Case No.: 20-55522

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JANET GARCIA, et al.,

Plaintiffs - Appellees,

vs.

CITY OF LOS ANGELES, a municipal entity,

Defendant - Appellant.

Appeal from the District Court for the Central District of California, Case No. 2:19-cv-06182-DSF-PLA
Honorable Dale S. Fischer, United States District Judge

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INTRODUCTION

Last year, Pete Diocson, who is homeless and lives in a tent along a dirt road in an industrial area of Los Angeles, was in the process of packing up his belongings to move them out of the way for a cleanup conducted by the City of Los Angeles ("City"), when a Los Angeles Police Department ("LAPD") officer stopped him and told him that the kennel he used to keep his dog Bella, was too big, and he could not take it with him. He didn't agree, but he also knew he could be arrested if he didn't, so he turned it over, and it was thrown into the back of a city trash truck. A month later, Marquis Ashley was using a cart to move his bedding and other items out of LA Sanitation's way, when he was stopped by a sanitation worker, who told him the cart he was using was a bulky item, and that he had to turn it over. He did not think the law applied to carts, especially the kind that attach to the back of bicycles, but he also didn't want to resist the city worker. The cart was thrown away.

In Los Angeles, these incidents are not exceptional. From the City's perspective, they were by design. When sanitation workers and LAPD officers took and immediately destroyed Mr. Diocson's kennel

and Mr. Ashley's cart, they were simply enforcing Los Angeles Municipal Code ("LAMC") Section 56.11 ("LAMC 56.11"), a municipal ordinance that regulates where and how much property homeless people can have on the sidewalks, and specifically LAMC 56.11(3)(i), the Bulky Item Provision, which allows the City, without any prior notice, to take and throw away any single item that does not fit in a 60-gallon container with the lid closed.

These were not the first, nor the last times that Mr. Diocson and Mr. Ashley have had their belongings taken and summarily destroyed. With no other way to challenge the City's actions, they joined five other unhoused residents, many of whom have lost all of their belongings at the hands of the City, and along with a community organization of housed and unhoused residents and a group of taxpayers, brought this lawsuit against the City. Plaintiffs challenge both the city's continued practice of seizing and destroying homeless people's belongings, and the constitutionality of the provision that authorized the City to take and immediately destroy Mr. Diocson's dog kennel, Mr. Ashley's cart, and countless other belongings, simply because they did not fit in a 60-gallon container with the lid closed. Even after the lawsuit was filed,

the City indicated its intention to increase enforcement of the Bulky Item provision, and so Mr. Diocson and Mr. Ashley, along with Ktown for All, brought a motion for a preliminary injunction to enjoin enforcement of the Bulky Item Provision.

In April, the district court granted Plaintiffs' request for this narrow injunction, prohibiting the City from enforcing the Bulky Item Provision and a companion provision that makes it a crime, punishable by six months in jail or a $1000.00 fine, to resist or even delay enforcement of the ordinance. *See* LAMC 56.11(10)(d). The district court left intact 16 other provisions in LAMC 56.11 that regulate unhoused people's property, including the provisions of the ordinance that allow the City to address "immediate threats to public health and safety," LAMC 56.11(3)(g), and the more specific provisions that address obstructions of public rights of way, exits, entrances and loading docks, city services, and even that regulate excess and unattended property and when tents can be constructed. *See* LAMC 56.11(a)-(f); (7), (8).

The City now appeals. The City abandons its challenge to the injunction in so far as it enjoins enforcement of the portion of the Bulky Item Provision that allows the City to immediate destroy people's

belongings. Presuming that this clause can be severed from the rest of the ordinance, the City focuses its appeal on the "removal" of Bulky Items. But striking the "discard" clause does not provide any more constitutionally-mandated due process or make the seizure of property based solely on the size and nothing else, any more reasonable. The district court did not abuse its discretion by issuing a narrow injunction, preventing enforcement of the Bulky Item Provision and the companion enforcement ordinance.

ISSUE(S) PRESENTED

I. Did the district court err in failing to sever the "may discard" language, when the City did not argue this at the district court and instead argued that the clause was functionally and volitionally necessary for the continued enforcement of the Bulky Item Provision?

II. Does a provision of an ordinance that allows the City to seize property based solely on the size of the item fall within the community caretaking exception to the Fourth Amendment's Warrant Requirement?

III. Did the district court abuse its discretion by enjoining

enforcement of the Bulky Item Provision when it allows for the warrantless seizure of property solely because an item will not fit within a 60-gallon container with the lid closed?

IV. Did the district court abuse its discretion by enjoining enforcement of the Bulky Item Provision, when the provision provides no procedural protections or safeguards whatsoever?

V. Does the Bulky Item Provision sufficiently protect unhoused peoples' dignity interest, as required by the California Constitution?

STATEMENT OF THE CASE

A. Statement of Facts

Los Angeles Municipal Code Section 56.11 is a long, detailed ordinance that regulates how much property an unhoused person can have in public, and where those items can be located. LAMC 56.11(1). The ordinance allows the City to enforce those provisions primarily through the seizure and in some instances, the immediate destruction of those belongings. LAMC 56.11(3).

The current version of LAMC 56.11, which contains the provisions at issue here, was adopted after the City of Los Angeles was sued by eight homeless people in Skid Row for seizing and immediately destroying their belongings. *See Lavan v. City of Los Angeles,* 797 F. Supp. 2d 1005, 1015 (C.D. Cal. 2011) The Ninth Circuit upheld a preliminary injunction against the City, prohibiting it from "[s]eizing property in Skid Row absent an objectively reasonable belief that it is abandoned, presents an immediate threat to public health or safety, or is evidence of a crime, or contraband; and 2) [a]bsent an immediate threat to public health or safety, destruction of said seized property without maintaining it in a secure location for a period of less than 90 days." *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1024 (9th Cir. 2012), *cert. denied*, 570 U.S. 918 (2013); *see also* SER 217, 226 ¶¶ 18-20, 54-57.

While *Lavan* was still pending in the district court, the Los Angeles City Council amended LAMC 56.11, which was previously just a law of general application that prohibited items from being left in the public right of way. *See Lavan*, 797 F. Supp. 2d at 1015. This version of LAMC 56.11, which remains in effect today, is applicable only to people

who are homeless, and regulates the amount of belongings they can have with them in public, as well as how and where those belongings can be kept. LAMC 56.11(1). It also amended how the City can enforce the provisions of the ordinance,

On its face, the amended law incorporates *Lavan*'s general rule that, in most instances, the City cannot take unhoused people's belongings and destroy them without some procedural safeguards. LAMC 56.11(3). The ordinance also integrates the exceptions carved out by the Court in *Lavan*, which allow the City to seize and destroy property that constituted an "immediate threat to public health or safety." *See Lavan*, 693 F.3d at 1024; *see also* LAMC 56.11(3)(g).

The ordinance goes further, however, creating a number of additional specific exceptions, including, for example, allowing the impounding of property that interferes with city operations or blocks sidewalks, loading docks, ingresses or egresses. LAMC 56.11(3)(c)-(e). The ordinance also prohibits property from being left unattended and limits the cumulative volume of person's property to what can fit in a 60-gallon trashcan with the lid closed. LAMC 56.11(2)(f), (3)(a), 3(b). Where the regulation prohibits the interference with access to buildings

or preventing the clear passage of sidewalks, the ordinance permits the City to move or impound the property without any pre-deprivation notice. LAMC 56.11(3)(e). The provisions related to the cumulative amount of property a person can have is enforceable by impound, only after the City provides individualized pre-deprivation notice. LAMC 56.11(3)(b). *See also* LAMC 56.11(4)(a). Most of the provisions that regulate where or how much property a person can have expressly incorporate post-deprivation notice requirements. LAMC 56.11(a)-(f); 4(a).The City is also required tohold impounded property for 90 days, so individuals can repossess their belongings. *See* LAMC 56.11(5).

Except when the item is "bulky." LAMC 56.11 creates two very different statutory schemes: one for items that can fit in a 60-gallon container with the lid closed and one for those that cannot. When the City determines that an unhoused person's belonging is a Bulky Item,[1]

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[1] LAMC 56.11(2)(c) defines a Bulky Item as:

> any item, with the exception of a constructed Tent, operational bicycle or operational walker, crutch or wheelchair, that is too large to fit into a 60-gallon container with the lid closed, including, but not limited to, a shed, structure, mattress, couch chair, other furniture or appliance. A container with a volume of no more than 60 gallons used by an individual to hold his or her Personal Property shall not in itself be considered a Bulky Item.

any and all safeguards and considerations provided in the other provisions of LAMC 56.11 fly out the window. Instead, under LAMC 56.11(3)(i) ("the Bulky Item Provision"), the City may immediately seize and discard these items. The considered approach outlined by the Court in *Lavan* and adopted in part by the City Council simply does not apply to any items the City deems a Bulky Item. The Bulky Item Provision does not require the City to take any factors other than size into consideration before seizing and destroying the item. *See* LAMC 56.11 (2)(c), (3)(i). And unhoused individuals whose items are taken from them because a city employee determines the item cannot fit in a 60-gallon container with the lid closed are afforded no procedural protections whatsoever. They are given no notice, before or after the items are taken, and there is *never* any opportunity to contest the deprivation of property. In fact, a separate provision of LAMC 56.11 makes it a crime, punishable by six months in jail or $1000 fine, to willfully resist, obstruct or even delay a city employee. LAMC 56.11(10)(a), LAMC Section 11.00(m).

This provision of LAMC 56.11 is routinely enforced on the streets of Los Angeles. Plaintiffs Pete Diocson and Marquis Ashley have

repeatedly had their belongings taken from them by city workers, acting pursuant to LAMC 56.11(3)(i). In April 2019, LA Sanitation workers took a dog kennel Mr. Diocson used to keep his dog Bella safe at night because city workers decided it was "bulky." 4 ER 487. In May 2019, Mr. Ashley was using a cart to remove the rest of his belongings from out of the way of a city cleanup when a sanitation worker stopped him and made him give up his cart because it too was "bulky." 4 ER 467. In both instances, their items were summarily destroyed. Both continue to fear they will lose even more belongings, if the City decides they are "bulky." 4 ER 488.

Since this lawsuit was filed, enforcement of LAMC 56.11 has continued. In January 2020, LA Sanitation explicitly announced it would increase enforcement of LAMC 56.11, including specifically LAMC 56.11(d)(3). SER 67-68. In February 2020, members of Ktown for All, an organizational plaintiff in this case that was founded to help fight against neighborhood resistance to the creation of homeless shelters and to forge connections between housed and unhoused residents, were on their way to a meeting to discuss how they could support the City's efforts to build more shelters. 4 ER 477. On their

way, members learned that LA Sanitation was threatening to throw away the belongings of one of their homeless neighbors who is in a wheelchair. 4 ER 477. They skipped the meeting, and when they got to where their neighbor was staying, they found him surrounded by law enforcement officers and sanitation workers. 4 ER 478. As they attempted to negotiate with the LAPD officers on the scene about whether he could keep any of his belongings, LA Sanitation workers told them the pallet he used to keep his tent off the wet, muddy ground and the foam cushion he slept on were "bulky" and summarily threw them away. 4 ER 478-479, 482, Exh. A.[2]

Ktown for All and its members have also been repeatedly affected by the enforcement of LAMC 56.11. For example, one of their unhoused members, Rachelle Bettega had plastic bins she used to keep her clothes and other possessions off the ground, to prevent them from getting wet when it rains. 4 ER 505. City workers seized and destroyed them because they determined they were Bulky Items. 4 ER 506.

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[2] This exhibit is attached as an Exhibit to Appellees' Motion to Transmit Physical Evidence, filed concurrently with this Answering Brief.

B. **Statement of the Case**

In July 2019, Pete Diocson, Marquis Ashley, and five other unhoused residents whose belongings were also summarily destroyed by the City of Los Angeles, along with Ktown for All and a group of taxpayers, filed this lawsuit against the City, alleging the City continues to violate their constitutional rights. 4 ER 520. Plaintiffs challenge the City's practice of seizing and destroying their belongings, and to the extent the City contends the seizure and destruction were done pursuant to LAMC 56.11, Plaintiffs challenge the ordinance as it is applied. Plaintiffs do not challenge the constitutionality of LAMC 56.11 as written,[3] with one exception. Plaintiffs bring a facial challenge to the Bulky Item Provision and the corresponding provision that makes it a crime to even delay city employees from seizing and

[3] Plaintiffs also initially challenged the Bulky Item Provision and another provision on the ground that they were vague, which therefore had led to arbitrary and discriminatory enforcement. The district court found that Section 1 of LAMC 56.11 limited the ordinance to the regulation of unhoused people's belongings; as such, it was not not vague. The court noted, however, that if the ordinance was a law of general application, "the statute would be unconstitutionally vague." *See* SER 108 (citing *Desertrain v. City of Los Angeles*,754 F.3d 1147,1156 (9th Cir. 2014)).

destroying any belongings the city determines are "bulky." Plaintiffs allege this provision, which allows the City to seize and immediately destroy people's belongings based solely on size and without consideration of any other factors, violates the Fourth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 7 and 13 of the California Constitution.

In October 2019, the City moved to dismiss Plaintiffs' facial challenge, among other claims. SER 175. Before the Court ruled on the City's motion, LA Sanitation, the designated administrative agency tasked with interpreting LAMC 56.11, stated publicly it was increasing enforcement of LAMC 56.11, including specifically, the Bulky Item Provision. SER 67-68.

On February 4, 2020, the district court denied the part of the City's motion to dismiss directed at Plaintiffs' facial challenge of the Bulky Item provision. SER 121. The Court dedicated more than 10 pages to the City's facial challenge, and after considering the constitutionality of both the removal and the destruction of Bulky Items, found that Plaintiffs had sufficiently stated claims that the Bulky Item Provision is unconstitutional as written. *See* SER 96-105.

In light of the court's ruling, Plaintiffs asked the City to voluntarily stop enforcement of the Bulky Item Provision. SER 72. The City declined. SER 73. After the City was unwilling to commit to any reduction of enforcement of the ordinance or delay enforcement to allow the parties to meaningfully discuss amendments to the provision, Plaintiffs, Marquis Ashley and Pete Diocson, along with Ktown for All, moved to enjoin the enforcement of the Bulky Item Provision, which the court did on April 13, 2020. 1 ER 32.

SUMMARY OF THE ARGUMENT

Plaintiffs sought and the district court issued a narrow injunction, enjoining the City from enforcing two of the approximately 18 provisions of LAMC 56.11 that regulate the storage of homeless people's belongings in public. The district court properly found the Bulky Item Provision and a related provision, LAMC 56.11(10)(d), were unconstitutional as written because the seizure and destruction of property based solely on the size of the item was unreasonable, and the challenged provisions provided no procedural protections whatsoever. The district court severed the Bulky Item Provision and LAMC 56.11(10)(d) from the remainder of LAMC 56.11 and enjoined the City

from enforcing these provisions, leaving intact the rest of LAMC 56.11, which Plaintiffs have not moved to enjoin.

The City concedes on appeal that the district court did not err in enjoining enforcement of the Bulky Item Provision to the extent that the provision allows the City to destroy people's belongings. Instead, the City argues, for the first time on appeal, that the district court should have simply severed "may discard" from the Bulky Item Provision. and allowed the City to continue to remove Bulky Items, just not destroy them.

The City's arguments fail for a number of reasons. First, the City waived its severability argument by failing to raise it below. Second, the "may discard" language is not severable from the rest of the Bulky Item provision. In fact, the City conceded this point in its opposition to the motion for a preliminary injunction. The City argued and presented evidence that the provision allowing the City to discard items was necessary for the enforcement of the Bulky Item Provision and removing items, as an alternative to immediately destroying them, was "unachievable." Moreover, the structure, legislative intent, and public policy behind the Bulky Item Provision demonstrate that the Bulky

Item Provision is not further severable.

Even if the words "may discard" were severable, the district court still did not abuse its discretion in issuing the injunction. Just as the City cannot immediately destroy Bulky Items based solely on the size of the item, the district court likewise found Plaintiffs were likely to succeed on the merits of their claim that the City cannot immediately remove Bulky Items without violating the United States and California Constitutions. Regardless of whether the items are destroyed or simply removed, the Bulky Item Provision provides no procedural protections whatsoever, as required by the Due Process Clauses of the U.S. and California Constitutions. Similarly, the provision allows the City to seize belongings without a warrant and is inconsistent with the well-established exceptions to the warrant requirement (including the community caretaking doctrine, which the City argues for the first time on appeal, saves the provision). Plaintiffs demonstrated they are likely to succeed on the merits of their facial challenge, and the district court did not abuse its discretion by issuing a narrow injunction that enjoins enforcement of the Bulky Item Provision.

ARGUMENT

I. THE DISTRICT COURT PROPERLY SEVERED THE BULKY ITEM PROVISION FROM LAMC 56.11 AND WAS NOT REQUIRED TO FURTHER SEVER THE "MAY DISCARD" CLAUSE

The City concedes the district court properly enjoined the City from destroying people's belongings, pursuant to the Bulky Item Provision. The City argues, however, that it erred by enjoining enforcement of the entire Bulky Item Provision, instead of just severing the "may discard" language. [4]

Because the City has not challenged Court's injunction as to the destruction of Bulky Items, in order for the City to succeed, the City must establish that the "may discard" phrase is severable from the rest of the Bulky Item Provision. For a number of reasons, the City fails to do so.

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[4] The City argues repeatedly on appeal that the district court failed to analyze "may remove" and "may discard" separately because the City suggests these are two legal questions. *See* Br. at 24-26, 41-43. As discussed below, these are questions of degree. The district court considered both removal and destruction. This is particularly clear in the district court's order on the City's motion to dismiss. *See* SER 95-101, 101-105. The order is cited and incorporated into the district court's order granting the preliminary injunction. *See* 1 ER 15, 24. The City inexplicably does not discuss this ruling in its opening brief.

Under California law (which is the applicable body of law to evaluate a severability clause, *see City of Lakewood v. Plain Dealer Pub. Co.,* 486 U.S. 750, 772 (1988), LAMC 56.11's severability clause alone is insufficient to establish a given clause or phrase is severable. Although a severability clause can give rise to a presumption of severability, *Cal. Redev. Ass'n v. Matosantos*, 53 Cal. 4th 231, 270 (2011), the Court must also look at "three additional criteria": A provision is only severable from the remainder of an ordinance if it is "grammatically, functionally, and volitionally separable." *Vivid Ent., LLC v. Fielding*, 774 F.3d 566, 574 (9th Cir. 2014)*; see also McMahan v. City & Cty. of San Francisco*, 127 Cal. App. 4th 1368 (2005).

All three criteria must be satisfied. *People v. Nguyen,* 222 Cal. App. 4th 1168, 1191 (2014) ("A preempted or invalid part of an ordinance can be severed if, and only if, it is grammatically, functionally and volitionally separable.") (internal quotation marks omitted)).

A. **The City Waived Its Severability Argument**

The City waived its severability argument because it failed to properly raise the argument to the district court. Even though the district court had already thoroughly analyzed the Bulky Item

Provision in a well-reasoned decision on the City's motion to dismiss and had effectively ruled it was unconstitutional, the City chose not to argue the phrases "may discard" were severable. Instead, the City simply stated in its opposition that "the Ordinance contains a severability provision. Thus, the Court should evaluate the constitutionality of 'may remove' and 'may discard' separately." SER 48. The City never even mentioned, let alone analyze the three elements necessary to establish severability; on the contrary, as discussed below, the City argued that prohibiting the destruction of bulky items would actually render the provision unenforceable. The City also failed to make the severability argument when it was given the chance to object to the district court's tentative order granting Plaintiff's preliminary injunction. SER 6. This argument is therefore waived. *See Conservation Nw. v. Sherman*, 715 F.3d 1181, 1188 (9th Cir. 2013) (argument mentioned but "buried in the middle of a section" addressing different issues was forfeited).

B. The Severed Bulky Item Provision Is Not Functionally or Volitionally Severable

The City's severability argument on appeal is conclusory and does not show that the "may discard" language is severable. The City fails to

consider whether the severed provision, limited only to seizure and removal is—in reality—enforceable standing alone, and whether the City Council would have adopted the Bulky Item Provision without the express ability to immediately discard Bulky Items. The only evidence the City points to is the self-serving severability provision itself—that is not enough. *See* Br. at 57; *Cal. Redev. Ass'n*, 53 Cal. 4th at 270 (presence of severability clause is "not conclusive."). Instead, the City's own evidence about the enforceability of the provision and the legislative history and intent demonstrate that the Bulky Item Provision is not further severable.

1. The Discard Phrase is Not Functionally Severable

The City argues the severed Bulky Item Provision "can still function," without considering whether the provision would actually function if severed. It is not enough for the City to just say that without "may discard," "the provision is still functional," albeit it with "reduced scope, of course." Br. at 56. The correct inquiry requires more: "[t]he remaining provisions must stand on their own . . . unaided by the invalid provisions nor rendered vague by their absence nor inextricably connected to them by policy considerations. They must be capable of

separate enforcement." *Vivid Ent. LLC*, 774 F.3d at 576 (citation omitted).

By the City's own admission, the Bulky Item Provision would not function without the "may discard" provision. The City explicitly (and repeatedly) argued to the district court that removal but not destruction of Bulky Items was "unachievable" for the City and that, without the ability to throw away these items, the Bulky Item Provision was not capable of separate enforcement. *E.g.*, SER 49, 131, 195. If the City takes possession of these items, they acknowledge they would be required to store them. *See* Cal. Civ. Code § 2080.10; *see also* SER 113. But the City explicitly argued both in its opposition to the motion for preliminary injunction and its earlier motion to dismiss that the City unable to do this: "as a practical matter, [providing 60-day storage for all Bulky Items] is unachievable." SER 49 (citing 3 ER 215 ¶ 50) ("LASAN's involuntary storage facilities do not have capacity to store bulky items removed from homeless encampments or other public areas."); *see also* SER 15 ("[t]he City also asserts that it 'does not have the space to store all Bulky Items it removes from public places,' and therefore it must be permitted to destroy them"). Indeed, in its

opposition to the preliminary injunction, the City dedicated two pages and submitted evidence to show the Court why, without the ability to discard Bulky Items, the City could not enforce the Bulky Item provision at all. *See* SER 49-51; *see also* 3 ER 215 ¶¶ 50-52.

Now, on appeal, the City dismisses this argument by observing without legal citation that the inability to store seized property is of no moment because "there is a difference between having to stop enforcing a statutory provision as a matter of resource allocation, which can change based on all kinds of circumstances, and having to stop enforcing it as a matter of the provision's constitutionality." Br. at 58. Yet the City did not argue it would have to put off enforcement for a time; instead, the City dismissed storage out of hand, arguing repeatedly that the inability to destroy Bulky Items would be fatal to its ability to enforce the provision. The City even went so far as to argue that the City's inability to store property rendered the destruction of property reasonable. SER 48-51.

The City cannot simply abandon this argument and evidence on appeal, now that they no longer suit its purposes. The "functionality" inquiry requires that the severed provision be capable of separate

enforcement. The City has repeatedly argued "the City lacks capacity to store Bulky Items" Br. at 57, and by the City's own argument and evidence, the ability to do so is practically "unachievable." *Id.* This ends the inquiry. The Bulky Item Provision is incapable of separate enforcement, and is not, therefore, functionally severable. *See Acosta v. City of Costa Mesa*, 718 F.3d 800, 820 (9th Cir. 2013) (holding that text is not functionally separable because words are necessary to the ordinance's operation and purpose).

2. The Discard Phrase is Not Volitionally Severable

The City bases its argument that the "may discard" provision is volitionally severable on a single piece of evidence—LAMC Section 56.11's severability clause. But again, more is required. [5]

Volitional severability requires that the severed provision still "constitute[] a completely operative expression of the legislative intent." *Nguyen*, 222 Cal. App. 4th at 1192 (citation omitted) (ordinance was not

[5] The presence of a severability clause cannot amount to evidence of volitional severability. If it did, this element would always be established when there is a severability clause, and the presence of a severability clause would be more than a mere presumption. But that is not the law. *People v. Library One, Inc.*, 229 Cal. App. 3d 973, 988-89 (1991).

volitionally severable because severing the preempted portion from the remaining ordinance made it a ban when it was intended to merely restrict use); *Metromedia, Inc. v. San Diego*, 32 Cal. 3d 180, 190-91 (1982) (ordinance intended to be a comprehensive ban on off-site advertising signs was not volitionally severable because confining its ban to commercial signs would make the ordinance different and less effective than intended). This does not rest on whether the City would have chosen to address the issue of Bulky Items; the question is whether the City would have chosen to address Bulky Items according to the terms of the severed ordinance. If not, then the provision is not severable.

The City's inability to provide post-removal storage makes the Bulky Item Provision not volitionally severable. The declaration of legislative intent in LAMC 56.11 indicates that "[t]he City enacts this section to balance the needs of the residents and public at large to access clean and sanitary public areas . . . with the needs of the individuals, who have no other alternatives for the storage of personal property, to retain access to a limited amount of personal property in public areas." LAMC 56.11(1). The City argues that removing Bulky

Items from public areas is critical to achieve this balance, but the severed Bulky Item Provision would actually prevent the City from addressing people's belongings that are "bulky," because the mechanism to address them would rest on post-removal storage, which the City argued is "unachievable." *See* SER 49; 3 ER 215 ¶¶ 50-52.

The City also argued that the removal of Bulky Items, without their immediate destruction, is inconsistent with sound public policy, since "it is hard to imagine how building more storage space is a better use of [the City's] resources than using that space for shelters or other faculties to provide services and addresses the humanitarian crisis facing the City." *See* SER 50.

The structure of the Bulky Item Provision also suggests the severed Bulky Item Provision would not be a functionally complete expression of legislative intent. Subsection three of LAMC 56.11 has nine provisions concerning the City's removal of homeless persons' property stored in a public area. LAMC 56.11(3)(a)-(i). All of the impound provisions expressly incorporate the post-removal notice provision. *See* LAMC 56.11(3)(a)-(f) (providing that "post-removal notice shall be provided as set forth" below). The one provision that predicates

the seizure of property based not on the location of the property, but rather, the volume of the property, requires pre-removal notice as well. On the other hand, the three provisions that allow destruction of property do not incorporate any notice provisions. *Compare* LAMC 56.11(3)(a)-(f) *with* LAMC 56.11(3)(g)-(i). This is not only constitutionally mandated, as discussed below, it is also functionally required, since without post-deprivation notice, there would be no way for individuals to retrieve their belongings.

Moreover, though the City has argued in this litigation that the City is not constitutionally required to provide any kind of notice, a dubious proposition for the reasons spelled out below, the fact that the City Council provided some notice in every instance the City provided for impound instead of destruction supports the conclusion that the City Council would not have adopted the severed Bulky Item provision without it. The severed provision is not volitionally severable for this reason as well. *See Nguyen*, 222 Cal. App. 4th at 1192.[6]

[6] Nor would it be appropriate for the Court to simply import these provisions into the severed Bulky Item Provision. *See Vivid Ent., LLC*, 774 F.3d at 573 (citing *United States v. Nat'l Treasury Emps. Union,* 513 U.S. 454, 479 (1995))("[w]hile the Court may excise an

The City asserts its "a mystery" that the district court did not sever the "may discard" clauses from the remainder of the Bulky Item Provision instead of enjoining enforcement of the provision as drafted. *See* Br. at 58. There is no mystery. The City itself failed to properly raise the issue of severability and on the contrary, argued forcibly why the requirement to store Bulky Items would render the Bulky Item Provision unenforceable and was ill-advised. The district court properly enjoined the entire Bulky Item Provision, and the Court should not disrupt that ruling.

II. THE DISTRICT COURT PROPERLY ENJOINED ENFORCEMENT OF THE BULKY ITEM PROVISION BASED ON PLAINTIFFS' FOURTH AMENDMENT CLAIMS

The district court found that Plaintiffs were likely to succeed on their facial challenge to the Bulky Item Provision on the ground that it violates the Fourth Amendment. 1 ER 15. The City concedes that the destruction of property pursuant to LAMC 56.11(3)(i) is unreasonable and does not dispute the injunction on this ground. Instead, the City chooses only to contest the district court's injunction in so much as it

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infirm clause or word, the "Federal courts should avoid 'judicial legislation'—that is, amending, rather than construing, statutory text").

prevents the removal of property as well. Putting aside the question whether the ordinance is severable, the removal of property based solely on its size and nothing else, is also inconsistent with the Fourth Amendment.

The Fourth Amendment prohibits the government from unreasonably seizing individuals' belongings. U.S. Const., amend. 4. While reasonableness may be the "touchstone of Fourth Amendment analysis," *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2186 (2016), both the United States Supreme Court and this Court have "[t]ime and again. . . observed that searches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well delineated exceptions." *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993); *see also Menotti v. City of Seattle* 409 F.3d 1113, 1154 (9th Cir. 2005) (rejecting the City of Seattle's argument that generalized "reasonableness," rather than a recognized exception to the warrant requirement, was sufficient to justify the seizure by law enforcement of Plaintiff's personal belongings). "Because warrantless searches are per se unreasonable, the government bears

the burden of showing that a warrantless search or seizure falls within an exception to the Fourth Amendment's warrant requirement." *Recchia v. City of Los Angeles,* 889 F.3d 553, 558 (9th Cir. 2018) (in a civil suit brought against the City of Los Angeles, the City had the burden of establishing an exception to the warrant requirement justified the seizure and destruction of an unhoused person's belongings); *Sandoval v. County of Sonoma*, 912 F.3d 509, 515 (9th Cir. 2018) (when property is impounded without a warrant, the Court begins its review "from the premise that the impounds were unreasonable").

When an ordinance or statute allows for the search or seizure of property without a warrant or without falling within a specifically established and well-delineated exception to the warrant requirement, Courts have and should strike down the ordinance or statute as unconstitutional. *City of Los Angeles v. Patel*, 576 U.S. 409, 419 (2015); *see also Torres v. Com. of Puerto Rico*, 442 US. 465, 474 (1979) (striking down a law in Puerto Rico that authorized searches at the border that were inconsistent with the Fourth Amendment); *Chandler v. Miller*, 520 U.S. 305, 308-09 (1997) (striking down a statute that required some state officers to take and pass a drug test because the "requirement . . .

[did] not fit within the closely guarded category of constitutionally permissible suspicionless searches"). Plaintiffs must establish, for purposes of a facial challenge, that the law is unconstitutional in "all the situations in which it would actually be determinative," *Isaacson v. Horne*, 716 F.3d 1213, 1230 (9th Cir. 2013), but need not consider where, because another exception or provision of the ordinance applies, the application of the ordinance is therefore "irrelevant." *Patel*, 576 U.S. at 418-19.

A. The Bulky Item Provision Is Not Coextensive With The Community Caretaking Exception to the Warrant Requirement

After twice failing to identify, let alone argue that the Bulky Item Provision falls within an exception to the warrant requirement, the City now argues that the Bulky Item Provision withstands constitutional scrutiny because it aligns with the community caretaking exception. [7]

[7] Although the City has had two opportunities to defend the constitutionality of the Bulky Item Provision at the district court, and both Plaintiffs and the district court noted the failure to identify an applicable exception to the warrant requirement, *see* SER 96, the City declined to do so, let alone argue the community caretaking exception applied. *See* SER 96. As such, the Court may decline to address this argument. *See Armstrong v. Brown*, 768 F.3d 975, 982 (9th Cir. 2014).

Even if the City had properly raised the argument below, the City cannot save the Bulky Item Provision by invoking the community caretaking exception.

"The Supreme Court has recognized a category of police activity relating to the protection of public health and safety—a category commonly referred to as the 'community caretaking function.'" *Rodriguez v. City of San Jose,* 930 F.3d 1123, 1137 (9th Cir. 2019). This exception has almost exclusively been applied in the context of the seizure of an automobile; however, this Court applied it beyond its usual application to automobiles in *Rodriguez*. There, the Court recognized the exception could also apply in limited circumstances to other types of tangible property as well, including, in that instance, the seizure of hand guns from an individual who had been taken into custody on a psychiatric hold. The Court upheld the seizure on the ground that the seizure "responds to an immediate threat to community safety." *Id.* The application of the community caretaking exception is an individual inquiry, and the Court identified three factors that must be considered in determining whether the community caretaking exception justifies the seizure of personal property without a warrant: "1) public

safety interest; 2) urgency of that public interest; and 3) individual property, liberty, and privacy interests." *Id.* at 1138.

Even presuming the community caretaking exception applies to personal property, the Bulky Item Provision does not require consideration of whether the seizure is necessary to protect against "an immediate threat to community safety." *Id.* The only factor the City considers is whether the item will fit in a 60-gallon container with the lid closed. Indeed, the City went out of its way in drafting LAMC 56.11 and the Bulky Item Provision to clarify that items can be seized *regardless* of whether there is an immediate threat, as well as many of the factors the Court has identified in determining whether a vehicle may be seized pursuant to the community caretaking doctrine. *See e.g.*, *Sandoval*, 912 F.3d at 517.

First, the community caretaking exception turns in part on the location of the item and its relationship to that environment. *See e.g.*, *United States v. Casares*, 533 F.3d 1064, 1075 (9th Cir. 2008) (seizure of vehicle not permitted under community caretaking exception, in part based on the location of the vehicle). The Bulky Item Provision, unlike most other provisions of LAMC 56.11(e) is based not at all on the

location of the item, but instead, on the item's size. As such, Bulky Items are subject to impound regardless of where the item is located in public. It does not apply just to property in the public right of way, let alone blocking the public right of way; in fact, the City went to great lengths to provide a cascade of expanding definitions to ensure the provision applies in every possible public space in Los Angeles. *See e.g.,* LAMC 56.11(2)(k) (defining "public area as "all property that is owned managed or maintained by the City. . . and shall include, but not be limited to any Street, medial strip, space, ground, building or structure); LAMC 56.11(2)(p) (defining Street equally broadly). It also applies regardless of how long an item is in public. *See* LAMC 56.11(2)(o) ("store" includes property only momentarily "placed" on the sidewalk).

Equally important, Courts have routinely held that the community caretaking exception does not allow a jurisdiction to seize a vehicle if there is a passenger or other individual who can remove the vehicle. *See*, *e.g., Miranda v. City of Cornelius*, 429 F.3d 858, 864 (9th Cir. 2005). Nor does it allow the seizure of a vehicle in circumstances where the individual whose vehicle is to be seized can contact another

driver to safely remove the vehicle. *Id.* On the other hand, the Bulky Item Provision expressly allows the City to seize and discard items, both when they are attended and unattended. The provision even allows the City to take property from persons attempting to move their belongings out of the way—as was the case with Mr. Diocson and Mr. Ashley—and seize the Bulky Item from them. The City's definition of "unattended" is equally expansive—it applies even when an individual is watching another person's belongings. *See* LAMC 56.11(2)(r) ("property is [only] considered 'Attended' if a Person is present with the Personal Property and the Person claims ownership over the Personal Property"). This is inconsistent with the community caretaking exception: "The policy of impounding [property] without regard to whether the defendant can provide for its removal is patently unreasonable if the ostensible purpose for impoundment is for the 'caretaking' of the streets." *Miranda*, 429 F.3d at 865 (quoting *United States v. Duguay*, 93 F.3d 346, 352 (7th Cir. 1996)).

Finally, to the extent the community caretaking exception has been invoked to protect an individual's property from vandalism or theft, *see, e.g., Ramirez v. City of Buena Park*, 560 F.3d 1012, 1025 (9th

Cir. 2009) (upholding the warrantless towing of a vehicle where it was done to ensure the vehicle's safekeeping from vandalism and theft if the car was harmed while individual was in police custody), it is absurd to suggest LAMC 56.11, which allows the item to be destroyed or even removed from public, codifies this exception.

Even the exceptions to the Bulky Item Provision undermine the City's argument. *See* LAMC 56.11(3)(i) (operational bicycles, walkers and crutches are exempted from the Bulky Item Provision, and structures used as shelters may be seized only with 24 hours notice). As the City points out, notice is inconsistent with the community caretaking exception, which is predicated on the need to act immediately. Br. at 46. And as a category, nothing about any of these items, *e.g.*, an operational bicycle, a walker, etc., makes them any more or less likely to threaten public health and safety than the myriad other items that cannot fit in a 60-gallon container with the lid closed. In fact, there is no reason why an item that can fit in a 60-gallon container categorically relates to community caretaking, any less than an item that cannot. Finally, the district court ruled that the Bulky Item Provision applies only to property belonging to people who are

homeless. SER 107-08. Whether the property belongs to a person who is homeless or to a person who is housed is wholly irrelevant to the consideration of whether an item constitutes an "immediate threat to community safety." *See Rodriguez*, 930 F.3d at 1138.

While seizing an item based solely on its size is not consistent with the community caretaking function, other provisions of LAMC 56.11 are. LAMC 56.11(3)(d) and (e) allow the City to address obstructions to the public right of way. [8] And more broadly, LAMC 56.11(3)(g) allows the City to seize (and immediately destroy) property when doing so is required to protect against "an immediate threat to the

[8] As the City notes, other provisions of the municipal code also prevent the obstruction of public rights of way. Br. at 37-38. Notably, these provisions are laws of general application and not targeted at unhoused people, and they uniformly do not allow the City to immediately seize property. *See e.g.,* LAMC Section 56.08(h) (providing for a warning and administrative penalties and specifically providing that "all non-criminal enforcement actions are subject to administrative hearing process as mandated by" state law); LAMC Section 56.12 (prohibiting the placement of "anything which shall obstruct any portion of the public right-of-way," but not providing for the seizure or destruction of that property); LAMC Section 80.77 (providing for the towing of vehicles parked on the street longer than 72 hours, but the towing can be done only pursuant to state law, *see* Ca. Veh. Code §§ 26550, which expressly prohibits towing of vehicles unless consistent with the community caretaking exception and the Fourth Amendment.

health and safety of the public."[9]

The "immediate threat to public health and safety" clause has its roots in the injunction against the City of Los Angeles issued in *Lavan,* 797 F. Supp. 2d at 1020, and upheld by this Court in 2012. *See Lavan*, 693 F.3d at 1033. The district court enjoined the City from seizing and destroying homeless peoples' belongings, except where doing so was necessary to address an "immediate threat to public health and safety." *Lavan*, 797 F. Supp. 2d at 1015. This exception recognized the City's need to address immediate concerns in the community. *Id.* When the City amended LAMC 56.11 in 2016, the City imported that language into the new version of LAMC 56.11. *See* LAMC 56.11(3)(g). This exception also tracks this Court's explication of the community

[9] Plaintiffs in this case bring an as-applied challenge the City's application of this provision, but do not challenge it on its face, because it could be interpreted consistent with the exigency exception, *see Recchia*, 8899 F.3d at 558-59, and the community caretaking exception, *see Rodriguez*, 930 F.3d at 1138. *See Sibron v. City of New York*, 392 U.S. 40, 60 (1968) (noting that because the operative categories of the law in question "could be susceptible of a wide variety of interpretations"; an as-applied challenge was appropriate to challenge whether the statute was in fact interpreted to be consistent with the Constitution).

caretaking exception in *Rodriguez,* 930 F.3d at 1138 (community caretaking exception allows the seizure of property where doing so "responds to an immediate threat to community safety"). The existence of a separate "immediate threat" provision and other provisions related to public safety further evidence why seizing property pursuant to an ordinance that considers only the size of the item is not justified by the community caretaking exception.

B. The Bulky Item Provision is Unconstitutional In All The Applications for Which it is Determinative

The fact that some Bulky Items can properly be seized pursuant to another provision of LAMC 56.11 and consistent with the City's community caretaking function does not defeat Plaintiffs' facial challenge of the Bulky Item Provision. There are undoubtedly instances in which the City can (and does) seize properly pursuant to the community caretaking or exigency exceptions. *See e.g., Recchia,* 889 F.3d at 560 (upholding the warrantless seizure of birds that were clearly unhealthy or sick in appearance, pursuant to the exigency exception to the warrant requirement, on the ground that the birds were suffering and it was necessary to prevent the spread of diseases to the otherwise healthy birds). There may be instances in which items

that are lawfully seized are larger than can fit in a 60-gallon container with the lid closed. This does not mean the Bulky Item Provision is constitutional on its face. It simply means that the other exceptions not challenged here apply with equal force to items that are both larger and smaller than a 60-gallon container with the lid closed. In other words, the size of the item is not determinative of whether the item can be seized consistent with the Fourth Amendment.

The City's argument that Plaintiffs' facial challenge fails because they cannot show the Fourth Amendment prevents the City "under every circumstance from removing Bulky Items from public areas," Br. at 42-43, is remarkably similar to the argument rejected by the Supreme Court in *Patel*, 576 U.S. at 418-19. There too, the City confronted a facial challenge to an ordinance that categorically allowed the LAPD to seize and inspect hotel registration logs without a warrant. *Id.* at 419. The City attempted to argue, as it does here, that because there were some instances in which seizing records would be allowable under an exception to the warrant requirement, the ordinance still could not withstand scrutiny under *United States v. Salerno,* 481 U.S. 739, 745 (1987). The Court firmly rejected that argument, holding that

"[w]hen assessing whether a statute meets this standard, the Court has considered only applications of the statute in which it actually authorizes or prohibits conduct," not where "the law is irrelevant." *Patel*, 576 US at 418; *see also Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. 442, 449-50 (2008); *Isaacson*, 716 F.3d at 1230 (granting a facial challenge to a statute that banned abortions on the ground that the statute was invalid in "all the situations in which it would actually be determinative.").

Under *Patel*, the relevant question in deciding a facial challenge of an ordinance that allows for the categorical seizure of property is whether the factors the jurisdiction considers in determining whether items can be seized comport with the Fourth Amendment. The Bulky Item Provision requires the consideration only of the size of the item seized. So while the City argues that it can seize Bulky Items pursuant to the community caretaking exception, the application of that exception rests not on the size of the item, but on the need to protect the "immediate threat to community safety." *Rodriguez*, 930 F.3d at 1138. The size of the item is not determinative, and likewise, the factors that are determinative are not actually factors contained in the Bulky Item

Provision. Nor is the size of the item determinative when the City seizes an item that is blocking the sidewalk, obstructing an ingress or egress, or is abandoned; in those instances, the size of the item is irrelevant. The district court properly applied the analysis required by the U.S. Supreme Court in *Patel* and found that seizing property based on size alone simply cannot stand constitutional scrutiny.

C. The City Cannot Seize Property Simply Because It Violates The Bulky Item Provision

The City also appears to suggest that the City can seize property because the City Council passed an ordinance prohibiting the property from being in public. Under the Fourth Amendment, jurisdictions cannot simply pass laws and then seize items without a warrant, for no other reason than it violates those laws. This Court has made that clear time and again, and often to the City. *See Lavan*, 693 F.3d at 1030 (seizure of property that violates a state or local law is still subject to the Fourth Amendment); *see also Miranda*, 429 F.3d at 864 (the decision to impound pursuant to the authority of a city ordinance and statute does not, in and of itself, determine the reasonableness of the seizures under the Fourth Amendment); *United States v. Cervantes*, 703 F.3d 1135, 1142 (9th Cir. 2012) (decision to impound vehicle cannot be

based solely on the California Vehicle Code and LAPD policy, but instead, must take into account "whether the vehicle was actually impeding traffic or threatening public safety and convenience on the streets, such that impoundment was warranted"); *Sandoval v. City of Sonoma*, 912 F.3d 509, 516 (9th Cir. 2018).

Yet that is precisely what the Bulky Item Provision does. It makes it illegal for homeless individuals to have an item that is larger than can fit in a 60-gallon container in public, and it allows the City to remove (and as drafted, immediately destroy) that item. Officers enforcing this law need not make any further inquiry into any other factor related to an exception to the warrant requirement—not where the item is in public or whether the property is attended and could be moved from the street, or whether item is, in fact, obstructing the sidewalk and "impeding traffic or threatening public safety or convenience." *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976). The Bulky Item Provision does not require consideration of any of those factors. Nor does the City argue, let alone introduce any credible evidence, that the City actually takes other factors into account before it seizes a bulky item pursuant to the Bulky Item Provision.

It is worth noting the City knows how to write a statute that evidences its intention to allow seizures only where it is consistent with the Fourth Amendment and the warrant requirement. *See*, *e.g.*, LAMC 56.11(3)(h) (allowing the seizure and destruction of property that is evidence of a crime or contraband, but only "as permissible by law").[10] The Bulky Item Provision contains no such limitation, or even a suggestion that the City limits its enforcement based on further consideration of the Fourth Amendment. Instead, the sole consideration of whether an item can be seized is whether it can fit in a trashcan with the lid closed, a characteristic that does not, in and of itself, justify the seizure under the Fourth Amendment. *See Sandoval*, 912 F.3d at 516 (deterrence and penalty, which may be sufficient in the forfeiture context, where a court approves the deprivation, are not considerations in the context of a warrantless seizure); *see also Miranda*, 429 F.3d at 864.

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[10] Similarly, Seattle's towing statute, which allows towing pursuant to Municipal Code Section 11.14.268, expressly incorporates consideration of the Fourth Amendment. *See* Seattle Mun. Code Section 11.30.040(B). Pasadena like the City of Los Angeles, *see* Fn. 10, may tow vehicles only consistent with California Vehicle Code Section 22650 *et seq*.

III. THE DISTRICT COURT PROPERLY ENJOINED ENFORCEMENT OF THE BULKY ITEM PROVISION BECAUSE IT INCLUDES NO PROCEDURAL SAFEGUARDS WHATSOEVER

The Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution and Article I, Section 7 of the California Constitution prevent the state from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1; Cal. Const. Art. I, § 7. When the government deprives an individual of a property interest, the Supreme Court has long held that the gravity of a deprivation is irrelevant to the question of whether account must be taken of the Due Process Clause. *See Goss v. Lopez*, 419 U.S. 565, 579 (1975). Therefore, the Due Process Clause applies with equal force to a temporary deprivation of property, as well as a permanent one. *See Stypmann v. City & County of San Francisco*, 557 F.2d 1338, 1342 (9th Cir. 1977) ("Due process strictures must be met though the deprivation is temporary"). *See also* Br. at 46, 48 (acknowledging that "any seizure of property warrants due process protections").

"Once it is determined that the Due Process Clause applies, 'the question remains what process is due.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (quoting *Morrissey v. Brewer*, 408

U.S. 471, 481 (1972)). While this depends on the specific interest at stake, balanced against the government's interest, *see Mathews v. Eldridge,* 424 U.S. 319, 333 (1976), due process requires individuals be given notice and an opportunity to be heard. *See Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, (1950). Moreover, "notice generally [must] be given *before* the government may seize property." *Clement v. City of Glendale*, 518 F.3d 1090, 1094 (9th Cir. 2008); *see also Grimm v. City of Portland*, --- F.3d ----, 2020 WL 4914057 (August 21, 2020). "The default rule is advance notice, and the state must present a strong justification for departing from the norm." *Id.* Similarly, the opportunity to contest the deprivation must generally occur prior to the deprivation. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) (predeprivation hearing and notice is required except in the "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event") (internal quotations removed)). But *at a minimum*, "[t]he base requirement of the Due Process Clause is that a person deprived of property be given an opportunity to be heard at a meaningful time and in a meaningful manner." *Buckingham v. Sec'y of*

U.S. Dep't of Agric., 603 F.3d 1073, 1082 (9th Cir. 2010) (quoting *Brewster v. Bd. of Educ.*, 149 F.3d 971, 984 (9th Cir. 1998)).

A. The District Court Correctly Found the Bulky Item Provision Provides No Procedural Protections Whatsoever

When granting Plaintiffs' motion for a preliminary injunction, the district court specifically found the Bulky Item Provision "provides no process at all." 1 ER 24. And it is clear on the face of the Bulky Item Provision that the district court did not abuse its discretion in so finding. The ordinance specifically provides that property may be seized (and discarded) "without prior notice," and unlike the impound provisions, *see e.g.*, LAMC 56.11(3)(a)-(g), it does not even integrate the provision's post-deprivation notice. At no time does the ordinance provide any opportunity to contest the City's determination that the property violates the ordinance, either before or after the deprivation occurs. In fact, LAMC 56.11(10)(d) makes it a crime to "resist, delay or obstruct a City employee from removing or discarding a Bulky Item." And there are no procedural protections in place regarding how City employees determine what constitutes a Bulky Item. There is an utter lack of process and procedural safeguards, and this is true whether the items are destroyed or just removed.

The absence of any process at all is anathema to the Due Process Clause and decades of case law. Due process may be flexible, *see Morrissey v. Brewer*, 408 US 471, 481 (1972), but when the state deprives a person of a protected property interest, due process requires, at a minimum, that the person be given notice and an opportunity to contest it. The context of the deprivation and the interests at stake define the contours of what process is due, *see Matthews*, 424 US at 334-5; however, in none of the cases the City points to from the last 100 years has the Court upheld a scheme like the Bulky Item Provision, which allows city workers to determine that homeless people's items are simply too big to fit in a trash can, and with no notice, demand that the owners of the property turn those belongings over, under threat of arrest. And at no point, before or after that interaction, does the owner of the property have a chance to contest the City's decision. It is for this reason that the district court easily found Plaintiffs were likely to succeed on the merits of their facial challenge to the Bulky Item Provision, and enjoined its enforcement.

The City does not even try to defend the position that it can take property, let alone destroy it, without due process. The City abandons its

defense of the Bulky Item Provision as drafted, conceding that the district court properly enjoined it from immediately discarding property based on its size. The City also concedes that "any seizure of property warrants due process protections." Br. at 48. After analogizing Bulky Items to cars, it concedes that "due process entitles the owner of the towed car to a post-seizure hearing to contest the tow." Br. at 46 (citing *Draper v. Coombs*, 792 F.2d 915 (9th Cir. 1986). Even presuming the City were correct that seizing Bulky Items is analogous to towing a vehicle, the City's concession that due process requires a post-seizure hearing should end the analysis. The Bulky Item Provision does not provide even that minimum protection.

The City's failure to provide any procedural protections, whether the items are removed or discarded, means the district court did not abuse its discretion when it found Plaintiffs were likely to succeed on their facial challenge of the Bulky Item Provision, and properly enjoined its enforcement.

B. **The City's Remaining Arguments Do Not Have Merit**

Despite these concessions, the City still makes a handful of arguments about why the district court erred in enjoining the Bulky

Item Provision. None of these arguments have any merit, let alone require this Court to reverse the district court.

a. The Bulky Item Provision Provides No Notice

The City attempts to distract the Court from the ordinance's utter lack of process by cobbling together some circumstances in which people may be aware of the law's prohibition on Bulky Items and calling it "notice." It is not.

First, the City argues the ordinance itself gives Angelenos sufficient notice. *See* Br. at 49 (citing *Lone Star Sec. & Video* v. *City of Los Angeles*, 584 F.3d 1232, 1237 (9th Cir. 2009); *Sackman v. City of Los Angeles*, 677 F. App'x 365, 366 (9th Cir. 2017)). This Court explicitly rejected this identical argument in the context of the towing of vehicles in *Grimm.*, 2020 WL 4914057, at *3-4. Just as the City does here, Portland cited *Lone Star* for the proposition that the City provided sufficient pre-deprivation notice by *Grimm* publishing the law that authorized the tow. *Id.* The Court in *Grimm* pointed out that *Lone Star* says nothing of the sort. The Court also settled that publication of an ordinance does not constitute notice, and that pre-deprivation notice is the norm. *Id.*

The other cases the City relies on now and at the district court, including *United States v. Locke*, 471 U.S. 84, 108 (1985), do not suggest otherwise. *Locke* and related cases address self-executing laws, where the passage of a law itself effectuates a change in property rights. *Id.* That line of cases has nothing to do with the circumstances here. *See MAK Investment Group v. City of Glendale*, 897 F.3d 1303, 1306 (10th Cir. 2018) ("the Supreme Court's case law on the 'knowledge of the law' presumption distinguishes between those laws and regulations which are 'self-executing' and those which only take effect after a legal proceeding begins."). The adoption of the Bulky Item Provision did not extinguish individuals' property interests in their belongings, even if they violate that ordinance. *Lavan*, 693 F.3d at 1032. The deprivation of property comes by virtue of government action, and in that case, the fact of the ordinance's existence does not constitute sufficient notice of that action. *Grimm*, 2020 WL 4914057, at *3-42.

Similarly, the City points out that it sometimes posts notices of cleanups, which include mention that Bulky Items are prohibited. But when analyzing the validity of an ordinance in a facial challenge, the Court must "look to the procedure dictated by the terms of the ordinance

and not to informal practices implemented at the discretion of municipal administrators." *Kash Enters. Inc. v. City of Los Angeles*, 19 Cal.3d 294, 307 n. 7 (1977); *see also Wash. State Grange*, 552 U.S. at 449-50 ("In determining whether a law is facially invalid, [the Court] must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases.") In this case, the Bulky Item Provision, and even its Standard Operating Procedures, explicitly provide that the items can be seized "without prior notice." LAMC 56.11(3)(c)-(i); 3 ER 230, 233, 238-39, 243-44, 252.

Moreover, the few notices the City does post state only generally that Bulky Items are prohibited. Generalized notices about the ordinance cannot stand in the place of individualized notice that the City considers specific property in violation of the ordinance, so the owner can contest that determination. "A primary purpose of the notice required by the Due Process Clause is to ensure that the opportunity for a hearing is meaningful." *City of West Covina v. Perkins*, 525 U.S. 234, 240 (1999) (citing *Mullane,* 339 U.S. at 314). These signs do not constitute individualized notice of a purported violation and cannot ensure the opportunity to contest the determination is meaningful, since

the City provides no mechanism to contest the determination in the first place.

Finally, the City suggests that when people are present when their items are seized, they have adequate notice. Notice is insufficient if it happens at a time or in a way that affords no opportunity to affect the outcome or challenge the result. *See Lane Hollow Coal Co. v. Dir., Off. of Workers' Comp. Programs*, 137 F.3d 799, 807 (4th Cir. 1998). The City's suggestion that Plaintiffs received constitutionally-adequate notice because they could "ask for an explanation of why" their belongings were taken is both insufficient, see *Kash Enter.*, 19 Cal. 3d at 307 n.7, and it ignores the on the ground reality faced by unhoused people, who can be arrested if they "delay" the seizure of their property or its destruction. As Mr. Diocson explained, witnessing one's items being taken (and destroyed) is not "notice," it is trauma. *See* 4 ER 488-89 ¶¶ 16-19.

b. The District Court Sufficiently Considered the Relevant Factors Under *Matthews v. Eldridge*

The City's other main argument appears to be that the district court erred by not engaging in a detailed analysis of the three factors outlined in *Mathews*, 424 U.S. at 335, to evaluate if the Bulky Item

Provision provides sufficient process. There is no merit to this argument. As the district court pointed out, the City's "focus on what process is due is misplaced" because "the challenged provision provides no process at all." 1 ER 24. It need not have engaged in a complicated analysis to determine what process was due, since the ordinance utterly failed to provide any process at all. *See Draper v. Coombs*, 792 F.2d 915, 922-23 (9th Cir. 1984) (unlike in cases where the question is whether the process provided is sufficient to satisfy due process, it is straightforward to strike down a Portland ordinance that failed to provide for a hearing after a vehicle is towed); *see also Lavan*, 693 F.3d at 1033 (upholding an injunction against the City of Los Angeles because it "failed utterly to provide any meaningful opportunity to be heard before or after it seized and destroyed property belonging to Skid Row's homeless population").

In any event, the district court properly considered and rejected the very arguments the City suggests it erred by not considering. First, the City faults the district court for not considering "the nature of the property interest at stake." The City concedes that unhoused people have a property interest in their belongings (as it must, *see Lavan*, 693 F.3d at 1032-33). But the City suggests the inquiry should focus on the

relative value the City places on various "Bulky Items" it has found on the street, seemingly to suggest that unhoused people have a lesser property interest in some belongings than others and drawing a distinction between tents and bike parts, chairs, storage containers, and other items the City does not deem "essential."

This is the wrong inquiry. The property interest at stake is "the most basic of property interests encompassed by the due process clause": Plaintiffs' continued possession of their personal belongings. *Lavan*, 693 F.3d at 1032. The value the City places on any particular item is not relevant to the question of whether the Fourteenth Amendment requires the City provide due process in the first place. As the Supreme Court explained, "[n]o doubt, there may be many gradations in the 'importance' or 'necessity' of various consumer goods[,]" but "[t]he Fourteenth Amendment speaks of 'property' generally. . . . It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that, by its own lights, are 'necessary.'" *Fuentes v. Shevin*, 407 U.S. 67, 89–90 (1972); *see also N. Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 608 (1975) ("We are no more inclined

now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause."). In other words, it is well settled that due process is required whether the item is "a Cadillac or a cart," *Lavan*, 693 F.3d at 1032, or as relevant here, whether the item is larger or smaller than 60 gallons by volume.[11]

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[11] While not relevant to the question of whether individuals are entitled to due process, the City once again underestimates unhoused individuals' property interest in the items it seizes. As the district court noted, the items that were seized from Plaintiffs and others may not fall into the category of "essential" by the City, but are critical to individuals' survival, including bins to keep belongings clean and dry (which is particularly important, given that the City's own evidence shows that its employees will immediately destroy any items they find that are "wet" or "dirty", *see, e.g.*, 3 ER 337-39), Mr. Diocson's dog kennel to keep Bella safe, and Mr. Ashley's cart to pick up groceries and food and to move belongings before the City's many cleanups. The City undisputedly seizes items such as chairs, coolers, and cushions that may have little monetary value, but are otherwise valuable to people living on the streets. Even items like pallets, broken umbrellas and construction materials that the City dismisses as insignificant become critical when they are used to create a makeshift shelter for shade or to stay dry, especially when the City routinely seizes and destroys tents and other items, such that these materials must therefore stand in for shelter.

Whether property is destroyed or just removed may be relevant to assessing the amount of process due;[12] but the impact of removing property and the hardship of retrieving property is also an important consideration. *See, e.g., Clement*, 518 F.3d at 1094 (requiring pre-deprivation notice before towing a vehicle in part because "the owner will normally have to travel to the towing garage to retrieve it, which may involve significant cost for someone who doesn't have an operational vehicle to drive"). This is especially true here. The City's own witness made clear that the "temporary deprivation" caused by the removal of Bulky Items is effectively a permanent deprivation. Property that is seized must be retrieved from a storage facility in downtown Los Angeles, and as their witness explains, unhoused people would likely be unable to retrieve their belongings, given the complication of doing so, including transportation issues. 3 ER 206 ¶ 19. Therefore, the City is well aware that the temporary deprivation of belongings is, in effect, a permanent deprivation.

[12] But as the City concedes, temporary deprivation of property is still protected by due process, and even when property is temporarily seized, such as when a vehicle is towed, a person is still entitled to notice and a hearing. *See* Br. at 46 (citing *Draper*, 792 F.2d at 923).

Next, the City argues that no process is warranted because the question of whether an item is "bulky" is straightforward and the "risk of erroneous deprivation" is slight. Br. at 51. The district court expressly considered this argument and rejected it, and rightly so, because it is not only factually inaccurate, it is simply not the law. As an initial matter, there are more questions at issue when a Bulky Item is taken than whether an item "would fit in a 60-gallon container with the lid closed," *id*., such as whether a bike or wheelchair is operational and whether an item is a structure. The ordinance also excludes containers that can hold a volume of 60 gallons or less—a question not easily determined on the spot by a sanitation worker. These questions—encompassed in the question of whether an item meets the definition of "bulky"—are precisely the types of determinations which additional procedural protections would address. *See Bell v. Burson,* 402 U.S. 535, 541 (1971).

Even if the outcome of a hearing seem obvious to the City, that is irrelevant to the question of whether due process is required: "The issues decisive of the ultimate right to continued possession, of course, may be quite simple. The simplicity of the issues might be relevant to the formality or scheduling of a prior hearing. But it certainly cannot

undercut the right to a prior hearing of some kind." *Fuentes*, 407 U.S. at 87 n.18 (internal citation omitted) (holding that two replevin statutes were facially unconstitutional because they failed to provide adequate due process); *see also Bell*, 402 U.S. at 540. Certainly in *Draper*, the question of whether a person is taken into custody, which was the basis for the tow in that case, *see* 792 F.2d at 923 n.12, is a more straightforward question than whether a single item can fit in a 60-gallon container, and yet, the failure to provide a post-deprivation hearing was fatal to that ordinance.

The City's own arguments and evidence belie its assertion that there is "little risk of erroneous deprivation." Br. at 51. The City's evidence shows that it routinely seizes and destroys items as bulky, even though they are in fact less than 60 gallons by volume. *See e.g.,* Br. at 48 (arguing that a "pile of dismantled bicycles" are bulky items, even though dismantled bike frames and wheels can certainly fit within a 60-gallon container with the lid closed). Mr. Ashley and Mr. Diocson both questioned whether their items were bulky, but they had no mechanism to contest this determination. 4 ER 467-68 ¶¶ 11-12; 4 ER 487-88 ¶¶ 12, 16.

Moreover, the Bulky Item Provision does not just forego a pre-deprivation hearing. As the district court properly found, the City fails to provide any procedural safeguards whatsoever. There is explicitly no pre-deprivation notice, and because the drafters contemplated that Bulky Items would be immediately destroyed, the severed provision does not even incorporate the ordinance's post-deprivation notice provisions. *Compare* e.g., LAMC 56.11(3)(c)-(f) (providing post-deprivation notice); LAMC 56.11(3)(a)-(b) (providing pre- and post-deprivation notice). But even the post-deprivation notice provided by the ordinance is lacking, because it does not provide, for example, an inventory of what was taken or any information about why the items were impounded.

With no procedural protections in place, there are no checks on City employees, who make these on-the-spot determinations of what constitutes a Bulky Item and therefore, what can be taken away from a person. City workers are allowed to operate without any procedural safeguards in place as they make those decisions. This leaves unhoused people completely powerless to contest the City's decision to remove their belongings. They cannot even resist the seizure of their

belongings, for fear of arrest. *See* LAMC 56.11(10)(d). This lack of any accountability is the exact harm the Due Process Clause seeks to prevent.

And it is the harm that could be addressed by more due process. A hearing would certainly reduce the risk of arbitrary and erroneous deprivation. And even if the Bulky Item provision presented the sort of "extraordinary situation" that allowed the City to forego a pre-deprivation hearing, *see James Daniel Good Real Prop.,* 510 U.S. at 43, a post-deprivation hearing would provide more of a check against erroneous deprivation than no hearing at all. And there are myriad procedural safeguards short of that, which the City could but does not deploy. These range from individualized pre-deprivation notice, warnings, a written inventory of items seized and the basis for the seizure, an informal review of the decisions before items were seized, administrative citations, even requiring the City worker to measure the item. The question of the sufficiency of these hypothetical processes is not before the Court. *See Montana Envtl. Info. Ctr. v. Stone-Mannin*, 766 F.3d 1184, 1188 (9th Cir. 2014); *see also Bell*, 402 U.S. at 541 (declining to prescribe the specific processes that would satisfy due

process). The district court properly declined to opine what would constitute sufficient due process. For purposes of the question before the Court, it is enough that there are other procedural safeguards the City could have deployed and instead, chose to provide "no process at all." 1 ER 24.

Finally, while the burden and expense of providing a hearing may be a consideration in determining the *type* of process that is due, the expense "does not justify denying a hearing meeting the ordinary standards of due process." *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970); *see also Bell*, 402 U.S. at 540–41; *Stypmann,* 557 F.2d at 1344 (state interest related to administrative burden and expense is insufficient to deny hearing). Moreover, the City focuses its argument about cost and burden on providing a pre-deprivation hearing, but as discussed, the Bulky Item Provision leaves out far more process than simply not providing a pre-deprivation hearing. It fails to provide post-deprivation review, and it fails to provide notice, even though the City provides notice in most other instances, including pre-deprivation notice when the City seizes property that cumulatively cannot fit in a 60-gallon container with the lid closed. The fact that the City provides

more notice in other circumstances undermines its argument that the administrative burden is too great to provide notice before the seizure of a single item that exceeds that limit. *See Styppman*, 557 F.2d at 1343 ("The fact that [the City] has undertaken to provide a hearing in some circumstances suggests that it is neither unduly burdensome nor unduly costly to do so").

And finally, although pre-deprivation due process is required except in "extraordinary situations" the City cannot show here, *see James Daniel Good Real Prop.*, 510 U.S. at 53, the question of whether a pre-deprivation hearing is required or whether a post-deprivation hearing would suffice is academic because LAMC 56.11(3)(i) does not simply forego a pre-deprivation hearing. There is *never* a hearing, or any other procedural safeguards for that matter.[13] This is inconsistent with the Fourteenth Amendment, and the district court did not abuse its discretion by enjoining its enforcement.

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[13] The City suggests Plaintiffs "shift[ed] the burden improperly to the City to 'articulate a constitutionally permissible justification for either seizing or destroying items based solely on their size.'" Br. at 52. This is misleading. The footnote appeared in the section devoted to the Fourth Amendment, *see* SER 18, where the burden does shift to the City. *See e.g.*, *Hopkins v. Bonvicino*, 573 F.3d 752, 764 (9th Cir. 2009).

IV. THE BULKY ITEM PROVISION IS UNCONSTITUTIONAL UNDER THE CALIFORNIA CONSTITUTION

Since the district court granted Plaintiffs' injunction based on violations of the U.S. Constitution, it was unnecessary to consider the claims brought under California's Due Process Clause, which is identical to the federal Due Process Clause except in one respect: the California clause has been interpreted to provide greater protection for the "the dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official." *Today's Fresh Start, Inc. v. Los Angeles Cnty. Off. of Educ.*, 57 Cal. 4th 197, 213 (2013) (quoting *People v. Allen*, 44 Cal. 4th 843, 862 (2008)). *See also Oberholzer v. Comm'n on Judicial Performance*, 20 Cal. 4th 371, 390 (1999). Therefore, in analyzing whether a statute or ordinance violates the California Due Process Clause, the Court considers the three *Matthews* factors, and a fourth factor that accounts for the dignitary interest at stake. *Today's Fresh Start, Inc.,* 57 Cal. 4th at 213.

The district court did not abuse its discretion when it found plaintiffs were likely to succeed on their federal due process claims, and therefore did not need to consider Plaintiffs' dignity interests under the

California Constitution.[14] But if such an inquiry were required, few circumstances could more clearly implicate the dignity interests at stake in providing additional due process than those presented here. As the Court in *People v. Ramirez* explained, the California Constitution recognizes that "[f]or government to dispose of a person's significant interests without offering him a chance to be heard is to risk treating him as a nonperson, an object, rather than a respected participating citizen." 25 Cal. 3d 260, 267-68 (1979).

Here, the City makes on-the-ground decisions about whether to take away the sole possessions of a person who is living on the sidewalk, and the ordinance provides no accountability to the people whose belongings are taken. They have no way to contest the City's decisions; they are subject to arrest if they even delay the process. There can be little doubt that the process outlined in the Bulky Item Provision does nothing to "ensure that the method of interaction itself is fair in terms of what are perceived as minimum standards of political

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[14] Contrary to the City's assertion, Plaintiffs did not rest solely on the federal due process claims and waive their California claims. *See* SER 78-80.

accountability-of modes of interaction which express a collective judgment that *human beings* are important in their own right, and that they must be treated with understanding, respect, and even compassion." *Id.* In this case, the dignitary interest in affording homeless individuals the ability to contest the City's decisions is significant. Therefore, as clear as it is under the federal due process clause, given the dignitary interest at stake, there is no question that the Bulky Item Provision and the companion arrest statute violated the California Constitution.

V. THE INJUNCTION IS NARROWLY DRAWN TO PREVENT CONTINUED CONSTITUTIONAL VIOLATIONS

Far from the "broad" injunction the City accuses the district court of issuing, the actual injunction is narrow and surgical, excising two provisions from a 3,000 word ordinance and leaving the rest intact. The district court did not find, nor did it need to find, that a program of removing private property from the public right of way is per se unconstitutional. *See* Br. at 40. The injunction cannot plausibly be read as suggesting the City cannot regulate the use of public spaces or even ban items from the sidewalk. *See* 1 ER 16. The court found only that Plaintiffs were likely to succeed on the merits of their claim that the

Bulky Item Provision, which allows the City to seize (and discard) homeless people's belongings based solely on its size. The district court properly declined to offer an opinion about the constitutionality of any of the other provisions of LAMC 56.11, including those other provisions written to allow the City to address public safety concerns in the public rights of way. The preliminary injunction did not address, one way or another, the constitutionality of whether the City could seize items under other provisions of LAMC 56.11, because those issues were not before the court.[15] 1 ER 31-32.

The district court did recognize, as this Court should as well, that the Bulky Item Provision is a significant departure from the protections afforded by the U.S. and California Constitutions. Although this Court

[15] The City argues, confusingly, that the "district court did not accurately describe its own order" when it clarified that the injunction requires the City to simply "treat Bulky Items like every other item stored in public areas." Br. at 54. The district court made that point in response to the City's objection that the injunction would prevent the City from ever seizing any Bulky Items, regardless of whether they were, to take the City's example, blocking a loading dock or violating another provision of the municipal code that has not been enjoined by the district court. The district court clarified that, while the City cannot remove and discard items *because* of the size, the injunction says nothing about the removal of a "bulky" item *because* it is blocking a loading dock.

and others have repeatedly clarified that constitutional protections extend to unhoused people and their belongings, LAMC 56.11(3)(i) simply fails to incorporate any of those protections. Allowing the City to seize property based solely on its size, without any notice or opportunity to contest that decision, is not an outcome the Court has been prepared to accept, nor would the City have ever considered it, if the Bulky Item Provision were applied to property more generally, instead of just limited to homeless people's belongings. *See, e.*g., LAMC 56.08, 56.12, Ca. Veh. Code § 22650.

As the district court acknowledged, "homelessness is a significant issue facing Los Angeles (and other cities around the country)," 1 ER 23. and it is beyond question that far too many people are compelled to live on the streets and public spaces throughout Los Angeles. But the court also properly declined the City's invitation to allow this to justify the violation of unhoused people's constitutional rights as a solution. The Court properly enjoined the enforcement of the Bulky Item Provision.

CONCLUSION

For the all foregoing reasons, the preliminary injunction issued by the district court should be affirmed.

Respectfully submitted,

Dated: September 4, 2020

LEGAL AID FOUNDATION OF LOS ANGELES
SCHONBRUN SEPLOW HARRIS HOFFMAN & ZELDES LLP
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By: *s/ Shayla Myers*
Shayla Myers
Attorney for Plaintiffs-Appellees.

STATEMENT OF RELATED CASES

Plaintiffs-Appellees are unaware of any related cases pending before this Court.

Dated: September 4, 2020

LEGAL AID FOUNDATION OF LOS ANGELES
SCHONBRUN SEPLOW HARRIS HOFFMAN & ZELDES LLP
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADDENDUM

Print

Los Angeles Municipal Code

SEC. 11.00. PROVISIONS APPLICABLE TO CODE.

(Amended by Ord. No. 175,676, Eff. 1/11/04.)

(a) **Short Title. Reference to Code in Prosecutions. Designation in Ordinances.** This Code, which consists of criminal or regulatory ordinances of this City, shall be known as the "Official Los Angeles Municipal Code," and it shall be sufficient to refer to the Code as the "Los Angeles Municipal Code" in any prosecution for the violation of any of its provisions; it shall also be sufficient to designate any ordinance adding to, amending or repealing this Code or a portion of this Code as an addition or amendment to or a repeal of the "Los Angeles Municipal Code."

(b) **Existing Law Continued.** The provisions of this Code, to the extent they are substantially the same as existing provisions relating to the same subject matter, shall be construed as restatements and continuations of the Code and not as new enactments.

(c) **Construction.** The provisions of this Code and all proceedings under it are to be construed with a view to effect its objectives and to promote justice.

(d) **Effect of Code on Past Actions and Obligations Previously Accrued.** Neither the adoption of this Code nor the repeal of any ordinance of this City shall in any manner affect the prosecution for violation of ordinances, which violations were committed prior to the effective date of the ordinance, nor be construed as a waiver of any license or penalty at the effective date due and unpaid under the ordinance, nor be construed as affecting any of the provisions of the ordinance relating to the collection of any license or penalty or the penal provisions applicable to any violation, nor to affect the validity of any bond or cash deposit in lieu of a bond, required to be posted, filed or deposited pursuant to any ordinance or its violation, and all rights and obligations associated with the ordinance shall continue in full force and effect.

(e) **References to Specific Ordinances.** The provisions of this Code shall not in any manner affect deposits or other matters of record which refer to, or are otherwise connected with ordinances that are specially designated by a number or otherwise and which are included within this Code, but those references shall be construed to apply to the corresponding provisions contained within this Code.

(f) **Heading, Effect of.** Division, chapter, article and section headings contained in this Code shall not be deemed to govern, limit, modify or in any manner affect the scope, meaning or intent of the provisions of any division, chapter, article or section.

(g) **Reference to Acts or Omissions Within This City.** This Code shall refer only to the omission or commission of acts within the territorial limits of the City of Los Angeles and that territory outside of this City over which the City has jurisdiction or control by virtue of the Constitution, Charter or any law, or by reason of ownership or control of property.

(h) **Proof of Notice.** Proof of giving any notice may be made by the certificate of any officer or employee of this City or by affidavit of any person over the age of 18 years, which shows service in conformity with this Code or other provisions of law applicable to the subject matter concerned.

(i) **Notices, Service of.** Whenever a notice is required to be given under this Code, unless different provisions in this Code are otherwise specifically made applicable, the notice may be given either by personal delivery to the person to be notified or by deposit in the United States Mail in a sealed envelope, postage prepaid, addressed to the person to be notified at his or her last known business or residence address as it appears in the public records or other records pertaining to the matter to which the notice is directed. Service by mail shall be deemed to have been completed at the time of deposit in the mail.

(j) **Prohibited Acts; Include Causing, Permitting, Suffering.** Whenever in this Code any act or omission is made unlawful it shall include causing, permitting, aiding, abetting, suffering or concealing the fact of the act or omission.

(k) **Validity of Code.** If any section, subsection, sentence, clause, phrase or portion of this Code is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, that decision shall not affect the validity of the remaining portions of this Code. The Council of this City hereby declares that it would have adopted this Code and each section, subsection, sentence, clause, phrase or portion of the Code, irrespective of the fact that any one portion or more sections, subsections clauses, phrases or portions are declared invalid or unconstitutional.

(l) In addition to any other remedy or penalty provided by this Code, any violation of any provision of this Code is declared to be a public nuisance and may be abated by the City or by the City Attorney on behalf of the people of the State of California as a nuisance by means of a restraining order, injunction or any other order or judgment in law or equity issued by a court of competent jurisdiction. The City or the City Attorney, on behalf of the people of the State of California, may seek injunctive relief to enjoin violations of, or to compel compliance with, the provisions of this Code or seek any other relief or remedy available at law or equity. **(Amended by Ord. No. 177,103, Eff. 12/18/05.)**

Violations of this Code are deemed continuing violations and each day that a violation continues is deemed to be a new and separate offense and subject to a maximum civil penalty of $2,500 for each and every offense.

As part of any civil action, the court may require posting of a performance bond to ensure compliance with this Code, applicable state codes, court order or judgment.

(m) It shall be unlawful for any person to violate any provision or fail to comply with any of the requirements of this Code. Any person violating any of the provisions or failing to comply with any of the mandatory requirements of this Code, shall be guilty of a misdemeanor unless that violation or failure is declared in this Code to be an infraction. An infraction shall be tried and be punishable as provided in Section 19.6 of the Penal Code and the provisions of this section. Any violation of this Code that is designated as a misdemeanor, may be charged by the City Attorney as either a misdemeanor or an infraction.

Every violation of this Code is punishable as a misdemeanor unless provision is otherwise made, and shall be punishable by a fine of not more than $1,000.00 or by imprisonment in the County Jail for a period of not more than six months, or by both a fine and imprisonment.

Every violation of this Code that is established as an infraction, or is charged as an infraction, is punishable by a fine as set forth in this Code section, or as otherwise provided in this Code, not to exceed $250.00 for each violation.

Violations of this Code may be addressed through the use of an Administrative Citation as set forth in Article 1.2 of Chapter 1 of this Code. The administrative fines prescribed by Chapter 1, Article 1.2 may be sought as an alternative to other legally available civil and criminal remedies. **(Amended by Ord. No. 184,766, Eff. 3/27/17.)**

Each person shall be guilty of a separate offense for each and every day during any portion of which any violation of any provision of this Code is committed, continued or permitted by that person, and shall be punishable accordingly.

(n) Pursuant to Government Code Section 38773, the City may summarily abate any nuisance at the expense of the persons creating, causing, committing, or maintaining it and the expense of the abatement of the nuisance may be a lien against the property on which it is maintained and a personal obligation against the property owner.

(o) Pursuant to Government Code Section 38773.7, upon entry of a second or subsequent civil or criminal judgment within a two-year period that finds an owner of property responsible for a condition that may be abated

in accordance with California Government Code Section 38773.5, a court may order the owner to pay treble the costs of the abatement. These costs shall not include conditions abated pursuant to California Health and Safety Code Section 17980.