

IN THE
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Applicants,

v.

STATE OF ILLINOIS AND CITY OF CHICAGO,

Respondents.

**Brief of Chicago Headline Club, et al.,
as Amici Curiae in Opposition to Application for Stay**

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INTEREST OF AMICI CURIAE¹

The press, clergy, and demonstrators filing this *amicus* brief are plaintiffs in *Chicago Headline Club v. Noem*, 1:25-cv-12173 (N.D. Ill.) (Ellis, J.), a putative class action in the Northern District of Illinois, in which they seek injunctive and declaratory relief against the federal government, alleging that federal immigration officers deployed to Chicago as part of “Operation Midway Blitz” are routinely perpetrating violence against the press, religious practitioners, and non-violent demonstrators, in violation of the First Amendment, the Religious Freedom Restoration Act (RFRA), and other laws. Judge Ellis has entered a temporary restraining order, and a preliminary injunction hearing is set for November 5, 2025. *Chicago Headline Club*, No. 1:25-cv-12173, Docs. 42, 43 & 66.

Amici submit this short brief to provide factual input from the record being developed in *Chicago Headline Club* that may assist the Court in its resolution of the stay application in this case.

¹ No party’s counsel in this case authored this brief in whole or in part. No party or party’s counsel contributed any money intended to fund preparing or submitting this brief. No person, other than amici, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The government’s application for a stay should be denied. The government’s factual account in support of its application distorts the record and it is counterfactual, illustrating why this Court’s cases hold that appellate courts must defer, except in extraordinary circumstances, to the factual findings of federal district judges, particularly so at this stage of a civil case, where a court has entered temporary relief in order to preserve the status quo while litigation proceeds.

ARGUMENT

1. This Court holds that courts of appeals must defer to the factual findings of district courts. *Maine v. Taylor*, 477 U.S. 131, 145 (1986). The reason for the rule is that district courts have the most intimate view of the factual record and are best equipped to weigh the evidence and testimony. *Anderson v. City of Bessemer*, 470 U.S. 564, 576 (1985). Deference is particularly important at the preliminary stage of civil litigation, when temporary relief has been entered to preserve the status quo based on an embryonic record. *Glossip v. Gross*, 576 U.S. 863, 882 (2015) (noting in reviewing a preliminary injunction decision that “[w]here an intermediate court reviews, and affirms, a trial court’s factual findings, this Court will not ‘lightly overturn’ the concurrent findings of the two lower courts.”) (quoting *Easley v. Cromartie*, 532 U.S. 234, 242 (2001)).

In this case, the district court concluded that the facts justify preliminary relief, *Illinois v. Trump*, No. 1:25-cv-12174, Doc. 70 (N.D. Ill. Oct. 10, 2025) (Perry, J.), and a panel of the Seventh Circuit, applying the governing standards just discussed, upheld that determination, *Illinois v. Trump*, No. 25-2798, ___ F.4th ___, 2025 WL 2937065 (7th Cir. 2025). This Court should not disturb that factual conclusion unless it appears that the trial court committed a clear error. *Butte & Superior Co. v. Clark-Montana Co.*, 249 U.S. 12, 30 (1919); see also *Baker v. Schofield*, 243 U.S. 114, 118 (1917) (“Our consideration of the evidence must be governed by the well-settled rule that, when two courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it is clear that their conclusion was erroneous.”); *United States v. King*, 48 U.S. (7 How.) 833, 845 (1849) (“[T]he decision of the Circuit Court upon [a] question of fact must, like the finding of a jury, be regarded as conclusive.”).

2. The district court’s factual findings in this case are wholly consistent with the district court’s factual findings in *Chicago Headline Club*, where the district court has found that there is no generalized threat of violence against federal employees, including agents of the Department of Homeland Security (DHS), within the Northern District of Illinois. See Ex. A (transcript of Oct. 8 hearing in *Chicago Headline Club*), at 12–13 (pointing to evidence of peaceful protest). To that end, Judge Ellis has found that federal agents are routinely using excessive force against journalists gathering the news, clergy praying in

public spaces, and peaceful demonstrators, in retaliation for their constitutionally protected activities. *Id.* at 7-13; see also *id.* at 12 (pointing to evidence “that defendants have assaulted and deployed tear gas, PepperBalls, rubber bullets, flash-bang grenades, and other munitions against peaceful protesters who were engaged in the lawful expression of their First Amendment rights”).

Judge Ellis concluded that the plaintiffs—*amici* here—are likely to succeed on the merits of their free press, exercise, and speech claims, and she entered a temporary restraining order restricting unlawful tactics pending a hearing on the plaintiffs’ motion for a preliminary injunction. See, *e.g.*, *id.* at 10, 13; see also *Chicago Headline Club*, No. 1:25-cv-12173, Doc. 43 at 5 (finding the plaintiffs provided sufficient evidence of federal agents using “violent force against people peacefully praying, including clergy members and lay practitioners alike,” which “substantially burdens their exercise of religion,” and “evidence that federal agents have used excessive force against those peacefully protesting the federal agents’ presence and operations in the Chicagoland area”). The litigation continues, including with in-court testimony from CBP and ICE supervising officials on October 20, 2025.

3. The government’s factual presentation in its stay application in this case amply demonstrates why the law demands deference to a district court’s factual findings, particularly where facts are disputed. The government’s

account is counterfactual and contrary to the record being developed in *Illinois v. Trump*, in *Chicago Headline Club v. Noem*, and in other pending litigation.

For instance, in its stay application, the government makes the following contested and incorrect factual assertions:

a. The government asserts that, on October 4, 2025, the President determined that Chicago was dangerous for federal agents. Application at 4, 11-12. Contrary evidence shows that a month earlier the President declared Chicago was “about to find out why it’s called the Department of WAR.” *Chicago Headline Club*, No. 1:25-cv-12173, Doc. 1. Moreover, DHS’s memorandum seeking assistance from the Department of Defense includes no findings about circumstances on the ground in Chicago. *Illinois v. Trump*, No. 1:25-cv-12174, Doc. 13-10 (N.D. Ill. Oct. 6, 2025) (Decl. of Sherief Gaber, Exhibits B and C). And a DHS supervisor wrote on October 8—four days later—that there were no issues at DHS’s Broadview, Illinois facility that required federal intervention, given the good work of local law enforcement. *Illinois v. Trump*, No. 1:25-cv-12174, Doc. 63-2 at ¶5 (N.D. Ill. Oct. 9, 2025) (Supp. Decl. of Bria Scudder, Illinois Deputy Governor for Public Safety).

b. The government contends that there is a pattern of violence targeted at federal personnel and property in Illinois in recent weeks. Application at 4, 6. Contrary to this contention, in addition to Judge Perry’s findings in this

case, two other district judges have considered the government's evidence and have concluded that federal immigration agents in Chicago have faced only isolated and minor incidents of civil disobedience, which have been sufficiently addressed by the local authorities. *Chicago Headline Club*, No. 1:25-cv-12173, Ex. B (transcript of Oct. 6, 2025 hearing in *Chicago Headline Club*), at 49 (Judge Ellis noting that "we have a different idea of what's going on in Chicago" in response to the Government's assertion that federal immigration officers are facing a "riot with violent terrorists organizations"); *Village of Broadview v. U.S. Department of Homeland Security, et al.*, 25-cv-12164, Doc. 35, at 16-17 (N.D. Ill. Oct. 9, 2025) (Hunt, J.) (noting that "there is evidence in the record and in the public domain that reflects the Federal Defendants' safety concerns are being addressed" through cooperation with local and state authorities).

c. The government states that, since September 2025, protestors have blocked access to the DHS facility in Broadview, Illinois, have slashed tires of government vehicles, and have threatened federal employees. Application at 8. However, while there have been demonstrations in Broadview, any assertion that protesters have shut down access to the facility is incorrect. Throughout Operation Midway Blitz, the facility has remained operational and accessible to agents and their vehicles. See, e.g., *Chicago Headline Club*, No. 1:25-cv-12173, Docs. 22-6 (Decl. of William

Paulson) ¶6 (describing vehicles accessing the Broadview facility); 22-12 (Decl. of Autumn Reidy-Hamer) ¶22 (same); 22-15 (Decl. of Scott Sakiyama) ¶22 (“No protesters stood at Beach Street and Harvard Street and any ICE vehicle could have easily moved in and out of that entrance”); 22-21 (Decl. of Paul Goyette) ¶13 (protesters near gate voluntarily moved out of the way of vehicles exiting the ICE facility). When individuals have committed acts of civil disobedience and attempted to block the path of ICE vehicles, the Illinois State Police have responded to maintain a clear roadway, *Chicago Headline Club*, No. 1:25-cv-12173, Doc. 22-16 (Decl. of Charles Thrush) ¶32, and regular law enforcement tools are more than sufficient to deal with such occurrences, *Chicago Headline Club*, No. 1:25-cv-12173, Doc. 22-32 ¶¶84, 86 (Expert Decl. of Gil Kerlikowske, Former Commissioner of CBP).

d. The government contends that “rioters” have used physical force, including fireworks, bottles, rocks, and tear gas, against federal employees at Broadview. Application at 8. But the record in *Chicago Headline Club* demonstrates that the Broadview protests have been non-violent and prayerful, that the use of physical force by bad actors has been minimal and isolated, and that violence is being perpetrated there principally by federal officials. *Chicago Headline Club*, No. 1:25-cv-12173, Docs. 22-16 (Decl. of Charles Thrush) ¶¶ 7, 9; 22-17 (Decl. of Raven Geary) ¶ 8; 22-19 (Decl. of Colin Boyle) ¶¶ 5, 8; 22-6 (Decl. of William Paulson) ¶ 11; 22-12 (Decl. of

Autumn Reidy-Hamer) ¶ 5; 22-5 (Decl. of Alderman Byron Sigcho-Lopez) ¶ 6. Local officials from the Village of Broadview itself have found that federal agents, and not civilians demonstrating, are the parties who have provoked unrest. See Village of Broadview Executive Order No. 2025-01 (Oct. 6, 2025) available at: <https://broadview-il.gov/media/33thwv3u/vob-executive-order-no2025-01.pdf> (Mayor of Broadview concluding that violence by federal officials warranted placing time limits on protests).

e. The government states that, on October 4, 2025, CBP vehicles were ambushed in Chicago on a public road, resulting in a shooting and a riot. Application at 9. While the full factual record regarding the shooting of a woman by federal officers has yet to emerge, multiple accounts suggest that federal officers initiated the chain of events that led to the shooting.² In addition, what the government calls a “riot” was instead a largely peaceful gathering of civilians concerned about a high-speed chase, a shooting, and the presence of military equipment in their normally quiet Brighton Park neighborhood, *Chicago Headline Club*, No. 1:25-cv-12173, Docs. 22-39 (Supp. Decl. of Paul Goyette); 22-41 (Decl. of Enrique Espinoza). The Chicago Police Department quickly responded and controlled the crowd,

² See Tia Ewing, Conflicting accounts emerge in ICE shooting that injured Chicago woman, FOX32 Chicago (Oct. 8, 2025, 4:52 PM), available at: <https://www.fox32chicago.com/news/conflicting-accounts-ice-shooting-injured-chicago-woman> (last accessed Oct. 20, 2025); Jake Sheridan, Federal agents shoot Chicago woman they accuse of ‘boxing in’ vehicle in Brighton Park, Chicago Tribune. (Updated Oct. 4, 2025, 8:22 PM), <https://www.chicagotribune.com/2025/10/04/ice-shooting-chicago-guard/> (last accessed Oct. 20, 2025) (citing account stating federal officers collided with civilian cars).

setting a perimeter between civilians and federal agents, *Chicago Headline Club*, No. 1:25-cv-12173, Doc. 22-41 ¶6. Despite all this, federal agents released numerous canisters of tear gas and flashbangs on the peaceful crowd. *Chicago Headline Club*, No. 1:25-cv-12173, Docs. 22-39 ¶¶15, 18; 22-41 ¶¶7, 8. Chicago police officers were stifled from doing their jobs because of the tear gas. *Chicago Headline Club*, No. 1:25-cv-12173, Docs. 22-39 ¶ 15; 22-41 ¶8.

A final factual point is worth mentioning. As it does in *Chicago Headline Club*, the government relies heavily in its application on a declaration submitted by Russell Hott, who was until recently assigned as the ICE Field Director in Chicago. E.g., Application at 6-11 27-28 (citing D. Ct. Doc. 62-2). No party in any case has been able to cross-examine Hott's declarations. Contrary to the government's contentions based on Hott's declaration, Hott wrote to Illinois State Police officials on October 8, 2025, praising local law enforcement's ability to manage security and demonstrators at the Broadview facility. D. Ct. Doc. 63-2 at 3, 10-11. Moreover, when Judge Ellis entered an order on October 16, 2025, commanding Hott to appear to testify on October 20 in *Chicago Headline Club* regarding Operation Midway Blitz, No. 1:25-cv-12173, Doc. 51, the government responded the next day, saying that Hott's final day as the ICE Field Director in Chicago was October 17, 2025, and

asserting that he lacked the knowledge necessary to provide testimony about DHS incidents occurring in Chicago, No. 1:25-cv-12173, Doc. 55.

The changing and disputed nature of the government's evidence in these cases is precisely the reason that this Court defers to district courts' factual findings, including credibility determinations. The government contends that the district court's "disregard for the sworn declarations of federal officials [is] indefensible," Application at 19, but the district court had good reason to question those declarations, at this stage, based on the evidence currently in the record. This Court should defer to that judgment.

CONCLUSION

For the foregoing reasons, the government's application for a stay should be denied.

October 21, 2025

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHICAGO HEADLINE CLUB, BLOCK	)	Case No. 25 C 12173
CLUB CHICAGO, CHICAGO NEWSPAPER	)	
GUILD LOCAL 34071, NABET-CWA	)	
LOCAL 54041, ILLINOIS PRESS	)	
ASSOCIATION, RAVEN GEARY,	)	
CHARLES THRUSH, STEPHEN HELD,	)	
DAVID BLACK, WILLIAM PAULSON,	)	
AUTUMN REIDY-HAMER, and LEIGH	)	
KUNKEL,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
KRISTI NOEM, Secretary, U.S.	)	
Department of Homeland Security	)	
(DHS); TODD LYONS, Acting	)	
Director, U.S. Immigration and	)	
Customs Enforcement (ICE);	)	
MARCOS CHARLES, Acting Executive	)	
Associate Director, Enforcement	)	
and Removal Operations, ICE;	)	
RUSSELL HOTT, Chicago Field	)	
Office Director, ICE; RODNEY S.	)	
SCOTT, Commissioner, U.S.	)	
Customs and Border Protection	)	
(CBP); GREGORY BOVINO, Chief	)	
Border Patrol Agent, CBP; DANIEL	)	
DRISCOLL, Director of the Bureau	)	
of Alcohol, Tobacco, Firearms	)	
and Explosives (ATF); WILLIAM K.	)	
MARSHALL III, Director of the	)	
Federal Bureau of Prisons (BOP);	)	
PAMELA BONDI, Attorney General	)	
of the United States; U.S.	)	
DEPARTMENT OF HOMELAND SECURITY;	)	
U.S. DEPARTMENT OF JUSTICE;	)	
UNIDENTIFIED FEDERAL OFFICER	)	
DEFENDANTS; UNIDENTIFIED FEDERAL	)	
AGENCY DEFENDANTS; and DONALD J.	)	
TRUMP, President of the	)	
United States,	)	Chicago, Illinois
	)	October 8, 2025
Defendants.	)	2:40 p.m.

TRANSCRIPT OF PROCEEDINGS -
EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER
BEFORE THE HONORABLE SARA L. ELLIS

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PROCEEDINGS REPORTED BY STENOTYPE
TRANSCRIPT PRODUCED USING COMPUTER-AIDED TRANSCRIPTION

1 (Proceedings heard in open court:)

2 THE COURT: All right.

3 Ms. Johnson.

4 THE CLERK: Case 25 CV 12173, Chicago Headline Club,
5 et al. v. Noem, et al.

6 MR. LOEVY: Good afternoon, Your Honor. Jon Loevy for
7 the plaintiffs.

8 MS. WANG: Elizabeth Wang for the plaintiffs.

9 MR. ART: And Steve Art for the plaintiffs. Good
10 afternoon, Your Honor.

11 THE COURT: All right. Good afternoon.

12 And --

13 MR. SKEDZIEWLEWSKI: Sean Skedziewlewski for
14 defendants, Your Honor. Good afternoon.

15 THE COURT: All right. Good afternoon,
16 Mr. Skedziewlewski.

17 Nope, say it again for me, because I'm going to get it
18 right today.

19 MR. SKEDZIEWLEWSKI: Skedziewlewski.

20 THE COURT: Skedziewlewski. Okay. Thank you.

21 Okay. All right. So, first, I want to thank
22 everybody for giving me the two kind of redlined versions of a
23 proposed TR0.

24 Here we go. Okay.

25 Is there anything anybody wants to add or have me

1 consider or bring up? I've read the government's response. So
2 thank you for getting that to me, Mr. Skedziewlewski. And I
3 know it was a quick turnaround, so I appreciate that.

4 So I've read that. I've read the competing redlined
5 orders.

6 Anything anybody wants to add at this point?

7 Mr. Loevy?

8 MR. LOEVY: Your Honor, it's our understanding that
9 there are loose ends that were left over from Monday that we're
10 trying to narrow things and, you know, resolve. So we will
11 stand on -- on where it all is.

12 THE COURT: All right.

13 And Mr. Skedziewlewski?

14 MR. SKEDZIEWLEWSKI: I'll just highlight one point
15 that we made in the brief, Your Honor, that I think if we were
16 to come to agreement on early would make our discussion of the
17 rest of the proposals perhaps a lot simpler and easier to come
18 to agreement on, and that's the scope of the relief.

19 We propose in the -- in our brief that the relief
20 should be limited to the Broadview facility. And we make a
21 suggestion in our proposed redline TR0 as to how we might do
22 that, but I think we're flexible on exactly what that would
23 look like.

24 But if that's in place, then a lot of our concerns
25 about how the TR0 would impact, you know, operations in the

1 field that aren't, at least from defendants' point of view,
2 related to plaintiffs' claims, since those wouldn't be
3 impacted, we would have a lot fewer concerns and it could
4 potentially streamline the rest of today's hearing.

5 THE COURT: So I saw that. And given the record
6 before me, however, these issues are not limited to Broadview.
7 And if I were -- if I felt secure that this was only happening
8 at the Broadview facility and was not happening out in the
9 field, I would be happy to limit it to Broadview, but I don't
10 believe that that is the case. And so I'm not going to limit
11 the TRO simply to Broadview.

12 MR. SKEDZIEWLEWSKI: Understood, Your Honor.

13 THE COURT: Okay. I -- I know --

14 MR. SKEDZIEWLEWSKI: In that case, I'm happy to move
15 on. Yep.

16 THE COURT: Okay. And I -- I understand that you are
17 disappointed, but that's where I come out on that.

18 So other than what's been filed and what we discussed
19 on Monday, though, you've got nothing more to add and you're
20 okay with me kind of getting to the nitty-gritty of my ruling?

21 MR. SKEDZIEWLEWSKI: Your Honor, defendants look
22 forward to being able to submit a sort of substantive merits
23 argument in the future with rebuttal evidence, but at this time
24 we -- yes, we stand on our arguments in this Court on Monday --
25 on Monday. And without waiving our objections to an

1 entrance -- any potential entrance of a temporary restraining
2 order, we're amenable to -- to proceeding, sort of discussing
3 the -- the workability and breadth of an order that the Court
4 might decide to enter.

5 THE COURT: Okay. Great.

6 All right. So, first, I'm -- so in order to obtain a
7 TRO, plaintiffs need to satisfy three threshold requirements:
8 First, that there's some likelihood of success on the merits;
9 second, that there's an inadequate remedy at law; and third,
10 that irreparable harm will result if the relief is not granted.

11 If the plaintiff satisfies these three factors, then I
12 conduct a balancing test: weighing the harm the denial of the
13 preliminary injunction would cause the plaintiff against the
14 harm to the defendant if I were to grant it. And here it's a
15 temporary restraining order rather than a preliminary
16 injunction, but the standards are the same.

17 The balancing process involves a sliding scale
18 approach. The more likely the plaintiff is to win on the
19 merits, the less the balance of harms needs to weigh in its
20 favor and vice versa. I'm also to consider the public
21 interest, which includes taking into account any effects on
22 nonparties.

23 So the first issue before the Court is standing. I
24 need to address plaintiffs' standing, which the defendants have
25 challenged. To establish standing to seek injunctive relief,

1 the plaintiffs must allege an actual or imminent threat of
2 suffering a concrete and particular -- particularized injury in
3 fact, which plaintiffs can fairly trace to the defendants'
4 conduct and that a favorable judicial decision will likely
5 prevent or redress.

6 In order to have standing, plaintiffs must face a real
7 and immediate threat of future injury.

8 And while the defendants argue that the plaintiffs
9 have not established that their injuries are likely to recur, I
10 disagree. The risk of future injury is not speculative given
11 the ongoing and sustained pattern of conduct that plaintiffs
12 have documented over the last month that show no signs of
13 stopping.

14 Plaintiffs indicate that they intend to continue their
15 reporting, ministering, and protesting. Because defendants
16 have acted indiscriminately in the past, the risk of
17 reoccurrence is not speculative, and I find that plaintiffs
18 have standing to pursue their claims.

19 For their First Amendment claims, plaintiffs also have
20 standing based on the chilling effect of defendants' conduct,
21 given that some of the plaintiffs have expressed the defendants
22 'actions have caused them to limit their activities.

23 The organizations have standing to sue on behalf of
24 their members and for their own injuries. An organization has
25 standing to sue on behalf of its members when its members would

1 otherwise have standing to sue in their own right, the interest
2 it seeks to protect are germane to the organization's purpose,
3 and neither the claim asserted nor the relief requested
4 requires the participation of individual members in the
5 lawsuit.

6 Organizations demonstrate an injury in fact if they
7 show that defendants' conduct impaired, which means to directly
8 affect and interfere with, their ability to conduct their
9 business or services.

10 I find that plaintiffs have met these requirements in
11 this case for both associational and organizational standing.
12 Plaintiffs' news organizations indicate that defendants'
13 activities have frustrated their efforts to defend journalist
14 safety and working conditions.

15 So having found that the plaintiffs have standing,
16 then I go through the various factors.

17 So the first is likelihood of success. To meet this
18 requirement, a plaintiff must demonstrate that its claim has
19 some likelihood of success on the merits. What amounts to some
20 depends on the facts of the case at hand because of the
21 Seventh Circuit's sliding scale approach. But it at least
22 requires a strong showing that normally includes a
23 demonstration of how the applicant proposes to prove the key
24 elements of its case. A mere possibility of success does not
25 meet this standard.

1 So turning to the First Amendment retaliation claim.
2 To prevail, plaintiffs must ultimately show that they engaged
3 in activity protected by the First Amendment, that they
4 suffered a deprivation that would likely deter First Amendment
5 activity in the future, and the First Amendment activity was at
6 least a motivating factor in defendants' decision to take the
7 retaliatory action.

8 Here, the allegations in the complaint establish that
9 this claim has some likelihood of success. Plaintiffs allege
10 that the defendants retaliated against them while they were
11 engaged in news gathering and/or protesting, which are both
12 activities protected by the First Amendment. This retaliation
13 allegedly involved being shot with impact or chemical
14 munitions, gassed, pepper sprayed, hit with near lethal
15 grenades and/or otherwise threatened with arrest.

16 All of this conduct would likely deter First Amendment
17 activity in the future.

18 I also find that plaintiffs' allegations are likely
19 sufficient to infer that their First Amendment activities were
20 the motivating factors in defendants' conduct. Proof of motive
21 can be established through either direct or circumstantial
22 evidence, including suspicious timing, ambiguous, oral, or
23 written statements, or behavior towards or comments directed at
24 other people in the protected group.

25 Turning to the RFRA claim. RFRA prohibits the federal

1 government from imposing substantial burdens on religious
2 exercise, absent a compelling interest pursued through the
3 least restrictive means.

4 Under the burden shifting framework of RFRA, once a
5 claimant makes a *prima facie* case that the application of a law
6 or regulation substantially burdens his religious practice, the
7 burden shifts to the government to justify the burden under
8 strict scrutiny.

9 A plaintiff can prove a government policy or act
10 substantially burdens their religious practice if the
11 government policy or act compelled them to perform acts
12 undeniably at odds with fundamental tenets of their religious
13 beliefs; two, put substantial pressure on them to modify their
14 behavior and to violate their beliefs; or three, bears direct,
15 primary, and fundamental responsibility for rendering a
16 religious exercise effectively impracticable.

17 In assessing whether a burden is substantial, we focus
18 primarily on the intensity of the coercion applied by the
19 government and not the centrality of the religious practice in
20 question.

21 Here, Reverend Black and the putative religious
22 exercise class argue that they're likely to succeed on their
23 claim because defendants' use of violent force against people
24 peacefully praying, including clergy members and lay
25 practitioners alike, substantially burdens their exercise of

1 religion.

2 And what is relevant here is the second factor, which
3 is to put a substantial pressure on them to modify their
4 behavior and violate their beliefs.

5 Plaintiffs argue that defendants' use of force puts
6 substantial pressure on Reverend Black and other similarly
7 situated people to modify their behavior and violate their
8 beliefs under highly coercive threats of violence. They allege
9 that defendants have engaged in the policy, pattern, and
10 practice of targeting people visibly engaged in prayer and
11 other religious exercise with PepperBalls, tear gas, and other
12 physical violence without provocation.

13 They argue that this forces Reverend Black and others
14 to choose between their health and safety on the one hand and
15 authentically practicing their faith on the other.

16 Plaintiffs submitted declarations from Father Curran
17 who states that he's restricted who he invites to join prayer
18 vigils at Broadview and has stopped using the vigils as an
19 opportunity to provide religious education to Catholic students
20 because of the high risk of violence.

21 This alleged coercion is enough to show a likelihood
22 of success on the merits of plaintiffs' RFRA claim.

23 I also find that defendants' policy, pattern, and
24 practice of using force against people praying or otherwise
25 practicing their religion cannot survive strict scrutiny

1 because I have not identified a compelling government interest
2 using the least restrictive means.

3 Turning to the Fourth Amendment claim. Plaintiffs
4 contend that defendants' actions are unreasonable and
5 constitute excessive force in violation of the Fourth
6 Amendment. Excessive force is a form of unreasonable seizure
7 in violation of the Fourth Amendment.

8 We normally evaluate these claims based on whether the
9 officers' actions were objectively reasonable under the
10 circumstances. And courts should give considerable leeway to
11 law enforcement officers' assessments about the appropriate use
12 of force in dangerous situations. But that latitude ends,
13 however, when police officers or law enforcement officers
14 employ force that is clearly excessive or unreasonable under
15 the circumstances.

16 Reasonableness must be judged from the perspective of
17 a reasonable officer on the scene and not in hindsight.

18 Here, plaintiffs have presented declarations and
19 evidence that defendants have assaulted and deployed tear gas,
20 PepperBalls, rubber bullets, flash-bang grenades, and other
21 munitions against peaceful protesters who were engaged in the
22 lawful expression of their First Amendment rights. The seizure
23 occurs under the Fourth Amendment when an officer, by means of
24 physical force or show of authority, has in some way restrained
25 the liberty of a citizen.

1 And there are courts that have found that the use of
2 pepper spray and similar projectiles amount to a seizure for
3 Fourth Amendment purposes.

4 And I find here that the plaintiffs have demonstrated
5 a likelihood of success on the merits here because they have
6 presented evidence that the protesters and members of the
7 putative class have been protesting peacefully and the
8 expression of force in relation to those protests is
9 unreasonable and excessive from the defendants here, that the
10 use of pepper spray could be considered excessive force if it's
11 used without justification, that assaulting citizens who are
12 safely detained without any provocation violates clearly
13 established constitutional principles.

14 All right. So then the next factor is irreparable
15 harm or inadequate remedy at law. If I find that the
16 plaintiffs have shown a likelihood of success on the merits,
17 then I would consider whether the plaintiffs have demonstrated
18 irreparable harm and that they have inadequate -- an inadequate
19 remedy at law.

20 In First Amendment cases, the likelihood of success on
21 the merits will often be the determinative factor.

22 The loss of First Amendment freedoms, even for a
23 minimal period of time, unquestionably constitutes irreparable
24 injury. Thus, under Seventh Circuit case law, irreparable harm
25 is presumed in First Amendment cases. Moreover, quantifying a

1 First Amendment injury is difficult, and damages are therefore
2 not an adequate remedy.

3 Turning to RFRA. Although that claim is statutory,
4 RFRA protects First Amendment free exercise rights. So courts
5 supply the First Amendment irreparable harm analysis to those
6 claims as well. Because I found that defendants' conduct
7 likely violates the First Amendment, plaintiffs have
8 established that they will suffer irreparable harm if the Court
9 denies their motion for a TR0.

10 Turning to the Fourth Amendment, it is a closer
11 question on irreparable harm. A Fourth Amendment violation
12 stemming from an illegal search or seizure does not
13 presumptively cause irreparable harm because it's a
14 constitutional tort analogous to a personal injury claim where
15 money damages will be awarded.

16 However, plaintiffs here have shown irreparable harm
17 because of the ongoing denial of Fourth Amendment rights, which
18 is an irreparable harm in and of itself. And the
19 Seventh Circuit noted that in *Campbell v. Miller*, 373 F.3d 834
20 at 835, noting that the right party to sue for injunctive
21 relief for Fourth Amendment violations is someone who the same
22 events are likely to happen to again.

23 The Seventh Circuit noted that as well in *Preston v.*
24 *Thompson*, 589 F.2d 300 at 303, Footnote 3. The existence of a
25 continuing constitutional violation constitutes proof of an

1 irreparable harm, and its remedy certainly would serve the
2 public interest.

3 All right. The next factor is balance of harms -- or
4 the next two factors I consider together would be the balance
5 of harms and public interest.

6 If the plaintiffs meet all the threshold requirements,
7 the Court then weighs the harm the denial of the TRO would
8 cause the plaintiffs against the harm to the defendants if I
9 were to grant it. This balancing process involves a sliding
10 scale approach. The more likely the plaintiff is to win on the
11 merits, the less the balance of harms needs to weigh in the
12 plaintiffs' favor and vice versa.

13 When the government is a party, the balance of
14 equities and the public interest factors merge. And the public
15 has a strong interest in having a government that conducts
16 itself fairly and according to its stated regulations and
17 policies, as well as the Constitution and laws.

18 So looking at the First Amendment and RFRA claims,
19 once -- once the moving party establishes a likelihood of
20 success on the merits, the balance of harms normally favors
21 granting injunctive -- preliminary injunctive relief because
22 injunctions protecting First Amendment freedoms are always in
23 the public interest. And just as with irreparable harm, the
24 same analysis applies to the plaintiffs' RFRA claim.

25 Because I find defendants' conduct likely violates the

1 First Amendment, the balances of equities weighs in favor of
2 granting the TR0.

3 Turning to the Fourth Amendment, it is difficult to
4 conceive of how an injunction requiring a party to comply with
5 the Constitution could be harmful. The balances of equities
6 favor plaintiffs because without a TR0, they will be subject to
7 defendants' ongoing violation of their Fourth Amendment right
8 to be free from excessive force, and the public interest is
9 served when courts uphold constitutional rights.

10 All right. So now we will turn to the scope of
11 relief. So the first issue that the defendants raised is that
12 an injunction -- any injunction that I issue would violate the
13 Supreme Court's prohibition on universal injunctions. But I
14 find that any injunction that I enter would not violate that
15 prohibition on universal injunctions because the effects on
16 nonparties are incidental to the need to provide complete
17 relief to the named plaintiffs.

18 And if I were to limit a TR0 solely to the named
19 plaintiffs, it would be utterly unworkable. And while I
20 haven't yet considered a class certification motion, plaintiffs
21 do seek to proceed on behalf of a putative class of peaceful
22 and nonviolent individuals who are present at demonstrations to
23 participate, observe, record, report, or pray.

24 And while I might have some concerns about the
25 ascertainability of the class, I do note that to the extent

1 that plaintiffs can conditionally show that class certification
2 pursuant to Rule 23(b)(2) is appropriate, the concern about
3 universal injunctions is also addressed then by proceeding as a
4 class.

5 And I would ask that at the preliminary injunction
6 hearing that we deal with the class certification issue.

7 I am limiting the TRO to this district. And at this
8 stage, it's time-limited given that it's only a TRO and we will
9 be having a preliminary injunction hearing.

10 And I'm not limiting the TRO to Broadview because I do
11 find that plaintiffs have provided sufficient evidence to
12 demonstrate that this is occurring throughout the district and
13 it is not limited to the Broadview facility.

14 I do note that the defendants have a concern that the
15 TRO merely tells the defendants to obey the law. The
16 Seventh Circuit, however, does not have a per se ban on "obey
17 the law" injunctions, unlike other circuits. And while "obey
18 the law" injunctions raise overbreadth and vagueness concerns,
19 I don't find the provisions in the TRO here are overbroad or
20 vague. Instead, they comply with Rule 65(d)'s requirements
21 that the injunction specifically state and describe in
22 reasonable detail the acts that are restrained or required.

23 As to the scope of relief, finally, I do raise the
24 question of whether the TRO can be directed at President Trump.
25 Injunctive relief typically is not available against the

1 President, although courts do have a limited ability to enjoin
2 the President to carry out ministerial, nondiscretionary
3 duties. Because I find that plaintiffs can obtain relief to
4 remedy the harms they face without enjoining the President
5 directly, I find it unnecessary to resolve that question, and I
6 except President Trump from the scope of the injunction at this
7 time.

8 Then the last issue is security. Rule 65(c) provides
9 that the Court may issue a preliminary injunction or a
10 temporary restraining order only if the movant gives security
11 in an amount that the Court considers proper to pay the costs
12 and damages sustained by any party found to have been
13 wrongfully enjoined or restrained. The Seventh Circuit case
14 law identifies two scenarios where I may forgo requiring a
15 bond.

16 First, I may not require a bond if the enjoined party
17 does not demonstrate it will incur any damages from the
18 injunction. Second, I may forgo a bond when a bond that would
19 give the opposing party absolute security against incurring any
20 loss from the injunction would exceed the applicant's ability
21 to pay, and the district court balances often implicitly the
22 relative cost to the opponent of a smaller bond against the
23 cost to the applicant of having to do without a preliminary
24 injunction or a temporary restraining order that he may need
25 desperately.

1 Both scenarios support waiving the bond requirement
2 here.

3 First, the government has not offered any expected
4 damages that would result from an erroneous TR0. The training
5 costs that the government brought up previously I find are not
6 going to be significant here. The TR0 that will be entered
7 essentially directs agents and officers to follow the training
8 that they've already received on use of force, that they've
9 already received on crowd control, and is essentially directing
10 them to follow their own rules, policies, regulations, the laws
11 that apply to them, and the behavior that the Constitution
12 demands.

13 So I don't find that requiring plaintiffs to post a
14 bond, I -- I can't even put a number on what it would be to
15 cover these alleged training costs.

16 More importantly, when a court implicitly balances a
17 potential cost of injunctive relief against the harm to speech
18 if an injunction is denied, free speech prevails. That is the
19 case here. So I will decline and am declining to require
20 plaintiffs to post a bond.

21 And then the last issue before we get to the language
22 of the TR0 is the stay. So defendants have asked me to stay my
23 order pending appeal.

24 When deciding whether to issue a stay pending appeal,
25 courts consider whether the stay applicant has made a strong

1 showing that they are likely to succeed on the merits, whether
2 the applicant will be irreparably injured absent a stay,
3 whether issuance of a stay will substantially injure the other
4 parties interested in the proceeding, and where the public
5 interest lies. The party requesting the stay bears the burden
6 of showing that the circumstances justify an exercise of that
7 discretion.

8 Here, in requesting a stay, defendants did not address
9 any of these factors in their request for a stay or explain why
10 a stay would be warranted. Because defendants have the burden
11 of demonstrating these factors and have not done so and I find
12 that the public interest lies in issuing the TR0 and preventing
13 continuing constitutional violations and I do not find that the
14 defendants have made a strong showing that they are likely to
15 succeed on the merits, I don't find that they will be
16 irreparably injured absent a stay, and I do find that issuing a
17 stay will substantially injure the plaintiffs who are
18 interested in this proceeding. I am not going to stay my
19 decision pending appeal.

20 So having ruled, now comes the painful part.

21 All right. So does everybody have the competing
22 proposed orders?

23 MR. ART: Yes, Judge.

24 MR. SKEDZIEWLEWSKI: Yes, Your Honor.

25 THE COURT: Okay. All right. Let me just organize

1 myself here for a second.

2 All right. So I'm looking at both versions. So what
3 I'm looking at, so that everybody is on the same page, I am
4 looking at the redline of plaintiffs' initial proposed order to
5 the updated proposed order on plaintiffs' side. And then on
6 defendants' side, I'm looking at defendants' proposed order
7 that is redlined to the plaintiffs' I think original proposed
8 order.

9 All right. And it's going to be a little messy, but
10 we will do our best.

11 Okay. So I am looking at paragraph 1. So the first
12 full paragraph, defendants requested that I add the language
13 "when deployed in and around or operating within 500 feet of
14 the Broadview ICE facility." I'm not including that, because
15 I'm not limiting the TRO to that.

16 All right. Then A. And I noticed that plaintiffs put
17 in headings throughout the TRO. I actually like the headings.

18 Mr. Skedziewlewski, do you have any objections to
19 those headings? There's just two of them. It's A and B, which
20 is the -- basically journalists and then others.

21 Do you have any objection to that?

22 MR. SKEDZIEWLEWSKI: No -- no objection to the
23 headings, Your Honor.

24 THE COURT: Okay. All right.

25 Then turning to 1.a., so the government suggested that

1 we strike out "or reasonably should know is a journalist." I'm
2 not going to take that out. That covers the later section
3 where we discuss the indicia that officers would consider, and
4 so it should -- "reasonably should know" needs to be included
5 there to cover that.

6 I've had some time to think, and I know we had a
7 discussion about the last phrase at the first sentence, which
8 is unrelated to failing to obey a dispersal order. And in
9 thinking it through, I think it is more appropriate to remove
10 that phrase, that I think this section reads better if that
11 phrase is removed and makes more sense.

12 Journalists still, while they are protected and have
13 protected rights, they still, I think, under the Constitution
14 could be ordered to disperse and leave a particular area, which
15 doesn't mean that they couldn't continue to report from a
16 different area, but I do think that they could be told
17 everybody needs to leave this one particular area and you can
18 report from over here.

19 So to not make things more complicated or more
20 difficult, I am going to remove that last phrase.

21 So it'll read: "Unless defendants have probable cause
22 to believe that the individual has committed a crime."

23 The defendants wanted to change "ask" to "order." I
24 don't know that that really makes a difference one way or the
25 other. They --

1 MR. LOEVY: Not from the plaintiff.

2 THE COURT: Okay. And they issue orders. They
3 generally don't make requests. So we'll change that to
4 "order."

5 Then we've got the switch from "press" to
6 "journalist." So we'll keep it "journalist has time to
7 comply."

8 So, again, I think, Mr. Skedziewlewski, if I start
9 inserting things like "a reasonably adequate time" or "a
10 reasonable opportunity," that we're getting a bit more
11 complicated than we need to be; that we want to give the
12 journalist time to comply and an opportunity to report and
13 observe.

14 I'm happy to hear if anybody has anything they want to
15 add on that, unless the plaintiffs want to add that language,
16 the reasonably language.

17 MR. LOEVY: Your Honor, I think we're fine with the
18 language as -- as you've proposed it.

19 THE COURT: All right. Mr. Skedziewlewski, do you
20 want to add anything like that?

21 MR. SKEDZIEWLEWSKI: Would "objectively reasonable"
22 make it more appealing?

23 THE COURT: All right. Yes. Because I don't -- I
24 just want to keep it out of -- what I don't want is fights
25 later on where an officer or an agent says, you know, I said

1 this and the person didn't move. And now we're fighting over,
2 you know, is two minutes enough time? Is 30 seconds enough
3 time?

4 Is there an objection to qualifying this to
5 "objectively reasonable"?

6 MR. LOEVY: Plaintiffs could live with that too,
7 Your Honor.

8 THE COURT: Okay. All right.

9 So then it will read: "Defendants may order a
10 journalist to change location to avoid disrupting law
11 enforcement, as long as the journalist has objectively
12 reasonable time to comply and an objectively reasonable
13 opportunity to report and observe."

14 Okay. And then the government suggests adding a
15 sentence -- or sentence, phrase, I suppose: "Nonetheless, if
16 the journalist fails to promptly change location, federal
17 agents may use reasonable force, including less-lethal devices
18 to clear the area or effectuate an arrest."

19 That's redundant, I think, and so I'm not going to
20 include that.

21 All right. Turning to B. So B did not turn out the
22 way I had asked on either side. So I'd like it to read
23 something along these lines: "Dispersal of others. Issuing a
24 dispersal order requiring any person to leave a public place
25 that they lawfully have a right to be, unless dispersal is

1 justified by exigent circumstances as defined by the Department
2 of Homeland Security use of force policy, updated February 6,
3 2023." And I guess it would be Section III.F and XII.E.

4 So I didn't -- I'm rejecting the "ranking officer
5 determination." I think that's too complicated. And I'm
6 rejecting the "reasonable under the totality of the
7 circumstances." I think that's way too vague and does not fall
8 under the specific requirements that I need to place in here
9 pursuant to Rule 65.

10 Okay. Moving along. Paragraphs C and D. So people
11 have -- some of these are overlapping and then some of them are
12 quite -- are different, right, in terms of what these --
13 what -- what's listed here. And I have to be honest with you,
14 I don't even know what some of these are.

15 Okay. So C, at least, will read: "Using riot control
16 weapons, including" -- so you both have "kinetic impact
17 projectiles." So that can stay in. Then you've got
18 "compressed air launchers."

19 What's the difference between LS and FN 303 versus
20 "for kinetic impactor marking"?

21 MS. WANG: Judge -- Judge, so that's -- there's a typo
22 there. It should say PLS.

23 So these words, these terms, are from the Department's
24 own policies describing less-lethal weapons. And so we had
25 originally listed -- you know, called them different things,

1 more -- more layperson terms like flash-bang and stinger and
2 things like that. But -- and especially after we saw the
3 defendants' version, which also used the words, it -- it's okay
4 with us to use the words that they describe their own weapons.
5 And so that's why these specific words are in here.

6 And just to -- to say in response to one of your
7 earlier comments, the reason why there's different paragraphs
8 addressing different things for different weapons is because
9 some weapons are not meant at all to be --

10 THE COURT: Right.

11 MS. WANG: -- shot at a person. And so that's why
12 there's some things in some sections and some things in other
13 sections.

14 THE COURT: Right. But I guess my -- it seems like
15 there's some things that were stricken in yours that were not
16 stricken in the government's. So it doesn't seem like we're
17 looking at the same universe of things in paragraph C, for
18 example, right?

19 So, Mr. Skedziewlewski, do you -- so I'm looking at
20 compressed air launchers. Would the department prefer the
21 example of -- for kinetic impactor marking versus, for example,
22 PLS and FN 303?

23 MR. SKEDZIEWLEWSKI: Your Honor, the reason for the
24 parenthetical in defendants' version is to try to capture a
25 concept that's in the CBP policy, which is that some of these

1 same weapons systems are appropriate for use on subjects based
2 on different types of resistance. And they can be used in
3 different ways based on the type of resistance that the officer
4 is met with.

5 So the two big categories are active resistance, which
6 tolerates -- or which enables some of these systems or devices
7 to be used in one way, and then assaultive resistance allows
8 them to be used in a different way. And so that was what we
9 were trying to capture here by having that parenthetical.

10 We don't have an objection to listing examples of
11 specific types of compressed air launchers, but we would ask
12 that there's also the specification that, for example,
13 compressed air launchers can be used for kinetic impactor
14 marking. And, you know, we go on to say: "On individuals
15 demonstrating assaultive resistance." At -- at -- at least
16 that's what we have in paragraph C.

17 And so that -- that's all just pulled right from the
18 CBP --

19 THE COURT: Yeah.

20 MR. SKEDZIEWLEWSKI: -- policy.

21 THE COURT: Yeah. And I'm looking at the CBP policy
22 now and that it defines active resistance as a type of
23 resistance where physical attributes are being used to resist
24 an officer/agent's control efforts. The efforts are not
25 directed toward the officer/agent, but rather appear intended

1 to thwart an officer/agent's control efforts.

2 And then assaultive resistance, there are two.

3 There's physical injury and then serious bodily injury or
4 death.

5 All right. So what is the plaintiffs' position on
6 making the point clear so it's very specific that -- I guess
7 the question -- well, in thinking it -- you know, I'm kind of
8 thinking this through as we're going through this.

9 There are two ways of kind of structuring C in that --
10 this whole TR0 really is meant to tell agents what they cannot
11 do for -- towards peaceful protesters or journalists. And if
12 that's the case, then it in some ways presumes, right, we're
13 presuming that people are peaceful. Therefore, they are not
14 providing either active resistance or either type of assaultive
15 resistance.

16 So the TR0 is not intended to tell the officers or
17 agents that they cannot follow -- it's way too many
18 negatives -- but that they aren't to follow their own internal
19 agency policies regarding the use of force and what they can
20 do, right?

21 So if someone is resisting, if they are an active
22 resister, they are still allowed to do what they are permitted
23 to do under the policy and obviously under the circumstances.
24 But this TR0 is not meant to tell them they can't do that,
25 right? It's only meant to say, if someone is peaceful, you are

1 not to use these tactics with respect to them.

2 So, I guess, you know, I'm a little concerned about
3 telling the agents what they can do when people resist,
4 depending on the level of resistance, when that's not the class
5 of people that we're talking about.

6 Does that make sense?

7 MS. WANG: Yes, Judge. Yes. It does -- it doesn't
8 make sense to import these concepts about assaultive resistance
9 and active resistance, which are designed for a different
10 purpose, into this TRO. And that's exactly right, it -- it --
11 the TRO presumes that we're dealing with members of the press
12 and religious, you know, exercisers and protesters who are
13 peaceful. And so doing this the way they've suggested overly
14 complicates it and doesn't really make sense.

15 Furthermore, our language in 1.c. is modeled from the
16 injunction entered by Judge Vera in the *L.A. Press Club* case.

17 THE COURT: Mr. Skedziewlewski, what's your -- do
18 you -- do you see where I'm going with that? I -- I'm -- I'm
19 worried about saying -- importing the idea of active or
20 assaultive resisters when the TRO is not meant to cover them.

21 MR. SKEDZIEWLEWSKI: Yes, Your Honor, I see where the
22 Court is going.

23 Our concern -- and maybe this could be addressed in
24 the sort of catchall paragraph that is -- the Court suggested
25 adding in 1.k. We just want to make sure that when -- whatever

1 the TRO says, that officers won't be sort of held in violation
2 of the TRO when they're following CB -- you know, following the
3 policy in the use of less-lethal devices. Whatever the
4 standard, whether it's assaultive or -- or active resistance
5 or -- or -- or deadly force that they're facing, and so maybe
6 we could tweak that paragraph K to incorporate that concept
7 without going into all the details that we laid out in
8 paragraph C.

9 THE COURT: Okay. So I will put a little placeholder
10 once we get to K, and we'll pick that up and deal with that.

11 So in terms of what the plaintiffs then laid out in C
12 with these examples, do you have any objection to that?

13 MR. SKEDZIEWLEWSKI: No, Your Honor, provided that the
14 Court agrees to -- to strike that 37 millimeter --

15 THE COURT: Yes.

16 MR. SKEDZIEWLEWSKI: -- launcher, because I've heard
17 from the client that that's just not used. They do use the 40
18 millimeter.

19 THE COURT: Yeah. And it looks like they actually --
20 so they struck soft-nosed round. So should that be still back
21 in? You didn't strike it.

22 MR. SKEDZIEWLEWSKI: I don't --

23 THE COURT: They did.

24 MR. SKEDZIEWLEWSKI: Yeah, I didn't -- I don't see
25 that in our policy manual, so I -- I think it should probably

1 be stricken. It may have been an oversight on our part that --

2 THE COURT: Okay.

3 MR. SKEDZIEWLEWSKI: -- that we didn't strike it.

4 THE COURT: Okay. So we'll strike the soft-nosed
5 rounds. We'll keep 40 millimeters. They had struck 40 and 37.
6 So we'll keep 40.

7 All right. And then the last part. The question that
8 I had for the plaintiffs is, where it says: "And members of
9 the press, protesters, or religious practitioners who are not
10 themselves posing a threat of immediate physical harm to a law
11 enforcement officer or another person," I am -- I'm wondering
12 what your thoughts are on instead of saying "posing a threat of
13 immediate physical harm to a law enforcement officer or another
14 person" to instead say "who are not themselves demonstrating
15 either active resistance or assaultive resistance as defined in
16 the CBP policy."

17 MR. ART: Judge, I think our concern with that is
18 the -- the standard for using that level of force -- and -- and
19 this will apply in D and E and F as well -- is not fully
20 defined by that definition in the DHS policy.

21 So in other words, if you're complying with the DHS
22 policy, presumably you're complying with the Fourth Amendment.

23 THE COURT: Right.

24 MR. ART: But we think the direction from this Court
25 should be based on the Fourth Amendment on this particular

1 point and not DHS policy.

2 So in other words, if they're following their policy
3 as co-counsel -- or our opposing counsel has said, they'll be
4 complying with this order. You know, if the class of
5 plaintiffs is the one we have defined, they'll be -- you know,
6 they will not trigger that Fourth Amendment standard, right?
7 But I think that from this Court, the direction should be one
8 based on the Constitution.

9 THE COURT: So I guess the issue brought up that I see
10 in the government's draft is that they split out the weapons,
11 right, and different things to be used, that certain of these
12 can be used only when the officer is experiencing assaultive
13 resistance and others would be limited or used for active
14 resistance.

15 And so if we've got everything kind of listed here, it
16 does make it a little bit messy. That's the -- that is my only
17 concern with this, is if we don't refer them back that -- for
18 example, pepper spray. So pepper spray would be used with an
19 active resister. You would -- I forget what it is, the --
20 basically a Taser, the electronic control weapon.

21 What is it? They're these compressed air launchers.
22 So the compressed air launchers can only be used for somebody
23 demonstrating assaultive resistance but couldn't be used if you
24 were demonstrating active resistance. And so to simply say
25 immediate physical harm to a law enforcement officer or other

1 person, their policy does break -- break it down where, you
2 know, assaultive resistance is serious bodily injury or death
3 or physical injury.

4 MR. ART: I -- I think that assaultive resistance as
5 defined by the DHS encompasses all of the Fourth Amendment
6 standards, right? The Fourth Amendment standard for using
7 force in the first place, the Fourth Amendment standard for
8 using deadly force.

9 What we've tried to do in C and D is take those
10 mechanisms that are the use of force, as this Court has found
11 in its ruling so far, and say, those can't be used unless the
12 Fourth Amendment has been satisfied that they can be used,
13 right? And so if DHS is defining standards for using force
14 differently than the Fourth Amendment, then those policies
15 can't be enforced consistent with the Constitution in this --

16 THE COURT: Right.

17 MR. ART: -- case.

18 THE COURT: But I -- I -- we might be talking past
19 each other, is that where we're delineating specific weapons,
20 because some of those weapons can be used in one instance and
21 other weapons cannot be used, I am -- what I don't want to do
22 is kind of go contrary to either CBP's or DHS's use of force
23 policies that are consistent with the Fourth Amendment.

24 You see what I'm saying?

25 MR. ART: I think that if their policies are

1 consistent with the Fourth Amendment and this Court's order in
2 this case says, you have to satisfy that standard, then they
3 will be able to use the mechanisms in the situations defined by
4 their policy consistent with the Fourth Amendment.

5 And all we have done is we have taken those mechanisms
6 that are use of force in C and D and that are deadly force in
7 E and F and we have said, to use those things, you have to
8 satisfy the applicable Fourth Amendment standard.

9 It -- it -- if what they are saying is no, our
10 policies provide that in some circumstances when there is
11 active resistance, as defined by our policy, we can use
12 particular devices against people, and the Fourth Amendment
13 isn't satisfied, then we would have a conflict and this Court
14 should order the Fourth Amendment relief.

15 If what counsel for the government is saying is, no,
16 we can only those weapons in circumstances that satisfy the
17 Fourth Amendment, then I don't think that we would need to
18 change the language we've proposed. The Court could say,
19 here's the Fourth Amendment standard. You can only use force
20 when the Fourth Amendment is satisfied, and there is no need to
21 discuss DHS policies in this circumstance.

22 THE COURT: So --

23 MR. ART: In other words, Judge, I think our concern
24 is that the government --

25 THE COURT: I guess -- I guess, would it -- so I

1 think -- so can we think about it this way? Can we break
2 out -- because we're using -- we're talking about specific
3 weapons. Can we break out -- and maybe we already have -- but
4 can we break them out, like C could cover whatever they are
5 allowed to use with active resisters, right, and then whatever
6 they could use with regard to assaultive resisters?

7 Does that make sense?

8 MR. ART: I think that that's what we have done,
9 Your Honor, is we've included all of the weapons in C, because
10 they are all uses of force.

11 THE COURT: Right.

12 MR. ART: And I think that the problem, Judge, is that
13 if the definition of active resistance that the government is
14 using is less than the standard required to use any force under
15 the Fourth Amendment, then we are displacing the Fourth
16 Amendment with a DHS defined policy. We don't want to do that.
17 So I think we sort of, like, stand on our proposal in these
18 sections that that last clause explaining the Fourth Amendment
19 law to the government is important.

20 In terms of what weapons are included, they're all in
21 C, because they're all uses of force --

22 THE COURT: Right.

23 MR. ART: -- when they are used against class members.

24 And then in E, you know, we are using a subset that
25 are deadly force.

1 THE COURT: Okay.

2 MR. ART: And then in F, we are simply saying that
3 when you use particular weapons in a particular -- if you shoot
4 them at a person, as they have in a particular place --

5 THE COURT: Mm-hmm.

6 MR. ART: -- that is also deadly force, right? And
7 thus, you know, a -- a greater showing is required under the
8 Fourth Amendment.

9 So I think that the -- the clearest command possible
10 is to say, here's what the Fourth Amendment requires for any
11 use of force, that's C and D; and here's what it requires for
12 deadly force, that's E and F. And if the DHS policies as
13 written are implemented the way they should be and haven't
14 been, as the Court has found --

15 THE COURT: Mm-hmm.

16 MR. ART: -- then they're going to comply with the
17 language that the Court orders if the Court adopts plaintiffs'
18 proposal.

19 MS. WANG: And -- and just to -- to mention that the
20 definition 1.c. that we proposed was adopted a month ago in
21 LA --

22 THE COURT: Mm-hmm.

23 MS. WANG: -- and they have not come to the court
24 saying, you know, that the -- the officers don't know how to
25 apply that.

1 THE COURT: Okay.

2 MR. SKEDZIEWLEWSKI: But we -- we actually have come
3 to the court and asked for a stay for exactly that reason, that
4 officers don't know how to apply the order.

5 But, Your Honor, if -- I think I could shed a little
6 bit of light on this.

7 THE COURT: Yep, go ahead.

8 MR. SKEDZIEWLEWSKI: Defendants aren't saying -- well,
9 allow me to rephrase that.

10 This -- this last clause in C -- in paragraph C does
11 not actually lay out the -- the correct Fourth Amendment
12 standard. And the -- the ambiguity in the first sentence
13 listing all the devices but not specifying how they're used
14 will lead to confusion.

15 Just to give one example, the compressed air launchers
16 are allowed to be used when responding to active resistance for
17 what they call in the policy saturation. That's where you're
18 firing small balls containing a pepper chemical at the -- at
19 the sort of ground near individuals, you know, showing active
20 resistance. That's -- and as written in plaintiffs' version,
21 that's -- that nuance is not captured, and it's just a blanket
22 prohibition against using compressed air launchers against
23 people posing a threat of immediate harm.

24 But, of course, by policy and consistent with the
25 Fourth Amendment, those launchers can be used against

1 individuals who are not posing a threat of immediate physical
2 harm when used to saturate an area, rather than as a kinetic
3 impact projectile.

4 MR. ART: Your Honor --

5 MR. SKEDZIEWLEWSKI: So -- so it's -- it's that nuance
6 that we're trying to capture and to avoid a blanket prohibition
7 against using these devices, in -- in fact, in ways that are
8 less -- and, in fact, can be, you know, no force at all.

9 So plaintiffs' version would actually sort of channel
10 agent's actions into a higher level of force by prohibiting a
11 lower level. And -- and so I think that's just counter -- runs
12 counter to what they're actually trying to accomplish here.

13 MR. ART: Your Honor, that explanation is exactly why
14 the Court should enter an order that says, here's the Fourth
15 Amendment standard that you have to meet to use force. What
16 counsel is saying is, no, we actually use this kind of force
17 against protesters who aren't posing any imminent threat of
18 harm to an officer or another person, so we want to be able to
19 do that.

20 And the point here is that that's unconstitutional.
21 The Court has found that that use of force on the scene ongoing
22 is unconstitutional. And obviously, the government needs an
23 order saying you can't use that kind of force.

24 THE COURT: Okay. All right. So anybody want to add
25 anything else on, I guess it would be C, D, E, and F? No?

1 MR. ART: Anything?

2 Not from the plaintiffs.

3 THE COURT: Okay. All right. So as you know, as I
4 have ruled, I am entering -- going to be entering a TR0.

5 It's not going to be today. It will be tomorrow
6 morning. I need a little time to just figure out these
7 sections, because I do think that it is extremely important if
8 what we are telling these officers and agents that they are not
9 to do. If we're listing out specific weapons, and I can
10 envision some circumstances where consistent with the Fourth
11 Amendment, right, what is a reasonable use of force might be
12 the use of a pepper spray where there is not an imminent threat
13 of harm to the officer and they're not -- and it's not even
14 necessarily becoming violent.

15 But, you know, I'm thinking if there's a medical
16 emergency in the crowd and the crowd refuses to move, for
17 example, the crowd's not causing a medical emergency, they're
18 not threatening the person suffering the medical emergency, but
19 it's so chaotic that the agents want to get into the crowd to
20 get that person assistance, that, you know, they could
21 potentially -- and I don't -- I'm just kind of thinking out
22 loud, right -- that there may be a use of force that is
23 consistent with the Fourth Amendment in order to get the crowd
24 to comply.

25 I just -- I think we're close, and I -- and I

1 understand the plaintiffs' position. I'm not obviously going
2 to include standards that are -- that don't meet or are
3 contrary to the Fourth Amendment requirement or less than the
4 Fourth Amendment requires. But because this is -- this is what
5 we're telling them they can or cannot do, and it's laying out
6 specific types of weapons, I just think I need a little longer
7 to figure out how to adjust this.

8 MR. ART: Understood, Judge. Could I make one more
9 point?

10 THE COURT: Yep.

11 MR. ART: In the example that the Court just offered,
12 I think that that is completely consistent with what we've
13 proposed because in that situation, the class of plaintiffs
14 here is posing a risk of imminent harm to another person,
15 right?

16 So I think the Court's quite right that there are
17 situations like that, but I think they are going to be
18 consistent with this order. And I think that when it comes to
19 enforcement, you won't see us coming in and saying, you know,
20 they cleared the way when no one would move to get the guy who
21 had a heart attack, right?

22 And so I think that that's consistent with our order.
23 And I also think that K, which we're going to get to --

24 THE COURT: Mm-hmm.

25 MR. ART: -- covers that sort of incidental exposure

1 scenario. So with that --

2 THE COURT: Yeah.

3 MR. ART: -- we understand.

4 THE COURT: Okay. So I just need to think about this
5 a little bit more.

6 All right.

7 MR. SKEDZIEWLEWSKI: Your Honor, would -- would I be
8 able to just quickly --

9 THE COURT: Yeah.

10 MR. SKEDZIEWLEWSKI: -- provide another
11 counterexample?

12 THE COURT: Absolutely.

13 MR. SKEDZIEWLEWSKI: So I -- I think -- I think
14 your -- the Court's example is -- is a good one, but we
15 actually have one in our brief that is -- is apropos here.

16 In -- in LA, you know, an officer was trying to detain
17 an individual, and a bystander who was sort of not presenting a
18 threat to the officer but was interfering with the arrest. So
19 the officer wasn't in any danger of physical harm but was
20 unable to, you know, complete the arrest.

21 And so in that case, you know, a -- an area of
22 saturation or pepper spray is sort of the -- you know, it's the
23 lowest level of force the officer could use without, you know,
24 sort of going hands-on or -- or using some elevated level of
25 force.

1 So this -- that -- so just another example of why this
2 language of immediate physical harm is just -- is a little too
3 restrictive because there are going to be scenarios where these
4 devices are appropriate at that lower level of, you know,
5 active resistance.

6 MR. ART: That person's not in the class, and that
7 person satisfies the Fourth Amendment standard as well.

8 THE COURT: Yeah. So I just need to think it through
9 a little -- just a little longer, because we all know that this
10 is not the only time that a judge is going to look at this
11 order. So I just want to make sure that we've covered what we
12 need to cover.

13 And then for -- oh, the -- so we're going to jump over
14 these, but --

15 MR. SKEDZIEWLEWSKI: Your Honor, I have one point
16 on -- on F, if -- if we're sort of moving past that now.

17 THE COURT: Yes. Just give me one second. I wanted
18 to go back to D for a second.

19 Do the plaintiffs have an objection to the -- to
20 having it be "reasonably foreseeable" as opposed to simply
21 "foreseeable"?

22 MR. ART: No, Your Honor.

23 THE COURT: Okay. And what are your thoughts on
24 "objectively reasonable under the totality of the
25 circumstances," as opposed to "necessary to stop an immediate

1 and serious threat of physical harm to a person"?

2 MS. WANG: So --

3 MR. ART: I think -- oh, go ahead.

4 MS. WANG: No. I mean, I -- I -- we would object to
5 that because, again, the, you know, presumption of, you know,
6 who -- our plaintiffs and the -- the class is that they're not
7 engaged in activity that is assaultive or interfering or
8 obstructing or any of those things. And this just takes it
9 back to a very -- a -- it's -- it's not as specific as what we
10 need in a specific circumstance, which is, you know --

11 THE COURT: Right.

12 MS. WANG: -- ordering officers to do something
13 specific or not do something specific.

14 THE COURT: Okay. You know, it seemed a little vague
15 to me, but I just wanted to get your -- okay.

16 So then you wanted to go to F.

17 Go ahead.

18 MR. SKEDZIEWLEWSKI: Yes, Your Honor.

19 And just going back to -- to D for a moment, it's been
20 mentioned a few times now that the -- that the TRO will only
21 apply to -- I think it's been said a few -- a couple of
22 different ways, but to peaceful, you know, protesters --

23 THE COURT: Right.

24 MR. SKEDZIEWLEWSKI: -- or to class members.

25 THE COURT: Right.

1 MR. SKEDZIEWLEWSKI: If we could just have that in the
2 order somewhere that it's -- it's limited to peaceful
3 protesters and, you know, plaintiffs -- individual plaintiffs
4 and class -- putative class members, that would just give
5 defendants a little bit of comfort on this issue that when
6 we're dealing with, you know, violent offenders, that -- that
7 we can use the type of force the policy allows.

8 MR. ART: There's nothing about the proposed order
9 that prevents the defendants in this case from using all of
10 their law enforcement power when they have probable cause, when
11 the Fourth Amendment is satisfied. We don't need to narrow it
12 in some artificial way, right, whether it's geography, as the
13 government argued earlier, or the particular people to which
14 they're going to apply it.

15 The Court has to fashion relief that can be
16 administered on the scene with all kinds of people present.
17 Our plaintiffs are peaceful, and they are the ones entitled to
18 relief. But as the Court said in the LA case, the relief is
19 going to have to necessarily be broadly stated to make sure
20 that all of the plaintiffs get the relief they are seeking.

21 And it shouldn't be that the government's, you know,
22 saying, there's Reverend Black, I'm not going to shoot him, but
23 I'm going to shoot someone else, right?

24 THE COURT: Right.

25 MR. ART: It doesn't work.

1 THE COURT: No, I mean, it's just unworkable to do
2 that.

3 Okay. So G --

4 MR. SKEDZIEWLEWSKI: I can raise that point about F --

5 THE COURT: Yeah. Go ahead.

6 MR. SKEDZIEWLEWSKI: -- F, Your Honor, if you don't
7 mind.

8 THE COURT: Yep. Go ahead.

9 MR. SKEDZIEWLEWSKI: So I believe -- I'm sorry. I'm
10 looking at our version, but let me take a look at plaintiffs'
11 version here. They have this -- this prohibition about use of
12 these systems on the torso. That's -- all the rest of what
13 plaintiffs have there in that sentence, the head, neck, groin,
14 other sensitive areas, that's all consistent with policy, but
15 torso is not. The torso is the only place that is not a
16 sensitive area, excepting what the policy does add is sort of
17 the -- the female breast area.

18 So I would just request that that particular clause
19 line up with policy, which should say head, neck, groin, spine,
20 a -- a female breast. And then other -- other sensitive area
21 kind of swallows the delimitation, so that should be stricken.

22 MR. ART: We have no objection to that proposal.

23 THE COURT: Okay. So we will make that change.

24 Did you guys get that? Okay. Okay.

25 All right. And then turning to G, then we've got this

1 extra section that the government's added about objectively
2 reasonable and factors to determine what's objectively
3 reasonable.

4 MR. ART: Yeah, Judge, we -- we discussed this one a
5 bunch last time and concluded that kettling wasn't a use of
6 force --

7 THE COURT: Right.

8 MR. ART: -- and that this is setting out the use of
9 force standard under the Fourth Amendment. Everything the
10 government added would be sort of like if we were having an
11 argument about how you or a jury would determine if excessive
12 force had been used.

13 THE COURT: Right.

14 MR. ART: I don't think it needs to be something that
15 boots on the ground are told about what to do and not to do.

16 THE COURT: So I'm not sure why the government added
17 this piece in here for G.

18 MR. SKEDZIEWLEWSKI: I think -- I think the client
19 liked that being in there, Your Honor, just to make sure that
20 we were agreed as to what the standard is. Because as we go
21 through the proposal, you know, it -- the -- the exceptions
22 to -- you know, where -- where agents can use force aren't
23 repeatedly stated in a way that's too restrictive, right?

24 So immediate threat of physical harm is just not the
25 standard. The standard is objectively reasonable under the

1 facts and circumstances. So we just want to -- there can't
2 be -- immediate threat of physical harm is exactly the kind of
3 mechanical application that the -- you know, that the case law
4 says we shouldn't impose on officer conduct.

5 MR. ART: It -- it -- the Court has to order some
6 relief that defendants can follow. And what the Court is
7 saying is you can't use force unless something --

8 THE COURT: Mm-hmm.

9 MR. ART: -- that I define is happening.

10 The Court is not saying you can use force if --

11 THE COURT REPORTER: Make sure you stay closer to the
12 microphone.

13 MR. ART: I'm so sorry.

14 You can use force, if, for example, you know, I would
15 judge you from the perspective of a reasonable officer on the
16 scene rather than 20/20 vision hindsight could use force.
17 That's not something that the Court can tell an officer and get
18 a result.

19 THE COURT: Well, and it seems to me this is something
20 that looks a lot more like a jury instruction that I would
21 give, Mr. Skedziewlewski, as opposed to something in a TRO
22 order where an officer/agent can look at it and say, yes, I can
23 do X, or no, I can't -- you know, I can't do Y.

24 And I'm -- you know, my overarching goal with this TRO
25 is to make it as clean and plain and directed as possible so

1 that when the agents -- it really needs to be from the
2 perspective of the officer or agent who looks at this and says,
3 in this particular situation, I can do X; I can't do Y. And
4 this I think just makes it a bit more cumbersome than it needs
5 to be, and I don't know that it adds to anything.

6 Okay. Turning to H about the warnings, so I did want
7 to track the -- kind of the language of -- of the policies.

8 So I actually do prefer what the government had
9 proposed in -- but I do want that it is two warnings. You can
10 give the two warnings, you know, kind of back-to-back, but I do
11 think that that second warning is a backstop so that if you
12 missed it the first time, you're going to hear it the second
13 time.

14 And it does describe or let them know how to determine
15 when something's feasible in that it lets -- you know, they're
16 to give these two warnings, explain what they're going to do,
17 and then give people time to comply before they do it.

18 MR. ART: I don't think we have any objection to that
19 in principle, Your Honor.

20 I think that the -- in addition to the two warnings
21 that at a sound level where it can be heard --

22 THE COURT: Mm-hmm.

23 MR. ART: -- is important, and we would ask that the
24 Court include that in a version of --

25 THE COURT: Sure.

1 MR. ART: -- the government's proposal.

2 THE COURT: Do you have an objection to that,
3 Mr. Skedziewlewski?

4 MR. SKEDZIEWLEWSKI: Yes, Your Honor. Just -- yes,
5 just to the extent that it's subjective and officers, you know,
6 can't know, especially in, you know, more chaotic situations
7 whether an announcement, even when it's been given over a
8 professional-grade PA system, is heard. I mean, we saw in the
9 LA case that individuals said they didn't hear warnings when
10 our officers issued warnings over an industrial-grade PA system
11 for every five minutes for 45 minutes straight and still people
12 said they didn't hear.

13 THE COURT: Well, so --

14 MR. SKEDZIEWLEWSKI: So I just -- I could just see --

15 THE COURT: -- I can --

16 MR. SKEDZIEWLEWSKI: -- officers doing everything that
17 they can to -- sorry.

18 THE COURT: No, that's okay. I didn't mean to
19 interrupt you. But, you know, I can put in at a sound level
20 where it can be reasonably heard, right, in that we're going
21 back to the objective reasonable person standard and if it's on
22 a -- you know, blasted on a sound system and you're not
23 listening, well, that's on you. But, you know, this is meant
24 to be, which I don't think would happen, but meant to be where
25 the officer whispers a warning and nobody can hear it and then

1 employs force.

2 So, you know, we've got two warnings which will ensure
3 that if somebody -- if it's chaotic and somebody happens to
4 miss it the first time, that it's the second, you know, you
5 have this opportunity to comply because there have been two
6 warnings and that it's a sound level where it can be reasonably
7 heard. Reasonable certainly seems to cover an example where if
8 it's broadcasted over a sound system, then yes, you know, a
9 reasonable person would be able to hear that.

10 All right. And then I, why did the plaintiffs take
11 out "who is not resisting a lawful dispersal order"?

12 MR. ART: We thought that the --

13 COURT REPORTER: Microphone, please.

14 MR. ART: We thought that the Court's instruction last
15 time, that your prohibit -- the -- the sort of double negative
16 made it confusing, and so we -- that's -- that's why we took
17 that out.

18 THE COURT: Okay.

19 MR. ART: We don't think that the government's
20 alternative proposal, though, should be accepted. You -- you
21 know, this is -- this -- the standard procedure is that you
22 have probable cause to believe that the person you are seizing
23 has committed a crime, not that you have some belief yourself
24 that maybe a lawful dispersal order was given and not followed.
25 So we think it needs -- that -- that -- the government's

1 language there does not fly given the Fourth Amendment
2 violations the Court has already found.

3 THE COURT: All right. So in -- just on further
4 thought -- I'm just trying to think of the class members and
5 how this TR0 is going to cover them.

6 I think maybe it does make more sense to put it back
7 in, "who is not resisting a lawful dispersal order."

8 MR. ART: We're fine with that, Judge. I mean, our --
9 our concern is the very, very common practice that we are
10 seeing on the ground of a demonstrator being dealt with by
11 being seized for no reason, taken out of the protest, and then
12 rarely ever charged and released back onto the street the next
13 day.

14 THE COURT: Mm-hmm.

15 MR. ART: And that's blatantly unconstitutional. And
16 so, you know, we took that out to make it more readable; but if
17 the Court wants to put it back in, we are fine with that.

18 THE COURT: Okay. So we'll put that back in.

19 And I don't -- I don't think that the government's
20 addition to paragraph I is needed. I think that is covered.
21 And, again, you know, we've got the catchall at the end. So
22 where the officer believes that they're following the TR0, I --
23 I just don't know that we're going to get a bunch of people
24 coming back in and complaining about I. I think it's pretty
25 clear.

1 All right. J, the --

2 (Counsel conferring.)

3 THE COURT: So I'm going to go with the plaintiffs'
4 change, which is instead of "shall be considered," it will be
5 "are examples of indicia of being a journalist." And their
6 change from "it shall also be" to "other."

7 So it will read: "Other indicia include that the
8 person is standing off to the side of a protest." You know, a
9 substantial distance away from a protest, I don't even know
10 what that means. I think that just is confusing, whereas, you
11 know, you can kind of look and see if somebody is standing off
12 to the side and that they're not engaging in the protest
13 activities.

14 Is -- do you have an objection to "the government
15 breaks down protest activities"?

16 MS. WANG: I -- I mean, there's many -- that's some
17 ways that somebody could be protesting, but I -- I would think
18 that the word -- the phrase "protest activities" is just
19 sufficiently clear to an officer.

20 THE COURT: Well, I mean, if we want to make it clear,
21 right --

22 MS. WANG: Because otherwise --

23 THE COURT: -- because they've got "otherwise
24 protesting" --

25 MS. WANG: "Otherwise protesting."

1 THE COURT: -- right?

2 MS. WANG: Okay. Yeah.

3 THE COURT: And if what we're trying to do is say we
4 want to make this clear that these activities -- you know, if
5 you see a journalist chanting or holding up a sign that they're
6 engaging in a protest activity and not acting as a journalist.

7 MR. ART: I guess we would advocate for removing
8 "shouting," you know, if they're shouting, "Don't fire that
9 bullet at me."

10 THE COURT: Yeah. And, Mr. Skedziewlewski, what -- I
11 mean, do you -- you have an objection to removing "shouting"?

12 MR. SKEDZIEWLEWSKI: I understand the point. Maybe
13 there's a way we could modify it to keep something like that in
14 there, because just the concern is, at least from -- from our
15 point of view, being at a protest is sort of -- it could be
16 construed as a protest activity, right? I mean, sort of the
17 point is showing strength in numbers, showing support for a
18 cause by your presence, but of course journalists are also
19 present at protests. So we're just trying to get a clear
20 line -- as clear a line as we can get, between journalists and
21 protesters so that this definition is actually workable.
22 "Shouting slogans," maybe, or something like that.

23 THE COURT: I don't necessarily have an issue with
24 "shouting slogans." I don't --

25 MR. ART: Neither do we.

1 THE COURT: -- think that any journalist is going to
2 be saying --

3 MS. WANG: Shouting slogans.

4 THE COURT: Right?

5 MS. WANG: Right.

6 THE COURT: You're not going to be saying -- you know,
7 as a journalist, you're not going to be yelling "down with
8 ICE," right?

9 MS. WANG: Right.

10 MR. LOEVY: That's right.

11 THE COURT: If you're going to be yelling something,
12 it's, you know, "Take your hands off that guy" or "Don't shoot
13 at me."

14 So -- okay. So we'll include "shouting slogans."

15 I bet the people in this courtroom observing never
16 imagined that law would be so exciting.

17 Okay. And then I don't know that we need to say that
18 a sufficient number of indicia must be present. Basically what
19 we're trying to tell the officers is if you see somebody that
20 is acting -- you know, if it -- what is it, walks like a duck,
21 talks like a duck, quacks like a duck, it's probably a duck.
22 If they're acting like a journalist, they're probably a
23 journalist. They don't have to tick every box, but you need to
24 believe -- have a reasonable belief that they are. And
25 because -- because we've got this last sentence that states,

1 "so the defendants will not be liable for unintentional
2 violations of the order in the case of an individual who does
3 not carry or wear a press pass, badge, or other official press
4 credentials, professional gear, or distinctive clothing that
5 identifies a person as a member of the press."

6 So it's, you know, this clause at the end that
7 basically says, if you did your best, right, and this person --
8 you didn't have a reason to believe essentially that this
9 person is a journalist, you're not liable.

10 MR. SKEDZIEWLEWSKI: Your Honor, could I make or
11 suggest one small tweak to that sentence?

12 THE COURT: Sure.

13 MR. SKEDZIEWLEWSKI: We've seen it where a journalist
14 was carrying their press pass, but it's tucked away in their
15 pocket and then they, you know, joined in the -- in a lawsuit
16 against DHS. So could we just strike the word "carry" and
17 make -- it has to be that they're wearing it?

18 THE COURT: Any objection to that?

19 MR. LOEVY: If we can have one moment, Your Honor.

20 THE COURT: Mm-hmm.

21 (Counsel conferring.)

22 MR. LOEVY: We're okay with that, Your Honor.

23 THE COURT: Okay. So then we'll strike "carry."

24 Okay. And then I don't know about that last sentence
25 about -- the defendants proposed: "Participating in any form

1 of violence or threat of violence immediately disqualifies a
2 person from being considered a journalist for purposes of the
3 order."

4 I mean, the order is supposed to protect people
5 behaving in a nonviolent way. And it doesn't apply if somebody
6 is behaving in a way that is violent or threatening violence,
7 then the order doesn't apply by its terms.

8 MR. LOEVY: We agree, Your Honor. If it's -- so to
9 the extent it's redundant or confusing or could be
10 misconstrued, it's not necessary.

11 MR. ART: And I guess the other point we'd add, Judge,
12 is that that doesn't make someone not a journalist, and all
13 we're trying to do here is define journalist. It makes it a
14 journalist that they can take law -- law enforcement action
15 against.

16 THE COURT: What are your thoughts on that,
17 Mr. Skedziewlewski?

18 MR. SKEDZIEWLEWSKI: Maybe I'm just missing something,
19 but could the Court point me to the -- the terms that limit the
20 order only to peaceful journalists, protesters, or other
21 individuals?

22 THE COURT: Let's see.

23 MR. ART: I think what we're talking about, Judge, is
24 each of the clauses in C, D, E, F, G that state when law
25 enforcement action can be used to effect a seizure.

1 MR. LOEVY: And A and B.

2 MR. ART: You want to read A?

3 MS. WANG: It's covered by A too.

4 THE COURT: So, you know, the defendants have to have
5 probable cause to believe that the journalist committed a crime
6 before they could use force. And so threatening violence or
7 using violence would fall under committing a crime. Therefore,
8 they wouldn't be prevented from dispersing, arresting,
9 threatening to arrest, threatening or using physical force
10 against that person even --

11 MR. SKEDZIEWLEWSKI: Maybe the issue, Your Honor, is
12 I'm -- oh, excuse me. I didn't mean to interrupt.

13 THE COURT: No, that's fine.

14 MR. SKEDZIEWLEWSKI: Maybe my -- my mistake is that
15 there's some equivocation on the -- the -- the term
16 "dispersing" in paragraph 1.a. I -- I understand this -- that
17 term here to mean, you know, issuing a lawful dispersal order
18 and then directing people to disperse. But if -- if -- if the
19 Court understands "dispersing" to mean some use of force,
20 you know, physically causing someone to be dispersed, that --
21 that seems to make a difference.

22 MR. ART: So paragraph A, first, covers dispersing,
23 arrest, use of force, explicitly as separate concepts. So I --
24 I don't think the objection applies to what we're talking about
25 here.

1 But I think it -- to the extent the Court wants to
2 define "dispersal order" in some way, because it's not a crowd
3 control entity, that DHS has no policy like that, but the
4 Chicago Police Department does, and -- and a dispersal order is
5 a lawful command given by a department member to all persons to
6 leave a designated area. And if the Court wants to define
7 "dispersal order" in its order that way because it prevents
8 confusion or equivocation, we have no objection to that.

9 THE COURT: Okay. So can you give us a copy of that?

10 MS. WANG: We have a copy of the order.

11 THE COURT: Okay.

12 MS. WANG: The general order.

13 THE COURT: Great.

14 MR. ART: We're -- you know what we will do? We can
15 submit that language to the Court --

16 THE COURT: Perfect.

17 MR. ART: -- right after this hearing.

18 THE COURT: Yep. That would be great.

19 MR. ART: Okay.

20 THE COURT: Okay. All right. Then K.

21 MR. ART: K is the language from Los Angeles that the
22 Court wanted added --

23 THE COURT: Yeah.

24 MR. ART: -- at the last hearing.

25 THE COURT: And I wanted to add -- so it only has

1 "crowd control devices." And the government has added
2 "chemical dispersal agents or physical force." And I think
3 that covers everything that we were talking about anyway.

4 MR. LOEVY: We agree, Your Honor. We don't -- we
5 understand why it would need to be in there.

6 THE COURT: Okay. So we'll include those.

7 And then I think the "otherwise warranted" language,
8 though, is redundant because we are covering that in other
9 sections.

10 So as long as, you know, you are using force in a
11 manner that complies with the injunction, if other people are
12 caught up in that, then you're not liable.

13 Okay. Then 2 -- and this is a question that I've got
14 for you, Mr. Skedziewlewski, is what is the policy for ICE
15 agents and CPB -- or CBP, sorry -- agents with the use of body
16 cams?

17 MR. SKEDZIEWLEWSKI: With the use of body cams,
18 Your Honor?

19 THE COURT: Mm-hmm. Are they required to wear body
20 cams?

21 MR. SKEDZIEWLEWSKI: Oh, I don't know. I would have
22 to ask the client about whether there are requirements. I know
23 that they sometimes use them. I don't know that there's a
24 requirement.

25 THE COURT: Okay.

1 And I guess one of the things I would be interested in
2 knowing -- and we will unfortunately be back tomorrow morning
3 just to tie up all our loose ends so I can get this entered --
4 this order entered.

5 But the one thing that I'd like to know is are these
6 agents -- so we're talking about ICE agents and Border Patrol
7 agents under DHS. Are there any other agents that are
8 operating?

9 MR. SKEDZIEWLEWSKI: The claims in this case,
10 Your Honor, are -- seem largely limited to ICE and CBP. But
11 FPS, HSI, ERO, there are a number of other component agencies
12 that could -- could be involved that they -- that were
13 involved, say, in the *L.A. Press Club* case.

14 But, for example, FPS's role is, you know, typically
15 limited to protecting federal property. The Broadview facility
16 at issue here where most of the claims stem from is a detention
17 facility, so it's sort of being handled -- I think is handled
18 by ICE with assistance from CBP.

19 THE COURT: Okay. So I just kind of wanted to know
20 the lay of the land of the different agencies involved and
21 whether they have a consistent policy on the use of body
22 cameras and what that would be.

23 Yes, go ahead.

24 MS. WANG: I mean, I -- I don't know the answer about
25 the body cameras, but I understand where Your Honor is going,

1 which is I presume if there's body cameras, that would be a way
2 of identifying them. Or no?

3 THE COURT: If there's body cameras and there's a
4 consistent policy that they need to be turned on, then I want
5 them on.

6 MS. WANG: Yes. And the -- the -- in the Denver
7 protest case from 2020, the Court did exactly that thing, and
8 then the Colorado legislature passed a law requiring officers
9 policing protests to turn on their body cameras.

10 THE COURT: So I don't know as I sit here right now
11 what the policy is regarding body-worn cameras, but I would
12 like to know what that is and how feasible it is to order that
13 they be used.

14 So 2, the -- I've got the statute. So the 10 U.S.C.
15 § 723, which is requirements for use of members of the Armed
16 Forces and federal law enforcement personnel, supportive
17 federal authorities in response to civil disturbances. And it
18 talks about when law -- federal law enforcement personnel need
19 to visibly display identifying information.

20 The exceptions -- so the default is that they need to
21 provide some sort of identifier that's unique to that person
22 and the agency under which they're employed. And the exception
23 is essentially if they're not wearing a uniform or other
24 distinguishing clothing or equipment in the regular performance
25 of their official duties or they're engaged in undercover

1 operations.

2 So I think that I have a problem with plainclothes in
3 the government's version, in that draft. So I'm okay with
4 excepting those assigned by a superior officer to undercover
5 duties. That covers kind of the exception here that's in the
6 statute. But otherwise, everybody else needs to be wearing
7 something that identifies them numerically and by agency.

8 MR. ART: I guess our concern with undercover,
9 particularly -- so we don't have a lot of experience with DHS
10 doing crowd control and protest control obviously. Other
11 police agencies don't use undercover police officers to do that
12 work ever. And we will be concerned by the situation where
13 suddenly a bunch of undercover officers are doing this work.

14 THE COURT: No. Well, it's that they are assigned to
15 undercover duties, right? So, like, if you're in the middle of
16 the crowd, right, as an undercover officer, it defeats the
17 purpose that you've got your badge on --

18 MR. ART: I think --

19 THE COURT: -- but, right, one would presume that the
20 people doing crowd control are not acting in an undercover
21 capacity at that moment, and it would blow your cover if all of
22 a sudden you whip out a rocket launcher and blast it at people.
23 Then you're not undercover anymore.

24 So I think "undercover" tracks the language of the
25 statute with the exception. But it presumes that in -- whoever

1 is doing crowd control is not acting in an undercover capacity
2 because it doesn't make sense.

3 MR. ART: Very good, Judge.

4 MS. WANG: One moment, Judge.

5 (Counsel conferring.)

6 MR. SKEDZIEWLEWSKI: Your Honor, I -- I understand
7 maybe they're concerned about the plainclothes phrasing, but
8 that term is just meant to capture the exception in paragraph
9 (b)(1) of the federal law, those officers who are not -- who
10 are designated to not wear uniforms for specific functions.
11 You know, if the -- if the Court prefers to have the language
12 match the Section 1720 -- 723, that's -- that would be fine and
13 it would -- it would capture what defendants are looking for
14 there with the plainclothes language.

15 THE COURT: Okay. I mean, I think the understanding
16 is that those -- as to 1 and 2, that it covers undercover
17 operations.

18 And then my reading of 1 is that it's, you know,
19 not -- it's not meant to cover Secretary Noem, right? It's not
20 meant to cover the person working in HR, right?

21 MR. SKEDZIEWLEWSKI: I think that's right, Your Honor.
22 But I think it also is meant to encompass sort of
23 nonpublic-facing duties. So, you know, when CBP or ICE
24 officers are engaged in sort of their public-facing law
25 enforcement role like has been at issue -- or is at issue in

1 this case with, you know, crowd control, you know, in those
2 circumstances they're wearing, you know, the alphanumeric
3 identifier. But if they're engaged in some kind of
4 investigation, they might not be undercover. They might be --
5 so undercover typically means they're not carrying a badge at
6 all because they're trying -- they need to conceal their
7 identity for the purposes of their investigation.

8 Plainclothes or what -- or paragraph (b)(1) covers
9 officers who will be carrying their badge, it's in their
10 pocket, they will display it if it's necessary, but they're --
11 they're not engaging in a public-facing role, and so they
12 wouldn't just have it on display all the time, though they may
13 be engaged in duties in the field, not -- not just, you know,
14 at -- at the desk, at an office.

15 MR. ART: Judge, I think that ex- -- that definition
16 swallows the whole requirement of identification. The
17 statutory language that the Court has quoted, "excepting those
18 who are engaged in undercover operations or do not wear a
19 uniform or other distinguishing clothing or equipment in the
20 regular performance of their official duties," we would have no
21 objection to.

22 THE COURT: Yeah. So that's -- it -- I wanted to
23 track the language of the statute.

24 MR. SKEDZIEWLEWSKI: That -- that works for
25 defendants, Your Honor.

1 THE COURT: Okay. All right. And I'm not going to
2 add the request that "unless such visible identification
3 creates an imminent risk of harm based on specifically
4 identifiable threat." I think that's too vague. I think that
5 the compromised position here where it's we don't have
6 anybody's name and it is a number that is unique to that
7 individual that I think provides sufficient cover and safety
8 for -- for those officers.

9 And again, you know, if there's something where you
10 believe this is not workable or there are specific risks
11 inherent in this, then obviously you can always come back to
12 me. But what I don't want is to hear that the officers somehow
13 thought that there was some risk and then, you know, put tape
14 over whatever the number is so that they can't be identified
15 because I just -- I -- I just feel like then we're getting into
16 where, you know, there's always a risk.

17 MR. SKEDZIEWLEWSKI: Yes, Your Honor. The -- the
18 thing that defendants have in mind with that additional
19 exception is -- is very narrow, and maybe it wasn't worded as
20 narrowly as it should have been.

21 But we're just worried about the scenario where
22 there's a specific threat tied to the alphanumeric. So, you
23 know, there's a gang, for example, has singled out Officer
24 XYZ123 and they've put out a bounty on that officer. And we've
25 seen bounties placed on officers by name. But --

1 THE COURT: So -- so --

2 MR. SKEDZIEWLEWSKI: -- it could easily be done by
3 alphanumeric.

4 THE COURT: Right. But if that were to happen and you
5 were to hear that, then come back in, and I will exempt that
6 person, right, and --

7 MR. SKEDZIEWLEWSKI: We could add a supervisor -- that
8 only a supervisor at DHS could make that determination? But
9 the -- the --

10 THE COURT: No.

11 MR. SKEDZIEWLEWSKI: -- in other words, the officer
12 can't just make that determination themselves. They'd have to
13 get supervisory authority.

14 THE COURT: Yeah. But, no, I mean, the point is that
15 you come back to me, right, and I will hear you out. And if I
16 find that the threat is credible as to this specific person,
17 then we'll deal with this specific person. But I just don't
18 want to leave it up to either that person or the supervisor.
19 Because what I don't want is, you know, this pervasive belief
20 that there are these threats and then that gets around the
21 whole point of this Section 2.

22 All right. 3. Oh my gosh, we are -- we are at the
23 last page. Hallelujah.

24 Okay. So I could split the baby and make it 48 hours.
25 I -- I think some of -- the reality is that this is going to

1 get entered tomorrow morning. I don't want to wait till Sunday
2 for this to go out. I understand that, you know, it's a lot of
3 people, but -- so I'm willing to give you 48 hours, but I -- I
4 want this disseminated. Because the reality is, you know,
5 these protests are ongoing every day. So the sooner it gets
6 out and is disseminated, the better it is.

7 MR. ART: Can -- can we make one proposal on that
8 point given that if the Court enters the order on Friday, we
9 are --

10 THE COURT: No, I'm --

11 MR. LOEVY: Thursday.

12 THE COURT: -- entering it tomorrow.

13 MS. WANG: We lost track of the days.

14 (Unreportable crosstalk.)

15 MR. ART: I just forgot what day it was today. Sorry,
16 Judge.

17 THE COURT: That's okay.

18 MR. ART: That the Court say something like it should
19 be distributed immediately on a rolling basis but no later than
20 48 hours after the entry of the order so that we have some hope
21 of making sure that by the weekend this is in place?

22 THE COURT: Any objection to that?

23 MR. SKEDZIEWLEWSKI: No, Your Honor. And I can, you
24 know, say to the Court that DHS is going to do its level best
25 to get it out by the end of the day Friday because they're not

1 going to want to do it Saturday morning. So...

2 THE COURT: Right. That's fine. Okay.

3 All right. And I'm not limiting it to the Broadview
4 ICE facility.

5 And we'll keep it as, you know, Operation Midway
6 Blitz, or whatever we want to call this operation, if it
7 changes names.

8 And then any objection to the addition under B for
9 "first line" as opposed to "any"?

10 MR. ART: Only that we don't completely understand the
11 distinction. If the notion here is it's going just to the
12 immediate supervisors of on the ground first-line personnel, we
13 have an objection to it. We think it should go to all of the
14 supervisory chain of command in the defendant organization so
15 that it is clear to all of those folks, including the Secretary
16 of the Department of Homeland Security, what the order is. But
17 if it means something different that we're not understanding,
18 we -- we would be open to that.

19 THE COURT: Okay. And I'd only ask that you stand
20 closer to the microphone --

21 MR. ART: I'm so sorry, Judge.

22 THE COURT: -- so that you don't --

23 MR. ART: I apologize.

24 THE COURT: -- torture my court reporter.

25 MR. ART: I'm sorry.

1 THE COURT: I like her a lot, and I can't have her
2 leave.

3 So what is the difference between "any supervisor"
4 versus "first-line supervisory or command authority"?

5 MR. SKEDZIEWLEWSKI: Your Honor, going from memory
6 here, I -- I would rather consult notes, but I -- I can't get
7 them at this very second.

8 My understanding is that's designed to -- to get this
9 to the people that it's relevant for; in other words, the
10 supervisors who have a role in crowd control, not the
11 supervisors who were far away from the scene in an office not
12 having anything to do with -- with crowd control.

13 And it's the same reason that we tried to add in
14 paragraph A "law enforcement personnel" rather than "employees"
15 because that -- "employees" will cover our -- you know, our IT
16 professionals who are working on computers and fixing up Wi-Fi
17 and things like that.

18 THE COURT: Okay. So I'm okay with law enforcement
19 personnel, officers, and agents.

20 MR. ART: We are too, your -- Your Honor.

21 THE COURT: Okay.

22 MR. ART: I think the concern with "first line,"
23 though, is that you've got the Secretary on the roof of the
24 facility directing troops. So...

25 THE COURT: Yeah. Let's think about -- so if folks

1 can send me, either later tonight or tomorrow morning, a way to
2 capture both concerns.

3 So this, you know, doesn't need to go to somebody who
4 has no operational responsibilities in the Northern District of
5 Illinois. But I think if there's a way to also include the
6 kind of executive, top-line folks who should know that this was
7 the order that we entered, right, who are ultimately
8 responsible for the operations in Chicago.

9 Does that make sense?

10 MR. ART: Yes, Judge, from plaintiffs.

11 MR. SKEDZIEWLEWSKI: Yes, Your Honor.

12 THE COURT: Okay.

13 So then 4, what is the government's objection to the
14 plaintiffs' proposal?

15 So I do want to order the defendants to tell their
16 employees, so the officers and agents, that they need to
17 implement the order, right? Like I don't want to take that
18 language out. I want to be able to order essentially DHS to
19 not simply disseminate the order but that they need to follow
20 it.

21 MR. SKEDZIEWLEWSKI: No objection to that, Your Honor.
22 All we are trying to address with our edits to paragraph 4 is
23 just withholding attorney-client privilege. So we -- we
24 thought it would be most sort of expeditious to just have the
25 relevant individuals at DHS submit a -- a very brief

1 declaration just saying yes, we've sub- -- we've disseminated
2 the order; yes, we've instructed -- and if -- and we'll add
3 this language. It sounds like Your Honor wants in there, yes,
4 we've instructed all relevant, you know, officers to comply.

5 THE COURT: And that I would want to know if those
6 instructions change over time. I don't anticipate that they
7 would, because that would be crazy, right? There would be no
8 way that that would ever happen. But I want to make sure that
9 that doesn't. So I would want to know, is it changing, right?
10 So have --

11 MR. SKEDZIEWLEWSKI: We'll --

12 THE COURT: -- the instructions changed.

13 MR. SKEDZIEWLEWSKI: Your Honor, I can envision the
14 instructions changing in response to, you know, an enforcement
15 motion in this Court or something to that effect. But we're
16 fine with that language, you know, being included in there.

17 THE COURT: Okay.

18 And then I --

19 MR. ART: Judge, could I speak on that -- that
20 point --

21 THE COURT: Uh-huh.

22 MR. ART: -- if the Court's moving on?

23 I think it -- it is important for the reasons that the
24 Court has identified that not only is there a sworn statement
25 that the order has been distributed and the instructions given

1 but that the actual instructions get filed with this Court. I
2 struggle to imagine how they could be privileged if -- if
3 agency personnel are telling line-level personnel here's what
4 you've got to do.

5 And -- and --

6 THE COURT: And I guess --

7 MR. ART: -- I would --

8 THE COURT: Sorry to interrupt you, and I'm just
9 trying to kind of --

10 MR. ART: Yes, Judge.

11 THE COURT: -- move us along a little, is that -- so
12 what I am looking for here, I'm not looking for anything that's
13 attorney-client privileged, right? And these policies, like
14 these use of force policies, are not attorney-client
15 privileged. And so I'm not looking for e-mail correspondence,
16 right, between counsel for -- either in-house DHS counsel or
17 between Main Justice counsel in DHS. I'm not interested in any
18 of that.

19 What I'm interested in is if there is a directive
20 that's issued that essentially says the Court issued this TRO
21 and you are supposed to follow the TRO -- I mean, if I were
22 DHS, that's what I would do because it would keep it real clean
23 and real simple and real easy and not be trying to explain what
24 I want them to do or not do.

25 So I don't run DHS, nor do I want to. But I think

1 that when you are talking to the client that that is the
2 cleanest, simplest, easiest way to comply, right, is just to
3 say, the Court entered this order; here is the order; follow
4 the order, and not try to rewrite or explain what is said in
5 there. That's why I'm trying to keep this as simple as
6 possible and direct as possible.

7 MR. SKEDZIEWLEWSKI: Understood, Your Honor. Just,
8 you know, the -- the in-house attorneys at DHS know better than
9 I do how to communicate with field officers so they -- they may
10 feel the need in their expertise to provide a further
11 explanation. I don't -- I'm not saying that they will in this
12 case. I don't know. But in the past they've certainly done
13 that and found it necessary.

14 THE COURT: Yeah. I just, you know, in my experience
15 in representing the Chicago Police Department in instances like
16 this, it is a lot easier and simpler to just simply say this is
17 the order, you are directed to follow the order, and not
18 attempt to rewrite the order or do anything or explain the
19 order. Because I think that is where folks get into trouble
20 because those DHS attorneys weren't here and they didn't sit
21 through all of this, and they don't know what was discussed and
22 let go or pushed to the side, and they don't know why. And so
23 I just think it makes life a lot easier if they kind of go down
24 that path; but, again, that's just some friendly advice.

25 All right. And then 5, I think what we had discussed

1 before was rather than "any time," it's just simply "as ordered
2 by the Court."

3 MR. LOEVY: That's our memory too, Your Honor.

4 THE COURT: Right?

5 So I think you actually do better, on both sides,
6 frankly, if there's no time limit in there but instead that I
7 will -- you know, plaintiffs will come in and seek relief for
8 any alleged violation, and then I'll let you know when you need
9 to respond in consultation with you.

10 Does that make sense?

11 MR. SKEDZIEWLEWSKI: That makes sense, Your Honor.

12 The other piece we were trying to get in there was
13 just a meet-and-confer requirement before the plaintiffs come
14 to the Court so that we -- we might be able to address the
15 concern and obviate any need for further, you know, motions
16 before the Court.

17 THE COURT: I've got --

18 MR. LOEVY: I -- go ahead. I see that too.

19 THE COURT: I mean, I've got no objection to that. I
20 think 72 hours might be too long, because if something is
21 happening immediately, I would want to hear about it and deal
22 with it. But I also do appreciate the concept of that if
23 plaintiffs believe that there is a violation, that you would
24 meet and confer before filing anything.

25 MR. ART: I think --

1 MS. WANG: And -- I'm sorry.

2 On -- the only -- I mean, if the Court want -- the --
3 it -- if it -- there -- if there's going to be a
4 meet-and-confer, some language in there about that, it should
5 say -- made, you know, a good faith attempt to meet and confer
6 within some shorter period of time --

7 THE COURT: Yeah.

8 MS. WANG: -- because if we can't reach
9 Mr. Skedziewlewski or what have you, even though we tried, that
10 should not hold us up because we couldn't actually speak with
11 him.

12 MR. LOEVY: I mean, we'd -- we'd be incentivized to
13 try to resolve it with the government and if -- if that was the
14 easiest way to do it. And every situation is going to be
15 different. If it's a super emergency, then we don't want to be
16 foreclosed.

17 MR. ART: I -- we're -- all the plaintiffs' attorneys
18 are talking. Sorry about that, Judge, but --

19 THE COURT: That's okay.

20 MR. ART: -- I think if the Court says, follow my
21 standing orders and the local rules and procedures and I'll
22 order briefing schedules on things, that we can do that because
23 we do in every case. And if there's an emergency and we can't
24 get the government, we can tell you that.

25 THE COURT: Yeah.

1 So why don't -- why don't we do this. I will say that
2 the parties need to make a good faith effort to meet and confer
3 at least 24 hours before plaintiffs file any request for
4 relief. And obviously if it's not practicable, I'm not going
5 to reject it out of hand, but I would want to know from the
6 plaintiffs why a meet and confer wasn't appropriate or
7 possible.

8 MR. LOEVY: Understood.

9 THE COURT: I think -- does that satisfy everybody,
10 more or less?

11 MR. LOEVY: It does, Your Honor.

12 THE COURT: All right.

13 Mr. Skedziewlewski?

14 MR. SKEDZIEWLEWSKI: Yes, Your Honor, that's helpful.

15 THE COURT: Okay. All right.

16 Oh my gosh, we're almost done.

17 6.

18 MR. LOEVY: And you've dealt with 6.

19 THE COURT: I already dealt with because I said there
20 won't be a bond or any security posted.

21 And 7, there were no changes.

22 MR. LOEVY: Super.

23 THE COURT: Woo-hoo. All right. I feel like I should
24 throw some confetti or something.

25 All right. We did it. So I just want to think about

1 C, D, E, and F. If the parties have a further proposal, you
2 can kind of send it to me tonight.

3 So -- because I want to get it right, I don't want to
4 just get it done, so how about 10:30 tomorrow morning?

5 MR. LOEVY: Works for us, Your Honor.

6 MR. ART: Works for the plaintiffs.

7 THE COURT: All right.

8 Mr. Skedziewlewski, does that work for you? Which
9 would be 11:30 your time?

10 MR. SKEDZIEWLEWSKI: Yes, Your Honor, provided that --

11 THE COURT: Always --

12 MR. SKEDZIEWLEWSKI: -- we wrap --

13 THE COURT: -- happy to see you --

14 MR. SKEDZIEWLEWSKI: -- we don't go quite as long as
15 we have been.

16 THE COURT: No. And I'm always happy to see you on a
17 video so remote is fine. And I think it will be very quick
18 tomorrow. It's just hammering out the -- these last sections
19 about use of force. And then we'll get the order entered and
20 go from there.

21 So then the last thing, and then we will call it a
22 day, is the preliminary injunction hearing. So when do the
23 parties want to do that? And I know from the plaintiffs you'll
24 come in ten minutes from now and do it, but I guess I should
25 direct this to the government.

1 MR. SKEDZIEWLEWSKI: Your Honor, I'll have to circle
2 back with the client on that question. And I'm not sure --
3 I'll do my best to have an answer by tomorrow if that -- if
4 that works, but --

5 THE COURT: Yeah. That's fine.

6 MR. SKEDZIEWLEWSKI: -- but hard to say. There's a
7 lot going on at DHS right now so tough -- tough to do something
8 like this on a very short timeline, which we would prefer, but
9 we'll need time to develop the re- -- our own record.

10 THE COURT: Yeah. And so, you know, the default, of
11 course, is 14 days. So if that's what DHS wants, that works,
12 and we could do that because -- let's see.

13 Okay. So allegedly I am supposed to be on trial
14 starting October 20th on a gun case, but that presumes that the
15 government's actually open and we can pay jurors.

16 So what we could do -- so we could hold -- okay. So I
17 can hold October 23rd, which is a Thursday, which would be
18 14 days from when I enter the TRO tomorrow. If my trial is
19 going, it will be done by then. And we can just use this as a
20 placeholder for people to kind of plan around things.

21 MR. LOEVY: You'd envision a one-day proceeding?

22 THE COURT: I'm thinking. I mean, I can do, you know,
23 the 20 -- Thursday and Friday if we need it, but I don't know
24 that we do. But we can see.

25 What do you think about that, Mr. Skedziewlewski?

1 Just as a -- when you're talking to the client and just kind of
2 as a placeholder to plan? And you can then change your mind
3 tomorrow, but...

4 MR. SKEDZIEWLEWSKI: That's fine as a placeholder,
5 Your Honor. I'll actually be out on parental leave sometime in
6 the next two weeks expecting a -- a newborn so I'll have to --
7 to find some additional coverage. So it may be a little bit
8 more complicated for me to get an answer as to date. But
9 we'll -- I'll endeavor to do that as quickly as possible.

10 THE COURT: Okay. All right. We'll be sorry to miss
11 you, but hopefully you'll be doing something a lot more fun.

12 MR. LOEVY: Mm-hmm.

13 THE COURT: All right. So we'll hold those two days
14 as a placeholder for now just so that everybody can kind of
15 plan ahead and then we can see where we are tomorrow.

16 And I think -- I think I said 10:30, right?

17 MR. LOEVY: 10:30 you said.

18 THE COURT: Okay. Okay.

19 All right. Anything that I've missed or we need to
20 keep talking about?

21 MR. LOEVY: Can juror -- can private parties pay the
22 juror pool?

23 THE COURT: They cannot.

24 MR. ART: Nothing further from the plaintiffs.

25 THE COURT: They cannot, no. No. What we can all do

1 is hope that the government reopens and we get back to regular
2 business.

3 All right. All right, everybody.

4 MR. ART: Thank you, Judge.

5 THE COURT: We will see you tomorrow.

6 MS. WANG: Thank you.

7 COURT SECURITY OFFICER: All rise.

8 THE COURT: Thank you.

9 (Concluded at 5:17 p.m.)
10

11 * * * * *

12 I certify that the foregoing is a correct transcript
13 from the record of proceedings in the above-entitled matter.

14 /s/Kelly M. Fitzgerald

October 10, 2025

15 Kelly M. Fitzgerald
16 Official Court Reporter
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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHICAGO HEADLINE CLUB, BLOCK	)	Case No. 25 C 12173
CLUB CHICAGO, CHICAGO NEWSPAPER	)	
GUILD LOCAL 34071, NABET-CWA	)	
LOCAL 54041, ILLINOIS PRESS	)	
ASSOCIATION, RAVEN GEARY,	)	
CHARLES THRUSH, STEPHEN HELD,	)	
DAVID BLACK, WILLIAM PAULSON,	)	
AUTUMN REIDY-HAMER, and LEIGH	)	
KUNKEL,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
KRISTI NOEM, Secretary, U.S.	)	
Department of Homeland Security	)	
(DHS); TODD LYONS, Acting	)	
Director, U.S. Immigration and	)	
Customs Enforcement (ICE);	)	
MARCOS CHARLES, Acting Executive	)	
Associate Director, Enforcement	)	
and Removal Operations, ICE;	)	
RUSSELL HOTT, Chicago Field	)	
Office Director, ICE; RODNEY S.	)	
SCOTT, Commissioner, U.S.	)	
Customs and Border Protection	)	
(CBP); GREGORY BOVINO, Chief	)	
Border Patrol Agent, CBP; DANIEL	)	
DRISCOLL, Director of the Bureau	)	
of Alcohol, Tobacco, Firearms	)	
and Explosives (ATF); WILLIAM K.	)	
MARSHALL III, Director of the	)	
Federal Bureau of Prisons (BOP);	)	
PAMELA BONDI, Attorney General	)	
of the United States; U.S.	)	
DEPARTMENT OF HOMELAND SECURITY;	)	
U.S. DEPARTMENT OF JUSTICE;	)	
UNIDENTIFIED FEDERAL OFFICER	)	
DEFENDANTS; UNIDENTIFIED FEDERAL	)	
AGENCY DEFENDANTS; and DONALD J.	)	
TRUMP, President of the	)	
United States,	)	Chicago, Illinois
	)	October 6, 2025
Defendants.	)	2:49 p.m.

TRANSCRIPT OF PROCEEDINGS -
EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER
BEFORE THE HONORABLE SARA L. ELLIS

APPEARANCES:

For the Plaintiffs: LOEVY & LOEVY
BY: MR. JONATHAN I. LOEVY
MR. LOCKE E. BOWMAN, III
311 N. Aberdeen Street, Third Floor
Chicago, Illinois 60607

For the Defendants: U.S. DEPARTMENT OF JUSTICE
BY: MR. SEAN SKEDZIELEWSKI (via video)
950 Pennsylvania Avenue NW
Washington, D.C. 20530

Court Reporter: KELLY M. FITZGERALD, RPR, RMR, CRR
Official Court Reporter
United States District Court
219 S. Dearborn Street, Room 1412
Chicago, Illinois 60604
312-818-6626
kmftranscripts@gmail.com

* * * * *

PROCEEDINGS REPORTED BY STENOTYPE
TRANSCRIPT PRODUCED USING COMPUTER-AIDED TRANSCRIPTION

1 (Proceedings heard in open court:)

2 THE COURT: All right. You can all be seated.

3 THE CLERK: We are here on case 25 CV 12173, Chicago
4 Headline Club, et al. v. Noem, et al.

5 THE COURT: All right.

6 MR. LOEVY: Good afternoon, Your Honor. Jon Loevy on
7 behalf of the plaintiffs.

8 THE COURT: All right. Do we have anybody on behalf
9 of the government? I...

10 MR. SKEDZIEWLEWSKI: Your Honor, Sean Skedziewlewski,
11 counsel to the assistant attorney general, civil division, from
12 Washington, D.C. is here on behalf of the government.

13 THE COURT: All right. Thanks.

14 Rhonda, my screen's not working.

15 (Off the record.)

16 THE COURT: And it's Mr. Skedziewlewski; is that
17 correct? Am I pronouncing it correctly?

18 MR. SKEDZIEWLEWSKI: Yeah, Mr. -- yes, Your Honor,
19 it's Skedziewlewski.

20 THE COURT: Skedziewlewski. Thank you.

21 MR. SKEDZIEWLEWSKI: Thank you.

22 THE COURT: All right. So hold on,
23 Mr. Skedziewlewski. We are going to get my screen working. So
24 hold on one second.

25 (Pause.)

1 THE COURT: Mr. Skedziewlewski, can you hear us?

2 MR. SKEDZIEWLEWSKI: Yes, Your Honor. Thank you.

3 THE COURT: Okay. Great.

4 All right. Okay. So we're here on the plaintiffs'
5 motion for a TRO. And my understanding, just preliminarily to
6 kind of get things out of the way, is we do, given the
7 shutdown, have amended General Order 25-24, which is the
8 general order holding in abeyance civil matters involving the
9 United States as a party. However, I don't find that the stay
10 order applies here because this would include an emergency
11 involving the safety of human life or the protection of
12 property, and further, that any litigant affected by the
13 general order may seek relief from the order by motion.

14 So does either party believe that the stay order
15 applies?

16 MR. LOEVY: Not from the plaintiff, Your Honor.

17 MR. SKEDZIEWLEWSKI: Not for federal defendants,
18 Your Honor.

19 THE COURT: Okay. All right. So getting that out of
20 the way.

21 Okay. All right. So, Mr. Loevy, do you want to --

22 MR. LOEVY: Thank you, Your Honor.

23 THE COURT: -- go first then?

24 MR. LOEVY: And I'm joined here by Locke Bowman, as
25 well as, it should be noted, a coalition of attorneys that --

1 you got the Mandel clinic from University of Chicago, the
2 Northwestern Bluhm clinic, the first -- the Protect Democracy
3 Project, First Defense Legal Aid, and the ACLU all have come
4 together representing a group of very courageous protesters,
5 people of faith, religious people, and members of the press
6 that are here on this very important First Amendment issue.

7 And taking a step back, the reason we're here is, is
8 as many of us know, the president has essentially declared war
9 on the city of Chicago. And that's not hyperbole. I'm, you
10 know, quoting. It started in LA. And he said he's going to
11 come and use force and knock some heads and -- and get people's
12 attention.

13 The problem is when he got here, when the federal
14 troops got here, there was nobody to fight. There were no
15 mobs. There were no lawbreakers. There were no rioters.

16 And our friends in D.C., you know, may not -- may
17 believe that there's blood in the streets, but we've amassed a
18 whole lot of evidence that there is nothing -- when they came
19 looking for a fight, all they found was small groups of
20 protesters, obeying the law, exercising their cherished First
21 Amendment rights to speak up, to say, I don't like what you're
22 doing. Groups of protesters who said, look, leave our
23 community alone, don't take our -- our neighbors who are
24 immigrants. You can agree with them, disagree with them, but
25 there is no dispute that what they were doing was exercising

1 their right to free speech, to disagree. They were doing it
2 peacefully and they were doing it within the law.

3 Because of that message, the federal agents attacked
4 them, used force, gassed them, shot them, pushed them. Not
5 because they were standing peacefully, but because of their
6 message. Literally they said, as the declarations attest,
7 things like, you know, shut up. You're -- you know, in other
8 words, they'd be leaving -- people would be saying, Get out of
9 here. Maybe, you know, in tones that the federal employees
10 didn't like, saying, you're not welcome here; they're throwing
11 tear gas at them out the window. They are attacking because of
12 the message.

13 Secretary Noem made that clear. She said, you know,
14 it's what -- what they're saying, what they're speaking. She
15 said -- you know, and we're quoted in our -- in our papers, she
16 said that, you know, the more they protest, the high -- harder
17 ICE is going to come down on them.

18 So you have protesters, you have people of faith who
19 are holding signs, who are being attacked because of their
20 message. It's not a -- as Tess pointed out, it wouldn't even
21 be an interesting law school problem about success on the
22 merits, because there's no subtlety.

23 Oftentimes, when you argue First Amendment, you say,
24 well, does the government's policy impinge on First Amendment
25 rights? This is because of the message they're saying, we

1 don't like you, ICE, go away, ICE is pushing people, shoving
2 people, shooting people, and gassing people.

3 And of course, the press. The press is out covering
4 these peaceful demonstrations, wearing signs that's -- that
5 mark them as press, equipment that mark them as press, no --
6 there's not going to be a dispute they were clearly identified
7 as press.

8 And that is why they were targeted, because they are
9 being press, bearing witness and reporting on what's happened.
10 So you have agents on rooftops shooting PepperBall bullets at
11 people -- at the press, trying to hit the press. They are --
12 in their world, if the press wasn't covering this, they could
13 control the message. They don't want the press to cover it.

14 And there's members of the press that are present.
15 Very brave people that are doing their job, covering these
16 protests, covering what these federal agents are doing, and
17 being attacked because of that. It's not just, oh, you know,
18 in some fact patterns maybe there's a riot and a press get hits
19 with a bullet. That's not this. There's guys on top of
20 buildings shooting at the press, hoping to deter the press,
21 hoping that the press will go away, hoping there's a --
22 Reverend Black submitted an affidavit. He's a religious man
23 who was -- was praying for ICE with his hands up. Somebody on
24 the top of the building took a shot at him. They don't like
25 the message; they're shooting them.

1 So this is not a complicated fact pattern. It's --
2 it's unconstitutional. What are we asking you to do? We're
3 asking you to do what happened in LA. In LA, a group brought a
4 similar case alleging similar harms, and a district court judge
5 there granted a preliminary injunction.

6 We have carefully modeled the TRO that we're asking
7 you to enter today after the LA order. The LA order was
8 created in conjunction with an expert, a guy named
9 Gil Kerlikowske, who is a 50-year law enforcement guy; he's a
10 chief of police I believe in Seattle; and a very high-ranking
11 member of DHS. And he is saying as a -- a former. He was --
12 he had run part of the border.

13 And he is saying, look, this is not okay. He has two
14 primary opinions. He's saying the force being used against
15 peaceful protesters greatly out- -- exceeds any reasonable law
16 enforcement purpose. You know, these are -- the -- the weapons
17 they're using are not like -- they're not -- they're --
18 they're -- they're being used disproportionately. They're
19 using them indiscriminately. They're using them targetedly.
20 Everything about this is wrong.

21 It's a -- it's a very persuasive affidavit. We urge
22 you to take a look at it. It's at the record 22-32. And his
23 opinion is supplemented with all of the declarations in
24 evidence.

25 And I have a courtesy copy of printouts, if I could

1 tender it to Your Honor?

2 THE COURT: Sure.

3 MR. LOEVY: Thank you, Your Honor.

4 We've amassed a considerable amount of evidence
5 attesting to what I am telling you what's happening today --
6 what I'm telling you today, is that peaceful protesters are
7 being targeted and -- for their message. They're basically
8 being told to shut up, stop criticizing ICE, and being met with
9 violence.

10 And what we would ask you to do is enter the same
11 injunction essentially that was entered in LA, and then there
12 will be a preliminary injunction hearing to be scheduled
13 either -- you know, in the future. Our -- our request and
14 preference and position is the government should be enjoined
15 until that hearing happens. If they want that hearing to
16 happen this week, we'll be here with witnesses this week.

17 So their harm will be incrementally small. They will
18 only be enjoined for a short while. If they want to do the
19 injunction in a month, we'll be here in a month. We -- we --
20 we will be here when -- whenever they're ready. But we are
21 asking you to hold the status quo and -- and to do what should
22 be noncontroversial.

23 The order -- the preliminary injunction, it's at the
24 record at 27. It was filed today. That's docket 27.

25 THE COURT: No, I've -- I've got it.

1 MR. LOEVY: Yep. So --

2 THE COURT: There are a few things that are in your
3 proposed order that were not in the order that Judge Vera
4 entered in LA, and so we would -- you know, I want to go
5 through some of those things, but -- and I guess some of the
6 questions I have are probably directed better towards the
7 government.

8 So anything further at this point, Mr. Loevy?

9 MR. LOEVY: No. Thank you for listening.

10 THE COURT: Okay. All right.

11 Now I'll hear from the government.

12 MR. SKEDZIEWLEWSKI: Good afternoon, Your Honor.

13 Thank -- thank you for -- for having me remotely. It --
14 it's -- it's appreciated.

15 So plaintiffs and organizational members are -- are
16 free to speak their minds however they -- they -- they -- they
17 prefer, but they cannot attack law enforcement officers, join
18 in groups that are engaging in riot, or in any other way
19 obstruct the law enforcement operations.

20 THE COURT: And -- and Mr. Sked- --

21 MR. SKEDZIEWLEWSKI: The idea that DHS --

22 THE COURT: I'm sorry. Whoops, I'm sorry,
23 Mr. Skedziewlewski. I don't mean to interrupt you, but I don't
24 believe that there's anything in terms of the affidavits that
25 I've read or anything in the complaint where anyone -- any of

1 these affected individuals were doing anything other than
2 peacefully showing up at various facilities or various areas
3 within the Northern District of Illinois, so not limited to the
4 Broadview facility, and were not engaged in violent protests
5 but were simply there and simply expressing their views; or
6 simply doing their jobs if they were journalists.

7 So I would agree with you --

8 MR. SKEDZIEWLEWSKI: Your Honor --

9 THE COURT: -- if any of these individuals were being
10 violent that DHS and these ICE officers under the law would be
11 able to engage in appropriate crowd control to protect the
12 safety of the other protesters who are there protesting
13 peacefully, as well as themselves and fellow officers. But
14 that's not what's alleged here in this complaint.

15 MR. SKEDZIEWLEWSKI: Your Honor, I would not expect
16 plaintiffs to submit evidence harmful to their case. And of
17 course the government has not yet had a chance, given that we
18 received these papers this morning, to submit our own rebuttal
19 evidence.

20 But what -- what I can tell the Court, based on my
21 conversations with the client that were admittedly rushed, and
22 our -- I will stipulate those are, you know, preliminary. But
23 what we know from -- on our end is that officers have been hit,
24 punched by -- punched by rioters at Broadview. Rioters have
25 shot fireworks at them, thrown bottles, rocks, and gas

1 canisters at officers.

2 An -- an individual drove his vehicle into an ICE
3 officer's vehicle intentionally trying to damage and injure
4 that officer, along with a litany of other attacks.

5 Now, I'm not alleging or -- or claiming, Your Honor,
6 that any named plaintiffs in this case are those perpetrators.
7 But just based on my, again, admittedly quick and cursory
8 review of plaintiffs' declarations this morning and some of the
9 video evidence submitted along with them, at -- at least one of
10 the named plaintiffs is in the middle of a -- of a crowd that
11 appears to be, you know, subject to an expansion of a secured
12 area by DHS.

13 And so that there's a very sort of obvious inference,
14 at least from my -- my point of view, that any injury or -- or
15 harm that may have come to -- to that individual, what is
16 incidental to DHS operations that are awful, that are directed
17 at securing the facility that many of these incidents occurred
18 at. And it can't be the case that officers have to be -- well,
19 allow me to rephrase that.

20 It -- it can't be the case that there are exceptions
21 to the -- the rule. When -- when DHS is -- has to secure a
22 facility -- and this facility from what I can tell, Your Honor,
23 has been under siege in these last few weeks. So admittedly,
24 we have not yet submitted evidence to that effect --

25 THE COURT: Well, but --

1 MR. SKEDZIEWLEWSKI: -- but they have to be able to --

2 THE COURT: -- but Mr. --

3 MR. SKEDZIEWLEWSKI: -- secure the facility --

4 THE COURT: But, Mr. Skedziewlewski, what -- I mean,
5 using the words "under siege" is fairly powerful language,
6 correct?

7 MR. SKEDZIEWLEWSKI: Correct, Your Honor. And -- and
8 we look forward to submitting evidence as soon as we can to --
9 to support that -- that claim.

10 Again, I -- I -- based on just plaintiffs' own
11 evidence, there -- there seem to be phalanxes of protesters
12 opposing the attempts by federal law enforcement officers to
13 permit the egress and -- and ingress to the Broadview facility
14 and to protect officers from attack, as I've mentioned with --

15 THE COURT: Which -- which they're --

16 MR. SKEDZIEWLEWSKI: -- and what we saw --

17 THE COURT: -- but that's what they're allowed to do.
18 Not attack officers, right? But they can peacefully protest by
19 standing in the driveway. They can peacefully --

20 MR. SKEDZIEWLEWSKI: No, Your Honor.

21 THE COURT: -- protest by standing around the
22 perimeter of the building.

23 MR. SKEDZIEWLEWSKI: Your Honor, as we -- as we --

24 THE COURT: At -- at least --

25 MR. SKEDZIEWLEWSKI: Oh, excuse me. I thought you

1 were finished.

2 THE COURT: Sorry.

3 I mean, at least, as I understand democracy, which may
4 not be how everybody understands it, but as I understand it,
5 you know, they -- protesters could stand in front of the
6 federal building, the -- here, the courthouse. They can stand
7 on the sidewalks. They could peacefully come into the lobby.
8 They could pray at the elevator banks if they want to.

9 Now, can they, you know, wait to ambush me and knock
10 me down as I come out of the elevator? No, they can't. But,
11 you know, this courtroom is full of people today. And if
12 people are here praying or if they are protesting holding up
13 signs, under the First Amendment, they're allowed to do that.
14 They're allowed to express themselves.

15 I had a sentencing this morning. If people disagreed
16 with the sentence that I was going to impose, there's nothing
17 to stop them from sitting in the back and holding up a sign and
18 expressing their opinion. And they're allowed to do that.
19 They're not allowed to do that violently. But they're
20 certainly allowed to do that peacefully under the First
21 Amendment.

22 And I am not allowed to do anything about it, right?
23 I can ignore the signs. I can be bothered by the signs. It
24 could bug me. I could disagree with that. But that doesn't
25 mean that -- unless they're being particularly disruptive such

1 that I can identify a compelling government interest, I can't
2 even remove them from the courtroom.

3 MR. SKEDZIEWLEWSKI: Well, Your Honor, respectfully, I
4 think the analogy doesn't hold or apply to the facts here. And
5 this -- and it's not our personal views that matter, but the
6 law. And the Supreme Court was very clear in -- in the
7 *Adderley* case from the sort of civil rights era that even when
8 peaceful protesters are not engaging in any violent conduct but
9 are trespassing on -- in that case it was property that, you
10 know, breaking -- detaining them and arresting them for
11 trespass was not a violation of their First Amendment rights.

12 And I would also say just building on Your Honor's own
13 analogy, that it's not that these protesters are just sitting
14 in your courtroom holding up signs, but that they're
15 interrupting the operation of the courtroom by making it
16 impossible for the Court to conduct its business.

17 THE COURT: But --

18 MR. SKEDZIEWLEWSKI: That's not First Amendment
19 protected activity.

20 THE COURT: Right. But that's --

21 MR. SKEDZIEWLEWSKI: And there's no case law to
22 suggest it is.

23 THE COURT: Right. But that's the burden, right, that
24 I would have to show before I did anything, is that they were
25 interrupting the proceedings to the extent that I have to order

1 them removed and that I need to show a compelling government
2 interest in order to do that, to override their First Amendment
3 rights. It's not absolute. Right? The First Amendment right
4 is not absolute. But I must, under strict scrutiny, show a
5 compelling government interest in order to curtail those rights
6 and show that the means by which I do that are the least
7 restrictive means.

8 MR. SKEDZIEWLEWSKI: But, Your Honor, a strict
9 scrutiny does not apply here because there's no viewpoint-based
10 discrimination in this -- in this case.

11 If these protesters were chanting --

12 THE COURT: No --

13 MR. SKEDZIEWLEWSKI: -- the opposite of the --

14 THE COURT: Hold on. Hold on. Hold on.

15 You can't possibly make that argument with a straight
16 face, right? Like there's no way, right, absolutely no way.
17 If people were showing up and saying, I support ICE; if people
18 were showing up and saying, remove people who are not here
19 lawfully as fast as you possibly can, handing out sandwiches
20 and lemonade and whatever else to ICE officers, there is no way
21 on God's green earth that those officers would be using tear
22 gas, rubber bullets, or anything else. I mean, we've got to
23 live in reality.

24 MR. SKEDZIEWLEWSKI: Your Honor, this -- this argument
25 is well within reality. Our -- the officers of DHS do not

1 target people because of their viewpoint. What they do is they
2 enforce federal law. And when individuals obstruct their
3 ability to enforce federal law, whatever their signs might say,
4 those individuals will be subject to expansions of a secure
5 area or be detained if they're engaging in criminal conduct or
6 otherwise be exposed to proper and appropriate and reasonable
7 use of crowd control devices.

8 But there's just simply no evidence in the record to
9 suggest that any officer at this Broadview site, or any other
10 site, took a special notice of a particular sign and was
11 offended by that particular language.

12 I mean, these officers, as I've mentioned,
13 Your Honor -- and we are -- look forward to getting this in the
14 record -- are being attacked. They're responding to being
15 physically attacked. And I don't know about you, Your Honor,
16 but if I was being attacked, I wouldn't really care whether the
17 person was on my side of the political aisle or the opposite
18 side of the political aisle.

19 And I think it's important for this Court, you know,
20 to not just assume because -- to say so, that each one of our
21 officers are motivated specifically to restrict plaintiffs'
22 First Amendment rights.

23 So -- so --

24 THE COURT: So --

25 MR. SKEDZIEWLEWSKI: -- because they had -- yes, Your

1 Honor.

2 THE COURT: Go ahead.

3 I'm sorry. Did you want to say something?

4 MR. BOWMAN: I wanted to respectfully object --

5 COURT REPORTER: Can you go in front of the mic,
6 please?

7 MR. BOWMAN: Yes, ma'am.

8 COURT REPORTER: Thank you.

9 MR. BOWMAN: I wanted -- Locke Bowman -- to
10 respectfully object to the government's characterization of
11 what is in the record at this time. There is a massive volume
12 of evidence to the contrary of what was just said. There is
13 indeed evidence that individuals are being targeted
14 specifically and in response to their statements.

15 For example, Reverend Black, one of the named
16 plaintiffs, is -- in -- in his affidavit says that he made
17 certain statements standing -- and there's a video of this. I
18 think it's Exhibit 41 in the record -- standing at a remove
19 from any ICE individual. And it is clearly apparent in video
20 that in response to the statements he made he was shot in the
21 head.

22 There is evidence in this record that ICE officers
23 have said to protesters who were saying words to the effect of,
24 We don't want you here; we want to protect our neighbors; and
25 statements to that effect that in response ICE officers gassed

1 them, saying, That's enough, in -- and -- in -- in reference to
2 what they were saying.

3 So to characterize the record as the government has
4 done is false. And I just wanted to respectfully object to the
5 characterization that was made.

6 THE COURT: All right. Thank you.

7 Go ahead, Mr. Skedziewlewski.

8 MR. SKEDZIEWLEWSKI: Your Honor, it's -- the record is
9 obviously one-sided and contains only plaintiffs' side of the
10 story at this stage in litigation.

11 And as I said, I've reviewed the -- some of the same
12 evidence that plaintiffs are describing right now. And I'm
13 sure Your Honor, if -- if she hasn't already, will do so as
14 well, and there are at least some cases -- I don't have the
15 number in front of me -- where whatever force is being used is
16 clearly in a -- in a crowd and individuals are in a sort of
17 chaotic melee, and there's a very logical inference to say
18 that -- that force used against nonviolent individuals in a --
19 in a scenario like that that's chaotic and where it's
20 impossible to distinguish, you know, nonviolent from violent
21 protester could be incidental and not motivated by viewpoint.

22 In fact, it's difficult to imagine how in some of
23 those sort of phalanx-like formations that anyone could take
24 note of the specific viewpoint of the individuals on the other
25 side who are, you know, engaged in a sort of melee.

1 MR. BOWMAN: And may I -- may I also add that
2 defendant --

3 THE COURT: You need the microphone. Sorry.

4 MR. BOWMAN: May I also add that defendant Noem -- and
5 this is on video, which is attached as an exhibit to our moving
6 papers -- has said to her subordinates, the ICE officers on the
7 street committing the infractions of the First Amendment that
8 we allege, said to them, You have full authority to arrest
9 them, to -- to attack them because of what they are saying, how
10 they are talking, and who they are associating with.

11 There could not be a more straightforward, indeed a
12 more gobsmacking admission that the purpose of the violence
13 that is alleged in the complaint and is apparent in the record
14 is to suppress speech, association, the reporting activities of
15 journalism, full stop.

16 MR. SKEDZIEWLEWSKI: Your Honor, plaintiffs' counsel,
17 respectfully, is not fully representing the Secretary's
18 statements.

19 In their brief, for example, they cite a passage from
20 a speech that the Secretary gave, and they clip out the middle
21 of the sentence. They quote her saying, The more they protest,
22 the harder ICE is going to come after them. They leave off the
23 conjunction that says: and commit acts of violence against law
24 enforcement officers.

25 What the Secretary is talking about when she talks

1 about words is incitement to violence. We've seen an
2 unprecedented escalation of political assassinations. That's
3 the kind of thing that the Secretary has in mind.

4 She -- we also know that ICE officers are being doxed,
5 followed to their homes, and their homes broken into, their --
6 their vehicles smashed and burglarized, because of this sort of
7 incendiary rhetoric painting them as fascists and -- and such
8 like as that.

9 That's the kind of thing that the Secretary has in
10 mind, not peaceful protests, not slogans, not telling the --
11 the federal government that the -- that people are unhappy with
12 their policies. That's all, of course, fine and protected by
13 the First Amendment. The -- the federal government, of course,
14 does not disagree with that.

15 What we -- what we disagree with is the idea that our
16 officers are engaging in some kind of a campaign to silence
17 these particular plaintiffs' speech.

18 So respect -- respectfully, Your Honor, while
19 plaintiffs may perceive that there's -- plaintiffs just
20 mentioned plaintiff Black, that he perceived that he was hit
21 because of his speech. I can understand why he might have felt
22 that way. But there's no evidence in the record suggesting
23 that the agent that hit him -- or may -- or is alleged to
24 have -- have fired upon him did so because of his speech.
25 That's a -- just an inference on their part. That is just pure

1 assertion.

2 And so the -- this -- this idea that strict scrutiny
3 should apply to law enforcement operations outside of the
4 detention facility to secure that facility just is not
5 supported by -- by case law or -- or by the facts in this case,
6 Your Honor.

7 MR. LOEVY: If I could rebut, Your Honor?

8 THE COURT: Well, let's --

9 MR. LOEVY: Okay.

10 THE COURT: -- see if Mr. Skedziewlewski has anything
11 further you want to add on this.

12 MR. SKEDZIEWLEWSKI: Would you like me to limit my
13 remarks, Your Honor, to the -- the sort of viewpoint -- the
14 viewpoint-based discrimination? Is that what you -- or would
15 you like me to sort of make my full argument now?

16 THE COURT: Why don't you make your full argument now,
17 and then I'll allow the plaintiffs to respond.

18 MR. SKEDZIEWLEWSKI: Thank you, Your Honor.

19 So plaintiffs also argue that -- well, I should -- I
20 should back up, Your Honor, because in my -- in my eagerness to
21 respond to your questions, I -- I may have skipped over a thing
22 or two.

23 So first, I would just like to say, since this
24 injunction would be forward looking, plaintiffs lack standing.
25 Whatever injuries may have occurred, what the plaintiffs would

1 need to show now under the Supreme Court's precedent in *Lyons*
2 would be that all of DHS's officers going forward will always
3 engage in this kind of, as they allege, viewpoint
4 discrimination or excessive force each time they have an
5 encounter with these specific plaintiffs.

6 It's not enough for them to say that -- that there's,
7 you know, excessive force being used at the -- the Broadview
8 facility. They would have to show that these plaintiffs will
9 be the ones targeted in the future.

10 THE COURT: Well --

11 MR. SKEDZIEWLEWSKI: And what the Supreme Court
12 said --

13 THE COURT: -- no, that -- that's not exactly true,
14 right? That these plaintiffs, in order to establish standing,
15 at least not the associational plaintiffs or organizational
16 standing -- or organizational plaintiffs, but the individual
17 ones simply need to show that because of what happened to them
18 in the past, right, is that they are not willing to go back and
19 protest in the future. That gives them standing. And so --

20 MR. SKEDZIEWLEWSKI: Your Honor, respectfully --

21 (Unreportable crosstalk.)

22 THE COURT: Right?

23 MR. SKEDZIEWLEWSKI: Respectfully, Your Honor, I -- I
24 believe that's the -- the merits case for a retaliation claim.
25 For them to have standing to receive a prospective injunction,

1 they have to show that the specific type of harm that they have
2 suffered will occur in the future. And there's just not
3 evidence of that in the record. Because what -- if there was,
4 we would know that Agent X specifically targeted, you know,
5 Plaintiff Y because of that individual's speech. But there's
6 nothing like that in the record.

7 THE COURT: Well, it -- the other thing is that
8 you're, you know, looking at -- were looking -- I think you're
9 asking too much, right? So first of all, one of the issues is
10 and one of the things that plaintiffs are asking for are that
11 the ICE agents wear some sort of identification, right?
12 Because obviously, no, you can't say, like, that Agent Smith is
13 going -- the plaintiffs will never be in a position to say,
14 Agent Smith is going to be working, you know, on Tuesday when I
15 plan on going back, and that Agent Smith then is going to use
16 excessive force on me when I'm at the Broadview facility on
17 Tuesday. Like, that's not what standing requires, and that's
18 not what standing asks of any plaintiff.

19 All that the plaintiff has to show is a continuing
20 present adverse effect of a defendant's past illegal conduct or
21 sufficient likelihood that they will again be wronged in a
22 similar way; that the plaintiff can show that an injury is
23 likely to reoccur, either by showing that the injury stems from
24 the defendants' written policy or that the harm is part of a
25 pattern of officially sanctioned behavior violative of

1 plaintiffs' federal rights; and that the plaintiffs may rely on
2 the allegations in their complaint or whatever evidence they
3 submit to meet their burden to establish standing.

4 MR. SKEDZIEWLEWSKI: Your Honor, in this case, there
5 is no policy of targeting individuals for their speech or of
6 using excessive force. In fact, on the contrary, DHS's
7 policies around these issues are compliant and specifically
8 designed to comply with the Constitution.

9 And the statements that plaintiffs cite to try to show
10 that there's a tacit policy or some kind of an informal
11 affirmation of misconduct are -- are in each case
12 misrepresented. So they cite the executive order, which is
13 titled "Countering Domestic Terrorism and Organized Political
14 Violence" as evidence for sort of sanctioning illegal conduct.

15 But, Your Honor, that executive order is specifically
16 designed to thwart political assassinations and to go after
17 domestic terrorism.

18 Plaintiffs misrepresent that order when they say that
19 it directs investigations into entities and organizations who
20 criticize support for law enforcement and Border Patrol. Not
21 so, Your Honor. That executive order says that portraying law
22 enforcement as fascists has been used to encourage violence and
23 then gives examples of the types of things that -- how people
24 have done that. It's -- it's directing investigations into
25 that type of incitement to violence.

1 It's not giving *carte blanche* to DHS to fire upon, you
2 know, individual protesters. And so since they say can't show
3 that there's a tacit policy of this --

4 THE COURT: Well, it goes back --

5 MR. SKEDZIEWLEWSKI: -- alleged misconduct --

6 THE COURT: Look, it -- it's very similar and very
7 analogous to bringing a *Mone*ll claim in a 1983 litigation,
8 right, where you are holding the ultimate decision-maker
9 responsible when there's an express policy that you can look
10 at; or you look at the pattern and practice of the government's
11 behavior that establishes, essentially, unwritten policy.

12 And here, what the plaintiffs are saying is the
13 following: This has been going on for weeks. And that over
14 the last four weeks or so, that DHS agents have systematically
15 been using excessive force against peaceful protesters at the
16 Broadview facility, at various other places in the Northern
17 District of Illinois where agents are attempting to enforce
18 immigration laws by detaining, questioning, seizing various
19 individuals across the Northern District of Illinois, and that
20 as they are encountering protesters who are opposing what the
21 agents are doing, that the agents are responding in a way that
22 violates the Fourth Amendment. And that gives them standing
23 that the -- this activity is going to continue.

24 There's nothing that I've read, and certainly I don't
25 think anything that you can tell me from the government's -- on

1 the government's behalf, that tomorrow ICE agents are going to
2 pack up and leave the Broadview facility; or that they are no
3 longer going to seek to enforce the immigration laws and
4 question people, stop people, go to a hospital and try and
5 question someone, as was seen on social media recently; that
6 they're not going to go to a school; that they're not going to
7 go to an apartment building; that this is going to continue.

8 Certainly, as long as this administration has made
9 this a priority, it will continue. Therefore, these protesters
10 are going to go back to protest. Journalists are going to go
11 and observe what is going on. That gives them standing. And
12 at this point, I don't believe that for any of the occasions
13 that have been listed by any of these plaintiffs or any of the
14 affidavits, that the government is going to come and tell me
15 that these agents did not act lawfully. In each of these
16 instances you're going to say that they acted lawfully.

17 So I think that standing is kind of a nonissue here.
18 But I'm happy to hear more.

19 MR. SKEDZIEWLEWSKI: Just -- just one more point on
20 standing, Your Honor.

21 The Court said that the -- the plaintiffs have
22 established -- or seems to believe that the plaintiffs have
23 established a pattern and practice of the alleged misconduct,
24 but it leaves off the cause of the actions that plaintiffs
25 complain of.

1 As I -- as I mentioned, and we look forward to getting
2 it into the record, officers are being hit and punched.
3 They're having fireworks shot at them, objects thrown at them,
4 their cars being smashed into by other assailants and -- and
5 vehicles. Another officer was almost run down by someone else
6 in a vehicle and was only -- only escaped potential serious
7 bodily injury -- injury or death when he discharged his -- his
8 firearm.

9 So the -- the -- the resistance that DHS is
10 encountering as it tries to lawfully enforce federal
11 immigration law is not First Amendment resistance. It's not --
12 it's not speech. They're encountering the violence. And so
13 the pattern and practice is a pattern and practice of officers
14 protecting themselves while they're engaging in law enforcement
15 action.

16 And so it sort of puts the cart before the horse, I
17 think, to say that they've established a pattern and practice
18 of misconduct without looking at the causes of this -- the
19 conflict.

20 THE COURT: And, you know, it's important to keep in
21 mind the procedural posture that we're in right now, right,
22 which this is an emergency TRO and they simply need to amass,
23 you know, enough evidence for me to find that they have
24 standing. It may very well be that by the time we get to a
25 preliminary injunction or before then that you can come back

1 and say that they don't have standing.

2 But certainly based on what is here in the record, I
3 do find that they do have standing. It's not that any of these
4 plaintiffs, you know, just happen to be in the wrong place at
5 the wrong time. It's rather that, you know, they are intending
6 on continuing to protest. They are contending -- in- --
7 intending on continuing to act in a journalistic capacity. And
8 therefore, there is a high likelihood that they may experience
9 what happened previously in the future.

10 So I do believe that at this point they have
11 established standing. And it's not speculative as the court
12 found in *Lyons*, but rather, they can point to a high likelihood
13 that this would occur in the future, which is sufficient to
14 give them standing.

15 But go ahead.

16 MR. SKEDZIEWLEWSKI: One final point on that Your
17 Honor, if I may. The -- the plaintiffs have cited the *L.A.*
18 *Press Club* as authority, as -- or -- or persuasive authority, I
19 suppose, and no doubt the facts are in -- in a general sense
20 analogous.

21 But the -- the court there at the TR0 stage actually
22 found that the plaintiffs lacked standing. That was
23 Judge Wilson's order. And he found they lacked standing for a
24 reason I haven't mentioned yet. I just want to submit it to
25 the Court's attention, which is that DHS's role in future

1 protests is uncertain. Local police may be involved, other
2 federal agencies may take over. And -- and -- and so it's
3 just -- it is uncertain in a number of ways, but it's even
4 uncertain as to who plaintiffs should be, you know, addressing
5 their -- their concerns to. And that -- that was how
6 Judge Wilson saw it in L.A. -- *L.A. Press Club*.

7 THE COURT: Except, you know, when it got to the
8 preliminary injunction stage, you know, Judge Vera saw things
9 very differently, and -- and it had the benefit of some time by
10 the time they got to the preliminary injunction stage. And I
11 don't believe, looking at the last four weeks, anyway, since
12 Operation Midway Blitz, or whatever we're calling it at this
13 point, started is that there doesn't seem to be -- and if, you
14 know, you've got other more recent updated information, I'm
15 happy to hear it -- but it doesn't seem to me that DHS is
16 intending to hand this over to anybody else, any other agency,
17 that it's been made abundantly clear, at least in the press,
18 that the City of Chicago has instructed the Chicago Police
19 Department not to participate, that it doesn't appear that
20 there are any other federal agencies that are ready, willing,
21 or able to jump in at this point.

22 I might be missing something, but this seems to be a
23 DHS initiative that DHS is going to be executing.

24 MR. SKEDZIEWLEWSKI: Your Honor, just to the extent
25 that the Court mentioned social media posts, if I may mention

1 one of my own. I've -- I've seen that National Guard troops
2 are expected in Chicago, but, like, I -- I cannot confirm that.
3 So I don't --

4 THE COURT: Well, all I can tell you is that there is
5 on the 17th floor an equally packed courtroom right now and
6 that they're -- they're having a similar hearing. So I have
7 not spoken to Judge Perry because I have been on the bench all
8 day, but I don't know that the National Guard will be here.
9 That's -- that's certainly the subject of a different lawsuit.

10 MR. SKEDZIEWLEWSKI: Understood. Thank you, Your
11 Honor.

12 So they may be there is -- is my only point, and that
13 creates uncertainty as far as the proper defendant.

14 So defendant -- plaintiffs also raise sort of
15 retaliation claims and claims under -- under RFRA. I don't
16 want to impose too much on the Court's time.

17 THE COURT: It's all right.

18 MR. SKEDZIEWLEWSKI: Defense obviously --

19 THE COURT: I'm here all day. Go ahead.

20 MR. SKEDZIEWLEWSKI: Okay. Well, in that case I'll at
21 least make a couple of points on those -- on those issues.

22 So of course in order to make a retaliation claim,
23 plaintiffs have to be engaged in First Amendment protected
24 activity. To the extent that any plaintiffs -- and, again, I
25 haven't, you know, had a chance to study the record carefully,

1 but to the extent -- extent that any plaintiffs are in the
2 middle of crowds that are engaged in unlawful activity, it's --
3 it's -- that's not First Amendment protected activity. But if
4 lawful dispersal orders were issued, if -- if crowds are
5 becoming violent, you know, mixing in with those crowds that
6 have been ordered to disperse is no longer First Amendment
7 protected activity.

8 To the extent that plaintiffs were engaged in First
9 Amendment protected activity, as we saw in the -- in the sort
10 of analogous case *L.A. Press Club*, what -- what officers do is
11 they target violent offenders with the use of force. And --
12 and there may be, because these crowds are dynamic, they're
13 shifting, these LLMs or sort of crowd control devices, they're
14 not -- they don't travel as fast as -- as bullets, and so it's
15 very easy for somebody to step in front of a PepperBall or --
16 or -- or a tear gas canister and have an incidental injury.
17 But that's not enough for a retaliation claim.

18 THE COURT: But --

19 MR. SKEDZIEWLEWSKI: So to the extent that --

20 THE COURT: -- but --

21 MR. SKEDZIEWLEWSKI: Yes, Your Honor.

22 THE COURT: -- some of the things that the plaintiffs
23 have noted is that it wasn't incidental, right, but that it was
24 directed at that individual plaintiff based on that plaintiff's
25 protected First Amendment activity.

1 And, you know, again, we are in early stages where in
2 an emergency TRO situation, so I understand that the government
3 doesn't have the opportunity to conduct discovery or kind of
4 marshal any evidence of its own. However, at least based on
5 what's before me in the record, that these plaintiffs are all
6 alleging that they were not engaged in any violence; they were
7 not around any violent protesters; and yet, they were on the
8 receiving end of these crowd control activities that were very
9 disproportionate to what was occurring at the time.

10 MR. SKEDZIEWLEWSKI: Your Honor, just if -- if I may,
11 at least one of these videos that I was able to -- to watch
12 before this -- this hearing, I mean, it shows, as I mentioned
13 earlier, sort of two -- two phalanxes on either side. And the
14 idea that in that type of an environment where a whole crowd is
15 being dispersed, that an individual can be retaliated against,
16 I -- I don't find that -- find that plausible.

17 But to the extent that plaintiffs have emphasized
18 incidents where an individual is standing apart and was -- and
19 was -- was hit, from my quick review of the record, it looks
20 like there may be a very small number of -- of cases that
21 are -- could even potentially fit that bill. And if that's the
22 case, then there's no pattern and practice. And so if they can
23 show a one-off here or there, that -- that doesn't get them the
24 pattern or practice that they would need for -- for -- for
25 standing.

1 I'll -- I'll move on if -- unless Your Honor has --

2 THE COURT: Yes.

3 MR. SKEDZIEWLEWSKI: -- questions to --

4 THE COURT: Go ahead.

5 MR. SKEDZIEWLEWSKI: -- the RFRA argument.

6 THE COURT: Go ahead.

7 MR. SKEDZIEWLEWSKI: So I -- I -- I had a chance to
8 quickly review some of the case law that -- that plaintiffs
9 cite on the RFRA issue, and none of it is -- is -- is
10 appropriate for -- for this situation.

11 They cite *Society of the Divine Word*. But there, the
12 RFRA claim, it's -- lost their RFRA claim on a -- on a variety
13 of grounds, including that they failed to identify any specific
14 religious belief that the plaintiffs there would have been
15 required to violate or comply with.

16 Now, here, my understanding is that some individuals
17 pray outside of this facility. But they're still free to pray
18 outside of the facility. It may just be they're slightly
19 further removed than they're accustomed to doing. They're not
20 required to, for example, say different prayers or -- or --
21 or -- or modulate their prayers in any way. Their -- their
22 religious activity is -- is simply unaffected by the DHS agents
23 securing the area outside of the -- the entrance to that
24 facility.

25 They also cite *Korte v. Sebelius*. But there, the --

1 the RFRA claimants were subject to governmental action merely
2 by operating, you know, preexisting businesses, right? And so
3 rather than undertaking voluntary actions on their own
4 accord -- so therefore, it's -- it's -- the -- the time, place,
5 and -- or the extent of their activities were -- well, let me
6 rephrase that, Your Honor.

7 Their activities were going to be affected no matter
8 what they did in that case. But here, the plaintiffs, while
9 they're free to pray anywhere in Chicago or the surrounding
10 area, they're just not free to, you know, interfere with
11 federal operations immediately outside of this -- of this
12 facility.

13 So -- so the cases are -- are I really think in a
14 pause. In one of the other cases, *West v. Radtke* -- that's
15 R-a-d-t-k-e -- there it was a religiously devout prisoner who
16 was subjected to cross-sex strip searches. And that just has
17 nothing in common with -- with this case; a person who is not
18 free to, you know, opt out.

19 Here, the plaintiffs can opt out by probably taking a
20 few, you know, hundred steps away. That's being generous.

21 So there -- there's just -- whatever may be going on
22 here, the -- the idea that people's religious exercise is -- is
23 being challenged under -- under RFRA I think is -- is quite a
24 stretch. Because RFRA requires that the government cannot
25 substantially burden the person's exercise. But, I mean,

1 it's -- it's not a substantial burden to conduct their
2 religious exercise a few yards away from the ideal location.
3 Unless -- I mean, one could imagine, you know -- I'll --
4 I'll -- I'll -- I'll skip that point, Your Honor.

5 So there's just not a burden on anyone's religious
6 exercise taking place at the -- at the ICE facility here.

7 I'll move on, Your Honor, to the -- to the use of
8 force claim if --

9 THE COURT: Yep.

10 MR. SKEDZIEWLEWSKI: -- unless Your Honor has
11 questions about RFRA.

12 THE COURT: Go ahead.

13 MR. SKEDZIEWLEWSKI: So to demonstrate excessive
14 force, plaintiffs have to show that the police use of force was
15 objectively unreasonable under the circumstances. Again, here,
16 the record is -- is one-sided, but the Court should still
17 consider the government's countervailing interests that are at
18 stake and whether the -- the person who was the subject of
19 force posed an immediate threat to the safety of officers or of
20 others, and whether that person was actively resisting arrest.

21 My understanding is that there have been a number of
22 arrests outside of this facility and that, you know, the force
23 used in those arrests, consistent with DHS policy, is always
24 going to be tailored to the necessity of -- of the arrest.
25 Where -- where resistance is present, the force is greater.

1 THE COURT: That -- so I --

2 MR. SKEDZIEWLEWSKI: And so --

3 THE COURT: I do have a couple of questions about
4 that.

5 So first, does DHS have a use of force policy?

6 MR. SKEDZIEWLEWSKI: Yes, Your Honor.

7 THE COURT: Okay. And with that use of force policy,
8 does it get -- you know, are there steps in the use of force
9 such that, for example, first, the officers are trained and
10 instructed to, for example, give a verbal warning? And then --

11 MR. SKEDZIEWLEWSKI: Yes, Your Honor.

12 THE COURT: Okay.

13 MR. SKEDZIEWLEWSKI: Oh, sorry. Go ahead.

14 THE COURT: No, no, go ahead.

15 MR. SKEDZIEWLEWSKI: Yeah, so officers are -- are
16 strongly encouraged to use verbal warnings whenever the
17 operation allows for it, right? So there may be circumstances
18 where warnings are simply not practicable. You could imagine
19 if someone's about to strike you, a warning doesn't make any
20 sense. But yes, as a general rule, warnings are the
21 preference. The least amount of force that's effective is --
22 is what's called for in the policy.

23 And we're happy to get that in the record as soon as
24 possible, Your Honor. But the -- the policy was designed with
25 case law in mind, with the Constitution in mind. It's --

1 it's -- it's designed to ensure that DHS is complying with --
2 with the law.

3 THE COURT: And has DHS's use of force policy changed
4 over time? Like, when was this policy last revised?

5 MR. SKEDZIEWLEWSKI: Going from memory here,
6 Your Honor, I believe that the current DHS use of force policy
7 was last modified in the Obama Administration. But I would
8 want to make sure of that and double-check that for you --

9 THE COURT: Okay.

10 MR. SKEDZIEWLEWSKI: -- before committing to that.

11 THE COURT: Okay. And -- I thought I had another
12 question.

13 Oh, and the -- I know you probably had a chance to
14 look at the proposed TRO.

15 MR. SKEDZIEWLEWSKI: Yes, Your Honor.

16 THE COURT: How much of what's requested in there
17 aligns with DHS's use of force policy and/or the policies
18 regarding crowd control, if there's a separate policy as to
19 that?

20 MR. SKEDZIEWLEWSKI: Your Honor, I think the only
21 piece that sort of tracks DHS's policy is that certain types of
22 projectiles should not be fired at individuals unless there's
23 an immediate threat of serious bodily injury. Though I think
24 as this is written, it seems to include -- it -- it may include
25 types of -- of crowd control devices that are not actually part

1 of DHS's policy.

2 So, yes, it's true that DHS -- you know, you can't
3 fire a tear gas canister at someone's head under DHS policy
4 unless there's essentially -- you know, lethal force is
5 about -- is justified. That's DHS's policy.

6 But many of these other prongs in the sort of various
7 paragraphs of the proposed order are -- they -- they diverge
8 from DHS's policy. And we have declarations in the *L.A.*
9 *Press Club* case detailing exactly why there -- and some of
10 these are similar to that case, why -- why these -- why
11 these -- why the proposed order would just be unworkable and
12 actually endanger both law enforcement officers and the general
13 public in these volatile situations.

14 So I'm happy to walk through some of that with you,
15 Your Honor, if we have a few more minutes.

16 THE COURT: Yeah.

17 MR. SKEDZIEWLEWSKI: And maybe starting at sort of
18 the --

19 THE COURT: Well, and it -- what I --

20 MR. SKEDZIEWLEWSKI: -- sort of at its highest level.

21 THE COURT: Well, what I want to do is kind of go
22 through the various sections of the proposed order. But why
23 don't we kind of finish this piece up. I'll let the plaintiffs
24 respond, and then we can kind of walk through the order.

25 The -- another one of the questions that I have,

1 though, is what's DHS's policy with regard to methods of crowd
2 control?

3 MR. SKEDZIEWLEWSKI: That policy is many pages long,
4 Your Honor. It's extensive. It's very detailed. It gets into
5 the nitty-gritty about this particular system; you know, this
6 particular crowd control device versus that one and what can be
7 done with it and what can't be done with it.

8 So, I mean, the -- the -- the overall principle is
9 DHS's use of force policy is designed to respect
10 the Constitution. It's designed to protect human life and to
11 use the minimal amount of force necessary in whatever the
12 situation is to effectuate the end of the protection of human
13 life. So that's sort of the overarching principle.

14 THE COURT: And -- and is there --

15 MR. SKEDZIEWLEWSKI: And we can, of course, get you
16 the full policy.

17 THE COURT: Is there a separate policy regarding crowd
18 control, or is it folded into the use of force policy?

19 MR. SKEDZIEWLEWSKI: The use of force policy I believe
20 covers both. You know --

21 THE COURT: Okay --

22 MR. SKEDZIEWLEWSKI: -- hands-on -- hands-on crowd --
23 you know, crowd control and -- all the different devices.

24 THE COURT: All right. And would creating a First
25 Amendment zone, would that fall under one of the lawful methods

1 of crowd control in DHS policy?

2 MR. SKEDZIEWLEWSKI: I don't believe, Your Honor, that
3 it was DHS that create -- I don't think plaintiffs are alleging
4 that DHS created a -- a First Amendment zone. What DHS does do
5 in their policy is they will try, whenever it's possible, if
6 there are journalists present at a protest to -- if -- if there
7 needs to be an expansion of the secured area due to safety
8 concerns, they'll try to relocate those journalists to a
9 further remove so that they can still observe the protest but
10 not be subject to the expansion of the secured area.

11 So maybe something like that happened in this case,
12 Your Honor, and people may have interpreted that as a free
13 speech zone. But to my understanding, DHS does not use that
14 category, and it's not a part of their use of force policy.

15 THE COURT: Okay. All right. Then those were the
16 questions that I had regarding the Fourth Amendment and use of
17 force issues.

18 So I'll let you pick up where you left off.

19 MR. SKEDZIEWLEWSKI: Thank you, Your Honor.

20 Since we're going to walk through the -- the proposed
21 order, I'll just make a couple of high-level points.

22 First, plaintiffs here are seeking a universal
23 injunction that's been, you know, prohibited by the Supreme
24 Court in the *Casa* decision.

25 THE COURT: Oh, no. That's --

1 MR. SKEDZIEWLEWSKI: But that decision is often
2 misunderstood as according to --

3 THE COURT: But that's not what I'm understanding that
4 they're asking for. They are asking for an injunction that
5 covers the Northern District of Illinois; is that correct?

6 MR. LOEVY: It is, Your Honor.

7 THE COURT: Yeah.

8 So they're not asking for a universal injunction.
9 They're simply asking for an injunction within the district.

10 MR. SKEDZIEWLEWSKI: Your Honor, but the word
11 "universal" here as the Supreme Court's decision doesn't refer
12 to geography. It refers to classes of individuals. So what
13 plaintiffs seek here are -- is relief for, in their words, any
14 person or journalists, full stop, or members of the press or
15 religious practitioners. So that would cover any religious
16 practitioner that happens to enter into the Northern District
17 of -- of Illinois. That's a universal injunction --

18 THE COURT: No.

19 MR. SKEDZIEWLEWSKI: -- not because it's -- of its
20 geography, but because it applies to plaintiffs who are not
21 before the Court -- or rather, parties who are not before the
22 Court.

23 THE COURT: No. So they're -- they are -- it would
24 only be those people, right, who are attempting to exercise
25 their First Amendment rights in a way that would cause them to

1 be engaged with ICE officers. So it's not any person
2 exercising their religious beliefs or any person protesting or
3 any journalist covering any event. It is limited --

4 MR. SKEDZIEWLEWSKI: But, Your -- Your Honor, that's
5 their language. Any person is their language. That's not
6 mine.

7 THE COURT: Well, and, you know, that's why I'm a
8 judge and I get to modify the language so that it doesn't
9 violate the Supreme Court precedent.

10 But go ahead, Mr. Bowman.

11 MR. BOWMAN: I -- I -- and I just wanted to jump in
12 and be clear that we are asking for relief on behalf of the
13 individuals and the putative class that we represent, which is
14 defined specifically as you indicated, Judge, with the
15 additional proviso that it is those peacefully protesting --

16 THE COURT: Mm-hmm.

17 MR. BOWMAN: -- who comprise the class, and I -- I --
18 I think that responds to a lot that's been said here.

19 THE COURT: All right. Go ahead, Mr. Skedziewlewski.

20 MR. SKEDZIEWLEWSKI: Well, just to respond to that,
21 the Court should -- can of course give whatever relief it
22 thinks is necessary to award complete relief to the parties
23 before the Court, including if there's a class, although no
24 class has been -- has been formed yet.

25 But it can't give relief to any peaceful protester,

1 which is I think what I just heard counsel for the other side
2 say.

3 THE COURT: Well, no, and again --

4 MR. SKEDZIEWLEWSKI: So that -- it's not --

5 THE COURT: Yeah, no, I mean, it's not any peaceful
6 protester protesting anywhere at all any thing, right? It's
7 any peaceful protester that would likely be encountering an ICE
8 official. So, you know, if somebody wanted to come and protest
9 downstairs, this injunction would not cover that individual.
10 It's not any protester anywhere within the Northern District of
11 Illinois. It is --

12 MR. SKEDZIEWLEWSKI: It is any protester -- sorry,
13 Your Honor. I didn't mean to interrupt.

14 But it would be any protester anywhere within the
15 Northern District of Illinois who encounters an ICE officer.
16 That's a universal injunction.

17 THE COURT: That's not universal.

18 MR. SKEDZIEWLEWSKI: It applies to any protester --

19 THE COURT: Any protestor --

20 MR. SKEDZIEWLEWSKI: -- in any case.

21 THE COURT: -- and then caveated by all of these other
22 things. That's not universal. That's not universal.

23 So go ahead.

24 MR. SKEDZIEWLEWSKI: Anyone outside of the parties
25 before the Court could fit that description is what makes it

1 universal. The -- the fact that a bunch of nonparties to the
2 suit, including individuals who may not even be -- fit the bill
3 of the class description would -- would fall within the --
4 the -- the parts of this proposed order.

5 THE COURT: Right. But, again, that's something that
6 can be tweaked, and it -- and I intend on tweaking it so that
7 it tracks the proposed language -- or tracks the language of
8 the proposed class. So it's not universal. It is to cover
9 this proposed class of individuals --

10 MR. SKEDZIEWLEWSKI: Okay.

11 THE COURT: -- which doesn't make it universal.

12 MR. SKEDZIEWLEWSKI: I'll --

13 THE COURT: But go ahead.

14 MR. SKEDZIEWLEWSKI: I'll touch on some of the
15 specifics in the proposed order, Your Honor.

16 They -- the plaintiffs ask for law enforcement
17 officers to display visible identification with their name
18 and/or badge number. Unfortunately, thanks to -- to doxing, as
19 I -- I mentioned briefly earlier, agents have been followed
20 home from the facility in question here, their homes broken
21 into, property damaged. I would submit to the Court that
22 requiring officers to display badges in this way could easily
23 endanger their lives --

24 THE COURT: Well --

25 MR. SKEDZIEWLEWSKI: -- given the -- the -- the --

1 threat by organizations who are intent on doxing them and their
2 families.

3 THE COURT: Okay. Except that, right, like, I can't
4 tell you how many judges have been doxed. I can't tell you how
5 many judges have received death threats. I can't tell you how
6 many judges have received death threats on the parts of --
7 on -- directed at family members, that they've had, you know,
8 pizza sent to their house, which is probably the least -- the
9 most innocuous and least harmful thing, all the way to having
10 family members shot right in front of them.

11 So it's unfortunately part of the cost of doing
12 business as a public servant in the government, that
13 unfortunately society has devolved to the point where anyone
14 who disagrees with how you do your job is subjected to threats,
15 is subjected to harassing activity, and at times subjected to
16 harm.

17 I don't know if DHS agents have a badge number that's
18 assigned to them, or in the parlance of the Chicago Police
19 Department, a star number, but something that is identifying.

20 And here's the issue and here's why I think it's
21 important: The plaintiffs, whether it's these plaintiffs or
22 someone who is part of a putative class going forward, can't
23 bring a lawsuit against Joe or John or Jane Doe, agent, right?
24 And that if something happens and they cannot identify this
25 individual, their rights cannot be redressed.

1 And I am very sympathetic and completely understand
2 how difficult it is when someone disagrees with you and decides
3 to harass you, to threaten you, to follow you home. It's
4 scary. But that doesn't mean that then you get to do this job
5 and be anonymous. That -- those two things don't match up.

6 MR. SKEDZIEWLEWSKI: Your Honor, respectfully, while I
7 appreciate the sympathetic remarks, at the same time, this is
8 more than being scary. ICE officers are being fired at with
9 weapons. There was -- I mean, there was an attack in Texas
10 where a marksman is -- is -- was shooting at -- at ICE
11 officers. Officers all over the country have been specifically
12 targeted with violent attack -- this is not just harassment.
13 These are individuals who are trying to kill ICE officers at
14 their homes while they're doing their job.

15 THE COURT: And I hear you --

16 MR. SKEDZIEWLEWSKI: It's not setting a --

17 THE COURT: I hear you. I do. I really do. But I
18 have to balance both of these things. Look, if I didn't -- you
19 know, if I could be anonymous and issue opinions anonymously, I
20 would do that too, right? I don't want to get threatening
21 e-mails and correspondence. I don't want the marshals sitting
22 outside of my house. I don't have to -- want to have to worry
23 about my family members. But under the rule of law, it's
24 important to be transparent. That's what makes it valuable.
25 That's what gives people trust in the system.

1 And I am sympathetic, trust me, to what these officers
2 are going through. But -- but they need to have -- there needs
3 to be some way to identify them, whether it's by -- and that's
4 why I'm asking this question about, you know, is there a badge
5 number or a star number or some other means of identification
6 that at the very least somebody can take that down and say,
7 this is a unique identifier to this individual that did this to
8 me; and so when I am filing a lawsuit, this is the person that
9 I'm suing, and we can identify this person by this -- by this
10 number.

11 Does that exist in DHS?

12 MR. SKEDZIEWLEWSKI: Your Honor, I don't have the
13 details of the badges that DHS gives to its agents or ICE and
14 CBP, and there may be variation across the component agencies
15 here. I know as a -- I know that there are badges, but I -- I
16 don't know any details as to whether they're unique
17 identifiers, whether they're anonymous -- whether they
18 anonymize the -- the -- the agents. That's something I have to
19 go to the client to get more information on.

20 But what I do know is that there's no rule of law
21 requiring the Court to have the officers display their badges.
22 And to the extent Your Honor feels that a balancing needs to be
23 done, I sympathize with that. But the balance between human
24 life and constitutional harms is very clear. It's human life
25 that prevails if that's the balance.

1 THE COURT: Well, I'm not -- I am not proposing that I
2 would put the agents in harm's way, right? And that's why I'm
3 asking about badge numbers or some other identifier that I
4 think appropriately balances any potential harm to an agent
5 versus someone's ability to use our court system to seek
6 redress for injuries that they have suffered.

7 MR. SKEDZIEWLEWSKI: Your Honor, the specific agents
8 would have immunity regardless -- the lawsuit would be against
9 DHS regardless.

10 THE COURT: Well, it would be against DHS regardless,
11 but we'd need to know in a *Bivens* lawsuit --

12 MR. LOEVY: *Bivens*, yes; FTCA would be against -- the
13 government would substitute in. But the plaintiff would want
14 to know who the defendant was so they could depose them --

15 THE COURT: Right.

16 MR. LOEVY: -- and hold them accountable.

17 MR. SKEDZIEWLEWSKI: That would of course come out in
18 discovery. That doesn't need to be on their chest in the
19 middle of a riot with violent terrorist organizations
20 attempting to dox ICE and their family.

21 THE COURT: Well, I think we have a different idea of
22 what's going on in Chicago, but...

23 All right. Anything else before I let the plaintiffs
24 respond? Because we'll go through the order itself.

25 MR. SKEDZIEWLEWSKI: Well, if we'll go through the

1 order itself, Your Honor, then the rest of what I have to say
2 can wait.

3 A quick point on the equities. So just there is a
4 compelling interest here, the protection of federal property
5 and personnel. Plaintiffs, while they do have an interest, of
6 course, in First Amendment expression, they don't have an
7 interest in joining in riots, nor do they have an interest in
8 thwarting the enforcement of federal law.

9 And the -- and the press does not have special
10 interests over and above the general public. And so I think
11 the plaintiffs have failed to meet their burden of showing that
12 they're entitled to -- to preliminary relief for all the
13 reasons that I stated. But I'm happy now after their rebuttal
14 to -- to say more about the proposed order, Your Honor.

15 Thank you.

16 THE COURT: Okay. Thank you.

17 Go ahead.

18 MR. LOEVY: Thank you, Your Honor.

19 You know, in some ways we're talking past each other.
20 Nothing about the order we're asking you to enter would stop
21 DHS from confronting violent rioters or Antifa, chaotic melees,
22 or even thwarting law enforcement. The order that we're asking
23 you to enjoin protects peaceful law -- protesters.

24 And, of course, it's not even clear why
25 Mr. Skedziewlewski would oppose that. If the order did not in

1 any way inhibit law enforcement's ability to deal with violent
2 obstruction of law enforcement but did just protect peaceful
3 protesters, does the government even want to be able to attack
4 peaceful protesters for the -- for the message? I mean, in
5 theory, why are they against it?

6 Now, we got to look at the posture here, and we're
7 just asking Your Honor to enter the TRO until there could be a
8 preliminary injunction. And it's possible that the universe
9 will -- they'll satisfy you that there's blood in the streets,
10 there's riots, it's just a chaotic, you know, situation. And
11 in that scenario -- because like counsel pointed out, you
12 haven't yet seen the evidence -- maybe you will say, you know
13 what, there's maybe a court doesn't need to be concerned about
14 protesters because there's a -- there's a revolution in the
15 streets.

16 But I don't think they're going to be able to prove
17 that. You know, we have declaration after declaration
18 attached. I've seen the videos. It's a -- it's soccer -- a
19 lot of them are soccer moms yelling at these law enforcement
20 officers and, you know, skinny kids, and -- and they're --
21 they're not obstructing. They're speaking. They're exercising
22 very American rights.

23 And I get it that -- that the ICE agents don't want to
24 hear it, but that's not the same thing as a legitimate law
25 enforcement concern coming back. And that -- so we'll see what

1 the hearing shows at the preliminary injunction hearing.

2 As counsel pointed out, you know, maybe there's a
3 one-off; maybe somebody pushed somebody in the last, you know,
4 month. But for the most part, I think the evidence is going to
5 show people are -- are doing a very American thing, they're
6 protesting. And against that backdrop, the TRO should be
7 entered and should be extended.

8 We submitted specific evidence. It's opinion 2 in the
9 Gil Kerlikowske affidavit that the -- the injunction is safe
10 for law enforcement. This is a guy who is a high-level DHS guy
11 who's saying, look, the injunction that I helped fashion in LA
12 and I helped fashion in Chicago doesn't impede law
13 enforcement's ability to do what they got to need to do. It is
14 workable and it can protect everybody's rights and be the right
15 balance.

16 Counsel made the point about rhetoric. You know, it
17 was a while ago, but I -- I thought it was worth mentioning
18 again. He said, look, speakers are saying things and people
19 are assassinating people and speech is getting very -- very
20 sharp and very dangerous. Your Honor, they're proving too
21 much. They're really admitting -- like, we don't want people
22 speaking. Next thing you know, there's going to be political
23 violence. Next thing you know, people are going to, you know,
24 do terrible things.

25 Your Honor should -- is not here to debate the merits

1 of the First Amendment. People can say to ICE agents, cut it
2 out, get out of here, we don't want you. It's not a response
3 for counsel to say, well, look where that goes. Maybe people
4 start assassinating people. We live in a country for better,
5 for worse that has a First Amendment. People can speak. And
6 if other people are going to, you know, use that speech and
7 take it in bad directions, that's not a reason to not grant the
8 relief we're seeking.

9 I think the standing issue has been covered. Just as
10 an aside, though, that it's an interesting analogy to the
11 policy and practice. Really what you got here is continuing
12 the analogy is a failure to train because these are federal
13 agents who are counterterrorism agents. They've been trained
14 to protect what they've been told is an invasion at the border.
15 They don't have any idea how to do urban crowd control in a
16 peaceful speech. That's not what you train a counterterrorism
17 person to do. So in a sense, it is a policy, it doesn't fit,
18 and there is standing.

19 I think the excessive force, the unreasonableness,
20 again, I'd -- I'd refer you back to Kerlikowske's affidavit.
21 He is saying that what these declarations show, what this video
22 shows, is indiscriminate violence. The officers are saying, we
23 don't like what you're saying. They're throwing tear gas out
24 the window. You know, they're -- they are -- it's both
25 indiscriminate and targeted. There's -- they're targeting the

1 press. They are targeting people who they're, like, basically
2 saying to shut up. But the -- the overall opinion that he's
3 given, which I believe is going to be unrebutted, is that this
4 is an unreasonable use of force and it should be -- it should
5 be enjoined.

6 The other point about the doxing. You know, we live
7 in a country where law enforcement officers every day wear a
8 name tag. You know, Chicago police officers wear a badge. And
9 if you don't like how you're treated by that Chicago police
10 officer, you can go make a complaint. And there's costs and
11 benefits.

12 I mean, you could make a lot of arguments why they
13 shouldn't wear a badge. And you can make some arguments -- a
14 name tag. You can make some arguments why they should. We as
15 a society have come out the other way. Yes, one in a million
16 could lead to a -- you know, a tragic outcome. Although the
17 examples counsel say where somebody is like shooting at -- at
18 an ICE agent or attacking an ICE agent, that's -- they're doing
19 their job in the street out in the open. There's always going
20 to be a risk people are going to retaliate against ICE agents.

21 You know, it's -- it's a -- it's a rhetoric just to
22 say, well, maybe they'll order pizzas, maybe they'll follow
23 them home. Maybe. You know, there is not any evidence that's
24 going to outweigh.

25 Because even if they had two examples where someone

1 got doxed, I want to bring it back to the enormous benefit that
2 we as a society get for having law enforcement officers
3 identify themselves.

4 You know, you made a great point, Judge, that how do
5 you sue if you don't know who to sue. But I'm going to take it
6 one step further. It's not just about that. If you're a law
7 enforcement officer wearing a mask, confident that nobody knows
8 who you are, and there's going to be no accountability, that's
9 a bad formula. And you're surrounded by your buddies who have
10 the same immunity and the same impunity, you know, you don't
11 have to be a great study of human history to know that when
12 people are anonymous and they're acting with their buddies and,
13 you know, maybe it is a chaotic situation, accountability is a
14 cost, but in a Democratic society, it's -- it's a tremendous
15 benefit. And I hope you will decide to enter that as part of
16 the injunction.

17 You know, we don't know what's happening in the
18 streets. I forgot to make this point. And maybe in the future
19 it's going to be a lot harder to know what the truth is. You
20 know, these deepfakes and stuff, you may have to judge two
21 years from now. You don't know what's going in the streets.
22 You weren't there. And you're -- nothing is going to be
23 reliable.

24 But we still do live in a world where we have evidence
25 about what's happening and we have declarations and we have

1 video. And we've provided to this court and what that evidence
2 shows is peaceful protesters exercising their very American
3 rights being met with inappropriate violence, being gassed,
4 being shot at, and being -- having their First Amendment rights
5 violated.

6 So that brings you back to the *L.A. Press Club*. It is
7 true that that -- that TR0 was denied. But you -- you nailed
8 it, Your Honor. It was -- it was brought up just a few days
9 after it all started. Nobody knew what -- what was going on;
10 nobody knew how long it was going to last. This is an entirely
11 different procedural posture where we're months later, where
12 there's 40 affidavits, where there's a much more fulsome record
13 of targeted violence.

14 So in LA, once they did figure out what's going on,
15 they entered the injunction, and that was after the hearing.
16 And I believe Mr. Skedziewlewski might have been part of those
17 proceedings. But the fact that the TR0 was entered very
18 quickly, there wasn't enough grounds, shouldn't control this
19 outcome.

20 I think you should do what we suggested, is enter the
21 TR0 now. If the government says this is going to really cramp
22 our style and cause us all kinds of prejudice, then as quickly
23 as they'd like, have a hearing. Instead of hearing about
24 Antifa riots, show us evidence of Antifa riots. Let's see the
25 evidence, and then you can make a decision. We'll do it fast,

1 slow, or medium, but I think the TRO should be entered in the
2 meantime.

3 THE COURT: All right. Anything further,
4 Mr. Skedziewlewski?

5 MR. SKEDZIEWLEWSKI: Yes, Your Honor.

6 Plaintiffs' counsel mentioned that the order would not
7 affect law enforcement officers. I guess we'll have a chance
8 to talk about this in a moment, but we have declarations in the
9 *L.A. Press Club* case, many of them, from high-level DHS
10 officers, CBP, ICE, DRO, explaining in detail how a very
11 similar order will not just impact operations, make it -- the
12 enforcement of federal law more difficult, but will be totally
13 unworkable and make the job of law enforcement dangerous.

14 It will -- it will put officers in a dangerous
15 catch-22 where they have to decide between doing what's
16 required by their job to protect themselves and the people
17 around them and being held in contempt when they are alleged to
18 have violated the order, or hesitating and exposing themselves
19 to serious harm. That's Monday-morning quarterbacking of the
20 worst kind, and it's -- it's not warranted by the -- by the --
21 by the facts here, and is -- is also not tethered to the
22 specific allegations.

23 I mean, at most, even if we take all of plaintiffs'
24 allegations as true and that they've established their claims,
25 but at most a narrow injunction instructing DHS to stop

1 targeting specific plaintiffs who could establish their Article
2 III standing to sue for prospective relief would be
3 appropriate.

4 In other words, if plaintiffs were saying DHS
5 targeted Mr. Black, well, then, the injunction should say stop
6 targeting Mr. Black. It's very simple. They're asking for a
7 sweeping injunction that would essentially allow plaintiffs'
8 counsel and this Court to write a new DHS use of force policy.
9 The facts don't support it.

10 Also, we don't need to show that there's a revolution
11 in streets. Maybe that was just rhetoric by the other side.
12 But all the DHS officers need to show in order to use force is
13 that there's a threat to safety, to theirs or to their
14 colleagues or to the public. And that's -- what we saw in *L.A.*
15 *Press Club* is that DHS is not -- is not just using force
16 willy-nilly, but that depending on the degree of the violence
17 they're met with, that determines the use of force that -- that
18 they deploy. In some instances, there's no force; in other
19 instances, there's more, and that's because of the violence
20 that they're met with.

21 THE COURT: So --

22 MR. SKEDZIEWLEWSKI: So it's a specific -- we don't
23 need blood in the streets and revolution. It --

24 THE COURT: No, it --

25 MR. SKEDZIEWLEWSKI: -- but specific acts of violence

1 against officers is what we're responding to.

2 THE COURT: And I -- I don't believe that you need a
3 full-fledged revolution, right, but that you need to ensure
4 that DHS follows its own policies, that DHS follows the
5 requirements and limitations of the Fourth Amendment so that
6 when agents exercise force, that it has done so in a way that
7 is considered, that is lawful, and that is commensurate with
8 what is going on at that time with those particular officers.

9 So, no, you don't need a revolution in the streets.
10 But it cannot be the case, right, that DHS officers are given
11 *carte blanche* to use whatever force they believe necessary
12 regardless of the circumstances. And I know that's not what
13 you're saying, and that's certainly not what the plaintiffs are
14 saying, but it appears, based on the evidence before me, that
15 there have been instances where these plaintiffs have a
16 reasonable likelihood of success on the merits to show that not
17 only has DHS violated their Fourth Amendment rights, but also
18 their First Amendment rights. And so at this point that -- a
19 TR0 would be appropriate here.

20 You said that the order entered in LA was unworkable
21 and that it was problematic.

22 In what ways was it unworkable?

23 MR. SKEDZIEWLEWSKI: Certainly, Your Honor.

24 So maybe one of the -- the biggest things to note
25 is -- is a similar definition of journalism here that's vague

1 and unworkable. And I can say why.

2 The injunction doesn't specify, for example, which --
3 or the proposed order, Your Honor, rather, does not specify
4 which -- how many of so-called indicia of journalism or -- or
5 press membership are necessary for someone to qualify as a
6 journalist.

7 The proposed order also states that a journalist --
8 or -- is -- is anyone standing off to the side of a protest not
9 engaging in protest activities. These are hopelessly vague
10 terms. I mean, these protests involve crowds that are
11 constantly shifting and moving, and it's -- it's -- it would be
12 impossible for a DHS agent to determine who is engaged in a
13 protest activity.

14 In fact, my understanding of protests is really that
15 the main point is showing up. And so presence is -- could be
16 understood as engaging in the protest. So it's -- it's -- it's
17 far too vague.

18 THE COURT: All right.

19 MR. SKEDZIEWLEWSKI: Standing off to the side -- so
20 it's unhelpful --

21 THE COURT: But --

22 MR. SKEDZIEWLEWSKI: -- because, first of all, it's --

23 THE COURT: But --

24 MR. SKEDZIEWLEWSKI: Yes, Your Honor.

25 THE COURT: So why don't we do this, because I don't

1 want to necessarily go down a rabbit hole, right, is that let's
2 go through -- you don't have anything specific, then, to tell
3 me, like this is our experience from trying to implement the LA
4 order. Here are the issues that we have had. You know, we've
5 been called into court --

6 MR. SKEDZIEWLEWSKI: So --

7 THE COURT: -- because of this issue or that issue.
8 And you don't have that? Or do you?

9 MR. SKEDZIEWLEWSKI: Everything I was just saying is
10 from -- is from declarations from CBP officers. Not -- it's
11 not -- not attorney argument. That's CBP's view of the
12 injunction. And I have a lot more of that sort of thing that I
13 can describe where they're telling us, this is how -- this is
14 why we can't work with this order, our officers won't know what
15 to do, and -- and -- and the like.

16 We haven't yet been hauled back into court in the
17 Central District of California for, you know, contempt or
18 anything like that, but the order is quite new and we're
19 seeking a stay in that case presently for the same reasons that
20 I'm articulating now, mainly that DHS simply can't -- can't
21 live with this order.

22 THE COURT: All right. Well, it's been --

23 MR. LOEVY: A month.

24 THE COURT: It's been a month.

25 MR. LOEVY: Yeah.

1 THE COURT: So as of today, you don't have anything
2 super specific. You haven't been hauled back in where the
3 plaintiffs have said they're violating this provision of the
4 order, that provision of the order, correct, over the last
5 month?

6 MR. SKEDZIEWLEWSKI: No, Your Honor.

7 THE COURT: Okay. All right. Then why don't we go
8 through the order, if that makes sense.

9 Okay. All right. So I'm looking at 1.a. And the
10 question that I have is the last sentence in 1.a. So it says:
11 "Defendants may ask a journalist to change location to avoid
12 disrupting law enforcement, as long as the instructions are
13 clear and the press have time to comply and sufficient
14 opportunity to report and observe."

15 The question that I have is the phrase "the
16 instructions are clear." I'm not sure I know what that means
17 or that I would be able to -- if I -- right? Like I'm reading
18 this order from the perspective of an ICE agent, right, and so
19 I want it all to be written in a way that if I am this agent, I
20 know what I can do and what I can't do.

21 "The instructions are clear" seems kind of vague to
22 me. And I would be inclined to take that out and say that "The
23 defendants can ask a journalist to change location to avoid
24 disrupting law enforcement, as long as the press has time to
25 comply and sufficient opportunity to report and observe."

1 MR. LOEVY: Maybe what they're getting at there is,
2 like, as long as the instructions are clear, if you're in a
3 situation and they say to the press guy, move, and he's like,
4 okay, you know, well, you're under arrest, because that's
5 what's been the problem, is that they're finding reasons to
6 arrest people and then release them. So I think -- this is
7 taken verbatim from LA, and it was fashioned by the DHS expert,
8 but Mr. --

9 THE COURT: Well, "the instructions are clear" part, I
10 don't know -- hold on. I've got so many pieces of paper.

11 Yeah, that was not there. That was not in the LA
12 order, and I think there's a reason why --

13 MR. LOEVY: Huh.

14 THE COURT: -- is that even using your example,
15 Mr. Loevy, you know, an agent may believe saying, I told you to
16 move is clear, right? Could I be more clear? Sure. I can
17 tell you, move 20 feet away. I can tell you, you know, move
18 down the sidewalk. I can tell you, move into this particular
19 zone. I can also just say, move, and expect that you will
20 move, and I believe that that's clear.

21 So that's -- that's my issue with this language.

22 MR. BOWMAN: Could I suggest an alternative
23 formulation?

24 THE COURT: Sure.

25 MR. BOWMAN: So long as the instructions are specific

1 as to timing and location.

2 THE COURT: I guess I can also see, though, where that
3 would be -- could be problematic, right? If I were to say,
4 move over there now, that is specific, right, because I'm
5 saying there and I'm saying now, but that could be anything,
6 right? And so I just -- I don't want to make it more
7 complicated or difficult than it needs to be.

8 I think that it is sufficient to say that "The
9 defendants could ask a journalist to move location, and give
10 the journalist time to comply and an opportunity to report and
11 observe." Right? So you can't tell somebody, go back behind
12 the building where you can't see anything, right? And you also
13 can't give an instruction and immediately arrest somebody
14 because they didn't start sprinting away, right?

15 And I just don't want to make things more difficult
16 than they need to be or more confusing for the agents. So I
17 would remove the phrase "the instructions are clear" so that it
18 would read -- that last sentence would read: "Defendants may
19 ask a journalist to change location to avoid disrupting law
20 enforcement, as long as the press has" -- because I think press
21 is singular --

22 MR. LOEVY: Mm-hmm.

23 THE COURT: -- has time --

24 MR. LOEVY: Maybe even reasonable time, reasonable
25 time.

1 THE COURT: -- "to comply and sufficient opportunity
2 to report and observe."

3 Again, I -- I don't know that I want to add a bunch of
4 qualifiers like "reasonable time."

5 MR. LOEVY: Plaintiffs could live with that language,
6 Your Honor.

7 THE COURT: All right. And I know that the government
8 objects to this entire process. But, Mr. Skedziewlewski, can
9 you -- so understanding that you are not waiving the
10 government's objection, is this something that you can live
11 with?

12 MR. SKEDZIEWLEWSKI: Your Honor, I think the issue for
13 defendants is more the first sentence than the second sentence
14 of this paragraph.

15 THE COURT: Okay.

16 MR. SKEDZIEWLEWSKI: In the past -- and if I may, in
17 the past, protesters have done things like throw Molotov
18 cocktails, say, at -- at DHS agents or shoot fireworks at -- at
19 federal buildings risking, you know, lighting the buildings on
20 fire. In scenarios like that, the most effective response by
21 officers is to push the whole crowd back. Because you have
22 violent offenders like that interspersed with what might
23 otherwise be a nonviolent crowd, but it's impossible to get at
24 them.

25 What we also saw in -- in LA was individuals, you

1 know, physically assaulting a DHS officer by, you know,
2 punching him in the face, retreating back into the supposedly
3 nonviolent crowd, but then purposefully shields that individual
4 from officers apprehending him.

5 And so sometimes the only solution is to disperse the
6 whole crowd. If journalists are excepted from that, then you
7 have this problem with individuals potentially posing as
8 journalists behind the DHS line creating risk to officers.
9 It's just -- there needs to be an option here for DHS to be
10 able to disperse an entire crowd, without excepting
11 journalists.

12 MR. LOEVY: Journalists have historically, you know,
13 enjoyed the ability to observe and -- and not be dispersed.
14 That's really a bedrock thing.

15 THE COURT: No, that -- it's the -- I guess I don't
16 know how often or whether it's -- really happens that the
17 journalists are standing amongst the crowd, as opposed to apart
18 from the crowd, right? So, I mean, at least -- and admittedly,
19 I have not read everything. This case was filed this morning,
20 and I was on the bench until 1:30, so I had literally an hour
21 and 15 minutes to kind of read and absorb everything. But at
22 least from what I've seen, it appears that the journalists are
23 standing apart, as opposed to within the crowd.

24 MR. BOWMAN: That is true, and it's visible on the
25 videos. So that the journalist has the opportunity from a

1 removed objective perspective to record with -- with a camera
2 or with a video recorder or in words the events unfolding to be
3 caught up into the events and -- and -- and treated as part of
4 the crowd defeats the journalistic purpose, which is to be the
5 objective eyes and ears of the community on -- on what is
6 occurring. That's why this is so important.

7 THE COURT: And, Mr. Skedziewlewski, are -- did you
8 hear that in LA this was causing a problem or an issue? You
9 know, I know that you have said in the last month that no one
10 has come to the government and said this is what is happening
11 to journalists, that they are getting caught up in dispersal
12 actions as it relates to journalists.

13 MR. SKEDZIEWLEWSKI: You know, Your Honor, you sort of
14 jogged my memory. And so there actually has been a filing in
15 the *L.A. Press Club* case since the -- the Court gave -- gave
16 its order for the PI where another journalist does allege, you
17 know, similar -- you know, violations of -- of the preliminary
18 injunction order. They didn't bring any kind of motion on that
19 basis. It was used as rebuttal at our stay.

20 But so -- so there -- there is -- there are
21 allegations that, you know, we're violating the order in --

22 THE COURT: What --

23 MR. SKEDZIEWLEWSKI: -- Los Angeles.

24 THE COURT: What if I were to add in, which I was
25 going to do at the end anyway, is that in the LA order at

1 No. 6, which is not present here, is the incidental language,
2 so incidental exposure.

3 So in the LA order it states: "Defendants shall not
4 be liable for violating this injunction if a protestor,
5 journalist, or legal observer is incidentally exposed to crowd
6 control devices after such a device was deployed in a manner
7 that complies with the injunction."

8 MR. LOEVY: Plaintiff could live with that language.
9 It makes -- sounds appropriate.

10 THE COURT: And, Mr. Skedziewlewski, does that sort of
11 cover your concern? So --

12 MR. SKEDZIEWLEWSKI: No, Your Honor.

13 THE COURT: Okay. Go ahead.

14 MR. SKEDZIEWLEWSKI: We -- we would be happy to have
15 that language added if an order is entered for other reasons.
16 But our concern for paragraph 1.a. would stand because what
17 agents often do to avoid having to use crowd control devices is
18 to just do a physical expansion of the area where officers sort
19 of form a line and they push the crowd out to either create an
20 opening for vehicles to come in or -- or what have you, or in
21 order to get access to a violent offender, as the case may be.

22 So as I understand paragraph 6 in the LA order, it
23 really just covers crowd control devices --

24 THE COURT: Well, we can --

25 MR. SKEDZIEWLEWSKI: -- not the kind of expansion of

1 the area.

2 THE COURT: But we could expand that, right? So, you
3 know, if they're exposed to a crowd control device or --

4 MR. LOEVY: Tactic.

5 THE COURT: -- physical force, right, if we add that,
6 then that would cover what you just described, which is there's
7 a journalist in the crowd. The officers don't know and can't
8 see necessarily all the way into the crowd and decide to use
9 force to push the crowd back and expand whatever zone there is,
10 that then there is no liability, right, just because
11 essentially a journalist got caught up in that.

12 MR. SKEDZIEWLEWSKI: I would worry about the
13 workability for officers, Your Honor. Putting -- putting 1.a.
14 alongside the -- your proposed sort of modified paragraph 6,
15 they seem to be at odds.

16 So paragraph 1.a. says no dispersing of journalists
17 unless probable cause. And then paragraph 6 says, oh, but you
18 can do it if you don't see them. But what if they see them at
19 the last minute? What if they -- I mean, that just creates all
20 kinds of sort of last-minute hesitations and problems for
21 officers.

22 THE COURT: No. I mean, what it does is that it
23 protects the officers from liability, right, where you can --
24 you know, you can push the crowd back and know that as long as,
25 you know, the person standing right in front of you is -- you

1 know, it's not a crowd of journalists, right, so you need to
2 ask -- if it's a crowd of journalists, you need to ask them to
3 move, and -- and give them time to do that.

4 If it's just a general crowd and you are using this
5 tactic, crowd control tactic of pushing them back, that you're
6 free to do that, as long as you don't know or reasonably should
7 have known that they're a journalist there.

8 So, you know, at least from what the plaintiffs have
9 provided up to now, it's that the journalists generally, not
10 always, but generally are off to the side. And so it's not --
11 I don't think that these are two conflicting paragraphs. It's,
12 you know, this is how you -- 1.a. is this is how you should
13 treat journalists.

14 And then, you know, 1, whatever this is going to be,
15 1 -- 1.k. will be that, you know, it covers the defendants
16 where they are otherwise following the order, the injunction
17 order, and that whether it's a journalist or a protester, that
18 they get incidentally caught up in what is happening because
19 the officers don't know or have reason to know.

20 MR. SKEDZIEWLEWSKI: There's the -- the last clause of
21 1 -- paragraph 1.a., Your Honor, says: "Unrelated to failing
22 to obey a dispersal order." So I'm just imagining a scenario
23 with Your Honor's modified order where there could be a group
24 of journalists in an area that DHS needs to secure, they've
25 been asked to move, and they've not -- they've refused to move.

1 And so I think DHS needs to be able to disperse crowds
2 in these chaotic situations even if there's a group of
3 journalists off to the side; again, not to thwart their First
4 Amendment activity, but to secure a particular area. And we've
5 seen lots of instances, Your Honor, and journalists here, we'll
6 get to the definition later, but people who pull out their cell
7 phone are filming and are they journal- -- they seem to be
8 journalists.

9 And so they're -- they're -- we're not necessarily
10 thinking -- we shouldn't necessarily think only about, you
11 know, your ABC and NBC news reporters here. There are lots of
12 sort of amateur journalists that are -- we've seen interspersed
13 with these crowds who also occasionally join in the protests
14 and don't necessarily obey or -- or -- or even heed a request
15 to relocate.

16 So I think if we could strike that clause, the
17 unrelated to failing to obey a dispersal order, and this idea
18 that probable cause is required to disperse them, then -- then
19 it would be a lot more workable.

20 MR. LOEVY: No, that would -- not it. That -- that's
21 the whole purpose of -- of -- otherwise they could say it
22 becomes circular, and then they could do whatever they wanted.
23 You know, journalists cover wars.

24 THE COURT: You need -- you need the microphone.

25 MR. LOEVY: Sorry.

1 This is not inventing brand-new ground. I started to
2 say, journalists cover wars. I mean, they're -- they're used
3 to chaotic situations and their rights can be respected.

4 MR. SKEDZIEWLEWSKI: A way to fix it for -- from DHS's
5 point of view, Your Honor, might be to say that -- that
6 journalists should be always asked when -- whenever it's
7 operationally possible, to relocate. And then if they don't,
8 then they can be subject to an expansion of an area.

9 I don't think DHS -- you know, again, not interested
10 in thwarting a journalist's ability to cover a protest, but
11 they sometimes need to clear an area and quickly when
12 there's -- I mean, again, it's not one-offs that people are
13 bringing firearms to these incidents and shooting them at DHS
14 officers. That's a -- you know, we can't wait for journalists
15 to relocate in that kind of an exigent circumstance.

16 MR. LOEVY: Well, this sentence, you know, exists in
17 the LA order, and it is protection, and it does beg how you
18 define journalists. But if you define journalist properly,
19 then they should be allowed to observe.

20 THE COURT: All right. All right. Let me think about
21 this last phrase.

22 I mean, Mr. Bowman, what are your thoughts, right? I
23 want to make this readily understandable to DHS agents, and do
24 understand that there may be circumstances where the dynamic is
25 fluid. And I don't think it's correct that officers can't ask

1 anyone, including a journalist, to disperse from a particular
2 area.

3 MR. BOWMAN: Indeed they can't. And -- I -- I mean,
4 I -- I -- there's too many negatives floating around.

5 THE COURT: Right.

6 MR. BOWMAN: I -- I meant to say, it is certainly true
7 that journalists can -- can be directed to move. And the point
8 of this order is to give the DHS officers the ability to
9 disperse a crowd where necessary. And -- and it does, very
10 clearly. You can -- they can ask a journalist to move.
11 There's a restriction on -- on that. They -- they can't be
12 abusive about it. That's essentially the essence of it.

13 THE COURT: Right.

14 MR. BOWMAN: But they -- they can say, y'all in the
15 press, you've gotta move out of here. We've -- we've got an
16 issue. And -- and that can happen.

17 THE COURT: So then I guess what -- you know, what
18 this 1.a. is covering is when can DHS essentially use force or
19 some other means of crowd control, essentially where they are
20 showing -- can show a compelling government interest that
21 overrides the journalist's First Amendment rights, right?

22 I --

23 MR. BOWMAN: I -- I -- I think that --

24 THE COURT: And, again, we might be talking about
25 things that just aren't going to happen, but --

1 MR. BOWMAN: I -- I --

2 THE COURT: No, go ahead.

3 MR. BOWMAN: I -- I -- I think that -- that -- that
4 what's going on here, and obviously we've all read ahead, there
5 is a definition of indicia or there's an explanation of indicia
6 of being a journalist that's rather restrictive in paragraph --
7 subparagraph J.

8 And I think that the -- the -- the point here is that
9 the act of professional journalism, to -- to be a journalist is
10 just a profession. It's not somebody, as counsel indicated,
11 pulling out a cell phone and nominating themselves as a
12 journalist today. It is a profession. And that profession
13 gets the respect of not being subjected to force for failure to
14 go where folks -- folks in DHS tell them to go. That's --
15 that's -- that's the restriction to address a problem that is
16 happening.

17 MR. LOEVY: I guess I can come back to my point is
18 that they're -- the --

19 COURT REPORTER: Microphone, please.

20 MR. LOEVY: I'm sorry.

21 In the war analogy, I mean, the press, everybody is
22 just supposed to pretend that they're just going to stand there
23 and they have to be legitimately the press, and that's
24 Mr. Bowman's point about indicia, but they are subject to
25 special rules internationally and, you know, in chaotic

1 situations.

2 And, again, it's a cost-benefit because if they're not
3 subject to special rules, then you can -- you can bet they're
4 going to clear everybody right out of there, and that's the end
5 of that. And the press gets a special privilege of being able
6 to report.

7 MR. BOWMAN: Exactly.

8 MR. LOEVY: Because that's what I meant by the
9 exception as well as the rule, because then all they say is,
10 you know what, I'm feeling a little chaotic right here,
11 everybody out. The press is supposed to be exempt from that.

12 MR. SKEDZIEWLEWSKI: Your Honor, what's happened in
13 the past with these expansions of a secure perimeter is that
14 press are asked to move. Oftentimes they do move. The
15 majority of them may move, and there will be a few remaining
16 members who refuse, and then they end up getting subject to
17 that expansion, whether they're in the middle of the group of
18 protestors or standing off to the side, because they may be
19 trying to clear a street, for example, not like a part of the
20 street.

21 THE COURT: So --

22 MR. SKEDZIEWLEWSKI: And so in that case --

23 THE COURT: The --

24 MR. SKEDZIEWLEWSKI: -- they would be in contempt of
25 this.

1 THE COURT: So I guess -- so I -- in thinking it
2 through, I'm going to leave that phrase in there, "unrelated to
3 failing to obey a dispersal order," because of the second
4 sentence, which allows the defendants to ask the journalist to
5 move and then gives them time to move. And that if they then
6 refuse to move -- you know, most move and one or two do not,
7 and then you are pushing the crowd back, I believe that that
8 last section that we were going to add in covers that, which is
9 the -- that DHS can come back and say, you know, during this
10 incident, we asked the journalists to move, eight of ten moved,
11 two did not, and we needed to create and expand the security
12 zone and we pushed everybody back.

13 I don't see that at this point plaintiffs' counsel
14 would come in and say that DHS has violated the -- the order in
15 those circumstances.

16 MR. LOEVY: Particularly with B, Your Honor, which
17 we're -- we're neglecting also that --

18 THE COURT: No, we're moving our way down. We haven't
19 even gotten to B and it's 5:00.

20 MR. LOEVY: But B helps your point on A, because if --
21 if the commanding officer finds there's a serious threat to
22 public safety, then they can disperse.

23 THE COURT: So -- all right. But I think we -- do we
24 have anything else to beat to death on A?

25 MR. LOEVY: Not from the plaintiff.

1 MR. SKEDZIEWLEWSKI: Well, I'll just note, Your Honor,
2 I -- I do think that this confers a special right.

3 Plus the First Amendment applies to everyone equally.
4 Journalists don't get a special exception. Of course, you
5 know -- and there's case law to this effect. You know, we'll,
6 of course, you know, cite to it in our briefing whenever we get
7 around to that, that people -- or everyone is entitled to the
8 same protections under the First Amendment, and journalists
9 don't get to have special treatment under -- under the First
10 Amendment.

11 And then this gives them that special treatment, and
12 in doing so, it creates a really challenging situation for DHS
13 officers. If anything -- if -- or if nothing else, rather, we
14 would appreciate Your Honor adding -- and maybe this is
15 beating, although I don't see it that way because of the
16 commanding officer piece -- but officers need, if there's a
17 true emergency, to not be required to ask journalists to
18 relocate and just relocate them if someone's, for example,
19 firing a weapon at them from -- from immediately behind
20 journalists.

21 THE COURT: So -- okay. So let's turn to B. So the
22 question that I have about B is the "justified by a commanding
23 officer's finding."

24 So the commanding officer is where I have a question
25 in that I can imagine in a lot of situations that there may not

1 be a chain of command where a decision to issue a dispersal
2 order goes up the chain of command, but instead, its those
3 particular agents right there are going to assess what's
4 happening and issue a dispersal order.

5 Am I incorrect?

6 MR. BOWMAN: I --

7 MR. SKEDZIEWLEWSKI: Your Honor, that's exactly
8 right. And if I could just quickly add, our -- our agents are
9 often operating in the field. A lot of the incidents here stem
10 from a specific federal facility, but it would cover protests
11 that happen when agents are out on operations. And in those
12 circumstances, the crews might be relatively small with no
13 supervisor traveling with the crew, and there would be -- and
14 can sometimes be no possibility of getting ahold of a
15 commanding officer in the middle of an exit.

16 And we see this repeatedly in the *L.A. Press Club* case
17 where officers are sort of swarmed by aggressive crowds when
18 there's maybe five officers out in the field on an operation.

19 But of course, even at a facility like this, the same
20 thing could occur if there's -- you know, where a commanding
21 officer might not be on site to see and specifically identify a
22 threat.

23 THE COURT: Mr. Bowman.

24 MR. BOWMAN: So -- so I -- I think three -- three
25 points.

1 Point one is dispersal is -- is the end of a protest.
2 You -- you get out of here. All you people leave, go home.
3 And the issue that drove the phrase that we're talking about is
4 this cannot be the *ad hoc* determination of one individual.
5 This has to be a -- a judgment that is -- that is a -- a
6 relatively dispassionate assessment by a person with authority.

7 We take counsel's point that, you know, this -- this
8 can't be Bovino's determination if he's in Portland this week,
9 as opposed to here, but -- and so we're going to suggest that a
10 tweak is appropriate to specify that the -- that -- that the
11 justification be by a supervisor -- a supervisory officer on
12 the scene.

13 THE COURT: So what -- are there DHS policies that
14 delineate what a serious threat to public safety is?

15 MR. SKEDZIEWLEWSKI: Your Honor, the -- the -- the
16 language of serious, I -- I don't believe -- I'd have to go
17 check, but I don't believe that that's a term that's compatible
18 with -- or is used in DHS's policy. I think their -- I think
19 that their policy, if I remember correctly, is a bit more
20 specific than that and gets into more detail about, you know,
21 threats, you know, to bodily injury and -- and -- and things
22 like that.

23 And I'll also add that as far as changing the language
24 to supervisor, that -- that -- that doesn't solve it because it
25 could be that there's not a supervisor out on an operation with

1 a small contingent, you know, CBP or -- or ICE officers, and
2 they would be unable to -- I mean, what we've seen it happen
3 where agents get surrounded and are unable to evacuate an area,
4 they just want to leave, they just want to get away from a
5 dangerous situation, and they're blocked in by people's
6 vehicles who have surrounded them.

7 And so being able to issue a dispersal order is
8 crucial because whoever law-abiding people may be part of a
9 crowd behaving like that, they may be then inclined to leave
10 and give officers an -- an opportunity to escape.

11 THE COURT: So I -- you know, I'm just wondering if
12 there's a way to reflect back DHS policy, right? So rather
13 than it be that it's justified by a commanding officer's
14 finding, because I -- I just think that there're going to be
15 lots of times where there is no commanding officer present, nor
16 are you going to be able to get ahold of that person in the
17 moment, right?

18 So if, for example, there is a protest, you know,
19 officers find out that they're going to a restaurant, right,
20 and they want to talk to everybody who's working in the kitchen
21 and the soccer mom group sees officers heading towards the
22 restaurant and word goes out and all of a sudden, right,
23 there's a protest at the restaurant, and not only are there
24 soccer moms, but now there are also other individuals that are
25 really unhappy with what's going on and they decide to become

1 violent, that you might have two officers or three that are
2 there at the restaurant, something happens, and it's now become
3 violent, say, they're, you know, breaking the windows of the
4 restaurant or whatever, trying to get in, that at that moment
5 in time, those two or three officers are not going to try to
6 track down a commanding officer. They are just going to tell
7 the crowd to leave so that they can leave.

8 I don't want to add things on that I -- I know may or
9 may not happen or may not be possible to happen. What I would
10 rather do is reflect back DHS policy where, you know, the
11 officers have been trained that these are the circumstances
12 where you are allowed to issue a dispersal order.

13 Does that make sense?

14 MR. LOEVY: That makes a lot of sense, Your Honor,
15 because they've confronted this exact question. We don't have
16 to reinvent it. You know, it's how they do it. And, you know,
17 I was going to guess or suggest justified by the ranking
18 officers finding a serious threat. But I suspect you're
19 exactly right, is that they've thought about this and come up
20 with a lawful and organized way to solve this problem.

21 And as far as where that leaves us here, I mean, maybe
22 we need to really look at DHS policies and try to graft it on.

23 THE COURT: Mr. Skedziewlewski --

24 MR. SKEDZIEWLEWSKI: Your Honor --

25 THE COURT. -- is it possible to -- you know, I don't

1 necessarily want to have this, you know, where we're inserting
2 the policy and it's all of these factors. What I would like to
3 do is find a way to kind of summarize this so the agent knows,
4 or the officer knows, if I'm issuing a dispersal order that I
5 have to comply with whatever DHS says in terms of when I can do
6 that.

7 MR. SKEDZIEWLEWSKI: Understood, Your Honor. I would
8 like to quickly correct the record. I said earlier that the
9 DHS use of force policy was last updated in the Obama
10 Administration. That wasn't right. It was during the -- just
11 the previous President Biden Administration --

12 THE COURT: Oh.

13 MR. SKEDZIEWLEWSKI: -- in 2023. So I just want to
14 correct it. I'm looking at it now.

15 And maybe one thing that helps in this scenario where
16 we -- we all don't have the papers in front of us is, the
17 policy leaves a lot of leeway to officer discretion. And I'll
18 give you just one example that kind of solves a lot of these
19 issues.

20 Under the heading "Exigent Circumstances," it says:
21 "In an exigent situation for self-defense or defense of
22 another, DHS law enforcement officers are authorized to use any
23 available object or technique in a manner that's objectively
24 reasonable in light of the circumstances."

25 So that -- it's that kind of -- that -- that's

1 characteristic of the policy, Your Honor, and it -- it would --
2 if we had something like that, then, you know, dispersing would
3 be fine in an exigent circumstance; and issuing dispersal
4 orders would be fine, if there was an exigent circumstance; and
5 so on.

6 So I -- I just submit that for the Court's
7 consideration. I mean, there's obviously a lot more detail in
8 the rest of the policy, but that -- it probably would be tough
9 to work through right now in this manner. But, again, as a
10 general matter, I -- I think trying to make -- if we're going
11 to have a -- a TRO here, it should as closely as possible match
12 the existing policies.

13 THE COURT: So I guess, you know, I would want
14 something like that, and -- and I realize it's a little hard to
15 draft on the fly. So, you know, one of the things that I would
16 be suggesting we do is we can kind of go through this today,
17 like, go through all of these, and then come back together
18 tomorrow to just make sure everybody's kind of on the same
19 page.

20 Because, to be honest, I probably shouldn't say this
21 in front of a courtroom full of people, but my brain is tired
22 at 5:20 after being on the bench all day. And I know I don't
23 like the commanding officer language. I also know I don't like
24 exigent circumstances language because I think that gives a
25 little too much leeway, in that anything can be an exigent

1 circumstance.

2 So I want something in between, which -- which
3 describes what a threat -- kind of what a threat would be.

4 All right. So --

5 MR. LOEVY: You mean --

6 THE COURT: Hold -- hold on.

7 I just want to give a shout-out to my newest, amazing
8 law clerk Annie who just sent me the use of force policy.

9 Okay. Just give me one second.

10 Okay. So it looks like the policy itself doesn't
11 define what an exigent circumstance is.

12 MR. LOEVY: Imminent danger to the safety of a person
13 or property.

14 THE COURT: Let's see.

15 Ah, here we go. Here's the definition on page 12 of
16 the policy. It says: "A situation that demands unusual or
17 immediate action that may allow LEOs to circumvent usual
18 procedures in order to preserve life or prevent catastrophic
19 outcomes."

20 MR. LOEVY: Catastrophic outcomes.

21 MR. BOWMAN: Yeah, that's good. That's good. I like
22 that.

23 MR. LOEVY: Yeah, I think that captures the, you know,
24 the serious of the exception, that it's not just I'm feeling
25 exigent.

1 THE COURT: So one of the things that we could do to
2 kind of alter this or fix it is we could say: "Issuing a
3 dispersal order requiring any person to leave a public place
4 that they lawfully have a right to be, unless dispersal is
5 justified by exigent circumstances as defined by the DHS use of
6 force policy."

7 MR. LOEVY: We would make a pitch, Your Honor, that if
8 you didn't like the commanding officer as being ambiguous, that
9 at least is the highest-ranking officer at the scene, capturing
10 that concept. If there's three guys out there by themselves,
11 then they are the highest-ranking guys at the scene. But a
12 dispersal order terminates a protest. There probably is a
13 chain of command requirement there.

14 THE COURT: I don't know that that would be true.

15 Mr. Skedziewlewski, would that be true in terms of how
16 to --

17 MR. SKEDZIEWLEWSKI: Is the question -- yeah, I -- I
18 can't speak to how each different component handles the issue
19 of dispersal orders, and there may be some variation. Here
20 we're looking at the DHS policy, but, you know, CBP and ICE
21 each have their own component-specific operational, you know,
22 directives. So I would -- I don't think I have a good answer
23 for Your Honor, but that's something we could certainly try
24 to -- to track down.

25 What -- what I can say is that there definitely will

1 be circumstances where there's -- there's no superior officer
2 on hand, even if it's only a little bit -- you know, the next
3 guy up, it could be that they're all on the same, you know,
4 scale on an operation.

5 MR. LOEVY: That would be covered by my proposal
6 because if it's just three line guys, then they have enough
7 authority.

8 THE COURT: Yeah. I'm just wondering, you know, we've
9 got to think about all the various ways that it can play out,
10 right? And I'm concerned even if we say the highest-ranking
11 officer, as opposed to referring them back to a policy is that
12 you may not know, right? Somebody might come on the scene that
13 is higher ranking than you are and you don't know. And maybe
14 you don't -- yeah, you should've asked that person. I think
15 rather than having somebody make a decision and that we're
16 looking up the ladder, it is better to just refer them back to
17 their own policy, which is, this is when you can issue a
18 dispersal order to someone who's there lawfully. That way, you
19 know, what we're trying to avoid is confusion and, you know,
20 people hesitating in a dynamic or changing situation.

21 So let's -- since we are going to come back tomorrow,
22 let's kind of put a star next to this and work on it, but
23 that's where I would go, is that I would much prefer to refer
24 back to a policy than to have them look up to have somebody
25 make a decision.

1 MR. LOEVY: Understood. Thank you, Your Honor.

2 THE COURT: Okay. So C and D are -- seem to mimic the
3 LA order.

4 I'm not sure if the government has an objection to
5 either of those.

6 MR. LOEVY: Oh, I bet they do.

7 MR. SKEDZIEWLEWSKI: We -- we -- we do, Your Honor.

8 THE COURT: Why am I not surprised.

9 MR. SKEDZIEWLEWSKI: We have a variety of -- we have a
10 number of declarations walking through the details from,
11 you know, DHS and subcomponent officers as to why instructions
12 substantially like these here are -- are not workable.

13 One of the issues is that, as I understand these,
14 there's -- as written, there's -- there's no allowance for
15 incidental contact, though I think Your Honor had suggested --

16 THE COURT: Well --

17 MR. SKEDZIEWLEWSKI: -- that --

18 THE COURT: -- but we've got that --

19 MR. SKEDZIEWLEWSKI: -- the Court will fix that.

20 THE COURT: -- at the end.

21 Yeah, we're going to add that --

22 MR. SKEDZIEWLEWSKI: Right, right.

23 I think also this -- the -- the idea that the agents
24 on the ground can identify members of the press and religious
25 practitioners and -- and distinguish them I think is -- is not

1 realistic.

2 And -- and the idea of imminent threat to -- of
3 physical harm, I think it's vague and leaves -- leaves officers
4 asking questions when -- when they are trying to make these
5 tough decisions.

6 THE COURT: I -- and I -- I get that they are going to
7 be, you know, having to make kind of on-the-fly, difficult
8 decisions, but they have to do that all the time, right? Like
9 when you're executing a warrant, when you're really engaging
10 with members of the public at any time, things can go sideways,
11 and that's why they're trained, is to be able to handle it when
12 it happens.

13 So I -- I have full faith that these officers are
14 going to make -- be able to make these assessments on the
15 ground in a dynamic and changing situation. It's -- you know,
16 I don't want it to get unwieldy and I don't want it to be very
17 confusing, but these two do make me less concerned in that this
18 is how they're trained anyway as -- as it relates to use of
19 force. You know, they've all received training on use of
20 force.

21 MR. SKEDZIEWLEWSKI: Yes, Your Honor. Just -- just
22 two points.

23 This adds the -- the threat of contempt to their
24 decision, which I think from what our officers have said will
25 increase the hesitancy on -- on the part of officers and

1 potentially increase their risk of -- of injury.

2 And also, I'm not certain, without having the chance
3 to compare this particular formulation with the use of force
4 policy, if it does actually track, though I'm not representing
5 that it doesn't. I just haven't had a chance to look at them
6 side by side, so I'd appreciate Your Honor having us back
7 tomorrow.

8 I -- I would like to ask the Court to let us run this
9 by the client to see if in their view it does track with the --
10 with their current policy. Because what happens with these
11 orders is the -- like you say, the officers have all been
12 trained, but now there's a new order and so now they have to
13 sort of rethink all their training and -- and line it up with
14 this -- this new, you know, order.

15 THE COURT: All right. So, yes, because it is late
16 so, I mean, I'll let you go back and look and see. But I -- my
17 inclination is that I don't see these two sections as
18 necessarily problematic and are certain that they can certainly
19 make those assessments in the field and on the ground.

20 Anything that the plaintiffs want to add on those two?

21 MR. LOEVY: I think you -- you've got it, Your Honor.
22 I mean, I heard counsel say that he is concerned there would be
23 some hesitancy, but that's why we're here. We would like them
24 to hesitate before shooting priests and journalists without the
25 threat of physical harm. That -- that -- that's what we're

1 trying to do.

2 THE COURT: Okay. All right. Turning to E and F. So
3 both of these were kind of condensed in the LA order. And the
4 one thing I would note in both of these is that they're kind of
5 not internally consistent. So, you know, I don't know that
6 there's a difference between imminent threat and immediate
7 threat, but it needs to be one or the other.

8 MR. LOEVY: I don't know that there's a distinction
9 between those words that would be enforceable or --

10 MR. BOWMAN: I think it's a scrivener's error.

11 THE COURT: Okay. So we can work on that.

12 And I don't even want to ask because I know what the
13 answer is, but, Mr. Skedziewlewski, what's -- I know that the
14 government has an objection, right?

15 MR. SKEDZIEWLEWSKI: That's right, Your Honor.

16 So just quickly, I -- I think part of the issue is
17 that some of these all become sort of "follow the law" orders,
18 which obviously DHS knows it has to follow the law and wants to
19 follow the law. But adding, you know, on top of that is -- is
20 problematic. And at least in the Ninth Circuit where we argued
21 this before, it's -- it's contrary to case law there to have
22 these sort of "follow the law" injunctions.

23 So, yeah, you're right, the DHS policy already
24 prohibits using certain weapons, you know, targeted at the
25 head, for example.

1 But here, I -- I would ask that -- that we specify
2 exactly which weapons and not leave it sort of open-ended.
3 Here we have large riot control weapons. I don't know what
4 that means. I'm not sure our DHS officers know what that
5 means. There are examples, but then those examples don't
6 necessarily seem to be exclusive.

7 I would at least request that the types of weapons
8 that this covers are specifically delineated.

9 THE COURT: And I think we can do that.

10 MR. LOEVY: Yeah, that's not a problem.

11 THE COURT: We can make that change and -- and make it
12 very specific.

13 MR. LOEVY: And, you know, this concept that it's the
14 follow the law, I mean, one of the reasons we're here is
15 they're not following the law --

16 THE COURT: I know, Mr. Loevy.

17 MR. LOEVY: -- and this order would --

18 THE COURT: I know.

19 MR. LOEVY: -- require them --

20 THE COURT: I know.

21 MR. LOEVY: -- to disseminate.

22 THE COURT: You don't have to -- I mean, it's 5:30.
23 You don't have to pick up every bait that's dropped.

24 MR. LOEVY: Got it.

25 THE COURT: Okay.

1 MR. LOEVY: That's what I do.

2 THE COURT: You don't. You really don't.

3 Okay. And I assume that for G, because, again, that
4 is -- so it's not in the LA order.

5 I presume that the government's objection is this is
6 another "follow the law" provision. And that would be the
7 basis of your objection; is that correct?

8 MR. SKEDZIEWLEWSKI: At a minimum, yes, Your Honor. I
9 mean, I'm just also thinking of an incident that I saw, you
10 know, from these incidents where an individual, you know, spits
11 on an ICE officer. In that -- in that case the individual
12 didn't run away, but if he had, he would have perhaps presented
13 no further physical harm, no threat of physical harm to the
14 officer, but the officer would have still been well within his
15 rights and obligations to -- to detain that person. If he's
16 fleeing, that could've -- that could look rather aggressive.

17 So I'm just -- this doesn't seem consistent with just
18 typical law enforcement conduct --

19 THE COURT: Although it is giving --

20 MR. SKEDZIEWLEWSKI: -- because it doesn't specify.

21 THE COURT: -- at the end, that last phrase, "unless
22 necessary and proportional to effectuate an apprehension and
23 arrest."

24 So in your example, if somebody spat on an officer and
25 then took off running, you don't -- the officer would not be

1 violating this provision if the officer then chased the
2 individual and, you know, used force to stop that person from
3 running, as long as the force used was proportional to
4 effectuate the apprehension and arrest, right?

5 MR. LOEVY: Exactly.

6 THE COURT: So, you know, you're not allowed to kick
7 the person in the head, but you're certainly allowed to grab
8 him by the arm.

9 MR. SKEDZIEWLEWSKI: Your Honor, I -- I wonder what
10 the Court's understanding of this phrase kettling is. My
11 understanding is that this is not very different from
12 relocating journalists from one location to another.

13 THE COURT: And what -- what is the definition that
14 you're using of kettling?

15 MR. BOWMAN: I understand the term to refer to
16 trapping a group of protesters by herding individuals into a
17 confined area where they have no way of getting away. It can
18 happen in a variety of different ways. But, you know, it's
19 basically you're -- you're -- you're surrounded, you're stuck.
20 You may wish to disperse, but there's nothing you could do
21 because you're confined in this area, not -- not through your
22 own desire.

23 THE COURT: All right. And Mr. Skedziew- -- oh, God,
24 how many -- Mr. Skedziewlewski, I'm going to get it right at
25 some point.

1 Mr. Skedziewlewski, what is the government's objection
2 to this phrase kettling? Is it that it's vague and not sure
3 what it means? Or is it that it is something that is -- that
4 the government doesn't believe is -- falls under using force or
5 a combination?

6 MR. SKEDZIEWLEWSKI: A combination. Vague. But also
7 if we -- even just accepting plaintiffs' counsel's definition,
8 I don't -- I don't think that -- it could involve force, of
9 course. You could imagine kettling done with force, but I
10 think you can also imagine it done without force. And so I
11 think it just creates additional ambiguities there.

12 Can -- can they kettle without force under this?
13 That's not clear to me.

14 MR. BOWMAN: You -- you know, given the lateness of
15 the hour, the -- the paragraph is supposed to be about uses of
16 force. I -- I think the point is well taken. Kettling is not
17 really an inapplication of force. It's something different.

18 THE COURT: Okay.

19 MR. LOEVY: So we're okay removing that word.

20 THE COURT: So we can remove it?

21 MR. BOWMAN: We can just take it out.

22 THE COURT: Okay. All right. And then H, the last
23 sentence, I'm not sure how the officer would be able to know
24 that the audience was unable to hear the warnings. So I'm
25 not -- I -- I guess I'm not sure why this last sentence is

1 there, because the first sentence requires two separate
2 warnings and at a level -- sound level where --

3 MR. BOWMAN: We'll take --

4 THE COURT: -- it can be heard?

5 MR. BOWMAN: We'll take it out.

6 THE COURT: Okay.

7 MR. BOWMAN: Let's take it out.

8 THE COURT: All right. And then the remainder of
9 that, what's the government's position on that?

10 MR. SKEDZIEWLEWSKI: Your Honor, the -- the DHS policy
11 addresses warnings and it -- it -- it recommends them, but
12 there's -- it doesn't require them, and there's specific
13 language about what -- what the exception would be. And I
14 would just ask the Court to have a look at that maybe tomorrow
15 and we could maybe try to mold this paragraph to be more in
16 line with the policy.

17 THE COURT: So it says that the limiting language is
18 when feasible so that the law enforcement officer has to
19 identify themselves and issue a verbal warning to comply with
20 the officer's instructions, and then lists some considerations
21 for when it is feasible to give the warning. And that's on
22 page 4.

23 So I -- I think, though, that this first sentence
24 does -- actually, the first two sentences I do think
25 encapsulate the policy. So I'd be inclined to leave it as is,

1 but we can talk about it tomorrow too. But I'm inclined to
2 leave it as is. I do think that it covers the feasibility
3 issue, and I'll be -- point two under warnings, which allows
4 the individual the opportunity to comply before applying force.

5 So I do think that's captured in here, and it -- you
6 know, it might be worthwhile as we're just revising things that
7 if you have the use of force policy, which is at the DHS.gov
8 site, so this is almost in the negative, right? This is almost
9 written in the negative, whereas the use of force policy seems
10 to be written in the positive, that maybe we switch some of
11 this language to more mimic the policy.

12 So, you know, where feasible, you -- so instead of
13 saying it's infeasible, to say where feasible, you give the
14 warning and that -- you know, describe where -- how it's not
15 feasible is you can kind of incorporate this, and then say you
16 also have to give people the means to leave or comply.

17 Is that --

18 MR. BOWMAN: We'll get on the website --

19 THE COURT: Does that make sense?

20 MR. BOWMAN: We'll get on the website and we'll review
21 the policy that appears on the website and we'll come -- come
22 with that in hand tomorrow morning.

23 THE COURT: Okay. All right.

24 And then I, which is the Fourth Amendment, seems to be
25 the Fourth Amendment issue that's being tracked here, what is

1 the government's objection to that?

2 MR. SKEDZIEWLEWSKI: It's the "follow the law"
3 injunction again, Your Honor.

4 THE COURT: Okay. You know, I think in some ways it's
5 worthwhile to have these reminders and have something in hand,
6 and I don't know that it's confusing to just remind officers
7 that they can't seize someone without probable cause or arrest
8 someone without probable cause.

9 All right. And then J. So this is the definition of
10 a journalist.

11 MR. LOEVY: Yes.

12 THE COURT: I do think it is worthwhile to add the
13 language in the LA order that also has the -- that shielding
14 language, right, which is that if somebody claims to be a
15 journalist but doesn't have this indicia that defendants would
16 not be liable, right, because it's an unintentional violation
17 of the order, that what we want is agents to be able to readily
18 identify who's a journalist and who isn't.

19 If someone later comes back and says, I didn't have a
20 press pass, I didn't have a camera, I didn't have a recording
21 device, you know, I was wearing civilian -- I was wearing a
22 hoodie and jeans and -- but, by the way, I work for ABC and I
23 was there in my capacity as a journalist and you violated
24 the -- this order, I think defendants can't be held liable for
25 something that they had no reason to know.

1 MR. BOWMAN: That's fair.

2 MR. LOEVY: That's language that's in the LA version
3 that's not in this one?

4 THE COURT: Yes. So it says: "Defendants shall not
5 be liable for unintentional violations of this order in the
6 case of an individual who does not carry or wear a press pass,
7 badge, or other official press credential, professional gear,
8 or distinctive clothing that identifies a person as a member of
9 the press."

10 MR. LOEVY: Sounds good, Your Honor. That's
11 acceptable to the plaintiff.

12 THE COURT: All right. And what's the government's
13 position on J if we add this additional language that exempts
14 the defendants?

15 MR. SKEDZIEWLEWSKI: I think that addition is welcome,
16 Your Honor, but its intention with that first clause of the
17 last sentence in the current paragraph J that says, "these
18 indicia are not exclusive," that seems to swallow the
19 exception.

20 If -- if these -- if these indicia are exclusive and
21 any old indicia other indicia that a potential plaintiff thinks
22 up can count, then we could be held liable for someone wearing
23 indicia that we're not aware are supposed to be indicia of
24 being a journalist.

25 MR. LOEVY: They complement each other, those two

1 sentences, the new sentence and the old one.

2 THE COURT: I -- I -- yeah, I would agree with
3 Mr. Loevy, I do think that they complement each other. It's
4 not that you're -- you know, what this is is that the officer,
5 the agent, needs to reasonably see that this person is a
6 journalist.

7 So you don't have to carry everything, right? You
8 don't need the press pass plus a badge, plus a hat, plus a
9 cam -- you know, plus camera gear, standing off to the side,
10 you know, so plus, plus, plus, plus, plus, and you have to hit
11 all of these things.

12 It's would a reasonable officer, agent, in that
13 person's position be able to identify this individual as a
14 journalist. And here are some things to consider, but it's not
15 exclusive in that you might not be wearing a hat but you've got
16 a press pass on you. You might be not carrying camera
17 equipment but you've got a microphone.

18 So there may be, you know, a mix and match and you
19 don't have to do everything. But if you are simply standing in
20 a crowd and later come back and say, I'm a journalist and
21 you've got nothing that, you know, the agents can't expect to
22 know that.

23 MR. SKEDZIEWLEWSKI: Your Honor, I think that the
24 explanation that the Court gave makes sense for the second
25 clause of that sentence that a person need not exhibit every

1 indicium. Agreed that, you know, it doesn't make sense for --
2 to ask the journalist to wear 15 different identifiers. But
3 the fact that the identifiers listed are not exclusive means
4 that there could be any -- theoretically, any number of other
5 indicia that would count. And -- and our officers just won't
6 know what those are.

7 MR. LOEVY: I mean, that's a true statement that
8 they're not exclusive. What if the person was holding a sign
9 that said, I'm a reporter. You know, it seems like that
10 language doesn't hurt anything.

11 THE COURT: All right. That -- let's think on that
12 piece of that clause. Instead of saying that they're not
13 exclusive, you know, it might be worthwhile to say that they
14 are illustrative --

15 MR. LOEVY: That's the same --

16 THE COURT: -- right?

17 MR. LOEVY: That -- that would solve the purpose.

18 THE COURT: Which kind of is alerting the officers to
19 say, this is what you should be looking for and considering.

20 MR. LOEVY: We could live with that modification,
21 Your Honor.

22 THE COURT: So -- and it might be that, you know,
23 somebody comes up with something better by tomorrow morning,
24 which I'm happy to hear.

25 Okay. We're going to find out on 2 about the visible

1 identification. So I do want to know at some point tomorrow
2 what do these agencies do. So, you know, do they have a number
3 that is unique to that officer? And, you know, I -- as I said
4 earlier, I don't -- I am sympathetic to the issues of doxing
5 and harassment and being followed home and being threatened and
6 having people shoot at you or destroy your car or your house or
7 threaten your family members. I mean, I am sympathetic to all
8 of that.

9 However, I think that a reasonable middle ground is
10 that the agents have some visible identification on them in the
11 form of a badge number or an agent number that if there is a
12 particular issue that the plaintiff -- and I understand
13 obviously under *Bivens* that the officers are not named, but you
14 still need to know who they are, right? And it is much easier
15 to figure out, this is the person that hit me. This is the
16 person that fired a rubber bullet in me because here is the
17 number, and you can go back and figure out who that person is.
18 So that I think is one factor.

19 And then the other factor, as I said before, is
20 transparency and a faith in the rule of law that if we're doing
21 what we're supposed to be doing and doing it lawfully, that it
22 should be okay that people to some extent know who you are,
23 right, that they -- that you know you can be identified.

24 I know I can be identified because I have to put my
25 name on every opinion I issue. And the public knows that I

1 issued this particular opinion, and they can look at it and
2 they can read it and they can disagree with me. They can agree
3 with me. It doesn't matter. But I know that my name is on
4 that, and that what that does is it prevents me as a judge from
5 going off the rails because I have to do it publicly.

6 And here, I think it is important that these officers
7 and agents know that at some point along the -- the way they
8 could be identified. And so it serves multiple purposes. And
9 I think that we can balance any concerns which are valid about
10 their own individual safety or the safety of their family by
11 using badge numbers or something that is similar to that.

12 So I'd like to know tomorrow what -- whether it's DHS,
13 ICE, CPB -- CBP -- what their policies are and -- and how they
14 identify particular officers internally.

15 Okay. I think that's it. The rest of this is fairly
16 standard and straightforward.

17 Anybody disagree with the rest?

18 MR. LOEVY: Not for plaintiff.

19 THE COURT: Mr. Skedziewlewski?

20 MR. SKEDZIEWLEWSKI: Yes, Your Honor. Without any
21 desire to prolong these proceedings any further, just -- just
22 briefly point that paragraph No. 4 requests the -- the
23 defendants to file with the Court any instructions implementing
24 the guidance. That -- that guidance is going to be written up
25 by, you know, DHS attorneys and it's going to be sort of

1 attorney-client privileged, and I don't think it's standard
2 practice for those to be submitted to the Court, and I'm sure
3 that DHS would oppose --

4 THE COURT: Yeah. So I think what we are trying to
5 get at here would be that whether it is a general order or, you
6 know, I'm not sure what the language of DHS is in terms of what
7 gets pushed out to officers, right? So whether it's a policy,
8 a general order, whatever it is, is that what the plaintiffs
9 are looking for, and I think what I would want, is not the
10 communications between counsel and DHS, but instead, you know,
11 here's the order that went out, Judge, that is instructing
12 officers to follow this order, right?

13 So it's sort of like the use of force policy, right,
14 that I wouldn't be asking you to give me communications between
15 the lawyers that drew up the use of force policy and the -- and
16 DHS, but instead that, you know, this is the policy.

17 Does that make sense?

18 MR. SKEDZIEWLEWSKI: It does make sense, Your Honor,
19 but the concern remains, because what -- the way DHS will do
20 this is they're going to draft up what they think is the best
21 way to communicate this to officers. And when I say "they," I
22 mean their attorneys, and -- and they're going to put it into
23 the language that their officers are familiar with. And that
24 document, whatever it looks like when it's done, it will be
25 much better than I could do, they're the experts on -- on, you

1 know, their agency, is itself going to be an -- an attorney
2 work product.

3 THE COURT: Well, but you can -- you could say that
4 this use of force policy is an attorney work product, right?

5 MR. SKEDZIEWLEWSKI: Oh, of course, but it was -- but
6 DHS decided to -- to publish that, you know, for all the world
7 to see. This is a slightly different situation.

8 THE COURT: So let's talk it through tomorrow, but
9 this is what I would want to know, is I want to make sure that
10 what is going out to the officers is consistent with the order,
11 right? And so that's why I want to see it, is to know that
12 this is what is consistent -- that this -- what officers are
13 being told to do is consistent with this order.

14 And that if it changes during the period of the order,
15 I want to know that too. Because what I don't want is -- which
16 I know would never, ever happen, is that something goes out to
17 the officers that says, yeah, there's this crazy judge in
18 Chicago that issued this order and forget what she says; you
19 don't have to do that, right? That would not be consistent
20 with this order. I know that would never, ever happen. But,
21 you know, it might be that things get lost in translation and
22 what the officers are being told they can or cannot do is not
23 consistent with this order. So I just want to make sure that
24 everybody's on the same page and rowing in the same direction.

25 I know that DHS and its officers are -- value the

1 democratic ideals that underpin this country, that they value
2 the rule of law, that they have no intention or desire to break
3 the law, and that they want to conform their behavior and
4 decisions and policies with the law.

5 So with that as the foundation, I just want to make
6 sure that what they are being told they can or cannot do is
7 consistent with what we have hashed out.

8 So however that works, you know, whether we want to
9 call it you're going to come up with a policy and you're going
10 to let me see the policy, and the policy simply could be,
11 here's the order, follow it, right? Could be that. And that
12 would be, like, great, you're telling them to follow this order
13 that has been legally entered. Awesome. We're done.

14 So that's my intent. And, you know, you can go back
15 and talk to your client and figure out how it is that we'll get
16 there.

17 Anything -- okay. So anything with 5, 6, or 7?

18 MR. SKEDZIEWLEWSKI: It's -- it's challenging for
19 paragraph 5 to respond within 24 hours to an alleged violation
20 of the order. I'm not sure if that's standard for -- for your
21 court, Your Honor, but for DHS to muster evidence in response
22 to an allegation, 24 hours is -- is essentially imp- --
23 it's well near impossible for -- for us to --

24 THE COURT: How about --

25 MR. SKEDZIEWLEWSKI: -- put that together.

1 THE COURT: How about as ordered by the Court?

2 MR. LOEVY: That works for the plaintiff, Your Honor.

3 MR. SKEDZIEWLEWSKI: That is fine.

4 THE COURT: Okay.

5 MR. SKEDZIEWLEWSKI: And, you know, I would also just
6 add, Your Honor, on paragraph 6, we would ask the Court to
7 require security. This is going to require lots of resources
8 on -- on DHS's part to implement and potentially retrain
9 officers and so --

10 THE COURT: Well, that's not the -- but that's not the
11 point of the security, right? The security is there in case
12 the TRO is entered improperly, right? So that -- that's the
13 point of the security.

14 MR. SKEDZIEWLEWSKI: Right.

15 THE COURT: Right?

16 MR. SKEDZIEWLEWSKI: Well, that's right, Your Honor.
17 So we of course -- I think that if you -- if your court -- the
18 Court has -- has indicated it enters a TRO that it will have
19 been done improperly and it will hopefully come to see as we
20 present our case that it has done so improperly and that
21 that -- but -- the -- our understanding of the dollar amount to
22 be sort of linked to the burden on the -- the person that the
23 order is issued against.

24 THE COURT: All right.

25 MR. SKEDZIEWLEWSKI: So that was my only reason for

1 noting it. There will be some substantial burdens to DHS in
2 implementing an order of the kind we've been discussing.

3 THE COURT: All right. Well, we can take that up
4 tomorrow.

5 MR. SKEDZIEWLEWSKI: Great.

6 THE COURT: Okay. All right. So I think we're good
7 on all of this.

8 And then I think the parties can kind of see where I'm
9 going in terms of the ultimate decision, but I'm going to do
10 that tomorrow because I want to make sure I cover all my bases.
11 And with a tired brain, it's probably not a good idea.

12 So let's look at tomorrow.

13 (Off the record.)

14 THE COURT: So why don't we -- can we say 2:30 again
15 tomorrow?

16 MR. LOEVY: We'll be here, Your Honor.

17 MR. BOWMAN: Judge, I have a commitment at 5:00
18 tomorrow. I'm hopeful that we'll --

19 THE COURT: I'm hopeful too.

20 All right. Mr. Skedziewlewski, do you -- can you do
21 2:30 Central time tomorrow?

22 MR. SKEDZIEWLEWSKI: So long as it's all right with
23 the Court if I appear remotely again --

24 THE COURT: Yeah.

25 MR. SKEDZIEWLEWSKI: -- that's not a problem.

1 THE COURT: Yeah.

2 MR. SKEDZIEWLEWSKI: Okay.

3 THE COURT: Yep, that's totally fine.

4 MR. SKEDZIEWLEWSKI: Then that's fine, Your Honor.

5 THE COURT: Okay. And that will give you enough time
6 to kind of run down some of these things that we talked about
7 today?

8 MR. SKEDZIEWLEWSKI: I'll -- I'll do my best. I mean,
9 I -- we would certainly prefer another day so I can get all
10 this squared away with the client. They're very busy, but
11 I'll -- I'll do my -- my best if it has to be tomorrow.

12 THE COURT: I mean --

13 MR. SKEDZIEWLEWSKI: I'll put it this way, Your Honor.
14 I may have better answers for you on Wednesday than I will have
15 by tomorrow afternoon, just as far as the things you're asking
16 for.

17 THE COURT: What do you think?

18 MR. BOWMAN: I -- I will not be available on
19 Wednesday. If the Court will excuse me, I -- I -- that's the
20 only --

21 THE COURT: What do you think, Mr. Loevy?

22 MR. LOEVY: Well, Your Honor, you could make a case
23 that Mr. Bowman is important too. I think our preference would
24 be Tuesday, but if you did this on Wednesday, we understand.

25 THE COURT: Or -- or Thursday morning? So here's --

1 here's my thinking on it, and I understand you filed it today
2 and that's why I wanted to do the TRO this afternoon, is that
3 obviously things are ongoing.

4 I will say that, you know, at this point, DHS is on
5 notice, so I would certainly expect that whatever has happened
6 in the past would not continue to occur if I push out entering
7 this order to Thursday is one thing that I just want to make
8 abundantly clear.

9 That being said, what I don't want to do is tinker and
10 tinker and tinker with the order over time as it's been entered
11 because I do feel like that creates and sows unnecessary
12 confusion, that the order should be the best order that we can
13 put together that provides the best guidance and is most clear
14 to the officers and agents who are expected to abide by the
15 order.

16 So --

17 MR. BOWMAN: Your Honor --

18 THE COURT: -- I would not have a problem doing this
19 Thursday morning if it allowed the government to get
20 information based -- you know, for some of these things that
21 I've asked for, like something that is particularly I think
22 important and vital is this identification issue. So I would
23 much rather give it a couple of days to allow us --

24 MR. BOWMAN: And -- and --

25 THE COURT: -- to get those answers, but --

1 MR. BOWMAN: To be clear, Judge, the -- the position
2 of the people we represent is they desire the order entered at
3 the earliest possible time. And I say that again just to
4 clarify one point.

5 THE COURT: Mm-hmm.

6 MR. BOWMAN: I -- I'm out of pocket for the rest of
7 the week. So --

8 THE COURT: Oh.

9 MR. BOWMAN: -- moving it to Thursday --

10 THE COURT: Okay.

11 MR. BOWMAN: -- doesn't address my issue.

12 THE COURT: Okay.

13 MR. BOWMAN: And the preference would be to do it on
14 Wednesday --

15 THE COURT: Okay.

16 MR. BOWMAN: -- if it is not going to happen
17 tomorrow --

18 THE COURT: Okay.

19 MR. BOWMAN: -- which would --

20 THE COURT: Okay.

21 MR. BOWMAN: -- be first preference.

22 THE COURT: Okay. And, Mr. Skedziewlewski, do you --
23 how realistic do you think it would be that you'd get the
24 information that we're looking for by tomorrow at 2:30?

25 MR. SKEDZIEWLEWSKI: I think it's a slim chance that I

1 would have, like, vetted answers for you that I can attest to
2 confidently by tomorrow at 2:30, Your Honor.

3 THE COURT: Okay. And I would much rather have real
4 answers than speculative answers.

5 MR. BOWMAN: Understood.

6 THE COURT: And that's what -- if we're doing this.

7 So if we're looking at Wednesday then, I've got an MDL
8 hearing at 1:30 that shouldn't take more than a half an hour.

9 So what about 2:00 on Wednesday?

10 MR. LOEVY: We'll be here, Your Honor.

11 MR. SKEDZIEWLEWSKI: I'm available as well,
12 Your Honor.

13 THE COURT: Okay. All right. So we'll say 2:00,
14 then, on Wednesday.

15 And if the parties can talk between now and then as
16 well, right, and knowing that obviously the government objects
17 to the imposition of any order and not waiving that objection,
18 you know, if I can see what the parties kind of have come to
19 before Wednesday, and then you can kind of highlight for me
20 where we have issues, and I think it can be just a more
21 efficient use of time.

22 Does that make sense?

23 MR. LOEVY: Makes a lot of sense. We'll -- we'll do
24 our best to try to narrow the disputes as appropriate.

25 THE COURT: Does that make sense?

1 MR. SKEDZIEWLEWSKI: Yes, Your Honor.

2 THE COURT: Okay. All right.

3 Okay. Anything else, then, that we need to take up?

4 MR. LOEVY: We do want to thank you for your time,

5 Your Honor. You put a lot of time and effort into it --

6 THE COURT: You're welcome.

7 MR. LOEVY: -- and much appreciated.

8 THE COURT: You're welcome.

9 All right.

10 MR. BOWMAN: Yes.

11 THE COURT: Then we'll see everybody Wednesday at

12 2:00.

13 MR. SKEDZIEWLEWSKI: Thank you, Your Honor.

14 THE COURT: All right. Thank you.

15 And sorry for butchering your name multiple times

16 throughout the hearing. I'll do better on Wednesday.

17 MR. SKEDZIEWLEWSKI: That's all right. Thank you,

18 Your Honor.

19 THE COURT: Thanks.

20 (Concluded at 6:18 p.m.)

21

* * * * *

22 I certify that the foregoing is a correct transcript of
23 the record of proceedings in the above-entitled matter.

24 /s/ Kelly M. Fitzgerald

October 7, 2025

25 Kelly M. Fitzgerald, RPR, RMR, CRR
Official Court Reporter