of a crime does not alone prove that a person aided or abetted, because inaction, knowledge, or passive acquiescence does not rise to the level of criminal culpability." *State v. Ostrem*, 535 N.W.2d 916, 924 (Minn. 1995); *see also Russell*, 503 N.W.2d at 114. However, "active participation in the overt act which constitutes the substantive offense is not required, and a person's presence, companionship, and conduct before and after an offense are relevant circumstances from which a person's criminal intent may be inferred." *Ostrem*, 535 N.W.2d at 924; *Russell*, 503 N.W.2d at 114.

In *State v. McAllister*, 862 N.W.2d 49 (Minn. 2015), the Supreme Court construed the "intentionally aids" term to require proof that a defendant charged with accomplice liability:

(1) knew that his alleged accomplices were going to commit a crime; and

(2) intended his presence or actions to further the commission of that crime.

862 N.W.2d at 52. *See also State v. Milton*, 821 N.W.2d 789, 805-08 (Minn. 2012); *State v. Mahkuk*, 736 N.W.2d 675, 682 (Minn. 2007); *State v. Ulvinen*, 313 N.W.2d 425, 428 (Minn. 1981) (to establish aiding and abetting liability, State must prove defendant affected principal who committed underlying charged crime, "encouraging [the principal] to take a course of action which he might not otherwise have taken").

Under the Due Process clause, criminal liability requires evidence of personal, not merely collective, guilt. *Scales v. United States*, 367 U.S. 203, 225 (1961). An individual can be prosecuted for the independent criminal actions of others only if the State can prove that the individual specifically intended to further the commission of the crimes by the others. *United States v. Montour*, 944 F.2d 1019, 1024 (2d Cir. 1991) ("When the ultimate objective of a group,

of which the defendant is a member, is legal, but the means chosen to accomplish that end involve both legal and illegal activities, a court will apply *strictissimmi juris* to ensure that the defendant was personally involved with the illegal aspects of the group activity."); *see also Dellinger*, 472 F.2d 340, 392-93 (7th Cir. 1972) (factual issue of specific criminal intent must be judged strictly "to avoid punishing one who participates in such an undertaking and is in sympathy with its legitimate aims, but does not intend to accomplish them by unlawful means"; "[s]pecially meticulous inquiry into the sufficiency of proof is . . . required because of the real possibility in considering group activity, characteristic of political or social movements, of an unfair imputation of the intent or acts of some participants to all others").

B. Insufficient Evidence Exists that Any of the Leader/Organizer Defendants Aided and Abetted Trespass by Others at the MOA on December 20, 2014.

In the amended complaints filed on August 3-4, 2015, the State dropped the trespass charges against all of the Leader/Organizer Defendants and is now charging them only with aiding and abetting trespass by others pursuant to Minn. Stat. § 609.605 subd. 1(b)(3). That statute, and the *prima facie* elements of the underlying trespass – refusal to depart on demand case have previously been set out. *See, supra*, Part III.A.

To make out a *prima facie* case of aiding and abetting trespass, the State must plead (and, ultimately, adduce probative evidence tending to show) that each of the Leader/Organizer Defendants:

(1) knew that at least one of the Participant Defendants arrested and charged with trespass was going to refuse to leave the mall, lacking any claim of right to remain at the mall, upon demands by MOA security and BPD officers that they depart from the mall, thereby committing the crime of trespass; and

(2) specifically intended, by his or her own presence or actions, to aid, advise, counsel, conspire with or otherwise meaningfully assist at least one of the Participant Defendants to defy orders to leave the MOA in order to be arrested for trespass.

The MOA is open to the public, extending generally to all what is referred to as a limited license as public invitees to enter the mall for a wide variety of purposes, including shopping, window shopping, dining at the mall's numerous restaurants, and partaking of entertainment at many of the mall's attractions, like the cinema, Nickelodeon Universe or the Sea Life Aquarium. *See, e.g., Lloyd Corp. v. Tanner*, 407 U.S. at 569; *Wicklund*, 589 N.W.2d at 802. Although the MOA refused to grant permission for the BLM demonstration, it did not inform any of the Leader/Organizer Defendants that they could not come to the MOA on December 20 nor did it inform them that others interested in the BLM cause were barred from coming to the mall. Merely issuing a call for members of the public to come to the MOA on December 20 cannot, absent much more, serve as the foundation upon which the State can prosecute the Leader/Organizer Defendants for aiding and abetting trespass by others.

As previously noted (*see supra* at p. 35), the MOA informed members of the public arriving at the mall on December 20 that the MOA is private property and that demonstrations are strictly prohibited. It also warned that those violating the rules were subject to eviction and arrest for trespass. Although Bernhjelm read three warnings over the PA system and the text of those warnings was displayed on the rotunda's AV screen during the first half hour of the demonstration, those warnings instructed demonstrators that they should "disperse" but did not order them to leave the mall. Only after the third warning, at 2:30 p.m., did MOA security officers and BPD officers begin issuing explicit instructions over bullhorns and by shouting out orders to various groups of protestors that everyone then present in the mall's east side – not

simply demonstrators who had actually been participating in the BLM demonstration -- was being required to leave the mall via the east doors.

Virtually everyone complied with the orders to depart from the MOA. Given the crowd estimates, this means between 1,000 and 3,000 individuals left the MOA voluntarily of their own accord or in response to orders by MOA security or BPD officers demanding that they do so. Only twenty-two individuals were arrested at the MOA on December 20 and charged with trespass (whose citations the State chose to prosecute): Aaron Lamar Abram (27-CR-15-3496); Emmett James Doyle (27-CR-15-3583); Andrew Jared Edwards (27-CR-15-3492); Tadele Kelemework Gebremedin (27-CR-15-3497); Sara Jean Gieseke (27-CR-15-4953); Madeline Cady Jacobs (27-CR-15-3586); Jamie Walker Johnson (27-CR-15-2056); Christopher Mark Juhn (27-CR-15-3494); Tamera Janae Larkins (27-CR-15-3491); Dakota Ryan Machgan (27-CR-15-3069); Rahsaan Mahadeo (27-CR-15-3144); Gustavo Mancilla-Bernal (27-CR-15-3070); Imani Christian McCray (27-CR-15-3495); Rose Marie Meyer (27-CR-15-3072); Anthony John Nocella (27-CR-15-3146); Benjamin Michael Painter (27-CR-15-3493); Deann Lynne Pratt (27-CR-15-3071); Roxxanne Leigh Rittenhouse (27-CR-15-3602); Dua Safaldien Saleh (27-CR-15-3582); Kimberly Ann Socha (27-CR-15-3068); Mautaui Kakemwa Alima Tongrit-Green (27-CR-15-3074); and Nakami Faridah Tongrit-Green (27-CR-15-3073).[57] *See* Dk #43 in 27-CR-15-1307 (*State v. Nekima Levy-Pounds*), Exh. 1, part b to State's Mem. in Opp. To Defts' Motion to Dismiss,

[57] Johnson pled guilty to the trespass charge on February 17, 2015. Nocella was found guilty of trespass by a jury on July 2, 2015. On July 31, 2015, the State voluntarily dismissed the cases against Gustavo Mancilla-Bernal and Deann Lynne Pratt pursuant to Minn. R. Crim. P. 30.01 based upon insufficient evidence to prove the trespass charges. Although McCray and Painter were initially charged with trespass, the State dismissed the trespass charges in the amended complaints filed against them on August 3 and 4, 2015. The State's cases against the other sixteen Participant Defendants in this list still include trespass charges.

Trespass Notices issued to individuals arrested at MOA on December 20 and charged with trespass.

The State has failed to plead that any of the Leader/Organizer Defendants knew that any of these twenty-two individuals intended to defy orders to depart from the mall in order to be arrested for trespass. The State has also failed to plead that any of the Leader/Organizer Defendants counseled, encouraged, caused or otherwise assisted any of these twenty-two individuals to refuse to leave the mall and be arrested for trespass. The probative evidence is, in fact, to the contrary, as to both points. The record is replete with evidence that, after the command came down to move everyone out of the east end of the mall, the Leader/Organizer Defendants and the protest marshals who had been trained three days prior to the demonstration by several of the Leader/Organizer Defendants actively exhorted and encouraged BLM demonstrators to cooperate with mall security and BPD officers and to depart from the mall so as not to be arrested for trespass.

For example, Sgt. Giles' report explicitly acknowledges that Bade, the designated head marshal, had, before the start of the demonstration, "instructed [the marshals] that on the third request for disbursement all protestors should leave the mall." Giles Report, p. 3 of 8. Consistent with that plan, Bade sent numerous texts to the marshals advising them to move the protestors out of the mall. Here are some of her texts:

"Action is ending. Exit now."

"Move towards exits."

"What exits r clear?"

"They will start making arrests. Get pple [people] out. Away from Sears."

"Get pple [people] to leave mall. Action is over."

"Calm and de-escalate. Cops should be letting pple [people] outside."

"We shut it down y'all, let's move out the exit toward the east past the rotunda and seaworld! Great work!!!"

"Looks like exit at sea life or world is clear."[58]

"Moving people towards sea life exit."

"Exit on the other side of Nickelodeon."

Giles Report, p. 4 of 8; *see also* Exh. 5 to the Potts Affidavit. Sgt. Giles' report expressly acknowledges that "Bade continued to send texts telling marshals to exit the mall to keep from being arrested." Giles Report, p. 4 of 8.

One of the videos submitted by the State shows Brianna Brilyahnt[59] telling the crowd: "They're going to start arresting people. If you don't want to be arrested, exit [or "leave"] through the east side." *See* Black Lives Matter 12-20-2014 (with CCTV footage) ➢ Aggressive Behavior ➢ Video OO7 GOPRO033 (between 9:00 and 10:00 running time on video). She repeated these instructions, with slightly different wording at the end, a minute or two later. *See id.* (between 11:15 and 11:40 running time on video). Immediately after that instruction was repeated, Brilyahnt is shown telling the crowd, after leading a reprise of the chant, "Black Lives Matter":

Thank you for being here.

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[58] The Sea Life Aquarium is located just off the east rotunda adjacent to the Barnes & Noble store and the exit from the mall into the east parking ramp. http://www.mallofamerica.com/shopping/map/sea-life-minnesota-aquarium

[59] Brilyahnt is not a defendant. She is not identified by name in this video recording, but is identified in Black Lives Matter 12-20-2014 (with CCTV footage) ➢ Offenders ➢ Other Offenders ➢ Identified ➢ Brianna Brilyahnt.

> We appreciate your voice. Your energy. Your passion. We want to see you be safe.
>
> So, we are asking everybody leave through the east door. Please.

Id. (between 11:35 and 12:10 running time on video).

On another of the videos proffered by the State, Defendant Gildersleve and another woman protestor can be heard speaking with security officers on Level Two, by Things Remembered, shortly after Brilyahnt concluded her remarks noted in the prior paragraph, saying: "Let the people go. We're trying to exit. We're leaving together." *See* Black Lives Matter 12-20-2014 (with CCTV footage) ➢ Aggressive Behavior ➢ Video 004-Body.X78044781.0009.141220.151816.1802 (between 17:10 and 17:50 running time on video).

At 2:29 p.m., immediately prior to Bernhjelm's final warning, the State acknowledges that a group of demonstrators led by Montgomery and Levy-Pounds left the MOA via the east doors on Level One and reassembled outside along the east ring road. Appendix B; Giles Report, p. 6 of 8. Officers observed Montgomery leading this group, and other officers photographed Levy-Pounds with a group of protestors on the ring road.[60] *Id*. McDowell, too, had led a separate group of demonstrators marching about the mall about a half hour later. Sgt. Spark acknowledged that McDowell told him: "I am leading this, and we are ready to leave to go outside." Spark Report, at p. 1 of 2 (Potts Aff., Exh. 4). Sgt. Spark directed them to leave through the east main doors, which they did.[61] *Id*. at pp. 1 and 2 of 2. This, of course, constitutes evidence

[60] The State contends this group, consisting of 150 to 250 protestors, blocked traffic from travelling on that roadway near the transit station while chanting, fist pumping and waving banners. This group ultimately dispersed shortly after 3:00 p.m. *See* Giles Report, p. 7 of 8; State's Timeline (Appendix B).

[61] A timeline proffered by the State places McDowell standing with a crowd in the Sears Court about 15 minutes into the demonstration, and then leading this group in a "die in" at 2:52 p.m., before leading the group out of the mall through the Level Three East skyway shortly before 3:00 p.m., and then giving an

that Montgomery, Levy-Pounds, and McDowell were acting affirmatively to lead demonstrators out of the mall, in order to ***avoid*** arrest for trespass. Here, again, the State offers no evidence suggesting that Montgomery, Levy-Pounds, or McDowell instructed or encouraged any of the twenty-two individuals who ultimately were arrested when they refused officers' orders to depart the mall to defy those orders and be arrested for trespass.

Officers observed Dahlstrom and Salonek leading chants near the Build-A-Bear Workshop (located on Level One, just to the north of the rotunda on the way toward Sears). Giles Report, p. 5 of 8. The protestors can be heard chanting "Hands Up, Don't Shoot" and Dahlstrom can be observed directing protestors in this area to perform another die-in about the time that Bernhjelm was reading his third and final warning over the mall's PA system.[62] After that die-in, though, Dahlstrom can be observed cooperating with BPD and MOA security officers after they began pushing demonstrators toward the exit doors. Black Lives Matter 12-20-2014 (with CCTV footage) ➢ Offenders ➢ Todd Dahlstrom ➢ Video 003-GPPRO096. He is shown on one of the videos offering no resistance, not leading any chanting, not issuing instructions to anyone to defy the orders to leave in order to be arrested, but simply moving along with the crowd as they were being ushered out of the mall. Black Lives Matter 12-20-2014 (with CCTV footage) ➢ Offenders ➢ Todd Dahlstrom ➢ Videos 004- & 006-GPPRO099.

The evidence shows that:

(1) Grimm was never at the MOA on December 20;

(2) Bade was escorted out of the mall before the demonstration began at 2:00 p.m.;

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interview to the media outside the mall by Gate 5 at 3:07 p.m. *See* Black Lives Matter 12-20-2014 (with CCTV footage) ➢ Offenders ➢ Michael McDowell ➢ Michael McDowell Timeline.

[62] Black Lives Matter 12-20-2014 (with CCTV footage) ➢ Offenders ➢ Todd Dahlstrom ➢ Video 002-GPPRO084, at 00:15-2:20.

(3) Foster was escorted out of the mall about 2:03 p.m.[63] (scarcely three minutes after the demonstration had begun); and

(4) Wronski-Riley was escorted out of the mall not long thereafter (some indications place this as early as around 2:15, others as late as about 2:30 p.m., just as the main demonstration was ending).[64]

The State offers no evidence or explanation of any specific instructions any of these four defendants supposedly issued, and to whom, encouraging them to defy orders to depart from the mall. In particular, the State has not offered any evidence or explanation of any specific actions any of these four defendants allegedly took to counsel and aid any of the twenty-two individuals who were arrested at the mall and charged with trespass on December 20 to defy the orders to leave the mall. While the record before the Court does not indicate the precise time at which each of those twenty-two individuals ultimately refused orders to depart and was arrested, it is obvious that many, if not almost all of them, were not arrested and charged with trespass until long after Bade, Foster and Wronski-Riley had left the mall.

Unlike the case with Bade, who maintained contact by means of text messages sent to protest marshals inside the mall after she had been escorted out of the mall before the demonstration had even begun, the State offers no evidence that either Foster or Wronski-Riley

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[63] The Timeline proffered by the State for Foster includes short video clips recorded and still photos taken between 1:44 and 2:01 p.m., with no actions attributed to her on the timeline after 2:01 p.m. Black Lives Matter 12-20-2014 (with CCTV footage) ➢ Offenders ➢ Other Offenders ➢ Amity Foster ➢ Amity Foster Timeline. Having identified Foster as assuming a leadership role over the protest marshals, MOA security officers escorted her out of the mall, apparently shortly after 2:00. Giles Report, p. 5 of 8; *see also* McHarg Report, p. 2 of 2. At oral argument, Foster's counsel represented that she had been asked to leave and departed from the mall at 2:03 p.m. Sept. 15, 2015 Hrg Transcript at p. 22.

[64] During the main demonstration in the rotunda, apparently about the time Bernhjelm's first warning was posted on the AV screen, the State acknowledges that Wronski-Riley walked around the rotunda, telling the marshals "the protesting would continue for another 20 minutes and then we would all leave." Giles Report, p. 5 of 8. Having identified Wronski-Riley as assuming a leadership role over the protest marshals, MOA security officers escorted her out of the mall. Giles Report, p. 5 of 8; *see also* McHarg Report, p. 2 of 2.

engaged in any communications or had any other contact with anyone in the mall after they had departed from the mall. The State offers no explanation how they can be liable for aiding and abetting trespass by others without any evidence of any direct contact they had with those who were actually arrested and charged with trespass by which they intentionally aided, advised, conspired with, or otherwise assisted in those others' arrest for trespass.

The State makes no specific allegations as to any conduct in which Twiss engaged or anything she said at any point during the BLM demonstration. She is mentioned only briefly and in passing: as an "additional organizer" in connection with a planning meeting; in a text from Bade to protest marshals identifying Twiss as a "point person" for the marshals; and that officers had observed Twiss joining Foster and Wronski-Riley in the center of the rotunda at an undetermined time. In its Brief, the State also contends that Twiss spoke to a large group of individuals in the rotunda and appeared to be giving them directions. There is no evidence the State points to in any of its written or video submissions of anything Twiss said during the BLM demonstration or any specific conduct in which she engaged in support of the State's charges against her. The State has proffered no evidence that Twiss counseled or advised anyone to trespass, to engage in disorderly conduct or unlawful assembly or to disturb or threaten the public peace. The State has failed to show how Twiss acted with intent to cause violence above public inconvenience, annoyance or unrest.

In sum, although the State has presented the Court with voluminous evidence in these cases, the State has neither pleaded nor pointed to any evidence that would tend to prove that any of the Leader/Organizer Defendants knew any of these twenty-two individuals intended to defy orders to depart from the mall or that any of the Leader/Organizer Defendants took any

specific action with the intent to aid, counsel, advise, or assist any of those twenty-two individuals in their decisions to defy orders of law enforcement personnel in order to be arrested for trespass. Thus, the charges of aiding and abetting trespass against all of the Leader/Organizer Defendants must be dismissed.

C. Insufficient Evidence Exists that Any of the Leader/Organizer Defendants Aided and Abetted Disorderly Conduct by Other BLM Demonstrators.

All of the Leader/Organizer Defendants are charged with aiding and abetting disorderly conduct by other demonstrators. The underlying disorderly conduct statute, Minn. Stat. § 609.72.1(3), has been set out earlier and the manner in which it has been narrowed, with respect to both its speech and conduct components, has also been discussed extensively earlier in this opinion. *See supra*, Discussion, Part V.

Four other defendants were charged with disorderly conduct under Minn. Stat. § 609.72.1(3): Abram, Edwards, Meyer, and Painter. Although the State does not say so explicitly, because these are the only Participant Defendants who were charged with disorderly conduct, the State's case for alleged aiding and abetting disorderly conduct against any of the Leader/Organizer Defendants must depend on links between one or more of the Leader/Organizer Defendants and at least one of these four individuals.

The State has failed to plead that any of the Leader/Organizer Defendants knew that any of these four individuals was going to utter any fighting words or otherwise engage in conduct proscribed by the disorderly conduct statute, as that statute has been narrowed and limited by the Minnesota appellate courts, as discussed earlier in this opinion. The State has failed to plead specific actions by any of the Leader/Organizer Defendants by which they

specifically intended to provide aid, counsel, advice, or otherwise to provide assistance to any of these four individuals to enable or in furtherance of their uttering any fighting words or otherwise engaging in actions sufficient to give rise to criminal disorderly conduct liability. Although the State has presented the Court with voluminous evidence in these cases, the State has not pointed to any evidence that would tend to prove that any of the Leader/Organizer Defendants knew any of these four individuals intended to be arrested for disorderly conduct or that they took any specific action with the intent to aid or assist any of those four individuals in their actions underlying the disorderly conduct charges against them.

While the State has produced evidence that most of the Leader/Organizer Defendants played some role in organizing and planning for the BLM demonstration at the MOA (*see supra* Factual Background, Part C), all that evidence shows that the demonstration they were planning, while unauthorized by the MOA, was intended to be peaceful. The State argues that because the Leader/Organizer Defendants assumed leadership roles in organizing the demonstration, their pre-demonstration conduct forms the foundation upon which they can be convicted for aiding and abetting disorderly conduct, based on conclusory assertions that some demonstrators blocked some hallways, some unidentified members of the public could not reach the rotunda, some unidentified members of the public in the MOA that afternoon appeared frustrated, loud yelling could be heard throughout the east side of the mall from time to time, and the specific testimony by officers Kne and Barland that someone spit on them. That argument does not withstand scrutiny under the principles of *McAllister*, *Scales*, *Montour* and *Dellinger*.

The State has not alleged, nor has it come forward with any evidence showing, that any of the Leader/Organizer Defendants said anything to any demonstrators or mall patrons watching the demonstration at the MOA on December 20 inciting them to block hallways, to attempt to close down businesses, or to spit on or otherwise engage in confrontational behavior with any law enforcement or private security officers at the mall. That the demonstrators' chanting may have been very loud, at times, does not suffice to establish unlawful disorderly conduct. *See, e.g., State v. Sharkey*, 2012 WL 1970057 (Minn. App. 2012); *State v. Peter*, 798 N.W.2d 552 (Minn. App. 2011); *City of Edina v. Dreher*, 454 N.W.2d 621 (Minn. App. 1990).

The charge that the Leader/Organizer Defendants planned in advance and intended to incite others to engage in acts of unlawful disorderly conduct is undermined by the very public manner in which the BLM demonstration was organized by means of social media and by the fact that Dahlstrom and Salonek met with the BPD Police Chief and Deputy Commander and the MOA's Director of Security prior to the demonstration to discuss the BLM demonstration plans. This Court has not previously come across cases in which those planning to engage in and incite others to engage in criminal activity planned their crimes in public by means of social media and sat down with law enforcement and corporate management of their target in advance to discuss in detail their plans, as occurred in this case. The State's contention that the Leader/Organizer Defendants intended to incite others to engage in criminal disorderly conduct is further belied by the fact that Montgomery, McDowell, Salonek, Gildersleve, Bade, Foster, and Levy-Pounds trained as many as a couple hundred volunteers three days before the

demonstration how to conduct an orderly and peaceful demonstration and how to de-escalate tensions involving any angry demonstrators or law enforcement.

In any event, as noted earlier in this Memorandum Opinion, conclusory assertions in the form upon which the State relies upon do not give rise to criminal liability under the disorderly conduct statute. Because no disorderly conduct can be founded upon such generalized, conclusory allegations, none of the Leader/Organizer Defendants can be convicted for aiding and abetting (such legally non-existent) disorderly conduct on those same grounds. The charges of aiding and abetting disorderly conduct against all of the Leader/Organizer Defendants must, therefore, be dismissed.

D. Insufficient Evidence Exists that Any of the Leader/Organizer Defendants Aided and Abetted Unlawful Assembly by Other BLM Demonstrators.

All of the Leader/Organizer Defendants are charged with two counts of aiding and abetting unlawful assembly, one under Minn. Stat. § 609.705(2), and one under Minn. Stat. § 609.705(3). The statutory language under both has been set out earlier in this opinion. (*See supra* Part VI). Thirteen defendants are charged with disorderly conduct under Minn. Stat. § 609.705(2): Doyle; Edwards; Gebremedin; Larkins; Machgan; Mahadeo; McCray; Meyer; Painter; Saleh; Socha; and both Tongrit-Greens. Four defendants are charged with disorderly conduct under Minn. Stat. § 609.705(3): Abram; Edwards; Meyer; and Painter.

Although the State has presented the Court with voluminous evidence in these cases, the State has neither pleaded nor pointed to any evidence that would tend to prove that any of the Leader/Organizer Defendants knew any of these fourteen individuals intended to engage in an unlawful assembly in a manner so as to disturb or threaten the public peace, whether with

or without an unlawful purpose, or that they took any specific action by which they specifically intended to provide aid, counsel, or advice to any of these fourteen individuals to assist them in engaging in an unlawful assembly in a manner so as to disturb or threaten the public peace. That the BLM demonstration was not authorized by the MOA does not render it unlawful *per se* for purposes of criminal liability under the unlawful assembly statute.

Thus, the charges of aiding and abetting unlawful conduct against all of the Leader/Organizer Defendants must be dismissed.

CONCLUSION

The MOA is private property. As long as *Wicklund* remains the law in Minnesota, and the forty-year old precedents of *Lloyd Corp. v. Tanner* and *Hudgens* remain the operative United States Supreme Court pronouncements on the right of privately-owned shopping malls to prohibit political demonstrations, no citizen and no group possesses a constitutional right under either the United States or Minnesota Constitution to conduct political demonstrations at the MOA over the express objection of MOA ownership and management. In this particular case, MOA management declined to grant permission for the BLM demonstration, consistent with its written policy prohibiting all demonstrations of any character at the mall. All of the Leader/Organizer Defendants knew this in advance of the demonstration. All of the Participant Defendants had notice of this on the afternoon of the demonstration, based on the signs posted on the mall's entry doors, Captain Bernhjelm's three broadcast warnings, and the three warnings posted on the large A/V screen in the mall's east rotunda.

Although the BLM demonstration was unauthorized and went forward over the express objection of MOA management, nothing about it was subversive. It was, in fact, highly

publicized. As some might say, that was rather the point. McDowell and Grimm were parties to correspondence with MOA management and the Bloomington City Attorney discussing the BLM demonstration in advance. Dahlstrom and Salonek met with officials from the MOA and BPD to discuss their plans for the BLM demonstration. Montgomery, McDowell, Salonek, Gildersleve, Bade, Foster, and Levy-Pounds participated in a planning meeting three days prior to the demonstration in which they trained many prospective demonstrators how to conduct a peaceful protest, how to keep demonstrators safe and the demonstration calm, how to keep lines of communication open with mall security and law enforcement personnel, and how to de-escalate any tensions that might arise involving either the police or angry demonstrators. BPD undercover officers attended that open public planning meeting and were privy to the discussions and planning. The demonstration was extensively publicized over social media, including by means of the Black Lives Matter Minneapolis Facebook page and Twitter. As some of the defendants in these cases have noted, criminals planning criminal activity do not ordinarily and typically communicate directly with their intended targets and the police in advance nor do they openly and widely communicate their intended criminal actions so publicly by means of social media.

Although the MOA did not authorize the demonstration, the manner in which MOA management and security officers acted during the first thirty minutes of the demonstration evinces a tacit decision to allow a brief demonstration before MOA management took affirmative, decisive action requiring everyone[65] present in the locked-down, east side to leave

[65] The MOA required all interested onlookers, employees of mall retail merchants, and other mall patrons who just happened to be in the affected corridors and rotunda area on the mall's east side

the mall. There is no evidence in this case that any of the Leader/Organizers actively opposed BPD or MOA security officers' efforts to force everyone to leave the mall after that decision was announced after 2:30 p.m., encouraged others to defy those orders, sought to incite unrest, rioting or other violence, or counseled any individual to remain in the mall and be arrested for trespass or obstruction. The evidence is precisely the opposite. By the State's own admission, Montgomery, Levy-Pounds, and McDowell led groups of demonstrators departing from the mall. Bade sent numerous texts to protest marshals inside the mall after 2:30 instructing them to help move demonstrators out of the mall. One of the protest marshals and Gildersleve are captured in videos supplied by the State exhorting demonstrators to leave the mall, informing security officers that they were trying to exit together, and imploring mall security to allow them to leave the mall. Bade, Foster, and Wronski-Riley had been escorted out or had left the mall at the direction of mall security before mall security and the BPD began the push after 2:30 p.m. to force everyone in the mall's east side to leave the mall. Grimm was not even at the mall on December 20.

The Court has viewed many hours of video evidence of the BLM demonstration at the MOA on December 20, 2014. This includes the entirety of the main demonstration, conducted in the Level One east rotunda between 2:00 and 2:30, viewed from various perspectives. It also includes many other aspects in other locations on Levels One and Two in the mall as well as in the skyway, the parking ramp, and outside the mall at various times throughout the afternoon. The BLM demonstration was, in the main, peaceful. The lock-down decision was made by MOA management at the very outset of the demonstration as a judgment call about managing a

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between 2:00 and 4:00 p.m. on December 20 to depart from the mall, not just those who had been actively participating in the demonstration.

large-scale, unauthorized demonstration, not in the face of a tumultuous and spiraling-out-of-control demonstration imminently threatening to erupt into rioting, fighting, violence, or destruction or defacement of property.

There were isolated incidents involving small-scale tests of will and confrontation between individual (or very small groups of) demonstrators and MOA security or BPD officers, most of which occurred during the ninety minutes after 2:30 p.m. when the latter were working in concerted fashion to move everyone on the mall's east side, where the BLM demonstration had taken place, off mall property. These resulted in obstruction charges against three of the Participant Defendants: Gieseke, Meyer, and Rittenhouse. They also include disorderly conduct charges against Participant Defendants Painter and Meyer, who have not filed motions seeking dismissal of those charges for lack of probable cause. However, the State has neither pleaded nor come forward, in response to any of the Leader/Organizer Defendants' motions to dismiss, with any competent, probative evidence it would offer at trial with a tendency to prove that any of them had any involvement or connection with any of the defendants involved in those small-bore skirmishes or did anything to encourage resistance or to counsel others to refuse to depart, resulting in their arrests for trespass and, in three cases, obstruction. It bears repeating that each of the Leader/Organizer Defendants who was actually at the MOA on December 20 left upon demand by MOA security or BPD personnel and none was arrested at the MOA that day and charged with trespass based upon refusal to depart from the mall.

As Bloomington City Attorney Sandra Johnson stated during the oral argument, the BPD is tasked with maintaining law and order, and the BPD and the Bloomington City Attorney's Office, working together, are tasked with enforcing the law within the City of Bloomington,

including at the MOA. While, fortunately, the large-scale BLM demonstration at the MOA did not erupt in violence, rioting, physical injury, or destruction to mall property, the specter of such possible outcomes remains a legitimate (and omnipresent) concern for MOA ownership and management and law enforcement personnel in the City of Bloomington.

With all this said, this Court is tasked with deciding specific motions filed by individual defendants in the wake of their actual conduct and in the larger context of the manner in which the unauthorized BLM demonstration unfolded, given the specific crimes charged by the Bloomington City Attorney's Office, and in light of the extensive affidavit testimony, police reports, and voluminous other documentary and video evidence in the record in these cases. For all the reasons discussed in this Memorandum Opinion, the Court is persuaded that the State lacks a sufficient factual basis giving rise to a triable issue of fact for a jury on all of the charges the State has filed against the eleven Leader/Organizer Defendants and McCray. The State's cases against those twelve defendants are being dismissed now because the State could not withstand a motion for a directed judgment of acquittal at the close of the State's case were the cases against these twelve defendants to proceed to trial. The Court is likewise persuaded that the State lacks a sufficient factual basis giving rise to a triable issue of fact for a jury on the disorderly conduct and unlawful assembly charges the State has filed against eleven of the Participant Defendants who have filed motions to dismiss those charges. Those charges against those eleven defendants are being dismissed now because the State could not withstand a motion for a directed judgment of acquittal at the close of the State's case on those charges at trial. Because genuine issues of fact remain as to the trespass charges against fifteen of the Participant Defendants who have filed motions to dismiss and as to the obstruction

charges against two of the Participant Defendants who have filed motions to dismiss, the State's cases against those fifteen defendants on those charges, as well as the State's cases against the two remaining Participant Defendants, Meyer and Painter, who did not file motions to dismiss, will proceed to trial on the non-dismissed charges against those seventeen defendants.

There is no larger political agenda here. Nor should the results in these cases arising in the wake of the BLM demonstration at the MOA on December 20, 2014 be taken by anyone as the Court tacitly condoning unauthorized demonstrations at the MOA. None of the parties, nor others perceiving the MOA as an appropriate venue at which to conduct politically, socially, or religiously-based demonstrations over the objections of MOA ownership or management, should construe anything in this order and opinion as forecasting a similar outcome or as *carte blanche* to conduct future demonstrations at the MOA without securing advance permission to do so from MOA management.

Those affiliated with the Black Lives Matter movement are, of course, free to express their views regarding policing conduct in this nation and the state of affairs between law enforcement and minority communities. They are free to advocate for systemic change they believe warranted. In doing so, they should remain mindful that others of good faith and good will can hold opposing views on these issues, or disagree with specific tactics. They should also remain mindful of the legitimate interests and rights of public authorities to impose reasonable and lawful time, place and manner restrictions deemed appropriate in view of other competing public interests, not the least of which are those of public safety, when advocates like those in

the BLM movement take to large-scale demonstrations on public property to draw attention to their causes.

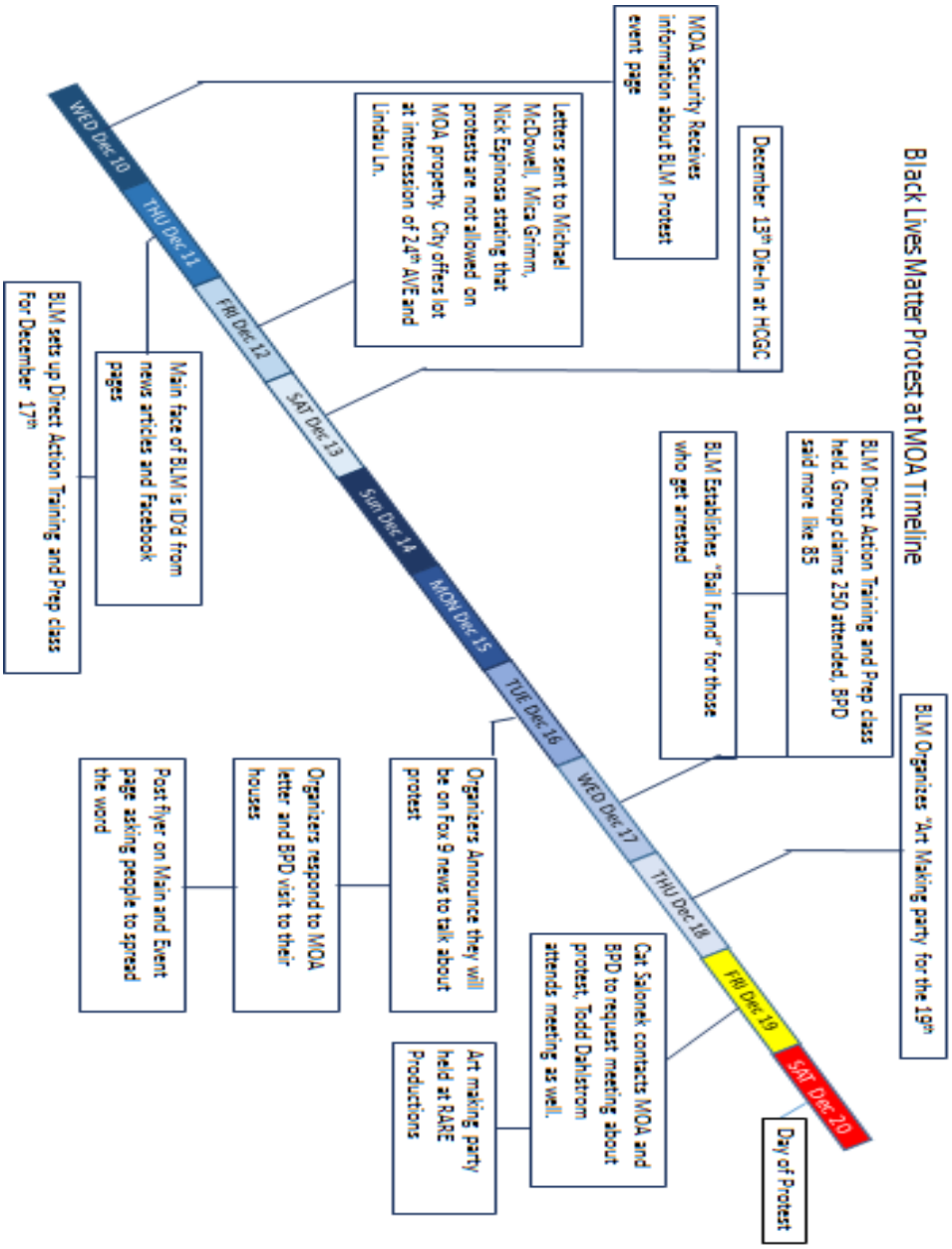
While the Court cannot condone the conduct of an unauthorized demonstration by Black Lives Matter at the MOA on December 20, 2014, the Court nevertheless commends the conduct of certain of the Leader/Organizer Defendants in communicating with officials of the MOA, the BPD, and the Bloomington City Attorney's Office in advance of the demonstration, and in the efforts they took to help ensure the demonstration remained peaceful, including their actions in training many volunteers to help maintain peace, order, and safety during the demonstration. Because it is not written anywhere that such outcomes can always be guaranteed, however, any of those who imagine themselves to be free to ignore the law and entitled to give voice to their political beliefs and social grievances wherever and however they wish would do well to bear that in mind, as not every such demonstration may always and inevitably unfold as peacefully as did the BLM demonstration at the MOA.

Finally, the Court commends MOA management, the BPD, and the Bloomington City Attorney's Office for seeking to work with some of those involved in organizing and planning the BLM protest in the ten days leading up to the demonstration to help ensure any demonstration, even if unauthorized, would remain peaceful. The Court also commends the general actions and conduct of MOA security and BPD officers at the MOA on December 20 for their restraint and efforts to ensure, in conjunction with the efforts of some of those in BLM leadership, that the demonstration remained peaceful and did not take a turn toward the disastrous. The degree to which peace and order was maintained is, in the Court's view, a credit to MOA management, MOA security, the BPD, and other law enforcement personnel,

who, broadly speaking, conducted themselves appropriately, and to the overwhelming majority of the demonstrators, including all of the Leader/Organizer Defendants who were at the mall for the BLM demonstration, who remained peaceful and cooperated with requests from MOA security and BPD officers after the half-hour main demonstration had ended.

PAC

APPENDIX A: BLM/MOA Pre-Demonstration Timeline, Dec. 10–19[66]



[66] Source: BLM Overview, p. 2 (found on video folder Black Lives Matter 12-20-2014 (with CCTV footage) > BLM PowerPoint subfolder > BLM Overview PowerPoint document.

APPENDIX B: BLM/MOA Demonstration Timeline, December 20

The following time line was offered by the State to chronicle the main events taking place at the Mall of America during the Black Lives Matter demonstration on Saturday, December 20, 2014**.** (All times listed are p.m.)

2:00 Group in the Rotunda begins chanting.
MOA initiates lockdown on the east side of the mall.

2:03 First warning is issued.

2:10 Due to technical issues, the first warning is not issued on screen until this time.

2:19 Second warning issued.

2:29 The group in the Rotunda begins moving toward the one east doors.

2:30 Third warning issued.
The group from the Rotunda arrives on the east ring road.

2:32 A second group marches through Nickelodeon Universe (NU).

2:33 The second group leaves NU and marches down the west side, then down the south side.

2:36 The second group arrives in Southeast Court level one, and takes the escalator up to level two. The group then walks down level two south, taking the stairs up to the South Food Court. The group then walks toward level three east (three Rotunda).

2:49 The second group congregates at the three east doors.

2:54 The second group moves out the three east doors. The second group reforms on P4 East.

2:56 The second group disperses down into the lower levels of the ramp and transit.

3:07 The group on the east ring road begins to disperse.

3:12 A third group forms on the west side of the mall (level 2), and marches over to two east.

3:19 The third group congregates on level two east central.

3:34 MOA/Law Enforcement (LE) begin moving the third group toward the two east doors.

3:48 The third group is moved out the two east doors into the skyway, where they reform.

3:56 MOA/LE move the group out of the skyway and into the ramp, eventually down to the lower levels and transit.

4:28 Lockdown cleared.

APPENDIX C: 2:10 P.M. ANNOUNCEMENT POSTED ON ROTUNDA'S AV SCREEN

APPENDIX D: FINAL 2:30 P.M. ANNOUNCEMENT POSTED ON ROTUNDA'S AV SCREEN