

**No. 23-15087**

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

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COALITION ON HOMELESSNESS; TORO CASTAÑO; SARAH CRONK;  
JOSHUA DONOHOE; MOLIQUE FRANK; DAVID MARTINEZ; TERESA  
SANDOVAL; NATHANIEL VAUGHN,

*Plaintiffs-Appellees*

v.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

*Defendants-Appellants.*

On Appeal from the United States District Court  
for the Northern District of California No. 4:22-cv-05502-DMR  
Hon. Donna M. Ryu

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**MOTION TO MODIFY THE PRELIMINARY  
INJUNCTION ORDER PENDING APPEAL;  
DECLARATION OF KAITLYN MURPHY**

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## INTRODUCTION

Defendant-Appellants City and County of San Francisco, et al. (“San Francisco” or “City”) find themselves in the unusual position of having a district court hold that their written law enforcement policies comply with the Eighth Amendment, yet enjoining San Francisco from following those policies. Plaintiffs-Appellees, seven individuals who experienced homelessness and the nonprofit Coalition on Homelessness (collectively, “Plaintiffs”), challenge San Francisco’s policies and procedures in response to the homelessness crisis. Plaintiffs relied on two theories to support its preliminary injunction motion: (1) that San Francisco’s “bag and tag” practices regarding unattended personal belongings in public spaces violated the Fourth Amendment; and (2) that enforcement of San Francisco’s sit/lie/sleep laws<sup>1</sup> violated the Eighth Amendment.

The district court recognized in both instances San Francisco’s written policies were constitutional, but issued an injunction because it found the City’s practices inconsistent with its policies. The district court’s Fourth Amendment remedy required San Francisco to simply follow its own bag and tag policy as written. But without explanation the district court took a different approach to Plaintiffs’ Eighth Amendment claims. San Francisco’s policies for enforcing sit/lie/sleep laws are set out in a San Francisco Police Department Enforcement

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<sup>1</sup> The district court enjoined enforcement or threatened enforcement of: California Penal Code sections 647(e), 370, and 372 and San Francisco Police Code sections 168 and 169.

Bulletin. Although the district court found the Enforcement Bulletin complied with the Eighth Amendment, the district court overreached by enjoining San Francisco from enforcing or threatening to enforce the sit/lie/sleep laws against those who are “involuntarily homeless,” requiring the City to revise its already constitutional Bulletin and to change practices that lawfully address the homelessness crisis in San Francisco.

The injunction has severe consequences for San Francisco and its residents, including those experiencing homelessness. Specifically, the injunction allows those experiencing homelessness—and not San Francisco’s employees with decades of experience—to decide where encampments in the City will remain. Post-injunction, fewer homeless individuals are accepting offers of shelter, some specifically citing the district court’s preliminary injunction. Tents are being almost immediately moved back into their previous locations after cleaning, and are being used for dangerous and illegal activities including drug dealing and drug use. The injunction also implicates the public interest by wresting a policy question traditionally left to local governments from San Francisco and transferring it to a federal court while the merits of the underlying litigation remain unresolved.

Seeking to mitigate these harms, San Francisco sought relief from the district court. When San Francisco filed an administrative motion for clarification or, in the alternative, for an expedited briefing schedule, the district court denied the clarification motion on procedural grounds. San Francisco also requested that

the district court stay its Eighth Amendment injunction pending appeal, but again the district court denied San Francisco relief.

Now San Francisco seeks a limited modification of the preliminary injunction order from this Court that would stay the district court's overreach and allow San Francisco to continue to follow its constitutional law enforcement policies. Specifically, San Francisco seeks an order permitting the City to comply with its pre-injunction Enforcement Bulletin pending resolution of the appeal. San Francisco is likely to succeed on its appeal of the preliminary injunction because the district court required San Francisco to re-write a constitutional policy.

The stay also poses no cognizable harm to Plaintiffs because San Francisco seeks to stay only of the portion of the injunction that prohibits San Francisco from implementing its pre-injunction Enforcement Bulletin, which Plaintiffs concede is constitutional.

## **SUMMARY OF LITIGATION**

### **I. The Underlying Preliminary Injunction Order**

Plaintiffs challenge San Francisco's policies and procedures around homelessness, homeless encampments, and the City's encampment resolutions. At encampment resolutions prior to the injunction, San Francisco cleaned and secured streets and other spaces for public use while offering services and shelter to individuals experiencing homelessness. Although San Francisco lacks sufficient shelter beds to offer shelter to every person in the City experiencing homelessness,

between January 2019 and January 2022, the City assisted over 8,000 households to exit homelessness. (ECF No. 45-2 [Cohen Decl. ¶ 7].)<sup>2</sup>

San Francisco offers shelter during encampment resolutions. (ECF No. 45-2 [Cohen Decl. ¶ 9].) Prior to the district court's injunction, a multi-department team of San Francisco employees, including those who devoted their entire professional careers to addressing poverty and homelessness, went out multiple times per week to perform encampment resolutions around the City. (ECF Nos. 45 at 8-9; 45-4 [Dodge Decl. ¶¶ 6-8].) Staff engaged with encampment residents and offered shelter. (ECF No. 45-4 [Dodge Decl. at ¶ 15].) A significant number of those offered shelter declined the offer, and others who initially expressed an interest rejected the specific type of shelter offered to them. (ECF Nos. 45-12 [Pistunovich Decl. ¶ 8]; 45-17 [client logs].)

Prior to the injunction, when an individual experiencing homelessness refused to leave an encampment after receiving an offer of shelter, the San Francisco Police Department had the option to enforce its sit/lie/sleep laws consistent with the Enforcement Bulletin to clear the area. (ECF No. 45-1 [Christ Decl. ¶ 3].) The pre-injunction Enforcement Bulletin stated “[o]fficers must secure appropriate shelter before taking enforcement action” and “[i]f there is no shelter

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<sup>2</sup> Documents cited herein were filed in district court Case No. 4:22-cv-05502-DMR. Unless otherwise indicated, page references reflect the page numbers in the header affixed by the court.

or navigation center bed available, officers may not issue a citation or seize the encampment/tent.” (ECF No. 9-8 at Ex. 27.)

Plaintiffs sought a preliminary injunction on September 27, 2020 (ECF No. 9), which the district court granted in part on December 23, 2022. (ECF No. 65.)

In its Opposition, San Francisco argued its policy to offer shelter before enforcement of sit/lie/sleep laws was consistent with both *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019) and *Johnson v. City of Grants Pass*, 50 F.4th 787 (9th Cir. 2022). (ECF No. 45 at 6, 13, 15.) San Francisco renewed this argument orally at the hearing. (Murphy Decl. Ex. C [12/22/22 Hr’g Tr. at 12:6-10; 18:12-25; 19:1-6; 21:13-25].)

Plaintiffs’ counsel acknowledged that the pre-injunction Enforcement Bulletin as written complied with the Eighth Amendment. (*Id.* at 10:8-19; 11:9-16.) In the injunction order issued the next day, the district court found the constitutionality of San Francisco’s written enforcement policies was “not at issue,” and that Plaintiffs had “confirmed that the substance of the Enforcement Bulletin is constitutional.” (ECF No. 65 at 38.) The district court nevertheless entered an injunction because it credited Plaintiffs’ evidence that San Francisco’s practices diverged from its official policy. (*Id.*) The district court issued the following Eighth Amendment injunction:

Defendants are preliminarily enjoined from enforcing or threatening to enforce, or using California Penal Code section 148(a) to enforce or threaten to enforce, the following laws and

ordinances to prohibit involuntarily homeless individuals from sitting, lying, or sleeping on public property:

- California Penal Code section 647(e)
- California Penal Code section 370
- California Penal Code section 372
- San Francisco Police Code section 168
- San Francisco Police Code section 169

This preliminary injunction shall remain effective as long as there are more homeless individuals in San Francisco than there are shelter beds available.

(*Id.* at 50.) The injunction also required San Francisco to comply with its existing bag and tag policy based on Plaintiffs' Fourth Amendment claims. (*Id.*)

## **II. San Francisco's Administrative Motion For Clarification, Or, In The Alternative, For An Expedited Briefing Schedule**

The district court's order does not define what it means to be "involuntarily homeless" despite preventing San Francisco from enforcing or threatening to enforce its sit/lie/sleep laws against this group. (*See* ECF No. 65 at 48.) Because Plaintiffs asserted that everyone experiencing homelessness in San Francisco is "involuntarily homeless," the City filed an administrative motion to clarify the meaning of "involuntarily homeless," or in the alternative, for expedited briefing. San Francisco filed its motion on January 3, 2023, ten days after the injunction issued and over the winter holidays. (ECF No. 70.) San Francisco specifically sought to clarify "that a particular individual is not 'involuntarily homeless' where San Francisco has offered that individual adequate temporary shelter." (ECF No. 70 at 2:23-24.)

In their opposition, Plaintiffs confirmed their view that the injunction prohibited any enforcement of the enumerated sit/lie/sleep laws against all persons

experiencing homelessness until the number of available shelter beds in the City exceeds the number of unhoused people experiencing homelessness, regardless of whether San Francisco offered a particular individual an adequate shelter bed. (ECF No. 81 at 1:2-4 (stating the injunction “unambiguously determined that homeless individuals in San Francisco are involuntarily homeless because the shelter system is short thousands of beds, essentially full, and effectively closed”).<sup>3</sup>)

The district court denied the clarification motion on January 12, 2023 as administratively improper and did not acknowledge San Francisco’s alternative motion for an expedited briefing schedule. (ECF No. 84.)

### **III. San Francisco’s Appeal**

San Francisco filed a Notice of Appeal from the district court’s preliminary injunction order on January 23, 2023. (ECF No. 88.)

### **IV. Revised Enforcement Bulletin**

After the district court entered the injunction and denied San Francisco’s clarification motion, San Francisco revised its Police Department Enforcement Bulletin to track the language of the district court’s order. (ECF No. 97-2.) The revised Bulletin quotes the district court’s injunction as to Plaintiffs’ Eighth Amendment claims. (ECF No. 97-2.) It also states:

The injunction’s use of the word ‘threat’ should be interpreted as any statement of an intention regarding the possibility of

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<sup>3</sup> The Coalition adheres to this view in its answering brief on appeal. *See* Pl. Ans. Br. at 51 n.5 (arguing that *Martin* prohibits enforcement when the City’s shelter system is “at capacity,” even if “specific beds” are “vacant” and available to an individual).

enforcement. . . . Under the injunction, Members may still ask individuals who are experiencing homelessness to relocate voluntarily, so long as the City's request is not accompanied with a threat of enforcement, or any language mentioning those statutes that could reasonably be interpreted as a threat to enforce any of the above listed laws. This also includes any conduct that could be reasonably seen as forcing a particular action without an explicit threat. The circumstances of any such request must make it clear there is no possibility of enforcement of the enumerated laws if the individual declines to move.

(*Id.*) The Bulletin also lists several codes that were not enjoined by the district court, such as ADA requirements and nuisance laws.

#### **V. San Francisco's Motion To Stay**

On February 2, 2023, promptly after filing its notice of appeal, San Francisco filed in the district court a motion to stay the Eighth Amendment elements of the preliminary injunction. (ECF No. 97.) In response to San Francisco's administrative motion to shorten time, the district court set the motion for hearing on March 23, 2023, 49 days after San Francisco filed the motion to stay. (ECF Nos. 104, 107.) Then, on March 20, 2023 the district court vacated the hearing, and two weeks after that on April 3, 2023, the district court denied San Francisco's motion. (ECF Nos. 114, 119.) The district court found San Francisco was not likely to succeed on the merits of its appeal, because the appeal raised issues not addressed at the district court level, and because the court's "factual findings [supporting the injunction] undercut" San Francisco's position. (ECF No. 119 at 6.) The Court discounted San Francisco's showing of irreparable harm, without addressing the changes San Francisco was required to make to its Enforcement Bulletin. (*Id.* at 9.) Finding San Francisco had not succeeded on the

first two *Nken* factors, the district court did not address the remaining factors and denied the motion. San Francisco's motion to stay in this Court followed because the district court's order failed to afford the relief requested. Fed. R. App. P. 8 (a)(2).

### STANDARD OF REVIEW

Generally, the purpose of a preliminary injunction is to “preserve the status quo and the rights of the parties until a final judgment issues in the cause.” *City & Cnty. of San Francisco v. United States Citizenship & Immigr. Servs.*, 944 F.3d 773, 789 (9th Cir. 2019) (citation omitted). Here, the district court issued an injunction that modified the status quo. The Court is empowered to suspend or modify such an injunction on appeal. Fed. R. Civ. Proc. 62(d). Stay of an injunction is appropriate when a combination of four factors weigh in favor of the applicant: (1) whether the applicant made a strong showing they are likely to succeed the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether a stay will substantially injure the non-moving party; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 426, (2009). “An applicant for a stay need not demonstrate that it is more likely than not they will win on the merits, but rather must show ‘a reasonable probability’ or ‘fair prospect’ of success”. *Fed. Trade Comm’n v. Qualcomm Inc.*, 935 F.3d 752, 755 (9th Cir. 2019) (citation omitted).

Deciding whether to grant a stay pending appeal is an equitable remedy and each factor need not be given equal weight. *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987) (“Since the traditional stay factors contemplate individualized judgments in each case, the formula cannot be reduced to a set of rigid rules.”). “The first two *Nken* factors ‘are the most critical’,” *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012), and courts “adopt[] a flexible approach” in analyzing these factors “in the context of preliminary injunctions.” *Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 513 (Fed. Cir. 1990).

## ARGUMENT

### **I. San Francisco Has Shown A Substantial Case For Relief On The Merits.** **A. The District Court’s Injunction Is Overbroad.**

San Francisco seeks to modify the injunction pending appeal to permit San Francisco to follow its pre-injunction policy as set out in the Enforcement Bulletin. The portion of the preliminary injunction San Francisco seeks to stay exceeds the scope of this Court’s precedent in *Martin* and *Johnson*. The injunction prohibits enforcement of various laws against persons who are “involuntarily homeless,” and considers all persons experiencing homelessness to be “involuntarily homeless,” because the number of unhoused persons exceeds the number of available shelter beds in San Francisco. The injunction is inconsistent *Martin* and *Johnson*, which both recognized that cities can enforce sit/lie/sleep laws against persons who refuse offers of shelter regardless of whether the city has shelter capacity for all persons experiencing homelessness within the jurisdiction. The injunction also improperly

forbids San Francisco from implementing an Enforcement Bulletin that the district court determined was lawful. San Francisco is therefore likely to succeed on its appeal, and at a minimum has shown a fair prospect of success because injunctive relief “should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-329 (2006) (“[W]hen confronting a constitutional flaw in a statute, [courts] try to limit the solution to the problem” and “enjoin only the unconstitutional applications of a statute while leaving the other applications in force.”); *McCormack v. Hiedeman*, 694 F.3d 1004, 1019 (9th Cir. 2012) (“A district court abuses its discretion by issuing an ‘overbroad’ injunction.”).

The Eighth Amendment prohibits the imposition of certain criminal penalties for sitting, sleeping, or lying outside on public property against a person who has nowhere else to go. *Martin*, 920 F.3d at 616 (prohibiting enforcement against “individuals who cannot obtain shelter”). This Court has repeatedly held the category of “involuntarily homeless” excludes those who either “have the means to pay” for shelter, or who have shelter offered “to them for free, but who choose not to use it.” *Id.* at 617 n.8; *see also Johnson*, 50 F.4th at 792 n.2 (quoting *Martin*). If “a homeless individual has access to shelter,” they are not involuntarily homeless and “may be cited or prosecuted” under sit/lie/sleep laws. *Johnson*, 50 F.3d at 805 n.23; *id.* at 805 n.24 (“A person with access to temporary shelter is not

involuntarily homeless unless and until they no longer have access to shelter.”). *Johnson* and *Martin* establish that a person is not “involuntarily homeless” if, as required by San Francisco’s pre-injunction Enforcement Bulletin, “[o]fficers must secure appropriate shelter before taking enforcement action” and “[i]f there is no shelter or navigation center bed available, officers may not issue a citation.” (ECF No. 9-8 at Ex. 27.)

San Francisco’s pre-injunction Enforcement Bulletin complied fully with the Eighth Amendment, and with *Martin* and *Johnson*. Nothing in this Court’s precedent requires San Francisco to have sufficient shelter beds for every person experiencing homelessness in the City prior to enforcing its sit/lie/sleep laws against an individual who rejects a shelter offer. Yet, that is exactly what the injunction requires.

The question of whether San Francisco may enforce its sit/lie/sleep laws against someone rejects an offer of shelter is not academic. At a typical encampment resolution, only 40% of the residents accept shelter. (ECF No. 45 at 21.) Many residents also “change their mind about wanting shelter upon learning what shelter is available or when they are unable to be placed in the specific shelter of their choosing.” (ECF Nos. 45-12 [Pistunovich Decl. ¶ 8]; 45-17 [client log].) Consistent with *Martin* and *Johnson*, San Francisco’s pre-injunction Enforcement Bulletin required an offer of shelter to a person experiencing homelessness before

the City took action against them under the sit/lie/sleep laws. (ECF No. 9-8 at Ex. 27.)

The injunction required San Francisco to abandon that policy—a policy both the Court and Plaintiffs agreed was constitutional—and replace it with a new policy that unjustifiably restricts San Francisco’s law enforcement authority, preventing enforcement of sit/lie/sleep laws even after making an offer of shelter. (ECF No. 65 at 38; Murphy Decl. Ex. C [12/22/22 Hrg. Tr. at 10:8-19; 11:9-16]). The district court provided no explanation why, to address Plaintiffs’ Eighth Amendment claims, it required San Francisco to *revise* its constitutional Enforcement Bulletin. San Francisco is likely to succeed on the merits of its appeal challenging this portion of the district court’s order, or at a minimum, has shown a fair probability of success on the merits of its underlying claim.

**B. San Francisco Raised This Argument Below.**

The district court’s primary argument for denying San Francisco’s requested stay was that the City had not “properly raised” with the district court its argument that *Martin* and *Johnson* allow the City to enforce its sit/lie/sleep laws against an individual who refuses an adequate offer of shelter. (ECF No. 119 at 6.) The district court is incorrect. The City made identical arguments in its briefing and at oral argument.

San Francisco argued in the underlying motion: “San Francisco’s policy of offering shelter to anyone before they are asked to vacate an encampment complies

fully with Ninth Circuit precedent”; “San Francisco’s policy of offering shelter before requiring any unhouse[d] person to vacate public property meets the requirements of the Eighth Amendment”; and “San Francisco’s policies ensure a person experiencing homelessness is asked to leave an encampment only after the person has received an offer of shelter and declined it.” (ECF No. 45 at 15, 13, 6.) This is the same argument the City makes now.

San Francisco renewed this argument at the preliminary injunction hearing. Acknowledging the total number of San Franciscans experiencing homelessness exceeded the available shelter beds (Murphy Decl. Ex. C [12/22/22 Hrg. Tr. 12:6-10; 18:22-25]), San Francisco nevertheless argued *Johnson* and *Martin* allowed the City to enforce its sit/lie/sleep laws at encampment resolutions because the City offers shelter to “anybody who says they want space” at the resolution. (*Id.* at 19:1:6; *see also id.* at 18:12-15 [“What plaintiffs haven’t shown is that there are insufficient beds offered at . . . encampment resolutions for the people who accept shelter. Everyone is offered, and we have enough beds for those who accept.”].) San Francisco criticized the dataset Plaintiffs’ expert relied on because “at resolutions, so long as there are enough shelter beds to provide for everyone who accepts shelter, every citation is proper.” (*Id.* at 23:20-23.) San Francisco also specifically addressed the district court’s formula approach, which would render every person experiencing homelessness involuntarily homeless until there were sufficient shelter beds for everyone, explaining San Francisco did something that

“neither *Grants Pass* nor *Boise* did, which was, before enforcing against an individual, offering shelter to that individual.” (*Id.* at 21:13-25.) These are the same arguments San Francisco presents on appeal.

But even if San Francisco had failed adequately to present these arguments below, which the record shows it has done, that would not justify a determination that San Francisco lacks even a fair prospect of success on appeal because the Court can consider purely legal questions first raised on appeal. *A-1 Ambulance Serv., Inc. v. Cnty. of Monterey*, 90 F.3d 333, 339 (9th Cir. 1996) (“[A]n issue not raised below might still be heard on appeal if the issue ‘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 also Bolker v. Comm'r of Internal Revenue*, 760 F.2d 1039, 1042 (9th Cir. 1985) (holding Court has the power to consider an issue raised for the first time on appeal.)

## **II. San Francisco Will Likely Suffer Irreparable Injury Absent The Requested Stay, And The Public Interest Favors The Stay.**

The second and fourth *Nken* factors, the moving party’s risk of irreparable injury and the public interest, merge in cases like this where the government is the moving party. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). The inquiry does not consider “the magnitude of the harm” to San Francisco, only whether the harm is irreparable. *City & Cnty. of San Francisco v. United States Citizenship & Immigr. Servs.*, 944 F.3d at 806.

Both the public interest and the risk of irreparable harm to San Francisco favor a stay. All San Francisco residents, visitors, and businesses suffer harm when validly enacted laws intended to promote the public welfare are made unenforceable. The district court's injunction limits San Francisco's ability to regulate "public health and the public safety" despite San Francisco's interest in "reasonable regulations" to protect the same. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 (1905); *see also Hutchinson v. City of Valdosta*, 227 U.S. 303, 308 (1913) (recognizing there is nothing "to justify a court in interfering with so salutary a power and one so necessary to the public health"). "Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated" while at the same time respecting "the constitutional liberty of one rightfully upon the street." *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147, 160 (1939). Prior to the injunction San Francisco could choose how to make its shelter beds available, including by offering them to individuals who are in violation of the City's sit/lie/sleep laws before issuing that individual a citation for refusing to comply with the law. Post-injunction, it cannot.

The injunction allows people experiencing homelessness to determine where encampments will be located in the City. Absent ADA violations, willful or malicious obstruction of free movement on the sidewalk, or a technical violation of

public nuisance law, San Francisco no longer has tools to relocate an encampment. (See ECF No. 97-2 [explaining what code sections San Francisco remains able to enforce].)

This Court should not lightly upend San Francisco’s balanced policy determinations while the appeal is pending, especially where San Francisco conducts several encampment resolutions per week. (ECF Nos. 45; 45-4 [Dodge Decl] ¶ 7.) Resolutions are a key element in San Francisco’s homeless response system. (ECF No. 45-2 [Cohen Decl. ¶ 9].) City employees on the ground have observed concrete changes since the injunction took effect. The number of individuals at an encampment resolution who refuse to interact with City outreach workers is increasing and some of those individuals specifically refer to the district court’s order as the reason they are refusing housing and services. (Dodge Decl. ¶ 6.)<sup>4</sup> At many encampment resolutions post-injunction, tents are “almost immediately” moved back into their previous locations after the resolution concludes and some individuals have erected “semi-permanent residence on the street and sidewalks.” (*Id.* at ¶¶ 7-8.) “Conflicts among homeless individuals in encampments, and between homeless individuals and others, some of which lead to violence, appear to be increasing in frequency. It also appears that tents on the streets and sidewalks are being used more frequently for dangerous and/or illegal

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<sup>4</sup> Filed herewith is the Declaration of Samuel Dodge in Support of Motion to Stay Preliminary Injunction Order Pending Appeal.

activities such as drug dealing and drug use.” (*Id.* at ¶ 8.) Injunctions that make it “considerably more difficult” for public entities “to fulfil their statutory obligations” create a likelihood of irreparable injury. *Mi Familia Vota v. Hobbs*, 977 F.3d 948, 953 (9th Cir. 2020). Allowing the injunction “to remain in place before the merits panel of this court can ultimately rule on the constitutionality of the [challenged policy] could throw a previously stable system into chaos.” *Lair*, 697 F.3d at 1214.

“[R]esponsible public officials in San Francisco have already considered” the appropriate process for managing the homelessness crisis, which the injunction would modify. *Golden Gate Rest. Ass’n v. City and Cnty. of San Francisco*, 512 F.3d 1112, 1126-27 (9th Cir. 2008). There is a specific harm to the public interest when federal courts interfere with “the rightful independence of state governments in carrying out their domestic policy.” *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943) (“for it ‘is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy’”). This Court has also found a stay in the public interest where the government entity shows “a strong showing of likelihood of success on the merits” and “some irreparable harm.” *City & Cnty. of San Francisco v. United States Citizenship & Immigr. Servs.*, 944 F.3d at 807. San Francisco clears that bar.

### III. Plaintiffs Suffer No Substantial Injury From A Stay.

The district court only credited two harms to support the injunction: the harm that accompanies a constitutional injury and the negative physical and mental health impacts that accompany “encampment closures *without offers of shelter*.” (ECF No. 65 at 45 (emphasis added).) Granting San Francisco’s requested stay imposes neither.

There can be no constitutional injury from the City’s request because all parties and the district court agree the pre-injunction Enforcement Bulletin is constitutional. *Goldie’s Bookstore, Inc. v. Super. Ct. of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984) (finding alleged constitutional harm did not support irreparable harm when “the constitutional claim is too tenuous”); *Lair*, 697 F.3d at 1215 (finding any harm to non-moving party “minimal and vastly outweighed by the public interest” where underlying statute was constitutional). The district court found: “Defendants’ policy is not at issue” (ECF No. 65 at 38), and Plaintiffs admitted that “as long as there’s adequate housing and as long as the Enforcement Bulletin were followed,” San Francisco’s policy “itself is constitutional.” (Murphy Decl. Ex. C [12/22/22 Hrg. Tr. at 10:8-19; 11:9-16]). A facially constitutional policy should not be enjoined.<sup>5</sup> See *Mi Familia Votas*, 977 F.3d at 953 (finding no

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<sup>5</sup> Although in its appeal San Francisco argues it was legal error for the district court to enjoin San Francisco from violating its own policy, San Francisco takes a narrowly tailored approach to this stay request, seeking to modify only the portion of the district court’s Eighth Amendment injunction that goes beyond the City’s pre-injunction Enforcement Bulletin as a sensible solution to address the immediate irreparable harms alleged by all parties.

substantial injury to non-moving party where “[t]he facial constitutionality of the statutory deadline [to be enjoined] is unchallenged”).

The requested stay also presents no risk Plaintiffs would be subject to the physical or mental harms the district court contemplated because the pre-injunction Enforcement Bulletin only permitted enforcement after City employees make an offer of shelter. (ECF No. 9-8 at Ex. 27.) Whatever injury the district court credited from enforcement action “without offers of shelter,” it would not be triggered by a stay that permits San Francisco to continue operating under its pre-injunction Enforcement Bulletin. (ECF No. 65 at 45.)

### **CONCLUSION**

For the reasons described above San Francisco seeks an order from this Court staying the portion of the district court’s injunction regarding the Eighth Amendment and instead permitting San Francisco to follow its pre-injunction Enforcement Bulletin until the Court resolves its pending appeal.

Dated: April 14, 2023

Respectfully submitted,

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DEPARTMENT; SAN FRANCISCO  
DEPARTMENT OF EMERGENCY  
MANAGEMENT; MAYOR LONDON  
BREED; SAM DODGE

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

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**9th Cir. Case Number(s)** 23-15087

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I am the attorney or self-represented party.

This brief contains 4791 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief (*select only one*):

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- is a cross-appeal brief and complies with the word limit of Cir. R. 28.1-1.
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- is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
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- it is a joint brief submitted by separately represented parties;
- a party or parties are filing a single brief in response to multiple briefs; or
- a party or parties are filing a single brief in response to a longer joint brief.
- complies with the length limit designated by court order dated \_\_\_\_\_.
- is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Kaitlyn M. Murphy Date April 14, 2023  
(use "s/[typed name]" to sign electronically-filed documents)

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**DECLARATION OF KAITLYN MURPHY IN SUPPORT OF MOTION TO STAY**

I, Kaitlyn Murphy, declare as follows:

1. I am an attorney at law duly licensed to practice law in the State of California and before the Ninth Circuit Court of Appeals. I am a Deputy City Attorney at the San Francisco City Attorney's Office, attorneys of record for the Appellees. I am familiar with the facts and pleadings herein. The following is within my personal knowledge and if called and sworn as a witness, I could and would competently testify thereto.

2. **Exhibit A** to the accompanying Motion to Stay is a true and correct copy of the April 3, 2023 district court order denying San Francisco's motion to stay.

3. **Exhibit B** to the accompanying Motion to Stay is a true and correct copy of the December 23, 2022 district court order granting in part and denying in part Plaintiffs' Motion for a Preliminary Injunction.

4. **Exhibit C** to the accompanying Motion to Stay is a true and correct copy of the reporter's transcript from the December 22, 2022 hearing on Plaintiffs' Motion for a Preliminary Injunction.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 14th day of April, 2023, at San Francisco, California.

*s/Kaitlyn Murphy*  
Kaitlyn Murphy

**EXHIBIT A  
TO  
DECLARATION OF KAITLYN MURPHY IN  
SUPPORT OF MOTION TO STAY**

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2  
3  
4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA

6  
7 COALITION ON HOMELESSNESS, et al.,

Case No. [22-cv-05502-DMR](#)

8 Plaintiffs,

9 v.

**ORDER DENYING DEFENDANTS'  
MOTION TO STAY**

10 CITY AND COUNTY OF SAN  
11 FRANCISCO, et al.,

Re: Dkt. No. 97

12 Defendants.

13 Plaintiffs are a group of current and formerly homeless residents of the City and County of  
14 San Francisco (“San Francisco”), along with the Coalition on Homelessness, a non-profit  
15 advocacy organization. They filed a lawsuit challenging certain aspects of San Francisco’s official  
16 response to homelessness, including its coordinated five-agency effort to address homeless  
17 encampments. On December 23, 2022, the court partially granted Plaintiff’s motion for a  
18 preliminary injunction. Defendants subsequently filed a notice of appeal of that order to the  
19 United States Court of Appeals for the Ninth Circuit. They now move to stay a portion of the  
20 preliminary injunction pending the outcome of their appeal. [Docket No. 97.] Plaintiffs oppose  
21 the motion.

22 This matter is suitable for resolution without a hearing. Civ. L.R. 7-1(b). For the  
23 following reasons, the motion to stay is denied.

24 **I. BACKGROUND**

25 The preliminary injunction order contains a detailed discussion of Plaintiffs’ Fourth and  
26 Eighth Amendment claims against Defendants and the evidence relevant to those claims. *See*  
27 *Coal. on Homelessness v. City & Cnty. of San Francisco*, No. 22-CV-05502-DMR, 2022 WL  
28 17905114 (N.D. Cal. Dec. 23, 2022). Plaintiffs’ Eighth Amendment claim is based on the

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Northern District of California

1 contention that “San Francisco criminalizes involuntary homelessness in violation of homeless  
 2 individuals’ Eighth Amendment rights” under *Martin v. City of Boise*, 920 F.3d 584, 618 (9th Cir.  
 3 2019). *Id.* at \*20. In the preliminary injunction order, the court discussed *Martin*, in which the  
 4 Ninth Circuit held that “the Eighth Amendment prohibits the imposition of criminal penalties for  
 5 sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain  
 6 shelter.” *Id.* (quoting *Martin*, 920 F.3d at 616, 617). The order quoted the following passage from  
 7 *Martin*:

8 We hold only that so long as there is a greater number of homeless  
 9 individuals in [a jurisdiction] than the number of available beds [in  
 10 shelters], the jurisdiction cannot prosecute homeless individuals for  
 11 involuntarily sitting, lying, and sleeping in public. That is, as long as  
 there is no option of sleeping indoors, the government cannot  
 criminalize indigent, homeless people for sleeping outdoors, on  
 public property, on the false premise they had a choice in the matter.

12 *Id.* at \*20-21 (citation and quotation marks omitted) (quoting *Martin*, 920 F.3d at 617). The Ninth  
 13 Circuit further explained “that its holding ‘does not cover individuals who *do* have access to  
 14 adequate temporary shelter, whether because they have the means to pay for it or because it is  
 15 realistically available to them for free, but who choose not to use it . . .” *Id.* at \*21 (emphasis in  
 16 original) (quoting *Martin*, 920 F.3d at 617 n.8).

17 The preliminary injunction order discussed an SFPD Enforcement Bulletin that describes  
 18 various laws and ordinances available to “address lodging or encampments, including criminal  
 19 laws prohibiting sitting, lying, and lodging.” *Id.* at \*4 (quotation marks and citation omitted). The  
 20 Enforcement Bulletin sets forth restrictions of SFPD’s enforcement of the same, including  
 21 requiring officers to “secure appropriate shelter before taking” specified enforcement actions and  
 22 prohibiting officers from issuing citations or ordering the removal of tents and encampments “[i]f  
 23 there is no shelter or navigation center bed available.” *Id.*

24 As noted in the order, the policy reflected in the Enforcement Bulletin “is not at issue” in  
 25 this case; in fact, “Plaintiffs [have] confirmed that the substance of the Enforcement Bulletin is  
 26 constitutional.” *Id.* at \*22. However, the court found that Plaintiffs had submitted “detailed  
 27 evidence demonstrating significant failures to comply with the policy,” and that the evidence was  
 28 “largely unchallenged” by Defendants. *Id.* The court ultimately concluded that Plaintiffs had

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1 shown that they “are likely to succeed on the merits of their claim that Defendants violate the  
 2 Eighth Amendment by imposing or threatening to impose criminal penalties against homeless  
 3 individuals for ‘sitting, sleeping, or lying outside on public property’ without giving them the  
 4 option of sleeping indoors” under *Martin*, 920 F.3d at 617, and *Johnson v. Grants Pass*, 50 F.4th  
 5 787, 795 (9th Cir. 2022). *Id.* at \*24. Finding that Plaintiffs had established the remaining  
 6 preliminary injunction factors, *id.* at \*25-26, the court entered the following preliminary injunction  
 7 corresponding to the Eighth Amendment claim:

8 Defendants are preliminar[il]y enjoined from enforcing or threatening  
 9 to enforce, or using California Penal Code section 148(a) to enforce  
 10 or threaten to enforce, the following laws and ordinances to prohibit  
 11 involuntarily homeless individuals from sitting, lying, or sleeping on  
 12 public property:

- 11 • California Penal Code section 647(e)
- 12 • California Penal Code section 370
- 13 • California Penal Code section 372
- 14 • San Francisco Police Code section 168
- 15 • San Francisco Police Code section 169

16 *Id.* at \*28.<sup>1</sup> The court ordered that the preliminary injunction “shall remain effective as long as  
 17 there are more homeless individuals in San Francisco than there are shelter beds available.” *Id.*

18 On January 3, 2023, Defendants inappropriately filed an “Administrative Motion for  
 19 Clarification of Preliminary Injunction Order” pursuant to Civil Local Rule 7-11. [Docket No.  
 20 70.] In the motion, Defendants asked the court “to clarify that a particular individual is not  
 21 ‘involuntarily homeless’” within the meaning of the preliminary injunction pertaining to the  
 22 Eighth Amendment claim “where San Francisco has offered that individual adequate temporary  
 23 shelter.” *Id.* at 2. According to Defendants, “Plaintiffs maintain all unsheltered people  
 24 experiencing homelessness . . . are ‘involuntarily homeless’ under the [preliminary injunction  
 25 order], regardless of whether they have received an adequate shelter offer, and therefore the City  
 26

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27 <sup>1</sup> The court also granted injunctive relief pertaining to the Fourth Amendment claim. *See*  
 28 *Coalition*, 2022 WL 17905114, at \*28. That portion of the preliminary injunction order is not at  
 issue in this motion.

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1 may not enforce sit/lie/sleep laws against any unhoused person anywhere in San Francisco.” *Id.*  
 2 Defendants dispute this interpretation and argue that under *Martin*, 920 F.3d at 617 n.8, and  
 3 *Johnson*, 50 F.4th at 793 n.2, “a particular individual is not ‘involuntarily homeless’ if the  
 4 individual refuses an offer of adequate shelter.” *Id.* at 4. According to Defendants’ administrative  
 5 motion, without the requested “clarification,” San Francisco is subject to conflicting obligations in  
 6 this case and in a different case, *Hastings College of the Law v. City & County of San Francisco*,  
 7 Case No. 4:20-cv-03033-JST (N.D. Cal. filed May 4, 2020, closed Oct. 7, 2020), in which the  
 8 court entered a stipulated injunction regarding encampments in the Tenderloin neighborhood of  
 9 San Francisco. *Id.* at 2. In the alternative, Defendants requested expedited briefing on the motion  
 10 for clarification. *Id.* at 6.

11 On January 6, 2023, Plaintiffs filed an administrative motion for a status conference,  
 12 arguing that Defendants were not complying with the preliminary injunction and asking for certain  
 13 discovery, compliance reports, and appointment of a special master to monitor Defendants’  
 14 compliance. [Docket No. 75.] Defendants filed an opposition to Plaintiffs’ motion shortly  
 15 thereafter and submitted declarations by 11 percipient witnesses purportedly rebutting Plaintiffs’  
 16 claims of noncompliance. [Docket No. 82.]

17 The court held an initial case management conference (CMC) on January 12, 2023 in  
 18 which it addressed the parties’ administrative motions, among other things. [*See* Docket Nos. 84  
 19 (Minute Order), 91 (Jan. 12, 2023 Hr’g Tr.).] The court denied Defendants’ administrative motion  
 20 on procedural grounds. It explained that Defendants’ motion sought substantive relief; Local Rule  
 21 7-11 is for “truly administrative matters,” such as requesting permission to go beyond page limits;  
 22 and the truncated procedures governing an administrative motion clearly made it an improper  
 23 vehicle for the requested relief. Tr. 23-24. The court noted that if Defendants wanted “a ruling on  
 24 the substantive issues raised in the administrative motion” they would need to “file an appropriate  
 25 motion” explaining any purported conflicting obligations and addressing the applicable standard.  
 26 The court also instructed Defendants “to evaluate . . . whether [such a] motion is actually a motion  
 27 for reconsideration [of the preliminary injunction order], which is governed by a different  
 28

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1 standard.” *Id.* at 24.<sup>2</sup>

2 Defendants did not file a motion for reconsideration or otherwise move for a ruling on the  
3 substantive issues they raised in their administrative motion. Instead, on January 23, 2023,  
4 Defendants filed a notice of appeal of the preliminary injunction order. [Docket No. 88.]

5 On February 2, 2023, Defendants filed the instant motion to stay a portion of the  
6 preliminary injunction order pending appeal. In particular, Defendants ask the court to stay “the  
7 portion of the [preliminary injunction order] regarding the use and enforcement of sit/lie/sleep  
8 laws.” Mot. to Stay 4 n.2.

9 **II. LEGAL STANDARD**

10 “A stay is not a matter of right, even if irreparable injury might otherwise result.” *Nken v.*  
11 *Holder*, 556 U.S. 418, 433 (2009) (quotation marks omitted). “It is instead ‘an exercise of judicial  
12 discretion’” that “‘is dependent upon the circumstances of the particular case.’” *Id.* (quoting  
13 *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672-73 (1926)).

14 “The standard for evaluating stays pending appeal is similar to that employed by district  
15 courts in deciding whether to grant a preliminary injunction.” *Lopez v. Heckler*, 713 F.2d 1432,  
16 1435 (9th Cir. 1983). Courts consider four factors: “(1) whether the stay applicant has made a  
17 strong showing that he is likely to succeed on the merits; (2) whether the applicant will be  
18 irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other  
19 parties interested in the proceeding; and (4) where the public interest lies.” *Nken*, 556 U.S. at 434  
20 (quotation marks omitted). “The first two *Nken* factors ‘are the most critical.’” *Lair v. Bullock*,  
21 697 F.3d 1200, 1204 (9th Cir. 2012) (quoting *Nken*, 556 U.S. at 434). “The party requesting a stay  
22 bears the burden of showing that the circumstances justify an exercise of [the court’s] discretion.”  
23 *Nken*, 556 U.S. at 433-34.

24 **III. DISCUSSION**

25 Defendants seek to stay the portion of the preliminary injunction order that enjoins San  
26 Francisco from enforcing or threatening to enforce, or using California Penal Code section 148(a)

27 \_\_\_\_\_  
28 <sup>2</sup> The court also denied Plaintiffs’ administrative motion on the ground that it sought substantive relief that was not appropriate for resolution on a Local Rule 7-11 motion. Tr. 25.

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Northern District of California

1 to enforce or threaten to enforce, laws and ordinances regarding sitting, lying, and sleeping on  
2 public property.

3 As to the first *Nken* factor, Defendants contend that they are likely to succeed on the merits  
4 of their appeal because the challenged portion of the preliminary injunction order is “overbroad”  
5 and exceeds the scope of *Martin* and *Johnson*. Mot. 5. Here, Defendants essentially renew the  
6 argument they made in their inappropriate administrative motion for clarification; that is, under  
7 Plaintiffs’ interpretation of the term “involuntarily homeless,” the preliminary injunction order  
8 prohibits San Francisco from enforcing sit/lie/sleep laws against any individual “so long as the  
9 total number of homeless individuals within the City exceeds the total number of shelter beds”  
10 even if the City has offered that individual “adequate temporary housing.” Mot. to Stay 2, 5.  
11 Defendants argue that if Plaintiffs’ interpretation is correct, the preliminary injunction order  
12 “require[s] more of San Francisco than the Eighth Amendment demands.” *Id.* According to  
13 Defendants, under *Martin* and *Johnson*, an individual is not “involuntarily homeless” if they are  
14 “offered the opportunity for adequate temporary shelter for free before SFPD enforces or threatens  
15 to enforce any of the relevant code sections against that individual,” regardless of whether San  
16 Francisco has enough shelter beds to offer every homeless individual in the city. *Id.* at 5.

17 The court concludes that Defendants are unlikely to succeed on the merits of their appeal  
18 because (1) they never properly raised this argument before the undersigned, and (2) in granting  
19 the preliminary injunction, the court made factual findings that undercut Defendants’ position.

20 As to the first reason, Defendants’ opposition brief in the preliminary injunction motion  
21 did not make the argument they now assert. *See Coalition*, 2022 WL 17905114, at \*27. In fact, it  
22 was not until the hearing that Defendants attempted to address the scope of *Martin* and *Johnson*  
23 and explain how those cases apply to the facts of this case. The court pointed this out in the  
24 preliminary injunction order. It observed that “[t]he formula established in *Martin* is that the  
25 government cannot prosecute homeless people for sleeping in public if there ‘is a greater number  
26 of homeless individuals in [a jurisdiction] than the number of available’ shelter spaces.” *Id.* at \*23  
27 (quoting *Johnson*, 50 F.4th at 795 (alteration in original) (citing *Martin*, 920 F.3d at 617)). It then  
28 noted that “[a]t the hearing, Defendants argued for the first time that the formula announced in

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1 *Martin* and *Johnson* for demonstrating an 8th Amendment violation should be interpreted  
 2 differently when applied to this case.” *Id.* Specifically, despite Defendants’ concession “that  
 3 there are thousands more homeless individuals living in San Francisco than there are available  
 4 shelter beds,” they argued at the hearing that San Francisco “does not violate the 8th Amendment .  
 5 . . because it is the City’s practice to provide homeless individuals with an option for sleeping  
 6 indoors, as all are offered shelter beds before they are displaced.” *Id.*

7 The court went on to hold that it “need not decide whether Defendants’ reading of *Martin*  
 8 and *Johnson* is correct” because it expressly found that “their position lacks factual support.” *Id.*  
 9 at \*24. In particular, the court made factual findings that “San Francisco does not have enough  
 10 available shelter beds for all homeless San Franciscans,” falling short “by thousands of beds,” and  
 11 that “homeless San Franciscans have not been able to voluntarily access shelter beds since April  
 12 2020” because waitlists and same-day lines are closed. *Id.* at \*2, 3, 21-22. Therefore, “the only  
 13 clear way to access shelter is via an encampment resolution while under threat from law  
 14 enforcement.” *Id.* at \*14 (quotation omitted). The court also found that Defendants had not  
 15 “meaningfully rebut[ted] evidence that San Francisco initiates encampment closures without  
 16 actually knowing whether any shelter beds will be available to encampment residents” and that  
 17 there was “ample evidence that encampment closures have been carried out even when [City]  
 18 representatives said there was no available bed space.” *Id.* at \*22. Ultimately, the court found that  
 19 Defendants had provided “thin” evidence supporting their assertion “that every homeless person is  
 20 offered shelter before being displaced by the City,” even though San Francisco “controls the  
 21 relevant evidence.” *Id.* at \*24. By contrast, “Plaintiffs submitted ample evidence that homeless  
 22 individuals routinely are displaced without a firm offer (or in many instances, any offer) of a  
 23 shelter bed,” contradicting Defendants’ position. *Id.*

24 After the court issued the preliminary injunction order, Defendants filed a procedurally  
 25 improper administrative motion for “clarification” that included argument about the application of  
 26 *Martin* and *Johnson* that had not been made in their opposition brief. In admonishing Defendants  
 27 for the maneuver, the court explained what Defendants would need to address in any future motion  
 28 seeking a ruling on the substantive issues, including potentially satisfying the standard for

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1 reconsideration. Defendants instead chose to file a notice of appeal. As a result, the court – and  
2 Plaintiffs – never had the opportunity to consider Defendants’ arguments regarding the scope of  
3 *Martin* and *Johnson* as applied to the factual record in this case, despite the court having invited  
4 Defendants to raise it properly. At best, Defendants raised it on the fly in oral argument, thereby  
5 depriving Plaintiffs of a meaningful chance to respond.

6 As to the second reason, Defendants have not established a factual record supporting their  
7 newly proposed application of *Martin* and *Johnson*. The court made factual findings in the  
8 preliminary injunction proceedings as described above and concluded that Defendants’ position  
9 “lacks factual support.” *Coalition*, 2022 WL 17905114, at \*24. Later, in opposing Plaintiffs’  
10 administrative motion challenging Defendants’ compliance with the preliminary injunction order,  
11 Defendants submitted a significant amount of evidence. This included declarations by Sam  
12 Dodge, current Director of the Department of Emergency Management’s Division of Street  
13 Response Coordination and former Director of the Healthy Streets Operation Center (“HSOC”),  
14 and David Nakanishi, current HSOC Director. Defendants’ evidence also included a declaration  
15 by an investigator with the San Francisco City Attorney’s office. [See Docket Nos. 82-6, 82-12,  
16 82-14.] All three witnesses presumably have detailed personal knowledge of the circumstances in  
17 which encampment closures take place. Despite the opportunity to finally substantiate  
18 Defendants’ position that “every homeless person is offered shelter before being displaced by the  
19 City,” none of Defendants’ witnesses stated that San Francisco officials offer shelter to every  
20 homeless individual before telling them to vacate public property.

21 In sum, Defendants have never properly raised the issue of how Ninth Circuit precedent  
22 should be applied to the facts of this case and have not established a factual record supporting their  
23 interpretation of that precedent. Accordingly, the court concludes that Defendants are unlikely to  
24 prevail on the merits of their appeal of the preliminary injunction order.

25 Defendants have not shown that the remaining “critical” factor of irreparable harm  
26 supports a stay. As the moving party, Defendants have “the burden of showing that irreparable  
27 injury is *likely to occur* during the period before the appeal is decided.” *Doe #1 v. Trump*, 957  
28 F.3d 1050, 1059 (9th Cir. 2020) (emphasis added) (citing *Leiva-Perez v. Holder*, 640 F.3d 962,

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Northern District of California

1 968 (9th Cir. 2011)). “[S]imply showing some possibility of irreparable injury is insufficient,” *E.*  
 2 *Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 778 (9th Cir. 2018) (cleaned up), and a party  
 3 “cannot meet this burden by submitting conclusory factual assertions and speculative arguments  
 4 that are unsupported in the record.” *Doe #1*, 957 F.3d at 1059-60. Defendants identify no  
 5 concrete harms that are “probable if the stay is not granted,” *Leiva-Perez*, 640 F.3d at 968, instead  
 6 arguing generally that “[e]ncampment resolutions promote public health and safety.” Mot. 6. But  
 7 they do not cite any evidence regarding their inability to address public health and safety under the  
 8 restrictions imposed by the preliminary injunction order. In fact, defense counsel stated at the  
 9 January 12, 2023 CMC that Defendants have offered “shelter and services” to individuals at  
 10 homeless encampments since the issuance of the preliminary injunction order and have been able  
 11 to clean areas where encampments are located, suggesting that Defendants have found ways to  
 12 accomplish their public health and safety goals despite the preliminary injunction order. *See Tr.*  
 13 26-27.

14 Defendants also claim that their appeal raises “issues of federalism” because the  
 15 preliminary injunction order “allows a federal court to overrule local government officials  
 16 regarding matters otherwise vested in the local officials’ authority.” Mot. 7. However, “claims  
 17 that the Government has suffered an institutional injury by erosion of the separation of powers do  
 18 not alone amount to an injury that is irreparable, because the Government may pursue and  
 19 vindicate its interests in the full course of this litigation.” *E. Bay Sanctuary Covenant*, 932 F.3d at  
 20 778 (cleaned up).

21 As noted, the first two *Nken* factors are “the most critical.” *Nken*, 556 U.S. at 434. Given  
 22 Defendants failure to satisfy those factors, the court declines to stay its preliminary injunction  
 23 order pending Defendants’ appeal. *See Washington*, 847 F.3d at 1164 (noting that “the last two  
 24 steps are reached ‘[o]nce an applicant [for a stay] satisfies the first two factors’” (quoting *Nken*,  
 25 556 U.S. at 435)).

26 //  
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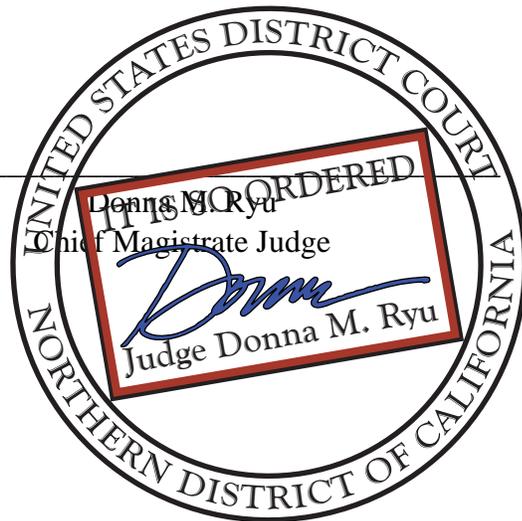
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**IV. CONCLUSION**

For the foregoing reasons, Defendants’ motion to stay is denied.

**IT IS SO ORDERED.**

Dated: April 3, 2023



United States District Court  
Northern District of California

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**EXHIBIT B  
TO  
DECLARATION OF KAITLYN MURPHY IN  
SUPPORT OF MOTION TO STAY**

1  
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4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA

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7 COALITION ON HOMELESSNESS, et al.,

8 Plaintiffs,

9 v.

10 CITY AND COUNTY OF SAN  
11 FRANCISCO, et al.,

12 Defendants.

Case No. [22-cv-05502-DMR](#)

**ORDER ON MOTION FOR  
PRELIMINARY INJUNCTION**

Re: Dkt. No. 9

13 Plaintiffs are Toro Castaño, Sarah Cronk, Joshua Donohoe, Molique Frank, David  
14 Martinez, Teresa Sandoval, and Nathaniel Vaughn, all current or formerly homeless residents of  
15 the City and County of San Francisco, along with the Coalition on Homelessness, a non-profit  
16 advocacy organization. Defendants are the City and County of San Francisco (“San Francisco” or  
17 “the City”); San Francisco Police Department (“SFPD”); San Francisco Department of Public  
18 Works (“DPW”); San Francisco Department of Homelessness and Supportive Housing (“HSH”);  
19 San Francisco Fire Department (“SFFD”); San Francisco Department of Emergency Management  
20 (“DEM”); San Francisco Mayor London Breed; and Sam Dodge, Director of San Francisco  
21 Healthy Streets Operation Center (“HSOC”). Plaintiffs move for a preliminary injunction to  
22 enjoin Defendants from enforcing San Francisco ordinances that punish sleeping, lodging, or  
23 camping on public property and related California Penal Code provisions, and to prohibit  
24 Defendants from seizing and destroying the unabandoned personal property of homeless  
25 individuals. The court held a hearing on December 22, 2022. For the following reasons, the  
26 motion is granted.

27 **I. INTRODUCTION**

28 Plaintiffs’ lawsuit challenges certain aspects of San Francisco’s official response to

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1 homelessness, including its coordinated effort among different agencies beginning in 2018 to  
 2 respond to and close homeless encampments, informally called “sweeps.”<sup>1</sup> Plaintiffs seek a  
 3 preliminary injunction for two of their claims: (1) that Defendants violate the Eighth Amendment  
 4 to the U.S. Constitution by imposing civil and criminal penalties on homeless persons “for the  
 5 involuntary act of sleeping outside” without offering shelter, and (2) that Defendants violate the  
 6 Fourth Amendment by confiscating and destroying homeless persons’ property without providing  
 7 notice or an adequate means to retrieve such property. *See* Mot. 2.

8 Plaintiff Coalition on Homelessness (“the Coalition”) has spent the last three years  
 9 documenting HSOC’s alleged unconstitutional practices.<sup>2</sup> *See id.* at 1. Plaintiffs submitted a  
 10 substantial body of evidence with their motion: six declarations by Coalition staff members and  
 11 volunteers, five of whom describe their personal observations of well over 125 planned HSOC  
 12 encampment closures and other informal “sweep” interactions between San Francisco and its  
 13 homeless residents; declarations by Plaintiffs Castaño, Cronk, Donohoe, Frank, Martinez,  
 14 Sandoval, and Vaughn regarding their experiences with encampment closures, interactions with  
 15 SFPD, and the seizure and destruction of their property by DPW; declarations by an additional 18  
 16 current or formerly homeless residents of San Francisco; a declaration by a former HSH employee  
 17 who participated in closures; a 106-paragraph declaration by Plaintiffs’ expert Christopher John  
 18 Herring, Ph.D.; and documentary evidence, including documents obtained via public records

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19  
 20 <sup>1</sup> Plaintiffs use the term “sweeps.” Defendants refer to these events as “homeless encampment  
 21 resolutions” or “HSOC engagements.” *See* Opp’n 4. The court will use “encampment closures.”

22 Plaintiffs use the terms homeless, unhoused, and unsheltered when referring to individuals  
 23 experiencing homelessness. The complaint states that it “uses the term ‘homeless’ to encompass  
 24 persons who are both ‘unhoused,’ that is, without a fixed residence, and ‘unsheltered,’ that is both  
 25 unhoused and without physical shelter.” Compl. 1 n.1. For simplicity, the court uses “homeless  
 26 persons” or “homeless individuals” throughout this opinion unless directly quoting material that  
 27 uses a different term.

28 <sup>2</sup> The Coalition is an advocacy organization of, by, and for “unhoused people in San Francisco.”  
 [Docket No. 9-3 (Friedenbach Decl., June 28, 2022) ¶ 6.] According to its executive director, the  
 Coalition was established to “research, plan, and monitor long-term strategies to alleviate  
 homelessness in” San Francisco and seeks “to find permanent solutions to homelessness while  
 recognizing the dignity and human rights of unhoused people.” *Id.* at ¶ 2. There are currently 50-  
 60 active members of the Coalition, at least 70% of whom are presently experiencing  
 homelessness. *Id.* at ¶ 8.

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1 requests.<sup>3</sup> [Docket No. 9-2 (Della-Piana Decl., Sept. 26, 2022).] Plaintiffs submitted additional  
2 evidence, including declarations, with their reply.<sup>4</sup> [Docket No. 50 (Shroff Decl., Dec. 1, 2022).]

3 In opposition, Defendants submitted nine declarations by employees of the relevant San  
4

5 <sup>3</sup> Defendants made various objections to Plaintiffs’ evidence. They argue that declarations by the  
6 Coalition’s staff and volunteers “are riddled with inadmissible hearsay” and are “vague and  
7 conclusory.” Opp’n 16. These objections are overruled. As to the hearsay objection, “it is well  
8 established that district courts may ‘consider hearsay in deciding whether to issue a preliminary  
9 injunction.’” *Garcia v. City of Los Angeles*, 481 F. Supp. 3d 1031, 1035 n.2 (C.D. Cal. 2020)  
10 (quoting *Johnson v. Couturier*, 572 F.3d 1067, 1083 (9th Cir. 2009)); *see also Flynt Distrib. Co. v.*  
11 *Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984) (“[t]he urgency of obtaining a preliminary injunction  
12 necessitates a prompt determination and makes it difficult to obtain affidavits from persons who  
13 would be competent to testify at trial. The trial court may give even inadmissible evidence some  
14 weight, when to do so serves the purpose of preventing irreparable harm before trial.”). The court  
15 has considered all of the evidence submitted by both sides and assigns the appropriate weight to  
16 evidence that would otherwise be inadmissible under the Federal Rules of Evidence. As to the  
17 “vague and conclusory” objection, it is so unspecific as to be meaningless. In any event, as set  
18 forth in this order, the court does not rely on any vague and conclusory statements in ruling on this  
19 motion.

20 Defendants also argue that “[m]uch of plaintiffs’ percipient testimony is stale, describing  
21 events more than a year old,” as are documents that “relate to conditions that existed prior to  
22 2022.” *Id.* at 15-16. According to Defendants, “in light of the shifting impact of Covid-19 on San  
23 Francisco’s delivery of homeless services, events prior to 2022 are not probative of current  
24 conditions and therefore cannot support” the motion. Opp’n 15. This is the extent of Defendants’  
25 “staleness” argument. They do not argue that they have changed any of their relevant policies or  
26 practices with respect to encampment closures or any other challenged conduct. They do not  
27 provide any detail as to why evidence of conduct prior to 2022 lacks probative value or submit any  
28 evidence demonstrating the same. Defendants’ failure to explain the basis for their objection is  
particularly notable in light of the fact that they had plenty of room to explain themselves. Their  
opposition brief was only 18 pages long, seven pages less than the applicable page limit. *See* Civ.  
L.R. 7-3(a). Moreover, Plaintiffs submitted a supplemental declaration by Dr. Herring with the  
reply in which he addresses new data from 2022 (which Defendants produced after Plaintiffs filed  
the motion) and states that the trends he analyzed and the conclusions he reached in his initial  
declaration “are confirmed” by the 2022 data. He “re-iterate[s] [his] initial findings in full based  
on the 2022 data,” thus putting to rest Defendants’ staleness argument. [Docket No. 49 (Supp.  
Herring Decl., Nov. 30, 2022) ¶¶ 4, 5.] The objection is overruled.

Defendants also object to each of the five opinions offered by Dr. Herring, although they  
do not object to his qualifications or the accuracy of the data underlying his opinions. Opp’n 16-  
18. The court addresses these objections below in its discussion of Dr. Herring’s declaration.

<sup>4</sup> Defendants filed objections to Plaintiffs’ reply evidence on December 13, 2022, 12 days after  
Plaintiffs filed their reply. [Docket No. 51.] The court declines to consider Defendants’  
objections, which were filed five days late. *See* Civ. L.R. 7-3(d)(1) (“[i]f new evidence has been  
submitted in the reply, the opposing party may file and serve an Objection to Reply Evidence . . .  
no more than 7 days after the reply was filed.”). The court also notes that Defendants’ objections  
are not limited to the evidence submitted with Plaintiffs’ reply; the filing improperly includes  
expanded argument supporting the objections to evidence Defendants initially raised in their  
opposition. *See id.* (“an Objection to Reply Evidence . . . may not include further argument on the  
motion.”).

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1 Francisco agencies, as well as a declaration by counsel. On reply, Plaintiffs submitted a  
2 supplemental declaration by their expert, Dr. Herring, along with four declarations by Coalition  
3 staff members and volunteers and an associated investigator, four declarations by homeless  
4 individuals, and two declarations by former San Francisco employees.

5 **II. FACTUAL BACKGROUND**

6 **A. San Francisco’s Shelter Bed Shortage and the Lack of Avenues to Access  
7 Shelter Beds**

8 It is undisputed that San Francisco does not have enough available shelter beds for all  
9 homeless San Franciscans. The United States Department of Housing and Urban Development  
10 (“HUD”) requires all communities that receive federal funding for homeless services to regularly  
11 conduct a Point-in-Time (“PIT”) Count of “people experiencing homelessness.” *See* San  
12 Francisco Homeless Count and Survey 2022 Comprehensive Report at 4, available at  
13 <https://hsh.sfgov.org/about/research-and-reports/pit-hic/> (last visited Dec. 22, 2022). On February  
14 23, 2022 (the date of the 2022 PIT Count) there were 7,754 homeless individuals residing in San  
15 Francisco. Della-Piana Decl. ¶ 10, Ex. 7 at 19. [*See also* Docket No. 45-2 (Cohen Decl., Nov. 10,  
16 2022) ¶ 5.] However, San Francisco reported having 5,080 shelter beds in 2021, the last year that  
17 it reported on its total shelter bed availability, which amounts to a shortage of 2,674 beds. Della-  
18 Piana Decl. ¶ 9, Ex. 6 at 3.<sup>5</sup>

19 Plaintiffs’ expert Dr. Herring states that the 2,674 figure for San Francisco’s 2022 shelter  
20 bed shortage is likely higher. According to Dr. Herring, there is a consensus among academics  
21 and policymakers that PIT Counts of homeless individuals are “always an undercount and  
22 conservative number” due to difficulties counting homeless individuals. [Docket No. 9-1 (Herring  
23 Decl., Sept. 24, 2022) ¶ 24.] He also states that the 5,080 available shelter beds reported by San  
24 Francisco for 2021 “is not a meaningful indication of currently available shelter beds,” because

25 \_\_\_\_\_  
26 <sup>5</sup> Emily Cohen, HSH’s Deputy Director for Communications & Legislative Affairs, states that a  
27 2022 HUD Housing Inventory count identified 4,322 shelter beds. Cohen Decl. ¶ 6. She also  
28 states that “[b]y the end of 2022 HSH plans to open approximately 1,000 shelter beds through a  
combination of new programs and reopening or expanding programs that had been closed or  
curtailed during Covid” but does not provide any details about the status of the new shelter beds.  
*See id.* at ¶ 12.

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1 2,263 of the 5,080 available shelter beds are part of the City’s Shelter-in-Place hotel programs and  
 2 are being phased out in fiscal year 2021-2022. According to Dr. Herring, a more accurate count of  
 3 shelter beds that are available to homeless people in San Francisco is reflected in the 2019 pre-  
 4 pandemic count of 3,493 shelter beds. Herring Decl. ¶¶ 26, 27; *see also* Cohen Decl. ¶ 19  
 5 (confirming that “HSH is winding down the Shelter-in-Place Hotel program.”). He states that  
 6 “[b]y that metric, shelter beds are effectively at capacity because there are approximately 3,357  
 7 individuals presently in shelter on any given night in 2022.” Herring Decl. ¶ 27; *see* Della-Piana  
 8 Ex. 7 at 19. Dr. Herring opines that San Francisco’s current “shelter bed shortage is likely to be  
 9 closer to approximately 4,261 beds (7,754 reported unhoused individuals – 3,493 permanent  
 10 shelter beds),” and could be higher if the 2022 PIT Count underreported the number of homeless  
 11 individuals. Herring Decl. ¶ 28. In fact, the City itself counted 4,397 homeless individuals who  
 12 were “unsheltered” in 2022.<sup>6</sup> Della-Piana Decl. Ex. 7 at 19; Cohen Decl. ¶ 5.

13 This substantial shortfall of shelter beds is not a new phenomenon. On January 24, 2019,  
 14 the date of the last full PIT Count, there were 8,035 homeless individuals in San Francisco, while  
 15 the City had only 3,493 shelter beds available that year. Approximately 5,180 homeless  
 16 individuals were unsheltered in 2019. *See* Della-Piana Decl. ¶¶ 8, 9, Ex. 5 at 10; Ex. 6 at 1  
 17 (explaining that San Francisco did not perform a full PIT Count in 2021 due to the impact of  
 18 COVID-19); Ex. 6 at 4.

19 Dr. Herring states that at the present time, “unhoused people seeking shelter in San  
 20 Francisco no longer have any immediate shelter options available to them because the traditional  
 21 avenues to seek shelter are closed.” Herring Decl. ¶ 32. Prior to the start of the COVID-19  
 22 pandemic, homeless individuals could access shelters via “the 311 waitlist and same-day lines,”  
 23 even though supply never met demand. Between January 2015 and March 2020, the 311 waitlist  
 24 for a 90-day bed was “nearly always over 1,000 people.” *Id.* at ¶ 29. Based on Dr. Herring’s

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26 <sup>6</sup> The 4,397 figure is from the San Francisco Homeless Count and Survey 2022 Comprehensive  
 27 Report. The report sets forth 7,754 as the total number of “persons experiencing homelessness” in  
 28 San Francisco as of February 23, 2022 and states that 4,397 of these individuals are “unsheltered,”  
 although it does not define that term. Della-Piana Decl. Ex. 7 at 19. In any event, San Francisco  
 appears to admit in this report that it currently lacks shelter space for at least 4,000 individuals.

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1 experience, this means the wait time to receive a shelter bed was usually between three to eight  
2 weeks and beds for one-night stays were “functionally full.” Herring Decl. ¶ 29. Homeless  
3 individuals could also wait in a same-day line, but “most waits involved standing in line or sitting  
4 in chairs for two to eight hours before receiving a bed, without any guarantee” of a bed, and “[o]n  
5 most nights anywhere from fifty to over one-hundred people would be left in line or sleeping in  
6 chairs waiting for a bed.” *Id.*

7 After the start of the pandemic, San Francisco closed the 311 waitlist and individuals can  
8 “no longer access same-day shelter beds at point of access as they could at least try to do prior to  
9 April 2020.” *Id.*

10 **B. Encampment Closures**

11 San Francisco’s HSH manages the City’s “homelessness response system.” Cohen Decl. ¶  
12 8. HSH partners with other agencies, including the Department of Public Health (“DPH”), DPW,  
13 DEM, SFPD, and SFFD, to provide homeless services. *Id.* at ¶ 4. San Francisco’s Homeless  
14 Outreach Team (“SFHOT” aka “HOT team”) “provides citywide outreach seven days a week,  
15 connecting individuals living outside with available and appropriate resources, through outreach,  
16 engagement, and case management,” including shelter placements in coordination with  
17 encampment closures. *Id.* at ¶ 9.

18 San Francisco established HSOC in 2018 “to coordinate the City’s response to both  
19 homeless encampments and to behaviors that impact quality of life, such as public drug use and  
20 sales.” Della-Piana Decl. ¶ 14, Ex. 11 at 3. “HSOC’s primary activity is conducting large  
21 encampment field operations.” [Docket No. 45-4 (Dodge Decl., Nov. 14, 2022) ¶ 2.] HSOC “is  
22 structured as a unified command with representatives of City departments all in one room,”  
23 including HSH, DPH, SFPD, DPW, and DEM. Della-Piana Decl. Ex. 11 at 3; Ex. 12 at 4. HSOC  
24 conducts several encampment closures each week. According to HSOC Director Sam Dodge,  
25 “[t]he goals of an HSOC engagement are to conduct outreach to clients, offer services and housing  
26 to clients, remove hazardous or abandoned tents, structures, and vehicles, and clean and secure the  
27 site after campers have relocated.” Dodge Decl. ¶ 7.

28 Two key policies govern San Francisco’s actions with respect to encampment closures and

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1 other agency interactions with homeless individuals: 1) an SFPD Department Bulletin that  
2 specifies the “legal enforcement options for addressing lodging and illegal encampments” in San  
3 Francisco and 2) DPW’s Bag and Tag Policy governing personal items collected from public  
4 property.

5 **1. SFPD Enforcement Bulletin**

6 SFPD Bulletin 19-080, dated April 16, 2019, describes “four categories of laws that  
7 various City personnel may enforce to address lodging or encampments,” including “criminal laws  
8 prohibiting sitting, lying, and lodging.” Della-Piana Decl. ¶ 31, Ex. 27 (“SFPD Enforcement  
9 Bulletin”); see Opp’n 9 (discussing the bulletin). Altogether, the bulletin discusses 15 laws and  
10 ordinances. These include California Penal Code section 647(e), which provides that “every  
11 person . . . [w]ho lodges in any building, structure, vehicle, or place, whether public or private,  
12 without the permission of the owner or person entitled to the possession or in control of it” is  
13 “guilty of disorderly conduct, a misdemeanor[.]” SFPD Enforcement Bulletin 2. The bulletin  
14 explains restrictions on SFPD’s enforcement of section 647(e) and emphasizes that “[o]fficers  
15 **must secure appropriate shelter before taking enforcement action under Penal Code Section**  
16 **647(e).**” *Id.* at 2 (emphasis in original); see also *id.* (“[o]fficers shall notify [HSOC] and secure  
17 shelter or a navigation center bed.”). It instructs that “[i]f there is no shelter or navigation center  
18 bed available, officers may not issue a citation or seize the encampment/tent.” *Id.* at 3.

19 The bulletin also describes “Prop Q,” which is codified in San Francisco Police Code  
20 section 169 as “a non-criminal prohibition on encampments on City sidewalks that DPW, DPH, or  
21 DSHS may enforce.” *Id.* at 3. Section 169 provides that “[i]n the City and County of San  
22 Francisco, it is unlawful to place an Encampment upon a public sidewalk.” S.F., Cal., Police Code  
23 § 169(c). The bulletin specifies that “officers may cite an individual for violating [California]  
24 Penal Code § 148(a)”<sup>7</sup> when an “individual refuses to vacate an encampment so that DPW may

25 \_\_\_\_\_  
26 <sup>7</sup> California Penal Code section 148(a) provides that “[e]very person who willfully resists, delays,  
27 or obstructs any public officer, peace officer, or an emergency medical technician . . . in the  
28 discharge or attempt to discharge any duty of his or her office or employment . . . shall be  
punished by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in a county  
jail not to exceed one year, or by both that fine and imprisonment.”

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1 remove it” if “the City has complied with the requirements for enforcing Prop Q[.]” Pursuant to  
2 the bulletin, “DPW, DPH, and DSHS must provide a written offer of shelter or housing at least 24  
3 hours before ordering the removal of a tent or encampment,” and “must provide at least 24-hour  
4 written notice to vacate.” SFPD Enforcement Bulletin 3.

5 The bulletin advises that Penal Code § 148(a) “prohibits any person from willfully  
6 resisting, delaying, or obstructing DPW, DPH, and ... DSHS personnel or any other public officer  
7 or peace officer who is discharging or attempting to discharge an official duty, including the  
8 enforcement of any of the [15] above mentioned laws.” *Id.*

9 **2. Bag and Tag Policy**

10 DPW’s Procedure No. 16-05-08 REV 03 governs “Removal and Temporary Storage of  
11 Personal Items Collected From Public Property . . . commonly known as ‘bag and tag.’” [Docket  
12 No. 62-1 (Bag and Tag Policy, effective Nov. 2022).]<sup>8</sup> The policy sets forth the circumstances in  
13 which personal items may be “remov[ed] . . . from public property for temporary storage and  
14 retrieval.” It provides that “all unattended personal property that is collected for storage will be  
15 bagged and tagged upon collection and taken to the Public Works Operations Yard for storage.”  
16 Bag and Tag Policy 1. DPW staff must collect the personal items and “while in the field  
17 document[ ] the collection with a personal property collection bag and tag intake form,” which  
18 specifies the date and time the items were collected, the number of items or bags, a description of  
19 the items, the location at which the items were collected, the owner’s name, and the names of  
20 DPW workers and SFPD officers, if applicable, among other information. *Id.* at 2, 3. The policy  
21 provides that DPW stores personal items for 90 days and describes the process for retrieval. *Id.* at  
22

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23 <sup>8</sup> Plaintiffs submitted a version of the bag and tag policy dated December 2016 with their motion  
24 (Della-Piana Decl. Ex. 26) but also referred to an “apparently revised, but unpublished” version of  
25 the policy that “purport[ed] to include even more expansive protections” for individuals’ personal  
26 property. Mot. 13 n.3; Della-Piana Decl. ¶ 16. The court ordered the parties to submit the revised  
27 version of the policy before the hearing. [Docket No. 60.] In response, Plaintiffs submitted a  
28 version of the bag and tag policy labeled Procedure No. 16-05-09 REV02. [Docket No. 61.]  
Defendants submitted a third version of the policy, labeled Procedure No. 16-05-08 REV 03, and  
represented at the hearing that San Francisco published the third version in September 2022 and is  
currently training employees on that version. [Docket No. 62.] Defense counsel also represented  
to the court that the second and third versions of the bag and tag policy are substantively the same.  
The court’s discussion of Plaintiffs’ Fourth Amendment claim will use the latest version of the bag  
and tag policy.

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4.

According to the policy, “[t]here is no limit to the number or volume of personal items that Public Works will bag and tag for a particular individual” as long as they do not constitute items that may be discarded. Bag and Tag Policy 2. The policy authorizes DPW to discard “[i]tems that present an immediate health or safety risk”; “[p]erishable items, perishable food”; and “[a]bandoned property,” as defined in the policy, among other categories. *Id.* at 2. It also states that “[t]rash, garbage, and/or debris” will be discarded and that “[i]f staff has a reasonable doubt as to whether an item constitutes trash, it should be collected and stored.” *Id.*

The policy distinguishes between unattended and abandoned property:

Temporarily unattended property is different from abandoned property, which may be immediately discarded. In determining if property is abandoned, staff should evaluate the facts and circumstances surrounding the items. Unattended property is not abandoned if it is accompanied by signs of ownership—for example, an unattended tent that is filled with personal belongings or items that are being stored in an orderly manner (i.e., packed up, wrapped or covered).

In addition, if there is a third party present who states they have been designated to watch or secure the items during the owner’s temporary absence, the items are not abandoned and are attended property . . .

*Id.* at 1. In contrast, abandoned property is that which is “unaccompanied by objective indications of ownership.” The bag and tag policy does not apply to abandoned property.

The bag and tag policy also provides guidance for the process to be followed in “encampment resolutions.” In such cases, the policy states

Staff should (a) provide the owner or person who is watching the owner’s property with a reasonable time (approximately 30 minutes) to collect and move his/her belongings, taking into account any special needs that individuals may have and the volume of belongings, (b) bag and tag those personal items that the owner or owner’s designee cannot or does not remove him/herself, and (c) provide information on how and where the items may be retrieved. HSOC staff must provide the advisement concerning medications, medical devices, and personal identification and documents discussed . . . in subsection b.

*Id.* at 1-2. Subsection b, in turn, states that “[p]rior to bagging and tagging,” HSOC staff “must advise the owner or owner’s designee to separate any medications, medical devices, personal

1 identification and legal documents.” Bag and Tag Policy 1.

### 2 3. The Timeline of Encampment Closures

3 Both parties submitted evidence explaining how encampment closures occur. Their  
4 accounts deviate in critical ways. The court now summarizes each parties’ description.

#### 5 a. Defendants’ Evidence

6 Defendants describe typical encampment closures as follows: HSOC conducts five to ten  
7 closures per week, Monday through Friday. They take place twice per day, from 7:00 am-11:00  
8 am in the morning and from 1:00 pm-3:00 pm in the afternoon. [Docket Nos. 45-11 (Nakanishi  
9 Decl., Nov. 14, 2022) ¶ 4; 45-12 (Piastunovich Decl., Nov. 15, 2022) ¶ 4.] HSOC Director Dodge  
10 states that he circulates a proposed schedule of times and locations for encampment closures on a  
11 weekly basis to the participating departments, including projected shelter needs for each closure.  
12 The schedule is finalized on Wednesdays after consultation with participating departments.  
13 Dodge Decl. ¶ 9. According to Dodge, the “HSH guest placement services team” receives  
14 projected shelter needs on Wednesday or Thursday of each week, and uses the projection to  
15 “inform[ ] HSH’s shelter allocations during the following week.” *Id.*

16 According to San Francisco’s witnesses, SFHOT workers perform outreach at the  
17 encampments the weekend before the scheduled closure. They post notices of upcoming closures  
18 on tents, utility posts, trees, and/or walls, provide verbal notice of the planned closures, and  
19 explain what to expect on the day of the closure. Nakanishi Decl. ¶ 5; Piastunovich Decl. ¶ 5, Exs.  
20 A (template for written notice), B (photos of posted notices in 2022); Dodge Decl. ¶ 12. SFHOT  
21 workers also “assess clients for housing and interest in shelter or other services and explain the  
22 process for accessing shelter.” Piastunovich Decl. ¶ 5.

23 HSH’s template for written notice includes the date and location of the upcoming closure  
24 and states, “[d]uring the encampment resolution, we will provide access to shelter, safe sleeping  
25 villages, and/or hotels based on eligibility,” as well as other services. The written notice states  
26 that “during the resolution, [DPW] will clean the sidewalks and street. **Any personal property**  
27 **that is left at the encampment will be removed and taken to the Public Works Operations**  
28 **Yard at 2323 Cesar Chavez Street**” and provides instructions for how to retrieve property that

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1 has been removed. Piastunovich Decl. Ex. A (emphasis in original). The notice also lists the  
2 types of items that will not be stored and that may be discarded, including “(1) items that present  
3 an immediate threat to public health or safety . . . , (2) items that are evidence of a crime, (3) trash,  
4 (4) perishable food, and (5) bulky items (i.e., furniture, mattresses, sheds, structures, and pallets),  
5 except for tents and operational bicycles, walkers, crutches, wheelchairs.” *Id.*

6 Additionally, Defendants state that 24-72 hours before each encampment closure, outreach  
7 workers from the Felton Engagement Specialist Team (“FEST”) visit the location, “engage  
8 everyone on-site to assess their health and interest in any treatment or other services, and remind[ ]  
9 people of the upcoming” closure. [Docket No. 45-8 (Horky Decl., Nov. 9, 2022) ¶ 11.] FEST  
10 workers then report to DPH in advance of the closure “about behavioral needs . . . among people  
11 at the encampment” so that DPH can “provide behavioral health resources matching the needs of  
12 the clients at the site.” *Id.*; Dodge Decl. ¶ 13.<sup>9</sup>

13 To conduct encampment closures, HSOC assembles “field teams” which consist of an  
14 SFFD paramedic who serves as the “incident commander,” two to four SFHOT workers, one DPH  
15 clinician, zero to six police officers, four to eight DPW street cleaners, and two parking control  
16 officers. Dodge Decl. ¶ 8.<sup>10</sup> [See also Docket No. 45-7 (Hardiman Decl., Nov. 14, 2022) ¶¶ 2, 3  
17 (describing role of “HSOC Incident Commander”).] On the morning of an encampment closure,  
18 the field team meets at 7:00 am at the site. Dodge Decl. ¶ 15; Nakanishi Decl. ¶ 6. HSH’s  
19 Encampment Resolution Team (“ERT”), which consists of four SFHOT workers, “begins  
20 engaging with clients and assessing what services they may be interested in being connected to,  
21 including shelter” by 7:30 am. Nakanishi Decl. ¶ 6; Dodge Decl. ¶ 15; Piastunovich Decl. ¶ 6.  
22 According to Defendants, DPW workers typically do not arrive at the encampment until 8:00 am  
23 or later, after ERT has begun its outreach. Nakanishi Decl. ¶ 10. [See also Docket No. 45-3  
24

25 \_\_\_\_\_  
26 <sup>9</sup> DPH contracts with the Felton Institute to provide services via FEST. “FEST is comprised of  
27 Engagement Specialists who . . . provide outreach and service linkage to support clients by  
28 addressing any combination of substance use, mental health, and physical health needs.” Horky  
Decl. ¶ 10; Dodge Decl. ¶ 14.

<sup>10</sup> Field teams for closures that take place in the afternoon are smaller. They do not include a DPH  
clinician and include only one DPW street cleaner. Dodge Decl. ¶ 8.

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1 (Dilworth Decl., Nov. 15, 2022) ¶ 5.]

2 During this initial contact between the residents and ERT, ERT “has not yet confirmed . . .  
3 the specific shelters that are available.” Opp’n 6. “The expectation is at 8:30 a.m., HSH notifies  
4 HSOC of the available shelter allocated to HSOC. While there can be a delay in notification due  
5 to the HSH placement team’s process of obtaining shelter availability, HSOC is generally notified  
6 by 9:00 a.m. at the latest.” Nakanishi Decl. ¶ 7. There is a daily meeting at 9:30 am “where  
7 HSOC can confirm its allocations with HSH placement and request additional or specific  
8 allocations.” *Id.*; Dodge Decl. ¶ 17. If an individual is interested in shelter, “ERT takes their  
9 information, including any preference for any specific shelter or type of shelter.” Piastunovich  
10 Decl. ¶ 6. Once HSH notifies HSOC “of the specific available shelter resources allocated to  
11 HSOC . . . ERT then circles back around to clients to discuss with them the specific shelter  
12 resources available that day, which shelter they want, and confirm their placement.” *Id.* After  
13 ERT confirms an individual is accepting a shelter placement, HSOC confirms the referral and  
14 ERT coordinates transportation to the shelter. Nakanishi Decl. ¶ 9. Since most shelter sites do not  
15 open for intake until 10:00 am, transportation does not begin until 9:45 am. *Id.*

16 Defendants assert that “DPW does not begin its responsibilities until ERT has conducted  
17 its outreach” and that “DPW relies on ERT to engage the clients to determine how much time the  
18 clients need to gather the [sic] move their belongings.” Nakanishi Decl. ¶ 10. According to  
19 Dodge, “DPW staff begin cleaning the area, disposing of abandoned property, bagging and  
20 tagging, and cleaning the streets” between 9:30 am and 10:00 am, Dodge Decl. ¶ 20, “only after  
21 [DPW] is given the go-ahead by HSOC.” Dilworth Decl. ¶ 5. While DPW waits for the go-ahead  
22 from the Incident Commander, its crews perform other street cleaning duties around the  
23 encampment’s perimeter, including disinfecting and steam cleaning sidewalks. Dilworth Decl. ¶  
24 5; Hardiman Decl. ¶ 4.

25 Darryl Dilworth, a DPW operations supervisor, states that “[w]hen cleaning an  
26 encampment, [DPW] only removes garbage and discarded debris,” and onsite supervisors decide  
27 which items must be removed and stored pursuant to the bag and tag policy. Dilworth Decl. ¶ 6.  
28 Additionally, Dilworth states that DPW “does not set time limits on removals . . . [and] [a]ny

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1 requests for more time to pack personal belongings are offered strictly by HSOC team members . . .  
2 .” Dilworth Decl. ¶ 7. According to Dilworth, “[w]hen items are bag and tagged . . . a homeless  
3 property information slip is filled out completely; [and] the items are bagged, tagged and brought  
4 back to a secured encampment items storage container.” DPW then provides the owner with  
5 information about how to retrieve the items, and if no one is present during the bag and tag, DPW  
6 tapes a Public Works Notice of Removal of Property slip to a pole, wall, or safety cone in the  
7 immediate vicinity. *Id.* at ¶ 8.

8 Finally, SFPD Lieutenant Sam Christ, the SFPD liaison to HSOC, states that he “assign[s]  
9 police support to” planned encampment closures “to provide safety and security for city  
10 employees, for the individuals at the encampment, and for any bystanders.” [Docket No. 45-1  
11 (Christ Decl., Nov. 7, 2022) ¶ 3.] At closures, “SFPD officers respond to questions from the  
12 public, deescalate any conflicts that may arise, and enforce the law consistent with [the SFPD  
13 Enforcement Bulletin], when requested to do so.” *Id.*

14 **b. Plaintiffs’ Evidence**

15 **i. Coalition Employees and Volunteers**

16 Plaintiffs’ evidence regarding the conduct of encampment closures is strikingly different  
17 from Defendants’. Plaintiffs rely on declarations from Coalition staff members and volunteers  
18 who have observed significant numbers of planned HSOC encampment closures. *See* Della-Piana  
19 Decl. Ex. 1 (Coalition Declarations).<sup>11</sup> Kelly Cutler, who worked for the Coalition from 2016  
20

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21 <sup>11</sup> Plaintiffs also submit a declaration by Damon Bennett, a former San Francisco employee who  
22 led SFHOT during encampment closures for two months in 2021. [Docket No. 9-5 (Bennett  
23 Decl., Nov. 15, 2021).] Defendants object that Bennett “lacks credibility because [he] is a  
24 disgruntled former employee who threatened HSH staff and behaved violently . . . when he was  
25 terminated.” Opp’n 15 n.5 (citing Mazza Decl., Nov. 14, 2022). The court has given the  
26 declaration appropriate weight given the circumstances of Bennett’s termination. However,  
27 Defendants do not address the substance of Bennett’s declaration, which corroborates those  
28 submitted by the Coalition’s witnesses. For example, Bennett states that he “never once saw”  
written notices posted at an encampment closure; that SFHOT members “had no idea whether  
there were shelter beds available to accommodate the homeless people onsite” when they told  
individuals to vacate the area; that he “almost never saw DPW bag and tag property,” which was  
in violation of protocol; and that SFPD threatened to cite individuals if they did not leave the area.  
Bennett Decl. ¶¶ 6, 8, 9, 12. Bennett also states that “[o]ften a couple days each week, there  
would be absolutely nothing to offer homeless individuals who had been swept—not even a  
congregate shelter bed.” *Id.* at ¶ 17.

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1 through May 2022, states that she has “witnessed well over a hundred” encampment closures in  
 2 San Francisco. Cutler Decl., Aug. 5, 2022, ¶¶ 4, 6, 7. Christin Evans, a small business owner and  
 3 Coalition volunteer, has “witnessed over 50 large-scale homelessness” encampment closures since  
 4 March 2020. Evans Decl., Nov. 5, 2021, ¶¶ 3, 7, 10. Carlos Wadkins, a former Coalition  
 5 organizer, trained Coalition volunteers on how to observe and monitor encampment closures. He  
 6 “personally witnessed at least a dozen large-scale homeless” encampment closures. Wadkins  
 7 Decl., May 25, 2022, ¶¶ 3, 7, 12. Larry Ackerman has been a Coalition volunteer since 2019. He  
 8 has “personally witnessed . . . at least ten sweeps of unhoused people and their belongings.”  
 9 Ackerman Decl., Apr. 4, 2022, ¶ 6. Finally, Ian James is the Coalition’s Organizing Director. He  
 10 has “personally witnessed several sweep operations” since 2021, and “three full-scale [HSOC]  
 11 sweeps” since July 2022. James Decl., Sept. 16, 2022, ¶¶ 2, 7.

12 Evans states that encampment closures begin early, around 6:50 am or 7:00 am., and that  
 13 SFPD and DPW are often arriving around that time. “SFPD and DPW are often the teams to make  
 14 first contact—letting homeless people know there is a sweep that day and that they need[ ] to clear  
 15 out their belongings and go.” Evans Decl. ¶ 12; Wadkins Decl. ¶ 18. According to Wadkins,  
 16 “DPW and SFPD will walk through the street, waking people up by shouting or shaking their  
 17 tents” and telling them to leave. Wadkins Decl. ¶ 18; Evans Decl. ¶ 13 (“I have seen most people  
 18 learn about a sweep for the first time when DPW or SFPD starts shaking them out of their tents at  
 19 7AM.”). Wadkins states that he has “heard countless reports from unhoused people that they  
 20 never received advanced written or verbal notice that an HSOC sweep was happening,” or that the  
 21 notice they received specified a different day. Wadkins Decl. ¶ 17. Similarly, Evans states that  
 22 “homeless people have rarely received notice” of the encampment closure prior to that date;  
 23 according to Evans, she has “never seen written notice posted at the site where an HSOC sweep is  
 24 taking place” in about 50 sweeps she has observed. Evans Decl. ¶ 13. Ackerman has seen written  
 25 notice posted at a site only once in ten encampment closures that he has witnessed. Evans states  
 26 that “[t]he lack of notice only increases the stress and anxiety of the experience. Individuals do  
 27 not know to pack their belongings—and then are in a frenzy to do so.” Evans Decl. ¶ 13.

28 According to the Coalition’s witnesses, SFHOT workers arrive around 7:30 am, after the

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1 DPW and SFPD representatives are already on site. Their job is to approach homeless individuals  
 2 and ask if they are interested in shelter. However, SFHOT has no idea if it can offer shelter to any  
 3 individuals onsite at that time, or if any shelter will become available that day at all. Wadkins  
 4 Decl. ¶ 18; Cutler Decl. ¶ 11; Evans Decl. ¶ 14; James Decl. ¶ 10. According to Cutler, “many  
 5 unhoused people will tell the HOT team that they want shelter” at 7:30 am, while others wait to  
 6 confirm what shelter options are actually available for them before they begin packing up their  
 7 belongings. However, based on Cutler’s conversations with homeless people and City workers  
 8 onsite, SFHOT “will often report that these individuals have declined shelter—even though HOT  
 9 team does not know what shelter will be available, has not made a shelter offer to anyone at this  
 10 time, and cannot answer their questions.” Cutler Decl. ¶ 12. James explains that he has seen San  
 11 Francisco “force people to choose between keeping their property and accessing shelter.” For  
 12 example, on one occasion, he observed that a homeless woman was interested in a congregate  
 13 shelter space but asked if she could place her belongings in a storage unit while she was in the  
 14 shelter. According to James, “[s]he was told that, if she left to arrange for a storage unit, the City  
 15 could not guarantee that her belongings would be there when she returned.” The woman declined  
 16 the shelter bed “because there was no way to protect her personal property.” James Decl. ¶ 17.

17 After speaking with residents, SFHOT then leaves for “several hours.” Cutler Decl. ¶ 12;  
 18 Evans Decl. ¶ 14; Wadkins Decl. ¶ 19; James Decl. ¶ 12. By 8:00 am, “the sweep begins.” Cutler  
 19 Decl. ¶ 13; Evans Decl. ¶ 15; Wadkins Decl. ¶ 19. Residents of the encampment “are told that  
 20 they need to take all of their belongings and leave the area immediately” while SFPD stands  
 21 watch. Cutler Decl. ¶ 13. DPW typically begins power washing the street, which is very loud.  
 22 According to Cutler, “the noise creates an intense environment” and makes it difficult for residents  
 23 to communicate with City workers, including asking to keep their belongings. *Id.* After a first  
 24 round of cleaning, “DPW then goes person by person, and tells people to clear out. They inform  
 25 homeless people that everything they leave behind will be thrown out,” which causes people to  
 26 rush. Wadkins Decl. ¶ 19. “Whatever homeless individuals do not have physically in their hands  
 27 usually gets picked up and put in the back of a DPW crusher truck—meaning that it is going  
 28 straight to the dump.” Cutler Decl. ¶ 15; Evans Decl. ¶ 15 (same). No one is allowed to recover

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1 property once it has been placed in the back of a truck. Evans Decl. ¶ 15; Ackerman Decl. ¶ 8  
2 (“Once DPW touches something or puts it in their truck, they claim it as theirs and there is no way  
3 to retrieve it—even if an individual is present and makes it clear that the items taken were not  
4 trash.”). According to Evans, “[a]ll unattended property, not just abandoned property, is  
5 destroyed,” regardless of “how neatly packed or clear it is that a person wanted to keep their  
6 property.” Evans Decl. ¶ 23. James states that “[t]here is confusion and chaos as people try to  
7 gather their survival belongings and protect them from being confiscated by the City.” James  
8 Decl. ¶ 13.

9 Ackerman, Wadkins, and James state that they have never seen DPW bag and tag  
10 individuals’ property or hand someone a tag informing them how they could collect their property.  
11 Ackerman Decl. ¶ 8; Wadkins Decl. ¶ 27; James Decl. ¶ 15; *see also* Cutler Decl. ¶ 22 (“I have  
12 almost never seen DPT bag and tag any individuals’ property”). Instead, Cutler states that she has  
13 “far more regularly seen City employees confiscate individual’s [sic] belongings and either throw  
14 those belongings out or throw them into DPW crusher trucks—over the objections of unhoused  
15 people who are asking to keep their property.” Cutler Decl. ¶ 22. Wadkins states “[t]here is no  
16 sorting [by DPW], and no attempt to safeguard any property of value . . . [p]eople leave the area  
17 with what they can and the rest is lost.” Wadkins Decl. ¶ 22. Evans states she has never seen  
18 DPW initiate a bag and tag of someone’s property on its own; rather, she has approached SFPD  
19 and DPW and demanded that they bag and tag individuals’ property and has occasionally  
20 succeeded in having them do so. Evans Decl. ¶ 22.

21 If an individual asks for more time, asks DPW to stop throwing away their belongings, or  
22 resists orders to leave, SFPD threatens them with citation or arrest if they do not leave the area.  
23 Cutler Decl. ¶ 16; Evans Decl. ¶ 16; Wadkins Decl. ¶ 20. Wadkins states that “SFPD will instruct  
24 unhoused people that they have 15 minutes to move or officers will seize their tents as evidence of  
25 a crime.” Wadkins Decl. ¶ 20. He has also seen SFPD threaten homeless people with citation or  
26 seizure of their property “despite the fact that they have not been offered any services that day.”  
27 *Id.* at ¶ 21.

28 DPW finishes clearing a site around 9:30 or 10:00 am. Cutler Decl. ¶ 16; Wadkins Decl. ¶

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1 19. SFHOT usually returns around that time. Evans Decl. ¶ 17; Wadkins Decl. ¶ 23. However,  
 2 by that point, most of the residents of the encampment have left the area. Cutler Decl. ¶ 16;  
 3 Wadkins Decl. ¶ 23; James Decl. ¶ 14. Those that remain may or may not receive offers of shelter  
 4 beds. Evans, Cutler, and Wadkins state that they have witnessed SFHOT return to the site with no  
 5 shelter beds to offer. Evans Decl. ¶ 17; Cutler Decl. ¶ 17; Wadkins Decl. ¶ 28. According to  
 6 Wadkins, if there are no shelter beds available for residents of a particular encampment, SFHOT  
 7 “will just stop talking to anyone onsite and let the sweep continue.” Wadkins Decl. ¶ 28. James  
 8 states that “[u]sually, HOT will only have congregate shelter beds available to offer, if they have  
 9 any offers at all,” and that he has learned that congregate shelter is not accessible to certain  
 10 individuals, including people who are in wheelchairs or who have PTSD or other trauma-related  
 11 diagnoses. James Decl. ¶ 14. Further, individuals who wait in line to receive SFHOT services  
 12 “run the risk of their belongings being seized by DPW in the meantime for being left unattended.”  
 13 Wadkins Decl. ¶ 23. The encampment removal is over by around 11:30 am. Evans Decl. ¶ 20.

14 The declarations by Cutler, Evans, Ackerman, and Wadkins also include charts in which  
 15 they “memorialize[ ] specific information” that they can recall about some of the formal and  
 16 informal encampment closures that they have observed. The charts include dates, locations, and  
 17 agencies involved. They also include brief descriptions of the particular closures listed, including  
 18 observations about San Francisco’s failure to post written notice of encampment closures; seizures  
 19 of homeless individuals’ belongings without bagging and tagging and removal of unattended tents  
 20 and other property without leaving notice; and threats of citation or arrest by SFPD officers even  
 21 when the individual was not offered shelter. *See* Cutler Decl. ¶ 26; Ackerman Decl. ¶ 10; Evans  
 22 Decl. ¶ 26; Wadkins Decl. ¶ 30; James Decl. ¶ 19.

23 **ii. Individual Plaintiffs’ Experiences**

24 The seven individual Plaintiffs submitted declarations that are largely consistent with the  
 25 observations by the Coalition’s employees and volunteers. They are summarized below.

26 **Toro Castaño**

27 Toro Castaño was homeless in San Francisco from 2019 to March 2021, when he secured  
 28 housing through a private organization. [Docket No. 9-4 (Castaño Decl., Sept. 27, 2022) ¶ 4.]

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1 Castaño states that for the majority of the time he was homeless, he stayed with six or seven other  
 2 individuals near 16th Street and Market Street. He states that “[n]early every morning, public  
 3 works crews would come wake us up and tell us we had to move,” and if they did not, he and the  
 4 others were threatened with arrest. He states that he “never recall[s] anyone offering [them]  
 5 services or shelter.” *Id.* at ¶ 5. Castaño also states that they “almost never got any notice from  
 6 public works crews or the police before these daily sweeps,” which involved public works crews  
 7 spraying “large volumes of water and chemicals on [them] or near [them] that would damage their  
 8 property.” *Id.* at ¶ 6. According to Castaño, police officers regularly told him that they would  
 9 arrest him if he did not move his tent or threatened to seize his tent “as evidence of a crime.” He  
 10 did not receive citations following these interactions and states that “[a]t no time did they offer  
 11 [him] any services.” *Id.* at ¶ 9.

12 Castaño states that he can recall only “about three times” in which San Francisco claimed  
 13 that it would “bag and tag” his property for him to retrieve. Each time, when he attempted to  
 14 recover his property “it was nowhere to be found and there was no record of the property logged in  
 15 any system.” *Id.* at ¶ 10. He personally witnessed his property destroyed by public works crews  
 16 at least four times in two years during sweeps. According to Castaño, there was no posted written  
 17 notice at any site before crews seized property and put it in their trucks, and the crews did not give  
 18 him and other individuals “enough time to collect [their] belongings before they started to throw”  
 19 their belongings away. *Id.* at ¶ 11.

20 For example, on August 21, 2020, SFPD and DPW gave Castaño two hours to pack all of  
 21 his belongings. He spent the entire two hours packing, and at the end of the two hours, crews  
 22 placed his belongings in a garbage truck after “the incident commander in charge declared that all  
 23 the property would be deemed a fire hazard.” *Id.* at ¶¶ 12-14. Castaño states that he lost over  
 24 \$9,000 worth of property that day, including a tent, laptop computer, and items of sentimental  
 25 value. *Id.* at ¶ 15. According to Castaño, he received no prior notice of the sweep. *Id.* at ¶ 12.  
 26 Castaño was eventually cited and detained by police for illegal camping after protesting the  
 27 destruction of the encampment and his property. Castaño recalls that the HOT team offered him a  
 28 congregate shelter bed on that date. He apparently declined the offer due to health concerns in

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1 light of the pandemic. *Id.* at ¶¶ 17, 18. Castaño states that during the two years that he was  
2 homeless, he only saw one other homeless person ever offered services or shelter. *Id.* at ¶ 19.

3 **Sarah Cronk and Joshua Donohoe**

4 Sarah Cronk and her partner Joshua Donohoe are currently homeless and unsheltered in  
5 San Francisco. They have been living together in a tent near 13th Street and Folsom Street since  
6 May 2022. [Docket No. 9-4 (Cronk Decl., Sept. 13, 2022) ¶ 2, (Donohoe Decl., Sept. 13, 2022) ¶  
7 2.]

8 Cronk and Donohoe state that DPW has “disturb[ed]” them “early in the morning at least 5  
9 days every week.” They state that sometimes DPW “want[s] to throw away everything [they]  
10 have,” while other days DPW “will quietly grab anything they can while [Cronk and Donohoe] are  
11 waking up.” They state that DPW has thrown away their “neatly packed dishware, sponges, and  
12 brooms” while ignoring “obvious pile[s] of trash.” Cronk Decl. ¶¶ 3, 4; Donohoe Decl. ¶¶ 3, 4.  
13 For example, on September 12, 2022, four DPW employees arrived at the couple’s tent early in  
14 the morning. The workers took Cronk and Donohoe’s clothes and food, which were “neatly  
15 packed outside of” the tent, without telling Cronk and Donohoe where they were taking their  
16 property or how they could recover it. After Donohoe protested and asked a worker to leave them  
17 alone, the worker threatened Donohoe with violence. Cronk Decl. ¶¶ 6, 7; Donohoe Decl. ¶¶ 6, 7.

18 According to Cronk and Donohoe, the HOT team is “almost never at the daily sweep  
19 operations” they have experienced. On one occasion in June 2022, the HOT team was present at a  
20 sweep and evaluated them for housing. The HOT team informed the couple that Donohoe was  
21 “Priority 1” for housing and that they would attempt to find shelter for the couple. During the  
22 intake process, however, they state that “DPW was already seizing [their] belongings and  
23 attempting to throw them away into dumpsters.” The HOT team ultimately told Cronk and  
24 Donohoe that it “might have a tiny home” for them, but that they needed to “decide right away if  
25 [they] would accept shelter and that, if [they] said yes, [they] would have to leave behind many of  
26 [their] survival belongings.” Cronk Decl. ¶¶ 8-10; Donohoe Decl. ¶¶ 8-10. Cronk and Donohoe  
27 were concerned about accepting the offer without confirmation that shelter was actually available  
28 and asked for more time to find someone to watch their property. The HOT team then left the site.

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1 When they returned hours later, Cronk and Donohoe expressed their concern about losing their  
2 “survival belongings with no guarantee of shelter,” and an SFPD captain told them, “[y]ou don’t  
3 deserve housing.” Cronk Decl. ¶ 11; Donohoe Decl. ¶ 11. Neither has interacted with the HOT  
4 team since that date. *Id.*

5 Cronk states that she has interacted with the HOT team on one other occasion in the past  
6 year and a half. The HOT team informed her that she was a priority for housing and offered her  
7 shelter. Thirty minutes later, they informed her that she was not eligible for shelter without  
8 explanation. Cronk Decl. ¶ 12.

9 **Molique Frank**

10 Molique Frank is 46 years old. Frank “ha[s] been experiencing homelessness” since he  
11 was 20 years old. [Docket No. 9-4 (Frank Decl., Mar. 10, 2022) ¶ 2.] Frank states that San  
12 Francisco agencies such as DPW and SFPD have “harassed” him “repeatedly over the years. They  
13 come to sweep and take [his] belongings away on a regular basis.” According to Frank, San  
14 Francisco “almost never” gives advance notice before a sweep, and that during the “few times  
15 where the City has put up signs that say they are coming,” he makes sure to be present onsite as  
16 “that is the only way to save [his] belongings from being thrown away.” *Id.* at ¶¶ 3-5.

17 Frank describes the most recent time the City destroyed his property at an encampment on  
18 January 26, 2022 on 12th Street. Although San Francisco had posted a notice, “they did not come  
19 on the day the notice said that they would” so he “did not receive prior notice that they were  
20 coming on this day.” *Id.* at ¶¶ 8, 9. SFPD, DPW, SFFD, and the HOT team were present at the  
21 sweep. Over Frank’s objections, DPT threw his belongings away, including clothes, an X-Box, a  
22 bike frame, and “backpacks with essential survival gear inside.” Frank states that he did not  
23 receive any information about bagging and tagging and did not see DPW workers “sort or arrange  
24 any of [his] belongings for safekeeping.” *Id.* at ¶¶ 9, 10. Frank explains that even though the  
25 HOT team was present, “they did nothing”; specifically, the HOT team did not offer or provide  
26 services to Frank that day. After Frank asked an SFPD officer “if [he] would be able to be housed  
27 that day,” the officer referred him to the HOT team leader, but “HOT said there was no shelter  
28 available that day.” As a result, he and the other homeless persons “were simply forced to move

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1 around the corner from where [they] were swept.” *Id.* at ¶¶ 12, 13.

2 **David Martinez**

3 David Martinez has been homeless in San Francisco for years. [Docket No. 9-4 (Martinez  
4 Decl., Sept. 12, 2022) ¶ 2.] He states that DPW or SFPD “come to tell [him] to move along at  
5 least once every week” and that his belongings have been taken “many times.” DPW is usually  
6 the agency that tells him he has to move from where he is sleeping, and “SFPD officers sometimes  
7 stand behind them and threaten me with citation and arrest” for failure to comply. *Id.* at ¶ 3.

8 Martinez estimates that he has had his “belongings seized and destroyed by the City on at  
9 least 4 occasions” from September 2021 until September 2022 and describes two such incidents.  
10 *Id.* First, on June 23, 2022, DPW approached Martinez where he was sleeping on Folsom Street  
11 and 13th Street. The night before, Martinez had “carefully cleaned [his] area and neatly packed  
12 up” his belongings. Martinez, who has “right side congestive heart failure,” informed DPW that  
13 he had to leave for a doctor’s appointment. *Id.* at ¶ 4. “DPW workers assured [him] that [his]  
14 belongings would not be disturbed,” and Martinez asked a friend to watch his belongings while he  
15 was gone. *Id.*

16 While Martinez was at his appointment, he learned that DPW had taken all of his  
17 belongings and placed them in a dumpster truck. His friend “jumped into the dumpster truck in an  
18 attempt to safeguard [his] belongings” and SFPD threatened her with arrest. Martinez states he  
19 lost a brand new tent that he had been living in, clothes, a laptop and two cell phones,  
20 nonperishable food, congestive heart failure medication, and his government-issued ID on that  
21 day. *Id.* at ¶ 5.

22 DPW again approached Martinez while he was sleeping in early September 2022.  
23 Martinez had found another tent and had started to collect clothing. He states that he pleaded with  
24 DPW not to take his tent and belongings but they took them anyway and threatened him with  
25 citation or arrest “if [he] resisted them as they took them away.” According to Martinez, the HOT  
26 team was not present and he was not offered any shelter. *Id.* at ¶ 7.

27 Martinez states that “[t]he City almost never posts a written notice or provides us with  
28 verbal notice that a sweep is going to be happening” in the area. He last saw a posted notice “a

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1 few months ago” and has not seen one since. Additionally, he states “[t]he HOT team usually has  
2 not been present for the sweeps” he has experienced. *Id.* at ¶ 9. Finally, Martinez states that he  
3 has attempted to retrieve property from DPW at least twice but has never gotten anything back.  
4 *Id.* at ¶ 10.

5 **Teresa Sandoval**

6 Teresa Sandoval is currently unhoused. She is a double amputee and normally uses a  
7 wheelchair or prosthetics. [Docket No. 9-4 (Sandoval Decl., Sept. 12, 2022) ¶ 2.] The longest she  
8 has ever been allowed to stay in a shelter is about three months, and she states, “shelter is hard to  
9 find.” *Id.* at ¶ 4. Sandoval states that she has been “harassed . . . on a regular basis” by SFPD and  
10 DPW during the years that she has been homeless and that SFPD has threatened to detain her if  
11 she does not move. *Id.* at ¶ 3.

12 Sandoval states that San Francisco “sometimes” comes by an encampment before a sweep  
13 to give individuals notice but that she has only ever seen one paper notice. *Id.* at ¶ 3. The HOT  
14 team is sometimes present at sweeps, but “[u]sually when [she] [is] approached by the City and  
15 told to move,” she has not been offered shelter. *Id.* at ¶ 4.

16 Sandoval states that she has had her property taken by San Francisco at least three or four  
17 times from March 2022 through August 2022. She describes one sweep in June 2022. The entire  
18 HSOC team arrived without having posted a notice at the site and workers woke her up in her tent  
19 upon arrival. She and others were ordered to clear the area. Sandoval, who was in her wheelchair,  
20 was moving slowly to collect her belongings. As she did so, DPW workers seized her purse and  
21 placed her tent in a dumpster truck, and “refused to stop” when she told them she needed her  
22 belongings. They also took her prosthetics and she has been unable to obtain new ones since that  
23 date. *Id.* at ¶ 6.

24 On another occasion in August 2022, DPW approached her where she was staying at 13th  
25 and Mission. Sandoval asked DPW if she could leave her property there while she went to her  
26 doctor’s appointment and “[t]hey said that if [she] left [her] property, they would take it,” and they  
27 threw away her property that day. *Id.* at ¶ 7.

28 Sandoval was “swept yet again” in early September 2022. She received an offer of shelter

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1 that day, which she accepted. However, she was unable to take all of her belongings to the shelter  
2 and “was forced to leave the majority of [her] survival belongings behind,” including her tent,  
3 clothing, storage bags, and personal diaries.” *Id.* at ¶ 8. The shelter was only temporary and she is  
4 again unhoused. She has been unable to retrieve from DPW any of the possessions she left behind  
5 when she accepted the shelter offer. *Id.*

6 **Nathaniel Vaughn**

7 Nathaniel Vaughn became homeless in 2019. He secured temporary supportive housing on  
8 January 21, 2020 and now has “a permanent place to live.” [Docket No. 9-4 (Vaughn Decl., Nov.  
9 10, 2021) ¶ 2.]

10 Vaughn states that from January 2019 to January 2020, SFPD and DPW forced him to  
11 move from where he was sleeping and threatened to take his belongings at least once per month.  
12 During those months, Vaughn “never once saw the City bag and tag anyone’s property,” and he  
13 states the HOT team was “rarely present at these sweeps.” *Id.* at ¶ 4.

14 Vaughn states his property was destroyed by law enforcement on January 8, 2020. He was  
15 not present at the time DPW and SFPD arrived as he was visiting his mother, but “had left [his]  
16 tent clean and had [his] belongings neatly packed inside.” When he returned to the site, “nothing  
17 was left. SFPD and DPW had destroyed everything” and there was no bag and tag. According to  
18 Vaughn, the HOT team was present that day and he “begged for them to help [him] secure  
19 housing” since he had lost all of his possessions. He estimates the value of the destroyed property  
20 was \$1,300, including a tent, sleeping bag, stove, clothing, food, toiletries, and bike parts, as well  
21 as various items he describes as priceless. *Id.* at ¶ 5.

22 **4. Interactions Between Homeless Individuals and San Francisco**  
23 **Employees Outside of HSOC Encampment Closures**

24 Defendants assert that DPW and SFPD comply with the bag and tag policy and SFPD  
25 Enforcement Bulletin during encounters with homeless persons outside of the context of HSOC  
26 encampment closures. *See* Opp’n 8-9. For example, DPW’s Dilworth states that cleaning crews  
27 encounter tents and homeless persons during routine maintenance operations and refer  
28 encampments of two or more tents to HSOC. He states that cleaning crews “generally do not

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1 remove or move people or tents during routine cleaning unless there are health and safety issues or  
2 the public right of way is inaccessible.” In those circumstances, crews provide “sufficient time”  
3 for individuals to collect and move their belongings and then bag and tag unremoved belongings  
4 in accordance with the bag and tag policy. Dilworth Decl. ¶ 9.

5 SFPD Officer Christ states he conducts regular training for SFPD officers on the applicable  
6 rules for “engag[ing] with individuals who are sleeping, sitting, or lying in public areas,” including  
7 “all aspects of” the SFPD Enforcement Bulletin. Christ Decl. ¶ 4. He also states that SFPD  
8 officers have his phone number and call him “to identify available shelter beds they may offer to a  
9 person experiencing homelessness” and to “arrange support from [DPW] to bag and tag a person’s  
10 belongings.” *Id.* at ¶ 6.

11 In contrast, notwithstanding San Francisco’s bag and tag policy and SFPD Enforcement  
12 Bulletin, Plaintiffs assert that “DPW and SFPD personnel have a daily practice of summarily  
13 destroying the property of homeless people without proper bag and tag, and of imposing or  
14 threatening civil and criminal penalties on homeless people simply for being homeless.” Mot. 8.  
15 Cutler states she has “witnessed dozens of informal sweeps on a monthly basis . . . over years,”  
16 and has never “seen an SFPD or DPW employee bag and tag an individual’s property during these  
17 informal sweep operations.” Cutler Decl. ¶ 24. Evans has seen “informal sweeps without the  
18 presence of the HOT team,” where “DPW and SFPD will disturb people in their sleep, force them  
19 to move, or seize their property without even the guise of offering services.” Evans Decl. ¶ 25.  
20 *See also* Wadkins Decl. ¶ 30 (describing “smaller sweeps carried about [sic] by DPW and SFPD  
21 all over the City”).

22 Additionally, Cutler states that SFPD employs “homeless outreach” officers who are  
23 specifically focused on encampments. When these officers return to an encampment that has been  
24 previously removed via HSOC action, they do not bring the HSOC field team with them. The  
25 officers inform homeless individuals “that they must move along or face arrest—even though  
26 there is not even an attempt to connect those individuals to services.” Cutler Decl. ¶ 25. She  
27 states that “this type of enforcement is referred to as ‘re-encampment prevention,’” and officers do  
28 not provide advance notice or offer shelter. *Id.* This does not appear to be in dispute; Plaintiffs

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1 cite a document produced by SFPD in response to a public records request that states, “[t]he goal  
2 of **re-encampment prevention** is to re-secure and clean areas where there have been encampment  
3 resolutions and to ensure no tents, structures and vehicles remain. In general, sheltering options  
4 will not be offered unless there is an urgent situation.” Della-Piana Decl. ¶ 20, Ex. 17 (emphases  
5 in original).

6 **5. Dr. Herring’s Opinions**

7 Dr. Herring offers five opinions in his declaration.

8 **a. Opinion 1**

9 Dr. Herring opines that “[v]oluntary access to shelter has been functionally inaccessible to  
10 unhoused people in San Francisco since the onset of the pandemic in April 2020 and has long been  
11 systematically inadequate for a large portion of the population.” Herring Decl. 10 (Opinion 1).  
12 He states that “the only clear way to access shelter is via an encampment resolution while under  
13 threat from law enforcement,” which “means that individuals are being threatened with criminal  
14 punishment when they genuinely had no voluntary means to access shelter on their own.” *Id.* at ¶  
15 33. Defendants do not dispute any of the data or analysis underlying this opinion. At the hearing,  
16 they conceded that since April 2020, homeless individuals have not been able to access shelter.

17 Defendants “object”<sup>12</sup> to Opinion 1 on the ground that “Herring conflates aggregate shelter  
18 capacity with the offer of a bed for a specific individual at an encampment resolution.” *Id.* (citing  
19 Herring Decl. ¶ 28). Dr. Herring sets forth the aggregate shelter capacity and explains that San  
20 Francisco has a clear shelter bed shortage based on the number of homeless individuals in the  
21 City. Given the undisputed fact that homeless individuals “no longer have any immediate shelter  
22 options available to them,” he concludes that “the typical unhoused person lacks access to shelter  
23 altogether” unless they are “under threat from law enforcement” via an encampment closure. *See*  
24 Herring Decl. ¶¶ 24, 28, 32, 33. This opinion is significant in light of *Martin v. City of Boise*, 920  
25 F.3d 584, 618 (9th Cir. 2019), discussed further below, in which the Ninth Circuit held that “so

26 \_\_\_\_\_  
27 <sup>12</sup> Defendants state a number of “objections” to Dr. Herring’s opinions but many are not  
28 objections in the formal sense. Defendants do not cite rules of evidence or other legal authority.  
They amount to disagreements with Dr. Herring’s conclusions. Notably, Defendants did not  
submit any evidence to counter his opinions.

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1 long as there is a greater number of homeless individuals in [a jurisdiction] than the number of  
2 available beds [in shelters], the jurisdiction cannot prosecute homeless individuals for  
3 “involuntarily sitting, lying, and sleeping in public.” (cleaned up). The “objection” is overruled.

4 **b. Opinion 2**

5 Dr. Herring’s second opinion is that “HSOC clears encampments and displaces homeless  
6 individuals despite the clear lack of available shelter on a daily basis.” Herring Decl. 15 (Opinion  
7 2). Dr. Herring analyzed HSOC data about encampment closures between January 1, 2021 and  
8 June 30, 2021 and compared the dates of those closures with data about HSH’s shelter bed  
9 availability for the same period. *Id.* at ¶¶ 45-49. Shelter was available for all encampment  
10 residents on only 10 days out of the 83 days on which HSOC conducted closures and evicted  
11 residents. *Id.* at ¶ 45.

12 Defendants do not challenge the underlying data or Dr. Herring’s analysis of the same in  
13 formulating Opinion 2. Importantly, they do not challenge the conclusion that HSOC executed  
14 encampment closures on days when there were documented deficiencies in shelter availability,  
15 thereby conceding this important fact. Instead, they argue that Herring’s analysis is based on  
16 “stale data” from 2021. Opp’n 17. This objection is not well taken. On reply, Plaintiffs explain  
17 that they were not able to provide a more up-to-date analysis in their opening brief because  
18 Defendants did not produce HSOC encampment reports for the period August 30, 2021 to  
19 November 8, 2022 until November 17, 2022, which was well after Plaintiffs filed the motion for a  
20 preliminary injunction. Shroff Decl. ¶ 23. Herring submitted a supplemental declaration that  
21 addresses the new data from 2022 in which he states that the conclusions he reached in his initial  
22 declaration “are confirmed” by the 2022 data, discusses the new data, and “re-iterate[s] [his] initial  
23 findings in full based on the 2022 data.” Supp. Herring Decl. ¶¶ 4, 5.

24 Defendants also “object” to Opinion 2 on the ground that “HSOC has learned that 40% of  
25 clients at an encampment resolution accept offers of shelter, and has made the rational decision to  
26 proceed accordingly.” Opp’n 17 (citing Herring Decl. ¶ 56 n.28). According to Defendants, “[i]f  
27 HSOC’s projection of shelter needs turns out to be insufficient on a particular day, the  
28 encampment resolution team shifts gears, continues to offer resources, and does not require clients

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1 to leave.” Opp’n 17 (citing Dodge Decl. ¶ 18). Dodge states, “[i]f adequate sheltering alternatives  
2 are not available, clients are not asked to relocate unless an immediate health or safety issue  
3 requires relocation.” Dodge Decl. ¶ 18.<sup>13</sup>

4 Again, this “objection” is more accurately described as a disagreement on the merits. As  
5 to the purported 40% rate of acceptance of shelter offers, the sole evidence of this is an October  
6 2021 article in the *San Francisco Public Press* in which Dodge is quoted as saying “the formula  
7 [to know how many shelter beds are needed during an encampment closure] changes each week,  
8 and at the moment teams head out with enough shelter beds available for around 40% of any  
9 encampment, but “[i]f the team happens to be in a place where there’s a lot of acceptance and not  
10 a lot of shelter beds, they stop and come back the next day.” Della-Piana Decl. ¶ 25, Ex. 22.  
11 Curiously, even though Dodge submitted a declaration in support of Defendants’ opposition, he  
12 does not explain or even verify the existence of this 40% “formula” or any evidence supporting it.  
13 As to Defendants’ general contention that San Francisco does not go forward with an encampment  
14 closure if bedspace is inadequate, Defendants do not offer any particularized proof of this alleged  
15 practice, either in the form of data analysis or anecdotal evidence. Moreover, Defendants’  
16 position is contradicted by Plaintiffs’ evidence, set forth above, that homeless individuals have  
17 been displaced even when there are no available shelter beds. Defendants’ objections to Opinion 2  
18 are overruled.

19 **c. Opinion 3**

20 According to Dr. Herring, “HSOC conducts police enforcement against homeless  
21 individuals despite the lack of available shelter, including citing and arresting individuals during  
22 camp clearances even when adequate shelter was not available or offered.” Herring Decl. 22  
23 (Opinion 3). From July 2018 through October 2021, SFPD cited or arrested homeless people for  
24 illegal lodging under California Penal Code section 647(e) at least 360 times. Herring Decl. ¶ 70;

25  
26 \_\_\_\_\_  
27 <sup>13</sup> Defendants’ admission that it proceeds with encampment closures without having shelter  
28 available for 100% of affected residents appears to violate the SFPD Enforcement Bulletin, which  
provides that “DPW, DPH, and DSHS must provide a written offer of shelter or housing at least  
24 hours before ordering the removal of a tent or encampment” for violation of San Francisco  
Police Code section 169. SFPD Enforcement Bulletin 3.

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1 Della-Piana Decl. ¶¶ 39, 40, Exs. 35, 36. During the same three-year period, SFPD cited or  
2 arrested homeless people under California Penal Code section 148(a) “for refusal to obey a law  
3 enforcement order to vacate or ‘move along’” at least 2,652 times. Herring Decl. ¶ 70.

4 Dr. Herring opines that “these numbers are likely a massive undercount of actual citations  
5 and arrests,” since “SFPD data has consistently vastly under-recorded its citations against  
6 unhoused individuals in the past.” *Id.* at ¶ 71. However, at a minimum, he contends that the data  
7 shows that “SFPD has cited or arrested at least 3,000 individuals for sleeping or residing in public  
8 over the last three years,” while at the same time, San Francisco “had insufficient and inadequate  
9 shelter to provide to its unhoused residents.” *Id.* at ¶ 73. Dr. Herring compared SFPD citation  
10 data with HSOC encampment closure and shelter records for the period January 1, 2021 and June  
11 30, 2021, which was a period in which San Francisco lacked daily shelter bed availability.  
12 Herring Decl. ¶¶ 45, 74. He concluded that “SFPD officers issued citations and arrests against  
13 unhoused individuals for lodging without permission, maintaining a public nuisance, or failure to  
14 obey a police officer on at least 51 of those 73 days (69.9%) even though there were not enough  
15 shelter beds available.” *Id.* at ¶ 75 (emphasis removed).

16 Defendants do not challenge the factual content of Dr. Herring’s analysis, nor do they offer  
17 any competing analysis. Defendants instead object that this opinion is based on “stale data.”  
18 However, as previously discussed, the record establishes that Defendants did not provide  
19 Plaintiffs’ counsel with citation and arrest data for 2022 until after the preliminary injunction  
20 motion was filed. *See* Shroff Decl. ¶ 19, Ex. 14. In his supplemental declaration, Dr. Herring  
21 states that an analysis of the 2022 records “shows the same trend.” *Supp. Herring Decl.* ¶ 19.

22 Defendants also argue that “Herring has not attempted to correlate police activity to HSOC  
23 encampment resolutions, though he acknowledges it is possible to do so.”<sup>14</sup> *Opp’n* 17 (citing  
24 Herring Decl. ¶ 59 (“The SFPD data I have been provided is location-specific and can be cross-  
25 referenced with HSOC Encampment Reports for a more robust analysis of SFPD activity at HSOC  
26 sweeps in particular.”). This is not grounds to disregard Dr. Herring’s analysis. Plaintiffs need  
27

28 <sup>14</sup> Defendants also had the ability to correlate the data but did not offer that analysis.

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1 not correlate police activity to specific encampment closures in order to make a factual record that  
2 SFPD cites and arrests homeless individuals for sleeping in public even though San Francisco  
3 does not have enough shelter beds to offer them. Defendants’ objections to Opinion 3 are  
4 overruled.

5 **d. Opinion 4**

6 Dr. Herring also opines that “HSOC engages in widespread property destruction instead of  
7 appropriately safeguarding and storing the property of unhoused individuals in accordance with  
8 federal guidelines.” Herring Decl. 29 (Opinion 4). Plaintiffs obtained DPW bag and tag records  
9 dated from 2016 to August 2022. Della-Piana Decl. ¶¶ 35, 36, Exs. 31, 32. Dr. Herring analyzed  
10 the period between January 2021 and June 2021. In that timeframe, the total number of bag and  
11 tag records was 195. During that same period, San Francisco “displac[ed] at least 1,282 people  
12 experiencing unsheltered homelessness from across sites they were inhabiting in 83 formally  
13 scheduled HSOC encampment resolutions alone.” Herring Decl. ¶¶ 83, 84. Dr. Herring further  
14 observes that the addresses on the bag and tag records do not match those of HSOC encampment  
15 closures. *Id.* at ¶ 85. According to Dr. Herring, the disparity between the number of homeless  
16 individuals displaced due to encampment closures and the number of recorded bag and tags  
17 “suggest that San Francisco fails to comply with its bag and tag policies during interactions with  
18 individuals experiencing homelessness.” *Id.* at ¶ 86.

19 Defendants object to Opinion 4 on the ground that it is based on “stale data.” Opp’n 17.  
20 In Dr. Herring’s supplemental declaration, he explains that an analysis of DPW bag and tag  
21 records from January 2022 to October 2022 “demonstrate the same pattern”; i.e., a disparity in the  
22 number of bag and tag records and the total number of homeless individuals subjected to  
23 encampment closures. Supp. Herring Decl. ¶¶ 30-32. The staleness objection is overruled.  
24 Defendants also argue that “Herring has no valid basis nor competence to resolve the disputed  
25 factual question whether DPW follows” its bag and tag policy. Opp’n 17. Defendants do not  
26 challenge the factual disparity observed by Dr. Herring; rather, they object on the ground that  
27 Opinion 4 goes to an ultimate issue in the case. To the extent Plaintiffs offer Opinion 4 as an  
28 opinion about HSOC’s compliance with federal guidelines, including Fourth Amendment

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1 restrictions, Defendants’ objection is sustained because the opinion encompasses an ultimate legal  
2 issue. *See United States v. Tamman*, 782 F.3d 543, 552 (9th Cir. 2015) (“an expert cannot testify  
3 to a matter of law amounting to a legal conclusion.”). However, the court will consider the facts  
4 underlying Opinion 4 (to which Defendants do not object).

5 **e. Opinion 5**

6 Finally, Dr. Herring offers an opinion about the harm caused by encampment closures  
7 without accompanying offers of shelter and property confiscation. He discusses federal guidance  
8 that “camp clearances that do not provide offers of adequate shelter or housing can ‘result in  
9 adverse health outcomes, exacerbate racial disparities, and create traumatic stress, loss of  
10 identification and belongings, and disconnection from much-needed services.’” Herring Decl. ¶  
11 90. He concludes that move-along orders and property confiscation against unhoused people  
12 results in serious and irreparable harm.” Herring Decl. 31 (Opinion 5).

13 Defendants object to Opinion 5 that it is an “articulat[ion]” of Dr. Herring’s “sharp policy  
14 disagreement with San Francisco” and that his “criticisms . . . are untethered to any constitutional  
15 standard.” According to Defendants, it is constitutionally permissible to “[e]nforc[e] restrictions  
16 on occupying public property . . . so long as the individual has somewhere to sleep.” Opp’n 17-  
17 18. Defendants’ objection is not directed to the subject of Opinion 5, which discusses the impacts  
18 of San Francisco’s challenged practices on its homeless residents. These impacts do not  
19 themselves establish constitutional violations, nor does Dr. Herring attempt to make such a  
20 connection. Rather, the opinion is relevant to whether Plaintiffs have demonstrated that they are  
21 entitled to preliminary injunctive relief. The “objection” is overruled. Although Defendants did  
22 not object on this basis, the court will not consider Opinion 5 to the extent it opines on an ultimate  
23 legal conclusion – namely, that the challenged conduct “results in serious and irreparable harm.”

24 **C. The Proposed Preliminary Injunctive Relief**

25 Plaintiffs request three forms of preliminary injunctive relief. First, Plaintiffs ask the court  
26 to prohibit Defendants “from citing, arresting, stopping, searching, questioning, or otherwise  
27 investigating or enforcing—or threatening to investigate or enforce—any ordinance that punishes  
28 sleeping, lodging, or camping on public property,” citing a series of statutes and ordinances set

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1 forth below. Mot. i. Plaintiffs’ proposal also includes “a prohibition on the issuance of ‘move  
 2 along’ orders or other police orders under threat of citation and arrest.” *Id.* Plaintiffs request that  
 3 the proposed preliminary injunction remain in effect “unless and until Defendants can confirm that  
 4 San Francisco’s unhoused residents have immediately available, appropriate, accessible, and  
 5 voluntary shelter such that they are not being punished for the involuntary status of  
 6 homelessness.” *Id.*

7 The relevant portions of the cited statutes and ordinances are:

- 8 • **California Penal Code section 647(e):** “every person . . . [w]ho  
 9 lodges in any building, structure, vehicle, or place, whether public or private, without  
 10 the permission of the owner or person entitled to the possession or in control of it” is  
 11 “guilty of disorderly conduct, a misdemeanor[.]”
- 12 • **California Penal Code section 148(a):** “[e]very person who willfully resists, delays,  
 13 or obstructs any public officer, peace officer, or an emergency medical technician . . .  
 14 in the discharge or attempt to discharge any duty of his or her office or employment,  
 15 when no other punishment is prescribed, shall be punished by a fine not exceeding one  
 16 thousand dollars (\$1,000), or by imprisonment in a county jail not to exceed one year,  
 17 or by both that fine and imprisonment.”
- 18 • **California Penal Code section 370:** “[a]nything which is injurious to health, or is  
 19 indecent, or offensive to the senses, or an obstruction to the free use of property, so as  
 20 to interfere with the comfortable enjoyment of life or property by an entire community  
 21 or neighborhood, or by any considerable number of persons, or unlawfully obstructs  
 22 the free passage or use, in the customary manner, of any navigable lake, or river, bay,  
 23 stream, canal, or basin, or any public park, square, street, or highway, is a public  
 24 nuisance.”
- 25 • **California Penal Code section 372:** “[e]very person who maintains or commits any  
 26 public nuisance, the punishment for which is not otherwise prescribed, or who willfully  
 27 omits to perform any legal duty relating to the removal of a public nuisance, is guilty of  
 28 a misdemeanor.”

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- **San Francisco Police Code section 97(b):** “[n]o person shall use or occupy or permit the use or occupancy of any motor vehicle for human habitation, either single or in groups, on any street, park, beach, square, avenue, alley or public way, within a residential neighborhood of the City and County of San Francisco between the hours of 10:00 p.m. and 6:00 a.m. . . .”
- **San Francisco Police Code section 168:** “[i]n the City and County of San Francisco, during the hours between seven (7:00) a.m. and eleven (11:00) p.m., it is unlawful to sit or lie down upon a public sidewalk, or any object placed upon a public sidewalk,” punishable “by a fine of not less than \$50 or more than \$100 and/or community service” for the first offense.<sup>15</sup> S.F., Cal., Police Code § 168(b), (f)(1).
- **San Francisco Police Code section 169:** “[i]n the City and County of San Francisco, it is unlawful to place an Encampment upon a public sidewalk. This prohibition shall not apply to the placement of an Encampment on a public sidewalk pursuant to and in compliance with a street use permit or other applicable permit.” S.F., Cal., Police Code § 169(c).
- **San Francisco Park Code section 3.12:** “[n]o person shall construct or maintain or inhabit any structure, tent or any other thing in any park that may be used for housing accommodations or camping, nor shall any person construct or maintain any device that can be used for cooking, except by permission from the Recreation and Park Department or Commission. No person shall modify the landscape in any way in order to create a shelter, or accumulate household furniture or appliances or construction debris in any park.”

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<sup>15</sup> San Francisco Police Code section 168(f)(2) authorizes different penalties for “Subsequent Offenses,” as follows: “[a]ny person violating any provision of this Section within 24 hours after violating and being cited for a violation of this Section shall be guilty of a misdemeanor and shall be punished by a fine of not less than \$300 and not more than \$500, and/or community service, for each provision violated, or by imprisonment in the County Jail for a period of not more than ten (10) days, or by both such fine and imprisonment. Any person violating any provision of this Section within 120 days after the date of conviction of a violation this Section shall be guilty of a misdemeanor, and shall be punished by a fine of not less than \$400 and not more than \$500, and/or community service, for each provision violated, or by imprisonment in the County Jail for a period of not more than thirty (30) days, or by both such fine and imprisonment.”

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- **San Francisco Park Code section 3.13:** “[n]o person shall remain in any park for the purpose of sleeping between the hours of 8:00 p.m. and 8:00 a.m., except that special permission may be granted by the Recreation and Park Department to persons providing security services between said hours in any park or for other unusual events.
- **San Francisco Port Code section 2.9:** “[n]o person shall construct or maintain any building, structure, tent or any other thing in any park that may be used for housing accommodations or camping, except by written permission from the Executive Director.”
- **San Francisco Port Code section 2.10:** “[n]o person shall remain in any park for the purpose of sleeping between the hours of 10:00 p.m. and 6:00 a.m., except that special permission may be granted by the Executive Director to persons providing security services between said hours in any park or for other unusual events.”

Second, Plaintiffs ask the court to prohibit Defendants from “summarily seizing and destroying the personal property of homeless individuals, including momentarily unattended property, and to prohibit the confiscation of unhoused individuals’ personal property except when bagged and tagged in accordance” with Defendants’ written policies. Mot. i-ii.

Third, Plaintiffs ask the court to appoint a Special Master at Defendants’ expense to help implement the preliminary injunction, monitor compliance with its terms, and resolve disputes among the parties or other interested persons. Mot. ii.

**D. Procedural History**

Plaintiffs filed the complaint and the motion for a preliminary injunction on September 27, 2022. On October 4, 2022 the court set a briefing schedule for a November 18, 2022 hearing. [Docket Nos. 19, 21, 22.] Defendants filed a motion to extend the briefing schedule and for additional time to respond to the complaint. Plaintiffs opposed the motion in part. They asked that if the court granted the extension that it also impose certain notice and reporting conditions and require Defendants to conduct a “prompt” Rule 26(f) conference. [Docket No. 27, 30.] The court notified the parties that it was inclined to grant an extension of the briefing schedule and ordered them to meet and confer on Plaintiffs’ proposed conditions to reach agreement or to file a

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1 joint letter setting forth their positions, including “their best compromise on the proposed  
2 conditions.” [Docket No. 31.] The parties timely filed a joint letter. [Docket No. 33.]

3 On October 18, 2022, the court granted Defendants’ motion for an extended briefing  
4 schedule in part and continued the hearing to December 22, 2022. [Docket No. 34.] The court  
5 ordered the parties to conduct the Rule 26(f) conference by the usual deadline set forth in the  
6 Order Setting Initial Case Management conference and ADR Deadline (December 14, 2022) and  
7 to meet and confer to determine whether any discovery was necessary to complete the briefing on  
8 the motion for a preliminary injunction. The court ordered the parties to file a joint letter by  
9 October 21, 2022 regarding any agreements and/or disputes about the discovery. *Id.*  
10 Additionally, the court ordered Defendants to provide 72-hour advance notice to Plaintiffs of any  
11 planned homeless encampment resolutions scheduled by any San Francisco agency, and to  
12 produce weekly logs maintained by DPW regarding interactions with unhoused individuals. *Id.*  
13 Finally, the court ordered the parties to meet and confer on Plaintiffs’ request for production of  
14 SFPD incident reports and dispatches and the use of search terms related to the same, and to file a  
15 joint letter by October 21, 2022 regarding any agreements and/or disputes about search terms. *Id.*  
16 The parties timely filed two joint letters regarding discovery for the preliminary injunction motion  
17 and weekly reporting of SFPD information. [Docket Nos. 36, 37.]

18 On October 31, 2022, the court ordered Defendants to provide weekly reports of  
19 misdemeanor citations for three penal code provisions and a report of dispatches for “homeless  
20 calls for service,” adopting Defendants’ proposal for the same. [Docket No. 38.] The court held a  
21 hearing on November 3, 2022 regarding the discovery disputes at which it adopted Plaintiffs’  
22 proposal that Defendant disclose certain records to Plaintiffs two days after it filed its opposition  
23 to the motion for a preliminary injunction, but only to the extent that “Defendants rely in part on  
24 individual records” in certain document categories in their opposition. [Docket Nos. 42, 44.]

25 **III. LEGAL STANDARD**

26 “A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter*  
27 *v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). “A plaintiff seeking a preliminary  
28 injunction must establish that he is likely to succeed on the merits, that he is likely to suffer

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1 irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor,  
 2 and that an injunction is in the public interest.” *Id.* at 20. “The first factor is the ‘most  
 3 important.’” *Garcia v. City of Los Angeles*, 11 F.4th 1113, 1118 (9th Cir. 2021) (quoting *Garcia*  
 4 *v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc)). “To establish a likelihood of  
 5 success, plaintiffs need not conclusively prove their case or show that they are ‘more likely than  
 6 not’ to prevail.” *Stewart v. City & Cnty. of San Francisco, California*, No. 4:22-CV-1108-YGR,  
 7 ---F. Supp. 3d---, 2022 WL 2720734, at \*4 (N.D. Cal. June 22, 2022) (citing *Univ. of Tex. v.*  
 8 *Camensich*, 451 U.S. 390, 395 (1981)). “Rather, a ‘fair chance’ of success is the standard for  
 9 granting preliminary injunctive relief.” *Id.* (quoting *Benda v. Grand Lodge of IAM*, 584 F.2d 308,  
 10 315 (9th Cir. 1978)).

11 The Ninth Circuit uses a sliding scale approach to preliminary injunctions, such that “a  
 12 stronger showing of one element may offset a weaker showing of another.” *Alliance for the Wild*  
 13 *Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). In addition, courts may issue a  
 14 preliminary injunction if the plaintiff raises “serious questions going to the merits . . . and the  
 15 balance of hardships tips sharply in [the plaintiff’s] favor.” *Id.*

16 **IV. DISCUSSION**

17 **A. Likelihood of Success on the Merits**

18 **1. Eighth Amendment Claim**

19 Plaintiffs assert that San Francisco criminalizes involuntary homelessness in violation of  
 20 homeless individuals’ Eighth Amendment rights under *Martin*, 920 F.3d at 616. *See* Mot. 17.

21 The Eighth Amendment states, “[e]xcessive bail shall not be required, nor excessive fines  
 22 imposed, nor cruel and unusual punishments inflicted.” U.S. Const., amend. VIII. The  
 23 amendment’s bar against cruel and unusual punishments “circumscribes the criminal process in  
 24 three ways.” *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). In relevant part, “it places  
 25 substantive limits on what the government may criminalize.” *Martin*, 920 F.3d at 615 (citing  
 26 *Ingraham*, 430 U.S. at 667).

27 In *Martin*, the Ninth Circuit considered two ordinances that “criminalize[d] the simple act  
 28 of sleeping outside on public property, whether bare or with a blanket or other basic bedding”

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1 anywhere in the city of Boise, Idaho, and held that “the Eighth Amendment prohibits the  
 2 imposition of criminal penalties for sitting, sleeping, or lying outside on public property for  
 3 homeless individuals who cannot obtain shelter.” 920 F.3d at 616, 617. The court based its  
 4 holding on “the principle ‘that the Eighth Amendment prohibits the state from punishing an  
 5 involuntary act or condition if it is the unavoidable consequence of one’s status or being.’” *Id.* at  
 6 616 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1135 (9th Cir. 2006), *vacated*, 505 F.3d  
 7 1006 (9th Cir. 2007)). “[J]ust as the state may not criminalize the state of being ‘homeless in  
 8 public places,’ the state may not ‘criminalize conduct that is an unavoidable consequence of being  
 9 homeless—namely, sitting, lying, or sleeping on the streets.” *Id.* at 617 (quoting *Jones*, 444 F.3d  
 10 at 1137).

11 The Ninth Circuit made clear that a city is not required to “provide sufficient shelter for the  
 12 homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any  
 13 place.” *Id.* (quoting *Jones*, 444 F.3d at 1138). Rather, it asserted that its holding was “a narrow  
 14 one” regarding when a city may prosecute homeless individuals for sitting, sleeping, or lying on  
 15 public property:

16 We hold only that so long as there is a greater number of homeless  
 17 individuals in [a jurisdiction] than the number of available beds [in  
 18 shelters], the jurisdiction cannot prosecute homeless individuals for  
 19 involuntarily sitting, lying, and sleeping in public. That is, as long as  
 there is no option of sleeping indoors, the government cannot  
 criminalize indigent, homeless people for sleeping outdoors, on  
 public property, on the false premise they had a choice in the matter.

20 *Id.* (alterations in original; internal quotation marks and citation omitted). The Ninth Circuit also  
 21 explained that its holding “does not cover individuals who *do* have access to adequate temporary  
 22 shelter, whether because they have the means to pay for it or because it is realistically available to  
 23 them for free, but who choose not to use it . . .” *Id.* at 617 n.8 (emphasis in original).

24 In *Johnson v. City of Grants Pass*, 50 F.4th 787, 813 (9th Cir. 2022), the Ninth Circuit  
 25 recently held that “‘sleeping’ in the context of *Martin* includes sleeping with rudimentary forms of  
 26 protection from the elements, and that *Martin* applies to civil citations where . . . civil and criminal  
 27 punishments are closely intertwined.”

28 Plaintiffs assert, and Defendants concede, that San Francisco does not have adequate

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1 available shelter for its homeless residents, falling short by thousands of beds. *See, e.g.*, Della-  
 2 Piana Decl. Exs. 7 at 19 (reporting 7,754 homeless residents in 2022); 6 at 3 (reporting 5,080  
 3 shelter beds in 2021, the date of the last count); Herring Decl. ¶ 28 (current shelter bed shortage  
 4 “is likely to be closer to approximately 4,261 beds” based on the total number of unhoused  
 5 individuals in San Francisco (7,754) and the City’s last count of the number of available shelter  
 6 beds (3,493)). Despite San Francisco’s indisputably insufficient stock of shelter beds, SFPD  
 7 continues to cite, arrest, and force homeless individuals to vacate encampments and “move along”  
 8 under threat of enforcement. Mot. 18; *see* Herring ¶¶ 70, 73-75, Opinion 3. Plaintiffs argue that  
 9 these facts amount to a violation of the Eighth Amendment because they demonstrate that San  
 10 Francisco “is criminalizing the status of homelessness in clear violation of *Martin*’s express  
 11 holding.” Mot. 18.

12 In response, Defendants argue that Plaintiffs are unlikely to succeed on the merits of their  
 13 Eighth Amendment claim because San Francisco’s “policy of offering shelter before requiring any  
 14 unhouse[d] person to vacate public property meets the requirements of the Eighth Amendment.”  
 15 Opp’n 9. Defendants do not specifically identify this policy but appear to rely on the SFPD  
 16 Enforcement Bulletin that requires SFPD officers to “secure appropriate shelter before taking  
 17 enforcement action” under certain statutes and ordinances. According to Defendants,  
 18 “[e]ncampment occupants in San Francisco asked to vacate public property ‘have access to  
 19 adequate temporary shelter,’ even if many ‘choose not to use it.’” *Id.* at 11 (quoting *Martin*, 920  
 20 F.3d at 617 n.8).

21 Defendants’ position is wholly unconvincing. They rely on declarations of San Francisco  
 22 employees, two of whom restate the policies embodied in the Enforcement Bulletin and the “Bag  
 23 and Tag” policy and assert that SFPD and DPW workers comply with these policies. *See* Christ  
 24 Decl. ¶¶ 4, 5; Dilworth Decl. ¶¶ 6-9. The declarants generally walk through how the City  
 25 typically conducts encampment closures, without discussing any specific closures or providing  
 26 supporting data or analysis of the same.<sup>16</sup> *See, e.g.*, Nakanishi Decl. ¶¶ 5-11; Piastunovich Decl.

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27  
 28 <sup>16</sup> The only reference to a particular encampment closure in Defendants’ declarations is a  
 statement by Dodge that “[a]t the January 26, 2022 HSOC resolution on 12th Street, HSOC had

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1 ¶¶ 5-8; Mazza Decl. ¶¶ 4-7; Hardiman Decl. ¶¶ 4, 5; Dilworth Decl. ¶¶ 5, 6, 8; Dodge Decl. ¶¶ 12-  
2 13, 15-20. They ignore Plaintiffs’ considerable and direct observations of violations of those  
3 policies, and do not provide a competing factual record from evidence within their control. For  
4 example, they do not offer declarations from SFHOT members testifying from personal  
5 experience that they offered an available shelter bed to every homeless individual affected by an  
6 encampment closure who wanted to sleep indoors.

7 Defendants’ policy is not at issue. At the hearing, Plaintiffs confirmed that the substance  
8 of the Enforcement Bulletin is constitutional. What is at issue is the body of detailed evidence  
9 demonstrating significant failures to comply with the policy. Plaintiffs’ key evidence is largely  
10 unchallenged. Defendants concede the existence of long-standing shelter bed shortfalls, as well as  
11 the fact that homeless San Franciscans have not been able to voluntarily access shelter beds since  
12 April 2020. *See* Herring Opinion 1. Defendants do not counter Plaintiffs’ evidence that SFPD has  
13 cited and arrested individuals for sleeping or lodging in public thousands of times from 2018 to  
14 October 2022 despite the lack of available shelter. *See* Herring Opinion 3; Supp. Herring Decl. ¶¶  
15 19-23. Defendants do not meaningfully rebut evidence that San Francisco initiates encampment  
16 closures without actually knowing whether any shelter beds will be available to encampment  
17 residents, and that the closure proceeds anyway, with many residents having already been  
18 displaced by the time HSOC confirms whether it has shelter available or not. In fact, Defendants’  
19 own witnesses confirm that HSOC does not know shelter availability when SFHOT workers begin  
20 “outreach” at the start of an encampment closure. *See* Nakanishi Decl. ¶ 7; Piastunovich Decl. ¶  
21 6; Mazza Decl. ¶¶ 5, 6.

22 Plaintiffs submit ample evidence that encampment closures have been carried out even

23  
24 \_\_\_\_\_  
25 sufficient shelter resources for everyone who accepted shelter space that morning.” Dodge Decl. ¶  
26 11. This is in response to Frank’s statements about a sweep on January 26, 2022 at 12th Street.  
27 Frank states that “[a]lthough the HOT team was present, they did nothing. The HOT team did not  
28 offer or provide any services to me that day. I specifically asked an SFPD officer if I would be  
able to be housed that day. SFPD directed me to the HOT team leader. HOT said that there was  
no shelter available that day.” Frank Decl. ¶¶ 8, 12; *see* Opp’n 11. At best, this evidence  
establishes a dispute of fact as to whether the residents of that encampment were offered shelter on  
that date. It does little to rebut Plaintiffs’ body of evidence that the City regularly does not comply  
with the SFPD Enforcement Bulletin.

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1 when HOT representatives said there was no available bed space. *See* Cutler Decl. ¶ 17;  
 2 Ackerman Decl. ¶ 9; Evans Decl. ¶¶ 17, 24, 25; James Decl. ¶ 14; Frank Decl. ¶ 12. Defendants’  
 3 rebuttal evidence is thin on this point. Dodge denies that San Francisco asks homeless individuals  
 4 to vacate an encampment “[i]f adequate sheltering alternatives are not available” but provides no  
 5 specific examples. Dodge Decl. ¶ 18. The only other evidence Defendants cite to show that  
 6 HSOC has ceased relocating encampment residents once it determines that “adequate sheltering  
 7 alternatives are not available” is the declaration of Patrick Dubose submitted by Plaintiffs. *See*  
 8 Opp’n 11. Dubose is a formerly unhoused resident of San Francisco who describes an  
 9 encampment closure that took place in February 2022. Dubose states “DPW came a day earlier  
 10 than” a posted notice informing him and other encampment residents of an upcoming closure.  
 11 [Docket No. 9-6 (Dubose Decl., Mar. 11, 2022, ¶ 9).] According to Dubose, “[t]he HOT team was  
 12 also present, but they did not make us any service offers,” and “[a]ll [he] heard from DPW and the  
 13 HOT team was just, ‘You’ve got to go.’” *Id.* at ¶ 9. Dubose states that the Coalition intervened  
 14 on his behalf and “City workers left the area without forcing [him] to move.” *Id.* Defendants  
 15 assert “[t]hat is exactly what is supposed to happen if in fact shelter resources are insufficient at an  
 16 HSOC resolution,” but fail to acknowledge that DPW and SFHOT were attempting to force  
 17 Dubose to leave even though they had not offered him shelter and would likely have succeeded  
 18 had the Coalition not advocated on his behalf.

19 Plaintiffs also offer evidence that closures took place without offers of bed space, either  
 20 because SFHOT members did not make the offer or because SFHOT members were not even  
 21 present. *See* Dubose Decl. ¶ 9; Castaño Decl. ¶¶ 13, 19; Frank Decl. ¶ 12; Cronk Decl. ¶ 8;  
 22 Donohoe Decl. ¶ 8; Martinez Decl. ¶ 7; Sandoval Decl. ¶ 4; Vaughn Decl. ¶ 4; Cutler Decl. ¶¶ 17,  
 23 26; Ackerman Decl. ¶¶ 9, 10; Evans Decl. ¶¶ 17, 18, 25, 26; James Decl. ¶ 19; Wadkins Decl. ¶¶  
 24 28, 30.

25 Defendants’ rebuttal evidence is once again unconvincing. In their opposition brief,  
 26 Defendants point to three individual Plaintiffs who acknowledge receiving and/or accepting  
 27 shelter offers at HSOC encampment closures in 2022. Opp’n 11 (citing Cronk Decl. ¶¶ 8-11;  
 28 Donohoe Decl. ¶¶ 8-11; Sandoval Decl. ¶ 8). Cronk and Donohoe explain that San Francisco’s

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1 shelter offer came with the threat that their survival belongings would be destroyed. Similarly,  
2 Sandoval was forced to leave the majority of her survival belongings behind when she accepted an  
3 offer of shelter. All three remain unsheltered, and all three also describe encampment closures  
4 that they have experienced without receiving shelter or offers of shelter from HSOC. In any event,  
5 the fact that three people once received offers of shelter does little to cut into the large body of  
6 evidence demonstrating that shelter offers are often not made.

7 At the hearing, Defendants cited additional evidence that purportedly supports San  
8 Francisco’s claim that it always offers shelter beds to individuals facing closure of their  
9 encampments. First, they cited Dodge’s declaration for the proposition that Dodge is “confident”  
10 that encampment closures proceed with an adequate allocation of shelter beds. Dodge’s  
11 declaration makes no such statement or assertion. Defendants also cited a spreadsheet attached to  
12 the declaration of Arielle Piastunovich, who has been the liaison between HSH and HSOC since  
13 January 2022. She explains that the spreadsheet is a “client log for 2022 that [she] maintain[s] to  
14 track client engagement during resolutions and facilitate shelter placement.” Piastunovich Decl.  
15 ¶¶ 2, 8, Ex. C. This exhibit offers little support for Defendants. It is not apparent from the  
16 document that it reflects actual offers of shelter connected to encampment closures or SFPD orders  
17 to “move along” or vacate, and Piastunovich’s declaration does not provide any explanation or  
18 detail about the data captured therein.

19 Defendants’ evidentiary record is notable for what it could have included but did not. For  
20 example, Defendants submitted a declaration by David Nakanishi, who is the clinical supervisor of  
21 the Encampment Resolution Team, which consists of SFHOT workers. Even though Nakanishi is  
22 generally “present for the morning resolutions, and the majority of afternoon resolutions,” he does  
23 not actually state that SFHOT offers shelter to every homeless individual facing closure of their  
24 encampment. See Nakanishi Decl. ¶¶ 4, 8-11. In fact, in discussing his team’s “effort to follow up  
25 [with clients] between scheduled resolutions,” he admits that “resources or shelter options” may  
26 not be “available at the time of a resolution.” *Id.* at ¶ 11. Similarly, Mark Mazza managed the  
27 work of SFHOT from August 2020 until October 2022. Mazza Decl. ¶ 2. Mazza does not state  
28 that SFHOT offers shelter to every encampment resident facing displacement.

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1           At the hearing, Defendants argued for the first time that the formula announced in *Martin*  
 2 and *Johnson* for demonstrating an 8th Amendment violation should be interpreted differently  
 3 when applied to this case. “The formula established in *Martin* is that the government cannot  
 4 prosecute homeless people for sleeping in public if there ‘is a greater number of homeless  
 5 individuals in [a jurisdiction] than the number of available’ shelter spaces.” *Johnson*, 50 F.4th at  
 6 795 (alteration in original) (citing *Martin*, 920 F.3d at 617). Defendants concede that there are  
 7 thousands more homeless individuals living in San Francisco than there are available shelter beds.  
 8 They nevertheless assert that *Martin* and *Johnson* permit an inquiry beyond that basic equation.

9           Defendants point to language in *Martin* that immediately follows the passage cited in  
 10 *Johnson*: “. . . [A]s long as there is no option of sleeping indoors, the government cannot  
 11 criminalize indigent, homeless people for sleeping outdoors, on public property, on the false  
 12 premise they had a choice in the matter.” 920 F.3d at 617. Defendants contend that even though  
 13 San Francisco has a large shortfall of shelter beds, it does not violate the 8th Amendment. This is  
 14 because it is the City’s practice to provide homeless individuals with an option for sleeping  
 15 indoors, as all are offered shelter beds before they are displaced.

16           Defendants claim support for this position in the preliminary injunction recently entered in  
 17 *Fund for Empowerment, et al. v. City of Phoenix, et al.*, 22-2041-PHX-GMS (D. Ariz. Dec. 16,  
 18 2022), slip op. at 19. The injunction includes a prohibition on “enforcing the Camping and  
 19 Sleeping Bans against individuals who practically cannot obtain shelter as long as there are more  
 20 unsheltered individuals in Phoenix than there are shelter beds available.” According to  
 21 Defendants, this wording supports their interpretation of *Martin* and *Johnson*, and shows that San  
 22 Francisco is not violating the 8th Amendment notwithstanding the large shelter bed shortfall,  
 23 because homeless individuals who experience encampment closures practically can obtain shelter  
 24 since it is always offered to them.

25           The court need not decide whether Defendants’ reading of *Martin* and *Johnson* is correct,  
 26 because their position lacks factual support. It is beyond dispute that homeless San Franciscans  
 27 have no voluntary “option of sleeping indoors,” and as a practical matter “cannot obtain shelter.”  
 28 As previously noted, Defendants conceded at the hearing that “[v]oluntary access to shelter has

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1 been functionally inaccessible to unhoused people in San Francisco since the onset of the  
 2 pandemic in April 2020.” Herring Decl. 10 (Opinion 1). Put another way, the parties agree that at  
 3 this time, a homeless San Franciscan who wants a shelter bed has no avenue to ask for one, much  
 4 less get one. Defendants nevertheless assert that every homeless person is offered shelter before  
 5 being displaced by the City. As discussed above, the evidence supporting this broad assertion is  
 6 thin; the City could have submitted a more convincing record (if it exists) because it controls the  
 7 relevant evidence. On the other hand, Plaintiffs submitted ample evidence that homeless  
 8 individuals routinely are displaced without a firm offer (or in many instances, any offer) of a  
 9 shelter bed.

10 Having carefully considered the evidence submitted by both sides, the court concludes that  
 11 Plaintiffs are likely to succeed on the merits of their claim that Defendants violate the Eighth  
 12 Amendment by imposing or threatening to impose criminal penalties against homeless individuals  
 13 for “sitting, sleeping, or lying outside on public property” without giving them the option of  
 14 sleeping indoors. *See Martin*, 920 F.3d at 617; *see also Johnson*, 50 F.4th at 795 (“[t]he formula  
 15 established in *Martin* is that the government cannot prosecute homeless people for sleeping in  
 16 public if there ‘is a greater number of homeless individuals in [a jurisdiction] than the number of  
 17 available’ shelter spaces.” (citing *Martin*, 920 F.3d at 617)).

18 **2. Fourth Amendment Claim**

19 “The Fourth Amendment protects individuals from unreasonable government seizures of  
 20 their property, even when that property is stored in public areas.” *Garcia*, 11 F.4th at 1118  
 21 (citation omitted); *see also Lavan v. City of Los Angeles*, 693 F.3d 1022, 1030 (9th Cir. 2012)  
 22 (affirming district court’s conclusion that the Fourth Amendment protects homeless individuals  
 23 from seizure and summary destruction of their unabandoned, but temporarily unattended, personal  
 24 property).

25 Plaintiffs assert that San Francisco’s bag and tag policy clearly requires City employees to  
 26 store unabandoned personal property, whether attended or unattended, so that homeless  
 27 individuals may reclaim it. Plaintiffs acknowledge that the policy itself if constitutional but claim  
 28 that the City violates the policy by regularly and indiscriminately destroying homeless individuals’

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1 personal property. Plaintiffs’ evidence shows that the City produced a total of 195 bag and tag  
 2 records for a six-month period in 2021, even though San Francisco “displac[ed] at least 1,282  
 3 people experiencing unsheltered homelessness from across sites they were inhabiting in 83  
 4 formally scheduled HSOC encampment resolutions alone” during that same period. Herring Decl.  
 5 ¶¶ 83, 84. Plaintiffs assert that this large disparity demonstrates that DPW does not consistently  
 6 comply with the bag and tag policy. This data point is brought to life by the individual Plaintiffs’  
 7 declarations recounting the seizure and destruction of their unabandoned personal property, as  
 8 well as the eyewitness accounts of Coalition employees and volunteers regarding dozens of  
 9 encampment closures.

10 At oral argument, Defendants relied on *Sullivan v. City of Berkeley*, 383 F. Supp. 3d 976,  
 11 987 (N.D. Cal. 2019), to argue that the large disparity does not support an inference that the City  
 12 routinely violates the bag and tag policy but instead demonstrates that encampment residents  
 13 receive proper notice of closures, are given plenty of time to pack their belongings, and therefore  
 14 have no need to use the bag and tag system. *Sullivan* is readily distinguishable because, unlike the  
 15 evidentiary record in that case, Plaintiffs in this case submit significant evidence<sup>17</sup> that written  
 16 notice of encampment closures is rarely provided, Evans Decl. ¶¶ 13, 26; Ackerman Decl. ¶¶ 7,  
 17 10; James Decl. ¶ 8; Wadkins Decl. ¶ 17, and that when homeless individuals ask for more time to  
 18 pack their belongings, “SFPD moves in to tell people that they will be cited or arrested if they do  
 19 not leave the area” or threatens to “seize their tents as evidence of a crime” if they are not leaving  
 20 the area fast enough. Cutler Decl. ¶ 16; Evans Decl. ¶¶ 15, 16; Wadkins Decl. ¶¶ 19, 20.  
 21 Plaintiffs also submit evidence that DPW “tells people to clear out” and that “everything they  
 22 leave behind will be thrown out.” Wadkins Decl. ¶ 19; James Decl. ¶ 13. Declarants state that  
 23 whatever property homeless individuals “do not have physically in their hands usually gets picked  
 24 up and put in the back of a DPW crusher truck” and taken “straight to the dump.” Cutler Decl. ¶

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26 <sup>17</sup> These are not one-off observations. The Coalition-affiliated declarants observed many  
 27 encampment closures. *See, e.g.*, Cutler Decl. ¶ 7 (witnessed “well over a hundred” sweep  
 28 operations); Ackerman Decl. ¶ 6 (witnessed “at least ten sweeps”); Evans Decl. ¶ 10 (witnessed  
 “over 50 large-scale homelessness sweeps”); James Decl. ¶ 7 (witnessed three “full-scale HSOC  
 sweeps”); Wadkins Decl. ¶ 12 (witnessed “at least a dozen large-scale homeless sweeps”).

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1 15; Evans Decl. ¶ 15. According to one declarant, “[t]here is no sorting [by DPW], and no attempt  
2 to safeguard any property of value . . . [p]eople leave the area with what they can and the rest is  
3 lost.” Wadkins Decl. ¶ 22.

4 Defendants do not rebut Plaintiffs’ evidence of widespread seizure and destruction of  
5 homeless individuals’ unabandoned personal property. Instead, they argue that “Plaintiffs have  
6 not demonstrated that the items they assert were confiscated and destroyed should have been  
7 preserved under DPW’s bag/tag policy, or whether DPW properly disposed of them” because they  
8 were trash, garbage, debris, or other materials subject to immediate disposal under the policy.  
9 Opp’n 14.<sup>18</sup> In a similar vein, at the hearing Defendants argued that Plaintiffs had not shown that  
10 any unabandoned property that had been discarded by DPW, including items such as laptops, had  
11 not been “intermingled” with items that pose an immediate health or safety risk, such as  
12 hypodermic needles, and thus were appropriate to discard. Defendants contend that Plaintiffs’  
13 declarations “are too general” to show that San Francisco has repeatedly violated its own policies.  
14 *Id.* (citing *Shipp v. Schaaf*, 379 F. Supp. 3d 1033, 1038 (N.D. Cal. 2019) (“[i]t is not sufficient to  
15 state, as Plaintiffs and their declarants do, that the City has sometimes removed and destroyed  
16 encampment members’ property. Sometimes the City has the right to do this.”)).

17 The evidence shows otherwise. The individual Plaintiffs’ declarations clearly describe  
18 specific incidents in which DPW has seized and/or destroyed personal property that was not  
19 abandoned, such as tents, laptops, dishware, cleaning supplies, clothing, “essential survival gear,”  
20 cell phones, medication, identification, and even prosthetics. *See* Castaño Decl. ¶¶ 14, 15; Cronk  
21 Decl. ¶¶ 4, 5; Donohoe Decl. ¶¶ 4, 5; Frank Decl. ¶¶ 9, 10; Martinez Decl. ¶¶ 5, 7; Sandoval Decl.  
22 ¶ 6; Vaughn Decl. ¶ 5. They also describe instances in which DPW had discarded property that  
23 had been neatly stored or organized, refuting Defendants’ claim about DPW discarding personal  
24 property that was intermingled with hazardous objects such as needles. *See* Castaño Decl. ¶¶ 14,  
25 15; Cronk Decl. ¶¶ 4, 6; Donohoe Decl. ¶¶ 4, 6; Vaughn Decl. ¶ 5. Coalition witnesses similarly

26 \_\_\_\_\_  
27 <sup>18</sup> Defendants also discuss the requirements of the Fourteenth Amendment’s due process clause  
28 and contend that San Francisco’s policies and practices with respect to providing notice of  
encampment closures satisfies due process. *See* Opp’n 12-14. The question of adequate notice  
under the Fourteenth Amendment is not before the court at this time. *See* Reply 14 n.11.

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1 describe DPW’s summary seizure and destruction of homeless individuals’ unabandoned personal  
2 property, including tents, a motorcycle, a wheelchair, and a walker. Cutler Decl. ¶ 26; Ackerman  
3 Decl. ¶ 10; Evans Decl. ¶¶ 23, 26, Ex. A; Wadkins Decl. ¶ 30. Plaintiffs have also submitted  
4 evidence that DPW indiscriminately seizes and destroys homeless individuals’ personal property  
5 without sorting, collecting, and storing anything that can be salvaged. See Evans Decl. ¶ 23;  
6 Wadkins Decl. ¶ 22; Ackerman Decl. ¶ 8.

7 The court concludes that Plaintiffs have shown a likelihood of success on their Fourth  
8 Amendment claim based on San Francisco’s “seizing and destroying” homeless individuals  
9 unabandoned property and the resulting “meaningful[ ] interfer[ence] with [their] possessory  
10 interests in that property.” See *Lavan*, 693 F.3d at 1030.

11 **B. Irreparable Harm**

12 The Ninth Circuit does “not require a strong showing of irreparable harm for constitutional  
13 injuries.” *Cuviello v. City of Vallejo*, 944 F.3d 816, 833 (9th Cir. 2019). The court has “stated  
14 that an alleged constitutional infringement will often alone constitute irreparable harm.” *Monterey*  
15 *Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (quoting *Associated General Contractors*  
16 *v. Coalition For Economic Equity*, 950 F.2d, 1401, 1412 (9th Cir. 1991)). Defendants agree that  
17 “a constitutional violation establishes irreparable harm.” Opp’n 18. As set forth above, Plaintiffs  
18 have demonstrated a likelihood of success on their claims that their Fourth and Eighth  
19 Amendment rights have been violated.

20 In addition, Plaintiffs have submitted evidence that encampment closures without offers of  
21 shelter and seizures of unabandoned property harm homeless individuals in myriad ways,  
22 including negatively impacting their physical and mental health. See Herring Decl. ¶¶ 90-105.  
23 The individual Plaintiffs explain these impacts in their declarations, describing the encampment  
24 closures as “dehumanizing” and “traumatizing.” See, e.g., Castaño Decl. ¶ 20; Frank Decl. ¶ 15.  
25 Plaintiffs have demonstrated that they will likely suffer irreparable harm in the absence of  
26 preliminary relief.

27 **C. Balance of Hardships and the Public Interest**

28 “A Court considering an application for a preliminary injunction must identify the harm

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1 that an injunction might cause a defendant and weigh it against the injury to a plaintiff.” *Lavan v.*  
2 *City of Los Angeles*, 797 F. Supp. 2d 1005, 1019 (C.D. Cal. 2011) (citations omitted). Plaintiffs  
3 argue that the deprivation of homeless individuals’ constitutional rights and this population’s  
4 “particular vulnerability” tips the balance of hardships sharply in Plaintiffs’ favor as a matter of  
5 law. Mot. 25 (citations omitted).

6 In response, Defendants dispute whether Plaintiffs have shown violations of their Eighth  
7 and Fourth Amendment rights. They also raise “the public interest in promoting public health and  
8 safety,” arguing that this interest does not weigh in favor of enjoining San Francisco “from  
9 exercising its considered judgment as to how to best maintain public health and safety.” Opp’n 18  
10 (quoting *Miralle v. City of Oakland*, No. 18-CV-06823-HSG, 2018 WL 6199929, at \*4 (N.D. Cal.  
11 Nov. 28, 2018) (where homeless plaintiffs had not shown a likelihood of success on their Eighth  
12 and Fourteenth Amendment claims related to the closure of their encampment, the court concluded  
13 that the balance of the equities did not tip in plaintiffs’ favor since the city had committed to  
14 provide temporary shelter and storage services to plaintiffs)). According to Defendants,  
15 “[e]ncampment resolutions are essential to keep public spaces clean and sanitary, and to allow safe  
16 access to the public right of way,” and the court “should not lightly upend San Francisco’s  
17 balanced and compassionate policy determinations.” Opp’n 18.

18 The court concludes that the balance of hardships tips in favor of Plaintiffs, as does the  
19 public interest. Homeless individuals “risk losing not only their homes . . . but their community  
20 and their possessions” if San Francisco conducts encampment closures and seizes and destroys  
21 their personal property in violation of their constitutional rights. *Le Van Hung v. Schaaf*, No. 19-  
22 cv-01436-CRB, 2019 WL 1779584, at \*7 (N.D. Cal. Apr. 23, 2019). *See also Arizona Dream Act*  
23 *Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) (“by establishing a likelihood that  
24 Defendants’ policy violates the U.S. Constitution, Plaintiffs have also established that both the  
25 public interest and the balance of the equities favor a preliminary injunction.”). As one court in  
26 this district has observed, homeless residents of the City “are members of the community, and  
27 their interests, too, must be included in assessing the public interest.” *See Le Van Hung*, 2019 WL  
28 1779584, at \*7.

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1           The relief sought by Plaintiffs will not bar Defendants’ efforts to “keep public spaces clean  
 2 and sanitary” or “allow safe access” to sidewalks and rights-of-way since Plaintiffs do not ask the  
 3 court to enjoin any ordinances targeting public health nuisances or willfully obstructing streets,  
 4 sidewalks, or other passageways, as discussed below. Rather, Plaintiffs ask that Defendants be  
 5 enjoined from enforcing ordinances that punish individuals for “involuntarily sitting, lying, and  
 6 sleeping in public” and from “seizing and destroying” homeless individuals’ unabandoned  
 7 property in violation of their constitutional rights. *See Martin*, 920 F.3d at 616; *Lavan*, 693 F.3d  
 8 at 1030.

9           Defendants have policies in place governing encampment closures and treatment of  
 10 homeless individuals’ personal property that Plaintiffs agree are constitutional, but Plaintiffs have  
 11 submitted substantial evidence that San Francisco routinely violates its own policies. This weighs  
 12 in Plaintiffs’ favor when balancing the equities and considering the public interest. *Le Van Hung*,  
 13 2019 WL 1779584, at \*7 (granting preliminary injunction to enjoin municipality from clearing  
 14 encampment in public park “in a manner that violates its stated policies”).

15           **D. Preliminary Injunctive Relief Granted**

16           “Crafting a preliminary injunction is ‘an exercise of discretion and judgment, often  
 17 dependent as much on the equities of a given case as the substance of the legal issues it presents.’”  
 18 *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018) (quoting *Trump v. Int’l Refugee Assistance*  
 19 *Project*, 137 S. Ct. 2080, 2087 (2017)). In awarding a preliminary injunction a court must  
 20 consider “the overall public interest,” and in doing so, “need not grant the total relief sought by the  
 21 applicant but may mold its decree to meet the exigencies of the particular case.” *Trump*, 137 S.  
 22 Ct. at 2087 (cleaned up).

23           Plaintiffs request three forms of injunctive relief: 1) a prohibition on Defendants’ taking  
 24 certain actions with respect to “any ordinance that punishes sleeping, lodging, or camping on  
 25 public property,” including barring Defendants’ enforcement of 11 separate ordinances and  
 26 statutes; 2) a prohibition on summarily seizing and destroying homeless individuals’ personal  
 27 property, including momentarily unattended property; and 3) appointment of a Special Master at  
 28 Defendants’ expense to implement the preliminary injunction.

United States District Court  
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1 In their opposition brief, Defendants wholly fail to object to or even address the substance  
2 or scope of the proposed preliminary injunction, thereby conceding these issues.

3 Plaintiffs present uncontradicted evidence that from July 2018 to October 2021, SFPD  
4 cited or arrested homeless individuals at least 2952 times for lodging without permission or for  
5 refusing to obey a law enforcement order to vacate or “move along.” Herring Decl. ¶ 70. In a  
6 supplemental declaration, Dr. Herring states that his analysis of “the same public records from  
7 2022 shows the same trend.” Supp. Herring Decl. ¶ 19. It is also undisputed that for years San  
8 Francisco has had a shortfall of shelter beds that numbers in the thousands, and that homeless San  
9 Franciscans have not been able to voluntarily access shelter beds since April 2020.

10 In *Martin*, the Ninth Circuit held that “so long as there is a greater number of homeless  
11 individuals in [a jurisdiction] than the number of available beds [in shelters], the jurisdiction  
12 cannot prosecute homeless individuals for involuntarily sitting, lying, and sleeping in public.” 920  
13 F.3d at 617 (quotation marks omitted, alterations in original) (quoting *Jones*, 444 F.3d at 1138);  
14 *see also Johnson*, 50 F.4th at 795 (“[t]he formula established in *Martin* is that the government  
15 cannot prosecute homeless people for sleeping in public if there ‘is a greater number of homeless  
16 individuals in [a jurisdiction] than the number of available’ shelter spaces.” (citation omitted)). In  
17 light of the record presented by Plaintiffs in support of their Eighth Amendment claim as well as  
18 governing Ninth Circuit law, Defendants are preliminarily enjoined from enforcing or threatening  
19 to enforce, or using California Penal Code section 148(a) to enforce or threaten to enforce, the  
20 following laws and ordinances to prohibit involuntarily homeless individuals from sitting, lying,  
21 or sleeping on public property:<sup>19</sup>

- 22 • California Penal Code section 647(e)
- 23 • California Penal Code section 370

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25 <sup>19</sup> These laws and ordinances are all identified in the Enforcement Bulletin as “laws governing  
26 lodging and encampments on streets or sidewalks.” Enforcement Bulletin at 1-3. The  
27 Enforcement Bulletin identifies several laws and ordinances that the court does not include in the  
28 injunction because Plaintiffs correctly did not seek their inclusion since they are directed at  
conduct beyond sitting, lying or sleeping outside. These are California Penal Code section 647(c),  
San Francisco Municipal Health Code sections 581 and 596; San Francisco Police Code sections  
22-24; and San Francisco Police Code sections 25-27.

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- 1 • California Penal Code section 372
- 2 • San Francisco Police Code section 168
- 3 • San Francisco Police Code section 169

4 Plaintiffs’ request for a preliminary injunction enjoining enforcement of San Francisco  
 5 Police Code section 97(b), San Francisco Park Code section 3.12, San Francisco Park Code  
 6 section 3.13, San Francisco Port Code section 2.9, and San Francisco Port Code section 2.10 is  
 7 denied without prejudice, as Plaintiffs have not established a record of enforcement of these  
 8 ordinances against homeless individuals who cannot obtain shelter in San Francisco.

9 As to Plaintiffs’ Fourth Amendment claim, Plaintiffs have presented significant evidence  
 10 of a practice of seizing and destroying of homeless individuals’ unabandoned personal property in  
 11 violation of the Fourth Amendment, *see Lavan*, 693 F.3d at 1030, and San Francisco’s own bag  
 12 and tag policy, which clearly requires the City to store personal property so that homeless  
 13 individuals may retrieve it. Plaintiffs acknowledge that the substance of the bag and tag policy is  
 14 constitutional. Accordingly, Defendants are preliminarily enjoined from violating San Francisco’s  
 15 bag and tag policy.

16 Plaintiffs’ request for appointment of a Special Master is denied without prejudice.

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United States District Court  
Northern District of California

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**V. CONCLUSION**

For the foregoing reasons, Plaintiffs’ motion for a preliminary injunction is granted as follows:

I. Defendants are preliminary enjoined from enforcing or threatening to enforce, or using California Penal Code section 148(a) to enforce or threaten to enforce, the following laws and ordinances to prohibit involuntarily homeless individuals from sitting, lying, or sleeping on public property:

- California Penal Code section 647(e)
- California Penal Code section 370
- California Penal Code section 372
- San Francisco Police Code section 168
- San Francisco Police Code section 169

This preliminary injunction shall remain effective as long as there are more homeless individuals in San Francisco than there are shelter beds available.

II. Defendants are preliminarily enjoined from violating San Francisco’s bag and tag policy as embodied in DPW Procedure No. 16-05-08 (REV 03).

**IT IS SO ORDERED.**

Dated: December 23, 2022



**EXHIBIT C  
TO  
DECLARATION OF KAITLYN MURPHY IN  
SUPPORT OF MOTION TO STAY**

Pages 1 - 46

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Donna M. Ryu, Magistrate Judge

COALITION ON HOMELESSNESS, )  
et al., )

Plaintiffs, )

VS. )

NO. C 22-05502 DMR

CITY AND COUNTY OF SAN )  
FRANCISCO, et al., )

Defendants. )

San Francisco, California  
Thursday, December 22, 2022

**TRANSCRIPT OF OFFICIAL ELECTRONIC SOUND RECORDING**

**OF REMOTE ZOOM VIDEO CONFERENCE PROCEEDINGS**

**TIME: 1:25 P.M. - 2:31 P.M. = 1 HOUR, 3 MINUTES**

**APPEARANCES VIA ZOOM:**

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**(APPEARANCES CONTINUED ON FOLLOWING PAGE)**

TRANSCRIBED BY: Ana Dub, RDR, RMR, CRR, CCRR, CRG, CCG  
CSR No. 7445, Official U.S. Reporter

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Sixth Floor, Fox Plaza  
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16 **BY: EDMUND T. WANG, DEPUTY CITY ATTORNEY**

17  
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1 Thursday - December 22, 2022

1:25 p.m.

2 P R O C E E D I N G S

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4 **THE CLERK:** Calling Civil Case C 22-5502 DMR,  
5 Coalition on Homelessness, et al. vs. City and County of  
6 San Francisco, et al.

7 This, again, is a gentle reminder. Since there's a lot of  
8 attorneys on the platform, please identify yourself each time  
9 you speak for the integrity of the record.

10 If plaintiff can start identifying themselves for the  
11 record

12 **MR. SHROFF:** Yes. Good afternoon, Your Honor. This is  
13 Zal Shroff from the Lawyers' Committee for Civil Rights of the  
14 San Francisco Bay Area for the plaintiffs.

15 We're also joined by the newest member of our team, who  
16 was sworn in last week, Ms. Hadley Rood, who is in our offices  
17 with one of our individual plaintiffs, Mr. Moliqye Frank.

18 **THE COURT:** Good afternoon, Mr. Shroff, Ms. Rood,  
19 Mr. Frank.

20 **MR. PFEIFFER:** Good afternoon, Your Honor, Al Pfeiffer of  
21 Latham & Watkins on behalf of the plaintiffs.

22 **THE COURT:** Good afternoon, Mr. Pfeiffer.

23 **MR. TIU:** Good afternoon, Your Honor. Wesley Tiu from  
24 Latham & Watkins as well for the plaintiffs.

25 **THE COURT:** Good afternoon, Mr. Tiu.

1           **MR. WU:** Good afternoon, Your Honor. This is Kevin Wu  
2 with Latham & Watkins on behalf of the plaintiffs.

3           **THE COURT:** Good afternoon, Mr. Wu.

4           **MR. DO:** Good afternoon, Your Honor. John Do with the  
5 ACLU. And I also have with us, if it's all right with you,  
6 members of the Coalition on Homelessness, who are the  
7 plaintiffs in this case as well.

8           **THE COURT:** All right. Good afternoon to all of you.

9           **MR. EMERY:** Good afternoon, Your Honor. Deputy City  
10 Attorney Jim Emery for the City and County of San Francisco.

11           **THE COURT:** Good afternoon, Mr. Emery.

12           **MR. WANG:** Good afternoon, Your Honor. Edmund Wang,  
13 Deputy City Attorney, on behalf of the City and County of  
14 San Francisco.

15           **THE COURT:** Good afternoon, Mr. Wang.

16           All right. We're here on the plaintiffs' motion for a  
17 preliminary injunction.

18           I want to start with some questions. Who will be arguing  
19 on behalf of plaintiffs, please?

20           **MR. SHROFF:** Yes, Your Honor. I'll take the lead from  
21 plaintiffs. And pursuant to the Court's standing order  
22 regarding professional development, we propose to divide the  
23 argument. I can answer questions as to the Eighth Amendment,  
24 and Mr. Tiu is prepared to address the Fourth Amendment, and  
25 Mr. Wu can address the parties' disputes as to evidentiary

1 admissibility, if the Court wishes to hear argument as to that.

2 **THE COURT:** Okay. Great. Thank you.

3 Mr. Emery, how is the defense going to handle the  
4 argument?

5 **MR. EMERY:** I will be arguing today, Your Honor.

6 **THE COURT:** Okay. So let me -- I want to -- I want to  
7 talk about the two policies that are at issue here. I want to  
8 confirm with the plaintiffs that I believe the plaintiffs  
9 believe these policies are constitutional, but they're  
10 complaining about how these policies are violated in a  
11 widespread and systematic way.

12 Mr. Shroff, is that a fair statement?

13 **MR. SHROFF:** Your Honor, I think that's a fair statement  
14 with respect to the Fourth Amendment issue, and not with  
15 respect to the Eighth Amendment issue.

16 **THE COURT:** Okay.

17 **MR. SHROFF:** Yes. The City doesn't have a coherent policy  
18 that addresses whether or not it actually offers shelter prior  
19 to encampment operations.

20 As to the Fourth Amendment issue, I think we are in  
21 general agreement that the policy -- and admittedly, there are  
22 a few iterations of it in the mix -- are generally  
23 constitutionally compliant. It's just a question of which is  
24 the policy that's currently at issue.

25 **THE COURT:** So let's start there.

1 I asked you all to submit what you thought were the  
2 more -- the most recent -- or the operative policy. This is  
3 the Bag and Tag DPW Procedure 16-05-18. Each of you submitted  
4 versions this morning, but they were different versions.

5 So, Mr. Emery, I -- I'm going to assume that the City gave  
6 me the operative version, which is Version 3. And I think your  
7 submission said that City employees are getting trained as of  
8 November 2022. Is that correct?

9 **MR. EMERY:** Yes. The rollout operationally is still  
10 underway for that. So what I learned just an hour or so ago is  
11 they have actually scheduled another training for next week.

12 **THE COURT:** All right. What are -- Mr. Emery, what are  
13 the differences between Version 3 and Version 2, which is what  
14 I think I received from plaintiffs this morning? They got that  
15 from the City in February 2022.

16 **MR. EMERY:** I actually think that the content of both is  
17 the same. And the difference is that the draft version that  
18 the plaintiffs had had not yet been published, which is what  
19 they -- how they described it in their brief.

20 And what happened in September was it was published, and  
21 then the actual operational rollout is still ongoing.

22 **THE COURT:** So --

23 **MR. EMERY:** And we --

24 **THE COURT:** -- is it the City's representation today that  
25 Version 3 is identical, substantively, to Version 2? It's just

1 that Version 3 is now public?

2 **MR. EMERY:** Version 2, which is -- was attached to the  
3 plaintiffs' moving papers, is several years old.

4 **THE COURT:** It was not --

5 **MR. EMERY:** What they --

6 **THE COURT:** It was not attached to -- that's why I asked  
7 for it.

8 **MR. EMERY:** Right.

9 **THE COURT:** And what I got this morning was something  
10 called Version 2. That came from the plaintiffs. They said  
11 they received it in February 2022.

12 **MR. EMERY:** Yeah. Yes, that is -- that is identical.

13 And how it's different from what was attached to  
14 plaintiffs' moving papers, which is an earlier version, the  
15 earlier version does not preserve bulky items.

16 **THE COURT:** Right.

17 **MR. EMERY:** The 2022 versions, from both the plaintiffs  
18 and the slightly tidier, cleaner version that I submitted this  
19 morning, that does provide for bulky items --

20 **THE COURT:** Okay.

21 **MR. EMERY:** -- also.

22 **THE COURT:** So again, for the record, I got two filings  
23 today. Right? One from plaintiffs, one from the defense.

24 **MR. EMERY:** Mm-hmm.

25 **THE COURT:** Mr. Emery, as a representative of the City who

1 created the document, can you say on the record that the  
2 version -- that both versions are identical by way of  
3 substance?

4 **MR. EMERY:** Yes.

5 **THE COURT:** It's just that the one submitted by the City  
6 has now been published. Is that a correct statement?

7 **MR. EMERY:** Yes. I'm saying that with a little wince  
8 because I have not gone word for word. I've looked at  
9 everything that is substantively important, and they look the  
10 same.

11 **THE COURT:** Mr. Shroff, have you had a chance to take a  
12 look at the version submitted by the City today?

13 **MR. SHROFF:** We have, Your Honor. And with the same  
14 caveat, that we have not looked in exact detail word for word,  
15 it looks to be substantially the same policy.

16 **THE COURT:** Does -- do plaintiffs concede that the policy  
17 itself, so Version 3, the one submitted by the City today  
18 that's public, that that policy is constitutional if followed?

19 **MR. SHROFF:** Yes, Your Honor, we would submit that that  
20 policy is constitutional.

21 **THE COURT:** Okay. Now, let's go back to, I guess I'm  
22 calling it a policy. It has to do with enforcement of the  
23 laws. Right?

24 So both sides have talked about the Enforcement Bulletin,  
25 also called the Department Bulletin, dated April 16th, 2019,

1 entitled "Legal Enforcement Options for Addressing Lodging and  
2 Illegal Encampments." Okay?

3 Now, that Enforcement Bulletin, in general, lays out  
4 various criminal and non-criminal statutes and ordinances that  
5 govern lodging and encampments on the streets or sidewalks of  
6 San Francisco.

7 The bulletin also sets forth restrictions on how to  
8 enforce Penal Code 647(e), which prohibits unauthorized  
9 lodging. And one of those restrictions specifically says that  
10 officers must secure appropriate shelter before taking  
11 enforcement action under Penal Code Section 647(e).

12 The bulletin also sets forth a restriction on enforcing  
13 Proposition Q, which is San Francisco Municipal Police  
14 Code 169, a non-criminal prohibition on encampments. And the  
15 bulletin specifically notes that when enforcing Proposition Q,  
16 the agency workers must provide a written offer of shelter or  
17 housing at least 24 hours before ordering the removal of a tent  
18 or encampment.

19 This bulletin also explains that officers can use  
20 Penal Code 148(a), which prohibits resisting, delaying, or  
21 obstructing a police officer, to enforce any of the laws that  
22 are mentioned in the bulletin. And there's a number of them.

23 So that's what I took from this bulletin. It's a  
24 statement -- it's a -- it's a, I guess, guidance for  
25 law enforcement officers in San Francisco about how -- what

1 they can do -- what their legal enforcement options are for  
2 addressing lodging and illegal encampments.

3 Mr. Emery, is that a fair summary of that document?

4 **MR. EMERY:** Yes, Your Honor.

5 **THE COURT:** Mr. Shroff, is it a fair summary of the  
6 document?

7 **MR. SHROFF:** Yes, Your Honor.

8 **THE COURT:** Okay. Now, if I'm -- calling that document a  
9 policy for the moment, Mr. Shroff, do plaintiffs agree that the  
10 policy itself, as written, is constitutional?

11 **MR. SHROFF:** Your Honor, the policy, as written, would be  
12 constitutional if San Francisco's shelter system was open,  
13 which it is not. So currently, unhoused individuals cannot  
14 access shelter on their own. The wait list is closed. There  
15 is no same-day line. You can't access shelter by calling.

16 If that were different, if the shelter system were, in  
17 fact, open such that people had practical access to shelter,  
18 then that policy would be constitutional with two caveats,  
19 Your Honor.

20 **THE COURT:** Okay.

21 **MR. SHROFF:** It doesn't address SFPD's stated policy via  
22 e-mail. And we do put this in the record. I believe it's  
23 Exhibit 17 with the opening brief. There's a stated SFPD  
24 policy by an incident commander that says that as long as an  
25 area of the City has been offered shelter in the past, it is

1 SFPD policy never to offer shelter in that area again. That  
2 happens in large swathes of the City. So that seems to be a  
3 separate policy at work beyond SFPD policy that the Court has  
4 mentioned.

5 And then there's the practice of move-along orders, which  
6 I don't think are covered under the policy that the Court has  
7 mentioned but is the standard operating procedure for SFPD, as  
8 we've put in the record.

9 **THE COURT:** Okay. Putting aside what the incident  
10 commander said in an e-mail, I'm really just talking about this  
11 one policy, which is the Enforcement Bulletin itself.

12 If -- is it fair to say that the plaintiffs' position, as  
13 long as there's adequate housing and as long as the Enforcement  
14 Bulletin were followed, that the policy itself is  
15 constitutional?

16 **MR. SHROFF:** That would be right, Your Honor, yes.

17 **THE COURT:** Okay. Okay. So let's get into the specifics.

18 And I -- Mr. Emery, I now have some questions for you  
19 about the underlying data.

20 In looking at the defense opposition, my takeaway is that  
21 the City does not dispute a number of key facts. So, for  
22 example, the City does not dispute or challenge that there is a  
23 shortfall that numbers in the thousands when comparing the  
24 number of homeless individuals in San Francisco and the number  
25 of available shelter beds in the period of time of roughly 2019

1 through 2022, and that that shortfall is calculated a number of  
2 ways but has been somewhere in the range of 2,700 to 4,200 beds  
3 short of the need during that time frame.

4 Mr. Emery, I didn't see any dispute of that in the defense  
5 papers.

6 **MR. EMERY:** The number of unsheltered people experiencing  
7 homelessness exceeds the number of shelter beds that  
8 San Francisco has.

9 **THE COURT:** By thousands?

10 **MR. EMERY:** Yes.

11 **THE COURT:** Okay. I also didn't see any dispute by  
12 the City on Dr. Herring's analysis about the minimum number of  
13 citations that were issued to homeless individuals for illegal  
14 lodging.

15 So for the period July 2018 to October 2021, Dr. Herring  
16 found that there were at least 360 citations issued to homeless  
17 individuals for illegal lodging and at least 2,652 citations  
18 during that same period pursuant to Penal Code 148(a), for  
19 refusal of a homeless individual to obey an order to vacate or  
20 move along.

21 Those were not challenged; so I assume --

22 **MR. EMERY:** That's correct.

23 **THE COURT:** -- the City agrees that that's correct  
24 information.

25 **MR. EMERY:** I don't have a basis to challenge that.

1           **THE COURT:** Okay. I also think that the City did not  
2 dispute that during encampment closures, when a member -- when  
3 members of the SFHOT team arrive to do their initial assessment  
4 or engagement, they do not have firm and immediate offers of  
5 beds for residents who are being displaced when they first get  
6 there. Is that -- I didn't -- the evidence on both sides  
7 seemed to confirm that.

8           **MR. EMERY:** They don't have specific beds available. They  
9 are confident that they can provide beds for everyone who  
10 expresses interest.

11           **THE COURT:** Okay. They -- I don't -- I don't think I saw  
12 that in the record. I don't think I saw an expression that  
13 they're confident, when they arrive, that they can provide bed  
14 space for everyone who wants it. Is that somewhere in the  
15 record?

16           **MR. EMERY:** What I remember in the record right now in  
17 response to that is Mr. Dodge explaining that on the occasions  
18 when he -- availability of beds falls short, which is very,  
19 very rare, that the encampment resolution change- -- switches  
20 gears. That's the phrase he used.

21           **THE COURT:** Okay.

22           **MR. EMERY:** And based on practice, they know that -- they  
23 expect that 40 percent of the people at the encampment will  
24 accept shelter. And based on those numbers, when they -- they  
25 are confident they will have that allocation that day to cover

1 the number of people they need. And that is borne out in the  
2 statistics.

3 **THE COURT:** Okay. Let me -- let me take that apart a  
4 little bit.

5 So your first -- the first question I had was: Where in  
6 the record does it show that SFHOT workers, even though they  
7 don't come with a firm and immediate offer of bed space, they  
8 are confident that they can meet the needs of everyone who  
9 wants a bed?

10 I don't -- if you're pointing to Mr. Dodge, I'm not sure  
11 that he said that. I don't think that he did.

12 Now, the other interesting thing about Mr. Dodge is that  
13 he is the source of this 40 percent notion; but the source of  
14 that is in an article in which he cited -- he is quoted.  
15 Mr. Dodge himself, who submitted a declaration in this case,  
16 did not talk at all about where this 40 percent rule comes  
17 from, what the formula is, how he derived it, how he -- so  
18 there's no -- there's nothing from the -- from the apparent  
19 maker of the percentage himself, even though he had an  
20 opportunity to put it in there. So that's -- that's a little  
21 problematic.

22 And finally, although Mr. Dodge says in his declaration  
23 that when there aren't enough shelter beds available, the  
24 enforcement does not go forward, there is certainly a lot of  
25 evidence submitted by Dr. Herring on the data that he crunched

1 as well as, you know, a lot of affidavits with anecdotal  
2 evidence that bring those numbers to life where, for example,  
3 Dr. Herring says in the period of June 1st -- sorry --  
4 January 1st to June 30th, 2021, there's sweep operations on  
5 83 days and that during that period there was only shelter  
6 available for all camp residents on 73 of those days; and yet  
7 enforcements went forward and citations occurred on at least 51  
8 of the 73 days when there wasn't, as a documented matter,  
9 enough shelter space for all residents.

10 So there's a -- that's -- that's really just one piece of  
11 the evidence submitted by plaintiffs on this -- this question.  
12 And I didn't see anything in any of the defense submissions  
13 about any particular enforcement where, you know, there weren't  
14 enough beds and so they stopped.

15 There's a general statement about that, but all of the  
16 defense submissions were generalities. None of it was about --  
17 you know, was based in statistical data, all of which was  
18 available to plaintiff -- sorry -- the defense, or more  
19 granular anecdotal data, which, quite frankly, the plaintiffs  
20 submitted, you know, a very significant amount of that  
21 material.

22 So I -- I am -- my initial question was, there doesn't  
23 appear to be a dispute that the SFHOT workers, when they come  
24 to the encampment closures, to start the day off, they do not  
25 have firm and immediate offers. Do you -- does the City

1 concede that that's true?

2 **MR. EMERY:** I -- I quibble with the phrase "firm and  
3 immediate." It's not a specific bed, but -- but the -- but the  
4 experience demonstrates that, day after day, we have -- we make  
5 the placements that -- for people -- we match placements with  
6 people who accept the offers.

7 **THE COURT:** Mr. Emery, besides pointing to Mr. Dodge's  
8 declaration, is there any other declaration or evidence that  
9 supports what you just said?

10 **MR. EMERY:** Well, attached to Ms. Piastunovich's  
11 declaration is her log of HSOC, the encampment outreach  
12 engagements for 2022. And it shows -- it's very hard to read,  
13 but it's there. And it shows day after day who was -- who was  
14 placed, who was matched with shelter.

15 And that's -- Piastunovich is P-i-a-s-t-u-n-o-v-i-c-h.

16 **THE COURT:** Is there any other evidence you want me to  
17 review?

18 **MR. EMERY:** No, Your Honor.

19 **THE COURT:** Okay. Let me turn briefly to Mr. Shroff.

20 Is there anything that Mr. Emery has said that you want to  
21 address or clarify with respect to the evidentiary record?

22 **MR. SHROFF:** Thank you, Your Honor.

23 Oh, I note that my Internet is unstable. Apologies.

24 Okay. I think we're back.

25 With respect to the Piastunovich evidence, that indicates

1 some degree of shelter acceptance or rejection. It doesn't  
2 connect that with enforcement operations.

3 So, as I think the Court noted, the plaintiffs have put in  
4 evidence of the substantial citations and arrests and  
5 move-along orders. The City has not attempted to suggest that  
6 only individuals who have actually been given a shelter offer  
7 were subject to those citations and arrests. That was  
8 something the City had the opportunity to do when this Court  
9 heard the discovery dispute between the parties regarding the  
10 record, and the City chose not to introduce evidence to suggest  
11 that.

12 And, yes, as Your Honor pointed out, there are 30  
13 percipient witnesses who have identified situations in which  
14 individuals did not have shelter offered to them prior to being  
15 enforced against.

16 I do think it's important to note, Your Honor, for  
17 the Court as well that the HSOC sweep operations that we're  
18 talking about, the formalized encampment resolutions are but a  
19 small fraction of the City's interactions with unhoused  
20 individuals. As the Herring report points out, SFPD is  
21 dispatched thousands of times every month to respond to  
22 complaints about homelessness. I believe it's in the record in  
23 the Herring report that about 80 percent of those interactions  
24 result in a move-along order. That's where the HOT team isn't  
25 even present and there isn't even the guise of shelter.

1           And there are also DPW cleaning operations happening every  
2 day, again, without the presence of the HOT team.

3           In fact, the vast majority of the City's unconstitutional  
4 practices here are with respect to those informal sweep  
5 operations that are discussed by the Herring report.

6           What we have the most data on are the HSOC formal sweeps,  
7 and even there we see there isn't even enough shelter just to  
8 cover those formal operations under the City's HSOC program.  
9 But the problem really is far larger than just HSOC.

10           **THE COURT:** Okay. Thank you.

11           Mr. Emery, anything to respond to those points?

12           **MR. EMERY:** What plaintiffs haven't shown is that there  
13 are insufficient beds offered at HSOC encampment resolutions  
14 for the people who accept shelter. Everyone is offered, and we  
15 have enough beds for those who accept.

16           Plaintiffs think that that's an improper approach, but  
17 there isn't a factual dispute, I don't think.

18           Regarding the --

19           **THE COURT:** Hold on. Let me make sure I understand the  
20 argument.

21           **MR. EMERY:** Yeah.

22           **THE COURT:** So the City concedes that there is a shortfall  
23 in the thousands between available shelter beds and people who  
24 are involuntarily unhoused, involuntarily homeless individuals.

25           **MR. EMERY:** That's right.

1           **THE COURT:** But the City says: We are not engaging in  
2 unconstitutional behavior because when we perform a  
3 displacement, we offer, and anybody who says they want space,  
4 we can guarantee that they get it, and the record shows that.

5           And the record you'd point to is the Piastunovich log?

6           **MR. EMERY:** Yes.

7           **THE COURT:** Okay. So there is a -- you know, a veritable  
8 mountain of evidence if you look at the data by Dr. Herring,  
9 plus the observations of coalition declarants which, between  
10 them, I think there were close to -- well, at least well over a  
11 hundred encampment closure events that they observed, plus we  
12 have the individual plaintiffs, plus other individuals.

13           And there's a fair amount of evidence where people are  
14 saying or observing that there were no beds to be offered; that  
15 the HOT team didn't have anything to offer. And the numbers  
16 bear that out.

17           So I'm not sure -- I will -- you know, I'll go back and  
18 take a look at Dodge and the Piastunovich log; but I don't  
19 think it really rebuts anything close to the evidence -- the  
20 qualitative and quantitative evidence produced by the  
21 plaintiffs in their motion on this point.

22           **MR. EMERY:** When I read the plaintiffs' declarations about  
23 whether there were offers of shelter, I understand the  
24 assertion that there was no offer of shelter to be the absence  
25 of an offer of a particular bed. I think that the plaintiff

1 declarations don't consider the outreach and the offer of -- of  
2 a non-specific shelter bed at 7:30 in the morning to be an  
3 offer of shelter.

4 And so I think that's a legal question. I don't think  
5 that's a factual dispute.

6 **THE COURT:** Well, let me ask you a different question,  
7 then, Mr. Emery. I'm looking at *Martin* and *Johnson*. Okay? So  
8 first we had the *Martin* case, Ninth Circuit.

9 **MR. EMERY:** Yes.

10 **THE COURT:** Their holding (as read):

11 "We hold only that 'so long as there is a  
12 greater number of homeless individuals in a  
13 jurisdiction than the number of available beds in  
14 shelters,' the jurisdiction cannot prosecute homeless  
15 individuals for 'involuntarily sitting, lying, and  
16 sleeping in public.'"

17 "That is, as long as there is no option of  
18 sleeping indoors, the government cannot criminalize  
19 indigent, homeless people for sleeping outdoors, on  
20 public property, on the false premise they had a  
21 choice in the matter."

22 That's followed very recently by *Johnson*, Ninth Circuit,  
23 September 2022 --

24 **MR. EMERY:** Mm-hmm.

25 **THE COURT:** -- which says (as read):

1           "The formula established in *Martin* is that  
2           the government cannot prosecute homeless people for  
3           sleeping in public if there 'is a greater number of  
4           homeless individuals in a jurisdiction than the  
5           number of available' shelter spaces."

6           It goes on to tell us that we can't count shelters if  
7           there's a mandatory religious focus -- right? -- that that  
8           should not be included in the formula.

9           So the Ninth Circuit is telling me that I need to follow a  
10          formula approach, and so I'm not -- what do I do with that,  
11          given the defense -- I think the defense is arguing for a  
12          different approach. You can spell that out for me.

13          **MR. EMERY:** Okay. I've been thinking about this a little  
14          bit.

15          I read *Martin* and *Johnson*, and they say two different  
16          things. They talk about the formula, and they also say as long  
17          as there's no option of sleeping indoors, the government cannot  
18          criminalize sleeping outdoors. That's -- that's *Martin*. And  
19          *Johnson* says it's unconstitutional to punish sleeping somewhere  
20          in public if one has nowhere else to do so.

21          The formula -- the context of the Ninth Circuit's  
22          articulation of that formula is in the absence of what  
23          San Francisco does, which neither *Grants Pass* nor *Boise* did,  
24          which was, before enforcing against an individual, offering  
25          shelter to that individual.

1           **THE COURT:** Okay. I understand the argument.

2           **MR. EMERY:** Yeah.

3           **THE COURT:** I will -- I don't know that I fully agree with  
4 it, but I understand the argument and will consider it.

5           But I also have to consider the bodies of evidence. So on  
6 the defense side, we've got Dodge and Piastunovich; right?

7 That's what you've pointed me to consider --

8           **MR. EMERY:** Yeah.

9           **THE COURT:** -- for that.

10           Okay. Let me move on for a moment to the bag and tag.

11 Mr. Emery, I didn't --

12           **MR. EMERY:** I did have some more on that. Can we --

13           **THE COURT:** I'm sorry. Go ahead.

14           **MR. EMERY:** Okay. When I looked through plaintiffs'  
15 evidence, I was focusing on -- on eyewitness, firsthand events  
16 that occurred in 2022. I was zeroing in on that because of the  
17 volume, and I explained why I don't think the rest is very  
18 probative.

19           And I only found one assertion that SFHOT at an encampment  
20 resolution did not have any beds to offer, and that was  
21 January 26th of 2022. And Mr. Dodge specifically rebuts that  
22 particular firsthand assertion because at the end of the day on  
23 January 26, 2022, HSOC had enough beds for everyone who wanted  
24 one that day.

25           **THE COURT:** I'm not sure -- I'm not understanding why you

1 would focus solely on 2022. I mean, there's a body of evidence  
2 here that --

3 **MR. EMERY:** Yeah.

4 **THE COURT:** -- dates back that Dr. Herring went through.

5 He -- the defense opposition objects to the opening brief,  
6 saying: It only went through 2021; that's stale.

7 But the reason it's stale is because the City didn't  
8 update their documents, didn't provide additional data until  
9 after the plaintiffs filed their opening brief, at which point  
10 plaintiffs had the additional data.

11 Dr. Herring has submitted a supplemental declaration  
12 saying the data that continues through 2022 is completely in  
13 line, nothing has changed. So I don't know that it's  
14 appropriate to focus on the January -- one specific incident  
15 when, actually, the data and the anecdotal evidence covers far  
16 more than that.

17 **MR. EMERY:** Well, they -- the Herring data does not  
18 distinguish between what happened at resolutions and what  
19 happens outside resolutions. We know that --

20 **THE COURT:** Why does that matter?

21 **MR. EMERY:** Well, because at resolutions, so long as there  
22 are enough shelter beds to provide for everyone who accepts  
23 shelter, every citation is proper.

24 Then if you look at the citations that are recorded  
25 outside resolutions, we know that the San Francisco Police

1 policy is to offer shelter, to call up on the phone the  
2 housing -- supportive housing services to see if there's a  
3 shelter bed available before enforcing, unless there -- the  
4 person is blocking the sidewalk so that a wheelchair can't go  
5 through or unless the person is blocking a -- access to a  
6 public area. Under those circumstances, you don't have to  
7 offer shelter. You're asking a person to move from a specific  
8 place. You're not saying a person has no place to sleep  
9 legally.

10 **THE COURT:** Mr. Emery, let me just stop you because  
11 I think this goes back to where we started.

12 I think the plaintiffs have conceded that the Enforcement  
13 Bulletin, as written, if --

14 **MR. EMERY:** Yeah.

15 **THE COURT:** -- there were enough shelter beds available,  
16 it's constitutional.

17 They are not challenging the policy itself.

18 **MR. EMERY:** Yes.

19 **THE COURT:** Their argument is that policy is violated on a  
20 widespread systematic basis, and they present evidence by  
21 Dr. Herring, as well as all of the declarations, to show that.

22 So I -- I didn't see -- what you're talking about now,  
23 what you're saying about practice, you know, there's not --  
24 there was no quantitative analysis by the defense. There's --  
25 there's -- there was nothing that was offered by the defense to

1 challenge Dr. Herring's analyses in any sort of quantitative  
2 way or to present an alternate analysis. So I can't --  
3 you know, I'm stuck with what the record is on this motion.

4 How this plays out down the road, I don't know. We're  
5 very early in the case.

6 **MR. EMERY:** Mm-hmm.

7 **THE COURT:** But for purposes of considering the likelihood  
8 of success on the merits, both sides had -- had an  
9 opportunity --

10 **MR. EMERY:** That's right.

11 **THE COURT:** -- to give me a record.

12 The City is in possession of all of the information. So  
13 I -- I'm -- you know, you pointed out a few things that are in  
14 the record that I can look at, and I will. I'll go back to  
15 look at them. But I'm not hearing sort of a full-throated  
16 analysis or sort of evidentiary record --

17 **MR. EMERY:** Mm-hmm.

18 **THE COURT:** -- that addresses the record put forward by  
19 the plaintiffs on this.

20 **MR. EMERY:** What I'm --

21 **THE COURT:** Is there anything further?

22 **MR. EMERY:** What I'm suggesting is that the City does not  
23 challenge the police data that it provided to the plaintiffs  
24 through Public Records Act requests.

25 The inferences are unwarranted, given that San Francisco

1 has a policy that accommodates and explains all of the numbers  
2 of citations.

3 **THE COURT:** But there's ample evidence, anecdotal evidence  
4 that that policy is not being followed. We have very different  
5 descriptions of how encampment closures occur; and the  
6 plaintiffs' descriptions, which are, you know, fairly detailed,  
7 talk about many instances, many, many, many instances in which  
8 the policy was not followed.

9 So that's, I guess, what I'm pointing to. The policy  
10 isn't the problem. The question is: How is that policy being  
11 executed?

12 **MR. SHROFF:** Your Honor, if I may.

13 **THE COURT:** Mr. Shroff, go ahead.

14 **MR. SHROFF:** I was just hoping to address the legal  
15 question regarding what really is the test in *Martin* relative  
16 to the City's argument here --

17 **THE COURT:** Okay.

18 **MR. SHROFF:** -- because *Martin* does articulate a numerical  
19 test, and I think we provided the Court the recent authority  
20 from the District of Arizona that applies that test.

21 **THE COURT:** Yes.

22 **MR. SHROFF:** There are several other courts in this  
23 district that have done so. *Warren vs. City of Chico* also  
24 takes that mathematical test into account.

25 I think *Grants Pass* really addresses the question that the

1 defendants are seeking to assert, which is they're purporting  
2 that people are choosing to be unhoused. Where does that fit  
3 into the mathematical equation?

4 And *Grants Pass* at Footnote 32 makes very clear, if  
5 there's not enough shelter in the jurisdiction, it is not the  
6 burden of the plaintiffs to demonstrate that the hundreds of  
7 unhoused people outside are involuntarily homeless. That is  
8 not a burden that is put on the plaintiffs under *Martin*.

9 What Footnote 33 of *Grants Pass* articulates is actually  
10 that where there isn't anything in the record from  
11 the government to suggest that people are choosing  
12 homelessness, then the default mathematical equation in *Martin*  
13 is what applies.

14 And the District of Arizona decision just from last week  
15 interpreting *Grants Pass* goes even further and says it is  
16 the Government's burden, in the massive absence of shelter, to  
17 demonstrate that people are authentically choosing  
18 homelessness.

19 And we put in the record, not just from the individual  
20 plaintiffs who have been searching for shelters for months to  
21 even up to a year while being policed and yet not having access  
22 to it, but also the observations of 30 percipient witnesses,  
23 including other directly impacted people who clearly have not  
24 had access to shelter. And that's because, again, the shelter  
25 wait list with 1,000 people on it is closed and not moving.

1 You can no longer wait in a same-day line for shelter.

2 And before the pandemic, we know how this played out.  
3 There were 1,000 people waiting for shelter who couldn't get  
4 access to it for six to eight weeks. There were hundreds of  
5 people waiting in a same-day line every day, falling asleep  
6 outside while waiting for shelter.

7 So the idea that people aren't choosing shelter is an  
8 illusion. It's not borne out by the record. And if anything,  
9 it is the Government's burden, in light of the sheer lack of  
10 shelter access by thousands, to make that showing. They  
11 haven't made the showing.

12 **THE COURT:** Mr. Emery?

13 **MR. EMERY:** I'm glad Mr. Shroff brought up the Phoenix  
14 case because after plaintiffs submitted it to the Court the  
15 other night, I did read it. I hadn't been aware of that.

16 And Phoenix, like San Francisco, has more unhoused people  
17 than it has shelter beds. And I -- I noticed how the Court in  
18 the Phoenix case addressed that in its injunction against  
19 the City of Phoenix.

20 First of all --

21 **THE COURT:** Hold on one second, Mr. Emery. Before I let  
22 you go down this road -- I will allow it, but I just want to  
23 say, it was extraordinary to me that the City did not challenge  
24 the proposed three-part preliminary injunctive relief. Not a  
25 single word of the City's opposition brief was devoted to that

1 topic; and therefore, the City has waived its right to say how  
2 the Court should exercise its discretion if I decide that  
3 plaintiffs are entitled to preliminary injunctive relief. We  
4 don't get to start arguing that now. That's not how the rules  
5 work. There's an opposition -- there's opening, opposition,  
6 and reply for a reason.

7 But I will allow you to talk about the new case, which is  
8 Arizona, because that came in after the fact. So your remarks  
9 on injunctive relief should be limited to that.

10 **MR. EMERY:** Okay. Well, this also goes to how to apply  
11 the formula. That's -- that's where I was going first.

12 **THE COURT:** Okay. Go ahead.

13 **MR. EMERY:** So like San Francisco, Phoenix is faced with  
14 more people experiencing homelessness than the shelter beds  
15 that are available.

16 The Court in Phoenix was faced with two different things  
17 going on: a planned large-scale operation at what is called  
18 the Zone and ongoing small-scale operations outside the Zone.  
19 The Court in Phoenix addressed the formula, what we were  
20 discussing as a formula, by saying in the first point of the  
21 injunctive relief that as long as there are more unsheltered  
22 individuals in Phoenix than the shelter beds available, Phoenix  
23 can't enforce the camping and sleeping bans against individuals  
24 who practically cannot obtain shelter.

25 And so there's a -- the Court in Phoenix is recognizing a

1 second level to this formula. The formula's not the end of the  
2 story. As long as the formula applies against Phoenix, then  
3 enforcement is proper only against people who can practically  
4 obtain shelter.

5 That demonstrates that this Court, within the  
6 Ninth Circuit, is looking at the *Martin* and *Johnson* case and  
7 understanding that the formula is not the end of the story;  
8 that an individual's Eighth Amendment rights depend on whether  
9 that individual has access to shelter.

10 **THE COURT:** Again, I point out that none of this is in the  
11 opposition brief. So -- and certainly, *Martin* and *Johnson* were  
12 on the books when the brief was submitted.

13 **MR. EMERY:** Right.

14 **THE COURT:** So, okay. Let me turn to Mr. Shroff.  
15 What do you think of that reading?

16 **MR. SHROFF:** Your Honor, we do describe this in our  
17 briefing in the opening brief with respect to an  
18 enforcement-first approach, which has been the City's approach  
19 in San Francisco at this time.

20 The basic precept of *Martin* is the Eighth Amendment  
21 doctrine that says that you cannot punish someone for something  
22 that is involuntary.

23 Right now in San Francisco, because of the closure of the  
24 shelter system, no one can access shelter in San Francisco  
25 unless they are subject to an enforcement operation by the City

1 under threat of citation or arrest. Until SFPD comes to tell  
2 you you are violating the law, you have no access to shelter.

3 That's in the record both from our individual plaintiffs,  
4 from the dozens of unhoused people who submitted declarations,  
5 from the five observers from the Coalition on Homelessness, and  
6 even from the former City workers who acknowledge that since  
7 the pandemic, the City has shut the shelter wait list so  
8 there's a thousand people still waiting there; you can't get in  
9 the line; you can't even call the City. So that's not  
10 "practically accessible shelter" under *Martin*.

11 In fact, what the City is doing to try to inflate the idea  
12 that it has beds -- and we know just last Friday, thanks to  
13 the Court's order giving us the shelter bed availability, there  
14 are reportedly 34 beds in San Francisco as of last Friday for  
15 4,000 individuals. It's an illusion that people can access  
16 those beds. They literally cannot if they sought them today.  
17 Until the police comes to them to enforce against them, there  
18 is no shelter for them to be had. That's exactly backwards  
19 under *Martin*. It is punishing someone, first, for something  
20 over which they had no control when shelter was not practically  
21 accessible.

22 So I think when we talk about the SFPD policy being  
23 lawful, it is lawful to the extent that there is an open  
24 shelter system where anyone can access it and it is practically  
25 accessible to someone prior to being enforced against. That's

1 just not the reality in San Francisco.

2 Even in Phoenix, frankly, it's an open shelter system.  
3 They are missing a thousand beds, but if there's a bed, someone  
4 can access it in the order that's appropriate because they all  
5 can seek it.

6 Right now we have people waiting in the wings, thousands  
7 of people waiting in the wings for shelter in San Francisco who  
8 aren't being given that access. The City is suggesting it has  
9 a 20- to 30-bed opening, and yet you only get that if SFPD  
10 enforces against you. And even then, the record shows you may  
11 not be getting access to a bed. That's not "practically  
12 available shelter" under *Martin*.

13 **THE COURT:** Mr. Emery, does the City concede -- I think  
14 the City concedes this and, in fact, relied on this; that at  
15 this point -- well, since April 2020, I think, that there's no  
16 voluntary avenue to accessing a bed, that the only way to  
17 access a bed is if there's an enforcement process where one is  
18 offered, if available. Does the City concede that?

19 **MR. EMERY:** No.

20 And what Mr. Shroff described is not the way encampment  
21 resolutions work.

22 **THE COURT:** Point me to the evidence in the record that  
23 shows that there's availability or that there's ways that  
24 homeless individuals can access a bed without having to go  
25 through an encampment closure or other kind of enforcement

1 procedure.

2 **MR. EMERY:** No. What I meant was that the encampment  
3 resolution procedure is -- is not an enforcement procedure.  
4 The enforcement only occurs at the back end of the day. The  
5 weekend before, it's outreach; it's -- it's social workers.

6 **THE COURT:** Okay. I need you to answer my question first.

7 **MR. EMERY:** Yeah.

8 **THE COURT:** Okay.

9 **MR. EMERY:** Now --

10 **THE COURT:** Does the City concede that there is no avenue  
11 for a homeless individual to, as an in- -- just voluntarily  
12 access a shelter bed at this juncture?

13 **MR. EMERY:** That is correct.

14 I was disagreeing with the characterization of an  
15 encampment resolution as an enforcement procedure.

16 **THE COURT:** Okay. That's okay. I've got the record on  
17 that. We've talked about what the record says and what the  
18 evidence is, and I can sort through that.

19 I understand that there are discrepancies -- that the City  
20 has a very different view than the plaintiffs do about how  
21 those events take place.

22 **MR. EMERY:** Well, nobody disagrees about what happens on  
23 the weekend before; that that outreach occurs, the posting  
24 occurs.

25 **THE COURT:** I think that there's a significant amount of

1 evidence submitted by the plaintiffs that a lot of times people  
2 have no notice, there's no outreach. Sometimes there's notice  
3 that's given of a different day and things of that nature. So  
4 I don't think that's undisputed at all. I think it's hotly  
5 disputed.

6 Okay. Before we move on to the Fourth Amendment,  
7 Mr. Emery, is there any other point that the City wants to make  
8 on the Eighth Amendment?

9 **MR. EMERY:** I quickly said that -- that enforcement is  
10 proper, even absent an offer of shelter, when the person is  
11 blocking public areas, public space, and creating an unsafe  
12 situation. And plaintiffs have provided no way to -- to rebut  
13 that we're following our policy and doing that; that the  
14 inference that the plaintiffs are suggesting of violations of  
15 City enforcement policy, just based on the numbers, is not  
16 warranted.

17 **THE COURT:** Before I hear from Mr. Shroff on that, is  
18 there any evidence in the record, Mr. Emery, that the City has  
19 presented to show that Dr. Herring's numbers somehow include --  
20 improperly include enforcement actions where, you know, they're  
21 being taken because somebody -- you know, that they don't --  
22 they shouldn't be counted for one reason or another? Maybe  
23 they're a true health and safety citation or someone's breaking  
24 the law or something like that.

25 **MR. EMERY:** No. He counted them, but those buckets that

1 he counted include -- have to include all -- by his own  
2 definition, include those circumstances.

3 **THE COURT:** Well, the City didn't break that down for me.  
4 The City has the numbers.

5 **MR. EMERY:** Correct.

6 **THE COURT:** The City didn't say: Gosh, those numbers are  
7 false. In fact, half an hour ago you conceded that the  
8 number -- Dr. Herring's underlying data is accurate.

9 And I think that Dr. Herring's data was based on,  
10 you know, a pool of documents that were described a certain  
11 way.

12 **MR. EMERY:** Right.

13 **THE COURT:** So the City had the opportunity to say this is  
14 pulling in displacements that shouldn't fall in those buckets,  
15 but I didn't see that in the record.

16 **MR. EMERY:** Well, the bucket, based on Mr. Herring --  
17 Dr. Herring's original description, includes, you know -- every  
18 nuisance citation, by definition, according to the policy, is  
19 someone who's blocking or someone who's been offered shelter.

20 **THE COURT:** But what I don't know -- what the City is  
21 saying is: Gosh, you shouldn't assume that all of those are  
22 about --

23 **MR. EMERY:** Right.

24 **THE COURT:** -- criminalizing lodge -- you know, the  
25 failure to lodge under a roof where no inside option is

1 available; right?

2 But the City -- you're saying that generally; but I don't  
3 have anything in the record to show whether that's, you know,  
4 two extra incidents or if it's most of it or -- you know,  
5 the City had the opportunity to do that --

6 **MR. EMERY:** Right.

7 **THE COURT:** -- but didn't.

8 **MR. EMERY:** You have Lieutenant Christ's declaration,  
9 saying how he trains everyone and how he's available to take  
10 phone calls from every officer who is encountering an issue and  
11 has a question. And he trains everyone who is encountering  
12 homeless -- all the police department people who are  
13 encountering homeless.

14 **THE COURT:** Okay.

15 **MR. SHROFF:** Your Honor, may I respond to that briefly?

16 **THE COURT:** Go ahead, Mr. Shroff.

17 **MR. SHROFF:** We do craft the proposed order and describe  
18 the evidence very carefully to only limit ourself to ordinances  
19 that are exclusively punishing people for sleeping or lodging  
20 outside or being asked to leave an area for sleeping outside.

21 In the SFPD policy that the Court cites, there are other  
22 lawfully permissible offenses to enforce. Penal Code 647(c),  
23 the San Francisco Police Code at Section 2022, those talk about  
24 obstructing sidewalks and pedestrian access. Those are not at  
25 issue in the Herring analysis. Those are excluded from the

1 analysis. They also are excluded from the proposed injunction  
2 in this order precisely because that is permissible conduct and  
3 not should be punishing unhoused people for being unhoused.

4 By the same token, the Municipal Health Code, again, part  
5 of the SFPD policy, when there's a genuine health and safety  
6 hazard, again, not part of the injunction, not part of the  
7 analysis, we only isolated and Dr. Herring's report only  
8 isolates those statutes that are ostensibly for sitting and  
9 sleeping outside, for lodging outside, or for failure to obey a  
10 move-along order. All of those are exclusively the natural  
11 consequence of simply being homeless without any further  
12 misconduct.

13 Presumably, if other ordinances were being violated,  
14 the City would prosecute under those ordinances. No one is  
15 precluding enforcement of a sidewalk safety ordinance. It's  
16 not relevant and it's not part of the proposed injunction.

17 **THE COURT:** Well, let me -- since we're there -- I'll get  
18 to the Fourth Amendment in a second, but I did have some  
19 questions about the plaintiffs' proposed injunction because the  
20 plaintiffs have a laundry list of statutes and ordinances. A  
21 number of them do not -- I think at least four of them do not  
22 appear in the Department Bulletin and are not, to my knowledge,  
23 discussed in Dr. Herring's reports. So let me just back into  
24 this.

25 Mr. Shroff, in looking at the Department Bulletin, it

1 names a number of laws that the City contends can be used to  
2 address lodging and encampments on streets and sidewalks.  
3 I think that all of these that are in the Enforcement Bulletin  
4 are included in plaintiffs' proposal. Is that correct?

5 **MR. SHROFF:** Your Honor, I believe if the -- I believe  
6 that the SFPD policy talks about the Municipal Health Code and  
7 the Police Code with respect to pedestrian access, in which  
8 case those are excluded from the proposed order.

9 **THE COURT:** Okay.

10 **MR. SHROFF:** And Your Honor is right. I just observed  
11 that what is not in the SFPD policy but what is in the  
12 San Francisco Charter are the Park and Port Codes --

13 **THE COURT:** Yes.

14 **MR. SHROFF:** -- that preclude lodging and sleeping.

15 So it appears that SFPD does not have a policy regarding  
16 those, and yet, they are ordinances on the books that, on their  
17 face, punish people for lodging or sleeping outside.

18 There wasn't available data to the plaintiffs regarding  
19 those ordinances. We are not aware of the extent of the  
20 enforcement practices there. That doesn't mean that they  
21 aren't occurring. And so we just don't have information about  
22 that at this time.

23 **THE COURT:** Okay. I mean, there's not data available, but  
24 there's also no anecdotal evidence that they've been used that  
25 way; right? So I don't have a record that those have been

1 enforced in a way that would potentially violate the  
2 Constitution.

3 But as to the others, I think what you're saying,  
4 Mr. Shroff, is that for -- well, why don't you go through this  
5 with me.

6 In the Department Bulletin, there are certain laws that  
7 are listed here that Dr. Herring did not include in his  
8 analysis because they might be for things like what Mr. Emery  
9 said, you know, blocking a sidewalk, and that that's not about  
10 sort of illegal lodging.

11 So what is in the bulletin that's not in your proposed  
12 injunction?

13 **MR. SHROFF:** Your Honor, I believe -- and I admittedly do  
14 not have that bulletin in front of me. I believe it's the  
15 Municipal Health Code sections and the Police Code Sections 22  
16 to 24 that are with respect to obstructing pedestrian access.

17 And I will just note for the Court, we did request data on  
18 the violations of the Park Codes and the Port Codes in terms of  
19 lodging and sleeping ordinances. The City did not have that  
20 data to provide us because they represented that it was in  
21 paper files, not in electronic files.

22 So there very well may be a substantial amount of  
23 enforcement under those provisions. Dr. Herring's report does  
24 describe enforcement under these ordinances as it was last  
25 reported in publicly available data, and it was in the

1 thousands. And, again, those are ordinances for lodging and  
2 sleeping outside exclusively. So we would request that those  
3 be included in the proposed injunction.

4 **THE COURT:** I -- I don't recall seeing any -- any  
5 reference to the Park or Port Codes. Port Code is definitely  
6 not in Dr. Herring's report. Maybe the Park Codes are in --  
7 but not -- not in a substantial way.

8 **MR. SHROFF:** That's correct, Your Honor.

9 **THE COURT:** Okay.

10 **MR. SHROFF:** That's correct.

11 **THE COURT:** All right.

12 **MR. SHROFF:** We had requested that information from  
13 the City, and I believe that's the -- the public records  
14 request is before the Court --

15 **THE COURT:** Okay.

16 **MR. SHROFF:** -- in the records, but no records were  
17 produced.

18 **THE COURT:** Okay.

19 Let's turn to the Fourth Amendment. Mr. Emery, does  
20 the City concede -- or I'll say that San Francisco did not  
21 challenge Dr. Herring's data, which is that from January 1  
22 through June 1, 2022, he looked at the number of bag and tag  
23 records and he said there were 195. But during that same  
24 period of time, he found that there were 1,282 displaced  
25 homeless individuals from encampment closures and that that

1 is -- that's a very large disparity.

2 That's one -- so I don't -- I didn't see that that  
3 particular figure or figures were challenged by the City. Is  
4 that correct?

5 **MR. EMERY:** The numbers are not challenged by the City.

6 **THE COURT:** Okay.

7 **MR. EMERY:** The inference is challenged by the City, just  
8 as Judge Alsup rejected that equivalent inference in the  
9 *Sullivan* case, that there weren't enough bag and tag receipts  
10 compared to the number of citations during a particular period.

11 And as Judge Alsup explained, that's because the notices  
12 are doing their job and because a lot of stuff that's left  
13 behind is either abandoned or is within the categories of items  
14 that are properly disposed of because of health and safety but  
15 for other reasons.

16 **THE COURT:** But here, we have significant anecdotal  
17 evidence talking about how items that were -- that were clearly  
18 personal property, that were neatly stored were thrown into the  
19 back of trash trucks; that there was -- some people reported  
20 there was no bag and tag effort. There were things lost like  
21 laptops, cell phones, prosthetics, a wheelchair, a bicycle -- I  
22 mean, things that are clearly personal property, survival gear,  
23 not garbage.

24 So there are, you know, details in the record that  
25 the City's opposition kind of glosses over as, well, things

1 were debris or garbage. We have some specifics. And it's not  
2 just one person. It's a lot of anecdotes, along with the  
3 observations of the Coalition declarants, who have logs in  
4 their declarations describing some of what -- the incidents  
5 that they saw with respect to the failure to bag and tag or to  
6 offer to bag and tag. So I don't think this is like *Sullivan*.

7 But is there anything further on this one, Mr. Emery?

8 **MR. EMERY:** What the plaintiffs don't do is make any  
9 explanation that the items that they describe as having been  
10 lost were not intermingled with stuff that justifies throwing  
11 them away.

12 **THE COURT:** You're saying that if a laptop is intermingled  
13 with --

14 **MR. EMERY:** With hypodermic needles, with -- with stuff  
15 that is a health and safety risk, yes.

16 **THE COURT:** And you're suggesting that I'm to make the  
17 inference that it is intermingled with debris and garbage and  
18 hypodermic needles?

19 **MR. EMERY:** That --

20 **THE COURT:** Is there anything in the record that supports  
21 your inference?

22 **MR. EMERY:** Our policies.

23 And if there -- and if there are individual events that --  
24 that depart from those policies, that there has -- there has to  
25 be a certain level of consistency before they become

1 NL violations.

2 **MR. TIU:** Your Honor, may I respond to that?

3 **THE COURT:** Yes, Mr. Tiu.

4 **MR. TIU:** The evidence in the declarations, in many of the  
5 declarations, show that the individuals who had their property  
6 destroyed took care to separate their personal property and  
7 the -- versus the trash or the stuff that they wanted DPW to  
8 throw out. It's not the case that individuals simply left  
9 their property commingled with any potential health and safety  
10 hazards. There's no evidence of that in the record. Rather,  
11 the record shows that individuals specifically distinguished  
12 between property they would like to keep versus property that  
13 they would like to throw out, but DPW ignores those  
14 distinguishing factors.

15 **THE COURT:** Okay. I have -- I have gone over the  
16 questions that I have for the parties, and I appreciate your  
17 answers.

18 I'll give each side, if you want five minutes to hit on  
19 any points that we haven't talked about that's not a rehash of  
20 your briefs but that you think's really important, I'll give  
21 you that opportunity.

22 Mr. Emery, let me start with the City.

23 **MR. EMERY:** If the Court's inclined to issue an  
24 injunction, I do urge the Court to look at the Phoenix case  
25 because that does demonstrate a way of handling the formula.

1           **THE COURT:** I don't necessarily read it the way you do.

2           **MR. EMERY:** Mm-hmm.

3           **THE COURT:** But I -- I see the spin you're putting on it.  
4 I'm not sure I read it the way you do.

5           **MR. EMERY:** Mm-hmm.

6           **THE COURT:** Especially given, you know, sort of  
7 "practically available," as Mr. Shroff pointed out and as  
8 the City's conceded, there's no way for a person to voluntarily  
9 try to access a bed at this point in San Francisco. That's  
10 been foreclosed, and that's an undisputed fact.

11           **MR. EMERY:** Except when offered through the outreach in  
12 advance of an encampment resolution, yes.

13           **THE COURT:** Okay. Anything else, Mr. Emery?

14           **MR. EMERY:** Plaintiffs have not shown any reason to have a  
15 special master as part of a preliminary injunction.

16           **THE COURT:** Mr. Emery, I'm sorry. I'm not going to  
17 entertain the City's argument on this. You had -- I was a  
18 little bit shocked. You had 25 pages to do an opposition. It  
19 was 17 pages long. There was not one word devoted to  
20 challenging the request for preliminary injunctive relief,  
21 which included the request for a special master. So that ship  
22 has sailed.

23           Now, whether or not I, you know, decide to issue a  
24 preliminary injunction and what it includes is in my  
25 discretion. But the City gave up its right to weigh in on

1 that. I don't know why it happened that way, but it did. So  
2 I'm -- I don't think it's fair, given that the defense,  
3 you know -- there's a reply mechanism that they'd be deprived  
4 of. So I'm not going to allow it in oral argument.

5 **MR. EMERY:** Well, then I rely on the arguments we did make  
6 in the brief about the contours and the scope of the  
7 substantive obligations and hope that the -- any injunction  
8 would -- would take into account those substantive obligations  
9 and the arguments we made there.

10 **THE COURT:** Okay. Thank you.

11 **MR. EMERY:** Thank you.

12 **THE COURT:** On the plaintiffs' team, is there anything you  
13 want to bring --

14 **MR. SHROFF:** Your Honor --

15 **THE COURT:** -- to my attention?

16 **MR. SHROFF:** -- just briefly, with respect to the scope of  
17 the injunction, we have the three more recent injunctions that  
18 have been issued in the Ninth Circuit.

19 I think we provided them to the Court in briefing. *Cobine*  
20 *vs. City of Eureka* is a helpful one, in addition to the  
21 District of Arizona order.

22 Many of those do keep open that any statute that  
23 criminalizes homelessness in the absence of shelter is to be  
24 enjoined. And we would ask that the injunction be that broad,  
25 given the sheer number of statutes and ordinances San Francisco

1 does have that criminalize ostensibly just sleeping or sitting  
2 outside or lodging, in the scope of the injunction.

3 But that would be it from us, Your Honor.

4 **THE COURT:** It's a little tricky because every case is  
5 different, and in some of the cases, they are challenging  
6 particular -- either particular closures or particular  
7 ordinances. And this is a little different. So I, you know,  
8 will have to consider what the record shows.

9 **MR. SHROFF:** Thank you, Your Honor.

10 **THE COURT:** All right. Submitted by both sides?

11 **MR. EMERY:** Submitted, Your Honor.

12 **MR. SHROFF:** Yes, Your Honor.

13 **THE COURT:** Okay. Thank you very much. I'll be issuing a  
14 written order.

15 **MR. EMERY:** Thank you, Your Honor.

16 **MR. SHROFF:** Thank you, Your Honor.

17 **THE COURT:** Take care.

18 **THE CLERK:** This Court is now adjourned.

19 (Proceedings adjourned at 2:31 p.m.)

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2 CERTIFICATE OF TRANSCRIBER

3

4 I, ANA DUB, CSR NO. 7445, RDR, RMR, CRR, CCRR, CRG, CCG,  
5 certify that the foregoing is a true and correct transcript, to  
6 the best of my ability, of the above pages of the official  
7 electronic sound recording provided to me by the U.S. District  
8 Court, Northern District of California, of the proceedings  
9 taken on the date and time previously stated in the above  
10 matter.

11 I further certify that I am neither counsel for, related  
12 to, nor employed by any of the parties to the action in which  
13 this hearing was taken; and, further, that I am not financially  
14 nor otherwise interested in the outcome of the action.

15

16

17 DATE: Friday, December 30, 2022

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21

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22 Ana Dub, Transcriber

23

24

25

**CERTIFICATE OF SERVICE**

I, Pamela Cheeseborough, hereby certify that I electronically filed the following document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 14, 2023.

**MOTION TO MODIFY THE PRELIMINARY  
INJUNCTION ORDER PENDING APPEAL;  
DECLARATION OF KAITLYN MURPHY**

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed April 14, 2023, at San Francisco, California.

s/Pamela Cheeseborough  
Pamela Cheeseborough

No. 23-15087

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

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COALITION ON HOMELESSNESS; TORO CASTAÑO; SARAH CRONK;  
JOSHUA DONOHOE; MOLIQUE FRANK; DAVID MARTINEZ; TERESA  
SANDOVAL; NATHANIEL VAUGHN,

*Plaintiffs-Appellees*

v.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

*Defendants-Appellants.*

On Appeal from the United States District Court  
for the Northern District of California No. 4:22-cv-05502-DMR  
Hon. Donna M. Ryu

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**DECLARATION OF SAMUEL DODGE IN  
SUPPORT OF MOTION TO STAY PRELIMINARY  
INJUNCTION ORDER PENDING APPEAL**

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Attorneys for Appellants CITY AND  
COUNTY OF SAN FRANCISCO, et al

I, SAMUEL DODGE, declare as follows:

1. I have personal knowledge of the matters stated herein, and if called and sworn as a witness could and would competently testify thereto.
2. I am the Street Response Coordination Director within the Department of Emergency Management (“DEM”) of the City and County of San Francisco (“the City”). I was named Street Response Coordination Director on October 29, 2022. As Street Response Coordination Director, my duties include supervising San Francisco's Healthy Streets Operations Center ("HSOC"), through which seven participating departments coordinate to address and resolve complex and unhealthy conditions by focusing on outreach and residential placements for homeless individuals. HSOC’s primary activity is conducting large homeless encampment field operations.
3. Before I became Street Response Coordination Director for DEM, I was the Director of HSOC from September 2021 through October 2022. Before I became Director of HSOC, I worked at San Francisco’s Department of Homelessness and Supportive Housing from April 2021 to September 2021, as Transitional Director and Special Projects Manager. I worked at San Francisco Public Works from November 2017 to April 2021, serving as Homelessness Coordinator. After founding the new Department of Homelessness and Supportive

Housing, I served as Deputy Director from August 2016 to October 2017. From November 2015 to July 2016, I served as Director of the Mayor's Office of HOPE, coordinating San Francisco's response to homelessness. From November 2014 to November 2015, I served as Deputy Director for Policy at the Mayor's Office of Housing Opportunity, Partnership & Engagement. From February 2014 to November 2014, I worked as Program Support Analyst for San Francisco's Department of Public Works, focusing on homeless services.

4. As a result of my experience working to address homelessness in San Francisco, I am extensively familiar with the conditions that homeless individuals in San Francisco face on the City's streets, and with the manner in which HSOC outreach workers interact with homeless individuals in San Francisco.

5. Based upon my own personal observations, as well as upon information provided to me by HSOC outreach workers, I believe that in multiple ways, the preliminary injunction order entered by the District Court in this lawsuit on December 23, 2022 has made the work of HSOC outreach workers – which was already very hard – even more difficult than it was before.

6. As one example, since the District Court entered its preliminary injunction order, an increasing share of homeless individuals in encampments on San Francisco's streets and sidewalks simply refuse to engage with HSOC outreach workers offering them housing and services. As a result, an increasing share of homeless individuals in encampments refuse HSOC outreach workers'

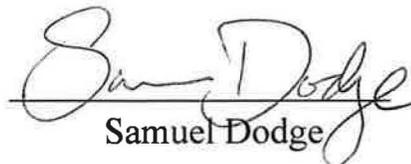
offers of housing, choosing instead to remain on the streets. Some of those individuals cite the District Court's preliminary injunction order as a reason that they are refusing offers of housing or services.

7. As another example, since the District Court entered its preliminary injunction order, it is increasingly common that when HSOC workers ask homeless individuals to move their tents and belongings so they are no longer blocking public access to the sidewalk, the tents and belongings will be moved temporarily, but will then almost immediately be moved back to their previous location blocking the path of travel. Because it is difficult for the City to respond quickly to this behavior, the result is that more homeless encampments block access to the public right of way.

8. As yet another example, since the District Court entered its preliminary injunction order, more homeless individuals have, in effect, taken up what appears to be semi-permanent residence on the streets and sidewalks. Conflicts among homeless individuals in encampments, and between homeless individuals and others, some of which lead to violence, appear to be increasing in frequency. It also appears that tents on the streets and sidewalks are being used more frequently for dangerous and/or illegal activities such as drug dealing and drug use.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed on April 11<sup>th</sup>, 2023, at San Francisco, California.

  
Samuel Dodge

**CERTIFICATE OF SERVICE**

I, Pamela Cheeseborough, hereby certify that I electronically filed the following document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECFsystem on April 14, 2023.

**DECLARATION OF SAMUEL DODGE  
IN SUPPORT OF MOTION TO STAY PRELIMINARY INJUNCTION  
ORDER PENDING APPEAL**

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed April 14, 2023, at San Francisco, California.

s/Pamela Cheeseborough  
Pamela Cheeseborough