

THE HONORABLE RICARDO S. MARTINEZ

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LISA HOOPER, BRANDIE OSBORNE,
KAYLA WILLIS, REAVY WASHINGTON,
individually and on behalf of a class of
similarly situated individuals; THE
EPISCOPAL DIOCESE OF OLYMPIA;
TRINITY PARISH OF SEATTLE; REAL
CHANGE,

Plaintiffs,

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

**PLAINTIFF’S MOTION TO STAY
PROCEEDINGS PENDING APPEAL**

**NOTE ON MOTION CALENDAR:
NOVEMBER 3, 2017**

I. INTRODUCTION

Plaintiffs filed a Petition with the Ninth Circuit pursuant to Rule 23(f) requesting permission immediately to appeal this Court's Order Denying Class Certification [Dkt. No. 209] (“Order”). Plaintiffs’ Petition asks the Court of Appeals to resolve important legal questions raised by the Order, which have significance far beyond this case. If the Court of

1 Appeals answers those questions in Plaintiffs' favor, this case may proceed as a class action;
2 if the Court of Appeals resolves these questions in Defendants' favor, it will lay these
3 threshold legal questions to rest. Either result will allow the parties to approach this action
4 with full information about the potential for Plaintiffs to bring these claims on behalf of a
5 class of similarly situated individuals.

6 Plaintiffs now respectfully request that the Court stay further proceedings pending
7 final disposition of the Petition. Plaintiffs have at least a reasonable chance of success on their
8 Petition, given the novel and unsettled issues addressed in the Order. Further, the balance of
9 hardships tilts sharply in Plaintiffs' favor: continued proceedings on a non-class basis would
10 look very different than proceedings on a class-wide basis both in terms of strategy, resource
11 allocation, and the scope of document and deposition discovery. Until the Court of Appeals
12 resolves these questions, it make no sense to proceed with further litigation. Conversely, a
13 stay will not prejudice Defendants, whose policies and practices are unaffected by the Court's
14 Order. Finally, a stay will benefit the public by furthering judicial economy and avoiding the
15 investment of judicial resources in a litigation that may ultimately proceed on a very different
16 trajectory.

17 **II. FACTUAL AND PROCEDURAL BACKGROUND**

18 **A. The Petition For Review**

19 The Court is familiar with the facts underlying this action. On October 4, 2017, the
20 Order denied Plaintiffs' Motion for Class Certification. Plaintiffs filed a Petition for
21 permission to appeal the Order pursuant to Rule 23(f) with the Ninth Circuit on October 18,
22 2017.¹ Plaintiffs' petition is timely. Fed. R. Civ. P. 23(f); (stating that petition must be filed
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25 ¹ Declaration of T. Williams at ¶ 3.

1 within 14 days after entry of order); *Beck v. Boeing Co.*, 320 F.3d 1021, 1023 (9th Cir. 2003)
2 (Fed. R. Civ. P. 6 governs timing of Rule 23(f) petitions).

3 Plaintiffs' petition asks the Court of Appeal to review whether this Court should grant
4 permission under Fed. Rule Civ. Proc. 23(f) to appeal the district court's order denying class
5 certification to a class of approximately 2,000 unhoused individuals living outside, where:

- 6 1. The District Court resolved against Petitioners a question of law regarding
7 application of the commonality requirement that this Court has not previously
8 resolved or applied in the context of challenges to allegedly unconstitutional
9 government policies and practices; and
10 2. The District Court applied incorrect legal standards on Rule 23(a) determinations
11 of the issues of commonality, typicality, and adequacy of representation to this
12 Rule 23(b)(2) proposed class against government agencies.²

13 Plaintiffs hope to have a ruling on the Petition within approximately 90 days.
14 Plaintiffs believe the Ninth Circuit may take review of the matter because of the importance
15 (and recurring nature) of the questions involved. There is currently no case schedule
16 addressing discovery or other pre-trial deadlines in this matter.

17 **III. ARGUMENT**

18 An appeal pursuant to Rule 23(f) "does not stay proceedings in the district court unless
19 the district judge or the court of appeals so orders." Fed. R. Civ. P. 23(f). Under Ninth Circuit
20 law, "[t]he standard for evaluating stays pending appeal is similar to that employed by district
21 court[s] in deciding whether to grant a preliminary injunction." *Lowden v. T-Mobile USA,*
22 *Inc.*, 2006 WL 1896678, at * 1 (W.D. Wash. July 10, 2006) (quoting *Lopez v. Heckler*, 713
23 F.2d 1432, 1435 (9th Cir.1983)) (Pechman, J.) (granting stay); *see also Ocean Beauty*
Seafoods LLC v. Pac. Seafood Grp. Acquisition Co. Inc., C14-1072RSM, 2015 WL

24 ² A copy of the Petition filed with the Court of Appeals is attached as Exhibit A to the Declaration of
25 T. Williams.

1 12977383, at *1 (W.D. Wash. Oct. 16, 2015) (granting stay pending appeal); *Costco*
2 *Wholesale Corp. v. Hoen*, 2006 WL 2645183, at *2 (W.D. Wash. Sept. 14, 2006) (Pechman,
3 J.) (granting stay in part). Other courts have adopted this standard for motions to stay pending
4 petitions to appeal under Rule 23(f). *In re Lorazepam & Clorazepate Antitrust Litig.*, 208
5 F.R.D. 1, 3 (D.D.C. 2002) (granting stay); *Chavez v. IBP, Inc.*, 2002 WL 32145647, at *1
6 (E.D. Wash. Dec. 23, 2002) (granting stay).

7 Under this standard, courts will stay an action where the moving party shows either
8 “(1) a probability of success on the merits and the possibility of irreparable injury; or (2) that
9 serious legal questions are raised and that the balance of hardships tips sharply in its favor.”
10 *Costco*, 2006 WL 2645183, at *2; *Lowden*, 2006 WL1896678, at *1. These tests are not
11 separate, but are two extremes of a single “continuum.” *Lopez*, 713 F.2d at 1435. This
12 analysis supports a stay of further proceedings in this action.

13 **A. Plaintiffs’ Appeal Raises Serious and Difficult Questions of Law**

14 To satisfy the first factor, Plaintiffs “need not persuade the Court that it is likely to be
15 reversed on appeal.” *Costco*, 2006 WL 2645183, at *2 (quoting *Canterbury Liquors & Pantry*
16 *v. Sullivan*, 999 F. Supp. 144, 150 (D.Mass.1998)). Instead, Plaintiffs need only establish that
17 the appeal raises “serious and difficult questions of law in an area where the law is somewhat
18 unclear.” *Id.* Plaintiffs raise at least four such questions in their Petition, which raise the issue
19 of whether the District Court’s denial of class certification was proper in this instance.

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1 **a. Whether the “significant proof” standard applies to cases seeking solely**
2 **prospective equitable relief to address a constitutional violation is a**
3 **serious and difficult question of law**

4 The District Court’s application of a “significant proof” evidentiary standard to satisfy
5 commonality presents a serious and difficult question of law. The Ninth Circuit has not yet
6 ruled on when “significant proof” of a policy or practice is required to satisfy commonality
7 outside of the employment discrimination context, nor what evidence is required to meet this
8 burden. When applying the “significant proof” standard, the District Court relied on the
9 ruling in *Parsons v. Ryan*, 289 F.R.D. 513, 516 (D. Ariz. 2013). On review, however, the
10 Ninth Circuit in *Parsons* expressly declined to address whether the “significant proof”
11 standard applies outside the systemic discrimination context. *Parsons v. Ryan*, 754 F.3d 657,
12 684, n. 29 (9th Cir. 2014). The Ninth Circuit in *Parsons* further explained that circuit courts
13 have differed on whether, and when, this evidentiary standard applies. *Id.* Plaintiffs agree
14 with the Ninth Circuit that the applicable evidentiary standard for a civil rights lawsuit that
15 seeks solely prospective equitable relief against written government policies and their
16 application is an unsettled area of law. In view of the acknowledged difficulty of this issue,
17 Defendants’ argument presents a substantial issue warranting a stay pending appeal.

18 **b. The Court’s application of a heightened commonality standard raises a**
19 **serious and difficult question of law**

20 Plaintiffs’ seek review of the Court’s application of a more stringent commonality
21 standard, which presents a substantial issue meriting a stay. Previous courts have explained
22 that “for purposes of Rule 23(a)(2) [e]ven a single [common] question will do.” *Wal-Mart*,
23 564 U.S. at 359. “Plaintiffs need not show that every question in the case, or even a
24 preponderance of questions, is capable of classwide resolution.” *Wang v. Chinese Daily*
25 *News, Inc.*, 737 F.3d 538, 544 (9th Cir. 2013). “Where the circumstances of each particular
class member vary but retain a common core of factual or legal issues with the rest of class,

1 commonality exists.” *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir.
2 2012) (internal citation omitted). Members of the proposed class need not share every single
3 fact in common: “common questions may center on ‘shared legal issues with divergent factual
4 predicates or a common core of salient facts coupled with disparate legal remedies.’” *Jimenez*
5 *v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014) (internal citation omitted).

6 In contrast to the standard applied in the foregoing cases, this Court required
7 “declarations, photographs, and videos [Plaintiffs] cited” to establish “at which point in the
8 City’s multi-stage cleanup process the declarants observed the alleged destruction of
9 property.” Dkt. 209 at 10. Plaintiffs believe this misses the point of commonality, which is to
10 establish common issues of fact and law which will generate common answers apt to resolve
11 the litigation. Plaintiffs have met this burden by providing evidence of Defendants’ written
12 policy, which authorizes the categorical destruction of certain types of property; and unlike
13 *Wal-Mart*, Plaintiffs have provided a wealth of evidence that in practice, Defendants do in
14 fact regularly destroy property.

15 Plaintiffs’ allegations of unconstitutional government conduct pursuant to official
16 policy and request for relief to stop that government conduct present the prototypical case for
17 commonality. *See Armstrong v. Davis*, 275 F.3d 849, 863, 868 (9th Cir. 2001) (commonality
18 satisfied where plaintiffs challenged written policy that failed to provide for adequate ADA
19 requirements at parole hearings); *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir.
20 2010) (commonality satisfied where plaintiffs challenged practice of holding detainees for
21 longer than six months); *Parsons v. Ryan, supra*, 754 F.3d at 664, 678 (commonality satisfied
22 where plaintiffs made “detailed factual allegations concerning the existence of uniform,
23 statewide policies and practices in all [Arizona Department of Corrections] facilities ... [that]
24 expose all ... inmates to a substantial risk of harm”). Requiring “significant proof” of a policy
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1 or practice goes beyond the established commonality standard in this Circuit, rising to the
2 level of a serious and difficult question of law warranting a stay of further proceedings in this
3 action while the issue is resolved at the Ninth Circuit.

4 **c. The Court's application of a heightened typicality standard raises a**
5 **serious and difficult question of law**

6 Plaintiffs' argument that the Court applied a heightened typicality standard than is
7 required by focusing on the individual circumstances of each Petitioner's losses rather than
8 the common aspects of Defendants' conduct that precipitated those losses also presents a
9 substantial issue warranting a stay pending appeal. Typicality does not require identical facts,
10 claims, or damages; the claims need only arise from a similar course of conduct and share the
11 same legal theory. *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116-18 (9th Cir. 2017). This is
12 particularly true when plaintiffs are seeking injunctive relief. In such cases, the focus is on
13 whether named plaintiffs and unnamed class members are affected by Defendants' systemic-
14 wide practices and policies and not on the nature of their specific injuries. *See Armstrong*,
15 275 F.3d at 868-869. Courts have never held that typicality demands that plaintiffs and class
16 members suffer substantially identical injuries. *See Wal-Mart*, 509 F.3d at 1184; *Parsons* at
17 685 ("Typicality refers to the nature of the claim or defense of the class representative, and
18 not to the specific facts from which it arose or the relief sought.") (citations omitted).

19 Plaintiffs believe the Court improperly required Petitioners and proposed class
20 members to have identical facts as to the alleged constitutional violations in order to show
21 typicality, rather than recognizing that typicality depends on whether plaintiffs and unnamed
22 class members are similarly affected by defendants' systemic practices and policies. *See*
23 *Armstrong*, 275 F.3d at 868-869. The precise circumstances of the previous injuries
24 Petitioners suffered as a result of Defendants' policies and practices is not the critical
25 inquiry: those previous injuries are merely illustrative of the on-going substantial and

1 imminent risk of further such irreparable harm they and other unhoused individuals living
2 outside face. Whether Defendants policies and practices actually present such a risk to
3 Petitioners—and whether the risk to which they are exposed is typical of the proposed
4 class—is the proper question. The discrepancy between the typicality standard usually
5 applied by the Ninth Circuit and the standard used in this action rises to the level of a serious
6 and difficult question of law that must be resolved before this action continues.

7 **d. The Court’s application of a heightened adequacy of representation**
8 **standard is a serious and difficult question of law**

9 The Court applied a more stringent standard for adequacy of representation than is
10 required by focusing on the individual circumstances of each Petitioner’s losses rather than
11 the common aspects of Defendants’ conduct that precipitated those losses. The District Court
12 additionally erred in finding that two of the Petitioners are inadequate class representatives
13 merely because they expressed personal wishes (that Defendants would stop the sweeps
14 entirely) that exceed the confines of what the litigation. In doing so, the District Court
15 applied a heightened adequacy standard that is not supported by existing Ninth Circuit case
16 law. The Ninth Circuit has not held that individual named Petitioners are precluded from
17 expressing personal opinions or political goals or beliefs not identical to the relief sought by
18 the lawsuit in order to be adequate class representatives. Plaintiffs disagree with the Court’s
19 heightened burden: Ms. Willis and Mr. Washington’s desire not to ever experience a sweep
20 again is neither antithetical to this lawsuit nor mutually exclusive from their goal of stopping
21 the such sweeps from taking place without constitutional safeguards. Their desires are,
22 moreover, wholly understandable in light of the harms they have suffered as a result of
23 previous sweeps—and likely shared by most, if not all, of the class they seek to represent.
24 *See Bucha v. Illinois High Sch. Ass’n*, 351 F. Supp. 69, 72 (N.D. Ill. 1972) (“the fact that the
25 named plaintiffs have interests which exceed those of some class members will not defeat the

1 class action, so long as they possess interests which are coextensive with those of the class.");
2 *In re Pet Food Products Liab. Litig.*, 629 F.3d 333, 343–45 (3d Cir.2010) (holding that named
3 class representatives who pursued individualized injury claims in addition to class-wide
4 reimbursement claims did not have conflict of interest with members of the larger class). The
5 Court's application of a more stringent adequacy of representation standard is a serious and
6 difficult question of law which deserves review before this case continues.

7 **B. Balance of Hardships Favors A Stay**

8 To determine whether to grant a stay, the Court may consider (1) whether the
9 applicant will be irreparably injured absent a stay; (2) whether issuance of the stay will
10 substantially injure the other parties interested in the proceeding; and (3) where the public
11 interest lies. *Costco*, 2006 WL 2645183, at *2 (*quoting Hilton v. Braunskill*, 481 U.S. 770,
12 776 (1987)); *Lowden*, 2006 WL 1896678, at ** 1 - 2 (applying factors); *In re Lorazepam*, 208
13 F.R.D. at 3 (same). These factors warrant a stay of further proceedings in this action.

14 **a. Plaintiffs Will Suffer Injury Absent A Stay**

15 If the Court denies the stay, Plaintiffs will have no choice but to pursue discovery on
16 behalf of the individual plaintiffs, without a class certification. The scope and strategy of
17 discovery related to the individual plaintiffs will be very different from that conducted if a
18 class were to be certified following a ruling from the Ninth Circuit. The identity of potential
19 witnesses would be different, as would the documents and depositions sought. There is a
20 stark difference between proceeding with claims brought by four individuals as compared
21 with claims on behalf of a class of similarly situated individuals spread out across the city.
22 The strategy, time, and resources associated with each are distinct and it makes no sense to
23 proceed with the claims of the four individuals until the petition to the Ninth Circuit (and any
24 eventual appeal) are resolved. Requiring Plaintiffs to proceed with the litigation without an
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1 answer to the class certification question would be both inefficient, unjust, and unnecessarily
2 burdensome on both Plaintiffs and their counsel.

3 **b. A Stay Will Not Injure Defendants**

4 A stay of this litigation would not injure Defendants. In fact, a stay would allow
5 Defendants to maintain the status quo in that they could continue enforcing their policies
6 without interruption. This has been, and remains, their desired result. Further, because the
7 Court has not yet issued a scheduling order with discovery deadlines and a trial date, a stay
8 would not affect any existing case deadlines. Any hypothetical harm to the Defendants does
9 not compare to the unjustifiable waste of time and money that would result from proceeding
10 with this litigation before the Ninth Circuit decides the issue of class certification. *See, e.g.,*
11 *C.B.S. Employees Fed. Credit Union*, 716 F. Supp. at 310 (general disadvantage to
12 nonmoving party caused by delay of proceedings was outweighed by potential injury to
13 moving party from proceeding in district court during pendency of appeal).

14 **c. A Stay Will Further the Public Interest**

15 A stay would further public interest because it would promote the important policy
16 and goals of judicial efficiency and economy. If the Court denies the stay, Plaintiffs will
17 proceed with active discovery. Based on Defendants' approach to this litigation so far,
18 Plaintiffs envision that discovery will involve active motion practice, especially as the parties
19 move towards trial. If a class were later to be certified following the appeal to the Ninth
20 Circuit, Plaintiffs would need to start over with the discovery applicable to the class. It does
21 not make sense for the Court and the parties to expend time and energy resolving issues
22 relating to these four Plaintiffs only to find out later that these individuals represent a much
23 larger class and this case should proceed as a class action.

IV. CONCLUSION

The point on the “continuum” at which a stay is justified turns on the relative hardship of the parties. *E.g., Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). Here, Plaintiffs’ interest in staying the litigation to resolve the issue of class certification, the determination of which could fundamentally alter the course of this litigation, greatly outweighs any interest Defendants may have, particularly because a stay would allow Defendants to maintain the status quo. For these reasons, Plaintiffs request that the Court stay all further proceedings until the later of the (1) denial of Plaintiffs’ petition for permission to appeal or (2) the Ninth Circuit’s entry of its mandate following disposition of Plaintiffs’ appeal, if accepted.

DATED this 19th day of October, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on **October 19, 2017**, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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