CASE NO. _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CORY SPENCER, an individual; DIANA MILENA REED, an individual; and COASTAL PROTECTION RANGERS, INC., a California non-profit public benefit corporation,

Plaintiffs and Petitioners,

v.

LUNADA BAY BOYS; THE INDIVIDUAL MEMBERS OF THE LUNADA BAY BOYS, including but not limited to SANG LEE, BRANT BLAKEMAN, ALAN JOHNSTON AKA JALIAN JOHNSTON, MICHAEL RAE PAPAYANS, ANGELO FERRARA, FRANK FERRARA, CHARLIE FERRARA, and N. F.; CITY OF PALOS VERDES ESTATES; CHIEF OF POLICE JEFF KEPLEY, in his representative capacity; and DOES 1-10,

Defendants and Respondents.

Appeal From The United States District Court,
Central District of California, Case No. 2:16-cv-02129-SJO (RAOx),
Hon. S. James Otero

PETITION FOR PERMISSION TO APPEAL

HANSON BRIDGETT LLP
Gary A. Watt
425 Market Street, 26th Floor
San Francisco, California 94105
Telephone: (415) 777-3200
Facsimile: (415) 541-9366

OTTEN LAW, PC
Victor Otten
3620 Pacific Coast Highway, #100
Torrance, California 90505
Telephone: (310) 378-8533
Facsimile: (310) 347-4225

Attorneys for Petitioners
CORY SPENCER, DIANA MILENA REED,
AND COASTAL PROTECTION RANGERS, INC.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Petitioner COASTAL PROTECTION RANGERS, INC. states that it has no parent corporation, is a non-profit, and that no publicly held corporation owns a 10% or greater interest in Coastal Protection Rangers.

DATED: March 7, 2017

HANSON BRIDGETT LLP

By: */s/ Gary A. Watt*
GARY A. WATT
Attorneys for Petitioners
CORY SPENCER, DIANA MILENA REED, AND COASTAL PROTECTION RANGERS, INC.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

INTRODUCTION 1

QUESTIONS PRESENTED 3

RELIEF AND JURISDICTION 3

ORDER APPEALED FROM 4

STATEMENT OF THE CASE 4

LEGAL DISCUSSION 6

I. THIS COURT SHOULD ALLOW AN APPEAL UNDER RULE 23(f) BECAUSE THE ORDER DENYING CLASS CERTIFICATION IS MANIFESTLY ERRONEOUS 6

A. The District Court Committed Manifest Legal Error On The Issue Of Numerosity When It Excluded Petitioners' Expert Dr. King's Opinion On Class Size 7

B. The District Court Also Committed Manifest Error As To Commonality By Improperly Focusing On The Variable Ways Class Members Experienced Injuries Instead Of The Invasion Of Their Legal Rights Arising From A *Common Core* Of Factual And Legal Issues 10

C. The District Court Also Committed Manifest Error On Typicality By Mistakenly Focusing On Underlying Factual Differences Instead Of The Class Representatives And Other Class Members' Actual Claims 14

D. The District Court's Order Is Manifestly Erroneous As To Rule 23(b) 18

1. The District Court's premise for not reaching rule 23(b)(2) was incorrect. 18

2. The District Court applied the wrong legal standard when making the rule 23(b)(3) determination. 19

II. PETITIONERS WILL BE IRREPARABLY HARMED ABSENT AN INTERLOCUTORY APPEAL 21

CONCLUSION 22

STATEMENT OF RELATED CASES 23

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. RULES 5(c)(1) & 32(A)(7)(C) AND CIRCUIT RULE 32-1 24

TABLE OF AUTHORITIES

Page(s)

Cases

Abdullah v. U.S. Sec. Assocs., Inc.,
731 F.3d 952 (9th Cir. 2013) 10

Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.,
738 F.3d 960 (9th Cir. 2014) 10

Amchem Prod., Inc. v. Windsor,
521 U.S. 591 (1997).....10, 20

Amgen Inc. v. Conn. Ret. Plans & Trust Funds,
133 S.Ct. 1184 (2013).....9

Chamberlan v. Ford Motor Company,
402 F.3d 952 (9th Cir. 2005) 2, 6

City of Pomona v. SQM North America Corporation,
750 F.3d 1036 (9th Cir. 2014) 9, 10

Comcast Corp. v. Behrend,
133 S.Ct. 1426 (2013).....20

Daubert v. Merrell Dow Pharms.,
509 U.S. 579 (1993).....9

Ellis v. Costco Wholesale Corporation,
657 F.3d 970 (9th Cir. 2011) 9

Estate of Barabin v. AstenJohnson, Inc.,
740 F.3d 457 (9th Cir. 2014) 10

Evan v. Law Offices of Sidney Mickell,
688 F.3d 1015 (9th Cir. 2012) 11

Gen. Tel. Co. of Sw. v. Falcon,
457 U.S. 147 (1982).....6

Hanon v. Dataproducts Corp.,
976 F.2d 497 (9th Cir. 1992) 15

Just Film, Inc. v. Buono,
847 F.3d 1108 (9th Cir. 2017) .....*passim*

Parsons v. Ryan,
754 F.3d 657 (9th Cir. 2014) .....*passim*

Stockwell v. City and County of San Francisco,
749 F.3d 1107 (9th Cir. 2014) 7, 11, 12

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011).....*passim*

Yokoyama v. Midland National Life Ins. Co.,
594 F.3d 1087 (9th Cir. 2008) 20

Statutes & Rules

Fed. R. App. P. Rule 5 3

Fed. R. Civ. P. Rule 23 .....2, 6, 20

Fed. R. Civ. P. Rule 23(a).....2, 3, 19

Fed. R. Civ. P. Rule 23(b).....2, 18, 20

Fed. R. Civ. P. Rule 23(b)(2).....3, 18, 19

Fed. R. Civ. P. Rule 23(b)(3).....*passim*

Fed. R. Civ. P. Rule 23(f) 3, 4, 6

Other Authorities

Free The Beach! Public Access, Equal Justice, And The California Coast, 2 Stan. J. Civ. Rts. & Civ. Liberties 143, 144 (Nov. 2005) 21

INTRODUCTION

The scenic California coast provides inspiration the world over. Images of endless summers, perfect waves, palm trees, and timeless serenity are hallmarks of the Golden State. And for those who visit California's public beaches, the coastline provides a multitude of recreational opportunities. Naturally, most people would be shocked to learn that at Lunada Bay—a public beach with direct public access located in one of California's richest communities—a gang reigns from parking lot to surf, harassing and harming visitors, damaging their property, and through such terror tactics, keeps the public beach accessible to only a handful of insiders. This has been going on for decades. And for decades, the local police have looked the other way. Isn't it time for this lawlessness to stop?

This petition arises from the civil rights action brought to end this tyranny and liberate Lunda Bay, thereby enabling the public to use this public beach without enduring the harassment, assault and battery, vandalism and police duplicity that continues to be leveled at all but those who have the gang's approval. So if ever there was a situation calling for legal intervention, a suit brought on behalf of all those wanting access to public land and seeking enforcement of the law from the local police against the predatory gang keeping them out, this is the one. And if ever there was a case suitable for class action treatment, this is it.

Yet by making multiple manifest legal errors with respect to rule 23(a) and (b), including essentially treating the class certification motion as a merits trial, the District Court denied Petitioners' motion for class certification. Absent these several errors, it is readily apparent that class certification should be granted. This questionable ruling by the District Court will essentially end Petitioners' efforts to vindicate their rights and those of *all* members of the public being excluded from Lunada Bay. The lawlessness will continue unabated. So will the police duplicity.

Californians have a constitutional right to access their public beaches. Accordingly, Petitioners ask this Court for the opportunity to appeal now, so that their motion for class certification can be given proper consideration under the correct interpretation of rule 23. As this Court has recognized, there is no reason for a plaintiff to litigate to finality "when a certification decision is erroneous and inevitably will be overturned." (*Chamberlan v. Ford Motor Company*, 402 F.3d 952, 959 (9th Cir. 2005) (per curiam).)

Absent an appeal, anarchy remains. Members of the public willing to exercise their rights to visit Lunada Bay will continue to experience confrontation and conflict, and given the failure of the local police to take even modest measures to prevent such criminal activity, will be left exposed to violence with only dangerous self-help remedies to protect themselves. This cannot go on in the 21st

Century at what should otherwise be another beautiful California beach open to all who respect the rule of law, not governed by a criminal gang who does not.

QUESTIONS PRESENTED

At the class certification stage, with respect to rule 23(a), a District Court rejects numerosity by striking expert testimony based on multiple erroneous characterizations of the record and because it acts as ultimate factfinder instead of gatekeeper; then rejects commonality and typicality by focusing on variances in individual class member experiences at the hands of the defendants, instead of properly focusing on the overarching and illegal common course of conduct applied by those defendants toward all class members.

With respect to rule 23(b)(2) the District Court, based on the manifest legal errors committed as to rule 23(a), refuses to rule. And as to rule 23(b)(3), the District Court applies an incorrect legal standard converting the law into an insurmountable bar, instead of a search for mere sufficient cohesion among the class.

Based upon all these erroneous rulings, class certification is denied. Has the District Court committed manifest legal error warranting an immediate appeal?

RELIEF AND JURISDICTION

Under rule 5 of the Federal Rules of Appellate Procedure and rule 23(f) of the Federal Rules of Civil Procedure, Petitioners seek permission for an

interlocutory appeal on the questions presented. Rule 23(f) authorizes a petition directly to this Court seeking such interlocutory relief without first seeking certification of the questions by the District Court. As required, this petition was filed within 14 days of the District Court's order denying Petitioners' motion for class certification.

ORDER APPEALED FROM

Attached as Exhibit A is the order appealed from: the February 21, 2017 order of the District Court denying Petitioners' motion for class certification.

STATEMENT OF THE CASE

Cory Spencer, Diana Milena Reed, and Coastal Protection Rangers, Inc. (collectively, "Petitioners"), initiated this civil rights action after suffering harassment (including assault and battery), property damage (auto vandalism), and enduring other intimidation tactics from a gang of local surfers known as the Lunada Bay Boys ("LBB gang"). (Exhibit A, Order Denying Motion For Class Action Certification ("Order"), 1-4.) This reign of terror against those members of the public not known to and approved by LBB gang members, is taking place on public land (the City of Palos Verdes Estates owns the beach), and has gone on for decades with the tacit approval of the local police. (*Id.* at 3-4.) The LBB gang's campaign of harassment has been so effective that it has essentially turned Lunada Bay into private property for the exclusive enjoyment of gang members, chilling

members of the public from traveling to, using, and enjoying Lunada Bay. (*Id.* at 2.)

Petitioners filed this civil rights action on March 29, 2016. (*Id.* at 1.) Petitioners sought equitable and other relief, all based on the same core set of facts: the harassment—physical, verbal, nonverbal—conducted by the LBB gang against outsiders. (*Id.* at 4.) On December 29, 2016, Petitioners moved for class certification. (*Id.* at 1.) Petitioners proposed the following class:

> All visiting beachgoers to Lunada Bay who do not live in Palos Verdes Estates, as well as those who have been deterred from visiting Lunada Bay because of the Bay Boys' actions, the Individual Defendants' actions, the City of PVE's actions and inaction, and Defendant Chief of Police Kepley's action and inaction, and subsequently denied during the Liability Period, and/or are currently being denied, on the basis of them living outside of the City of PVE, full and equal enjoyment of rights under the state and federal constitution, to services, facilities, privileges, advantages, and/or recreational opportunities at Lunada Bay. For purposes of this class, "visiting beachgoers" includes all persons who do not reside in the City of PVE, and who are not members of the Bay Boys, but want lawful, safe, and secure access to Lunada Bay to engage in recreational activities, including, but not limited to, surfers, boaters, sunbathers, fisherman, picnickers, kneeboarders, stand-up paddle boarders, boogie boarders, bodysurfers, windsurfers, kite surfers, kayakers, walkers, dog walkers, hikers, beachcombers, photographers, and sightseers.

(Exhibit B, Motion for Class Certification ("Motion"), 12; see also, Order, 4.) On February 21, 2017, the District Court denied Petitioners' motion. (*Id.* at 1, 23.) This petition timely followed on March 7, 2017.

LEGAL DISCUSSION

Under rule 23(f) of the Federal Rules of Civil Procedure, this Court has "broad discretion" to grant a petition for immediate appeal of an order denying class certification. (*Chamberlan*, 402 F.3d at 960.) Immediate review is most likely to be warranted under any of the following circumstances: when a questionable ruling means the death-knell for the plaintiff; the order presents an "unsettled and fundamental issue of law relating to class actions" that is unlikely to be reviewed later; or "the district court's class certification decision is manifestly erroneous." (*Id.* at 959.) But these categories "do not constitute an exhaustive list" and are "merely guidelines, not a rigid test." (*Id.* at 960.)

I. THIS COURT SHOULD ALLOW AN APPEAL UNDER RULE 23(f) BECAUSE THE ORDER DENYING CLASS CERTIFICATION IS MANIFESTLY ERRONEOUS

Rule 23's threshold requirements for class certification are not designed to prevent class treatment, but rather to "limit the class claims to those fairly encompassed by the named plaintiff's claims." (*Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982)) (internal quotation marks omitted).) "[T]he purpose of class

certification is merely 'to select the metho[d] best suited to adjudication of the controversy fairly and efficiently,' [citation] (alteration in original) (internal quotation marks omitted)." (*Stockwell v. City and County of San Francisco*, 749 F.3d 1107, 1112 (9th Cir. 2014.) "'The class suit is a uniquely appropriate procedure in civil-rights cases … .'" (*Parsons v. Ryan*, 754 F.3d 657, 686 (9th Cir. 2014) (citation omitted).)

A. The District Court Committed Manifest Legal Error On The Issue Of Numerosity When It Excluded Petitioners' Expert Dr. King's Opinion On Class Size

On the issue of numerosity, Plaintiffs' expert economist Dr. Phillip King concluded that roughly speaking, absent the LBB gang's harassment, approximately 20 to 25 surfers would be surfing Lunada Bay's exquisite water during peak wave times. (Exhibit C, King Decl., ¶ 17.) That number compares to the presence of only 4 to 8 surfers under the LBB gang reign of terror. (*Id.*) Using basic arithmetic, Dr. King extrapolated from there, with the upshot being "at least 20,000" annual surfers, which breaks down to a very reasonable *55 surfers per day* for a world class beach located within a metropolis the size of Los Angeles. (*Id.* at ¶¶ 18-19.) Of course, other users such as beachgoers and hikers would only increase the number of people accessing Lunada Bay. (*Id.* at ¶¶ 19-20.) In other words, with respect to numerosity, conservatively speaking and *using only surfers*, Dr. King concluded that absent the LBB gang's harassment of the public, 55 surfers

per day would be at Lunada Bay, and that the potential class was, annualizing 55 surfers per day, "at least 20,000." (*Id.*)

Without any competing evidence, no defense expert opinion, and making a litany of erroneous statements about Dr. King's showing, the District Court concluded that it cannot determine "whether Dr. King's opinions result from the application of reliable principles and methodologies to sufficient data." (Order, 9.) But each and every one of the District Court's objections to Dr. King's opinion is clear error, making the decision to strike the opinion also manifestly erroneous:

District Court's Order	Actual Record & Implication
"daily average of approximately 900 surfers; an exceedingly unlikely number of daily surfers at a single beach" (Order, 9.)	Trestles is not one but three different surfing locations, "Lower Trestles, Upper Trestles, and Cotton's." (King Decl., ¶ 15) So the actual number would be 301 surfers at a single world class beach, not 900 as Judge Otero states in the order.
Without "explaining his data, Dr. King concludes that Trestles averages about 330,000 surf trips per year."	Dr. King cites to a voluminous study of Trestles by Dr. Chad Nelson. And to an estimate of attendance at Trestles by Nelson. (Exh. D, King Supp. Decl., ¶¶ 10, 16, 17.) So the principles, methods and data sources are actually disclosed by Dr. King.
"[W]ithout explaining *any* aspect of his methodology or calculations" Dr. King reaches conclusions as to surfers per day at Lunada Bay. (Order, 9 (emphasis added).)	Dr. King "used a standard technique … applying periodic counts" and attached exhibits explaining same. (King Supp. Decl., ¶ 10.) So the methods are disclosed and discussed.

District Court's Order	Actual Record & Implication
Dr. King "makes no effort to compare or explain these facially dissimilar qualities." (Order, 8.)	Dr. King acknowledged differences between Trestles and Lunada Bay including "material variances." (King Decl., ¶¶ 15 & 17.) So Dr. King acknowledged and accounted for variances.

To allow the District Court to strike Dr. King's surfers per day analysis—unopposed by any defense expert and resting on such errors is to transform the court's role under *Ellis v. Costco Wholesale Corporation*, 657 F.3d 970, 982 (9th Cir. 2011), from that of gatekeeper to that of *ultimate* fact-finder. And while "some overlap with the merits of the plaintiff's underlying claim" cannot be avoided at the class certification stage (*Wal-Mart,* 564 U.S. at 350-51), such potential for overlap is "no license to engage in free-ranging merits inquiries at the certification stage." (*Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S.Ct. 1184, 1194-95 (2013).) Yet to reject Dr. King's conclusions as to surfers per day at Lunada Bay under the circumstances that occurred here, is to allow the District Court to insert itself as the ultimate finder of fact rather than perform its role as gatekeeper.

As this Court stated in *City of Pomona v. SQM North America Corporation*, 750 F.3d 1036, 1044 (9th Cir. 2014), the trial court's role under *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 597 (1993) and rule 702 is as gatekeeper, not as

ultimate fact finder. "Facts casting doubt on the credibility of an expert witness and contested facts regarding the strength of a particular scientific method are questions reserved for the fact finder." (*Id*. at 1053; *Estate of Barabin v. AstenJohnson, Inc*., 740 F.3d 457, 463 (9th Cir. 2014) (en banc) ("The district court is not tasked with deciding whether the expert is right or wrong, just whether his testimony has substance such that it would be helpful to a jury"); *Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 969 (9th Cir. 2014) (The judge is "supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable").) Here, at the threshold class certification stage, Dr. King provided a detailed opinion on numerosity. But the District Court, exceeding its function as gatekeeper and simply disagreeing with King, rejected Petitioners' showing.

B. The District Court Also Committed Manifest Error As To Commonality By Improperly Focusing On The Variable Ways Class Members Experienced Injuries Instead Of The Invasion Of Their Legal Rights Arising From A *Common Core* Of Factual And Legal Issues

Commonality turns on "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." (*Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). A single common question of law or fact can be sufficient to meet the commonality requirement. (*Wal-Mart*, 131 S.Ct. at 2556; *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013).) The commonality

requirement is satisfied if *whatever the answer* to the common question *is*, it "will resolve an issue that is central to the validity of each one of the claims in one stroke." (*Wal-Mart*, 131 S.Ct. at 2551.) Thus, the proper focus is whether the questions, "meritorious or not, [a]re common to members of the putative class." (*Stockwell*, 749 F.3d at 1113-14.)

In *Stockwell*, a putative class of police officers alleged that the City's employment policy had an impermissible disparate impact on them. (*Id.* at 1110.) At the class certification stage, instead of recognizing that the plaintiffs had identified a single question that would affect them all—the existence of a discriminatory policy—the district court got into the weeds, quarreling with the plaintiffs' statistical analysis, whether it was accurate, and what its implications were. (*Id.* at 1114-15.) But this Court rejected such merits focused attack, observing that whatever the answer to the discriminatory policy question, the plaintiffs' "claims will rise and fall together." (*Id.* at 1115.) Commonality was obvious. "Where the circumstances of each particular class member vary but retain a *common core* of factual or legal issues with the rest of the class, commonality exists." (*Evan v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2012) (quotation marks and citation omitted) (emphasis added).)

Here, Petitioners asserted "a common core of factual or legal issues" that whatever the post-certification motion answer, will make their "claims [ ] rise and

fall together." First, whether the LBB gang engages in a course of conduct, i.e., concerted unlawful activity including verbal harassment, assault and battery, and inflicting property damage, all for the common aim and purpose of preventing public access to the public beach at Lunada Bay. (Motion, 14.) Second, whether the Defendant police department has an unwritten custom, policy or practice of failing to enforce the law with respect to the LBB gang's unlawful activities, a policy that has an impermissible effect on Petitioners as a class—harassment and injuries at, and ultimately exclusion from, Lunada Bay. (*Id*.) When these questions are resolved later at the merits stage, the answer to these common questions will affect all class members similarly because the answer will have a similar effect on the entire class. Thus, as this Court recognized in *Stockwell* and *Parsons*, when the answer to the common questions—whatever the answer is—affects all class members similarly, commonality has been satisfied and use of the class action is appropriate. (*Stockwell*, 749 F.3d at 1112-13; *Parsons*, 754 F.3d at 673-674 (conduct systemic in nature exposed all class members to the same *injury*—violation of their constitutional rights—irrespective of different individual experiences or varied physical "injuries" resulting from such conduct).)

But instead of adhering to this Court's controlling principles, the District Court here—like the lower court in *Stockwell* and the defendants' misplaced arguments in *Parsons*—got into the weeds by focusing on individual differences in

experiences on the ground rather than whether the class alleged a *common cause* of those various experiences. (Order, 18 (citing variations in Petitioners' reactions to/with local police), 19 (discussing fact that some plaintiffs had not yet been harassed but ignoring their fear of going to Lunada Bay).)

Instead of focusing on the common aspect of the two questions, the District Court—at the invitation of Defendants—parsed various Plaintiffs' declarations for differences in the way they *experienced* their exclusion and their injuries and the fact that some had not yet been injured (because they have not yet been willing to subject themselves to being victims of the LBB gang). (Order, 18-19.) But the issue is not whether some Petitioners did and some did not seek the assistance of the police department (Order, 18). And the issue is not whether some Petitioners were brave enough to be subjected to LBB gang injuries and some were not. (*Parsons*, 754 F.3d at 679 (no defense at commonality stage that some plaintiffs have not yet been injured by the common core of illegal conduct/unlawful policy).) The issue is whether or not there is a core custom, policy, or practice at Defendant police department that has created, enabled, assisted, or led to the violation of the Petitioners' rights by the LBB gang's concerted criminal activity against outsiders. As this Court so simply stated in *Parsons*, whether a policy or practice results in harm and continued risk of harm to a particular group is a common question that can be answered *irrespective of variation in individual experiences under the*

policy or practice. (*Parsons,* 754 F.3d at 679-80.) Either the Defendant police department has an illicit custom, policy, or practice that violates Petitioners' rights—or it does not. Either the LBB gang engages in a concerted course of criminal activity targeted at Petitioners—or it does not. These common questions can be answered *as to the entire class* "in one stroke." (*Wal-Mart*, 131 S.Ct. at 2551.) Therefore, the District Court's cursory ruling—erroneously focusing on individualized differences in which each Plaintiff *experienced the effects* of the LBB gang and police department's unlawful conduct, instead of focusing on the common questions of unlawful conduct and the fact that the answers to those questions would affect the class as a whole—is manifest legal error.

C. The District Court Also Committed Manifest Error On Typicality By Mistakenly Focusing On Underlying Factual Differences Instead Of The Class Representatives And Other Class Members' Actual Claims

"Typicality focuses on the class representative's claim—but not the specific facts from which the claim arose—and ensures that the interest of the class representative 'aligns with the interests of the class.' (Citation.)" (*Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017).) "Representative claims are 'typical' if they are *reasonably coextensive* with those of absent class members; they need not be substantially identical." (*Parsons,* 754 F.3d at 685.) Typicality analysis includes "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether

other class members have been injured by the same course of conduct." (*Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).) As a result, 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." (*Id.*)

In *Just Film*, the defendants appealed class certification arguing lack of typicality. (847 F.3d at 1115.) Focusing on underlying details of the named plaintiff's claims, the defendants mischaracterized the plaintiffs' legal theory. (*Id.* at 1116.) This Court rejected those arguments, stating that the plaintiffs' legal theory was a simple *overarching* one, alleging that the defendants engaged in a course of conduct designed to defraud the plaintiffs and which did in fact, injure them. (*Id.*) This Court found the named plaintiff's claim reasonably coextensive with that of the class because she alleged the defendants "committed the *same* overall course of misconduct against other members of the class … and the class's alleged injuries also resulted from that course of misconduct." (*Id.* at 1117, underlining added; *Parsons*, 754 F.3d at 686 (typicality was met because the plaintiffs' injury "is a result of a course of conduct that is not unique to any of them; and they allege that the injury follows from the course of conduct *at the center of the class claims*," emphasis added).) "[I]t is sufficient for typicality if the plaintiff endured a course of conduct directed against the class." (*Just Film*, 847 F.3d at 1118.)

Here, as in *Parsons* and *Just Film*, the class representatives' claims are "reasonably coextensive" with the rest of the class. The class representatives assert that their injuries arise from a core course of conduct—concerted criminal activity by the LBB gang that is not unique to any one of them but instead, carried out in various ways and means against all class members—and all with the common goal to exclude Petitioners from Lunada Bay. (Motion, 7-11, 15-16.) The class representatives allege that the injury from the course of conduct and "*at the center of the class claims*," is the organized campaign of terror against outsiders and the police department's custom, policy and practice of enabling it. (*Id.*) Thus, "focusing on the class representative's claim—but not the specific facts from which the claim arose," it is obvious that the class representatives' interests are sufficiently aligned with the interests of the absent class members. (*Just Film*, 847 F.3d at 1116.)

But instead of applying the permissive standards for typicality, the District Court here engaged in manifest legal error by making the same mistakes rejected by this Court in *Just Film* and *Parsons*. Instead of focusing on the class representatives' overarching legal claims, the District Court accepted Defendants' invitation to examine "the specific facts from which the claim arose," the very thing that is off-limits in the typicality determination. (Order, 19-20.) Having gone down the wrong path using the wrong focus, the District Court agreed with

Defendants' contention that the class representatives claims were—at the factual level—different from other putative class members' experiences both with respect to the LBB gang and local police. (Order, 19-20.) But this kind of parsing overlooks the central purpose of typicality, making sure that the class representative's claims are merely "sufficiently coextensive" to ensure that "the interests of the class members will be fairly and adequately protected in their absence." (*Wal-Mart*, 131 S.Ct. at 2551, n. 5.)

Here, it could not be clearer that the class representatives and absent class members all want the same thing: to visit Lunada Bay free from the terror inflicted on outsiders by the LBB gang, a reign of terror in which the local police have been complicit. The ending of this criminal activity will also end the chilling effect that has kept some class members who are not willing to risk harm at the hands of the LBB gang, from visiting Lunada Bay. Thus, it could not be clearer that the named class representatives will fairly and adequately protect absent class members. Successful prosecution of this class action will mean cessation of criminal activity against, and the chilling effect upon, all class members. Therefore, the District Court erred—in the same way the defendants erred in *Just Film* and *Parsons*—by myopically focusing on underlying factual differences among class members instead of whether the named class representatives' claims are "aligned with the interests of the class." This, too, was manifest legal error.

D. The District Court's Order Is Manifestly Erroneous As To Rule 23(b)

1. The District Court's premise for not reaching rule 23(b)(2) was incorrect.

This lawsuit's primary goal is to obtain injunctive relief enabling the public to use Lunada Bay free from harassment by the LBB gang. (Exh. F, Complaint, ¶ 37.) The primary role of rule 23(b)(2) "has always been the certification of civil rights class actions." (*Parsons*, 754 F.3d at 686.) The key to the (b)(2) class is "the indivisible nature of the injunctive or declaratory remedy warranted — the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." (*Wal-Mart*, 131 S.Ct. at 2557.) Because rule 23(b)(2) classes have this innate cohesion, they need not meet the additional requirements contained in rule 23(b)(3). Predominance and superiority are self-evident.

Here, Petitioners have documented exclusion through violent and coordinated conduct by the LBB gang, utilizing certain "rules [and] term[s] of engagement" to protect "their turf" from all "outsiders." (Exh. G, Decl. Otten, Exhs. 3 & 4.) The police have enabled this conduct for decades, by refusing to hold the LBB gang accountable. Nearly all putative class-member declarants describe exclusion at the hands of the LBB gang and complicity by the police. (Motion, 5-7.) Critically, these declarants all share the desire to return to Lunada

Bay without fear of attack. And the named Plaintiffs, who have been denied access and endured harassment when courageous enough to expose themselves to the LBB gang's wrath by attempting to enjoy the public beach, have standing to represent this putative class of similarly harassed and/or excluded non-resident beachgoers. (Motion, 7-8.) Thus, Rule 23(b)(2) is the appropriate vehicle for vindicating all class members' civil rights.

Such a compelling showing of predominance and superiority notwithstanding, the District Court ruled that it "need not reach a conclusion whether certification under Rule 23(b)(2) or 23(b)(3) would be proper." (Order, 21.) This finding rested upon the District Court's erroneous conclusion, demonstrated above, that Petitioners did not meet their burden under rule 23(a). Therefore, the refusal to reach 23(b)(2) was also manifest legal error.

2. The District Court applied the wrong legal standard when making the rule 23(b)(3) determination.

As to rule 23(b)(3), the District Court states that Petitioners cannot establish that common questions of law or fact predominate. (Exh. A, Order, 22-23.) But in order to get there, the District Court looks beyond the big picture, class-wide issues, erroneously focusing on the possibility of individual suits and potential problems in the calculation of modest damages. (*Id.*)

But in every class action that gets certified, it is always possible to envision at least some individual actions—that's why potential class members can opt out.

And in many class actions, there are sometimes potential problems with formulating class-wide damages. But rule 23(b)(3)'s purpose is not to bar class actions over possibilities and potentials, but only to ensure that common questions of law and fact predominate. Moreover, "damage calculations alone cannot defeat certification." (*Yokoyama v. Midland National Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2008).) And because LBB gang members engage in a core course of conduct to exclude Petitioners from Lunada Bay—and the City is complicit in such conduct—such common questions of law and fact quite obviously predominate.

Furthermore, where, as here, many individuals may have incidental damages claims, a class action is especially appropriate because it is unlikely that any of the claimants would independently seek relief absent a class suit. (*Amchem*, 521 U.S. at 617.) These considerations are at the heart of Rule 23. (*Just Film*, 847 F.3d at 1123.) And "[r]ecognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal." (*Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1437 (2013) (Ginsburg, J. & Breyer, J., dissenting).)

Moreover, the Court rejected Petitioners' expert's damages calculation over quibbles with scope and potential individual variations. But at this stage, Dr. King's analysis merely demonstrated that a methodology for calculation exists, and that it would result in nominal recovery (estimating damages between $50 to $80 per person per visit). (King Decl. ¶ 19.) Quibbling with King's demonstration is

decidedly not the same as a finding, consistent with the record, that individual questions of law and fact predominate. As this Court put it in *Just Film*, the test is whether the class is "sufficiently cohesive" to warrant class treatment, not whether the class is nearly identical in the way that each class member experienced wrongdoing or suffered damages. (847 F.3d at 1120-21.) Therefore, the District Court's rule 23(b)(3) ruling is rife with manifest error.

II. PETITIONERS WILL BE IRREPARABLY HARMED ABSENT AN INTERLOCUTORY APPEAL

The public's loss of access to *public* beaches is a nationwide trend, one from which California has not escaped. (*Free The Beach! Public Access, Equal Justice, And The California Coast*, 2 Stan. J. Civ. Rts. & Civ. Liberties 143, 144 (Nov. 2005) (describing nationwide struggle to hold on to public access to public beaches).) Thus, the issues raised by Petitioners are important to every member of the public in California and to all public bodies with jurisdiction over such lands. In every instance, the risks, small recovery, and relatively high costs of litigation make resolution outside of class treatment undesirable and thus, unlikely. "These considerations are at the heart of why the Federal Rules of Civil Procedure allow class actions … [And] [t]his case vividly points to the need for class treatment." (*Just Film*, 847 F.3d at 1123.)

CONCLUSION

Petitioners have the right to public access at Lunada Bay without running a gauntlet of harassment—verbal and physical—designed to keep them away. Petitioners' motion for class certification should be evaluated by the District Court without the fatal combination of manifest errors that led to denial of the otherwise meritorious motion. Therefore, this Court should grant the petition and allow Petitioners to appeal. And to avoid the waste of scarce party and judicial resources, this Court should also issue an order staying the District Court proceedings until the appeal is resolved.

DATED: March 7, 2017

HANSON BRIDGETT LLP

By: */s/ Gary A. Watt*
GARY A. WATT
Attorneys for Petitioners
CORY SPENCER, DIANA MILENA REED, AND COASTAL PROTECTION RANGERS, INC.

STATEMENT OF RELATED CASES

Petitioners are not aware of any related cases pending before the Court.

DATED: March 7, 2017

HANSON BRIDGETT LLP

By: */s/ Gary A. Watt*
GARY A. WATT
Attorneys for Petitioners
CORY SPENCER, DIANA MILENA REED, AND COASTAL PROTECTION RANGERS, INC.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. RULES 5(c)(1) & 32(A)(7)(C) AND CIRCUIT RULE 32-1

Pursuant to the Federal Rules of Appellate Procedure, rules 5(c)(1) and 32 (a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached petition is proportionally spaced, has a typeface of 14 points and does not exceed 5,200 words.

DATED: March 7, 2017

HANSON BRIDGETT LLP

By: */s/ Gary A. Watt*
GARY A. WATT
Attorneys for Petitioners
CORY SPENCER, DIANA MILENA REED, AND COASTAL PROTECTION RANGERS, INC.