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VIA EMAIL

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Dear Tyeesha, Allan, Chris, and Maggie:

We thank the City for sending us the December 14, 2020 draft of the Chicago Police Department ("CPD") General Order G02-02: The First Amendment and Public Assemblies ("December 14 General Order"). We appreciate the tone of this General Order, which is improved from previous guidelines on this issue. In that spirit, we offer comments on the December 14 General Order below.

As described before Judge Dow on November 12, 2020 and reiterated in our November 18, 2020 correspondence to the City, the City must present a clear standard reflecting the constitutional and statutory limitations that must be met before police can order a First Amendment assembly to disperse. The December 14, 2020 General Order still does not provide that clear standard grounded in constitutional and statutory limitations. In fact, much of the Order is at odds with the requirements of the Constitution and legal standards governing First Amendment protections.

Given the issues with the City's policy revisions—and its failure to respond to our proposals regarding meaningful accountability for officers who engage in misconduct in policing protests and the use of OC Spray at protests—we intend to continue the dispute resolution process with the involvement of the Court. We previously made significant progress with the Court's assistance and we hope that one or more conferences will allow us to complete this process.

We incorporate our November 18, 2020 letter into these comments, attached as Exhibit A, and present the following comments specific to the December 14 General Order:

1. DESCRIPTION OF FIRST AMENDMENT ACTIVITY

Section III.B of the December 14 General Order describes various types of speech and conduct that are protected by the First Amendment. The list is too narrow and suggests that the First Amendment protects only conduct or speech relating to certain issues. Although there is a caveat at the start of Section III.B indicating that the subsequent list is not exhaustive, the enumerated list should reiterate the caveat or exclude the limiting language identified below to properly underscore the breadth of speech and conduct protected by the First Amendment. In particular:

A. Section III.B references "freedom of the press" but omits an enumerated list of First Amendment rights needed to explain the types of activity that officers will likely encounter related to freedom of the press, such as observing and recording events, approaching individuals to ask questions for news gathering purposes, and disseminating information.

B. Section III.B.1 suggests that First Amendment protection is limited to "ideas or beliefs concerning public or social policy, or political, educational, cultural, economic, philosophical, or religious matters." First Amendment protections are not limited by subject manner, and the Order should not suggest that this is the case. Section III.B.1 should simply note that the First Amendment protects the "right to hold any opinion, idea, or belief," omitting the current restrictive language (i.e., the clause beginning with "concerning . . . ").

C. Similarly, Section III.B.3 suggests that the rights to associate and to assemble with others is limited to situations "concerning ideas or beliefs about public or social policy, or political, educational, cultural, economic, philosophical, or religious matters . . . ." The limitation by specific reference to certain categories of ideas is both unclear and legally inaccurate. It should state: "The First Amendment protects the right to associate and to assemble with others for the purpose of expressing, receiving, or exchanging ideas, beliefs, or information." Moreover, it is important to recognize that gatherings may begin with a different purpose, but then evolve into a First Amendment assembly. At a minimum, the City must remove the parenthetical in the phrase "about public or social policy, or political, educational, cultural, economic, philosophical, or religious matters (but not a right to associate or to assemble for purposes unrelated to the right to hold and express such ideas or beliefs)."

D. Section III.B.2 would be improved if it simply stated, "the right to communicate or receive opinions, ideas, beliefs, or information."

E. Section III.C references time, place, and manner limitations on First Amendment activity but incorrectly sets forth the standard for such restrictions. It should be revised to read: "First Amendment rights exercised in a public forum may be subject to reasonable time, place, and manner restrictions, which means content-neutral time, place and manner restrictions that are narrowly tailored to serve a significant governmental interest and leave open alternative communication channels."

2. SECTION IV'S REFERENCE TO FIRST AMENDMENT INVESTIGATIONS

Subsection IV.B.5 references CPD investigations targeting people and groups engaged in First Amendment activity. These types of investigations have long been fraught and were conducted unlawfully for many decades, violating Chicagoans' rights and leading to costly court oversight. *See ACLU of Illinois v. City of Chicago*, No. 75 C 3295 (N.D. Ill. 1975) (challenging the CPD's investigations targeting First Amendment activity and resulting in a consent decree in effect for more than three decades). Subsection IV.B.5 and any other references to investigations of First Amendment activities should cite appropriate restrictions on those investigations, either by citing a separate policy on First Amendment investigations, or by listing those restrictions in the December 14 General Order.

3. ADDITIONAL KEY TERMS SHOULD BE DEFINED

A number of provisions in the December 14 General Order reference the term "Department intervention," which is not defined anywhere in the policy. Section IV.C.3 should specify the types of "Department intervention" that may follow the referenced conduct ("violent actions or statements that are intended and likely to cause imminent violence") and the purpose of those interventions. If "intervention" is defined elsewhere, this subsection should reference that definition. Section IV.C.3 should also make clear that any "Department intervention" (once defined) must be individualized to the greatest extent possible so as to avoid improper and unlawful general dispersal orders. Similarly, the term "Department interventions" in Section VIII.D.1 should be defined or cross-referenced.

Sections VI.D and VIII.D of the December 14 General Order should define "unlawful disorderly conduct," or point to an order or statute that defines this term.

4. CONSIDERATIONS BEFORE ISSUING DISPERSAL ORDERS

A. The December 14 General Order should require exhaustion of less intrusive measures or a finding that they would be ineffective before an officer can issue a dispersal order.

The December 14 General Order does not require officers to exhaust all available less intrusive measures before issuing a dispersal order. As the City is aware, this has been among our most steadfast demands throughout the negotiations before Judge Dow. *See* Exhibit A at 2. The events of this summer demonstrated the need for improvements here in particular. The December 14 General Order gets closer to meeting this demand by noting a commitment to supporting First Amendment activity and establishing a review process ostensibly aimed at doing the same. But it explicitly fails to require officers to exhaust non-dispersal crowd management techniques prior to issuing a dispersal order. Instead, in Section VIII.D.4, it simply says that officers will "consider . . . employing less intrusive methods, *where possible*, that are less likely to have an impact on a group's First Amendment rights." This failure to require exhaustion renders meaningless the other improvements made in the December 14 General Order.

The necessary revision is simple: the December 14 General Order should replace Section VIII.D.4 with a requirement that field commanders are to "employ less intrusive methods that are less likely to have an impact on the group's First Amendment rights as a *prerequisite* to the

issuance of a dispersal order. To underscore the importance of this prerequisite, the December 14 General Order should put it in its own subsection of Section D, using the following language: "Prior to issuing a dispersal order, the field commander *will* employ all available less intrusive methods that are less likely to have an impact on the group's First Amendment rights."

Relatedly, the City should separate out subsection VII.C.4 from the section on crowd management, and move it to the aforementioned subsection of Section D requiring employment of less intrusive methods prior to the issuance of a dispersal order. Subsection VII.C.4, which requires an assessment of whether measures less intrusive than the techniques described in Sections VII.C.1 through VII.C.3 have been exhausted, also addresses when a general dispersal order is appropriate and lawful. When it is moved to the appropriate subsection, it should also be reframed as follows: "The field commander will ensure and document that other crowd management techniques have been exhausted or would otherwise be ineffective prior to the issuance of a dispersal order."

When implemented, these recommendations will square the substance of the policy with the goals of the After Action Review ("AAR") process described in Section VIII.E.5. In the AAR process, the City aims to identify whether specific modifications to existing policy, training, tactics, or equipment could "provide less intrusive methods that would be less likely to impact a group's First Amendment rights." (VIII.E.5.a.2.b). Without a requirement that officers utilize less intrusive methods prior to the issuance of a dispersal order, the cited provision in the AAR process loses its meaning and impact. To that end, the recommended "less intrusive measures" subsection of the policy should specifically state that adherence to its requirements will be considered in the AAR process. If the City is committed to using dispersal orders as a last resort – which the AAR process seems to suggest – it must demonstrate that commitment on the front end, and on the streets of Chicago, as First Amendment gatherings take place.

B. The "will consider" framework is confusing and does not provide appropriate guidance to officers or protection to Chicagoans who exercise their First Amendment rights.

We continue to oppose the "will consider" framework as drafted in Sections VII.C and VIII.D. By only requiring field commanders to "consider" crowd management techniques less intrusive than dispersal, the order does not protect the First Amendment rights of Chicagoans. The "will consider" framework provides officers discretion to disregard available less intrusive methods and fails to require that officers ensure that the least intrusive measures are utilized where available. To that end, the City should revise these provisions, replacing "will consider" in Sections VII.C and VIII.D with a requirement that pre-dispersal measures will be used "to the furthest extent feasible." Similarly, the December 14 General Order should frame the measures listed in Section VIII.D as prerequisites to the issuance of a general dispersal order rather than as amorphous "considerations" for which there is no documentation or accountability. We suggest the following language instead: "The field commander will not issue a dispersal order unless one or more of the following conditions have been met . . . ".[1]

[1] The suggested "one or more" framework is only applicable to the extent that the City applies the Coalition's recommendation to separate out Section VIII.D.4 from the rest of the considerations in

C. Crowds should be assessed in terms of relative proportions, not numbers.

Sections VIII.D.1 and VIII.D.2 currently require field commanders to assess the "number" of individuals engaging in certain conduct prior to the issuance of a dispersal order. The City should revise those provisions to instead require officers to assess the *proportion* of a crowd engaging in certain conduct prior to the officer's issuance of a dispersal order.[2] To illuminate the distinction, 20 people will generally have a much larger impact on a crowd of 50 than they would on a crowd of 50,000. Requiring that field commanders base dispersal decisions on the "number" of people in a crowd engaging in allegedly unlawful conduct, rather than relative proportion of a crowd engaging in that same conduct, creates a confusing standard for field commanders and for people engaging in First Amendment activities. Decisions to disperse should be rare and based on the characteristics and behavior of a significant proportion of the crowd, weighed against the interests of the other participants and after attempting all less intrusive measures.

D. A determination that "public safety concerns" necessitate dispersal should be unrelated to the First Amendment assembly.

Section VIII.D.3 currently allows for a dispersal order upon a determination by certain police officers, including leaders, that unspecified "public safety" concerns require a dispersal. This section should specify that any public safety concerns designated by the Superintendent, incident commander, or their designee must be unrelated to the fact that a First Amendment assembly is occurring in order for those concerns to independently support the issuance of a dispersal order. We have consistently advocated for this qualifying language. Without it, Section VIII.D is superfluous and should be removed, as it undermines the entirety of the December 14 General Order. If the Superintendent, incident commander, or their designee makes a determination that a First Amendment assembly itself involves conduct that presents a public safety concern necessitating dispersal, then by definition the more specific requirements of Sections VIII.D.1 and VIII.D.2 would have already been met and the separate "public safety" determination would not be necessary. As used in other jurisdictions, this language is meant to signify unrelated public safety threats that would put members of the First Amendment assembly in danger (for example, a nearby mass shooter event or extreme weather crisis). As such, the "unrelated to the First Amendment activity" qualifier must be added.

E. Other considerations

The December 14 General Order contains several provisions referencing the Department's ability to arrest individual protestors when probable cause exists. In particular, Section IV.C.2 references arresting individuals who fail to comply with reasonable time, place, and manner restrictions, and subsection VI.D notes that the directive does not restrict the Department from

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Section VII.D and make it mandatory. If the City refuses to accept this recommendation, the Coalition suggests the following language: "The field commander will not issue a dispersal order unless they have employed all available less intrusive methods that are less likely to have an impact on the group's First Amendment rights *and* one or more of the following conditions have been met:" If the City chooses to adopt this secondary framework, it should delete Section VIII.D.4.

[2] Text suggesting that officers may issue dispersal orders based on an assessment that individuals are "about to engage" in unlawful conduct, disorderly conduct, or acts of violence is too subjective must be removed.

arresting individuals engaging in unlawful disorderly conduct or violence directed at persons or property. As this policy is specifically focused on First Amendment activity, tacit encouragements and references to arrests should be removed. To the extent that references to arrests remain in the December 14 General Order, they should each be accompanied by a requirement that officers use the least intrusive means to induce compliance with lawful orders given during a First Amendment assembly before they conduct arrests. The December 14 General Order must also include a prohibition on retaliatory arrests and must set out a review mechanism for any arrests made at First Amendment Assemblies to ensure that such arrests are not retaliation for protected speech or expression.

5. LEGAL AUTHORITY TO ISSUE DISPERSAL ORDERS AND EFFECTUATE RELATED ARRESTS

The City has still not responded to the Coalition's inquiry as to the source of its authority to issue dispersal orders. The December 14 General Order cites MCC 8-4-010 (which the Coalition's November 18, 2020 letter presumed as the source of authority). However, the General Order references both subsection (d) and (e) of MCC 8-4-010. *See* Section VIII.E.4.a. This is inappropriate, as only MCC 8-4-010(d) governs dispersal orders. As such, the reference to MCC 8-4-010(e) in Section VIII.E.4.a should be removed. Further, the December 14 General Order must comply with the standards set out in case law analyzing MCC 8-4-010. The Coalition has described those standards in great detail in *Exhibit A* and will not repeat them here.

6. PROCESS OF ISSUING DISPERSAL ORDERS

The December 14 General Order does not remedy the Coalition's concerns governing the actual process of issuing dispersal orders. In this draft, as in previous versions of the dispersal guidelines, officers are only required to ensure notice to the crowd (including ensuring audibility of orders) when it is "when safe and feasible." Section VIII.E. The City must recognize that notice is both important from a public safety perspective and is constitutionally required to protect the civil rights of people engaging in First Amendment activity. As such, the reference to "safe and feasible" must be removed from the audibility assessment in Section VIII.E.3. Given the size of many First Amendment assemblies in Chicago, it is almost always the case that an order must be made via amplified sound to ensure that all members of the crowd hear it. Furthermore, the City should add language requiring dispersal orders to be accessible for people with disabilities. Depending on the circumstances, this may include utilizing gestures, posting written notice, or taking other necessary measures to ensure that all participants have notice that they have been ordered to disperse prior to enforcement actions.

7. TRANSPARENCY AND ACCOUNTABILITY

We further request that the City ensure that the crowd management and dispersal requirements addressed in the December 14 General Order are accompanied by corresponding documentation requirements to ensure compliance. In particular, the City should mandate that following each First Amendment assembly, field commanders generate a report describing the location, size, and duration of the assembly, and whether a dispersal order was issued. If a dispersal order is issued, the field commander must document how it was issued, the crowd management techniques used prior to its issuance, and all other required actions and considerations set out by

this order. This documentation should be considered in the AAR process. Additionally, the City should aggregate and maintain this data in anonymized form such that it may issue public reports and respond to Freedom of Information Act requests related to its dispersal practices. This type of documentation is vital to the City's transparency and accountability efforts.

Finally, we also have serious concerns with the proposed training bulletin related to public gatherings and the First Amendment. This bulletin contains the same problematic, vague language that dooms the December 14 General Order. It also fails to provide clear, explicit instruction regarding the limits on use of force against protesters; is silent on accountability measures; and contains troubling language about "doxing" that fails to recognize CPD officers' role in using social media to target protesters and other Black and brown Chicagoans with hate. We hope that once we resolve the issues with the General Order, we can work together to develop a revised training bulletin.

Again, we appreciate the City's willingness to receive the Coalition's comments at this stage of policy development, and we look forward to the City's response. Please let us know if you have any questions about this letter, or if you would like to discuss language as you revise the policy.

Best,

/s/

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For the Coalition

Encl.