IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, vs. CHRISTIAN NOEL PADILLA-MARTEL, Defendant and Respondent.	Case No. A162872 San Francisco Superior Court No. CGC-20-586763
PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, vs. VICTOR ZELAYA, Defendant and Respondent.	Case No. A162873 San Francisco Superior Court No. CGC-20-586761
PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, vs. JAROLD SANCHEZ, Defendant and Respondent.	Case No. A162874 San Francisco Superior Court No. CGC-20-586753
PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, vs. GUADALOUPE AGUILARBENEGAS, Defendant and Respondent.	Case No. A162875 San Francisco Superior Court No. CGC-20-586732

APPELLANT'S OPENING BRIEF
[Service on the Attorney General required by CRC 8.29(c)(2)(B); Bus. & Prof. Code 17209]

The Honorable Ethan P. Schulman

DENNIS J. HERRERA, State Bar #139669
City Attorney
PETER J. KEITH, State Bar #206482
Chief Attorney, Neighborhood and Resident Safety Division
HOLLY D. COULEHAN, State Bar #244682
Deputy City Attorney
1390 Market Street, 7th Floor
San Francisco, California 94102-5408
Telephone: (415) 554-3800
Facsimile: (415) 437-4644

Attorneys for Plaintiff and Appellant
PEOPLE OF THE STATE OF CALIFORNIA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

[THIS PAGE INTENTIONALLY LEFT BLANK.]

INTRODUCTION

The Tenderloin neighborhood is one of the most diverse and densely populated areas in the City and County of San Francisco. It is also now home to a sprawling open-air drug market sustained by persistent drug dealers like Respondents Christian Noel Padilla-Martel, Victor Zelaya, Jarold Sanchez, and Guadaloupe Aguilar-Benegas (Respondents), who commute to the Tenderloin for the purpose of selling highly addictive and deadly drugs like fentanyl and methamphetamine. Respondents' illegal activity has taken over the streets and sidewalks, turned this neighborhood into a dangerous drug haven, and endangered the lives of all who live in, work in, or visit the Tenderloin.

In an effort to address Respondents' nuisance and illegal activity, the Appellant People of the State of California by and through San Francisco City Attorney Dennis J. Herrera (People) filed civil lawsuits asserting violations of the public nuisance law and the Unfair Competition Law (UCL) against 28 defendants, including Respondents. The People then moved for a preliminary injunction ordering Respondents to stay away from the neighborhood they have been harming (a demarcated "Tenderloin Drug Abatement Area"), with certain exceptions.

On the People's motion, the trial court found by clear and convincing evidence that it was reasonably likely the People would prevail on the merits of the public nuisance and UCL claims against Respondents, and that Respondents were likely to continue their unlawful conduct given their "track record of recidivism." Despite this finding, the trial court denied the motion, ruling that it lacked legal authority under the civil public nuisance and UCL statutes to enter the requested stay-away order, and that

such an order would violate Respondents' constitutional right to travel. This was error.

The injunctive remedy exists to allow a court of equity to abate nuisances and prevent unlawful business practices in whatever form they may appear. The relevant statutes are broadly written and deliberately construed to give courts the flexibility to craft appropriate remedies catered to the unique facts of each case. Neither the statutes nor the cases interpreting them foreclose a stay-away order as a tool to abate a nuisance or prevent UCL violations. Nor does the constitutional right to travel serve as an impediment to such a remedy, or override the health and safety rights of the community that is trying to lawfully and peacefully live and work in the Tenderloin.

This Court should hold that an injunction ordering Respondents to stay away from the Tenderloin is lawful and enter an order directing the trial court to issue the People's proposed injunction, or at a minimum, remand so that the trial court can apply the correct legal standards to the People's requested relief.

STATEMENT OF FACTS

San Francisco's Tenderloin neighborhood is in crisis, suffering under palpable and pervasive drug dealing. In 2020, 154 people died from drug overdose deaths in the Tenderloin – more deaths than in any other neighborhood in San Francisco, and a substantial portion of the city's 699 total overdose deaths. (5 AA 735:24-736:1.) Community members do not feel safe in their neighborhood, where they witness drug sales on a massive scale, and all the ill effects that follow – dirty syringes, overdosing users, unusable sidewalks, filth, and related crime. (4 AA 629:9-14 and 25-27, 630:1-14, 633:17-18, 633:26-634:8, 637:9-22, 638:3-10; 5 AA 676:17-25,

677: 8-18, 694:21-22, 695:11-14, 702:9-22, 703:7-10, 718:11-16, 719:1-10, 725:10-16, 726:23-727:16, 757:15-25, 758:10-12; 6 AA 799:1-9.)

The trial court's order details the conditions of the Tenderloin and the ravages of the drug dealing there, finding that the People established by clear and convincing evidence

> among other things, that blatant and open-air drug sales have been increasingly common in the Tenderloin, with drug dealing occurring all day and night; that sales of narcotics take place in the vicinity of schools, childcare centers, and playgrounds, and while children are walking to and from school; that drug sales occur in front of businesses, restaurants, and office buildings during business hours, making entry ways inaccessible; that neighborhood residents and workers have to move to the other side of the street or into the street to avoid drug dealers; that injection and other open drug use is common on public streets, sidewalks, in and around alcoves and entry ways of businesses and restaurants, and that users leave behind narcotics waste on the sidewalks and streets, including used crack pipes and dirty syringes, as well as human waste; and that rampant drug dealing in the Tenderloin is directly and indirectly related to numerous other crimes committed by drug dealers and their customers, including theft, weapons trafficking, and violent crimes. … Tragically, widespread drug trafficking and use has resulted in numerous drug overdoses and deaths in the Tenderloin and elsewhere.

(8 AA 2330:21-2331:7.)

Based on this evidence, the trial court found that "illegal drug sales, which the Legislature has expressly defined by statute to constitute a nuisance, affect the entire neighborhood, or a considerable number of persons in that neighborhood…." (8 AA 2335:4-6.)

And Respondents have contributed to the conditions in the Tenderloin by openly and repeatedly dealing drugs. As the trial court found, none of the four Respondents live in the City; they all live in Oakland and commute into the Tenderloin to deal drugs. (6 AA 823: 6-9, 884:19-20, 911:20-23, 953-955, 1044:3; 8 AA 2331:13, 22; 2332:2, 8.)

They have each engaged in drug sales in the Tenderloin. (8 AA 2331:13-17, 22-26; 2332:2-6, 8-18.) And they have all violated stay-away orders issued by criminal court judges prohibiting them from entering into areas smaller than the People's proposed Tenderloin Drug Abatement Area. (1 AA 300-301, 305-306; 2 AA 404-409, 413; 3 AA 511-515; 4 AA 625-626; 6 AA 802:24-803:14, 851:27-853:17, 871:14-20, 896:16-22, 911:24-912:6, 913:21-914:2, 940:18-941:12, 1042:26-1043:18.) Respondents' activities in the Tenderloin, as found and summarized by the trial court, are as follows.

Respondent Guadaloupe Aguilar-Benegas was arrested on five separate occasions from May 2020 to February 2021 for selling drugs or possessing drugs for sale in the Tenderloin. Ms. Aguilar-Benegas was found in possession of suspected cocaine base, heroin, methamphetamine, cocaine salt, and fentanyl. For several of those arrests, she was found to be in violation of criminal court stay-away orders. (8 AA 2331:12-20.)

Similarly, Respondent Jarold Sanchez was also arrested on five separate occasions spanning the one-year period from February 2020 to February 2021 for dealing drugs in the Tenderloin. On one of those occasions, Mr. Sanchez sold suspected methamphetamine to an undercover police officer. Collectively, Mr. Sanchez was found to be in possession of suspected methamphetamine, cocaine salt, cocaine base, heroin, and fentanyl. During some of those arrests, he was also booked for violating stay-away orders. (8 AA 2331:22-27.)

Respondent Victor Zelaya was arrested in the Tenderloin three times between July 24, 2019 to May 20, 2020 for selling illegal drugs or possessing them for sale. Those drugs included suspected cocaine powder, heroin, fentanyl, methamphetamine, and cocaine base. During at least one

of those arrests, Mr. Zelaya was in violation of a stay-away order. (8 AA 2332:2-6.)

Lastly, Respondent Christian Padilla-Martel has been arrested three times since May 2020 for both dealing drugs in the Tenderloin and violating a stay-away order. On these occasions, he was found to be in possession of large quantities of suspected fentanyl, cocaine salt, heroin, and methamphetamine. (8 AA 2332:8-20.)

The trial court found that the illegal drug dealing in the Tenderloin was a public nuisance, that Respondents "contributed to the overall public nuisance," and that given Respondents' "track record of recidivism as shown by repeated arrests, violations of court-issued stay-away orders, and criminal prosecutions, it is reasonable to infer that they are likely to continue their unlawful conduct in the future." (8 AA 2335:28-2336:3.) The trial court concluded, "Even under the clear and convincing standard of proof, this evidence is sufficient to establish at least a reasonable likelihood that the People will prevail on the merits of their nuisance claims against Defendant." (8 AA 2335:3-8, 2335:26-2336:5.) The trial court found the same as to the People's UCL claims. (8 AA 2337:8-9.)

PROCEDURAL HISTORY

On September 24, 2020, the People filed separate civil complaints against Respondents Christian Padilla-Martel, Victor Zelaya, Jarold Sanchez, and Guadaloupe Aguilar-Benegas. (1 AA 90-162.) Each complaint alleged public nuisance and UCL causes of action and sought declaratory relief, injunctive relief, UCL penalties, and costs. (1 AA 104-105, 122-123, 140-141, 159-160.) Each complaint also prayed for injunctive relief that would order Respondents to stay away from a

designated "Tenderloin Drug Abatement Area." (1 AA 100, 104:17-19, 118, 122:12-14; 136, 140:14-16, 154, 159:7-9.)

In addition to the four cases filed against Respondents, the People filed similar civil cases against 24 other individuals.[1] A notice of related cases was filed in each of these cases, although the cases were not consolidated. (1 AA 163-178.)

Respondents were served over the course of several months. (1 AA 179-187, 211-213.) Respondents and others obtained counsel, who continue to represent them on appeal.

Respondents Aguilar-Benegas and Sanchez filed demurrers and motions to strike. The trial court overruled the demurrers, ruling that the People had stated claims for public nuisance and UCL violations. (1 AA 191-194, 198-201.) The court also denied the motions to strike, which primarily targeted the People's requested relief. The trial court stated in its written order that it was "premature" to decide whether the People were entitled to a stay-away order from the Tenderloin, and it would await the presentation of evidence. (1 AA 188-190, 195-197.) Between February 8 and March 1, 2021, Respondents answered the complaints with a general denial and asserted several affirmative defenses. (1 AA 202-210, 214-221, 222-239.)

On March 10, 2021, the People filed a motion for a preliminary injunction against all four Respondents. (1 AA 240-267; 2 AA 344-371, 416-443; 3 AA 524-529; 4 AA 562-584.) The People's proposed injunction provided that Respondents stay away from the Tenderloin Drug Abatement

[1] Respondents' are the first cases to have reached the preliminary injunction stage, and this is why the other defendants are not parties to these appeals.

Area, with certain exceptions.[2] (7 AA 1090-1094.[3]) Each of the motions was supported by declarations describing the devastating effects that Respondents' nuisance and UCL activity has on the Tenderloin community. (4 AA 627-638, 5 AA 671-758, 6 AA 791-799.)[4]

The motions were also supported by evidence showing this public nuisance is widespread throughout the Tenderloin neighborhood. (5 AA 675:19-676:12, 680:19-24, 687; 5 AA 724:26-725:9, 728:7-729:12.) The proposed borders of the Tenderloin Drug Abatement Area were recommended by experienced police leaders as necessary given the size of the open-air drug market. The officers explained that, given the mobility of dealers and buyers, a more limited stay-away area would be ineffective, simply pushing the nuisance and UCL violations to a different street corner within the Tenderloin. (5 AA 675:5-18, 679:16-681:2, 685; 728:7-19.) Finally, each motion was supported by percipient witness declarations detailing each of the Respondents' participation in the illegal drug trade in the Tenderloin. (6 AA 800-1057.)

---

[2] The exceptions provided for in the proposed preliminary injunction are: (1) travel on underground public transportation (BART and Muni Metro), except no embarking or disembarking at Civic Center or Powell Street stations; (2) travel on public transportation along Van Ness Avenue, except no embarking or disembarking within the Tenderloin Drug Abatement Area; (3) use of the sidewalk on the south side of Turk Street from Polk Street to the Turk Street entrance of the federal court house for a scheduled appearance should the Golden Gate entrance be closed; and (4) pre-approved, stipulated travel into the Tenderloin Drug Abatement Area to conduct specified lawful business on a designated date and time. (7 AA 1093.)

[3] The proposed preliminary injunction that was filed by the People, but never entered by the trial court, was the same in each of the four motions for preliminary injunction with the exception of the caption that references the named defendant. For simplicity, only one copy is included and referenced.

[4] These declarations were filed in all four cases, and were identical in substance. By stipulation, Appellant's Appendix includes only one copy of each of them (with its accompanying exhibits). (8 AA 2692-2723.)

Respondents' oppositions argued that the People had not shown a likelihood of success on the merits and that the requested injunctive relief was statutorily and constitutionally impermissible. (7 AA 1095-1117, 1139-1161, 1183-1205, 1227-1249.) Respondents filed several declarations arguing that civil injunctions against drug dealers were undesirable as a matter of public policy, and that the injunctions against Respondents would not stop other drug dealers from dealing in the Tenderloin. (7 AA 1291-1400.) Along with this set of declarations, which was filed in each of the four cases,[5] each Respondent also submitted his or her own brief declaration. (7 AA 1270-1290.) None of the Respondents, however, contradicted the People's evidence of their drug dealing.

The trial court heard argument on all four motions in a single May 4, 2021 hearing (RT, May 4, 2021), and on May 14, 2021, issued a single 23-page order denying them. (8 AA 2327-2351.[6]) After finding by clear and convincing evidence[7] that the People were likely to prevail on the merits of their claims (8 AA 2330:8-9), the court nonetheless ruled that the requested injunction was unavailable under the nuisance and UCL statutes because the statutory language did not mention stay-away orders, and it did not appear that courts had previously entered such orders under those statutes. (8 AA 2338:7-2345:19.) It also ruled that the requested injunction would

[5] These declarations were identical in substance. By stipulation, Appellant's Appendix includes only one copy of each of them (with its accompanying exhibits). (8 AA 2692-2723.)

[6] The same court order was entered in all four cases with the same caption reflecting it applied to all four cases. For simplicity, only one copy is included and referenced.

[7] The trial court applied the "clear and convincing" standard of proof, which the People conceded applied here under *People v. Englebrecht* (2001) 88 Cal.App.4th 1236, 1256, because the requested injunction would prohibit "commonplace" and "everyday" activities—prohibitions that were lawful to impose but required a more exacting standard of proof.

violate Respondents' constitutional right to travel, because it was "not narrowly tailored so as to minimally infringe upon the protected interest." (8 AA 2345:26-27, quoting *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1128 [Kennard, J., concurring and dissenting] (*Gallo*).)

On June 6, 2021, the People filed timely notices of appeal in all four cases. (8 AA 2352-2363.) On the People's motion, this Court transferred and consolidated all four cases in Division Two, and subsequently granted the People's motion for calendar preference.

STATEMENT OF APPEALABILITY

An order denying a motion for a preliminary injunction is appealable. (Code Civ. Proc., § 904.1(a)(6); *Davenport v. Blue Cross of California* (1997) 52 Cal.App.4th 435, 445.)

STANDARD OF REVIEW

"Ordinarily, the trial court's grant or denial of a preliminary injunction is reviewed for abuse of discretion. [Citation.] However, where the ruling depends on the construction of a statute, it is to that extent reviewed de novo." (*Citizens for Better Streets v. Board of Supervisors* (2004) 117 Cal.App.4th 1, 6, citing *Garamendi v. Executive Life Ins. Co.* (1993) 17 Cal.App.4th 504, 512 (*Garamendi*).) "Findings of facts are reviewed for substantial evidence. Where the issue is whether the trial court correctly interpreted and applied statutory or constitutional law, we conduct an independent review." (*In re Pham* (2011) 195 Cal.App.4th 681, 685.)

Here, the Superior Court correctly found by clear and convincing evidence that Respondents were causing a public nuisance and violating the UCL in the Tenderloin. (8 AA 2335:3-8, 2335: 22-28, 2336:3-5, 2337:8-9.) But the court committed legal error when it then concluded that the requested relief was not authorized by the public nuisance and UCL

statutes, and would violate the constitutional right to travel. "The standard of review is not whether discretion was appropriately exercised, but whether the statute was correctly construed." (*Garamendi, supra*, 17 Cal.App.4th at p. 512.) On these legal issues, review is de novo.

ARGUMENT

I. The public nuisance and UCL statutes authorize the trial court to impose the injunctions sought by the People.

The trial court concluded that the People were likely to prevail on the merits of their nuisance and UCL claims. (8 AA 2335:3-2337:9.) Nevertheless, the trial court denied relief because it construed these statutes not to authorize a stay-away order as an abatement tool. (8 AA 2338:9-12.) That was legal error.

A. Courts have broad abatement power under public nuisance law.

The court found Respondents likely to be liable under the general public nuisance statutes. (8 AA 2335:3-8, 22-28, 2336:3-5, 2336:20-2337:7.) Those statutes provide in relevant part: "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, …so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any…street, or highway, is a nuisance." (Civ. Code, § 3479.) "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons…" (Civ. Code, § 3480.)

The decisions construing these and other public nuisance statutes have consistently held that a court of equity's authority to issue a nuisance abatement order is broad and flexible. Nothing in the caselaw suggests that this authority does not include issuing an order that a nuisance creator stay

away from the place where they are causing a nuisance, particularly where no lesser measures are likely to abate the nuisance.

The Civil Code authorizes three remedies for public nuisance: "(1) indictment or information, (2) civil action, or (3) abatement." (Civ. Code, § 3491.) Abatement of a nuisance by a court of equity "is accomplished… by means of an injunction proper and suitable to the facts of each case." (*People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51, 132 (*ConAgra*), quoting *Sullivan v. Royer* (1887) 72 Cal. 248, 249.)

Historically, caselaw has upheld courts' "broad discretion to fashion an appropriate abatement injunction" to remedy a public nuisance. (*ConAgra, supra*, 17 Cal.App.5th 51 at p. 134.) Courts have recognized that abatement can take many forms and have upheld a variety of injunctions and orders tailored to the facts and issues in specific cases. In some cases, the injunction has taken the form of an order to fund abatement activities targeted at addressing the nuisance. As an example, the Court of Appeal upheld a trial court's order that defendants prefund a $1.15 billion abatement fund to be distributed on behalf of the People in ten jurisdictions over the course of four years to remedy the lead paint nuisance. (*Id.* at pp. 131-132.)

A court abating a nuisance caused by an unlawful business can order that the business close entirely, particularly where the business's activity is a nuisance per se (like drug dealing is under Civil Code section 3479). For example, in *People ex rel. Feuer v. FXS Management, Inc.* (2016) 2 Cal.App.5th 1154, 1158, 1161-1162, the Court of Appeal upheld a trial court's order closing an unpermitted medical marijuana business.

In other cases where previously-imposed orders have proved insufficient, courts have upheld abatement orders that do more than tell a

recalcitrant defendant to stop violating the law. For example, in *Golden Gate Water Ski Club v. County of Contra Costa* (2008) 165 Cal.App.4th 249, 265-266, the court held that where a property owner had refused to comply with county orders to abate the nuisance created by its unpermitted residential and dock complex, the county was entitled to accomplish abatement by demolition of all of the structures at the site. (See also, e.g., *People v. Wheeler* (1973) 30 Cal.App.3d 282, 295-296 [court order requiring the demolition of structures after the owner had the opportunity to either bring them up to code or demolish them]; *San Diego County v. Carlstrom* (1961) 196 Cal.App.2d 485, 493 [court order requiring removal of nuisance structures was permissible given repeated failures to abate the nuisance].)

Indeed, the public nuisance statutes themselves provide for more expansive remedies than an order to stop. Section 3495 authorizes the removal of the source of the public nuisance. (Civ. Code, § 3495.) Other nuisance statutes recognize exclusion from a building as a proper tool for abatement. (See Pen. Code, § 11230(a)(1); Health & Saf. Code, § 11573.5(b) [permitting a one-year closure of a property where the nuisance activity occurs].) In *People ex rel. Hicks v. Sarong Gals* (1974) 42 Cal.App.3d 556, 563 (*Sarong Gals*), the Court of Appeal upheld an order under the Red Light Abatement Law nuisance statute, which excluded nuisance creators from the property where they were creating the nuisance. It is self-evident that prohibiting a defendant from going to the place where they are creating nuisance conditions has a clear remedial purpose. In a related context, the Oregon Supreme Court upheld a City of Portland ordinance that prohibited persons arrested for certain prostitution-related offenses from entering three Prostitution Free Zones (PFZ), stating "it is

evident that the geographical designs of the PFZs are linked closely to the remedial purpose of inhibiting prostitution in areas that have become centers of prostitution activity." (*State v. Lhasawa* (Ore. 2002) 334 Or. 543, 554.)

Where, as here, a public nuisance is also a crime, our Supreme Court has expressly recognized a *civil* trial court's power to issue an appropriate injunction to prevent *future* nuisance activity. (*Gallo, supra,* 14 Cal.4th at p. 1108-1109 [civil gang injunctions].) By contrast, a *criminal* court's power stems from its authority to punish *past* misconduct. Once the nuisance creator has served the sentence pronounced, the criminal court is powerless to issue any orders for the prevention of future misconduct. But a court of equity has jurisdiction prospectively to remedy a public nuisance that is also a crime to vindicate the community's collective rights and interests. (*Ibid.*) "[A] principal office of the centuries-old doctrine of 'public nuisance' has been the maintenance of public order – tranquility, security and protection – *when the criminal law proves inadequate*." (*Id.* at p. 1103, emphasis added.) California has long recognized that when activity is both a crime and a public nuisance, a civil court of equity can more effectively achieve abatement than a criminal court:

> [T]he fact that the act of maintaining the nuisance is itself a crime, which would, if it were not in and of itself already one, class it as a nuisance *per se*, furnishes the most forcible reason for authorizing the interposition of equity, to the end that its suppression may speedily and *effectually* be accomplished—a result which experience has demonstrated may not be expected from the courts of criminal jurisdiction, whose proceedings, more from the system itself than from the course of the ministers of the law in conducting those tribunals, are too often characterized by delays and mistrials, and whose judgments involve only the imposition of mere penalties without, as is more frequently true than not, having the effect of permanently abating the nuisance itself.

(*People ex rel. Bradford v. Barbiere* (1917) 33 Cal.App. 770, 776.)

California's public nuisance law contemplates intentionally broad injunctive and abatement remedies to permit and encourage courts to tailor injunctions to the specific circumstances of each case. There is no support in caselaw or statute to exclude the equitable remedy of an exclusion order against a recidivist who predictably returns to the same location to perpetuate a nuisance that harms the local community.

B. The Unfair Competition Law confers broad injunctive power on courts to address unlawful business practices.

As with public nuisance law, the trial court also found Respondents likely to be liable under the Unfair Competition Law, Business and Professions Code sections 17200 *et seq.* (UCL). (8 AA 2337:8-9.) And like the public nuisance statutes, the UCL is consciously broad in its application and in its injunctive remedies. Nothing in the UCL or the caselaw construing it suggests that courts lack authority to issue a stay-away order where such a tool is appropriate to prevent UCL violations.

The UCL prohibits any unlawful, unfair, or fraudulent business act "that can properly be called a business practice and that at the same time is forbidden by law." (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 113 (*Barquis*).) "By proscribing 'any unlawful' business practice, 'Section 17200 "borrows" violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, 180 (*Cel-Tech*), quoting *State Farm Fire & Cas. Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, 1103.) This includes "borrowing" criminal law violations to establish UCL liability. (*People v. E.W.A.P. Inc.* (1980) 106 Cal.App.3d 315, 320.) Accordingly, the UCL

reaches the illegal sale of controlled substances. (*People ex rel. Trutanich v. Joseph* (2012) 204 Cal.App.4th 1512, 1525.)

And just as with public nuisance law, the remedial injunctive relief section of the UCL sweeps broadly. Section 17203 of the UCL provides that "[t]he court may make such orders or judgments…, *as may be necessary to prevent the use or employment by a person* of any practice which constitutes unfair competition…" (Bus. & Prof. Code, § 17203, emphasis added.) This includes the power to enjoin unlawful conduct that is also a crime, as provided by other sections of the UCL. (*Id.*, §§ 17202, 17205.)[8] Courts have held that section 17203 confers upon courts "extraordinarily broad," "sweeping," "wide and diversified" power to impose relief that is designed to protect the public. (*Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 540 (*Hewlett*); *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy* (1992) 4 Cal.App.4th 963, 973 (*Alta-Dena*); *Barquis, supra*, 7 Cal.3d at pp. 111-112.) "[S]ection 17203 authorizes the court to fashion remedies to prevent, deter, and compensate for unfair business practices." (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 176; see also *People ex rel. Harris v. Aguayo* (2017) 11 Cal.App.5th 1150, 1178-1179 (*Aguayo*).)

And this injunctive power is deliberately undefined. (*Barquis, supra*, 7 Cal.3d at pp. 111-112; accord *American Philatelic Soc. v. Claibourne* (1935) 3 Cal.2d 689, 698-699 (*Claibourne*).) Injunctive relief under section 17203 "may be as wide and diversified as the means employed in perpetuation of the wrongdoing." (*Hewlett, supra*, 54 Cal.App.4th at p. 540,

[8] Thus, contrary to the trial court (8 AA 2343, fn.7), the chance that a criminal court might eventually issue a stay-away order against a UCL violator, upon conviction of a crime and placement on probation, in no way reduces a civil court's power to issue orders to prevent future violations.

quoting *People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 536, abrogated on other grounds by *Cel-Tech, supra*, 20 Cal.4th at pp. 184-185.) "[I]t would be impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited [citations], since unfair or fraudulent business practices run the gamut of human ingenuity and chicanery." (*Cel-Tech*, *supra*, 20 Cal.4th at p. 181, quoting *People ex rel. Mosk v. National Research Co. of Cal.* (1962) 201 Cal.App.2d 765, 772.)

UCL injunctive relief is not limited to disallowing unlawful activities. Rather, a court may make further orders that will prevent the violator from engaging in the same unlawful activities in the future. "An 'order which commands [a party] only to go and sin no more simply allows every violator a free bite at the apple.'" (*Hewlett, supra*, 54 Cal.App.4th at p. 540, quoting *Alta-Dena, supra*, 4 Cal.App.4th at p. 973.) In *Hewlett*, the defendant ski resort had flagrantly violated planning department and permit requirements in removing trees and developing trails. In response to the resort's "cavalier" approach and "disregard" for the law, the trial court concluded it should impose a flat-out ban on any development in a portion of the ski resort, and a ban on the resort removing any trees, even hazard trees, without express advance permission. The Court of Appeal upheld these prohibitions on otherwise lawful activity, because they were necessary to prevent further unlawful activity. (*Id.* at pp. 540-543.) Likewise, in *Alta-Dena*, the court required the dairy to print the dangers associated with raw milk on its packaging and in its advertisements, even though such warnings were not otherwise required by law. (*Alta-Dena, supra*, 4 Cal.App.4th at pp. 972-973.)

And a UCL injunction may also prevent future violations by excluding the violator from the scene of their earlier violations and victims. For example, after a landlord violated the UCL by repeatedly and constantly harassing his tenants, he was ordered to stay away from his rental units while unsupervised, whether occupied or vacant, for five years. (*People ex rel. City of Santa Monica v. Gabriel* (2010) 186 Cal.App.4th 882, 886-888.)

As the above cases illustrate, the remedial injunctive powers that spring from the UCL are intended to be broad and wide-ranging. It would be inconsistent with this caselaw to read the UCL to preclude the use of a stay-away order to prevent violations when the facts warrant such relief. "There is a maxim as old as law that there can be no right without a remedy, and in searching for a precise precedent, an equity court must not lose sight, not only of its power, but of its duty to arrive at a just solution of the problem." (*Barquis, supra*, 7 Cal.3d 94 at p. 112, quoting *Claibourne*, 3 Cal.2d at p. 699.)

C. The trial court erred in construing these statutes to exclude stay-away orders as potential equitable remedies.

Despite the settled law confirming a civil court's broad statutory authority to remedy public nuisances and violations of the UCL, the trial court concluded that an injunction ordering Respondents to stay away from the Tenderloin could not have reasonably been contemplated under the language of these statutes. Specifically, the trial court ruled that in public nuisance, "abatement is equivalent to an injunction against injurious *activity* or *conduct*—not removal of a person who is engaged in such conduct." (8 AA 2339:21-22, emphasis in original.) Similarly, the trial court ruled that the "purpose of injunctive relief under the UCL is to

prohibit unfair competitive *practices* or conduct—not to exclude the persons engaged in it." (8 AA 2340:11-12, emphasis in original.)

But the distinction drawn by the trial court is a false one. As illustrated by the caselaw discussed above, the plain language of the nuisance and UCL statutes do not on their face exclude particular remedies; such a reading would undermine and cramp the consciously broad equitable power conferred on courts to craft meaningful remedies tailored to these particular statutory violations. Nor does this distinction preclude injunctive relief affecting individuals' activities when they are the nuisance creators and perpetrators of the unlawful business practices. And this makes sense. Sometimes an order excluding the defendant from the place where the nuisance or unlawful conduct is committed is the most (or perhaps only) effective way to ensure that the defendant does not continue the nuisance affecting that place, or the unlawful conduct. And indeed, here the trial court found that the People's evidence established that Respondents were likely to continue returning to the Tenderloin to deal drugs there. (8 AA 2336:1-3.)

None of the cases relied on by the trial court held, or even suggested in dicta, that in circumstances like these a court of equity is powerless to grant relief by issuing a stay-away order to individuals who have demonstrated that they will return to a place to continue the same nuisance conduct. (8 AA 2339:16-2341:14.) The trial court relied on *Leider v. Lewis* (2017) 2 Cal.5th 1121, 1137 (*Leider*), for limits on the scope of injunctive relief to prevent criminal conduct, but that decision is inapposite. It construed Civil Code section 3369, which limits the scope of injunctive relief available in taxpayer suits like the *Leider* plaintiffs' suit. But section 3369 expressly does *not* limit the injunctive relief available in a "nuisance"

case *or* "as otherwise provided by law," such as a suit under the UCL (Civ. Code, § 3369) – as *Leider* itself recognized. (*Leider*, at p. 1135.) Here, where the People are proceeding under both nuisance law and the UCL, *Leider* does not apply. Regardless, nothing in *Leider* suggested that a nuisance creator could not be excluded. And *People v. Lim* (1941) 18 Cal.2d 872, 879-880, is similarly unavailing, as it simply upheld the Legislature's authority to declare the repetition of certain criminal acts to be a nuisance per se (which is precisely what the Legislature did here with drug dealing, Civ. Code, § 3479). It imposed no limits on a court's power to remedy such a nuisance. Similarly, the trial court cited *In re Englebrecht* (1998) 67 Cal.App.4th 486, 492, a gang injunction case, for the proposition that an injunction may address only nuisance activity. But that case, which upheld restrictions on associational activity in a particular neighborhood, supports the notion that a remedy going beyond the nuisance activity itself (and imposing restrictions on otherwise lawful activity in the public place where the nuisance consequences are most palpable) is *within* the court's statutory and equitable power. Also, while *Aguayo, supra*, 11 Cal.App.5th at pp. 1176-1178, did state that a court is empowered to enjoin conduct that causes a nuisance, it had no occasion to consider the abatement power that exists when the evidence shows that excluding the person from the area of the nuisance is the most effective way to ensure the conduct is not repeated there.

The trial court also cited *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144 (*Korea Supply*) for the proposition that the UCL's remedies are limited. (8 AA 2339:10-12.) But *Korea Supply* did not address a court's injunctive power under section 17203 to prevent future violations. Rather, this decision concerned the scope of a court's

separate power under section 17203's to issue orders for victim restitution; it merely held that this restitutionary power does not include ordering nonrestitutionary disgorgement of a defendant's gain. (*Korea Supply*, at p. 1144.) Again, nothing in *Korea Supply* suggested limits on injunctive power.

Finally, the trial court suggested that such preventative orders would be punitive here, citing *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997 (*Feitelberg*). But *Feitelberg* undermines the trial court's position. *Feitelberg* simply cautioned that "'the injunctive remedy should not be exercised in the absence of any evidence that the acts are likely to be repeated in the future,'" because then the only purpose left for such an injunction would be punitive. (*Feitelberg*, at p. 1012, quoting *Cisneros v. U.D. Registry, Inc.* (1995) 39 Cal.App.4th 548, 574.) But here, there is ample evidence of a likelihood the acts will be repeated; indeed, the trial court expressly found that given Respondents' "track record of recidivism as shown by repeated arrests, violations of court-issued stay-away orders, and criminal prosecutions, it is reasonable to infer that they are likely to continue their unlawful conduct in the future." (8 AA 2336:1-3.)

In short, none of these cases supports the trial court's view that section 17203 *withholds* the power to issue a stay-away order when that is an appropriate tool to prevent UCL violations. In fact, a stay-away order may be the only effective injunctive relief to stop a person who, despite previously issued court orders, continues to frequent the same open-air drug market to sell illegal drugs.

II. An order prohibiting Respondent drug dealers from coming into the Tenderloin Drug Abatement Area, with the exceptions proposed by the People, does not impermissibly burden Respondents' right to intrastate travel.

While not expressly stated in the California or United States constitutions, a constitutional right to intrastate travel has been recognized by California courts as protected by the due process clauses of the Fifth Amendment of the United States Constitution and article I, section 7 of the California Constitution. (*People v. Moran* (2016) 1 Cal.5th 398, 406, quoting *Tobe v. City of Santa Ana* (2014) 9 Cal.4th 1069, 1100 (*Tobe*).)[9] "Like all constitutional rights, the right to travel is subject to limits." (*Ibid.*)

In the probation context, courts have held that a court-ordered limitation on travel must be "reasonably necessary to further a legitimate governmental interest." (*People v. Smith* (2007) 152 Cal.App.4th 1245, 1250 (*Smith*).) As with other limitations on constitutional rights, restrictions should be "narrowly drawn to serve the important interests" (*ibid.*) and "specifically tailored" to the defendant. (*Ibid.*, quoting *In re Babak S.* (1993) 18 Cal.App.4th 1077, 1084, internal quotation marks omitted.)

The trial court declined to apply this test because "those cases arose under a different statute, Penal Code section 1203.1, and involved entirely different considerations." (8 AA 2341:16-17.) While those cases indeed arose under a different statute, they do not involve entirely different considerations. Most significantly, both types of cases involve constitutional review of court-ordered limitations on a defendant who has

[9] Similarly, the right to *inter*state travel is not expressly enumerated in the United States Constitution, but is recognized by the United States Supreme Court as emanating from the Fifth Amendment. (*Shapiro v. Thompson* (1969) 394 U.S. 618, 629, overruled on other grounds by *Edelman v. Jordan* (1974) 415 U.S. 651.) However, the United States Supreme Court declined to extend this federal right to movement that was purely *intra*state, like the movement in this case. (*Bray v. Alexandria Women's Health Clinic* (1993) 506 U.S. 263, 277.)

been found to have violated the law.[10] Additionally, there is overlap in the governmental interests being served by a court-ordered restriction. For example, *Smith* explained that a probation condition must, among other things, "protect public safety." (*Smith, supra,* 152 Cal.App.4th at p. 1249.) The injunction sought by the People here has the same aim. And another purpose justifying a restriction on constitutional rights in the probation context is "preventing future criminality." (*People v. Relkin* (2016) 6 Cal.App.5th 1188, 1195 (*Relkin*).) That purpose is remarkably similar to abating an ongoing nuisance and preventing future UCL violations that also happen to be crimes. Indeed, injunctions are the vehicles courts use to abate nuisances as well as to stop and prevent unlawful business practices, even when the underlying activity is also a crime. (*Aguayo, supra*, 11 Cal.App.5th at pp. 1178-79.)

Nevertheless, having rejected the right to travel test stated in the probation cases, the trial court ruled that the applicable legal test was that where "a constitutionally protected interest is at stake, 'the injunctive relief must be narrowly tailored so as to minimally infringe upon the protected interest.'" (8 AA 2345:26-28, quoting *Gallo, supra,* 14 Cal.4th at p. 1128 [Kennard, J., concurring and dissenting].) The trial court borrowed this formulation from the dissent in *Gallo,* a civil gang injunction case that did not involve a "right to travel" challenge, but rather a First Amendment

[10] The most common grist for right-to-travel challenges to court-ordered movement restrictions are cases involving court-ordered terms of criminal probation – and these are the cases that most frequently state and apply the relevant legal test. (E.g., *People v. Smith, supra,* 152 Cal.App.4th at p. 1250.) In civil cases, such challenges are relatively rare. (See, e.g., *People ex rel. Reisig v. Acuna* (2010) 182 Cal.App.4th 866, 891 [civil nuisance abatement injunction, with curfew provision that prohibited gang members' presence in certain areas during designated hours, did not violate any protected freedoms including the right to travel].)

challenge to association and speech limits. And for that First Amendment challenge, the California Supreme Court applied the test for injunctions affecting speech articulated in *Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753 (*Madsen*). (*Gallo, supra,* 14 Cal.4th at p. 1114.) The *Madsen* decision described this First Amendment test as something more than intermediate scrutiny but something less than the "strictest standard of scrutiny" applicable to content-based restrictions on speech. (*Madsen*, 512 U.S. at p. 762.)

In this right to travel case, the trial court should not have rejected a right to travel test in favor of a First Amendment test. But regardless, under either test, the trial court should have entered the People's proposed injunction. Even assuming that the trial court adopted the correct level of scrutiny, it failed to complete the analysis. While the trial court held that "[t]he People's proposed exclusion order fails [the trial court's] test" (8 AA 2345:28), it did not identify what less restrictive means it believed were available to abate the nuisance and prevent the unlawful conduct, or any lesser restriction on Respondents' movement in the Tenderloin that would be effective. And, as discussed below, the evidence submitted by the People expressly credited by the trial court established that no less restrictive injunction would abate the nuisance or prevent the unlawful conduct. Thus, under either the *Smith/Relkin* test or the *Gallo/Madsen* test, the People's proposed injunction passes constitutional muster.

A. Here, abating public nuisances and preventing UCL violations are legitimate governmental purposes that permit court-ordered limitations on a defendant's exercise of constitutional rights.

There is no question that abating public nuisances and preventing UCL violations are substantial governmental interests that may warrant the

issuance of remedial court orders that impose some burden on the exercise of constitutional rights.

"[T]he state's substantial interest in abating public nuisances" justifies injunctions that may interfere with a civil defendant's future exercise of constitutional rights. (*Sarong Gals, supra*, 42 Cal.App.3d at p. 563.) *Sarong Gals* concerned an abatement order that excluded the defendant business from its exotic dance facility where unlawful lewdness had occurred. The abatement order thus had the effect of preventing the defendant from presenting non-lewd dance shows, which enjoyed First Amendment protection. The court rejected the claim that the abatement order impermissibly infringed on constitutional rights, stating, "just as a court order for the incarceration of a convicted lawbreaker impinges on all sorts of constitutional rights, so does the abatement order." (*Id.*, at pp. 562-563.) Nuisance abatement was important enough to allow this impingement. Nuisance abatement "injunctions 'may work to deprive the enjoined parties of rights others enjoy precisely because the enjoined parties have abused those rights in the past." (*People ex rel. Gwinn v. Kothari* (2000) 83 Cal.App.4th 759, 766, quoting *People v. Conrad* (1997) 55 Cal.App.4th 896, 899, 902 [acknowledging the validity of a court order enjoining picketing activity by individuals who repeatedly harassed clinic staff and patients].)

Similarly, where, as here, a public nuisance has been established under Civil Code section 3480, an injunction may restrict First Amendment rights of speech and association on public streets, in service of the "overriding purpose" of nuisance abatement. (*Gallo, supra*, 14 Cal.4th at pp. 1110, 1121.) The right to familial association may also be limited. (*People v. Englebrecht* (2001) 88 Cal.App.4th 1236, 1263; see also *People*

ex rel. Totten v. Colonia Chiques (2007) 156 Cal.App.4th 31, 45-46.) A curfew provision that prohibited gang members' presence in certain areas during designated hours has been upheld against a right to travel challenge. (*People ex rel. Reisig v. Acuna* (2010) 182 Cal.App.4th 866, 891.)

These cases, authorizing courts to protect the public's rights to be free from nuisance – even if it means, following a proper showing of proof (like here), limiting the nuisance defendant's exercise of constitutional rights – reflect the principle that "[p]ublic nuisance law originated from the ancient maxim '*sic utere tuo ut alienum non laedes*,' 'which means 'one must so use his rights as not to infringe on the rights of others.'" (*In re Englebrecht, supra*, 67 Cal.App.4th at p. 492, quoting *CEEED v. California Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 306, 318.)

Like abating public nuisances, preventing future UCL violations is a substantial government interest justifying an injunction even when it impinges on protected constitutional rights. (*People v. Custom Craft Carpets, Inc.* (1984) 159 Cal.App.3d 676, 683.) Thus, a UCL violator proven to have engaged in deceptive advertising in the past may be subjected to an injunction that burdens even truthful future advertising, notwithstanding that truthful advertising enjoys First Amendment protection. (*Ibid.*)

Where a civil defendant is found to have violated the law, there is nothing unusual about an injunction limiting the exercise of constitutional rights. For example, in the antitrust arena, the United States Supreme Court has held that a civil antitrust defendant may, as a consequence of violating the law, be subject to an injunction restricting its First Amendment rights.

> While the resulting order may curtail the exercise of liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation. Just as an injunction

> against price fixing abridges the freedom of businessmen to talk to one another about prices, so too the injunction in this case must restrict the Society's range of expression on the ethics of competitive bidding.

(*National Soc. of Professional Engineers v. United States* (1978) 435 U.S. 679, 697.) Even where constitutional rights are at issue, a court is not limited to simply prohibiting the previous bad conduct. "While it goes beyond a simple proscription against the precise conduct previously pursued that is entirely appropriate." (*Ibid.*) Just as a criminal defendant who was found, after an adversarial proceeding with due process, to have violated public rights, can be subject to restrictions on their full exercise of constitutional rights, so may a civil defendant.

For all of these reasons, a civil injunction issued to abate a public nuisance or prevent a UCL violation may restrict the guilty defendant's exercise of constitutional rights, including the right to travel.

B. The proposed injunction against Respondents is narrowly drawn to serve the important interests of abating and preventing Respondents' public nuisance and UCL violations, and individually tailored not to interfere with Respondents' residence or lawful employment.

The People's proposed injunction passes the legal test for restrictions on freedom of movement under either the *Smith/Relkin* probation test or the *Gallo/Madsen* First Amendment test.

Beginning with the *Smith/Relkin* test, to be lawful a court-ordered restriction on movement must be "narrowly drawn to serve the important interests," and "specifically tailored" to the defendant. (*Smith, supra,* 152 Cal.App.4th at p. 1250, quoting *In re Babak S., supra,* 18 Cal.App.4th at p. 1084.) The phrase "narrowly drawn" means that there must be a "fit" between the scope and terms of the movement restrictions, and the governmental purpose which those specific restrictions are calculated to

accomplish. "'A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.'" (*Relkin, supra,* 6 Cal.App.5th at p. 1194 [evaluating limitations on the right to travel], quoting *In re Sheena K.* (2007) 40 Cal.4th 875, 890.) But the fit between the problem and the injunctive decree need not be perfect to pass constitutional muster. Thus, in *Relkin, supra,* 6 Cal.App.5th at p. 1194, the court held that a "condition's limitation on interstate travel is closely tailored to the purpose of monitoring defendant's travel to and from California not by barring his ability to travel altogether but by requiring that he first obtain written permission before doing so." Likewise, in another case a court rejected a right to travel challenge to conditions "requir[ing] Ramon to refrain from being present in known gang gathering areas of Barrio Pobre as directed by his probation officer," and held these limitations "are closely tailored to the goal of keeping a probationer out of gang activity, and therefore not facially unconstitutional." (*In re Ramon M.* (2009) 178 Cal.App.4th 665, 678, as modified (Oct. 30, 2009), disapproved of on other grounds by *In re G.C.* (2020) 8 Cal.5th 1119, 1133.) As reflected in these decisions, the test is akin to intermediate scrutiny, where "determining whether the regulation is not more extensive than 'necessary' … does not require the government to adopt the least restrictive means, but instead requires only a 'reasonable fit' between the government's purpose and the means chosen to achieve it." (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 952, as modified (May 22, 2002) [describing intermediate scrutiny applicable to government restrictions on commercial speech], citing *Board of Trustees, State Univ. of N.Y. v. Fox* (1989) 492 U.S. 469, 480.) The test is not one of strict scrutiny.

Turning to the *Gallo/Madsen* test, that is also not a strict scrutiny test, as noted above. (*Madsen, supra,* 512 U.S. at p. 762.) Instead, the Supreme Court described the inquiry as "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." (*Madsen*, 512 U.S. at p. 765.) And—substituting "movement" for "speech"—the fit need not be perfect here either. As the *Gallo* majority explained, injunctions involve the exercise of discretion to draw lines, and exactly where the line is drawn will inevitably be criticized. (*Gallo, supra,* 14 Cal.4th at p. 1122 [rejecting argument that some greater degree of association between gang members should have been allowed under public nuisance injunction, and recognizing "the kind of narrow yet irreducible arbitrariness that inheres in such line-drawing" by courts issuing injunctions]; see also *People v. Englebrecht, supra*, 88 Cal.App.4th at p. 1263 [applying *Gallo* to uphold limit on gang association even without a carve-out for familial association, because "[a]ny attempt to limit the familial associational impact of the injunction would make it a less effective device for dealing with the collective nature of gang activity"].)

As discussed below (*infra* Sections II.B.1., II.B.2., & II.C.), considering the relevant factors, the People's proposed injunction satisfies either test. But here, the trial court did not actually consider the relevant factors. Instead, the trial court ruled that any prohibition on presence in a particular area, rather than restriction on conduct, by definition was not tailored enough. In reaching this conclusion, the trial court failed to consider the "fit" between the proposed restriction, Respondents' misconduct, and the nuisance conditions in the Tenderloin community. Because the trial court ruled that any prohibition on presence would be unconstitutional, it failed to perform the necessary analysis.

Had it done so, it would have concluded that the proposed injunction was closely tailored to meet the governmental need, and met either test. In evaluating the injunction's terms, the trial court should have considered the governmental interest in abating the significant harm to the Tenderloin community that these injunctions are seeking to address, one defendant drug dealer at a time; how the area of the stay-away order is narrowly drawn to track the open-air drug market in the Tenderloin and its effects; and the ineffectiveness of less restrictive terms. The trial court also should not have disregarded the proposed exceptions to the injunction that provide a "safety valve" that would allow Respondents to enter the Tenderloin Drug Abatement Area for lawful purposes with preapproval. And it should not have ignored that the injunctions are tailored so as not to impinge on Respondents' most important interests protected by the right to travel, in that they do not force them to change their place of residence, prevent them from continuing lawful employment, or prevent them from reaching transit hubs.

1. The injunction is narrowly drawn, tracking the area dominated by public nuisance conditions and containing stay-away terms that are necessary given Respondents' recidivism and the failure of lesser measures to curb Respondents.

The proposed stay-away order is carefully calibrated to address the public nuisance and UCL violations in the Tenderloin for which Respondents are responsible. The violence, misery, filth, and overdoses that plague the sidewalks and streets of the Tenderloin have been amply described. There is a substantial, even compelling, governmental interest in abating this nuisance, which the trial court found by clear and convincing evidence Respondents are causing.

The terms of the People's proposed injunction are narrowly drawn to serve this substantial interest in abatement. The People are not seeking an order that Respondents stay out of the City and County of San Francisco, or even a large portion of the city. Rather, they are seeking an order that (with exceptions for lawful visits with pre-approval) Respondents stay out of the Tenderloin Drug Abatement Area – a single neighborhood. (5 AA 675:2-4, 683; 7 AA 1092:4-28.) And there is no dispute that the borders of this proposed area are tailored to match the scope of the open-air drug market that plagues this neighborhood. (4 AA 629:21-24, 633:14-15, 637:6-8; 5 AA 675:19-22, 689, 695:15-18, 718:10-11, 724:26-725:2, 726:13-15, 757:8-10; 6 AA 799:10-12.) The People presented evidence from police witnesses with extensive knowledge of the neighborhood and its narcotics activity, testifying as to the appropriateness of the designated area for the purposes of prevention and abatement. (5 AA 675:16-18, 675:27-676:3, 676:9-12, 687, 689, 724:6-7.) Its borders hew closely to the areas where drug dealing has been open and notorious. It also includes the spots where Respondents have been arrested or observed by law enforcement selling drugs. (6 AA 800-1057.) The borders encompass the areas where the public nuisance is pervasive – where community members live in fear amidst the drug trafficking and its deadly and dangerous effects. (4 AA 629:9-14 and 25-27, 630:1-14, 633:17-18, 633:26-634:8, 637:9-22, 638:3-10; 5 AA 676:17-25, 677: 8-18, 694:21-22, 695:11-14, 702:9-22, 703:7-10, 718:11-16, 719:1-10, 725:10-16, 726:23-727:16, 735:24-736:1, 757:15-25, 758:10-12; 6 AA 799:1-9.) Additionally, the People presented evidence that the mobility of street drug dealers allows Respondents and their customers to easily relocate to different parts of the Tenderloin's open-air drug market. (5 AA 679:16-680:2, 725:1-5, 728:7-19.) Therefore, a stay-away order

covering a block, or two, or three would be ineffective to abate and prevent Respondents from harming other nearby areas of the Tenderloin. Indeed, the trial court itself found that this problem "affects the entire Tenderloin neighborhood." (8 AA 2335:22-26.) It would be ineffective to issue an injunction that does not protect the entire Tenderloin neighborhood.

Indeed, Respondents themselves have not been stopped by stay-away orders of lesser scope. (1 AA 300-301, 305-306; 2 AA 404-409, 413; 3 AA 511-515; 4 AA 625-626; 6 AA 802:24-803:14, 851:27-853:17, 871:14-20, 896:16-22, 911:24-912:6, 913:21-914:2, 940:18-941:12, 1042:26-1043:18.) They have been undeterred by the police presence, buy-bust arrests, and even the prospect of criminal prosecution. (1 AA 302-304, 307-311; 2 AA 405-407, 410-411, 414-415; 3 AA 509-514, 516-517, 521-523; 4 AA 611-612, 614-616, 618-619, 622-624, 5 AA 677:19-678:2; 6 AA 940:18-27, 949:16-950:4.) As detailed in the Declarations of Captain Fabbri and Officer Montero, a broader stay-away order would be easier for police officers to enforce and would prevent Respondents from simply moving from place to place within the Tenderloin. (5 AA 679:16-680:2, 725:1-5, 728:7-19.) If nothing changes, Respondents are likely to continue this harmful course of conduct in the Tenderloin. The trial court found as much, by clear and convincing evidence. (8 AA 2336:3-5, 2337:8-9.)

2. The People's proposed injunction is individually tailored to avoid forcing Respondents to change their residency or lawful employment, and the injunction includes carve-outs and exceptions that preserve its constitutionality.

As noted above, part of the test for a restriction on a defendant's movement is whether it is specifically tailored to account for a defendant's particular needs. (*Smith*, *supra*, 152 Cal.App.4th at p. 1250.) The most common reason why restrictions fail this test is that they force a defendant

to leave their home or prevent them from keeping their lawful employment. (See, e.g., *id.* at pp. 1252-1253; *People v. Beach* (1983) 147 Cal.App.3d 612, 620; *In re White* (1979) 97 Cal.App.3d 141, 144 (*White*).)

Here, however, the Respondents are not being forced to leave their home or prevented from keeping their lawful employment. Respondents neither live in the Tenderloin nor have lawful employment there. Rather, they live in Oakland and commute into the Tenderloin for the purpose of selling illicit drugs on the public streets and sidewalks, and are likely to continue to do so, as the trial court found. (6 AA 823:6-9, 884:19-20, 911:20-23, 953-955, 1044:3; 8 AA 2331:13, 22; 2332:2, 8.)

As for other matters that might call for tailoring, here there was an adversarial proceeding where Respondents had the opportunity to submit credible proof of hardships that might arise from the requested stay-away orders. (7 AA 1095-1482; 8 AA 1515-1718; RT (May 4, 2021).) The four Respondents attested to a vague desire to seek services in the Tenderloin, but no evidence was presented that any had actually engaged such services. (7 AA 1270-1290.)[11] Nor was any evidence presented that services were unavailable to them in Alameda County or elsewhere in the Bay Area or San Francisco. (*Ibid.*) However, the trial court failed to consider whether this evidence warranted further tailoring of the injunction because it held that any "mere presence" restriction was unconstitutional.

[11] Other than that, only Respondent Zelaya presented evidence of potential hardship, in the form of testimony that he has non-custodial children living somewhere in the Tenderloin with their grandmother; however, no information was provided as to the nature, frequency, or terms of his visits with them. (7 AA 1288:12-25, 1289:13-15; 8 AA 2070:20-2071:8.) With more information, the People could propose a carve-out for bona fide lawful visits with his children, with appropriate provisions to ensure that claimed visits were not abused as a pretext for Zelaya to sell drugs. But, because the trial court erroneously denied the requested injunctions as a matter of law, it never reached this question.

The proposed injunction provides for individual tailoring. In furtherance of individual flexibility, the injunction provides for pre-approved, stipulated trips to the Tenderloin Drug Abatement Area for Respondents to conduct specified lawful business on a designated date and time. (7 AA 1093:10-13.) Courts have upheld travel restrictions that prohibit travel to areas much larger than the Tenderloin neighborhood when such "safety valves" are available. (*In re Antonio R.* (2000) 78 Cal.App.4th 937, 942 [constitutional to bar travel to Los Angeles County without parental or probation officer permission]; *Relkin, supra*, 6 Cal.App.5th at p. 1194 [constitutional to forbid interstate travel without probation officer's permission]; *United States v. Watson* (9th Cir. 2009) 582 F.3d 974, 979, 985 [upholding a supervised release condition prohibiting entry into the City and County of San Francisco without prior approval].)

The People's proposed injunction also contains exceptions that maintain access to public transit through the Tenderloin Drug Abatement Area (7 AA 1093:1-6), and Respondents are not prevented from accessing regional transit hubs like the Transbay Terminal or Caltrain, which lie outside the area. (Cf. *White, supra*, 97 Cal.App.3d at pp. 147, 151 [noting importance of allowing some access to public transit].) The area is also drawn to avoid interfering with access to all San Francisco Superior Court buildings, the federal district court, and to City Hall. (7 AA 1092:5-27.)

Finally, if the factual circumstances changed such that an additional exception became necessary to preserve the constitutionality of the injunction, the trial court would have the power to modify the injunction. (Code Civ. Proc., § 533.)

C. A less restrictive injunction would fail to accomplish the objective of abating Respondents' illegal activity.

Because the trial court held that any restriction on Respondents' travel to the Tenderloin Drug Abatement Area would be unconstitutional, the trial court failed to consider the futility of less restrictive measures. Under either the right to travel standard or the trial court's heightened First Amendment standard, the People's proposed injunction passes constitutional muster.

The trial court erred when it did not consider, much less identify, a less restrictive injunction that it believed would be effective. (See, e.g., *Smith*, *supra*, 152 Cal.App.4th at p. 1252 [directing trial court to either modify the probation condition prohibiting out-of-county travel that prevented Smith from working to allow for such work, or eliminate the condition].) Had the trial court considered whether a less restrictive injunction would accomplish the People's objective, it would have found that the proposed injunction was the least restrictive option. For example, although the trial court faulted the People's proposed injunction for seeking to exclude the Respondents from the Tenderloin "at all times of the day and night" (8 AA 2345:11-12), in the same order it expressly found that the People established that drug dealing occurs in the Tenderloin "all day and night." (8 AA 2330:21-23.) Perplexingly, allowing Respondents to enter the Tenderloin Drug Abatement Area during particular hours of the day would be tantamount to designating certain hours in which they could engage in drug dealing. A less restrictive injunctive provision is not required where it would be ineffective to abate the nuisance even if it would lessen the impact on the asserted constitutional right. (*People v. Englebrecht*, *supra*, 88 Cal.App.4th at p. 1263.)

D. The remaining cases cited by the trial court are distinguishable.

1. Cases invalidating ordinances that automatically imposed stay-away orders upon drug arrestees do not control here, where the People are seeking individualized court orders issued in an adversarial proceeding with full due process protections.

The trial court's constitutional analysis relied heavily on *Johnson v. City of Cincinnati* (6th Cir. 2002) 310 F.3d 484 (*Johnson*). (8 AA 2347:18-2349:12.) The *Johnson* decision involved a constitutional challenge to a Cincinnati ordinance providing that individuals arrested on drug charges in any one of several designated drug exclusion zones would automatically be subject to a 90-day stay-away order from all such zones. While the ordinance allowed for certain enumerated exceptions if a person already lawfully worked or resided in a zone, it did not allow for any individualized consideration of other compelling needs. It "(1) automatically applie[d] to persons arrested or convicted without any individualized consideration, let alone consideration by a neutral arbiter, and (2) [did] not require any particularized finding that the arrested or convicted individual is likely to repeat his or her drug crime" in the exclusion area. (*Johnson*, at p. 503.) Applying strict scrutiny to the ordinance, the court held it was unconstitutional because it did not use the least restrictive means to accomplish the compelling governmental interest of fighting drug dealing. And the ordinance violated due process because its restrictions flowed from an arrest alone; it had no mechanism for considering individual needs or the likelihood that an individual would continue to sell drugs in the exclusion area. (*Id.* at pp. 503-504.)[12]

[12] The trial court also cited *State v. Burnett* (Ohio 2001) 755 N.E.2d 875, which considered the same Cincinnati ordinance, and reached the same result as *Johnson*.

Johnson does not control here, for at least two reasons.

First, a court-ordered injunction here, unlike the ordinance in *Johnson*, can be tailored to balance any compelling needs demonstrated by Respondents. Respondents have a full opportunity to present any relevant concerns for the trial court to consider. The People's proposed injunction provides additional flexibility by building in an exception allowing Respondents to travel to the Tenderloin by permission. And Respondents would always have the ability to move to amend or modify the injunction based on changed circumstances.

Second, in *Johnson*, the travel restriction under the ordinance was triggered by a mere arrest; no adversary proceeding occurred to establish that the arrestee indeed sold drugs or would do so again in the restricted area. Here, by contrast, in an adversarial proceeding the People established all of these facts about the Respondents by clear and convincing evidence.

Indeed, the *Johnson* court acknowledged that even severe restrictions on an individual's constitutional rights can be permitted when the government proves the necessary facts about the individual in an adversarial proceeding. The court contrasted the deficient Cincinnati ordinance with the Bail Reform Act, which the United States Supreme Court upheld in *United States v. Salerno* (1987) 481 U.S. 739, 751. In *Salerno*, the Supreme Court held constitutional the Act's provision that, upon a showing by clear and convincing evidence that an arrestee is dangerous, an arrestee may be detained without bail. Even a "strong interest in liberty" can be infringed "where the government's interest is sufficiently weighty … to the greater needs of society." (*Id.* at pp. 750-751.) In *Johnson*, the absence of that adversary proceeding and individualized proof made all the difference. But here, both of those things are present.

2. *In re White* does not control here.

The trial court also relied heavily on *In re White*, *supra*, 97 Cal.App.3d 141, finding it authority for the proposition that a neighborhood-wide stay-away order could not constitutionally be issued in a criminal or a civil case. (8 AA 2347:3-15.)

White was convicted of prostitution, and as a term of her probation the trial court prohibited her from being present at any time in three different map areas within the city of Fresno where prostitution was frequent. (*White, supra*, 97 Cal.App.3d at pp. 143-44.) These probation terms were ordered notwithstanding White informing the trial court that she resided in an exclusion area, whereupon she was given three weeks to move out. (*Id.* at p. 144.) Furthermore, White routinely conducted her everyday activities in the restricted area. (*Ibid*.) The Court of Appeal held that imposing these conditions on White violated her right to travel, because they were not tailored to White's personal needs. And no showing had been made that barring White from an area would further the government interest in preventing future crime "except possibly in that particular area." (*Id.* at p. 147.) Finally, the 24-hour-a-day prohibition was not a good fit for preventing prostitution, which the court identified as being "more prevalent in the later hours of the day." (*Ibid.*) The Court of Appeal remanded, explaining that it was appropriate to revise these limitations on travel so they were better tailored to rehabilitation and the prevention of future criminality, and could pass constitutional muster. (*Id.* at p. 151.)

White is distinguishable, for at least four reasons.

First, none of the Respondents lives in the Tenderloin. Unlike White, Respondents are not proposed to be enjoined from where they live or their home communities, where they remain free to conduct lawful business.

Later Court of Appeal decisions distinguished *White* on these grounds, and even approved a much broader geographical restriction on travel that did not force a defendant to change residency. (E.g., *In re Antonio R.* (2000) 78 Cal.App.4th 937, 942 [upholding a restriction on traveling to Los Angeles County without permission, and distinguishing *White* and other decisions as cases "where the probationers were effectively banished from their homes"].)

Second, the governmental interests in *White* and the interests here are not identical. The governmental interest in *White* was White's rehabilitation and preventing her future criminality. A place-based restriction only tangentially served those goals, because they did not stop White from engaging in prostitution elsewhere. Here, by contrast, the People's interest is in abating Respondents' nuisance that bedevils a specific place – the Tenderloin. Barring Respondents from the Tenderloin (subject to the exceptions already allowed) keeps them from perpetuating a nuisance there. Indeed, the *White* court allowed that a stay-away order from a particular area was appropriate to reduce crime in that area. (*Id.* at p. 147.)

Third, while the 24-hour restriction on White's movement was not tailored to the fact that prostitution occurs mostly later in the day (*White, supra*, 97 Cal.App.3d at p. 147), here a 24-hour restriction is properly tailored to the problem. As noted above, the trial court found drug dealing occurs "all day and night" throughout the "entire Tenderloin neighborhood." (8 AA 2330:16-2331:4; 2335:4-6, 22-26.)

Fourth, the People's proposed preliminary injunction builds in safeguards and modifications like those recommended in *White*, 97 Cal.App.3d at p. 151, such as allowing the use of public transit to travel

through the Tenderloin, and providing for trips for lawful purposes by permission. (7 AA 1093:1-26.)

3. Cases involving "banishment" are not applicable here, where the People are requesting an order that Respondents stay out of a single neighborhood where they do not live.

The trial court found that the proposed injunction was tantamount to banishment – a punishment that requires its subject to leave the political unit where they currently live. (See *People v. Blakeman* (1959) 170 Cal.App.2d 596, 597; *In re Scarborough* (1946) 76 Cal.App.2d 648, 649.) The trial court expressed concern that "in California even a criminal court 'does not have [the] power' to 'banish' a defendant." (8 AA 2344:6-7.) The trial court went on to conclude that, "[i]f a court cannot enter such an exclusion order as a condition of probation following a criminal conviction, it certainly cannot do so in the guise of a civil injunction." (8 AA 2344:13-14.)

Yet the trial court's analogy between the stay-away order requested by the People and "banishment" does not hold. The People are not seeking an injunction that would require Respondents to leave the place where they live. Moreover, "[n]o court in this state has held that exclusion from a part of a political subdivision, such as a county constitutes banishment.… Does exclusion from a part of the community equal banishment? We conclude the answer is 'no.'" (*In re Pham, supra,* 195 Cal.App.4th at p. 688 [considering impact of residency restrictions on sex offenders].) A stay-away order from a neighborhood is not "banishment," especially when its subject does not live there.

Further, cases cited in *In re Pham* reached similar conclusions regarding the actual definition of "banishment." For example, in *State v.*

Lhasawa, supra, 334 Or. 543, the Oregon Supreme Court rejected the defendant's analogy between banishment and a civil exclusion ordinance which prohibited people who were arrested for certain crimes from entering established prostitution free zones, because "banishment traditionally meant exclusion from a sovereign's entire territory for life or a significant period of time. The exclusion at issue here, in contrast, pertains for a limited period of time to a limited part of the city's area." (*Id.* at p. 551.)

The People are not seeking to banish Respondents. Rather, the People are seeking an order that will effectively, narrowly, and meaningfully abate the nuisance Respondents have created in the Tenderloin. The purpose of the People's injunction is not to punish Respondents; it is to protect the Tenderloin community from Respondents.

Respondents have ignored existing legal prohibitions on drug dealing in the Tenderloin, and they are causing great harm to the Tenderloin community. The trial court found that they have done so, and will continue to do so. Respondents' failure to heed lesser restrictions on their nuisance and UCL violations has made it necessary to impose the greater restriction sought by the People. Having created this necessity, Respondents should not be heard to complain that it would violate their constitutional rights. The right to travel does not foreclose a stay-away order from a community where Respondents neither live nor lawfully work, but are instead harming. As our Supreme Court explained in *Gallo*,

> To hold that the liberty of the peaceful, industrious residents… must be forfeited to preserve the illusion of freedom for those whose ill conduct is deleterious to the community as a whole is to ignore half the political promise of the Constitution and the whole of its sense.

(*Gallo*, *supra*, 14 Cal.4th at p. 1125.)

CONCLUSION

This Court should reverse the trial court's order with instructions to enter the requested preliminary injunctions as to Respondents Aguilar-Benegas, Padilla-Martel, and Sanchez; and to enter the preliminary injunction as to Respondent Zelaya with a modification allowing visits to his noncustodial children on appropriate terms consistent with the purpose of the injunction. Alternatively, this Court should remand so that the trial court can apply the correct legal standards to the People's requested relief.

Dated August 12, 2021

DENNIS J. HERRERA
City Attorney
HOLLY D. COULEHAN
Deputy City Attorney

By: /s/ Holly D. Coulelan
HOLLY D. COULEHAN
Attorneys for Plaintiff and Appellant
PEOPLE OF THE STATE OF CALIFORNIA

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 11,798 words.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on August 12, 2021.

DENNIS J. HERRERA
City Attorney
HOLLY D. COULEHAN
Deputy City Attorney

By: /s/ Holly D. Coulehan
HOLLY D. COULEHAN
Attorneys for Plaintiff and Appellant
PEOPLE OF THE STATE OF CALIFORNIA

PROOF OF SERVICE

I, MORRIS ALLEN, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Sixth Floor, San Francisco, CA 94102.

On August 12, 2021, I served the following document(s):

APPELLANT'S OPENING BRIEF

on the following persons at the locations specified:

Edward W. Swanson, Esq.
Carly Bittman, Esq.
Swanson & McNamara LLP
300 Montgomery Street, Suite 1100
San Francisco, CA 94101
Tel: 415-477-3800
Fax: 415-477-9010
ed@smllp.law
Carly@smllp.law
Via TrueFiling

David F. Gross, Esq.
Robert Nolan, Esq.
Mandy Chan, Esq.
Katherine Thoreson, Esq.
DLA Piper LLC (US)
555 Mission Street, Suite 2400
San Francisco, CA 94105-2933
Tel: 415-836-2500
Fax: 415-836-2501
david.gross@dlapiper.com
robert.nolan@dlapiper.com
mandy.chan@dlapiper.com
katherine.thoreson@dlapiper.com
Via TrueFiling

Anne Decker, Esq.
Chessie Thacher, Esq.
American Civil Liberties Union
Foundation of Northern California
39 Drumm Street
San Francisco, CA 94111
Tel: 415-621-2493
Fax: 415-255-8437
adecker@aclunc.org
cthacher@aclunc.org
Via TrueFiling

Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Via U. S. Mail

Appellate Coordinator
Office of the Attorney General
Consumer Protection Section
300 S. Spring Street
Los Angeles, CA 90013-1230
Via U. S. Mail

San Francisco District Attorney's Office
350 Rhode Island Street
North Building, Suite 400N
San Francisco, CA 94103
Via U. S. Mail

Hon. Ethan P. Schulman
San Francisco Superior Court
400 McAllister Street, Dept. 302
San Francisco, CA 94102
Via U. S. Mail

in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☒ **BY ELECTRONIC MAIL:** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be served electronically through **TrueFiling** in portable document format ("PDF") Adobe Acrobat [include Transaction No. if POS filed separately].

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed August 12, 2021, at San Francisco, California.

MORRIS ALLEN