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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,

Plaintiff,

v.

THE CITY OF FRESNO,

Defendant.

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

DEFENDANT CITY OF FRESNO'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER SUPPORT OF MOTION TO DISMISS

Date: May 17, 2020
Time: 9:30 a.m.
Crtrm.: 5, 7th Floor

The Hon. Dale A. Drozd

Defendant, CITY OF FRESNO respectfully submits the following Reply Memorandum of Points and Authorities in Further Support of Motion to Dismiss.

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I. INTRODUCTION

In Plaintiffs' brief filed on March 30, 2022, attendant to their concurrently calendared injunction motion, Plaintiffs openly admitted that the instant action involves a facial challenge to FMC Section 10-616:

- "Plaintiffs are likely to succeed on the merits of their claims that the Ordinance is facially invalid under the First Amendment because 'a substantial number of its applications are unconstitutional" (See Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction ("P's & A's") p. 21:12-13; and
- "Plaintiffs' can readily demonstrate that the Ordinance is unconstitutional because, on its face, it restricts a range of activities protected by the First Amendment" (P's & A's p. 21:7-9).

Approximately three (3) weeks later, in opposition to the instant motion, Plaintiffs take a much different tact, and now argue that they are really asserting an "as-applied" challenge. As discussed below, Plaintiffs' newly created legal theory fails.

Limited by their facial challenge, Plaintiffs offer a hypothetical construction of the statute that strains credibility (i.e. that the City seeks to cut-off unhoused people from their advocates). It is particularly revealing that, despite a 34 page opposition, Plaintiffs wholly ignore the language of the Ordinance which specifically provides that once a "bufferzone" is created "[n]o person" shall enter the restricted area. Thus, application of the statute does not seek to separate the occupants of the homeless encampment from anyone, or limit First Amendment rights, as once a "bufferzone" is created everyone must leave. This is a critical issue in evaluating the instant motion because in the absence of the "forced separation" foretold by Plaintiffs, the entirety of their currently pled claims fail.

Similarly, Plaintiffs' opposition also ignores the multitude of applications of the Ordinance to abatements that have nothing to do with the clean-up of homeless encampments. As reflected in the City's Nuisance Abatement Ordinance (Request for Judicial Notice Ex. 2):

- There is an ongoing need for property maintenance and sanitation;
- The Ordinance seeks to address issues of public health, safety and welfare;

- The failure to address existing and future maintenance and sanitation conditions will result in the depreciation of the community's social and economic standards; and
- The abatement of such conditions will improve the general welfare of the City.

(Exhibit 2, p. 1, Section 10-602).

Moreover, Public Nuisance Abatement Ordinance identifies the scope of the issues it seeks to abate, including:

- Rubbish, junk refuse, garbage, scrap metal, lumbar, concrete, asphalt, tin cans, tires and piles of earth;
- Fire Code violations;
- Abandoned, wrecked, dismantled, or inoperative vehicles;
- Weeds, sagebrush, puncture vine, tumbleweed or poison oak;
- Dead, decayed or hazardous trees;
- Zoning ordinance violations; and
- Blighted buildings.

(Exhibit 2, pp. 2-4, Section 10-603)

Despite the broad scope of abatement issues faced by the City, to which the recent amendments to Fresno Municipal Code ("FMC") Section 10-616 ("Ordinance") apply, Plaintiffs interpret the statute to have a single purpose and a single intent: ". . . the Ordinance's history and text show that it was intended to, and does, specifically target abatement activity at homeless encampments". (Opposition p. 9:10-11). As referenced above, even a cursory review of the City's Public Nuisance Abatement Ordinance (Exhibit 2) demonstrates the inaccuracy of Plaintiffs' argument. [1]

Plaintiffs also argue that the statute is unconstitutional because it allows City employees "…to cordon off an area of indeterminate size for an indefinite amount of time while an abatement is in process" (Opposition p. 27:14-16). Such hyperbole underscores why courts are hesitant to sustain a facial challenge, as it invariably relies upon speculation, raises the risk of a premature

[1] Plaintiffs also misstate the scope of the recent amendments which they claim "extends the City's nuisance abatement authority to public property". (Opposition p. 16:2-4) This is erroneous, as the Ordinance has always defined "Property" to mean "any lot or parcel of land", and which specifically identifies several types of public property, including e.g. sidewalks, park strips, alleys, or unimproved public easements (Exhibit 2, p. 3, § 10-603(l))

interpretation of a statute on a facially barebones record, and threatens to short circuit the democratic process by preventing laws that embody the will of the people from being implemented in a lawful manner. Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449-50 (2008). ["[W]e must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases"]

As a result, the allegations of Plaintiffs' complaint and matters subject to judicial notice establish that there are at least "some" constitutional applications of the contested Ordinance sufficient to overcome a facial challenge. Washington State Grange v. Washington State Republican Party, supra 552 U.S. at, 456 (2008). Consequently, Plaintiffs' attempt to thwart the implementation of a public safety statute based upon their imagined concerns over how this statute may apply to the clean-up of homeless encampments is unavailing. Rather, both federal and state law strongly favor allowing the City to implement the statute to demonstrate that the Ordinance can and will be constitutionally applied. See Washington State Grange, supra, 552 U.S. at pp. 455-456. ["…we must, in fairness to the voters of the State of Washington who enacted I-872 and in deference to the executive and judicial officers who are charged with implementing it ask whether the ballot could conceivably be printed in such a way as to eliminate the potential for widespread voter confusion and with it the perceived threat to the First Amendment".] See also Colgan v. Leatherman Tuul Group, Inc., (2006) 135 Cal.App.4th 663, 692 [A statute is not unconstitutionally vague merely because its meaning "must be refined through applications".]

In this case, Plaintiffs' constitutional challenge is predicated upon their belief of how the statute will be enforced. However, Plaintiffs' belief is simply immaterial.

II. APPLICABLE LEGAL STANDARDS

Plaintiffs accuse the City of misconstruing the legal framework for reviewing facial claims "implicating First Amendment and other rights". (Opposition at p. 17:3-4.) While Plaintiffs are notably vague in their assertion that the City ignores the distinct standards that apply when First

Amendment and "other fundamental rights" are implicated, the modified standard Plaintiffs seek to apply across the board to their facial challenges is inapplicable outside of a First Amendment overbreadth challenge. Plaintiffs have not, and cannot, meet the heavy burden imposed on their non-First Amendment facial challenges. Furthermore, Plaintiffs' Complaint has not even satisfied the less strict inquiry associated with First Amendment overbreadth challenges.

A. Standards for Plaintiffs' Facial Challenges of FMC 10-616

A party challenging the constitutionality of a statute ordinarily must carry a heavy burden. First, "A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual." Tobe v. City of Santa Ana, 892 P.2d 1145, 1152 (Cal. 1995). Further, "Facial challenges to statutes ... are disfavored. Because they often rest on speculation, they may lead to interpreting statutes prematurely, on the basis of a bare-bones record. [Citation.] ... [¶] Accordingly, we start from 'the strong presumption that the [statute] is constitutionally valid.' [Citations.] 'We resolve all doubts in favor of the validity of the [statute].' [Citation.] Unless conflict with a provision of the state or federal Constitution is clear and unmistakable, we must uphold the [statute]. [Citations.]" People v. Superior Court (J.C. Penney Corp., Inc.), (2019) 34 Cal.App.5th 376, 387; Building Industry Assn. of Bay Area v. City of San Ramon (2016) 4 Cal.App.5th 62, 90.

Finally, "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739 (1987); See Roulette v. City of Seattle, 97 F.3d 300, 306 (9th Cir. 1996) ("The fact that [a legislative act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." United States v. Salerno, supra, 481 U.S. at, 745 (1987).") Although the Salerno Court recognized the existence of the First Amendment overbreadth doctrine, under which the Court applies a less onerous facial challenge test, the Court stated that the doctrine was inapplicable "outside the limited context of the First Amendment." United States v. Salerno, supra, 481 U.S. 739, 745.

B. Plaintiffs Fail to Meet the Standard for Overbreadth Facial Challenges under the First Amendment

Generally, a First Amendment overbreadth facial challenge may succeed if the Plaintiff can show that a "substantial number" of applications against third parties would be unconstitutional. See New York v. Ferber, 458 U.S. 747, 769-70 (1982). "Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is 'strong medicine' and have employed it with hesitation, and then 'only as a last resort.' [Citation.] We have, in consequence, insisted that the overbreadth involved be 'substantial' before the statute involved will be invalidated on its face." Id. at 747, 769. The Court continued, "[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Id. at 770.

Plaintiffs aver that FMC 10-616 is unconstitutional as it provides overly broad discretion to Government officials, and cites to and relies upon Kaahumanu v. Hawaii, 682 F.3d 789, 802-803 (9th Cir. 2012). In Kaahumanu, plaintiffs challenged Hawaii's permitting scheme for commercial weddings occurring on public beaches. However, the Kaahumanu Court's analysis actually supports the City's position. Specifically, in Kaahumanu Court held that the challenged regulations "do not on their face "seek [] to regulate spoken words or patently expressive or communicative conduct, such as picketing or hand billing". Thus, the Court held that "a facial challenge is not available." Id. at 801. Plaintiffs have not, and cannot, cite to any case authorities that have upheld a facial challenge to the constitutionality of a statute wherein municipal officials possess the discretion to establish a temporary bufferzone in order to safely complete abatement activities.

For the reasons outlined herein, Plaintiffs have not and cannot establish that a "substantial number" of the asserted applications of FMC Section 10-616 are unconstitutional. Plaintiffs have failed to allege facial invalidity applicable to the their own conduct or any third parties not before the Court. Finally, Plaintiffs have not made a sufficient showing that FMC 10-616 is overbroad, affects third parties not before the court, or chills protected speech. Therefore, Plaintiffs have not

established a facial challenge as to third parties or otherwise.[2]

C. Plaintiffs' Attempt to Create a Pre-Enforcement As-Applied Challenge Is Unavailing

Plaintiffs cite to Wolfson v. Brammer 616 F.3d 1045 (9th Cir. 2010) for the proposition that they have alleged that they possess an "intent" to violate FMC Section 10-616, which raises a "genuine threat" of enforcement. (Id. at 1059-61). Based upon these assertions, which do not appear in their complaint, Plaintiffs argue that they have raised a "pre-enforcement as-applied challenge". (Opposition p. 19-20) They have not. To the contrary, Plaintiffs filed their lawsuit on March 16, 2022, and specifically alleged that: "[t]he Ordinance has an effective date of March 31" (Complaint ¶ 52).

More importantly, however, the legal analysis advanced by Plaintiffs applicable to a "pre-enforcement, as-applied" challenge is misplaced, as such analysis relates solely to the question of whether Plaintiffs' challenge is ripe for review. As the Ninth Circuit has held:

"We typically look to three factors to assess whether a pre-enforcement challenge is ripe for review under Article III. Id. We first consider whether the plaintiff articulates a 'concrete plan to violate the law.' Id. (internal quotation marks omitted). With regard to this prong, '[a] general intent to violate a statute at some unknown date in the future' is not sufficient, id, and the plaintiff must establish a plan 'that is more than hypothetical,' Wolfson v. Brammer, 616 F.3d 1045, 1059 (9th Cir. 2010).

Next, we typically look to whether the government has 'communicated a specific warning or threat to initiate proceedings' under the statute. Thomas, 220 F.3d at 1139. Our analysis under this second prong is somewhat different, however, in a pre-enforcement challenge that alleges a free speech violation under the First Amendment. See Wolfson, 616 F.3d at 1059-60. In such actions, the plaintiff need not establish an actual threat of government prosecution. Id. Rather, the plaintiff need only demonstrate that threat of potential enforcement will cause him to self-censor, and not follow through with this concrete plan to engage in protected conduct. Id.

Finally, we consider the history of past prosecution or enforcement under the statute. Thomas, 220 F.3d at 1140. Under this third prong, 'the government's active enforcement of a statute [may] render [] the plaintiff's fear [of injury] . . . reasonable.' Id.

Weighing these factors, we will only conclude that a pre-enforcement action is ripe for judicial review if the alleged injury is 'reasonable' and 'imminent,' and not merely 'theoretically possible.' Id. at 1141. A claim is not ripe where '[t]he asserted threat is wholly contingent on the occurrence of unforeseeable events,' or where the plaintiffs do not 'confront a realistic danger of

[2] To the extent the Court disagrees, the City contends that FMC 10-616 is not inseverable. See United States v. Raines, 362 U.S. 17, 23 (1960).

sustaining a direct injury as a result of the statute's operation or enforcement.' Id. (internal quotation marks and citations omitted).
ProtectMarriage.com – Yes on 8 v. Bowen, 752 F.3d 827, 839.

Thus, the "pre-enforcement, as-applied" argument raised by Plaintiffs seeks to address a defense that was not raised: ripeness. Plaintiffs' misguided analysis does not change the fact that Plaintiffs' action was filed before the challenged amendments to FMC Section 10-616 became effective, and that the City has never applied the subject statute to the clean-up of homeless encampments. As such, Plaintiffs' challenge is a facial challenge, and Plaintiffs have not and cannot establish that a "substantial number" of its applications are unconstitutional.

III. PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM FOR STATE CREATED DANGER

Plaintiff's Opposition reasserts the voluminous "facts" set forth in their complaint, and states that: "[t]he City's arguments mostly amount to factual disputes with Plaintiff's allegations…" (Opposition p. 21:1-2). Plaintiffs are incorrect.

First, despite whatever factual disputes which may exist, one (1) fact remains undisputed: FMC Section 10-616 has never been applied.

Second, Plaintiffs offer a strained construction of the statutory language under which homeless individuals subject to encampment clean-ups will be physically separated from service providers or advocates that is untethered to the language of the statute itself. Even a cursory review of the City's Nuisance Abatement Ordinance confirms that the plain language of the statute does not support Plaintiffs' punitive construction.

Third, Plaintiffs conjecture about how FMC Section 10-616 will be applied does not support any of the elements of a cause of action under federal law for state create danger.[3] Neither Plaintiffs' complaint nor their opposition point to any statutory language that will separate the unhoused community from anyone. Nor have Plaintiffs addressed the specific language of the statute that excludes everyone other than City workers from an abatement before a "bufferzone" is created.

[3] As referenced in the City's moving papers, California state law does not recognize such a cause of action, Shen v. Albany Unified Sch. Dist., 436 F.Supp.3d 1305, 1315 (N.D. Cal. 2020).

Thus, Plaintiffs have not alleged facts to support their speculative assertions that:

- The City's conduct will create an actual, particularized danger;
- The foreseeability of any injury; or
- The City's deliberate indifference to a known or obvious danger.

Hernandez v. City of San Jose, 897 F.3d 1125, 1133 (9th Cir. 2018).

Fourth, Plaintiffs' cited authorities do not support their arguments.

- Plaintiffs cite to Sausalito/Marin Cnty. v. City of Sausalito 522 F. Supp.3d 648, 658-59 (N.D. Cal. 2021) for the proposition that federal law allows pre-enforcement state created danger claims, because if implemented, residents "could" suffer serious health consequences. However, Plaintiffs misstate the holding, as the Court found in that case (which sought to impose a ban on day camping during the Covid pandemic) because "[t]here is a strong argument that Defendants have acted in reckless disregard for the campers' health and safety. Thus, Plaintiffs have made a strong showing (and at the very least raised a serious question) that the ban on day camping under the circumstances of this case violates due process." (Id at 659). Such facts are notably absent here.

- Plaintiffs also cite to Lakewood v. Plain Dealer Pub Co., 486 US 750, 770, and Comite De Jornaleros De Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 946-947 (9th Cir. 2011) for the proposition that a reviewing court will not assume that the City will act in good faith in applying the statute. In Lakewood, a City ordinance gave "unlimited discretion" to City officials to grant or deny licenses as a condition of engaging in protected First Amendment activity. (Id. at 757-758). In City of Redondo, the Court reviewed a City ordinance that prohibited individuals standing on a street or sidewalk, from soliciting or attempting to solicit employment, business or contributions.[4] In both cases, the reviewing courts found that the language of the contested statutes plainly restricted speech. As such, these authorities dealt with broad government imposed limits or regulation of speech which stand in contrast to the instant action, in which the amendments to FMC Section 10-616 do not restrict Plaintiffs' speech in any way, and merely gives the City the discretion in certain cases to create a temporary "bufferzone" for the safe completion of abatement activities.

Thus, Plaintiffs' speculative and unsupported construction of how the Ordinance will be applied in the future fails to offer anything other than impermissible speculation to support their pre-enforcement cause of action that FMC Section 10-616 will expose them to actual, foreseeable injuries to which the City is deliberately indifferent.

IV. PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM FOR VIOLATION OF FREE SPEECH AND ASSEMBLY

Plaintiffs' First Amendment challenge targets a municipal ordinance that authorizes the City to create a temporary "bufferzone" to address public safety issues in a wide variety of Code

[4] Solicitation constitutes protected speech under the First Amendment. (Id. at 945)

enforcement activities. The statute never mentions the restriction of anyone's rights to free speech or assembly, and does not target traditional public forums involving free speech. Rather the statute applies to abatement actions on both private and public property throughout the City, and does not exclude anyone from public streets or parks, unless and except for limited time periods in limited areas during which an abatement may be proceeding in such areas (e.g. the removal of garbage accumulations on streets or in parks).

Irrespective of the plain language of the statute, Plaintiffs attempt to infer a nefarious and toxic intent to the statute in order to create a hypothetical fact pattern that does not exist: to wit, that the City seeks to exclude anyone from monitoring or advocating for the City's homeless during a homeless encampment clean-up. Such an argument is unavailing as, once again, a facial challenge is limited to the language of the statute itself, and Plaintiffs' individual circumstances do not factor into the analysis. Duncan v. Bonta 19 F.4th 1087, 1101 (9th Cir. 2021); Tobe v. City of Santa Ana, supra 9 Cal.4th at, 1102. [If an ordinance does not on its face reflect a discriminatory purpose, and it is one which the City has the power to enact, its validity must be sustained unless it cannot be applied without trenching upon constitutionally protected rights.]

In support of their claim for violation of free speech and assembly, Plaintiffs also aver that the Ordinance targets homeless encampments located in public places historically associated with the free exercise of speech and expressive activities, such as parks, sidewalks and streets (Complaint ¶ 65). However, the Ordinance is not so limited, and applies without restriction to all public and private properties upon which a wide range of abatement actions occur. For example, the term "Property" as defined in the Ordinance means "any lot or parcel of land", and specifically extends to City owned property (e.g. sidewalks, alleys, park strips and unapproved public easements" (Exhibit 2, § 10-603(l)). Thus, the scope of the statute does not target traditional public forums anymore then it targets blighted homes, structures with Fire Code violations or empty lots which are subject to illegal dumping.

The language of the statute plainly establishes that if City employees create a restricted zone during an abatement, "[n]o person shall enter the restricted area…". (FMC Section 10-616(b)(1)). The term "[n]o person" is used in its literal sense, and means what it says. In instances in which the

City elects to establish temporary "restricted area" all non-City employees are excluded. This applies to Plaintiffs as well as all other non-City employees, including the homeless in instances of an abatement in or around a homeless encampment.[5] Thus, Plaintiffs have not established that the language of FMC Section 10-616 violates any First Amendment rights.

In an effort to convince this Court to consider extrinsic, historical evidence of the City's intent in amending FMC Section 10-616, Plaintiffs cite to Village of Arlington Heights v. Metro. Hous. Dev. Corp 429 U.S. 252 (1977) and Valle Del Sol, Inc. v. Whiting, 709 F.3d 808 (9th Cir. 2013). Plaintiffs citations are unavailing.

- In Arlington Heights, the U.S. Supreme Court considered the denial of a rezoning petition to develop low and moderate income housing. (Id. at 254) However, Arlington Heights had nothing to do with the interpretation of an allegedly unconstitutional statute, but rather observed that the denial of a petition for rezoning… "must be examined in light of its "historical context and ultimate effect'" (Id. at 259-260); and

- In Via Del Sol, Arizona Senate Bill 1070 made it unlawful for a motor vehicle occupant to hire or attempt to hire a person to work at another location from a stopped car. (Id. at 814). However, plenary authorities establish that solicitation directly implicates free speech. (See City of Redondo, supra 657 F.3d at 945). The Via Del Sol Court's analysis was focused upon what it found to be content-based restrictions on commercial speech, which it analyzed under the Central Hudson test for commercial speech. As part of its analysis, the Court looked to the "purposes clause introducing S.B. 1070 [which] describes it as an immigration bill, not a traffic safety bill." Thus, it was through the "purposes clause" of the statute itself that the Court determined the "intent" of the legislation was to discourage and deter the unlawful entry and presence of aliens and economic activity by person unlawfully present in the United States. The Court observed that this "clear and unambiguous expression of purpose" contradicted the Government's argument that the day labor provisions are content-neutral traffic regulations. (Id. at 819). In this case, as in Via Del Sol, FMC Section 10-616 (b)(1) similarly reveals the intent of the statute, which is "[t]o protect the health and safety of the public and City employees while an abatement is in process".

As Plaintiffs concede, the language of the Ordinance is content neutral. As such, Plaintiffs' facial challenge is limited to the "content neutral" language of the statute. However, should this Court follow Via Del Sol, as urged by Plaintiffs, the language of the statute itself discloses that it

[5] It is revealing to note that Plaintiffs completely ignored this statutory language in their 34 page Opposition. The reason is obvious, as the specific language of the statute undermines Plaintiffs speculative and inaccurate construction.

was adopted solely for public safety reasons.

A. Plaintiffs' Attempt To Color the Ordinance as Content Based Is Unavailing

Plaintiffs' complaint concedes that the Ordinance is facially content neutral (Complaint ¶ 67) but alleges that it was adopted for a content-based purpose: to wit, the City's "disagreement" with advocates exercising First Amendment speech (Complaint ¶ 67). However, a Court's review of a facial challenge is limited to the text of the statute itself, and Plaintiffs individual circumstances do not factor into the Court's analysis. Duncan v. Bonta, supra 19 F.4th at, 1101 (9th Cir. 2021); Accord: Tobe v. City of Santa Ana, supra 9 Cal.4th at, 1093.

B. Plaintiffs' Overbreadth Challenge Fails

In ruling on the sufficiency of Plaintiffs' Freedom of Speech and Assembly claim, the standard for measuring a facial challenge to a law's asserted overbreadth is whether "a substantial number" of its applications are unconstitutional" judged in relation to the statutes plainly legitimate sweep". Washington State Grange v. Washington State Republican Party, supra 552 U.S. at, 449 n.6 (2008). Plaintiffs agree. (See Opposition p. 17:19-18:2) The City's motion meets this burden, as the "sweep" of the Ordinance applies to a broad range of lawful nuisance abatement activities that Plaintiffs do not even address, much less challenge.

V. PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM FOR VOID FOR VAGUENESS

Again, Plaintiffs' facial challenge does not establish that FMC Section 10-616 "clearly implicates free speech rights". As such, a facial challenge for vagueness does not lie. Foti v. City of Menlo Park 146 F.3d 629, 639 n. 10 (9th Cir. 1998). See United States v. Salerno, supra, 481 U.S. at, 745 [the fact that a legislative act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it invalid]. Moreover, a statute is not unconstitutionally vague merely because its meaning "must be refined through application." Colgan v. Leatherman Tool Group, Inc., supra, 135 Cal.App.4th at 692.

VI. PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM FOR RIGHT TO TRAVEL

Plaintiffs opposition essentially summarizes some of the "right to travel" cases, but does

not explain how Plaintiffs' rights are directly impacted by the Ordinance. In contrast, let's look at an example at how the City might apply the statutory language to abate illegal dumping on City property. If the City creates a temporary "bufferzone" around a work crew which is abating a pile of refuse, does that create a cause of action for unlawfully restricting Plaintiffs' right to travel? Of course not, as such a temporary restriction does not: (1) constitute an "actual barrier" to intrastate travel [6]; or (2) treat Plaintiffs differently than others. Bray v. Alexandria Woman's Health Clinic, 506 U.S. 263, 277 (1993); Tobe v. City of Santa Ana, supra, 9 Cal.4th at 1098-1100.

In Tobe, the plaintiff challenged a Santa Ana Ordinance that banned camping and the storage of property throughout the City (Id at 1081-82). As the Tobe Court observed:

"Neither the United States Supreme Court nor this court has ever held, however, that the incidental impact on travel of a law having a purpose other than restriction of the right to travel, and which does not discriminate among classes of persons by penalizing the exercise by some of the right to travel, is constitutionally impermissible."

Thus, California Courts have only found violations of the right to intrastate travel when a direct restriction of the right to travel occurs, and such restriction discriminates among classes of people. Adams v. Superior Court (1974) 12 Cal.3d 55, 61-62; In re White, (1979) 97 Cal.App.3d 141, 148 [the petitioner had been barred directly from traveling to specified areas]; In re Marriage of Fingert (1990) 221 Cal.App.3d 1575 [a parent had been ordered to move to another county as a condition of continued custody of a child.] Indirect or incidental burdens on travel resulting from otherwise lawful governmental action have not been recognized as impermissible infringements of the right to travel and, even when subjected to an equal protection analysis, strict scrutiny is not required. If there is any rational relationship between the purpose of the statute or ordinance and a legitimate government object, the law must be upheld. Adams v. Superior Court, (1974), 12 Cal.3d 55, 61-62.

[6] Federal courts do not recognize a federal claim for the restriction of intrastate travel. Nunez by Nunez v. City of San Diego, 114 F.3d 935, 949 n.7 (9th Cir. 1997).

In this case, the creation of a temporary "bufferzone" is rationally related to the City's interests in maintaining safe work areas during an abatement, as is specifically recited in the Ordinance (FMC Section 10-616(b)(1)). As such, Plaintiffs have failed to state a cognizable state law claim for the threatened impingement of their right to intrastate travel.

VII. PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM FOR PREEMPTION

Plaintiffs challenge FMC 10-616(c) on grounds that the ordinance is in conflict with the California Government Tort Claims Act ("Act"). First, Plaintiffs contend that the City's recent amendment, to add only the word "contractors", was not a "mere re-enactment", as the City added a new class of persons to those shielded from liability. Plaintiffs further argue that their challenge is timely because the recent amendments, taken together, alter the effect of the Ordinance. (Opposition p. 30:22-25, 31:2-10.)

The addition of the word "contractors" does not alter the effect of the ordinance upon the plaintiffs such that the "clock is restarted." Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd. 509 F.3d 1020, 1027 (9th Cir. 2007) ["In the context of a facial challenge under the Takings Clause, we have held that the cause of action accrues on the date that the challenged statute or ordinance went into effect. [Citation.] We also have held that the mere re-enactment of a statutory scheme does not restart the clock, [Citation], and that substantive amendments to a takings statute will give rise to a new cause of action only if those amendments alter 'the effect of the ordinance upon the plaintiffs.'"]; De Anza Properties X, Ltd. v. County of Santa Cruz, 936 F.2d 1084, 1086 (9th Cir. 1991) ["…the effect of the ordinance upon the plaintiffs has not altered. Appellants were experiencing substantially the same injury in 1982 that they experienced in 1987. They were on notice that their property interests would be affected by the ordinance at the time it was enacted. There is no basis for distinguishing between two types of injury."] Plaintiffs' attempt to renew their untimely challenge is ineffective. Further, Plaintiffs' argument that Section (c) works in concert with newly added Section (b) to create a framework that makes government accountability more difficult, by removing witnesses who might be able to hold city workers and contractors accountable, is predicated upon pure speculation, erroneous assumptions, and hypotheticals.

Additionally, Plaintiffs' argument that FMC 10-616(c) is preempted by the Act is not predicated upon the addition of contractors as a class of persons protected from liability. Rather, review of Plaintiffs' Complaint makes abundantly clear that Plaintiffs attack subdivision (c) as it relates to the City's employees. (Complaint, p. 30:20-31:15) The language targeted by Plaintiffs' challenge of FMC 10-616 (c) has been in effect for decades. The excerpts of the Act that Plaintiffs proffer in support of their purported preemption claim highlight that the subject of their preemption claim is not contractors, but "public employees". (Opposition p. 32:11-15, 23-25) Therefore, it is apparent that the actual language upon which Plaintiffs predicate their preemption claim predates the recent amendment of FMC 10-616. Thus, Plaintiffs' challenge could have been mounted in the nineties, as the addition of the word "contractors" has not altered the effect of the Ordinance upon Plaintiffs, and does not appear to factor into Plaintiffs' preemption argument.

Further, Plaintiffs accuse the City of wrongly criticizing Plaintiffs' statement of law in Plaintiffs' separate Motion for Preliminary Injunction and that "the language 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, (1982) 31 Cal. 3d 446, 463, recognizing that, under 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)).'" (Plaintiffs' Opp. p. 31:21-32:3.) However, Plaintiffs have missed the point of the City's comment, as Plaintiffs cut-off the quote just prior to the accompanying footnote which provides that statutory exceptions exist. Id. at p. 463 fn. 20. Plaintiffs endeavor to evade the fact that statutory exceptions exist and attempt to discard the preface of Section 820(a) which states "except as provided by statute…"

Plaintiffs grasp at multiple theories of preemption, arguing not only that the Ordinance is preempted because it is in conflict with the Act as it cannot be reconciled with state law, but also that the Ordinance may also be construed as duplicative of the Act. (Opposition p. 32:4-18.) In an attempt to throw all theories of preemption at the wall and see what sticks, Plaintiffs have made statements that undercut their position. If, assuming *arguendo*, the Ordinance provides more immunity than the Act, which it does not, it would not be duplicative. Big Creek Lumber Co. v.

County of Santa Cruz, (2008) 38 Cal.4th 1139, 1150 ["Local legislation is 'duplicative' of general law when it is coextensive therewith and 'contradictory' to general law when it is inimical thereto."] Moreover, once again, without any argument on the point, Plaintiffs summarily argue by reference that FMC 10-616 is preempted because the court has the power to strike an ordinance that invades an area fully occupied by general law. Notably, Plaintiffs' papers are devoid of any support that the state legislature intended to or impliedly occupies the area.

FMC 10-616(c) is not preempted by the Act for the reasons previously outlined in the City's Motion to Dismiss. Plaintiffs' challenge of FMC 10-616(c) should be seen by this Court for what it is: an untimely challenge that could have been, but was not, lodged during the last several decades.

VIII. CONCLUSION

Because Plaintiffs' claims are each dependent upon their assertions that the statute unlawfully infringes upon constitutional rights, those claims fail. However, to the extent that there are any questions concerning the viability of any state law claims raised by Plaintiffs, such causes of action should be remanded to state court.

Dated: May 2, 2022

BETTS & RUBIN

By: _____
James B. Betts
Attorneys for Defendant City of Fresno

PROOF OF SERVICE

I am a citizen of the United States of America, a resident of Fresno County, California, over the age of 18 years and not a party to the within-entitled cause or matter. My business address is 907 Santa Fe Avenue, Suite. 201, Fresno, CA. On May 2, 2022, I served **DEFENDANT CITY OF FRESNO'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER SUPPORT OF MOTION TO DISMISS** on the parties in this action by placing an original/a true copy in an envelope and delivering it as follows:

____ **(By Overnight Courier)** I caused such envelope with postage fully prepaid, to be sent by _____.

____ **(By Mail)** I deposited the envelope, with postage fully prepaid, with the United States Postal Service at Fresno, Fresno County, California.

__X__ **(By Mail)** I placed the envelope for collection and processing for mailing following this business' ordinary practice with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

__X__ **(By E-Mail)** I caused each document to be sent by e-mail.

Each envelope was addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 2, 2022, at Fresno, California.

/s/ Adriana Garcia
Adriana Garcia