No. 17-80214

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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-Petitioners,

v.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
CASE NO. C17-77RSM
The Honorable Ricardo S. Martinez, United States District Court Judge

REPLY BRIEF IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL FROM ORDER DENYING CLASS CERTIFICATION

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I. INTRODUCTION

Defendants may feel "entitled to have this dispute finally resolved," but at issue before this Court is not whether Defendants are likely to prevail on a future motion for summary judgment, nor whether Plaintiffs are likely to prevail on the merits of their claims. Rather, Plaintiffs have petitioned this Court to review the District Court's denial of class certification. Here, where Plaintiffs need not demonstrate that the District Court's denial of class certification is the "death knell" for their claims; where the District Court committed manifest errors early in the proceedings on purely legal issues; and where Plaintiffs should not have been forced functionally to prove the merits of their case in order to receive class certification, 23(f) review is more than appropriate. Defendants do not cite to a single Ninth Circuit case that supports denial of review in these or similar circumstances.

II. DEFENDANTS MISCONSTRUE THE PURPOSE AND SCOPE OF RULE 23(F) REVIEW

Defendants' opposition mangles the criteria that are set forth for interlocutory review under Rule 23(f). Defendants also mistakenly argue that Plaintiffs waived their argument below and mischaracterize the unsettled question and manifest errors at issue.

A. A Death Knell is Not Required For Interlocutory Review

Defendants improperly suggest that Plaintiffs must show that the District Court's decision signals the death knell for this case. Dkt. 8-1 (Opposition) at 7–9. But Plaintiffs need not meet every potential criteria that this Court has set forth for interlocutory review to be appropriate. In fact, the drafters of Rule 23(f) identified a "decision [that] turns on a novel or unsettled question of law" as a separate circumstance from a decision that "sounds the death knell of the litigation." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 957 (9th Cir. 2005). Review is also warranted "when the district court's decision is manifestly erroneous—even absent a showing of another factor." *Id.* at 959.

Neither must Plaintiffs even demonstrate that any particular criteria is met: this Court can grant interlocutory appeal "on the basis of any consideration [it] finds persuasive." Fed. R. Civ. P. 23(f), Advisory Committee Notes to 1998 Amendments, Subdivision (f). As this Court noted, the categories enumerated in *Chamberlan* are merely guidelines, do not constitute an exhaustive list of factors, and are not intended to circumscribe this Court's broad discretion. *Chamberlan*, 402 F.3d at 960.

Here, interlocutory review is appropriate, especially given the District Court's manifest error in applying the "significant proof" standard and more

stringent commonality, typicality, and adequacy of representation standards than Fed. R. Civ. P. 23(a)(2–4) require. Plaintiffs need not establish a death knell.

B. Rule 23(f) Review is Both Timely and Appropriate

Defendants make the peculiar argument that Plaintiffs have somehow waived their right to bring this petition because they did not previously challenge the District Court's use of the "significant proof" standard. Opp. at 10-11. This argument, too, entirely misses the purpose of interlocutory review pursuant to Fed. R. Civ. P. 23(f), which includes allowing correction of errors of law at the trial court level. *Chamberlan*, 402 F.3d at 959 ("the kind of error most likely to warrant interlocutory review will be one of law"). Plaintiffs never argued that the "significant proof" standard was the correct law applicable to this issue; rather, Plaintiffs repeatedly cited the commonality standard this Court articulated in *Parsons*. Dkt. 159 at 2, 7. Plaintiffs could not possibly have foreseen that the District Court would commit manifest error in applying such an improper standard and timely filed this very petition as soon as it did.[1] Moreover, Plaintiffs have consistently maintained that this Court's acknowledgment in *Parsons* of the "significant proof" issue should be resolved in their favor in light of the standards for commonality articulated by this Court for this type of case. Dkt. 1-2 (Petition).

[1] In support of their "waiver" notion, Defendants cite to *Conservation N.W. v. Sherman*, 715 F.3d 1181, 1188 (9th Cir. 2013) and *Handa v. Clark*, 401 F.3d 1129, 1131 (9th Cir. 2005). Critically, neither of these cases was about Rule 23(f).

Defendants further argue that Rule 23(f) requires that the District Court's decision evade end-of-case review and that this Court should wait for a ruling on a hypothetical motion for summary judgment. Opp. at 7–9. But the very purpose of Rule 23(f) is to provide early review of unsettled questions of law and to remedy manifest errors: it furnishes "an avenue, if the need is sufficiently acute, whereby the court of appeals can take earlier-than-usual cognizance of important, unsettled legal questions, thus contributing to both the orderly progress of complex litigation and the orderly development of law." *Chamberlan*, 402 F.3d at 958 (quotation marks and citation omitted). And errors of law, such as the legal standard at issue here, are "more obvious and susceptible to review at an early stage than an error that must be evaluated based on a well[-]developed factual record." *Chamberlan*, 402 F.3d at 959 (citation omitted).

Defendants also argue that Plaintiffs cannot both characterize a legal issue as unsettled and also receive a Rule 23(f) appeal based on manifest error. Opp. at 11. But Plaintiffs urge simply that the Court acknowledge the unsettled area of law and resolve it in Plaintiffs' favor to find manifest error—precisely the type of situation for which 23(f) review is appropriate, because it gives this Court the opportunity to guide the lower courts as to the applicable legal framework. *Chamberlan*, 402 F.3d at 962 (noting that a class certification order is manifestly erroneous if "the

district court applies an incorrect Rule 23 standard") (citation omitted); *Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138, 145 (4th Cir. 2001).

The criteria for Rule 23(f) review are mutually reinforcing, not mutually exclusive. Here, the confluence of multiple rationales compels appellate review—exactly the sort of special circumstances contemplated by the Rule's drafters and the case law. *See Chamberlan*, 402 F.3d at 957–60. The District Court's application of the "significant proof" standard to a classic Rule 23(b)(2) case challenging the constitutionality of state action presents an important legal question this Court should resolve. *See Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) (granting review where the district court's decision was "problematic" and "implies that important legal principles have evaded attention by appellate courts."). For the reasons stated in the Petition for Review, Plaintiffs urge the Court to resolve this issue in their favor.

III. DEFENDANTS MISREPRESENT THE SUBSTANTIVE LAW REGARDING CLASS CERTIFICATION

Defendants additionally misrepresent the substantive law regarding the requisite standards for class certification, as well as the evidence Plaintiffs presented in support of their motion, and again improperly focus on the merits of Plaintiffs' claims. Under the appropriate Rule 23 standards, the District Court's order presented a number of manifest errors.

A. Application of the "Significant Proof" Standard in Rule 23(b)(2) Cases is Legally and Manifestly Erroneous

Defendants concede that this Court refused to resolve a similar dispute concerning application of the "significant proof" standard in *Parsons*. Opp. at 13-14. Their assertion that the issue is nevertheless well-settled is thus bolstered only by an irrelevant string cite: it is undisputed that other courts have applied the significant proof standard—the question for this Court is the applicability of the standard in *this type of case*. *Parsons v. Ryan*, 754 F.3d 657, 684 n.29 (9th Cir. 2014). Defendants do not and cannot cite to a single Ninth Circuit opinion since *Parsons* that applies the significant proof standard to a Rule 23(b)(2) case challenging unconstitutional state action. In fact, Plaintiffs are not aware of a single other district court ruling on a homeless sweeps case with a similar proposed class since *Dukes* that has even mentioned a "significant proof" requirement. *See, e.g.*, *Lyall v. Denver*, 319 F.R.D. 558, 562–64 (D. Colo. 2017).

This Court should also reject Defendants' suggestion that *Dukes* undid all prior class certification jurisprudence, and that the entire opinion is controlling of every component of any post-*Dukes'* class seeking certification. Opp. at 11-14. Numerous circuit courts have distinguished cases from *Dukes*, including this Court in *Parsons*, which conducted an in-depth analysis of commonality and the application of *Dukes* to 23(b)(2) cases challenging unconstitutional government

policy and practice. *Parsons*, 754 F.3d at 674–85. In so doing, this Court also relied on pre-*Dukes* cases in its analysis of the commonality standard. *Id.*

Defendants also miss the point of *why* significant proof was required in *Dukes*, which turned on the *reason why* each class member was disfavored. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352 (2011). And because the defendants in *Dukes* did not centrally control the critical employment decisions at issue, there was no common answer. *Dukes*, 564 U.S. at 356. Here, however, individual inquiries probing Defendants' motivations for seizing and destroying property are both unnecessary and irrelevant. Defendants undoubtedly have centralized control of the decisions that allegedly give rise to Plaintiffs' injuries because they are solely responsible for their written policies and their practices.

Defendants dismiss the other manifest errors regarding typicality and adequacy of representation as "icing on the cake," arguing those claims failed because Plaintiffs did not provide the requisite proof of Defendants' policy and practice. Opp. at 18–19. No argument can make more clear the importance and impact of the District Court's manifest error in applying the significant proof standard.

B. Plaintiffs Submitted Sufficient Evidence For Class Certification Under the Correct Legal Framework

Defendants also misrepresent the evidence before the District Court, and Plaintiffs' claims, by suggesting that "Plaintiffs presented no reliable evidence

supporting their allegations of summary destruction of property without notice." Opp. at 15. Not only did Plaintiffs submit an abundance of evidence, but their claims do not exclusively hinge on Defendants' failure to provide notice. *See, e.g.*, Dkt. 87 at 48–49. For example, Plaintiffs' evidence repeatedly shows Defendants seizing and destroying property without a warrant, which directly supports Plaintiffs' claims that Defendants have a policy and practice that violates the Fourth Amendment of the U.S. Constitution, and Article I, Section 7 of the Washington State Constitution, regardless of what time of day the destruction occurred.

Defendants also mistake the type of inquiry into the merits that Rule 23 allows—erroneously suggesting that Plaintiffs must prove every element of each of their claims at the class certification stage. This is simply not the standard. *See, e.g.*, *Stockwell v. City and Cnty. of San Francisco*, 759 F.3d 1107, 1113–14 (9th Cir. 2014) ("We conclude that the district court erred in denying class certification because of its legal error of evaluating merits questions, rather than focusing on whether the questions presented, whether meritorious or not, were common to the members of the putative class. By doing so, the district court made an error of law and relied on improper factors, thereby abusing its discretion."); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011) ("Whether class members

could actually prevail on the merits of their claims" is not a proper inquiry in determining the preliminary question "whether common questions exist.").

Defendants even go so far as to repeatedly and incorrectly claim the District Court "ruled the City's policies are reasonable and lawful on their face." Opp. at 4, 16. But the District Court's ruling was plainly on class certification and a preliminary injunction. And, of course, a Rule 23(f) appeal is not about who will ultimately win the litigation, but "whether the district court correctly selected and applied Rule 23's criteria." *In re Wells Fargo Home Mortg. Overtime Pay Litig*., 571 F.3d 953, 956–57 (9th Cir. 2009) (quotation marks and citation omitted).

Here, like in numerous other cases in which certification was granted, Plaintiffs identified a number of specific policies and practices to which all members of the putative class are subject to, the constitutionality of each of which constitutes a common question. *See, e.g.*, *Parsons*, 754 F.3d at 678–9 (finding each of the 10 policies and practices identified to which all class members were exposed afforded "a distinct basis for conclusion that members of the putative class satisfy commonality"). This includes Defendants' written policies, which, unlike those in *Dukes*, contain (1) contain explicit provisions allowing the seizure and destruction of Plaintiffs' property, including without notice, (2) provide for expansive pre- and post-deprivation exemptions to providing notice, and (3) indisputably apply to all class members. *Dukes*, 564 U.S. at 353–54. Plaintiffs

simply need not prove their entire case at the class certification stage in order for a common question to exist. *See, e.g.*, *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016) (noting that whether there is a "common policy or practice of withholding information pertaining to H-2A jobs from job-seekers and current employees" will help to drive the resolution of the litigation for all class members); *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165–66 (9th Cir. 2014) (holding that "[p]roving at trial whether such informal or unofficial policies existed" would drive the resolution of class claims).

Because the District Court manifestly erred by applying improper Rule 23 standards, this Court should take interlocutory review.

IV. CONCLUSION

For the foregoing reasons, the petition for review should be granted.

Respectfully submitted this 16th day of November, 2017.

s/Breanne Schuster

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CERTIFICATE OF COMPLIANCE

I hereby certify that :

1. This brief complies with the type-volume limitation assuming the application of Fed. R. App. P. 32(a)(7)(B)(ii) to Fed. R. App. P. 5(c) compliant length of the original brief because this brief contains 2239 words, excluding the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (Times New Roman, size 14 font) using Microsoft Word 2016.

Dated this 16th day of November, 2017.

s/Breanne Schuster
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Counsel for Plaintiffs-Petitioners

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 16, 2017. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 16th day of November, 2017.

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