c: LEK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Catherine Russell; Terry Anderson; (De)Occupy Honolulu; And John Does 1-50,

Plaintiffs,

vs.

City and County of Honolulu; John Does 1-50.

Defendants.

CAS E NO. CV13 00475 LEK RLP

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

HEARING:

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PLAINTIFFS' MEMORANDUM
IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

For almost two years, Defendants have routinely conducted "raids" on the De-Occupy encampment at Thomas Square. Initially, purportedly pursuant to "Bill 54" (ROH § 29-19) Defendants seized and destroyed property at their discretion without providing the victims of such tyranny with any type of hearing and often without notice of the seizure. These raids are the subject of the case styled *De-Occupy Honolulu, et. al. v. City and County of Honolulu, et. al.*, No. 1:12-cv-000668 (Dist. Haw. 2012), of which Plaintiffs request this Court take judicial notice of all documents and proceedings thereof, including the videotapes of those raids that are filed repeatedly in the record of those proceedings. A preliminary injunction order was entered in that case on June 6, 2013 as Doc. 134.

Despite that stipulated preliminary injunction order, the City has now begun to terrorize those protected by that order under the guise of "Bill 7:" Instead of making any effort whatsoever to treat its homeless citizens with dignity, morality, or even within the bounds of the constitutions of the United States or of the State of Hawaii, the City codified in this new scheme as Chapter 29, Article 19 of the Revised Ordinances of Honolulu. Now, no notice whatsoever is provided. Instead, city officials are purportedly authorized to "summarily remove" any objects or "collection of objects" which they deem to be in violation of this unconstitutional ordinance. And, although provisions that allow for only a

discretionary post-deprivation hearing exist within the ordinance, those hearings are demonstrably untimely and inadequate, and Plaintiffs have yet to experience the substance of such a hearing despite requesting one nearly a month ago.

Moreover, the City has ascribed a $200 ransom that must be paid before an object or "collection of objects" (a term apparently left to the arbitrary interpretation of some unknown city official) will be returned. There is no evidence that this $200 in any way reflects the actual costs incurred by the City in seizing the property.

Thus, despite the previous order in Case No. 1:12-cv-000668, despite this Court's specific reprimand requiring the City to provide adequate procedures to return seized property, and despite the magistrate's recent encouragement that the City adopt appropriate procedures and protocols to address the overarching social issues that that these and future lawsuits necessitate the City to address and the Plaintiffs' demonstrable willingness to participate and assist in defining such procedures and protocols, the City has chosen instead to continue its tyrannical approach of abuse and harassment. Faced with this reality and continual victimization by the City, Plaintiffs are left with no choice but to pursue the instant lawsuit and Defendants have continued to demonstrate that meaningful injunctive constraint and the supervision of this Court is an unavoidable necessity.

I. PLAINTIFFS HAVE STANDING.

To satisfy standing requirements, a plaintiff must show: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (quoting *Lujan v. Defenders of Wildfire*, 504 U.S. 555, 560-61 (1992)).

In this case, Plaintiffs' property was seized and never returned. Plaintiffs have neither been compensated for their property nor provided any opportunity to be heard despite specific requests in accordance with City policy. Defendants have substantially interfered with Plaintiffs' exercise of constitutionally protected speech and activities.

Moreover, Plaintiff De-Occupy Honolulu has standing. The United States Supreme Court has held that an organization or association "has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333, 343 (1977).

First, all Plaintiffs are members of De-Occupy Honolulu. Each clearly has standing as discussed above. Second, the primary purpose of De-Occupy Honolulu is to protest social injustices exacted upon the poor, injustices directly challenged in this lawsuit. Third, the relief sought does not require the participation of any De-Occupy members. Fourth, much of the property at issue is communal property of the members of De-Occupy. De-Occupy clearly has standing.

II. THE ORDINANCE IS FACIALLY UNCONSTITUTIONAL.

Chapter 29, Article 16 should be struck for at least three reasons:

1. Adequate due process protections are not afforded. Notice is not provided at all.

2. No timely hearing is provided.

3. The ordinance is unconstitutionally vague as it does not define what constitutes a "collection of objects."[1] Moreover, whether $200 must be paid for the return of all of the property, some of the property, or each object of the property is not defined and is apparently left in the sole discretion of either a hearing officer or, even worse, the biased enforcement agent who seizes the property and decides what property will be recorded on each separate post-seizure notice.

Each of these issues is discussed below.

[1] Thus, those affected by the ordinance, *i.e.*, the homeless, cannot know how much property they may have in their possession at any given time. Stated another way, if all of a homeless citizen's combined property is viewed as a "collection of property", homeless citizens cannot own property that is not at all times combined into an area no larger than 42 inches long, 25 inches wide, and 43 inches tall.

A. Procedural Due Process infirmities require the Ordinance be struck.

Plaintiffs recognize that the standard that must be met on this facial challenge is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstance exists under which the Ordinance would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *United States v. Inzunza*, 638 F.3d 1006, 1019 (9th Cir. 2011). Nevertheless, there is no set of circumstances under which Chapter 29, Article 16 would be valid.

The Ordinance simply provides neither notice nor a timely or adequate opportunity for those aggrieved to be heard before or after their property is seized.[2] "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

> It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . (And n)o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.' . . .
>
> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented.

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[2]The plain language of the Ordinance requires that property owners be divested of either property that was seized or $200 unless a hearing is requested. ROH § 29-13(c). As discussed below and pursuant to the City's own adopted policies, a hearing cannot even commence within a constitutionally permissible time.

Id. at 81. Thus, absent extraordinary circumstances, the government must provide *notice and* a *pre-deprivation* hearing:

> As such, before the City can seize and destroy [homeless] Plaintiffs' property, it must provide notice and an "opportunity to be heard at a meaningful time and in a meaningful manner," except in "extraordinary situations where some valid governmental interest is at stake that justifies the postponing of the hearing until after the event."

Lavan v. City of Los Angeles, 797 F. Supp. 2d 1005, 1016-17 (C.D. Cal. 2011) (*quoting Mathews v. Eldridge*, 424 U.S. 319, 339–43 (1976), *and United States v. James Daniel Good Real Prop.*, 510 U.S. 43(1993)). In other words, "as [the Ninth Circuit] has repeatedly made clear, '[t]he government may not take property like a thief in the night; rather, it must announce its intentions and give the property owner a chance to argue against the taking.'" *Lavan*, 693 F.3d at 1032 (*quoting Clement v. City of Glendale*, 518 F.3d 1090 (9th Cir. 2008)); *See also Mathis v. County of Lyon*, 633 F.3d 877, 879 (9th Cir. 2011) ("The right to notice and hearing prior to a public official's administrative taking of property is clearly established.") (*citing James Daniel Good Real Property*, 510 U.S. at 53 ["'the right to prior notice and hearing is central to the Constitution's command of due process'" absent extraordinary circumstances."]).

Here, the entire purpose of the ordinance was to deprive property owners of any notice before City officials, acting precisely as thieves in the night, take their

property, sometimes from their hands. This alone should cause this Court to strike Bill 7. *See Fuentes, supra.*; *Good, supra.*

There certainly is no pre-deprivation hearing that would allow property owners to argue against the seizure. Yet, the law requires that absent extraordinary circumstances involving "the necessity of quick action by the State or impracticality of providing any pre-deprivation process" pre-deprivation hearings be provided. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 436 (1982) (*quoting Parratt v. Taylor,* 451 U.S. 527, 539 (1981)); *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 19 (1978) ("Ordinarily, due process of law requires an opportunity for 'some kind of hearing' prior to the deprivation of a significant property interest."); *Hodel v. Virginia Surface Mining & Recl. Ass'n,* 452 U.S. 264, 299 (1981); *Boddie v. Connecticut,* 401 U.S. 371, 378-79 (1971); *Tom Growney Equipment, Inc. v. Shelley Irrigation Dev., Inc.,* 834 F.2d 833, 835 (9th Cir.1987); *Fuentes,supra.* This alone should result in the striking of Bill 7.

Perhaps most egregious, there is not even a timely or adequate post-deprivation hearing that could be provided. In passing Bill 7, the City vested in the Director of Facilities Maintenance authority to promulgate rules governing the post-deprivation hearings contemplated by Bill 7. ROH § 29-16.4; *see also* ROH § 29-16.3(d). And, on June 19, 2013, Corporation Counsel approved rules adopted by the director "as to form and legality" and the Mayor approved the rules as to

form. The rules are attached as **Exhibit 1**. Considered singularly or combined, these rules do not comport with established due process guarantees.

In *Stypmann v. City & County of San Francisco*, 557 F.2d 1338 (9th Cir. 1977), the Ninth Circuit invalidated a statute, remarkably similar to the Ordinance *sub judice*, that allowed for the towing and storage of illegally parked cars.[3]

> Also in the course of the litigation, and apparently in response to it, the City and County of San Francisco adopted an ordinance providing that a person "unable to pay" towage fees may obtain a hearing on the underlying traffic citation within five days of the time he notifies the Traffic Fines Bureau that he intends to challenge the citation and that he is financially unable to redeem his vehicle from storage. If the owner is found not guilty and the traffic citation dismissed, the vehicle is to be returned, and towing and storage charges are to be paid by the city. San Francisco Traffic Code s 160.01.

Stypmann, 557 F.2d 1338 at 1340-41.

The Court first found:

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[3] The Ninth Circuit subsequently explained its holding as follows:

> A more plausible interpretation is that we held the statute invalid as applied, or in other words, that private vehicles could not be towed and stored pursuant to it without at least some sort of hearing. . . . we suggested that the statute could be saved if implemented . . . with an ordinance providing a sufficiently prompt hearing. Id. at 1344.

Goichman v. Rheuban Motors, Inc., 682 F.2d 1320, 1323 (9th Cir. 1982). However, regardless of whether this Court chooses to label Bill 7 "wholly void" or "invalid as applied . . . without some sort of [adequate and timely] hearing" is largely an exercise in semantics. Plaintiffs, since the initiation of the first lawsuit have complained about the lack of due process protections.

> The private interest in the uninterrupted use of an automobile is substantial. A person's ability to make a living and his access to both the necessities and amenities of life may depend upon the availability of an automobile when needed.
>
> The public interest in removing vehicles from streets and highways in the circumstances specified in the traffic code is also substantial, though differing in the various situations in which removal is authorized. Moreover, the government has a considerable interest in imposing the cost of removal upon the vehicle owner and retaining possession of the vehicle as security for payment. But neither of these interests is at stake here. The only government interest at stake is that of avoiding the inconvenience and expense of a reasonably prompt hearing to establish probable cause for continued detention of the vehicle. The fact that San Francisco has undertaken to provide a hearing in some circumstances suggests that it is neither unduly burdensome nor unduly costly to do so.
>
> Despite the greater relative weight of the private interests involved, the statute affords virtually no protection to the vehicle owner.
>
> The vehicle may be recovered only by paying the towing and storage fees; there is no provision for obtaining its release by posting bond. There is no provision that would mitigate the loss if the detention is unlawful or fraudulent. The statute establishes no procedure to assure reliability of the determination that the seizure and detention are justified. A police officer must authorize the tow, but he also "gathers the facts upon which the charge of ineligibility rests," and his judgment cannot be wholly neutral. *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S.Ct. 1011, 1021, 25 L.Ed.2d 287 (1970). Moreover, no official participates in any way in assessing the storage charges or enforcing the lien. No hearing is afforded and no judicial intervention is provided by section 22851 at any stage before or after seizure unless and until the vehicle is sold to satisfy the lien. The only hearing available under any other state procedure may be long deferred, and the burden of proof is placed upon the owner of the property seized rather than upon those who have seized it.

Stypmann, 557 F.2d at 1342-43.

Thus, further analyzing the seizure of only an automobile against a government's interest in a procedure that provided an inadequate or no hearing, the Ninth Circuit went on to apply the three factor analysis in *Matthews v. Eldridge* and concluded:

> 'The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' Seizure of property without prior hearing has been sustained only where the owner is afforded prompt post-seizure hearing at which the person seizing the property must at least make a showing of probable cause. Neither this nor any other procedural protection is afforded here that might prevent or ameliorate a temporary but substantial deprivation of the use and enjoyment of a towed private vehicle.
>
> An early hearing, on the other hand, would provide vehicle owners the opportunity to test the factual basis of the tow and thus protect them against erroneous deprivation of the use of their vehicles. The only state interest adversely affected by requiring an early hearing avoidance of the administrative burden and expense is not enough in these circumstances to warrant denying such a hearing. We conclude, therefore, that section 22851 does not comply with due process requirements.
>
> **Nor is the statute saved by the San Francisco ordinance. A five-day delay in justifying detention of a private vehicle is too long. Days, even hours, of unnecessary delay may impose onerous burdens upon a person deprived of his vehicle. *Lee v. Thornton*, supra, 538 F.2d at 33, a case involving seizure and detention of automobiles in comparable circumstances, held that due process required action on a petition for rescission or mitigation within 24 hours, and, if the petition was not granted in full, a hearing on probable cause within 72 hours.**
>
> **Although a five-day delay is clearly excessive**, the record in this case does not contain the information necessary for a more precise determination of the exact schedule that would best balance the private and public interests involved.

Stypmann, 557 F.2d at 1343-45 (citations omitted) (emphasis added).[4]

Here, the property interests at stake are obviously greater than that of an automobile as the seized property includes not just a means of obtaining "the necessities and amenities of life" but those necessities and amenities themselves, including: shelter, bedding, and often medicines and the tools necessary to earn income. Not surprisingly, other courts have found that the effect of such seizures of homeless persons' property is severe:

> The evidence adduced demonstrates that the City's destruction of homeless people's property causes a variety of other significant, legally cognizable harms. In the City's operations, homeless people lose medicine and health supplies; tents and bedding that shelter them from the elements; clothing and hygiene supplies; identification documents and other personal papers; the tools by which they try to make a meager income; and items of immeasurable sentimental value. The irreparable harm from the City's practices also includes the harm to homeless people's security and dignity.

Pamela Kincaid v. City of Fresno, No. 1:06-cv-1445 OWW SMS, 2006 WL 3542732 at *40 (E.D.Cal. Dec. 8, 2006) (attached as **Exhibit** 2). And:

> the City's interest in clean parks is outweighed by the more immediate interest of the plaintiffs in not having their personal belongings

[4] Subsequently, California changed its statute to allow for a hearing within 48 hours and, where another Plaintiff did not challenge the "garage-man's lien," the Ninth Circuit found that due process was satisfied. *Goichman*, 682 F.2d at 1324; *See also City of Los Angeles v. David*, 538 U.S. 715, 717-18 (2003) (27 hour delay between towing and hearing permissible where car had been returned, citing *Stypmann* and *Goichman*).

> destroyed. As this court previously found, the loss of such items such as clothes and medicine threatens the already precarious existence of homeless individuals by posing health and safety hazards.

Pottinger v. City of Miami, 810 F.Supp. 1551 (S.D.Fla. 1992). "Similarly, Defendants' actions are likely to displace homeless individuals and threaten their ability to access charities for food, shelter, and assistance . . ." *Michael Justin v. City of Los Angeles*, No. CV0012352LGBAIJX, 2000 WL 1808426 at *11 (C.D. Cal. Dec. 5, 2000) (unpublished) (attached as **Exhibit 3**); *See also Lavan*, 797 F.Supp.2d at 1019 ("the City's interest in clean streets is outweighed by Plaintiffs' interest in maintain the few necessary personal belongings they might have.").

Yet, the City's specifically adopted rules provide that, in the best possible scenario (and assuming that the Department of Facilities Maintenance responds to hearing requests) that a hearing cannot proceed until at least seven days after the petitioner is notified of the hearing, Rules § 14-5-11(a). Moreover, the Department can simply decide to decline to have a hearing, leaving a petitioner to seek an even slower judicial remedy. Rules § 14-5-9. And, assuming that the Department decides to actually have a hearing, the length of time in which the decision must be rendered is constrained only by a 120 day deadline. Rules § 14-5-23(a). Indeed, with this rule serving as the sole time constraint, it is not required that the hearing actually even commence until the 120th calendar day.

Bill 7 lacks both of the cornerstones of due process – notice and a meaningful opportunity to be heard. The Ordinance should not survive without it. Courts consistently strike statutes and/or ordinances that fail to provide procedural due process. For example, The United States Supreme Court reversed the Wisconsin Supreme Court's opinion upholding a statute that permitted the garnishment of wages before any hearing was had. *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 339 (1969) (stating in *dicta* that summary procedures may meet procedural "due process requirements [only] in extraordinary situations" and finding that "the sole question is whether there has been a taking of property without that procedural due process that is required by the Fourteenth Amendment."). And, the Court also invalidated Florida and Pennsylvania replevin statutes that permitted a private party, without a hearing or prior notice to the other party, to obtain a pre-judgment writ or replevin, which authorized the Sheriff to then seize the property at issue, so long as the Plaintiff posted a bond double the value of the property. *Fuentes*, 407 U.S. at 80 (beginning the analysis by declaring "[f]or more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard . . . It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'"

(citations omitted)). This Court should follow this binding precedent and strike Bill 7.

B. The Ordinance is unconstitutionally vague.

"It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits...." *Giaccio v. Pennsylvania,* 382 U.S. 399, 402–403, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966).

The Ninth Circuit resisted adopting the standard set forth in *City of Chicago v. Morales*, 527 U.S. 41 (1999) (ordinance was "inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene" and/or no reasonable person can tell what conduct is prohibited) in favor of the "no set of circumstances" requirement gleaned from *United States v. Salerno*, 481 U.S. 739, 745 (1987). *See Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 971 (9th Cir. 2003). More recent cases appear conflicted. In 2011, for example, that Court stated:

> Rather, the test is whether the text of the statute and its implementing regulations, read together, give ordinary citizens fair notice with respect to what the statute and regulations forbid, and whether the statute and regulations read together adequately provide for principled enforcement by making clear what conduct of the defendant violates the statutory scheme. *City of Chicago v. Morales,* 527 U.S. 41, 56, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999).

United States v. Zhi Yong Guo, 634 F.3d 1119, 1122-23 (9th Cir. 2011) (*cert. denied*, 131 S. Ct. 3041, 180 L. Ed. 2d 860 (2011)). Yet, in 2013, the Ninth Circuit reverted back to the "no set of circumstances" requirement:

> 'A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [statute] would be valid.' Thus, to succeed on a facial vagueness challenge under the Fifth Amendment's Due Process Clause, the challenger must "prove that the enactment is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.' Put another way, he must demonstrate that the 'provision simply has *no* core.'

Alphonsus v. Holder, 705 F.3d 1031, 1042 (9th Cir. 2013) (citations omitted).

Nevertheless, Plaintiffs submit that where an ordinance leaves undefined terms crucial to its enforcement, leaving people without notice as to how they may comply with the law and leaving enforcement agents without notice as to how they may enforce the law, the ordinance is unconstitutionally vague.[5] *Morales*, 527

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[5] To the extent that Plaintiffs' contention is somehow contrary to *Salerno*, counsel would note that the United States Supreme Court has plainly stated that *Salerno* is not dispositive of vagueness inquiries. *See, e.g., City of Chicago v. Morales,* 527 U.S. 41, 55 n. 22, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (plurality opinion) ("To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court."). As Justice Stevens explained in his concurring opinion in *Washington v. Glucksberg,* 521 U.S. 702, 739-40 (1997):

> The appropriate standard to be applied in cases making facial challenges to state statutes has been the subject of debate within this

*Footnote continued

U.S. at 61-62; *Zhi Yong Guo*, 634 F.3d at 1123 (noting that the "regulations also provide law enforcement with clear guidance as to what technologies they may police" when upholding a regulatory scheme).

Here, "sidewalk nuisances" are defined as both objects and "collection[s] of objects." ROH § 29-16.3. Only those that exceed 42 inches in length, 25 inches in width, and 43 inches in height, are unattended and do not obstruct the use of the sidewalks or protrude into the roads may be seized pursuant to Bill 7. ROH § 29-16.6. Yet, what constitutes a collection of objects is undefined. Must one person own all the objects or can more than one person own the collection? Must there be some spatial relationship between individual objects before the objects become a

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> Court. See *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 116 S.Ct. 1582, 134 L.Ed.2d 679 (1996). Upholding the validity of the federal Bail Reform Act of 1984, the Court stated in *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), that a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id.*, at 745, 107 S.Ct., at 2100. I do not believe the Court has ever actually applied such a strict standard, even in *Salerno* itself, and the Court does not appear to apply *Salerno* here.

(footnotes omitted). Nevertheless, in this case, even if *Salerno* is rigidly applied, Plaintiffs submit that no set of circumstances exist under which the ordinance would be valid. In all circumstances, there is no guidance to enforcement officers as to what constitutes a "collection of objects" and what does not. Thus, in light of the exceptions of ROH § 29-16.6, it is entirely within the enforcement agents' discretion as to what property to seize and what ransom to demand for the seized property.

collection? And, most importantly, would the collective sidewalk nuisance be seized if the objects could be viewed as several collections that meet the arbitrary size requirements of ROH § 29-16.6? These questions render homeless citizens and Plaintiffs unable to decipher the type of property or the amount of property that they are allowed to effectively own, and the seizure decision is left to the sole subjective discretion of the seizing official.

Moreover, the arbitrary $200 ransom is also assessed pursuant to either the seizing official's or the administrative official's subjective whim. In this case, for example, the ransom could be as low as $200 for the return of all of the objects seized on July 25, 2013 (assuming that the entirety of the objects collected are perceived as a "collection of objects") or as high as $15,800 if each of the 79 objects that can be ascertained from the tags as having been seized are ransomed separately. There is nothing in the ordinance that directs officials as to what constitutes a "collection of objects" and, therefore, what ransom should be demanded.

Courts have consistently struck ordinances and statutes that contain such vague terms that render the public unaware of how to comply with those laws and leave enforcement of those laws to the subjective interpretation of enforcement officials. *Morales,* 527 U.S. at 56-64 (holding a provision criminalizing loitering, which is defined as "to remain in any one place with no apparent purpose," void

for vagueness because the provision was "inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene"); *Tucson Woman's Clinic v. Eden,* 379 F.3d 531, 554-55 (9th Cir.2004) (holding a statute requiring physicians to treat patients "with consideration, respect, and full recognition of the patient's dignity and individuality" void for vagueness because it "subjected physicians to sanctions based not on their own objective behavior, but on the subjective viewpoint of others"); *Free Speech Coalition v. Reno,* 198 F.3d 1083, 1095 (9th Cir.1999), *aff'd sub nom. Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002) (holding a provision that criminalized sexually explicit images that "appear[ ] to be a minor" or "convey the impression" that a minor is depicted unconstitutionally vague because it was unclear "whose perspective defines the appearance of a minor, or whose impression that a minor is involved leads to criminal prosecution."); *Kolender v. Lawson,* 461 U.S. 352, 358–61, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) (concluding that a penal statute requiring that a criminal suspect provide "credible and reliable" identification to police was unconstitutionally vague); *Smith v. Goguen,* 415 U.S. 566, 568–69, 581–82, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974) (concluding that a statute criminalizing the act of "treat[ing] contemptuously" a United States flag was unconstitutionally vague). There is no difference between the Bill 7 term "collection of objects" and the vague terms reviewed in those cases.

Indeed, this case is strikingly similar to *Morales, supra.* There, Chicago passed an ordinance prohibiting "criminal street gang members" from "remaining in any one place with no apparent purpose" after a police officer orders them "all" to leave. *Morales*, 557 U.S. at 47. The Court explained that "[v]agueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement."[6] *Id.* at 56.

> If the police are able to decide arbitrarily which members of the public they will order to disperse, then the Chicago ordinance becomes indistinguishable from the law we held invalid in *Shuttlesworth v. Birmingham,* 382 U.S. 87, 90, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965). Because an officer may issue an order only after prohibited conduct has already occurred, it cannot provide the kind of advance notice that will protect the putative loiterer from being ordered to disperse. Such an order cannot retroactively give adequate warning of the boundary between the permissible and the impermissible applications of the law.
>
> Second, the terms of the dispersal order compound the inadequacy of the notice afforded by the ordinance. It provides that the officer "shall

[6] Although when reviewing a criminal law, courts should take "extra care" to prevent deterrence from constitutionally protected activities, *Molando v. Morales*, 556 F.3d 1037, 1045 (9th Cir. 2009), review of Bill 7 deserves no less care where the City has effectively illegalized homelessness, *see* ROH § 29-19 ("Bill 54"), Haw. Rev. Stat. § 708-814.5, and ROH §§ 10-1.2(a)(12), (13), (14), 10-1.2(b)(9), and 10-1.6(d), and the extraordinary amount for which the seized property is ransomed is more akin to punishment than any remuneration for costs actually incurred in the seizure process.

> order all such persons to disperse and remove themselves from the area." App. to Pet. for Cert. 61a. This vague phrasing raises a host of questions. After such an order issues, how long must the loiterers remain apart? How far must they move? If each loiterer walks around the block and they meet again at the same location, are they subject to arrest or merely to being ordered to disperse again? As we do here, we have found vagueness in a criminal statute exacerbated by the use of the standards of "neighborhood" and "locality." *Connally v. General Constr. Co.,* 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926). We remarked in *Connally* that "[b]oth terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles." *Id.,* at 395, 46 S.Ct. 126.
>
> Lack of clarity in the description of the loiterer's duty to obey a dispersal order might not render the ordinance unconstitutionally vague if the definition of the forbidden conduct were clear, but it does buttress our conclusion that the entire ordinance fails to give the ordinary citizen adequate notice of what is forbidden and what is permitted. The Constitution does not permit a legislature to "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *United States v. Reese,* 92 U.S. 214, 221, 23 L.Ed. 563 (1876). This ordinance is therefore vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates v. Cincinnati,* 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971).

Id. at 58-60.

Here, all of the constitutional problems discussed in *Morales* are present. First, enforcement agents decide what property is to be seized and what property constitutes a "collection of objects." "Collections of objects" could be measured in rods or miles, as could the terms "neighborhood" or "vicinity" as analyzed in *Morales*. Unlike *Morales*, there is no advance notice as to whether objects will be

deemed a "collection of objects" at all. And, although the *Morales* Court was plainly troubled by the questions that remained after an order to disperse, at least there was an order to disperse. Here, enforcement officials appear and indiscriminately seize objects in the dead of night. Moreover, enforcement officials are then left with the discretion to determine which objects should be considered separately and which should be grouped together in order to assess the ransom.

Clearly the City has "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *United States v. Reese,* 92 U.S. 214, 221, 23 L.Ed. 563 (1876). And, the public is left not knowing how to comply with the ordinance, an ordinance tamed only by the subjective interpretation of enforcement officials. This ordinance is vague and should be struck.

III. THE ORDINANCE IS UNCONSTITUTIONAL "AS APPLIED."

Alternatively, the Preliminary Injunction should issue for the "as applied" violations shown by the attached Declarations, noted above and upon which Plaintiffs rely. The proper legal standard for preliminary injunctive relief requires the moving party to demonstrate "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." *Winter v. Natural Res. Def. Council*, Inc., 55 U.S. 7, 19 (2008).

A. Plaintiffs are likely to succeed on the merits.

The United States Constitution protects Plaintiffs' property despite Plaintiffs' homelessness and/or encampment in expression of protected speech:

> the Fourth and Fourteenth Amendments protect homeless persons from government seizure and summary destruction of their unabandoned, but momentarily unattended, personal property.

Lavan v. City of Los Angeles, 693 F.3d 1022, 1024 (9th Cir. 2012). Indeed, Defendants' actions and omissions have violated and continue to violate a plethora of Plaintiffs' constitutional rights, including violations of the First, Fourth, Fifth (the "takings clause"), and the Fourteenth Amendments of the United States Constitution. Each of these rights is either specifically identified in the Fourteenth Amendment or is nonetheless incorporated against the states by the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652 (1925) (First Amendment); *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth Amendment); *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897) (takings clause).

Not surprisingly, the Hawaii Constitution contains similar or identical provisions guaranteeing these same rights. Haw. const. Art. 1 §§ 2, 4, 5, 6, 7, and 8. In fact, the Hawaii Constitution even provides that "*mamala-hoe kanawai* . . . Let every elderly person, woman and child lie by the roadside in safety--shall be a

unique and living symbol of the State's concern for public safety." Haw. const. Art. 9 § 10. And, of course, commonlaw torts and equitable remedies such as conversion, replevin, and trespass to chattels condemn and redress the exact actions taken against Plaintiffs by Defendants in this case.

Accordingly, the federal courts have been intolerant of the type of conduct challenged here, even when committed by local governments and officials pursuant to ordinance or policy. Plaintiffs are aware of at least three temporary restraining orders and/or preliminary injunctions that have issued in identical or very similar circumstances:

1. The City of Los Angeles has been subjected to several injunctions for the exact conduct that the Defendants in this case are routinely committing. *Lavan*, 693 F.2d at 1025 (*citing Justin v. City of Los Angeles*, No. 00-CV-12352, 2000 WL 1808426 at *13 (C.D. Cal. Dec. 5, 2000) (*Justin* attached as **Exhibit 3**)); *see also Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2007)) (remanding to District Court for determination of injunctive relief under theory that it is cruel and unusual punishment to criminalize homelessness) (*vacated pursuant to settlement, Jones v. City of Los Angeles*, 505 F.3d 1006 (9th Cir. 2007)).

2. After an exhaustive analysis of the City of Fresno's policies in dealing with the homeless, which were strikingly similar to the actions of Defendants in this case, the United States District Court for the Eastern District of California issued an injunction similar to the injunction requested here. *Kincaid v. City of Fresno*, No. 1:06-CV-1445 OWW SMS, 2006 WL 3542732 (E.D.Cal. Dec. 8, 2006) (unpublished) (attached as **Exhibit 2**);

3. Following trial in a class action suit on behalf of a class of homeless members, the United States District Court for the Southern District of Florida established "safety zones" in which the Plaintiffs sought injunctive relief against the continued harassment and seizure of property of the homeless in the public areas where they are forced to live. *Pottinger v. City of Miami*, 810 F.Supp. 1551 (S.D.Fla. 1992). Plaintiffs specifically

> complained (and the court subsequently condemned) "that the City routinely seizes and destroys their property and has failed to follow its own inventory procedures regarding the seized personal property of homeless arrestees and homeless persons in general." *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1554 (S.D. Fla. 1992). The Eleventh Circuit found no fault with the issuance of the injunction; but it did remand the case "on a limited basis" for the District Court to consider changed circumstances such as new homeless shelters and to clarify the scope of the injunction, particularly the enforcement of the ordinances outside of the "safety zones." *Pottinger v. City of Miami*, 40 F.3d 1155, 1157 (11th Cir. 1994).

As with each of these analogous cases, Plaintiffs have a high likelihood of success.

First, Defendants have violated Plaintiffs' Fourth Amendment rights. "A 'seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property.'" *Lavan*, 693 F.3d at 1027 (*quoting United States v. Jacobsen*, 466 U.S. 109, 113 (1984)).[7] The seizures of Plaintiffs' property are unreasonable. *Id.* at 1031 ("[t]he City does not – *and almost certainly could not* – argue that its summary destruction of Appellees' . . . property was reasonable under the Fourth Amendment.") (emphasis added). No judicial determination of probable cause or wrongdoing occurred.

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[7] Although Plaintiffs clearly have a reasonable expectation of privacy in the property seized in this case, Plaintiffs would prevail even with no expectation of privacy. This Court need not make that determination, however. It is not necessary because the "constitutional standard is [only] whether there was 'some meaningful interference' with Plaintiffs' possessory interest.'" *Id.* at 1028. And, "the Supreme Court has clarified that the Fourth Amendment protects possessory and liberty interests even when privacy rights are not implicated." *Id.* (*citing Soldal v. Cook County,* 506 U.S. 56, 63–64 & n. 8 (1992)).

Second, as discussed in Plaintiffs' facial challenge (above) even if the seizures were reasonable, due process requires that Plaintiffs receive notice. Bill 7 was passed for the specific purpose of divesting property owners of notice that is constitutionally required.

Further, due process requires some opportunity to be heard. While there is a perfunctory provision affording a hearing, as discussed above, there is no means by which Plaintiffs or any other aggrieved person could be meaningfully heard within a constitutionally permissible time. And, even if an adequate and timely hearing could be afforded, as shown by the Declarations and the Exhibits to those Declarations, Plaintiffs have requested hearings and have received constitutionally untimely responses.[8]

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[8] It matters not whether property could or will be returned at a later date:

> At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.'

Fuentes, 407 U.S. at 81-82 (citations omitted). The need for injunctive relief and continued judicial supervision in this case is clear as the City has already been reprimanded for the lack of an adequate return procedure in Case No. 1:12-cv-000668. Plaintiffs request that this Court judicially notice the evidence presented on January 17, 2013 in Case No. 1:12-cv-000668, the oral findings of this Court,

*Footnote continued

Finally, insofar as the seized property that was taken was used in furtherance of the expression of protected speech and activities, Plaintiffs' First Amendment rights have been violated. Accordingly, Plaintiffs' exercise of protected speech and activities has been unconstitutionally chilled.

Defendants' actions constitute clear constitutional violations. And, much (if not all) of these allegations are supported by video recording and strong documentary evidence. There is a strong likelihood of success on the merits. Moreover, Plaintiffs have alleged cognizable claims for conversion, replevin, negligence, and trespass to chattels.

B. Plaintiffs are harmed irreparably.

Plaintiffs will suffer irreparable harm to their liberty if not granted a preliminary injunction. "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." 11A Charles Alan Wright et al., Federal Practice & Procedure § 2948.1 (2d ed. 1995) Thus, "an alleged constitutional infringement will often alone constitute irreparable harm." *Associated Gen. Contractors of Cal., Inc. v. Coalition for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991).

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and this Court's written ruling that there was no adequate procedure for the return of property, which was filed in that case as Doc. 48.

Accordingly, relying on *Associated Gen. Contractors of Cal., Inc., supra.*, the risk of irreparable harm has been assumed where, as here, the City offers no hearings or post-deprivation remedy and the Plaintiffs show a likelihood of proving violations. *Justin v. City of Los Angeles*, No. CV0012352LGBAIJX, 2000 WL 1808426 at *10 (C.D.Cal. Dec. 5, 2000) (unpublished) (attached as **Exhibit 3**); *Kincaid v. City of Fresno*, No. 1:06-cv-1445 OWW SMS, 2006 WL 3542732 at *38 (E.D.Cal. Dec. 8, 2006) (unpublished) (attached as **Exhibit 2**); *Lavan v. City of Los Angeles*, 797 F.Supp.2d 1005, 1019 (C.D.Cal. 2011). Here as in those cases, "[t]he City's process, or lack thereof, creates not just the risk, but the certainty of erroneous deprivation." *Kincaid v. City of Fresno*, No. 1:06-cv-1445 OWW SMS, 2006 WL 3542732 at *38 (E.D.Cal. Dec. 8, 2006) (**Exhibit 2**).

Additionally, the United Supreme Court has specifically held that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347 (1976). Thus, insofar as the First Amendment is implicated, irreparable harm is rightfully presumed.

This factor also weighs in favor of the issuance of the requested injunction.

C. The Balance of Equities Mandates Relief.

The balance of equities weighs heavily in favor of the Plaintiffs. The Plaintiffs' interest is the protection of their property, which is often the sum of their worldly possessions, and/or the expression of protected speech. As the United

States District Court for the Eastern District of California has recognized: "Plaintiffs' interest in protecting against unlawful seizure and immediate, irrevocable destruction of their personal property including the loss of constitutional rights [is], in itself, an injury that the law will not tolerate." *Pamela Kincaid v. City of Fresno*, No. 1:06-cv-1445 OWW SMS, 2006 WL 3542732 at *40 (E.D.Cal. Dec. 8, 2006) (*citing Associated Gen. Contractors*, *supra.*, *Guiterrez v. Mun. Ct.*, F.2d 1031, 1045 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016; *Citicorp Servs.*, 712 F.Supp. 749, 753 (N.D.Cal. 1989)). The effect of Defendants' actions on the homeless is severe:

> The evidence adduced demonstrates that the City's destruction of homeless people's property causes a variety of other significant, legally cognizable harms. In the City's operations, homeless people lose medicine and health supplies; tents and bedding that shelter them from the elements; clothing and hygiene supplies; identification documents and other personal papers; the tools by which they try to make a meager income; and items of immeasurable sentimental value. The irreparable harm from the City's practices also includes the harm to homeless people's security and dignity.

Id. at *40. And, as found in *Pottinger*:

> the City's interest in clean parks is outweighed by the more immediate interest of the plaintiffs in not having their personal belongings destroyed. As this court previously found, the loss of such items such as clothes and medicine threatens the already precarious existence of homeless individuals by posing health and safety hazards.[9]

[9] Plaintiffs observe that the seizure of property and failure to return the property is little better than outright destruction.

Pottinger, 810 F.Supp. at 1573. "Similarly, Defendants' actions are likely to displace homeless individuals and threaten their ability to access charities for food, shelter, and assistance . . ." *Michael Justin v. City of Los Angeles*, No. CV0012352LGBAIJX, 2000 WL 1808426 at *11 (Dec. 5, 2000) (unpublished) (attached as **Exhibit 3**); *See also Lavan*, 797 F.Supp.2d at 1019 ("the City's interest in clean streets is outweighed by Plaintiffs' interest in maintain the few necessary personal belongings they might have.").

On the other hand:

> The City will still be able to lawfully seize and detain property, as well as remove hazardous debris and other trash; issuance of the injunction would merely prevent it from *unlawfully* seizing and destroying personal property that is not abandoned without providing any meaningful notice and opportunity to be heard. This not only benefits the Plaintiffs, but the general public as well.

Id. at 1019-20. Thus, while

> Defendants may be slowed in their efforts to keep the City, and especially the [Thomas Square] area, clean and safe[, and] [t]his injunction may disturb their new initiative [pursuant to Chapter 29, Article 16] . . . Plaintiffs, however, risk a greater harm if the injunction is not granted: the violation of their First, Fourth, and Fourteenth Amendment rights.

Michael Justin v. City of Los Angeles, No. CV0012352LGBAIJX, 2000 WL 1808426 at *11 (Dec. 5, 2000) (unpublished) (attached as **Exhibit 3**).

D. It serves the public interest to grant relief.

Here, Defendants are simply requesting that the Constitution be observed. The requested injunction:

> does not concern the power of the federal courts to constrain municipal governments from addressing the deep and pressing problem of mass homelessness or to otherwise fulfill their obligations to maintain public health and safety. . . . Nor does [it] concern any purported right to use public sidewalks as personal storage facilities.

Lavan, 693 F.3d at 1033. Instead, as in *Lavan*, the City has acted as if:

> unattended [or attended but 'tagged'] property of homeless persons is uniquely beyond the reach of the Constitution, so that the government may seize and destroy with impunity the worldly possessions of a vulnerable group in our society. [Yet,] [e]ven the most basic reading of our Constitution prohibits such a result . . ."

Id.

In other contexts, the Ninth Circuit has stated, "all citizens have a stake in upholding the Constitution" and have "concerns [that] are implicated when a constitutional right has been violated." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). A preliminary injunction would advance this shared interest of enforcing the Constitution's guarantees and reinforce this "Nation's basic commitment to foster the dignity and well-being of all persons within its borders." *Goldberg* 397 U.S. at 264-65.

Accordingly, the public interest weighs heavily in favor of issuance of the requested injunction. *Kincaid, supra.* at *41 ("the public interest is served . . . by

issuance of preliminary injunctive relief to maintain the status quo" and because "the City will not suffer undue hardship in having to retain property seized to afford due process, as opposed to the immediate irrevocable destruction of the Constitutional rights and property of affected homeless individuals") (attached as **Exhibit 2**); *Tony Lavan v. City of Los Angeles*, No. CV 11-2874 PSG (AJWx), 2011 WL 1533070 at *6 (C.D.Cal. April 22, 2011) ("the public interest is served by issuance of a TRO in that the City will still be able to *lawfully* seize and detain property, as opposed to unlawfully seizing and immediately destroying property.") (unpublished) (attached as **Exhibit 4**).

The need for injunctive relief is clear.

III. CONCLUSION

Plaintiffs request that the requested injunctive relief and temporary restraining order be granted.

DATED: Honolulu, Hawaii; September 13, 2013

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