No. 20-55522

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JANET GARCIA, et al.,
Plaintiffs and Appellees,
v.

CITY OF LOS ANGELES
Defendant and Appellant.

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

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The City of Los Angeles has never disputed the tragedy of homelessness, even as it has for years struggled to grapple with it. The ordinance at issue here, Los Angeles Municipal Code Section 56.11(3)(i), represents one attempt to resolve a problem created by homelessness of the scale that the City is experiencing: The degradation of its public places into de facto storage areas—*not* for tents or sleeping bags or medicine or documents—but for every and any thing that a person feels like putting there. Again, no one disputes that the City's unhoused residents have property rights. But having a property right in something is not synonymous with the right to store that thing, whatever it may be, in any public area that one wishes.

With that in mind, it pays to be clear about the position Plaintiffs are defending on appeal. At bottom, it is that if a worker in the City's Bureau of Sanitation comes across this sofa set on the City's sidewalk, the Fourth Amendment requires the worker to go before a judicial officer and get a warrant to remove it.[1] In another instance, someone placed a jacuzzi in a public right-of-way. Plaintiffs' position is that the Fourteenth Amendment and the California Constitution require the City worker to give some type of notice before removing that jacuzzi. The easiest way to understand why those arguments cannot possibly be correct is to ask whether the City worker would need (1) to go get a warrant or (2) to provide some kind of notice before towing a car parked in the same place as the sofa set or jacuzzi. The answer to both questions is almost certainly "no."

As the opening brief explained, the Fourth Amendment allows the City to apply Section 56.11(3)(i) to remove Bulky Items from public areas as the community caretaker of those areas, just as it would by

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[1] The image above is taken from 2 ER 127. It has been cropped, and the face of the person in the image obscured to provide a measure of privacy.

towing an illegally parked car from a public street. The answering brief's chief responses are (1) to argue that the City's community caretaking function can be applied only to deal with immediate threats to public safety, and (2) that in any event, the community caretaking doctrine cannot apply every time the City removes a Bulky Item from a public place.

As to the first point, the answering brief simply misunderstands the community caretaking doctrine. If it only applies in cases where something poses an immediate threat to public safety, it wouldn't apply even in one of the two seminal cases in which the Supreme Court announced it: A case involving a car that was towed after being parked on the street outside of posted hours. That is materially indistinguishable from a sofa set left on a sidewalk, where no sofa set should be in the first place.

The second point, even if true, doesn't help Plaintiffs' case. It was not the City's burden to show that *every* possible use of Section 56.11(3)(i) would fit within the bounds of the community caretaking function; it was Plaintiffs' burden to show that *no* possible use of Section 56.11(3)(i) would.

The same is true of the answering brief's due process arguments. It may be that due process sometimes requires the City to do more to minimize the risk of erroneously depriving an unhoused person of his or her Bulky Item under Section 56.11(3)(i). But that isn't true in *every* case. There is, for example, no risk of misidentifying a jacuzzi as a Bulky Item—or much risk of depriving someone of something critical in seizing it—and so no problem with removing it from the City's sidewalk without notice.

As the City admitted in its opening brief, the analysis of whether the City can subsequently destroy Bulky Items is a different one. The City is not challenging in this appeal the district court's findings that it cannot summarily destroy the Bulky Items that it seizes. The City *is* asking that the constitutionality of seizing Bulky Items be analyzed separately from the constitutionality of destroying them, which the district court refused to do. The answering brief argues that the City forfeited an argument that the district court should have done that. Never mind that the City said as much, explicitly and with citation, more than once.

* * *

Homelessness is a serious policy problem and it creates a cascade of other serious policy problems, including the monopolization of public spaces by the large pieces of personal property being stored there. It isn't a matter limited to Pete Diocson's kennel, or Marquis Ashley's cart. Angelenos very reasonably demand that the City do whatever it can to remedy these conditions in their public places:

And why wouldn't they? The City holds public spaces in trust for all Angelenos. It has a duty to keep them available to the general public. Accordingly, as this Court has already recognized, no one person has a right to commandeer a public area to store a sofa set or a

jacuzzi—and no one should reasonably expect to be able to do that.[2] By analyzing together the City's power to remove such items with its power to subsequently destroy them, the district court entered an order that sweeps too broadly—and thereby risks the City's ability to carry out its duty. This Court should vacate it.

[2] The image above is taken from 2 ER 68. It has been cropped.

ARGUMENT

To get the preliminary injunction that they did, Plaintiffs were required to demonstrate a likelihood that they would prevail on their facial challenges to Section 56.11(3)(i). That meant showing that there are no circumstances under the Fourth Amendment, the Fourteenth Amendment, or Article I, Section 7 of the California Constitution in which Section 56.11(3)(i) can be constitutionally applied. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

To put facts to this analytical framework, assume the question is whether the City can constitutionally apply Section 56.11(3)(i) only to remove (but not to discard) a sofa set (2 ER 127–28) or a jacuzzi (2 ER 105 ¶ 3) that someone is storing in its public areas. (Either of those two things is a Bulky Item. L.A. Mun. Code § 56.11(2)(c).) The district court, which considered only whether the City can both remove *and* discard those items, answered "no." The opening brief explained why the district court's analysis was wrong. The answering brief does not show otherwise:

I. The Fourth Amendment doesn't require the City to get a warrant before removing a sofa set—a Bulky Item—stored on the sidewalk.

A. The City's authority under the Fourth Amendment "to seize and remove" things that are "impeding traffic or threatening public safety and convenience is beyond challenge."

The answering brief cannot dispute that the Fourth Amendment allows City employees—without a warrant—to remove things from public areas that "imped[e] traffic or threaten[] public safety and convenience." *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976); *see Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) (Fourth Amendment permits "community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute"). While the things removed are ordinarily cars, the answering brief cannot claim there is a relevant difference between relying on this community caretaking function to remove a car from a place where it could "imped[e] traffic or threaten[] public safety and convenience" and relying on it to remove any other piece of personal property left in a similar place.

The answering brief cannot argue that anyone has a constitutional right to store *any* personal property, never mind Bulky Items, in the

City's public areas. *Lavan v. City of L.A.*, 693 F.3d 1022, 1033 (9th Cir. 2012). Nor can it argue that the City lacks the ability to regulate what may be stored on its streets, sidewalks, or in any other public place. *Schneider v. State*, 308 U.S. 147, 160 (1939); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 947–48 (9th Cir. 2011) (en banc). And the answering brief cannot contend that a Bulky Item must be an actual impediment at the time the City removes it, lest it also declare that the Fourth Amendment requires parking enforcement officers to wait for a driver in search of a parking space before towing away another car that has overstayed a parking limitation—an otherwise archetypal use of the community caretaking function. *E.g.*, *Opperman*, 428 U.S. at 365–66.

Taken together, why isn't this sufficient to demonstrate that the City can prohibit the storage of sofa sets (for example) on its sidewalks, and—consistently with the Fourth Amendment—rely on Section 56.11(3)(i) to haul away a sofa set left there?

B. The City didn't forfeit the argument that the community caretaking doctrine applies.

The answering brief first says that this reasoning is insufficient because the City forfeited the argument that its community caretaking function applies at all in this case. (AB 30 & n.7.) The City argued in the district court that removing Bulky Items from public places "'serves special government needs beyond the normal need for law enforcement,'" a statement that looks an awful lot like the argument that the City can remove a Bulky Item "for reasons 'totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'" (SER 44, quoting *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 449–50 (1990); AOB 34, quoting *Cady*, 413 U.S. at 441.)

Both statements accurately describe a rationale for removing Bulky Items; the case names *Opperman* or *Cady* aren't shibboleths necessary to preserve the community-caretaking argument. *See W. Watersheds Project v. U.S. Dep't of Interior*, 677 F.3d 922, 925 (9th Cir. 2012) ("we do not require a party to file comprehensive trial briefs on every argument that might support an issue"). Nor are the interests of justice served by deeming forfeited a purely legal argument that the

answering brief addressed at length (AB 27–43) and of which Plaintiffs were surely aware, having themselves argued in the district court that "the seizure and destruction of [Bulky Items] must be justified consistent with the Fourth Amendment and the City's role as caretaker" (SER 16 n.5). *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1004 (9th Cir. 2002).[3]

C. No immediate threat to community safety is necessary to remove either an illegally parked car or a sidewalk sofa set.

Next, the answering brief says that the City's community caretaking function cannot be exercised without an immediate threat to community safety, and Section 56.11(3)(i) "does not require consideration of whether the seizure is necessary to protect" against such a threat. (AB 32.) But if something poses an immediate threat to

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[3] The answering brief also repeats frequently that the City "concedes" the unconstitutionality of Section 56.11(3)(i)'s "may discard" provision. (*E.g.*, AB 27.) The City is not challenging the district court's preliminary injunction insofar as it prevents the City from destroying Bulky Items that it seizes. (*E.g.*, AOB 12.) Because appeals from preliminary injunctions are permissive, *e.g.*, *Union of Prof'l Airmen v. Alaska Aeronautical Indus., Inc.*, 625 F.2d 881, 884 n.3 (9th Cir. 1980), the City does not concede an issue for all purposes simply by declining challenge it now.

community safety, the Fourth Amendment permits its removal under an exigent or emergency circumstances rule, *Recchia v. City of L.A. Dep't of Animal Services*, 889 F.3d 553, 558 (9th Cir. 2018), and the community caretaking function does no work. Correspondingly, if the community caretaking function actually requires the kind of "immediate threat" of which the answering brief conceives, then the routine removal of illegally parked cars, a la *Opperman*, will almost never be permitted. Still, because the answering brief purports to find an immediate-threat requirement in a recent opinion of this Court—*Rodriguez v. City of San Jose*, 930 F.3d 1123 (9th Cir. 2019)—the point merits further analysis.

Lori Rodriguez called the San Jose Police Department to the house she shared with her husband, who was suffering "an acute mental health crisis." *Id.* at 1127–28. After removing Mr. Rodriguez from the house, and pursuant to California law, police officers confiscated 12 guns from a safe inside. *Id.* at 1128. Mrs. Rodriguez wanted the guns back, resulting in complex litigation over their return. *See id.* at 1128–30 (procedural history). The only facet of Mrs. Rodriguez's litigation

relevant here is over "the officers' warrantless confiscation of her firearms." *Id.* at 1136.

This Court held that the Fourth Amendment allowed the officers in *Rodriguez* to seize the guns as an act of community caretaking. *Id.* at 1138. In so doing, it likened removing guns from the house of an acutely mentally ill person to impounding a car "after the driver has been detained or has otherwise become incapacitated." *Id.* In cases in which a driver is detained or incapacitated, the ability to seize a car under the community caretaking function turns on (1) whether the car can be left safely and legally where it is or in someone else's care, or (2) whether leaving the car will create "an immediate threat to community safety." *Id.*

That's why, if a person is arrested for driving without a valid license, the availability of a licensed driver who can remove the car prevents the car from being impounded as an act of community caretaking: The licensed driver can just drive it away. *Sandoval v. Cnty. of Sonoma*, 912 F.3d 509, 516–17 (9th Cir. 2018). It's also why police generally cannot rely on the community caretaking function to seize a car out of its owner's driveway, *Miranda v. City of Cornelius*, 429

F.3d 858, 864–66 (9th Cir. 2005), or from some other *lawful* parking place, *United States v. Caseres*, 533 F.3d 1064, 1075 (9th Cir. 2008).

None of that, however, speaks to what happens if a car is parked somewhere *unlawfully*: The community caretaking function allows for the car to be towed, and there's no need for its parking violation to cause an immediate threat to anyone. That's been well understood for so long that it was already "beyond challenge" when Donald Opperman violated a no-parking-between-2-and-6 ordinance over 45 years ago. *Opperman*, 428 U.S. at 365, 369.

So too with a Bulky Item stored in a public place, in violation of Section 56.11(3)(i). The City need not wait for the Bulky Item to actually inconvenience anyone before removing it any more than it would wait for someone in need of an ADA-compliant sidewalk to show up before removing an item that thwarts ADA accessibility. L.A. Mun. Code § 56.11(3)(d). And that comparison is particularly apt: Most (if not all) of the answering brief's Fourth Amendment arguments as to Section 56.11(3)(i) would apply with equal force to Section 56.11(3)(d), which provides for the removal of items that prevent ADA compliance in public places.

D. Even if the City's community caretaking function doesn't *always* allow it to remove a Bulky Item under Section 56.11(3)(i), it's Plaintiffs' burden to show that the community caretaking function would *never* allow the City to remove a Bulky Item under Section 56.11(3)(i).

The answering brief has one other notable objection to the removal of Bulky Items as an application of the City's community caretaking function: It argues that just as the community caretaking function doesn't allow the City to continue to impound a car that someone could otherwise lawfully drive away, *e.g.*, *Sandoval*, 912 F.3d at 516–17, it also doesn't allow the City to remove a Bulky Item that someone could take from a public place him or herself. (AB 34.)

Whatever the merits of this argument, it doesn't have much baring on Plaintiffs' *facial* challenge. Because pointing to *one* instance, or even a set of instances, in which it would be *unconstitutional* to apply an ordinance gets Plaintiffs' burden exactly backwards. Plaintiffs must instead show that there are *no* instances in which it would be *constitutional* to apply the ordinance. *United States v. Salerno*, 481 U.S. 739, 745 (1987). That's why when a plaintiff in *Sandoval* demonstrated one instance in which the impoundment of a car under California Vehicle Code § 14602.6(a)(1) failed to comport with the

community caretaking doctrine—because someone else could have driven his car away—the result wasn't the facial invalidation of that Vehicle Code section. *Sandoval*, 912 F.3d at 516–17. The result was instead an as-applied holding that police cannot use that statute to retain a car in impound, consistently with their community caretaking function, when someone is available to drive the car away. *Id.*[4]

Or, turning the same reasoning on a set of facts from this case: Assume for argument's sake that the answering brief is correct (1) that Mr. Diocson could have moved his large dog kennel out of a public area, and (2) the City therefore could not rely on the community caretaking doctrine to remove the kennel under Section 56.11(3)(i). (AB 34.) It doesn't follow that (3) the community caretaking doctrine *never* applies to *anything* removed under Section 56.11(3)(i) because Mr. Diocson (or some other subset of people) could move their Bulky Items out of a public area. Section 56.11(3)(i) could still be applied constitutionally to

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[4] And it isn't as if the text of the Vehicle Code section must be amended to recognize expressly that the Constitution supersedes it in order to pass muster, in the future, under *Sandoval*. (*Contra* AB 36 n.8, 43 n.10.)

remove the now-familiar sofa set, for example—especially if there's no one around to move the sofa set or there is no private area to which it can be moved. That is enough to demonstrate Plaintiffs' inability to prevail on their facial Fourth Amendment challenge to the removal of Bulky Items under Section 56.11(3)(i), and so also to demonstrate the district court's error in granting them a preliminary injunction on that basis.

E. *City of Los Angeles v. Patel* does nothing to change the fact that Section 56.11(3)(i)'s constitutional applications save it from facial invalidation.

The answering brief argues that *City of Los Angeles v. Patel*, 576 U.S. 409 (2015) somehow changes this result. It isn't clear, though, how or why that would be.

Starting with *Patel* itself: The Supreme Court there held facially unconstitutional a Los Angeles ordinance that required hoteliers to turn over their guest registries to the police on demand and without a warrant. *Id.* at 412–13. When pressed to identify a situation in which the police could constitutionally demand access to that information without a warrant, every example the City provided was an instance in which the police could demand access to the information irrespective of

the ordinance. *Id.* at 418–19. The Court subsequently held that the ordinance couldn't be saved by reference to "constitutional 'applications'" where the ordinance wasn't actually being applied to do anything at all. *Id.*

Contrast that with what's going on here. Police officers, as in *Patel*, get their authorization to conduct criminal investigations from someplace other than an ordinance that forces hoteliers to turn over their guest registries on demand. They can get guest registries in conducting those investigations without ever having to rely on an ordinance that forces their disclosure. Unlike the *Patel* ordinance, however, Section 56.11(3)(i) is doing work *every time* a Sanitation employee seizes a Bulky Item—City employees don't operate under some general brief that has them removing Bulky Items from public areas.

So the question is simply whether the work Section 56.11(3)(i) is doing in any given instance is constitutional. The answer—as discussed above—is that *at least* some instances must be, under a properly framed understanding of the community caretaking doctrine. (*Contra* AB 40–

41.) *Patel* does nothing to change the fact that Plaintiffs' Fourth Amendment facial challenge to Section 56.11(3)(i) seizures must fail.

II. The Fourteenth Amendment doesn't require the City to give notice before removing a jacuzzi—another Bulky Item—stored on the sidewalk. Nor does a dignitary interest protected by the California Constitution.

The answering brief doesn't dispute that to prevail on a facial challenge to a Section 56.11(3)(i) no-notice seizure, Plaintiffs must show that there is *no* situation in which the City can remove a Bulky Item without giving notice first. Nor does the answering brief dispute that the entitlement of a Bulky Item's owner to pre-removal notice depends on the factors set out in *Mathews v. Eldridge*, 424 U.S. 319 (1976). It just refuses to grapple with the application of those factors to *every* type of Bulky Item that the City encounters in its public spaces, even though there are likely some instances in which no pre-removal notice is required because there is little-to-no-risk of erroneous deprivation.

A. Different private interests are affected by the removal of different property. A person's interest in storing his or her shelter in a public area is not the same as that person's interest in storing a jacuzzi there.

The first *Mathews* factor requires a court to consider "the private interest that will be affected" by the seizure of property. *Mathews*, 424

U.S. at 335. The answering brief insists that the relevant private interest is simply "property." (AB 54–55.) There is certainly an argument for such a high-level definition to be made from cases like *Fuentes v. Shevin*, 407 U.S. 67 (1972), which the answering brief reads to bar courts from distinguishing, for procedural due process purposes, between types of property. But if *Fuentes* truly bars courts from considering the differences between different types of property—or their uses—and requires that procedural due process not "rest on such distinctions," 407 U.S. at 90, then *Fuentes*'s rule has been one honored in the breach. For procedural due process purposes, courts distinguish between pieces of personal property and their uses all the time.[5]

For example, in deciding whether notice is required before towing a car, the rule is not simply "yes, always, because it's property." The rule is instead "maybe"—or, after *Grimm v. City of Portland*, 971 F.3d 1060, 1063 (9th Cir. 2020), presumptively "yes." That's not because of

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[5] *Fuentes* undercuts itself by allowing that no notice is required before depriving someone of a de minimis property interest. 407 U.S. at 90 n.21. Allowing a court to deem a property interest de minimis opens the same door that the Court had just purported to shut: "De minimis as to whom or relative to what?"

the car's monetary value, though, or just because a car is property. It's because "the uninterrupted use of one's vehicle is a significant and substantial private interest." *Scofield v. City of Hillsborough*, 862 F.2d 759, 762 (9th Cir. 1988). The notice to which a vehicle's owner is entitled before it's seized depends on the contours of *that* interest. Thus, if a vehicle isn't registered to be driven on a public road, it's a "close" case that notice is required before towing it—because the owner's use of the car is pretty limited. *Clement v. City of Glendale*, 518 F.3d 1090, 1094 (9th Cir. 2008). Or, if a vehicle that is used only for advertising is chronically parked illegally, it can be towed without any new notice beforehand. *Lone Star Sec. & Video v. City of L.A.*, 584 F.3d 1232, 1238–39 (9th Cir. 2009). *But see Lavan*, 693 F.3d at 1032 (implying that notice is always required before removing any property).

So it should not be a "complete[] misunderstand[ing]" of the role of due process, *Lavan*, 693 F.3d at 1032, to observe that while both are undisputedly items in which someone retains a property interest, there are qualitative differences between storing a non-tent shelter on the sidewalk and storing a jacuzzi there (2 ER 105 ¶ 3)—just as there are qualitative differences between a vehicle with a non-operational

registration, *Clement*, 518 F.3d at 1094, and one that is being used for roadside advertising, *Lone Star Sec. & Video*, 584 F.3d at 1238–39. And just as those differences distinguish the pre-removal notice requirement between the registered non-operational vehicle and the scofflaw mobile advertisement, so too can they vary the requirement as between the shelter and the jacuzzi—to the point that no notice ought to be required at all before removing the jacuzzi from a public sidewalk.

B. There is a vanishingly small likelihood that a jacuzzi will be labeled a Bulky Item erroneously.

Moreover, on the second *Mathews* factor, there are cases in which "the risk of an erroneous deprivation" is so low that there is no "probable value" in the addition of any pre-removal procedural safeguards. *Mathews*, 424 U.S. at 335. For even assuming that it's true that Section 56.11(3)(i)'s existence, by itself, doesn't suffice as notice to every person whose property is seized as a Bulky Item (AB 49), it's also true that there's nothing to be gained from providing the jacuzzi owner pre-removal notice.

Because the point of pre-removal notice isn't to inform its recipient of the law's requirements; everyone is presumed to know the

law already. *E.g., Flores v. Cnty. of L.A.*, 758 F.3d 1154, 1160 (9th Cir. 2014). The point is instead to give the recipient of the notice the opportunity to contest that he or she is violating the law before the government interferes with a property right. But where the item in question is *indisputably* a Bulky Item—like a jacuzzi—there is *no* likelihood that it will be removed mistakenly, and so little to be gained from providing notice before it is removed. *Clement*, 518 F.3d at 1094; *Scofield*, 862 F.2d at 764.

C. The dignitary interest protected by the California Constitution doesn't entitle the jacuzzi's owner to any more notice than the Fourteenth Amendment does.

In moving for a preliminary injunction, Plaintiffs devoted all of a footnote to the California Constitution's due process protections—a fact they concede in their answering brief (also in a footnote). (AB 64 n. 14; SER 78 n. 8.) They have, by their own standards (AB 18-19), forfeited the argument. But as the answering brief's forfeiture arguments are bogus when applied to the City, *see* § I.A, *supra* and §III.B, *infra*, it is equally fair to give the answering brief's new arguments the Court's consideration.

Those new arguments, however, add nothing if the question is whether the City is *always* required to give notice when removing a Bulky Item. For an item like the exemplar jacuzzi, the answering brief doesn't explain how the dignitary interest protected by the California Constitution requires any more than does the Fourteenth Amendment. Or—more generally—why the application of Section 56.11(3)(i) would violate that interest in *every* possible case, as is necessary to facially invalidate the ordinance. The answering brief simply announces that such a dignitary interest exists, and claims it is significant. (AB 65.) Undoubtedly it is a significant interest, as are all the interests at issue in this case. But announcing the significance of a dignitary interest doesn't demonstrate how it is violated in *every* instance of Section 56.11(3)(i)'s application.

III. The district court should have analyzed separately the legally distinct questions whether the City "may remove" a sofa set or jacuzzi stored on the sidewalk and whether the City summarily "may discard" those things.

The answering brief insists that the constitutionality of removing a Bulky Item from a public area must be analyzed together the constitutionality of subsequently destroying that item. But it never disputes that the two are different acts with different constitutional significance. *E.g.*, *Brewster v. Beck*, 859 F.3d 1194, 1196–97 (9th Cir. 2017). So why *shouldn't* they be analyzed separately?

A. Severability is a particular reason to analyze the separate provisions separately, but it isn't the only reason.

As an initial matter, whether Section 56.11(3)(i)'s "may remove" and "may discard" clauses are ultimately severable is subsidiary to the question whether either is constitutional on its own. *See, e.g.*, *Long Beach Area Peace Network v. City of Long Beach* (*Peace Network*), 574 F.3d 1011, 1027–44 (9th Cir. 2009) (analyzing separately the constitutionality of nine separate features of an ordinance before remanding to the district court to determine whether they are severable). Indeed, as the City observed in the opening brief (AOB 41–43), its preliminary injunction opposition (SER 47–48), and in support

of its motion to dismiss (SER 131), Fourth Amendment jurisprudence *by itself* requires a court to analyze the removal of a Bulky Item and its subsequent destruction separately. *Brewster*, 859 F.3d at 1196–97 (citing, e.g., *United States v. Jacobsen*, 499 U.S. 109, 124 & n.25 (1984)).

Even if the City is to be ultimately enjoined from enforcing Section 56.11(3)(i) with no portions severed, separately analyzing its "may remove" and "may discard" functions would have had the salutary effect of allowing the City Council to focus on correcting specific problems with one or the other. And separating the two issues would have minimized the risk that that a broad analysis will cause knock-on effects for other, unchallenged portions of Section 56.11. *See Plaut v. Spendthrift Farm*, 514 U.S. 211, 217 (1995) (courts should adjudicate constitutional issues narrowly to avoid knock-on effects); *see, e.g.*, L.A. Mun. Code § 56.11(3)(d).

B. The City didn't forfeit the issue of severability.

That severability was at issue, however, was a particular reason for the district court to parse the constitutionality of Section 56.11(3)(i) carefully. To this, the answering brief says that severability wasn't actually at issue; that the City failed to argue in the district court that

Section 56.11(3)(i)'s "may remove" language can be severed from its "may discard" language. (AB 18.) To support that contention, the answering brief first asserts that the City was required to raise severability in a motion to dismiss, and if it didn't, then it forfeited the issue entirely. (AB 18–19.) There is no authority for that proposition.

The reason there is no authority for that proposition is that the proposition is nonsense. It isn't as if pointing out that an ordinance has severable provisions is tantamount to raising a use-it-or-lose-it defense. The City could've abstained entirely from moving to dismiss, said nothing at all about severability in an answer, opted to forgo making a summary judgment motion, and ended up making no argument about the law's meaning at all until trial—but for Plaintiffs' preliminary injunction motion. *See generally* Fed. R. Civ. P. 8(b) (elements of an answer); Fed. R. Civ. P. 12(b) (listing defenses that *may* be asserted by motion); Fed. R. Civ. P. 12(h) (listing defenses that are waived if not asserted by motion); Fed. R. Civ. P. 56(a) (parties *may* move for summary judgment). There would still be no forfeiture of severability.

The answering brief then claims that the City forfeited severability by not raising it adequately in its preliminary injunction

opposition. The City's opposition divided removal and destruction of Bulky Items into two separately headed sections. (SER 43, SER 47.) The very first sentence of the section headed "Disposal of Bulky Items" argued that while "Plaintiffs speak of 'seizure and destruction' as one concept, the Court has made it clear that those two events must be analyzed separately . . . and [Section 56.11(3)(i)] treats them as distinct." (SER 47–48.) It continued: "Also, [Section 56.11] contains a severability provision." (SER 48.) Especially for that reason, and citing this Court's opinion in *Vivid Entertainment, LLC v. Fielding*, 774 F.3d 566 (9th Cir. 2014), the City argued that the district court "should evaluate the constitutionality of 'may remove' and 'may discard' separately." (SER 48.)

The presence of a severability clause creates a presumption of severability. *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 325 (9th Cir. 2015) (en banc); *Cal. Redevelopment Ass'n v. Matosantos*, 267 P.3d 580, 607 (Cal. 2011). So it's worth asking what Plaintiffs argued to convince the district to forgo even separate analysis, never mind severance, of the "may remove" and "may discard" provisions. The answer is that Plaintiffs essentially ignored the issue, and the district

court ignored it totally. (*See* SER 18 n. 8 [Plaintiffs' glancing reference to the issue].) The City pointed that out, objecting to the district court's tentative order with a section headed "The Order Does Not Address Severance Of Removal And Disposal Clauses." (SER 6.) The district court still failed to address the issue—not even to say, as does the answering brief, that the City argued the point insufficiently.

C. The state law presumption favoring severability dictates analyzing the "may remove" and "may discard" provisions separately.

Given the meritlessness of its forfeiture argument, the answering brief attempts for the first time to demonstrate something that Plaintiffs should have addressed in the district court: Why the presumption in favor of severability should *not* apply to Section 56.11(3)(i). *See Associated Gen. Contractors, Inc. v. City & Cnty. of S.F.*, 813 F.2d 922, 928 n.10 (9th Cir. 1987) (a severability clause applied to a grammatically severable ordinance creates a rebuttable presumption of severability); *cf., e.g.*, *Yount v. Salazar*, 933 F. Supp. 2d 1215, 1243 (D. Ariz. 2013) (when a severability clause creates a presumption of severability, the party opposing severability has the burden of rebutting the presumption); *cf. generally Nat'l Mining Ass'n v. Zinke*, 877 F.3d

845, 861–62 (9th Cir. 2017) (it requires strong evidence to overcome a presumption of severability). After all, given both their "respect for federalism and local control" and the dictates of judicial restraint, the starting position for federal courts is to "avoid nullifying an entire statute when only a portion is invalid." *Vivid Entm't*, 774 F.3d at 574.

So strong is the imperative to avoid imposing unnecessary constraints of constitutional scope on local governments that when a district court did not consider severability in another case, this Court remanded for it to do so without any party even raising the issue. *E.g.*, *Peace Network*, 574 F.3d at 1044. The same reluctance to declare legislative enactments unconstitutional drives the presumption of severability under California law, *e.g.*, *Lopez v. Sony Elecs., Inc.*, 420 P.3d 767, 774 n.7 (Cal. 2018), which applies to the question of severability here. *Vivid Entm't*, 774 F.3d at 574.

Now disputing severability for the first time, Plaintiffs concede that Section 56.11(3)(i)'s "may remove" and "may discard" clauses can be severed grammatically. (AB 19.) The answering brief argues only that the function of removing items can't be separated from the function of destroying them, and that even if it could, the City Council wouldn't

have enacted Section 56.11(3)(i) if the City couldn't destroy Bulky Items summarily. (AB 20–27.)

One portion of an ordinance is functionally severable if it can be enforced separately from the others. *Matosantos*, 267 P.3d at 608. It is at least as possible to remove a Bulky Item from a public area without discarding it as it is, for example, to impose a royalty only on in-state art sales when a statute originally contemplates imposing it on both in- and out-of-state sales. *Sam Francis Found.*, 784 F.3d at 1326. Or to require a city to provide various public services even after invalidating the portion of an ordinance that mandated the budget for those services. *McMahan v. City & Cnty. of S.F.*, 26 Cal. Rptr. 3d 509, 511–13, 517 (Cal. Ct. App. 2005). Stripped of the clauses allowing the City to discard Bulky Items, Section 56.11(3)(i) "is complete, has coherent functionality, and does not conflict" with any other provision in Section 56.11. *Sam Francis Found.*, 784 F.3d 1326; *see Matosantos*, 267 P.3d at 608 (functional severability exists if it is possible to enforce what remains of an enactment).

What the answering brief principally disputes, even in the section in which it claims to dispute functional severability, is instead volitional

severability: Whether the City Council, "knowing that only part of its enactment would be valid, would have preferred that part to nothing, or would instead have declined to enact the valid without the invalid." *Matosantos*, 267 P.3d at 609. As this Court observed, a severability clause—which Section 56.11 has—is the most telling evidence that a legislative body would've preferred part of its enactment to nothing. *Sam Francis Found.*, 784 F.3d at 1326.

Nevertheless, the answering brief argues that a severability clause "cannot amount to evidence of volitional severability" at all, because if it did then there would be nothing left of the volitional severability requirement in any case involving a severability clause. (AB 23 n.5.) It's a strange position, that a legislature's express intent is no evidence *at all* of its preferences. *See, e.g.*, *Judd v. Weinstein*, 967 F.3d 952, 956 (9th Cir. 2020) (text is the best indicator of purpose). It's certainly not a position taken by the authority the answering brief cites for it. *See People v. Library One, Inc.*, 280 Cal. Rptr. 400, 409 (Cal. Ct. App. 1991) ("[o]ur resolution of this issue obviates any need to address the volitional element").

It would be something else to say that a severability clause is only one piece of evidence of volitional severability, rebuttable by contrary evidence. Plaintiffs haven't previously attempted that showing. Now that they have, much of it turns on pointing to the City's *consistent* position that it cannot store Bulky Items as a matter of resource allocation. (AB 24–25; *compare, e.g.*, SER 49 *with* AOB 57.) According to the answering brief, that proves that without the ability to destroy Bulky Items, the City Council would have forgone their removal entirely. (AB 24–25.) Because *that* is the volitional-severability question that *Matosantos*, 267 P.3d at 609, requires a court to ask.

But Section 56.11's "Declaration of Legislative Intent" certainly doesn't reflect a preference for doing nothing: The Council's overriding goal was to allow unhoused Angelenos "access to a manageable amount of essential property" while ending "the unauthorized use of public areas for the storage of unlimited amounts of personal property." L.A. Mun. Code § 56.11(1).

Nothing about that statement compels the conclusion, upon which the answering brief insists, that the City Council would (or will) opt to forgo removing Bulky Items if barred constitutionally from destroying

them. Because there *is*, in fact, a difference between having to stop enforcing a provision as a matter of resource allocation and as a matter of the provision's constitutionality. *See McMahan*, 26 Cal. Rptr. 3d at 513–17 (holding that ballot measure prescribing a sea-change in indigent services would have been enacted, even stripped of a funding mechanism).

The City's overriding goal is to stop "the unauthorized use of public areas for the storage of unlimited amounts of personal property," not to destroy property for destruction's sake. The courts' treatment of its efforts to do should not trench more broadly than is strictly necessary to protect the rights of *all* Angelenos.

CONCLUSION

Plaintiffs are unlikely to prevail on their *facial* constitutional challenges to the City's ability *to remove* Bulky Items from its public areas under Section 56.11(3)(i).

Respectfully submitted,

Dated: October 23, 2020

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FOR THE NINTH CIRCUIT

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