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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

TABATHA MARTIN, TRACY
MARTIN, T.M., a minor, by her
parents and next friends,
TABATHA MARTIN and TRACY
MARTIN; KIONINA KENESO,
K.H., a minor, by her next
friend, KIONINA KENESO;
TANAKO YUG, GABRIEL YUG,
G.Y., a minor, by his next
friends, TANAKO YUG and
GABRIEL YUG; DIANA

Case No. CV 15-00363 HG-KSC
[Class Action]

PLAINTIFFS' APPLICATION FOR
**FOR TEMPORARY RESTRAIN-
ING ORDER AND MOTION
FOR PRELIMINARY
INJUNCTION**; MEMORANDUM
IN SUPPORT OF MOTION;
DECLARATION OF DANIEL M.

(caption continues)

Trial Date: Not Set

CHONIONG; JON JOSEPHSON;
NORMA MANUEL; MENSİ
RIKAT; ARI RODEN; RIMUO
RUNTE; and SNOPIA WEINEI;
individually and on behalf of the
class of homeless or formerly
homeless individuals whose
property was seized and
destroyed by City and County of
Honolulu officials,

Plaintiffs,

vs.

CITY AND COUNTY OF
HONOLULU, a municipal
corporation; and DOE
EMPLOYEES OF CITY AND
COUNTY OF HONOLULU 1-100;

Defendants.

GLUCK; EXHIBITS "1"- "4";
DECLARATION OF JONATHAN
CORTEZ; DECLARATION OF
JON JOSEPHSON;
DECLARATION OF TABATHA
MARTIN; DECLARATION OF
TRACY MARTIN;
SUPPLEMENTAL
DECLARATION OF TRACY
MARTIN; DECLARATION OF
V.T.; DECLARATION OF
CORILYNN WALLACE;
DECLARATION OF GABRIEL
YUG; DECLARATION OF
TANAKO YUG; CERTIFICATE
OF SERVICE

**PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING
ORDER AND MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs TABATHA MARTIN; TRACY MARTIN; T.M., a
Minor, by her parents and next friends TABATHA MARTIN and
TRACY MARTIN; KONINA KENESO; K.H., a Minor, by her next
friend KIONINA KENSEO; NORMA MANUEL; MENSİ RIKAT; ARI
RODEN; and SNOPIA WEINEI, individually and on behalf of the
class of homeless individuals threatened with imminent and

unconstitutional seizure and destruction of their property¹ by Defendant City and County of Honolulu (“the City”), by and through their attorneys, Alston Hunt Floyd & Ing and the ACLU of Hawai`i Foundation, respectfully move this Court for a temporary restraining order or preliminary injunction:

(1) prohibiting Defendant CITY AND COUNTY OF HONOLULU (“the City”) from seizing and immediately destroying non-abandoned property belonging to homeless individuals in Honolulu. This temporary restraining order is necessary because the City has distributed written signs indicating it will immediately destroy certain property belonging to homeless individuals (specifically, it will destroy “[a]ll items such as construction

¹ There are currently fifteen named Plaintiffs in this Action, all of whom seek to represent a class of homeless and formerly homeless individuals whose property was seized and immediately destroyed by the City. See Docket #1. The instant Motion seeks prospective injunctive relief for those Plaintiffs (and putative class members) who are still homeless; as such, those class members who are currently housed do not join the instant Motion. Plaintiffs’ counsel intends to file an Amended Complaint alleging sub-classes (one class of individuals who are currently homeless, and another class of individuals who are not currently homeless) although some of the relief sought (i.e. damages and a permanent injunction) will be common to everyone.

materials, . . . pallets, poles, wooden structures, tarps and perishable food") in "sweeps" of the Kaka'ako area that began last week and are continuing today and tomorrow; and

(2) ordering the City to discontinue any further enforcement actions until the City (a) serves compliant Notices of Enforcement Action; (b) trains its employees in the proper impoundment of seized property in compliance with the Sidewalk Nuisance ("SNO") and Stored Property Ordinances ("SPO"), Revised Ordinances of Honolulu 1990, as amended ("ROH"), Chapter 29, Articles 16 and 19, respectively, and the Fourth and Fourteenth Amendments to the United States Constitution; (c) provides Summary Removal Notices to all affected persons with legible lists of Stored Items; (d) stores impounded property for no less than ninety days; and (e) provides translated forms and a simplified method for waiver of the \$200.00 fee charged by the City for the costs of removal, storage and handling of removed property.

This Motion is made pursuant to Rules 7 and 65 of the Federal Rules of Civil Procedure ("FRCP"), and is based upon the attached memorandum and declarations, and the record and file herein.

LOCAL RULE 10.2(g) STATEMENT

This Application for Temporary Restraining Order and Motion for Preliminary Injunction was not filed contemporaneously with the Complaint because Plaintiffs first attempted to negotiate immediate relief to avoid the need for a TRO, and because the City has escalated its enforcement actions since Plaintiffs filed the instant action. See Declaration of Kristin L. Holland ¶¶ 3-5.

Specifically: (1) shortly after filing the Complaint, Plaintiffs proposed a good-faith settlement and stipulation regarding these issues to the City to attempt to moot the need for injunctive relief; but (2) on Thursday, September 17 – after Plaintiffs' filing of the Complaint, and despite a call by Plaintiffs' counsel on the day of filing inviting a stipulation related to ongoing enforcement – the City seized and immediately destroyed property belonging to members of the putative plaintiff class; and then, (3) on Friday, September 18, the City announced that it would escalate enforcement with plans to

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conduct back-to-back unconstitutional sweeps on September 21, 2015 and September 22, 2015.

DATED: Honolulu, Hawai`i, September 21, 2015.

/s/ Kristin L. Holland

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

TABATHA MARTIN, et al.;

Plaintiffs,

vs.

CITY AND COUNTY OF
HONOLULU, a municipal
corporation; et al.;

Defendants.

Case No. CV 15-00363 HG-KSC

MEMORANDUM IN SUPPORT OF
MOTION

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Movants are homeless individuals living in the City and County of Honolulu. Their shelters, food and other personal possessions have been seized and immediately destroyed by City personnel pursuant to City policy (as part of the City's enforcement of the Revised Ordinances of Honolulu 1990, as amended ("ROH"), Chapter 29, Articles 16 and 19, commonly referred to as the Sidewalk Nuisance Ordinance ("SNO") and Stored Property

Ordinance ("SPO"), respectively).² Plaintiffs seek to represent a class of similarly situated homeless men, women and children who have suffered and will continue to suffer the same type of loss as a result of the same unlawful practices and policies.

The City maintains an official policy that it may seize and immediately destroy certain non-abandoned property belonging to Plaintiffs. The City is currently executing that policy and has announced plans to do so in the immediate future. Specifically, the City has posted signs indicating that it will seize and immediately destroy non-abandoned property belonging to the Plaintiffs, as follows: “*All items* such as construction materials, cardboard, newspapers, pallets, poles, wooden structures, tarps and perishable food, will be removed and disposed of immediately.” (Emphasis added.) Declaration of Daniel Gluck, Exh. 1-4. Those seizures are happening today and tomorrow, and will continue in the weeks to come absent action by this Court. For some class members,

² The SNO, SPO, Ordinances 13-8 and 11-29, and the Assessment of Fees for Release of Sidewalk Nuisance under Honolulu Ordinance 13-8, are attached to the Declaration of Kristin L. Holland as Exhibits 9, 10, 11 and 12, respectively.

including Plaintiffs Tracy and Tabatha Martin and their four-year old daughter T.M., and putative class member sixteen-year-old V.T., who is pregnant, this means that the City will be destroying their only shelter, leaving them exposed to the elements and without any means to get their shelter back. See Declarations of Tracy Martin, Tabatha Martin, and V.T.

This ongoing policy of seizing and immediately destroying property belonging to homeless individuals was ruled unconstitutional by the Ninth Circuit Court of Appeals in *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1030 (9th Cir. 2012), *cert. denied*, 133 S.Ct. 2855 (2013) (affirming preliminary injunction against City of Los Angeles to prevent immediate destruction of homeless individuals' property).

Despite clearly established law prohibiting the City from immediately destroying property, and despite Plaintiffs' multiple attempts to resolve this issue without the need for litigation (let alone the immediate relief of a Temporary Restraining Order), the City has *escalated* its enforcement actions and continues to assert that it has the power to seize and destroy Plaintiffs' property on the

spot, without any post-deprivation recourse. Holland Decl. ¶¶ 3-7; Exh. 5, 13, 17, 18; Gluck Decl. Exh. 1-4.

The City's announcements that it intends to seize and destroy homeless individuals' property do not constitute due process. Due process requires both notice *and* an opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965))). The City provides no opportunity to be heard – that is, no opportunity for homeless individuals to argue that the destruction of their property is unlawful. (As discussed more fully *infra*, there are numerous arguments that homeless individuals could raise as to why the City's ordinances are unconstitutional as applied to them.)

A Temporary Restraining Order is needed to prevent imminent harm to Plaintiffs. Additional sweeps were announced on Friday, September 18, 2015, and are taking place rapidly, with more scheduled for Monday September 21, 2015 and Tuesday, September 22, 2015. Gluck Decl. Exhs. 1-4. The City has made clear through its repeated acts, which have only escalated since this

case was filed on September 16, 2015, that the seizure and destruction of class members' property is part of an ongoing campaign of unconstitutional government action in the City and County of Honolulu. One news report on September 17, 2015, described the destruction of a putative class member's shelter as his father was undergoing a triple bypass. Holland Decl. Exh. 17. Unless restrained by an Order of this Court, these unlawful acts will continue.

The instant Motion requests very narrow relief: Plaintiffs ask the Court for an order that: (1) prohibits the City from seizing and immediately destroying their property, absent an immediate threat to public safety from storing the property; (2) requires the City to provide a post-deprivation process whereby indigent individuals may retrieve their property without paying a \$200.00 penalty, within twenty-four hours, and without having to travel to multiple offices around the island of Oahu; and (3) other protections as outlined in the Application.

II. STATEMENT OF FACTS

A. The City's Ordinances and Practices Toward the Homeless.

Two City ordinances prohibit Plaintiffs from possessing property when they are homeless: the SPO and the SNO. ROH §29-19.1 *et seq.* and §29-16.1 *et seq.*; Holland Decl. Exhs. 9-11.

1. The Stored Property Ordinance.

The SPO provides that once the City issues notice to the owners of property that is “stored” on public property, the owner has twenty-four hours to remove the property, or it will be impounded. ROH §§ 29-19.3-19.4. This impoundment occurs whether the property has been abandoned or not. The SPO and SNO require the City to impound all property³ and store it for no less than 30 days before destroying it. ROH § 19-19.5.

The SPO contains an additional clause that is particularly devastating for the homeless: “moving the personal property to another location on public property shall not be considered to be removing the personal property from public

³ The ordinances allow for the immediate destruction of perishable items like food; Plaintiffs contend that this provision is unconstitutional. ROH § 29-19.5(e).

property[.]” ROH § 29-19.3(b). In other words, an individual who receives an SPO notice must find some private location to store her/his belongings; merely moving the belongings to another sidewalk or park will result in the property’s impoundment. Therefore, even if a homeless person were to reclaim his or her property from the City before its destruction, the property would be again subject to impoundment and destruction as soon as it is placed on public property.

The SPO by its terms only specifically allows the destruction of perishable items.⁴ ROH § 29-19.5(e). All other “personal property” (defined term) must be maintained for at least 30 days. ROH § 29-19.5(b). “Personal property” is defined broadly to include “any and all tangible property, and includes, but is not limited to, items, goods, materials...[and] structures....” ROH § 29-19.2.

The SPO requires written notice, however, and is specific as to what that notice must include. ROH § 29-19.4(a). It provides:

⁴ Plaintiffs contend that this exception for perishable items is unconstitutional as well, particularly in past cases where the City has provided no advanced notice of sweeps.

Sec. 29- 19.4 Notice.

(a) . . . The written notice shall contain the following:

- (1) A description of the personal property to be removed (such description may refer to an attached photograph).
- (2) The location of the personal property.
- (3) The date and time the notice was posted.
- (4) The section of the ROH that is being violated.
- (5) A statement that the personal property will be impounded if not removed within 24 hours.
- (6) The location where the removed property will be stored.
- (7) A statement that impounded property will be sold or otherwise disposed of if not claimed within 30 days after impoundment.
- (8) A statement that the property owner shall be responsible for all costs of removal, storage and disposal.

2. The Sidewalk Nuisance Ordinance.

The SNO is even more antagonistic toward the homeless.

Under the SNO, the City may seize property at any time without any notice whatsoever if it is on or hanging over any sidewalk. ROH §§ 29-16.2-16.3. As the Ordinance itself states, the property of homeless persons “shall be subject to summary removal.” ROH § 29-16.3(a). The SNO, like the SPO, requires the City to hold the property for a minimum of 30 days before destroying it. ROH § 29-16.3(b).

“Sidewalk-nuisance” is defined to include “any object or collection of objects constructed, erected, installed, maintained, kept, or operated on or over any sidewalk, including but not limited to structures, stalls, stands, tents, furniture, and containers, and any of their contents or attachments.” ROH § 29-16.2. Under the SNO, the City also has the authority to disassemble a structure for removal, but has no authority to destroy one. See ROH 29-16.3(b).

The SNO provides:

Sec. 29-16.3 Summary removal of sidewalk-nuisances.

(a) No person shall erect, establish, place, construct, maintain, keep or operate any sidewalk-nuisance on any sidewalk, except as provided in Section 29-16.6 or as otherwise authorized by law. Any sidewalk-nuisance in violation of this subsection shall be subject to summary removal.

(b) The director may immediately and summarily remove or cause the immediate and summary removal of a sidewalk-nuisance. A sidewalk-nuisance may be disassembled for removal.

(1) The director shall store or cause to be stored any sidewalk-nuisance removed pursuant to this subsection until the director is authorized to destroy, sell, or otherwise dispose of the sidewalk-nuisance pursuant to the applicable provisions of this section, but in no event less than 30 calendar days from the date of removal.

(2) Notification.

(A) Written notice of the city's removal of the sidewalk-nuisance shall be posted for three consecutive days following removal of the sidewalk-nuisance on the public property where the sidewalk-nuisance was

removed. If notice cannot be posted as provided, then it shall be posted on the internet website for the city for three consecutive days following removal of the sidewalk- nuisance.

(B) The written notice shall state:

(i) The date, violation and removal of the sidewalk- nuisance;

(ii) That the owner may reclaim the sidewalk- nuisance within 30 calendar days from the date of the removal of the sidewalk- nuisance;

(iii) Contact information and instructions on how the owner may reclaim the sidewalk- nuisance;

(iv) That the owner has the right to appeal the removal of the sidewalk- nuisance in accordance with subsection (d); and

(v) That, if not timely reclaimed or the subject of timely appeal, the sidewalk- nuisance shall be subject to disposal.

The SNO's prohibitions do not apply to certain objects, collections of objects or literature tables. ROH § 29-16.6. These include objects "smaller than 42 inches in length, 25 inches in width, and 43 inches in height" which are attended "at all times," do not obstruct the sidewalk or road, and do not "otherwise threaten public health and safety." ROH § 29-16.6(1).

3. The Harsh Combined Effect of the SPO and SNO on Homeless Persons.

The SNO and SPO are particularly offensive to Plaintiffs' constitutionally protected property rights when considering their

joint effect. Plaintiffs often have no feasible place to store their property, other than the sidewalk, when they are homeless. See Decl. Gabriel Yug ¶¶ 11-12; Decl. Jonathan Cortez ¶¶ 8-9; Decl. Tabatha Martin ¶ 24. But even if they were to remove it to other public property, it would violate the SPO and still be subject to impoundment.

Plaintiffs often do not have the ability to access shelters or the means to find permanent or temporary housing. And even if they did, it would not save them from the harsh effects of the SPO and SNO if they were to find themselves homeless again, which often occurs. Whenever they have to store their property on the sidewalk, it can be confiscated under the SNO. Unless they can find shelter with 24 hours, which is most times a virtual impossibility, their property will be subject to seizure. See Decl. Yug; Decl. Josephson; Decl. Martin; Decl. Cortez, and Decl. V.T.

B. Previous Due Process Violations (and Injunctions of City Issued by This Court) in Enforcement of SPO and SNO.

This is at least the third time the City has been sued for summarily confiscating and destroying the property of individuals under the SNO and SPO. See *Catherine Russell, et al. v. City and*

County of Honolulu, Civ. 13-00475 LEK-RLP, 2013 WL 6222714 (November 29, 2013) (City enjoined and ordered to change its notices related to enforcement of the SNO; plaintiffs likely to succeed on the merits of their as-applied challenges); *De-Occupy Honolulu, et al. v. City and County of Honolulu*, Civil No. 12-00668 JMS-KSC (City stipulated to a Temporary Restraining Order (Docket #18) and Preliminary Injunction (Docket #134). Holland Decl. ¶¶ 8-9; Exh. 6 and 7.

C. City's Past Seizures and Immediate Destruction of Plaintiffs' Property

Despite the aforementioned Orders of this Court, the City has repeatedly violated Plaintiffs' constitutional rights in enforcement of the SPO and SNO – and the City continues to do so.

For example, on November 13, 2014, City personnel swept the Kaka'ako area. The City did not even pretend to comply with the SPO, SNO, or Constitution: instead, City personnel ordered homeless individuals to stay away from their property under threat of arrest; seized the property; and threw the property directly into City garbage trucks. The City did not provide notice to any of the Plaintiffs, nor did it provide any of the Plaintiffs with an

opportunity to be heard before (or after) the destruction of their property. See Declarations of Jon Josephson, Tabatha Martin, Tracy Martin, Gabriel Yug and Tanako Yug.

D. City's Current Intentions to Violate Plaintiffs' Constitutional Rights

1. The September 8, 2015 Kaka'ako Sweep.

The City conducted a sweep of a portion of the Kaka`ako area on September 8, 2015. The City publicized this sweep extensively ahead of time, generating broad press coverage. The Mayor gave a press conference standing beside the Governor, a U.S. Congressperson, and a U.S. Senator.⁵ If ever there was a time that one would expect the sweep to conform with at least the minimal protections of the SPO and SNO, one would expect it with the September 8, 2015 sweep.

⁵ See Holland Decl. ¶ 21-22, Exh. 19-20; (*Sweep Notices coming Monday*, Honolulu Star-Advertiser (August 28, 2015), available at http://www.staradvertiser.com/newspremium/20150828_sweep_notices_coming_monday.html?id=323193761; '*Compassionate disruption' of Kakaako homeless encampment begins next week*, khon 2, available at <http://khon2.com/2015/09/01/compassionate-disruption-of-kakaako-homeless-encampment-begins-next-week-2/>).

a. The Defective “Notices of Enforcement.”

Rather than complying with the SPO and SNO, the September 8, 2015 sweep notice made it clear that it was the City’s intent to violate the SPO and SNO.

On or about September 2, 2015, the City began posting two similar signs around the Kaka’ako area. See Declaration of Daniel M. Gluck, Exh. 1 and 2. The first sign (Gluck Decl. Exh. 1, hereinafter, “Sign #1”), stated that enforcement of the SPO and SNO would start on or after September 8, 2015, as follows:

This enforcement action will occur over the course of several weeks or months and will start in the vicinity of Ohe Street and Cooke Street, from Ilalo Street to Ala Moana Boulevard. The enforcement action will occur in phases and will cover sidewalks and other City property from and *including the makai side of Ala Moana Boulevard to the ocean, and from Forrest Avenue to the east end of Ilalo Street.* The enforcement action area is generally shown on the map below.

(Emphasis added.) In other words, the City has indicated that it intends to sweep the *entirety* of the Kaka’ako area in the imminent future.

The second sign (Gluck Decl. Exh. 2, hereinafter “Sign #2”) was similar to Sign #1, but also contained a map with a red-

border area indicating the boundaries of the area subject to a sweep on a particular day. The City has posted and/or distributed similar signs with different red-border areas in advance of subsequent sweeps. See Gluck Decl. Exh. 3 (September 21 sweep), Exh. 4 (September 22 sweep). These signs are hereinafter referred to collectively as “the September signs.”

The September signs all contain similar language: individuals are required to move their belongings; if they do not, the property will be seized. Any individuals who attempt to keep their property risk arrest. See Gluck Decl. Exh. 1, 2, 4. (Exhibit #3 is written in Chuukese.)

The September signs do not comply with the SPO as they lack, *inter alia*, (1) a description of the personal property to be removed; (2) the date and time the notice was posted; (3) a statement that the personal property will be impounded if not removed within 24 hours; (4) the location where the removed property will be stored; and (5) a statement that the impounded property will be sold or otherwise disposed of if not claimed within 30 days after impoundment. ROH § 29-19.4.

The September Signs also affirmatively state that many types of shelter-related property will be summarily destroyed, even though the SNO and SPO only allow the *immediate* disposal of property of a "perishable nature." ROH § 29-19.5(h). The signs state:

All items such as construction materials, cardboard, newspapers, pallets, poles, wooden structures, tarps and perishable food, will be removed and disposed of immediately.

Gluck Decl., Exh. 1, 2, 4 (Emphasis added). These signs also offer no opportunity for individuals to contest the City's actions, either before or after their property is seized and/or destroyed.⁶

Neither the SPO nor the SNO allow for the immediate disposal of things like "tarps" or "poles" (presumably including tent poles) – or anything else (with the exception of perishable goods) less than 30 calendar days from the date of removal. ROH § 29-16.3(b)(1); §29-19.5. The SNO requires "notification" *after* the

⁶ Even if these signs satisfied the notice required in the SPO, they would be meaningless for many plaintiffs who have no where to move their shelter and no means to move their shelter without private transportation.

removal of any sidewalk-nuisance. ROH § 29-16.3(b)(2). Even if this notification was provided, it would not remedy the wrong caused by the City's immediate destruction of personal property.

The September signs and related press coverage make clear that sweeps will continue and are being accelerated. Shortly after this case was filed, the Honolulu Corporation Counsel was quoted as saying: "The city will continue to enforce the Stored Property and Sidewalk Nuisance Ordinances." Holland Decl. ¶ 5, Exh. 5. As a result, the City is now moving more rapidly to destroy the property of the remaining homeless in Kaka'ako. Holland Decl. ¶ 15-17, 19-22, Exh. 13-15, 17-20.

2. Upcoming Sweeps and Threatened Harm to Plaintiffs and Prospective Class Members

Plaintiffs, and putative class members, fear the upcoming sweeps. Many Plaintiffs and putative class members have gone through previous sweeps in which the City summarily destroyed their property, including identification documents and personal necessities like food and shelter. *See, e.g.*, Declaration of Tabatha Martin, Declaration of Tracy Martin. For homeless individuals, the City's stated intention to seize and immediately destroy things like

tarps, poles, and construction materials means that their shelters will be thrown away on the spot:

- V.T., who is sixteen years old and pregnant, sleeps in a shelter made up of pallets, 2x4s, wood, and tarps – all items that the City intends to destroy immediately. V.T. recognizes this, declaring that “[t]he notices say they’re going to destroy any construction materials. That means they’ll pretty much take and throw away my whole shelter.” Declaration of V.T. ¶¶4-7. She continues: “If they take away my shelter, I’ll be sleeping in the rain on the sidewalk. I’m worried and scared about that. I’m pregnant and we wouldn’t have shelter.”
- Named Plaintiff Tracy Martin lives with his wife and four-year-old daughter alongside Ohe Street in Kakaako. He declares as follows: “Our shelter is made up of tent poles, tarps, rope, and wood. . . . Basically, the City is going to come and if I don’t move it all they’re going to take our shelter and destroy it. If they destroy our shelter we’ll have to sleep in the open. I’m scared about that because of my daughter. I have a lot of anxiety about that, a lot of stress.” Supplemental Declaration of Tracy Martin, ¶¶3-4; Declaration of Tracy Martin ¶4.

- Jonathan Cortez lost his job and was evicted from his apartment just a few months ago. Declaration of Jonathan Cortez, ¶2. He uses some pallets, some poles, and some big covers to create a shelter for himself. *Id.* ¶8. He declares: “If the City came and destroyed my shelter, I don’t know what I’d do. I’d have no place to stay. What would I do? I’d be worried, I’d be scared about what I would do to survive.” *Id.* ¶9.

In other words, the items the City intends to seize and immediately destroy are not garbage – they are integral parts of the shelters that Plaintiffs rely upon for survival.

The Kakaako sweeps are particularly troubling, given that at least some homeless individuals have been advised by City officials to come to Kaka‘ako to avoid City sweeps. For example, Jonathan Cortez declares that City officials *instructed him to go to Kakaako* after the City swept the Kapalama Canal area several weeks ago. Declaration of Jonathan Cortez at ¶¶ 2-6. Yet despite this instruction, the City did a sweep the mauka area of Kaka‘ako on September 8, forcing that individual to move to another location in Kaka‘ako. *Id.* ¶¶ 7-8.

Even if the City were to impound Plaintiffs' property, however, current procedures are insufficient to satisfy due process. Plaintiffs are homeless and poor, and cannot afford a \$200.00 fine. See Declaration of Tabatha Martin at ¶ 14 ("We didn't have any money to pay the City to get our stuff back even if they would've let us go get it."); Declaration of Tracy Martin at ¶ 4 ("We are homeless and poor."). To obtain a waiver of the \$200.00 fee, however, the City has established a byzantine process that fails to comport with due process: Plaintiffs must first travel to Kapolei and complete a six-page (English-only) fee-waiver application, see http://www.honolulu.gov/rep/site/dfm/spo_docs/reevisedapplicai ontowaivesidewalknuisancefee4.9.14.pdf, then wait some undetermined period of time for a decision on the application, then take another trip to the Department of Facility Maintenance Baseyard in Halawa Valley to retrieve their things – assuming that the City has not destroyed or lost the property in the process. See Declaration of Corilynn Wallace at ¶¶7, 9, 11. Some individuals simply cannot wait to retrieve their possessions. *Id.* Many homeless individuals do not speak or read English preventing them from understanding the fee waiver process or obtaining a waiver.

See Mileka Lincoln, *State officials: Majority of Kaka‘ako homeless are COFA migrants*, Hawaii News Now (May 12, 2015), available at <http://www.hawaiinewsnow.com/story/29049224/state-officials-majority-of-kakaako-homeless-are-cofa-migrants>. It is not surprising, then, that many individuals opt not to retrieve their property at all. See also Declaration of Corilynn Wallace at ¶3-5 (homeless individual gave birth 10 days after sweep in November 2014 and was unable to retrieve property within 30-day window as a result).

III. STANDARD FOR TEMPORARY AND PRELIMINARY INJUNCTIVE RELIEF

“The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction.” *Brown Jordan Intern., Inc. v. Mind’s Eye Interiors, Inc.*, 236 F. Supp. 2d 1152, 1154 (D. Haw. 2002). To obtain a temporary restraining order or a preliminary injunction, a plaintiff “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the

public interest.” *M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th Cir. 2012) (quoting *Winter v. Natural Res.*, 555 U.S. 7, 20 (2008)).

Irreparable harm is that which “can seldom be adequately remedied by money damages and is permanent or at least of long duration[.]” *Amoco Production Co. v. Gambell*, 480 U.S. 531, 545 (1987). Where serious questions going to the merits are raised, but the balance of the hardships “tips sharply” in plaintiffs’ favor, district courts can issue an injunction to preserve the status quo “where difficult legal questions require more deliberate investigation,” so long as the other *Winter* factors are met. *Lavan v. City of Los Angeles*, 797 F.Supp.2d 1005, 1009-10 (C.D. Cal. 2011) (internal citations omitted), *aff’d* 693 F.3d 1022 (9th Cir. 2012); *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011).

A. Plaintiffs Are Likely To Succeed On The Merits.

The City has taken and destroyed personal property that was never abandoned. Several of the named Plaintiffs – and hundreds, if not thousands, of putative class members – are still living in areas of imminent sweeps. See City & County of Honolulu Department of Community Services, State of Hawai‘i Department of

Human Services Homeless Programs Office, and Partners in Care, *Homeless Point-in-Time Count 2015* (April 18, 2015), p. 7, available at <http://humanservices.hawaii.gov/bessd/files/2012/12/PIT-Oahu-2015-PIT-Report-Rev-4.18.15.pdf> (hereinafter, “2015 Point in Time Count”) (estimating over 1,900 unsheltered homeless individuals island-wide); Rui Kaneya, Ige’s Team Cuts Kakaako’s Homeless Population by 10 Percent, HONOLULU CIVIL BEAT (August 26, 2015), available at [http://www.civilbeat.com/2015/08/iges-team-relocates-10-percent-of-kakaakos-homeless-population-to-shelters/\(estimating-between-200-and-300-homeless-individuals-living-in-Kakaako-area\)](http://www.civilbeat.com/2015/08/iges-team-relocates-10-percent-of-kakaakos-homeless-population-to-shelters/(estimating-between-200-and-300-homeless-individuals-living-in-Kakaako-area)).

While the SPO and SNO purport to prohibit the City from summarily destroying everything but perishable goods, the City’s practice has been to seize, and immediately destroy, Plaintiffs’ property without due process.

1. First Claim for Violation of the Fourth Amendment to the U.S. Constitution (Unreasonable Seizure) Actionable Pursuant to 42 U.S.C. § 1983.

The Fourth Amendment's protections extend to the unabandoned property of homeless persons. *Lavan v. City of Los*

Angeles, 693 F.3d 1022, 1030 (9th Cir. 2012) (affirming preliminary injunction against the City). "The Fourth Amendment protects the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *United States v. Place*, 462 U.S. 696, 700 (1983). A "seizure" of property occurs when "there is some meaningful interference with an individual's possessory interests in that property." *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 61 (1992); *see also Russell v. City and County of Honolulu*, 2013 WL 6222714 *15 (D. Haw. November 29, 2013); *Young v. County of Hawaii*, Civ. No. 11-00580 ACK-RLP, 2013 WL 2286068, at *6 (D. Haw. May 22, 2013). "The destruction of property is 'meaningful interference' constituting a seizure under the Fourth Amendment" *Fuller v. Vines*, 36 F.3d 65, 68 (9th Cir. 1994).

These core protections extend to tents, shelters and similar temporary structures on public property, even if their location on a City sidewalk violates a municipal ordinance. *Lavan*, 693 F.3d 1022, 1029-1030; *see also United States v. Gooch*, 6 F.3d 673, 677 (9th Cir. 1993) (citing, *inter alia*, *Pottinger v. City of Miami*, 810 F.Supp. 1551 (S.D. Fla. 1992) (reasonable expectation of

privacy for personal belongings in a public area)). "[A]n officer who happens to come across an individual's property in a public area could seize it only if Fourth Amendment standards are satisfied – for example, if the items are evidence of a crime or contraband." *Soldal*, 506 U.S. at 68; see also *San Jose Charter of the Hells Angels Motorcycle Club*, 402 F.3d at 975 ("[T]he destruction of property by state officials poses as much of a threat, if not more, to people's right to be 'secure . . . in their effects as does the physical taking of them.") (citation omitted).

In *Lavan*, the City of Los Angeles swept Skid Row, seizing and summarily destroying the personal possessions of plaintiff homeless persons who had stepped away from their belongings to attend to the necessary tasks of life, such as showering, eating, using restrooms, or attending court. 693 F.3d at 1025. The district court granted an application for a temporary restraining order and issued a preliminary injunction, which was upheld by the Ninth Circuit, and which barred the City from:

1. Seizing property in Skid Row absent an objectively reasonable belief that it is abandoned, presents an immediate threat to public health or safety, or is evidence of a crime, or contraband; and

2. Absent an immediate threat to public health or safety, destruction of said seized property without maintaining it in a secure location for a period of less than 90 days.

Lavan, 797 F.Supp.2d at 1020. The City was also “directed to leave a notice in a prominent place for any property taken on the belief that it is abandoned, including advising where the property is being kept and when it may be claimed by the rightful owner.” *Id.* The Ninth Circuit affirmed that the unattended property of homeless persons is protected by the Fourth and Fourteenth Amendments, and that a city may not “seize and destroy with impunity the worldly possessions of a vulnerable group in our society.” *Lavan*, 693 F.3d at 1033.

As in *Lavan*, here there is no legitimate interest in the immediate disposal of Plaintiffs' property. 693 F.3d at 1030 (“even if the seizure of the property would have been deemed reasonable had the City held it for return to its owner instead of immediately destroying it, the City's destruction of the property rendered the seizure unreasonable.”) *Justin v. City of Los Angeles*, 2000 WL 1808426 (C.D. Cal. Dec. 5, 2000), where a temporary restraining order was granted, also explains:

Here, Defendants may be slowed in their efforts to keep the City, and especially the downtown area, clean and safe. This injunction may disturb their new initiative to revitalize and uplift communities, to improve the streets and sidewalks, and to diminish the crime rate. Plaintiffs, however, risk a greater harm if the injunction is not granted: the violation of their First, Fourth and Fourteenth Amendment rights.

Id. at *11. See also *Kincaid v. City of Fresno*, 2006 WL 3542732, No. 106CV-1445 OWW SMS (E.D. Cal. Dec. 8, 2006). Absent a legitimate governmental interest that somehow outweighs Plaintiffs' fundamental constitutional rights to be free from government seizure and destruction of their private property, the Fourth Amendment is violated. *Soldal*, 506 U.S. at 68-69; *Miranda v City of Cornelius*, 429 F.3d 858, 862-63 (9th Cir. 2005).

In *Pottinger*, 810 F.Supp. 1551 (S.D. Fla. 1992), the court held that the City of Miami's conduct, including usage of "front-end loaders and dump trucks" to destroy the possessions of homeless persons and threats to arrest those who attempted to retrieve their belongings from City workers, violated both the Fourth and Fourteenth Amendments. *Id.* at 1556. The court rejected the City's argument that its interests in sanitation and order trumped any

interest of the homeless in keeping their scarce belongings. *Id.* at 1570-73. While the City claimed the belongings lacked value, the court observed that property value "is in the eyes of the beholder, as one man's junk is another man's treasure." *Id.* at 1556. On balance, the court held that "the City's interest in having clean parks is outweighed by the more immediate interests of the plaintiffs in not having their personal belongings destroyed." *Id.* at 1573.

As in *Lavan, Justin, Pottinger* and *Kincaid*, the immediate seizure and destruction of Plaintiffs' personal possessions is not justified by the City's purported goal to sweep the sidewalks clean or "compassionately" disrupt the homeless to other locations. Because these violations are ongoing and devastating to Plaintiffs, the Court should issue a temporary restraining order and, subsequently, a preliminary injunction, restraining these ongoing violations.

2. Second Claim For Violation of the Fourteenth Amendment to the U.S. Constitution Actionable Pursuant to 42 U.S.C. § 1983.

The due process clause requires both notice *and* an opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 339-

343 (1976). Even if the City has provided adequate notice, it has failed to provide *any* opportunity to be heard, let alone an opportunity to be heard “at a meaningful time and in a meaningful manner.” *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Here, the City has provided no mechanism for homeless individuals to argue against the City’s actions prior to the destruction of their meager possessions.

Homeless individuals likely have numerous constitutional and statutory arguments they could raise to defeat the City’s seizure and destruction of their property. These include, but are not limited to, (1) claims that homeless individuals have nowhere else to go (because shelters are full and/or because they cannot seek refuge in an emergency homeless shelter because they lack required identification documents, they have already “timed out” of shelters by staying the maximum allotted time in available shelters, and/or because shelters cannot accommodate their disabilities), such that the City’s actions violate (a) the Eighth Amendment’s prohibition on cruel and unusual punishment, see *Jones v. Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), *vacated pursuant to settlement*, 505 F.3d 1006 (9th Cir. 2007), and/or (b)

the Fourteenth Amendment's requirements of substantive due process; (2) claims that the SPO and SNO, as applied, violate procedural due process (because, *inter alia*, they fail to comply with Hawaii's Language Access Law, Hawaii Revised Statutes ("HRS") chapter 321C); (3) claims that the SPO and SNO, as applied, violate the individual's right to intrastate travel. The City must provide notice *and* an opportunity to be heard; the City does not provide the latter (and, indeed, threatens individuals with arrest if they interfere with government agents as they seize and destroy property), such that notice alone fails to satisfy due process requirements.

"No state shall. . . deprive any person of life, liberty, or property, without due process of law." United States Const. Amend. XIV. Plaintiffs' personal possessions, even those the City has called "trash," represent most, if not all, of what they own, and plainly constitute property under the Fourteenth Amendment. *Fuentes v. Shevin*, 407 U.S. 67, 84 (1972); *see also Pottinger*, 810 F.Supp. at 1559 ("[A] homeless person's personal property is generally all he owns; therefore, while it may look like 'junk' to some people, its value should not be discounted.")

When a protected property interest is threatened, the court must consider the three *Mathews* factors to determine whether due process rights have been violated:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

The City's policies and practices deliberately ignore these clearly established factors. This District Court has granted preliminary injunctive relief where the City failed to provide the De-Occupy plaintiffs with notice of critical aspects of the SNO process. *Russell*, 2013 WL 6222714 at *15. While the City has added some language to the Summary Removal Notice ("SRN") related to the SNO, it has not provided any of the Plaintiffs with proper, legible SRNs (and often none at all) and there are other defects with the Notices of Enforcement which violate Due Process.

The government must provide notice and an opportunity to be heard *before* any seizure of private property, absent

"extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event."

United States v. James Daniel Good Real Prop., 510 U.S. 43, 53 (1993) (citations omitted). This is required even for property of limited value. *See Fuentes*, 407 U.S. at 84-87 (prior notice required before temporary seizure of household goods); *Propert v. District of Columbia*, 948 F.2d 1327, 1334 (D.C. Cir. 1991) (pre-seizure notice required even for parked "junk" cars).

Even if the City were to follow the SNO and SPO as each is written (which it does not), the City's procedures would also violate due process as applied to the Plaintiffs because:

a. The City's Notices announce the immediate destruction of perishable items, though these items are likely to be the only food items the homeless individuals intend to eat that day and, when destroyed based on alleged violations of the SNO, immediate destruction or disposal is not allowed and causes Plaintiffs, including children, to lack food and subsistence needed for survival;

b. They require the owners to travel large distances to reclaim their property, despite the fact many homeless persons have no means to do so;

c. They require the owners to pay a \$200.00 fee to collect the belongings seized pursuant to the SNO, unless the owner obtains a waiver. Holland Decl. ¶ 14, Exh. 12. However, owners cannot obtain a waiver unless they (i) go to the Department of Facility Maintenance (“DFM”) office in Kapolei, (ii) submit a six-page waiver request (available only in English), (iii) provide a mailing address (which some homeless individuals may not have) to which the City can send its written decision; (iv) wait some undetermined period of time for the City to rule upon the waiver request (despite the fact that owners must reclaim the property itself within 30 days of seizure); then, if the waiver request is granted, (v) take a second trip to a different Department of Facility Maintenance office – this time, likely (although not specified in the Notice) the DFM baseyard in Halawa Valley; and (vi) have some means of transporting all their belongings all at once (despite the fact that most homeless individuals do not own a car, and must rely on TheBus (which generally prohibits passengers from bringing large objects on

board)). See Declaration of Corilynn Wallace; TheBus Baggage Rules, available at <http://thebus.org/howtoride/BaggageRules.pdf>.
Id.

d. The City's SPO and SNO documents are written only in English, violating Hawaii's Language Access Law (set forth in Hawaii Revised Statutes ("HRS") chapter 321C).

Under these conditions, the City's seizure and disposal of Plaintiffs' property without adequate prior notice or hearing violates Due Process. See *Lavan*, 797 F.Supp.2d at 1017–18, *aff'd* 693 F.3d 1022 (9th Cir. 2012).

The *Mathews* factors demonstrate a clear need for *some* opportunity to be heard prior to the destruction of Plaintiffs' property. First, the City's employees are seizing and destroying the very necessities of life: shelter and food. Second, because the City is destroying much more than perishable goods (or contraband) in violation of the SNO and SPO, and is not impounding property or providing any means for Plaintiffs to move the property before seizure to another location (because there are no other public spaces to which they can move their property pursuant to the plain language of the SPO), it is erroneously depriving Plaintiffs of their

necessities and prolonging their homelessness. Third, the City has already accepted the fiscal and administrative burdens of impounding the property through enactment of the SNO and SPO, so following those ordinances should not create any additional burden on the City, but would avoid irreparable harm to the Plaintiffs.

Even if the City can show that the hearing procedure for *impounded* property satisfies due process, it will never be able to show that it is constitutional to destroy property without a hearing. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) ("[T]he State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement.") As with the "sweep of derelict vehicles" in *Wong v. City and County of Honolulu*, 333 F.Supp. 2d 942 (D. Haw. 2004), no reasonable City officer could believe that the immediate destruction of Plaintiffs' shelters and perishable food items here comports with due process. *Id.* at 955-956. *See also James v. City and County of Honolulu*, ___ F. Supp. 3d ___ (D. Haw. 2015), 2015 WL 5076978, *9 (upholding the SPO against a due process challenge precisely because of the procedural protections the City

ignores in the instant case: claimants could “retrieve [property] post-seizure” and “may simply seek the[] return [of property] from the City.” (quoting *De–Occupy Honolulu v. City & Cnty. of Honolulu*, 2013 WL 2285100, at *6 (D. Haw. May 21, 2013)).

The "most basic of property interests encompassed by the due process clause" is the "continued ownership" of "personal possessions." *Lavan*, 693 F.3d at 1031. In the application of the SNO and SPO, and through its summary disposal of Plaintiffs' shelters, food and other personal possessions, the City violated Plaintiffs' Fourteenth Amendment rights to due process and a reasonable opportunity to be heard. "Because homeless persons' unabandoned possessions are 'property' within the meaning of the Fourteenth Amendment, the City must comport with the requirements of the Fourteenth Amendment's due process clause if it wishes to take and destroy them." *Lavan*, 693 F.3d at 1033.

B. Plaintiffs Are Likely To Suffer Irreparable Harm In The Absence of Temporary and Preliminary Relief.

"[A]n alleged constitutional infringement will often alone constitute irreparable harm." *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir.1997) (citation and quotation marks

omitted); *see also Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir.2008) ('Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm.'). *reversed on other grounds*, 131 S.Ct. 746 (2011)." *Russell*, 2013 WL 6222714 at *17. "[W]here a defendant has violated a civil rights statute, we will presume that the plaintiff has suffered irreparable injury from the fact of the defendant's violation." *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001).

Local government "sweeps" which confiscate (and often destroy) the property of the homeless cause such individuals irreparable damage. Confiscated property often includes basic necessities required for human survival, including food, bottled water, medications, and clothing. *See Wayne Wagner, Homeless Property Rights: An Analysis of Homelessness, Honolulu's "Sidewalk Law," and Whether Real Property is a Condition Precedent to the Full Enjoyment of Rights Under the U.S. Constitution*, 35 U. Haw. L. Rev. 197, 223 (2013). Life-sustaining medications and medical equipment impounded or discarded by government officials are often impossible to replace, and the consequences of their loss can

be deadly. Tristia Bauman, *No Safe Place: The Criminalization of Homelessness in U.S. Cities*, National Law Center on Homelessness & Poverty, at 26 (2014) (“[T]he loss of medicine or medical equipment can become a matter of life and death.”), *available at* http://www.nlchp.org/documents/No_Safe_Place. When government sweeps seize tents, tarps, and building materials, homeless individuals are also deprived of shelter. *See Homeless Property Rights* at 223. Tents and other building materials are costly, and most homeless cannot immediately replace such property. Where the surrounding area lacks adequate shelter space and where the homeless are subsequently forced to erect “tent cities,” these government actions effectively dispossess the homeless of their only protection from the natural elements. *See* Lisa M. Kline, *Criminals by Necessity: The American Homeless in the Twenty-First Century*, 5 Liberty U.L. Rev. 275, 295 (2011).

Identification documents are often frequently taken during government sweeps, preventing affected individuals from obtaining employment or cashing a paycheck, seeking temporary refuge in homeless shelters (assuming space is available), and receiving other services. *See Homeless Property Rights* at 223

("[L]aws and practices that strip homeless of their birth certificates and identification and social security cards effectively disenfranchise the homeless, and make it virtually impossible for homeless people to secure legal employment."). The dispossession of identification documents and the resulting disastrous consequences are particularly acute in Honolulu: surveys conducted of the homeless of Kaka'ako, the Kapalama Canal, and A'Ala Park during the Spring of 2015 show that 57 percent of those affected by Defendant's sweeps had their identification confiscated. Tai Dunson-Strane and Sara Soakai, *The Effects of City Sweeps and Sit-Lie Policies on Honolulu's Houseless*, Department of Urban and Regional Planning University of Hawai'i at Manoa, at 22 (June 2015) (further noting that "the confiscation of identification cards and documents has had the most significant impact negatively affecting [the survey participants'] lives."), *available at* http://blog.hawaii.edu/durp/files/2015/06/Houseless-Honolulu-Report.small_.pdf; Holland Decl. ¶ 18, Exh. 16.

Of the homeless who had their identification documents seized, 81 percent were unable to reclaim them. *Id.* at 24-25 (describing that lack of a fixed mailing address, lack of alternate

forms of identification, and fees have prevented individuals from replacing their destroyed documents). The government's confiscation of identification documents and other necessities is routinely deemed to constitute irreparable harm in light of the disastrous and irreversible consequences such deprivations have on the homeless. *See, e.g., Russell v. City and Cnty of Honolulu*, 2013 WL 6222714, No. CIV. 13-00475 LEK (D. Haw. Nov. 29, 2013) *reconsideration denied*, 2014 WL 356627, No. CIV. 13-00475 LEK (D. Haw. Jan. 30, 2014) (finding that the imminent seizure of food, medication, shelter, and clothing from a (De)Occupy Honolulu encampment deemed a sidewalk nuisance constituted irreparable harm); *Lavan v. City of Los Angeles*, 797 F. Supp. 2d 1005, 1019 (C.D. Cal. 2011), *aff'd* 693 F.3d 1022 (9th Cir. 2012), *cert. denied* 133 S. Ct. 2855 (2013) (finding that homeless individuals whose personal property was seized and destroyed had established that irreparable injury would likely result in the absence of preliminary injunction); *Kincaid v. City of Fresno*, 2006 WL 3542732, No. 106CV-1445 OWW SMS (E.D. Cal. Dec. 8, 2006) (finding that seizure of the homeless' food, medicine, health supplies, and bedding results in "significant, legally cognizable harms" amounting

to irreparable harm). Courts have also taken care to note the psychological damage caused by such sweeps. *See Kincaid*, 2006 WL 3542732 *40, No. 106CV-1445 OWW SMS at 40 (“The irreparable harm from the City’s practices also includes the harm to homeless people’s security and dignity”); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1559 (S.D. Fla. 1992) (“For many of us, the loss of our personal effects may pose a minor inconvenience. However... the loss can be devastating for the homeless”).

Further, several Plaintiffs (and putative class members) face the imminent threat of being subjected to additional SNO and SPO enforcement, *see* Declarations of Tracy Martin, Jonathan Cortez, and V.T., and the City has announced ongoing enforcement procedures through its September 2015 Signs that show it plans to engage in further sweeps without affording Plaintiffs proper notice and without adequate procedures for the reclamation of their personal property. *See* Gluck Decl. Exh. 1, 2, 4. Plaintiffs will suffer irreparable harm unless the City is enjoined from seizing and destroying the property of homeless individuals who have no place to live other than the streets of Honolulu.

C. The Balance of the Equities Tips In Favor of Plaintiffs.

"To determine which way the balance of the hardships tips, a court must identify the possible harm caused by the preliminary injunction against the possibility of the harm caused by not issuing it." *Univ. of Hawai'i Prof'l Assembly v. Cayetano*, 183 F.3d 1096, 1108 (9th Cir.1999). Here, the balance of hardships tips sharply to Plaintiffs.

The City has destroyed, and will continue to destroy, Plaintiffs' meager possessions. Plaintiffs are at immediate risk of being deprived of their shelter – tarps, tent poles, and other items used to create some semblance of a barrier from sun, rain, and wind. Considering similar issues and finding that the balance tipped in favor of the homeless plaintiffs and against the City, the court held in *Russell*:

Without an injunction, Plaintiffs will arguably continue to suffer constitutional violations. If this Court grants an injunction and orders the City to return the items identified in the notices issued [to plaintiffs], the City will benefit by no longer having to store the property and will suffer the minimal monetary loss of not being able to collect fees [plaintiffs].

2013 WL 6222714 at *17.

Russell also found: ". . . the City would incur minimal burdens from changing its Summary Removal Notices and its Article 16 enforcement procedures to provide property owners with notice of the right to reclaim necessities without a fee and without a hearing and the right to seek a waiver of the fee for any remaining items from the hearings officer." *Id.* The same is true here. There is no hardship to the City to return property to Plaintiffs nor will the City suffer at all if it is ordered to follow its own ordinances and the Constitution.

D. An Injunction Is In the Public Interest.

The public has an interest in ensuring the City operates in a constitutional manner in its enforcement of the SNO and SPO. *See Sammartano v. First Judicial District Ct.*, 303 F.3d 959, 973 (9th Cir. 2002). Although the public also has an interest in being able to safely use public sidewalks and to be free from sidewalk nuisances. In balancing these interests, the *Russell* court held that the public interest factor weighed in favor of issuing the preliminary injunction where the City was not precluded from enforcement, but was only directed to do so in a manner that was constitutional. *Russell*, 2013 WL 6222714 at *17. This is also the case here.

E. The Requirement of a Bond Should Be Waived.

Waiver or imposition of a minimal bond is appropriate under Fed. R. Civ. P. 65(c) where, as here, a public interest organization is enforcing public rights on behalf of individual plaintiffs. *See Save our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2004) (recognizing the court’s “long-standing precedent that requiring nominal bonds is perfectly proper in public interest litigation”); *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999) (district courts have discretion to waive Rule 65(c)’s bond requirement). A bond is unnecessary “when [the district court] concludes there is no realistic likelihood of harm to the defendant from enjoining his or her conduct.” *Jorgensen v. Cassidy*, 320 F.3d 906, 919 (9th Cir. 2003); *see also Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999) (holding that, when there is no likelihood of harm to the party enjoined, the requirement of a bond may be dispensed entirely).

IV. CONCLUSION.

The September Signs and recent actions perfectly illustrate the City’s actual pattern and practice of summarily destroying the property of homeless persons. The City may not take

property "like a thief in the night" or without properly announcing its intentions and giving "the property owner a chance to argue against the taking." *Clement v. City of Glendale*, 518 F.3d 1090, 1093 (9th Cir. 2008).

Even after multiple prior lawsuits, and despite the filing of this new case, the City is recalcitrant and cannot adhere to the minimal standards it has set for itself by ordinance nor can it refrain from summarily destroying the property of its most destitute residents. Plaintiffs respectfully request that the Court issue a temporary restraining order and preliminary injunction.

DATED: Honolulu, Hawai`i, September 21, 2015.

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Local Rule 7.5(b) Certificate

Counsel for Plaintiffs certifies that the foregoing Memorandum in Support of Motion is in 14 point Bookman Old Style and contains 8,347 words according to the Word Count function in MicroSoft Word.

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