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16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**
18 **OAKLAND DIVISION**

19 COALITION ON HOMELESSNESS, et al.,

20 Plaintiffs,

21 v.

22 CITY AND COUNTY OF SAN FRANCISCO,
23 et al.,

24 Defendants.

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

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO STAY
PORTION OF COURT ORDER (ECF No.
65) PENDING APPEAL**

Judge: The Hon. Donna M. Ryu

Hearing Date: April 13, 2023

Time: 1:00 p.m.

Place: Courtroom 4 – 3rd floor
1301 Clay Street Oakland,
CA 94612

Trial Date: April 15, 2024

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1 **I. INTRODUCTION**

2 Defendants' request for a stay is simply an improper attempt to relitigate the merits of the
3 preliminary injunction motion, and the Court should deny it. The Court's injunction is narrowly
4 tailored to the Ninth Circuit's articulation of the Eighth Amendment doctrine in *Johnson v. City of*
5 *Grants Pass* and *Martin v. Boise*, and it is based on a detailed and largely uncontested record
6 demonstrating that hundreds of San Francisco residents are involuntarily homeless when San
7 Francisco criminalizes and punishes them for sleeping and existing in public. The law is well-
8 established in this Circuit and the Court's factual findings are entitled to the highest deference on
9 appeal. The Court should not put any part of its order on hold. Further, Defendants waived their
10 opportunity to argue about the scope of the Court's injunction. As a result, Defendants are unlikely
11 to succeed on appeal as they will be unable to show that the Court abused its discretion in issuing
12 the preliminary injunction.

13 Defendants simply have not demonstrated any circumstances that would warrant a stay.
14 Defendants' motion comes six weeks after the Court's injunction took effect, and almost two
15 weeks after Defendants pursued their appeal in the Ninth Circuit. Defendants' unexplained delay
16 in seeking relief undermines any claimed irreparable harm. Furthermore, Defendants introduced
17 *nothing* in the record regarding their purported need to criminally punish homelessness in the
18 absence of shelter. By contrast, Plaintiffs presented uncontroverted evidence that Defendants'
19 conduct at sweep operations undermines public health and safety and irreparably harms hundreds
20 of unhoused San Franciscans. There is no cognizable basis for a stay under these circumstances.

21 Defendants' real goal is to revise the Court's unambiguous preliminary injunction to allow
22 Defendants to continue their unconstitutional enforcement practices. Specifically, Defendants seek
23 the Court's authorization of the enforcement-first approach that was the primary target of
24 Plaintiffs' preliminary injunction motion. Defendants should have presented the arguments they
25 now claim justify a stay in their opposition to the preliminary injunction motion. Defendants then
26 took another bite at the apple via an improper administrative motion that the Court denied, and
27 subsequently refused the Court's invitation to attempt to file an appropriate motion for
28 reconsideration. Their motion to stay confirms that on appeal, yet again, they plan to raise

1 arguments they failed to preserve, to evade this Court’s detailed factual findings and its narrowly
2 tailored order. For these reasons, the Court should deny Defendants’ stay request.

3 **II. PROCEDURAL HISTORY**

4 On December 23, 2022, the Court granted Plaintiffs’ motion for preliminary injunction. Dkt.
5 No. 65. On January 3, 2023, Defendants filed an administrative motion asking the Court to permit
6 Defendants’ encampment displacement operations to continue, despite the fact that these
7 unconstitutional operations were central to Plaintiffs’ preliminary injunction motion that the Court
8 granted. *Compare* Dkt. No. 70, *with* Dkt. No. 9 at 18-22; Dkt No. 81. On January 6, 2023,
9 Plaintiffs’ counsel filed declarations containing detailed reports of Defendants’ likely non-
10 compliance with the Court’s order. *See* Dkt. Nos. 76-79.

11 On January 12, 2023, the Court held a status conference denying Defendants’ administrative
12 motion and suggesting that Defendants needed to file an appropriate motion if they wished to seek
13 clarification of the Court’s order. The Court also noted that the relief requested by Defendants—
14 to authorize their encampment resolutions—might actually require a motion for reconsideration.
15 Dkt. No. 91, Jan. 12, 2023 Hr’g Tr. at 24:20-23. The Court then noted a series of “questions and
16 concerns” regarding Defendants’ compliance with the Court’s order. *Id.* at 25:21-25. Specifically,
17 Defendants had not identified “what the police or any of the involved departments are being told
18 about the preliminary injunction order.” *Id.* at 32:7-10. The Court also inquired whether
19 Defendants were appropriately training or instructing staff that threatening displacement of
20 unhoused individuals at encampment resolutions violates the Court’s preliminary injunction. *Id.*
21 at 29:22-25 (“[T]here is really questions in my mind about what is -- what the intent – what the
22 training or instruction is versus what actually is happening”); *id.* at 30:1-8 (“There is some
23 un rebutted evidence that the same notice that’s being used now as was used before the preliminary
24 injunction order That’s completely contrary to the order.”); *id.* at 30:15-17, 31:14-15 (“My
25 other big concern has to do with the police presence. So, do individuals understand that moving is
26 voluntary[?] . . . Your declarations raised some concerns that there is a real miscommunication, a
27 real gap, in understanding especially with the police presence that was described in those
28

1 declarations.”). The Court instructed the parties to meet and confer regarding sufficient disclosures
 2 and information Plaintiffs needed to verify compliance with the Court’s Order. *Id.* at 35:24-36:21.

3 Defendants never filed a motion for reconsideration, but proceeded to file a notice of appeal
 4 of the Court’s preliminary injunction on January 23, 2023. Dkt. No. 88. On January 25, 2023,
 5 Defendants issued their first guidance to law enforcement addressing the Court’s preliminary
 6 injunction—more than a month after the injunction was entered, after moving to appeal that order.
 7 Dkt. No. 97-2. Defendants then waited still longer, until February 2, 2023, to move for a stay of
 8 the Court’s preliminary injunction. Dkt. No. 97. Meanwhile, Plaintiffs’ counsel have attempted to
 9 reach a compromise on ongoing document disclosures critical to assessing Defendants’
 10 compliance with the injunction, but no agreement has been reached. Do Decl. Ex. 1.

11 **III. LEGAL STANDARD**

12 A stay is an “intrusion into the ordinary processes of administration and judicial review,”
 13 and accordingly “is not a matter of right, even if irreparable injury might otherwise result to the
 14 appellant.” *Nken v. Holder*, 556 U.S. 418, 427 (2009). Courts consider four factors to decide
 15 whether to stay an injunction pending appeal: (1) “the stay applicant has made a *strong showing*
 16 that he is likely to succeed on the merits”; (2) “the applicant will be irreparably injured absent a
 17 stay”; (3) “issuance of the stay will [not] substantially injure the other parties interested in the
 18 proceeding”; and (4) the “public interest” favors a stay. *Hilton v. Braunskill*, 481 U.S. 770, 776
 19 (1987) (emphasis added). A strong showing on the merits is an especially onerous burden in the
 20 preliminary injunction context as such orders are reviewed on appeal only for abuse of discretion,
 21 which “occurs only if the district court based its decision on either an erroneous legal standard or
 22 clearly erroneous factual findings.” *Nader v. Brewer*, 386 F.3d 1168, 1169 (9th Cir. 2004).

23 **IV. ARGUMENT**

24 **A. Defendants are Unlikely to Succeed on the Merits of their Appeal.**

25 1. Defendants Mischaracterize the Court’s Tailored Order as Overbroad.

26 The Court has “broad discretion in fashioning a remedy.” *Melendres v. Arpaio*, 784 F.3d
 27 1254, 1265 (9th Cir. 2015) (citing *Sharp v. Weston*, 233 F.3d 1166, 1173 (9th Cir. 2000)). But
 28 here, the relief was actually narrowly drawn, in context. The preliminary injunction *only* precludes

1 San Francisco from enforcing specific anti-homelessness laws against the “involuntarily
2 homeless” (Dkt. No. 65 at 50), those who have no “practically available” shelter prior to
3 enforcement. *See Martin v. City of Boise*, 920 F.3d 584, 618 (9th Cir. 2019) (enforcement is
4 impermissible whenever shelter is not “practically available”). As such, the Court’s order
5 resembles the preliminary injunction in the District of Arizona that Defendants cite approvingly,
6 which precludes all enforcement actions against “individuals who practically cannot obtain
7 shelter.” *Fund for Empowerment v. City of Phoenix*, No. 22-cv-02041, 2022 WL 18213522 (D.
8 Ariz. Dec. 16, 2022); *see* Mot. at 5:23-6:10.

9 Although the Court is free to provide “relief that the Constitution would not of its own
10 force initially require if such relief is necessary to remedy a constitutional violation,” *Melendres*,
11 784 at 1254, the Court’s preliminary injunction is actually *less* expansive than other injunctions
12 applying *Martin*’s holding. These injunctions preclude all enforcement of certain ordinances when
13 a jurisdiction lacks sufficient shelter for the entire unhoused community, regardless of whether
14 any individuals have voluntary access to shelter. *See, e.g., Warren v. City of Chico*, No. 21-cv-
15 00640, 2021 WL 2894648, at *2 (E.D. Cal. July 8, 2021) (“this Circuit has previously held that
16 ordinances such as this are not enforceable, *unless there is enough practically available shelter*
17 *within the City for all unhoused individuals*,” issuing a preliminary injunction against all
18 enforcement (emphasis added)). Indeed, in *Johnson*, the Ninth Circuit expressly adopted this
19 approach. *Johnson v. City of Grants Pass*, 50 F.4th 787, 795 (9th Cir. 2022) (“The formula
20 established in *Martin* is that the government cannot prosecute homeless people for sleeping in
21 public if there is a greater number of homeless individuals in [a jurisdiction] than the number of
22 available shelter spaces” (internal quotations omitted)); *see id.* at 796 (granting injunction where
23 “[t]he record is undisputed that Grants Pass has far more homeless individuals than it has
24 practically available shelter beds”). As with *Johnson*, the Ninth Circuit has consistently held that
25 the primary evidence of “involuntary homelessness” warranting injunction is an inaccessible
26 shelter system due to that shelter system being at functional capacity. *Martin*, 920 F.3d at 604, 617
27 (citing *Jones v. City of Los Angeles*, 444 F.3d 1118, 1132, 1138 (9th Cir. 2006)).

28

1 There is no basis to argue the Court’s preliminary injunction is an abuse of discretion, in
2 light of the controlling law. The injunction permits Defendants to enforce their anti-homelessness
3 ordinances despite a massive shelter shortage, if an unhoused individual is not “involuntarily
4 homeless” because that person has voluntary, practical access to adequate housing or shelter before
5 enforcement. *See* Dkt. No. 65 at 50. This is fully consistent with *Martin* and *Johnson*. In fact, the
6 injunction is precisely and narrowly tailored to the exact language most recently endorsed by the
7 Ninth Circuit in *Johnson*. *See* 50 F.4th at 813 (noting the injunction only precludes enforcement
8 operations against those who are involuntarily homeless); *see id.* at 792 n.2 (“Persons are
9 involuntarily homeless if they do not have access to adequate temporary shelter, whether because
10 they have [no] means to pay for it or because it is [not] realistically available to them for free”)
11 (internal quotations and citations omitted). Thus, Defendants’ assertions that the preliminary
12 injunction is overbroad are baseless. *See* Mot. at 5:1-5.

13 Defendants try to mischaracterize the Court’s preliminary injunction as generally
14 overbroad in light of the Ninth Circuit’s partial remand in *Johnson*. *See* Mot. at 6:11-14. But the
15 Ninth Circuit only remanded the injunction in *Johnson* because the order sought to preclude
16 additional ordinances that “may be enforced against Plaintiffs who engage in prohibited activity
17 *unrelated to their status as homeless persons.*” *See* 50 F.4th at 812 n.36 (emphasis added). By
18 contrast, the preliminary injunction here only bars enforcement of ordinances used to punish the
19 very status of being homeless. Dkt. No. 65 at 48 n.19.

20 Defendants’ argument also relies on nonexistent limitations to the scope of the Eighth
21 Amendment. To that end, Defendants reargue positions they first raised at the hearing on
22 preliminary injunction—that the Eighth Amendment is an individual, not a collective, right. Mot.
23 at 5:15-6:2. They argue that the definition of “involuntarily homeless” must be evaluated on an
24 individualized, person-by-person basis. *See also* Dkt. No. 70 at 4-5. Defendants’ attempt to rely
25 on *Fund for Empowerment* to support this argument is misguided. Mot. at 5:23-6:2. The district
26 court in that case rejected as inadequate the “individualized assessments” the City of Phoenix
27 claimed to perform prior to enforcing against a specific individual—the same procedure
28 Defendants advocate for here. *See Fund for Empowerment*, 2022 WL 18213522, at *3. The District

1 of Arizona relied on an aggregate shelter bed shortage as evidence that any unsheltered individual
2 within such a jurisdiction is involuntarily homeless because they have no “practical recourse to
3 housing.” *Id.* at *7 (“[T]here is not enough shelter space for every unsheltered person to choose
4 whether to sleep or camp outside. **Thus**, any enforcement of the Camping and Sleeping Bans
5 against individuals who practically cannot obtain shelter effectively criminalizes homelessness”
6 (emphasis added)); *see also Johnson*, 50 F.4th at 792 (“[T]he number of homeless persons
7 outnumber the available shelter beds. **In other words**, homeless persons have nowhere to shelter
8 and sleep in the City other than on the streets or in parks.” (emphasis added)).

9 Regardless, the preliminary injunction here recognizes that enforcement would be
10 permissible against individuals that are in fact voluntarily homeless, considered on an individual
11 basis, but that as a factual matter unsheltered San Franciscans clearly lack that access because San
12 Francisco’s shelter system is fully at capacity and closed for all self-referral. Dkt. No. 65 at 41:25-
13 42:9 (“The court need not decide whether Defendants’ reading of *Martin* and *Johnson* is correct,
14 because their position lacks factual support.”); *see also infra* Subsection A(2). Because
15 Defendants’ request for individualized analysis did not alter the Court’s conclusions under the
16 Eighth Amendment, the question is irrelevant on appeal. *See Nader*, 386 F.3d at 1169 (“abuse of
17 discretion . . . only if the district court based its decision on . . . an erroneous legal standard”).

18 Defendants continue to reargue this position because they continue to engage in the type
19 of displacement operations that the Court found unconstitutional in the preliminary injunction, and
20 Defendants’ compliance with the injunction is, at best, very much in question. *See, e.g.*, Dkt. Nos.
21 75-80. Defendants effectively ask the Court to excuse their ongoing violations of the Constitution
22 so long as Defendants provide a last-minute shelter offer, in conjunction with an enforcement
23 action, to individuals who otherwise have no voluntary access to shelter. But Plaintiffs’
24 preliminary injunction motion already confronted this argument and explained that this
25 enforcement-first approach defies *Martin* and the Eighth Amendment doctrine prohibiting
26 punishment for involuntary status. *See* Dkt. No. 9 at 19:13-20:4 (“withholding of shelter beds for
27 the purposes of criminal enforcement actually perpetuates the criminalization of involuntary
28 homelessness—because no unhoused person has any genuine option to obtain shelter until they

1 are first subject to law enforcement consequences”). The Court’s preliminary injunction also
2 directly addressed this point. *See* Dkt. No. 65 at 25:17-26:3; *see also infra* Section A(2). Despite
3 the Court’s clear directive, it still took Defendants more than a *month* after the Court’s order to
4 issue a new SFPD bulletin telling law enforcement to cease their unconstitutional enforcement
5 actions. Dkt. No. 92-7. Defendants’ reluctance and refusal to comply with the clear terms of the
6 injunction is no basis to grant a stay.

7 2. The Factual Record Established that San Francisco’s Unsheltered
8 Population is Involuntarily Homeless.

9 Defendants real dispute on appeal is a factual question that has already been definitively
10 answered, not a legal one. Dkt. No. 65 at 41:25-42:9 (“The court need not decide whether
11 Defendants’ reading of *Martin* and *Johnson* is correct, because their position lacks factual
12 support.”). Defendants claim that their enforcement and displacement operations—including
13 orders to “move along” under threat of citation and arrest—are only made against unhoused
14 individuals who have been given a real, voluntary offer of appropriate shelter such that they are
15 not “involuntarily homeless.” *See* Mot. at 6:5. But the Court has already determined that there was
16 little to no factual basis for this assertion, and an appellate court is unlikely to disturb this
17 conclusion. *See Nader*, 386 F.3d at 1169. The Court’s factual findings are entitled to the highest
18 degree of deference on appeal of its preliminary injunction.

19 The Court’s preliminary injunction is replete with factual findings that establish that
20 unsheltered San Franciscans have no practically available or voluntary access to appropriate
21 shelter in the City. They are therefore “involuntarily homeless,” as demonstrated by a massive and
22 largely uncontested record that the shelter system in San Francisco is both functionally at capacity
23 and totally closed to voluntary access. *See, e.g.*, Dkt. No. 65 at 41:25-42:9 (“the parties agree that
24 at this time, a homeless San Franciscan who wants a shelter bed has no avenue to ask for one,
25 much less get one”); *id.* at 41:26-28 (“[i]t is beyond dispute that homeless San Franciscans have
26 no voluntary ‘option of sleeping indoors,’ and as a practical matter ‘cannot obtain shelter’”); *id.* at
27 25:9-16 (“[v]oluntary access to shelter has been functionally inaccessible to unhoused people in
28 San Francisco since the onset of the pandemic in April 2020 and has long been systematically

1 inadequate for a large portion of the population.’ . . . Defendants do not dispute any of the data or
2 analysis underlying this opinion”); *see also id.* at 5:8-6:9 (recounting the complete closure of the
3 shelter system to voluntary access since April 2020, noting that 1000 people were on a waitlist for
4 shelter at the time and that the shelter system is essentially always at full capacity); Dkt. No. 68,
5 Dec. 22, 2022 Hr’g Tr. at 43:23-44:10 (“there’s no way for a person to voluntarily try to access a
6 bed at this point in San Francisco”); Dkt. No. 9 at 4 (noting lack of functioning phone or in-person
7 reservation system). Defendants understand, however, that opening the shelter system to voluntary
8 access would completely expose how many unhoused individuals in San Francisco need shelter
9 but are barred from accessing it, leading back to the conclusion this Court has already reached:
10 Defendants’ enforcement scheme is unconstitutional under these circumstances.

11 So instead, Defendants ignore the Court’s factual findings and seek to perpetuate the
12 enforcement-first approach that was the core subject of Plaintiffs’ preliminary injunction motion.
13 Dkt. No. 9 at 18-20. In particular, Defendants argue that their belated offers of shelter incident to
14 enforcement—when individuals had no access to shelter anywhere before being subject to an
15 encampment closure—are genuine offers of available shelter that render individuals voluntarily
16 homeless prior to enforcement. *See* Mot. at 6:5. But this is yet another disguised (and procedurally
17 improper) motion for reconsideration. The Court’s factual findings regarding Defendants’
18 “encampment resolutions” are well-supported and directly contrary to Defendants’ assertions here.
19 *See, e.g.,* Dkt. No. 65 at 37:21-40:28 (“Defendants do not meaningfully rebut evidence that San
20 Francisco initiates encampment closures without actually knowing whether any shelter beds will
21 be available to encampment residents, and that the closure proceeds anyway. . . . Plaintiffs submit
22 ample evidence that encampment closures have been carried out even when [city] representatives
23 said there was no available bed space.”); *id.* at 39:19-24 (“Plaintiffs also offer evidence that
24 closures took place without offers of bed space,” recounting declarations describing SFPD sweeps
25 conducted without even pretending to offer shelter); *id.* at 24:17-21 (same); *id.* at 40:5-6 (“the fact
26 that three people once received offers of shelter does little to cut into the large body of evidence
27 demonstrating that shelter offers are often not made”); *id.* at 17:20-21 (recounting evidence of
28 “threats of citation or arrest by SFPD officers even when the individual was not offered shelter”).

1 The Court also found that the only way an unhoused person can hope to receive a shelter
 2 bed is *after* Defendants have already unconstitutionally enforced against them at an encampment
 3 displacement operation. *Id.* at 25:17-26:3 (crediting Dr. Herring’s finding that “the only clear way
 4 to access shelter is via an encampment resolution while under threat from law enforcement,” which
 5 “means that individuals are being threatened with criminal punishment when they genuinely had
 6 no voluntary means to access shelter on their own”); Dec. 22, 2022 Hr’g Tr. at 32:13-33:13 (“the
 7 City concedes this and, in fact, relied on this; that at this point . . . there’s no voluntary avenue to
 8 accessing a bed, that the only way to access a bed is if there’s an enforcement process where one
 9 is offered, if available”). These findings establish that enforcement-first shelter offers in the course
 10 of Defendants’ encampment resolution operations are a charade to justify enforcement; they do
 11 not and cannot magically provide San Francisco’s involuntarily homeless individuals with
 12 genuine, practically accessible shelter before being forcibly displaced under threat of citation and
 13 arrest. *See* Dkt. No. 65 at 37:21 (“Defendants’ position is wholly unconvincing”). The Court’s
 14 factual determinations are amply supported by the record, rendering Defendants’ appeal unlikely
 15 to succeed. *See Nader*, 386 F.3d at 1168.

16 3. Defendants’ Arguments are Waived.

17 Defendants have also waived any challenge to the scope of the Court’s injunction smuggled
 18 into their motion for a stay. *See* Dkt. No. 65 at 48:1-2 (“In their opposition brief, Defendants wholly
 19 fail to object to or even address the substance or scope of the proposed preliminary injunction,
 20 thereby conceding these issues”); Dec. 22, 2022 Hr’g Tr. at 28:23-29:3 (“the City has waived its
 21 right to say how the Court should exercise its discretion if I decide that plaintiffs are entitled to
 22 preliminary injunctive relief”). Defendants cannot now raise this issue on appeal. *See Barrientos*
 23 *v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1216 (9th Cir. 2009) (“We agree with [appellees] that
 24 [appellant] waived the objection to the scope of relief by failing to raise it before the district
 25 court.”); *Lazar v. Kroncke*, 862 F.3d 1186, 1203 (9th Cir. 2017) (“Here, by contrast, the district
 26 court expressly found [appellant] Lazar’s Commerce Clause claim to have been waived.”).¹

27 ¹ Defendants baselessly assert that Plaintiffs would have consented to the Court’s injunction being
 28 limited to compliance with SFPD’s own enforcement bulletin. Mot. at 6:7-10. Plaintiffs in fact

1 Defendants had ample opportunity to address these arguments in their opposition and have
 2 thus waived those arguments on appeal. A belated, brief exchange during the preliminary
 3 injunction hearing is not enough to develop the record for appeal, especially when Defendants
 4 offered no explanation as to why “none of this [was] in the opposition brief” when, “certainly,
 5 *Martin and Johnson* were on the books when the brief was submitted.” *See* Dec. 22, 2022 Hr’g Tr.
 6 at 30:10-12; *see also United Nurses Associations of California v. National Labor Relations Board*,
 7 871 F.3d 767, 780 (9th Cir. 2017) (“This perfunctory argument is inadequately briefed and
 8 therefore waived”). The Court also expressly rejected Defendants’ enforcement-first approach at
 9 the hearing. Dec. 22, 2022 Hr’g Tr. at 30:14-33:1. The Court then found, as a factual matter, that
 10 even after Defendants’ enforcement operations unhoused individuals are unlikely to actually
 11 receive shelter, rendering the argument moot. Dkt. No. 65 at 42:7-9.

12 Since Defendants waived these legal arguments, and whether enforcement is actually
 13 preceded by firm shelter offers is clearly a factual question on which the Court is entitled to
 14 deference, Defendants will be unable to raise these non-meritorious arguments on appeal. *See In*
 15 *re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989) (issue must be “raised sufficiently for the
 16 trial court to rule on it” for it to be preserved); *A-1 Ambulance Serv., Inc. v. Monterey*, 90 F.3d
 17 333, 338 (9th Cir. 1996) (review of waived arguments on appeal is *only* permitted if the question
 18 raised is “purely one of law” and “does not depend on the factual record developed below”).

19 **B. Defendants Offer No Evidence of a Legally Cognizable, Irreparable Injury or**
 20 **that the Public Interest Favors a Stay.**

21 Defendants offer no evidence, not even a declaration, to support their claim of injury, let
 22 alone an irreparable one. *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011) (“[S]tays must
 23 be denied to all [] who did not meet the applicable irreparable harm threshold, regardless of their
 24

25 _____
 25 made clear that voluntary access to shelter is a necessary predicate to any enforcement, consistent
 26 with this Court’s order and the Ninth Circuit’s remand orders to the district court in *Johnson*. *See*
 27 *also* 12/22/2022 Mot. Hr’g Tr. at 31:22-32:1 (Plaintiffs’ Counsel: “So I think when we talk about
 28 the SFPD policy being lawful, it is lawful to the extent that there is an open shelter system where
 anyone can access it and it is practically accessible to someone prior to being enforced against.
 That’s just not the reality in San Francisco”); *id.* at 10:11-12 (“Your Honor, the policy, as written,
 would be constitutional if San Francisco’s shelter system was open, which it is not”).

1 showing on the other stay factors.”); *see also Doe # 1 v. Trump*, 957 F.3d 1050, 1059-60 (9th Cir.
2 2020) (“The government cannot meet this burden by submitting conclusory factual assertions and
3 speculative arguments that are unsupported in the record”). The preliminary injunction was issued
4 six weeks before they filed this motion. “Rather than submitting evidence of actual burdens and
5 delays it has experienced since the injunction issued” two months ago, “the government has made
6 a weak showing that it will suffer harm over the requisite interim period.” *Al Otro Lado v. Wolf*,
7 952 F.3d 999, 1007 (9th Cir. 2020). The only factual representations Defendants have submitted
8 in the interim shows that they have still been able to “clean” and “provide services” at homeless
9 encampments since the injunction. Jan. 12, 2023 Hr’g Tr. at 26:16-27:1. Defendants implausibly
10 claim they will suffer irreparable injury without a stay yet waited six weeks after the Court’s
11 injunction to seek relief. In fact, since the preliminary injunction motion, Defendants promulgated
12 new police policies (*see* Dkt. No. 104) that put the Court’s injunction into practice and have
13 submitted no evidence in the record of actual burdens or harms.

14 Defendants also contend that enforcement policies that criminalize homelessness are
15 needed to protect “public health and safety,” without explaining how the preliminary injunction
16 prevents them from serving those interests. Mot. at 6. Services and shelter can be offered. Street
17 cleanings (if not done to harass) are still appropriate and encouraged. Nor does the injunction
18 prevent Defendants from ensuring access to the streets. The Court recognized as much in its order.
19 Dkt. No. 65 at 47; *see also Lo v. Cnty. of Siskiyou*, 558 F. Supp. 3d 850, 871-72 (E.D. Cal. 2021)
20 (granting preliminary injunction when municipality has other tools to mitigate impacts on public
21 health and safety); *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1033 (9th Cir. 2012) (noting that
22 constitutional protections for unhoused people did not actually “constrain municipal governments
23 from addressing . . . homelessness or . . . maintain[ing] public health and safety”). Indeed,
24 Defendants’ police bulletin lists numerous ways law enforcement can assure appropriate
25 pedestrian passage. Dkt. No. 104-2 at 2-3.

26 Defendants also argue they have made “difficult [policy] decisions” and the Court “should
27 not lightly upend San Francisco’s balanced policy determinations” out of respect for “federalism”
28 Mot. at 7. That argument rings hollow—policies, whether local or national, need to comply with

1 constitutional protections. Nor is such an “institutional injury” even legally cognizable as
2 irreparable harm on a stay motion. *See, e.g., East Bay Sanctuary Covenant v. Trump*, 932 F.3d
3 742, 778 (9th Cir. 2018) (rejecting federalism and separation of power arguments in denying stay
4 because government can “pursue and vindicate its interests in the full course of this litigation”);
5 *Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017) (“[I]t is the resolution of the case on
6 the merits, not whether the injunction is stayed pending appeal, that will affect those principles”)
7 (internal quotations and citations omitted).²

8 While Defendants demonstrate no cognizable harms from having to comply with the
9 Court’s injunction—irreparable or otherwise—Defendants do not even attempt to argue the public
10 interest stay factor because they maintain that the government’s request for a stay is always
11 consistent with the public interest. Mot. at 6-7. That is simply incorrect. *Sierra Club v. Trump*, 929
12 F.3d 670, 705-06 (9th Cir. 2019) (even when the government is a party, “[p]ublic interest is a
13 concept to be considered broadly” including “the respective impacts” on “Plaintiffs, and others
14 interested in the proceedings, and the general public”). This Court also noted, “homeless residents
15 of the City are members of the community, and their interests, too, must be included in assessing
16 the public interest.” Dkt. No. 65 at 46 (citing *Le Van Hung v. Schaaf*, No. 19-cv-01436, 2019 WL
17 1779584, at *7 (N.D. Cal. Apr. 23, 2019)). Regardless, it is always in the public interest for the
18 government to abide by the Constitution. *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053,
19 1069 (9th Cir. 2014) (“it would not be equitable or in the public’s interest to allow the state . . . to
20 violate the requirements of federal law”). Defendants’ cannot justify policy choices that violate
21 the Constitution by claiming some group prefers those choices. And where Defendants’ policies
22 are constitutional, the Court’s injunction ensures that Defendants’ day-to-day practices are aligned

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24
25 ² Defendants’ assertion of a right to determine their own public health and safety regulations relies
26 on *Hispanic Taco Vendors of Washington v. City of Pasco*, 994 F.2d 676, 680 (9th Cir. 1993),
27 which only discusses whether a challenged ordinance, absent proof of discriminatory intent, is
28 rationally related to a legitimate governmental interest in the context of a Fourteenth Amendment
claim. Mot. at 6. This rational basis review standard has no application in the context of irreparable
injury analysis for a stay.

1 with those policies and the Constitution. *Melendres*, 784 F.3d at 1254.³

2 **C. Defendants’ Past Conduct Confirms that Unhoused San Franciscans will be**
 3 **Subjected to Harmful Sweeps and Attendant Constitutional Violations.**

4 A stay would undoubtedly cause Plaintiffs and unhoused San Franciscans to suffer
 5 irreparable harm. *See Norsworthy v. Beard*, No. 14-cv-00695, 2015 WL 1907518, at *4 (N.D. Cal.
 6 Apr. 27, 2015) (rejecting stay where “the Court’s order granting an injunction was explicitly based
 7 on the finding that [plaintiff] is likely to succeed on the merits and that she is suffering from . . .
 8 deprivation of her Eighth Amendment rights.”). The Court’s conclusions in granting the
 9 preliminary injunction show that a stay would authorize unrelenting sweeps and criminalization of
 10 unhoused people that are both deeply traumatizing and do nothing to solve homelessness. Dkt. No.
 11 65 at 45 (citing Herring Decl. ¶¶ 90-105, Castaño Decl. ¶ 20, and Frank Decl. ¶ 15). At the same
 12 time, Plaintiff Coalition on Homelessness would have to divert even more resources to monitor
 13 Defendants’ misconduct if the injunction is stayed. Dkt. No. 9-3, Friedenbach Decl. ¶¶ 11-22;
 14 James Decl. ¶ 4. Thus, the balance of injuries strongly favors denying the stay.

15 Defendants’ argument that Plaintiffs suffer no harm rests on a gross misstatement: “There
 16 can be no constitutional injury from the requested stay because Plaintiffs agree the Enforcement
 17 Bulletin complies with the Eight Amendment.” Mot. at 8. That is false. *See infra* n.1. Further,
 18 Defendants have not proven they can be trusted to follow their own policies given their prior
 19 widespread violations of the Constitution that led to this lawsuit. There is a dearth of evidence, for
 20 example, that SFPD officers “secure appropriate shelter before taking enforcement action” under

21 _____
 22 ³ Defendants’ cases regarding a supposed public interest in protecting the choices of local
 23 governments are also totally inapposite. Mot. at 7. *Oakland v. Holder* examined whether a
 24 municipality could challenge the federal government’s civil forfeiture action, which was a truly
 25 novel legal question that gave rise to significant public interest. 961 F. Supp. 2d 1005, 1015 (N.D.
 26 Cal. 2013). In *Golden Gate Restaurant Association v. San Francisco*, the Court specifically stated
 27 that an ordinance would be found contrary to the public interest “if it were obvious that the
 28 Ordinance was unconstitutional,” as is the case here. 512 F.3d 1112, 1126 (9th Cir. 2008). In
Miralle v. Oakland, the court found that the public interest might favor unhoused plaintiffs even
 where the government’s conduct was likely to be constitutional. No. 18-cv-06823, 2018 WL
 6199929, at *4 (N.D. Cal. Nov. 28, 2018). Finally, *Burford v. Sun Oil Co.* is an eighty year old
 opinion cautioning federal courts to exercise their discretion to avoid friction with certain state oil
 and gas regulatory policies, which in no way suggests that a federal court should abstain from
 vindicating constitutional rights. 319 U.S. 315, 318 (1943).

1 the prior SFPD Bulletin 19-080. Dkt. No. 9 at 9-12, 14-15; Dkt. No. 48 at 10-12 (cataloging
 2 failures); Dkt. No. 65 at 37-39 (rejecting Defendants’ “wholly unconvincing” rebuttal to Plaintiffs’
 3 account); Dkt. No. 50-10, Marshal Decl. at 3-7; Dkt. No. 9-1, Herring Decl. ¶¶ 58-79. The Court
 4 also granted the preliminary injunction due to Defendants’ routine failure to follow their own bag
 5 and tag policy. Dkt. No. 65 at 44 (“Defendants do not rebut Plaintiffs’ evidence of widespread
 6 seizure and destruction of homeless individuals’ unabandoned personal property.”). Lest there be
 7 any doubt, even Defendants’ current compliance with the preliminary injunction is in serious
 8 question; Plaintiffs continue to gather evidence in that regard. *See* Dkt. Nos. 75-80. Because
 9 Plaintiffs’ concerns regarding noncompliance remain, Plaintiffs will continue to monitor
 10 noncompliance, seek discovery, and assess whether to file an appropriate motion for redress.⁴
 11 Defendants have given every indication of refusal to comply with the law. And regardless of the
 12 unconstitutionality of Defendants’ sweeps, they are undisputedly harmful.

13 V. CONCLUSION

14 For the reasons above, the Court should deny Defendants’ motion to stay a portion of the
 15 preliminary injunction order.

16
 17
 18 Dated: February 16, 2023

Respectfully submitted,

19
 20 By: /s/ Zal K. Shroff

21 LAWYERS’ COMMITTEE FOR CIVIL
 22 RIGHTS OF THE SAN FRANCISCO BAY
 AREA

Zal K. Shroff, MJP 804620, *pro hac vice*

Elisa Della-Piana, SBN 226462

Hadley Rood, SBN 348168

131 Steuart Street, Ste. 400

25
 26 ⁴ Defendants themselves insinuate their likely non-compliance with the requirements of the
 27 Court’s preliminary injunction in their recent request for expedited briefing regarding their request
 28 for stay, where they continue to maintain the order is somehow shrouded in “uncertainty.” *See*
 Dkt. No. 104 at 3 (“Defendants . . . face the choice of either enforcing the injunction in a way that
 exceeds Ninth Circuit precedent or risking accusations from the Plaintiffs of contempt”).

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By: /s/ John Thomas H. Do

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

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Coalition on Homelessness, Toro Castaño, Sarah Cronk, Joshua Donohoe, Moliq Frank, David Martinez, Teresa Sandoval, Nathaniel Vaughn

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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: February 16, 2023

/s/ Alfred C. Pfeiffer, Jr.
Alfred C. Pfeiffer, Jr.

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5 LAWYERS' COMMITTEE FOR CIVIL
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13 *Attorneys for Plaintiffs Coalition on Homelessness,*
Toro Castaño, Sarah Cronk, Joshua Donohoe,
Molique Frank, David Martinez, Teresa Sandoval,
14 *Nathaniel Vaughn*

15
16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**
18 **OAKLAND DIVISION**

19 COALITION ON HOMELESSNESS, et al.,

20 Plaintiffs,

21 v.

22 CITY AND COUNTY OF SAN FRANCISCO,
23 et al.,

24 Defendants.

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

**DECLARATION OF JOHN THOMAS H.
DO IN SUPPORT OF PLAINTIFFS'
OPPOSITION TO DEFENDANTS'
MOTION TO STAY PORTION OF
COURT ORDER (ECF No. 65) PENDING
APPEAL**

Judge: The Hon. Donna M. Ryu

Hearing Date: April 13, 2023

Time: 1:00 p.m.

Place: Courtroom 4 – 3rd floor
1301 Clay Street Oakland,
CA 94612

Trial Date: April 15, 2024

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DECLARATION OF JOHN THOMAS H. DO

I, John Thomas H. Do, hereby declare as follows:

1. I am a Senior Staff Attorney with the ACLU of Northern California. I am an attorney of record for the Plaintiffs Coalition on Homelessness, Toro Castaño, Sarah Cronk, Joshua Donohoe, Moliq Frank, David Martinez, Teresa Sandoval, and Nathaniel Vaughn in the above-captioned action. I am admitted to practice before this Court.

2. I submit this Declaration in support of Plaintiffs’ Opposition to Defendants’ Motion to Stay Portion of Court Order (ECF No. 65) Pending Appeal. I have personal knowledge of the facts set forth herein, and if called as a witness, could and would testify competently to them.

3. Attached hereto as **Exhibit 1** is a true and accurate copy of correspondence between the parties between the period of January 24, 2023 to February 16, 2023 discussing Plaintiffs’ request for disclosures to monitor Defendants’ compliance with the preliminary injunction order.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 16, 2023, in San Francisco, California.

/s/ John Thomas H. Do
John Thomas H. Do

*Attorney for Plaintiffs
Coalition on Homelessness, Toro Castaño,
Sarah Cronk, Joshua Donohoe, Moliq Frank,
David Martinez, Teresa Sandoval, Nathaniel
Vaughn*

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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: February 16, 2023

/s/ Alfred C. Pfeiffer, Jr.
Alfred C. Pfeiffer, Jr.

EXHIBIT 1

From: Emery, Jim (CAT) <Jim.Emery@sfcityatty.org>
Sent: Thursday, February 16, 2023 11:26 AM
To: 'Zal Shroff'
Cc: John Do; Lee, Joseph (OC); Pfeiffer, Al (Bay Area); Stevens, Ryan (CAT); Snodgrass, Wayne (CAT); Murphy, Kaitlyn (CAT); Gradilla, Miguel (CAT); Hadley Rood; #SF PRO BONO - UNHOUSED PERSONS LITIGATION
Subject: RE: COH v SF: m/c on ongoing productions

Hi Zal,



I expect to get back to you today. I had a 9th Circuit argument yesterday that occupied much of my attention to prepare. Thank you for your patience.

Jim Emery
Deputy City Attorney
Office of City Attorney David Chiu
(415) 554-4628 Direct
www.sfcityattorney.org

From: Zal Shroff <zshroff@lccrsf.org>
Sent: Thursday, February 16, 2023 11:19 AM
To: Emery, Jim (CAT) <Jim.Emery@sfcityatty.org>
Cc: John Do <jdo@aclunc.org>; Joseph Lee <Joseph.Lee@lw.com>; Al Pfeiffer <Al.Pfeiffer@lw.com>; Stevens, Ryan (CAT) <Ryan.Stevens@sfcityatty.org>; Snodgrass, Wayne (CAT) <Wayne.Snodgrass@sfcityatty.org>; Murphy, Kaitlyn (CAT) <Kaitlyn.Murphy@sfcityatty.org>; Gradilla, Miguel (CAT) <Miguel.Gradilla@sfcityatty.org>; Hadley Rood <hrood@lccrsf.org>; sf.probono.unhoused.persons.litigation@lw.com
Subject: Re: COH v SF: m/c on ongoing productions

Jim:

We have not heard back from you regarding the proposed stipulated discovery order and our most recent version. Please confirm whether you will agree to the proposed order's terms or whether the parties should prepare to file their joint letter regarding this ongoing discovery dispute. As we indicated earlier this week, we had expected to either resolve these matters by the end of the week (in fact, we had expected to last week) or otherwise to approach the Court. Let us know Defendants' position as soon as possible so we can determine next steps.

Best regards,



Zal K. Shroff (he/him)
Senior Staff Attorney
Lawyers' Committee for Civil Rights of the San Francisco Bay Area
131 Steuart Street, Suite 400
San Francisco, CA 94105
Tel: (415) 543-9444 x.220
Fax: (415) 543-0296
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From: Zal Shroff <zshroff@lccrsf.org>

Date: Tuesday, February 14, 2023 at 12:17 PM

To: "Emery, Jim (CAT)" <Jim.Emery@sfcityatty.org>

Cc: John Do <jdo@aclunc.org>, Joseph Lee <Joseph.Lee@lw.com>, Al Pfeiffer <Al.Pfeiffer@lw.com>, "Stevens, Ryan (CAT)" <Ryan.Stevens@sfcityatty.org>, "Snodgrass, Wayne (CAT)" <Wayne.Snodgrass@sfcityatty.org>, "Murphy, Kaitlyn (CAT)" <Kaitlyn.Murphy@sfcityatty.org>, "Gradilla, Miguel (CAT)" <Miguel.Gradilla@sfcityatty.org>, Hadley Rood <hrood@lccrsf.org>, "sf.probono.unhoused.persons.litigation@lw.com" <sf.probono.unhoused.persons.litigation@lw.com>

Subject: Re: COH v SF: m/c on ongoing productions

Jim:

We have provided further comments in the attached redline. In general, however, it seems we are at an impasse regarding certain critical parts of the information needed to assess preliminary injunction compliance—particularly as to prior notice that the City’s own policies require, the definition of a planned encampment resolution for which notice should be provided, and an agreement that the City will disclose in its initial disclosures records for the 2-3 reporting periods since the preliminary injunction order was entered and for which Plaintiffs have no present information.

If you cannot agree to the changes we have identified here with our clear explanations as to why, we will need to prepare separate proposed orders for the Court and will need to proceed with the dispute resolution process. Please advise whether that will be necessary. If it is, given the now months-long negotiation process here, we will expect the parties to agree to file a joint letter and competing proposed orders explaining the points of disagreement by Friday.

We will also note that we are awaiting a response to our meet and confer process regarding Defendants’ failure to produce more than a *single* document in written discovery for discovery responses due weeks ago, without explaining what diligent search has been conducted to meet Defendants’ discovery obligations. We will expect to meet and confer on this matter before Friday as outlined in our letter and await your written response. Please provide your availability as soon as possible.

Best regards,



Zal K. Shroff (he/him)

Senior Staff Attorney

Lawyers’ Committee for Civil Rights of the San Francisco Bay Area

131 Steuart Street, Suite 400

San Francisco, CA 94105

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From: "Emery, Jim (CAT)" <Jim.Emery@sfcityatty.org>

Date: Saturday, February 11, 2023 at 3:27 PM

To: Zal Shroff <zshroff@lccrsf.org>

Cc: John Do <jdo@aclunc.org>, Joseph Lee <Joseph.Lee@lw.com>, Al Pfeiffer <Al.Pfeiffer@lw.com>, "Stevens, Ryan (CAT)" <Ryan.Stevens@sfcityatty.org>, "Snodgrass, Wayne (CAT)"

<Wayne.Snodgrass@sfcityatty.org>, "Murphy, Kaitlyn (CAT)" <Kaitlyn.Murphy@sfcityatty.org>, "Gradilla, Miguel (CAT)" <Miguel.Gradilla@sfcityatty.org>, Hadley Rood <hrood@lccrsf.org>, "sf.probono.unhoused.persons.litigation@lw.com" <sf.probono.unhoused.persons.litigation@lw.com>



Subject: RE: COH v SF: m/c on ongoing productions

Hi Zal,

Thank you for your patience. I've provided further edits and responded to your comment bubbles.

Jim Emery

Deputy City Attorney
Office of City Attorney David Chiu
(415) 554-4628 Direct
www.sfcityattorney.org

From: Zal Shroff <zshroff@lccrsf.org>

Sent: Tuesday, February 7, 2023 7:03 PM

To: Emery, Jim (CAT) <Jim.Emery@sfcityatty.org>

Cc: John Do <jdo@aclunc.org>; Joseph Lee <Joseph.Lee@lw.com>; Al Pfeiffer <Al.Pfeiffer@lw.com>; Stevens, Ryan (CAT) <Ryan.Stevens@sfcityatty.org>; Snodgrass, Wayne (CAT) <Wayne.Snodgrass@sfcityatty.org>; Murphy, Kaitlyn (CAT) <Kaitlyn.Murphy@sfcityatty.org>; Hadley Rood <hrood@lccrsf.org>; sf.probono.unhoused.persons.litigation@lw.com

Subject: Re: COH v SF: m/c on ongoing productions

Hi Jim:

Thank you for these further edits. You will see our additional redlines and comments in the attached. Please advise once you have had a chance to review. We are hopeful that the parties can prepare to file the final stipulated order by the end of this week.

Best regards,



Zal K. Shroff (he/him)

Senior Staff Attorney

Lawyers' Committee for Civil Rights of the San Francisco Bay Area

131 Steuart Street, Suite 400

San Francisco, CA 94105

Tel: (415) 543-9444 x.220

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From: "Emery, Jim (CAT)" <Jim.Emery@sfcityatty.org>

Date: Monday, February 6, 2023 at 7:54 PM

To: Zal Shroff <zshroff@lccrsf.org>

Cc: John Do <jdo@aclunc.org>, Joseph Lee <Joseph.Lee@lw.com>, Al Pfeiffer <Al.Pfeiffer@lw.com>,

"Stevens, Ryan (CAT)" <Ryan.Stevens@sfcityatty.org>, "Snodgrass, Wayne (CAT)"

<Wayne.Snodgrass@sfcityatty.org>, "Murphy, Kaitlyn (CAT)" <Kaitlyn.Murphy@sfcityatty.org>, Hadley Rood <hrood@lccrsf.org>, "sf.probono.unhoused.persons.litigation@lw.com"

<sf.probono.unhoused.persons.litigation@lw.com>

Subject: RE: COH v SF: m/c on ongoing productions



Hi Zal,

I've put my redlines on top of yours, and responded to your comment bubbles within the document. Ryan will get back to you separately about the proposed protective order.

Jim Emery

Deputy City Attorney
Office of City Attorney David Chiu
(415) 554-4628 Direct
www.sfcityattorney.org

From: Zal Shroff <zshroff@lccrsf.org>

Sent: Friday, February 3, 2023 3:01 PM

To: Emery, Jim (CAT) <Jim.Emery@sfcityatty.org>

Cc: John Do <jdo@aclunc.org>; Joseph Lee <Joseph.Lee@lw.com>; Al Pfeiffer <Al.Pfeiffer@lw.com>; Stevens, Ryan (CAT) <Ryan.Stevens@sfcityatty.org>; Snodgrass, Wayne (CAT) <Wayne.Snodgrass@sfcityatty.org>; Murphy, Kaitlyn (CAT) <Kaitlyn.Murphy@sfcityatty.org>; Hadley Rood <hrood@lccrsf.org>;
sf.probono.unhoused.persons.litigation@lw.com

Subject: Re: COH v SF: m/c on ongoing productions

Hi Jim:

Thank you for these edits. We agree we are fairly close here. You will see our additional comments in response to your thoughts below in the attached. We can agree to using the SFPD codes you recommend for the random sampling—with the particulars of randomization worked out between us. We do however want a Boolean search to run across the SFPD database, even if an imperfect one, and are firm in our request for 50 incident reports as a tiny fraction of the responsive material—with the expectation that a robust protective order will adequately address any concerns regarding redaction burden. As promised, we also attach a draft protective order for that purpose here. Please advise once you have reviewed.

Best regards,



Zal K. Shroff (he/him)
Senior Staff Attorney
Lawyers' Committee for Civil Rights of the San Francisco Bay Area
131 Steuart Street, Suite 400
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From: "Emery, Jim (CAT)" <Jim.Emery@sfcityatty.org>

Date: Thursday, February 2, 2023 at 8:46 PM

To: Zal Shroff <zshroff@lccrsf.org>

Cc: John Do <jdo@aclunc.org>, Joseph Lee <Joseph.Lee@lw.com>, Al Pfeiffer <Al.Pfeiffer@lw.com>,

"Stevens, Ryan (CAT)" <Ryan.Stevens@sfcityatty.org>, "Snodgrass, Wayne (CAT)" <Wayne.Snodgrass@sfcityatty.org>, "Murphy, Kaitlyn (CAT)" <Kaitlyn.Murphy@sfcityatty.org>
Subject: RE: COH v SF: m/c on ongoing productions

Dear Zal,

I've attached a track-changes version of the draft stipulation you circulated on Monday afternoon, including my suggested edits. My edits are intended to track more closely to the agreement I thought we reached on our Friday telephone call last week.

Regarding police dispatch data, all dispatch information is publicly available online. The dispatch data includes location information and is searchable. I provided a link to that website in my January 27, 2023 letter to John. For this reason, I've deleted the dispatch data from the proposed stipulation.

I've also attached SFPD's Coding Manual. Each incident report is assigned at least one and up to three title codes. For example, if a bank robbery results in a homicide, the incident report will bear both title codes. I have learned that Boolean searches of incident reports are clunky and unreliable.

I therefore propose that Plaintiffs select incident reports by title code. Plaintiffs could identify as many title codes as they want, and the random selection of incident reports would come from the universe of incident reports bearing the selected title codes. I've been advised that the "civil sidewalk" codes are most likely to correlate to relevant incidents. Other potentially fruitful title codes are "Lodging in Park," "Obstruction on Streets, Sidewalks," and "Obstructing Public Thoroughfare." By contrast, your proposed Boolean searches would capture incident reports where a witness is described as homeless, or a drug dealing arrest occurring in the vicinity of a homeless camp. I'm happy to discuss further how to select responsive incident reports, and how to randomize them.

Because of the burdens of collecting, processing, and redacting this information, I urge plaintiffs to accept my proposed scaling of the incident reports to 30, rather than 50, every three weeks, and the volume of bodycam footage to 5 hours, and the turnaround time for producing bodycam footage at 14 days.

I'd like us to consider deleting item 2 from the Notices of Ongoing Operations, because DPW has confirmed there are no responsive operations. I know there was one incidence in which someone from DPW posted a 72-hour notice before removing property. That was done because the employee misunderstood what was required under the bag-and-tag policy. If we do not delete this item, I expect there will be no responsive notices.

Finally, I think it makes sense for the disclosures pursuant to this agreement to continue until the close of fact discovery, at which time we can consider the need to extend it.

I'm happy to discuss further. I think we're close.



Jim Emery

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From: Zal Shroff <zshroff@lccrsf.org>
Sent: Monday, January 30, 2023 5:03 PM
To: Emery, Jim (CAT) <Jim.Emery@sfcityatty.org>; John Do <jdo@aclunc.org>; Stevens, Ryan (CAT) <Ryan.Stevens@sfcityatty.org>; Snodgrass, Wayne (CAT) <Wayne.Snodgrass@sfcityatty.org>; Wang, Edmund (CAT) <Edmund.Wang@sfcityatty.org>
Cc: Joseph Lee <Joseph.Lee@lw.com>; Al Pfeiffer <Al.Pfeiffer@lw.com>
Subject: Re: COH v SF: m/c on ongoing productions

Hi Jim:

Thanks again for speaking with us on Friday. As discussed, we have attached a proposed stipulated order for your review. We have also left space for Defendants to explain their recommendation on an initial randomization protocol for the SFPD incident reports. We are hoping that the parties can work to finalize our agreement and the stipulated order by Wednesday. We will also plan to circulate a draft protective order in the coming days.

Best regards,



Zal K. Shroff (he/him)
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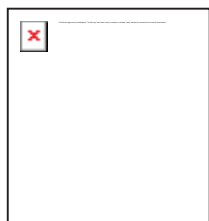
From: "Emery, Jim (CAT)" <Jim.Emery@sfcityatty.org>
Date: Thursday, January 26, 2023 at 7:21 PM
To: John Do <jdo@aclunc.org>, "Stevens, Ryan (CAT)" <Ryan.Stevens@sfcityatty.org>, "Snodgrass, Wayne (CAT)" <Wayne.Snodgrass@sfcityatty.org>, "Wang, Edmund (CAT)" <Edmund.Wang@sfcityatty.org>
Cc: Joseph Lee <Joseph.Lee@lw.com>, Al Pfeiffer <Al.Pfeiffer@lw.com>, Zal Shroff <zshroff@lccrsf.org>
Subject: RE: COH v SF: m/c on ongoing productions

Thanks, John. I can be available to talk at noon tomorrow. I expect to circulate a letter in the morning. Once you see my letter, let me know whether you'd prefer to have more time to review it before we talk. You may wish to revise plaintiffs' portion of the joint discovery letter.

Jim Emery
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From: John Do <JDo@aclunc.org>
Sent: Thursday, January 26, 2023 2:50 PM
To: Emery, Jim (CAT) <Jim.Emery@sfcityatty.org>; Stevens, Ryan (CAT) <Ryan.Stevens@sfcityatty.org>; Snodgrass, Wayne (CAT) <Wayne.Snodgrass@sfcityatty.org>; Wang, Edmund (CAT) <Edmund.Wang@sfcityatty.org>
Cc: 'Joseph.Lee@lw.com' <Joseph.Lee@lw.com>; 'Al.Pfeiffer@lw.com' <Al.Pfeiffer@lw.com>; 'Zal Shroff' <zshroff@lccrsf.org>
Subject: RE: COH v SF: m/c on ongoing productions

Correction: We are available at 9am or 12pm tomorrow, Friday. You are still welcome to send an email response in advance. Thank you.



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From: John Do
Sent: Thursday, January 26, 2023 2:34 PM
To: Emery, Jim (CAT) <Jim.Emery@sfcityatty.org>; Stevens, Ryan (CAT) <Ryan.Stevens@sfcityatty.org>; Snodgrass, Wayne (CAT) <Wayne.Snodgrass@sfcityatty.org>; Wang, Edmund (CAT) <Edmund.Wang@sfcityatty.org>
Cc: 'Joseph.Lee@lw.com' <Joseph.Lee@lw.com>; 'Al.Pfeiffer@lw.com' <Al.Pfeiffer@lw.com>; 'Zal Shroff' <zshroff@lccrsf.org>
Subject: RE: COH v SF: m/c on ongoing productions

Jim,

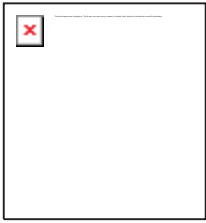
We understood that you wanted to meet and confer by phone about this dispute today. Given that we previously raised our concerns on the pacing of these conversations, we agreed so long as we would file the joint letter five days from today. Rather than provide a written response to our joint letter or have that requested call, you have suggested you would respond by email instead and discuss at a later unknown time.

We are still at an impasse. We have met and conferred on these issues since before the preliminary injunction and on December 29, 2022, January 3, 2023, and January 18, 2023. The dispute was also briefed in a prior administrative motion. We have spent numerous hours, including a two-hour phone call just last week, meeting and conferring.

Therefore, please provide your response to the joint letter by Wednesday morning. Due to our documented concerns that Defendants are violating the preliminary injunction on a daily basis, we will, otherwise, be prepared to submit a separate letter to the Court as provided for in the Court's standing order.

In the meantime, we are available to discuss this tomorrow at 10am or 12pm. Please confirm.

Regards,
John



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From: Emery, Jim (CAT) <Jim.Emery@sfcityatty.org>
Sent: Wednesday, January 25, 2023 6:22 PM
To: John Do <JDo@aclunc.org>; Stevens, Ryan (CAT) <Ryan.Stevens@sfcityatty.org>; Snodgrass, Wayne (CAT) <Wayne.Snodgrass@sfcityatty.org>; Wang, Edmund (CAT) <Edmund.Wang@sfcityatty.org>
Cc: 'Joseph.Lee@lw.com' <Joseph.Lee@lw.com>; 'Al.Pfeiffer@lw.com' <Al.Pfeiffer@lw.com>; 'Zal Shroff' <zshroff@lccrsf.org>
Subject: RE: COH v SF: m/c on ongoing productions

Thanks, John.

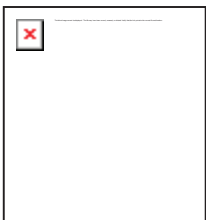
I think it would be most productive for me to provide a written response to what you sent last night, and then to talk. I'll get you my response tomorrow, but I can't be exactly sure when. As you can appreciate. I was occupied today. It will be my first priority in the morning.

Jim Emery
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From: John Do <JDo@aclunc.org>
Sent: Wednesday, January 25, 2023 6:07 PM
To: Stevens, Ryan (CAT) <Ryan.Stevens@sfcityatty.org>; Emery, Jim (CAT) <Jim.Emery@sfcityatty.org>; Snodgrass, Wayne (CAT) <Wayne.Snodgrass@sfcityatty.org>; Wang, Edmund (CAT) <Edmund.Wang@sfcityatty.org>
Cc: 'Joseph.Lee@lw.com' <Joseph.Lee@lw.com>; 'Al.Pfeiffer@lw.com' <Al.Pfeiffer@lw.com>; 'Zal Shroff' <zshroff@lccrsf.org>
Subject: RE: COH v SF: m/c on ongoing productions

Per your request, we are available to discuss this discovery dispute tomorrow. We are available at 9 am or 2pm. Thank you.

Regards,
John



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From: John Do

Sent: Tuesday, January 24, 2023 5:26 PM

To: Stevens, Ryan (CAT) <Ryan.Stevens@sfcityatty.org>; Emery, Jim (CAT) <Jim.Emery@sfcityatty.org>; Snodgrass, Wayne (CAT) <Wayne.Snodgrass@sfcityatty.org>; Wang, Edmund (CAT) <Edmund.Wang@sfcityatty.org>

Cc: 'Joseph.Lee@lw.com' <Joseph.Lee@lw.com>; 'Al.Pfeiffer@lw.com' <Al.Pfeiffer@lw.com>; 'Zal Shroff' <zshroff@lccrsf.org>

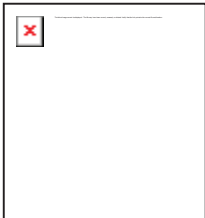
Subject: RE: COH v SF: m/c on ongoing productions

Jim, Wayne, Ed, and Ryan,

As discussed, please see the attached joint discovery dispute letter and provide your additions. We are using this dispute process due to our urgent concerns regarding Defendants' compliance with the PI, but we are not foreclosing discussing these issues tomorrow during the settlement conference.

Regards,

John



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