



Law Enforcement Response to First Amendment Assemblies: Best Practices and Tactics

First Amendment Assembly Working Group
Major Cities Chiefs Association

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*The **Major Cities Chiefs Association (MCCA)** is a professional organization of police executives representing the largest cities in the United States and Canada. The MCCA provides a unique forum for urban chiefs, sheriffs and other law enforcement executives to share ideas, experiences and strategies. The MCCA provides a collaborative forum for the advancement of public safety through innovation, research, policy development, government engagement, community outreach, and leadership development.*

Introduction

After the tragic death of George Floyd in May 2020, an unprecedented wave of protests and civil unrest swept across the United States and Canada. During this time, members of the public assembled to exercise their First Amendment rights, voice their dismay at what had occurred to Mr. Floyd, and call for change in the law enforcement profession. The sheer volume, coupled with the significant level of civil disobedience, and in some instances, violence that occurred during those assemblies, created an extraordinarily challenging environment for law enforcement.¹

The Major Cities Chiefs Association (MCCA) has served as a leader in the law enforcement profession for years. Consistent with that role, this report outlines a series of policy recommendations and considerations related to law enforcement's response to First Amendment assemblies. It provides additional perspective on some of the challenges facing law enforcement and serves as an educational resource outlining why specific actions are taken during First Amendment assemblies. The information in this report seeks to advance and inform thoughtful conversations so police departments and communities can best work together to facilitate the continued exercise of First Amendment rights while ensuring safety for all.

Methodology

Given the events of last summer and the public's focus on law enforcement's response to First Amendment assemblies, at the request of several members, the MCCA established a First Amendment Assembly Working Group in January of 2021. The Working Group was tasked with examining and issuing recommendations related to law enforcement tactics and best practices for responding to a First Amendment Assembly.

The Working Group met virtually on a weekly basis from January 2021 to March 2021 for in-depth discussions. The recommendations contained throughout this report were developed during these meetings and represent the consensus positions of the MCCA. Please note that individual MCCA member positions and policies may vary from those included in this report.

Support for the First Amendment

The MCCA strongly supports the First Amendment and recognizes that individuals engaging in First Amendment-related activities have legal rights. Activities protected under the First Amendment include, but are not limited to, protests, speeches, demonstrations, vigils, picketing, distribution of literature, displaying banners or signs, and other forms of expression. MCCA members will continue to work tirelessly to protect these rights and facilitate lawful First Amendment assemblies. Major city law enforcement agencies will also continue to balance these rights with the rights of those not involved, including local businesses, to keep all community members as safe as possible.

¹ Please note that for this document's purposes, the word "assembly" is an umbrella term that refers to a broad range of First Amendment activities. This includes, but is not limited to, protests, speeches, demonstrations, vigils, picketing, distribution of literature, and displaying banners or signs.

Different Categories of First Amendment Assemblies

Summary

Before discussing law enforcement's response to First Amendment assemblies, it is important to identify the different categories of assemblies. There is perhaps nothing that has a more significant impact on the law enforcement response than the nature of a given assembly. For example, peaceful and lawful assemblies present little risk to public safety. First Amendment assemblies generally are grouped into three broad categories: peaceful and lawful, unlawful, and violent. As circumstances on the ground change, it can impact an assembly's nature, and it is not uncommon for the same assembly to include components from all three categories.

Peaceful and Lawful Assemblies

Peaceful and lawful assemblies account for the majority of assemblies that law enforcement agencies encounter. For example, during the summer of 2020, peaceful and lawful assemblies accounted for 51% of the assemblies that MCCA members reported.² These assemblies typically have no significant impact on the surrounding area and represent little to no threat to people or property. Peaceful and lawful assemblies only require a limited police presence. For example, law enforcement may need to assist with traffic control.

Peaceful and lawful assemblies are sometimes preplanned. There may be clearly defined leaders who are willing to work with law enforcement to discuss plans and expectations for the First Amendment activity. Organizers may also obtain a permit for the assembly from the relevant government entity. It is important to note that spontaneous assemblies, such as those where a permit is not obtained in advance, can also be peaceful and lawful, such as gatherings in parks and other public spaces or marches down sidewalks and other pedestrian thoroughfares.

Unlawful Assemblies

Unlawful assemblies were fairly common in the summer of 2020, accounting for 42% of the assemblies MCCA members encountered.³ Assemblies become unlawful when they infringe on the rights of other members of the public not involved in the assembly or otherwise represent a minor threat to public safety.

These assemblies usually involve acts of civil disobedience. For example, individuals involved in the assembly may takeover roadways, block access to hospitals or other critical infrastructure, commit traffic violations, refuse to comply with lawful orders from the police, harass other community members, or otherwise violate local codes and ordinances. Unlawful assemblies may also include minor criminal offenses, such as temporary property damage, like turning over trashcans or spray painting, chalking, or otherwise marking public property.

While minor, these activities are still illegal and can present a threat that law enforcement must address. During these assemblies, law enforcement must monitor the situation on the ground and

² Major Cities Chiefs Association Intelligence Commanders Group, *Report on the 2020 Protests and Civil Unrest*, October 2020. <<https://majorcitieschiefs.com/wp-content/uploads/2021/01/MCCA-Report-on-the-2020-Protest-and-Civil-Unrest.pdf>>

³ *Ibid.* Please note that the MCCA Intelligence Commanders Group report referred to these protests as “peaceful but unlawful.”

use discretion to determine if and when it must act to uphold public safety. Law enforcement's response must always be proportionate and measured. The specific response will depend on several factors, such as the size and type of crowd, the location and environment, and the impact of the assembly on the surrounding community. For example, minor acts of civil disobedience like shutting down a street or redirecting traffic may require additional officers or bike patrol units. Larger crowds, significant acts of civil disobedience, or substantial property damage may necessitate the deployment of mobile field forces, other specialized teams, or even the assembly's dispersal.

Violent Assemblies

While significantly less common than peaceful and lawful or unlawful assemblies, many law enforcement agencies have unfortunately encountered violent assemblies. Although they only accounted for 7% of the assemblies reported during the summer of 2020, nearly 80% of MCCA members experienced at least one violent assembly.⁴ When a violent assembly occurs, there are typically severe violations of state and federal law. Some of the most common criminal activities seen during these assemblies include assaults on law enforcement officers, looting, and arson. These violent assemblies create an imminent danger to the public and require a robust law enforcement response.

The level of violence in any given assembly can vary dramatically and, in some instances, change from minute to minute. In some cases, law enforcement can remove the agitators, and the assembly will return to being peaceful. In others, however, there is a total loss of control. Law enforcement may encounter widespread violence, and there even may be organized efforts amongst assembly participants to engage in serious criminal activity. In these situations, law enforcement officers can no longer protect themselves or individuals in the crowd. Even if the agitators are removed, the assembly will likely remain violent. It can become impossible to identify specific agitators, and the crowd may attempt to prevent law enforcement from doing its job and taking enforcement action. No matter the circumstances, law enforcement must always ensure its response to any violent assembly is proportionate and measured.

Law Enforcement's Response to First Amendment Assemblies

Summary

Many police departments expect that with the number of challenges and political polarization our country is currently experiencing, First Amendment assemblies will continue to occur on a frequent basis. Even if the rate of assemblies slows, there is value in improving the ability of law enforcement to respond to such events. Every police department should strive to create an environment where the public can safely exercise its First Amendment rights. Implementing the policy recommendations and best practices contained throughout this report will help achieve that goal.

Law Enforcement's Responsibilities

Law enforcement is responsible for protecting the lives and property of all people. In the context of a First Amendment assembly, this includes maintaining public peace and order and preventing criminal activity while facilitating the safe exercise of First Amendment rights. Law enforcement

⁴ *Ibid.*

must also treat all members of the community equitably. The crowd's affiliation with any particular group cannot unduly influence law enforcement's response.

During some assemblies, law enforcement may need to act to control or manage the crowd, mitigate potential threats, and address criminal activity and violence. The MCCA recommends that police departments have robust policies in place for responding to First Amendment assemblies that establish clear guidelines for appropriate responses, the tools and techniques available, and instances where a specific tactic may not be used.

Finally, law enforcement's response to First Amendment assemblies must always be proportionate and measured and take into account the "anatomy of the crowd." Law enforcement must consider the impact of any actions it takes and how the crowd will react to help ensure the best possible public safety outcome. As indicated earlier in this document, a single assembly can continuously cycle through the different categories identified above. As such, it's crucial that law enforcement consistently reassess the situation and its response to ensure the response is still appropriate given the current circumstances of an assembly.

Recent Reform Efforts

Following the events of last summer, there have been calls to change how law enforcement responds to First Amendment assemblies, and policymakers have proposed a myriad of reforms focused on the tactics, tools, and techniques used by police departments. Due to misconceptions about how, when, and why law enforcement uses these tactics, tools, and techniques, many of these proposals are short-sighted and, if enacted, would inhibit law enforcement's ability to keep the public safe during First Amendment assemblies.

Preparation for First Amendment Assemblies

Summary

Advanced preparation, when feasible, is the first step in responding to a First Amendment assembly. As not all assemblies are preplanned, this is not always possible. MCCA members have found that advanced planning helps ensure law enforcement has the appropriate resources on hand to safely facilitate an assembly and effectively and efficiently respond to any threats to public safety that may arise. In general, advanced preparation includes:

- Training;
- Engaging with assembly leaders;
- Engaging with the community and effective messaging
- Maintaining situational awareness;
- Coordinating with the local district attorney;
- Establishing an incident command structure; and
- Implementing specific tactics, such as buffer zones

The MCCA encourages police departments to clearly outline in policy the steps department personnel should take to prepare for a First Amendment assembly. These steps may include, but are not limited to, conducting a formal threat assessment for the assembly, developing an incident action plan, or establishing an operations center. Since First Amendment assemblies are not always

preplanned, these policies should also address responding to unplanned and spontaneous assemblies.

Training

The MCCA recommends that police departments have their officers undergo robust training on responding to First Amendment assemblies. This will help make sure the workforce is prepared whenever an assembly, planned or unplanned, occurs. The assemblies that happened throughout the summer of 2020 demonstrated the importance of this training. Several MCCA members reported their response was impacted by a training discrepancy, especially amongst newer officers who had never previously dealt with such large-scale or violent assemblies.⁵

For training to be as effective as possible, it should be continuous and recurrent. The MCCA recommends that police departments have all officers undergo training on responding to First Amendment assemblies annually. Police departments should also frequently review their curriculums and update them as necessary to ensure the training continues to meet the needs of both the community and police officers. In addition to covering department-specific policies and tactics, police departments should seek to incorporate best practices from other law enforcement agencies into their training. One training program that some MCCA members have found valuable is the Field Force Operations course from the Center for Domestic Preparedness. Finally, to help mitigate training discrepancies, the MCCA encourages police departments to engage in succession planning. This will help the department maintain a consistent level of leadership experience and expertise.

It must be acknowledged that law enforcement training is a costly undertaking. MCCA members routinely spend millions of dollars annually on training and other associated activities. Not every department has the resources to have their entire workforce undergo crowd and riot control training. In recent years, this type of training has been de-emphasized, and in some departments, it is only provided to specialized units. Recent events have demonstrated the importance of having all police officers trained to respond to First Amendment assemblies, especially unlawful or violent assemblies. To ensure police departments can provide this training, elected officials at every level of government must ensure police departments are adequately resourced and have the requisite funding for ongoing training.

Assembly Leader Engagement

Engaging with assembly leaders in advance of an event plays an essential role in any successful First Amendment assembly response. Many MCCA members indicated that a lack of cooperation between law enforcement and assembly organizers was one of the biggest challenges they faced in responding to assemblies that occurred in the summer of 2020. Such engagement builds trust and fosters open lines of communication. Law enforcement can utilize this goodwill and these relationships to help de-escalate the situation should tensions exacerbate during the assembly. When practical, the MCCA strongly encourages law enforcement to communicate with organizers in advance of the assembly to discuss plans and expectations. This dialogue should continue throughout the assembly and can be used to share relevant updates and information.

⁵ *Ibid.*

Community Engagement and Messaging

Some First Amendment assemblies, especially large-scale ones, can significantly impact those not involved in the assembly. It is essential for police departments to engage with the broader community to keep them abreast of pertinent updates. This engagement can assist law enforcement with responding to an assembly. For example, police departments can push out messages asking the public to avoid certain areas, making it easier for law enforcement to move around resources and respond to threats.

Effective messaging can also assist law enforcement with countering misinformation about the assembly or law enforcement response. Some MCCA members found using social media to share pictures and live videos of the situation on the ground to be an effective strategy for refuting false allegations regarding law enforcement response and tactics. If not addressed, misinformation can undermine community support for law enforcement.

Situational Awareness

Law enforcement is responsible for ensuring the public can exercise its First Amendment rights safely. In order to do so, police departments must do their due diligence and maintain situational awareness of assemblies in their jurisdiction. Identifying key pieces of information ahead of time is necessary so law enforcement can ensure the proper resources are in place to protect the crowd and respond appropriately to prevent violence and other criminal activity. For example, if law enforcement learns that a large group plans to march down a specific road, it can preemptively redirect traffic to reduce the chances of an accident.

Maintaining situational awareness can also help address some of the challenges associated with different assembly groups sharing tactics. Some MCCA members have reported seeing groups in their jurisdiction utilize tactics that first appeared in other First Amendment assemblies across the country. This is especially troublesome when one group shares information on a tactic that has presented a challenge for law enforcement, such as using black umbrellas to block identities and conceal criminal activity. By identifying tactics that are being shared ahead of time, police departments can be better positioned to mitigate and respond if such tactics appear in their area of operations.

Law enforcement can maintain situational awareness regarding assemblies in many ways. One of the most effective is to engage with assembly leaders as described above. However, this is not always feasible as assemblies are not always announced in advance, or organizers may be unwilling to work with law enforcement. In these situations, police departments may utilize other methods, such as monitoring and analyzing open-source information. Finally, if law enforcement has reasonable suspicion that malicious actors are planning to hijack an assembly to disguise criminal activity, more traditional criminal intelligence tactics may be necessary. These tactics should only be used when there is a criminal predicate, and the assembly will be unlawful or violent.

Coordination with the District Attorney

The MCCA recommends that police departments proactively engage with their local district attorney's office in advance of First Amendment assemblies, especially if law enforcement anticipates that there will be civil disobedience, violence, or other criminal activity. These

conversations will provide additional information on the support departments can expect to receive and the types of charges the DA has available to prosecute. This can help law enforcement better target its response and avoid situations where many charges are dismissed, which may send a mixed message to the community. A failure to prosecute also removes an important deterrent, and individuals who engaged in unlawful conduct during a previous assembly may feel emboldened to do so again during future assemblies. Discussions with the DA can also help determine when law enforcement should involve a US Attorney's office regarding potential federal charges for cases such as arson.

Incident Command Structure

A formal incident command structure (ICS) can help coordinate public safety responses to a variety of large-scale events, such as natural disasters, terrorist attacks, and other public gatherings (i.e., sporting events, concerts, etc.) During these events, an ICS helps increase the efficiency of decision making, promotes information sharing, prevents the duplication of efforts, and helps avoid confusion regarding tactical orders. The MCCA recommends police departments implement an ICS when responding to a First Amendment assembly. A successful ICS must establish a clear chain of command and delineate the specific responsibilities of each entity involved in the response. The ICS should be based on the particular circumstances of a given assembly, and as a result, the ICS used for each response will differ slightly. Department policy, however, should include general guidelines to assist with implementation. The MCCA also recommends that command staff undergo regular training on this topic.

Buffer Zones

Law enforcement should consider establishing buffer zones when opposing groups will be present at the same First Amendment assembly. Buffer zones can keep groups separated, helping keep police officers and the individuals involved in the assembly safe while ensuring everyone has an opportunity to exercise their First Amendment rights. It is important to realize that there are times when buffer zones will not work. In some situations, they may have the opposite of the intended effect as they can create lines of demarcation that serve as flashpoints for conflict.

This tactic underscores the importance of maintaining situational awareness and stakeholder engagement. It is challenging to establish buffer zones once an assembly is underway, so police departments must know in advance if opposing groups will be there. In some instances, during conversations with law enforcement about the assembly, leaders from the groups may even ask for buffer zones.

Dispersal of Assemblies

Summary

The Constitution guarantees the right to peacefully assemble, but this right is not absolute. The Supreme Court held in *Cantwell v. Connecticut* that the "First Amendment does not provide the right to conduct an assembly at which there is a clear and present danger of riot, disorder, interference with traffic on public streets, or other immediate threat to public safety, peace, or order."⁶ While most First Amendment assemblies are peaceful and lawful, there are situations where they become volatile and may turn violent or otherwise represent a threat to public safety.

⁶ *Cantwell v. Connecticut*, 310 U.S. 296 (1940) < <https://www.law.cornell.edu/supremecourt/text/310/296>>

In these circumstances, law enforcement may declare the assembly unlawful and disperse the crowd. This should always be the first step before police departments take additional action, such as conducting mass arrests or using less lethal munitions.

Process for Dispersing an Assembly

The MCCA recommends police departments outline the process for dispersing an assembly in relevant agency policies. When it is determined that an assembly needs to disperse, law enforcement must provide a clear warning. In general, this should include instructions that indicate the assembly has been declared unlawful, order everyone to leave the area, and specify an egress route. Those participating in the assembly must have sufficient time to disperse, based on the current circumstances.⁷ The instructions should also outline the consequences for failing to disperse, such as being subject to arrest or exposed to less lethal munitions. The MCCA encourages police departments to include a template for the instructions and specify the number of warnings officers should provide in their First Amendment assembly response policies.

Police departments must take steps to ensure that individuals present at the First Amendment assembly can hear the order to disperse and associated instructions. Some major city law enforcement agencies place officers at different points on the egress route to confirm that the order and instructions are audible throughout the assembly. Others drive vehicles outfitted with speakers around the crowd to broadcast the instructions. Several major city law enforcement agencies even post a live video of the order on their social media channels.

The MCCA recommends police departments record the dissemination of the order to disperse using multiple sources. These recordings could range from a body worn camera to agency-issued smartphone video to footage shot by crime scene unit personnel stationed at strategic points throughout the First Amendment assembly. Multiple recordings can be valuable in both litigation and refuting misinformation.

Mass Arrests

Summary

Should an assembly refuse to disperse after being declared unlawful and participants continue to engage in illegal conduct, law enforcement must take further action to manage the crowd and keep everyone safe. When feasible, police officers should use de-escalation techniques to gain compliance, however, if such tactics are unsuccessful, one potential law enforcement response is to effectuate arrests. While it is always preferable to target and arrest specific agitators, this is not always possible or feasible. In these circumstances, mass arrests can help keep everyone involved in, or impacted by, the assembly safe.

Planning and Preparation

In some instances, law enforcement may have reason to believe that a First Amendment assembly may result in mass arrests. For example, a police department may obtain intelligence that a group is planning to engage in wide-scale civil disobedience or use an assembly as cover to engage in

⁷ These circumstances may include, but are not limited to, the size and nature of the crowd, the amount of violence or other criminal activity occurring, and the threat posed to the public, the surrounding community, and police officers.

criminal behavior. When possible and necessary, a plan for booking, transporting, and detaining anyone who is arrested should be established before the assembly begins. Examples of this planning include establishing processing teams, ensuring there is sufficient leadership and oversight at arrestee intake points (usually the transportation vehicles), and arranging transportation ahead of time.

Mass arrests are incredibly complicated and have a lot of moving parts. Advanced planning will help ensure police departments have the necessary resources and personnel on hand to perform the arrests. These plans should also account for any unique situations that may arise. For example, if there is the possibility that juveniles may be arrested, law enforcement must ensure there is a separate area to detain them.

Mass Arrests During Unlawful Assemblies

As discussed earlier, unlawful assemblies may include acts of civil disobedience, such as taking over a major road or freeway. If the individuals involved in civil disobedience do not comply with the order to disperse, law enforcement may need to effectuate arrests to restore order. While peace is always preferable to violence, civil disobedience is illegal and can significantly impact the surrounding community. Law enforcement must ensure the rights of those not involved in the assembly are also being protected.

If law enforcement needs to conduct a mass arrest during a unlawful assembly, police officers should conduct these arrests one at a time. Each individual should be given one additional chance to leave the area before being arrested. Similar to giving an order to disperse, officers should ensure the entire arrest process is recorded via body worn camera or another mechanism. In cases of individuals purposefully seeking arrest, the MCCA encourages police departments to work with the assembly's organizers, if possible, to establish procedures for utilizing tickets or citations instead of the complete booking process. These alternative procedures will help preserve resources and allow law enforcement to focus on other threats.

Mass Arrests During Violent Assemblies

While law enforcement's goal is always to disperse unlawful assemblies peacefully, there are incidents where extraordinary action is required. Crowds may continue to commit acts of violence or other serious crimes after an order to disperse is issued and de-escalation techniques have failed. In some instances, this criminal behavior may even continue after law enforcement uses less lethal munitions. When there is a total loss of control, police departments must have the ability to restore order and protect assembly participants, police officers, and the surrounding community.

When facing these circumstances, law enforcement may have to prevent egress from the assembly to isolate individuals engaged in criminal behavior. Police officers may have to arrest everyone in the crowd, especially if the group makes it impossible to identify the specific offenders. A full investigation will be completed after the fact to identify the specific crimes committed by each individual. The MCCA recommends that this tactic only be used as a last resort and when it is absolutely imperative for public safety.

Deployment of Less Lethal Munitions

Summary

Violent assemblies may require law enforcement to use less lethal munitions.⁸ These tools should only be used as a last resort by police officers to prevent injury or significant property damage. In these situations, the assembly has devolved into violence, looting, and other serious criminal activity, and is no longer a First Amendment activity. Oftentimes, the behavior that requires law enforcement to use less lethal munitions meets the legal definition of a riot in that jurisdiction.

Low-Level Response to Resistance

Deploying less lethal munitions is a low-level response to resistance and, if used properly, has no long-term effects. Even so, the decision to use them is not taken lightly. Despite what some may claim, law enforcement's use of less lethal munitions has historically been proportionate and measured. For example, during the summer of 2020, no MCCA member used less lethal munitions more frequently than the percentage of violent assemblies that occurred in their city. In fact, many police departments used these tools less often than they could have to quell the violence.⁹ Less lethal munitions are explicitly used to prevent chaotic situations from becoming a threat to public safety and ultimately save lives.

Appropriate Use

Police officers must abide by their department's response to resistance policies at all times. Any response to resistance during a First Amendment assembly, including the deployment of less lethal munitions, must be consistent with those policies. The MCCA recommends that police departments also develop and implement clear policies specific to less lethal munitions. These policies should contain guidance on when it is appropriate to deploy less lethal munitions and specify who within the department can authorize their use. There must be enough flexibility within these policies to account for exigent circumstances related to life and safety.

In general, these tools should only be used when the crowd threatens or has caused harm and law enforcement has no other options to regain control of the situation. The assembly must also be declared unlawful, and individuals must have the opportunity to disperse before less lethal munitions are deployed. Finally, if law enforcement does utilize less lethal munitions during an unlawful or violent assembly, it needs to be able to articulate to the public why this action was necessary.

Kinetic Projectiles

Kinetic projectiles, if misused, are more likely than other types of less lethal munitions to cause serious injury. Nevertheless, kinetic projectiles are a tool that can help law enforcement address various threats. In order to mitigate the risk associated with kinetic projectiles, they should only be used when law enforcement can deploy them against a specific actor engaged in criminal activity that threatens another person's safety, and there is no risk to a third party. The MCCA believes department policy should prohibit police officers from firing kinetic projectiles indiscriminately into a crowd. It should also clarify that kinetic projectiles should never be directed

⁸ Less lethal munitions include, but are not limited to, CS gas, flashbangs, and kinetic projectiles

⁹ Major Cities Chiefs Association Intelligence Commanders Group, *Report on the 2020 Protests and Civil Unrest*, October 2020.

at an individual's head. Finally, any police officer authorized to use kinetic projectiles must be trained on the proper use of this less lethal munition and undergo frequent recertification testing.

Conclusion

Law enforcement's ultimate goal during any First Amendment assembly is to maintain public safety while fostering an environment where the community can exercise its First Amendment rights. To achieve this goal, police departments may need to take action to manage or control the crowd during an assembly. First Amendment assemblies are dynamic, and their nature is ever-changing. Law enforcement must constantly monitor and assess the situation to ensure that its response is measured and proportionate given the current circumstances.

Law enforcement is entrusted with the solemn responsibility of keeping the public safe and protecting its rights. MCCA members take this responsibility and the authority vested in them seriously. It is important to remember that police officers are dedicated members of the communities they serve and have a vested interest in ensuring a positive outcome for all parties. The MCCA will continue to work with elected officials, the community, and other stakeholders to facilitate the continued exercise of First Amendment rights while ensuring safety for all.

Acknowledgments

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