No. 18-35053

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-Appellants,**

v.

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

On Appeal from the United States District Court
for the Western District of Washington
The Honorable Ricardo S. Martinez
Case No. 2:17-cv-00077-RSM

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Contrary to Defendants' assertions, the question before this Court is not whether Defendants approach the homelessness crisis with compassion, whether Defendants can or should clear homeless encampments on public property, whether the encampments are dirty, or whether the manner in which Defendants conduct homeless "sweeps" is ultimately unconstitutional. The only question at issue is whether the district court abused its discretion in denying class certification of a class of approximately 2,000 unhoused people seeking solely prospective equitable relief in relation to Defendants' official policies and well-established practices of seizing and destroying homeless peoples' property. This Court should find the answer to that question is yes because Plaintiffs have satisfied all requirements for a Rule 23(b)(2) class.

Defendants' focus on the merits of Plaintiffs' claims—which Defendants are litigating as though Plaintiffs seek damages for previously destroyed property—is misplaced. This Court has repeatedly held that plaintiffs do not have to prove the merits of their claims at class certification. And the parties' active dispute over the legality of Defendants' policies and practices establishes precisely the type of common questions that this Court routinely finds warrant classwide adjudication. Plaintiffs' evidence of past injuries serves only to underscore Plaintiffs' standing to

pursue litigation challenging conduct and policies that continue to expose them to risk of future harm—a risk they share with all other unhoused people in Seattle.

Plaintiffs' claims satisfy the requirements of Rule 23(a) and (b)(2), and Plaintiffs respectfully request that the Court reverse the district court's denial of their motion for class certification.

II. ARGUMENT

A. Because the record shows several "common questions" are at issue, the district court abused its discretion in finding commonality unsatisfied.

Plaintiffs need only show there is "a single common question" of law or fact, and they are not required to prove that the common question can or will be resolved in their favor on the merits. *Parsons v. Ryan*, 754 F.3d 657, 675-76 & n.19 (9th Cir. 2014) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011)). In a civil rights case seeking prospective relief, plaintiffs satisfy commonality by identifying governmental policies and practices that affect all proposed class members, even if those policies and practices "may not affect every member . . . in exactly the same way . . . ." *Parsons*, 754 F.3d at 678-79, 688. The district court incorrectly resolved ultimate merits factual disputes at this early stage of the litigation to reject commonality. This deviation from the *Parsons* standard was an abuse of discretion.

1. Plaintiffs have identified paradigmatic common questions.

Plaintiffs have identified and defined at least four of Defendants' policies

and practices for carrying out homeless sweeps that affect all proposed class members, including: (1) Defendants' policy and practice of destroying wet property; (2) Defendants' policy and practice of authorizing the seizure of property without notice when an encampment is deemed a "hazard" or "obstruction," an exemption that is overused and encompasses most camps by definition, and thus includes the majority of sweeps; (3) Defendants' practice of destroying property without a warrant or an adequate opportunity to argue against the destruction as well as Defendants' use of a storage system that is so inadequate it amounts to permanent property deprivation; and (4) Defendants' practice of providing inadequate and confusing notice of sweeps that amounts to no notice at all.[1]

Plaintiffs provided the district court with substantial evidence to support their allegations that Defendants carry out these policies and practices in a manner that affects all class members, including Defendants' official policies—MDAR 17-

[1] Plaintiffs challenged each of these policies and practices before the district court, although they did not categorize them in the same way. *See* ER11 (recognizing that Plaintiffs' complaint "identifies several notice, storage, and storage-retrieval practices Defendants allegedly engage in"); *see also* ER4-6 (describing challenged policies and practices). Contrary to the City's assertion, Plaintiffs did not raise the City's destruction of property without a warrant for the first time on appeal. *See* ER12 (district court's recitation of the common questions posed in Plaintiffs' motion for class certification); ER1152, 1153, 1182. Nor, as WSDOT asserts, did Plaintiffs abandon this position in later briefing. Plaintiffs have consistently argued that Defendants' policies and practices violate article I, section 7 of the Washington State Constitution which generally protects people's homes and property from government seizure absent a warrant.

01 and FAS 17-01—which undisputedly exist and apply to all encampments where class members live. *See* Pls' Br. at 7-21. Plaintiffs' evidence consists of more than 40 declarations from Plaintiffs, class members, and other witnesses to sweeps, as well as over 100 exhibits, including photographs and videos of sweeps, and Defendants' own testimony and documents. *Id*. Plaintiffs' evidence is comparable to the evidence submitted by the plaintiffs in *Parsons*, which this Court found "far exceeded" the requirements for establishing commonality. 754 F.3d at 683.

Rather than deny the existence of these policies and practices, Defendants focus instead on justifying them as necessary and appropriate. Defendants contend that (1) "there can be no genuine dispute that Seattle's formal policy regarding wet items is facially lawful" and "the City avoids storing wet items only if they are 'soaking wet' and cannot be 'patted dry' or 'dried out during the course of the clean-up'" (City Br. at 37, 39); (2) "the City is restrained and careful when electing to conduct a clean-up on shortened notice, doing so only when necessary" (City Br. at 42) and "although some cleanups have had to be performed on a shorter timeframe without prior written notice, there are still measures taken to avoid loss of property" (WSDOT Br. at 18); (3) Defendants "provide more than adequate opportunity for campers to avoid losing their belongings" and no warrant is required (City. Br. at 44-45; WSDOT Br. at 16); and (4) Defendants have "taken reasonable steps to provide notice, both in advance of clean-ups and when

unclaimed items have been stored" (City Br. at 52; WSDOT Br. at 16-17).

In other words, Plaintiffs contend Defendants' policies and practices are unlawful while Defendants contend the opposite.[2] And it is that debate that creates the "common contention" that "is capable of classwide resolution" and "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. Plaintiffs do not have to prove that Defendants' policies and practices are unconstitutional to obtain class certification. "[A] common contention need not be one that 'will be answered, on the merits, in favor of the class.'" *Stockwell v. City & County of San Francisco*, 749 F.3d 1107, 1112 (9th Cir. 2014) (quoting *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 459 (2013)); *see also Parsons*, 754 F.3d at 676 n.19 (although bare allegations are insufficient, "this does not mean that the plaintiffs must show at the class certification stage that they will prevail on the merits").

2. Defendants improperly focus on disputing Plaintiffs' evidence and justifying past sweeps rather than the common questions.

Defendants' briefing, which focuses on disputing Plaintiffs' evidence and

[2] The City's argument that Plaintiffs have not facially challenged Defendants' policies or practices is irrelevant to class certification because Plaintiffs have shown that Defendants' conduct places all unhoused persons in Seattle at risk. Whether Defendants' policies and practices are facially invalid presents the straightforward common question of whether there is any set of circumstances in which they can constitutionally be applied. *See Tipton v. Univ. of Hawaii*, 15 F.3d 922, 925 (9th Cir. 1994).

justifying past sweeps, serves only to underscore their improper focus on the merits of Plaintiffs' claims instead of whether Plaintiffs have satisfied the "common contention" requirement. *See* City Br. at 3-17, 22-25, 36-52; WSDOT Br. at 13-19, 30-32; *cf.* Pls' Br. at 8-10 (providing evidence of City refusal to store wet items, City's destruction of wet items, and the frequent rain in Seattle).[3] The issue before this Court is whether the claims can be tried on a classwide basis, not whether Plaintiffs have amassed the proof necessary to establish the merits of those claims. This Court recently emphasized that "[f]or practical reasons, we have never equated a district court's 'rigorous analysis' at the class certification stage with conducting a mini-trial." *Sali v. Corona Reg'l Med. Ctr.*, 889 F.3d 623, 631 (9th Cir. 2018) (holding that evidence need not be admissible at class certification). Not only is a class certification order "preliminary" since it may be "altered or amended before final judgment," it is usually issued before discovery has concluded. *Id*. ("Notably, the evidence needed to prove a class's case often lies in a defendant's possession and may be obtained only through discovery."). As a result, "transforming a preliminary stage into an evidentiary shooting match inhibits an early determination of the best manner to conduct the action." *Id*.

In *Stockwell*, for example, the defendant and the district court critiqued the

[3] The City's argument that Plaintiffs misrepresent their policy and practice rests on a distinction between a policy and practice of destroying wet property from a policy and practice of destroying items that are not dry. City Br. at 39-40.

plaintiffs' evidence of classwide discrimination (a statistical study) as inadequate for several reasons. 749 F.3d at 1115. As this Court explained, "whatever the failings of the class's statistical analysis, they affect every class member's claims uniformly" and the class members' "claims rise and fall together." *Id*. The Court concluded that it did not need to approve of the plaintiffs' evidence or consider the merits of the defendant's defenses to find that "the officers are all challenging a single policy they contend has adversely affected them," satisfying commonality. *Id*. at 1116; *see also Jimenez v. Allstate Ins. Co*., 765 F.3d 1161, 1166 n.5 (9th Cir. 2014) ("Allstate argues that its formal policies which call for employees to be paid for all overtime worked are lawful, and that the alleged informal 'policy-to-violate-the-policy' does not exist. This argument is appropriately made at trial or at the summary judgment stage, as it goes to the merits of the plaintiffs' claim.").

The same is true in this case. That Plaintiffs may not be able to prove the ultimate merits of their claims at this early stage of the litigation is not a reason to deny class certification. Discovery is far from complete, as class certification briefing concluded a mere six months after Plaintiffs filed their initial complaint. *See* Dkt. Nos. 1 (complaint filed January 19, 2017) & 159 (class certification reply filed July 21, 2017). The hearing took place less than two months later. Dkt. No. 201 (hearing on September 7, 2017). And as in *Sali*, much of the relevant evidence is in Defendants' possession, a fact confirmed by the declarations and other

exhibits Defendants submitted in opposing Plaintiffs' class certification and preliminary injunction motions.

Defendants' focus on disputing Plaintiffs' evidence and justifying their past conduct also critically ignores that Plaintiffs seek only prospective injunctive relief, not monetary damages for injuries suffered during prior sweeps. As this Court has noted, "a proper understanding of the nature of the plaintiffs' claims clarifies the issue of commonality." *Parsons,* 754 F.3d at 678. In *Parsons,* the defendants mounted a similar challenge to commonality, contending the plaintiffs could not pursue their Eighth Amendment claims on a classwide basis because "healthcare and conditions-of-confinement claims are inherently case specific and turn on many individual inquiries." 754 F.3d at 675. The defendants' characterization of "the plaintiffs' claims as little more than an aggregation of many claims of individual mistreatment," this Court explained, "rests upon a misunderstanding of the plaintiffs' allegations," which focused not on the sufficiency of "the care provided on any particular occasion to any particular inmate (or group of inmates)" but rather on whether the "policies and practices of statewide and systemic application expose all inmates in ADC custody to a substantial risk of serious harm." *Id*. at 676.

Other courts have recognized that the factual disputes on which Defendants focus are not relevant to whether similar claims can be adjudicated on a classwide basis. As one court explained,

> Denver will receive an opportunity to put forward its evidence, at summary judgment and/or at trial. In that context, Denver may succeed in proving that all of the alleged Sweeps were different and that no homeless person's belongings were confiscated and discarded in an unconstitutional manner. But Plaintiffs claim to the contrary, and a number of them have submitted declarations attesting that they personally witnessed the conduct that they allege. The Court cannot resolve that dispute through class certification proceedings, but when it does resolve the dispute, there is more than a fair chance that the resolution will generate a common answer.

Lyall v. City of Denver, 319 F.R.D. 558, 562–63 (D. Colo. 2017); *see also Lehr v. City of Sacramento*, 259 F.R.D. 479, 483 (E.D. Cal. 2009) ("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. Thus, commonality exists because the evidentiary and legal arguments necessary to prosecute the instant claims are nearly identical as to all class members."); *Joyce v. City and County of San Francisco*, No. C-93-4149 DLJ, 1994 WL 443464, at *8 (N.D. Cal. Aug. 4, 1994) (explaining that "[t]hose factual differences distinguishing one plaintiff from another here—differences which form the genesis of the City's argument against commonality—are ultimately without meaningful effect" in the context of class certification).

3. The district court also improperly focused on resolving disputed merits issues and erred in requiring "significant proof" of common questions.

The district court below also improperly focused on resolving disputed factual issues. Plaintiffs' motion for class certification and motion for preliminary injunction were both before the trial court but have very different standards. In ruling on the injunction, the district court was required to evaluate Plaintiffs' likelihood of succeeding on the merits. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).[4] In ruling on class certification, however, the court was to consider the merits "to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen*, 568 U.S. at 466. This is because "[a] court, when asked to certify a class, is merely to decide a suitable method of adjudicating the case and should not 'turn class certification into a mini-trial' on the merits." *Edwards v. First Am. Corp.*, 798 F.3d 1172, 1178 (9th Cir. 2015) (citation omitted). Despite these different standards, the district court used the same critique of Plaintiffs' evidence—that

[4] Defendants suggest that the factual findings the district court made in ruling on Plaintiffs' motion for preliminary injunction are somehow binding because Plaintiffs have not appealed the decision, but a preliminary injunction ruling "leaves open the final determination of the merits of the case" because "decisions on preliminary injunctions are just that—preliminary—and must often be made hastily and on less than a full record." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dept. of Agriculture*, 499 F.3d 1108, 1114 (9th Cir. 2007) (citations omitted).

"[t]he declarations, photographs, and videos cited do not provide enough context for the Court to determine at which point in the City's multi-stage cleanup process the declarants observed the alleged destruction of property"—to determine both that Plaintiffs were not likely to succeed on the merits of their Fourth Amendment claim and that Plaintiffs failed to provide the "significant proof" it found was required to establish commonality. ER11, 13.[5]

This Court reversed a similar denial of class certification in *Alcantar v. Hobart Service*, where the district court found that commonality was not satisfied because the plaintiff had not proven the defendant had a company-wide policy requiring its technicians to use company vehicles for their commutes. 800 F.3d 1047, 1053 (9th Cir. 2015). This Court explained that the district court's insistence on proof of a company-wide policy "asks too much of [the plaintiff], who need only show that there is a common contention capable of classwide resolution—not that there is a common contention that 'will be answered, on the merits, in favor of the class.'" *Id*. (quoting *Amgen*, 568 U.S. at 459). By resolving "a question of fact" as to whether the policy applied to all class members, the district court "evaluated

[5] The district court also found that the common questions Plaintiffs identified in the motion for class certification they filed with their complaint, before any discovery had taken place, "merely ask whether Defendants' conduct violates the law." ER12. But Plaintiffs reframed the common questions in their reply brief to focus on the policies and practices established by the evidence as it developed. ER542, 545.

the merits rather than focusing on whether the questions presented—meritorious or not—were common to the class." *Id*. If the plaintiff ultimately could not prove his claim, "that determination would not amount to 'some fatal dissimilarity' among class members that would make use of the class action device inefficient or unfair" but would "generate 'a fatal similarity—failure of proof as to an element of the plaintiff's [claim].'" *Id*. (citations omitted) (alteration in original).

The district court also erred by requiring "significant proof" to establish commonality.[6] As Plaintiffs discussed in their opening brief, the Supreme Court has used the "significant proof" standard only in Title VII employment discrimination cases challenging discretionary practices. *See* Pls' Br. at 31-34. In those cases, significant proof of a general policy of discrimination serves as the "glue" that connects "the alleged reasons" for the class members' adverse employment decisions. *Dukes*, 564 U.S. at 352. The heightened "significant proof" standard has no place in a civil rights case like this one that challenges governmental policies and practices that affect all class members. *See, e.g.*, *Parsons*, 754 F.3d at 681 (distinguishing *Dukes* because, among other things, the

[6] WSDOT argues that Plaintiffs should not be permitted to challenge the standard of proof the district court used to evaluate commonality because they did not address it in their briefing before the district court. That Plaintiffs did not directly respond to Defendants' single reference to the standard in the briefing below (SER1392) does not preclude them from addressing the standard now that the district court has used it as a basis for denying class certification. (WSDOT cites SER1472 and 1488 but there is no reference to "significant proof" on those pages.)

claims focus on prospective relief for statewide practices rather than "the varied reasons for millions of decisions made in the past").

Even the City recognizes that this Court has not required significant proof of commonality in a case like this one, arguing the Court should adopt a preponderance of the evidence standard. City Br. at 54-55.[7] Defendants urge yet another incorrect standard for the first time on appeal, suggesting that Plaintiffs must prove that the policies and practices they identified are "arguably unlawful." *See, e.g.*, City Br. at 1, 2, 28, 29, 31, 33, 34, 38, 39, 41, 52, 61; *see also* WSDOT Br. at 22, 27, 56. This purported "standard" is contrary to well-established precedent holding that plaintiffs do not have to prove the merits of their claims at class certification. *See Amgen*, 568 U.S. at 459; *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1122 (9th Cir. 2017) ("Plaintiffs' position in this regard may or may not prevail, but that is a merits question not appropriately addressed at the class certification stage."); *Stockwell*, 749 F.3d at 1112. The City relies on *Parsons* for support, but there the Court held that plaintiffs must demonstrate common policies or practices, not show that the policies or practices are in fact (or even "arguably")

[7] In making this argument, Defendants assert that Plaintiffs must prove at class certification "the same facts" they will have to prove at trial on the "underlying claims." City Br. at 53-54. But as previously explained, Plaintiffs are not required to establish the merits of their claims unless the merits "are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen*, 568 U.S. at 466-67. Defendants fail to demonstrate that a single element of Rule 23(a) turns on a resolution of the merits of Plaintiffs' claims.

unlawful. 754 F.3d at 683-84 & n.28; *see also id*. at 676 n.19 (citing cases explaining that plaintiffs do not have to prove the merits of their claims at class certification).

Since Plaintiffs identified "common contentions" – the policies and practices that Defendants use in carrying out the sweeps that Plaintiffs contend are unconstitutional – and Defendants do not deny the existence of those policies and practices, under any applicable standard commonality was shown. Plaintiffs have demonstrated there is at least one significant common issue of law or fact that will "generate common answers apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350.

B. The district court erred in finding typicality unsatisfied.

Plaintiffs have established that (1) Defendants' policies and practices apply to all unhoused people in Seattle who live outside on public property; (2) Plaintiffs are unhoused people in Seattle who live outside on public property; and (3) Defendants' policies and practices have inflicted similar injuries on Plaintiffs in the past as the injuries they now seek to prevent in the future. It was therefore error for the district court to conclude that Plaintiffs are unable to establish typicality because "they have failed to demonstrate their risk of injury and the proposed class's risk of injury derives from the same, injurious course of conduct." ER14.

Plaintiffs' past injuries need not be identical to class members' past injuries to satisfy typicality, particularly when Plaintiffs seek only prospective equitable relief. As this Court explained in *Parsons*, "[i]t does not matter that the named plaintiffs may have in the past suffered varying injuries" because they need not "be identically positioned to each other or to every class member." 754 F.3d at 686. What matters is that Plaintiffs "raise similar constitutionally-based arguments and are alleged victims of the same practice[s]" Defendants use in carrying out the sweeps. *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010); *see also Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 734 (9th Cir. 2007) ("In determining whether typicality is met, the focus should be on the defendants' conduct and plaintiff's legal theory, not the injury caused to the plaintiff." (citation omitted)).

The district court also erred in rejecting typicality on the grounds that Plaintiffs are "expose[d]" to unique defenses because they "implicitly acknowledge" they received sufficient notice from Defendants and testified they "have never or would never accept Defendants' offers to store their property." ER14-15. Because Plaintiffs are challenging widespread policies and practices that affect all unhoused individuals in Seattle, the specific circumstances of Plaintiffs' experiences of certain past sweeps do not make them atypical of the class. A pattern or practice is a *usual* course of conduct, and the fact that Defendants may have occasionally deviated from that course does not defeat certification. *See*

Parsons, 754 F.3d at 685 ("[T]ypicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." (citation omitted)).

Moreover, there is nothing unique about Plaintiffs' testimony about the "notice" they received of past sweeps. Plaintiffs have never testified that they received constitutionally adequate notice, and none of the testimony Defendants cite supports their argument that Plaintiffs concede this issue. Demonstrating typicality, Plaintiffs allege that Defendants routinely provide misleading, inaccurate, or insufficient information in their notices and cite several examples in support. *See* Pls' Br. at 19-20, 42. In fact, Ms. Osborne's testimony (including in the deposition excerpt cited by Defendants) is wholly consistent with Plaintiffs' theory: not only did she explain that the 72 hours "postings" are unreliable because Defendants provide conflicting oral notice and show up on different days than the written posting, but she recounted a specific incident when Defendants posted notices in one area saying that "they would come in … no less than 72 hours" but "they never came" and then, two days after the 72 hours had passed, "somebody showed up . . . [and] did a cleanup of another area but not the area that was originally posted." SER976-977. The other named Plaintiffs also consistently testified to similar deficiencies in notice. ER1241-1242 ¶¶ 9-11; ER1411-1412

¶¶ 4-6. The record shows that Plaintiffs were typical "alleged victims" of Defendants' practices as to notice, satisfying this Court's precedent on typicality.

There is also nothing "unique" about Plaintiffs' testimony regarding Defendants' storage practices. Instead of testifying they would never accept storage as the City contends, Ms. Osborne and Ms. Hooper merely explained they have not affirmatively asked Defendants to store their belongings given how much was lost in past sweeps and their disbelief that Defendants would actually preserve the items. SER1449-51 (Ms. Hooper testifying that she hasn't asked WSDOT for help to store her items because she has "lost too much over the years [in past sweeps]. If I can't hold onto it, I'm going to let it go to the garbage."); SER1463, SER1467-68 (Ms. Osborne testifying that she never asked anyone to store her belongings because "[i]t was an unheard of thing. Why would they want to store your stuff? … I don't believe it to be true."). Defendants also neglect to address Plaintiff Washington's testimony about Defendants' refusal to store many of his belongings and his inability to get back some of the items Defendants allegedly did store. *See* ER0562-0563 ¶¶ 26-27; ER0396-0397 ¶¶ 1-6. This skepticism about Defendants' storage practices is not unique to Plaintiffs, as Defendants' own records show that very few people have been able to reclaim their belongings. ER0965-0969 (only 2 people successfully retrieved property in 2017); ER0402, ER0412 (fewer than 12 people successfully retrieved property since 2016); *see*

also ER1263-1271; ER0837-0838; ER0907. Moreover, the testimony from Ms. Willis's deposition that Defendants and the district court cite referenced only her decision not to store her tent "because we're going to be putting our tent with us, we don't need anywhere to store it." SER1432. It's also unclear from her testimony whether the offer to store her tent even came from Defendants. The record establishes the Plaintiffs raised "typical" claims as to storage.

Even if the evidence showed Plaintiffs received perfect notice of every sweep or would refuse Defendants' offers of storage under all circumstances, it is well established that "[d]efenses unique to a class representative counsel against class certification only where they 'threaten to become the focus of the litigation.'" *Rodriquez*, 591 F.3d at 1124 (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). The district court found only that Plaintiffs are "expose[d]" to unique defenses, not that those defenses "threaten to become the focus of the litigation." *Id*. Because Plaintiffs' claims challenge the constitutionality of Defendants' common policies and practices and they seek prospective relief rather than damages for injuries arising from past sweeps, there is no risk of their testimony about isolated instances of some form of prior notice and skepticism of Defendants' storage practices becoming the focus of the litigation. This is particularly true when one of the primary challenges is to Defendants' policy and

practice of seizing property without notice when an encampment is deemed a "hazard" or "obstruction."

C. The district court abused its discretion in finding adequacy unsatisfied.

The district court found that adequacy was not satisfied because commonality and typicality were not satisfied. The court cited its finding that Plaintiffs had not shown they were subject to the same policies and practices as other class members but as discussed above, this finding conflicts with this Court's well-established precedent governing commonality and fails to recognize the nature of Plaintiffs' prospective claims for relief.

The district court also found two of the three Plaintiffs to be inadequate representatives of the proposed class because they testified that they want Defendants to stop the sweeps. The court improperly heightened the adequacy inquiry by requiring legally unsophisticated individuals to understand the nuances of the scope of their legal claims. It is also not unexpected that Plaintiffs, and likely many other class members, would personally prefer that Defendants stop the sweeps altogether, and that they have expressed those views on occasion. But Plaintiffs did not file this lawsuit to halt the sweeps, and that is not the relief they seek. Instead, Plaintiffs are asking for relief similar to the injunction issued in *Lavan v. City of Los Angeles*, 797 F. Supp. 2d 1005, 1020 (C.D. Cal. 2011), *aff'd*,

693 F.3d 1022 (9th Cir. 2012). *See* SER1506-08 (Plaintiffs' proposed order granting motion for preliminary injunction).

Neither Defendants nor the district court have ever explained how Plaintiffs' personal desire to be free of the sweeps conflicts with the interests of other class members in a way that makes then inadequate class representatives. And this Court has said that it does not "favor denial of class certification on the basis of speculative conflicts." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 942 (9th Cir. 2015) (citation omitted). That Plaintiffs and their counsel chose not to work with the City on updating the MDARs is not only a speculative conflict but irrelevant to adequacy when the claims in the lawsuit are limited to challenging the constitutionality of Defendants' existing policies and practices.

Even if Plaintiffs' statements did reflect a conflict with the class, "[a] difference of opinion about the propriety of the specific relief sought in a class action among potential class members is not sufficient to defeat certification." *Californians for Disability Rights, Inc. v. Cal. Dep't. of Transp.*, 249 F.R.D. 334, 348 (N.D. Cal. 2008); *cf. Probe v. State Teachers' Ret. Sys.*, 780 F.2d 776, 781 (9th Cir. 1986) ("if the state plan is found to violate Title VII, it will be invalidated notwithstanding the fact that there may be some who would prefer that it remain in operation"). And as the district court noted, only two of the four individual Plaintiffs expressed a personal belief that the sweeps should cease altogether.

ER15; *see also Sali*, 889 F.3d at 634 ("Nevertheless, because Plaintiff Sali remains as an adequate class representative, [Plaintiff] Sprigg's inadequacy is not a basis to deny class certification."). Precedent supports adequacy rather than defeating it.

D. Plaintiffs' claims satisfy Rule 23(b)(2).

The district court did not address Rule 23(b)(2) in its certification order. Nonetheless, WSDOT argues that Plaintiffs cannot satisfy (b)(2) because "Plaintiffs failed to establish a specific potentially unconstitutional practice that affects all putative class members which could be remedied by an injunction." WSDOT Br. at 56. This assertion is erroneous. Plaintiffs have, in fact, identified common policies and practices that they maintain are unconstitutional and that Defendants contend are constitutional. While Plaintiffs do not have to show they qualify for a permanent injunction to obtain certification under Rule 23(b)(2), *see Kincaid v. City of Fresno*, 244 F.R.D. 596, 605 (E.D. Cal. 2007), they have proposed preliminary injunctive relief that would address these unconstitutional policies and practices. *See* SER1506-08. Numerous courts have granted similar relief and approved settlements in cases challenging similar policies and practices. *See Lavan*, 693 F.3d at 1033; *Cooper v. Gray*, No. 12-208 TUC DCB, 2015 WL 13119400, at *9 (D. Ariz. Feb. 13, 2015); *Russell v. City & County of Honolulu*, No. 13-00475 LEK, 2013 WL 6222714, at *18 (D. Haw. Nov. 29, 2013); *Kincaid v. City of Fresno*, No. 1:06-CV-1445 OWW SMS, 2006 WL 3542732, at *41-42

(E.D. Cal. Dec. 8, 2006), *Johnson v. Bd. of Police Comm'rs*, 351 F. Supp. 2d 929, 953-54 (E.D. Mo. 2005); *Justin v. City of Los Angeles*, No. CV0012352LGBAIJX, 2000 WL 1808426, at *13 (C.D. Cal. Dec. 5, 2000); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1584 (S.D. Fla. 1992); *Engle v. Municipality of Anchorage*, No. 3AN-10-7047 CI, 2011 WL 8997466 (Sup. Ct. Alaska Jan. 4, 2011).

Defendants argue that individualized determinations often preclude class certification in cases involving unreasonable seizures and due process violations, but Defendants rely on cases in which plaintiffs sought damages for past conduct. *See Portis v. City of Chicago*, 613 F.3d 702, 705 (7th Cir. 2010) (reversing (b)(3) certification of class of individuals who sought damages for being retained more than two hours post-arrest once administrative processing was complete);[8] *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 985-87 (9th Cir. 1998) (individual plaintiff sought damages for alleged due process violation in reduction of his salary); *Roy v. County of Los Angeles*, Nos. CV 12-09012, 13-04416, 2016 WL 5219468, at *17-20 (C.D. Cal. 2016) (denying (b)(3) certification of class of individuals who sought damages after being detained by ICE); *see also Mathews v. Eldridge*, 424 U.S. 319, 324 (1976) (individual plaintiff alleging due

[8] The district court certified a Rule 23(b)(3) class of persons who were arrested for violations without jail time and detained for more than two hours after the administrative steps incident to the arrests were completed. *Portis v. City of Chicago*, No. 02 C 3139, 2003 WL 22078279, at *4 (N.D. Ill. Sept. 8, 2003).

process violation in administrative procedures assessing whether he had a continuing disability sought injunctive relief reinstating his disability benefits). Notably, in *Roy* the court granted certification under Rule 23(b)(2) of classes seeking only injunctive relief. 2016 WL 5219468, at *16-17, 21.[9]

This Court has rejected arguments similar to Defendants' in certifying classes under Rule 23(b)(2). In *Walters v. Reno,* for example, the Court affirmed injunctive relief addressing a due process violation as well as certification of the class under Rule 23(b)(2). 145 F.3d 1032, 1046-1053 (9th Cir. 1998). The Court dismissed the government's contention that factual differences among the class members' individual circumstances precluded class certification:

> We note that with respect to 23(b)(2) in particular, the government's dogged focus on the factual differences among the class members appears to demonstrate a fundamental misunderstanding of the rule. Although common issues must predominate for class certification under Rule 23(b)(3), no such requirement exists under 23(b)(2). It is sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole.

Id. at 1047.

[9] In *Jennings v. Rodriguez*, the Supreme Court instructed this Court to consider whether certification was still appropriate given the Court's recognition that "some members of the certified class might not be entitled to bond hearings as a constitutional matter" and thus would not benefit from the requested injunctive relief. 138 S. Ct. 830, 851-52 (2018). That is not an issue in this case, as the relief Plaintiffs seek would require Defendants to modify or terminate *their own* policies and practices (as opposed to taking actions that are specific to particular members of the class). Such comprehensive relief will benefit all unhoused persons in Seattle who live outside and keep their personal possessions on public property.

That some discretion may ultimately be involved in carrying out Defendants' general policies and practices for conducting homeless sweeps does not preclude a court from determining whether those policies and practices are constitutional or granting injunctive relief to ensure their constitutionality in the future. Indeed, this Court affirmed the district court's preliminary injunction in *Lavan*, which granted the City of Los Angeles "great leeway … to protect public health and safety" by "merely prevent[ing] the City from *unlawfully* seizing and destroying personal property that is not abandoned without providing any meaningful notice and opportunity to be heard." 693 F.3d at 1024 (citation omitted); *cf. Martin v. City of Boise*, No. 15-35845, 2018 WL 4201159, at *13 (9th Cir. Sept. 4, 2018) (holding that "as long as there is no option of sleeping indoors, the government cannot criminalize the indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter" but "in no way dictat[ing] to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets … at any time and at any place" (citation omitted)).

III. CONCLUSION

The district court held Plaintiffs to a far higher standard on class certification than this Court has ever required. The parties dispute whether certain of Defendants' policies and practices in conducting homeless sweeps are

constitutional, and such a dispute presents paradigmatic common questions for classwide resolution. The four individuals who have stepped forward to lead this class action assert claims that are typical of the other members of the proposed class and they are adequate representatives of the class's interests. Plaintiffs request that the Court reverse the district court's denial of class certification.

RESPECTFULLY SUBMITTED AND DATED this 24th day of September, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,095 words, excluding the portions of the brief exempted by Fed. R. App. P. 32(f); 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 2010.

DATED this DATED this 24th day of September, 2018.

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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 September 24, 2018. 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 24th day of September, 2018.

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