

***-“Both Spectacular and Unremarkable”***

**Letter of Allegation regarding the Excessive Use of Force and Discrimination by the  
Philadelphia Police Department in response to Black Lives Matter protests  
in May and June of 2020**



**Prepared and submitted by the Andy and Gwen Stern Community Lawyering Clinic of the Drexel University Thomas R. Kline School of Law and the American Civil Liberties Union of Pennsylvania as a Joint Submission to the UN Special Rapporteur on extrajudicial, summary or arbitrary executions.**

**Much of the credit for this submission belongs to the volunteers who spent countless hours investigating and documenting the events recounted here, as well as interviewing witnesses and victims, editing, and repeatedly verifying the accuracy of this submission. We thank Cal Barnett-Mayotte, Jeremy Gradwohl, Connor Hayes, Tue Ho, Bren Jeffries, Ryan Nasino, Juan Palacio Moreno, Lena Popkin, Katie Princivalle, Caitlin Rooney, Abbie Starker, Ceara Thacker, and William Walker.**

**Cc:**

**Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance**

**Special Rapporteur on Rights to Freedom of Peaceful Assembly and of Association**

**Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment**

**Working Group of Experts on People of African Descent**

## **EXECUTIVE SUMMARY**

The tragic killings of George Floyd in Minneapolis and Breonna Taylor in Louisville, and the ongoing and disproportionate killings of Black and Brown people by law enforcement throughout the United States, have sparked demonstrations against police brutality and racism in all fifty states – and around the world. Given Philadelphia’s own history of racially discriminatory policing, it was expected and appropriate that such protests would happen here as well.

In response to the protests for Black lives and against police violence that began on May 30, 2020, in Philadelphia, the Philadelphia Police Department (“PPD”) brought to bear overwhelming, racially-targeted, and excessive force to discourage these protesters from exercising their constitutional and human rights. The PPD used force indiscriminately against protesters, legal observers, journalists, medical personnel, bystanders, and even residents in their homes.

At the same time, the PPD empowered white groups, who were often armed with bats, clubs, and even military-style automatic weapons, to take over streets and parks, make threats of violence, and even assault protesters for Black lives. The PPD went so far as to forcibly disperse anti-racism protesters instead of dispersing the white groups that threatened violence against them.

The purpose and effect of these practices has been to intimidate, deter, and punish protesters for Black lives from exercising their human and constitutional rights to peaceably assemble, exercise freedom of expression, exercise freedom of the press, and petition for redress of grievances.

This submission provides a summary of PPD’s violations of human rights in May and June of 2020, as told by some of the victims of those police actions, as well members of the press and public who documented and publicized the police’s response to protests. **We thank those victims who bravely spoke of their experiences and their fears, and who have stepped forward to be named in this submission:**

**52<sup>nd</sup> Street**

*Stephanie Bonham*

*Anthony James*

*Amelia Carter*

*Amy Muehlmatt*

*Sergio Cea*

*Emily Neil*

*Christina Garcés*

*Johana Rahman*

*Audrey Hausig*

*Marquis Ransom*

*Daniel Hawkins*

*Michelle Rifken*

*Kitty Heite*

*Anthony Smith*

*Elaine Holton*

*Pascale Vallee*

*Cora Isom*

*Judith Max Palmer*

**Highway 676**

*Connor X*

*George MacLeod*

*Christopher Bauer*

*Benjamin Peifer*

*Christopher Cannito*

*Chris Romano*

*Eric Lesko*

*Kelsey Romano*

*Annie Liontas*

*Elsa Wefes-Potter*

*A.K.*

*Sandeep Singh*

**Fishtown**

***Jaime Alvarez***

**Marconi Plaza**

***Tue Ho***

***David Pashley***

While the events themselves are shocking, it is impossible to fully grasp their impact on Black residents and activists from Philadelphia without understanding the historical relationship between the PPD and Black residents and activists. Indeed, more than one of the victims we interviewed cited that history in describing the terror they felt when confronted by police in riot gear and armored vehicles, who indiscriminately used chemical weapons and brute force against protesters, residents, and onlookers alike. Many Black residents of Philadelphia remember too well the violence and racism unleashed by the PPD under Frank Rizzo, who served as Police Commissioner and then Mayor in the 1960s and 70s. Many also remember the notorious day in 1985 when the city bombed a Black neighborhood not far from some of the most extreme violence perpetrated by the PPD on May 31, 2020. That history—and the ongoing violence and over-policing by the PPD in Black neighborhoods—inspired one victim from West Philadelphia on May 31 to describe the police’s violence that day as “both spectacular and unremarkable.”<sup>1</sup> The brutal violence that was unleashed by police that day is tragically congruent with what West Philadelphians have come to expect from police based on the frequent police violence they have experienced for so many years.

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<sup>1</sup> Interview with Daniel Hawkins (July 21, 2020).

The PPD's actions in May and June of 2020 violate the human rights conventions and norms that the United States claims to defend. As is described below, victims charge that:

1. The City violated the Victims' Right to Peaceful Assembly and Freedom of Expression.
2. The PPD used Excessive Force in Violation of International Law.
3. The PPD's Policies on the Use of Force do not Comply with Human Rights Standards.
4. The City's Accountability Procedures for the PPD are Woefully Inadequate and Out of Line with Human Rights Standards.

This report proposes remedies and reparations based upon victims' vision for what true accountability, justice, and repair should be. We include a proposed set of questions that seek clarity regarding how the City is planning to investigate and address these events.

We need to make one thing clear at the outset: the events we report were not the result of rogue officers. While there were officers who made headlines because of especially violent conduct, the responsibility for these events belongs to City leadership. After each instance of police violence described in this submission, Philadelphia's leadership defended the actions of police until confronted with video evidence from journalists and residents that disproved the police claims of protester violence. The most notable—but far from only—example of this was the City's insistence, until the New York Times released its video exposé of the incident, that the extraordinary assault of June 1, 2020, on protesters on Interstate 676 was sparked by protester violence. Similarly, after each report of PPD tolerance for armed and violent white mobs, City officials decried vigilantism and vowed that police officers would be disciplined—but no such accountability ever followed. The same pattern of police

support for and protection of white mobs repeated across the days and across the City, from the Target in South Philadelphia, to Fishtown and Port Richmond, to Marconi Plaza.

Philadelphia's leadership has made it clear that they will not, in this instance, lead. This submission and demand for redress are necessary because the City has failed to discipline all but one officer who used excessive force, lied about their reasons for doing so, and courted private violence against protesters. Nor has the City apologized or offered redress for the harms experienced by the residents of West Philadelphia and other victims. In light of the City's obfuscation, inaction, and history, the victims named here hold out no hope that City officials will, of their own accord, take the steps required to begin to build trust and safety for them.

**We name as perpetrators the policymakers whose disregard for the lives and rights of all Philadelphians led to these events:**

- **Major James F. Kenney**
- **Former Managing Director Brian Abernathy**
- **Police Commissioner Danielle Outlaw**
- **Deputy Police Commissioner Dennis Wilson.**

The violence perpetrated by the PPD in May and June has had lasting impacts on residents, who are living with the effects of physical harm and emotional trauma.<sup>2</sup> The events

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<sup>2</sup> Aubrey Whelan et al., *Besieged, then Betrayed*, PHILA. INQUIRER (July 17, 2020) [hereinafter Whelan et al., *Besieged*], <https://www.inquirer.com/crime/a/west-philadelphia-52nd-street-protest-police-response-tear-gas-20200717.html> ("The trauma on 52nd Street didn't end on the 31st — it began. Neighbors described waking up crying in the days that followed. They rubbed at bruises and welts from rubber bullets that wouldn't fade. They lived in rented hotel rooms because their homes still reeked of gas. One woman on Locust Street has not left her house since that night. Parents have had to explain to children why their house had filled with gas that made their eyes and lungs burn, leaving a sickeningly sour smell on their furniture and clothes.").

inverted the role of residents and the police. Philadelphians put themselves in harm's way to protect neighbors, friends, and complete strangers from violence by police. Despite the danger presented by police presence, many continued to assert their right to assemble and protest. One victim from West Philadelphia plainly stated, "residents were playing the role that we're told police are supposed to play: protecting and serving in the name of public safety and peace. Which begs the question, why are the police there, and why do they have rifles?"<sup>3</sup> The PPD and City leadership must be held accountable for actions and omissions.

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<sup>3</sup> Interview with Hawkins, *supra* note 1.

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## **I. Factual Background**

### **A. Context: The Murder of George Floyd and Nationwide Protests**

On May 25, 2020, George Floyd was killed by the police in Minneapolis, Minnesota.<sup>4</sup> Mr. Floyd, a Black man, was accused of a nonviolent offense.<sup>5</sup> During his arrest, Mr. Floyd fell to the ground, where the police handcuffed and restrained him.<sup>6</sup> Minutes later, for no discernible reason, a police officer placed his knee—and the full weight of his body—on Mr. Floyd’s neck as he lay pinned to the ground.<sup>7</sup>

For nearly nine excruciating minutes, the officer kept his knee pressed into Mr. Floyd’s neck as Mr. Floyd struggled to breathe and pleaded for both mercy and his mother.<sup>8</sup> Rather than intervene, three other officers held Mr. Floyd’s legs or stood by watching the officer take Mr. Floyd’s life.<sup>9</sup> Among Mr. Floyd’s last words were, “please, please, please, I can’t breathe.”<sup>10</sup> The officer knelt on Mr. Floyd’s neck for minutes after he became unresponsive.<sup>11</sup> Mr. Floyd died at the scene, a victim of unconscionable police brutality.<sup>12</sup>

Mr. Floyd was far from the first victim of such force. His final words echo those spoken by Eric Garner in 2014, before Mr. Garner died at the hands of a New York police officer who

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<sup>4</sup> Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES, <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> (last updated Aug. 13, 2020).

<sup>5</sup> *Id.*

<sup>6</sup> *What We Know About the Death of George Floyd in Minneapolis*, N.Y. TIMES, <https://www.nytimes.com/article/george-floyd.html> (last updated Nov. 5, 2020).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

put him in a chokehold during an arrest for a nonviolent offense: “I can’t breathe.”<sup>13</sup> Like Mr. Floyd, Mr. Garner was asphyxiated while police officers at the scene watched him die.<sup>14</sup>

In March of 2020, Breonna Taylor, a Black woman, was shot five times and killed by three plain-clothed Louisville police officers who entered her home in the middle of the night to execute a no-knock warrant.<sup>15</sup> The incident resulted in charges against one officer whose conduct endangered other residents of the apartment complex, but no charges against the officers who shot and killed Ms. Taylor.<sup>16</sup>

On October 26, 2020, the PPD fatally shot Walter Wallace Jr., who was having a mental health crisis and wielding a knife, fourteen times in front of his mother, who was trying to de-escalate the situation. Mr. Wallace had long suffered from mental health issues and police had been called to the Wallace home on multiple occasions.<sup>17</sup>

In response to the tragic killings of George Floyd, Breonna Taylor, Walter Wallace Jr., and many others and to law enforcement’s ongoing and disproportionate violence against Black and Brown people, protesters have gathered across the country, and around the world, to demand an end to racialized violence.<sup>18</sup> Throughout Pennsylvania, people have assembled

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<sup>13</sup> *Id.*; Mike Baker et al., *Three Words. 70 Cases. The Tragic History of ‘I Can’t Breathe.’*, N.Y. TIMES (June 29, 2020), <https://www.nytimes.com/interactive/2020/06/28/us/i-cant-breathe-police-arrest.html>.

<sup>14</sup> Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html>.

<sup>15</sup> Richard A. Opiel et al., *Here’s What You Need to Know About Breonna Taylor’s Death*, N.Y. TIMES (Sept. 15, 2020), <https://www.nytimes.com/article/breonna-taylor-police.html>.

<sup>16</sup> *Id.*

<sup>17</sup> Chris Palmer et al., *‘Shoot Him,’ Officer Said Before Firing at Walter Wallace Jr., Lawyer Says Bodycam Footage Shows*, PHILA. INQUIRER (Oct. 29, 2020, 4:28 PM), <https://www.inquirer.com/news/walter-wallace-jr-philadelphia-police-shooting-body-worn-camera-video-20201029.html>.

<sup>18</sup> *Black Lives Matter Protests 2020*, CREOSOTE MAPS, <https://www.creosotemaps.com/blm2020/> (last updated Nov. 18, 2020) (mapping “4,446 cities or towns with protests worldwide since May 25, 2020”); *Mapping Black Lives Matter Protests Around the World*, WBUR (June 22, 2020), <https://www.wbur.org/hereandnow/2020/06/22/mapping-black-lives-matter-protests>.

in large numbers to protest police brutality, racism, and racial inequality. Philadelphians have been no exception.

## **B. PPD Response to Protests in Philadelphia**

### *1. May 30 in Center City Philadelphia*

In Philadelphia, protests in response to the death of George Floyd began Saturday, May 30, 2020.<sup>19</sup> It was reported that on May 29, in anticipation of the protests planned for May 30, PPD leaders discussed implementing a comprehensive plan that involved deploying as many as 250 police officers on bikes and on foot.<sup>20</sup> Deputy Commissioner Wilson declined to follow that approach, which the Philadelphia Police had used when large-scale protests were planned in the city for nearly a decade, and instead opted for minimal staffing.<sup>21</sup>

On the afternoon of May 30, approximately 3,000 peaceful protesters gathered outside the Philadelphia Museum of Art<sup>22</sup> to protest George Floyd's murder and systemic police brutality.<sup>23</sup> At around 2:30 p.m., protesters began to walk from the Art Museum to City Hall.<sup>24</sup> Among the largely peaceful crowd were some individuals who spray-painted

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<sup>19</sup> Chase Sutton et al., *Thousands of Activists March Through Philadelphia Protesting Police Murder of George Floyd*, DAILY PENNSYLVANIAN (May 30, 2020, 3:53 PM), <https://www.thedp.com/article/2020/05/george-floyd-philadelphia-protest-police-brutality>.

<sup>20</sup> David Gambacorta et al., *'Sir, It's Chaos!': Critical Mistakes Doomed the Police Response to Philly's George Floyd Demonstrations*, PHILA. INQUIRER (June 12, 2020), <https://www.inquirer.com/news/philadelphia/a/philadelphia-police-overwhelmed-protests-city-leaders-george-floyd-20200611.html>.

<sup>21</sup> *Id.*

<sup>22</sup> Phila. Office of Emergency Mgmt. (@PhilaOEM), TWITTER (May 30, 2020, 8:14 PM), <https://twitter.com/PhilaOEM/status/1266885618572898305>.

<sup>23</sup> Caroline Cunningham, *Photos: Peaceful George Floyd Protests in Philadelphia Turn Violent*, PHILA. MAG. (May 31, 2020, 9:54 AM), <https://www.phillymag.com/news/2020/05/31/george-floyd-protests-philadelphia/>.

<sup>24</sup> Sean Collins Walsh, *Activist Contrasts Minneapolis Demonstrations with Philly MOVE Bombing*, PHILA. INQUIRER (May 30, 2020, 2:42 PM), <https://www.inquirer.com/news/philadelphia/live/george-floyd-protest-philadelphia-minneapolis-police-20200530.html>.

buildings or damaged police cars.<sup>25</sup> In response, the PPD deployed officers in riot gear, armed with batons and rubber bullets.<sup>26</sup> Through the afternoon and evening, protesters and police clashed around the statue of former Philadelphia Mayor Frank Rizzo, which stood on the steps of the Municipal Services Building.<sup>27</sup> There was also a standoff between protesters and police outside City Hall.<sup>28</sup> Protesters converged around an armored vehicle that the police drove through the protest.<sup>29</sup> During the evening and into the night, break-ins to commercial buildings and fires were reported throughout Center City.<sup>30</sup> At 7:05 p.m., Mayor Jim Kenney issued a citywide curfew, effective at 8 p.m. that day, lasting until 6 a.m. on May 31.<sup>31</sup> In doing so, however, he and other City officials attributed the destruction to “outside agitators,” not the non-violent protesters from earlier in the day.<sup>32</sup>

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<sup>25</sup> Oona Goodin-Smith & Anna Orso, *Demonstrators Spray Paint Buildings, Vandalize Police Vehicles as Police Guard Rizzo Statue*, PHILA. INQUIRER (May 30, 2020, 3:30 PM), <https://www.inquirer.com/news/philadelphia/live/george-floyd-protest-philadelphia-minneapolis-police-20200530.html>.

<sup>26</sup> Anna Orso et al., *Police Car Set on Fire at Broad and Vine as Tensions Rise*, PHILA. INQUIRER (May 30, 2020, 3:46 PM), <https://www.inquirer.com/news/philadelphia/live/george-floyd-protest-philadelphia-minneapolis-police-20200530.html>.

<sup>27</sup> Aubrey Whelan & Laura McCrystal, *Protesters Gather Around Rizzo Statue: ‘Tear It Down!’*, PHILA. INQUIRER (May 30, 2020, 4:52 PM), <https://www.inquirer.com/news/philadelphia/live/george-floyd-protest-philadelphia-minneapolis-police-20200530.html>. See also *infra* Section I.D for a discussion of PPD’s violence toward and the repression of Black Philadelphians when Frank Rizzo was Mayor and Police Commissioner.

<sup>28</sup> Sean Collins Walsh & Aubrey Whelan, *Police Have Moved Protesters Away from City Hall*, PHILA. INQUIRER (May 30, 2020, 6:37 PM), <https://www.inquirer.com/news/philadelphia/live/george-floyd-protest-philadelphia-minneapolis-police-20200530.html>.

<sup>29</sup> Jeremy Roebuck, *Demonstrators Target Armored Police Vehicle near City Hall*, PHILA. INQUIRER (May 30, 2020, 5:13 PM), <https://www.inquirer.com/news/philadelphia/live/george-floyd-protest-philadelphia-minneapolis-police-20200530.html>.

<sup>30</sup> *Massive Looting in Center City Drowning out Message from Peaceful George Floyd Protesters*, CBS PHILLY (May 30, 2020, 11:30 PM), <https://philadelphia.cbslocal.com/2020/05/30/massive-looting-center-city-drowning-out-message-peaceful-george-floyd-protesters-dilworth-park-starbucks-fire/>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

## 2. *The Events of May 31: A Tale of Two Neighborhoods*

### a) On May 31, a Majority Black West Philadelphia Neighborhood Suffers Extreme Police Violence

On Sunday morning, May 31, newspapers throughout the city displayed images of violence and property damage.<sup>33</sup> Many media outlets portrayed protesters broadly as “looters,” choosing to focus on property destruction rather than the injustices at the heart of protesters’ rallying cry.<sup>34</sup> The extent of Saturday’s physical damage occurred in the commercial zones of Center City – which is surrounded by mostly white residential neighborhoods. On Sunday, however, the PPD focused its most of its attention (and force) on a Black neighborhood in West Philadelphia, where little to no damage had occurred in the days prior.<sup>35</sup>

The morning of May 31, West Philadelphia was peaceful and unremarkable. After the City-wide curfew was lifted, many neighbors were out enjoying the warm spring morning, congregating in local parks, and going about business as usual.<sup>36</sup> There were families gathering on porches, children playing outside, and neighbors hosting barbecues and birthday parties.<sup>37</sup> Others were shopping at the commercial corridor at 52nd Street, known

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<sup>33</sup> Rudy Chinchilla & David Chang, *Looting, Violence Drown Out Peaceful Protests in Philadelphia*, <https://www.nbcphiladelphia.com/news/local/after-violent-protests-philadelphia-wakes-up-a-city-in-tatters/2414067/> (last updated June 1, 2020).

<sup>34</sup> *Id.*

<sup>35</sup> Whelan et al., *Besieged*, *supra* note 2 (embedded video) (describing “the residential neighborhoods on either side of 52nd Street”).

<sup>36</sup> Interview with Johana Rahman (July 7, 2020); *see also* Anne Berg, *The Tear Gassing of West Philly—A History Told in Police Dispatches*, WHYY (July 30, 2020), <https://whyy.org/articles/the-tear-gassing-of-west-philly-a-history-told-in-police-dispatches/>.

<sup>37</sup> Interview with Michelle Rifken (July 9, 2020).

by many as “West Philadelphia Main Street”<sup>38</sup> or simply as “the Strip,”<sup>39</sup> which is home to many Black-owned businesses and surrounded by residential neighborhoods.<sup>40</sup>

Shortly after 2:00 p.m., the police began to talk about “taking 52nd and Market.”<sup>41</sup> Groups of police began gathering at the 52nd Street commercial corridor as early as 2:15 p.m.<sup>42</sup> Starting at 2:45 p.m., the dispatch began calling “all available units” to 52nd and Market.<sup>43</sup> Shortly thereafter, the police descended upon 52nd Street.<sup>44</sup> At the time, it wasn’t clear to witnesses why the police were “assembling an army on empty streets” and a small group of community members gathered, trying to figure out what the police were doing there.<sup>45</sup>

At around 2:00 p.m., a group of had police gathered under the Elevated train line (the “El”) at the intersection of 52nd and Market Streets.<sup>46</sup> This is the site of a major transit hub

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<sup>38</sup> Laura Benshoff & Darryl C. Murphy, *Return to Main Street: Historic West Philly Corridor Fights to Keep Its Identity*, WHYY (June 17, 2020), <https://whyy.org/articles/return-to-main-street-historic-west-philly-corridor-fights-to-keep-its-identity/>; Jamie Gauthier, *Statement on 52nd Street Protests—May 31, 2020*, MEDIUM (May 31, 2020), <https://medium.com/@councilmemberjg/statement-on-52nd-street-protests-may-31-2020-70bc3289f4c8> (“The 3rd District is a vibrant community, and 52nd Street is at its heart. It is tragic to see our own small businesses—the lifeblood of this neighborhood—being destroyed.”).

<sup>39</sup> Gauthier, *supra* note 38.

<sup>40</sup> Benshoff & Murphy, *supra* note 38; Theresa Stigale, *The Skinny—and Everything More—on 52nd Street*, HIDDEN CITY PHILA. (April 25, 2012), <https://hiddencityphila.org/2012/04/the-skinny-and-everything-more-on-52nd-street/>; see also *OpenMaps*, CITY OF PHILA., <https://openmaps.phila.gov/> (select “Zoning Base Districts” under “Filters”) (last visited Nov. 16, 2020) (showing zoning across Philadelphia, data provided by Department of Planning and Development); Whelan et al., *Besieged*, *supra* note 2 (describing “the residential neighborhoods on either side of 52nd Street”).

<sup>41</sup> Interview with Rifken, *supra* note 37.

<sup>42</sup> *Id.*

<sup>43</sup> Berg, *supra* note 36.

<sup>44</sup> Interview with Amy Muehlmann (July 10, 2020).

<sup>45</sup> Interview with Rifkin, *supra* note 37; Interview with Muehlmann, *supra* note 44.

<sup>46</sup> Berg, *supra* note 36; Interview with Rifken, *supra* note 37.

and one or two police cars are normally stationed at this intersection.<sup>47</sup> However, on that day, numerous cars arrived at the intersection.<sup>48</sup>

The position under the El meant that the police were hidden from aerial view, and their actions were not detectable. A group of 30 children and adolescents from the community, around 16-years-old and under, assembled not far from where the police were lined up, curious and angry about the police's presence.<sup>49</sup> The police were in SWAT gear, including body armor, helmets and shields.<sup>50</sup> The children yelled and occasionally threw half-full water bottles, stones, and pieces of brick at the vehicles and police officers.<sup>51</sup> In response, the police did not tell the children to disperse, or give any direction, but instead threw the water bottles and debris back at them many times.<sup>52</sup> The police also used flashbangs under the metal train line creating deafening and threatening sounds.<sup>53</sup> At one point, an officer threw a piece of cement at the children and it struck a nine year old girl.<sup>54</sup>

Witnessing this and hoping to protect the children, one victim, Michelle Rifken, a 41-year-old white woman, approached the police to plead with them to move away from the intersection at 52nd and Market in an attempt to diffuse the situation.<sup>55</sup> When the line of officers finally began to back away from the intersection, Ms. Rifken approached to praise them for de-escalating. Suddenly, a uniformed officer ran from the street onto the sidewalk

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<sup>47</sup> Interview with Rifken, *supra* note 37.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

toward her yelling at her to back up. While she raised her hands up in the air and repeatedly asked which way to go, he charged her, forcing her against the wall of a building.<sup>56</sup> Even though Ms. Rifken was against a wall, and her hands were up, he continued to scream for her to “back up!” and then pepper sprayed her directly in the face--three full sprays from about half a foot away. Once Ms. Rifken was able to see, she attempted to get information and help from other officers, they mocked and threatened her.<sup>57</sup> After the attack Ms. Rifken went to run away and saw a huge armored military tank approaching.<sup>58</sup>

Meanwhile, as the officers targeted the group of children, some people damaged abandoned police vehicles north of the subway line near Arch Street.<sup>59</sup> The police did nothing to stop this and instead chose to continue to antagonize and assault a small group of children under the cover of the subway tracks.<sup>60</sup> The police also did not respond to the property theft and vandalism on 49th Street at Forman Mills or at Parkside Plaza.<sup>61</sup> The police that lined up south of the El stop on 52nd and Market were armed with billy clubs and dressed in full SWAT gear, as if prepared for a riot.<sup>62</sup> In addition, police vehicles from the

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.* Officers stationed on 52<sup>nd</sup> and Market were verbally antagonistic and some allegedly used racial slurs to refer to community members. See Testimony of Bedjy Jeanty, available at <https://youtu.be/4cIwsgqnRuc>

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Cherri Gregg (@cherrigregg), TWITTER (May 31, 2020, 5:23 PM), <https://twitter.com/cherrigregg/status/1267205169332334592>.

<sup>62</sup> Whelan et al., *Besieged*, *supra* note 2 (“SWAT members view their duty as protecting police officers, sources said, and cops on the street Sunday looked at the military-style vehicles’ arrival as cavalry coming to rescue them. . . . Onika Carrine [, a native of West Philadelphia, said] . . . [t]he first thing she saw when she arrived on Arch Street was the armored SWAT car and officers in riot gear. When an officer in the SWAT car fired tear gas at her, she turned and fled. As she ran, she thought: *Children live here.*”) (emphasis added); @BooneNotBoom, TWITTER (May 21, 2020, 6:22 PM), <https://twitter.com/BooneNotBoom/status/1267219857642225668> (“PPD SWAT vehicles began shooting tear gas and pepper spray onto crowded residential street, one block before 52nd and Arch St where looters were engaging police #phillyprotest #westphilly[.]”).

University of the Sciences and the University of Pennsylvania were parked along 52nd Street.<sup>63</sup>

Around this time, community activists also began receiving requests for support from neighbors and seeing posts on social media describing the growing police presence.<sup>64</sup> In response, many residents and activists went to the Strip worried about what might ensue.<sup>65</sup>

Suddenly, at 4:03 p.m., an explosion occurred at 52nd and Market Streets and smoke wafted over the elevated subway line.<sup>66</sup> Within 10 minutes, a helicopter appeared, and a crowd gathered to see what was happening.<sup>67</sup> In the crowd of approximately 150 people, most were shoppers or pedestrians who had unexpectedly walked into the situation.<sup>68</sup> Two blocks south on 52nd Street between Sansom and Walnut Streets, another small group of young men tried to break into SunRay Pharmacy and King's Men & Women apparel store.<sup>69</sup> A helicopter siren blared, and police began indiscriminately shooting rubber bullets and tear gas into the businesses and into the crowd gathered there too.<sup>70</sup> People ran from the gas, screaming, as a whitish gray fog visibly drifted east.<sup>71</sup> A group of only about 10 to 15 people were actively going into the stores and taking merchandise, while the vast majority of the

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<sup>63</sup> Aubrey Whelan & Oona Goodin-Smith, *Penn. Drexel Officers' Presence on 52nd Street Renews Calls to Defund Campus Police*, PHILA. INQUIRER (Aug. 3, 2020), <https://www.inquirer.com/news/university-pennsylvania-drexel-police-west-philadelphia-52nd-street-protest-20200803.html> ("A mile away from their usual patrol areas, some in black tactical gear, some carrying shields, campus police officers from the University of Pennsylvania and Drexel University assisted Philadelphia officers amid unrest and protests against police brutality, photos and video show.").

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*; Interview with Rifken, *supra* note 37.

<sup>66</sup> Interview with Amelia Carter (July 10, 2020).

<sup>67</sup> Chuck McDade (@Squared6abc), TWITTER (May 31, 2020, 4:32 PM), <https://twitter.com/Squared6abc/status/1267192319406735361>.

<sup>68</sup> Interview with Carter, *supra* note 66.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Maddie Hanna (@maddiehanna), TWITTER (May 31, 2020, 6:44 PM), <https://twitter.com/maddiehanna/status/1267225582099668992>.

crowd was outside, watching with concern.<sup>72</sup> Some people also tried to surround and protect the Black-owned businesses in the area.<sup>73</sup> The police presence was overwhelming to observers who did not see anything that could possibly justify a police presence of this scale.<sup>74</sup> One victim explained, “I never felt like I was going to be attacked by anyone. The looters didn’t feel threatening. The police only agitated more. Neighborhood members holding down some of the local Black-owned businesses w[ere] the only thing that helped calm people and prevent the situation from escalating further.”<sup>75</sup>

At 4:40 p.m., the PPD officially gave the “green light” to use tear gas and the police on and near 52nd Street began shooting excessive amounts of tear gas and rubber bullets, causing a stampede.<sup>76</sup> Over the course of the next hour, tanks drove up and down 52nd Street multiple times deploying smoke bombs, tear gas, and rubber bullets indiscriminately along the way.<sup>77</sup> One victim, Amy Muehlmatt, estimates that there were 10 to 12 waves of attacks by the police.<sup>78</sup> According to those present, PPD did not issue any warning before

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<sup>72</sup> Interview with Carter, *supra* note 66.

<sup>73</sup> Whelan et al., *Besieged*, *supra* note 2 (“Neighbors tried to stop people from throwing rocks or breaking into stores, and banded together to guard Black-owned businesses — and one another. Carter and her housemates lined up to protect a local bookstore. Another group stood outside the African Cultural Art Forum, a longtime neighborhood institution.”).

<sup>74</sup> Interview with Rifken, *supra* note 37.

<sup>75</sup> Interview with Carter, *supra* note 66; *see also* Whelan et al., *Besieged*, *supra* note 2 (“To Carter, it felt as if police had decided to be at war with residents.”).

<sup>76</sup> Interview with Carter, *supra* note 66; *see also* Jeff Gammage et al., *Philadelphia Convulses as Protests and Looting Continue*, PHILA. INQUIRER (June 1, 2020), <https://www.inquirer.com/news/philadelphia-protests-floyd-burning-cars-businesses-arrests-police--20200531.html>; Whelan et al., *Besieged*, *supra* note 2 (“At 4:40 p.m., an officer asked over police radio for ‘approval for a chemical dispersal of 52nd Street, just one block north of Market.’ A supervisor replied: ‘You’ve got the green light for that. Give me a minute to move the police out of the way because the wind’s blowing back.’”).

<sup>77</sup> Whelan et al., *Besieged*, *supra* note 2 (“Police shot rubber bullets at a group of young men breaking into the Sunray drugstore, Carter said, causing a stampede.”).

<sup>78</sup> Interview with Muehlmatt, *supra* note 44.

indiscriminately deploying tear gas and rubber bullets. They did not provide an explanation. They did not order people to disperse.<sup>79</sup> The police simply attacked.<sup>80</sup>

Onlookers report that there was a mix of people there. Consequently, individuals of all ages, including the elderly and children, became unwitting targets of the police's relentless assault on the neighborhood.<sup>81</sup> Some were there to protest; others arrived with supplies prepared to render aid; yet others became victims for simply living in a neighborhood now under siege.<sup>82</sup>

Activists with training in de-escalation tried to smother the tear gas canisters to prevent the gas from spreading and harming people.<sup>83</sup> But the police targeted those activists, shooting rubber bullets at them, even as they tried to run away.<sup>84</sup> Many residents and other bystanders got caught in the crosshairs too. One victim described seeing police shoot an elderly Black man twice, once on his hand and once on his leg, with rubber bullets.<sup>85</sup> Once he

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<sup>79</sup> *Id.*; see also Whelan et al., *Besieged*, *supra* note 2 (“Police Department leaders failed to adequately plan for a weekend of volatile protests, putting too few officers on the streets in outlying neighborhoods and leaving those who were there without clear direction. Consequently, commanders approved aggressive tactics, and some officers, in a department long plagued by incidents of racial bias, targeted bystanders and residents—in one case, a witness said, using racial slurs. . . . [B]y midafternoon, . . . officers indiscriminately fire[d] gas, pepper spray, and rubber bullets at not only agitators but also residents, protesters, and bystanders. . . . None of the people on the street that day interviewed by *The Inquirer* remembered hearing a warning.”).

<sup>80</sup> Whelan et al., *Besieged*, *supra* note 2 (“Police Department leaders failed to adequately plan for a weekend of volatile protests, putting too few officers on the streets in outlying neighborhoods and leaving those who were there without clear direction. Consequently, commanders approved aggressive tactics, and some officers, in a department long plagued by incidents of racial bias, targeted bystanders and residents — in one case, a witness said, using racial slurs. . . . [B]y midafternoon, . . . officers indiscriminately fire[d] gas, pepper spray, and rubber bullets at not only agitators but also residents, protesters, and bystanders. . . . None of the people on the street that day interviewed by *The Inquirer* remembered hearing a warning.”); Interview with Muehlmann, *supra* note 44.

<sup>81</sup> Interview with Amy Muehlmann, *supra* note 44; Interview with Rifken, *supra* note 37.

<sup>82</sup> *Id.*; see also Whelan, *supra* note 40; Claudia Vargas, *When Cops Stormed West Philadelphia and Shot Residents with Plastic Pellets*, NBCPhiladelphia <https://www.nbcphiladelphia.com/investigators/when-cops-stormed-west-philadelphia-and-shot-residents-with-plastic-pellets/2495362/> (updated Aug. 10, 2020).

<sup>83</sup> Interview with Hawkins, *supra* note 1.

<sup>84</sup> *Id.*; Interview with Rahman, *supra* note 36.

<sup>85</sup> Interview with Muehlmann, *supra* note 44.

was able to get down a side street, he laid there on the sidewalk, unable to walk.<sup>86</sup> His hand was swollen twice its size, and there was a significant wound on his leg.<sup>87</sup> He had not come to protest; he was just on his way home.<sup>88</sup> Likewise, an older woman, who was in the area that day to visit her niece, was shot in the head with a rubber bullet.<sup>89</sup> The police also shot a cab driver, who approached them for help, in the head with a rubber bullet on 51st and Market Streets.<sup>90</sup>

To help these victims of the police violence, a group of medics set up an impromptu aid station at 52nd and Locust Streets near Big G's Chicken Shack; however, as they rendered aid, the police began to target them too.<sup>91</sup> Despite being clearly marked and deliberately dressed as paramedics, several individuals from the Firefly Action Medical Collective were hit by police canisters containing rubber bullets.<sup>92</sup> One victim, Daniel, witnessed a police officer pepper-spray two young female medics directly in the face at close range. At the time,

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Interview with Carter, *supra* note 66.

<sup>90</sup> Whelan et al., *Besieged*, *supra* note 2; Vargas, *supra* note 82 (“As Danial rushes home, he gets a call that his taxi is now on fire. Once he arrives, Danial walks over to his partially charred taxi. Amid the chaos all around him, members of Philadelphia's SWAT teams roll in to disperse protesters. Danial opens his car door to get his license, insurance and other items, and he suddenly is struck in the head. ‘And this time a cop shoots me in my forehead,’ Danial says in an interview with NBC10. ‘I see blood is coming (out).’ The NBC10 Investigators’ camera was rolling as Danial realizes he’s been shot. He goes up to the police line asking why they shot him and points to his taxi. Eventually, strangers come to his aid, laying him on the grass next to the sidewalk and clean up his wound.”).

<sup>90</sup> See Chris Palmer, *Activists, Defense Lawyers Condemn Police Department’s Response to Protests*, PHILA. INQUIRER (June 4, 2020, 1:49 PM), <https://www.inquirer.com/news/live/philadelphia-protest-looting-news-live-george-floyd-police-20200604.html> (“Emily Seiter, 34, displayed a bruise on her right leg, which she said was the result of being struck by a canister containing rubber bullets when she was acting as a medic in West Philadelphia around 6:30 p.m. Sunday.”); see also Interview with Hawkins, *supra* note 1.

<sup>91</sup> See Palmer, *supra* note 90 (“Emily Seiter, 34, displayed a bruise on her right leg, which she said was the result of being struck by a canister containing rubber bullets when she was acting as a medic in West Philadelphia around 6:30 p.m. Sunday.”); see also Interview with Hawkins, *supra* note 1.

<sup>92</sup> Palmer, *supra* note 90 (“[Emily Seiter] said she and several people with her were ‘clearly marked as medics’ on scene to treat protesters and residents for potential injuries. Seiter, of the Firefly Action Medical Collective, said she did not see who shot her, but that the canister exploded after striking her and ricocheting.”).

the women had crossed the police line and were retreating from the officers with their hands raised in the air.<sup>93</sup> They were clearly identified as medics.<sup>94</sup>

Police also targeted journalists and others who sought to document the police brutality that day. Police pepper-sprayed an independent journalist on Arch Street after the journalist asked an officer for his badge number while filming the police response.<sup>95</sup> After being hit twice in the head with rubber bullets, once on the left side of her head and once on her forehead above her left eye, another journalist, Emily Neil, began bleeding profusely from her face and had to be taken to the hospital in an ambulance.<sup>96</sup> She believes that police targeted her because she was recording them.<sup>97</sup> Additionally, a local resident, who showed up to observe and document the protests, was injured when an officer fired a rubber bullet without warning as she attempted to photograph a tank and officers.<sup>98</sup> Because of the threat of violence, she and a neighbor returned home instead of attending the protests.

Over the next hour after tear gas was first authorized at 4:40 p.m., the air became so thick with gas that you could not see through it. As it spread throughout the air, it choked all present, including residents, pedestrians, peaceful protesters, and motorists.<sup>99</sup> Trying to seek refuge from the gas, protesters and residents alike fled 52nd Street.<sup>100</sup> They ran down small side streets, but police followed them, firing tear gas canisters and rubber bullets down

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<sup>93</sup> Interview with Hawkins, *supra* note 1.

<sup>94</sup> *Id.*

<sup>95</sup> Whelan et al., *Besieged*, *supra* note 2.

<sup>96</sup> Interview with Emily Neil (Nov. 13, 2020); Interview with Hawkins, *supra* note 1; Interview with Muehlmann, *supra* note 44.

<sup>97</sup> Interview with Neil, *supra* note 96.

<sup>98</sup> Interview with Judith Max Palmer (July 4, 2020).

<sup>99</sup> Interview with Rahman, *supra* note 36; Interview with Carter, *supra* note 66.

<sup>100</sup> *Id.*

those small residential streets – away from the commercial corridor and any alleged “looting.”<sup>101</sup> One victim Johana, who suffers from asthma and had a strong reaction to the tear gas, describes being unable to breathe.<sup>102</sup> Another victim Amelia Carter described being hit by tear gas four times as she tried to make her way home. She also witnessed a neighbor suffer a severe allergic reaction after a gas plume hit her.<sup>103</sup> She found this neighbor disoriented on the sidewalk a mere three feet away from her own doorstep.<sup>104</sup> Because she could not see or breathe, she did not know where she was and was screaming for help to get into her house, eventually getting help from another neighbor.<sup>105</sup> When Amelia Carter entered her own home, she found no relief, as the inside of her house was also filled with gas.<sup>106</sup>

Tear gas canisters shot by police also landed in yards and on porches where children and elders sat. As neighbors scrambled into homes trying to escape the fumes, the gas blew through the opened windows meant to keep a house cool on a warm spring day.<sup>107</sup> Many struggled to breathe as the toxic gas seeped into their homes. A single mother was forced to shelter with her two children in their bathroom after the hazardous gas in their house

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<sup>101</sup> Whelan et al., *Besieged*, *supra* note 2 (“Within seconds, the gas became inescapable. It wafted into the residential neighborhoods on either side of 52nd Street. Witness accounts and video indicate police fired tear gas canisters directly onto residential streets.”).

<sup>102</sup> Interview with Rahman, *supra* note 36.

<sup>103</sup> Interview with Carter, *supra* note 66.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Complaint ¶ 75, *Smith v. City of Philadelphia*, No. 20-3431 (E.D. Pa July 14, 2020), available at <https://www.naacpldf.org/wp-content/uploads/Anthony-Smith-et-al.-v.-City-of-Philadelphia-FILED-Complaint.pdf> [hereinafter NAACP Complaint].

choked them and burned their eyes.<sup>108</sup> After a canister of tear gas landed on one family's front porch, local doctors worked to evacuate the family and treat the young children exposed to the gas.<sup>109</sup> One mother, Audrey Housing, felt the effects of the tear gas several blocks from 52nd Street, while she played with her children in their yard.<sup>110</sup>

Victim Elaine Holton, recounted that “the whole time they were firing tear gas, I just wanted to scream at them that kids live here. They were traumatizing children and retraumatizing people who grew up in this neighborhood, people with knowledge of the MOVE bombing and other instances of violence.”<sup>111</sup> Elaine reported that no one was challenging or provoking the police. Residents were totally horrified and unsure of what could have provoked this violent response.<sup>112</sup>

At some point between 5 p.m. and 6 p.m., a group of about 30 residents began to “hold the line” at 52nd and Chancellor Streets in an attempt to make sure the police didn’t progress past Locust Street again into the more residential areas, south of the Strip.<sup>113</sup> The police made no attempt to negotiate with the crowd.<sup>114</sup> At one point, a man walked towards the police -- the crowd begged him not to, fearing he would be shot.<sup>115</sup> He took a white sheet,

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<sup>108</sup> *Id.* (“On May 31<sup>st</sup>, at around 6 PM, Ms. Mubarak-Hadi was at home on a residential block of 52<sup>nd</sup> Street with her three and six-year-old sons. Some of the windows of the home were open. Suddenly, her youngest son began crying, and her older son said to her that there was something in his eyes. Ms. Mubarak-Hadi noticed that there was tear gas coming through the windows. An asthmatic, she had trouble breathing. Days later, she still had a persistent burning sensation in her chest, nostrils, and throat. She and her sons are deeply traumatized by the harm they experienced from police without warning and while they sat in the safety of their own home.”).

<sup>109</sup> Aubrey Whelan, *West Philly Calls for Investigation of Police Use of Tear Gas After Officials Apologize for Using It on I-676*, PHILA. INQUIRER (June 28, 2020), <https://www.inquirer.com/news/west-philadelphia-tear-gas-use-of-force-police-investigation-20200628.html>.

<sup>110</sup> Interview with Audrey Hausig (July 23, 2020).

<sup>111</sup> Interview with Elaine Holton (July 17, 2020).

<sup>112</sup> *Id.*

<sup>113</sup> Interview with Carter, *supra* note 66.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

covered his body with it and performed a demonstration called a “die in” at their feet.<sup>116</sup> Despite all of the violence and terror enacted by the PPD many community members remained committed to exercising their right to assemble and protest. This action was not planned. Similar to so many of the events of the day, it was a spontaneous response to police attacks and the threat of more violence.<sup>117</sup>

Later that evening, sometime between 6:00 p.m. and 7:00 p.m., on the northern end of the Strip, a large group of police officers dressed in full riot gear formed a line.<sup>118</sup> Although the City’s curfew started at 6 p.m. that day, a group of approximately 100 people, made up of neighbors and activists, remained on the street “to support the community and to make sure if anything happened, they could share resources.”<sup>119</sup> Many community members questioned why the police were still present, as any property theft and destruction had long subsided.<sup>120</sup> As the crowd began to fade, a smaller group of approximately 25 residents and peaceful activists mostly just “held space” on the corner of 52nd and Arch Streets, playing music and dancing until 10:30 p.m., when SWAT and the National Guard showed up and unleashed a new round of violence.<sup>121</sup>

SWAT seemed intent on harassing and intimidating those who remained, at one point advancing toward the group only to steal the group’s food and throwing it in the trash.<sup>122</sup>

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<sup>116</sup> *Id.*

<sup>117</sup> Interview with Rahman, *supra* note 36 (“It was a Sunday afternoon—people were out and about. It wasn’t an organized thing. Once cops showed up havoc ensued.”).

<sup>118</sup> Maddie Hanna (@maddiehanna), Twitter (May 31, 2020, 8:09 PM), <https://twitter.com/maddiehanna/status/1267246750475194371>.

<sup>119</sup> Interview with Rahman, *supra* note 36.

<sup>120</sup> *Id.*; Interview with Muehlmann, *supra* note 44.

<sup>121</sup> Interview with Rahman, *supra* note 36.

<sup>122</sup> *Id.*

The tipping point came when Anthony Smith, a long time Black Lives Matter activist, tried to warn a pedestrian who was crossing the street about the police presence.<sup>123</sup> The police grabbed the pedestrian and Anthony Smith, arresting them both.<sup>124</sup> They also charged the small group of fleeing peaceful protesters, pepper-spraying them from behind as they fled.<sup>125</sup> The police claimed they were trying to disperse, but to multiple victims, it felt like a deliberate attempt to hurt them.<sup>126</sup>

Soon after, SWAT began to fire rubber bullets into the crowd, hitting multiple people at close range.<sup>127</sup> As things began to escalate, some of the protesters ran to a nearby house.<sup>128</sup> Nine or ten SWAT team officers chased them onto the porch of the house.<sup>129</sup> The officers shined lights into the house and ultimately left. However, the victims reported that they “thought that SWAT was going to break the door down.”<sup>130</sup> Inside the house, people tried to recover. One victim, Johana Rahman, who has severe asthma, tried to wash the pepper spray from her hair (the back of her head was soaked in chemicals), but her actions made the tear gas powder from earlier reactivate.<sup>131</sup> She became short of breath and started to wheeze and cough uncontrollably. Someone brought her an inhaler that likely saved her life.<sup>132</sup>

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

The occupation of West Philadelphia by police officers continued until 2:00 a.m. Monday morning, June 1, 2020.<sup>133</sup> Victim Anthony Smith was arrested, driven around in a police cruiser for several hours, and then released around 3:00 a.m. in an entirely different neighborhood – “putting him in danger of being picked for curfew violation again.”<sup>134</sup> The resident described his detention as “arbitrary” and “ridiculous.”<sup>135</sup>

One victim, who has had many violent experiences with police as a protester, reported that “the level of violence was so much bigger than anything [she] had ever seen before. I have never seen tanks on residential streets like that. For days I was terrified. . . Every time I cried more pepper spray would come out of my tear ducts. It was still there. It did that for days. It was a poetic level of consequence.”<sup>136</sup>

b) On May 31, in Majority White South Philadelphia, Police Welcome White Men Acting as Vigilantes

On May 31, 2020, the same day that police bore down on residents in West Philadelphia with armored vehicles and weapons, dozens of white self-described “vigilantes” began gathering after curfew at the Target store at 1 Mifflin Street in South Philadelphia with

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<sup>133</sup> See Zachariah Hughes et al., *Police Brutality, Funding Protests Fan Across Region for 3<sup>rd</sup> Consecutive Saturday*, WHYY (June 13, 2020), [https://whyy.org/articles/police-brutality-funding-protests-fan-across-region-for-3<sup>rd</sup>-consecutive-saturday/](https://whyy.org/articles/police-brutality-funding-protests-fan-across-region-for-3rd-consecutive-saturday/) (reporting that a West Philadelphia resident said “the police occupied the neighborhood until 2 a.m., ‘antagonizing and arresting people’”).

<sup>134</sup> Ryan Briggs & Miles Bryan, *Protesters, Residents Sue City over Tear Gas on 52<sup>nd</sup> St., 676*, WHYY (July 14, 2020), <https://whyy.org/articles/protesters-residents-sue-city-over-tear-gas-on-52nd-st-676/> (“Plaintiff Anthony Smith, a 29-year-old Black man who lives near 52<sup>nd</sup> street, said he was arrested around 11pm on May 31 and driven around for hours, before finally being delivered to a police station in North Philadelphia round 3 in the morning. There he was given a citation for violating curfew, and released to walk home—putting him in danger of being picked for curfew violation again.”); Whelan et al., *Besieged*, *supra* note 2 (“Smith remained in police custody for the next four hours, he said, driven around the city in a police wagon with the man he had tried to help. Officers released him at 3 a.m. from a district station more than four miles from his house on 57<sup>th</sup> Street, with a \$20 curfew violation.”).

<sup>135</sup> Briggs & Bryan, *supra* note 134.

<sup>136</sup> *Id.*

the stated purpose of preventing break-ins like the ones they had seen reported from the previous night in Center City.<sup>137</sup> Despite the curfew, this group remained gathered outside the Target with the sanction of the police, who received a round of cheers from the group when they came to the scene around 9:00 p.m.<sup>138</sup> Around 11:00 p.m., more than five hours after the curfew began, the vigilante group was still guarding the store. Police officers in white shirts stood close by, circled around a police vehicle, and some spoke with organizers throughout the night.<sup>139</sup> Police made no arrests.

Seeing that the police allowed the vigilante group to stay out past the city's curfew, a group of Black residents arrived at the Target to ask why.<sup>140</sup> As their cars pulled in around 11:15 p.m., the group of vigilantes began to shout, asking what the Black residents were doing there.<sup>141</sup> Arguments broke out between the two groups,<sup>142</sup> while police stood by and watched.<sup>143</sup> When people were finally asked to disperse, the police allowed a small group of white men to stay at the store in the company of police officers despite sending the Black residents home.<sup>144</sup>

### 3. *The Events of June 1: Teargas and Sandwiches*

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<sup>137</sup> Julia Musto, *Philly Residents Protect Store from Looters: 'We Stand with Peaceful Protesters,' Not Rioters*, FOX NEWS (June 2, 2020), <https://www.foxnews.com/media/philly-residents-stand-guard-to-protect-store-from-looters>.

<sup>138</sup> Ed Barkowitz (@edbarkowitz), TWITTER (May 31, 2020, 9:22 PM), <https://twitter.com/edbarkowitz/status/1267265298471755778>; Alex Tewfik, *As the City Burned, Some Philadelphians Chose to Protect a Target*, PHILA. MAG. (June 1, 2020, 4:46 PM), <https://www.phillymag.com/news/2020/06/01/target-george-floyd-riots-protest-philadelphia/>.

<sup>139</sup> @NBCPhiladelphia, TWITTER (June 1, 2020, 12:30 AM), <https://twitter.com/NBCPhiladelphia/status/1267312496601374721>.

<sup>140</sup> Tom Galish, *Tensions Briefly Flare at South Philly Target*, PHILA. INQUIRER (May 31, 2020, 11:17 PM), <https://www.inquirer.com/news/philadelphia/live/philadelphia-protest-curfew-news-live-george-floyd-minneapolis-looting-stores-police-20200531.html>.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

- a) On June 1, Hundreds of Peaceful Protesters for Black Lives were Trapped, Gassed, Shot with Rubber Bullets and Arrested in Center City

On June 1, 2020, around 3 p.m., several hundred people gathered outside the PPD headquarters at 8th and Race Streets in Philadelphia for a protest organized by the Party for Socialism and Liberation.<sup>145</sup> Speakers at the event described the harms of racist policing and how “opportunities for a good education, safe affordable housing, healthy choices, safety... have been taken from [them] because of [their] blackness.”<sup>146</sup> Just before 4:00 p.m., the group marched from their starting location<sup>147</sup> west towards City Hall, and then down the Benjamin Franklin Parkway.<sup>148</sup> Along the way, the group grew in size; some accounts indicated a crowd of nearly 5,000 people.<sup>149</sup>

From the Parkway, portions of the group entered Interstate 676, a highway that cuts through Center City, Philadelphia. Many of the protesters entered the highway from the on- and off-ramps linking the highway to the 22nd Street overpass.<sup>150</sup> Several police officers were stationed on the on-ramps as protesters passed, but none of them ordered the

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<sup>145</sup> Ryan Briggs & Max Marin, *Philly Police Say Tear Gas Used Because 676 Protest Turned Hostile, But There’s No Evidence That Happened*, WHYY (June 2, 2020), <https://whyy.org/articles/philly-police-say-tear-gas-used-because-676-protest-turned-hostile-but-theres-no-evidence-that-happened/>.

<sup>146</sup> Kristen Graham, *Hundreds Gather at Police Headquarters*, PHILA. INQUIRER (June 1, 2020, 3:51 PM), <https://www.inquirer.com/news/live/philadelphia-protest-curfew-news-live-george-floyd-minneapolis-looting-stores-police-20200601.html>.

<sup>147</sup> Jeff Neiburg (@Jeff\_Neiburg), TWITTER (June 1, 2020, 3:52 PM), [https://twitter.com/Jeff\\_Neiburg/status/1267544514539016206](https://twitter.com/Jeff_Neiburg/status/1267544514539016206).

<sup>148</sup> Jeff Neiburg (@Jeff\_Neiburg), TWITTER (June 1, 2020, 4:35 PM), [https://twitter.com/Jeff\\_Neiburg/status/1267555276695244802](https://twitter.com/Jeff_Neiburg/status/1267555276695244802); Jeff Neiburg (@Jeff\_Neiburg), TWITTER (June 1, 2020, 4:42 PM), [https://twitter.com/Jeff\\_Neiburg/status/1267557113544544257](https://twitter.com/Jeff_Neiburg/status/1267557113544544257).

<sup>149</sup> Briggs & Marin, *supra* note 145.

<sup>150</sup> Jeff Neiburg (@Jeff\_Neiburg), TWITTER (June 1, 2020, 5:02 PM), [https://twitter.com/Jeff\\_Neiburg/status/1267562140103315457](https://twitter.com/Jeff_Neiburg/status/1267562140103315457).

protesters to stop.<sup>151</sup> As protesters entered the highway, traffic stopped in both directions.<sup>152</sup> By all accounts, protesters acted peacefully as they marched around the stopped cars; one officer even described the highway protest as “peaceful” over the police radio.<sup>153</sup>

Some protesters headed east towards a tunnel where the highway runs under 20th Street. At the entrance of the tunnel, a state trooper vehicle was parked across part of the westbound lanes, leaving the remainder of the westbound lanes and the eastbound lanes unobstructed.<sup>154</sup> But when the protesters entered the tunnel, PPD officers in SWAT uniforms were there to meet them.<sup>155</sup> Without warning, the officers began pepper-spraying the protesters.<sup>156</sup> Video footage shows one officer walking down the elevated highway median, pepper-spraying everybody within range.<sup>157</sup> While some protesters fell to their knees and put their hands up, the officers didn’t let up.<sup>158</sup> In at least one instance, an officer pulled down a protester’s mask and pepper-sprayed him in his face from inches away.<sup>159</sup> Another

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<sup>151</sup> Interview with A.K. (September 24, 2020) (“I thought as I walked by the police that maybe this was something they had planned for because it seemed odd that they were letting us walk on the highway.”); *see also* Interview with Christopher Bauer (June 1, 2020); Interview with George MacLeod (September 28, 2020).

<sup>152</sup> Christoph Koettl et al., *How the Philadelphia Police Tear-Gassed a Group of Trapped Protesters*, N.Y. TIMES (June 25, 2020), <https://www.nytimes.com/video/us/100000007174941/philadelphia-tear-gas-george-floyd-protests.html>.

<sup>153</sup> *Id.*

<sup>154</sup> Interview with Bauer, *supra* note 151; Interview with Sandeep Singh (September 25, 2020); *see also* Koettl et al., *supra* note 152.

<sup>155</sup> Koettl et al., *supra* note 152.

<sup>156</sup> *Id.*; Interview with Bauer, *supra* note 151; Interview with Macleod, *supra* note 151; Interview with Singh, *supra* note 154.

<sup>157</sup> Koettl et al., *supra* note 152.

<sup>158</sup> *Id.*; Interview with Bauer, *supra* note 151; Interview with Singh, *supra* note 154.

<sup>159</sup> 6abc Philadelphia, *Protesters Pepper-Sprayed in Face During Demonstration on Philadelphia’s I-676*, YOUTUBE (June 3, 2020), <https://www.youtube.com/watch?v=8KyClqTzYJ4>.

protester fell to the ground but when protesters tried to help the injured protester to safety, the officers physically prevented the aid.<sup>160</sup>

From the west, SWAT teams also moved in on the protesters, this time with armored vehicles.<sup>161</sup> In response, protesters knelt on the street, many with their hands in the air chanting “Hands up, don’t shoot.”<sup>162</sup> The police responded with tear-gas canisters and pepper spray.<sup>163</sup> As with the SWAT officers emerging from the underpass to the east, in at least one instance, an officer pulled down the mask of a kneeling protester to spray them more aggressively.<sup>164</sup> There is no indication that the police gave a warning to disperse before deploying these tactics.<sup>165</sup>

As the teargas began to roll in from the west, protesters gathered on the highway found themselves cornered between the suffocating gas coming towards them and the line of officers with pepper spray to their east.<sup>166</sup> To the south, a high concrete wall separated the highway from the rest of the city.<sup>167</sup> As the officers advanced with teargas, people looked for safety in the only possible direction: to the north.<sup>168</sup> Some protesters escaped the highway through an unfenced embankment, but many others were left with no option but to

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<sup>160</sup> Interview with Singh, *supra* note 154.

<sup>161</sup> Koettl et al., *supra* note 152; Interview with Singh, *supra* note 154.

<sup>162</sup> Koettl et al., *supra* note 152; Interview with Singh, *supra* note 154.

<sup>163</sup> Koettl et al., *supra* note 152.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*; Interview with Bauer, *supra* note 151; Interview with A.K.; Interview with MacLeod, *supra* note 151; Interview with Singh, *supra* note 154.

<sup>166</sup> Interview with Bauer, *supra* note 151.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*; Interview with Singh, *supra* note 154.

climb a steep hill and attempt to scale an eight-foot-tall fence.<sup>169</sup> At least one officer encouraged protesters to flee that way.<sup>170</sup>

Officers then attacked the fleeing protesters on the hill with even greater force, causing a stampede.<sup>171</sup> While protesters tried to help each other to scale the tall fence at the top of the hill and protect those that fell down in the rush to escape, police officers shot rubber bullets and tear gas canisters in their direction.<sup>172</sup> Witnesses recalled being “crushed against the wall,”<sup>173</sup> and “packed in like sardines,”<sup>174</sup> as more protesters sought an escape from these weapons. One witness described the chaotic moment when officers began firing on the protesters: “[W]hen the teargas started exploding within our group, everyone started to push to try to escape from it. . . . I felt like I was going to throw up. People around me were throwing up. My eyes were burning and I could barely see.”<sup>175</sup> Another witness who was trapped on the hill felt a canister clip his arm.<sup>176</sup> Under fire from the officers below and struggling to breathe and to see, protesters frantically scrambled to escape.<sup>177</sup> Some

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<sup>169</sup> Jeff Neiburg (@Jeff\_Neiburg), TWITTER (June 1, 2020, 5:33 PM), [https://twitter.com/Jeff\\_Neiburg/status/1267570017526263810](https://twitter.com/Jeff_Neiburg/status/1267570017526263810).

<sup>170</sup> *Id.*; see also Jeff Neiburg (@Jeff\_Neiburg), TWITTER (June 1, 2020, 5:12 PM), [https://twitter.com/Jeff\\_Neiburg/status/1267564639598018561](https://twitter.com/Jeff_Neiburg/status/1267564639598018561).

<sup>171</sup> Koettl et al., *supra* note 152 (depicting and describing police forming a line along the embankment at the base of the hill and targeting protesters who were pinned in); Interview with Hawkins *supra* note 1.

<sup>172</sup> Koettl et al., *supra* note 152; see also Interview with Bauer, *supra* note 151 (“[T]he police in the armored vehicles started shooting the tear gas directly at us.”); Interview with Singh, *supra* note 154; Interview with Hawkins.

<sup>173</sup> Interview with Singh, *supra* note 154.

<sup>174</sup> Interview with MacLeod, *supra* note 151.

<sup>175</sup> *Id.*

<sup>176</sup> Interview with Singh, *supra* note 154.

<sup>177</sup> Interview with Bauer, *supra* note 151.

protesters were trampled in the frenzy,<sup>178</sup> while others coughed and gasped for air.<sup>179</sup> Still others tried to urge calm and aid others who were struggling or panicking.<sup>180</sup>

Although some protesters were able to climb over the fence with the aid of protesters on the other side of it, officers forcefully dragged many of the remaining protesters down the hill and restrained them.<sup>181</sup> Police arrested dozens of these protesters who they forcibly prevented from escaping the tear gas.

Protesters reported physical symptoms following the tear gas exposure, including nausea, coughing, shortness of breath, and burning sensation.<sup>182</sup> Some suffered from these symptoms for almost a week.<sup>183</sup> Many also experienced the physical manifestations of lasting anxiety, including panic attacks.<sup>184</sup> Two witnesses interviewed have required additional medical treatment: one for a sprained foot after he twisted it trying to climb over the median to safety;<sup>185</sup> another will be getting surgery for his shoulder after a protester fell from the fence and onto his arm during the intense period of tear gas.<sup>186</sup>

b) On June 1, Armed White Men were Welcomed by Police in Fishtown and nearby Port Richmond

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<sup>178</sup> See *id.* (reporting that he lost sight of his girlfriend after she collapsed in the crowd); see also Interview with MacLeod, *supra* note 151 (reporting that he suffered a dislocated shoulder after a protester fell on him while scaling the fence).

<sup>179</sup> Interview with Singh, *supra* note 154 (“Some people pulled off their masks and were gasping for air and coughing from the teargas.”).

<sup>180</sup> Interview with Hawkins, *supra* note 1.

<sup>181</sup> Koettl et al., *supra* note 152.

<sup>182</sup> See Interview with Singh, *supra* note 154 (“Th[e] burning sensation on my skin lasted a few days. I also had some coughing and shortness of breath for maybe a day or two longer.”).

<sup>183</sup> Interview with A.K., *supra* note 151.

<sup>184</sup> *Id.*; Interview with Bauer, *supra* note 151; Interview with MacLeod, *supra* note 151.

<sup>185</sup> Interview with Bauer, *supra* note 151.

<sup>186</sup> Interview with MacLeod, *supra* note 151.

At the same time as police were trapping and tear-gassing unarmed protesters on Interstate 676, a notably different dynamic was developing between police and many armed white civilians in the Fishtown section of Philadelphia, just four miles away. On the afternoon of June 1, 2020, dozens of mostly white men, armed with baseball bats, metal pipes, axes,<sup>187</sup> golf clubs,<sup>188</sup> and firearms,<sup>189</sup> gathered outside the entrance of the 26th Philadelphia Police District headquarters on East Girard Avenue with the stated purpose of “protecting” the neighborhood.<sup>190</sup> Multiple sources reported that police officers told members of this group that “looters” were coming to the area.<sup>191</sup> As these men gathered with their weapons of choice around the District headquarters, a group of police officers stood on the street outside.<sup>192</sup> The officers chatted with these armed men, and some even shared pizza and sandwiches with them.<sup>193</sup> The group gradually swelled to about a hundred people.<sup>194</sup>

The crowd’s presence drew a group of counter-protesters affiliated with the BLM movement who gathered to oppose the white group’s threatening presence.<sup>195</sup> Initially, the

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<sup>187</sup> Jon Ehrens (@jwehrens), TWITTER (June 1, 2020, 7:28 PM), <https://twitter.com/jwehrens/status/1267598902842347520>.

<sup>188</sup> Interview with Jaime Alvarez (July 12, 2020).

<sup>189</sup> Maanvi Singh, *The Armed White Men Who Terrorized Philadelphia’s Black Lives Matter Supporters*, GUARDIAN (June 4, 2020, 3:53 PM), <https://www.theguardian.com/us-news/2020/jun/04/philadelphia-armed-white-men-george-floyd-protests>.

<sup>190</sup> *Id.*

<sup>191</sup> Layla Jones, *‘There’s Gonna be Looting,’ Police Warned White Fishtowners, Showing a Close-Knit Relationship That Plays Out Across Philly*, BILLY PENN (June 17, 2020, 2:00 PM), <https://billypenn.com/2020/06/17/theres-gonna-be-looting-police-warned-white-fishtowners-showing-a-close-knit-relationship-that-plays-out-across-philly/>.

<sup>192</sup> Interview with Alvarez, *supra* note 188.

<sup>193</sup> Wendy Ruderman & Barbara Laker, *‘Why Aren’t You Arresting Them?’ Philly Officials Investigate Police After Assaults Against Fishtown Protesters*, PHILA. INQUIRER (June 25, 2020), <https://www.inquirer.com/news/philadelphia/philadelphia-fishtown-protester-vigilante-police-investigation-20200625.html>; Interview with Alvarez, *supra* note 188.

<sup>194</sup> Anna Orso & Julia Terruso, *Neighborhood Clash in Fishtown Ends with at Least One Hurt*, PHILA. INQUIRER (June 1, 2020, 9:34 PM), <https://www.inquirer.com/news/live/philadelphia-protest-curfew-news-live-george-floyd-minneapolis-looting-stores-police-20200601.html>; Jones, *supra* note 191.

<sup>195</sup> Orso & Terruso, *supra* note 194.

two groups mostly remained on opposite sides of Girard Avenue.<sup>196</sup> However, around 5:15 p.m., a “neighborhood defender” crossed Girard Avenue, grabbed a woman’s BLM sign, and ripped it up.<sup>197</sup> Witnesses reported several similar efforts to deface signs as well as threats that the “neighborhood defenders” hurled at the BLM protesters.<sup>198</sup> Footage from the incident, which garnered over 400,000 views on Twitter that night alone,<sup>199</sup> showed armed white men shouting at the BLM protesters that the armed men were there because “police can’t defend themselves” and instructing the BLM protesters to “take that f\*\*\*ing fa\*\*ot energy and go somewhere else.”<sup>200</sup> Police in Fishtown took no action as these mostly white men continued walking the streets of the neighborhood wielding their weapons,<sup>201</sup> while the same police department was arresting unarmed BLM protesters in Center City.<sup>202</sup> When BLM protesters requested protection from the armed men in Fishtown, police blamed *them* for “escalating the situation.”<sup>203</sup>

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<sup>196</sup> *Id.*

<sup>197</sup> Ruderman & Laker, *supra* note 193; Vinny Vella, *Man Rips Up Woman’s Black Lives Matter Sign as Group Gathers to Support Police in Fishtown*, PHILA. INQUIRER (June 1, 2020, 5:52 PM), <https://www.inquirer.com/news/live/philadelphia-protest-curfew-news-live-george-floyd-minneapolis-looting-stores-police-20200601.html>.

<sup>198</sup> See Ruderman & Laker, *supra* note 193.

<sup>199</sup> Alex Bollinger, *White Vigilantes Caught on Video Yelling About “Fa\*\*\*t Energy” & Attacking Protesters*, LGBTQ NATION (June 2, 2020), <https://www.lgbtqnation.com/2020/06/white-vigilantes-caught-video-yelling-fat-energy-attacking-protesters/>.

<sup>200</sup> Johnny Akzam (@JohnnyAkzam), TWITTER (June 1, 2020, 9:13 PM), <https://twitter.com/JohnnyAkzam/status/1267625413540544512>; see also Interview with Alvarez, *supra* note 188.

<sup>201</sup> Jon Ehrens (@jwehrens), TWITTER (June 1, 2020, 7:13 PM), <https://twitter.com/jwehrens/status/1267595095009869825>.

<sup>202</sup> Ruderman & Laker, *supra* note 193; Pranshu Verma (@pranshuverma\_), TWITTER (June 1, 2020, 7:06 PM), [https://twitter.com/pranshuverma\\_/status/1267593476503490568](https://twitter.com/pranshuverma_/status/1267593476503490568).

<sup>203</sup> Anna Orso et al., *Philly Police Stood By as Men with Baseball Bats ‘Protected’ Fishtown. Some Residents Were Assaulted and Threatened.*, PHILA. INQUIRER (June 2, 2020, 5:52 PM), <https://www.inquirer.com/news/fishtown-george-floyd-protests-philadelphia-bats-hammers-20200602.html> [hereinafter Orso et al., *Police Stood By*].

The armed men also made good on their violent threats on multiple instances in the presence of the police. Just before 7:00 p.m., directly across from the 26th Police District headquarters, a “neighborhood protector” aggressively shoved a male BLM protester who was accompanied by a female protester holding a sign that read “I Can’t Breathe” in front of William Fisher, Captain of the 26th Police District.<sup>204</sup> The captain merely shooed away the man who shoved the protester.<sup>205</sup> The agitators also assaulted a WHYY reporter who had been filming them, causing injuries that required hospital treatment.<sup>206</sup>

Police eventually dispersed the crowds. In a video included in a *Philadelphia Inquirer* article the next day, a police officer can be heard thanking a leader of the white group for “the support” and for being “pro-police.”<sup>207</sup>

In all, local residents lodged 36 reports of “person with a weapon” between 4:00 p.m. and 10:00 p.m. that night.<sup>208</sup> Police reported making zero arrests on any charge within a half-mile of the 26th District headquarters.<sup>209</sup> Bystanders documented only one instance of police intervention: videos on Twitter show a Black man unaffiliated with the “neighborhood

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<sup>204</sup> Ruderman & Laker, *supra* note 193 (first embedded video). Captain Fisher admitted to witnessing a protester get shoved at the recent town hall. Anna Orso (@anna\_orso), TWITTER (July 1, 2020, 8:38 AM) at 00:08, [https://twitter.com/anna\\_orso/status/1278306994814935040](https://twitter.com/anna_orso/status/1278306994814935040).

<sup>205</sup> Ruderman & Laker, *supra* note 193.

<sup>206</sup> Samantha Melamed, *Man Is Arrested in Fishtown ‘Vigilante’ Group’s Assault on WHYY Producer*, PHILA. INQUIRER (June 25, 2020, 10:42 PM), <https://www.inquirer.com/news/philadelphia/philadelphia-fishtown-white-vigilante-assault-arrest-why-jon-ehrens-20200625.html>.

<sup>207</sup> Ruderman & Laker, *supra* note 193.

<sup>208</sup> Anna Orso, *Police Under Fire for ‘Coddling’ Violent Groups of White People in Fishtown, South Philly*, PHILA. INQUIRER (June 26, 2020, 5:52 AM), <https://fusion.inquirer.com/news/philadelphia/philadelphia-protests-marconi-plaza-fishtown-south-philadelphia-protests-20200626.html>.

<sup>209</sup> *Id.*

protectors” being taken into police custody for allegedly possessing an ax after a “neighborhood protector” chased him down the street and threw a bat at him.<sup>210</sup>

Local and national media outlets covered the Fishtown events extensively, including the incidents described above. Reports emphasized confusion about why self-described “vigilantes” were permitted to roam past curfew, armed, on the same night that BLM activists were arrested for peaceful protests.<sup>211</sup>

It was not until the District Attorney’s Office initiated an investigation that any action was taken against any assailants.<sup>212</sup>

The police tolerated additional displays of white threats: while armed white groups roamed Fishtown’s streets on June 1, at least two white men positioned themselves with semiautomatic rifles on top of a shopping plaza near Aramingo and Castor Avenues in nearby

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<sup>210</sup> Jon Ehrens (@jwehrens), TWITTER (June 1, 2020, 8:00 PM), <https://twitter.com/jwehrens/status/1267606925035941890>; Jon Ehrens (@jwehrens), TWITTER (June 1, 2020, 7:58 PM), <https://twitter.com/jwehrens/status/1267606479848247296>; see also Ruderman & Laker, *supra* note 193.

<sup>211</sup> See Paul Blest, *Armed, White Vigilantes Threatened BLM Protesters in Philly and Sent a Journalist to the Hospital*, VICE NEWS (June 2, 2020, 11:23 AM), [https://www.vice.com/en\\_us/article/z3enea/armed-white-vigilantes-threatened-blm-protesters-in-philly-and-sent-a-journalist-to-the-hospital](https://www.vice.com/en_us/article/z3enea/armed-white-vigilantes-threatened-blm-protesters-in-philly-and-sent-a-journalist-to-the-hospital); Michael D’Onofrio, *Disparity in Police Tactics On Display During Third Day of Unrest in Philadelphia*, PHILA. TRIB. (June 2, 2020), [https://www.phillytrib.com/news/local\\_news/disparity-in-police-tactics-on-display-during-third-day-of-unrest-in-philadelphia/article\\_6437ba1a-e47e-5db8-9472-1986d8ad68db.html](https://www.phillytrib.com/news/local_news/disparity-in-police-tactics-on-display-during-third-day-of-unrest-in-philadelphia/article_6437ba1a-e47e-5db8-9472-1986d8ad68db.html); Andrew Knips & Kendall LaParo, *Opinion, Fishtown Police Must Repair Neighborhood Relations After Support of White Men with Weapons*, PHILA. INQUIRER (June 3, 2020, 1:58 PM), <https://www.inquirer.com/opinion/commentary/fishtown-protests-police-bats-hammers-20200603.html>; Tamar Lapin, *Tense Face-off in Philadelphia Neighborhood*, N.Y. POST (June 1, 2020, 11:54 PM), <https://nypost.com/2020/06/01/protesters-and-vigilantes-face-off-in-philadelphia-neighborhood/>; *Police Allowed Fishtown Mob to Threaten Neighbors Who Want Answers*, WHY? (June 4, 2020), <https://why.org/episodes/police-allowed-fishtown-mob-to-threaten-neighbors-who-want-answers/>; NBC10 Phila., *After Men with Bats and Axes Take Over Corner, Philly Says No Vigilante Justice*, YOUTUBE (June 2, 2020), <https://www.youtube.com/watch?v=EIW3E8YL2dQ> [hereinafter NBC10 Phila., *Men with Bats*]; Ewan Palmer, *Armed Vigilantes Patrolling Philadelphia Streets as Police Stood By ‘Shames the Entire City,’ DA Says*, NEWSWEEK (June 3, 2020, 10:34 AM), <https://www.newsweek.com/philadelphia-armed-vigilante-protests-george-floyd-fishtown-1508376>; Ruderman & Laker, *supra* note 193; Christopher Wink, *What a Police-Sanctioned Mob in Fishtown Says About Systemic Racism*, GENEROCITY (June 2, 2020, 9:12 AM), <https://www.fox29.com/news/philadelphia-officials-condemn-vigilantism-in-fishtown>; Interview with Singh, *supra* note 154.

<sup>212</sup> Orso et al., *Police Stood By*, *supra* note 203.

Port Richmond.<sup>213</sup> The following afternoon, a group of armed white men—including at least three with semiautomatic weapons—showed up at the same shopping plaza.<sup>214</sup> According to social media posts (which have since been deleted), the group intended to protect the neighborhood from “looters.”<sup>215</sup>

During the afternoon on June 2, PPD officers arrived, took pictures with the armed men, and apparently showed support for their threatening display.<sup>216</sup> There is no indication that any of the men were arrested or cited, and while the pictures with police have been deleted, pictures of men with semiautomatic weapons remain on the Instagram account where the pictures with police were originally posted.<sup>217</sup>

#### 4. *Marconi Plaza: Philadelphia Police allow Mob Violence and Shut Down Peaceful Protest*

With bad press and public pressure mounting, the police appeared to back off from the use of official violence; however, they continued to allow, and at times, even encourage mob violence against anti-racism protesters and to protect white vigilantes at the expense of protesters.

This dynamic played out over several nights in mid-June at Marconi Plaza located in South Philadelphia.<sup>218</sup> Marconi Plaza is a gathering place for members of Philadelphia’s

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<sup>213</sup> Moselle, *supra* note 211; Shawnette Wilson, *Philadelphia Officials Condemn ‘Vigilantism’ in Fishtown*, FOX 29 PHILA. (June 3, 2020), <https://www.fox29.com/news/philadelphia-officials-condemn-vigilantism-in-fishtown>.

<sup>214</sup> @LILACPhilly, TWITTER (June 2, 2020, 3:33 PM), <https://twitter.com/LILACPhilly/status/1267902077998686208>.

<sup>215</sup> @LILACPhilly, TWITTER (June 2, 2020, 3:55 PM), <https://twitter.com/LILACPhilly/status/1267907769367171073/photo/1>.

<sup>216</sup> *Id.*

<sup>217</sup> @hardcity\_\_, INSTAGRAM (June 10, 2020), <https://www.instagram.com/p/CBRsfYHA5Ca>.

<sup>218</sup> Anna Orso & Oona Goodin-Smith, *Brawl Ensues Near South Philadelphia Columbus Statue after March, Protest at Municipal Services Building*, PHILA. INQUIRER (June 24, 2020), <https://www.inquirer.com/news/south-philly-protest-marconi-plaza-christopher-columbus-20200623.html>.

Italian-American community, and it contains two statues: one of Guglielmo Marconi, an Italian inventor and Nobel Laureate, and one of Christopher Columbus.<sup>219</sup>

Starting on June 13, large groups of white people gathered in Marconi Plaza. They identified themselves as residents of South Philadelphia and “protectors” of the Christopher Columbus statue in the park.<sup>220</sup> One such individual described the group as “preserving heritage and history.”<sup>221</sup> On June 13, the group was visibly armed, principally with baseball bats and golf clubs.<sup>222</sup> Once these crowds started gathering, police were assigned to the location.

When Chris Schiano, a reporter, attempted to record and interview the statue defenders, they physically assaulted him and slashed his bicycle tires.<sup>223</sup> The police who were present did not intervene and protect him, but when the crowd of statue defenders increased their threats of violence against Schiano, PPD 1st District Captain Campione told Schiano that if he did not leave the area he would be charged with inciting a riot.<sup>224</sup> Schiano departed and posted the story and video of both the assaults and the confrontation with

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<sup>219</sup> Jeff Gammage et al., *For Second Day, Group ‘Protects’ Christopher Columbus Statue in South Philadelphia; Mayor Denounced ‘Vigilantism’*, PHILA. INQUIRER (June 14, 2020, 6:17 PM), <https://www.inquirer.com/news/floyd-protest-columbus-statue-protesters-unrest-philadelphia-police-20200614.html>.

<sup>220</sup> Unicorn Riot, *Philadelphia Police Threaten Unicorn Riot Reporter after Vigilante Assault [Raw]*, VIMEO (June 14, 2020), <https://vimeo.com/428917635>.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* (showing a different individuals carrying rifles); see also Chris Palmer & Samantha Melamed, *South Philly Residents Surround Columbus Statue as Demonstrations Unfold Across the City*, PHILA. INQUIRER (June 13, 2020, 5:43 PM), <https://www.inquirer.com/news/christopher-columbus-statue-marconi-plaza-vandalism-threats-protest-20200613.html> (“And another man, who declined to give his name, stood close to the statue while holding a rifle — one of at least two men in the plaza carrying guns.”).

<sup>223</sup> Unicorn Riot, *supra* note 220.

<sup>224</sup> *Id.*

Captain Campione online. The story immediately went viral, and large numbers of anti-racism protesters flocked to the site over the next several nights.

City officials reacted to the story, as they had with the Fishtown incidents, by condemning vigilantism and criticizing the police response. That morning Mayor Kenney responded on Twitter:

We are aware of the groups of armed individuals ‘protecting’ the Columbus statue in Marconi Plaza. All vigilantism is inappropriate, and these individuals only bring more danger to the city. We are also aware of an apparent assault caught on video tape, as well as possible restrictions placed on journalists filming the event. These incidents are under investigation at this time.<sup>225</sup>

That same afternoon, District Attorney Krasner directed a series of tweets at “bat-wielders,” writing that “prosecutors and police will uphold the law in Philly, consistent with their oaths, against criminal bullies.”<sup>226</sup> Nonetheless, over the next several nights, the PPD officers assigned to keep the peace at Marconi Plaza allowed the white crowds to escalate their violence. Several times police officers stood and watched as statue “defenders” violently assaulted and beat protesters, often with several “defenders” ganging up on a single protester. At other times the police would stand in a line to separate the “defenders” and the anti-racism protesters, but would not intervene when the statue defenders screamed threats and threw objects at protesters, nor would they react when statue defenders moved around the end of the police line to attack the protesters. Protesters reported receiving death threats from the statue defenders: “I looked across the [police] lines and made eye contact with a

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<sup>225</sup> Jim Kenney (@PhillyMayor), TWITTER (June 14, 2020, 10:33 AM), <https://twitter.com/PhillyMayor/status/1272175272595423237>.

<sup>226</sup> Larry Krasner (@DA\_LarryKrasner), TWITTER (June 14, 2020, 12:50 PM), [https://twitter.com/DA\\_LarryKrasner/status/1272209831441678336](https://twitter.com/DA_LarryKrasner/status/1272209831441678336).

woman on the other side. She was right behind a police officer. She shouted at me, ‘We’re gonna kill you.’”<sup>227</sup> After a period of escalation, the police forced the antiracism protesters to leave the park<sup>228</sup> but allowed the statue defenders to remain, jeering and threatening more violence.<sup>229</sup>

One antiracism protester, Ron Joseph, who suffered a broken nose and other injuries when he was attacked in full view of the police, reported that the PPD officers actually encouraged the violence: “The police . . . were congratulating [the violent statue defenders]. . . . They laughed.”<sup>230</sup> Another antiracism protester, David Pashley, was grabbed, choked, slammed to the ground, and kicked by six men—all in full view of PPD officers, who did nothing to intervene.<sup>231</sup> He said, “I remember seeing a police officer fist bump one of the white vigilantes. In contrast, the one time that a woman with a Black Lives Matter sign crossed the police line, the police arrested her and pulled her out of the crowd,”<sup>232</sup>

One video from June 14 depicts what witnesses reported over and over: a PPD officer refused to take a report of an alleged assault or make an arrest but told the victim, an antiracism protester, they could “go down to the District Attorney’s Office and file a complaint for the simple assault that occurred against you.”<sup>233</sup> Adam Bomstein, who was present as a legal observer, overheard an officer telling one of the statue defenders, “You do

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<sup>227</sup> Interview with Tue Ho (July 2, 2020).

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> Samantha Melamed, *Protest Observers Say Police Allowed South Philly Columbus ‘Defenders’ to Assault Them*, PHILA. INQUIRER, <https://www.inquirer.com/news/columbus-statue-black-lives-matter-krasner-philadelphia-marconi-vigilantes-20200616.html> (last updated June 16, 2020, 2:34 PM).

<sup>231</sup> *Id.*

<sup>232</sup> Interview with David Pashley (July 27, 2020).

<sup>233</sup> Melamed, *supra* note 230.

what you gotta do.” He also observed another officer, upon seeing a conflict, say, “I’m going to let these guys take care of it,” referring to the statue “defenders.”<sup>234</sup> A protester who had experienced police violence in response to her peaceful advocacy for Black lives articulated the disparity between this violence and the police’s response to the violent statue defenders: “[A few weeks ago] I was tear-gassed for just standing in the middle of the Parkway, and yesterday white men took swings at me while making rape threats and white police officers looked on and laughed.”<sup>235</sup>

### **C. The PPD’s History of Violence Against and Repression of Black Communities & Political Protest**

The police violence on display in West Philadelphia and Center City, coupled with the courting of white violence in Fishtown and South Philadelphia, echo Philadelphia’s history: racist police culture and using police violence to disempower Black communities and activists. One victim described the police violence on 52nd Street as both “spectacular and unremarkable,”<sup>236</sup> because, in his view, PPD brutality is so common that residents of the City’s Black neighborhoods have come to expect it.

Throughout its existence, PPD has functioned in tandem with white mobs to disperse and destroy organizations fighting for the rights of Black people<sup>237</sup> and facilitate the murder

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<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> Interview with Hawkins, *supra* note 1.

<sup>237</sup> Dan Saint, et al., *Black and Blue: 190 Years of Police Brutality Against Black People in Philadelphia*, PHILA. INQUIRER (July 10, 2020), <https://www.inquirer.com/news/inq/philadelphia-police-brutality-history-frank-rizzo-20200710.html>. For example, in 1838, the Pennsylvania Hall was burnt to the ground. It was built by Black and white abolitionists as a place to gather and organize. However, four days after its opening, a mob of white vigilantes, incensed by the radical ideas being discussed by the Hall’s integrated crowd—mixed in both race and gender—destroyed the building. The police “endorsed this action as expressing the ‘moral force’ of the community or will of the people.” See Alexander Elkins, “*At Once Judge, Jury, and Executioner*”: *Rioting and Policing in Philadelphia*,

of Black community and political leaders.<sup>238</sup> One particular illuminating figure in PPD's history is Frank Rizzo, colloquially referred to as "Rizzo." Rizzo served as Police Commissioner from 1967 to 1971 and was subsequently elected as the City's Mayor from 1972 to 1980.<sup>239</sup> In a time of social upheaval,<sup>240</sup> Rizzo stood, unabashedly, for a no-holds-barred, ends-justifies-the-means style of policing that turned, often and quickly, to overwhelming force: "The way to treat criminals is *spacco il capo*" (Italian for "break their heads").<sup>241</sup>

In his first year as Police Commissioner, Rizzo met a peaceful student protest with egregious force. On November 17, 1967, high school students gathered to peacefully demand better conditions in schools, the hiring of more African American administrators, the inclusion of African American history in curriculum, and acceptance of Black culture in the classroom in one of the country's largest protests organized by teens.<sup>242</sup> Police Commissioner Rizzo arrived with hundreds of officers in riot gear ready to attack.<sup>243</sup> After a

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1838-1964, 54 BULL. GER. HIST. INST. 67, 67 (2014), <https://www.ghi-dc.org/fileadmin/publications/Bulletin/bu54.pdf>.

<sup>238</sup> On Election Day in 1871, the Black civil rights leader and political organizer Octavius Catto was murdered by two white men. Despite testimony from six eyewitnesses, Catto's murderers were found not guilty, cementing the sense in the Black community that there was no justice available in Philadelphia's criminal legal system for Black citizens. Aaron X. Smith, *Murder of Octavius Catto*, ENCYCLOPEDIA GREATER PHILA., <https://philadelphiaencyclopedia.org/archive/murder-of-octavius-catto/> (last visited November 17, 2020).

<sup>239</sup> David Gambacorta & Barbara Laker, *Frank Rizzo Leaves a Legacy of Unchecked Police Brutality and Division in Philadelphia*, PHILA. INQUIRER (June 3, 2020), <https://www.inquirer.com/news/philadelphia-frank-rizzo-police-violence-legacy-shootings-20200603.html> ("Rizzo's influence left an imprint on the Philadelphia Police Department that it continues to reckon with even now, nearly 30 years after he died while seeking a third mayoral term.").

<sup>240</sup> Timothy J. Lombardo, *Civil Rights and the Rise of Frank Rizzo in 1960s Philadelphia*, HIST. SOC'Y PA. (Jan. 25, 2019, 2:01 PM), <https://hsp.org/blogs/fondly-pennsylvania/civil-rights-and-rise-frank-rizzo-1960s-philadelphia>.

<sup>241</sup> *Id.*

<sup>242</sup> Michael Bixler, *Remembering Philly's 1967 School Walkout & the Attack on Teen Activism*, HIDDEN CITY (Mar. 13, 2018), <https://hiddencityphila.org/2018/03/remembering-phillys-1967-school-walkout-the-attack-on-teenage-activism/>.

<sup>243</sup> *Id.*

young protester climbed on top of a car, Rizzo told his officers to “get their black asses.”<sup>244</sup> The peaceful protest descended into a police riot.<sup>245</sup> Police viciously beat the teenage protesters and at least fifteen were hospitalized.<sup>246</sup>

One of the most notorious scenes during Rizzo’s tenure as Police Commissioner was the 1970 raid on Black Panthers headquarters. Unlike many other daily acts of violence against civilians, these raids were captured by journalists.<sup>247</sup> Under Rizzo’s command, police threw tear gas into offices to force the activists outside. Once outside, the police handcuffed six individuals, placed them against a wall on a public street, and stripped them naked at gunpoint.<sup>248</sup> Photos of this deliberate humiliation of the young Black men appeared in newspapers from coast to coast.

While Mayor, multiple studies and lawsuits exposed the corrupt and violent environment Rizzo had fostered during his tenure as Police Commissioner. In 1974, the Pennsylvania Crime Commission’s *Report on Police Corruption and the Quality of Law Enforcement in Philadelphia* concluded: “police corruption in Philadelphia is ongoing, widespread, systematic, and occurring at all levels of the police department. Corrupt practices were uncovered . . . in every police district and involved police officers ranging in rank from policeman to inspector.”<sup>249</sup> In 1979, the U.S. Department of Justice filed a civil

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<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> Donald Janson, *Panthers Raided in Philadelphia*, N.Y. TIMES (Sept. 1, 1970), <https://www.nytimes.com/1970/09/01/archives/panthers-raided-in-philadelphia-3-more-policemen-wounded-14-blacks.html>.

<sup>248</sup> Lombardo, *supra* note 240.

<sup>249</sup> NAT’L CRIM. J. REF. SERV., REPORT ON POLICE CORRUPTION AND THE QUALITY OF LAW ENFORCEMENT IN PHILADELPHIA 5 (1974), <https://archive.org/details/reportonpoliceco00penn>.

rights lawsuit against PPD alleging a range of violent and corrupt practices, including shooting nonviolent suspects, beating people while they were handcuffed, and using a “purposely fragmented system” for internal investigations that ensured civilian complaints did not go far.<sup>250</sup> A study completed that same year by the Public Interest Law Center found that in 1978, Philadelphia police had shot 17 unarmed people, killing eight, and in one confrontation, an officer shot and killed a man who was naked, armed only with a tree limb.<sup>251</sup> The police violence did not end when Rizzo left office, but instead his legacy influenced one of the worst acts of state violence in U.S. history.

On May 13, 1985, the PPD dropped two bombs on a residence in West Philadelphia, which then caught fire destroying three whole city blocks. This event was the result of the PPD’s decade-long hostility with MOVE, a Black liberation group.<sup>252</sup> The tensions between police and MOVE ignited in 1978 when a police officer died during an effort to remove MOVE members from their home.<sup>253</sup> Police bulldozed the fence and used water cannons, teargas, and smoke bombs to force the inhabitants out.<sup>254</sup> A gun battle ensued, in which a PPD officer

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<sup>250</sup> Philip Taubman, *U.S. Files Its Rights Suit Charging Philadelphia Police With Brutality*, N.Y. TIMES (Aug. 14, 1979), <https://www.nytimes.com/1979/08/14/archives/us-files-its-rights-suit-charging-philadelphia-police-with.html>.

<sup>251</sup> Statement of Anthony E. Jackson, Dir., Police Project, Pub. Int. L. Ctr. Phila. (Apr. 19, 1979), [https://www.pubintl.org/wp-content/uploads/2012/04/Deadly\\_Force\\_1.pdf](https://www.pubintl.org/wp-content/uploads/2012/04/Deadly_Force_1.pdf); see also Gambacorta & Laker, *supra* note 239.

<sup>252</sup> Gene Demby, *I’m From Philly. 30 Years Later, I’m Still Trying to Make Sense of the MOVE Bombing*, NPR (May 13, 2015), <https://www.npr.org/sections/codeswitch/2015/05/13/406243272/im-from-philly-30-years-later-im-still-trying-to-make-sense-of-the-move-bombing>.

<sup>253</sup> Gregory Jaynes, *Officer Killed as Philadelphia Radicals Are Evicted*, N.Y. TIMES (Aug. 9, 1978), <https://www.nytimes.com/1978/08/09/archives/officer-killed-as-philadelphia-radicals-are-evicted-dies-in.html>.

<sup>254</sup> Mike Africa, *Philadelphia’s Deadly MOVE Bombing: Why We Can’t Settle for Apologies Now*, SALON (Aug. 15, 2020, 11:30 PM), <https://www.salon.com/2020/08/15/philadelphias-deadly-move-bombing-why-we-cant-settle-for-apologies-now/>.

was shot in the back, apparently by friendly fire.<sup>255</sup> Nine MOVE members were convicted of third-degree murder and incarcerated,<sup>256</sup> with two of the nine dying in prison.<sup>257</sup> The remaining MOVE community—eight adults and five children—relocated to a rowhouse at 6221 Osage Avenue in West Philadelphia. After neighbors complained about noise<sup>258</sup> and disruption by MOVE, the PPD decided to eliminate the commune once and for all.<sup>259</sup>

In 1985, Mayor Wilson Goode and Police Commissioner Gregore J. Sambor classified MOVE as a terrorist organization and made the decision to clear all occupants of the house by force.<sup>260</sup> On May 13th, police evacuated residents from the area.<sup>261</sup> Once the neighbors dispersed, nearly five hundred police officers attempted to clear the building and arrest the MOVE members.<sup>262</sup> After a 90-minute gun battle, in which police used more than ten thousand rounds of ammunition, Sambor ordered that the compound be bombed.<sup>263</sup> The

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<sup>255</sup> *Last Member of MOVE Freed on Parole in Death of Officer*, ASSOCIATED PRESS (Feb. 7, 2020), <https://apnews.com/5322561cf03510d4cc99dd8d053b2f78>.

<sup>256</sup> Damon C. Williams, *After 34 Years, MOVE 9 Still in Prison*, PHILA. TRIB. (Aug. 12, 2012), [https://www.phillytrib.com/news/after-34-years-move-9-still-in-prison/article\\_71ce23ad-892a-55e6-8bcb-eee06b643432.html](https://www.phillytrib.com/news/after-34-years-move-9-still-in-prison/article_71ce23ad-892a-55e6-8bcb-eee06b643432.html).

<sup>257</sup> Robert Moran, *Last Member of MOVE Freed on Parole in Death of Officer*, PHILA. INQUIRER (Feb. 7, 2020), <https://www.inquirer.com/news/philadelphia-move-charles-sims-africa-parole-release-police-james-ramp-20200208.html>.

<sup>258</sup> MOVE Members were known to blare protest messages on behalf of their jailed brothers and sisters from the house night and day. Lindsey Norward, *The Day Philadelphia Bombed Its Own People*, VOX (Aug. 15, 2019, 9:03 AM), [www.vox.com/the-highlight/2019/8/8/20747198/philadelphia-bombing-1985-move](http://www.vox.com/the-highlight/2019/8/8/20747198/philadelphia-bombing-1985-move).

<sup>259</sup> *Id.*

<sup>260</sup> Alex Q. Arbuckle, *May 13, 1985: The Bombing of MOVE*, MASHABLE (Jan. 10, 2016), <https://mashable.com/2016/01/10/1985-move-bombing/>.

<sup>261</sup> Deb Kiner, *'What We Have Out There Is a War': The 35<sup>th</sup> Anniversary of the MOVE Bombing in Philadelphia*, PENNLIVE (May 13, 2020), <https://www.pennlive.com/life/2020/05/what-we-have-out-there-is-a-war-the-35th-anniversary-of-the-move-bombing-in-philadelphia.html>.

<sup>262</sup> Kim Kelly, *The History of the Black Radical Group MOVE and Its Infamous Bombing by Police*, TEEN VOGUE (May 14, 2020), <https://www.teenvogue.com/story/history-black-radical-group-move-infamous-bombing-by-police>.

<sup>263</sup> Ron Wolf et al., *How the Bomb Decision Was Made*, PHILA. INQUIRER (May 8, 2010), [https://www.inquirer.com/philly/news/How\\_the\\_bomb\\_decision\\_was\\_made.html](https://www.inquirer.com/philly/news/How_the_bomb_decision_was_made.html).

PPD dropped two bombs on the roof.<sup>264</sup> The resulting explosions ignited a fire and killed 11 of the 13 residents, most of them children.<sup>265</sup> As the fire burned, the Police Commissioner stopped the fire department from extinguishing it and the fire soon grew out of control, burning three city blocks.<sup>266</sup> No criminal charges were ever levied against any City official for the decisions made that day.<sup>267</sup> This tragedy occurred less than a mile away from the 52nd Street attack on May 31.

In more recent history, PPD has remained plagued by evidence of overt racism among its ranks. In 2009, “Domelights.com” was exposed as racist message board for Philly police.<sup>268</sup> The content on the site was so offensive that the Black police officers’ league sued the PPD over it.<sup>269</sup> And in early 2019, the Plain View Project exposed racist and/or violent public Facebook posts by over 300 active duty PPD officers, including command staff.<sup>270</sup> It is worth noting that between 2007 and 2014, there were 394 officer-involved shootings in the PPD, 80% of them directed at Black people.<sup>271</sup>

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<sup>264</sup> Frank Trippett, ‘It Looks Just Like a War Zone’, TIME (June 24, 2001), <http://content.time.com/time/magazine/article/0,9171,141842,00.html>.

<sup>265</sup> Alan Yuhas, *Philadelphia’s Osage Avenue Police Bombing, 30 Years On: ‘This Story is a Parable’*, GUARDIAN (May 13, 2015, 7:00 AM), <https://www.theguardian.com/us-news/2015/may/13/osage-avenue-bombing-philadelphia-30-years>. Ramona Africa, one of the two survivors, has stated that police fired at those who tried to escape. Lamont Lilly, *Black Woman Freedom Fighter, Ramona Africa, Discusses MOVE and Surviving the 1985 Bombing*, WORKERS WORLD (Apr. 3, 2017), <https://www.workers.org/2017/04/30511/>.

<sup>266</sup> Demby, *supra* note 252.

<sup>267</sup> Gray Hall, *11 Philadelphia City Council Members Issue Apology on 35<sup>th</sup> Anniversary of MOVE Bombing*, 6ABC PHILA. (May 13, 2020), <https://6abc.com/move-bombing-philadelphia-osage-avenue/6179659/>.

<sup>268</sup> Troy Graham, *Black Officers Sue Phila. Police for Alleged Online Racism*, PHILA. INQUIRER (July 16, 2009), [https://www.inquirer.com/philly/blogs/from\\_the\\_source/Black\\_officers\\_sue\\_Philadelphia\\_police\\_for\\_alleged\\_online\\_racism.html](https://www.inquirer.com/philly/blogs/from_the_source/Black_officers_sue_Philadelphia_police_for_alleged_online_racism.html).

<sup>269</sup> *Id.*

<sup>270</sup> See generally PLAIN VIEW PROJECT, <https://www.plainviewproject.org/> (last visited Nov. 1, 2020).

<sup>271</sup> GEORGE FACHNER & STEVEN CARTER, AN ASSESSMENT OF DEADLY FORCE IN THE PHILADELPHIA POLICE DEPARTMENT, COLLABORATIVE REFORM INITIATIVE 18 (2015), <https://www.phillypolice.com/assets/directives/cops-w0753-pub.pdf>. That is nearly a police shooting a week for eight years. *Id.*

## II. PHILADELPHIA'S VIOLATIONS OF INTERNATIONAL LAW

### A. Applicable Human Rights Law

#### 1. *The Rights to Freedom of Expression & Peaceful Assembly*

Protesting involves the exercise of both the right to freedom of expression and the right to peaceful assembly under international human rights law.<sup>272</sup> These rights “are essential for any society and constitute the foundation stone for every free and democratic society.”<sup>273</sup> “Peaceful assemblies can play a critical role in allowing participants to advance ideas and aspirational goals in the public domain, and to establish the extent of support for or opposition to those ideas and goals.”<sup>274</sup> The United Nations Human Rights Committee has said that “[a] failure to respect and ensure the right of peaceful assembly is typically a marker of repression.”<sup>275</sup> It also concluded that this right is “of particular importance to marginalized individuals and groups.”<sup>276</sup>

The United States is bound by numerous international conventions that require it not only to protect peaceful protests, but also to fulfill its positive obligation to facilitate the exercise of the right to peaceful assembly.<sup>277</sup> This obligation is heightened when the protests

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<sup>272</sup> UN Human Rights Committee (1994). *Kivenmaa v. Finland*, Communication No. 412/1990, UN Doc. CCPR/C/50/D/412/1990.

<sup>273</sup> Communication No. 2029/2011, *Praded v. Belarus*, Views adopted 10 October 2014, CCPR/C/112/D/2029/2011, para. 7.3.

<sup>274</sup> UN Human Rights Committee, General Comment No. 37 on Article 21, The Right of Peaceful Assembly, July 20, 2020, at ¶ 1 [Hereinafter General Comment No. 37].

<sup>275</sup> *Id.* at ¶ 2.

<sup>276</sup> *Id.*

<sup>277</sup> International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), *ratified* 138 Cong. Rec. S4784 (1992) [hereinafter ICCPR]; AMNESTY INT’L., THE HUMAN RIGHTS IMPACT OF LESS LETHAL WEAPONS AND OTHER LAW ENFORCEMENT EQUIPMENT 5 (2015), <https://www.amnesty.org/download/Documents/ACT3013052015ENGLISH.PDF> [hereinafter IMPACT OF LESS LETHAL WEAPONS] (citing Report of the Special Rapporteur on The Rights to Freedom of Peaceful Assembly and of Association, Reports to the Human Rights Council, A/HRC/20/27, para. 27, and A/HRC/23/29, para. 49).

in question call for an end to racial discrimination and advocate for greater racial equality in the United States.<sup>278</sup> The International Covenant on Civil and Political Rights (ICCPR), which is binding on the United States, protects both the right to peaceful assembly and the right to freedom of expression, which safeguards the content of the messages expressed at demonstrations, such as speech during group chants and in writing on banners or placards.<sup>279</sup> As a general matter, States thus have a negative duty to not interfere with peaceful assemblies.<sup>280</sup> This means that States may not “prohibit, restrict, block, disperse or disrupt peaceful assemblies without compelling justification, nor to sanction participants or organisers without legitimate cause.”<sup>281</sup> These rights can only be restricted, in conformity with the law, when such restrictions are necessary to respect the rights and reputation of others or to protect national security, public safety, public order, or public health and proportionate to achieving such goals.<sup>282</sup> In order for a restriction to be justified on the basis of public safety, the assembly must pose “a real and significant risk to the safety of persons (to life or security of person) or a similar risk of serious damage to property.”<sup>283</sup> Any restrictions should be the the least intrusive possible and imposed with an eye toward facilitating the exercise of the right, rather than limit it.<sup>284</sup> The Committee was also careful

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<sup>278</sup> International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969), *ratified* 140 Cong. Rec. S7634 (June 24, 1994) [hereinafter CERD] (“Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races”).

<sup>279</sup> ICCPR, *supra* note 277.

<sup>280</sup> General Comment No. 37, *supra* note 274, at ¶ 23.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at ¶¶ 23, 36.

<sup>283</sup> *Id.* at ¶ 23.

<sup>284</sup> *Id.* at ¶¶ 36, 40.

to note that peaceful assemblies in some cases can be “inherently or deliberately disruptive” and such disruption must be tolerated and accommodated.<sup>285</sup>

The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has further affirmed that “states have a positive obligation under international human rights law not only to actively protect peaceful assemblies, but to facilitate the exercise of the right to freedom of peaceful assembly.”<sup>286</sup> The U.N. Human Rights Committee shares this understanding concerning the duty of States to facilitate peaceful protests under Article 21 of the ICCPR, concluding that States must “promote an enabling environment for the exercise of the right of peaceful assembly without discrimination, and put in place a legal and institutional framework within which the right can be exercised effectively.”<sup>287</sup> These measures can include blocking off streets, redirecting traffic, providing security, and protecting protesters from interference, violence, and abuse by counter-protesters or other members of the public.<sup>288</sup> Significantly, “[t]he possibility that a peaceful assembly may provoke adverse or even violent reactions from some members of the public is not sufficient grounds to prohibit or restrict the assembly.”<sup>289</sup>

This duty to protect peaceful protest is also heightened under certain circumstances. Under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which is also binding on the United States, States have an obligation not just to

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<sup>285</sup> *Id.* at ¶¶ 44, 47.

<sup>286</sup> IMPACT OF LESS LETHAL WEAPONS, *supra* note 277, at 5 (citing Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Reports to the Human Rights Council, A/HRC/20/27, para. 27, and A/HRC/23/29, para. 49.).

<sup>287</sup> General Comment No. 37, *supra* note 274, at ¶ 24.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at ¶ 27.

facilitate the exercise of the right, but to “encourage” organizations and movements seeking to eliminate barriers between races.<sup>290</sup> In addition, States must ensure that all peoples, regardless of race, can equally enjoy their rights to freedom of expression and to freedom of assembly.<sup>291</sup> The CERD Committee, the treaty monitoring body of the CERD, has further specified that any restrictions placed on the exercise of the freedom of assembly must not be applied in a discriminatory manner.<sup>292</sup> Under the ICCPR, the U.N. Human Rights Committee has similarly concluded that “[p]articular efforts must be made to ensure equal and effective facilitation and protection of the right of peaceful assembly of individuals who are members of groups who are or have been subjected to discrimination.”<sup>293</sup> Under the ICCPR, States must also protect participants from all forms of discriminatory abuses or attacks.<sup>294</sup> All of these rights and protections, including the duties and responsibilities of all functionaries involved, must be clearly laid out in domestic law.<sup>295</sup> When violations of these rights occur, States must “ensure independent and transparent oversight of all bodies involved with peaceful assemblies, including through timely access to effective remedies.”<sup>296</sup>

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<sup>290</sup> CERD, *supra* note 278 (“Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races”).

<sup>291</sup> *Id.*

<sup>292</sup> Committee on the Elimination of Racial Discrimination, General Recommendation 20, The Guarantee of Human Rights Free from Racial Discrimination (Forty-eighth session, 1996), U.N. Doc. A/51/18, annex VIII at 124 (1996), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 208 (2003) (“Whenever a State imposes a restriction upon one of the rights listed in article 5 of the Convention which applies ostensibly to all within its jurisdiction, it must ensure that the restriction, neither in purpose nor effect, is incompatible with article 1 of the Convention as an integral part of international human rights standards. To ascertain whether this is the case, the Committee is obliged to inquire further to make sure that any such restriction does not entail racial discrimination.”).

<sup>293</sup> General Comment No. 37, *supra* note 274, at ¶ 25.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at ¶ 28.

<sup>296</sup> *Id.* at ¶ 29.

The repression of the rights of anti-racist protesters in the United States has already drawn the reproach of the United Nations special procedures. After visiting Philadelphia and other U.S. cities in the wake of Black Lives Matter protests in 2016, the former United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, expressed concern that “[r]acism and the exclusion, persecution and marginalization that come with it” was inhibiting the exercise of these rights by Black protesters in the United States.<sup>297</sup> In particular, the Special Rapporteur was disturbed to learn that “assemblies organized by African-Americans [were] managed differently, with these protests often met with disproportionate force.”<sup>298</sup> He was alarmed that police encounters with Black protesters were likely to be militarized and aggressive.<sup>299</sup> Special Rapporteur Kiai also criticized the federal government’s “1033 Program,” which allows local and state police authorities to acquire surplus military equipment at low cost.<sup>300</sup> He cautioned that “[p]rotesters are not war enemies and should never be treated as such. It is ill-advised to use military material to manage activities so fundamental to democratic societies.”<sup>301</sup> Special Rapporteur Kiai also expressed concern that armed white militia were brandishing weapons in order to intimidate Black protesters in Ferguson, Missouri and warned that “[f]ear should not define the parameters of organizing or managing protests.”<sup>302</sup> As aptly noted by the

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<sup>297</sup> Maina Kiai, *Statement by the United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association at the Conclusion of His Visit to the United States of America*, U.N. HUM. RTS: OFF HIGH COMM. (July 27, 2016), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20317&LangID=E>.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* For more information, also see 1033 Program FAQs on the website of the U.S. Defense Logistics Agency, <https://www.dla.mil/DispositionServices/Offers/Reutilization/LawEnforcement/ProgramFAQs.aspx>.

<sup>301</sup> Kiai, *supra* note 297.

<sup>302</sup> *Id.*

Special Rapporteur after his country visit to the United States, “[p]rotests naturally come with some disruptions, but police should target only the individuals responsible for violence. Acts of violence by a few do not make an entire protest violent; nor do they strip other individuals of their right to continue the assembly.”<sup>303</sup>

## 2. *Prohibition on torture and cruel, inhuman, or degrading treatment*

In addition, the United States is bound by numerous international conventions that require law enforcement to refrain from torture, or other cruel, inhuman, or degrading treatment. Specifically, the United States has signed and ratified the ICCPR, which bans torture and cruel, inhuman or degrading treatment or punishment.<sup>304</sup> The Convention on the Rights of the Child (“CRC”) further provides that “no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.”<sup>305</sup> The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) also requires signatory parties like the United States to take measures to end torture within their jurisdiction.<sup>306</sup> CAT also expressly defined torture as “any act [involving state agents] by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as...punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.”<sup>307</sup>

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<sup>303</sup> *Id.*

<sup>304</sup> ICCPR, *supra* note 277.

<sup>305</sup> Art. 37, G.A. Res. 44/25 Convention on the Rights of the Child (Nov. 20, 1989).

<sup>306</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984 <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>.

<sup>307</sup> *Id.*

## B. International Standards on the Use of Force by Police

To ensure protection of these rights, over the past forty years, U.N. experts and bodies have delineated a set of international standards specifically directed at guiding and limiting the use of force by police.<sup>308</sup> These international standards are derived from the three main sources: 1) the U.N. Code of Conduct for Law Enforcement Officials, 2) the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and 3) a 2014 report by the U.N. Special Rapporteur on extrajudicial, summary, or arbitrary executions on protection of the right to life during law enforcement.<sup>309</sup>

Starting in 1979, the United Nations General Assembly adopted the Code of Conduct for Law Enforcement Officials, which is meant to ensure that law enforcement officials “respect and protect human dignity and maintain and uphold the human rights of all persons” and perform their duties in a manner consistent with their duty to serve the community.<sup>310</sup> Under the U.N. Code of Conduct, “[n]o law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment.”<sup>311</sup> This prohibition is absolute, meaning that law enforcement cannot “invoke superior orders or exceptional circumstances” including “internal political instability or any

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<sup>308</sup> UNIV. CHI. HUMAN RTS. CLINIC, DEADLY DISCRETION: THE FAILURE OF POLICE USE OF FORCE POLICIES TO MEET FUNDAMENTAL INTERNATIONAL HUMAN RIGHTS LAW AND STANDARDS 20–22 (2020), <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1014&context=ihr> [hereinafter DEADLY DISCRETION].

<sup>309</sup> *Id.* at 11.

<sup>310</sup> Code of Conduct for Law Enforcement Officials, G.A. Res. 34/169 of 17 (Dec. 17, 1979), Art. 1 & 2, <https://www.ohchr.org/en/professionalinterest/pages/lawenforcementofficials.aspx> [hereinafter U.N. Code of Conduct].

<sup>311</sup> *Id.* at Art. 5.

other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.”<sup>312</sup>

The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offender adopted the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials in 1990, which were meant to further clarify certain aspects of the U.N. Code of Conduct.<sup>313</sup> The U.N. Basic Principle underscored that “law enforcement officials have a vital role in the protection of the right to life, liberty and security of the person” and that any use of force by police must be “commensurate with due respect for human rights.”<sup>314</sup> To support implementation of the U.N. Basic Principles by law enforcement agencies, Christof Heyns, the U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions at the time, issued a report with a series of recommendations in 2014.<sup>315</sup>

In their totality, the standards articulated in these three documents compel that law enforcement to be guided by four principles: necessity, proportionality, legality and accountability.<sup>316</sup>

### 1. *The Principles of Necessity and Proportionality*

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<sup>312</sup> *Id.*

<sup>313</sup> DEADLY DISCRETION, *supra* note 308, at 12; Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27–Sept. 7, 1990, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 112–13, U.N. Doc. A/CONF.144/28/Rev.1 (1991), <http://www.ohchr.org/Documents/ProfessionalInterest/firearms.pdf> [hereinafter U.N. Basic Principles].

<sup>314</sup> U.N. Basic Principles, *supra* note 313.

<sup>315</sup> Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. Doc. A/HRC/26/36 (Apr. 1, 2014), <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Pages/ListReports.aspx> [hereinafter UNSR Heyns Report].

<sup>316</sup> DEADLY DISCRETION, *supra* note 308, at 11.

The U.N. Code of Conduct introduced the principles of necessity and proportionality, stipulating that law enforcement “may use force only when strictly necessary and to the extent required for the performance of their duty.”<sup>317</sup> The U.N. Basic Principles further developed these principles, specifying that police can only resort to the use of force after all other means have failed.<sup>318</sup>

The principle of necessity requires law enforcement to question “whether force should be used at all.”<sup>319</sup> As a starting point, intentional force may only be used when law enforcement officers are pursuing a legitimate objective and “in response to an imminent or immediate threat.”<sup>320</sup> The former Special Rapporteur on Extrajudicial Summary or Arbitrary Executions has specified that imminency is “a matter of seconds, not hours.”<sup>321</sup> The U.N. Basic Principles also provides specific guidance for law enforcement when protests are peaceful but unlawful, explaining that “law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.”<sup>322</sup> Additionally, potentially lethal force, which infringes on the right to life codified in Article 6(1) of the ICCPR, should only be employed in response to an imminent and particularized threat and when no other options exist.<sup>323</sup>

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<sup>317</sup> U.N. Code of Conduct, *supra* note 310, at Art. 3.

<sup>318</sup> U.N. Basic Principles, *supra* note 313, at ¶ 4.

<sup>319</sup> UNSR Heyns Report, *supra* note 315, at ¶ 59.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> U.N. Basic Principles, *supra* note 313, at ¶ 13.

<sup>323</sup> DEADLY DISCRETION, *supra* note 308, at 15 (citing U.N. Basic Principles, *supra* note 313, at ¶ 9 & U.N. Code of Conduct, *supra* note 310, at Art. 3, commentary I to Art. 3). See also ICCPR, *supra* note 277, at Art. 6 (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”). UNSR Heyns Report, *supra* note 315, at ¶ 70 & U.N. Code of Conduct, *supra* note 310, at commentary(c) & (b) to Art. 3).

When assessing whether force is in line with the principle of proportionality, law enforcement must balance the harm that will be caused by the use of force, with the legitimate interest that is being protected.<sup>324</sup> When weighing that balance, the European Court of Human Rights (ECHR) concluded that, when less-lethal weapons<sup>325</sup> are used inappropriately, they can become lethal weapons and amount to cruel and inhuman treatment when used to disperse demonstrations.<sup>326</sup> Thus, such legal force may only be used in response to threats to life or serious bodily harm to the officer or others.<sup>327</sup> Moreover, any use of less lethal weapons “should be carefully evaluated in order to minimize the risk of endangering uninvolved persons, and the use of such weapons should be carefully controlled.”<sup>328</sup>

When the use of force is unavoidable, law enforcement must:

- (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;
- (b) Minimize damage and injury, and respect and preserve human life;
- (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;

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<sup>324</sup> UNSR Heyns Report, *supra* note 315, at ¶ 65.

<sup>325</sup> The U.N. Guidance defines less lethal weapons as “[w]eapons designed or intended for use on individuals or groups of individuals and which, in the course of expected or reasonably foreseen use, have a lower risk of causing death or serious injury than firearms.” OFFICE OF THE UNITED NATIONS HIGH COMM’R. HUM. RTS., UNITED NATIONS GUIDANCE ON LESS-LETHAL WEAPONS IN LAW ENFORCEMENT 23 (2020) [hereinafter GUIDANCE ON LESS-LETHAL WEAPONS], [https://www.ohchr.org/Documents/HRBodies/CCPR/LLW\\_Guidance.pdf](https://www.ohchr.org/Documents/HRBodies/CCPR/LLW_Guidance.pdf).

<sup>326</sup> Abdullah Yasa et al. v. Turkey, ECtHR, Appl. No. 44827/08, Judgment of 16 July 2013, ¶¶ 42, 50.

<sup>327</sup> UNSR Heyns Report, *supra* note 315, at ¶ 70 & U.N. Code of Conduct, *supra* note 310, at commentary (c) & (b) to Art. 3).

<sup>328</sup> U.N. Basic Principles, *supra* note 313, at ¶ 3.

(d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.<sup>329</sup>

The U.N. Basic Principles also provides specific guidance for the use of force allowable once someone is in police custody. Namely, force can only be employed “when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened.”<sup>330</sup> Additionally, the U.N. Code of Conduct obliges law enforcement officials to “ensure the full protection of the health of persons in their custody” and to “take immediate action to secure medical attention whenever required.”<sup>331</sup>

## 2. *The Principles of Legality and Accountability*

The principle of legality, generally founded in the principle of the rule of law, requires states to promulgate domestic laws on the use of force by law enforcement that comply with international human rights and abide by those laws.<sup>332</sup> For instance, the U.N. Basic Principles provide that “[g]overnments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials.”<sup>333</sup> The U.N. Special Rapporteur report further establishes that in order for the use of lethal force not to be arbitrary, it must have been legal under a domestic law that complies with international standards.<sup>334</sup>

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<sup>329</sup> *Id.* at ¶ 5.

<sup>330</sup> *Id.*

<sup>331</sup> U.N. Code of Conduct, *supra* note 310, at Art. 6.

<sup>332</sup> DEADLY DISCRETION, *supra* note 308, at 20.

<sup>333</sup> U.N. Basic Principles, *supra* note 313, at ¶ 1.

<sup>334</sup> UNSR Heyns Report, *supra* note 315, at ¶¶ 55–56.

When a violation of these laws is alleged, the principle of accountability requires that those affected by the use of force have “access to an independent process, including a judicial process.”<sup>335</sup> In addition, law enforcement officials must promptly report incidents where the use of force or firearms results in injury or death, to their superiors.<sup>336</sup> When a death results from the use of force, accountability requires that an independent body conduct an “exhaustive and impartial” investigation in a prompt and expeditious manner.<sup>337</sup> The U.N. Special Rapporteur has also specified that this external oversight body investigating these cases must have “necessary powers, resources, independence and transparency” to be effective, as well as “community and political support, and civil society involvement.”<sup>338</sup>

In addition, the process must ensure that superior officers are held accountable “if they know, or should have known that law enforcement officials under their command are resorting, or have resorted, to the unlawful use of force and firearms, and they did not take all measures in their power to prevent, suppress or report such use.”<sup>339</sup> At the same time, following orders of superior officers is no defense if the subordinate officer “knew that an order to use force and firearms resulting in the death or serious injury of a person was manifestly unlawful and had a reasonable opportunity to refuse to follow it.”<sup>340</sup> The Special Rapporteur noted that racism and other discrimination can impact patterns of accountability

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<sup>335</sup> U.N. Basic Principles *supra* note 313, at ¶ 23. States are also obliged, under article 2(3) of the ICCPR to “ensure that any person whose rights or freedoms . . . are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in official capacity.”

<sup>336</sup> *Id.* at ¶ 81.

<sup>337</sup> *Id.* at ¶ 80.

<sup>338</sup> *Id.* at ¶ 84.

<sup>339</sup> *Id.* at ¶ 24.

<sup>340</sup> *Id.* at ¶ 26.

and therefore governments “must instead adopt both a reactive and a proactive stance, encompassing all available means, to combat racially motivated and other similar violence within law enforcement operations.”<sup>341</sup>

### 3. *Specific Guidance for Less Lethal Weapons*

International human rights law and standards require that when law enforcement use less-lethal weapons during an assembly, those weapons must be used as both a last resort, and in a manner that specifically addresses individual acts of violence.<sup>342</sup> The Office of the United Nations High Commissioner for Human Rights (OHCHR) has also provided guidance to law enforcement on the use of less-lethal weapons. As detailed below, those guidelines provide specific guidance on how certain types of less-lethal weapons should be used in response to protests and assemblies. According to OHCHR, “the use of less-lethal weapons to disperse an assembly should be considered a measure of last resort.”<sup>343</sup> If there are members of the assembly acting violently, police should isolate violent participants, so the rest of the assembly can continue.<sup>344</sup> Law enforcement may employ weapons that target groups only when targeted interventions are ineffective, and only after having issued appropriate warnings.<sup>345</sup> Participants in the assembly should be given opportunity to follow a warning and a safe space or route for them to move.<sup>346</sup> When using less-lethal weapons, law enforcement should also take due care to third parties and bystanders.<sup>347</sup> In addition,

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<sup>341</sup> UNSR Heyns Report, *supra* note 315, at ¶ 74.

<sup>342</sup> GUIDANCE ON LESS-LETHAL WEAPONS, *supra* note 325, at 29.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* at 23–24.

<sup>346</sup> *Id.*

<sup>347</sup> *Id.* at 23.

law enforcement should take particularly care when using these weapons when those who are particularly vulnerable to the harmful consequences of the use of force are present, including children, pregnant women, the elderly, and persons with disabilities, are present.<sup>348</sup>

a) Pepper spray

Hand-held chemical irritants like pepper spray or CS spray, are designed to subdue a violent individual by causing irritation to a person’s eyes, skin, and respiratory tract.<sup>349</sup> Use of pepper spray can cause nausea, vomiting, and in large doses necrosis of the tissue in a person’s respiratory tract, or internal bleeding.<sup>350</sup> Pepper spray can also cause burning on a person’s skin.<sup>351</sup>

Because of the potential health risk to a person subjected to pepper spray, “chemical irritants should only be deployed when a law enforcement official has reason to believe there is an imminent threat of injury.”<sup>352</sup> Hand-held chemical irritants like pepper spray “should not be used in situations of purely passive resistance. In accordance with the principle of necessity, once a person is already under the control of a law enforcement official, no further use of a chemical irritant will be lawful.”<sup>353</sup>

b) Tear gas

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<sup>348</sup> *Id.* at 6.

<sup>349</sup> *Id.* at 27.

<sup>350</sup> *Id.* at 27–28.

<sup>351</sup> *Id.* at 28.

<sup>352</sup> *Id.* at 27.

<sup>353</sup> *Id.* at 28.

The Centers for Disease Control and Prevention (CDC) warns that prolonged exposure to tear gas, especially in an enclosed space, can cause long-term health problems, such as “glaucoma, and cataracts, and may possibly cause breathing problems such as asthma.”<sup>354</sup> According to the CDC, tear gas exposure can also result in death, either from respiratory failure, or from severe chemical burns to the throat and lungs.<sup>355</sup>

In the incidents described above, Philadelphia Police deployed a type of tear gas common for U.S. law enforcement agencies, 2-chlorobenzalmalonitrile (CS).<sup>356</sup> CS degrades the mucus membranes of the respiratory system, leaving an individual with increased risk of contracting a virus or bacteria.<sup>357</sup> Studies conducted by the U.S. military showed that those exposed to CS were “at higher risk for contracting influenza, pneumonia, bronchitis and other respiratory illnesses.”<sup>358</sup>

Chemical irritants like tear gas should only be used from a distance to disperse a group and stop that group from acting violently.<sup>359</sup> Firing of tear gas presents a danger of inducing a stampede, when used against a crowd that is in an enclosed space.<sup>360</sup> Because of the nature of tear gas, the irritant may have indiscriminate effects, affecting those who were not acting violently, including bystanders, due to changes in wind direction.<sup>361</sup>

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<sup>354</sup> *Facts About Riot Control Agents Interim Document*, CTRS. DISEASE CONTROL & PREVENTION, <https://emergency.cdc.gov/agent/riotcontrol/factsheet.asp> (last updated Apr. 4, 2018).

<sup>355</sup> *Id.*

<sup>356</sup> Lisa Song, *Tear Gas Is Way More Dangerous Than Police Let On—Especially During the Coronavirus Pandemic*, PROPUBLICA (June 4, 2020, 12:15 PM), <https://www.propublica.org/article/tear-gas-is-way-more-dangerous-than-police-let-on-especially-during-the-coronavirus-pandemic>.

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> GUIDANCE ON LESS-LETHAL WEAPONS, *supra* note 325, at 29.

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

Aside from the chemical agents in tear gas, the projectile itself poses a danger to individuals.<sup>362</sup> Irritant projectiles should generally not be fired at an individual, especially not their head or face.<sup>363</sup> Rather, it should always be fired at an angle.<sup>364</sup> The European Court of Human Rights (ECtHR) has observed that firing a tear gas canister directly at individuals can cause serious injury, even death, if the grenade launcher is used improperly.<sup>365</sup> This court concluded that “firing a tear-gas grenade along a direct, flat trajectory by means of a launcher cannot be regarded as an appropriate police action as it could potentially cause serious, or indeed fatal injuries, whereas a high-angle shot would generally constitute the appropriate approach, since it prevents people from being injured or killed in the event of an impact.”<sup>366</sup> In that case, a 13 year old boy, who allegedly threw stones at officers while participating in a demonstration, was struck in the nose by a tear gas canister.<sup>367</sup> The ECtHR concluded that, even if the allegation were true, the use of tear canisters in this way by police was a not proportionate response, because it poses a serious risk of injury and possibly death.<sup>368</sup>

### c) Rubber bullets

Kinetic projectiles such as rubber bullets should only be used in direct fire with the aim of striking the lower body of a violent individual, and only to address an imminent threat

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<sup>362</sup> Jamie Duffy, *Indiana Tech Student Loses Eye During Saturday’s Protest*, J. GAZETTE (May 31, 2020, 10:00 PM), <https://www.journalgazette.net/news/local/police-fire/20200531/indiana-tech-student-loses-eye-during-saturdays-protest>.

<sup>363</sup> GUIDANCE ON LESS-LETHAL WEAPONS, *supra* note 325, at 30.

<sup>364</sup> *Id.* at 29.

<sup>365</sup> Abdullah Yasa et al. v. turkey, ECtHR, Appl. No. 44827/08, Judgment of 16 July 2013, ¶¶ 42, 50.

<sup>366</sup> *Id.* at ¶ 48.

<sup>367</sup> *Id.* at ¶ 44, 54.

<sup>368</sup> *Id.* at ¶ 45.

of injury to a law enforcement officer or a member of the public.<sup>369</sup> Law enforcement should not target the face or head, or the torso.<sup>370</sup> Rubber bullets can cause skull fracture, brain injury, damage to the eyes, or damage to vital organs.<sup>371</sup>

### **C. The City of Philadelphia's Human Rights Violations**

#### *1. The City of Philadelphia violated the Victims' Right to Peaceful Assembly and Freedom of Expression*

Instead of facilitating and encouraging Black Lives Matters protests in the wake of the murder of George Floyd, as required under the ICCPR and CERD, the City of Philadelphia actively impeded and repressed protests for racial equity, all while emboldening and supporting white vigilante groups and counter-protesters.

To determine if the protests on highway 676 and in West Philadelphia fall within the scope of protections under the right to peaceful assembly in the ICCPR, there is a two-step analysis.<sup>372</sup> First, it must be established whether the individual victims were participating in a peaceful protest.<sup>373</sup> Second, it must be established whether any restrictions imposed by the State were warranted under the circumstances.<sup>374</sup>

With respect to the protest on the highway on 676 on June 1<sup>st</sup>, 2020, there is no evidence that any acts of violence took place.<sup>375</sup> Indeed, the only act of aggression captured

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<sup>369</sup> GUIDANCE ON LESS-LETHAL WEAPONS, *supra* note 325, at 35.

<sup>370</sup> *Id.*

<sup>371</sup> *Id.*

<sup>372</sup> General Comment No. 37, *supra* note 274, at ¶ 11.

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> Briggs & Marin, *supra* note 145.

on video was the spray painting of a police vehicle.<sup>376</sup> Mayor Kenney and Police Commissioner Outlaw first justified police force alleging that protesters had rocked a state trooper vehicle with a trooper inside and thrown rocks at officers.<sup>377</sup> Despite numerous reports, video footage, and eyewitness accounts contradicting this account, it was only after the NY Times released a damning video, nearly a month later, that Mayor Kenney and Police Commissioner Outlaw apologized, with Commissioner Outlaw indicating that the reports she received from officers on the ground were “substantively inaccurate,” admitting that officers “utilize[ed] force instruments gratuitously,” and declaring a “categorical moratorium on the use of tear gas for the dispersal or control of crowds.”<sup>378</sup> Moreover, under international law, the fact that protesters were blocking the highway and preventing the flow of traffic does not preclude them from the protections of the ICCPR. As acknowledged by the U.N. Human Rights Committee, disruption of vehicular or pedestrian movement does not amount to “violence.”<sup>379</sup> Due to their scale and nature, protesters might intentionally or unintentionally disrupt vehicular movement; however, the Committee recognizes that they still enjoy human rights protections.<sup>380</sup>

While some restrictions are lawful if needed to protect public safety, the PPD far exceeded the bounds of what is allowable under human rights law. The deployment of less

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<sup>376</sup> Koettl et al., *supra* note 152.

<sup>377</sup> Press Release, Jim Kenny, Phila. Mayor, & Danielle Outlaw, Phila. Police Comm., Mayor Kenney and Police Commissioner Danielle Outlaw Issue Statements on the Use of Tear Gas, Press Release (June 1, 2020), <https://www.phila.gov/2020-06-01-mayor-kenney-and-police-commissioner-danielle-outlaw-issue-statements-on-the-use-of-tear-gas/>.

<sup>378</sup> *Philly Mayor, Police Commissioner Apologize for Pepper Spraying Protesters on I-676*, NBC10 PHILA. (June 25, 2020, 8:01 PM), <https://www.nbcphiladelphia.com/news/local/mayor-kenney-police-commssioner-outlaw-discuss-676-tear-gas-incident/2446920/>.

<sup>379</sup> *General Comment No. 37*, *supra* note 274, at ¶ 15.

<sup>380</sup> *Id.* at ¶ 7.

lethal weapons could hardly have been viewed as necessary to protect public safety. In fact, it endangered the lives of protesters and bystanders who were parked in their vehicles on highway 676, which runs through the heart of Philadelphia. The PPD unleashed repeated rounds of tear gas and pepper spray, which are nearly impossible to contain and compromise the respiratory systems of all in its vicinity. The fact that the police did so during the outbreak of COVID-19, a virus with well-documented destructive, sometimes with lethal, effects on lungs is all the more alarming.

With respect to the events on May 31<sup>st</sup> in West Philadelphia, even though the demonstrations were not planned, but rather spontaneous acts of group solidarity, protesters are still protected under the ICCPR, according the U.N. Human Rights Committee.<sup>381</sup> Moreover, like the protests on highway 676, the protests in West Philadelphia were, with a few exceptions, peaceful. Yet, at the same press conference where Police Commissioner Outlaw and Mayor Kenney apologized for the excessive use of force on 676, Mayor Kenney doubled down on the appropriateness of the use of force in West Philadelphia, calling it a “totally different situation.”<sup>382</sup> Specifically, he justified the use of tear gas at 52nd Street due to the “violence, arson, and looting in West Philadelphia.”<sup>383</sup> However, while there were some reports of destruction and theft of property following the arrival of police, the vast majority of demonstrations were peaceful.<sup>384</sup> The only threat of physical violence to police officers witnessed by the victims was an isolated incident in which children threw

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<sup>381</sup> *Id.* at ¶¶ 12, 14.

<sup>382</sup> *Philly Mayor, Police Commissioner Apologize for Pepper Spraying Protesters on I-676*, *supra* note 378.

<sup>383</sup> *Id.*

<sup>384</sup> Interview with Carter, *supra* note 66.

rocks and water bottles at police.<sup>385</sup> As the U.N. Human Rights Commission has specified, “any restrictions on participation in peaceful assemblies should be based on a differentiated or individualized assessment of the conduct of the participants and the assembly concerned.”<sup>386</sup>

In West Philadelphia, the PPD’s use of force was not nearly so targeted. As will be described in further detail below, police indiscriminately unleashed less than lethal weapons on passersby and residents in a manner that posed a threat to public safety rather than protected it. Residents describe being tear-gassed in their homes and on their porches, pedestrians being pelleted by rubber bullets, and protesters being attacked and maced in the face by police, all without warning.<sup>387</sup> Often times, police aggression and assaults appeared to be in retaliation for residents exercising their right to freedom of expression. For instance, one victim, Johana Rahman, describes seeing a SWAT team member pepper spray a man, who was standing and yelling in protest on a stool in the middle of an intersection, directly in the face. She said that “the cop got really close, maybe a little over arms-length. The pepper spray got in his mouth. It was everywhere. He didn’t have a mask on or if he did it was pulled down.”<sup>388</sup> This assault happened around 3 p.m. before any property destruction or theft occurred in the neighborhood.<sup>389</sup>

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<sup>385</sup> Interview with Rifken, *supra* note 37.

<sup>386</sup> General Comment No. 37, *supra* note 274, at ¶ 38.

<sup>387</sup> Interview with Carter, *supra* note 66.

<sup>388</sup> Interview with Rahman, *supra* note 36.

<sup>389</sup> *Id.*

In addition, human rights law requires that any restrictions on the right to peaceful assembly be imposed in a “content neutral” way<sup>390</sup> and not be based on the identity of the participants or their relationship with the authorities.<sup>391</sup> In the aftermath of the murder of George Floyd and during the subsequent demonstrations, the broad restrictions on the right to peaceful assembly and police violence were overwhelmingly directed at protesters who supported racial equity, many of whom were Black and brown. In stark contrast, white vigilantes and counter-protesters in Fishtown, at Target, and at Marconi Plaza were protected by police, even though they hurled epithets at and attacked anti-racist protesters and journalists covering the protests. The PPD went so far as to forcibly disperse protesters for Black lives in the face of threats of violence by white groups, instead of dispersing the groups threatening violence and disorder. This too is out of line with international law. The U.N. Human Rights Committee has specified that violence against participants in a protest does not render an assembly non-peaceful and participants in these protests must be protected.<sup>392</sup>

Furthermore, the 8 p.m. curfew in place from May 31<sup>st</sup> to June 7<sup>th</sup> imposed by Mayor Kenney due to “recent civil disturbance and disorder that has erupted in Philadelphia” was discriminately enforced against Black residents and protesters.<sup>393</sup> On May 31, 2020, the same day that police bore down on residents in West Philadelphia, police encouraged the

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<sup>390</sup> See *Alekseev v. Russian Federation*, (CCPR/C/109/D/1873/2009), para. 9.6. See also *Amelkovich v. Belarus* (CCPR/C/125/D/2720/2016), para. 6.6; CCPR/C/GNQ/CO/1, para. 54.

<sup>391</sup> General Comment No. 37, *supra* note 274, at ¶ 22.

<sup>392</sup> *Id.* at ¶¶ 18, 52.

<sup>393</sup> See *Emergency Orders to Implement Curfew*, CITY OF PHILA., <https://www.phila.gov/documents/emergency-order-to-implement-curfew/> (last updated June 6, 2020) (containing executive orders implementing curfew for May 31 to June 6, 2020).

gathering of white groups in front of a Target in South Philadelphia well after curfew, making not a single arrest. When the police ultimately told people to go home after 11 p.m., they allowed a small group of white men to stay at the store in the company of police officers while sending Black counter-protesters home. Meanwhile in West Philadelphia on that day, the police arrested Anthony Smith, a Black organizer for the anti-racist group the Philly Coalition for REAL Justice, for a curfew violation.<sup>394</sup> Likewise, on June 1, 2020, armed white vigilantes were permitted to roam past curfew in Fishtown, on the same night that Black Lives Matter activists were arrested for peaceful protests on highway 676.<sup>395</sup> The police shared food and thanked these white vigilantes for being “pro-police.”<sup>396</sup> No arrests were made even though some members of the group assaulted a Black Lives Matter protester and a journalist covering the incident.<sup>397</sup>

Regrettably, journalists often came under attack as they reported on the protests of George Floyd’s murder. One journalist was hospitalized after being assaulted by white vigilantes.<sup>398</sup> Police also pepper sprayed an independent journalist on Arch Street after the journalist asked an officer for his badge number while filming the police response to a Black Lives Matter protest.<sup>399</sup> These acts too are violations of the right to peaceful assembly under the ICCPR. In addition to protesters, the U.N. Human Rights Committee has underscored that

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<sup>394</sup> NAACP Complaint, *supra* note 107, at ¶ 29.

<sup>395</sup> Blest, *supra* note 211; D’Onofrio, *supra* note 211; Knips & LaParo, *supra* note 211; Lapin, *supra* note 211; Orso et al., *Police Stood By*, *supra* note 203; NBC10 Phila., *Men with Bats*, *supra* note 211; Ewan Palmer, *supra* note 211; Ruderman & Laker, *supra* note 193; Singh, *supra* note 189; *Police Allowed Fishtown Mob to Threaten Neighbors Who Want Answers*, *supra* note 211; Wink, *supra* note 211.

<sup>396</sup> Ruderman & Laker, *supra* note 193.

<sup>397</sup> Orso & Terruso, *supra* note 194.

<sup>398</sup> Blest, *supra* note 120.

<sup>399</sup> Whelan et al., *Besieged*, *supra* note 2.

journalists are also entitled to protection under the ICCPR because of their essential role in reporting on protests, which helps to ensure the full enjoyment of the right of peaceful assembly.<sup>400</sup> The Committee emphasized that reporters “must not be met with reprisals or other harassment, and their equipment must not be confiscated or damaged.”<sup>401</sup>

## 2. *PPD used Excessive Force in Violation of International Law*

As specified above, under international law, law enforcement can only use force when it is necessary and proportionate for a specific law enforcement objective and in response to an imminent threat. Disturbingly, in violation of the principles of proportionality and necessity, the PPD used excessive force against protesters and residents, needlessly putting them in great danger. In both West Philadelphia and on Interstate-676, Philadelphia police deployed less lethal weapons such as pepper spray and tear gas without providing warnings, without distinguishing between peaceful assembly participants and agitators (seemingly very few, if any were present), and without taking due care to the proximity of bystanders and those particularly vulnerable to the harmful effects of less lethal weapons.

Specifically, on June 1st, the PPD employed brute force seemingly to punish peaceful protesters for exercising their human rights to freedom of expression and peaceful assembly. After protesters entered the highway in an act of civil disobedience, the police corralled protesters from both sides. Within about five minutes of protesters entering the highway, police began to repeatedly pellet protesters with rubber bullets, tear gas, and pepper spray,

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<sup>400</sup> General Comment No. 37, *supra* note 274, at ¶ 30.

<sup>401</sup> *Id.*

causing a stampede.<sup>402</sup> These measures were not necessary to achieve any legitimate law enforcement objective nor responsive to any discernible threat. Indeed, to eyewitnesses, police efforts could not have felt farther from a measured attempt at crowd control. The scene was described by victims as a horror film with people panicking, screaming, and running in all directions. Victim Chris Cannito recalls hearing one woman scream that she didn't want to die, saying aloud what he was already thinking.<sup>403</sup> Victims also describe being unable to breathe and seeing blood and hearing screams everywhere.<sup>404</sup> International law mandates that any use of force should be a last resort, but in this case, the police engendered this chaos, without warning and without trying other means of clearing the highway. Alternatively, to protect the protesters' right to freedom of peaceful assembly, the police could have instead temporarily closed down the highway, redirected traffic to other routes until the march finished, and then guided demonstrators to exit the highway via one of the off ramps.

In further contravention of human rights standards, officers continued to use the less lethal weapons well after the highway was clear, forcing (in some instances directing) protesters to climb a steep hill and scale nearly unascendable fences, instead of using safer modes of exit and escape.<sup>405</sup> Many were injured in the process. For instance, George MacLeod

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<sup>402</sup> Interview with Chris Cannito (June 16, 2020); Interview with A.K., *supra* note 151; Interview with Annie Liontas (Aug. 13, 2020); Interview with MacLeod, *supra* note 151; Interview with Singh, *supra* note 154; Interview with Elsa Wefes-Potter (July 21, 2020).

<sup>403</sup> Interview with Cannito, *supra* note 402.

<sup>404</sup> Annie Liontas & Rachel López, *Eyes Blistering, Crawling on Highway: What It Felt Like to Be Tear Gassed on 676*, WHY Y (June 11, 2020), <https://why.org/articles/eyes-blistering-crawling-on-highway-what-it-felt-like-to-be-tear-gassed-on-676/>; Interview with Cannito, *supra* note 402; Interview with Eric Lesko (July 21, 2020); Interview with MacLeod, *supra* note 151; Interview with Wefes-Potter, *supra* note 402.

<sup>405</sup> Briggs & Marin, *supra* note 145; Interview with Wefes-Potter, *supra* note 402.

dislocated his arm attempting to climb over the steep wall that was his only point of escape from the highway.<sup>406</sup> Some victims report seeing others' eyes blister shut.<sup>407</sup> Bystanders on the overpass on 676, drivers blocked on the highway, and onlooking residents were also hit by the gas.<sup>408</sup> Those looking down from the highway overpass report police shooting rubber bullets and tear gas in their direction, even though they posed no possible threat to the police down below.<sup>409</sup> One protester, Ben Peifer, was hit in the knee by a rubber bullet, although he never entered the highway.<sup>410</sup> Another, Eric Lesko, said that an officer in full riot gear charged at him and his friend, waving his gun. Although they backed away and there was a fence between them, the officer still shot a rubber bullet at them through the fence, and Eric's friend was hit in the back of the head with a piece of the fence.<sup>411</sup> These acts were in contravention of the United Nations Guidance on Less-Lethal Weapons in Law Enforcement, which provides that rubber bullets should only be aimed at the lower body of a violent individual, and only used to address an imminent threat of injury to a law enforcement officer or member of the public.

The U.N. Basic Principles also provides specific guidance for the use of force allowable once someone is in police custody, which the PPD violated that day. Namely, force can only be employed "when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened."<sup>412</sup> Additionally, the U.N. Code of Conduct

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<sup>406</sup> Interview with MacLeod, *supra* note 151.

<sup>407</sup> Lontas & López, *supra* note 404.

<sup>408</sup> Interview with Ben Peifer (June 18, 2020).

<sup>409</sup> Interview with Cannito, *supra* note 402.

<sup>410</sup> Interview with Peifer, *supra* note 408.

<sup>411</sup> Interview with Lesko, *supra* note 406.

<sup>412</sup> U.N. Basic Principles, *supra* note 313, at ¶ 5.

obliges law enforcement officials to “ensure the full protection of the health of persons in their custody” and to “take immediate action to secure medical attention whenever required.”<sup>413</sup> To the contrary, police endangered those in their custody. Even after protesters were already arrested and had their hands bound, police pulled down their masks and sprayed them directly in the face at a close range—all during a pandemic.<sup>414</sup> One protester who was arrested reported having to slip out of his handcuffs to get his inhaler, fearing that he might suffocate without it.<sup>415</sup>

At 52nd Street in West Philadelphia, the PPD indiscriminately and without warning deployed tear gas, pepper spray, and rubber bullets on protesters and residents alike, including children and elderly individuals in contravention of human rights standards.<sup>416</sup> Just like on highway 676, they sprayed residents with pepper spray directly in their faces even though they posed no danger to police or the public. Per U.N. guidance, this chemical irritant should never be used in situations of purely passive resistance, but on that day the PPD did so multiple times. For instance, one victim, Michelle Rifken, reported an alarming incident in which she witnessed officers get into a scuffle with about 30 children, all likely under the age of 16 years old.<sup>417</sup> The children, upset that police had showed up in their neighborhood seemingly out of nowhere and for no reason, were yelling and throwing stones and half full water bottles at the police.<sup>418</sup> The police retaliated, throwing back water bottles

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<sup>413</sup> U.N. Code of Conduct, *supra* note 310, at Art. 6.

<sup>414</sup> Briggs & Marin, *supra* note 145.

<sup>415</sup> Liontas & López, *supra* note 404.

<sup>416</sup> Interview with Holton, *supra* note 111; Interview with Muehlmann, *supra* note 44; Interview with Rahman, *supra* note 36; Interview with Rifken, *supra* note 37.

<sup>417</sup> Interview with Rifken, *supra* note 37.

<sup>418</sup> *Id.*

and debris back at the children numerous times and using flashbangs.<sup>419</sup> Michelle was particularly alarmed when she saw a police officer hit a nine-year-old girl with a piece of cement.<sup>420</sup> When Michelle tried to intervene to deescalate the situation, an officer responded by charging her and telling her to back up.<sup>421</sup> Michelle put her hands up and inquired where she should go.<sup>422</sup> Instead of directing her where to go, the officer sprayed her with pepper spray within a foot of her face and continued aiming directly at her face as she attempted to turn her head away.<sup>423</sup> Michelle estimates that he sprayed her in the face for a full fifteen seconds, all while she had her hands up in a surrender position.<sup>424</sup> After the assault, Michelle's eyes were nearly swollen shut. For three days following the incident, she frantically went around the neighborhood to make sure that all the children she knew were kept in their houses—this being the only way she knew to keep them from harm.<sup>425</sup> Michelle cried a lot in those three days, and every tear burned with pepper spray.<sup>426</sup> It was deep in her tear ducts.<sup>427</sup>

The police's deployment of less lethal weapons, particularly rubber bullets, put elderly people at risk, in contravention of U.N. guidance as well. These weapons can become lethal when used against those who are particularly vulnerable to their effects. Amelia Carter saw an elderly Black woman in her 60s stumble onto Chancellor Street from 52nd Street. As

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<sup>419</sup> *Id.*

<sup>420</sup> *Id.*

<sup>421</sup> *Id.*

<sup>422</sup> *Id.*

<sup>423</sup> *Id.*

<sup>424</sup> *Id.*

<sup>425</sup> *Id.*

<sup>426</sup> *Id.*

<sup>427</sup> *Id.*

one of Amelia’s neighbors iced her head where she had been struck, she said, “they shot me with the rubber bullet. I was just here to visit my niece.<sup>428</sup>” As explained above, rubber bullets should never be shot at the head for risk of skull fracture, brain injury, and damage to the eyes, particularly at elderly individuals who are more susceptible to permanent injury. Similarly, Johana Rahman, a trained medic, helped an elderly Black man, who had been hit by a rubber bullet and was trying to limp down 52nd Street as SWAT vehicles descended on the neighborhood.<sup>429</sup> Later in the day, she also came across two women who needed medical attention because they had been pepper sprayed and curiously had a walker with them.<sup>430</sup> They explained to Johana that police descended on a residential area near Locust Street and the street devolved into chaos.<sup>431</sup> The two woman caught sight of an elderly woman with a walker, but then lost sight of her.<sup>432</sup> After the attack was over, all that was left was her walker.<sup>433</sup> They didn’t know what happened to the elderly woman, but hoped to find her and return her walker.<sup>434</sup> Amy Muehlmatt helped an older Black man who had been hit twice, once on his hand and once on his leg, with rubber bullets.<sup>435</sup> His hand was swollen twice its size and on his leg there was a significant swollen wound which made it hard for him to walk.<sup>436</sup> Amy described him as being at least in his 60s and definitely not there to protest, but just got caught in the crosshairs.<sup>437</sup> Elaine Holton also described helping an elderly Black

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<sup>428</sup> Interview with Carter, *supra* note 66.

<sup>429</sup> Interview with Rahman, *supra* note 36.

<sup>430</sup> *Id.*

<sup>431</sup> *Id.*

<sup>432</sup> *Id.*

<sup>433</sup> *Id.*

<sup>434</sup> *Id.*

<sup>435</sup> Interview with Muehlmatt, *supra* note 44.

<sup>436</sup> *Id.*

<sup>437</sup> *Id.*

woman to safety who had been caught in the tear gas fired by an officer from the top of a big armored truck.<sup>438</sup> These are vivid illustrations of how the police failed to use less lethal force only when strictly necessary to confront an immediate threat to public safety and as a last resort, at grave risk to the elderly residents of West Philadelphia.

Numerous victims reported that the police also appeared to be targeting medics, who were providing medical assistance to those injured by police, acts which undermine the U.N. Basic Principles.<sup>439</sup> During the police attack at 52nd and Chestnut Street, Amy Muehlmann reported helping a woman with a medic shirt who said that one of the riot police had pulled her mask down and fired mace directly in her face.<sup>440</sup> Daniel Hawkins witnessed two female medics walking very slowly down 52nd Street with their hands up and saying very explicitly that they were medics.<sup>441</sup> As they passed the officers, one of the officers very calmly pulled out a canister of pepper spray and sprayed one of the women straight in the face from 2 or 3 feet away.<sup>442</sup> Daniel also witnessed the police targeting other medics with rubber bullets and tear gas that day.<sup>443</sup> Johana Rahman, a street medic, says that there is one thing really stays with her and demonstrates the cruelty of police that day—when she was in front of the medic station near Big G’s Chicken Shack someone trying to grab supplies from the medic table to help someone who was injured, the police started firing directly at her. Police seemed to be trying to prevent her from getting supplies for those who really needed them. These

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<sup>438</sup> Interview with Holton, *supra* note 111.

<sup>439</sup> Interview with Muehlmann, *supra* note 44; Interview with Rahman, *supra* note 36; Interview with Hawkins, *supra* note 1.

<sup>440</sup> Interview with Muehlmann, *supra* note 44.

<sup>441</sup> Interview with Hawkins, *supra* note 1.

<sup>442</sup> *Id.*

<sup>443</sup> *Id.*

egregious acts are totally out of line with human rights standards on the use of force. The U.N. Basic Principles specify that police have an obligation to ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment.<sup>444</sup> Instead, they obstructed injured protesters' and residents' access to medical care, as required by international law, and targeted the medics providing them first aid.

The police also appeared to target journalists. As noted above, journalists are protected under the ICCPR because of their special role in documenting demonstrations, and thereby facilitating others' right to peaceful assembly. As described above, Emily Neil, a young female journalist who was documenting the incident, was hit in the head twice and rushed to the hospital.<sup>445</sup> To onlookers, it appeared like the journalist was targeted for taking photos, because she wasn't doing anything aggressive or unusual.<sup>446</sup> Amy observed that in general the police were targeting people who were documenting the incident.<sup>447</sup>

According to multiple eyewitness accounts, the police seemed unconcerned with public safety or preventing theft. Rather, they appeared there solely to antagonize protesters and residents. One victim, Daniel Hawkins, saw police fire canisters over houses, so they landed either on the residential streets or in people's backyards.<sup>448</sup> Amy Muehlmann saw police fire tear gas canisters onto people's porches and through the open windows of houses where she knew children lived.<sup>449</sup> Elaine Holton reported being really upset that the police

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<sup>444</sup> U.N. Basic Principles, *supra* note 313, at ¶ 5.

<sup>445</sup> Interview with Neil, *supra* note 96.

<sup>446</sup> Interview with Hawkins, *supra* note 1.

<sup>447</sup> Interview with Muehlmann, *supra* note 44.

<sup>448</sup> Interview with Hawkins, *supra* note 1.

<sup>449</sup> Interview with Muehlmann, *supra* note 44.

shot a tear gas canister into an empty lot in the residential area where she lives because her neighbors across the street have kids, ranging in age from toddlers to preteens.<sup>450</sup> Additionally, police did not secure the area or control traffic at all, so people were still driving into the area and the bus route was still running through the area.<sup>451</sup> As a result, people were getting off buses or driving back to their homes in the neighborhood and getting caught in the crosshairs of tear gas and rubber bullets.<sup>452</sup> If anything, police were endangering residents by shooting tear gas into residential streets far from the commercial corridor where any property theft was occurring.<sup>453</sup> One video captures residents screaming at police “kids live here. Go!!” as police hurled tear gas canisters down their street.<sup>454</sup> This threatening behavior continued long after any “looters” had left the neighborhood. To the extent that police argue that they were responding to a public safety threat, at this point, they should have reassessed the situation and de-escalated the amount of force used in accordance with the principle of necessity.

Instead, the police became the threat to the neighborhood’s safety and wellbeing. At one point, a group of about thirty residents attempted to “hold the line” at Chancellor Street to prevent the police from progressing toward the nearby residential area again.<sup>455</sup> The police made no attempt to negotiate with the crowd and gave no warning before firing tear gas or rubber bullets at them.<sup>456</sup> In another incident, where residents gathered to protest

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<sup>450</sup> Interview with Holton, *supra* note 111.

<sup>451</sup> Interview with Carter, *supra* note 66.

<sup>452</sup> *Id.*

<sup>453</sup> *Id.*

<sup>454</sup> See video: <https://youtu.be/gFzMcF6BxJI>

<sup>455</sup> Interview with Carter, *supra* note 66; Interview with Rahman, *supra* note 36.

<sup>456</sup> *Id.*; see also NAACP Complaint, *supra* note 107 at ¶¶ 76–79.

police presence in their neighborhood, police escalated the situation, stealing the group's food, assaulting and arresting a member of the group as well as a passerby, firing rubber bullets and pepper spray, which hit several members of the group, and then aggressively chasing protesters into nearby residences.<sup>457</sup> Johana Rahman describes feeling terrified as approximately ten police officers chased her up the steps of a nearby home and fearing that they were going to break down the door after she shut it.<sup>458</sup> During the attack, Johana, who suffers from asthma, was also pepper sprayed in the back of the neck.<sup>459</sup> Later, she tried to clean herself, but the pepper spray became active again and she had respiratory attack.<sup>460</sup> Johana's face and hands continued to burn for hours, and her throat continued to feel irritated for weeks.<sup>461</sup>

According to U.N. Guidance, when law enforcement contemplates the use of force, they must balance the harm that will be caused by the use of force, with the legitimate interest that is being protected. Here, the only legitimate interest officers had was to prevent property theft. That goal hardly warrants the violence unleashed and the injuries sustained that day. Police should prioritize protecting and serving people, over saving property, if that even was their goal.

### *3. The PPD's Policies do not Comply with Human Rights Standards*

Out of line with the principle of legality, which requires States to enact domestic laws in conformity with international human rights law and abide by them, the PPD's use of force

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<sup>457</sup> Interview with Rahman, *supra* note 36.

<sup>458</sup> *Id.*

<sup>459</sup> *Id.*

<sup>460</sup> *Id.*

<sup>461</sup> *Id.*

policies do not comply with international human rights standards.<sup>462</sup> A recent report published by the International Human Rights Clinic at the University of Chicago Law School found that, of the police departments in the 20 largest U.S. cities, not a single department including Philadelphia, had a use of force policy that satisfied international standards for legality, necessity, proportionality, and accountability.<sup>463</sup> This finding is consistent with a 2015 Amnesty International report, which found that no state law in the U.S. complied with international standards for use of force.<sup>464</sup> And yet, even with use of force policies that fall below these international standards, Philadelphia police conduct in response to the 2020 protests still managed to violate their already insufficient internal policies, further undermining the legality principle.<sup>465</sup>

First, the PPD's written policies on pepper spray do not comport with international human rights law. As noted above, pepper spray should only be deployed when "there is an imminent threat of injury."<sup>466</sup> However, PPD's policy provides that pepper spray may be used to assist in effecting an arrest, including to prevent escape and to overcome resistance to arrest, in addition to defensive purposes, far outside the scope of what the U.N. envisioned.<sup>467</sup>

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<sup>462</sup> DEADLY DISCRETION, *supra* note 308, at 19–20.

<sup>463</sup> *Id.* at 19.

<sup>464</sup> AMNESTY INT'L., DEADLY FORCE: POLICE USE OF LETHAL FORCE IN THE UNITED STATES, 4 (2015).

<sup>465</sup> PHILADELPHIA POLICE DEPARTMENT, DIRECTIVE 10.2: USE OF MODERATE/LIMITED FORCE (2015), <https://www.phillypolice.com/assets/directives/D10.2-UseOfModerateLimitedForce.pdf> [hereinafter DIRECTIVE 10.2]; Koettl et al., *supra* note 152; Darryl C. Murphy, 'Terrorized' at Home: West Philly Calls for Investigation into Police Use of Tear Gas, WHYY (July 3, 2020), <https://whyy.org/articles/terrorized-at-home-west-philly-calls-for-investigation-into-police-use-of-tear-gas/>.

<sup>466</sup> GUIDANCE ON LESS-LETHAL WEAPONS, *supra* note 325, at 27.

<sup>467</sup> DIRECTIVE 10.2, *supra* note 465, at 6(C).

Additionally, Philadelphia Police conduct on May 31st and June 1st violated its policies for deploying pepper spray, which do not comport with international law.<sup>468</sup> First, its deployment of pepper spray on peaceful protesters and bystanders violated Section 6 of Philadelphia Police Directive 10.2, which provides that pepper spray should not to be used to disperse 1) non-violent persons, 2) disorderly crowds, and 3) in situations where people are peacefully exercising their Constitutional rights of free speech or assembly.<sup>469</sup> Second, the PPD failed to abide by the provisions of the same PPD directive that described the appropriate manner in which police should administer peppery spray when necessary. Specifically, police should ensure care is taken to protect infants, children, and the elderly from exposure to the OC Spray and deliver the spray directly into the face (eyes, nose, mouth) and when practical, when in the range of 10-12 feet, in two, one-half second bursts.<sup>470</sup> The directive further states that police should not “spray directly into the eyes at a distance of less than three feet, when possible.”<sup>471</sup> In contravention of this written policy, police regularly used pepper spray on protesters on I-676 and residents in West Philadelphia, delivering the spray for longer the than the two, one-half second bursts, and directly into the eyes of protesters, at a distance of less than three feet.<sup>472</sup> For instance, Michelle Rifken describes an officer spraying her within a foot of her face for a full fifteen seconds, while she had her hands up in surrender posture.<sup>473</sup> As captured on video and published in the

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<sup>468</sup> Koettl et al., *supra* note 152; Murphy, *supra*, note 465.

<sup>469</sup> DIRECTIVE 10.2, *supra* note 465, at 6(D).

<sup>470</sup> DIRECTIVE 10.2, *supra* note 465, at 6(G).

<sup>471</sup> DIRECTIVE 10.2, *supra* note 465, at 6(H).

<sup>472</sup> Koettl et al., *supra* note 152; Interview with Carter, *supra* note 66; Interview with Muehlmann, *supra* note 44; Interview with Rahman, *supra* note 36; Interview with Rifken, *supra* note 37; Interview with Hawkins, *supra* note 1.

<sup>473</sup> Interview with Rifken, *supra* note 37.

Philadelphia Inquirer, after Christina Sorenson lowered her head and put her hands behind her back, preparing to be taken into custody, an officer pulled down her goggles and pepper sprayed her in the eyes at close range.<sup>474</sup> He then proceeded to spray two other protesters, within inches of their face, and violently shoved the head of the only Black protester who was passively seated, awaiting arrest.<sup>475</sup> Other video shows an officer indiscriminately pepper spraying in all directions, rather than aiming it at any one individual.<sup>476</sup>

The PPD does not have specific policies directing when tear gas or rubber bullets may be used, whereas the U.N. Code of Conduct has very specific guidance about their appropriate and safe use.<sup>477</sup> As a general matter, however, the PPD directive on the use of force provides that officers should first try to de-escalate any situation and if force becomes necessary, they should use “only the minimal amount of force necessary to overcome an immediate threat or to effectuate an arrest.”<sup>478</sup> Both at 52nd Street in West Philadelphia and on highway 676, the police made no efforts to de-escalate or give warning before employing either of these less lethal weapons. As described in detail above, in West Philadelphia, police indiscriminately launched tear gas canisters into residential streets where no imminent threat existed, violating their own policy and endangering the lives of residents. They also aimed tear gas canisters at residents, in contravention of U.N. standards, which require that

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<sup>474</sup> Sean Collins Walsh et al., *Philly Mayor, Police Say Tear Gas Was Used as ‘Last Resort’ on Protesters; Others Question Tactics and Call for Reform*, PHILA. INQUIRER (June 2, 2020), <https://www.inquirer.com/news/tear-gas-vine-street-expressway-interstate-676-philadelphia-george-floyd-police-20200602.html>.

<sup>475</sup> *Id.*

<sup>476</sup> @d0wnrrrrr, TWITTER (June 2, 2020, 12:01 PM), <https://twitter.com/d0wnrrrrr/status/1267848782689054723>.

<sup>477</sup> *See, e.g.*, GUIDANCE ON LESS-LETHAL WEAPONS, *supra* note 325, at 29 (“Chemical irritants used at a distance like tear gas should only be used from a distance to disperse a group and to stop that group from acting violently.”).

<sup>478</sup> DIRECTIVE 10.2, *supra* note 465, at 4(A).

they never be shot directly at people.<sup>479</sup> Likewise, on highway 676, as captured on video, police repeatedly pelleted non-violent protesters with tear gas canisters.<sup>480</sup> Also, numerous victims report being shot or witnessing others being shot by rubber bullets in the head and torso in contravention of U.N. guidance that rubber bullets only be aimed at the lower body.<sup>481</sup>

#### 4. *Philadelphia Provides Little to No Oversight of and Accountability for Police Violence.*

In accordance with the principle of accountability, those affected by the use of force must have “access to an independent process, including a judicial process.”<sup>482</sup> In 1958, Philadelphia created what was then a first in the United States — a board charged with reviewing complaints against police, compromised of citizens.<sup>483</sup> Today’s version of that civilian review board exists in two forms: the Police Advisory Commission<sup>484</sup> and the Use of Force Review Board.<sup>485</sup> In practice, both of these groups provide little meaningful public

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<sup>479</sup> Interview with Stephanie Bonham (July 23, 2020).

<sup>480</sup> @d0wnrrrrr, TWITTER (June 2, 2020, 12:12 PM), <https://twitter.com/d0wnrrrrr/status/1267851528225853440>.

<sup>481</sup> Interview with Hawkins, *supra* note 1.

<sup>482</sup> U.N. Basic Principles, *supra* note 313, at ¶ 23. States are also obliged, under article 2(3) of the ICCPR to “ensure that any person whose rights or freedoms . . . are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in official capacity.”

<sup>483</sup> *Board Set Up to Hear Beefs Against Police*, PHILA. INQUIRER, Oct. 1, 1958, at 11 [hereinafter *Beefs Against Police*]; Editorial, *For New Police Oversight Commission to Work, Philly Must Learn From its Past*, PHILA. INQUIRER (July 8, 2020, 5:00 AM), <https://www.inquirer.com/opinion/editorials/philadelphia-police-advisory-board-citizen-oversight-commission-20200708.html> (“In 1958, following uproar against police brutality, Mayor Richardson Dilworth appointed a five member Police Review Board to investigate—the first of its kind in the nation.”).

<sup>484</sup> *Police Advisory Commission*, CITY OF PHILA., <https://www.phila.gov/departments/police-advisory-commission/> (last visited Nov. 17, 2020).

<sup>485</sup> PHILA. POLICE DEP’T, DIRECTIVE 10.4: USE OF FORCE REVIEW BOARD (UFRB) (2015) [hereinafter DIRECTIVE 10.4], <https://www.phillypolice.com/assets/directives/D10.4-UseOfForceReviewBoard.pdf>.

oversight or review of police conduct, and have failed to create “more harmonious relations” between citizens and police as was originally intended.<sup>486</sup>

a) Police Advisory Commission

Created in 1994,<sup>487</sup> the Police Advisory Commission (PAC) states its mission is to help “improve the relationship between the Police and community.”<sup>488</sup> The commission attempts to accomplish this mission by analyzing and reviewing department policies and practices and holding public meetings. Philadelphians may also submit complaints about specific officers to PAC, through a complaint form available on PAC’s website.<sup>489</sup> PAC also reviews specific instances of police conduct, and publishes opinions and recommendations to improve police conduct and departmental policy.<sup>490</sup> PAC provides its recommendations to PPD, who are required to substantively respond, in writing.<sup>491</sup> According to the opinions publicly available on the commission’s website, the commission has released opinions in only twenty-two cases in its twenty-six years of existence.<sup>492</sup> In response to PAC recommendations, Philadelphia Police has declined to adopt PAC’s recommendations,<sup>493</sup>

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<sup>486</sup> *Beefs Against Police*, *supra* note 483.

<sup>487</sup> Phila. Exec. Order No. 8-93 (Dec. 21, 1994), <https://www.phila.gov/ExecutiveOrders/Executive%20Orders/8-93Amend3.pdf>.

<sup>488</sup> *Police Advisory Commission*, *supra* note 484.

<sup>489</sup> *Feedback Forms*, CITY OF PHILA., <https://www.phila.gov/documents/feedback-forms/> (last visited Nov. 17, 2020).

<sup>490</sup> *Police Advisory Commission Opinions*, CITY OF PHILA., <https://www.phila.gov/departments/police-advisory-commission/police-advisory-commission-opinions/> (last visited Nov. 17, 2020).

<sup>491</sup> Phila. Exec. Order No. 8-93, *supra* note 487 (“Within thirty (30) days of the submission of a recommendation for action by the Commission to the Police Commissioner, the Police Commissioner shall respond in writing regarding which recommendations are accepted, rejected, or will be implemented with modifications.”).

<sup>492</sup> *Police Advisory Commission Opinions*, *supra* note 490.

<sup>493</sup> Letter from John F. Timoney, Phila. Police Comm’r, to Jane Leslie Dalton, Chair, Police Advisory Comm’n (Oct. 6, 2000), <https://www.phila.gov/media/20190109151358/Marvin-Hightower-response.pdf>; Letter from Charles H. Ramsey, Phila. Police Comm’r, to Robert S. Nix, Chairman, Police Advisory Comm’n (May 6, 2009), <https://www.phila.gov/media/20190114102946/Grupo-Fuego-response.pdf> (in which a PPD Commissioner does not even bother to spell “Police Advisory Commission” correctly).

denied information requests,<sup>494</sup> and disputed PAC's findings entirely.<sup>495</sup> The commission has released opinions on only three incidents that have taken place in the last decade.<sup>496</sup>

In addition to opinions, the commission has also published reports, often in response to police conduct that received notable press coverage.<sup>497</sup> PAC recently released a report reviewing PPD response to the protracted Occupy ICE protests that occurred in Philadelphia in 2018.<sup>498</sup> The PAC described observations and accounts from those on the ground at those protests, applied department policies and directives, and provided several recommendations to improve police response to prolonged protests movements being led by disparate organizations.<sup>499</sup> The Police Commissioner's response to PAC's work was a two sentence letter that failed to substantively engage with PAC's recommendations.<sup>500</sup>

Although the PAC has initiated an investigation into the PPD's violent response to the protests and civil unrest following George Floyd's killing, the PPD has blocked the efforts of the PAC to investigate these incidents.<sup>501</sup> To facilitate its investigation, the PAC has requested

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<sup>494</sup> Editorial, *For New Police Oversight Commission to Work, Philly Must Learn From its Past*, PHILA. INQUIRER (July 8, 2020, 5:00 AM), <https://www.inquirer.com/opinion/editorials/philadelphia-police-advisory-board-citizen-oversight-commission-20200708.html>.

<sup>495</sup> Letter from John F. Timoney, Phila. Police Comm'r, to Jane Leslie Dalton, Chair, Police Advisory Comm'n (Aug. 9, 2001), <https://www.phila.gov/media/20190114123631/Cleveland-Joyce-Taylor-response.pdf>; Letter from Sylvester M. Johnson, Phila. Police Comm'r, to William Cannon, Chair, Police Advisory Comm'n (Mar. 1, 2002), <https://www.phila.gov/media/20190109150350/Nichols-Response.pdf>.

<sup>496</sup> *Police Advisory Commission Opinions*, *supra* note 490.

<sup>497</sup> *Police Advisory Commission Reports*, CITY OF PHILA., <https://www.phila.gov/documents/police-advisory-commission-reports/> (last visited Oct. 28, 2020).

<sup>498</sup> PHILA. POLICE ADVISORY COMM'N, A REVIEW OF THE PPD RESPONSE TO THE OCCUPY ICE PROTEST (2018), <https://www.phila.gov/media/20190208142702/PAC-ICE-report.pdf>.

<sup>499</sup> *Id.*

<sup>500</sup> Letter from Richard J. Ross, Jr., Phila. Police Comm'r, to Hans Menos, Executive Director, Police Advisory Comm'n (Nov. 20, 2018), <https://www.phila.gov/media/20190208142702/PAC-ICE-report.pdf>.

<sup>501</sup> Claudia Vargas, *Police Advisory Commission Blocked By Outlaw While Investigating Protests*, NBC10 PHILA., (Aug. 25, 2020), <https://www.nbcphiladelphia.com/investigators/philadelphia-police-advisory-commission-blocked-by-danielle-outlaw-while-investigating-protests/2511832/>.

numerous records, like body camera videos, use of force reports, and completed internal affairs investigations by the PPD.<sup>502</sup> Commissioner Outlaw initially declined these requests, saying that the PAC would have to request the records from the outside consultant hired by the City, but then later promised to hand them over after inquiries from the local news media.<sup>503</sup> Still, the unnecessary months delay caused by these initial obstacles has set back the PAC's investigation significantly. In contrast, the civilian oversight boards of police in other U.S. cities have direct access to this evidence.<sup>504</sup>

City funding of the PAC further evidences the City's effort to marginalize and minimize the impact of the PAC. As of June 2020, PAC's annual budget was \$640,000, amounting to 0.0008% of PPD's budget, whereas other U.S. Cities like New York City and Chicago have budgets of 19 million and 14 million, respectively.<sup>505</sup> For its part, the PPD does not even bother to mention the PAC on its official webpage as part of its "Accountability."<sup>506</sup>

#### b) Use of Force Review Board

PPD Directive 10.4 outlines the policies and procedures for the PPD's Use of Force Review Board (UFRB).<sup>507</sup> UFRB reviews all police-involved shootings, and incidents "where it appears extraordinary and unanticipated actions were required" of police officers, and renders a "determination" as to whether department policy was followed.<sup>508</sup> Despite UFRB's

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<sup>502</sup> *Id.*

<sup>503</sup> *Id.*

<sup>504</sup> *Id.*

<sup>505</sup> Brian X. McCrone, *With No Independent Oversight, Only Cops Investigate Cops in Philly*, NBC10 PHILA., <https://www.nbcphiladelphia.com/news/local/the-only-way-to-report-police-misconduct-in-philly-is-to-go-to-the-police/2428688/> (last updated Aug. 25, 2020).

<sup>506</sup> *Open and Accountable*, PHILA. POLICE DEP'T. <https://www.phillypolice.com/accountability/index.html> (last visited Nov. 17, 2020).

<sup>507</sup> DIRECTIVE 10.4, *supra* note 485.

<sup>508</sup> *Id.*

broad mandate, it has not rendered a determination on any incident that occurred after 2015, according to publicly available data provided by PPD.<sup>509</sup> The lack of activity from UFRB is not because Philadelphia police officers have stopped using their firearms. The PPD website shows that, since 2016, over 60 incidents of police-involved shootings have occurred without a single determination as to whether the police activity was consistent with policy.<sup>510</sup>

Even if UFRB were reaching determinations at the same rate Philadelphia police officers were discharging their weapons, UFRB's ability to function as civilian oversight would be minimal, due to the composition of the UFRB and confidentiality agreements in place.<sup>511</sup> Under PPD Directive 10.4, four of UFRB's five voting members are required to be high ranking members of PPD. UFRB determinations require a mere majority vote.<sup>512</sup> UFRB also consists of a sixth, non-voting member: the President of the local Fraternal Order of Police.<sup>513</sup> PPD policy requires members of UFRB to sign non-disclosure agreements about the contents of cases heard before the board,<sup>514</sup> a requirement that does not seem designed to "maintain Departmental integrity"<sup>515</sup> in the eyes of the public.

### c) Complaint Process Within PPD

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<sup>509</sup> *Officer Involved Shootings*, PHILA. POLICE DEP'T., <https://www.phillypolice.com/ois/index.html> (last visited Nov. 17, 2020).

<sup>510</sup> *Id.*

<sup>511</sup> DIRECTIVE 10.4, *supra* note 485.

<sup>512</sup> *Id.*

<sup>513</sup> *Id.*

<sup>514</sup> *Id.*

<sup>515</sup> *Id.*

Thus, in Philadelphia, the majority of civilian complaints against police are investigated and adjudicated by the police department itself.<sup>516</sup> One Philadelphia attorney describes the process as “designed to intimidate people.”<sup>517</sup> After a civilian files a complaint with police, Internal Affairs investigates the complaint and determines if the substance of the complaint is “sustained.”<sup>518</sup> According to data available from Open Data Philly, about 19% of civilian complaints are sustained by Internal Affairs.<sup>519</sup> But when a complaint is sustained, it does not mean that an officer will face any discipline greater than a reprimand and a note in a personnel file.<sup>520</sup> Instead, the officer’s commander determines whether the case will be sent to the Police Board of Inquiry (PBI) for a hearing.<sup>521</sup> The proceedings of PBI have little to no public oversight.<sup>522</sup> In 2019, the PAC provided Philadelphia police with several recommendations that would increase transparency and public access to PBI proceedings.<sup>523</sup> While acknowledging that several of the recommendations were “worthy of discussions,” Philadelphia police declined to adopt any of PAC’s recommendations.<sup>524</sup> Even in circumstances where the police’s internal processes result in an officer facing discipline, the

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<sup>516</sup> McCrone, *supra* note 505.

<sup>517</sup> *Id.*

<sup>518</sup> *Complaints Against Police*, OPENDATAPHILLY, <https://www.opendataphilly.org/dataset/police-complaints> (last visited Nov. 17, 2020).

<sup>519</sup> *Id.*

<sup>520</sup> McCrone, *supra* note 505.

<sup>521</sup> *Id.*

<sup>522</sup> Letter from Hans Menos, Exec. Dir., Police Advisory Comm’n., to Christine Coulter, Phila. Police Comm’r (Nov. 20, 2019), <https://www.phila.gov/media/20191213171358/PBI-recommendations-Letter-PPD-Response.pdf>.

<sup>523</sup> *Id.*

<sup>524</sup> Letter from Christine Coulter, Phila. Police Comm’r, to Hans Menos, Exec. Dir., Police Advisory Comm’n (Dec. 5, 2019), <https://www.phila.gov/media/20191213171358/PBI-recommendations-Letter-PPD-Response.pdf>.

local FOP can file for arbitration to have the disciplinary decision overturned, something they have done successfully 70% of the time from 2011 to 2019.<sup>525</sup>

Both PAC and UFRB fail to provide adequate public oversight of Philadelphia police.<sup>526</sup> Instead, they are monuments to PPD's decades of resistance to civilian review.<sup>527</sup>

### **III. Proposed Recommendations**

The victims make the following demands:

1. In line with human rights law, the City of Philadelphia should actively facilitate and encourage the exercise of the rights to peaceful assembly and freedom of expression by Black Lives Matter ("BLM") protesters and activists.
2. The City of Philadelphia should adopt a policy regarding the use of teargas, rubber bullets, and other "less than lethal" weapons in line with international human rights law. Specifically, the use of less than lethal weapons should never be permitted against peaceful protesters or in residential areas where it risks jeopardizing the health and safety of bystanders, including vulnerable people like children and the elderly. Where individual instances of violence or property damage accompany peaceful protests, police should seek to halt that behavior only, and do so in line with the principles of necessity and proportionality, rather than seeking to disperse peaceful protesters. The use of less lethal weapons should always be a last resort and only employed with prior warning when necessary and proportionate to disperse a violent crowd. The City of Philadelphia should revise Directive 10.2 to include specific policies directing when and how tear gas and rubber bullets may be used, in line with the U.N. Code of Conduct for Law Enforcement Officials.<sup>528</sup>
3. The City of Philadelphia should hire an independent, third-party to investigate the unlawful use of tear gas, pepper spray, and rubber bullets in West Philadelphia on May 31, 2020. The investigators' findings should be disseminated and made publicly available.

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<sup>525</sup> David Gambacorta et al., *Philly's Police Union Spent Decades Amassing Power. Reforms Could Cut Its Clout*, PHILA. INQUIRER (June 19, 2020, 5:02 AM), <https://www.inquirer.com/news/pennsylvania/philadelphia-police-union-reform-george-floyd-fop-john-mcnesby-20200619.html>.

<sup>526</sup> William Bender & David Gambacorta, *Fired, Then Rehired*, PHILA. INQUIRER (Sept. 12, 2019), <https://www.inquirer.com/news/a/philadelphia-police-problem-union-misconduct-secret-20190912.html>.

<sup>527</sup> *Court Order Curbs Phila. Police Board*, PHILA. INQUIRER (Jan. 30, 1960), at 22 (reporting that legal action brought by Philadelphia FOP resulted in an injunction, stopping a civilian review board from fulfilling its mission).

<sup>528</sup> The Philadelphia City Council has passed a bill banning the use of tear gas and rubber bullets against those exercising their First Amendment rights, but Mayor Kenney has yet to sign it into law. Laura McCrystal, *Philly City Council Votes to Ban Tear Gas and Rubber Bullets in Demonstrations*, PHILA. INQUIRER (October 29, 2020), <https://www.inquirer.com/news/tear-gas-rubber-bullets-pepper-spray-ban-police-20201029.html>.

4. Those found to have violated human rights law as a result of the aforementioned independent investigation, including the police officers who used excessive force against BLM protesters and residents and the high-ranking members of the City of Philadelphia who authorized it, should be sanctioned or removed from office.
5. In addition to the apology from Mayor Kenney and Police Commissioner Outlaw regarding the excess use of force by police on highway 676, the City of Philadelphia should issue a formal apology for the City's violence against protesters and residents who were subjected to unnecessary and illegal violence in West Philadelphia on May 31, 2020.
6. The City of Philadelphia should also formally recognize the history of racism and pattern of police brutality against Black communities in Philadelphia, especially in West Philadelphia, acknowledge that police violence presents a public health crisis for these communities, and grant reparations that seek to support community healing and revitalization.
7. The City of Philadelphia should facilitate and support community conversations about what accountability and public safety should look like. These public dialogues should seek to elevate the voices of the victims of police violence and occupation and should take a trauma-informed approach. Communities most often and most disproportionately affected by police violence must be entrusted to take a leadership role in these conversations and define the terms and form they take. The City should listen to the demands that have already been raised by Black activist groups, like the Black Philly Radical Collective.<sup>529</sup>
8. In line with international human rights law, the City of Philadelphia should create and appropriately fund a mechanism for police accountability responsible for investigating claims of unlawful force and disciplining police, which is independent of the Philadelphia Police Department (PPD) and subject to judicial review. Oversight should not be within the purview of agreements between the City and the Fraternal Order of Police, if it is to be truly independent oversight. Like other U.S. cities, like New Orleans and Washington, D.C., this body should have direct access to police records and the ability to sanction, and when appropriate remove, police officers who have violated police policy regarding the use force. This body should also hold high-ranking officers accountable who seek to cover up or defend police abuse and brutality.<sup>530</sup>

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<sup>529</sup> Find the list of demand by the Black Philly Radical Collective here: <https://blackphillyradicalcollective.com/our-13-demands/>.

<sup>530</sup> On November 2, 2020, the voters of Philadelphia approved a change to the City's Home Rule Charter to provide for a new Citizens Police Oversight Commission to replace the PAC. Laura McCrystal, *Philadelphia Voters Approve Police Reform Ballot Questions*, PHILA. INQUIRER (Nov. 6, 2020),

9. The City of Philadelphia should also withdraw from the federal government’s “1033 Program,” which allows local and state police authorities to acquire surplus military equipment at low cost. In line with calls to defund the police, the City should prioritize funding initiatives that would reduce the need for policing, by increasing access to education, mental health resources, housing, and addiction and harm reduction services.

#### **IV. Questions for Consideration**

1. What internal investigations have taken place with regard to officers’ excessive use of force at highway 676 and 52nd Street?
2. Have any of the victims of police violence in the wake of George Floyd’s murder been compensated by the City of Philadelphia?
3. How much did the military grade weaponry owned/used by the PPD cost the City of Philadelphia?
4. How many police officers have been disciplined for their excessive use of force on highway 676 and at 52nd Street? How were they disciplined (e.g. terminated? Put on desk duty? Etc.)?
5. Who authorized the use of less lethal weapons at 52nd Street on May 31, 2020? When and why did they authorize it?
6. Why was SWAT present on 52nd Street? What was the relationship between all of the different law enforcement groups present on May 31, 2020? Who was coordinating these efforts?