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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA, FRESNO DIVISION

DESIREE MARTINEZ, FRESNO HOMELESS UNION, FAITH IN THE VALLEY, and ROBERT MCCLOSKEY,

Plaintiffs,

v.

THE CITY OF FRESNO,

Defendant.

Case No. 1:22-cv-00307-DAD-SAB

OPPOSITION TO DEFENDANT CITY OF FRESNO'S MOTION TO DISMISS AND MOTION TO STRIKE

Judge: Judge Drozd
Date: May 17, 2022
Time: 9:30 a.m.
Courtroom: 5

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INTRODUCTION

While wrong in many respects, the City of Fresno's Motion to Dismiss gets one thing right: abatement sweeps of homeless encampments can be dangerous—not because of Plaintiffs' conduct, but because of the City's. When the City conducts an abatement sweep, it can be a long, even multi-day, process in which workers and crews show up with little to no notice, provide unreasonable time demands to clear an area, destroy peoples' shelter and life-saving items, and drive in heavy machinery while unhoused people are still onsite, sometimes within inches of their bodies and tents.

The City argues that the recently amended Section 10-616 of the Fresno Municipal Code ("the Ordinance") is not subject to facial challenge because it applies to a wide range of abatement activities. But the Ordinance's history and text show that it was intended to, and does, specifically target abatement activity at homeless encampments. In particular, the Ordinance expressly refers to abatements that take place "at an occupied location" and expressly applies to people who are "providing services to the occupants or advocating on their behalf." FMC § 10-616(b)(2). Plaintiffs are some of these very people. They are dedicated organizers, reporters, and community groups who engage in constitutionally protected activity and advocate on behalf of unhoused people at occupied locations.

Additionally, the City's contention that the Ordinance will not separate Plaintiffs and other witnesses or reporters from those targeted by a sweep runs contrary to the Ordinance's plain text. The Ordinance—which does not define "the work of abatement" and which covers "any necessary act preliminary to or incidental to such work"—provides workers and contractors unbridled discretion to cordon off an area of unknown size "while an abatement is in progress." *Id.* § 10-616(b)–(b)(1). The Ordinance thus authorizes restrictions as soon as abatement work begins—a time when unhoused people are typically still in the targeted area. Given the breadth of this authority, the Court "cannot simply 'presume the City will act in good faith and adhere to standards absent from the ordinance's face.'" *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 946–47 (9th Cir. 2011) (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988)) (cleaned up).

By imposing criminal sanctions and fines for "unauthorized entry" into restricted areas during the indeterminate period an abatement is in progress, the Ordinance restricts Plaintiffs, and other advocates, organizers, reporters, and unhoused persons, from providing aid and representation, and from

monitoring, documenting, and reporting on the City's treatment of its unhoused residents. The Ordinance thereby sweeps in substantial constitutionally protected conduct, making it ripe for both the facial and pre-enforcement as-applied legal challenges that Plaintiffs have amply pled. And yet, instead of engaging with Plaintiffs' allegations, the City ignores them. Its Motion to Dismiss under Rule 12(b)(6) misstates the legal framework and its meritless Motion to Strike under Rule 12(f) serves only to reinforce the City's practice of trying to hide wrongdoing from scrutiny. The Motions should be denied.

BACKGROUND[1]

I. Fresno's Housing Crisis and Long-Standing Hostility Towards the Unhoused Community

Fresno is facing a severe housing and displacement crisis exacerbated by growing income inequality and a lack of affordable housing. Compl. ¶¶ 1–4, 12. The City estimates that 4,200 people living within City limits lack housing. *Id.* ¶ 12. Plaintiffs and others familiar with the situation believe this number is an underestimate. *Id.* But there is no dispute the crisis is growing. Even the City acknowledges that, since 2019, the number of unhoused persons in the region has doubled. *Id*. Those most at risk of being homeless in Fresno are already among society's most vulnerable: aging adults, people with disabilities, teenagers, and veterans. *Id.* ¶ 13.

Despite the evident and desperate need, Fresno lacks sufficient emergency shelter bed options, space in transitional housing, and permanent supportive housing. *Id.* ¶ 14. The City acknowledges that it has more unhoused persons than services, reporting just 1,500 beds for over 4,000 unhoused persons. *Id.* As a result, the City's shelters regularly turn people away, and many people have nowhere to live but in tents and other makeshift shelters in public parks, on sidewalks, and in other public spaces. The City recently estimated that there are 64 "encampments" and 479 "shanties" in the area. *Id.* ¶ 15.

Fresno has attempted to address its housing and displacement crisis by proposing policies that often fail to respect the dignity and humanity of unhoused people. *Id.* ¶ 16. The City's Motion, for

[1] Without citing a legal basis, the City requests that "this Court take judicial notice" of the preliminary evidence and legal arguments asserted in Plaintiffs' separate Motion for Preliminary Injunction. MTD at 3 n.2; *id.* at 3–5, 17. Although this material bolsters Plaintiffs' case, the request should be denied under Rule 12(d), which prohibits "matters extraneous to the pleadings" from being considered on a Rule 12(b)(6) motion. *See Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1301 (9th Cir. 1982). Plaintiffs do not, however, object to the City's concurrently filed request under Federal Rule of Evidence 201 for judicial notice of relevant Municipal Code Sections. *See* ECF No. 13-2; *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998–1008 (9th Cir. 2018).

example, crassly labels encampments as "abatement locations" and the unhoused people who live there "abatement occupants." MTD at 4, 11. This language feeds into the official narrative that unhoused people are not neighbors and constituents, but a form of blight that needs to be "swept up." Compl. ¶¶ 16–17. Indeed, the City has long pursued encampment sweeps that force unhoused residents to leave their resting and sleeping places or risk criminal citation, arrest, and property loss. *Id.* ¶ 18.

II. Encampments Provide a Stage for Community, Expressive Acts, and Collective Action, where Plaintiffs Play an Important Role

Despite the hardships of being without permanent shelter, unhoused people form meaningful communities and "street families" in the encampments where they reside. Compl. ¶ 26. Together, they find and create safer shelter, share resources and information, and, like any community, take care of one another. *Id.* Unhoused people also form encampments to send a collective message about Fresno's housing crisis and to demonstrate their lived struggle with housing insecurity. *Id.* ¶ 27. They convey this message by living in highly visible spaces, including Roeding Park and the sidewalk in front of Poverello House; by wearing apparel and posting signs bearing messages like "We Are Not Invisible"; and by using tents, a recognizable symbol of protest and the intensifying housing crisis. *Id.* ¶¶ 27–28. The frequent demonstrations and news coverage of the City's treatment of its unhoused population provide significant context for the unhoused community's symbolic and expressive efforts. *Id.* ¶ 28.

Plaintiffs act in solidarity with this message. They are dedicated advocates, organizers, reporters, and community groups who frequent encampments to organize in support of unhoused residents' interests, and to share food, water, rides, prayer, assistance, and information. *Id.* ¶¶ 29–34, 7–10. They are bound by a commitment to mutual aid and a desire to hold the City accountable for its mistreatment of the unhoused. More specifically, Plaintiff Dez Martinez is the founder of the Fresno-based group We Are Not Invisible, and the lead organizer of Fresno Homeless Union. *Id.* ¶ 7. She visits encampments and attends sweeps, often wearing Union and We Are Not Invisible clothes, to organize and assist the targets of those sweeps. She also documents the City's conduct, "livestreaming" what she sees during sweeps to a Facebook page called "Homeless in Fresno," which has a reported 14,000 followers. *Id.*

Plaintiff Fresno Homeless Union, a member local of the California Homeless Union, is an unincorporated association of unhoused and housing-insecure individuals and organizers. *Id.* ¶ 8. It

pursues its mission of achieving permanent housing for all by organizing individuals in encampments to advocate for their own interests and to provide each other with mutual aid and protection. *Id.* The Union also sends its organizers into encampments during abatement sweeps in order to provide critical representation to the unhoused targets of those sweeps. *Id.*

Plaintiff Faith in the Valley is a non-profit organization that uses grassroots faith-based organizing and advocacy to address problems of equity, including Fresno's housing and homelessness crisis. *Id.* ¶ 9. Its community organizers and volunteers attend the City's encampment sweeps and other abatement activity to build relationships and set the course of advocacy. *Id.* They also lead rallies and events to raise public awareness and push the City to address Fresno's housing issues. *Id.*

Plaintiff Robert McCloskey is the homelessness beat reporter for Community Alliance. *Id.* ¶ 10. He regularly attends encampments sweeps in order to interview unhoused people and City officials, and he publishes articles on the City's actions and policies regarding homelessness as well as the conditions and conduct he observes. *Id.* He is also an advocate for unhoused individuals in Fresno and assists by documenting their mistreatment and helping to protect their belongings during sweeps. *Id.*

III. Fresno's Troubled History of Unlawful Encampment Sweeps Continues to the Present

Over the years, Fresno has embraced cruel and, at times, unlawful means of conducting abatements activity at encampments. Compl. ¶¶ 1–2, 18. In 2006, Fresno's inhumane conduct gave rise to a successful lawsuit, *Kincaid v. City of Fresno*, by a group of unhoused people whose property had been destroyed during sweeps. *Id.* ¶¶ 19–21. The *Kincaid* plaintiffs obtained injunctive relief to stop the City from intentionally and indiscriminately destroying unhoused peoples' property, including clothing, medication, and tents. *Id.* They also secured a multi-million dollar settlement in which the City promised to provide notice before sweeps and to not destroy property without due process. *Id.* ¶ 21.

The *Kincaid* lawsuit was successful in part because unhoused people, advocates, and reporters were able to provide the court with detailed evidence about encampment sweeps and other abatement activities that they witnessed from near vantage points. *Id.* ¶ 20. One reporter attested that he had observed city staff toss unhoused peoples' tents, bulging with their belongings, straight into a dumpster. *Id.* Other witnesses explained to the court how police officers had used force to clear an area and how advocates' presence had saved an unhoused person from being run over by a bulldozer. *Id.* This

compelling evidence contravened the City's narratives about what happens during sweeps. *Id.*

Notwithstanding the promises that the City made to settle *Kincaid*, many of the problems raised in that case persist—particularly as the unhoused population in Fresno grows and the City increases the frequency of its sweeps and abatements to a weekly if not more frequent basis. *Id.* ¶¶ 1, 18, 21, 24. Today, those targeted by sweeps still typically receive little to no notice before sweeps and other abatement activity take place. *Id.* And contrary to representations by the City, the process of an abatement is not linear. Heavy and dangerous machinery does not come in only at the end of a sweep, when unhoused people have moved their property from an encampment and left the area. *Id.* ¶ 22.

Rather, "the work of abatement" tends to start very early in the morning while unhoused individuals are just waking up and gathering their belongings. *Id.* ¶¶ 1, 18, 21–24, 32–33. City staff and contractors bring heavy machinery into an abatement area early on, such that front loaders and dump trucks often get very close to unhoused people while they are packing up. *Id.* ¶ 22; MTD at 4–5. These workers rush people to pack whatever they can carry in a single trip and force them to leave behind what they cannot salvage immediately. Compl. ¶¶ 1, 18, 22–24, 32–33. Many unhoused individuals have had to watch as the City throws away—sometimes straight into dump trucks and often without the safeguard of adequate due process—precious items, including tents, bedding, clothing, food, mobility devices, identification, and family memorabilia. *Id.* Unhoused people who have experienced sweeps and other abatement activity describe the experiences as hectic and traumatic. *Id.* ¶ 32.

Today, the City also continues to use excessive force when clearing an area. *Id.* ¶¶ 21–22. For example, in February 2020, the City conducted an encampment abatement at the "180 Camp." *Id.* ¶ 21. When one person allegedly did not pack fast enough, he was brutally beaten by city law enforcement. Other people living at the Camp feared the same fate and grabbed what they could and ran, but many lost precious items. *Id.* No Plaintiffs were present during the beating of the person, and in later describing this incident, a Union member said that the officers clearly felt that they "could do that to anybody" so long as advocates like Ms. Martinez or reporters like Mr. McCloskey were not there to document and speak out. *Id.*

IV. Advocates, Union Members, and Reporters Play a Vital Role During Sweeps

Plaintiffs, other advocates, reporters, and the organized unhoused serve important roles during

the City's encampment sweeps and other abatements. Compl. ¶¶ 1–2, 7–10, 21–25. They assist by witnessing, documenting, and reporting on the City's actions, which helps to push back on official narratives about how abatements are conducted. *Id.* ¶¶ 22, 25. When witnesses are present, the City is pressed to provide alternative shelter and to give people more time to pack. *Id.* As one Union member puts it: "These people would walk over us without Dez. When she is there, she gets out her camera phone and they behave. If someone's looking at you, you act different." *Id.* ¶ 25.

Additionally, members of the unhoused community believe that their advocates are "needed most" during abatements. *Id.* ¶¶ 32–33. Plaintiffs defuse potential negative interactions when city law enforcement, staff, and contractors act in such a way as to trigger unhoused persons' prior experiences of trauma. *Id.* ¶¶ 25, 32, 41. They keep a watchful eye over how the City wields its trucks and machines near unhoused people while they are packing up. And they also help prevent, as best they can, the City from seizing, damaging, or destroying personal property. *Id.* ¶¶ 1–2, 7–10, 21–25, 41. Plaintiffs do so by standing guard near tents and other property so that unhoused persons can make multiple trips to salvage their belongings. *Id.* Advocates and organizers also frequently serve as representatives to clarify where the City will be storing property, and by helping to label items. *Id.* ¶ 23. Without this assistance, unhoused people likely would be unable to retrieve their possessions. *Id.*

Despite their vehement opposition to abatement sweeps, Plaintiffs do not interfere with the legitimate functions of the City consistent with the rights of those targeted during sweeps. *Id.* ¶ 34. Nor do they endanger anyone by being present during sweeps. Instead, they make sweeps as safe as they are able. Plaintiffs' presence serves as a powerful restraint against even more abuse and official misconduct.

V. Events Leading up to the Ordinance and its Adoption by the City Council

On January 4, 2022, Ms. Martinez learned that the City had swept several people near Kings Canyon and South Clovis Avenue. Compl. ¶ 35. When she arrived, she learned that these individuals had lost many of their belongings during the abatement, which was still ongoing. *Id.* Using her cell phone to record, she approached a city law enforcement officer to discuss the sweep and he referred her to the code enforcement officers still there. *Id.* ¶ 36. When Ms. Martinez approached the men whom the officer had identified, they refused to acknowledge who was in charge or speak with her so long as she was recording the interaction. *Id.* ¶ 37. Ms. Martinez's footage shows that when she tried to engage them

further, one man stated, "we don't talk to press" and then laid his hands on Ms. Martinez, covering her camera. *Id.* He was issued a Notice to Appear for misdemeanor battery. *Id.*

The day after this altercation, the City Attorney initiated legislative action to amend FMC § 10-616 to afford city workers and contractors the discretion to designate a restricted area on public property. *Id.* ¶¶ 38–40. The section had not been amended for 20 years and the City identified no intervening incident to justify the amendments following on the heels of the January 4 incident. *Id.* Nonetheless, the City Attorney claimed that workers needed to limit access to "protect the health and safety of the public and city employees while an abatement is in progress." FMC § 10-616(b)(1).

Over four City Council meetings, community members, including Plaintiffs, provided voluminous public comment explaining why the Ordinance would have a negative and chilling impact on their advocacy, speech, associational rights, and other protected conduct. Compl. ¶¶ 41–52. Speakers from the unhoused community commented that the work of advocates, representatives, and observers made them feel safer and bridged gaps in service that the City seemed unwilling or unable to provide. *Id.* ¶ 41. Plaintiffs and others told Councilmembers that, if the amendments were adopted, they feared they would be criminalized for providing the compassionate assistance they perform as an extension of their political beliefs, religious faith, and civic values. *Id.* ¶¶ 42, 46, 48, 52. Many speakers expressed confusion around what "abatement" meant in the context of an encampment sweep. Speakers worried they could be punished for trying to access a location to retrieve personal property, to help others safely pack, or to otherwise assist their "street family." *Id.* At the first of these meetings, one Councilmember wondered aloud if the amendments would penalize people who came to encampments before a sweep to help and noted his concern over the City's "discretion on the severity of penalties." *Id.* ¶ 43.

The City Council thereafter considered a further amendment which, "subject to particular restrictions mandated by safety concerns or emergency procedures," purported to grant special, early access to persons "providing services to the occupants or advocating on their behalf." *Id.* ¶ 51. The provision seemed both illusory and inscrutable, however, because the public already should have had the right to move freely on public property not yet "secured." The provision also compounded confusion about when abatement activity starts and ends, and what size area it covers. *Id.*

Notwithstanding the amendments' deficiencies and the public's outcry, the City Council adopted

the Ordinance on February 17, 2022. *See* FMC § 10-616 [also attached as Ex. A to Compl.]. It was approved on February 28, 2022, and it went into effect March 31, 2022. *Id.* As amended, the final version of the Ordinance extends the City's nuisance abatement authority to public property and expands the authority of the "Director" to include "City employees or a contractor retained by the City." *Id.* § 10-616(b). It maintains prior language stating that no person shall "obstruct, impede or interfere" with city staff and contractors who are "engaged in the work of abatement" or "performing any necessary act preliminary to or incidental to such work[.]" *Id.* And it further provides:

> (b)(1) To protect the health and safety of the public and city employees while an abatement is in progress, city employees or a retained contractor may designate a restricted area by erecting a barrier or cordon off an area of public or private property where an abatement is taking place. No person shall enter the restricted area without express authorization from city employees or contractor [sic] on site conducting the abatement.
>
> (b)(2) Subject to particular restrictions mandated by safety concerns or emergency procedures, prior to any abatement taking place at an occupied location, those persons providing services to the occupants or advocating on their behalf shall be permitted a reasonable time to make contact with the occupants and assist prior to the area being secured as provided herein.

Section (b)(3) also makes punishable "[u]nauthorized entry" or any other violation "either as a misdemeanor for intentional violations, or as an administrative citation" with a fine of up to $250. Lastly, Section (c) added "contractor" to the list of individuals who could not be "personally liable for any damage incurred or alleged to be incurred as a result of any act required, permitted, or authorized to be done or performed in the discharge of his duties pursuant to this article."

STANDARD OF REVIEW

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The court "accept[s] the complaint's well-pleaded factual allegations as true, and construes[s] all inferences in the plaintiff's favor." *Koala v. Khosla*, 931 F.3d 887, 894 (9th Cir. 2019) (citation omitted). If the complaint states a plausible case, it "survives a motion to dismiss under Rule 12(b)(6)," even if other explanations are also "plausible." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). If dismissed, leave to amend "must" be granted unless amendment would "be futile." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015); *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

ARGUMENT

I. The City Offers the Court the Wrong Standards to Review Plaintiffs' Complaint

The City makes two missteps in assessing Plaintiffs' claims. First, it misconstrues the legal framework for reviewing facial claims implicating the First Amendment and other fundamental rights. Second, it misapprehends Plaintiffs' claims by characterizing them as only facial. The result is a motion at odds with the law that ignores well-pleaded allegations and fails to engage with the issues at hand.

A. The City ignores the permissive standards that apply to Plaintiffs' facial challenges.

The City devotes great space arguing that a "statute is not facially invalid unless the statute 'can never be applied in a constitutional manner.'" MTD at 7 (quoting *United States v. Kaczynski*, 551 F.3d 1120, 1125 (9th Cir. 2009)). But the City ignores the distinct standards that apply when, as here, First Amendment and other fundamental rights are implicated. In such contexts, courts apply a relaxed threshold for facial challenges because the "very existence" of an overbroad, unduly discretionary, or vague law chills the protected activities of "others not before the court." *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 129 (1992); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988) ("mere existence" of unbridled discretion "intimidates parties" into censorship).

Thus, "for the benefit of society," the law permits plaintiffs to bring a facial challenge either when the law may chill the rights of others not before the court or plaintiffs' own constitutionally protected conduct. *Sec'y of State v. Joseph H. Munson Co.* ("*Munson*"), 467 U.S. 947, 958, 965 n.13 (1984); *see also Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 949 (9th Cir. 1997). A plaintiff need only show that a law is substantially overbroad—that is, it reaches "a substantial amount of constitutionally protected conduct." *Kolender v. Lawson*, 461 U.S. 352, 359 n.8 (1983) (quotation marks, citation omitted) (facial vagueness challenge where law implicated both First Amendment and "constitutional right to freedom of movement"); *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1152 (9th Cir. 2009) ("The touchstone of a facial vagueness challenge in the First Amendment context" is "whether a *substantial* amount of legitimate speech will be chilled."). Other courts have described this standard as an inquiry into whether "a substantial number of [] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Redondo Beach*, 657 F.3d at 944 (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)). And when a plaintiff shows that a

law confers "unbridled discretion," it is facially invalid even without reference to the proportion of unconstitutional applications. *Kaahumanu v. Hawaii*, 682 F.3d 789, 802 (9th Cir. 2012).[2]

These permissive standards apply to Plaintiffs' facial First Amendment, void-for-vagueness, and right-to-travel claims because the Ordinance has "a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the risks of censorship." *S. Oregon Barter Fair v. Jackson Cnty., Or.*, 372 F.3d 1128, 1135 (9th Cir. 2004) (quoting *Lakewood*, 486 U.S. at 759). That nexus exists when a law "by its terms seeks to regulate spoken words or patently expressive or communicative conduct, or if the statute significantly restricts opportunities for expression." *Id.* (citations omitted). The Ninth Circuit's decision in *Nunez* is instructive on how a generally applicable law restricts opportunities for expression. There, the court concluded that, although a juvenile curfew was "a general regulation of conduct, not speech," it was subject to facial First Amendment and vagueness challenges because it restricted "access to any and all public forums" at night—"a necessary precursor to most public expression." *Nunez,* 114 F.3d at 950.

As another example, the court in *Yeakle v. City of Portland*, 322 F. Supp. 2d 1119 (D. Or. 2004), concluded that an ordinance temporarily excluding from public parks anyone who violated any law was subject to a facial First Amendment challenge. *Id.* at 1126–27. Relying on *Nunez*, the *Yeakle* court explained: "Public parks are special places for First Amendment activities" and the "ability to be *physically present* in quintessential public forums is necessary to engaging in free speech in those forums." *Id.* at 1127; *see also Cutting v. City of Portland*, 802 F.3d 79, 83 n.4 (1st Cir. 2015) (Even if "styled as a restriction only on conduct," laws "aimed at restricting physical presence within a specified place" are "treated as restrictions on speech rather than merely conduct precisely because the laws necessarily prohibit persons from engaging in expressive activity in such places[.]") (citing *McCullen v. Coakley*, 573 U.S. 464 (2014)).

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[2] California courts apply similar standards for facial challenges in this context. *See People v. Rodriguez*, 66 Cal. App. 4th 157, 168–70 & 170 n.11 (1998) (recognizing "exceptions to the general rule" for facial challenges, including "overbreadth doctrine" and "'prior restraint' doctrine" for protected expression); *Summit Bank v. Rogers*, 206 Cal. App. 4th 669 (2012) (invalidating statute as overbroad "because it brushes constitutionally protected speech within its reach and thereby creates an unnecessary risk of chilling free speech") (citations omitted). By citing only the "strictest" formulation of a facial challenge, *see* MTD at 8 (quoting *Guardianship of Ann S.*, 45 Cal. 4th 1110, 1126 (2009)), the City ignores that the California Supreme Court has articulated a more "lenient" standard applicable here. *Gerawan Farming, Inc. v. Agric. Lab. Rels. Bd.*, 3 Cal. 5th 1118, 1138 (2017).

So too here. By giving city workers sweeping discretion to cordon off areas of indefinite size for indefinite time during abatements, the Ordinance restricts access to traditional public forums such as the public parks and sidewalks where many of Fresno's unhoused residents set up temporary shelter. In this way, the Ordinance also implicates the fundamental right to travel by hindering free movement in public parks and on public streets. The City's reliance on *Roulette v. City of Seattle*, 97 F.3d 300 (9th Cir. 1996) is misplaced. The law at issue in that case prohibited not *access* to public forums, but specific conduct within those forums—daytime sitting or lying on sidewalks in certain commercial areas—that the Ninth Circuit concluded was not "integral to, or commonly associated with, expression." *Id.* at 303–04. This is the very distinction that *Nunez* recognized when it distinguished *Roulette* one year later.

B. The City overlooks Plaintiffs' pre-enforcement as-applied claims.

The City also errs in labeling Plaintiffs' claims as only facial. The choice to bring facial and as-applied challenges is not binary. A claim can "obviously ha[ve] the characteristics of both," *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010), and "[a]s-applied challenges . . . may be coupled with facial challenges." *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998). The "label is not what matters." *John Doe No. 1*, 561 U.S. at 194. Rather, the "distinction" between the two "goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010).

In any event, Plaintiffs have amply pled both facial *and* pre-enforcement as-applied challenges. They assert, for example, Substantive Due Process claims based on the doctrine of state-created danger—a doctrine that is necessarily focused on the litigants before the Court. And while the City contends that Plaintiffs' claims must be only facial because the City has not yet enforced the Ordinance, MTD at 2, the United States "Supreme Court has repeatedly pointed out the necessity of allowing pre-enforcement challenges to avoid the chilling of speech." *Wolfson v. Brammer*, 616 F.3d 1045, 1060 (9th Cir. 2010). To this end, and in line with the foregoing analysis on facial challenges implicating fundamental rights, courts "relax the requirements of standing and ripeness" so that a plaintiff "need not await prosecution to seek preventative relief." *Id.* Plaintiffs have pled sufficient facts to sustain their as-applied challenge because they have alleged an "intent" to engage in conduct that violates the Ordinance and a "genuine threat" of enforcement. *Id.* at 1059–61. Specifically, they would like to continue

attending the City's frequent abatement sweeps to oppose, monitor, and document the City's conduct and to provide critical representation to the unhoused, but reasonably fear they will not be permitted to do so, or be punished for doing so, under the Ordinance. Compl. ¶¶ 7–10, 42, 46, 48, 52, 71, 78.[3]

II. Plaintiffs Have Stated Claims for State-Created Danger

The City moves to dismiss Plaintiffs' state-created danger claims as "speculative and unsupported," MTD at 10, but this critique ignores Plaintiffs' well-pleaded allegations and rests on an interpretation of the Ordinance divorced from its text. Government action violates Substantive Due Process when it "creates or exposes an individual to a danger which he or she would not have otherwise faced." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006) (cleaned up). To state a claim under this standard, Plaintiffs must plead (1) "affirmative" state action that creates an "actual, particularized danger," (2) "foreseeable" injury, and (3) "deliberate indifference" to a "known or obvious danger." *Hernandez v. City of San Jose*, 897 F.3d 1125, 1133 (9th Cir. 2018) (cleaned up).

Plaintiffs more than meet these requirements. Taking all factual allegations as true and drawing all reasonable inferences in their favor, Plaintiffs have adequately alleged that cordoning off encampments during sweeps and other abatement activity will expose unhoused people, including Union members, to actual, particularized danger in the form of more frequent, aggressive, and destructive sweeps—leading to foreseeable injuries of displacement, physical harm, and property loss. *See* Compl. ¶¶ 21–23, 25, 32–33, 55–57. Plaintiffs have also pled facts sufficient to show that the Ordinance reflects the City's deliberate indifference to the safety of unhoused people given the harm inflicted at prior abatements conducted without public scrutiny and accountability. *Id.*; *see Hernandez*, 897 F.3d at 1136–37 (denying motion to dismiss where complaint alleged officers were "aware of the danger to the plaintiffs" because of prior acts and still took affirmative actions that jeopardized safety).[4]

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[3] Plaintiffs believe the Ordinance should be enjoined in its entirety because of its many constitutional infirmities. But because an as-applied challenge depends on "the breadth of the remedy employed by the Court," Plaintiffs would not object to the Court fashioning an order enjoining the City from enforcing the Ordinance only during abatement activity involving unhoused people or their temporary shelters. *See Citizens United*, 558 U.S. at 331.

[4] Because Plaintiffs have adequately pled a federal state-created danger claim, their California state-created danger claim should not be dismissed. California courts have not foreclosed such a claim. And, as the City states, they apply federal standards when analyzing state-created danger claims brought under 42 U.S.C. § 1983. *See, e.g.*, *Zelig v. Cnty. of Los Angeles*, 27 Cal.4th 1112, 1149–50 (2002); c*f. Reed v. City of Emeryville*, -- F. Supp. 3d --, 2021 WL 4974973, at *8 (N.D. Cal. Oct. 26, 2021) (considering together, but dismissing, state-created danger claims under federal and state law for failure to make specific allegations, not because state claim was not viable).

The City's arguments mostly amount to factual disputes with Plaintiffs' allegations, including the bare assertion that buffer zones around abatement activity are no more than a "measured approach" to safety. MTD at 11. But under Rule 12(b)(6), the question before this Court is whether Plaintiffs have adequately pled the elements of their claims, not whether they have "prove[d] the case on the pleadings." *OSU Student All. v. Ray*, 699 F.3d 1053, 1078 (9th Cir. 2012). The City also argues that Plaintiffs' claims about the "actual, particularized danger" they face are "speculative and unsupported" because the City has not yet imposed such a buffer zone.[5] MTD at 10. This response ignores Plaintiffs' allegations about the frequency of the City's abatements and the more aggressive and destructive sweeps when advocates, organizers, and other witnesses are not present. Compl. ¶¶ 21–22 24–25, 32–33, 55–56. The Court should resist the City's effort to impose a higher standard at the pleading stage.

The City also describes the entirety of Plaintiffs' "constitutional concerns" as "misplaced," arguing that nothing in the Ordinance will "physically separate" Plaintiffs from encampment residents or "abatement occupants" during "abatement." MTD at 10, 11. In essence, the City asks the Court to presume that "abatement" begins only after all encampment residents have packed, moved their belongings, and vacated the area even though the text allows city workers and contractors to cordon off an area of indefinite size "*while* an abatement is in progress"—which includes right when abatement work begins. FMC § 10-616(b)(1) (emphasis added). Practice likewise contradicts the City's argument as Plaintiffs have alleged that city workers and contractors often start working and operating heavy machinery while unhoused people are still present. Compl. ¶¶ 1, 18, 22–24, 32–33. The law "requires that the limits the city claims are implicit in its law be made explicit" because, with only vague promises as to when the public will be allowed entry into abatement areas, there is no guarantee the City "will act in good faith." *Lakewood*, 486 U.S. at 770; *see also Redondo Beach*, 657 F.3d at 946–47.

III. Plaintiffs Have Stated Freedom of Speech and Association Claims

In moving to dismiss Plaintiffs' freedom of speech and association claims, the City misses the mark in every way. The City fundamentally misconstrues Plaintiffs' First Amendment claims as limited

[5] To the extent the City suggests that the state-created danger doctrine allows only retrospective claims, the law does not foreclose "pre-enforcement" state-created danger claims. *See Sausalito/Marin Cnty. Chapter of Cal. Homeless Union v. City of Sausalito*, 522 F. Supp. 3d 648, 658–59 (N.D. Cal. 2021) (enjoining encampment sweep because, if implemented, residents could suffer serious health consequences and, thus, state-created danger); *Santa Cruz Homeless Union v. Bernal*, 514 F. Supp. 3d 1136, 1143–45 (N.D. Cal. 2021) (same).

to facial challenges when, as explained *supra*, Plaintiffs properly bring both facial and as-applied First Amendment challenges to the Ordinance. The City also makes the conclusory assertion—without addressing any factual allegations—that the Ordinance "does not regulate speech in any way, shape or form." MTD at 11–12. To the contrary, Plaintiffs' complaint is more than sufficient to state claims that the Ordinance is an unconstitutional content-based restriction; time, place, and manner restriction; and prior restraint on expressive activity. Moreover, because the gravamen of the Ordinance is abatement activity directed at the unhoused, it is facially invalid as substantially overbroad.[6]

A. The Ordinance interferes with First Amendment expression.

Based on the facts alleged, the Ordinance interferes with a wide range of protected expression.

First, the First Amendment undeniably protects the core political speech, issue-based advocacy, and protest at issue here. As the United States Supreme Court long ago commanded, "expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quotation marks omitted). Plaintiffs have alleged that they regularly attend abatement sweeps to use their voices, their actions, and even their presence to express their views on one of the most pressing issues in Fresno: the housing and displacement crisis and the treatment of the unhoused. Compl. ¶¶ 7–10, 22–25, 29, 32, 34, 41, 46, 48.

Second, the First Amendment protects the public's right to observe and document "matters of public interest," including public officers "engaged in the exercise of their official duties in public places," *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018), as well as the media's parallel right to gather news, *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 831 (9th Cir. 2020). Plaintiffs have alleged that they regularly attend abatement sweeps in order to monitor, document, and report on the manner in which the City treats its unhoused residents. Compl. ¶¶ 7, 10.

Third, the First Amendment protects conduct when it is "sufficiently imbued with elements of communication," which means an "intent to convey a particularized message" that has a likelihood of

[6] The "California Constitution's protection of free speech can be broader in some respects than the protection provided by the First Amendment." *Cuviello v. City of Vallejo*, 944 F.3d 816, 826 (9th Cir. 2019). But the standards for evaluating whether a regulation is a reasonable time, place, and manner restriction and whether it is a content-based restriction that is narrowly tailored are the same under California and federal law. *See id.*; *Glendale Assocs., Ltd. v. NLRB.*, 347 F.3d 1145, 1155–56 (9th Cir. 2003). The reasons to deny the City's motion with respect to Plaintiffs' First Amendment claims apply with equal force to Plaintiffs' Article I, § 2 claims.

being "understood by those who view[] it." *Spence v. State of Wash.*, 418 U.S. 405, 409–11 (1974). It also protects the right to expressive association because "[e]ffective advocacy . . . is undeniably enhanced by group association." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). Plaintiffs, especially the Homeless Union and Faith in the Valley, have alleged that they convey these types of particularized messages and engage in exactly this type of expressive expression and association through their advocacy and organizing activities. Compl. ¶¶ 27–29.

The fact that Plaintiffs conduct their First Amendment expression and collective symbolic efforts against the backdrop of the City's longstanding mistreatment of the unhoused—a pressing "issue of concern" in Fresno—only reinforces the expressive and protected nature of their efforts. *See Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1238, 1240–43 (11th Cir. 2018) (nonprofit "does not serve food as a charity, but rather to communicate its message" of equality based on expressive indicia like public and open events, use of banners with logos, and meal sharing).

B. The Ordinance is unconstitutional as either a content-based restriction or an unreasonable time, place, and manner restriction and prior restraint.

The City's ability to regulate the type of protected expression in which Plaintiffs engage depends on how and where its regulation operates. Content-based restrictions are "presumptively unconstitutional" and must be "narrowly tailored to serve compelling state interests" under strict scrutiny. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). The City's power to impose restrictions on the "time, place, or manner" of expression in traditional public forums like the public parks and streets where unhoused people form encampments is likewise "sharply circumscribed." *Askins*, 899 F.3d at 1044. Such restrictions must (1) be "narrowly tailored to serve a significant government interest"; (2) "leave open ample alternative channels for communication"; and (3) not delegate "overly broad" discretion to government officials. *Id.* (quotation marks, citation omitted). This standard also applies to "prior restraints" that give public officials the authority to deny the use of a forum in advance of expression. *United States v. Baugh*, 187 F.3d 1037, 1042 (9th Cir. 1999). On the facts pled, the Ordinance fails these tests both on its face and as applied to Plaintiffs.

1. The Ordinance is an unconstitutional content-based restriction.

Plaintiffs have robustly alleged that the Ordinance—which expressly references abatements that

take place "at an occupied location"—is "content based" because it was adopted for a content-based purpose: restricting advocates, organizers, and reporters like Plaintiffs from exercising their First Amendment rights to observe and document the City's conduct during abatement at encampments. Compl. ¶ 67; *see also Reed*, 576 U.S. at 166. This conclusion is supported by the specific sequence of events and legislative deliberation that Plaintiffs have described leading up to the Ordinance's adoption. Despite not having amended Section 10-616 for 20 years and without citing any particular intervening safety or health concern, the City initiated the Ordinance amendments just one day after its code enforcement officer was cited for battery on Ms. Martinez during an abatement. Compl. ¶¶ 37–38. Then, over the course of four City Council meetings, official discussions and public comment focused solely on how the Ordinance would impact abatement sweeps at encampments. *Id.* ¶¶ 41–52; *see Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (considering "historical background" of a challenged decision as "an evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes"); *see also Valle del Sol, Inc. v. Whiting*, 709 F.3d 808, 819 (9th Cir. 2013) (relying, in part, on legislative history to identify content-based purpose of new law).

Plaintiffs have further plausibly alleged that the Ordinance is also content based because it "singles out" specific categories of speakers "for differential treatment." *Reed*, 576 U.S. at 169. Section (b)(2) of the Ordinance allows persons who are "providing services to the occupants or advocating on their behalf" to "be permitted a reasonable time to make contact with the occupants and assist prior to the area being secured." While the City maintains that this differential treatment benefits Plaintiffs, MTD at 5, this supposed benefit is still suspect as a content-based provision, and it is especially problematic vis-à-vis reporters and the general public. The provision is also but an illusory benefit "[s]ubject to" amorphous "safety concerns or emergency procedures." *Id.*[7] And it is not apparent from the text whom a city worker or contractor will consider to qualify for, as the City describes it, a "reasonable time period to interact with individuals present at an occupied location." MTD at 5.

As a content-based restriction, the Ordinance is unconstitutional unless the City proves it satisfies strict scrutiny. *See Reed*, 576 U.S. at 163. Because Plaintiffs adequately allege that the Ordinance does not even meet intermediate scrutiny, *infra*, the City cannot meet this more stringent test.

[7] The City's Motion disingenuously excises Section (b)(2)'s "subject to" provision. *See* MTD at 2, 10, 14.

2. Even if content neutral, the Ordinance unreasonably burdens expression and is an unlawful prior restraint.

Plaintiffs also have stated cognizable claims that, both facially and as applied, the Ordinance is not a reasonable time, place, and manner restriction. Taking the facts pled as true and construing them in Plaintiffs' favor, the Ordinance is not narrowly tailored. It burdens "'substantially more speech than is necessary,'" *Berger v. City of Seattle*, 569 F.3d 1029, 1041 (9th Cir. 2009) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)), in part because the Ordinance restricts far more than an "appropriately targeted evil," *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). And because its scope is vague, Plaintiffs have plausibly alleged that the Ordinance is likely to extend to "chill[] protected speech or expression." *Edge v. City of Everett*, 929 F.3d 657, 664–65 (9th Cir. 2019); *see also* Compl. ¶¶ 42, 46, 48, 52, 71, 78. The City "is not free to foreclose expressive activity in public areas on mere speculation about danger." *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1228 (9th Cir. 1990).

Where it does limit such activity, the City must leave open "ample alternative channels" for communication. *Galvin v. Hay*, 374 F.3d 739, 755 (9th Cir. 2004). Yet, here, Plaintiffs have alleged that the Ordinance authorizes workers to cordon off encampments during abatement sweeps in such a manner as to prevent Plaintiffs from being able to meaningfully see or record the City's actions, or to reach their "intended audience." *Id.* at 748–49, 755–56 (citation omitted). The City incorrectly assumes that the only audience Plaintiffs seek is the unhoused community. MTD at 11. Not so. Plaintiffs allege that they observe, document, and report on the City's conduct also so that *the public* may be informed and the City held accountable. *See* Compl. ¶¶ 7, 9–10, 24, 29. And they come together in encampments to organize and provide representation in a show of solidarity not just for other unhoused persons but for the *city workers and officials* themselves. *Id.* ¶ 29.

The Ordinance also fails the time, place, and manner test because it provides no standards, let alone "reasonably specific and objective" ones, to guide when the City should grant the "express authorization" required to enter a restricted abatement area, leaving the decision about who gets to enter and exercise their rights to the government's "whim." *See Thomas v. Chicago Park Dist.*, 534 U.S. 316, 324 (2002) (quoting *Forsyth Cnty.*, 505 U.S. at 133). The risk is significant because much of the expression Plaintiffs engage in is directed at the very officials empowered to bar entry. The City shrugs that people "may request" re-entry, MTD at 12, but this response ignores the complete lack of standards

for evaluating such requests. This "unbridled discretion presents too great a danger of censorship and of abridgement of our precious First Amendment freedoms." *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1295 (11th Cir. 2021) (quotation marks, citation omitted) (rejecting food-sharing ordinance that failed to include "*any* standards to guide City officials' discretion").

C. Plaintiffs also state a claim for substantial overbreadth.

Finally, Plaintiffs allege that the Ordinance is invalid under the First Amendment for another reason: its substantial overbreadth. A law is overbroad if it "does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech[.]" *Klein v. San Diego Cnty.*, 463 F.3d 1029, 1038 (9th Cir. 2006) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)). The requirement that overbreadth be "substantial" ensures that courts "avoid striking down a statute on its face simply because of the possibility that it might be applied in an unconstitutional manner." *Munson*, 467 U.S. at 964. When, as here, a law "attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack." *Members of City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 n.19 (1984).

The Ordinance undoubtedly sweeps within its ambit protected expression. Although the City points to other circumstances in which the Ordinance may apply, like Fire Code violations, MTD at 9, these applications do not overcome the "realistic danger" that the Ordinance "will significantly compromise recognized First Amendment protections[.]" *United States v. Hansen*, 25 F.4th 1103, 1109–10 (9th Cir. 2022) (quoting *Taxpayers for Vincent*, 466 U.S. at 801). No speculation is needed to predict the significant impact the Ordinance will have on protected expression because, regardless of any legitimate applications, the gravamen of the Ordinance is abatement that takes place at encampments and other places unhoused people reside. As already explained, both the history and the text of the Ordinance reflect this focus. Simply put, the Ordinance "is susceptible of regular application to protected expression." *Id*. (quoting *City of Houston, Tex. v. Hill*, 482 U.S. 451, 467 (1987)).

IV. Plaintiffs Have Stated Void-for-Vagueness Claims

Plaintiffs have stated due process claims by pleading that the Ordinance is not "clearly defined" and lacks the "explicit standards" needed to "avoid arbitrary and discrimination enforcement." *See Edge*,

929 F.3d at 664–65 (quotation marks, citation omitted); *Williams v. Garcetti,* 5 Cal. 4th 561, 567–68 (1993) (same under California law). Plaintiffs allege that the Ordinance vests unbridled discretion in city workers and contractors to cordon off public areas and then to expressly authorize entry. Compl. ¶¶ 68–69, 75–76. The absence of standards guiding the exercise of such discretion is sufficient to state a claim. But the Ordinance is doubly flawed because it lacks the "even greater degree of specificity and clarity" required when freedom of speech is at stake. *Edge*, 929 F.3d at 664–65 (citation omitted); *Franklin v. Leland Stanford Junior Univ.*, 172 Cal. App. 3d 322, 347 (1985) (same). This "enhanced" standard also applies to criminal laws. *See Info. Providers' Coal. for Def. of the First Amend. v. FCC*, 928 F.2d 866, 974 (9th Cir. 1991). The City reprises its flawed argument that standards used in the First Amendment context do not apply, MTD at 12–13, but as explained, that argument fails.[8]

Next, instead of engaging with Plaintiffs' specific allegations, the City suggests that any ambiguity can be resolved by judicial interpretation and case-by-case adjudication. MTD at 13–14. But the Ordinance contains far more than a few ambiguities that can be resolved in piecemeal fashion. The Ordinance, for example, leaves open what constitutes "the work of abatement" and allows city workers to cordon off an area of indeterminate size for an indefinite amount of time "while an abatement is in progress." *See* FMC § 10-616(b)–(b)(1). With good reason, speakers during public comment expressed confusion about what "abatement" means in the context of an encampment sweep and when in the "dynamic" process of such sweep the City will claim authority to close off the area. Compl. ¶¶ 42, 48, 51. The City's vague promise that the Ordinance will not separate Plaintiffs from unhoused persons only muddles the matter further. While the City seems to suggest that "abatement" begins only once all encampment residents have packed and vacated the area, that assertion is contrary to Plaintiffs' well-pleaded reality, *id.* ¶¶ 1, 18, 22–24, 32–33, and not apparent on the face of the law.

The Ordinance is more ambiguous still. The City insists that the Ordinance "ensures" Plaintiffs access to "occupants before the creation of a buffer zone." MTD at 14. Assuming the City is referencing the "reasonable" access period before an area is "secured" in Section (b)(2), the Ordinance actually limits such access only to those persons "providing services to the occupants or advocating on their

[8] Indeed, the City cites *Evangelatos v. Superior Court*, 44 Cal. 3d 1188 (1988), but in that case, the California Supreme Court emphasized that heightened clarity requirements do not apply when the challenged law does "not threaten to infringe on the exercise of First Amendment or other constitutional rights." *Id.* at 1201.

behalf." FMC § 10-616(b)(2). How those persons are identified is not explained. And while the City implies this access will be unfettered, the text subjects such access to amorphous "safety concerns or emergency procedures." *Id.* Moreover, by purporting to impose limitations on who may access an area subject to abatement prior to that area being secured, the Ordinance invites further confusion as to why certain members of the public are given privileged access to an area that should presumably still be open to all. These ambiguities are all the more chilling because the Ordinance threatens misdemeanor sanctions if the violation is "intentional" and civil fines if it is not. *Id.* § 10-616(b)(3). What distinguishes an intentional and unintentional violation is undefined and uncertain, particularly because the Ordinance mandates a "verbal warning" and "opportunity to comply" before any citation. *Id.*

Finally, the Ordinance's restrictions on unhoused people residing in occupied locations—whom the City labels "abatement occupants," MTD at 11—is entirely unclear. The City appears to contend that the Ordinance authorizes city workers to force unhoused people (and anyone else) to *leave* an area once it is cordoned off. But the text itself refers only to entry, not exit—making it unknown whether unhoused people still packing their precious belongings will violate the law by remaining in a secured area. It is also unclear whether an unhoused person who leaves a restricted area during a sweep to move precious belongings will be allowed to reenter to continue packing. This multitude of ambiguities is "sufficiently murky" to chill a substantial amount of protected speech, *see Edge*, 929 F.3d at 664, rendering it unconstitutionally vague on its face and as applied.

V. Plaintiffs Have Stated Right to Intrastate Travel Claims

Plaintiffs have stated right to travel claims by alleging that the Ordinance infringes their right to free movement in public places. The United States Supreme Court has long acknowledged that the right to freedom of movement is fundamental to our nation's scheme of values:

> Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.

Kent v. Dulles, 357 U.S. 116, 126 (1958). Although the City is correct that the Supreme Court has yet to expressly recognize a right to intrastate travel, it has invoked this right in prior decisions. In *Kolender v. Lawson*, 461 U.S. 352 (1983), for example, the Supreme Court ruled that a California statute requiring identification from persons "who loiter or wander" was unconstitutional on its face because the law

"implicate[d] consideration of the constitutional right to freedom of movement," *id.* at 358, but failed to establish minimal guidelines that might check "'the whim of any police officer'" enforcing the law, *id.* (quoting *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965)).

The Ninth Circuit has been similarly skeptical of government intrusion on freedom of movement. In *Nunez by Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997)—a case relied upon by the City as a basis to dismiss Plaintiffs' federal free movement claim—the Ninth Circuit construed San Diego's juvenile curfew ordinance as infringing the fundamental right to travel and therefore applied strict scrutiny. *Id.* at 944–46. The *Nunez* Court further recognized: "The rights of free movement and travel and the right to free expression are integral to our analysis of [] whether the ordinance unconstitutionally burdens minors' fundamental rights." *Id.* 944 n.6. As was the case in *Nunez*, these fundamental rights are also integral to understanding the constitutional infirmity of Fresno's Ordinance.[9]

California Courts have, in turn, repeatedly affirmed that the "right of intrastate travel" is "a basic human right protected" by the California Constitution. *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1100 (1995) (citing *In re White*, 97 Cal. App. 3d 141 (1979)). "Such a right is implicit in the concept of a democratic society and is one of the attributes of personal liberty under common law." *In re White*, 97 Cal. App. 3d at 148. This right entitles "all citizens [to] be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *People v. Moran*, 1 Cal. 5th 398, 405 (2016) (quoting *Tobe*, 9 Cal. 4th at 1098).

Contrary to the City's arguments, Plaintiffs allege the Ordinance does not "appl[y] equally to all members of the public" at all times. MTD at 15. A law that impacts freedom of movement must not "penalize[e] the exercise by some of the right to travel." *Tobe*, 9 Cal.4th at 1100. Plaintiffs assert that

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[9] Although courts are split on if the right to intrastate travel is fundamental, *id.* at 944 n.7, many have recognized such a right. *See Johnson v. City of Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002) ("In view of the historical endorsement of a right to intrastate travel and the practical necessity of such a right, we hold that the Constitution protects a right to travel locally through public spaces and roadways."); *Lutz v. City of York, Pa.*, 899 F.2d 255, 268 (3d Cir. 1990) ("We conclude that the right to move freely about one's neighborhood or town, even by automobile, is indeed implicit in the concept of ordered liberty and deeply rooted in the Nation's history.") (quotations omitted); *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648–49 (2d Cir. 1971) (residency requirement to qualify for housing burdened "constitutional right to travel within a state"); *see also Catron v. City of St. Petersburg*, 658 F.3d 1260, 1267 n.5 (11th Cir. 2011) (recognizing "federal right to use [local] parks under the ordinary conditions in which these parks are made available to the general public" and invalidating anti-trespassing statute because it violated state constitutional right to intrastate travel).

Section 10-616 facially discriminates against the right of free movement for certain classes of persons. In particular, and as discussed *supra*, Section (b)(2) of the Ordinance singles out for differential treatment the movement of persons other than advocates and service providers, thereby discriminating against the press and the wider public. The only way the City can argue that the Ordinance "does not distinguish between classes of people" is to ignore the statutory text. MTD at 16.[10]

Plaintiffs have also stated a claim that the Ordinance will infringe the right to intrastate travel and free movement by giving city workers unbridled discretion to cordon off an area of any size on public property for indefinite periods during abatement and then arbitrarily decide who might be authorized to enter that area. Compl. ¶¶ 91–97; *cf. Kolender*, 461 U.S. at 358. This restriction hinders free movement in public parks and on public streets—movement that Plaintiffs engage in to conduct lawful and constitutionally protected First Amendment activities. And critically, the restriction has the purpose of preventing movement into and out of public spaces; it is not, as the City contends, merely "incidental" to this right. *See* MTD at 15; *see also Tobe*, 9 Cal. 4th at 1100 (because ordinance prohibited camping in public areas, it had a "purpose other than restriction of the right to travel" and only "incidental impact on travel," and thus did not infringe fundamental right to travel).

Where, as here, a restriction impedes a fundamental right like the right to travel, courts have "adopted an attitude of active and critical analysis" calling for strict scrutiny. *See Johnson v. Hamilton*, 15 Cal. 3d 461, 466 (1975) (citation omitted). This Court should apply no less a critical review here.

VI. Plaintiffs Have Stated a Claim that the Ordinance Is Preempted by State Law

The City advances multiple attacks on Plaintiffs' claim that the Ordinance is preempted by the Government Claims Act and thus violates California Constitution Article XI, §§ 5, 7. All lack merit. Procedurally, no statute of limitations bars Plaintiffs' challenge for the simple reason that the City's recent amendments were not a "mere re-enactment" of Section (c)'s personal liability provisions. *See Action Apartment Ass'n, Inc. v Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1027 (9th Cir. 2007). Specifically, the City added a new class of persons—"contractors"—to those it purports to shield from

[10] The City relies on *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), but that case is inapposite because it involved a lawsuit against a group of people who blocked access to abortion clinics, not a challenge to government action. *Id.* at 266. Moreover, the *Bray* Court's analysis turned on the fact that anti-abortion activists had conspired to keep *all* women from receiving reproductive healthcare, and that any impairment on the right to interstate travel of women who had come from out of state for an abortion was not intentional. *Id.* at 275–77.

liability. FMC § 10-616(c). The City fails to explain why this expansion of liability should not be considered a "substantive[]" amendment. *See* MTD at 16–19.

Plaintiffs' challenge is also timely because the recent amendments, taken together, alter "the effect of the Ordinance," thus re-starting any applicable limitations period. *De Anza Props. X, Ltd. v. Cnty. of Santa Cruz*, 936 F.2d 1084, 1086 (9th Cir. 1991). Plaintiffs assert that the Ordinance is flawed because of the way revised Section (c) works in concert with newly added Section (b) to create a framework that makes government accountability more difficult. Through the Ordinance, the City removes witnesses who might be able to hold accountable city workers and contractors and removes liability for any wrongdoing that then occurs—a recipe that increases the likelihood of harm and which alters the Ordinance's effect. *See id.*; *Action Apartment*, 509 F.3d at 1027.

The City's own legal authorities are unavailing. *See* MTD at 18. As just discussed, *Action Apartment* recognized that a limitations period can "restart" when an ordinance is not merely "re-enact[ed]." 509 F.3d at 1027. But the *Action Apartment* Court declined to hold that the limitations period had restarted following an amendment there, because the plaintiff's challenge made "no mention whatsoever" of the amendment. *Id.* And in *Travis v. County of Santa Cruz*, 33 Cal. 4th 757, 772–73 (2004), the California Supreme Court principally considered how a later-enacted state statute impacted the ability to sue under the ordinance. Particularly relevant here, the Concurring and Dissenting Opinion by Justice Brown observed that the "rationale for imposing a limitations period breaks down . . . where the plaintiff seeks a declaration of constitutional invalidity or preemption rather than monetary damages or similar remedies." *Id.* at 778.[11]

With respect to its merits-based attacks, the City wrongly criticizes Plaintiffs for providing the Court with "an inaccurate" statement of law in Plaintiffs' separate Motion for Preliminary Injunction. MTD 17 (citing P's&A's at 31:5-6). The Preliminary Injunction Motion does not bear on whether Plaintiffs have sufficiently pled their preemption claim for purposes of Rule 12(b)(6). And the language that the City quarrels with is actually a direct quote by the California Supreme Court in *Societa per Azioni de Navigazione Italia v. City of Los Angeles*, 31 Cal. 3d 446, 463 (1982), recognizing that, under

[11] The City also relies on the unpublished decision of *Besaro Mobile Home Park, LLC v. City of Fremont*, 289 F. App'x 232 (9th Cir. 2008). MTD at 18. But that case is neither precedential, *see* Ninth Circuit Rule 36-3(a), nor dispositive because it is similar to the facts and ruling in *Action Apartment*, *see* 509 F.3d 1027.

the Government Claims Act, the "general rule is that an employee of a public entity is liable for his torts to the same extent as a private person (§ 820(a)) and the public entity is vicariously liable for any injury which its employee causes (§ 815.2(a)) to the same extent as a private employer (§ 815(b))."

More directly, the Ordinance is preempted because it conflicts with the Government Claims Act. "A local ordinance contradicts state law when it is inimical to or cannot be reconciled with state law." *Fiscal v. City & Cnty. of San Francisco*, 158 Cal. App. 4th 895, 903 (2008) (quoting *O'Connell v. City of Stockton*, 41 Cal. 4th 1061, 1068 (2007)). Here, the Ordinance cannot be reconciled with the Act's key provisions concerning employee and municipal liability. Section (c) states: "No officer, agent, [contractor] or employee of the city shall be personally liable for any damage incurred or alleged to be incurred as a result of ***any*** act required, permitted, or authorized to be done or performed in discharge of his duties pursuant to this article." (emphasis added). This language conflicts with, for example, Government Code § 820.4, which shields "a public employee" from liability only if the employee is "exercising due care, in the execution or enforcement of any law." The Ordinance, by comparison, shields individuals regardless of whether they act with due care when enforcing FMC Chapter 10, Article 6. A similar conflict arises with § 821.8, which provides that, even though a "public employee is not liable for an injury arising out of his entry upon any property where such entry is expressly or impliedly authorized by law[,] [n]othing . . . exonerates a public employee from liability for an injury proximately caused by his own negligent or wrongful act or omission."[12]

By providing more individual immunity than the Act would otherwise afford city officers, agents, contractors, and employees, the Ordinance also conflicts with the Government Claims Act's *respondeat superior* scheme for municipal liability—a field of law that has "long been settled" to be "a matter of general state concern." *Societa per Azioni*, 31 Cal. 3d at 463 (citation omitted). Specifically, Government Claims Act § 815.2(b) establishes: "Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." Because individual liability can be a prerequisite for municipal liability under the Act, Section (c)'s grant of immunity to individuals is a backdoor expansion of the

[12] The Ordinance could also be construed as "duplicative" of the Act, and thus preempted. As the City acknowledges, Section (c) "incorporates the general principles outlined for employee liability under Government Code §§ 820.2 and 820.4." MTD at 18; *Big Creek Lumber v. Cnty. of Santa Cruz*, 38 Cal. 4th 1139, 1150 (2006).

City's own "statutory immunities"—which the California Supreme Court has repeatedly ruled a local government cannot do. *Societa per Azioni*, 31 Cal. 3d at 463; *Haggis v. City of Los Angeles*, 22 Cal. 4th 490, 500 (2000).[13] The Ordinance is therefore preempted. *Am. Fin. Servs. Ass'n v. City of Oakland*, 34 Cal. 4th 1239, 1251–52 (2005) (striking ordinance that invaded area "fully occupied by general law").

VII. The City's Motion to Strike under Rule 12(f) Should be Denied

The City seeks to strike well-pleaded allegations that do not cast it in a favorable light—yet another example of its strategy to hide from public scrutiny. The City makes this meritless request notwithstanding that "[m]otions to strike are disfavored and infrequently granted" and that its claims of prejudice are wholly specious. *Nat. Res. Def. Council v. Kempthorne*, 539 F. Supp. 2d 1155, 1162 (E.D. Cal. 2008); *see also Whittlestone, Inc. v. Handi-Craft, Co.*, 618 F.3d 970, 973–74 (9th Cir. 2010) (construing Rule 12(f) narrowly). A motion to strike should "be denied unless the allegations in the pleading have no possible relation to the controversy[.]" *Sliger v. Prospect Mortg., LLC*, 789 F. Supp. 2d 1212, 1216 (E.D. Cal. 2011). Here, the challenged allegations are directly related to Plaintiffs' standing, as well as to their facial and as-applied claims; their theory of the case and the harm they will suffer; the history, text, and content-based purpose of the Ordinance; the Ordinance's substantial overbreadth; and the ripeness of this legal challenge. *See, e.g.*, *N.Y. State Club Ass'n v. New York City*, 487 U.S. 1, 14 (1988) (substantial overbreadth); *Real v. City of Long Beach*, 852 F.3d 929, 933–35 (9th Cir. 2017) (standing); *Valle del Sol*, 709 F.3d at 819 (content-based purpose). The City wrongly casts aside Plaintiffs' allegations in its Motion to Dismiss and seeks to excise them completely with its Motion to Strike. This Court should do neither.[14]

CONCLUSION

Both the City's Motion to Dismiss and Motion to Strike should be denied. But should either motion be granted, leave to amend must be freely given. *See La Raza*, 800 F.3d at 1041–42.

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[13] The City dismisses *Haggis* on the facts, MTD at 17 n.6, but Plaintiffs cite that case for the California Supreme Court's legal observation that it has "previously rejected the notion that a local government can, by its own ordinance, exempt itself from liability under the state's Tort Claims Act," *Haggis*, 22 Cal. 4th at 500.

[14] The out-of-district cases upon with the City relies undercut its request. MTD at 19. In *Cortina v. Goya Foods, Inc.*, 94 F. Supp. 3d 1174, 1197–98 (S.D. Cal. 2015), the court denied the defendant's motion to strike, and, in the CERCLA case, *Cal. Department of Toxic Substances Control v. Alco Pacific, Inc.*, 217 F. Supp. 2d 1028, 1033 (C.D. Cal. 2002), the court granted the State's request to strike because, unlike here, "courts often strike affirmative defenses in CERCLA actions."

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Respectfully submitted,

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