

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALAN E. FISCHER III,
JOHN DOES 1-10,000

CIVIL ACTION NO. 1:24-cv-00044

Plaintiffs,

v.

DISTRICT OF COLUMBIA,
US CAPITOL POLICE DEPARTMENT,
US CAPITOL POLICE BOARD,
MURIEL BOWSER,
NANCY PELOSI,
STEVEN SUND,
YOGANANDA PITTMAN,
ERIC WALDOW,
THOMAS LOYD,
JOHN DOE USCP OFFICERS 1-50,
ROBERT GLOVER,
DANIEL THAU,
JAMES CRISMAN,
JOHN DOE D.C. MPD OFFICERS 1-50,
individually and in their official capacities,

CIVIL RIGHTS
CLASS ACTION
FOR DAMAGES &
DECLARATORY
RELIEF

JURY TRIAL
DEMANDED

Defendants,

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND MEMORANDUM OF LAW

Plaintiff, Alan E Fischer III, moves the Court to certify this case as a Class Action and states as follows:

General Overview of the Case

This case is about the United States Capitol Police and the Metropolitan Police of the District of Columbia indiscriminately shooting munitions into a crowd of thousands of people at the United States Capitol on January 6, 2021. The people hit by the munitions were injured. The police also used billy clubs, including strikes to the head, pepper spray and other means of excessive force. Many videos from body cams, cell phones and other cameras confirm the plaintiffs' allegations are true. (See links to sample videos, *infra.*)

Contemporaneously with this motion, plaintiff has filed: Plaintiffs' Motion for Extension of Time to Request Class Certification and Memorandum of Law.

The plaintiff, Alan E. Fischer III, seeks appointment as class representative. He initially filed a *pro se* complaint on January 5, 2024 and then filed a proposed amended complaint on August 27, 2024. [D.E. #22, Ex 1]. On behalf of himself and the class he seeks money damages for physical and mental injuries caused by the defendants' use of excessive force and violation of Constitutional Rights. The allegations show violations of the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution. Some of the details are set forth in the plaintiff's declaration filed as Exhibit 1 to this motion. (Fischer Declaration, Ex. 1).

Relief Being Sought in this Motion

Plaintiff seeks class certification under Fed.R.Civ.P. 23(b)(3) or alternatively Rule 23(c)(4). Plaintiff seeks class certification with a class meeting the following definition:

“All persons who were on the west terrace, west plaza, west steps and/or west lawn of the United States Capitol on January 6, 2021 who were struck by weapons or exposed to chemicals launched or thrown or weapons used by law enforcement personnel in violation of the persons' rights under the United States Constitution and amendments thereto.”

Class Certification Standard

Parties seeking class certification must meet the requirements of Federal Rule of Civil Procedure 23 (“Rule 23”). A proposed class first must satisfy Rule 23(a). In addition, depending on the relief sought, it must satisfy Rule 23(b)(1), (b)(2), or (b)(3), or Rule 23(c)(4). Plaintiffs here respectfully request that the Court certify the Class pursuant to Rule 23(b)(3) or alternatively Rule 23(c)(4). Rule 23(a) requires that the following prerequisites be met:

(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.

Fed. R. Civ. P. 23(a). These requirements are referred to as “numerosity,” “commonality,” “typicality,” and “adequacy.” *Reese v. Bahash*, 248 F.R.D. 58, 62 (D.D.C. 2008).

Rule 23(b)(3) provides that claims for damages should be certified where common questions of law or fact “predominate over any questions affecting only individual members” and class resolution is “superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). Rule 23(c)(4) allows a court to certify a class to resolve “particular issues” even if the requirements of Rule 23(b) are not met.

Although courts do not decide the merits of plaintiffs’ claims at the class certification stage, the Supreme Court has explained that courts should take a “**close look at the case**,” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) and conduct a “rigorous analysis” of the Rule 23 requirements at the certification stage, *Comcast v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982)). But the Court has further made clear that courts should **not** “conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

A “Close Look at the Case”

The basic facts of the case are stated in plaintiff’s proposed amended complaint filed *pro se* [D.E. #22, Ex 1] and stated in the plaintiff’s 10/8/2024 Reply Memorandum [D.E. #27] and also in the attached declaration in support of this motion. Example videos of the excessive and unconstitutional force are cited below with hyperlinks for the court to review. Some of the facts already alleged in the record of this case are repeated as follows:

Highlights of the evidence show that the police launched explosive munitions into the

crowd that included: (1) pepper balls, which are small rubber balls filled with a synthetic hot-pepper-like substance called Oleresin Capsicum (“O.C.”); (2) FM303 projectiles which also contain O.C. and have striations that make the projectile bullet spin for more accuracy; (3) pepper spray from canisters that project a stream from 10 to 15 feet; (4) stingball grenades, which are rubber balls about the size of a softball that have a pin to pull after which an internal CO2 cartridge explodes spraying out rubber pellets, some solid and others filled with O.C.; (5) MK46 pepper spray containers, which are similar to a fire extinguishers that spray O.C. to a distance of 25 to 30 feet; (6) flash-bang grenades which the police threw in the air and which caused at least one of the protesters to catch on fire; (7) O.C. smoke grenades which mix O.C. and smoke to keep the O.C. droplets airborne 2 to 3 times longer than the O.C. chemical stays in the air by itself; (8) Blue Tip, exact impact heavy duty 40 mm sponge rounds; (9) a “Tripple Chaser” which is a hand tossed container that bursts into three pieces each of which spews 2-chlorobenzalmalononitrile, a much stronger chemical than the O.C. (commonly called “CS Gas” or tear gas). Metropolitan D.C. police used 40 mm teenage launchers to fire muzzle blast munitions which flew into the faces of the demonstrators. The 40 mm grenades launchers were also used to fire tear gas and other projectiles into the middle of the demonstration, affecting peaceful, praying citizens exercising their First Amendment rights.

The crowd was composed of protesters who were overwhelmingly peaceful before the shooting by police started. They were assembled on the grounds not engaging in violence. A small group of protesters were up along a temporary bike fence line and pushing several officers. No one was intentionally hurting any officers, although one officer did fall on the ground and got hurt. The munitions launched into the crowd were not directed at any of the people who were pushing on the fence line. The police were shooting indiscriminately into the crowd further back. The police never gave the crowd any warning before shooting.

Under District of Columbia law, before police can use force against protesters they must give the crowd three verbal warnings. District of Columbia First Amendment Assemblies Act, D.C. 5-331-07 (“FAAA”). Of the numerous video and audio recordings from that day, none of them have a recording of such a warning before the police shooting started. In fact to the contrary nearly 30 minutes after the shooting started, one female officer can be heard reprimanding another officer for throwing a “Tripple Chaser CS gas canister”, which is a “burning munition” into the crowd without giving three warnings—or even one for that matter. [Amed. Comp. 31]. After he shot the Tripple Chaser indiscriminately into the crowd she yeld at him: “You give them three chances, why would you?” [Amed. Comp. 31].

The United States Capitol has a ‘Giant Voice’ Alert System that, for whatever reason, was not used that day. It was not used to advise the protesters to disburse. It was not used to advise the protesters that munitions and/or pepper spray and other weapons would be used on them if they did not disburse.

The indiscriminate shooting of munitions went on for well over an hour. The shooting and throwing of grenades into the crowd agitated the protesters. The police admitted an hour after the shooting started that the munitions shot into the crowd were “hitting innocent people.” [Amend. Comp. paragraph 34].

***The Allegations in the Amended Complaint Show
Violations of the Constitutional Rights of Hundreds of People***

The allegations in the Amended Complaint detail the Constitutional violations in a timeline: “At approximately 1:06pm, U.S. Capitol Police Deputy Chief Waldow ordered the U.S. Capitol Police CDU Less Lethal team to fire into the crowd, demanding they “LAUNCH” three times. [Amend. Comp. paragraph 14] Not until an hour later: “At approximately 2:03pm, the D.C. Metropolitan Police Department gave the first FAAA mandated warning with a single

LRAD amplification device, which transmitted warnings that a failure to disperse would subject protesters to arrest. [Amend. Comp. paragraph 33]. (The “FAAA” is the District of Columbia First Amendment Assemblies Act, D.C. 5-331-07.)

At 1:07pm after Chief Waldo ordered “LAUNCH”, U.S. Capitol Police Inspector Loyd ordered the U.S. Capitol Police CDU Less Lethal team to fire into the crowd with a hand signal pointing into the crowd. Loyd who was standing within feet of Waldow would have known there had been no audible FAAA warnings were given to notify, instruct or disperse the newly formed crowd. [Amend. Comp. paragraph 15] At approximately 1:07pm, members of the U.S. Capitol Police CDU Less Lethal team to fired into the crowd, striking an innocent and peaceful protester in the face. The round penetrated and lodged itself in the victim’s cheek, causing significant blood loss. [Amend. Comp. paragraph 15] That protester was Joshua Black. After the crowd saw Mr. Black was shot, “Some of the protesters in the vicinity became angry.” [Amend. Comp. paragraph 17].

“At approximately 1:12pm, D.C. Metropolitan Police Department’s Special Operations Division officers began arriving on the Lower West Plaza and engaging with protesters with physical violence, using baton strikes, OC chemical irritants, and “ECD” taser rounds. D.C. Metropolitan Police Department’s officers would go on to fire dozens to hundreds of munitions into crowds over the next hour . . . using deadly force by beating protesters over the head with baton strikes, and firing grenades and mortars directly at their bodies.” [Amend. Comp. paragraph 20].

One of the named defendants, D.C. Metropolitan Police Sergeant Thau, was among these arriving D.C. Metro officers, and he, just after 1:12pm, “immediately began calling for “blast munitions” from U.S. Capitol Police and D.C. Metropolitan Police personnel, spraying non-violent protesters with OC chemical irritants, and using “ECD” taser rounds as offensive

weapons to injure protesters with no intent to arrest them.” [Sergeant paragraph 21]

As stated above, body cams and other videos show the police indiscriminately shooting munitions into the crowd. Plaintiff hereby incorporates the following videos (the “Skip Ad” feature of Rumble platform might need to be used)::

CLIP TWO - THREE CHANCES:

RUMBLE: <https://rumble.com/v5kil3p-j6-dc-police-you-were-supposed-to-give-them-3-chances.html>

CLIP THREE - LOYD TO FIRE, WEST PLAZA TIMELINE:

RUMBLE: <https://rumble.com/v5kiw9x-j6-capitol-first-moments-in-timeline-sequence.html>

CLIP FOUR - MUNITIONS:

RUMBLE: <https://rumble.com/v5kipil-j6-west-plaza-police-munitions-fired-into-crowd.html>

DC MPD CRISTMAN THROWS 13 IN A ROW:

RUMBLE: <https://rumble.com/v3e8xve-j6-132-136-pm-mpd-cop-throws-13-explosive-munitions-in-a-row-into-crowd-on-.html?e9s=src v1 ucp>

DC MPD THAU EDWARDS PAIN COMPLAINT, ADMIT INCITING, HURTING INNOCENT PEOPLE: **RUMBLE:** <https://rumble.com/v44s8yn-dc-mpd-officers-admit-hitting-and-inciting-innocent-people-a-clip-from-j6-a.html?e9s=src v1 ucp>

Plaintiff Alan E. Fischer III who is requesting to be appointed as Class Representative was subject to the unlawful force as he was struck and wounded in the head by a pepper ball launched by the police at approximately 1:18 p.m. Later that day he also suffered injuries from Oleresin Capsicum exposure. (Fischer Declaration, Ex. 1).

Common Issues

The claims brought in the Amended Complaint raise numerous common issues that should be resolved on a class basis. For instance:

- 1 Members of the Class were subject to the same comprehensive attack, at the same time and place, when law enforcement officers launched munitions and used other excessive force without warning or justification.

- 2 The same parties planned, oversaw, and conducted the attack on all of the members of each Class.
- 3 What forms of physical force were used against members of the Class by Metropolitan District of Columbia Police and/or the U.S. Capitol Police?
- 4 The same parties authorized the use of force against all members of the Class and dictated the time and place when the attack on members each Class would take place.
- 5 The physical force used against the members of each Class was deployed by an organized group of officers operating under the same rules of engagement and command structure.
- 6 The physical force used against the members of each Class involved the same instrumentalities, weapons, and tactics.
- 7 The same conduct by the defendants constituted an assault on each member of the Class.
- 8 The same conduct by the defendants constituted intentional conduct directed at each member of the Class.
- 9 Members of the Class had the same rights under the U.S. Constitution and the Amendments thereto to engage in free speech, assemble, and petition the government for redress.
- 10 The same conduct violated the U.S. Constitution and the Amendments thereto rights of all members of the Class such that no discretionary function(s) apply as a defense to the Class plaintiffs' claims.
- 11 The same conduct stopped and/or deterred each member of the Class from exercising of their First Amendment rights.
- 12 The U.S. Capitol Police acted in complicity and/or conspiracy with the Metropolitan District of Columbia Police such that the U.S. Capitol Police and the other federal defendants are subject to 42 U.S.C. § 1983 as provided in *Smith v. United States*, 723 F.Supp. 1300 , 1306 (C.D.Ill.1989) (citations omitted.)(*emphasis added*). " *Fluellen v. United States Department of Justice Drug Enforcement Administration*, 816 F. Supp. 1206 (E.D. Mich. 1993)("[w]hen a non-state actor (which includes a federal agent) conspires with state officials to deprive an individual of his constitutional rights, an action under section 1983 will lie against the non-state actor.").
- 13 Are the U.S. Capitol Police and the other defendants are subject to liability under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) and *Davis v. Passman*, 442 U.S. 228 (1979).
- 14 What were the rules of engagement provided to Metropolitan District of Columbia Police and/or U.S. Capitol Police prior to deployment of the use of force?

- 15 What was the command and control structure over Metropolitan District of Columbia Police and the U.S. Capitol Police during the incident?
- 16 Did Metropolitan District of Columbia Police and/or the U.S. Capitol Police federal law enforcement officers adequately inform protesters that they should disperse and leave Lafayette Square before using force against them?
- 17 Which Defendants authorized or encouraged the use of force against the Class members?
- 18 What elements of physical force were authorized and deployed by the Defendants?
- 19 Were the actions, including the use of force on January 6, 2021 by Metropolitan District of Columbia Police and/or the U.S. Capitol Police subsequently ratified by any of the other defendants. (See, *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). *Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 44 F.4th 867, 885 (9th Cir. 2022)(A municipality can be liable for an isolated constitutional violation if a final policymaker “*ratified*” a subordinate’s actions.); *Christie v. Iopa*, 176 F.3d 1231, 1238 (9th Cir. 1999).
- 20 What reasons did the Defendants claim to have for using force against the Class and were those justifications reasonable under the circumstances?
- 21 Did the Defendants’ actions impair activities protected by the U.S. Constitution and the amendments thereto such that any discretionary function exception would not apply to the Defendants actions?
- 22 Were class members entitled to peacefully demonstrate on January 6, 2021 on the Capitol grounds?
- 23 If not, where near the Capitol were they entitled to peacefully demonstrate on January 6, 2021?
- 24 If not entitled to demonstrate on Capitol grounds, were the demonstrators so informed and how were they so informed?
- 25 Was the United States Capitol closed to the public on January 6, 2021 and if so, why was it closed to the public?
- 26 Was the United States Capitol open to Congressmen and Congresswomen and Senators on January 6, 2021 and if so, why was it closed to the public?
- 27 If the United States Capitol open to Congressmen and Congresswomen and Senators on January 6, 2021 but yet closed to the public, what provisions, if any, were made so that the demonstrators message would be conveyed to the Congressmen and Congresswomen and Senators?
- 28 What were the rules of engagement provided to Metropolitan District of Columbia Police and/or the U.S. Capitol Police prior to their use of

- 29 What was the command and control structure over Metropolitan District of Columbia Police and/or the U.S. Capitol Police during the incident?
- 30 Did Metropolitan District of Columbia Police and/or the U.S. Capitol Police adequately inform protesters that they should disperse and leave the Capitol grounds and allow them an opportunity to do so before using force against them?
- 31 Was the U.S. Capitol's 'Giant Voice' Alert System used on January 6 2021 to make any announcements to the crowd on the West side of the Capitol that afternoon?
- 32 If the U.S. Capitol's 'Giant Voice' Alert System was used to make any announcements to the crowd on the West side of the Capitol that afternoon when and what announcements were made? If it wasn't used, why wasn't it used?
- 33 What was the legal effect of D.C. Metropolitan Police Commander Glover officially declaring, at 1:49 p.m. the protest outside of the US Capitol's West Plaza a "riot" and what rights duties and responsibilities changed with that declaration for any law enforcement personnel or government officials and any of the public on the West side of the Capitol?
- 34 What elements of physical force were authorized and deployed by the Metropolitan District of Columbia Police and/or the U.S. Capitol Police Defendants?
- 35 What reasons did the Defendants claim to have for using force against the protesters and were those justifications reasonable under the circumstances?
- 36 Did the Defendants' use of force to disperse protesters at the United States Capitol violate the protesters' First Amendment rights?
- 37 Did the Metropolitan District of Columbia Police and/or the U.S. Capitol Police act in reckless or callous indifference to class members rights such that the Section 1983 Class members are entitled to punitive damages?
- 38 Does the lack of a plan to have more law enforcement and/or the National Guard present at the Capitol on January 6, 2021 to control the crowd without the use of police force and/or violence demonstrate a deliberate indifference to the Constitutional rights of the protesters at the Capitol that day.
- 39 Does the lack of a plan to have more law enforcement and/or the National Guard present at the Capitol on January 6, 2021 to control the crowd without the use of police force and/or violence demonstrate an indifference and/or lack of care or concern for the protection of the rights of the protesters to peacefully protest at the Capitol that day.
- 40 Does the lack of a plan to have more law enforcement and/or the National Guard present at the Capitol on January 6, 2021 to control the crowd without the use of police force and/or violence demonstrate an intent or design on behalf of policy makers to create a disturbance or create an environment favorable for a disturbance to break out with an idea or plan to use the disturbance later for

political means.

- 41 Does the lack of a plan to have more law enforcement and/or the National Guard present at the Capitol on January 6, 2021 to control the crowd without the use of police force and/or violence demonstrate a deliberate indifference to ability of Capitol Police and/or the Metro District of Columbia Police to protect the Capitol building and grounds from being overrun by protesters at the Capitol that day.
- 42 Does the lack of a plan to have more law enforcement and/or the National Guard present at the Capitol on January 6, 2021 to control the crowd without the use of police force and/or violence demonstrate a reckless indifference to the Capitol Police and/or the Metro District of Columbia Police being “set up” for failure as expressed by the officers in the audio of body-cam footage taken that day [See, link below] and the officer’s admitted inability to protect the Capitol building and grounds from being overrun by protesters at the Capitol that day.

CLIP ONE - THEY SET US UP:

RUMBLE: <https://rumble.com/v5kikw5-j6-dc-police-they-set-us-up.html>

- 43 Whether physical force was ordered and deployed upon protesters by the Defendants with impermissible intent (*i.e.*, with (i) intent to cause harmful contact, (ii) intent to cause offensive bodily contact, or (iii) intent to place protesters in apprehension that such contact was imminent).
- 44 Whether the MPD’s actions when overrunning and dispersing the demonstrators with chemical irritants, tear gas, pepper spray, O.C. and/or physical force violated their First Amendment rights.

Why This Case is Appropriate for a Class Action:

Similarly situated class members should not have to bring hundreds of separate lawsuits to recover for nearly identical claims that raise the same issues and involve the same witnesses and evidence. To the contrary, class actions were designed for these precise circumstances and the proposed classes meet the prerequisites for certification.

The proposed class satisfies Rule 23(a). The class is believed to include well in excess of 100 members and is therefore numerous. The vidoes to which plaintiff has provided links bear this out. Commonality is also met, since there are many central questions that can be answered

on a class-wide basis. In addition, the claims of the Class Representative is similar to and aligned with those of the class members, as necessary for typicality, and the Class Representative and class counsel will adequately represent each class. The class also meets Rule 23(b)(3)'s requirements. The claims of each class raise numerous common questions of law and fact that predominate over any individual issues. (See Commons Issues list, *supra*.) And a class action is superior to, more manageable than, and more efficient than litigating these claims on an individual basis.

Accordingly, the Court should certify the Class under Rule 23(b)(3). Alternatively, if the Court declines to certify either class under Rule 23(b)(3), it should certify that class under Rule 23(c)(4) in order to resolve common issues presented by that class's claims more efficiently.

The Proposed Class Satisfies Rule 23(a)

The proposed Class meets Rule 23(a)'s numerosity, commonality, typicality, and adequacy requirements.

A. The Proposed Classes Are Sufficiently Numerous

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "[N]umerosity is satisfied" with credible evidence that "a proposed class has at least forty members." See *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 196 (D.D.C. 2013); see also, e.g., *Frazier v. Consol. Rail Corp.*, 851 F.2d 1447, 1456 n.10 (D.C. Cir. 1988) (recognizing appellate courts' acceptance of 40-member threshold); *Disability Rts. Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 239 F.R.D. 9, 25 (D.D.C. 2006) ("[C]ourts in this jurisdiction have observed that a class of at least forty members is sufficiently large to meet this requirement.").

The proposed Class meets this standard. The protesters assembled on January 6, 2021 2020 at the U.S. Capitol. There were hundreds if not thousands on the West side outdoor exterior of the Capitol grounds, plaza and terrace. Numerous pictures and videos show a vast crowd on

the West side of the Capitol.

The number of individuals in or around the Capitol on January 6, 2021 who are putative members of the Class far exceeds the minimum forty persons and is sufficiently numerous for certification. *See Richardson*, 991 F. Supp. 2d at 196.

The Class Claims Present Common Questions of Law and Fact

Rule 23(a)(2) requires “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). “Commonality . . . requires the court to determine whether there is at least one question of law or fact common to the class.” *Moore v. Napolitano*, 926 F. Supp. 2d 8, 28–29 (D.D.C. 2013). The Supreme Court has made clear that “even a single common question will do” for purposes of commonality. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011) (internal quotations and citations omitted). And “[f]actual variations among class members will not defeat the commonality requirement, so long as a single aspect or feature of the claim is common to all proposed class members.” *Kinard v. E. Capitol Fam. Rental, L.P.*, 331 F.R.D. 206, 213 (D.D.C. 2019) (quoting *Bynum v. District of Columbia*, 214 F.R.D. 27, 33 (D.D.C. 2003)).

The claims brought by the Class meet this standard. The claims of the class members arise out of the same facts and are based on the same series of events directed and overseen by the same Defendants. During the assault, the Defendants were operating under a common set of rules of engagement, the same command and control structure, and the same directives. The claims of each class member are based on the same legal theories and seek the same form of relief.

B. The Representative Plaintiffs’ Claims Are Typical

Alan E. Fischer III’s claims are typical of the other purported Class members. He was on the West side of the Capitol and he was struck in the face and injured with a pepper ball. Latter, he was exposed to O.C. gas launched by the police and suffered injuries typical of that kind of exposure.

C. The Proposed Representatives and Class Counsel Are Adequate

Rule 23(a)(4) requires that “the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). This includes two criteria: (1) “the named representative must not have antagonistic or conflicting interests with the unnamed members of the class,” and (2) “the representative must appear able to vigorously prosecute the interests of the class through qualified counsel.” *Moore*, 926 F. Supp. 2d at 31 (quoting *Twelve John Does v. District of Columbia*, 117 F.3d 571, 575–76 (D.C. Cir. 1997)). These criteria are met here.

Most obviously, filing this action as a *pro se* plaintiff cannot be challenged as anything but a vigorous prosecution. There is nothing antagonistic nor conflicting between the purported class members and Mr. Fischer’s interests in this case. *Moore*, 926 F. Supp. 2d at 31.

Accordingly, Mr. Fischer is an adequate representative. *See, e.g., Garnett v. Zeilinger*, 301 F. Supp. 3d 199, 211 (D.D.C. 2018) (class representatives adequate where “lawyers informed them of the responsibilities of a class representative,” they were “willing to protect the class’s interests, and their declarations demonstrate an awareness of the facts”). Indeed, courts rarely find representatives inadequate outside of “flagrant cases, where the putative class representatives display an alarming unfamiliarity with the suit, display an unwillingness to learn about the facts underlying their claims, or are so lacking in credibility that they are likely to harm their case.” *Howard v. Liquidity Servs. Inc.*, 322 F.R.D. 103, 135 (D.D.C. 2017) (internal quotations and citations omitted).

In addition, proposed undersigned class counsel can fairly and adequately represent the class. Undersigned counsel is an attorney with forty years experience, all of which has been in the practice of litigation. He is a Florida Bar Board Certified Civil Trial Attorney since 2001.

Of note since 2016, he has tried to verdict fifteen tobacco trials each trial lasting between two and three weeks. All of those cases were individual trials that were spun out of a larger class action filed and tried in Miami by other attorneys on behalf of smokers (or their family if deceased) who were addicted to cigarettes and suffered injuries or death from illnesses caused by cigarettes. *See, Engle v. Liggett Group, Inc.*, 945 So.2d 1246 (Fla. 2006). Counsel obtained seven favorable plaintiff verdicts in those cases, all of which were affirmed or paid by the defendant without an appeal. Although it is several years ago, counsel also has experience with 42 U.S.C. § 1983 and police excessive force cases. (*See Decl. of Austin Carr, Esq., Ex. 2*). Rule 23(a)(4)'s adequacy requirement is therefore satisfied.

***The Court Should Certify the Class Under Rule 23(b)(3)
Or, Alternatively, Rule 23(c)(4)***

The claims brought under Section 1983, including the conspiracy and the *Bivens* claims (See, D.E. #22.1 & #27) raise numerous common questions that can be resolved more efficiently in a single, class-wide proceeding. Accordingly, the claims satisfy predominance and superiority and should be certified under Rule 23(b)(3): When “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Alternatively, at a minimum, the Court should certify the many common issues presented by these claims for class-wide resolution under Rule 23(c)(4): “*Particular Issues*. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.”

The Class Meets the Requirements of Rule 23(b)(3)

1. Common Questions Predominate Over Individual Questions

Rule 23(b)(3) requires that “questions of law or fact common to class members predominate over any questions affecting only individual members.” Fed. R. Civ. P.

23(b)(3). Common questions “do not have to be dispositive of the litigation” to meet this requirement. *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 29 (D.D.C. 2001). Instead, the “predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.” *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (internal quotation and citation omitted). The claims brought by the class present predominating common questions.

The claims brought by the Class based on First Amendment violations raise predominating common questions. The Court or jury would need to determine, for example, whether the public had a First Amendment right to assemble and protest at the Capitol on January 6, 2021. *See, e.g., U.S. v. Grace*, 461 U.S. 171, 176 (1983) (“[A]s a general matter peaceful picketing and leafletting are expressive activities involving ‘speech’ protected by the First Amendment.”). The answer to this question will be the same for all class members.

Assuming the protesters had a First Amendment right to demonstrate at the Capitol the Court or jury would need to determine if using force to prevent demonstrations on January 6, 2021 impaired those rights. *See, e.g., Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (“In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed.”). The answer to this question about the Capitol West Terrace, West Plaza and/or West lawn again would be the same for the class as a whole.

Moreover, if the Court or jury were to find an impairment, the defendants would “bear[] the burden of showing that its restriction [was] justified.” *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986). In addition, the trier of fact would need to determine whether the Defendants’ violent and indiscriminate launching of munitions into a crowd of

innocent people was “narrowly tailored” to achieve any proper government interest. *See, e.g., Henderson v. Lujan*, 964 F.2d 1179, 1184 (D.C. Cir. 1992) (“[T]he test of ‘narrow tailoring’ . . . [is] a balancing test, inquiring whether the restriction ‘burdens[s] substantially more speech than is necessary to further the government’s legitimate interests.’”) (brackets in original) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). It also would need to determine whether any of the defendants warned the protesters before the munitions were launched and, if so, whether that warning was sufficient. *See, e.g., Dellums v. Powell*, 566 F.2d 167, 184 (D.C. Cir. 1977) (finding First Amendment violation where evidence supported finding that the defendant “realized that the crowd had not heard his warnings and yet took no steps to correct the situation”). All of these issues raise additional common questions that predominate over individual issues.

Defendants might point to potential individual issues concerning the amount of damages or possible affirmative defenses. Such issues do not foreclose certification. To the contrary, the Supreme Court has made clear that, “[w]hen one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) *even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.*” *Tyson Foods*, 136 S. Ct. at 1045 (internal quotation and citation omitted) (emphasis added). Courts in this Circuit have reached the same conclusion: “[t]he mere existence of individualized damages issues in a Rule 23(b)(3) class does not cause individual issues to predominate over common issues on liability or causation.” *Johnson*, 248 F.R.D. at 56–57 (certifying Fourth Amendment claims based on allegedly unlawful strip searches); *see also, e.g., Barnes v. District of Columbia*, 242 F.R.D. 113, 123 (D.D.C. 2007) (certifying Fourth Amendment claims under Rule 23(b)(3) even though “unique issues might arise at the

damages stage”); *Coleman through Bunn v. District of Columbia*, 306 F.R.D. 68, 85 (D.D.C. 2015) (“[T]he mere fact that damage awards will ultimately require individualized fact determinations is insufficient by itself to preclude class certification”) (internal quotation and citation omitted); *Hoyte v. District of Columbia*, 325 F.R.D. 485, 494 (D.D.C. 2017) (same).

Indeed, even if certain individual issues need resolution, the Court can adopt procedures to manage those issues after common issues are resolved:

If the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification. Otherwise defendants would be able to escape liability for tortious harms of enormous aggregate magnitude but so widely distributed as not to be remediable in individual suits.

Butler v. Sears, Roebuck & Co., 727 F.3d 796, 801 (7th Cir. 2013).

These principles apply here. Defendants’ liability turns on common questions concerning planning, directives, communications, intent, and actions that apply to Defendants and the proposed classes as a whole. Any questions about the specific damages that a class member suffered do not predominate and should not preclude class certification. *See, e.g., Hickey v. City of Seattle*, 236 F.R.D. 659, 667 (W.D. Wash. 2006) (certifying class of demonstrators subjected to mass arrest under Rule 23(b)(3) and ordering bifurcation, with the first phase focusing on liability and resolving common facts and the second phase addressing any individual issues regarding probable cause to arrest and damages).

2. A Class Action Is Superior to Other Methods to Resolve the Claims Raised Here

Rule 23(b)(3) also requires that a class be “superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). The superiority

requirement “ensures that resolution by class action will ‘achieve economies of time, effort, and expense, and promote . . . uniformity of decisions as to persons similarly situated, without sacrificing procedural fairness.’” *Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 246 F.R.D. 293, 313 (D.D.C. 2007) (ellipsis in original) (quoting *Amchem*, 521 U.S. at 615). Rule 23(b)(3) sets out four considerations relevant to superiority—every one confirms that a class action would be superior to the alternative of individual trials.

First, class members are unlikely to have much, if any, interest in separate actions. *See* Fed. R. Civ. P. 23(b)(3)(A). Litigating these claims against federal agencies and individual officers will inevitably involve massive amounts of discovery, experts, motions practice, and trial. The costs of those efforts would swallow some, if not all, of the amount an individual might receive.

By contrast, a class action would “permit the plaintiffs to pool claims which would be uneconomical to litigate individually.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985); *see also Amchem*, 521 U.S. at 617 (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.”) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

Second, it would be “desirab[le]” to “concentrate[e] the litigation” in this forum. Fed. R. Civ. P. 23(b)(3)(C). The events in question occurred in Washington, D.C., and nearly all of the defendants reside in Washington, D.C. or nearby, as do many likely witnesses. *Finally*, “the likely difficulties . . . in manag[ing] a class action” do not present a barrier to certification. Fed. R. Civ. P. 23(b)(3)(D). To assess manageability, courts do not look at “whether [the] class action will create significant management problems, but instead determin[e] whether it will create relatively more management problems than any of the alternatives.” *Klay v.*

Humana, Inc., 382 F.3d 1241, 1273 (11th Cir. 2004), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008); *see also Allen v. Int'l Truck & Engine Corp.*, 358 F. 3d 469, 471 (7th Cir. 2004) (finding class proceeding more manageable than numerous separate proceedings). The “alternatives” here would be many individual cases conducted simultaneously or *in seriatim*, forcing courts, the parties, the witnesses, and potentially many juries to revisit the same issues, evidence, and testimony over and over again. Certifying the personal injury claims would be exceedingly more manageable.

D. Alternatively, the Court Should Certify the Class and under Rule 23(c)(4)

If the Court does not certify the claims of the Class under Rule 23(b)(3), it should grant certification “with respect to particular issues” under Rule 23(c)(4). Fed. R. Civ. P. 23(c)(4); *see, e.g., In re Johnson*, 760 F.3d 66, 75 (D.C. Cir. 2014) (affirming decision certifying class solely to resolve questions concerning discrimination and noting that such an approach was “expressly authorized” by Rule 23(c)(4)). The D.C. Circuit recently addressed issue certification under Rule 23(c)(4) in greater detail in *Harris v. Medical Transportation Management, Inc.*, 77 F. 4th 746, 760-62 (D.C. Cir. 2023). The court explained that certifying issues classes is appropriate where (1) “common questions predominate as to . . . proof of a key element of a cause of action, such that there is an issue class for that element,” or “another aspect of the controversy that, if decided, would materially advance the fair resolution of the litigation” and (2) where “the use of issue classes is ‘superior to other available methods for fairly and efficiently adjudicating the controversy.’” *Id.* at 760-62 (quoting Fed. R. Civ. P. 23(b)(3)).

Under *Harris*, if the Court does not certify the Class under Rule 23(b)(3), it should determine under the rule which of the above Common Issues are appropriate for class-wide treatment under Rule 23(c)(4).

Many of the issues listed raise common questions of law and fact that predominate over any possible individual questions. Issues such as whether the federal Defendants' use of force against protesters at the Capitol on January 6, 2021 was intended to put protesters in fear of harmful or offensive contact or create the reasonable apprehension of such force—raises many common questions. These questions include whether, why, and to what extent law enforcement officers on January 6, 2021 were authorized to use force against protesters, the chain of command and rules of engagement in place on January 6, 2021, the kinds of physical force that were authorized by the Defendants, the kinds of physical force that were deployed by the Defendants, any efforts to disperse protesters without using force, whether the Defendants' authorization and use of force were reasonable, whether the use of force was not shielded by an applicable law enforcement privilege, whether the amount of force used by the Defendants was reasonable, and whether the Defendants' actions impaired activity protected by the First or Fourth Amendment such that the discretionary function exception would not apply.

Another such example is whether the police use of force on January 6, 2021 violated their First Amendment rights. That issue raises predominating common questions. These questions include the scope of the First Amendment's protections, the extent to which those protections applied to demonstrators at the location and time in question, whether and to what extent the policy-making defendants authorized the use of force against protesters and why, the chain of command and rules of engagement Metro DC police and Capitol Police had in place on January 1, 2021, the kinds of force used by the police, any efforts by the police to disperse protesters at the Capitol without using force, and whether the use of the munitions, pepper spray O.C. spray and billy clubs, chemical irritants, and other tactics to disperse protesters violated their First Amendment rights.

Certifying these issues under Rule 23(c)(4) also would be superior to resolving them and the many related common questions that they entail in separate individual actions. These two issues depend on evidence concerning the Defendants' conduct that would be the same across each class. Certifying an issues class would limit discovery on these questions to a single proceeding and avoid the need for numerous triers of fact to consider and resolve them many times over.

Accordingly, if the Court does not certify the Class under Rule 23(b)(3), it should certify the issues above under Rule 23(c)(4). As the D.C. Circuit recognized in *Harris*, numerous courts have certified issues classes under this provision, even when those classes would not resolve liability or would leave individual questions to resolve. *See, e.g., In re Nassau City Strip Search Cases*, 461 F.3d 219, 225 (2d Cir. 2006) (holding that "a court may employ Rule 23(c)(4)(A) to certify a class on a particular issue even if the action as a whole does not satisfy Rule 23(b)(3)'s predominance requirement"); *Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405, 408 (6th Cir. 2018) (affirming district court's certification of issues classes regarding liability, and reserving resolutions of the remaining individualized issues concerning fact-of-injury, proximate causation, and extent of damages").⁴² The Court should do so here if it opts not to certify either class under Rule 23(b)(3).

Conclusion

For the foregoing reasons, the Court should certify this action as a Class Action and appoint Alan E. Fischer III and the undersigned attorney as class counsel.

CERTIFICATE OF COUNSEL – THE PARTIES CONFERRED

I the undersigned hereby confer that I have discussed the above-referenced motion with opposing counsel, one by telephone and the other by email, and both counsel for both of the

defendant groups have indicated by follow up email that they cannot agree to the motion. I continue to remain willing to further confer and attempt to resolve the motion or narrow the issues.

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify on the 29TH day of October 2024 a copy of same was electronically filed using the CM/ECF system and thus delivered to the parties of record and in pursuant to the rules of the Clerk of Court.

Austin Carr, P.A.
6314 Engram Road
New Smyrna Beach, FL 32169
austin@austincarrlaw.com
786-282-2882

/s/ Stephen Austin Carr, Esq.

U.S. District Court for D.C. Bar No: FL00141
Florida Bar No: 440833

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALAN E. FISCHER III,
JOHN DOES 1-10,000

CIVIL ACTION NO. 1:24-cv-00044

Plaintiffs,

v.

DISTRICT OF COLUMBIA, etc., et al.,

Defendants,

_____ /

[PROPOSED] ORDER

UPON CONSIDERATION of Plaintiffs' Motion for Class Certification and the entire record herein, it is hereby

ORDERED that Plaintiff's motion is GRANTED. The Class will be deemed as:

“All persons who were on the west terrace, west plaza, west steps and/or west lawn of the United States Capitol on January 6, 2021 who were struck by weapons or exposed to chemicals launched or thrown or weapons used by law enforcement personnel in violation of the persons' rights under the United States Constitution and amendments thereto.”

The attorneys for the parties are hereby ordered to confer, pursuant to LCvR 16.3 at a mutually convenient time within the next 21 days to discuss the matters set forth in LCvR 16.3 and to endeavor to narrow the issues in this matter and to attempt to agree upon a mutually agreeable scheduling order. The conference among counsel may be by Zoom or other mutually agreeable video conferencing platform.

SO ORDERED:

Date

CHRISTOPHER R. COOPER
United States District Judge