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12
13 **UNITED STATES DISTRICT COURT**
14 **FOR THE DISTRICT OF ARIZONA**

15
16 Puente, an Arizona nonprofit corporation;
Poder in Action, an Arizona nonprofit
17 corporation; Ira Yedlin; Janet Travis;
Cynthia Guillen; Jacinta Gonzalez
18 Goodman, individually and as class
representatives,

19 Plaintiffs,

20 v.

21 City of Phoenix, a municipal corporation;
22 Jeri L. Williams; Benjamin Moore; Douglas
McBride; Robert Scott; Christopher
23 Turiano; Glenn Neville; John Sticca; Lane
White; Jeffrey Howell; George Herr,
24 individually and in their official capacities;
and Does 1-20.

25 Defendants.
26

Case No.: CV 18-2778-PHX-JJT

**PLAINTIFFS' AMENDED MOTION
FOR CLASS CERTIFICATION**

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1 Newberg on Class Actions (5th Ed.) 21, 25, 28

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1 **I. INTRODUCTION.**

2 Plaintiffs move the Court for an order certifying this case as a class action under
3 Rule 23(b)(2) for injunctive relief and Rule 23(b)(3) or 23(c)(4) for damages, and appoint
4 Plaintiffs' counsel as class counsel under Rule 23(g). Defendants created a "Free Speech
5 Zone" for the August 22, 2017 Trump protestors that they calculated held "approximately
6 6,000 protestors." Although Defendants concede that "the vast majority of participants
7 were peaceful, organized and respectful," they "saturated" the Free Speech Zone with
8 approximately 500 chemical-filled pepper balls and 8-12 canisters of tear gas before
9 providing any warnings, before determining or announcing an unlawful assembly, and
10 without any effort or plan to isolate or extract what they themselves characterize as 10-20
11 troublemakers. The eventual unlawful assembly announcement could not be heard by much
12 of the crowd; no exit directions were provided; thousands of peaceful protestors' First
13 Amendment rights were violated; and all relevant decisions were made by a centralized
14 command appointed by Chief Williams, who was "actively involved" in the management
15 of the operations and who approved and ratified the Phoenix Police Department's ("PPD")
16 actions that day. Plaintiffs have submitted declarations from more than 70 proposed class
17 members whose rights were violated by PPD's actions, as well as extensive evidence from
18 PPD, to demonstrate the predominance of common questions of fact and law and the other
19 certification criteria.

20 **II. STATEMENT OF FACTS.**

21 **A. Defendants had six days to plan for the thousands of protestors they**
22 **knew would be present, and the protest proceeded without any**
23 **significant issues for most of the day.**

24 Defendants knew at least six days before August 22, 2017, that President Trump
25 would hold a rally at the Phoenix Convention Center on that day. (Ex. 1 at 14832.) They
26 "anticipated that large numbers of protestors [would] be participating in this event." (Ex. 4
27 at 15085.) Defendants also knew that several pro-Trump and anti-Trump groups might try
28 to disrupt the event, and that in the weeks before this rally there had been violence at

1 protests in Boston, Berkeley, and Charlottesville. (Ex. 1 at 14832, 14866.) As part of the
2 preparation, Defendants identified a “Free Speech Zone,” restricting where Trump
3 protestors were directed to exercise their First Amendment rights. (Ex. 3 at 15073-15074.).

4 According to Defendants, “approximately 6,000 protestors gathered outside the
5 Convention Center,” and “the vast majority of participants were peaceful, organized and
6 respectful.” (Ex. 1 at 14840, 14832.) Up through 8:30 p.m., the protest proceeded smoothly,
7 with no arrests, minimal if any property damage or reports of injuries, and no need for the
8 police to use force. (Ex. 6 at 15079-15084.) With the exception of a handful of plastic water
9 bottles thrown in the direction of officers, Defendants documented no adverse actions
10 before 8:30 pm by the approximately 6,000 protestors against the force of a thousand-plus
11 police officers on the scene. (Ex. 1 at 14847-14848; Ex. 19 at 210:25-211:23.) Trump
12 arrived at the Convention Center at 6:30 pm and the rally proceeded as planned. (Ex. 1 at
13 14847.) At approximately 8:30 pm, the rally ended, and Trump exited the Convention
14 Center. (*Id.* at 14848; Ex. 19 at 193:5-19.) This is the moment when Trump protestors
15 expected to deliver their messages to Trump and his supporters. (*See* Ex. 27; Ex. 28.)

16 **PPD knew that Antifa might try to disrupt the protest and that there**
17 **were fewer than 20 Antifa among the 6,000 protestors.**

18 Defendants knew that Antifa would be present at the protest. (Ex. 6 at 15079.) They
19 also knew that Antifa had disrupted recent protests across the country. (Ex. 1 at 14843-
20 14844.) As a result, PPD specifically identified and monitored Antifa at the protest. (Ex. 3
21 at 15075; Ex. 1 at 14843-14844.) PPD’s plainclothes officers stationed in the crowd were
22 “providing constant updates to Command personnel,” including reporting any “potential
23 unlawful acts.” (Ex. 15 at 17251; Ex. 7 at 14993, 14995.) PPD reported observing a group
24 of either 5-10 or at most 10-20 Antifa in the Free Speech Zone near the corner of Monroe
25 and 2nd Streets. (Ex. 3 at 15075; Ex. 9.) At 8:07 pm, PPD observed some Antifa individuals
26 “shove down” a protestor who was telling them not to throw water battles and become
27 “extremely agitated” when confronted by PPD. (Ex. 5 at 15131-15132.) At 8:20 pm, PPD
28 observed this small group of Antifa gathered against the temporary pedestrian fencing that

1 stood approximately 3 feet tall on the north side of Monroe Street. (Ex. 3 at 15075; Ex. 9;
2 Ex. 19 at 208:19-20.) Although PPD claims that Antifa attempted to “breach” the fence,
3 video shows only the fence being shaken and confirms, as the Field Force Commander
4 conceded, that none of the Antifa individuals (or anyone else) ever attempted to climb the
5 fence. (Ex. 19 at 206:12-17, 207:23-208:18; Ex. 38.)

6 **C. PPD “saturated” the Free Speech Zone with chemical weapons instead**
7 **of addressing the handful of Antifa individuals.**

8 At 8:33 pm, the 10-20 Antifa were surrounded by thousands of peaceful protestors.
9 (Ex. 29; Ex. 38; Ex. 3 at 15075.) Without warning, PPD “saturated” the Free Speech Zone
10 with pepper balls, which are chemical weapons that “combine[] the kinetic impact of a
11 baton round and a chemical agent payload.” (Ex. 5 at 15132; Ex. 11 at 17567.) PPD’s
12 reports confirm that PPD effected a “complete saturation” of the area with pepper balls.
13 (Ex. 5 at 15128, 15132; Ex. 16 at 18053; Ex. 12 at 17567.) PPD fired approximately 500
14 pepper balls at protestors in the Free Speech Zone between 8:33 and 9:31 pm. (Ex. 1 at
15 14854, 14848-14849.)

16 PPD policy requires that planning for an event like this must include “identify[ing]
17 possible scenarios that could occur and mak[ing] necessary tactical preparations.” (Ex. 15
18 at 17239-17240, 17244.) PPD policy also requires that any action against a crowd of
19 protestors must be preceded by certain considerations, including, “if only scattered
20 individuals are violent, is it better to arrest those individuals rather than to disperse the
21 entire crowd?”, and that “an effort should be made to arrest as many of the crowd ‘leaders’
22 as possible.” (*Id.* at 17244, 17236.) PPD did none of these things before firing saturating
23 the area with pepper balls.

24 PPD knew exactly where the small group of Antifa were and what they were doing,
25 and should have been able to address their actions without violating the First Amendment
26 rights of the thousands of “peaceful, organized and respectful” protestors in the Free
27 Speech Zone. (Ex. 1 at 14832.) According to Police Practices Expert Roger Clark, “The
28 PPD failed to use well-known law enforcement methods that they were, or should have

1 been, trained on for addressing the small group of unlawful individuals within the much
2 larger group of lawful protestors. The most obvious and reasonable method of control was
3 to individually identify and arrest the small group of alleged Antifa members for individual
4 criminal acts and allow the much larger group of peaceful protesters to continue to exercise
5 their First Amendment rights.” (Ex. 13 at 17.) PPD conducted no training specifically for
6 the August 22, 2017 protest, and Clark concludes that “PPD clearly lacked sufficient or
7 appropriate policies and training regarding . . . the handling of a small group of disruptive
8 or violent persons in a generally peaceful crowd . . . and the circumstances in which the
9 use of force against a crowd of protestors is appropriate.” (*Id.* at 17; Ex. 19 at 243:5-244:7.)

10 **D. PPD fired 8-12 canisters of tear gas into the Free Speech Zone before**
11 **determining that the assembly was unlawful.**

12 PPD’s initial pepper ball saturation forced the 10-20 Antifa to scatter into the
13 surrounding crowd. (Ex. 3 at 15076.) PPD nevertheless then fired 8-12 canisters of tear gas
14 into the Free Speech Zone between 8:36 and approximately 8:42 pm. (Ex. 1 at 14849; Ex.
15 19 at 203:13-22.) PPD reportedly took the wind direction “into account during the
16 deployment to disperse the smoke strategically toward the ANTIFA group,” even though
17 those individuals were no longer in a group because PPD had forced them to move into the
18 crowd. (Ex. 1 at 14845; Ex. 3 at 15076.)

19 PPD’s tear gas attack inundated the Free Speech Zone and the thousands of peaceful
20 protesters with powerful chemical agents. (Ex. 29; Ex. 30; Ex. 31; Ex. 32; Ex. 33; Ex. 34.)
21 Defendants concede that the tear gas affected “protestors who were there peacefully
22 exercising their 1st amendment rights.” (Ex. 3 at 15077.) Indeed, the attack was so potent
23 that PPD documented that staff inside the Basilica complained that PPD’s “airborne
24 chemical munitions . . . permeated the grounds of the [St. Mary’s] Basilica.” located north
25 of Monroe between 3rd and 5th Streets. (Ex. 1 at 14861.)¹

26 Plaintiffs have submitted declarations from more than 70 individuals who were

27 _____
28 ¹ Tear gas is such a powerful weapon that, according to PPD, it will be “used only as a last
resort to protect the safety of the officers and the public.” (Ex. 7 at 14977; Ex. 4 at 15087.)

1 exercising their First Amendment Rights when they were attacked with tear gas or other
2 chemical agents. (Ex. 27; Ex. 28.) These witnesses attest that “many of [the people
3 attacked] were children, elderly or differently abled.” (Ex. 2, Crystal Carillo Dec., ¶ 10.)
4 They “observed children screaming and vomiting from the inhalation of tear gas” and
5 describe how their families, friends, and the people around them were attacked by these
6 chemical weapons as well (Ex. 27, Adrian Ingraham Dec., ¶ 7; *see also, e.g.*, Ex. 27, Anna
7 Gault, Milan Jeknich, Jacklyn Link). People reported having difficulty breathing. (*E.g.*, Ex.
8 27, Jacob Olson.) “The feeling I had when I inhaled the gas was very sharp like I had
9 inhaled a bunch of glass shards. My throat was burning and I was in a lot of pain.” (Ex. 27,
10 Alex Rempel Dec., ¶ 6.) The chemical weapons made their eyes burn and made it difficult
11 or impossible to see. (*E.g.*, Ex. 27, Jacob Olson Dec., ¶ 6.) One person described seeing
12 “people dragging their friends and others out of the area who were so severely affected by
13 the gas that they could not stand or walk.” (Ex. 27, Milan Jeknich Dec., ¶ 6.)

14 Police Expert Clark opines that PPD’s use of tear gas and other force before
15 declaring an unlawful assembly “was improper and in violation of well-known law
16 enforcement tactics Tear gas cannot be directed at a small group of unlawful protestors
17 within a much larger group of lawful protestors. This is particularly true where, as here,
18 the officers knew, or should have known, that the conditions would cause this powerful
19 chemical weapon to be deployed into the large crowd of lawful protestors.” (Ex. 13 at 15.)

20 PPD does not have any policies regarding the use of tear gas.² Clark concluded that
21 “the Phoenix Police Department’s policy regarding the use of tear gas is insufficient. There
22 is no policy governing the use of this powerful chemical weapon in either the Phoenix
23 Police Department’s use of force policy or the Downtown Operations Unit Policies relating
24 to chemical weapons. The lack of a policy regarding the use of this powerful weapon, as
25 well as a failure to prepare formal rules of engagement regarding the use of weapons at the

26 _____
27 ² The City’s 30(b)(6) designee testified that all of PPD’s policies regarding the use of tear
28 gas are in the Use of Force policy or the Downtown Operations Unit policies, but there are
no provisions on tear gas in those documents. (Ex. 19 at 219:2-221:9; Ex. 14; Ex. 12.)

1 event, likely contributed to the officers' improper use of tear gas on August 22, 2017." (Ex.
2 13 at 15.)³

3 In addition to firing hundreds of pepper balls and 8-12 tear gas canisters before
4 making any unlawful assembly announcements, PPD also fired eleven 40mm cartridges
5 loaded with chemical agents and eight other 40mm projectiles containing chemical agents
6 at the protestors. (Ex. 19 at 211:24-212:4; Ex. 1 at 14854-14856.)⁴ PPD does not have any
7 policies governing the use of these chemical weapons either. (Ex. 14; Ex. 12.)

8 PPD fired at least 590 munitions/projectiles into the crowd, and according to
9 Defendants, "multiple unknown protestors were struck by PepperBall and less lethal
10 munitions There would be too many to list." (Ex. 1 at 14854-14856; Ex. 5 at 15132.)
11 More than 15 protestors have given declarations stating that PPD's projectiles hit them (Ex.
12 24; Ex. 25; Ex. 26; Ex. 27, Michael Green, Kimberly Murray, Jocelyn L. Porter, Thomas
13 Swenson, Teddi Swidinsky, Julian Castillo, Shawn Severud, Danny Kuehn, Jacklyn Link,
14 Jacob Olson; Ex. 28, Joel Cornejo Ojeda, Sandra M. Cornejo Ojeda), some saw others hit
15 by projectiles (*e.g.*, Ex. 27, Alex Rempel; Ex. 28, Erika Ovalle, Lizette A. Zamudio,
16 Manuel Saldana), and many have stated that PPD hit them with pepper spray. (*See*
17 *generally* Ex. 27; Ex. 28; *see also* Ex. 40; Ex. 35; Ex. 36; Ex. 37; Ex. 41; Ex. 42; Ex. 43;
18 Ex. 44; Ex. 45; Ex. 46; Ex. 47; Ex. 48; Ex. 49.) PPD used these tactics only against Trump
19 protestors; no force was used against Trump supporters. (Compl., Doc. 1, at 31-32; *see*,
20 *e.g.*, Ex. 27, Jocelyn L. Porter.)

21 Police Expert Clark concluded that, before using force there must be "an objectively
22 reasonable basis for the use of force against that particular individual. All persons are not

23
24 ³ PPD failed to prepare "rules of engagement" that governed how and when chemical
25 weapons like tear gas would be used, and nothing given to officers at briefings on the day
26 of the protest addressed specific tactics or the potential use of force. (Ex. 19 at 64:21-25,
27 66:23-67:21, 69:5-14, 75:11-77:6, 84:14-85:2; Ex. 4; Ex. 10.) After the protest, PPD stated
28 that it should "establish rules of engagement before each incident . . . regarding the type of
munitions allowable and under which circumstances they will be deployed." (Ex. 6 at
15084; Ex. 1 at 14864.)

⁴ PPD also fired at least 18 non-chemical weapons at protestors. (Ex. 1 at 14854-14856.)

1 subject to indiscriminate police force by simply being present at the scene, particularly at
2 a scene where First Amendment rights are being exercised, and the PPD had no right to
3 use indiscriminate force on the entire group as if they were all criminally culpable for the
4 individual acts of a few persons in the crowd.” (Ex. 13 at 15.)⁵

5 **E. PPD did not decide that the assembly was unlawful until some time**
6 **between 8:42 and 8:47 pm, and the unlawful assembly announcements**
7 **that followed were improper and insufficient.**

8 Defendants made no preparations in advance regarding how or when they might
9 declare an unlawful assembly at this particular protest. (Ex. 19 at 115:25-116:24.) Nor do
10 Defendants know when they decided that the assembly was unlawful; the timeline in PPD’s
11 After-Action Report does not identify when this occurred. According to the City’s 30(b)(6)
12 designee, however, PPD made the unlawful assembly decision some time between 8:42
13 and 8:47 pm, at least nine minutes *after* they began firing chemical weapons at the
14 protestors. (Ex. 19 at 124:10-125:17.) The first and only discussion about the possibility of
15 declaring the assembly unlawful was just 45 seconds long and took place immediately
16 before PPD decided the assembly was unlawful. (Ex. 19 at 137:10-138:8, 157:10-24.)

17 Although Defendants now claim that they decided that the assembly was unlawful
18 sometime between 8:42 and 8:47 pm, they did not inform the protestors or make any
19 unlawful assembly announcement until 8:52 pm. (Ex. 1 at 14849; Ex. 19 at 146:21-25.) As
20 a result, *there was a five- to ten-minute gap between the decision to declare the assembly*
21 *unlawful and any communication to protestors that they were part of an unlawful*
22 *assembly*. Meanwhile, PPD shot tear gas and other chemical weapons into the crowd in the
23 Free Speech Zone for approximately 19 minutes before they made any announcements.

24 When PPD did begin to make announcements, they were insufficient and improper

25 ⁵ Although Defendants may contend that they fired the tear gas at the crowd only after gas
26 was thrown at them, even if this is true it does not impact class certification as the issue of
27 whether PPD’s use of force was appropriate is a common question. Moreover, it is
28 undisputed that any gas that came from the crowd happened *after* the first pepper ball
saturation and Plaintiffs have submitted substantial evidence that the tear gas use against
the entire crowd was disproportionate and excessive.

1 for several reasons. First, PPD policy requires that dispersal announcements “will be issued
2 with significant amplification and repetition as necessary to be heard by the entire crowd.”
3 (Ex. 8 at 17243).⁶ But, even according to PPD, “people within the crowd reported that they
4 did not hear warnings or orders to disperse.” (Ex. 1 at 14859-14860; *see, e.g.*, Ex. 27,
5 Joseph Preston, Nicholas Radtke; Ex. 28. Edgar Zamuido Guillen.) Belatedly, PPD
6 concluded that it should have used “amplified notifications in conjunction with police
7 action. Handheld megaphones or similar low-tech options are preferable to voice or no
8 warnings Amplified warnings should be given in all but the most extreme incidents
9 before enforcement or dispersal actions are taken against the larger assembly.” (Ex. 1 at
10 14865.)

11 Although PPD had a Long Range Acoustic Device (LRAD), which is “a high
12 volume communications system designed to give clear instructions to large crowds in
13 amplified noise conditions,” it did not use it to make unlawful assembly announcements.
14 (Ex. 19 at 94:17-95:1; Ex. 3 at 15074; Ex. 1 at 14843.) The LRAD was used earlier at the
15 protest, but no one was operating it when PPD began to deploy chemical weapons or when
16 PPD determined that the assembly was unlawful, and no orders were given to use the
17 LRAD to make those announcements. (Ex. 19 at 171:4-9, 173:6-174:8.) Instead, PPD
18 eventually made unlawful assembly announcements and dispersal orders using Chevy
19 Tahoe trucks, which are less effective than the LRAD for communicating to large crowds.
20 (*Id.* at 165:21-167:3). And, although there were other law enforcement agencies assisting
21 at the protest, PPD made no efforts to use any of their communication devices. (*Id.* at
22 175:14-17.)

23 PPD also failed to make unlawful assembly announcements in Spanish, even though
24

25 ⁶ PPD policy also requires that it “[r]equest that the Federal Aviation Administration (FAA)
26 restrict air space above the affected area for emergency police air operations, which will
27 allow our aircraft to fly in a blackout condition above the affected area.” (Ex. 15 at 17241.)
28 PPD did not do this and in fact, although the air unit was requested at 8:34 pm, it was
“delayed because of the need to get FAA clearance” and did not do anything until 8:52 pm.
(Ex. 1 at 14849, 14845.)

1 many protestors understood only Spanish (*id.* at 226:13-18, 228:20-229:2); failed to make
2 unlawful assembly announcements on social media or on-line (Ex. 1 at 14865); failed to
3 inform protestors how to disperse or where to go (Ex. 19 at 189:23-191:7; Ex. 1 at 14833);
4 and failed to identify the geographic area of the unlawful assembly, finding instead that “it
5 was wide open.” (Ex. 19 at 129:24-130:20.) For all these reasons, Police Expert Clark
6 concluded, “The Defendants’ unlawful assembly announcements were insufficient and
7 improper, and violated Department policy as well as well-known law enforcement
8 standards.” (Ex. 13 at 16.)

9 **F. The chain of command authorized, and Chief Williams ratified, all**
10 **PPD’s decisions and actions at issue.**

11 Under the Phoenix City Code, Chief Williams is responsible for PPD’s conduct,
12 including training and policies. (Ex. 17; Ex. 18.) As such, Chief Williams and PPD’s
13 Command Staff were “actively involved” in the preparations for and the management of
14 PPD’s operations during the protest. (Ex. 19 at 33:15-34:16, 35:15-36:9, 39:6-40:10,
15 40:24-41:42:4, 44:24-45:22.) PPD’s chain of command for the protest identifies Chief
16 Williams at the top, followed by three Assistant Chiefs, and “Chief Williams was
17 ultimately responsible for the department’s actions on August 22, 2017.” (Ex. 8; Ex. 20;
18 Ex. 19 at 22:14-23:3.) PPD acted pursuant to this chain of command on August 22, 2017,
19 and there were no instances where the chain of command was not followed. (Ex. 19 at 23:4-
20 8, 25:13-18.) Significantly, each use of force by PPD, and PPD’s actions related to
21 declaring the unlawful assembly, were authorized by Chief Williams and PPD’s Command
22 Staff through the established chain of command. (*Id.* at 23:24-24:3, 24:4-18, 125:9-126:3,
23 129:3-15, 214:3-10, 215:15-24, 217:3-218:25, 240:12-241:8.) Chief Williams also publicly
24 and wholeheartedly ratified PPD’s actions against the protestors after the event. When
25 asked whether the PPD’s use of force against the protestors “was appropriate,” Chief
26 Williams responded “absolutely.” (Ex. 39.) As she states in her Report, “the actions of our
27 officers [on August 22, 2017] reflected the direction I gave them.” (Ex. 1 at 14834.)

28 Police Expert Clark concluded, “The [PPD’s] improper actions . . . flowed from

1 several factors that go to the conduct of the PPD as a whole and not the conduct of
2 individual officers. First, command staff from the Chief on down were directly involved in
3 planning for this event and the PPD's actions at the event Second, command staff
4 from the Chief on down made the use of force, unlawful assembly, crowd control and
5 related decisions that resulted in the arbitrary and unnecessary actions against the crowd . .
6 . . Chief Williams and the command staff also expressly approved of the PPD's conduct at
7 the rally, including the use of force, in their statements and reports made after the event.”
8 (Ex. 13 at 17-18.)

9 **G. PPD's wrongful conduct on August 22, 2017 harmed Puente, Poder in**
10 **Action, and their members.**

11 Puente is a grassroots nonprofit membership organization whose mission is to
12 develop, educate, and empower migrant communities through lobbying, advocacy, and
13 activism. (Garcia Decl., Doc. 20-5, ¶ 5.) As part of its mission, Puente frequently organizes
14 and participates in demonstrations in Phoenix, including the Trump protest on August 22,
15 2017. (*Id.* ¶¶ 6, 7.) Puente devoted significant staff, volunteer, and financial resources to
16 ensuring that it and its members and supporters could express their opposition to Trump
17 and his anti-immigrant policies. (*Id.* ¶¶ 8-10.) Numerous Puente members and supporters
18 attended the Trump protest to express their views. (*See* Ex. 21, ¶ 7; Ex. 28.) When PPD
19 attacked protesters with pepper balls, tear gas, and other weapons, it cut short Puente's and
20 its members' ability to express themselves together with others with similar views. (Garcia
21 Decl., Doc. 20-5, ¶ 10; Ex. 28.) In the aftermath of the Trump protest, Puente devoted staff
22 resources to responding to members and supporters who were harmed by PPD's violent
23 actions. (Ex. 21, ¶ 9.) Puente and its members plan to organize and participate in protests
24 in Phoenix in the future, but must take into account safety concerns following PPD's
25 violent actions on August 22, 2017. (Garcia Dec., Doc. 20-5, ¶¶ 16-18.)

26 Likewise, Poder in Action (“Poder”) is a grassroots nonprofit organization whose
27 mission is to build power with people impacted by injustice through leadership
28 development, civic engagement, and policy advocacy. (Hernandez Dec., Doc. 20-8, ¶ 5.)

1 As part of its mission, Poder regularly organizes and participates in protests and political
2 expressive activities in Phoenix, including the Trump protest on August 22, 2017. (*Id.* ¶¶
3 5, 8.) Poder’s members include people who participate in its programming and who
4 volunteer on its various project teams. (Ex. 22, ¶ 5.) Poder devoted significant staff,
5 volunteer, and financial resources to ensuring that it and its members and supporters could
6 express their opposition to Trump and his anti-immigrant policies. (Hernandez Dec., Doc.
7 20-8, ¶ 10.) Numerous Poder members and supporters attended the Trump protest to
8 express their views. (*Id.* ¶¶ 11-12; Ex. 22, ¶ 6.) When PPD attacked protesters with pepper
9 balls, tear gas, and other weapons, it cut short Poder’s and its members’ ability to express
10 themselves together with others with similar views. (Hernandez Dec., Doc. 20-8, ¶ 10.)
11 Poder and its members plan to organize and participate in protests in Phoenix in the future,
12 but must take into account safety concerns following PPD’s violent actions on August 22,
13 2017. (*Id.*, ¶¶ 13-15.)

14 **III. CLASS DEFINITIONS.**

15 **A. Injunctive relief class.**

16 The proposed Injunctive Relief Class is defined as:

17 All persons who have in the past, including those present at the Trump protest
18 on August 22, 2017, between 8:25 and 10:00 pm in the area designated as
19 the “free-speech zone” (the area for anti-Trump protestors bounded to the
20 south by Monroe Street, 2nd Street to the west, and 5th Street to the east),
21 or may in the future, participate in, or be present at, protests or
22 demonstrations within the City of Phoenix in the exercise of their rights of
23 free speech and assembly.

24 The injunctive relief class representatives are Puente, Poder In Action, Ira Yedlin,
25 Janet Travis, Cynthia Guillen, and Jacinta Gonzalez Goodman.

26 The fact that the 23(b)(2) class includes members who “in the future may” be
27 affected is proper in an injunctive relief class. *See, e.g., Probe v. State Teachers’ Ret. Sys.*,
28 780 F.2d 776, 780 (9th Cir. 1986) (inclusion of “future members does not render
the class definition so vague as to preclude certification”).

1 **B. Damages class.**

2 The proposed Damages Class is defined as:

3 Those persons who were present at the Trump protest on August 22, 2017, between
4 8:25 and 10:00 pm in the area designated as the “free-speech zone” (the area for
5 anti-Trump protestors bounded to the south by Monroe Street, 2nd Street to the west,
6 and 5th Street to the east), or the immediately adjacent areas (“Trump Protest”), and
7 were engaged in the exercise of their rights of free speech and assembly and did not
8 engage in any conduct justifying the Defendants’ use of force or dispersal order.⁷

9 The damages class representatives are Ira Yedlin, Janet Travis, Cynthia Guillen and
10 Jacinta Gonzalez Goodman.

11 The proposed damages subclasses are defined as:

12 *Damages Subclass #1:* All persons who were present at the Trump Protest (defined
13 above) and were subjected to the Phoenix Police Department’s use of gas, pepper
14 spray, pepper bullets, or other chemical agents and who did not engage in any
15 conduct justifying such force against them.

16 *Damages Subclass #2:* All persons who were present at the Trump Protest and were
17 the subject of individual physical force by the Phoenix Police Department (either
18 struck with projectiles or individually pepper sprayed) and who did not engage in
19 any conduct justifying such force against them.

20 The Damages Subclass #1 class representatives are Ira Yedlin, Janet Travis, Cynthia
21 Guillen, and Jacinta Gonzalez Goodman. The Damages Subclass #2 class representatives
22 are Ira Yedlin, Janet Travis and Cynthia Guillen.

23 **C. Plaintiffs meet the definiteness requirement for damages class certification.**

24 A class definition is adequate so long as the class is defined objectively, is capable
25 of membership ascertainment when appropriate, and is defined without regard to the merits
26 of the claim or the seeking of particular relief. 1 *Newberg on Class Actions* § 3:6 (5th Ed.)
27 (hereafter “*Newberg*”); *Melgar v. CSK Auto, Inc.*, 681 F. App’x 605, 607 (9th Cir. 2017)

28

⁷ This definition is adapted from *Multi-Ethnic Immigrant Workers Org. Network v. City of Los Angeles*, 246 F.R.D. 621, 625 (C.D. Cal. 2007) (“*MIWON*”) (police use of force to disperse protest without proper announcement of unlawful assembly; class defined by geographic boundaries of protest and protestors who “did not engage in any conduct justifying Defendants’ dispersal order or the use of force”).

1 (citing *Vizcaino v. U.S. Dist. Ct.*, 173 F.3d 713, 721–22 (9th Cir. 1999)). In the Ninth
2 Circuit, there is no administrative feasibility requirement, and self-identification of class
3 membership is proper. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1125–33 (9th Cir.
4 2017). *Briseno* “foreclose[es]” the argument that “a self-identifying class” is improper.
5 *Melgar*, 681 F. App’x at 607. The proposed class definition satisfies the definiteness
6 criteria.

7 **IV. GENERAL CLASS CONSIDERATIONS.**

8 **A. Presumptions applicable to motions for class certification.**

9 When analyzing class certification, the court takes the complaint’s allegations as
10 true, and performs a “rigorous analysis,” which may require it “to probe behind the
11 pleadings.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352 (2011). This is not a merits
12 determination. See *Waine-Golston v. Time Warner Entm’t-Advance/New House P’ship*,
13 2012 WL 6591610 (S.D. Cal. Dec. 18, 2012). In close cases, a court should err on the side
14 of certifying the class because a class can always be decertified. See *Esplin v. Hirschi*, 402
15 F.2d 94, 99 (10th Cir. 1968). Thus, “an appellate court . . . is noticeably less deferential”
16 to a denial than a grant of class certification. *Parker v. Time-Warner Entm’t Corp.*, 331
17 F.3d 13, 18 (2nd Cir. 2003).

18 **B. Plaintiffs have standing to pursue injunctive relief.**

19 Individual Plaintiffs Ira Yedlin, Janet Travis, Cynthia Guillen, and Jacinta Gonzalez
20 Goodman have established that they have regularly participated in protests in the past and
21 intend to do so in the future, particularly around issues related to immigrant rights.
22 Similarly, organizational Plaintiffs Puente and Poder In Action organize around issues of
23 immigrant rights and the rights of people of color in Phoenix. Both organize protests in
24 which their members actively participate, and PPD has used unjustifiable force against
25 their activities in the past (aside from the 2017 Trump protest). (Ex. 22; Ex. 28, Diane
26 Ovalle, Erika Ovalle, Joel Cornejo Ojeda, Julio Zuniga, Maria Castro, Sandra M. Cornejo
27 Ojeda.)
28

1 For injunctive relief, the threat of injury must be “actual and imminent.” *Summers*
2 *v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). Past wrongs with similar injuries are
3 “evidence” of “a real and immediate threat of repeated injury.” *City of Los Angeles v.*
4 *Lyons*, 461 U.S. 95, 102 (1983) (internal quotation marks omitted). In determining whether
5 an injury is similar, the court should not employ “too narrow or technical an
6 approach.” *Armstrong v. Davis*, 275 F.3d 849, 867 (9th Cir. 2001), *abrogated on other*
7 *grounds by Johnson v. California*, 543 U.S. 499 (2005).

8 Here, a realistic threat exists. The conduct here is not an isolated incident; PPD has
9 engaged in previous disruption of peaceful protests and use of force against demonstrators.
10 (Ex. 21, ¶ 10; Ex. 22, ¶¶ 11-13; Ex. 28, Diane Ovalle, Erika Ovalle, Joel Cornejo Ojeda,
11 Julio Zuniga, Maria Castro, Sandra M. Cornejo Ojeda.) Moreover, Chief Williams ratified
12 the conduct at issue and indicated that PPD’s actions reflected “the direction [she] gave
13 them” (Ex. 1 at 14834.) There is also no evidence that anyone from PPD was reprimanded
14 or disciplined for violating class members’ rights. The deficiencies and inadequacies in
15 PPD’s policies independently demonstrate a realistic threat of recurrence. For example,
16 PPD has no or insufficient policies regarding: (1) the use of tear gas and other chemical
17 weapons against protestors, (2) what type of notice must accompany an unlawful assembly
18 declaration (including indicating and establishing exit routes), (3) having and using audible
19 loudspeakers for announcements at demonstrations, and (4) isolating and removing
20 troublemakers from an otherwise lawful event, just to name a few. These combined
21 considerations make injunctive relief appropriate.

22 Even if this were a lone incident, Plaintiffs have standing for injunctive relief in
23 light of the Chief’s and Command Staff’s role in the conduct, the participation of dozens
24 or even hundreds of officers, and the policy and training deficiencies. *See, e.g., Clouthier*
25 *v. Cnty. of Contra Costa*, 591 F.3d 1232, 1249 (9th Cir. 2010) (liability for single incident
26 when “the need for more or different training is so obvious, and the inadequacy so likely
27 to result in the violation of constitutional rights, that the policymakers of the city can
28

1 reasonably be said to have been deliberately indifferent to the need.” (quoting *City*
2 *of Canton v. Harris*, 489 U.S. 378, 390 (1989)); *Farvardin v. Santos*, 2014 WL 7150023,
3 at *9 (E.D. Pa. Dec. 15, 2014) (injunctive relief for failure to train with no evidence of past
4 pattern); *Leadholm v. City of Commerce City*, 2017 WL 1862313, at *8 (D. Colo. May 9,
5 2017) (sufficient evidence to go to trial for excessive force during traffic stops based on
6 single incident involving multiple officers); *Grandstaff v. City of Borger*, 767 F.2d 161,
7 171 (5th Cir. 1985) (single night excessive force by several officers, with no action taken,
8 sufficient to establish custom or policy).

9 In any event, a final standing determination is most appropriate after full discovery.
10 *See, e.g., Quad Cities Waterkeeper Inc. v. Ballegeer*, 2016 WL 287013, at *3 (C.D. Ill. Jan.
11 22, 2016) (standing should be determined on summary judgment “after full discovery has
12 occurred, and the parties have been permitted ample time to depose witnesses and gather
13 evidence as to standing issues”); *Synthes USA, LLC v. Davis*, 2017 WL 5972705, at *5
14 (D.S.C. Dec. 1, 2017) (“[A]t this early stage and without the benefit of full discovery . . . ,
15 the Court is disinclined to make a definitive ruling regarding standing.”).

16 **V. THIS ACTION SATISFIES THE REQUIREMENTS OF RULE 23(A), AND**
17 **THE RULE 23(B)(2) AND 23(B)(3) PREDOMINANCE REQUIREMENT.**

18 All class actions in federal court must meet the prerequisites of Rule 23(a):
19 *Numerosity*: The class must be so numerous that joinder of all members individually is
20 “impracticable.” Fed. R. Civ. P. 23(a)(1); *Commonality*: There must be questions of law or
21 fact common to the class. Fed. R. Civ. P. 23(a)(2); *Typicality*: The claims or defenses of
22 the class representative must be typical of the claims or defenses of the class. Fed. R. Civ.
23 P. 23(a)(3); and *Adequacy of representation*: The person representing the class must be
24 able fairly and adequately to protect the interests of all members of the class. Fed. R. Civ.
25 P. 23(a)(4). Because Plaintiffs seek certification of both injunctive relief and damages
26 classes, the Rule 23(b)(3) requirement that common issues predominate is addressed below
27 together with Rule 23(a) commonality.
28

1 **A. Numerosity.**

2 The Damages Class consists of approximately 6,000 people. The injunctive relief
3 class is cumulatively even larger. Damages Subclass #1 (those who were subjected to
4 chemical agents like tear gas) numbers at least in the hundreds. These numbers far exceed
5 the numerosity requirement. *See Newberg* § 3:12 (a “class of 40 or more members raises a
6 presumption of impracticability of joinder based on numbers alone”); *Jordan v. Cnty. of*
7 *Los Angeles*, 669 F.2d 1311, 1319 & n.10 (9th Cir. 1992), *vacated on other grounds*, 459
8 U.S. 810 (1982) (listing 13 cases with class members of fewer than 100, including 8 with
9 fewer than 40).

10 Damages Subclass #2 encompasses Trump Protest participants who were subjected
11 to individual PPD physical force (either struck with projectiles or individually pepper
12 sprayed). PPD fired 590 projectiles and documented that its projectiles struck “too many
13 [protestors] to list.” Plaintiffs are currently aware of more than 20 individuals who fit this
14 definition, identified to date, which is likely to rise significantly after notice outreach.

15 Even if this subclass is less than 40, certification is appropriate. “Other indicia of
16 impracticality” for a class “in the gray area between 20 and 40 [include] . . . judicial
17 economy arising from avoidance of a multiplicity of actions, geographic dispersion of class
18 members, size of individual claims, financial resources of class members, and the ability
19 of claimants to institute individual suits.” *Newberg* § 3:12; *Jordan*, 669 F.2d at 1319
20 (identifying class member geographical diversity and ability to institute separate suits as
21 factors); *Odom v. Hazen Transp., Inc.*, 275 F.R.D. 400, 407 (W.D.N.Y. 2011) (certifying
22 class of 16 due to small amount of individual recoveries, judicial economy, and limited
23 resources of class members); *Michaud v. Monro Muffler Brake, Inc.*, 2015 WL 1206490,
24 at *2 (D. Me. Mar. 17, 2015) (23 individuals).

25 Here, it is unrealistic for individuals to sue individually given the likely small size of
26 individual recoveries, as evidenced by the absence of individual suits. The demonstration
27 drew people from all over Arizona. *See* Ex. 24, ¶ 2; Ex. 22, ¶ 7; Ex. 11 at 8600. These
28

1 combined factors support certification of Damages Subclass #2.

2 **B. Typicality.**

3 “The test of typicality is whether other members have the same or similar injury,
4 whether the action is based on conduct which is not unique to the named plaintiffs, and
5 whether other class members have been injured by the same course of conduct.” *Hanon v.*
6 *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citations omitted). Claims are
7 typical “if they are reasonably coextensive with those of absent class members; they need
8 not be substantially identical.” *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003)
9 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)). This analysis
10 applies in mass protest cases.

11 The named Plaintiffs’ claims are typical of those of the damages classes they
12 represent. Each named Plaintiff was subjected to the unlawful dispersal order and to the
13 generalized use of force (deployment of pepper spray and gas projectiles), qualifying them
14 to represent the Damages Class and Damages Subclass #1. Each individual named Plaintiff
15 (except Jacinta Gonzalez Goodman) was also the subject of direct physical force,
16 qualifying them to represent Damages Subclass #2.

17 For the Injunctive Relief Class, organizational Plaintiffs Puente and Poder in Action
18 are typical of, and appropriate class representatives for, the Injunctive Relief Class, both in
19 their own right and on behalf of their members. They organize protests and have
20 experienced other situations of inappropriate PPD use of force. Similarly, the individual
21 injunctive relief class representatives have participated in the past, and intend to participate
22 in the future, in protests and demonstrations in general, particularly with Puente or Poder
23 In Action and in protests against Trump and his policies.

24 **C. Adequacy of representation.**

25 **1. The class representatives’ interests are not antagonistic to the interests of**
26 **the class.**

27 Rule 23(a)(4)’s requirements are met when (1) there is no conflict of interest
28 between the legal interests of the named plaintiffs and those of the proposed class, and (2)

1 counsel for plaintiffs are competent to represent the class. *Lenvill v. Inflight Motion*
2 *Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978); *In re N. Dist. of Cal., Dalkon Shield IUD*
3 *Prods. Liab. Litig.*, 693 F.2d 847, 855 (9th Cir. 1982); *Staton*, 327 F.3d at 957. In this case,
4 the interests of all class members are aligned. Each named Plaintiff has signed a declaration
5 stating he or she meets the class definition for which he or she is designated, is unaware of
6 any conflicts of interest, and understands and will execute his or her responsibilities as a
7 class representative. (Ex. 21; Ex. 22; Ex. 23; Ex. 24; Ex. 25; Ex. 26.) Defendants' actions
8 subjected the class and subclasses to the same unlawful conduct. And all class or subclass
9 members have suffered substantially similar injuries.

10 **2. Counsel are well qualified to represent the class.**

11 Plaintiffs' counsel are experienced class action and civil rights lawyers. The
12 litigation team includes (1) Kathleen Brody of the ACLU of Arizona, who represents
13 classes in at least four law enforcement cases matters; (2) Dan Stormer, Joshua Piovia-
14 Scott, and Cindy Pánuco of Hadsell, Stormer & Renick LLP, who have collectively been
15 designated class counsel in at least twelve matters, including at least six in the law
16 enforcement area (one of which is the Occupy LA protest case *Aichele v. City of Los*
17 *Angeles*); and (3) Barrett S. Litt of Kaye, McLane, Bednarsik & Litt, who has been
18 appointed class counsel in well over a dozen civil rights class actions mostly dealing with
19 law enforcement related issues (three of which – the *MIWON*, *Aichele*, and *Chua* cases
20 discussed in the next section – were protest cases). (Litt, Brody, and Piovia-Scott Decs. in
21 Support of Motion for Class Certification.)

22 **D. Common questions exist and predominate.**

23 Rule 23(a) requires common questions; Rule 23(b)(3) requires for a damages class
24 that the common questions “predominate” over individual issues. Commonality under Rule
25 23(a) does not require that “[a]ll questions of fact and law . . . be common.” *Hanlon*, 150
26 F.3d at 1019. It is sufficient that there are “shared legal issues with divergent factual
27 predicates” or “a common core of salient facts coupled with disparate legal remedies.” *Id.*
28 Where, as here, “examination of all the class members’ claims for relief will produce a

1 common answer” to a central common question, Rule 23(a) commonality is met. *Dukes*,
2 564 U.S. at 352. To the extent necessary to determine commonality, but only to that extent,
3 courts examine the underlying legal merits. *Id.* at 351-52; *Jimenez v. Allstate Ins.*, 765 F.3d
4 1161, 1165 (9th Cir. 2014).

5 The Supreme Court summarized the predominance inquiry in *Tyson Foods, Inc. v.*
6 *Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). A “common question [under Rule 23(a)(1)] is
7 one where ‘the same evidence will suffice for each member to make a prima facie showing
8 [or] the issue is susceptible to generalized, class-wide proof.’” *Id.* (quoting *Newberg* § 4:50,
9 at 196–97). “The predominance inquiry [under Rule 23(b)(3)] ‘asks whether the common,
10 aggregation-enabling, issues in the case are more prevalent or important than the non-
11 common, aggregation-defeating, individual issues.’” *Id.* (quoting *Newberg* § 4:49, at 195-
12 96). So long as “‘one or more of the central issues in the action are common to the class
13 and can be said to predominate, the action may be considered proper under Rule 23(b)(3)’”
14 even if there are other important individualized issues like “damages or some affirmative
15 defense.” *Id.* (quoting 7AA C. Wright, A. Miller, & M. Kane, *Federal Practice and*
16 *Procedure* § 1778, at 123–24 (3d ed. 2005)).⁸

17 Plaintiffs have presented substantial evidence (largely undisputed) that:

- 18 (1) PPD used generalized force against the whole protest, which was not targeted
19 to those individuals for whom such force was justified;
- 20 (2) PPD did not separate and isolate Antifa or other troublemakers, even though
21 they had identified them, before using generalized force;
- 22 (3) PPD used a significant amount of chemical weapons against the protest
23 without any warning and well before an unlawful assembly was announced;
- 24 (4) PPD policies regarding the use of tear gas and other chemical weapons are

25 ⁸ To the extent that Defendants contend that some (small number) in the crowd engaged in
26 aggressive and unlawful conduct against PPD officers, that is an affirmative defense that
27 does not undermine class certification. *See, e.g., Chang v. United States*, 217 F.R.D. 262,
28 272 (D.D.C. 2003) (“contention that some class members may have been engaged in
violent or otherwise unlawful conduct” is an individualized affirmative defense that does
“not preclude class certification so long as common issues of fact and law predominate”).

1 insufficient;

- 2 (5) PPD did not inform protestors that they were part of an unlawful assembly
3 until 5-10 minutes after they declared the assembly unlawful;
- 4 (6) When an unlawful assembly was declared, it was inaudible to many people
5 in the free speech zone;
- 6 (7) PPD did not provide instructions for how and where to disperse, or position
7 officers to direct the crowd where to disperse;
- 8 (8) All decisions were made by the centralized command staff on the scene;
- 9 (9) Similar actions were not taken against pro-Trump demonstrators;
- 10 (10) Chief Williams delegated responsibility to command staff on the scene to
11 make immediate decisions;
- 12 (11) Chief Williams was “actively involved” in the management of the operations
13 for the event;
- 14 (12) Chief Williams approved her officers’ actions, thereby ratifying their
15 conduct; and
- 16 (13) There were no or inadequate policies or training on a number of relevant
17 areas, including how to address a disruption by a small group.

18 The central and common questions of fact and law establishing both commonality
19 and predominance include the existence, circumstances, and lawfulness of:

- 20 (1) The generalized use of force against all the demonstrators at everyone at the
21 Trump Protest;
- 22 (2) The propriety of the level of force used;
- 23 (3) PPD’s failure to isolate and remove Antifa and any other persons engaged in
24 unlawful conduct;
- 25 (4) The announcement of an unlawful assembly and its timing;
- 26 (5) The failure to provide audible and understandable announcements, dispersal
27 directions, and guidance, even if the dispersal announcement was lawful;
- 28 (6) Whether PPD unjustifiably treated anti-Trump protestors differently from
pro-Trump demonstrators;
- (7) Whether the decisions at issue were made or authorized by command staff;
- (8) Whether Chief Williams delegated command authority to the command staff
and senior officers on the scene, or directed or ratified their actions;
- (9) Whether there were adequate training, supervision, and policies on the
relevant issues;
- (10) Whether the foregoing establish a PPD policy or custom;

- 1 (11) Whether PPD's actions were so closely related to the deprivation of
2 Plaintiffs' rights as to be a moving force that caused Plaintiffs' ultimate
3 injury; and
4 (12) Whether classwide general or presumed damages are available (as discussed
5 below).

6 Courts in this circuit and elsewhere have routinely certified both injunctive relief
7 and damages classes where the police acted against a group of demonstrators on a group
8 basis, as occurred here. *See, e.g., MIWON*, 246 F.R.D. at 629-30, 634 (dispersal and
9 generalized force at May Day 2007 protest; "the common issues in the First Amendment
10 claim, Fourth Amendment claim, [and] *Monell* claim . . . are more than sufficient to meet
11 the predominance requirement of Rule 23(b)(3)"); *Aichele*, 314 F.R.D. at 491 (C.D. Cal.
12 2013) (dispersal and arrests for Occupy LA protests); *Chua v. City of Los Angeles*, 2017
13 WL 10776036, at *13 (C.D. Cal. May 25, 2017) (kettling and arresting people protesting
14 failure to bring criminal charges against officer who killed Michael Brown in Ferguson,
15 Mo.); *Moss v. U.S. Secret Serv.*, 2015 WL 5705126, at *4-5 (D. Or. Sept. 28, 2015) (Rule
16 23(b)(3) damages class for breakup of demonstrators and subsequent arrests); *Spalding v.*
17 *City of Oakland*, 2012 WL 994644, at *4 (N.D. Cal. March 23, 2012) (arrests of
18 protestors).⁹ *Aichele*, *Spalding*, *Moss*, and *Chua* all post-date and address *Dukes*, making
19 clear that it does not affect the validity of pre-*Dukes* protest cases.

20 *Moss* is useful to assess common versus individualized issues. There, the court
21 certified a damages class based on the centralized decision and actions to encircle the
22 protest and arrest the protestors, but did not certify a damages class for excessive force
23 because the force decisions were made by individual officers. The court distinguished

24 ⁹ *See also, e.g., Vodak v. City of Chicago*, 2006 WL 1037151, at *1 (N.D. Ill. 2006) ("all
25 persons who were surrounded by Defendants" and arrested during anti-Iraq War march);
26 *MacNamara v. City of N.Y.*, 275 F.R.D. 125, 143-46 (S.D.N.Y. 2011) (arresting, netting
27 protestors in groups, or otherwise taking police action on a group basis); *Hickey v. City of*
28 *Seattle*, 236 F.R.D. 659, 664 (W.D. Wash. 2006); *All. for Glob. Justice v. Dist. of*
Columbia, Civ. 01-0811 (D.D.C. 2006); *Barham v. Ramsey*, 434 F.3d 565 (D.C. Cir. 2006);
Chang v. United States, 217 F.R.D. 262 (D.D.C. 2003); *Dellums v. Powell*, 566 F.2d 167
(D.C. Cir. 1977); *Williams v. Brown*, 214 F.R.D. 484, 485 (N.D. Ill. 2003).

1 *MIWON* because, in that case, “‘the legality of the command decision [to use non-lethal
2 force was] the overriding common question’ that met the predominance requirement.”
3 *Moss*, 2015 WL 5705126, at *5 (quoting *MIWON*, 246 F.R.D. at 635). The “very
4 distinction between the command decision and the individual acts of the police officers”
5 was the critical factor because “the [*MIWON*] command decision predominated over the
6 individualized injuries,” in contrast to the individualized force in *Moss*. *Id.* Here, the
7 decision to use force and the type of force to use was a command decision appropriate for
8 Rule 23(b)(3) certification.

9 **E. Even if individualized damages exist, they do not defeat predominance where
10 common liability issues predominate.**

11 So long as Plaintiffs can “show that their damages stemmed from the defendant’s
12 actions that created the legal liability” the “presence of individualized damages cannot, by
13 itself, defeat class certification under Rule 23(b)(3).” *Leyva v. Medline Indus.*, 716 F.3d
14 510, 514 (9th Cir. 2013) (distinguishing *Comcast v. Behrend*, 569 U.S. 27, 38 (2013)). The
15 Ninth Circuit has repeatedly confirmed this point. *See, e.g., Pulaski & Middleman, LLC v.*
16 *Google, Inc.*, 802 F.3d 979, 988 (9th Cir. 2015; *Jimenez*, 765 F.3d at 1168; *Vaquero v.*
17 *Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1154-55 (9th Cir. 2016) (“our precedent is
18 well settled on this point”).

19 **F. In any event, liability is appropriately certified under Rule 23(c)(4).**

20 Rule 23(c)(4) provides that “when appropriate an action may be brought or
21 maintained as a class action with respect to particular issues.” Thus, it is proper to certify
22 a Rule 23(b)(3) class for liability only. *See Tyson Foods*, 136 S. Ct. at 1045 (so long as
23 “‘one or more of the central issues . . . are common . . . and can be said to predominate,”
24 Rule 23(b)(3) certification is proper); *Valentino v. Carter- Wallace, Inc.*, 97 F.3d 1227,
25 1234 (9th Cir. 1996) (“Even if the common questions do not predominate . . . so that class
26 certification of the entire action is warranted, Rule 23 authorizes . . . isolate[ing] the
27 common issues under Rule 23(c)(4)(A) and proceed[ing] with class treatment of these
28 particular issues.”); 7A *Wright & Miller* §1778 (certification of one or more issues proper

1 “even though important matters will have to be tried separately”). In the “typical” Rule
2 23(c)(4) case, the court certifies “liability, leaving only damages to be litigated on an
3 individual bases.” *Tasion Commc’ns, Inc. v. Ubiquiti Networks, Inc.*, 308 F.R.D. 630, 640
4 (N.D. Cal. 2015). That is the case here (if classwide general damages are not certified).

5 The Second Circuit has concluded that “a court must first identify the issues
6 potentially appropriate for certification ‘and . . . then’ apply the other provisions of the
7 rule, *i.e.*, subsection (b)(3) and its predominance analysis.” *In re Nassau Cnty. Strip Search*
8 *Cases*, 461 F.3d 219, 226 (2d Cir. 2006) (quoting the rule). *See also id.* (“[A] court may
9 employ Rule 23(c)(4) . . . when common questions predominate only as to the ‘particular
10 issues’ of which the provision speaks”) (discussing Advisory Committee Notes to
11 Rule 23(c)(4)); *Manual for Complex Litigation, Fourth* § 21.24 (4th ed.) (issues classes
12 “enable . . . class action treatment for a portion of a case, the rest of which may either not
13 qualify under Rule 23(a) or may be unmanageable [referring to 23(b)(3)] as a class action”).
14 The Ninth Circuit agrees. *See Valentino*, 97 F.3d at 1234 (“Even if the common questions
15 do not predominate over the individual questions so that class certification of the entire
16 action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the
17 common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular
18 issues.”); *Amador v. Baca*, 2014 WL 10044904, at *9 (C.D. Cal. Dec. 18, 2014) (reversing
19 prior denial of Rule 23(b)(3) certification for a Rule 23(c)(4) liability-only class; “Ninth
20 Circuit—and respected jurists across the country—have energetically endorsed the
21 concept” of issue certification for liability only) (class de-certified by *Amdor v. Baca*, 2016
22 WL 6804910 (C.D. Cal. July 27, 2016), after significantly changed circumstances).

23 **VI. This case meets the other requirements of Rule 23(b).**

24 **A. Superiority and manageability are met.**

25 In addition to predominance, Rule 23(b)(3) requires that class adjudication be
26 “*superior* to other available methods” of adjudication. (Emphasis added.) The text of the
27 rule specifies four factors to guide this inquiry: (1) individual class member interest in
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1 controlling the litigation; (2) whether there is other pending litigation on the same
2 controversy; (3) the desirability or undesirability of concentrating the litigation of the
3 claims in a particular forum; and (4) the difficulties likely to be encountered in the
4 management of a class action.

5 A class action is the superior method of adjudicating cases with numerous claims
6 too small to litigate individually. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591,
7 617 (1997) (policy “at the very core of the class action mechanism is to overcome the
8 problem that small recoveries do not provide the incentive” for individual suits and to
9 provide a means to vindicate the rights of large numbers with small claims) (citation
10 omitted); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985); *Blackie v. Barrack*,
11 524 F.2d 891, 899 (9th Cir. 1975). The claims here fit that mold. Most class members were
12 injured by PPD’s arbitrary and unjustified curtailment of their First Amendment rights and
13 use of force through tear gas and projectiles, but their injuries are not significant enough to
14 justify individual litigation, and very few lawyers, if any, would handle such cases
15 individually. (Brody Dec., ¶¶ 12-14.)

16 The manageability of this case is demonstrated by the fact that many similar cases
17 have been certified. Liability can be determined readily on a classwide basis. Unless the
18 Court certifies this case for general damages (see below), it would make sense to bifurcate
19 liability and damages, try liability, and then determine how to handle damages. While “it
20 may be that . . . separate proceedings of some character will be required” after a liability
21 determination, that “prospect need not defeat class treatment.” *Carnegie v. Household Int’l,*
22 *Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). “[A] global settlement . . . will be a natural and
23 appropriate sequel” to a liability finding, and if not, “Rule 23 allows . . . imaginative
24 solutions,” including bifurcation, appointing a special master, decertifying the class for
25 later proceedings, and others, to address damages. *Id.*; *accord MIWON*, 246 F.R.D. at 636.

26 **B. Classwide general damages are determinable and, in any event, the issue can**
27 **be deferred.**

28 The damages within each class or subclass are relatively uniform. All class

1 members' First Amendment rights were uniformly curtailed; all Damages Subclass # 1's
2 class members' Fourth Amendment rights were violated by the indiscriminate use of
3 generalized force (tear gas and other chemical weapons) on peaceful protestors; all
4 Damages Subclass # 2 members were damaged by direct force impact not causing major
5 physical injury.

6 Presumed or general damages are available without individual inquiry in civil rights
7 cases where there is "an injury that is likely to have occurred but difficult to establish."
8 *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 310-11 (1986). This concept flows
9 from the principle that, where there is "a constitutional violation and [indisputably] some
10 injury to the plaintiff, the plaintiff is entitled to an award of compensatory damages as a
11 matter of law." *Kerman v. City of New York*, 374 F.3d 93, 124 (2d Cir. 2004) (general
12 damages available for excessive force and deprivations of liberty).

13 General or presumed damages are appropriate for First and Fourth Amendment
14 rights. See, e.g., *Hessel v. O'Hearn*, 977 F.2d 299, 301-02 (7th Cir. 1992) (presumed
15 damages "may be recoverable when substantive constitutional rights, such as the right to
16 freedom of speech, or the right to be free from unreasonable searches and seizures, are
17 infringed"; no proof of injury is required, but plaintiff may "not ask for heavy damages on
18 the ground that the constitutional right invaded was 'important'") (citation omitted); *Walje*
19 *v. City of Winchester*, 773 F.2d 729, 732 (6th Cir. 1985) ("the right of free speech may be
20 violated without accompanying consequential or 'actual' injury"; "general damages for
21 First Amendment violations" are "thus necessary . . . to fully vindicate the challenged
22 substantive right"); *Bell v. Little Axe Indep. Sch. Dist. No. 70 of Cleveland Cnty.*, 766 F.2d
23 1391, 1412 (10th Cir. 1985) (presumed damages may be awarded for First Amendment
24 violations in general even in the absence of proof of actual damages);¹⁰ *Siebert v. Severino*,

25 _____
26 ¹⁰ In *Stachura*, the Supreme Court disapproved of general damages based "on the jury's
27 subjective perception of the importance of constitutional rights as an abstract matter," 477
28 U.S. at 308, and disapproved *Bell* to the extent it rested on that premise. The focus must be
compensation for a provable injury. This is why *Hessel* emphasized that damages do not
rest on the importance of the right.

1 256 F.3d 648, 655 (7th Cir. 2001) (“The law recognizes that law-abiding citizens can sue
2 and recover general (or presumed) damages for a Fourth Amendment violation, even
3 without proof of injury.”); *cf. Hazle v. Crofoot*, 727 F.3d 983, 992-93 (9th Cir. 2013)
4 (parolee entitled to compensatory damages for violation of First Amendment rights).

5 Classwide general or presumed damages have been certified in several class actions.
6 *See Betances v. Fischer*, 304 F.R.D. 416, 431 (S.D.N.Y. 2015) (unconstitutional
7 administrative imposition of post-release supervision on people convicted of felonies;
8 allowing classwide general damages for unlawful incarceration and classwide presumed
9 damages for less severe liberty restrictions such as curfews and travel restrictions); *In re*
10 *Nassau Cnty. Strip Search Cases*, 742 F. Supp. 2d 304, 331 (E.D.N.Y. 2010) (classwide
11 general damages of \$500 per strip search for dignitary harm from unlawful strip searches
12 awarded); *Augustin v. Jablonsky*, 819 F. Supp. 2d 153, 162 (E.D.N.Y. 2011) (same);
13 *Barnes v. Dist. of Columbia*, 278 F.R.D. 14, 21 (D.D.C. 2011) (classwide general damages
14 for unlawful strip searches and overdetentions); *Roy v. Cnty. of Los Angeles*, 2018 WL
15 3436887, at *3–4 (C.D. Cal. July 11, 2018) (classwide general damages for people held
16 pursuant to ICE holds); *Aichele*, 314 F.R.D. at 496 (classwide general damages in protest
17 arrest case); *Rodriguez v. City of Los Angeles*, 2014 WL 12515334, at *1, 5–7 (C.D. Cal.
18 Nov. 21, 2014) (classwide general damages for arrests based on unconstitutional gang
19 injunction imposing curfew); *Dellums v. Powell*, 566 F.2d 167, 196 (D.C. Cir. 1977)
20 (damages for unlawful protest arrests and detentions).

21 In such classwide cases, only objective information would be relevant (e.g., what
22 happened and how long it lasted), but subjective information (e.g., the effect it had on the
23 individual and how it made them feel) would not. Thus, in *Nassau Count* and *Augustin*, the
24 standardized strip search protocol and process was the basis for general damages; in
25 *Barnes*, before the case settled, the court intended to consider information regarding the
26 strip searches and over-detentions without allowing any testimony about criminal history,
27 witness reactions, individual emotional distress, or the like; in *Dellums*, the award was
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1 based on a matrix reflecting how long people spent in custody.

2 Here, the Court may and should certify classwide general damages for First
3 Amendment violations, the generalized use of unreasonable force, and the direct imposition
4 of unjustifiable force – or, alternatively, defer determination of the best means of handling
5 damages until after liability has been determined. *See, e.g., Carnegie*, 376 F.3d at 661.

6 **C. Rule 23(b)(2)’s requirements are also met.**

7 Certification under Rule 23(b)(2) for injunctive relief is appropriate where, as here,
8 the opposing party “has acted or refused to act on grounds generally applicable to the
9 class.” Rule 23(b)(2) applies “when a single injunction or declaratory judgment would
10 provide relief to each member of the class.” *Dukes*, 564 U.S. at 360 (internal quotation
11 marks and citations omitted). Civil rights injunctive relief class actions are paradigmatic
12 Rule 23(b)(2) suits, “for they seek class-wide structural relief” that would benefit each class
13 member. *Marcera v. Chinlund*, 595 F.2d 1231, 1240 (2d Cir. 1979), *vacated on other*
14 *grounds sub nom. Lombard v. Marcera*, 442 U.S. 915 (1979).

15 **D. Alternatively, Rule 23(b)(1)’s requirements are met.**

16 Rule 23(b)(1) provides that a class action may be maintained where prosecution by
17 or against individual class members would create a risk of either (a) inconsistent or varying
18 adjudications that could establish incompatible standards, or (b) adjudication with respect
19 to individual class members that would, as a practical matter, dispose of others’ claims or
20 substantially impair or impede their ability to defend their interests. Although certification
21 under this rule is relatively rare, it has been expressly applied in protest cases. *See Chang*
22 *v. United States*, 217 F.R.D. 262, 273 n.5 (D.D.C. 2003) (certifying on Rule 23(b)(1) as
23 well as other grounds).

24 **VII. Conclusion.**

25 Plaintiffs have satisfied all requirements of Rule 23 and, therefore, respectfully
26 request that the Court certify the proposed classes, approve the named Plaintiffs as class
27 representatives, and appoint Plaintiffs’ counsel to represent the class.
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Dated: February 20, 2019

Respectfully submitted,

By: /s/ Kathleen E. Brody

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CERTIFICATE OF SERVICE

1
2 I hereby certify that on February 20, 2019, I electronically transmitted the
3 attached document to the Clerk’s office using the CM/ECF System for filing. Notice of
4 this filing will be sent by e-mail to all parties by operation of the Court’s electronic
5 filing system or by mail as indicated on the Notice of Electronic Filing.
6

7 /s/ Kathleen E. Brody
8 Kathleen E. Brody
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