

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

HASHEEM BOUDJERADA; DAMON
DAMON COCHRAN-SALINAS;
ERIN GRADY; TYLER HENDRY;
and KIRTIS RANESBOTTOM,

Plaintiffs,

v.

CITY OF EUGENE; SARAH MEDARY;
WILLIAM SOLESBEE; SAMUEL STOTTS;
BO RANKIN; TRAVIS PALKI; MICHAEL
CASEY; RYAN UNDERWOOD; CRAIG
WRIGHT; CHARLES SALSBURY; and
CHIEF CHRIS SKINNER,

Defendants.

Case No. 6:20-cv-01265-MK
**FINDINGS AND
RECOMMENDATION**

KASUBHAI, United States Magistrate Judge:

Following events that occurred on May 31, 2020, in Eugene, Oregon during ongoing protests related to the killings of Breonna Taylor and George Floyd, Plaintiffs filed this civil

rights lawsuit pursuant to 42 U.S.C. § 1983 (“Section 1983”) for alleged violations of their constitutional rights. *See* Sec. Am. Compl., ECF No. 78. The claims generally relate to events that took place following the expansion of a curfew imposed on the downtown area of Eugene (“the Downtown Curfew”) on May 31, 2020 to a curfew which applied to the entire city (“the City-Wide Curfew”).

There are two groups of plaintiffs whose claims depend on conduct by different groups of defendants. The first plaintiffs are three individuals—Hasheem Boudjerada, Erin Grady, and Tyler Hendry (collectively, the “Curfew Plaintiffs”)—who were arrested by Defendants Underwood, Casey, Palki, Stotts, and Rankin (collectively, the “Curfew Defendants”) for allegedly violating the City-Wide Curfew imposed by Defendant City of Eugene, the City Manager, and Chief of Police Skinner (collectively, the “City Defendants”). The Curfew Plaintiffs allege violations of their First, Fourth, and Fourteenth Amendment rights.

The second set of plaintiffs include Damon Cochran-Salinas and Kirtis Ranesbottom (collectively, the “Campbell Club Plaintiffs”) who were residents and occupants of the so-called Campbell Club house when it was struck by less-lethal ammunition during Sergeant Solesbee and Officer Wright’s (collectively, the “Campbell Club Defendants”) attempts to arrest one or more individuals—who are not parties here—for violating the City-Wide Curfew. The Campbell Club Plaintiffs allege violations of their Fourth and Fourteenth Amendment rights.

Both sets of Plaintiffs also allege supervisory liability claims against Lieutenant Salsbury for his alleged involvement in supervising the arrests and use of force by the Curfew Defendants and the Campbell Club Defendants respectively.

Before the Court are three motions for summary judgment filed by: (1) the City Defendants; (2) the Curfew Defendants; and (3) the Campbell Club Defendants along with

Lieutenant Salsbury. For the reasons below, the City Defendants’ motion (ECF No. 147) should be DENIED in part and GRANTED in part; the Curfew Defendants’ motion (ECF No. 137) should be GRANTED, and the Campbell Club Defendants Lieutenant Salsbury’s motion (ECF No. 132) should be GRANTED.

BACKGROUND

I. Facts relating to curfews and the arrests of the Curfew Plaintiffs

The Court recited the facts related to the Curfew Plaintiffs in detail in its May 24, 2023 Findings and Recommendation. *Boudjerada v. City of Eugene*, No. 6:20-CV-01265-MK, 2023 WL 3903751 (D. Or. May 24, 2023), *report and recommendation adopted*, 2023 WL 3886114 (D. Or. June 8, 2023). The Court incorporates that recitation here by reference.

II. Facts relating to the events at the Campbell Club

Plaintiffs Cochran-Salinas and Ranesbottom were residents of the “Campbell Club” in Eugene, Oregon at the time of the events underlying the complaint. Cochran-Salinas Decl. ¶¶ 2-4, ECF No. 170; 2nd Ranesbottom Decl. ¶¶ 2-4, ECF No. 171. Residents of the Campbell Club were all members of the Students’ Cooperative Association, which provides for cooperative ownership of the association’s cooperative properties, including the Campbell Club. *Id.* Under the membership contracts signed by the Campbell Club Plaintiffs, they shared “equal rights and responsibilities in the cooperative decision-making” and “how to use the money we brought in from membership fees.” *Id.* The website and handbook explain that all members are “owners” of the cooperative. *Id.*

Both Campbell Club Plaintiffs had participated in at least some protest activity before the imposition of the City-Wide Curfew. Cochran-Salinas Dep. 31:10-33:23, ECF No. 133-1; Ranesbottom Dep. 35:6-25, 43:22-46:14, ECF No. 133-5. Both attended protests on May 31,

2020, and dispersed back to the Campbell Club upon the announcement of the City-Wide Curfew. *Id.*

On May 31, 2020, about 20 minutes after the City-Wide Curfew went into effect, Plaintiff Cochran-Salinas arrived at the Campbell Club and went out onto the front porch to smoke a cigarette. Cochran-Salinas Dep. 32:20-25, ECF No. 133-1. Plaintiff Raneshottom was in their room at the time, having arrived before the City-Wide Curfew went into effect. Raneshottom Dep. 46:15-18, ECF No. 133-5. Plaintiff Cochran-Salinas witnessed police driving “really fast down Alder” in pursuit of who he recognized as his friend “Eric,” who was riding on his bike away from the police. Cochran-Salinas Dep. 51:6-52:14, ECF No. 133-1. He watched Eric run towards the Campbell Club, and witnessed police striking him an estimated three times with pepper rounds. *Id.* He also saw another unidentified individual running along the sidewalk yelling “please don’t shoot. I’m going home” and was shot in the back with a less-lethal weapon. *Id.* at 33:7-13.

He observed three officers but did not recall which officer or officers fired. 2nd Cochran-Salinas Dep. 38:24-39:7, ECF No. 133-2. As he let Eric in, he observed an officer “suar[]e up” and fire at head level. Cochran-Salinas Dep. 33:16-20, ECF No. 133-1. He closed the door and the munition broke the top hinge. *Id.* Officer Wright and Sergeant Solesbee both agree that they fired on the individual as he ran towards the Campbell Club, with Sergeant Solesbee agreeing that he struck him once and struck the door with 40mm rounds. Solesbee Dep. 89:23- 93:21, ECF No. 133-4; Wright Decl. ¶ 2-3, ECF No. 136. Hearing the shots, Raneshottom came downstairs to see what was happening. Raneshottom Dep. 46:15-47:2, ECF No. 133-5. Raneshottom remembers feeling scared and confused but remembers nothing else. *Id.*

The police remained outside the Campbell Club for “a few more minutes” before leaving. Cochran-Salinas Decl. ¶ 22, ECF No. 170. Tear gas, which had been fired into the yard of a nearby home, “seeped into the Campbell Club” and was “very unpleasant for about an hour to an hour and a half” and irritated Cochran-Salinas’ eyes. *Id.* ¶ 24. Windows and at least one window frame were also broken, and residents could not go outside the home for fear of being hit by projectiles. *Id.* ¶¶ 21-23. Neither Campbell Club Plaintiff was struck by less-lethal ammunition. Cochran-Salinas Dep. at 58:13-17, ECF No. 133-1; Raneshottom Dep. 61:6-10, ECF No. 133-5. Cochran-Salinas repaired the door. Cochran-Salinas Dep. 58:23-25, ECF No. 133-1.

At the time the above events were taking place, Lieutenant Salsbury was acting as the field force commander, and was not present at the Campbell Club. Salsbury Dep. 32:8-18, 40:16-19, ECF No. 133-6. He was located at W 2nd Ave. and Lincoln St. *Id.* Lieutenant Salsbury was responsible for controlling the resources, equipment, and deployment. *Id.* at 32:16-33:12. Officers were not required to obtain authorization from him before deploying less-lethal weapons. *Id.* at 43:4-11. The determination of whether to use that level of force is based on the officers’ individual observations. *Id.* The use of less-lethal weapons was covered under the department’s use of force policy, under which officers are authorized to use such force in order to “overcome[e] resistance” or in response to threats to officers or the community. *Id.* at 52:14-53:16. Following the imposition of the City-Wide Curfew, Lieutenant Salsbury commanded officers to give dispersal orders and make arrests for failure to comply “if it appeared that those lawful orders were not being followed.” *Id.* at 45:9-19.

STANDARD OF REVIEW

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file, if any, show “that there is no genuine dispute

as to any material fact and the [moving party] is entitled to judgment as a matter of law.” *Fed. R. Civ. P. 56(a)*. Substantive law on an issue determines the materiality of a fact. *T.W. Elec. Servs., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987). Whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party determines the authenticity of the dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324.

Special rules of construction apply when evaluating a summary judgment motion: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *T.W. Elec.*, 809 F.2d at 630.

DISCUSSION

I. Defendants City of Eugene, Medary, and Skinner’s Motion for Summary Judgment

The City Defendants’ motion addresses each of Plaintiffs’ claims for relief in turn, and the Court does the same.

A. Plaintiffs’ First Claim for Relief against the City of Eugene

Defendant the City of Eugene (“the City”) first moves for summary judgment as to Plaintiffs’ First Claim for Relief, which alleges two counts—one related to the curfews, and the other for the use of force—against the City only. Sec. Am. Compl. ¶¶ 89-125, ECF No. 78.

1. First Claim for Relief, Count One

The first count of Plaintiffs’ First Claim for Relief alleges municipal liability for the curfews which Plaintiffs allege violated their First and Fourteenth Amendment rights. The claim

challenges both the Downtown Curfew and the City-Wide Curfew. The City's motion is based on the argument that the curfew orders were lawful restrictions on Plaintiffs' First Amendment rights.¹ The Court has already granted summary judgment in Plaintiffs' favor on whether the City-Wide Curfew violated Plaintiffs' First Amendment rights. ECF Nos. 187, 189. Defendants' motion for summary judgment as to the City-Wide Curfew should therefore be denied as moot in light of that ruling.

However, Plaintiffs have presented no argument or evidence that the Downtown Curfew violated Plaintiffs' First Amendment rights and the City of Eugene is therefore entitled to summary judgment on this claim as it relates to the Downtown Curfew. Additionally, Plaintiffs have withdrawn their theory that the curfews were overbroad. To the extent that count one of Plaintiffs' First Claim for Relief asserts on an overbreadth theory, the City should be granted summary judgment.

2. First Claim for Relief, Count Two

The City also moves for summary judgment on Plaintiffs' municipal liability claim for an "unlawful practice or policy allowing indiscriminate use of force as a tactic to disperse crowds in violation of First, Fourth, and Fourteenth Amendments." First Am. Compl. ¶¶ 115-125. The City specifically argues that it is entitled to summary judgment because Plaintiffs have presented no evidence from which the jury could find that the City had such a policy or practice.

¹ The City of Eugene's motion does not appear to contest the applicability of municipal liability relative to this count. Nevertheless, to the extent that Defendants' arguments as to count two discuss the curfew policy applicable to count one, the Court finds that it was an express policy for which the City may be subject to municipal liability. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91 (1978) (a municipality may be subject to liability under Section 1983 for an unconstitutional "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers").

In certain circumstances, a municipality may be held liable as a “person” under Section 1983. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91 (1978). However, “a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.” *Id.* Liability only attaches where the municipality itself causes the constitutional violation through the “execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.” *Id.* at 694; *see also Gillette v. Delmore*, 979 F.2d 1342, 1347 (9th Cir. 1992) (“[i]f the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability”) (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 126 (1988)).

There are three methods by which a plaintiff may establish municipal liability under *Monell*. First, a local government may be liable where the “execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflict[s] the injury.” *Rodriguez v. City of Los Angeles*, 891 F.3d 776, 802 (9th Cir. 2018) (quoting *Monell*, 436 U.S. at 694). Second, a local government can fail to train employees in a manner that amounts to “deliberate indifference” to a constitutional right, such that “the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the [government entity] can reasonably be said to have been deliberately indifferent to the need.” *Id.* (quoting *City of Canton v. Harris*, 489 U.S. 378, 390 (1989)). Third, a local government may be held liable if “the individual who committed the constitutional tort was an official with final policy-making authority or such an official ratified a subordinate’s unconstitutional decision or action and the

basis for it.” *Id.* at 802–03 (quoting *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1097 (9th Cir. 2013)).

a) Execution of official policy or custom

The City contends that Plaintiffs have failed to produce evidence of any express policies which caused Plaintiffs’ injuries. Plaintiffs’ response cites no evidence from which a jury could conclude that the City had any express policies in place that would give rise to *Monell* liability for the use of excessive force against protestors or for crowd control; indeed, the crux of their argument is that the City *lacked* such a policy. While Plaintiffs did cite the curfew as an express policy, see Pl.’s Resp. 4, ECF No. 172, that policy relates to *Monell* liability for count 1 (pertaining to the curfews) not count 2 (pertaining to the use of force in crowd control). Plaintiffs’ response to Defendant’s motion in fact states that its claim is premised on the lack of applicable policy. *See* Pl.’s Resp. 4, ECF No. 172. Accordingly, there is no evidence of an express policy giving rise to an excessive use of force *Monell* claim.

Instead, Plaintiffs assert a “custom or usage” theory, arguing that “as for the arrests and use of less lethal weapons, the delegation of authority to the arresting officers and the officers who shot the projectiles, without any established policy...presents a *Monell* claim.” Pl.’s Resp. 4, ECF No. 172. In support of this theory, Plaintiffs cite *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994). *Chew* involved allegations of excessive use of force related to the use of canines. There, the city argued the “even if the department’s policy was to use dogs to apprehend concealed suspects by biting and mauling them, this policy was attributable only to the officers responsible for training the canine units.” *Id.* at 1445. The record contained evidence that canines were being used to seize suspects. *Id.* The Court explained that the city could not distance itself from policy via delegation and that “if the city in fact permitted departmental policy regarding the use of

canine force to be designed and implemented at lower levels of the department,” a jury could find a “custom or usage” subject to municipal liability. *Id.*

But here, there is no evidence that the City delegated the decisions about when and how to use less-lethal weapons to control crowds of protestors to officers in the field. Unlike *Chew*, where canines *were* being deployed to apprehend suspects without any upper-level guidance on when such force was warranted or how it should be used, here there is no evidence that officers were customarily using less-lethal weapons to control crowds (and that because the City had no policy on this matter, it was customarily delegating that decision to officers in the field). To the contrary, Chief Skinner noted that this was the first time the City had encountered the issue of when and how to use less-lethal weapons as a means of crowd control:

There’s a policy that identifies the criteria by which the tool would be used, and for a variety of years the circumstances fit neatly within that policy. And for maybe the first time in a long time, if ever, we were forced into a situation that we just didn’t have neat and clean language around what we were trying to deal with and that tool in how those two -- how those two would be in alignment.

Skinner Dep. at 91:25-92:8, ECF No. 175-1. A jury could not conclude there was any “custom or usage” of allowing officers in the field to determine when and how to employ less-lethal weapons to control crowds in protests because Plaintiffs have produced no evidence that the City had a policy or practice of doing so.

b) Deliberate indifference/failure to train, supervise, or discipline

The City argues that Plaintiffs have presented no evidence to support a failure to train, supervise, or discipline. The Supreme Court has held that “there are limited circumstances in which an allegation of a ‘failure to train’ can be the basis for liability under § 1983.” *City of Canton*, 489 U.S. at 387. In fact, “[a] municipality’s culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train.” *Connick v. Thompson*, 563 U.S. 51, 61 (2011). “The need for more or different training [must be] so obvious, and the inadequacy so

likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. *City of Canton*, 489 U.S. at 390. A municipality’s failure to train is only actionable when it amounts to “deliberate indifference,” which ordinarily requires a pattern of similar constitutional violations. *Connick*, 563 U.S. at 62. As it relates to inadequate policy, a plaintiff must show that the city “was on actual or constructive notice that its omission [in policy] would likely result in a constitutional violation” *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1145 (9th Cir. 2012) (internal quotations and citation omitted).

Plaintiffs rely on *Chew*, the canine use of force case discussed above, in support of a “deliberate indifference” *Monell* theory. But in *Chew*, the Court specifically noted that “the record contains evidence that the dogs bit suspects in over 40% of the instances in which they were used.” 27 F.3d at 1445. Under those facts, the court explained that where “evidence is adduced that those animals inflict injury in a significant percentage of the cases in which they are used, a failure to adopt a departmental policy governing their use, or to implement rules or regulations regarding the constitutional limits of that use, evidences a ‘deliberate indifference to constitutional rights’” and held that a jury could find *Monell* liability. *Id.* Here, the record contains no such facts as to a pattern or practice which could give rise to a *Monell* claim for an inadequate policy governing how officers are trained on the use of less-lethal weapons for crowd control. Plaintiffs have produced no evidence that officers had previously used excessive force in such circumstances.² Without a “pattern of similar constitutional violations,” *Connick*, 563 U.S. at 62, there are no facts from which a jury could find for Plaintiffs on this theory.

² Plaintiffs’ only citations to the record pertain to prior incidents involving Sergeant Solesbee. As an initial matter, a City’s deficiency in training a single officer cannot give rise to municipal liability. *See, e.g. City of Canton*, 489 U.S. at 390–91 (“That a particular officer may be

Plaintiffs also assert a “failure to discipline” theory in opposition to the City’s motion, arguing that evidence of prior complaints against Sergeant Solesbee—and the City’s failure to discipline him—give rise to a question of fact as to whether the City had a pattern of ignoring similar constitutional violations. Plaintiffs rely on past incidents relating to Sergeant Solesbee and the City’s failure to address them, citing *Velazquez v. City of Long Beach*, 793 F.3d 1010 (9th Cir. 2015). In *Velazquez*, the plaintiff was struck eleven times with a police baton by a police officer during his arrest. *Id.* at 1013. In a trial on the plaintiff’s unlawful arrest and excessive force claims, the district court excluded evidence that this same police officer had many other similar complaints preceding the incident with the plaintiff, and then granted the defendant’s Rule 50(a) motion for judgment as a matter of law on the plaintiff’s *Monell* theories. *Id.* at 1016-17. On appeal, the plaintiff argued that prior incidents relating to this police officer were relevant and admissible to show the department’s custom or practice of failing to discipline officers. *Id.* at 1027. In particular, the officer had “30 internal affairs incidents of force since 2007, 19 of them using a baton or flashlight.” *Id.* at 1027. The Court articulated the relevant rule as follows:

“[A] custom or practice can be inferred from ... evidence of repeated constitutional violations for which the errant municipal officers were not discharged or reprimanded.” *Id.* at 1233 (internal quotation marks omitted). Evidence of “identical incident[s]” to that alleged by the plaintiff may establish that a municipality was put on notice of its agents’ unconstitutional actions, *Henry v. Cnty. of Shasta*, 132 F.3d 512, 518–21 (9th Cir.1997), *opinion amended on denial of reh’g*, 137 F.3d 1372 (9th Cir.1998), while general evidence of departmental treatment of complaints and of the use of force can “support[] the [plaintiff’s] theory that ... disciplinary and complaint processes ... contributed to

unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer’s shortcomings may have resulted from factors other than a faulty training program”); *Blankenhorn v. City of Orange*, 485 F.3d 463, 484 (9th Cir. 2007) (“evidence of the failure to train a single officer is insufficient to establish a municipality’s deliberate policy”). In addition, there is no evidence that any of the prior instances involving Sergeant Solesbee pertained to the use of less-lethal weapons in crowd control.

the police excesses complained of because the procedures made clear to [the] officer that ... [he] could get away with anything,” *Larez v. City of L.A.*, 946 F.2d 630, 646–47 (9th Cir.1991).

Velazquez, 793 F.3d at 1027. Applying that rule, the Ninth Circuit held that the district court erroneously excluded prior complaints relevant to the jury’s consideration of whether the city was “aware that [the officer] had previously used excessive force when making arrests, but had taken no steps to curb his propensity.” *Id.* at 1028.

Velazquez is distinguishable from this case because here there is no “general evidence of departmental treatment of complaints” or “identical incidents” that put the City on notice of any officers’ unconstitutional actions in the use of less-lethal weapons as a means of crowd control. Plaintiffs’ evidence of prior incidents involving Sergeant Solesbee cannot establish a genuine issue of material fact on this issue. The sealed portion of Plaintiffs’ submitted record contains deposition excerpts discussing several prior incidents. *See* 2nd Dugan Decl. Ex. E, ECF No. 175-2. But the record contains very little detail about the circumstances of those incidents from which a jury could find that the City was on notice of any unconstitutional actions by Sergeant Solesbee, much less in the context of crowd control. Although at least one of the incidents involved the use of less-lethal weapons, a review of that sealed record shows that the circumstances there were vastly different from those here. By contrast, *Valazquez* noted dozens of incidents of use of force by the officer in question, many of which involved similar circumstances to the one at issue in that case (the use of police batons/flashlights against individuals during the course of arrest). In sum, without any evidence of similar incidents to put the City on notice of Sergeant Solesbee’s alleged propensity to use excessive force in similar circumstances, the City is entitled to summary judgment on Plaintiffs’ inadequate training, supervision, and discipline *Monell* theories.

c) Actions of officials with final policy-making authority

Finally, Plaintiffs' opposition to the City's motion argues that Plaintiffs' excessive use of force *Monell* claim must survive summary judgment based on the third method of establishing municipal liability: where "the individual who committed the constitutional tort was an official with final policy-making authority or such an official ratified a subordinate's unconstitutional decision or action and the basis for it." *Rodriguez*, 891 F.3d 802-03. Plaintiffs argue (1) that Chief Skinner, an individual with final policy-making authority, ratified the actions at issue by approving an internal investigation which found no wrongdoing by Sergeant Solesbee related to the facts in this case; and (2) that Sergeant Solesbee was a final decisionmaker regarding the use of less-lethal weapons. The City argues that Plaintiffs did not plead these theories in their complaint or disclose them during discovery and the Court therefore cannot deny Defendants summary judgment based on these theories.

Where "the complaint does not include the necessary factual allegations to state a claim, raising such claim in a summary judgment motion is insufficient to present the claim to the district court." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1080 (9th Cir. 2008). Plaintiffs at oral argument pointed to ¶ 122 of their Second Amended Complaint as their ratification theory. It provides:

Defendant City of Eugene has failed to properly train its officers, agents, and employees in how to address protests, protestors, mass protests, and has failed to properly train officer's to use an appropriate level of force; and/or has allowed numerous other similar incidents; and/or has a policy or practice of allowing that level of force; and/or has encouraged or acquiesced in this unlawful behavior, and/or tacitly encouraged or acquiesced in it by failing to train, supervise, or discipline their officers, thus evincing deliberate indifference to Plaintiffs' constitutional rights, sufficient to support a verdict that those policies, customs, or practices caused the use of excessive force against Plaintiffs.

Sec. Am. Compl. ¶ 122.

Neither this paragraph, nor any of the others in this Court’s review of the complaint, plead the ratification theory Plaintiffs now assert in opposition to the City’s motion. While the Court agrees that a plaintiff need not use the magic word “ratification,” Plaintiffs’ complaint does not put the City on notice of that theory. To begin with, the subject of the paragraph pertains to Plaintiffs’ inadequate training, supervision, and discipline theory, not a ratification theory. It plainly asserts a “deliberate indifference” theory, which necessarily relates to the City’s treatment of prior incidents rather than ratification of the incident at issue. But even giving Plaintiffs the benefit of the doubt that the reference to “acquiesce[nce]” refers to ratification of any officers’ actions in this case specifically, the facts supporting that theory do not appear in the complaint. “To show ratification, a plaintiff must show that the authorized policymakers approve a subordinate's decision and the basis for it.” *Lytle v. Carl*, 382 F.3d 978, 987 (9th Cir. 2004) (internal quotations and citation omitted). Plaintiffs pleaded no such facts that would put the City on notice of the factual basis of a ratification theory, even if the City understood that such a theory was asserted amid a paragraph focused on a different theory entirely. Because this theory was not pled, it cannot provide a basis to oppose the City’s summary judgment motion against this claim.³

³ Even if Plaintiffs had pled that the City ratified Sergeant Solesbee’s conduct by finding no wrongdoing, case law suggests that fact, standing alone, would be insufficient to go to a jury on a ratification theory. See *Mueller v. Cruz*, 2015 WL 9455565, at *3 (C.D. Cal. Dec. 23, 2015) (“courts in this circuit have stopped short of holding that a plaintiff can prove *Monell* liability simply on the basis of a defendant department’s post-incident ratification through failure to discipline or take other action concerning the officer directly involved”). The case on which Plaintiffs rely, *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991) does not hold to the contrary, as that case involved expert testimony that the officer should in fact have been disciplined and that the city had a policy of inadequate investigation. *Id.* at 635-36. No such facts exist in the record here.

Likewise, Plaintiffs did not allege that Sergeant Solesbee was a final policymaker, nor did that assert that as a theory of *Monell* liability. Even if the theory were adequately pled, Plaintiffs further fail to cite any facts in the record to support it. While Plaintiffs cite portions of Sergeant Solesbee's deposition regarding his experience in the field, none of those citations speak to his authority to enact final policy on behalf of the City. The only evidence in the record on that issue is to the contrary. *See* Solesbee Decl. ¶ 5 ECF No. 135.

In sum, the City is entitled to summary judgment on count two of Plaintiffs' First Claim for Relief for the alleged "unlawful practice or policy allowing indiscriminate force as a tactic to disperse crowds" and its motion should be granted.

B. Plaintiffs' Second Claim for Relief

Plaintiffs' Second Claim for Relief again alleges that the curfews violated Plaintiffs' First and Fourteenth Amendments rights. It applies to the City of Eugene as well as Defendants Medary and Skinner in their individual capacities. Sec. Am. Compl. ¶¶ 126-139. As to the constitutional issues, the same analysis applies here as applied to count one of Plaintiffs' First Claim for Relief. However, because Plaintiffs also assert this claim against Defendants Medary and Skinner, qualified immunity is relevant to whether these defendants are entitled to summary judgment.

Qualified immunity "protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quotation marks and citation omitted). The purpose of qualified immunity is to "strike a balance between the competing 'need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when

they perform their duties reasonably.” *Mattos v. Agarano*, 661 F.3d 433, 440 (9th Cir. 2011) (quoting *Pearson*, 555 U.S. at 231). Qualified immunity “applies regardless of whether the government official’s error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.” *Pearson*, 555 U.S. at 231.

“Determining whether officials are owed qualified immunity involves two inquiries: (1) whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the official's conduct violated a constitutional right; and (2) if so, whether the right was clearly established in light of the specific context of the case.” *Robinson v. York*, 566 F.3d 817, 821 (9th Cir. 2009) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Here, the Court has granted summary judgment in Plaintiffs’ favor finding that the City-Wide Curfew violated Plaintiffs’ First Amendment rights. ECF No. 187. Thus, the first prong of the analysis is satisfied, and the remaining question is whether the right violated was clearly established in light of the specific context of the case.

The Supreme Court has emphasized that the asserted right “must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (brackets and internal quotation marks omitted).

To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be “settled law,” which means it is dictated by “controlling authority” or “a robust ‘consensus of cases of persuasive authority[.]’ ” It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. Otherwise, the rule is not one that “every reasonable official” would know.

District of Columbia v. Wesby, 583 U.S. 48, 63 (2018) (citations omitted). In other words, while qualified immunity does not require “a case directly on point, [] existing precedent must have

placed the statutory or constitutional question beyond debate.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

It has been clearly established since at least 1996 that “the occurrence of limited violence and disorder on one day is not a justification for banning all demonstrations, peaceful and otherwise, on the immediately following day (or for an indefinite period thereafter).” *Collins v. Jordan*, 110 F.3d 1363, 1372 (9th Cir. 1996). In fact, *Collins*—which itself was a qualified immunity case—held that rule was already clearly established when it was decided in 1996, citing cases from the 1960s and 1970s. *Id.* at 1372-73. As explained in this Court’s prior opinion finding the City-Wide Curfew unconstitutional, the facts in *Collins* are substantially similar to those present here. Both cases involve city-wide restrictions on free speech in the wake of largely peaceful demonstrations in prior days which nevertheless had a limited and localized number of violent incidents which the city sought to curtail. *See id.* at 1372. Based on *Collins* and the cases cited therein, it was clearly established at the time of the City-Wide Curfew here that such a curfew violated protestors’ First Amendment rights such that a reasonable person imposing that curfew would know that it was unconstitutional.

Accordingly, Defendants Medary and Chief Skinner should not be entitled to qualified immunity. The City Defendants should be granted summary judgment only to the extent this claim for relief relies on an overbreadth theory (which Plaintiffs have withdrawn) and as applied to the Downtown Curfew (for which Plaintiffs present no argument or evidence in opposition to Defendants’ motion).

C. Plaintiffs’ Third Claim for Relief

Plaintiffs’ Third Claim for Relief alleges retaliation by the City Defendants in violation of Plaintiffs’ First, Fourth, and Fourteenth Amendment rights. Sec. Am. Compl. ¶¶ 140-143.

Plaintiffs allege that Defendants' imposition of the City-Wide Curfew and its enforcement was "substantially motivated by a desire to retaliate against Plaintiffs' exercise of constitutionally protected conduct as well as a desire to retaliate against Plaintiffs[] for the actions of others." *Id.* ¶ 141. The City Defendants contend that because there is no evidence that they knew any of the plaintiffs such that they could be motivated to retaliate against them individually, they are entitled to summary judgment.

In order to prevail on retaliation claim, a plaintiff must show: (1) that they were engaged in a constitutionally protected activity, (2) that the defendants' actions would chill a person of ordinary firmness from continuing to engage in the protected activity; and (3) that the protected activity was a substantial or motivating factor in the defendants' conduct. *Capp v. Cty. of San Diego*, 940 F.3d 1046, 1053 (9th Cir. 2019). As to the third element, a plaintiff may meet it "with either direct or circumstantial evidence, and...it involves questions of fact that normally should be left for trial." *Index Newspapers LLC v. United States Marshals Serv.*, 977 F.3d 817, 827 (9th Cir. 2020) (internal citation omitted).

The City Defendants' summary judgment motion focuses on the third element, arguing that there is no evidence that they knew any of the Plaintiffs or Plaintiffs' alleged protected activity individually, and therefore no evidence that they could have been motivated to retaliate against Plaintiffs. The parties' arguments boil down to the following issue: in the context of an allegedly retaliatory decision to restrict speech, must the officials imposing the restriction be aware of the individual plaintiffs ultimately injured by the restriction, or is evidence supporting a general animus towards individuals engaged in the same type of speech sufficient. A similar issue has come up in the context of several other cases related to protests, recently collected and discussed by the United States District Court, N.D. California in *Johnson v. City of San Jose*,

2022 WL 17583638 (N.D. Cal. Dec. 12, 2022). That case, and the cases collected in it, concern the actions of police officers in response to similar protests in the wake of George Floyd’s killing. *Id.* at *2. In *Johnson*, the plaintiff alleged that an officer fired less-lethal weapons into a crowd of protestors “as a result of his discriminatory views towards the demonstrations and his disagreement with the protest.” *Id.* There, the court’s inquiry into retaliatory intent was not tied to the individual protestor who was injured, but instead at the officer’s animus towards the protestors as a larger group. *Id.* at *5-6. Citing other recent cases involving protests against police brutality and racism, the court noted that “given that the protestors were specifically protesting police misconduct, it is reasonable to allege that the protestors’ viewpoint was a substantial or motivating cause—even if not necessarily the sole cause—behind the defendants’ conduct.” *Id.* at 6.

Although Defendants correctly point out that *Johnson* concerned officers on the ground and not city officials imposing a curfew, they do not provide any rationale for why this court should treat this case any differently on that basis. Defendants cite *Nieves v. Bartlett* as a factually similar case in which a retaliation claim did not survive summary judgment. 139 S. Ct. 1715 (2019). *Nieves* was a retaliatory arrest case involving the arrest of a man at a music festival following an earlier altercation between one of the arresting officers and the plaintiff. *Id.* at 1720. In evaluating the plaintiff’s retaliation claim, the Supreme Court noted that without evidence that the other arresting officer knew of the prior run-in, no evidence supported retaliation. *Id.* at 1728. But *Nieves* does not address a circumstance in which a defendant may have reason to retaliate against a group of which the plaintiff is a part and is therefore not instructive here; it does not suggest that such a scenario can never give rise to a First Amendment retaliation claim.

This case is more analogous to *Johnson* and the cases cited within that opinion. As in those cases, the protests here involved viewpoints related to police misconduct. The curfew was enacted by the City Defendants, who a jury could conclude are implicated by the speech at issue. Plaintiffs are entitled to have a jury evaluate the circumstances present here and determine whether protestors' viewpoints were a substantial or motivating cause behind the City Defendants' decision to impose a City-Wide Curfew, and whether Plaintiffs were among those protestors. Defendants' motion for summary judgment against Plaintiffs' Third Claim for Relief should be denied.

II. Defendants Underwood, Casey, Palki, Stotts, and Rankin's Motion for Summary Judgment.

Defendants Underwood, Casey, Palki, Stotts, and Rankin move for summary judgment as to Plaintiffs' Fifth Claim for Relief—unlawful arrest in violation of the Fourth Amendment—which is the only claim asserted against them. Defendants argue (1) that a reasonable officer could conclude that they had probable cause to arrest the Curfew Plaintiffs, and (2) that the officers are entitled to qualified immunity. Because the Court agrees that these officers are entitled to qualified immunity, it does not address the first issue. See [Romero v. Kitsap Cnty.](#), 931 F.2d 624, 627 (9th Cir. 1991) (“regardless of whether the constitutional violation occurred, the officer should prevail if the right asserted by the plaintiff was not ‘clearly established’ or the officer could have reasonably believed that his particular conduct was lawful”).

As explained in greater detail above, qualified immunity does not attach when the right violated “was clearly established in light of the specific context of the case.” [Robinson](#), 566 F.3d at 821. In opposition to Defendants' motion, Plaintiffs incorporate their reply in support of their own motion for partial summary judgment, which relies on [Collins](#), 110 F.3d 1363, and related

case law to argue that qualified immunity should not attach to the Curfew Defendants.⁴ But those cases pertain to the decision to restrict free speech (*i.e.*, First Amendment freedom of speech claims), not officers relying on an allegedly unconstitutional restriction to arrest individuals in violation of it (Fourth Amendment claims for unlawful arrest). The Supreme Court has explained that the analysis of qualified immunity in the Fourth Amendment context requires the plaintiff to “identify a case where an officer acting under similar circumstances ... was held to have violated the Fourth Amendment.” *Wesby*, 583 U.S. at 64 (quoting *White v. Pauly*, 580 U.S. 73, 79 (2017)). Such an analysis requires the Court to consider “the circumstances with which the officers were confronted.” *Id.* at 64-65.

Plaintiffs’ citations to case law governing the larger issue of the constitutionality of the City-Wide Curfew under the First Amendment are not sufficiently on point to “clearly establish” a violation of Plaintiffs’ Fourth Amendment rights. The Court’s conclusion that the City Defendants are not entitled to qualified immunity for their decision to enact the City-Wide Curfew does not compel the same conclusion with respect to the officers charged with enforcing it. There is no evidence that the officers were privy to the information and rationale underlying the decision of the City Defendants to expand the curfew city-wide. That knowledge and rationale forms the basis of a time, place, and manner analysis of the constitutionality of the City-Wide Curfew. Without that information, the arresting officers could not have known whether the curfew they were enforcing was constitutional and therefore whether enforcing it violated any clearly established rights of the Plaintiffs.

⁴ Although Plaintiff Hendry was arrested for disorderly conduct as well as a curfew violation, Plaintiffs’ briefing presents no case law or analysis as to why the officers should not be entitled to qualified immunity for that as well. Accordingly, the Court finds that the officers are entitled to qualified immunity for their arrest of Plaintiff Hendry for disorderly conduct.

In addition, case law is clear that “when a city council has duly enacted an ordinance, police officers on the street are ordinarily entitled to rely on the assumption that the council members have considered the views of legal counsel and concluded that the ordinance is a valid and constitutional exercise of authority.” *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994). Although that case concerns a city ordinance rather than an administrative order, the Court sees no reason to treat these facts any differently; the order was signed by the City Manager and officers should generally be entitled to assume that the order was constitutional. While the general rule announced in *Grossman* may be overcome if the city authorizes conduct that is “patently violative of fundamental constitutional principles” or “unlawfully enforces an ordinance in a particularly egregious manner,” *id.* at 1209-10, there are no facts to that effect here which would compel a departure from the general rule.

Finally, the fact that this Court has already found that there is a question of fact as to whether the officers had probable cause to arrest Plaintiffs supports qualified immunity. “In analyzing qualified immunity, the question with respect to whether an unlawful arrest violated clearly established law is whether it is *reasonably arguable* that there was probable cause for arrest.” *C.L. by & through Leibel v. Grossman*, 798 F. App'x 1015, 1016 (9th Cir. 2020) (internal quotations and citation omitted). This rule “acknowledges that an otherwise competent officer will sometimes make an unreasonable decision or make an unreasonable mistake as to law or fact.” *Rosenbaum v. Washoe Cnty.*, 663 F.3d 1071, 1078 (9th Cir. 2011). Thus, even if the officers did not have probable cause, they are entitled to qualified immunity unless “all reasonable officers would agree that there was no probable cause in this instance.” *Id.* Here, the Court explained in its prior ruling that there is a genuine issue of material fact as to whether these officers had probable cause to arrest the Curfew Plaintiffs based on the facts presented here. The

existence of a question of fact on this issue necessarily implies that the officers had at least “arguable” probable cause to arrest the Curfew Plaintiffs. The Curfew Defendants are therefore entitled to qualified immunity for this additional reason.

Because the Curfew Defendants are entitled to qualified immunity, the Court should grant summary judgment in their favor against Plaintiffs’ Fifth Claim for Relief.

III. Defendants Solesbee, Wright, and Salsbury’s Motion for Summary Judgment

Defendants Solesbee, Wright, and Salsbury move for summary judgment against Plaintiffs Campbell Club Plaintiffs’ Fourth Claim for Relief for excessive force and deliberate indifference under the Fourth and Fourteenth Amendments. Sec. Am. Compl. ¶¶ 144-149. This claim alleges that the Campbell Club Defendants’ use of less-lethal weapons against Plaintiffs or their property was an unreasonable seizure under the Fourth Amendment and was in conscious disregard of harm that would be inflicted on the Campbell Club Plaintiffs in violation of the Fourteenth Amendment. *Id.*

The Campbell Club Defendants argue that they are entitled to summary judgment because (1) The Campbell Club Plaintiffs lack standing to bring a Section 1983 claim; (2) there was no seizure of the Campbell Club Plaintiffs; (3) there are no facts to support a claim for deliberate indifference; and (4) there is no supervisory liability for Sergeant Salsbury.

1. Standing

Defendants first argue that the Campbell Club Plaintiffs lack standing. For there to be a “case or controversy” that is justiciable under Article III, a plaintiff must establish standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). To satisfy that requirement, a plaintiff must show (1) injury in fact that is “concrete and particularized” and “actual or imminent; (2) that the injury is “fairly traceable to the challenged action of the defendant; and (3) that it is redressable by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S.

167, 181 (2000). Defendants argue that the Campbell Club Plaintiffs suffered no injury and that they therefore lack standing.

The Court finds that there is sufficient evidence in the record to establish that the Campbell Club Plaintiffs were “injured” for Article III purposes and therefore have standing. There is evidence that by virtue of the co-operative ownership agreement they entered into, they were part-owners of the Campbell Club which was damaged by less-lethal munitions. There is also additional evidence of injury to Cochran-Salinas based on the entry of tear gas into the home and irritation to his eyes as a result.

Defendants’ arguments to the contrary rely on the contention that the Campbell Club Plaintiffs are not asserting violations of their own constitutional rights, but those of the individuals the Officer Wright and Sergeant Solesbee were targeting with less-lethal weapons. But that is not the claim Plaintiffs brought; they instead allege that they were themselves seized in violation of the Fourth Amendment and that the officers were deliberately indifferent to harm that would be inflicted on them. Sec. Am. Compl. ¶¶ 144-149. Whether a jury could find such violations is separate question addressed in the following sections, but Defendants’ formulation of the standing question is inaccurate. The Campbell Club Plaintiffs pled that they suffered property damage as a result of Defendants’ actions, and the record supports that they did.⁵ This is sufficient to establish standing.

2. Seizure

When a plaintiff alleges excessive force, the federal right at issue is the Fourth Amendment right against unreasonable seizures. *Tolan v. Cotton*, 572 U.S. 650, 656 (2014). A

⁵ Defendants also argue that Plaintiffs’ position on this issue improperly claims property damages when Plaintiffs have disavowed seeking economic damages. Def.’s Reply 3, ECF 182. This argument conflates the concept of damages with that of injury for standing purposes.

seizure under the Fourth Amendment occurs “when there is a governmental termination of freedom of movement through means intentionally applied.” *Brower v. Cnty. of Inyo*, 489 U.S. 593, 597 (1989). “Accidental force will not qualify.” *Torres v. Madrid*, 141 S. Ct. 989, 998, 209 L. Ed. 2d 190 (2021). Here, the officers testified that they were targeting individuals who they believed were resisting arrest for violating the City-Wide Curfew. Thus, the threshold question presented by the parties’ arguments is whether the officers’ intent to restrain the individuals outside the Campbell Club by use of less-lethal weapons can be transferred to the Campbell Club Plaintiffs.

To argue that it is immaterial whether the Campbell Club Plaintiffs were the intended targets, Plaintiffs rely first on *Brower v. Cnty. of Inyo* in which the Supreme Court explained “[a] seizure occurs even when an unintended person or thing is the object of the detention or taking.” 489 U.S. at 596. But that quote is taken out of context. *Brower* does not involve a bystander, and the case it cites concerns the use force in the context of mistaken identity. See *Hill v. California*, 401 U.S. 797 (1971). Indeed, the Court in *Brower* made the distinction from a bystander clear: “a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual’s freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual’s freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied*.” *Brower*, 489 U.S. at 596-7. Put another way, “an officer’s intentional seizure of the wrong (unintended) suspect is a fact pattern squarely within the Fourth Amendment, ... while an officer’s unintentional injury to an innocent bystander while in pursuit of a suspect is not.” *Edmiston v. City of Port Angeles*, 360 F. Supp. 3d

1147, 1153 (W.D. Wash. 2018) (internal citation omitted). The facts presented here are plainly the latter.

Plaintiffs also rely heavily on *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012). There, the plaintiff was shot by a pepperball projectile while officers were attempting to clear an apartment complex of students attending a large party. *Id.* at 872. The projectile was shot indiscriminately in the direction of the plaintiff and his friends as they were unarmed and attempting to leave the party. *Id.* Because the projectile was not fired at the plaintiff in particular—but rather the group he was in—the Ninth Circuit analyzed whether the officers could be said to have “seized” the plaintiff for Fourth Amendment purposes. *Id.* at 875-76. The court explained that “[r]egardless of whether [the plaintiff] was the specific object of governmental force, he and his fellow students were the undifferentiated objects of shots intentionally fired by the officers in the direction of that group.” *Id.* at 877. In other words, the court found the seizure intentional because the plaintiff was part of a group which the officers intentionally targeted generally with the pepperballs.

The record here is substantially different from the facts present in *Nelson*. The facts in the record here show that the officers were firing at individuals who they believed were unlawfully violating the City-Wide Curfew. The Campbell Club Plaintiffs were not among a targeted group in the same way that the plaintiff in *Nelson* was one of a group the officers were targeting; there is no dispute that the Campbell Club Plaintiffs were not among the individuals who the officers perceived as being in violation of the City-Wide Curfew. They were inside the Campbell Club when Officer Wright and Sergeant Solesbee arrived in pursuit of perceived curfew-violators. Because there is no evidence that the Campbell Club Defendants intended to seize the Campbell

Club Plaintiffs or any group of which they were a part, no reasonable jury could find that they were seized within the meaning of the Fourth Amendment.

3. Deliberate Indifference

Defendants Wright and Solesbee also argue that the Campbell Club Plaintiffs have no substantive due process claim for deliberate indifference under the Fourteenth Amendment because excessive force claims are governed by the Fourth, not the Fourteenth Amendment. Defendants rely on *Graham v. Connor*, in which the Supreme Court held that “all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard, rather than under a ‘substantive due process’ approach.” 490 U.S. 386, 395 (1989). The Ninth Circuit has reiterated that it is “reversible error to give a substantive due process instruction in an excessive force case after *Graham*.” *Ward v. City of San Jose*, 967 F.2d 280, 285 (9th Cir. 1991).

But this is not a Fourth Amendment excessive force case for the reasons explained above. In similar circumstances, where individuals lack a Fourth Amendment excessive force claim, courts have evaluated the merits of a Fourteenth Amendment claim. *See, e.g. Nicholson v. City of Los Angeles*, 935 F.3d 685, 695 (9th Cir. 2019) (evaluating the claim of a bystander struck by a police bullet under the Fourteenth Amendment and noting that any Fourth Amendment excessive force claim was personal to the individual the police were targeting). Accordingly, the rule announced in *Graham* does not apply in this circumstance; the fact that Plaintiffs also alleged a Fourth Amendment excessive force claim arising out of the same facts does not preclude them from also asserting a Fourteenth Amendment claim, particularly where the Court has already found there is no evidence to support a Fourth Amendment seizure.

However, setting aside whether there is a question of fact for the jury on the merits of this claim, Defendants are entitled to qualified immunity. No reasonable officer would know based on the clearly established law at the time that firing pepperballs at a fleeing suspect violates *bystanders'* Fourteenth Amendment rights. Plaintiffs have cited no similar cases on this issue. *Nelson*, the sole case cited by Plaintiffs in response to Defendants' qualified immunity arguments, does not involve a Fourteenth Amendment claim and—as already explained earlier in this opinion—does not involve similar facts. In fact, even in the context a bystander struck by bullets from a deadly weapon, the Ninth Circuit has held that there is no clearly established law on whether the accidental shooting of a bystander violates the Fourteenth Amendment. *Nicholson*, 935 F.3d at 695. If no reasonable officer in that circumstance would understand their actions to violate a bystander's rights, then neither would any officer here, where the danger to bystanders was significantly less.

Accordingly, the Campbell Club Defendants are entitled to qualified immunity as to Plaintiffs' deliberate indifference claim. Because there are no facts from which a jury could conclude the Campbell Club Plaintiffs were “seized” for purposes of their Fourth Amendment claim, and because the officers are entitled to qualified immunity as to Plaintiffs' Fourteenth Amendment claims, the Court should grant the Campbell Club Defendants' motion for summary judgment against Plaintiffs' Fourth Claim for Relief.

4. Liability of Defendant Salsbury

Lieutenant Salsbury also moves for summary judgment on Plaintiffs' Fourth and Fifth Claims for Relief, which are based on his position as the supervisor of the Curfew Defendants and Campbell Club Defendants. Although there is no vicarious liability under Section 1983, supervisory officials may be liable “if there exists either (1) his or her personal involvement in

CONCLUSION

For the reasons above:

- Defendants City of Eugene, Medary, and Skinner’s Motion for Summary Judgment (ECF No. 147) should be DENIED in part and GRANTED in part as set forth above.
- Defendants Underwood, Casey, Palki, Stotts, and Rankin’s Motion for Summary Judgment (ECF No. 137) should be GRANTED; and
- Defendants Solesbee, Wright, and Salsbury’s Motion for Summary Judgment (ECF No. 132) should be GRANTED.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to [Federal Rule of Appellate Procedure 4\(a\)\(1\)](#) should not be filed until entry of the district court’s judgment or appealable order. The Findings and Recommendation will be referred to a district judge. Objections to this Findings and Recommendation, if any, are due fourteen (14) days from today’s date. *See Fed. R. Civ. P. 72.* Failure to file objections within the specified time may waive the right to appeal the district court’s order. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991).

DATED this 8th day of September 2023.

s/ Mustafa T. Kasubhai
MUSTAFA T. KASUBHAI (He / Him)
United States Magistrate Judge