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9 UNITED STATES DISTRICT COURT

10 SOUTHERN DISTRICT OF CALIFORNIA

11 EUGENE DAVIDOVICH, an individual,
 DAVINA LYNCH, an individual, and JOHN
 12 KENNEY, an individual,

13 Plaintiffs,

14 v.

15 CITY OF SAN DIEGO,

16 Defendant.

) Case No. 11-cv-2675 WQH (NLS)

) **DEFENDANT CITY OF SAN DIEGO'S**
) **OPPOSITION TO PLAINTIFFS' EX**
) **PARTE APPLICATION FOR**
) **TEMPORARY RESTRAINING**
) **ORDER**

) District Judge: Hon. William Q. Hayes
) Courtroom: 4 – 4th Floor

) Complaint filed: November 16, 2011

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1 Defendant City of San Diego (“the City”) respectfully submits the following opposition
2 to Plaintiffs’ most recent ex parte application for a temporary restraining order (Doc. No. 29):

3 **I. INTRODUCTION**

4 The City’s encroachment ordinance, San Diego Municipal Code (SDMC) section
5 54.0110, essentially prohibits people from leaving objects or vegetation on public property for
6 indefinite periods of time. The Court has determined that SDMC § 54.0110 is a content-neutral,
7 reasonable time, place, and manner restriction, which is narrowly tailored to serve a significant
8 governmental interest and leaves open ample alternative channels for communication. (Doc. No.
9 25, p. 6.) The Court has also determined that Plaintiffs have failed to show a likelihood of
10 success on the merits of their claims that SDMC § 54.0110 is facially unconstitutional as vague
11 or overbroad. (Doc. No. 25, pp. 8 & 11.)

12 Plaintiffs nevertheless again seek to immediately enjoin the City from enforcing SDMC §
13 54.0110, this time based on how the ordinance has been allegedly applied in regard to their
14 speech activities. (Doc. No. 29-1, p. 4.) However, Plaintiffs fail to meet their burden of clearly
15 showing they are entitled to such preliminary injunctive relief. SDMC § 54.0110 is
16 constitutional as applied to Plaintiffs’ activities. The City has significant and legitimate interests
17 in protecting the public’s health, safety and welfare, protecting the City’s properties from
18 damage, overuse, and unsanitary conditions, and maintaining public areas and right-of-ways free
19 of obstructions and clutter, open for the use and enjoyment of the public. SDMC § 54.0110 and
20 the City’s enforcement of the ordinance against Plaintiffs and others, when needed, furthers
21 those interests and curtails no more speech, if any, than is necessary to accomplish the City’s
22 legitimate goals. Plaintiffs are free to exercise their speech rights in the City’s public areas,
23 including Civic Center Plaza and adjacent public areas, and have done so. The City’s
24 enforcement of SDMC § 54.0110 does not unconstitutionally restrict Plaintiffs’ speech.

25 **II. ISSUANCE OF A TEMPORARY RESTRAINING ORDER IS AN**
26 **EXTRAORDINARY REMEDY WHICH MUST BE CLEARLY**
WARRANTED

27 Injunctive relief “must be used sparingly, to prevent future harm, and not to punish past
28 violations.” (*U.S. v. Barr Laboratories, Inc.* (D.N.J., 1993) 812 F.Supp. 458, 487-488.) Further,

1 “[t]he scope of injunctive relief is dictated by the extent of the violation established. [Citation.]
2 If injunctive relief is premised upon only a few isolated violations affecting a narrow range of
3 plaintiffs, its scope must be limited accordingly.” (*Armstrong v. Schwarzenegger* (9th Cir. 2010)
4 622 F.3d 1058, 1072.)

5 The grant of a preliminary injunction “is the exercise of a very far reaching power never
6 to be indulged except in a case clearly warranting it.” (*Sierra Club v. Hickel* (C.A.Cal. 1970)
7 433 F.2d 24, 33.) Thus, issuance of a temporary restraining order, as a form of preliminary
8 injunctive relief, is an extraordinary and drastic remedy, and Plaintiffs have the burden of
9 proving the propriety of such a remedy. (*Mazurek v. Armstrong* (1997) 520 U.S. 968, 972;
10 *Stuhlberg Intl. Sales, Co., Inc. v. John D. Brush & Co., Inc.* (9th Cir. 2001) 240 F.3d 832, 839, fn.
11 7.) A preliminary injunction is an “extraordinary remedy that may only be awarded upon a clear
12 showing that the plaintiff is entitled to such relief.” (*Winter v. Natural Resources Defense*
13 *Council, Inc.* (2008) 555 U.S. 7, 22.)

14 A temporary restraining order’s purpose is to preserve the status quo pending the
15 complete briefing and thorough consideration contemplated by full proceedings. (*Granny Goose*
16 *Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers* (1974) 415 U.S. 423, 438-439;
17 *see also, Reno Air Racing Assoc., Inc. v. McCord* (9th Cir. 2006) 452 F.3d 1126, 1131.) “Status
18 quo” means the last uncontested status that preceded the pending controversy. (*GoTo.com, Inc.*
19 *v. Walt Disney Co.* (9th Cir. 2000) 202 F.3d 1199, 1210.)

20 In this case, SDMC § 54.0110 has been in effect in some form since 1993¹ and the City
21 through its Police Department has been actively enforcing the ordinance. Hence, the status quo
22 is a 19-year old encroachment ordinance being enforced by the government. Accordingly,
23 Plaintiffs do not seek to maintain the status quo; rather, they seek to alter it, in that, if granted,
24 the City would be precluded from enforcing SDMC § 54.0110, which predates the Occupy San
25 Diego movement by 18 years.

26
27 ¹ SDMC § 62.0306 (Unauthorized Encroachments Prohibited), which was adopted in 1993, was
28 repealed in 2006 as a result of revisions to the Land Development Code, and reenacted in 2007 as SDMC
§ 54.0110.

1 **III. PLAINTIFFS HAVE NOT SHOWN THEY ARE ENTITLED TO**
 2 **PRELIMINARY INJUNCTIVE RELIEF**

3 In order to obtain preliminary injunctive relief, a plaintiff must demonstrate: (1) “that he
 4 is likely to succeed on the merits”; (2) “that he is likely to suffer irreparable harm in the absence
 5 of preliminary relief”; (3) “that the balance of equities tips in his favor”; and (4) “that an
 6 injunction is in the public interest.” (*Winter*, 555 U.S. at 20; *Stormans, Inc. v. Selecky* (9th Cir.
 7 2009) 586 F.3d 1109, 1127 [quoting same].)

8 **A. Plaintiffs Are Unlikely to Succeed on the Merits**

9 To obtain a preliminary injunction, first, success on the merits must be “more likely than
 10 not.” (*Titan Tire Corp. v. Case New Holland, Inc.* (Fed. Cir. 2009) 566 F.3d 1372, 1379.) Here,
 11 Plaintiffs cannot meet their burden of showing it is more likely than not they will succeed on the
 12 merits because SDMC § 54.0110 is a reasonable time, place, and manner restriction;
 13 enforcement of SDMC § 54.0110 is a valid exercise of the City’s police power; and SDMC §
 14 54.0110 is not being unconstitutionally enforced with respect to Plaintiffs’ speech activities.

15 **1. Reasonable Time, Place, and Manner Restriction**

16 “Even protected speech is not equally permissible in all places and at all times. Nothing
 17 in the Constitution requires the Government freely to grant access to all who wish to exercise
 18 their right to free speech on every type of Government property without regard to the nature of
 19 the property or to the disruption that might be caused by the speaker's activities.” (*Cornelius v.*
 20 *NAACP Legal Defense and Educational Fund, Inc.* (1985) 473 U.S. 788, 799-800.) The mere
 21 fact that government property can be used as a vehicle for communication does not mean that the
 22 Constitution requires such uses to be permitted. (*Members of City Council of City of Los*
 23 *Angeles v. Taxpayers for Vincent* (1984) 466 U.S. 789, 814.) Hence, expression, whether oral,
 24 written, or symbolized by conduct, is subject to reasonable time, place, or manner restrictions.
 25 (*Clark v. Community for Creative Non-Violence* (1984) 468 U.S. 288, 293.) Here, as this Court
 26 has found, SDMC § 54.0110 is a content-neutral, reasonable time, place, and manner restriction,
 27 which is narrowly tailored to serve a significant governmental interest and leaves open ample
 28 alternative channels for communication. (Doc. No. 25, p. 6.)

1 **2. Valid Exercise of the City’s Police Power**

2 Additionally, in the exercise of its police power, the City has broad discretion in
3 determining what is reasonable in endeavoring to protect the public health, safety, morals, and
4 general welfare. (*Carlin v. City of Palm Springs* (1971) 14 Cal.App.3d 706, 711.) An ordinance
5 enacted under a city’s police power “will ordinarily be upheld if ‘it is reasonably related to
6 promoting the public health, safety, comfort, and welfare, and if the means adopted to
7 accomplish that promotion are reasonably appropriate to the purpose.’” (*Sunset Amusement Co. v.*
8 *Board of Police Commissioners* (1972) 7 Cal.3d 64, 72.)

9 In this case, SDMC § 54.0110 was enacted to keep public areas and right-of-ways (which
10 includes Civic Center Plaza and adjacent public areas) clean, safe, and free of obstructions and
11 clutter, open for the use and enjoyment of the public. Thus, the enforcement of SDMC §
12 54.0110 is a valid exercise of the City’s police power, in that it is reasonably related to
13 promoting the health, safety, comfort, and welfare of the community. (*Carlin*, 14 Cal.App.3d at
14 711; *see also, Foti v. City of Menlo Park* (9th Cir. 1998) 146 F.3d 629, 642-643 [preventing
15 permanent encampments on sidewalks that block pedestrian traffic and intimidate passers-by is a
16 legitimate city objective that can be achieved through the application of a city’s police powers
17 without burdening the manner of picketing].)

18 **3. SDMC § 54.0110 Is Not Being Unconstitutionally Enforced**
19 **Against Plaintiffs and Other Occupy San Diego Members**

20 An as-applied challenge does not implicate the enforcement of a law against third parties;
21 rather, it contends that the law is unconstitutional as applied to the plaintiff’s particular speech
22 activities. (*Foti*, 146 F.3d at 635.) A successful as-applied challenge does not render the law
23 itself invalid, but only the particular application of the law. (*Id.*) An as-applied challenge
24 contemplates analysis of the facts to determine the circumstances in which the ordinance has
25 been applied and to consider whether in those particular circumstances the application deprived
26 the individual(s) to whom it was applied of a protected right. (*Tobe v. City of Santa Ana* (1995)
27 9 Cal.4th 1069, 1084.) If it is contended that an otherwise valid law has been applied in a
28 constitutionally impermissible manner in the past and the plaintiff seeks an injunction against

1 future application of the law in that manner, the plaintiff must show a pattern of impermissible
2 enforcement. (*Id.* at 1085.)

3 It is well established that the state may sometimes curtail speech when necessary to
4 advance a significant and legitimate state interest. (*Taxpayers for Vincent*, 466 U.S. at 804.)
5 Hence, the critical inquiries are whether the state's interest is sufficiently substantial to justify
6 the effect of the ordinance on the plaintiff's expression, and whether that effect is no greater than
7 necessary to accomplish the City's purpose. (*Id.* at 805.) In *Clark v. Community for Creative*
8 *Non-Violence*, *supra*, for example, the United States Supreme Court upheld as constitutional a
9 National Park Service regulation prohibiting camping in certain parks, finding that the regulation
10 was a reasonable time, place, and manner restriction and did not violate the First Amendment
11 even as applied to prohibit demonstrators from sleeping in Lafayette Park and the Mall in
12 connection with a demonstration intended to call attention to the plight of the homeless. (*Clark*,
13 468 U.S. at 297-299.)

14 Similarly, in *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*,
15 *supra*, the Supreme Court upheld an ordinance prohibiting the posting of signs on public
16 property, finding that it was not unconstitutional as applied to the expressive activities of a group
17 of supporters of a political candidate. (*Taxpayers for Vincent*, 466 U.S. at 817.) The Court noted
18 that "the city's interest in attempting to preserve [or improve] the quality of urban life is one that
19 must be accorded high respect." (*Id.* at 807.) Further, the Court determined that the scope of the
20 restriction on the plaintiffs' expressive activity was not broader than necessary to protect the
21 city's interest in eliminating visual clutter. (*Id.* at 808-810.) The Court also provided the
22 example that while ordinances prohibiting handbilling on the streets may be invalid, "there is no
23 constitutional impediment to the punishment of those who actually throw papers on the streets."
24 (*Id.* at 808-809.)

25 In *American Civil Liberties Union of Nevada v. City of Las Vegas* (9th Cir. 2006) 466
26 F.3d 784, a case frequently cited by Plaintiffs, the Court found that an ordinance that completely
27 prohibited tables, racks, chairs, boxes, and other objects from being placed in a particular
28 pedestrian mall, with certain express exceptions, infringed on the plaintiffs' First Amendment

1 rights to the extent the ordinance prohibited erecting tables used to facilitate the dissemination of
2 protected speech. (*Id.* at 799.) The Court noted that the plaintiffs “were not selling ice cream
3 from the table.” Rather, the plaintiffs were using their table for petitions. (*Id.*) However, the
4 Court did not find that chairs, umbrellas, boxes, or other items besides tables for speech activities
5 were entitled to First Amendment protection. (*Id.* at 798-799.) Likewise, the Court did not find
6 that an ordinance (like SDMC § 54.0110) that precludes the placement of items, including tables,
7 on public property for indefinite periods of time is unconstitutional.

8 The Constitution does not require perfection with respect to the enforcement of an
9 ordinance or comprehensive regulation. (*Falls v. Town of Dyer* (7th Cir. 1989) 875 F.2d 146,
10 149.) Selective enforcement is not constitutionally prohibited unless the selective decision to
11 prosecute is based on impermissible grounds such as race, religion, or the exercise of
12 constitutional rights. (*Id.* at 148; *United States v. Christopher* (9th Cir. 1983) 700 F.2d 1253,
13 1258.) For example, a government legitimately could enforce its law against just one person or
14 only a few persons to establish a precedent, ultimately leading to widespread compliance. (*Falls*,
15 875 F.2d at 148.)

16 To establish unconstitutional selective enforcement, therefore, the plaintiff must show
17 that others were not prosecuted for the same conduct, and the decision to prosecute was based
18 upon impermissible grounds. (*Christopher*, 700 F.2d at 1258.) In other words, the plaintiff must
19 prove (1) that he has been deliberately singled out for prosecution on the basis of some invidious
20 criterion, and (2) that the prosecution would not have been pursued except for the discriminatory
21 design of the prosecuting authorities. (*People v. Owens* (1997) 59 Cal.App.4th 798, 801.) An
22 invidious criterion for prosecution is “one that is arbitrary and thus unjustified because it bears
23 no rational relationship to legitimate law enforcement interests.” (*Id.*, emphasis added.)
24 Unequal treatment which results simply from laxity of enforcement or which reflects a
25 nonarbitrary basis for selective enforcement is not constitutionally prohibited. (*Id.*) The plaintiff
26 must show that he would not have been prosecuted but for his membership in a constitutionally
27 protected class or his exercise of a constitutional right. (*Id.*)

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1 In this case, Plaintiffs argue that SDMC § 54.0110 is being enforced against them and
2 other members of Occupy San Diego arbitrarily, such as when they set an item down
3 momentarily. (Doc. No. 29-1, p. 3.) However, in fact, no one has been arrested for merely
4 allowing his or her backpack, for example, to touch the Plaza concrete. (Decl. of Capt. Mark
5 Jones, ¶ 6, filed and served herewith; Doc. No. 18-1, ¶ 26.) And, the information that the City
6 has been providing through its Police Department in regard to SDMC § 54.0110 is not that
7 people are precluded from touching their things to the ground. To the contrary, individuals have
8 been permitted to carry and temporarily set down signs, backpacks, and other personal
9 belongings. (Jones Decl., ¶ 6; Doc. No. 18-1, ¶ 26.) While Plaintiffs may be interpreting
10 SDPD's statements to mean that people cannot ever set any items down, even for a moment, in
11 fact, what SDPD is trying to convey, and how the ordinance is actually being enforced, is that
12 individuals cannot set their items down and leave them there indefinitely, and that if they do set
13 their items down and allow them to remain there, then they could be subject to arrest. (Jones
14 Decl., ¶ 6.) In other words, SDMC § 54.0110 is being enforced to prevent any individuals,
15 including Plaintiffs, other members of Occupy San Diego, and anyone else in the Plaza area and
16 elsewhere who may or may not have any affiliation with Occupy San Diego, from setting up
17 camp, leaving their personal property around in Civic Center Plaza and other public areas, and
18 otherwise obstructing the free use and enjoyment of the Plaza, and the City's other public
19 properties and right-of-ways, by all. (Jones Decl., ¶¶ 6 & 8-9.)

20 SDMC § 54.0110 is not being enforced to prevent or discourage Plaintiffs or other
21 members of Occupy San Diego from demonstrating or engaging in speech-related activities.
22 Likewise, SDMC § 54.0110 has not been enforced against Plaintiffs or other members of Occupy
23 San Diego due to their exercise of their First Amendment speech rights. In fact, the enforcement
24 of SDMC § 54.0110 against Plaintiffs and other members of Occupy San Diego has had nothing
25 to do with their message(s) or the fact they are demonstrators or demonstrating. (Jones Decl., ¶
26 9.) Specifically, the goal of enforcement, in this specific context, has been to prevent the Occupy
27 San Diego group members from re-establishing the unsafe and unsanitary "camp" they have set
28 up at least three times since October 2011 and from making a mess of the Civic Center Plaza and

1 adjacent areas. (Jones Decl., ¶ 9; Doc. No. 18-1, ¶¶ 7-24.) After each enforcement action taken
2 by the San Diego Police Department since October 2011, the members of Occupy San Diego,
3 little by little, item by item, have re-established their encampments or attempted to do so. (Doc.
4 No. 18-1, ¶¶ 7-24.) As the encampments have grown, so have the unsanitary conditions. (*Id.*)
5 Since October 2011, members of Occupy San Diego have brought in and set up or attempted to
6 set up camping equipment, tents, canopies, tarps, sleeping bags, tables, chairs, food and beverage
7 stations, cooking equipment (such as propane grills), refrigeration units, and luggage. (Jones
8 Decl., ¶ 9; Doc. No. 18-1, ¶¶ 7-24.) The encampments have been unsanitary and SDPD has
9 received reports of public urination, defecation, public intoxication, drug use, un-leashed
10 animals, lewd behavior, rodent and pest infestations, as well as physical and sexual assault, and
11 threatening behavior towards other “non-occupy” citizens. (Doc. No. 18-1, ¶¶ 8 & 18-19.) At
12 times, the obstruction, clutter, and health and safety hazards have been so severe that the City has
13 incurred significant costs to clean, sanitize, and repair the affected areas. (Jones Decl., ¶ 9; Doc.
14 No. 18-1, ¶¶ 12, 17, & 23.)

15 Hence, SDMC § 54.0110 has been used not to suppress speech but as a tool to protect the
16 health, safety, and welfare of everyone using or passing through Civic Center Plaza, including
17 the members of Occupy San Diego. The enforcement of SDMC § 54.0110 advances the City’s
18 substantial and legitimate interests in protecting the public’s health, safety and welfare,
19 protecting the City’s properties from damage, overuse, and unsanitary conditions, and
20 maintaining the City’s public areas and right-of-ways free of obstructions and clutter, open for
21 the use and enjoyment of the public. Notably, this Court has acknowledged that “[th]e conduct
22 targeted by the ordinance relates to the maintenance, use, and enjoyment of public space and is
23 not constitutionally protected.” (Doc. No. 25, p. 8.)

24 In sum, the City’s health, safety, and welfare interests in the enforcement of SDMC §
25 54.0110 are substantial and legitimate, and the enforcement of SDMC § 54.0110 does not curtail
26 any more speech than is necessary to accomplish the City’s legitimate goals with respect to its
27 public properties and right-of-ways. Moreover, Plaintiffs have not been subjected to

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1 unconstitutional selective enforcement of SDMC § 54.0110. Accordingly, SDMC § 54.0110 is
2 not unconstitutional as applied to Plaintiffs' activities.

3 **B. Plaintiffs Are Able to Freely Exercise Their Speech Rights Without**
4 **the Court Enjoining the Enforcement of SDMC § 54.0110**

5 The propriety of a temporary restraining order hinges on a significant threat of irreparable
6 injury that must be imminent in nature. (*Caribbean Marine Services Co., Inc. v. Baldrige* (9th
7 Cir. 1988) 844 F.2d 668, 674; *Midgett v. Tri-County Metro. Transp. Dist. of Oregon* (9th Cir.
8 2001) 254 F.3d 846, 850-851.) Plaintiffs must show that irreparable harm is likely in the
9 absence of an injunction. (*Winter*, 555 U.S. at 20.) Here, there has been no showing of
10 imminent irreparable harm. Plaintiffs are not precluded by SDMC § 54.0110 from freely
11 exercising their speech rights in regard to the Occupy San Diego movement. In fact, they have
12 been actively doing so. (Jones Decl., ¶ 10; Doc. No. 18-1, ¶ 27.) Plaintiffs are not precluded
13 from marching or otherwise demonstrating in Civic Center Plaza and other public areas; they just
14 cannot camp and live there or leave their things there for indefinite periods of time. SDMC §
15 54.0110 does not preclude Plaintiffs from communicating their message(s) in other ways, besides
16 turning Civic Center Plaza into a *de facto* campground in the middle of downtown San Diego.

17 Plaintiffs claim that the City should be restrained from enforcing SDMC § 54.0110, or at
18 least from enforcing it in an incorrect manner, in order to prevent the arbitrary suppression of
19 free speech and the chilling effect on speech that has allegedly occurred as a result of arbitrary
20 arrests and threats based on incorrect interpretations of the ordinance. (Doc. No. 29-1, pp. 3-4.)
21 However, Plaintiffs have not shown that their speech has been suppressed. To the contrary,
22 Plaintiffs have acknowledged that they have regularly assembled and spoken out at length in
23 Civic Center Plaza. (E.g., Doc. No. 29-2, ¶¶ 5 & 7-8.) The declarations contradict Plaintiffs'
24 claims of imminent irreparable injury if a TRO does not immediately issue.

25 **C. Enjoining the Enforcement of SDMC § 54.0110 Is Not in the Public's**
26 **Interest**

27 Finally, before issuing a preliminary injunction, the court must identify the harm that a
28 preliminary injunction might cause the defendant and weigh it against the plaintiff's threatened

1 injury. (*Scotts Co. v. United Industries Corp.* (4th Cir. 2002) 315 F.3d 264, 284; *Winter*, 555
 2 U.S. at 24.) Where the harm likely to be suffered by defendant substantially outweighs any
 3 injury threatened by defendant's conduct, plaintiff must make a stronger showing of likely
 4 success on the merits. (*MacDonald v. Chicago Park Dist.* (7th Cir. 1997) 132 F.3d 355, 357.)
 5 Moreover, injunctive relief may be refused where it would adversely affect the rights of persons
 6 who are not parties to the litigation. (*Horwitz v. Southwest Forest Industries, Inc.* (D. NV 1985)
 7 604 F.Supp. 1130, 1136.) Additionally, in exercising their sound discretion, courts of equity
 8 "pay particular regard for the public consequences in employing the extraordinary remedy of
 9 injunction." (*Winter*, 555 U.S. at 24.) If the injunction goes beyond the parties, carrying with it
 10 a potential for public consequences, the "public interest" becomes relevant to whether an
 11 injunction should issue. (*United States v. First Nat'l City Bank* (1965) 379 U.S. 378, 383; *see*
 12 *also, Winter*, 555 U.S. at 24 [national security interest outweighed risk of sonar affecting marine
 13 animals].)

14 Here, on balance, whatever expressive benefit Plaintiffs may derive from instituting
 15 around-the-clock activities in Civic Center Plaza and leaving their belongings in the Plaza
 16 indefinitely is outweighed by the public interest in the various benefits derived from the
 17 enforcement of SDMC § 54.0110, to wit, public areas that are clean, safe, and free of
 18 obstructions and clutter, open for the use and enjoyment of all members of the public. In other
 19 words, the City's inability to enforce SDMC § 54.0110 would have substantial negative
 20 consequences on the public. (Jones Decl., ¶ 13; Doc. No. 18-1, ¶ 28.)

21 IV. CONCLUSION

22 For all of the foregoing reasons, Plaintiffs' ex parte application for a temporary
 23 restraining order should be denied.

24 Dated: January 25, 2012

JAN I. GOLDSMITH, City Attorney

25
 26 By /s/ KRISTIN M. J. ZLOTNIK
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