**No. 25-1658**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

EVELYN DAVIS ALFRED,
*Plaintiffs/Appellee,*

v.

CITY OF VALLEJO,
*Defendant/Appellant.*

On Appeal from the United States District Court
for the Eastern District of California
No. 2:24-CV-03317-DC-SCR
Hon. Dena M. Coggins

# BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, THE AMERICAN CIVIL UNION OF NORTHERN CALIFORNIA, AND THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, *AMICI CURIAE* SUPPORTING PLAINTIFF-APPELLEE

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, *amici curiae* state that they do not have a parent corporation and that no publicly held corporation owns 10 percent or more of their stock.

Date: May 29, 2025

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## STATEMENT OF INTEREST[1]

The **American Civil Liberties Union Foundation** ("ACLU"), the **American Civil Liberties Union of Northern California** ("ACLU NorCal"), and the **American Civil Liberties Union of Southern California** ("ACLU SoCal"), are nonpartisan, non-profit civil rights organizations. For decades, they have engaged in litigation and advocacy to protect civil rights, including specifically to protect and advance the rights of unhoused people.

The ACLU is a nationwide, non-profit, non-partisan organization of more than 1.6 million members dedicated to defending the principles of liberty and equality embodied in the U.S. Constitution and our nation's civil rights laws. Through its Trone Center for Justice and Equality, the ACLU engages in nationwide litigation and advocacy to enforce and protect the constitutional rights of unhoused people, including appearing as counsel of record in *Fund for Empowerment v. City of Phoenix*, 646 F. Supp. 3d 1117 (D. Ariz. 2022) and *Coalition on Homelessness v. City and Cnty. of San Francisco*, 647 F. Supp. 3d 806 (N.D. Cal. 2022), and as amicus, including in *City of Grants Pass, Oregon v. Johnson*, 603 U.S. 520 (2024).

[1] *Amici* submit this brief pursuant to Circuit Rule 29-2(a) and certify that all parties have consented to its timely filing. Pursuant to Federal Rule of Appellate Procedure Rule 29(a)(4)(E), *amici* also certify that no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part.

The ACLU NorCal and the ACLU SoCal are regional affiliates of the ACLU with long-standing interests in advancing economic and racial justice and decriminalizing poverty. They have directly represented individuals, acted as class counsel, and engaged as *amici* to safeguard constitutional guarantees for unhoused people, including in *Coalition on Homelessness v. City and Cnty. of San Francisco*, No. 23-15087, 2024 WL 3325655, (9th Cir. July 8, 2024), *Warren v. City of Chico*, No. 2:21-CV-00640-MCE-DMC, 2021 WL 2894648, (E.D. Cal. July 8, 2021), and *Tyson v. City of San Bernardino*, No. EDCV 23-01539 TJH (KKX), 2024 WL 3468832, (C.D. Cal. Jan. 12, 2024).

## INTRODUCTION

In this case, the district court issued a narrow injunction preventing the City of Vallejo (hereinafter "the City") from removing a single individual's shelter from a specific location. The court's order was based on a particularized, fact-based conclusion regarding the specific circumstances of Plaintiff Evelyn Davis Alfred (hereinafter Ms. Alfred). The district court concluded that Ms. Alfred was likely to succeed on the merits of her state-created danger claim based on its finding that the "City is aware that Plaintiff's current shelter is her only protection from the elements and that it accommodates her mobility challenges stemming from her disabilities, provides access to hygiene facilities, and access to life essentials such as water." 1-ER-14.

On appeal, the City does not meaningfully grapple with the lower court's detailed factual findings. It likewise offers no basis on which to challenge the district court's conclusion that, by removing her only means of shelter when it was evident that she had no alternative place to live, the City exposed Ms. Alfred to danger in violation of her due process rights. Instead, the City raises new, unmeritorious arguments that have been waived, or it seeks broad pronouncements on questions not presented by this case.

Throughout its brief, the City argues for new limits on the state-created danger doctrine that depart from established law. It claims that this doctrine

cannot be applied to the context of encampment sweeps or to harms caused by inclement weather, and it also asserts that the court's ruling below runs afoul of the recent Supreme Court holding in *Grants Pass*. But the City's cries of wolf should be ignored. The present case does not touch on the specific Eighth Amendment question addressed by *Grants Pass*, and nothing in this Court's precedent suggests that the state-created danger doctrine does not apply with equal force to unhoused people or to state actions connected to encampment removals.

Though the City attempts to paint the district court's ruling as broad and an expansion of precedent, it is neither. The district court's injunction is individualized, narrow, and fact-bound—it applies to a single individual and falls squarely within this Court's precedent. It should be affirmed.

## STANDARD OF REVIEW

The district court correctly awarded Ms. Alfred a narrow preliminary injunction. To obtain a preliminary injunction, a plaintiff must establish (1) "that he is likely to succeed on the merits," (2) "that he is likely to suffer irreparable harm in the absence of preliminary relief," (3) "that the balance of equities tips in his favor," and (4) "that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "When the government is a party, these last two factors merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073,

1092 (9th Cir. 2014).[2] This Court reviews a preliminary injunction for abuse of discretion. *Herb Reed Enters., LLC v. Fla. Ent. Mgmt., Inc*., 736 F.3d 1239, 1247 (9th Cir. 2013). A district court abuses its discretion only where it applies the wrong legal standard or makes "a factual finding that [is] illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Id.* at 1247. If "the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." *Earth Island Inst. v. U.S. Forest Serv*., 351 F.3d 1291, 1298 (9th Cir. 2003).

## ARGUMENT

### I. THE DISTRICT COURT APPLIED THIS COURT'S STATE-CREATED DANGER PRECEDENT TO THE FACTS OF THIS CASE AND ISSUED A NARROW INJUNCTION.

The City claims that this appeal concerns "whether the Fourteenth Amendment precludes the otherwise constitutional process of clearing homeless encampments during wet or cold weather based on the state-created danger doctrine." Appellant's Opening Br. at 9. That was neither the question before the district court nor the one now on appeal. This case concerns whether the lower court abused its discretion by enjoining the City from taking a specific eviction action against the shelter *of a single individual* because such action would run

[2] Unless otherwise indicated, all internal citations and quotation marks are omitted.

afoul of her due process rights. The district court examined the particular facts presented by a single plaintiff and concluded that an injunction was warranted. The court's relief is based on a straightforward application of this Court's precedent to the specific facts of this case. It should be affirmed.

### A. This Court has applied the state-created danger doctrine to a range of actions and harms.

Throughout its brief, the City avers that the district court's ruling is an expansion of precedent because the state-created danger doctrine cannot be applied to encampment evictions, or to any situation where the government is enforcing a specific ordinance or "acting to protect the health and safety of the entire community." Appellant's Opening Br. at 36–39.

The Ninth Circuit has never exempted a category of state conduct from the doctrine. Rather, this Court has applied the state-created danger doctrine to hold state actors liable "in a variety of circumstances, for their roles in creating *or* exposing individuals to danger they otherwise would not have faced." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1062 (9th Cir. 2006). "The right which is established in these substantive due process cases is not the narrow right to be protected from constitutional wrongs committed by third persons. Rather, because the individual has been placed in a dependent and helpless position, she is entitled to the broader right to be protected from *harm*." *United States v. Koon*, 34 F.3d 1416, 1447 (9th Cir. 1994), *aff'd in part*, *rev'd in part*, *Koons v. United States*,

584 U.S. 700 (1996). Accordingly, none of the limitations on which the City relies in its brief has merit.

*First*, throughout the Ninth Circuit, "district courts have recognized that the clearing of homeless encampments may present a state-created danger claim when residents are exposed to increased risk of significant harm due to its clearing." *Prado v. City of Berkeley*, No. 23-CV-04437-EMC, 2024 WL 3697037, at *29 (N.D. Cal. Aug. 6, 2024). This case is among the most narrow of a long list of time-limited injunctions in this Circuit that prevent cities from dismantling *certain* encampments and displacing *certain* individuals due to dangerous conditions or health and mobility limitations. *See, e.g.*, *Sanchez v. City of Fresno*, 914 F. Supp. 2d 1079, 1091–92 (E.D. Cal. 2012); *Jeremiah v. Sutter Cnty.*, No. 2:18-CV-00522-TLN-KJN, 2018 WL 1367541, at *6 (E.D. Cal. Mar. 16, 2018); *Sausalito/Marin Cnty. Chapter of Cal. Homeless Union v. City of Sausalito*, 522 F. Supp. 3d 648, 660 (N.D. Cal. 2021); *Santa Cruz Homeless Union v. Bernal*, 514 F. Supp. 3d 1136, 1146 (N.D. Cal. 2021); *Blain v. California Dep't of Transportation*, 616 F. Supp. 3d 952, 955 (N.D. Cal. 2022); *Janosko v. City of Oakland*, No. 3:23-CV-00035-WHO, 2023 WL 187499, at *1 (N.D. Cal. Jan. 13, 2023); *Tassey v. California Dep't of Transportation*, No. 23-CV-05041-AMO, 2023 WL 6466205, at *1 (N.D. Cal. Oct. 4, 2023).

*Second*, the City's contention that the state-created danger doctrine cannot apply to the enforcement of valid laws similarly fails. The Ninth Circuit has indeed applied the doctrine to situations where the enforcement of laws and policies placed individuals in greater danger. *See, e.g.*, *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) (arrest of driver for driving while intoxicated and impounding of vehicle); *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1087 (9th Cir. 2000) (ejecting patron from bar and preventing him from driving while intoxicated); *Kennedy*, 439 F.3d at 1076 (actions done pursuant to inter-local agreement on child abuse investigations). Accordingly, numerous courts in this circuit have applied the state-created danger doctrine to encampment removals conducted pursuant to local law. *See, e.g.*, *Sausalito/Marin Cnty. Chapter of Cal. Homeless Union*, 522 F. Supp. 3d at 659 (city resolution banning day camping); *Janosko*, 2023 WL 187499, at *1 (various laws regulating encampments); *Tassey*, 2023 WL 6466205, at *1 (state anti-camping laws); *Boyd v. City of San Rafael*, No. 23-CV-04085-EMC, 2023 WL 6960368, at *21 (N.D. Cal. Oct. 19, 2023) (anti-camping ordinance prohibiting large encampments).

*Third,* the City claims that a state-created danger cannot exist where "the government is acting to protect health and safety of the entire community." Appellant's Opening Br. at 36–37. But the Ninth Circuit has expressly rejected this rationale. In *Wood v. Ostrander*, this Court found a police officer liable under the

doctrine for leaving a passenger of a vehicle stranded in a high-crime area, even though the officer acted to further the safety of other drivers by impounding the vehicle and arresting the intoxicated driver. 879 F.2d at 596; *see also Polanco v. Diaz*, 76 F.4th 918, 929 (9th Cir. 2023) (rejecting argument that because defendants' actions furthered the "safety of the inmates entrusted to their care" they could not be liable for placing guards at risk of danger). Similarly, the City's mere intent to further public health and safety has no bearing on whether it exposed a particular individual to danger. *See id.* Moreover, the district court found that this case does not raise a conflict between community and individual safety. *See* 1-ER-20 (finding that the City presented no evidence that the shelter interferes with the rights and safety of others or poses a health risk).

Finally, the City argues that this case "differs from this Court's [state-created danger] precedents which largely involve exposing the plaintiff to a risk of harm from a third party." Appellant's Opening Br. at 37. Here again, the City errs. This Court has repeatedly found that the government can be liable for creating exposure to danger in the form of severe weather and other environmental conditions. *See Munger*, 227 F.3d 1082 (cold weather); *Kennedy*, 439 F.3d at 1061 n.1 ("defendants left helpless minor children subject to inclement weather and great physical danger" (citing *White v. Rochford*, 592 F.2d 381, 384 (7th Cir. 1979))); *Pauluk v. Savage*, 836 F.3d 1117, 1125 (9th Cir. 2016) (toxic mold);

*Penilla v. City of Huntington Park*, 115 F.3d 707, 708 (9th Cir. 1997) (the absence of medical care); *Polanco*, 76 F.4th at 923 (COVID-19 virus). In short, "a review of Ninth Circuit authority establishes that there is, in fact, no such requirement. Danger could come from, *e.g.*, environmental elements or from preventing access to medical care; no third party need be involved." *Where Do We Go Berkeley v. Cal. Dep't of Transp. (Caltrans)*, No. 21-CV-04435-EMC, 2021 WL 5964594, at *11 (N.D. Cal. Dec. 16, 2021) (collecting cases). The City's half-hearted attempts to distinguish *Munger* and *Penilla* (but not the other cases) are incomplete and unpersuasive.

### B. This application of state-created danger does not run afoul of *Grants Pass*.

The City attempts to raise alarm bells regarding the "far-reaching consequences" of the district court's ruling, arguing that it effectively circumvents *City of Grants Pass v. Johnson*[3] and that, if affirmed, would require every city "to offer each homeless individual alternative shelter that provides equal or greater protection, prior to removing any homeless encampment." Appellant's Opening Br. at 40. This is absurd. As noted above, this case involves an injunction that applies to one individual and is based on the lower court's fact-intensive,

[3] *Grants Pass* held that ordinances criminalizing public sleeping and camping do not constitute a punishment of status violative of the Eighth Amendment's Cruel and Unusual Punishment clause. *City of Grants Pass, Oregon v. Johnson*, 603 U.S. 520 (2024).

individualized analysis of Ms. Alfred's particular circumstances. The district court's ruling does nothing to constrain the City's actions as to any other individual in its jurisdiction.

The district court's decision is also completely consistent with *Grants Pass*—which did not involve the substantive due process clause or the state-created danger doctrine. There, the Supreme Court carefully noted that its decision addressed only the Eighth Amendment: "The only question we face is whether one specific provision of the Constitution—the Cruel and Unusual Punishments Clause of the Eighth Amendment—prohibits the enforcement of public-camping laws." *City of Grants Pass, Oregon v. Johnson*, 603 U.S. 520 (2024). The Court was clear that "many substantive legal protections and provisions of the Constitution may have important roles to play when States and cities seek to enforce their laws against the homeless." *Id*. Ms. Alfred's challenge arises from the Fourteenth Amendment Due Process Clause, not the Eighth Amendment Cruel and Unusual Punishment Clause. And unlike the plaintiffs in *Grants Pass*, Ms. Alfred does not seek to enjoin the City from enforcing its public-camping laws writ large—she seeks only to prevent the City from removing her shelter until she can obtain adequate alternative housing because of the specific dangers she will experience without it.

The City similarly insists that the Due Process Clause does not create an affirmative right to shelter or housing. 1-ER-13. But this is beside the point. Ms. Alfred is *not* challenging the City's failure to provide her with housing. Rather, she challenges its decision to expose her to danger by dismantling her only shelter when she has no safe alternative way to protect herself.

## II. THE DISTRICT COURT CORRECTLY HELD THAT MS. ALFRED RAISED A SERIOUS QUESTION ON THE MERITS OF HER STATE-CREATED DANGER CLAIM.

In determining whether Ms. Alfred was likely to succeed on the merits of her state-created danger claim, the district court correctly applied the Ninth Circuit's "serious questions" analysis. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–32 (9th Cir. 2011). Under this Circuit's sliding-scale approach to analyzing preliminary injunctions, where there are at least "serious questions" as to the likelihood of success on the merits and the court finds that the other *Winter* elements are sufficiently established, a preliminary injunction is appropriate. *See id.* at 1135–38; *see also Winter*, 555 U.S. at 20.

### A. Ms. Alfred has raised a serious question on the merits of her state-created danger claim.

The state-created danger doctrine creates liability for state actors' "roles in creating or exposing individuals to danger they otherwise would not have faced." *Kennedy*, 439 F.3d at 1062. A plaintiff succeeds on a state-created danger claim by showing (1) "affirmative conduct on the part of the state that exposed him to an

actual, particularized danger that [he] would not otherwise have faced," and (2) "that the state official acted with deliberate indifference to that known or obvious danger." *Polanco*, 76 F.4th at 926. The lower court meticulously and faithfully applied this standard to the evidence before it and concluded that Ms. Alfred's claim had merit.

### 1. The City's decision to evict Ms. Alfred constitutes affirmative conduct that would leave her in a more dangerous situation.

Contrary to precedent, the City argues that its removal of Ms. Alfred's shelter does not affirmatively place her in danger because conditions like weather are outside its control and pre-exist her eviction. State actors affirmatively place an individual in danger if their conduct leaves "the person in a situation that was more dangerous than the one in which they found him." *Munger*, 227 F.3d at 1086. Importantly, the government does not have to be the cause-in-fact of the plaintiff's injury or create the source of harm; to satisfy this element, the government need only increase the danger faced by the plaintiff. *E.g.*, *Penilla*, 115 F.3d at 710 ("The critical distinction is not . . . an indeterminate line between danger creation and enhancement, but rather the stark one between state action and inaction in placing an individual at risk.").

The City does not meaningfully challenge the district court's findings that evicting Ms. Alfred would place her in danger, nor the voluminous evidence

underpinning those factual findings. *See, e.g.*, 1-ER-14 (finding that the City's attempt to move Ms. Alfred's shelter would expose her to the elements and deprive her of life essentials); 1-ER-16 (finding that City's efforts to evict Ms. Alfred would increase her risk of medical deterioration and physical injury). Indeed, the City *conceded* in lower court filings that the destruction of Ms. Alfred's shelter would "no doubt" expose her to increased danger. 2-ER-189. Instead, the City argues—for the first time on appeal and relying only on a single out-of-circuit case—that it cannot be liable because it does not control the weather Ms. Alfred may face without shelter. Appellant's Opening Br. at 31. But as noted above, this Court has repeatedly found a state-created danger where a state actor's affirmative acts expose plaintiffs to dangers from unsafe conditions, including the weather. *See, e.g.*, *Munger*, 227 F.3d at 1087 (ejecting plaintiff from a bar into subfreezing temperatures); *Polanco*, 76 F.4th at 927–28 (exposing plaintiff to risk of contracting COVID-19); *Pauluk*, 836 F.3d at 1125 (staffing plaintiff in mold-ridden building). Accordingly, the lower court correctly held that the City's effort to displace Ms. Alfred is "affirmative action" that would leave her in a more dangerous position, based on well-founded factual findings. 1-ER-14.

The City also argues (again, for the first time on appeal), that its eviction of Ms. Alfred cannot be "affirmative action" that increases the danger she faces because her shelter is already "exposed to wet and cold weather." Appellant's

Opening Br. at 31. As a legal matter, the City's argument cannot be squared with binding precedent. *See, e.g.*, *Henry A. v. Willden*, 678 F.3d 991, 1002–03 (9th Cir. 2012) (noting that whether the danger "already existed" is not dispositive of the state-created danger inquiry); *Penilla*, 115 F.3d at 709 (finding that acts sequestering plaintiff from medical care while he was seriously ill increased the danger to him, supporting a state-created danger claim even though the acts may not have been the but-for cause of his death). While it may be that Ms. Alfred is vulnerable to some measure of danger absent the City's affirmative conduct, the correct legal inquiry is whether the City's actions would *increase* her exposure to danger. *Penilla*, 115 F.3d at 710. The lower court faithfully assessed this inquiry.

As a factual matter, the particulars of the shelter's weatherproofing were neither argued nor developed below, so the Court should not consider them now. *See Bolker v. Comm'r*, 760 F.2d 1039, 1042 (9th Cir. 1985) ("[a]s a general rule, we will not consider an issue raised for the first time on appeal"). Exposure to weather was also only one of several potential dangers identified by the court. 1-ER-14–16 (finding Ms. Alfred would face multiple dangers, including lack of access to life essentials and hygiene facilities; increased risk of physical injury, medical decompensation, and violence; and a worsening of her disabilities).[4]

[4] This Court should likewise decline attempts to relitigate whether Ms. Alfred could re-construct her shelter elsewhere. The district court made numerous fact-

### 2. The district court correctly found that the dangers of being unsheltered were particularized as to Ms. Alfred.

In yet another argument it failed to raise below, and contrary to the record, the City now asserts that the dangers of removing Ms. Alfred's shelter are not particularized to her. To assess whether danger is particularized, a court asks whether the challenged conduct exposes an individual or "discrete and identifiable group" to danger, or whether the conduct "exposes a broad swath of the public to 'generalized dangers.'" *Polanco*, 76 F.4th at 927 (quoting *Sinclair v. City of Seattle*, 61 F.4th 674, 676, 683 (9th Cir. 2023)).

In arguing that this standard has not been met here, the City attempts to analogize this case to *Sinclair v. City of Seattle*. But that case is inapposite. In *Sinclair*, the court found that the plaintiff did not allege that Seattle exposed her son to a particularized danger because she claimed that the city left *all members of the public* who chose to visit an area in a more dangerous position—the plaintiff's son, therefore, was indistinguishable from the public at large. 61 F.4th at 682. There, the plaintiff did not allege that the city "had any previous interactions with

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intensive findings related to Ms. Alfred's mobility disabilities in reaching its conclusion that Ms. Alfred could not do so. *See e.g.*, 1-ER-16, 21 (Ms. Alfred cannot carry survival gear without risking physical injury and already injured herself trying to pack); 1-ER-15 (Ms. Alfred has no alternative location available to her); SER-24–25 (Ms. Alfred is at risk of a slipped or bulging disk if made to do strenuous activities); SER-10–11, 15 (the City has refused to allow Ms. Alfred to move or camp anywhere in the city).

her son, directed any actions toward him, or even knew of her son's existence . . ." *Id.* at 683. In contrast, here the district court found that the dangers at issue arise from the specific course of action that the City planned for and *directed at Ms. Alfred individually*. *See, e.g.*, 1-ER-2 (describing City's efforts to notice Ms. Alfred and her property); 2-ER-189 (describing City inspection and red-tagging of Ms. Alfred's property); 1-ER-4–5 (describing communications between the City and Ms. Alfred about removal of her property).

Moreover, even if the dangers faced by Ms. Alfred are shared by other displaced individuals, this does not undermine Ms. Alfred's claim. A state-created danger claim can rest upon a danger that impacts a "discrete and identifiable" group. *See, e.g.*, *Polanco*, 76 F.4th at 927 (holding that people impacted by the state's transfer of incarcerated people from one prison to another formed "a discrete and identifiable group—prison guards and inmates at San Quentin"); *Sinclair*, 61 F.4th at 683 (noting that a group of plaintiffs living or owning businesses in a given area may meet the particularity standard); *Boyd*, 2023 WL 6960368 at *20 (finding that harm was particularized to unhoused individuals living in one encampment); *San Luis Obispo Cnty. Homeless Union v. Cnty. of San Luis Obispo*, No. 2:24-cv-00616-AB-MAA, 2024 WL 2107711, at *1 (C.D. Cal. Mar. 29, 2024) (finding that harm was particularized to the sixteen unhoused individuals affected by a displacement).

### 3. The City was "deliberately indifferent" to the risk Ms. Alfred would face upon displacement, as it intended to remove her shelter without regard to the known consequences.

The City argues that, in removing Ms. Alfred's shelter, it did not act with deliberate indifference; but its argument both mischaracterizes the relevant legal standard improperly asks this Court to reweigh evidence. The state-created danger doctrine requires that the defendant act with deliberate indifference to a known and obvious danger. This standard is met if the state actor "recognizes the unreasonable risk and actually intends to expose the plaintiff to such risks without regard to the consequences to the plaintiff," *L.W. v. Grubbs*, 92 F.3d 894, 899 (9th Cir. 1996), "no more, no less," *Kennedy*, 439 F.3d at 1064.

In its brief, the City argues (once again, for the first time on appeal) that it cannot be deliberately indifferent because there is no evidence that the City knew about the risk posed by inclement weather "and intentionally schedul[ed] removal date on a cold or wet weather day." Appellant's Opening Br. at 35. But deliberate indifference "does not require *intent to cause harm* or knowledge of *certain* harm." *Murguia v. Langdon*, 61 F.4th 1096, 1117 n.16 (9th Cir. 2023). While the state actor must act with knowledge that the action will *expose* the plaintiff to an unreasonable risk, he "need not know with certainty that the risk will materialize or intend for the plaintiff to face the risk." *Id.*

The lower court adhered to the proper standard in its ruling. It found that the City is aware that Ms. Alfred depends on her shelter for survival and disability-related needs and that she would face an unreasonable risk of harm if she were removed. *See, e.g.*, 1-ER-16 (noting that the City is familiar with Ms. Alfred's serious health conditions, disabilities, and mobility challenges); 1-ER-14–15 (finding that the City "is aware" that Ms. Alfred's shelter is her only means of accommodating her disabilities, protecting herself from the elements, and accessing life essentials, and that Ms. Alfred has no safe alternative form of shelter). While weather is not the only danger the Court found Ms. Alfred would face, the Court also noted that the City is seeking to remove her during the winter. 1-ER-16. The court had ample evidence to conclude that the City recognized the unreasonable risk that displacement poses and still intended to proceed despite such risks. *See, e.g.*, *Wood*, 879 F.2d at 590 (finding a triable issue regarding deliberate indifference because the "inherent danger" of ejecting a woman into a high-crime area at night "is a matter of common sense"); *Est. of Soakai v. Abdelaziz*, No. 23-4466, 2025 WL 1417105, at *10 (9th Cir. May 16, 2025) (noting that deliberate indifference may be shown where defendants "knew from their training—and common sense—that the danger to Plaintiffs would increase the longer they went without help"). Asking the court to require more—a showing that the City *went out of its way* to evict Ms. Alfred in certain rain—transforms the

deliberate indifference standard into a more stringent intent requirement. Just as the defendants in *Polanco* could be deliberately indifferent for neglecting COVID-19 precautions without intending to transfer infectious people, 76 F.4th at 928, so too can the City be deliberately indifferent to the risks posed by inclement weather without intending that Ms. Alfred immediately face such weather.

The City also seeks to improperly re-litigate the factual findings that underpin the district court's finding of deliberate indifference. As an initial matter, the City again claims that Ms. Alfred can simply move her shelter, despite the district court's conclusive finding otherwise. 1-ER-16–17. The City also cites a delay in removing Ms. Alfred as evidence of its lack of intent to expose Ms. Alfred to danger. But, contrary to the City's suggestion, this delay occurred not out of an attempt to mitigate harm, but because the district court entered a temporary restraining order pending the City's participation in the Reasonable Accommodation process required under the Americans with Disabilities Act (ADA). 1-ER-7. The lower court properly found that the City's mandatory participation in that process was not sufficient to overcome the otherwise robust factual evidence of this City's deliberate indifference. 1-ER-17.

Deliberate indifference is "by [its] nature highly fact-specific." *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 975 (9th Cir. 2011). The City's desire for a different assessment of the facts is not a basis for overturning the lower court's findings. *See*

*Earth Island Inst.*, 351 F.3d at 1298 ("[If] the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case."). The district court's finding on deliberate indifference is based on a strong factual record and is consistent with this Court's precedent.

### B. The City's *Monell* arguments have been waived and are contrary to established law.

For the first time on appeal, the City argues that there is insufficient evidence to support a *Monell* claim. As with many of the arguments discussed above, the City failed to raise its *Monell* arguments before the district court, and this Court should decline to consider them. *See, e.g.*, *Bolker*, 760 F.2d at 1042. There are three recognized exceptions to the general rule that this Court will not consider an argument raised for the first time on appeal: (1) when "review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process"; (2) when there is a change in the law; or (3) "when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." *See id*. None of these apply. No miscarriage of justice would result from declining to consider the City's newly raised arguments, particularly since they have no merit. *See id*. There has been no change of law that would excuse their failure to raise this argument below. Furthermore, *Monell* liability requires development of a factual

record to show an official policy or custom. *See, e.g.*, *S.R. Nehad v. Browder*, 929 F.3d 1125, 1142 (9th Cir. 2019) (analyzing whether "evidence is sufficient" to show a *Monell* practice). Had the City raised its *Monell* arguments below, Ms. Alfred could have bolstered the factual record, if needed. *See A-1 Ambulance Serv., Inc. v. Cnty. of Monterey*, 90 F.3d 333, 339 (9th Cir. 1996), *as amended on denial of reh'g and reh'g en banc* (July 31, 1996).

Even were the City's *Monell* arguments not waived, they have no merit. The City concedes and the district court found that the conduct at the heart of this lawsuit was carried out pursuant to a written policy. *See e.g.*, 1-ER-2; *see also* Appellant's Opening Br. at 29 (describing local Administrative Rule 7.10, which governs the challenged eviction); 2-ER-189 (stating in lower court opposition brief that "[t]he City is adhering to Rule 7.10 in its decision to clear the encampment."). It is that very policy to which *Monell* liability attaches. *See Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978).

Moreover, the City's argument that the evidence considered by the district court is insufficient to establish a *Monell* practice, Appellant's Opening Br., at 29–30, cannot be reconciled with established law. *See, e.g.*, *Henry v. Cnty. of Shasta*, 132 F.3d 512, 518–520 (9th Cir. 1997), *as amended on denial of reh'g*, 137 F.3d 1372 (9th Cir. 1998) (declarations detailing similar rights violations by defendant evidenced a municipal practice); *see also Rodriguez v. Cnty. of Los Angeles*, 891

F.3d 776, 803 (9th Cir. 2018) (evidence of repeated instances of excessive force established municipal practice). Here, Ms. Alfred provided evidence that the City engaged in similar acts on multiple past occasions. *See* 2-ER-246 (describing similar evictions of other people by the City); 2-ER-248–50 (stating that witness "attended numerous sweeps" by the City, witnessed "numerous evictions" like the one threatened against Ms. Alfred, and observed the City's practice of destroying personal property at encampments); 2-ER-255 (stating that witness observed the City's encampment removal practice on multiple occasions, including the City's routine destruction of personal property at encampments). This evidence is sufficient to show more than "an isolated or sporadic incident." *Saved Mag. v. Spokane Police Dep't*, 19 F.4th 1193, 1201 (9th Cir. 2021). To demand more would unsettle precedent.

## III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE REMAINING REQUIREMENTS OF A PRELIMINARY INJUNCTION WERE MET.

### A. Ms. Alfred faces irreparable harm.

This Court has explained that "[i]t is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). And "when an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *See Warsoldier v. Woodford*, 418 F.3d 989, 1001–

02 (9th Cir. 2005); *see also Associated Gen. Contractors of California, Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991) ("[a]n alleged constitutional infringement will often alone constitute irreparable harm."). Here, the district court rightly concluded that the alleged infringement of Ms. Alfred's substantive due process rights is enough to establish irreparable harm. 1-ER-19. The City does not and cannot contest this established law.

In addition, the district court found that absent an injunction, Ms. Alfred faced multiple kinds of injuries – many of which alone would be sufficient to establish irreparable harm. For example, the district court found that the City's planned eviction threatens the loss of Ms. Alfred's only form of shelter. 1-ER-19–20. Its conclusion is consistent with Ninth Circuit precedent finding irreparable harm when a plaintiff is threatened with eviction from their home. *See Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Tr.*, 636 F.3d 1150, 1159 (9th Cir. 2011). The City's suggestion that an eviction inflicts no irreparable harm if a plaintiff can move to another location is not supported with citations and conflicts with legal precedent and the factual record. *See* note 5, at 25. Further, this Court has found that the irreparable harm of constitutional violations is compounded by the permanent deprivation of unsheltered people's belongings—like makeshift shelters. *See Garcia v. City of Los Angeles*, 481 F. Supp. 3d 1031, 1048 (C.D. Cal. 2020), *aff'd*, 11 F.4th 1113 (9th Cir. 2021).

The district court also found—after considering extensive evidence documenting Ms. Alfred's serious disabilities and medical conditions—that the City's proposed eviction poses serious dangers to Ms. Alfred's health and wellbeing. ER-019–020; SER-24–27.[5] Thus, the harms of the City's planned eviction of Ms. Alfred are not "speculative," as the City claims, but real and supported by voluminous evidence in the record.[6]

### B. The district court's fact-intensive analysis of the balance of equities and the public interest adhered to Ninth Circuit precedent.

This Court has previously held that it is "always in the public interest" to prevent violation of a litigant's constitutional rights. *Melendres*, 695 F.3d at 1002. When, as here, the government is a party, courts consider the balance of equities

[5] This is consistent with empirical research regarding harms that flow to displaced individuals during encampment removals. *See e.g.*, Jamie Suki Chang et al., *Harms of Encampment Abatements on the Health of Unhoused People*, 2 SSM - Qualitative Research in Health 100121, (2022), https://www.sciencedirect.com/science/article/pii/S2667321522000269; Diane Qi, et al., *Health Impact of Street Sweeps from the Perspective of Healthcare Providers.*, 37 J. Gen. Internal Med. 3707, (2022), https://pubmed.ncbi.nlm.nih.gov/35296981/; Margot Kushel, *Involuntary Displacements—Making a Bad Situation Worse*, 329 JAMA 1455, (2023).

[6] As an example of the real physical dangers that can result from the City of Vallejo's encampment removal process, the City crushed a man to death while removing his encampment in December of 2024. *See* Matthew Brown, *New Details Emerge in Killing of Unhoused Man in Vallejo*, Open Vallejo (Mar. 11, 2025), https://openvallejo.org/2025/03/11/new-details-emerge-in-killing-of-unhoused-man-in-vallejo/.

and the public interest together. *Env't Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 991–992 (9th Cir. 2020). In evaluating the balance of equities, "courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 7.

Here, the district court correctly concluded that the impending irreparable harm to Ms. Alfred, a senior with disabilities, from being evicted with no suitable alternative outweighed any purported harm to the City in conducting its encampment removals. 1-ER-20–21. In so finding, the lower court considered evidence that Ms. Alfred is "disabled with limited mobility and unable to carry survival gear." 1-ER-21. Alongside these facts, the district court considered evidence that Ms. Alfred "does not have any alternative shelter, housing, or camping options at this time." *Id.* This is consistent with this Court's precedents finding that the balancing test favors the rights of unsheltered people in situations where they stand to lose nearly all their belongings. *See Lavan v. City of Los Angeles*, 797 F. Supp. 2d 1005, 1019 (C.D. Cal. 2011) ("[T]he City's interest in clean streets is outweighed by Plaintiffs' interest in maintaining the few necessary personal belongings they might have."); *see also Garcia*, 481 F. Supp. 3d at 1051 (finding that "the constitutional rights of homeless individuals outweigh the potential hurdles the injunction might pose to the City's efforts to keep the sidewalks clean"). It is also consistent with precedent holding that the public

interest is actually *served*, not thwarted, by protecting the rights and dignity of the most vulnerable members of our society. *See Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983) (finding that "[o]ur society as a whole suffers when we neglect the poor, the hungry, the disabled, or when we deprive them of their rights or privileges"); *see also Santa Cruz Homeless Union*, 514 F. Supp. 3d at 1146 (recognizing "the public interest in maintaining the protections afforded by the Constitution to those most in need of such protection").

Appellant falsely suggests that the lower court's determination that the balance of the interests weighs in favor of Ms. Alfred means that the court "dismissed" the City's concerns. Appellant's Opening Br. at 42–43. But the City's wish for a different outcome is immaterial. *See All. for the Wild Rockies*, 632 F.3d at 1131. In fact, the district court *did* consider the City's public safety, health, and welfare concerns and concluded, based on a thorough analysis of the factual record, that the City failed to produce evidence to support its contentions about the impacts of a narrow injunction that prevents it from removing only a single individual's shelter. 1-ER-20–21. Indeed, as the district court found, the City did not provide sufficient facts to support its claims that Ms. Alfred's shelter violates the California Building Code, 1-ER-21, or any evidence that the shelter presents public health and safety issues. 1-ER-20; *see also* 2-ER-223; 2-ER 241; 2-ER-248; 2-ER-253 (fact witnesses describing Plaintiff's shelter as "clean" and

"immaculate"). It is the proper role of the district court to weigh the relative credibility of evidence before it. The district court aptly considered the competing claims of injury before it, and this Court need not revisit its analysis.

## IV. CONCLUSION

*Amici* urge this court to affirm the decision of the district court.

Dated: May 29, 2025

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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## CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2025, I electronically filed the foregoing *Amici Curiae* Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the ACMS system, which effects service upon all counsel of record.

Date: May 29, 2025

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