No. 23-15087

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees

v.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Defendants-Appellants.

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

REPLY IN SUPPORT OF MOTION TO MODIFY THE PRELIMINARY INJUNCTION ORDER PENDING APPEAL

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INTRODUCTION

San Francisco's pre-injunction Enforcement Bulletin contained all the protections the Eighth Amendment requires. The district court even agreed it was constitutional. Yet, the district court prohibited San Francisco from following its constitutional policy by enforcing sit/lie/sleep laws against those who are offered and decline shelter in the context of an encampment resolution. The City's pre-injunction Enforcement Bulletin required the City to offer shelter before any enforcement. By issuing an order that both blessed the constitutionality of the Enforcement Bulletin and forbade enforcement pursuant to that Bulletin, the district court committed reversable legal error.

That error irreparably harmed San Francisco and the public by limiting the City's ability to control where encampments are located. San Francisco cannot use its sit/lie/sleep laws to relocate an encampment away from highways, schools, or residential areas. Persons experiencing homelessness are citing the injunction as a basis to refuse shelter and to refuse requests to relocate.

Plaintiffs did not explain how the requested modification harms them. Plaintiffs incorrectly contend that the Enforcement Bulletin is unlawful and argue San Francisco would violate a modified injunction that conformed to the Bulletin. Neither is a credible reason to deny the motion.

ARGUMENT

I. San Francisco Is Likely To Succeed On Appeal

A. The Eighth Amendment Permits Cities To Offer Shelter As Part Of An Encampment Resolution

Plaintiffs' opposition crystalizes the legal dispute between the parties and demonstrates the injunction's overbreadth.[1] The injunction adopts the phrase "involuntarily homeless" from *Martin* and *Johnson*, but expands the term beyond recognition. According to Plaintiffs, the injunction prohibits enforcement against an individual who is offered and declines adequate shelter at an encampment resolution because such an individual remains "involuntarily homeless," since San Francisco's shelter system is at capacity and that individual's decision to seek out shelter was therefore involuntary. Plaintiffs would prohibit enforcement against all persons experiencing homelessness, regardless of an individual's actual access to shelter, until the aggregate number of shelter beds exceeds the number of unsheltered homeless. This is not the law. Nor is it practical. Notwithstanding San Francisco's robust shelter system and 11,000 supportive housing units, it would cost San Francisco $1.5 billion and at least 5 years – on top of its current annual expenditures on homelessness – to house everyone now living on San Francisco's streets as Plaintiffs suggest. AOB, RJN Ex. A at 56. Plaintiffs would make the perfect the enemy of the good.

[1] Plaintiffs violate Circuit Rule 28-1(b) by incorporating their Answering Brief arguments into their opposition. Opp. at 6. San Francisco requests the Court reciprocally consider San Francisco's opening and reply brief arguments if it entertains Plaintiffs' effort.

The Eighth Amendment does not require the type of self-referral system for which Plaintiffs advocate. A person who receives an offer of shelter as part of an encampment resolution has somewhere to "sleep in the City other than in the streets or in the parks," which is what precedent requires. *Johnson v. City of Grants Pass*, 50 F.4th 787, 792 (9th Cir. 2022). That person no longer has "no . . . other shelter to go to." *Martin v. City of Boise*, 920 F.3d 584, 603 (9th Cir. 2019). Plaintiffs claim the district court adopted the language of *Martin* "to the letter," (Opp. at 7), but ignore that neither *Martin* nor *Johnson* involved cases where plaintiffs received an offer of shelter before citation.

Here, Plaintiffs do not dispute SFPD's pre-injunction Enforcement Bulletin only permitted officers to enforce sit/lie/sleep laws after making an offer of shelter. ECF Nos. 9-8 at Ex. 27; 65 at 38. Plaintiffs disingenuously assert "the district court's injunction did *not* require the City to . . . revise its existing policy," yet also claim Plaintiffs would not have "consented to the district court's injunction" if it permitted San Francisco to comply with the Enforcement Bulletin. Opp. at 11-12 (italics in original); ECF No. 65 at 38. They cannot have it both ways.

The Enforcement Bulletin is constitutional and the district court's order prohibiting enforcement pursuant to the Bulletin exceeded the court's authority. This makes the current case distinguishable from those Plaintiffs cite where the Ninth Circuit upheld injunctions prohibiting policies or practices it held unconstitutional. *See Melendres v. Arpaio*, 784 F.3d 1254, 1264 (9th Cir. 2015)

(injunction applicable to all patrols because the constitutional injury from each was the same); *Roman v. Wolf*, 977 F.3d 935, 942 (9th Cir. 2020) (enjoining conduct "necessary to cure the alleged constitutional violations").

Plaintiffs argue San Francisco should not be able to enforce its sit/lie/sleep laws because its shelter system is "closed to voluntary . . . access," (Opp. at 1), and so those experiencing homelessness lack "voluntary, practical access to adequate housing or shelter prior to enforcement." *Id*. at 8. However, the phrases "voluntary access" and "voluntary practical access" appear nowhere in this Court's precedent. What precedent does consider is whether shelter is "practically available." *Martin*, 920 F.3d at 618. Shelter offers prior to enforcement pursuant to San Francisco's pre-injunction Enforcement Bulletin do just that.

Because this is a purely legal question, Plaintiffs' reference to the district court's factual findings are irrelevant. Pre-injunction conduct has no effect on the question of whether the injunction is overbroad and should be modified pending appeal. San Francisco currently cannot enforce its sit/lie/sleep laws against a person even after making them a direct offer of shelter. Pre-injunction, it could. The City therefore at a minimum has shown a fair prospect of success on appeal because the policy set out in its pre-injunction Enforcement Bulletin was constitutional.

B. San Francisco Preserved Its Arguments

Plaintiffs complain San Francisco never previously argued for an order staying the Eighth Amendment portion of the injunction because the Enforcement Bulletin was constitutional. This is incorrect. ECF No. 100 at 1 ("San Francisco seeks to stay the portion of the PI Order enjoining San Francisco from complying with its own policies regarding the enforcement or threatened enforcement of sit/lie/sleep laws"). It also misses the point. San Francisco argued to the district court that Plaintiffs did not meet their burden for the imposition of *any* injunction. ECF No. 45 at 1 ("plaintiffs have not demonstrated San Francisco's policies are unconstitutional"). On appeal the City now asks that the Ninth Circuit vacate the injunction in its entirety. AOB at 4. This motion to modify the injunction makes a narrower argument, seeking to stay only the most egregious portion of the district court's order while the appeal is pending. This is an interim step designed to address the irreparable harm from the district court's order, not the district court's ultimate error. San Francisco's restraint is no basis to deny its meritorious motion.

The City also preserved the claims that support its appeal and identified the applicable district court record citations as part of its motion to modify the injunction. AOB at 13-14. Instead of engaging with the City's citations, Plaintiffs recited the now debunked statements from the district court's orders regarding waiver. Plaintiffs also confuse waiver of claims with waiver of arguments. "[I]t is claims that are deemed waived or forfeited, not arguments." *Allen v. Santa Clara*

Cnty. Corr. Peace Officers Ass'n., 38 F.4th 68, 71 (9th Cir. 2022). San Francisco has consistently argued a preliminary injunction is inappropriate because the City complies with the Eighth Amendment—the same claim it raises on appeal. And even if San Francisco's motion was based on new claims, which it is not, this Court may nonetheless consider questions of law raised for the first time on appeal. *A-1 Ambulance Serv., Inc. v. Cnty. of Monterey*, 90 F.3d 333, 339 (9th Cir. 1996). Accordingly, Plaintiffs cannot sidestep the merits of San Francisco's motion.

II. The Overbroad Injunction Harms San Francisco And The Public

Plaintiffs misunderstand the harm the injunction has inflicted. San Francisco and the public continue to suffer irreparable injury because the injunction prohibits the City from enforcing certain public welfare laws and negatively impacts the City's ability to determine where encampments are located. San Francisco cannot move encampments from near highways, residential areas, or schools to other parts of the City. That is a cognizable harm. *See Mi Familia Vota v. Hobbs*, 977 F.3d 948, 953 (9th Cir. 2020) (a likely irreparable injury is created by injunctions that make it more difficult to fulfill statutory obligations).

Plaintiffs and the district court assert that the City has other tools to ensure pedestrian access to the streets or to address safety hazards, but the two cases Plaintiffs cite are distinguishable. Opp. at 16; ECF No. 119 at 9. *Lo v. Cnty. of Siskiyou*, 558 F. Supp. 3d 850 (E.D. Cal. 2021) concerned ordinances related to water access permits that had the effect of depriving Hmong community members,

who had been the target of racial prejudice, from accessing water in the name of fighting illegal marijuana growers. *Id.* at 854, 858, 860. The court concluded that "[w]ithout an injunction" Hmong community members "w[ould] likely go without water for their basic needs and will likely lose more plants and livestock," which were irreparable injuries. *Id.* at 871. In the face of ordinances that cut off water access, the court pointed out other tools at the County's disposal to address its concerns. *Id.* at 872. Here, in sharp contrast, the Enforcement Bulletin does not subject Plaintiffs to any constitutional harm. San Francisco seeks to address an intractable issue—homelessness—as compassionately as possible. It is a problem that does not have a single cause nor does every person experiencing homelessness face the same struggles or have the same needs. Siskiyou County targeted illegal marijuana growers with a very blunt tool—cutting off water access to growers but also making it difficult for Hmong community members to obtain water for their lawful needs. *Id.* at 871-72. San Francisco's multifaceted, compassionate approach is not remotely similar to Siskiyou's blunt water cut-off.

Plaintiffs' second case, *Lavan v. City of Los Angeles*, 693 F.3d 1022 (9th Cir. 2012) does not actually say what Plaintiffs assert. In the *Lavan* appeal, Los Angeles did "not challenge the scope of the injunction, nor d[id] it ask [the Court] to modify its terms." *Id.* at 1024. The Court held: "This appeal does not concern the power of the federal courts to constrain municipal governments from addressing the deep and pressing problem of mass homelessness or to otherwise

fulfill their obligations to maintain public health and safety." *Id.* at 1033. Here, San Francisco does argue that the district court's injunction was overbroad in scope and has requested this Court modify its terms. Contrary to Plaintiffs' assertion, the *Lavan* Court said nothing about the impact constitutional protections have on municipal governments' obligation to safeguard public health, which are impacted here.

The injunction's prohibition against San Francisco enforcing its sit/lie/sleep laws against individuals who have rejected adequate shelter offers has meant encampments remain even after City employees conduct outreach and offer shelter and services. Dodge Decl. ¶¶ 6-8. Contrary to Plaintiffs' assertion, Director Dodge's declaration does not contain "conclusory factual assertions," but is based on his "own personal observations" as San Francisco's Street Response Coordination Director. *Id*. at ¶¶ 5, 1. The authority Plaintiffs cite is distinguishable. *Doe #1* concerned a presidential proclamation, which was not signed under penalty of perjury, "stating, without citation to any source, 'data show that lawful immigrants are about three times more likely than United States citizens to lack health insurance.'" *Doe #1 v. Trump*, 957 F.3d 1050, 1056-57 (9th Cir. 2020). The only support the government identified for its alleged irreparable harm absent a stay was the proclamation itself; the government could not "provide any source for this assertion in its briefing or at oral argument." *Id*. at 1059. A President's unsupported factual assertions about millions of potential immigrants' access to

health care is completely different from Director Dodge's statements, signed under oath, that come from his direct experience providing services to San Francisco's unhoused population. And, as to Plaintiffs' claim that the Court cannot consider the declaration, they are again incorrect because, as explained above in Section I.B., San Francisco preserved the claim for appeal. *Allen*, 38 F.4th at 68 n.1.

The injunction further harms the public interest because it takes lawful power from the state and transfers it to a federal court. *See Burford v. Sun Oil Co.*, 319 U.S. 315, 317-18 (1943). As to Plaintiffs' statement that the public interest is broadly construed, San Francisco agrees. However, the risk of irreparable harm to the government and the public interest merge in cases such as this one where the government is the moving party. *See, e.g., Lo*, 558 F. Supp. 3d at 871 (citing *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (cited by Plaintiffs).

III. The Requested Modification Causes Plaintiffs No Harm

Plaintiffs do not dispute that if the pre-injunction Enforcement Bulletin is constitutional they suffer no new harm from San Francisco complying with the Bulletin. Instead, Plaintiffs renew their arguments that the Enforcement Bulletin is in fact unconstitutional because "Plaintiffs have repeatedly affirmed that voluntary access to the shelter system within the City is a necessary predicate to any enforcement against involuntarily homeless individuals." Opp. at 20. This is contrary to Ninth Circuit precedent, as described in Section I.A. The Ninth Circuit

does not differentiate between self-referral and shelter offered in the context of enforcement. *Johnson*, 50 F.4th 787, 792 n.2. If a person declines San Francisco's offer of adequate shelter, they are no longer involuntarily homeless. The district court already determined San Francisco's pre-injunction Enforcement Bulletin "is not at issue." ECF No. 65 at 38; Murphy Decl., Ex. C [12/22/22 Hr'g Tr. at 10:8-19; 11:9-16].

Plaintiffs then argue that even if the Enforcement Bulletin were found constitutional, they would suffer harm from the requested relief because San Francisco would violate its own policy and enforce its sit/lie/sleep laws without first making an offer of shelter. This scare tactic should be disregarded. The question before the Court is whether there are sufficient grounds to modify the district court's injunction based on the facts and the law presented. San Francisco has shown there are. Plaintiffs do not even attempt to offer legal support for their claim that the speculative future threat of non-compliance with an order is grounds not to issue the order in the first instance, especially when balanced against the irreparable harm to San Francisco and the public discussed above in Section II.

CONCLUSION

Accordingly, the Court should modify the injunction to state San Francisco may comply with its pre-injunction Enforcement Bulletin pending disposition of the appeal.

Dated: May 1, 2023

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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REPLY IN SUPPORT OF MOTION TO MODIFY THE PRELIMINARY INJUNCTION ORDER PENDING APPEAL

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