No. 23-16123

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SACRAMENTO HOMELESS UNION, et al.,

Plaintiffs-Appellees,

v.

CITY OF SACRAMENTO,

Defendant/Appellant.

On Appeal from the from the United States District Court for the Eastern District of California
Case No. 2:22-cv-01095-TLN-KJN
Judge: Hon. Troy L. Nunley

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, DISABILITY RIGHTS ADVOCATES, DISABILITY RIGHTS EDUCATION & DEFENSE FUND, THE NATIONAL HOMELESSNESS LAW CENTER, AND THE WESTERN REGIONAL ADVOCACY PROJECT AS *AMICI CURIAE* SUPPORTING PLAINTIFFS-APPELLEES AND AFFIRMANCE

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Rodriguez v. Cnty. of Los Angeles,
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Other References

DIV. OF SOC. WORK AND THE CTR. FOR HEALTH PRAC., POL'Y & RSCH. AT THE CAL. STATE UNIV., SACRAMENTO, HOMELESSNESS IN SACRAMENTO COUNTY, RESULTS FROM THE 2022 POINT-IN-TIME COUNT,
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JEFFREY BERKO ET AL., DEATHS ATTRIBUTED TO HEAT, COLD, AND OTHER WEATHER EVENTS IN THE UNITED STATES, 2006–2010, NATIONAL HEALTH STATISTICS REPORT 76 (2014).....25

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U.S. ENVIRONMENTAL PROTECTION AGENCY, CLIMATE CHANGE AND SOCIAL VULNERABILITY IN THE UNITED STATES (2021),
https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf.....25

U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, 7 PRINCIPLES FOR ADDRESSING ENCAMPMENTS (2022), https://www.usich.gov/resources/uploads/asset_library/Principles_for_Addressing_Encampments_1.pdf.....18

CORPORATE DISCLOSURE STATEMENT

Amici are nonprofit organizations. They have no parent corporations, and no publicly held corporation owns any portion of any of them.

STATEMENT OF INTEREST

The American Civil Liberties Union, the American Civil Liberties Union of Northern California, the American Civil Liberties Union of Southern California, Disability Rights Advocates, Disability Rights Education & Defense Fund, the National Homelessness Law Center, and the Western Regional Advocacy Project are nonpartisan, non-profit civil rights organizations. For decades, they have engaged in litigation and advocacy to protect civil rights, including specifically to protect and advance the rights of unhoused people and people with disabilities. The *amici* organizations are described in more detail in the attached Addendum.[1]

INTRODUCTION

This case concerns whether a federal court may, during periods of extreme heat, temporarily prevent a city from putting unhoused individuals at increased risk of bodily injury and death. The answer, based on the evidence before the district court and Ninth Circuit precedent, is yes. A district court is empowered to issue the type of narrow and time-limited relief ordered by the lower court here in order to

[1] Amici file this brief with the consent of all parties. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

secure unhoused individuals' "liberty interest in [their] own bodily security." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006).

This should not be a controversial conclusion. The City of Sacramento's conduct is exactly the type of state action that "affirmatively place[s] individuals at greater risk of danger," which this Circuit has routinely found violates the state-created-danger doctrine. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 194–95 (1989). The only difference is that the City's actions target a politically unpopular group that the City believes it should have unfettered ability to treat however it sees fit in the name of "public safety." The City's appeal is a thinly veiled attempt to shield its treatment of unhoused people from constitutional constraints and judicial review, regardless of the harm its actions cause. The vulnerability of the unhoused population at issue, a majority of whom have disabilities, and the City's legal obligations to protect this group, are all the more reason to affirm. This Court should decline the City's invitation to narrow settled Ninth Circuit precedent and should reaffirm the ability of unhoused individuals to use the Constitution and the courts to protect themselves from grave bodily harm at the hands of the state.

ARGUMENT

The district court applied the correct legal standards in issuing its preliminary injunction. Despite this, the City now frames its disagreement with the

lower court's factual findings as legal error. In doing so, it urges this Court to apply incorrect legal standards as to *Monell* liability and the state-created-danger doctrine. The Court should reject these narrowed and erroneous interpretations of settled Ninth Circuit precedent and affirm the district court's decision.

In truth, the City is asking this Court to apply an improper standard of review and usurp the fact-finding role of the district court. But deference must be given to the district court's factual findings unless they are "clearly erroneous." *United States v. Fry*, 322 F.3d 1198, 1200 (9th Cir. 2003); *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 794 (9th Cir. 2005) (review of district court's factual findings "in the preliminary injunction context is very deferential"). The City's invitation for this Court to "review the underlying merits of the case" is inappropriate for appellate review of a preliminary injunction and should be rejected. *Gregorio T. By & Through Jose T. v. Wilson*, 59 F.3d 1002, 1004 (9th Cir. 1995) (preliminary injunction "will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of case," but only if district court abused its discretion).

I. THE CITY'S *MONELL* ARGUMENTS ARE UNSUPPORTED BY ESTABLISHED LAW AND CONTRARY TO THE PURPOSE AND INTENT OF THE CIVIL RIGHTS ACT

The district court properly found the City liable for its widespread practice of clearing encampments during extreme heat. This was proper under *Monell*, and

the City's arguments to the contrary are precluded by established law and unsupported by the evidence considered by the district court. While the City no longer erroneously asserts, as it did below, that a widespread practice cannot form the basis for a *Monell* claim, it raises a new argument on appeal—that the evidence before the district court was insufficient to show such a "widespread practice." This argument improperly asks this Court to ignore the governing "clearly erroneous" standard and, in any case, should be considered waived. Even if proper to consider, this argument is contradicted by the governing law and the evidence considered below.

In the proceedings below, the City erroneously argued that because there was no evidence of an express City policy or decision by a City policymaker, there was no basis for a *Monell* claim. Dist. Ct. Dkt. No. 68 at 13. But well-established Supreme Court and Ninth Circuit precedents make clear that such evidence of an express policy or official decision is not necessary to establish municipal liability under Section 1983, where there is evidence of a widespread practice or custom. *See, e.g., Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 659 (1978) ("local governments . . . may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such custom has not received formal approval through the government's official decision-making channels"); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (Supreme Court has

"long recognized" that municipal liability may be established by proving "existence of a widespread practice . . . not authorized by written law or express municipal policy"). Given this binding law and the substantial evidence before it documenting the City's widespread and longstanding practice of clearing encampments during extreme heat, the district court properly disregarded the City's spurious *Monell* argument.

Now, the City acknowledges—as it must—that evidence of a "widespread practice" that is "not authorized by written law or express municipal policy" can establish a "policy or custom" under *Monell*. Appellant's Opening Br. 64-65, ECF No. 6. The City newly contends, however, that the evidence before the district court was insufficient to establish such a widespread practice. This is false.

As an initial matter, because this argument is raised for the first time on appeal, the Court should decline to consider it.[2] *See, e.g., A-1 Ambulance Serv., Inc. v. Cnty. of Monterey*, 90 F.3d 333, 338 (9th Cir. 1996) ("we lack the power to consider" an issue not raised below unless the issue "is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed"). The City's new *Monell* argument is not legal in

[2] Indeed, the City first raised *Monell* in opposition to a motion filed after the order it appeals here. *See* Dist. Ct. Dkt. No. 68.

nature, but rather urges the Court to conduct its own findings of fact based on its misrepresentation of the record.

The City's *Monell* argument is also foreclosed because it improperly asks this Court to substitute its own interpretations of the evidence for the district court's findings of fact. As discussed *supra* this contravenes settled Ninth Circuit precedent. *See supra*, at 3.

Even if it were proper for this Court to entertain this argument, the City's contention that the evidence considered by the district court is insufficient to establish a "policy or custom" under *Monell* cannot be reconciled with established law. This Court has consistently held that "a plaintiff may prove the existence of a custom or informal policy with evidence of repeated constitutional violations for which the errant municipal officials were not discharged or reprimanded . . . irrespective of whether official policy-makers had actual knowledge of the practice at issue." *Navarro v. Block*, 72 F.3d 712, 714–15 (9th Cir. 1995), *as amended on denial of reh'g* (Jan. 12, 1996)) (citations omitted); *see also Henry v. Cnty. of Shasta*, 132 F.3d 512, 518–520 (9th Cir. 1997), *as amended on denial of reh'g*, 137 F.3d 1372 (9th Cir. 1998) (declarations detailing similar rights violations by police and jail personnel sufficient to establish municipal custom or informal policy); *Rodriguez v. Cnty. of Los Angeles*, 891 F.3d 776, 790–803 (9th Cir. 2018)

(repeated instances of excessive force supported finding of municipal custom or informal policy).

To demand more than the evidence considered below would unsettle this precedent. The record shows that the district court considered—and specifically cited—evidence documenting the City's "widespread" practice of encampment clearing during hot weather, which one declarant observed "hundreds" of times.[3] *See* Dist. Ct. Dkt. No. 22 at 11 (quoting Sanchez Decl.). The district court also noted that it had reviewed multiple other declarations that spoke to the nature of the City's "widespread," "continuing," and "regular" practice of clearing encampments in hot weather. *Id.* at 12-13. These declarants averred that they witnessed the City's practice of clearing encampments "on a regular basis" in "hot weather," "during the hottest days," and during "the extreme heat wave." *See id.* (quoting Rios Decl. stating he had "personally been swept dozens [of] times," and that his community had experienced "over 78" sweeps since 2019). This evidence plainly shows more than "an isolated or sporadic incident"—i.e., the quantum of evidence addressed by the inapposite caselaw on which the City relies. *Saved Mag. v. Spokane Police Dep't*, 19 F.4th 1193, 1201 (9th Cir. 2021).

[3] The August 2023 order that is the subject of this appeal incorporated the factual findings, background, and reasoning set out in its prior preliminary injunction orders, *See* Dist. Ct. Dkt. No. 55 at 4-5.

The Court should decline to stray from binding precedent to impose new, onerous requirements for claims against municipalities under Section 1983, particularly at this early posture. Accepting the City's *Monell* arguments would undermine the purpose and intent of the Civil Rights Act by shielding municipalities from accountability for repeated and egregious constitutional rights violations. As the *Monell* Court recognized, "there can be no doubt that . . . the Civil Rights Act was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." 436 U.S. at 700–01. The higher evidentiary bar advocated for by the City would immunize municipalities for repeated, widespread practices that violate civil rights, contravening the purpose and intent of the Civil Rights Act.

II. THE COURT SHOULD REJECT THE CITY'S DISTORTION OF THE STATE-CREATED-DANGER DOCTRINE

A plaintiff succeeds on a state-created-danger claim if he shows, first, "affirmative conduct on the part of the state that exposed him to an actual, particularized danger that [he] would not otherwise have faced," and, second, "that the state official acted with deliberate indifference to that known or obvious danger." *Polanco v. Diaz*, 76 F.4th 918, 926 (9th Cir. 2023) (citations omitted). The lower court faithfully applied this legal standard to the evidence before it, finding that the City violated substantive due process by conducting encampment sweeps during extreme heat that placed unhoused individuals at increased risk of

heat-related illness and death.

The Court should affirm this decision and decline the City's invitation to diverge from settled Ninth Circuit precedent to adopt a significantly narrowed interpretation of the state-created-danger doctrine.

A. Clearing Encampments in Extreme Heat is Affirmative Conduct, Cognizable Under the State-Created-Danger Doctrine.

A state actor may be liable under the state-created-danger doctrine if its "affirmative actions created or exposed [a plaintiff] to an actual, particularized danger that she would not otherwise have faced," *Martinez v. City of Clovis*, 943 F.3d 1260, 1271 (9th Cir. 2019). The district court correctly concluded that sweeping encampments in extreme heat satisfies this requirement.

1. Clearing Encampments in Extreme Heat Leaves Unhoused Individuals in a More Dangerous Situation.

The City urges this Court to find that clearing encampments during extreme heat does not expose unhoused individuals to greater heat-related health risks than they would otherwise face and, thus, that the City's sweeps are not affirmative conduct cognizable under the state-created-danger doctrine. At bottom, this is a disagreement with the district court's factual findings and must be reviewed (and upheld) under the clear error standard. But the City muddies this analysis, suggesting that, as a matter of law, clearing encampments during extreme heat cannot satisfy the "affirmative conduct" element. In doing so, it relies on two

incorrect interpretations of what constitutes "affirmative conduct" under this Circuit's precedents. Both should be rejected.

First, the City incorrectly suggests that it cannot be liable for the heat-related harms that result from its sweeps because it "didn't create" the heat. Appellant's Br. 67, ECF No. 6.[4] This contention, that state action is not "affirmative conduct" if it does not *directly* create or control all aspects of the danger, turns the state-created-danger doctrine on its head. State action need not "be the cause-in-fact of the plaintiff's injury. Rather, the state actor need only have created the particularized risk that plaintiff might suffer such injury." *Kennedy*, 439 F.3d 1062 n.2. Here, the City enhanced the heat risks unhoused people face, satisfying the affirmative conduct element. *See Hernandez v. City of San Jose*, 897 F.3d 1125, 1135 (9th Cir. 2018) ("[T]he "critical distinction" for finding liability is not "between danger creation and enhancement, but . . . between state action and inaction in placing an individual at risk.") (citation omitted).

This Court's recent decision in *Polanco v. Diaz* is instructive. There, the

[4] The only case cited by the City for this proposition is an out-of-circuit district court decision. *See* Appellant's Br. 67 (citing *Berry v. Hennepin County*, 2022 U.S. Dist. LEXIS 148691, at *24-25 (D. Minn. Aug. 19, 2022)). In *Berry*, the court appears to incorrectly apply Eighth Circuit law. While it cites *Hart v. City of Little Rock*, 432 F.3d 801, 805 (8th Cir. 2005), *Hart* itself did not address the affirmative conduct element of the claim and the Eighth Circuit case cited in *Hart* makes clear that government conduct is cognizable "when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced." *Gregory v. City of Rogers, Ark.*, 974 F.2d 1006, 1010 (8th Cir. 1992).

Court found a deceased prison guard's family members adequately pled a state-created-danger claim where the state conduct in question was a decision to transfer incarcerated people from one facility experiencing a COVID-19 outbreak to a second facility with no known cases. 76 F.4th at 926–27. This decision "exposed" the guard to a known and particularized danger, namely "the dangers of COVID-19," that foreseeably resulted in his death. *Id.* at 927. While the prison officials in *Polanco* did not create or control the COVID-19 virus, just as the City does not create or control extreme weather, the Court had no trouble finding that their transfer decision satisfied the affirmative conduct element because it put the guard in "a much more dangerous position than he was in before." *Id.* at 926.

Here, too, the district court properly found that the City's sweeps during extreme temperatures placed plaintiffs in a much more dangerous position. The court reached this conclusion based on evidence before it that the sweeps separated plaintiffs from communities that provided food, water, and weather-protective materials; removed them from areas shaded from sun; and required them to hurriedly pack their belongings and search for a new place to live under extremely hot and stressful conditions; and that all this resulted in collapse, illness, and death. *See* Dist. Ct. Dkt. No. 22 at 11-13. These dangers are well within the scope of this Court's precedent and the resulting harm is "sufficiently severe to raise constitutional concerns." *Polanco*, 76 F.4th at 927. *See, e.g.*, *Murguia v. Langdon*,

61 F.4th 1096, 1112 (9th Cir. 2023) ("This court and other circuits have applied the state-created danger exception in situations where an officer . . . separated the plaintiff from a third-party who may have offered assistance, or prevented other individuals from rendering assistance to the plaintiff."); *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1087 (9th Cir. 2000) (officers placed individual "in a more dangerous position than the one in which they found him" when they evicted him from a "bar late at night when the outside temperatures were subfreezing").

This conclusion is in line with those of "several district courts in this circuit [that] have found similar violations based on placing homeless people in danger from the elements or lack of adequate services." *Mary's Kitchen v. City of Orange*, No. 8:21-cv-01483-DOC-JDE, 2021 WL 6103368, at *11 (C.D. Cal. Nov. 2, 2021) (city's proposal to evict service provider without transition plan that would "leave hundreds without the services needed to survive, particularly with upcoming strong winds and harsh winter rains and the ongoing pandemic" puts "the unhoused people of Orange 'in a situation that was more dangerous than the one in which they found [them]'") (quoting *Munger*, 227 F.3d at 1086); *see also Janosko v. City of Oakland*, No. 3:23-cv-00035-WHO, 2023 WL 187499, at *3 (N.D. Cal. Jan. 13, 2023) (finding closure of encampment during "severe weather conditions . . . will affirmatively expose them to harsher, more dangerous conditions than if they were able to stay in the camp" sufficient to show a "likelihood of state-created danger");

Jeremiah v. Sutter Cnty., No. 2:18-cv-00522-TLN-KJN, 2018 WL 1367541, at *5 (E.D. Cal. Mar. 16, 2018) (finding "increased risk of harm" based on declarations detailing "fear for safety without shelter, recent wind, rain, and cold weather," and past efforts by county "to remove essential needs"); *Sanchez v. City of Fresno*, 914 F.Supp.2d 1079, 1102 (E.D. Cal. 2012) (city's plan to demolish a shelter at "the onset of the winter months that would bring cold and freezing temperatures, rain, and other difficult physical conditions" stated claim under state-created-danger doctrine); *Langley v. City of San Luis Obispo*, No. CV 21-07479-CJC (ADSx), 2022 WL 18585987, at *5 (C.D. Cal. Feb. 7, 2022) (plaintiffs plausibly alleged state-created-danger claim where "the City's sweeps and property seizures force homeless people to live exposed to the elements, without protection from cold, wind, and rain, jeopardizing their physical and mental health").

Second, the City incorrectly argues that because unhoused individuals are already exposed to high heats, regardless of its actions, it should not be liable for the additional harm its sweeps cause. *See* Appellant's Br. 67-68, ECF No. 6. This is directly contradicted by this Circuit's precedent. "Whether the danger already existed is not dispositive because, 'by its very nature, the doctrine only applies in situations in which the plaintiff was directly harmed by a third party—a danger that, in every case, could be said to have already existed.'" *Martinez*, 943 F.3d at 1271 (citation omitted).

A similar argument was advanced in *Hernandez v. City of San Jose*, which found that attendees at a political rally adequately stated a claim that police officers violated their due process rights by shepherding them into a crowd of violent protesters. 897 F.3d 1125 (9th Cir. 2018). The defendants in that case argued that the "danger [to the Attendees] was already present by virtue of the heated speech activity taking place throughout the entire area," and, therefore, that "the Officers could not have been the cause of the Attendees' injuries." *Id.* at 1135. The Court squarely rejected this argument, stating that "it is not the law of this circuit" that "liability would only attach when an official does 'more than simply expose the plaintiff to a danger that already existed.'" *Id.* (citation omitted).

Here, as the officers in *Hernandez* did, the City argues that it should not be held liable because "[h]eat-related health risks to the homeless from 'extreme heat' . . . exist whether in an encampment or not." Appellant's Br. 67-68, ECF No. 6. But, as this Court already recognized, accepting such an argument "would render the state-created danger doctrine meaningless." *Hernandez*, 897 F.3d at 1135 (citation omitted).

2. Government Action that Places a Discrete Group of Unhoused People at Increased Risk of Heat-Related Illness and Death Exposes Them to a "Particularized" Harm.

The district court correctly concluded that the City's sweeps exposed the plaintiffs and other similarly situated unhoused individuals to an actual,

particularized danger. The City tries to undermine this conclusion by advancing an incorrect test for what constitutes "particularized danger" that unduly focuses on the City's intent to place a single victim in danger. But a particularized danger need not—as the City argues—be directed only at a specific plaintiff. Rather, the critical inquiry is whether the affirmative conduct exposes a "discrete and identifiable group" to a particular danger or whether the conduct "exposes a broad swath of the public to 'generalized dangers.'" *Polanco*, 76 F.4th at 927 (quoting *Sinclair v. City of Seattle*, 61 F.4th 674, 676, 683 (9th Cir. 2023)).

That inquiry is met here, where the City's actions did not expose the public at large, or even all unhoused individuals, to heat-related health risks, but rather the "discrete and identifiable group" of individuals living in targeted encampments. By pushing this group into unprotected areas, scattering them away from resources, and forcing them to quickly gather and transport their belongings, all during extreme heat, the City exposed them to danger that is "both 'actual' and 'particularized.'" *Hernandez*, 897 F.3d at 1133 (citation omitted).

The City misinterprets *Sinclair* to argue that a particularized danger can only be directed at a specific victim, not a group. 61 F.4th at 682. This runs contrary to both prior and subsequent Ninth Circuit precedent. *See Polanco*, 76 F.4th at 927 (finding particularized harm where state action exposed all prison guards and incarcerated individuals in a facility to COVID-19); *Hernandez*, 897 F.3d at 1133

(increased danger to all attendees at a rally was sufficiently "actual," "particularized," and "foreseeable").

In *Sinclair*, the court held the danger that defendants' actions created was not particularized because it was a "generalized danger experienced by all those members of the public **who chose to visit**" a certain part of the city. 61 F.4th at 682 (emphasis added). The Court in *Sinclair* found these facts similar to those presented in *Johnson v. City of Seattle*, where the plaintiffs "**voluntarily** placed themselves in the midst of the crowd that subsequently became unruly." *Id.* at 683 (emphasis added) (quoting *Johnson v. City of Seattle*, 474 F.3d 634, 640 (9th Cir. 2007)). The victims in both cases voluntarily entered areas where they—and all others in the area—were exposed to danger. Here, by contrast, the plaintiffs did not voluntarily expose themselves to universally faced heat-related dangers. Rather, the City removed plaintiffs and other similarly situated unhoused individuals from encampments against their will.

3. The City was "Deliberately Indifferent" Regardless of Whether It Had a Specific Intent to Cause a Certain Harm.

Under the second prong of the state-created-danger doctrine, a claim only succeeds if the defendant acted with deliberate indifference to a known and obvious danger. This standard requires that the state actor "recognizes the unreasonable risk and actually intends to expose the plaintiff to such risks without regard to the consequences to the plaintiff," *L.W. v. Grubbs*, 92 F.3d 894, 899 (9th

Cir. 1996), "no more, no less," *Kennedy*, 439 F.3d at 1064. This Court recently clarified in *Murguia* that while this standard is higher than mere negligence, it "does not require *intent to cause harm* or knowledge of *certain* harm." *Murguia*, 61 F.4th at 1126 n.16. In other words, while the state actor must take an intentional action with knowledge that it will expose the plaintiff to an unreasonable risk, he "need not know with certainty that the risk will materialize or intend for the plaintiff to face the risk." *Id.*

For example, in *Kennedy*, a police officer was found to be "deliberately indifferent" because he intentionally told the plaintiff's neighbor about the plaintiff's allegations of abuse against the neighbor, knowing that would place the plaintiff's family in danger. *Kennedy*, 439 F.3d at 1065. Notably, the officer did not intend or know for certain that his actions would result in their injury. Similarly, in *Murguia*, the court found an officer was deliberately indifferent after he ignored the obvious risk of leaving two babies unattended with a parent he knew was undergoing a mental health crisis, despite having no intention to harm the babies. 61 F.4th at 1114.

Here, too, the City knew that evicting unsheltered individuals from shaded encampments during extreme heat "posed a serious risk of physical harm," but proceeded nonetheless. *Id.* The lower court correctly found that the City acted with deliberate indifference to this known and obvious danger based on the evidence

before it showing, among other things, that the City continued to conduct sweeps even while under a state court order to cease them due to the health risks they posed. *See* Dist. Ct. Dkt. No. 22 at 14. That the heat-related illness and death at issue here were "known and obvious" to the City is also bolstered by its affirmative duties towards unhoused people with disabilities, *see infra* at III.B., and the widely accepted fact that sweeps are detrimental to health.[5]

B. The City's Attempts to Portray This Case as Expanding the State-Created-Danger Doctrine Fail.

The City portrays this case as an outlier and an aberration. It pretends that the state-created-danger doctrine itself is archaic and narrow and balks at its application to state actions directed at unhoused individuals. This is false. While the City and its *amici* would have this Court believe that the case before it is "unprecedented," it is in fact one among a long list of narrow, time-limited injunctions in this Circuit preventing cities from sweeping encampments during dangerous conditions. *See e.g.*, *Sanchez*, 914 F.Supp.2d 1079; *Jeremiah*, 2018 WL 1367541; *Sausalito/Marin Cnty. Chapter of California Homeless Union v. City of*

[5] *See* U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, 7 PRINCIPLES FOR ADDRESSING ENCAMPMENTS (2022), https://www.usich.gov/resources/uploads/asset_library/Principles_for_Addressing_Encampments_1.pdf ("closi[ng] encampments without offering shelter or housing options . . . result in adverse health outcomes, exacerbate racial disparities, and create stress, loss of identification and belongings, and disconnection from much-needed services.").

Sausalito, 522 F.Supp.3d 648, 658 (N.D. Cal. 2021); *Santa Cruz Homeless Union v. Bernal*, 514 F.Supp.3d 1136, 1143 (N.D. Cal. 2021); *Where Do We Go Berkeley v. California Dep't of Transportation (Caltrans)*, No. 21-cv-04435-EMC, 2021 WL 5964594 (N.D. Cal. Dec. 16, 2021); *Blain v. California Dep't of Transportation*, 616 F.Supp.3d 952 (N.D. Cal. 2022); *Langley v. City of San Luis Obispo*, No. CV 21-07479-CJC (ADSx), 2022 WL 18585987 (C.D. Cal. Feb. 7, 2022); *Janosko v. City of Oakland*, No. 3:23-cv-00035-WHO, 2023 WL 187499 (N.D. Cal. Jan. 13, 2023); *Tassey, v. California Dep't of Transportation (Caltrans)*, No. 23-cv-05041-AMO, 2023 WL 6466205 (N.D. Cal. Oct. 4, 2023).

While sometimes framed as an "exception" to the rule that the state does not have a duty to protect individuals, the Ninth Circuit has never suggested that courts should apply this doctrine sparingly, nor that they should exempt certain types of state conduct, as the City and its *amici* suggest should be the case with homelessness policies. *See United States v. Koon*, 34 F.3d 1416, 1447–48 (9th Cir. 1994) ("The right which is established in these substantive due process cases is not the narrow right to be protected from constitutional wrongs committed by third persons. Rather, because the individual has been placed in a dependent and helpless position, she is entitled to the broader right to be protected from harm."). Indeed, "this circuit has held state officials liable, in a variety of circumstances, for

their roles in creating *or* exposing individuals to danger they otherwise would not have faced." *Kennedy*, 439 F.3d at 1062.

The City attempts to avoid application of this doctrine by asserting that this case "stretches the exception too far." Appellant's Br. 77, ECF No. 6. In doing so, it relies on three unsupported limitations on the state-created-danger doctrine: that it does not apply to enforcement of laws or policies, that it does not apply to action intended to promote health and safety, and that it does not apply when harm is caused by conditions, not third parties. Each is incorrect.

Enforcement of laws does not insulate the City's conduct. First, the City argues that, because its sweeps are conducted pursuant to a valid ordinance, they cannot constitute a state-created danger. There is no such rule and, contrary to the City's assertion, the Ninth Circuit has applied the state-created-danger doctrine to situations involving enforcement of laws and policies. *See, e.g.*, *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) (arrest of driver for driving while intoxicated); *Munger*, 227 F.3d at 1087 (ejecting patron from bar and preventing him from driving while intoxicated); *Kennedy*, 439 F.3d at 1076 (officer acting pursuant to inter-local agreement on child abuse investigations). And numerous courts in this Circuit have applied the state-created-danger doctrine to sweeps conducted pursuant to local law. *See Sausalito/Marin Cnty. Chapter of California Homeless Union*, 522 F.Supp.3d at 659 (enforcement of city resolution banning

day camping); *Janosko*, 2023 WL 187499, at *1 (enforcement against illegal encampment); *Tassey*, 2023 WL 6466205, at *1 (enforcement of state anti-camping laws).

Good intentions are not a defense. Second, the City claims that state-created danger cannot exist where the government is acting "to protect health and safety of the entire community." Appellant's Br. 77, ECF No. 6. This is false. *See, e.g.*, *Polanco*, 76 F.4th at 929 (rejecting argument that because defendants' actions furthered the "safety of the inmates entrusted to their care" they could not be liable for placing guards at risk of danger); *Bloom v. City of San Diego*, No. 17-CV-2324-AJB-NLS, 2018 WL 9539239, at *7 (S.D. Cal. Aug. 21, 2018) ("although the City has a discernable interest in promoting cleanliness and public health, a homeless person's interest in their personal possessions, safety, and rights outweighs it"). Just as the defendants in *Wood* could be liable for the increased risk of danger they created by leaving a passenger stranded in a high-crime area despite the fact that arresting the intoxicated driver furthered the safety of all drivers on the road, 879 F.2d at 586, so too can the City be liable for the health risks of encampment clearings even if those clearings arguably further the health or safety of others.

Harms from conditions are cognizable. The City invents a rule that would distinguish state action that places a plaintiff at risk of harm from a human from

harm caused by some other circumstance, including weather. No such distinction exists. This Circuit has found that danger can come in the form of severe weather, *Munger*, 227 F.3d 1082; *see also Kennedy*, 439 F.3d at 1061 n.1 (citing *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) (finding liability for leaving children "[u]nder exposure of the cold" in an abandoned car)); toxic mold, *Pauluk v. Savage*, 836 F.3d 1117, 1125 (9th Cir. 2016); the absence of medical care, *Penilla v. City of Huntington Park*, 115 F.3d 707 (9th Cir. 1997); and the COVID-19 virus, *Polanco*, 76 F.4th 918. In short, "a review of Ninth Circuit authority establishes that there is, in fact, no such requirement. Danger could come from, *e.g.*, environmental elements or from preventing access to medical care; no third party need be involved." *Where Do We Go Berkeley*, 2021 WL 5964594, at *11 (collecting cases).

The City's attempt to distinguish *Munger* and *Penilla* as outliers conveniently omits these other cases. Its reasoning is also unavailing. According to the City, danger is only cognizable if the state actor finds the plaintiffs in "conditions unable to care for themselves." Appellant's Br. 79, ECF No. 6 (citing intoxication in *Munger*, 227 F.3d 1082 and illness in *Penilla*, 115 F.3d 707). But under this logic, plaintiffs—unsheltered individuals who are unable to take shelter from the elements indoors with disabilities that render them especially vulnerable to heat-related illness—would be similarly situated.

III. THE CITY'S TREATMENT OF UNHOUSED PEOPLE WITH DISABILITIES SUPPORTS AFFIRMANCE

A. Sacramento's Unhoused Population Consists Predominantly of People with Disabilities Who Are More Vulnerable to Sweeps in Extreme Temperatures.

Sacramento's unhoused population, like much of the unhoused population in California, is growing exponentially and consists primarily of people with disabilities. Sacramento's Point in Time ("PIT") Count from 2022 showed a 167% increase in the population of unhoused people with disabilities in the County since 2019.[6] Although only about 23% of Californians report having a disability, 58% of unhoused Sacramento residents reported having "*one or more disabling health conditions*" and four out of every ten reported two or more disabling conditions.[7]

The City of Sacramento is home to between 67% to 75% of unsheltered homelessness in the County, but represents only 33% of the total population of the County.[8] The City is well aware of this statistic and of the demographics of its

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[6] DIV. OF SOC. WORK AND THE CTR. FOR HEALTH PRAC., POL'Y & RSCH. AT THE CAL. STATE UNIV., SACRAMENTO, HOMELESSNESS IN SACRAMENTO COUNTY, RESULTS FROM THE 2022 POINT-IN-TIME COUNT, at 45 (July 2022) hereafter ("PIT Report"), https://sacramentostepsforward.org/wp-content/uploads/2022/06/PIT-Report-2022.pdf (showing 167% increase in chronic homelessness). Chronic homelessness is defined under federal law as "A 'homeless *individual with a disability*' . . . who: [l]ives in a place not meant for human habitation . . . and . . . [h]as been homeless continuously for at least 12 months or on at least 4 separate occasions in the last 3 years" with certain other conditions on the 4 separate occasions. 24 C.F.R. § 91.5 (emphasis added).

[7] *Id*. at 43-44.

[8] *Id*. at 21.

unhoused population. It provides support and resources to conduct the PIT Count and, as an active participant in the Sacramento City and County Continuum of Care, is responsible for collecting and analyzing information about the local homeless service system and homelessness more generally, including conducting the biennial PIT Count.[9]

People with disabilities are especially vulnerable to sweeps in extreme temperatures. During sweeps, unhoused individuals with disabilities are forced to relocate and may find themselves in situations where shade is harder to find and/or it is more difficult to access transportation and visit accessible cooling centers, have prescriptions filled, or seek necessary medical care. Additionally, during encampment clearings, they may lose (or have seized and destroyed) items necessary to protect them from the elements, including tents, umbrellas, clothing, water, sunglasses, and sunscreen.

The resulting exposure to extreme temperatures and lack of access to care may result in severe health responses or death because it exacerbates preexisting conditions, including cerebral, respiratory, and cardiovascular diseases, and because it has a greater impact on those taking prescription or other drugs that may

[9] *Id.* at 7, 11.

affect the body's ability to regulate its temperature.[10] Extreme heat is linked to elevated emergency room visits, hospital admissions, and mortality for individuals with mental health issues, cardiovascular and respiratory complications, and other disabilities.[11]

B. The City has an Affirmative Obligation to Modify its Enforcement and Sweep Protocols to Accommodate Unhoused People with Disabilities and Ensure They are Not Disproportionately Harmed.

Title II of the Americans with Disabilities Act (ADA) prohibits public entities from discriminating against people with disabilities and demands that they not be "excluded from participation in or be denied the benefits of the services, programs, or activities" of public entities. 42 U.S.C. § 12132. For over two decades, the Ninth Circuit has held that Title II's prohibition against discrimination "brings within its scope **anything a public entity does**." *Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001) (emphasis added) (citation omitted). This includes all enforcement activity of City ordinances to maintain public spaces

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[10] JEFFREY BERKO ET AL., DEATHS ATTRIBUTED TO HEAT, COLD, AND OTHER WEATHER EVENTS IN THE UNITED STATES, 2006–2010, NATIONAL HEALTH STATISTICS REPORT 76 (2014); U.S. ENVIRONMENTAL PROTECTION AGENCY, CLIMATE CHANGE AND SOCIAL VULNERABILITY IN THE UNITED STATES (2021), https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf.

[11] NATIONAL COUNCIL ON DISABILITY, THE IMPACTS OF EXTREME WEATHER EVENTS ON PEOPLE WITH DISABILITIES (2023), https://ncd.gov/sites/default/files/NCD%20Extreme%20Weather_508.pdf.

because that activity constitutes the "normal function[s] a governmental entity." *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002); *see also Where Do We Go Berkeley v. California Dep't of Transportation*, 32 F.4th 852, 861 (9th Cir. 2022) (finding the ADA applies to the "program" of clearing encampments). Sacramento, from its participation as a defendant in the *Barden* lawsuit, is well aware of this obligation.

A public entity's duty not to discriminate includes a duty to make "reasonable modifications in policies, practices, or procedures" when "necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that the modifications would fundamentally alter the nature of the service, program, or activity" in question. 28 C.F.R. § 35.130(b)(7)(i). "Even facially neutral government actions that apply equally to disabled and nondisabled persons may violate Title II if the public entity has failed to make reasonable accommodations to avoid unduly burdening disabled persons." *Cohen v. City of Culver City*, 754 F.3d 690, 700 (9th Cir. 2014).

This affirmative duty includes modifying enforcement of state law or municipal ordinances so as not to burden people with disabilities in "a manner different from and greater than it burden[s] non-disabled residents." *McGary v. City of Portland*, 386 F.3d 1259, 1265 (9th Cir. 2004). The Ninth Circuit has expressly found that Title II of the ADA applies to a public entity's enforcement

activities—holding, for example, that the law can require reasonable modification of a facially neutral administrative regulation whose "enforcement burdens" people with disabilities "in a manner different and greater than it burdens others," *Crowder v. Kitagawa*, 81 F.3d 1480, 1482, 1485 (9th Cir. 1996), and that "municipal code enforcement can constitute a benefit of the services, programs, or activities of a public entity under Title II." *McGary*, 386 F.3d at 1269. Federal law thus prohibits the City from enforcing its municipal ordinances, by sweeping encampments, in a way that discriminates against Plaintiffs and other people with disabilities or that fails to reasonably accommodate their needs. *See* 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b)(7)(i) (obligation to make reasonable modifications).

While the case before the Court is not a Title II case, this affirmative duty extends to the City regardless of the context. The City knows that more than 50% of the unhoused population in Sacramento County have disabilities and that somewhere between 67% and 75% of those individuals reside within the City's limits. It also knows that these individuals are particularly vulnerable to harm from extreme heat (or cold). It has been on notice of its affirmative obligations under federal law to modify its enforcement scheme in order not to burden or harm unhoused people with disabilities for decades. Together, this shows that the City knowingly put unhoused people with disabilities, which is more than half the unhoused population, in greater danger by exposing them to elevated risks of harm

from its encampment sweeps by virtue of the fact that they are more vulnerable to that harm.

CONCLUSION

Amici urge this Court to affirm the decision of the district court.

Dated: October 23, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32 and Local Rule 32, I certify that this brief:

(i) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Ninth Circuit Rule 32-1 because it contains 6,498 words, including footnotes and excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f);

(ii) complies with the typeface requirements of Federal Rule of Appellate Procedure Rule 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure Rule 32(a)(6) and it has been set in Times New Roman font in 14-point type.

Dated: October 23, 2023

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ADDENDUM

STATEMENT OF INTERESTS OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan organization of more than 1.6 million members dedicated to defending the principles of liberty and equality embodied in the U.S. Constitution and our nation's civil rights laws. Through its Trone Center for Justice and Equality and Racial Justice Program, the ACLU engages in nationwide litigation and advocacy to enforce and protect the constitutional rights of unhoused people, including serving as counsel of record in *Fund for Empowerment et al. v. City of Phoenix et al.*, No. CV-22-02041-PHX-GMS (D. Ariz. 2022), which challenges the City of Phoenix's unlawful treatment of unhoused residents, including its practice of pushing unhoused people into a crowded encampment where they are at increased risk of heat-related illness and death, in violation of the Fourteenth Amendment's prohibition on state-created danger. The ACLU's Disability Rights Program engages in nationwide litigation and advocacy to advance and protect the constitutional and statutory rights of people with disabilities.

The American Civil Liberties Union of Northern California ("ACLU NorCal") and the **American Civil Liberties Union of Southern California** ("ACLU SoCal") are regional affiliates of the ACLU. The ACLU NorCal focuses on civil rights advocacy specifically in the Northern California region, including

Sacramento, California. The ACLU NorCal and ACLU SoCal have long-standing interests in advancing economic and racial justice and decriminalizing poverty. In particular, the ACLU NorCal has directly represented individuals, acted as class counsel, and engaged as *amici* to safeguard constitutional guarantees for unhoused people, including in *Coalition on Homelessness, et al. v. City and County of San Francisco, et al.* No. 23-15087 (9th Cir. 2023) and *Warren, et al. v. City of Chico, et al.*, No. 2:21-cv-640-MCE-KJN (E.D. Cal. 2021).

Disability Rights Advocates (DRA) is based in Berkeley, California with offices in New York, New York and Chicago, Illinois. DRA is a national nonprofit public interest legal center recognized for its expertise on issues affecting people with disabilities. DRA is dedicated to ensuring dignity, equality, and opportunity for people with all types of disabilities, and to securing their civil rights. To accomplish those aims, DRA represents clients with disabilities who face discrimination or other violations of federal or state civil rights or federal constitutional protections in complex, system changing class action and impact litigation. DRA is generally acknowledged to be one of the leading public interest disability rights litigation organizations in the country, taking on precedent-setting disability rights class actions across the nation.

Disability Rights Education & Defense Fund (DREDF) is a national non-profit law and policy organization dedicated to protecting and advancing the civil

rights of people with disabilities. Based in Berkeley, California, DREDF has remained board- and staff-led by people with disabilities since its founding in 1979. DREDF pursues its mission through education, advocacy, and law reform efforts, and is nationally recognized for its expertise in the interpretation of California and federal disability civil rights laws. As part of its mission, DREDF works to ensure that people with disabilities have the legal protections, including effective legal remedies, necessary to vindicate their right to be free from discrimination.

Founded in 1989, **The National Homelessness Law Center** (the "Law Center")[12] is a national nonprofit legal organization based in Washington, D.C., with the mission to use the power of the law to end and prevent homelessness. In connection with this objective, the Law Center gathers information about state and local laws that impact homeless people nationwide, identifies best practices to address the root causes of homelessness, and litigates to safeguard the civil and human rights of homeless persons.[13] In the course of this work, the Law Center has

[12] The Law Center was formerly known as the National Law Center on Homelessness & Poverty.

[13] *See*, e.g., *Martin v. City of Boise*, 920 F.3d 584 (9th Cir.), *cert. denied*, 140 S. Ct. 674 (2019).

published numerous reports analyzing issues related to homelessness in the United States.[14]

The Western Regional Advocacy Project (WRAP) exists to expose and eliminate the root causes of civil and human rights abuses of people experiencing poverty and homelessness in our communities. WRAP is part of a movement committed to defend and expand the social, political, and economic rights of historically oppressed communities. We are building a democratic, multi-lingual, multi-racial and gender-balanced organization whose leadership and membership reflect our communities.

[14] The reports that the Law Center has produced in recent years are available at https://homelesslaw.org/publications/ (last visited Oct. 23, 2023). *See* Nat'l Law Center on Homelessness & Poverty, *Housing Not Handcuffs 2019: Ending the Criminalization of Homelessness in U.S. Cities* (Dec. 2019), https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf; *see also* Nat'l Law Center on Homelessness & Poverty, *Tent City, USA: The Growth of America's Homeless Encampments and How Communities are Responding* (2017), https://homelesslaw.org/wp-content/uploads/2018/10/Tent_City_USA_2017.pdf.

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all the participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

Dated: October 23, 2023

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