COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION TWO

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

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

The Honorable Ethan P. Schulman

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INTRODUCTION

The trial court found by clear and convincing evidence that the People showed "a reasonable likelihood of prevailing on the merits of their public nuisance and UCL claims." Nonetheless, the trial court denied the People's preliminary injunction on two purely legal grounds: (1) the scope of the court's authority to issue a stay-away order as a remedy under the public nuisance statutes or the UCL; and (2) the constitutionality of the proposed restriction on Respondents' right to travel into the Tenderloin neighborhood to sell drugs, based on evidence that Respondents have no other legitimate purpose to travel into the neighborhood.

While the trial court found that the proposed injunction was not statutorily authorized or constitutionally permissible, its factual findings were entirely in the People's favor. Respondents nonetheless attempt to re-argue the scope of the nuisance and their own contributions to it as if those were the issues on appeal. Because the trial court found that the proposed injunction was not statutorily authorized or constitutionally permissible, its factual findings are unchallenged. However, the trial court's findings also cannot seriously be disputed based on the record below.

The trial court found that the "blatant and open-air drug sales have been increasingly common in the Tenderloin," that the drug-dealing occurs "all day and night," and that multiple ill-effects of this drug-dealing are felt throughout the Tenderloin neighborhood. The trial court also found there was "substantial evidence" that the Respondents have been repeatedly arrested, charged with, and "in some cases convicted of, multiple drug crimes." Finally, the trial court found Respondents responsible for causing a nuisance in the Tenderloin, and found it likely that each of them will continue to perpetuate it. But for the trial court's erroneous ruling that it

was powerless to issue the injunctions, the trial court's factual findings would have dictated their issuance.

In essence, Respondents seek to limit the People's statutory authority to enjoin only conduct that is already criminalized – namely, the drug-dealing itself. But this runs directly contrary to the long-standing precedent interpreting the nuisance and UCL laws broadly. Further, the conduct that the People seek to curtail – namely, Respondents' travel into the Tenderloin neighborhood for no purpose other than to sell drugs – is not qualitatively different than other constitutionally-protected conduct that has been enjoined under the public nuisance statutes and UCL.

The trial court also committed constitutional error when it failed to apply the appropriate intermediate level of scrutiny, or properly apply a stricter level of scrutiny. Under either test, the proposed injunction passes constitutional muster. The nuisance created by Respondents' drug dealing is severe, and the proposed injunction is narrowly tailored to achieve the government's compelling interest in abating that nuisance. It is simply hyperbole for Respondents to claim that if this Court were to find that the preliminary injunctions were statutorily authorized and constitutional, it would give "the City Attorney the power to exclude any number of disfavored groups."

Rather, the proposed injunction is targeted at each Respondents' individualized and specific conduct – as the trial court found, each has repeatedly sold illegal drugs in the neighborhood and will continue to do so. As to the supposed infringement on their rights, Respondents have been given every opportunity to show that they have any legitimate or protected purpose in coming to the Tenderloin neighborhood and have failed to do

so.[1] By seeking the requested injunctive relief only against drug-dealers who lack a nexus to the neighborhood other than their illegal drug sales, the People narrowly tailored their requested relief. These facts are critical because they distinguish the People's proposed injunction from one that prohibits an individual's "mere presence" in a particular location. Unlike an ordinance that "banishes" a class of people from an area in perpetuity, the proposed injunction is based on an individualized determination based on the evidence of each Respondent's conduct and absence of other legitimate activities in the Tenderloin.

The People ask that this Court reverse the trial court's two purely legal errors, and remand to the trial court with instructions to issue the injunction, or in the alternative, apply the correct legal standard to the question whether the preliminary injunctions should issue.

PROCEDURAL HISTORY

There is no need for the People to restate the procedural history here. However, the People note that Respondents suggest in passing that they might be able to prevail on their claims "on a fully developed record at trial." Be that as it may, this is an appealable denial of a motion for preliminary injunction, and on this evidentiary record the trial court found by clear and convincing evidence that the People had a reasonable likelihood of prevailing on the merits.

Further, though Respondents suggest that the People's brief was filed late, this ignores California Rule of Court 8.220(a). The People filed

[1] Respondent Zelaya has suggested he has family members in the neighborhood that he would like to visit, but has failed to present any supporting evidence to substantiate this claim. However, this Court could remand to the trial court to determine, in the first instance, whether the proposed injunction should be modified to permit Respondent Zelaya to travel into the neighborhood for this purpose.

their brief in compliance with that rule and therefore the opening brief was timely.

STATEMENT OF FACTS

I. The Tenderloin is the epicenter of San Francisco's overdose crisis.

Respondents admit that the Tenderloin neighborhood is the epicenter of the drug crisis in San Francisco. The trial court found that "there can be little doubt that illegal drug-dealing in the Tenderloin, and the other conduct associated with it . . . constitutes a public nuisance that affects the entire Tenderloin neighborhood." (8 AA2329:22-25.) Ironically, Respondents fault the government for failing to remedy the situation, while denying the government's ability to do one thing that would affirmatively protect the neighborhood's residents from its primary scourge – enjoin out-of-town drug dealers from coming into the neighborhood to peddle their deadly wares.

II. Respondents do not have any purpose to go to the Tenderloin other than to sell drugs.

Importantly, Respondents point to no evidence in the record that they enter the Tenderloin neighborhood for any purpose other than to sell drugs. While Respondents speculate that they "could" have legitimate purposes to travel to the Tenderloin to receive services, they presented no evidence that they actually do so. Respondents all submitted declarations to the trial court, and none of them attested that they lived in the Tenderloin. Only one asserted he had legitimate reason for being in the Tenderloin, but failed to provide evidence supporting that claim. Respondents say only that "those who sell drugs often do so in order to survive." While Respondents claim that they "lack resources and support," they have provided no evidence that they themselves rely on resources or support in the

Tenderloin neighborhood. Nor have they presented evidence that they could not obtain these resources or support in the cities and counties – like Oakland, Daly City, and Alameda – where they live.

III. Respondents are not "low-level" drug dealers.

Respondents attempt to characterize their crimes as "low-level drug" offenses. Yet, this is contradicted by the record. As the trial court found, each of the four Respondents was arrested multiple times for dealing large quantities of deadly drugs, including fentanyl, methamphetamine, and heroin. (8 AA2331:4-11.)

Even if Respondents' crimes were low-level drug offenses, that does not make them less of a nuisance. The Legislature has specifically determined that "the illegal sale of controlled substances" is a nuisance. (Civ. Code § 3479.) Respondents are an essential part of the illegal drug trade, and the Legislature has made the considered judgment that this makes Respondents liable for the effects that their illegal activity has on the community.

STANDARD OF REVIEW

The questions at issue in this appeal are entirely ones of law, which Respondents concede are reviewed de novo by this Court. (*In re Pham* (2011) 195 Cal.App.4th 681, 685.) Indeed, because the trial court did not decide whether it would have granted the preliminary injunction if it had ruled otherwise on the statutory and constitutional claims issues by Respondents, there is no decision to which this Court must afford deference.

ARGUMENT

I. California's public nuisance statute and the UCL authorize the issuance of stay-away orders.

Respondents claim that the statutes only permit courts to prohibit "conduct," and that such conduct cannot include entering into a particular area. The distinction that Respondents are making is not supported by the relevant statutes or their interpretation by California courts.

A. The court's abatement power permits it to enjoin nuisance-related conduct, such as travel into an area to perpetuate a nuisance.

The court's authority is not limited to prohibiting only Respondents' illegal drug sales. Rather, the abatement power authorizes courts to take any number of actions, so long as they are necessary to abate the nuisance. Because the requested injunction is necessary to prevent Respondents from continuing to contribute to the nuisance in the Tenderloin, the proposed injunction is not overbroad.

Respondents cite *People v. Mason* (1981) 124 Cal.App.3d 348 to argue that the People's requested injunction "is akin to the absolute prohibitions on businesses that are routinely" rejected by appellate courts. But *Mason* is inapposite, as a case where the proposed injunction, while lawful, was nonetheless overbroad. There, the enjoined restaurant owners were operating a "legitimate business," and so the appellate court held that the injunction should "go no further than is absolutely necessary to protect the lawful rights of the parties seeking the injunction." (*Id.* at 354.) But here, contra *Mason*, Respondents' business selling illegal drugs is a nuisance per se.

Similarly, in *Anderson v. Souza* (1952) 38 Cal.2d 825, the California Supreme Court expressed no hesitation about the trial court's statutory

authority to enjoin the operation of an airport. Rather, as in *Mason*, the question was only whether the injunction was overbroad.

In any case, both *Mason* and *Anderson* are inapposite because they concerned the proper scope of an injunction against a business that was inherently lawful and could be modified to avoid causing a nuisance. They did not involve activities that were a nuisance *per se* and impossible to reform, like Respondents'. Indeed, *Anderson* explicitly recognized that consideration of a less restrictive injunction is a privilege afforded to lawful businesses, not one that is a nuisance *per se*. (*Anderson*, at p. 841; accord *Morton v. Superior Court* (1954) 124 Cal.App.2d 577, 582 ["when the defendant's business is not a nuisance *per se*, the injunction should be limited in scope so as to not enjoin the defendant's entire business"].)

To the extent that *Mason* and *Anderson* stand for the proposition that a court should consider a less restrictive injunction if that would abate the nuisance, these decisions support the People's position that the trial court erred. Having decided it lacked statutory power to issue the injunctions, the trial court declined to consider whether a narrower injunction could abate Respondents' nuisance activity in the Tenderloin. If it had, however, the trial court would have found that the proposed injunction was not overbroad because Respondents are not engaged in any legitimate business in the Tenderloin neighborhood, and so therefore their only business in the neighborhood is "calculated to cause injury to [the neighborhood's] residents." (*Mason*, 124 Cal.App.3d at 354.)

Respondents also argue that even in cases where injunctions are sought against illegal activities, they cannot restrict travel into a particular neighborhood to conduct those activities. As an initial matter, there is no logic to an argument that suggests that courts have less power to enjoin an

illegal business activity than a legal business activity. However, there is also no support for Respondents' claim that *Gallo* established a clear demarcation between restrictions on activity and restrictions on "physical presence." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090.) There are three reasons why Respondents' argument based on *Gallo* fails: (1) the proposed injunctions cannot be reduced to mere restrictions on presence; (2) *Gallo* provided an example of the courts' abatement powers and did not set its outer limits; and (3) the proposed injunctions are narrower in scope than those at issue in *Gallo*.

First, this Court should resist Respondents' attempt to recharacterize the proposed injunction as a restriction on mere presence as opposed to conduct. Respondents enter the Tenderloin neighborhood solely to deal drugs. They have done it repeatedly, despite the threat of criminal prosecution and the issuance of narrower stay-away orders. Respondents have presented no evidence that they have any other purpose in coming to the Tenderloin, discounting Respondents' speculative comments that they "could" come into the neighborhood to seek certain services. Respondents do not have an unqualified right to come to the Tenderloin, no matter the evidence of the harm they cause to this community. Just as an order that a gang member not associate with other gang members is not a ban on all association, neither is an order that Respondents stay away from the Tenderloin a ban on "mere presence." Respondents may be present throughout other parts of the San Francisco where they have not been proven to be engaging in creating a harmful and localized nuisance. Respondents may also seek permission to enter the Tenderloin for legitimate and lawful purposes.

Second, Respondents suggest that *Gallo* created a rule that only conduct, and indeed, only certain kinds of conduct, can be enjoined under the nuisance statute. But *Gallo* does not set the outer limits of the court's abatement powers. In *Gallo*, the appellate court considered whether the defendants' activity was, in fact, a public nuisance. The court answered this question in the affirmative, despite much of the prohibited conduct being non-criminal and constitutionally-protected activity. (*Gallo*, *supra*, 14 Cal.4th at 1120.)

Third, the requested injunction is actually narrower and constrains less constitutionally protected activity than the gang injunctions in *Gallo*. In *Gallo*, the appellate court permitted an injunction preventing gang members "from engaging in any form of social intercourse" with other gang members within the exclusion zone. (*Gallo*, 14 Cal.4th at 1091.) By comparison, the People's proposed injunctions merely enjoin Respondents from entering a specific area where the evidence shows they will continue to engage in illegal drug sales. Respondents ask this Court to ignore that drug-dealing is the sole reason supported by the evidence for their entry into the drug abatement zone. But the record shows that there is no other reason that Respondents have for coming into the Tenderloin. For this reason, the proposed injunction is targeted to the specific harm caused by Respondents' conduct, just like the injunctions at issue in *Gallo*.

B. The public nuisance statutes authorize the proposed injunction.

Respondents argue that *People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51 is inapposite because it involved the abatement of an existing harmful condition, rather than a prohibition on prospective conduct. But the trial court already found that, as a factual matter,

Respondents created and are perpetuating a harmful nuisance through their past and persistent drug-dealing. While the means of abatement may be different in this case than in *ConAgra*, the remedial purpose is the same. Respondents attempt to distinguish *ConAgra* further based on a distinction between abatement orders and injunctions, but that language comes from the section of the case explaining there is no right to a jury trial in a nuisance abatement action.

Respondents also attempt to distinguish *People ex rel. Feuer v. FXS Management, Inc.* (2016) 2 Cal.App.5th 1154, on the grounds that the medical marijuana business that was enjoined from operating "met the definition of a nuisance per se." Respondents argue that their presence in the Tenderloin is not a nuisance *per se*, despite the trial court's finding that their illegal drug dealing in the neighborhood is a nuisance *per se* that they will continue to perpetuate. Given that Respondents' only evident conduct in the Tenderloin neighborhood is a nuisance *per se*, the question this Court must answer is whether the trial court has the authority to grant an injunction to prevent Respondents from entering the neighborhood to create that nuisance. *FXS Management* supports the People's argument that the trial court does have this authority, just as it had the authority to shut down the entire marijuana business in that case. The People have proven that Respondents' only reason to enter the Tenderloin is to sell deadly and illegal drugs, and it is proper for an abatement injunction to mirror that reality. To prevent Respondents from causing a nuisance in the Tenderloin, their absence should be the rule, and their presence the exception.[2]

[2] To this end, the proposed injunction included a carve-out for occasional visits to the Tenderloin for lawful purposes, by advance stipulation with the People. Likewise, the People acknowledge that to the extent Respondents such as Zelaya have shown a legitimate reason to periodically be in the Tenderloin, the injunction may carve out appropriate

Cases requiring removal of structures illustrate the far-ranging authority that courts have to craft remedies. However, Respondents seek to dismiss them merely by saying that they were about "structures, not people." This misses the point. If courts are authorized to raze entire buildings to abate a nuisance, surely, they can prohibit individuals from coming to a location to engage in illegal activity. Contrary to Respondents' claim, the People do not argue that Respondents' mere presence in the Tenderloin constitutes a public nuisance. Rather, the record shows that Respondents are not "merely present" in the Tenderloin. The uncontroverted evidence is that they come into the Tenderloin, miles away from where they live, for no purpose other than to sell illegal drugs.

The People cited California Civil Code section 3495 and the Red Light Abatement and Drug Abatement statutes as illustrative of the expansive powers granted courts to address and abate nuisances. Of course, the People are not contending that these laws authorize the injunctions. Thus, it does no harm to the People's argument to point out that they are not the direct source of statutory authority for the proposed injunctions. Rather, these statues demonstrate that barring nuisance-creators from particular places is not a novel concept in the law. And in any case, California courts generally recognize "the broad discretion conferred on trial courts in fashioning appropriate remedies to abate public nuisances" under their equitable powers, regardless of the specific public nuisance statute. (*People ex rel. Sorenson v. Randolph* (1979) 99 Cal.App.3d 183, 190 [Red Light Abatement Law case].)

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exceptions for that purpose – but such exceptions should not be allowed to swallow the rule.

Respondents are also unpersuasive in their attempt to distinguish *State v. Lhasawa* (Ore. 2002) 334 Or. 543, which upheld an Oregon ordinance prohibiting people from entering an exclusion zone. The fact that *Lhawasa* involved an ordinance makes it more persuasive here, where the People are seeking the more limited remedy of individualized injunctions. An ordinance is a blanket restriction on a class of people, whereas the injunctions here are individualized and issue only upon individualized determinations that the Respondents are contributing to the nuisance. Further, the *Lhasawa* court helpfully distinguished between an order to stay away from a neighborhood, versus actual "banishment," explaining that "banishment traditionally meant exclusion from a sovereign's entire territory for life." (*Id.* at 551.) Not only are Respondents not residents of the Tenderloin, but the Tenderloin is a neighborhood and not a political unit. Further, the proposed injunctions would be effective only until entry of a final injunction after trial.

The proposed injunction can thus be distinguished from an ordinance that would purport to exclude all drug-sales arrestees from the Tenderloin, regardless of their residency, other legitimate activities in the neighborhood, the strength of the case against them, or the likelihood of their continued drug-sales. Here, the People have shown, after an adversarial proceeding that provides due process protections, that Respondents are drug dealers who have no other legitimate purpose, or documented activity, in the Tenderloin neighborhood. This Court should resist Respondents' attempt to mischaracterize these proposed injunctions as if they were indiscriminate "bans" on entire class of individuals.

C. The UCL authorizes stayaway orders to prevent unfair competition.

Respondents argue that the UCL does not permit a court to enjoin individuals' presence in the area where they are engaging in prohibited activities, only those activities themselves. But where the evidence shows that the only purpose for entering the area is to conduct illegal drug sales, the UCL allows a court to prevent that unlawful business practice by prohibiting the activity (namely, the travel) that enables the law-breaking. If Respondents are permitted to enter the Tenderloin neighborhood, the record amply demonstrates that they will continue to conduct illegal drug sales there. Thus, Respondents may be prevented from entering the Tenderloin neighborhood as a way to prevent their illegal drug sales, which are an unlawful "act or practice" under section 17200.

Respondents' coming to the Tenderloin to sell illegal and dangerous drugs is a "practice which constitutes unfair competition" under section 17203. Since there is no doubt that Respondents' conduct is actionable under the UCL, Respondents instead suggest that the People's proposed equitable remedy is too broad, pointing to *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134. That case, however, did not address the scope of non-monetary equitable relief under the statute. (*Id.* at 1144.) The court in *Korea Supply* instead ruled that disgorgement was an available remedy "only to the extent that it constitutes restitution." (*Id.* at 1145.) The appellate court held that although the UCL's equitable remedies were broad, they did not encompass monetary remedies like disgorgement of profits that went beyond restitution. (*Id.* at 1146.) This was not because the statute limited courts' powers to "'prevent' practices that constitute unfair competition." Rather, this was because the forms of monetary relief available are expressly limited by statute. (*Id.* at 1147-48.). Likewise,

Kraus v. Trinity Management Services, Inc. (2000) 23 Cal.4th 116 simply held that monetary remedies are limited under the UCL, and the court's broad equitable powers do not expand those limited monetary remedies through a backdoor. Neither case suggests that courts' powers to craft equitable remedies targeted at Respondents' conduct is limited.

Respondents suggest that the Legislature's explicit authorization of stayaway orders in other contexts requires a similarly explicit authorization under the UCL. But if such explicit authorization were required under the UCL, then none of the equitable remedies for UCL violations recognized by the courts would be permitted. *Korea Supply* and *Kraus* cannot stand for the proposition that each of the myriad of possible equitable relief remedies that courts may craft for violations of the UCL must be enumerated in the statute. That would call into question every form of equitable relief that has already been held to be within courts' remedial powers, in countless California court decisions.

Further, criminal stay-away orders do not serve as an adequate remedy at law, nor is there any finding that they do. In *Gallo*, the California Supreme Court already amply explained that civil abatement actions and criminal proceedings are concurrent, non-exclusive remedies for public nuisances. Likewise, our Supreme Court long ago rejected the argument that a criminal prosecution was an adequate remedy at law that would foreclose a civil public nuisance proceeding. (*In re Wood* (1924) 194 Cal. 49, 55-59.) And the UCL expressly authorizes injunctions against acts prosecutable under the penal laws. (Bus. & Prof. Code § 17202; see *id.* § 17205 [UCL remedies cumulative to those of other laws].)

D. Stayaway orders are permissible under the UCL.

Respondents accuse the People of setting up a strawman argument by arguing that the trial court wrongly limited UCL injunctive relief to "disallowing unlawful activities." But having just disavowed one extreme position, Respondents then argue the requested injunction is an "order excluding Respondents from the Tenderloin for essentially all purposes." But the proposed injunction merely prohibits Respondents from entering the Tenderloin for the purpose of selling drugs. If Respondents had other lawful purposes – such as obtaining services, etc. – they were free to request a carve-out to permit their continued travel into the neighborhood for those purposes. Notably, Respondents have not made any such showing nor requested any such modification of the proposed injunction.

Respondents are eliding the factual record in the case. The record shows that the Respondents repeatedly enter the Tenderloin for one purpose: to cause a nuisance in the Tenderloin by selling illegal drugs. Respondents had an opportunity to present evidence of other purposes, and they did not do so. On this record, an injunction making exclusion the rule and presence the exception is entirely appropriate.

II. The proposed injunction does not violate Respondents' constitutional right to travel.

Respondents argue that strict scrutiny applies to this Court's review of the proposed injunction. This is incorrect. However, even under the heightened level of scrutiny applied by the trial court, the proposed injunction is not unconstitutional. The trial court erred by failing to consider whether there were less restrictive alternatives. If the court had considered the availability of such alternatives, its own factual findings would have required the trial court to find there were no less restrictive alternatives and the proposed injunctions were narrowly tailored.

A. Strict scrutiny does not apply.

Respondents do not cite, and the People have not found, any case in which a court has held that strict scrutiny applies to an individualized injunction restricting the right to intrastate travel. (*Cf. Nunez by Nunez v. City of San* Diego (9th Cir. 1997) 114 F.3d 935, 946 [applying strict scrutiny to ordinance imposing curfew on minors where the ordinance infringed on multiple fundamental rights, including the right to travel].) As Respondents admit, the United States Supreme Court has not expressly recognized a right to intrastate travel. The cases cited by Respondent stand only for the proposition that a statute or regulation of general application that restricts intrastate travel may be subject to either intermediate or strict scrutiny. (*Johnson v. Hamilton* (1975) 15 Cal.3d 461; *Thompson v. Mellon* (1973) 9 Cal.3d 96.) *Johnson* involved a residency requirement for candidates in local elections, and applied strict scrutiny because of the fundamental right to participate in elections. (*Johnson*, 15 Cal.3d at 469). It did not decide what level of scrutiny should apply based on a right to travel. The California Supreme Court has never otherwise opined on the level of scrutiny applicable to "right to travel" challenges to court-ordered restrictions on movement. (*People v. Moran* (2016) 1 Cal.5th 398, 406.)

Respondents cannot rely on *Johnson* and *Thompson* to support their argument for strict scrutiny. This case does not implicate the right to vote or the imposition of residency restrictions. Moreover, here the restrictions on travel are imposed by individual injunctions issued after an adversarial proceeding, not by a statute or ordinance on a class-wide basis. But even if these distinctions were not enough, it is also true that *Johnson* and *Thompson* have been abrogated by more recent decisions evaluating such residency requirements under a rational basis test. (*MacDonald v. City of*

Henderson (D. Nev. 1993) 818 F.Supp. 303, 306 [recognizing abrogation of *Bay Area, etc. v. City and Cty. of San Francisco* (1978) 78 Cal.App.3d 961].)

Finally, Respondents ask the Court to ignore the qualitative differences between a general ordinance restricting travel and an individualized injunction. But the Supreme Court recognized precisely this point in *Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753. The Supreme Court recognized that while injunctions may carry "greater risks of censorship and discriminatory applications than general ordinances," they also "have some advantages over generally applicable statutes in that they can be tailored by a trial judge to afford more precise relief than a statute where a violation of the law has already occurred." (*Id.* at 764-65.) Weighing these differences, the Supreme Court landed on a level of scrutiny in *Madsen* that was less than the strict scrutiny that Respondents urge here, yet slightly higher than the time-place-manner level of scrutiny that applies to ordinances restricting content-neutral speech. (*Id.* at 767.) At the end of the day, the *Madsen* test, to the extent that it was relied upon by the trial court, is not strict scrutiny. Moreover, there is no compelling reason to apply even the *Madsen* level of elevated intermediate scrutiny here. Unlike *Madsen*, this is not a First Amendment case, and therefore the concern for viewpoint discrimination and censorship that the *Madsen* majority cited as its reason for adopting something like "intermediate scrutiny-plus," is absent here. Traveling into a neighborhood to sell drugs is not constitutionally-protected activity. Without the kinds of particular concerns articulated in *Madsen*, simple intermediate scrutiny applies.

B. Intermediate scrutiny applies.

The level of scrutiny used in *Smith* and *Relkin* is controlling. (*People v. Smith* (2007) 152 Cal.App.4th 1245; *People v. Relkin* (2016) 6 Cal.App.5th 1188.) Respondents advance four theories for why the court should have rejected this test, none of which are compelling.

First, there is no support for the idea that a level of constitutional scrutiny used in criminal cases cannot be used in the civil context. If anything, the infringement of rights in the criminal context is afforded greater scrutiny than it is in the civil context. That is because the liberty consequences in the criminal system are more severe than they are in civil cases. Thus, even if the standards differ, they should not require a greater degree of scrutiny in a case involving only a civil injunction than a case where an individual's liberty is at stake.

As a factual matter, there is no dispute that Respondents sell dangerous and illegal drugs in the Tenderloin. Further, Respondents are arguably afforded greater due process protections in this civil context than they are in the probation context. Probation violations do not have to be determined beyond a reasonable doubt, but rather only by a preponderance of the evidence. (*People v. Abrams* (2008) 158 Cal.App.4th 396, 400.) The Sixth Amendment right to confrontation does not apply, and hearsay evidence may be admitted to a greater degree than allowed during a criminal trial. (*Id.*) Thus, it is simply inaccurate to say that probationers are afforded greater due process protections than Respondents.

Respondents also put much weight on the fact that probation conditions are imposed after conviction, while ignoring the civil law standards applied to pretrial detainees, who are entitled to the presumption of innocence and whose liberty interest has not yet been reduced by the fact

of their conviction. In these circumstances, pretrial detention is determined in the first instance upon a showing by clear and convincing evidence (the same standard applied here) that the suspect's release poses a threat to the safety of the public or the victim and that no other conditions of release could reasonably protect those interests. (*In re Humphrey* (2021) 11 Cal.5th 135, 153.) In *United States v. Salerno* (1987) 481 U.S. 739, the Supreme Court held constitutional the Bail Reform Act's provision that, upon a showing by clear and convincing evidence that an arrestee is dangerous, an arrestee may be detained without bail. Even a "strong interest in liberty" can be infringed "where the government's interest is sufficiently weighty… to the greater needs of society." (*Id.* at pp. 750-751.) If pre-trial imprisonment can be justified by clear and convincing evidence that a person not yet convicted is dangerous or a flight risk, surely clear and convincing evidence that a person is selling illegal and dangerous drugs in a particular neighborhood and is likely to continue to do so is sufficient to justify an order to stay out of that neighborhood. This must be the case, especially when the person has failed to show the existence of other legitimate purposes for their travel into the neighborhood. Indeed, the record reflects that stay-away orders are a normal feature of the pre-trial release of drug arrestees, under Penal Code § 1318(a)(2). Respondents have no argument that they are entitled to a higher level of scrutiny than pretrial detainees, who are presumed innocent and whose liberty is at stake.

And although this fact is not dispositive, Respondents *do* have criminal convictions for selling drugs. The court found these convictions probative of the fact that Respondents will continue to sell drugs despite criminal sanctions if they are not excluded from the Tenderloin neighborhood.

Second, and for the same reasons articulated above, the fact that probation occurs after a criminal conviction does not make restrictions on probationers' movement subject to a lesser degree of scrutiny. Although it is true that probationers' "reasonable expectations regarding . . . travel may necessarily have been reduced" during probation, the cases cited by Respondents do not use this as a reason to alter the degree of scrutiny imposed. (*In re White* (1979) 97 Cal.App.3d 141 [applying intermediate scrutiny to probation condition restricting right to travel].) And although probationers do nominally "consent" to the conditions of probation as an alternative to incarcerations, courts have not found that probationers' consent allows the government to impose any condition, no matter how restrictive.

Third, to the extent Respondents argue that probation cases are distinguishable because they arise under the probation statutes, a comparison of the probation condition statutes with the public nuisance and UCL statutes actually supports the People's case. The relevant probation condition statutes are just as general and non-specific regarding stay-away orders as the UCL and nuisance remedy statutes. There is no provision of the Penal Code sections dealing with probation that expressly provides for stay-away orders. Nevertheless, such orders are routinely issued under the Superior Court's general authority to impose terms and conditions of probation. (Penal Code § 1203.1(a), (i)(2), (j).) Indeed, Respondents' citation to Penal Code section 1203.1 tends to prove the People's point – conditions of probation operate similarly, and should be scrutinized similarly, to injunctions designed to abate nuisance activity. Finally, as a matter of fact, the proposed injunctions do not "permanently restrict Respondents' fundamental right to travel to into the Tenderloin." The

proposed injunction, by its own terms, sought to enjoin Respondents only until the issuance of an injunction after trial and subject to several exceptions, including one for preapproved visits for any legitimate purpose. Here, Respondents seem to have been carried away on a detour into hyperbole that is contradicted by the record.

Fourth, the rehabilitative purpose of probation conditions has no bearing on the level of scrutiny that applies. Respondents argue that courts have "broad discretion" to craft probation conditions in a way that distinguishes them from courts' broad powers to craft injunctive relief for violations of the nuisance statutes and UCL. But the law makes no such distinction. For example, in *Gallo* the injunction contained restrictions that could have been cut and pasted from a set of probation restrictions. The defendants in *Gallo* were prohibited, among other things, from drinking alcohol in public, possessing weapons, wearing clothing exhibiting the name or letters of the gang, possessing spray paint cans or objects capable of defacing property, trespassing on private property, approaching vehicles, engaging in conversation or otherwise communicating with the occupants of any vehicle, and using or possessing pagers or beepers in any public place. (*People ex rel. Gallo v. Acuna* (1995) 40 Cal.Rptr.2d 589, fn. 1.) In total, the injunction at issue in *Gallo* contained 25 separate restrictions on the defendants' conduct. These restrictions are neither qualitatively nor quantitatively different than standard conditions of probation. They also give the lie to Respondents' claim that the rehabilitative goal of probation "permits extraordinary individual tailoring and conditions that would be neither appropriate nor permissible outside of the probation context." This Court need look only to *Gallo* to find precedent upholding conditions that are probation-like in the nuisance context.

And although Respondents claim that the proposed injunction is punitive and "runs counter to rehabilitation," this is not supported by the record. The injunction addresses the likelihood, found by the trial court by clear and convincing evidence, that Respondents will continue to sell drugs in the Tenderloin. The purpose of a nuisance abatement injunction is not rehabilitation of the wrongdoer, it is to protect a place and a community from the wrongdoer. While it is not necessary that the proposed injunction serve a rehabilitative purpose, it cannot help but rehabilitate Respondents by preventing them from returning, time and again, to the place where they sell drugs.

C. Under intermediate scrutiny, the proposed injunction clearly passes constitutional muster.

If the trial court had applied the appropriate standard of scrutiny to court-ordered restrictions on travel, it would have issued the proposed injunctions. Cases in which the courts have rejected overbroad restrictions on travel during probation demonstrate why the proposed injunctions are constitutionally permissible here. The People have already explained why the three cases cited by Respondent dictate a different result here. All three involve probation restrictions that required the defendants to leave their home or lawful employment. (*In re White*, (1979) 97 Cal.App.3d 141; *People v. Beach* (1983) 147 Cal.App.3d 612, 621 [condition required defendant to relocate herself from the community in which she had lived in her own home for 24 years]; *People v. Bauer* (1989) 211 Cal.App.3d 937.) *In re White* is distinguishable in any number of ways, but most importantly because the defendant in that case lived in the area from which the government sought to exclude her. But it is also important that unlike Respondents, there was no evidence that the defendant in *White* engaged in

prostitution in any particular location, or that the condition would do anything more than change the location of her future criminal conduct. (*In re White*, *supra*, 97 Cal.App.3d at 147 [restriction also made it difficult for White to take her children to the local park, and prevented her from taking the Greyhound Bus].) Here, the People have amply demonstrated the "factual nexus between the proscribed activity and future criminality" that was lacking in *White*. (*Id.*)

In *Bauer*, similar to the condition imposed in *Beach*, the trial court imposed a residency approval condition of probation, which the probation officer used to bar the defendant from living in his childhood home. But in *Bauer*, there was no evidence that "appellant's home life (which is exemplary compared to that of most convicted felons) contributed to the crime of which he was convicted or is reasonably related to future criminality." (*Id.* at 944.) The court's rejection of the residency restriction in that case was focused on the inexplicability of the trial court's disapproval of a 26-year-old living with his parents. As precedent, it has little to nothing to add to this Court's evaluation of the proposed injunctions in this case.

D. Even under strict scrutiny, the proposed injunction infringes on respondents' constitutional rights no more than necessary to accomplish the compelling public interest in abating public nuisance.

Respondents concede that the People have a compelling and substantial public interest in abating the illegal drug trafficking activities of Respondents in the Tenderloin neighborhood. They also concede, as they must, that governments may burden individual constitutional rights to achieve legitimate government interests.

Respondents, however, overstate their case when they argue that the proposed injunction "set[s] aside constitutional safeguards to pursue a general goal of reducing crime." The proposed injunctions only minimally affect Respondents' constitutional rights by preventing them from entering a small neighborhood in which Respondents' only interest is to sell drugs. The proposed injunctions also provide multiple layers of safeguards against unreasonable burdens on those rights. The proposed injunctions provide legal paths to travel by public transportation through the Tenderloin neighborhood, and to access the state and federal courts within the neighborhood. If Respondents have other lawful reasons to enter the neighborhood, they may obtain advance stipulations from the People. Finally, the People also seek to achieve not a general goal of reducing crime but a specific outcome – ceasing Respondents' illegal drug trafficking in the Tenderloin neighborhood.

The trial court and Respondents suggest that the simple fact that the proposed injunctions seek to enjoin Respondents from entering into the Tenderloin neighborhood shows that it is not narrowly tailored. This cannot be true, because Respondents also have failed to demonstrate they are engaging in any constitutionally protected activity in the Tenderloin that the injunctions would limit. (*Cf. People v. Smith* (2007) 152 Cal.App.4th 1245, 1252 [noting that Smith twice sought relief from injunction preventing him from traveling to location of his employment and was denied].) Rather, the only right Respondents have invoked is the "right to travel into the Tenderloin." This argument is circular. In the absence of evidence that Respondents travel to the Tenderloin for a legitimate purpose, there is no less restrictive means available that would both abate Respondents' nuisance and be less restrictive on Respondents' lawful exercise of their

constitutional rights. Respondents' decision not to seek individual carve-outs to the injunctions does not prove that the proposed injunctions are not narrowly tailored. Rather, it proves that it *is*, because it shows that Respondents have no legitimate purpose to travel to the Tenderloin neighborhood, which the proposed injunctions would prevent them from engaging in.

Respondents' criticism of the People's civil suit as "setting aside constitutional safeguards" is misguided. After all, no one would criticize a criminal prosecution of a drug dealer as "setting aside constitutional safeguards" on the grounds that the remedy – imprisonment – limits constitutional liberties. The limitation on Respondents' right to travel sought in this civil case is far less of an infringement of constitutional liberties. But, as in a criminal case, it occurs through a full due process adversarial proceeding with an enhanced standard of proof imposed on the People. And the consequence of being found guilty in a civil law enforcement proceeding properly can include limitations on the exercise of constitutional rights enjoyed by those who are innocent. (*People ex rel. Hicks v. Sarong Gals* (1974) 42 Cal.App.3d 556, 562-63 ["just as a court order for the incarceration of a convicted lawbreaker impinges on all sorts of constitutional rights, so does the abatement order"]; *National Soc. of Professional Engineers v. United States* (1978) 435 U.S. 679, 697 [upholding limitation on First Amendment expression following civil antitrust proceeding].) As to the second part of Respondents' criticism – that the People's suits are motivated by the "general goal of reducing crime" – this is both irrelevant and incorrect. A general goal of reducing crime is not unconstitutional – indeed, crime reduction itself is a compelling government interest. But here the People are pursuing a more

specific outcome – abating Respondents' illegal drug trafficking in the Tenderloin neighborhood.

In essence, Respondents are saying that the only constitutional injunction the People could obtain would be one that prevented them from selling drugs in the Tenderloin. But the trial court already found that such an injunction would be ineffective. Alternatively, they suggest that another authority – the District Attorney's Office – could seek broader stay-away orders as a condition of probation. But as already argued, the possibility of criminal conviction does not preclude nuisance abatement.

E. Precedent weighs in favor of granting the proposed injunctions.

Finally, Respondents' attempts to distinguish the remaining cases cited by the People are unpersuasive. First, Respondents argue that unlike the proposed injunctions, the broad restrictions on constitutional rights upheld in the gang injunction cases "went to the core of the nuisance" in those cases. It is hard to see what is more at the core of the nuisance in this case than Respondents' coming into the Tenderloin to sell drugs. Indeed, the fact that out-of-town dealers flock to the Tenderloin's open-air drug market aggravates the nuisance. This is the nuisance conduct the People seek to abate, and it cannot be abated in any less restrictive way. The People should not be forced to allow Respondents, who live elsewhere, to travel into a neighborhood blighted by drug dealers when Respondents' only purpose for being there is to sell illegal drugs. And yet, that is exactly what Respondents would have this Court hold.

Ordinances by definition sweep in innocent conduct because they are not individualized – they affect a class of individuals regardless of their individual circumstances. Respondents ask this Court to consider them in

the same category as those restricted by a general law. But Respondents are not. Respondents got exactly what critics of blanket ordinances complain was lacking: individualized proof of wrongdoing and the likelihood the wrongdoing would continue, as well as an opportunity to show why a proposed restriction would be unjust under an individual's particular circumstances, and should be modified. Given that opportunity, Respondents failed to rebut the government's showing as to their wrongdoing and failed to show why the proposed injunction was not suited to their circumstances. All the ills identified in the ordinance cases cited by Respondents are ameliorated by the simple fact of individualized due process before the imposition by the court of an injunction.

For instance, as Respondents admit, the ordinance in *Johnson* was constitutionally infirm because it applied without a particularized finding that a person was likely to engage in additional drug activity. (*Johnson v. City of Cincinnati* (6th Cir. 2002) 310 F.3d 484 at 503; *see also State v. Burnett* (Ohio 2001) 755 N.E.2d 857, 866-67 [holding that ordinance was not narrowly tailored because it applied even without evidence that a crime occurred or that a particular person was likely to repeat his criminal activity].) Here, of course, the trial court did find that each of the individual Respondents *had* engaged in repeated illegal drug sales in the Tenderloin and *was* likely to engage in additional illegal drug sales in the neighborhood in the absence of the proposed injunction. It is therefore disingenuous for Respondents to complain that the proposed injunctions sweep as broadly as these ordinances.

The People understand that the right to travel, just like the right of freedom of speech and freedom of association, is a fundamental right. It does no constitutional harm to that right, however, to enjoin Respondents

from exercising that right when the only purpose for doing so is to commit crimes. To say otherwise would mean that courts could never restrict the right of free movement outside of the criminal justice system. Workplace harassment stay-away orders and domestic violence restraining orders – both civil restrictions on travel that issue based only on notice and an opportunity to be heard – would be unconstitutional. Respondents would thus privilege the right to travel above all other rights protected by the Constitution. It is the equivalent of permitting Respondents to yell "Fire!" in a crowded theater to protect their First Amendment rights. The Court should not affirm such a sweeping restriction on the government's ability to combat the worst public nuisance the City has ever experienced.

Since the beginning of 2020, the illegal drug trade has taken the lives of twice as many San Franciscans as the COVID-19 pandemic. In that time, the courts have upheld far more draconian restrictions, passed by general order, on law-abiding City residents' right to intrastate travel. San Franciscans have been prohibited from leaving their homes, going to playgrounds and other public places, and traveling for "non-essential" purposes. Here, the People seek only to restrict the ability of specific individuals to continue to go into a neighborhood to which their only connection is the illegal drug trade. And yet Respondents, and the trial court, found the proposed injunction could not be narrowly tailored, without ever considering whether the proposed exceptions and evidence-based carve-outs would render it constitutional in individual cases. This Court should reject such an extreme limitation on the People's ability to take necessary actions to abate a nuisance that will otherwise continue to metastasize on the streets of the Tenderloin, rendering it all but uninhabitable for those who actually live and work there.

CONCLUSION

For the foregoing reasons, the People respectfully request that this Court reverse the trial court and remand with instructions to enter the proposed injunctions, or, in the alternative, to apply the correct legal standard to the question whether the proposed preliminary injunctions should issue.

Dated: November 10, 2021

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 7,950 words.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on November 10, 2021.

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

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Executed November 10, 2021, at San Francisco, California.

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