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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**

12 MARIN COUNTY HOMELESS
13 UNION, a local affiliate of the
CALIFORNIA HOMELESSNESS
14 UNION, on behalf of itself and those it
represents; CAMP COMPASSION, a
15 Homeless Union-affiliated encampment
in Lee Gerner Park; Individual Plaintiffs
16 JASON SARRIS; LEA DEANGELO;
ZACH BOULWARE; CARRIE
17 HEALON, LISA NICOLE JOHNSON;
DONALD HOBBS; DEBORAH ANN
18 MIROMONTES; LISA JOHNSON;
CHARLES TALBOT; BETHANY
19 ALLEN; MICHELANGELO MONTEZ;
DEBORAH ANN MIRAMONTES;
20 KALANI WELSCH, and other similarly
situated homeless persons including
21 current residents of Camp Compassion
homeless encampment,

22 Plaintiffs,

23 v.

24 CITY OF NOVATO; CITY MANAGER
25 ADAM MCGILL, MAYOR PAT
EKLUND, MAYOR PRO TEM ERIC
26 LUCAN, CHIEF OF POLICE
MATHEW MCCAFFREY, PUBLIC
27 WORKS DIRECTOR CHRIS BLUNK,

28 Defendants.

CASE NO.: 4:21-cv-05401-YGR

[Assigned to the Hon. Yvonne Gonzalez
Rogers]

**DEFENDANT CITY OF NOVATO'S
OPPOSITION TO ORDER TO SHOW
CAUSE FOR PRELIMINARY
INJUNCTION**

Hearing Date: August 9, 2021
Time: 12:00 pm
Ctm: 1

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1 **I. INTRODUCTION**

2 The City of Novato, like most cities, is experiencing an increasing number of
3 homeless persons camping, living or loitering on various parcels of property owned by
4 the City. These circumstances are not only undesirable to the unhoused but have
5 created an inability for other individuals to enjoy and benefit from public spaces, both
6 for recreation and the continuity of essential government services.

7 In order to address these issues, the City adopted Ordinances 1669 and 1670
8 (together, the “Ordinances”) to regulate the time and place where camping is
9 permitted within the City. In light of the continuing COVID-19 pandemic, these
10 Ordinances will not be used to clear any encampment until specific COVID-related
11 conditions are met. Further, the City has entered into an agreement with a local
12 homeless services provider to reserve 15 shelter beds for City referrals, allowing the
13 City to offer shelter placements to persons currently camping in Lee Gerner Park.

14 Plaintiffs’ Complaint and Ex Parte Application misstate and misrepresent the
15 Ordinances and the City’s efforts to account for the risks associated with the COVID-
16 19 pandemic. The true state of facts demonstrates that the Ordinances do not violate
17 applicable Ninth Circuit precedent, and that enforcement of the Ordinances, when all
18 applicable conditions are met, will not place Plaintiffs in greater danger than their
19 current circumstances. As Plaintiffs cannot demonstrate the validity of their claims, or
20 that they will suffer irreparable harm, they are not entitled to injunctive relief.

21 **II. STATEMENT OF FACTS**

22 **A. Lee Gerner Park**

23 Lee Gerner Park is a park that runs along the creek to the rear of the Novato
24 Library. Winter Decl. ¶ 6. A walking path and a bridge connect the north and south
25 sides of the park. *Id.* Located to the west of the park is a multi-unit office building
26 which is the home to local doctors and dentists. Winter Decl. ¶ 7. The Novato Library
27 is located south west of and adjacent to the park. *Id.* On the east side of the park, there
28 are private businesses and a restaurant. *Id.* On the North side of the park is Downtown

Center, which houses Creekside Bakery, CVS Pharmacy, Lucky's, US Bank, Sonoma Fit, Morning Glory Florist, Baskin Robbins and the Novato Farmer's Market. Winter Decl. ¶ 7; Supp. McGill Decl. Exh. 10.

Over the past year, Lee Gerner Park has become a source of complaints from the community and business owners due to a large homeless encampment that formed over time. Winter Decl. ¶ 8. The businesses that border the park report that members of the encampment harass customers and staff. Supp. McGill Decl. Exh. 8. Multiple business owners have reported seeing encampment members urinating or defecating in the park. *Id.* at pp. 1, 3, 7, 8. The NRT has received calls for service reporting trespasses (Winter Decl. ¶ 23(a)), attempted stabbings (*id.* at ¶ 23(j)), aggressive and unleashed dogs (*id.* at ¶ 23(n), (u), (v)), and theft and vandalism (*id.* at ¶ 23(r), (s)) all from members of the encampment.

The encampment consists of a large row of tents along the North side of the south walking path. *Id.* In addition to the tents, the homeless encamped there installed a large dog run on the lawn as well as a volleyball net and a large ping pong table. *Id.* The area was littered with trash, plants and trees were damaged, and the creek under the Seventh Street bridge was being used as a makeshift toilet for those living in the park. Winter Decl. ¶ 9. In response to the pandemic, near the end of March 2020, the Marin County Emergency Operations Center (EOC) installed portable restrooms and hand washing stations in the front of the Novato Library, in accordance with CDC's guidelines for homeless living in encampments during COVID-19. Winter Decl. ¶ 13.

In response to the complaints from the community regarding the conditions at Lee Gerner Park, in March 2020 the Novato Police Department partnered with the City of Novato's Public Works Department to remediate the conditions at Lee Gerner Park. Winter Decl. ¶ 11. Before the cleanup could occur, the Novato Police Department collaborated with the Marin County Health and Human Services Department to develop an outreach strategy for those residing in Lee Gerner Park. The mission of the project was to help find housing, provide outreach, and offer services to

1 those experiencing homelessness. Winter Decl., ¶ 12.

2 The Novato Response Team (NRT) is the City’s community point of contact for
 3 unhoused outreach. Winter Decl. ¶ 2. In March 2020 the NRT was tasked with
 4 meeting with those living in the park to determine what their needs were and how the
 5 NRT could assist them, either by placement in permanent or temporary housing during
 6 this pandemic. Winter Decl. ¶ 16; Bates Decl. ¶ 10. At that time there were
 7 approximately nine people living in seven tents within the park. Winter Decl. ¶ 15;
 8 Bates Decl. ¶ 6. In coordination with the Marin County Emergency Operations Center,
 9 Marin Health & Human Services, and the County’s CARE Team (a consumer-staffed
 10 team providing outreach to homeless individuals with mental illness), the NRT was
 11 able to develop individualized strategies to find temporary housing or alternative
 12 locations for eight of the nine occupants. Winter Decl. ¶ 16; Bates Decl. ¶ 10. Each of
 13 these strategies were in voluntary cooperation with the individual seeking alternate
 14 shelter. Bates Decl. ¶ 10.

15 After a significant amount of time and effort were spent housing and relocating
 16 individuals, the Novato Police Department met with City’s Public Works Department
 17 to conduct an initial park restoration. This included hiring an arborist to assess damage
 18 to the heritage oak trees, creek bank and riparian life along the creek. Winter Decl.
 19 ¶¶ 18, 34, Exh. 2. The California Department of Fish and Wildlife and the California
 20 Water Resource Control Board were also consulted about a habitat restoration area.
 21 Winter Decl. ¶¶ 18, 33, Exhs. 3, 4. Several thousand pounds of garbage were removed
 22 from the park and a temporary fence was added to secure the area until a permanent
 23 fence could be installed to protect the creek area. Winter Decl. ¶ 19. On August 20,
 24 2020, the NRT, the City’s Public Works Department, the Rotary Club of Novato
 25 Sunrise and other volunteers from the community installed the new fence together to
 26 help restore the park and create a barrier to protect the habitat. Winter Decl. ¶ 20.

27 Unfortunately, shortly after the park restoration and the installation of the new
 28 fence were completed in August 2020, an independent homeless advocate persuaded

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1 over ten individuals, some from areas outside of Novato, to move into the park, all
2 with the purpose of re-creating and misguidedly hoping to secure the protection of a
3 homeless “encampment” as defined by the CDC guidelines. Winter Decl., ¶ 21; Bates
4 Decl. ¶ 12; see Supp. McGill Decl. Exh. 9 at p. 5 (CDC guidance recommending the
5 provision of portable latrines with handwashing facilities for encampments of more
6 than 10 people).

7 In September 2020, the NRT began tracking the occupants and tents at Lee
8 Gerner Park. Muller Decl. ¶ 17. The lowest recorded number of unhoused individuals
9 at the Park after the NRT started formally tracking was 14 in October 2020. *Id.* The
10 most occupants recorded at the Park was approximately 30 in early 2021. *Id.* As of
11 July 22, 2021, the Park had approximately 20 occupants. *Id.*; Wax Decl. ¶ 21. In
12 addition to the persons camping at the Park, large social gatherings with campers
13 occur there. Muller Decl. ¶ 19. NRT Officers have observed anywhere from four to
14 eight visitors, who were not camping in the park, spending time with campers. *Id.* At
15 times, the social gatherings exceeded 20 people. *Id.*

16 The NRT has documented the environmental impact of individuals camping and
17 living in the Park. Officers have observed damage to the trees and foliage caused by
18 individuals tying ropes to the trees, tying tarps to the trees, hanging items from the
19 trees such as towels and trash bags. Winter Decl. ¶ 28, Exh. 5 at pp. 4, 9, 11, 19. These
20 practices can injure the trees. Winter Decl. Exh. 2 at p. 2. They have also created dog
21 runs on the foliage for the many dogs that they bring onto the site, causing damage to
22 the foliage and heritage trees. Winter Decl. ¶ 25. Over time, the grass lawn that once
23 existed in front of the library has disappeared, now replaced with heavily compacted
24 soil. Winter Decl. ¶ 26, Exh. 5 at p. 10. An illegal planter box was installed by the
25 homeless for growing vegetables, but now contains only signs and trash. Winter Decl.
26 ¶ 27, Exh. 5 at pp. 2–3. Large tarps are hanging from the branches of trees and bushes
27 to provide shade and protection from rain causing damage to the tree branches. Winter
28 Decl. Exh. 5 at pp. 9, 18. Other observations include trampled foliage, litter, human

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1 feces and urine in the creek, large items of furniture that have been left and excess
 2 trash in the park and creek. Winter Decl. ¶¶ 29, 31. Rodents and insects are present in
 3 this area due to the amount of trash that has accumulated over time. Winter Decl. ¶ 30.
 4 Graffiti and vandalism are present on nearby structures. Winter Decl. ¶ 32.

5 The City regularly conducts clean-up of the park and offers trash removal to the
 6 occupants on a weekly basis. Winter Decl. ¶ 40; Wax Decl. ¶ 25. At the request of the
 7 Park's campers, and in an attempt to address the copious amounts of garbage
 8 generated by the homeless, the City has provided and services ten to twelve trash
 9 containers. Wax Decl. ¶ 25. On July 1, 2021 City recently added a 20-yard dumpster
 10 to help motivate campers to discard excess trash and furniture into that container,
 11 rather than on the ground. Winter Decl. ¶ 46; Wax Decl. ¶ 25; Dkt. 13-1 [McGill
 12 Decl.] at p. 5, ¶ 17. The dumpster was filled within a week, and replaced with an
 13 empty dumpster on July 15, 2021. Winter Decl. ¶ 46. The total encampment clean-up
 14 costs from March 1, 2020, to the present are \$19,842.74. Winter Decl. ¶ 49, Exh. 6.

15 The City has received numerous reports of illegal warming and cooking fires at
 16 the Park. Winter Decl. ¶ 50. These fires are particularly dangerous because large
 17 portions of the City have moderate to very high fire hazard severity zone ratings. Dkt.
 18 13-1 at p. 4, ¶ 12. An illegal fire can easily become the source of a larger fire that can
 19 threaten the unhoused living in the Park and the structures of the surrounding
 20 businesses. At least one fire has already occurred at the Park. On September 18, 2020,
 21 the Novato Fire Protection District responded to Lee Gerner Park on the report of a
 22 tent on fire. A tent within the encampment and a nearby tree were burned. Winter
 23 Decl. ¶ 51(b), Exh. 1 at pp. 73–74.

24 Despite the Covid-19 pandemic, the NRT and its partners continued to provide
 25 outreach and services to the unhoused population at the Park. Winter Decl. ¶ 62. On
 26 nearly a daily basis, outreach workers engage unhoused individuals in person at the
 27 Park. *Id.* Once the Kerner Shelter became available in January of 2021, the NRT
 28 collaborated with outreach workers to submit referrals from the Park's homeless

1 occupants for shelter at the Kerner Shelter every week. Winter Decl. ¶ 63; Bates Decl.
2 ¶ 16; Muller Decl. ¶ 31.

3 **B. Ordinances 1669 and 1670**

4 The City faces significant wildfire risk due to its climate, topography, and other
5 relevant factors. Dkt. 13-1 at p. 4, ¶ 12; Supp. McGill Decl., Exh. 11. Novato is
6 currently on the California Communities at Risk List. Dkt. 13-1 at p. 4, ¶ 12. In the
7 current Marin County Community Wildfire Prevention Plan (CWPP), peak fire
8 conditions modeling scenarios results identified that when the hazard assessment was
9 overlaid with fire agency jurisdiction boundaries, Novato has 45,992 burnable acres.
10 Dkt. 13-1 at p. 4, ¶ 12. Marin County has already had two red flag warnings in 2021,
11 one on May 7, 2021, and the other just days ago on July 18, 2021. Winter Decl. ¶ 52;
12 Dkt.13-1 at p. 4, ¶ 12.

13 In order to address the significant fire risk in Novato, the City Council adopted
14 Ordinance 1669. See Dkt 3 at pp. 30–36 (Ordinance 1669). This Ordinance added
15 section 14-20.5 to the Novato Municipal Code to generally prohibit open flames in
16 any public space. Supp. McGill Decl. Exh. 12 at p. 1. It also added section 7-11 to the
17 Municipal code to address particular fire risks associated with homeless
18 encampments. *Id.* Novato Municipal Code (“Nov. Muni. Code”) section 7-11.3(a)(5)
19 prohibits camping in designated wildfire risk areas. Dkt 3 at pp. 32. Section 7-
20 11.3(a)(1) prohibits camping at or within 50 feet of facilities that have been designated
21 as critical infrastructure by the City Council. Dkt 3 at pp. 31. This restriction ensures
22 that such facilities are accessible by first responders and others and able to operate at
23 all times, including during a fire emergency. Supp. McGill Decl. Exh. 12 at p. 3. It
24 also reduces the risk that these important facilities will be directly affected by a fire
25 started within 50 feet. *Id.*

26 The City Council then acted to define “critical infrastructure” by resolution as
27 required by Ordinance 1669. Supp. McGill Decl. ¶ 12, Exh. 14. The following real
28 property and facilities were declared to be critical infrastructure:

- “1. Government buildings, including City Hall, schools, fire

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- 1 stations, police stations, jails, courthouses, and libraries.
- 2 2. Electric, sewer, wastewater and water utility facilities, including
- 3 generation stations, transformers and substations.
- 4 3. Health facilities, as that term is defined in Health & Safety Code
- 5 section 1250
- 6 4. Train stations and train tracks
- 7 5. Water sources and levees
- 8 6. Bridges and roads designated by the City as Citywide
- 9 evacuation routes.”

10 *Id.* Notably, this list does not include “electrical wires” or “subterranean gas pipelines”
 11 as Plaintiffs wildly claim in their Complaint. See Dkt 3 at p. 5, ¶ 23. Nor does the
 12 ordinance apply to the entire City. Supp McGill Decl. Exh. 11 at p. 3.

13 Ordinance 1670 is very similar to Ordinance 1669, and acts to protect the
 14 existing Stream Protection Zone from the detrimental effects caused by camping.
 15 Supp. McGill Decl. ¶ 10, Exh. 12. In 2012 the City established a Stream Protection
 16 Zone (“Zone”) through amendment to its zoning code that imposes special
 17 requirements for development and land uses within the Zone. Supp. McGill Decl.,
 18 ¶ 11, Exh. 13 (Nov. Muni. Code § 19.35). The purpose of the Zone is to protect water
 19 quality preserve and restore riparian habitat, and provide for wildlife migration
 20 corridors. *Id.* The Zone includes the stream bed, stream banks, riparian vegetation, and
 21 a 50-foot buffer zone on either side of the stream. *Id.* Ordinance 1670 introduced
 22 additional regulations within the existing Stream Protection Zone making it unlawful
 23 to camp in that Zone, among other restrictions. Dkt 3 at p. 39 (Ordinance 1670), § 7-
 24 12.2(b).

25 Once the Ordinances are fully enforceable, they will still be narrowly tailored to
 26 address the identified harms without banning camping throughout the City. The
 27 Ordinances ban all camping within specified geographic areas. See Supp. McGill
 28 Decl. Exh. 11 at p. 3; Exh. 12 at p. 2. However, under the exception created by Novato
 Municipal Code section 14-20.8, any public property not subject to the geographic
 restrictions can be used for camping between the hours of 9 p.m. and 7 a.m. if no other

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1 shelter is available. Dkt. 3 at p. 34 (Ordinance 1669), § 14-20.8.

2 **C. The COVID-19 Pandemic**

3 During the COVID-19 pandemic, the Center for Disease Control (“CDC”)
4 issued guidance instructing local agencies to refrain from clearing homeless
5 encampments in order to protect access to services and prevent the dispersal of at-risk
6 persons throughout the community. On July 7, 2021, the CDC updated that guidance,
7 acknowledging that increased vaccination levels in the community could justify
8 modifications of COVID-19 prevention measures. Supp. McGill Decl. Exh. 9 at p. 6.
9 The CDC recommended that local agencies consider three factors: (1) community
10 transmission levels; (2) vaccination levels; and (3) availability of housing. *Id.* The
11 CDC asserts these factors should be considered together.

12 Ordinances 1669 and 1670 both acknowledge the ongoing COVID-19
13 pandemic and provide that neither ordinance shall be used to restrict camping on
14 public property until one of two conditions occurs. Dkt. 3 at pp. 34–35 (Ordinance
15 1669) and 40–41 (Ordinance 1670). The first condition is that the CDC amends or
16 revokes its guidance to remove the recommendation that local agencies refrain from
17 clearing homeless encampments. *Id.* The CDC’s revised guidance issued July 8, 2021,
18 as discussed above, retains this recommendation. Supp. McGill Decl., Exh. 9.
19 However, the new guidance also states that fully vaccinated persons, including
20 homeless persons in encampments, may resume most daily activities. *Id.* at p. 1 (“In
21 encampments or other unsheltered locations, individuals who are fully vaccinated
22 should follow CDC’s Recommendations for Fully Vaccinated People.”); p. 8 (“If
23 you’ve been fully vaccinated ... You can resume activities that you did prior to the
24 pandemic.”)

25 The second, independent condition precedent to these Ordinances’
26 enforceability requires three things to be true: (1) COVID-19 vaccinations are
27 available for the homeless population; (2) 90% of County residents have been fully
28 vaccinated; and (3) the County reaches the State’s Yellow Tier level, the latter of

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1 which requires the County to have fewer than one new case per 100,000 residents
 2 each day, and less than 2% positive tests. Supp. McGill Decl., Exh. 11 at p. 4. Marin
 3 County reached the Yellow Tier in May 2021. Supp. McGill Decl. ¶ 6. COVID-19
 4 vaccinations are currently available for all residents of Novato above the age of 12,
 5 and the County sent mobile vaccination units on May 6, 2021, and June 29, 2021 to
 6 Lee Gerner Park to offer vaccinations to the persons camping there. Winter Decl. ¶ 60.
 7 The only element of this condition that has not yet been met is the requirement that
 8 90% of County residents have been fully vaccinated. Currently, 85.4% of the County
 9 has been fully vaccinated, and 92.6% have received at least one dose of the vaccine.
 10 Winter Decl. ¶ 58.

11 **D. The City's Agreement with Homeward Bound**

12 Homeward Bound of Marin ("Homeward Bound") is the main provider of
 13 emergency shelter and supportive housing for people experiencing homelessness in
 14 Marin County. Dkt. 13-2 (Sweeney Decl.) at p. 2, ¶ 2. Since 2000, Homeward Bound
 15 has operated an 80-bed emergency shelter for the homeless in the City called the New
 16 Beginnings Center. *Id.* at p. 2, ¶ 5. The New Beginnings Center provides intensive
 17 support services, individualized counseling, daily meals, transit assistance, and links
 18 to community resources to help people overcome their barriers to housing and move
 19 out of homelessness for good. *Id.* at p. 3, ¶ 7. It also offers on-site programs for
 20 employment skills training, including an award-winning 10-week intensive course in
 21 culinary basics and paid apprenticeships in Janitorial and Building Maintenance as
 22 well as Landscaping and Garden Maintenance. *Id.* at p. 3, ¶ 8.

23 The New Beginnings Center has implemented protocols for COVID-19 and
 24 bedbugs to ensure the safety of its residents. All individuals admitted to the New
 25 Beginnings Center are tested for COVID-19, dormitory beds and dining tables are
 26 spaced to ensure social distancing, and clinicians conduct regular vaccination clinics
 27 on site offering all residents COVID-19 vaccines. *Id.* at pp. 3–4, ¶¶ 11–14. The New
 28 Beginnings Center has never experienced a single resident testing positive for the

1 COVID-19 virus. *Id.* at p. 4, ¶ 18. All new clients are required to shower and launder
2 clothing, and their personal belongings are treated at intake to kill any bed-bugs. *Id.* at
3 p. 4, ¶ 22. When bedbugs are found onsite, they are immediately treated by in-house
4 maintenance staff, with professional pest control companies brought in as necessary.
5 *Id.* at p. 5, ¶ 23.

6 On July 13, 2021, the Novato City Council authorized the City Manager to
7 enter into a Memorandum of Understanding (“MOU”) with Homeward Bound to
8 provide immediate placement at the New Beginnings Center of up to 15 homeless
9 individuals in Novato. Dkt. 13-1 (McGill Decl.) at p. 2, ¶ 2; pp. 7–9. The services
10 associated with this placement include housing, food, case management assistance,
11 medical coordination services, job placement and training, and transitional/permanent
12 housing referrals. *Id.* at p. 7. If more than 15 individuals experiencing homelessness in
13 Novato are willing to accept the placement offer, the City has made arrangements to
14 refer those individuals to Homeward Bound’s Kerner shelter in the City of San Rafael.
15 *Id.* at p. 2, ¶ 3; p. 8. Any person who accepts a placement offer will additionally be
16 offered free storage (paid by the City) of any personal property in excess of that
17 permitted at the New Beginnings Center (“New Beginnings”) or the Kerner shelter
18 (“Kerner”) for 90 days. *Id.* at p. 2, ¶ 4; p. 8.

19 **E. The City’s Interactions with Plaintiffs**

20 The City’s NRT team has had regular interactions with the named Plaintiffs
21 over the past year, and has worked to obtain alternate shelter for the Plaintiffs without
22 success. Plaintiff Jason Sarris was provided with a stay in a local hotel in summer
23 2020. Bates Decl. ¶ 31; Wax Decl. ¶ 18. However, despite his promise to stop camping
24 in Lee Gerner Park if the City paid for the hotel stay, he returned to Lee Gerner within
25 weeks. Bates Decl. ¶ 32. Sarris has also camped in other areas of the City during the
26 last year, including Pioneer Park and an encampment informally referred to as the
27 “Bachelor Officers’ Quarters.” Bates Decl. ¶ 34; Wax Decl. ¶ 34; Muller Decl. ¶ 39.
28 Sarris has travelled throughout the County during the pandemic to engage in activism.

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1 Bates Decl. ¶ 35; Wax Decl. ¶ 35; Muller Decl. ¶ 38. Although he has a campsite
 2 established in Lee Gerner Park, he frequently travels throughout the City during the
 3 day. Bates Decl. ¶ 36; Wax Decl. ¶ 36.

4 Plaintiff Carrie Healon and Plaintiff Zach Boulware are in a relationship and
 5 share a tent at Lee Gerner Park. Bates Decl. ¶ 39; Muller Decl. ¶ 34(a). Healon has
 6 rarely been observed at the Lee Gerner Park camp for more than one day at a time.
 7 Healon and Boulware frequently stay overnight with residents of the City. Bates Decl.
 8 ¶ 38; Wax Decl. ¶¶ 48. They moved to Oregon together for a brief time in mid-2020.
 9 Bates Decl. ¶ 39. However, they quickly returned to the City. *Id.*

10 Plaintiff Kalani Welsch was given a city-funded hotel room in spring 2020.
 11 Bates Decl. ¶ 42. He returned to Lee Gerner Park several weeks later. Bates Decl.
 12 ¶ 43. Plaintiff Leah DeAngelo has been offered housing solutions at multiple shelters,
 13 but has refused because she will not take the required COVID-19 test. Wax Decl.
 14 ¶¶ 37, 44; Muller Decl. ¶ 33(i). She instead demanded the City build her a “cabin”
 15 within Lee Gerner Park. Wax Decl. ¶ 39. Plaintiff Donald Budd Hobbs was referred to
 16 an inpatient treatment facility in June 2021, and has not been seen at Lee Gerner Park
 17 since he began treatment. Muller Decl. ¶ 24.

18 **III. LEGAL STANDARD**

19 Preliminary injunctive relief is an “extraordinary and drastic remedy,” that is
 20 never awarded as of right. *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) “It is so well
 21 settled as not to require citation of authority that the usual function of a preliminary
 22 injunction is to preserve the status quo ante litem pending a determination of the
 23 action on the merits.” *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808 (9th
 24 Cir. 1963). A preliminary injunction is “not a preliminary adjudication on the merits
 25 but rather a device for preserving the status quo and preventing the irreparable loss of
 26 rights before judgment.” *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d
 27 1415, 1422 (9th Cir. 1984) (citation omitted).

28 To obtain a preliminary injunction, a party must establish (1) a likelihood of

1 success on the merits, (2) a likelihood of irreparable harm in the absence of
 2 preliminary relief, (3) that the balance of equities tips in its favor, and (4) that an
 3 injunction is in the public interest. See *Winter v. Natural Resources Defense Council*,
 4 555 U.S. 7, 20 (2008). As to a likelihood of success on the merits, that factor has been
 5 measured in various ways, including “reasonable probability,” “fair prospect,”
 6 “substantial case on the merits,” and “serious legal questions . . . raised.” *Lair v.*
 7 *Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012). At a minimum, the petitioner must show
 8 that there is a “substantial case for relief on the merits.” *Id.* (quoting *Leiva-Perez v.*
 9 *Holder*, 640 F.3d 962, 968 (9th Cir. 2011)). Whether to grant or deny a TRO or
 10 preliminary injunction is a matter within the court’s discretion. See *Miss Universe,*
 11 *Inc. v. Flesher*, 605 F.2d 1130, 1132–33 (9th Cir. 1979).

12 A plaintiff’s burden is particularly heavy when, as here, it seeks to enjoin
 13 operation of a legally enacted statute because “it is clear that a [government agency]
 14 suffers irreparable injury whenever an enactment of its people or their representatives
 15 is enjoined.” *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997).
 16 A strong factual record is therefore necessary before a federal district court may enjoin
 17 a government agency. *Cupola v. Bay Area Rapid Transit*, 5 F. Supp. 2d 1078, 1085
 18 (N.D. Cal. 1997). Plaintiffs in this case have not met their heavy burden to
 19 demonstrate they are entitled to injunctive relief.

20 **IV. ARGUMENT**

21 **A. Plaintiffs’ Complaint is Unlikely to Succeed on the Merits**

22 **I. The Complaint Misunderstands the Ordinances**

23 Plaintiffs’ Complaint is replete with misunderstandings and misrepresentations
 24 of the scope of the Ordinances. The meaning of the law as provided by the
 25 government agency who enacted it is particularly relevant where a plaintiff raises a
 26 facial challenge. *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d
 27 1022, 1035 (9th Cir. 2006); *Forsyth County v. Nationalist Movement*, 505 U.S. 123,
 28 131 (1992) (“In evaluating respondent’s facial challenge, we must consider the

1 county’s authoritative constructions of the ordinance, including its own
 2 implementation and interpretation of it.”). Furthermore, in evaluating a facial
 3 challenge, a federal court must consider any limiting construction that the enforcement
 4 agency has proffered. *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 (1989).

5 The Complaint incorrectly states that the 90 percent threshold is the only
 6 COVID-19-related standard for enforcement of the Ordinance. Compl. ¶¶ 56–58. Based
 7 on this misreading, Plaintiffs argue the City has not complied with CDC guidelines.
 8 To the contrary, the CDC’s July 8, 2021 revision to its guidance on homeless
 9 encampments instructs local agencies to consider three factors before modifying
 10 COVID-19 prevention measures: (1) community transmission levels; (2) vaccination
 11 levels; and (3) availability of housing. The Ordinances’ conditional enforcement
 12 mechanism address these factors. The second condition for enforcement in both
 13 Ordinance 1669 and Ordinance 1670 contains three elements, **all** of which must be
 14 present in order to allow the City to use the Ordinances to clear an encampment. First,
 15 COVID-19 vaccinations must be available and accessible for individuals experiencing
 16 homelessness. This element ensures that any person removed from an encampment
 17 has the opportunity to protect themselves with a vaccine.

18 Second, the vaccination rate for the County must be 90%. The CDC has not
 19 determined a vaccination percentage that will ensure herd immunity. Supp. McGill
 20 Decl. Exh. 9 at p. 6. However, as even Plaintiffs’ evidence demonstrates, a 90%
 21 vaccination rate is highly effective at limiting COVID-19 outbreaks, even with the
 22 Delta variant. Dkt. 1-1 at p. 27. At a 90% vaccination rate, outbreaks can be controlled
 23 and do not spread beyond the small number of unvaccinated people affected. *Id.* at p.
 24 28. Thus, while a specific threshold for herd immunity has not yet been established,
 25 the current vaccination rate in Marin County is already proving highly effective at
 26 preventing transmission. The City’s determination that it must reach 90% vaccination
 27 before enforcing the Ordinances against encampments is a reasonable threshold.

28 Third, the County must meet the criteria to be in the “Yellow Tier” pursuant to

1 the tier system in place as of May 25, 2021. This element in the Ordinances addresses
2 the transmission rate of COVID-19 within the County, and, together with the
3 vaccination rate requirement, aims to protect even the unvaccinated. The City has also
4 taken action to ensure the availability of housing, satisfying the third factor in the
5 CDC guidance. The City’s recent MOU with Homeward Bound reserves 15 beds at
6 the New Beginnings Center for City referrals. If demand exceeds those 15 beds, the
7 City has also negotiated for additional overflow space at the nearby Kerner shelter.
8 Plaintiffs’ assertion that the City is relying on vaccination rates alone is false.

9 Plaintiffs also complain that Ordinance 1669 is vague and overbroad due to
10 their own misreading of the Ordinance’s terms. Plaintiffs ignore that Novato
11 Municipal Code section 7-11.2 defines critical infrastructure as “any real property or
12 facility, whether privately or publicly owned, **as designated by the City Council by**
13 **resolution**, that the City Council determines . . . that its damage, incapacity,
14 disruption, or destruction would have a debilitating impact on the public health, safety,
15 or welfare.” (emphasis added.) Thus, on June 8, 2021, the City Council adopted
16 Resolution No. 2021-042 to define “critical infrastructure.” Plaintiffs make no
17 reference to this Resolution, instead alleging that the definition of “critical
18 infrastructure” is found in the list of exemplars in Municipal Code section 7-11.2. The
19 facilities identified in the Resolution are far narrower, and include government
20 buildings, utility buildings, health facilities, train stations, water sources, and
21 evacuation routes. Supp. McGill Decl. Exh. 13. Plaintiffs are simply incorrect that
22 Municipal Code section 7-11.2 could be used to ban sleeping under any electrical wire
23 or over buried gas pipelines. Cf. Dkt. 3 at pp. 7–8, ¶¶ 13, 15.

24 Finally, Plaintiffs claim it is “undisputed that there are no shelters or individual
25 housing options available” Dkt. 3 at p. 15, ¶ 46. This is patently untrue and is
26 advanced to mislead the Court. And the City vigorously disputes this point. Prior to
27 the filing of Plaintiffs’ Complaint, the City entered into an agreement with Homeward
28 Bound to reserve 15 beds at New Beginnings for City referrals of homeless

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1 individuals. Dkt. 13-1 at p. 10–13. If more than 15 homeless individuals in Novato are
 2 willing to accept the placement offer, the City has made arrangements to refer those
 3 individuals to the Kerner shelter in the City of San Rafael. Dkt. 13-1 McGill Decl., p.
 4 2, ¶ 3; p. 8. Any person who accepts a placement offer will additionally be offered free
 5 storage (paid by the City) of any personal property in excess of that permitted at New
 6 Beginnings or Kerner for 90 days. Dkt. 13-1 at p. 2, ¶ 4; p. 8. Plaintiffs have options
 7 other than camping at Lee Gerner Park.

8 These misreadings and misrepresentations undermine Plaintiffs’ entire basis for
 9 seeking injunctive relief. The City has not set an arbitrary vaccination rate cutoff – it
 10 has devised a multi-element conditional test that considers the very CDC factors
 11 Plaintiffs cite, and has made concrete, actionable agreements to reserve 15 beds at the
 12 New Beginnings Shelter. Nor has the City created an ordinance with “exceptions that
 13 swallow the rule” in banning camping near critical infrastructure. Resolution 2021-
 14 042 defines critical infrastructure, and it does not include “electrical wires” or “gas
 15 pipelines” as Plaintiffs incorrectly contend. As Plaintiffs’ causes of action all
 16 fundamentally stem from these misreadings, Plaintiffs cannot prevail on the merits.

17 **2. The Ordinances Comply with *Martin v. City of Boise***

18 Cities may lawfully regulate the location and timing of outdoor sleeping sites
 19 for persons with no options for sleeping indoors. The Ninth Circuit has held that “as
 20 long as there is no option of sleeping indoors, the government cannot criminalize
 21 indigent, homeless people for sleeping outdoors, on public property, on the false
 22 premise they had a choice in the matter.” *Martin v. City of Boise*, 920 F.3d 584, 617
 23 (9th Cir. 2019). Explaining further, the Court stated “we in no way dictate to the City
 24 that it must provide sufficient shelter for the homeless, or allow anyone who wishes to
 25 sit, lie, or sleep on the streets...at any time and at any place.” *Id.* Equally importantly,
 26 the *Boise* court left the door open for local jurisdictions to regulate how, when, and
 27 where homeless persons may occupy public property.

28 Our holding does not cover individuals who do have access to adequate
 temporary shelter, whether because they have the means to pay for it or

1 because it is realistically available to them for free, but who choose not to
 2 use it. Nor do we suggest that a jurisdiction with insufficient shelter can
 3 never criminalize the act of sleeping outside. Even where shelter is
 4 unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at
 5 particular times or in particular locations might well be constitutionally
 6 permissible. So, too, might an ordinance barring the obstruction of public
 7 rights of way or the erection of certain structures. Whether some other
 8 ordinance is consistent with the Eighth Amendment will depend, as here,
 9 on whether it punishes a person for lacking the means to live out the
 10 “universal and unavoidable consequences of being human” in the way the
 11 ordinance prescribes.

12 *Id.* at 617, n. 8. Thus, *Martin v. Boise* allows cities to prohibit camping when
 13 individuals have access to adequate temporary shelter, and to impose reasonable time
 14 and place restrictions on camping.

15 Plaintiffs overstate *Martin* as requiring alternative shelter for enforcement of
 16 any type of camping restrictions anywhere in the City. Dkt. 3 at p. 4, ¶ 4. Our Supreme
 17 Court has limited the cruel and unusual punishment clause to “punishment imposed
 18 for the violation of criminal statutes.” See *Ingraham v. Wright*, 430 U.S. 651, 667–69
 19 (1977) (collecting cases and holding that paddling schoolchildren was beyond the
 20 scope of Eighth Amendment protections). Consistent with this principle, courts have
 21 declined to expand *Martin*’s holding beyond criminalization of homelessness. In
 22 *Butcher v. City of Marysville*, in which the defendant city had evicted homeless
 23 occupants and destroyed their property, the court rejected the plaintiffs’ cruel and
 24 unusual punishment claim because the Eighth Amendment does not extend beyond the
 25 criminal process. No. 218CV02765JAMCKD, 2019 WL 918203, at *1-2, 7 (E.D. Cal.
 26 Feb. 25, 2019); see also *Shipp v. Schaaf*, 379 F. Supp. 3d 1033 (N.D. Cal. 2019)
 27 (holding that *Martin* did not apply because the city did not impose criminal sanctions
 28 in temporary eviction of homeless residents from an encampment).

Thus, *Martin* does not limit a city’s ability to evict homeless individuals from
 particular public places. “*Martin* does not establish a constitutional right to occupy
 public property indefinitely at Plaintiffs’ option.” *Miralle v. City of Oakland*, 2018 WL

1 6199929, at *2 (N.D. Cal. Nov. 28, 2018); see also *Le Van Hung v. Schaaf*, No. 19-
 2 CV-01436-CRB, 2019 WL 1779584, at *5 (N.D. Cal. Apr. 23, 2019) (reaching the
 3 same conclusion). Plaintiffs have no constitutional right to establish daytime
 4 encampment sites in the Park to the exclusion of other persons' use of the Park.
 5 Indeed, courts consistently uphold broadly applicable park closures. See, e.g., *Occupy*
 6 *Sacramento v. City of Sacramento*, 878 F.Supp.2d 1110 (E.D. Cal. 2012) (upholding
 7 Sacramento's park closure ordinance); *State v Bailey*, 166 N.H. 537 (2014) (upholding
 8 Manchester's park closure ordinance).

9 The Ordinances do not run afoul of *Martin's* limits. Novato Municipal Code
 10 sections 7-11 and 7-12 establish geographic limitations on camping within the City in
 11 order to protect critical infrastructure, wildfire risk zones, and public waterways. And,
 12 in line with *Martin's* admonishments, Section 14-20.8 only prohibits overnight
 13 camping when there are no beds in any shelter or other accommodation. Persons may
 14 camp overnight on public property not subject to the geographic restrictions in
 15 Sections 7-11 and 7-12 if there is no alternative available. And, as described in greater
 16 detail above, the City currently has shelter beds available at New Beginnings.
 17 Plaintiffs cannot prevail on their causes of action under the Eighth Amendment.

18 **3. The "State Created Danger" Doctrine Does Not Apply**

19 Plaintiffs' primary argument for an injunction is based on the "state created
 20 danger" exception to the general rule that the due process clause does not require a
 21 government to protect a plaintiff. This argument is misplaced. There is no
 22 fundamental right to housing. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972). The Ninth
 23 Circuit recognizes liability under substantive due process only where a state or local
 24 official acts to place a person in a situation of known danger with deliberate
 25 indifference to their personal or physical safety. *Kennedy v. City of Ridgefield*, 439
 26 F.3d 1055, 1061-62 (9th Cir. 2006). "[D]eliberate indifference' is a stringent standard
 27 of fault, requiring proof that a municipal actor disregarded a known or obvious
 28 consequence of his action." *Board of County Com'rs of Bryan County, Okl. v. Brown*,

1 520 U.S. 397, 410, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997). “In examining whether
 2 [the city] affirmatively places an individual in danger, [a court does] not look solely to
 3 the agency of the individual, nor [does it rest its] opinion on what options may or may
 4 not have been available to the individual. Instead, [the court must] examine whether
 5 [the city] left the person in a situation that was more dangerous than the one in which
 6 they found him.” *Kennedy*, 439 F.3d at 1062 (citation omitted).

7 Plaintiffs rely heavily on the CDC guidance against clearing encampments
 8 during the course of the COVID-19 pandemic. Plaintiffs’ argument appears to be that
 9 any attempt to clear an encampment while this guidance is in place will place the
 10 people camping in a state created danger. Dkt. 3 at p. 15, ¶ 47. The cases Plaintiffs cite
 11 each concern injunctions granted at the height of the pandemic, and are not
 12 persuasive. In *Santa Cruz Homeless Union v. Bernal*, the court acknowledged “the
 13 keystone of the preliminary injunction is the current dire state of the COVID-19
 14 pandemic. As vaccines roll out and the pandemic eases, dispersal of homeless persons
 15 from the encampments may no longer put them at greater risk for COVID-19, and re-
 16 evaluation of the injunction will be necessary.” No. 20-CV-09425-SVK, 2021 WL
 17 222005, at *1 (N.D. Cal. Jan. 20, 2021). Citing the Santa Cruz order, the court in
 18 *Sausalito/Marin Cty. Chapter of California Homeless Union v. City of Sausalito*, too,
 19 stated “as the COVID-19 situation changes, the preliminary injunction may need to be
 20 revisited.” No. 21-CV-01143-EMC, 2021 WL 783571, at *10 (N.D. Cal. Mar. 1,
 21 2021).

22 The severe dangers posed by COVID-19 which formed the basis for the
 23 injunctions in *Santa Cruz* and *Sausalito* are, thankfully, easing. Vaccines are widely
 24 available, and the County has sent mobile vaccination clinics to Lee Gerner Park. Too,
 25 unlike in *Santa Cruz* and *Sausalito*, the Ordinances contain self-imposed enforcement
 26 conditions. By voluntarily restricting its own ability to use the Ordinances to restrict
 27 camping until the County reaches both the lowest transmission level in the State’s
 28 blueprint **and** the vaccination rate reaches 90%, the City has complied with the CDC’s

1 latest guidance on when to modify COVID-19 prevention measures. And in any event,
2 as the CDC itself acknowledges, a fully vaccinated person in an encampment or other
3 unsheltered location can resume activities without wearing a mask or physically
4 distancing. Supp. McGill Decl. Exh. 9 at p. 9.

5 Plaintiffs have provided no evidence that enforcement of the Ordinances, once
6 all of the elements of the enforcement condition are met, will place them in any
7 greater danger than they currently face in the Park encampment. The Cofer
8 Declaration submitted with the Complaint does not support this argument. First, Dr.
9 Cofer does not refer to the latest CDC guidance (Supp McGill Decl. Exh. 9), instead
10 referring to the superseded June 7, 2021 guidance. Dkt. 1-1 at p. 19, ¶ 7. Second, Dr.
11 Cofer does not address specific facts relevant to Lee Gerner Park, instead making only
12 general and unsupported statements about encampments generally. See Dkt. 1-1 at pp.
13 19–20. Thus, Dr. Cofer does not appear to know that the Lee Gerner Park
14 encampment fluctuates significantly in number, and that Plaintiffs are already
15 regularly traveling within the City and even to other cities. Wax Decl. ¶ 33–36. NRT
16 officers have observed many persons within the encampment violating shelter in place
17 orders by leaving the encampment during the day (Wax Decl. ¶ 33–36, 46, 48),
18 socializing with persons from outside the encampment without masks (Wax Decl.,
19 ¶ 57, Muller Decl., ¶ 19) sharing tents (Muller Decl. ¶ 37), and otherwise failing to
20 take necessary precautions against contracting COVID-19. Equally importantly,
21 Plaintiffs have offered no evidence that their own, constant comings and goings have
22 led to the spread of COVID-19 infections or increases in cases or hospitalizations in
23 Marin County or Novato due to COVID-19 reasons. There is no evidence that
24 enforcing the Ordinances within Lee Gerner Park would place Plaintiffs in any greater
25 risk of exposure to COVID-19 than their own voluntary actions.

26 Plaintiffs next claim the Ordinances are “indifferent to the environmental
27 realities of living outside.” Dkt. 3 at p. 17, ¶ 54. Prohibiting enforcement of
28 restrictions on public camping due to heat or other weather conditions is a novel legal

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1 theory. Plaintiffs provide no citation to authority to support their claim that they are
 2 entitled to occupy public property during specified weather conditions. And again, the
 3 Declaration of Dr. Cofer does not provide any evidence relevant to the specific
 4 situation at Lee Gerner Park. The sole article Dr. Cofer relies on does not address heat
 5 conditions in Marin County, only San Diego, Los Angeles, and the Central Valley.
 6 Dkt. 1-1 at pp. 43–48.

7 Finally, Plaintiffs’ other arguments in support of the state created danger theory
 8 are vague and unsupported. Plaintiffs assert they will have their life sustaining items
 9 seized without warning (Dkt 3 at p. 16, ¶ 52), but Novato Municipal Code section 7-
 10 11.4 requires 24 hours of prior notice before abatement unless the violation poses an
 11 imminent threat to public health or safety. Plaintiffs’ evidence regarding the
 12 hypothetical harms that they would suffer if the Ordinances were enforced are belied
 13 by the observations of the NRT Officers. Although Plaintiff Jason Sarris declares that
 14 his health conditions will place him at risk if he has to leave Lee Gerner Park during
 15 the day (Dkt 1-1 at p. 3, ¶ 2), multiple officers have observed Sarris moving through
 16 the City during the day and returning to Lee Gerner Park only at night. Wax Decl.
 17 ¶¶ 35–36; Muller Decl. ¶¶ 38–40; Bates Decl. ¶ 29, 36. Sarris has also visited
 18 neighboring cities during the last year. Wax Decl. ¶ 36, Muller Decl. ¶ 38, Bates Decl.
 19 ¶ 35. Plaintiffs Healon and Boulware, too, frequently leave the camp and have been
 20 observed walking through the City. Wax Decl., ¶ 46; Muller Decl. ¶ 34(h). Again, the
 21 City’s Ordinances will place Plaintiffs in no greater danger than their own voluntary
 22 actions.

23 Plaintiffs have failed to demonstrate that they are likely to succeed on their state
 24 created danger claims.

25 **B. Plaintiffs Have Failed to Demonstrate Irreparable Harm**

26 Without a showing of irreparable harm in the first instance, no balancing of
 27 remaining factors is permitted. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127
 28 (9th Cir. 2011). A plaintiff must demonstrate irreparable harm is likely, not just

1 possible, in order to obtain a preliminary injunction. *Am. Trucking Ass'ns, Inc. v. City*
2 *of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

3 As a preliminary matter, the Ordinances are not yet enforceable for the purpose
4 of clearing encampments such as the one in Lee Gerner Park. The County has not yet
5 reached a 90% vaccination rate. Arguably, Plaintiffs' request for injunctive relief is not
6 ripe as no irreparable harm is imminent until the County passes the necessary
7 threshold.

8 The remainder of Plaintiffs' alleged harms fail for the same reasons detailed in
9 section IV.A.3, *supra*. Plaintiffs overstate the COVID-19 risks associated with
10 enforcement of the Ordinances. Enforcement of the Ordinances is conditioned on
11 three elements which, taken together, will ensure that no encampment is cleared until
12 the City has extremely low transmission rates and extremely high vaccination rates.
13 Mobile vaccination clinics have visited the Park to offer vaccines to the campers there,
14 though as Plaintiffs admit, most of the campers have not taken advantage of this
15 service. Dkt. 1-1 at p. 6, ¶ 14. Vaccination, of course, is the most reliable protection
16 against COVID-19. Supp. McGill Decl. Exh. 9 at p. 1. Enforcement of the Ordinances
17 is not likely to cause the Plaintiffs to be at any higher risk of contracting COVID-19
18 than they currently face in the encampment.

19 Too, Plaintiffs overstate the effects of the Ordinances. The Ordinances do not
20 prohibit overnight camping in the entirety of the City. Overnight camping locations
21 are subject to the geographical restrictions in Sections 7-11 and 7-12 but, as required
22 by *Martin*, the City will permit overnight camping outside the prohibited areas when
23 no alternative shelter is available. Muni. Code, § 14-20.8. As has already been
24 conclusively demonstrated, the City has arranged for shelter beds and free storage for
25 those campers willing to accept them. Dkt. 13-1 at p. 2, ¶ 4; Dkt. 13-1 at p. 2, ¶ 3.

26 Plaintiffs' asserted harms are based on their misreading of the Ordinances. This
27 factor, too, weighs against granting injunctive relief.
28

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C. The Balance of Equities Weighs in Favor of Dissolving the TRO

When balancing both parties' harms, the court "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (quotation omitted). When the government is the target of the injunction, these factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Courts afford substantial judicial deference to public safety officials to make local public safety determinations. See *Yamaha Corp. of America v. State Bd. Of Equalization*, 19 Cal.4th 1 (1998); *Harrott v. County of Kings*, 25 Cal.4th 1138, 1155 (2001); *Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd.*, 210 Cal.App.4th 1255, 1268 (2012); *Guinnane v. San Francisco City Planning Comm.*, 209 Cal.App.3d. 732, 738 (1989).)

The consequences to the public if the Ordinances are enjoined would be significant. First, Ordinance 1669 was adopted in order to address the fire risk posed by homeless encampments. The City, like the rest of California, is currently experiencing a heightened risk of fire. It is imperative that the City be allowed to use all resources at its disposal, including public nuisance citations, to protect the public from fire danger. As shown in the images attached to the Complaint, the campers in the Park use propane grills to cook. Dkt 1-1 at p. 15 [Sarris Decl.]; McGill Decl., ¶ 11. A communal grill within the encampment is operated underneath a tarp, which increases the risk of fire. Muller Decl., ¶ 20. At least one fire at the camp has already occurred, burning a tent and a nearby tree. Winter Decl. ¶ 51(b).

The encampment has also caused significant damage to the Park and the creek that runs through it. The encampment area caused damage to the heritage oak trees and creek bank in the park, requiring the City to install a fence to minimize further damage. Winter Decl. Exh. 2. The Marin Resource Conservation District and the Marin County Flood Control District have both communicated concerns to the City regarding the environmental impacts of the encampment. Winter Decl. Exh. 3. Between March 1, 2020 and July 22, 2021 the City has spent \$19,842.74 on clean-up

1 operations within Lee Gerner Park related to the encampment. Winter Decl. ¶ 49, Exh.
 2 6. In order to fully remediate the damage to the park, the City estimates it will be
 3 forced to spend another \$200,000. Dkt. 13-1 at p. 3, ¶ 8.

4 Finally, the encampment presents a public safety hazard. Businesses near Lee
 5 Gerner Park have repeatedly reported harassment of staff and customers by members
 6 of the encampment. Winter Decl. ¶ 23; Supp. McGill Decl. Exh. 8. Local businesses
 7 have been vandalized and experienced theft. Winter Decl. ¶ 23(r), (s). Camp members
 8 have assaulted both park visitors and other campers. Winter Decl. ¶ 23 (j), (t).

9 Plaintiffs' alleged harms are insufficient to negate the serious and significant
 10 public interest in remediating the fire danger, environmental damage, and public
 11 safety concerns presented by the encampment.

12 **D. In the Alternative, a Narrower Injunction is Required**

13 As demonstrated by this opposition, Plaintiffs have failed to demonstrate that
 14 they are entitled to any injunctive relief. The City therefore requests this Court
 15 dissolve the temporary restraining order and deny Plaintiffs' request for a preliminary
 16 injunction.

17 Nonetheless, should this Court be inclined to grant injunctive relief, the
 18 injunction requested by Plaintiffs must be narrowed. A preliminary injunction should
 19 be no more burdensome to defendant than needed to provide complete relief to
 20 plaintiff. *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1049 (9th Cir. 2013).
 21 The temporary restraining order is overly broad and unnecessary to maintain the status
 22 quo.

23 Prior to adopting the Ordinances, the Novato Municipal Code broadly banned
 24 camping at any public property except with a park permit. Nov. Muni. Code, § 14-
 25 20.3. That code section is still in effect and enforceable, as it is not subject to the
 26 enforcement conditions placed on the Ordinances. The Ordinances modified this ban
 27 by enacting Novato Municipal Code sections 7-11, 7-12, and by modifying section 14-
 28 20.8. Thus, even though the Municipal Code sections added by the Ordinances are not

1 yet enforceable, Section 14-20.3 provides legal grounds to cite and eventually remove
2 campers from the Park. In addition, the Novato Municipal Code requires a City-issued
3 permit to anyone wishing to have exclusive use of any portion of a park or wishing to
4 consume or furnish alcoholic beverages thereon. Nov. Muni. Code, §§ 10-4(a), (h). No
5 such permit was issued to Plaintiffs.

6 The City therefore requests the Court, in the exercise of its equitable powers, to
7 narrow the injunction from the form requested by Plaintiffs to expressly limit the
8 restriction on removal to those persons encamped in the Park on July 15, 2021, and
9 permit the City to remove any new persons who attempt to establish a campsite within
10 the Park pursuant to Novato Municipal Code section 14-20.3. Narrowing the
11 injunction in this manner will preserve the status quo by maintaining the size of the
12 encampment at or below the number of campers present when the TRO was issued.
13 Without such a restriction, the encampment may significantly expand in size, further
14 damaging the Park, increasing remediation costs and increasing the risk of the spread
15 of COVID-19. The City further requests that any injunction issued continues to permit
16 the City to enforce Municipal Code section 14-20.5 throughout the City as set forth in
17 the Order Granting in Part and Denying in Part Motion to Modify TRO issued July 27,
18 2021. Dkt. 16.

19 If, indeed, the purpose of a preliminary injunction is to “freeze” or preserve the
20 status quo, it is difficult to imagine an order that more dramatically stands such a
21 proposition on its head than one that prevents the City from removing campers for the
22 ostensible purpose of reducing the spread of COVID-19 while at the same time
23 handcuffing the City from preventing unlimited numbers of homeless persons coming,
24 visiting, and residing at the Park infecting all those with whom they come in contact.

25 **E. Plaintiffs Must be Required to Post a Bond**

26 Finally, Plaintiffs have not posted a bond, nor have they provided any
27 explanation or authority to support waiver of the bond requirement. “The court may
28 issue a preliminary injunction or a temporary restraining order only if the movant

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1 gives security in an amount that the court considers proper to pay the costs and
2 damages sustained by any party found to have been wrongfully enjoined or
3 restrained.” FRCP 65(c). “[T]he district court must expressly address the issue of
4 security before allowing any waiver and cannot ‘disregard the bond requirement
5 altogether.’” *Pashby v. Delia*, 709 F3d 307, 332 (4th Cir. 2013).

6 If any injunctive relief is granted, Plaintiffs must be ordered to post a bond
7 sufficient to pay the City’s costs to remediate the damage caused by the encampment
8 and to cover the costs of the further degradation of the Park likely to be caused by the
9 homeless’ continued occupancy and use of same. The City respectfully requests this
10 Court set the bond at \$200,000. Dkt. 13-1 at p. 3, ¶ 8.

11 **V. CONCLUSION**

12 Plaintiffs have failed to establish irreparable harm or a likelihood of prevailing
13 on the merits of their claim. Nor does the balance of equities favor allowing a small
14 group to monopolize and damage a public park when shelter beds and other,
15 alternative accommodations exist. The temporary restraining order must be dissolved,
16 and no injunction should issue. If any injunction issues, Plaintiffs must be required to
17 post a bond.

18
19 DATED: July 27, 2021

**COLANTUONO, HIGHSMITH &
WHATLEY, PC**

20
21
22 /s/ Liliane M. Wyckoff
23 JEFFREY A. WALTER
24 CARMEN A. BROCK
25 LILIANE M. WYCKOFF
26 Attorney for Defendants
27 City of Novato, City Manager Adam
28 McGill, Mayor Pat Eklund, Mayor Pro
Tem Eric Lucan, Chief of Police Mathew
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Blunk

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CERTIFICATE OF SERVICE

Marin County Homeless Union v. City of Novato, et al.
United States District Court, Northern District
Case No. 4:21-cv-05401-YGR

I, McCall L. Williams, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 790 East Colorado Boulevard, Suite 850, Pasadena, California 91101. My email address is: MWilliams@chwlaw.us. On July 27, 2021, I served the document(s) described as **DEFENDANT CITY OF NOVATO’S OPPOSITION TO ORDER TO SHOW CAUSE FOR PRELIMINARY INJUNCTION** on the interested parties in this action as follows:

BY ELECTRONIC TRANSMISSION: I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court, Northern District by using the CM/ECF system on July 27, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the USDC, Northern District CM/ECF system.

I declare that I am employed in the offices of a member of the State Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on July 27, 2021, at Pasadena, California.

/s/McCall Williams
McCall L. Williams

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