

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF PUERTO RICO

3 ASOCIACIÓN DE PERIODISTAS DE
4 PUERTO RICO, et al.,

5 Plaintiffs,

6 v.

7 ROBERT MUELLER, Director
8 of the Federal Bureau of
9 Investigation, et al.,

10 Defendants.
11

Civil No. 06-1931 (JAF)

12 **OPINION AND ORDER**

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

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

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

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

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

11 **I.**

12 **Factual and Procedural Synopsis**

13 We derive the following facts from Defendants' and Plaintiffs'
14 motions, statements of material facts, and exhibits. (Docket Nos. 38,
15 39, 41, 46, 50, 52, 53, 54, 55, 56, 58, 64, 86, 87, 88, 89, 90, 100,
16 101, 102, 125, 126, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152,
17 153, 154, 155, 156, 157, 164, 169.) Unless otherwise indicated, facts
18 contained herein are undisputed.

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

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

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

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

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

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

17 When Plaintiffs and other members of the press, local University
18 of Puerto Rico students, and the general public heard that the FBI
19 was executing a search warrant at the condominium complex, they
20 gathered outside the complex. The first onlookers arrived at around
21 11:00 a.m. Members of the press set up outside the fence behind the
22 apartment complex's pedestrian gate. Between 11:00 a.m. and
23 2:00 p.m., the reporters and protesters did not enter the gated
24 grounds of the building.

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

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

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

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

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

1 discharged by showing that there is an absence of evidence to support
2 the non-movant's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325,
3 331 (1986). The burden has two components: (1) an initial burden of
4 production, which shifts to the non-movant if satisfied by the
5 movant; and (2) an ultimate burden of persuasion, which always
6 remains on the movant. Id. at 331.

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

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

19 **III.**

20 **Analysis**

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

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

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

3 **A. Qualified Immunity**

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

8 Qualified immunity protects state officials from the burden of
9 standing trial or facing other onerous aspects of litigation.
10 Saucier v. Katz, 533 U.S. 194, 200 (2001). The test to determine
11 whether Defendants are entitled to qualified immunity has two parts:
12 "(1) whether the facts alleged or shown by the plaintiff make out a
13 violation of a constitutional right; and (2) if so, whether the right
14 at issue was 'clearly established' at the time of the defendant's
15 alleged violation." Maldonado v. Fontañes, 568 F.3d 263, 268-69 (1st
16 Cir. 2009) (citing Pearson v. Callahan, ___ U.S. ___, 129 S. Ct. 808,
17 815-16 (2009)). The second step of the Pearson inquiry has two parts:
18 First, whether the law was sufficiently clear and, second, whether,
19 under the facts of the particular case, a reasonable defendant would
20 have known that his conduct violated that law. Maldonado, 568 F.3d at
21 269 (citing Brousseau v. Haugen, 543 U.S. 194, 198 (2004); Anderson
22 v. Creighton, 483 U.S. 635, 640 (1987)). Although Pearson held that
23 the sequence of this analysis is not mandatory, we nonetheless apply
24 it in this case. See 129 S. Ct. at 815-16.

1 **1. Did Defendants Violate Plaintiffs' Constitutional Rights?**

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

14 The Fourth Amendment protects people against unreasonable
15 searches and seizures. U.S. Const. amend. IV. As a threshold matter,
16 to establish a Fourth Amendment excessive-force violation, a
17 plaintiff must show that he was seized within the meaning of the
18 Fourth Amendment. The plaintiffs have been seized if the defendant
19 law-enforcement officers restrained their liberty by physical force
20 or an assertion of authority. United States v. Ford, 548 F.3d 1, 4
21 (1st Cir. 2008) (citing California v. Hodari D., 499 U.S. 621, 626
22 (1991); United States v. Sealey, 30 F.3d 7, 9 (1st Cir. 1994)). On
23 appeal, Defendants argued that the Fourth Amendment does not apply to
24 the present context (see Docket No. 131-14), and the First Circuit
25 implicitly rejected this argument by analyzing the appeal under the

1 Fourth Amendment reasonableness test, see Periodistas, 529 F.3d at
2 58-62. The First Circuit's decision binds us; therefore, we address
3 Plaintiffs' claims under the Fourth Amendment reasonableness test.

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

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

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

6 Where a crowd presents a threat to the safety of themselves or
7 law enforcement officers, however, courts have found the deployment
8 of pepper spray to be reasonable. See McCormick v. City of Ft.
9 Lauderdale, 333 F.3d 1234, 1245 (11th Cir. 2003) ("Given that pepper
10 spray ordinarily causes only temporary discomfort, it may be
11 reasonably employed against potentially violent suspects."); Jackson
12 v. City of Bremerton, 268 F.3d 646, 653 (9th Cir. 2001) (finding it
13 reasonable for officers to use pepper spray against group that
14 attempted to interfere with arrest, refused to obey officers'
15 commands to disperse, and engaged in verbal and physical altercations
16 with officers); see also Griffin v. Runyon, No. 04-348, 2006 WL
17 1344818, at *11 (M.D. Ga. May 16, 2006) (referring to pepper spray as
18 "a minimally intrusive tool"), aff'd, 213 F. App'x 938 (11th Cir. Jan
19 17, 2007). Similarly, courts have found that law enforcement
20 personnel may reasonably use force against members of a crowd when
21 they ignore instructions to disperse and create a potential safety
22 threat. See Gomez v. City of Whittier, 211 F. App'x 573, 575-76 (9th
23 Cir. 2006) (affirming summary judgment on excessive force claims,
24 where officers struck, tackled, and restrained plaintiffs during
25 arrest, due to "the volatile situation the officers faced, and the

1 legitimate interest in maintaining order and safety"); Darrah v. City
2 of Oak Park, 255 F.3d 301, 306 (6th Cir. 2001) (finding no Fourth
3 Amendment violation where officers, in midst of unruly group of
4 picketers, struck and injured plaintiff); Jackson, 268 F.3d at 653-
5 54.

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

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

1 violated Plaintiffs' Fourth Amendment rights. If there was no marked
2 perimeter and Plaintiffs received no warning not to enter the
3 grounds; if the crowd was not violent and only peaceful reporters
4 entered the premises; if Defendants did not order Plaintiffs to exit
5 or Plaintiffs did not hear the orders, and if Defendants did not warn
6 Plaintiffs before deploying pepper spray, then a rational jury could
7 arguably conclude that Defendants' use of force was unreasonable and,
8 therefore, in violation of the Fourth Amendment. See Periodistas, 529
9 F.3d at 59; Humbolt II, 276 F.3d at 1129-30 (holding that rational
10 jury could find use of pepper spray during arrest of peaceful
11 trespassing protesters to be unreasonable, where police were not in
12 danger and there was conflicting evidence over whether alternatives
13 were available) (citing Headwaters Forest Def. v. County of Humboldt
14 (Humbolt I), 240 F.3d 1185, 1205 (9th Cir. 2000), vacated on other
15 grounds, 534 U.S. 801).

16 **2. Were Plaintiffs' Rights Clearly Established?**

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

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

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

6 First, we consider whether Defendants could reasonably have
7 known that the Fourth Amendment governed their actions. As discussed
8 above, the First Circuit's decision in this case requires us to
9 conclude that the Fourth Amendment applies to this case. See
10 Periodistas, 529 F.3d at 59. However, the First Circuit did not
11 address whether it was clearly established that the Fourth Amendment
12 would govern in a context such as this one, where officers used force
13 in order to control a potentially-violent crowd and remove protesters
14 from a private area, but without arresting them or restraining their
15 movement. See id. Instead, the court simply held that, under the
16 Fourth Amendment reasonableness standard, taking Plaintiffs' facts as
17 true, Defendants' conduct constituted an obvious violation. Id. at
18 61. All of the cases cited by the First Circuit for this proposition
19 involved complaints of excessive force in the course of an arrest.
20 See Vinyard, 311 F.3d at 1348; Humbolt II, 276 F.3d at 1130; Park,
21 250 F.3d at 853; Adams v. Metiva, 31 F.3d 375, 387 (6th Cir. 1994).
22 In these cases, because the plaintiffs had been arrested, they had
23 clearly been seized within the meaning of the Fourth Amendment. See
24 Hodari D., 499 U.S. at 624 (referring to an arrest as "the
25 quintessential 'seizure of the person' under our Fourth Amendment

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

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

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

1 involved an arrest or a greater degree of physical control. See Rauen
2 v. City of Miami, No. 06-21182, 2007 WL 686609, at *21 (S.D. Fla.
3 Mar. 2, 2007) (finding Fourth Amendment violation where hundreds of
4 officers encircled protesters and used force to herd them in a
5 desired direction, but finding no violation of clearly-established
6 law); Logan v. City of Pullman, 392 F. Supp. 2d 1246, 1260 (E.D.
7 Wash. 2005) (finding seizure where officers pepper-sprayed fighting
8 individuals in attempt to gain physical control and then arrested
9 them); Coles v. City of Oakland, Case No. 03-2961, slip op. at 8
10 (N.D. Cal. April 27, 2005) (finding seizure where officers used
11 projectiles and tear gas to herd demonstrators to location over a
12 mile away, continuing to pursue them after they attempted to leave
13 protest); see also Otero v. Wood, 316 F. Supp. 2d 612, 622 (S.D. Ohio
14 2004) (denying summary judgment to officer who shot plaintiff
15 directly in face with projectile during riot).

16 It is true that in Marbet v. City of Portland, a district court
17 found that peaceful protesters were seized under the Fourth Amendment
18 where the defendants employed force to move them a short distance but
19 did not ultimately arrest them. No. 02-1448, 2003 WL 23540258 (D.
20 Ore. Sept. 8, 2003). However, that single unpublished, non-binding
21 district court opinion from outside of our circuit hardly provided
22 Defendants with sufficient guidance that the Fourth Amendment would
23 apply to their situation. See Wilson v. Layne, 526 U.S. 603, 617
24 (1999) (affirming grant of qualified immunity because plaintiffs
25 failed to cite "cases of controlling authority in their jurisdiction

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

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

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

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

9 First, Defendants reasonably believed that there was a
10 perimeter. The agents received a briefing instructing them to
11 establish a perimeter and permit the press to film from outside the
12 perimeter. (Docket No. 88-12.) All of the agents deposed by
13 Plaintiffs testified that they understood that there was a perimeter,
14 although no agent testified that he was continuously stationed by the
15 gate of the condominium complex so as to prevent onlookers from
16 entering the premises.² Also, under Puerto Rico law, people cannot

² (See Docket No. 143, Figueroa Dep., at 12-13 (stating that the perimeter was the fence surrounding the complex and that he informed members of the media not to enter the premises); Docket No. 144, Byers Dep., at 12-18 (describing plans to set up perimeter and explaining that he was not personally responsible for maintaining perimeter); Docket No. 145 at 5-6, 11, Regil Dep., (describing crowd of media representatives and agitators penetrating perimeter, but stating that it was not his job to maintain perimeter); Docket No. 146, Goodman Dep., at 16 ("[W]e were advised there was a perimeter going to be set up . . . at the gate."); Docket No. 147, Machado Dep., at 24 (stating that the perimeter had been breached); Docket No. 148, Stout Dep., at 6-9 (stating that he understood that agents would establish a perimeter but that he was not assigned to maintaining it); Docket No. 149, Clark Dep., at 17-18 (same); Docket No. 152, Rahl Dep., at 86-87 (stating that he was stationed close to the perimeter almost the entire day); Docket No. 153, Vega-Irizarry Dep., at 15-16 ("That's standard to establish a perimeter everywhere we go to conduct an operation. . . . we did establish a perimeter."); Docket No. 154, Cano Dep., at 13, 18 (explaining that although he was not aware of the planned crowd control measures prior to the search, the location of the

1 enter residential property without the authorization of the owner or
2 a lawful occupant, see 33 L.P.R.A. § 4284a (2001); however,
3 Plaintiffs entered upon receiving a signal from a visitor. Thus,
4 whether or not there was a valid perimeter, the agents could
5 reasonably have believed that a perimeter had been established, and
6 that all but one of the Plaintiffs were trespassing in violation of
7 that perimeter. See Estate of Bennett, 548 F.3d at 175-76.

8 Next, the agents reasonably believed that Los Macheteros
9 affiliates or sympathizers were in the crowd. First, it was
10 publicized that the raid was related to Los Macheteros, making it
11 likely that Macheteros sympathizers would come to the site. Second,
12 Byers observed two or three onlookers with bandanas covering their
13 faces, which Byers understood to be a signal that they were
14 Macheteros-affiliates, as sympathizers commonly covered their faces
15 prior to engaging in acts of violence. (Docket No. 88-4.) Plaintiffs
16 flippantly dismiss this by arguing that “[b]andanas are a common
17 piece of apparel,” without disputing that members of the crowd had
18 covered their faces with bandanas in such a way as to hide their
19 identity. Bandanas may be commonly worn over the head or hair, but
20 are not typically worn so as to obscure the face. By analogy, if the
21 agents had seen individuals with stockings covering their faces, this
22 could have given them reasonable suspicion, even though stockings are
23 common pieces of apparel when worn over the foot. It is not

perimeter was obvious); Docket No. 156, Vitousek Dep., at 6-7 (same);
Docket No 157, Myers Dep., at 7-8 (same); Docket No. 155, Lowe Dep., at 5-
14 (explaining that he helped set up the perimeter but did not maintain
it).

1 commonplace for people to hide their identities, and such attempts
2 can lead officers to reasonably believe that criminal activity may be
3 brewing. Thus, whether or not there were Macheteros sympathizers in
4 the crowd, Byers could have reasonably believed that there were. See
5 Estate of Bennett, 548 F.3d at 175-76.

6 Furthermore, Defendants had reason to believe that they were
7 confronting an unruly and potentially-violent crowd. Although
8 Plaintiffs argue that the crowd outside the complex was "peaceful and
9 calm" (Docket No. 164-1 at 37), both parties agree that at least some
10 members of the crowd were cursing and screaming insults at FBI
11 agents. Additionally, Figueroa heard Rivera, a photographer from El
12 Vocero, say that he had overheard members of the crowd planning to
13 gather rocks and other objects to throw at the agents. Plaintiffs
14 argue that, had a threat been made, it would have been communicated
15 among the reporters. (Docket No. 164-2.) Whether or not any onlookers
16 actually made such a threat, however, it would have been reasonable
17 for Figueroa to believe that the onlookers were disposed towards
18 violence, given what Rivera told him. See Estate of Bennett, 548 F.3d
19 at 175-76. Also, the crowd inside the complex did not comply with the
20 agents' commands. Plaintiffs assert that they were willing to leave
21 the premises without force; however, none of them manifested their
22 willingness to follow Defendants' orders and leave the complex before
23 Regil used pepper spray. Thus, it was reasonable for Defendants to
24 believe that they faced a hostile crowd. Finally, while we do not
25 rely on this fact, the fact that several members of the crowd threw

1 rocks and other items at the agents after the incident with
2 Plaintiffs bolsters our conclusion that it was reasonable for
3 Defendants to believe that the crowd had the potential for violence.

4 Moreover, Defendants were aware that their firearms lacked
5 safeties. We disagree with Plaintiffs about Defendants' calculations
6 regarding the risk that members of the crowd would grab the agents'
7 weapons. (See Docket No. 164.) Surely the fact that Defendants' guns
8 did not contain safeties presented an additional risk that the agents
9 were aware of and that made their crowd-control behavior even more
10 reasonable.

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

1 In sum, without making any determinations as to disputed factual
2 issues, we find that Defendants could have reasonably believed that
3 (1) a perimeter had been established, and reporters were violating
4 the perimeter by entering the complex; (2) the crowd of onlookers
5 contained Macheteros sympathizers or others preparing to engage in
6 violent acts; (3) the crowd was angry and had threatened to throw
7 rocks or other objects at the agents; (4) the agents' guns lacked
8 safeties and could be accidentally or intentionally discharged; and
9 (5) the group that passed through the purported perimeter was
10 comprised of both peaceful journalists and angry protesters. Under
11 these circumstances, it was reasonable for officers to believe that
12 force was necessary to control the crowd and to prevent violence.

13 Thus, Defendants' use of force against each individual Plaintiff
14 was reasonable. Lago entered the premises, crossing the purported
15 perimeter, and approached agents rather than leaving as directed.
16 Byers struck Lago in the stomach with a retractable baton because it
17 appeared that Lago was assaulting another agent. Moments later, when
18 Lago sat blocking the pedestrian gate, it was reasonable for Regil to
19 use a burst of pepper spray against him so that the agents could
20 close the gate and reestablish the perimeter. Fernández was sprayed
21 in the face while he filmed events from outside the fence, while
22 standing one or two feet from Regil. However, there is no evidence
23 that Regil targeted him. Regil was reasonably attempting to move a
24 screaming crowd back from a fence during a volatile situation.
25 Finally, Valentín, Sánchez, Alvarez, and Donalds claim that they were

1 punched, pushed, or shoved through the gate. None were injured.
2 Given the fact that the agents perceived them as trespassing across
3 a perimeter and disobeying direct orders, it was reasonable for
4 Defendants to use force, including pushes or punches, to compel these
5 Plaintiffs to leave the premises. It was also reasonable for Regil to
6 employ pepper spray on the crowd that these Plaintiffs were part of,
7 in an effort to get the crowd to disperse.

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

10 **B. Injunctive Relief**

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

18 Plaintiffs must demonstrate that they have standing by
19 demonstrating the existence of an actual case or controversy and
20 showing that they have a personal stake in the outcome. City of Los
21 Angeles v. Lyons, 461 U.S. 95, 101 (1983). In order to have standing
22 to pursue injunctive relief, plaintiffs must demonstrate that there
23 is a "real and immediate threat" that they will suffer legal
24 violations in the future. Id. at 105. Although Plaintiffs attempt to
25 distinguish Lyons, we find that it controls the present case.

1 Plaintiffs have not established that FBI agents always or habitually
2 use excessive force against members of the media. Accordingly, we
3 find that Plaintiffs lack standing to pursue injunctive relief. See
4 id. at 105-06; cf. Dudley v. Hannaford Bros., 333 F.3d 299, 306 (1st
5 Cir. 2003) (holding that where defendant maintains specific
6 objectionable policy, plaintiff has standing to seek injunction).

7 **IV.**

8 **Conclusion**

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

12 **IT IS SO ORDERED.**

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

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