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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 DEREK TUCSON, ROBIN SNYDER,
11 MONSIEREE DE CASTRO, and ERIK
MOYA-DELGADO,

12 Plaintiffs,

13 v.

14 CITY OF SEATTLE, ALEXANDER
15 PATTON, TRAVIS JORDAN, DYLAN
NELSON, JOHN DOES (#1-4), and
16 JANE DOES (#1-2),

17 Defendants.

CASE NO. C23-17 MJP

ORDER DENYING MOTION TO
DISMISS

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19 This matter comes before the Court on Defendants' Motion to Dismiss. (Dkt. No. 42.)

20 Having reviewed the Motion, Plaintiffs' Response (Dkt. No. 46), the Reply (Dkt. No. 47), and all
21 supporting materials, the Court DENIES the Motion.

22 **BACKGROUND**

23 On January 1, 2021, Plaintiffs wrote political messages, some of which were critical of
24 the Seattle Police Department (SPD), in sidewalk chalk and charcoal on "eco-block" walls that

1 were temporarily erected by the City outside of the SPD’s East Precinct. (Supplemental
 2 Complaint ¶¶ 2.1-2.4, 4.1-4.2 (Dkt. No. 36).) Plaintiff Derek Tucson wrote the words “peaceful
 3 protest” in charcoal, while the precise messages the other Plaintiffs wrote are not clearly
 4 identified. (See Supp. Compl. ¶¶ 4.8-4.15.) SPD officers arrested all four Plaintiffs for violating
 5 Seattle Municipal Code 12A.08.020 (the “Ordinance”). (Id. ¶¶ 4.3-4.4, 4.10-4.4.14, 4.27-4.28.)
 6 Plaintiffs allege that the Ordinance was selectively enforced against them because of the views
 7 they expressed and that they are currently chilled in their use of chalk to express their views on
 8 public sidewalks and barriers built over the public sidewalk. (Id. ¶¶ 4.44-4.45, 5.3.)

9 At the time of the arrests, the Ordinance stated:

10 A. A person is guilty of property destruction if he or she:

- 11 1. Intentionally damages the property of another; or
 12 2. Writes, paints, or draws any inscription, figure, or mark of any type on any
 13 public or private building or other structure or any real or personal property
 owned by any other person.

14 B.

- 15 1. It is an affirmative defense to property destruction under subsection
 12A.08.020.A.1 that the actor reasonably believed that he had a lawful right to
 16 damage such property.
 17 2. It is an affirmative defense to property destruction under subsection
 12A.08.020.A.2 that the actor had obtained express permission of the owner or
 18 operator of the building, structure, or property.

19 C. Property destruction is a gross misdemeanor.

20 SMC 12A.08.020 (2021). “Property destruction” under SMC 12A.08.020 is punishable by
 21 imprisonment of up to 364 days and a fine of up to five thousand dollars. SMC 12A.08.020(C);
 22 12A.02.070(A).

23 After Plaintiffs filed suit, the City amended the Ordinance to take effect on May 13,
 24 2023, which now reads:

1 A. A person is guilty of property destruction if the person intentionally:

- 2 1. Damages the property of another; or
- 3 2. Writes, paints, or draws any inscription, figure, or mark of any type on any
- 4 public or private building or other structure or any real or personal property
- 5 owned by any other person unless the person has obtained the express permission
- 6 of the owner or operator of the property.

7 B.

- 8 1. It is an affirmative defense to property destruction under subsection
- 9 12A.08.020.A.1 that the actor reasonably believed that he had a lawful right to
- 10 damage such property.

11 C. Property destruction is a gross misdemeanor.

12 (Declaration of Nathaniel Flack Decl. Ex. 6.)

13 Plaintiffs pursue four claims: (1) First Amendment violations under 42 U.S.C. § 1983; (2)

14 Fourteenth Amendment violations under 42 U.S.C. § 1983; (3) Fourth Amendment violations

15 under 42 U.S.C. § 1983; and (4) Monell claims against the City.

16 As to their First Amendment claims, Plaintiffs allege that Defendants selectively enforced

17 the Ordinance and retaliated against them because of their political views in violation of the First

18 Amendment. (Suppl. Compl. ¶¶ 5.1, 5.4.) They allege that their arrests have chilled their right to

19 engage in further political speech. (Id.) They also argue that the Ordinance (both pre- and post-

20 amendment) is facially unconstitutional because it is impermissibly vague and substantially

21 overbroad. (Id. ¶¶ 5.2-5.3, 5.5.) As to their Fourteenth Amendment claims, Plaintiffs allege that

22 the Ordinance is facially unconstitutional because it is impermissibly vague and criminalizes

23 innocent conduct without due process. (Id. ¶¶ 5.6-5.8.) As to their Fourth Amendment claims,

24 each Plaintiff asserts that their arrest was an unreasonable search and seizure without probable

cause or justification. (Id. ¶ 5.9.) In their Response brief, Plaintiffs suggest that their Fourth

1 Amendment claims is an alternative claim “to the extent the City has offered constructions of the
2 ordinance that attempt to limits its vagueness and overbreadth.” (Resp. Br. at 23 (Dkt. No. 46).)

3 As to their Monell claim, Plaintiffs allege that “the Defendant City has a pattern, practice,
4 or policy of enforcing and threatening to enforce SMC 12A.08.020 in retaliation for protected
5 speech, discriminating against speech on the basis of content and viewpoint, and denying
6 Plaintiffs and similarly situated persons of liberty without due process of law.” (Supp. Compl. ¶
7 5.10.) Plaintiffs allege that the “City’s long-established policy is to treat the use of sidewalk
8 chalk as non-criminal” and that the “City does not apply SMC 12A.08.020 to temporary chalk or
9 charcoal writing that is supportive of the government or police.” (Id. ¶¶ 4.37-4.38; see also id. ¶¶
10 4.39-4.41.) But Plaintiffs allege there is a “municipal policy or practice of enforcing and
11 threatening to enforce SMC 12A.08.020 against people who express criticism of government
12 and/or police in temporary messages written in traditional public forums on surfaces like the
13 public sidewalk, including concrete barriers built over the public sidewalk[.]” (Id. ¶ 4.4.) The
14 evidence of this policy or practice includes Plaintiffs’ arrests and statements made by SPD’s Lt.
15 John Brooks’ threats to enforce the Ordinance against members of the public for chalking
16 criticism of SPD outside of the West Precinct in March 2021. (Id. ¶¶ 4.42-4.43.) In addition,
17 Plaintiffs allege that “one person employed by SPD at the rank of ‘assistant chief or higher’” and
18 “at least one person employed by Defendant City in an ‘executive leadership’ position in the
19 Mayor’s Office used their official position to ‘override’ the County’s Covid-19 booking policy
20 so that it did not apply to people arrested during political protests.” (Id. ¶¶ 4.21-4.22.) Plaintiffs
21 allege that the “override” enabled Defendants to book Plaintiffs in King County Jail “based upon
22 political participation and viewpoint” and that this “extended the duration, and enhanced the
23 severity, of Plaintiffs’ seizures.” (Id. ¶¶ 4.24-4.25.)
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ANALYSIS

A. Legal Standards

Defendants move to dismiss under both Rule 12(b)(1) and Rule 12(b)(6). The Court reviews the applicable standards.

Defendants' Rule 12(b)(1) motion challenges the Court's subject matter jurisdiction on the theory that Plaintiffs lack standing to pursue their First and Fourteenth Amendment challenges to the Ordinance. (Mot. at 4-5.) "A Rule 12(b)(1) jurisdictional attack may be facial or factual." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." Id. And "[b]y contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." Id.

Although Defendants do not label their challenge, the Court construes it as a facial challenge because Defendants do not dispute the truth of the allegations that would invoke federal jurisdiction and submit no contradictory evidence from outside of the Supplemental Complaint. The only materials Defendants cite to outside of the Supplemental Complaint are declarations from Plaintiffs filed in support of the Motion for Preliminary Injunction. This does not convert Defendant's attack into a factual one, because the declarations do not contain materials contradictory to the allegations in the Supplemental Complaint—they merely buttress them. As such, the Court accepts the allegations in the Supplemental Complaint as true and draw all reasonable inferences in Plaintiffs' favor. See Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004). But Plaintiffs bear the burden of alleging facts that are sufficient to invoke the Court's jurisdiction. See Leite v. Crane Co., 749 F.3d 1117, 1121 (9th Cir. 2014).

1 Under Fed. R. Civ. P. 12(b)(6), the Court may dismiss a complaint for “failure to state a
2 claim upon which relief can be granted.” In ruling on a motion to dismiss, the Court must
3 construe the complaint in the light most favorable to the non-moving party and accept all
4 well-pleaded allegations of material fact as true. Livid Holdings Ltd. v. Salomon Smith Barney,
5 Inc., 416 F.3d 940, 946 (9th Cir. 2005); Wylter Summit P’ship v. Turner Broad. Sys., 135 F.3d
6 658, 661 (9th Cir. 1998). Dismissal is appropriate only where a complaint fails to allege “enough
7 facts to state a claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S.
8 544, 570 (2007). A claim is plausible on its face “when the plaintiff pleads factual content that
9 allows the court to draw the reasonable inference that the defendant is liable for the misconduct
10 alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

11 **B. Plaintiffs have Standing**

12 In its Order Granting Plaintiffs’ Motion for Preliminary Injunction, the Court determined
13 that Plaintiffs have standing to pursue their facial and as-applied attacks to the Ordinance under
14 both the First and Fourteenth Amendment. (See Preliminary Injunction Order (Dkt. No. 50) as
15 clarified (Dkt. No. 53).) Defendants’ Motion to Dismiss raises no new arguments that might alter
16 the Court’s standing analysis. Plaintiffs have standing to pursue these claims for the same
17 reasons discussed in the Preliminary Injunction Order (as clarified) to which the Court refers the
18 reader and adopts in deciding this Motion. The Court finds that standing has sufficiently been
19 shown on the face of the Supplemental Complaint. The Court recognizes that some of its analysis
20 in the Preliminary Injunction Order also considered Plaintiffs’ declarations. The declarations
21 merely build on allegations in the Supplemental Complaint and the Court’s conclusion in this
22 Order as to standing does not rely on the assertions in the declarations. The Court DENIES the
23 Motion to Dismiss as to standing.

1 **C. Fourth Amendment Claim**

2 Defendants argue that “Plaintiffs’ conclusionary allegation [that they were subject to an
3 unreasonable search and seizure, without probable cause] is insufficient.” (Mot. at 24 (citing
4 Iqbal, 556 at 678).) Defendants provide no argument to support this assertion, suggesting instead
5 in a footnote that they may be entitled to qualified immunity. (Id. n.10.) With scant analysis,
6 Defendants argue that ““the constitutionality of a law is generally irrelevant to whether probable
7 cause existed to believe that Plaintiff violated the law.”” (Mot. at 24 (quoting Frey v. Town of
8 Jackson, Wy., 41 F.4th 1223, 1243 (10th Cir. 2022); and citing Grossman v. City of Portland, 33
9 F.3d 1200, 1209 (9th Cir. 1994)).) Defendants contend that an officer would reasonably believe
10 the Ordinance was constitutional given its twenty-five-year existence and Plaintiffs’ admission
11 that they violated its ban on drawing. (Id. at 25.) Plaintiffs, for their part, offer a confused
12 response. Plaintiffs state: “In the alternative, Plaintiffs allege Fourth Amendment claims to the
13 extent the City has offered constructions of the ordinance that attempt to limits its vagueness and
14 overbreadth.” (Resp. at 23.) This suggests that Plaintiffs’ Fourth Amendment claim is pleaded
15 only in the alternative to their First and Fourteenth Amendment claims. Plaintiffs then argue that
16 they have sufficiently alleged that Defendants arrested them without probable cause because they
17 could not have been presumed to have caused property damage by using chalk or charcoal.

18 Plaintiffs do not respond to Defendants’ qualified immunity argument. And they offer no
19 explanation as to why an objectively reasonable officer would believe that it was
20 unconstitutional to arrest Plaintiffs for violating the Ordinance’s ban on writing or drawing.

21 The Court declines to dismiss the Fourth Amendment. Defendants have not articulated a
22 fully-formed or reasoned basis for the Court to dismiss the claim. The suggestion in a footnote
23 that qualified immunity bars this claim is insufficient for the Court to consider the issue in
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1 earnest. And given Plaintiffs' response, it appears that this may be a non-issue if the claim is an
2 unnecessary, alternatively-pleaded cause of action. The Court therefore DENIES the Motion as
3 to this claim without rendering any decision on qualified immunity. The Court ORDERS
4 Plaintiffs to notify the Court with seven days of entry of this Order whether they will dismiss
5 their Fourth Amendment claim in light of this Order.

6 **D. Monell Claim**

7 Defendants argue that Plaintiffs' Monell claims cannot proceed without an underlying
8 constitutional violation. (Mot. at 25 (citing City of Los Angeles v. Heller, 475 U.S. 796, 799
9 (1986) (per curiam)).) This argument fails, given the Court's conclusion that the constitutional
10 claims may proceed. Defendants also argue that Plaintiffs fail to allege sufficient facts to suggest
11 that the City could be liable for retaliatory arrest or booking Plaintiffs in jail. The Court finds the
12 allegations sufficient to allow the claim, as explained below.

13 Under Monell, a municipality cannot be held liable under a respondeat superior theory for
14 the unconstitutional acts of its employees. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690
15 (1978) (A local government may be sued "when execution of a government's policy or custom,
16 whether made by its lawmakers or by those whose edicts or acts may be fairly said to represent
17 official policy, inflicts the injury that the government as an entity is responsible under § 1983.")
18 There are three ways to prove Monell's policy or custom requirement. First, "the plaintiff may
19 prove that a city employee committed the alleged constitutional violation pursuant to a formal
20 government policy or a longstanding practice or custom which constitutes the 'standard
21 operating procedure' of the local government entity." Hopper v. City of Pasco, 241 F.3d 1067,
22 1083 (9th Cir. 2001) (citation and quotation omitted). "Second, the plaintiff may establish that
23 the individual who committed the constitutional tort was an official with final policy-making
24

1 authority and that the challenged action itself thus constituted an act of official government
2 policy.” Id. (citation and quotation omitted). “Third, the plaintiff may prove that an official with
3 final policy-making authority ratified a subordinate's unconstitutional decision or action and the
4 basis for it.” Id. (citation omitted).

5 Plaintiffs argue that they have pleaded sufficient allegations to support all three theories
6 of Monell the liability. The Court reviews all three theories and agrees in part.

7 Plaintiffs argue that there is a longstanding policy or custom to arrest only those who use
8 sidewalk chalk when used for protest, while allowing virtually all other sidewalk chalking
9 activity. (Resp. at 25 (citing Supp. Compl. ¶¶ 4.37-4.43).) While Plaintiffs have provided cogent
10 allegations that City’s longstanding custom permits sidewalk chalking notwithstanding the
11 Ordinance’s prohibition, they have not offered plausible allegations that there is a longstanding
12 policy or custom to arrest those who chalk political messages. They identify only their own
13 arrests and one other threat of enforcement of the Ordinance against sidewalk chalking political
14 messages in March 2021. (See Suppl. Compl. ¶¶ 4.42-4.43.) This is not evidence of a
15 longstanding policy and it is inadequate to support the Monell claim.

16 Plaintiffs also argue that they have sufficiently alleged an executive in the Mayor’s
17 Office or SPD made the decision to subject them to booking in King County Jail in retaliation for
18 their protest activity. (Resp. at 25 (citing Supp. Compl. ¶¶ 4.21-4.25.) Defendants suggest that it
19 “is not plausible that the arresting officers contacted officials within SPD Command Staff or the
20 Mayor’s Office after the arrests but before the King County jail accepted Plaintiffs for booking,
21 in order to discuss the personal treatment of Plaintiffs.” (Reply at 8.) While it may be unlikely
22 that Plaintiffs’ allegations are true, the Court does not find them to be implausible. The
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1 | allegations must be tested through discovery and they support Plaintiffs' Monell claim. The
2 | Court DENIES the Motion as to the Monell claim.

3 | Plaintiffs also argue that they have adequately pleaded facts suggesting that City officials
4 | ratified the First Amendment violations alleged in the Supplemental Complaint. Defendants offer
5 | no response to this argument. The Court finds the allegations, while thin, sufficient to show that
6 | the City ratified the arrests by virtue of the alleged booking-related "override." This is an
7 | additional basis on which the Court DENIES the Motion.

8 | **CONCLUSION**

9 | The Court remains unpersuaded that Plaintiffs lack standing to pursue any of the claims
10 | that are contained in the Supplemental Complaint. The Court declines to dismiss the Fourth
11 | Amendment claim, given the inadequacy of the briefing on qualified immunity and Plaintiffs'
12 | potential dismissal of the claim. And the Court finds the allegations, while thin, sufficient to state
13 | a claim for municipal liability under Monell. For these reasons, the Court DENIES the Motion to
14 | Dismiss.

15 | The clerk is ordered to provide copies of this order to all counsel.

16 | Dated June 23, 2023.

17 | 

18 | Marsha J. Pechman
19 | United States Senior District Judge