No. 09-2385

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ASOCIACIÓN DE PERIODISTAS DE PUERTO RICO, Puerto Rico Journalists Association; OVERSEAS PRESS CLUB OF PUERTO RICO; NORMANDO VALENTIN, individual capacity and on behalf of his respective Conjugal Partnership; VICTOR SANCHEZ, individual capacity and on behalf of his respective Conjugal Partnership; JOEL LAGO-ROMAN, individual capacity and on behalf of her respective Conjugal Partnership; COSETTE DONALDS-BROWN, individual capacity and on behalf of her respective Conjugal Partnership; VICTOR FERNANDEZ, individual capacity and on behalf of his Conjugal Partnership; ANNETTE ALVAREZ, individual capacity and on behalf of her respective Conjugal Partnership

Plaintiffs-Appellants

v.

ROBERT MUELLER, in his official capacity as Director of the Federal Bureau of Investigation; TEN UNKNOWN AGENTS OF THE FEDERAL BUREAU OF INVESTIGATION, individually and in their official capacity and on behalf of their Conjugal Partnership; KEITH BYERS, individually and in his official capacity and on behalf of his Conjugal Partnership; LUIS S. FRATICELLI, individually and in his official capacity and on behalf of his Conjugal Partnership; JOSE FIGUEROA-SANCHA, individually and in his official capacity and on behalf of his Conjugal Partnership.

Defendants-Appellees.

On Appeal from the United States District Court for the District of Puerto Rico

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REPLY BRIEF FOR THE PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

The first time this case was before this Court, the Court reversed entry of summary judgment for defendants on plaintiffs' excessive force claims because the district court "erroneously adopted the defendants' characterization of the day's events." *Asociacion de Periodistas de P.R. v. Mueller*, 529 F.3d 52, 59 (1st Cir. 2008) (hereinafter "ASPPRO"). On remand, the district court has done the same thing again, crediting defendants' characterization of what took place and ignoring evidence that supports plaintiffs. Because the evidence in the record establishes that many material facts are sharply disputed, and on plaintiffs' facts, defendants are not entitled to summary judgment, summary judgment is again inappropriate.

Defendants, whose opposition is devoted to defending the reasoning of the district court rather than offering independent grounds for affirmance, replicate the district court's error throughout their brief. They contend that "plaintiffs have offered a partial and one-sided description of the incident, and they have not disputed many of the remaining facts established by defendants' evidence." Defs.' Br. 23. What defendants disparage as a "partial and one-sided description" is otherwise known as plaintiffs' version of events, and it is amply supported by valid evidence.

Although defendants contend the district court did not rule on the constitutional question, that is incorrect. The district court correctly held that plaintiffs' facts establish a constitutional violation because it was unreasonable for defendants to kick, punch and pepper spray peaceful and compliant reporters. Although the record is now more voluminous than it was the first time this case came before this Court, the material facts have not changed. Plaintiffs' evidence still establishes that "without any provocation or need for force, the defendants assailed them." *ASPPRO*, 529 F.3d at 59. Based on plaintiffs' version of the facts, this Court previously held that plaintiffs had established a constitutional violation. The Court should reach the same conclusion today. Remarkably, defendants advance no argument to the contrary.

The district court erred as a matter of law, however, when it held that the right at issue was not sufficiently clearly established. The district court's conclusion that it was unclear whether the Fourth Amendment or substantive due process clause applied is precluded by the law of the case and is wrong on the merits.

The district court also erroneously concluded that a reasonable agent could have believed that his actions were constitutional. The district court was only able to reach this conclusion by applying the wrong legal standard

and focusing on defendants' perceptions of what happened, rather than plaintiffs' version of the facts. By focusing on defendants' subjective perceptions, the district court and defendants once again give credence to "defendants' characterization of the day's events." *ASPPRO*, 529 F.3d at 59. If plaintiffs' facts are properly credited, it is clear that no reasonable officer would have thought it was permissible to punch, kick and pepper spray peaceful, compliant journalists who posed no risk of harm to the FBI agents.

Furthermore, it is too early in this litigation to dismiss plaintiffs' claim of injunctive relief for lack of standing, and the district court's numerous procedural errors underscore that summary judgment is inappropriate.

ARGUMENT

I. THE DISTRICT COURT AND DEFENDANTS IMPERMISSIBLY RELY ON DEFENDANTS' VERSION OF DISPUTED FACTS.

At summary judgment, factual disputes must be resolved in favor of the non-movant. *Buchanan v. Maine*, 469 F.3d 158, 162 (1st Cir. 2006). The district court impermissibly relies on defendants' version of events. Defendants make the same error in their brief.

Defendants' brief relies heavily on facts that plaintiffs dispute. The following are some examples. Others are discussed throughout the brief.

- Defendants contend their actions were reasonable because agents were "confronting an unruly and potentially-violent crowd." Defs.' Br. 29. Whether the crowd was unruly or potentially violent is sharply disputed. Plaintiffs' evidence establishes that the crowd was peaceful until after defendants used force against the journalists. A-607, 620, 624.

- Defendants assert that "[a]s the day wore on, the crowd grew to about 50 people." Defs.' Br. 5. Evidence in the record contradicts that, stating that there were never more than 20-30 people present. District Court Opinion (hereinafter "Op.") 6; SA-526, A-750 (agent testimony); A-633-34, 662.

- Defendants claim non-journalists entered complex grounds. Defs. Br. 2. Plaintiffs' evidence demonstrates that everyone who entered complex grounds was a peaceful and compliant journalist, and that those journalists who entered the complex grounds were not unruly or aggressive in any manner. A-607, 635, 637.

- Defendants contend the journalists refused to leave the complex grounds. Defs.' Br. 6. Numerous declarations say the exact opposite. A-605-06, 616-17, 627.

- Defendants assert that agent [REDACTED] 100-10, the agent who pepper sprayed everyone, "lifted a canister of pepper spray and displayed it to the crowd as a warning." Defs.' Br. 7. Even defendants' own colleagues do not all support that claim. SA-885-86, A-1107-08 (agent testimony). Their testimony is consistent with plaintiffs' declarations. A-606, 636.

- Defendants claim that plaintiff Lago "does not dispute that he failed to comply with instructions to leave." Defs.' Br. 6. That is inaccurate. Plaintiff Lago has made clear that he tried to leave. A-616-17. He was at first unable to leave because a ring of agents had formed between him and the exit, and he could not get through. A-616-17. Later, he again tried to leave, but was unable to do so because he was blinded by pepper spray and fell to the ground. A-619.

- Defendants attempt to justify pepper spraying plaintiff Lago while he was motionless on the ground by claiming that he deliberately "sat on the ground, blocking the pedestrian gate." Defs.' Br. 11. Plaintiff Lago did not voluntarily sit down; he lost his bearings and fell down because agent [REDACTED]-100-10 had just sprayed him with pepper spray. A-619. Plaintiff Lago was also not near the gate when he fell; he was dragged over to the gate by agent [REDACTED] 100-12. A-619-620, SA-144-45, A-305-06 (agent testimony).

The inability of the district court and defendants to articulate their claims without relying on their version of disputed facts underscores that this is not a case that can be resolved at summary judgment.

II. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' EXCESSIVE FORCE CLAIMS.

A. The Evidence Shows Defendants Violated Plaintiffs' Fourth Amendment Rights.

The district court correctly held that plaintiffs' facts make out a constitutional violation. Op. 15. Plaintiffs' opening brief explains why defendants' punching, kicking and pepper spraying of plaintiffs violates the Fourth Amendment's prohibition on excessive force. Pls.' Br. 30-38. This Court should reach the constitutional question and conclude that plaintiffs have established an excessive use of force.

The material facts have not changed since the Court last found that plaintiffs established a constitutional violation. At that time, the Court summarized plaintiffs' evidence as follows:

> Here, the plaintiffs' submissions reveal that without any provocation or need for force, the defendants assailed them. The plaintiffs contend that they were attempting to exit the gated area, but were impeded by the narrow pedestrian access gate. While bottlenecked in the space between the agents and the gate, the defendants hit some of the plaintiffs and, without warning, applied pepper spray directly into their faces. One plaintiff attests in his affidavit that he fell to the ground during the course of events and an agent intentionally sprayed him in the area around his eyes and caused intense burning and temporary blindness. While this plaintiff was still blinded and prone on the ground, an agent grabbed and kicked him, causing additional injuries. According to the plaintiffs' submissions, all of this occurred without any provocation.

ASPPRO, 529 F.3d at 59. Each of these facts is still supported by record evidence. Both plaintiffs and others were peaceful. A-606-07, 620, 624. The plaintiffs attempted to exit. A-605-06, 616-17, 627, 636, 643, 651. They could not do so because the gate was too narrow. A-605-06, 616-17. *See also* SA-816-17; A-1038-39 (stating that it would have been physically impossible for him, an FBI SWAT agent, to exit complex grounds); SA-546-47, A-770-71 (same). Plaintiffs were hit, and they were pepper sprayed without warning. A-606, 618-19, 626, 636-37, 651, 704-05. Plaintiff Lago fell down and was pepper sprayed directly in the space between his sunglasses and forehead. A-619-20. After he lay on the ground, plaintiff Lago was dragged, tossed and kicked. A-619-20. These material facts have not changed since the last time the Court considered this case, and the

district court was correct to conclude that plaintiffs' facts established a Fourth Amendment violation.

Conspicuously absent from defendants' brief is any argument that the facts as alleged by plaintiffs do not make out a constitutional violation. Defendants instead argue that the district court did not "definitively resolve" the question of whether plaintiffs' facts establish a constitutional violation. Defs.' Br. 8-9, 11. This is incorrect. The district court wrote:

> If there was no marked perimeter and Plaintiffs received no warning not to enter the grounds; if the crowd was not violent and only peaceful reporters entered the premises; if Defendants did not order Plaintiffs to exit or Plaintiffs did not hear the orders, and if Defendants did not warn Plaintiffs before deploying pepper spray, then a rational jury could arguably conclude that Defendants' use of force was unreasonable and, therefore, in violation of the Fourth Amendment.

Op. 15.

This is a textbook application of the first step of the qualified immunity analysis at the summary judgment stage. In *Morelli v. Webster*, the Court explained that courts should "first identify[] the version of events that best comports with the summary judgment standard." 552 F.3d 12, 19 (1st Cir. 2009). That is what the district court did. The district court's reference to a "rational juror" is not a hedge. It is an invocation of the summary judgment rule that courts must credit factual assertions that a

"rational trier of fact" could believe. *Scott v. Harris*, 550 U.S. 372, 380 (2007).

Defendants' argument that the district court did not resolve the first step of the qualified immunity analysis appears to be based on the district court's use of the word "arguably." Defs.' Br. 9. The word "arguable" means, among other things, "plausible" or "possible." Merriam-Webster Dictionary Online, http://www.merriam-webster.com/dictionary/arguable. The district court was simply applying the traditional summary judgment standard. Because a jury could rule in plaintiffs' favor, summary judgment is not appropriate.

This Court should address the first prong of the qualified immunity analysis. Deciding the constitutional question first "promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public." *Wilson v. Layne*, 526 U.S. 603, 609 (1999). Deciding only whether the law is clearly established short circuits the "process for the law's elaboration from case to case." *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

If the Court finds that plaintiffs do not have standing to pursue injunctive relief, then addressing the first part of the qualified immunity analysis becomes all the more important. The basic purpose of the *Bivens*

remedy is to deter official misconduct, and that purpose will be frustrated if this Court does not address whether there was a constitutional violation. *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009) (addressing the first step is "especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable"). Even the government has conceded as much in other cases. *See* Brief for United States as Amicus Curiae at 25, *Pearson v. Callahan*, 129 S. Ct. 808 (2009) (No. 07-0751), 2008 WL 2436685 (for "excessive-force cases under the Fourth Amendment, Section 1983 or *Bivens* actions may provide the only realistic avenue of fashioning clear constitutional rules for officers in the field.").

B. It Was Clearly Established that Kicking, Punching and Pepper Spraying Peaceful People Violates The Fourth Amendment.

1. It Was Clear That The Fourth Amendment Reasonableness Standard Applied.

The district court concluded that it was not clearly established that the Fourth Amendment rather than the substantive due process standard applies. Op. 17. Defendants made that exact argument the first time this case was before this Court. Defs.' Br. to 1st Cir. (1/16/08) at 20, 31-32. The Court rejected it, holding that on plaintiffs' facts, qualified immunity was not appropriate on the excessive force claims. The law of the case doctrine

precluded the district court from ignoring this Court's ruling. *See United States v. Holloway*, 499 F.3d 114 (1st Cir. 2007). Although the district court and defendants claim that the Court did not expressly hold that the Fourth Amendment applied, that was obviously implicit in the Court's holding.

Defendants criticize plaintiffs' reliance on *Brower v. County of Inyo*, 489 U.S. 593 (1989). Defs.' Br. 36-37. *Brower* set out the bright-line rule that there is a Fourth Amendment seizure where the government engages in an "intentional acquisition of physical control" of an individual. *Brower*, 489 U.S. at 596. Defendants suggest that the law was not clearly established because the Court in *Brower* "did not address the proper legal standard when an official lawfully requires a plaintiff to leave an area, and uses force to ensure compliance." Defs.' Br. 36. That specificity is unnecessary. The idea that the law must be clearly established "is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal citations omitted). The bright-line rule of *Brower* provides fair warning.

So do other Supreme Court cases. In *Michigan v. Chesternut*, the Court held that an individual is seized wherever law enforcement attempts

"to capture *or otherwise intrude upon* respondent's freedom of movement." 486 U.S. 567, 575 (1988) (emphasis added). The respondent in *Chesternut* was not seized because law enforcement did not try to capture him "or otherwise control the direction or speed of his movement." *Id.* Here, the federal agents did "control the direction" of plaintiffs' movement when they used force to move plaintiffs off complex grounds.

Defendants' efforts to distinguish *Ciminillo v. Streicher*, 434 F.3d 461 (6th Cir. 2006), are unavailing. Defs.' Br. 36-37. *Ciminillo* reached the Sixth Circuit on summary judgment. *Ciminillo*, 434 F.3d at 463. The plaintiff was shot with a beanbag at point blank range. *Id.* Resolving factual disputes in favor of plaintiffs, the court accepted that the officer shot the plaintiff with a beanbag in order to restrain his movement, and held there was a seizure. *Id.* at 466. It did not matter that the plaintiff was not arrested. *Id.* at 463-64. Furthermore, the court ultimately found that there was such a clear violation of the Fourth Amendment that it denied qualified immunity. *Id.* at 467-68. *See also McCracken v. Freed*, 243 Fed. App'x 702, 708-09 (3d Cir. 2007) (occupant of home was "seized" where law enforcement officers threw pepper spray canisters into home to debilitate those inside); *Logan v. City of Pullman*, 392 F. Supp. 2d 1246, 1260 (E.D. Wash. 2005) (persons intentionally sprayed with pepper spray were "seized").

2. No Reasonable Officer Would Have Believed That Kicking, Punching And Pepper Spraying Plaintiffs Was Lawful.

Qualified immunity is also not appropriate because no reasonable officer would have believed that kicking, punching and pepper spraying plaintiffs was lawful. The evidence demonstrates that they and others were peaceful and compliant, and no reasonable officer would have believed that it was permissible to kick, punch and pepper spray plaintiffs under these circumstances. The district court and defendants could only reach a contrary conclusion by discarding plaintiffs' facts.

a. The district court used the wrong legal standard in determining whether a reasonable officer would have done what defendants did.

When analyzing whether the constitutional right was clearly established, the district court improperly accepted defendants' view of disputed facts. It wrote:

> In sum, without making any determinations as to disputed factual issues, we find that Defendants could have reasonably believed that (1) a perimeter had been established, and reporters were violating the perimeter by entering the complex; (2) the crowd of onlookers contained Macheteros sympathizers or others preparing to engage in violent acts; (3) the crowd was angry and had threatened to throw rocks or other objects at the agents; (4) the agents' guns lacked safeties and could be accidentally or intentionally discharged; and (5) the group that passed through the purported perimeter was comprised of both peaceful journalists and angry protesters.

Op. 23-24. That conclusion could only be reached by applying the wrong legal standard and substituting defendants' facts for plaintiffs' facts.

Defendants attempt to argue that it is appropriate to accept their facts at this step of the qualified immunity analysis. Defs.' Br. 22. Defendants write:

> Plaintiffs argue that this [third] prong of the qualified immunity analysis should be based on the same factual analysis as the first prong. That is not the law; indeed, such an approach would render largely irrelevant the distinction between the two prongs and the significance of ensuring that officials have the leeway to exercise their judgment without risking personal liability based on hindsight.

Defs.' Br. 22 (internal citation omitted).

The facts that can form the basis of decision at summary judgment are the undisputed facts plus the disputed facts construed in the non-movant's favor. *ASPPRO*, 529 F.3d at 61-62. As the Court wrote in *Morelli*, courts should "first identify[] the version of events that best comports with the summary judgment standard," 552 F.3d at 19, and then apply those facts in the qualified immunity analysis. Courts do not look solely at defendants' version of the facts in deciding if defendants' actions were reasonable.

It is impossible to accept any of the district court's five conclusions above without substituting defendants' facts for plaintiffs' facts. On

plaintiffs' facts, defendants are not entitled to qualified immunity. The district court's five conclusions will be reviewed in turn.

i. Plaintiffs' evidence shows there was no perimeter.

The premise of the district court's opinion is that a perimeter had been established. Op. 23. In light of plaintiffs' facts, there is nothing reasonable about believing there was a perimeter. A perimeter can be established by posting agents along the perimeter line, displaying police tape, or stationing vehicles to form a barricade. SA-770-71, A-992-93 (agent testimony); SA-537-38, A-761-62 (same); SA-518, A-742 (same). The FBI agents did not do any of these things. SA-416, A-640; SA-841, A-1063; SA-401, A-625; SA-732-33, 739, A-954-55, 961. No one told plaintiffs that there was a law enforcement perimeter, and none of the agents themselves manned a perimeter. SA-497, A-721 (agent testimony); A-603, 616, 625, 632. Civilians entered and exited the complex throughout the day, both on foot and by car. SA-490, A-714; SA-726, A-948. Given the complete lack of any visible sign of a perimeter, no reasonable officer would have thought that one had been set up, or that it was justifiable to use force to push individuals behind the alleged, invisible perimeter. A-1126 (expert testimony that there was no perimeter).

Defendants fall back on the argument that even if the FBI agents did not establish a perimeter, their actions were reasonable because plaintiffs violated Puerto Rico's criminal trespass statute. The statute plainly does not apply. It reads:

> Any person who enters any area of land where a residence or residential building is located, *with criminal intent*, without the consent of the owner or lawful occupant thereof, or without legal authorization, shall be punished by imprisonment not to exceed six (6) month, a fine not to exceed five hundred dollars ($500), or both penalties, at the discretion of the court.

33 L.P.R.A. § 4284a (emphasis added). The statute is only applicable where individuals have "criminal intent." *Id.* Defendants have never argued, and have submitted no evidence, that plaintiffs entered the property with criminal intent. The evidence shows plaintiffs entered to gather the news, in a response to the inviting wave of a relative of the woman whose apartment was being searched, SA-419, A-643; SA-465, A-689 (agent testimony), and through a gate that was opened for them by someone with a key. SA-847-49; A-1069-71 (agent testimony); A-605, 614-15, 643, 650.

One of the agents testified that plaintiffs were admitted to the complex by a woman with a key who opened the gate for them. Defendants simply ignore this fact. Given this fact, at least at the summary judgment stage, it is clear that plaintiffs were not trespassing or violating any perimeter. The district court's conclusion that defendants' actions were permissible because

plaintiffs improperly violated a perimeter is, therefore, based on defendants' facts.

ii. Plaintiffs' evidence shows there was no Macheteros threat.

The district court's conclusion that defendants acted reasonably because they believed the Macheteros or Macheteros sympathizers were a threat has no evidentiary support. Defs.' Br. 28; Op. 21. The only agent who offered any testimony regarding seeing possible Macheteros sympathizers was defendant Byers. A-243. There is no evidence in the record that defendant Byers ever communicated that information to other defendants or agents who used force. What Byers witnessed was not what the other agents witnessed. In fact, all the other agents but one[1] testified they had no specific knowledge or evidence regarding the presence of Macheteros or Macheteros sympathizers. Pls.' Br. 38. Given that the agents each acted independently, there is no basis for imputing knowledge from one to another as a basis for relieving them from liability.

As for defendant Byers, it is undisputed that he now claims he saw someone with a bandana. Regardless, plaintiffs submitted evidence that the crowd was peaceful. *See supra* p. 4. The issue here is not whether there

[1] The final agent, defendant Figueroa, refused to answer plaintiffs' question on this issue. SA-642-649, A-864-871.

were or were not Macheteros. The issue is whether a reasonable officer would have assaulted peaceful reporters because he saw someone in the crowd who may or may not have been a Machetero. Absent any other facts suggesting that the crowd was violent or that there was a legitimate threat of injury, it was unreasonable for defendants, including defendant Byers, to use the force they did on peaceful, compliant reporters. *See also* A-1128-29 (expert testimony that no reasonable officer would have thought that Byers' perceptions regarding the possible presence of the Macheteros would justify the force used here).

iii. Plaintiffs' evidence shows the crowd was peaceful.

The district court held that "the crowd was angry and had threatened to throw rocks or bottles at the agents." Op. 23. This claim is disputed. Plaintiffs submitted evidence that, prior to the time the reporters entered complex grounds, the crowd was peaceful. Pls.' Br. 7. One or two members of the crowd yelled occasionally, but this is normal at such protests and did not portend violence. A-624, 633-34, 637, 641-42. Plaintiffs also submitted evidence that everyone who entered complex grounds was a peaceful and compliant journalist. Pls.' Br. 11. Some defendants dispute that, but regardless of who is right, it is clearly a disputed fact.

Defendant Figueroa claims that a photographer "advised me that he had overheard individuals in the crowd discussing plans to harm FBI employees," but no one else testified to having heard this alleged statement or having been told about it. A-225. Plaintiffs attempted to depose the photographer, but the district court refused to allow it. This hearsay evidence should not, thus, be considered.

Defendant Byers claims that he "suspected" that someone "had thrown a rock in the direction of me and the other agents standing next to me." SA-81, A-243. However, he did not see anyone throw anything or see the object that was allegedly thrown. SA-499-500, A-723-24; SA-302, A-521. Finally, although agent [REDACTED] 100-8's declaration states that he "observed gravel/dirt and other unknown objects being thrown at the FBI personnel by members of the group outside," he explained in his deposition testimony that he did not know whether this took place before or after the FBI agents kicked, punched and pepper sprayed reporters. SA-750, A-972.

In their brief, defendants state that, "[i]n light of the ample evidence of actual violence (such as throwing rocks and bottles), as well as yelling, swearing, and name-calling…plaintiffs cannot seriously defend the view that the crowd was entirely peaceful." Defs.' Br. 29 n.4. This statement is misleading. The only evidence of rock throwing before the use of force is

defendant Byers' statement that he had the feeling that someone might have thrown a rock at him. After the agents used force against reporters and drove their cars through the crowd, someone did throw a rock at a vehicle. SA-446, A-670. That fact cannot support a finding that the crowd was unruly at the time the agents used force. Moreover, there is no evidence that anyone threw "bottles" at the agents. After the agents kicked, punched and pepper sprayed the reporters, one cameraman tossed a plastic water bottle over the condominium complex fence. SA-346-47, A-568-69. But this, too, happened after the agents used force, and cannot serve as a justification for their actions.

iv. Plaintiffs' evidence shows the agents' weapons were safe.

The district court reasoned that someone might accidentally or intentionally discharge an agent's weapon, Op. 23, but no reasonable officer would have used force on this basis. There is no evidence that anyone reached for an agent's weapon, or that anyone intended to do so. SA-470, 485, 819, 854, 859, A-694, 709, 1041, 1076, 1081.

The mere theoretical possibility that someone would intentionally or accidentally fire an agent's weapon is insufficient justification to punch, kick and pepper spray peaceful journalists. By this rationale, any civilian on the street could be subjected to force anytime a law enforcement officer happens

to be carrying a weapon. Absent any evidence that a reasonable officer could have thought that the reporters were armed, dangerous, or present on the scene for an unlawful purpose, no reasonable officer would have thought it was acceptable to use force against the reporters because they were carrying weapons.

v. Plaintiffs' evidence shows only journalists entered.

The district court concluded that defendants "could have reasonably believed that some members of the angry crowd had entered the pedestrian gate along with the journalists." Defs.' Br. 31 (quoting Op. 23). The only way the district court could reach that conclusion is by ignoring plaintiffs' evidence.

Plaintiffs submitted evidence that only journalists entered the complex grounds. A-607, 635, 643, 651. They were immediately recognizable as journalists because they carried cameras, tape recorders, notepads, and microphones. A-614, 636. In addition, defendants had encountered many of them throughout the day. SA-618, A-840. Those who came in were calm and peaceful. A-606, 627, 637, 643.

On these facts, no reasonable agent could have believed that "angry crowd" members had entered complex grounds. But even if it was reasonable to think that some non-journalists entered, it was unreasonable to

use force against them to compel them to leave. Plaintiffs testified that once the agents ordered those inside complex grounds to get back, everyone tried to comply. A-605-06, 616-17, 627, 636, 643, 651. Regardless of the identity of those inside the complex, it was unreasonable to kick, punch and pepper spray peaceful and compliant individuals. *ASPPRO*, 529 F.3d at 60 ("mere obstinance" insufficient to justify the force used).

vi. No reasonable officer would have used force considering the individual circumstances of each plaintiff.

The district court also erred by failing to follow this Court's instruction to conduct an individualized assessment for each plaintiff. *Id.* at 61-62. Individualized assessments of the force used against each plaintiff demonstrate that no reasonable agent would have used the force that was exhibited against plaintiffs. First, plaintiff Fernandez never entered complex grounds, posed no threat, and yet he was still deliberately targeted for the use of force. Specifically, "the agent with the pepper spray turned and faced me and proceeded to pepper spray me directly in my face from one to two feet away." A-627-28. Defendants nevertheless assert there is no evidence "contradicting defendants' testimony that Fernandez was not purposefully targeted or singled out." Defs.' Br. 34. Plaintiff Fernandez's declaration

directly contradicts that. If his account is accepted, no reasonable officer would have pepper sprayed plaintiff Fernandez.

Second, no reasonable officer would have kicked, punched and pepper sprayed plaintiff Lago, either, particularly after plaintiff Lago lay incapacitated and motionless on the ground. Plaintiff Lago attempted to comply with agents' commands. A-617 ("I did my best to comply with [agent Byers'] efforts to push me through the line of agents."); A-618-19. He was peaceful and did not initiate a physical altercation with anyone. SA-395-96; A-619-20; SA-483, 571, 573, 800-01, A-707, 795, 797, 1022-23 (agent testimony).

It was particularly unreasonable for agents to use force against plaintiff Lago after he sat incapacitated and motionless on the ground. He was not saying anything, doing anything, or holding anything. *Id.* He was nonetheless pepper sprayed, for a second time, at point-blank range, A-619-20; SA-788, A-1010 (agent testimony), and then dragged, shoved and kicked off complex grounds, A-619-20. The First Circuit specifically addressed the force used against plaintiff Lago, and concluded this evidence justified denying qualified immunity. *ASPPRO*, 529 F.3d at 59 Because the facts have not changed, this Court must once again deny qualified immunity.

Defendants ignore this evidence and suggest that the use of force against plaintiff Lago was reasonable because they were "faced with an admittedly non-compliant trespasser." Defs.' Br. 32. They also state that plaintiffs "notably omit to mention that Lago ignored an order to leave, and that he was engaged in an altercation with an FBI agent who threatened to arrest him." Defs.' Br. 32. Plaintiffs do not "omit" these facts, they *dispute* them, as the previous paragraph demonstrates.

Third, no reasonable agent would have used force against plaintiff Valentin. Plaintiff Valentin was peaceful and it was obvious that he was desperate to leave, because he pleaded with the agents to open the vehicular gate so that he and others could exit more quickly. A-651. Defendants conclusorily claim he was also "an apparently non-compliant individual," Defs.' Br. 33, but there is no evidence supporting that. In any event, this Court has already held that "mere obstinance by a crowd" is insufficient to justify the force defendants used. *ASPPRO*, 529 F.3d at 60. Finally, no reasonable agent would have pepper sprayed plaintiffs Donalds, Alvarez and Sanchez. The wanted to leave but could not because they were trapped. A-606, A-637, A-643. Defendants assert that "[p]laintiffs do not dispute that [these plaintiffs] failed to leave when directed to do so," Defs.' Br. at 33, but

given that leaving was physically impossible, no reasonable officer would have believed it was reasonable to use force against them.

b. The cases defendants cite are factually inapposite.

Defendants next cite cases in which courts have granted qualified immunity in what defendants characterize as "similar circumstances." Defs.' Br. 24. However, the only way to conclude that these cases are similar is to accept defendants' facts and reject plaintiffs' facts.

For example, several of the cases defendants cite involve the presence of unruly crowds of people. *See Jackson v. City of Bremerton*, 268 F.3d 646, 649 (9th Cir. 2001); *Gomez v. City of Whittier*, 211 Fed. App'x 573, 577 (9th Cir. 2006); *Hicks v. City of Portland*, 2006 WL 3311552 at *9 (D. Or. 2006). To the extent the presence of individuals other than plaintiffs was a factor in these courts' analyses, it was because the crowds were disobedient or violent. *Jackson*, 268 F.3d at 649 ("fights broke out" between crowd members and officers); *Gomez*, 211 Fed. App'x at 576 (describing a verbal and physical altercation with a large crowd); *Hicks*, 2006 WL 3311552 at *9 (a "large, and unlawfully assembled crowd" that physically blocked a street). Because, at the time the agents used force, the evidence shows the journalists and others were peaceful and compliant, these cases are inapposite.

Furthermore, the mere presence of even a disobedient or violent crowd was not outcome-determinative in those cases. The court looked at the specific actions taken by plaintiffs and based its decision on an individualized assessment. *Jackson*, 268 F.3d at 653 ("Jackson's active interference posed an immediate threat to the officers' personal safety and ability to control the group."); *Gomez*, 211 Fed. App'x at 576 (agents and plaintiffs engaged in a "verbal and physical altercation"); *Hicks*, 2006 WL 3311552 at *10-11 (plaintiff violated an order to disperse and, once apprehended, "attempted to pull away" from officer and "dropped to the ground, passively resisting arrest"). Because the plaintiffs here were peaceful and obedient and were nonetheless punched, kicked and pepper sprayed, these cases are irrelevant.[2]

Other cases defendants cite are inapposite because they all involve the use of force against individuals who actively disobeyed orders, not peaceful and compliant individuals. *Portillo v. Montoya*, 170 Fed. App'x 453, 456 (9th Cir. 2006) (an individual yelled and cursed at officers and swiped an officer's hand); *Esters v. Steberl*, 93 Fed. App'x 711, 713-714 (6th Cir. 2004) ("two women . . . involved in combat"); *Monday v. Oullette*, 118 F.3d

[2] Two of the cases defendants cite are not relevant because they do not even involve Fourth Amendment claims. *Dalrymple v. United States*, 460 F.3d 1318, 1327 (11th Cir. 2006) (Florida tort law); *Baldwin v. Stalder*, 137 F.3d 836, 838, 841 (5th Cir. 1998) (Eighth Amendment).

1099, 1104-05 (6th Cir. 1997) (police used pepper spray to incapacitate a depressed man who was drinking, may have taken an overdose of medication, and refused to go to the hospital); *Sorgen v. City and County of San Francisco*, 2006 WL 2583683 at *2, *6-7 (N.D. Cal. 2006) (officer first pushed an individual backward with an open hand to the chest and then struck him three times on the leg with a baton, where the individual smelled of alcohol, and "repeatedly refused to comply" with the officer's request); *Ramos Bonilla v. Vivoni Del Valle*, 336 F. Supp. 2d 159, 164 (D. P.R. 2004) (plaintiff, who disobeyed order to leave area, was arrested for his own safety after he was thrown into a hostile group).

The fundamental problem with defendants' theory is that their dispute with plaintiffs is about the facts, not the law. On plaintiffs' facts, no reasonable officer would have kicked, punched and pepper sprayed plaintiffs. Summary judgment is inappropriate.

III. PLAINTIFFS HAVE STANDING TO PURSUE INJUNCTIVE RELIEF.

Plaintiffs have standing to pursue injunctive relief. Standing depends on a showing that one is "likely to suffer future injury." *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). On plaintiffs' facts, defendants intentionally used force against people they knew were peaceful and compliant reporters working to gather the news. A-606, 616-17, 627, 637,

643-44, 651. Plaintiffs submitted evidence that they, unlike the average person, are likely to appear repeatedly at the scene of FBI operations regarding independence activists because it is their job to cover such events. A-608, 621, 637-38, 653. This is sufficient evidence of standing at this preliminary stage of the litigation. *Riggs v. City of Albuquerque*, 916 F.2d 582, 586 (10th Cir. 1990) (plaintiffs should be "afforded a fair opportunity to develop the facts" before their case is dismissed for want of standing).

IV. THE DISTRICT COURT COMMITTED SEVERAL PROCEDURAL ERRORS

The Court should also vacate and reverse the district court decision because of the numerous procedural errors committed.

A. The District Court Abused Its Discretion By Denying Plaintiffs' Discovery Requests.

The only discovery plaintiffs received were depositions of self-selected agents who submitted declarations in defendants' favor and an incomplete collection of certain written statements by those agents. At a minimum, plaintiffs should have been given the opportunity to learn which agents were present at the scene, and should have been given the written statements of all of those agents, so that they could choose whom to depose, rather than being limited only to those whose testimony defendants believed

most vigorously supported defendants' case. It was clear error to prevent plaintiffs from receiving this basic, yet essential, discovery.

Contrary to defendants' assertion, Defs.' Br. 45, plaintiffs were not supplied with all of the written statements of the testifying agents. Plaintiffs were only supplied with most of the agents' "after action" reports, not any other writings, which the depositions proved existed. SA-263. Defendants contend that the district court "carefully consider[ed]" plaintiffs' renewed motion for discovery, Defs.' Br. 46, but that is speculative at best, given that the entirety of the district court's statement on the matter was the following: "Order denying Motion For Miscellaneous Relief, for the reasons set forth by the government in its opposition." A-21.

B. Defendants' DVD Evidence Should Not Be Considered.

On remand, defendants again submitted highly edited DVD footage, plaintiffs objected to its consideration, and the district court failed to rule on the matter. This is exactly what happened the last time this case was before this Court. Like last time, the Court should "likewise decline to consider the DVD in [its] review." *ASPPRO*, 529 F.3d at 57. Defendants concede that the district court did not consider the DVDs. Defs.' Br. 50-51. Accordingly, this Court should not consider them.

There is little question that the DVDs defendants submitted consist of highly edited, incomplete footage, particularly at key points of the incident. *See, e.g.*, A-1355 12:22-12:23; A-1355 13:46-13:47; A-1356 11:23-12:33, 32:56-33:02, 34:18-34:47.[3] In any event, the DVDs support plaintiffs' version of the facts. The DVDs show that plaintiffs were non-violent at all times and that the only confrontations between plaintiffs and defendants occurred after defendants starting pepper spraying and hitting plaintiffs. Defendants' DVD evidence depicts defendant Byers being interviewed calmly by journalists at the vehicle gate for over one minute. A-1355 5:23-6:25. Defendants' DVD evidence shows that some of defendant Byers' fellow agents are in the background, oftentimes with their backs to both defendant Byers and the journalists/crowd, something highly trained agents would not do if they were truly facing a dangerous crowd. *Id.* Defendants' DVD evidence also fails to show an "unruly crowd;" indeed, no crowd is visible at all. Although the existence of a number of journalists can be inferred, there is no evidence that the journalists were unruly; as stated

[3] Defendants are correct that a DVD can be authenticated by someone who is familiar with how the video was recorded in addition to someone who participated in the filmed events. Defs.' Br. 52 (citing *United States v. Rengifo*, 789 F.2d 975, 978 (1st Cir. 1986)). However, the declaration defendants proffered does not meet this standard because declarant has no knowledge of how the DVDs were created, instead stating only that she worked for the company that produced them. A-334.

earlier, all that can be determined is that many were visibly scared and trapped. A-1356 at 16:09.

C. The District Court Abused Its Discretion By Relying On Evidence That Plaintiffs Did Not Have A Chance To Oppose.

The district court erred in relying on new evidence and arguments presented by defendants on reply that plaintiffs never had the opportunity to oppose. Defendants obscure the issue by suggesting that plaintiffs believe only plaintiffs and not defendants are entitled to rely on the deposition transcripts. Defs.' Br. 48. That is not plaintiffs' point. Defendants could have relied on the deposition transcripts, had they taken up the district court's offer of an opportunity to file a supplemental memorandum in support of summary judgment. They did not. Instead, defendants chose to move for summary judgment only on their old evidence, and to introduce new evidence and arguments based on these depositions in reply, when plaintiffs had no opportunity to respond. It is no answer to say that plaintiffs could have filed a sur-reply to cure this error. The Federal Rules of Civil Procedures and the District of Puerto Rico's local rules set up a specific order of battle for the parties at summary judgment, and it does not involve parties filing a potentially endless series of briefs, declarations, and statements of materials facts whenever one party or the other decides to

amend their legal theory and add new evidence. *See* P.R. Dist. Ct. L.R. 7.1(a) (requiring documents setting forth facts to be filed with opening brief).[4]

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

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[4] Defendants also support the district court's decision to seal certain agents' names, but they do not deny that the First Amendment strict scrutiny standard applies to decisions to seal this information. The district court's sealing was not narrowly tailored because there was no evidence in the record that plaintiffs—as opposed to the general public—should be forbidden to know the names and there was no evidence that there was a need to seal indefinitely. *See, e.g.*, *In re Sealing and Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 894-95 (S.D. Tex. 2008) (imposing a 180-day limit on sealing).

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,994 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2010, I served the foregoing REPLY BRIEF OF APPELLANTS, using the Court's ECF system, upon the following counsel:

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