1 UNITED STATES DISTRICT COURT
2 DISTRICT OF PUERTO RICO

3 ASOCIACION DE PERIODISTAS DE
4 PUERTO RICO, et al.,

5 Plaintiffs,

6 v.

7 ROBERT MUELLER, DIRECTOR OF THE
8 FEDERAL BUREAU OF
9 INVESTIGATION, et al.,
10
11 Defendants.

Civil No. 06-1931 (JAF)

12 **OPINION AND ORDER**

13 Plaintiffs, Asociación de Periodistas de Puerto Rico, Overseas
14 Press Club of Puerto Rico, Normando Valentín, Víctor Sánchez, Joel
15 Lago Ramón, Cossette Donalds Brown, Víctor Fernández, Annette
16 Alvarez, and their respective conjugal partnerships, bring the
17 present action for injunctive relief and damages against Defendants
18 Robert Mueller and other agents of the Federal Bureau of
19 Investigation ("FBI"). Docket Document No. 1-1. Plaintiffs allege
20 that Defendants violated their First and Fourth Amendment rights by
21 assaulting them and other members of the media in an attempt to
22 prevent Plaintiffs from reporting on the execution of a search
23 warrant on the home of an alleged pro-independence political

1 activist, which the undersigned had previously authorized.[1] Id.
2 Defendants move for summary judgment on the basis of qualified
3 immunity pursuant to Federal Rule of Civil Procedure 56. Docket
4 Document No. 37. Plaintiffs oppose, Docket Document No. 49, and
5 Defendants have replied to the opposition, Docket Document No. 64.

6 **I.**

7 **Factual and Procedural Synopsis**

8 We derive the following facts from Defendants' and Plaintiffs'
9 motions, statements of material facts, and exhibits. Docket Document
10 Nos. 38, 39, 41, 46, 50, 52, 53, 54, 55, 56, 58, 64. Unless otherwise
11 indicated, facts contained herein are undisputed.

12 On February 10, 2006, FBI agents executed a search warrant at
13 the home of Lillian Laboy-Rodríguez ("Laboy") at 444 De Diego Avenue,
14 San Juan, Puerto Rico. When Plaintiffs and other members of the media
15 caught wind of the operation, they arrived on the scene to cover the
16 event. Members of the media set up behind the apartment complex's
17 pedestrian gate and initially did not enter the gated grounds of the
18 building. Throughout the day, other members of the public joined the
19 press outside the gates of the apartment to observe and protest the
20 FBI action. The crowd exhibited hostility towards the FBI by shouting
21 and, towards the end of the day, by throwing rocks at FBI vehicles.

[1] The search warrant relates to an internal terrorism investigation and the possible involvement of certain pro-independence groups, including the "Ejército Popular Boricua" (Popular Boricua Army), also known as "Los Macheteros."

1 Approximately two hours into the four-hour search, a helicopter
2 labeled Department of Homeland Security landed in a field adjacent to
3 the apartment complex. Plaintiffs approached the landing area.
4 Plaintiffs allege that Defendants "pushed away their recording
5 equipment in a violent and threatening way" and that one agent
6 "pointed a rifle at one of the plaintiffs in a threatening way."
7 Docket Document No. 49.

8 After the search concluded and while agents loaded their cars,
9 reporters entered the premises of the condominium in response to
10 Laboy's daughter's signal to them to come through the pedestrian
11 gate. FBI agents instructed the reporters to return to the other side
12 of the gate. Agents then used pepper spray to compel the reporters
13 back through the gate. Congestion occurred as the reporters squeezed
14 through the narrow entrance. Several reporters sustained injuries
15 during the agents' attempts to push the crowd back through the gate.
16 Defendants assert that these injuries were caused by the crowd,
17 Docket Document No. 39-1, while Plaintiffs claim that agents, in
18 addition to using pepper spray against them, punched them, pushed
19 them, kicked them, and used their batons against them, Docket
20 Document No. 50. Plaintiffs also assert that Defendants acted with
21 the express purpose of impeding Plaintiffs' efforts to record the
22 day's events. Id.

23 On September 20, 2006, Plaintiffs filed a complaint against
24 Defendants alleging (1) violations of Plaintiffs' First Amendment

1 rights of freedom of speech and the press, and (2) the use of
2 excessive force in violation of the Fourth Amendment. Docket Document
3 No. 1. Plaintiffs filed an amended complaint on February 8, 2007.
4 Docket Document No. 34. Defendants moved for summary judgment on
5 April 4, 2007. Docket Document No. 37. On April 13, 2007, Plaintiffs
6 moved for relief pursuant to Federal Rule of Civil Procedure 56(f),
7 seeking denial or continuance of the summary judgment motion to allow
8 for discovery, which we denied on May 10, 2007. Docket Document
9 Nos. 46-1, 63. Plaintiffs opposed the summary judgment motion on
10 May 1, 2007. Docket Document No. 49. Defendants replied to
11 Plaintiffs' opposition on May 16, 2007. Docket Document No. 64.
12 Plaintiffs requested reconsideration of the order denying their Rule
13 56(f) motion on May 18, 2007. Docket Document No. 65. That request
14 is still pending before this court.

15 **II.**

16 **Standard for Rule 56(c) Motion for Summary Judgment**

17 The standard for summary judgment is straightforward and
18 well-established. A district court should grant a motion for summary
19 judgment "if the pleadings, depositions, and answers to the
20 interrogatories, and admissions on file, together with the
21 affidavits, if any, show that there is no genuine issue as to any
22 material fact and the moving party is entitled to a judgment as a
23 matter of law." FED. R. CIV. P. 56(c). A factual dispute is "genuine"
24 if it could be resolved in favor of either party, and "material" if

1 it potentially affects the outcome of the case. Calero-Cerezo v.
2 U.S. Dep't of Justice, 355 F.3d 6, 19 (1st Cir. 2004).

3 The moving party carries the burden of establishing that there
4 is no genuine issue as to any material fact; however, the burden "may
5 be discharged by showing that there is an absence of evidence to
6 support the nonmoving party's case." See Celotex Corp. v. Catrett,
7 477 U.S. 317, 325, 331 (1986). The burden has two components: (1) an
8 initial burden of production, which shifts to the non-moving party if
9 satisfied by the moving party; and (2) an ultimate burden of
10 persuasion, which always remains on the moving party. See id. at
11 331.

12 The non-moving party "may not rest upon the mere allegations or
13 denials of the adverse party's pleadings, but . . . must set forth
14 specific facts showing that there is a genuine issue for trial." FED.
15 R. CIV. P. 56(e). Summary judgment exists "to pierce the boilerplate
16 of the pleadings and assess the proof in order to determine the need
17 for trial." Euromodas, Inc. v. Zanella, 368 F.3d 11, 17 (1st Cir.
18 2004)(citing Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 794
19 (1st Cir. 1992)).

20 **III.**

21 **Analysis**

22 Defendants argue that (1) we should grant them summary judgment
23 based on qualified immunity, and (2) Plaintiffs lack standing to

1 request injunctive relief. Docket Document No. 38. We first address
2 Defendants' claim of qualified immunity.

3 **A. Qualified Immunity**

4 Qualified immunity protects state officials from the burden of
5 standing trial or facing other onerous aspects of litigation.
6 Saucier v. Katz, 533 U.S. 194, 200 (2001). "The reach of this
7 doctrine is long, but not infinite." Pagan v. Calderon, 448 F.3d 16,
8 31 (1st Cir. 2006). The test to determine whether Defendants are
9 entitled to qualified immunity has three parts: (1) "whether the
10 plaintiff's allegations, if true, establish a constitutional
11 violation;" (2) "whether the constitutional right at issue was
12 clearly established at the time of the putative violation;" and
13 (3) "whether a reasonable officer, situated similarly to the
14 defendant, would have understood the challenged act or omission to
15 contravene the discerned constitutional right." Id. Qualified
16 immunity, thus, "safeguards even unconstitutional conduct if a
17 reasonable officer at the time and under the circumstances
18 surrounding the action could have viewed it as lawful." Jordan v.
19 Carter, 428 F.3d 67, 71 (1st Cir. 2005).

20 Applying this three-step approach, we first inquire if
21 Plaintiffs allegations, if true, establish a constitutional
22 violation. Pagan, 448 F.3d at 31. Plaintiffs allege violations of
23 (1) their First Amendment rights to freedom of speech and the press
24 and (2) the Fourth Amendment's protection against the use of

1 excessive force. Docket Document No. 34. We examine each of these
2 allegations in turn.

3 **1. First Amendment**

4 The First Amendment provides that "Congress shall make no law
5 . . . abridging the freedom of speech, or of the press." U.S. CONST.
6 amend. I. Plaintiffs assert that Defendants have a First Amendment
7 "obligation to accommodate the press' efforts to gather and report
8 the news" and that "the First Amendment strictly limits the authority
9 of law enforcement personnel to interfere with or prevent the
10 gathering and reporting of news, particularly where the news is being
11 reported live from a public location." Docket Document No. 49.
12 Plaintiffs also state that "in the absence of any claimed
13 interference or other security consideration, the police do not have
14 the authority [to] deny the press access to the investigatory scene
15 or facts." Id.

16 To support these assertions, Plaintiffs rely on cases that
17 proclaim a general, but qualified, right of the press to gather news.
18 Docket Document No. 49 (citing Richmond Newspapers v. Virginia, 448
19 U.S. 555, 578 (1980) (finding that the press may exercise their First
20 Amendment rights on streets, sidewalks, and in parks); Branzburg v.
21 Hayes, 408 U.S. 665, 681 (1972) (finding that the press should be
22 afforded some type of First Amendment protection); Daily Herald Co.
23 v. Munro, 838 F.2d 380, 384 (9th Cir. 1988) (finding exit polling to
24 be a protected activity when it occurs on public streets, sidewalks

1 and parks); CBS, Inc. v. Smith, 681 F. Supp. 794, 803 (S.D. Fl. 1988)
2 (same); Channel 10, Inc. v. Gunnarson, 337 F. Supp. 634, 638 (D.Minn.
3 1972) (finding that the media has a right to be present in "public
4 places and on public property")). Contrary to Plaintiffs' assertions,
5 these cases do not establish specific rights of the press during the
6 recording of live events from public locations or at an investigatory
7 scene. See id.

8 Plaintiffs argue that Defendants violated their First Amendment
9 rights when they "intentionally interfered with the gathering of
10 information and news" by "violently knock[ing] aside microphones and
11 cameras in an attempt to prevent the event from being recorded."
12 Docket Document No. 34. Plaintiffs also allege that one agent "used
13 his hand to block a video camera lens." Docket Document No. 49.

14 Plaintiffs rely on Connell v. Town of Hudson, 733 F. Supp. 465
15 (D.N.H. 1990), to support their theory that these actions represent
16 First Amendment violations. Docket Document No. 49. In Connell,
17 police instructed a photographer to move away from the scene of a car
18 accident and, even after he retreated to the second floor of a house
19 further away from the scene, threatened to arrest him if he continued
20 taking pictures. 733 F. Supp. at 466. The court found that the
21 police violated Connell's First Amendment rights by threatening to
22 arrest him because Connell obediently followed police instructions
23 and was taking pictures some distance from the scene. Id. at 470.

24 In contrast to the facts in Connell, here Plaintiffs do not
25 contend that law enforcement instructed them to stop recording the

1 event or that the agents threatened to arrest them. See Docket
2 Document Nos. 34, 49. Plaintiffs also do not allege that the agents
3 asked Plaintiffs to turn over their cameras or film in violation of
4 the First Amendment. See Gunnarson, 337 F. Supp. at 637 (finding
5 that the police seizure of a reporter's camera constituted a prior
6 restraint in violation of the First Amendment). Plaintiffs have not
7 cited to any case, nor have we found one, where the court found a
8 First Amendment violation based on law enforcement agents pushing
9 away a microphone or temporarily seeking to obstruct recording by
10 placing a hand in front of a camera.

11 We, therefore, find that Plaintiffs have not alleged a violation
12 of their First Amendment rights. Because Plaintiffs do not meet the
13 first prong of the test for qualified immunity in regard to their
14 First Amendment allegations, we do not proceed to the second and
15 third prongs. See Pagan, 448 F.3d at 31. Instead, we now turn to
16 Plaintiffs' allegations regarding the Fourth Amendment.

17 **2. Fourth Amendment**

18 Plaintiffs allege that Defendants violated their Fourth
19 Amendment rights by using excessive force against them. Docket
20 Document No. 34. Specifically, Plaintiffs allege that "it was an
21 excessive use of force to spray [Plaintiffs] with pepper spray and
22 shove them backward through a security gate." Docket Document
23 No. 49.

24 The Fourth Amendment protects people "against unreasonable
25 searches and seizures." U.S. CONST. amend. IV. "To establish a

1 Fourth Amendment violation based on excessive force, a plaintiff must
2 show that the defendant [agent] employed force that was unreasonable
3 under the circumstances." Jennings v. Jones, 479 F.3d 110, 119 (1st
4 Cir. 2007). We judge reasonableness "from the perspective of a
5 reasonable officer on the scene." Graham v. Connor, 490 U.S. 386,
6 396 (1989).

7 In some circumstances, using pepper spray against non-suspects
8 may be considered unreasonable. See Headwaters Forest Def. v. County
9 of Humboldt, 276 F.3d 1125, 1130 (9th Cir. 2002) (finding the use of
10 pepper spray against non-violent protesters to be unreasonable
11 because "the protesters were sitting peacefully, were easily moved by
12 the police, and did not threaten or harm the officers"). Where a
13 crowd presents a threat to the safety of themselves or law
14 enforcement, however, courts have found the deployment of pepper
15 spray to be reasonable. Jackson v. City of Bremerton, 268 F.3d 646,
16 653 (9th Cir. 2001) (finding it reasonable for officers to use pepper
17 spray against a group of people who attempted to interfere with an
18 arrest, refused to obey the officers' commands to disperse, and
19 engaged in verbal and physical altercations with officers).

20 Defendants argue that it was necessary for them to use pepper
21 spray to subdue the crowd due to the "proximity of the crowd to
22 weapons and the manner in which crowd members were crushed against
23 the gate." Docket Document No. 38. Defendants also note that members
24 of the crowd were shouting at the agents and carrying stones which
25 they later threw at FBI vehicles. Docket Document Nos. 38, 41. We

1 agree with Defendants that they did not use excessive force when
2 deploying pepper spray during their attempts to control the crowd, or
3 when attempting to push the crowd back to the other side of the gate
4 surrounding the apartment complex, because the agents reasonably
5 could have believed that it was necessary to deploy the spray to
6 maintain order. See Jackson, 268 F.3d at 653-54 (finding that the
7 use of pepper spray was reasonable and necessary to control a
8 "rapidly evolving" and escalating situation); McCormick v. City of
9 Ft. Lauderdale, 333 F.3d 1234, 1245 (11th Cir. 2003) ("Given that
10 pepper spray ordinarily causes only temporary discomfort, it may be
11 reasonably employed against potentially violent suspects."); see also
12 Griffin v. Runyon, No. 5:04-348, 2006 U.S. Dist. LEXIS 29688, at *33
13 (M.D. Ga., May 16, 2006) (referring to pepper spray as "a minimally
14 intrusive tool"). None of the Plaintiffs in the present case
15 complained that they suffered permanent injuries from the agents' use
16 of pepper spray. Docket Document No 49.

17 Plaintiffs also allege, however, that Defendants punched them,
18 kicked them, and hit them with metal batons. Docket Document Nos. 34,
19 49. Defendants deny these allegations. Docket Document No. 38.
20 Defendants further ask us to substitute Plaintiffs' version of the
21 facts with the evidence contained on a DVD submitted by Defendants.
22 Docket Document Nos. 41, 64. Defendants cite to Scott v. Harris in
23 support of their contention. 127 S. Ct. 1769 (2007). The Scott court
24 found that the Court of Appeals should have relied on a videotape of
25 the car chase at issue because the respondent's "version of events is

1 so utterly discredited by the record that no reasonable jury could
2 have believed him" and there were "no allegations or indications that
3 [the] videotape was doctored or altered in any way, nor any
4 contention that what it depicts differs in any way from what actually
5 happened." Id. at 1775-76.

6 In the present case, however, Plaintiffs dispute the accuracy
7 and authenticity of Defendants' DVD. Docket Document No. 49. We,
8 therefore, base our discussion on Plaintiffs' version of the facts
9 and analyze whether by kicking, punching, and hitting Plaintiffs with
10 batons, Defendants used excessive force in violation of the Fourth
11 Amendment.

12 Courts have found that officers used excessive force when
13 inflicting violence on individuals who posed no threat to themselves
14 or others. See Vinyard v. Wilson, 311 F.3d 1340, 1348 (11th Cir.
15 2002) (finding excessive force when officer bruised and pepper
16 sprayed female suspect who was handcuffed in back of patrol car);
17 Park v. Shiflett, 250 F.3d 843, 853 (4th Cir. 2001) (finding
18 excessive force where officers threw non-threatening couple against
19 the wall and on the ground, used pepper spray against them,
20 handcuffed and arrested them).

21 Courts have found, however, that law enforcement personnel may
22 reasonably use force against members of a crowd when they ignore
23 instructions to disperse and create a potential safety threat. See
24 Gomez v. City of Whittier, No. 04-56944, 2006 U.S. App. LEXIS 29423,
25 at **5 (9th Cir., Nov. 30, 2006) (affirming summary judgment on

1 excessive force claims where officers struck, tackled, and restrained
2 plaintiffs during handcuffing due to "the volatile situation the
3 officers faced, and the legitimate interest in maintaining order and
4 safety"); Jackson, 268 F.3d at 653-54.

5 "The "most important single element" in the reasonableness
6 analysis is the threat posed by the plaintiffs at the time of the
7 incident." Gomez, No. 04-56944, 2006 U.S. App. LEXIS 29423, at **7-8
8 (quoting Smith v. City of Hernet, 394 F.3d 689, 702 (9th Cir. 2005)).
9 We find that, faced with an angry mob that shouted insults at agents
10 and carried rocks that they later hurled at departing FBI vehicles,
11 Defendants reasonably could have believed that it was necessary to
12 use physical force against members of the crowd that included
13 kicking, punching, and hitting Plaintiffs with batons in order to
14 prevent the situation from escalating into one that would threaten
15 the safety of the agents, the crowd, and innocent bystanders.

16 "[O]fficers are often forced to make split-second judgments - in
17 circumstances that are tense, uncertain, and rapidly evolving - about
18 the amount of force that is necessary in a particular situation."
19 Graham v. Connor, 490 U.S. 386, 396 (1989). It is impossible to gauge
20 exactly what measure of force would have been necessary to control
21 the crowd at 444 De Diego Avenue and to maintain peace in the face of
22 a potentially escalating situation. What is clear is that "'[n]ot
23 every push or shove, even if it may later seem unnecessary in the
24 peace of a judge's chambers,' violates the Fourth Amendment." Id.
25 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

1 We, therefore, find that Defendants did not act unreasonably in
2 using pepper spray against Plaintiffs or in kicking, punching, or
3 hitting them with batons. Because we find that Defendants did not
4 use excessive force in violation of the Fourth Amendment, Plaintiffs
5 have not satisfied the first prong of the qualified immunity test
6 that requires them to prove that their allegations, if true,
7 establish a constitutional violation. Pagan, 448 F.3d at 31. We,
8 thus, find that Defendants are entitled to summary judgment on the
9 basis of qualified immunity.

10 Because we hereby dismiss all of Plaintiffs' claims, we need not
11 reach Defendants' argument that Plaintiffs lack standing to seek
12 injunctive relief.

13 Finally, because we grant Defendants' motion for summary
14 judgment, we find that Plaintiffs' motion for reconsideration of our
15 Rule 56(f) motion, Docket Document No. 65, is moot.

16 **IV.**

17 **Conclusion**

18 For the aforementioned reasons, we hereby **GRANT** Defendants'
19 motion for summary judgment pursuant to Federal Rule of Civil
20 Procedure 56. We also **DENY** Plaintiff's motion for reconsideration of
21 our Rule 56(f) order.

22 **IT IS SO ORDERED.**

23 San Juan, Puerto Rico, this 12th day of June, 2007.

24 s/José Antonio Fusté
25 JOSE ANTONIO FUSTE
26 Chief U. S. District Judge