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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CRUZ

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

MIGUEL DELEON and ANNA RICHARDSON

Defendant.
_____/

No. CV162525
(Consolidated with CV162526)

RESPONSE TO PLAINTIFF'S TRIAL BRIEF

Next Court Date: TBD
Department: 3
Time: TBD

I. LEGAL ARGUMENT

A. Defendant's Conduct Does Not Constitute a Public Nuisance Which May Be Enjoined

The Plaintiff in this matter, citing from the California Civil Code §§ 3479 and 3480 as well as Santa Cruz Municipal Code § 4.01.101(16), argues that the conduct of Mr. Deleon and Ms. Richardson constitutes a public nuisance. In support of that argument, and without basis in fact, the Plaintiff argues that that Mr. Deleon and Ms. Richardson's actions are; (1) injurious

to health because of sanitation issues; (2) safety of others is impacted when the defendants sleep in doorways; (3) free use of property and comfortable enjoyment of life downtown is interfered with when the defendant's "take over" parks and plaza's.

1. Factual Arguments

Each of these factual statements is unsupported by the record. General statements contained in affadavits submitted by the Plaintiff here that homeless campsites might have sanitation issues does not mean that the times Mr. Deleon and Ms. Richardson were cited for camping necessarily involved any sanitation issues. In point of fact, several of the citations issued to Mr. Deleon and Ms. Richardson were done at the one public bathroom in downtown Santa Cruz, lending credence (albeit circumstantial) that sanitation is an issue that these two defendant's take seriously.

Further, the record of Mr. Deleon and Ms. Richardson does not support any "safety of others" argument. The only "confrontations" Ms. Richardson and Mr. Deleon have had with the community involves 1st Amendment protected arguments with law enforcement officers and/or City employees who continually cite them for the camping ordinance (SCMC 6.36.010(a)(1)) outside of the times and dates when it is supposed to be enforced (SEE 6/29/09 citation at 1739 p.m.; 9/14/09 citation at 1140 a.m.; 11/4/09 citation at 0844 a.m.; 1/26/10 citation at 1532 p.m.; 2/12/10 citation at 1401 p.m.; 1/9/10 citation at 1321 p.m.; 1/26/10 citation at 1733 p.m.; 3/16/10 citation at 1054 a.m.; 3/9/10 citation at 0940 a.m.; 11/14/09 citation at 1200 p.m.; 11/4/09 citation at 0844 a.m.; 9/30/09 citation at 1211 p.m.; 6/4/09 citation at 1256 p.m.; 8/12/09 citation at 1215 p.m.; 6/29/09 citation at 1835 p.m.; 10/23/09 citation at 0847 a.m.) SEE Houston v. Hill (1987) 483 U.S. 1001; People v. Quiroga (1993) 16 Cal.App.4th 961. It is not difficult to see why Mr. Deleon and Ms. Richardson may have engaged in verbal wordplay (which has never escalated into violence) when local law enforcement continually cites them for violations which are not illegal!

The final factual issue raised by the Plaintiff is that the defendant's "take over parks and plazas." As part of the discovery process here, the Plaintiff has turned over 64 pages of

citations issued to the defendants over the past several years. Not a single one of them indicates anywhere that there has been any "taking over" of parks or plazas. This type of activity seems relegated to angry UC students in this day and age.

2. Legal Issues

Supporting the factual leaps of faith required to come to these conclusions, the Plaintiff asks the court to enter into another leap of faith, arguing that support for their position comes from the case of People ex re. Gallo v. Acuna (1997) 14 Cal.4th 1090 at 1120. The Plaintiff's reliance on Gallo illustrates an essential weakness in their argument–that there is no case that supports their basic proposition that a court can and should grant a permanent injunction, on the facts presented here.

More importantly, the issue before this court is whether a permanent injunction should issue. Injunctions under any form are "extraordinary relief that should be granted with great caution". Witkin 4th Ed § 355, p. 284-285. This is particularly true of injunction issued before a trial on the merits. Ibid. It is possible for extraordinary circumstances to warrant extraordinary measures–in point of fact that is what occurred in Gallo cited by the Plaintiff.

Consider this factual recitation taken directly from Gallo as comparison to the issues and facts in this case:

> The 48 declarations submitted by the City in support of its plea for injunctive relief paint a graphic portrait of life in the community of Rocksprings. Rocksprings is an urban war zone. The four-square-block neighborhood, claimed as the turf of a gang variously known as Varrio Sureo Town, Varrio Sureo Treces (VST), or Varrio Sureo Locos (VSL), is an occupied territory. Gang members, all of whom live elsewhere, congregate on lawns, on sidewalks, and in front of apartment complexes at all hours of the day and night. They display a casual contempt for notions of law, order, and decency--openly drinking, smoking dope, sniffing toluene, and even snorting cocaine laid out in neat lines on the hoods of residents' cars. The people who live in Rocksprings are subjected to loud talk, loud music, vulgarity, profanity, brutality, fistfights and the sound of gunfire echoing in the streets. Gang members take over sidewalks, driveways, carports, apartment parking areas, and impede traffic on the public thoroughfares to conduct their drive-up drug bazaar. Murder, attempted murder, drive-by shootings, assault and battery, vandalism, arson, and theft are commonplace. The community has become a staging area for gang-related violence and a dumping ground for the weapons and instrumentalities of crime once the deed is done. Area residents have had their garages used as urinals; their homes commandeered as escape routes; their walls, fences, garage doors, sidewalks, and even their vehicles turned into a sullen

> canvas of gang graffiti.
>
> The people of this community are prisoners in their own homes. Violence and the threat of violence are constant. Residents remain indoors, especially at night. They do not allow their children to play outside. Strangers wearing the wrong color clothing are at risk. Relatives and friends refuse to visit. The laundry rooms, the trash dumpsters, the residents' vehicles, and their parking spaces are used to deal and stash drugs. Verbal harassment, physical intimidation, threats of retaliation, and retaliation are the likely fate of anyone who complains of the gang's illegal activities or tells police where drugs may be hidden.
>
> Among other allegations, the City's complaint asserted that the named defendants and others "[f]or more than 12 months precedent to the date of [the] complaint, continuing up to the present time . . . [have] occupied [and] used the area commonly known as 'Rocksprings' . . . in such a manner so as to constitute a public nuisance . . . injurious to the health, indecent or offensive to the senses, [and] an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property by those persons living in the . . . neighborhood."

Gallo v. Acuna 14 Cal.4th at 1101.

Consider the crimes evidence that the Gallo court was attempting to contain; murder, attempted murder, drive by shootings, arson, theft, vandalism and battery. The Gallo court noted that to even consider taking an action as extraordinary as a permanent injunction, the action sought to be enjoined must be both (a) substantial and (b) unreasonable. Id at 1105. The ongoing activity by the defendants must effect an entire community or neighborhood or a considerable number of persons. Id at 1104 citing from People exrel. Busch v. Projection Room Theater (1976) 17 Cal.App.3d 42.

First and foremost, the actions of Ms. Richardson and Mr. Deleon are not substantial under any measure. Perhaps their regular contacts with local law enforcement is substantial, but that is due to their apparent attractiveness and not to any criminal conducta on their part. The Plaintiff in this matter has stated on several occasions both before this court and to the press that Mr. Deleon and Ms. Richardson are scofflaws who have amassed over 60 citations over the past several years. A brief review of the citations given to the defendants in this matter show that the vast majority of them are spurious affronts to both the conscience of the individuals involved and to the court.

In terms of true criminal matters, a review of Open Access shows Mr. Deleon and Ms.

Richardson to be fairly low on the criminal totem pole in the county. Taken in tandem, Open Access shows convictions in 2008 (for disturbing the peace under Penal Code § 415) and two in 2007 (for Health & Safety 11357–less than an ounce of marijuana and failure to stop at a stop sign.) This is not "substantial" activity which would support the extraordinary measures being requested by the Plaintiff.

Reflective of this was the Plaintiff's attempt to hold the defendant's in contempt on March 19, 2010 before the Honorable Judge Volkmann. On that date, the Plaintiff's attempted to have to court issue a contempt order based on the actions of the defendant's. The factual basis for that request were three camping ordinance violations alleged against the defendants. The Court found that none of them constituted a violation of the camping ordinance and refused to issue a contempt citation. The Plaintiffs had their day in court to prove up a select few of these "over 60 violations" and were unable to do so. The record speaks for itself in terms of the "substantial" number of violations. Further, it cannot even begiun to be equated to the number and nature of the Rocksprings events that lead the Santa Clara Court to issue its temporary injunction.

As for the unreasonable prong in the Gallo argument, the fact that this county has not provided for a growing homeless population, despite being told by its own task force that it had to do so more than a decade ago is the most unreasonable issue before this court. The reasonableness argument is circular and is best addressed in the necessity argument under (E.) below. However, counsel does question what other "reasonable" options the Plaintiff would have had Mr. Deleon and Ms. Richardson take to avoid these legal, but apparently citable contacts with local law enforcement.

Like Gallo the case of People v. McDonald (2006) 137 Cal.App.4th 521 is cited by the Plaintiff in support of the proposition that actions do not necessarily have to be violent to be a public nuisance. No argument need be made to this statement since it's irrelevant (and simply quotes from Gallo anyway.) No one here is stating that public urination, in a certain setting, might be construed as a public nuisance. But the issue in this case is whether, if the

Plaintiff can prove a public nuisance, a pernanent injunction should issue. McDonald is silent on that issue and does not touch the basic analysis for determination laid out in Gallo.

3. The Court Cannot Abatement Actions That Are Not Ongoing

In a series of cases, beginning with Gilbert v. Peck (1912) 162 Cal. 54 121 and including People v. Goddard (1920) 47 Cal.App. 730 and Stephens v. Seccombe (1930) 103 Cal.App. 306, the California Supreme Court laid down the basic legal principal that no injunction shall be issueed to abate a nuisance that is no longer continuing. "[W]here a nuisance to abate which an action has been commenced has been abated or suppressed by the parties themselves charged with maintaining the nuisance or otherwise prior to the commencement of the action, the further prosecution of the action cannot be maintained, and the action should be dismissed...." People v. Goddard 47 Cal.App. At 740.

B. Plaintiff's Request for an Injunction Must Fail Under the Rationale of IT Corporation v. County of Imperial (1983) 35 Cal.3d 63.

At the court hearing preceeding the issuance of the extremely limited temporary injunction, all parties agreed that the appropriate general standard by which to proceed, based on the vindication of ordinances as the basis of an injunction where injunctive relief, is provided by statute is IT Corporation v. County of Imperial (1983) 35 Cal.3d 63. Specifically, the City must prove that the ordinances in question were violated. The issue to be determined in IT Corporation was: What is the proper test for issuance of a preliminary injunction when a government entity seeks to enjoin an alleged violation of a zoning ordinance which provides for specific injunctive relief? IT Corporation, supra, 35 Cal.3d at 66.

The IT Corporation court held that once a government entity establishes that it will probably succeed at trial, a rebuttable presumption arises that public harm will result if an injunction does not issue. Id. at 72. If the defendant shows that it would suffer grave or irreparable harm from the issuance of the preliminary injunction, the court must examine the relative harms to the parties. Id.

Once the defendant has made such a showing, an injunction should issue if-after consideration

of both (1) the degree of certainty of the outcome of the merits, and (2) the consequences to each of the parties of granting or denying interim relief- the trial court concludes an injunction is proper. Id.

The court went on to hold that,

> On the other hand, the harm which the defendants might suffer if an injunction were issued may so outweigh that which the plaintiff might suffer in the absence of an injunction that the injunction should be denied even though the plaintiff appears likely to prevail on the merits. *The ultimate goal of any test to be used in deciding whether a preliminary injunction should issue is to minimize the harm an erroneous interim decision may cause*. Id. at 73. [emphasis added.]

In evaluating the instant request for preliminary relief, the court should utilize the above standard as determined at the hearing on March 20, 2009.

1. Plaintiffs Cannot at this Time Show Success on the Merits.

A. Plaintiff Has Not Established that it is More Probable Than Not That an Normal Person in the Community Would Be Substantially Annoyed By These Particular Defendants' Behaviors Looking at the Whole Situation Impartially and Objectively Pursuant to Gallo (1997) 14 Cal.4th 1090, 1105.

In People ex re. Gallo v. Acuna (1997) 14 Cal.4th 1090 , 1105, the California Supreme Court ruled that in order for an injunction to be issued the petitioner must show "a significant harm, defined as a real and appreciable invasion of the Plaintiff's interests, one that is definitely offensive, seriously annoying or intolerable. ... The question is not whether the particular Plaintiff found the invasion unreasonable but whether persons generally, *looking at the whole situation*, *impartially and objectively*, would consider it unreasonable." Id.

This court should also consider historically Plaintiff's unprecedented and extraordinary request that does not preserve the status quo but changes it to assesses more severe punishment for acts that are already sanctioned by the criminal laws.

> It is an extraordinary power, and is to be exercised always with great caution and in those cases only where it fairly appears "upon all the papers presented, before such injunction is granted, that the Plaintiff will suffer irreparable injury if it be not issued, or that it is necessary to preserve the estates of the parties, or some sufficient cause showing that need of hasty action exists." Joyce on Injunctions, § 109. The power, therefore, should rarely, if ever, be exercised in a doubtful case. "The right must be clear, the injury impending and threatened, so as to be averted only by the protective preventive process of injunction."

Schwartz v. Arata, (1920) 45 Cal.App. 596, 601.

The only multiple ordinance violations that are supported by affidavits (evidence) are violations of the camping ban. The Plaintiff has proved that each defendant has been cited on multiple occasions for violating the camping ban when the Armory Shelter had available beds pursuant to SCMS 6.36.055. Two of those occasions were overlapping, meaning both Defendants were cited for the same incident, February 22, 2008 and March 14, 2008. Those two incidents occurred in a public park, not a business, at 4:23am and 6:36am respectively. Given the times, Plaintiffs cannot establish "seriously annoying or intolerable" standard. One of the other situations was for merely lying a sleeping bag on the day the before the Armory shelter closed. The one ticket for trespassing was for sitting at the post office picnic table, where both Defendants were cited at the same time. The noise complaint was the one incident at Borders Bookstore, previously discussed, with declarant Szarek as the complaining party. The open container was for possessing one 12 oz bottle of beer, as an adult, in a park on one occasion.

Further, as noted above, the majority of the offenses for which the defendants were cited occurred outside of the times allocated a violations under the Municipal Code. The camping ordinance cited by the Plaintiff is not all encompassing. It covers the time period between 11:00 p.m. (2300 hours) and 8:30 a.m. (0830 hours.) Ony a very select few, and only the very oldest of the citations noited by the Plaintiff even fall within that category. A cursory review of the citations provided by the Plaintiff shows only one violation which occurred during those time periods.

As far as the incidents at Bunny's Breezeway, these are accusations that have not been substantiated even to the point of the issuance of a citation. Further, the court must consider that for the purposes of the injunction, all of the citizen declarants are offering hearsay, not subject to cross examination. All of these declarants are managers of businesses who have a vested interest in the granting of this injunction to remove Defendants from the sight of their customers who view Defendants as undesirable. Therefore, the declarants are not impartial pursuant to the Gallo test.

The accusations of vandalism, defecation, and urination, which are indeed a serious health and aesthetic risks are admittedly based on pure speculation and inference, not personal observation. "The

smell of urine" in an undefined locale, near a homeless encampment occupied by several individuals is not evidence that Mr. Deleon was urinating in public. As for Plaintiff's assertion that Defendants are belligerent and rude, this behavior is not illegal and is often provoked, especially considering the times both temporal and in terms of numerosity) and places that defendants have been cited. It is well outside the role of the court to control the otherwise legal disposition of Defendants where Defendants perceive they are the target of selective enforcement and constant harassment by a City who does not provide its homeless population with the resources it needs need to: safely store their items, use the public facilities in peace, sleep in shelters instead of protective enclaves of breezeways and well lit postal property to protect themselves from theft and violence.

Defendants also assert that these declarations are merely accusations from interested parties who have not been subject to cross-examination. No normal impartial person in Santa Cruz would think that getting one citation for having an open container or one citation for noise would warrant the court's use of its extraordinary equitable powers. Neither would an impartial person believe that the court should enjoin, over and above criminal sanctions, sleeping in public where shelter space is inaccessible and there is no evidence to show that the sleeping is occurring during business hours. For all these reasons the Plaintiffs will fail to succeed on the merits by proving that a *normal* person would be substantially annoyed by these particular Defendants considering the whole situation in light of the de minimus citations and violations that the Plaintiff can actually substantiate pursuant to Gallo (1997) 14 Cal.4th 1090, 1105.

2. Defendant's Liberty Interest Greatly Outweighs Any Alleged Harm to Plaintiff.

A. Plaintiff's Harm

The harm to the Plaintiff that it can actually prove to be caused by the Defendants is superficial at best and goes to the aesthetic of order and tidiness more than to the health and public safety. This Court should not consider the alleged unsanitary conditions and vandalism caused by unidentified homeless people and attributed, through admitted speculation, to Defendants.

Plaintiff has not shown any substantial pattern of blocking sidewalks or monuments. Plaintiffs presented one citation for each violation and both for Miguel Deleon only. Further, those two citations

and the several others related to camping are not voluntary but are due to an acute lack of resources and shelter space offered by Plaintiff. See generally, First and Second Declaration of Anna Richardson and Declaration of Paul Lee and Paul Brindel, incorporated by reference from the Defendant's Response to Supplemental Brief.

The other allegations consist primarily of Defendants' unfriendly and aggressive behavior when they are badgered and ordered around pursuant to constant citations issued by Plaintiff's employees. Defendants' attitudes are not subject to injunctive relief. It is almost as if the Plaintiff wants to deny Defendants a sufficient level of resources to maintain desirable standards and then expect Defendants to be happy and cordial about city employees who make Defendants' survival that much harder through hyper technical enforcement of Plaintiff's ordinances.

B. Defendant's Harm

The Defendants in this case do not deny that due to the lack of resources available to them and due to their economic circumstances they are forced to live outside the strictures of the municipal codes raised by the Plaintiff such as sleeping outside, lying in public places or being in possession of large amounts of personal items.

If this injunction were granted Defendants could face jail for merely sleeping. Defendant would not be able to possess their personal items even though they are not allowed to use public city lockers to store their items. See Declaration of Maintenance Worker Ruiz. Defendants would also have to secret themselves in places that are not safe.

In other words, the Defendants would not practically be allowed to exist as homeless downtown without the threat of immediate incarceration. The punishment for their same act would go from an city ordinance infraction to a state misdemeanor, Penal Code § 166(a) without an act from the legislature changing the punishment of the act.

Unless released on their own recognizance, any ordinance violation downtown would result in incarceration until the case was concluded. The sentence could be very severe. Moreover, a civil contempt could potentially result in indeterminate incarceration for acts necessary for survival. Further, unlike a criminal action, appealing from an injunction, Defendants would not have a right to

direct appeal, instead having to rely on review by writ which is discretionary and not mandatory. Considering the preliminary nature of the injunctive relief, all of these scenarios would be set into motion for acts that are already subject to criminal enforcement. At this point, the preliminary relief would not be preserving, but changing the status quo in a proceeding supported by only hearsay declarations that are merely accusations by interested parties not subject to cross-examination.

As a result Defendants would be forced to sleep in unsafe places where they face theft and violence to avoid detection and substantial and unknown punishment. Plaintiffs cannot use the Court's power to simply shuttle "undesirable" members of society into the brush.

Defendants also mitigate their behavior by attempting to cause as little disruption and negative impact as possible under the circumstances. Second Declaration of Anna Richardson, ¶ 6. Further, Anna Richardson gives a significant portion of her time volunteering at the Red Church on Cedar Street in downtown Santa Cruz, where she assists with the provision of food and other services to homeless individuals. Id. 5. Ms. Richardson is also attempting to gain employment. Id. ¶ 4.

In balance, considering the behavior for which Plaintiffs can actually prove harm, considering Defendant's mitigation of that behavior, and considering Defendants' likely incarcerations, Defendants' potential harm is unquestionably greater.

C. Plaintiff's Will Not Be Able To Overcome Affirmative Defense Available to the Defendants

1. Necessity Defense

Defendants incorporate their necessity argument from their prior Opposition Brief as if fully set forth herein. Plaintiffs now assert that in order to raise the defense of necessity, Defendants have to show that they violated the law: 1) to prevent a significant evil, 2) with no adequate alternative, 3) without creating a greater danger than the one avoided, 4) with good faith belief in the necessity, 5) with such belief being objectively reasonable, and 6) under the circumstances in which he or she did not substantially contribute to the emergency. In Re Eichorn (1998) 69 Cal.App.4th 382, cited by Plaintiffs and Defendants, clearly establishes that under the circumstances, Defendants can meet these tests. In Eichorn, the court analyzed all these factors under the same circumstance as Defendants',

namely the enforcement of a camping ban. The Court held that the Defendant presented evidence sufficient to warrant a necessity defense where, "there was substantial if not uncontradicted evidence that Defendant slept in the civic center because his alternatives were inadequate and economic forces were primarily to blame for his predicament." Id. at 390. The court held, "Sleep is a psychological need, not an option for humans." Id. at 390. The Eichorn court also rejected the argument, now asserted by the Plaintiff, that the necessity defense is not available because Defendant was not "involuntarily" homeless where he did not choose to go to the armory on the specific night of the citation where the Defendant knew the shelter to be generally full. Id. at 387.

In the instant case, the Defendants, through the declarations of two of the foremost experts on homelessness in Santa Cruz, can establish that the local shelters can only accommodate either 6.7% or 10.8% of the homeless population. Declaration of Paul A. Lee, ¶ 8 & 9. In Eichorn, the same statistic was 8.3% (1500 homeless, 125 beds).

Therefore, even if Plaintiffs can prove the camping ordinance was violated the Defendants will likely succeed in defending their actions on the basis of necessity.

2. Cruel and Unusual Punishment

Defendants assert that enforcement of the camping ban under the circumstances is a violation of the Eighth Amendment to the United States Constitution. Defendants urge the Court to review Jones v. City of Los Angeles (9th Cir. 2006) 444 F. 1118. The Jones court specifically held that enforcement against homeless individuals, at all times and in all places within the City, based on an ordinance that criminalized sitting, lying, or sleeping on public streets and sidewalks, violated the Eighth Amendment's prohibition against cruel and unusual punishment where the City failed to provide adequate shelter space to accommodate homeless city residents.

Plaintiffs assert that the court cannot rely on Jones because it was de-published by agreement of the parties and not due to any change in or superceding law. Defendants agree Jones is not precedential and is not cited here as authority. However, that fact does not prevent this Court from reading the case, following its logic nor relying on any cases cited within Jones including the Eighth

Amendment to the United States Constitution. In so far as Jones addressed the constitutionality of punishing the exact acts in question in the manner at issue, it may provide some relevant basis for the court's review of the constitutionality of the relief requested by Plaintiff under the Eighth Amendment to the United States Constitution. This is particularly true where the Jones court issued its ruling based on United States Supreme Court rulings to which all parties are bound. These case are Robinson v. California (1962) 370 U.S. 660 and Powell v. Texas (1968) 392 U.S. 514. Specifically, the court cited Robinson and Powell as holding, "...Robinson also supports the principle that the state cannot punish a person for certain conditions, either arising from his own acts or contracted involuntarily, or acts he is powerless to avoid." Powell, supra, 392 U.S. at 567. Powell and Robinson read together in conjunction to Eichorn's ruling compel us to conclude that enforcement of the [camping ban] at all times in all places against homeless individuals who are sitting, lying or sleeping ... because they cannot obtain shelter violates the Cruel and Unusual Punishment Clause.

Defendants assert that the basis of the Jones decision did not originate with the Jones court, but instead with the United States Supreme Court, and therefore the same logical inference should be drawn by this court. This court should rule the camping ban under the current shelter shortage unenforceable in this case because the camping ban violates the Eighth And Fourteenth Amendment of the United States Constitution and parallel portions of the California Constitution.

3. Separation of Powers/ Equal Protection

Defendants assert that if this court were to grant the relief requested by Defendants, the preliminary injunction would violate the Separation of Powers Clause of the United States and Article III, section 1 of the California Constitution. Plaintiffs seek to enjoin specific acts that already have criminal sanctions. The legislature has determined that all of those acts are to be charged as infractions. The court would be creating what would amount to *ad hoc* enhancement of a criminal act that would transform the infraction into a misdemeanor. The California Supreme Court held, "Subject to the constitutional provision against cruel and unusual punishment, the power to define crimes and fix penalties is vested exclusively in the legislative branch." Manduley v. Superior Court (2002) 27

Cal.4th 537, 552.

In People v. Wilkerson (2004) 33 Cal.4th 821, 840 the California Supreme Court further held,

> The decision of how long a particular term of punishment should be is left properly to the Legislature. The Legislature is responsible for determining which class of crimes deserves certain punishments and which crimes should be distinguished from others. As long as the Legislature acts rationally, such determinations should not be disturbed." Id.

The violation of the relevant ordinances was determined by the legislature to be punishable only by fine as a non-jailable infraction. That same act could now be punished by pretrial incarceration followed by potential sentence of incarceration of up to one year in jail for the exact same act previously determined by the legislature to be an infraction. Penal Code Section 166(a)(4). The determination of maximum punishment for a crime is the sole province of the legislature. The role of the Court is to determine whether applying the facts to the law the accused should be held responsible based on the limitations imposed by the legislature. Manduley, 27 Cal.App.4th at 552. By enacting such an *ad hoc* enhancement the court would be in violation of the Separation of Powers provisions of the United States and California Constitutions.

Moreover, this substantial enhancement of punishment would be exclusive only to the Defendants in this particular case in violation of the Defendants rights to equal protection of the laws pursuant to the Fourteenth Amendment to the Untied States Constitution and Article I, Section 7 and Article IV, Section 16(a) of the California Constitution. The court would be fashioning an *ad hoc* criminal enhancement for common acts committed in Santa Cruz County. However, in all of Santa Cruz County only the Defendants would be subject to the enhanced punishment fashioned by the court for criminal acts that are committed often by other people and under the exact same circumstances as Defendants. The only reason for this differential (in) punishment would be because the Plaintiff, City of Santa Cruz, made the arbitrary determination that an *ad hoc* judicial enhancement of punishment should be fashioned by the court against these particular Defendants for criminal acts that already have punishments. Moreover, Plaintiff, the City, is the legislative body that determined through the democratic process that the punishment for violations of the ordinances that now apply equally to everyone should be an infraction.

The Court must also consider that the Plaintiff has the power to change the punishment for the acts complained of if they wish. Therefore Plaintiff, City of Santa Cruz does not need the assistance of the court for anything other than non-democratic efficiency and individualized punishment.

Under the circumstances, considering the unprecedented and extraordinary relief requested, considering the lack of severity of behavior of Defendants that can be proved, and considering the proper power to change punishment rests with the Plaintiff through democratic process, any *ad hoc* judicially created enhancement of punishment specifically for these Defendants violates the Separation of Powers and Equal Protection Clauses of the United States and California Constitutions under the provision previously raised.

4. Hearsay and Other Inadmissible Evidence

The admission of hearsay not falling within one of the exceptions to the hearsay rule is a violation of Evidence Code § 1200(b). For the purposes of a preliminary injunctive relief, Defendants assert that all evidence thus far offered is hearsay except perhaps the citations of officers (official documents/ business records) for which a sufficient foundation has been established through declaration. Yet, general comment of officers and lay witnesses in declarations without sufficient recording including time place and circumstance is rank hearsay. Counsel is aware that for the purposes of a preliminary injunction courts typically proceed by way of declarations and not live testimony. Unlike ordinary civil injunctive relief, the present proceedings are at least "quasi-criminal" meriting the Court's reliance on reliable and credible evidence. An injunctive order from the court will almost certainly result in the pretrial incarceration of the Defendants as they concede they cannot avoid sleeping outside.

Plaintiffs should not be able to rely on rank hearsay to prove contested facts supporting their injunction. Therefore, Defendants assert that they possess a constitutional right to cross examine any witness whose testimony could support a preliminary injunction in this case, where Defendants concede that they cannot avoid sleeping outside and will likely be arrested in a matter of days from the issuance of any injunction directing them to comply with all city ordinances under the circumstances. This is especially true considering the large amount of conjecture, inference and speculation present

in many of the declarations.

5. City's Unclean Hands

In Mendoza v. Ruezga (2008) 190 Cal.App.4th 270, 279, the Court held,

> "The doctrine of unclean hands requires unconscionable, bad faith, or inequitable conduct by the plaintiff in connection with the matter in controversy. [Citations.] Unclean hands applies when it would be inequitable to provide the plaintiff any relief, and *provides a complete defense to both legal and equitable causes of action.* [Citations.] 'Whether the defense applies in particular circumstances depends on the analogous case law, the nature of the misconduct, and the relationship of the misconduct to the claimed injuries." [Citations] The "unclean hands doctrine is not a legal or technical defense to be used as a shield against a particular element of a cause of action. Rather, it is an equitable rationale for refusing a plaintiff relief where principles of fairness dictate that the plaintiff should not recover, regardless of the merits of his claim. It is available to protect the court from having its powers used to bring about an inequitable result in the litigation before it."

For more than a decade, the City has been aware of an acute shortage of resources, particularly shelter space, available to homeless persons in Santa Cruz. A 2000 Report released by the Plaintiff's own Homeless Issues Task Force specifically addressed the issues now faced by the Court: "Driven by humanitarian and moral concerns, without waiting for the final report," the task force urged as priority number one that, "We recommend repeal of the camping ordinance since the City does not have adequate indoor shelter for all its residents." See Exhibit A, page 4 to the Declaration of Paul Brindel, ¶ *7* . Moreover, to alleviate the problem, the City's Homeless Issues Task Force also recommended the establishment of a safe outdoor sleeping zone in city parks, a safe legal vehicular sleeping provision, extension of armory dates and other recommendations. Id ¶ 7 & 8 . The City failed to enact any of these recommendations over the unanimous support of the eight Homeless Issues Task force members. Id The situation has only gotten worse since that time because of the Plaintiffs' failure to act. Id.

Moreover, the Plaintiff is now aware that more than 90% of the citations issued to the defendants

in this case can not and will not pass court review. The results of the Request for a Contempt Order proceeding from March 19, 2010 illustrate that. The times and dates of the citations issued to the defendants support that. Their actions are not illegal under any measurement. The citations, taken on their face, do not constitute the basis for any illegal action and the Plaintiff is well aware of that. Yet they continue to go forward with this action knowing full well that the basis for the allegations they bring forth are baseless.

The City now comes before this Court and asks for a quick fix to a problem that it allowed to fester and worsen for over a decade. The City requests the Court declare homeless persons, the Defendant's, acts of mere survival to be considered a public nuisance. The City offers no other viable option, particularly between March 15 and November 15. Over 90% of the citations issued in this case and relied on are for some violation of the camping ban. Most are issued improperly, when the Armory shelter is closed or full. More importantly, they are issued during times when the Camping Ordinance is not in effect.

Paul Lee, one of the founders of practically all of the homeless shelters in Santa Cruz offered his opinion that 89.9 % to 93.3% of all homeless people in Santa Cruz County do not have access to homeless shelters depending on the time of year. See the Declaration of Paul Lee. In his opinion developed over twenty-four years of service to the homeless in Santa Cruz, enforcing the sleeping ban under the current circumstances is morally reprehensible as it punishes poor people's "mere peaceful existence" where no other option is reasonably available to the vast majority of homeless persons. Declaration of Paul Lee.

Paul Brindel who has coordinated homeless housing in Santa Cruz for over ten years and sat on the Plaintiff's own homeless issues task force asserts that sleeping outdoors and engaging in other acts

related to homelessness (possession of large amounts of personal items, sleeping near food and services, etc.) are not nuisance behavior under the circumstances but are instead necessary acts of survival where homeless persons face insufficient resources, services and particularly shelter space. Declaration of Paul Rachuy Brindel, ¶ 8. Mr. Brindel confirms based on his vast experience in providing homeless services in Santa Cruz that their continues to be insufficient legal and adequate sleeping space for homeless persons in Santa Cruz. Id. ¶ 8

D. Defendants Inability to Comply with the Ordinances in Question Provides a Complete Defense to the Citations at Issue.

In the case of In Re James Warner Eichorn (1998) 69 Cal.App.4th 382, the court noted facts similar to the current facts. Eichorn was cited for a violation of the City of Santa Ana ordinance banning sleeping in designated public areas. Eichorn, 69 Cal.App.4th at 385. Further, the court noted that the Supreme Court had upheld the ordinance as facially constitutional in Tobe v. City of Santa Ana (1995) 9 Cal.4th 1069. Id.

Eichorn did not contest the facts asserted against him, that he was sleeping in a sleeping bag outside of the Santa Ana civic center. Id. at 391. As a defense to his violation of the ordinance, Eichorn asserted that he was involuntarily homeless and that the homeless shelters were frequently full, providing him no place to sleep except for outside. Id. Eichorn was not permitted to raise the defense of necessity by the trial court.

In overruling Eichorn's conviction, the court recognized the defense of necessity as being available to an involuntarily homeless person who could not avoid sleeping in public. Id. at 389. The necessity defense is founded upon public policy and provides a justification distinct from the elements required to prove the crime. Id. The situation presented to the defendant must be of an emergency

nature, threatening physical harm, and lacking an alternative, legal course of action. Id.

The Eichorn court noted the importance of balancing the harm to be avoided versus the costs of the criminal conduct and then held that, "Reasonable minds could differ whether defendant acted to prevent a significant evil. **Sleep is a physiological need, not an option for humans... There was substantial evidence if not uncontradicted evidence that defendant slept at the civic center because his alternatives were inadequate and economic forces were primarily to blame for his predicament.**" Id.

The facts in Eichorn, supra, are similar to the instant lawsuit. Defendants in the instant matter assert that their citations for violations of the ordinances in question, particularly SCMC § 9.50.020(a) (walking, standing, sitting, lying on a public monument, etc), SCMC § 6.36.010(a) (sleeping outdoors between 11pm and 8:30am), SCMC § 10.32.060 (no person shall erect a barrier or sign on any street), SCMC § 6.36.010(c) (setting up a campsite), and SCMC § 10.12.030 (disobeying a police officer) are all the direct result of the fact that Defendants are involuntarily homeless and do not have adequate alternative accommodations. Therefore their violations of the ordinances are not of their own free will. Id. Declaration of Anna Richardson, p. 1-2. Plaintiffs have offered no evidence that Defendants are not involuntarily homeless nor that any other adequate accommodations were available at the time of the citations at issue. Id.

Under the circumstances, it is not clear that the Defendants acts of camping or sleeping in public, the primary complaint against the Defendants, if true are enforceable in the manner asserted by Plaintiff. Id. The Eichorn court clearly recognized under the facts a defense of necessity would be available to Defendants' position for involuntarily sleeping in public. Id. Moreover, in balancing the evils, the Eichorn court appears to find that having the ability to sleep somewhere, even if it violates

the law, trumps the evil of not being able to sleep or being jailed for that reason. Id. at 390.

Despite its lack of precedential value, the United States Court of Appeals for the Ninth Circuit has held that preventing involuntarily homeless people from sleeping on public sidewalks where adequate alternatives are not available violates the Eighth Amendment's proscription against cruel and unusual punishment.[1]

E. The City Attorney Seriously Undervalues the Constitutional Rights At Stake

The United States Supreme Court has held that, "Conduct needs only a significant expressive element or at least the semblance of expressive activity to invoke the First Amendment analysis." Arcara v. Cloud Books (1986) 478 U.S. 697, 702. Further, it is settled law that a the First Amendment protects a person's right to choose how to express herself, including her right to the manner in which she communicates. California v. Cohen, (1971) 403 U.S. 15.

There is no question that sidewalks regulated by this ordinance is public fora in which First Amendment rights are at their highest. Perry Educ, Ass'n v. Perry Local Educator's Ass'n (1983) 460 U.S. 37, 45. Further, despite the cases depublication by stipulation of the parties, courts have found sitting on public sidewalks to be protected speech that communicates speech even if the act only speaks to the degradation of society. Berkeley Community Health Project v. City of Berkeley (N.D. Cal.1995) 902 F.Supp 1084. (DEPUBLISHED BY STIPULATION OF PARTIES DUE TO REPEAL

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[1] Defendants also urge the Court to review Jones v. City of Los Angeles (9th Cir. 2006) 444 F. 1118. *Jones* was depublished due to a stipulation between the parties based on a repeal of the statute and is not being cited as authority. However, Jones did address the constitutionality of punishing the exact acts in question and therefore may provide some relevant basis for the court's review as to the constitutionality of the relief requested by Plaintiff. The Jones court specifically held that enforcement against homeless individuals, at all times and in all places within the City, of ordinance that criminalized sitting, lying, or sleeping on public streets and sidewalks, violated the Eighth Amendment's prohibition against cruel and unusual punishment.

OF ORDINANCE.)

The case of Roulette v. City of Seattle (9th Cir.1996) 97 F.3d 300, 316 (Dissent) is instructive. In Roulette, the City of Seattle banned sitting or lying on the sidewalk during only business hours from 7am to 9pm. Id. at 302. Plaintiffs in Roulette challenged the statue as unconstitutional on its face. The Roulette court held that it would not reach the merits because the Plaintiffs challenged the statute facially and not "as applied." Id. at 306. Roulette's holding is, therefore, distinguishable on the facts from the present case in that the scope of the ban was significantly more narrowly tailored than the Municipal Code section addressed in this action Id.

Notably the dissent in Roulette noted that those deemed "desirable by shopkeepers may sit on the sidewalk [on chairs and benches] and obstruct pedestrian traffic all day long, drinking their cappuccinos and reading their Wall Street Journals to their hearts' content. But ... an unsightly beggar symbolizing the failure of our society to achieve economic justice, may not sit, even to add power to the content of his message. Id. at 316. The dissent further found, "Seattle seeks economic preservation by ridding itself of social undesirables-homeless or otherwise-who sit or lie on the sidewalks, and this is done to protect the sensibilities of shoppers." Id. Further, "a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Id. citing Romer v. Evans (1996) 517 U.S. 620.

The ability to restrict speech in public forums, whether traditional public forums or public forums is "sharply circumscribed."(Perry Local Educators' Ass'n, (1983) 460 U.S. at 45-46.) "Public fora have achieved a special status in our law; the government must bear an extraordinarily heavy burden to regulate speech in such locales." (NAACP v. City of Richmond, (9th Cir. 1984) 743 F.2d 1346 at 1355). "The quintessential public forums are sidewalks, streets and parks." (United States v.

Grace, (1983) 461 U.S. 171 at 176.) These areas have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." (Hague v. CIO (1939) 307 U.S. 496 at 515.)

In a traditional public forum, "the State may...enforce regulations...which are content neutral, narrowly tailored to serve a significant government interest, and leave open amply alternative channels of communication." (American Civil Liberties Union v. City of Las Vegas, (9th Cir. 2003), 333 F.3d 1092 at 1098.)

Clearly, access to the streets and parks of downtown Santa Cruz is covered under a variety of constitutional issues, including the right to travel and the right to free speech. By denying the defendants the right to access to such a forum, protected as it is, the the Plaintiff runs afoul of some of the most closely guarded rights afforded to U.S. citizens.

If the permanent injunction is allowed to issue, the Court will be sanctioning a restriction on the rights of Santa Cruz citizens to freely gather, discourse and exercise their free speech opportunities. No right is more closely intertwined with the concept of America than this right to free speech. It was at the core of our succession from Great Britain (representation is simply a form of speech) and has been held all but inviolable throughout American legal jurisprudence.

Allowing the Plaintiff to proscribe such drastic measures would be a first in the American legal system. As the White opinions shows, such restrictions have been globally held to be untenable in light of the basic liberties all American's are afforded under the Constitution. A careful review of existing case law has shown of no similar, global restriction that has been allowed to stand.

In fact, it is nearly impossible for any restriction to withstand the heightened strict scrutiny test enunciated in Hague in 1939, and reinforced as recently as 2003. Traditional public forums, such as

the areas at issue here, are sacrosanct. While the government, in very few instances has been able to restrict communication in such locales, it has only been through the most narrowly drawn time, place and manner restrictions. (See New York Magazine, Div. Of Primemedia v. Metropolitan Transportation Authority (1997) 987 F. Supp 254.)

The blanket restriction called for by the requested injunction is not narrowly tailored; is not the least restrictive alternative; and is not narrowly drawn time, place and manner restrictions. It is a punitive, global response, which has consistently been held as unconstitutional by courts throughout this Country.

There is no place in America for restrictions which seek to cut out a few disenfranchised members of our society. Simply put, you cannot bar individuals from the streets of our land without the kind of massive governmental interest that the Supreme Court has yet to find. It offends logic; it offends the law; and it offends traditional values and morality. This restriction cannot be allowed to stand.

Further, Defendants in the instant matter assert that the ordinances in question, particularly SCMC § 9.50.020(a) (walking, standing, sitting, lying on a public monument, etc), SCMC § 6.36.010(a) (sleeping outdoors between 11pm and 8:30am), SCMC § 10.32.060 (no person shall erect a barrier or sign on any street), SCMC § 6.36.010(c) (setting up a campsite), SCMC § 10.12.030 (disobeying a police officer) at a bare minimum are solely and unequally enforced against Defendants as a means to prevent them from living as dignified homeless persons in the downtown area of Santa Cruz, California. See Declaration of Anna Richardson, p. 2-3. No actual harm has been demonstrated in fact to show their behavior is a health hazard or otherwise interferes with personal or property interests.

Defendants, therefore, assert a colorable claim that the ordinances at issue "as applied" may be violating Defendants rights under the First Amendment to the United States Constitution and Article One, Sections 1 and 2(a) of the California State Constitution.

F. Plaintiff Cannot Demonstrate That the Balance of Harm Analysis Supports Their Polition

In Gallo the Supreme Court held that, " if a normal person in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one." Gallo, 14 Cal. 4th at 1105. The question is not whether the particular plaintiff found the invasion unreasonable, but whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable. Id.

Plaintiff has not proven through fact how it has been harmed in the manner it purports. The plaintiff has only presented its own opinion, first through broad conclusions of counsel as to its belief of general public morality and aesthetic and second the single opinion of an employee of the Plaintiff, a police officer, in his professional capacity as the enforcer of the codes in question.

In its offer of proof, Plaintiff does not purport to consider, nor attempt to show just how annoyed and injured an average member of the Santa Cruz Community may feel by defendants' conduct. Id. The court should consider that fact in light of the 43 declaration by community members in the Gallo case.

Further, the mere annoyance of Plaintiff, if it does exist, pales in comparison to the fact that the City may jail homeless youth for sleeping outside. where it has not been shown that adequate alternative accommodations were available on the dates in question. The same analysis is true for the other ordinances cited herein that involve lack of available alternatives, specifically SCMC §

9.50.020(a) (walking, standing, sitting, lying on a public monument, etc), SCMC § 6.36.010(a) (sleeping outdoors between 11pm and 8:30am), SCMC § 10.32.060 (no person shall erect a barrier or sign on any street), SCMC § 6.36.010(c) (setting up a campsite), SCMC § 10.12.030 (disobeying a police officer).

If at least this showing is not required, then we will have arrived at a point where the Plaintiff is jailing youth only for being homeless with no other available alternative and still needing to sleep and bathe. A minor public annoyance, which at this point has not been proved, versus potentially jailing homeless for not having sleeping accommodations is hardly an even balance let alone a sufficiently basis for of extraordinary relief prior to the actual proving of the claim through fact. Continental Baking Co., 68 Cal.2d at 528.

G. Plaintiff Has Not Shown That the Harm that It Purports to Exist is Irrepreable in Nature

First, Plaintiff has asserted no facts and, therefore, cannot show on its record that a normal person in the locality would perceive the violations in question as offensive. Gallo, 14 Cal.4th 1105.

Second, even if that objective person did find the Defendants acts offensive, Plaintiff must still show that the violation presents an irreparable harm. Loder, 216 Cal.App.3d at 782-83. To satisfy this requirement it is incumbent upon the plaintiff to present *evidence.* Id. [emphasis added]. The Plaintiff's complaint only states conclusions and the existence of citations but is not supported by underlying facts. For example, the complaint concludes that the Defendant's actions are illegal, seriously offensive, obstruct the free movement of others and constitute a public nuisance. Plaintiffs P & A in Support of Preliminary Injunctive Relief, p. 3. However, the Plaintiff never states facts demonstrating that putting down a sleeping bag down or even hoisting a tarp over it to protect Defendants from the weather obstructs free movement or is seriously offensive. Id. Instead, the

Plaintiff relies almost exclusively on the mere issuance of citations from unnamed officers based on nonspecific facts. This type of evidence is insufficient as the Defendants are entitled to a presumption of innocence until proven guilty. Stephens, 103 Cal.App. at 310-11.

The facts also do not support that the "harm" defined by the Court's initial order (banning the defendants from camping) is irrepreable. Actually, the more recent litigation in this case indicates that (a) the Plaintiff's representations to this Court are overblown; and (b) that the "harm" identified by the court has been addressed. The fact that a few other citations have been issued to the defendants, once again outside of the prescribed hours, is not evidence of anything here, especially considering the history in this matter.

In sum, even if the City has set forth a transgression that could potentially be a nuisance, it has not demonstrated how the harm resulting therefrom is irreparable. Neither is Sergeant Garner's off-hand conclusion that Defendants' inability to find indoor accommodations makes his job harder for him, the type of irreparable harm that Civil Code 3480 was intended to abate. See Declaration of Sergeant Garner. The mere allegation that irreparable harm will result to the complainant, unless protection is extended to it, is not sufficient; the facts must be stated, that the court may see that the apprehensions of irreparable mischief are well founded. Stephens, 103 Cal.App. at 312. The Plaintiffs, on the present record, have not demonstrated such facts, and, therefore, should be afforded no such relief.

H. Any Punish of Defendants Beyond the Statutory Maximum Punishment Is Unconstitutional.

1. A Punishment of Jail or Community Service for Failing to Obey the Preliminary Injunction Violates the Separation of Powers Clause of Article III, Section 3 of the California Constitution and the parallel sections of the United State Constitution.

The California Supreme Court has conclusively held that the power to define crimes and fix

penalties is vested exclusively in the legislative branch, and the courts may not expand the Legislature's definition of a crime, nor may they narrow a clear and specific definition. People v. Farley (2009) 46 Cal.4th 1053. Further, the legislative branch bears **sole** responsibility and power to define criminal charges and to prescribe punishment, the executive branch decides which crime to charge and judicial branch which imposes sentence **within legislative limits for chosen crime**. People v. Mikail (1993) 13 Cal.App.4th.846, 854.

The court in People v. Rhodes (2005) 126 Cal.App.4th 1374, 1385 stated this point succinctly:

> The matter of defining crimes and punishment is solely a legislative function. The legislature has the authority to change the penalties, or separate them by degree. Prescribing punishment ... is distinctly within the police power of the states, as is the definition of the elements of crimes and the delineation of their punishments. Evils in the same field may be different dimensions and proportion, requiring different remedies. Or so the legislature may think. Subject to the constitutional prohibition against cruel and unusual punishment, the power to define crimes and fix penalties is vested exclusively in the legislative branch. **The judiciary may not interfere with the authority of the Legislature to define crimes and prescribe punishment** unless a prescribed penalty is so severe in relation to the crime that it violates the constitutional prohibition of cruel and unusual punishment. Id. [Internal cites omitted.].

In the present case, the Santa Cruz City Counsel, our local legislature, through the democratic process, has determined that violations of its municipal code section 6.36.010 are an infraction and not jailable offenses. Santa Cruz Municipal Code Chapter 4.04, section 4.04.010 (Criminal Violations-Misdemeanors and Infractions) provides,

> It shall be unlawful for any person to violate any provision or fail to comply with any provision of the requirements of the Santa Cruz Municipal Code. Except as elsewhere stated in this code[2], a violation of any requirements of the Santa Cruz Municipal Code or failing to comply with any of the

[2] Section 6.36.010, the "camping ban" does not provide for misdemeanor punishment.

> mandatory requirements of this code shall constitute an infraction.... Any person charged with an infraction under the provisions of this code, unless provision is otherwise herein made, **shall be punishable by fine only** as follows... Santa Cruz Municipal Code, section 4.04.010.

Santa Cruz Municipal Code section 4.04.020(2) (Civil Violations-Injunction and Civil Penalties) provides,

> **As part of a civil action filed to enforce provisions of this code, a court may assess a maximum civil penalty** of two thousand five hundred dollars per violation of the municipal code for each day during which any person commits, continues or maintains a violation of any provision of this code. Santa Cruz Municipal Code, section 4.04.020.

As an enforcement agent of the City, the City Attorney is properly designated in the executive branch of local government. The City of Santa Cruz Municipal Code simply has not authorized the City Attorney to seek the punishment of either incarceration or community service for violations of section 6.36.010, pursuant to either a criminal or a civil proceeding. As such the City Attorney is not authorized to pursue incarceration or community service punishments. Mikail, 13 Cal.App.4th.at 854; Rhodes, 126 Cal.App.4th at 1385 Further, the Court is similarly not authorized to issue them. Id.

The Court should note that Defendants do not deny the general power of the Court to defend its orders. However, the facts giving rise to the contempt proceedings in this case did not occur in the presence of the Court. In this case, the sole basis for the injunction is the violation of one criminal municipal statute. This act is already completely regulated by the Santa Cruz City Counsel.

The City Attorney is trying to use the Court's inherent contempt powers to make law, i.e., raise the maximum punishment for the violation of 6.36.010. The City's memorandum in support of contempt ("City's Contempt Memo') states that, "The City submits that given their history of arrogant recalcitrance relative to compliance with obligations imposed upon them by the judicial process, the

only meaningful punishment for Defendants' contempt would be a jail sentence levied with each violation." City's Contempt Memo, p 5. Lines 21-23. The City Attorney is attempting to make law by utilize the judicial process of civil contempt to exceed the maximum punishment permitted by the legislature for violations of section 6.36.010. In doing so, the City Attorney also seeks to exceed the maximum punishment provided by the legislature pursuant to its injunction authority provided in section 4.04.020. The Legislature has simply not provided for enhanced penalties of jail or community service for repeat offenders of the camping ordinance.

The Court should not condone the City Attorney's attempted usurpation of legislative powers by using the Court's inherent contempt power to increase the punishment for a violation of Section 6.36.010. Therefore, in the present case, despite the Court's general power to jail or order community service for contempt of its orders, in this situation, where the charge is exclusively a violation of the municipal code and nothing more, punishing Defendants with jail or community service violates of the Separation of Powers provisions of Article III, Section 3 of the California Constitution. If the City Attorney thinks the punishments provided for by the City Counsel for violations of section 6.36.010 are not sufficient, they should direct their attention to the democratic process and not this Court.

2. Any Punishment Beyond the Statutorily Defined Limitations Violates the Doctrine Prohibiting Delegation of Legislative Powers.

Even if the City Attorney is able to convince the Court that the punishment pursued by it is implicitly authorized by the Legislature (City Counsel), the City Attorney still must overcome the doctrine prohibiting the delegation of legislative powers. The California Supreme Court held that the doctrine prohibiting the delegation of legislative power, although much criticized, is well established in California. Kugler v. Yocum (1968) 69 Cal.2d 371, 375. The power to change a law of the state

is necessarily legislative in character, and is vested in the legislature and cannot be delegated by it. Id. Moreover, the same doctrine precludes the delegation of legislative powers of a city. Id. "...[T]he Purpose lf the doctrine that legislative power cannot be delegated is to assure that truly fundamental issues will be resolved by the Legislature and that a grant of authority is accompanied by safeguards adequate to prevent its abuse." Id. at 376.

This doctrine has been limited to some degree so that legislative power may be delegated if channeled by a sufficient standard. Id. It is well settled that the legislature may commit to an administrative officer the power to determine whether facts of a particular case bring it within a rule or standard previously established by the legislature. Id.

In the present case, the exception stated above may allow the City Attorney to determine when and against whom to bring injunctive action, which is a mechanism that has been provided for the use of the City Attorney in its discretion. Id. However, no law provides the City Attorney the authority to seek the punishments of jail and community service for violations of Section 6.36.010. The Legislature has not, and cannot delegate to the City attorney, the authority to arbitrarily increase the maximum punishment for violations of Section 6.36.010, when the City Attorney feels a case so warrants the punishment. Id. This is true whether or not, the Court mantains general contempt powers that it is authorized by statute to levy on a contemnor. The prescription in relation to the doctrine against the delegation of legislative power to increase maximum punishments for crimes operates against the City Attorney's power **to seek** that punishment, as much as it does on the Court's general power to jail people for contempt, in this instance.

3. The Specific Law in Place Here Controls Over Attempts to Impose General Orders

It is horn book law that when the legislature (in this case the City Counsel) proscribes specific

enumerated punishments for specifically delineated violations, any attempt to increase the punishments for those violations cannot be allowed to stand (discussed in A above.) The reasoning behind this is that general enforcement of laws is circumscribed when a more specific law, designed to address the same issue exists.

> "It is well settled, also, that a general provision is controlled by one that is special, the latter being treated as an exception to the former. A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates." (Rose v. State of California (1942) 19 Cal. 2d 713, 723-724 [123 P.2d 505]; see also People v. Moroney (1944) 24 Cal. 2d 638, 644 [150 P.2d 888].)" People v. Honig (1996) 48 Cal.App.4th 289 at 328.

Further, when two statutes essentially occupy the same space, or the same subject, and one is a broad general provision and one specific, the specific controls.

> "When two statutes relate to the same subject, ordinarily the more specific and particular provision will govern as against the more general provision, although the latter standing alone is broad enough to include the subject addressed by the more particular provision. (San Francisco Taxpayers Assn. v. Board of Supervisors (1992) 2 Cal.4th 571, 577; see also In re Williamson, (1954) 43 Cal.2d 651, 654.)" Gonzalez v. County of Tulare (1998) 65 Cal.App.4th 777 at 786. See also People v. Walker (2002) 29 Cal.4th 577. "'The fact that the Legislature has enacted a specific statute covering much the same ground as a more general law is a powerful indication that the Legislature intended the specific provision alone to apply.' (People v. Jenkins (1980) 28 Cal.3d 494, 505, fn. omitted.)" People v. Sainz (1999) 74 Cal.App.4th 565 at 570. See also Barnes v. Superior Court of Los Angeles County (2002) 96 Cal.App.4th 631.

The Court must also note that the specific versus general statutory construction applies equally to civil actions and laws as to the criminal context. (See People v. Neely (2004) 124 Cal.App.4th 1258; People v. Briceno (2004)34 Cal.4th 451 --applying to voter initiatives-- and Ramos v. Superior Court

(People) (2007)146 Cal.App.4th 719–applying to procedural provisions.)

Here, the City Counsel, whose actions embody the will of the people, has proscribed the punishment for violations of the camping ban in downtown Santa Cruz. The City Counsel has determined that the punishment for said crime (Municipal Code section 6.36.010–see A above) is punishable by a fine only. That is the specific statutory provision that governs this case. The more general civil contempt of court action is inapplicable and unconstitutional for the same reasons where, as here, the scope of the order was limited to not violating 6.36.010.

An analogy can be drawn in this case to the circumstance when a criminal complaint is filed against a probationer for violating the terms of their probation. There, the criminal complaint controls, not a general order of contempt for violating probation terms.

I. <u>Conclusion</u>

For the reasons submitted above the Defendants respectfully request this court to deny the request for a permanent injunction and dismiss this matter forthwith.

Dated: June 11th, 2010

Respectfully Submitted,

_____
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Attorney for Miguel Deleon

Jonathan Gettleman
Attorney for Anna Richardson