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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

TIMOTHY SCOTT CAMPBELL, KERIE CAMPBELL, MARCUS KRYSHKA, MARC MCKINNIE, MICHAEL SIEGEL, *and* AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA,

Plaintiffs,

v.

CITY OF OAKLAND, INTERIM CHIEF OF POLICE HOWARD JORDAN, *and* DEFENDANT DOES 1-100,

Defendants.
_____/

No. C 11-05498 RS

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

On November 14, 2011, plaintiffs filed this civil rights action against the City of Oakland and Interim Chief of Police Howard Jordan (collectively "Oakland") based on confrontations between local law enforcement officers and individuals observing and taking part in the "Occupy Oakland" protests. On November 17, the Court denied plaintiffs' *ex parte* request for a temporary restraining order, scheduled a hearing on plaintiffs' motion for a preliminary injunction, and solicited supplemental briefs. Plaintiffs' proposed preliminary injunction would enjoin Oakland from violating certain provisions of the Oakland Police Department's Crowd Control and Crowd Management Policy (the "Crowd Policy"). Upon consideration of the briefs and the arguments presented at the hearing, and for the reasons explained below, plaintiffs' motion must be denied.

II. FACTS

This case arises out of the Occupy Oakland protests. Those protests began in early October 2011, one of many nationwide demonstrations inspired by New York's "Occupy Wall Street" movement. The protesters seek to raise awareness about economic inequality, and advocate political and social change. They have repeatedly convened, among other locations, on Frank Ogawa Plaza, in front of Oakland City Hall, with some participants erecting tents and others periodically gathering for meetings and rallies. Most of these events proceeded peacefully with 200 to 400 protesters in attendance. Plaintiffs' request for a preliminary injunction, however, focuses on confrontations between Oakland police and protesters at larger rallies, where crowds of 1000 or more people gathered. Accordingly, just two incidents are at issue for present purposes.

The first occurred in the afternoon and evening of October 25, 2011. A few days earlier, on October 20, Oakland had presented protesters at the Plaza with an eviction notice, and in the early morning hours of October 25, Oakland police and municipal employees, assisted by law enforcement officers from other local agencies, forcibly removed a smaller group of demonstrators from the Plaza. In their previous motion for a restraining order, plaintiffs alleged that the eviction operation was marred by the use of excessive force against protesters, and other offenses. Plaintiffs predicate their motion for a preliminary injunction, however, on confrontations that occurred during demonstrations later in that same day, when approximately 1500 to 2000 people were present.

Oakland claims, and plaintiffs do not appear to disagree, that it facilitated the rallies throughout the day by diverting traffic and allowing protesters to occupy downtown areas. The afternoon, unfortunately, was punctuated by violence. According to Oakland, some protesters began to assault police officers by "kicking them in the legs, spitting at their faces, and throwing rocks, bottles with bleach and urine, and paint balls." Jordan Decl. in Supp. of Defs.' Opp'n Br. to T.R.O., 4:5-6. On at least one occasion, according to Jordan, tear gas was necessary to disperse a crowd of approximately 500 protesters that surrounded and was threatening a small group of officers conducting arrests. Plaintiffs, by contrast, allege that in the afternoon, police beat a protester who was trapped by the crowd, and fired bean bags, "flash-bang" grenades, and tear gas into the midst of assembled crowds without warning, in violation of Oakland's own policies.

By way of background: Oakland's Crowd Policy is the result of a settlement in a prior case against the City.[1] Under its express language, the Crowd Policy is intended to "uphold constitutional rights of free speech and assembly while relying on the minimum use of force and authority needed to address a crowd management or crowd control issue." Ex. 1 (Crowd Policy) to Jordan Decl., 1. It specifies crowd control techniques and dispersal tactics that may be appropriately used in certain circumstances. For instance, when an assembly is declared unlawful, "[t]he police may not disperse a demonstration or crowd event before demonstrators have acted illegally or before the demonstrators pose a clear and present danger of imminent violence." *Id.* at 11. It also places limits on the use of chemical agents, flash-bang grenades, and "less lethal" munitions, for example, by requiring that demonstrators receive warnings, and an opportunity to disperse, prior to the deployment of such devices. Plaintiffs have specifically documented what they allege to be violations of particular provisions of the Crowd Policy that concern dispersal orders, as well as the use of less lethal munitions, flash bang grenades, and tear gas.

By the evening of October 25, the protesters had once again convened at Frank Ogawa Plaza, and a more intense confrontation ensued. Plaintiffs state that the police ordered dispersal before any illegal conduct had occurred, failed to issue audible dispersal orders, and immediately resorted to forcible tactics, all in violation of various provisions of the Crowd Policy. As numerous declarations filed by plaintiffs attest, police officers used projectiles, including flash bang grenades, tear gas, rubber bullets, and pepper balls, on crowds and non-threatening individuals, including the named plaintiffs. For example, in one specific instance, plaintiffs contend that police "blanketed the crowd indiscriminately" with tear gas and other projectiles after a single bottle was thrown at officers. Pls.' Suppl. Mot. for P.I., 5:7. Plaintiffs maintain that Oakland generally failed to provide medical assistance to protesters, and, in at least one instance, police allegedly targeted individuals who attempted to assist an injured protester with tear gas and flash-bang grenades. *Id.* at 5:12-21. According to plaintiffs, a number of protesters sustained serious injuries in the melee.

[1] *Local 10, Int'l Longshore and Warehouse Union, et al. v. City of Oakland (Local 10)*, Nos. 03-02961 TEH, 03-02962 TEH.

Oakland, by contrast, insists that it deployed force to protect police and City sanitation crews in the Plaza that evening from increasingly hostile groups of protesters. For example, Oakland claims that "certain groups and their sympathizers" dismantled metal barricades and "used them in a threatening manner" against officers. Jordan Decl., 4:20-23. Allegedly, police declared an unlawful assembly around the Plaza after masked protesters began throwing objects. According to Oakland, police then announced, audibly and approximately thirty times, that the assembly was unlawful and that chemical agents would be used. The City claims that protesters were afforded "[s]ignificant time" to leave via "plenty of clear escape routes." *Id.* at 5:1-8. Even after the announcements, however, Oakland alleges that some protesters refused to leave and others vandalized property and assaulted officers by throwing bottles, rocks, and other objects. At that point, officials authorized police to use tear gas, and other less lethal munitions to stem the violence and disperse the crowd. Oakland maintains that its officers' actions throughout the events of the afternoon and evening strictly complied with its Crowd Policy and the law.

Although the protests continued in the days immediately following October 25, the next large-scale demonstrations did not take place until November 2. On that day, Occupy demonstrators called for a general strike and disrupted the Port of Oakland's operations. The parties agree that the majority of the events that occurred throughout the day "were peaceful and involved no police confrontation." Pls.' Mot. for T.R.O., 10:19. Again, plaintiffs' present motion focuses not on these events, but on police conduct during a late-night confrontation in the area around the Plaza. This time, approximately 1000 to 1500 protesters were in attendance. According to plaintiffs, Oakland again responded to unlawful activity by a few individuals with indiscriminate force. Specifically, plaintiffs claim that peaceful protesters, as well as journalists and legal observers, were directed to the Plaza by police, only to be "caught in a volley of projectiles, exploding flash bang grenades, and tear gas." Pls.' Suppl. Mot. for P.I., 8:16-27. According to declarations filed by plaintiffs and other eye witnesses, Oakland police again failed to give intelligible dispersal orders, used excessive physical force against some individual protesters, and fired projectiles, flash bang grenades, and tear gas indiscriminately into crowds and toward non-threatening individuals, including the named plaintiffs.

Under Oakland's version of events, around midnight, masked protesters "went on a rampage breaking windows, vandalizing private property, breaking into and occupying a large abandoned building near the Plaza, and starting a bon fire in the street." Jordan Decl., 5:25-28. Oakland insists that police reacted "surgically to these violent protesters without disturbing the demonstrators who had returned to the Plaza." *Id.* at 5:28-6:2. According to him, police first communicated to peaceful protesters that they would be limiting their response to those behaving destructively or violently before deploying tear gas and less lethal munitions. Approximately eighty demonstrators were ultimately arrested.

Although Oakland generally acknowledges that the confrontations on both October 25 and November 2 were "tense, violent, and chaotic," it insists that police acted in compliance with the Crowd Policy on both occasions, and will continue to do so. Defs.' Opp'n Br. to T.R.O., 4:22. According to plaintiffs, these statements indicate that senior Oakland officials sanctioned the alleged police misconduct. Plaintiffs also insist this must be so because the Crowd Policy itself requires supervisory approval of the use of force. Interim Chief Jordan states he has ordered internal investigations into reported injuries and alleged police misconduct. A supplemental declaration submitted by Oakland notes such inquiries are supervised by this Court, pursuant to the settlement of an earlier federal case. To that, plaintiffs observe that the Court's monitor has found that Oakland's internal investigations procedures do not meet the settlement's requirements.

Plaintiffs predict there will be further large-scale demonstrations. Oakland notes, in supplemental materials, that three subsequent, smaller interactions between police and Occupy protesters have transpired without incident. Plaintiffs and their supporters, however, stress that as a result of past events they now hesitate to participate in future Occupy Oakland rallies out of fear for their safety. They further suggest that police intimidation has stalled the Occupy Oakland movement. Plaintiffs have also filed supplemental declarations by legal observers and journalists stating that they feel they cannot safely observe the Occupy Oakland movement.

III. LEGAL STANDARD

A preliminary injunction order is an "extraordinary remedy" that is "never granted as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To win a preliminary

injunction, a plaintiff must "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. Alternatively, if the moving party can demonstrate the requisite likelihood of irreparable harm, and show that an injunction is in the public interest, a preliminary injunction may issue so long as there are serious questions going to the merits and the balance of hardships tips sharply in the moving party's favor. *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). In any case, a court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 542 (1987). Courts are "not mechanically obligated to grant an injunction for every violation of law," *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982), and "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (citing *Weinberger*, 456 U.S. at 313).

IV. DISCUSSION

In an apparent response to the suggestion that the relief requested in their motion for a temporary restraining order was exceptionally broad, plaintiffs now characterize the scope of such relief as being less intrusive into local law enforcement operations. Specifically, plaintiffs sought a restraining order requiring defendants' compliance with the entire Crowd Policy. Now they seek an order enjoining Oakland from violating four specific provisions of the Crowd Policy, which govern dispersal orders, and the use of less lethal munitions, flash bang grenades, and tear gas.[2] These changes, though nominally limiting, do not fundamentally alter the nature of the relief sought. Plaintiffs' claim that "[s]uch an order cannot be characterized as an attempt by the court to regulate the internal affairs" of defendants, simply ignores the obvious. Pls.' Suppl. Mot. for P.I., 20:1-2. As before, the proposed order would require the court to supervise and oversee defendants'

[2] The specific provisions of the Crowd Policy plaintiffs seek to have subject to Court enforcement are: V-G-1 (requiring repeated dispersal orders prior to deployment of dispersal tactics), VI-F-2 (detailed provisions governing the use of less lethal munitions), V-H-5-b, V-H-5-c and V-H-5-d (flash bang grenades must be deployed a safe distance from crowds and may not be used prior to adequate warnings and exhaustion of less forceful alternatives), and V-H-4-b, and V-H-4-e (prohibiting use of tear gas prior to exhaustion of alternative tactics and warnings).

compliance with its own policy. Accordingly, federalism principles still disfavor judicial oversight of local law enforcement agencies, absent evidence of concerted, officially-sanctioned violations of constitutional rights. In an effort to demonstrate that Oakland has indeed engaged in such a pattern of violations of protesters' rights, plaintiffs argue that alleged police misconduct at large-scale rallies has chilled their willingness to exercise their First Amendment rights, thereby damaging a nascent political movement. Although plaintiffs have not abandoned their Fourth Amendment claims, and still maintain that future police misconduct is imminent, they emphasize that the alleged First Amendment violations resulted in ongoing injuries to protesters' fragile free speech interests. For the reasons discussed below, however, plaintiffs cannot escape federalism concerns and their heavy burden of proof by characterizing their injuries expansively in First Amendment terms and removing the relevant events from context.

A. Likelihood of success

To prevail, plaintiffs must first show that they will likely succeed on the merits of their constitutional claims. *Winter*, 555 U.S. at 20. It is not enough to show that there is a "possibility" of success. *Id.* at 22 (reversing Ninth Circuit's "possibility" standard). Rather, there must be a "clear showing" that the plaintiffs are entitled to preliminary relief. *Id.* As noted in the prior order, plaintiffs have produced a significant body of evidence that establishes some probability of success on their individual claims for relief for past violations of 42 U.S.C. § 1983. Ultimate success on these claims, however, would entitle plaintiffs to money damages only, *not* injunctive relief. Although plaintiffs may dispute that Oakland's internal investigations and civil liability will provide an adequate remedy, these are, ordinarily, the appropriate forms of redress for such injuries.

To demonstrate standing for injunctive relief, plaintiffs must overcome the Supreme Court's cautionary guidance that considerations of "equity, comity, and federalism" militate against federal judicial supervision of state and local law enforcement authorities. *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983). Significantly, all of these jurisprudential concerns are at play in the current case. As for federalism, "the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the States' criminal laws in the absence of irreparable injury which is both great and immediate."

City of Los Angeles v. Lyons, 461 U.S. 95, 112 (1983). Plaintiffs forcefully argue that they have met *Lyons*' requirement by documenting grave, ongoing First and Fourth Amendment injuries that are the result of "a pattern of officially sanctioned … behavior, violative of plaintiffs' rights." *LaDuke v. Nelson*, 762 F.2d 1318, 1324 (9th Cir. 1985). Nonetheless, this Court must still be mindful of "[t]he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law." *Id*., *citing Stefanelli v. Minard*, 342 U.S. 117, 120 (1951).

It follows, in evaluating plaintiffs' contention that Oakland police engaged in a pattern of officially sanctioned unconstitutional conduct, this Court may not ignore defendants' version of events – particularly where, as here, the underlying events and legal issues are subject to serious dispute. *City of Los Angeles v. Lyons*, 461 U.S. 95, 112-13 (1982). Rather, the law obligates consideration of "the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Milliken v. Bradley*, 433 U.S. 267, 280 (1977). Although plaintiffs have developed an extensive factual record in a comparatively short time, significant disputes persist as to whether: (1) these incidents were in fact violations of Oakland policy; (2) they constituted a "pattern"; and (3) such violations (if any) were officially sanctioned, in the relevant sense. Since denial of plaintiffs' request for a restraining order, Oakland has not altered its position on these questions. The City disputes, as a factual matter, that violations occurred, insists that any alleged departures from constitutional norms or the Crowd Policy were the exception rather than the rule, and vows to investigate and punish any misconduct that may have occurred.

Whatever the relative strength of each side's factual record, mere proof of police misconduct does not entitle plaintiffs to an injunction. As explained in greater detail below, because plaintiffs have not shown a pattern of officially sanctioned misconduct, they have not dispelled doubt as to their standing for injunctive relief, and therefore cannot establish a likelihood of success on the merits. Although this shortcoming does not necessarily foreclose injunctive relief under *Wild Rockies* so long as plaintiffs succeed in raising serious questions going to the merits of their claims, for the reasons discussed below, no such adequate injury has been advanced, and it is not at all clear that an injunction serves the public interest, or that the balance of hardships tips sharply in plaintiffs' favor. Therefore the first factor weighs against issuing an injunction.

B. Immediate, irreparable harm

Plaintiffs' request primarily fails because they have not sufficiently shown a likelihood of "great and immediate" harm, and therefore have not established standing for injunctive relief. *Lyons*, 461 U.S. at 113. Plaintiffs contend that the First and Fourth Amendment injuries allegedly suffered by protesters at the hands of defendants are irreparable as a matter of law. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"), *and Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (same as to Fourth Amendment rights). They are indisputably very serious if established. Nonetheless, to justify injunctive relief, plaintiffs must show that they face a realistic threat of *future* injury.

Plaintiffs argue that they have done so by alleging "ongoing" injuries to "fragile" First Amendment interests, which they contend threaten the health of Occupy Oakland. Specifically, plaintiffs maintain that the alleged police misconduct has dissuaded active Occupy supporters from attending rallies, and prevented legal observers and journalists from observing the protesters' activities. *See, e.g.,* K. Campbell Decl. in Supp. of Pls.' Mot. For P.I., at 1 (named plaintiff declaring, "I would very much like to take my children to one of the demonstrations, but I am not willing to expose them to the police violence that I expect will occur again"). Although plaintiffs correctly point out that courts have sometimes applied relaxed standing rules when a plaintiff alleges First Amendment injuries, no special standard exists for nascent political movements.[3] Oakland, moreover, appears to doubt its conduct has had any appreciable chilling effect on protesters' rights. It is unnecessary to dwell on this question because it is ultimately defendants' conduct, less the alleged injury, that poses a stumbling block to plaintiffs' request for preliminary injunctive relief.

[3] It is not clear that such relaxed standing rules ought to apply to this case. The Ninth Circuit has consistently limited its application of the arguably less demanding "actual and well-founded fear" standard to cases where plaintiff seeks pre-enforcement review of a statute's or rule's constitutionality. *See, e.g., Wolfsom v. Brammer*, 616 F.3d 1045, 1062 (9th Cir. 2010), *and Humanitarian Law Project v. U.S. Treasury Dep't*, 578 F.3d 1133 (9th Cir. 2009). *But see Amnesty Int'l v. Clapper*, 638 F.3d 118, 135 (2d Cir. 2011) (plaintiffs' adequately alleged prospective First Amendment injury based on "actual and well-founded fear" of surveillance by law enforcement). In those circumstances, where enforcement of the challenged regime is planned, concerns about the threat or probability of future injury to the plaintiff are understandably less acute.

Under the analytical framework urged by plaintiffs, the "injury-in-fact" standing requirement under *Lyons*' may be satisfied by showing that "defendants engaged in a *standard pattern of officially sanctioned* officer behavior violative of the plaintiffs' constitutional rights." *LaDuke*, 762 F.2d at 1324 (emphasis added, internal citation omitted). The Ninth Circuit emphasized in *LaDuke*, "[t]he Supreme Court has repeatedly upheld the appropriateness of federal injunctive relief to combat a 'pattern' of illicit law enforcement behavior." *Id.* (citing *Alee v. Medrano*, 416 U.S. 802, 812 (1974)). *LaDuke* itself concerned the Immigration and Naturalization Service's "standard practice" of "initiating and executing searches of migrant farm housing [that] violated [migrant workers'] Fourth Amendment rights." *Id.* at 1321. In other words, the challenged conduct was a routine law enforcement tactic used by the agency on a regular basis. Reviewing the sweep of Supreme Court precedents, the *LaDuke* panel recognized that those cases draw a distinction between patterns of misbehavior and "isolated incidents." *Id. See also Multi-Ethnic Immig. Workers Organizing Network v. City of Los Angeles*, 246 F.R.D. 621, 627 (C.D. Cal. 2007) (distinguishing between "isolated event[s] caused by unusual or isolated factors" and a pattern of police misconduct that stretched back to 1995, and encompassed multiple confrontations at a number of distinct demonstrations).

In *Allee v. Medrano*, for instance, the Supreme Court considered a challenge to efforts by Texas Rangers to disrupt a strike by the United Farm Workers. The Court characterized the enjoined conduct as "but one part of a single plan by the defendants," which included highly targeted, unlawful arrests and detentions, illegal threats, harassment and physical assaults, that took place over the course of a year. 416 U.S. 802, 812 (1974). The Court specifically noted that "the District Court found a pervasive pattern of intimidation in which the law enforcement authorities sought to suppress appellees' constitutional rights." *Id.* As the Court recalled in a later case, an injunction was warranted in *Allee* because the District Court had "established beyond peradventure not only a 'persistent pattern' but one which flowed from an intentional, concerted, and indeed conspiratorial effort to deprive the organizers of their First Amendment rights and place them in fear of coming back." *Rizzo v. Goode*, 423 U.S. 362, 375 (1976).

Those circumstances hardly resemble the allegations against Oakland in this case. Here, plaintiffs' accusations arise from demonstrations that, they concede, were "unique" in size, unlike other Occupy events, and tainted by groups of violent protesters. The attempt by plaintiffs to reframe the issue, as Oakland's excessive response to the only two large, violent rallies that occurred during the Occupy Oakland movement, merely underscores that defendants' conduct on October 25 and November 2 was not part of a "standard pattern" but rather, a strained response to exceptional circumstances. Plaintiffs cannot transform these two incidents, which collectively occurred over a course of hours, into a "pattern" of misconduct by myopically focusing on discrete interactions between police and individual protesters. To do so would be to ignore completely the undisputed fact that the specific interactions upon which plaintiffs rely occurred within the context of a pitched confrontation between police and hundreds of protesters, some of whom, plaintiffs agree, were behaving destructively or violently.[4] *Lyons* and *LaDuke*, far from supporting injunctive relief in such circumstances, weigh heavily against judicial intervention.

Because no pattern is evident, it is unnecessary to determine whether Oakland sanctioned the alleged misconduct. Nonetheless, Oakland's position vis-à-vis any misconduct that may have occurred further supports the conclusion that no injunction is warranted here. Unlike both *LaDuke* and *Allee*, defendants here insist they have complied with the Crowd Policy as well as the law, and intend to continue doing so in the future. The City acknowledges that "[c]rowd control and dispersal actions following the declaration of an unlawful assembly is dangerous and difficult work," and notes that internal investigations are underway to guarantee that any possible police misconduct does not recur. Defs.' Opp'n Br. to T.R.O., at 4:26-27. Thus, this is not a case where defendants engaged in an "intentional, concerted, and indeed conspiratorial effort to deprive the organizers of their First Amendment rights and place them in fear of coming back." *Rizzo*, 423 U.S. at 375. Plaintiffs argue that Oakland must have sanctioned police misconduct because the Crowd

[4] Plaintiffs argue that this case is distinct from *Lyons* because they and other peaceful protesters were allegedly subjected to police misconduct based on "completely innocent behavior." *LaDuke*, 762 F.2d at 1326. *See also Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1041 (9th Cir. 1999) (distinguishing *Lyons* where "plaintiffs did nothing illegal to prompt" the challenged conduct). Here, however, Oakland maintains that it did *not* wrongly subject innocents to excessive force, and plaintiffs concede that at least some Occupy Oakland protesters were engaging in violence and property destruction. As a result, this case cannot be so neatly distinguished from *Lyons*.

Policy expressly requires supervisory approval prior to the use of forcible dispersal tactics. Whether police commanders or other officials pre-approved violations of the Crowd Policy is a highly-disputed and as yet unresolved question of fact. Though plaintiffs suggested at oral argument that injunctive relief would be *less* justified if the City admitted to past misconduct rather than generally denying it, they do not explain why Oakland subjects itself to increased exposure of court intervention simply by disputing plaintiffs' version of the facts in preliminary legal proceedings.

While not quite questioning Oakland's good faith, plaintiffs discredit its assurances, and claim the City's professed compliance with its legal obligations ensure that it will do nothing to prevent recurrent misconduct at future rallies, thereby reinforcing protesters' fears. Plaintiffs invoke several out-of-circuit cases for the proposition that a defendant's defense of its own unconstitutional policies may be evidence of a "realistic threat" of future injury. *See DeJohn v. Temple Univ.*, 537 F.3d 301, 309 (3d Cir. 2008), *and Dambrot v. Cent. Michigan Univ.*, 55 F.3d 1177, 1182-83 (6th Cir. 1995). Tellingly, those cases concerned university conduct which did not implicate the concerns in *Lyons* regarding judicial intervention into official local law enforcement activities. To the extent plaintiffs doubt the adequacy of Oakland's internal investigations, of course, the appropriate recourse is to bring a direct challenge to those procedures, rather than to attack them collaterally by requesting the courts to enjoin any potential misconduct that could warrant internal inquiries.[5]

In sum, without diminishing the significance of the First Amendment injuries alleged by plaintiffs, or doubting that such injuries could properly form a basis for injunctive relief in other circumstances, here the prudential concerns articulated by *Lyons* must override plaintiffs' request for preliminary injunctive relief. Putting aside the disputed factual question of whether plaintiffs have established that Oakland violated its own policies and protesters' First or Fourth Amendment rights, they have not shown that police engaged in a "standard pattern of officially sanctioned" misconduct. *LaDuke*, 762 F.2d at 1324. Plaintiffs' contention that First Amendment interests are

[5] Plaintiffs have not demonstrated the requisite likelihood of success on their theory that, as third-party beneficiaries to the settlement in the *Local 10* case, they are due an injunction because "the City of Oakland has been unable to substantially comply with Court [o]rdered reforms of its Internal Affairs investigation procedures for almost nine years." Pls.' Suppl. Mot. for P.I., 22:6-7.

particularly fragile, and therefore, perhaps, warrant more aggressive protection, does not supply what is otherwise deficient in their request for injunctive relief.[6] Accordingly, plaintiffs have not sufficiently satisfied *Lyons*' requirements to prevail on the second factor.

C. Balance of the equities & public interest

As before, the balance of the equities, and the public interest, do not clearly favor plaintiffs or defendants. Neither party has revisited, in detail, their arguments concerning the balance of the final two factors, and both maintain compelling interests. Plaintiffs, of course, seek to protect and exercise their First and Fourth Amendment rights in ways that implicate the public interest. The defendants, on the other hand, seek to protect the safety and property of Oakland residents generally; their interests are therefore at least as significant as those advanced by plaintiffs. Although plaintiffs deny that the proposed order would prove unworkable as a practical matter (contrary to defendants' contentions), they fall far short of establishing that either factor weighs in favor of granting equitable relief, much less that the balance of the equities tip sharply in their favor, per *Wild Rockies*. *See* 632 F.3d at 1131. As a result, the final two factors do not support issuance of an injunction.

V. CONCLUSION

For the reasons stated, plaintiffs' motion for a preliminary injunction is denied.

IT IS SO ORDERED.

Dated: 12/12/11

RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE

[6] *Zorzi v. Cnty. of Putnam*, invoked by plaintiffs, is of limited relevance to this case. 30 F.3d 885, 895-98 (7th Cir. 1994). There, an emergency dispatcher was fired in retaliation for espousing political views that ran contrary to those of the local sheriff. Plaintiffs rely on *Zorzi* for the proposition that government conduct that has a "chilling effect" on the First Amendment rights of a larger audience constitutes "pervasive and systematic" harm. However, the limited remedy provided by the Seventh Circuit in *Zorzi* was to reinstate the dispatcher – not to enjoin the sheriff from violating the First Amendment by wrongfully terminating other employees. Accordingly, *Zorzi* does not support plaintiffs' request for relief.