THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LISA HOOPER, BRANDIE OSBORNE, KAYLA WILLIS, REAVY WASHINGTON, individually and on behalf of a class of similarly situated individuals; THE EPISCOPAL DIOCESE OF OLYMPIA; TRINITY PARISH OF SEATTLE; REAL CHANGE,

Plaintiffs,

vs.

CITY OF SEATTLE, WASHINGTON; WASHINGTON STATE DEPARTMENT OF TRANSPORTATION; ROGER MILLAR, SECRETARY OF TRANSPORTATION FOR WSDOT, in his official capacity,

Defendants.

No. 2:17-cv-00077-RSM

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR CERTIFICATION OF CLASS ACTION

NOTED ON MOTION CALENDAR: SEPTEMBER 7, 2017, 9:00 A.M.

ORAL ARGUMENT GRANTED

I. INTRODUCTION

Over the past two years, Defendants City of Seattle (the "City") and Washington State Department of Transportation ("WSDOT") have conducted more than 1,000 sweeps—seizing and/or destroying the belongings of unhoused individuals living outside without adequate notice, an opportunity to be heard, or a meaningful way to reclaim their belongings—in violation of the

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federal and state constitutions. As the extensive evidence submitted thus far demonstrates, this unlawful conduct is not random or isolated, but a pattern and practice that results in the permanent deprivation of property belonging to Plaintiffs and members of the proposed class. Defendants' sweeps continue to occur almost every day throughout the City, leaving all members of the proposed class at risk of losing critical belongings. And the City admits that at least 499 individuals—nearly a quarter of the estimated proposed class—have been subjected to one of Defendants' sweeps since Plaintiffs' filed for a TRO.[1]

Class certification is appropriate here under Rule 23(a) and 23(b)(2). First, it is undisputed that the proposed class, which encompasses more than 2,000 individuals and is only increasing, is so numerous that joinder of all members is impracticable. Second, the commonality requirement is met because members of the proposed class challenge an unconstitutional government policy that puts them all at serious and imminent risk of harm. *Parsons v. Ryan*, 754 F.3d 657, 678, 681 (9th Cir. 2014). Proposed class members also share multiple common questions of law and fact, including whether Defendants have taken and destroyed their property and whether this conduct violates the federal and state constitutions. *See also* Dkt. No. 5-1 at 11. Third, the named Plaintiffs' claims are typical of the proposed class and result from the same injurious conduct: Defendants' policy and practice of taking and destroying the personal property of unhoused individuals without notice, an opportunity to be heard, or a meaningful way to reclaim that property. Fourth, the named Plaintiffs are committed to this litigation, and understand their role as class representatives, the claims of the lawsuit, and possible outcomes of litigation, ensuring they will fairly and adequately protect the interests of the class. Fifth, class certification is

[1] *See* COS_100577–100585 attached at Exhibit 1 to the Decl. of B. Schuster. This number does not include individuals who have been affected but were not contacted by the Navigation Team.

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appropriate because final injunctive or declaratory relief is appropriate for the whole class. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360–361 (2011).[2]

Courts in multiple jurisdictions have certified similar classes of unhoused individuals. *See, e.g., Lyall v. City of Denver*, --- F.R.D. ----, No. 16-cv-2155-WJM-CBS, 2017 WL 2167031 (D. Colo. April 27, 2017) (certifying class of "[a]ll persons in the City and County of Denver whose personal belongings may be in the future taken or destroyed without due process on account of the City and County of Denver's alleged custom and practice."); *Lehr v. City of Sacramento*, 259 F.R.D. 479 (E.D. Cal. 2009) (certifying class of "all persons in the City . . . who were, are, or will be homeless at any time after August 2, 2005 and whose personal belongings have been taken and destroyed, or will be taken and destroyed, by one or more of the defendants."); *Kincaid v. City of Fresno*, 244 F.R.D. 497 (E.D. Cal. 2007) (certifying class of "all persons in the City . . . who were or are homeless, without residence, after October 17, 2003, and whose personal belongings have been unlawfully taken and destroyed during a sweep, raid, or clean up by any of the Defendants."); *Justin v. City of Los Angeles*, 2000 U.S. Dist. LEXIS 17881, at *1 (C.D. Cal. Dec. 5, 2000); *Pottinger v. City of Miami*, 720 F. Supp. 955, 960 (S.D. Fla. 1989); *Joyce v. City & Cty. Of San Francisco*, No. C-83-4149 DLJ, 1994 WL 443464 (N.D. Cal. Aug. 4, 1994).

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[2] WSDOT's suggestion that the court may only consider evidence presented in Plaintiffs' Motion when considering the issue of class certification is plainly incorrect. Dkt. No. 130 at 7. Courts regularly examine the "entire record" when assessing a motion for class certification—and this Court should not hesitate to do so here. *See, e.g., Mitchell v. Cate*, No. 2:08-CV-01196-TLN-EFB, 2015 WL 5920755, at *6 (E.D. Cal. Oct. 8, 2015); *Taylor v. Fedex Freight, Inc.*, 13-CV-1137-LJO-BAM, 2015 WL 2358248, at *1 (E.D. Cal. May 15, 2015), *report and recommendation adopted*, 1:13-CV-01137-LJO, 2015 WL 4557412 (E.D. Cal. July 27, 2015); *Le Beau v. Libbey-Owens Ford Co.*, No. 71 C 1902, 1975 WL 240, at *1 (N.D. Ill. May 15, 1975).

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II. AUTHORITY AND ARGUMENT

A. Defendants Have an Ongoing Policy and Practice of Unconstitutionally Seizing and Destroying the Property of Unhoused People Living Outside

The more than 40 declarations and 100 exhibits submitted by Plaintiffs thus far consistently tell the same story: Defendants regularly seize and destroy the property of unhoused individuals living outside without adequate and effective notice, an opportunity to be heard, or a meaningful way to reclaim any property not immediately destroyed. Defendants' sweeps occur throughout Seattle at any location where unhoused individuals reside on public property that is not one of the few "sanctioned" encampments. Defendants' acts subject thousands of unhoused individuals residing within the City to ongoing constitutional violations that cause lasting and irreparable physical, mental, and social harm. Defendants' acts constitute a policy and practice that is appropriate for resolution on a class-wide basis.

B. The Putative Class Presents Common Questions of Law and Fact

Although Plaintiffs need only point to a single common issue of fact *or* law, Plaintiffs have established numerous common issues of both fact and law that exceed the standard for commonality. *Dukes*, 564 U.S. at 359 ("[F]or purposes of Rule 23(a)(2) [e]ven a single [common] question will do."). *See* Dkt. No. 5-1 at 10–11 (listing common questions of law and fact among the class). For example, Plaintiffs all share the common fact that Defendants' policy and practice puts them at imminent risk of having their property seized and destroyed without an opportunity to recover it. *See Lehr*, 259 F.R.D. at 483 ("There is no question that the instant case presents common legal issues as to whether the City has taken and destroyed the property of homeless individuals."). Plaintiffs are additionally all subject to this seizure and destruction without adequate pre- or post-deprivation notice. *Kincaid*, 244 F.R.D. at 602 ("[C]ommon questions of fact and law arise from Defendants' alleged destruction of Plaintiffs' personal property without notice pursuant to the duly adopted and regularly established practice of the City."). Plaintiffs and

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members of the proposed class are also all unhoused individuals who live outside, and have erected their homes and store their belongings on public property. *See Pottinger*, 720 F. Supp. at 958 ("The status of plaintiffs as homeless is a fact common to the class."). It is because of their status as unhoused individuals residing on public property that members of the class are at risk of being permanently deprived of their property in violation of the federal and state constitutions.

Defendants' emphasis on minor factual differences among the named Plaintiffs is unavailing. The "existence of shared legal issues with divergent factual predicates is sufficient" to establish commonality. *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1041 (9th Cir. 2012); *see Dukes*, 564 U.S. at 359. Here, Plaintiffs and members of the proposed class share common legal issues, including whether Defendants' policy and practice violates Plaintiffs' rights (1) against unreasonable search and seizure under the U.S. constitution; (2) to privacy under the Washington State Constitution; (3) to due process under the U.S. Constitution; and (4) to due process under the Washington State Constitution.

Courts assessing similar arguments agree that differing circumstances surrounding individual sweeps does not defeat commonality. *See, e.g.*, *Lyall*, 2017 WL 2167031, at *3 (rejecting Defendants' argument that "every one of the alleged Sweeps took place under differing circumstances, at the direction of differing authorities, and for different reasons" defeated commonality); *Kincaid*, 244 F.R.D. at 602 ("Differences in the ways in which these practices affect individual members of the class do not undermine the finding of commonality."); *Pottinger* 720 F. Supp. at 958 ("The mere presence of factual differences will not defeat the maintenance of a class action if there are common questions of law.").

The City's reliance on *Anderson v. Portland*, No. 08-1447-AA, 2011 WL 6130598 (D. Or. Dec. 7, 2011), and *Smith v. Corvallis*, No. 6:14-cv-01382-MC, 2016 WL 3193190 (D. Or. Jun. 6, 2016), is misplaced. The *Corvallis* decision lends no support to Defendants' assertion because the

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court there provided no analysis of commonality. And the *Anderson* Court denied class certification because Plaintiffs challenged at least three different City ordinances and failed to articulate a "common contention" for the legal harm they allegedly suffered. *Anderson*, 2011 WL 6130598, at *6–7. In contrast to *Anderson*, the class representatives here have put forth a "common contention" violation of Fourth and Fourteenth Amendment and the state constitution corollaries through the loss of property each class representative has suffered. Resolution of the class representatives' common contention "will resolve an issue that is central to the validity of each one of the claims" and will prevent further deprivation loss of plaintiffs' property. *Dukes*, 564 U.S. at 350.

Defendants also distort Plaintiffs' definition of the class and available data. For example, Defendants argue that the proposed class is too broad because it encompasses individuals living in authorized encampments and vehicles. But individuals living in vehicles and authorized encampments are not members of the proposed class. Dkt. No. 5-1 at 1, 3–5.[3] Relatedly, relying upon one survey conducted of a small sampling of unhoused individuals, Defendants claim that only 41% of potential class members have been forced to relocate by sweeps. But this statistic is misleading and underestimates impacts on the proposed class because the referenced 41% figure is actually a tally of *all* "survey respondents," which includes hundreds of individuals who are not members of the proposed class and therefore would not be subject to Defendants' sweeps.[4] The

[3] Plaintiffs' definition excludes people who have "fixed, regular, or adequate shelter" and those who do not "keep their belongings outdoors" "on public property." Dkt. No. 5-1 at 1-2. It also excludes people living in vehicles. Dkt. No. 5-1 at 3-4.

[4] In fact, only approximately 23% of all survey respondents would likely be potential class members. According to the general findings of the survey, 41% of 1,002 respondents reported spending the prior night living outdoors. Only those who reported staying in a park and or another outdoor location like a sidewalk or public right of way would be potential class members. These groups constitute 56% of the City's 41%, or only 23% of the total survey. The report also suffers from other serious methodological flaws, including: the sample size for each of the surveys varies without explanation; the survey itself is not provided; and it does not appear to have been peer reviewed.

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critical inquiry, contrary to Defendants' argument, is whether members of the proposed class are *at risk* of being deprived of property—and the extensive evidence before this Court demonstrates that they are. *See Parsons*, 754 F.3d at 678.

The commonality that binds the proposed class members is clear. The proposed class includes unhoused people who have been deprived of their property, and those who are imminently at risk of deprivation without adequate notice, an opportunity to be heard, or a meaningful way to reclaim any property not destroyed, due to Defendants' unconstitutional practices. Far from acting to reduce the risk of unlawful deprivation, Defendants have made clear both in their pleadings before this Court and through their actions that they will continue to target the unhoused. In 2016 alone, Defendants conducted more than 600 sweeps; to date in 2017, they have conducted more than 160.[5] These sweeps have occurred at hundreds of locations throughout the City,[6] including nearly every location Plaintiffs have lived. Defendants' claims that the named Plaintiffs were subject to sweeps because they were residing in areas that posed "distinct public health and safety issues" ignores the more than 1,000 sweeps not involving named Plaintiffs since 2015 in hundreds of other locations.

C. The Individual Plaintiffs' Claims Are Typical of the Class

The typicality and adequacy requirements seek to ensure that the named plaintiffs' interests are aligned with other class members so that the claims of absent class members will be pursued with sufficient effort and ability. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n.20

[5] *See* Exhibits 2 and 3 attached to the Decl. of B. Schuster. When data provided by the City (COS_085038) is filtered by year, it shows 615 sweeps were conducted in 2016 and more than 160 in 2017. *See also* COS_064959 attached as Exhibit 4 to the Decl. of B. Schuster (email from Julie Moore to August Drake-Ericson and Chris Potter noting the City conducted "605 cleanups of unauthorized encampments" in 2016); COS_055223 attached as Exhibit 5 to the Decl. of B. Schuster (email exchange between City employees wherein Julie Moore notes that the City at one point was averaging 13 sweeps per week).

[6] *See* Exhibits 2 and 3 attached to the Decl. of B. Schuster. *See also A Year of Emergency*, Casey Jaywork, Seattle Weekly, *available at* http://www.seattleweekly.com/news/a-year-of-emergency/ (Nov. 2, 2016) (providing a map of sweeps conducted in late 2015 and 2016).

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(1997). Typicality does not require identical facts, claims, or damages; the claims need only arise from a similar course of conduct and share the same legal theory. *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116-18 (9th Cir. 2017); *Ault v. Walt Disney World Co.*, 692 F.3d 1212, 1216 (11th Cir. 2012); *Beck v. Maximus, Inc.*, 457 F.3d 291, 296 (3d Cir. 2006). The individual Plaintiffs' claims typify those of the class. Each of the Plaintiffs has suffered a loss of property because Defendants seized and/or destroyed it with inadequate pre- and post- deprivation notice. And their interests are perfectly aligned with those of the class because they seek to prevent Defendants' unconstitutional seizure and destruction of class members' property.

Defendants make much of minor factual differences in the named Plaintiffs' deprivations but such differences do not defeat typicality when the reasons for deprivations were the same: Defendants policy and practice of seizing and destroying property without adequate notice, an opportunity to be heard, or a meaningful way for individuals to reclaim property.

Defendants cannot deny the seizure and destruction of Plaintiffs' property and so instead blame Plaintiffs for their losses, claiming that Plaintiffs should have predicted when Defendants would confiscate and destroy their property, and that their failure to move before a sweep occurs distinguishes them from the rest of the class.[7] But Plaintiffs' inability to predict when and where Defendants' would conduct a sweep is not uncommon and it is a direct result of Defendants' persistent failure to provide constitutionally required notice. Even when "notice" is provided, it is often misleading, inaccurate, inconsistent, or ambiguous.[8]

[7] Dkt. No. 132 at 20–21.

[8] The City has also acknowledged numerous times that it cannot provide alternative shelter for all individuals living outside; yet continues to conduct constant sweeps throughout Seattle, leaving proposed class members with nowhere to move their belongings to. *See, e.g.*, COS_100577-100585, attached as Exhibit 1 to the Decl. of B. Schuster (noting on April 4, 2017, that there were only 26 alternative shelter spaces for potential class members).

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Defendants additionally attempt to discredit Plaintiffs' claims by focusing on wholly irrelevant aspects of Plaintiffs' personal histories. The genesis of Plaintiffs' complaints is not "personal issues with alternative shelter." Dkt. No. 132 at 20. Plaintiffs' complaints are rooted in their common and all too typical experience of being unlawfully deprived of the property on which they rely upon to survive and go about their daily lives. And the named Plaintiffs all remain at continued and imminent risk of further deprivation based on where they currently live: outside and on public property.

D. Plaintiffs will be adequate representatives of the class

Plaintiffs and their Counsel will fairly and adequately protect the interests of the class. Plaintiffs understand their role as class representatives and take it very seriously.[9] Plaintiffs also understand the claims and the possible outcomes of the litigation.[10] The City attempts to impugn the Plaintiffs' ability to represent the class with *ad hominum* attacks on their credibility, contending that purported discrepancies and variations in their testimony undermine their fitness as class representatives. The City functionally urges this Court to adopt a heightened standard of weighing credibility during the adequacy analysis based upon out-of-context quotes and mischaracterization of Plaintiffs' testimony.

For example, the City claims that Ms. Osborne describes a particular sweep in which it was vague where "notices" were posted while also testifying that notice stickers were placed on each tent in that location. Dkt. No. 132 at 23. But Ms. Osborne never testified that every tent received a sticker on that occasion; in fact she explicitly stated that she could not recall if there were stickers on tents, noted the inadequacy of the stickers as notice, and described how Defendants arrived

[9] *See, e.g.* Hooper Dep. at 87:3–88:9 (Schuster Decl. Exhibit 6); Osborne Dep. at 124:7–125:5, 131:13–15 (Schuster Decl. Exhibit 7); Washington Dep. at 29:17–30:8, 135:9–24 (Schuster Decl. Exhibit 8).

[10] *See, e.g.* Washington Dep. at 35:23–36:15, 135:9–24 (Schuster Decl. Exhibit 8); Osborne Dep. at 8:11–19 (Schuster Decl. Exhibit 7); Hooper Dep. at 58:11–14 (Schuster Decl. Exhibit 6).

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earlier and swept a different area than originally posted.[11] Similarly, the City argues that Mr. Washington provided contradictory testimony because he stated that the City told him items that did not fit in a bin would not get stored, yet ultimately stored a handful of larger items. Dkt. No. 132 at 24. Mr. Washington's wholly consistent testimony does nothing more than to point out Defendants' own bewildering policy and practices.[12]

When it comes to the facts that inform the basis of this lawsuit, Plaintiffs are consistent: each have suffered the loss of property at the hands of Defendants due to unreasonable seizures and destruction;[13] and each has been victim to Defendants' refusal to provide adequate notice.[14] That Plaintiffs did not express their concerns with the City's newly adopted rules within the process the City desired is not the standard for determining whether they would be adequate representatives. Each has—consistently and in their own words—explained why the Defendants' policies and practices violate their constitutional rights. Each is an adequate class representative.

E. Certification Is Appropriate Under Rule 23(b)(2) Because Final Injunctive Relief Would Adequately Address the Class as a Whole

Class certification is also appropriate here because the primary relief sought is declaratory or injunctive. *See Dukes*, 564 U.S. at 360–361. In fact, so many courts have enjoined similar policies

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[11] Osborne Dep. at 14:7–16:13 (Schuster Decl. Exhibit 7).

[12] The City additionally claims Mr. Washington admitted that only property the City refused to store was a community tent that was soiled and likely contaminated with feces. *See* Dkt. No. 132 at 24. This is patently false. Mr. Washington's testimony was that multiple workers for the City told him only items in bins would be stored, and refused to store many of Mr. Washington's items, including a brand new grill. Washington Dep. at 88:10–89:18. (Schuster Decl. Exhibit 8). Mr. Washington also states that the "[c]ommunity tent **didn't** have rat feces in it . . . ." Washington Dep. at 104:8–10. (Schuster Decl. Exhibit 8).

[13] *See e.g.* Osborne Dep. at 45:16–19, 57:19–58:25, 59:13–23, 63:7–15, 63:24–65:9, 89:23–90:6 (Schuster Decl. Exhibit 7); Washington Dep. 48:14–59:4, 115:20–116:9 (Schuster Decl. Exhibit 8); Hooper Dep. at 36:24–37:3, 40:24–41:6, 43:10–13 (Schuster Decl. Exhibit 6); Willis dep. at 10:9–13, 13:16–24, 20:20–23, 22:3–11 (Schuster Decl. Exhibit 9).

[14] *See e.g.* Osborne Dep. at 13:24–14:20, 38:25–39:8, 45:22–46:19, 74:2–14; 88:7–18 (Schuster Decl. Exhibit 7); Washington Dep. at 54:22–55:14, 123:5–14 (Schuster Decl. Exhibit 8); Hooper Dep. at 32:2–10, 58:14–24 (Schuster Decl. Exhibit 6); Willis Dep. at 17:23–18:6, 18:22–19:1, 22:19–21 (Schuster Decl. Exhibit 9).

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and practices for similar classes that it is beyond doubt that the questions at issue here can and should be resolved on a class-wide basis. *See, e.g., Lavan v. City of Los Angeles*, 693 F.3d 1022 (9th Cir. 2012); *Mitchell*, 2015 WL 5920755, at *6.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant this Motion and enter the attached order certifying the proposed class pursuant to Rule 23(b)(2); appoint Lisa Hooper, Brandie Osborne, Kayla Willis, and Reavy Washington as class representatives; and appoint the American Civil Liberties Union of Washington Foundation and Corr Cronin Michelson Baumgardner Fogg & Moore LLP as class counsel.

DATED this 21st day of July, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on **July 21, 2017**, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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