The Honorable Barbara J. Rothstein

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT HICKEY, KENNETH HANKIN, JENNIFER HUDZIEC, STEPHANIE LANE, CARROLL JACKSON, DENISE COOPER, NICOLE PEARSON, and EMILY MALONEY, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

THE CITY OF SEATTLE, a municipality; PAUL SCHELL, Mayor of the City of Seattle; and NORMAN STAMPER, Chief of Police of the City of Seattle,

Defendants.

No. C00-1672 R

PLAINTIFFS' SECOND MOTION FOR CLASS CERTIFICATION AND MEMORANDUM OF POINTS AND AUTHORITES IN SUPPORT THEREOF

Noted: October 11, 2002

I. INTRODUCTION

On December 1, 1999, the Seattle police herded a large group of people into the area around First Avenue and Broad Street, trapped them between two groups of officers, arrested nearly 150, and booked them for violating a mayoral order that had declared a large portion of downtown Seattle off-limits to all protesters (the "No-Protest Zone"). At the time of their arrest, however, these people were at least 11 blocks outside the No-Protest Zone and had never entered

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the No-Protest Zone. All of those arrested were arrested without probable cause, for a crime they did not commit.

In this motion, Plaintiffs request that the Court certify a class of those arrested during this herding incident.[1]

Because Seattle police arrested a large group of people at the same location, at the same time, for the same reason, and on the same erroneous charges, the proposed Class easily meets the certification requirements of Fed. R. Civ. P. 23 ("Rule 23"). The threshold requirements of 23(a) are all satisfied: (1) the proposed class has more than 140 members, (2) the claims of the Class members arise from the same conduct, (3) the claims of named Plaintiffs Robert Hickey and Carroll Jackson are typical of other class members in that they were among those arrested as part of the herding incident, and (4) Plaintiffs Hickey and Jackson and their counsel have and will adequately represent the Class.

In addition, the Class satisfies Rule 23(b) without difficulty. Because the claims of the Class arise from a single incident in which all Class members were treated nearly identically, the issues common to the Class far outweigh any individual issues, thus satisfying Rule 23(b)(3). In addition, a class action is the superior method of addressing well over a hundred nearly identical claims.

Certification under Rule 23(b)(2) for the portion of the case addressing equitable relief is also appropriate. In addition to damages, Plaintiffs seek declaratory relief, and the declaration sought will likely affect the interests of all Class members.

[1] This is Plaintiffs' second motion for class certification. Plaintiffs' first motion, which sought to certify a larger class with all named Plaintiffs as representatives, was filed prior to this Court's rulings on summary judgment. Those summary judgment rulings effectively disposed of the claims of several named Plaintiffs and a large part of the proposed class. The Court therefore denied the motion for class certification without considering the merits. Plaintiffs respectfully disagree with the Court's summary judgment rulings and plan to appeal. Plaintiffs will renew their first motion on any remand following appellate review. This motion seeks to certify a different class with only Plaintiffs Hickey and Jackson as representatives.

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II. STATEMENT OF RELEVANT FACTS

Plaintiffs seek to certify a class, defined below, which consists of all those arrested in the mass arrest that took place in the vicinity of First Avenue and Broad Street at about 4 o'clock in the afternoon on December 1, 1999, and whose arrest records indicate that they were arrested for violating an order of then-Mayor Paul Schell. On December 1, 1999, then-Mayor Schell issued the Local Proclamation of Civil Emergency Order Number 3, City of Seattle ("Order No. 3"). *See* Ex. F to Declaration of Tyler S. Weaver ("Weaver Decl."). Under Order No. 3, no person intending to protest the World Trade Organization ("WTO") was allowed to enter a multi-block area of downtown Seattle (the "No-Protest Zone"). *See id.* Any protester who violated the terms of Order No. 3 by entering the No-Protest Zone was subject to arrest. *See id*. As illustrated by a map incorporated into Order No. 3, the western edge of the No-Protest Zone was Fourth Street, with the farthest northern edge being Lenora Street and the farthest southern edge being Seneca Street. *See id.*

On December 1, 1999, the first day Order No. 3 was in effect, a large group of individuals marched from the Labor Temple at approximately First and Clay toward the Seattle waterfront, where they held a demonstration. Deposition of James Pugel, pp. 267-69, Ex. A to Weaver Decl. The march and demonstration, which had been organized by the United Steelworkers of America, were conducted pursuant to a permit issued by the City and took place several blocks outside of the No-Protest Zone. *See id.*

After the march and demonstration concluded, the crowd dissipated and a number of them proceeded to the 200 or 300 block of Pine Street, near the Pike Place Market and outside of the No-Protest Zone. *See id.* at 257, 269-72. According to the testimony of Captain James Pugel, Event Commander for the WTO meetings, ***no one*** in this group attempted to enter the No-Protest Zone. *See id.* at 272. However, despite the fact that they were outside the No-Protest Zone and were not attempting to enter it, this group of future arrestees was met by a phalanx of law enforcement officers lining Pine Street from First Avenue to Third Streets. *See id.* at 257.

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The officers ordered the crowd to leave the area, which it did, generally traveling northward, away from the No-Protest Zone. *See id.* at 259-60. Rather than allow the group to disperse, the officers herded them northward on First and Second Avenues – which are two to three blocks south of the No-Protest Zone. *See id.* at 261-62, 272, 278; *see also* Ex. S to Weaver Decl. (Declaration of Tricia Sexton, Ex. 3 (transcript of radio transmissions documenting herding movements)). As Captain Pugel testified, the goal of the police was to "get [the group] cornered." Ex. A to Weaver Decl, at 261-62.

Eventually the officers did corner the group. A second group of officers formed a blockade to the north, at Denny Avenue, in order to prevent the group from leaving the downtown area entirely. *Id.* at 278. The officers were ordered to "use some sting balls" in order to keep the group from moving farther northward or eastward. *See* Ex. S to Weaver Decl. (Ex. 3 to Sexton Decl., at p. 12). Eyewitness testimony indicates that the officers also used concussion grenades and tear gas to keep the group at or near the intersection of First Avenue and Broad Street. *See* Ex. T to Weaver Decl. at pp. 3-4 (Declaration of Carroll Jackson); Ex. U to Weaver Decl. at p. 3 (Declaration of Robert Hickey). Finally, at approximately First and Broad – after the police had pursued the group for 11 blocks – the officers converged, trapping a large group of people that were then arrested. *Id*. at 277-78. The police did not allow individuals to disperse from this confined area, even those who requested that they be allowed to leave and attempted to do so. *See* Ex. T to Weaver Decl. at p. 4; Ex. U to Weaver Decl. at pp. 3-4.

As Captain Pugel admitted in his deposition, ***those arrested at First and Broad never entered the No-Protest Zone***. *Id*. at 266. In fact, the intersection of First and Broad is no less than 3 blocks west and 8 blocks north of the nearest corner of the No-Protest Zone. It is so far outside the No-Protest Zone, in fact, that it does not even appear on the map of Seattle incorporated into Order No. 3. See Ex. E to Weaver Decl. Moreover, the arrest occurred at roughly the same intersection where the permitted United Steelworkers march had started – First and Clay (Broad and Clay are one block from each other). It is likely that a significant number

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of those arrested were attempting to return to the march's origination to retrieve their cars or other belongings, or participate in events scheduled that night at the Labor Temple. *See* Pugel Decl., Ex. A to Weaver Decl., at p. 270.

As the arrest records of Plaintiffs Hickey and Jackson submitted with this motion illustrate, these Plaintiffs and the class they seek to represent were arrested for a crime they did not commit: violating the boundaries of the No-Protest Zone. The arrest records for Hickey and Jackson both contain an ***identical*** description of the reason for arrest:

> SUSP FAILED TO CLEAR STREET IN THE AREA OF 1ST & BROAD TO 1ST & DENNY IN ACCORDANCE WITH MAYOR ORDER.

Exs. C and D to Weaver Decl.

In case this description left any doubt about the basis for arrest, the arrest records for both of these Plaintiffs indicate, on pre-printed stickers, that they were booked on charges of "FAILURE TO OBEY 12A.26.040." *Id.* Seattle Municipal Code ("SMC") § 12A.26.040, in turn, provides as follows:

> **SMC 12A.26.040 Failure to obey**
>
> A person is guilty of failure to obey the Mayor's emergency order when he or she knowingly violates any order issued under authority of Sections 12A.26.010 or 12A.26.040.

Ex. E to Weaver Decl.

The same basis for arrest appears on the records for every member of the Class. Plaintiffs have produced the arrest records of twelve other people arrested as part of this mass arrest, and in each instance, the record indicates the person was arrested for violating the "mayor order" and has a preprinted sticker indicating that the reason for arrest was a violation of SMC § 12A.26.040. *See* Exs. G through R to Weaver Decl. Plaintiffs have reviewed the arrest records of those arrested at or near First and Broad on December 1, 1999, and have determined that there

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were more than 140 people arrested and booked in the same fashion. Weaver Decl., ¶¶ 2-5 and Ex. B.[2]

III. PROPOSED CLASS

Plaintiffs seek to certify the following class:

> All individuals arrested on December 1, 1999, in the vicinity of the intersections of First Avenue and Broad Street or First Avenue and Clay Street in Seattle, Washington, whose arrest records indicate that a reason for arrest was a violation of Seattle Municipal Code § 12A.26.040.

IV. THE PROPOSED CLASS SATISFIES ALL THE REQUIREMENTS OF FRCP 23

A. The Class Action Device is Frequently Used to Resolve Civil Rights Claims

Courts have recognized that the class action device is well suited to resolving civil rights case involving large groups of people. *See Wilson v. Tinkcom Township*, 1993 U.S. Dist. Lexis 9971 (E.D. Pa. July 20, 1993) (certifying class of persons challenging same illegal conduct involving policy of stopping and searching cars). The Supreme Court itself, in *Amchem Prods. v. Windsor*, 521 U.S. 591, 614 (1997), recognized that civil rights cases are particularly amenable to class treatment.

Accordingly, courts have certified classes in circumstances similar to those at issue here, where police officers have violated the constitutional rights of a large group of people in a single arrest or other incident. In *Johns v. DeLeonardis*, 145 F.R.D. 480 (N.D. Ill. 1992), for example, plaintiffs alleged that the Chicago police had performed a raid on a group of Gypsy elders in which the officers had, without a warrant or other basis for suspicion, separated the men and

[2] As noted in the Declaration of Tyler Weaver, ¶ 5 and Exs. B and Q, some class members were also booked on charges of obstructing an officer. In each and every instance where a class member was charged with this additional offense, the arrest record indicates that – in addition to violating the mayor's order – the class member refused to promptly leave the bus in which the class member was placed following the arrest. This notation is, again, photocopied for every class member and does not refer to individual circumstances. This does not affect class certification because it does not change the circumstance of their arrest. In addition, as noted in the Declaration of Tyler Weaver, ¶ 6 and Exs. B and R, eight class members were booked on a third offense of failure to disperse. The reason why these few members were charged with this third offense is not evident from the arrest records, which do not indicate any special circumstances applicable to these arrestees. In any event, this also does not affect class certification, as they were subject to the same arrest and the same uniform booking procedure, and their records indicate that the only reason for their arrest was that they were found to be in violation of Order No. 3.

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women and then strip-searched all the women. *See id.* at 481-82. The plaintiffs brought suit under the First, Fourth, and Fourteenth Amendments and sought to certify a class of all of those searched in the police raid, allegedly without probable cause. The court certified the class, finding no reason to deny certification where "the injuries arise from a core of common operative facts concerning a single occurrence." *See id.* at 485. *See also Patrykus v. Gomilla*, 121 F.R.D. 357, 360-63 (N.D. Ill. 1988) (certifying class of bar patrons who were forbidden as a group from leaving a bar by police who were acting without a warrant).

Courts have also certified classes involving mass arrests that took place in multiple locations over the course of several days. In *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir. 1973), for example, the plaintiffs sought to certify a class of people arrested, allegedly without probable cause, during the 1971 May Day demonstrations in Washington, D.C. Although the arrests had taken place in different parts of the city over several days, the court certified the class, finding that they were "the product of a common course of conduct by the police." *Id.* at 967. *See also generally Collins v. Jordan*, 110 F.3d 1363 (9th Cir. 1997) (class certified in legal challenge to San Francisco policy of arresting protesters within specified areas of the City following the 1992 Rodney King verdict). Since class certification is appropriate in such circumstances, it is certainly appropriate here, where the members of the proposed Class were all arrested at the same location at the same time and were booked on precisely the same charges.

The certification of the proposed Class would follow a long line of precedent in which courts have certified civil rights claims under section 1983. *See*, *e.g.*, *Maneely v. City of Newburgh*, 208 F.R.D. 69, 74-79 (S.D.N.Y. 2002) (class of prisoners alleging Fourth Amendment violation due to strip-searches without probable cause certified); *Thompson v. City of Chicago*, 2002 U.S. Dist. Lexis 10627 (N.D. Ill. June 11, 2002) (class certified where claims were brought under First, Fourth, and Fourteenth Amendments for damages arising from enforcement of panhandling ordinance); *Mathis v. Bess,* 138 F.R.D. 390 (S.D.N.Y. 1991) (class of prisoners certified where undue delay alleged in perfecting appeals of convictions); *Milonas v.*

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Williams, 691 F.2d 931 (10th Cir. 1982) (class certified where cruel and unusual punishment and due process violations alleged by boys confined in juvenile school).

Thus, Plaintiffs invoke a long-used and well-established procedure for resolving their civil rights claims. Plaintiffs demonstrate below specifically how the Class meets the requirements of Rule 23.

B. The Court Should Certify the Proposed Class Under Rule 23(b)(3), or, In the Alternative, Under Rule 23(b)(2) with an Opt-Out Class for Plaintiffs' Damages Claims

"Class actions serve an important function in our system of civil justice." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981). Class actions allow individuals to collectively redress a wrong:

> Equity has long recognized that there is need for a course which would redress wrongs otherwise unremediable because the individual claims involved were too small, or the claimants too widely dispersed. Moreover, early in the development of our civil procedures it became apparent that judicial efficiency demanded the elimination of multiple suits arising from the same facts and questions of law. Hence, the wise and necessary procedure was created by which a few representatives of a class could sue on behalf of others similarly situated, and be granted a judgment that would bind all.

Green v. Wolf Corp., 406 F.2d 291, 297 (2d Cir. 1968).

A putative class action must satisfy all four of Rule 23(a)'s prerequisites, and at least one of Rule 23(b)'s requirements, in order to be certified as a class action. Plaintiffs' claims satisfy all the elements of Rule 23(a) and the elements of 23(b)(3), as well as 23(b)(2).

1. Plaintiffs' claims satisfy Rule 23(a)'s requirements

Rule 23(a) has four requirements:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Id.

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Plaintiffs' claims satisfy each of these requirements.

a. Rule 23(a)(1) is satisfied because the class is so numerous that joinder of all members is impracticable

Rule 23(a)(1) requires that the class be so numerous that the joinder of all class members is impracticable. Impracticability may be based on size alone. *See, e.g., Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001), *cert. denied*, 122 S. Ct. 2661 (2002).

The number of individuals in the proposed class is more than 140. Weaver Decl., ¶ 2 and Ex. B. This is more than sufficient to establish impracticability of joinder. *See, e.g.,* NEWBERG ON CLASS ACTIONS, Third Ed., § 3.05 ("In light of prevailing precedent, the difficulty inherent in joining as few as 40 class members should raise a presumption that joinder is impracticable"); *Stewart*, 275 F.3d at 226-27 (41 is sufficiently large class); *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982) (classes with 39, 64 and 71 members probably sufficient); *Gay v. Waiters' and Dairy Lunchmen's Union*, 549 F.2d 1330, 1332 n.7 (9th Cir. 1977), quoting *Sagers v. Yellow Freight Sys., Inc.*, 529 F.2d 721 (5th Cir. 1976) (a class of 110 is "clearly sufficient" under Rule 23(a)(1)). Requiring class members to join almost 150 plaintiffs in one action would not only be burdensome to the parties, it would also create administrative problems for the court. *See Int'l Moulders' & Allied Workers' Local Union No. 164 v. Nelson*, 102 F.R.D. 457, 461 (N.D. Cal. 1983). The Class, therefore, satisfies Rule 23(a)(1).

b. Rule 23(a)(2) is satisfied because there are questions of law and fact common to the class

The "commonality" requirement of Rule 23(a)(2) is satisfied where a common question of law or fact exists. *Id*. at 461-62. "[A]ll that is required is a common issue of law or fact." *Blackie v. Barrack*, 524 F.2d 891, 904 (9th Cir. 1975). The fact that there may be some individual issues of fact or law does not mean that commonality does not exist. "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.,*

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150 F.3d 1011, 10 (9th Cir. 1998). It is enough, for the purposes of Rule 23(a)(2), that "the defendants have acted in a uniform manner with respect to the class." *Int'l Moulders,* 102 F.R.D. at 462.

Here, Plaintiffs Hickey and Jackson and each of the members of the Class have numerous factual and legal issues in common. In fact, their claims are virtually indistinguishable from one another. Each member of the Class, including Plaintiffs Hickey and Jackson, was arrested at or near First and Broad on December 1, 1999, for entering the No-Protest Zone, which was at least 11 blocks away at the time. Their arrest records are virtually identical, the result of a blank form that was photocopied and used for each person arrested at or near First and Broad, a form that listed the same operating officer and gave the exact same reason for the arrest. *Compare*, *e.g.,* Exs. C, D, and G-R to Weaver Decl.

Every arrestee has the same claim – that they were arrested for a crime they did not commit, without probable cause, in violation of the First, Fourth and Fourteenth Amendments of the U.S. Constitution as well as the Washington Constitution. Plaintiffs Hickey and Jackson and the Class therefore have, *at a minimum*, the following legal issues in common:

- whether Defendants, by arresting Plaintiffs Hickey and Jackson and the Class for violating the mayor's order and SMC § 12A.26.040 when they were no less than 11 blocks outside of the No-Protest Zone, violated the First, Fourth, and Fourteenth Amendments of the United States Constitution; and

- whether Defendants, by arresting Plaintiffs Hickey and Jackson and the Class for violating the mayor's order and SMC § 12A.26.040 when they were no less than 11 blocks outside of the No-Protest Zone violated the rights guaranteed under Article 1, Section 5 of the Washington State Constitution.

Each member of the Class, including Plaintiffs Hickey and Jackson, was arrested at the same place, at the same time, as a result of the same police conduct, and was booked on the same charges. They therefore have the same claims and have numerous issues of fact and law in common. The claims of Plaintiffs Hickey and Jackson claims satisfy Rule 23(a)(2).

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c. Rule 23(a)(3) is satisfied because the representative plaintiffs' claims are typical of all class members' claims

Typicality under Rule 23(a)(3) is satisfied upon a showing that other members of the class have the same or similar grievances. In *Jones v. Shalala*, 64 F.3d 510, 514 (9th Cir. 1995), the Ninth Circuit stated: "The test of typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." *See also*, *e.g.*, *Hanlon,* 150 F.3d at 1020 (9th Cir. 1998); *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 830 (8th Cir. 1977); *Wright v. Stone Container Corp.*, 524 F.2d 1058 (8th Cir. 1975).

The typicality requirement is satisfied "when the claims of the named plaintiffs emanate from the same event or are based on the same legal theory as the claims of the class members." *In re Workers' Compensation*, 130 F.R.D. 99, 105 (D. Minn. 1990) (quoting *Dirks v. Clayton Brokerage Co.*, 105 F.R.D. 125, 132-33 (D. Minn. 1985)). As the Ninth Circuit has explained, "[u]nder the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. Differences in damages among class plaintiffs do not defeat typicality. *See, e.g., Blackie*, 524 F.2d at 905 ("The amount of damages is invariably an individual question and does not defeat class action treatment.").

Here, the claims of Plaintiffs Hickey and Jackson are not only typical of those of the other Class members, but they are also virtually indistinguishable from those of the other Class members. As the arrest records of Plaintiffs Hickey and Jackson clearly show, they were arrested in the area at or near First and Broad on December 1, 1999, at approximately 4:00 p.m., and were booked on charges of violating SMC § 12A.26.040 because they violated the "mayor[al] order." Their claims are typical of the Class because the same is true of every member of the Class. Plaintiffs Hickey and Jackson do not seek any relief different from or in addition to that which is sought for all Class members. Like every other member of the Class, Plaintiffs Hickey and Jackson claim only that their arrest without probable cause for a crime they

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did not commit violated their constitutional rights under the First, Fourth, and Fourteenth Amendments of the U.S. Constitution, and the Washington Constitution. Plaintiffs Hickey and Jackson satisfy the typicality requirement of Rule 23(a)(3).

d. Rule 23(a)(4) is satisfied because Plaintiffs Hickey and Jackson will fairly and adequately protect the interests of all class members

Rule 23(a)(4) requires that the named plaintiffs be adequate representatives of the class, by (1) prosecuting the action vigorously through qualified counsel, and (2) having no interests antagonistic to or conflicting with the unnamed class members. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). *See also Hanlon*, 150 F.3d at 1020.

Plaintiffs seek to appoint only Plaintiffs Hickey and Jackson as representatives of the proposed Class, and Plaintiffs Hickey and Jackson easily satisfy both adequacy requirements. As to the first requirement, all Plaintiffs have retained experienced and qualified counsel. Plaintiffs' counsel has experience both in the field of class actions and in the field of civil rights and constitutional law. *See* Ex. 1 to Declaration of Steve Berman (résumé of Hagens Berman LLP) and Ex. 2 to Berman Decl. (Declaration of Arthur Bryant). Moreover, among Plaintiffs' counsel is one of the foremost Constitutional scholars in the United States. *See* Ex. 3 to Berman Decl. (*curriculum vitae* of Professor Erwin Chemerinsky).

Plaintiffs also satisfy the second criterion under Rule 23(a)(4) since their interests are coincident with the general interests of the class. The focus under the second prong is on whether there is an actual or potential conflict between the claims of the representatives and the claims of the Class. *See, e.g., Hanlon*, 150 F.3d at 1020. Plaintiffs Hickey and Jackson suffered the exact same injury as the rest of the members of the Class, as they were arrested in the same place, at the same time, for the same reason, and on the same charges, as the rest of the Class. Their claims are precisely co-extensive with those of the Class, and they seek no recovery in addition to that sought on behalf of every Class member. There is no actual or potential conflict

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between the Class and Plaintiffs Hickey and Jackson. Plaintiffs Hickey and Jackson satisfy both aspects of Rule 23(a)(4).

C. Plaintiffs' Claims Satisfy the Requirements of Rule 23(b)

A class action must not only satisfy the prerequisites of Rule 23(a), but must also satisfy at least one of the three parts of Rule 23(b). Plaintiffs ask the Court to certify an opt-out damages class pursuant to Rule 23(b)(3), or in the alternative, a hybrid class pursuant to Rule 23(b)(2) for Plaintiffs' declaratory relief claims with an opt-out class for Plaintiffs' damages claims. Plaintiffs satisfy both subsections (b)(3) and (b)(2).

1. Plaintiffs' claims meet the requirements of Rule 23(b)(3)

The claims of Plaintiffs Hickey and Jackson satisfy Rule 23(b)(3) because: (1) common questions predominate over individual questions, and (2) the class action device is superior to other forms of litigation. Rule 23(b)(3) permits an order granting certification if the Court finds that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." These conditions are satisfied here.

a. Common questions predominate

The Class satisfies the requirement of Rule 23(b)(3) that common issues of law and fact predominate over any individual issues. The predominance test does not require exact identity of the claims among Class members, and instead merely "tests whether proposed classes are adhesive enough to warrant adjudication by representation." *Local Joint Ex. Board of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001), cert denied 151 L. Ed. 2d 299 (U. S. 2001), *quoting Amchem*, 521 U.S. at 591. The test is satisfied "[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." *Hanlon*, 150 F.3d at 1022.

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There should be little question that the claims of the Class satisfy this standard. The Class is comprised of a group of people who were herded together by the Seattle police into a single location and then arrested *en masse* for the same reason and booked on the same charges – for committing a crime that even the Seattle police concede none of the Class members committed. The Class was herded, arrested, and booked without regard to individual circumstances, and hence there are virtually no relevant individual issues of fact or law that stand in the way of class certification. The Class has in common the issue of whether they were arrested without probable cause, as they were all booked on charges of entering the No-Protest Zone despite never having entered it. This common, overarching issue completely overshadows any and all individual issues of fact. In other words, a "common nucleus of facts and potential legal remedies dominates" the claims of the Class that remain after the Court's previous rulings on summary judgment. *Hanlon*, 150 F.3d at 1022.

Courts have found that common issues predominated in mass arrest cases larger and more complex than the case presented by the present motion for class certification. In *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977), for example, the plaintiffs brought a class action on behalf of everyone arrested at the U.S. Capitol on May 5, 1971, during a protest against the Vietnam War. During the protest, the police formed a line at the bottom of the Capitol steps and arrested the protesters without giving them an opportunity to disperse. The complaint further alleged that the arrestees were detained for periods of up to several days without due process of law. The district court certified the class under Rule 23(b)(3) and the D.C. Circuit affirmed.

In particular, the *Dellums* Court noted that a mass false arrest case is ***not*** the equivalent of a 'mass accident' case resulting in injuries to numerous persons that would ordinarily not be appropriate for a class action. The key difference is that in a mass arrest, the issue of liability would be tried on substantially the same evidence no matter who brought suit or whether suit was brought individually, by joined plaintiffs, or by a class. The court went on to point out that

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despite varying lengths of incarceration, damages could be fixed without any difficulty, either for the class as a whole, or by subclass. *Dellums*, 566 F.2d at 188 n.56.

In summary, common issues unquestionably predominate. The Class members were arrested at the same place, at the same time, for the same reasons, and on the same charges. They therefore have the same claims, for which liability can uniformly be determined without reference to individual claims. Defendants treated the Class members like a herd of cattle, and in so doing created a uniquely cohesive, uniform class for which common issues completely overshadow any individual issues. This Class is a creature of Defendants' creation.

b. The class action device is superior

In addition to finding that common questions predominate, Rule 23(b)(3) requires a finding that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." As the Supreme Court has recognized, the requirement of superiority was designed and intended to

> achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.

Amchem Prods. v. Windsor, 521 U.S. 591, 615 (1997), quoting *Adv. Comm. Notes*, 28 U.S.C. App., p. 697. Certification of the Class would promote all of these values.

If the more than 140 Class members arrested in the vicinity of First and Broad on December 1, 1999, each brought an individual civil rights action, the federal courts – and this Court in particular – would face dozens of summary judgment motions, dozens of motions to dismiss, and untold numbers of motions *in limine* and other non-dispositive motions. This multiplication of efforts would overburden this Court and delay adjudication of the claims of the Class members. Such a scenario is completely unnecessary and entirely avoidable because the virtually indistinguishable claims of the Class members can be tried in the same action without multiplication of the efforts of counsel and of the Court. Certification would promote both

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judicial efficiency and overall fairness by expediting adjudication of the claims of the Class and ensuring consistent treatment of similarly-situated claimants.

A class action on the claims of the Class would also allow those Class members who cannot afford to hire an attorney the opportunity to litigate their claims. The typical claim too small for each individual Class member to maintain a separate action against the City. In the words of the Ninth Circuit,

> the alternative [to certification of a class is] individual claims for a small amount of . . . damages. . . . Even if efficacious, these claims would not only unnecessarily burden the judiciary, but would prove uneconomic for potential plaintiffs. In most cases, litigation costs would dwarf potential recovery. In this sense, the proposed class action is paradigmatic. A fair examination of alternatives can only result in the apodictic conclusion that a class action is the clearly preferred procedure in this case.

Hanlon, 150 F.3d at 1023.

A review of other relevant factors identified in Rule 23(b)(3) only confirms the conclusion that a class action is superior to other methods of adjudicating the claims of the class. This is, for example, clearly the proper forum for the certification of this Class: the mass arrest at First and Broad took place in this District and the vast majority of the witnesses and evidence are located here. Rule 23(b)(3)(C). In addition, the interests of the Class members in pursuing their own claims is relatively small, given the relatively small damages each member suffered. Rule 23(b)(3)(A). And finally, given the cohesiveness of the Class and the nearly identical issues of fact and law applicable to every member of the Class, it is unlikely that certification of this Class would cause significant difficulties in the future litigation of this case. Rule 23(b)(3)(D).

Plaintiffs satisfy the predominance and superiority aspects of Rule 23(b)(3). Evaluation of the four 23(b)(3) factors relevant to superiority confirms that conclusion. This Court should certify this case according to Rule 23(b)(3).

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2. The Class also satisfies Rule 23(b)(2)

In the alternative, the Class should also be certified for the purposes of declaratory judgment under Rule 23(b)(2), which authorizes a class action where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole …." Certification pursuant to subsection (b)(2) is particularly appropriate in civil rights cases where the defendants have acted in a uniform manner toward the members of the class. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 614 (1997); *Int'l Molders'*, 102 F.R.D. at 465; *Santiago v. City of Philadelphia*, 72 F.R.D. 619, 625-26 (E.D. Pa. 1976); *see also Alliance to End Repression v. Rochford*, 565 F.2d 975, 979 (7th Cir. 1977), citing to Advisory Committee Notes to the 1966 Amendments to Rule 23).

For example, in *Daniels v. City of New York*, 198 F.R.D. 409 (S.D.N.Y. 2001), the plaintiffs alleged that New York police officers routinely stopped and searched drivers based on their race and without a reasonable suspicion that the drivers had committed any crime. The plaintiffs brought suit under the Fourth and Fourteenth Amendments, seeking a declaration that their civil rights had been violated, and moved to certify a class of similarly situated individuals. The court certified the class, noting that:

> (b)(2) classes have been certified in a legion of civil rights cases where commonality findings were based primarily on the fact that defendant's conduct is central to the claims of all class members irrespective of their individual circumstances and the disparate effects of the conduct.

Id. at 416, quoting *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994). That is certainly the case here, where Defendants arrested Plaintiffs Hickey and Jackson and every member of the Class under the exact same circumstances and booked them with the exact same offense. A declaration as to the constitutionality of the arrest at First and Broad will affect the claims of each member of the Class in precisely the same fashion. Accordingly, in the event this Court determines that Rule 23(b)(3) certification for all claims is not proper, this Court

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should certify the declaratory judgment claims under Rule 23(b)(2) and certify the damages claims under Rule 23(b)(3) in order to preserve class members' rights to opt out.

V. CONCLUSION

For the reasons above, this Court should certify the proposed Class under Rule 23.

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