Honorable Ricardo S. Martinez

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; THE EPISCOPAL DIOCESE OF OLYMPIA; REAL CHANGE,

Plaintiffs,

v.

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

DEFENDANT CITY OF SEATTLE'S OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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I. INTRODUCTION

There is no easy solution to the housing crisis many cities are facing today, particularly where, as in the City of Seattle (the "City"), threats to public safety are intertwined with the issue of camping on public property. For many years, the City has strived to be a leader in providing unhoused persons with outreach, shelter, and other services, all the while balancing competing interests, including the need to protect all community members from unsafe conditions in public areas. As part of this process, the City conducts both clean-ups and targeted outreach whenever encampments on its public property raise significant public health or safety concerns, obstruct the intended use of public facilities, or otherwise necessitate intervention in furtherance of the public interest.

The City certainly does not dispute that persons living outside have personal property rights protected by the Constitution. That is one reason why, for nearly a decade, the City has been operating under a set of detailed policies, called the Multi-Departmental Administrative Rules ("MDARs"), which govern among other things how and when property may be removed from an encampment on public property. The City is now on the verge of adopting a new set of MDARs, which will provide even more protections for persons living in encampments and keep the City at the forefront of progress on this issue. The new proposed MDARs are currently out for public comment, and the City has specifically invited all the plaintiffs in this case to provide input on the draft provisions.

Importantly, with regard to the proper disposition, storage, and return of personal property in conjunction with the City's clean-ups—the legal issue raised in this case—the MDARs meet and exceed baseline constitutional requirements. The current MDARs require notice prior to removal of property, and an opportunity for retrieval of that property. The new

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MDARs propose further protections, including more detailed notices, and free delivery of property to be returned. Plaintiffs provide anecdotal evidence regarding past individual incidents of encampment clean-ups, but even as to those incidents, the testimony does not support the allegation that the City has adopted and follows a policy of seizing property without notice and summarily destroying it. As numerous courts have recognized, the constitutional requirements of reasonable seizure and due process require only basic notice prior to removal and a reasonable opportunity for retrieval, which the City's policies and general practices satisfy and surpass.

Notwithstanding the City's robust policies and ongoing efforts to refine its procedures, Plaintiffs now ask this Court to intervene on shortened time and on a limited record, to disregard the pending MDARs in the midst of the public comment period, and effectively to craft a new regulation that bars the City from removing any items from public property except in case of an "immediate" emergency. Such an extraordinary remedy would be unwarranted, for numerous reasons. For one thing, Plaintiffs have failed to demonstrate a bona fide constitutional violation and have ignored the substantial legal protections the City has afforded those residing in hazardous encampments. Plaintiffs have also ignored the pressing need to deal with these encampments and the substantial outreach and support the City offers to the residents. Finally, the specific language Plaintiffs have requested to govern what is a highly complex public policy matter would be overbroad, vague, and thus especially inappropriate. For all these reasons, the Court should deny Plaintiffs' motion.

II. FACTUAL BACKGROUND

A. Encampments on Public Property and the Need for Clean-Ups

The City owns property throughout its jurisdiction, much of which is designed for and devoted to special public purposes. *See, e.g.*, Decl. of Chris Potter in Supp. City's Opp. ("Potter

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Decl."), Ex. 1 at § 1.2. Years ago, to protect and promote the safe and beneficial use of such property for the public, the City enacted various laws restricting access and regulating on-site conduct on its properties. *See id.* This includes, for example, laws generally prohibiting camping in the City's designated parks and open spaces. *See id.*; Decl. of Jesús Aguirre in Supp. City's Opp. ("Aguirre Decl.") at ¶¶ 21-23.

More recently, as in other areas of the country, the City has been faced with substantially increasing numbers of unhoused individuals residing on public property in unauthorized encampments. *See* Decl. of Scott Lindsay in Supp. City's Opp. ("Lindsay Decl.") at ¶ 3; Aguirre Decl. at ¶ 9. The Mayor has declared a state of emergency with regard to homelessness, established some authorized tent encampments, and devoted increased funds to addressing this issue.[1] At the same time, the number of unauthorized encampments in the City has continued to grow, and is now in the hundreds. *See* Potter Decl. at ¶ 3.[2]

The increasing number of encampments on public property raises numerous difficult issues for the City and the community. The unhoused persons in such encampments lack adequate shelter, and unfortunately, they often also struggle with mental illness, drug abuse, and other such difficulties. *See* Lindsay Decl. at ¶ 7.[3] As encampments develop, they can become increasingly dangerous and harmful to both the occupants and the surrounding community. *See id.* This often includes concentrations of hazardous and biological waste, increases in violence

[1] *See, e.g.*, Daniel Beekman, *Seattle officials say more 'sweeps' of homeless camps in the works*, THE SEATTLE TIMES (Dec. 20, 2015), *available at* http://www.seattletimes.com/seattle-news/politics/seattle-officials-say-more-sweeps-of-homeless-camps-in-the-works/ (last visited Feb. 8, 2017).

[2] *See also* Beekman, *supra* n.1.

[3] *See also, e.g.*, Bob Young & Vernal Coleman, *Inside the grim world of The Jungle: The Caves, sleeping in shifts and eyeball-eating rats*, THE SEATTLE TIMES (June 17, 2016) ("'Our teams estimated 90 percent of the people have some type of addiction issues. Heroin is pretty rampant,' he said, particularly in the north end of the Caves. 'It's very clear to us that some camps are clearly dealing drugs.'"), *available at* http://www.seattletimes.com/seattle-news/inside-the-grim-world-of-the-jungle-the-caves-sleeping-in-shifts-and-eyeball-eating-rats/ (last visited Feb. 8, 2017).

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(both within the encampments and in the surrounding areas), amplified drug use and growing numbers of discarded needles, covert sex trafficking, large uncontrolled fires that damage nearby infrastructure, and myriad other harmful conditions and activities. *See id.* at ¶¶ 4-7; Potter Decl. at ¶¶ 8-10; Aguirre Decl. at ¶¶ 9-19; Decl. of Steven Wilske in Supp. City's Opp. ("Wilske Decl.") at ¶¶ 2-6; Decl. of Karen Sweeney in Supp. City's Opp. ("Sweeney Decl.") at ¶¶ 9-10.[4] Encampments on public property may also obstruct access to public facilities dedicated to other uses, such as courthouses or playgrounds. Potter Decl. at ¶ 10; Sweeney Decl. at ¶¶ 5-8.

Encampments may also have serious impacts on their neighbors. As but one example, the campuses of the Fred Hutchinson Cancer Research Center and the Seattle Cancer Care Alliance have experienced extreme duress from unauthorized encampments near their properties. Lindsay Decl. at ¶ 6. They have reported serious criminal activity associated with persons from the encampments, including multiple assaults on employees. *Id.* On one occasion, a caregiver was stabbed inside one of the Care Alliance's in-residence facilities. *Id.* In late January 2017, several patient buildings had to be evacuated because of arson fires at unauthorized encampments adjacent to the facility. *Id.*

In light of the numerous threats to public health and safety that encampments can pose, and the housing crisis more broadly, the City has adopted a multi-faceted approach, including the City's Pathways Home Plan and the investment of substantial funds for prevention, intervention, and permanent housing.[5] As part of these comprehensive efforts, the City also conducts clean-

[4] *See also, e.g.*, Young, *supra* n.3 ("One well-worn path leads right to the cluster of tents where the . . . shootings left two dead and three injured. . . . A woman wounded in the attack . . . shares a tent with a man also wounded that night when three teenagers allegedly burst into the campsite in what police have called an attempted drug robbery. . . . In the past five years, Seattle police have responded to more than 70 violent incidents. . . . [L]ast month, a five-member team happened upon a woman being sexually assaulted.").

[5] *See Pathways Home*, SEATTLE.GOV (Sept. 27, 2016), *available at* http://www.seattle.gov/Documents/Departments/pathwayshome/ActionPlan.pdf (last visited Feb. 9, 2017).

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ups at encampments that present the "highest hazard." Potter Decl. at ¶ 8; *see also* Lindsay Decl. at ¶¶ 3-7. In other words, clean-ups are used as a tool to mitigate the harms from the most problematic encampments. *See* Potter Decl. at ¶ 3. Each clean-up allows the City to remove harmful waste, address any damage to City infrastructure or other public property, and disperse a problematic concentration of threatening activities—avoiding a downward spiral into worse conditions and greater harms. Lindsay Decl. at ¶ 7.[6] Although the City has adopted broader initiatives to tackle the interrelated problems of inadequate housing and crime that plague these encampments, clean-ups remain a critical tool that the City uses to manage this ongoing crisis and the real threats that hazardous encampments pose to both inhabitants and others. *Id.*

B. The City's Development of the MDARs

In response to the myriad public health and safety issues associated with encampments, the City previously sought to develop a uniform policy for cleaning up problematic encampments. To develop such a policy, the City spearheaded a collaborative process that solicited input from a wide array of community stakeholders, including policy experts, individuals living in homeless encampments, and local, county, and state officials. *Id.* at ¶ 10. Of particular concern to all stakeholders was the disposition of personal property during the City's clean-ups. *Id.* The City wanted to consider perspectives from all sides. The City thus provided several opportunities for public comment. *Id.*

The City's collaborative process culminated in the drafting of the current MDARs. *Id.* Many stakeholders, including representatives from the homeless community and public at large, praised the MDARs as a sensible solution. *Id.* The City formally adopted the current

[6] *See also, e.g.*, Young, *supra* n.3 ("'As much as I don't believe it's good to shuffle everybody . . . the other side is leaving them in a place that continues to spiral downward.'").

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MDARs on April 7, 2008. *See* Potter Decl., Ex. 1. The MDARs require the City to follow specific notice procedures before removing personal property from encampments and to provide opportunities for retrieval of such property. *See id.* at § 7.

C. The City's Implementation of the MDARs

Ever since adopting the current MDARs in 2008, the City has not only complied with those "baseline" requirements—it has also steadily increased the additional protections and services that it provides. Potter Decl. at ¶ 6. Per the MDARs, the City has always provided notice at least 72 hours in advance of its clean-ups. *Id.* at ¶ 6, 9, 12. The City has also inspected all on-site materials, stored any personal property left behind, and posted notice that such property can be recovered. *See id.* at ¶¶ 19-24. As the City's Director of Operations for the Department of Finance and Administrative Services has confirmed, "City employees follow City encampment procedures at all sites . . . ." *Id.* at ¶ 11.

Over time, the City has steadily added to the MDARs' baseline procedures. For example, 72-hour notice is provided, except in emergencies, to encampments of any size, not just encampments with three or more tents, as required in the original MDARs. *Id.* at ¶ 6; Ex. 1, ¶ 3.9, ¶ 7.4.1.1. The City now provides notice of the particular dates scheduled for any clean-up (rather than merely a 72-hour deadline for removing property), and re-notices any clean-up that is not conducted on schedule. *Id.* at ¶ 12. The City also provides individualized notice, both orally to any individuals present at the time and by placing stickers on each tent and structure at the site. *Id.* In addition, the City sends outreach staff prior to each and every clean-up in order to offer shelter alternatives to all persons at the encampment. *Id.* at 13. The outreach staff are present the day before the clean-up and during the entire clean-up. *Id.* at 13-14. Further, City staff will provide bags and containers for storage purposes and will work with anyone on-site to

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facilitate the storage of his or her belongings if desired. *Id.* at 20. The City continues to refine and strengthen its approach; some of the City's supplemental practices have been adopted within the past six months. *See id.* at ¶ 12. The City's current protocols are already among the most compassionate and respectful in Washington and of any major city in the United States. Lindsay Decl. at ¶ 12.

D. The New MDARs

In its continuing efforts to refine its practices in this area, the City is in the process of updating the MDARs it adopted in 2008. The City initially convened a Task Force to develop recommendations and guidance for revising the MDARs. Lindsay Decl. at ¶ 13. The Task Force included homeless advocates, neighborhood advocates, service providers, business interests, and public property managers. *Id.* The ACLU Foundation of Washington was invited to join the Task Force, but it chose not to participate. *Id.* The Task Force meetings were public and included the opportunity for public comment. *Id.* Based on numerous recommendations from the Task Force, the City developed its proposed set of new MDARs. *Id.*

As with the adoption of the current MDARs, the City is soliciting additional input and feedback from community stakeholders in order to consider additional improvements to the new MDARs. The City has already published notice of its proposed new rules and is currently accepting public comments. *See* Potter Decl. at ¶ 5. The City has specifically invited the Plaintiffs and their counsel, the ACLU, to participate. *See* Decl. of Matthew Segal in Supp. City's Opp. ("Segal Decl."), Ex. A.

The City's proposed update would not only formalize existing practices, it would also extend numerous additional protections to encampments. *See* Potter Decl. at ¶¶ 5-7 & Exs. 2-3. As noted above, the City already has some of the strongest protocols in the country. *See* Lindsay

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Decl. at ¶¶ 12. The new MDARs would make the City's policies even more protective, in numerous ways.

At the outset, the new MDARs would provide more robust notice requirements. Among other things, the new MDARs require notice posted "on or near each tent or structure that is subject to removal," specifying: (1) a time range when removal of personal property will commence, which cannot exceed four hours; (2) where property will be stored if removed by the City and how it can be reclaimed; and (3) contact information for an outreach provider that can provide shelter alternatives. Potter Decl., Ex. 2 at §§ 6.1, 6.3.

The new MDARs would also expand the scope of formal procedures for retrieval of personal property. First, "[i]ndividuals claiming that personal property has been removed from an encampment" can "contact the city of Seattle Customer Service Bureau" for information on "how the property may be recovered." *Id.* at § 12.1. Second, upon request, the City will deliver stored personal property anywhere within the geographical limits of the City on or before the next business day. *Id.* at § 12.4. The storage, recovery, and delivery of personal property is at no cost to the property owner. *Id.* at § 12.5.

E. This Lawsuit

On January 19, 2017, Plaintiffs filed the present lawsuit against the City and the Washington State Department of Transportation ("WSDOT"). *See* Dkt. # 1. Plaintiffs are two individuals and two organizations seeking to represent a class of unhoused individuals in the City. That class has not been certified, and it remains unclear whether the organizational plaintiffs have standing to pursue the claims asserted in this lawsuit. On January 20, the day after filing their complaint, Plaintiffs filed a Motion for Class Certification, which remains pending. *See* Dkt. # 2.

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On January 30, the City released its new MDARs for public comment. Potter Decl. at ¶ 5. The ACLU was on a circulation list and automatically received a copy just before the release. Shortly after, on February 3, counsel for the City emailed counsel for Plaintiffs, memorializing a conversation from the previous week and proposing a "face to face discussion about the issues in the case, as well as the proposed new MDARS that the City has issued." Segal Decl., Ex. A. On February 6, Plaintiffs—without having responded to the City's inquiry or provided notice—filed the present motion for a temporary restraining order. *See* Dkt. # 23.

Although Plaintiffs filed a large number of declarations with their motion, the testimony substantially overlaps and often provides only very general accounts of alleged incidents upon which Plaintiffs rely to establish their legal claims regarding loss of property. For example, the declaration of Timothy Alexander generally describes a cleanup that occurred on February 2, 2017, but does not identify any property destroyed or seized without notice. *See* Dkt. # 29 at ¶¶ 5-8. The declaration of Jamie Fuller states that she lost family photos seven months ago in Tacoma, not Seattle. *See* Dkt. # 30 at 2. The declarations of Simon Stephens and Brandie Osborne describe a cleanup conducted by WSDOT on January 19, 2017, but admit that notice was provided and do not identify any property seized without notice or destroyed. *See* Dkt. # 25 at ¶ 5; Dkt. # 32 at ¶ 8. Ms. Osborne describes another cleanup in December 2016 by WSDOT, but again acknowledges notice was given and does not identify any lost property. *See* Dkt. # 32 at 7. Lisa Hooper's declaration describes cleanups on January 12, 2017, and in September 2016, but does not identify any property seized without notice or destroyed. *See* Dkt. # 27 at 5-6. Other testimony describes incidents that occurred a year ago or even in 2015, but again does not specify whether notice was given, how property may have been removed, and/or whether there was a chance to reclaim it. Multiple declarations describe an incident involving WSDOT and

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state troopers on January 26, 2017, but WSDOT substantially disputes the accounts in those declarations, and this appears to have been a state law enforcement issue rather than a clean-up. *See, e.g.*, Dkt. # 24 at ¶ 2; Dkt. # 32 at ¶ 9.[7]

III. ARGUMENT

A. Plaintiffs Have Not Made the Showing Necessary to Enjoin the City's Continuing Implementation of the MDARs.

Plaintiffs are not entitled to a temporary restraining order or a preliminary injunction against the City. The standard for issuing such preliminary relief is the same for either form of injunction. *See, e.g.*, *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush and Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). Plaintiffs "must establish" that: (1) it is "likely" they will "succeed on the merits;" (2) it is "likely" they will "suffer irreparable harm in the absence of preliminary relief;" (3) the "balance of equities tips" in their favor; and (4) the requested relief is "in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Because preliminary injunctive relief is "an extraordinary remedy," it "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 22. Here, Plaintiffs have not made the required "clear showing" as to any required element, much less all of them.

1. Plaintiffs are not likely to succeed in their challenge to the City's continuing implementation of the MDARs.

First, Plaintiffs have failed to demonstrate a likelihood of success on the merits. The encampments at issue are located on public property, including in public parks, on sidewalks, and adjacent to roads or freeway onramps. *See* Potter Decl. at ¶¶ at 3, 8-10; Aguirre Decl. at ¶ 9; Sweeney Decl. at ¶¶ 5-10. Plaintiffs do not and cannot argue that they have a constitutional right

[7] Other declarations, such as those of Alex Garland and Randi Kearn, rely substantially on hearsay. Paragraphs 7 and 8 of the Hooper Declaration and paragraphs 7 and 8 of the Stephens Declaration also contain several of the same detailed sentences, word for word.

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to trespass or to otherwise store their belongings on public property contrary to City ordinance. *See, e.g.*, *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) ("We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill."); *Church v. City of Huntsville*, 30 F.3d 1332, 1345 (11th Cir. 1994) ("The Constitution does not confer the right to trespass on public lands. Nor is there any constitutional right to store one's personal belongings on public lands."); *see also Whiting v. Town of Westerly*, 942 F.2d 18, 21 (1st Cir. 1991) ("The act of sleeping in a public place, absent expressive content, is not constitutionally-protected conduct."). Thus, Plaintiffs' sole argument is that their personal property cannot be interfered with unreasonably or without due process of law. *See* Pls.' Mot. for Temp. Restr. Order ("Mot.") at 3. Plaintiffs rely substantially on *Lavan v. City of Los Angeles*, 693 F.3d 1022 (9th Cir. 2012) as the legal basis for their claims.

Lavan, however, addressed entirely different circumstances than those before the Court here. The issue in *Lavan* was whether the City of Los Angeles could, without any notice, remove and in all cases destroy property left on public sidewalks. *Lavan*, 693 F.3d at 1024 ("We conclude that the Fourth and Fourteenth Amendments protect homeless persons from government seizure and summary destruction of their unabandoned, but momentarily unattended, personal property."). The court (unsurprisingly) disapproved of "summary" and "on-the-spot" destruction of belongings—a practice Los Angeles did not even attempt to defend as reasonable. *Id.* at 1031, 1032-33 (internal quotations omitted); *see also Lavan v. City of Los Angeles*, 797 F. Supp. 2d 1005, 1019 (C.D. Cal. 2011) ("The City will still be able to lawfully seize and detain property, as well as remove hazardous debris and other trash; issuance of the injunction would

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merely prevent it from *unlawfully* seizing and destroying personal property that is not abandoned without providing any meaningful notice and opportunity to be heard.").[8]

In contrast, and consistent with the specific holding of *Lavan*, numerous subsequent courts have denied injunctive relief analogous to that sought here, and ruled that a city may clean up encampments consistent with the Fourth and Fourteenth Amendments—including through the removal of property left on-site—so long as the city provides notice beforehand and a reasonable opportunity for retrieval of the property that is removed. *See Martin v. City and Cnty. of Honolulu*, No. 15-00363, 2015 WL 5826822, at *4 (D. Haw. Oct. 1, 2015) (denying TRO because clean-up ordinance provided for 24 hours' notice and opportunity to retrieve within 30 days); *Cobine v. City of Eureka*, No. C 16-02239, 2016 WL 1730084, at *4 (N.D. Cal. May 2, 2016) (denying TRO based on advance notice and ability to reclaim); *Acosta v. City of Salinas*, No. 15-cv-05415, 2016 WL 1446781, at *8 (N.D. Cal. Apr. 13, 2016) (denying TRO based on prior notice and secure storage for retrieval).

As these courts all recognized, the provision of prior notice and a reasonable opportunity to reclaim personal property satisfies the baseline requirements under the Fourth and Fourteenth Amendments of reasonableness and procedural fairness, respectively. The basic provision of notice and an opportunity to retrieve is generally adequate in this context because of the relevant rights and interests at stake, including the government's need to safeguard public health and safety, to effectuate the appropriate use of its own property, and to enforce its laws. *See Fuller v.*

[8]Indeed, Los Angeles's lone argument on appeal was that the persons whose property was seized on public property had no rights in that property under the Fourth or Fourteenth Amendments, a position the court rejected and which the City does not advance here. *See Lavan*, 693 F.3d at 1024 n.1 ("The injunction does not require the City to allow hazardous debris to remain on Skid Row, nor does the City quibble with the contours of the order. Rather, the City seeks a broad ruling that it may seize and immediately destroy any personal possessions, including medications, legal documents, family photographs, and bicycles, that are left momentarily unattended in violation of a municipal ordinance.").

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Aila, No. 14-00097, 2015 WL 127887, at *4-7 (D. Haw. Jan. 7, 2015) (discussing reasonableness inquiry and *Mathews* balancing test in context of removing personal belongings from public property). In sum, notice and an opportunity to retrieve are sufficient to satisfy the constitutional requirements that Plaintiffs invoke in this case.[9]

As explained below, the City meets and exceeds the baseline requirements of notice and an opportunity for retrieval. The City's rules are constitutional on their face; the City has followed and even surpassed those rules in actual practice; and Plaintiffs' evidence does not demonstrate otherwise. At the very least, the record is in dispute and thus does not warrant the extraordinary relief Plaintiffs are requesting at this time.

a. The MDARs are facially constitutional.

The City's current MDARs provide for adequate notice and an opportunity for retrieval, consistent with applicable constitutional requirements. As noted above, this is the touchstone to satisfy both the Fourth and Fourteenth Amendments. In order to invalidate the MDARs on their face, Plaintiffs would have to show that under no set of circumstances may they be constitutionally applied, which Plaintiffs cannot do. *See, e.g.*, *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008). The MDARs expressly allow for "summary removal" only of "refuse," "hazardous items," and other specified materials. Potter Decl., Ex. 1 at § 7.2. As to removal of "personal property" from an "encampment," the MDARs require that "written notice" be posted on-site 72 hours in advance, warning of the upcoming clean-up. *Id.* at § 7.4.1.1. At qualifying "recurring encampments," a more enduring

[9] In most cases, the Washington Constitution's due process clause is coextensive with its federal counterpart *Hardee v. State*, 172 Wn.2d 1, 7 n.7 (2011). And while in certain contexts Article I, section 7 of the Washington Constitution may in some cases provide greater privacy protections than the Fourth Amendment, *State v. Mecham*, 186 Wn.2d 128, 141, 380 P.3d 414 (2016), Plaintiffs have not argued or demonstrated why or how it would do so here. As the Ninth Circuit concluded in *Lavan*, expectations of privacy are not the legal issue when seizure of personal property is alleged. *Lavan*, 693 F.3d at 1029.

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notice may be posted, allowing for recurring removal of personal property. *Id.* at § 7.4.1.2. In either case of removal, the City must post a notice "regarding how individuals may claim removed personal property," in addition to individualized notice to the owner if identifiable. *Id.* at §§ 7.3, 7.4.2-.3. The City must store property for at least 60 days before disposing of it. *Id.* at § 7.5.

The new MDARs propose even greater protections. Under the pending rules, notice must be posted "on or near each tent" and must include numerous details about the planned removal, such as the time range for commencement and contact information of outreach providers. *Id.*, Ex. 2 at § 6.1. If removal does not occur at the specified time, a new notice must be posted before the planned removal may occur. *Id.* at § 6.2. Moreover, the City must "offer alternative locations . . . or identify available housing" prior to removing any encampment, and those alternatives must remain available at least until the clean-up is completed. *Id.* at § 7.1. The City will not only provide notice of available retrieval options, it will also deliver claimed property to any safe and appropriate location within city limits, at no charge. *Id.* at § 12.3.

Plaintiffs contend that these proposed new rules "provide no improvement," but Plaintiffs misunderstand (or misstate) the new provisions. Mot. at 7. For example, Plaintiffs assert that the new MDARs would allow the City "to remove without notice . . . virtually any unhoused person," citing to the provisions governing expedited removal of "obstructions" or "immediate hazards." Mot. at 8 & n.24 (citing new MDARs at §§ 3.3, 3.4, 4.1). Those terms are defined narrowly, however, to cover only (1) people or objects "that *block* the normal use" of the City's property or (2) situations that present "risk of injury or death," such as "camping in a location that can only be accessed by crossing driving lanes outside of a marked crosswalk." Potter Decl., Ex. 2 at §§ 3.3, 3.4 (emphasis added). These are not hypothetical circumstances but

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serious and recurring problems. *See* Sweeney Decl. at ¶¶ 5-8; Potter Decl. at ¶¶ 9-10. Plaintiffs complain also about the potential designation of "Emphasis Areas," which are specially designated areas with heightened restrictions—but Plaintiffs overlook the City's underlying right to designate certain areas of its property as off-limits and the rule's proviso that there can be "no more than ten Emphasis Areas at any one time," which must be identified on the City's website. Potter Decl., Ex. 2 at §§ 13.5, 13.6.

Finally, to whatever extent the Plaintiffs have concerns with the proposed new MDARs, they can and should submit comments through the City's ongoing and collaborative public process. *See* Potter Decl. at ¶ 5. The City invited the plaintiffs to do so before this motion was filed. *See* Segal Decl., Ex. A. The ACLU of Washington Foundation was also asked to participate in the taskforce for the new MDARs, but declined. Lindsay Decl. at ¶ 13. The City will continue to work with stakeholders on the MDARs to ensure the best possible practices and an appropriate balancing of relevant interests over time. In the short term, the City will review all public comments submitted and then refine and finalize the new MDARs. This provides a ready venue for Plaintiffs to voice their concerns, and further obviates the need for injunctive relief. Regardless of whether additional protections are added to the new MDARs, however, the City's rules comply with applicable baseline requirements under the Fourth and Fourteenth Amendments.

b. The City has followed the MDARs in practice.

In addition to adopting rules that meet constitutional requirements, the City has followed those rules in actual practice. For starters, the City has consistently provided 72 hours' notice before cleaning up any encampments. *See* Potter Decl. at ¶¶ 6, 7, 9, 11-12. At any given site, the City has attempted in good faith to distinguish items that are garbage from personal property,

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and to segregate bona fide property from trash piles, erring on the side of caution. *Id.* at ¶¶ 15-19. In many cases, however, it is difficult to discern whether a given item remaining on-site is trash or intended for future use. *See id.* In other cases, it is simply unsafe to sift through waste piles—which often include hypodermic needles and human excrement—to identify any underlying property. *See id.* But when personal property has been removed from an encampment, the City has stored that property and provided reasonable notice of the ability to retrieve it. *See id.* at ¶¶ 20-24. Over time, the City has also adopted more robust procedures than the current MDARs even require, such as paired outreach efforts. *See id.* at ¶¶ 6, 13-14.

Plaintiffs overlook the City's continuous, long-term, and good faith efforts at developing and implementing the MDARs and related practices. Plaintiffs instead assert, without support, that the City is engaged in the "summary destruction" of property and is "intent" on "seizing and destroying property without notice." Mot. at 13. Plaintiffs even go so far as to ascribe to the City a "policy and practice of destroying property without any process . . . ." *Id.* at 15. Plaintiffs fall far short of establishing this claim.

First, Plaintiffs' declarations do not demonstrate that the City has a "policy and practice" of unreasonably seizing property without notice and summarily destroying it. Instead, many of the declarations (1) fail to allege that property was destroyed or seized without notice, sometimes acknowledging that notice was provided; (2) fail to address whether an opportunity to reclaim property was provided; (3) discuss events remote in time[10] or that did not involve City actors[11];

[10] This point is especially significant because the City has adopted numerous supplemental services and protections over time, including within the past six months. *See, e.g.*, Potter Decl. at ¶¶ 6, 12.

[11] A substantial portion of the Plaintiffs' declarations are actually devoted to a singular, recent incident on January 26 of this year that did not involve the City at all. *See supra*, at Section II.E. Actions by unidentified persons, state employees, or third parties do not establish entitlement to a temporary restraining order against the City. *See, e.g.*, *Carr v. Or. Dept. of Transp.*, No. 3:13-cv-02218, 2014 WL 3741934, at *3-5 (D. Or. July 29, 2014) (county not responsible for distinct activities of state agency related to encampment clean-ups).

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and (4) omit other relevant information, such as the state and arrangement in which property that was removed had been kept. While the City takes seriously the issues identified in the declarations, to the extent they involve City actors and the specifics of the instances described can be verified (which was not possible in the 72 hours permitted to respond to this motion), they appear to be past aberrations. In any case, none of the declarations indicates that the City is intent on engaging in the summary destruction of property as Plaintiffs suggest.[12]

Second, a municipality is not liable under 42 U.S.C. § 1983, whether for injunctive relief or otherwise, unless the municipality's "policy or custom" (rather than the conduct of its individual agents) caused actionable harm. *E.g.*, *Los Angeles Cnty. v. Humphries*, 562 U.S. 29, 36-39 (2010). Likewise, mere negligence of a municipal agent does not rise to the level of a constitutional violation. *See Stone v. Agnos*, 960 F.2d 893, 895 (9th Cir. 1992) (holding that destruction of unhoused man's personal property implicated "[m]ere negligence of the police" and did not rise to the level of a constitutional violation by municipality). While the City does not contend that each and every clean-up over a multi-year period has been conducted perfectly, the City's policies are enshrined in the MDARs, and the City endeavors to follow and generally has complied with those policies. To whatever extent sporadic deviations from those policies may have occurred in application—something Plaintiffs have not demonstrated—that alone would not establish the City's liability.[13]

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[12] Plaintiffs also selectively rely on portions of the newspaper articles to which they cite. *See, e.g.*, Mike Baker, *Chaos, trash and tears: Inside Seattle's flawed homeless sweeps*, THE SEATTLE TIMES (Aug. 19, 2016) ("For sweeps on city property, Seattle officials typically post signs with a specific date and time of each event."), *available at* http://www.seattletimes.com/seattle-news/chaos-trash-and-tears-inside-seattles-flawed-homeless-sweeps/ (last visited Feb. 9, 2017).

[13] *Cf. Ellis v. Clark Cty. Dep't of Corr.*, No. 15-5449 RJB, 2016 WL 4945286, at *10 (W.D. Wash. Sept. 16, 2016) (liability could attach to county where plaintiffs proved county workers seized without notice and summarily destroyed property as instructed by a specific county policy to do so) ("Defendants' argument that it wasn't the March 2012 WP 115 policy itself that was a problem (because it only addressed abandoned property), but the

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Third, at the very least, in light of the substantial evidence the City has now submitted showing it follows the MDARs and has provided increasing protections over time; Plaintiffs' declarations fail to meet the requirement for a clear showing of entitlement to preliminary relief. *See Earth Gen Biofuel Inc. v. Fink*, No. 2:16-cv-07161, 2017 WL 354157, at *3 (C.D. Cal. Jan. 24, 2017) ("Where there is a limited evidentiary record and material facts are in dispute, courts have generally considered the likelihood of success factor to weigh against granting a temporary restraining order."); *Martin*, 2015 WL 5826822, at *4, 5 (refusing to grant preliminary relief where plaintiffs "submitted a number of declarations . . . claiming that the City . . . removed and destroyed their property without notice" but "Defendant City . . . represented" that it had "complied" with applicable requirements and the relevant facts were thus "disputed").

In sum, because the City follows the MDARs, which are constitutionally valid; because the City is continuing its efforts to enhance the protections afforded by the MDARS; and because the record does not demonstrate the City's liability, Plaintiffs have failed to show they are likely to prevail on the merits. For this reason alone, relief should be denied.

2. Plaintiffs have not shown that irreparable harm is likely to result from the City's continuing implementation of the MDARs.

Relief should be denied also based on the second factor relevant to preliminary injunctive relief, the likelihood of irreparable harm. This factor further weighs in favor of the City.

Initially, given the absence of any constitutional violation, the Plaintiffs cannot demonstrate cognizable harm. *See, e.g.*, *Hale v. Dept. of Energy*, 806 F.2d 910, 918 (9th Cir. 1986); *Acosta*, 2016 WL 1447891, at *8 (plaintiffs failed to demonstrate irreparable harm

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execution of it, is misplaced. Contrary to Defendants' assertions, the policy states that work crews were to 'immediately' clean up all homeless camps 'if a camp has been abandoned or there is no one currently at the site.' The only evidence in the record is that the County's employees took all unattended property and then immediately destroyed the property, regardless of whether the property was abandoned.").

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because city "represented that it complies" with its adequate "procedures" for clean-ups). Because the Plaintiffs have failed to demonstrate any constitutional violation, Plaintiffs have also failed to demonstrate irreparable harm.

Moreover, the City continues to provide more robust procedural protections to mitigate any potential harm. The City allows for personal property to "be recovered," for example, and summarily disposes only of property that "poses a risk to the health and safety of the community" (such as "syringes" or "garbage"), all of which "does not support a finding of a likelihood of irreparable harm to the Plaintiffs." *Martin*, 2015 WL 5826822, at *7.

Along these same lines, the forthcoming adoption of the new MDARs will further minimize any risk of future harm, given the heightened and robust protections that will be added. *See supra*, at Section II.D. Under the new MDARs, the Plaintiffs will receive individualized notice, additional outreach, and the ability to have confiscated property delivered to them anywhere in the City. In light of these procedures, any cognizable harm to the Plaintiffs would be minimized.

3. The balance of equities tips in favor of the City's continuing implementation of the MDARs.

As to the third element for preliminary relief, the balance of equities tips sharply in favor of the City. Undoubtedly the Plaintiffs have a strong interest in the continued ownership of their belongings. *See Martin*, 2015 WL 5826822, at *8. But the City respects and accommodates that interest, most notably by providing notice and an opportunity for retrieval. *See id.* (noting "the possible hardship . . . is low given that individuals have a responsibility to remove their personal property . . . after they are given notice"). Moreover, the City, like many other cities today, is facing a genuine crisis and has its own strong interest "in enforcing its ordinances . . . to prevent

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health and safety hazards and the blockage of public spaces and thoroughfares." *Acosta*, 2016 WL 1447891, at *9; *see also Martin*, 2015 WL 5826822, at *8 ("If the Court grants the temporary restraining order, the Defendant City . . . will not be able to enforce its own ordinances, and the sidewalks and public spaces in the community can be obstructed. A temporary restraining order that prohibited the City . . . from enforcing the . . . Ordinances would also prevent the City . . . from removing hazards that may pose health and safety risks to the public.").

As this court noted in *Veterans for Peace Greater Seattle, Chapter 92 v. City of Seattle*, No. C09-1032 RSM, 2009 WL 2243796, at *5 (W.D. Wash. July 24, 2009), the government "has several compelling interests in effectuating . . . sweep[s]" and a city has "a substantial interest in protecting its public spaces." This Court further observed that the government is "obviously unequipped to manage or otherwise maintain a homeless encampment on its property," which is not designed for that purpose. *Id.* As noted above, encampments often cause spikes in violent crime, drug abuse, and dangerous fires, among other harms. *See supra*, at Section II.A. The City's clean-ups help to keep these problems from spiraling out of control. *See id.*

The City has also gone to great lengths to support often-troubled members of the community, notwithstanding the difficulties involved. The City regularly offers supportive services and alternative shelter to residents of hazardous encampments. *See* Potter Decl., ¶¶ 13-14. But these individuals sometimes refuse the City's offers. *See, e.g.*, Potter Decl. at ¶ 14.[14] Others maintain belongings in a way that is difficult if not impossible to segregate from garbage

[14] *See also, e.g.*, Young, *supra* n.3 ("Both returned to the gray dirt under the freeway. 'Why leave here?' the man asked. 'This is my spot.' . . . The woman said her struggles with addiction make returning to her family difficult. The Caves feel comfortable to her. . . . "'What they're saying is they're not ready to move . . . . You can do everything, but some individuals are just not ready yet.'"); Beekman, *supra* n.1 ("Combs said he'd rather sleep outside than in a shelter. . . . Hoit recalled . . . 'They offered me services. They said there were places I could stay the night. But I was kind of intoxicated. I wasn't ready to deal with it at the time.'").

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or hazardous waste. *See id.* at ¶¶ 16-19. Under the circumstances, the equities favor the City's ongoing, good faith efforts to implement the MDARs.

4. The City's continuing implementation of the MDARs is in the public interest.

Fourth and finally, allowing the City to continue implementing its clean-up policies under the MDARs is in the public interest. As noted above, encampments often pose serious public health and safety risks, among other substantial harms. The use of clean-ups is an important tool that allows the City to prevent such encampments from becoming more substantial public health and safety risks. *See supra*, at Section II.A. The City's interest in this regard is "weighty" and further supports denial of the Plaintiffs' requested relief. *Acosta*, 2016 WL 1447891, at *9; *Veterans for Peace*, 2009 WL 2243796, at *5; *Martin*, 2015 WL 5826822, at *8 ("The public has a strong interest in being able to safely use and enjoy both the public sidewalks and the City . . . property, including public parks."). The Court should also "defer" to government officials' "specific, predictive judgments about how [a] preliminary injunction would reduce the effectiveness" of their programs. *Winter*, 555 U.S. at 27; *see* Lindsay Decl. at ¶ 7-8; Aguirre Decl. at ¶¶ 20-25; Wilske Decl. at ¶ 6.

In sum, Plaintiffs have failed to demonstrate any likely entitlement to relief; irreparable harm will not arise from denying their requested injunction; and both the equities and the public interest favor allowing the City to continue its substantial and good faith efforts to address an ongoing crisis. The City respectfully requests that this Court deny the Plaintiffs' request for preliminary injunctive relief.

B. The Language Plaintiffs Have Requested Would Be Especially Inappropriate.

Not only have Plaintiffs failed to show any entitlement to preliminary relief, they have also requested an order that would be both overbroad and impermissibly vague. . In particular,

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the Plaintiffs' proposed order would prohibit the City from confiscating any "*property*" absent an "*immediate* threat to public health or safety," regardless of other circumstances. Dkt. # 23-1 at 2 (emphases added). There is no constitutional basis for such a sweeping injunction, and certainly the *Lavan* decision does not require it. *See* 693 F.3d at 1033 ("This appeal does not concern the power of the federal courts to constrain municipal governments from addressing the deep and pressing problem of mass homelessness or to otherwise fulfill their obligations to maintain public health and safety.").

As to overbreadth, the Ninth Circuit has emphasized that "[i]njunctive relief must be tailored to remedy the specific harm alleged, and an overbroad preliminary injunction is an abuse of discretion." *Nat. Res. Def. Council, Inc. v. Winter*, 508 F.3d 885, 886 (9th Cir. 2007). Here, the only relevant issue concerns whether the City is providing adequate notice and the opportunity for retrieval of confiscated property. *See supra*, at Section III.A.1. Yet the Plaintiffs' requested injunction would severely limit the circumstances in which the City could act *regardless* of the notice and retrieval options it provided. The order would not allow the City to remove obstructive encampments, whether in the doorways of a courthouse or at some other public facility. The order would also purport to regulate things as specific as the days and times that facilities will be open to pick up belongings, and the exact length of time that property must be stored. While not mirroring the exact parameters of the proposed order, the MDARs (crafted with substantial study and community input) already address in substance much of what the order contains. *See* Potter Decl., Ex. 1 at § 7. The proposed injunction order thus equates more to an ordinance crafted by Plaintiffs rather than an injunction, and limiting the City in this

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manner would unduly hinder its ongoing efforts at addressing the serious harms that may arise in or around encampments.[15]

The proposed order would also be impermissibly vague. The language of an injunction must be sufficiently specific to "prevent uncertainty and confusion" and must provide "explicit notice of precisely what conduct is outlawed." *Schmidt v. Lessard*, 414 U.S. 473, 476-77 (1974). Here, the requested order would apply to "property," without defining that term or informing the City about the standards it can follow to segregate trash from items that must be stored. In contrast, the MDARs already contain a detailed definition of personal property for this very purpose. *See* Potter Decl., Ex. 1 at § 3.15. Likewise, the requested order would require an "immediate" threat for the City to act, but that term is undefined and would be difficult to implement and follow. *See* Lindsay Decl. at ¶ 8. Simply put, a vague restraining order, as Plaintiffs have requested, would be counterproductive and only invite confusion and uncertainty.

In sum, this Court should further decline to grant the relief that Plaintiffs have requested because that relief extends far beyond any constitutional requirements and contravenes the general standards governing injunctions in this Circuit.

IV. CONCLUSION

The City shares the interest and concerns of the Plaintiffs in protecting personal property and finding sustainable shelter, and the City continues to take steps to improve the protections afforded to those living outside, to provide them outreach and services, and to work toward permanent solutions to the housing crisis. Nonetheless, Plaintiffs' motion does not demonstrate

[15] The ACLU also already proposed legislation to the Seattle City Council that would have achieved similar results as Plaintiffs' proposed order here. *See* Lindsay Decl. at ¶ 13. After extensive debate, the City Council decided not to move forward with that legislation, opting instead to convene a broad-based Task Force, which ultimately led to the City's recently proposed update to the MDARs. *See id.* Now, the ACLU and Plaintiffs are attempting to impose through an injunction what they could not obtain through the City Council.

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constitutional violations by the City, nor does it establish the other grounds for preliminary injunctive relief. The Plaintiffs alone should not be permitted to supersede the City's detailed and carefully crafted policies in this area, which comply with constitutional requirements. A "temporary restraining order or a preliminary injunction is an *extraordinary* equitable remedy, and one that should only issue when the movant's right to relief [is] *clear and unequivocal.*" *Veterans for Peace*, 2009 WL 2243796, at *6 (emphasis and brackets in original, internal quotes omitted). The City "has a legitimate interest in prohibiting homeless encampments on its property, and the attenuated constitutional rights Plaintiffs claim are being implicated by this action simply do not justify the issuance of Plaintiffs' requested relief." *Id.* The City respectfully requests that the Court deny Plaintiffs' motion for a temporary restraining order and preliminary injunction.

DATED this 9th day of February, 2017.

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I hereby certify that on this 9th day of February, 2017, I electronically filed the foregoing document with the United States District Court ECF system, which will send notification of such filing to the following:

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