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Pleading for Justice: An Analysis of Pleading Sufficiency and Class Action Certification as Applied to Vulnerable Populations in *Willis v. City of Seattle*

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Pleading for Justice: An Analysis of Pleading Sufficiency and Class Action Certification as Applied to Vulnerable Populations in *Willis v. City of Seattle*[*]

Unhoused individuals are one of the most vulnerable populations in the United States. Yet, frequently, state and local governments have seized and destroyed their property with impunity during "sweeps" of encampments where those individuals seek shelter. The plaintiffs in Willis v. City of Seattle *were victims of such cruelty. In an attempt to stop the unconstitutional sweeps, they brought a class action lawsuit. However, the Ninth Circuit tossed out their case for procedural reasons before the merits could ever be discussed. In its majority opinion, the court couched its callousness toward the plight of the plaintiffs in the complexities of civil procedure.*

Class action lawsuits, like the one in Willis*, are often the only way that unhoused individuals can effectively protect their constitutional rights from rampant violations. Accordingly, when the courthouse doors are closed to these individuals, as in* Willis*, so too is any hope of obtaining justice.*

This Recent Development analyzes the Federal Rules of Civil Procedure at issue in Willis *in light of the Supreme Court's rulings in cases such as* Ashcroft v. Iqbal *and* Wal-Mart v. Dukes *and ultimately argues that the plaintiffs pled a sufficient facial challenge to the defendants' sweep policies and should have been certified as a class. In erroneously failing to certify the plaintiffs in* Willis *as a class, the Ninth Circuit misapplied clear precedent and procedural rules, ignored the seriousness (and similarity) of the plaintiffs' constitutional injury, and enabled the continued victimization of one of the most vulnerable populations in the United States: unhoused individuals.*

INTRODUCTION

Your life did not turn out the way you planned, or perhaps this is the life you have always known. No matter where you look, you cannot find an affordable place to live.[1] Sometimes you can find space at one of the local

1. This is disproportionately true for unhoused individuals with a mental disability. *See* Project Homeless team, *Three Years into a State of Emergency, What We've Learned About Homelessness*, SEATTLE TIMES, https://www.seattletimes.com/seattle-news/homeless/three-years-into-a-state-of-emergency-what-weve-learned-about-homelessness/ [https://perma.cc/C6XA-AU54] (Nov. 3, 2018, 8:49 PM) ("Nearly half of King County's homeless people said they had a mental-health problem that hindered their getting housing, holding a job or taking care of themselves.").

shelters, but you are usually turned away with countless others.[2] You take what few possessions you have and decide that your best option is to live in one of the local encampments. Before you leave the encampment one day—perhaps to get groceries, search for work, or attend school[3]—the woman in the tent nearest yours warns you not to leave your possessions behind. In response to your puzzled look, she tells you about the City and their "sweeps." She says you never know when they are coming, but they take everything you have and usually just throw it away.[4] She shakes her head, then tells you what the City has seized or destroyed: medication, medical devices, blankets, sleeping bags, clothing, tents, tarps, cookware, food, identification, and family heirlooms.[5] Shocked, you ask why the City is allowed to treat its citizens that way and why nothing has been done. She tells you that a few years ago, some attorneys tried to stop the City from conducting the sweeps, but the court tossed out the case. She sighs and says that she thought they might have stood a chance if enough people joined the lawsuit. But now it is over, and no one has the resources to go up against the City alone. Assuming that one of the encampment members had the extra time and money to sue, it would be almost impossible for them to keep up with any documents or other communications for the suit; it would all be thrown away in the sweeps along with everything else.[6] She lowers her voice and says that even if someone could bring another lawsuit, it would not matter—no one wants to help the homeless, they just want them gone.[7]

This economic hopelessness, physical danger, and public disapproval comprises the daily experience of many unhoused individuals[8] living in

2. *See id.* ("King County shelters for single adults are more than 90 percent full on any given night, and families are routinely turned away.").

3. *See* Second Amended Complaint—Class Action for Declaratory and Injunctive Relief at 21, Hooper v. City of Seattle, No. C17-77, 2017 WL 4410029 (W.D. Wash. Oct. 4, 2017), *aff'd sub nom.* Willis v. City of Seattle, 943 F.3d 882 (9th Cir. 2019) [hereinafter Complaint].

4. *Id.* at 35–36.

5. *Id.* at 46.

6. *See* Brief of Amici Curiae of Disability Rights Washington, et al. in Support of Appellants at 20–21, Willis v. City of Seattle, 943 F.3d 882 (9th Cir. 2019) (No. 18-35053) [hereinafter Washington et al. Amicus Brief].

7. When interviewed by NPR, a victim of similar sweeps in Los Angeles, California, said, "We're targeted because Los Angeles look at us like cockroaches instead of human beings . . . . We're no longer human beings out here. Homeless people are cockroaches to society now." Leila Fadel & Kirk Siegler, *How Boise's Fight over Homelessness Is Rippling Along the West Coast*, NPR (Dec. 13, 2019, 5:00 PM), https://www.npr.org/2019/12/13/787861253/how-boises-fight-over-homelessness-is-rippling-across-the-west-coast [https://perma.cc/HMZ2-PNB9]; *see also* Complaint, *supra* note 3, at 6 ("Defendants' submissions in this case confirm what Plaintiffs have long known, that Defendants have no respect for their property rights because they view these possessions as nothing more than garbage.").

8. This Recent Development uses "homelessness" when referencing the broader systemic issue of individuals lacking traditional forms of housing. However, this Recent Development uses only "unhoused," rather than "homeless," when referencing unhoused individuals themselves to mirror the

encampments across the United States. With no resources of their own to pursue justice, these individuals must rely on outside legal organizations like the American Civil Liberties Union ("ACLU") to pursue justice on their behalf. The ACLU has done just that by initiating legal action in response to sweeps of homeless encampments in several cities, including Seattle, Washington (the "City").[9]

In *Willis v. City of Seattle*,[10] the ACLU brought to light the tragic and brutal reality that unhoused individuals in the City face as a result of the City's sweeps. Seeking strength and maximum effectiveness in numbers, the ACLU requested declaratory and injunctive relief[11] on behalf of those individuals as a class.[12] The court tossed out their case, however, just as the City tossed out the plaintiffs' belongings in the sweeps. Rather than assessing the plaintiffs' claims on the merits, the court held that their claims could not be addressed at all due to a failure to meet the requirements of a class action lawsuit under Rule 23 of the Federal Rules of Civil Procedure ("FRCP 23").[13] Due to this procedural issue, the plaintiffs never had a chance to demonstrate the merits of their constitutional claims against the City.

At first blush, the legal standards and concepts discussed in *Willis* seem abstract and conceptually harmless. However, the *Willis* court's decision to deny the plaintiffs' motion for class certification[14] has grave real-world consequences for those experiencing homelessness across the United States. Encampments of

complaint in *Willis v. City of Seattle*, 943 F.3d 882 (9th Cir. 2019), which provides the following explanation:

> "Unhoused" refers to all individuals who lack fixed, stable, or adequate shelter or housing. While the term "homeless" is often utilized to refer to this population, we use the term "unhoused" because people who lack permanent or stable housing still have homes in which they sleep and go about their private affairs.

Complaint, *supra* note 3, at 13 n.2.

9. *See, e.g.*, *ACLU Calls for a Halt of Homeless Sweeps During Pandemic*, KITV (Aug. 14, 2020, 8:09 PM), https://www.kitv.com/story/42499067/aclu-calls-for-a-halt-of-homeless-sweeps-during-pandemic [https://perma.cc/UV54-ZLFN]; Katie McKeller, *ACLU: Salt Lake County May Be Violating Rights in Homeless Camp Cleanup Sweeps*, DESERET NEWS, https://www.deseret.com/utah/2019/12/23/21035312/aclu-salt-lake-city-homeless-camp-clean-up-cleanups-improperly-noticed [https://perma.cc/8MNJ-GPV4] (last updated Dec. 23, 2019, 5:12 PM); Michael Risher, *The California Transportation Department Is Cruelly and Unconstitutionally Destroying Homeless People's Belongings*, ACLU (Dec. 15, 2016, 10:00 AM), https://www.aclu.org/blog/human-rights/california-transportation-department-cruelly-and-unconstitutionally-destroying [https://perma.cc/F7DY-FVZ3].

10. 943 F.3d 882 (9th Cir. 2019).

11. The plaintiffs sought a declaratory judgment that the City's sweeps were unlawful and injunctive relief to prevent the City from conducting additional sweeps. Complaint, *supra* note 3, at 6.

12. *Id.* at 13.

13. *Willis*, 943 F.3d at 887–88.

14. *Id.*

unhoused individuals have been reported in every state[15] and are often "addressed"—to put it delicately—with sweeps, in which the local government confiscates and destroys their personal property.[16] Given the lack of precedent by higher courts concerning the constitutionality of these sweeps,[17] the procedural outcome in *Willis* encourages continued sweeps in the Ninth Circuit, and particularly in California and Hawaii where sweeps are becoming increasingly common.[18] The *Willis* decision could also be used to defeat challenges brought in other jurisdictions where sweeps occur, such as Colorado, Florida, and the District of Columbia.[19] Given the potential weight and widespread effect of the *Willis* decision on vulnerable populations and pleading standards alike, it must not stand. Otherwise, unhoused individuals will not be able to effectively challenge the merciless seizure and destruction of their possessions.

These potential negative effects can be prevented by remedying the *Willis* court's misapplication of precedent and enduring legal standards. Had the *Willis* majority properly applied the standard established in *Ashcroft v. Iqbal*[20] for determining whether a plausible claim exists, it would have found that the plaintiffs plausibly pleaded that the City's sweep policies are unconstitutional as written. Because such a facial challenge to the policies satisfies one of the requirements for class action certifications—commonality[21]—the class would have been certified and the case could have been adjudicated on the merits. However, the plaintiffs in *Willis* were not afforded this opportunity. As a result, these unhoused individuals have no other practical means of vindicating their basic human rights and continue to suffer the seizure and destruction of their property, even in the throes of a global pandemic.[22]

15. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, TENT CITY, USA: THE GROWTH OF AMERICA'S HOMELESS ENCAMPMENTS AND HOW COMMUNITIES ARE RESPONDING 21 (2017) [hereinafter TENT CITY], https://www.nlchp.org/Tent_City_USA_2017 [https://perma.cc/VNX2-EGH4]. North Carolina is no exception. *See* GENE R. NICHOLS, THE FACES OF POVERTY IN NORTH CAROLINA, at xi–xix (2018) (describing a dramatic recent increase in the unhoused population—and encampments—in the foothills town of Hickory, North Carolina).

16. TENT CITY, *supra* note 15, at 8–9.

17. Anna Maria Barry-Jester, *Sweeps of Homeless Camps in California Aggravate Key Health Issues*, NPR (Jan. 10, 2020, 5:00 AM), https://www.npr.org/sections/health-shots/2020/01/10/794616155/sweeps-of-homeless-camps-in-california-aggravate-key-health-issues [https://perma.cc/M54U-D2GV] (discussing the lack of higher-court precedent as to whether destroying or confiscating the personal property of unhoused individuals in sweeps is unconstitutional).

18. *See* TENT CITY, *supra* note 15, at 28–38.

19. *Id.* at 8–10.

20. 556 U.S. 662 (2009).

21. The commonality requirement will be addressed in Part III, but to provide context for the argument, "commonality" is one of the pleading requirements of FRCP 23 and requires that a class action must present "questions of law or fact common to the class." *See* FED. R. CIV. P. 23(a)(2).

22. *See* Dae Shik Kim Jr. & Guy Oron, *Seattle Destroyed Homeless Encampments as the Pandemic Raged*, NATION (Apr. 2, 2020), https://www.thenation.com/article/society/seattle-homeless-sweeps-coronavirus/ [https://perma.cc/BXS8-9JBM].

This Recent Development addresses the legal issues and implications of the *Willis* decision before turning to the larger policy concerns involved. Part I provides the factual and legal background of *Willis*. Part II demonstrates why the plaintiffs' pleadings were sufficient to bring a facial challenge under the standards established by Rule 8 of the Federal Rules of Civil Procedure ("FRCP 8") and *Iqbal*. Part III explains why the facial challenge should have been sufficient to satisfy the FRCP 23 requirements for certifying a class. Finally, Part IV discusses the policy implications of *Willis* with respect to one of America's most vulnerable populations—unhoused individuals.

I. FACTUAL AND LEGAL BACKGROUND OF *WILLIS V. CITY OF SEATTLE*

A. *The Sweeps: Origins, Policies, and Application*

The mayor of the City declared a state of emergency in 2015[23] in response to the increasing number of unhoused individuals in the City.[24] Rather than responding to homelessness as the emergency it is, however, the City has continued to treat unhoused individuals as if they are the problem.[25] Since 2015, the City has expended considerable resources[26] on conducting over one

23. Daniel Beekman & Jack Broom, *Mayor, County Exec Declare 'State of Emergency' over Homelessness*, SEATTLE TIMES, https://www.seattletimes.com/seattle-news/politics/mayor-county-exec-declare-state-of-emergency-over-homelessness/ [https://perma.cc/X7HG-HHLH] (Jan. 31, 2016, 10:41 AM).

24. *See* U.S. DEP'T HOUS. & URB. DEV., HUD 2019 CONTINUUM OF CARE HOMELESS ASSISTANCE PROGRAMS HOMELESS POPULATIONS AND SUBPOPULATIONS 1 (2019), https://files.hudexchange.info/reports/published/CoC_PopSub_State_WA_2019.pdf [https://perma.cc/57EA-4LZ8] (finding that of 21,577 total unhoused individuals, 9,557 were unsheltered while 8,378 were in emergency shelters and 3,642 had traditional housing).

25. This criminalization of homelessness is becoming increasingly common and more cities are taking punitive law enforcement approaches to address visible homelessness. *See* TENT CITY, *supra* note 15, at 8–9. However, some states have taken a more progressive approach by implementing "Housing First" policies, which focus on providing housing first, then other services such as mental health treatment or substance abuse treatment second. *See* John M. Glionna, *Utah Is Winning the War on Chronic Homelessness with 'Housing First' Program*, L.A. TIMES (May 24, 2015, 4:30 AM), https://www.latimes.com/nation/la-na-utah-housing-first-20150524-story.html [https://perma.cc/MQ5L-2SDF]; Michael Wilt, *"Housing First" Policy Helps Communities Combat Veteran Homelessness*, TSAHC (Aug. 14, 2015), https://www.tsahc.org/blog/post/housing-first-policy-helps-communities-combat-veteran-homelessness [https://perma.cc/8DZ6-4DDQ]. Some have suggested implementing a similar Housing First policy in the City, coupled with providing more affordable housing. Natalie Brand, *Seattle Lacks 'Coherent Strategy' To Fight Homelessness, Expert Says*, KING5, https://www.king5.com/article/news/politics/seattle-lacks-coherent-strategy-to-fight-homelessness-expert-says/281-552841013 [https://perma.cc/SZV9-ABV7] (May 17, 2018, 9:50 AM).

26. According to the plaintiffs' complaint, "[a]pproximately one third of the more than $7 million the City secured as a result of its State of Emergency Declaration was spent removing the homes of people living outside and seizing and destroying their property." Complaint, *supra* note 3, at 23. The funds were broken down into three categories: $2.9 million for "[p]revention efforts," $2.5 million for "[s]upporting people to move out of encampments," and $2.2 million for "[m]eeting basic needs." Bryan Cohen, *Seattle Has $7.6 Million Emergency Plan for Homeless and Encampment Sweeps*, CAPITOL

thousand sweeps.[27] During these sweeps, personnel employed by the City or the Washington State Department of Transportation ("WSDOT") seize and often destroy the property of unhoused individuals under the guise of cleaning up the city.[28]

The policies and procedures for these sweeps are found in the City's Multi-Departmental Administrative Rules 17-01 ("MDAR 17-01")[29] and WSDOT's "Guidelines to Address Illegal Encampments Within State Right of Way" (collectively, "Sweep Policies").[30] The City and WSDOT (the named defendants in *Willis*)[31] promulgated the Sweep Policies, which give the City and WSDOT personnel the authority to seize and destroy the belongings of unhoused individuals.[32]

The ACLU brought suit on behalf of the unhoused individuals subject to the Sweep Policies by filing suit in the Western District of Washington in September 2017.[33] The proposed class of plaintiffs in *Willis* was comprised of over two thousand "unhoused persons who live outside within the City of Seattle, Washington and who keep their belongings on public property."[34] These individuals were subject to the defendants' sweeps and had their personal property seized or destroyed by the City and WSDOT personnel as a result.[35] According to the complaint, the defendants acted "without a warrant, probable

HILL SEATTLE (Feb. 9, 2016, 9:45 PM), https://www.capitolhillseattle.com/2016/02/seattle-has-7-6-million-emergency-plan-for-homeless-and-encampment-sweeps/ [https://perma.cc/T5MN-VMC2]. WSDOT spent "approximately $250,000 a year removing unhoused people's property." Complaint, *supra* note 3, at 23.

27. Complaint, *supra* note 3, at 22–23.

28. *Id.* at 36; *see also* Mike Baker, *Chaos, Trash and Tears: Inside Seattle's Flawed Homeless Sweeps*, SEATTLE TIMES, https://www.seattletimes.com/seattle-news/homeless/chaos-trash-and-tears-inside-seattles-flawed-homeless-sweeps/ [https://perma.cc/5B4V-59W5] (Oct. 12, 2017, 3:11 PM); Ansel Herz, *How the City of Seattle Trashes Homeless People's Belongings and Chases Them Around Town*, STRANGER (Apr. 6, 2016, 10:28 AM), https://www.thestranger.com/slog/2016/04/06/23909768/how-the-city-of-seattle-trashes-homeless-peoples-belongings-and-chases-them-around-town [https://perma.cc/8QYQ-R9KH]; Mitch Pittman, *'We are Spring Cleaning:' Seattle Conducts Homeless Camp Cleanups Along I-5 in U-District*, KOMO NEWS (Mar. 17, 2017), https://komonews.com/news/local/we-are-spring-cleaning-city-conducts-more-homeless-camp-cleanups-along-i-5-in-seattle [https://perma.cc/D5UQ-ZLXM].

29. MDAR 17-01 was adopted by the City in 2017 as an amendment to its 2008 version, titled "MDAR 08-01." Willis v. City of Seattle, 943 F.3d 882, 884 (9th Cir. 2019). The plaintiffs in *Willis* amended their complaint on May 23, 2017, because their original complaint was filed on January 19, 2017—prior to the adoption of MDAR 17-01. *See* Complaint—Class Action for Declaratory and Injunctive Relief at 36, Hooper v. City of Seattle, No. C17-77, 2017 WL 4410029 (W.D. Wash. Oct. 4, 2017), *aff'd sub nom.* Willis v. City of Seattle, 943 F.3d 882 (9th Cir. 2019); Complaint, *supra* note 3, at 28, 50.

30. *Willis*, 943 F.3d at 884.

31. Complaint, *supra* note 3, at 23.

32. *Id.* at 23–29.

33. *Id.* at 50.

34. *Id.* at 17–18.

35. *Id.* at 18.

cause, adequate notice, an opportunity to have a meaningful pre- or post-deprivation hearing, or an opportunity to retrieve vital personal property before its seizure or destruction."[36]

B. *The Lawsuit: The Plaintiffs' Claims and Procedural History*

The plaintiffs in *Willis* brought both facial and as-applied challenges to the Sweep Policies,[37] but the court focused solely on the facial challenge for purposes of class certification.[38] The plaintiffs alleged that the defendants' policies and practices were "unnecessarily cruel" and violated the plaintiffs':

> 1. right to protection from unreasonable search and seizure under the Fourth Amendment of the U.S. Constitution;[39]
>
> 2. right to protection from invasion of homes and privacy under Article I, Section 7 of the Washington State Constitution;[40]
>
> 3. right to procedural due process under the Fourteenth Amendment of the U.S. Constitution; and . . . the Washington State Constitution.[41]

As part of their facial challenge, the plaintiffs argued that the Sweep Policies were impermissibly vague and overbroad due to (1) several poorly defined key

36. *Id.*

37. Hooper v. City of Seattle, No. C17-77, 2017 WL 4410029, at *2 (W.D. Wash. Oct. 4, 2017), *aff'd sub nom.* Willis v. City of Seattle, 943 F.3d 882 (9th Cir. 2019).

38. This Recent Development will also focus solely on the facial challenge (rather than the as-applied challenge) since the *Willis* dissent agreed with the *Willis* majority that the "plaintiffs failed to show their as-applied claims pose common questions for purposes of" FRCP 23 class certification. Willis v. City of Seattle, 943 F.3d 882, 888 (9th Cir. 2019) (Christen, J., concurring in part and dissenting in part).

39. Complaint, *supra* note 3, at 3.

40. *Id.* "Home" has been interpreted to include tent-like structures of unhoused individuals. *See, e.g.*, State v. Pippin, 403 P.3d 907, 914–15 (Wash. Ct. App. 2017) (invoking the protection of article I, section 7 of the Washington Constitution despite the unhoused individual's lack of permission to camp at the location). In addition, Washington courts have held that article I, section 7 of the Washington Constitution provides more protection than the Fourth Amendment. *See, e.g.*, State v. Groom, 947 P.2d 240, 244 (Wash. 1997) (en banc) ("Article I, section 7 is more protective of the home than is the Fourth Amendment, and the cases reflect the heightened constitutional protection afforded the home under the state constitution."); D.A.H. v. Seattle Times Co. (*In re* Det. of D.A.H.), 924 P.2d 49, 53 (Wash. Ct. App. 1996) ("Our state constitution provides greater privacy protection than the expectations created by the Fourth Amendment."); State v. Cleator, 857 P.2d 306, 309 (Wash. Ct. App. 1993) ("[A]rticle 1, section 7 provides greater protection for privacy interests than the Fourth Amendment . . . .").

41. Complaint, *supra* note 3, at 3.

terms,[42] (2) the exceptions that permeated any notice requirements,[43] and (3) the lack of adequate storage and means of retrieving seized personal property.[44]

Perhaps surprisingly, the plaintiffs did not seek compensation for the financial losses or emotional damages caused by the sweeps; they simply requested declaratory and injunctive relief.[45] They were tired of "repeatedly moving all of their belongings and living in constant fear of the pending seizure and destruction" of the few things they owned in the world.[46] They just wanted the sweeps to cease.

Given the near impossibility and unlikely success of single-handedly taking on the City and WSDOT, the plaintiffs sought strength in numbers via class certification. While the ACLU could have challenged the defendants' Sweep Policies by bringing individual claims on behalf of an unhoused individual subjected to the sweeps, a class action structure was practically and strategically necessary to provide the appropriate relief to all unhoused individuals harmed by the sweeps.[47]

42. Several terms within the Sweep Policies are defined only by example, including, "apparent utility" and "personal property," while others—such as "hazard" and "obstruction"—have overbroad or vague definitions that give the defendants' personnel too much discretion. *Id.* at 27–29. See *infra* Section II.B for a discussion of the vague terms.

43. Most of the exceptions pertain to the City's obligation to provide notice before conducting the sweeps. For example, no notice is required for:

- individuals who do not live in tents, lean-tos, or other "structures";
- individuals who do live in a "structure," but are 300 feet or more away from an encampment, living alone, or living next to only one other person;
- "sites where an encampment has been observed three or more times within any 60 day period . . . . [E]ven if none of the current residents lived there within the prior 60 days, or were otherwise unaware that a notice for the area had been posted at some point within the last 8 years"; and
- sites where it is not "'practical' or 'feasible' to post notice because of '[c]rew scheduling, emergency repairs and removal of nuisances,' or other situations 'where the maintenance activity cannot wait or be predicted.'" Complaint, *supra* note 3, at 24–25.

Additional exceptions apply even if notice must be posted:

- The notice does not have to be written in such a way that it accommodates "people with limited English proficiency, limited literacy, or disabilities (such as blindness)." *Id.* at 26.
- The sweep does not have to actually occur on the date or time given in the notice. *Id.*

Another sweeping exception states that "[e]ach Region may exercise its discretion to deviate from these [Sweep Policies] if the Region determines that coordination with a local jurisdiction on a specific clean-up activity is the best course of action under the circumstances." Complaint, *supra* note 3, at 27.

44. *Id.* at 27–29.

45. *Id.* at 6. See *infra* Section III.A for a discussion of the implications of this strategic decision.

46. Complaint, *supra* note 3, at 47.

47. *See* Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017, 2028–39 (2015) (discussing the incentives for pursuing a common claim via class action, rather than an individual suit).

One strategic advantage of bringing a class action instead of an individual claim is that the constitutional challenge to the Sweep Policies could continue if an individual plaintiff obtained housing.[48] Moreover, "the absence of class treatment undermines the court's ability to consider the full range of relevant facts and interests when determining liability and fashioning relief."[49] There are some advantages to bringing an individual claim as well, of course. For example, there would be no need to satisfy the FRCP 23 class action requirements, the case would likely be resolved more expeditiously, and the court could tailor relief to the specific unhoused plaintiff's needs. Although appealing, these advantages fail to outweigh the benefits of the class action route. Pursuing an individual claim would not only forfeit the aforementioned benefits afforded to a class of plaintiffs but would also rob many unhoused individuals of the relief they desperately need. By bringing a class action claim, the ACLU could ensure that any legal remedy mandated by the courts would apply broadly to other similarly situated unhoused individuals subject to the sweeps.[50]

However, bringing a class action instead of an individual claim subjects plaintiffs to additional procedural hurdles.[51] This was precisely the issue in *Willis*, as the court ruled that the plaintiffs did not meet the requisite standards for class certification and denied their request for relief.[52] The plaintiffs appealed the district court's decision to the Ninth Circuit, but they were again denied the opportunity to adjudicate their claims on the merits.[53]

II. ADEQUACY OF THE PLEADINGS

Understanding the legal and practical contexts of *Willis* is vital to understanding why its resolution is improper. This part uses the pleading standards established in FRCP 8 and *Iqbal*[54] to discuss why the plaintiffs'

48. *Id.* at 2037–38. In an individual suit, however, the claim would be rendered moot and the case would be dismissed once the plaintiff obtained housing. *Id.*

49. *Id.* at 2021. To obtain the broadest form of relief possible via an individual suit, the ACLU would have had to engage in the difficult—if not impossible—task of finding a representative plaintiff who experienced each and every harm the plaintiffs in *Willis* collectively experienced as a result of the sweeps. Otherwise, the relief would be limited to only those specific harms that the representative plaintiff experienced. *See id.* at 2030–34.

50. *See id.* at 2030–31 (explaining that granting system-wide relief is the result of a meritorious class action suit, but that such relief is not necessarily granted in nonclass litigation and is generally prohibited).

51. *See infra* Section III.A.

52. Hooper v. City of Seattle, No. C17-77, 2017 WL 4410029, at *16 (W.D. Wash. Oct. 4, 2017), *aff'd sub nom.* Willis v. City of Seattle, 943 F.3d 882 (9th Cir. 2019).

53. Willis v. City of Seattle, 943 F.3d 882, 887–88 (9th Cir. 2019).

54. Notably, *Iqbal* built upon the plausibility standard the Supreme Court established in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), by expanding its applicability from antitrust cases alone to all cases. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[T]he pleading standard [FRCP] 8 announces

pleadings in *Willis* were sufficient to bring a plausible facial challenge to the defendants' Sweep Policies. Given that *Willis* concerned the denial of a class certification—governed by FRCP 23—one might wonder why a FRCP 8 analysis of the adequacy of the plaintiffs' pleadings is relevant to the inquiry. To clarify, while FRCP 23 governs class certification, such determinations first require review of the pleadings according to FRCP 8.[55] Thus, FRCP 8 is often the operative standard. If, unlike in *Willis*, the court determines that the pleadings collectively pose an adequate facial challenge under FRCP 8, then its analysis proceeds to the second question of whether to certify the class under FRCP 23 based on the facial challenge.[56]

The majority in *Willis*, however, narrowly focused its analysis almost exclusively on the plaintiffs' motion for class certification[57] rather than the pleadings as a whole.[58] More specifically, the majority only looked to the "five questions of fact and law in support of [the plaintiffs'] commonality argument in their motion for class certification,"[59] and refused to certify the class because it deemed that section inadequate to bring a facial challenge to the defendants' Sweep Policies.[60]

A. *Pleadings Standards Under FRCP 8 and* Iqbal

According to FRCP 8, "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief."[61] Furthermore, the "allegations in the complaint [must] 'give

does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." (quoting *Twombly*, 550 U.S. at 555)).

55. *See* Comcast Corp. v. Behrend, 569 U.S. 27, 33–34 (2013) (quoting Gen. Tel. Co. v. Falcon, 457 U.S. 147, 160 (1982)) (explaining that a class certification analysis will frequently "overlap with the merits of the plaintiff's underlying claim" because a "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action").

56. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (stating that "[FRCP] 23 does not set forth a mere pleading standard" and that the court must "probe behind the pleadings" in a separate analysis before certifying a class).

57. The majority makes a passing reference to the plaintiffs' second amended complaint, but only in response to the dissent's argument. *Willis*, 943 F.3d at 887 ("The Appellants' Second Amended Complaint also makes general and conclusory statements about the [Sweep Policies'] deficiencies, without arguing that a single policy would be unconstitutional in all its applications.").

58. The majority's failure to consider the complaint as a whole runs contrary to binding precedent. *See, e.g.*, Argueta v. U.S. Immigr. & Customs Enf't, 643 F.3d 60, 74 (3d Cir. 2011) (recognizing that "*Iqbal* made it clear that courts must determine whether the complaint as a whole contains sufficient factual matter to state a facially plausible claim"); *In re* VeriFone Holdings, Inc. Sec. Litig., 704 F.3d 694, 703 (9th Cir. 2012) (stating that the court cannot "unduly focus on the weakness of individual allegations to the exclusion of the whole picture").

59. *Willis*, 943 F.3d at 886.

60. *Id.* at 887–88.

61. FED. R. CIV. P. 8(a)(2).

the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'"[62]

The Supreme Court first refined this standard as applied to antitrust cases in *Bell Atlantic Corp. v. Twombly*,[63] then, in *Iqbal*, expanded the standard to apply to all plaintiffs.[64] In *Iqbal*, the Court established a two-part analysis of pleadings that first requires stripping away mere legal conclusions or conclusory allegations, leaving only factual allegations.[65] Then, judges "must accept as true all of the allegations" and assess whether a plausible claim for relief exists.[66] If the facts give rise to a reasonable inference that a defendant is liable, then the claim is plausible and can proceed to adjudication on the merits.[67]

These standards have some flexibility and inherent deference toward plaintiffs. First, courts must accept all factual allegations as true, leaving all credibility determinations and fact-finding duties to a jury.[68] Second, courts must take all relevant context into consideration when "determining whether a complaint states a plausible claim."[69] Third, courts must ensure that "[p]leadings [are] construed so as to do justice," as mandated by FRCP 8.[70]

B. *Misapplication of the* Iqbal *Standard to the Facial Challenge Assessment in* Willis

The Supreme Court has defined a facial challenge as a claim that "a law is unconstitutional in all of its applications."[71] Essentially, a facial challenge argues that a policy is unconstitutional as written, rather than unconstitutional only in its application to a particular group of individuals (known as an "as-applied" challenge). While facial challenges are often difficult to bring successfully, *Iqbal* limits a court's assessment at the class certification stage to whether a *plausible*—not a *meritorious*—facial challenge exists.[72]

62. Updike v. Multnomah County, 870 F.3d 939, 952 (9th Cir. 2017) (quoting Pickern v. Pier 1 Imps. (U.S.), Inc., 457 F.3d 963, 968 (9th Cir. 2006)).

63. 550 U.S. 544 (2007).

64. *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike." (quoting *Twombly*, 550 U.S. at 555–56)).

65. *Id.* at 679.

66. *Id.* at 678.

67. *Id.*

68. *Id.*

69. *Id.* at 679 (emphasizing that "determining whether a complaint states a plausible claim" is context specific).

70. FED. R. CIV. P. 8(e).

71. City of Los Angeles v. Patel, 135 S. Ct. 2443, 2451 (2015) (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008)).

72. *See* Willis v. City of Seattle, 943 F.3d 882, 888 (9th Cir. 2019) (Christen, J., concurring in part and dissenting in part) ("The City was right to concede the existence of the facial claims, but it badly missed the mark when it conflated the merits of the facial claims with whether the claims presented a common question.").

Here, the proper inquiry under *Iqbal* is whether the plaintiffs in *Willis* "plead factual matter that, if taken as true, states a claim" that the Sweep Policies were facially unconstitutional.[73] In answering the first part of this question, the court should have taken the complaint "as a whole," looking to *all* factual allegations contained in the plaintiffs' pleadings.[74]

However, in direct contrast with *Iqbal*, the *Willis* majority did not look at the entirety of the pleadings but only to the section in the plaintiffs' motion for class certification containing the common questions of fact and law.[75]

To its credit, the majority did not explicitly disregard *Iqbal*. Rather, it simply conducted its analysis in a backward manner, thus narrowing its scope.[76] If the majority had initially assessed whether a plausible facial challenge existed, it would have looked at the plaintiffs' complaint as a whole. By jumping to the FRCP 23 commonality issue instead, the majority did not look to the entire complaint, but only the section containing the common questions of law and fact. As a result of this narrow review—in direct conflict with *Iqbal* and FRCP 8 standards—the majority found no plausible facial challenge.[77]

73. *See Iqbal*, 556 U.S. at 666. Importantly, this *Iqbal* analysis—which the *Willis* court did not properly conduct—is separate from the question of whether the plaintiffs satisfied the class certification requirements of FRCP 23. Class certification is discussed below in Part III.

74. A court must look to a complaint "as a whole" and cannot "unduly focus on the weakness of individual allegations to the exclusion of the whole picture." *In re* VeriFone Holdings, Inc. Sec. Litig., 704 F.3d 694, 703 (9th Cir. 2012); *see also* Argueta v. U.S. Immigr. & Customs Enf't, 643 F.3d 60, 74 (3d Cir. 2011) (stating that "*Iqbal* made it clear that courts must determine whether the complaint as a whole contains sufficient factual matter to state a facially plausible claim" (citing *Iqbal*, 556 U.S. at 666)).

75. The common questions of fact and law asserted by the plaintiffs in this section read as follows:

> a. Whether Defendants have a practice and policy of seizing and destroying the personal property of people living outside without a warrant, probable cause, adequate notice, an opportunity to have a meaningful pre- or post-deprivation hearing, or an opportunity to retrieve vital personal property before its seizure or destruction;
>
> b. Whether Defendants' custom, policy, or practice violates the plaintiffs' constitutional rights against unreasonable search and seizures under the Fourth Amendment of the U.S. Constitution;
>
> c. Whether Defendants' custom, policy, or practice violates class members' right to privacy under Article I, Section 7 of the Washington State Constitution;
>
> d. Whether Defendants' custom, policy, or practice violates class members' constitutional rights to procedural due process under the Fourteenth Amendment of U.S. Constitution; and
>
> e. Whether Defendants' custom, policy, or practice violates class members' constitutional rights to procedural due process under Article I, Section 3 of the Washington State Constitution.

Complaint, *supra* note 3, at 18–19.

76. *Willis*, 943 F.3d at 885–88 (finding no facial challenge after analyzing the complaint strictly under FRCP 23).

77. *Id.* at 886.

To conduct a proper *Iqbal* analysis, the majority in *Willis* should have first identified the factual allegations presented *throughout* the pleadings—not just in the common questions section of the plaintiffs' motion for class certification. Ironically, the majority criticized the dissent for looking to various "statements from the 'Factual Background' section" within the motion "to argue that [the plaintiffs] adequately presented a facial challenge."[78] However, according to *Iqbal*, this is exactly what the majority should have done in order to examine the pleadings "as a whole."[79]

The factual background section of the plaintiffs' motion for class certification specifically identified the Sweep Policies and then stated that these "official policies *fail on their face* to provide requisite procedural safeguards."[80] In addition, the plaintiffs explicitly stated that the "[d]efendants' policies *contemplate on their face* arbitrary enforcement and unbridled employee discretion, and lack meaningful oversight and enforcement mechanisms."[81] The facts alleged in the complaint support these assertions by citing various definitions pulled from both MDAR 08-01 and the Sweep Policies—such as "personal property,"[82] "hazard"[83] or "hazardous" items,[84] "obstruction,"[85] and

78. *Id.* at 887.

79. *In re VeriFone Holdings*, 704 F.3d at 703; *see also Argueta*, 643 F.3d at 74.

80. Motion for Class Certification at 5, Hooper v. City of Seattle, No. C17-77, 2017 WL 4410029 (W.D. Wash. Oct. 4, 2017), *aff'd sub nom.* Willis v. City of Seattle, 943 F.3d 882 (9th Cir. 2019) (emphasis added).

81. *Id.*

82. The complaint outlines the City's definition of personal property as being "limited to items which have 'apparent utility,' are defined by example, or 'have a reasonable value of more than $25.' The MDAR does not consider building materials to be personal property . . . ." Complaint, *supra* note 3, at 27. The complaint states that the "WSDOT Guidelines similarly define personal property by example, and provide minimal criteria for determining whether an item should be stored." *Id.*

83. The complaint outlines the City's definition of hazard as

> situations in which the City unilaterally determines people are "at risk of injury or death beyond that caused by increased exposure to the elements; or their presence creates a risk of injury or death to others, including but not limited to encampments at highway shoulders and off-ramps, areas exposed to moving vehicles, area that can only be accessed by crossing driving lanes outside of a legal crosswalk, and landslide-prone areas."

Id. at 29.

84. The complaint asserts that under the City's definition, hazardous items "can include items that are wet or muddy because they are kept outside." *Id.* at 27.

85. The complaint outlines the City's definition of "obstruction" to include

> people, tents, personal property, garbage, debris or other objects related to an encampment that: are in a City park or on a public sidewalk; interfere with the pedestrian or transportation purposes of public rights-of-way; or [the City unilaterally determines] interfere with areas that are necessary for or essential the intended use of a public property or facility.

Id. at 29 (alterations in original).

"emphasis areas"[86]—as problematic in light of the Fourth and Fourteenth Amendments.

Ultimately, the plaintiffs argued that the vague nature of these definitions rendered the "[d]efendants' official policies and proposed rules unconstitutional as written."[87]

Given that a policy can be unconstitutional on its face if impermissibly vague,[88] the plaintiffs' factual allegations raised a plausible facial challenge.[89] According to the second prong of the *Iqbal* pleading standard, the *Willis* court should have taken the factual allegations presented in these sections[90] as true and then found a plausible facial challenge to the Sweep Policies as overly vague.[91] Upon correct application of the pleading standards, "the record plainly shows that [the] plaintiffs brought [plausible] facial challenges."[92]

While addressing the dissent's argument that a facial challenge existed, the majority concedes that the plaintiffs "mention in passing in their motion that sweeps were conducted 'pursuant to official policies,' and later that the [Sweep P]olicies '*fail on their face* to provide requisite procedural safeguards.'"[93] To prevent this concession from destroying their argument, however, the majority states that the plaintiffs failed to assert that "a single policy would be unconstitutional in all its applications,"[94] as mandated by the Supreme Court in *City of Los Angeles v. Patel*.[95] Conversely, the complaint explicitly states that "[e]ven if [the d]efendants' sweeps were conducted fully in accordance with

86. The complaint asserts that the City's Sweep Policies "allow the City to declare 'emphasis areas' wherein camping is prohibited at all times," yet "provide no criteria for what can constitute an emphasis area: one can be of any size and anywhere within the City limits, as long as it is somewhere an unauthorized encampment has previously existed and been swept." *Id.* at 30.

87. *Id.* at 32.

88. *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 357 (1983) ("As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.").

89. To reiterate, the facial claim need not be *meritorious* at this stage; the court should simply determine whether it is plausible. *See supra* note 72 and accompanying text.

90. In addition to the aforementioned factual allegations concerning the overbroad and vague definitions of the Sweep Policies, the complaint presents additional factual allegations. First, the exceptions to the defendants' Sweep Policies on their face make it impossible for people living outside to safely live and store their belongings without constant risk that everything will be taken from them with no notice. Complaint, *supra* note 3, 27–30. Second, not only are the defendants' official Sweep Policies unconstitutional as written, but the defendants also have conducted and approved of longstanding and ongoing practices that violate even the most basic portions of their own Sweep Policies, along with the U.S. Constitution and Washington Constitutions. *Id.* at 22–24.

91. These claims need not be meritorious at the class certification stage. Their merit is assessed once the class has been certified. *See supra* note 72 and accompanying text.

92. Willis v. City of Seattle, 943 F.3d 882, 888 (9th Cir. 2019) (Christen, J., concurring in part and dissenting in part).

93. *Id.* at 887 (majority opinion) (emphasis added).

94. *Id.*

95. 135 S. Ct. 2443, 2449 (2015).

both the MDAR and the WSDOT Guidelines, they would still be unconstitutional."[96] This allegation and its associated facts clearly pose a facial challenge to the Sweep Policies by asserting that the sweeps cannot be conducted constitutionally.[97] This is sufficient to satisfy both FRCP 8 and the *Iqbal* standard.[98]

Putting aside the court's improperly narrowed analysis for a moment, FRCP 8 additionally counsels in favor of the plaintiffs.[99] Courts have historically leaned on FRCP 8's mandate to construe pleadings "so as to do justice,"[100] and there is no reason why that deferential standard should be altered or ignored in *Willis*. The plaintiffs here were one of the most vulnerable populations imaginable—one that would almost certainly lack any recourse for the violation of their constitutional rights outside a class action suit. Therefore, when assessing the plaintiff's pleadings under *Iqbal* as a whole[101]—rather than just a small section of one motion—and keeping in mind the plaintiff-friendly underpinnings of FRCP 8 as a whole, the plaintiffs in *Willis* pled sufficient facts to give rise to a reasonable inference that the Sweep Policies are facially unconstitutional.

III. SATISFACTION OF THE FRCP 23 REQUIREMENTS

While FRCP 8 describes pleading standards, FRCP 23 details the elements necessary for class certification. The relationship between FRCP 8 and FRCP 23 can be a difficult one to grasp, but explaining this relationship at the outset will foster a greater understanding of the analysis in this part. As Part II explained, the FRCP 8 and *Iqbal* standards are used to analyze the pleadings and determine whether a plausible facial challenge exists. A plausible facial challenge—by its very nature—is a common question of law: whether the

96. Complaint, *supra* note 3, at 24.

97. *Willis*, 943 F.3d at 889 (Christen, J., concurring in part and dissenting in part) ("There is no way to read this allegation as anything other than a contention that defendants' policies are unconstitutional no matter how they are applied.").

98. *Id.* ("In the language of *Patel*, this was an unambiguous assertion that defendants' policies are unconstitutional 'in all of [their] applications.'" (quoting *Patel*, 135 S. Ct. at 2451)).

99. FED. R. CIV. P. 8(e); Starks v. Perloff Bros., Inc., 760 F.2d 52, 55 (3d Cir. 1985) ("An overly restrictive reading of a complaint is inconsistent with the mandate that 'pleadings shall be so construed as to do substantial justice.'" (quoting Richardson v. Pa. Dep't of Health, 561 F.2d 489, 492 (3d Cir. 1977))); Peoples Nat. Gas Co. v. Fed. Power Comm'n, 127 F.2d 153, 156 (D.C. Cir. 1942) ("[W]e are required to construe the pleadings so as to do substantial justice . . . .").

100. *See, e.g.*, Mitchell v. Cate, No. 08-CV-01196, 2014 WL 3689287, at *6 (E.D. Cal. July 23, 2014) ("Plaintiffs' Fourteenth Amendment claim challenges the CDCR's statewide policy. Although not explicitly stated, the Court reads Plaintiffs' allegations as posing a facial challenge to the CDCR's policy. Thus, the Court is not persuaded by Defendants' challenges to commonality that are based upon its contention that the policy as applied is constitutional.").

101. *See supra* notes 63–75 and accompanying text.

challenged policy or practice is constitutional on its face.[102] Given that FRCP 23 requires a common question of law, inter alia, a plausible facial challenge logically satisfies this commonality requirement because the legal question of whether the challenged law is "unconstitutional in all applications"[103] can be resolved "in one stroke," as the Supreme Court's decision in *Wal-Mart, Inc. v. Dukes*[104] requires. Once the commonality requirement is met, the class will likely be certified, given that the analyses of the remaining FRCP 23 requirements typically merge with the commonality inquiry in cases evaluating the constitutionality of a given statute.[105]

A. *Overview of FRCP 23 Requirements*

Class certification under FRCP 23 first requires plaintiffs to meet the four requirements of FRCP 23[106]:

> the class is so numerous that joinder of all members is impracticable;
>
> there are questions of law or fact common to the class;
>
> the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> the representative parties will fairly and adequately protect the interests of the class.[107]

These requirements are respectively referred to as (1) numerosity, (2) commonality, (3) typicality, and (4) adequate representation.[108]

102. *See* Garris v. City of Los Angeles, No. CV 17-1452, 2018 WL 5919214, at *4 (C.D. Cal. Feb. 9, 2018) ("Cases that involve a facial challenge to a statute satisfy the commonality requirement." (citing Califano v. Yamasaki, 442 U.S. 682, 701 (1979) (finding facial due process challenges to the Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.), "peculiarly appropriate" for class treatment because the "issues involved are common to the class as a whole" and "turn on questions of law applicable in the same manner to each member of the class"))), *rev'd on other grounds*, Garris v. City of Los Angeles, 798 F. App'x 155 (9th Cir. 2020); Guckenberger v. Boston Univ., 957 F. Supp. 306, 325 (D. Mass. 1997) ("[F]acial challenges to . . . allegedly discriminatory [university policy] involve common questions of fact and law.").

103. City of Los Angeles v. Patel, 135 S. Ct. 2443, 2450 (2015).

104. 564 U.S. 338 (2011).

105. *See infra* note 148 and accompanying text for further discussion of this domino effect—by which a facial challenge leads to the satisfaction of the commonality standard which in turn makes the complaint likely to satisfy other class certification requirements. It is important to emphasize, however, that this domino effect only occurs in a limited set of circumstances. First, it is limited to cases that challenge a statute as unconstitutional. Second, plaintiffs must pursue a facial challenge to the statute, rather than an as-applied challenge. Third, that facial challenge must be plausible. Fourth, a plaintiff must still provide sufficient evidence to prove that the remaining FRCP 23 elements are required; this is not guaranteed. *See infra* note 148 and accompanying text.

106. FED. R. CIV. P. 23(a)(1)–(4) (listing the four requirements); Blake v. Arnett, 663 F.2d 906, 912 (9th Cir. 1981) (citing Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1339 (9th Cir. 1976)).

107. FED. R. CIV. P. 23(a)(1)–(4).

108. *Dukes*, 564 U.S. at 349.

After satisfying these four requirements under FRCP 23, plaintiffs must then fit into one of the three categories further listed in FRCP 23 for the class to be certified.[109] The first category—colloquially known as a "(b)(1) class"—is satisfied if proceeding individually could lead to either (1) "inconsistent or varying adjudications" and "incompatible standards of conduct" for the defendants; or would (2) "impair or impede" the ability of other similarly-situated plaintiffs "to protect their interests."[110] A class fits in the second category—a "(b)(2) class"—if "the party opposing the class had acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[111] Finally, the third category—a "(b)(3) class"—is satisfied if "questions of law or fact common to class members predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy" based on four factors: predominance, superiority, mandatory notice, and the right to opt out.[112] Although not addressed at length in the opinion, *Willis* was categorized as a (b)(2) class.[113]

The Supreme Court recently heightened the standard for assessing whether a plaintiff satisfies FRCP 23 in *Dukes*, where the plaintiffs were ultimately determined to be a (b)(3) class.[114] Acknowledging the context of this decision is vital to understanding why the standard was heightened and why *Dukes* is distinguishable from public interest class actions like *Willis*. First, the Court noted at the outset that *Dukes* was "one of the most expansive class actions ever," as the class of plaintiffs in *Dukes* consisted of over 1.5 million female employees of Wal-Mart.[115] Second, "Wal-Mart is the Nation's largest private employer."[116] Third, the plaintiffs brought Title VII claims for unlawful discrimination on the basis of sex in pay and promotions—decisions made pursuant to "local managers' broad discretion, which is exercised 'in a largely

109. FED. R. CIV. P. 23(b)(1)–(3) (outlining the three available categories); Willis v. City of Seattle, 943 F.3d 882, 885 (9th Cir. 2019).

110. FED. R. CIV. P. 23(b)(1).

111. FED. R. CIV. P. 23(b)(2).

112. FED. R. CIV. P. 23(b)(3).

113. *Willis*, 943 F.3d at 884.

114. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 362 (2011). While some scholars worried that class action lawsuits would become altogether too difficult to mount successfully after *Dukes*, this has not proven true. *See* Brief of Civil Procedure Professors as Amici Curiae in Support of Plaintiffs-Appellants (Reversal) at 5 n.3, *Willis*, 943 F.3d 882 (No. 18-35053) [hereinafter Civ. Pro. Professors' Amicus Brief] (providing examples of types of successful class actions in the wake of *Dukes*); Aaron Bernay, *3 Months After Wal-Mart v. Dukes*, LEXISNEXIS LAW 360 (Sept. 14, 2011, 4:18 PM), https://www.law360.com/articles/268717/3-months-after-wal-mart-v-dukes [https://perma.cc/4ALY-5L43 (dark archive)].

115. *Dukes*, 564 U.S. at 342.

116. *Id.*

subjective manner.'"[117] Fourth, the plaintiffs were seeking not only injunctive and declaratory relief but also backpay.[118] The Court emphasized the importance of this last point when categorically distinguishing these claims from public interest class actions:

> [I]ndividualized monetary claims belong in [FRCP] 23(b)(3). The procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are . . . unnecessary *to a (b)(2) class*. When a class seeks an indivisible injunction benefiting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident. But with respect to each class member's individualized claim for money, that is not so . . . .[119]

All four of these factors contributed to the majority's decision in *Dukes* to implement a more "rigorous analysis" for (b)(3) class claims.[120] Under the new *Dukes* standard, plaintiffs "must affirmatively demonstrate [their] compliance" with FRCP 23 by proving "that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc."[121]

In making its determination, however, the court cannot "engage in free-ranging merits inquiries at the certification stage."[122] In fact, the Ninth Circuit has stated that a court "determining the propriety of a class action" does not evaluate the strength of the claims, and that "inquiry into the merits" should be limited to determining whether the requirements of FRCP 23 are met and "may not go so far . . . as to judge the validity of the claims."[123] In a more recent case, the Ninth Circuit clarified that "this does *not* mean that the plaintiffs must show at the class certification stage that they will *prevail* on the merits."[124] Thus, all that was necessary for the *Willis* plaintiffs' claims to proceed beyond the class certification stage was the finding that a facial challenge existed. They did not have to demonstrate that it was meritorious or even likely to succeed.[125]

117. *Id.* at 343.

118. *Id.* at 345.

119. *Id.* at 362–63.

120. *See id.* at 342–67.

121. *Id.* at 350.

122. Willis v. City of Seattle, 943 F.3d 882, 888 (9th Cir. 2019) (Christen, J., concurring in part and dissenting in part) (citing Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 466 (2013)).

123. United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union v. ConocoPhillips Co., 593 F.3d 802, 808 (9th Cir. 2010).

124. Parsons v. Ryan, 754 F.3d 657, 676 n.19 (9th Cir. 2014).

125. *See Willis*, 943 F.3d at 888 (Christen, J., concurring in part and dissenting in part) (citing Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 466 (2013)) ("Whether a facial challenge is meritorious is the *answer* to a common question; it is not a reason to deny class certification.").

B. *Facial Challenge as a Common Question of Law*

The commonality requirement of FRCP 23 was the central issue in *Dukes*, in which the Court ultimately heightened this requirement.[126] The *Dukes* Court clarified that "[w]hat matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather, the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation."[127] Now, plaintiffs must demonstrate "a common contention"[128] that is "capable of classwide resolution," such that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[129]

The recent Ninth Circuit decision in *Parsons v. Ryan*,[130] which was binding law when the court decided *Willis*, provides a relevant example of the application of the *Dukes* heightened commonality standard. Contextually, *Parsons* is comparable to *Willis* but distinguishable from *Dukes*. Like *Willis*—but unlike *Dukes*—*Parsons* was a public interest class action concerning members of a vulnerable population (incarcerated individuals) who sought injunctive relief against the Arizona Department of Corrections ("ADC") for harms they experienced due to medical deficiencies in ten different prison complexes.[131] Unlike the *Dukes* plaintiffs, the *Parsons* plaintiffs did not seek monetary damages but only declaratory and injunctive relief from harmful government practices, just as the plaintiffs in *Willis* did.[132] Moreover, the defendants in both *Parsons* and *Willis* were state government entities, not the nation's largest private employer. The main distinction between *Parsons* and *Willis*, however, is that the plaintiffs in *Parsons* brought an as-applied challenge to government policies, rather than a facial challenge, and thus the plaintiffs in *Parsons* had to jump through additional evidentiary hoops to satisfy the commonality requirement.[133]

Citing *Dukes*, the *Parsons* court held that the FRCP 23 commonality requirement was satisfied because the "putative class and subclass members . . . all set forth numerous common contentions whose truth or falsity can be determined in one stroke: whether the specified statewide policies and practices

126. *Dukes*, 564 U.S. at 349.

127. *Id.* at 350 (alterations in original) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

128. *Id.* Though semantically different, there is no operative difference between "common question" and "common contention," as *Dukes* focuses on whether the common question or contention is capable of classwide resolution. *Id.*

129. *Id.*

130. 754 F.3d 657 (9th Cir. 2014).

131. *Id.* at 662–63.

132. *Id.*

133. *Compare id.* at 674, *with* Willis v. City of Seattle, 943 F.3d 882, 886–87 (9th Cir. 2019).

to which they are all subjected by ADC expose them to a substantial risk of harm" in violation of the Eighth Amendment.[134] The court further explained:

> These policies and practices are the "glue" that holds together the putative class and the putative subclass; either each of the policies and practices is unlawful as to every inmate or it is not. That inquiry does not require us to determine the effect of those policies and practices upon any individual class member . . . .[135]

Like the *Willis* majority, the *Parson* defendants argued that the plaintiffs could not satisfy the commonality requirement because the "claims are inherently case specific and turn on many individual inquiries."[136] The *Parsons* defendants "describe[d] the plaintiffs' claims as little more than an aggregation of many claims of individual mistreatment,"[137] in an attempt to compare the *Parsons* plaintiffs to those in *Dukes*, who blamed a uniform corporate culture for sex discrimination in discretionary pay and promotion decisions rather than a specific company-wide policy. However, the *Parsons* court distinguished the two cases by pointing out that "every inmate in ADC custody is necessarily subject to the same medical, mental health, and dental care policies and practices of ADC."[138] In doing so, the Ninth Circuit in *Parsons* clarified that "[w]here the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class, commonality exists."[139]

Like the plaintiffs in *Parsons*, the plaintiffs in *Willis* presented common contentions capable of class-wide resolution: whether "the City's Updated Encampment Rules are unconstitutional on their face" (1) under the Fourth Amendment due to the "definitions of 'personal property,' and 'hazardous items"; and (2) "under the Fourteenth Amendment because their definitions of 'obstruction,' 'immediate hazard,' and the creation of 'emphasis areas,' essentially do away with pre-seizure notice and provide City personnel with too much discretion."[140] However, because the plaintiffs in *Willis* did not bring an as-applied challenge, they did not need to go to the same evidentiary lengths as the *Parsons* plaintiffs to satisfy the *Dukes* commonality standard. The plaintiffs' facial challenge in *Willis*, if plausible under the pleading standards of FRCP 8

134. *Id.* at 678.

135. *Id.*

136. *Id.* at 675.

137. *Id.* at 676.

138. *Id.* at 678.

139. *Id.* at 675 (alteration in original) (quoting Evon v. Law Offs. of Sidney Mickell, 688 F.3d 1015, 1029 (9th Cir. 2012)).

140. Willis v. City of Seattle, 943 F.3d 882, 888 (9th Cir. 2019) (Christen, J., concurring in part and dissenting in part) (quoting Hooper v. City of Seattle, No. C17-77, 2017 WL 4410029, at *8 (W.D. Wash. Oct. 4, 2017), *aff'd sub nom.* Willis v. City of Seattle, 943 F.3d 882 (9th Cir. 2019)).

and *Iqbal*,[141] is sufficient to satisfy the commonality requirement because it is inherently a common question of law that is capable of classwide resolution.

As argued in an amicus brief by civil procedure professors, "courts routinely hold that common questions exist in injunctive relief class action challenges to government policies and practices."[142] This is true because "when a policy is facially unconstitutional, it is void—in whole or in part—and that invalidity applies equally to all class members."[143] If the plaintiffs are raising structural challenges to government policies, they pose a "common question" with a "common answer," thus making it capable of resolution "in one stroke," as required by *Dukes*.[144] Such claims "lend themselves to class certification because they often raise generic questions about how system-wide procedures impact a group of people who depend on those procedures for relief."[145]

Furthermore, invalidating the governmental policies at issue in *Willis* would apply to all class members in the same way.[146] If the Sweep Policies in *Willis* were declared unconstitutional for impermissible vagueness and insufficient pre-seizure notice, the sweeps would cease to occur in the same unconstitutional manner. Ending the sweeps would provide common relief to all of the plaintiffs. Thus, the plaintiffs' facial challenge in *Willis* should have been enough to satisfy the FRCP 23 commonality standard and certify the class of unhoused individuals subject to the City's sweeps.

The only way to deny class certification in *Willis* was to find that no such facial challenge existed or that it would not likely prevail on the merits. However, "[w]hether a facial challenge is meritorious is the answer to a common question; it is not a reason to deny class certification."[147] As such, both arguments are irrelevant to *Willis*, and should not have barred satisfaction of the commonality standard.

In sum, the plaintiffs in *Willis* established a plausible facial challenge to the defendants' Sweep Policies. If the majority conducted a proper *Iqbal* analysis of the pleadings, it would have found this to be true. Given that facial claims are inherently common contentions capable of class-wide resolution, the plaintiffs met the commonality standard under *Dukes*. Because finding

141. *See supra* Section II.A.

142. Civ. Pro. Professors' Amicus Brief, *supra* note 114, at 2.

143. *Id.* at 8 (citing Cruz v. Zucker, 195 F. Supp. 3d 554, 565–66 (S.D.N.Y. 2016)); *see also supra* notes 93–96.

144. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011).

145. Civ. Pro. Professors' Amicus Brief, *supra* note 114, at 7 (first citing Mathews v. Eldridge, 424 U.S. 319, 348 (1976); and then citing Kuck v. Danaher, 600 F.3d 159, 165 (2d Cir. 2010)).

146. *Id.*

147. Willis v. City of Seattle, 943 F.3d 882, 888 (9th Cir. 2019) (Christen, J., concurring in part and dissenting in part) (citing Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 466 (2013) ("[FRCP] 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage.").

sufficient commonality often creates a domino effect[148] of satisfying the remaining requirements of FRCP 23—typicality and adequate representation—the plaintiffs' motion for class certification should have been granted. With class certification, the represented unhoused individuals could have adjudicated their claims on the merits in hopes of receiving protection from the unconstitutional seizure of the few possessions they own.

IV. POLICY CONSIDERATIONS AND IMPLICATIONS

FRCP 23 was designed "to provide means of vindicating the rights of groups of people who individually would lack effective strength to bring their opponents into court at all."[149] While class action lawsuits have undergone considerable criticism over the years in product liability and toxic tort contexts,[150] most, if not all, of these criticisms have no place in suits requesting injunctive relief from unlawful or oppressive government policies and practices.[151] Some critics argue that class action lawsuits should be subjected to heightened pleading requirements.[152] This argument rests on the premise that class action lawsuits generate enormous costs—especially at the discovery stage—and therefore should not proceed unless resolution in favor of the plaintiffs is extremely likely.[153] If the plaintiffs are likely to succeed, the class action should proceed because the costs of litigation will be justified.[154] Proponents of this view are essentially suggesting a "mini-trial" on the merits at the pleading stage for class action lawsuits, regardless of their subject.[155] However fiscally responsible this approach may sound, there are compelling legal and policy reasons for refusing to implement this suggested approach.

148. In *Dukes*, the Supreme Court described this domino effect:

> We have previously stated in this context that "[t]he commonality and typicality requirements of [FRCP] 23(a) tend to merge . . . . Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest."

Dukes, 564 U.S. at 349 n.5 (quoting Gen. Tel. Co. v. Falcon, 457 U.S. 147, 157–58 n.13 (1982)).

149. Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969).

150. *See* Wade Lambert, *Class-Action Suit Is a Target for Criticism from All Sides*, WALL ST. J. (Apr. 19, 1996, 10:03 AM), https://www.wsj.com/articles/SB829877425363143500 [https://perma.cc/9PCC-RLF5 (dark archive)] (criticizing product liability and toxic tort class actions for making greedy lawyers rich and putting only pennies in plaintiffs' pockets).

151. *See* Civ. Pro. Professors' Amicus Brief, *supra* note 114, at 13–20.

152. *See, e.g.*, Matthew J.B. Lawrence, *Courts Should Apply a Relatively More Stringent Pleading Threshold to Class Actions*, 81 U. CIN. L. REV. 1225, 1229 (2013).

153. Richard A. Epstein, Bell Atlantic v. Twombly*: How Motions To Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 81 (2007).

154. *Id.*

155. Alcantar v. Hobart Serv., 800 F.3d 1047, 1053 (9th Cir. 2015); Ellis v. Costco Wholesale Corp., 657 F.3d 970, 983 n.8 (9th Cir. 2011).

From a legal standpoint, this argument is directly contrary to FRCP 23, given that the only inquiry a court makes in a class certification determination is whether the requirements of FRCP 23 are *met*—not whether they are *meritorious*.[156] While the *Dukes* Court acknowledged that it is inevitable in some cases that the FRCP 23 analysis will overlap with the merits of the underlying claim, "[FRCP] 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage."[157] From a policy standpoint, there is a critical distinction between refusing to certify consumer class action lawsuits seeking only monetary damages and rejecting suits against governments concerning the basic human rights of vulnerable populations.[158] This is particularly true in cases like *Willis* where the plaintiffs seek only declaratory or injunctive relief rather than monetary damages.[159]

The arguments for heightened class action standards are more focused on the cost of litigation than the value of ensuring access to justice for particularly disadvantaged members of society.[160] As the amicus brief by Disability Rights Washington points out, "[m]arginalized and vulnerable people are often without the means and capacity to seek court intervention when their rights are violated."[161] If an individual lacks "a permanent address, regular access to transportation, a safe place to store personal records, and [has] few or no financial resources,"[162] it is nearly impossible to bring an individual claim against the government to enjoin the violation of their constitutional rights.

These obstacles are further magnified for unhoused individuals with "serious mental health or physical disabilities,"[163] who are "particularly likely to experience unsheltered homelessness."[164] Even if the defendants in *Willis* posted notices of the sweeps in conspicuous areas, these notices would be of no help to

156. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974) (stating that the only question in a class certification inquiry is whether the requirements of FRCP 23 are met).

157. Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 466 (2013).

158. See *supra* Section III.A for the *Dukes* court's discussion of the distinction between these types of claims in light of FRCP 23. *See also* Lawrence, *supra* note 152.

159. Complaint, *supra* note 3, at 6.

160. *See generally* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 984 (2003) ("Critics maintain that excessive and frivolous litigation overwhelms the judicial system's capacity to administer speedy and efficient justice, leads to higher costs for litigants and society at large, and even hinders America's competitive position in the global economy."). Critics of this view simply wave away this argument by saying that the value of broad access is too difficult or impossible to quantify. *See* Lawrence, *supra* note 152, at 1237–38.

161. Washington et al. Amicus Brief, *supra* note 6, at 12.

162. *Id.* at 16.

163. *Id.* at 2.

164. *Id.* at 8 (citing U.S. DEP'T OF HOUS. & URB. DEV., 2017 CONTINUUM OF CARE HOMELESS ASSISTANCE PROGRAMS HOMELESS POPULATIONS AND SUBPOPULATIONS 1, 2 (2017), https://www.hudexchange.info/resource/reportmanagement/published/CoC_PopSub_NatlTerrDC_2017.pdf [https://perma.cc/47LZ-EA9D]).

individuals who are blind, have cognitive disabilities, suffer from other visual impairments, or have language barriers.[165] Moreover, some of the items the defendants seized include "medication, respirators, wheelchairs, [and] canes."[166] Thus, the defendants' sweeps threaten not only the legal rights of unhoused individuals in the City but also their well-being. The government should not be permitted to "seize and destroy with impunity the worldly possessions of a vulnerable group in our society."[167] Likewise, courts should not be complicit by shutting the courthouse doors to vulnerable populations seeking to fight systemic injustice and abuse.

CONCLUSION

The plaintiffs in *Willis* face challenges on a daily basis that most Americans never have to think about. Despite—or perhaps because of—their status as members of a particularly vulnerable population, they were not afforded the opportunity to use the only vehicle designed to help them fight violations of their constitutional rights.

Even though the unhoused plaintiffs presented plausible facial challenges to the Sweep Policies of the City and WSDOT according to the pleading standards in *Iqbal* and FRCP 8, the *Willis* majority waved them aside and refused to acknowledge them. If the majority had recognized the plaintiffs' adequate facial challenges, it would have found that the facial challenge satisfied the FRCP 23 commonality standard.

The *Willis* majority's decision rests on indefensible logic and misapplies FRCP 23 precedent. By refusing to certify the class of unhoused individuals, the *Willis* court engaged in legal acrobatics to shut out the claims of "poor, marginalized, and vulnerable people who are already significantly disadvantaged in their ability to access justice."[168] In one fell sweep, their decision treats homelessness like a crime[169] and punishes those whom FRCP 23 was designed to protect.

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165. *Id.* at 11–12.

166. Complaint, *supra* note 3, at 46.

167. Lavan v. City of Los Angeles, 693 F.3d 1022, 1033 (9th Cir. 2012).

168. Washington et al. Amicus Brief, *supra* note 6, at 20 (citing NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 37 (2016), https://nlchp.org/wp-content/uploads/2018/10/Housing-Not-Handcuffs.pdf [https://perma.cc/NDW7-VSHW]).

169. For an in-depth discussion of the criminalization of homelessness, see generally Ron S. Hochbaum, *Bathrooms as a Homeless Rights Issue*, 98 N.C. L. REV. 205 (2020), and Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99 (2019).

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