

THE HONORABLE RICARDO S. MARTINEZ

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LISA HOOPER, BRANDIE OSBORNE,
individually and on behalf of a class of
similarly situated individuals; EPISCOPAL
DIOCESE OF OLYMPIA, REAL CHANGE,

Plaintiffs,

vs.

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

Defendants.

No. 2:17-cv-00077-RSM

**PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

**NOTE ON MOTION CALENDAR:
FEBRUARY 6, 2017**

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

Defendants City of Seattle (the "City") and the Washington State Department of Transportation ("WSDOT") regularly conduct "sweeps" where they seize and destroy the property of unhoused people living within the City without constitutionally-required notice, without a warrant or probable cause, and without providing an opportunity to be heard, or a meaningful way to reclaim any property that was not destroyed. The frequency and number

1 of these “sweeps”—and the harm wrought by them—has increased steadily. Approximately
2 1,000 sweeps have been conducted since 2015 alone.

3 The violations described in Plaintiffs’ Complaint have continued unabated since this
4 matter was filed on January 19, 2017. For example, on January 26, 2017, during one of the
5 coldest months of the year, Plaintiff Brandie Osborne was told without notice that she had to
6 pack up everything she owned and leave her place of residence within 30 minutes. When Ms.
7 Osborne explained that she had been provided no notice, she was told that Defendants did not
8 have to issue notice. Because Ms. Osborne could not move everything in such a short time,
9 many of her belongings were destroyed.
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11 Defendants’ continued constitutional violations deprive Plaintiffs and members of the
12 proposed class of belongings that are critical to their health, safety, and survival. The harm
13 caused to Plaintiffs and members of the proposed class far outweighs any speculative public
14 health or safety arguments made by Defendants to justify their actions. This is particularly
15 true during the winter months when those living outside may be deprived of shelter, bedding,
16 or other cover that is essential to their survival. Members of our community already living
17 without essentials that we take for granted are being forced to fight for their survival as a
18 result of Defendants’ unlawful actions. Absent a restraining order, Defendants will continue
19 to engage in this unlawful conduct, causing direct serious irreparable harm.
20

21 In fact, Defendants have recently doubled down on their illegal policies and practices.
22 On January 31, 2017, without any consultation or outreach to Plaintiffs, the City proposed
23 new rules that would give Defendants even greater latitude to “remove” encampments without
24

1 notice.¹ Such unfettered executive action is neither healthy nor desirable without the check of
2 the judicial branch of government to ensure that Plaintiffs' rights are protected.

3 In *Lavan v. City of Los Angeles*, 693 F.3d 1022 (9th Cir. 2012), the Ninth Circuit
4 affirmed the issuance of a preliminary injunction barring the City of Los Angeles from seizing
5 and destroying unhoused people's personal property: "the Fourth and Fourteenth
6 Amendments protect unhoused persons from government seizure and summary destruction of
7 their unabandoned, but momentarily unattended, personal property." *Id.* at 1024. The Court
8 held that the City could not seize and destroy such property but, instead, had to comply with
9 fundamental requirements of due process. *Id.* at 1026-27.

11 In this application for a temporary restraining order, Plaintiffs seek only what *Lavan*
12 directs: an order prohibiting Defendants from seizing and summarily destroying homeless
13 people's property without probable cause and constitutionally adequate notice. *Id.* at 1033.
14 Plaintiffs do not seek to prevent Defendants from collecting actual garbage or waste on public
15 property. Plaintiffs simply ask that their constitutional rights not be violated in the process.

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21 _____
22 ¹ See proposed Finance and Administrative Services rules regarding Unauthorized Camping on City Properties;
23 Enforcement Procedures; and Removal of unauthorized Property, No. FAS 17-01 (attached as Exhibit C to the
24 Declaration of Breanne Schuster); and proposed Multi-departmental Administrative Rules regarding Operating
Hours for City Properties, Unauthorized Camping on City Properties; Enforcement Procedures; and Removal of
Unauthorized Property, No. MDAR 17-01 (attached as Exhibit D to the Declaration of B. Schuster) [hereinafter
referred to as the MDAR 17-01].

II. FACTUAL BACKGROUND

A. **Plaintiffs and the Proposed Class Have And Will Continue To Suffer Substantial Injury and Irreparable Harm As A Result of Defendants' Unlawful Acts**

The individual Plaintiffs in this litigation are two unhoused women who currently live outside on public property in the City of Seattle.² Both women have been victims of the City and WSDOT's ongoing practice and policy of seizing and destroying the property of unhoused people living outside without adequate and effective notice, an opportunity to be heard, or a meaningful way to reclaim any property that was not destroyed, during Defendants' ongoing policy and practice commonly referred to as "sweeps" or "clean-ups."³ Over the past 18 months, each of these individuals have had critical personal belongings taken and destroyed during sweeps conducted by the City and WSDOT.⁴ Neither were ever given an opportunity to contest the confiscation and destruction of their property.⁵ Further, neither were ever given notice or any reason to believe that any of their property would be stored and could be later retrieved⁶

Plaintiffs' experiences are typical of the Class. Defendants frequently fail to provide any notice before a sweep, or provide inconsistent, inadequate, or misleading notice.⁷ Once

² Declaration of Brandie. Osborne at ¶ 2; Declaration of Lisa Hooper at ¶ 2.

³ Declaration of B. Osborne at ¶ 2-4, 7-9; Declaration of L. Hooper at ¶ 4-8, 12-13.

⁴ Declaration of B. Osborne at ¶ 2, 8, 11; Declaration of L. Hooper at ¶ 4, 12; Declaration of Simon Stephens at ¶ 14; Declaration of Randi Kearn at ¶ 2; Declaration of Alex Garland at ¶ 3.

⁵ Declaration of B. Osborne at ¶ 4; Declaration of L. Hooper at ¶ 4, 5.

⁶ Declaration of B. Osborne at ¶ 4, 8; Declaration of L. Hooper at ¶ 4, 5, 12.

⁷ Declaration of B. Osborne at ¶ 9; Declaration of R. Kearn at ¶ 2; Declaration of S. Stephens at ¶ 8, 13; Declaration of A. Garland at ¶ 3-4; Declaration of L. Hooper at ¶ 6, 8; Declaration of Love Mccoy at ¶ 3-4. *See*

1 on site, Defendants often summarily and indiscriminately remove and/or destroy all property
2 in an area, making no effort to distinguish between belongings that are obviously abandoned
3 and trash; rather, nearly everything on site is treated as garbage.⁸ In the majority of instances,
4 Plaintiffs and the Class are not provided an opportunity to challenge the destruction of their
5 belongings prior to or after the sweeps.⁹ And Defendants provide no fair or reliable process
6 to get any items that are preserved. In fact, Defendants' repeated destruction of all unhoused
7 persons' property on site, coupled with their consistent failure to provide any information at
8 all regarding the storage of property leads many individuals living outside to believe, and
9 reasonably so, that all of their property is gone forever. Further, even if Defendants were to
10 store belongings and notify individuals to that effect, their storage facility is frequently closed
11 or inaccessible, items are lost, representatives for Defendants do not know what the
12 procedures are, and notices (if given) provide insufficient information on whether items were
13 stored and how to retrieve them.¹⁰ As a result, Plaintiffs and the Class have lost critical and
14 irreplaceable belongings, sometimes constituting everything they own.¹¹
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19 *also* "Chaos, trash and tears: Inside Seattle's flawed homeless sweeps", Seattle Times, August 19, 2016
20 available at: <http://www.seattletimes.com/seattle-news/chaos-trash-and-tears-inside-seattles-flawed-homeless-sweeps/>.

21 ⁸ Declaration of B. Osborne at ¶ 4, 8; Declaration of L. Hooper at ¶ 6, 8 ; Declaration of L. Mccoy at ¶ 4, 8, 11;
22 Declaration of S. Stephens at ¶ 8, 12; Declaration of L. Mccoy at ¶ 4, 11; Declaration of Aedan Roberts at ¶ 2.

23 ⁹ Declaration of B. Osborne at ¶ 4; Declaration of L. Hooper at ¶ 4, 5; Declaration of S. Stephens at ¶ 8.

24 ¹⁰ Declaration of B. Osborne at ¶ 4, 8; Declaration of L. Hooper at ¶ 4, 6, 12; Declaration of S. Stephens at ¶ 8-
10. *See also* the City of Seattle Department of Transportation's webpage regarding personal property
collected at unauthorized encampments, attached as Ex. J to Declaration of B. Schuster.

¹¹ Declaration of B. Osborne at ¶ 2, 5, 11; Declaration of L. Hooper at ¶ 4, 10; Declaration of S. Stephens at ¶ 9,
14; Declaration of L. Mccoy at ¶ 7.

1 Defendants have conducted approximately 1,000 sweeps over the past two years,¹²
 2 directly affecting the more than 2,000 individuals who are unhoused and living outside within
 3 the City of Seattle.¹³ The organizational plaintiffs must expend significant resources because
 4 of these practices,¹⁴ and the individual plaintiffs, organizational members, and members of the
 5 proposed class have suffered adverse health consequences in addition to the loss of their
 6 property, including illness, loss of sleep, depression, and even death.¹⁵

7
 8 The Plaintiffs and members of the proposed class remain outside and at risk of
 9 additional deprivation as a result of these practices, which remain ongoing, continuing even
 10 after this lawsuit was filed.¹⁶ For example, on January 26, 2017 Plaintiff Brandie Osborne
 11 was told by the Washington State Patrol to move her property from an encampment without
 12 any notice.¹⁷ Ms. Osborne was told that WSDOT was not required to give notice prior to
 13 clearing the area where she was camped and that she had 30 minutes to pack up her home and
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15 ¹² See *Seattle Officials say more 'sweeps' of homeless camps in the works*, The Seattle Times, December 20,
 16 2015, available at [http://www.seattletimes.com/seattle-news/politics/seattle-officials-say-more-sweeps-of-](http://www.seattletimes.com/seattle-news/politics/seattle-officials-say-more-sweeps-of-homeless-camps-in-the-works/)
 17 [homeless-camps-in-the-works/](http://www.seattletimes.com/seattle-news/politics/seattle-officials-say-more-sweeps-of-homeless-camps-in-the-works/) (indicating that at least 527 sweeps were conducted in 2015); *City Council to*
 18 *consider proposal regulating Seattle homeless encampment sweeps*, Capitol Hill Seattle, September 7, 2016,
 19 available at [http://www.capitolhillseattle.com/2016/09/city-council-to-consider-proposal-regulating-seattle-](http://www.capitolhillseattle.com/2016/09/city-council-to-consider-proposal-regulating-seattle-homeless-encampment-sweeps/)
 20 [homeless-encampment-sweeps/](http://www.capitolhillseattle.com/2016/09/city-council-to-consider-proposal-regulating-seattle-homeless-encampment-sweeps/) (wherein the City admits to conducting at least 441 sweeps between the Mayor's
 21 State of Emergency and September of 2016); *Hott mess': Seattle's civil-rights monitors slam breaks on some*
 22 *homeless camp sweeps*, The Seattle Times, December 13, 2016, available at [http://www.seattletimes.com/seattle-](http://www.seattletimes.com/seattle-news/politics/hott-mess-seattles-civil-rights-monitors-slam-brakes-on-some-homeless-camp-sweeps/)
 23 [news/politics/hott-mess-seattles-civil-rights-monitors-slam-brakes-on-some-homeless-camp-sweeps/](http://www.seattletimes.com/seattle-news/politics/hott-mess-seattles-civil-rights-monitors-slam-brakes-on-some-homeless-camp-sweeps/) (indicating
 24 that at least 26 sweeps were conducted between September and early November of 2016)..

¹³ See 2016 Annual Report, Seattle/King County Coalition on Homelessness, available at
http://www.homelessinfo.org/resources/publications/2016_AnnualReport.pdf.

¹⁴ Declaration of T. Harris at ¶ 5-7.

¹⁵ Declaration of B. Osborne at ¶ 6, 9, 11; Declaration of L. Hooper at ¶ 6, 9, 13; Declaration of S. Stephens at
 ¶ 11-14; Declaration of L. McCoy at ¶ 6, 10; Declaration of A. Roberts at ¶ 2; Declaration of Timothy Alexander
 at ¶ 8; Declaration of T. Harris at ¶ 5-7.

¹⁶ Declaration of B. Osborne at ¶ 13; Declaration of L. Hooper at ¶ 9, 13.

¹⁷ Declaration of B. Osborne at ¶ 9, 13; Declaration of S. Stephens at ¶ 14; Declaration of A. Garland at ¶ 3.

1 everything she owned; everything else would be considered garbage.¹⁸ Ms. Osborne was not
 2 able to move all of her property on such short notice and WSDOT seized a number of her
 3 belongings.¹⁹ Ms. Osborne has not been able to retrieve any of these belongings and has been
 4 given no reason to believe any of the belongings were retained; in fact she was told anything
 5 she did not move would be destroyed.²⁰ The Defendants have conducted a number of sweeps
 6 like this without providing residents any notice, leaving people living outside with no reason
 7 to believe that this unlawful conduct will not continue.²¹ In fact, Defendants implied that,
 8 pursuant to new rules, they will be able to continue to engage in this conduct unfettered.²²
 9

10 **B. Defendants Have Ignored Prior Policies; The New Proposed Rules Will Not**
 11 **Remedy Constitutional Violations; Injunctive Relief Is Required to Protect**
 12 **Plaintiffs From Further Harm**

13 The Defendants' prior conduct demonstrates that any proposed change in the rules that
 14 purportedly apply to the sweeps will not provide the necessary relief to Plaintiffs.
 15 Defendants' sweeps are currently governed by the Multi-Departmental Administrative Rules
 16 08-01 ("MDAR 08-01") and the WSDOT Guidelines to Address Illegal Encampments within
 17 the State Right of Way ("WSDOT Guidelines"). On January 31, 2017, the City released
 18 proposed revised rules that would apply to the City's conduct during sweeps.²³ These rules
 19 provide no improvement (and in many ways are worse than) the current guidelines. The new
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21 ¹⁸ Declaration of B. Osborne at ¶ 13.

22 ¹⁹ Declaration of B. Osborne at ¶ 11.

23 ²⁰ Declaration of B. Osborne at ¶ 9, 11.

24 ²¹ Declaration of S. Stephens at ¶ 3, 6.

²² Declaration of B. Osborne at ¶ 13; Declaration of L. Hooper at ¶ 9.

²³ See Proposed FAS Encampment Rule 17-01 (attached as Exhibit C to the declaration of B. Schuster).

1 proposed rules would enable the City to remove without notice the belongings of virtually any
2 unhoused person on City-owned or City-controlled property or many of the other areas where
3 homeless encampments currently exist.²⁴ They also allow the City to unilaterally declare an
4 area to be a hazard and to “remove” a nearby encampment without notice.²⁵ The new
5 proposed rules would enable the City to sweep virtually any encampment in the City
6 immediately without notice. The new proposed rules would do nothing to remedy the
7 constitutional violations that are inherent in Defendants’ sweeps.
8

9 The new proposed rules would also allow the city to declare “emphasis areas” that
10 would enable it to exclude many otherwise reasonable areas from any camping altogether.
11 The rules provide no criteria for what can constitute an “emphasis area”—it can be of any size
12 and anywhere within the City limits, as long as it’s somewhere an encampment has previously
13 existed and been swept. The emphasis areas by definition can only be created where people
14 already live, and given the City’s conduct and frequent sweeps of particular areas, it’s likely
15 they will be where many if not most unhoused people currently live. This will have a
16 tremendous impact on people living outside, many of whom have been living in the same
17 place for months if not years, and will be left with nowhere safe to go and store their
18 belongings. Finally, the enforcement of these new proposed rules is still at the sole discretion
19 of the executive and aside from brief mention that the City may collaborate with WSDOT, the
20 proposed rules provide no requirements for how that coordination will occur or to ensure
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23 ²⁴ See Proposed FAS Encampment Rule 17-01 at ¶ 3.3, 3.4, and 4.1 (attached as Exhibit C to the declaration of
B. Schuster).

24 ²⁵ See Proposed FAS Encampment Rule 17-01 at ¶ 3.3, 3.4, and 4.1 (attached as Exhibit C to the declaration of
B. Schuster).

1 those sweeps are done constitutionally. The City's decision to pursue these proposed rules,
 2 which do nothing to remedy the constitutional violations inherent in Defendants' sweeps,
 3 demonstrates the need for immediate relief from the Court.

4 More importantly, Defendants' ongoing practice demonstrates that even if Defendants
 5 were to adopt official policies and procedures that comply with the constitutional rights of
 6 Seattle residents living outside, there is no guarantee that Defendants would follow them
 7 absent a court order. For decades—and in the 8 years since the current guidelines applying to
 8 sweeps were adopted—Defendants have conducted sweeps sporadically, unpredictably, and
 9 with utter disregard of even their own (wholly inadequate) regulations.²⁶

11 For example, according to both the MDAR 08-01 and WSDOT Guidelines,
 12 Defendants are, provided an exception does not apply, to provide 72 hours' notice before
 13 clearing particular areas where unhoused individuals living outside reside.²⁷ Yet, Defendants
 14 repeatedly arrive on site without providing any form of notice, informing residents they must
 15 immediately move all of their belongings, and that anything left behind will be removed
 16 and/or disposed of.²⁸

18 In the event that Defendants do provide notice 72 hours in advance, the notice
 19 frequently does not conform with their own official written policies.²⁹ However, notices

21 ²⁶ Declaration of L. Hooper at ¶¶ 6-7, 13; Declaration of S. Stephens at ¶¶ 5-7 11, 13-15; Declaration of A. Garland
 22 at ¶¶ 3-4; Declaration of B. Osborne at ¶¶ 3,8-9.

23 ²⁷ See MDAR 08-01 at ¶ 7.4 (attached as Exhibit A to declaration of B. Schuster).

24 ²⁸ Declaration of B. Osborne at ¶ 9; Declaration of R. Kearns at ¶ 2; Declaration of S. Stephens at ¶¶ 6, 8, 14;
 Declaration of A. Garland at ¶¶ 3-4; Declaration of L. Mccoy at ¶¶ 3-4, 9-11.

²⁹ For example, the WSDOT Guidelines clearly state that notices must contain the following information: (1) Identification of WSDOT as the agency responsible for the clean-up; (2) Date the notice was given; (3) Date or

1 frequently offer inconsistent and inaccurate information as to when a sweep will occur.³⁰
 2 Additionally, sweeps are frequently conducted on different days than the notice provides for.
 3 Further, Plaintiffs are unaware of any notices posted within the last year that provide 72
 4 hours' notice *and* information about storage of property. Rather, notices, if posted, merely
 5 state that any property remaining on site after a particular day will be subject to removal or
 6 disposal.³¹

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 8 Defendants additionally neglect to follow their own rules and procedures regarding the
 9 storage of property.³² WSDOT repeatedly and indiscriminately treats all property in an area as
 10 garbage, often using backhoes and bulldozers to gather, destroy, and dispose of all property
 11 on site.³³ WSDOT has even admitted that their policy and practice has resulted in the
 12 disposal of unhoused persons' personal property, property that likely should have been kept.³⁴

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 15 dates on which the clean-up will occur; (4) Phone number for storage location; (5) That the items will be stored
 16 for a maximum of 70 days. *See* WSDOT Guidelines at ¶ 5 (attached as Exhibit B to declaration of B. Schuster).

17 ³⁰ See, e.g. Exs. E and F to the Schuster Declaration. Both notices were posted on the same day, for the same
 18 area, but provided different dates for which the sweep would occur

19 ³¹ Declaration of B. Schuster at Ex. E and Ex. F. MDAR 08-01 similarly provides that the City "shall post a
 20 notice on the property providing information regarding how individuals may claim removed personal property."
 21 Yet, notices regarding the storage and retrieval of property are rarely if ever posted when the City conducts a
 22 sweep. Thus, despite the City's own rules, unhoused people living outside are given no information regarding
 23 whether or where their belongings are stored, or how to retrieve them.

24 ³² *See* WSDOT Guidelines at ¶ 5 (attached as Exhibit B to declaration of B. Schuster).

³³ Declaration of B. Osborne at ¶ 9; Declaration of R. Kearns at ¶ 2; Declaration of S. Stephens at ¶ 8, 13;
 Declaration of A. Garland at ¶ 3-4; Declaration of L. Hooper at ¶ 6, 8; Declaration of L. McCoy at ¶ 3-4, 8. *See*
 also "Chaos, trash and tears: Inside Seattle's flawed homeless sweeps", Seattle Times, August 19, 2016
 available at: <http://www.seattletimes.com/seattle-news/chaos-trash-and-tears-inside-seattles-flawed-homeless-sweeps/>.

³⁴ *See also* "Chaos, trash and tears: Inside Seattle's flawed homeless sweeps", Seattle Times, August 19, 2016
 available at: <http://www.seattletimes.com/seattle-news/chaos-trash-and-tears-inside-seattles-flawed-homeless-sweeps/>.

1 Even if property is stored, Defendants frequently violate their own guidelines for
 2 keeping inventory.³⁵ There is no evidence from property owners that attempts have been
 3 made to do store and inventory property and WSDOT public records received to this date
 4 indicate few items are ever stored and inventoried.³⁶

5 III. ARGUMENT

6 Plaintiffs seek a temporary restraining order enjoining Defendants from seizing and
 7 destroying the property of unhoused people living outside without adequate and effective
 8 notice, an opportunity to be heard, or a meaningful way to reclaim any property taken.
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10 The “standard for issuing a temporary restraining order is essentially the same as that
 11 for issuing a preliminary injunction.” *Stuhlberg Intern. Sales Co., Inc. v. John D. Brush &*
 12 *Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). “A plaintiff seeking a preliminary injunction
 13 must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer
 14 irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his
 15 favor, and [4] that an injunction is in the public interest.” *Winter v. Natural Res. Defense*
 16 *Council, Inc.*, 555 U.S. 7, 21, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). Plaintiffs are not
 17 required to show that they *will* succeed on the merits, only that they are “likely” to prevail. At
 18 a minimum, they must show “serious questions going to the merits[,]” that the “balance of
 19 hardships tips sharply in [their] favor, and the other two *Winter* factors are satisfied. *Shell*
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23 ³⁵ See WSDOT Guidelines at ¶ 5, 6 (attached as Exhibit B to declaration of B. Schuster).

24 ³⁶ Documents from 2014 and 2015 received pursuant to public records requests indicate that only a handful of items were stored out of hundreds of sweeps conducted. Declaration of B. Schuster at Ex. I.

1 *Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (internal quotation
2 marks omitted). All four factors are met here.

3 **A. Plaintiffs Are Likely to Succeed on their Claim That Defendants’ Sweeps Policy
4 and Practice Violates the Federal and Washington State Constitutions**

5 **1. Fourth Amendment of U.S. Constitution and Article I, Section 7 of the
6 Washington State Constitution**

7 The Fourth Amendment of the U.S. Constitution “protects the right of the people to be
8 secure in their persons, houses, papers and effect, against unreasonable seizures and
9 searches.” U.S. Const., Amend. IV. A “seizure” under the Fourth Amendment occurs “where
10 there is some meaningful interference with an individual’s possessory interest in that
11 property.” *Soldal v. Cook County Ill.*, 506 U.S. 56, 63 (1992). A seizure without a warrant is
12 “per se unreasonable. The Government bears the burden of showing that a warrantless search
13 or seizure falls within an exception to the Fourth Amendment’s warrant requirement.” *United*
14 *States v. Cervantes*, 703 F.3d 1135, 1141 (9th Cir. 2012). And even if a search or seizure is
15 lawful at its inception, the seizure “can nevertheless violate the Fourth Amendment because
16 its manner of execution unreasonably infringes possessory interests protected by the Fourth
17 Amendment’s prohibition on ‘unreasonable seizures.’” *United States v. Jacobsen*, 466 U.S.
18 109, 124-25 (1984). *See also Lavan*, 693 F.3d at 1030.

19 Article I, Section 7 of the Washington State Constitution provides that “No person
20 shall be disturbed in his private affairs, or his home invaded, without authority of law.” Both
21 the Fourth Amendment and Article I, section 7 of the Washington Constitution prohibit
22 unreasonable seizures. *State v. McLean*, 178 Wn. App. 236, 244 (2013). “Article I, section 7
23 requires no less than the Fourth Amendment.” *State v. Chesley*, 158 Wn. App. 36, 45 (2010),
24

1 review granted, case remanded, 174 Wn.2d 1012 (2012) (internal quotations omitted). In fact,
2 Washington courts have noted that “the broad language of article I, section 7 is more
3 protective than the Fourth Amendment to the United States Constitution.” *State v. Lyons*, 174
4 Wn.2d 354, 359, n.1 (2012).

5 There should be no legal dispute that homeless individuals have a property interest in
6 their tents, blankets, tarps, medication, personal papers and other items, and that these enjoy
7 state and federal constitutional protection. This issue has already been resolved, and in *Lavan*
8 the Ninth Circuit foreclosed any argument that homeless individuals do not have a protectable
9 property interest in their belongings. *Lavan*, 693 F.3d at 1031. Therefore, the only question is
10 whether the summary destruction of Plaintiffs’ property constitutes unreasonable seizures.
11 Existing case law and the circumstances surrounding the seizure and destruction compel a
12 finding that Plaintiffs are likely to succeed on this claim. As the new proposed rules make
13 clear, the City does not intend to remedy the constitutional violations inherent in its sweeps.
14 Rather, the City appears intent on giving itself further latitude for conducting sweeps and
15 seizing and destroying property without notice.³⁷

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18 First, the destruction of homeless people’s property is undoubtedly a deprivation that
19 triggers Fourth Amendment analysis. *See Miranda v. City of Cornelius*, 429 F.3d 858, 862
20 (9th Cir. 2005). And that deprivation—the wholesale destruction of plaintiffs’ personal
21 belongings—is patently unreasonable. *Lavan*, 693 F.3d at 1030. In fact, in *Lavan*, the Ninth
22 Circuit noted that the City “almost certainly could not” even argue that the summary
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24 ³⁷ See Proposed FAS Encampment Rule 17-01 at ¶ 3.3, 3.4, and 4.1 (attached as Exhibit C to the declaration of B. Schuster).

1 destruction of homeless people’s property under very similar circumstances was reasonable
2 under the Fourth Amendment. *Id.*

3 When the destruction occurs during Defendants’ ongoing sweeps, the Defendants
4 know that the property is not abandoned—in fact, it is often property that Plaintiffs have had
5 to leave behind after demands by Defendants to vacate on little or no notice.³⁸ There is no
6 legitimate reason for Defendants to seize and destroy the property of unhoused Seattle
7 residents without adequate notice, a warrant or probable cause, an opportunity to be heard, or
8 a meaningful way to reclaim seized property. Neither can concern for the general health and
9 safety of the community justify these actions: the Ninth Circuit has soundly rejected these
10 arguments. See *Lavan*, 797 F. Supp. 2d at 1015 (noting that the seizure of property “threatens
11 the already precarious existence of homeless individuals by posing health and safety hazards”
12 and violated the Fourth Amendment, despite “an inherent interest in keeping public areas
13 clean and prosperous”).

14
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16 **2. Fourteenth Amendment of U.S. Constitution and Article I, Section 3 of the
Washington State Constitution**

17 Under the Fourteenth Amendment, “No state shall . . . deprive any person of life,
18 liberty, or property, without due process of law.” U.S. Const., Amend. XIV. To determine
19 whether there has been a due process violation, the Court follows a two-step analysis: first, it
20 determines whether there is a property interest encompassed within the protection of the due
21 process clause, and if there is, what process is due. *Propert v. District of Columbia*, 948 F.2d
22 1327 (D.C. Cir. 1991). Whether there is a protected property interest requires the court to look
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³⁸ Declaration of B. Osborne at ¶ 2, 11; Declaration of L. Hooper at ¶ 4, 10; Declaration of S. Stephens at ¶ 9, 14.

1 to “existing rules or understandings that stem from an independent source such as state-law
2 rules or understandings.” *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

3 Washington additionally recognizes the right of ownership of personal property.
4 “Possession of personal property is prima facie proof of ownership, and is presumptive
5 evidence that the possession is rightful.” *Merinella v. Swartz*, 123 Wash. 521, 523, 212 P.
6 1052, 1053 (1923) (internal quotes omitted). Article I, Section 3 of the Washington State
7 Constitution provides the fundamental guarantee that “[n]o person shall be deprived of life,
8 liberty, or property, without due process of law.”

9
10 Tents, tarps, blankets, medication, and other items are property protected by the
11 Fourteenth Amendment and the Washington State Constitution. *See Lavan*, 693 F.3d at 1032
12 (holding that the protections guaranteed by the Fourteenth Amendment attach “regardless of
13 whether the property in question is an Escalade or an EDAR, a Cadillac or a cart”). In many
14 instances, the volume of what is taken and destroyed constitutes almost everything the
15 individual owns.

16
17 The second question is what process is due, which depends on a balance of factors
18 outlined in *Mathews v. Eldridge*: “first, the private interest affected by the government action;
19 second, the risk of an erroneous deprivation of such interest through the procedures used, and
20 the probable value, if any, of additional or substitute procedural safeguards; and finally, the
21 government’s interest, including the function involved and the fiscal and administrative
22 burdens that the additional or substitute procedural requirements would entail.” 424 U.S. 319,
23 335. Defendants’ policy and practice of destroying property without any process, and storing
24

1 property without sufficient notice or procedures to ensure its return, ignores these clearly
2 established legal standards.

3 **a. The destruction of property, without any method to challenge the**
4 **destruction, violates the 14th Amendment**

5 The summary destruction of property, whether it is incident to an individual's
6 removal, or when the individual is unable to move it during a sweep, suffers from the same
7 constitutional infirmity—it affords no process by which the owner of the property can
8 challenge its destruction before “the owner is finally deprived of a protected property
9 interest.” *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). Such state action is
10 anathema to the concept of due process. “However weighty the governmental interest may be
11 in a given case, the amount of process required can never be reduced to zero - that is, the
12 government is never relieved of its duty to provide some notice and some opportunity to be
13 heard prior to final deprivation of a property interest.” *Propert*, 948 F.2d at 1333 (citing
14 *Logan*, 455 U.S. at 434).
15

16 Despite the “truism that some form of hearing is required before the owner is finally
17 deprived of a protected property interest,” *Logan*, 455 U.S. at 433, and very clear instruction
18 to that effect from the Court in *Lavan* and the preceding cases, Defendants destroy property
19 without any opportunity to challenge the basis for the destruction. In multiple instances,
20 Plaintiffs’ property was destroyed after Plaintiffs were removed from the area or while
21 Plaintiffs had momentarily left their property unattended.³⁹ The new proposed rules make
22
23

24 ³⁹ Declaration of B. Osborne at ¶ 11, Declaration of Jamie Fuller at ¶ 2; Declaration of L. Hooper at ¶ 4;
Declaration of L. Mccoy at ¶ 3. *See also* the Seattle Times report on the City’s sweeps, finding “At the March
cleanup near the I-90 and I-5 interchange, crews found tents, a baby carriage, furniture and a stuffed animal. But

1 clear that the City does not intend to stop these unlawful practices. Instead, the new proposed
 2 rules allow the City to unilaterally and without notice “remove” any encampments that it
 3 deems hazardous (including encampments that are under overpasses or other property that the
 4 City determines are unacceptable) or that are on City property.⁴⁰ This puts many, if not all,
 5 encampments at risk of summary removal without any notice or other pre- or post-deprivation
 6 services.

7
 8 In *Lavan*, the Court made it explicitly clear that “the City is required to provide
 9 procedural protections before permanently depriving [homeless individuals] of their
 10 possessions.” *Id.* at 1032. *Lavan* is consistent with numerous other cases, in which the Court
 11 required due process to challenge the basis for destruction before the property was
 12 permanently destroyed.⁴¹ As in *Lavan*, “the City’s decision to forego any process before
 13 permanently depriving [homeless individuals] of protected property interests is especially
 14

15
 16 the items were mixed in with massive amounts of trash and waste, along with some needles. State crews deemed
 17 it all to be trash and spent hours filling dump trucks to take everything away.” See “Chaos, trash and tears:
 18 Inside Seattle’s flawed homeless sweeps”, Seattle Times, August 19, 2016, available at:
 19 <http://www.seattletimes.com/seattle-news/chaos-trash-and-tears-inside-seattles-flawed-homeless-sweeps/>. See
 20 also, *How the City of Seattle Trashes Homeless Peoples Belongings and Chases Them Around Town*, available at
 21 [http://www.thestranger.com/slog/2016/04/06/23909768/how-the-city-of-seattle-trashes-homeless-peoples-
 22 belongings-and-chases-them-around-town](http://www.thestranger.com/slog/2016/04/06/23909768/how-the-city-of-seattle-trashes-homeless-peoples-belongings-and-chases-them-around-town), describing an instance in which a homeless individual had important
 23 documents disposed of while he stepped away to get more trash bags to gather and save his belongings during a
 24 sweep. When he returned, he found all of his property throw into the dump truck. The individual plead to go
 and get his belongings, really needing his medication and identification, but was told “No, once things are on this
 truck, it’s a one way trip to the dump.”

⁴⁰ See Proposed FAS Encampment Rule 17-01 at ¶ 3.3, 3.4, and 4.1 (attached as Exhibit C to the declaration of
 B. Schuster).

⁴¹ See e.g., *Schneider v. County of San Diego*, 28 F.3d 89 (9th Cir. 1994) (holding that car owner was deprived
 of due process when his car was destroyed without proper notice or sufficient process, even after adequate notice
 and process regarding the initial seizure); *Wong v. City & County of Honolulu*, 333 F. Supp. 2d 942, 945 (D.
 Haw. 2004) (sweep of derelict vehicles that resulted in the destruction of motor vehicles violated due process).
 See also *Proper*, 948 F.2d at 1333 (compiling cases).

1 troubling given the vulnerability of [the City of Seattle’s] homeless residents.” 693 F.3d at
2 1032.

3 **b. Plaintiffs are likely to prevail on their claim that the Defendants’**
4 **failure to provide adequate notice and a process to get a person’s**
5 **belongings back violates their right to due process**

6 Due process requires an individual both “be given notice and an opportunity to be
7 heard at a meaningful time and in a meaningful manner.” *Schneider*, 28 F.3d at 92. This
8 process “must be tailored to the capacities and circumstances of those who” must rely on the
9 process. *Goldberg*, 397 U.S. at 268-69. For the notice to satisfy due process, “[t]he notice
10 must be of such nature as reasonably to convey the required information.” *Mullane v. Cent.*
11 *Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

12 The Defendants also violate individuals’ rights when they provide no meaningful
13 notice or process to get back the few items they seize and store, let alone challenge the
14 underlying seizure. The owners of property are frequently given no notice where they can
15 pick up their property or even if property has been preserved. If they are given notice, the
16 notice is inaccurate and does not outline the process actually required to get their property
17 back. The process itself is convoluted and does not take into account any of the “capacities
18 and circumstances” of the parties, as the Defendants are required to do. *Goldberg*, 397 U.S. at
19 268-69. Taken together, the Defendants’ policies are inadequate, given the serious
20 deprivation to plaintiffs. *See Eldridge*, 424 U.S. at 341.

21 First, “the nature of the interest . . . and the degree of potential deprivation that may be
22 created,” is significant. *Eldridge*, 424 U.S. at 341. Assuming, *arguendo*, that the Defendants
23 preserve some property, these few remaining items are frequently the last remaining
24

1 belongings an individual has. *See Lavan*, 693 F.3d at 1032. *See also Memphis Light, Gas and*
2 *Water Division v. Craft*, 436 U.S. 1, 17-18 (1974) (holding that a deprivation for even a short
3 period of time can threaten health and safety and constitutes a significant interest). Moreover,
4 if, as here, the notice and process for getting the property back is flawed, the individual will
5 be permanently deprived of these items, either because they are never actually able to find
6 them, or because it simply takes too long. Defendants' official policy requires property to be
7 stored for 60 or 70 days.⁴² Yet, employees of Defendants estimate only 1 or 2 percent of it is
8 actually retrieved; the rest is thrown in the trash.⁴³ Therefore, the interest and the potential
9 deprivation are significant.
10

11 The second *Eldridge* factor considers "the risk of an erroneous deprivation of such
12 interest through the procedures used, and the probable value, if any, of additional or substitute
13 procedural safeguards." *Eldridge*, 424 U.S. at 335. This factor requires the Court to weigh the
14 "fairness and reliability of the existing procedures." *Nozzi*, 806 F.3d at 1193. The
15 Defendants' procedures for getting property back after it taken is anything but fair and
16 reliable.
17

18 First, notice about how to get one's property back is insufficient. "To be
19 constitutionally adequate, notice must be reasonably calculated under all circumstances, to
20 apprise interested parties with due regard for the practicalities and particularities of the case."
21

22 ⁴² *See* WSDOT Guidelines at ¶ 6 (attached as Exhibit B to declaration of B. Schuster), which provide that
23 property is to be stored for 70 days; and MDAR 08-01 at ¶ 7.5 (attached as Exhibit A to declaration of B.
24 Schuster), providing that stored property can be disposed of after 60 days.

⁴³ *See* "Chaos, trash and tears: Inside Seattle's flawed homeless sweeps", *Seattle Times*, August 19, 2016,
available at: <http://www.seattletimes.com/seattle-news/chaos-trash-and-tears-inside-seattles-flawed-homeless-sweeps/>.

1 Nozzi, 806 F.3d at 1194 (citing *Mullane*, 339 U.S. at 314) (internal quotations removed). The
2 notice provided here fails this test. Many individuals are not given any notice of what
3 happened to their property and are given no reason to not assume it has all been destroyed and
4 discarded.⁴⁴ WSDOT and City employees answering the phone are unwilling or unable to say
5 where items are stored or when they can be picked up.⁴⁵ In the unlikely event an individual
6 does receive notice of how to retrieve their property, the Defendants impose other barriers to
7 retrieval. The facility where items deemed worthy of storage are kept is at 4200 Airport Way
8 South, approximately an hour walk from downtown Seattle. As a result, one worker at the
9 City's storage facility estimates that only 1 or 2 percent of the materials stored are ever picked
10 up, with the rest eventually thrown out.⁴⁶

12 These failures in notice and process render the deprivation of property, whether
13 temporarily or permanently, unconstitutional. *See Memphis Light, Gas and Water Division v.*
14 *Craft*, 436 U.S. 1 (1978) (holding that a utility company violated Plaintiffs' due process rights
15 after Plaintiffs made "good faith efforts" to "straighten out the problem," but were never
16 notified of a process to resolve the issue and, despite their efforts, their service was
17 wrongfully terminated). This is particularly true for unhoused individuals who find their
18 belongings taken when they are temporarily or unable to physically move all of their property
19

21 ⁴⁴ Declaration of B. Osborne at ¶ 4; Declaration of L. Hooper at ¶ 5, 8, 12; Declaration of S. Stephens at ¶ 8, 10.

22 ⁴⁵ *See* "Chaos, trash and tears: Inside Seattle's flawed homeless sweeps", Seattle Times, August 19, 2016,
23 available at: <http://www.seattletimes.com/seattle-news/chaos-trash-and-tears-inside-seattles-flawed-homeless-sweeps/>.

24 ⁴⁶ *See* "Chaos, trash and tears: Inside Seattle's flawed homeless sweeps", Seattle Times, August 19, 2016
available at: <http://www.seattletimes.com/seattle-news/chaos-trash-and-tears-inside-seattles-flawed-homeless-sweeps/>.

1 in the limited amount of time Defendants provide. They, moreover, rarely have access to
2 reliable transportation or a charged cell phone, and frequently have mobility challenges. The
3 failure to “take account for the ‘capacities and circumstances’” of the individuals who must
4 traverse this system renders an already unfair system unconstitutional. *Nozzi*, 806 F.3d at
5 1194 (quoting *Goldberg*, 397 U.S. at 268-69; *Memphis Light*, 436 U.S. at 14, n. 15).

6 Finally, the third *Eldridge* factor also weighs in favor of a due process violation. The
7 burden of providing adequate process, including immediate access to property and notice that
8 effectively spells out the process to get the property back, would be minimal, since the
9 Defendants have more than enough resources to return property to individuals, particularly
10 when balancing their rights and the interests at stake. *See Prophet*, 948 F.2d at 1335.

11
12 **B. Class Members Will Suffer Irreparable Harm if Defendants Are Not Enjoined**
13 **from Using Sweeps**

14 Absent the Court’s intervention, Plaintiffs and members of the proposed class will
15 continue to suffer irreparable harm from the Defendants’ policies and practices because they
16 violate their constitutional rights. “An alleged constitutional infringement will often alone
17 constitute irreparable harm.” *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir.
18 1997) (internal citation omitted). “Unlike monetary injuries, constitutional violations cannot
19 be adequately remedied through damages and therefore generally constitute irreparable
20 harm.” *Nelson v. Nat’l Aeronautics & Space Admin.*, 530 F.3d 865, 882 (9th Cir. 2008), *rev’d*
21 *on other grounds and remanded*, 562 U.S. 134 (2011). No countervailing interest of the
22 Defendants outweighs the dire impact on Plaintiffs and members of the proposed class, who
23 are unhoused and live outside during even the most severe weather. The loss of essential
24

1 possessions is “devastating” and clearly constitutes irreparable harm. *Lavan*, 693 F.3d at
2 1032 (internal citations omitted); *Lavan*, 79 F.Supp. 2d at 1019.

3
4 **C. The Balance of Equities Is In Plaintiffs’ Favor**

5 Where Plaintiffs show the likelihood of success on the merits and irreparable harm, “the
6 balance of equities and public interest tip in favor of Plaintiffs.” *Los Padres Forestwatch v.*
7 *U.S. Forest Service*, 776 F. Supp. 2d 1042, 1052 (N.D. Cal. 2011). The more permanent
8 Plaintiffs’ harm if relief is denied and the more temporary Defendant’s harm if it is not, the
9 greater the balance tips toward Plaintiffs. *League of Wilderness Defenders*, 752 F.3d at 765.
10 The District Court in *Lavan* agreed that the balance of equity tipped in Plaintiffs’ favor: “The
11 City’s interest in clean streets is outweighed by Plaintiffs’ interest in maintaining the few
12 necessary personal belongings they might have.” *Lavan*, 797 F. Supp. 2d at 1019-20.

13
14 **D. A Temporary Restraining Order Is In the Public Interest**

15 The fourth element considers how an injunction will impact non-parties. *League of*
16 *Wilderness Defenders*, 752 F.3d at 766. This prong, too, is in Plaintiffs’ favor since “[i]t is
17 always in the public’s interest to prevent the violation of a party’s constitutional rights”, and
18 all the more so when the violation is being done in the name of their own government.
19 *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). The unhoused individuals affected
20 by the Defendants’ unlawful acts are part of the public and are directly harmed by the sweeps.
21 These individuals will continue to lose critical belongings until Defendants are restrained
22 from their unlawful conduct. Further, the new proposed rules appear crafted specifically to
23 drive unhoused individuals out into the elements with provisions that allow for immediate
24

1 clearing of encampments under overpasses.⁴⁷ Not only will this endanger the health and
2 safety of unhoused individuals but it will force encampments into other open spaces, which
3 the rest of the public finds disagreeable.

4 **E. A Temporary Restraining Order Should Apply Within the City of Seattle**

5
6 An injunction may extend beyond the named plaintiffs if it “is necessary to give
7 prevailing parties the relief to which they are entitled.” *Easyriders Freedom F.I.G.H.T. v.*
8 *Hannigan*, 92 F.3d 1486, 1501B02 (9th Cir. 1996) (internal citation and emphasis omitted);
9 “Class-wide relief may be appropriate even in an individual action.” *Bresgal v. Brock*, 843
10 F.2d 1163, 1171 (9th Cir. 1987) (noting that “The district court has the power to order
11 nationwide relief where it is required.”). Defendants seize and discard property of all
12 individuals present at a location during a sweep. It is not possible, practical, or effective to
13 limit the relief to only certain individuals. The injunction must extend to all unhoused people
14 living outside within the City of Seattle. *See, e.g., Lavan*, 693 F.3d at 1026, 1033 (injunction
15 applies to “all unabandoned property on Skid Row” because “it would likely be impossible
16 for the City to determine whose property is being confiscated”).

17
18 **F. The Requirement of a Bond Should be Waived**

19
20 Federal courts may exercise their discretion under FRCP 65(c) to waive the bond
21 requirements in suits to enforce important federal rights of public interest. *Barahona-Gomez*
22 *v. Reno*, 167 f.3d 1228, 1237 (9th Cir. 1999); *Cal. ex rel. Van de Kamp v. Tahoe Reg'l*

23
24

⁴⁷ *See* Proposed FAS Encampment Rule 17-01 at ¶¶ 3.3, 3.4, and 4.1 (attached as Exhibit C to the declaration of B. Schuster).

1 *Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985) (no bond required for non profit
2 group). This Court should do so here.

3 **IV. CONCLUSION**

4
5 This action challenges an ongoing practice and policy of the City of Seattle and
6 WSDOT of seizing and destroying the property of people who are unhoused and living
7 outside within the City of Seattle. For the aforementioned reasons, Plaintiffs and members of
8 the proposed class are entitled to injunctive relief to prevent their property from being
9 destroyed. A proposed order is submitted herewith.
10

11
12
13 DATED this 6th day of February, 2017.

14
15 AMERICAN CIVIL LIBERTIES UNION
OF WASHINGTON FOUNDATION

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PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING
ORDER AND PRELIMINARY INJUNCTION - 26
(No. 2:17-cv-00077-RSM)

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