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14  
15 **UNITED STATES DISTRICT COURT**  
16 **CENTRAL DISTRICT OF CALIFORNIA**

17 LOS ANGELES PRESS CLUB,  
18 NEWSGUILD - COMMUNICATIONS  
19 WORKERS OF AMERICA, SEAN  
BECKNER-CARMITCHEL, RYANNE  
MENA, LEXIS-OLIVIER RAY, CHARLES  
XU, BENJAMIN ADAM CLIMER, ABIGAIL  
OLMEDA, and MARIA ALEJANDRA-PAZ,

20 Plaintiffs,

21 v.

22 KRISTI NOEM, in her official capacity as  
23 Secretary, Department of Homeland Security;  
TODD LYONS, in his official capacity as  
24 Acting Director, U.S. Immigration and  
Customs Enforcement; GREGORY BOVINO,  
25 in his official capacity as Chief Patrol Agent  
for the El Centro Sector of the U.S. Border  
Patrol; ERNESTO SANTACRUZ JR., in his  
26 official capacity as Acting Field Office  
Director for the Los Angeles Field Office, U.S.  
Immigration and Customs Enforcement;  
27 EDDY WANG, in his official capacity as

28 Case No. 2:25-CV-05563-HDV-E

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION TO DISMISS  
FIRST AMENDED COMPLAINT**

**CLASS ACTION**

Date: December 4, 2025  
Time: 10:00 a.m.  
Judge: Hon. Hernán D. Vera  
Location: Courtroom 5B, 5th Floor

1 Special Agent in Charge for the Los Angeles  
2 Field Office of Homeland Security  
3 Investigations; MARIO CANTON, in his  
4 official capacity as Regional Director for  
5 Region 9 of the Federal Protective Service;  
6 KEVIN GREEN, in his official capacity as  
7 Commander of the U.S. Customs and Border  
8 Protection, Office of Field Operations, Special  
9 Response Team; and U.S. DEPARTMENT OF  
10 HOMELAND SECURITY,

11 Defendants.  
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1     I.     INTRODUCTION

2     Vedic teachings, Friedrich Nietzsche, and Lucy, Charlie Brown and the football all hold that  
3     events are destined to eternally recur.<sup>1</sup> Litigation, however, should progress linearly toward a  
4     denouement—precedent builds on itself, cases move forward, and courts do not have to repeatedly  
5     decide the same questions in the same case.

6     Defendants' Motion to Dismiss mainly repeats the same arguments the Court rejected in  
7     holding that Plaintiffs were likely to succeed on the merits in their motion for a preliminary  
8     injunction. Under the Rule 12(b)(6) standard, the Court takes everything alleged in the complaint as  
9     true and must only find the allegations plausible enough such that a trier of fact could find in  
10    Plaintiffs' favor. The First Amended Complaint ("FAC") incorporates as factual allegations the  
11    "avalanche of evidence" before the Court on the preliminary injunction motion. So under the more  
12    liberal Rule 12 standard, Plaintiffs should *a fortiori* win as to Defendants' arguments as to  
13    standing, retaliation, and right-of-access for the same reasons this Court has already given.

14    The only new arguments in Defendants' motion relate to Plaintiffs' Fourth and Fifth  
15    Amendment, Administrative Procedure Act ("APA"), and declaratory relief claims. Those  
16    arguments lack merit. The repeated acts of gratuitous violence alleged in the FAC constitute  
17    unreasonable seizures under established Ninth Circuit law. The Fifth Amendment claim  
18    alternatively pleads a substantive due process claim based on specific allegations of conduct that  
19    "shocks the conscience" and should not be dismissed. The APA claim identifies final agency  
20    actions that violate many of the agency's own regulations, and the declaratory relief claim easily  
21    establishes an ongoing controversy between the parties that the Court should resolve.

22    Throughout their motion, Defendants ignore and misstate the FAC allegations and draw on  
23    "facts" from their own press releases. Even if this material were appropriate to consider on a Rule  
24    12(b)(6) motion, which it is not, the Court should only consider doing so after taking judicial notice  
25    that Defendants have published misleading and doctored videos about the national protests over  
26    ICE raids that includes using footage from Chicago to make false claims about protesters in

27  
28    <sup>1</sup> *THUS SPAKE ZARATHUSTRA*, Pt. 3; Charles Schultz, *Peanuts* (United Features Syndicate, 1950).

1 Portland and claiming that footage from more than a year ago captures current events.<sup>2</sup> At the same  
2 time, Defendants maintain that they have no animus against protesters and should be allowed to  
3 exclude the free press from covering these events, which would ensure that their videos are the  
4 only portrayal of these important events. Those arguments are misguided for all the reasons the  
5 Court has already detailed. For all those reasons, Defendants' motion should be denied.

6 **II. BACKGROUND**

7 The facts and allegations in this case are well known to the Court because it issued a 45-  
8 page Opinion and Order granting Plaintiffs' motion for a preliminary injunction based on "the  
9 avalanche of evidence before the Court." (Dkt. 55 at 33.) After the Court issued the preliminary  
10 injunction, Plaintiffs filed the FAC, which adds factual allegations based on all the declarations that  
11 the Court considered in granting the preliminary injunction and additional allegations about  
12 violence meted out by DHS against journalists and protesters after the Court heard argument on the  
13 preliminary injunction. It further adds class allegations, which Defendants do not challenge on this  
14 motion; allegations that Defendants engage in unconstitutional viewpoint discrimination and  
15 maintain policies, patterns, and practices of violating the First Amendment rights to protest and  
16 record federal agents' official conduct (FAC ¶¶ 91-104, 276-282), which Defendants also do not  
17 challenge; and claims for violation of the APA (FAC ¶¶ 292-303).

18 **III. LEGAL STANDARD**

19 "At the motion to dismiss stage," both for facial challenges to standing under Rule 12(b)(1)  
20 and challenges to the legal sufficiency of claims under Rule 12(b)(6), "allegations of material fact  
21 in the complaint are taken as true and construed in the light most favorable to Plaintiffs." *Thomas v.*  
22 *Cnty. of Humboldt, Cal.*, 124 F.4th 1179, 1186 (9th Cir. 2024) (cleaned up). "A plaintiff needs only  
23 to plead general factual allegations of injury in order to survive a motion to dismiss, for '[courts]  
24 presume that general allegations embrace those specific facts that are necessary to support the  
25 claim.'" *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1156 (9th Cir. 2000) (quoting *Lujan v. Defs. of Wildlife*,  
26 504 U.S. 555, 561 (1992)). "Dismissal is proper only where there is no cognizable legal theory or

27  
28 <sup>2</sup> Drew Harwell & Joyce Sohyun Lee, *We Checked DHS's Videos of Chaos and Protests. Here's What They Leave Out*, WASH POST, Oct. 29, 2025.

1 an absence of sufficient facts alleged to support one.” *Navarro v. Block*, 250 F.3d 729, 732 (9th  
2 Cir. 2001). Except in limited circumstances not present here, a “district court may not consider any  
3 material beyond the pleadings in ruling on a Rule 12(b)(6) motion.” *Hal Roach Studios, Inc. v.*  
4 *Richard Feiner & Co.*, 896 F.2d 1542, 1555 (9th Cir. 1989).

5 **IV. ARGUMENT**

6 Plaintiffs have already met the heavier burden of demonstrating standing and a reasonable  
7 likelihood of success on their First Amendment claims for the purposes of a preliminary injunction.  
8 Because the FAC incorporates the key information the Court relied on in reaching its findings to  
9 support the preliminary injunction as allegations, it necessarily follows that Plaintiffs have met  
10 their burden to plead a plausible claim necessary to avoid dismissal. *See Tohono O’odham Nation v.*  
11 *United States Dep’t of the Interior*, 138 F.4th 1189, 1202 (9th Cir. 2025).

12 **A. Plaintiffs Have Standing<sup>3</sup>**

13 To establish Article III standing, a “plaintiff must have (1) suffered an injury in fact, (2) that  
14 is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed  
15 by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). A plaintiff  
16 establishes an injury in fact when they show that they suffered “an invasion of a legally protected  
17 interest” that is “concrete and particularized.” Id. at 339 (quoting *Lujan*, 504 U.S. at 560). Plaintiffs  
18 have Article III standing because, as the FAC alleges, each Plaintiff and several members of the  
19 Plaintiffs organizations have suffered a concrete physical injury caused by DHS’s challenged

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21 <sup>3</sup> Defendants conflate the jurisdictional question of whether Plaintiffs have Article III standing with  
22 the equitable question of whether plaintiffs have standing to seek prospective injunctive relief. *See*  
23 *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1041-42 (9th Cir. 1999) (distinguishing). A Rule  
24 12(b)(1) motion to dismiss is properly directed at questions of subject matter jurisdiction only. In  
25 any event, the facts pleaded in the FAC establish that Plaintiffs both have standing and satisfy the  
26 considerations for injunctive relief. *See Hodgers-Durgin*, 199 F.3d. at 1045 (discussing *Wooley v.*  
27 *Maynard*, 430 U.S. 705 (1977)). Moreover, the operative Complaint seeks not only injunctive  
28 relief, but also declaratory relief and relief under the Administrative Procedure Act – remedies not  
addressed by Defendants’ specific arguments about standing to seek an injunction. By not  
addressing whether Plaintiffs have standing to seek declaratory relief, Defendants have waived the  
argument that Plaintiffs’ claim for declaratory relief should be dismissed under FRCP 12(b)(1)  
because the legal standards governing declaratory relief are not the same as those governing  
injunctive relief. *See Steffel v. Thompson*, 415 U.S. 452, 466-67 (1974).

1 conduct, see FAC ¶¶ 111-115, 140-143, 150-154, 167-168, 182, 192-196, 209-213, 221, 226-237,  
2 and each has also suffered a related “invasion of” their First Amendment rights that is likely to be  
3 redressed by a favorable decision in this case. *See infra*, Section IV.B at 11-12.

4 Defendants repeat the same standing arguments the Court rejected at the preliminary  
5 injunction stage (Dkt. 55 at 22-27) and in their motion to stay (Dkt. 74 at 5-9; Mot. at 5-8.)  
6 Defendants argue that Plaintiffs lack standing to assert claims for injunctive relief because they fail  
7 to show that they face a realistic threat of future injury. *Id.* But as this Court already found,  
8 Plaintiffs proved a realistic likelihood of recurrent injury and ongoing, adverse effects of their past  
9 injuries, including chilling effects on their First Amendment exercise—distinguishing this case  
10 from *Lyons* on both grounds. (Dkt. 55 at 22-26; Dkt. 74 at 5.) The FAC’s allegations are based on  
11 the evidence Plaintiffs proffered to reach those findings. (See, e.g., FAC ¶¶ 93-104 (alleging an  
12 unconstitutional policy, pattern, and practice of retaliating against First Amendment protected  
13 recording and reporting activity; ¶¶ 105-229 (alleging sustained pattern of DHS attacks on named  
14 plaintiffs, class representatives, and members of the Plaintiff press organizations).)

15 **1. Defendants’ Ongoing Pattern and Policy of Misconduct Gives Rise to a  
16 Likelihood of Future Injury**

17 Defendants are incorrect that Plaintiffs’ past injuries do not show a likelihood of future  
18 injury. As this Court correctly reasoned, the Ninth Circuit “unequivocally and forcefully rejected”  
19 Defendants’ contention that Plaintiffs “have not established that their injuries are likely to recur” in  
20 *Index*, which found that the “‘risk of future injury [was] not speculative,’ where an ‘ongoing,  
21 sustained pattern of conduct . . . resulted in numerous injuries to members of the press’ since the  
22 action was filed.” (Dkt. 55 at 23 (quoting *Index Newspapers LLC v. United States Marshals Serv.*,  
23 977 F.3d 817, 826 (9th Cir. 2020))). The Court noted that, “as in *Index Newspapers*, some Plaintiffs  
24 were indeed injured more than once.” *Id.* (citing allegations from the Mena, Beckner-Carmitchel,  
25 and Ray Declarations-- incorporated into the FAC at ¶¶ 105-172.)

26 Contrary to Defendants’ claims, Plaintiffs have not merely “asserted” that Defendants have  
27 a “pattern, policy, and practice” of retaliating and using unlawful force. (Mot. at 8 (citing FAC ¶  
28 5).) Instead, they compiled an overwhelming record that provided the basis for the Court’s findings

1 in granting a preliminary injunction and for the allegations in the Complaint, including “detailed  
2 and credible declarations from nearly 50 journalists, legal observers, and protestors” and two  
3 unrefuted expert declarations that established the existence of, and that certainly allow them to  
4 plausibly allege, such a pattern, policy, and practice. (Dkt. 74 at 2.)

5 As the Court correctly held, the Ninth Circuit explained in *Index* that Defendants’ sustained  
6 pattern of misconduct makes this a fundamentally different case than *Lyons* because “the  
7 possibility of recurring injury ceases to be speculative when actual repeated incidents are  
8 documented.”” *Id.* (quoting *Index*, 977 F.3d at 826); *see also LaDuke v. Nelson*, 762 F.2d 1318,  
9 1324 (9th Cir. 1985), amended, 796 F.2d 309 (9th Cir. 1986) (“The Supreme Court has repeatedly  
10 upheld the appropriateness of federal injunctive relief to combat a ‘pattern’ of illicit law  
11 enforcement behavior.”) (citing cases).

12 And Plaintiffs have, in fact, alleged more than a “pattern” of illicit law enforcement  
13 behavior. They have also plausibly alleged that this pattern has been officially sanctioned at the  
14 highest levels of DHS, including by Defendants Noem, Lyons, and Bovino, such that it must be  
15 understood as official policy. (FAC ¶¶ 17-24, 42-44, 46; *see also id.* ¶¶ 51, 61-67, 74-77, 82  
16 (specifically alleging ratification)). These Defendants see the operation that they launched against  
17 protesters and journalists in Chicago as an extension of their Los Angeles operations. (*Id.*  
18 ¶ 88.) As part of their Chicago operations, Defendants Noem and Bovino have egged on ICE and  
19 CBP agents, encouraging them to continue “going hard” at protesters for their protected speech.  
20 (*Id.* ¶ 90.) DHS has also consistently treated protected First Amendment activity as acts of violence  
21 warranting a violent response. (*Id.* ¶ 93.) For example, DHS issued an internal bulletin on June 14,  
22 2025, that identified “livestreaming . . . interactions [with officers]” and videorecording at protests  
23 as “unlawful civil unrest” tactics and “threats.” (*Id.* ¶¶ 94, 97 (DHS Assistant Secretary for Public  
24 Affairs stating that “videotaping ICE law enforcement and posting photos and videos of them inline  
25 is doxing our agents” and will result in prosecution).) Defendant Noem has referred to “videotaping  
26 [ICE] agents” . . . when they’re out on operations” as acts of “violence.” (*Id.* ¶ 95.) DHS has even  
27 taken the position in court that recording and livestreaming law enforcement activity, which is  
28 protected under the First Amendment, is dangerous activity sufficient to prevent a journalist from

1 being released under an immigration judge’s bond order. (*Id.* ¶ 96.) This policy constitutes a legal  
2 injury to establish standing because it violates the First Amendment. *See Leigh v. Salazar*, 677 F.3d  
3 892, 898 (9th Cir. 2012) (“[T]he Supreme Court has long recognized a qualified right of access for  
4 the press and public to observe government activities.”); *Askins v. U.S. Dep’t of Homeland Sec.*,  
5 899 F.3d 1035, 1044 (9th Cir. 2018) (“The First Amendment protects the right to photograph and  
6 record matters of public interest.”). Together, these allegations make clear that the Court was  
7 correct to determine that the record (or the FAC) shows that “Defendants’ practice of meeting First  
8 Amendment protected activities with force” has been ratified by Defendant Noem (and others).  
9 (Dkt. 55 at 34.)

10 Because Plaintiffs have plausibly alleged that their injuries are “part of a pattern of  
11 officially sanctioned behavior, violative of the plaintiffs’ federal rights,” they have established the  
12 likelihood of future injury necessary to confer standing. *Nordstrom v. Ryan*, 762 F.3d 903, 911 (9th  
13 Cir. 2014) (citation modified). The Court has repeatedly and correctly rejected Defendants’  
14 contention that Plaintiffs do not have standing because they have not demonstrated that they  
15 themselves will suffer further injury. (Mot. at 8.) As the Court has explained, Plaintiffs documented  
16 their own, often repeated injuries, and proffered evidence that Defendants had injured others  
17 “engaged in similar protected activity.” (Dkt. 55 at 24.) And the declaration information the Court  
18 relied upon when referring to these injuries has been incorporated as allegations in the FAC. At the  
19 preliminary injunction stage, Defendants objected to Plaintiffs’ reliance on injuries suffered by  
20 people who are not parties to this case, but the Court correctly determined that “[a]t any rate, the  
21 experience of other journalists, legal observers, and protesters bears directly on the operative  
22 question of whether Plaintiffs ‘will again be wronged in a similar way.’” (*Id.* (quoting *Villa v.*  
23 *Maricopa Cnty.*, 865 F.3d 1224, 1229 (9th Cir. 2017)). Now, the FAC asserts unchallenged class  
24 allegations on behalf of those individuals. (FAC ¶¶ 256-74.) It also incorporates new allegations  
25 that Defendants again attacked journalist members of Plaintiff Los Angeles Press Club (LAPC)  
26 recently. (FAC ¶¶ 10, 123-130, 227-237.)

27 The FAC makes clear that DHS has declared open season on protesters, journalists, and  
28 legal observers, and as the Court has rightly determined, “[i]mmigration raids in Southern

1 California will undoubtedly continue” and “Plaintiffs attest that they intend to continue their  
2 activities as reporters, legal observers, and protestors.” (*Id.* at 33, 24 (citing information from  
3 declarations of Beckner-Carmitchel, Mena, Ray, Climer, and Olmeda that has been incorporated as  
4 allegations in FAC ¶¶ 106-131, 132-156, 157-172, 185-199, and 200-205)).<sup>4</sup> As the Court  
5 determined, one crucial way that this case is different from *Lyons* is that Plaintiffs cannot avoid  
6 further injury by “avoid[ing] . . . illegal conduct” as they “were injured engaging in innocent  
7 activities” and have established that they will likely be injured again as they continue to engage in  
8 those activities, so “‘no string of contingencies [is] necessary to produce an injury.’” (*Id.* at 24-25  
9 (quoting *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1041 (9th Cir. 1999)).<sup>5</sup>

10 The Court correctly determined that Plaintiffs’ plans to continue engaging in these innocent  
11 activities by “attending and covering the very protests where Defendants target or fire  
12 indiscriminately upon peaceful protestors, legal observers” also distinguishes this case from *Noem*  
13 *v. Vasquez Perdomo*, where Justice Kavanaugh wrote in a concurring opinion that the plaintiffs  
14 “ha[d] no good basis to believe that law enforcement will unlawfully”—or imminently—“stop *them*  
15 in the future,’ as opposed to ‘any other citizen of Los Angeles.’” (Dkt. 74 at 7 (quoting *Vasquez*  
16 *Perdomo*, 2025 WL 2585637 at \*2 (U.S. 2025) (Kavanaugh, J., concurring)); FAC ¶ 105  
17 (“Plaintiffs/Class Representatives intend to continue attending protests and exercising their rights  
18 to videorecord, observe, speak, and assemble”)). As the Court determined, Plaintiffs here have  
19 every reason to believe that they will be subjected to further DHS violence in the future, absent an  
20 injunction, because they intend to keep attending or covering protests, and DHS has a pattern of

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<sup>4</sup> The Court also cited the Government’s Appl. To Stay, *Noem v. Vazquez Perdomo*, 2025 WL  
2323447, at \*iii-2 (“Given the Administration’s commitment to enforcing the Nation’s immigration  
laws – under which illegal aliens are subject to investigative stops and detention to facilitate  
removal – it should be no surprise that the Los Angeles area is a top enforcement priority.”) to  
establish that immigration raids will continue in the area. Dkt. 55 at 24 n.12.

<sup>5</sup> Because Plaintiffs’ claims arise from injuries they suffered while engaging in activity protected  
by the First Amendment without ever being subject to arrest or entangled in the criminal legal  
system, this case is also distinguishable from *O’Shea v. Littleton*, 414 U.S. 488, 495 (1974), and  
*Eggar v. City of Livingston*, 40 F.3d 312, 317 (9th Cir. 1994), and *Murphy v. Kenops*, 99 F. Supp.  
2d 1255, 1257 (D. Or. 1999). In none of these cases did plaintiffs allege that they planned to protest  
at sites where there was a pattern or practice of officers’ assaulting protesters, and where it would  
be impossible to avoid injury by simply avoiding engaging in illegal activity.

1 targeting or firing indiscriminately upon peaceful protests, legal observers, and journalists, at those  
2 protests. *Id.* Plaintiffs are different from random Los Angeles residents because they “have made  
3 clear that they will be at the events where” DHS illegal use of force “is alleged to occur.” (*Id.*)  
4 Once there, they have no way to avoid injury at DHS hands as “Defendants have fired on Plaintiffs  
5 even when they were far from the center of protest activity.” (*Id.*)

6 Defendants attempt to relitigate their argument that the injuries to Plaintiffs happened too  
7 long ago to establish the likelihood of future harm, even though the Court has squarely rejected it,  
8 and even though Plaintiffs have provided new evidence or allegations of DHS brutality and  
9 retaliation with virtually every new substantive filing or round of briefing. When the Court denied  
10 the stay that Defendants requested, it noted that “Defendants cavil that the alleged injuries  
11 ‘occurred over two months ago.’” (Dkt. 74 at 8.) “As the Court explained, however, Plaintiffs  
12 introduced evidence of additional injuries to themselves and other similarly-situated journalists,  
13 legal observers, and protestors ‘between the date the complaint was filed’ and the TRO denied ‘and  
14 the date the district court entered its preliminary injunction.’” (*Id.* (quoting *Index Newspapers*, 977  
15 F.3d at 826, and citing PI Order, Dkt. 55 at 24 n.3)).

16 When the Court issued the preliminary injunction in September 2025, it determined that  
17 Plaintiffs had established a likelihood of future injury based on the fact that immigration raids  
18 would continue in the region and that Plaintiffs would continue to show up to protest sites where  
19 DHS officers had a pattern or practice of brutalizing protestors, journalists and legal observers.  
20 (Dkt. 55 at 24.) The Court rightly declined to require additional evidence that future injury was  
21 likely six weeks later when Defendants sought to stay the preliminary injunction, noting that the  
22 Ninth Circuit had not required “fresher evidence of plaintiffs’ standing when considering whether  
23 to stay the preliminary injunction in *Index Newspapers*, 977 F.3d at 826 and Defendants have not  
24 cited (and this Court has not found) any case requiring plaintiffs to produce evidence of injury post-  
25 dating the preliminary injunction in order to oppose its stay.” (Dkt. 74 at 8.) The Court explained  
26 that requiring Plaintiffs to prove that DHS had harmed them once the injunction was in place  
27 seemed “absurd” given that “such fresh injuries are precisely what this Court’s PI Order [was]  
28 designed to *prevent.*” (*Id.* (original italics).) That reasoning remains persuasive. If Plaintiffs had no

1 evidence of more recent injuries and unlawful DHS violence, that would only suggest that the  
2 injunction was effective, not that Plaintiffs would be safe without it.

3 Even so, Plaintiffs *have* alleged “fresh” DHS violence in their amended Complaint. For  
4 example, the FAC incorporates allegations that Defendants hit journalists who are Plaintiffs or  
5 members of Plaintiff LAPC on August 30 and September 1 with pepper balls and OC spray—after  
6 the Court heard argument on the motion for Preliminary Injunction—when they were peacefully  
7 attempting to cover protests against ICE in downtown Los Angeles. (FAC ¶¶ 10, 123-30, 227-237.)  
8 And one of those journalists was hit by chemical weapons fired by DHS on two different days  
9 when she was exercising her First Amendment rights as a journalist. (*Id.* ¶¶ 227-35.) If Defendants  
10 could act so brazenly even as the Court was contemplating issuing its injunction, Plaintiffs surely  
11 have ample reason to fear what would happen in its absence.

12 **2. Plaintiffs Separately and Independently Have Standing Due to the  
Chilling Effects of Defendants’ Pattern of Violence**

13 In their Motion, Defendants do not address that the Court correctly distinguished this case  
14 from *Lyons* by noting that ““First Amendment injuries “sharply differ[] from the substantive due  
15 process injury asserted in *Lyons*.’’ (*Id.* at 25 (quoting *Index Newspapers*, 977 F.3d at 826).) The  
16 Court recognized that, under *Index* and related cases, a “chilling of First Amendment rights can  
17 constitute a cognizable injury, so long as the chilling effect is not ‘based on a fear of future injury  
18 that itself [is] too speculative to confer standing.’’ (*Id.* at 25.) *See also Libertarian Party of Los  
19 Angeles Cnty v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013) (First Amendment cases “present unique  
20 standing considerations” such that “the inquiry tilts dramatically toward a finding of standing.”).  
21 And the Court correctly determined that Plaintiffs have established that their First Amendment  
22 rights have, in fact, been chilled, as they have limited their First Amendment activities both  
23 because of the likelihood of future harm and because of their past injuries. (*Id.* at 25-26, 26 n.15  
24 (citing Mena and Ray declarations addressing their limited ability to continue their reporting  
25 because of DHS violence).) The FAC alleges the same information relied upon by the Court in  
26 making that determination. (FAC ¶¶ 155-156, 170-171.)

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1 Moreover, Defendants' assertion that Plaintiffs have not alleged that they will be harmed at  
2 protests going forward, Mot. at 8, mischaracterizes the FAC and fails to acknowledge that First  
3 Amendment chill is a cognizable injury. *Index*, 977 F.3d at 837-38 (holding that the chill on  
4 plaintiffs' First Amendment rights because of wounds they sustained as bystanders at protests  
5 "unquestionably constitute[d] irreparable injury"). Defendants are also simply wrong when they  
6 claim that "only one of the seven individual Plaintiffs specifically alleges that she will even attend  
7 protests in the future." (Mot. at 8.) Instead, the individual Plaintiffs here have alleged that their  
8 First Amendment activities have been chilled, and they *all* either plan to attend future protests or  
9 have decided not to only because they do not want to risk being subjected to further DHS violence.  
10 (See, e.g., FAC ¶131 (Plaintiff Beckner-Carmitchel is "continuing to cover the protests of  
11 immigration raids, including by photographing and videorecording agents with his camera and  
12 phone, in Southern California because he believes what is going on is an important story" but  
13 because he was "injured by DHS repeatedly at protests" he is "concerned for his safety."); ¶ 184  
14 (Plaintiff Paz "has decided to express herself through digital advocacy rather than by engaging in  
15 protests on the streets because" the DHS violence she was subjected to, including being exposed to  
16 tear gas, pepper balls, and flash-bang grenades and being hit by a series of projectile weapons,  
17 "made her afraid to engage in traditional forms of protest." She would, however, "physically  
18 protest in the streets more often" if she thought she could do so safely without risking the same  
19 kinds of injury she suffered while protesting near Roybal/MDC); ¶ 156 (Plaintiff Mena); ¶¶170-171  
20 (Plaintiff Ray); ¶ 214 (Plaintiff Olmeda); ¶ 13 (Plaintiff Xu); ¶ 14 (Plaintiff Climer)).

21 Defendants' assertion that Plaintiff Paz cannot establish future injury sufficient to overcome  
22 *Lyons* because "she alleges that she will *not* attend future protests" is especially jarring because the  
23 only reason this is true is that Defendants' brutality has traumatized her and given her good cause  
24 to fear for her safety wherever their agents are present. The Court has rightly recognized that this  
25 type of First Amendment chill can constitute a cognizable injury sufficient to confer standing. Dkt.  
26 55 at 25 (citing *Index*, 977 F.3d at 826; *Porter v. Martinez*, 68 F.4th 429, 437 (9th Cir. 2023), cert.  
27 denied, 144 S. Ct. 1007 (2024)). If this were not the case, Defendants could ensure that no one had  
28 standing by ratcheting up their brutality to the point where it would be irrational for anyone to

1 consider attending future protests. Fortunately, case law does not require people who have been  
2 victimized by ongoing patterns or practices of wanton violence to once again place themselves in  
3 harm's way before seeking equitable relief to stop that violence. The Court also rightly determined  
4 that First Amendment chill can exist even for Plaintiffs like Beckner-Carmitchel, Mena, and Ray,  
5 who continue to engage in protected activities, noting that "Plaintiffs need not show that their  
6 speech was "actually inhibited or suppressed," as "'it would be unjust to allow a defendant to  
7 escape liability for a First Amendment violation merely because an unusually determined plaintiff  
8 persists in his protected activity[.]"' *Id.* at 28-29 (quoting *Mendocino Env't Ctr. v. Mendocino*  
9 *Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999)).

10 **B. Plaintiffs Have Stated a First Amendment Claim**

11 The FAC contains First Amendment claims against Defendants for engaging in viewpoint  
12 discrimination, retaliation, infringing on the First Amendment rights to record federal agents'  
13 official conduct and to protest, and violating reporters' and legal observers' right of access.  
14 Defendants only move to dismiss Plaintiffs' First Amendment claims to the extent they allege  
15 retaliation and denial of journalists' and legal observers' right of access to protests. Because  
16 Defendants fail to address Plaintiffs' other alleged First Amendment theories, the Court can deny  
17 the motion to dismiss the First Cause of Action on that basis alone.<sup>6</sup> Defendants' bid to dismiss  
18 Plaintiffs' First Amendment claims does not raise any argument that the Court has not already  
19 rejected. (Mot. at 9-10.) Defendants argue that the right of access should not attach to a protest  
20 when they unilaterally declare that it has "turned violent" and that "the FAC does not allege that  
21 Defendants denied any named Plaintiff access to any space, let alone access to a government  
22 proceeding, which is the focus of the right-of-access inquiry." (Mot. at 10.) These are the same  
23 arguments that the Ninth Circuit rejected in *Index*, in upholding an injunction that prohibited DHS  
24 from dispersing journalists and legal observers after the Portland police had declared an unlawful  
25 assembly. 977 F.3d at 830 ("Portland's streets and sidewalks—and the process—public protests  
26 and law enforcement's response to them—have historically been open to the public."). This Court

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<sup>6</sup> Defendants cannot raise new arguments against these claims for the first time in reply. *Graves v. Arpaio*, 623 F.3d 1043, 1048 (9th Cir. 2010) (per curiam).

1 likewise already expressly rejected both these arguments in its Order denying Defendants' stay  
2 motion, where it explained:

3 The process in question is properly understood as "public protests  
4 and law enforcement's response to them." Index Newspapers, 977  
5 F.3d at 830. Defendants attempt to avoid this conclusion by  
6 "refram[ing] all of the protests as" "violent riots," id. at 834; Reply at  
7 4, but this characterization is belied by the record and approaches the  
8 Press-Enterprise II question at too narrow a level of generality.

9 (Dkt. 74 at 10.) Plaintiffs' briefing on that motion is incorporated by reference and as a tribute to  
10 the shortness of life is not cut and pasted into this pleading.

11 As to retaliation, Defendants repeat their argument that Plaintiffs' allegations of retaliatory  
12 intent are insufficient. (Mot. at 9.) The Court already rejected this argument, too, based on the  
13 declarations and direct evidence of retaliatory motive Plaintiffs have incorporated into the FAC.  
14 Contrary to the low bar on a Rule 12(b)(6) motion of showing that if true the allegations are  
15 sufficient for a reasonable factfinder to find retaliatory intent, the Court found that Plaintiffs were,  
16 in fact, likely to prevail on this claim. (See, e.g., Dkt. 55 at 29 ("Having carefully reviewed each  
17 incident and Defendants' response, the Court finds that Defendants' excessive and indiscriminate  
18 response evinces strong and persuasive evidence of retaliatory intent."); id. at 33 (describing direct  
19 evidence of "policy or custom" of retaliation); FAC ¶¶ 75-77, 93-99 (incorporating direct evidence  
20 of retaliation cited by Court and adding more).)<sup>7</sup> The Court's conclusions were entirely consistent  
21 with well-established Ninth Circuit law on First Amendment retaliation. See, e.g., *Index*, 977 F.3d  
22 at 828 (holding retaliation can be established by direct or circumstantial evidence and holding that  
23 extensive evidence of defendants shooting at people clearly exercising First Amendment rights  
demonstrated a likelihood of success on retaliation claim).

24 **C. Plaintiffs Have stated a Fourth Amendment Claim**

25 The FAC alleges in detail how Defendants maintain official policies, patterns, and practices  
26 for use of projectile and chemical weapons and grenades that violate the Fourth Amendment. (See,

27 <sup>7</sup> Defendants also cite to *Puente v. City of Phoenix*, 123 F.4th 1035, 1063 (9th Cir. 2024), which  
28 upheld summary judgment where the plaintiffs failed to meet their evidentiary burden of showing  
intent. Here, in contrast, Plaintiffs have already submitted an "avalanche of evidence" of retaliation  
such that they could survive summary judgment, even though discovery has not yet commenced.

1 *e.g.*, FAC ¶¶ 45-47, 49, 286-287.) And it describes how Defendants unconstitutionally seized  
2 Plaintiffs, members of the Plaintiff organizations and Class members pursuant to these same  
3 policies, patterns, and practices. *See, e.g.*, *id.* ¶¶ 111-112, 116, 121-122, 127, 138, 145, 150, 154,  
4 167-68, 182, 192-193, 209, 221, 228-237.<sup>8</sup>

5 Defendants argue that the FAC alleges that they were using unnecessary and excessive  
6 force to “disperse” Plaintiffs, rather than “restrain” them. (Mot. at 11.) Plaintiffs, however, also  
7 allege that “Defendants maintain a policy, pattern, and practice of using significant force” by  
8 shooting “tear gas canisters, pepper balls, pepper spray, exploding grenades, kinetic impact  
9 projectiles, 40mm projectiles, and other impact munitions—against people who are not committing  
10 a serious crime, are not posing a threat to officers, and are not actively resisting or evading arrest.”  
11 (FAC ¶ 287.) Under clearly established Ninth Circuit law, this alleged conduct is an unreasonable  
12 seizure that violates the Fourth Amendment. *See Nelson v. City of Davis*, 685 F.3d 867, 884-886  
13 (9th Cir. 2012) (clearly established that firing pepper balls at “individuals suspected of, at most,  
14 minor crimes, who posed no threat to the officers or others” was an unreasonable seizure); *Deorle  
15 v. Rutherford*, 272 F.3d 1272, 1285 (9th Cir. 2001) (clearly established that shooting less-lethal  
16 round without warning at a person who posed no threat was unreasonable seizure); *see also Berg v.  
17 Cnty. of Los Angeles*, No. CV 20-7870 DMG (PDX), 2021 WL 4691154, at \*11-12 (C.D. Cal. May  
18 28, 2021) (launching less lethal projectiles and flash-bang grenades against peaceful protesters,  
19 legal observers, and journalists, without warning and against individuals posing no immediate  
20 threat to the officers or others, violates Fourth Amendment).

21 In 2024, the Ninth Circuit denied qualified immunity to an officer who shot a protester in  
22 the groin with a 40mm weapon in San Jose in a 2020 protest, holding that the “act of firing a  
23 projectile at [the protester] constituted a seizure under the Fourth Amendment.” *Sanderlin v.  
24 Dwyer*, 116 F.4th 905, 913 (9th Cir. 2024). It reasoned that “the 40mm launcher . . . is chiefly

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26 <sup>8</sup> As Defendants apparently acknowledge, the FAC establishes Plaintiffs’ standing to challenge  
such “officially sanctioned” conduct if it plausibly alleges that even an unwritten policy exists.  
27 (Mot. at 9 (citing *Nordstrom*, 762 F.3d at 911 (quoting *LaDuke v. Nelson*, 762 F.2d 1318, 1324 (9th  
28 Cir. 1985) (holding plaintiffs had standing to challenge officially sanctioned pattern or policy of  
violating Fourth Amendment); *see also* FAC ¶ 46 (alleging that Defendants’ Director of Less  
Lethal Training swore their policy authorizes the alleged force practices).)

1 designed, intended, and used for the purpose of incapacitating its target”; that police training  
2 materials provide “Less Lethal Impact munitions” like the foam baton round the officer fired “are  
3 used to: Disorient [and] *Incapacitate*”; and that “‘incapacitating’ an individual by firing a projectile  
4 at them is an act that ‘meaningful[ly] interfere[es]’ with their freedom of movement” *Id.* (citing  
5 *United States v. Jacobsen*, 466 U.S. 109, 113 n.5 (1984) (“meaningful interference, however brief,  
6 with an individual’s freedom of movement” constitutes a seizure); *see also Nelson*, 685 F.3d at 877  
7 (when “officers took aim and fired their weapons,” shooting pepper balls at plaintiff, that “was a  
8 knowing and willful act that terminated [plaintiff’s] freedom of movement”). *Sanderlin* applied  
9 traditional Fourth Amendment analysis to hold *Nelson* and *Deorle* “clearly established” that using a  
10 40mm launcher to shoot a projectile at a protester who was not personally threatening officer safety  
11 or evading arrest was an unreasonable seizure. *Sanderlin*, 116 F.4th at 917.

12 The FAC also alleges with specificity Defendants’ pattern and practice of spraying pepper  
13 spray out of cannons directly at and onto protesters, legal observers, and press who pose no threat  
14 and are not resisting or evading arrest. (See FAC ¶¶ 127-128 (describing how DHS sprayed  
15 Plaintiff Beckner-Carmitchel straight on in the face); *see also id.* ¶ 68 (still of video of DHS  
16 spraying press); ¶¶ 119-120 (video of DHS spraying press); ¶¶ 227-228, 231 (alleging pattern of  
17 DHS agents spraying multiple LAPC members across multiple days).) This, too, is conduct the  
18 Ninth Circuit has recognized constitutes an unreasonable seizure. *See Nelson*, 685 F.3d at 885  
19 (clearly established that “the application of pepper spray to individuals . . . whose only  
20 transgression was the failure to disperse as quickly as the officers desired, would violate the Fourth  
21 Amendment”) (citing *Headwaters Forest Def. v. Cnty. of Humboldt*, 276 F.3d 1125, 1130 (9th Cir.  
22 2002), as amended (Jan. 30, 2002)); *see also Young v. Cnty. of Los Angeles*, 655 F.3d 1156, 1166-  
23 67 (9th Cir. 2011) (employing pepper spray without warning “against an individual who is  
24 suspected only of minor offenses, is not resisting arrest, and, most important, does not pose any  
25 apparent threat to officer or public safety” violates Fourth Amendment).

26 Contrary to Defendants’ misrepresentation that Plaintiffs did not allege DHS restrained  
27 them (Mot. at 11), the FAC specifically alleges that Defendants incapacitated Plaintiffs. (See, e.g.,  
28 FAC ¶ 247 (“Kinetic impact projectile weapons, like rubber bullets, sponge and foam rounds, and

1 pepper balls (when used as projectile weapons) are specifically designed to cause trauma and  
2 incapacitate individuals.”); ¶ 211 (describing how Plaintiff Olmeda was incapacitated by DHS  
3 shooting her in the head); ¶¶ 151-153 (same for Plaintiff Mena); ¶¶ 87, 237 (alleging that when  
4 DHS shot photographer for LAPC member publication in the temple with a pepper ball, it caused  
5 him to buckle at the knees and almost fall to the ground); *see also id.* ¶¶ 56, 80 (describing how  
6 protesters were “incapacitated” by DHS use of force); FAC at 57 (“Use of Chemical Weapons Can  
7 Limit Basic Human Functions”).) It also alleges that DHS subjected Plaintiffs to types of force the  
8 Ninth Circuit has held are unconstitutional seizures, as discussed above.<sup>9</sup> (*See id.* ¶¶ 111-112, 116  
9 (Plaintiff Beckner-Carmitchel shot in head with projectile); ¶¶ 121-122 (Plaintiff Beckner-  
10 Carmitchel shot in torso with pepper ball), ¶ 127 (Plaintiff Beckner-Carmitchel sprayed straight on  
11 with pepper spray), ¶¶ 138-145 (Plaintiff Mena shot with pepper ball); ¶¶ 150-154 (Plaintiff Mena  
12 shot with less lethal round); ¶¶ 167-68 (Plaintiff Ray shot with multiple pepper balls); ¶ 182  
13 (Plaintiff Paz shot with multiple projectiles); ¶¶ 192-193 (Plaintiff Climer shot with projectile); ¶  
14 209 (Plaintiff Olmeda shot with pepper balls and less lethal rounds); ¶ 221 (Plaintiff Xu shot with  
15 pepper ball), ¶¶ 228-237 (LAPC members shot with pepper balls and pepper spray).)

16 Defendants’ reliance on *Puente v. City of Phoenix*, 123 F.4th 1035 (9th Cir. 2024) to argue  
17 Plaintiffs fail to state a Fourth Amendment claim is unavailing. There, the Ninth Circuit panel was  
18 careful to emphasize that its holding was limited to “airborne transmission of chemical irritants”  
19 and the auditory and visual effects of flash-bang grenades; it did not (and could not) abrogate the  
20 Court of Appeals precedent holding that the incapacitating physical impacts caused by shooting a

21 <sup>9</sup> Plaintiffs also allege that Defendants’ agents have seized members of Plaintiff LA Press Club—  
22 restraining them by threat of force from moving to film DHS agents—by brandishing their  
23 weapons at them (FAC ¶ 225), and that Defendants did so pursuant to an official policy and  
24 practice of conducting such unlawful seizures. (*Id.* ¶¶ 100-101.) These allegations also state a  
25 Fourth Amendment claim. *See Robinson v. Solano Cnty.*, 278 F.3d 1007, 1013-15 (9th Cir. 2002)  
26 (holding seizure where officers pointed gun at person who posed no threat, during investigation of  
27 minor crime, violated Fourth Amendment, and agreeing with the Fifth Circuit that “[a] police  
28 officer who terrorizes a civilian by brandishing a cocked gun in front of that civilian’s face” has  
laid the foundation for a civil rights claim); *Tekle v. United States*, 511 F.3d 839, 847-48 (9th Cir.  
2007) (en banc) (clearly established that officer pointing gun at someone who posed no threat, was  
not actively resisting arrest, and was not engaged in assaultive behavior toward officers violated  
Fourth Amendment); *see also Puente*, 123 F.4th at 1051 (“The ‘seizure’ of a ‘person’ can take the  
form of . . . a show of authority that in some way restrains the liberty of the person.”).

1 person with a projectile, hitting them with an exploding grenade, or directly spraying them in the  
2 face with chemicals effect a seizure subject to the limitations of the Fourth Amendment. *Id.* at 1051  
3 (emphasis in original); *see also id.* at 1053 (expressly “set[ting] aside” consideration of claims  
4 related to “physical impacts [caused] by projectiles” and “focus[ing] only upon” claims related to  
5 “generalized exposure to chemical irritants” in the form of airborne gas).<sup>10</sup>

6 **D. Plaintiffs Have stated a Fifth Amendment Claim**

7 Defendants ask the Court to dismiss Plaintiffs’ Fifth Amendment claims because Plaintiffs  
8 have separately pleaded Fourth Amendment claims. (Mot. at 13-14.) However, “a party is  
9 permitted to plead in the alternative—even where the alternatives are mutually exclusive.” *Jones v.*  
10 *City of Los Angeles*, No. 2:20-CV-11147-SVW-SK, 2022 WL 2062920, at \*5 (C.D. Cal. Feb. 16,  
11 2022) (citing *PAE Gov’t Servs., Inc. v. MPRI, Inc.*, 514 F.3d 856, 858-59 (9th Cir. 2007); Fed. R.  
12 Civ. P. 8(d)(2), (3)). Thus, although Plaintiffs allege that Defendants’ policies, patterns, and  
13 practices effect unreasonable seizures giving rise to a Fourth Amendment claim and unlawfully  
14 infringe on and retaliate against First Amendment exercise—“at the pleading stage, Plaintiff[s] may  
15 also pursue an alternative [Fifth] Amendment claim[.]” *Id.* (citing *Graham v. Connor*, 490 U.S.  
16 386, 395 (1989)); *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 842-43 (1998) (holding plaintiff  
17 “permitted to alternatively plead [a] substantive due process claim” in addition to First and Fourth  
18 Amendment claims). “As the Supreme Court … made clear in [*Lewis*] … an excessive force claim  
19 made” as a “substantive due process” claim “is viable when the use of force occurred outside the  
20 context of a search or a seizure.” *Jones*, 2022 WL 2062920, at \*5 (quoting *Lewis*, 523 U.S. at 842-  
21 43). Such claims are evaluated under the “shocks the conscience test.” *Puente*, 123 F.4th at 1055.

22 As an alternative to the First and Fourth Amendment claims, the FAC states a Fifth  
23 Amendment substantive due process claim. The FAC alleges that Defendants have implemented  
24

25 <sup>10</sup> Defendants’ remaining arguments rely on cases that predate *Puente* to address the allegations  
26 that their official conduct “shocks the conscience.” (Mot. at 11-13.) In *Puente*, the Ninth Circuit  
27 opined that in light of the Supreme Court’s decision in *Torres v. Madrid*, 592 U.S. 306 (2021), non-  
28 seizure excessive force claims are properly assessed under the “shocks the conscience” standard as  
substantive due process claims. 123 F.4th at 1051-1055. Accordingly, Plaintiffs address *Puente* and  
the factually distinct pre-*Puente* cases Defendants cite to discuss the “shocks the conscience”  
standard in Section D below.

1 policies, patterns, and practices of using chemical weapons and flash-bang grenades alongside  
2 sweeping, indiscriminate volleys of projectiles in ways that that “shock[ ] the conscience” (FAC ¶  
3 289; *see also id.* ¶¶ 44-50), both because they are “deliberate[ly] indifferen[t]” to the resulting harm  
4 to non-violent protesters, legal observers, and journalists (*id.* ¶ 290), and because they are carried  
5 out with a purpose to harm that is unrelated to legitimate law enforcement objectives. (*Id.* ¶¶ 288-  
6 289 (alleging that “Defendants’ sweeping, indiscriminate violence—including ... their use of  
7 chemical weapons . . . is so gratuitous as to give rise to a reasonable inference that it was applied to  
8 cause harm rather than for a legitimate purpose”); *see also Puente*, 123 F.4th at 1055-56  
9 (discussing “deliberate indifference” and “purpose to harm” variations of “shocks the conscience”  
10 test)).

11 Defendants have no tenable argument that Plaintiffs failed to allege the elements of a  
12 substantive due process claim. Instead, they argue the FAC “glosses over” extrinsic facts (Mot. at  
13 11), even as they argue that the Court cannot consider the factual record in this case. (*Id.* at 4  
14 (“[A]lthough this Court must accept as true ‘all factual allegations set forth in the complaint,’ ...  
15 this Court cannot accept as true—or otherwise rely on—factual allegations made in other public  
16 filings”) (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001)).) And they  
17 improperly seek to construe the allegations in the FAC to draw inferences against Plaintiffs,  
18 misrepresenting Plaintiffs’ allegations to inappropriately inject allegations of their own about  
19 “violent riots” that can nowhere be found in the FAC. (Mot. at 11-12.)

20 Indeed, the summary judgment rulings in *Puente* and all the pre-*Puente* cases about  
21 chemical weapons that Defendants cite are inapplicable to the facts alleged because they address  
22 use of such weapons against people engaged in “physical altercations” with law enforcement and  
23 resisting arrest (*id.* at 12), when the FAC specifically alleges that Defendants have a policy, pattern,  
24 and practice of attacking people engaged in no such conduct. (*Compare* FAC ¶ 45 (alleging  
25 Defendants maintain policy, pattern, and practice of “deploying sweeping force . . . without regard  
26 for whether [people harmed] pose any threat or are attempting to disperse”); *id.* ¶ 50 (same); *id.* ¶  
27 54 (“DHS faced no threat from the people gathered when it deployed this [chemical] weapon, nor  
28 did DHS agents give any audible warning or instruction to disperse in advance.”); *id.* ¶¶ 149, 185,

1 217 (describing peaceful protests where DHS attacked Plaintiffs), *with Puente*, 123 F.4th at 1056  
2 (weapons deployed without purpose to harm after protesters already engaged in escalating  
3 violence); *Felarca v. Birgeneau*, 891 F.3d 809, 818 (9th Cir. 2018) (plaintiffs ignored multiple  
4 warnings, “purposefully restricted officers’ movements” with their bodies and physically attacked  
5 them); *United Steelworkers of Am. v. Milstead*, 705 F. Supp. 1426, 1437 (D. Ariz. 1988)  
6 (“motivation for the use of the tear gas was not to punish anyone but to force persons suspected of  
7 having attacked [officers] to leave the building”).)<sup>11</sup>

8 When all allegations are taken as true and all inferences drawn in favor of Plaintiffs, as they  
9 must be for the purposes of this Rule 12(b)(6) motion, the FAC more than plausibly alleges that  
10 Defendants have implemented an officially sanctioned policy, pattern, or practice of dumping  
11 hazardous chemical weapons into communities that protest their actions and indiscriminately  
12 launching sweeping volleys of shock grenades and projectiles against peaceful protests (*see, e.g.*,  
13 FAC ¶¶ 54-55, 59-60, 68, 78-81), not for legitimate reasons but *for the purpose of causing harm*: to  
14 punish and terrorize Plaintiffs and Class members for daring to disagree with and report the truth  
15 about DHS’s immigration operations; to create a pretext for deploying a militarized show of force;  
16 and to send a message to the nation watching. (FAC ¶¶ 1, 6, 7, 288; *see also supra*, Section IV.B at  
17 11-12; *cf. Sexton v. Faris*, No. 22-CV-1927-WJM-MEH, 2024 WL 4201603, at \*6 (D. Colo. Sept.  
18 16, 2024) (allegations that officer deployed chemical agent against plaintiff “in absence of any  
19 intent to restore order or arrest” and “with an intent to cause injury . . . out of malice” sufficient to  
20 support substantive due process claim at motion to dismiss stage).)<sup>12</sup>

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22 <sup>11</sup> *Felarca and Forrester v. City of San Diego*, 25 F.3d 804, 805-07 (9th Cir. 1994) also do not  
23 support Defendants’ arguments because they are pre-*Puente* cases that applied the *Graham*  
24 standard and did not opine on whether the challenged conduct was deliberately indifferent or  
25 carried out with a purpose to harm under the “shocks the conscience” standard. *See supra* n.10. The  
same is true of *Bayer v. City of Simi Valley*, 43 F.App’x 36 (9th Cir. 2002) (addressing use of gas  
against individual resisting arrest who shot at officers and threatened to do so again), an  
unpublished pre-2007 disposition Defendants improperly cite in violation of Ninth Cir. Rule 36-3.

26 <sup>12</sup> Because Plaintiffs allege Defendants deliberately implemented and maintain officially sanctioned  
27 policies, patterns, and practices of excessive force, such that the harms caused to Plaintiffs are not  
28 merely the result of “snap judgments” by individual DHS agents, the case law about “split second  
judgments” referenced by Defendants (Mot. at 12) does not apply, and the “deliberate indifference”

1           The FAC also specifically alleges how Defendants' gratuitous use of crowd control  
2 weapons is "deliberately indifferent" to the resulting harm caused to everyone present—including  
3 children, elderly people, and others peacefully exercising their First Amendment rights. (*Id.* at ¶ 59  
4 ("DHS agents launched so much tear gas that they created a thick and inescapable fog of harmful  
5 chemicals covering a broad swath of the area. People were struggling to breathe, coughing,  
6 weeping in pain, and pouring water into their eyes. Some people vomited."); ¶ 68 ("Members of the  
7 press and a ten-year-old boy holding a protest sign were among those that DHS agents  
8 teargassed."); ¶ 80 (people at protest attacked by DHS "described feeling like their limbs were on  
9 fire from the pepper balls, and were so incapacitated by chemical weapons other protesters had to  
10 render medical aid to help them see and breathe"); ¶ 81 ("DHS agents detonated a flash-bang  
11 grenade, a smoke bomb, and a tear gas canister at the gathering of protesters" which "included a  
12 mother and her daughter, elderly people, and families with three- and four-year-old toddlers,"  
13 making them "cough violently, struggle to breathe, and dry heave"); ¶¶ 241-246 (describing how  
14 the chemical weapons Defendants deploy against protests in this District "indiscriminately" cause  
15 serious harm to "peaceful participants and bystanders"); *see also* ¶ 151 ("DHS teargassed Ms.  
16 Mena, which aggravated her asthma and caused her severe difficulty breathing"); *id.* ¶¶ 113-114,  
17 181, 183-184, 226-228 (other harms caused to Plaintiffs and members).)

18           In all these ways, the FAC alleges excessive force that "shocks the conscience" and thus  
19 states a substantive due process claim. *See Edrei v. Maguire*, 892 F.3d 525, 538, 540-44 (2d Cir.  
20 2018) (allegations that defendants subjected non-violent protesters to pain and serious injury  
21 simply to move them onto sidewalks stated substantive due process claim by describing "exercise  
22 of power without any reasonable justification in the service of a legitimate government objective")  
23 (quoting *Lewis*, 523 U.S. at 846); *Est. of Soakai v. Abdelaziz*, 137 F.4th 969, 980 n.5 (9th Cir.  
24 2025) ("Suppose that an officer walks into a crowd and shoots at an unarmed civilian purely for the  
25  
26  
27

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28 standard does. *See Puente*, 123 F.4th at 1055. Regardless, the Complaint plausibly alleges both  
deliberate indifference and purpose to cause harm.

1 purpose of causing pain. Surely, such conduct would shock the conscience whether the officer hits  
2 the intended target or instead strikes a bystander standing a few feet away.”).<sup>13</sup>

3 **E. Plaintiffs Have Stated a Claim under the APA**

4 The FAC alleges that Defendants follow multiple policies that are unlawful, in violation of  
5 the APA. (FAC ¶¶ 292-303.) Plaintiffs can challenge an agency action under the APA if the  
6 underlying conduct is “reviewable by statute” or a “final agency action for which there is no other  
7 adequate remedy.” 5 U.S.C. § 704; *Navajo Nation v. Dep’t of the Interior*, 876 F.3d 1144, 1171  
8 (9th Cir. 2017). The finality requirement has two elements: “First, the action must mark the  
9 consummation of the agency’s decisionmaking process. And second, the action must be one by  
10 which rights or obligations have been determined, or from which legal consequences will flow.”  
11 *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016) (internal quotations marks  
12 omitted). The Ninth Circuit has long recognized that “[t]he finality element must be interpreted in a  
13 pragmatic and flexible manner.” *Dietary Supplemental Coal., Inc. v. Sullivan*, 978 F.2d 560, 562  
14 (9th Cir. 1992) (internal quotation marks omitted). When determining whether an agency’s action  
15 is final, courts “look to whether [a] the action amounts to a definitive statement of the agency’s  
16 position or [b] has a direct and immediate effect on the day-to-day operations of the subject party,  
17 or [c] if immediate compliance with the terms is expected.” *Oregon Nat. Desert Ass’n v. U.S.*  
18 *Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) (internal quotations and citations omitted). The  
19 focus is “on the practical and legal effects of the agency action.” *Id.* Indeed, “[a]n unwritten policy  
20 can still satisfy the APA’s pragmatic final agency action requirement.” *Al Otro Lado, Inc. v.*  
21 *McAleenan*, 394 F.Supp. 3d 1168, 1206-07 (S.D. Cal. 2019) (collecting cases).

22 Defendants argue that “Plaintiffs have failed to identify an actual, discrete decision by the  
23 agency, let alone a final agency decision, that may be challenged under the APA.” (Mot. at 15.)  
24 This argument disregards the FAC’s allegations identifying unlawful policies that constitute “final

25  
26 <sup>13</sup> See also *Chicago Headline Club v. Noem*, No. 25-CV-12173 (N.D. Ill., preliminary injunction  
27 order entered Nov. 6, 2025) (finding in oral ruling from the bench that similar use of force by DHS  
28 against protesters, press, and bystanders in Chicago “shocks the conscience,” as widely reported by  
reliable sources. See e.g., Megan Crepeau, “Federal Violence in Chicago Shocks Conscience, Judge  
Says,” Bloomberg Law News (Nov. 6, 2025), <https://news.bloomberglaw.com/litigation/ice-use-of-force-against-chicago-protesters-restrained-by-judge>).

1 agency action,” such as the discrete policy of “treating photography and videorecording that  
2 documents the conduct of DHS officers in public as threats or ‘doxxing’ that DHS officers may  
3 respond to with force and address as crimes.” (FAC ¶ 300.) Moreover, under *United States ex. rel.*  
4 *Accardi v. Shaughnessy*, a plaintiff can bring an APA claim to set aside an agency action when they  
5 allege that an agency has flouted federal law to do “precisely what [its] regulations forbid [it] to  
6 do.” 347 U.S. 260, 267 (1954); *accord Church of Scientology of California v. United States*, 920  
7 F.2d 1481, 1487 (9th Cir. 1990) (“Pursuant to the *Accardi* doctrine, an administrative agency is  
8 required to adhere to its own internal operating procedures.”); *Morton v. Ruiz*, 415 U.S. 199, 235  
9 (1974) (“Where the rights of individuals are affected, it is incumbent upon agencies to follow their  
10 own procedures.”). An agency’s failure to follow its own procedures is actionable under the APA,  
11 even if the policy was never formally established. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S.  
12 502, 515 (2009) (an agency may not “simply disregard rules that are still on the books”); *Alcaraz v.*  
13 *I.N.S.*, 348 F.3d 1150, 1162 (9th Cir. 2004) (*Accardi* extends beyond formal regulations).

14 The cases cited by Defendants are inapposite because they address interim guidance and  
15 policy recommendations, rather than final agency policies. *See Mary Ferrell Found., Inc. v. Biden*,  
16 No. 22-CV-06176-RS, 2023 WL 4551066, at \*6 (N.D. Cal. July 14, 2023) (addressing a “guidance  
17 document, presidential recommendations, concurrence with continued postponement requests, and  
18 Transparency Plan review” that were offered as “tentative recommendation[s]” to the agency);  
19 *Oregon Nat. Desert Ass’n v. U.S. Forest Serv.*, 303 F.App’x 517, 519 (9th Cir. 2008) (challenging  
20 the enactment of land use advisory “grazing documents” that plaintiff admitted were not “specific  
21 agency actions.”); *Cobell v. Norton*, 392 F.3d 461, 478 (D.C. Cir. 2004) (addressing an interim  
22 “To-Be Plan”); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (seeking improvements  
23 to general program deficiencies); *City of Rialto v. W. Coast Loading Corp.*, 581 F.3d 865, 878-79  
24 (9th Cir. 2009) (holding that an APA claim not ripe “because the feared harm has not yet been  
25 realized”); *Gallo Cattle Co. v. U.S. Dep’t of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998) (denying  
26 an APA claim because the “judicial officer’s denial of interim relief” was not final). In contrast,  
27 Plaintiffs’ APA claim does not challenge interim agency policies or advisory recommendations.  
28 Instead, the FAC alleges agency actions that were finalized by agency leadership, articulated to

1 subordinate officers, and implemented in violation of existing federal regulations. Thus, Plaintiffs'  
2 resulting constitutional harms are entirely distinct from the cases cited in Defendants' motion.

3 Plaintiffs allege that in violation of their written policies, Defendants adopted policies,  
4 patterns, and practices of using force or weaponry against the press, legal observers, and peaceful  
5 protesters that violate federal law. As outlined in the FAC, federal statute provides for regulations  
6 that "prescribe the categories of officers and employees . . . who may use force (including deadly  
7 force) and the circumstances under which such force may be used." (FAC ¶ 293 (citing 8 U.S.C. §  
8 1357(a)).) The corresponding federal regulations establish that "[n]on-deadly force may be used  
9 only when a designated immigration officer . . . has reasonable grounds to believe that such force is  
10 necessary"; "[a] designated immigration officer shall always use the minimum non-deadly force  
11 necessary to accomplish the officer's mission" while escalating to increased uses of force "only  
12 when such higher level of force is warranted by the actions, apparent intentions, and apparent  
13 capabilities of the suspect, prisoner, or assailant"; and "[d]eadly force may be used only when a  
14 designated immigration officer . . . has reasonable grounds to believe that such force is necessary to  
15 protect the designated immigration officer or other persons from the imminent danger of death or  
16 serious physical injury." (FAC ¶¶ 294-298 (citing C.F.R. § 287.8(a)(1)(ii), (iii))).

17 Plaintiffs then allege that Defendants' policy, pattern, and practice for use of force at  
18 protests of immigration operations violate 8 C.F.R. § 287.8(a) because they involve uses of force  
19 that exceed the authority granted under the regulation. (*Id.* ¶¶ 296, 298.) The FAC outlines several  
20 policies and practices that violate DHS's own regulations. (*Id.* ¶ 47.) And the FAC alleges that  
21 "this sustained pattern of misconduct is officially sanctioned and ratified," as "DHS officials'  
22 statements make clear[.]" (*Id.* ¶ 51; *see also id.* ¶ 46 (Director of the Less-Lethal Training Branch  
23 of the Law Enforcement Safety and Compliance Directorate of CBP said in a sworn statement that  
24 current CBP policy authorizes the alleged practices that violate 8 C.F.R. § 287.8(a)); ¶¶ 18-24, 301  
25 (approval of alleged policies, patterns, and practices by DHS officials with policymaking  
26 authority); ¶¶ 61-62, 64-66, 74-77, 82, 89 (statements made by several of those officials about  
27 sustaining DHS's violent conduct against protesters exercising their First Amendment rights); ¶¶

28

1 263, 271, 274 (class allegations outlining Defendants' policy and practice of violating First  
2 Amendment rights of reporters, legal observers, and protesters).)

3       Taking Plaintiffs' allegations as true, the FAC states a claim that as of June 2025,  
4 Defendants decided DHS will not follow its own rules at protests of its immigration operations; this  
5 is sufficient to allege a final agency action that implicates *Accardi. Torres v. United States Dep't of*  
6 *Homeland Sec.*, 411 F.Supp.3d 1036, 1069 (C.D. Cal. 2019). Plaintiffs' APA claim does not seek  
7 judicial review of general programmatic deficiencies. Nor do Plaintiffs seek improvement of  
8 generally deficient policies. Plaintiffs specifically challenge discrete final agency action that has  
9 promoted the use of excessive force against Plaintiffs. It is clear from the FAC allegations that  
10 Defendants' conduct is not merely a "constellation of disparate but equally suspect practices  
11 distilled from the varying experiences of the class," *McAleenan*, 394 F.Supp. 3d at 1207, but  
12 instead reflects official agency decisions "from which legal consequences will flow," *Hawkes*, 578  
13 U.S. at 597. (See FAC ¶¶ 42-44 (describing practical implementation of the alleged agency policies  
14 through DHS's command and operation structure).) Moreover, Defendants' policies have already  
15 imposed tangible legal consequences by violating the constitutional rights of Plaintiffs and Class  
16 members. (See, e.g., FAC ¶¶ 105-237, 256-274.) This is sufficient to state an APA claim,  
17 regardless of whether the violated procedure was a formal agency rule, or an informal internal  
18 agency policy. See *Alcaraz*, 384 F.3d at 1162 (observing that "courts have recognized that the so-  
19 called *Accardi* doctrine extends beyond formal regulations" and collecting cases).

20       **F. Plaintiffs Have Stated a Claim for Declaratory Relief**

21       The Declaratory Judgment Act permits "any court of the United States" to "declare the  
22 rights and other legal relations of any interested party seeking such declaration, whether or not  
23 further relief is or could be sought." 28 U.S.C. § 2201(a). For declaratory relief, "an actual case or  
24 controversy" as to the legal rights and duties of the parties must exist. *Principal Life Ins. Co. v.*  
25 *Robinson*, 394 F.3d 665, 669 (9th Cir. 2005) (citation omitted). When "an actual case or  
26 controversy exists," the next step is for "the court [to] decide whether to exercise its jurisdiction."  
27 *Id.; Gov't Emps. Ins. Co. v. Dizol*, 133 F.3d 1220, 1224 (9th Cir. 1998) (when constitutional and  
28 statutory jurisdictional prerequisites are met, the district court may entertain a declaratory action).

1 Defendants argue that Plaintiffs' claim should be dismissed because Plaintiffs lack standing.  
2 (Mot. at 16.) This argument should be rejected for all the reasons already stated. "If a plaintiff has  
3 standing to seek injunctive relief, the plaintiff also has standing to seek a declaratory judgment."  
4 *Clark v. City of Lakewood*, 259 F.3d 996, 1007 (9th Cir. 2001).

5 Defendants also appear to argue that even if it had jurisdiction, the Court should not  
6 exercise its discretion to issue declaratory relief. (Mot. at 16.) However, they articulate no basis for  
7 this argument. There are many live controversies between the parties that this Court can and should  
8 resolve and certainly should not dismiss out of hand at the pleading stage. For example, Plaintiffs  
9 allege that since June 2025, DHS has declared as a matter of policy that videorecording DHS  
10 officers in public is threatening conduct or "doxxing" that agents may appropriately respond to  
11 with force and address as crimes, FAC ¶ 93, while Plaintiffs contend this statement of policy  
12 contradicts the First Amendment. And as outlined in the FAC, Plaintiffs seek a declaration of their  
13 constitutional rights to be free from certain indiscriminate and unwarranted uses of crowd control  
14 weapons that Defendants continue to claim are legally permissible. (FAC ¶¶ 44-49, 287-290, 305.)  
15 Because Defendants continue to undertake actions pursuant to these unconstitutional policies,  
16 despite the resulting violations of Plaintiffs' and Class members' rights, there is an actual and  
17 ongoing controversy that exists. (*Id.* ¶ 306.) In sum, declaratory judgment is appropriate in this case  
18 because it will "serve a useful purpose in clarifying and settling the legal relations between the  
19 parties." *Los Angeles Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 703 (9th Cir. 1992).

20 **V. CONCLUSION**

21 For the foregoing reasons, Defendants' motion should be denied.

22  
23 Dated: November 13, 2025

Respectfully submitted,

24

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25

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Matthew Borden

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