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11
12 **UNITED STATES DISTRICT COURT**
13 **EASTERN DISTRICT OF CALIFORNIA**

14
15 DESIREE MARTINEZ, FRESNO HOMELESS
UNION, FAITH IN THE VALLEY, and ROBERT
16 MCCLOSKEY,

17 Plaintiffs,

18 v.

19 THE CITY OF FRESNO,

20 Defendant.

CASE NO.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

1 Plaintiffs Desiree “Dez” Martinez, Fresno Homeless Union, Faith in the Valley, and Robert
2 McCloskey (collectively, “Plaintiffs”) bring this case against the City of Fresno (“Fresno” or “City”) for
3 deprivation of rights enshrined in federal and state law, and allege as follows.

4 INTRODUCTION

5 1. Fresno has a severe housing crisis, a growing population of unhoused residents, and a
6 long history of mistreating its unhoused community. Despite the lack of readily available shelter beds,
7 the City deems encampments where houseless people live a “public nuisance” and targets these
8 locations for abatement with frequent dismantling, or “sweeps.” The City often carries out this
9 abatement activity by destroying precious belongings and life-saving items without due process and by
10 deploying excessive force to make people pack up and move to a new location—sometimes only a few
11 blocks away. Plaintiffs regularly frequent such encampments to share resources, offer support,
12 document conditions, and, in the case of the Fresno Homeless Union, represent and organize unhoused
13 people in defense of their rights and for permanent housing. Plaintiffs also regularly show up at sweeps
14 on public property to provide representation, legal support, and critical assistance or, simply, to observe,
15 document, and report on the City’s actions.

16 2. As recently amended, Section 10-616 of the Fresno Municipal Code addressing
17 administrative nuisance abatements (“the Ordinance”)¹ represents the City’s latest unlawful efforts
18 directed at unhoused people. But the Ordinance also signals a new, more sinister approach: the
19 criminalization of concerned citizens and reporters trying to address or alleviate the unhoused
20 community’s plight. The recent amendments impose high administrative fines and misdemeanor
21 sanctions for “unauthorized entry” into an area—such as a public park where unhoused people are
22 living—“while an abatement is in progress.” The Ordinance fails, however, to define what activities
23 constitute “the work of abatement” and is woefully vague as to what stage in the long and traumatic
24 process of an encampment sweep, Plaintiffs, advocates, representatives, unhoused individuals,
25 journalists, and other members of the public will be barred entry or face sanctions.

26 3. By punishing the type of advocacy, speech, expressive conduct, and association that
27 Plaintiffs engage in before and during an encampment sweep, the Ordinance threatens to restrict or chill

28 _____
¹ A true and correct copy of the amended and adopted Ordinance is attached hereto as Exhibit A.

1 fundamental rights protected under the United States and California Constitutions. The Ordinance
2 further contravenes California statutory law because it purports to evade liability for wrongful acts that
3 occur during nuisance abatement.

4 4. Public scrutiny is essential to government accountability. This Ordinance provides the
5 City with a potent tool to hide its misconduct away from public view and then avoid liability for any
6 wrongdoing, thereby increasing the risk of harm to all those involved in a sweep or other abatement
7 activity at an encampment. This Complaint seeks declaratory and injunctive relief to enjoin
8 enforcement of the Ordinance.

9 JURISDICTION AND VENUE

10 5. The Court has original jurisdiction over this action pursuant 28 U.S.C. § 1331 because
11 this action arises under the U.S. Constitution and 42 U.S.C. § 1983. Pursuant to 28 U.S.C. § 1367, this
12 Court also has supplemental jurisdiction over California constitutional and statutory claims. Plaintiffs'
13 state law claims are related to their federal claims, arise out of a common nucleus of operative facts, and
14 form part of the same case or controversy under Article III of the U.S. Constitution.

15 6. Venue is proper in the Eastern District of California pursuant to 28 U.S.C. § 1391(b)–(c)
16 because Defendant City of Fresno is within this District and all events giving rise to Plaintiffs' claims
17 occurred in the District. For the same reason, venue is also proper in this Court pursuant to Local Rule
18 120(d) of the Local Rules of Practice for the United States District Court, Eastern District of California.
19 The relief that Plaintiffs seek is within this Court's power to grant.

20 PARTIES

21 7. Plaintiff **DESIREE "DEZ" MARTINEZ** is a California resident who lives in Fresno,
22 CA. She is an advocate, founder of the Fresno-based groups Homeless in Fresno and We Are Not
23 Invisible, and the president of the Fresno Homeless Union. As the Fresno Homeless Union's lead
24 organizer, Ms. Martinez regularly visits encampments, organizing residents and distributing food,
25 hygiene supplies, and other needed aid to unhoused people. She also attends encampment sweeps to
26 represent and assist people targeted by those sweeps and to document how law enforcement, abatement
27 officers, and other city workers and contractors conduct their official business. Whenever possible, Ms.
28 Martinez tries to "livestream" encampment sweeps and other abatement activity. She then posts her

1 video recordings on the “Homeless in Fresno” Facebook page that she administers, which has a reported
2 14,000 followers. These recordings form the basis for her advocacy work to educate the wider
3 community about the City’s treatment of unhoused people. On the Homeless in Fresno Facebook page,
4 Ms. Martinez also shares political messages about Fresno’s housing crisis, information about the Fresno
5 Homeless Union, updates on shelter bed availability, stories of evictions, and news regarding
6 community meals and other assistance for anyone in need. Over the last two years, Ms. Martinez has
7 pushed ceaselessly for improved living conditions for unhoused people, setting up safe protest camps,
8 organizing overnight vigils and rallies at City Hall, and communicating with City leadership. Ms.
9 Martinez conducts much of her advocacy work wearing clothes bearing the name “California Homeless
10 Union” and “We Are Not Invisible” and drives a truck emblazoned with the latter message. Ms.
11 Martinez submitted public comments in opposition to the Ordinance explaining the negative and chilling
12 impact on her advocacy, speech, associational rights, and other protected conduct.

13 8. Plaintiff **FRESNO HOMELESS UNION** (“Homeless Union” or “the Union”) is an
14 unincorporated association of unhoused and housing-insecure families, individuals, and advocates. It is
15 a member local of the California Homeless Union/Statewide Organizing Council and is affiliated with
16 the National Union of the Homeless. The Union’s mission is to organize, represent, and serve Fresno’s
17 unhoused community. The majority of its officers and members live in homeless encampments.
18 Through the City’s practice of clearing encampments and because of the Ordinance’s prohibition on
19 entry to observe, document, and assist during encampment sweeps, Fresno continues to directly interfere
20 with the Union’s survival, ability to represent its members, and other fundamental activities. The
21 Homeless Union provided public comments in opposition to the Ordinance explaining the negative and
22 chilling impact on its advocacy, speech, associational rights, and other protected conduct. The Union
23 brings this lawsuit on behalf of itself and on behalf of its members.

24 9. Plaintiff **FAITH IN THE VALLEY** is a non-profit organization located in the Central
25 Valley. It is a federated member of PICO California, the largest faith-based community organizing
26 network in California, as well as the National Faith in Action Network. Faith in the Valley uses
27 grassroots organizing and advocacy to address problems of equity encompassing safe and decent
28 housing, jobs and poverty, environmental justice, parks, and police accountability. This work is led by

1 volunteer leaders who are among the people most impacted by these issues, including low-wage
2 workers, immigrants, and the formerly incarcerated. Faith in the Valley organizers regularly attend the
3 City's encampment sweeps; spearhead mass public comments advocating for affordable housing and an
4 end to sweeps; lead rallies and listening sessions to push elected officials to address Fresno's housing
5 crisis; and work to educate City residents about Fresno's practices. The conditions that Faith in the
6 Valley organizers observe during sweeps and the relationships that they build with unhoused people set
7 the course of its work. Through the City's practice of clearing homeless encampments and because of
8 the Ordinance's prohibition on entry to observe, document, and assist during encampment sweeps,
9 Fresno continues to directly interfere with the mission of Faith in the Valley. Faith in the Valley
10 provided public comments in opposition to the Ordinance explaining the negative and chilling impact on
11 its advocacy, speech, associational rights, and other protected conduct.

12 10. Plaintiff **ROBERT MCCLOSKEY** is a California resident who lives in Fresno County,
13 CA. Mr. McCloskey is a reporter for Community Alliance, a monthly newspaper that has been
14 published in Fresno since 1996 and has published multiple articles on the City's actions and policies
15 regarding housing and homelessness in the Fresno area.² Mr. McCloskey is also an advocate for
16 unhoused individuals in Fresno. As a reporter and an advocate, Mr. McCloskey has observed the City
17 sweep numerous homeless encampments and has advocated on behalf of unhoused individuals during
18 those sweeps and before the City Council. During sweeps, Mr. McCloskey regularly interviews
19 unhoused people and City officials, turning his investigatory work into articles that describe the
20 conditions and conduct he observes. Mr. McCloskey also assists unhoused people during sweeps,
21 documenting mistreatment and helping to preserve their belongings. Mr. McCloskey provided public
22 comments in opposition to the Ordinance explaining the negative and chilling impact on his advocacy,
23 speech, associational rights, and other protected conduct.

24 11. Defendant **City of Fresno** is a charter city and municipal corporation duly created and
25 existing under the Constitution and laws of the State of California. The City is responsible for
26 amending, approving, and adopting the Ordinance set forth at Section 10-616 of Fresno's Municipal
27

28 ² See, e.g., Bob McCloskey, *Public Funds to Shelter the Unhoused: Crossroads on the Money Trail*,
Community Alliance (May 3, 2021, updated Feb. 10, 2022), <https://tinyurl.com/5r8ut7t9>.

Code. Through its agents, including the Mayor, City Council, City Attorney, Code Enforcement, Police Department, Police Chief, and other agents and contractors, it will enforce the challenged Ordinance and will issue citations and prosecute alleged violations thereunder.

FACTUAL ALLEGATIONS

A. Fresno's Housing Crisis

12. Fresno is facing a housing and displacement crisis that has been decades in the making. Growing economic inequality and lack of affordable housing make finding safe, secure housing far out of reach for many. The City estimates that, at present, 5,200 people in the Fresno-Madera region lack housing, and, of this total, 4,200 people live within Fresno City limits. Plaintiffs and others familiar with the situation on the ground believe that the number of people lacking stable housing is vastly higher than the City's estimates. There is, however, no dispute that the crisis is growing. Recent reports to the City Council indicate that, since 2019, the number of unhoused people in the region has increased 60%.

13. Surveys conducted as a part of Fresno's comprehensive "Here to Stay Public Comment Report," which was discussed during Fresno's Anti-Displacement Task Force Meeting on December 16, 2021, indicate that the main reasons for displacement include rising rents, evictions, foreclosures, natural disasters, condo conversions, and neighborhood or domestic violence. The Here to Stay Report also observes that those most at risk of displacement are "aging adults, people with disabilities, young adults, veterans and people returning home from institutionalization, farmworkers and people with documentation challenges, third-generation Black households, Southeast Asian residents, and community advocates." Of the displaced persons surveyed in Fresno, the report revealed that "people between the ages of 45 and 54 were over three times more likely to have been displaced"; that "Non-binary, Questioning, Queer, and Transgender respondents were 300% more likely to have experienced displacement"; and that "people who identified as mixed race, or 'other' were nearly 400% more likely to have been displaced." Significantly, "39.3% of all survey respondents indicated that they had children."

14. And yet, despite the evident and desperate need, Fresno lacks sufficient affordable housing options, permanent supportive housing, space in transitional facilities, and temporary beds in shelters. The City candidly recognizes that it has more unhoused persons than services or beds. For

1 Fresno’s more than 4,000 unhoused persons, government reports indicate that the City has only 1,500
2 beds. The City’s shelters regularly turn people away for lack of space.

3 15. As a result of Fresno’s housing crisis, many people have nowhere to live but in tents and
4 other makeshift shelters in public parks, on public sidewalks, and in other public spaces. Recently, the
5 City estimated that there are 64 “encampments” and 479 “shanties” in the area. The conditions at some
6 of these locations are both unsanitary and unsafe, presenting increased risks of violence, sexual assault,
7 and health problems. Persons who identify as female are particularly vulnerable without secure housing.
8 Lacking housing can also make it more challenging to pursue educational opportunities, find good work,
9 and access social and mental health services or treatments for substance use issues. COVID-19 has
10 exacerbated many of these problems and made houselessness all the more dangerous.

11 **B. Fresno’s Long-Standing Hostility Toward the Unhoused Community**

12 16. Like many local governments across California, Fresno has attempted to address its
13 housing and displacement crisis by proposing policies that often fail to respect the dignity and humanity
14 of unhoused people. These policies have subjected unhoused persons to a host of discriminatory
15 practices, prohibiting them from moving freely in public spaces; ejecting them from public
16 accommodations; surveilling, policing, and criminalizing them; fining them exorbitant sums for
17 engaging in basic activities (like sitting, resting, and sleeping outside or having personal belongings in
18 public); and banishing them to remote, often dangerous, areas with challenging access to vital resources
19 like food, water, public transportation, and health care.

20 17. The rhetoric that public officials use to justify these policies and practices is often
21 dehumanizing. Officials describe unhoused people as a threat to public safety and a form of blight that
22 needs to be “swept up,” disappeared, and excluded from the public places where housed people gather.
23 Official narratives treat unhoused people less as neighbors and constituents, and more as scapegoats for
24 a host of dynamic and complex urban challenges. Rarely do these narratives include in the public
25 dialogue the voices, perspectives, and interests of people who have been displaced.

26 18. Encampment sweeps are an outgrowth of these dehumanizing practices. Despite
27 Fresno’s acknowledged lack of sufficient affordable housing and temporary shelter beds, the City has
28 long pursued systematic sweeps and other abatement activities in which law enforcement, abatement

1 officers, and other city workers and contractors force involuntarily unhoused residents to leave their
2 resting and sleeping places by threatening criminal citation, arrest, and destruction or seizure of
3 property. These sweeps have taken place with little to no notice. In some instances, these sweeps have
4 also been carried out with unreasonable time demands for unhoused persons to pack up precious and
5 vital belongings. City officials have been known to take and destroy tents, bedding, clothing, phones,
6 medicine, food, mobility devices, identifying documents, birth certificates, EBT cards, and even pets
7 and the ashes of loved ones. The destruction is particularly cruel given that many unhoused people
8 suffer from physical ailments and mobility issues and are directed to dismantle their shelters only to
9 move to a different location around the block.

10 19. In 2006, Fresno’s manner of conducting encampment sweeps, especially its practice of
11 confiscating and destroying the belongings of unhoused people, formed the basis of a successful class
12 action lawsuit against the City. Specifically, in *Kincaid v. City of Fresno*, No. 1:06-cv-01445-LJO-
13 SKO, a group of unhoused persons alleged that City officials “regularly engage[d] in what amount to
14 raids of areas where homeless people live, during which defendants intentionally and indiscriminately
15 take and destroy personal property owned by homeless people in the area and immediately destroy that
16 property.”³

17 20. The *Kincaid* plaintiffs obtained injunctive relief to stop the City from “seizing the
18 personal property of homeless persons without lawful cause and from immediately destroying any
19 property that it seize[d]”⁴ and, later, a favorable settlement. Part of the lawsuit’s success was due to the
20 facts that the plaintiffs marshalled in declarations by unhoused people, advocates, and reporters, who
21 were able to witness the sweeps and other abatement activities from a near vantage point. As a result of
22 their proximity to the sweeps, witnesses provided the court with compelling evidence that the City was
23 violating the constitutional rights of unhoused people. One independent reporter, for example, attested
24 that he had observed city workers toss unhoused peoples’ tents, bulging with their belongings, straight
25 into a dumpster on numerous occasions. His testimony, accompanied by photographs, contravened the

26 _____
27 ³ Complaint ¶ 2, *Kincaid v. City of Fresno*, No. 1:06-cv-01445-LJO-SKO (E.D. Cal. Oct. 17, 2006),
ECF No. 1 at 2.

28 ⁴ Statement of Decision & Findings re: Plaintiffs’ Application for a Preliminary Injunction ¶ 31, *Kincaid*
(Dec. 8, 2006), ECF No. 91 at 83.

1 City's narrative about what happens during sweeps.⁵ Others who were present at the sweeps explained
 2 how officers had used force to clear an area⁶ and how the presence of advocates and organizers had once
 3 saved an unhoused person from being run over by a bulldozer.⁷

4 21. Under the terms of the *Kincaid* settlement agreement, the City agreed to provide between
 5 three and seven days notice before conducting a sweep and agreed to not destroy personal property
 6 during any sweep.⁸ Sustained reports of un-noticed property destruction and other unlawful practices in
 7 connection with the City's sweeps and other abatement activity have, however, persisted over the last
 8 decade, and many of the problems raised in that litigation still occur today. For example, on February
 9 21, 2020, when Lewis Dewane Brown, an unhoused person, allegedly did "not pack[] fast enough"
 10 during an encampment sweep where he had resided for more than one year, he was brutally beaten.⁹
 11 Unhoused people who witnessed this beating were cowed and stunned, fleeing the area that day with
 12 whatever they could carry on their backs so that they could avoid a similarly violent interaction with law
 13 enforcement. Ms. Martinez was not present during the beating of Mr. Brown, and in later describing
 14 this incident, a Homeless Union member said that law enforcement officers clearly felt that they "could
 15 do that to anybody" so long as organizers and advocates like Ms. Martinez or reporters like Mr.
 16 McCloskey were not there to document and speak out.

17 22. At the start of this year, the City began sending out a police-led Homeless Assistance
 18 Response Team ("HART") to serve as "compassionate, responsive, lawful and effective outreach
 19 leading unsheltered individuals and families to take the first step off the streets and into a new future."
 20 But already HART has had problems. In one instance, on a morning in February 2022, Mr. McCloskey

21 _____
 22 ⁵ Decl. of Mike Rhodes, *Kincaid* (Oct. 17, 2006), ECF No. 14; *see also* Mike Rhodes, *Fresno Homeless*
 23 *Attacked and Insulted by City Workers*, Street Spirit (July 2006),
<https://www.thestreetspirit.org/July2006/demolished.htm>.

24 ⁶ Decl. of Logan Siler, *Kincaid* (Nov. 6, 2006), ECF No. 56.

25 ⁷ Decl. of Liza Apper, *Kincaid* (Oct. 17, 2006), ECF No. 15.

26 ⁸ Settlement Agreement Between Plaintiffs & the Plaintiff Class & Defendants, *Kincaid* (June 5, 2008),
 ECF No. 304-2.

27 ⁹ This incident is the subject of a separate, pending civil rights lawsuit against the City and other
 28 defendants: *Brown v. City of Fresno*, No. 1:22-cv-00216-JLT-SAB (E.D. Cal. filed Feb. 21, 2022); *see*
also Mike Rhodes, *Police Brutality Will Be Put on Trial in Fresno*, Community Alliance (Mar. 1, 2022),
<https://tinyurl.com/262h9azt>.

1 was driving along F Street outside Poverello House, which provides daily meals, social services, and
2 temporary shelter for those in need, when he saw a HART officer interacting with an unhoused person
3 during a sweep. Mr. McCloskey observed the officer aggressively tell a man to get up and then kick the
4 pillow where that man’s head was lying. Mr. McCloskey documented this incident, spoke with the
5 officer, and then wrote to the Mayor’s Office about it. Due to Mr. McCloskey’s advocacy, City officials
6 have since reportedly pledged to reform HART to prevent this sort of misconduct. Mr. McCloskey has
7 also repeatedly documented the City’s use of heavy machinery to clear encampments while unhoused
8 persons are still nearby the machinery—just as his own news editor had done in the *Kincaid* litigation 15
9 years ago.

10 23. In another instance, on March 9, 2022, at an abatement sweep along the Fresno Canal
11 between South Clovis Avenue, East Huntington Avenue, and East Tulare Avenue, which was partially
12 attended by the Mayor and a Councilmember, abatement officers and city workers placed the belongings
13 of the people who were being displaced into large black garbage bags, promising to deliver or store
14 these items for safekeeping. But the workers did not label these items with the names of the individuals
15 to whom they belonged and thus it would have been nearly impossible for those individuals to recover
16 their property. Ms. Martinez and Mr. McCloskey were both on site at the time documenting this
17 conduct. Despite Ms. Martinez’s pleading with the workers to label the items, they appeared unwilling
18 to do so. The bags were only labeled after Ms. Martinez got tape and a pen from a city worker and
19 labeled them herself.

20 24. The City generally performs sweeps and other abatement activity on a near-weekly basis
21 in publicly visible areas where the unhoused reside. As demonstrated by the *Kincaid* litigation and in
22 light of the City’s continuing abuses, reporters, advocates, and organized unhoused persons themselves
23 are all fundamental to documenting and shining a light on official wrongdoing during this abatement
24 activity. The Supreme Court has long recognized the necessity of such watchdogs: “many governmental
25 processes operate best under public scrutiny.”¹⁰

26 25. Just the presence of public observers at a location where an abatement sweep is taking
27 place—including from the moment law enforcement, abatement officers, and other city workers and
28

¹⁰ *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986).

1 contractors begin to interact with unhoused persons—is credited by the unhoused community and others
2 with de-escalating conflict, compelling workers to act with greater care, and ensuring that proper
3 procedures are followed with a reasonable amount of time given to pack up. Indeed, as at least one
4 Homeless Union member and unhoused person has observed: “these people would walk over us without
5 Dez. When she is there, she gets out her camera and they behave. If someone’s looking at you, you act
6 different.” But the Ordinance, by cordoning people off from sweeps and other abatement activity, will
7 have a negative and chilling impact on much of this protected advocacy, speech, expressive conduct, and
8 association, and will interfere with other protected conduct as well, such as unhoused individuals’ right
9 to move freely in public spaces like encampments. It will also likely increase the risk of harm to those
10 targeted by the sweeps.

11 **C. Encampments Serve as a Symbol and a Sanctuary, Where Advocates and Homeless**
12 **Union Members Play an Important Role**

13 26. Despite the hardships that unhoused people endure, they also form meaningful “street
14 families.” These families gather not only to find and create safer shelter, but also to pool resources and
15 exchange food, water, and information. Having such tight bonds helps people to provide mutual
16 security, and—like any community—generally take care of one another.

17 27. While unhoused people may form encampments to survive and stay safe, they also do so
18 to send a powerful collective message about the housing crisis in Fresno and to visually demonstrate
19 their lived struggle with housing insecurity. Unhoused individuals, including members of the Homeless
20 Union, send this message by, among other things, donning We Are Not Invisible and Homeless Union
21 apparel in protest of the City’s policies, particularly during sweeps. They also reside and gather in and
22 around public parks and other open spaces that are purposefully conspicuous to the public and City
23 leaders. Some of these public places include, but are not limited to, Pilibos Park, Roeding Park, and
24 Chukchansi Park and even the public sidewalks in front of Poverello House, an area that the City tends
25 to sweep daily.

26 28. The locations where unhoused people choose to gather and find shelter constitute and
27 convey a political statement about housing that cannot, and should not, be ignored. Moreover, the tents
28 that unhoused persons erect in these locations also convey a message recognized, both by the public and

1 numerous courts, as playing a symbolic role in protests.¹¹ The fact that the City’s treatment of its
2 unhoused population is one of the most pressing issues of concern, and a frequent focus of
3 demonstrations in Fresno, also provides significant context for these collective symbolic efforts.¹²

4 29. Showing up and speaking at the site of an encampment furthers this powerful message
5 about Fresno’s housing crisis. Plaintiffs, Union members, and other advocates, organizers, and
6 unhoused people come together to convey solidarity with the unhoused and to protest the City’s
7 dehumanizing treatment of the unhoused community. Plaintiffs are frequently present in the
8 encampments organizing residents in support of the residents’ own interests, sharing food, water, prayer,
9 rides, assistance, and information. Plaintiffs also gather to break bread, which, like the tent, is a well-
10 recognized symbol of shared humanity dating back to biblical times. As one member of the Homeless
11 Union puts it, “If we have it, we give it. The broader community stereotypes you when you’re
12 homeless. They think you’re the lowest. We fight that by trying to build community, by cooking for
13 one another.” Mutual aid is also especially symbolic. As another Union member who comes to
14 encampments during sweeps to help, to be seen, and to be heard, says: “If you don’t speak up and
15 visualize who you are, they’ll just walk around you. I come out to see how people are and to help them.
16 If you don’t speak up, you’ll be unheard.”

17 30. Plaintiffs, as well as other advocates, organizers, and Union members in the community,
18 are instrumental in addressing the housing crisis in Fresno. Ms. Martinez, for example, has been able to
19 build trust over many years by advocating on behalf of her unhoused neighbors and family. As lead
20 organizer for the Homeless Union, she regularly visits encampments to distribute food, hygiene supplies,
21 and other essential aid to houseless people. She also regularly connects unhoused people with City
22 services, directing people to shelter beds and free meal gatherings. Other advocates and organizers
23 share this mission and sense of purpose. One regular visitor to Fresno’s encampments has publicly

24 _____
25 ¹¹ See, e.g., *Watters v. Otter*, 955 F. Supp. 2d 1178, 1182 (D. Idaho 2013) (“Occupy Boise’s tent city is a
26 political protest of income inequality. As such, it is express conduct covered by the First
27 Amendment.”); cf. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293–94 (1984)
(assuming without deciding that “symbolic tents [] may be expressive and part of the message delivered
by [a] demonstration”).

28 ¹² See, e.g., Cassandra Garibay, ‘Urgency Isn’t There.’ *Fresno Renters, Unhoused Call on City to
Address Housing Crisis Now*, *The Fresno Bee* (Mar. 4, 2022, updated Mar. 9, 2022),
<https://tinyurl.com/82srtcw2>.

1 explained the relationship as follows: the unhoused “people trust us . . . because we treat them like
2 people and human beings.” Advocates, organizers, and Union members assist over the long term by
3 reminding individuals of their civil rights, providing rides to medical and social-services appointments,
4 and, as explained above, coming together to share meals, information, and other resources.

5 31. Many advocates and organizers, including leaders and volunteers with Faith in the
6 Valley, are motivated to do this work because their faith compels them to do so. Faith in the Valley
7 believes that “a different, better future is possible for the Central Valley A future in which
8 everyone is included, treated as sacred, has a chance to thrive and live a healthy, decent life.”¹³ To make
9 this future a reality, Faith in the Valley works directly with Fresno’s unhoused persons, centering them
10 in the organization’s faith-led activism. An outreach worker and advocate with Christ Helping Hands
11 Ministry echoed a similar sentiment in public comments, explaining that she builds “relationships with
12 [her] friends on these streets” through prayer and encouragement. Because of her faith, this advocate
13 states that she is willing to “assist[] with whatever needs to get done,” including giving rides and even
14 paying for motel rooms when individuals are displaced. Similarly, a pastor from Fresno’s Big Red
15 Church publicly emphasized that, “Our church depends on advocates like Dez Martinez to live out our
16 very basic commitment to our faith” and “treat our unhoused neighbors with . . . human dignity.”

17 32. The unhoused community echoes the importance of having trusted representatives,
18 organizers, and advocates on site during sweeps, which are long and traumatic events, because that is
19 “when they’re needed most.” Known advocates and Homeless Union organizers provide a familiar face
20 and are reliable defenders of those threatened with or experiencing a sweep. They help to prevent
21 escalation of aggressive abatement actions and the harm that often arises therefrom, and they also assist
22 with communications between the targets of sweeps and the law enforcement, abatement officers, and
23 other city workers and contractors conducting such sweeps and other abatement activity. In particular,
24 abatement crews typically start their work while unhoused individuals are still present at a site and
25 gathering their belongings. Crews often forcefully hurry and threaten them, disregarding their physical
26 safety and seizing and destroying vital possessions, including personal documents, family memorabilia,
27

28 ¹³ See “Our Vision,” Faith in the Valley, *available at* <https://faithinthevalley.org/> (last accessed Mar. 16, 2022).

1 and life-saving medicines. Union representatives, advocates, and others also help to protest, object to,
2 and document any inhumane or unlawful treatment they witness.

3 33. Not everyone can play the role of advocate or representative; only those who respect the
4 organizing of unhoused people themselves and who have taken the time to build long-term, trusting
5 relationships can play this role. As one unhoused person pleaded with the City Council when discussing
6 encampment sweeps: “If you guys take [our union representatives and advocates] away, we have
7 nobody” because the City-run or -supported “programs don’t listen.” Another Homeless Union member
8 put it similarly, stating: when Ms. Martinez is not present, abatement crews come “with no warning and
9 throw your stuff on the back of a trash truck—that tells you what they feel about you.” In other words,
10 unhoused individuals want and need to be able to associate with the representatives and advocates of
11 their choice, not the City’s.

12 34. Despite their vehement opposition to encampment sweeps, organizers, advocates, and
13 reporters like Ms. Martinez, Mr. McCloskey, the Fresno Homeless Union, and volunteers of Faith in the
14 Valley do not interfere with the legitimate functions of law enforcement, abatement officers, and other
15 city workers and contractors. Nor do they endanger anyone by being present during sweeps. Instead,
16 they increase public safety and reduce the risk of harm to all involved. In addition to protecting the
17 personal belongings and physical wellbeing of unhoused individuals and defusing potential negative
18 interactions, advocates, organizers, and reporters make sweeps safer by witnessing and documenting
19 official actions. Plaintiffs want to continue playing this vital role during sweeps. But the Ordinance, by
20 cordoning people off from sweeps and other abatement activity, will have a negative and chilling impact
21 on much of this protected advocacy, speech, expressive conduct, and association, and will interfere with
22 other protected conduct as well, such as unhoused individuals’ right to move freely in public spaces like
23 encampments.

24 **D. Events Taking Place Just Prior to Amendment of the Ordinance**

25 35. On January 4, 2022, Ms. Martinez learned that the City had directed several individuals,
26 including a military veteran, who were living in makeshift shelters near the corner of Kings Canyon and
27 South Clovis Avenue to pack up and leave the site. The City had reportedly done so without offering
28 any space in a shelter. Ms. Martinez arrived at the location to find these individuals congregated in a

1 parking lot a short distance away. She discovered that they had lost many of their belongings during the
2 site sweep and other abatement activity. Although the abatement activity still seemed to be “taking
3 place,” the site did not appear to be off-limits or behind any clearly demarcated barrier.

4 36. As Ms. Martinez almost always does when monitoring sweeps and other abatement
5 activity, she used her cell phone to record what was happening. Ms. Martinez approached an officer
6 with the Fresno Police Department to discuss the problematic manner in which the sweep had occurred.
7 During their discussion, which remained respectful and friendly at all times, Ms. Martinez noted that
8 semi-trucks had been allowed to park at the same location for an extended period of time, which she
9 believed to be a code violation. She further pointed out the unfairness that “people get to park all the
10 time, but people don’t get to live.” The officer suggested that Ms. Martinez raise her question with the
11 code enforcement officers onsite at the time.

12 37. When Ms. Martinez approached the two men whom the officer had identified, they
13 refused to acknowledge who was in charge and both refused to speak with her so long as she was
14 recording their interaction. Ms. Martinez attempted to engage the men further, at which point recorded
15 video footage shows that one of the men—later identified as Howard Lacy—laid his hands on Ms.
16 Martinez and covered her camera, forcefully stating, “we don’t talk to the press.” Mr. Lacy was then
17 issued a Notice to Appear for misdemeanor battery under Penal Code § 242. On information and belief,
18 Mr. Lacy is a City employee who has worked in some capacity for the Fresno Code Enforcement
19 Department for approximately 17 years.

20 **E. The Proposed Ordinance and the Community Outcry Opposing It**

21 38. On January 5, 2022, the day after the incident between Ms. Martinez and Mr. Lacy, the
22 City Attorney initiated legislative action to propose amending Section 10-616 at the upcoming City
23 Council meeting scheduled for January 13, 2022.¹⁴ Section 10-616 of the Fresno Municipal Code had
24 last been amended 20 years earlier in 2002.

25 39. At the January 13, 2022 City Council Meeting, the City Attorney introduced an early
26 version of the Ordinance “to clarify limits on access to restricted areas where abatements are taking
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28 ¹⁴ See City of Fresno Legislation Details (With Text) File # ID 22-98, available at
<https://tinyurl.com/mwsmtzm7> (last accessed Mar. 16, 2022).

1 place.” Prior to the proposed amendments, Section 10-616 had permitted only a “Director” to enter
2 private property to abate a nuisance and also prohibited persons from interfering with this work or “any
3 necessary act preliminary to or incidental to such work” Section 10-616 previously had not
4 included an explicit reference to public property, created a restricted area, required authorization to enter
5 such an area, or imposed criminal or civil penalties for an unauthorized entry.

6 40. The City Attorney’s proposed amendments sought to extend the Director’s authority to
7 all “city employees or a contractor retained by the City” who were conducting nuisance abatement on
8 both private and public property. The amendments also sought to allow “city employees or a retained
9 contractor” to “designate a restricted area by erecting a barrier or cordon off an area of public or private
10 property where an abatement is taking place.” In addition, the amendments added new penalties for
11 violations, stating that any violation would be “punishable either as a misdemeanor for intentional
12 violations, or as an administrative citation with administrative penalty of up to \$250”

13 41. Numerous concerned citizens, advocates, and reporters, including Ms. Martinez, Mr.
14 McCloskey, Fresno Homeless Union members, and Faith in the Valley organizers, provided public
15 comments opposing the proposed amendments at the January 13, 2022 Council meeting. They
16 explained the important roles that advocates and representatives for the unhoused, as well as other
17 witnesses, serve during encampment sweeps to help de-escalate conflict, save personal property, and
18 document abuses of authority. Many speakers, especially those from the unhoused community,
19 commented that the work of advocates, representatives, and observers made them feel safer and bridged
20 gaps in service that the City seemed unwilling or unable to provide, thereby constituting a great benefit
21 to the City.

22 42. Plaintiffs and others told Councilmembers that, if the amendments were adopted, they
23 feared they would be criminalized for providing compassionate and vital assistance, which they
24 performed as an extension of their political beliefs, religious faith, and civic values. The speakers
25 expressed confusion around the vagueness of what it means for “an abatement” to be “taking place” in
26 the context of an encampment sweep. Speakers worried that they could be punished for trying to access
27 a location to retrieve personal property, to help others safely pack up their belongings, or to assist their
28 “street family” with other needs and information-sharing. Such confusion appears well-founded.

1 Section 10-616’s pre-amendment language had made clear that the statute applies to “the work of
2 abatement” as well as the performance of “any necessary act preliminary to or incidental to such work,”
3 and the proposed amendments failed to clarify whether the City was claiming authority to cordon off
4 areas during “preliminary” and “incidental” abatement work and what such work might include during
5 an encampment sweep.

6 43. After public comment closed, Councilmembers and the City Attorney discussed the
7 Council’s concerns and questions “regarding discretion on the severity of penalties.” The Council
8 thereafter continued discussion of the Ordinance to its next meeting.

9 44. The City Council convened again on January 27, 2022, and a revised version of the
10 proposed Ordinance appeared on the Consent Calendar. Although Section 10-616 previously had not
11 mentioned an “occupied location” or any type of “advocate,” the revision that appeared in the January
12 27 version used these terms to clearly implicate encampment sweep activity. This revision read:
13 “Subject to particular restrictions mandated by safety concerns or emergency procedures, prior to any
14 abatement taking place at an occupied location, those persons authorized to provide services to the
15 occupants or advocate on their behalf shall be permitted a reasonable time to make contact with the
16 occupants and assist prior to the area being secured as provide herein.”

17 45. Statements by Councilmembers suggest that they considered this revision as a way of
18 protecting advocates for the unhoused community. But this proposed “safety valve” did not quell
19 concerns. Among other issues, the new language appeared to single out for special treatment an
20 undefined category of advocates who needed to be vetted for authorization in some unspecified way,
21 inviting arbitrary and discriminatory enforcement by city workers and abatement officers.

22 46. Public comments by Ms. Martinez, Mr. McCloskey, and Faith in the Valley, as well as
23 many others, explained why the proposed Ordinance remained an overbroad, “anti-Dez,” anti-advocate
24 measure that risked impairing important work and restricting protected activities through the threat of
25 criminal sanctions. They reemphasized the important role that advocates, representatives, Union
26 organizers, and witnesses serve during encampment sweeps to ensure fair treatment of unhoused people,
27 a role which serves to increase public safety—not compromise it. As an example, one unhoused person
28 told the Council about the destruction that she had experienced and witnessed during the encampment

1 sweeps, bemoaning the loss of precious items, including the ashes of a loved one, as well as her belief
2 that the encampment sweeps were safer when witnesses were present and cameras rolling.

3 47. In addition, speakers for the Homeless Union read aloud a letter opposing the Ordinance.
4 That letter, together with a further submission from the Regional Advisor of Faith in the Valley, now
5 comprise the City Council’s official “Email / eComment Report,” a true and correct copy of which is
6 available in the City’s public records.¹⁵ The Homeless Union’s letter expressly stated that the Ordinance
7 violated, on its face, state and federal constitutional law and advised the Council that, if the Ordinance
8 were to pass as proposed, all available legal remedies would be pursued, “including application for a
9 temporary restraining order and preliminary injunction barring its enforcement.”

10 48. At the next City Council meeting on February 10, 2022, the Ordinance was reintroduced.
11 Many members of the public, again spoke against the Ordinance, including unhoused persons, advocates
12 for the unhoused community like Ms. Martinez, Mr. McCloskey, and representatives of Faith in the
13 Valley and the Homeless Union, students, a pastor, a church volunteer, a professor, and numerous
14 others. Their message to the City Council echoed prior comments in opposition to the Ordinance,
15 explaining that the proposed amendments risked criminalizing people who provide vital assistance when
16 the City’s processes and services fall short. In particular, the speakers expressed renewed concerns that
17 the Ordinance was so vague and overbroad that, to avoid criminal sanctions and financial penalties, they
18 would have to restrain themselves from exercising their fundamental rights and engaging in important
19 and protected activities during sweeps, like associating with and advocating for unhoused community
20 members and observing and documenting law enforcement, abatement officers, and other city workers
21 and contractors performing their duties in public.

22 49. After public comment on the Ordinance closed, the City Attorney discussed a revision
23 performed at the direction of the Council, whereby the word “authorized” was deleted from the
24 following sentence: “Subject to particular restrictions mandated by safety concerns or emergency
25 procedures, prior to any abatement taking place at an occupied location, those persons **authorized** to
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28 ¹⁵ Fresno City Council, Email / eComment Report re: File ID 22-200, 1-C, *available at*
<https://tinyurl.com/fxdwv76> (last accessed Mar. 16, 2022).

1 provide services to the occupants or advocate on their behalf shall be permitted a reasonable time to
2 make contact with the occupants and assist prior to the area being secured as provided herein.”

3 50. Despite removing the word “authorized” from this particular sentence, the proposed
4 amendments still contained fatal flaws. The amendments, for example, continued to include provisions
5 regarding “authorization” that would allow city employees and contractors to arbitrarily decide who to
6 permit, exclude, or punish for entering an abatement area. Specifically, the amendments read: “No
7 person shall enter the restricted area without express authorization from city employees or contractor
8 [sic] on site conducting the abatement.”

9 51. In addition, the amendments still purported to grant some sort of special, early authorized
10 access to those persons—and only those persons—who were “providing services to the occupants or
11 advocating on their behalf” even though those persons, and the public, already should have had the right
12 to move freely on public property that was not yet secured. This “prior to” period also compounded the
13 ambiguity as to what it meant for an abatement to be “taking place,” when that abatement activity was
14 supposed to start and end, and what size area it was supposed to cover. The amendments still also
15 contained the preamble—“subject to particular restrictions mandated by safety concerns or emergency
16 procedures,” which rendered the remainder of that paragraph’s protection illusory. Lastly, the
17 amendments continued to impose penalties for “unauthorized entry” as “a misdemeanor for intentional
18 violations” or as an administrative citation resulting in fines of up to \$250. The City Council voted to
19 adopt the Ordinance as amended.

20 52. The Ordinance came up for a final vote at the City Council meeting held on February 17,
21 2022. Once again, Ms. Martinez, Mr. McCloskey, Faith in the Valley, Homeless Union members, and
22 others provided public comments opposing the Ordinance. These statements reprised Plaintiffs’ prior
23 fears about the Ordinance’s overbreadth and vagueness and their concern that the Ordinance would
24 penalize their protected rights to provide representation, aid, advocate, speak, observe, record, and move
25 freely. The Ordinance nonetheless passed as an item on the Consent Calendar. The Mayor did not take
26 specific action following the Council’s vote and thus, by operation of the Fresno City Charter § 605(d),
27 the Ordinance was approved on February 28. The Ordinance has an effective date of March 31.

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LEGAL CLAIMS

FIRST CLAIM FOR RELIEF

State-Created Danger

(Fourteenth Amendment of the U.S. Constitution; 42 U.S.C. § 1983)

53. Plaintiffs incorporate by reference all foregoing and subsequent paragraphs as though fully set forth herein.

54. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” Substantive Due Process protects against government action that “affirmatively place[s] the plaintiff in a position of danger, that is, where state action creates or exposes an individual to a danger which he or she would not have otherwise faced.” *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006) (alteration in original) (internal quotation marks, citation omitted).

55. The Ordinance gives the City the power to completely cut off public access to what it designates an “area . . . where an abatement is taking place” absent “express authorization” from law enforcement, abatement officers, and other city employees and contractors. By restricting the ability of advocates, representatives, journalists, and concerned members of the public to observe and record City officials sweeping encampments and by preventing them from providing otherwise lawful assistance or representation, the City affirmatively places unhoused members of the Fresno Homeless Union and other unhoused individuals in known or obvious danger. Public scrutiny is an important deterrent to excessive use of force and property destruction. Without the safeguards of accountability and transparency and without witnesses on hand, there will be greater risk of escalated conflict, severe physical abuse, injury, and death.

56. Cutting off Plaintiffs from their unhoused community and cutting off unhoused people from their advocates and Union representatives with whom they wish to associate, will also likely lead to unsafe conditions by increasing the likelihood that life-sustaining items, such as tarps, tents, blankets, medicines, and mobility devices, will be destroyed. As described *supra*, advocates, representatives, and other eyewitnesses serve as a powerful deterrent against abuse. The Ordinance removes that deterrent. By design, the Ordinance shields from public scrutiny the City’s abatement sweeps and removes from the scene those witnesses who would otherwise protect the rights and property of those most directly and

1 negatively impacted by sweeps—opening the door to more frequent, aggressive, and ultimately
2 destructive abatements.

3 57. By conducting abatement sweeps at homeless encampments without the watchful eyes of
4 Union representatives, advocates, and other would-be witnesses, the City will act in reckless disregard
5 for unhoused individuals’ safety, affirmatively placing members of the Fresno Homeless Union and
6 other unhoused individuals in known or obvious danger.

7 **SECOND CLAIM FOR RELIEF**
8 **State-Created Danger**
9 **(Article I, Section 7 of the California Constitution)**

10 58. Plaintiffs incorporate by reference all foregoing and subsequent paragraphs as though
11 fully set forth herein.

12 59. Article I, section 7 of the California Constitution provides that a “person may not be
13 deprived of life, liberty, or property without due process of law.” Substantive Due Process protects
14 against government action that affirmatively places an individual in a position of danger that he or she
15 would not have otherwise faced.

16 60. The Ordinance gives the City the power to completely cut off public access to what it
17 designates an “area . . . where an abatement is taking place” absent “express authorization” from law
18 enforcement, abatement officers, and other city employees and contractors. By restricting the ability of
19 advocates, representatives, journalists, and concerned members of the public to observe and record City
20 officials sweeping encampments and by preventing them from providing otherwise lawful assistance or
21 representation, the City affirmatively places unhoused members of the Fresno Homeless Union and
22 other unhoused individuals in known or obvious danger. Public scrutiny is an important deterrent to
23 excessive use of force and property destruction. Without the safeguards of accountability and
24 transparency and without witnesses on hand, there will be greater risk of escalated conflict, severe
25 physical abuse, injury, and death.

26 61. Cutting off Plaintiffs from their unhoused community and cutting off unhoused people
27 from their advocates and Union representatives with whom they wish to associate, will also likely lead
28 to unsafe conditions by increasing the likelihood that life-sustaining items, such as tarps, tents, blankets,
medicines, and mobility devices, will be destroyed. As described *supra*, advocates, representatives, and

1 other eyewitnesses serve as a powerful deterrent against abuse. The Ordinance removes that deterrent.
2 By design, the Ordinance shields from public scrutiny the City’s abatement sweeps and removes from
3 the scene those witnesses who would otherwise protect the rights and property of those most directly and
4 negatively impacted by sweeps—opening the door to more frequent, aggressive, and ultimately
5 destructive abatements.

6 62. By abating conducting abatement sweeps at homeless encampments without the watchful
7 eyes of Union representatives, advocates, and other would-be witnesses, the City will act in reckless
8 disregard for unhoused individuals’ safety, affirmatively placing members of the Fresno Homeless
9 Union and other unhoused individuals in known or obvious danger.

10 **THIRD CLAIM FOR RELIEF**
11 **Violation of Freedom of Speech and Assembly**
12 **(First and Fourteenth Amendments to the U.S. Constitution; 42 U.S.C. § 1983)**

13 63. Plaintiffs incorporate by reference all foregoing and subsequent paragraphs as though
14 fully set forth herein.

15 64. The First Amendment, as applied to state and local government agencies and officials by
16 the Fourteenth Amendment, prohibits government entities from “abridging the freedom of speech, or of
17 the press; or the right of the people peaceably to assemble . . .” The First Amendment protects the
18 rights to advocate and protest, observe and record public officials engaged in the public discharge of
19 their duties, and assemble and engage in expressive association. The Ordinance is substantially
20 overbroad on its face and impermissibly burdens these protected speech, expressive conduct, and
21 associational rights.

22 65. The Ordinance applies to homeless encampments located in public places historically
23 associated with the free exercise of speech and expressive activities, such as parks, sidewalks, and
24 streets. These places are considered traditional public forums.

25 66. The government’s right to limit protected First Amendment activity in a traditional public
26 forum “is sharply circumscribed” for both content-based and content-neutral restrictions. *S.O.C., Inc. v.*
27 *Cnty. of Clark*, 152 F.3d 1136, 1145 (9th Cir. 1988) (internal quotation marks, citation omitted).

28 67. The Ordinance is an unconstitutional content-based regulation of speech and expression.
Although facially content neutral, the Ordinance was adopted for a content-based purpose: the City’s

1 “disagreement” with advocates’ and representatives’ exercise of their First Amendment speech,
2 expression, and associational rights, including to protest, observe, and record officials sweeping
3 encampments in public. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 166, 164 (2015) (quoting *Ward v.*
4 *Rock Against Racism*, 491 U.S. 781, 791 (1989)). Content-based laws “are presumptively
5 unconstitutional and may be justified only if the government proves that they are narrowly tailored to
6 serve compelling state interests.” *Id.* at 163. The Ordinance is not narrowly tailored to further a
7 government interest.

8 68. Even if considered content neutral, the Ordinance violates the First Amendment as an
9 unreasonable time, place, and manner restriction that impermissibly burdens protected speech,
10 expression, and associational rights in a public forum. A time, place, and manner restriction for a public
11 forum must be narrowly tailored to serve a significant government interest, leave open ample alternative
12 channels for expression, and—where, as here, the restriction requires advance governmental
13 authorization—not delegate overly broad discretion to officials. *Kaahumanu v. Hawaii*, 682 F.3d 789,
14 802–03 (9th Cir. 2012). The Ordinance fails to satisfy these requirements. By requiring “express
15 authorization” to enter an area subject to abatement, including a homeless encampment located in a
16 traditional public forum like a park or a sidewalk, the Ordinance delegates overly broad discretion to law
17 enforcement, abatement officers, and city workers. The Ordinance is also not narrowly tailored because
18 it burdens substantially more speech, expressive conduct, and association than necessary and does not
19 leave open alternative channels for expression.

20 69. Under the prior restraint doctrine, “a law cannot condition the free exercise of First
21 Amendment rights on the unbridled discretion of government officials.” *Desert Outdoor Adver., Inc. v.*
22 *City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996) (internal quotation marks, citation omitted).
23 The Ordinance is an unconstitutional prior restraint because it requires advance “express authorization”
24 to enter an abatement area, including when that area is in a traditional public forum, and vests law
25 enforcement, abatement officers, and other city workers and contractors with sweeping discretion to
26 arbitrarily suppress speech, expression, and associational rights. Such limitless discretion inherently
27 creates an unacceptable risk of viewpoint discrimination, regardless of whether or how it is in fact
28 exercised. *Kaahumanu*, 682 F.3d at 806.

1 70. The City is violating or imminently will violate the First Amendment by enforcing the
2 Ordinance against protected speech, expressive conduct, and association.

3 71. When abatement sweeps occur, Plaintiffs would like to continue their protected First
4 Amendment speech, expression, and association in areas—including homeless encampments located in
5 traditional public forums—where they would likely be excluded under the Ordinance. The City’s
6 actions have and will continue to chill, deter, and infringe Plaintiffs’ First Amendment free speech,
7 expression, and associational rights in a traditional public forum.

8 **FOURTH CLAIM FOR RELIEF**
9 **Violation of Freedom of Speech and Assembly**
10 **(Article I, Sections 2 and 3 of the California Constitution)**

11 72. Plaintiffs incorporate by reference all foregoing and subsequent paragraphs as though
12 fully set forth herein.

13 73. The California Constitution, Article I, section 2 prohibits laws that “restrain or abridge
14 liberty of speech or press.” The liberty of speech provision in California’s Constitution “is at least as
15 broad as and in some way is broader than the comparable provision of the federal Constitution’s First
16 Amendment.” *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 958–59 (2002) (internal quotation marks, citations
17 omitted). The California Constitution, Article I, section 3 protects the right to “assemble freely to
18 consult for the common good.”

19 74. The standards for evaluating whether a regulation is content based and whether a content-
20 based regulation is constitutional are similar under federal and state law. *See Glendale Assocs., Ltd. v.*
21 *NLRB*, 347 F.3d 1145, 1155–56 (9th Cir. 2003). As under the United States Constitution, the Ordinance
22 is a content-based regulation of protected speech, expressive conduct, and association that is not
23 narrowly tailored to serve a compelling state interest.

24 75. The standard for evaluating time, place, and manner restrictions on protected speech and
25 assembly rights in a public forum is similar under federal and state law. *Cuviello v. City of Vallejo*, 944
26 F.3d 816, 827 (9th Cir. 2019) (citing *Dulaney v. Mun. Court*, 11 Cal. 3d 77, 84–85 (1974)); *Int’l Soc’y*
27 *for Krishna Consciousness of Cal., Inc. v. City of Los Angeles*, 48 Cal. 4th 446, 456–57 (2010))
28 (freedom of speech); *Chambers v. Mun. Court*, 65 Cal. App. 3d 904, 908 (1977) (right to freely
assemble and associate). As under the United States Constitution, the Ordinance is not a reasonable

1 time, place, and manner restriction on protected speech, expressive conduct, and association in a
2 traditional public forum under the California Constitution. By requiring “express authorization” to enter
3 an area subject to abatement, including a homeless encampment located in a traditional public forum
4 like a park or sidewalk, the Ordinance delegates overly broad discretion to law enforcement, abatement
5 officers, and other city workers and contractors. The Ordinance is also not narrowly tailored because it
6 burdens substantially more speech, expressive conduct, and association than necessary and does not
7 leave open alternative channels for expression.

8 76. The standard for evaluating the validity of a prior restraint is similar under federal and
9 state law. *See Molinaro v. Molinaro*, 33 Cal. App. 5th 824, 832 (2019). A law cannot condition the free
10 exercise of liberty of speech rights on the “unbounded discretion” of government officials. *People v.*
11 *Fogelson*, 21 Cal. 3d 158, 166 (1978). The Ordinance is an unconstitutional prior restraint because it
12 requires advance “express authorization” to enter an abatement area, including when that area is in a
13 traditional public forum, and vests law enforcement, abatement officials, and other city workers and
14 contractors with sweeping discretion to arbitrarily suppress speech, expressive conduct, and
15 associational rights. Such “unbounded discretion” creates an unacceptable risk that officials will “base
16 their determination on the content of the ideas sought to be expressed.” *Id.* at 166 (internal quotation
17 marks, citation omitted).

18 77. The City is violating or imminently will violate Article I, sections 2 and 3 of the
19 California Constitution by enforcing the Ordinance against protected speech, expressive conduct, and
20 association.

21 78. When abatement sweeps occur, Plaintiffs would like to continue their protected First
22 Amendment speech, expression, and association in areas—including homeless encampments located in
23 traditional public forums—where they would likely be excluded under the Ordinance. The City’s
24 actions have and will continue to chill, deter, and infringe Plaintiffs’ liberty of speech, expressive
25 conduct, and associational rights in a traditional public forum.

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FIFTH CLAIM FOR RELIEF

**Substantive Due Process—Void for Vagueness
(Fourteenth Amendment of the U.S. Constitution; 42 U.S.C. § 1983)**

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3 79. Plaintiffs incorporate by reference all foregoing and subsequent allegations as though
4 fully set forth herein.

5 80. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides
6 that no state shall “deprive any person of life, liberty, or property, without due process of law.” To
7 satisfy Substantive Due Process, a municipal ordinance must be sufficiently definite to provide adequate
8 notice of the conduct proscribed and sufficient guidelines for officials so that arbitrary and
9 discriminatory enforcement does not occur. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253
10 (2012). When First Amendment rights are at stake, an even greater degree of specificity is required to
11 ensure that ambiguity does not chill protected speech and expression. *Id.* at 253–54.

12 81. The Ordinance fails to provide adequate notice of the conduct proscribed because it relies
13 on ambiguous and undefined terms. Section (b)(1) of the Ordinance prohibits unauthorized entry into a
14 “restricted area” “where an abatement is taking place” and “while an abatement is in progress.” The
15 Ordinance fails to define what activities constitute abatement, when that abatement activity “is in
16 progress,” and how wide a perimeter will be established around “where” abatement is “taking place.”
17 The restriction on entry is particularly vague because the pre-amendment language in section (b) makes
18 clear that the statute applies to “the work of abatement” as well as “any necessary act preliminary to or
19 incidental to such work”—an application so broad as to have no limits at all.

20 82. In addition, under the Ordinance, persons shall not “obstruct, impede or interfere with
21 any officer, employee, contractor or authorized representative of the city” engaged in that boundless
22 range of abatement work—but “obstruct, impede, or interfere” is likewise not defined. Moreover, while
23 the Ordinance purports to allow limited access “prior to an area being secured” to “persons providing
24 services to the occupants or advocating on their behalf,” the Ordinance conditions that access on vague
25 “particular restrictions mandated by safety concerns or emergency procedures.” It also does not explain
26 how this category of persons will be identified or why they, or anyone else, would need statutory
27 permission to any public area that has not yet been “secured”—further compounding the ambiguity of
28 when an abatement is “taking place.” Finally, although the type of punishment varies depending on

1 whether the violation is “intentional,” the Ordinance fails to clarify the difference between “intentional”
2 and unintentional violations.

3 83. Furthermore, the Ordinance fails to provide adequate guidelines or standards so as to
4 prevent arbitrary and discriminatory enforcement. For example, although the Ordinance vests law
5 enforcement, abatement officers, and other city workers and contractors with discretionary authority to
6 create a restricted abatement area “[t]o protect [] health and safety,” the Ordinance provides no guidance
7 on when a restriction will protect health and safety or what standards guide that determination. In
8 addition, the Ordinance mandates “express authorization from city employees or contractor[s] on site” to
9 enter a restricted area but does not explain how to obtain authorization or what standards will guide
10 whether authorization is granted. And, as explained *supra*, the Ordinance provides no clarity on who
11 will determine who is a “person[] providing services to the occupants or advocating on their behalf”
12 entitled to some preliminary but undefined access and how those unidentified officials will make that
13 determination. Thus, under the Ordinance, law enforcement, abatement officers, and other city workers
14 and contractors will be able to arbitrarily decide who to authorize, exclude, and punish for entering an
15 abatement area.

16 84. The Ordinance should therefore be declared unconstitutionally vague on its face in
17 violation of Substantive Due Process protections under the Fourteenth Amendment to the U.S.
18 Constitution.

19 **SIXTH CLAIM FOR RELIEF**
20 **Substantive Due Process—Void for Vagueness**
(Article I, Section 7 of the California Constitution)

21 85. Plaintiffs incorporate by reference all foregoing and subsequent paragraphs as though
22 fully set forth herein.

23 86. Article I, section 7 of the California Constitution provides that a “person may not be
24 deprived of life, liberty, or property without due process of law.” To satisfy Substantive Due Process, a
25 municipal ordinance must be sufficiently definite to provide adequate notice of the conduct proscribed
26 and provide sufficient guidelines for officials so that arbitrary and discriminatory enforcement does not
27 occur. *Williams v. Garcetti*, 5 Cal. 4th 561, 567–68 (1993). When First Amendment rights are at stake,
28

1 an even greater degree of specificity is required to ensure that ambiguity does not chill protected
2 speech. *Franklin v. Leland Stanford Junior Univ.*, 172 Cal. App. 3d 322, 347 (1985).

3 87. The Ordinance fails to provide adequate notice of the conduct proscribed because it relies
4 on ambiguous and undefined terms. Section (b)(1) of the Ordinance prohibits unauthorized entry into a
5 “restricted area” “where an abatement is taking place” and “while an abatement is in progress.” The
6 Ordinance fails to define what activities constitute abatement, when that abatement activity “in in
7 progress,” and how wide a perimeter will be established around “where” abatement is “taking place.”
8 The restriction on entry is particularly vague because the pre-amendment language in section (b) makes
9 clear that the statute applies to “the work of abatement” as well as “any necessary act preliminary to or
10 incidental to such work”—an application so potentially broad as to have no limits at all.

11 88. In addition, under the Ordinance, persons shall not “obstruct, impede or interfere with
12 any officer, employee, contractor or authorized representative of the city” engaged in that boundless
13 range of abatement work—but “obstruct, impede, or interfere” is not defined either. Moreover, while
14 the Ordinance purports to allow limited access “prior to an area being secured” to “persons providing
15 services to the occupants or advocating on their behalf,” the Ordinance conditions that access on vague
16 “particular restrictions mandated by safety concerns or emergency procedures.” It also does not explain
17 how this category of persons will be identified or why they, or anyone else, would need statutory
18 permission to a public area that has not yet been “secured”—further compounding the ambiguity of
19 when an abatement is “taking place.” Finally, although the type of punishment varies depending on
20 whether the violation is “intentional,” the Ordinance fails to clarify the difference between “intentional”
21 and unintentional violations.

22 89. Furthermore, the Ordinance fails to provide adequate guidelines or standards so as to
23 prevent arbitrary and discriminatory enforcement. For example, although the Ordinance vests law
24 enforcement, abatement officers, and other city workers and contractors with discretionary authority to
25 create a restricted abatement area “[t]o protect [] health and safety,” the Ordinance provides no guidance
26 on when a restriction will protect health and safety or what standards guide that determination. In
27 addition, under the Ordinance, “No person shall enter the restricted area without express authorization
28 from city employees or contractor[s] on site conducting the abatement.” But the Ordinance does not

1 explain the process for obtaining express authorization or the standards for weighing whether to grant
2 such authorization. Thus, under the Ordinance, law enforcement, abatement officers, and other city
3 workers and contractors will be able to arbitrarily decide who to authorize, exclude, and punish for
4 entering an abatement area.

5 90. The Ordinance should therefore be declared unconstitutionally vague on its face in
6 violation of Substantive Due Process protections under Article I, section 2 of the California Constitution.

7 **SEVENTH CLAIM FOR RELIEF**
8 **Right to Free Movement and Travel**
9 **(Fourteenth Amendment of the U.S. Constitution; 42 U.S.C. § 1983)**

10 91. Plaintiffs incorporate by reference all foregoing and subsequent paragraphs as though
11 fully set forth herein. Even before the adoption of the U.S. Constitution, residents of all states have
12 “possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within
13 the limits of their respective states, to move at will from place to place therein, and to have free ingress
14 thereto and egress therefrom . . .” *United States v. Wheeler*, 254 U.S. 281, 293 (1920). The
15 fundamental right to travel and to “peacefully dwell,” although not explicitly enumerated in the U.S.
16 Constitution, has been consistently recognized by the courts and has been found to be embedded within
17 the Commerce Clause and the Privileges and Immunities, Due Process, and Equal Protection Clauses of
18 the Fourteenth Amendment. Although sometimes referred to in shorthand fashion as a “right to travel”
19 or “right to freedom of movement,” this fundamental right encompasses not only both intrastate and
20 interstate travel, but also the right to remain, free from disturbance, in the place where one has arrived.

21 92. Because the right of freedom of movement is a fundamental right, under the Equal
22 Protection Clause of the Fourteenth Amendment to the U.S. Constitution, any ordinance restricting
23 exercise of that right is “presumptively invidious” and is invalid unless the government can prove the
24 restriction has been “precisely tailored to serve a compelling governmental interest.” *Plyler v. Doe*, 457
25 U.S. 202, 216–17 (1982).

26 93. By requiring “express authorization” to enter an abatement area in a public place, the
27 Ordinance interferes with the right to move freely and is not precisely tailored to serve a compelling
28 interest.

//

EIGHTH CLAIM FOR RELIEF
Right to Free Movement and Travel
(Article I, Sections 7 and 24 of the California Constitution)

94. Plaintiffs incorporate by reference all foregoing and subsequent paragraphs as though fully set forth herein.

95. The California Constitution, Article I, sections 7 and 24, protects the right to travel and freedom of movement. “[T]he right to intrastate travel (which includes intramunicipal travel) is a basic human right . . . implicit in the concept of a democratic society . . .” *In re White*, 97 Cal. App. 3d 141, 148 (1979). “This personal liberty consists in the power of locomotion, of changing situation or moving one’s person to whatever place one’s inclination may direct, without imprisonment or restraint.” *Id.* at 149 (citation omitted).

96. Because the right of freedom of movement is a fundamental right, under the Equal Protection Clause of the California Constitution, any ordinance restricting exercise of that right “should be regarded with skepticism. If available alternative means exist which are less violative of the constitutional right and are narrowly drawn so as to correlate more closely with the purposes contemplated, those alternatives should be used.” *Id.* at 150.

97. By requiring “express authorization” to enter an abatement area in a public place, the Ordinance interferes with the right to move freely. There are available alternative means that further and are more closely correlated with the City’s interests in health and safety that are less violative of the right of freedom of movement.

NINTH CLAIM FOR RELIEF
Preemption
(Article XI, Sections 5 and 7 of the California Constitution)

98. Plaintiffs incorporate by reference all foregoing and subsequent paragraphs as though fully set forth herein.

99. The California Constitution, Article XI, section 7, provides that a “city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” Under the “home rule” doctrine, Article XI, section 5 reserves to charter cities, such as Fresno, the right to adopt and enforce ordinances that conflict with general state laws so long as the subject of the regulation is a “municipal affair” rather than one of “statewide concern.”

1 efforts to conduct nuisance abatements pursuant to Section 10-616 until a lawful authorizing ordinance
2 is adopted;

3 5. Award Plaintiffs reasonable attorneys' fees pursuant to 42 U.S.C. § 1988, 42 U.S.C.
4 § 12205, Cal. Civ. Code § 52, and Cal. Civ. Proc. Code § 1021.5;

5 6. Order such other and further relief that the Court deems just and proper.
6

7 Dated: March 16, 2022

Respectfully submitted,

8
9 AMERICAN CIVIL LIBERTIES UNION
10 FOUNDATION OF NORTHERN CALIFORNIA,
11 INC.

12 /s/ Chessie Thacher

13 Chessie Thacher (SBN 296767)
14 Hannah Kieschnick (SBN 319011)
15 Angelica Salceda (SBN 296152)
16 Shilpi Agarwal (SBN 270749)

17 CALIFORNIA HOMELESS UNION
18 STATEWIDE ORGANIZING COUNCIL
19 LAW OFFICES OF ANTHONY D. PRINCE

20 /s/ Anthony Prince (authorized March 16, 2022)

21 Anthony Prince (SBN 202892)

22 *Attorneys for Plaintiffs*
23
24
25
26
27
28

EXHIBIT A



BILL NO. B-2

ORDINANCE NO. 2022-002

AN ORDINANCE OF THE CITY OF FRESNO, CALIFORNIA,
AMENDING SECTION 10-616 OF THE FRESNO
MUNICIPAL CODE

SECTION 1. Section 10-616 of the Fresno Municipal Code is amended to read
SECTION 10-616. ADMINISTRATIVE ABATEMENT.

(a) Abatement of the nuisance may in the discretion of the Director be performed by city forces or by a contractor retained pursuant to the provisions of this Code.

(b) [City employees or a contractor retained by the City] ~~The Director~~ may enter upon private [or public] property to abate the nuisance pursuant to the provisions of this article. No person shall obstruct, impede or interfere with any officer, employee, contractor or authorized representative of the city whenever such person is engaged in the work of abatement, pursuant to the provisions of this article, or in performing any necessary act preliminary to or incidental to such work or authorized or directed pursuant to this article.

[(1) To protect the health and safety of the public and city employees while an abatement is in progress, city employees or a retained contractor may designate a restricted area by erecting a barrier or cordon off an area of public or private property where an abatement is taking place. No person shall enter the restricted area without express authorization from city employees or contractor on site conducting the abatement.]

1 of 3

Date Adopted: 02/17/2022
Date Approved: 02/28/2022
Effective Date: 03/31/2022

Ordinance No. 2022-002



(2) Subject to particular restrictions mandated by safety concerns or emergency procedures, prior to any abatement taking place at an occupied location, those persons providing services to the occupants or advocating on their behalf shall be permitted a reasonable time to make contact with the occupants and assist prior to the area being secured as provided herein;

(3) Unauthorized entry into the restricted area or other violation of this section shall be punishable either as a misdemeanor for intentional violations, or as an administrative citation with administrative penalty of up to \$250 pursuant to Section 1-308, at the election of the City Attorney; prior to any person being cited for either a misdemeanor or administrative citation, first a verbal warning shall be provided to vacate the area with opportunity to comply.]

(c) No officer, agent, [contractor] or employee of the city shall be personally liable for any damage incurred or alleged to be incurred as a result of any act required, permitted or authorized to be done or performed in the discharge of his duties pursuant to this article.

(d) The Director may charge an hourly fee, as established in the Master Fee Schedule, for the enforcement of this ordinance.

(e) Upon completion of the abatement, the costs of abatement may be collected under the provisions of Chapter 1, Article 5 of this Code.

SECTION 2. This ordinance shall become effective and in full force and effect at 12:01 a.m. on the thirty-first day after its final passage.

* * * * *



STATE OF CALIFORNIA)
COUNTY OF FRESNO) ss.
CITY OF FRESNO)

I, TODD STERMER, City Clerk of the City of Fresno, certify that the foregoing ordinance was adopted by the Council of the City of Fresno, at a regular meeting held on the 17th day of February 2022.

AYES :Soria, Karbassi, Arias, Chavez, Bredefeld, Esparza
NOES :None
ABSENT :Maxwell
ABSTAIN :None

Mayor Approval: N/A, 2022
Mayor Approval/No Return: February 28th, 2022
Mayor Veto: N/A, 2022
Council Override Veto: N/A, 2022

TODD STERMER, CMC
City Clerk

BY: Brian Pan 3/2/2022
Deputy Date

APPROVED AS TO FORM:
DOUGLAS T. SLOAN
City Attorney

BY: Christina Roberson 3/1/22
Christina Roberson Date
Assistant City Attorney



February 18, 2022

Council Adoption: 02/17/2022

Mayor Approval:

Mayor Veto:

Override Request:

TO: JERRY DYER
FROM: TODD STERMER, CMC
City Clerk

SUBJECT: TRANSMITTAL OF COUNCIL ACTION FOR APPROVAL OR VETO

At the City Council meeting of February 17, 2022 Council adopted the attached Bill No. B-2, Ordinance No. 2022-002, entitled ***BILL No. 2 (Re-intro'd 2/10/2022) (For Adoption) - Amending Administrative Abatement, FMC section 10-616, to clarify limits on access to restricted areas where abatements are taking place (Subject to Mayor's Veto). Item 1-B, File ID 22-316, by the following vote:

Ayes : Soria, Karbassi, Arias, Chavez, Bredefeld, Esparza
Noes : None
Absent : Maxwell
Abstain : None

Please indicate either your formal approval or veto by completing the following sections and executing and dating your action. Please file the completed memo with the Clerk's office on or before February 28, 2022. In computing the ten day period required by Charter, the first day has been excluded and the tenth day has been included unless the 10th day is a Saturday, Sunday, or holiday, in which case it has also been excluded. Failure to file this memo with the Clerk's office within the required time limit shall constitute approval of the ordinance, resolution or action, and it shall take effect without the Mayor's signed approval.

APPROVED (NO RETURN): _____

VETOED for the following reasons: (Written objections are required by Charter; attach additional sheets if necessary.)

_____ Date: _____

Jerry Dyer, Mayor
COUNCIL OVERRIDE ACTION: _____ Date: _____

Ayes :
Noes :
Absent :
Abstain :

CITY CLERK COPY

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
Desiree Martinez, Fresno Homeless Union, Faith in the Valley, and Robert McCloskey
(b) County of Residence of First Listed Plaintiff Fresno
(c) Attorneys (Firm Name, Address, and Telephone Number) See attachment.

DEFENDANTS
The City of Fresno
County of Residence of First Listed Defendant
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
PTF DEF
Citizen of This State 1 1
Citizen of Another State 2 2
Citizen or Subject of a Foreign Country 3 3
Incorporated or Principal Place of Business In This State 4 4
Incorporated and Principal Place of Business In Another State 5 5
Foreign Nation 6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only) Click here for: Nature of Suit Code Descriptions.

Table with 5 columns: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes codes for various legal claims like 110 Insurance, 310 Airplane, 365 Personal Injury, etc.

V. ORIGIN (Place an "X" in One Box Only)
1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District
6 Multidistrict Litigation - Transfer
7 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
Fourteenth Amendment of the U.S. Constitution; 42 U.S.C. §1983
Brief description of cause:
1st Amend., state-created danger, violation of freedom of speech & assembly, substantive due process, right to free movement & travel, preemption

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$
CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions):
JUDGE DOCKET NUMBER

DATE Mar 16, 2022 SIGNATURE OF ATTORNEY OF RECORD /s/ Chessie Thacher

FOR OFFICE USE ONLY
RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

Attachment to Civil Case Cover Sheet

I. (c) Attorneys for Plaintiffs

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Angelica Salceda
Shilpi Agarwal
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