UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHRISTIAN RODRIGUEZ, et al., Plaintiff, v. CITY OF LOS ANGELES, et al., Defendants.	Case No. CV 11-01135 DMG (JEMx) **ORDER RE: PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

This matter is before the Court on Plaintiffs' motion for class certification [Doc. # 46]. The Court held a hearing on Plaintiffs' motion for class certification on June 1, 2012. Having duly considered the respective positions of the parties, as presented in their briefs and at oral argument, the Court now renders its decision. For the reasons set forth below, Plaintiffs' motion for class certification is GRANTED in part and DENIED in part.

I.

PROCEDURAL BACKGROUND

Plaintiffs filed a class action complaint on February 7, 2011, a first amended class action complaint on April 13, 2011, and a second amended class action complaint on June 30, 2011. Plaintiffs allege violations of the First, Fourth, and Fourteenth Amendments to the United States Constitution; Article 1, §§ 1, 2, 7, and 13 of the

California Constitution; Cal. Civ. Code § 52.1; Cal. Penal Code § 236; and mandatory duties under Cal. Gov't Code § 815.6.

On April 3, 2012, Plaintiffs filed this motion for class certification [Doc. # 46]. On April 27, 2012, Defendants City of Los Angeles (the "City"), Los Angeles Police Department ("LAPD"), Los Angeles City Attorney's Office, Carmen Trutanich, Charles Beck, Allan Nadir, and Angel Gomez filed an opposition [Doc. # 49]. On May 18, 2012, Plaintiffs filed a reply [Doc. # 54].

Pursuant to Rules 23(a), 23(b)(2), and (b)(3) of the Federal Rules of Civil Procedure, Plaintiffs move to certify the following class (the "Class"):

> All persons who have been served with one or more gang injunctions issued in Los Angeles County Superior Court Case Numbers BC397522; BC332713; BC305434; BC313309; BC319166; BC326016; BC287137; BC335749; LC020525; BC267153; BC358881; SC056980; BC359945; NC030080; BC330087; BC359944; BC282629; LC048292; BC311766; BC351990; BC298646; BC349468; BC319981; SC060375; SC057282; and BC353596.

Plaintiffs also move to certify the following subclass (the "Subclass"):

> All persons who have been served with one or more of the above gang injunctions who have been seized, arrested, jailed, and/or prosecuted by the City of Los Angeles, its agents and/or subdivisions for violation of the curfew provision of the injunction(s).[1]

Plaintiffs Christian Rodriguez and Alberto Cazarez ask that they be appointed as

[1] At the hearing on June 1, 2012, Plaintiffs offered to excise the words "jailed, and/or prosecuted" from the Subclass definition.

the representatives of the Class and Subclass. Plaintiffs seek the appointment of the following as Class Counsel: Olu K. Orange, Esq. of the law firm of Orange Law Offices and Anne Richardson, Esq. of the law firm Hadsell, Stormer, Keeny, Richardson & Renick, LLP.

II.

FACTUAL BACKGROUND

On March 27, 2011, the Los Angeles Superior Court entered final judgment in Case Number SC 056980, granting a permanent injunction against members of the Culver City Boys Gang (the "Culver City Boys Injunction"). (Decl. of Anne Richardson ¶ 27, Ex. 18 at 246 [Doc. # 44-4].) Plaintiffs Christian Rodriguez and Alberto Cazarez (the "Named Plaintiffs") live in the Mar Vista Gardens Housing Projects, which is within the Safety Zone defined in the Culver City Boys Injunction.[2]

In or around 2005, LAPD Officer Anthony Rodriguez served Plaintiff Rodriguez, then age 16, with the Culver City Boys Injunction. (Decl. of Christian Rodriguez ¶¶ 3, 5 [Doc. # 44].) He was served while walking to his home in the Mar Vista Gardens Housing Projects. (*Id.* ¶ 3.) As Rodriguez was served, Officer Rodriguez told him, "I'm going to make sure you do life, just like your friend is doing life right now!" (*Id.*) Rodriguez was served a second time on February 25, 2006, when Officer Rodriguez stopped him and gave him some documents, including one entitled, "Culver City Boys Gang Injunction." (*Id.* ¶ 4.)

On June 19, 2009, near midnight, as Rodriguez and Cazarez were walking home from visiting their girlfriends' homes in the Mar Vista Gardens Housing Projects, police officers detained them. (Rodriguez Decl. ¶ 6.) Officer Gomez and his partner arrested Rodriguez for violation of the gang injunction, specifically for violation of subsections (a) (association with other known gang members in public) and (e) (curfew).

[2] The "Safety Zone" is the defined geographical area within which certain criminal street gangs exist and to which the gang injunction applies.

(Declaration of Angel Gomez ¶ 3 [Doc. # 49].) As a result, Rodriguez was handcuffed, arrested, and jailed for five days. (*Id.*; Rodriguez Decl. ¶ 6; Defs.' Request for Judicial Notice ("RJN"), Ex. A [Doc. # 50].)[3] During the course of the criminal proceedings, the Appellate Division of the Los Angeles County Superior Court confirmed the existence of reasonable suspicion for Rodriguez's detention. (Defs.' RJN, Ex. C at 22-25.) Subsequently, Rodriguez's demurrer was sustained and the curfew charge was dismissed on October 6, 2009. (Defs.' RJN Ex. B; Richardson Decl. ¶ 14, Ex. 6 at 160.)

Officer Gomez and his partner also arrested Cazarez on the same night that they arrested Rodriguez. (Gomez Decl. ¶ 3; Declaration of Alberto Cazarez ¶¶ 3-4 [Doc. # 44].) Cazarez was arrested for violation of the juvenile curfew, Los Angeles Municipal Code Section 45.03(a).[4] (*Id.*) Cazarez was seized, handcuffed, and detained in the back of a police car, and subsequently released. (*Id.*) At that time, Cazarez had not yet been served with a gang injunction. (Cazarez Decl. ¶ 3.)

It was not until December 20, 2009 that Cazarez was served with the Culver City Boys Injunction. (*Id.* ¶ 5.) On that date, Cazarez was on his way into a local recreation center when he saw two female friends and classmates standing outside. (*Id.*) LAPD Officer Switzer approached Cazarez as he stood talking with his friends and gave him a document entitled, "Culver City Boys Gang Injunction." (*Id.*) When he served Cazarez with the injunction, Officer Switzer said to Cazarez, "That document means you can't hang out with this guy right here," and pointed at Rodriguez, who was standing a few feet away. (*Id.* ¶ 6.)

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[3] Federal Rule of Evidence 201 permits a court to take judicial notice of facts not subject to reasonable dispute that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201. A court may take judicial notice of matters of public record. *United States v. 14.02 Acres of Land More or Less in Fresno County*, 547 F.3d 943, 955 (9th Cir. 2008). In addition, courts "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).

[4] As of September 7, 2011, the charges against Cazarez remained pending. (Defs.' RJN Ex. D.)

Rodriguez and Cazarez, now 21 and 20 years of age respectively, live in fear of immediate arrest for activity that may violate the terms of the gang injunction, including going outside between 10 p.m. and sunrise. (Rodriguez Decl. ¶ 8; Cazarez Decl. ¶ 7.) For example, on one occasion, a police officer stopped Rodriguez when he walked into the parking lot next to his housing project to help his mother carry groceries. (Rodriguez Decl. ¶ 8.) Both Rodriguez and Cazarez deny that they have ever been a member of any gang. (Rodriguez Decl. ¶ 5; Cazarez Decl. ¶ 6.)

Plaintiffs challenge 26 gang injunctions that have substantially similar curfew provisions limiting the enjoined parties' ability to go "outside" between the hours of 10 p.m. and sunrise, with certain exceptions, all of which they contend have substantially identical language to the following:

> Being outside between the hours of 10:00 p.m. on any day and sunrise of the following day, unless (1) going to/from a legitimate meeting or entertainment activity, or (2) actively engaged in some business, trade, profession or occupation which requires such presence, or (3) involved in a legitimate emergency situation that requires immediate attention.

(Rodriguez Decl. ¶¶ 13, 27, Exs. 5. 18.)

Defendants acknowledge that, on October 15, 2007, the California Court of Appeal, in *People ex rel. Totten v. Colonia Chiques*, 156 Cal. App. 4th 31, 67 Cal. Rptr. 3d 70 (2007), *review denied* by *People v. Colonia Chiques (Acosta)*, 2008 Cal. LEXIS 906 (2008), found a gang injunction's curfew provision unenforceable. The Court held that the following portions of the injunction were unconstitutionally vague: (a) the provision enjoining gang members from "being outside" in the safety zone during curfew hours; and (b) the "legitimate meeting or entertainment activity" exception to the curfew provision. (Defs.' Opp'n at 10; citing *Colonia Chiques*, 156 Cal. App. 4th at 48-49.)

On August 30, 2012, in opposition to Plaintiffs' motion for preliminary injunction, Defendants submitted to the Court a copy of Operations Order No. 3 ("Op. Ord. No. 3"),

Modification of Enforcement of Four Provisions Contained in Permanent Civil Gang Injunctions, dated August 2, 2012, which was issued by Assistant Chief Earl C. Paysinger. (Decls. of Carol J. Aborn Khoury ¶ 2 and Matthew J. Blake ¶ 2 , Ex. A [Doc. # 77].) Op. Ord. No. 3 was distributed on the LAPD's Local Area Network ("LAN") on August 3, 2012. (Khoury Decl. ¶ 3.) According to Commander Blake, an email from Chief Paysinger to each of the four Bureau Chiefs and area commanding officers attached Op. Ord. No. 3 and provided instructions to ensure distribution to all officers under their command. (Blake Decl. ¶ 4.) Chief Paysinger also met with the Bureau Chiefs and Commander Blake on August 7, 2012, at which time he discussed Op. Ord. No. 3 and again directed the Bureau Chiefs to ensure the order was distributed to their subordinates. (*Id.* ¶ 5.) On August 9, 2012, Commander Blake met with the Bureau Gang Coordinators, discussed Op. Ord. No. 3, and directed them to ensure compliance by the gang officers. (*Id.* ¶ 6.)

III.

DISCUSSION

A. Legal Standards

Rule 23 provides district courts with broad discretion in making a class certification determination. *Navellier v. Sletten*, 262 F.3d 923, 941 (9th Cir. 2001); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 345, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979) (recognizing that district courts "have broad power and discretion vested in them by Fed. Rule Civ. Proc. 23"). Nonetheless, a court must exercise its discretion "within the framework of Rule 23." *Navellier*, 262 F.3d at 941. A district court may certify a class only if the following prerequisites are 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 prerequisites "ensure[] that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate." *Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011).

If the Rule 23(a) requirements are satisfied, a class action may be maintained pursuant to Rule 23(b)(2) if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). If the Rule 23(a) requirements are satisfied, a class action may also be maintained pursuant to Rule 23(b)(3) if "questions of law or fact common to class members predominate over any questions affecting only individual members" and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

The party seeking certification bears the burden of demonstrating that it meets the Rule 23(b) requirements. *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 n.9 (9th Cir. 2009) (citing *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001)). The Rule 23 analysis must be rigorous to ensure that its prerequisites have been satisfied, and such analysis will often require looking beyond the pleadings to issues overlapping with the merits of the underlying claims. *Dukes*, 131 S. Ct. at 2551-52.

B. Evidentiary Objections

As a preliminary matter, the Court addresses Defendant's evidentiary objections to eight declarations submitted by Plaintiffs. The portions of the declarations to which Defendants object contain summaries of gang injunction service record documents and arrest reports produced by the City. (*See* Declaration of Olu Orange ¶¶ 20-22 and Table A, 25, 27-29; Declaration of Arpine Sardaryan ¶¶ 6-7 and Table A; Declaration of Mitchell Diesko ¶¶ 6-7 and Table A; Declaration of Lauren Ige ¶¶ 6-7 and Table A; Declaration of Min Ji Gal ¶¶ 6-7 and Table A, ¶¶ 9-10; Declaration of Angel Lopez ¶¶ 6-

7 and Table A; Declaration of Sarah Ayad ¶¶ 6-7 and Table A; Declaration of Ben Stormer ¶ 5 [Doc. # 44].)

Plaintiffs, on the other hand, argue that the declarations are admissible because they constitute summaries of voluminous writings under Fed. R. Evid. 1006, which permits a party to "use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court." Fed. R. Evid. 1006; *see also Amarel v. Connell*, 102 F.3d 1494, 1516 (9th Cir. 1996) (allowing use of a summary exhibit where the proponent establishes a foundation that the underlying materials are admissible and those materials were made available to the opposing party for inspection).

In this case, the underlying materials are approximately 11,000 pages consisting of the records of gang injunction service and arrest reports produced by Defendants in discovery. Plaintiffs' preparation of a summary for the convenience of the Court is appropriate under Fed. R. Evid. 1006. The Court therefore overrules Defendants' objections.

C. The *Colonia Chiques* Decision

Insofar as the *Colonia Chiques* decision is central to the analysis of Plaintiffs' motion, the Court will briefly describe the pertinent aspects of that decision before proceeding to a discussion of the Rule 23 factors governing class certification.

Among the underlying concerns when reviewing the language in injunctions is whether it meets the due process requirement of providing adequate notice. A law that fails to provide such notice is void for vagueness. In *Colonia Chiques*, the California Court of Appeal found the curfew provision in a gang injunction to be unenforceable because it was "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." 156 Cal. App. 4th at 49 (internal quotation marks omitted). The curfew provision "impermissibly delegate[d] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the

attendant dangers of arbitrary and discriminatory application." *Id.* (internal quotation marks omitted).

In particular, the *Colonia Chiques* court noted the absence of definition for the terms "being outside" in the curfew provision and the ambiguity of the exception for gang members who are "outside" for the purpose of "going to or from a legitimate meeting or entertainment activity." *Id*. at 48. Through a series of rhetorical questions, the court illustrated the difficulties inherent in the words "being outside":

> Does this mean that a gang member is in violation of the injunction, and subject to arrest, if he or she is sitting in the open air on the front porch of his or her residence, or if he or she is standing on his or her own front lawn, or if he or she is at a late night barbecue in the backyard? Is a gang member "outside" if he or she is sitting inside a vehicle parked on the street? Is a gang member in violation of the injunction if he or she is present at a "legitimate meeting or entertainment activity" that occurs "outside" in the open air?

Id..

Similarly, the court questioned the meaning of the phrase "meeting or entertainment activity":

> Does "entertainment activity" apply only to activities occurring at places of entertainment open to the public, such as restaurants, theaters, and nightclubs? If a gang member is going to a party at someone's home in the Safety Zone, is he or she going to an "entertainment activity" within the meaning of the exception to the curfew provision? Is he or she going to an "entertainment activity" if visiting a friend's house in the Safety Zone to watch a DVD movie on a big screen television?

Id. at 49.

The *Colonia Chiques* court found the curfew provision to be a violation of due process and unenforceable. *Id*. According to Plaintiffs, the curfew provision in the gang injunctions at issue in this case suffer from the same infirmities as the one struck down in *Colonia Chiques*.

D. The Class Definition

Before addressing the Rule 23 factors, Defendants attack the proposed class definition itself on three grounds: (1) no one has been harmed merely by being served with the gang injunction because Plaintiffs are presumed to know about the *Colonia Chiques* decision and therefore were free to disobey the injunction; (2) seven of the 26 gang injunctions contain lawful curfew provisions; and (3) each person served with the gang injunction could have invoked the procedure to remove themselves from enforcement if he or she is not or is no longer a gang member. Although these arguments go in part to the merits of Plaintiffs' claims, the Court addresses each of these contentions only to the extent they impact upon and overlap with certain issues in the Rule 23 analysis.[5] *See Dukes*, 603 F.3d at 594.

1. Plaintiffs are not presumed to know about the *Colonia Chiques* decision.

According to Defendants, "[j]ust as police officers are presumed to know the law, so are gang members." (Defs.' Opp'n at 8.) In effect, Defendants assert that Plaintiffs cannot meet the numerosity requirement for class certification because no one served with the injunction was harmed in that he or she should have known that the gang injunction was unenforceable and should simply have disobeyed it. Defendant's argument is untenable and devoid of any legal support.

The cases on which Defendants rely are inapposite. In *Pittsburg & L.A. Iron Co. v. Cleveland Iron Mon. Co.*, 178 U.S. 270, 278-79, 20 S. Ct. 931 (1900), the court held that,

[5] Defendants also contend that the proposed subclass definition is improper because the facts and law are individualized and it is therefore not susceptible of class treatment. Because this issue substantially overlaps with the question of whether individual issues predominate under Fed. R. Civ. P. 23(b)(2), the Court will address the issue in that context in section III.F.2, *infra*.

because the plaintiff was presumed to know the law, there could be no equitable tolling of its claim. Here, Plaintiffs are not seeking to be excused from any failure to file a timely claim. In *Atkins v. Parker*, 472 U.S. 115, 105 S. Ct. 2520, 86 L. Ed. 2d 81 (1985), after finding that the notice provided was sufficient under the statute and under the regulations, the court determined that the participants in the food-stamp program had no greater right to advance notice of the legislative change than did any other voters. *See id.* at 130. In this case, however, Defendants have not provided Plaintiffs with any kind of notice of the rescission of the injunction and, instead, argue that Plaintiffs do not have a right to such notice. (*See* Defs.' Opp'n at 10 ("Plaintiffs' [sic] themselves have neither a right to notice that the CCBG Injunction curfew is invalid (because they are presumed to know already) or a need to notice (because they have actual notice already).")

Defendants further contend that, because California has not adopted the collateral bar rule, Plaintiffs could have elected to violate an unconstitutional injunction. *See People v. Gonzalez*, 12 Cal. 4th 804, 818, 50 Cal. Rptr. 2d 74 (1996) ("a person subject to a court injunction may elect whether to challenge the constitutional validity of the injunction when it is issued, or to reserve the claim until a violation of the injunction is charged as a contempt of court.") The cases cited by Defendants do not stand for the proposition that a party served with an unconstitutional injunction is barred from challenging it and seeking civil remedies. In fact, the contrary is true. It would be an anomalous result for this Court to deprive Plaintiffs of the ability to now challenge Defendants' actions because they should have known of the unenforceability of the curfew provision, particularly when the law enforcement officers and prosecutor in Rodriguez's case apparently did not. Indeed, the record reflects that most of the gang injunctions containing the challenged curfew provisions issued more than a year after the decision in *Colonia Chiques*. (Richardson Decl. ¶ 16, Exs. 7, 15, 18, 19, 20, 21, 23, 24, 25, 26, 27, 29, 30, 31, 32.) Despite the issuance of the October 15, 2007 decision in *Colonia Chiques*, Rodriguez was detained on June 19, 2009 and subsequently charged with a violation of the curfew provision.

Stranger still is Defendants' reference to the legal maxim "ignorance of the law is no excuse." That maxim—as illustrated by the very cases they cite—is typically applied to prevent litigants from *evading* liability, in either the civil or criminal context, due to their ignorance of the law. If, for example, Defendants were to defend against this lawsuit by claiming that they were ignorant of the *Colonia Chiques* decision when they engaged in the challenged conduct, Plaintiffs could assert this concept. Defendants cite no authority for the extraordinary proposition that "ignorance of the law" prevents a plaintiff from asserting that he or she has suffered legal harm.

2. All of the curfew provisions are alleged to suffer from the defect identified in *Colonia Chiques*.

Defendants argue that the class definition is overbroad, because at least seven of the injunctions at issue do not have substantially similar curfew provisions and therefore they are not necessarily unconstitutionally vague.[6] Defendants cite *People v. Reisig*, 182 Cal. App. 4th 866, 889-91, 106 Cal. Rptr. 3d 560 (2010), where the court found the following curfew provision valid and enforceable:

> Remaining upon public property, a public place, on the premises of any establishment, or on a vacant lot between the hours of 10:00 p.m. on any day and 6:00 a.m. the following day.

Id. at 889.

Unlike that in *Colonia Chiques*, the *Reisig* injunction defined "a public place" as "any place to which the public has access, including but not limited to sidewalks, alleys, streets, highways, parks, the common areas of schools, hospitals, office buildings and transport facilities" and provided an exception for "a meeting or scheduled entertainment

[6] Defendants acknowledge that the court in *Colonia Chiques* invalidated injunction language identical to that in 19 of the injunctions at issue in this case, but argue that the language in the following seven injunctions is distinguishable: All for Crime, Blythe Street, Eastside Wilmas, Langdon Street, Rolling Sixty Crips, Venice 13, and Venice Shoreline Crips. (Defs.' Opp'n at 11-12; Richardson Decl. ¶¶ 16, 24, 29, 33, 36, 39, and 40, Exs. 7, 15, 20, 24, 27, 30, and 31.)

activity at a theatre, school, church, or other religious institution, or sponsored by a religious institution, local education authority, governmental agency or support group like Alcoholics Anonymous." *Id*. at 891.

While seven of the injunctions here may not be identical to that in *Colonia Chiques*, they also are not as specific as that in *Reisig*. The seven injunctions at issue do not define a "place accessible to the public," nor do they contain a *Reisig*-type list of the permitted locations for a legitimate meeting or entertainment activity.[7] Thus, they suffer from a similar defect as the injunction challenged in *Colonia Chiques*.

3. <u>The existence of the procedure to petition the City Attorney for removal from gang injunction enforcement does not preclude a class action</u>.

Defendants assert that persons served with a gang injunction do not constitute a proper class for certification because non-gang members could have petitioned the City Attorney's Office to opt out of enforcement of the injunction by proving they are not gang members. Defendants' argument is peculiar because it seems to assume that the existence of an alternative remedy bars class treatment in this case or that there is a requirement to exhaust an administrative remedy. Again, Defendants cite no authority for this proposition—and for good reason. It could not possibly be the law.

Even if a removal procedure exists, this does not address the underlying issue of whether putative class members suffered harm for any period of time *before* they invoked the procedure if they were inclined to do so. Since only those who consider themselves unaffiliated with a gang can invoke the procedure, this leaves gang members in the proposed class without any administrative remedy for the unconstitutionally vague injunction. As Plaintiffs correctly point out, however, the decision in *Colonia Chiques*

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[7] The All for Crime injunction, for example, issued in 2009 after the *Colonia Chiques* decision would make it a curfew violation to attend Midnight Mass on Christmas Eve or to stand on one's own lawn or driveway after 10:00 p.m. (Richardson Decl. ¶ 16, Ex. 7.)

applies to all of those subject to an unconstitutionally vague curfew provision, whether or not they are gang members.

Finally, Defendants fail to provide any support for the adequacy and fairness of the removal procedure itself. The procedure neither involves the services of a third party neutral nor includes any of the traditional hallmarks of a due process hearing. Not surprisingly, the relatively few individuals who have had the fortitude to invoke the removal process have met with little success in removing the gang branding. (*See* Orange Supp. Decl., Exh. 2 (as of 2010, only three out of 49 petitioners had successfully challenged their gang status) [Doc. # 54].)

In short, the Court does not find that the existence of the removal procedure cures the constitutional defect such that the proposed class definition is indefinite or overbroad.

E. The Rule 23(a) Factors

1. Numerosity

A putative class may be certified only if it "is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "'[I]mpracticability' does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964) (quoting *Adver. Specialty Nat'l Ass'n v. FTC*, 238 F.2d 108, 119 (1st Cir. 1956)). The numerosity requirement imposes no absolute limitations; rather, it "requires examination of the specific facts of each case." *Gen. Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318, 330, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980). Thus, while the Supreme Court has noted that putative classes of 15 are too small to meet the numerosity requirement, *id*. at 330 & n.14, district courts in this Circuit have found that classes with as few as 39 members meet the numerosity requirement, *see Patrick v. Marshall*, 460 F. Supp. 23, 26 (N.D. Cal. 1978); *see also Jordan v. L.A. County*, 669 F.2d 1311, 1320 (9th Cir. 1982) (noting, in *dicta*, that the court "would be inclined to find the numerosity requirement . . . satisfied solely on the basis of [39] ascertained class members"), *vacated on other grounds*, 459 U.S. 810, 103 S. Ct. 35, 74 L. Ed. 2d 48 (1982).

Plaintiffs estimate that, according to the gang injunction service records produced by Defendants, there are 3,010 members of the Class. (Orange Decl. ¶¶ 23-29). Based on arrest reports produced by the City, Plaintiffs estimate that there are 501 individuals who were seized or arrested between January 13, 2007 and October 27, 2011, with 87 of those individuals being arrested solely for violation of a curfew provision. (*Id.* ¶¶ 16-20.)

Defendants, on the other hand, maintain that the number of persons served with the injunction is irrelevant because no one was harmed merely by having been served because they should have known that the injunction was unenforceable. The Court has rejected this lack of harm argument, *supra*.

According to Defendants, any potential class should consist only of those persons unlawfully detained or arrested in violation of an unenforceable gang injunction curfew after February 1, 2008, the date the decision in *Colonia Chiques* became final, and within the two-year limitations period. That number, say Defendants, is approximately 19, counting only those persons seized after February 1, 2008 pursuant to the 19 unenforceable curfews, with arrests within two years prior to the filing of this action.

First, the Court disagrees with Defendants' position that the rights of those Plaintiffs who were served with the injunctions before *Colonia Chiques* was issued were not violated. Prior to the *Colonia Chiques* decision becoming final, neither Defendants nor Plaintiffs were on notice that the curfew provision was unenforceable. The date on which Defendants were put on notice that the curfew provision was unenforceable is immaterial to whether the curfew provision was unenforceable from the time of its inception.[8]

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[8] In California, the date on which the decision becomes final is also the time when the decision becomes retroactive. *In re Richardson*, 196 Cal. App. 4th 647, 664, 126 Cal. Rptr. 720 (2011) ("It has long been the rule in federal and California courts that a case is not final for purposes of determining the retroactivity and application of a new decision addressing a *federal* constitutional right until direct appeal is no longer available in the state courts, and the time for seeking a writ of certiorari has lapsed or a timely filed petition for that writ has been denied"). Thus, even if the Court were to use the February

Finally, in a further effort to narrow the number of putative class members, Defendants argue that, because at least seven of the injunctions at issue do not have substantially similar curfew provisions, they are not necessarily unconstitutionally vague. The Court has already addressed and rejected this argument, *supra*.

Under these circumstances and on this record, the Court finds that Plaintiffs satisfy Rule 23(a)(1)'s numerosity requirement as to both the Class and the Subclass.

2. Commonality

The commonality requirement is satisfied if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Dukes*, 131 S. Ct. at 2551 (quoting *Falcon*, 457 U.S. at 157). In determining that a common question of law exists, it is insufficient to find that all putative class members have suffered a violation of the same provision of law. *Id*. Rather, the putative class members' claims "must depend upon a common contention" that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*.

Nonetheless, in conducting the commonality inquiry, one significant issue shared by the class may suffice to warrant certification. *Id*. at 2556; *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) ("All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient. . . .").

Here, Plaintiffs point to Defendants' pattern of utilizing and enforcing unconstitutionally vague curfew provisions in the gang injunctions. Plaintiffs identify the following common issues of law: (1) "whether the gang injunctions at issue violate the U.S. Constitution on grounds of free speech in that they are vague and thus do not give

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1, 2008 date that Defendants propose, the decision becomes retroactive from that date and is not the relevant date for purposes of defining the Class.

those served with the injunction notice of what the proscribed activity is"; (2) "whether the conduct of the City in serving, detaining, arresting, and prosecuting persons under these curfew provisions [is] a violation of Cal. Civil Code 52.1, entitling the plaintiffs to statutory penalties"; (3) "whether this conduct violates Article One, sections 1 (liberty, happiness, privacy), 2 (expression, association), 7 (due process), and 13 (freedom from unreasonable seizures) of the California constitution"; (4) "whether this conduct constitutes false imprisonment as prohibited by Cal. Penal Code § 236"; and (5) "whether the City has violated its mandatory duty not to violate the rights protected by the California Constitution." (Pls.' Mot. at 10-11.)

The Court finds that Plaintiffs have identified several common legal questions which are susceptible of a class-wide resolution as to the Class. Plaintiffs therefore meet the commonality requirement with respect to the Class.

As to the Subclass, however, the Court finds that Defendants raise a serious concern regarding whether commonality exists. In particular, Defendants argue against commonality on the ground that there is no common answer to the question "Why was I arrested?" They point out, for example, that the analysis of whether each person was arrested solely for violation of an unenforceable curfew provision or whether he or she also committed another crime at the time that would have justified detention or arrest is an individualized one. The Court finds that common issues of law may exist when the Subclass definition is narrowed to those detained *only* for curfew violations, but individualized questions of fact predominate for the reasons discussed in section III.F.2, *infra*.

3. Typicality

Typicality requires a showing that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The purpose of this requirement "is to assure that the interest of the named representative aligns with the interests of the class." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497,

508 (9th Cir. 1992)). "The test of typicality is 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." *Id*. (quoting *Hanon*, 976 F.2d at 508). The typicality standard under Rule 23(a)(3) is "permissive": "representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003) (quoting *Hanlon*, 150 F.3d at 1020).

As to the proposed Class, Defendants state conclusorily that "[t]here is no evidence that the legal rights of any member of the proposed class or subclass member ha[ve] been violated." (Defs.' Opp'n at 20.) For the reasons discussed *supra* in section III.D.1, the Court is not persuaded by Defendants' position. Defendants fail to present any other arguments as to why Plaintiffs' claims are not typical of those of the Class.

With regard to the proposed Subclass, however, the facts presented by Rodriguez and Cazarez illustrate why their claims of illegal detention are not typical of the Subclass.

Citing the August 27, 2010 decision issued by the Appellate Division of the Los Angeles County Superior Court, Defendants maintain that Rodriguez's detention and arrest were lawful because the state court has already determined in the underlying criminal case that Officer Gomez, based on his specialized knowledge about the activities of the Culver City Boys gang, had reasonable suspicion to detain Rodriguez for reasons having nothing to do with the curfew violation. (Defs.' RJN Ex. C at 22-25 [Doc. # 50].) The court held that it was error for the trial court to suppress the evidence of Rodriguez's identification based on a finding of a Fourth Amendment violation. (*Id*.)

Under the doctrine of collateral estoppel, or issue preclusion, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first

case.[9] *In re Marshall*, 600 F.3d 1037, 1061 (9th Cir. 2010) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)) (internal quotations omitted). Regardless of whether this Court agrees with the Appellate Division's determination or not, that decision became final and was never appealed. Notwithstanding Officer Gomez's subjective intent or motivations, the issue of whether the arresting officer had reasonable suspicion under an objective standard for his detention of Rodriguez has preclusive effect such that Rodriguez cannot now challenge the lawfulness of his detention.[10] *See Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) ("The arresting officer's subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause.") (internal citation omitted).

Defendants also assert that Cazarez's detention and arrest was lawful because he was charged with violation of the juvenile curfew in the City's Municipal Code, not for

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[9] State law governs the application of collateral estoppel or issue preclusion to a state court judgment in a federal civil rights action. *Ayers v. City of Richmond*, 895 F.2d 1267, 1270 (9th Cir. 1990) (quoting *Allen*, 449 U.S. at 96). In California, five threshold requirements must be met in order for collateral estoppel to apply:

> First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.

Hernandez v. City of Pomona, 46 Cal. 4th 501, 511 (2009) (emphasis added).

[10] When an individual has a full and fair opportunity to challenge a reasonable suspicion determination during the course of prior criminal proceedings, he may be barred from relitigating the issue in a subsequent civil action. *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1068 (9th Cir. 2004) (collateral estoppel may bar subsequent challenge to probable cause finding) (citing *Haupt v. Dillard*, 17 F.3d 285, 289 (9th Cir. 1994)); *see also Phillips v. Franco*, 612 F. Supp. 2d 1190, 1194 (D. N.M. 2009) (collateral estoppel may bar subsequent challenge to reasonable suspicion finding); *Schmidlin v. City of Palo Alto*, 157 Cal. App. 4th 728 (2004) (probable cause); *McCutchen v. City of Montclair*, 73 Cal. App. 4th 1138 (1999) (probable cause). Because the issue whether the officers had reasonable suspicion to detain Rodriguez was fully litigated in his state court action, collateral estoppel bars him from challenging that finding here. *See Haupt*, 17 F.3d at 289 (explaining circumstances where collateral estoppel will not prevent a subsequent attack on probable cause finding); *see also Schmidlin*, 157 Cal App. 4th at 769.

violation of the Culver City Boys Injunction. (Gomez Decl. ¶¶3-4.) Plaintiffs argue that, insofar as Officer Gomez arrested Rodriguez for violation of the gang injunction, including for violation of the curfew provision (*id.* ¶ 3.), and Cazarez was arrested at the same time, the Court should infer that Cazarez was also arrested for violation of the gang injunction's curfew provision. The Court understands the difficulty in identifying the real basis for an arrest or detention and therein lies the problem. Each arrest of a class member, even if ostensibly on the basis of a curfew violation, would raise a host of potential alternative unique, fact intensive defenses. In this case, Officer Gomez states that he and his partner "did not arrest Cazarez for violating the gang injunction, but rather for violation of Los Angeles Municipal Code Section 45.03, subsection (a) (juvenile curfew)." (*Id.* ¶ 3.) Plaintiffs fail to present any evidence otherwise.

The Court therefore finds that Plaintiffs' claims are reasonably coextensive with those of the putative Class, but not with those of the Subclass, even when the Subclass is limited to those detained solely for curfew violations under the gang injunction.

4. Adequate Representation

Rule 23(a)(4) permits certification of a class action if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Class representation is inadequate if the named plaintiff fails to prosecute the action vigorously on behalf of the entire class or has an insurmountable conflict of interest with other class members." *Hesse v. Sprint Corp.*, 598 F.3d 581, 589 (9th Cir. 2010) (citing *Hanlon*, 150 F.3d at 1020); *see also Dukes*, 131 S. Ct. at 2551 n.5 (explaining that the adequacy of representation inquiry is distinct from questions of typicality and commonality insofar as it "raises concerns about the competency of class counsel and conflicts of interest"). The Named Plaintiffs themselves must be entitled to seek injunctive relief if they are to represent a class seeking such relief. *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999).

Defendants attack Plaintiffs' ability to serve as adequate representatives for the Class on the ground that, insofar as they assert that they are not gang members, they are

not representative of the other Class members. Defendants' argument fails for the simple reason that the Class includes *all persons* served with an allegedly unenforceable injunction, whether such persons are gang members are not.

For the reasons discussed above with regard to typicality, however, neither Rodriguez nor Cazarez is an adequate representative for the Subclass, even when the Subclass is limited to those detained *only* for curfew violations. As such, the Court finds that Plaintiffs have satisfied Rule 23(a)(4)'s adequate representative requirement for the Class only.

There is no dispute that Plaintiffs' counsel are highly experienced and skilled class action attorneys and that they would well represent the Class and Subclass as class counsel.

F. The Rule 23(b)(2) Requirements

Classes may be certified pursuant to Rule 23(b)(2) if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Class certification under Rule 23(b)(2) "applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Dukes*, 131 S. Ct. at 2557. "It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant," nor does it apply "when each class member would be entitled to an individualized award of monetary damages." *Id.* (emphasis in original).

Thus, in determining whether certification is appropriate under Rule 23(b)(2), a court must "look at whether class members seek uniform relief from a practice applicable to all of them." *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010). Civil rights actions against parties charged with unlawful, class-based discrimination are "prime examples" of Rule 23(b)(2) cases. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997); *see also Walters*, 145 F.3d at 1047 (explaining that Rule 23(b)(2) "was adopted in order to permit the prosecution of civil

rights actions").

Defendants challenge certification under Rule 23(b)(2) on two grounds: (1) Plaintiffs lack standing due to their inability to show a real threat of repeated injury; and (2) the individualized nature of the questions regarding liability or damages predominate over common questions.

1. Plaintiffs Do Not Lack Standing as to the Proposed Class

In a class action, the plaintiff class bears the burden of showing that Article III standing exists. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 978 (9th Cir. 2011). "The plaintiff must demonstrate that he has suffered or is threatened with a concrete and particularized legal harm, coupled with a sufficient likelihood that he will again be wronged in a similar way." *Id.* (internal quotation marks omitted). "Past wrongs do not in themselves amount to a real and immediate threat of injury necessary to make out a case or controversy but are evidence bearing on whether there is a real and immediate threat of repeated injury." *Id.* (internal quotation marks omitted).

In cases where a plaintiff seeks prospective injunctive relief, he must demonstrate "that he is realistically threatened by a *repetition* of [the violation]." *Armstrong v. Davis*, 275 F.3d 849, 860-61 (9th Cir. 2001), *abrogated on other grounds* (emphasis in original). There are at least two ways to demonstrate that such injury is likely to recur. "First, a plaintiff may show that the defendant had, at the time of the injury, a written policy, and that the injury 'stems from' that policy." *Id.* at 861. "Second, the plaintiff may demonstrate that the harm is part of a 'pattern of officially sanctioned . . . behavior, violative of the plaintiffs' [federal] rights.'" *Id.* Where a court, through its specific factual findings, documents the threat of future harm to the plaintiff class and establishes that the named plaintiffs (or some subset thereof sufficient to confer standing on the class as a whole) are personally subject to that harm, the "possibility of recurring injury ceases to be speculative," and standing is appropriate. *Id.*

In their supplemental brief in opposition to Plaintiffs' motion for preliminary injunction, Defendants present a copy of Op. Ord. No. 3, which "establishes protocols to

ensure that [Civil Gang Injunctions] are implemented uniformly, equitably, and in accordance with changes in the law." (Khoury Decl. ¶ 2, Ex. A.) Op. Ord. No. 3 indicates that "[v]iolations of the ["Obey Curfew" provision] must not be used as a reasonable suspicion or probable cause to detain or arrest an enjoined gang member." (*Id.*) Defendants also present testimony by LAPD leadership that Op. Ord. No. 3 has been distributed to all police officers and that "should any LAPD officer willfully disobey OO No. 3, such action could constitute misconduct and could subject the officer to discipline." (Khoury Decl. ¶¶ 2-3; Blake Decl. ¶ 3.) In addition, Defendants indicate that the City has engaged in a series of actions to comply with *Colonia Chiques*, including, *inter alia*, changing the curfew language in subsequent injunctions and "permitting non-gang members to file petitions for removal from injunction enforcement." (Defs.' Opp'n at 23-24.)

It is well-established that the voluntary cessation of illegal conduct in response to pending litigation does not render a claim for injunctive relief moot, "unless the party alleging mootness can show that the allegedly wrongful behavior could not reasonably be expected to recur." *See Rosemere Neighborhood Ass'n v. U.S. Environmental Protection Agency*, 581 F.3d 1169, 1173 (9th Cir. 2009) (internal quotations omitted). The party alleging mootness bears a "heavy burden" in seeking dismissal and must show that it is "absolutely clear" that the allegedly wrongful behavior will not recur if the lawsuit is dismissed. *Id.*

As to the Class, the Court finds that Defendants fail to meet that burden. The policy change reflected in Op. Ord. No. 3 neither indicates that the 26 gang injunctions at issue in this case will be modified before further service nor requires that any of the individuals previously served with an unenforceable gang injunction be informed of the change. Instead, the City concedes that it considered, but rejected (1) seeking court modification of the pre-*Colonia Chiques* curfew provisions affected by the decision and (2) asking LAPD officers to serve notice on gang members covered by the curfew provisions that LAPD would not be enforcing such provisions. (Decl. of Anne C.

Tremblay ¶ 17 [Doc. # 49].) According to Tremblay, Assistant City Attorney and Supervisor of the Anti-Gang Section of the Los Angeles City Attorney's Office, the City decided against such action because it believed that many of the individuals could not be located and service to some, but not all gang members, would be "confusing and inconsistent." (*Id.*)

Even more concerning is Tremblay's statement that "it is questionable whether it would be proper for us to attach any document, such as a notice of non-enforcement of certain injunction provisions, *when serving new gang members with a permanent injunction previously served to others*." (*Id.*; emphasis added.) Tremblay's assertion implies that the City may continue to serve gang injunctions with potentially unenforceable curfew provisions merely for the sake of consistency. On the current record, Defendants have not established that it is "absolutely clear" that Plaintiffs and putative class members will not be subjected to the repeated injury of being served with injunctions containing unenforceable curfew provisions. Moreover, those individuals who already have been served with the challenged injunctions remain subject to the self-inhibitory deterrent effect of the curfew provision contained therein. Thus, the Court finds that Plaintiffs do not lack standing to seek injunctive relief for the Class.

With regard to the Subclass, however, the Court finds that Defendants have adopted a broad-based policy that "[v]iolations of the ["Obey Curfew" provision] must not be used as a reasonable suspicion or probable cause to detain or arrest an enjoined gang member" and that any willful actions to disobey the order can be a basis for disciplinary actions against individual officers. (Khoury Decl. ¶ 2, Ex. A; Blake Decl. ¶ 3.) As such, the Court finds that Plaintiffs are unable to demonstrate that the harm that previously occurred and which conferred standing at the commencement of the litigation— *i.e.*, seizure pursuant to an unenforceable curfew provision—is currently part of a continuing pattern of officially sanctioned behavior or is likely to recur. The Court therefore finds that injunctive relief for the Subclass has become moot. *See United States*

Parole Commission v. Geraghty, 445 U.S. 388, 397, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980); *see also Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 556 (9th Cir. 2010).

2. Individualized Questions Predominate As To The Proposed Subclass But Not As To The Class

Defendants object to Rule 23(b)(2) class treatment because of the individualized nature of questions regarding liability or damages, as to both the improper service and false arrest claims. (Defs.' Opp'n at 25.)

With regard to the proposed Class, the Court does not find that individualized issues predominate. Rather, Plaintiffs seek uniform relief from a practice applicable to all members of the Class, *i.e.*, to enjoin Defendants' service and enforcement of gang injunctions that contain unconstitutional curfew provisions.

As to the proposed Subclass, however, the Court finds that the individualized inquiry into the basis for a putative class member's arrest or detention prevents the application of uniform relief where the Subclass is defined broadly to include those who were seized for additional reasons, beyond a curfew violation.

First, in order for Plaintiffs to prevail on a claim for false arrest under Penal Code § 236, they must establish that there was no probable cause. *Lacey v. Maricopa County*, 693 F.3d 896, 918 (9th Cir. 2012). "Probable cause exists when there is a fair probability or substantial chance of criminal activity." *Id.* The determination of probable cause is based upon the totality of the circumstances known to the officers at the time of the search. *Id.* As discussed above, the situations presented by Rodriguez and Cazarez demonstrate the type of individualized inquiry the Court must undertake as to each Plaintiff and potentially each putative Subclass member.[11]

[11] The existence of probable cause is judged objectively and without regard to the subjective motivations of the officer involved, even if detention of a suspect for one crime is a pretext for investigation of another suspected crime. *Whren v. U.S.*, 517 U.S. 806, 813-19, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996); *see also Fayer*, 649 F.3d at 1064.

Plaintiffs contend that, because they seek only statutory minimum damages under Cal. Civ. Code § 52, *i.e.*, "a simple across the board calculation for each person so injured" (Pls.' Reply at 10), the Court need not make an individualized determination of actual damages.[12]

The problem, of course, is that an award of statutory damages under section 52.1 must still be predicated on a finding that Defendants "attempted or completed [an] act of interference with a legal right, accompanied by a form of coercion." *Jones v. Kmart Corp.*, 17 Cal. 4th 329, 334, 70 Cal. Rptr. 2d 844, 949 P. 2d 941 (1998).

Section 52.1 provides a private right of action against a person who "interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state."[13] Cal. Civ. Code § 52.1 (a). Section 52.1(b) permits an individual whose rights have been so violated to bring a civil action and recover damages provided for by section 52. Cal. Civ. Code § 52.1(b).

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[12] "Proof of actual damages is not a prerequisite to recovery of statutory minimum damages" under section 52. *See Botosan v. Paul McNally Realty*, 216 F.3d 827, 835 (9th Cir. 2000); *see also Koire v. Metro Car Wash*, 40 Cal. 3d 24, 33-34 (1985) ("Section 52 provides for minimum statutory damages [of $4000] for *every* violation of section 51, *regardless* of the plaintiff's actual damages") (emphasis in original).

[13] The elements of a claim under section 52.1 are:

> (1) that the defendant interfered with or attempted to interfere with the plaintiff's constitutional or statutory right by threatening or committing violent acts; (2) that the plaintiff reasonably believed that if she exercised her constitutional right, the defendant would commit violence against her or her property; that the defendant injured the plaintiff or her property to prevent her from exercising her right or retaliate against the plaintiff for having exercised her right; (3) that the plaintiff was harmed; and (4) that the defendant's conduct was a substantial factor in causing the plaintiff's harm.

See also Austin B. v. Escondido Union School District, 149 Cal. App. 4th 860, 882, 57 Cal. Rptr. 3d 454 (2007).

"The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., 'threats, intimidation or coercion'), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law." *Austin B.*, 149 Cal. App. 4th at 883.

Thus, irrespective of whether each Subclass member is entitled to damages under section 52, the Court must first make a determination whether that member has established *liability* under section 52.1.[14] "It is not merely a question of damages, it is a question of liability." *Pryor v. Aerotek Scientific, LLC*, 278 F.R.D. 516, 532 (C.D. Cal. 2011) (noting that policies common to the class weigh strongly in favor of finding that class issues predominate, but not where the court must determine how those policies affect individual members of the class).

In the alternative, Plaintiffs ask the Court to certify the Subclass either as to liability only or as to persons who were seized for curfew violations only. For the reasons already discussed, the liability questions as to the Subclass cannot be determined on a class-wide basis. Consequently, certification of the Subclass as to liability only is

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[14] "There is a split of authority regarding whether a class action can be brought under the Bane Act." *Schilling v. Transcor America, LLC*, 2010 WL 583972 (N.D. Cal. Feb. 16, 2010). In *Schilling*, the court held that, because the plaintiffs alleged that all inmates were handcuffed and shackled, the plaintiffs sufficiently pled the "coercion" element of a Bane Act claim. In this case, however, Plaintiffs seek to certify a Subclass of individuals who were detained pursuant to an unenforceable curfew provision. Plaintiffs fail to allege "coercion" of the Subclass members and California courts are split on whether a false arrest, without more, satisfies the "coercion" element of a Bane Act claim. *See Gant v. County of Los Angeles*, 765 F. Supp. 2d 1238, 1252 (C.D. Cal. 2011). Even in *Cole v. Doe 1 through 2 Officers of City of Emeryville Police Dep't*, 387 F. Supp. 2d 1084, 1103 (N.D. Cal. 2005), where the court allowed a plaintiff to proceed on a section 52.1 claim for unreasonable seizure even though there was no claim that the police used excessive physical force, the court noted that "[u]se of law enforcement authority to effectuate a stop, detention (including use of handcuffs), and search can constitute interference by 'threat[], intimidation, or coercion' **if the officer lacks probable cause** to initiate the stop, maintain the detention, and continue a search." *Id.* at 1103 (emphasis added). Thus, insofar as Plaintiffs are unable to allege any class-wide "coercion" based upon an absence of probable cause, the Court finds that individualized questions prevent class-wide treatment for the Subclass on the Bane Act claim.

inappropriate. Moreover, as discussed *supra*, even if it were feasible to redefine the Subclass to consist of those seized for curfew violations *only*, Plaintiffs fail to identify an adequate representative for that Subclass.

The Court therefore finds that class certification under Fed. R. Civ. P. 23(b)(2) is appropriate only with regard to the Class.

G. Superiority Under Rule 23(b)(3)

The requirement, under Rule 23(b)(3), that a class action would be the superior procedure for deciding a case, "necessarily involves a comparative evaluation of alternative mechanisms of dispute resolution." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023 (9th Cir. 1998). The class action must be superior to any other methods of resolving the case. Fed. R. Civ. P. 23(b)(3).

To the extent Plaintiffs seek statutory damages for the harm caused to class members by the service of the unconstitutionally vague gang injunctions, a class action is superior to other methods of dispute resolution.

The Court finds that individual questions do not predominate over common questions as to the Class and certification is therefore proper under Rule 23(b)(3).[15]

IV.

CONCLUSION

In light of the foregoing, Plaintiffs' Motion for Class Certification is **GRANTED** in part and **DENIED** in part, as follows:

1. The Court certifies the following Class:

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[15] The Court certifies the class under both Rule 23(b)(2) and (b)(3) because some uncertainty exists in the post-*Dukes* environment whether statutory damages in California would be considered "incidental damages" or "substantial damages" under Rule 23(b)(2). The Court is of the view that the statutory damages sought here are "incidental" to the injunctive relief sought and therefore a Rule 23(b)(2) class certification is appropriate. *See Molski v. Gleich*, 318 F.3d 937, 947 (9th Cir. 2003) (an opt-out right is required only when "non-incidental" damages are sought). To the extent that any individualized damages were sought and are now foreclosed by the certification order, however, the Court also certifies the class under Rule 23(b)(3) in order to afford class members the right to opt out.

All persons who have been served with one or more gang injunctions issued in Los Angeles County Superior Court Case Numbers BC397522; BC332713; BC305434; BC313309; BC319166; BC326016; BC287137; BC335749; LC020525; BC267153; BC358881; SC056980; BC359945; NC030080; BC330087; BC359944; BC282629; LC048292; BC311766; BC351990; BC298646; BC349468; BC319981; SC060375; SC057282; and BC353596.

2. The Court certifies Christian Rodriguez and Alberto Cazarez as the representatives of the Class.

3. The Court certifies the following individuals as class counsel: Olu K. Orange, Esq. of the law firm of Orange Law Offices and Anne Richardson, Esq. of the law firm Hadsell, Stormer, Keeny, Richardson & Renick, LLP.

4. The motion for certification of the Subclass is respectfully DENIED.

IT IS SO ORDERED.

DATED: February 15, 2013

DOLLY M. GEE
UNITED STATES DISTRICT JUDGE