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23 **UNITED STATES DISTRICT COURT**  
24 **NORTHERN DISTRICT OF CALIFORNIA**  
25 **OAKLAND DIVISION**

26 COALITION ON HOMELESSNESS, et al.,

27 Plaintiffs,

28 v.

CITY AND COUNTY OF SAN FRANCISCO,  
et al.,

Defendants.

CASE NO. 4:22-cv-05502-DMR

**PLAINTIFFS' REPLY IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION**

**Judge:** The Hon. Donna M. Ryu

**Hearing Date:** December 22, 2022

**Time:** 1:00 p.m.

**Place:** Courtroom 4 – 3<sup>rd</sup> Floor  
1301 Clay Street  
Oakland, CA 94612

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1 **I. INTRODUCTION**

2 Claims that San Francisco aspires to make progress to correct its own homelessness and  
3 affordable housing failures do not absolve the City of responsibility for its flagrant and ongoing  
4 violations of the Constitution. Defendants tout their written and stated policies and offer bland,  
5 generalized statements about adhering to them, but they do not rebut Plaintiffs' abundant contrary  
6 evidence as to the City' unconstitutional *conduct*. Rather than addressing the reality of the City's  
7 rampant misconduct, Defendants baselessly reject Plaintiffs' *dozens* of supporting declarations and  
8 years of underlying data while continuing to terrorize unhoused communities with impunity.  
9 Defendants also concede or ignore the bulk of Plaintiffs' legal arguments under *Martin v. Boise*.  
10 Even under Defendants' incorrect, myopic reading of *Martin*, the facts still demonstrate the City's  
11 failure to meet its constitutional obligations. Defendants lament that Plaintiffs' motion for relief  
12 calls for an end to enforcement of all laws necessary for San Francisco to promote safe and clean  
13 streets. But that assertion is disingenuous. Far from constitutionally enforcing legitimate safety  
14 laws—which are not at issue here—Defendants continue to subject hundreds of unhoused San  
15 Francisco residents to criminal enforcement and property destruction for the involuntary status of  
16 being unhoused—in clear violation of their Eighth and Fourth Amendment rights. Plaintiffs need  
17 this Court's intervention to safeguard their constitutional rights and prevent Defendants from  
18 irreparably harming them while this action is pending.

19 **II. STATEMENT OF UNCONTROVERTED FACTS**

20 **A. Defendants Fail to Rebut Plaintiffs' Factual Assertions Regarding Criminal**  
21 **Enforcement Without Shelter Offers.**

22 Defendants provide no evidence to disprove that San Francisco has insufficient shelter and  
23 housing for all its unhoused residents and is at least thousands of temporary shelter beds short.  
24 *Compare* Mot. at 3:1-4:10, *with* Opp'n at 2-4. At this moment, the City maintains insufficient  
25 shelter availability for the entirety of its unsheltered population—which the City estimates to be at  
26 least 4,397 people. Della-Piana Decl., Ex. 7 at 19. Defendants do not dispute that shelters are  
27 generally at capacity and that the most recent waitlist was 1000-person plus long. *See* Mot. at 4  
28 n.2; *see generally* Opp'n at 2-4. That waitlist is now closed, and people can no longer meaningfully

1 refer themselves to a shelter or even wait in line for one. Mot. at 4:11-14.<sup>1</sup>

2 Defendants do not respond to the extensive public records that show the City has threatened  
 3 unhoused individuals with criminal enforcement and has cited or arrested unhoused San Francisco  
 4 residents purely for sleeping or lodging in public *thousands of times* over the past several years—  
 5 both at HSOC encampment resolutions and when SFPD is dispatched independently to respond to  
 6 homelessness complaints. *Compare* Mot. at 9:24-10:27 (recounting extensive SFPD enforcement  
 7 operations), *with* Opp’n at 9:1-6 (acknowledging SFPD’s practice of enforcing ordinances against  
 8 unhoused people for sitting, lodging, or sleeping in public). Defendants also do not address  
 9 Plaintiffs’ evidence that when SFPD is dispatched independently, officers make no effort to offer  
 10 shelter and are not accompanied by the HOT team. Mot. at 8:22-9:23; Cutler Decl. ¶¶ 24-26.

11 Likewise, Defendants admit that the City routinely sets out to remove unhoused individuals  
 12 and their property even when the City knows it does not have enough shelter beds available to  
 13 offer to every individual targeted for enforcement that day, which violates San Francisco’s own  
 14 City ordinances. *Compare* Opp’n at 17:6-7 (“HSOC has learned that 40% of clients at an  
 15 encampment resolution accept offers of shelter, and has made the rational decision to proceed  
 16 accordingly”), *with* S.F. Police Code § 169(d) (the City is required to “offer Housing or Shelter *to*  
 17 *all residents of the Encampment who are present*” and “shall not enforce the prohibition . . . unless  
 18 there is available Housing or Shelter for the person or persons in the Encampment.”) (emphasis  
 19 added). The City admittedly does not know what shelter beds will be available—if any—at the  
 20 start of an encampment resolution. *Compare* Mot. at 6:16-24, *with* Opp’n at 6:18-19. Defendants’  
 21 own declarants concede that there are often not enough shelter resources at a given encampment  
 22 to place all individuals who actively want shelter. *See, e.g.*, Nakanishi Decl. ¶ 11 (describing how  
 23 “due to resources or shelter options *not* being available at the time of a resolution,” the HOT team  
 24 has to follow-up with unhoused individuals afterwards) (emphasis added).

25 \_\_\_\_\_  
 26 <sup>1</sup> Current daily shelter availability records Defendants provided reveal that on any given day there  
 27 are as few as 10 shelter beds available across all of San Francisco for an unsheltered population of  
 28 more than 4,000 individuals. *See, e.g.*, Shroff Decl. Ex. 16 at 136, 172, 192, 196. Defendants’  
 opposition touts that 1,000 individuals were placed in temporary shelter in 2021. Opp’n at 3:7-9;  
 see also Dkt. No. 45-17. But that statistic, if accurate, ignores that shelters are at capacity almost  
 every day while thousands of San Franciscans are forced to live unsheltered.

1           **B. Defendants Present No Evidence Rebutting the Conclusion that the City**  
 2           **Indiscriminately Destroys Unhoused People’s Belongings.**

3           Defendants do not cite any authority beyond their own policy to support the claim that  
 4 “DPW stores and discards items left behind pursuant to its policy and procedure.” Opp’n at 7,  
 5 *citing* Dilworth Decl. ¶¶ 4-8 (DPW supervisor stating the general “Public Works” policy). Even  
 6 Defendants’ bag and tag policy authorizes DPW staff to throw away tents and other bulky items  
 7 in violation of the Fourth Amendment. *See* Mot. at 23:4-7, 23:26-28. On the other hand, dozens  
 8 of Plaintiffs’ declarations contain detailed and itemized lists of property Defendants seized and  
 9 destroyed and never returned—which were valuable personal property, not trash nor intermingled  
 10 with hazardous material, and not abandoned—in violation of the City’s stated policies. *See* Mot.  
 11 at 6:25-7:23, 12:8-25, 14:10-15:28. Defendants have not even attempted to explain why they  
 12 destroy unhoused individuals’ personal items such as laptops, medical devices, medications,  
 13 family photos and other similar personal and survival belongings. *See* Mot. at 14:10-15:7.

14           **C. Defendants Recount Their Written Policies Without Addressing Plaintiffs’**  
 15           **Detailed Evidence Showing City Policies Are Rarely Followed.**

16           Plaintiffs’ motion relies on aggregated public data over the past three years and declarations  
 17 from thirty-one percipient witnesses who have witnessed *hundreds* of sweeps. All this evidence  
 18 demonstrates that Defendants regularly criminalize unhoused people for involuntary homelessness  
 19 and destroy their personal belongings—in direct violation of Defendants’ own stated policies. *See*  
 20 Mot. at 9:24-15:28 (expert review of San Francisco’s data and the experiences of twenty-five  
 21 unhoused individuals, five volunteers, and a former City staff member document dozens of  
 22 episodes of unlawful criminal enforcement and property destruction).

23           Defendants’ opposition relies on the declarations of City officials that restate San  
 24 Francisco’s written policies and assert that the City complies with those policies, without  
 25 presenting any evidence rebutting direct observations to the contrary. *See* Opp’n at 4:20-9:11,  
 26 *citing* Crist Decl. ¶¶ 3-4, 6 (SFPD Lieutenant describing SFPD’s written policies); Cohen Decl. ¶¶  
 27 2, 4-19 (HSH communications director touting HSH statistics unrelated to whether shelter offers  
 28 are made before criminal enforcement); Dilworth Decl. ¶¶ 4-8 (DPW supervisor providing a

1 general explanation of “Public Works” procedures but nowhere indicating that he is typically  
 2 present during DPW cleaning operations); Hardiman Decl. ¶¶ 2-5 (SFFD Commander describing  
 3 his role leading encampment resolutions but not any specific circumstances at encampment  
 4 resolutions); Horky Decl. ¶¶ 7-13 (DPH worker describing goals of public health work generally);  
 5 Mazza Decl. ¶¶ 5-7 (describing HOT team practices without discussing availability of shelter beds  
 6 at encampment resolutions or whether shelter offers are made prior to criminal enforcement).  
 7 Plaintiffs do not dispute that Defendants have accurately recounted their own policies. The reality  
 8 is that these policies are regularly ignored. *See* Mot. at 11:13-14:9; *supra* at II.A.

9       Only three of Defendants’ supporting declarations even purport to address San Francisco’s  
 10 actual practices at HSOC encampment resolutions. But these brief, generalized statements without  
 11 further support do not rebut Plaintiffs’ detailed factual collection. Notably, Defendants submit  
 12 declarations from two HOT team workers that take care *not* to suggest that all unhoused individuals  
 13 will get shelter at an encampment resolution before being forced to move. Nakanishi Decl. ¶¶ 4-  
 14 7, 11 (noting that shelter often cannot be provided “due to resources or shelter options not being  
 15 available at the time of a resolution” and that requests might only be accommodated “based on  
 16 need and availability”); Piastunovich Decl. ¶¶ 4-8 (“*[d]epending on the allocation of placements*  
 17 *received that day, we work . . . to place clients in suitable shelter*”) (emphasis added).

18       Further, Sam Dodge’s declaration as the Director of HSOC largely reports only on his  
 19 general understanding of the timeline for HSOC sweep operations. Dodge Decl. ¶¶ 7-10, 12-21.  
 20 Mr. Dodge’s only response to Plaintiffs’ evidence of criminal enforcement absent shelter—  
 21 including analysis of years of data and the direct observations of dozens of witnesses—is a single  
 22 assertion that “[i]f adequate sheltering alternatives are not available, clients are not asked to  
 23 relocate.” Dodge Decl. ¶ 18. But Mr. Dodge does not substantiate that statement or account for  
 24 the substantial contrary evidence presented by Plaintiffs. Thus, Defendants do not meaningfully  
 25 rebut the detailed factual allegations in Plaintiffs’ motion regarding systematic criminal  
 26 enforcement absent shelter. Mot. at 9:24-12:7, 14:10-15:28.<sup>2</sup>

27 \_\_\_\_\_  
 28 <sup>2</sup> The few instances from Plaintiffs’ declarations that Defendants highlight do not demonstrate that  
 the City offers shelter to unhoused individuals before enforcement. *See* Opp’n at 11:16-25. Mr.



1           **D. Defendants’ Conduct Continues to Irreparably Harm Plaintiffs After the**  
 2           **Preliminary Injunction Motion Was Filed.**

3           Defendants continue to engage in routine criminalization of involuntary homelessness and  
 4           destruction of unhoused individuals’ survival belongings—undeterred by Coalition volunteers  
 5           who have been monitoring Defendants’ sweep operations pursuant to Court-ordered notice. *See*  
 6           Verner-Crist Decl. ¶¶ 7-29; James Supp. Decl. ¶¶ 3-15; Evans Supp. Decl. ¶¶ 4-24; Friedenbach  
 7           Supp. Decl. ¶¶ 3-6; *see also* Castaño Supp. Decl. ¶¶ 3-9; Reasor Decl. ¶¶ 3-12; Cobb Decl. ¶¶ 2-  
 8           12; Williams Decl. ¶¶ 4-9. Plaintiffs’ counsel is also aware of additional planned sweep operations  
 9           the City conducted without any notice to Plaintiffs’ counsel, despite the Court’s Order—resulting  
 10          in serious and irreparable harm to the unhoused individuals present. *See* Shroff Decl. Ex. 18.<sup>3</sup>

11          **III. PLAINTIFFS’ EVIDENCE IS NEITHER STALE NOR INADMISSABLE**

12          As described above, Defendants do not meaningfully rebut *any* factual assertions made by  
 13          Plaintiffs’ declarants. To no avail, Defendants instead resort to raising broad unfounded objections  
 14          to Plaintiffs’ witness declarations that have nothing to do with their substance.

15               **A. Plaintiffs’ Declarations Are Not Stale as Defendants Have Shown No Change**  
 16               **in Conduct or Circumstances.**

17          Defendants argue that this Court should decline to consider all evidence of Defendants’  
 18          extensive and ongoing unconstitutional response to homelessness prior to 2022—suggesting that  
 19          any evidence that is “more than a year old” must be considered “stale.” Opp’n at 15:9-21. In  
 20

21 \_\_\_\_\_  
 22          Frank says he was never offered shelter on January 26, 2022, and Defendants do not contend that  
 23          he was offered shelter. Frank Decl. ¶ 12 [2-16]. Mr. Dubose was spared criminal enforcement  
 24          only after intervention by the Coalition on Homelessness. Dubose Decl. ¶ 9 [4-18]. The other  
 25          declarants clearly explain that the City’s shelter offer to them on *one occasion* came under threat  
 26          of property destruction—itself an unconstitutional practice—while noting that generally the City  
 27          never offered them shelter at all despite constant displacement through sweep operations. *See*  
 28          Cronk Decl. ¶¶ 9-10 [2-9]; Donohoe Decl. ¶¶ 9-10 [2-13]; Sandoval Decl. ¶ 8 [2-22].

<sup>3</sup> In addition to not providing notice of planned sweep operations, Defendants have continued to  
 stall in producing the SFPD reports that would aid Plaintiffs’ counsel in effectively monitoring  
 SFPD’s interactions with unhoused individuals—both in scheduled HSOC sweeps and at more  
 informal occasions. *See* Shroff Decl. Ex. 18. Plaintiffs’ counsel has repeatedly requested  
 additional information necessary to make the records intelligible and complete.

1 doing so, Defendants point to substantial evidence regarding Defendants’ conduct *this year*. *Id.*<sup>4</sup>  
 2 Regardless, Defendants provide no explanation for this arbitrary rule.

3 The fact that Plaintiffs have documented a multi-year pattern of unconstitutional practices  
 4 from at least 2018 through 2022 is certainly no basis to disregard sworn declarations. Indeed, “the  
 5 mere lapse of substantial amounts of time is not controlling in a question of staleness.” *United*  
 6 *States v. Dozier*, 844 F.2d 701, 707 (9th Cir. 1988). Rather, to “render an opinion stale, subsequent  
 7 evidence must be contradictory—or at least inconsistent—with the earlier opinion in some material  
 8 manner.” *Ginger R. v. Kijakazi*, No. 20-cv-02524, 2022 WL 2713352, at \*7 (S.D. Cal. July 13,  
 9 2022) (internal quotations omitted). Here, the exact opposite is true. Defendants have not argued  
 10 that they changed any of their relevant policies or conduct in 2022. In their opposition, Defendants  
 11 pride themselves on practices that have been in place from 2018 through 2022 that they defend as  
 12 constitutional. Opp’n at 1-4. Defendants have therefore failed to identify any intervening changes  
 13 in 2022 that could justify a determination that Plaintiffs’ evidence is “stale.”<sup>5</sup>

14 Defendants’ sole argument for limiting relevant evidence on the motion to 2022 is a hollow  
 15 reference to the “shifting impact of Covid-19”—without further explanation. Opp’n at 15:11-13.  
 16 The COVID-19 pandemic does not excuse Defendants from their constitutional obligations—let  
 17 alone justify the exclusion of relevant and probative evidence. *See Calvary Chapel Dayton Valley*  
 18 *v. Sisolak*, 140 S. Ct. 2603, 2605 (2020) (J. Alito, dissenting) (“public health emergency does not  
 19 give . . . public officials *carte blanche* to disregard the Constitution”).

20 **B. Hearsay is No Basis to Exclude Relevant Evidence on Preliminary Injunction,**  
 21 **and Plaintiffs’ Declarants Offer Direct Observations.**

22 Defendants suggest that Plaintiffs’ witness declarations are “riddled with inadmissible  
 23 hearsay.” Opp’n at 16:4-12. This argument has no merit. Hearsay and other evidence that may  
 24 be inadmissible at trial can support a preliminary injunction. *Johnson v. Couturier*, 572 F.3d 1067,  
 25

26 <sup>4</sup> *See also* Donohoe Decl.; Cronk Decl.; Martinez Decl.; Sandoval Decl.; Murdock Decl.; Solomon  
 27 Decl. (noting unconstitutional conduct as recent as weeks before this litigation was filed). This  
 evidence alone sufficiently supports Plaintiffs’ motion.

28 <sup>5</sup> Newly available evidence gathered from 2022 also confirms the same aggregate trends regarding  
 San Francisco’s criminalization and property destruction. *See* Herring Supp. Decl. ¶¶ 8-33.

1 1083 (9th Cir. 2009); *Anderson v. Reverse Mortg. Sols., Inc.*, No. 16-cv-01411, 2016 WL 9175875,  
 2 at \*1 (N.D. Cal. Aug. 18, 2016). Regardless, dozens of unhoused individuals who have had their  
 3 property destroyed and been under threat of citation and arrest—and witnesses to those and similar  
 4 experiences—speak directly from their own personal observations, which is not hearsay. *See* Mot.  
 5 at 14-15 (summarizing thirty-one detailed declarations documenting property destruction and  
 6 enforcement without services, based on direct observations and experience).<sup>6</sup>

7 **C. Defendants’ *Ad Hominem* Attack of the City’s Ex-Employee is Meritless.**

8 Defendants also seek to discredit the direct observations of Mr. Bennett—a former City  
 9 employee and HOT team supervisor charged with making shelter offers to unhoused individuals—  
 10 on the sole basis that he is an allegedly disgruntled employee. Opp’n at 15 n.5. This *personal*  
 11 attack does not address the substance of Mr. Bennett’s statements. Given the opportunity to rebut  
 12 Mr. Bennett’s specific testimony, Defendants declined to do so. *See Spark Indus., LLC v. Kretek*  
 13 *Intern., Inc.*, No. 14-cv-05726, 2014 WL 4365736, at \*11 n.9 (C.D. Cal. Aug. 28, 2014) (rejecting  
 14 defendant’s assertion that “disgruntled, former [] employees” were unreliable when defendants did  
 15 not “rebut[] the claims made by the disgruntled employees”) (internal quotations omitted). The  
 16 content of Mr. Bennett’s declaration is also further corroborated by statements of other former  
 17 employees of the City. *See* Marshall Decl. ¶¶ 11-23, 30-34; Malone Decl. ¶¶ 5-15.

18 **D. Dr. Herring’s Expert Report Is Supported by the City’s Own Records.**

19 Defendants offer a superficial and defective critique of Dr. Herring’s expert opinions. They  
 20 argue that Dr. Herring’s conclusions “lack a factual basis.” Opp’n at 16:17-18:4. But they ignore  
 21 that Dr. Herring’s conclusions relied on analysis of hundreds of pages of the City’s own records,  
 22 including the City’s HSOC encampment resolution schedules and reports, DPW bag and tag logs,

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23 <sup>6</sup> Defendants also claim, with no support, that declarations by Coalition staff and volunteers are  
 24 “vague and conclusory.” Opp’n at 16:15-16; *see RG Abrams Ins. v. Law Offs. of C.R. Abrams*,  
 25 No. 21-cv-00194, 2022 WL 16641829, at \*7 (C.D. Cal. Nov. 2, 2022) (“Defendants fail to explain  
 26 what matter within any of the declarations is vague.”). But Plaintiffs’ declarations are detailed in  
 27 documenting Defendants’ misconduct. *See generally* Mot. at 6-9, 14-15 (citing to detailed  
 28 descriptions of City conduct at sweeps). Defendants also vaguely assert that “characterizations of  
 San Francisco’s conduct” in the Friedenbach declaration are “improper opinion”—again without  
 further explanation. Opp’n at 16:13-15; *Petrosyan v. Ali*, No. 09-cv-00593, 2013 WL 5466572, at  
 \*5 (E.D. Cal. Sept. 30, 2013) (overruling improper opinion objection because Plaintiff “fail[ed] to  
 explain the rationale behind his objections”). These objections are invalid.

1 SFPD citation and arrest logs, and HSH daily shelter bed availability. *See* Herring Decl. ¶ 20. His  
2 conclusions are further based on his prior experience working with the City and law enforcement,  
3 field research, and surveying hundreds of unhoused people in San Francisco. *Id.* ¶¶ 9-18.

4 **Opinion 1.** Dr. Herring’s first opinion does not “conflate” aggregate shelter capacity with  
5 the offer of a bed for a specific encampment resolution. *See* Opp’n at 16:20-21. His opinion  
6 correctly observes *both* that the number of available shelter beds reported by the City is  
7 consistently less than the number of unhoused individuals in San Francisco, *and* that the City  
8 scarcely has any shelter beds available system-wide because of the shortage. Herring Decl. ¶¶ 24-  
9 35. He further points out that *no* beds are available to unhoused individual upon self-referral  
10 because the City’s shelter waitlist is closed and there were one thousand people on the waitlist  
11 before it closed. *Id.* Defendants do not contest these conclusions. *See* Opp’n at 16:20-17:3.

12 **Opinion 2.** Defendants similarly do not challenge Dr. Herring’s conclusion that HSOC  
13 planned and carried out encampment resolutions on days when there was a documented deficiency  
14 in shelter availability. *See generally* Opp’n at 16-17. In fact, they admit it. *Id.* at 17:6-7 (“HSOC  
15 has learned that 40% of clients at an encampment resolution accept offers of shelter, and has made  
16 the rational decision to proceed accordingly”). Defendants downplay this admission by asserting  
17 that “if HSOC’s projection of shelter needs turns out to be insufficient on a particular day,”  
18 Defendants’ stated policy is to “shift gears” and stop the sweep operation. Opp’n at 17:8-12.  
19 However, voluminous accounts, eyewitness reports, and at least three former city employees  
20 demonstrate that, in practice, Defendants almost never follow this policy and continue to threaten  
21 individuals with citations and arrest and destroy property even in the absence of sufficient available  
22 shelter. *See* Mot. at 6-9, 14-15 (citing thirty-one declarations belying that Defendants’ policy is  
23 actually followed). Defendants did not rebut the factual assertions underlying these declarations.  
24 *See supra* at II.A-C. Furthermore, Defendants do not challenge Dr. Herring’s conclusion that  
25 institutional pressures and limited shelter availability can cause workers on the ground to fabricate  
26 compliance. *See* Herring Decl. ¶ 52; Marshall Decl. ¶¶ 14-23.

27 **Opinion 3.** Defendants take issue with Dr. Herring’s decision not to specifically identify  
28 which of the approximately 3,000 arrests of unhoused individuals for lodging in public and

1 refusing to obey a law enforcement order to “move along” pertained specifically to an HSOC  
 2 sweep operation—even though Dr. Herring acknowledges that it is possible to do so. *See* Opp’n  
 3 at 17:14-15. The point is irrelevant though, since criminal enforcement occurs both at HSOC  
 4 resolutions and during daily SFPD actions without any pretense of offering shelter. Mot. at 6-9.<sup>7</sup>

5 **Opinion 4.** Defendants contend that Dr. Herring did not have a factual basis to conclude  
 6 that DPW routinely fails to follow its bag and tag policies. But Dr. Herring analyzed the limited  
 7 bag and tag logs provided by DPW and compared them to HSOC’s encampment resolutions to  
 8 reveal a dearth of bag and tag logs recorded during HSOC operations. *See* Herring Decl. ¶ 85  
 9 (concluding that no bag and tags were recorded during 89% of HSOC operations between January  
 10 and February 2021). The lack of information in Defendants’ own records, in conjunction with Dr.  
 11 Herring’s direct observations, field research, and published academic surveys of unhoused San  
 12 Franciscans, provides a valid basis for Dr. Herring’s conclusion that City employees confiscate  
 13 and destroy unhoused individuals’ belongings instead of bagging and tagging them.<sup>8</sup>

14 **Opinion 5.** Defendants do not challenge this opinion, merely claiming that it is “untethered  
 15 to any unconstitutional standard.” Opp’n at 17:27-18:4. But Dr. Herring does not purport to opine  
 16 on the constitutionality of Defendants’ practices. Dr. Herring simply explains how Defendants’  
 17 practices have caused and will continue to cause harm to unhoused individuals. Defendants do  
 18 not rebut these findings in any way.

19 **IV. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR**  
 20 **LEGAL ARGUMENTS**

21 Defendants’ rebuttal of Plaintiffs’ constitutional arguments fares no better—and in fact  
 22 Defendants’ authority reveals precisely why Plaintiffs are entitled to a preliminary injunction. To  
 23 establish likelihood of success on the merits, Plaintiffs need only show that they have a fair chance  
 24

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25 <sup>7</sup> Notwithstanding Defendants’ baseless assertion that Dr. Herring’s data analysis from 2018-2021  
 26 is stale (Opp’n at 17), SFPD provided Plaintiffs’ counsel with citation and arrest data for 2022  
 27 after Plaintiffs’ motion was filed. Shroff Decl. ¶ 14. Dr. Herring has confirmed that the more  
 28 recent data shows the same enforcement trends. Herring Suppl. Decl. ¶¶ 18-23.

<sup>8</sup> Again notwithstanding that any claim of “stale” data is baseless, Dr. Herring’s supplemental  
 analysis of bag and tag data from 2022 reflects the same incongruity between San Francisco’s  
 enforcement actions and its bag and tag records. *See* Herring Suppl. Decl. ¶¶ 8-33.

1 of success or present serious questions to require litigation, not conclusively prove their case or  
 2 show that they are more likely than not to prevail. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395  
 3 (1981); *Benda v. Grand Lodge of IAM*, 584 F.2d 308, 315 (9th Cir. 1978); *Stewart v. City and*  
 4 *Cnty. of San Francisco*, No. 22-cv-01108, 2022 WL 2720734, \*4 (N.D. Cal. June 22, 2022).

5 **A. Plaintiffs Demonstrate Defendants’ Persistent Custom and Practice Of**  
 6 **Unlawful Conduct Sufficient to Establish Municipal Liability Under *Monell*.**

7 Defendants assert that they cannot be held liable for their unconstitutional conduct because  
 8 the experiences of Plaintiffs’ declarants “directly contravenes San Francisco’s policies” or are “too  
 9 general” to establish municipal liability. Opp’n at 2:2-3, 14:26. But Defendants’ actual conduct—  
 10 not mere lip service to their written policies—determines liability. *See* Mot. at 23:24-24:3, *citing*  
 11 *Redman v. Cnty. of San Diego*, 942 F.2d 1435, 1445-46 (9th Cir. 1991) (holding Defendants liable  
 12 for “the routine failure (or claimed inability) to follow the general policy[, which] constitutes a  
 13 custom or policy which overrides, for *Monell* purposes, the general policy”). Plaintiffs’ extensive  
 14 factual record in support of their motion for relief—including over thirty percipient witnesses with  
 15 direct knowledge of *hundreds* of sweeps, three former City workers from different agencies, an  
 16 expert review of Defendants’ data, and San Francisco Superior Court opinions finding  
 17 constitutional violations—largely uncontroverted by Defendants—are more than sufficient to  
 18 establish municipal liability. *See supra* at II.A-B; Mot. at 12:8-15:23; Herring Decl. ¶¶ 24-89;  
 19 Della-Piana Decl. Exs. 41-50; *see also, e.g., Lawman v. City & Cnty. of San Francisco*, 159 F.  
 20 Supp. 3d 1130, 1144-45 (N.D. Cal. 2016) (finding 60 incidents over 5 years and former employee’s  
 21 report sufficient to establish unconstitutional pattern despite written policy); *Meggitt (San Juan*  
 22 *Capistrano), Inc. v. Yongzhong*, No. 13-cv-00239, 2013 WL 12120067, at \*4 (C.D. Cal. Sept. 26,  
 23 2013) (noting that plaintiffs’ “uncontroverted version of the facts” supports a preliminary  
 24 injunction). Nor can the sheer volume of these accounts be characterized as “random acts or  
 25 isolated events.” *Cf. Navarro v. Block*, 72 F.3d 712, 714 (9th Cir. 1995).<sup>9</sup>

26 \_\_\_\_\_  
 27 <sup>9</sup> Defendants vaguely assert that “San Francisco trains its employees on these policies and through  
 28 effective oversight ensures these policies are followed,” and on that basis it should not be  
 municipally liable absent “systemic training failures.” Opp’n at 2:9-11. The assertion has no



1           **B. Defendants Violate the Eighth Amendment Under Any Proper Reading of**  
 2           ***Martin v. Boise.***

3           *Martin*'s central holding cannot be disputed: "so long as there is a greater number of  
 4 homeless individuals in a jurisdiction than the number of available beds in shelters, the jurisdiction  
 5 cannot prosecute homeless individuals for involuntarily sitting, lying and sleeping in  
 6 public." *Martin v. City of Boise*, 920 F.3d 584, 617 (9th Cir. 2019) (internal quotations  
 7 omitted); *see, e.g., Warren v. City of Chico*, No. 21-cv-00640, 2021 WL 2894648, at \*2 (E.D. Cal.  
 8 July 8, 2021) ("this Circuit has previously held that ordinances such as this are not enforceable,  
 9 unless there is *enough practically available shelter within the City for all unhoused individuals*"  
 10 (emphasis added)). The Ninth Circuit endorsed this holding again just days after Plaintiffs' motion  
 11 was filed. *See Johnson v. City of Grants Pass*, 50 F.4th 787, 795 (9th Cir. 2022) (citing "the  
 12 formula established in *Martin*" and prohibiting punishment and criminal enforcement against the  
 13 homeless for taking "rudimentary precautions to protect themselves from the elements").

14           Plaintiffs have established that Defendants flagrantly violate *Martin*'s Eighth Amendment  
 15 prohibitions in at least five ways. Mot. at 17:13-22:19. Defendants' opposition does not brook  
 16 any genuine disagreement on the law. Defendants do not rebut the fact that San Francisco is  
 17 thousands of shelter beds short of its unhoused population. The City's shelters are essentially at  
 18 capacity on a daily basis and often there are as few as 10 shelter beds available for an unsheltered  
 19 homeless population of 4,000. *See supra* at II.A; Shroff Decl. Ex. 16 (showing shelter bed  
 20 allocations since the filing of this case). As to the few shelter beds available, Defendants fail to  
 21 contest that unhoused individuals have no ability to voluntarily access them because the shelter  
 22 waitlist is closed and no one is allowed to wait in line to receive shelter. *See Opp'n* at 16:20-17:3;  
 23 Herring Decl. ¶¶ 24-32. In other words, San Francisco's thousands of unsheltered residents have  
 24 no choice in the matter: they are involuntarily homeless. Defendants' own interpretation of *Martin*  
 25 concedes as much—agreeing that shelter must be "realistically available" such that people can  
 26 \_\_\_\_\_  
 27 supporting authority. In fact, where municipal staff are repeatedly violating agency policies with  
 28 impunity and without sufficient corrective action from supervisors, *Monell* liability is bolstered—  
 not diminished. *Rodriguez v. Cnty. of Los Angeles*, 891 F.3d 776, 803 (9th Cir. 2018).

1 “choose” to access it. Opp’n at 10:19-22, *citing Martin*, 920 F.3d at 617 n.8. In San Francisco,  
2 they cannot, which ends the Court’s inquiry.

3           Nonetheless, Defendants admit to an enforcement model where the City supposedly  
4 withholds shelter beds so that it has just enough beds to offer everyone onsite at an encampment  
5 resolution as a way to enforce targeted displacement. Opp’n at 4:25-5:2; *id.* at 16:21-22 (asserting  
6 that encampment resolutions are the “clear way to access shelter” in San Francisco); *see also*  
7 Marshall Decl. ¶¶ 10, 20-23, 29. This enforcement-only approach also violates the Eighth  
8 Amendment. Mot. at 19:13-20:4. In any event, Defendants admit that they do not make written  
9 offers of shelter to every unhoused person at an encampment, violating San Francisco’s own  
10 ordinance requiring written shelter offers for all individuals onsite 24-hours in advance. *See supra*  
11 II.A. Defendants explain that they are only ever prepared to offer 40% of individuals shelter  
12 because only that many people really want it. Opp’n at 17:6-7. But Defendants cannot shirk their  
13 constitutional obligations to provide the homeless with the choice of shelter by simply assuming  
14 that a larger percentage of the unhoused would refuse an unmade offer of shelter. Under *Martin*,  
15 this practice again can only be characterized as punishing the homeless on the “false premise” that  
16 they voluntarily chose to be homeless. Such a contrived work-around also creates perverse  
17 incentives to fabricate shelter refusals to justify enforcement—and should not be credited. Herring  
18 Decl. ¶ 52; Marshall Decl. ¶¶ 17-18, 36-37.

19           Defendants’ opposition primarily relies on the bare assertion that San Francisco has a  
20 “policy of offering shelter before requiring any unhoused person to vacate public property.” Opp’n  
21 at 9:22-23. But as described above, Defendants do not controvert Plaintiffs’ evidence that  
22 unhoused individuals are threatened with citation and arrest and forcibly displaced from San  
23 Francisco streets without being offered shelter. *See supra* II.A; *see also* Mot. at 8:8-19, 8:24-9:17.

24           Defendants’ few references to cases other than *Martin* that predate *Johnson* lend them no  
25 support. In *Shipp v. Schaaf*, the plaintiffs failed to show that any criminal enforcement occurred  
26 at encampment resolutions at all—thereby rendering the Eighth Amendment inapplicable. 379 F.  
27 Supp. 3d 1033, 1037 (N.D. Cal. 2019) (“Nothing . . . in the record suggests that the City intends  
28 to issue criminal sanctions”). Here, Defendants routinely issue “move-along” orders, citations,



1 and arrests when conducting encampment resolutions and other displacement operations. Mot. at  
 2 7:26-28; Herring Decl. ¶¶ 58-79; *see also* Castaño Decl. ¶¶ 17-18 [2-4]; Bryant Decl. ¶¶ 16-17, 23  
 3 [4-3]. This case is likewise distinguishable from *Miralle v. City of Oakland*, where the city actually  
 4 committed to provide shelter to every member of a particular encampment prior to an encampment  
 5 closure—which San Francisco routinely fails to do. No. 18-cv-06823, 2018 WL 6199929, at \*2  
 6 (N.D. Cal. Nov. 28, 2018). Regardless, in *Miralle* there were no allegations that Oakland’s broader  
 7 shelter system lacked capacity or that it was law enforcement’s daily practice to enforce criminal  
 8 sanctions against dozens of unhoused individuals without first making genuine shelter offers. In  
 9 contrast, as Plaintiffs have shown, and Defendants do not rebut, there is “no safe harbor for  
 10 unhoused individuals anywhere within the City.” *See* Mot. at 18:13.<sup>10</sup>

11 **C. Defendants’ Indiscriminate Property Destruction Violates the Fourth**  
 12 **Amendment—Whether or Not Unhoused Individuals Are Provided Notice.**

13 Defendants do not disagree with the basic tenet that the summary destruction of unhoused  
 14 individuals’ unabandoned personal property violates the Fourth Amendment and the City’s own  
 15 policies unless the property presents an obvious health and safety hazard. Opp’n at 12:1-16, 13:20-  
 16 28. Defendants argue that those exceptions apply here—without support—notwithstanding  
 17 Plaintiffs’ detailed and voluminous evidence that Defendants engage in indiscriminate destruction  
 18 of unhoused individuals’ property even when it is demonstrably not trash or a safety hazard—and  
 19 often over the direct objection and pleas of unhoused individuals. *See* Mot. at 14:12-15:7  
 20 (documenting more than 30 such episodes of warrantless property destruction and providing an  
 21 expert review of the City’s data indicating extensive property destruction), 24:7-19 (noting that  
 22 claims of abandoned or hazardous property are an insufficient defense to indiscriminate property  
 23 destruction); *see also supra* II.B.; Malone Decl. ¶¶ 6, 10-15.

24 \_\_\_\_\_  
 25 <sup>10</sup> Contrary to Defendants’ contention, Plaintiffs’ challenge does not target governmental conduct  
 26 beyond the bounded holdings of *Martin* or *Johnson*. *See* Opp’n at 10:11-15. Plaintiffs do not seek  
 27 in this action to compel the City to provide sufficient shelter to the homeless, nor do Plaintiffs  
 28 deny the City’s right to enforce laws prohibiting anyone from obstructing sidewalks or any other  
 valid and lawful ordinance appropriately restricting the use of public property. Plaintiffs’  
 challenge is limited only to the unlawful enforcement of statutes that criminalize the involuntary  
 status of being homeless. *See* Dkt. No. 9-10 (Proposed Preliminary Injunction Order).

1           Because they cannot rebut the evidence of Fourth Amendment violations, Defendants  
 2 instead incorrectly argue that if they satisfy the notice requirements of the Fourteenth Amendment,  
 3 they can freely destroy unhoused people’s survival belongings. Opp’n at 12:17-13:19. Yet  
 4 Defendants themselves cite cases that make clear that even where notice is provided, unhoused  
 5 individuals’ property *must* be safeguarded and stored rather than summarily discarded. *Sullivan*  
 6 *v. City of Berkeley*, 383 F. Supp. 3d 976, 980 (N.D. Cal. 2019) (noting that “unattended property  
 7 collected was stored for 14 or 90 days”); *Shipp*, 379 F. Supp. 3d at 1038 (removal acceptable when  
 8 property was stored for 90 days and notice “is posted at the encampment with information on how  
 9 to retrieve stored property”); *Miralle*, 2018 WL 6199929, at \*3 (same). Indeed, *Sullivan* only held  
 10 the destruction of property permissible in that case because “the record demonstrates . . . that the  
 11 property left behind . . . was wholly abandoned rather than temporarily unattended”). 383 F. Supp.  
 12 3d at 985. Plaintiffs demonstrate just the opposite took place here and therefore prior notice alone  
 13 does not justify Defendants’ destruction of unhoused individuals’ personal property.<sup>11</sup>

14 **V. THE REMAINING INJUNCTIVE RELIEF FACTORS WEIGH HEAVILY IN**  
 15 **PLAINTIFFS’ FAVOR**

16           Defendants’ opposition concedes that if Plaintiffs establish that they are likely to succeed  
 17 on their Fourth and Eighth Amendment Claims, irreparable harm is established. *See* Opp’n at  
 18 18:6-7. Indeed, “the deprivation of constitutional rights ‘unquestionably constitutes irreparable  
 19 injury.’” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). Defendants also do not dispute  
 20 that when it comes to the civil rights of unhoused individuals, the balance of equities tips *sharply*  
 21 in their favor such that Plaintiffs may prevail on a preliminary injunction motion by demonstrating  
 22 even less than a likelihood of success on the merits. *See* Mot. at 25:13-28.

23 \_\_\_\_\_  
 24 <sup>11</sup> Even though the question of adequate notice under the Fourteenth Amendment is not before the  
 25 Court on this motion, Plaintiffs have presented ample evidence in this record to find that  
 26 Defendants regularly fail to provide the kind of notice required by due process. Castaño Decl. ¶  
 27 6, 11-12 [2-2]; Frank Decl. ¶¶ 5, 9 [2-15]; Martinez Decl. ¶ 9 [2-20]; Sandoval Decl. ¶¶ 3, 5 [2-  
 28 21]; Bryant Decl. ¶¶ 5, 15, 21 [4-2]; Brown Decl. ¶ 11 [4-8]; Connick Decl. ¶¶ 3, 5 [4-11]; Dubose  
 Decl. ¶¶ 6, 9 [4-17]; Hill Decl. ¶ 10, 12, 14 [4-31]; Howard Decl. ¶¶ 4-6, 10-11, 15 [4-40]; Hurd  
 Decl. ¶¶ 7, 11 [4-46]; Orona Decl. ¶¶ 9, 12 [4-57]; Partee Decl. ¶¶ 5, 9-10 [4-63]; Solis Decl. ¶¶  
 11, 13, 15 [4-69]; Solomon Decl. ¶¶ 4, 7, 9 [4-78]; Vetter Decl. ¶ 9, 12 [4-82]; Reasor Decl. ¶¶ 4,  
 9; Cobb Decl. ¶¶ 3, 9.

1           Instead, Defendants offer hollow assertions that San Francisco’s policy choices and the  
 2 City’s need to promote public health and safety suggest that an injunction is against the public  
 3 interest. *See Lavan v. City of Los Angeles*, 693 F.3d 1022, 1033 (9th Cir. 2012) (rejecting assertion  
 4 that “the unattended property of homeless persons is uniquely beyond the reach of the  
 5 Constitution” and noting that the case did not concern “constrain[ing] municipal governments from  
 6 addressing . . . homelessness or . . . maintain[ing] public health and safety”). Plaintiffs do not  
 7 challenge the lawful enforcement of *any* of a litany of laws promoting safe public right of access  
 8 or protecting against road and sidewalk hazards. *See Mot.* at i:19-25 (identifying the specific  
 9 ordinances to be enjoined); *Lo v. Cnty. of Siskiyou*, 558 F. Supp. 3d 850, 871-2 (E.D. Cal. 2021)  
 10 (granting preliminary injunction when municipality has other tools to mitigate impacts on public  
 11 health and safety). In fact, in many cases, Plaintiffs simply ask the Court to compel Defendants to  
 12 follow their own policies. It is always in the public interest for the government to follow both its  
 13 own policies and the Constitution. *Melendres*, 695 F.3d at 1002. That is precisely what Plaintiffs  
 14 now request. Defendants simply fail to explain how criminal enforcement against unhoused  
 15 individuals *purely because they are unhoused* legitimately supports the City’s interest in  
 16 promoting health and safety. *See Opp’n* at 18:12-18. The implication is that the mere presence of  
 17 unhoused individuals is inherently contrary to the public interest. This is simply another example  
 18 of Defendants unconstitutionally punishing the homeless for their involuntary status.

## 19 **VI. CONCLUSION**

20           For the foregoing reasons, the Court should grant the Motion for Preliminary Injunction.

21  
 22 Dated: December 1, 2022

Respectfully submitted,

23  
 24 By: /s/ Alfred C. Pfeiffer, Jr.

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**ATTESTATION**

I, Alfred C. Pfeiffer, Jr., am the ECF user whose user ID and password authorized the filing of this document. Under Civil L.R. 5-1(h)(3), I attest that all signatories to this document have concurred in this filing.

Dated: December 1, 2022

/s/ Alfred C. Pfeiffer, Jr.