

THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,
Plaintiff,
v.
CITY OF SEATTLE,
Defendant.

No. 2:12-cv-01282-JLR

**MOTION FOR TEMPORARY
RESTRAINING ORDER ENJOINING
IMPLEMENTATION OF THE DIRECTIVE
ISSUED ON JULY 23, 2020**

NOTED FOR: July 24, 2020

The United States files this motion for a temporary restraining order (“TRO”) in response to the Seattle Police Department (“SPD”)’s directive to officers on July 23, 2020 at 5:38 p.m. (“Directive”). *See* Declaration of Christina Fogg, Exhibit A. The Directive instructs officers to cease use and possession of the less lethal implements known as 40 mm launchers, blast balls, CS gas, and oleoresin capsicum spray (“OC”). *Id.* The Directive is set to become effective on Saturday, July 25, 2020 at 3:00 a.m. *Id.* Implementation of the Directive as scheduled will conflict with both the procedural and substantive requirements of the Consent Decree. The Consent Decree requires review by the United States and Monitor and approval of this Court before changes to policies covered by the Consent Decree may be implemented, including by directive. *See* (Dkt. 3-1) at ¶¶ 53, 177. Further, the Consent Decree contains a commitment to

1 the use of force “principles” that officers’ actions: (1) increase public safety, (2) be reasonable
 2 given the circumstances, and (3) employ “de-escalation techniques, when appropriate and
 3 feasible, in order to reduce the need for force.” *Id.* at ¶¶ 69 and 70(a). Implementation of the
 4 Directive, which will significantly limit officers’ ability to moderate force, will conflict with
 5 these terms of the agreement.¹

7 If the Directive is permitted to take effect on July 25, 2020, the United States and the
 8 public are likely to suffer irreparable harm resulting from officer confusion and the inability to
 9 modulate force or de-escalate situations in which force may be needed. Further, if these changes
 10 proceed under the usual course of policy review and approval, they are likely to be found to
 11 violate the Consent Decree. At the very least, there is a serious question regarding whether the
 12 removal of these less lethal options (in particular without additional guidance or training to
 13 officers) is in violation of the Consent Decree’s provisions. Accordingly, the United States now
 14 seeks a TRO from this Court prohibiting the Directive from becoming effective on July 25, 2020.

17 **A. The United States Satisfies the Requirements of a TRO**

18 To obtain such a TRO, “[a] plaintiff . . . must establish that he is likely to succeed on the
 19 merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
 20 balance of equities tips in his favor, and that an injunction is in the public interest.” *See Winter*
 21 *v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008)). “A plaintiff must make a showing as to each
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25 ¹ The Consent Decree provides a mechanism for Court intervention when the United States believes that
 26 the City of Seattle is acting in violation of a provision of the agreement. *See Id.* at ¶ 224. As discussed
 27 below, the United States has followed the notice and cure provisions of this term of the Consent Decree.
 28 *Id.* at ¶ 222.

1 of these elements, although in [the Ninth Circuit] ‘if a plaintiff can only show that there are
 2 ‘serious questions going to the merits’—a lesser showing than likelihood of success on the
 3 merits—then a preliminary injunction may still issue if the ‘balance of hardships tips sharply in
 4 the plaintiff’s favor,’ and the other two Winter factors are satisfied.” *See Feldman v. Ariz. Sec’y*
 5 *of State’s Office*, 843 F.3d 366, 375 (9th Cir. 2016) (quoting *Shell Offshore, Inc. v. Greenpeace,*
 6 *Inc.*, 709 F.3d 1282, 1291(9th Cir. 2013)). “That is, ‘serious questions going to the merits’ and a
 7 balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary
 8 injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and
 9 that the injunction is in the public interest.” *All. for the Wild Rockies v. Cotrell*, 632 F.3d 1127,
 10 1135 (9th Cir. 2001). The United States’ request satisfies these requirements.²

13 **B. Implementation of the Directive Will Violate the Consent Decree’s Requirements**

14 As an initial matter, the United States notes the difficult position that the Chief of Police
 15 and SPD find themselves in given Ordinance 119805, which by its terms, requires SPD to cease
 16 use of the same less lethal implements addressed by the Directive, or in the case of OC spray,
 17 restrict its use. However, there is no city ordinance exception to the terms of the Consent
 18 Decree. It requires that all changes to policy in areas covered by the Consent Decree must be
 19 reviewed by the United States and the Monitor with time for comment, and approved by the
 20 Monitor prior to implementation. Accordingly, it is the act of changing SPD policy that renders
 21 the City’s actions in violation of the Consent Decree.
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27 ² Pursuant to LCR 65(b)(1), the United States has provided notice to the City of Seattle of this motion in
 28 advance of filing and will provide copies of this motion contemporaneously with filing to the City.

1 1. The Consent Decree’s Procedural Requirements

2 As the Court is well aware, the United States investigated SPD for a potential pattern or
 3 practice of unconstitutional policing and excessive force in 2011. Subsequent to the
 4 investigation, the United States issued findings that such a pattern or practice of excessive force
 5 existed. Rather than pursue litigation to contest this finding, the City of Seattle opted to enter a
 6 Consent Decree in 2012 by which it agreed to abide by a number of prescriptive requirements
 7 designed to eliminate unconstitutional uses of force. Specifically, the Decree required revisions
 8 to SPD’s use of force policies, including the use of less lethal weapons and crowd management.
 9 (Dkt 3-1), ¶¶ 69-129. The Decree also requires those policies to be submitted to the Monitor and
 10 DOJ before they are implemented: “SPD will submit the policies, procedures, training curricula,
 11 and training manuals required to be written, revised, or maintained by the Settlement Agreement
 12 to the Monitor and DOJ for review and comment prior to publication and implementation.” (Dkt
 13 3-1), ¶ 177.³ Paragraphs 177 and 178 then provide up to 45 days for the Parties and the Monitor
 14 to meet and confer regarding the policies “if necessary”, and 14 days following that period to put
 15 any issues before the Court.
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19 From 2012 onward, the City has abided by these requirements,⁴ including by following
 20 this exact process for every revision of SPD’s Use of Force policies since the case’s inception.
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 23 ³ “Policies” and “procedures” include directives issued by the Chief. *See* (Dkt 3-1), ¶ 53 (“Policies and
 24 Procedures’ means regulations or directives, regardless of the name, describing the duties, functions, and
 25 obligations of SPD officers and/or employees, and providing specific direction in how to fulfill those
 26 duties, functions, or obligations”).

27 ⁴ *See* (Dkts. 59, 127, 221-1, 294-1) (Agreed Monitoring Plans in place during Phase I of the litigation,
 28 which set forth the procedure for submitting draft revisions to the Monitor, DOJ, and the Court); *see also*
 (Dkt. 444) (City’s Sustainment Plan, stating “APRS will seek the input of the DOJ and Monitor in
 reviews of Consent Decree-mandated policies”).

1 | See (Dkt. 107-1 to 107-6, 204-1, 388-1, 471-1 to 471-3, 500-1 to 500-5, 569-2 to 569-4). The
 2 | last revision of which occurred in July 2019 and currently governs SPD's use of less lethal
 3 | implements. See (Dkt. 569-2 to 569-4). Likewise, the City abided by this process in passing the
 4 | current version of SPD's Crowd Management policy. See (Dkt. 359-1) (January 27, 2017); (Dkt.
 5 | 363) (approved by Court February 7, 2017).⁵ Directives were similarly submitted to DOJ and
 6 | the Monitor and received their approval prior to being published and implemented. Accordingly,
 7 | the United States is likely to succeed on the merits that failure to provide a draft of the Directive
 8 | to the United States and the Monitor, and receive their approval as well as the approval of this
 9 | Court, prior to implementation is a violation of the Consent Decree's terms and past practices in
 10 | this case.

13 | 2. The Consent Decree's Substantive Requirements

14 | Under the Consent Decree, the City of Seattle agreed to abide by a series of principles
 15 | intended to govern all use of force issues, including changes to policy, training, supervision, and
 16 | the like. The first of which, is that "[o]fficers' actions should increase public safety, be effective
 17 | and constitutional, and embrace principles of procedural justice." See (Dkt. 3-1) at ¶ 69. The
 18 | second of which is the principle that all uses of force will be consistent with *Graham v. Connor*
 19 | (*i.e.* reasonable under the circumstances) and "[o]fficers should use de-escalation techniques,
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 24 | ⁵ In 2017, the City of Seattle sought a finding of "full and effective compliance" with the Consent Decree
 25 | from this Court in 2017. The United States supported that motion, in part, on the basis of the City's
 26 | conformance with the requirements of Paragraph 177's mandates (*i.e.* the City consistently provided draft
 27 | revisions to all Consent-Decree related policies to the United States and the Monitor for review and
 28 | conference and sought and obtained approval by the Court prior to their adoption). The Court granted the
 City's motion, however, the City remains under a "Sustainment Period" in which it must continue to
 comply with the terms of the Consent Decree.

1 when appropriate and feasible, in order to reduce the need for force.” *Id.* at ¶ 70. Further, the
2 City agreed to the governing idea stated in the introduction to the Consent Decree that policing
3 must be delivered to the people of Seattle in a manner that ensures both public and officer safety.
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5 *Id.* at 5. The Parties drafted and revised all Consent Decree-related policies, including use of
6 force and crowd management, with these principles and goals in mind. The Directive that is set
7 to take effect tomorrow will run directly contrary to these principles and requirements.

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9 To begin with, it is likely that removing nearly all forms of less lethal implements from
10 all police encounters will not “increase[s] public safety” nor provide the means for SPD officers
11 to abide by the de-escalation mandate. Indeed, while City Council may have intended the ban on
12 these less lethal implements to prevent the use of excessive force, the Directive – which removes
13 them without providing training or alternative mechanisms to de-escalate and resolve the
14 dangerous situations officers routinely find themselves – may cause it. Removing force options
15 means officers will lack other options to choose from in moderating their force to the threat
16 presented and will, therein, increase the likelihood of use of hands-on force (punches, kicks,
17 etc.), batons, and potentially deadly force. As stated by Chief Best: “Left only with the options
18 of a baton, a Taser (effective distance of approximately 7-12 feet), and an officer’s body, the
19 likelihood of greater injury – to both officer and subject in those (again) empirically rare but
20 foreseeable situations where some level of force is necessary – should be patent and concerning.”
21 (Dkt. 625-2 at 4) (Memorandum from Chief Carmen Best to City Attorney Peter Holmes).

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24 These risks are not just hypothetical with respect to force encounters that may or may not
25 occur at some future date. Rather, the City of Seattle is anticipating significant and potentially
26 dangerous protests this weekend, at the very same time that these changes to SPD’s policies (and
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1 | therein, tactics and decision-making) are being rolled out. Chief Best has made statements
2 | regarding how the Ordinance and therein, implementation of the Directive, will directly impact
3 | SPD's response to these protests. She states:
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5 | This weekend we know that several events are planned across the city that will
6 | foreseeably involve many of the same violent actors from recent days. There is no
7 | reason not to assume we will continue to experience property destruction, arson,
8 | looting, and attempts to injure additional officers throughout the weekend and
9 | beyond

10 | Under these circumstances, as created by Council, we cannot manage
11 | demonstrations as we have in the past. If I am not allowed to lawfully equip officers
12 | with the tools they have been trained to use to protect the community and
13 | themselves, it would be reckless to have them confront this level of violence under
14 | the current legal restrictions imposed by Council. . . .

15 | SPD's de-escalation principles are premised on the expectation, consistent with
16 | policy and best practices, that officers have the full array of approved tools. In large
17 | crowds, there is no safe way for officers to effect arrests when their colleagues do
18 | not have the tools necessary to protect them. . . .

19 | As City Council's legislation goes into effect, it will create even more dangerous
20 | circumstances for our officers to intervene using what they have left – riot shields
21 | and riot batons.

22 | *See* Fogg Dec. at Exhibit C. Accordingly, the Chief further states: "SPD will have an adjusted
23 | deployment in response to any demonstrations this weekend. The Council legislation gives
24 | officers no ability to safely intercede to preserve property in the midst of a large, violent crowd."

25 | *Id.* The Chief of Police has therefore made clear that this Directive (implementing the
26 | Ordinance) will result in changes to SPD procedures such that will increase the danger to either
27 | the public or officers. This is a clear conflict with the Consent Decree and, thus, the United
28 | States is likely to succeed on the merits in challenging their adoption. At the very least, this
29 | impact raises serious questions about the City's compliance with the terms of the Consent Decree

1 related to use of force principles. For the exact same reasons already discussed, implementation
 2 of the Directive also creates a likelihood of irreparable harm to the public.⁶

3 **C. The United States Satisfied the Notice and Cure Provisions of the Consent Decree**

4 This motion is filed consistent with the notice-and-cure provisions of the Consent Decree
 5 set forth in paragraphs 222 and 224. Paragraph 224 allows the United States to seek enforcement
 6 of a provision of the Consent Decree when it has determined that the City and SPD have failed to
 7 comply with the provision. (Dkt. 3-1) at 73. Paragraph 222 provides procedures for notice and
 8 opportunity to cure that must be followed before such a petition. *Id.* at 72. After the United
 9 States received notice of the Ordinance, the City of Seattle notified the United States that it
 10 would need to modify SPD policies in order to effectuate the terms of the Ordinance. Following
 11 informal discussion, the United States formally notified the City that any such changes would
 12 require compliance with Paragraphs 177 and 178 of the Consent Decree prior to implementation.
 13 *See Fogg Dec.* at Exhibit B (Notice). The City indicated that it did not intend on complying with
 14 this provision. *Id.* The parties then met and conferred about this issue via conference call on
 15 July 16, 2020, but were unable to resolve the issue. *Id.* The issuance of the July 23, 2020
 16 Directive now ripens the issue before the United States and this Court⁷ as its implementation
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 22 ⁶ Further, the issuance of this immediate change, without additional direction or training by which to
 23 navigate their duties, is likely to result in significant officer confusion, particularly given that additional
 24 policy revisions are likely to occur after the process contemplated by the Ordinance in which the OPA,
 25 OIG, and CPC provide input and guidance. These additional changes to policy would whipsaw officers
 26 through three varying set of expectations in approximately one month. Officer confusion presents risks to
 27 both the officers themselves and the safety of the public. It is hard to think of a greater public interest
 28 than that.

⁷ The Court notes in its Order of July 22, 2020 that other restrictions on crowd control weapons –
 including Judge Jones’ TRO and the City’s June 17, 2020 prohibition on CS gas – have not been
 challenged. The United States submits that failing to challenge those has not effectuated any form of

1 would be in direct conflict with the procedural and substantive requirements of the Consent
2 Decree.

3 **D. Conclusion**

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5 For the foregoing reasons, the United States requests that the Court issue an order
6 prohibiting the City of Seattle from enacting any changes to policies covered by the Consent
7 Decree, without first engaging in the review, comment, and approval process set forth in
8 Paragraphs 177 and 178 of the Consent Decree. In particular, the United States requests that the
9 Court's order make clear that the July 23, 2020 Directive may not take effect on July 25, 2020.

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22 waiver, in particular because those circumstances are legally and factually distinguishable. For one,
23 Judge Jones' TRO is an order of a federal court, not the action of a City employee subject to the Consent
24 Decree. One is not appropriately challenged in a separate federal court proceeding, one is. Further, Judge
25 Jones' order provided for significant exceptions to the blanket prohibition on less lethal implements, such
26 that SPD can (and has) continued to use them as necessary for the protection of officers and the public.
27 Indeed, Judge Jones' order appears to simply require that the City use less lethal implements in a manner
28 that is consistent with the existing policy. As such, it is actually in furtherance of the Consent Decree, not
at odds with it. The prohibition on CS gas is also distinguishable because: (1) it did not ban the many
other types of less lethal implements or their procedures and training that were previously reviewed and
approved through the Consent Decree and its processes; and (2) there is no policy created, approved, or
revised through the Consent Decree process that relates to CS gas. For these reasons, the United States
believes that this Directive poses a reviewable issue for the Court where the others did not.

1 DATED on July 24, 2020.

2 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2020, I have electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorneys of record:

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DATED on July 24, 2020.

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