

No. 23-35449

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DEREK TUCSON, et al,
Plaintiff - Appellees,

v.

CITY OF SEATTLE,
Defendant - Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
CASE NO. 2:23-cv-00017-MJP
The Honorable Marsha J. Pechman, United States District Court Judge

**BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION
OF WASHINGTON AND KING COUNTY DEPARTMENT
OF PUBLIC DEFENSE IN SUPPORT OF PLAINTIFF
APPELLEES AND AFFIRMANCE**

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STATEMENT OF COMPLIANCE WITH RULE 29

Pursuant to Fed. R. App. P. 29(a)(2), *Amici* submits this brief without an accompanying motion for leave to file because all parties have consented to its filing. Pursuant to Fed. R. App. P. 29(a)(4)(E), *Amici* states that: (i) neither party's counsel authored the brief in whole or in part; (ii) neither party, nor their counsel, contributed money that was intended to fund preparing or submitting the brief; and (iii) no person other than *Amici*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

Dated: August 25, 2023

Respectfully Submitted,

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I. IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union of Washington (ACLU-WA) is a statewide, nonpartisan, nonprofit organization with over 150,000 members and supporters, dedicated to the principles of liberty and equality embodied in the Constitution and federal and state civil rights laws and has a particular interest and expertise regarding the First Amendment. The ACLU-WA has long advocated in support of the freedom of speech and has participated in numerous cases involving the federal and state constitutional guarantees of free speech in the context of political protests, but also in myriad other contexts.

Attorneys for *Amici* have read all relevant filings in the matter and are familiar with the record and the issues on review. The *Amici Curiae* brief submitted in this matter addresses the scope of and protections afforded to individuals by the First Amendment, including freedom from viewpoint discrimination and retaliation for the content of their speech. *Amici's* brief also explains how the Seattle Police Department's ("SPD's") long resistance to police accountability and its culture informs how it responds to individuals exercising their First Amendment rights to protest policing practices, such as its response to the Protesters in the present case, infringing constitutional guarantees, chilling future speech, and unnecessarily and impermissibly using force including through undue arrests, incarceration, and the detrimental consequences that follow such punishment.

This case challenges the constitutionality of SPD's use of Seattle Municipal Code ("SMC") 12A.08.020(A)(2) ("the ordinance") to discriminatorily suppress speech. The issues in this case are of substantial public interest because of the impact on the fundamental free speech rights of all who question policing practices. Further, protecting speech critical of police practices is especially important because of SPD's history of discriminatory policing targeting Black and brown people and its resistance to oversight.

II. AUTHORITY TO FILE BRIEF OF *AMICI CURIAE*

The parties have consented to the filing of this brief. Fed. R. App. P. 29(a)(2).

III. STATEMENT OF THE CASE

The parties have described the factual and procedural background, which is incorporated here by reference. The district court properly granted a preliminary injunction enjoining the enforcement of SMC 12A.08.020(A)(2).

IV. ARGUMENT

A. SPD Has a Long History of Biased Policing and Viewpoint Discrimination Against Those Expressing Concerns About Policing Practices.

SPD has a long history of biased policing and viewpoint discrimination exhibited by its active resistance to reform, its selective use of force against

protesters who question SPD's policing practices, and a culture that pits itself against the community it serves.

1. SPD Has Long Resisted Accountability for Biased Policing.

The City's own website recounts in detail the long history of SPD's resistance to answering public complaints about its practices and the various oversight efforts that have attempted to change SPD's practices and policies to comply with constitutional requirements. Anne Frantilla, *Police Accountability in Seattle, 1955-2020*, SEATTLE.GOV, <https://www.seattle.gov/documents/Departments/CityArchive/Exhibits/PoliceAccountabilityInSeattle.pdf>. Some of the lowlights that deserve particular attention include SPD's history of discriminatory policing and brutality, which increased in the 1950s in response to the growth of Seattle's Black population. *Id.* In response to critiques of discriminatory policing and requests to make changes, SPD opposed public criticism and rebuffed accountability measures stating it would not "take any steps that will handicap [SPD] in their ongoing endeavor to protect the vast number of law abiding citizens against the depredations of a constantly increasing group, who apparently have not respect for either the law or the officers who enforce it." *Id.* at 5 (responding to a Seattle Times editorial advocating for a police review board following the killing of an unarmed Black man). In 1969, a Police Liaison Committee, which was formed to improve community relationships, issued a report

highlighting problems at SPD that included “reluctance to accept criticism, harshness toward Black people,” and “questions that arise when there is a shooting as to whether the police are empowered to be the judge, jury and executioner of Black people.” *Id.* at 6.

Decades later, similar concerns were raised about SPD’s retaliation for complaints about its discriminatory policing:

Youths and citizens of color are especially apt to feel that their complaints are ignored or improperly handled. On rare occasions, the fear of retaliation is a barrier that inhibits citizens from filing complaints....The panel learned of a number of cases in which citizens were cited for crimes or infractions under circumstances that the citizen felt to be retaliatory.”

CITIZENS REVIEW PANEL, FINAL REPORT, at 12 CLERK.SEATTLE.GOV, (August 19, 1999), http://clerk.seattle.gov/~CFS/CF_303750.pdf. Notably, the Office of Professional Accountability was established in 1999, but its Board was not filled until 2002. *Id.* Frantilla, *supra*, at 14. Enhanced oversight has not been enough; instead, SPD continues to resist reform and use its police powers to unduly punish those protesting its practices. In 2020, when widespread racial justice conversations in the Seattle community and at the city council resulted in calls to reform SPD, SPD communications strategists worked behind the scenes to ghost-write opinion pieces arguing against reform and funding cuts, inaccurately presenting data to undercut racial justice arguments supporting reform. Glen Stellmacher, *Derailing the defund: How SPD manipulated the media narrative around the 2020 protests*, REAL

CHANGE, (July 19, 2023),

<https://www.realchangenews.org/news/2023/07/19/derailing-defund-how-spd-manipulated-media-narrative-around-2020-protests>.

2. SPD Has a History of Viewpoint Discrimination Against Peaceful Protesters Seeking to Hold Police Accountable.

Despite decades of oversight by accountability entities, SPD has continued to resist community input and concerns regarding its policing practices and, instead, has consistently targeted protesters advocating for police accountability. For example, in 1999, SPD gained notoriety for its aggressive treatment of legal observers who attended peaceful protests, including the World Trade Organization (WTO) protest, to ensure the police were accountable for First Amendment rights violations.¹ An attorney, at the WTO protest, wearing a “legal observer” shirt “was chased down by a police officer and doused with pepper spray[.]” Letter from Bob Boruchowitz, Director of the Defender Assoc., to City Council, (Dec. 5, 1999), SEATTLE.GOV, https://archives.seattle.gov/digital-collections/media/collectiveaccess/images/1/7/3/6/67559_ca_object_representation_s_media_173643_original.pdf.

¹ Investigations into “abuse by law enforcement officers,” mistreatment of individuals,” and “the rights of free speech and assembly” followed for months. SEATTLE MUNICIPAL ARCHIVES, WORLD TRADE ORGANIZATION PROTESTS IN SEATTLE, SEATTLE.GOV, <https://www.seattle.gov/cityarchives/exhibits-and-education/digital-document-libraries/world-trade-organization-protests-in-seattle>

a. SPD Is Placed Under Federal Supervision for Unconstitutional Policing, Including Actions Against Individuals Who “Talk Back.”

SPD’s biased police practices were so egregious that it led 35 community organizations, including the ACLU-WA, to call on the United States Department of Justice (“DOJ”) to investigate incidents of deadly and excessive use of force against people of color. Frantilla, *supra*, at 14. DOJ’s nine-month investigation found “a pattern and practice of constitutional violations regarding the use of force that result from structural problems, as well as serious concerns about biased policing.” U.S. DEP’T. OF JUST., CIV. RTS. DIV., INVESTIGATION OF THE SEATTLE POLICE DEPT., AT 2 (DECEMBER 16, 2011), SEATTLE.GOV, http://archives.seattle.gov/digital-collections/media/collectiveaccess/images/1/9/4/1/10046_ca_object_representations_media_194192_original.pdf. DOJ found that SPD’s improper use of excessive force against individuals availing themselves of their First Amendment rights to express discontent with the police was “unreasonable and unconstitutional...even when such speech constitutes a verbal attack on the police.” *Id.* at 14-15. The City entered into a consent decree providing federal court oversight of SPD’s policies, practices, training, and systems, which was approved in 2012 and currently remains in place (“Consent Decree”). Frantilla, *supra*, at 17.

b. SPD Used Excessive Force Against Protesters During the Black Lives Matter Protests.

On May 25, 2020, George Floyd was killed in Minneapolis and protests began in Seattle on May 29th. Frantilla, *supra*, at 17. Collective grief and anger demanding a reckoning about racial inequality and police violence targeting Black, Indigenous, and other People of Color resulted in the largest mass protest movement in U.S. History. Audra D. S. Burch, Amy Harmon, Sabrina Tavernise & Emily Badger, *The Death of George Floyd Reignited a Movement. What Happens Now?* N.Y. TIMES, (April 20, 2021, updated June 23, 2023), <https://www.nytimes.com/2021/04/20/us/george-floyd-protests-police-reform.html>.

The protests in Seattle, and around the country, were incited by and sought to address “the long history of abuse, excessive use of force, and deaths suffered by Black, Indigenous, and other People of Color at the hands of police.” Amanda Zhou, *Seattle police must rebuild trust with community, modify use of less-lethal weapons, report says*, SEATTLE TIMES, (March 14, 2022), <https://www.seattletimes.com/seattle-news/law-justice/seattle-police-must-rebuild-trust-with-community-modify-its-use-of-less-lethal-weapons-report-says/>. For many, “Mr. Floyd’s death carried the weight of other episodes of police violence over the past decade, a list that includes the deaths of Eric Garner, Laquan McDonald, Michael Brown and Breonna Taylor.” Audra D. S. Burch et al., *supra*.

It was not lost on SPD that the protests demanded police accountability. In the City's own words – the protests “served as an urgent call for an examination of the institution of policing, to find a manner that would not further erode public trust, given these longstanding problems and concerns.” OFF. OF INSPEC. GEN., SENTINEL EVENT REVIEW OF POLICE RESPONSE TO 2020 PROTESTS IN SEATTLE, WAVE 1, at 5 (July 22, 2021) SEATTLE.GOV, <https://seattle.gov/documents/Departments/OIG/Policy/OIGSERWave1Report072221.pdf>. Instead of protecting the people it is supposed to serve and upholding their rights to free speech, SPD, met the protesters in a moment of collective grief over police brutality, with more police brutality.²

There were more than 12,000 complaints made to the Office of Police Accountability about SPD's handling of the protests. Frantilla, *supra*, at 17. The complaints were the result of SPD's repeated failure to recognize the difference between throngs of peaceful protesters exercising their First Amendment rights and the few people engaging in criminal activity in the crowd. Mike Carter, *SPD should apologize for violence against Black Lives Matter protester, panel says*, SEATTLE

² Officers employed tear gas on crowds, which had devastating effects on community members, and left residents of the Capitol Hill neighborhood feeling like they were “living in a war zone.” Nathalie Graham, *Seattle Residents Got Tear Gassed in Their Own Apartments*, THE STRANGER, (June 4, 2020), <https://www.thestranger.com/slog/2020/06/04/43840246/seattle-residents-got-tear-gassed-in-their-own-apartments>.

TIMES, (April 18, 2023), <https://www.seattletimes.com/seattle-news/law-justice/spd-should-apologize-for-violence-against-black-lives-matter-protesters-panel-says/>.

SPD employed an unprovoked “wholesale use of force” against protesting crowds that were largely peaceful, making “assumptions about crowds as monoliths, especially where this created [SPD’s] unwarranted defensiveness[.]” OFF. OF INSPEC. GEN., SENTINEL EVENT REVIEW OF POLICE RESPONSE TO 2020 PROTESTS IN SEATTLE, Wave 4: July 2 – October 7, 2020, at 20 (April 18, 2023) SEATTLE.GOV, <https://seattle.gov/documents/Departments/OIG/Sentinel%20Event%20Review/FINALSERWave%204Report.pdf>.

“SPD’s response to the protests was viewed by many as a reflection and perpetuation of the problems inherent to the institution of policing itself. Particularly considering the strong movement at that time calling for law enforcement reform[.]” SENTINEL EVENT REVIEW, Wave 4, *supra*, at 4. This was highlighted by the Police Officers Guild headquarters decision to blast country music over loudspeakers as officers charged into the crowd on bicycles issuing commands like “run” and “go faster” while they used pepper spray and blast balls on protesters. Carter, *supra*. In an intentional “misinformation effort” during the protests, SPD officers pretending to be members of the white supremacist extremist group, Proud Boys, lied about armed extremists escalating danger to protesters, which “added fuel to the fire[.]”

Daniel Beekman, *Seattle police faked radio chapter about Proud Boys as CHOP formed in 2020, investigation finds*, Seattle Times, (Jan. 5, 2022), <https://www.seattletimes.com/seattle-news/law-justice/pioneering-detective-sues-spd-alleges-racial-and-gender-discrimination/> (incorporating reference to the Office of Police Accountability’s Closed Case Summary of the events).

SPD’s response to the Black Lives Matter protests is one of the most concrete examples of the animus it continues to show to those demanding police accountability.³ The Office of the Inspector General review of SPD’s response to the protests identified “SPD’s continued posture of anticipatory defensiveness and assumption of protestors as organized and intent on violence—exacerbate[ed] the negative opinion of protestors to the point of dehumanization.” SENTINEL EVENT REVIEW, Wave 4, *supra*, at 25.

c. SPD’s Attitude Towards the Community It Is Supposed to Serve Is “Us” versus “Them.”

³ It is without dispute that institutional and systemic racism were contributing factors to SPD’s response:

The damage that has been done – the damage that caused these protests in the first place, and the overall inability of SPD as a Department and the City of Seattle to immediately craft particularized responses to the needs of peaceful protestors while addressing threats to public order and safety – is deep and lasting. However, acknowledging the underlying contributing factor of institutional and systemic racism was critical[.]

SENTINEL EVENT REVIEW, Wave 4, *supra*, at 18.

Video capturing SPD's East Precinct in the wake of the Black Lives Matter protests confirms SPD's "negative opinion of protesters to the point of dehumanization." *See, e.g.*, SENTINEL EVENT REVIEW, Wave 4, *supra*, at 25. In July of this year, footage from a police body camera was released in connection with this case. Carter, *supra*. It showed the interior of the break room of the East Precinct, which was the epicenter of the Black Lives Matter protests and where SPD officers assigned to the protests rested. Displayed prominently in the break room was a mock tombstone for Damarius Butts, a 19-year-old Black man killed by SPD officers in 2017.⁴ The tombstone appeared to be taken from a Black Lives Matter memorial. News Release, Seattle Cmty. Police Comm'n, CPC Co-Chair Statement on SPD East Precinct Break Room Reporting (July 12, 2023) <https://www.seattle.gov/community-police-commission/news>. The callous display was a shocking disregard to the grief exhibited across the country in the face of police brutality targeting Black Americans, and an "open display of contempt and disregard toward a young black man who Seattle Police shot and killed[,]" and to his

⁴ Damarius Butts was shot and killed by SPD officers on April 20, 2017, after officers suspected that he stole snacks and beverages from a convenience store and gave chase, leading to an exchange of gunfire. Mike Carter-Seattle Times, *Washington Supreme Court Reinstates Inquest System That Expands Inquiry Into Police-Caused Deaths*, THE DAILY CHRONICLE, (July 16, 2021) <https://www.chronline.com/stories/washington-supreme-court-reinstates-inquest-system-that-expands-inquiry-into-police-caused-deaths,269200>.

family, friends, and community. Seattle Cmty. Police Comm’n, *supra*. The break room was also adorned with the image of a tardigrade with the words, “Live Tiny, Die Never” and a large “Trump 2020” flag.⁵

The timing of the video establishes that SPD’s prominent display of Mr. Butts’ tombstone was “clearly an intentional act” because the inquest into his killing had already commenced. News Release, Seattle Cmty. Police Comm’n, CPC Co-Chair Statement on SPD East Precinct Break Room Reporting (July 12, 2023), <https://www.seattle.gov/community-police-commission/news>.

A tardigrade flag hung between the “Trump 2020”⁶ flag and an American Flag decorating a large wall. *Id.* In addition, a section of a wall combined a red and black anarchist flag and a plywood sign with a Black power fist. *Id.* Taken together the tardigrade and Trump flags along with the prominence of Damarius’ mock tombstone, the decor suggests the celebration of fallen enemies and war trophies. *See, e.g.,* Carter, *supra*, at embedded video. It displays SPD’s “Us” versus “Them” culture of promoting othering to the point of dehumanization and suggests the killing of Mr. Butts was something SPD celebrated. The video footage shows SPD operates

⁵ Carter, *supra*, at embedded video.

⁶ SPD members also made up the “biggest known contingent of cops” at the January 6th Insurrection. Martin Kaste, *Seattle cops make up biggest known contingent of cops at Jan. 6 Capitol rally*, KUOW.ORG (Jan. 27, 2021) <https://www.kuow.org/stories/police-departments-search-for-political-extremism-in-ranks-following-capitol-riot>.

under the belief it is in a life-and-death struggle against those who dare to hold the police accountable. *See, e.g., Carter, supra.*

A recent complaint from a Black female officer documents being subjected to and witness to race discrimination, which included posters that depict “an adversarial relationship with the community the officer works with.” Mike Carter, *Pioneering detective files claim against SPD, alleges racial and gender discrimination*, Seattle Times, (March 17, 2023), <https://www.seattletimes.com/seattle-news/law-justice/pioneering-detective-sues-spd-alleges-racial-and-gender-discrimination/>.

A “culture that allows such displays and violations of policy and law have no place in any police department, especially a department seeking to come out from under federal court oversight following a pattern and practice of unconstitutional policing.” Seattle Cmty. Police Comm’n, *supra*. (Seattle’s Cmty. Police Comm’n referencing SPD’s request to a federal court to find it in compliance with the Consent Decree). However, such a culture exists within SPD and continues to fuel its consistent targeting of protesters who are advocating for policing reforms—which is exactly what happened in this matter.

B. SPD Exploits the Ordinance to Target the Protesters, Likely Infringing on Their Exercise of Free Speech

1. The Protesters’ Political Speech Falls Squarely within First Amendment Protection.

Political speech is “at the heart of the First Amendment’s protection” and is thus afforded the highest constitutional safeguards. *See Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011); *Connick v. Myers*, 461 U.S. 138, 145 (1983) (“[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”) (internal quotation marks and citations omitted); *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (noting that “speech concerning public affairs is more than [self-expression]; it is the essence of self-government.”); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 n.5 (1985) (“...[R]egulation of political speech is subject to the most rigorous scrutiny.”) (citing *Brown v. Hartlage*, 456 U.S. 45, 52-53 (1982)); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279, n.19 (1964); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

Those who won our independence believed . . . that public discussion is a political duty, and that this should be a fundamental principle of the American government. [T]hey knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Whitney v. California, 274 U. S. 357, 375-376 (1927) (Brandeis, J., concurring).

Criticism and speech about policing is accorded no less protection. *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990) (“[W]hile police, no less than anyone else, may resent having obscene words and gestures directed at them, they may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment.”)

The content, delivery, and public forum of the Protesters’ political speech in this case is protected political speech. The Protesters wrote phrases including, “peaceful protest,” “BLM” (Black Lives Matter), “FTP” (Fuck the Police), “Abolish SPD,” “Kill KKKops,” “Killers →” (arrow pointing at the precinct), “New Year No New Names,” (referencing individuals killed by police) and “Fuck SPD.” The phrases were written in charcoal and children’s sidewalk chalk on the temporary cinderblock wall of a public thoroughfare outside a police precinct. There is no appreciable distinction between the Protesters’ speech and chalking on a sidewalk. The District Court is not alone in its determination that chalking is a protected and harmless expressive act of speech. *See Mackinney v. Nielsen*, 69 F.3d 1002 (9th Cir. 1995) (holding that chalking was protected speech and that “[n]o reasonable person could think that writing with chalk would damage a sidewalk.”); *Selah All. for Equal. v. City of Selah*, No. 1:20-CV-3228-RMP, 2021 WL 5286582, *13 (E.D. Wash. June 30, 2021) (granting preliminary injunction prohibiting enforcement of local ordinance used to remove chalking of political speech); *Osmar v. City of Orlando*,

No. 6:12-cv-185-Orl-DAB, 2012 WL 1252684, at *3 (the temporary nature of chalking “evoke[s] the classic example of the exercise of free speech: the soap box orator who knows his words may be lost to the winds.”).

The location where the Protesters chalked – on the public thoroughfare outside SPD’s East Precinct – is germane to the Protesters’ expression of protected speech and necessary to reach the intended audience. *See, e.g., Seattle Affiliate of the October 22nd Coalition To Stop Police Brutality, Repression and the Criminalization of a Generation v. City of Seattle*, 550 F.3d 788, 796 (9th Cir. 2008) (holding that a facial challenge under the First Amendment could be brought because ruling otherwise “would ignore that both the message and the ability to reach an audience are sensitive to the place and method of communication.”) (citing *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (noting that “[d]isplaying a sign from one’s own residence often carries a message quite distinct from placing the sign somewhere else, or conveying the same text or picture by other means”); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1047 (9th Cir. 2006) (“The ability to communicate a particular message in a particular location can significantly contribute to the effectiveness of that communication.”). There can be no dispute that the Protesters’ charcoal and chalk messages were an act of expression implicating the First Amendment.

2. SPD's Viewpoint Discrimination Likely Violates the First Amendment.

The First Amendment protects the very speech that SPD and the City seek to suppress by relying on SMC 12A.08.020(A)(2). The ordinance cannot shield the unconstitutional suppression of speech.

It is well settled that the First Amendment bars the government from engaging in viewpoint discrimination. *See Kaahumanu v. Hawaii*, 682 F.3d 789, 806 (9th Cir. 2012). “The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 828 (1995) (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983)); *see also Barr v. Am. Assoc. of Political Consultants, Inc.*, — U.S. —, 140 S. Ct. 2335, 2346 (2020) (Kavanaugh, J.) (“[t]he First Amendment means that government [] has no power to restrict expression because of its message, its ideas, its subject matter or its content.”) (citing *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

The breadth of the ordinance itself (‘mark[s] of any type on any public or private building or structure’) provides SPD with opportunity to discriminate based on viewpoint through selective enforcement. In response to concerns that SPD has “unbounded discretion” to enforce the ordinance, the City proclaims, “there is nothing wrong with discretion per se.” City’s Opening Brief, p. 26 (referencing ER

21). But SPD's selective enforcement of the ordinance against the Protesters in this case belies the evils of such unbounded discretion. SPD took no enforcement action against pro-police messages written in chalk on thoroughfares at City Hall during a "Back the Blue" rally on July 15, 2020, that read "DEFEND SPD" and "LIBERTY IS ESSENTIAL." ER 69-70 (one image shows a protester chalking while SPD officers observe at a distance).⁷ The City's general policy of not arresting individuals who use chalk on sidewalks, is further proof of SPD's selective enforcement. Compare City's Opening Brief, p. 26 (noting City's policy not to enforce ordinance against those chalking on sidewalks); and ER 70(p.14) (showing a still image of an officer threatening enforcement action for chalking on the sidewalk "criticizing SPD for the murder of Black and Brown Seattle residents."). The Protesters were arrested and incarcerated for chalking messages of protest critical of SPD outside of the precinct. SPD's actions, here, present a stark contrast to SPD's policy permitting messaging that expresses pro-police political positions, such as "WE ♥ SPD" and "DEFEND SPD." ER 69-70.

SPD chooses when to enforce the ordinance based on the viewpoint expressed by the speaker and the location of the speech. Within the historical context of SPD's hostility towards those advocating for police reform, it employed its unbounded

⁷ The Seattle Police Foundation Facebook page includes pictures of pro-SPD chalking of public sidewalks, which includes the messages: "WE ♥ SPD" and "SPD is AWESOME". ER 69-70.

discretion to arrest and incarcerate⁸ the Protesters because their speech was critical of SPD. On similar facts, the Ninth Circuit reversed a finding of qualified immunity and remanded for a determination of whether an officer violated First Amendment rights by singling out for arrest someone who chalked an anti-police message when

⁸ The City does not address the harm the Protesters experienced by being arrested and incarcerated. The immediate consequences of pretrial incarceration can be life-altering. Nearly 50 years ago the United States Supreme Court recognized that even short “[p]retrial confinement may imperil the suspect’s job, interrupt his source of income, and impair his family relationships.” *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). “[P]retrial detention predicts job issues, loss of employment, and becoming homeless.” TIFFANY BERGIN ET. AL., THE INITIAL COLLATERAL CONSEQUENCES OF PRETRIAL DETENTION, NEW YORK CITY CRIMINAL JUSTICE AGENCY, (SEPT. 27, 2022) AVAILABLE AT [HTTPS://WWW.NYCJA.ORG/PUBLICATIONS/THE-INITIAL-COLLATERAL-CONSEQUENCES-OF-PRETRIAL-DETENTION](https://www.nycja.org/publications/the-initial-collateral-consequences-of-pretrial-detention). In addition to the risk of assault that is all-too prevalent in our jails and prisons, infectious disease and other health risks run rampant in these settings. Individuals in carceral settings have “dramatically higher rates of disease than the general population, and [] correctional facilities too often serve as ill-equipped treatment providers of last resort for medically underserved, marginalized people.” DAVID CLOUD, ON LIFE SUPPORT: PUBLIC HEALTH IN THE AGE OF MASS INCARCERATION, Vera Institute of Justice, (November 2014) <https://www.vera.org/downloads/publications/on-life-support-public-health-mass-incarceration-report.pdf>. This risk was never more visible than during the height of the Covid-19 pandemic, when “a majority of the largest, single-site outbreaks” occurred “in jails and prisons.” Data Tracker, Covid Prison Project (available at <https://covidprisonproject.com>). As of July 2023, the Tracker reported more than 600,000 cases of Covid-19 among incarcerated people, and nearly 3,000 deaths. *Id.* In light of these known risks and harms, jails and prisons across the country sought to reduce their inmate populations. *See, e.g.*, JASMINE HEISS ET. AL., THE SCALE OF THE COVID-19-RELATED JAIL POPULATION DECLINE, Vera Evidence Brief, (August 2020) <https://www.vera.org/downloads/publications/the-scale-of-covid-19-jail-population-decline.pdf>.

there was no evidence presented other individuals had been arrested for chalking on the sidewalk. *See Ballentine v. Tucker*, 28 F.4th 54, 62-64; 67 (9th Cir. 2022) (noting agent “had fair notice that the First Amendment prohibited arresting Plaintiffs for the content of their speech.”).

Similarly, in *Bledsoe v. Ferry County*, a district court analyzed charges against a protester who chalked messages that criticized a local government official outside of a government building. *Bledsoe v. Ferry County*, 499 F. Supp. 3d 856, 866 (E.D. Wash. 2020). The court found the criminal statute was applied unconstitutionally and discriminatorily:

[I]t is common knowledge that children, as well as some businesses, routinely engage in sidewalk chalking, without police involvement or prosecution. When the proscription on chalking is only enforced when the government does not like who is drawing or what is drawn, the First Amendment is plainly implicated. *See Nieves v. Bartlett*, — U.S. —, (2019) (Gorsuch, J., concurring in part and dissenting in part) (“[C]riminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something. If the state could use these laws not for their intended purposes but to silence those who voice unpopular ideas, little would be left of our First Amendment liberties.”)...

[T]he facts show that the chalk was removed and the police were called, at least in part, due to the identity of the speaker and that speaker’s previous expressive activities. The Commissioners’ actions purposefully suppressed the ideas being communicated by Ms. Bledsoe.

Id. at 874.

As set forth above, the Protesters’ First Amendment rights are implicated by SPD’s enforcement of the ordinance. While SPD may resent having obscene words

and gestures directed at it, SPD may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment.” *See, e.g., Duran*, 904 F.2d at 1378. SPD’s selective enforcement motivated by the content, location, and identity of the speakers was unlawful purposeful suppression of the ideas they are entitled to communicate.

3. SPD’s Viewpoint Bias Has a Chilling Effect on Protected Speech.

The harm that results from the chilling of political speech is “particularly irreparable.” *See Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009); *Cuviello v. City of Vallejo*, 944 F.3d 816, 833 (9th Cir. 2019). The chilling of First Amendment rights is of grave constitutional insult. *See Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) (determining that “there [would] be some hardship on the State,” in enjoining a California sex offender registration requirement that likely violated the First Amendment since it had an interest in protecting the public from crime but concluding that the loss of Plaintiff’s First Amendment rights was greater).

SPD’s viewpoint bias, as applied through its discriminatory use of the ordinance, is a tool SPD has relied on to unduly censor and persecute those demanding police accountability. Its use of the ordinance in combination with its resistance to police accountability measures, and the evidence of its “Us” versus “Them” culture, results in a concerning chilling effect on protected speech. The district court did not abuse its discretion by recognizing the declarations provided

by the Protesters provided sufficient, credible evidence that their expression is chilled as a result of the ordinance and the threat of future prosecution. ER 22 (Order Granting Preliminary Injunction, referencing Plaintiffs' Declarations at ER 127-143).

V. CONCLUSION

For the foregoing reasons, the Court should affirm the order granting the preliminary injunction enjoining the enforcement of Seattle Municipal Code SMC 12A.08.020(A)(2).

DATED this 25th day of August, 2023.

Respectfully submitted,

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Dated: August 25, 2023

By: /s/ Taryn Darling
Taryn Darling, WSBA No. 38276

Counsel for ACLU of Washington
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