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**Regarding: Use of Force Investigation & Reforms** *(Sent by Email Only)*

Dear Inspector General Huntsman, County Counsel Wickham and Chief McDonald,

We, the undersigned members of the LA Youth Uprising Coalition, urge the Office of the Inspector General (OIG), County Counsel and the Department to use the opportunity created by Board Motion 18-8780 to:

- **Promote transparency** about use of force and in particular the use of chemical agents like pepper spray **by making data about use of force public** and releasing the full text of the Board of Supervisors-mandated report-back; and,
- Recommend that the Board of Supervisors **enact an ordinance banning the use of chemical agents, including pepper spray**, in Department detention facilities and setting out a process and timetable to ensure that the Department does so in a way that safeguards the rights and welfare of youth.

On December 18 2018, the Los Angeles County Board of Supervisors unanimously [voted](#)<sup>1</sup> to approve a [Motion](#)<sup>2</sup> tasking the OIG, in coordination with County Counsel and the Chief Probation Officer, to:

*“[I]nvestigate client and staff safety concerns in Los Angeles County’s juvenile halls and probation camps, particularly use of force including pepper spray, and report back in writing in 45 days with any findings and recommendations for improvement.”*

At the conclusion of [deliberations](#)<sup>3</sup> on the Motion, the Chief Probation Officer was “instructed to provide training to employees regarding changes in protocols and expectations as it relates to the use of force, and to be cognizant of populations [the County is] serving while also protecting the welfare of [County] employees” and the Inspector General was “instructed to identify tools to help deescalate the use of physical force and ensure appropriate staff is available to help in the deescalation.” We write to share our perspective on the use of chemical agents against youth in Los Angeles County Probation Department (Department) detention facilities.

Use of force – and particularly use of force involving aerosolized Oleoresin Capsicum, commonly called OC-spray or pepper spray<sup>4</sup> – in Department detention facilities has been shrouded in secrecy for far too long. The use of chemical agents traumatizes all who come into contact with it, especially youth with physical or mental health conditions,<sup>5</sup> is significantly out of step with good

<sup>1</sup> Los Angeles County Board of Supervisors, Statement of Proceedings, December 18, 2018.

<sup>2</sup> Los Angeles County Board of Supervisors, Motion 18-7870 “Ensuring Safety and Humane Treatment in the County’s Juvenile Justice Facilities (Ridley-Thomas, Hahn), December 18, 2018.

<sup>3</sup> Los Angeles County Board of Supervisors, Statement of Proceedings, December 18, 2018, pages 15-16.

<sup>4</sup> Pepper spray, or oleoresin capsicum (OC) spray, is a type of “chemical restraint” that contains *capsaicinoids* extracted from the resin of hot peppers. According to a report published by the National Institute of Justice, pepper spray, “incapacitates subjects by inducing an almost immediate burning sensation of the skin and burning, tearing, and swelling of the eyes. When it is inhaled, the respiratory tract is inflamed, resulting in a swelling of the mucous membranes . . . and temporarily restricting breathing to short, shallow breaths.” U.S. Department of Justice, [National Institute of Justice](#). Oleoresin Capsicum: Pepper Spray as a Force Alternative (NCJ 181655) (1994).

<sup>5</sup> OC spray can be particularly dangerous for individuals with respiratory health conditions or mental health disabilities. Eugene J. Olajos and Harry Salem, *Riot Control Agents: Pharmacology, Toxicology, Biochemistry and Chemistry*, 21 J. APPLIED TOXICOLOGY 364, 380 (2001); Michael Cohen, *The health effects of pepper spray: a review of the literature and commentary*, 4 J. CORRECTIONAL HEALTH CARE 73 (1997). Research suggests that the harms of air pollution and the effect on children’s health in the Los Angeles region are among the greatest in the United States. See *Breathless in Los Angeles: The Exhausting Search for Clean Air*, 93 AM. J. PUB. HEALTH, 1494 (2003). Some estimates place the proportion of youth in the California juvenile justice system with mental health conditions at as high as 70 percent. *Berkeley Center for Criminal Justice, Juvenile Justice Policy Brief: Mental Health Issues in California’s Juvenile Justice System* (2010), page 2.

practices for safely operating a juvenile justice system, undermines relationships and trust between youth and staff in juvenile detention facilities, preventing healthy growth and rehabilitation, is inconsistent with principles of trauma-informed-care and youth development and violates fundamental rights. Simply put, OC spray contributes to the prioritization of use of force over more effective prevention and de-escalation strategies. Los Angeles County should live up to its goal of being a “model” jurisdiction and join the vast majority of U.S. juvenile justice systems in enacting a ban.

## 1. Pepper Spray Traumatizes and Harms Youth

“It was hard to breathe because the spray, it was like [ . . . ] it messes you up . . . once you breathe it, you like, you start coughing. You can’t breathe.”<sup>6</sup> That is how one youth described, in interviews carried out for the Los Angeles County Auditor-Controller (Auditor-Controller), the experience of being subjected to OC spray in Department detention facilities. Youth who have been subjected to OC spray in Los Angeles consistently describe it as traumatic. “[Y]ou feel like your body is on fire,” said one youth.<sup>7</sup> Youth have described witnessing others have serious allergic reactions, including breaking out with “welts all over their face” after being subjected to OC spray in Los Angeles.<sup>8</sup> As a young person who had been subjected to OC spray in another California county’s juvenile hall described, being subjected to OC spray,

“was a horrible, frightening and very traumatic experience. Growing up I had asthma and every time I was sprayed I would have panic attacks, could not breath[e] and on several occasions I felt like I was going to die! . . . Every time I was pepper sprayed it was a very traumatic experience, it is very difficult to breath[e] and catch your breath and mucus freely spilled out of my nose.”<sup>9</sup>

Another young person described, also in interviews carried out for the Auditor-Controller, being subjected to OC spray while pregnant and being terrified about the potential consequences for pre-natal health, saying “. . . that was terrible. It was a terrible day.”<sup>10</sup>

Chemical agents like OC spray have been linked to a number of short- and long-term effects on adults, including:

- Intense pain, swelling, and blistering of the skin;
- Wheezing, an inability to breathe or speak, and respiratory arrest;
- Acute hypertension, which may lead to an increased risk of stroke or heart attack;
- The deterioration of nerve tissue and permanent corneal damage; and,

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<sup>6</sup> Report of the Los Angeles County Department of Auditor-Controller to the Los Angeles County Board of Supervisors dated November 15, 2016, pages 109-110.

<sup>7</sup> *Id.* at page 109.

<sup>8</sup> *Id.* at page 110.

<sup>9</sup> The California Endowment, Online Survey Results Regarding Chemical Agents in Juvenile Facilities (2017) (complete results on file with CDF-CA).

<sup>10</sup> Report of the Los Angeles County Department of Auditor-Controller to the Los Angeles County Board of Supervisors dated November 15, 2016, page 112.

- Potential asphyxiation when used in conjunction with physical and mechanical restraint, or when used on individuals with respiratory conditions such as asthma.<sup>11</sup>
- 2. The Probation Department has Failed to Adequately Address Use of Pepper Spray for More Than 15 Years**

The use of chemical agents against youth in Department custody has plagued Los Angeles County – and untold scores of youth – for decades. As recent data show, the Department has been unable to address this problem.

More than fifteen years ago, in 2003, the United States Department of Justice (DOJ) [determined](#)<sup>12</sup> that the use of chemical agents like OC spray by the Los Angeles County Probation Department likely violated the Constitution. The DOJ threatened to bring a lawsuit against the County to compel an end to legal violations.<sup>13</sup> Multiple provisions of a subsequent [Memorandum of Agreement](#)<sup>14</sup> reached in 2008 (under threat of litigation) obligated the Department to establish new policies to restrict its use of OC spray.

The DOJ found the Department to be in substantial compliance with such obligations in 2012. But, just four years later, in 2016, the Auditor-Controller [found](#)<sup>15</sup> that the Department was again failing to achieve substantial compliance with provisions related to the use of OC spray. At one facility, OC spray was used in a manner not prescribed by policy in 22% of cases reviewed by the Auditor-Controller.<sup>16</sup> This past February, the Governance Study produced for Los Angeles County by Resource Development Associates (RDA) [raised concerns](#)<sup>17</sup> that the Department was not providing adequate training to staff in alternatives to the use of force when attempting to reduce disciplinary techniques like OC spray.

Recent data made public by the Department suggests that use of force involving chemical agents is alarmingly frequent and has increased substantially in recent years. In March 2018, the Probation Department [reported](#)<sup>18</sup> to the Los Angeles County Probation Commission that the Department had attempted a review of all incident reports on the use of OC spray from 2015 to 2017 in all camps and halls. The Department provided only a partial report of this analysis, revealing that:

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<sup>11</sup> Center on Children’s Law and Policy, [Fact Sheet: Chemical Agents in Juvenile Facilities](#) (2012) citing C. Gregory Smith & Woodhall Stopford, *Health Hazards of Pepper Spray*, 60 NORTH CAROLINA MED. J. 268 (1999). See also Council of Juvenile Corrections Administrators, [Issue Brief: Pepper Spray in Juvenile Facilities](#) (2011); Texas Criminal Justice Coalition Juvenile Justice Initiative, *Pepper Spray in the Texas Youth Commission* (2007) (reviewing research).

<sup>12</sup> United States Department of Justice, Letter from Ralph F. Boyd, Jr. to Yvonne B. Burke dated April 9, 2003.

<sup>13</sup> DOJ has expressed similar constitutional concerns about the use of chemical agents such as OC spray in other investigations of state and local juvenile detention facilities. See United States Department of Justice, Letter from Thomas E. Perez to Phil Bryant dated March 20, 2012; Letter from Thomas E. Perez to Mitch Daniels dated January 29, 2010.

<sup>14</sup> Memorandum of Agreement between the United States and Los Angeles County (2008), ¶ 11.

<sup>15</sup> Report of the Los Angeles County Department of Auditor-Controller to the Los Angeles County Board of Supervisors dated December 6, 2016, page 2.

<sup>16</sup> *Id.*

<sup>17</sup> Resource Development and Associates, Final Probation Governance Study in Report of the Los Angeles County Chief Executive Officer to the Los Angeles County Board of Supervisors dated February 13, 2018.

<sup>18</sup> Los Angeles County Probation Commission Minutes of Regular Meeting, March 22, 2018, pages 2-6.

- Between 2015-2017, the use of force involving OC spray in juvenile halls increased between 192% and 338% overall (no comparable data on the use of force involving OC spray in juvenile camps was presented);
- In 2017, of more than 1600 “crisis interventions,” 518 (32%) included a use of force involving OC spray (no comparable data was provided for 2015 or 2016);
- In 2017, of the 518 reported use of force incidents involving OC spray, 12% (at least 62) were in response to something determined to be “nonphysical” (i.e., not involving behavior deemed to be violent) (no comparable data was provided for 2015 or 2016).<sup>19</sup>
- In 2017, of the 518 reported use of force incidents involving OC spray, 2% (at least 10) were in response to youth acts of self-harm (no comparable data was provided for 2015 or 2016).<sup>20</sup>

According to the publicly-available minutes of Probation Commission meetings held since, the Department has [not yet](#) finished its analysis of use of force involving OC spray. Nor has the Department shared with the Commission the data it reported having [already gathered](#) and reviewed showing use of force involving OC spray at the camps.<sup>21</sup>

The Department recently produced more data to the National Broadcasting Corporation (NBC) (more than it had produced to either the Probation Commission or in response to a recent request under the California Constitution and Public Records Act (PRA) by the American Civil Liberties Union of Southern California (ACLU SoCal)).<sup>22</sup> In late December, NBC [reported](#)<sup>23</sup> that the Department had subjected youth to uses of force involving OC spray 747 times in halls and camps in 2017 (at least 200 more times than it had reported to the Probation Commission). NBC reported that the rate of use of force involving OC spray had increased since 2015 at eight of the nine facilities for which it had data (with a net rate increase ranging between 4 and 110 per 100) and that use of force involving OC spray increased by an average of 154% across all nine facilities, with an average increase of 248% in the halls and 58% in the camps.<sup>24</sup>

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<sup>19</sup> The use of force involving OC spray in response to nonviolent behavior is one of the practices identified repeatedly by DOJ as likely unconstitutional in investigations of state and local juvenile detention facilities.

<sup>20</sup> It strains credulity that a chemical weapon was required to stop so many youth from ending their lives. It is entirely inappropriate to use chemical agents in response to a young person’s statements about self-harm or self-harming behavior. Such statements and actions should lead to supportive and therapeutic interventions, not the use of chemical agents which only cause further harm and trauma. The use of pepper spray on youth engaged in actual or threatened self-harm was one of the very practices identified by DOJ as likely unconstitutional more than fifteen years ago.

<sup>21</sup> At the Probation Commission’s April 12, 2018 meeting (the meeting directly following the meeting at which the Department summarized some data about use of force involving pepper spray from 2015-2017), the Department apparently informed Commissioners that it had not finalized its report on the use of pepper spray and “does not have a data system to provide exact numbers” notwithstanding that the Department had informed Commissioners on March 22, 2018 that a “manual poll” and “review” of “every single incident” from 2015-2017 had already been “conducted.” *Compare* Los Angeles County Probation Commission Minutes of Regular Meeting, March 22, 2018, pages 2-6 with Los Angeles County Probation Commission Minutes of Regular Meeting, April 12, 2018, page 4.

<sup>22</sup> ACLU SoCal has not yet brought litigation regarding this failure to comply with California law.

<sup>23</sup> Jason Kandel and Lolita Lopez, *Other Juvenile Lockups are Shunning Pepper Spray, But its Use is on the Rise in LA*, NBC 4 News, December 13, 2018. Raw data reported in the story can be found [here](#) and [here](#).

<sup>24</sup> *Id.*

Data about procurement and deployment has never before been made public. Based on responses to an ACLU SoCal request under the California Constitution and PRA (made public here for the first time), it appears that between November 2014 and March 2017, the Department purchased 1,300 canisters of [Galls-brand](#) MK-4 pepper spray at a total cost of \$16,360.29.<sup>25</sup> That represents a total of 4,030 ounces of OC spray procured during that period. Between January 2014 and July 2018, the Department issued 1,574 canisters of OC spray to its officers.<sup>26</sup>

### **3. The Use of Pepper Spray in Department Detention Facilities Contrary to the Rehabilitative Purpose of the Juvenile Justice System, is Inconsistent with Good Practices, and Would Violate the Rules in the Vast Majority of other U.S. Jurisdictions**

OC spray is a weapon that should be banned in juvenile detention facilities.<sup>27</sup> The use of chemical spray can have serious effects on the relationship between youth and staff – a relationship that is crucial to healthy growth and rehabilitation. Young people thrive when they are in trusting relationships with committed, caring adults. But, as DOJ’s Office of Juvenile Justice and Delinquency Prevention has found, “youth distrust of facility staff and conflict with them can undermine program efforts to alter delinquent career paths and elevate discipline, control, and safety issues.”<sup>28</sup> The use of chemical agents impedes the development of a trusting relationship between staff and youth that is crucial for youth rehabilitation and overall facility safety. A survey conducted by the Council of Juvenile Correctional Administrators (CJCA) found that where OC spray is used, staff and youth fear for their safety more than average.<sup>29</sup> Instead of relying on chemical agents to control youth’s behavior, staff in juvenile facilities should employ non-punitive approaches. For these reasons, [good practices](#) for operating juvenile detention facilities do not permit staff to possess or to use chemical agents like OC spray.<sup>30</sup>

[Research](#) presented by California’s Legislative Counsel to the State Assembly Committee on Public Safety found that at least thirty-five U.S. states do not permit the use of OC spray in juvenile detention facilities; of those that do, only California, Illinois, Indiana, Minnesota, South Carolina and Texas allow facility staff to carry canisters of OC spray on their persons.<sup>31</sup>

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<sup>25</sup> Public records on file with ACLU SoCal.

<sup>26</sup> *Id.*

<sup>27</sup> Although it does not use the term “weapon,” Probation Department Directive 1194 specifies that the use of OC spray “is considered the final level of authorized intervention in the force continuum.” County of Los Angeles Probation Department Directive 1194 (2011), page 8.

<sup>28</sup> Andrea J. Sedlak & Karla S. McPherson, Office of Juvenile Justice and Delinquency Prevention, Conditions of Confinement: Findings from the Survey of Youth in Residential Placement 10 (May 2010) <https://www.ncjrs.gov/pdffiles1/ojjdp/227729.pdf>.

<sup>29</sup> Council of Juvenile Corrections Administrators, [Issue Brief: Pepper Spray in Juvenile Facilities](#) (2011), page 3.

<sup>30</sup> The Annie E. Casey Foundation’s *Juvenile Detention Facility Assessment* is among the most comprehensive recently-issued standards for the administration of juvenile justice detention facilities. Annie E. Casey Foundation, *Juvenile Detention Facility Assessment: 2014 Update* (2014), page 174. Their inspection instrument requires that facilities ban the use of chemical agents including OC spray in order to be in compliance. For a review of older standards prohibiting or strictly limiting chemical agents see Council of Juvenile Corrections Administrators, [Issue Brief: Pepper Spray in Juvenile Facilities](#) (2011).

<sup>31</sup> Report by Legislative Counsel David Billingsley presented to the Assembly Committee on Public Safety for hearing held April 17, 2018, page 4. See also Council of Juvenile Corrections Administrators, [Issue Brief: Pepper Spray in Juvenile Facilities](#) (2011) (reviewing data from the national Performance Based Standards initiative showing use of OC spray an outlier among the many participating juvenile justice systems).

#### **4. The Department’s Increased Use of Pepper Spray Against Youth Comes at a Time when Arrest, Detention and Incarceration Rates Have Declined Significantly**

Arrest rates nationally and in LA County have declined dramatically since the 1990s; crime rates in LA County now are at historic lows.<sup>32</sup> Youth arrest rates in particular are at historic lows in California.<sup>33</sup> The detention rate and population in Department detention facilities has likewise plummeted – with camp populations falling by close to 60% in recent years and the juvenile hall population currently now hovering around 500.<sup>34</sup> The Probation Department has thus increased use of OC spray at a time that the Department has far more resources to work with far fewer youth.<sup>35</sup>

#### **5. Systemic Use of Pepper Spray in Department Detention Facilities is Unlawful and Exposes the County to Further, Costly Litigation**

Though permitting use of OC spray is a rare exception, those juvenile Detention systems across the U.S. that still permit its use have repeatedly faced complaints or lawsuits for mistreating youth in their custody by subjecting them to excessive force involving OC spray.<sup>36</sup> The California legislature has specifically required that juveniles (who are at no time accused or convicted of any criminal offense) “receive care, treatment, and guidance that is consistent with their best interest” and that the “rehabilitative objectives” mandated by the law must “not include retribution.”<sup>37</sup> Other Federal circuit courts of appeals have held that youth in the juvenile justice system are entitled to “rehabilitative treatment” as a matter of Constitutional law.<sup>38</sup> The county violates its heightened obligations to support detained juveniles’ healthy growth, development and rehabilitation when its staff subject youth to conditions or treatment – like the use of chemical agents like OC spray – that constitute a “substantial departure from accepted professional judgment, practice, and standards.”<sup>39</sup> As noted above, DOJ has previously [determined](#) that use of chemical agents in Los

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<sup>32</sup> See, e.g., Cindy Chang, *Crime is town in Los Angeles for the first time in five years*, LOS ANGELES TIMES (December 29, 2018).

<sup>33</sup> Mike Males, *Center on Juvenile and Criminal Justice, California Youth Continue Steep Declines in Arrests* (2017).

<sup>34</sup> See Report from Terri McDonald to the Los Angeles County Board of Supervisors dated April 23, 2018; California Sentencing Institute, *Center on Juvenile and Criminal Justice, Los Angeles County*, <http://casi.cjci.org/Juvenile/Los-Angeles> last accessed February 1, 2019 (showing juvenile crime and detention data from 2009-2016); Proceedings of the Los Angeles County Probation Reform and Implementation Team, January 9 2019 available at <https://www.facebook.com/lacountyprison/videos/610207822725610/> (last accessed February 1, 2019).

<sup>35</sup> This data also calls into question any argument that the population of young people in Department detention facilities is comprised of more serious offenders, constituting a driver for use of force data.

<sup>36</sup> See generally Richard Mendel, *Maltreatment of Youth in U.S. Juvenile Corrections Facilities: An Update* (2015).

<sup>37</sup> CAL. WELF. INST. CODE §§ 202(b), (e), 203. The statute permits that such “guidance” may include “punishment” as well as detention as long as measures taken are consistent with the best interest of the child and the rehabilitative objectives of the law. § 202(b), (e).

<sup>38</sup> See, e.g., *Nelson v. Heyne*, 491 F.2d 352, 360 (7th Cir. 1974). Cf. *Youngberg v. Romeo*, 457 U.S. 307, 319 (1982) (liberty interests of people with disabilities in state institutions require “minimally adequate or reasonable training”) accord *Gary H. v. Hegstrom*, 831 F.2d 1430, 1433 (9th Cir. 1987).

<sup>39</sup> *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982); *Gary H. v. Hegstrom*, 831 F.2d 1430, 1433 (9th Cir. 1987) (holding that “to the extent that the [district] court ordered due process hearings . . . and minimum sanitary, health, educational and medical resources for the inmates, the decree was clearly within the power of a federal court to assure minimum constitutional standards taught by *Youngberg*”). See also *Rohde v. Rowland*, 898 F.2d 156 (9th Cir. 1990) (finding a failure to show “that [the state’s] decisions depart so substantially from accepted professional judgment or practice as to warrant a finding of a [C]onstitutional violation.”) (unpublished decision).

Angeles (as well as other U.S. state or local) juvenile detention facilities likely violated the Constitution.<sup>40</sup> Finally, use of chemical agents against youth violates international human rights law and standards and can constitute a form of torture or cruel, inhuman or degrading treatment or punishment.<sup>41</sup> The systemic – and increasing – use of OC spray in use of force incidents in Department detention facilities places the County at risk of costly litigation brought by youth harmed while in the County’s custody.<sup>42</sup>

**6. The Board of Supervisors Should Mandate Transparency About Use of Force and a Ban on the Use of Chemical Agents such as Pepper Spray in Department Detention Facilities**

The available data suggest that OC spray is systemically used in Department detention facilities at alarming rates. The full scope of the problem will only be clear, however, if the Department is required by the Board of Supervisors to make more and better data available for public scrutiny. County leaders and the public must know how County resources are being spent on and the extent of trauma and harm caused by a practice that is ineffective and contrary to good practices. It is a *decade and a half* since the DOJ determined that use of OC spray in LA was likely unconstitutional. It is deeply troubling that use of OC spray is *increasing* at a time when all eyes – except, now, those of DOJ monitors – are on the Department’s reform effort to become a “model” department, while the juvenile detention population is shrinking and thus the Department’s budget-and-staff-to-youth ratio is growing. These factors suggest that the Board of Supervisors should ban the possession or use of OC spray in Department detention facilities.

We therefore urge the Office of the Inspector General, County Counsel and Chief Probation Officer to call for Board-mandated transparency and a ban on the use of chemical agents, including OC spray, in Department detention facilities. Chemical agents like OC spray have no place in a well-run Department. The time for action is now.

Sincerely,

American Civil Liberties Union of Southern California, Anti-Recidivism Coalition, Children’s Defense Fund-California, Urban Peace Institute, Youth Justice Coalition

*CC: Board of Supervisors Districts 1-5 Justice Deputies (EArcidiacono@bos.lacounty.gov; DGarcetti@bos.lacounty.gov; NAspaturian@bos.lacounty.gov; RKhanna@bos.lacounty.gov; AYoung@bos.lacounty.gov; MNewell@bos.lacounty.gov)*

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<sup>40</sup> United States Department of Justice, Letter from Ralph F. Boyd, Jr. to Yvonne B. Burke dated April 9, 2003. DOJ expressed constitutional concerns about the use of chemical agents in investigations of Mississippi and Indiana juvenile detention facilities. *See* United States Department of Justice, Letter from Thomas E. Perez to Phil Bryant dated March 20, 2012; Letter from Thomas E. Perez to Mitch Daniels dated January 29, 2010.

<sup>41</sup> *See, e.g.*, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368, Art. 10(1)-(3) (1967); Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Mendéz, A/HRC/28/68 (5 March 2015).

<sup>42</sup> While this report primarily focuses on the rights of youth subjected to chemical agents, the County is also exposed to litigation involving other uses of force against youth as well as litigation involving injuries to staff related to the use of OC spray caused by the County’s failures to keep Probation Department facilities safe.