Chessie Thacher (SBN 296767)
cthacher@aclunc.org
Hannah Kieschnick (SBN 319011)
hkieschnick@aclunc.org
Angelica Salceda (SBN 296152)
asalceda@aclunc.org
Shilpi Agarwal (SBN 270749)
sagarwal@aclunc.org

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493
Facsimile: (415) 255-1478

Anthony Prince (SBN 202892)
princelawoffices@yahoo.com
General Counsel, California Homeless Union
LAW OFFICES OF ANTHONY D. PRINCE
2425 Prince Street, Suite 100
Berkeley, CA 94705
Telephone: (510) 301-1472

Attorneys for Plaintiffs

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

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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

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INTRODUCTION

This case is about whether the City of Fresno can keep Plaintiffs, and other advocates, reporters, and witnesses, from encampment sweeps and abatements involving Fresno's unhoused population. Plaintiffs submitted detailed evidence showing that the City conducts abatement sweeps that are long, traumatic events in which workers 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's Opposition is largely silent about this evidence and why it is necessary to have Plaintiffs and other witnesses at a sweep to record and monitor the City, and to assist, represent, and protect the unhoused.

Instead of addressing what Plaintiffs demonstrate abatement sweeps look like on the ground, the City falls back on a guidance document, Administrative Order 06-23 ("AO6-23"), which details how the City thinks "encampment clean-ups" *should be* conducted, not how they are, and introduces more ambiguity than answers. The City also presents an artificial interpretation of Section 10-616 of the Fresno Municipal Code ("the Ordinance"), claiming that it will not enforce the Ordinance's restrictions until after unhoused people and their property are no longer in an area where abatement is taking place. This interpretation is contradicted by both the text and the context of the recent amendments.

In addition, the City's Opposition attempts to distract with a logical fallacy. It contends that, because the City has expended a lot of resources to connect unhoused people with services, the City cannot have a "hostile" relationship with the unhoused community. Opp. to MPI at 2–3. But the City's significant investment of resources is more a reflection of how significant its homelessness crisis is. It can be—and is—also true that the City is more likely to mistreat unhoused people living in encampments and public places when witnesses are not watching. The City's accounting ledger is thus no answer to Plaintiffs' legal challenge that the Ordinance violates the Constitution and exposes Plaintiffs and others to an increased risk of harm.

The requested preliminary injunction should be granted because Plaintiffs are likely to succeed on the merits of their facial and as-applied claims that the Ordinance sweeps in substantial constitutionally protected conduct and directly violates their rights. Absent injunctive relief, Plaintiffs are likely to suffer imminent and irreparable injury.

ARGUMENT

I. Plaintiffs have raised serious questions, and established their likely success, on the merits.

The City's response to the merits of Plaintiffs' claims is short: read the Motion to Dismiss. *See* Opp. to MPI at 9. But as Plaintiffs explained in opposing that motion, the characterization of Plaintiffs' claims as only facial was incorrect. *See* Opp. to MTD at 17–20. The City repeats that mistake here and goes one step further still. It urges the Court to ignore the evidence that Plaintiffs offered in support of a preliminary injunction, arguing that such "extrinsic evidence" is "immaterial" to facial claims. Opp. to MPI at 7–8. This position is doubly flawed: first, because Plaintiffs bring facial *and* as-applied challenges, and, second, because Plaintiffs' evidence is relevant to both. At its own peril, the City has elected to set aside Plaintiffs' evidence and shunt to the Motion to Dismiss its arguments concerning Plaintiffs' likelihood of success. Thus, if the Court denies—as it should—the City's Motion to Dismiss, Plaintiffs' merits arguments will stand unrebutted and Plaintiffs will have met the "threshold inquiry" for a preliminary injunction. *See California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) (citation omitted).

A. Plaintiffs bring a combination of facial and as-applied challenges.

As in its Motion to Dismiss, the City errs in its Opposition to the Motion for Preliminary Injunction by labeling Plaintiffs' claims as "purely facial." Opp. to MPI at 1. Plaintiffs, however, are bringing both facial and as-applied challenges. *See* Opp. to MTD at 19–20. They state, for example, Substantive Due Process claims based on the doctrine of state-created danger—a doctrine that is "highly fact-specific" and necessarily focused on the parties. *See Patel v. Kent Sch. Dist.*, 648 F.3d 965, 975 (9th Cir. 2011); *see also, e.g.*, *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1063–65 (9th Cir. 2006). And while the City implies that Plaintiffs' claims must be facial because the Ordinance has not been enforced, this opinion is contrary to law. 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); *see, e.g.*, *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (Supreme Court "not troubled by the pre-enforcement nature of this suit" because danger of "self-censorship" is "harm that can be realized even without an actual prosecution"); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159–61 (2014) (describing pre-enforcement First Amendment cases).

B. The Court can, and should, consider Plaintiffs' detailed evidentiary support, and the City's cases do not compel a different result.[1]

The City's initial mistake leads to its next. The City would confine this Court's review to the text of Section 10-616 on the ground that "extrinsic evidence is immaterial when ruling upon a facial challenge to a statute." Opp. to MPI at 8. Not so. The Court can, and should, consider Plaintiffs' evidence when evaluating their likelihood of success on the merits for at least four reasons.[2]

First, the Court can rely on the evidence Plaintiffs submitted in support of their preliminary injunction motion to determine whether Plaintiffs have met their burden of demonstrating standing to bring a pre-enforcement challenge. *See Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 653 (9th Cir. 2021) (quoting *City & Cnty. of San Francisco v. U.S.C.I.S.*, 944 F.3d 773, 787 (9th Cir. 2019)). Such standing depends on the particular circumstances of every plaintiff, including whether that plaintiff has shown an "intent to violate the law that is more than hypothetical." *See Wolfson*, 616 F.3d at 1059; *see also Prigmore v. City of Redding*, 211 Cal. App. 4th 1322, 1349–50 (2012) (concluding that Tea Party had standing to bring pre-enforcement challenge to ordinance prohibiting placing handbills on vehicles).

Second, the Court can look to Plaintiffs' evidence to evaluate their as-applied challenges because they necessarily depend on facts specific to Plaintiffs. For instance, as explained, state-created danger claims are "highly fact-specific" inquiries into the danger a plaintiff faces and the deliberate indifference with which the state acts. *See Patel*, 648 F.3d at 975. And Plaintiffs' as-applied First Amendment challenges depend on their "particular speech activity." *See Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998); *see also, e.g.*, *Jacoby v. State Bar*, 19 Cal. 3d 359, 372–73 (1977) (evaluating "overall context of petitioner's statements" to conclude they "have constitutionally protected value").

Third, irrespective of whether a claim is facial or as-applied, the Court can consider evidence beyond the Ordinance's text to assess its constitutional defects. Plaintiffs' evidence about the events

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[1] The City objects to Plaintiffs' evidence as "irrelevant" under Federal Rule of Evidence 401. Opp. to MPI at 1–2. For the reasons set forth herein, Plaintiffs' evidence is no such thing. But if the Court is inclined to exclude their evidence, Plaintiffs request that the Court treat similarly the City's declarations and exhibits. Additionally, Plaintiffs note that much of the City's evidence amounts to self-serving legal argument, which should not be afforded deference. *See, e.g.*, Sloan Decl. ¶ 7 ("The ordinance does not in any way limit free expression, association, or impede Constitutional rights of occupants, service providers, or advocates.").

[2] Beyond its relevance to the merits, Plaintiffs' evidence is also necessary to establish the imminent and irreparable injury required for a preliminary injunction. *See Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (for preliminary injunction, "plaintiff must do more than merely allege imminent harm sufficient to establish standing," it "must *demonstrate* immediate threatened injury") (emphasis in original).

leading up to the amendments is relevant to the Ordinance's content-based purpose. *See Valle Del Sol, Inc. v. Whiting*, 709 F.3d 808, 818–20 (9th Cir. 2013); *cf. Parr v. Mun. Ct.*, 3 Cal. 3d 861, 865 (1971) (in equal protection case, rejecting government's argument to "look exclusively at the operative language of the ordinance" when evaluating discriminatory purpose of facially neutral law). For example, in *National Rifle Association of America v. City of Los Angeles*, 441 F. Supp. 3d 915 (C.D. Cal. 2019), the district court considered the legislative history and context of an ordinance to conclude that the plaintiffs had demonstrated "an intent to suppress the[ir] political speech" and thus a content-based purpose. *Id.* at 932–34. Based on this conclusion, the court held that they were likely to succeed on their facial First Amendment claim and granted a preliminary injunction. *Id.* at 934, 940. Similarly, Plaintiffs' specific circumstances are relevant to the Ordinance's narrow tailoring. *See Cuviello v. City of Vallejo*, 944 F.3d 816, 830 (9th Cir. 2019) (in evaluating narrow tailoring in facial and as-applied challenge to ordinance, explaining that law's "broad sweep" was "more apparent when applied to the facts of this case").

Fourth, the Court can consider evidence beyond the text to determine that the Ordinance is facially invalid because of its substantial overbreadth. For Plaintiffs' facial First Amendment, freedom of movement, and vagueness claims, they need only show that the Ordinance "reaches 'a substantial amount of constitutionally protected conduct.'" Opp. to MTD at 17–19 (quoting *Kolender v. Lawson*, 461 U.S. 352, 359 n.8 (1983)); *see also Summit Bank v. Rogers*, 206 Cal. App. 4th 669, 690 (2012).[3] Plaintiffs' evidentiary support is relevant to this inquiry because they must demonstrate "from actual fact that a substantial number of instances exist in which the Law cannot be applied constitutionally." *N.Y. State Club Ass'n, Inc. v. New York City*, 487 U.S. 1, 14 (1988) (denying substantial overbreadth challenge where appellant failed to develop "record" as to what First Amendment rights would be impaired); *In re J.C.*, 228 Cal. App. 4th 1394, 1401 (2014) (same). And while Plaintiffs "need not necessarily introduce admissible evidence of overbreadth," they "generally must at least 'describe the instances of arguable overbreadth of the contested law.'" *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)).

[3] On behalf of itself and five other groups dedicated to free speech and free press, the First Amendment Coalition submitted an amicus brief supporting Plaintiffs' Motion that discusses the important interests jeopardized by the Ordinance and explains the standards for First Amendment challenges. *See* Amicus Br., ECF No. 16-1, at 3.

The City relies on inapposite cases where courts limited their review to the text. Opp. to MPI at 8. Both *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021) (en banc) and *Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021) (en banc) involved facial Second Amendment challenges, not overbreadth challenges. As a result, the plaintiffs there needed to "show that no set of circumstances exist[ed] under which the [statute] would be valid." *Duncan*, 19 F.4th at 1101 (quoting *Young*, 992 F.3d at 779). A different standard applies here. Opp. to MTD at 17 (explaining First Amendment standard). And in *Dillon v. Municipal Court*, 4 Cal. 3d 860 (1971), the California Supreme Court concluded, based on text alone, that the law was an unlawful prior restraint because it was "a barefaced example of uncontrolled discretion" that had the "glaring and fatal defect" of containing "no standards whatsoever." *Id.* at 870. While *Dillon* buttresses Plaintiffs' facial claim that the Ordinance is a "barefaced example of uncontrolled discretion," and, thus, an unlawful prior restraint, *see* MPI at 28–29, it has no bearing on whether the Court may consider evidence beyond the text in evaluating Plaintiffs' overbreadth claims.

C. Plaintiffs' unrebutted merits-arguments demonstrate the serious questions they have raised and their likely success.

The City's framing of this case results in an Opposition that largely fails to respond to the substance of Plaintiffs' claims. The City wholly tethers its merits-based arguments to its separate Motion to Dismiss—which likewise refused to engage with Plaintiffs' well-pleaded allegations. *See* Opp. to MPI at 9. Thus, a denial of the Motion to Dismiss will leave unrebutted Plaintiffs' arguments that they are likely to succeed on and have raised "serious questions" as to the merits. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–32 (9th Cir. 2011). In their Motion, Plaintiffs demonstrated that the Ordinance interferes with a range of First Amendment rights, including the right to oppose, monitor, document, and report on the City's public conduct, as well as the right to engage in expressive association (*see* MPI at 21–24), and that the Ordinance is unlawful either as a content-based law (*see id.* at 24–26), or as an unreasonable time, place, and manner restriction (*see id.* at 26–29). They also demonstrated, for similar reasons, that the Ordinance violates the fundamental right to travel (*see id.* at 27 n.17); is void for vagueness (*see id.* at 29–30); and is preempted because it purports to immunize from liability city workers and contractors (*see id.* at 30–31). And finally, Plaintiffs demonstrated a likelihood of success on their state-created danger claims. Cordoning off encampments during sweeps

and other abatements will expose unhoused people, including Union members, to more frequent and aggressive sweeps and thus also to displacement, physical harm, and property loss. *Id.* at 18–19.

II. Plaintiffs have established that they will suffer imminent, irreparable harm absent relief.

Although the City tries to discount Plaintiffs' showing that the Ordinance exposes them to irreparable harm, its efforts miss the mark. Plaintiffs, as the law requires, have "demonstrated a significant threat of irreparable injury, irrespective of the magnitude of the injury." *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999). Plaintiffs' Motion, and the evidence submitted, show that the Ordinance causes them harm by: first, affirmatively placing Plaintiffs in a position of danger by exposing them to risks they would not have otherwise faced (*see* MPI at 18–19); second, restricting their First Amendment and other constitutional rights (*see id.* at 19–20); and third, interfering with their organizational missions (*see id.* at 20–21). The City globally responds to these distinct harms by claiming that they are all speculative because the Ordinance may not even be "put into practice." Opp. to MPI at 9. Nonsense. The City cannot absolve itself of liability after adopting an unconstitutional law by merely implying it may not be enforced. *See United States v. W.T. Grant. Co.*, 345 U.S. 629, 632 n.5 (1953) ("It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is a probability of resumption.") (citation omitted). The City further responds that Plaintiffs' harms are "unfounded" because they are based on an "inaccurate" reading of the Ordinance. Opp. to MPI at 10. But, as explained below, it is the City that misreads the Ordinance and misconstrues its impact.[4]

A. The Ordinance "cuts off" Plaintiffs and restricts their constitutional rights.

The City dismisses as "misplaced" Plaintiffs' concerns that the Ordinance will "cut them off from the homeless clients they serve." Opp. to MPI at 10; Sloan Decl. ¶ 6. But the City's argument depends on an interpretation of the Ordinance belied by its very text.[5]

[4] In setting forth the standard for irreparable harm, the City relies on a hodgepodge of out-of-circuit authority. Opp. to MPI at 9. There is no reason to range so far afield. The law is settled in the Ninth Circuit that, as here, for a preliminary injunction to issue "the risk of irreparable harm must be 'likely, not just possible.'" *Right to Life of Cent. Cal. v. Bonta*, No. 21-cv-01512-DAD-SAB, 2021 WL 5040426, at *13 (E.D. Cal. Oct. 30, 2021) (quoting *All. for the Wild Rockies*, 632 F.3d at 1131); *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991).

[5] The City's limited description of Plaintiffs' role as serving "clients" also misconstrues their different interests in accessing locations where abatements are proceeding. *See* MPI at 9–11, 14–16 (setting forth Plaintiffs' interests).

The City provides only a partially accurate characterization when it explains: "The new ordinance expressly states that advocates and service providers will be provided the opportunity to work with occupants prior to the area being secured." *Id.* at 10 (quoting Sloan Decl. ¶ 6). While Section (b)(2) of the Ordinance does allow 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," this access is "[s]ubject to" amorphous "safety concerns or emergency procedures." FMC § 10-616(b)(2). This access is also conditioned on the unfettered discretion of city workers and contractors to determine who qualifies as a "service provider" or "advocate" and what a "reasonable time to make contact" might be. Given that Plaintiffs have provided the Court with unrebutted evidence that a city worker was cited for battery on Ms. Martinez at an abatement the day before the City initiated the challenged amendments (*see* Martinez Decl. ¶¶ 33–35, Ex. H), there is good reason to be suspect as to how such discretion will be exercised.[6]

The City further compounds its mischaracterization of the Ordinance when it states:

> In dealing with homeless encampment clean-ups, *per the ordinance* the abatement area will only be secured when that has occurred and the occupants have taken their belongings they wish to keep or have stored, or specified items they wish to keep or do not wish to keep and may be disposed of.

Opp. to MPI at 10 (quoting Sloan Decl. ¶ 6) (emphasis added). The Ordinance, however, says none of these things and offers none of these protections. In fact, it says the opposite.

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 authority to cordon off an area of indefinite size "*while* an abatement is in progress." FMC §§ 10-616(b)–(b)(1) (emphasis added). The Ordinance thus authorizes restrictions as soon as the work of abatement begins, which includes the time when abatement crews start their work—a time when unhoused people are likely to still be in the targeted area. Plaintiffs have provided the Court with unrebutted evidence that

[6] The City Attorney confirms his involvement in "initial drafting and subsequent editing of the amendments" to Section 10-616. Sloan Decl. ¶ 2. He leaves unaddressed, however, Plaintiffs' evidence that the City initiated legislative action to amend the Ordinance just one day after a city worker was cited for battery on Ms. Martinez during an abatement. Martinez Decl. ¶ 35 & Ex. H. The City Attorney otherwise identifies no specific incident to explain why—after 20 years of remaining unchanged, and but one day after the battery incident—Section 10-616 needed to be amended to "protect the safety of people who may be at an abatement site." Sloan Decl. ¶ 3.

city workers and contractors often start working and operating some of the heavy machinery that the City uses to conduct abatements, such as front loaders and dump trucks, very early in the morning while unhoused individuals are just waking up and gathering their belongings. MPI at 12; Sloan Decl. ¶ 3.

The City essentially asks the Court to presume that "abatement" begins only after all encampment residents have packed, moved their belongings, and vacated an area. But given the City's prior established practices and the breadth of the authority that the Ordinance provides, the Court "cannot simply 'presume the City will act in good faith and adhere to standards absent from the ordinance's face.'" *Redondo Beach*, 657 F.3d at 946–47 (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988)) (cleaned up). The law "requires that the limits [which] the city claims are implicit in its law be made explicit." *City of Lakewood*, 486 U.S. at 770.

B. Because the Ordinance restricts Plaintiffs' presence and rights, the harm is not speculative.

1. The Ordinance exposes Plaintiffs to more frequent and destructive sweeps.

In support of their Motion, Plaintiffs submitted voluminous evidence to show that encampment sweeps and other abatement activities are often conducted in a dangerous, rushed, and inhumane manner. *See* MPI at 12–16 (declarations cited therein). Plaintiffs also demonstrated that their presence—along with the presence of other advocates, reporters, and organized unhoused persons—can serve to deter the City's more aggressive and destructive conduct. *Id.* at 9–16. For example, Plaintiffs established that, at sweeps and to the extent possible, they work to:

- Prevent the City from seizing, damaging, and destroying unhoused persons' belongings by "standing guard" near property so that unhoused persons can make multiple trips to salvage belongings and by clarifying where and how encampments residents' property will be stored. Martinez Decl. ¶¶ 22–29; Alvarado Decl. ¶¶ 12–14;
- 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, including by praying together. Martinez Decl. ¶ 31; Alvarado ¶ 14; Piombino Decl. ¶¶ 6, 9, 13; Valdez Decl. ¶ 12;
- Protect encampment residents when abatement crews disregard residents' physical safety and use heavy machinery in close proximity to the residents as they are packing up. Alvarado Decl. ¶ 9; Martinez Decl. ¶ 20; Sanchez Decl. ¶ 10; Piombino Decl. ¶ 14;
- Document, witness, and report on the City's actions, which helps to hold officials accountable and push back on official narratives about how abatements are conducted. Alvarado Decl. ¶¶ 7–13, 16–18; Martinez Decl. ¶¶ 7–9, 16, 20–24, 36; McCloskey Decl. ¶¶ 2–4, 8, 11, 13–14; Piombino Decl. ¶¶ 6, 16; Sanchez Decl. ¶¶ 9–10;
- And especially with respect to the Homeless Union, organize unhoused individuals so that Union members are able to advocate for their own interests and provide each other with mutual aid, critical protection, and assistance. Sanchez Decl. ¶¶ 6, 8–10; Martinez Decl. ¶¶ 4, 6, 10, 19, 22.

The Ordinance threatens all this important work. As explained *supra*, it cuts off Plaintiffs from being in close proximity to a sweep or abatement and threatens criminal sanctions or fines for "unauthorized entry" into a restricted area. The harm that this will cause is not speculative. If Plaintiffs are not present, they will be unable to protect the rights and property of the people most directly and negatively impacted by abatement. And if the City is shielded from public scrutiny, its weekly (if not daily) sweeps and abatements will become ever more frequent and aggressive. MPI at 18–19. The risk that this lack of accountability will lead to more aggressive sweeps is not hypothetical as demonstrated by Plaintiffs' evidence that City officials "would walk all over [them]" when advocates like Ms. Martinez or reporters like Mr. McCloskey are not there to document and speak out. Valdez Decl. ¶ 6; MPI at 15–16, 19. And this risk of harm becomes all the more severe because the Ordinance gives city staff and contractors license to act with impunity, explicitly shielding them from personal liability for any wrongdoing while carrying out sweeps or other abatement activity. FMC § 10-616(c).

Beyond the threat of more frequent and aggressive sweeps and abatement, the Ordinance poses a direct threat to the ability of unhoused persons, including Union members, who reside in a targeted area to act with agency on their own behalf. If an unhoused person is excluded from the area before being able to collect her property, she will be prevented from securing the vital possessions she needs to survive, including bedding, medicine, cooking supplies, and mobility devices, and saving them from destruction. And even if the City permits an unhoused person to remain within an area targeted for abatement, she will be separated from advocates and organizers, restraining her ability to turn to chosen supporters for assistance. In addition, as explained *infra*, this separation also directly infringes the Union's ability to represent its members.

Other than by misconstruing what the Ordinance does, and does not say, and pointing to its general AO6-23 guidance titled "Garbage Removal; Clean-up of Temporary Shelters; and Code Enforcement Abatement Procedures," the City offers generalized responses about its "fairly standard protocol" (*see* Betts Decl. ¶ 9; Stokes Decl. ¶ 4) and few specific rebuttals to the risk-of-harm evidence that Plaintiffs submitted. For example, in the face of Plaintiffs' detailed descriptions of sweeps, including dates and locations, where they witnessed property destruction or the use of needless force, the City's declarants offer, simply, that they have never personally "seen City Crews throw away personal

property of value . . . designated to be retained and/or stored" or observed officers threaten "the homeless . . . if they do not 'move fast enough.'" Spees Decl. ¶ 7; *see also* Betts Decl. ¶ 10 & Stokes Decl. ¶ 5 (reprising same). The City does not even bother citing these generalized assertions in its Opposition. Thus, any evidence that the Court deems unrebutted should be "taken as true." *See Elrod v. Burns*, 427 U.S. 347, 350 n.1 (1976); *see also Arch Ins. Co. v. Sierra Equip. Rental, Inc.*, 2012 WL 5897327, at *5 (E.D. Cal. Nov. 13, 2012).[7]

The City does, however, raise an argument worth addressing in response to Plaintiffs' evidence demonstrating that interactions between city workers and contractors are materially different when Plaintiffs, and other advocates, organizers, reporters, and witnesses, are present. *See* MPI at 14–16, 19. It asserts that Plaintiffs "ignore[] the fact that the City records contact between Fresno Police Officers and the homeless on police body cameras." Opp. to MPI at 6. This fact, however, does not address the importance of *third-party* watchdogs in holding the government accountable. As the United States Supreme Court long ago observed, "many governmental processes operate best under public scrutiny." *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986). And both Plaintiffs and *Amici* provide this Court with a long list of cases and incidents affirming that the public and press have not only a right, but an important role to serve, in documenting official conduct. MPI at 21–22; Amicus Br. at 4–12; *see also Index Newspapers LLC v. U.S. Marshal Serv.*, 977 F.3d 817, 831 (9th Cir. 2020) ("[T]he public became aware of the circumstances surrounding George Floyd's death because citizens standing on a sidewalk exercised their First Amendment rights and filmed a police officer kneeling on Floyd's neck until he died."); *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012) ("When wrongdoing is underway, officials

[7] In his declaration, Mr. Stokes does offer a contrasting response to reporter and advocate Mr. McCloskey's sworn statements about events involving the improper destruction of unattended tents and personal property during an encampment sweep on January 12, 2022. *Compare* Stokes Decl. ¶ 8, *with* McCloskey Decl. ¶ 6. Mr. Stokes states that either he "or other City personnel confirmed with these individuals that any items left behind could be thrown away," and he explains his version of how one particular tent was destroyed. Stokes Decl. ¶ 8. Mr. Stokes fails to address, however, the sworn statements of Ms. Alvarado of Faith in the Valley, who was also present at this sweep and who provides an account similar to Mr. McCloskey's. Alvarado Decl. ¶¶ 8–12. She also describes, and depicts with photographs, the destruction of a different tent and the ensuing discussion between the attorney and the distraught tent owner, who reportedly stated that "he and his wife had been moving some of their belongings to another spot two blocks away when their tent had been destroyed, and that they had been doing so because the City had directed them to move to that spot." *Id.* ¶ 12, Exs. B–E; *id.* ¶ 13 (describing other efforts to save items).

have great incentive to blindfold the watchful eyes of the Fourth Estate.").[8]

2. The Ordinance infringes Plaintiffs' constitutional rights.

Plaintiffs' Motion also demonstrated that, by imposing criminal sanctions and fines for "unauthorized entry" into restricted areas during the indeterminate period while an abatement is in progress, the Ordinance restricts and chills 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. *See* MPI at 19–20. Plaintiffs especially detailed how they feared the Ordinance would force them to choose between doing work that their faith and civic duty compel them to do, or risk jail time and fines that they cannot afford. *Id.* The Ordinance thereby directly interferes with, and chills the expression of, Plaintiffs' First Amendment rights and sweeps in substantial constitutionally protected conduct. Interference with these rights, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Right to Life of Cent. Cal*, 2021 WL 5040426, at *13 (emphasizing same); Amicus Br. at 4–6. This harm is real despite the City's observation that the Ordinance has "not been employed." Opp. to MPI at 9. An "ordinance need not be enforced against a speaker to pose a threat to [their] free speech rights." *Cuviello*, 944 F.3d at 832–33 (citing *Elrod*, 427 U.S. at 373–74). Just the chilling "threat of enforcement rather than actual enforcement—constitutes irreparable harm." *Id.* at 833.

3. The Ordinance causes ongoing organizational harms.

Plaintiffs' Motion further showed that the Ordinance frustrates Fresno Homeless Union and Faith in the Valley's abilities to carry out their core missions to organize and represent unhoused people in support of their own interests and to center their voices in the dialogue around the City's displacement crisis. MPI at 20–21. The City's response that this "harm is unfounded" (*see* Opp. to MPI at 10) fails for the reasons explained *supra*—the Ordinance authorizes the separation of organizers and volunteers from entering encampments during sweeps and other abatement activity when their presence is most needed

[8] The City's assertion that it "retains a videographer to record all AO6-23 encampment clean-ups," Opp. to MPI at 6, suffers for the same reasons. Practically, bodycam and videographer footage are also no substitute for Plaintiffs and other witnesses being present and able to record. The City's footage is not readily available to the public and would likely have to be sought through a lengthy, potentially costly California Public Records Act request. *See* Gov't Code §§ 6251 *et seq.* Moreover, not all negative interactions in an abatement area involve an officer wearing a body camera, as evidenced by the worker who was cited for battery on Ms. Martinez. *See* MPI at 16.

to assist, represent, and protect members and to witness the way the City mistreats unhoused community members. *See* MPI at 18–19. In addition, more frequent and forceful encampment sweeps, and the displacement that results, disrupt the Union's connections with those it represents and, thus, its ability to continue organizing and raising awareness. *Id.* at 20. Such interference with organizational missions constitutes irreparable harm. *Valle Del Sol, Inc. v. Whiting*, 732 F.3d 1006, 1018–19, 1029 (9th Cir. 2013); *see e.g.*, *Right to Life of Cent. Cal.*, 2021 WL 5040426, at *13 (interference with organization's ability to share message during "biannual 40 Days for Life campaign" constituted irreparable harm); *Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump*, 508 F. Supp. 3d 521, 545–46 (N.D. Cal. 2020) (ban on "divisive" workplace trainings interfered with nonprofits' ability to provide trainings on messages "fundamental" to their missions).

C. The City's Invocation of AO6-23 does not render Plaintiffs' harm speculative.

The City emphasizes AO6-23 in its "Background Facts," but does not then explain how the order rebuts the harms that Plaintiffs have demonstrated. The City nowhere clarifies, for example, if the order has any binding or legal effect. Indeed, it takes pains to note that AO6-23 was "voluntarily adopted" in 2007. Opp. to MPI at 4; Betts Decl. ¶ 6. But whatever its effect, the City's reliance on AO6-23 is misplaced. This policy document represents how the City thinks "encampment clean-ups" *should be* conducted, not how they always *are* conducted. Plaintiffs submitted detailed evidence showing that city workers and contractors often do not provide sufficient notice of a sweep, reasonable time to clear an area, or a meaningful opportunity to save their shelter and life-saving items. *See* MPI at 12–16. Plaintiffs' evidence also demonstrated that, starting early in the process of a sweep or abatement, the City maneuvers heavy machinery very close by to people as they pack up. *See id.*

Plaintiffs are challenging the cordoning-off of any public area where any sweep or abatement directed at an unhoused person is taking place—conduct that the Ordinance covers. It is therefore a non-sequitur to say that, by "its terms, AO6-23 only deals with the clean-up of homeless encampments, or the removal of accumulated trash adjacent to homeless encampments, which involve ten (10) or more people who have been present in a specific location for ten (10) or more days." Opp. to MPI at 4. Plaintiffs are dedicated to addressing the treatment of unhoused people during a sweep regardless of how many people are subject to that abatement work or how long those individuals have lived in an area

targeted for abatement. The Ordinance would ostensibly bar Plaintiffs from being present in many instances that do not fall within the City's definition of "AO6-23 encampment clean ups." *Id.* at 6.

AO6-23's reach also extends beyond what the City says. The stated "purpose" of AO6-23 is to set forth "policies and procedures for cleaning up areas in which individuals have constructed temporary shelters[.]" AO6-23 at 1. In addition to the section referred to by the City entitled "Clean-up of Encampments," AO6-23 also includes separate sections covering "Garbage Removal," "Clean-Up(s)," and "Code Enforcement" that are not limited to the City's 10-person, 10-day qualification. Of particular relevance, this latter section covers "code enforcement activities concerning the abatement of a public nuisance," and incorporates the activities described in the other preceding sections. *Id.* § IV.

The City's professed distinction between "clean ups" and "morning wake-up calls" underscores the lack of clarity around when the City will claim an "abatement" is taking place such that the Ordinance applies. The City implies that its "morning wake-up calls to maintain open access to City sidewalks, streets, and parks" fall outside the scope of AO6-23 and the Ordinance, and so should be of no concern to Plaintiffs. Opp. to MPI at 3, 5. But the City's description of what takes place during these "wake-ups" would appear to include "the work of abatement," including city workers requiring individuals to "disassemble tents or other structures" and "pack up their belongings," and the City's sanitation division workers removing what they term trash and debris. *Id.* at 5.[9] Critically, the City does not disclaim authority to cordon off and shield from public scrutiny any abatement that takes place during these wake-ups calls.

So, while the City offers up AO6-23 as a panacea for any problem Plaintiffs cite, the City's construction of AO6-23 only further reveals the problematic nature of the Ordinance and the urgent need for injunctive relief. *See Redondo Beach*, 657 F.3d at 946 (concluding that the "plain language" of a challenged ordinance was "not reasonably susceptible" to the "narrowing construction" proffered).

III. The Balance of Equities and Public Interest Favor an Injunction

Plaintiffs' Motion for Preliminary Injunction also established that the final factors in the preliminary injunction test—the balance of equities and the public interest—weigh in favor of injunctive

[9] The City also asserts that it does "not provide advance notice" of its wake-up calls because they do "not seek to de-encamp any unhoused individuals." Opp. to MPI at 5. But AO6-23 contemplates three days' notice before removing trash within 200 feet of any temporary shelters. *See* AO6-23 § I(A)(1).

relief. The City tries to rewrite and recalibrate this test to get a different result. Its efforts fall flat.

First, the City resists uncontroversial case law by critiquing Plaintiffs for treating these final factors together. *See* Opp. to MPI at 12 n.2 (citing *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983)).[10] Though inapposite for the City's cited reason, the Ninth Circuit's description of the public's interests in *Lopez* applies just as well here: "The government must be concerned not just with the public fisc but also with the public weal. . . . Our society as a whole suffers when we neglect the poor, the hungry, the disabled, or when we deprive them of their rights and privileges." 713 F.2d at 1437.

Second, the City stumbles when identifying and weighing the public interests at stake. It identifies but one: the public's "clear interest in the safe conduct of abatement projects." Opp. to MPI at 12. Plaintiffs wholeheartedly agree that safety is paramount. But when framing its safety concerns, the City overlooks the health and safety interests of the unhoused persons it targets. In fact, the City juxtaposes what it calls "dealing with the homeless" with "enforcing public health and safety concerns." *Id.* Plaintiffs have submitted voluminous, largely unrebutted evidence that, if encampment sweeps and other abatement activity are to occur, the health and safety of unhoused persons are best protected by public scrutiny. *See* MPI at 18–19. The City, by contrast, has identified no public health or safety incidents to justify the extreme measure of prohibiting the public from observing, monitoring, and reporting on city workers and contractors discharging their duties in public.

The City also ignores that it "is always in the public interest to prevent the violation of a party's constitutional rights." *Index Newspapers LLC*, 977 F.3d at 838 (quotation marks, citation omitted). In particular, "courts have consistently recognized the significant public interest in upholding First Amendment principles," *id.* (quotation marks, citation omitted), because harm caused by the "very existence" of an unconstitutional restriction on expression redounds to others not before the court, *Nunez*

[10] Plaintiffs cited *Nken v. Holder*, 556 U.S. 418 (2009) for the straightforward proposition that when the government is a party, the final factors in the preliminary injunction test merge. *See* MPI at 31. The City addresses these factors separately because *Nken* involved a stay of removal pending appeal. *See* Opp. to MPI at 12 n.2. True, but the Ninth Circuit and this Court apply *Nken*'s merged inquiry when "the government is a party to a case in which a preliminary injunction is sought." *Roman v. Wolf*, 977 F.3d 935, 940–41 (9th Cir. 2020) (quoting *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (itself quoting *Nken*, 556 U.S. at 435)); *see also Right to Life of Cent. Cal* 2021 WL 5040426, at *13 (same). *Lopez*, a pre-*Nken* case involving a request for stay of an injunction pending appeal, is not to the contrary. That case emphasized that, in "a broader sense, [] the government's interest is the same as the public interest." 713 F.2d at 1437.

by Nunez v. City of San Diego, 114 F.3d 935, 949 (9th Cir. 1997). Here, the public interest is served by Plaintiffs' presence inasmuch as it creates awareness and allows the public to develop informed opinions on whether the City's practice of sweeping the unhoused from place to place *itself* should continue.

Third, while ignoring the chilling effect the Ordinance has on First Amendment rights, the City claims any injunction will have a "chilling effect" on the City's abatement efforts. Opp. to MPI at 12. But the City can claim no harm "by issuance of an injunction that prevents . . . [it] from enforcing unconstitutional restrictions." *Legend Night Club v. Miller*, 637 F.3d 291, 302–03 (4th Cir. 2011). While the City may have general interests in health and safety, the Ordinance is not a lawful, narrowly tailored means of promoting those interests. Thus, Plaintiffs believe that the Ordinance should be enjoined in its entirety because its many constitutional infirmities render it facially invalid.[11]

However, to the extent that the Court is instead inclined to grant relief on Plaintiffs' as-applied claims, the Court could fashion an order enjoining the City from enforcing the Ordinance only during abatement activity involving unhoused people or their temporary shelters. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010) (distinction between facial and as-applied claims depends on "the breadth of the remedy employed by the Court"); *see also Kirola v. City & Cnty. of San Francisco*, 860 F.3d 1164, 1176 (9th Cir. 2017) (emphasizing district court "may enter any injunction it deems appropriate"); *Right to Life of Cent. Cal.*, 2021 WL 5040426, at *16; *Santa Cruz Lesbian & Gay Cmty. Ctr.*, 508 F. Supp. 3d at 547. In that event, there can be no question that the balance of equities favors relief. *See* Opp. to MPI at 11–12 (arguing only that "overbroad" injunctive relief would cause City greater harm than no relief would cause Plaintiffs).

The sum of these interests, and the balance of equities, thus tips sharply in favor of an injunction.

CONCLUSION

Plaintiffs' Motion for Preliminary Injunction should be granted.

[11] Although the City complains that Plaintiffs' initial proposed injunction is vague (Opp. to MPI at 12–13), that proposal does not run afoul of the specificity requirements in Rule 65(d). The proposed injunction "provides fair and precisely drawn notice of *what* the injunction actually prohibits." *See Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1087 (9th Cir. 2004) (quotation marks, citation omitted). While the City may want information on "*how*" it should comply with the injunction, "Rule 65(d) does not require this of the district court." *Id.*

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Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.

/s/ Hannah Kieschnick
Chessie Thacher (SBN 296767)
Hannah Kieschnick (SBN 319011)
Angelica Salceda (SBN 296152)
Shilpi Agarwal (SBN 270749)

CALIFORNIA HOMELESS UNION STATEWIDE ORGANIZING COUNCIL,
LAW OFFICES OF ANTHONY D. PRINCE

***/s/ Anthony Prince* (Authorized April 25, 2022)**
Anthony Prince (SBN 202892)

Attorneys for Plaintiff