

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

SCHOOL OF AMERICAS WATCH, ROY BOURGEOIS,  
JEFF WINDER, ERIC LECOMPTE, and BECKY JOHNSON,

Appellants,

vs.

CONSOLIDATED GOVERNMENT OF COLUMBUS, GEORGIA,  
MAYOR BOBBY PETERS AND CHIEF W.L. DOZIER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF GEORGIA

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**CERTIFICATE OF INTERESTED PERSONS**  
**AND CORPORATE DISCLOSURE STATEMENT**

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STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument in this case. The decision below is the first case in the Nation to consider and sanction mass searches of non-violent demonstrators. Given the significant precedent that will be set, and the scant First and Fourth Amendment jurisprudence in the area, oral argument should assist this Court.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it is filed in Book Antiqua 13 point type and the word count is 8,857, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Upon consultation with the clerk's office, the Appendix is attached behind the Certificate of Service and adds 3,301 words to the word count for a total of 12,158 words.

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## **STATEMENT OF JURISDICTION**

Plaintiffs-Appellants appeal under 28 U.S.C. § 1291 from a final order and judgment on a preliminary injunction consolidated with a trial on the merits pursuant to Federal Rule of Civil Procedure 65.

## STATEMENT OF ISSUES

- I Whether the district court erred in finding that the Fourth Amendment permits mass searches of all demonstrators, as a precondition for entry to a protest, where the demonstrators had protested over a 13 year period without any violent arrests, weapons seizures, or threats of violence.
- II Whether the district court erred in finding that the First Amendment permits mass searches of all demonstrators, as a precondition for entry to a protest, where the demonstrators had protested over a 13 year period without any violent arrests, weapons seizures, or threats of violence.
- III Whether the district court erred in failing to consider relevant findings from a prior court ruling, between the same parties, under the doctrine of collateral estoppel.

## STATEMENT OF FACTS

This case involves the constitutionality of a new mass search policy requiring searches of all demonstrators entering an annual protest with a 13-year history of non-violence -- not a single arrest for violence, not a single seizure of weapons, and not a single threat of violence directed at the demonstration in all prior years.

### A. School of Americas Watch Demonstrations

For over 13 years, School of Americas Watch (SOAW) has conducted, annually, a large, non-violent demonstration and memorial procession outside the front gate of Fort Benning, which houses the School of Americas (SOA). V2-R1-38, 78. SOAW “is a grassroots organization, working non-violently to close the Western Hemisphere Institute for Security Cooperation and change the foreign policy it represents.”<sup>1</sup> V2-R1-37. Each year, the demonstrators include a broad spectrum of “college students, people representing a variety of religious traditions, people of all ages, many families with small children, [and] elderly people.” V2-R1-39. Children, nuns, priests and the elderly historically make up a large contingent of the attendees. V2-R1-64, 76. As many as 15,000 persons attend the demonstration in any given year. V2-R1-39; V1-R1-Affidavit of Bourgeois ¶¶ 3, 9.

### B. School of Americas Watch History of Non-Violent Demonstrations

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1. The School of Americas changed its name to the Western Hemisphere Institute for Security Cooperation but will be referred to as SOA for consistency.

Even with as many as 100,000 total demonstrators, the undisputed evidence shows that while a handful of demonstrators are arrested each year for solemnly walking onto the base without permission in violation of 18 U.S.C. § 1382:

- √ not a single weapon has ever been seized at the demonstrations, V2-R1-130; V1-R1-Affidavit of Bourgeois ¶¶ 3, 9
- √ no person has ever been arrested for committing any act of violence at the demonstrations V2-R1-79, 100, 115; and
- √ not a single threat was ever received by police agencies or SOAW concerning these protests V2-R1-47-48, 72-73, 79

In preparation for their yearly event, over 300 SOAW “trainers” hold seminars and meetings in their local communities, churches and schools on the philosophy of nonviolence and SOAW’s concerns about SOA. The demonstration itself is preceded by a week of events throughout the City of Columbus including seminars and education presentations -- many devoted to “nonviolence training” and “nonviolence workshops.” V2-R1-42, 65. The day before the Sunday memorial service-demonstration, many participants gather at a large event (sometimes at a stadium or auditorium) where a “pledge of nonviolence” is read aloud, collectively, and the group hears speakers from all over the world express their concerns about the military and foreign policy philosophies underlying SOA. The pledge, inter alia, condemns the carrying or use of weapons. V1-R1-Affidavit of Bourgeois ¶¶ 3, 4, 9 (contents of pledge).

The annual Sunday event also begins with the reading of a “pledge of nonviolence” and a “memorial service for civilians and others who were killed by soldiers trained at this school and a solemn funeral procession memorializing those victims.” V2-R1-39, 40. As the event lasts all day,

and weather is not always the best, most protesters bring “a backpack with some food, a water bottle, additional layers of clothes, an umbrella, parents carrying diaper bags and strollers, that sort of thing.” V2-R1-49 A stage is utilized for speakers, musicians, and periodic “moments of silence.” V2-R1-89. The non-violence pledge is repeated throughout the day and “sets the tone for the annual gathering . . . differentiat[ing] it from other social protests.” V2-R1-41, 46. In addition, 300-500 trained “peacekeepers” wearing “yellow armbands” and with a “network of cell phones and two-way radios” are dispersed throughout the crowd to ensure events run smoothly and consistent with the pledge of nonviolence. V2-R1-46-47. These efforts demonstrate that SOAW is “clearly against violence every step of the way.” V2-R1-67, 69, 139; V1-R1-Affidavit of Bourgeois ¶¶ 3, 4, 9.

Traditionally, a small group of demonstrators each year engage in one non-violent form of civil disobedience; they “enter onto the post” in violation of 18 U.S.C. § 1382, “to try to carry the funeral procession to the School of Americas itself” located a few miles into the base. V2-R1-39. This act of civil disobedience, a simple trespass, was described by SOAW co-founder Jeff Winder:

[W]e believe it’s our right to have visual proximity to the object of our protest. Because [the] School of Americas lies several miles within the bounds of Fort Benning, we are not permitted -- . . . we are not allowed to gather at the School of the Americas itself. We can only be at the gate that opens on to a broad expanse of grass and trees that allow us really no access to the School of Americas, the soldiers who are training there or the trainers or anything. So some people have chosen to cross the line onto Fort Benning property and try to proceed to the school as part of our movement and risk the consequences V2-R1-45.

See also United States v. Corrigan, 144 F.3d 763, 765-67 (11<sup>th</sup> Cir. 1998) (describing peaceful 1995 demonstration and arrests involving SOAW protesters at Fort Benning); United States v. Bichsel, 156 F.3d 1148 (11<sup>th</sup> Cir. 1998) (same - 1996 SOAW at SOA). The evidence presented at trial demonstrated that beyond these arrests for trespass, in 13 years with tens upon tens of thousands of

demonstrators (1) no arrests for violent acts occurred, V2-R1-48, 100, 115;<sup>2</sup> and (3) no weapons were ever seized, V2-R1-130; and (3) this year (or previous years) no one had received any threats of violence concerning the SOAW protest. V2-R1-47-48, 72-73; V1-R1-Affidavit of Bourgeois ¶¶ 3, 4, 9; see also Columbus v SOA Watch, No. 4:01-CV-147-3 (HL), slip op. at 14 (M.D. Ga. Nov. 16, 2001) (magistrate finding that SOAW demonstrated for “11 years without permit, without arrests outside of Fort Benning, without incident out of bounds, without harm to the community, without anything but perhaps a nuisance to the people in the neighborhood and nuisance to the people who find that to be a nuisance”) V1-R1-Ex1-P14.

D. Mass Searches of Non-Violent Demonstrators

Last year, on the eve of the demonstration, the City of Columbus unsuccessfully sought to obtain an injunction preventing the demonstration and funeral procession from taking place. That lawsuit was rejected as a content-based attempt to seek a prior restraint on speech. Id. This year, the City relented and granted a permit for the event. V2-R1-53. But one week before the event, the City announced an unprecedented and broad-based plan to establish a perimeter around the protest, conduct mass searches of all protesters and their belongings, and to prohibit the possession of certain legal items. V2-R1-98, 81-85, 88, 95, 102-103. After counsel for SOAW raised constitutional concerns, the City reduced the list of prohibited items and revised its plan to require all protesters to

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2. The “only one incident” involving any act that could be considered violent involved an unknown person “threw an unknown substance” -- perhaps “feces” -- at a minister participating in the protest. V2-R1-63, 99, 150. This is an “impeccable record of safety for a large protest.” V2-R1-65.

first submit to magnetometer searches and then personal searches if the magnetometer were to alert. V2-R1-54-55.

The perimeter and checkpoints were to be placed far from the demonstration and near a private plot of land where persons “publicly stated their intent to play music loudly enough to drown out the protest.” V2-R1-55, 80, 85-86. Thus, unless persons submitted to the searches, they could not attend, see or even hear the events. V2-R1-56, 88, 91.

The searches were admittedly to be conducted without a warrant, probable cause, or individual suspicion. V2-R1-91. The initial “low level” magnetometer searches,<sup>3</sup> according to police witnesses, were allegedly to take about 10 seconds per person -- but the previous year, at a smaller Saturday event in a Stadium preceding the Sunday march, magnetometers were employed and delays of over 30-45 minutes occurred. V2-R1-57, 108. If the metal detector alerted, the search would become more invasive and more time-consuming -- people might have to empty their backpacks, empty their pockets, submit to searches of their persons, and even remove shoes. V2-R1-89-91, 107-108, 118-119. Police witnesses conceded that the search duration would then increase significantly, V2-R1-71, and demonstrators might have to arrive “maybe two hours ahead of time” to make it though the metal detectors and arrive at the demonstration on time. V2-R1-145, 148; V1-R1-Affidavit of Bourgeois ¶¶ 6-12.

### **COURSE OF PROCEEDINGS**

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3. Though the defendants claimed a “public safety rationale for the searches, the effectiveness of low setting metal detector searches was unclear in both a demonstration at trial and testimony. Some testimony suggested a “low level” setting would only detect a “gun or a large knife.” V2-R1-111-113, 117-118.

SOAW objected to the mass searches because “[w]e believe very deeply ... that people should not be forced to sacrifice their right to privacy in order to participate in political protests.” V2-R1-60. After negotiations failed, SOAW filed suit seeking to have the policy declared unconstitutional, and seeking an injunction and nominal damages. V1-R1-7. The district court held a hearing three days before the demonstration was to take place. V1-R12-1. The parties consolidated the preliminary injunction hearing with the trial on the merits for equitable relief and damages V2-R1-105. The district court denied all relief, and this appeal followed.

### **STANDARD OF REVIEW**

The facts underlying the district court’s decision are essentially undisputed, and the district court’s legal conclusions, its assessment of the weight of the government’s interest, and other “constitutional facts” are subject to de novo review. Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta, 219 F.3d 1301, 1316 (11<sup>th</sup> Cir. 2000).

### **SUMMARY OF ARGUMENT**

This is the first case in the country to sanction mass searches of demonstrators at a non-violent protest. In the 13-plus years of the SOAW’s annual demonstration, the record demonstrates a complete lack of violent incidents, violent arrests, weapon seizures or threats of violence. As this Brief and the attached appendix demonstrate, only a few cases have even considered mass searches of any kind even for *protests with a history of savage violence* and all have rejected mass searches absent proven likelihood of violence. Under the First and Fourth Amendment, and with SOAW’s record of non-violence, mass searches were impermissible.

### **ARGUMENT AND CITATIONS OF AUTHORITY**

The mass searches of non-violent demonstrators violated the First and Fourth

Amendments, and the district court's holding to the contrary marks a significant departure from all cases in the area of searches of demonstrators.

I. MASS SEARCHES IMPEDING ENTRY TO SOAW'S NON-VIOLENT DEMONSTRATION WERE UNREASONABLE UNDER THE FOURTH AMENDMENT

The district court sanctioned the use of magnetometers to “conduct[] a blanket search upon everyone” who attended the SOAW protest<sup>4</sup> “without any individual determination of suspicion or probable cause.” V1-R11-1, 4, 5; V2-R1-91. Yet, individualized suspicion is a cornerstone of the Fourth Amendment, and no exception to that requirement applies here. Chandler v. Miller, 520 U.S. 305 (1997); City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000). The government must have “a particularized and objective basis for suspecting the particular person searched.” Justice v. City of Peachtree City, 961 F.2d 188, 193 (11<sup>th</sup> Cir. 1992). The Supreme Court rejected mass searches decades ago in Ybarra v. Illinois, 444 U.S. 85, 91 (1979) finding that a mass search of tavern patrons for illegal drugs based on “mere propinquity to others” failed to provide either reasonable suspicion or probable cause under the Fourth Amendment. See also United States v. Cole, 628 F.2d 897, 899 (11<sup>th</sup> Cir. 1980) (“[m]ere presence neither obviates nor satisfies the requirement

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4. As the district court held, wandng protesters with magnetometers constitutes a Fourth Amendment search. V1-R11-4; United States v. Vega-Barvo, 729 F.2d 1341, 1346 (11<sup>th</sup> Cir. 1984); United States v. Cyzeweski, 484 F.2d 509 (11<sup>th</sup> Cir. 1973); see also United States v. Epperson, 454 F.2d 769, 770 (4<sup>th</sup> Cir. 1972) (“Indeed, that is the very purpose and function of magnetometer: to search for metal and disclose its presence in areas where there is a normal expectation of privacy.”).

of [reasonable suspicion]). “Each [person is] clothed with Constitutional protections against an unreasonable search or an unreasonable seizure” and each must have “individualized protection separate and distinct from” the conduct of others. 444 U.S. at 91; Swint v. City of Wadley, 51 F.3d 988, 996-97 (11<sup>th</sup> Cir. 1995) (mass search not “even arguabl[y]” constitutional after Ybarra).

Absent individualized suspicion, mass searches are unconstitutional unless they fall within one of the specifically delineated and “closely guarded categor[ies] of constitutionally permissible suspicionless searches.” Chandler, 520 U.S. at 309; Edmond, 531 U.S. at 37. The Supreme Court has carefully carved out “limited circumstances in which the usual rule does not apply” for situations where there are “special needs, beyond the normal need for law enforcement.” Id. The Court has emphasized their narrow scope, warning that “without drawing the line . . . the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life.” Id. at 42. The Supreme Court has recognized only five exceptions where mass searches, even minimally intrusive ones, are permitted:

(1) fixed Boarder Patrol checkpoints where “the flow of illegal aliens cannot be controlled effectively at the border,” United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976);

(2) motor vehicle checkpoints for a “small[] class of offenses” that create “an

immediate, vehicle-bound threat to life and limb,” Edmond, 531 U.S. at 43;<sup>5</sup>

(3) drug testing for certain “closely regulated” businesses where the “expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety,” Skinner v. Railway Labor Execs. Assoc., 489 U.S. 602, 627 (1989);

(4) drug testing in public schools, where there was an “immediate crisis” of “epidemic proportions” involving drug use by students, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 658-64 (1995); and

(5) airports and courthouses, “where the risk to public safety is substantial and real.” Chandler, 520 U.S. at 323, 309.

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5. Sobriety stops were justified because “drunk drivers cause an annual death toll of over 25,000,” Michigan Dept. of State v. Sitz, 496 U.S. 444, 451 (1990), and the program was “aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways.” Edmond, 531 U.S. at 39 (emphasis added).

**There is no exception to the requirement of individualized suspicion for non-violent demonstrations or general public safety.** In fact, recently the Supreme Court explicitly rejected a similar expansion when it held unconstitutional a fixed motorist drug checkpoint where “the primary purpose was to detect evidence of ordinary criminal wrongdoing.” Edmond, 531 U.S. at 41. The Court explained: “We are particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends.” Id. at 43. Like Edmond, this case plainly does not involve one of the narrow, recognized exceptions to individual suspicion -- and searches devoid of such suspicion are unconstitutional. This Court should reverse the district court’s new and boundless exception for non-violent protests.<sup>6</sup>

**A. The District Court’s New Exception Allowing Mass Searches at Non-Violent Demonstrations Does Not Meet the “Special Need” Requirement**

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6. “Where a Fourth Amendment intrusion serves special governmental needs,” Sitz, 496 U.S. at 449, the court must balance “the gravity of the public concerns served by the [search], the degree to which the [search] advances the public interest, and the severity of the interference with individual liberty.” Brown v. Texas, 443 U.S. 47, 50-1 (1979); see Edmond, 531 U.S. 32; Merrett v. Moore, 58 F.3d 1547, 1552 (11<sup>th</sup> Cir. 1995); United States v. Herzbrun, 723 F. 2d 773 (11<sup>th</sup> Cir. 1984).

Each of the established exceptions to individual suspicion involved a “special need” that was “substantial – important enough to override the individual’s acknowledged privacy interest [and] sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion.” Chandler, 520 U.S. at 318. The district court, however, did not indicate how non-violent protests necessitate a new “special needs” exception. V1-R11-5.

According to the district court, even though the evidence showed that no one had ever been arrested for violent acts and no weapons had ever been seized, the government could dispense with individual suspicion because the protesters have a “past history of disrespect for the law, combined with the irrefutable fact that the leaders of the SOAW cannot possibly control the number of participants expected to attend this year’s demonstration.” V1-R11-4. Those concerns fall well short of creating a “special need” beyond the normal need for law enforcement. The district court provided no explanation whatsoever for why nonviolent “disrespect for the law” (trespassing, sit-ins, and the like) created a likelihood of or a need to search for “dangerous devices.” V1-R11-4-6 Nor did the Court explain why a decade-plus non-violent protest that has involved over 100,000 participants -- devoid of arrests for violence, weapons, and threats -- would justify a mass search for weapons. 1

**The established exceptions for mass searches require proof of a history of violence**

The district court may have leaped to mass searches at protests from the airport/courthouse exception, but this exception is predicated on prior violent activities, such as hijackings, bombings, and murders.<sup>7</sup> Dowling v. Kunzig, 454

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7. The Eleventh Circuit “has recognized that airport security checkpoints . . . [are allowed] due to the intense dangers of air piracy.” Herzbrun, 723 F.2d at 775. “[C]ritical zones’ in which special fourth amendment considerations apply,” airports and courthouses have nevertheless experienced “unprecedented violence” including “death and or serious injury to a number of citizens caused by inherently lethal weapons or bombs.” Collier v. Miller,

F.2d 1230, 1232 (6<sup>th</sup> Cir. 1972) (threats were “direct and immediate and likely to materialize into acts of violence and destruction”). Searches at a non-violent rally cannot be justified under this exception.

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414 F. Supp. 1357, 1362 (S.D. TX. 1976) (citing “the wake of unprecedented airport bombings, aircraft piracy, and courtroom violence”); United States v. Albarado, 495 F.2d 799, 803, 900 (2d Cir. 1974). Courts have noted forty hijackings and attempted hijackings in one year, id. at 900, “bomb threats and bomb attacks,” McMorris v. Alioto, 567 F.2d 897, 900 (9<sup>th</sup> Cir. 1978), “firearms alleged and real used in 117 incidents,” Albarado, 495 F.2d at 804, and an incident where “terrorists kidnaped three jurors and a state prosecutor and killed a superior court judge.” McMorris, 567 F.2d at 900. All of these searches were necessary to “protect sensitive facilities from a real danger of violence.” McMorris at 899.

Only a few courts have even considered extending the airport/courthouse exception to other contexts and **none** have extended the exception to situations lacking an imminent likelihood of violence or serious physical harm.<sup>8</sup> And, even for rallies with a history of violence, courts have generally declined to retreat from the ingrained individual suspicion requirement. See Attachment A (collecting cases).

In Norwood v. Bain, 143 F.3d 843 (4<sup>th</sup> Cir. 1998), aff'd in part and rev'd and remanded in part, 166 F.3d 243 (1999) (en banc), the Fourth Circuit held *unconstitutional* a mass search where two rival motorcycle gangs involved in an

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8. The Defendants rely upon Grider v. Abramson, 180 F.3d 739 (6<sup>th</sup> Cir. 1999), as support that the search does not violate the Fourth Amendment. Grider explained that the Fourth Amendment issue was not before it, id. at 749 n.14, but in dicta, dismissed a Fourth Amendment claim. Id. Important to note, however, is that the groups involved in the Klan rally and the counter-protests had publicly threatened violence and had hidden weapons in the protest area for use at the rally. See id. at 743. One group actually “proclaimed that new recruits would be required as an initiation rite, to commit a serious crime at the Klan rally.” Id. at 744. According to police, such a crime was likely to involve “the slaying of a police officer.” Id. This case will be discussed more fully in the First Amendment section *infra*.

“ongoing territorial struggle” planned to attend and planned to fight at the rally.

According to the court:

- ★ there were “two violent altercations between the groups in recent months . . . both of which resulted in physical injuries”;
- ★ “a confrontation was planned” at the event in question;
- ★ the gangs were known for carrying weapons so that gang experts could identify their “weapons of choice.” Id. at 846.

Nevertheless, the court rejected mass, suspicion-free searches because the “reality and imminence of any violence threatened here was not a matter of documented public record, but was based on only anecdotal, necessarily speculative information.” Id. at 853. The Fourth Circuit also found that the government’s argument to extend the airport exception “breaks down at every critical point.” Id. at 852 (airport search exception “was a carefully constrained special exception of quite narrow scope” that “addressed on-going risks or threatened risks of violence”). Thus, even a planned violent confrontation was not enough for the Fourth Circuit to extent the airport exception.<sup>9</sup>

In Wilkinson v. Forst, 832 F.2d 1330, 1339 (2d Cir. 1987), the Second Circuit

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9. And, even though the plaintiffs did not challenge the police practice of stopping rally participants at the entrance to the rally, the court suggested that such a challenge would succeed: “We observe, however, that the situation presented by the merely suspected threat of violence at a local event differs significantly from” the “special needs” cases identified by the Supreme Court. Norwood, 143 F.3d at 849 n.3.

also rejected mass pat-down searches (but reluctantly allowed mass magnetometer searches) against an overwhelming record of repeated and savage incidents of Klan violence and future, definite plans to commit violent acts:

- ★ at least three of the Klan rallies considered by the court included attacks on protest participants and police officers with rocks, bottles, bricks, and other weapons;
- ★ at one rally, “one female Klan member suffered head lacerations and injuries to the skull, while another was rendered semiconscious by a blow to the head,” at another rally, “twenty-six policemen, six Klansmen, and one bystander received injuries,” and at yet another rally “[t]hree officers and one Klansman were treated for injuries”;
- ★ at more than one rally, “fist fights broke out”;
- ★ at one rally, a person used a bullhorn to advocate violence;
- ★ “in the course of publicizing its rallies, the Klan made known its intention to arm its members for purposes of self-defense”; and
- ★ at just one of the sixteen Klan rallies before the court in Wilkinson, a search revealed seven firearms, fifty-four rounds of ammunition, forty-one knives, two swords, two machetes, five baseball bats, three pieces of pipe, eight lengths of chain, two cans of mace, three sling shots, one set of weighted knuckles, a detonator, and a number of clubs.”

Id. at 1333-36 (see Attachment A for full record of violent acts and threats). Even

with this overwhelming evidence of imminent danger, the court held that “the mass pat-down searches conducted at these Klan rallies went beyond the bounds established by the fourth amendment,” *id.* at 1340, but the court held that on that record “magnetometer searches are justified for the specific purpose of keeping firearms away from rallies, and reliance must be placed upon different techniques (adequate police, separation of hostile forces, site selection and preparation, etc.) to deal with the other challenges to safety and order.” *Id.* at 1341.

In contrast, there is neither a history nor a threat of violence at the SOAW event -- (1) *“No evidence is found in the record to show a history of physical violence resulting in personal injuries associated with the SOAW demonstration,”* V1-R11-4; V2-R1-47, 48, 79, 98, 99, 115, 139; (2) *no guns, knives or weapons of any kind have ever been seized at SOAW protests,* V2-R1-130; (3) *there have been no arrests or complaints of violent crimes or activities at the protests,* V2-R1-79; and (4) *no opposition groups, counter-protesters, or affinity groups have ever engaged in violence at the protest,* V2-R1-47, 48, 64, 72-73, 134. Indeed, the demonstrators

very message is global peace and non-violence. V2-R1-42, 75.<sup>10</sup>

The peaceful SOAW demonstration cannot be credibly compared to the real and proven threats of terrorism at airports and courthouses or to the documented, savage violence reported at the Klan and motorcycle rallies. There is no justification, therefore, for a mass search: “[W]here, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.” Chandler, 520 U.S. at 323.

2. **The Government’s true concern consists of no more than preventing “disrespect for law” through non-violent, civil disobedience**

The district court’s clear focus on SOAW’s non-violent “disrespect for the law”

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10. SOAW even takes steps to ensure that the demonstration remains non-violent. First, at various times during the weekend long protest, the protestors recite and agree to adhere to a pledge of non-violence. V2-R1-38, 41,42, 43. The pledge states that the participants “will not assault -- either verbally or physically -- those who oppose or disagree with us . . . even if they assault us,” they “will protect those who oppose us from insult or attack,” and that they “will carry no weapons.” V1-R1-Affidavit of Bourgeois at 3, 9; V2-R1-74. SOAW also asks participants to attend SOAW sponsored “non-violence training sessions” before attending the protest, V2-R1-41, 42, and it sponsors an orientation session where the protestors learn about the event and, again, recite the pledge of non-violence. V2-R1-42, 75. Finally, 300-500 peacekeepers, who are trained and have experience in nonviolence, attend the demonstration to maintain the peace. V2-R1-46, 47, 65.

demonstrates nothing more than a general crime control rationale. V1-R11-4 But in Edmond, the Supreme Court held that suspicion-free roadblocks set up to “interdict unlawful drugs” were unconstitutional where the “primary purpose was to detect evidence of ordinary criminal wrongdoing.” 531 U.S. at 38. Permitting a mass search for general criminal detection purposes would give “the authorities [power] to construct roadblocks for almost any conceivable law enforcement purpose.” Id. at 42.

The district court justified a mass search for weapons based on past episodes of what it claimed were “complete disrespect for the law” -- non-violent civil disobedience by a handful of protesters that did not even involve weapons. V1-R11-4. If concerns about trespassing, and blocking of right of ways could justify a mass search, any large crowd or assembly would also be subject to such a suspicion-free search. Moreover, generalized concerns about crime control are not sufficient because, as Edmond held, “the detection and punishment of almost any criminal offense serves broadly the safety of the community . . . [but] only with respect to a smaller class of offenses” may a suspicion-less search be justified. 531 U.S. at 43.

Edmond follows an instructive line of cases finding that mass, suspicion-free searches at rock concerts were unconstitutionally designed to prevent ordinary criminal wrongdoing. Law enforcement sought to prevent “property damage, personal injury, alcohol, drugs, and general rowdiness” at concert stadiums, Stroeber v. Commission Veteran’s Auditorium, 453 F. Supp. 926 (S.D. Iowa 1977), but courts rejected mass searches even where the record showed “unruly behavior,” assaults on police officers and the performers, and the confiscation of guns, assorted knives and other weapons at concerts. Wheaton v. Hagan, 435 F. Supp. 1134, 1140 (M.D. N.C. 1977); Gaioni v. Folmar, 460 F.Supp. 10 (M.D. Ala. 1978).

In the thirteen year history of the protest, the Defendants can only cite to one incident of an arguably violent nature—the throwing of feces at a minister by someone not even involved in the protest. All other actions—trespassing, blocking traffic, and four women exposing their breasts—were non-violent. V2-R1-100, 126. This small handful of incidents, in thirteen years and with over 100,000 protesters, does not create a need beyond that of normal law enforcement tactics. Edmond, and the Fourth Amendment it interprets, prohibit the seemingly limitless new expansion of mass, suspicion-free searches endorsed by the district court.

A. **The Mass Searches are Ineffective**

Even if the Defendants could demonstrate a sufficient public need for a mass search, “[n]ecessity alone . . . whether produced by danger or otherwise, does not in itself make all non-probable-cause-searches reasonable.” United States v. Skipwith, 482 F.2d 1272, 1275 (5<sup>th</sup> Cir. 1973).<sup>11</sup> The Court must next examine whether the search is a sufficiently productive mechanism to justify the intrusion upon the Fourth Amendment. Delaware v. Prouse, 440 U.S. 648, 658 (1979); Merrett v. Moore, 58 F.3d 1547, 1551 (11<sup>th</sup> Cir. 1995); Skipwith, 482 F.2d at 1274. The district court failed to even make such an inquiry. See Prouse, 440 U.S. at 659 (considering alternative mechanisms available, common sense, and the lack of

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11. “[N]o court has ever approved a dragnet search of all citizens in a high crime area of any urban center, based upon the justification that the danger of criminal conduct would be reduced.” Skipwith, 482 F.2d 1275 n. 4.

empirical data indicating that the searches were effective); Michigan Dept. of State v. Sitz, 496 U.S. 444, 451 (1990).<sup>12</sup> The mass search in question is ineffective under this inquiry. First, the government instituted a magnetometer search with the magnetometers set on their lowest level in an alleged search for a “gun or a large knife,” V2-R1-98, 112, 129; see also V1-R11-5 (search “aimed at detecting dangerous devices”). Yet, according to the Defendant’s expert on magnetometers, officers looking for such items would use a high setting to find such objects: “If you were going to use it on a suspect with—and you were looking for a gun specifically and in an arrest situation is where we usually use it, it would be set on high, and of course, the search would be much more intrusive.” V2-R1-112. The searches here cannot be considered effective, as they were not even appropriate to discover the contraband the government seeks.

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12. Airport magnetometer searches are considered effective because they “detect the ‘overwhelming majority’ of items searched for and consequently caused a significant decline in” the behavior the government sought to prevent. Ringe, 624 F. Supp. at 423 (quoting Folmar, 468 F. Supp. at 14). Checkpoint cases have upheld stops where the “hit rate” is significant. Sitz, 496 U.S. at 462 (an arrest rate of 1.6 percent); Merrett v. Dempsy, 1992 WL 700220 (N.D. Fla. May 18, 1992), aff’d sub nom, 58 F.3d 1547 (11<sup>th</sup> Cir. 1995) (4.6 percent).

Second, although the Defendant's witnesses cited incidents that they claim justified their need to search the protesters, by their own concessions all but one of these incidents could not be stopped by the magnetometer search.<sup>13</sup> See V2-R1-100, 149-50. The mass search for items that had never before been seized in 13 years of demonstrations (and which, were not seized in 2002 even with mass magnetometer searches) cannot be considered effective.

This mass search violates the Fourth Amendment because the Government unquestionably lacked individualized suspicion, there was no proven "special need," and the searches were ineffective.

II **MASS SEARCHES IMPEDING ENTRY TO SOAW'S NON-VIOLENT DEMONSTRATION WERE UNPRECEDENTED, CONTENT BASED AND ABRIDGED THE FIRST AMENDMENT**

Until the district court's decision, no federal or state court had ever permitted mass searches of attendees at a non-violent demonstration under the First Amendment either. The district court's unprecedented decision veers far from well-established public forum analysis and imposes a new burden on political expression.

"[U]se of the streets and public places has, from ancient times, been part of the

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13. The only incident the defendants claim could be prevented by the search is the existence of a smoking device, which Defendants admit was a nonviolent incident. V2-R1-125.

privileges, immunities, rights and liberties of citizens." Hague v. CIO, 307 U.S. 496, 515 (1939). "[S]treets are natural and proper places for the dissemination of information." Schneider v. State, 308 U.S. 147, 163 (1939). "[O]ne who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion." Jamison v. Texas, 318 U.S. 413, 416 (1943); United States v. Gilbert, 920 F.2d 878 (11th Cir. 1991).

Public streets and parks occupy a "special position in terms of First Amendment protection," United States v. Grace, 461 U.S. 171, 180 (1983), and the government's ability to restrict expressive activity "is very limited." Id. at 177." Boos v. Barry, 485 U.S. 312, 318 (1988). While the use of the public streets and sidewalks may sometimes be regulated, "it must not, in the guise of regulation, be abridged or denied." Hague, 307 U.S. at 516.

A. **Mass Searches of Demonstrators Are Not Permitted Where an Utter Lack of Past Incidents of Violence, Past Weapons Seizures or Threats of Violence at SOAW's Non-Violent Protests Provided No Basis For Finding an Imminent Likelihood of Serious Harm**

SOAW is provocative, but non-violent. "[W]e have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression." Texas v. Johnson, 491 U.S. 397, 409 (1989). Fear of violence can justify restrictions upon speech only if it meets the test set out

in Brandenburg v. Ohio, 395 U.S. 444 (1969). There, a KKK leader was convicted under the Ohio criminal syndicalism statute for advocating violence and “revengeance” after he spoke at a highly-charged rally where a large cross was burned by hooded figures, some of whom were armed with pistols, rifles and shotguns. Id. at 447. A unanimous Court reversed because jurisprudence had “fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force of law violation except where such advocacy *is directed at inciting or producing imminent lawless action and is likely to incite or produce such action.*” Id. (emphasis added); NAACP v. Claiborne Hardware, 458 U.S. 886, 928 (1982) (protester’s threat “we’re gonna break your damn neck” did not “transcend the bounds of protected speech set forth in Brandenburg”).

Under Brandenburg, government impediments to demonstrations must be predicated on a “clear and present danger of imminent violence,” which generally requires more than a showing that “previous violence” occurred:

[E]njoining or preventing First Amendment activities before demonstrators have acted illegally or before the demonstration poses a clear and present danger is presumptively a First Amendment violation. Carroll v. President and Com'rs of Princess Anne, 393 U.S. 175, 180-81 (1968); Laurence Tribe, American Constitutional Law, § 12-34, at 1041 (2d ed. 1987) (collecting cases). The generally accepted way of dealing with unlawful conduct that may be intertwined with First Amendment activity is to punish it after it occurs, rather than to prevent the First Amendment activity from occurring in order to obviate the possible unlawful conduct. Collins v. Jordan, 110 F.3d 1363, 1371-72 (9<sup>th</sup> Cir. 1997) (rejecting

regulations on demonstrations implemented in the days following often violent San Francisco protests in the wake of the Rodney King verdicts).

See also United States v. Baugh, 187 F.3d 1037 (9<sup>th</sup> Cir. 1999) (National Park Service violated the First Amendment by conditioning permission to demonstrate on group's promise not to trespass on nearby property). "As a matter of law, . . . the occurrence of limited violence and disorder on one day is not a justification for banning all demonstrations, peaceful and otherwise, on the immediately following day (or for an indefinite period thereafter)." Collins, 110 F.3d at 1372; Sabel v. Stynchcombe, 746 F.2d 728, 730-31 (11<sup>th</sup> Cir. 1984) ("review of the record casts doubt on the conclusion that police had a sufficient interest in preventing imminent violence to justify restricting appellants' speech").

The City of Columbus conceded that the 13-plus years of large-scale demonstrations by SOAW were marked by a near complete lack of violent incidents, no arrests for violence, not a single seizure of weapons, and not a single threat against the SOAW protest itself. V2-R1-47, 48, 72, 73, 79, 100, 115, 130; V1-R1-Affidavit of Bourgeois at 3, 9. see also Columbus v SOA Watch, No. 4:01-CV-147-3 (HL), slip op. at 14 (M.D. Ga. Nov. 16, 2001) (magistrate finding that SOAW demonstrated for "11 years without permit, without arrests outside of Fort Benning, without incident of bounds, without harm to the community, without anything but perhaps a nuisance to the people in the neighborhood and nuisance to the people who find that to be a nuisance") (V1-R1-Ex1-14). ***This evidence pales by comparison to that presented in similar cases involving government attempts to conduct mass searches of protesters that had a proven history and propensity for brutal, savage violence and life-threatening attacks.***

In Grider v. Abramson, 180 F.3d 739 (1999), the Sixth Circuit examined the propriety of

magnetometer searches at a KKK rally and counter-demonstration that posed a “potentially explosive environment” including:

- ★ violent confrontations at other recent KKK rallies that included “combat, chaos, turmoil, injuries, and multiple arrests”;
- ★ “intelligence” indicating “that certain radical outside agitators which had in the past exhibited violent anti-Klan propensities . . . might infiltrate” this particular march;
- ★ some groups had recently “distributed leaflets in the [city] which advocated confrontation with Klansman at the [upcoming] rally”;
- ★ weapons, including “three brick fragments, as well as six iron rebar rods were found hidden in the courthouse bushes” only two days preceding the rallies;
- ★ a “NAZI” party flier about “protection from threat of harm” was distributed days before the rally; and
- ★ an “urban street gang” affiliated with the Crips had “proclaimed that new recruits would be required, as an initiation rite, to commit a serious crime at the Klan rally.” Id. at 743-44.

While finding that magnetometer searches were presumptively unconstitutional content-based restrictions on speech, the Sixth Circuit, relying upon this extensive, “compelling” evidence of “significant risk of serious violence,” upheld the searches

on an overwhelming factual record. Id. at 749.

Similarly, in another KKK protest, the Second Circuit reviewed the propriety of mass searches “against a . . . background” of “violence . . . and specific information that the rallies at issue could potentially erupt in violence” -- a factual record in another universe from the instant case:

- ★ the KKK’s announced “intention to arm its members for the purposes of self-defense”;
- ★ rallies had included significant violence, injuries, arrests and dangerous weapons including shotguns, rifles, handguns, knives, swords, machetes, mace, sling shots, weighted knuckles, a detonator, baseball bats and clubs, pitchforks, tomahawks, spears, a whip, a flare-launcher, and a wooden stake;
- ★ counter-demonstrators with a “predilection for hostile confrontation with the Klan planned to attend;
- ★ “[r]eliable information from an undercover agent of the United States Treasury Department indicated that [counter-demonstrators] would be armed”; and
- ★ “gunfire emanating from the private property on which the Klan rally was to be held in the days preceding the scheduled rally.”

Wilkinson v. Forst, 832 F.2d 1330-33 (2d Cir. 1987) (Fourth Amendment challenge).

Even with this evidence of serious violence, the Second Circuit rejected mass personal and property searches -- finding that the record of violence was insufficient to justify personal searches. And even against this evidence of savage violence, the government did not even argue "that they have the right to conduct blanket searches . . . at all political rallies where violence is anticipated." Id. at 1337-38. But the Court reluctantly allowed magnetometer searches premised on "the entire record presented here, including the stated intention and practice of the Klan to bring firearms to their rallies, the fact that a multitude of rifles and shotguns were brought by Klan members . . . and the continuing potential for violent confrontations at these events." Id. at 1341. See also Norwood v. Bain, 143 F.3d 843, 845-46, 853 (4<sup>th</sup> Cir. 1998), aff'd en banc, 166 F.3d 243 (4<sup>th</sup> Cir. 1999) (Mass search impermissible even though record showed "ongoing territorial struggle" between "two rival motorcycle gangs [where violence was] threatened" and "planned," and "episodic violence" and "two violent altercations between the groups in recent months ... resulted on physical injuries." Absent "probable cause" and "individual suspicion" the "reality and imminence of any violence threatened here was not a matter of documented public record, but was based on only anecdotal, necessarily speculative information."). **Thus, until the district court's opinion, no federal or state case has**

**ever allowed mass searches of non-violent demonstrators.**

The City's primary reference point for its public safety concerns is world conditions in the wake of 911 -- the same rationale that the City unsuccessfully advanced in seeking a prior restraint against the demonstration itself in 2001. V1-R1-Ex1-3. But where a government relies upon "the existence of terrorism in the world generally . . . or other threats of violent attacks ... unrelated to incidents in the [area of a protest]," it simply "is not free to foreclose expressive activity in public areas on [such] mere speculation about danger." Bay Area Peace Navy v. United States, 914 F.2d 1224, 1227-28 (9th Cir. 1990). Nor are organizers shouldered with the impossible responsibility to ensure the conduct of all participants:

Organizers of protests ordinarily cannot warrant in good faith that all participants in a demonstration will comply with the law. Demonstrations are often robust. No one can guarantee how demonstrators will behave throughout the course of the entire protest. Baugh, 187 F.3d at 1043. Compare V1-R11-4 (district court finding that mass searches justified in part because "SOA Watch cannot possibly control participants").

Certainly the City of Columbus is not required to show "an actual terrorist attack or serious accident" will occur, but the factual record in this case is simply not

sufficient to justify the City's unprecedented mass searches of non-violent demonstrators. Id.; see also Baugh, 187 F.3d at 1045 (Silverman, J., concurring) (“Although it is difficult to articulate when threatened [civil disobedience] might create such a clear and present danger to public safety . . . Sunday in the park with Sister Bernie was not such a case”).

**B. The Mass Search Policy is Content Based and Presumptively Unconstitutional**

The district court's errors in First Amendment analysis were not limited to its unprecedented misapplication of Brandenburg and its progeny to allow mass searches at a non-violent protest. The district court also erred in basic public forum analysis. The regulation here was adopted for and focused only on this protest. It was content based. Yet the district court's one-sentence analysis of content neutrality found that the “this-protest-only” burden on speech was content neutral because “everyone will be searched in the same manner.” V1-R11-4. That all protesters at a particular demonstration are treated equally is not the test for content neutrality. Rather, the test is whether this demonstration was treated differently from other demonstrations and other similar events.

In Forsyth County v. Nationalists Movement, the Supreme Court grappled with an ordinance that was designed to address “public safety” concerns and the public safety costs associated with a series of protests and often violent counter-demonstrations in Forsyth County, Georgia. 505 U.S. 123 (1992). “As a direct result” of these demonstrations, Forsyth County enacted the ordinance that allowed for assessment of a permit fee based upon the size of a protest or hostility of onlookers. Reversing the Eleventh Circuit decision that upheld the ordinance, and finding the ordinance impermissibly content based, the Court held:

The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based upon its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit. . . . [The County] contends that the ordinance is content neutral because it is aimed only at a secondary effect -- the cost of maintaining public order. It is clear, however, that, in this case, it cannot be said that the fee's justification "has nothing to do with content. . . ." Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob. Id. at 134-35.

The Court continued: "This Court has held time and again: 'Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.'" Id. (citation omitted).

Like Nationalist Movement, the regulation here was aimed at "maintaining public safety," V1-R11-2; V2-R1-97, but was nevertheless drafted "as a direct result" of the SOAW protests. V1-R1-ExB; V2-R1-98, 54-55. The Sixth Circuit, relying on Nationalist Movement, held that a mass magnetometer search of demonstrators was a content-based regulation of speech:

At a superficial glance, the assaulted magnetometer searches appear to constitute content-neutral time, place and manner restrictions narrowly crafted to serve significant public interests in the maintenance of public safety, security, and order, including the physical protection of rally participants, spectators, passers-by, and law enforcement personnel; as well as preservation of the free speech and assembly rights of rally institutors and participants. . . . [E]very person entering the restricted area was searched in the same manner for the same facially content-neutral reason. Nevertheless, the Supreme Court has dictated that government regulation of speech or assembly activities by speakers, motivated by anticipated *listener reaction* to the *content* of the implicated communication is *not* content neutral. . . . Similarly, government regulation of the speech, assembly, or association activities of members of a public speaker's audience, when triggered by fears of hostile listener response to

the content of that speech, is not content neutral. 180 F.3d at 747-49 (citing Nationalist Movement) (emphasis in original).

The City of Columbus adopted and imposed a metal detector search policy impeding this protest, and this protest only, despite its 13+ year non-violent history. The City also concedes that it does not use metal detectors at many other sporting events where violent acts had *in fact* occurred. V2-R1-81-85, 103. Its decision to burden this protest with mass searches as a precondition for entry is directly related to SOAW's message, the zeal of its expression, and the reactions of others.<sup>14</sup>

Last year, the City of Columbus was found to have sought an unconstitutional, content-based, prior restraint against this annual SOAW demonstration. City of Columbus, slip op. at 14-15 (“This is not content-neutral. The only people you seek to enjoin from this property, from this parade, from this march are people who have a political difference of opinion with the Government, which is protected by the First Amendment. And the Only people sought to be enjoined are the SOA Watch people....It is directed absolutely toward the political grievance wished to be demonstrated

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14. See V2-R1-83 (“a special relationship created in this particular event here”); V2-R1-83 (“the mood of the crowd”); V1-R7-5 (“the size of the expected crowd”); V2-R1-102 (“the environment that’s being created”); V2-R1-102 (“the messages that are being implicated across the Web site”); V2-R1-123-25 (“the intensity and volume of the crowd [and its] frenzied level”); the non-violent civil disobedience that has occurred in the past (without any hint of weapons or violence); and a single prior incident where a counter-demonstrator reacted to the SOAW protest by throwing feces.

publicly by the SOA Watch, so it does not meet the content-neutral requirement of the law to allow the local government to restrict that activity.”) V1-R1-ExA-14-15. Defendants’ special rules for SOAW’s demonstration this year again fail the content neutrality test. Under Forsyth, and consistent with the analysis in Grider, the magnetometer search policy directed at this demonstration *only* was a content-based and “presumptively unconstitutional.” R.A.V. v. City of St. Paul, 505 U.S. 377, 382, 391 (1992).

C. **The District Court's Public Forum Analysis is Flawed**

The district court's failure to analyze the ordinance as a presumptively unconstitutional, content-based regulation of speech led to diminished review of the public forum requirements. Although the district court correctly stated the traditional public forum test of compelling interest and narrow tailoring, it applied the test improperly.

The district court noted that "there is a compelling government interest to maintain public safety, security, and order, which includes physical protection of demonstration participants, spectators, passers-by and law enforcement." V1-R11-3; But see City of Columbus, slip op. at 17-18 ("The City's governmental interest in this situation does not appear clearly to me at all. It appears to me that the City, in all patriotic burden . . . is trying to protect the United States Army at Fort Benning. My Position in their respect is: If they cannot protect themselves against these weak SOA Watch people, they are in serious trouble that you can't help them with anyway. It's not the City's duty or responsibility to protect the federal installation....Should anything harmful or untoward happen there, the Army will full well take care of it by whatever degree of force is necessary") V1-R1-ExA-17-18. The mere recitation of an abstract compelling interest, however, is not enough: "This burden is not satisfied by mere speculation or conjecture; rather the governmental body must demonstrate that the harms it recited are real and that its restriction will in fact alleviate them to a material degree." Edenfield v. Fane, 507 U.S. 761, 770-71 (1993) ("the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose"); Simon & Shuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 120 (1991); Arkansas Writer's Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987). If an abstract compelling interest is not advanced materially by the regulation of speech, the regulation fails.

Carey v. Brown, 447 U.S. 455, 465-67 (1980); Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 566 (1980) (in commercial speech case, regulation must “directly and materially advance the government interest”).

In Bay Area Peace Navy, the government sought to create a security zone where demonstrators were prohibited. 914 F.2d at 1227. Although both the government’s interest “in protecting public and navy officials from attack” and “marine safety” were significant, the Ninth Circuit found that the zone was not “essential to serve security interests.” Id. Similarly, in Norwood and Wilkinson, mass personal searches were rejected even where factual records provided some significant, but not compelling, support for the public safety rationale. Mass searches may “not [be] necessary or even particularly helpful in preventing violence at . . . rallies,” 832 F.2d at 1338, and the low-level magnetometer searches here proved particularly weak. T57, 108. See Sabel, 746 F.2d at 730-31.

While the government always has an interest in public safety, the factual record in this case does not even come close to overcoming the strong presumption of unconstitutionality. See also Richard Hyatt, "More than 90 Jailed After Peaceful Protest: Points of View Clash After 'Uneventful' Demonstration" Columbus Ledger Enquirer, Nov. 18, 2002 (Columbus Police Department stating that 2002 demonstration, with mass searches, proved "uneventful, nothing out of the ordinary" and Fort Benning officials reflecting that "This is America at its finest"). It is hard to imagine 100,000 persons gathering anywhere over a 13 year period with the track record that matches that of SOAW -- no violence, no weapons, and no threats. These non-violent protesters are not the hooded and violent hate groups of Grider or Wilkinson or members of vicious, warring motorcycle gangs in Norwood. They should not be treated as such, and certainly not treated worse. If this Court upholds

mass searches of these non-violent protesters, what is next?

III **THE DISTRICT COURT ERRED BY EXCLUDING FINDINGS  
SUBJECT TO COLLATERAL ESTOPPEL**

The district court refused to consider any part of the findings in a prior case between the same parties where the City of Columbus unsuccessfully sought to obtain a prior restraint against the 2001 SOAW demonstration based upon supposed fear of violence. V2-R1-33-34, 50 (refusing to consider prior order). See Supra at 6, 26, 34, 35 (relevant references to findings in prior litigation). The district court erred in refusing to consider, under collateral estoppel, the prior court's findings as a result of a full-day hearing regarding two relevant issues (1) lack of any violence at prior demonstrations involving SOAW and (2) the City's content-based motivation to deter protected expression. Citibank, N.A. v. Data Lease Fin Corp., 904 F.2d 1498, 1501 n. 6 (11<sup>th</sup> Cir. 1990); see also Schiro v. Farley, 510 U.S. 222, 232 (1994).

**CONCLUSION**

For the reasons set forth above, Appellants respectfully request that this Court vacate and reverse the decision on the district court.

DATED: This the \_\_\_\_\_, day of February, 2003.

Respectfully submitted,

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UNITED STATES COURT OF THE APPEALS  
FOR THE ELEVENTH CIRCUIT

School of Americas Watch, et al

versus

Case No. 02-16886-CC

Consolidated Government of  
Columbus, Georgia

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing BRIEF OF APPELLANTS and  
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DATED this the \_\_\_th day of February, 2003.

Gerald Weber

## Appendix "A"

	<u>Wilkinson</u>	<u>Grider</u>	<u>Norwood</u>	<u>SOAW</u>
<b>Previous Violent Acts</b>	<p>(1) At one rally, members of a second counter-protest group "attacked people in the area outside the rally site with fists, rocks, sticks, and flagpoles, resulting in injuries to a number of persons."</p> <p>(2) "As Klan members arrived at the protest areas they were attacked with rocks and bottles thrown by anti-Klan forces."</p> <p>(3) "A person with a bullhorn advocated violence against the Klan and police."</p> <p>(4) "Fist fights broke out" at more than one rally.</p> <p>(5) As the police escorted the Klan out of the area, both police and Klan members were pelted with "rocks, bottles, boards, clubs, and bricks."</p> <p>(6) "Two people used a building block to strike the plaintiffs daughter on the back."</p> <p>(7) "A Klansman attempted to draw a revolver from his coat pocket."</p> <p>(8) "Twenty-six policemen, six Klansmen, and one bystander received injuries" at one rally.</p> <p>(9) "Three officers and one Klansman were treated for injuries" at another rally.</p> <p>(10) At more than one rally, "many of the officers were hit with rocks and bricks" and "tin cans."</p> <p>(11) "One female Klan member suffered head lacerations and injuries to the skull while another was rendered semi-unconscious by a blow to the head."</p>	<p>(1) "Some recent Klan rallies in other cities had incited hostile reactions by offended spectators."</p>	<p>(1) "Two violent altercations between the groups in recent months . . . both of which resulted in physical injuries."</p>	<p>(1) The throwing of feces at a minister by someone not even involved in the protest. V2-R1-63, 99, 150.</p> <p>(2) <b>There were no other incidents of violent acts in 13 years.</b> V1-R1-Ex1-1; V1-R11-4, V2-R1-47, 48, 79, 98, 99, 100, 115, 139.</p>
	<u>Wilkinson</u>	<u>Grider</u>	<u>Norwood</u>	<u>SOAW</u>
<b>Violent</b>	(1) Police searches discovered found 54	(1) One group hid "one	(1) The gangs were	<b>NONE.</b> V2-R1-47, 48,

<p><b>Weapons Found</b></p>	<p>rounds of ammunition, 7 firearms, 30 rifles, 1 machine gun, 2 pellet guns, and 1 BB gun. 68 knives, numerous pocket knives, 2 swords, 8 machetes, 4 pipes, 9 lengths of chain, 3 sling shots, 1 set of weighted knuckles, 7 axes, 23 arrows, 15 shells, 2 hatchets, 5 sheaths, 4 tomahawks, 2 shillelaghs, 4 rubber hose pieces, 3 tear gas containers, 2 spears, 2 pitchforks, 1 metal pike, 1 blackjack, 1 crossbow, 1 whip, 1 flare-launcher, 1 wooden stake, 1 pick, 1 ice pick, 1 steel bar, a detonator, mace, claw hammers, tire irons, scissors, razors, screwdrivers, bottles, fists, rocks, sticks, flagpoles, tin cans, boards, bricks, a number of clubs, numerous baseball bats, and a number of ax or hammer handles.</p> <p>(2) Police also recovered about thirty shotguns and rifles.</p>	<p>whole brick plus three brick fragments, as well as six iron rebar rods,” in the courthouse bushes, so that they could use them when they arrived at the rally.</p>	<p>known to carry weapons so much so that the experts could identify the gangs’ “weapons of choice.</p>	<p>64, 71-73, 79, 125, 130, 132; V2-R1-Affidavit of Roy Bourgeois ¶¶ 3, 4, 9.</p>
<p><b>Specific Threats of Violence</b></p>	<p>(1) “Klan members expressed an intention to arm themselves.”</p> <p>(2) The plaintiffs’ “armed bodyguards were scheduled to attend the rally.”</p> <p>(3) Federal intelligence reported that one group of protesters “would be armed . . . and ready to attack Klansmen.”</p> <p>(4) “Several neighborhood residents heard gunfire emanating from the private property on which the Klan rally was to be held in the days proceeding the scheduled rally.”</p> <p>(5) The Klan, “in the course of publicizing its rallies, made known its intention to arm its members for self-defense.”</p>	<p>(1) “Louisville authorities received intelligence from local citizens, including [the counter protest] organizers, that certain radical outside agitators which had in the past exhibited violent anti-Klan propensities, . . . might infiltrate the Klan rally.”</p> <p>(2) Counter protesters with a history of violence “distributed leaflets in the Louisville region which advocated confrontation with the Klansmen at the rally.”</p> <p>(3) A second group of counter protesters had smuggled weapons into the protest area before the rally date.</p> <p>(4) An urban street gang “had proclaimed that new recruits would be required as an initiation rite, to commit a serious crime at the Klan rally.”</p>	<p>(1) “Reserve officer” reported that a “confrontation was planned” and that gangs intended “to drop their colors” so that they could not be identified.</p>	<p><b>NONE.</b> V2-R1-47, 48, 72-73, 79.</p>
<p><b>General History of Violence</b></p>	<p>(1) “Some of these groups had a predilection for hostile confrontation with the Klan and the police.</p> <p>(2) One of the counter protest representatives claimed that its members are “almost duty bound” to shoot a Klansman if they have the opportunity.</p>	<p>(1) A citizen of the town Had recently shouted racial epithets at two African Americans and fired five gun shots at them.</p>	<p>(1) An expert on motorcycle gangs said that the gangs were engaged in an “ongoing territorial struggle for ‘control.’”</p>	<p><b>NONE.</b> V1-R1-Ex1-14; V1-R11-4, V2-R1-47, 48, 72-73, 79, 98, 99, 100, 115, 139.</p>

