HELLER EHRMAN LLP
PAUL ALEXANDER (SBN: 49997)
275 Middlefield Road
Menlo Park, CA 94025-3506
Telephone: (650) 324-7000
Facsimile: (650) 324-0638
E-mail: paul.alexander@hellerehrman.com

LAWYERS' COMMITTEE FOR CIVIL RIGHTS
OREN SELLSTROM (SBN: 161074)
ELISA DELLA-PIANA (SBN: 226462)
131 Steuart Street, Suite 400
San Francisco, CA 94105
Telephone: (415) 543-9444
Facsimile: (415) 543-0296
E-mail: osellstrom@lccr.com

ACLU FOUNDATION OF NORTHERN CALIFORNIA
ALAN SCHLOSSER (SBN: 49957)
MICHAEL T. RISHER (SBN: 191627)
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493
Facsimile: (415) 255-8437
E-mail: mrisher@aclunc.org

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA: FRESNO DIVISION

Pamela Kincaid, Doug Deatherage, Charlene Clay, Cynthia Greene, Joanna Garcia, and Randy Johnson, Individually on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

v.

City of Fresno, California Department of Transportation, Alan Autry, Jerry Dyer, Greg Garner, Reynaud Wallace, John Rogers, Phillip Weathers and Will Kempton, individually and in their official capacities; DOES 1-100, inclusive,

Defendants.

Civil Action No. 1:06-CV-1445 OWW

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

DATE: November 7, 2006
TIME: 9:00 a.m.
CTRM: 3

I. RESPONSE TO CITY'S STATEMENT OF FACTS

The homeless population in the City of Fresno ("City") ranges between a "conservative" estimate of 4,412 to a more realistic "Point in Time" estimate of 8,205 as of January, 2005. (Continuum of Care Report, p. 10-11, Ex. B to Supplemental Apper Decl.). These figures have only increased since then, including in particular the number of homeless women. The City's Opposition Brief ("Opp'n Br.") does not dispute this, but refers to "available housing at Poverello House, Naomi's House or the Fresno Rescue Mission," implying that the homeless in Fresno could stay in one of these facilities but instead "choose to trespass and construct shelters upon property that they do not own." Opp'n Br. at 1, 2. The City, however, omits the critical facts that:

- "Naomi House, the primary women's shelter in town, has only 24 beds; they hold a lottery each day to determine which women will get those beds." Supp. Apper Decl., ¶ 4.
- "Additionally, there is space for 44 people in the Poverello House "Village of Hope", where homeless people can stay in small tool sheds." *Id.* ¶ 5.
- There are approximately 134 beds at the Fresno Rescue Mission only for adult men. "To stay at the Rescue Mission, men must participate in praver services regardless of their denomination or faith." *Id.*

Thus, realistically speaking, for the thousands of homeless men and women in Fresno, there are 25 places for women and roughly 200 for men. The idea that homelessness is a voluntary choice is both heartless and, perhaps more importantly, wholly refuted by evidence.

The City further claims that it provides "notice" to the homeless that it is about to come and destroy all their property because it is necessary to clean up a given area. Yet the only written notice the City has supplied is a single "memorandum" (in English only) dated August 25, 2006, attached as Exhibit A to the Garner Declaration. What the City's limited evidence concedes, moreover, is that once the "heavy equipment" moves in, Plaintiffs' property is destroyed and they are prevented from even the chance to save their few possessions from destruction. Opp'n Br. at 9.

Plaintiffs have already presented overwhelming specific evidence in the form of eleven separate declarations, some with clear visual evidence, proving that the City destroyed their personal property with no opportunity to reclaim it. In light of the City's claim that it has a "compassionate, patient approach in dealing with the homeless," (Opp'n Br. at 1) Plaintiffs submit

herewith the declarations of Jeannine Nelson, Deanna Phillips, Emilio Rodriquez, Alfonso Williams, Louis Jiminez, and Keith O'Brien. These provide direct evidence of how the City treats the homeless, which refutes the City's claim that it has a "compassionate, patient approach." Each is graphic in its own right, but the experience of Ms. Nelson in June, 2006, in particular demonstrates how the homeless and their property are treated, and how helpless they are to do anything about it:

> As I woke up, I saw Officer Montoya standing over me. Officer Lee ordered me to get up and go sit on the nearby canal bank . . . . Officer Lee said to me, "didn't I tell you I didn't want to see you again." I said I had written permission from the church to be there, but he said he did not believe me and that he did not care. I started to have a hard time breathing, and I said I needed my asthma medication. He refused to allow me to get it, even though it was obvious that I could not breathe well. In fact, Officer Lee told us that we were ruining his life and that we were an embarrassment to the City. Then he and Officer Montoya pushed almost all our belongings into the canal. There were at least four shopping carts full of things and they were all ruined.

Nelson Decl. ¶ 5. Plaintiffs' evidence clearly proves that the City's actions are based upon a policy of the City, as well as an ongoing pattern and practice. Indeed, the City does not deny that this is its practice; rather, it focuses upon semantics in the place of law. Thus, Plaintiffs' evidence is more than sufficient to establish the ongoing violation of the Fourth and Fourteenth Amendments of the U.S. Constitution, the California Constitution and of California Civil Code §§ 2080 and 52.1.

Finally, the City does not dispute—because *it cannot*—that *the City makes no effort to retain the property it seizes nor does it provide any process of any kind for homeless people to reclaim their property.* Even the City's limited evidence confirms that the destruction is immediate without any effort to store property or allow it to be reclaimed. To the contrary, the City insists that this would be too hard for it to do, even though the law clearly requires it. *See* Opp'n Br. at ___. If the City is claiming that a "clean-up" is too difficult or somehow requires that everything be destroyed, any such claim is utterly belied by the fact that Rev. Harris and a group of youth volunteers from the National Action Network cleaned the entire area near E and Ventura Streets in Fresno, CA, just three weeks before the City decided to destroy all the property of the homeless in this area:

> When we finished our work on August 5, 2006, the strip of land near E Street and Ventura was very clean. It was not necessary to destroy anyone's property in order

> to clean the area. During the day, we did not encounter drug paraphernalia or elated items that would cause a healthy concern to myself or any of the other volunteers that would cause concern for our health or the healthy of the youngsters who were present to volunteer.

Harris Decl. ¶ 4.

Notwithstanding the City's claim that following the law would be "too difficult," the City presents no evidence that it has even investigated the cost or feasibility of any procedure for preserving the property of the homeless and making it available to be reclaimed. Its baseless claim that this cannot be done is belied by the fact that many cities do exactly this:

> A number of cities across the country and at least one state have instituted formal policies establishing procedures that police officers and other city employees must follow when cleaning public areas where homeless persons are living, including procedures for storing homeless people's personal belongs if encountered during a clean-up.

Ozdeger Decl. ¶ 4. By way of illustration, the District of Columbia; Cincinnati, Ohio; and Portland, Oregon (followed by the State of Oregon) have all established procedures that comply with the law and provide for storage of homeless people's property and an opportunity to retrieve it. *See* Ozdeger Decl. ¶¶ 5-8 & Exs. A-C. The city of Pittsburgh, Pennsylvania has done the same. (See Exhibit A to Request for Judicial Notice). Each of these governmental entities found it quite feasible to follow rather than flout the law. And there is no good reason why the City of Fresno cannot do the same.

II. ARGUMENT

A. Plaintiffs Have Shown Specific Evidence Establishing a Strong Likelihood of Success on the Merits.

1. The City Destroys Plaintiffs' Property with No Chance to Recover it, in Clear Violation of the Fourth Amendment.

Defendants argue that Plaintiffs, unlike the homeless plaintiffs in *Pottinger*, lack a reasonable expectation of privacy in their shelters and effects. This argument is irrelevant, because the United States Supreme Court rendered this part of *Pottinger* analysis unnecessary for purposes of evaluating a seizure, as opposed to a search in *Soldal v. Cook County Ill.*, 506 U.S. 56, (1992). After *Soldal*, it is clear that the "Fourth Amendment protects against unreasonable interferences in property interests regardless of whether there is an invasion of privacy." *Miranda v. City of*

Cornelius, 429 F.3d 858, 862 (9th Cir. 2005) (citing *Soldal*). Indeed, the whole point of the Supreme Court's unanimous opinion in *Soldal* is that the Fourth Amendment "protects property as well as privacy." *Soldal*, 506 U.S. at 62. Plaintiffs do not argue that the City is invading their privacy; rather they argue that the City is seizing and destroying their property. For this question, the existence or lack of privacy expectations is irrelevant.

Moreover, the City's attempt to distinguish *Pottinger* has no merit. The City focuses upon a passage pertaining to the "expectation of privacy," while ignoring the fact that the *Pottinger* court *did* find the homeless possessed a protectable Fourth Amendment privacy right in their property, even if they were trespassing. *Pottinger*, 810 F. Supp. at 1572. Thus, as *Pottinger* recognized (even if the City did not), society *does* recognize that the homeless have a reasonable expectation of privacy in their property.

The City points to a single district court decision of *Love v. City of Chicago, 1996 U.S. Dist. Lexis 16041*. A thorough reading of the case, however, reveals that it neither supports the City's position in this case, nor justifies its conduct. The program at issue in *Love* was a regular cleaning of the Lower Wacker Drive area where homeless people lived. It was a regular program so that the homeless knew what to expect. The parties had agreed to substantial portions of the cleaning procedure. Chicago provided "safe areas" within 50 feet to which the homeless could move their belongings during the cleaning. Chicago did not destroy all property, even if it was not moved into a safe zone, but "if it is of obvious value, attempts to return it to its rightful owners or turns it over to the Police Department to be inventoried." *Love*, 1996 U.S. Dist. Lexis at 9. The court went on to find that the evidence did not establish that "any property claimed by homeless individuals present during the cleaning has been lost since implementation of the temporary procedure." *Id.* at 11. This is a stark contrast to what the City does in this case – wholesale destruction of everything in its path, even if the owner is present and requesting that it not be destroyed. Moreover, unlike the facts in *Love*, the City in this case returns no property to its rightful owner nor does it inventory any property that it encounters. Indeed, on this motion the City avowedly seeks the right to continue this conduct. Unlike the situation in *Love*, it has engaged in no effort to find a way to preserve the property of the homeless.

Moreover, the *Love* court's Fourth Amendment analysis rested on a factual finding that limited property discarded had been abandoned. *Id*. at 15. The basis for this was that the extensive notice that was provided, that the cleanings were regularly scheduled, and that the purpose was simply to clean the streets, not to destroy property. The city in that case had established an written procedure for their cleanings that provided for at least three separate notices. *Id*. at 9-10. Moreover, the city established "safe zones" for the property of the homeless. *Id* at 10. Finally, city workers would save and inventory certain items of value so that the owner could reclaim them. In this case, the City does none of these things and there is no basis to conclude that Plaintiffs have abandoned their property that the City has seized and immediately destroyed.

In any event, the City cannot use the argument of "abandonment" to justify its actions in this case because the City seizes and immediately destroys everything that is present, and makes no effort to determine whether it is truly abandoned. Plaintiffs did not abandon their possessions; a person abandons her property only when "she simply no longer desires to possess the thing." [1] Moreover, in *Love*, the court's discussion of abandonment was based on an analysis of the plaintiffs' privacy expectation. *See id.* at 5 (discussing *United States v. Rem*, 984 F.2d 806, 810 (7th Cir. 1993). It is clear at this point, however, that although a search violates the Fourth Amendment only if it affects an expectation of privacy, a *seizure* is unconstitutional if it violates a property interest. The two standards are quite different: abandonment of a privacy expectation does not imply abandonment of a property interest, because "it is possible for a person to retain a property interest in an item, but nonetheless to relinquish his or her reasonable expectation of privacy in the object."[2] The Supreme Court's decision in *Soldal* made clear that the Fourth Amendment protects property interests from seizure and this, of course, is the law this Court is bound to follow.

2. The City's Destruction of Plaintiffs' Property Also Violates Plaintiffs' Fourteenth Amendment Right to Due Process.

[1] 1 Cal. Jur. 3d Lost, and Escheated Property, s 2; *see A & W Smelter and Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1111 (9th Cir. 1998); *Katsaris v. United States*, 684 F.2d 758, 761-63 (11th Cir. 1982).

[2] *United States v. Thomas*, 864 F.2d 843, 845-46 (D.C. Cir. 1989); *see, e.g., United States v. Jackson*, 544 F.2d 407, 409 (9th Cir. 1976);

Due process requires that the government must provide notice and an opportunity to be heard *before* it seizes a person's property, even temporarily, except in "extraordinary situations where some valid governmental interest is at state that justifies postponing the hearing until after the event." *U.S. v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) (citations omitted). In this case, the City's seizure of Plaintiffs' property violates procedural due process because any notice that the City claims was given was not meaningful.

The City's evidence of notice is weak and the notice that was given was grossly inadequate. The City asserts that it has given written warnings on some occasions and oral warnings on others. Opp'n Br. at 2. Yet the City has provided only one notice and it refers to a "clean-up" on August 25, 2006. Garner Decl., Exh. A. The raid on the homeless, however, was on August *26*, 2006. Contrary to the City's vague claims, the Plaintiffs received on one occasion a vague verbal warning, on two occasions a limited written warning (one of which was for the wrong date), and in most occasions *no warning.*

Moreover, the City clearly violated Plaintiffs' due process right to be heard *before the government destroyed Plaintiffs' property*. *See, e.g. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) ("[T]he State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement."). Thus, the City violated Plaintiffs' due process rights by seizing and *immediately destroying* Plaintiffs' property without affording Plaintiffs the opportunity to recover it. There is no justification for this violation, as "however weighty the governmental interest may be in a given case, the amount of process required can never be reduced to zero – that is, the government is never relieved of its duty to provide *some* notice and *some* opportunity to be heard prior to final deprivation of a property interest." *Propert v. District of Columbia*, 948 F. 2d 1327, 1332 (D.C. Cir. 1991).

3. The City's Destruction of Plaintiffs' Property also Violates California Civil Code § 2080 *et seq.* and the Bane Act.

The City argues that it would be unreasonable for the Court to require it to store the homeless people's belongings instead of immediately destroying them. In fact, state law specifically requires that the City store "found or saved on property subject to its jurisdiction" for a

minimum of 90 days (or three months). Cal. Civ. Code § 2080.6(1); *see id*. § 2080 (a "public entity" that takes possession of goods or other "personal property" must return them to owner). Nothing in this statute restricts its application to property that has been "lost."

A local government may not ignore its statutory duty simply because it believes compliance too expensive or burdensome. *Robbins v. Superior Court*, 38 Cal.3d 199, 217 (1985); *Mooney v. Pickett*, 4 Cal.3d 669, 680 (1971). The City has established procedures with regard to "Evidence Handling & Property Booking," which includes very short provisions on "found property." *See* Fresno Police Department Standing Order No. 3.8.12, §§ 06.00 and 06.02. It would not (and cannot) be overly burdensome for the City to obey the law or to follow its own procedures.

The essence of a Bane Act claim under California Civil Code § 52.1 *et seq.*, is that the defendant, by threats, intimidation or coercion, violated the plaintiff's state or federal constitutional right or statutory right. *See, e.g. Jones v. Kmart Corp.*, 17 Cal. 4th 329, 344 (1998). In this case, the City has violated Plaintiffs' Fourth Amendment and Fourteenth Amendment Rights, as well as rights under the California Constitution, and in so doing has violated the Bane Act.

B. The Balance of Hardships Strongly Favor Issuance of a Preliminary Injunction.

The City has destroyed essentially all of Plaintiffs' property, which is necessary for Plaintiffs' survival, health, income, and mental comfort. The enormity of the harm this destruction has caused Plaintiffs cannot be side-stepped. The finality of losing everything Plaintiffs had in the world does not solely affect the Plaintiffs economically, but is mentally traumatizing as well as destructive of Plaintiffs' dignity. See Snow Decl. ¶ 6. Indeed, "the hardship to the plaintiffs is irrevocable, irredeemable and total once the property is destroyed." TRO Hearing Transcript, page 38.

The harm caused by the City's destruction is irreparable and cannot be resolved through legal damages. When the City destroys Plaintiffs' identification documents, family heirlooms, necessary medication, and the means by which Plaintiffs' survive in beyond difficult circumstances, "this is more than just money, it's not even compensable or measurable in money terms . . .." TRO Hearing Transcript, page 31.

The City also destroyed Plaintiffs' essential medication. *See e.g.* Clay Decl. ¶ 5; Green Decl. ¶ 6; Johnson Decl. ¶ 3. *Pottinger* recognized that "the loss of items such as clothes and medicine affects the health and safety of homeless individuals; . . . the prospect of such losses may discourage the homeless from leaving parks and other areas to seek work or medical care." *Pottinger*, 810 F. Supp. at 1559. Thus, the harm of the City's destruction has a grave impact on Plaintiffs' health, both at the time of destruction and thereafter.

The City destroyed the means by which Plaintiffs earn what little income they can to sustain themselves. Several Plaintiffs declared that the City destroyed their identification documents. *See* Garcia Decl.¶ 7; Greene Decl. ¶ 6; and Kincaid Decl. ¶ 5. The final destruction of Plaintiffs' identification documents prevents Plaintiffs from obtaining work and necessary services. *See Pottinger*, 810 F. Supp. at 1559 (noting the "loss [of personal papers] affected [plaintiff's] ability to obtain work because many prospective employers required identification." As Professor Snow pointed out, when their property is destroyed, "the homeless have to start anew, which sets them back further, makes daily subsistence and survival even more difficult, and reduces the prospect of getting off the streets." Snow Decl. ¶ 6.

The City destroyed Plaintiffs' irreplaceable personal possessions which have an immeasurable sentimental value. As this Court recognized:

> the balance of hardships of the Plaintiffs' interest in protecting against immediate, irrevocable destruction of their personal property, some of which is so unique and of such sentimental value as not to be replaceable by money, against the City's need to destroy that property as part of its law enforcement efforts, weighs heavily in favor of Plaintiffs.

Statement of Decision and Findings at 11. In this case, these items include, *inter alia*, last remaining family photos, letters from family members and other personal papers, address books containing important contact information, a lock of a child's hair, an urn containing the ashes of a loved one, and puppies that provide companionship, all which are now gone forever. *See* Kincaid Decl. ¶ 5; Deatherage Decl. ¶ 5; Garcia Decl. ¶ ¶ 4,5; Johnson Decl. at ¶ 3; Clay Decl. ¶ 4. The loss of property that provides personal comfort to an individual who has almost nothing else is enormous. *See Pottinger*, 810F. Supp. 2d at 1559 ("For many of us, the loss of our personal effects may pose a minor inconvenience. However . . . the loss can be devastating for the homeless.").

The City's immediate destruction of Plaintiffs' property has a devastating effect on the homeless. While the destruction involved in this case would cause irreparable harm to anyone, it denigrates a homeless person to an even greater degree. *Id.* ("[A] homeless person's personal property is generally all he owns; therefore, while it may look like "junk" to some people, its value should not be discounted."). Destroying his or her few remaining possessions has a particularly devastating effect on the homeless because it destroys what little dignity and hope they have left. *See* Deatherage Decl. ¶ 7 ("The City of Fresno has made it clear to me by destroying my property twice and by the way in which they did that, that because I am a homeless person, I will always be vulnerable to having my property taken and destroyed by City of Fresno workers and police.").

C. Any Hardship to the City is Minimal and the City's Evidence Is Weak

The City has shown no evidence of any prohibitive cost of maintaining property before destruction. The City speculates about the "disproportionate expense" of storing Plaintiffs' property rather then seizing and immediately destroying it. Opp'n Br. at 17. Yet, the City has offered no *proof* that this possible cost is prohibitive or would prevent the City from enforcing its laws. Even if there were some additional cost, the Court correctly recognized that "sometimes the Constitution costs us in monetary terms to see that those rights that are not only unalienable, but that are more important than money, are respected and that they are protected." TRO Tr. at 36. The City's speculated cost is thus insufficient to tip the balance of hardships in its favor because, "while cost to the government is a factor to be weighed in determining the amount of process due, it is doubtful that cost alone can ever excuse the failure to provide adequate process." *Propert v. District of Columbia*, 948 F. 2d 1327, 1335 (D.C. Cir. 1991).

The City also complains about the "administrative burden and risk of liability" relating to claims of missing property and the challenging logistics of distributing property back to its owners. Opp'n Br. at 17. Yet, the City offers no evidence of even one instance where a city that stores homeless people's property from raids has had a debilitating administrative effect or false claims. In *Pottinger*, the court rejected a similar argument, referring to the City's own "Policy for Handling Evidence, Found Property and Personal Property." *See Pottinger*, 810 F. Supp. at 1572. This

reasoning applies equally to this case. The City's unsupported speculation about "administrative burden" cannot justify its violation of law.

The City also conjures up hypothetical health-risk situations with no *evidence* that these situations have even been an issue for other cities with systems of storage of homeless people's property in place. Contrary to the City's concerns, refraining from immediately destroying Plaintiffs' property does not require "don[ning] full biohazard suits to protect their health and safety," nor "expos[ing] themselves to being pricked by a dirty AIDS infected syringe . . .." *See* Opp'n Br. at 16. As evidenced by Rev. Harris, the volunteers and the homeless' clean up of one of the areas at issue, they did not require biohazard suits nor encounter drug paraphernalia. And, more to the point if there was any possible health risk (which there is not), "the City would not be prohibited from taking appropriate measures to guard against dangerous conditions posed by items . . .." *Pottinger*, 810 F. Supp. at 1573; *see also* TRO Tr. at 36 ("[I]f there is any risk, injunctive relief is always modifiable.").

D. An Injunction Will Promote the Public Interest

An injunction against the seizure and immediate destruction of Plaintiffs' property with no opportunity to recover it preserves the constitutional rights of all citizens. Contrary to the City's assertion, preserving the constitutional rights of the homeless, as with every citizen, is not an interest that necessarily competes with enforcement of law pertaining to public health and safety, or trespass and criminal activity. *See* Opp'n Br. at 17. The City has no evidence that prohibition of the wholesale seizure and immediate destruction of Plaintiffs' property would produce a chilling effect or overly burden the City against the public interest.

E. The Terms of Plaintiffs' Proposed Preliminary Injunction Are Clear, Straightforward, Simple, and Similar to Orders in Other Cities

The proposed injunction would not prevent police from "removing a loaded firearm from an arrested individual if it knows or reasonably should know that the individual is homeless." Opp'n Br. at 19. As discussed above, under the proposed injunction the City and police can still enforce the law, but simply cannot take Plaintiffs' property and then immediately destroy it. Nothing in the wording of the injunction creates any unreasonable uncertainty for the City.

Finally, the proposed language does not place an unreasonable burden upon the police by requiring them to decipher whether items are Plaintiffs' property as opposed to trash or abandoned items. The proposed injunction include a non-exclusive, illustrative list of items. It is similar to the injunction found reasonable in *Pottinger*, 810 F. Supp. at 1571.

November 5, 2006

Respectfully submitted,
HELLER EHRMAN LLP
LAWYERS' COMMITTEE FOR CIVIL RIGHTS
ACLU FOUNDATION OF NORTHERN CALIFORNIA

By /s/ Paul Alexander
Paul Alexander
Attorneys for Plaintiffs

Heller
Ehrman LLP