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THE HONORABLE MARY ROBERTS

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

IN RE THE MATTER OF RECALL
CHARGES AGAINST CITY OF SEATTLE
MAYOR JENNY DURKAN (HARVEY)

Case No. 20-2-10455-8 SEA
STATEMENT OF ADDITIONAL
AUTHORITY

Mayor Jenny A. Durkan respectfully submits the following Statement of Additional Authority in connection with her currently pending Motion for Reconsideration.

Filed herewith as **Exhibit A** is a true and correct copy of Judge James L. Robart’s Saturday, July 25, 2020,¹ order granting the United States of America’s Motion for a Temporary Restraining Order enjoining implementation of the July 23, 2020, directive to Seattle Police Department officers implementing a recent Seattle City Council ordinance banning crowd control weapons. *See United States of America v. City of Seattle*, Case No. C12-1282JLR, Dkt. 630, *3, 6-8 (W.D. Wash., July 25, 2020) (holding that (1) the Consent Decree requires that policies relating to the use of crowd control tools be submitted to the Monitor, the DOJ, and the Court for approval prior to implementation, and (2) removing all forms of less lethal crowd control tools “will not increase public safety” due to remaining measures being more likely to cause injury and insufficient time for police training in

¹ Mayor Durkan filed her Reply in Support of her Motion for Reconsideration on July 23, 2020.

1 alternative de-escalation techniques).

2 DATED this 27th day of July, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2020, I caused the foregoing opposition to be served via the Court's e-service portal on the party listed below:

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DATED this 27th day of July, 2020.

s/ G. William Shaw

G. William Shaw

EXHIBIT A

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

CITY OF SEATTLE,

Defendant.

CASE NO. C12-1282JLR

ORDER

I. INTRODUCTION

Before the court is Plaintiff United States of America’s (“the Government”) motion for a temporary restraining order (“TRO”) enjoining implementation of Seattle Police Chief Carmen Best’s directive to Seattle Police Department (“SPD”) officers on July 23, 2020, which implemented portions of the Seattle City Council’s Ordinance No. 119805 banning certain crowd control weapons (“CCW”). (*See* TRO Mot. (Dkt. # 627); *see also* Fogg Decl. (Dkt. # 628) ¶ 2, Ex. A (“Directive”).) The Directive instructs officers to cease use of and possession of certain crowd control implements known as 40

1 mm launchers, blast balls, CS gas, and oleoresin capsicum (“OC”) spray. (*See Directive*.)
2 The court has reviewed the motion, the submissions related to the motion, the relevant
3 portions of the record, and the applicable law. In addition, the court held a video and
4 telephonic hearing on July 24, 2020, at 8:00 p.m., PDT, in which counsel for the parties
5 and the Community Police Commission (“CPC”) participated. Having considered all of
6 the foregoing, the court GRANTS the Government’s motion as more fully described
7 below.

8 II. BACKGROUND

9 In 2011, the Government investigated SPD for a potential pattern or practice of
10 unconstitutional policing and excessive force. (*See Dkt. # 1-1.*) As a result of its
11 investigation, the Government issued findings that such a pattern or practice of excessive
12 force existed. (*See id.*) Rather than pursue litigation to contest this finding, the City of
13 Seattle opted to enter into the Consent Decree¹ that this court now administers. Although
14 the City did not admit that the SPD engaged in a pattern or practice of unconstitutional
15 policing and excessive force, the City did admit that there was an evidentiary basis for
16 entry of the Consent Decree, including but not limited to the Government’s investigation.
17 (*See Findings and Conclusions (Dkt. # 14) ¶¶ 16, 27.*)

18 Under the Consent Decree, the City agreed to abide by a number of prescriptive
19 requirements designed to eliminate unconstitutional uses of force. (*See generally*

21 ¹ The Settlement Agreement between the parties that the court entered an as order has
22 been known as the “Consent Decree.” (*See Settlement Agreement (Dkt. # 3-1); Order*
Provisionally Approving the Settlement Agreement (Dkt. # 8); Order Modifying and
Preliminarily Approving the Settlement Agreement (Dkt. # 13).)

1 Consent Decree.) Specifically, the Consent Decree requires that the City submit policies
2 related to the use of force, including the use of crowd control management weapons, to
3 the Monitor and the Government before the policies are implemented. (Consent Decree
4 ¶ 177.) Since 2012, the City has followed these requirements, including for every
5 revision for SPD's use of force policies, since the Consent Decree's inception. (See Dkt.
6 ## 569-2 to 569-4.) Likewise, the City followed this process in passing the current
7 version of SPD's crowd management policy. (See Dkt. ## 359-1, 363.)

8 In the Consent Decree, the City also agreed to abide by a series of principles
9 including that officers' actions should increase public safety, be effective and
10 constitutional, embrace principles of procedural justice, that comply with uses of force
11 that are consistent with the principles set forth in *Graham v. Connor*, 490 U.S. 368
12 (1989). In other words, the City agreed that SPD's uses of force shall be reasonable
13 under the circumstances and that officers should use de-escalation techniques. (See
14 Consent Decree ¶ 70.) Further, the City agreed to the governing principle that policing
15 must be delivered to the people of Seattle in a manner that ensures both officer and the
16 public's safety. (*Id.* ¶ 5.)

17 Recently, the City Council passed Ordinance No. 119805 banning certain crowd
18 control weapons ("CCW Ordinance"). The CCW Ordinance prohibits the City's use or
19 possession of "crowd control weapons," which are defined to include "kinetic impact
20 projectiles, chemical irritants, acoustic weapons, direct energy weapons, water cannons,
21 disorientation devices, ultrasonic cannons, or any other device that is designed to be used
22 on multiple individuals for crowd control and is designed to cause pain or discomfort."

1 (See Notice (Dkt. # 625) at 2; *see also id.*, Ex. 1 (attaching a copy of the CCW
2 Ordinance) §§ 1(A), 1(B).) The CCW Ordinance makes an exception for the use of
3 oleoresin capsicum spray (“OC spray”) outside the setting of a “demonstration, rally, or
4 other First Amendment-protect event.” (*Id.* Ex. 1 § 1(D)(2).) However, when used, OC
5 spray must not “land on anyone other than” “an individual in the process of committing a
6 criminal act or presenting an imminent danger to others.” (*Id.*) Finally, the CCW
7 ordinance also creates a private right of action for individuals against whom a prohibited
8 crowd control weapon is used. (*Id.*, Ex 1 §§ 1(E)-(F).) Because Mayor Durkan returned
9 the CCW Ordinance to the City Council without a signature, the Ordinance will take
10 effect on July 26, 2020. (*See* Notice at 3; *see also id.*, Ex. 1 § 5 (“This ordinance shall
11 take effect and be in force 30 days after it is approved by the Mayor, but if not approved
12 and returned by the Mayor within ten days of presentation, it shall take effect as provided
13 by Seattle Municipal Code Section 1.04.020.”).)

14 On July 17, 2020, the City filed a notice with the court concerning the CCW
15 Ordinance. (*See* Notice.) Because both Mayor Jenny Durkan and Chief Best asked the
16 court to enjoin the effective date of the CCW Ordinance (*see id.* at 6), the court construed
17 the notice as a motion for a TRO (*see* 7/22/20 Order (Dkt. # 626) at 3). However, the
18 court declined to enjoin the effective date of the CCW Ordinance because the City had
19 failed to demonstrate that it met the necessary standard for entry of this type of relief.
20 (*Id.* at 4-7.) The court nevertheless ordered the City to provide the court with the Office
21 of Police Accountability (“OPA”) and the Inspector General’s (“IG”) analysis of the
22 CCW Ordinance, which OPA and IG have committed to provide to the City Council by

1 August 15, 2020, and the court set a briefing schedule so that it could consider the
2 interaction of the CCW Ordinance with the Consent Decree, as well as with any SPD
3 policies that the Consent Decree governs. (*Id.* at 7-9.)

4 On July 23, 2020, Chief Best issued her Directive to SPD officers to ensure their
5 compliance with the CCW Ordinance. (Fogg Decl. ¶ 2, Ex. A.) Chief Best’s Directive
6 becomes effective on July 25, 2020 at 3:00 a.m., PDT. (*See id.*)

7 The Government maintains that removing all forms of less lethal implements from
8 all police encounters, as Chief Best’s Directive and the CCW Ordinance will do, will not
9 increase public safety nor provide the means for SPD officers to abide by the
10 de-escalation mandate. The Government asks the court to grant a TRO prohibiting the
11 implementation of Chief Best’s Directive. (*See* TRO Mot.) The court now considers the
12 Government’s motion.

13 III. ANALYSIS

14 The standard for issuing a TRO is the same as the standard for issuing a
15 preliminary injunction. *See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434
16 U.S. 1345, 1347 n.2 (1977). A TRO is “an extraordinary remedy that may only be
17 awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Nat.*
18 *Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). “The proper legal standard for
19 preliminary injunctive relief requires a party to demonstrate (1) ‘that he is likely to
20 succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of
21 preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an

22 //

1 injunction is in the public interest.” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th
2 Cir. 2009) (citing *Winter*, 555 U.S. at 20).

3 As an alternative to this test, a preliminary injunction is appropriate if “serious
4 questions going to the merits were raised and the balance of the hardships tips sharply in
5 the plaintiff’s favor,” thereby allowing preservation of the *status quo* when complex legal
6 questions require further inspection or deliberation. *All. for the Wild Rockies v. Cottrell*,
7 632 F.3d 1127, 1134-35 (9th Cir. 2011). However, the “serious questions” approach
8 supports the court’s entry of a TRO only so long as the plaintiff also shows that there is a
9 likelihood of irreparable injury and that the injunction is in the public interest. *Id.* at
10 1135. The moving party bears the burden of persuasion and must make a clear showing
11 that it is entitled to such relief. *Winter*, 555 U.S. at 22.

12 **A. Serious Questions Going to the Merits and the Balance of Equities**

13 With the respect to the first factor, the court concludes that the Government has
14 met the Ninth Circuit’s alternative test of serious questions going to the merits and the
15 balance of hardships tipping sharply in the Government’s favor. If Chief Best’s Directive
16 is implemented, the Government loses its right under the Consent Decree, in which the
17 City voluntarily engaged, to review these policies prior to implementation. Further, the
18 court agrees that by removing all forms of less lethal crowd control weapons from
19 virtually all police encounters, the Directive and the CCW Ordinance will not increase
20 public safety. This is so particularly because neither the CCW Ordinance nor the
21 Directive provide time for police training in alternative mechanisms to de-escalate and
22 resolve dangerous situations if the crowd control implements with which the officers

1 have been trained are abruptly removed. As Chief Best stated: “Left only with the
2 options of a baton, a Taser (effective distance of approximately 7-12 feet), and an
3 officer’s body, the likelihood of greater injury – to both the officer and subject in those
4 . . . empirically rare but foreseeable situations where some level of force is necessary –
5 should be patent and concerning.” (Best Mem. (Dkt. # 625-2) at 4.)

6 Further, the City is anticipating significant and potentially dangerous protests this
7 weekend just as the Directive and CCW Ordinance go into effect. (*See* Fogg Decl. ¶ 4,
8 Ex. C (attaching a letter from Chief Best to the City Council on July 23, 2020).) The
9 issuance of this immediate change, without time for additional direction or training, is
10 likely to result in officer confusion, particularly if the Directive or CCW Ordinance
11 undergo additional changes after review by IG, OPA, the parties to this litigation, and the
12 court. (*See* 7/22/20 Order at 8-9.) These additional changes to policy risk whipsawing
13 officers through three varying sets of expectations in less than one month. The court
14 concludes that such officer confusion presents risks to both the officers’ and the public’s
15 safety.

16 These substantial risks tip the balance of the equities in the Government’s favor.
17 Further, the Government is not arguing that the CCW Ordinance may never be
18 implemented. The Government merely seeks a pause until such time as the Chief Best’s
19 Directive, and the underlying CCW Ordinance, can be reviewed pursuant to the terms of
20 the Consent Decree. For these reasons, the court concludes that the Government has
21 established serious questions going to the merits of its claim and that the balance of the
22 equities tips sharply in the Government’s favor.

1 **B. Irreparable Harm and the Public Interest**

2 The remaining factors of the *Winter* test also favor an injunction. There are both
3 substantive and procedural grounds on which to find that the absence of injunctive relief
4 will yield irreparable harm. First, substantively, the Government has established that
5 implementation of the Directive and the CCW Ordinance will create a risk that SPD
6 officers will resort to excessive force, which could violate both the Fourth Amendment
7 and the terms of the Consent Decree relating to the use of force. “It is well established
8 that the deprivation of constitutional rights ‘unquestionably constitutes irreparable
9 injury.’” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v.*
10 *Burns*, 427 U.S. 347, 373 (1976)) (finding irreparable harm in case where the plaintiffs
11 established likelihood of success on the merits of their Fourth Amendment claims).

12 Second, procedurally, as discussed above, the Government, the Monitor, and the
13 court are entitled to review “the policies, procedures, training curricula, and training
14 manuals required to be written, revised, or maintained” by the Consent Decree before
15 implementation by SPD. If the court allows SPD to implement the CCW Ordinance and
16 the Directive without first complying with the procedural protections in the Consent
17 Decree, that procedural harm cannot be undone. These substantive and procedural harms
18 are particularly acute here given that the City has reason to believe that protests and
19 public demonstrations in Seattle may occur shortly after the Directive and the Ordinance
20 go into effect. (See Fogg Decl. ¶ 4, Ex. C (attaching July 23, 2020, letter from Chief Best
21 to the City Council).

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1 The court also finds that a temporary injunction that preserves the status quo of the
2 Consent Decree and the processes put in place by the Consent Decree is in the public
3 interest for similar reasons that the court finds a likelihood of irreparable harm. To the
4 extent that implementation of the Directive and the Ordinance makes it difficult for the
5 SPD to practice effective crowd management tactics and increases the risk of excessive
6 force in violation of the Fourth Amendment, it is in the public interest to prevent that
7 deprivation of constitutional rights. *Melendres*, 695 F.3d at 1002 (“[I]t is always in the
8 public interest to prevent the violation of a party’s constitutional rights.”) (internal
9 quotation marks omitted); *Miller v. City of Cincinnati*, 622 F.3d 524, 540 (6th Cir. 2010)
10 (“When a constitutional violation is likely . . . the public interest militates in favor of
11 injunctive relief because it is always in the public interest to prevent violation of a party's
12 constitutional rights.”) (internal quotation marks omitted).

13 The court recognizes that preservation of the status quo does not ensure that SPD
14 will refrain from using crowd control tactics that result in deprivations of constitutional
15 rights. *See Black Lives Matter Seattle-King Cty. v. City of Seattle, Seattle Police Dep’t*,
16 No. C20-0887RAJ, 2020 WL 3128299, at *4 (W.D. Wash. June 12, 2020) (finding that
17 the SPD’s use of force in response to recent protests likely violated the Fourth
18 Amendment). However, the procedural and substantive provisions in the Consent Decree
19 are in place to provide the court with mechanisms to monitor SPD’s practices and to
20 work in hand with the parties to determine the most effective police practices for SPD. It
21 is not in the public’s interest to eschew the protections that the parties and the court have
22 spent nearly a decade fashioning the moment SPD engages in potentially unconstitutional

1 practices. Instead, the court concludes that the public interest weighs in favor of
2 preserving the status quo under the Consent Decree by reviewing SPD's recent practices
3 and the City's recent crowd control proposals with input from all the appropriate
4 stakeholders before determining the correct path forward under the terms of the Consent
5 Decree.

6 In summary, the court concludes that the Government has clearly met the standard
7 for issuing a TRO and therefore grants its motion.

8 IV. CONCLUSION

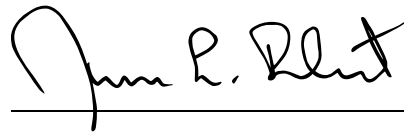
9 Having concluded that the Government has met the standard for issuing a TRO,
10 the court GRANTS the Government's motion (Dkt. # 627) and issues a TRO against
11 implementation of Chief Best's Directive. The court further concludes that it would
12 cause confusion not only for SPD officers, but also the public, if the court were to enjoin
13 Chief Best's Directive while leaving the CCW Ordinance in place. Accordingly, the
14 court's TRO will also enjoin the effective date of the CCW Ordinance. The court does
15 not enjoin the CCW Ordinance itself, but rather enjoins only the Ordinance's
16 implementation date until such time as the procedures the City agreed to follow in the
17 Consent Decree concerning SPD use of force and crowd control policies are followed.

18 Finally, the court notes that nothing in this order is contrary to the preliminary
19 injunction that the Honorable Richard A. Jones issued in *Black Lives Matter Seattle-King*
20 *County, et al., v. City of Seattle*, No. C20-0887RAJ (W.D. Wash.), Dkt. # 42. Judge
21 Jones' preliminary injunction is the current *status quo* and remains in effect.

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1 Pursuant to Rule 65(b)(2), this TRO will expire 14 days after entry unless before
2 that time the court, for good cause, extends it for a like period or the adverse party
3 consents to a longer extension. *See* Fed. R. Civ. P. 65(b)(2). The court ORDERS the
4 parties to meet and confer to set a schedule for briefing on a preliminary injunction and
5 file a joint status report concerning the same no later than Wednesday, August 1, 2020.

6 Dated this 24th day of July, 2020.

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9 JAMES L. ROBART
10 United States District Judge
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