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15

16 **UNITED STATES DISTRICT COURT**  
17 **NORTHERN DISTRICT OF CALIFORNIA**  
18 **NORTHERN DIVISION**  
19

20  
21 **RYAN SALSBUURY, et al.,** ) **CASE NO. C-02-0693 MHP**  
22 ) **(Consolidated with C-02-1528MHP)**  
23 **Plaintiffs,** ) **PLAINTIFFS' RESPONSE TO**  
24 ) **DEFENDANTS' MOTION FOR SUMMARY**  
25 **vs.** ) **JUDGMENT**  
26 )  
27 **CITY OF BERKELEY; BERKELEY** ) **March 15, 2004**  
28 **POLICE DEPARTMENT; et al.** ) **2:00 PM**  
29 ) **Before the Hon. Judge Patel**  
30 **Defendants.** )  
31 \_\_\_\_\_ )  
32

# TABLE OF CONTENTS

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39

I. STATEMENT OF FACTS .....	1
Summary of Facts and Response to Defendants' Statement of Facts .....	1
April 13, 2001 Critical Mass Demonstration .....	6
Meggs and Salsbury's Claims of Improper Citations Against Sgt. Hester .....	6
July 13, 2001 Critical Mass Demonstration .....	19
Valencia's Claim of Improper Citation Against Defendant Meredith .....	19
Payne's Claim of Improper Citation Against Defendant Meredith .....	23
August 10, 2001 Critical Mass Demonstration .....	24
Villaseñor's Claim of False Arrest Against Officer Meredith and Sgt, Hester .....	24
Plaintiff Meggs' First Claim of Excessive Force Against Defendant Singh .....	27
Shattuck and Kittredge Avenues	
The August 10 Ride Continues .....	29
And Abusive Use of Sirens at University and Shattuck	
Plaintiff Meggs' Second Claim of Excessive Force Against Defendant Singh .....	34
University and Shattuck Avenues	
Salsbury's and Kahn's Claims of Excessive Force Against Defendant Meredith .....	35
Oxford and Allston	
Salsbury's and Kahn's Claims of Damage of Property Against .....	35
Defendants Meredith and Romano/ Oxford and Allston	
Long's Claim of Unlawful Arrest Against Sgt. Hester .....	39
Martin Luther King Jr. Way at and before Dwight	
II. LEGAL ARGUMENTS .....	45
A. OVERVIEW AND PROPER CONSTITUTIONAL FRAMEWORK:.....	45
THE FIRST AMENDMENT IS SUPERIOR TO LOCAL TRAFFIC LAW	
B. SPECIFIC RESPONSES TO DEFENDANTS ARGUMENTS .....	54
1. EXCESSIVE FORCE CLAIMS .....	54
a) DEFENDANTS MISSTATED THE STANDARD AND APPLICABLE .....	54
AMENDMENT IN THEIR ANALYSIS OF THE EXCESSIVE FORCE CLAIMS	
AS TO THE PLAINTIFFS WHO WERE NOT ARRESTED	
1) A Seizure Occurs Whenever Government Actors Have, By Force .....	55
or Show of Authority, Restricted the Liberty of a Citizen	
(a) Plaintiff Valencia .....	57
(b) Plaintiff Meggs .....	58
(c) Plaintiffs Salsbury and Kahn .....	58
b) FORCE USED IN THE COURSE OF DETENTION .....	59
AND/OR ARREST OF OTHER PLAINTIFFS	

1	c) THE FORCE USED AGAINST PLAINTIFFS WAS UNREASONABLE .....	60
2	1 AND 2) LONG AND VILLASEÑOR .....	60
3	3) MEGGS .....	61
4	(a) DEFENDANT SINGH.....	61
5	(b) EXCESSIVE FORCE FROM SIRENS .....	63
6	4) VALENCIA .....	64
7	(a) JULY 13, 2001 .....	64
8	(b) AUGUST 2001-OXFORD AND ALLSTON .....	66
9	5) PAYNE.....	66
10	6 and 7) SALSBURY AND KAHN .....	69
11	2. ATTACKS ON PROPERTY-DAMAGE AND DESTRUCTION.....	72
12	THE ASSAULTS BY MEREDITH AND ROMANO ON THE SOUND SYSTEM,	
13	TRAILERS AND BICYCLES AND OTHER EQUIPMENT WERE	
14	UNREASONABLE, UNJUSTIFIED, AND UNCONSTITUTIONAL	
15	a) BICYCLES AND TRAILERS .....	72
16	b) ROMANO'S ACTIONS YANKING WIRES OUT OF THE SOUND SYSTEM .....	74
17	WAS UNREASONABLE AND CONSITUTIONALLY VIOLATIVE	
18		
19	3. DEFENDANTS' ARRESTS OF PLAINTIFFS VILLASEÑOR AND LONG WERE .....	78
20	WRONGFUL AND UNCONSTITUTIONAL AND THEY ARE NOT ENTITLED	
21	TO IMMUNITY	
22		
23	a) VILLASEÑOR'S ARREST WAS NOT BASED ON ILLEGAL .....	78
24	CONDUCT, BUT WAS STRICTLY SELECTIVE ENFORCMENT INTENDED	
25	AS RETALIATION AGAINST HIM FOR LAWFUL CONDUCT	
26	b) LONG'S ARREST WAS NOT BASED ON ILLEGAL CONDUCT, BUT .....	82
27	WAS STRICTLY SELECTIVE ENFORCMENT INTENDED AS RETALIATION	
28	AGAINST HIM FOR EXERCISING HIS FIRST AMENDMENT RIGHTS IN A	
29	VISIBLE AND VOCAL MANNER	
30		
31	4. MEREDITH'S JULY 13, 2001 CITATIONS OF VALENCIA AND PAYNE .....	86
32	WERE SELECTIVE ENFORCMENT AND SPECIFICALLY TARGETED	
33	HARASSMENT AND WERE UNCONSTITUTIONAL	
34		
35	a) VALENCIA .....	86
36		
37	b) PAYNE .....	88
38		
39	5. HESTER'S MAILED CITATIONS TO MEGGS AND SALSBURY WEEKS .....	90
40	AFTER THE APRIL 13, 2001 DEMONSTRATION WERE SELECTIVE	
41	ENFORCEMENT, HARASSMENT, AND INTENDED FOR A WHOLLY	
42	IMPROPER PURPOSE	
43		
44	6. PLAINTIFFS' CLAIMS FOR INTENTIONAL INFLICTION .....	95
45	OF EMOTIONAL DISTRESS ARE SUPPORTED BY EVIDENCE	

1		
2	7. PLAINTIFFS' CLAIM UNDER THE UNRUH CIVIL RIGHTS ACT	95
3	(CIVIL CODE § 51.7 IS APPROPRIATE AS PLAINTIFFS HAVE PROVED	
4	BOTH VIOLENCE AND DISCRIMINATION	
5		
6	8. MONELL	96
7		
8	III. CONCLUSION	98

**TABLE OF AUTHORITIES**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
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28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43

**A. LAW AND STATUTES**

**1. U.S. CONSTITUTION:**

First Amendment- Pages .....4, 8, 9, 10, 15, 17, 18, 20, 26, 30, 35, 39, 45, 47,  
49, 50, 64, 66, 70, 71, 73, 76, 77, 82, 85, 90, 93, 94

Fourth Amendment-Pages .....45, 54, 55, 56, 59, 62, 64, 65, 66, 67, 73, 76, 90,  
93, 94

Fifth Amendment- Pages .....66, 73, 76

14<sup>th</sup> Amendment- Pages .....54, 55, 66, 73, 76

**2. STATUTES**

**a) Federal**

42 USC 1983- Page .....67

**b) California**

**Penal Code §§**

148(a) Pages.....81, 85

415(2), Page .....75

**Vehicle Code §§**

27007 Page.....76

2800 Pages.....81, 85

**Civil Code §§**

51.7 Page.....96

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
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22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40

Government Code §§

821.6 Page.....95

820.2 Page.....95

Business and Professions Code §§

17200 Page.....97

**c) Berkeley Municipal Code §§**

13.40.100 Pages.....75, 76

**B. CASES**

Murgia v. Municipal Court 15 Cal 3d 286 (1975).....16, 40, 46, 47, 81, 82, 83, 89, 92

Yick Wo v. Hopkins 118 U.S. 356 (1886) .....46, 47

People v. Harris (1960) 182 Cal.App.2d Supp. 837.....47

People v. Winters (1959) 171 Cal.App.2d Supp. 876.....47

Skinner v. Oklahoma (1942) 316 U.S. 535, 541.....47

In re King (1970) 3 Cal.3d 226, 232.....47

Cannon v. City and County of Denver 998 F.2d 867 (10<sup>th</sup> Circuit 1993).....47

Hague v. CIO, 307 U.S. 496, 515-16 (1939).....48

Cate v. Oldham 707 F.2d 1176 (11<sup>th</sup> Circuit, 1983).....48

Church on the Rock v. City of Albuquerque 84 F.3d 1273(10<sup>th</sup> Circuit, 1996).....48

Burnham v. Ianni 119 F.3d 668 (8<sup>th</sup> Circuit, 1997).....49

1 Corneilius v. NAACP 473 US 788 (1985).....49

2 Terminello v. Chicago 337 U.S. 1 (1949).....52, 53

3 Brandenburg v. Ohio 395 U.S. 444 (1969).....52

4 County of Sacramento v. Lewis 523 U.S. 833 (1998).....54

5 Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865, 1871 (1989)...55, 56, 58, 60, 61, 64, 65

6 Terry v. Ohio, 392 U.S. 1, 19 n.16, 88 S. Ct. 1868, 1879 n. 16 (1968).....55, 67, 84

7 Tennessee v. Garner [471 US 1 (1985).....55

8 California v. Hodari, 499 U.S. 621, 624-26 (1991).....56, 57, 58, 65, 84

9 Saucier v. Katz 533 US 194 (2001).....61, 62, 64, 65, 66, 68, 72, 73

10 Mackinney v. Nielsen 69 F. 3d 1002(9<sup>th</sup> Circuit, 1995).....68

11 Crowell v. City of Coeur d'Alene 339 F.3d 338 (9<sup>th</sup> Circuit, 2003).....68, 84

12 Carey v. Nevada Gaming Control Bd. 279 F.3d 873(9<sup>th</sup> Circuit, 2002).....66

13 Lawson v. Kolender, 658 F.2d 1362(9<sup>th</sup> Circuit, 1981).....68, 84

14 Monell v. Social Services City of New York 436 US 658 (1978).....74, 94, 96

15 Bratt v. City and County of San Francisco 50 Cal. App 3d 55 (1975).....77

16 Watts v. County of Sacramento 136 Cal. App. 3d 232 (1982).....77

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1 **PLAINTIFFS RESPOND AS FOLLOWS TO DEFENDANTS' MOTION FOR SUMMARY**

2 **JUDGMENT:**

3  
4 **I. STATEMENT OF FACTS**

5 **SUMMARY OF FACTS AND RESPONSE TO DEFENDANTS' FACTS**

6 Defendants have miscast, misstated, and added numerous red herrings to the  
7 actual facts of this case. Plaintiffs now seek to correct all of those and give an accurate  
8 picture of the facts of this case.

9 Critical Mass is a political movement that holds monthly protests by bicycle on  
10 a set Friday afternoon in cities around the country. In Berkeley, the ride takes place on the  
11 second Friday of every month, and has for more than 10 years. The focus of Critical  
12 Mass's demonstrations is on advocating for alternative, non-polluting sources of  
13 transportation such as bicycles, and for the rights of bicyclists to be visible and to be able to  
14 ride safely in traffic as equals to automobiles. Logically, their demonstrations occur on  
15 bicycle. Critical Mass, while portrayed by the Police as a threat to public order, is actually  
16 mainstream enough that it attracts participation from at least one member of the Berkeley  
17 City Council (Salsbury Dec ¶78; Meggs Dec ¶120). In fact, the City of Berkeley has issued  
18 a proclamation praising Critical Mass as a force for positive change and as advocates for  
19 alternative transportation (Meggs Supp Dec ¶4 and see Videotape Exhibit X at 00:15—  
20 00:04:11). (Plaintiffs' videotape will be hereafter referred to as "Vid X.") Councilmember  
21 Kriss Worthington participates, and he did so on July 13, 2001 (Vid X, 00:01:03). However,  
22 the police in the police van, videotaping the ride, made a disrespectful comment about his  
23 participation: "I can't believe they got people like that in office" (Vid X, 00:02:41). Even



1 some of the involved Officers admit that Critical Mass exists not to block traffic, but as a  
2 specific political protest (Meredith Depo 105:5-16).

3 Periodically over the years, the Berkeley Police Department has subjected  
4 organizers and participants of Critical Mass to a period of harassment and brutality which  
5 typically includes disruption of the demonstration, citation or arrest for violations of traffic  
6 rules that other demonstrations are not held to, destruction of property and equipment, and  
7 excessive and unwarranted use of force. Eventually the police calm down, shift their focus  
8 to something else, and leave Critical Mass alone for a period of years, only to come back to  
9 them again. The periods of harassment appear to have little to do with actions or lack  
10 thereof by the participants in Critical Mass.

11 Typically, when called to task over their treatment of any given demonstration,  
12 the City responds by stating that Critical Mass did not have a permit. In fact, however, it is  
13 very rare for any demonstration in Berkeley to obtain a permit, and any such requirement is  
14 rarely, if ever, enforced (Meggs Dec ¶¶81; Long Dec ¶¶26, ¶47; Kahn Dec ¶49; Valencia  
15 Dec ¶¶54-56) (Hester Depo 247:23-251:16; Romano Depo 26:18- 27:08). Sgt. Hester, the  
16 event manager for all of the Critical Mass demonstrations in question, admits that he  
17 enforces the law the same way whether a demonstration has a permit or not (Hester Depo  
18 251:08-251:16).

19 All conduct by Defendant Officers was specifically ratified and controlled by  
20 Defendant Hester, and then ratified by his superiors Lt. Cynthia Harris (who was actually  
21 present for much of what occurred at Oxford and Allston) (Hester Depo 14:13-17:9), Lt.  
22 Stone, and Captain Pittman (see, Exhibit C to Dec. of Hildes, "After Action Report...6-8-

1 2001”, addressed to Captain Pittman via Lt. Stone; Exhibit B to Dec. of Hildes, Operations  
2 Plan for 8-10-2001, addressed to “Chief Butler via Chain of Command”). According to  
3 Hester, Stone ratified the use of announcements that the vehicle code would be enforced  
4 at the beginning of the demonstration, and other possible actions that the police officers  
5 below Stone were considering taking (Hester Depo 90:24-92:05). All police actions were  
6 fully in accordance with Berkeley Police Departmental policies, training, and standards  
7 (Hester Depo 305:1-4, 177:9-16). Hester also e-mailed his operations plans and after  
8 action reports to Lt. Stone and Captain Pittman (Hester Depo: 86:17-87:8), and in at least  
9 one case to then Chief of Police Dashell Butler (see March ’01 operations plan attached to  
10 Dec of Hildes as Exhibit B )And they were routinely approved. His supervisors, including  
11 Stone and Pittman, advised Hester and made him aware of potential situations and  
12 instructed him accordingly (Hester Depo 126:3-16).

13           The police do not issue citations when foot demonstrations march through red  
14 lights at intersections. As a matter of fact, neither Sgt. Hester nor Officer Romano could  
15 ever remember a single time when either ever did so (Hester Depo 201:12-202:17;  
16 Romano Depo 29:18-22).

17           Throughout the Spring and Summer of 2001, the Berkeley Police, led by  
18 Defendant Hester, engaged in a campaign of harassment, false arrest and citation,  
19 destruction of sound systems and necessary ride equipment, and excessive force against  
20 Critical Mass, focusing particularly on the organizers, speakers, and other highly visible  
21 participants in the demonstrations. The incidents that are the subject of this action took  
22 place in April, July, and August of 2001.

1                   One theme that has run continuously throughout these proceedings is the  
2 rationale for the treatment of Critical Mass. Several of the officers began with the theory  
3 that Critical Mass was not a demonstration because it was a planned monthly event (Meggs  
4 Dec ¶¶117-118). When the participants responded by protesting that they are advocating  
5 for a certain position, as outlined above, and pointed out that this position, if adopted by the  
6 wider public, would make the police department’s duties easier, the theories held by the  
7 police that justify their behavior towards this expression of First Amendment protected  
8 activity then ran through a gamut of absurdities, from declaring that Critical Mass was not a  
9 demonstration because it took place on bicycle (Hester Depo 113:7-115:5, Meggs Dec  
10 ¶¶117-118) to the final absurdity that Critical Mass was a demonstration while the  
11 participants stopped to give speeches and hold a rally, but that they were not a  
12 demonstration while they were riding their bicycles (Hester Depo 222:24-228:25, 232:02 –  
13 234:12) (Meggs Dec ¶¶114-115). The crux of the competing views of Critical Mass, between  
14 the participants and the police department, lie in exactly this kind of absurdity. As a  
15 demonstration, then it is a First Amendment-protected activity, and as such, eligible for the  
16 same protections a demonstration on foot would be. Simply because a demonstration may  
17 make the jobs of the police more difficult does not eviscerate their responsibilities. A foot  
18 demonstration would not be expected to have portions of its march stop for red lights.  
19 (Valencia Dec ¶¶3, 8, 16, 22; Villaseñor Dec ¶¶6, 28; Long Dec ¶¶3, 45; Meggs Dec ¶¶3,  
20 30, 94-95; Salsbury Dec ¶¶3, 60, 79; Payne Dec ¶¶3, 8; Kahn Dec ¶3).

21                   As a matter of fact, the police often go out of their way to protect the foot  
22 marchers by holding cross traffic for them before they arrive at an intersection and as they

1 pass through an intersection no matter what color the light; and they often did so for Critical  
2 Mass as well (Meggs Dec ¶¶94; Payne Dec ¶¶3, 8) (Vid X, 00:10:11). Simply because a  
3 demonstration is on bicycle, and therefore moving at a different speed, does not mean that  
4 the police may suddenly treat it as if it is not a demonstration. Similarly, a police officer on  
5 a motorcycle who is riding along with a foot demonstration would not suddenly and  
6 repeatedly run his motorcycle through the march, making the marchers nervous and  
7 threatening a collision. But the Berkeley police officers, particularly Officer Meredith,  
8 seemed to feel justified in doing so simply because this was Critical Mass (Vid X,  
9 0031:20—0038:19, including numerous scenes from various demonstrations in 2001; this  
10 portion includes scenes of harassment directed at Plaintiff Meggs at 00:33:30-00:33:33 and  
11 00:36:00-00:36:11) (Villaseñor Dec ¶¶3-5; Valencia Dec ¶¶19-20; Long Dec ¶¶21; Salsbury  
12 Dec ¶¶67-68, 43; Meggs Dec ¶¶22-24, 105-108; Kahn Dec ¶¶16, 43, 44; Payne Dec ¶¶9).

13           The argument that Critical Mass bicyclists presented traffic dangers simply  
14 because they are riding bicycles, and therefore they should follow traffic rules, is specious.  
15 It happens frequently on foot marches that people walking will fall behind, and then rush to  
16 catch up, sometimes running across an intersection where the police have been holding  
17 cross traffic just as the police begin to allow that traffic to move. Granted, this is still at a  
18 slower speed, but that doesn't mean that there aren't situations that present grave danger  
19 to the march participant. And yet, the police do not insist that the entire foot  
20 demonstration/march is moot and must follow traffic rules simply because of the actions of  
21 some individuals.

22           **APRIL 13, 2001 CRITICAL MASS DEMONSTRATION**

1                   **Meggs and Salsbury’s Claims of Improper Citations Against Defendant Hester**

2                   On April 13, 2001, Critical Mass held its monthly demonstration in the City of  
3 Berkeley. The ride was entirely peaceful and calm, with no untoward incidents or any  
4 interactions to mar it. It is true that Critical Mass had no permit to demonstrate; however,  
5 very few demonstrations in Berkeley have permits, it is not custom and practice to require  
6 or obtain one, and the police rarely if ever attempt to enforce this regulation against any  
7 demonstration (Meggs Dec ¶¶81; Long Dec ¶¶26, 47; Kahn Dec ¶¶49; Valencia Dec ¶¶54-  
8 56; Payne ¶20) (Hester Depo 247:23-251:16; Romano Depo 26:18- 27:08).

9                   Plaintiffs Meggs and Salsbury were never given a warning during this ride, nor  
10 stopped. However, three and four weeks after the ride, respectively, Defendant Hester  
11 mailed a traffic citation to each of them, charging each of them with running a red light.

12                   Critical Mass has a long-standing practice of keeping the group together, as  
13 do demonstrations done on foot. This is done for two reasons: first, in order for the  
14 demonstration to have the maximum impact in presenting their message, the riders try to  
15 stay together to increase visibility. It is extremely difficult for a passerby or motorist to  
16 identify a single rider, particularly if that rider does not have the banners or other equipment  
17 that some of the participants use (such as a trailer with couch), that identify them as a  
18 Critical Mass rider. So the riders have a general practice that, for example, those at the  
19 front attempt to keep track of the speed of the riders behind them, so that the ride doesn’t  
20 get too elongated, etc. This is a common practice on foot demonstrations, also, as people  
21 walk at different speeds, and the participants at the front monitor the speed so that the  
22 demonstration stays together as one group.

1           The second reason for this is simple: safety. Motorists in our society tend to  
2 ignore bicyclists, and as a result of this and the difference in size and weight between a car  
3 and a bicycle, bicyclists are in more danger. By keeping the group together, Critical Mass  
4 seeks to reduce the danger for their participants (Salsbury Dec ¶79, Meggs Dec. ¶120).

5           Therefore, while the riders at the front may occasionally stop for a red light  
6 that they are approaching, depending on the circumstances and the amount of cross-traffic,  
7 etc., the rest of the ride attempts to keep up with the front riders. As a result, it does occur  
8 that various riders will go through a red light. Often, this happens because of the flow of  
9 the ride. In other words, the ride has already begun to cross the intersection; the light  
10 changes, the motorists are waiting, and the following riders do not stop, so the motorists  
11 continue to wait (Salsbury Depo 187:22–188:01; 188:02–190:05 (for general discussion  
12 and misquoted by opposition, see discussion below of misquote); 192:25– 193:05)  
13 (Salsbury Dec ¶79); (Vid X, 00:04:12—00:27:24 [23 minutes of riders going through various  
14 red lights on several demonstrations in 2001 without being charged, stopped or warned]).

15           This is no different than what happens when a foot demonstration occurs. It  
16 is a typical practice with foot demonstrations that if the middle or some other portion of the  
17 march is in the middle of the intersection, the march does not stop if the light changes. (It  
18 is also well known that the Plaintiffs were participants in other protests, and expected that  
19 Critical Mass would be treated in the same manner as other demonstrations, i.e., foot  
20 marches.) It is specious of the City of Berkeley to argue that simply because this is a  
21 demonstration on bicycle, that the riders should have to stop en masse or in smaller groups  
22 because a light changes. The end result would be a demonstration so wildly spread out

1 that the message Critical Mass seeks to convey would be lost.

2 Sgt. Hester admits that he's never handed out a jaywalking or other traffic  
3 citation to a participant in a foot demonstration (Hester Depo 201:12–202:17).

4 The City of Berkeley and individual Defendants have made the argument that  
5 they want to balance the First Amendment rights of protestors against the needs of traffic  
6 and citizens living within the City. The argument that portions of the ride should stop if the  
7 light changes would make the demonstration longer than it does, by a factor of many times,  
8 thus obstructing and disrupting far more traffic. It appears that the City is making an  
9 argument against itself in this instance. The City is attempting to use the red herring of the  
10 traffic regulations to cover the harassment and bias that police officers and the department  
11 in general has against this demonstration and certain participants in particular.

12 It is also important to note that Counsel for the Defendants quotes a portion of  
13 Plaintiff Salsbury's deposition completely out of context and directly contrary to what  
14 Salsbury was saying in the deposition both before and after. On Page 3, lines 1-2, of his  
15 motion, Defendants quote Salsbury as saying that "Critical Mass riders tended to stop at  
16 red lights if there was cross-traffic present." The cite is to Salsbury's depo at page 188,  
17 lines 11-14. The accurate quote is:

18 11 Q. Okay. But if the front riders were approaching  
19 12 an intersection where there was cross traffic, they would  
20 13 stop?  
21

22 14 A. Most cases, yeah.  
23

24 15 Q. Okay. Sometimes not?  
25

26 16 A. There -- it depended on the situation, how it  
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17       seemed.

Reading in the page before and for several pages afterward, the intent of Salsbury is extremely clear in saying that the ride primarily tried to stay together, and frequently went through red lights. Salsbury says this several times, in different ways (Salsbury Depo 187:22–188:01; 188:02–190:05; 192:25– 193:05;) (Salsbury Dec ¶79). (The videotape provided by Plaintiffs shows a total of 23 minutes of riders going through red lights without being charged, stopped or warned at various intersections and on various demonstrations (Vid X, 00:04:12—00:27:24). It happened many times that the police also rode through red lights before, along with, or after the ride. The police also frequently stopped at a red light and were passed by several riders without any contact, warning or citation issued; one such scene with Officer Meredith is included in Vid X at 00:32:08-00:32:14).

[Please note that Counsel for Defendants misquoted Plaintiff Salsbury also on Defendants page 11, line 5-6 (Salsbury Dec ¶80); there is further discussion of this under Plaintiffs’ section entitled “August 10, 2001, Critical Mass Demonstration,” subsection, “Salsbury’s Claim of Excessive Force Against Meredith – Oxford and Allston later in the fact section of this brief.]

Generally, demonstrations are not expected to stop for traffic. Traffic is expected to stop for demonstrations, as First Amendment protected activity is held as more sacred and more important than momentary delays to traffic. We say “momentary” because even though the demonstration may last more than an hour, even two or three<sup>1</sup>, any individual motorist usually is held for a matter of minutes, often less than 2 minutes,



1 most, 5 minutes or less, a matter of minor inconvenience. Whereas Sgt. Hester and other  
2 police officers are claiming that their more important duty is to protect the privilege of traffic  
3 to proceed over the protected activity of a demonstration (Hester Depo 257:2-4, 61:14-16,  
4 117:20-118:2; Meredith Depo 107:117-22; Romano Depo 31:2-7).

5           The situation with riding on the sidewalks and riding in the lanes in the other  
6 direction is another red herring that Defendants are attempting to use to distract off the  
7 disparate treatment of Critical Mass and the attempt to focus on traffic laws rather than the  
8 First Amendment. Occasionally, the ride was too large for a narrow street, and it would  
9 expand into the lane(s) on the other side. Sometimes, if there was an obstruction in the  
10 road, perhaps a stopped car, then a rider may be forced to veer off to the lanes in the other  
11 direction or onto the sidewalk. The riders also took turns at various positions in the ride,  
12 trading off, for example, who would be the one pulling the trailer, as that was hard work, or  
13 who was the one riding in the front of the ride, making decisions about traffic or the route.  
14 If one of the riders wanted to catch up with a different portion of the ride, sometimes that  
15 would require riding on the sidewalk to get into position, or riding in the opposite lanes of  
16 traffic (Salsbury Depo 122:25 - 123:16) (examples of all these actions are shown  
17 throughout the videotape provided by Plaintiffs, Vid X).

18  
19 <sup>1</sup>Please note, this is approximately the same time, or shorter, than most foot demonstrations.

20           Again, bicyclists are well aware that in a duel between a motor vehicle and a  
21 bicycle, given the mass and speed, they will lose. And given their political statements,  
22 urging observers to use alternative transportation other than motor vehicles, they would

1 emphasize protecting pedestrians. But there are situations that call for split second  
2 decisions, that call for making choices among less-than-desirable alternatives, and these  
3 Plaintiffs, being some of the more dedicated riders to the message, would work hard at  
4 making the safest decisions possible.

5           Critical Mass occasionally would take up both sides of the road, as do many  
6 (foot) demonstrations. There are several reasons for this, but the most common is to  
7 again, keep the ride/march together. In addition, as a result, it would make the ride shorter  
8 than if it is spread out on one side of the street, and therefore, delay traffic for a shorter  
9 period of time. By reducing the amount of time any particular motorist is stopped also  
10 contributes to the safety of the riders, as motorists become impatient and are less likely to  
11 attempt to cross the demonstration's pattern of traffic if the demonstration is thicker than if  
12 it's thinner and strung out along one side of the road.

13           When Plaintiff Meggs rode onto the left side of the street and then onto the  
14 sidewalk, it must be noted that the traffic in the opposition direction was stopped and/or  
15 barely moving because the demonstration had expanded into both lanes because of its size  
16 and the narrowness of the road. In Sgt. Hester's videotape of the scene, it appears that  
17 Meggs is the only one to be riding in this lane. However, in Meggs' videotape of the same  
18 scene, it is clear that there are many demonstrators riding in both lanes of traffic (forward  
19 and opposite lanes) (Vid X, 00:30:41—00:30:54). In Hester's video, he is riding the center  
20 line because of the size and density of the demonstration (Vid X, 00:30:17—00:30:39; also  
21 see 00:30:59—00:31:16). In Plaintiffs' Videotape Exhibit X, it is also clear that at least two  
22 other demonstrators were also riding on the sidewalk, one on the left (who is not Meggs or

1 Salsbury) and one on the right, in the same direction as the rest of the ride (Vid X,  
2 00:30:09—00:30:18).

3 In the instance of Plaintiff Salsbury's riding on the sidewalk, Salsbury  
4 remembers having to move onto the sidewalk because of an obstruction or hazard in the  
5 road, although he can't remember exactly what that was. Even in Defendant Hester's  
6 videotape of the scene, the road is narrow and densely packed because of the cars and  
7 demonstration (Vid X, 00:28:03—00:28:50). As indicated above, there were other riders on  
8 the sidewalk, very close in the vicinity of the two Plaintiffs who were cited; and throughout  
9 the Plaintiffs' videotape, there are numerous examples of demonstrators who rode on the  
10 sidewalk, against traffic and who passed through red lights without contact, warning or  
11 citation on all the demonstrations in question in this lawsuit.

12 Plaintiff Meggs was charged with running a red light during the April  
13 demonstration. However, in the videotape, he clearly crosses the limit line as the light is  
14 turning yellow, accompanied and followed by numerous demonstrators who also passed  
15 through the same red light without citation or other contact (Vid X, 00:28:57—00:30:08).

16 Plaintiff Salsbury was charged with running a red light, also during the April  
17 demonstration. However, he did so with the entire group; and, although he was attempting  
18 to catch up to the rest of the ride, he was not the last demonstrator to go through the light  
19 (Vid X, 00:27:25—00:28:02). For both Plaintiffs, the same arguments regarding First  
20 Amendment protected activity, and common practice in treatment of demonstrations going  
21 through red lights, also applies.

22 In addition, the police often would ride on the wrong side of the street or on

1 the sidewalk, sometimes at the same time, sometimes at different times, often for the same  
2 reasons or for no apparent reason (throughout Vid X, but particularly evident in 00:04:12—  
3 00:27:24 and 00:31:20—00:38:19, including 33:30 and 36:00 where motorcycle officers  
4 stop in front of Meggs apparently to make him run into them; an egregious example of  
5 Officer Meredith riding in the middle of the opposite lanes on busy University Avenue for no  
6 apparent reason, and in contradiction of the Operations Plan stating that motorcycles were  
7 to ride to the rear is shown at 00:55:30—00:55:37).

8           It is selective enforcement that Hester chose to give a ticket to only one  
9 participant in each of these instances, and each time, Hester chose one of the two principal  
10 organizers and most visible participants in Critical Mass as he would later expand to target  
11 selected others. He admitted before the Police Review Commission and in deposition that  
12 he singled Meggs and Salsbury out because he recognized them and that he recognized  
13 them because of their centrality to the demonstration (Meggs Dec ¶188; Salsbury Dec ¶54,  
14 Hildes Dec ¶5; Weill Dec ¶5). There is no dispute that he also knew who other participants  
15 in the demonstration were. Clearly he knew who Villaseñor was, because he targeted him  
16 outside of the ride. Meggs was so central to his thinking that he specifically noted in his  
17 after action report of June '01 that Meggs was not present (see June after action report  
18 attached to Hildes Dec. as Exhibit C). Salsbury was also specifically targeted in August.  
19 As Plaintiffs point out in the legal argument that follows, individuals cannot be targeted with  
20 citation or arrest specifically because of their visibility or organizing of First Amendment  
21 activity as here.

22           Plaintiffs wish to emphasize that the framework for judging a demonstration is

1 different than any other situation on the street. When Sgt. Hester was asked if he had ever  
2 given out a traffic ticket for any foot demonstration, he could not cite a single instance  
3 (Hester Depo 201:12-202:17). Similarly, Officer Romano could not remember ever handing  
4 out one either (Romano Depo 29:18-22). The involved demonstrators, all of whom had  
5 attended many marches and other foot demonstrations in Berkeley, also cannot recall any  
6 instance where traffic rules were enforced against other demonstration, which are slower,  
7 block traffic for longer periods of time, and often sit down in the street and completely block  
8 traffic (Meggs Dec ¶180; Salsbury Dec ¶47; Kahn Dec ¶48; Valencia Dec ¶7).

9 Defendants state that Sgt. Hester decided not to stop Salsbury and Meggs on  
10 April 10, 2001, and sent out traffic tickets through the mail, in order to avoid an adverse and  
11 potentially hostile confrontation between riders and police. In their Summary Judgment  
12 Motion, the Defendants point to the crowds' reactions on July 13 and August 10 as  
13 justification for this alleged worry (p. 4, lines 1-3). The speciousness of this argument is  
14 clearly seen in the videotape's recording of the riders' reaction to the arrest of Plaintiff Efre  
15 Garcia Villaseñor at the corner of Oxford and Allston on August 10<sup>th</sup>, 2001. Villaseñor was  
16 arrested for an action that several of the demonstrators had performed at the same time,  
17 an action that was typical for this demonstration and any demonstration, and an arrest that  
18 the crowd clearly disagreed with and angered them. What was the "adverse and potentially  
19 hostile" reaction? Speeches and a rally, held at the same corner where the arrest took  
20 place. The ride used the type of actions that they have used all along, in their entire 10  
21 years of demonstrating in the streets: they appealed to citizens, passers by (pedestrian  
22 and motorists), in order to inform them and attempt to persuade them to Critical Mass's

1 point of view. (Please note: this is an action common to foot demonstrations as well, they  
2 will stop at corners to give speeches.) Critical Mass riders did not participate in a riot. They  
3 did not destroy property; attempt to destroy property nor attempt to attack the police who  
4 they felt were treating the ride unfairly and in a biased and harassing manner. Even when  
5 they see the police attacking other riders (Lauren Valencia, Ryan Salsbury and Herman  
6 Kahn (Vid X, 01:04:48—01:06:04, 01:06:05—01:08:12 and 01:37:43—01:38:41)) and  
7 destroying property belonging to Critical Mass (yanking wires out of the stereo sound  
8 system (Vid X, 01:06:05—01:06:19, 01:39:11-12 and 01:39:23)), they respond with  
9 appropriate First Amendment protected speech and rally (Salsbury Dec ¶39; Kahn Dec  
10 ¶39), and start gathering information to help their friend’s upcoming legal battle (Vid X,  
11 01:41:10—01:54:32 (note: this starts at 7:21:02 p.m. according to counter across the  
12 bottom of scene)).

13 Even the behavior of Plaintiff Lauren Valencia, girlfriend to Mr. Villaseñor, was  
14 extremely restrained. What was the entire heinous nature of her offense? She walked  
15 toward the police officer arresting her lover, and first, demanded to know why he was being  
16 arrested, and second, demanded to know where they were taking him. As a result, she  
17 was pushed, shoved, thrown in a circle, and otherwise physically assaulted by four police  
18 officers no less than seven times in 1-2 minutes (Villaseñor Dec ¶28; Valencia Dec ¶¶29-  
19 32) (Vid X, 01:04:48—01:06:04)

20 Plaintiffs also wish to emphasize the fact that Critical Mass rides are calm,  
21 peaceful, and law-abiding. This is clear and easily ascertained by watching of any of the  
22 full-length videotapes made of any of the rides in question in this lawsuit: April 13, July 13,

1 or August 10. In addition, the rides for May and June of 2001, were also calm and without  
2 incident; calm enough that Sgt. Hester noted this in his Operations Plans and After Action  
3 Reports (Exhibits B and C to Hildes Dec). Yet, the police department clearly stepped up its  
4 enforcement in July and August.

5 Sgt. Hester admits that he only sent out citations to Plaintiff Salsbury and  
6 Plaintiff Meggs for their behavior on April 13, 2001, because he knew who they were. He  
7 knew Salsbury and Meggs because they were organizers and highly visible participants in  
8 the demonstrations. He recognized Salsbury, although didn't know his name; but did know  
9 Meggs by name. The Police Review Commission found that Hester had specifically and  
10 improperly targeted Meggs and Salsbury for citation because they were organizers and  
11 spokespeople for Critical Mass, and the court after a hearing on Plaintiffs' Murgia motion to  
12 dismiss for selective enforcement, found the Plaintiffs not guilty of the charges cited. The  
13 cited charges included not just infractions, but misdemeanors for disobeying officers whom  
14 evidence showed had not given them any instructions or orders.

15 In addition, he sent them out three and four weeks after the event, by mail, to  
16 an address that he had not verified, and that did not belong to Salsbury, who did not have  
17 access to that post office box. Thus, a warrant may have been issued to against Salsbury,  
18 unbeknownst to him for tickets he did not know existed, and that was a very likely possibility  
19 when Hester chose to act in this manner.

20 Since Critical Mass takes place on a monthly basis, this should actually make  
21 the job of the police easier. They know the demonstration will occur on the same Friday of  
22 every month, month after month, year after year. After a few experiences, it is easy to

1 predict the length of the ride (as a matter of fact, Critical Mass tried to hold to a time limit for  
2 the convenience of their own riders). This means the police department could have some  
3 plans in place to try to divert traffic or formulate some other response to the demonstration,  
4 rather than to act to chill the riders' expression of their First Amendment rights.

5 Defendants also speak of an "extended period" that a particular intersection  
6 was blocked (Summary Judgment Motion, 4:06-07; Defendant's Video - Exhibit A, Seg. 5).  
7 In a behavior dubbed as "circling" by Critical Mass, riders would create a circle of riders at  
8 large intersections that would block both streets. Again, it is an attempt to draw more  
9 attention to the riders' message. And again, it is no different than any other demonstration  
10 on foot, where the march will sit down at an intersection, stop to listen to a speaker or stop  
11 at an intersection for the musicians or dancers to perform – in order to draw attention to the  
12 message the demonstrators wish to convey.

13 In addition, for the circles that have shown in the videotapes, the average time  
14 an intersection is blocked is 2-3 minutes, slightly more than the time that a traffic light stops  
15 a motorist. In the August 10<sup>th</sup> ride, at the corner of Shattuck and University, the time  
16 between when the riders began to form the circle, and when the police assaulted them with  
17 sirens and other noise, was 46 seconds. For the examples given in the Summary  
18 Judgment Motion, the following times for the circles are: April 13<sup>th</sup>, Bancroft and Telegraph,  
19 2:47 (approximately); April 13<sup>th</sup>, Shattuck and Hearst, 3:48.

20 Defendants never ordered the demonstration to move from the intersection of  
21 Shattuck and University Avenues. The first that the demonstrators knew that the police  
22 wanted them to move was when the Defendants formed the line and began blaring their



1 sirens. At no point were the Plaintiffs told to clear the intersection, to move the  
2 demonstration along, or to disperse (Meggs Dec ¶¶11-12; Salsbury Dec ¶¶5-7; Villaseñor  
3 Dec ¶8; Kahn Dec ¶¶5-7).

4 Defendants never cited any rider for stopping traffic during a circle. They  
5 cited riders for other traffic infractions, but not this one. Yet, suddenly, in the lawsuit, it  
6 becomes a major point of contention among the Police allegations against the riders. Why  
7 was it not important enough to issue a citation at the time?

8 Critical Mass and the police department attempted to have face-to-face talks  
9 to resolve their differences. However, Sgt. Hester made it clear in his comments during the  
10 talks, and in the fact that he would make promises of certain behaviors by himself and  
11 officers and then renege on those promises during the next ride or two, that he still  
12 considered Critical Mass was NOT a demonstration and therefore not eligible for First  
13 Amendment protection.

14 Almost as a footnote, Defendants' point to a portion of Plaintiff Meggs'  
15 videotape that shows a brief encounter between Meggs and a motorist, where Defendants  
16 insist that there was a heated exchange where the motorist was begging to be allowed to  
17 go to the hospital, and Meggs supposedly spent a long period of time verbally and  
18 physically obstructing him from doing so.

19 This does not appear on any reports nor is mentioned by any Defendant in  
20 any context heretofore. Counsel for Defendants pulled this incident out and blew it up to  
21 tragic proportions in order to stage an *ad hominum* attack on Plaintiffs' credibility. In  
22 reality, what occurred was that an annoyed (not distraught looking) motorist walked up to

1 Meggs and said, "I need to get to the hospital." Meggs pointed out that they were doing a  
2 memorial and suggested an alternate route that would be faster than the one he was intent  
3 on taking. This interchange took barely 12 seconds. Meggs then immediately agreed to  
4 allow him through, walked over to the microphone attached to demonstration's sound  
5 system which was being used to conduct a memorial to a pedestrian who had been struck  
6 and killed at that location a month previously, and directed the demonstrators to clear a  
7 lane so that the motorist could get through. Despite the fact he did not believe that the  
8 man wanted to go to the hospital, in less than 14 seconds from the time the man  
9 approached Meggs, Meggs began to process of clearing the lane, and then the  
10 demonstration had fully left the intersection within 27 seconds of Meggs' announcement  
11 that they needed to let the man go to the hospital. (Meggs Dec ¶¶92; and Hildes Dec ¶¶23-  
12 25 throughout). Meggs complied as quickly as possible with the request, and did not  
13 suddenly "realize he was videotaping" and "relent" (Meggs Dec ¶¶93). Mr. Meggs is aware  
14 of his videotaping, as is apparent throughout the videotapes he is making, where he makes  
15 adjustments in his position or the camera's position in order to get a better angle on an  
16 incident, etc.

17  
18

**JULY 13, 2001 CRITICAL MASS DEMONSTRATION**

19 **VALENCIA'S CLAIM OF IMPROPER CITATION AGAINST DEFENDANT MEREDITH**

20 The May and June 2001 rides were totally without incident, so much so that  
21 Sgt. Hester actually noted this regarding June 2001 in his after-action report (Exhibit C to

1 Dec of Hildes) (Meggs Dec ¶11; Salsbury Dec ¶50). In spite of that fact, Hester had Officer  
2 Meredith ride his motorcycle onto the BART plaza before the ride began and announce that  
3 all traffic laws would be enforced.

4 Plaintiff Valencia, along with many other demonstrators, did not hear this  
5 announcement. Even those present at the time could not all hear the announcement  
6 because of the normal noise of the crowd, including the speeches being made (Meggs Dec  
7 ¶8; Payne Dec ¶5). Plaintiff Valencia was not present (Valencia Depo 29:22-30:13)  
8 (Valencia Dec ¶5). (Plaintiff Villaseñor also was not present (Depo 23:20-24:18). In both  
9 cases that was true for both the July and August demonstrations (Villaseñor Depo 23:20-  
10 24:18).

11 Sgt. Hester and other officers under his command then passed out bicycle  
12 safety cards and pamphlets produced by AAA and intended for use by parents and schools  
13 to teach children how to operate a bicycle safely. The cards and pamphlets did not have  
14 anything to do with the course of a demonstration, nor did they even accurately reflect  
15 traffic laws. Officer Romano stated that he had refused to pass out the cards and/or  
16 pamphlets, and refused to participate in the announcement made at the beginning of the  
17 ride, because he felt they were geared to juveniles (Romano Depo 41:10-12), because it  
18 made him uneasy and embarrassed (Romano Depo 42:14-16), and would not help him in  
19 his job (Romano Depo 43:09-11).

20 Plaintiff Valencia was improperly targeted for the citation of running a red light  
21 during the July 13<sup>th</sup> 2001 ride at the corner of University and Milvia. As Plaintiffs have  
22 argued, First Amendment protected speech is more sacred and important than local traffic

1 laws. Second, demonstrations are never held to local traffic laws except in extremely rare  
2 instances. The disobeying of a red light happens routinely on both foot marches and  
3 Critical Mass rides, because of the fact these are demonstrations, and local traffic is held  
4 routinely to allow a demonstration to occur; and because of the various reasons listed  
5 above, including visibility of the message, safety, and the routine flow of a demonstration.

6 While Plaintiff Valencia admits that a few other riders stopped for the red light  
7 at University and Milvia, this was still not the routine behavior. She had not seen any riders  
8 stopping for a red light before that intersection (Valencia Depo 38:08-15) (Declarations on  
9 Valencia stop: Valencia Dec ¶¶8; Villaseñor ¶¶28; Long ¶¶45; Meggs ¶¶94-95) (Declarations  
10 on red lights: Valencia ¶¶3, 16, 22; Villaseñor ¶¶6; Long ¶¶3; Meggs ¶¶3, 30, 94; Salsbury  
11 ¶¶3, 60, 79; Payne ¶¶3, 8; Kahn ¶¶3).

12 Police also had been blocking cross traffic at some of the intersections, and  
13 allowing Critical Mass to pass through on a red light (Romano Depo 45:21-24; 67:02-06),  
14 leading Plaintiff Valencia to believe that this was the accepted practice (Valencia Dec ¶¶3;  
15 Meggs Dec ¶¶94; Long Dec ¶¶3-4, Salsbury Dec ¶¶3-4). This action by the Police was  
16 common at all the rides (Villaseñor Dec ¶¶28).

17 Plaintiff Valencia wanted to catch up with the rest of the ride, which was at the  
18 next intersection. She felt uncomfortable riding next to Officer Meredith, who had already  
19 begun to demonstrate some of the dangerous behavior of weaving recklessly and at too  
20 great a speed through the crowd of demonstrators ) (Valencia Depo 48:02-21; Vid X  
21 00:55:09—00:55:29) (examples of this behavior by Officer Meredith are shown on the  
22 videotape at 00:31:20—00:38:19) (Villaseñor Dec ¶¶3-5; Valencia Dec ¶¶19-20; Long Dec

1 ¶21, 37; Salsbury Dec ¶¶67-68, 43; Meggs Dec ¶¶22-24, 105-108; Kahn Dec ¶¶16, 43, 44;  
2 Payne Dec ¶¶9).

3           In the videotape, it is also clear that Plaintiff Valencia is afraid of Officer  
4 Meredith (Vid X, entire sequence of her stop and citation at 00:38:20—00:48:48;  
5 expression of her fear of Meredith at 00:55:09—00:55:29). At the beginning of the stop, he  
6 leans in towards her and she visibly shrinks away from him (Vid X, 00:38:48—00:38:53).  
7 When the police officer gave her the opportunity to speak with Sgt. Hester, she agreed  
8 quickly, because of her greater fear of Meredith. Officer Meredith did not tell her he was  
9 demanding her name and address in order to give her a ticket until almost two minutes into  
10 his questioning of her. While this may not sound very long, when someone who is at least  
11 a foot and a half larger than you are, is leaning over you and making himself intimidating,  
12 and using a tone of voice that is threatening (Valencia Depo 53:08-18) (Meggs Dec ¶¶95), it  
13 is a very long time. Plaintiff Valencia feels that Sgt. Hester appeared much more calm and  
14 in control of himself (Valencia Depo 66:10-12). When Sgt. Hester made it clear that she  
15 was being asked these questions in order for the officer to issue her a citation, she then  
16 gave them her name and address and was cited for running a red light. In a traffic  
17 proceeding where she was unable to get her lawyer or witnesses there, she was convicted  
18 by a commissioner who convicts everyone, but did not impose a fine. The only witness  
19 against her, Officer Meredith drastically understated and misrepresented the number of  
20 demonstrators who rode through red light, and the number of times they were allowed to do  
21 so (Valencia Depo 59:2-60:16).

1                                   **JULY 13, 2001 CRITICAL MASS DEMONSTRATION**

2                                   **PAYNE’S CLAIM OF IMPROPER CITATION AGAINST DEFENDANT MEREDITH**

3                                   On both the July 2001 demonstration and the August 2001 Critical Mass  
4 demonstration, on orders from Hester, the ride was followed by an unmarked white  
5 van that videotaped the demonstration (Payne Dec ¶12; Meggs Dec ¶96). In July, as  
6 the ride stopped while Valencia was issued her citation and threatened, the  
7 surveillance van pulled up to the intersection, still openly filming it. Meggs, Payne  
8 and other demonstrators demanded that the uniformed police officers inside the van  
9 identify themselves. Not only did they refuse to do so, but the police forced the  
10 inquiring demonstrators to move away from the van under threat of arrest or violence  
11 (Vid X 00:41:50—00:42:10; 00:46:16—00:48:48) (Payne Dec ¶13; Meggs Dec ¶97).

12                                  The demonstration was engaging in no illegal activity that would have allowed  
13 the police to videotape the ride, and there was no illegal activity on the part of the  
14 demonstrators, in any month leading up to July of 2001 that would have justified the  
15 video surveillance and other harassment and abusive conduct towards the July and  
16 August 2001 rides (Payne Dec ¶14). In fact, Hester had also been videotaping since  
17 April with a camera concealed on the handlebar of his bicycle (Hester Depo 105:6-  
18 106:22). (It was concealed because it is so small, it appears to be part of the  
19 officer’s light assembly.) That policy of videotaping came from the department and  
20 was approved and endorsed by them (Hester Depo 172:19-181:12).

21                                  Plaintiff Payne, frustrated that he was unable to ascertain who from the

1 government was filming the demonstration, followed the van. He was followed in  
2 turn by Officer Meredith, who stopped him and issued a false citation (later  
3 dismissed) for running a stop sign (Vid X, 00:48:48—00:50:19). This must be the  
4 only such citation ever issued to a demonstrator in the history of the City of Berkeley.  
5 Meredith claims that he saw Payne making this movement when he was in the west  
6 bound lanes of Martine Luther King Jr. Way, which means he had to see completely  
7 across both sides of MLK (east and west bound), down a block and basically,  
8 through at least one building in order to see Payne supposedly running a stop sign.  
9 Payne never tried to flee; nothing resembling an attempt to flee is shown on the  
10 videotape of the entire detention. The only reaction Payne shows is anger and  
11 pointing out the harassing nature of the charge.

12

13 **AUGUST 10, 2001 CRITICAL MASS DEMONSTRATION**

14 **Villaseñor’s Claim of False Arrest Against Defendants Meredith and Hester**

15 On August 10<sup>th</sup>, 2001, Officer Meredith cited Plaintiff Efren Garcia Villaseñor  
16 for allegedly running a red light during the demonstration. However, Sgt. Hester made the  
17 extraordinary admission in his deposition that he and Officer Meredith had decided to pull  
18 Efren Villaseñor over PRIOR to Oxford and Center, where Plaintiff Villaseñor allegedly ran  
19 the red light (Hester Depo 238:10-16; 290:11-292:16). Yet, in his report on this incident,  
20 Officer Meredith states that Plaintiff Villaseñor was arrested solely for running the red light  
21 and not stopping for Meredith (Exhibit M, Meredith’s Police Report, attached to Villaseñor

1 Dec), who Villaseñor thought was simply again driving recklessly and with the intent to  
2 intimidate as Meredith had been the entire ride (Vid X, 00:31:20—00:38:19). The arrest  
3 was a false arrest as a matter of law, as the officers had already decided to pull him over  
4 before the incident occurred (Hester Depo 238:10-14; 290:11 – 292:16). He was not being  
5 arrested for running a red light, he was arrested because he had tried to slow both officers  
6 at separate times earlier in the ride, by “zigzagging” in front of them, so that they would ride  
7 more safely; to stop Meredith’s harassment of the riders by Meredith riding his motorcycle  
8 too quickly and dangerously through the middle of the ride (Villaseñor Dec ¶¶3-5; Valencia  
9 Dec ¶¶19-20; Long Dec ¶¶21, 37; Salsbury Dec ¶¶67-68, 43; Meggs Dec ¶¶22-24, 105-108;  
10 Kahn Dec ¶¶16, 43, 44; Payne Dec ¶¶9) (Vid X, 00:31:20—00:38:19) and he was arrested for  
11 giving Sgt. Hester the finger while circling at the intersection of University and Shattuck,  
12 approximately 5 minutes before his arrest (Vid X, 00:59:02) (Meggs Dec ¶¶23-28;  
13 Villaseñor Dec ¶¶8; Valencia Dec ¶¶21). Sgt. Hester has been harassing Plaintiff Villaseñor  
14 for months. In one instance, Hester approached Villaseñor while the latter was on his lunch  
15 break from work and otherwise innocently going about his business (Hester Depo 28:3-  
16 31:12) (Villaseñor Dec ¶¶23-24; Valencia Dec ¶¶9-11; Long Dec ¶¶37), including making  
17 threatening comments about Critical Mass to him. On another occasion, on June 5, 2001,  
18 listed in Hester’s police report on Villaseñor from the August 10, 2001 incident, he saw  
19 Villaseñor riding down the street minding his own business, followed him for several blocks  
20 and then gave a him a ticket for running a red light (see Villaseñor police report attached to  
21 Dec of Villaseñor as Exhibit M). Villaseñor was never charged by the court with any  
22 violation from that ticket, and no proof has ever been offered that the violation occurred.



1 Villaseñor himself does not recall the incident; it is only known about because it appears in  
2 Hester's report.

3 As noted above, Plaintiffs have argued that demonstrations are not held to  
4 traffic laws both as a matter of law and a matter of practice; that the First Amendment  
5 protection supercedes traffic laws; that there are strong reasons, both in the interest in  
6 allowing First Amendment protected speech to occur by giving the demonstration the  
7 visibility of numbers and even in the interest of less traffic disruption, to allow  
8 demonstrations to proceed through red lights.

9 Defendants claim that the intersection of Oxford and Center was open to and  
10 being approached by cross traffic. This is not true, and is easily visible in the videotape  
11 (Vid X, 00:57:50—01:02:54). Plaintiff Villaseñor could not have been the first rider into the  
12 intersection against the red light, as another rider had blocked the intersection from Center  
13 and was holding cross traffic, so that the intersection was clear (Vid X 01:00:13) (Villaseñor  
14 Dec ¶¶9; Valencia Dec ¶¶22-23). Thereafter, Plaintiff Villaseñor rode across the  
15 intersection as part of a group of riders; he did not cross the intersection alone against the  
16 red light (Vid X, 01:00:32-01:00:40) (Valencia Dec ¶¶22-23). None of the other riders,  
17 neither the demonstrator who blocked the intersection nor any of the group who crossed  
18 the intersection with Villaseñor, were charged or cited. Neither were any of the riders  
19 following him, who also crossed against a red light (Vid X, 01:00:22) (Valencia Dec ¶¶24;  
20 Villaseñor Dec ¶¶15).

21 Villaseñor and his co-Defendant Matthew Long were never charged with the  
22 underlying Infractions, only misdemeanors for allegedly trying to evade arrest. Thirteen

1 months after their arrest, after over a dozen court appearances, the District Attorney's  
2 Office dismissed the charges against Long and Villaseñor with a motion to dismiss for  
3 selective enforcement and discriminatory prosecution pending. The Judge in the case,  
4 Carol Brosnahan of Alameda Superior Court in Oakland, indicated ***on the record*** that the  
5 District Attorney's Office was going to have a great burden to overcome the Judge's belief  
6 that the prosecution was discriminatory and based on selective enforcement. At that time,  
7 the Judge also indicated that she had found selective enforcement in reviewing the  
8 evidence in the Meggs and Salsbury infraction case stemming from their tickets  
9 subsequent to the April demonstration (Hildes Dec ¶5 throughout).

10  
11 **AUGUST 10, 2001 CRITICAL MASS DEMONSTRATION**

12 **PLAINTIFF MEGGS' FIRST CLAIM OF EXCESSIVE FORCE**  
13 **AGAINST DEFENDANT SINGH**  
14 **Shattuck and Kittredge Avenues**

15  
16 Defendant Singh gratuitously and maliciously hit Plaintiff Meggs in the groin  
17 area twice while the demonstration was stopped at Shattuck and Kittredge Avenue. There  
18 was no need for the use of the Defendant's bicycle in this manner, no possible police action  
19 that would be served. Defendant Singh had not given an order or indicated he wished  
20 Meggs to do anything in particular before using his bicycle in this manner (Meggs Dec  
21 ¶¶16-21).

22 Defendant claim that Singh had his bicycle on a kickstand at the moment of  
23 the alleged contact between Singh and Plaintiff Meggs. As a matter of fact, it is clear from  
24 the videotape that Singh is first moving toward Meggs (Meggs also stated this in his

1 deposition, (Meggs Depo 99:23-100:04)), and then putting his bicycle on its kickstand.  
2 Singh uses the motion as a poor excuse for a cover-up of the fact that he has struck Meggs  
3 with the left handlebar of his bicycle. In a slow-motion playing of the videotape, you can  
4 see an image of Singh approaching Meggs, and the handlebar hitting Meggs' groin area  
5 when he pulls the camera downward toward the area of impact. As the camera pans  
6 upward again, you can see Officer Singh, with his head down, evidently putting his  
7 kickstand down, and leaning his bicycle on it (Vid X, 00:51:23—00:53:16). The Defendants  
8 allege that the secondary video evidence shows that Meggs did not flinch. While it is  
9 difficult to see, Meggs does flinch and move suddenly backwards, as shown in a playing of  
10 the videotape in slow motion (Vid X, 00:53:17—00:54:43).

11           The slow-motion version showing the handlebar at Meggs' groin area was  
12 actually discovered by the Berkeley Police Commission, not by Plaintiffs. The videotape  
13 had been shown to the Commissioners, and because it had grown late, they had left the  
14 Commission's hearing room with the intent of returning later to finalize their decision, not  
15 with the intention of viewing any further videotape. They were called back by Barbara  
16 Attard, the administrator of the PRC, who wanted them to see the videotape in slow motion.  
17 After this subsequent viewing, the Commission found in favor of Plaintiff's charge of  
18 Excessive Force against Officer Singh.

19

1                                   **AUGUST 10, 2001 CRITICAL MASS DEMONSTRATION**

2   **THE AUGUST 10 RIDE CONTINUES**  
3   **AND ABUSIVE USE OF SIRENS AT UNIVERSITY AND SHATTUCK**

4                                   Defendants make a point of the fact that the police diverted traffic around the  
5 demonstration at Bancroft Way and Telegraph Avenue. Again, as mentioned in other  
6 portions of this response, this is a typical action by police in Berkeley and many other  
7 jurisdictions in response to any demonstration, whether on foot or on bicycle. Defendants  
8 would like to make a claim that this behavior had been tolerated by police and the city to  
9 excess in the past, and that now, finally, at the corner of University and MLK and then at  
10 the corner of Shattuck and University, they have finally reached the end of their rope and  
11 wish to prevent further occurrences of this type of behavior. This is simply not true.

12                                   Demonstrations, by their nature, are slow-moving creatures. Traffic is often  
13 reduced to one lane by the demonstration; and is often blocked in both directions by the  
14 mass of the demonstration, either along the route or at certain points when the  
15 demonstration will stop for many reasons, including to allow other portions of the  
16 demonstration to catch up, to stop for speeches, to stop for street theater that is aimed at  
17 getting out the demonstrations' message, to allow demonstration participants to hand out  
18 leaflets or flyers, etc. These stops, even when they happen to allow various portions of the  
19 demonstration to catch up, occur frequently at intersections. This happens frequently with  
20 foot marches, and is not only tolerated by police in Berkeley and other jurisdictions, but  
21 protected by their actions of diverting traffic away from the demonstration and onto side  
22 streets.

1           To try to imply, as Defendants do, that this is an escalating problem, and an  
2 escalating level of frustration on the part of the police, is specious. If it is an increasing  
3 problem, then it has been building for over the 10 years of Critical Mass's history in  
4 Berkeley, and over the unknown number years of demonstrations in general in Berkeley,  
5 which have always been remarkably consistent in Berkeley, as everywhere, in that they  
6 stop for speeches, contact with the public, and to regroup. The First Amendment doesn't  
7 require rapidity or efficiency. Indeed, it has often been said of democracy that it is slow,  
8 cumbersome, and inefficient. Dissent, by its nature, is a time-consuming and inefficient  
9 process, and gums up the works, that is part of the point. Only military and other  
10 dictatorships are efficient, as they govern as they desire, and line up and shoot those who  
11 object. The founders of this country took actions designed to slow the process down and  
12 dissent, see for example the Boston Tea Party<sup>1</sup>.

13           The police have demonstrated by their behavior over literally decades with  
14 many other demonstrations that demonstrations are considered more important than traffic  
15 laws and will allow First Amendment protected activity to disrupt traffic.

16           The most objectionable comment in this portion of the Motion is the statement  
17 that the officers felt it necessary to clear the intersection with the blaring of all sirens at one  
18 time. It is clear from the videotape that the noise this creates is not only obnoxious but  
19 painful. The music that had been playing from Plaintiff Salsbury's sound system is totally  
20 drowned out, despite the fact that the music is purposely played loud enough to draw

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<sup>1</sup> This is not to compare the City of Berkeley to the British Empire or a military dictatorship but to show where the thinking that traffic is superior to the First Amendment, and efficiency and continuous movement more important than dissent, can lead.

1 attention to the demonstration and for all participants to enjoy. Meggs protests verbally  
2 (Vid X, 01:32:29, 01:34:27, 01:34:51 and 01:35:16); and one police officer (Vid X,  
3 01:35:02), at least two participants and two passers-by hold their ears in discomfort (Vid X,  
4 01:31:04—01:35:39).

5           It was not the playing of the sirens that succeeds in getting the demonstration  
6 to move out of the intersection. It is clear from the videotape that what is successful is the  
7 verbal orders and visual gestures that the police officers make. At one point, Officer Roe is  
8 clearly pointing to a participant on a recumbent bicycle, who is clearly angry about the  
9 tactics that the police are choosing, and then pointing down the road. Roe repeats the  
10 gesture two or three times, at which time, the participant rides off (Vid X, 01:33:19—  
11 01:33:26).

12           The use of this type of obnoxious and frightening noise has been documented  
13 in the Vietnam War, and has been used by the U.S. Military as a tactic with frequency, e.g.  
14 blasting rock music to drive Manuel Noriega from his palace, and most recently blasting  
15 “patriotic” songs at high volume at Fort Benning Georgia in an attempt to drown out and  
16 drive away protestors against the School of the Americas. The sirens were an unnecessary  
17 and gratuitous harassment of the Critical Mass participants that generally added to the air  
18 of warfare created by the police. In fact, Hester admits in his deposition that it was a tactic  
19 that he learned from an Inter-Departmental Bulletin (Hester Depo 40:2-18), and that Hester  
20 learned in a national police training in Dallas taught by the LAPD under Darryl Gates  
21 (Meredith Depo 241:2-245:13). BPD had used the tactic on a small scale but never before  
22 or since with more than two or three sirens (Ibid) To indicate the state of mind of the police:

1 in his deposition, Meredith specifically stated that to him, the 46 seconds of peacefully  
2 circling the intersection constituted a **RIOT** because traffic was obstructed, and therefore it  
3 was appropriate to act as they did (Meredith Depo 247:8-248:2).

4           The scene at University and Shattuck also provides one of the clearest  
5 examples of the police targeting Jason Meggs. After the police had blasted their sirens,  
6 and the riders moved out of the intersection of University and Shattuck, the front of the  
7 demonstration stopped along the short block of University between Shattuck Avenue and  
8 Shattuck Square, in order to regroup after the barrage of sirens had disrupted their march;  
9 and get ready to move on. They therefore waited for the light at Shattuck Square to  
10 change. Because of the shortness of the block and because there were enough  
11 participants, the back of the demonstration is waiting on the crosswalk at Shattuck Avenue,  
12 with one or two participants and the police line slightly beyond the crosswalk, still slightly in  
13 the intersection of Shattuck Avenue and University. (Please note that Shattuck Avenue  
14 becomes a one way in a southbound direction at this intersection. A police vehicle has just  
15 joined the demonstration and has blocked the #1/left lane of Shattuck Avenue at University  
16 behind the demonstration and the bicycle/motorcycle police line. Traffic is able to pass in  
17 the #2 lane and then in both lanes (Vid X, 01:29:17 and 01:33:55—01:34:12)). The sirens  
18 have died down, until it appears by the sound that only one or perhaps two sirens are still  
19 going. It is extremely clear from the videotapes of the Shattuck Avenue/University  
20 intersection that the demonstration is waiting for the red light at Shattuck Square to turn;  
21 and traffic can pass in all directions all around them (Vid X 01:33:34—01:35:39).

22           Jason Meggs, who has been extremely frustrated and angry by the intentional

1 attack on Critical Mass, then yells out, “Ow, you’re hurting my ears.” No, Mr. Meggs does  
2 not believe that one or two sirens are hurting his ears more than an entire barrage of 6-9  
3 bicycles plus two motorcycles plus a police vehicle siren. On the contrary, it is the first time  
4 that the scene has been quiet enough for an individual voice to be heard. Mr. Meggs is  
5 letting the police know that they have and are harming him (Vid X, 01:34:27).

6           What is extremely interesting is the response of the police directly behind and  
7 surrounding Mr. Meggs on three sides. Rather than continuing to allow the sirens to die  
8 down, rather than continuing to wait for the traffic light to change, there is now a new  
9 (perhaps second, perhaps third) siren that immediately starts up again (Vid X, 01:34:28),  
10 and suddenly, as if this were a pre-arranged signal, all of the sirens start back up again him  
11 (Vid X, 01:34:33). At this time, what could be the point? The block is short, forcing the  
12 demonstration into a space (the Shattuck Avenue crosswalk) where they probably don’t  
13 want to be any longer because of the actions of the police; traffic on Shattuck Avenue is  
14 able to pass and in all other directions; the wait for a red light is at most, one minute, of  
15 which some period of time has already passed. What purpose could the new sirens blaring  
16 serve? Plaintiffs argue that it serves no police function, that it is the clearest example of the  
17 harassment of Jason Meggs because he is seen as the organizer of Critical Mass and  
18 because in his capacity of one of the founders and leaders of the Berkeley ride, has been  
19 the most vocal defender of it when police actions similar to this in the past have led to  
20 disagreements with the police.

21



1                                   **AUGUST 10, 2001 CRITICAL MASS DEMONSTRATION**

2                                   **PLAINTIFF MEGGS' SECOND CLAIM OF EXCESSIVE**  
3                                   **FORCE AGAINST DEFENDANT SINGH**  
4                                   **University and Shattuck Avenues**

5                                   At this intersection, during the time the police had unconstitutionally and with  
6                                   intent to harm Plaintiffs, blared their sirens, Defendant Singh also pushed his bicycle into  
7                                   Meggs' bicycle, causing him pain, humiliation, and emotional distress.

8                                   Defendant Singh bumped his front bicycle tire into the back bicycle tire of  
9                                   Meggs, causing a metal part, perhaps the foot pedal, or some portion of the metal that  
10                                  connects the pedal to the bicycle, to dig into Plaintiff Meggs' ankle (Meggs Dec ¶14).

11                                 Officer Singh did not order Plaintiff Meggs to move several times, he only  
12                                 ordered to move once. Even that order was only discovered by Plaintiffs when watching  
13                                 the tape in slow motion, as the noise and confusion made the one order extremely difficult  
14                                 to hear or to make out (if, for example, one is watching his face for that split second as he  
15                                 says it). Singh did not make any hand gestures in accompaniment to his order, the way  
16                                 other officers are clearly doing in the videotape. None of the other officers felt a need to  
17                                 use their bicycles as battering rams in order to get the demonstrators moving, and, as a  
18                                 matter of fact, are clearly seen giving more than one order to one particular demonstrator,  
19                                 and giving him several seconds to respond. The time between Singh giving the order to  
20                                 move and his using his bicycle as a battering ram is almost instantaneous.

21                                 In addition, when the videotape is played in slow motion, there is a moment  
22                                 that shows Singh's front tire and Meggs' back tire in contact.

23                                 Once again, Singh was attempting to take advantage of the fact that Meggs

1 was videotaping other portions of the scene (such as the police vehicle pulling up behind  
2 the demonstrators with its sirens and lights fully on) in order to sneak in a harmful and  
3 tortious physical contact for which there is no possible police justification.

4           Given that this is the second instance of Defendant Singh engaging in this  
5 type of conduct; given the fact that Defendant Singh is misrepresenting himself and the  
6 facts in the first instance of assaulting Plaintiff in contradiction to the videotape evidence;  
7 given the fact that a witness, John Tanghe, points out the conduct is occurring on the  
8 videotape, the court can reasonably extrapolate that Plaintiff Meggs is telling the truth,  
9 despite the lack of videotape evidence.

10           Meggs suffered physical, emotional and constitutional harm and damages  
11 from this incident, from this attack on his person and his First Amendment rights.

12  
13           **AUGUST 10, 2001 CRITICAL MASS DEMONSTRATION**

14           **SALSBURY'S AND KAHN'S CLAIMS OF EXCESSIVE FORCE**  
15           **AGAINST DEFENDANT MEREDITH**  
16           **SALSBURY'S AND KAHN'S CLAIMS OF DAMAGE OF PROPERTY**  
17           **AGAINST DEFENDANTS MEREDITH AND ROMANO**  
18           **Oxford and Allston**

19           Salsbury and Kahn were beyond the corner of Oxford and Allston, at least  
20 one-half to one block further down Oxford towards Kittredge, at the time that Villaseñor was  
21 arrested at the corner of Oxford and Allston. They and other riders realized that the rest of  
22 the ride had stopped at Oxford and Allston, and that there was clearly a commotion going  
23 on.

1                   Salsbury and Kahn could not see what was happening. Neither of them knew  
2 why the ride had stopped (Salsbury Dec ¶¶41-42; Kahn Dec ¶¶41-42). Both he and Kahn  
3 then turned around and returned to Oxford and Allston, both because the riders keep the  
4 demonstration together *en masse*, and out of curiosity, to see what was happening.

5                   In the videotape, it is clear that Salsbury and Kahn arrived at the middle of the  
6 intersection of Oxford and Allston almost simultaneously with the police vehicle attempting  
7 to move toward the intersection in order to leave it (Vid X, 01:38:31—01:38:37), Salsbury  
8 slightly ahead of Kahn (Vid X, 01:38:55) . Salsbury does not remember even being aware  
9 of the police car, although he does remember seeing the black police truck sticking up  
10 above the crowd (Salsbury Depo 62:22-66:24) (Salsbury Dec ¶11). The profile of the police  
11 car (i.e., the roof of the car) would have been lower than the truck and even lower than the  
12 people standing between Salsbury and the police car. He could not see the car, first  
13 because of the crowd between him and the police car and because there was intense  
14 activity occurring almost directly in front of him (for example, Valencia being thrown  
15 gratuitously in a circle by Romano, one female rider being pushed by a bicycle officer,  
16 another female rider being pushed by Meredith (Vid X, 01:38:34—01:38:40). Meredith lets  
17 go of the female rider, and immediately grabs Salsbury, and turns him instantly around (Vid  
18 X, 01:38:37). Salsbury arrives and in less than a second, has been turned around by  
19 Meredith so his back was to the police car during the car’s attempt to leave the scene (Vid  
20 X, 01:38:37) (Salsbury Dec ¶¶81-82).

21                   From that moment forward, Salsbury’s attention was completely on the  
22 bicycle, and Meredith’s attempts to overturn it and potentially damage it (Salsbury Dec

1 ¶¶81-82). Defendants claim that Salsbury had stopped his bicycle in order to block the  
2 intersection. In fact, it is clear from the video that when Meredith grabbed Salsbury's  
3 bicycle, Salsbury has just arrived in his attempt to see what is going on. Meredith abruptly  
4 grabbed the bicycle, twisted it, stopping Salsbury's forward progress, and forced Salsbury  
5 to quickly dismount, rather than be thrown off the bike (Vid X, 01:38:37—01:38:43). At this  
6 point, Salsbury still had his hands on the bicycle, attempting to keep it upright and  
7 protected from further damage by Meredith. At one point in the videotape, you can clearly  
8 see Meredith with Salsbury's bicycle almost completely in the air, twisting it and the trailer  
9 as he attempts to manhandle the bicycle. In Plaintiff's videotape, it is clear that the bike is  
10 being shoved back and forth (Vid X, 01:38:45—01:38:48). Meredith then jams the bicycle  
11 into Salsbury's leg severely cutting his knee.

12 In addition, at no point in time did Meredith ask him to move or tell him to  
13 move (Kahn Dec ¶¶21, 23-24; Salsbury Dec ¶¶12, 21; Meggs Dec ¶37). Meredith was  
14 entirely silent throughout the interaction (Kahn Dec ¶¶21, 23-24; Salsbury Dec ¶¶12, 21;  
15 Meggs Dec ¶37). Salsbury, not having seen the vehicle, and having his back turned by  
16 Meredith to the vehicle almost from the instant that he arrived at the intersection, could not  
17 have deduced from the surrounding circumstances what could have caused Meredith's  
18 actions (Salsbury Depo 66:5-24) (Salsbury Dec ¶¶11, 16-17, 21-23).

19 At one point in a videotape, you can clearly hear an officer (Peritoni)  
20 requesting the rider to move back, and states that this is in order to allow the vehicle to  
21 move forward. He makes the request politely, calmly and certainly loudly enough to be  
22 clearly heard on the videotape over the sound system. Meredith is approximately the same

1 distance away from Salsbury as Officer Peritoni was from the videographer. Even with the  
2 sound system being so much closer to them, there is no reason for Meredith not to have  
3 spoken to Salsbury, to explain what he wanted or to give an order.

4           When Herman Kahn arrives at the intersection, the interaction between  
5 Meredith and Salsbury has already begun. Kahn stops to witness this clear violation of  
6 Salsbury's rights and property. When Romano approaches at a diagonal toward Kahn,  
7 dragging still another rider, Kahn attempts to move out of the way, and moves closer to  
8 Meredith and Salsbury. Meredith then grabs Kahn's trailer, and is clearly seen in the  
9 videotape, pulling and twisting on both pieces of property (Vid X, 01:39:04—01:39:18). At  
10 the same time, Romano comes to stand at the trailer holding the sound system, including  
11 speakers. He both attempted to rock the trailer and attached sound system in an apparent  
12 effort to overturn it and thereby damage it, and also began pulling out wires, in order to  
13 disable it and get the sound system turned off (Vid X, 01:06:05—01:06:19, 01:39:11-12 and  
14 01:39:23-24) (Kahn Dec, ¶35; Salsbury Dec. ¶¶29-31). At no time did he ask Salsbury or  
15 Kahn, by this time standing next to him, to turn off the sound system. (Romano had been  
16 assigned to several Critical Mass rides, and was aware that Kahn occasionally rode the  
17 bicycle pulling the trailer, and knew enough to turn the sound down.) Kahn also never  
18 heard either Romano nor Meredith ever ask Salsbury to either turn the sound down or off,  
19 nor asked or ordered Salsbury to move. In addition, Kahn believes that Romano's tortious  
20 attempt to turn down or off the sound system by yanking on the wires, which did not have  
21 plugs and therefore were hard-wired to the system, could have caused a fire, creating a  
22 safety hazard and potentially greater property damage. The result was that the sound

1 system did not work as well as before, and did not work as consistently as before, causing  
2 further damage to Plaintiff's First Amendment right to communicate. The sound system is  
3 used to amplify speeches given during the ride. In addition, the music provides a focal  
4 point, a rallying point and draws attention to the demonstrator's message decrying  
5 automobiles and their damage to the environment and asking passers by to use bicycles  
6 and public transportation (Salsbury Dec ¶37 throughout)

7 Defendants claim that Romano immediately discontinued his actions once the  
8 patrol car cleared the intersection. It is clear in the videotape that Romano did not stop  
9 pulling the wires on the sound system until after the police vehicle had already left, not  
10 instantly or simultaneously. He does not stop pulling on the wires until Hester has said  
11 something to him twice (Vid X, 01:06:05—01:06:19, 01:39:11-12 and 01:39:23-24).

12  
13 **AUGUST 10, 2001 CRITICAL MASS DEMONSTRATION**

14 **LONG'S CLAIM OF UNLAWFUL ARREST AGAINST DEFENDANT HESTER**  
15 **Martin Luther King Jr. Way at and before Dwight**  
16

17  
18 After Efren Garcia Villaseñor's violent arrest at the corner of Oxford and  
19 Allston on August 10<sup>th</sup>, 2001, and fellow rider John Tanghe being thrown into the plate  
20 glass window of the Kamal Palace Restaurant, the crowd of demonstrators reacted with  
21 shock and disbelief that a compatriot would be arrested for crossing against a red light,  
22 something that they had seen the police condone and encourage (by blocking cross traffic  
23 so that the ride could continue through a red light), an action that many riders had  
24 performed frequently throughout this ride and previous rides, and that they knew was

SALSBURY, et al., v. CITY OF BERKELEY-PLAINTIFFS' RESPONSE TO DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT

1 common practice on demonstrations in general. They stopped in order to decide what  
2 would be the best course of action to take in response; and one of the decisions was to  
3 hold a rally and speeches in response to the police brutality they had witnessed, and the  
4 attempt to disrupt the demonstration itself.

5 Plaintiff Valencia, having just witnessed the violent arrest and disappearance  
6 of her boyfriend in a police car, and having just experienced brutality and violence at the  
7 hands of the officers herself, chose to cross the street in order to have a few minutes by  
8 herself, away from the crowd (more than 90% of the demonstration was in the Southbound  
9 lanes of Oxford, with only a few riders on the east side of Oxford, Northbound side), in  
10 order to calm down and collect herself. Plaintiff Long, seeing her by the side of the road  
11 and still upset, made the decision to cross the street within the crosswalk, while walking his  
12 bicycle, in order to offer what comfort and reassurance he could, and to ask how she was.

13 While he was crossing the street from west to east, from Southbound to  
14 Northbound lanes, and while he was in the Northbound #1 lane (closest to the median),  
15 Sgt. Hester called to him from the Southbound lanes. He stopped briefly for approximately  
16 five (5) seconds to respond. Almost simultaneously to his stopping, the car in the  
17 Northbound #1 lane started to move, and then immediately stopped (Vid X, 01:12:25—  
18 01:13:09). In the videotape, the driver walks up to Long, is talking with open hands (not the  
19 pointing or other type of angry gestures you would expect to see from someone who is  
20 upset) and then shakes his hand (Vid X, 01:13:09—01:15:25) (Long Dec ¶¶10; Meggs Dec  
21 ¶¶67-68). This is in striking contrast to Hester’s police report account, and sworn  
22 declaration made in opposition to Long and Villaseñor’s Murgia motion for discovery (See

1 declaration attached as Exhibit D to Hildes Dec). Therein Hester insists that Long blocked  
2 the car for an extended period of time, and that the man angrily jumped out of his car and  
3 began screaming and threatening Long in a confrontation that went on for several minutes  
4 before the police intervened to rescue Long (See police report and declaration of Hester  
5 throughout). As the video shows, it was actually Hester who blocked the vehicle after Long  
6 and the car occupant shook hands, while first Hester spoke to the man in the green jacket,  
7 while a motorcycle officer approached the driver (Vid X, 01:13:09—01:17:10). Hester  
8 insists in his report that that confrontation and the lengthy blockade by Long that led to it  
9 were the sole reason Long was to be stopped and charged, and the only reason the police  
10 were pursuing him. The videotapes and testimony clearly reveal that those statements by  
11 Hester were untrue. Even opposition, in their motion concedes that the handshake took  
12 place and that there was not a lengthy confrontation (Defendants' Motion for summary  
13 judgment 14:3-4) while continuing to promote the other fictions about the lengthy  
14 obstruction and the heated confrontation. (For an entire sequence of the incident, see Vid  
15 X 01:09:15—01:22:14.)

16 In addition, in contrast to Hester's report and declaration, the gentleman who  
17 walked up to Long and shook his hand is seen walking through the crowd previously, as did  
18 a second occupant (Vid X, 01:09:15—01:11:39). There is also a view of the car several  
19 minutes before this interaction (Long in crosswalk and shaking hands), as it came to a stop  
20 in the Northbound lane, and blocked traffic for quite some time. Both these facts lend  
21 credence to Plaintiffs' argument that the car's occupants were angry with police and the  
22 police disruption of the demonstration, which the occupants were well aware of, as the two



1 gentlemen had been clearly among the crowd of participants in the Southbound lanes for  
2 several moments before getting back in their car. It was not “clever” of Long to shake the  
3 car occupant’s hand. First, the occupant was making his feelings regarding the police  
4 clear. Second, this gentleman and the other occupants then yelled at the police in anger.  
5 Given the totality of the individual gentleman’s behavior plus the behavior of the other  
6 occupants shown on the videotape, it is much more plausible and likely that all of them  
7 were angry at the police all along and it is Hester who is attempting to be disingenuous, not  
8 Long. As is often the case, Defendants seek to narrow the view of any particular  
9 participant’s behavior to a shortened time in an effort to prove their case, when a wider view  
10 not only provides a better explanation, but often leads to the exact opposition conclusion  
11 that Defendants seek.

12           In addition to this more plausible explanation of what occurred in the  
13 interaction between Long and the vehicle’s occupant(s), Plaintiffs point out that Long was in  
14 the crosswalk for a total of approximately 5 seconds. If it is true, as Hester and Defendants  
15 claim, that traffic was just beginning to move again, an additional 5 seconds of delay is not  
16 excessive and certainly not worthy of a citation that then results in jail time (even of “only” 3  
17 hours). Five seconds does not reasonably distinguish Long’s conduct from the other riders  
18 (Long Dec ¶¶5-14; Meggs Dec ¶¶67-71) (Vid X, 01:11:40—01:11:59, shot of another rider  
19 stopping the car; 01:09:25—01:09:39, several riders were cause of car initially stopping).  
20 And why were the occupants not cited for stopping traffic? They had had other  
21 opportunities to move their vehicle, yet chose to get out in order to participate/ mingle/listen  
22 to the demonstrators (the videotape shows traffic moving while the occupants were in the

1 crowd (Vid X, 01:09:15—01:11:15)).

2           Plaintiffs also point out that the traffic did not resume immediately after Long  
3 moves out of the crosswalk; as a matter of fact, it is clear from the videotape on Hester’s  
4 bike cam that the choice that Hester made of where to stand and to place his bicycle slows  
5 traffic down, as Hester has effectively blocked the Northbound #2 lane, and traffic now has  
6 to merge into the Northbound #1 lane in order to move. Traffic diverts for approximately 2  
7 minutes around Hester (Vid X 01:13:09—01:15:24) (Long Dec ¶¶5-14; Meggs Dec ¶¶67-  
8 71). If moving traffic was important enough to later arrest Plaintiff Long for blocking it, why  
9 would the police then more than double the length of the blockage after Long has left the  
10 crosswalk? There does not appear to be any legitimate reason for this, and it puts to  
11 question the officer’s motivation for arresting Long.

12           There was no good reason for Hester to have waited a half-hour after the  
13 incident to issue the ticket. There were several opportunities for Hester to speak with Long.  
14 First, Long is standing immediately next to Hester as the green car prepares to leave and  
15 then as the bus follows it (Vid X, 01:16:09—01:17:02). Long remained available, highly  
16 visible and frequently near the police line (Vid X, 01:17:11--01:17:34, shows the same  
17 scene twice, with the second shot in slow motion). Long is clearly in the crowd around the  
18 speakers at the corner of Oxford and Allston, and then is one of the speakers, accusing  
19 Hester as the commander of the police who arrested Villaseñor, of bias and harassment  
20 01:17:35—01:18:28 and 01:18:54—01:19:28). Hester’s bike cam shows Long only the  
21 width of the crosswalk away from Hester in the Southbound lanes, approximately 5 minutes  
22 after the green car has left (Vid X, 01:18:29—01:18:53).

1                   Once the ride leaves Oxford and Allston, there are other times shown clearly  
2 in the videotape where Hester has an opportunity to either speak with Long or to issue a  
3 citation. Hester's bike cam shows Long only one bicycle length away from Hester as the  
4 ride turns from Allston onto Milvia for 33 seconds. Long is then seen later at the circle  
5 created in front of the Police Station, and one of the speakers in the middle of the circle  
6 (01:21:21—01:22:13). At this time, they are in front of the police station; Hester has access  
7 to further police backup than at Oxford and Allston, as is clearly seen in the videotape from  
8 the number of officers who come out of the police station/jail in order to watch the circle. In  
9 the videotape, as an example, Mateo speaks in the middle of the circle; AND he is seen  
10 turning in a circle with his bicycle on his shoulders BY HIMSELF on the side of the  
11 crosswalk closest to the police station and seven extra cops (Vid X, 1:21:26—01:21:58).

12                   Instead of citing Long or talking to him as Hester states he allegedly wanted  
13 to do, he waited until the ride is close to its end, but in progress along Martin Luther King.  
14 In the videotape, Hester is seen making a dangerous move to cut Long off with his own  
15 bicycle (this portion is difficult to see in Meggs' video and therefore has been shown twice,  
16 once blown up, and then a second time, further blown up, see Vid X, 01:24:06—01:24:17.  
17 In the view of the scene from Hester's camera, his camera clearly jiggles, even though  
18 Long is not in view, at 01:24:35; and then Long comes in view suddenly from the left as the  
19 two motorcycle officers roar off to pursue him). Hester creates a major intimidating  
20 spectacle with his own unsafe attempt at a stop, motorcycles racing at Long, an officer  
21 (Roe) leaning off his moving bicycle and falling over trying to grab Long while both are in  
22 motion, and then slapping handcuffs on him and hauling him off to jail (Vid X, 01:22:14—

1 01:26:43).

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## **II. LEGAL ARGUMENT**

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Since, by the nature of responding to Defendants' statement of facts, Plaintiffs have made a great deal of legal argument, as appropriate Plaintiffs will refer back to that argument while putting the facts and response in the context of law and case law.

### **A. OVERVIEW AND PROPER CONSTITUTIONAL FRAMEWORK: THE FIRST AMENDMENT IS SUPERIOR TO LOCAL TRAFFIC LAW**

Defendants have taken the harassment of Plaintiffs and the disparate treatment of the demonstrations and political campaign in question, and sought to use that harassment as the font of their arguments in their summary judgment motion, using the harassment to justify itself. In that manner, Defendants seek to reduce this case and its issues to a series of debates over alleged traffic violations, discarding the First Amendment and Fourth Amendment in the process. If allowed to do so, Defendants would be able to completely remove the case from the context of police response to demonstrations, the general conduct of the police towards Critical Mass, and set a precedent that would allow any march, rally, or parade to be stopped simply because traffic is briefly inconvenienced by it, something it's extremely difficult to imagine that the framers of the Constitution ever intended. It also ignores the fact that the Berkeley Police Department has been wholly inconsistent and erratic in its treatment of Critical Mass, and has at times cited and arrested

SALSBURY, et al., v. CITY OF BERKELEY-PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

1 for conduct that the vast majority of the time they simply allowed to occur, and that the  
2 police, particularly Sergeant Hester, who was the incident commander at all times in  
3 question admittedly singled out organizers and other visible and outspoken participants in  
4 the demonstration for selective and disparate enforcement, thus triggering analysis under a  
5 host of cases and political standards.

6 The essential and definitive case on the issue in California is Murgia v.  
7 Municipal Court 15 Cal 3d 286 (1975). Murgia was an organizer for the United  
8 Farmworkers Union, who was carrying out organizing efforts in fields where the owners  
9 owned a great deal of land and had great influence with the county sheriff's office. The  
10 grower prevailed upon the sheriff's office to help him drive out the "trouble-maker" in  
11 question. As a result, Murgia was repeatedly stopped and cited or arrested for violations  
12 that others who were not UFW organizers were generally not.

13 Murgia appealed his convictions, which were overturned on appeal by the  
14 California Supreme Court on the grounds that the laws were applied to him in a selective  
15 manner to retaliate against him for his organizing efforts. This is directly analogous to the  
16 present situation, where Hester and his officers undertook a specific campaign of threats  
17 and harassment against Critical Mass because they did not like the demonstration.

18 "Although the People concede the authoritative nature of the Yick Wo  
19 decision, they contend that its rationale does not apply to the enforcement of penal laws.  
20 Relying on language in several early California Court of Appeal decisions, fn. 5 the People  
21 argue that since no one has "a **[15 Cal.3d 296]** right to commit a crime," an individual who  
22 has violated a criminal statute may not justifiably complain of the discriminatory  
23 enforcement of the law. Although obviously no one has a right to commit a crime, the  
24 People's argument misconceives the nature of the entire discriminatory enforcement  
25 problem. Just as it would have been constitutionally impermissible for San Francisco to  
26 enact an ordinance specifically barring only Chinese from obtaining laundry permits, so it

1 would be constitutionally improper for the state to pass a statute which, for example,  
2 declared gambling a criminal offense only if committed by blacks. Because the state could  
3 not explicitly mandate criminal sanctions for gambling on such an arbitrary, invidious basis,  
4 Yick Wo teaches that law enforcement authorities may not enforce a facially fair gambling  
5 statute as if it was explicitly directed only at blacks. (See, e.g., People v. Harris (1960) 182  
6 Cal.App.2d Supp. 837 [5 Cal.Rptr. 852]; People v. Winters (1959) 171 Cal.App.2d Supp.  
7 876 [342 P.2d 538].) [6] This analysis extends to the enforcement of all penal statutes, for  
8 the equal protection clause, of course, fully applies to all criminal laws. (See, e.g., Skinner  
9 v. Oklahoma (1942) 316 U.S. 535, 541 [86 L.Ed. 1655, 1660, 62 S.Ct. 1110]; In re King  
10 (1970) 3 Cal.3d 226, 232 [90 Cal.Rptr. 15, 474 P.2d 983].) Murgia at 295-296  
11  
12

13 Note, Murgia itself was specific to discrimination based on First Amendment  
14 activity, and has been consistently so applied.

15  
16 Despite the protestations of the police and City that the right of traffic to flow  
17 unimpeded is pre-eminent, the courts have never found that to be the case.

18 “Public places such as sidewalks, streets, and parks historically associated  
19 with the free exercise of expressive activity are considered to be “public forums”; in such  
20 places the government’s ability to permissibly restrict expressive conduct is very limited.”  
21 Cannon v. City and County of Denver 998 F.2d 867 (10<sup>th</sup> Circuit 1993).

22 Streets and parks are considered to be the pre-eminent public forum since  
23 time immemorial, and demonstrations and to be held in trust for the use of the public, and  
24 as such use for purpose of assembly, communicating thoughts between citizens, and  
25 discussing public questions is given great priority and has rights significantly great than that  
26 of public or private traffic or commerce. Such use of the streets and public places has,  
27 from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.  
28 Hague v. CIO, 307 U.S. 496, 515-16 (1939).

1                   “The First Amendment may make individual criminal Defendants immune  
2 from defending actions for having exercised their right to petition the government.” Cate v.  
3 Oldham 707 F.2d 1176 (11<sup>th</sup> Circuit, 1983)

4                   “The three types of forums that exist are traditional public forums (parks and  
5 streets), designated public forums, and non-public forums. Of these, traditional public  
6 forums are entitled to the highest level of protection.” Church on the Rock v. City of  
7 Albuquerque 84 F.3d 1273(10<sup>th</sup> Circuit, 1996).

8                   It is revealing that even the most conservative circuits in the country, the 10<sup>th</sup>  
9 and 11<sup>th</sup> hold that the public streets are a sacrosanct public forum and that that is their  
10 traditional and highest function. That puts the rights of demonstrators squarely and  
11 explicitly ahead of those of traffic. Placing restrictions on the exercise of such protected  
12 rights in such a forum, such as announcements that all traffic laws will be enforced, and  
13 citing, intimidating, and arresting individuals participating in specific peaceful  
14 demonstrations is held by all of the above to require a strict scrutiny test in that Defendants  
15 must show that such restriction and harassment was narrowly tailored to protect a  
16 compelling government interest. Free flow of traffic has never been held to be a compelling  
17 government interest in this context, in fact, as cited above the Supreme Court has held that  
18 demonstrations are a substantially superior interest to traffic. There is no comparable  
19 Constitutional Right that the City or its officers can cite for a motorist to proceed at a rapid  
20 speed on any street they so desire at any time. In fact, driving has been consistently held  
21 to be a privilege not a right.

22                   By engaging in the arbitrary citations, the destruction of demonstration and

1 demonstrator property central to the demonstration (e.g. trailers, bicycles, and the sound  
2 system, by chasing down and arresting participants without cause, and by using excessive  
3 and unnecessary force, and otherwise acting to disrupt and intimidate participants in  
4 Critical Mass, Defendants acted in such a manner as to severely disrupt the  
5 demonstrations, discourage participation, retaliate against the organizers, spokespeople,  
6 and other visible and active participants in the demonstration, and otherwise caused great  
7 harm to the demonstration and its participants.

8           The Defendants bear the burden of proving that Plaintiffs' First Amendment  
9 Rights are not clearly established and that Defendants' restrictions and actions were lawful.  
10 Burnham v. Ianni 119 F.3d 668 (8<sup>th</sup> Circuit, 1997)

11           In addition, strict scrutiny is required where the restrictions and/or attacks on  
12 the demonstration are content specific or can be proved to be so (see e.g. Corneilius v.  
13 NAACP 473 US 788 (1985)).

14           Here, there is no precedent for the police giving traffic tickets to a  
15 demonstration on a local street, and Defendants Hester, Meredith, and Romano admit as  
16 quoted previously that they don't recall ever giving out such a ticket to a foot demonstration,  
17 or that any other officer ever gave out such a ticket to any other demonstration.

18           There is also no other example that Hester, or any other Defendant could cite  
19 where an officer approached a participant in a demonstration when he was minding his own  
20 business own his own time, days or weeks removed from the demonstration when a  
21 Berkeley Police Officer approached a participant in a demonstration, even an ongoing one,  
22 and threatened or warned him based on alleged conduct during the demonstration. The



1 fact that this happened to Defendant Villaseñor on at least 2-3 occasions points to a pattern  
2 of harassment, as does the devising of charges and mailing tickets weeks later to only the  
3 organizers as Hester admits to, and most revealingly Hester's repeated insistence that the  
4 First Amendment doesn't apply to Critical Mass because its on bicycles, or regularly  
5 scheduled, and finally in deposition despite banners, signs, chants, the very nature of the  
6 use of the bicycles as a visible protest and advocacy, that Critical Mass is only a  
7 demonstration and only protected by the First Amendment while it is standing still and  
8 speeches are being given. There is no precedent for such a determination, and marches  
9 have been held to be First Amendment activity since the First Amendment was written. It  
10 also makes the fact that Hester chose to break up a gathering where the march stopped  
11 after 46 seconds at Center and Shattuck, especially revealing of his animosity, since that  
12 we be a point where, according to his definition, the demonstration was engaged in First  
13 Amendment Activity.

14 In the weeks following the April 13, 2001 Critical Mass demonstration, it is  
15 uncontraverted that Hester singled out the leaders and principal organizers for citation on  
16 both misdemeanors and infractions because he recognized them and knew them to be the  
17 organizers.

18 Between July and August, the police managed to target and harass the only  
19 two people of color of the demonstrations Valencia and Villaseñor, cited Evan Payne for  
20 following the surveillance van, chased down and arrest one of the major spokespeople,  
21 Long who spoke at at least two locations, the beginning, and Oxford and Allston, and was  
22 generally highly visible and vocal half an hour after a supposed incident that clearly, from all

1 video evidence, and numerous declarations, and even some of Defendants' statement of  
2 facts did not occur in anything resembling the manner in which Hester describes it in the  
3 police report and sworn declarations to the criminal court, and which according to Hester  
4 was the sole basis for wanting to stop, cite, and thus chase down and arrest Long. The  
5 claimed confrontation with the motorist did not occur, and the motorist was a supporter and  
6 was calmly chatting with demonstrators, out of his stopped car and in the crowd shortly  
7 before the incident. In addition, seeking to cite one individual for supposedly obstructing  
8 traffic in an intersection where the entire ride was in the middle of traffic lanes and blocking  
9 the street, even if Long had actually done so himself is clear selective enforcement and an  
10 attack based on what he was saying and that he was saying it, not based on any conduct  
11 by him. The discriminatory treatment of Villaseñor has been discussed at length and will be  
12 discussed again under the section pertaining to his arrest, but it is important to note that the  
13 police report and attachments, and Defendants' arguments all focus on the pretextual  
14 reason for the arrest, but Defendant Hester admits that the decision to arrest Villaseñor had  
15 already been made before they ever reached the intersection in question, based not on  
16 illegal conduct, but on the fact that Meredith and Hester were annoyed because Villaseñor  
17 was riding in front of them while they were riding unsafely and illegally through the crowd,  
18 and tried to slow them to a safe speed. While Meggs and Salsbury were not arrested in  
19 August, they and Herman Kahn, who was pulling the other ride trailer with equipment while  
20 Salsbury was pulling the trailer with the sound system were physically assaulted, and their  
21 equipment damaged. Three times Defendant Singh shoved his bicycle into Meggs, twice  
22 into his crotch. Despite Defendants insistence that this is either "entirely fictitious or grossly

1 exaggerated” the first two clearly appear on video, and are noted by Plaintiff and by an  
2 eyewitness on the videotape, both in spontaneous statements /excited outbursts. At  
3 University and Shattuck, Meggs held his ears and objected to the blasting of sirens at the  
4 demonstrators, which was at a volume and pitch that caused severe pain and could cause  
5 lasting hearing loss. The response of the officers was to instantly retaliate by doubling the  
6 volume inflicting even more severe pain. Meredith grabs, shakes, tries to overturn and  
7 generally attacks the bicycles and trailers of Salsbury and Kahn, resulting in bent, damaged  
8 trailer hitches, dumped and damaged equipment, and Salsbury’s knee being severely cut  
9 by Meredith shoving his bicycle into him intentionally. Meanwhile Romano begins yanking  
10 out wires from the sound system, creating a dangerous situation and impairing their ability  
11 to use it for expressive speech and music. Not only was the demonstration singled out  
12 because of its content (and bicycles are an inimical part of its content, but the organizers,  
13 spokespeople, and most visible participants are singled out for that very reason for false  
14 arrest and citation, and abusive force and destruction of property. They attacked the  
15 speakers, and the equipment used to amplify their speech.

16 It is virtually unprecedented for content-based restrictions to be upheld. The  
17 only examples available are the “clear and present danger” of public violence cases,  
18 Terminello v. Chicago 337 U.S. 1 (1949), Brandenburg v. Ohio 395 U.S. 444 (1969), etc.  
19 And that entire family of cases makes clear that those are the only situations where content  
20 based restrictions can be upheld, and even then it is tightly restricted.

21 Bicycles are intrinsic and inseparable from a demonstration on behalf of the  
22 rights of bicyclists and a demand that cars not be treated as the centerpiece and priority of

1 this society. To then attack them specifically for the fact that their demonstration impairs  
2 and delays automobile traffic is problematic at best.

3 In fact, the rationale that Critical Mass delays more traffic than foot  
4 demonstrations, aside from the fact that they are entitled to demonstrate even if they  
5 obstruct traffic, is still specious. Foot demonstrations are much slower; they stop frequently  
6 to regroup, give speeches etc. It is a reasonable and accurate conclusion that they, by  
7 moving slower and stopping more, create much greater back ups than Critical Mass does.  
8 The City has also argued that restrictions against Critical Mass are acceptable as motorists  
9 become angry and get into conflicts with demonstrators. This runs directly counter to a  
10 great body of Supreme Court law. Starting with Terminello v. Chicago 337 U.S. 1 (1949),  
11 the courts have held that hecklers do not have the right to veto a demonstration and that  
12 the police cannot bar a demonstration because others might become enraged by it. And, in  
13 fact, as Plaintiffs have noted in their statement of facts and declarations, there is  
14 uncontradicted evidence that since the police ceased harassing and “protecting” Critical  
15 Mass after August of 2001, there have been no incidents or conflicts.

16 Since there is no compelling state interest, and Defendants cannot show that  
17 their actions were grounded in such, as a matter of law there is no basis for holding that it  
18 was appropriate to require the demonstration to stop at every red traffic signal while other  
19 demonstrations were not so required, and to single out leaders, organizers, spokespeople  
20 and others who Defendants did not like for citation, arrest, or force, and therefore that  
21 Defendants actions as a whole were improper and Constitutionally violative.

22 Having framed the issues and the case in light of the overall plan and scheme

1 by the City and in light of well grounded prevailing Constitutional and legal standards,  
2 Plaintiffs now turn to the individual issues raised by Defendants, covering the overall  
3 Summary Judgment standards last.

4  
5 **B. SPECIFIC RESPONSES TO DEFENDANTS ARGUMENTS**

6 **1. EXCESSIVE FORCE CLAIMS**

7 **a) DEFENDANTS MISSTATED THE STANDARD AND APPLICABLE AMENDMENT IN**  
8 **THEIR ANALYSIS OF THE EXCESSIVE FORCE CLAIMS AS TO THE PLAINTIFFS WHO**  
9 **WERE NOT ARRESTED**

10  
11 Defendants insist that the applicable standard for the Plaintiffs who were  
12 pushed, shoved, grabbed, or had their bicycles and trailers seized, including Salsbury who  
13 had his knee badly cut by Meredith's twisting and pulling on his bicycle is a 14<sup>th</sup>  
14 Amendment Substantive Due Process standard, i.e. that it must shock the conscience of  
15 the court, but that is not the applicable standard. The case that Defendants cite, County of  
16 Sacramento v. Lewis 523 U.S. 833 (1998) only applies to specific types of potentially  
17 reckless conduct and unintended and unforeseen consequences of intentional conduct, but  
18 does not apply to logical consequences of intentional use of force. And, furthermore, Lewis  
19 very specifically throughout the body of the opinion only refers to policies related to high  
20 speed pursuits, and provides immunity if they conform to the relevant vehicle code section.  
21 This has nothing whatsoever to do with the situation herein.

22 Defendants' argument misinterprets Fourth Amendment precedent and  
23 misplaces reliance on the premise that those Plaintiffs were not seized. A more  
24 thorough analysis of Fourth Amendment jurisprudence reveals that the Plaintiffs

1 were undoubtedly seized here.

2  
3 **1) A Seizure Occurs Whenever Government Actors Have, By Force**  
4 **or Show of Authority, Restricted the Liberty of a Citizen**

5 The Fourth Amendment provides in relevant part that:

6  
7 "The right of the people to be secured in their persons, houses, papers, and  
8 effects, against unreasonable searches and seizures, shall not be violated".

9 U.S. Constitution, Fourth Amendment.

10  
11 It is settled law that a "seizure" occurs "when government actors have, by means of  
12 physical force or show of authority, in some way restricted the liberty of a citizen."  
13 Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865, 1871 (1989); Terry v. Ohio, 392  
14 U.S. 1, 19 n.16, 88 S. Ct. 1868, 1879 n. 16 (1968). In Graham, the Court  
15 unanimously held that any use of force "in the course of an arrest, investigatory stop,  
16 *or other 'seizure' of a free citizen* should be analyzed under the Fourth Amendment  
17 and its 'reasonableness' standard." Graham at 395, 109 S. Ct. 1871 (emphasis  
18 added). The Court specifically rejected the contention now advanced by the  
19 Defendants that claims of excessive force, absent an arrest, should be analyzed  
20 under the 14<sup>th</sup> rather than 4<sup>th</sup> Amendment:

21  
22 "Today we make explicit what was implicit in [Tennessee v.] Garner's  
23 [471 US 1 (1985)]analysis, and hold that all claims that law  
24 enforcement officers have used excessive force – deadly or not – in the  
25 course of an arrest, investigatory stop, or other 'seizure' of a free citizen  
26 should be analyzed under the Fourth Amendment and its  
27 'reasonableness' standard, rather than under a 'substantive due  
28 process' approach. Because the Fourth Amendment provides an  
29 explicit textual source of constitutional protection against this sort of  
30 physically intrusive governmental conduct, that Amendment, not the  
31 more generalized notion of 'substantive due process,' must be the

1           guide for analyzing these claims.”

2  
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4

5           In so holding, the Court rejected a long line of Court of Appeals cases  
6 applying the due process standard, holding instead that most cases of excessive  
7 force should be analyzed under either the Fourth Amendment’s prohibition against  
8 unreasonable seizures or the Eighth Amendment’s ban on cruel and unusual  
9 punishment, “the two primary sources of constitutional protection against physically  
10 abusive governmental conduct.” Graham 490 U.S. at 394;

11           Graham makes clear that excessive force claims can and should be brought  
12 under the Fourth Amendment whenever there is a “seizure,” whether it occurs in the  
13 course of an arrest, an investigatory stop, or some other type of seizure that does not  
14 arise to the level of an arrest nor an investigatory stop.

15           Since Graham, the Supreme Court has held that a seizure can occur by  
16 either: 1) the application of physical force, however slight, whether or not it  
17 successfully subdues the subject; or 2) where such physical force is absent, by  
18 actual submission to an officer’s show of authority to restrain the subject’s liberty.  
19 California v. Hodari, 499 U.S. 621, 624-26 (1991). That case involved the second  
20 seizure prong because there had been no physical contact whatsoever at the time  
21 the defendant claimed a seizure had occurred. The subject was fleeing an officer  
22 when he discarded a rock of cocaine. After discarding the contraband, the officer  
23 tackled the suspect. The Court held that, because the suspect did not yield to the  
24 officer’s show of authority, there was no seizure until the officer tackled him, and the  
25 contraband discarded before the seizure was therefore admissible. Hodari at 629.

26           In distinguishing the two prongs, the Court made clear that a seizure by  
27 physical force does not require submission like a seizure by show of authority:

SALSBURY, et al., v. CITY OF BERKELEY-PLAINTIFFS’ RESPONSE TO DEFENDANTS’  
MOTION FOR SUMMARY JUDGMENT

1 “The word ‘seizure’ readily bears the meaning of laying on of hands or  
2 application of physical force to restrain movement, even when it is ultimately  
3 unsuccessful.” Hodari at 626.

4 Thus, any physical force applied against protesters, “however slight,”  
5 constitutes a seizure if it was applied to restrain movement, regardless of  
6 whether it actually achieved that objective.

7  
8 The Defendants’ actions, as alleged in Plaintiffs Complaint and herein, clearly  
9 constituted a “seizure” within the meaning of these cases. The Defendants cannot  
10 seriously maintain that the Plaintiffs’ liberty was not restricted, or that the officers, for  
11 what ever reason, were attempt to assert some level of control over them.

12  
13 **(a) VALENCIA**

14 Here, Plaintiff Valencia was grabbed, pushed, shoved, and twisted a total of at  
15 least seven times as shown on Plaintiffs’ video exhibit and as discussed in the  
16 declaration of every Plaintiff on the scene. Defendants claim that Valencia was  
17 obstructing the arrest of Plaintiff Villaseñor and had to be moved, but the tape clearly  
18 shows that on at least two of those occasions, Defendants Roe, Hester, Meredith,  
19 and Romano waded into the crowd, past other demonstrators who were closer to the  
20 arrest scene and/or other activities and pushed Valencia while she was standing in  
21 the middle of the crowd engaged in no problematic activity. Furthermore, several of  
22 those pushes, shoves, were inflicted on her after the arrest was completed and  
23 Villaseñor was securely in the car. And, in fact, all Valencia ever did was verbally



1 demand to know what Villaseñor was being charged with and why he had been  
2 arrested. She was not free to continue or to move freely, as the officers kept seizing  
3 and pushing her regardless of her location. It is inarguable that the involved Officers  
4 Roe, Hester, Meredith, and Romano, acted to restrict her movement.

5  
6 **(b) MEGGS**

7 In all three cases where Singh attacked him physically with his bicycle he  
8 used force to do so, one presumes he was attempting to move him in some  
9 direction, or at least using the pain to assert some sort of control; even if that wasn't  
10 his intention (in which case it was straight sadism) the effect was to impair Meggs in  
11 videotaping and to assert control over him. As for the blasting of large numbers of  
12 sirens with their cumulative effect. It is undisputed that that force, painful, high  
13 decibel sound, was intentionally used to push the crowd out of the intersection. In  
14 other words, it was intended to and effective at forcing the crowd to move. That  
15 would clearly constitute a seizure under the Graham and Hodari standard.

16  
17 **(c) SALSBURY AND KAHN**

18 By grabbing Salsbury and Kahn's bicycles and trailers while they were still  
19 riding, and then standing astride or holding on to them, Meredith restricted their  
20 liberated and attempted to assert control over them by physical action, shaking,  
21 twisting, trying to knock them over, pushing them. Certainly that includes the cutting  
22 of Salsbury's leg, which was a likely, foreseeable, and logical outcome of Meredith's

1 tortious conduct. If you repeatedly shove a bulky object with sharp edges (Chains,  
2 pedal rims) into someone, it is certainly likely that you could inflict serious cuts,  
3 bruises, etc. Salsbury did not have the option of letting go and was not told or asked  
4 to do so. If Salsbury had let go, the entire several thousand dollar sound system  
5 would have go crashing off the trailer and onto the pavement severely damaging it.  
6 The fact that Meredith was shoving and twisting with enough force to bend and ruin a  
7 heavy steel trailer hitch designed to with stand severe impact indicates the level of  
8 force he was using against Salsbury and the bicycle and trailer.

9 Similarly, Meredith was succeeding in knocking equipment off of Kahn's trailer  
10 and spilling liquid contained therein. If Kahn had let go, all of the equipment on the  
11 trailer would have also gone crashing down onto the street, damaging and breaking  
12 it. Just as with Salsbury's trailer, the hitch holding the trailer to the bicycle was so  
13 badly bent that it took great effort to pry it loose and it was never usable again. Such  
14 an action required significant force to bend a thick plug of case hardened steel.

15

16 **b) FORCE USED IN THE COURSE OF DETENTION**  
17 **AND/OR ARREST OF OTHER PLAINTIFFS**

18 It is undisputed that those Plaintiffs who were detained for citation (**Payne and**  
19 **Valencia** in July), or forcibly arrested in August (**Long and Villaseñor**) were seized  
20 under any definition of the Fourth Amendment.

21

22 **c) THE FORCE USED AGAINST PLAINTIFFS WAS UNREASONABLE**

1 **1 AND 2) LONG AND VILLASEÑOR**

2 It is an axiom of 4<sup>th</sup> Amendment law, that no amount of force is reasonable for  
3 a false arrest or citation, and that the act of the false arrest itself, especially in the  
4 cases of Long and Villaseñor when they were pursued and forced to stop, and then  
5 taken to the police cars and taken off to jail. So, even if they, as lay witnesses not  
6 attorneys or police officers expected to understand what excessive force is, the  
7 seizure as defined in Graham and the other cases listed above, was used to exert  
8 dominion and control over Long and Villaseñor. Asking an objected to and legally  
9 conclusory question in deposition as to whether excessive force was used against  
10 them and receiving a negative response from a Plaintiff with no legal training is not  
11 dispositive. If the court finds that the arrests of Long and Villaseñor were  
12 unreasonable, improper, of otherwise Constitutionally violative, or at least that that is  
13 a question of material fact for the jury, then correspondingly, there is an excessive  
14 force claim for all force used to effect the arrest even if not otherwise violent or  
15 excessive that is proven, or at least should be before the jury. Furthermore, an  
16 excessive force claim will also encompass the intimidation, dangerous riding of  
17 motorcycles at, and attempted forcing of these Plaintiffs off the road to effect the  
18 illegal arrests, which was extremely dangerous and intimidating, and could easily  
19 have resulted in death or serious injury to Plaintiffs in order to stop them for alleged  
20 traffic violations that, as discussed in great detail above and in Plaintiff's response to  
21 defendants on the false arrest claims, had not occurred or were merely pretextual to  
22 punish them and intimidate them for their legal, appropriate, and protected conduct.

SALSBURY, et al., v. CITY OF BERKELEY-PLAINTIFFS' RESPONSE TO DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT

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**3) PLAINTIFF MEGGS**

**(a) DEFENDANT SINGH**

Defendants repeatedly attempt to trivialize, dispute, minimize, and otherwise attack Meggs' claims for excessive force, and misrepresent the evidence that exists. Meggs is not on the tape "faintly" objecting to being hit, rather he loudly objects. "Singh, you just hit me in the crotch and then the second time "Ow you just hit me!" There was no reason for the force; Meggs was engaged in no illegal, threatening, or disruptive conduct. Rather he was standing peacefully at a reasonable distance videotaping the issuance of a highly questionable citation, and Singh walks up to him and by Meggs' account, according to the spontaneous statement of an eyewitness in the crowd, John Tanghe, and as specifically shown in the videotape produced by Plaintiffs Singh twice jabs his bicycle into Meggs' crotch and then smirks. Clearly Singh is aware of what he's done, and reacts showing his pleasure. There can be no doubt that he knows what he's doing the second time after Meggs has told him, and then immediately does it again. There is no legal standard in Graham, in Saucier v. Katz 533 US 194 (2001), in a single case on reasonable force that says that slamming a bicycle into a demonstrator's crotch while that demonstrator is standing still and engaged in no unreasonable or illegal activity is reasonable. There was no reasonable force under the circumstances, and yet Singh takes the opportunity and the fact that Meggs is focused on another officers activity to engage in an act of sadism. Regardless of whether Defendants feel that the videotape shows, Plaintiff

1 has testified and declared that the battery caused him great pain and humiliation,  
2 and was completely unjustified, and cannot be reasonable force. The level of pain  
3 that he felt will be a question of fact for the jury, since Plaintiff has repeatedly  
4 declared and testified that Singh inflicted great physical and emotional pain on him,  
5 and Defendant cannot reasonably argue that no pain was inflicted and thus prevail  
6 on summary judgment. As a completely unjustified and unprovoked use of force  
7 under the Saucier standard the conduct is not entitled to qualified immunity. There  
8 are two prongs to Saucier: that the conduct violate a Constitutional Right, and that  
9 Defendant reasonably be on notice that said conduct was Constitutionally violative.  
10 Since no level of force was justified and since the force utilized was sadistic and  
11 highly inappropriate, the use of force violated Plaintiff's Fourth Amendment Right to  
12 be free from excessive force. By any legal or societal standard, it is extremely  
13 difficult for Defendant to argue that striking a peaceful demonstrator in the genitals  
14 and testicles with a bicycle was not excessive force, and Singh is not entitled to  
15 qualified immunity as to the use of force. The third striking by Singh of Meggs at  
16 University and Shattuck was literally "adding insult to injury". Singh, without pretext  
17 walked up to Meggs and shoved his bicycle into Meggs' bicycle so that Meggs'  
18 bicycle banged into Meggs' foot and ankle, causing pain and injury, a precursor to  
19 the injuries that were inflicted by Meredith on Salsbury a few blocks later at Oxford  
20 and Allston. The three batteries on Meggs by Singh should be looked at as a pattern  
21 of conduct with cumulative as well as individual painful injuries and emotional trauma  
22 and are clearly and obviously, including to Singh excessive force.

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**(b) EXCESSIVE FORCE FROM SIRENS**

Defendants have not moved for dismissal or in anyway pled Plaintiff's excessive force claim stemming from the blasting of sirens, but in the interest of being thorough, Plaintiffs will address this issue as well. 46 seconds after the ride stopped at the intersection of University and Shattuck engaging in a gathering of the demonstration colloquially referred to as a circle, on a specific and direct order from Hester, the officers in the scene line up and begin a continuous sounding of sirens on two different patterns making a deafening cacophony of high pitched ear splitting noise. The police did not precede this action by asking or ordering any demonstrator to move on or otherwise clear the intersection, nor did they wait the circle out, which would have been reasonable, given that the average circle lasts approximately two minutes, nor was there any emergency that necessitated clearing the intersection at that rate of speed. Rather, based on deposition testimony discussed in the statement of facts, Meredith and Hester had this tactic, trained by LAPD, and intended to be used for riot situations, and chose for improper and inappropriate reasons to practice or try out this tactic on the peaceful demonstration. By their testimony, BPD had never used that tactic with any more than two or three sirens before, and certainly not the approximately dozen that were employed at that moment. Meggs, who has sensitive hearing to begin with, immediately objected and held his ears, verbally indicated that the sirens were inflicting pain on him, where upon you can clearly hear in the video provided by Plaintiffs that the officers turned up the volume dramatically. The use of sirens inflicted pain, every bit as much as a baton blow, or striking a

1 demonstrator with a fist, or a bicycle, and uses pain to exert control and move a crowd of  
2 demonstrators, and therefore is a use of force under Graham and its progeny. This use of  
3 force to dispel a 45 second gathering that was most likely only going to last another minute  
4 or so, on a peaceful march again smacks of sadism, and was not calculated to be a  
5 reasonable application of force for any reasonable purpose. As discussed above, this use  
6 of painful sound is a form of psychological as well as physical abuse, and is a direct assault  
7 on Plaintiff's rights under both the First and Fourth Amendments. Defendants were  
8 reasonable on notice that an extremely loud and painfully pitched assault on Plaintiff's  
9 eardrums would violate both their Fourth Amendment Right to be free of unreasonable use  
10 of force and his First Amendment right to peaceably demonstrate and assemble, and chose  
11 intentionally to violate that right. Therefore, a finding of Constitutional violation and  
12 unreasonable force is appropriate under the Saucier standard.

13 Note, this also applies to all other Plaintiffs who are making a claim for this  
14 particular act.

15 **4) PLAINTIFF VALENCIA**

16 **(a) JULY 13, 2001**

17 As discussed above, any amount of force used to affect an unlawful  
18 arrest or citation is per-se excessive force. Here, Plaintiff Valencia was stopped by Officer  
19 Meredith, in an intimidating and threatening manner for doing something that Critical Mass  
20 riders do on a routine basis, go through intersections where the light was red to stay  
21 together with the rest of the ride, and as mentioned previously, other than Critical Mass,  
22 Meredith, Hester, and Romano, the officers who actually made red light stops against

1 Critical Mass participants could not point to a single example of any other demonstrator on  
2 any other demonstration than Critical Mass who'd ever been cited for going through a red  
3 light, despite the fact that marches routinely do so, a fact raised with great concern by the  
4 Police Review Commission which found per-se discriminatory law enforcement. So, there  
5 is a strong argument that the force used to pursue, stop, and restrain Valencia in July was  
6 excessive per-se. Moreover, as Valencia testified to in deposition, and stated in her  
7 declaration, Meredith's demeanor towards her was so intimidating, insulting, and  
8 threatening that she felt compelled to insist that he bring over Hester, an officer who also  
9 scared her because she felt much safer dealing with him than with Meredith, who was  
10 intentionally acting in a manner that was calculated to intimidate and threaten. Indeed, in  
11 the video evidence of that scene, you can see Valencia cowering, and flinching away from  
12 Meredith's intimidation. This use of intimidating and physical threat to induce Valencia to  
13 give him information was severe enough to effect a seizure under Graham and Hodari, and  
14 was unnecessary for any legitimate law enforcement function. It constitutes a use of force  
15 that violates Plaintiff's Fourth Amendment rights, and she told him several times, audibly on  
16 the videotape—"You're scaring me." Meredith knew or should have known that such  
17 intentional infliction of fear and intimidation to induce eliciting of information so violated  
18 Valencia's Fourth Amendment Rights, and he is not entitled to qualified immunity under  
19 Saucier.

20 **(b) AUGUST 2001-OXFORD AND ALLSTON**

21 As previously discussed, when Valencia began legally verbally demanding to  
22 know why Villaseñor was being arrested, officers Roe, Sgt. Hester, Meredith, and Romano



1 began a pattern of battery against her, charging at her, and in the last 3-4 cases wading  
2 into the crowd bypassing closer people to the car they were allegedly trying to protect to  
3 push, twist, swing, strike, and otherwise batter her while she was peacefully standing in the  
4 crowd engaged in nothing that could be considered threatening behavior. At no time did  
5 Valencia, who is very small pose any threat to any of the large muscular officers, nor did  
6 she make any physical or verbally threatening statements, gestures, or movements. The  
7 pattern left her physically injured and emotionally traumatized, as she has testified and  
8 declared ( Valencia Dec ¶32) (Valencia Depo 150:18-153:8). Even if the defendants can  
9 argue that the uses of force were justified when she was “approaching” the car that  
10 Villaseñor was being put in to be hauled off to jail, there is no legal justification for the  
11 pushes, shoves, twists, and strikes that followed. It is very well settled law under Saucier  
12 and its many predecessors that police cannot target an individual and subject them to  
13 repeated physical battery, regardless of where they’re standing or what they are doing.  
14 This is at best illegal bullying, and as a repeated course of conduct as it is here become  
15 brutalizing and extremely frightening, as well as painful, to the victim.

16

17 **5) PAYNE**

18 Payne was stopped for allegedly following the surveillance van through a stop  
19 sign, by Meredith who was following him. In other words, he was singled out, not for any  
20 violation, but specifically because he was following the police van in which officers were  
21 videotaping a peaceful legal demonstration, and refusing to identify themselves when  
22 asked to do so, both Constitutionally violative conduct (First, Fourth, Fifth, and Fourteenth

1 Amendments) under 42 USC§1983. Meredith was extremely intimidating and frightened  
2 Payne, and then without cause or provocation stuck his hand into Payne’s pocket and  
3 pulled his wallet out and began going through it. Meredith has made absolutely no claim  
4 that he thought the wallet was a weapon, or that the shape looked suspicious to him. He  
5 knew it was a wallet and simply made contact with Payne’s pocket, pulled out his personal  
6 property and began searching it. This by its nature is not justifiable force, nor is it a legal or  
7 appropriate search. It is not legal as a pat down search under the Terry v. Ohio standard.  
8 The search also was not custodial as part of an arrest, since Payne was not arrested.  
9 There is no case law that allows an officer to search a person simply to obtain information  
10 that that individual is declining to provide. The search was patently offensive, unduly  
11 intrusive, and highly inappropriate. There is no basis for believing that Meredith believed it  
12 was Constitutional or appropriate, and constitutes both an illegal search under the Fourth  
13 Amendment and an intrusive and offensive touching (a Battery). Payne’s wallet could and  
14 may have contained all manner of personal documents, politically specific information, and  
15 information that was none of Meredith’s business and not appropriate material for an officer  
16 under any circumstances, let alone one following, harassing, and violating demonstrators  
17 rights. The wallet may have included phone numbers, names, and other information that  
18 Payne would not want this or any officer to have access to, and have a right to restrict this  
19 officer from having. It is difficult to imagine that Meredith, an officer by his description  
20 highly trained in crowd control and a very experienced law enforcement officer would not  
21 know that he didn’t have a right to reach into a subject’s pocket when not making an arrest.  
22 Therefore he was or should have been on notice that was he was doing was

1 Unconstitutional and not entitled to qualified immunity under Saucier. The case that  
2 Defendants cite, does not allow reaching into the pockets of a subject being issued a  
3 citation, and the courts have never allow such a search pursuant to a citation. Furthermore  
4 the use of handcuffs against Payne would only be reasonable if Payne was offering  
5 physical resistance or trying to get away. In fact, Payne made no move to escape, did not  
6 leave the scene, merely lawfully and appropriately argued about a discriminatory and  
7 selective citation where he had violated no law. A subject cannot be arrested for criticizing  
8 the police or insisting that his conduct was illegal and that he should not cited. Mackinney  
9 v. Nielsen 69 F. 3d 1002(9<sup>th</sup> Circuit, 1995). And, in fact, a subject cannot be arrested for  
10 refusing to identify himself or to produce identification. Crowell v. City of Coeur d'Alene  
11 339 F.3d 338 (9<sup>th</sup> Circuit, 2003), Carey v. Nevada Gaming Control Bd. 279 F.3d 873(9<sup>th</sup>  
12 Circuit, 2002), Lawson v. Kolender, 658 F.2d 1362(9<sup>th</sup> Circuit, 1981). In issuing a citation  
13 all Meredith is allowed to do is detain Payne at the scene until he ascertains his identity, not  
14 arrest him, since under the case law, he has not committed a crime, but detain him. If he is  
15 not under arrest, and not a flight risk (which is highly questionable and wholly disputed, and  
16 nothing resembling an attempt to flee is shown on the videotape of the entire detention,  
17 wherein the camera is focused on Payne and Meredith) (Vid X 00:48:48—00:50:19), and  
18 Payne is adamant that he did not attempt to flee, then the search cannot be pursuant to a  
19 valid arrest. Thus a search pursuant to arrest is inapplicable, there is no provision allowing  
20 any search other than a patdown while a subject is merely detained. Therefore the search  
21 and handcuffing were illegal and improper.

22 **6 and 7) SALSBURY AND KAHN**

SALSBURY, et al., v. CITY OF BERKELEY-PLAINTIFFS' RESPONSE TO DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT

1                   Neither Salsbury nor Kahn returned to Oxford and Allston with the intention of  
2 blocking a police car that was not heading in their direction at the time or giving any  
3 indication that it was intending to do so. In fact the car abruptly turned and began making a  
4 u-turn through the intersection that it was not originally going to make, and Meredith  
5 created the situation by grabbing Salsbury's bicycle as he was rolling through and stopping  
6 it, effectively knocking Salsbury off his bicycle and spinning Salsbury around so that his  
7 back was to the path of the car, which he had not seen. He never asked Salsbury (or  
8 Kahn) to move, never ordered them to move, never even told them that the car was trying  
9 to get through. Meredith never said a word to either Salsbury or Kahn, never explained  
10 what was taking place. He instead took hold of Salsbury's bicycle and trailer and began  
11 shaking it, twisting it, and trying to dump the sound system into the street, and capped it off  
12 by slamming the bicycle into Salsbury's knee, creating a nasty cut that was both bloody and  
13 painful. He then did the same thing with Kahn's trailer, shaking, twisting, tilting, and spilling  
14 equipment onto the pavement. There is a clearly established right not to be attacked by a  
15 an officer who instead of reasonably and appropriately communicating what action he  
16 wants demonstrators to take, if any, to without warning or legitimate need to do so, used  
17 their presence in the intersection as a pretext to inflict injury and attempt to sabotage the  
18 demonstration's sound and other equipment. This is borne out by the fact that in the midst  
19 of the chaos and confusion caused by Meredith's attacks on the bicycles and trailers, and  
20 the police car going by several feet away, Romano walks up and starts trying to overturn  
21 the sound system so that it will fall onto the street, smashing it, and when that doesn't work,  
22 settles for yanking wires out, substantially diminishing the sound, and causing an extremely

1 hazardous situation. Clearly that action did not advance the ability of the police car, which  
2 could have taken several other routes to leave the scene if it needed to leave, to so leave  
3 the scene, but was narrowly targeted at disabling or destroying the sound system.  
4 Romano's actions will be discussed at greater length in Plaintiffs' response to Defendant's  
5 argument on that point specifically. As discussed above, Plaintiff Salsbury and Kahn, as  
6 well as the entire demonstration's right to be free of a forcible attack on the equipment and  
7 sound system for a First Amendment protected even is clearly established, and it is difficult  
8 to imagine that any thoroughly trained officer, as Meredith is, could reasonably believe that  
9 a use of force to attack the equipment and sound system was reasonable, and that he  
10 could be mistaken as to what the law allows. Furthermore Meredith's actions should be  
11 looked at in light of the overall specific pattern of attacks on Critical Mass that he  
12 specifically, and the other named officers were engaged in on that date, the previous  
13 month, and in the weeks that followed the April 13, 2001 demonstration. Furthermore, as  
14 previous and hereinafter discussed, the crowd, while angry, was peaceful and engaged in  
15 no violent or threatening acts, merely verbally objecting, and standing around, thus making  
16 Meredith and the other officers actions stand out as clearly unnecessary, inappropriate,  
17 unreasonable, and Unconstitutional all the more.

18           The pattern and practice of the involved BPD Officers in all three of the  
19 monthly demonstrations shows a calculated attack on the organizers, the speakers, those  
20 hauling the equipment, and very calculated selected participants for purposes of  
21 harassment, intimidating, driving them out, chilling their First Amendment rights and  
22 inflicting harm for the sake of. This conduct was not as defendants describe it; "split

1 second decisions” in a “rapidly evolving crowd control situation.” Rather they engaged in a  
2 five month long pattern of harassment and intimidation. In addition, the crowd at Oxford  
3 and Allston was not tense, there was no crisis; the police acted violently-chasing down,  
4 seizing and arresting one demonstrator, and slamming another into a plate glass window,  
5 and, as discussed previously, the crowd stopped, objected, and then peacefully stood  
6 around-giving speeches and denouncing the attacks on their civil liberties, before  
7 continuing on down to the public safety building to advocate peacefully for their friend’s  
8 release. No one assaulted or threatened a police officer, vandalized any property,  
9 assaulted passers-by, or initiated a negative interaction with anyone. The situation was  
10 angry but completely calm, from the side of the demonstrators. It was hardly a riot, or near  
11 riot as Officer Romano described it.

12           The only force or violence was by the police: shoving demonstrators,  
13 vandalizing the sound system, trying to dump the contents of their trailers onto the street,  
14 shoving Salsbury’s bicycle into his knee cutting it. Furthermore, even *if the situation had*  
15 *deteriorated* because of the crowd’s legitimate anger, which did not happen, the police  
16 cannot as a matter of public policy and law instigate an angry response and then further  
17 attack the crowd hiding behind, “it was a tense and volatile situation.” Here the police  
18 attacked participants systematically, calculatedly, and methodically, and then claimed all of  
19 their actions were justified because they had to make quick decisions, which they did not do  
20 in any case. This is the height of cynicism, and is intellectually dishonest, and morally  
21 offensive. Saucier was not intended to protect officers who gleefully act the assault a First  
22 Amendment protected demonstration, simply because they don’t like it, nor was it intended

1 to allow officers to engage in violence and intimidation and then simply say they didn't know  
2 it was wrong. Such a cynical use of the protections afforded by the court makes a mockery  
3 of those protections and the judicial system. For all of those reasons, judgment should be  
4 entered in favor of Plaintiffs as to all of the allegations of excessive force, or at the very  
5 least, the case should be placed before a jury.

6  
7 **2. ATTACKS ON PROPERTY-DAMAGE AND DESTRUCTION**  
8 **THE ASSAULTS BY MEREDITH AND ROMANO ON THE SOUND SYSTEM, TRAILERS**  
9 **AND BICYCLES AND OTHER EQUIPMENT WERE UNREASONABLE, UNJUSTIFIED,**  
10 **AND UNCONSTITUTIONAL**  
11

12 **a) BICYCLES AND TRAILERS**

13 Even though Defendants have not mentioned this in their legal argument, and  
14 have not specifically argued or moved to dismiss these allegations, out of an abundance of  
15 caution, Plaintiffs will respond as if they had in any case.

16 As discussed at length above, Meredith seized an opportunity to silently and  
17 violently attack the trailers that pull the sound system and other equipment on the  
18 demonstration, and not only bend the hitches that hold the bicycles to the trailers so that  
19 they would never be usable again, and not only cut Salsbury's knee, but to attempt to dump  
20 all of the equipment down onto the pavement hard enough to severely damage or destroy  
21 it. The hitches have to be specially ordered and are difficult to replace, and had to be cut  
22 off in order to remove the trailers from the bicycles so that the bicycles could be used for  
23 normal commuting and other personal uses. This was not the first attack by Berkeley  
24 Police Officers on the trailers and bicycles which were seized, destroyed, and hauled away

1 never to be seen again six months earlier, and not the first time those hauling them were  
2 targeted and attacked by Berkeley Police Officers. This also follows from the pattern of  
3 physical attacks and false arrests and citations and should be viewed in light of the totality  
4 of the circumstances. It is clearly established that the police cannot attack the equipment  
5 associated with First Amendment activity fore the sake of doing so, and in addition, there is  
6 a Fifth Amendment Due Process protection against seizure and damage/ destruction of  
7 property without an appropriate proceeding or extreme exigent circumstances under the  
8 takings clause, applied to the States under the 14<sup>th</sup> Amendment. While an officer under  
9 Saucier cannot be held liable simply because he had reasonable alternatives if he  
10 reasonably believed that his conduct was reasonable, here there was no reason for  
11 Meredith to believe that his conduct was reasonable. Here he didn't, even assuming his  
12 pretext that he wanted to move Salsbury and Kahn out of the way to allow the police car  
13 transporting Villaseñor to proceed off to jail , take any reasonable steps. He could have  
14 approached Salsbury and Kahn and asked or directed them to move, he could, if that were  
15 the actually justification, have arrested them for failing to do so. The fact is, he took none  
16 of those steps, he; didn't even attempt to get them to move personally. Instead, he directed  
17 his actions at twisting, tilting, and wrenching the trailers, and trying to destroy the  
18 equipment, something that does not advance his stated goal, does not perform any  
19 legitimate police function, and does nothing except continue the pattern and practice of  
20 attacking the core of the demonstration (both people and material). There is a strong  
21 argument that Meredith knew that what he was doing violated clearly established rights  
22 under the First, Fourth, Fifth, and Fourteenth Amendments, or at the very least that he



1 should reasonably have know that they did. If this officer was not on notice that this  
2 conduct was Constitutionally violative, then the City is liable for profound Monell violations  
3 for failure to properly train him. See Monell v. Social Services City of New York 436 US 658  
4 (1978)

5 The courts should again look at this conduct in light of the overall pattern and  
6 practice of Meredith's conduct against Critical Mass. Again, Plaintiffs' are entitled to  
7 summary judgment themselves on this matter. At the very least, there is sufficient factual  
8 and legal basis for Plaintiffs' arguments to warrant allowing the triar of fact to decide the  
9 reasonableness of Defendants actions.

10  
11 **b) ROMANO'S ACTIONS YANKING WIRES OUT OF THE SOUND SYSTEM**  
12 **WAS UNREASONABLE AND CONSITUTIONALLY VIOLATIVE**

13  
14 As discussed above, there was no reasonable law enforcement function  
15 carried out or furthered by silently sneaking up to the sound system, trying to tip it over and  
16 then yanking wires out of it.

17 First of all, as previously noted, the crowd was not out of control, they were  
18 engaged in neither riotous or threatening behavior. They were mostly standing around.  
19 Indeed, any tension at the scene was being caused solely and specifically by the police.

20 It seems clear that the sound system was not a problem, and indeed it did not  
21 seem to have been, since the police were able to give instructions over both it and the ear-  
22 splitting volume of the sirens at University and Shattuck, and can be heard and seen doing  
23 so, and were able to give orders, issue citations, make arrests, and have casual

1 conversations throughout the ride. And, in fact, the police were able to communicate with  
2 the riders on every other Critical Mass demonstration where the sound system was present.

3  
4 Even if the sound system had been a problem, the reasonable and prudent  
5 course would have been to simply walk up to Salsbury and/or Kahn, or Meggs, Long, or any  
6 of the other organizers, or leaders that the police were aware of and simply ask them to  
7 turn it down, and then act if they didn't, if necessary.

8 Furthermore, the Penal Code section that Defendants cite, §415(2), is a  
9 disorderly conduct statute that applies only to concerts and loud parties. Careful  
10 research has not revealed a single case where it was applied to a moving  
11 demonstration, or even a stationary one. Furthermore §415(2) is complaint driven,  
12 that is it only becomes active when a *member of the public* complains about the  
13 volume, and Defendants present no evidence that anyone had. In addition, the  
14 Berkeley Municipal Code § 13.40.100 is similarly structured to only apply to  
15 stationary events a specific venue, not a street demonstration. Both statutes require  
16 that a specific warning be given before action can be taken, and then allow for the  
17 issuance of citations, not the destruction of the sound equipment. Again, virtually no  
18 demonstration obtains a permit in Berkeley, and the code sections were not  
19 mentioned at any time by Romano, only by his attorney in the motion herein  
20 responded too. ) The California Vehicle Code gives a blanket exception for  
21 demos/parades: §27007. No driver of a vehicle shall operate, or permit the  
22 operation of, any sound amplification system which can be heard outside the vehicle

1 from 50 or more feet when the vehicle is being operated upon a highway, unless that  
2 system is being operated to request assistance or warn of a hazardous situation.

3 This section does not apply to authorized emergency vehicles or vehicles operated  
4 by gas, electric, communications, or water utilities. This section does not apply to  
5 the sound systems of vehicles used for advertising, or in parades, political or other  
6 special events, except that the use of sound systems on those vehicles may be  
7 prohibited by a local authority by ordinance or resolution.

8 2) The Berkeley Municipal Code has a blanket exemption for political speech and  
9 expression:

10 "Non-commercial public speaking and public assembly activities conducted  
11 on any public space or public right-of-way shall be exempt from the  
12 operation of this section."

13 In any case, Romano's appropriate action would have been to issue a verbal warning, if the  
14 statutes applied, which they do not. Romano issued no warning, and it is uncontraverted  
15 that he simply and silently walked up to the sound system, trying to knock it over, and then  
16 began yanking wires out. His actions were egregious enough, and clearly enough captured  
17 on video that even Hester walked up to him and told him to stop saying audibly, "that's  
18 enough."

19 Romano can't reasonable argue that those actions were reasonable, and are  
20 again part of the calculated attack on the demonstration.

21 There is a well established First Amendment right to have a sound system at  
22 a demonstration, and to have the equipment maintained without attack and destruction by

1 the police as a matter of First, Fourth, Fifth, and Fourteenth Amendment law. Romano was  
2 or most certainly should have been on notice that his actions violated some or all of those  
3 rights, which were clearly established.

4 Again, this was not a split second decision, nor is illegal conduct discretionary  
5 as Defendants argue. Once again, Defendants cite a case Bratt v. City and County of San  
6 Francisco 50 Cal. App 3d 55 (1975) that only applies to discretion in high speed chases,  
7 not stationary demonstrations, and their second case Watts v. County of Sacramento 136  
8 Cal. App. 3d 232 (1982) only applies to discretionary decisions where the officer made a  
9 reasonable and honest mistake as to circumstances, in that case whether a subject was on  
10 their own or another's property. Here there was no sincere mistake of fact, since Romano  
11 knew who the sound system belonged to and that it wasn't his, and knew or certainly  
12 should have known that it was wrong to damage or destroy it. As previously discussed in  
13 the statement of facts, he certainly did not "unplug" it a fact that counsel for Defendants is  
14 well aware of, having seen the sub-woofer in question. And, in fact, the pulling and leaving  
15 of live wires created a dangerous situation that required repairs once the ride was over.  
16 Finally, despite Defendants' insistence to the contrary, the volume of the sound system was  
17 in fact noticeably diminished, and thus a substantial impairment. In fact, listening to the  
18 tapes reveals that the bass, which not only provides depth and sound quality, but also  
19 much of the volume was completely obliterated from the sound system. As the sound  
20 system provides a rallying point, attracts attention, and is one of the means of identifying  
21 the ride, as well as providing amplification for speeches, an essential First Amendment  
22 activity and one that even Hester concedes was taking place on the ride and at those points

1 made it First Amendment protected activity.

2 If even Romano's supervisor knew that his activity was illegal and that he had  
3 gone too far, as evidenced by his statement "That's enough", then it's substantially clear  
4 that Romano knew or should have known that his actions were illegal and violated a clearly  
5 established right, as detailed above.

6 For all of the above reasons, Romano is not entitled to qualified immunity, nor  
7 to summary judgment, whereas Plaintiffs likely are. At the very least, the issue has been  
8 sufficiently pled and factually based to require that it be presented to the triar of fact for  
9 determination.

10

11 **3. DEFENDANTS' ARRESTS OF PLAINTIFFS VILLASEÑOR AND LONG WERE**  
12 **WRONGFUL AND UNCONSTITUTIONAL AND THEY ARE NOT ENTITLED TO**  
13 **IMMUNITY**

14

15 **a) VILLASEÑOR'S ARREST WAS NOT BASED ON ILLEGAL CONDUCT,**  
16 **BUT WAS STRICTLY SELECTIVE ENFORCMENT INTENDED AS RETALIATION**  
17 **AGAINST HIM FOR LAWFUL CONDUCT**

18

19 As discussed above, despite police reports that insist that Villaseñor was to  
20 be stopped because he ran a red light, and that was the sole reason for Meredith trying to  
21 pull him over, Hester admitted in his deposition that he and Meredith had already decided  
22 to stop and arrest Villaseñor **BEFORE** Villaseñor ever reached the intersection where he  
23 allegedly ran the red light, thus throwing the pretext out the window. In fact Villaseñor had  
24 attracted Meredith's attention by getting in front of Meredith as the latter was repeatedly  
25 racing through the crowd at excessive speed on his motorcycle, risking serious injury or  
26 death to demonstrators on their small, much lighter bicycles, and trying to slow Meredith

1 down by riding in front of him at bicycle speed. Villaseñor did the same with Hester as  
2 Hester darted through the crowd on his bicycle, cutting demonstrators off and forcing them  
3 to jam on their brakes. Meredith, in fact, according to the operations plan was specifically  
4 supposed to stay at the rear of the ride and not ride through the crowd, and yet Hester, the  
5 Event Coordinator made no move to stop or slow him down, forcing the demonstrators to  
6 do so for their own collective safety. In addition, Villaseñor had attracted negative attention  
7 from Hester by making an obscene, but Constitutionally protected gesture to Hester when  
8 Hester began verbally harassing him at University and Shattuck. In the two blocks that  
9 followed Meredith and Hester had a discussion wherein they agreed that Meredith was  
10 going to pull over and arrest Villaseñor. A block later, Meredith took off after Villaseñor to  
11 do just that.

12           As for the intersection where Villaseñor supposedly ran a red light: First of all  
13 Critical Mass participants, along with the accompanying police officers had been  
14 consistently going through intersections where the lights were red without penalty or  
15 warning (see videotape), and in the case of the intersection in question, a demonstrator  
16 who was not arrested, cited, or even approached and warned, blocked traffic so that there  
17 were no cars in the intersection, and four demonstrators went through the intersection  
18 simultaneously, not obstructing any traffic, not creating a dangerous situation, not doing any  
19 of the things that make running a red light a violation. The other three were not arrested,  
20 chased, cited, or warned, only Villaseñor. In his police report, Meredith claims that  
21 Villaseñor was singled out because he had waved and smiled at Meredith, even if true not a  
22 crime, and as already discussed, that was not why Meredith was chasing Villaseñor in the

1 first place.

2           None of the cases that Defendants cite allow an officer to concoct a reason to  
3 arrest someone. They have to, as Defendants said, reasonably believe that they have  
4 probable cause for the stop and the arrest. Here, Defendant made up a reason after the  
5 fact for a stop and arrest that he was already going to make for harassment purposes,  
6 which is not protected discretion.

7           Furthermore, even if by some astronomically remote chance, Meredith had  
8 intended to pull Villaseñor over for going through the light, in order for Villaseñor to be  
9 arrestable for disobeying an officer or for resisting, he has to have intended to do so. Here  
10 Meredith had been riding at demonstrators throughout the demonstration and had been  
11 pointlessly and obnoxiously blaring his siren at demonstrators all demonstration long. Less  
12 than three-and-a half blocks before he rode at Villaseñor on his motorcycle, the entire body  
13 of officers had blasted their sirens at the demonstrators at ear splitting volume to force  
14 them to move on. At the time Meredith took the opportunity to harass Villaseñor, he aimed  
15 his motorcycle straight at the middle of Villaseñor's bicycle as if to intimidate him as he'd  
16 been doing all day long, and then arrested Villaseñor for trying to get out of his way and  
17 trying to get away from the harassment. As Villaseñor testified in his deposition and states  
18 in his declaration, he had no idea that Meredith was trying to arrest him, not simply threaten  
19 and intimidate him with his motorcycle as he had been doing, especially since Villaseñor  
20 had not broken any law and simply had been riding with the demonstration. Both Vehicle  
21 Code Section 2800 "disobeying a traffic officer" and Penal Code Section 148(a), "resisting  
22 arrest" require specific knowledge and intent to do so. Here, Villaseñor had no idea that

1 Meredith was trying to stop him, rather than simply playing more games, and Meredith  
2 knew, or reasonably should have know that he was simply acting in the same manner that  
3 he had been all demonstration long and that Villaseñor was not on notice that Meredith had  
4 stepped up his harassment to include false arrest. In all videotapes the crowd is audible  
5 asking and demanding to know why Villaseñor was being stopped and arrested, clearly  
6 they didn't know either. When Meredith answered the crowd's demands, at no time did he  
7 mention that Villaseñor had run a red light.

8           It is also necessary and appropriate to view Villaseñor's arrest in the totality of  
9 the circumstances and view the ongoing harassment of him by Hester that had been going  
10 on for months, as well as the singling out of particular demonstrators for attack on the  
11 demonstrations in question, along with the above mentioned fact that Meredith was going to  
12 stop and arrest Villaseñor irrespective of anything at the intersection where he went through  
13 the protected blocked intersection with a group, and was going to be arrested whether he  
14 stopped or not.

15           Villaseñor was charged criminally for the above listed code sections: Vehicle  
16 Code §2800, and Penal code§148(a). In a hearing in July of 2002 on Defendants' Motion  
17 to Dismiss for Discriminatory Prosecution and Selective Enforcement as per Murgia v.  
18 Municipal Court along with Co-Defendant Long, whose similar case is discussed above and  
19 below, Judge Brosnahan warned the District Attorney's Office that they would have a "great  
20 burden to overcome" and that she intended to grant the motion (Hildes Dec ¶¶10-12; Weill  
21 Dec ¶¶8-11). On the eve of the hearing where the Judge had announced she would issue  
22 her ruling, the District Attorney's Office contacted counsel and informed him that he



1 intended to dismiss in the interest of justice if Defendants would drop their motion to  
2 dismiss for discriminatory prosecution and selective enforcement. (Hildes Dec ¶13 In court  
3 the following day, an agreement was made that the prosecution would be dismissed in the  
4 interest of justice, but with the Murgia motion pending (Hildes Dec ¶14).

5 While it is true than a dismissal or even an acquittal is not wholly dispositive,  
6 as the burden is higher on the officer than a mere establishment of probable cause, a  
7 finding of selective enforcement and/or discriminatory prosecution requires that Defendants  
8 prove the improper motive of the arrest and prosecution to a “substantial certainty” a  
9 burden that is higher than that needed to disprove probable cause, and therefore that, at  
10 the very least creates a question of material fact sufficient to render summary judgment  
11 inappropriate and require the jury to make a determination. Plaintiffs would argue that  
12 meeting that standard would be sufficient to render the question settled in their favor.

13  
14 **b) LONG’S ARREST WAS NOT BASED ON ILLEGAL CONDUCT, BUT WAS STRICTLY**  
15 **SELECTIVE ENFORCMENT INTENDED AS RETALITION AGAINST HIM FOR**  
16 **EXERCISING HIS FIRST AMENDMENT RIGHTS IN A VISIBLE AND VOCAL MANNER**

17  
18 As discussed at length above, Long did not even in the remotest sense  
19 commit the violation that Hester alleged he had, to warrant the stop. Despite the lengthy  
20 description by Hester in the police report, his sworn declaration in opposition to Long’s  
21 Murgia motions in the criminal case, and his declaration in the motion responded to herein,  
22 all of the video evidence shows that Long simply crossed at the crosswalk, stopping only a  
23 for a moment to look back when Hester said something to him about Tanghe being  
24 slammed into the window. He only paused again for a moment when the driver who was

1 supposedly so angry with the demonstration, and who had been hanging out with the  
2 demonstrators until moments before, walks up to Long, shakes his hand and walks back to  
3 his car as Long continues across the street to the sidewalk where he stands and comforts  
4 Lauren Valencia. Meanwhile, Hester holds the car at the scene, blocking traffic for several  
5 minutes arguing with the driver and then blocks the right lane for several more for no  
6 apparent reason, forcing other officers to route traffic around him. Long merely crossed the  
7 road at a reasonable and lawful pace at a crosswalk. Meanwhile the entire demonstration  
8 blocks the Southbound lanes for at least 15 minutes, and occasionally spills into the  
9 Northbound lanes without penalty and without ever being told to move. Out of that entire  
10 course of action, Hester singles out one particular demonstrator out of 100, for supposedly  
11 taking an extra action that never occurred, and made up a fictitious confrontation between  
12 that demonstrator (Long) and a supposedly irate motorist, who clearly wasn't. On that  
13 basis, ***HALF-AN-HOUR*** later Hester orders Long arrested.

14 Hester had to have known there was no basis for citing or charging Long, or  
15 he wouldn't have created a story of an incident that never occurred.

16 In the intervening half hour, Long is consistently visible and accessible, and at  
17 many points, stationary. In at least one case, outside the Public Safety Building, Long is  
18 actually standing right next to Hester, who just ignores him. Instead, Hester waits until the  
19 ride is moving again, and requests to have a conversation with him while the ride is moving,  
20 under both the Hodari and Terry standards that constitutes a consensual encounter. He  
21 doesn't order him to speak with him, or demand that he speak with him, or threaten to  
22 arrest him if Long doesn't speak with him. "The nature of a consensual encounter is that

1 the subject has a right to decline.” Crowell v. City of Coeur d’Alene 339 F.3d 338 (9<sup>th</sup>  
2 Circuit, 2003). See also Lawson v. Kolender, 658 F.2d 1362(9<sup>th</sup> Circuit, 1981).

3 And, in any case, there was absolutely nothing that Hester needed to discuss  
4 with Long, and no reason for Long to believe that there was, since Long had committed no  
5 violation and half-an-hour had gone by since the supposed incident.

6 Hester sounded no siren, did not wave or gesture Long over, flashed no lights  
7 at him: Hester simply, and without explanation, asked if he could speak with him, at the end  
8 of a day where Hester, Meredith, and other officers had singled out demonstrators for  
9 personal harassment throughout the demonstration, as described throughout. Long had no  
10 reason to believe he had to comply, and every reason to say no. He was at the back of the  
11 ride, out of view of most of the other demonstrators, and Hester made him nervous and  
12 scared him, and as the facts of what occurred show, with good reason.

13 And then, as with Villaseñor, officers without warning began riding at him on  
14 motorcycles, and reaching out to grab at him from bicycles. To Long it just seemed like  
15 another ratcheting up of the general harassment that had been inflicted by the police all day  
16 long. None of the officers riding at him told him to pull over; the sirens were not generally  
17 correlated with any intent to pull anyone over that day, and as with Villaseñor, Long had no  
18 reason to know that that was what was happening, and every reason to think that it was just  
19 harassment as usual and to get out of the way. In any case, Long was also only charged  
20 with VC §2800 and PC §148(a), as explained above on Villaseñor. Neither of them was  
21 ever charged with any infraction, which in both cases was supposedly the basis for the  
22 stop. It is an axiom in California that if the basis for the arrest is illegal that it is not a crime

1 to peacefully resist it, even if either Long or Villaseñor had actually intended to do so, which  
2 they did not. Here, even if Villaseor and Long’s actions were intended to evade a detention  
3 or arrest, which they most certainly were not, they would have been lawful since the  
4 citations were unlawful, and therefore the police had no right to detain or cite either Long or  
5 Villaseor.

6 As with Villaseñor, the actual motivation for arresting Long was not any  
7 supposed violation, especially since none occurred. Long was a vocal speaker at both the  
8 rally at the beginning of the ride, and most strikingly while the demonstration was at Oxford  
9 and Allston where his supposed violation occurred. At that location Long spoke through a  
10 bullhorn, and specifically criticized Hester by name for the arrest of Villaseñor, thus  
11 attracting Hester’s attention. As with all of the other Plaintiffs in this action, Long, by legal  
12 and appropriate action attracted Hester’s notice, and was specifically targeted as a result.

13 Long was a Co-Defendant with Villaseñor in the criminal case discussed  
14 above with the same results on precisely the same basis, and the same legal arguments  
15 apply.

16 There is also the question of the timing, Hester chose to make the timing of  
17 the contact while the ride was moving, and instigate a dramatic and intimidating chase half-  
18 an-hour after the supposed incident rather than chat with Long while they were standing  
19 next to each other on multiple occasions, thus furthering the oppressive and intimidating  
20 atmosphere that substantially chilled the First Amendment climate.

21 There is no qualified immunity for intentionally wrongful conduct, as with both  
22 Villaseñor and Long, nor is there tort immunity because Hester could not reasonably

1 believe that his game playing and false arrests were reasonable. The reasonable officer  
2 would not engage in this conduct. While it is correct that the court should not look at the  
3 officer's conduct in light of what is known now, as opposed to the, it is quite appropriate to  
4 examine the officer's motives for otherwise inexplicable or questionable conduct, and find  
5 improper motive, and thus unreasonable conduct, or if there is a question, to let the trier of  
6 fact make a determination.

7  
8 **4. MEREDITH'S JULY 13, 2001 CITATIONS OF VALENCIA AND PAYNE WERE**  
9 **SELECTIVE ENFORCMENT AND SPECIFICALLY TARGETED HARASSMENT AND**  
10 **WERE UNCONSTITUTIONAL**

11  
12 **a) VALENCIA**

13  
14 As discussed previously, Plaintiffs have included a tape with 23 minutes of  
15 video footage of Critical Mass riding through red lights and stop signs, on the  
16 demonstrations in question, police riding along with them, without arrest, citation, or even a  
17 warning or exclamation. On the videotape the involved police officers are clearly visible  
18 gliding through red lights without so much as an expression of concern.

19 Valencia was singled out for selective enforcement and discriminatory  
20 treatment on both the July 13, 2001 demonstration (the citation and related intimidation and  
21 threats), and in August, (the numerous pushes, shoves, blows, twists, etc.), and her citation  
22 for running a red light (the only such citation on a demonstration that rode through at least a  
23 dozen red lights) should be viewed in that light. It begs the question of why Valencia was  
24 singled out, especially when, at the immediately preceding intersection, the tape shows that  
25 the entire ride went through a red light, as noted by the police videographer, "They're

1 running a red light, all of them” (Vid X, 00:18:10—00:18:15).

2 Defendants cite Valencia’s conviction by a commissioner on the traffic offense  
3 as if that is dispositive. In fact, the traffic court refused to hear and did not take into  
4 account Valencia’s arguments as to selective enforcement and the pattern of what was  
5 taking place, which this court is entitled to do. Defendants are correct that they can argue  
6 that Valencia rode through the light (as the entire ride and portions thereof had been doing  
7 all day long). They are not correct that that resolves the issue. They are not entitled *to res*  
8 *judicata* on whether the singling out of Valencia was discriminatory, or whether the law was  
9 enforced selectively against her, as those issues have not been ruled upon.

10 It is also significant to note that of the six people who have been singled out  
11 for arrest or citation for going through a red light (including one who is not a party to this  
12 litigation), three: Valencia, Villaseñor, and Salsbury are among the very few people of color  
13 on the ride [a fourth- Meggs-was the principal and most visible organizer]. In addition, a  
14 fifth, Long, is frequently identified as being Latino as he was in constantly in Valencia and  
15 Villaseñor’s company, looks Latino, goes publicly by a Latino name (Mateo), speaks  
16 Spanish fluently, etc. When such a pattern emerges where virtually every single person of  
17 color is targeted for arrest, citation, or force, it begs the question of discrimination, and  
18 provides a possible motivation for including Valencia in the harassment and intimidation  
19 inflicted on the other Plaintiffs. She is also a particularly visible and vocal participant in  
20 Critical Mass, and is Villaseñor’s domestic partner, thus causing her to be targeted along  
21 with him (also note that Long was their roommate at the time).

22 At the very least, her claim should be put before the jury to decide, as there is

1 a significant question of material fact as to whether she was personally targeted, and her  
2 claims should be examined within the totality of the circumstances of the pattern of  
3 harassment, and her targeting for physical assault in August repeatedly and gratuitously,  
4 and Plaintiff should be able to present the entire course of Constitutional violation and  
5 discriminatory conduct, which, of course, again would not allow Meredith qualified or tort  
6 immunity.

7  
8 **b) PAYNE**

9 Plaintiff Evan Payne was, as previously discussed cited for allegedly running  
10 a stop sign while following the unmarked police van whose occupants were videotaping the  
11 July 13, 2001 demonstration and had refused to identify themselves. He directly followed  
12 the van which flashed no lights and sounded no siren when proceeding through the  
13 intersection, and it is uncontraverted that the van did not stop for the stop sign. As far as  
14 any records indicate, Payne is the only person in the history of any demonstration in the  
15 City of Berkeley to ever be cited for allegedly running a stop sign. As with red lights,  
16 Plaintiffs video exhibit shows numerous occasions in that 23 minutes of initial footage  
17 where individuals or entire rides went through stop signs in full view of the police without  
18 being arrested, cited, or even warned.

19 The ticket against Payne was dismissed by the court on Payne's oral motion,  
20 which is not dispositive, but does raise issues.

21 Again, an examination of this ticket in light of the specific pattern of selective  
22 enforcement and harassment begs the question of whether Payne was specifically

1 targeted. Here the motivation was simple, Payne demanded to know who the occupants of  
2 the van following him and videotaping them were. When his question was ignored by the  
3 involved police personnel, who were required as a matter of law to identify themselves, and  
4 other officers moved those who were demanding the identity of the videographers away, he  
5 followed the van, especially when they broke off from the demonstration and headed South  
6 down a side street. Meredith followed Payne and found a pretext to pull him over to  
7 retaliate against Payne following the van.

8           There was no cross-traffic and no one was delayed even if Payne went  
9 through the stop sign without stopping, a fact that Plaintiffs do not concede and which is a  
10 subject for the jury to determine along with the improper motive for enforcement. While an  
11 officer does have the discretion to stop an individual for a perceived violation, that cannot  
12 be a pretext for selective enforcement or abuse of that discretion, Murgia. Nor can an  
13 officer single out an individual for improper reasons and follow that individual, who has  
14 otherwise driven lawfully, and safely, and wait for that individual to commit an violation or  
15 perceived violation.

16           Here Meredith claims he saw Payne, but not the van going through a stop  
17 sign a block away to his left and at an angle, while he was on the right side of University  
18 Avenue when he just happened to look in that direction for no particular reason while still  
19 watching the demonstration, which was proceeding straight ahead in front of him with cross  
20 traffic in the two lanes between him and the street he happened to look down, a claim  
21 which strains credulity, and at least is challengable and should be presented along with  
22 Plaintiff's actual explanation that Meredith was following him to the jury for a credibility



1 determination. The fact that Meredith concocted a story that he happened to see Payne go  
2 through a stop sign across two lanes of traffic and then down a block and at an angle, and  
3 then raced over to cite him indicates that he knew that the true explanation-that he followed  
4 Payne with the purpose of pulling him over and then came up with a pretext for doing so  
5 would point directly to harassment, selective enforcement and the First and Fourth  
6 Amendment violations, especially when viewed in the totality of the pattern of attacks on  
7 specific targeted individuals participating in Critical Mass. The handcuffing and illegal  
8 search builds on that harassment, and were discussed more fully in the section on  
9 excessive force as to Payne, Plaintiffs refer back to that discussion. As also discussed at  
10 that point, there was no basis for arresting Payne.

11           Since the conduct was deliberate and intended for an improper purpose, it is  
12 per-se not reasonable and Meredith is on notice of the Constitutionally violative nature of  
13 his conduct, hence the misrepresentation of how the stop came to be made, and qualified  
14 immunity is not appropriate. Neither is tort immunity appropriate as the conduct was  
15 intentionally and knowingly for a discriminatory and Unconstitutional purpose.

16

17

18 **5. HESTER'S MAILED CITATIONS TO MEGGS AND SALSURY WEEKS AFTER THE**  
19 **APRIL 13, 2001 DEMONSTRATION WERE SELECTIVE ENFORCEMENT,**  
20 **HARASSMENT, AND INTENDED FOR A WHOLLY IMPROPER PURPOSE**

21

22

23

24

As discussed previously, two and three weeks after a Critical Mass demonstration that was wholly uneventful and without incident at the time, Hester mailed three tickets each alleging five violations to Meggs and Salsbury over a period of over a

1 week to a P.O. Box for Critical Mass that he pulled out of the files. Hester made no attempt  
2 to verify that the address was correct, and in fact the citations did not get to Meggs and  
3 Salsbury until after the deadline because Meggs was out of the country and had no idea  
4 the citations were in the P.O. Box, since he had never been cited by mail before, and were  
5 given no indication at a demonstration where they were in proximity to Hester and the other  
6 officers for hours without so much as a scolding word from them.

7 Hester admitted in deposition that the only other time he had ever sent a  
8 ticket by mail to a subject was in the aftermath of a dangerous drug raid where he felt under  
9 great personal threat and was afraid to give out the citation for fear of being killed. He  
10 conceded that that was not the situation here. The method used bespeaks harassment,  
11 and bizarre games, and is in keeping with the rest of the pattern of conduct.

12 As for the charges in the citations, Meggs and Salsbury were cited for two  
13 misdemeanors and three infractions each for disobeying an officer, running red lights, riding  
14 on the wrong side of the road, riding on the sidewalk, and riding between lanes of traffic.

15 The misdemeanors were dismissed by the District Attorney's Office in the  
16 interest of justice as soon as they came up in Oakland Superior Court. Meggs and  
17 Salsbury were found not guilty by Judge Brosnahan on the infractions as a result of a  
18 hearing on a Motion to Dismiss for Discriminatory Prosecution (Murgia Motion) on June 6,  
19 2002. (See Exhibit A to Declaration of Hildes). During the aforescribed Murgia hearing  
20 on Long and Villaseñor while stating on the record that the District Attorney's Office would  
21 have an extremely high burden to overcome to disprove selective enforcement and  
22 discriminatory prosecution, she noted specifically that she had found those conditions to

1 exist in “the other Critical Mass case”—Meggs and Salsbury (which was the only other  
2 Critical Mass case that had been before her) (Hildes Dec ¶12 , Weill Dec ¶10, throughout).

3 In addition, the Police Review Commission found both selective enforcement  
4 and improper citation.

5 The video evidence clearly shows that Meggs crossed into the intersection  
6 while the light was turning yellow, which is legal at the location where Hester insisted that  
7 he ran a red light, and that Salsbury, at the intersection where Hester claimed that Salsbury  
8 had gone through a red light by himself, actually went through towards the back of the ride,  
9 where the entire demonstration went through the intersection while the light was red. And,  
10 of course the riding was doing so routinely.

11 Salsbury went up onto the sidewalk for a brief period to avoid a hazard in the  
12 street, as stated in Salsbury’s declaration and deposition testimony. As previously  
13 discussed, the demonstration, as with foot demonstrations, expands laterally as necessary  
14 under the conditions, which is all that happens when demonstrators are riding on the  
15 “wrong” side of the road, and occasionally going around stopped or parked cars, and, as  
16 previously discussed, Plaintiffs were acquitted on those charges. In fact the videotape  
17 shows that on the ride in question, within moments of Meggs crossing the road, half the ride  
18 was on the left side of College Avenue, and other riders are visible intermittently on the  
19 sidewalk. The conduct they allegedly engaged in was conduct that other demonstrators  
20 both on Critical Mass and other demonstrations engaged in routinely, and no other example  
21 of penalty exists, even by the admission of Defendant Hester.

22 As previously discussed in the statement of facts, Hester admitted in his

1 deposition, and in front of the Police Review Commission, (Meggs Dec ¶88; Hildes Dec at  
2 ¶7;;Salsbury Dec ¶54, Weill Dec ¶9) that he had singled out Meggs and Salsbury for  
3 citations because he knew who they were, and that he knew who they were because the  
4 were organizers of Critical Mass and he had seen them on other Critical Mass  
5 demonstrations. In fact, many Critical Mass demonstrators are known by name by Hester  
6 and other Berkeley Police Officers. It is not coincidence that he singled out the principal  
7 organizers and he has admitted so. As discussed above under Long and Villaseñor, the  
8 burden of proving selective enforcement and discriminatory prosecution is actually higher  
9 than the burden of disproving probable cause, and is thus dispositive, and in any case, if  
10 the law was enforced with intentional selectivity, defendants cannot argue that their actions  
11 were reasonable or that they acted in a good faith belief that they had individualized  
12 probable cause. Hester as an experienced officer, a sergeant, and a frequent Event  
13 Coordinator is presumed to know that selectively targeting organizers of a demonstration  
14 violates their First and Fourth Amendment rights, such law is very clearly established as is  
15 the right to be free from discriminatory law enforcement while exercising their First  
16 Amendment Rights-see the body of case law cited at the beginning of the legal argument.  
17 Defendant Hester, and the other Defendants in this action have all conceded that they have  
18 received a great deal of training in crowd control. Hester has been with the Berkeley Police  
19 Department for 28 years and has received continuous ongoing training including crowd  
20 control training pertaining to demonstrations and other First Amendment Activity (Hester  
21 Depo 41:25-42:11, 177:22-178:3, 184:22-185:4, 303:23-304:2). He is also a trained  
22 member of the crowd management team and has been called out in that capacity

1 approximately two dozen times (Hester Depo 41:25-43:17), convenes trainings (see above  
2 sections), and generally is extremely well versed in response to First Amendment protected  
3 activity. In addition, he was the event coordinator for Critical Mass Demonstrations for the  
4 Department for three years or two depending on his answer beginning in June of 2000, and  
5 had occasionally handled the assignment before that (Hester Dec 34:5-35:2). He is also  
6 the Special Events Coordinator for the Department which includes covering demonstrations  
7 (Hester Dec 7:17-20). In short, Hester is a very experienced officer with a great deal of  
8 experience responding to demonstrations and is presumed to know how to respect  
9 demonstrators Constitutional rights. If not given the number of demonstrations he is  
10 assigned to and the Event Coordinator for, the City would be per-se liable for a Monell  
11 claim for failure to properly train him.

12           And on each operations plan Hester notes that the officers assigned are to  
13 protect the First Amendment rights of the demonstrators, so he clearly knows those rights  
14 exist, even as he is violating them and ordering them violated.

15           Again, this was the opening salvo in Hester's and his officers campaign to  
16 attack selected demonstrators on only Critical Mass demonstrations, and especially since  
17 he admits to issues citations very selectively to only those two individuals, this technique  
18 and singling out are precisely in keeping with his targeted attacks on the demonstrations in  
19 July and August, and indicative of a pattern and practice that is intentional Constitutionally  
20 violative, and discriminatory, targeting leaders, organizers, visible vocal participants, and  
21 speakers, and no qualified or tort immunity is available or appropriate for such conduct.

22

1 **6. PLAINTIFFS' CLAIMS FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**  
2 **ARE SUPPORTED BY EVIDENCE**  
3

4 Plaintiff Valencia has stated in her declaration and deposition that she was  
5 physically injured and emotionally traumatized ( Valencia Dec ¶32) (Valencia Depo150:18-  
6 153:8).

7 Plaintiff Salsbury has stated in his declaration that the false mail citations in  
8 April, and resulting criminal prosecution, as well as the attack on him and his property were  
9 sufficiently emotional traumatic that he stopped attending Critical Mass (Salsbury Dec ¶45).

10 Meggs, Villaseñor, and Long have also testified and declared that they  
11 suffered significant emotional distress (see statement of facts) which is highly foreseeable  
12 under the circumstances. Government Code §821.6 only applies to prosecutors, and then  
13 only to malicious prosecution, and there is no discretionary immunity under G.C. §820.2 for  
14 intentionally abusive and discriminatory conduct such as here.

15  
16  
17 **7. PLAINTIFFS' CLAIM UNDER THE UNRUH CIVIL RIGHTS ACT (CIVIL CODE § 51.7 IS**  
18 **APPROPRIATE AS PLAINTIFFS HAVE PROVED BOTH VIOLENCE AND**  
19 **DISCRIMINATION**  
20

21 Plaintiffs have spent nearly 90 pages demonstrating proof of discrimination  
22 and spent many pages detailing the physical attacks on Valencia, Meggs, Salsbury, Kahn,  
23 Payne, and Long and Villaseñor. At the very least, Plaintiffs believe they have shown  
24 sufficient disputed material facts for that issue to be presented to the triar of fact for review.  
25

1 **8. MONELL**

2 Defendants have presented no argument to challenge Plaintiffs' Monell claims  
3 for failure to properly supervise or discipline for allow the course of conduct to fester, grow,  
4 and attack the Constitutional Rights of Critical Mass demonstrators, simply claiming that  
5 Plaintiffs have presented no evidence to support their individual claims so that Monell  
6 become irrelevant. In fact, Plaintiffs have presented a great deal of factual and legal  
7 support for their claims, so that argument is specious. Furthermore, if the court finds the  
8 individual claims to be actionable, there is ample evidence that Hester's supervisors signed  
9 off on and ratified his conduct. . His supervisors, including Stone and Pittman, advised  
10 Hester and made him aware of potential situations and instructed him accordingly (Hester  
11 Depo 126:3-16). He sent his reports and operations plans and After Action reports to Lt.  
12 Stone, Captain Pittman and Chief Butler, and that Lt. Harris actually came to the scene at  
13 Oxford and Allston and witnessed the events that occurred there in August (Hester Depo  
14 14:13-17:9). According to Hester, Stone ratified the use of announcements that the vehicle  
15 code would be enforced at the beginning of the demonstration, and other possible actions  
16 that the police officers below Stone were considering taking (Hester Depo 90:24-92:05).  
17 There is also evidence from Hester that both Stone and Pittman were aware beforehand  
18 that Hester planned and did use a video camera on his bicycle during the ride (Hester Depo  
19 106:07-15). (Note: The camera was difficult for the demonstrators to see.) In addition,  
20 Hester stated that his lieutenants (Albinger and Gustafson) were aware that he had had a  
21 conversation with a Sacramento officer regarding Critical Mass, their rides, and their  
22 website (Hester Depo 158:14-21).

1                   It is undisputed that none of those supervisory officials disciplined Hester,  
2 discouraged or criticized his tactics, or said a single negative thing about them, ratifying all  
3 of his conduct. Furthermore, Hester himself was the incident commander/Event  
4 Coordinator for the demonstrations and ratified explicitly and implicitly the tortious and  
5 Unconstitutional conduct of the Officers under his command, only once, in the case of  
6 Romano’s assault on the sound system, telling an officer under his command to stop. In  
7 fact they all acted in the devious, manipulative, and intimidating manner modeled and  
8 ordered by Hester.

9                   Officer Meredith has a penchant for acting in a violent and inappropriate  
10 manner towards demonstrators, and there have been numerous complaints, so BPD was  
11 well aware of it. (See Dec. of Newmark, ¶¶16-18).

12                   All of this shows a clear pattern of failure to properly control, supervise, and  
13 discipline that led directly to the harm that occurred.

14  
15 Plaintiffs will concede the B&P 17200 claim is inapplicable, and agree that all of Defendants  
16 conduct was either intentional or reckless.

### 17                   **III. CONCLUSION**

18                   Defendants have correctly stated that the standard on summary judgment is  
19 that there be no disputed material facts or issues of law. Here the law supports Plaintiffs  
20 position, and it is difficult to argue that there are no disputed issues of material fact when  
21 Defendants have a 15 page statement of facts, and Plaintiffs have 40 pages of factual  
22 issues and disputes. Furthermore, Plaintiffs have demonstrated that they entirely dispute



1 Defendants version of facts, and that they have compelling proof that the facts are as  
2 Plaintiffs not Defendants state them.

3 For all of the above reasons, Defendants motion for summary judgment must  
4 be denied.

5  
6 Dated: February 23, 2004 \_\_\_\_\_  
7 Lawrence A. Hildes, Attorney for Plaintiffs

**PROOF OF SERVICE**

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Lawrence A. Hildes certifies as follows:

I am over the age of 18 years, and not a party to this action. I am a citizen of the United States. My business address is P.O. Box 5405, Bellingham, WA 98227

On February 23, 2004, I served the following documents(s) described as follows:

PLAINTIFFS' RESPONSE TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT

on the following persons(s) in this action at the following addresses:

Matthew Orebic, City Attorney's Office  
Berkeley City Hall  
2180 Milvia Street,  
Berkeley, CA 94704

(BY **EXPRESS** MAIL) by placing a true copy of the above documents in a sealed envelope with postage fully prepaid in the mail at Berkeley, California, addressed to the person(s) above at the above address

(BY PERSONAL SERVICE) by personal delivery to the addresses listed above.

(BY FACSIMILE) by causing such document(s) to be faxed to the person(s) listed above by transmitting said document(s) from facsimile machine no. (510) 540-4821 to facsimile machine no. \_\_\_\_\_

By electronically serving, by sending a copy of all pleadings to counsel for Defendants by e-mail

(FEDERAL) I declare under penalty of perjury that I am a member of the BAR of this court, and that the above information is true and correct.

Executed on February 23, 2004 at Bellingham, Washington.

\_\_\_\_\_  
Lawrence A. Hildes

SALSBURY, et al., v. CITY OF BERKELEY-PLAINTIFFS' RESPONSE TO DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT