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1st Civil Nos. A162872, A162873, A162874, A162875

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION TWO

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff-Appellant,

v.

CHRISTIAN NOEL PADILLA-MARTEL,
Defendant-Respondent.

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff-Appellant,

v.

VICTOR ZELAYA,
Defendant-Respondent.

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff-Appellant,

v.

JAROLD SANCHEZ,
Defendant-Respondent.

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff-Appellant,

v.

GUADALOUPE AGUILAR-BENEGAS,
Defendant-Respondent.

Appeal from the Superior Court for San Francisco County
The Honorable Ethan P. Schulman
San Francisco County Superior Court Case Nos. CGC-20-586763, CGC-20-586761, CGC-20-586753, CGC-20-586732

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to Rule 8.208(e) of the California Rules of Court, Respondents certify that they know of no other person or entity that has a financial or other interest in the case.

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INTRODUCTION

The San Francisco City Attorney ("City Attorney") asks this Court to condone an extraordinary order that no court in California has ever approved. Relying on stale allegations about low-level drug-related offenses, the City Attorney contends that Respondents should be excluded indefinitely from a roughly 50-square-block area in San Francisco's Tenderloin neighborhood at any time and for almost any purpose based on the theory that Respondents have violated California's public nuisance statutes and Unfair Competition Law. The exclusion order that the City Attorney seeks is not only unprecedented, it is also statutorily unauthorized and unconstitutional.

As the trial court correctly held, the statutes relied upon by the City Attorney authorize the regulation of a person's ***conduct***, not the outright exclusion of their presence. (8 AA2340:7-12, 2341:11-14.) This Court should affirm the trial court's conclusion that the relief sought by the City Attorney is "both statutorily and constitutionally impermissible." (8 AA2330:13.) This Court should also give deference to the trial court's finding that the proposed injunction violates Respondents' fundamental right to intrastate travel and is, by "no stretch of the imagination," narrowly tailored. (8 AA2346:25-26.)

Were this Court to reverse the trial court's order, it would hand the City Attorney the power to exclude any number of disfavored groups simply because it views them as a nuisance. The law does not grant the City Attorney such a potent tool of social control, nor should it. Moreover, the extreme relief sought by the City Attorney would not ameliorate the conditions of addiction and drug use gripping the Tenderloin. The City Attorney should not be permitted to override statutory language or constitutional safeguards in exchange for political expediency.

PROCEDURAL HISTORY

In September 2020, Appellant People of the State of California, by and through San Francisco City Attorney Dennis J. Herrera, filed nearly identical actions against 28 individuals arrested for low-level drug offenses in the Tenderloin.[1] (1 AA0090-178.) Each complaint asserts one cause of action under California's general public nuisance statutes, Civil Code sections 3479 and 3480, and one cause of action for violation of California's Unfair Competition Law ("UCL"), Business and Professions Code sections 17200 *et seq*.

The complaints all seek declaratory relief, civil penalties, and an injunction permanently barring these individuals from ever entering roughly 50 square blocks in San Francisco's Tenderloin neighborhood, an area with a circumference of over 2.6 miles and covering 221 acres. (1 AA0090-178; *see also* 8 AA2329:27-28.) The complaints also request a permanent injunction banning these individuals from "any area of the City and County of San Francisco where [he or she] has engaged in the illegal sale of controlled substances." (1 AA0090-178.)

The City Attorney served Respondents Jarold Sanchez and Guadaloupe Aguilar-Benegas with the summons and complaint in their respective cases in October 2020. (1 AA0179-184.) In December 2020, Mr. Sanchez and Ms. Aguilar-Benegas filed demurrers and motions to strike the complaints (1 AA0068-83), which the trial court rejected in January 2021 (1 AA0188-201). In denying the motions to strike, the trial

[1] The City Attorney describes the four cases on appeal here as the "first cases to have reached the preliminary injunction stage." (Appellant's Opening Brief ("AOB") at p. 16, fn. 1.) It is more accurate to state that these are the only cases being litigated. There is reason to believe that none of the other 24 cases will move past the pleading stage: the City Attorney is not actively pursuing three cases; it has failed to serve most of the other named individuals; one defendant is dead. (8 AA2445:1-19.)

court recognized that the City Attorney's requested injunctive relief raised "significant constitutional concerns," but concluded that "the scope of any sought injunction should be determined based upon a more fully developed record." (*Ibid.*) Mr. Sanchez and Ms. Aguilar-Benegas thereafter filed answers to the complaints. (1 AA0202-10, 231-39.)

The City Attorney served Respondent Christian Noel Padilla-Martel with a summons and complaint in December 2020 and served Respondent Victor Zelaya in January 2021. (1 AA0185-87, 211-13.) Mr. Padilla-Martel and Mr. Zelaya answered the complaints in February 2021.[2] (1 AA0214-22.)

In March 2021, nearly six months after filing these lawsuits alleging ongoing irreparable harm by Respondents, the City Attorney sought preliminary injunctive relief. (1 AA0240–3 AA0584.) The injunctions requested in all four cases were identical. Each sought to exclude Respondents from the same 50-square blocks identified in the complaints. (8 AA2329:10-13, 27-28.) Each also sought to subject any Respondent who violated the order to criminal proceedings, contempt proceedings, and enforcement under the Business and Professions Code. (8 AA2330:2-4.)

The proposed preliminary injunctions included a few limited exceptions—Respondents could take select routes of public transportation through the neighborhood (so long as they did not enter or exit public transportation in the Tenderloin); could conditionally use a block of Turk Street to access court appearances in the federal building; and could seek a "written and filed stipulation" from the City Attorney granting advance permission to enter the neighborhood for a scheduled visit. (8 AA2329:13-

[2] With assistance from the San Francisco Public Defender's Office, Respondents engaged undersigned *pro bono* counsel in these civil actions.

22.) Any such stipulation would, however, have to be printed and carried by Respondents at all times while in the area. (*Ibid.*)

The trial court denied the City Attorney's preliminary injunction motions in a consolidated order dated May 14, 2021.[3] (8 AA2327-51.) Although the trial court found that the City Attorney had shown a reasonable likelihood of prevailing on the merits of its public nuisance and UCL claims, the court concluded that the requested injunctions were "unsupported by California precedent" and "statutorily and constitutionally impermissible."[4] (8 AA2330:8-13.) The trial court explained that no California court had ever upheld an injunction excluding someone from an entire neighborhood under the public nuisance statutes or the UCL, and concluded that neither law "can reasonably be read to authorize such relief." (8 AA2338:14-24.) Even if these statutes did authorize such relief, the trial court ruled that the proposed exclusion of Respondents from the Tenderloin "would violate the constitutional right to intrastate travel, which is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 7 of the California Constitution." (8 AA2345:22-26.)

The City Attorney appealed (8 AA2352-63), and, in June 2021, the parties stipulated to consolidating these appeals. Respondents disagreed that the appeals were entitled to calendar preference, but agreed not to oppose the preference motion. Although this Court granted that motion, the City Attorney cast further doubt on the urgency of its request by failing to

[3] The trial court issued a consolidated order because these four cases "raise[] closely similar issues." (8 AA2329:25-27.) The cases have not been consolidated in the trial court.

[4] Respondents dispute that the City Attorney would be able to prevail on its claims on a fully developed record at trial.

timely file its Opening Brief in accord with the parties' stipulated briefing schedule.

STATEMENT OF FACTS

I. The Tenderloin Is a Historically Impoverished Area

The Tenderloin is a densely populated neighborhood in the center of San Francisco. (1 AA0093:27, 111:27, 129:25, 148:1.) Many community-based organizations and government-run programs provide critical services in the neighborhood, including those related to housing, substance abuse, job training, and food insecurity. (7 AA1344-47, 1357-59, 1363-64, 1392-94.)

While these vital resources help support those in need, they cannot meet all of the area's substantial challenges. (8 AA1734:11-16.) More than 10 percent of the Tenderloin's residents are unemployed, and more than one-third of its households survive on less than $15,000 per year. (8 AA1734:2-5.) The Tenderloin also has the highest number of unhoused residents in San Francisco. (8 AA1735:1-2.) For decades, poverty has contributed to significant health disparities in the neighborhood. (8 AA1734:6-10.) The COVID-19 pandemic's destabilization of both the economy and health care system has further exacerbated these issues. (8 AA1735:9-737:6.)

II. The Tenderloin's Lack of Resources Fuels Its Drug Crisis

The Tenderloin's drug crisis is a symptom of its complex and long-standing social and economic problems—which, to date, San Francisco's leadership has been unable to remedy. (5 AA0675:19-21; 7 AA1374:3-10.) Those who suffer from addiction and substance abuse often use drugs to cope with a lack of health care, stable housing, financial support, and community. (7 AA1341:4-17, 1383:22-28.) And those who sell drugs

often do so in order to survive because they also lack resources and support. (*Ibid.*)

Between 2019 and 2020, the San Francisco Police Department ("SFPD") made over 1,200 drug-related arrests of nearly 800 individuals in the Tenderloin. (8 AA1559:12-14; 5 AA0680:19-24.) Low-level drug sales such as these are crimes of survival. (7 AA1294:21-27, 1341:4-5, 1383:22-28.) Many arrestees express a desire to get a job, go to school, provide for their children, and live a stable life. (7 AA1353:3-6; 8 AA1601:21-23.) Some are forced to possess and sell drugs by human traffickers. (7 AA1384:25-1385:3.) Extensive overlap exists between those who use drugs and those who engage in street-level drug sales. (8 AA1610:16-21.) Thus, those who use drugs and those who sell drugs often find themselves in need of the same direct aid and social services. (*Ibid.*)

While the Tenderloin is unquestionably in the grips of San Francisco's drug crisis, it is also true that drug crimes and overdoses occur throughout the city. (5 AA0675:21-23, 676:10-12, 735:24-736:2.)

III. Excluding Those in Need of Social Services from the Tenderloin Does Not Make the Neighborhood Safer

Professionals providing medical, legal, and social services in the Tenderloin, as well as academics researching cycles of poverty and substance abuse, agree that excluding low-level drug dealers from a neighborhood like the Tenderloin does not improve community health, and that such exclusion even impairs public safety.[5] These experts attest that street-level dealers are so easily replaced that their removal has no impact on drug use or sales. (7 AA1341, 1359:7-11; 8 AA1609:11-20.) Rather

[5] *See, e.g.*, 7 AA1295:3-7, 1301:11-1302:18, 1341:1-1342:6, 1351:22-1353:9, 1358:21-1359:16, 1364:5-23, 1368-369, 1376-1379, 1383:22-28, 1386:13-1388:13, 1393:13-1394:9, 1399:27-1400:5; 8 AA1608:14-1611:19, 1719-1754.

than banning street-level dealers, experts recommend investing in a strong social safety net, improving access to medical services, and decriminalizing low-level drug offenses to address the Tenderloin's public health crisis. (8 AA1719-1854.)

The People of San Francisco, to some extent, also endorse this approach. Last year, they elected a progressive District Attorney, who ran on a platform of decriminalizing poverty, lowering incarceration rates, and undoing the war on drugs. (7 AA1345.) But as evidenced by the current litigation, the City Attorney is at odds with these policies.

IV. Respondents, Young Parents Living in Poverty, Were Arrested for a Small Number of Low-Level Offenses

Apart from being the targets of the City Attorney's lawsuits, Respondents have no relationship to each other. They do, however, face similar challenges as impoverished young parents. They all share a desire to support their families, find stable work and housing, and travel freely throughout San Francisco and the Bay Area. They all have also been arrested for a small number of low-level drug crimes in the Tenderloin, but the record does not show that any Respondent has ever been convicted for selling drugs or for violating a court-imposed stay-away order under Penal Code section 166.[6] None of Respondents' arrests involved violence, and all occurred in a very small portion of the City Attorney's proposed exclusion zone. (7 AA1406, 1441, 1447, 1482; 8 AA1520, 1555, 1561, 1596.)

[6] The record indicates Ms. Aguilar-Benegas, Mr. Sanchez, and Mr. Zelaya each have a conviction for a misdemeanor violation of Penal Code section 32 (accessory after the fact) and Mr. Zelaya also has a misdemeanor conviction under Health and Safety Code section 11350 (possession of controlled substance for personal use). (2 AA0405-407; 3 AA0511-514; 4 AA0611, 618.) The record does not reflect whether any of Mr. Padilla-Martel's arrests have resulted in a conviction. (1 AA0304, 311.)

A. Christian Noel Padilla-Martel

Mr. Padilla-Martel dropped out of school in the sixth grade so that he could help his family. Today, he is responsible for supporting his parents and his five-year-old son, providing them with shelter, food, and other necessities. He works painting houses but hopes to find employment as a mechanic. (7 AA1273:8-17.)

The SFPD arrested Mr. Padilla-Martel three times between May and July 2020, with his most recent arrest occurring nearly eight months prior to the City Attorney's motion for a preliminary injunction. (6 AA0802-04, 818-19, 822-24, 848, 851-53, 863-64.) One arrest occurred after police stopped Mr. Padilla-Martel for being outside in violation of San Francisco's stay-at-home order, searched him, and allegedly found narcotics for sale. (6 AA0822-823.) The other two arrests occurred after police allegedly observed Mr. Padilla-Martel engage in a few hand-to-hand drug sales. (6 AA803, 819, 852.) These arrests constituted just 0.48% of the drug-related arrests in the Tenderloin in 2020. (7 AA1404:12-18.)

B. Guadaloupe Aguilar-Benegas

Ms. Aguilar-Benegas is a 28-year-old mother to three children, including a newborn. After her husband died last year, she became her children's sole caregiver. She struggles to afford rent, groceries, and other necessities, and she is interested in receiving services, like those available in the Tenderloin, to help her provide for her family. (7 AA1278.)

The SFPD arrested Ms. Aguilar-Benegas on five occasions between May 2020 and February 2021. Four of those five arrests occurred after police claimed to see her in the Tenderloin in violation of criminal stay-away orders and to have found drugs on her during their search. (6 AA0871:15-872:22, 896:17-25, 911:24-914:16.) The other arrest occurred after the police alleged seeing her engage in two hand-to-hand drug sales.

(6 AA0867:14-868:10). The four arrests that occurred in 2020 constituted just 0.63% of the drug-related arrests in the area that year.[7] (7 AA1445:12-19.)

C. Jarold Sanchez

Mr. Sanchez is 23 years old and lives with his wife, their one-year-old son, and his brother-in-law. His wife is pregnant and due to give birth later this year. Mr. Sanchez's family is struggling to get by. His brother-in-law helps with the rent, but Mr. Sanchez is primarily responsible for providing for his wife and child. He also helps his diabetic parents to purchase medicine. Mr. Sanchez is interested in obtaining services that could help him support his family, particularly those related to job-training and employment, including services available in the Tenderloin. (7 AA1283.)

The SFPD arrested Mr. Sanchez five times between February 2020 and February 2021. (6 AA0940:19-942:12, 949:17-950:5, 959:12-18, 964:13- 965:10, 980:21-981:11, 992:24-993:4, 1002:25-1003:17, 1007:19-28, 1011:23-12:7.) One of the arrests followed a search of Mr. Sanchez that allegedly uncovered various narcotics. The other four arrests occurred after the SFPD allegedly observed Mr. Sanchez engage in one or two hand-to-hand drug sales. (Ibid.) The four arrests that occurred in 2020 constituted just 0.63% of the drug-related arrests in the Tenderloin that year. (8 AA1518:12-19.)

D. Victor Zelaya

Mr. Zelaya, 27 years old, lives with his wife and their daughter. Mr. Zelaya runs a food-cart business with his wife and sister-in-law where they

[7] Data for drug-related arrests in the Tenderloin in 2021 was not available at the time of the preliminary injunction briefing. (7 AA1445:22-23.)

prepare traditional Latin food and sell it to customers. Mr. Zelaya's two daughters from a prior relationship live in the Tenderloin with their grandmother. Mr. Zelaya would like to continue visiting his daughters in the neighborhood. He wants to be able to move freely through the Tenderloin so that he can take his daughters to school, parks, shops, and medical appointments. Mr. Zelaya is also interested in accessing social services available in the Tenderloin. (7 AA1288:8-17.)

The SFPD arrested Mr. Zelaya on three occasions between July 2019 and May 2020, with his most recent arrest occurring more than 10 months prior to the City Attorney's motion for a preliminary injunction. (6 AA1024:21-25:22, 1042:27-43:19, 1047:15-48:3.) One arrest occurred after police stopped Mr. Zelaya for a traffic infraction, searched him, and allegedly found drugs. The other two arrests occurred after police allegedly observed Mr. Zelaya engage in a small number of hand-to-hand drug sales. (*Ibid.*) These three arrests constituted just 0.23% of the drug-related arrests in the Tenderloin during 2019 and 2020, although two of the arrests actually occurred *outside* of the neighborhood. (8 AA1559:12-22, 1596.)

STANDARD OF REVIEW[8]

The denial of a preliminary injunction rests in the sound discretion of the trial court and must not be reversed on appeal except for an abuse of

[8] The City Attorney misstates the standard of review and the record when it asserts that the trial court "found by clear and convincing evidence that Respondents were causing a public nuisance and violating the UCL." (AOB at p. 19; *cf.* 8 AA2335:3-8, 2336:4, 2337:9.) As with any preliminary injunction, the question decided was whether the evidence demonstrated "the likelihood" that the City Attorney would prevail on the merits of its public nuisance and UCL claims. (*People v. Uber Technologies, Inc.* (2020) 56 Cal.App.5th 266, 283.) A preliminary injunction "order . . . reflects nothing more than the superior court's evaluation of the controversy on the record before it *at the time* of its ruling; it is not an adjudication of the ultimate merits of the dispute." (*Ibid.*, original italics, quotations omitted.)

discretion. (*Union Interchange, Inc. v. Savage* (1959) 52 Cal.2d 601, 606.) The reviewing court should interpret the facts most favorably to the prevailing party and draw such reasonable inferences as will support the trial court's ruling. (*MCA Records, Inc. v. Newton-John* (1979) 90 Cal.App.3d 18, 21.) Issues of pure law are subject to de novo review. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1136-37 (*Gallo*).)

ARGUMENT

I. The Trial Court Correctly Held California's Public Nuisance Statutes and UCL Do Not Authorize the Requested Exclusion Order

The City Attorney asks this Court to create a 50-square-block exclusion zone in the center of San Francisco based on a handful of allegations of drug possession and sales. In so doing, the City Attorney does not dispute that its requested relief is unprecedented under California's nuisance statues and the UCL. (8 AA2395:1-5.) Instead, it stretches inapposite cases to find support for its novel proposal. As the trial court correctly ruled, neither the statutes nor the caselaw supports the exclusion of people from entire neighborhoods. These statutes convey authority to abate public nuisances and to prevent unfair competition by enjoining harmful ***conduct***, not by banning people. The ruling that these statutes do not authorize the City Attorney's proposed injunction should be affirmed. (8 AA2338-41.)

A. The Court's Abatement Power Permits It to Enjoin Nuisance-Related Conduct, Not Create Exclusion Zones

While courts have broad equitable authority to abate a public nuisance under Civil Code sections 3479 and 3480, that power is not limitless. The California Supreme Court has "articulated an important limitation on the scope of the government's power to exploit the public

nuisance injunction as an adjunct of general legal policy." (*Gallo*, *supra*, 14 Cal.4th at p. 1106 [citing *People v. Lim* (1941) 18 Cal.2d 872].) Specifically, "courts lack power . . . to grant equitable relief against conduct not reasonably within the ambit of the statutory definition of a public nuisance." (*Id.* at p. 1107.) Civil Code section 3369 additionally prohibits injunctive relief "to enforce a penal law, except in a case of nuisance or as otherwise provided by law." Accordingly, "unless the conduct complained of constitutes a nuisance as declared by the Legislature, equity will not enjoin it even if it constitutes a crime . . . ." (*Leider v. Lewis* (2017) 2 Cal.5th 1121, 1133 [quoting *Nathan H. Schur, Inc. v. City of Santa Monica* (1956) 47 Cal.2d 11, 17].)

The City Attorney's purported purpose in seeking to exclude Respondents from the Tenderloin is to abate the public nuisance of drug dealing. (*See*, *e.g.*, AOB at pp. 11-12.) But excluding Respondents' mere presence in the Tenderloin—indefinitely—enjoins much more than selling illegal drugs.[9] Prohibiting Respondents' presence in the neighborhood—whether in private or public, at any time of day or night—also prohibits innumerable innocuous activities such as going to a restaurant, visiting a park, seeing friends and family, or seeking social services, activities that have no connection to the alleged nuisance. Pursuant to the clear language of the Civil Code and as construed by the California Supreme Court, the trial court correctly concluded that the public nuisance statutes do not authorize such a broad injunction as a means to abate the crime of drug dealing. (8 AA2341:11-14; *see also* 8 AA2339:21-22, 2340:7-10.)

[9] While the proposed preliminary injunctions would dissolve "upon entry of a final injunction in [these] action[s] or upon further order of the Court" (7 AA1093:27-28), the permanent injunctions sought by the City Attorney have no termination date (1 AA0104:17-19).

The City Attorney's overbroad request here is akin to the absolute prohibitions on businesses that are routinely struck down by appellate courts. In *People v. Mason* (1981) 124 Cal.App.3d 348, 351, for example, the district attorney alleged that loud music from the defendants' restaurant constituted a public nuisance. The trial court accordingly prohibited the defendants from making any noise that would be "audible anywhere" in the neighborhood. (*Id.* at pp. 351-52.) The appellate court reversed, explaining that the prohibition impermissibly swept in conduct that was "not necessarily a nuisance." (*Id.* at pp. 350, 354.) Similarly, in *Anderson v. Souza* (1952) 38 Cal.2d 825, 841, the trial court completely enjoined the operation of an airport because low-flying planes were causing a nuisance and disturbing nearby residents.[10] The California Supreme Court reversed, concluding that the "extreme decree" was overbroad because it might have been possible for the airport to operate with planes flying at elevations that would not cause a nuisance. (*Id.* at pp. 843-44.)

Even in nuisance cases attempting to abate activity by criminal street gangs, court injunctions are narrowly drawn to prohibit specific conduct that meets "the statutory definition of a public nuisance;" they are not categorical exclusion orders of perceived gang members. (*Gallo*, *supra*, 14 Cal.4th at p. 1120.) The Supreme Court's decision in *Gallo* clearly delineates the difference between bans on certain conduct and bans on physical presence. There, the Court affirmed an injunction against gang members that prohibited them "from engaging in any form of social intercourse with anyone known to them to be a gang member 'anywhere in public view' within the four-block area" covered by the injunction, due to

[10] Even though the trial court reached the wrong result in its order, it still correctly observed that, in general, "a lawful act should not be enjoined; that all that should be enjoined is the commission of the act in such a way as to constitute a nuisance; in other words, that only the nuisance should be enjoined." (*Anderson v. Souza*, *supra*, at p. 841.)

"the threat of ***collective*** conduct by gang members loitering in a specific and narrowly described neighborhood." (*Id.* at p. 1121, original italics.) The Court noted, however, that within the four-block covered area, "gang members" could still engage in other lawful activities and even "associate freely out of public view." (*Id.* at pp. 1121-22.)

Subsequent gang injunctions have similarly targeted conduct rather than mere presence; notably, these cases have not enjoined any defendants from being in a target area. (*See*, *e.g.*, *In re Englebrecht* (1998) 67 Cal.App.4th 486, 496 [enjoining gang and its members from engaging in specified activities within abatement zone]; *cf. People ex rel. Reisig v. Acuna* (2010) 182 Cal.App.4th 866, 888 (*Reisig*) [rejecting as overbroad an injunction that prohibited gang members from stores where prescription drugs were sold].) While no gang-related activity is alleged here, these decisions demonstrate that an injunction must specifically target the nuisance conduct at issue. The City Attorney's requested exclusion order, by contrast, would prohibit Respondents' presence entirely, and thus would prohibit activities wholly disconnected from the nuisance the City Attorney purportedly seeks to prevent—the illegal sale of drugs.

B. The City Attorney's Authorities Do Not Support Its Unprecedented Request to Exclude Respondents from the Tenderloin Under the General Public Nuisance Statutes

The City Attorney cites ample authority establishing the court's equitable power to remedy nuisance behavior, but it cites none for the proposition that an appropriate remedy is the blanket exclusion of individuals from the area where a nuisance exists. No court has authorized the wholesale exclusion of individuals from a neighborhood under California's public nuisance statutes, and none of the caselaw cited by the City Attorney provides a basis for this Court to be the first.

The City Attorney grounds its analysis in the decision in *People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51 (*ConAgra*), but it could not point to a more inapt precedent. (AOB at p. 21.) The *ConAgra* Court upheld the creation of a $1.15 billion abatement fund so that the defendants—large corporations found liable for knowingly manufacturing and promoting hazardous lead paint over decades—would pay for the clean-up of their products. (*ConAgra*, *supra*, at pp. 84, 133.) But the court's authority to create such a targeted remedial fund has no bearing on its authority to impose an exclusion zone and order the wholesale prohibition of innocuous conduct. Moreover, the *ConAgra* Court explicitly distinguished between abatement orders issued to undo "already accomplished harmful conditions," and orders, as here, issued to prohibit prospective conduct, suggesting that caution was necessary when enjoining future activities "that might prove beneficial and might not prove to cause the feared harm." (*Id.* at pp. 123-24; *see also id.* at pp. 124-31.)

Next, the City Attorney cites *People ex rel. Feuer v. FXS Management, Inc.* (2016) 2 Cal.App.5th 1154, 1158 (*FXS Management*), which involved a medical marijuana business that operated in violation of a local ordinance. (AOB at p. 21.) The *FXS Management* Court ruled that, because the business met the definition of a nuisance per se, the defendants could be barred from operating their unlawful business "or any other medical marijuana business and/or collective" in Los Angeles. (*FXS Management*, *supra*, at p. 1158.) The case thus stands for the uncontroversial principle that where conduct is a nuisance per se, a court may enjoin that specific conduct. (*Ibid.*) Respondents' mere presence in the Tenderloin is neither nuisance conduct nor a nuisance per se. An order excluding people from the Tenderloin goes far beyond *FXS Management*'s injunction of specific nuisance per se conduct.

The cited decisions requiring the removal of structures that violate planning or safety codes provide no better support for the City Attorney's position. (AOB at p. 22.) In *Golden Gate Water Ski Club v. County of Contra Costa* (2008) 165 Cal.App.4th 249, 265–66, the court upheld an order requiring the defendant to remove buildings that constituted a nuisance per se because they were constructed in violation of land use regulations. Similarly, in *People v. Wheeler* (1973) 30 Cal.App.3d 282, the Court of Appeal blessed a trial court order requiring the demolition of buildings that constituted a nuisance per se because they violated local codes and endangered the health and safety of nearby residents. And in *San Diego County v. Carlstrom* (1961) 196 Cal.App.2d 485, 493, the court upheld an order requiring the removal of structures which created a fire hazard to the entire neighborhood. None of these cases relate to the removal of people.

The City Attorney also claims that Civil Code section 3495 "authorizes the removal of the source of [a] public nuisance." (AOB at p. 22.) But that is not what section 3495 authorizes. That provision instead permits a plaintiff to abate a public nuisance "by removing, or, if necessary, destroying ***the thing*** which constitutes the same . . . ." (*Ibid.*, emphasis added.) A person is, of course, not a "thing." And again, the City Attorney has not claimed that Respondents' mere presence in the Tenderloin constitutes a public nuisance, only that their alleged selling of drugs in the area does. Civil Code section 3495 does not authorize the indefinite exclusion of a person from an area in which a nuisance could exist.

Nor can the City Attorney rely on California's Red Light Abatement Statute, Penal Code sections 11225 *et seq.*, and Drug Abatement Act, Health and Safety Code sections 11570 *et seq.*, which are also directed at things and places, not people. These are specialized statutes that the City Attorney has not invoked in its complaints against Respondents. Moreover,

they apply only when a "building or place" is used for certain illegal conduct, and they "prescribe certain specific forms of relief not available under the general nuisance statutes, including temporary injunctions, removal and sale of fixtures, and closure of the premises for one year." (*People ex rel. Busch v. Projection Room Theater* (1976) 17 Cal.3d 42, 60 (*Busch*) [citing Pen. Code, §§ 11227, 11230]; *see also People ex rel. Gwinn v. Kothari* (2000) 83 Cal.App.4th 759, 765-66 (*Gwinn*) [Drug Abatement Act "prescribe[s] remedies not available under the general nuisance statutes."].) For the same reasons, the Red Light Abatement Statute cases that the City Attorney relies on for the proposition that a property can be shut down for one year are unavailing. (*See* AOB at pp. 22-24; *see also People ex rel. Hicks v. Sarong Gals* (1974) 42 Cal.App.3d 556, 563 (*Sarong Gals*) ["It is to be remembered that red light abatement proceedings are directed against the ***offending property*** itself."] [emphasis added]; *People ex rel. Bradford v. Barbiere* (1917) 33 Cal.App. 770, 775 [describing statute as intended to "put[] a stop to the maintenance of houses of ill fame"].)

Finally, the City Attorney cites *State v. Lhasawa* (Ore. 2002) 334 Or. 543, 545 [55 P.3d 477, 479], claiming that the Oregon Supreme Court "upheld a City of Portland ordinance that prohibited persons arrested for certain prostitution-related offenses from entering [certain zones in the city]." (AOB at p. 22.) This argument misstates the holding in *Lhasawa*. The Oregon court was not asked to consider the validity of Portland's ordinance; rather, the court's inquiry focused on whether the ordinance's 90-day "civil exclusion" was sufficiently criminal in nature to constitute "jeopardy" under the double jeopardy provisions of the Oregon and United States Constitutions. (*Lhasawa*, *supra*, at pp. 545, 555.) Regardless, *Lhaswa* did not involve California's nuisance statutes; it involved a

municipal ordinance from another state. No corresponding legislation authorizes the City Attorney's request for an exclusion order here.[11]

C. The Trial Court Correctly Held the UCL Does Not Authorize Exclusion Orders to Prevent Unfair Competition

As with the trial court's power to abate public nuisances, its authority to enjoin unfair competition under the UCL is circumscribed by statute—and the statute makes clear it is intended to address specific conduct, not mere presence. "While the scope of conduct covered by the UCL is broad, its remedies are limited." (*Korea Supply v. Lockheed Martin Corp*. (2003) 29 Cal.4th 1134, 1144 (*Korea Supply*); *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 131, fn. 14 (*Kraus*) ["[A] statute may specify the remedy and/or relief available for violation of the statute and thereby limit the extent of equitable relief a court may grant."].)

Pursuant to its statutory scheme, injunctive relief under the UCL is limited to enjoining conduct and does not extend to excluding persons who violate its terms. Specifically, section 17200 defines "unfair competition" in terms of conduct, *i.e.*, as an "act," a "practice," or "advertising." (Bus. & Prof. Code, § 17200.) Section 17203, in turn, authorizes a court to enjoin anyone who "engages, has engaged, or proposes to engage in unfair competition," and permits orders "as may be necessary to prevent the use or employment by any person of ***any practice*** which constitutes unfair competition . . . ." (*Id.*, § 17203, emphasis added.) And section 17207 awards civil penalties for "***conduct*** constituting a violation" of any

[11] In 2007, Portland dissolved its civil exclusion ordinances after a report commissioned by the mayor's office found that police discriminatorily enforced the exclusions on the basis of race. (Meek, *Street Vendors, Taxicabs, and Exclusion Zones: The Impact of Collateral Consequences of Criminal Convictions at the Local Level* (2014) 75 Ohio St. L.J. 1, 28.)

injunction issued under section 17203. (*Id.*, § 17207, emphasis added.) The standard for assessing such civil penalties reinforces the conclusion that an injunction under section 17203 is likewise directed at conduct. In particular, section 17207 directs a court to "consider all relevant circumstances, including but not limited to, the extent of the harm caused by ***the conduct*** constituting a violation, the nature and persistence of ***that conduct***, [and] the length of time over which ***the conduct*** occurred . . . ." (*Ibid.*, emphasis added; *see also id.*, § 17206 [discussing "misconduct"].)

The legislative history of section 17203 also supports the conclusion that the UCL does not confer authority to categorically exclude individuals from areas where they may have engaged in unfair competition. Amended in 1933, the predecessor to the UCL "provided express authority to enjoin unfair competition." (*Korea Supply*, *supra*, 29 Cal.4th at pp. 1146-47 [citing Civ. Code, former § 3369, as amended by Stats. 1933, ch. 953, § 1, p. 2482].) In 1976, the statute was amended again to allow courts to make such orders "as may be necessary" to prevent the use of any practice that constituted unfair competition. (*See* Stats.1976, ch. 1005, § 1, pp. 2378–2379.) The 1976 amendments, however, "confirmed, but did not increase, the powers of the court in a UCL action." (*Kraus*, *supra*, 23 Cal.4th at p. 132.)

Like the statute, the caselaw provides no authority for the court to enjoin the presence of individuals who violate the UCL. Instead, the California Supreme Court has twice cautioned "that the Legislature did not intend section 17203 to provide courts with *unlimited* equitable powers." (*Korea Supply*, *supra*, 29 Cal.4th at p. 1147, original italics [citing *Kraus*, *supra*, 23 Cal.4th at p. 116].) The Court of Appeal has further observed: "*Kraus* and *Korea Supply* clearly instruct that the court's equitable powers under the 'prevent' prong of section 17203 are limited." (*Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 407.)

In *Korea Supply*, *supra*, 29 Cal.4th at p. 1146, for example, the plaintiff sought the non-restitutionary disgorgement of profits that the defendant had earned from unfair business practices, arguing that section 17203's broad equitable language allowed such a remedy. The Supreme Court disagreed. It concluded that, because restitution is the only monetary remedy expressly authorized by the UCL, a plaintiff could not recover other types of monetary relief—notwithstanding that the relief sought might likely deter future unfair practices. (*Id.* at p. 1148.)

And in *Kraus*, *supra*, 23 Cal.4th at p. 128, the plaintiff requested that the court create "a fluid recovery fund," a remedy that the Legislature had expressly authorized in class actions (Code Civ. Proc., § 384), but had not expressly authorized in UCL actions. Again, the Supreme Court rejected the relief sought. It held that even though a fluid recovery fund may have been "deemed necessary to deter employment of unfair practices in the future," such a fund did not fall within a court's broad equitable powers. (*Kraus*, *supra*, at p. 137.) In so ruling, the *Kraus* Court emphasized that a "court's inherent equitable power may not be exercised in a manner inconsistent with the legislative intent underlying" the UCL. (*Id.* at pp. 131, fn. 14, 137; *see also Committee On Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 210["The Legislature apparently intended to permit courts to enjoin ongoing wrongful ***business conduct*** in whatever context such activity might occur."] [emphasis added].)

Decisions in the appellate courts are in accord and have repeatedly affirmed the principle that UCL injunctions should target particular conduct. In *People ex rel. Harris v. Aguayo* (2017) 11 Cal.App.5th 1150, 1176-78, the defendants engaged in a fraudulent scheme to misappropriate distressed real property, and the trial court permanently enjoined them from conducting certain real estate activities. Defendants argued that the

injunction was overbroad because it also prohibited legally protected activity. (*Id.* at pp. 1178-79.) The court of appeal rejected this argument, concluding that the injunction properly covered "the acts which formed the basis for [the defendants'] wrongful scheme," but did not bar the defendants from participating in other real estate activities. (*Ibid.*; *see also In re Tobacco Cases II* (2015) 240 Cal.App.4th 779, 802 ["A trial court has broad authority to enjoin ***conduct*** that violates section 17200. That authority is expansive but not unlimited."] [emphasis added].)[12]

Like the plaintiffs in *Korea Supply* and *Kraus*, the City Attorney relies on the court's "broad injunctive power" to seek relief that the UCL does not expressly authorize. (AOB at p. 24.) And as in *Korea Supply* and *Kraus*, the City Attorney's request must be denied. While the Legislature has explicitly permitted exclusion orders in certain circumstances, it has not authorized that remedy for violations of the UCL. (*Cf.* Pen. Code, § 1203.097, subd. (a)(2) [permitting "exclusion or stay-away conditions" as terms of probation]; Welf. & Inst. Code, § 15657.03, subd. (b)(4) [permitting "order enjoining a party from . . . coming within a specified distance of" petitioner in elder abuse case]; Code Civ. Proc., § 527.6, subd. (b)(6) [permitting "order enjoining a party from . . . coming within a specified distance of" petitioner in civil harassment case]).[13]

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[12] *See also* Stern, Cal. Practice Guide: Business & Professions Code Section 17200 Practice (The Rutter Group 2021) ¶ 5:241 ["The requested injunction must seek to enjoin an unfair trade practice as defined in the statute, not some other wrong ancillary to the §§ 17200 or 17500 violation."].

[13] Contrary to the City Attorney's argument (AOB at p. 25, fn. 8), the trial court did not conclude that the criminal court's ability to issue stay-away orders under Penal Code section 1203.1 circumscribed its ability to issue exclusion orders under the UCL (8 AA2343:26-28). Such stay-away orders imposed as a condition of pretrial release or probation do, however, serve as an adequate remedy at law, thereby undercutting the City Attorney's need for equitable relief. (*See Martin v. County of Los Angeles* (1996) 51 Cal.App.4th 688, 696 ["Perhaps the most basic rule governing equity jurisdiction is that there is no right to equitable relief or an equitable

The City Attorney's assertion that the trial court can issue an exclusion order because section 17203 (or, for that matter, the UCL) does not explicitly withhold such power turns statutory interpretation on its head. It ignores the scope of the statute's express grant—and thereby its limitation—of injunctive power. Because the UCL's text and history demonstrate that injunctive relief must be directed to the specific acts or practices that violate the UCL, the trial court correctly held that the UCL did not authorize the exclusion of Respondents from the Tenderloin.

D. The City Attorney's Authorities Undercut Its Position That Exclusion Orders Are Permissible Under the UCL

The City Attorney advances a strawman argument when it implies that the trial court erroneously construed UCL injunctive relief as "limited to disallowing unlawful activities." (AOB at p. 26.) That was not the trial court's ruling. Rather, the trial court explained 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 AA2340:11-13, first italics added.) None of the decisions cited by the City Attorney regarding a court's authority to enjoin generally lawful activity are to the contrary. (AOB at pp. 26-27.)

In *Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 516-17, the trial court enjoined a ski resort from removing trees or otherwise developing the land without prior permission after the resort had cut down over 1,800 trees to build ski runs in violation of environmental laws and a restraining order. It was the cutting of trees that, in the first instance, had been found to be an unfair business practice, so it is unsurprising that this otherwise lawful activity could be proscribed moving

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remedy when there is an adequate remedy at law."] [quotations and italics omitted].)

forward. By no means did the court prohibit anyone from entering the area where the UCL violation had occurred or restrain the defendant from operating as a ski resort. (*Id.* at pp. 538-39.)

And in *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy* (1992) 4 Cal.App.4th 963, 967, the defendant made false representations about the safety of raw milk in its advertisements. The resulting injunction prohibited the defendant from making future false statements and required the company to place warnings on its product about the risks of consuming raw milk. (*Id.* at pp. 970-71.) Even though these warnings were not required under law, the court concluded they were "necessary to correct" the misperceptions created by the defendant's past unlawful conduct. (*Id.* at pp. 972-73.) The injunction did not restrain lawful conduct by, for example, ordering the defendant to stop selling milk altogether.

Finally, contrary to the City Attorney's argument, *People ex rel. City of Santa Monica v. Gabriel* (2010) 186 Cal.App.4th 882 (*Gabriel*), does not stand for the proposition that a UCL injunction can "exclude[] the violator from the scene of their earlier violations and victims." (AOB at p. 27.) The defendant in *Gabriel* was a landlord who had sexually harassed tenants, stolen property, and engaged in other activity found to constitute an unlawful business practice. (*Gabriel*, *supra*, at pp. 885-887.) The trial court ordered the landlord to retain a property management company, prohibited him from visiting the property without a member of that company for five years, and enjoined him from engaging in the very conduct forming the basis of his unlawful business practices: interacting with his tenants. (*Ibid.*) The court did not exclude the landlord from the area outright or prevent him from lawfully renting out his properties. Notably, too, the landlord did not challenge the scope of this injunction on appeal, but rather challenged the award of attorney's fees. (*Id.* at pp. 889-91.) In reversing the fee award against the landlord as not authorized by the

UCL, the reviewing court confirmed once more that the UCL is not limitless. (*Ibid.*)

An order excluding Respondents from the Tenderloin for essentially all purposes based solely on a small number of low-level drug crimes would be an extraordinary expansion of legal precedent. The trial court properly ruled that the requested injunction to ban Respondents from 50 square blocks at any time of day or night lacks support under the UCL.

II. The Trial Court Correctly Held That an Order Excluding Respondents from the Tenderloin Would Violate Their Constitutional Rights

The City Attorney acknowledges—as it should—that the matters now before this Court are "right to travel case[s]." (AOB at p. 33.) The City Attorney also concedes—as it must—that California courts recognize "a constitutional right to intrastate travel . . . protected by the due process clauses of the Fifth Amendment of the United States Constitution and article I, section 7 of the California Constitution." (*Id.* at p. 31.)

These two simple facts lead to a well-established corollary: where a fundamental constitutional right, like the right to travel, is infringed, strict scrutiny applies, and the government must show that a restriction is "necessary to further a compelling state interest." (*Adams v. Superior Court* (1974) 12 Cal.3d 55, 60-61 (*Adams*).) Notwithstanding the City Attorney's arguments to the contrary (AOB at pp. 31-32), there was no error in the trial court's articulation of this constitutional test or in its conclusion that the "proposed exclusion order[s] fail[] that test." (8 AA2345:28.)

The City Attorney contends that a lesser level of scrutiny controls. It asks this Court to apply the standard developed in criminal proceedings for reviewing probation conditions that impede a defendant's right to travel. (AOB at pp. 31-32.) Not only do probation cases present very different

concerns than those implicated in the present civil setting, the City Attorney's self-designed test misrepresents the law. The trial court's ruling that the proposed injunction "violate[s] the constitutional right to intrastate travel" should be affirmed. (8 AA2345:23-34.)[14]

A. The Right to Intrastate Travel Is a Fundamental Right, and Any Infringement on That Right Must Survive Strict Scrutiny

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

Although the United States Supreme Court has yet to expressly recognize a right to intrastate travel, it has long acknowledged that the right to freedom of movement is fundamental to our nation's scheme of values:

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[14] The fact that the trial court reached the correct result holds whether the constitutional question is analyzed at the balancing stage of the preliminary injunction analysis—as Respondents presented it below—or as an independent reason to deny the proposed exclusion orders—as the trial court did. (*Compare*, *e.g.*, 7 AA1110-115 *with* 8 AA2345-349.) Had the trial court reached a balancing of harms analysis, it would have correctly concluded that Respondents would suffer grave and irreparable harm from the issuance of the preliminary injunctions, and that the balance of the relative harms to the parties weighs against the issuance of the exclusion orders. (*See IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 72; *see also Roman Cath. Diocese of Brooklyn v. Cuomo* (2020) -- U.S. --, 141 S.Ct. 63, 67 [per curiam] ["The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."].)

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

(*Kent v. Dulles* (1958) 357 U.S. 116, 126; *see also United States v. Wheeler* (1920) 254 U.S. 281, 293 [recognizing that "the fundamental right" to "move at will from place to place" reaches as far back as the Articles of Confederation]; *Kolender v. Lawson* (1983) 461 U.S. 352, 358 [observing that a California statute requiring identification from persons "who loiter or wander" in the streets "implicates consideration of the constitutional right to freedom of movement"].)

Where, as here, a restriction impedes a fundamental right like the right to travel, courts have consistently adopted "an attitude of active and critical analysis" calling for strict scrutiny. (*Johnson v. Hamilton* (1975) 15 Cal.3d 461, 466; *Thompson v. Mellon* (1973) 9 Cal.3d 96, 102.) Indeed, strict scrutiny is generally applied whenever "state action creates a 'suspect classification' or impinges on the exercise of a fundamental right." (*Adams*, *supra*, 12 Cal.3d at pp. 60-61; *see also Washington v. Glucksberg* (1997) 521 U.S. 702, 720-21 [emphasizing same]; *Tobe*, *supra*, 9 Cal.4th at p. 1128 (dis. opn. of Mosk, J.) ["Because the ordinance impairs the right to travel of plaintiffs and other homeless persons, it is subject to strict scrutiny."];[15] *Bay Area Women's Coalition v. City and County of San*

[15] Like the court in *Adams*, *supra*, 12 Cal.3d at p. 62, the majority in *Tobe*, *supra*, 9 Cal.4th at p. 1101, ruled that the restriction being challenged constituted only an "[i]ndirect or incidental burden on travel," which was not sufficient to establish any infringement on the fundamental right to travel and thus did not trigger strict scrutiny. Neither case stands for the proposition that strict scrutiny does not apply when, as here, an explicit prohibition on travel is under review. Similarly, *People v. Moran*, *supra*, 1 Cal.5th at p. 407—a case analyzing a probation condition—recognized that while a right to intrastate travel exists, the condition being challenged in

Francisco (1978) 78 Cal.App.3d 961, 967-68 [applying strict scrutiny to durational residency requirements infringing right to travel]; *Nunez by Nunez v. City of San Diego* (9th Cir. 1997) 114 F.3d 935, 946 (*Nunez*) [applying strict scrutiny to local California ordinance infringing "the right of free movement and the right to travel"].)[16]

Under the strict scrutiny standard, the City Attorney "bears the burden of establishing not only that it has a ***compelling*** interest which justifies the law but that the distinctions drawn by the law are ***necessary*** to further its purpose." (*Johnson v. Hamilton*, *supra*, 15 Cal.3d at p. 468, original italics; *see also Dunn v. Blumstein* (1972) 405 U.S. 330, 338-39 [articulating same].) This test is in line with the level of scrutiny that the trial court articulated here: "When a constitutionally protected interest is at stake, 'the injunctive relief must be narrowly tailored so as to minimally infringe upon the protected interest.'" (8 AA2345:26-27 [quoting *Gallo*, *supra*, 14 Cal.4th at p. 1128].)

The City Attorney quarrels with this articulation because the trial court "borrowed th[e] formulation from the dissent in *Gallo*, a civil gang

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that case (entry into Home Depot stores) was "too de minimis to implicate the constitutional travel right."

[16] Other federal courts of appeal have also applied strict scrutiny where a burden on the right to intrastate travel is alleged. (*See*, *e.g.*, *Catron v. City of Petersburg* (11th Cir. 2011) 658 F.3d 1260, 1270-71 [concluding that anti-trespassing statute prohibiting unhoused people from being present on public sidewalks failed strict scrutiny]; *Johnson v. City of Cincinnati* (6th Cir. 2002) 310 F.3d 484, 502 [concluding that local ordinance banning persons arrested for drug offenses from city neighborhood failed strict scrutiny]; *King v. New Rochelle Municipal Housing Authority* (2d Cir. 1971) 442 F.2d 646, 648-49 [concluding that durational residency requirement to qualify for public housing burdened "constitutional right to travel within a state" and did not "promote a compelling government interest"]; *but see Lutz v. City of York, Pa.* (3d Cir. 1990) 899 F.2d 255, 269-80 ["borrow[ing] from the well-settled, highly analogous rules . . . developed in the free speech context" and applying intermediate scrutiny to analyze "cruising" restriction on "localized movement on the public roadways"].)

injunction case that did not involve a 'right to travel' challenge, but rather a First Amendment challenge to association and speech limits." (AOB at pp. 32-33.) According to the City Attorney, relying on *Gallo* was wrong because it looked to *Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753, 762 (*Madsen*), which had analyzed speech restrictions outside of reproductive health centers. (AOB at pp. 32-33.) But the trial court's reference to *Gallo* introduced no error—as the foregoing decisions applying strict scrutiny to other right-to-travel cases demonstrate. Moreover, the trial court only referred to *Madsen* in a footnote to counter the City Attorney's erroneous assertion that injunctions are treated more deferentially than ordinances. (8 AA2349:25-28, quoting *Madsen*, *supra*, 512 U.S. at p. 764 ["Injunctions also carry greater risks of censorship and discriminatory application than do general ordinances."].)[17]

B. The Muddled Probation Conditions Analysis the City Attorney Advances Is Not Only Inapposite, but Wrong

Disregarding constitutional precedents, the City Attorney argues that the trial court should have used the so-called "*Smith/Relkin*" test, which the City Attorney has invented whole cloth by stitching together cases considering the lawfulness of probation conditions. (AOB at pp. 32-33.) Putting aside that the City Attorney first surfaced these cases in cursory fashion on the very last page of its reply briefs in support of the preliminary

[17] The City Attorney confuses the analysis further by invoking *Madsen*'s examination of public-forum, content-neutral speech restrictions (AOB at p. 38), as well as cases that have applied intermediate scrutiny to commercial speech (AOB at p. 35 [citing *People v. Custom Craft Carpets, Inc.* (1984) 159 Cal.App.3d 676, 683]; *id.* at p. 37 [citing *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 952]). The City Attorney invites this Court to "substitut[e] 'movement' for 'speech'" (AOB at p. 38) and inquire "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest" (*ibid.* [quoting *Madsen*, *supra*, 512 U.S. at p. 765].) The trial court, however, did not apply this standard and this Court need not wade into inapt First Amendment jurisprudence on *de novo* review.

injunctions (8 AA1872, 1937, 2002, 2067), the test that the City Attorney now advances as controlling is:

> [A] court-ordered limitation on travel must be 'reasonably necessary to further a legitimate governmental interest.' [Citation.] As with other limitations on constitutional rights, restrictions should be 'narrowly drawn to serve the important interests' and 'specifically tailored' to the defendant.

(AOB at p. 31 [quoting *People v. Smith* (2007) 152 Cal.App.4th 1245, 1250 (*Smith*)]; *see also* AOB at p. 32 [quoting *People v. Relkin* (2016) 6 Cal.App.5th 1188, 1195 (*Relkin*)]; AOB at pp. 36-37; 8 AA2402:24-2403:16.)

According to the City Attorney, this standard should control the civil cases now before this Court because both "involve constitutional review of court-ordered limitations on a defendant who has been found to have violated the law." (AOB at pp. 31-32.) Probation cases are indeed relevant to the extent that they recognize the right to travel as a fundamental or important right requiring heightened scrutiny when infringed. (*See*, *e.g.*, *In re White*, *supra*, 97 Cal.App.3d at p. 148.) The standard of review employed in them is, however, inapposite. The City Attorney's overly-simplistic reduction fails for numerous reasons—as the trial court correctly recognized. (8 AA2341:16-17, 2342:22-28, 2346:8-10, 2346:18-22, 2408:14-2409:28.)

First, the standard employed in cases analyzing the lawfulness of probation conditions is inapt because of the fundamental due process differences between criminal and civil court. "'Probation, like incarceration, is a 'form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty.'" (*United States v. Knights* (2001) 534 U.S. 112, 119 [quoting *Griffin v. Wisconsin* (1987) 483 U.S. 868, 874].) The standard for a conviction is, of course, proof beyond a reasonable doubt following an adversarial proceeding in which a defendant

is entitled to legal representation. (*See generally Bell v. Wolfish* (1979) 441 U.S. 520, 535 [acknowledging that a person "may not be punished prior to an adjudication of guilt in accordance with due process of law"].)

By comparison, here, the record does not show that any Respondent has been criminally convicted for selling drugs. (*See supra* fn. 6.) The trial court only made a preliminary determination that Respondents had "engaged in the unlawful activity of selling illegal drugs" in the Tenderloin. (8 AA2336:15-16; *see also* 8 AA2334:10-13, 2335:26-28; *see also Reisig*, *supra*, 182 Cal.App.4th at pp. 873-74.) Furthermore, Respondents' ability to defend themselves in these civil matters has been complicated by the fact that Respondents are simultaneously defending themselves in open criminal cases, and they therefore risk waiving their constitutional protection against self-incrimination by providing information here. (*See, e.g.*, *Pacers, Inc. v. Superior Ct.* (1984) *Pacers, Inc. v. Superior Court* (1984) 162 Cal.App.3d 686, 688–89, 688-89 [acknowledging that, when a pending or threatened prosecution relates to litigation, there is a "difficult choice between defending either the civil or criminal case"].)[18]

Second, "[p]robation is not a right, but a privilege." (*People v. Bravo* (1987) 43 Cal.3d 600, 608.) "If the defendant considers the conditions of probation more harsh than the sentence the court would otherwise impose, he has the right to refuse probation and undergo the sentence." (*Ibid.*; *see also In re Osslo* (1958) 51 Cal.2d 371, 381 ["It is settled that a defendant has the right to refuse probation . . . ."].) Thus, it is only "in preference to incarceration" that a defendant may "validly []

[18] While Respondents have *pro bono* counsel, legal representation is not guaranteed on these claims. Any other individuals subject to the City Attorney's proposed exclusion order will likely be unrepresented, and, as a practical matter, exclusion orders could very well be entered *in absentia* based merely on allegations in a complaint. Indeed, the City Attorney is now seeking entry of default against several defendants. (8 AA2445:12.)

consent to limitations upon their constitutional rights . . . ." (*People v. Olguin* (2008) 45 Cal.4th 375, 384.) And even then, a court's discretion to impose probation conditions is "circumscribed by constitutional safeguards." (*In re White*, *supra*, 97 Cal.App.3d at p. 146 [citing *People v. Keller* (1978) 76 Cal.App.3d 827, 832].)

Because probationers expressly and voluntarily consent to the terms of their probation, courts routinely uphold conditions that would be unconstitutional if applied to individuals not on probation. "Inherent in the very nature of probation is that probationers 'do not enjoy the absolute liberty to which every citizen is entitled.'" (*United States v. Knights*, *supra*, 534 U.S. at p. 119 [quoting *Morrissey v. Brewer* (1972) 408 U.S. 471, 480].) Here, if the Court enters the requested injunctions, Respondents will have no choice but to suffer the constriction of their constitutional rights.

Third, probation conditions are authorized by statute. Specifically, Penal Code section 1203.1 directs a court to impose "reasonable conditions" so that "amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer . . . ." (Pen. Code, § 1203.1, subd. (j).) "Generally, a condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.'" (*Moran*, *supra*, 1 Cal.5th at p. 403 [citing *People v. Lent* (1975) 15 Cal.3d 481]; *see also* 8 AA2341:25-2342:1 [trial court quoting same].) Section 1203.1 further limits any probation condition to two years. (Pen. Code, § 1203.1, subd. (a).)

The present cases are in civil court, and Penal Code section 1203.1 does not control. The City Attorney cannot supplant constitutional review in favor of the more relaxed statutory analysis applied to probation

conditions in criminal court. That courts have permitted travel restrictions not exceeding two years as a condition of probation expressly agreed to by a criminal defendant in lieu of custody, does not mean that the City Attorney may, in an entirely different context, permanently restrict Respondents' fundamental right to travel into the Tenderloin. The scrutiny applied in each of these contexts is distinct regardless of whether the City Attorney perceives probation conditions and the proposed injunctions as sharing "the same aim" to "protect public safety." (AOB at p. 32.) In arguing otherwise, the City Attorney has simply gotten lost on its own detour.

Fourth, "courts deem probation an act of clemency in lieu of punishment [citation], and its ***primary purpose is rehabilitative in nature*** [citation]." (*Moran*, *supra*, 1 Cal.5th at p. 402, emphasis added.) Thus, courts analyzing the lawfulness of probation conditions do so with a particular emphasis on fostering rehabilitation, not just on public safety. The City Attorney's lead case *Smith* makes this point abundantly clear: "Particularized conditions of probation should be directed toward rehabilitation." (*Smith*, *supra*, 152 Cal.App.4th at p. 1251 [quoting *In re White*, *supra*, 97 Cal.App.3d at pp. 150-151].) Its other lead case *Relkin* reinforces the point: "'In general, the courts are given broad discretion in fashioning terms of supervised release, in order to foster the reformation and rehabilitation of the offender, while protecting public safety." (*Relkin*, *supra*, 6 Cal.App.5th at p. 1194.)

The goal of rehabilitation permits extraordinary individual tailoring and conditions that would be neither appropriate nor permissible outside of the probation context. (*See*, *e.g.*, *People v. Balestra* (2014) 76 Cal.App.4th 57, 67 [warrantless searches on probationers "serve a valid rehabilitative purpose"].) To accomplish rehabilitation, courts often tell probationers where they can (and cannot) live, who they can (and cannot) see, and what

they can (and cannot) do. Likewise, courts view conditions that undercut rehabilitation, such as the condition in *Smith* restricting the probationer's ability to travel for work, with suspicion. (*Smith*, *supra*, 152 Cal.App.4th at p. 1252 [striking down condition that prohibited probationer's travel out of county for work because "[p]ublic safety and Smith's rehabilitation both benefit from his steady employment"].)

The City Attorney's proposed exclusion orders run counter to rehabilitation. Excluding Respondents from the Tenderloin indefinitely is the definition of punitive. The punishment is all the more severe because it cuts Respondents off from access to the neighborhood's many organizations offering assistance with housing, substance abuse, job training, and food security. (*See* 8 AA2346:26-27; *see also* 7 AA1344-47, 1357, 1364, 1392-94.)

Moreover, many of the probation condition cases that the City Attorney cites in support of its proposed injunctions involve juvenile adjudications—where courts have even wider latitude to impose strict probation conditions for rehabilitative purposes. (AOB at pp. 37, 43, 48.) The City Attorney, for example, relies on *In re Antonio R.* (2000) 78 Cal.App.4th 937, 942, for the proposition that courts have "approved a much broader geographical restriction on travel" than what it is seeking here. (AOB at p. 48.) That case, however, unequivocally stated: "juvenile conditions may be broader than those pertaining to adult offenders," and explained "[t]his is because juveniles are deemed to be more in need of guidance and supervision than adults, and because a minor's constitutional rights are more circumscribed." (*In re Antonio R.*, *supra*, at p. 941.)

Another juvenile probation case relied on by the City Attorney—*In re Ramon M.* (2009) 178 Cal.App.4th 665, 676 as modified (Oct. 30, 2009), disapproved of on other grounds by *In re G.C.* (2020) 8 Cal.5th 1119, 1133—further confirms: "A juvenile court enjoys broad discretion to

fashion conditions of probation for the purpose of rehabilitation and may even impose a condition of probation that would be unconstitutional or otherwise improper so long as it is tailored to specifically meet the needs of the juvenile." (*See also* AOB at p. 37.)

Applying this rubric, it is unsurprising that the courts in these cases upheld conditions prohibiting juvenile probationers with a criminal history of gang-related offenses, which are associational by definition, from traveling to areas where they were known to have associated with gang members and run afoul of the law. (*In re Antonio R.*, *supra*, 78 Cal.App.4th at pp. 941-42; *In re Ramon M.*, *supra*, 178 Cal.App.4th at p. 678.) Particularly important to the court in *In Antonio R.*, *supra*, at p. 942, was the "safety valve condition" by which the juvenile probationer could travel into Los Angeles with either his parent or with the permission of his probation officer. Neither of these decisions inform the analysis here given that the goals of the City Attorney's proposed injunctions are not rehabilitative, given that Respondents are not juveniles, and given that the City Attorney cannot stand in as a parent or a probation officer to Respondents.[19]

C. Even in the Probation Context, Courts Have Rejected Similar Travel Restrictions as Unconstitutional

Notwithstanding the relaxed scrutiny that applies to probation conditions, a number of courts have concluded that restrictions on a probationer's right to travel can be overbroad and unconstitutional. These

[19] The City Attorney's reliance on *United States v. Watson* (9th Cir. 2009) 582 F.3d 974, 979 is no more relevant or helpful. (AOB at p. 43.) The defendant there had accepted a plea deal and waived his right to appeal his sentence, a fact that the Ninth Circuit concluded was dispositive when analyzing a travel restriction imposed under the Sentencing Reform Act, 18 U.S.C. § 3583, subd. (d)—a statute that is inapplicable in this civil state court case. (*United States v. Watson*, *supra*, 582 F.3d at p. 974.)

decisions demonstrate that the City Attorney's proposed orders seeking the indefinite exclusion of Respondents from the Tenderloin go much too far. They also confirm the trial court's assessment that "even in sentencing a defendant following a criminal conviction, a court would not have the authority to grant the broad relief sought by the People as a condition of probation." (8 AA2343:3-5; *see also* 8 AA2344:13-14.)

As the trial court recognized, the leading California case on travel restrictions as a condition of probation is *In re White*, *supra*, 97 Cal.App.3d 141. (8 AA2343:5.) The defendant in that case was found guilty of soliciting an act of prostitution and granted probation on the condition that she not go into certain high-prostitution areas of the City of Fresno "at any time, day or night." (*In re White*, *supra*, at p. 143.) The Court of Appeal held that, even though the exclusion zone had "some relationship to the crime of soliciting," the provision was unreasonable, as well as "unduly harsh and oppressive." (*Id.* at p. 147.) Because the condition swept in "conduct which is not criminal" and prohibited "innumerable situations in which a probationer could be in the map area . . . unrelated to prostitution," the court concluded it was far too broad. (*Ibid.*) It reasoned: "Mere presence at a particular place, without more, does not amount to solicitation." (*Ibid.*; *see also Tobe*, *supra*, 9 Cal.4th at p. 1100 [affirming *In re White*'s reasoning that right to intrastate travel is "a basic human right"].)

Following *In re White*, the Court of Appeal rejected a probation condition in *People v. Beach* (1983) 147 Cal.App.3d 612 requiring an elderly widow convicted of involuntary manslaughter to relocate from her home and community. The appellate court concluded that the condition was unreasonably broad and violated constitutional rights because "far less intrusive" means of rehabilitation were available to the trial court. (*Id.* at pp. 621-23.)

Similarly, in *People v. Bauer* (1989) 211 Cal.App.3d 937, the Court of Appeal rejected a probation condition requiring a defendant to obtain his probation officer's approval of his residence. The *Bauer* Court concluded the condition did not relate to conduct that was in itself criminal. (*Id.* at p. 944.) The court also noted that the condition was "extremely broad" and not narrowly tailored to minimize interference with the defendant's constitutional right to travel and freedom of association. (*Ibid*.)

The proposed injunctions at issue here are as unnecessarily broad as the conditions of probation considered in *White*, *Beach*, and *Bauer*. If an exclusion order was imposed, Respondents would be enjoined from entering the Tenderloin for almost any purpose at any time of day or night, indefinitely. Again, as the trial court rightly reasoned: "If 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 AA2344:13-14.)

D. Regardless of the Level of Scrutiny Applied, the Proposed Exclusion Orders Fail Constitutional Muster

The City Attorney identifies "abating public nuisances and preventing UCL violations" as being both "substantial government interests" and "legitimate governmental purposes" sufficient to justify the proposed infringements on Respondents' constitutional right to intrastate travel. (AOB at pp. 33-34.) The City Attorney's stated goal is to exclude Respondents from the Tenderloin so as to prevent them from "returning to the Tenderloin to deal drugs there." (*Id.* at p. 28.) Respondents do not dispute that decreasing crime is an important municipal interest. (*See*, *e.g.*, *Schall v. Martin* (1984) 467 U.S. 253, 264.) Nor do they dispute that an injunction to abate a nuisance or prevent unfair competition can, within certain limits, "interfere with a civil defendant's future exercise of

constitutional rights." (AOB at p. 34 [quoting *Sarong Gals*, *supra*, 42 Cal.App.3d at p. 563].)[20]

The City Attorney may not, however, set aside constitutional safeguards to pursue a general goal of reducing crime. (*Kolender v. Lawson, supra*, 461 U.S. at p. 358.) The "interest in abating public nuisance cannot be pursued by means infringing personal liberties when less restrictive alternatives are available." (*Welton v. City of Los Angeles* (1976) 18 Cal.3d 497, 507-08 [citing *Shelton v. Tucker* (1960) 364 U.S. 479, 488].) Like an abatement remedy, an injunction under the UCL must comply with the Constitution. (*See Skinner v. Superior Court* (1977) 69 Cal.App.3d 183, 188-89 [court's power to abate unlaw and unfair business practices subject to constitutional right to notice and to be heard].)

As the trial court correctly held, by "no stretch of the imagination" is the injunctive relief sought by the City Attorney narrowly tailored. (8 AA2346:25-2347:2.) Nor can it be said to be reasonably necessary. "Rather than prohibit specified harmful conduct, it prohibits mere presence in the exclusion zone, at any time of the day or night and for any reason." (8 AA2346:26-27.) This determination that less restrictive means are available to address the alleged unlawful conduct is a factual finding entitled to substantial deference. (*Shoemaker v. County of Los Angeles*

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[20] In addition to *Sarong Gals*, the City Attorney relies on *People ex rel. Gwinn v. Kothari*, *supra*, 83 Cal.App.4th at p. 766, for the generic proposition that abatement injunctions may infringe rights enjoyed by others "precisely because the enjoined parties have abused those rights in the past." (AOB at p. 34.) Both of these cases arise under the specialized Red Light Abatement Statute, which, as previously discussed, is not at issue here and which "prescribe[s] certain specific forms of relief not available under the general nuisance statutes." (*Busch*, *supra*, 17 Cal.3d at p. 60.) The City Attorney ranges even farther afield when it cites the federal antitrust case, *National Soc. of Professional Engineers v. United States* (1978) 435 U.S. 679, 697-98, for the unobjectionable proposition that a court can reasonably curtail the anti-competitive "***conduct***" of a defendant found guilty of violating the Sherman Act. (AOB at pp. 35-36, emphasis added.)

(1995) 37 Cal.App.4th 618, 625 [appellate court's "task is to ensure that the trial court's factual determinations, whether express or implied, are supported by substantial evidence"]; *MCA Records, Inc. v. Newton-John*, *supra*, 90 Cal.App.3d at p. 21 [reviewing court should "interpret the facts in the light most favorable to the prevailing party, and indulge all intendments and reasonable inferences in support of the trial court's order"].)

None of the City Attorney's arguments demonstrate that the trial court erred, either legally or factually, in concluding that the proposed exclusion zone violates constitutional limits. This conclusion is inescapable regardless of the level of scrutiny applied. The City Attorney, for example, claims that its proposed preliminary injunctions are "narrowly drawn" because it is "not seeking an order that Respondents stay out of the City and County of San Francisco." (AOB at p. 40.) This assertion, however, sidesteps the fact that the City Attorney argued before the trial court that it would actually have authority to exclude Respondents from San Francisco if the conditions in the Tenderloin existed throughout the city. (8 AA2396:20-397:3.) More fundamentally, the City Attorney's argument as to what constitutes "narrowly drawn" focuses on the relative size of the exclusion zone compared to the size of San Francisco, not the specific parameters of the exclusion zone itself. Although the City Attorney cites evidence about "the scope of the open-air drug market" in the Tenderloin (AOB at pp. 40-41), it nowhere grapples with the fact that most of Respondents' arrests occurred in a very small proportion of the proposed exclusion zone. (7 AA1441, 1482; 8 AA1555, 1596.)

In addition to the overbroad size of the proposed exclusion zone, the relief sought by the City Attorney is also not narrowly, or even reasonably, drawn because it seeks to prohibit Respondents' ***mere presence*** in the Tenderloin. This broad exclusion, as discussed *supra*, will prohibit innocent and lawful conduct having nothing to do with drug sales. The

City Attorney has the burden to show that less restrictive measures would be ineffective in reducing drug-related crime in the Tenderloin. (*See O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1481 [holding that the burden was on plaintiffs "to formulate the nature of the remedy they were seeking"]; *People v. Englebrecht* (2001) 88 Cal.App.4th 1236, 1256 (*Englebrecht II*) [government must show by clear and convincing evidence that restrictions on commonplace activities are necessary].) Yet the City Attorney does not convincingly tether the proposed exclusion order to what it describes as "Respondents' misconduct and the nuisance conditions in the Tenderloin community." (AOB at p. 38.)

At most, the City Attorney argues that the proposed exclusion orders are necessary because narrower stay-away orders have not prevented Respondents' subsequent arrests in the Tenderloin. But the ineffectiveness of prohibiting Respondents from a particular street corner does not speak to the ineffectiveness of prohibiting ***particular conduct***.[21] The record does not support the City Attorney's position that banning Respondents on the basis of a handful of arrests (some of which are months-old), at any time of day or night, anywhere within a 50-square-block area of San Francisco, is ***the only*** effective means of abating the alleged public nuisance or preventing the alleged unfair competition.[22] (*See, e.g.*, AOB at pp. 28, 30.) The record instead establishes that excluding Respondents and others, "one defendant drug dealer at a time," will be ineffective and counterproductive

[21] The City Attorney also fails to explain why Respondents' violation of narrower stay-away orders demonstrates that a broader stay-away order will be effective.

[22] For these same reasons, even if statutorily and constitutionally permissible, the requested injunction is inappropriate under general equitable principles. (*Califano v. Yamasaki* (1979) 442 U.S. 682, 702; *People v. Uber Technologies, Inc.*., *supra*, 56 Cal.App.5th at p. 313 ["In fashioning a remedy, a court should 'strive for the least disruptive remedy adequate to its legitimate task' and tailor it to the harm at issue."].)

to improving conditions in the neighborhood. (AOB at p. 39; *cf.* 7 AA1302:5-18, 1341, 1359:7-11; 8 AA1609:11-20, 1719-1854).

Contrary to the City Attorney's argument, the requested exclusion orders need not force Respondents to leave their homes or quit current lawful employment to be unconstitutionally overbroad, as was the case in *In re White*, *supra*, 97 Cal.App.3d at p. 150. (*See* AOB at pp. 41-42, 47-48.) The trial court correctly reasoned that "nothing in *In re White* suggests that the court's analysis turned in any way on that distinction." (8 AA2347:26-28.) Indeed, there are many legitimate reasons why Respondents would be present in the Tenderloin, and the proposed injunctions do not include reasonable exceptions for any of them—a fatal defect rendering them unconstitutional. (*See In re White*, *supra*, at p. 147 [holding that probation condition was "too broad in proscribing every type of activity"]; *cf. Nunez*, *supra*, 114 F.3d at pp. 948-49 [holding that absence of "exceptions for many legitimate activities" supported conclusion that challenged curfew was not narrowly tailored].)

The City Attorney's offer to have Respondents ask advance permission to enter the Tenderloin is so impractical that it is meaningless. Respondents are monolingual Spanish speakers struggling to make ends meet. They cannot be expected to ask the City Attorney—an opposing party in ongoing litigation—for a permission slip to enter the Tenderloin (permission which the City Attorney could seemingly withhold for any reason) and then submit a stipulation to the Court, while also finding a way to print that stipulation so that it can be carried with them at all times. This onerous and impractical "solution" is no solution at all. (*Cf. In re Antonio R.*, *supra*, 78 Cal.App.4th at pp. 941-42 [finding support from a parent or probation officer to be an acceptable "safety valve" where broad exclusion zone imposed].)

The factual record further establishes that the City Attorney's sweeping injunctions will harm both Respondents and the broader community. As the trial court correctly observed, the proposed injunctions would prevent Respondents from "accessing vital social and health services," (8 AA2346:26-2347:2), which the trial court appropriately considered in evaluating the constitutionality of the requested exclusion order. (*See Beach*, *supra*, 147 Cal.App.3d at pp. 621-22 [weighing harm to defendant against potential benefit to public is a part of the required constitutional scrutiny of the interference with freedom of movement].) With respect to the community's health, increased criminalization and surveillance can cause higher rates of overdoses, result in the quick replacement of street-level drug dealers, and make the neighborhood less, not more, safe. (7 AA1301:20-1302:4, 1341:18-24, 1345, 1358:21-1359:6; 8 AA1611:4-7.)

The City Attorney also claims that the trial court erred because the court "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." (AOB at p. 33.) In fact, the trial court did identify less restrictive means that it believed was available—an injunction targeting specific conduct. (8 AA2340:19-20.)

To the extent the City Attorney argues that the trial court should have further detailed its reasoning in denying the preliminary injunction, the trial was not required to do so. In fact, the "denial of a preliminary injunction does not require any statement of decision or explanation." (*Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 Cal.App.4th 853, 858.) And for the purposes of appellate review, the reviewing court presumes the trial court "considered every pertinent argument and resolved each one consistently with" the order denying the

preliminary injunction. (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1451.)[23]

Finally, while the City Attorney implies that the trial court should have *sua sponte* imposed a narrower restriction upon finding that the remedy requested was overbroad, the City Attorney never asked the court to do so. (7 AA1091-94.) The City Attorney's request for an injunction barring Respondents from the Tenderloin is the very purpose of these lawsuits. (*See*, *e.g.*, 1 AA0100, 103:10-11, 104:6-7, 104:17-19.) Having found that the City Attorney's only requested relief was statutorily unauthorized and constitutionally impermissible, nothing required the trial court to develop an alternative remedy.

E. The Remaining Decisions Discussed by the City Attorney Demonstrate Why the Requested Relief Is Unconstitutional

Throughout its brief, the City Attorney relies on decisions considering the abatement of criminal street gang activity to support its proposed restriction of Respondents' rights. (AOB at pp. 23, 31-35, 38.) But this caselaw reinforces the unconstitutionality of the relief requested here. Injunctions against gang members target "social intercourse" and "***collective*** conduct." (*Gallo*, *supra*, 14 Cal.4th at p. 1121, original italics.) The restrictions on public associational and expressive activities discussed by the City Attorney thus go to "the core of the nuisance" at issue in those cases. (*Englebrecht II*, *supra*, 88 Cal.App.4th at p. 1242.)[24] By

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[23] The City Attorney cites *Smith*, *supra*, 152 Cal.App.4th at p. 1252, in arguing that the trial court erred in failing to identify a less restrictive injunction that it believed would be effective, (AOB at p. 44), but the *Smith* Court did *not* explicitly describe narrower conditions that it believed would be sufficient under the facts of that case, thus undercutting the City Attorney's claim that the trial court's failure to do so constitutes reversible error. (*Smith*, *supra*, at pp. 1251-52.)

[24] *See also Gallo*, *supra*, 14 Cal.4th at pp. 1110, 1120-21 [restriction on public associational activities targeted "the threat of *collective* conduct by

comparison, Respondents are not alleged to be gang members, and the proposed injunctions extend far beyond prohibiting drug dealing. The lawful activity enjoined—including visits to see family in the Tenderloin and access social services—is not at "the core" of the alleged nuisance conduct.

Nor does the curfew provision upheld in *Reisig*, *supra*, 182 Cal.App.4th at p. 891, support the requested exclusion order. As the trial court recognized, the curfew in *Reisig* was far narrower than a prohibition on Respondents' presence. (8 AA2344:26-2345:19.) In addition to only restricting ***public*** activities at certain times of night, the curfew condition contained exceptions for, among other things, attending "a meeting or scheduled entertainment activity" or "actively engaging in a business, trade, profession or employment." (*Reisig*, *supra*, at p. 889.) The injunctions sought by the City Attorney, by contrast, would prohibit essentially all public and private activities in the Tenderloin at any time of day or night.

Far more instructive are decisions addressing the constitutionality of other municipalities' efforts to exclude individuals from neighborhoods for purposes of public safety. Although not binding on this Court, such decisions have forcefully concluded that exclusion orders violate the fundamental right to intrastate travel where, as here, they unnecessarily restrict innocent activities in addition to prohibiting the unlawful conduct that the government seeks to abate.

In *Johnson v. City of Cincinnati*, *supra*, 310 F.3d at 487, the Sixth Circuit concluded that banning individuals for 90 days from "drug-

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gang members loitering in a specific and narrowly described neighborhood"] [original italics]; *In re Englebrecht*, *supra*, 67 Cal.App.4th at p. 496 [same]; *People ex rel. Totten v. Colonia Chiques* (2007) 156 Cal.App.4th 31, 37, 47 (*Totten*) [same]; *Reisig*, *supra*, 182 Cal.App.4th at pp. 886–87 [same]; *Englebrecht II*, *supra*, 88 Cal.App.4th at p. 1266 [upholding "a narrowly drawn prohibition" on expression that "amount[ed] to or contribut[ed] to the nuisance enjoined"].

exclusion zones" upon their arrest for drug offenses, and for one year upon a conviction, violated the right to intrastate travel. Although the court recognized a compelling government interest in protecting the health and safety of the city's residents, it concluded that the prohibition presented "constitutional tailoring problems" because it excluded individuals "without regard to their reason for travel in the neighborhood," thereby prohibiting wholly innocent and even socially beneficial conduct. (*Id.* at pp. 502-03.)

The *Johnson* Court explained that these constitutional concerns were "***compounded by***" the fact that the ordinance applied without any particularized finding that a person was likely to engage in additional drug activity. (*Johnson v. City of Cincinnati*, *supra*, 310 F.3d at p. 503, italics added.) Accordingly, that Respondents' mere arrest did not trigger the exclusion orders requested does not solve the tailoring issue discussed in *Johnson*. (AOB at p. 46.) Here, the City Attorney seeks to prohibit a similarly broad range of innocent conduct, and for a much longer, potentially indefinite, period of time. And despite the City Attorney's promises that individuals will be subject to an exclusion order only following an adversarial proceeding, it is notably seeking entries of default against several individuals similarly situated to Respondents. (8 AA2445:12.)

Considering the same ordinance at issue in *Johnson v. City of Cincinnati*, *supra*, 310 F.3d at 484, the Supreme Court of Ohio similarly recognized that the ordinance unconstitutionally infringed on the right to intrastate travel. (*State v. Burnett* (Ohio 2001) 755 N.E.2d 857, 866-67.) Applying strict scrutiny, the court found that the ordinance failed constitutional muster because it went beyond "restrict[ing] only those interests associated with illegal drug activity, but also restrict[ed] a substantial amount of innocent conduct." (*Id.* at p. 866.) The *Burnett*

Court concluded: "A narrowly tailored ordinance would not strike at an evil with such force that constitutionally protected conduct is harmed along with unprotected conduct." (*Id.* at p. 867.)

In *City of New York v. Andrews* (N.Y. Sup. Ct. 2000) 186 Misc.2d 533, Judge Arthur Lonschein of the Supreme Court of the State of New York also addressed the constitutionality of exclusion orders. There, the City of New York sought to ban individuals from an area where their prostitution-related activities allegedly created a public nuisance. (*Id.* at pp. 535-38.) The court found that the requested relief would unconstitutionally restrict the defendants' rights to move freely about the city, explaining that the plaintiff impermissibly sought to "prohibit all activity by the defendants in the Queens Plaza area: good, bad or indifferent, lawful or unlawful, innocent or guilty." (*Id.* at p. 547.) The court concluded that proscribing "the defendants' presence in the area," rather than nuisance-related activities, "restrict[ed] the defendants' liberties far more than is necessary to prohibit the illegal activity." (*Ibid.*) So too here.

"The right to travel locally through public spaces and roadways—perhaps more than any other right secured by substantive due process—is an everyday right, a right we depend on to carry out our daily life activities." (*Johnson v. City of Cincinnati*, *supra*, 310 F.3d at p. 498.) The City Attorney fails to recognize the significance of this right, but it is, "at its core, a right of function." (*Ibid.*)

CONCLUSION

This Court should affirm the trial court's denial of the preliminary injunctions requested by the City Attorney against Respondents and its ruling that each requested injunction is "unsupported by California precedent and is both statutorily and constitutionally impermissible."

Dated: October 21, 2021 Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately 1.5-spaced, 13-point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 13,967 words.

I declare under penalty of perjury under the laws of the State of California that this Certificate of Compliance is true and correct.

Executed this 21st day of October 2021 in San Francisco, California.

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PROOF OF SERVICE

I, Sara Cooksey, declare that I am over the age of eighteen and not a party to the above action. I am an employee of the American Civil Liberties Union Foundation of Northern California, and my business address is 39 Drumm Street, San Francisco, CA 94111. My electronic service address is scooksey@aclunc.org. On October 21, 2021, I served the following document(s):

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

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