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14 UNITED STATES DISTRICT COURT
15 EASTERN DISTRICT OF CALIFORNIA: FRESNO DIVISION
16

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

21 v.

22 City of Fresno, California Department of
23 Transportation, Alan Autry, Jerry Dyer, Greg
Garner, Reynaud Wallace, John Rogers, Phillip
24 Weathers and Will Kempton, individually and in
their official capacities; DOES 1-100, inclusive,
25 Defendants.
26

Civil Action No.:

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR TEMPORARY
RESTRAINING ORDER AND FOR
ORDER TO SHOW CAUSE RE
ISSUANCE OF A PRELIMINARY
INJUNCTION**

1 **I. INTRODUCTION**

2 Plaintiffs are six homeless persons living in the City of Fresno (“Fresno”) whose
3 personal possessions have been confiscated and summarily destroyed by Fresno employees
4 as a part of an ongoing Fresno practice and policy targeting the homeless. Plaintiffs seek to
5 represent a class of similarly situated homeless men and women who have suffered and will
6 continue to suffer the same type of loss from this same practice and policy.¹ Plaintiffs seek
7 a temporary restraining order and a preliminary and permanent injunction preventing Fresno
8 and the remaining Defendants from continuing this unlawful practice.

9 Fresno and the remaining Defendants are engaged in an ongoing practice of seizing
10 and summarily destroying plaintiffs’ valuable and essential personal property such as
11 medicine, clothing, personal papers, portable radios and televisions. These possessions
12 include essentials of life of plaintiffs. Plaintiffs’ possessions are not abandoned when
13 seized and destroyed, but rather are lawfully owned property usually in the immediate
14 presence of its owner. The property plainly is not abandoned or “trash”, but is valuable and
15 in many cases, essential possessions that Plaintiffs are desperately trying to protect even as
16 it is being destroyed. No legitimate basis exists to seize the property in the first place, much
17 less immediately destroy it, often while Plaintiffs watch helplessly. The only real reason for
18 this wholesale seizure and destruction is that Plaintiffs are homeless and defenseless and
19 Fresno regards their existence on city streets as an annoyance.

20 A Temporary Restraining Order is needed to prevent imminent harm to Plaintiffs.
21 Defendants have made clear through their repeated raids that their seizure and destruction of
22 Plaintiffs’ property is part of any ongoing campaign against Plaintiffs. As recently as last
23 Wednesday, October 11, 2006, Fresno police officers confronted a group of homeless
24 people in an area near H Street and San Benito, lined them up and threatened them that they
25 intended to return very soon to destroy their possessions. Unless restrained by an
26 appropriate and balanced injunction of this Court, these unlawful acts will be visited upon

27 _____
28 ¹ For simplicity, Plaintiffs and the putative plaintiff Class will be referred to herein as
“Plaintiffs.”

1 Plaintiffs again and again so long as they continue to live in Fresno. Injunctive relief is
2 therefore essential to preserve Plaintiffs’ rights under the Constitution and to protect what
3 few personal belongings they have left.

4 **II. STATEMENT OF FACTS**

5 Between 4,400 to 8,800 of Fresno’s approximately 440,000 residents are homeless,
6 according to a recent report by a consortium of local government agencies and providers.
7 Fresno Madera Continuum of Care Plan To End Homelessness at 10-11, attached as Exhibit
8 A hereto. However, services for low-income people in need of shelter are extremely scarce.
9 “[O]nly 1.4% of the homeless population [is] sheltered . . . leaving more than 98% of the
10 homeless population unsheltered and receiving no services.” *Id.* at 13. The report indicates
11 that there is currently an “overwhelming need for homeless assistances,” with a gap of
12 approximately 7,000 shelter/housing spaces in the Fresno-Madera area. *Id.* The lack of
13 shelter for women is particularly acute. Naomi House, one of the few shelters in Fresno for
14 women, has capacity for only 25 women on any given night. On information and belief, a
15 lottery is held every day to choose which women will be allowed to stay in the shelter on
16 that night. Those who are not successful in this lottery are turned away, and often end up
17 staying on the streets nearby. In the face of this severe need, Fresno has chosen to respond
18 by brute force, directed at homeless people themselves for over a year and escalating over
19 the past few months.

20 Fresno and the other Defendants in this case are engaged in the ongoing, conscious
21 practice—based upon official policy—of seizing and summarily destroying the personal
22 possessions of the homeless living in Fresno. They do this in what can fairly be described
23 as raids on the homeless. Fresno city employees, accompanied by Fresno police officers,
24 sweep through an area where the homeless are found and intentionally take and destroy
25 essentially all of the possessions of the homeless that they find.

26 The raids are similar in nature: Early in the morning, Fresno employees, equipped
27 with a bulldozer, City garbage truck or other heavy equipment, arrive at an area where the
28

1 homeless are living. Rhodes Decl., ¶ 4 and 9; Kincaid Decl., ¶ 4; Deatherage Decl., ¶ 3;
2 Clay Decl., ¶ 3; Greene Decl., ¶ 4; Garcia Decl., ¶ 6; Streeter Decl., ¶ 2; Williams Decl., ¶
3 2; Vizcarrondo Decl., ¶2; Apper Decl., ¶ 4 and 6. The bulldozer then makes a pass,
4 scooping up most of the Plaintiffs’ possessions and dumping them into a garbage truck
5 where they are quickly crushed. Rhodes Decl., ¶ 6; Deatherage Decl., ¶ 6; Kincaid Decl., ¶
6 9; Clay Decl., ¶ 3; Greene Decl., ¶6; Garcia Decl., ¶ 7; Johnson Decl., ¶ 2; Streeter Decl., ¶
7 3; Apper Decl., ¶ 8. The large bulldozer with the huge metallic “grabber” on the front is
8 particularly effective at seizing and destroying Plaintiffs’ property, as is evident from this
9 photograph below from one of the raids. The tent that has been grabbed by the bulldozer in
10 the picture below is bulging at the bottom due to the weight of the owner’s belongings,
11 which are about to be destroyed along with the tent:²



27 ² I am informed and believe that the photograph of the raid on the homeless was taken by
28 Dallas Blanchard on February 4, 2004, and published in the SF Bay Area Independent Media
Center web page.

1 This practice continues today as illustrated by the following a photograph from the
2 May 25, 2006 raid:³



12 Whatever possessions of Plaintiffs that the bulldozer misses are thrown into the garbage
13 truck by Fresno employees. When the raid is complete, nothing is left.

14 Plaintiffs are not permitted to retrieve their possessions or save them from
15 destruction. Instead, Plaintiffs seek to save their possessions from destruction, they are
16 threatened with arrest. Streeter Decl., ¶ 3; Apper Decl., ¶ 9. Fresno police make it plain
17 that no one will be permitted to interfere with the seizure and destruction of the possessions
18 of the homeless:⁴



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³ Rhodes Decl., ¶ 9.

⁴ Rhodes Decl., ¶ 12.

1 Since May, 2006, Defendants have intensified these raids in both scope and pace,
2 leaving no doubt that this practice is a deliberate policy and a continuing practice. During
3 the past five months, Defendant Fresno, acting through and with the assistance of the other
4 Defendants, conducted at least five raids on the Fresno homeless, each time confiscating
5 and immediately destroying all the personal property they found:

6 **May 3, 2006** – Defendants confiscated and destroyed the property of the homeless
7 living on the west side of E Street, Broadway Street and H Street, Van Ness Street and Los
8 Angeles Street, and Santa Fe Street and Ventura Street.

9 **May 25, 2006** – Defendants confiscated and destroyed the property of the homeless
10 living on the west side of E street.

11 **June 22, 2006** – Defendants confiscated and destroyed the possessions of the
12 homeless, this time on both sides of E Street and Santa Clara Street.

13 **July 1, 2006** – Defendants confiscated and destroyed the property of the homeless
14 living on the west side of E Street.

15 **August 26, 2006** – Defendants confiscated and destroyed the property of the
16 homeless living on E Street, this time on both sides of the street.

17 **October 8, 2006** – Fresno police officers came to an area near H and San Benito
18 streets where several homeless people were found. Some of these homeless people had
19 shopping carts that were their own property and essential for them to move their property.
20 The police dumped the possessions onto the ground, confiscated all of the shopping carts
21 (even though there was no lawful basis to do so) and took them away, apparently for
22 destruction.

23 **October 11, 2006** – Fresno police officers confronted a group of homeless people in
24 the area of H and San Benito Streets, forced them to stand in lines for an extended period
25 and specifically threatened them with a “formal warning” that they intended to return very
26 soon (though they refused to say exactly when) to destroy everything homeless people
27 owned in this area.

1 The declarations filed with this Motion – together with the photographic evidence –
2 unequivocally establish an ongoing practice and policy of the City of Fresno, implemented
3 and/or joined in by the remaining Defendants, to seize and destroy all of the property of the
4 homeless living in Fresno. This evidence leaves no doubt that the Defendants have engaged
5 in this conduct and that they will continue to do so unless retrained by an appropriate Order
6 of this Court. Specifically, the evidence establishes that:

7 1. Defendants routinely raid areas where Plaintiffs live as homeless citizens in
8 Fresno, California. All of the raids are conducted under color of law and as part of a policy
9 and practice of the City of Fresno, implemented by city employees and the remaining
10 Defendants.

11 2. In these raids, Defendants confiscate and destroy all of the personal property
12 of the Plaintiffs that they find, making no distinction between obviously important and
13 valuable personal property, and anything that could be legitimately regarded as abandoned
14 or “trash.”

15 3. As a result, Plaintiffs lose most, if not all, of the few possessions they own,
16 including their shelter (often a tent), their clothing, their medication, radios, small
17 televisions and items of enormous and irreplaceable personal value such as photographs of
18 loved ones, a lock of child’s hair and, in one case, an urn containing the ashes of a close
19 family member.

20 4. Defendants give little or no actual notice of their impending raid and, in
21 virtually every case, what little notice may be given is inadequate to allow Plaintiffs to
22 retrieve and preserve their personal belongings.

23 5. Defendants make no effort to retain or preserve any of the property that they
24 confiscate, even though it is obvious that most of this property is valuable to the Plaintiffs
25 and in many cases represents virtually everything they own. Instead, Defendants
26 immediately destroy all of the property that they confiscate, often while the Plaintiffs watch
27 helplessly.

1 6. Plaintiffs who protest or seek to retrieve their personal possessions to prevent
2 them from being destroyed are often restrained by Fresno police officers. Once the raid
3 begins, efforts to stop it or to “interfere” by retrieving personal property are often met with
4 threats of arrest.

5 7. Plaintiffs are not cited for violation of any ordinance or law of the City of
6 Fresno or the State of California in connection with the destruction of their property.
7 Rather, the policy and practice of Defendants is to “clean up” the area by destroying
8 everything that Plaintiffs own. It is this practice and policy that is unlawful and that this
9 lawsuit challenges.

10 **III. ARGUMENT**

11 **A. Defendants Have Violated and Are Violating the Fourth Amendment of**
12 **the U.S. Constitution.**

13 The Fourth Amendment to the Constitution provides that “the right of the people to
14 be secure in their persons, houses, papers and effects, against unreasonable seizures and
15 searches shall not be violated” United States Const. Amend. IV.⁵ Defendants’
16 confiscation and destruction of Plaintiffs’ personal property violates their Fourth
17 Amendment right to be free from unreasonable seizures of their property.

18 A “seizure” under the Fourth Amendment occurs “where there is some meaningful
19 interference with an individual’s possessory interests in that property.” *Soldal v. Cook*
20 *County Ill.*, 506 U.S. 56, 63 (1992). There is no question that Fresno and the other
21 Defendants have seized Plaintiffs’ property.

22 Likewise, it is plain that these seizures are unreasonable under the Fourth
23 Amendment. As the Ninth Circuit recently explained:

24 _____
25 ⁵ Defendants’ actions also violate the Plaintiffs’ concomitant rights under Article I, Section
26 13 of the California Constitution which provides in part that “[t]he right of the people to be secure
27 in their persons, houses, papers and effects against unreasonable seizures and searches may not be
28 violated” This provision provides at least as much protection as does the Fourth Amendment.
See *People v. Brisendine*, 13 Cal. 3d 528, 548-52 (1975), abrogated on other grounds as discussed
in *In re Lance W.*, 37 Cal. 3d 873, 879 (1985).

1 Reasonableness is the touchstone of any seizure under the Fourth
2 Amendment. Thus, to comply with the Fourth Amendment, the seizure . . .
3 must have been reasonable under the circumstances. We look to the totality
4 of the circumstances to determine whether the destruction of property was
5 reasonably necessary to effectuate the performance of the law enforcement
6 officer's duties. A seizure becomes unlawful when it is "more intrusive than
7 necessary." To determine whether the [given seizure] was reasonable, we
8 balance the nature and quality of the intrusion on the individual's Fourth
9 Amendment interests against the countervailing governmental interests at
10 stake.

11 *San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962,
12 975 (9th Cir. 2005) (citations and quotation marks omitted).

13 Under the Fourth Amendment, it is plainly established law that public officials and
14 employees cannot seize and destroy an individual's personal property simply because it is
15 located in a public place. Rather "an officer who happens to come across an individual's
16 property in a public area could seize it only if Fourth Amendment standards are satisfied—
17 for example, if the items are evidence of a crime or contraband." *Soldal*, 506 U.S. at 68; *see*
18 *also San Jose Charter of the Hells Angels Motorcycle Club*, 402 F.3d at 975 ("[T]he
19 destruction of property by state officials poses as much of a threat, if not more, to people's
20 right to be 'secure . . . in their effects' as does the physical taking of them.") (citation
21 omitted). Under the Fourth Amendment, governmental seizure of property such as that seen
22 in this case violates the Constitution unless there is a legitimate governmental interest that
23 somehow outweighs the citizen's fundamental constitutional right to be free from having a
24 governmental entity take and destroy his or her private property. *Soldal v. Cook County*,
25 *supra*, at 549. *Miranda v. City of Cornelius*, 429 F.3d 858, 862-63 (9th Cir. 2005). Such
26 "legitimate interest" is not present.

27 The case of *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992), *cited*
28 *with approval in U.S. v. Gooch*, 6 F.3d 673, 677 (9th Cir. 1993), is particularly instructive
because it involved similar conduct and made it plain that this conduct violates the Fourth
Amendment (as well as the Fourteenth Amendment). In *Pottinger*, the class of Plaintiffs
were homeless people living in Miami. And there, as here, Miami decided to address its
homeless "problem" through force: Miami employees routinely seized and destroyed the

1 possessions of the homeless. In one instance, police officers “dumped [the Plaintiffs’]
2 personal possessions—including personal identification, medicine, clothing and a Bible—
3 into and pile and set the pile ablaze.” In another, Miami workers used “front-end loaders
4 and dump trucks” to destroy the property of the Plaintiffs. When one homeless person
5 “attempted to retrieve his belongings from the City workers, he was threatened with arrest
6 for obstructing justice.” *Id.* at 1556.

7 The court in *Pottinger* had no difficulty in holding that this conduct violated
8 Plaintiffs’ Fourth Amendment right to be free from unreasonable seizure. Miami argued—
9 as presumably Fresno will in this case—that its interest in keeping areas sanitary and
10 orderly outweighed any interest that the homeless had in their few belongings. The
11 *Pottinger* court, however, expressly rejected this argument, holding that such interests
12 cannot justify violations of fundamental, constitutional rights. *See id.* at 1570-73. Indeed,
13 as the court noted, the value of personal property of the homeless “is in the eyes of the
14 beholder, as one man’s junk is another man’s treasure.” *Id.* at 1556.

15 Similarly, in *Justin v. City of Los Angeles*, No. CV 012352LGBAIJX, 2000 WL
16 1808426 (C.D. Cal. Dec. 5, 2000), the Plaintiffs (homeless individuals) alleged, *inter alia*,
17 that the Defendants (Los Angeles police officers and other city officials) “search[ed],
18 seiz[ed], and, at times, destroy[ed] the Plaintiffs’ property.” *Id.* at *9. Plaintiffs sought a
19 temporary restraining order . Defendants resisted, arguing that the City had the right to
20 keep its streets safe and clean. The court considered and rejected these arguments:

21 Here, Defendants may be slowed in their efforts to keep the City, and
22 especially the downtown area, clean and safe. This injunction may disturb
23 their new initiative to revitalize and uplift communities, to improve the streets
24 and sidewalks, and to diminish the crime rate. Plaintiffs, however, risk a
greater harm if the injunction is not granted: the violation of their First,
Fourth, and Fourteenth Amendment rights.

25 *Id.* at *11. The court thus granted the temporary restraining order. *Id.* at *13.

26 The facts from the *Pottinger* and *Justin* cases are parallel to this one, as should be the
27 result. It could hardly be more clear that the Defendants’ actions in physically taking and
28 destroying Plaintiffs’ valuable and essential personal property constitutes a “seizure.” The

1 “interference” resulting from Defendants’ intentional conduct is total—Defendants not only
2 seize the property, they destroy it. *Fuller v. Vines*, 306 F.3d 65, 68 (9th Cir. 1994) cert
3 denied. , 514 US 1017 (1995)(“The destruction of property is ‘meaningful interference’
4 constituting a seizure under the Fourth Amendment . . .”). Fresno’s ongoing policy of
5 destroying the personal property of Plaintiffs and the Plaintiff Class thus plainly violates the
6 Fourth Amendment.

7 There is no case that holds the extreme seizures and immediate destruction of the
8 valuable – indeed essential – personal possessions that Fresno and the other Defendants
9 inflicted upon Plaintiffs to be lawful. The destruction of Plaintiffs’ personal property is
10 immediate and devastating, as is seen below from a August 26, 2006 photo:⁶



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21 These incredibly destructive seizures are without any doubt “more intrusive than
22 necessary.” *San Jose Charter of the Hells Angels Motorcycle Club*, 402 F.3d at 975
23 (quoting *Florida v. Royer*, 460 U.S. 491, 504 (1983)). Indeed, the absurdity of any defense
24 the Defendants might assert is obvious when one “balance[s] ‘the nature and quality of the
25 intrusion on the individual’s Fourth Amendment interests against the countervailing
26 governmental interests at stake.’” *Id.* (quoting *Graham v. Connor*, 490 U.S. 386, 396

27
28 ⁶ Rhodes Decl., ¶ 17.

1 (1989).

2 In the limited statements that it has made about the purpose of the raids, the
3 governmental interest asserted by Fresno is its desire to clean the streets where the homeless
4 Plaintiffs live and that Plaintiffs may be trespassing – although no actual complaints of
5 trespassing have been identified. The immediate seizure and destruction of Plaintiffs’
6 personal possessions cannot be justified on this basis. As a matter of well-established law,
7 the purported desire to clean an area cannot justify the immediate and wholesale destruction
8 of Plaintiffs’ personal possessions. The Court in *Pottinger* made this clear over ten years
9 ago: “[T]he City’s interest in having clean parks is outweighed by the more immediate
10 interests of the plaintiffs in not having their personal belongings destroyed.” *Pottinger*, 810
11 F. Supp. at 1573. The subsequent opinion in 2000 in *Justin* confirmed this clear law.
12 Moreover, even if there were a complaint about an incident of trespassing, this would not
13 justify the *wholesale destruction* of Plaintiffs’ personal property. There is no legitimate
14 basis that justifies the wholesale seizure and immediate destruction of all Plaintiffs’
15 possessions. It is a violation of well-established law. Moreover, because these violations
16 are ongoing and devastating to Plaintiffs, the Court should issue a temporary restraining
17 order and, subsequently, a preliminary injunction restraining these ongoing violations.

18 **B. Defendants’ Confiscation and Destruction of Plaintiffs’ Personal**
19 **Property Violates Plaintiffs’ Constitutional Right to Due Process Under**
20 **the Fourteenth Amendment.**

21 “No state shall . . . deprive any person of life, liberty, or property, without due
22 process of law.” United States Const. Amend XIV. Plaintiffs’ personal possessions, which
23 in many cases represent most of what they own, plainly constitute “property” under the
24 Fourteenth Amendment. *Fuentes v. Shevin*, 407 U.S. 67, 84 (1972). “[A] homeless
25 person’s personal property is generally all he owns; therefore, while it may look like ‘junk’
26 to some people, its value should not be discounted.” *Pottinger*, 810 F. Supp. at 1559.

27 The basic requirements of procedural due process are a right to notice and “the
28 opportunity to be heard at a meaningful time and in a meaningful manner.” *Matthews v.*

1 *Eldridge*, 424 U.S. 319, 339-343 (1976) (citation and quotation marks omitted). When a
2 protected property interest is threatened, a court must consider three factors to determine
3 whether due process right has been violated:

4 [f]irst, the private interest that will be affected by the official action;
5 second, the risk of an erroneous deprivation of such interest through
6 the procedures used, and the probable value, if any, of additional or
7 substitute procedural safeguards; and finally, the Government's
8 interest, including the function involved and the fiscal and
9 administrative burdens that the additional or substitute procedural
10 requirement would entail.

11 *Id.* at 335.

12 Defendants' policy and practices flagrantly disregard these clearly established legal
13 standards.

14 Before the government seizes a person's property, even temporarily, it must provide
15 notice and an opportunity to be heard *prior* to the seizure, except in "extraordinary
16 situations where some valid governmental interest is at stake that justifies postponing the
17 hearing until after the event." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43,
18 53 (1993) (citations omitted). The importance of pre-seizure notice is not dependent on the
19 value of the property. *See Fuentes v. Shevin*, 407 U.S. 67, 84-87 (1972) (government must
20 provide notice before temporarily seizing household goods); *Propert v. District of*
21 *Columbia*, 948 F.2d 1327, 1334 (D.C. Cir. 1991) (government must provide adequate
22 notice to owners of parked cars before it tows them as "junk"). Pre-seizure notice is
23 required in these situations because the difficulty of determining whether the seizure is
24 justified creates too great a "risk of an erroneous deprivation." *Propert*, 948 F.2d at 1333.

25 Defendants' seizure of homeless people's property without prior notice violates Due
26 Process under the three-part *Matthews* test. First, Defendants are seizing the very
27 necessities of life: shelter, medicine, and clothing. Second, without notice to allow the
28 homeless to gather up and move their belongings, Defendants will continue to erroneously
deprive them of lawful property that is neither abandoned nor creates any risk to public
health or safety. The indiscriminate and total sweeps of the targeted area clearly result in
Defendants taking far more than they have any right to seize, resulting not just in the risk

1 but in the certainty of erroneous deprivations.

2 Finally, the City could easily provide notice that would effectively allow the
3 homeless to protect their possessions. There is no indication that the raids are a response to
4 some sort of emergency that would prevent adequate notice; indeed, their sheer size
5 suggests that the City plans them days in advance. If the purpose of these operations is truly
6 to clean up the sites where Plaintiffs are living, there is no reason that the City cannot
7 provide adequate notice to allow Plaintiffs to move their belongings.

8 Yet Plaintiffs' right to injunctive relief is not dependent on establishing a right to
9 *pre-seizure* due process, for Defendants have ignored the even more fundamental due
10 process requirement of a right to be heard in some meaningful way before the state *destroys*
11 one's property: "the State may not finally destroy a property interest without first giving
12 the putative owner an opportunity to present his claim of entitlement." *Logan v.*
13 *Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982). This issue has arisen commonly in the
14 context of the government's treatment of vehicles that it considers to be "junk", much as
15 Fresno apparently deems plaintiffs' personal possessions. In an operation that was in many
16 ways similar to the Fresno raids, Honolulu officials conducted a "sweep of derelict
17 vehicles" that resulted in the seizure and immediate destruction of motorcycles that were
18 parked in front of a repair shop. *Wong v. City & County of Honolulu*, 333 F. Supp. 2d 942,
19 945 (D.Haw. 2004). The sweep was conducted under a statute that provided for the
20 summary seizure and destruction of inoperable, partially dismantled vehicles that were more
21 than 10 years old. *Id.* at 948. The only notice that Mr. Wong had received was an oral
22 statement from the police telling him to move the motorcycles. *Id.* at 945. The district
23 court held that, in spite of the statute, no reasonable officer could have believed that the
24 destruction comported with Due Process. *Id.* at 948, 955-56. *See also Propert*, 948 F.2d at
25 1335 ("Although [a municipality] may have a strong interest in the prompt removal of
26 supposed junk vehicles from the streets, its interest in the immediate destruction of such
27 vehicles is far from apparent.") And in *Schneider v. County of San Diego*, 28 F.3d 89 (9th
28 Cir. 1994), the Ninth Circuit held that, even though a car owner had been provided a formal

1 pre-seizure notice and hearing as to whether his car constituted a nuisance, he was deprived
2 of due process because the notice that his car would be destroyed after it was towed was
3 inadequate.

4 Thus, the law is clear that even if the initial seizure of property is justified, the
5 subsequent destruction of that property without a hearing violates Due Process. Here,
6 Defendants *immediately destroy everything*, leaving no time for any determination that the
7 deprivation was “erroneous” and that the destruction is unjustified. The only “hearing”
8 occurs “on site” when Plaintiffs plead (in vain in most instances) for more time to gather-up
9 their possessions, or ask that they be allowed to retrieve them from the garbage truck before
10 the city destroys them. Due Process demands more.

11 **C. Defendants’ Conduct Also Violates California Law.**

12 **1. Defendants’ Conduct Violates California Civil Code § 2080 *et seq.***

13 California Civil Code § 2080 *et seq.* creates duties that apply when a person or
14 governmental entity “finds” or takes possession of property that they know belongs to
15 another, even if it is lost. California Civil Code § 2080 provides in pertinent part:

16 Any person or any public entity or private entity that finds and takes
17 possession of any money, goods, things in action, or other personal property .
18 . . shall within a reasonable time, inform the owner, if known, and make
19 restitution without compensation, except a reasonable charge for saving and
taking care of the property.

20 Cal. Civ. Code § 2080. The “person, public entity or private entity” that “takes possession”
21 of another’s personal property must either make a reasonable effort to return it or turn it
22 over to the police. *Id.* § 2080.1. The police must maintain the property for at least 90 days
23 and return it to the owner if the owner appears and requests it. *Id.* § 2080.2. A public
24 agency need not follow this procedure, but if the agency chooses not to follow the statutory
25 provisions, it must implement regulations which include the retention of the item for at least
26 90 days in case the owner should claim it. *Id.* § 2080.6(a).

27 Defendants make no effort at all to comply with California Civil Code § 2080 *et seq.*
28 To the contrary, they immediately destroy all of Plaintiffs’ personal property and ignore

1 Plaintiffs’ protestations and requests to return it. In so doing, Defendants flagrantly flout
2 the law. It is inherently unreasonable to destroy all of a vulnerable homeless person’s few
3 remaining possessions, particularly when the owners are close at hand and pleading that
4 their property not be destroyed. Defendants cannot ignore Civil Code § 2080. They cannot
5 claim to be unaware that California law provides a legal standard for what must be done
6 with personal property when it is found. Fresno and the remaining Defendants flatly and
7 intentionally flout this legal standard when they seize and immediately destroy Plaintiffs’
8 personal possessions. Defendants have violated clearly established law and will do so again
9 unless enjoined by this Court.

10 **2. Defendants’ Conduct Violates the Bane Act**

11 The Bane Act, codified at California Civil Code § 52.1 *et seq.*, establishes a remedy
12 for actual or attempted interference with existing rights under federal and California law. In
13 particular, Section 52.1(a) provides that if a person interferes, or attempts to interfere, “by
14 threats, intimidation, or coercion, with the exercise or enjoyment by any individual or
15 individuals of rights secured by the Constitution or laws of the United States, or the rights
16 secured by the Constitution or laws of this state,” then the Attorney General, or any district
17 or city attorney, may bring a civil action for equitable or injunctive relief. Cal. Civ. Code §
18 52.1(a); *see also Doe By and Through Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560,
19 1582 (N.D. Cal. 1993). Section 52.1(b) further allows “[a]ny individual” so aggrieved to
20 sue for “[statutory] damages under Section 52, injunctive relief, and other appropriate
21 equitable relief to protect the peaceable exercise or enjoyment of the right or rights
22 secured.” Cal. Civ. Code § 52.1(b); *see also Venegas v. County of Los Angeles*, 32 Cal. 4th
23 820, 841-43 (2004).⁷

25 ⁷ Given the fundamental nature of the rights secured by the Bane Act, the monetary
26 remedies available under it are understandably robust. Section 52(a)—referenced in Section
27 52.1(b)—provides for liability “for each and every offense for the actual damages,” as well as
28 mandatory additional damages “up to a maximum of three times the amount of actual damages but
in no case less than four thousand dollars (\$4,000), and any attorney’s fees . . .” Cal Civ. Code §
52(b). Notably, a prevailing Plaintiff is entitled to the statutory damages even if the Plaintiff did

(Footnote Continued)

1 The word “interferes,” as used in the Bane Act, means “violates.” *See, e.g., Jones v.*
2 *Kmart Corp.*, 17 Cal. 4th 329, 336-37 (1998). Thus, the essence of a Bane Act claim is that
3 the defendant, by threats, intimidation or coercion, violated some statutory or Constitutional
4 right—be it Federal or State—of the Plaintiff. *Id.* at 344. And, significantly, even in the
5 absence of excessive force, “[u]se of law enforcement authority to effectuate a stop,
6 detention . . . , and search can constitute” a threat, intimidation or coercion. *Cole v. Doe 1*
7 *Through 2 Officers of City of Emeryville Police Dept.*, 387 F. Supp. 2d 1084, 1103 (N.D.
8 Cal. 2005); *see also Whitworth v. City of Sonoma*, 2004 WL 2106606 (Cal.App. Sept. 22,
9 2004) (holding conduct of a police officer physically barring a person from entering a
10 meeting a form of “coercion” under the Bane Act, even if there was no actual use of force).⁸
11 Indeed, “threat, intimidation or coercion” is broadly construed. *See Venegas*, 32 Cal. 4th at
12 850-51 (Baxter, J. concurring) (“[A]lthough the proscribed conduct is . . . delineated by the
13 requirement that it be delivered in the form of a threat, intimidation, or coercion, it should
14 not prove difficult to frame many, if not most, asserted violations of any state or federal
15 statutory or constitutional right, including mere technical statutory violations, as
16 incorporating a threatening, coercive, or intimidating verbal or written component.”).

17 Defendants violated several of the Plaintiffs’ rights, including but not limited to their
18 rights secured by the Fourth Amendment and Fourteenth Amendment of the U.S.
19 Constitution, as well as by the California Constitution. During each of the raids, City
20 employees and sanitation workers—using bulldozers and garbage trucks—unlawfully

21 not suffer any actual damages, or is unable to prove them. *O’Toole v. Superior Ct.*, 140 Cal.App.
22 4th 488, 502 (2006).

23 The availability of damages under Section 52(a) does not prejudice Plaintiffs’ right to
24 injunctive relief. *See, e.g., Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999).
25 Section 52.1(b) is written in the *conjunctive*, permitting a plaintiff to sue for “[statutory] damages
under Section 52, injunctive relief, and other appropriate equitable relief to protect the peaceable
exercise or enjoyment of the right or rights secured.” Cal. Civ. Code § 52.1(b) (emphasis added).

26 ⁸ Although California Rules of Court 977(a) prohibit citation to or reliance upon *Whitworth*
27 in a California court, this Rule does not apply to a Federal court. Indeed, the Federal District Court
in *Cole* relied explicitly upon the “persuasive reasoning” of *Whitworth*. *Cole*, 387 F. Supp. 2d at
1103 n.7.

1 seized and destroyed Plaintiffs’ property, while Fresno Police Officers restrain Plaintiffs
2 and prevent them from saving their personal possessions. Plaintiffs are entitled to not only
3 monetary damages, *see* Cal. Civ. Code § 52(a), but also to injunctive relief “to protect the
4 peaceable . . . enjoyment of the right or rights secured,” Cal. Civ. Code § 52.1(b).

5 **D. Plaintiffs Are Entitled to Injunctive Relief to Restrain the Ongoing**
6 **Violation of Their Constitutional and Statutory Rights.**

7 The standard for issuance of a preliminary injunction is a practical one that considers
8 both the likelihood of success on the merits and the nature of the harm caused by the
9 challenged conduct. The moving party may show a probability of success on the merits and
10 the possibility of irreparable harm or that serious questions on the merits exist and the
11 balance of hardships tips strongly in the moving party’s favor. *Int’l Jensen, Inc. v*
12 *Metrosound U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir. 1993). This test for issuance of a
13 preliminary injunction is a continuum—that is, the stronger the showing of success on the
14 merits, the less serious the harm must be and the greater the harm caused by the ongoing
15 activity, the less strong the showing on the merits must be. *Id.* Stated another way:

16 The critical element in determining the test to be applied is the relative
17 hardship to the parties. If the balance of the harm tips decidedly toward the
18 plaintiff, then the plaintiff need not show as robust a likelihood of success on
the merits as when the balance tips less decidedly.

19 *Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1389 (9th Cir. 1988).

20 Plaintiffs need not show that they *will* succeed on the merits. Rather, all that
21 Plaintiffs need to prove is that there is a *reasonable probability* of success. *Gilder v. PGA*
22 *Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991); *see also Johnson v. Cal. State Bd. Of*
23 *Accountancy*, 72 F.3d 1427, 1429 (9th Cir. 1995) (recognizing that a plaintiff need only
24 prove a “fair chance of success on the merits”).

25 In this case, Plaintiffs have shown a high probability of success on the merits.
26 Further, Plaintiffs have shown that the acts of Defendants constitute a direct infringement of
27 their constitutional rights. Further still, the nature of the harm inflicted on Plaintiffs by
28 Defendants’ unlawful conduct is enormous. And, the harm to Defendants of being

1 restrained from continuing these raids while the merits of this case are adjudicated is
2 relatively small. There is a clear and powerful need for a preliminary injunction to halt this
3 unlawful and devastating conduct inflicted upon essentially defenseless people.

4 **1. Plaintiffs Have Shown A Strong Probability of Success on the**
5 **Merits.**

6 Defendants' ongoing conduct in summarily confiscating and destroying the personal
7 property of Plaintiffs and the Plaintiff Class directly violates Plaintiffs' constitutional rights.
8 As set forth in the declarations filed with this Motion—and as further documented in the
9 photographs before the Court—Defendants summarily sweep through areas where homeless
10 people reside, take essentially everything they own that remains in that area at the time, and
11 immediately destroy it. In some instances, no notice whatsoever of the impending
12 destruction is given. In other instances, the notice does not provide sufficient time or is not
13 made so as to inform all of the people who will be affected. Moreover, there is *no* effort to
14 retain obviously valuable property so that it can be later recovered or claimed by its owners.
15 As a matter of both constitutional and statutory law—to say nothing of basic human
16 decency—there is no lawful basis upon which Defendants may summarily destroy with a
17 bulldozer Plaintiffs' personal property.

18 As set forth in sections A and B above, Defendants' actions in seizing and
19 destroying, without adequate notice or hearing, valuable personal property that is neither
20 evidence of a crime, nor contraband, plainly violate the Fourth and Fourteenth Amendments
21 of the United States Constitution and Article 1, Section 7(a) and 13 of the California
22 Constitution. Moreover, Defendants' failure to store Plaintiffs' property and permit
23 Plaintiffs the opportunity to claim it plainly violates California state law. Thus, Plaintiffs
24 have made a strong showing of likelihood of success on the merits of their claims.

25 **2. The Balance of Harms Tips Only in Plaintiffs' Favor.**

26 This Court need not, in fact, weigh the balance of harms. For when the harm caused
27 by the acts of a defendant amounts to the deprivation of a constitutional right, generally no
28

1 further showing of injury is required: the loss of a constitutional right is, in itself, an injury
2 that the law will not tolerate. *Associated Gen. Contractors of Cal., Inc. v. Coalition for*
3 *Econ. Equal.*, 950 F.2d 1401, 1412 (9th Cir. 1991); *Gutierrez v. Municipal Ct.*, 838 F.2d
4 1031, 1045 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016; *Citicorp Servs., Inc. v*
5 *Gillespie*, 712 F. Supp. 749, 753 (N.D. Cal. 1989). Similarly, courts recognize that “where
6 a defendant has violated a civil rights statute, we will presume that the plaintiff has suffered
7 irreparable injury from the fact of the defendant’s violation.” *Silver Sage Partners, Ltd. v.*
8 *City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001).

9 Regardless of the above, however, a balancing of the harms does tip overwhelmingly
10 in Plaintiffs’ favor. Defendants destroy essentially the only property that the all-but
11 defenseless Plaintiffs own at the time. Defendants destroy, with impunity, medications that
12 Plaintiffs can ill-afford (if at all) to replace. Defendants destroy Plaintiffs’ dwellings—
13 usually tents—as winter now approaches. Defendants destroy Plaintiffs’ clothing, shoes,
14 blankets, and other essentials of life. And, Defendants destroy inimitable personal items—
15 from important records, to a lock of hair of a loved one, to the last remains of a
16 granddaughter preserved in an urn—without remorse.

17 Defendants’ interests, while real, are not nearly so weighty nor immediate. Fresno
18 has an interest in clean and orderly streets, but these interests cannot justify the ongoing and
19 complete destruction of Plaintiffs’ valuable personal possessions. *See, e.g., Pottinger*, 810
20 F. Supp. at 1570-73. Defendants could readily maintain order and clean streets without the
21 dramatic destruction they inflict. It is not essential to cleaning streets to bring a bulldozer
22 through to destroy everything in its path. And there is no justification whatsoever for the
23 immediate destruction of Plaintiffs’ property, with no opportunity to claim or retrieve it.

24 In fact, the very nature of the ongoing raids conducted by Defendants suggests that
25 their purpose is not just to maintain clean and orderly streets at all. Rather, it strongly
26 appears that Defendants are conducting these raids in an ongoing effort to harass the
27 homeless and thereby drive them out of the community entirely. In order to prevail in this
28 case, however, Plaintiffs do not need to prove that this is the motive for these raids, even

1 though it seems patently clear. Plaintiffs have shown that Defendants are flagrantly and
2 continuously violating their rights under the Constitution, and that justifies the relief
3 Plaintiffs seek.

4 A reasonable weighing of the nature of the conduct that Plaintiffs seek to enjoin, its
5 impact upon Plaintiffs, and the clear availability of other, less dramatic means to
6 accomplish any legitimate governmental purpose makes plain that a preliminary injunction
7 should issue.⁹

8 **IV. CONCLUSION**

9 This action challenges an ongoing policy of the City of Fresno of seizing and
10 destroying the property of the homeless. Plaintiffs have presented overwhelming evidence
11 that this destruction has occurred. Plaintiffs have presented specific evidence that Fresno
12 Police Officers have threatened to repeat this process again. Plaintiffs are entitled to
13 injunctive relief to prevent their property from being destroyed.

14 October 17, 2006

Respectfully submitted,

15

HELLER EHRMAN LLP

16

LAWYERS' COMMITTEE FOR CIVIL RIGHTS

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18

ACLU FOUNDATION OF NORTHERN
CALIFORNIA

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By /s/ Paul Alexander

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Paul Alexander

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Attorneys for Plaintiffs

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⁹ Plaintiffs have no assets and cannot reasonably post a bond even if one were justified in this case. Plaintiffs respectfully request that this Court decline to impose a bond requirement. *See, e.g., Jorgensen v. Cassidy*, 320 F.3d 906, 919 (9th Cir. 2003) ("We have recognized that Rule 65(c) invests the district court with discretion as to the amount of security required, *if any*." (quotation marks omitted) (emphasis in original). By their nature, the Plaintiffs are destitute and cannot afford to pay for a bond. *See, e.g., Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 385 n.42 (C.D. Cal. 1982) (waiving bond where action was brought by destitute plaintiff); *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999) (waiving bond where vast majority of plaintiffs were "very poor"). Further, there is "no realistic likelihood of harm to the defendant[s] from enjoining [their] conduct." *Jorgensen*, 320 F.3d at 919.

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