UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

ASOCIACIÓN DE PERIODISTAS DE PUERTO RICO, et al., Plaintiffs, v. ROBERT MUELLER, Director of the Federal Bureau of Investigation, et al., Defendants.	Civil No. 06-1931 (JAF)

SECOND REDACTED OPINION AND ORDER

Plaintiffs, the Asociación de Periodistas de Puerto Rico; the Overseas Press Club of Puerto Rico; and Normando Valentín, Víctor Sánchez, Joel Lago Ramón, Cossette Donalds Brown, Víctor Fernández, and Annette Alvarez, all reporters or camera operators living in Puerto Rico, bring the present action for injunctive relief and damages against Defendants, Robert Mueller, Director of the Federal Bureau of Investigation ("FBI"), FBI agents Keith Byers, Luis Fraticelli, José Figueroa-Sancha ("Figueroa"), and ten unknown agents. (Docket No. 34.) Plaintiffs allege that Defendants violated their First and Fourth Amendment rights by assaulting them and other members of the press in an attempt to prevent Plaintiffs from reporting on the execution of a search warrant at the apartment

complex where an alleged pro-independence political activist lived. (Id.) Plaintiffs seek damages and injunctive relief. (Id.)

On June 13, 2007, we granted Defendants' motion for summary judgment (Docket No. 37), holding that Plaintiffs could not state a First or Fourth Amendment claim because Defendants' actions were reasonable in light of the circumstances. (Docket No. 67.) Plaintiffs appealed (Docket No. 68), and the First Circuit affirmed in part, vacated in part, and remanded, Asociación de Periodistas de P.R. v. Mueller (Periodistas), 529 F.3d 52 (2008). The First Circuit affirmed our First Amendment ruling on the grounds that Plaintiffs had no right to access private property. Id. at 58. The Court of Appeals reversed our ruling on the Fourth Amendment claims, holding that we had erroneously adopted Defendants' version of the facts, and holding that under Plaintiffs' facts, Defendants violated Plaintiffs' clearly-established Fourth Amendment rights. Id. at 60-62. The court left open the possibility that Defendants could establish qualified immunity on the Fourth Amendment claims on a more developed record. Id. at 62.

Having obtained court-ordered discovery pursuant to Federal Rule of Civil Procedure 56(f), Defendants again move for summary judgment, asserting qualified immunity and arguing that Plaintiffs lack standing to seek injunctive relief. (Docket No. 86.) Plaintiffs oppose (Docket No. 164), and Defendants reply (Docket No. 169). For the reasons stated herein, we now hold that although Plaintiffs can

establish an issue of fact over whether Defendants violated the Fourth Amendment, the governing law was not clearly established at the time of the alleged offense. We hold this both because it was not clear that Defendants' actions constituted seizures of Plaintiffs, and because under the facts as Defendants reasonably understood them, their actions complied with the Fourth Amendment. Accordingly, we grant summary judgment in Defendants' favor on the grounds of qualified immunity. We further rule that Plaintiffs do not have standing to pursue injunctive relief, and grant summary judgment to Defendants on that issue as well.

I.

Factual and Procedural Synopsis

We derive the following facts from Defendants' and Plaintiffs' motions, statements of material facts, and exhibits. (Docket Nos. 38, 39, 41, 46, 50, 52, 53, 54, 55, 56, 58, 64, 86, 87, 88, 89, 90, 100, 101, 102, 125, 126, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 164, 169.) Unless otherwise indicated, facts contained herein are undisputed.

In the late 1970s and early 1980s, a Puerto Rican independence group, the "Ejército Popular Boricua" (Popular Boricua Army), also known as "Los Macheteros," claimed responsibility for numerous violent acts, including an armed robbery of a Wells Fargo depot located in West Hartford, Connecticut. United States v. Meléndez-Carrión, 820 F.2d 56, 57 (2d Cir. 1987). In 1985, a grand jury

indicted Macheteros leader Filiberto Ojeda Ríos ("Ojeda") for his involvement in the Wells Fargo robbery. Id. During a subsequent shootout with FBI agents, Ojeda wounded an agent in the face. Ojeda jumped bail and was convicted in absentia of armed robbery. He remained a fugitive for years and was killed in 2005 by FBI agents as they attempted to arrest him.

At around 10:00 a.m., on February 10, 2006, FBI agents arrived at the home of Lillian Laboy-Rodríguez ("Laboy") at 444 De Diego Avenue, San Juan, Puerto Rico, to execute a search warrant. The search warrant related to a domestic terrorism investigation and the possible involvement of Los Macheteros. Keith Byers served as the FBI media representative for this operation. Byers gave participating FBI agents a briefing based on a draft handout (Docket No. 88-12), instructing agents to set up a perimeter to keep the general public off the grounds of the condominium complex at 444 De Diego Avenue and to permit members of the media to film, photograph, and set up outside the perimeter.

During the operation, some agents carried Glock pistols, which do not have traditional safeties. Other agents carried various other types of pistols, assault rifles, or submachine guns. Some agents also carried pepper spray, which incapacitates subjects by causing tears, involuntary coughing, and burning pain on contact, and by preventing them from opening their eyes. FBI policy permits the use of pepper spray if "[t]he subject is likely to cause serious bodily

injury if not controlled, and [f]orce is necessary to achieve control." (Docket No. 88-10.)

A fence surrounds the condominium complex. A security guard booth is located next to a sliding vehicle access gate and a swinging pedestrian access gate that locks automatically when closed. The pedestrian gate is not wide enough to permit more than a few individuals to pass at once. The parties dispute whether the security guard was the only person who controlled access to the pedestrian gate and whether the FBI set up a perimeter other than the fence around the building. The agents did not stand along a perimeter line, post yellow police tape, or station vehicles to form a physical barricade. However, some agents, including Figueroa and [redacted], were frequently near the pedestrian and vehicle gates during the execution of the warrant. Several agents have testified that they believed that there was a perimeter, although they did not participate in setting one up.

When Plaintiffs and other members of the press, local University of Puerto Rico students, and the general public heard that the FBI was executing a search warrant at the condominium complex, they gathered outside the complex. The first onlookers arrived at around 11:00 a.m. Members of the press set up outside the fence behind the apartment complex's pedestrian gate. Between 11:00 a.m. and 2:00 p.m., the reporters and protesters did not enter the gated grounds of the building.

The parties dispute how large the crowd grew: Defendants assert that it was "large", but Plaintiffs maintain that it was never larger than twenty or thirty people. (See Docket No. 164-2.) At some points, members of the crowd stood in front of the vehicular and pedestrian gates. Some members of the crowd exhibited hostility towards the FBI by cursing, shouting, spitting on, and insulting the agents. In particular, a man later identified as José Carreras Díaz ("Carreras") repeatedly yelled profane insults at the agents. Byers observed Carreras watching agents in a covert manner and taking photographs of the agents with his cell phone. This led Byers to believe that Carreras was affiliated with Los Macheteros, who have in the past published photographs of FBI agents in sympathetic media and on the internet. At least some members of the crowd covered their faces with bandanas or T-shirts, which led Byers to conclude that these were Macheteros sympathizers contemplating more hostile activity. Byers believed that Macheteros sympathizers commonly covered their faces prior to committing violent acts in order to hide their identities and avoid criminal prosecution.

At around Noon, a helicopter bearing the markings of the Department of Homeland Security landed in a field adjacent to the apartment complex. Reporters and camera operators approached the landing area. Plaintiffs allege that Defendants "pushed away their recording equipment in a violent and threatening way" and that one agent "pointed a rifle at one of the plaintiffs in a threatening

way." (Docket No. 49.) At around 1:20 p.m., Figueroa heard Rafael Ángel Rivera, a photographer from El Vocero newspaper, say that Rivera had heard members of the crowd discussing plans to harm FBI employees. (Docket No. 88-2.)

After the search concluded and while agents loaded their cars, ten to twenty journalists entered the premises of the condominium complex through the pedestrian gate. Defendants perceived that some protesters had also entered the premises. Plaintiffs believed they had been invited in by a signal from Liliana Hernández-Laboy ("Hernández"), Laboy's adult daughter who did not live in the complex. FBI agents instructed the reporters to return to the other side of the gate. The agents then used physical force, including pushing and deploying pepper spray, to compel the reporters back through the gate. The parties disagree over whether the reporters failed to comply with orders to exit, and whether they resisted the efforts to physically remove them. They also disagree over whether the agents gave any warning before using pepper spray.

The reporters became trapped as they attempted to exit or were pushed through the narrow pedestrian entrance. After this conflict between Plaintiffs, trespassing protesters, and agents, some members of the crowd of onlookers became angry and threw things at the agents, including water bottles and rocks. As the agents left the condominium complex in their vehicles, someone launched rocks at them. Four vehicles' windows were broken.

On September 20, 2006, Plaintiffs filed a complaint against Defendants alleging (1) violations of Plaintiffs' First Amendment rights of freedom of speech and the press, and (2) the use of excessive force in violation of the Fourth Amendment. (Docket No. 1.) Plaintiffs filed an amended complaint on February 8, 2007. (Docket No. 34.) On June 13, 2007, we issued an opinion and order granting Defendants' motion for summary judgment. (Docket No. 66). Plaintiffs appealed, and the First Circuit reversed and remanded. Periodistas, 529 F.3d at 52.

On October 31, 2008, Defendants again moved for summary judgment. (Docket No. 88.) After obtaining substantial additional discovery, Plaintiffs opposed on July 2, 2009. (Docket No. 164.) Defendants replied on July 29, 2009. (Docket No. 169.)

II.

Standard for Summary Judgment under Rule 56(c)

We grant a motion for summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute is "genuine" if it could be resolved in favor of either party, and "material" if it potentially affects the outcome of the case. Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 19 (1st Cir. 2004).

The movant carries the burden of establishing that there is no genuine issue as to any material fact; however, the burden "may be

discharged by showing that there is an absence of evidence to support the non-movant's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 331 (1986). The burden has two components: (1) an initial burden of production, which shifts to the non-movant if satisfied by the movant; and (2) an ultimate burden of persuasion, which always remains on the movant. Id. at 331.

In evaluating a motion for summary judgment, we view the record in the light most favorable to the non-movant. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). However, the non-movant "may not rely merely on allegations or denials in its own pleading; rather, its response must . . . set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2).

A party may not raise new arguments in a reply brief. Brandt v. Wand Partners, 242 F.3d 6, 17 (1st Cir. 2001). However, in deciding the motion for summary judgment, we may examine the entire record, including all discovery and disclosure materials on file, to determine whether there exists a triable issue of material fact. Fed. R. Civ. P. 56(c).[1]

III.

Analysis

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

[1] We, therefore, reject Plaintiffs' argument that Defendants cannot use the facts developed in depositions, or that we cannot rely on those facts in making our ruling. (See Docket No. 164-1.)

request injunctive relief. (Docket No. 87.) We address these arguments in turn.

A. Qualified Immunity

Defendants argue that they are entitled to qualified immunity both because their actions did not violate the Fourth or Fourteenth Amendment and because the law governing their conduct was not clearly established. (Docket No. 87.)

Qualified immunity protects state officials from the burden of standing trial or facing other onerous aspects of litigation. Saucier v. Katz, 533 U.S. 194, 200 (2001). The test to determine whether Defendants are entitled to qualified immunity has two parts: "(1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) if so, whether the right at issue was 'clearly established' at the time of the defendant's alleged violation." Maldonado v. Fontañes, 568 F.3d 263, 268-69 (1st Cir. 2009) (citing Pearson v. Callahan, __ U.S. __, 129 S. Ct. 808, 815-16 (2009)). The second step of the Pearson inquiry has two parts: First, whether the law was sufficiently clear and, second, whether, under the facts of the particular case, a reasonable defendant would have known that his conduct violated that law. Maldonado, 568 F.3d at 269 (citing Brousseau v. Haugen, 543 U.S. 194, 198 (2004); Anderson v. Creighton, 483 U.S. 635, 640 (1987)). Although Pearson held that the sequence of this analysis is not mandatory, we nonetheless apply it in this case. See 129 S. Ct. at 815-16.

1. Did Defendants Violate Plaintiffs' Constitutional Rights?

We first inquire if Plaintiffs' allegations, if true, establish a constitutional violation. Maldonado, 568 F.3d at 268-69. Plaintiffs assert that Defendants violated their Fourth Amendment rights by using excessive force against them when Defendants kicked, punched, and pepper-sprayed peaceful reporters. (Docket Nos. 34, 164.) Defendants contend that we should apply the Fourteenth Amendment "shocks-the-conscience" test instead of the Fourth Amendment reasonableness test to determine whether Defendants' actions were constitutional. (Docket Nos. 87, 169.) They also argue that, under either test, they are entitled to qualified immunity for using force to prevent Plaintiffs and others from trespassing or participating in unlawful assemblies. (Docket No. 87.)

The Fourth Amendment protects people against unreasonable searches and seizures. U.S. Const. amend. IV. As a threshold matter, to establish a Fourth Amendment excessive-force violation, a plaintiff must show that he was seized within the meaning of the Fourth Amendment. The plaintiffs have been seized if the defendant law-enforcement officers restrained their liberty by physical force or an assertion of authority. United States v. Ford, 548 F.3d 1, 4 (1st Cir. 2008) (citing California v. Hodari D., 499 U.S. 621, 626 (1991); United States v. Sealey, 30 F.3d 7, 9 (1st Cir. 1994)). On appeal, Defendants argued that the Fourth Amendment does not apply to the present context (see Docket No. 131-14), and the First Circuit implicitly rejected this argument by analyzing the appeal under the

Fourth Amendment reasonableness test, see Periodistas, 529 F.3d at 58-62. The First Circuit's decision binds us; therefore, we address Plaintiffs' claims under the Fourth Amendment reasonableness test.

Next, the plaintiffs must show that the defendants employed force that was unreasonable under the circumstances. Periodistas, 529 F.3d at 59 (citing Graham v. Connor, 490 U.S. 386, 397 (1989)). To determine whether the use of force in a particular instance was reasonable, we consider factors including the severity of the crime or events at issue, whether the subject posed a threat to the safety of officers or others, and whether the subject was actively resisting arrest or attempting to flee. Graham, 490 U.S. at 396. We must also allow for the fact that officers "are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." Id. at 396-97.

"[M]ere obstinance by a crowd, without any evidence of a potential public safety threat or other law enforcement consideration" does not warrant the use of physical violence (punching and kicking) or pepper spray. Periodistas, 529 F.3d at 60; see Vinyard v. Wilson, 311 F.3d 1340, 1348 (11th Cir. 2002) (finding excessive force when officer bruised and pepper-sprayed female suspect who was handcuffed in back of patrol car); Headwaters Forest Def. v. County of Humboldt, 276 F.3d 1125, 1130 (9th Cir. 2002) (Humboldt II) (finding use of pepper spray against non-violent protesters unreasonable because "protesters were sitting peacefully,

were easily moved by the police, and did not threaten or harm the officers"); Park v. Shiflett, 250 F.3d 843, 853 (4th Cir. 2001) (finding excessive force where officers threw non-threatening couple against wall and on ground, used pepper spray, handcuffed, and arrested them).

Where a crowd presents a threat to the safety of themselves or law enforcement officers, however, courts have found the deployment of pepper spray to be reasonable. See McCormick v. City of Ft. Lauderdale, 333 F.3d 1234, 1245 (11th Cir. 2003) ("Given that pepper spray ordinarily causes only temporary discomfort, it may be reasonably employed against potentially violent suspects."); Jackson v. City of Bremerton, 268 F.3d 646, 653 (9th Cir. 2001) (finding it reasonable for officers to use pepper spray against group that attempted to interfere with arrest, refused to obey officers' commands to disperse, and engaged in verbal and physical altercations with officers); see also Griffin v. Runyon, No. 04-348, 2006 WL 1344818, at *11 (M.D. Ga. May 16, 2006) (referring to pepper spray as "a minimally intrusive tool"), aff'd, 213 F. App'x 938 (11th Cir. Jan 17, 2007). Similarly, courts have found that law enforcement personnel may reasonably use force against members of a crowd when they ignore instructions to disperse and create a potential safety threat. See Gomez v. City of Whittier, 211 F. App'x 573, 575-76 (9th Cir. 2006) (affirming summary judgment on excessive force claims, where officers struck, tackled, and restrained plaintiffs during arrest, due to "the volatile situation the officers faced, and the

legitimate interest in maintaining order and safety"); Darrah v. City of Oak Park, 255 F.3d 301, 306 (6th Cir. 2001) (finding no Fourth Amendment violation where officers, in midst of unruly group of picketers, struck and injured plaintiff); Jackson, 268 F.3d at 653-54.

There are disputed facts in this case as to whether Defendants violated Plaintiffs' Fourth Amendment right to be free from excessive force. First, the parties disagree over whether the FBI agents had established a perimeter and clearly informed Plaintiffs that they could not enter the premises. Defendants acknowledge that they neither used yellow police tape to mark off a perimeter, nor otherwise marked the pedestrian gate to indicate to reporters or members of the general public that they were not permitted to cross. The parties dispute whether there were agents posted at the pedestrian gate at all times, and whether a security guard controlled access through the gate. Second, although Defendants contend that an angry crowd including protesters pushed its way into the condominium complex, Plaintiffs argue that the crowd was peaceful and only reporters entered the premises. Third, the parties disagree over whether the reporters deliberately refused to comply with orders to exit the condominium complex and resisted efforts to remove them. Finally, the parties disagree over whether the agents gave any warning before using pepper spray.

Viewing the disputed facts in the light most favorable to Plaintiffs, a rational jury could arguably find that Defendants

violated Plaintiffs' Fourth Amendment rights. 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. See Periodistas, 529 F.3d at 59; Humbolt II, 276 F.3d at 1129-30 (holding that rational jury could find use of pepper spray during arrest of peaceful trespassing protesters to be unreasonable, where police were not in danger and there was conflicting evidence over whether alternatives were available) (citing Headwaters Forest Def. v. County of Humboldt (Humbolt I), 240 F.3d 1185, 1205 (9th Cir. 2000), vacated on other grounds, 534 U.S. 801).

2. Were Plaintiffs' Rights Clearly Established?

Defendants argue that (1) they could not have known that the Fourth Amendment would govern their actions, and (2) under the facts of this case, it was not reasonably clear that their conduct violated the Fourth Amendment. (Docket Nos. 87, 169.)

"[T]he reasonableness of an officer's use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Estate of Bennett v. Wainwright, 548 F.3d 155, 175 (1st Cir. 2008) (quoting Napier v. Town of Windham, 197 F.3d 177, 188 (1st Cir. 1999)). In determining

whether the defendants' conduct was reasonable, we must examine both whether the defendants could have reasonably misunderstood the law governing their conduct, see Brosseau, 543 U.S. at 197, and whether they could have reasonably misapprehended the facts so as to justify their conduct, see Estate of Bennett, 548 F.3d at 175-76.

First, we consider whether Defendants could reasonably have known that the Fourth Amendment governed their actions. As discussed above, the First Circuit's decision in this case requires us to conclude that the Fourth Amendment applies to this case. See Periodistas, 529 F.3d at 59. However, the First Circuit did not address whether it was clearly established that the Fourth Amendment would govern in a context such as this one, where officers used force in order to control a potentially-violent crowd and remove protesters from a private area, but without arresting them or restraining their movement. See id. Instead, the court simply held that, under the Fourth Amendment reasonableness standard, taking Plaintiffs' facts as true, Defendants' conduct constituted an obvious violation. Id. at 61. All of the cases cited by the First Circuit for this proposition involved complaints of excessive force in the course of an arrest. See Vinyard, 311 F.3d at 1348; Humbolt II, 276 F.3d at 1130; Park, 250 F.3d at 853; Adams v. Metiva, 31 F.3d 375, 387 (6th Cir. 1994). In these cases, because the plaintiffs had been arrested, they had clearly been seized within the meaning of the Fourth Amendment. See Hodari D., 499 U.S. at 624 (referring to an arrest as "the quintessential 'seizure of the person' under our Fourth Amendment

jurisprudence"). It is less clear that the Fourth Amendment would apply in instances where the plaintiff was never arrested.

Plaintiffs have not cited, nor have we discovered, controlling cases from this circuit or the Supreme Court prior to the events in this case holding that when police use force to remove individuals from an area, without arresting them, they have seized them for Fourth Amendment purposes. (See Docket No. 164.) The most analogous case from a district court in this circuit suggests the opposite. See Connell v. Town of Hudson, 733 F. Supp. 465, 468 (D.N.H. 1990) (concluding that police had not seized photographer when they ordered him to leave private home from which he was taking pictures but did not arrest him or prevent him from leaving scene).

The cases cited by Plaintiffs do not convince us that the application of the Fourth Amendment to the present case is clearly established. In Ciminillo v. Streicher, the Sixth Circuit held that it was a jury question whether the Fourth Amendment applied where a police officer, attempting to maintain order during a riot, shot a nonviolent onlooker in the face with a beanbag propellant, yelled at him to "stay down," and then ordered him to report to another officer. 434 F.3d 461, 466 (6th Cir. 2006). The present case is distinguishable from Ciminillo because Defendants did not shoot Plaintiffs and never restricted their movement other than by pushing them out of the grounds of the condominium complex. See 434 F.3d at 466. Several of Plaintiffs' other cited cases, all from district outside of our circuit, are similarly distinguishable because they

involved an arrest or a greater degree of physical control. See Rauen v. City of Miami, No. 06-21182, 2007 WL 686609, at *21 (S.D. Fla. Mar. 2, 2007) (finding Fourth Amendment violation where hundreds of officers encircled protesters and used force to herd them in a desired direction, but finding no violation of clearly-established law); Logan v. City of Pullman, 392 F. Supp. 2d 1246, 1260 (E.D. Wash. 2005) (finding seizure where officers pepper-sprayed fighting individuals in attempt to gain physical control and then arrested them); Coles v. City of Oakland, Case No. 03-2961, slip op. at 8 (N.D. Cal. April 27, 2005) (finding seizure where officers used projectiles and tear gas to herd demonstrators to location over a mile away, continuing to pursue them after they attempted to leave protest); see also Otero v. Wood, 316 F. Supp. 2d 612, 622 (S.D. Ohio 2004) (denying summary judgment to officer who shot plaintiff directly in face with projectile during riot).

It is true that in Marbet v. City of Portland, a district court found that peaceful protesters were seized under the Fourth Amendment where the defendants employed force to move them a short distance but did not ultimately arrest them. No. 02-1448, 2003 WL 23540258 (D. Ore. Sept. 8, 2003). However, that single unpublished, non-binding district court opinion from outside of our circuit hardly provided Defendants with sufficient guidance that the Fourth Amendment would apply to their situation. See Wilson v. Layne, 526 U.S. 603, 617 (1999) (affirming grant of qualified immunity because plaintiffs failed to cite "cases of controlling authority in their jurisdiction

at the time of the incident which clearly established the rule," or identify "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful"). We, therefore, find that Defendants were not on notice that the Fourth Amendment would apply to the events at issue.

Furthermore, Defendants' conduct was not egregious enough to violate the substantive due process clause of the Fourteenth Amendment, which prohibits governmental conduct that "shocks the conscience." See Maldonado, 568 F.3d at 272; see also Darrah, 255 F.3d at 306 (stating that "in a rapidly evolving, fluid, and dangerous predicament which precludes the luxury of calm and reflective pre-response deliberation," government conduct shocks the conscience only if it "involved force employed 'maliciously and sadistically for the very purpose of causing harm' rather than 'in a good faith effort to maintain or restore discipline'" (quoting Claybrook v. Birchwell, 199 F.3d 350, 359 (6th Cir. 2001)). Accordingly, we find that Defendants are entitled to qualified immunity because they were not reasonably on notice that their conduct was covered by the Fourth Amendment or was otherwise unlawful. See Wilson, 526 U.S. at 617.

Although we find that Defendants are entitled to qualified immunity based on the lack of clear precedent demonstrating that the Fourth Amendment applies to the present context, we nevertheless consider whether Defendants could have reasonably believed that their conduct complied with the Fourth Amendment. See Periodistas, 529 F.3d

at 60-61. We, thus, examine whether Defendants could have reasonably misunderstood the facts in such a way that their conduct was justified. See Estate of Bennett, 548 F.3d at 175-76 (holding that, even where suspect had discharged sole bullet in single-shot shotgun, rendering him harmless, officers reasonably believed they were in danger and were justified in shooting suspect). We consider the facts as understood by Defendants, to the extent that their understanding was reasonable.

First, Defendants reasonably believed that there was a perimeter. The agents received a briefing instructing them to establish a perimeter and permit the press to film from outside the perimeter. (Docket No. 88-12.) All of the agents deposed by Plaintiffs testified that they understood that there was a perimeter, although no agent testified that he was continuously stationed by the gate of the condominium complex so as to prevent onlookers from entering the premises.[2] Also, under Puerto Rico law, people cannot enter residential property without the authorization of the owner or a lawful occupant, see 33 L.P.R.A. § 4284a (2001); however, Plaintiffs entered upon receiving a signal from a visitor. Thus, whether or not there was a valid perimeter, the agents could reasonably have believed that a perimeter had been established, and that all but one of the Plaintiffs were trespassing in violation of that perimeter. See Estate of Bennett, 548 F.3d at 175-76.

[2] Footnote text redacted; available to Court of Appeals in the sealed opinion (Docket No. 172).

Next, the agents reasonably believed that Los Macheteros affiliates or sympathizers were in the crowd. First, it was publicized that the raid was related to Los Macheteros, making it likely that Macheteros sympathizers would come to the site. Second, Byers observed two or three onlookers with bandanas covering their faces, which Byers understood to be a signal that they were Macheteros-affiliates, as sympathizers commonly covered their faces prior to engaging in acts of violence. (Docket No. 88-4.) Plaintiffs flippantly dismiss this by arguing that "[b]andanas are a common piece of apparel," without disputing that members of the crowd had covered their faces with bandanas in such a way as to hide their identity. Bandanas may be commonly worn over the head or hair, but are not typically worn so as to obscure the face. By analogy, if the agents had seen individuals with stockings covering their faces, this could have given them reasonable suspicion, even though stockings are common pieces of apparel when worn over the foot. It is not commonplace for people to hide their identities, and such attempts can lead officers to reasonably believe that criminal activity may be brewing. Thus, whether or not there were Macheteros sympathizers in the crowd, Byers could have reasonably believed that there were. See Estate of Bennett, 548 F.3d at 175-76.

Furthermore, Defendants had reason to believe that they were confronting an unruly and potentially-violent crowd. Although Plaintiffs argue that the crowd outside the complex was "peaceful and calm" (Docket No. 164-1 at 37), both parties agree that at least some

members of the crowd were cursing and screaming insults at FBI agents. Additionally, Figueroa heard Rivera, a photographer from El Vocero, say that he had overheard members of the crowd planning to gather rocks and other objects to throw at the agents. Plaintiffs argue that, had a threat been made, it would have been communicated among the reporters. (Docket No. 164-2.) Whether or not any onlookers actually made such a threat, however, it would have been reasonable for Figueroa to believe that the onlookers were disposed towards violence, given what Rivera told him. See Estate of Bennett, 548 F.3d at 175-76. Also, the crowd inside the complex did not comply with the agents' commands. Plaintiffs assert that they were willing to leave the premises without force; however, none of them manifested their willingness to follow Defendants' orders and leave the complex before [redacted] used pepper spray. Thus, it was reasonable for Defendants to believe that they faced a hostile crowd. Finally, while we do not rely on this fact, the fact that several members of the crowd threw rocks and other items at the agents after the incident with Plaintiffs bolsters our conclusion that it was reasonable for Defendants to believe that the crowd had the potential for violence.

Moreover, Defendants were aware that their firearms lacked safeties. We disagree with Plaintiffs about Defendants' calculations regarding the risk that members of the crowd would grab the agents' weapons. (See Docket No. 164.) Surely the fact that Defendants' guns did not contain safeties presented an additional risk that the agents

were aware of and that made their crowd-control behavior even more reasonable.

Finally, although the facts are not clear as to how many non-reporters entered the premises of the condominium complex, several agents testified that they believed that several non-reporters had entered. Figueroa testified that he believed that the crowd was about "half and half" reporters and non-reporters, while Byers testified that he believed that eighty or ninety percent of those who entered were journalists. (See Docket No. 143, Figueroa Dep., at 44; Docket No. 144, Byers Dep., at 73-74.) Plaintiffs counter that only peaceful reporters entered the grounds. (Docket No. 164-2.) As Defendants note, it may not have been immediately obvious to Defendants who in the crowd was a reporter and who was not. Thus, regardless of whether and how many non-journalists entered the premises, Defendants could have reasonably believed that some members of the angry crowd had entered the pedestrian gate along with the journalists. See Estate of Bennett, 548 F.3d at 175-76.

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. Under these circumstances, it was reasonable for officers to believe that force was necessary to control the crowd and to prevent violence.

Thus, Defendants' use of force against each individual Plaintiff was reasonable. Lago entered the premises, crossing the purported perimeter, and approached agents rather than leaving as directed. Byers struck Lago in the stomach with a retractable baton because it appeared that Lago was assaulting another agent. Moments later, when Lago sat blocking the pedestrian gate, it was reasonable for [redacted] to use a burst of pepper spray against him so that the agents could close the gate and reestablish the perimeter. Fernández was sprayed in the face while he filmed events from outside the fence, while standing one or two feet from [redacted]. However, there is no evidence that [redacted] targeted him. [Redacted] was reasonably attempting to move a screaming crowd back from a fence during a volatile situation. Finally, Valentín, Sánchez, Alvarez, and Donalds claim that they were punched, pushed, or shoved through the gate. None were injured. Given the fact that the agents perceived them as trespassing across a perimeter and disobeying direct orders, it was reasonable for Defendants to use force, including pushes or punches, to compel these Plaintiffs to leave the premises. It was also reasonable for [redacted] to employ pepper spray on the crowd that these Plaintiffs were part of, in an effort to get the crowd to disperse.

Accordingly, we conclude that Defendants are entitled to qualified immunity.

B. Injunctive Relief

Plaintiffs seek a prospective injunction prohibiting Defendants' use of excessive force during press coverage of FBI actions and requiring the FBI to develop policies and procedures to prevent the use of excessive force against members of the media. (Docket No. 34.) Defendants argue that Plaintiffs lack standing to pursue injunctive relief. (Docket No. 86.) Neither we nor the First Circuit has yet addressed whether Plaintiffs are entitled to injunctive relief.

Plaintiffs must demonstrate that they have standing by demonstrating the existence of an actual case or controversy and showing that they have a personal stake in the outcome. City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983). In order to have standing to pursue injunctive relief, plaintiffs must demonstrate that there is a "real and immediate threat" that they will suffer legal violations in the future. Id. at 105. Although Plaintiffs attempt to distinguish Lyons, we find that it controls the present case. Plaintiffs have not established that FBI agents always or habitually use excessive force against members of the media. Accordingly, we find that Plaintiffs lack standing to pursue injunctive relief. See id. at 105-06; cf. Dudley v. Hannaford Bros., 333 F.3d 299, 306 (1st Cir. 2003) (holding that where defendant maintains specific objectionable policy, plaintiff has standing to seek injunction).

IV.

Conclusion

For the foregoing reasons, we hereby **GRANT** Defendants' motion for summary judgment (Docket No. 86), and **DISMISS** all claims against Defendants **WITH PREJUDICE.**

IT IS SO ORDERED.

San Juan, Puerto Rico, this 13th day of August, 2009.

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