ACTION CALENDAR
September 13, 2018

To: Honorable Mayor and Members of the City Council
From: Councilmembers Cheryl Davila and Kate Harrison and Mayor Jesse Arreguin
Subject: City of Berkeley Policy Limiting the Publishing of Arrest Photos (doxing) of people arrested by the Berkeley Police Department

RECOMMENDATION
That the Council, direct the City Manager to develop an ordinance that:

The Berkeley Police Department (BPD) shall not publicly post on social media, including but not limited to FaceBook, Instagram, Twitter, etc., the arrest photos of individuals arrested, unless they pose an immediate threat to the public safety of the Berkeley community (e.g. persons wanted for serial rape, homicide, or felony assault).

Furthermore, it is recommended that the City of Berkeley resist PRA requests for arrest photos and identifying information on individuals that have been arrested when doing so poses a risk to their safety as a result of threats against them and when doing so provide no public safety value.

BACKGROUND
As a Sanctuary City, Berkeley prides itself on its commitment to protecting and standing in solidarity with its residents targeted by racism, xenophobia, homophobia, transphobia, ableism, sexism and other biases and forms of hate violence. Being a Sanctuary City for immigrants as well as from racial, religious or gender-based violence also requires that we do not allow City-supported platforms to espouse hatred and calls for violence against people based on race, nationality, religion, gender, sexual orientation or immigration status. As such, the City of Berkeley needs to be clear in word and action that it is against such hatred and violence – by individuals or groups.

Following arrests during the August 5, 2018 demonstrations, the Berkeley Police Department released the arrest photos and identifying information on individuals arrested. These names were then promoted by Fox news and other outlets used to foment attacks against those who speak out against racism and fascism. By doing so, the Berkeley Police Department contributed to “doxing” people – publishing personal information to be used to harass and threaten people at their homes and places of work.

Doxing has resulted in threats to people’s children and families, and even putting “bounties” on their heads. Though these photos were later removed due to political...

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pressure and international criticism of Berkeley, the damage was done. They remain available on the internet and continue to be circulated by Fox news and other outlets. People whose names were released are receiving threatening phone calls at work and home, postings and emails.

After BPD published these photos, City Councilmembers received numerous calls and emails from Berkeley residents expressing outrage over this practice.

Of the persons whose identifying information and booking photos were published by BPD in 2017 during demonstrations, none were convicted of any crime related to these arrests. Similarly, these photos were published on social media prior to any conviction of a crime. The practice of posting the pictures publicly of those arrested could create a chilling effect and discourage free speech activity and could pose a safety risk to those persons whose pictures are published on social media.

As recommended by the National Lawyers Guild, the City of Berkeley should discourage the release of arrest photos and other identifying information not already available on the BPD website when requested in PRAs in situations where one party is likely to do harm to another.

It is important, however, to have an exception to this policy for individuals who pose an immediate threat to the public safety of the Berkeley community (e.g. persons suspected of serial rape, persons wanted for homicide, or felony assault). Residents should know if a suspect who is out in the community can pose an imminent threat to public safety.

FINANCIAL IMPLICATIONS
Staff time to draft, review and finalize ordinance.

ENVIRONMENTAL SUSTAINABILITY
No ecological impact.

CONTACT PERSON
Vice Mayor Cheryl Davila, 510.981.7120

Attachments:
1. NLG Statement (attached)
2. Berkeley police slammed for Antifa-related mugshot tweets after violent rally – Fox news posting of mug shots and names of those arrested
3. Berkeley police under fire for publishing anti-fascist activists' names and photos - Guardian article
4. Anti-fascists say police post mugshots on Twitter to 'intimidate and silence' – Guardian article
5. ACLU of California Statement: White Supremacist Violence is Not Free Speech

Deleted: in First Amendment
Deleted: activity while protesting racist and fascist rallies
Deleted: arrested for
Deleted: a serious risk
Deleted: (pending)
RESOLUTION NO. #269-23

Resolution against City of Berkeley doxing or releasing of arrest photos and other identifying information about people arrested in civil conflicts.

WHEREAS, Berkeley unequivocally supports people’s exercise of their First Amendment rights, including the right to associational privacy and to protect oneself from future retaliation as a result of exercising their freedom of expression; and,

WHEREAS, Berkeley has expressed its solidarity with communities most targeted by white supremacist organizing, and recognizes the threat to their safety and the trauma caused by incursions into Berkeley by violence-prone agitators; and,

WHEREAS, the ACLU of California stated in August of 2017, “the First Amendment does not protect people who incite or engage in violence. If white supremacists march into our towns armed to the teeth and with the intent to harm people, they are not engaging in activity protected by the United States Constitution. The First Amendment should never be used as a shield or sword to justify violence;” and,

WHEREAS, after Berkeley police officers arrested counter-demonstrators against white supremacy on both August 27, 2017 and August 5, 2018, the police publicly released identifying information including legal names and photos of those arrested on Twitter, leading to harassment of the demonstrators at their homes and workplaces, and threats to their children and family members; and,

NOW THEREFORE, BE IT RESOLVED that the Council of the City of Berkeley directs the City Manager to draft an ordinance that restricts the Berkeley Police Department or other City of Berkeley departments from publishing or releasing the addresses or arrest photos of people arrested under the special circumstances of civil conflicts, particularly when one party is likely to do harm to another, on social media; and,

NOW THEREFORE, BE IT RESOLVED that the Council of the City of Berkeley directs the City Manager to draft an ordinance that also encourages the Berkeley Police Department or other City of Berkeley departments to resist PRA’s requesting the release of addresses, arrest photos or other identifying information of people arrested under the special circumstances of civil conflicts, particularly when one party is likely to do harm to another.
AN OPEN LETTER TO BERKELEY MAYOR ARREGUIN,
CITY COUNCIL, CITY ATTORNEY, AND POLICE DEPARTMENT

August 24, 2018

Dear Mayor Arreguin, City Council Members, Ms. Brown, and Chief Greenwood:

We are writing once again on behalf of the National Lawyers Guild, San Francisco Bay Area Chapter (NLGSF), regarding the Berkeley Police Department’s (BPD) response to anti-racist protesters on August 5, 2018, the publishing of arrestees’ photos and identifying information on Twitter on August 5, and the mask regulation and other overbroad restrictions promulgated on August 3, 2018.

Anti-racist protesters were peacefully assembling at Ohlone Park, preparing to march to Martin Luther King, Jr. Park where white supremacists would be gathering, when they were met with an immediate aggressive response by BPD. A vehicle transporting sound equipment for the rally was surrounded and all three people in the truck were arrested. When asked why the individuals were being arrested, police claimed that there were weapons on board. When pressed to disclose what weapons were on board, BPD referred members of NLGSF to the overbroad list of banned items issued on August 3, 2018. BPD continued to detain other counter-protestors for alleged weapons possessions, those weapons in question being, for example, plastic poles used to mount signs.

Police officers formed lines to prevent protesters from leaving Ohlone Park from multiple directions. It appeared that BPD shut down an anti-racist rally and march, while simultaneously facilitating free speech for white supremacists by forming a barricade around Martin Luther King, Jr. Park, where the white supremacists had gathered. BPD, with the aid of the other departments including the Alameda County Sheriff’s Department, formed skirmish lines to prevent the peaceful march of anti-racist protesters from proceeding down any road leading to MLK park.

BPD arrested 21 people -- all of whom are anti-racist activists. No white supremacists were arrested. Most of the anti-racists were arrested for violations of the hastily enacted restrictions on various items or on covering one’s face in Civic Center and Ohlone Parks. In fact, at least one person appears to have been cited for simply wearing a decorative multi-colored “infinity scarf” around her neck, not over her face. A 69-year-old woman was arrested for using small rocks as
weights on a political banner.

In the wake of the 2014 Black Lives Matter demonstration fiasco, BPD revised its crowd control policies and training last year to emphasize de-escalation and peaceful conflict resolution. Yet BPD carried out arrests in a provocative and brutal fashion: so brutal that one protester sustained a broken clavicle when he was forcefully tackled by an officer. We are disturbed to hear reports that the police used flash bangs, stinger grenades or some similar explosive grenades that emit a loud bang and chemical agent. These types of weapons are explicitly designed to cause panic and chaos – the opposite of de-escalation. They are known to cause serious injuries including chemical burns, permanent hearing loss and tinnitus. When projectiles like these are tossed into a crowd, it is all too easy to hit someone or to have one of these tiny bombs explode close to their head, damaging their ears.

BPD published 15 of the arrestees’ photos on Twitter, along with their names, home cities, and misleading descriptions of their charges. In many cases, BPD described individuals as having been arrested for “possession of a banned weapon”, when in fact individuals were arrested for allegedly wearing banned items like masks, scarves, or bandanas or carrying objects that were on a long list of prohibited items including common protest sign items such as sticks or poles. Police officers did not issue verbal warnings to dispose of banned items and instead arrested people on sight.

None of the anti-racist arrestees whose names and photos BPD publicized last year were convicted of any crimes; indeed, most were never charged with a crime by the District Attorney at all. As of the publishing of this letter, the District Attorney declined to charge four of the 21 arrestees whose needless incarceration caused them to have early hearing dates. The same will likely be true for the remaining August 5 arrestees. Despite this, BPD chose to publicize their arrests.

The danger and harm created by BPD’s publication of booking information is immediate and non-speculative. Such information can and will be used to facilitate criminal activity against the activists. Neo-Nazis, the “alt right” and other fascist/white nationalist/white supremacist hate groups promote violence against people of color, LGBTQIA people, Jews, Muslims, and white people who oppose them, and use doxing to target individuals. As we have previously informed you, when BPD released arrestee information last year, arrestees and one volunteer lawyer received death threats. During one case arising from an April 2017 protest, where the defense attorney received several death threats, the Assistant District Attorney prosecuting the case was also subject to endless harassment. Nazis sporting swastika tattoos showed up at the arrestees’ court dates and waited for them outside the jail. BPD is all too familiar with the harm to which their actions subject the arrestees. Last year, Berkeley’s own mayor was the target of the very stalking and harassment by white supremacists that anti-racist protestors face when their name, image and city of residence is widely published.

The anti-racist activists’ safety is endangered by BPD’s knowing violation of their privacy. What’s more, since March 14, 2017 (the first currently available date for BPD’s twitter feed) through August 5, 2018, the overwhelming majority of booking photos published by BPD on Twitter have been people apparently affiliated with anti-racist and anti-fascist causes. BPD’s
Twitter feed demonstrates a disturbingly clear bias against anti-racists and anti-fascists.

We call on the BPD to immediately cease and desist from such publication and refrain from such publicity in the future. The City of Berkeley could be liable should the arrestees be threatened, placed in fear, injured or even killed as a result of Berkeley employees’ actions publishing arrestees’ names, cities of residence and photos despite the well documented danger to them from doing so, in violation of the activists’ First and Fourteenth Amendment rights to free speech, association, equal protection, and privacy.

In addition, as we have discussed multiple times, the mask restriction is invalid because it “directly contravenes the First Amendment of the United States Constitution.” (Ghafari v. Mun. Court for San Francisco Judicial Dist. (1978) 87 Cal.App.3d 255.) In Ghafari, the appellate court held that former Penal Code section 650a1 was unconstitutional on its face under the First and Fourteenth Amendments to the U.S. Constitution, because it was overbroad and vague and denied equal protection of the law. The court recognized that: “Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.” Ghafari, supra, 87 Cal.App.3d quoting NAACP v. Alabama (1958) 357 U.S. 449, 462.

Like the statute struck down in Ghafari, the City Manager's Administrative Rule is a blanket prohibition on covering one's face. It serves no legitimate law enforcement function and is unconstitutionally overbroad because the state's interests are fully protected by more narrowly drawn prohibitions such as Penal Code section 185. Ghafari v. Mun. Court, supra, at p. 262 [citing Britt v. Superior Court (1978) 20 Cal.3d 844, 855-856.]

The Berkeley mask ordinance would authorize the arrest of a perfectly peaceful individual wearing a mask caricaturizing a disliked politician, or a person with respiratory issues who wears a safety mask. Moreover, there are valid reasons for anti-racist demonstrators to cover their faces in proximity to Neo-Nazis due to the prevalence of doxing and violence, as discussed above. The right to exercise freedom of speech anonymously is well recognized. (See, e.g., Talley v. California, 362 U.S. 60, 64 (1960).)

The National Lawyers Guild is committed to protecting the right to speak out against hate, racism and fascism in Berkeley and across the country. We urge you to instruct the City Manager not to continue enacting invalid municipal mask bans and BPD to immediately remove any existing photos, names, and other personal information of arrestees from its social media accounts and to cease its practice of releasing this information moving forward.

Sincerely,

Jay Kim, Executive Director – National Lawyers Guild SF Bay Area Chapter
Rachel Lederman, Attorney at Law

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1 Then Cal. Penal Code sec. 650a read, “It is a misdemeanor for any person, either alone or in company with others, to appear on any street or highway, or in other public places or any place open to view by the general public, with his face partially or completely concealed by means of a mask or other regalia or paraphernalia, with intent thereby to conceal his identity.