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

BRIEF OF PLAINTIFFS-APPELLANTS

Emily Chiang
Nancy Talner
Breanne Schuster
ACLU of Washington Foundation
901 5th Avenue, Suite 630
Seattle, Washington 98164
Telephone: (206) 624-2184

Attorneys for Plaintiffs-Appellants

Toby J. Marshall
TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603

Eric A. Lindberg
Kristina Markosova
Todd T. Williams
CORR CRONIN MICHELSON
BAUMGARDNER FOGG & MOORE
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154
Telephone: (206) 625-8600

Cooperating Attorneys for ACLU-WA

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Plaintiff-Appellant Real Change is a non-profit entity with no entity owning ten percent (10%) or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Plaintiff-Appellant the Episcopal Diocese of Olympia is a nonprofit unincorporated association, has no shares, and no entity has any ownership in it.

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Plaintiff-Appellant Trinity Parish of Seattle is a Washington nonprofit corporation, has no shares, and no entity has any ownership in it.

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Plaintiffs – Appellants Lisa Hooper, Brandie Osborne, Kayla Willis, and Reavy Washington are individuals with no corporate affiliations.

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

STATE CASES

FEDERAL STATUTES

FEDERAL RULES

OTHER AUTHORITIES

I. SUMMARY OF ARGUMENT / INTRODUCTION

Defendants-Appellees ("Defendants"), the City of Seattle ("City") and Washington State Department of Transportation ("WSDOT"), operate a homeless "sweeps" program in the City of Seattle. The program—which is conducted pursuant to official policies and well-established practices—explicitly incorporates the seizure and destruction of personal property belonging to homeless people. Defendants have vociferously defended all aspects of the program, including the sanctioned destruction of all wet property and due process exemptions for the majority of sweeps they conduct. As a direct result of this program, all people living outside in Seattle are at risk of losing essential and irreplaceable property in violation of their federal and state constitutional rights. *Cf. Lavan v. City of Los Angeles*, 693 F.3d 1022 (9th Cir. 2012).

Plaintiffs-Appellants ("Plaintiffs") are four unhoused people in Seattle who live outside on public property and seek to represent a class of approximately 2,000 others who are similarly situated. They seek solely declaratory and injunctive relief to address the constitutional deficiencies in Defendants' program. In so doing, Plaintiffs have built an ample record, which is replete with evidence that Defendants' policies and practices subject class members to harm, including routine destruction of their property without notice or an opportunity to be heard. This evidence includes declarations from named Plaintiffs, class members, and

witnesses to sweeps; photographs and videos; and Defendant testimony and documents. Plaintiffs have demonstrated that Defendants pursue a common course of action towards the proposed class and have raised common legal questions as to the legality of that common course of action.

Plaintiffs' case is a classic (b)(2) class action, which "was added to Rule 23 . . . in part to make it clear that civil-rights suits for injunctive or declaratory relief can be brought as class actions." *Parsons v. Ryan*, 754 F.3d 657, 686 (9th Cir. 2014). The district court's denial of class certification was an abuse of discretion. First, the court improperly required Plaintiffs to provide "significant proof" of Defendants' practices, a requirement inapplicable here, where Plaintiffs challenge a structured government program regulated by official policies. And even if "significant proof" were required, the court misapplied the requirement by conflating it with a merits inquiry into Plaintiffs' claims while disregarding the overwhelming evidence of Defendants' policies and practices. Plaintiffs have posed common questions apt to drive the resolution of the litigation.

Second, the district court erred by requiring Plaintiffs to show identical facts and harms to satisfy typicality and misapplied the doctrine of unique defenses. Defendants do not contest that their sweeps program targets unhoused people living outside in Seattle. Plaintiffs and class members are all equally subject to Defendants' policies and practices and at equal risk of harm as a result. That some

Plaintiffs may have received some amount of (inadequate) notice for a sweep in the past, or that some Plaintiffs would refuse the (inadequate) storage offered by Defendants, does not defeat typicality. And Defendants' contentions that their notice and storage policies and practices are adequate are defenses far from unique to Plaintiffs.

Lastly, the district court abused its discretion in rejecting adequacy of representation—even though one named Plaintiff remained an adequate representative. It also heightened the adequacy inquiry both by prohibiting named Plaintiffs from expressing political beliefs that exceed (and yet are consistent with) the remedy sought in the litigation and by requiring legally unsophisticated plaintiffs to understand legal terms of art, like "notice." This aspect of the court's opinion is particularly troubling for the barriers it raises for the poor and vulnerable to access our court system. And surely participation in litigation cannot be conditioned on silence as to one's political opinions about the underlying government policy being challenged. Plaintiffs' expression of personal political beliefs is protected speech, wholly consistent with the class claims, and entirely reasonable given the suffering they have experienced. It is no barrier to their adequacy as class representatives.

For the reasons discussed below, the district court's rejection of class action status in this case violated this Court and U.S. Supreme Court authority. This Court should reverse.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

(1) Whether the district court abused its discretion when it required "significant proof" of Defendants' policies and practices, a requirement in Title VII employment discrimination cases, instead of finding commonality satisfied because Plaintiffs established that Defendants' allegedly unconstitutional policies and practices are generally applicable to class members;

(2) Whether the district court abused its discretion in finding that Plaintiffs did not "meet the evidentiary burden necessary to demonstrate commonality" when they provided the Court with substantial evidence of Defendants' policies and practices;

(3) Whether the district court abused its discretion in denying typicality when Plaintiffs and class members are all subject to the same policies and practices; and

(4) Whether the district court abused its discretion in denying adequacy when it acknowledged that one Plaintiff is an adequate representative and found that two Plaintiffs were inadequate simply because they testified they wanted to

"stop the sweeps" in this case seeking to stop Defendants from conducting sweeps unconstitutionally.

III. STATEMENT OF JURISDICTION

This Court granted Plaintiffs' 23(f) petition seeking review of the October 4, 2017 order of the district court for the Western District of Washington denying class certification. ER0002-0017. The district court has federal question jurisdiction under 28 U.S.C. § 1331 and supplemental jurisdiction under 28 U.S.C. § 1367(a). This Court has jurisdiction to consider Plaintiffs' appeal under 28 U.S.C. § 1292(e) and Federal Rule of Civil Procedure 23(f).

IV. STATEMENT OF THE CASE

A. Procedural Background.

Plaintiffs Lisa Hooper, Brandie Osborne, Kayla Willis, and Reavy Washington[1] are four unhoused people who live outside and store their belongings on public property in the City of Seattle. They seek to represent approximately 2,000 similarly situated Seattle residents and request solely injunctive and declaratory relief to remedy the constitutional deficiencies in Defendants' sweeps program. Defendants are the City of Seattle ("City"), Washington State

[1] Organizational Plaintiffs Real Change, Episcopal Diocese, and Trinity Parish of Seattle did not move to serve as class representatives.

Department of Transportation ("WSDOT"), and Roger Millar, Secretary of Transportation for WSDOT, who is sued in his official capacity.

Plaintiffs filed their Class Action Complaint for declaratory and injunctive relief on January 19, 2017, alleging violations of the Fourth and Fourteenth Amendments of the U.S. Constitution and Article I, Sections 3 and 7 of the Washington State Constitution. ER1497-1533. Plaintiffs simultaneously filed a motion requesting certification of a class of "all unhoused people who live outside within the City of Seattle, Washington and who keep their personal possessions on public property." ER1456-1472, ER 539-551. Additional Plaintiffs were added in Amended and Second Amended Complaints. ER1134-1185, ER1186-1236. Plaintiffs also filed motions for a temporary restraining order and preliminary injunction. ER1428-1453, ER1282-1296; ER1038-1074, ER0401-0420.

The district court heard Plaintiffs' motions for class certification and a preliminary injunction on September 7, 2017. It denied both motions on October 4, 2017, finding that Plaintiffs satisfied the numerosity requirement under Federal Rule of Civil Procedure 23(a)(1) but failed to satisfy the other Rule 23(a) requirements. ER0002-0035. The court did not examine whether Plaintiffs satisfied Rule 23(b)(2). Plaintiffs timely filed a Rule 23(f) petition on October 18, 2017, which this Court granted on January 23, 2018. Dkt. 1, Dkt. 12.

B. Facts in the Record.

The City and WSDOT run an official government program wherein they seize and destroy the property of people living outside in a process referred to as "sweeps" or "clean-ups" of homeless encampments. Defendants conduct hundreds of sweeps annually across the City. *See* ER0433 (indicating at least 499 people were subjected to a sweep between Feb. 20 and May 5, 2017); ER0436-0455; ER0456-0461; ER0462-0463; ER0464-0465; ER0545; ER0847-0848 (noting the City's goal to have 4 "events" each week); ER0372-0382 (showing a map of sweeps conducted in 2016 and 2017).

Property seizure and destruction pursuant to the sweeps program is governed by Defendants' official policies: the Multi-Departmental Administrative Rules ("MDAR 17-01") and Finance and Administrative Services Encampment Rules ("FAS 17-01"). ER0853-0860; ER0861-0877. These rules are amendments to the Multi-Departmental Administrative Rules 08-01 ("MDAR 08-01") from 2008.[2] ER1157, ¶ 97; ER1323. Both sets of rules state that their purpose is to "establish uniform rules and procedures for addressing encampments" on public property within the City of Seattle. ER0864; ER0854. MDAR 17-01 also states that it

[2] In 2008, WSDOT adopted "WSDOT's Guidelines to Address Illegal Encampments Within the State Right of Way." ER 1155, ¶ 87; ER 1340-1346. Those guidelines remain in effect, but because WSDOT states that it typically applies the City's rules (*see* ER 1301), Plaintiffs have focused on the City's rules.

establishes "standard procedures regarding removing from City property unauthorized structures, camping equipment, and other personal property." ER0864.

Plaintiffs challenge the constitutionality of specific provisions of these policies and Defendants' practices, including: (1) Defendants' policy and practice of destroying wet property; (2) Defendants' policy and practice of authorizing the seizure of property effectively anywhere in the City without notice; (3) Defendants' practice of destroying property without a warrant or an adequate opportunity to argue against the destruction; and (4) Defendants' practice of providing such inadequate, misleading, and confusing notice of the sweeps (to the extent notice is provided at all) that it amounts to no notice. Plaintiffs submitted substantial evidence to the district court demonstrating that each of these policies and practices exists and is generally applicable to all class members.

1. Defendants' policy and practice of destroying wet property.

Defendants' official policies provide for the immediate disposal of belongings that are "hazards," and "reasonably expected to become a hazard." The definition of "hazard" specifically includes items that are "wet," such as "blankets, clothing, sleeping bags and other items." ER0855; ER0866. This includes items that are exposed to rain. Plaintiffs submitted City employee testimony that they follow these policies by refusing to store wet items, which employees maintain

have "no value." ER0190, ER0194-0196, ER0198-0199; ER0213; *see also* Ex. 4 to District Court Dkt. 117[3] (voicemail from City employee explaining the City would not store wet items). Plaintiffs also submitted testimony from an Office of Civil Rights ("OCR") sweeps monitor who observed Defendants destroying wet property and raised concerns with the practice. ER0914, ER0916, ER0917-0918; *see also* ER0175. And Plaintiffs filed declarations from people who had been told the City cannot store wet items, *see* Ex. 4 to District Court Dkt. 117, ER0635-0636, ¶ 15, as well as people who witnessed Defendants destroy wet belongings. *See* ER0654-0656, ¶¶ 17, 22, 26; ER0635-0636, ¶¶ 15-16.

Plaintiffs submitted evidence that the policy authorizing destruction of wet property and the practice of refusing to store wet property affects all class members because of the frequency with which it rains in Seattle. There was evidence that it rained on nearly 70% of the days between October 2016 and March 2017, that the amount of rainfall in Seattle set a 122-year record, and that Seattle winters are only expected to get wetter. *See, e.g.*, ER1048. As one witness stated: "[T]he residents are living outside in Seattle—naturally many of their belongings, particularly their forms of shelter, are going to be wet." ER0687, ¶ 19. Another witness

[3] Ex. 4 to District Court Dkt. 117 is a recording sought to be filed in the pending Motion for Leave to Conventionally File Physical Evidence. All subsequent references to recordings that are the subject of the pending motion shall consist of citations to the exhibit number(s) and District Court docket number associated with each recording.

commented: "[I]t was raining on the day of the sweep and everyone's property was wet and therefore subject to being treated like trash and discarded by the City." ER0654-0656, ¶¶ 17, 22, 26. Another noted, "The result of this rule is that hundreds of wet items get left behind." ER0635, ¶ 15.

Plaintiff Washington testified that Defendants dismantle and tear apart homes, exposing everything inside to the rain and rendering it un-storable:

> As soon as the City cleared people from a part of the camp, it began knocking down and breaking apart tents, many of which were full of peoples' property. The City would knock out tent legs, snap poles, and use box cutters or knives—whatever it took to get the tent down. The City never asked about the owner of the tents—it just destroyed the tent and whatever was in it. The City then threw all of the tents and the property into big piles across the camp, and bulldozed everything. There was no opportunity for people to get their stuff back once it was heaped into a pile—it was immediately destroyed. And because it was raining, everything was immediately made wet and soiled.

ER0561, ¶ 22. Another witness stated: "It was particularly traumatic because it was raining and the Field is really muddy. They were just forming giant trash piles . . . At that point, your tent is slashed with a box cutter, making it unusable. It's in a trash pile with actual trash. It's wet, muddy." ER0715, ¶ 33.

Defendants did not deny that their policy contemplates the destruction of wet property or that their practice is not to store wet items.

2. Defendants' policy and practice of authorizing the seizure of property without notice when an encampment is deemed a "hazard" or "obstruction," which covers the majority of sweeps.

Defendants' official policies authorize the seizure or destruction of property without notice when an encampment is deemed a "hazard" or "obstruction." ER0855-0856; ER1050-1055; ER0403-0404. These are broad terms. A "hazard" is defined as "including but not limited to encampments at highway shoulders and off-ramps, areas exposed to moving vehicles, areas that can only be accessed by crossing driving lanes outside of a legal crosswalk, and landslide-prone areas," 0855-0856. An "obstruction" is defined as "tents, personal property, garbage, debris or other objects related to an encampment that are in a City park or on a public sidewalk; interfere with the pedestrian or transportation purposes of public rights-of-way; or interfere with areas that are necessary for or essential to the intended use of a public property or facility." *Id*.

Plaintiffs submitted a map that shows the vast majority of public property within the City falls within the definitions of "hazard" and "obstruction," which means Defendants can destroy property at those locations without notice. ER0669-0677. Several organizations have expressed concern about the breadth of Defendants' notice exemptions. *See* ER0158; ER0168; ER0164.

Defendants' own documentation shows that of the 44 sweeps conducted between February 22 and May 1 of 2017, 28 (more than 60%) involved "hazards"

or "obstructions." ER0965-0969; *see also* ER0430 (noting that hazards and obstruction related sweeps encompassed more than 55% of sweeps over this time period). Thus, Defendants carry out obstruction or hazard sweeps 2 to 3 times per week.

Evidence also shows Defendants regularly seize and destroy the property of class members without notice because the sites on which they were living were considered "obstructions" or "hazards." ER0720-0721, ¶ 4-11; ER0802-0803, ¶ 7-10; ER0730, ¶ 7-8; ER0965-0969. Defendants classified a number of sites as hazards or obstructions subject to immediate removal, even though people had been living there for months. ER0749-0751, ¶ 1, 6; ER0802, ¶ 4; ER0730, ¶ 7; ER1056-1057. Class members lost critical and irreplaceable property due to the lack of notice. For example, class member Gibson lost all of her belongings when Defendants seized her property without warning while she got coffee. ER0802-0803, ¶¶ 7, 10. That property included her medications, Real Change badge and newspapers for work, the eulogy for her father, her birth certificate and other identification, books, coats, shoes, and other clothing, her fiancé's "painter whites" and a fully loaded ORCA card for public transit that his church pastor had given him to get a new job as a journeyman painter. ER0803, ¶ 12.

Class member Peila similarly lost all of her belongings when she stepped away for the afternoon. ER0730, ¶¶ 7-8. It had taken Ms. Peila "months to get

[her] items together" and almost a year to get the typewriter she lost. ER0731, ¶ 13. She has no idea how she will replace her belongings. *Id*.

Class member Alexander happened to be home when Defendants "opened the flap of [his] tent" and told him he "had 30 minutes to pack up [his] stuff or the cleanup crew would throw it away." ER0720, ¶ 6. He protested that he had just woken and up and is disabled and that there was "no way [he] could pack up all of his stuff and move it in 30 minutes. The Sargent responded that they were going to help [him] if [he] couldn't pack up all of [his] stuff by throwing it away." ER0720, ¶ 8. Mr. Alexander packed up what he could carry (no more than 10 pounds due to his disability); Defendants threw away the rest of his belongings, including shoes, clothing, blankets, his birth certificate and every other form of identification that he had. ER0721, ¶¶ 10-12; ER0078.

Defendants did not deny that their policies permit seizure of property without notice at all sites deemed a hazard or obstruction or that their definitions of "hazard" and "obstruction" encompass wide swaths of the City.

3. Defendants have a practice of destroying property without a warrant or adequate opportunity to argue against the destruction, and the storage system is so inadequate that it amounts to property deprivation.

Defendants have an established practice of destroying property without a warrant or an adequate opportunity to argue against the destruction. Plaintiffs and class members have described instances in which Defendants destroyed their

property during sweeps—including their homes, essential items like medicines, and irreplaceable items like family mementoes—all without a warrant, consent, or an opportunity to be heard as to why the items should not be destroyed. *See* ER1411-1413, ¶¶ 4, 5, 6, 8, ER1415, ¶12; ER1394-1398, ¶¶ 2, 4, 8, 9, 11; ER0741-0743, ER0745-0746; ER1242-1243, ¶¶ 12-18; ER1407-1408, ¶¶ 2-4, 8, 11; ER0810, ¶¶ 11-15; ER0730-0731, ¶¶ 8-10; ER0803, ¶ 12; ER1247, ¶¶ 10-13; ER0561-0563, ¶¶ 20-25, 30; ER0721, ¶¶ 11-12; ER0750, ¶ 3; ER0776, ¶ 8-10, 12; ER0736-0737, ¶¶ 4, 7, 11; *see also* Surveys from Real Change vendors ER0250-0254, ER0256-0260 (indicating the same); ER0487, ER0489-0494, ER0497-0498; ER0509-0520, ER0524-0525; ER0469-0473; ER0531-0532, ER0536-0537 (named Plaintiff testimony).

Plaintiff Hooper describes losing "the only photos of her three daughters," "important legal paperwork, a mattress, clothing, and several shoes (leaving [her] without matching pairs)," "a family Bible that had been in [her] family for generations," her "children's baby teeth that [she] had been saving for about 20 years and antibiotics," because they were treated as garbage by Defendants. ER1411, ¶ 4.

Plaintiff Osborne stated, "Each time a sweep occurs, I have lost important property. It is a great hardship to replace it and sometimes impossible." ER1396, ¶ 5.

Plaintiff Washington watched Defendants "physically break down the legs of [his] tent and implode it on top of everything in there and piled it." ER0562, ¶ 24. Defendants then "bulldozed everything into a mound, and it was then eventually loaded into a dumpster." ER0562, ¶ 25. The property Defendants destroyed included

> a brand new grill [he] used to cook for everyone, a Colman double burning stove, 2 boom-boxes, a home docking station stereo, a DVD player, 30 DVDs, clothes, including jeans, work gear like pants, jackets, and steel toe boots, canisters of propane, a craftsmen wrench set, glasses, jewelry like a watch, gold chain, and men's ring, binoculars, a canopy for the kitchen, plates, pots, pans, 2 tents, a bed, and other miscellaneous stuff.

ER0562, ¶ 23.

Defendants also destroyed several of Plaintiff Willis's belongings, including "clothes, tents, blankets, and cooking utensils." ER1243, ¶ 18. Ms. Willis testified that "[w]hen a sweep occurs, the City and/or WSDOT destroy everything immediately. They use machinery like bulldozers to tear town tents and pile up all of the property on site that people are unable to move somewhere else." ER1242, ¶ 12.

Defendants' destruction of property is well documented in photos and videos. *See* ER0618-0619, ER0620-0621, ER0622-0623, ER0626-0627, ER0628-0629; ER0579-0580, ER0581-0582, ER0583-0584; ER0586-0587, ER0588-0589, ER0590-0591, ER0592-0593, ER0594-0595, ER0601-0602, ER0603-0604,

ER0605-0606, ER0607-0608; ER0554-0555; *See* recording submitted to the District Court at the February 13, 2017 hearing on Plaintiffs' Motion for Temporary Restraining Order under District Court Dkt. 64; Exs. J-P to District Court Dkt. 94, Ex. 5 to District Court Dkt. 111; Exs. 6-7 to District Court Dkt. 113; Exs. 9-11 to District Court Dkt. 115; Exs. 12-17 to District Court Dkt. 120; Exs. 24-27, 31-33, and 41 to District Court Dkt. 121; Exs. 48-50 to District Court Dkt. 123; Exs. 1-2 to District Court Dkt. 187; ER0961-0962, ER0963-0964; ER1252-1253, ER0390-0391; *see also* ER0262-0267 (highlighting evidence of property destruction).

Plaintiffs submitted declarations from witnesses as well. Mr. Roberts, a student and member of Tent City Collective, watched "the wholesale destruction of at least 10 tents full of people's belongings" during a sweep. ER0714-715, ¶ 28. He noted the "tents were being destroyed with box cutters or physically taken apart. Everything was piled into a pile with garbage." *Id.* "What was more striking was that the stuff [Defendants] were taking apart was obviously in good condition," but the Defendants "just took apart everything and destroyed it." ER0715, ¶ 29. *See also* ER1421-1422, ¶ 8, ER1423-1425, ¶¶12-14; ER0681, ¶ 2; ER0610-0613, ¶¶ 4, 10, 17, 19; ER0802-0803, ¶ 8, 10; ER1402; ER0655-0656, ¶¶ 26-28; ER0635-0636, ¶¶ 15-17; ER0701-0702, ¶ 27-30; ER0819, ¶ 5 (c)(iii) (other declarations). Service providers also recounted times when their clients,

who are members of the proposed class, lost property destroyed in a sweep. *See* ER0755-0757 at ¶¶ 6, 10-12, ER0759-0762, ¶¶ 20-25, ER0763-0764, ¶¶ 28-30; ER0771, ¶ 3-4; ER0798 ER0234-0236, ER0238, ER0241; ER0325.

Defendants' own records show that at least some property was destroyed in most sweeps and that no property at all was salvaged in nearly 30% of sweeps. *See* ER0965-0969; ER1263-1271 (WSDOT property retention track sheet, showing property was only salvaged in 30 sweeps in 2016, even though hundreds were conducted). *See also* ER0298, ER0300, ER0301, ER0306, ER0307, ER0310 (OCR notes indicating the type of property not stored and therefore destroyed); ER0182, ER0949 (noting City will not store property located near drug paraphernalia); ER0224 (justifying destroying 2 wheelchairs); ER0885-0890 (describing items the City will not store).

Defendants never denied that they destroy property during the sweeps and never submitted evidence contradicting the statements of Plaintiffs and class members pertaining to the destruction of their property.

Plaintiffs also submitted evidence that Defendants' storage practices make it unduly difficult for people to retrieve property that was not destroyed. *See* ER1460-1462; ER1172-1176, ¶¶ 174, 178-188; ER1431, ER1437-1438, ER1445-1447, ER1283, ER1287-1289, ER1291-1292, ER0402, ER0409-0412. For example, Defendants provide little or no information—and often conflicting

information—about property storage and retrieval options, resulting in further property deprivation. *See* ER1422, ¶ 10; ER1415, ¶ 12; ER0804, ¶ 15, ER0805-0806, ¶ 22; ER0775-0776, ¶¶ 6-8; ER0750, ¶ 3, ER0751, ¶ 9; ER0736-0737 ¶¶ 8, 11; ER0731, ¶ 10, ER0722, ¶ 15, ER0702-0703, ¶¶ 33-36; ER0664-0665; ER0766, ¶ 37; *see also* ER0689-0695 (a City employee email exchange expressing confusion about storage measures).

Plaintiff Osborne testified, "I know of a few people that have taken that option and they don't have their belongings. They can't even get ahold of anybody on the phone to try to get their belongings, if they're still there." ER1064. Plaintiff Washington used the City's storage facility and cannot get his belongings back. *See* ER0562-0563, ¶¶ 26-27; ER0396-0397, ¶¶ 1-6. He described several of the City's inadequate storage practices, including refusing to store various items and destroying property class members do not pack up themselves (meaning "if you were gone during the sweep, whether moving your stuff to another camp, or doing other things, the City piled everything up into a heap and bulldozed it."). ER0561-0563, ¶¶ 20-27, 30; ER0508-0510, ER0521-0522. *See also* ER1415, ¶ 12; ER1242, ¶ 11, ER0562-0563, ¶¶ 26-27; ER0396-0397, ¶¶ 1-6.

Defendants' own documents confirm their failure to provide adequate processes to reclaim belongings. Of the hundreds of sweeps conducted since 2016, fewer than 12 people have successfully reclaimed property seized in a sweep.

ER0965-0969 (indicating only 2 people successfully retrieved property in 2017); ER0402, ER0412 (noting fewer than 12 people have successfully retrieved property since 2016); *see also* ER1263-1271 (WSDOT property retention sheet indicating only 1 person retrieved property successfully in 2016); ER0837-0838 (WSDOT employee testifying he had only ever seen storage offered about 3 or 4 times); ER0907 (Office of Civil Rights explaining concerns about Defendants' storage policies and practices).

4. Defendants' practice of providing inadequate notice of sweeps.

Defendants have an established practice of providing inadequate notice of the sweeps. Class members have had their property seized or destroyed when they stepped away momentarily with no advance warning. *See* ER1407-1408, ¶¶ 3-4, 9-11; ER0802-0803, ¶¶8, 10; ER0730, ¶¶ 7-8. Class members have been told to pack up their belongings and leave immediately; everything they were unable to take with them was discarded. *See* ER1397, ¶ 9, ER1399, ¶ 13; ER0720, ¶¶ 6-7; ER0744-0745; *see also* ER1426-1427, ¶ 2; ER1420-1421, ¶6, ER1424-1425, ¶ 14; ER1417-1418 ¶¶ 3-4; See Ex 46 to District Court Dkt. 112.

Not only do Defendants execute sweeps without any advance warning, they often provide misleading, inaccurate, or insufficient information when they do provide notice, leaving class members with no idea whether, when or where a sweep will occur. *See, e.g.*, ER1397, ¶ 9; ER1407-1408, ¶¶ 3-4, 9-11; ER1246-

1247, ¶¶ 9-11; ER1241-1242, ¶¶ 9-11; ER1411-1412, ¶¶ 4-6, ER0775, ¶ 5, ER0777, ¶ 13; ER0737, ¶ 12; ER0751, ¶¶ 7-8; ER0725-0726, ¶¶ 4-5. *See also* ER0250, ER0253-0254, ER0256-0257, ER0260 (surveys from Real Change newspaper vendors indicating their property had been taken without notice). Defendants also regularly post notice of sweeps and then fail to show up on that date or time. *See, e.g.*, ER0775, ¶ 5; ER0633, ¶ 7; ER0610, ¶ 5; ER0804, ¶¶ 17-18; ER0481-0482, ER0485-0488, ER0495-0496; ER0515-0516, ER0526; ER0468, ER0474; ER0533-0535, ER0537. This practice is well known among those who work with the unhoused and has been witnessed by many others. *See, e.g.*, ER0237-0238, ER0798; ER0759- 0760, ¶ 20. *See also* ER1420-1422, ¶¶6, 8, ER1424-1425, ¶ 14; ER0639, ¶ 28; ER0787-0789, ¶8, ER0791-0792, ¶¶10, 13; ER0656-0657, ¶¶ 30-32; ER0660-0661 (documenting retroactive notice).

The Office of Civil Rights has halted multiple sweeps because Defendants' notices failed to clearly designate the sites to be swept. ER0147-0150. *See also* ER0905-0910 (noting issues OCR observed with notice); and ER0224 (noting sites OCR had to call off due to Defendants' noncompliance with their own rules and failure to provide adequate notice). Defendants' own documents show that a majority of sweeps in 2016 and 2017 were conducted with inadequate notice. *See* ER0113-0129; ER0130-0137 (highlighting sweeps where the document on its face

indicates a posting was provided less than 72 hours prior to a sweep, retroactively, not at all, or a posting was provided but a sweep never occurred).

Notice matters. As discussed above, Defendants destroy items class members are unable to move in time. For example, Defendants destroyed everything class member McCoy owned without warning right before Christmas, when she stepped away for the day. ER1407, ¶ 3, ER1408, ¶ 9. She lost her tent, clothes, hygiene items, ID, social security card, birth certificate, pictures of her kids and their drawings—"everything." ER1407, ¶ 3, 4; *see also* the evidence submitted in Sections IV.B.1 and 3.

Defendants contest the accuracy of their own documentation but offer no evidence of a practice providing the required notice. *See* ER1272-1273; ER1276-1277; ER1278-1279; ER1280-1281; ER1022-1023; ER1024-1025; ER1026-1027; ER1028-1029; ER1030-1031 (notices that on their face provide conflicting or incomplete information); ER0965-0969.

C. The District Court's Rulings.

The district court acknowledged that Plaintiffs identified specific policies and practices pertaining to the seizure and destruction of property and that Plaintiffs submitted evidence to support their contention that these policies and practices exist. ER0002-0005, ER0010-0011. But the court nevertheless ruled that because Plaintiffs did not provide "significant proof" of Defendants' practices,

Plaintiffs did not establish commonality, typicality, or adequacy of representation. ER0011-0017. Critically, the court found fatal that Plaintiffs' evidence did "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." ER0011. The court concluded that the common questions Plaintiffs posed merely asked "whether they and the proposed class have suffered violations of the same provisions of the law." ER0013.

The district court held that Plaintiffs' inability to provide "significant proof" of Defendants' practices was fatal to the other requirements of Rule 23(a). ER0013-0017. It found that Plaintiffs were not typical because they "implicitly" acknowledged they received notice in some instances and three said they would not accept an offer by Defendants to store their property. ER0014-0015.

The district court also concluded that two of the Plaintiffs were not adequate representatives because they testified to wanting to "stop the sweeps." ER0016-0017. The district court rejected adequacy even though it never found Plaintiff Lisa Hooper was an inadequate representative. *Id.*

V. STANDARD OF REVIEW

A district court's class certification order is reviewed for an abuse of discretion. *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013). Orders denying class certification are given notably less deference than grants of

class certification. *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 956 (9th Cir. 2013) (citations omitted). "An abuse of discretion occurs when the district court . . . relies upon an improper factor, omits consideration of a factor entitled to considerable weight, or mulls the correct mix of factors but makes a clear error of judgment in assaying them." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1171 (9th Cir. 2010).

"[A]n error of law *is* an abuse of discretion." *Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010), *abrogated on other grounds by Comcast v. Behrend*, 569 U.S. 27 (2013). And "it will always be considered an abuse of discretion if the district court materially misstates or misunderstands the applicable law." *Just Film Inc. v. Buono*, 847 F.3d 1108, 1115 (9th Cir. 2017) (citing *Yokoyama*, 594 F.3d at 1091). A district court's application of the "correct legal rule" is clearly erroneous when it was based on a "factual finding that was illogical, implausible, or without support in inferences that may be drawn from facts in the record." *See Leyva*, 716 F.3d at 513 (quoting *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc)). A certification decision is manifestly erroneous and should be reversed when the district court "applies an incorrect Rule 23 standard or ignores a directly controlling case." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 962 (9th Cir. 2005).

VI. ARGUMENT

A. Plaintiffs Have Presented Ample Evidence of Common Questions of Law and Fact, and the District Court Applied an Improper "Significant Proof" Standard in Rejecting Commonality.

Plaintiffs' claims are quintessential 23(b)(2) claims. The primary purpose of Rule 23(b)(2) has "always been the certification of civil rights class actions." *Parsons*, 754 F.3d at 686 (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997)). "The class suit is a uniquely appropriate procedure in civil-rights cases . . . . By their very nature, civil-rights class actions almost invariably involve a plaintiff class." *Id.* at 686 (citation omitted). The purpose of subsection (b)(2) is to "foster institutional reform by facilitating suits that challenge widespread rights violations of people who are individually unable to vindicate their own rights." *Id*. (quotation marks and citations omitted). Reversal of the district court's commonality findings is consistent with the purposes of Rule 23 and applicable precedent.

1. Plaintiffs satisfy commonality because the claims they assert turn on whether Defendants' generally applicable policies and practices are unconstitutional.

Rule 23(a)(2) is "construed permissively, and all questions of fact and law need not be common to satisfy the rule." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) (internal citation omitted). For purposes of Rule 23(a)(2), "even a single common question" will do. *Wang v. Chinese Daily News*, 737 F.3d 538, 544 (9th Cir. 2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564

U.S. 338, 359 (2011)). Rather than turning on the number of common questions, the commonality analysis examines "their relevance to the factual and legal issues at the core of the purported class' claims." *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014). "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Meyer v. Portfolio Recovery Associates, LLC*, 707 F.3d 1036, 1041 (9th Cir. 2012) (citations and internal quotation marks omitted).

A class satisfies the commonality requirement when the common answers are "apt to drive the resolution of the litigation." *Abdullah*, 731 F.3d at 962 (quoting *Dukes*, 564 U.S. at 351). "Whether a question will drive the resolution of the litigation necessarily depends on the nature of the underlying legal claims that the class members have raised." *Jimenez*, 765 F.3d at 1165; *see also, e.g.*, *Stockwell v. City and Cnty. of S.F.*, 749 F.3d 1107, 1114 (9th Cir. 2014) ("To assess whether the putative class members share a common question . . . we must identify the elements of the class members' case-in-chief.") (citing *Dukes*, 564 U.S. at 349 (2011)).

The elements of Plaintiffs' claims are established by the precedent of this Court and Washington state courts. The "Fourth and Fourteenth Amendments protect unhoused persons from government seizure and summary destruction of

their unabandoned, but momentarily unattended, personal property." *Lavan*, 693 F.3d at 1024; *see also San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 977–78 (9th Cir. 2005) ("The Fourth Amendment forbids . . . the destruction of a person's property, when that destruction is unnecessary—*i.e.*, when less intrusive, or less destructive, alternatives exist."). Article I, Section 7 of the Washington Constitution grants even greater protections to the homes and belongings of unhoused individuals, whose tents or structures and contents are protected from "governmental trespass absent a warrant." *State v. Pippin*, 200 Wash. App. 826, 846, 403 P.3d 907 (2017) (internal quotation marks and citations omitted).

As described in Section IV.B., Plaintiffs presented ample evidence that Defendants' policies and practices expose all unhoused people in Seattle living on public property to property seizure and deprivation in violation of those rights. These policies and practices give rise to "common questions apt to drive the resolution of the litigation." *Abdullah*, 731 F.3d at 962; *see also Jimenez*, 765 F.3d at 1165; *Stockwell*, 749 F.3d at 1114; *Parsons*, 754 F.3d at 679-680.

The district court failed to recognize the "common core of salient facts" and did not apply the "shared legal issues" standard. *See Meyer*, 707 F.3d at 1041. It instead characterized Plaintiffs' common questions as merely asking whether or not Defendants' conduct violates the law. ER0012. But the common questions

Plaintiffs raise are "precisely the kind of common questions that Rule 23(a)(2) and *Dukes* require." *Jimenez*, 765 F.3d at 1166.

For example, whether Defendants have a practice of destroying property without a warrant and or opportunity to contest the destruction is a question that can be answered yes or no for the entire class. Whether that practice in turn violates the federal and state constitutions is apt to drive the resolution of the litigation. The same is true for whether Defendants' policy authorizing the destruction of wet property violates the Fourth Amendment's prohibition of unreasonable seizure and the Fourteenth Amendments' due process requirement. This is the crux of commonality. *Cf. Abdullah*, 731 F.3d at 963 ("Thus, the legality of [the defendant's] policy is a 'significant question of law' that is apt to drive the resolution of the litigation' in this case." (quotations and citations omitted)); *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1030 (9th Cir. 2012) ("This case presents the classic case for treatment as a class action: that is, the commonality linking the class members is the dispositive question in the lawsuit."); *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1133 (9th Cir. 2016) (finding commonality satisfied where plaintiffs alleged that the defendants had a common policy and practice); *Jimenez*, 765 F.3d at 1165 (finding commonality where "[p]roving at trial whether . . . informal or unofficial policies existed will drive the resolution" of an element of the plaintiffs' claims).

Plaintiffs have identified policies and practices to which all class members are exposed. ER0004-0005, ER0011. *See Parsons*, 754 F.3d at 679 ("Critically, the district court also identified 10 policies and practices to which all members of the certified class are exposed."). And Plaintiffs have defined Defendants' policies and practices with "sufficient precision and specificity; they involve particular and readily identifiably conduct on the part of the defendants." *Id.* at 683. These policies and practices include: 1) the official policy authorizing destruction of wet property; 2) the official policy authorizing seizure or destruction of property without notice when the site is deemed a "hazard" or "obstruction;" 3) the practice of destroying property without a warrant or adequate opportunity to argue against the destruction, and having a storage system that is so inadequate it amounts to a complete deprivation of property; and 4) the practice of providing inadequate, misleading and confusing notice of sweeps, if notice is provided at all.

As in *Parsons*, "[e]ach of these . . . policies and practices affords a distinct basis for concluding that members of the putative class satisfy commonality, as all members of the class are subject identically to those same policies and practices, and the constitutionality of any given policy and practice with respect to creating a systemic, substantial risk of harm . . . can be answered in a single stroke." *Id.* at 679.

This Court recognized in *Parsons* that a determination of the merits of the plaintiffs' claims would "not require [the court] to determine the effect of those policies and practices upon any individual class member (or class members) or to undertake any other kind of individualized determination." *Id.* at 678. Instead, "either each of the policies and practices is unlawful as to every [class member] or it is not." *Id.* The same reasoning applies here. To prevail on the merits, Plaintiffs will need to prove (1) that Defendants unreasonably seize property, *see Lavan*, 693 F.3d at 1031; (2) that Defendants fail to provide adequate pre- and post-deprivation notice, *see United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993); and (3) that destroying property is equivalent to government trespass, see *Pippin*, 200 Wash. App. at 846. None of these claims turn on how Defendants' policies affect any individual class member. The question instead is whether Defendants' policies and practices are unlawful, a question that will be answered as to every class member at once.

"To be sure . . . utterly threadbare allegations that a group is exposed to illegal policies and practices" are not enough. *Parsons*, 754 F.3d at 683. But Plaintiffs provided the district court with substantial evidence (including the declarations, photos and videos, and Defendants' own testimony and documents cited in Section IV.B) of Defendants' official policies and practices and the general applicability of those policies and practices to class members.

That the district court erred is underscored by the number of other nearly identical classes courts have certified across the country. *See Lyall v. City of Denver*, 319 F.R.D. 558, 564 (D. Colo. 2017) ("Plaintiffs have established that common questions exist classwide, most notably, whether Denver is engaging in the Homeless Sweeps in the manner alleged.");[4] *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); *Kincaid v. City of Fresno*, 244 F.R.D. 597, 603 (E.D. Cal. 2007) ("Such members of the class share common questions of law and fact in the manner in which the sweeps were carried out, the fact and content of any notice, the seizure and destruction of personal property and whether any pre or post deprivation remedy was afforded."); *see also Justin v. City of Los Angeles*, No. CV0012352LBGAIJK, 2000 WL 1808426, at *3 (C.D. Cal. Dec. 5, 2000) (finding it "likely that a class can be properly certified" in granting a TRO); *Pottinger v. City of Miami*, 720 F. Supp. 955, 960 (S.D. Fla. 1989); *Joyce v. City and Cnty. of S.F.*, No. C-93-4149 DLJ, 1994 WL 443464, at *9 (N.D. Cal. Aug. 4, 1994).

[4] Despite the district court's cursory dismissal of *Lyall*, a very similar post-*Dukes* case, because it posed different common questions, ER 0013 at 12, the common questions presented in the two cases are nearly identical. *See* ER 1466.

The district court ignored five of these cases because they pre-dated *Dukes*, but never explained why the commonality analysis would be any different after *Dukes*. ER0013. The district court even acknowledged that "[i]n the civil rights context, commonality is satisfied 'where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members.'" *Id.* at 9 (quoting *Parsons v. Ryan*, 289 F.R.D. 513, 516 (D. Ariz. 2013), which in turn quotes pre-*Dukes* case *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2011)).

2. The district court erred in requiring "significant proof" to establish commonality.

The district court erred in demanding "significant proof" of Defendants' practices. ER0010-0013. Although the court cited the district court's decision in *Parsons* as authority, "significant proof" originates from a Title VII employment discrimination case, *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982). The requirement surfaced again in *Dukes*, which involved a straightforward application of *Falcon*, to identical claims and similar circumstances. *See Dukes*, 564 U.S. at 341, 352-358. Nothing in *Dukes* indicates that the significant proof requirement should or would apply in any other context.

The *Dukes* plaintiffs sought class certification of approximately 1.5 million current and former female employees of Wal-Mart who alleged "that the discretion exercised by their local supervisors over pay and promotion matters violate[d] Title VII by discriminating against women." *Id.* at 342. The Court found that the

plaintiffs' claims depended on *why* each employment decision was made. *Id*. at 352 ("The crux of a Title VII inquiry is the reason for a particular employment decision.") (internal quotation marks and citations omitted). Thus, to demonstrate commonality, plaintiffs had to bridge the conceptual gap between their individual claims and the existence of a class of persons suffering the same injuries. *Id.* at 353. Without such "glue," it would be "impossible to say that examination of all of the class members' claims for relief will produce a common answer to the crucial question of *why was I disfavored*." *Id*. at 352.

Falcon and *Dukes* explained that in Title VII discrimination cases, plaintiffs can bridge this gap in at least two different ways. First, commonality and typicality may be satisfied if the employer "used a biased testing procedure to evaluate both applicants for employment and incumbent employees." *Id.* at 353 (quoting *Falcon*, 457 U.S. at 159 n.15). Alternatively, "significant proof that an employer operated under a general policy of discrimination conceivably could justify" class certification "if the discrimination manifested itself in hiring and promotion practices in the same general fashion such as through entirely subjective decision-making processes." *Dukes*, 564 U.S. at 353 (quoting *Falcon*, 457 U.S. at 159 n.15).

Importantly, "significant proof" is *not* always required to establish commonality, even in a Title VII case. But in *Dukes* "Wal-Mart had no testing

procedure or other companywide evaluation method that [could] be charged with bias." *Dukes*, 564 U.S. at 353. And "[t]he only corporate policy that the plaintiffs' evidence convincingly establishe[d] is Wal-Mart's 'policy' of *allowing discretion* by local supervisors over employment matters." *Id.* at 354. Plaintiffs therefore had to proffer "significant proof" of a general policy of discrimination.

The "significant proof" requirement applied in *Dukes* and *Falcon* derives from the specific claims and circumstances in those cases: Title VII employment discrimination cases challenging discretionary practices. *See, e.g.*, *id.* at 341 ("On the facts of this case, the conceptual gap between an individual's discrimination claim and the existence of a class of persons who have suffered the same injury, must be bridged by significant proof that an employer operated under a general policy of discrimination.") (internal quotation marks and citations omitted); *Falcon*, 457 U.S. at 159 n.15 ("It is noteworthy that Title VII prohibits discriminatory employment *practices*, not an abstract policy of discrimination.").

As other courts have recognized, the requirement should not be applied outside that context. *See, e.g.*, *Jermyn v. Best Buy Stores, L.P.*, 276 F.R.D. 167, 172 (S.D.N.Y. 2011) (recognizing the requirement is "designed for and unique to the context of employment discrimination"); *D.G. ex rel. Strickland v. Yarbrough*, 278 F.R.D. 635, 639 (N.D. Okla. 2011) ("The court is not convinced 'significant proof' is required for plaintiffs to resist defendants' motion to decertify, or whether

some lesser standard is required outside of employment discrimination cases."); *Gray v. Golden Gate Nat'l. Recreational Area*, 866 F. Supp. 2d 1129, 1142 (N.D. Cal. 2011) (rejecting contention that the "significant proof" requirement applied to disability rights case).

Plaintiffs' claims and facts differ from *Dukes* in every way that matters. *Cf. Parsons*, 754 F.3d at 681 ("This case is different than Wal-Mart in every respect that matters."); *see also Stockwell*, 749 F.3d at 1114-1116 (distinguishing the evidentiary requirements for plaintiffs' disparate impact claims from *Dukes*); *Ross v. RBS Citizens, N.A.*, 667 F.3d 900, 909-910 (7th Cir. 2012), *vacated on other grounds* 569 U.S. 901 (2013) ("Despite [Defendants'] best efforts to fit the present case into the *Dukes* mold, there are significant distinctions.").

Dukes was "one of the most expansive class actions ever," involving 1.5 million potential class members around the country. 564 U.S. at 342-43. Plaintiffs' proposed class consists of approximately 2,000 people who live outside in Seattle. ER1456-1472; *Parsons*, 754 F.3d at 681 (distinguishing *Dukes* because it "involve[d] 33,000 inmates in the custody of a single state agency, not millions of employees scattered throughout the United States"); *Ross*, 667 F.3d at 909-910 (noting the size and geographic scope of the proposed class distinguished it from *Dukes*).

Moreover, Plaintiffs challenge the constitutionality of official policies and proven practices that all class members are exposed to, not discretionary decision-making in the context of employment discrimination claims. And they seek solely prospective equitable relief, not damages for past conduct. *See Parsons*, 754 F.3d at 676 (distinguishing *Dukes*, where the crucial question was *why* Plaintiffs were disfavored); *Connor B., ex rel. Vigurs v. Patrick*, 278 F.R.D. 30, 34 (D. Mass. 2011) ("Plaintiffs have alleged specific and overarching systemic deficiencies . . . that place children at risk of harm. These deficiencies, rather than the discretion exercised by individual case workers, are the alleged causes of class members' injuries . . . . These systemic shortcomings provide the 'glue' that unites Plaintiffs' claims."); *see also Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984) (noting that in resolving a Title VII claim, the crux of the inquiry is "the reason for a particular employment decision").

Finally, unlike *Dukes*, where the only relevant policy explicitly forbade discrimination, Defendants have official policies (the MDAR 17-01 and FAS 17-01) that explicitly apply to all class members and authorize the conduct at issue. Plaintiffs also provided substantial evidence of Defendants' unlawful practices. Together, the written policies and evidence of Defendants' practices provide ample "glue" for commonality.

3. Even if significant proof were required, Plaintiffs have provided it.

Even if this Court were to apply the significant proof requirement, Plaintiffs submitted more than enough evidence to satisfy that requirement. The district court determined that although Plaintiffs identified "several notice, storage, and storage-retrieval practices . . . Plaintiffs' class certification motion does not try to demonstrate the existence of the practices alleged" and that this case is "unlike *Parsons*, where the plaintiffs submitted significant proof of the existence of the systemic policies and practices alleged." ER0011.

But the evidence Plaintiffs presented exceeded the evidentiary threshold for commonality. *See Parsons*, 754 F.3d at 683 (describing materials submitted that "far exceeded" threshold, including internal policies and plaintiff declarations). Plaintiffs' evidence included Defendants' official policies, declarations from Plaintiffs, class members, and witnesses, photos and videos of property destruction, Defendants' deposition testimony, and Defendants' own records.

If this evidence was insufficient to demonstrate the existence of Defendants' policies and practices, it is unclear what evidence would ever suffice for marginalized communities to challenge mistreatment pursuant to an official government program. *See id.* at 680 ("In fact, without such a means of challenging unconstitutional prison conditions, it is unlikely that a state's maintenance of

prison conditions that violate the Eighth Amendment could ever be corrected by legal action.").

The court's finding is all the more perplexing because Defendants never disputed that they operate a homeless sweeps program or that their policies authorize the destruction of wet property and sweeps of "hazards" and "obstructions" without notice. ER0855-0856. Nor do Defendants deny class members' accounts of sweeps without notice, or the destruction of property. *See Parsons*, 754 F.3d at 663 (noting that the defendants did not address the individual policies and practices complained of by the plaintiffs or present evidence meant to deny their existence).

The district court's ruling on significant proof resulted from an improperly heightened application of that requirement. The court summarily dismissed all of Plaintiffs' evidence for failing to "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." ER0011. But this inquiry into the timing of property destruction during past sweeps is neither relevant nor required under the significant proof requirement or for class certification. Plaintiffs' claims center not on the lack of notice or destruction of property in any particular past sweep, but rather the legality of Defendants' ongoing policies and practices to which all class members are exposed. *See Parsons*, 754 F.3d at 676.

Commonality does not require proof that Defendants destroyed their property at a particular moment or the exact same moment.

Moreover, Plaintiffs' evidence showed that property was destroyed at the point in time relevant to their constitutional claims: before there was adequate notice and an opportunity to contest the destruction. *See, e.g.*, ER1407-1408, ¶¶ 3-4, 9-11; ER0802-0803, ¶¶ 8, 10; ER0730, ¶¶ 7-8; ER1397, ¶ 9, ER1399, ¶ 13; ER0720, ¶¶ 6-7; ER0744-0745 and ER1426-1427, ¶ 2; ER1420-1421, ¶ 6, ER1424-1425, ¶ 14; ER1417-1418, ¶¶ 3-4; See Ex 46 to District Court Dkt. 112; ER1246, ¶ 8, ER0635-0636, ¶¶ 13-16; ER0786-0791, ¶¶ 6-10, ER0699, ¶¶ 15, 17; ER0560, ¶ 16.

The exact point during a sweep "when" property is destroyed is likely irrelevant to Plaintiffs' claims. *See, e.g., A & W Smelter and Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1111-12 (9th Cir. 1998) (holding that the government cannot treat property as garbage just because an individual has not moved it within an allotted time); *Lavan*, 693 F.3d at 1031 ("The City does not—and almost certainly could not—argue that its summary destruction of Appellees' family photographs, identification papers, portable electronics, and other property was reasonable under the Fourth Amendment."); *Pippin*, 200 Wash. App. at 846 (holding that unhoused people's tents or other home-like structures are protected

from government trespass absent a warrant, even when law enforcement announce their entry).

And to the extent timing is relevant, that inquiry goes to the merits of Plaintiffs' claims, not class certification. *See Buono*, 847 F.3d at 1122 ("Plaintiffs' position in this regard may or may not prevail, but that is a merits question not appropriately addressed at the class certification stage."); *Jimenez*, 765 F.3d at 1166 n.5 (a defendant's argument that its policies are lawful "is appropriately made at trial or at the summary judgment stage"); *Stockwell*, 749 F.3d at 1113-14 ("The district court erred in denying class certification because of its legal error of evaluating merits questions instead of focusing on whether the questions presented, whether meritorious or not, were common to the members of the putative class."); *Alcantar v. Hobart Services*, 800 F.3d 1047, 1053 (9th Cir. 2015) (same); *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 480 (9th Cir. 1983) (same).

Defendants maintain that their policies and practices are lawful. They will have ample opportunity to offer proof in support of their position at trial. And Plaintiffs will proffer their own proof that Defendants' policies and practices are unlawful. But not only does this dispute not defeat commonality for class certification purposes, it underscores the existence of common questions of law and fact "apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350.

This Court should find that Plaintiffs have satisfied the commonality requirement.[5]

B. The District Court Abused Its Discretion in Finding That Typicality Was Not Satisfied.

The district court's erroneous commonality analysis permeated its typicality analysis. ER0013-0015 ("Plaintiffs' failure to establish commonality affects their ability to demonstrate they satisfy Rule 23(a)(3)'s typicality requirement"). The district court also found it fatal to typicality that Plaintiffs "implicitly" acknowledged receipt of adequate notice, and that three of the four named Plaintiffs "have never or would never accept Defendants' offers to store their property." *Id.* at 0014-0015. In reaching this conclusion, the district court improperly heightened the typicality requirement by requiring identical factual circumstances and past injuries for a Rule 23(b)(2) class. The district court also misinterpreted the doctrine of unique defenses. This was an abuse of discretion.

[5] The district court failed to consider whether Plaintiffs satisfied Rule 23(b)(2) but noted that because Plaintiffs "have not provided significant proof of the existence of the alleged unlawful practices," subsection (b)(2) was likely unsatisfied. ER0017. Because the district court abused its discretion in applying the "significant proof" requirement, this finding is also erroneous. Plaintiffs seek injunctive and declaratory relief to halt Defendants' allegedly unlawful policies and practices, which "unquestionably" satisfies Rule 23(b)(2). *Parsons*, 754 F.3d at 687-88.

1. Plaintiffs are typical of class members because they are all subject to the same policies and practices.

Typicality is a permissive standard, and "representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Parsons*, 754 F.3d at 685 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)). "[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." *Parsons*, 754 F.3d at 685 (quoting *Hanon v. Dataproducts Crop.*, 976 F.2d 497, 508 (9th Cir. 1992)). Measures of typicality include "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Parsons*, 754 F.3d at 685 (quoting *Hanon*, 976 F.2d at 508).

Plaintiffs allege "the same or [a] similar injury as the rest of the putative class": the violation of their federal and state constitutional rights caused by Defendants' policies and practices in conducting sweeps. *Parsons*, 754 F.3d at 685 (citations omitted). Plaintiffs also "allege that this injury is a result of a course of conduct that is not unique to any of them": Defendants' policies and practices regarding notice and the destruction of property. *Id*.

The district court nevertheless determined that Plaintiffs did not satisfy typicality because they "implicitly acknowledged" that the notice provided by

Defendants was sufficient. ER0015. This was error. Plaintiffs never conceded receiving constitutionally adequate notice, and their testimony regarding the inadequacy of the "notices" they did receive is wholly consistent with their claims in the Second Amended Complaint.

For example, Plaintiff Osborne testified that "there's always been an issue with notice" and that "they have never once come and posted and it was smooth sailing the way it was supposed to be, the way it's on paper, so to speak, you know. Not for me anyway." ER0496. She also explained Defendants' notices are inadequate and misleading, including instances of Defendants not conducting sweeps on the posted date, sweeping a different area than the one identified in a notice, posting notices inconsistently, and showing up without any notice at all. *See* ER0496, ER0481-0482, ER0485-0488, ER0495-0496. Other witnesses, including the other Plaintiffs, described similar experiences in declarations and deposition testimony. *See, e.g.*, ER1241-1242, ¶¶ 9-11; ER1411-1412 at ¶¶ 4-6, ER1397, ¶ 9, ER1399, ¶ 13, ER0515-0516, ER0526; ER0468, ER0474; ER0533-0535, ER0537.

The district court's typicality analysis construes Plaintiffs' allegations too narrowly. Plaintiffs' claims challenge Defendants' ongoing course of conduct based on the policies and practices at issue—not specific incidents in which notice was or was not provided, or in which property was destroyed unreasonably in the

past. Typicality does not require that Plaintiffs (and class members) share identical injuries and factual circumstances. All unhoused people living in Seattle are subject to Defendants' policies and practices pertaining to sweeps and are thus exposed to the same risks created by the sweeps program. This Court has repeatedly recognized that the underlying facts of named plaintiffs' claims do not have to be identical if they are exposed to the same policies and practices. *See Parsons*, 754 F.3d at 685-6. ("Each of the named plaintiffs is similarly positioned to all other [proposed class members] with respect to a substantial risk of serious harm resulting from exposure to the defendants' policies and practices."); *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998) ("It is sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole."); *Baby Neal v. Casey*, 43 F.3d 48, 61 (3d Cir. 1994) ("The complaint prays for declaratory and injunctive relief. Factual differences among the situations of the plaintiffs will thus not preclude the district court from determining whether the class claims are meritorious, or from ordering the appropriate relief in the event that they are.").

Nor does typicality require that Plaintiffs suffer injury in every conceivable way that Defendants' conduct could violate the constitution to satisfy Rule 23(a)(3). "It does not matter that the named plaintiffs may have in the past suffered varying injuries or that they may currently have different . . . needs; Rule

23(a)(3) requires only that their claims be 'typical' of the class, not that they be identically positioned to each other or to every class member." *Parsons*, 754 F.3d at 686. *See also Buono*, 847 F.3d at 1117-1118 (noting that plaintiffs need not suffer an injury from multiple predicate acts or all of the predicate acts, and that differing predicate acts causing injury was insufficient to defeat typicality) Whether Defendants fail to declare that sweeps will occur, fail to provide accurate information about sweeps, or fail to conduct sweeps at stated dates and times, the injury is the same: a lack of adequate notice.

Further, whether individual Plaintiffs would accept Defendants' hypothetical offers of storage is immaterial. Plaintiffs challenge the adequacy of Defendants' storage policies and practices generally, as unconstitutional property deprivation. *See* ER1460-1462; ER1172-1176, ¶¶ 174, 178-188; ER1431, ER1437-1438, ER1445-1447, ER1283, ER1287-1289, ER1291-1292, ER0402, ER0409-0411. Plaintiffs seek prospective equitable relief requiring Defendants to safeguard property in lieu of destroying it, not damages for property improperly stored in the past. *Cf. Buono*, 847 F.3d at 1118 (finding no reason why the plaintiff "cannot prove the nature of the fraudulent scheme for benefit of all class members, whether or not their precise injuries are identical"); *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) ("Though Petitioner and some of the other members of the proposed class . . . do not raise identical claims, they all . . . raise similar

constitutionally-based arguments that they are alleged victims of the same practice . . .").

Finally, the district court's rejection of typicality conflates Plaintiffs' unreasonable seizure, invasion of privacy, and inadequate notice claims. The Fourth Amendment prohibits the unreasonable destruction of property even with advance notice. *See, e.g.*, *A & W Smelter and Refiners*, 146 F.3d at 1111; *Lavan*, 693 F.3d at 1031; *San Jose Charter of Hells Angels Motorcycle Club*, 402 F.3d at 977–78. The Washington Constitution's privacy clause similarly prohibits intrusion into one's tent or other home-like structure absent a warrant even if law enforcement announce their entry. *Pippin*, 200 Wash. App. at 846. It is undisputed that Defendants have seized and destroyed the property of Plaintiffs and proposed class members on numerous occasions and intruded into their private tents without a warrant. And Defendants have made clear they will continue to do so until and unless enjoined by a court of law.

2. Plaintiffs' claims are not subject to unique defenses that defeat typicality.

In finding Plaintiffs' testimony regarding notice and storage fatal to typicality, the district court also misapplied the doctrine of unique defenses. Defenses unique to a class representative counsel against class certification only where they "threaten to become the focus of the litigation." *Hayes*, 591 F.3d at 1124 (quoting *Hanon*, 976 F.2d at 508). Where a defendant "will no doubt assert

the same defense[s] for most if not all of the class members' claims . . . the assertion of [those] defense[s] does not render plaintiff's claims atypical." *Kavu, Inc. v. Omnipak Crop.*, 246 F.R.D. 642, 648 (W.D. Wash. 2007).

There is nothing "unique" about Defendants' defenses. Defendants have consistently maintained that they offer adequate notice, provide lawful reasons for destroying rather than storing property, and have adequate property storage protocols and practices. And Plaintiffs have consistently disputed each of these defenses. *See, e.g.*, ER1460-1462; ER1172-1176, ¶¶ 174, 178-188; ER1431, ER1437-1438, ER1445-1447, ER1283, ER1287-1289, ER1291-1292, ER0402, ER0409-0412; ER1415, ¶ 12; ER1242, ¶ 11, ER0562-0563, ¶¶ 26-27; ER0396-0397, ¶¶ 1-6; ER1064 (citing Plaintiff Osborne testimony); ER0508-0510, ER0521-0522, ER0526. The named Plaintiffs' positions, including those pertaining to storage, are typical of the class as a whole: in fact, fewer than 12 people have successfully retrieved property since 2016. ER0412. *See also* ER0766, ¶ 37; ER1422, ¶ 10; ER1415, ¶ 12; ER0804, ¶ 15, ER0805, ¶ 22; ER0775-0776, ¶¶ 6-8; ER0750, ¶ 3, ER0751, ¶ 9; ER0736, ¶ 8, ER0737, ¶ 11; ER0731, ¶ 10, ER0722, ¶ 15, ER0702-0703, ¶¶ 33-36; ER0664-0665; ER0965-0969; ER0402, ER1460-1462; ER1172-1176, ¶¶ 174, 178-188; ER1431, ER1437-1438, ER1445-1447, ER1283, ER1287-1289, ER1291-1292, ER0402, ER0409-0411.

Disputes about how property is stored and whether it is an adequate defense to Plaintiffs' claims regarding destruction can and should be resolved for the class as a whole at trial. *Cf. Lyall*, 319 F.R.D. at 564 ("Denver's contention that it may have had a lawful basis for seizing an individual Plaintiff's property in a particular instance . . . is a merits question and does not destroy typicality.").

Moreover, it is entirely reasonable and "typical" of the class that Plaintiffs would reject Defendants' purported offer to store their property given Defendants' routine practices of failing to properly catalog seized property, destroying property instead of keeping it in storage, failing to properly notify class members where stored property is kept, and failing to make stored property accessible to class members. In fact, Plaintiff Washington took the City up on its offer to store property but the City refused to store a significant portion of it and he has been unable to get all of the purportedly stored items back. ER0561-563, ¶¶ 19-20, 23-27; ER0396-0397, ¶¶ 1-6; ER0508-0510, ER0521-0522, ER0526.

Class certification would not present any of the dangers that Rule 23(a)(3) was intended to avoid. Plaintiffs seek solely equitable relief and do not have any interests that conflict with absent class members. *See Baby Neal*, 43 F.3d at 63 (finding the lower court abused its discretion in finding no typicality because the "suit seeks only declaratory and injunctive relief, the named plaintiffs are simply not asserting any claims that are not also applicable to the absentees"). "Many

courts have noted that the individual interest in pursuing litigation where the relief sought is primarily injunctive will be minimal." *Id*. at 63 (internal quotation marks and citations omitted). Under this Court's precedent, typicality is satisfied, and this Court should reverse the district court's decision.

C. The District Court Abused Its Discretion in Finding the Adequacy of Representation Requirement Was Not Satisfied.

Lastly, the court found that adequacy was not satisfied even though it never deemed Plaintiff Hooper to be an inadequate representative. The court also determined that two of the named Plaintiffs were inadequate representatives because they testified they wanted to "stop the sweeps." ER0016-0017. The district court abused its discretion by applying a heightened and erroneous standard for adequacy of representation.

The purpose of the adequacy inquiry is to ensure that the class representative is "part of the class and possess[es] the same interest and suffer[s] the same injury as the class members." *Amchem*, 521 U.S. at 625–26 (internal quotation marks and citations omitted). Courts must consider: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020. Rule 23(a)(4) "is satisfied as long as one of the class representatives is an adequate class representative." *Rodriguez v. West*

Publ'g Corp., 563 F.3d 948, 961 (9th Cir. 2009) (citation and internal quotation marks omitted).

1. Lisa Hooper is an adequate representative.

The district court abused its discretion in finding adequacy was not satisfied even though the Court did not find *all* named Plaintiffs inadequate, because Rule 23(a)(4) only requires that *one* class representative be adequate. *Id*. The district court never found any reason to question Plaintiff Hooper's adequacy, and should have found the requirement was satisfied. ER0015-0017.

2. The named plaintiffs share common interests and objectives with the proposed class members.

The district court also abused its discretion in finding that two of the Plaintiffs are inadequate class representatives because they expressed personal goals that exceed the confines of the litigation. Neither this Court nor the Supreme Court has ever held that individual named plaintiffs are inadequate because they expressed personal opinions, political goals, or beliefs that are not completely identical to the relief sought by the lawsuit, particularly when the statements are wholly consistent with the goals of the litigation. *See Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir. 2003) ("[T]his circuit does not favor denial of class certification on the basis of speculative conflicts. Mere speculation as to conflicts that may develop at the remedy stage is insufficient to support denial of initial class certification.") (internal quotation marks and citations omitted); *see also*

Blackie v. Barrack, 524 F.2d 891, 908 (9th Cir. 1975) (noting that "potential conflicts" do not present a valid reason for refusing to certify a class). "Only conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement." *In re. Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 942 (9th Cir. 2015) (quoting 1 William B. Rubenstein et al., *Newberg on Class Actions* § 3.58 (5th ed. 2011)).

Individual plaintiffs may have different personal goals without being "inadequate" class representatives. A plaintiff is not disqualified "merely because of the existence of interests beyond those of the class he seeks to represent." *G.A. Enters. Inc. v. Leisure Living Communities, Inc.*, 517 F.2d 24, 27 (1st Cir. 1975);[6] *see also Denny v. Carey*, 73 F.R.D. 654, 657 (E.D. Pa. 1977) (rejecting defendant's challenge, on adequacy grounds, to the class representative's "ulterior motives" for bringing suit, finding "no interests of plaintiff which are antagonistic to the class."); *Bucha v. Illinois High Sch. Ass'n*, 351 F. Supp. 69, 72 (N.D. Ill. 1972) ("The fact that the named plaintiffs have interests which exceed those of some class members will not defeat the class action, so long as they possess interests which are coextensive with those of the class."); *First Am. Corp. v. Foster*, 51

[6] Although *G.A. Enterprises* addresses the question of adequacy under Rule 23.1, the standard is essentially the same as Rule 23, and cases interpreting either Rule may be considered in analyzing the adequacy of a class representative. *See* 517 F.2d at 26 n.3.

F.R.D. 248, 250 (N.D. Ga. 1970) ("[T]he fact that individual plaintiffs may have interests which go *beyond* the interest of the class, but are at least coextensive with the class interest, will not defeat the class.").

A difference in interests must create an antagonism that goes to the subject matter of the suit to render a representative inadequate; it must make it likely that the interests of absent class members will be disregarded. *See G.A. Enters.*, 351 F. Supp. at 27; *Evans v. City of Evanston*, No. 84 C 2718, 1985 WL 4100, at *5 (N.D. Ill. Nov. 20, 1985).

Plaintiffs Washington's and Willis's interest in stopping Defendants' sweeps is entirely consistent with this litigation, which "seeks declaratory and injunctive relief" to assure the Defendants' official policies and practices, do not violate state and federal constitutional rights." ER1136, ¶ 7, ER1145, ¶ 51. In fact, it would be surprising if there were a member of the proposed class willing to avow an interest in the sweeps continuing, even if they were conducted lawfully. *Cf. In re Pet Food Products Liab. Litig.*, 629 F.3d 333, 343–45 (3d Cir. 2010) (holding that named class representatives who pursued individualized injury claims in addition to class-wide reimbursement claims did not have a conflict of interest with members of the larger class); *Saucedo v. NW Mgmt. & Realty Servs. Inc.*, 290 F.R.D. 671, 683 (E.D. Wash. 2013) (finding adequacy satisfied even though named plaintiffs

sought actual damages for their individual claims while seeking only statutory damages for the class claims).

In contrast to cases where the plaintiffs seek a different type of relief than the class (such as damages rather than prospective equitable relief), Plaintiffs have consistently testified that they understand the claims and possible outcomes of the litigation. For example, Plaintiff Washington explained, "[I]t's also the reason for the lawsuit is to ask the City to stop destroying people's property. They are coming in to these places and when you're sweeping them, you're violating certain rights that we have, I mean a right to live, you know, a right to property. They say that they're going to do this and they destroy our property without regard of notification." ER0507-0508. Mr. Washington added: "I'm not doing this for self, this is not just for me, for the possessions that I lost or I'm not totally in this for monetary things or nothing like that, but it is to ask the City to really look at their policies, reconsider their policies." ER0527.

Ms. Hooper testified, "Well, I understand the parameters of the lawsuit and within the parameters of the lawsuit is to have guidelines and rules as to the way sweeps are conducted that are clear to everybody participating in it." ER0474; *see also* ER0475-0476. *See also* ER0480, ER0499-0500 (Plaintiff Osborne).

Because they still live outside, Plaintiffs remain at risk of harm as a result of Defendants' sweeps policies and practices. Plaintiffs "maintain a sufficient interest

in, and nexus with, the class so as to ensure vigorous representation." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 943. Plaintiffs are aware of no cases finding a conflict where the plaintiffs sought the same type of relief as the class complaint. Where, as here, there is "an absence of antagonism, a sharing of interests between representatives and absentees, and an unlikelihood that the suit is collusive," adequacy is satisfied. *Local Joint Exec. Bd. of Culinary/Bartender Tr. Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001).

Finally, and critically, Plaintiffs are legally unsophisticated laypeople who are among the most marginalized in our community. The district court found them lacking adequacy based on a hypertechnical interpretation of their words rather than any actual conflict. Like other non-lawyer witnesses, they may not have used the precisely correct legal terms to describe the particular type of relief they seek or what it means to "represent" a class.[7] And they were understandably confused by the legal distinction between "notice" in the constitutional due process sense, and postings of sweeps, which are frequently referred to as "notices."[8] "[I]t would

[7] The district court determined that Plaintiff Osborne is not an adequate representative because she indicated she cannot represent anybody else. ER0017. But Ms. Osborne testified that she understands the claims in the litigation and her role, and is willing to fulfill it. *See, e.g.*, ER 0480, ER 0499-0501.

[8] The district court noted but did not address Defendants' argument that Plaintiffs are inadequate representatives because they provided inconsistent testimony and were unfamiliar with minutiae of the MDAR 17-01 and FAS 17-01. But Plaintiffs *are* consistent when it comes to the facts that inform this lawsuit: each has suffered the loss of property due to Defendants' policies and practices of destroying

be unfair to deny someone . . . access to our courts merely because he is unable to articulately respond to questions from attorneys." *Longest v. Green Tree Servicing LLC*, 308 F.R.D. 310, 325 (C.D. Cal. 2015) (quotations and citations omitted); *see also Parrish v. Nat'l Football League Players Ass'n*, No. C 07–00943 WHA, 2008 WL 1925208, at *6-7 (N.D. Cal. Apr. 29, 2008) (finding a class representative adequate who "repeatedly gave conflicting and peculiar answers in response to questioning relating to this suit" when his testimony showed "he was confused and probably thrown off by the rigor of the deposition" and unfamiliar with the legal process).

Rule 23 should not be used to "defeat the ends of justice" by facilitating the dismissal of class action complaints involving unsophisticated named plaintiffs. *Surowitz v. Hilton Hotels Corp*., 383 U.S. 363, 373 (1966)*; see also Villanueva v. Liberty Acquisitions Serv'g, LLC*, 319 F.R.D. 307, 331 (D. Or. 2017) ("Plaintiff is a seemingly unsophisticated, inexperienced litigant. That does not make him

---

belongings: *See, e.g.*, ER 0487, ER 0489-0494, ER 0497-0498; ER 0509-0520, ER 0524-0525; ER 0469-0473; ER 0531-0532, ER 0536-0537; ER 1411-1413, ¶¶ 4, 5, 6, 8, ER 1415, ¶ 12; ER 1394-1399 at ¶¶ 2, 4, 8-9, 11; ER 1242-1243, ¶¶ 12-18; ER 0561-0563, ¶¶ 20-25, 30. And each has been victim to Defendants' policies and practices of providing inadequate notice. *See, e.g.*, ER 0481-0482, ER 0485-0488, ER 0495-0496; ER 0515-0516, ER 0526; ER 0468, ER 0474; ER 0533-0535, ER 0537; ER 1397, ¶ 9; ER 1241-1242, ¶¶ 9-11; ER 1411-1413, ¶¶ 4-6. Any apparent inconsistencies in Plaintiffs' testimony are due to the inconsistent nature of Defendants' policies and practices and the fact that Plaintiffs are laypersons.

unknowledgeable about the case or inherently suggest that he will not participate in the litigation."); *In re Conseco Life Ins. Co. LifeTrend Ins. Sales & Mktg. Litig.*, 270 F.R.D. 521, 531 (N.D. Cal. 2010) ("Plaintiffs are laypersons and cannot be expected to define the scope of the class or name all of the causes of action in more precise terms. The fact that they are familiar with the basis for the suit and their responsibilities as lead plaintiffs is sufficient to establish their adequacy.").

Nothing in the record supports a conclusion that any of the named Plaintiffs is unwilling or unable to serve as a class representative. To the contrary, each "understands [their] duties and is currently willing and able to perform them." *Local Joint Executive Bd. of Culinary/Bartender Tr. Fund*, 244 F.3d at 1162. All Plaintiffs testified that they were familiar with the basis for the suit and their responsibilities. *See, e.g.*, ER0505-0508, ER0527; ER0480, ER0499-0501; ER0474-0476. "The Rule does not require more." *Local Joint Executive Bd. of Culinary/Bartender Tr. Fund*, 244 F.3d at 1162. The district court abused its discretion in requiring more and this Court should reverse.

VII. CONCLUSION

For the reasons stated above, Plaintiffs request that this Court reverse the district court's denial of class certification and remand with instructions to enter a new order certifying the proposed class.

RESPECTFULLY SUBMITTED AND DATED this 4th day of June, 2018.

TERRELL MARSHALL LAW
GROUP PLLC

By: /s/ Toby J. Marshall
Toby J. Marshall, WSBA #32726
Email: tmarshall@terrellmarshall.com
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603

Eric A. Lindberg, WSBA #43596
Email: elindberg@corrcronin.com
Kristina Markosova, WSBA #47924
Email: kmarkosova@corrcronin.com
Todd T. Williams, WSBA #45032
Email: twilliams@corrcronin.com
CORR CRONIN MICHELSON
BAUMGARDNER FOGG & MOORE
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154
Telephone: (206) 625-8600

Cooperating Attorneys for ACLU-WA

Emily Chiang, WSBA #50517
Email: echiang@aclu-wa.org
Nancy Talner, WSBA #11196
Email: talner@aclu-wa.org
Breanne Schuster, WSBA #49993
Email: bschuster@aclu-wa.org
ACLU OF WASHINGTON
FOUNDATION
901 5th Avenue, Suite 630
Seattle, Washington 98164
Telephone: (206) 624-2184

Attorneys for Plaintiffs-Appellants

STATEMENT OF RELATED CASES

There are no known related cases pending in this Court.

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 12,651 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 4th day of June, 2018.

TERRELL MARSHALL LAW
GROUP PLLC

By: /s/ Toby J. Marshall
Toby J. Marshall, WSBA #32726
Email: tmarshall@terrellmarshall.com
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603

Cooperating Attorneys for ACLU-WA

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 June 4, 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 4th day of June, 2018.

TERRELL MARSHALL LAW GROUP PLLC

By: /s/ Toby J. Marshall
Toby J. Marshall, WSBA #32726
Email: tmarshall@terrellmarshall.com
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603

Cooperating Attorneys for ACLU-WA