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10 FOR FREEDOM OF THE PRESS
11

12 UNITED STATES DISTRICT COURT
13 EASTERN DISTRICT OF CALIFORNIA
14

15 DESIREE MARTINEZ, FRESNO
16 HOMELESS UNION, FAITH IN THE
VALLEY, and ROBERT MCCLOSKEY,

17 Plaintiffs,

18 v.

19 THE CITY OF FRESNO,

20 Defendant.
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Case No. 1:22-cv-00307-DAD-SAB

**[PROPOSED] BRIEF OF AMICI
CURIAE FIRST AMENDMENT
COALITION, CALIFORNIA NEWS
PUBLISHERS ASSOCIATION,
CALIFORNIANS AWARE, NATIONAL
PRESS PHOTOGRAPHERS
ASSOCIATION, NORTHERN
CALIFORNIA CHAPTER OF THE
SOCIETY OF PROFESSIONAL
JOURNALISTS AND REPORTERS
COMMITTEE FOR FREEDOM OF THE
PRESS IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION**

Crtrm.: 5
Judge: The Hon. Dale A. Drozd

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1 **STATEMENT OF INTEREST**

2 The *amici curiae* in this brief are a coalition of nonprofits and trade associations dedicated
3 to free speech and a free press. This case is of paramount importance to *amici* because it presents
4 the Court with the opportunity to recognize and uphold the First Amendment rights of the press
5 and public against unconstitutional regulations.

6 First Amendment Coalition (“FAC”) is a nonprofit advocacy organization based in San
7 Rafael, California, dedicated to freedom of speech and government transparency and
8 accountability. Founded in 1988, FAC’s activities include free legal consultations on First
9 Amendment issues, educational programs, and public advocacy, including extensive litigation and
10 appellate work. FAC’s members include news media outlets, both national and California-based,
11 traditional media and digital, together with law firms, journalists, community activists, and
12 ordinary persons.

13 California News Publishers Association (“CNPA”) is a nonprofit trade association
14 representing more than 800 daily, weekly, digital, and student news publications in California. Its
15 members regularly use the California Public Records Act in reporting on government agencies,
16 public employees, and the expenditure of public funds throughout the state. CNPA has appeared
17 as *amicus curiae* in several important public access decisions over the years, including *Sierra Club*
18 *v. Superior Court*, 57 Cal. 4th 157 (2013).

19 Californians Aware (“CalAware”) is a nonpartisan, non-profit advocacy group with a
20 board comprised of journalists, current and former government officers and employees, and public
21 interest advocates. Its mission is to foster the improvement of, compliance with, and public
22 understanding of open government laws throughout the State of California.

23 National Press Photographers Association (“NPPA”) is a 501(c)(6) nonprofit organization
24 dedicated to the advancement of visual journalism in its creation, editing, and distribution.
25 NPPA’s members include video and still photographers, editors, students, and representatives of
26 businesses that serve the visual journalism community. Founded in 1946, the NPPA is the voice
27 of visual journalists, vigorously promoting the constitutional and intellectual property rights of
28

1 Section 10-616 of the Fresno Municipal Code (the “Ordinance”) substantially impairs the
2 recording of law enforcement and other government officials while they conduct controversial
3 “abatements” of encampments where unhoused people are living. Given the City of Fresno’s
4 checkered history of abusing the rights of unhoused persons and unjustifiably destroying their
5 property, it is especially important that this Court safeguard the right to document the city’s
6 conduct. By allowing city employees or officials to cordon off an area of any size surrounding
7 any abatement in their unbridled discretion, the Ordinance impermissibly authorizes public
8 servants to screen their conduct from public scrutiny.

9 At the outset, even if the Ordinance is styled as a prohibition on the conduct of entering an
10 “abatement” area without permission, it is subject to a First Amendment challenge. *Cutting v.*
11 *City of Portland*, 802 F.3d 79, 83 n.4 (1st Cir. 2015) (noting that even if “styled as a restriction
12 only on conduct,” laws “aimed at restricting physical presence within a specified place” are
13 “treated as restrictions on speech rather than merely conduct precisely because the laws
14 necessarily prohibit persons from engaging in expressive activity in such places”) (citing
15 *McCullen v. Coakley*, 573 U.S. 464 (2014)). Because the Ordinance “vests unbridled discretion in
16 a government official over whether to permit or deny expressive activity” within the prohibited
17 zone, Plaintiffs “may challenge it facially.” *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S.
18 750, 755 (1988). Plaintiffs may also challenge the Ordinance as overbroad under the First
19 Amendment if “a substantial number of its applications are unconstitutional, judged in relation to”
20 any “plainly legitimate sweep.” *United States v. Stevens*, 559 U.S. 460, 473 (2010).

21 The First Amendment prohibits laws unjustifiably “abridging the freedom of speech, or of
22 the press.” In particular, as Plaintiffs correctly note, the First Amendment prohibits laws that
23 excessively restrict the right to document the government’s conduct. Yet the Ordinance does just
24 that. It strips the press of their ability to document encampment sweeps on the public’s behalf,
25 further silencing the already marginalized unhoused community. This prevents the public from
26 knowing what the government is doing in its name and allows the government to operate with
27 impunity. Although the First Amendment right to gather and disseminate the news is not absolute,
28 and may be subject to reasonable time, place and manner restrictions, here, as Plaintiffs correctly

1 explain, the Ordinance does not meet the standard necessary to overcome the presumptive First
2 Amendment right, under either a strict scrutiny or intermediate scrutiny test. Plaintiff’s
3 Memorandum at 24-29. *Amici* urge this Court to grant Plaintiffs’ Motion for Preliminary
4 Injunction (ECF No. 6) to prevent further harm to the First Amendment and the unhoused
5 community in Fresno. To the extent the arguments herein pertain to the City’s recently filed
6 Motion to Dismiss (ECF No. 13), the Court is respectfully requested to consider them in deciding
7 whether Plaintiffs state a First Amendment claim.

8 **ARGUMENT**

9 **I. THE FIRST AMENDMENT PROTECTS THE PRESS AND PUBLIC’S RIGHT TO**
10 **GATHER INFORMATION TO DISSEMINATE TO THE PUBLIC**

11 The First Amendment protects freedom of the press and therefore safeguards the rights of
12 journalists and the general public alike to gather news and information. *Branzburg v. Hayes*, 408
13 U.S. 665, 681 (1972); *see also, e.g., First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 781 (1978)
14 (noting “special and constitutionally recognized role” of the press “in informing and educating the
15 public”); *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (“The Constitution specifically selected the
16 press . . . to play an important role in the discussion of public affairs.”).

17 Accordingly, the Ninth Circuit has confirmed, “[t]he free press is the guardian of the public
18 interest, and the independent judiciary is the guardian of the free press.” *Leigh v. Salazar*, 677
19 F.3d 892, 900 (9th Cir. 2012). In addition, “speech critical of the exercise of the State’s power lies
20 at the very center of the First Amendment.” *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034
21 (1991). The press has historically “strengthened our government by exposing its flaws.” *Leigh*,
22 677 F.3d at 897. By excluding the press from access to encampment sweeps, the Ordinance
23 prevents the press from performing its critical function in our democracy.

24 As Plaintiffs note, Section (b)(2) of the Ordinance restricts access to persons other than
25 advocates and service providers, which impermissibly disadvantages the press in a content-based
26 fashion. This cannot stand under the First Amendment. *See* Plaintiffs’ Memorandum at 25-26;
27 *see also, e.g., Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (“Content-based laws—those
28 that target speech based on its communicative content—are presumptively unconstitutional.”).

1 To the extent it is content neutral, the Ordinance nonetheless violates the First Amendment
2 rights of the press and public. While the press dedicates its time covering the news, the right to
3 record is universal. The media are “surrogates for the public,” and both the press and the public
4 enjoy the same First Amendment rights. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573
5 (1980). The press stands in for the public for practical purposes. “In a society in which each
6 individual has but limited time and resources with which to observe at first hand the operations of
7 his government, he relies necessarily upon the press to bring to him in convenient form the facts of
8 those operations.” *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975).

9 The “First Amendment protects the right to photograph and record matters of public
10 interest” in a traditional public forum. *Askins v. U.S. Dep’t of Homeland Sec.*, 899 F.3d 1035,
11 1044 (9th Cir. 2018); *see also, e.g., Chestnut v. Wallace*, 947 F.3d 1085, 1090 (8th Cir. 2020)
12 (“[A] person has the right to record police activity in public.”); *Fields v. City of Philadelphia*, 862
13 F.3d 353, 356 (3d Cir. 2017) (“[T]he First Amendment protects the act of photographing, filming,
14 or otherwise recording police officers conducting their official duties in public.”); *ACLU of Ill. v.*
15 *Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (“The act of *making* an audio or audiovisual recording
16 is necessarily included within the First Amendment's guarantee of speech and press rights as a
17 corollary of the right to disseminate the resulting recording.”); *Smith v. City of Cumming*, 212 F.3d
18 1332, 1333 (11th Cir. 2000) (“The First Amendment protects the right to gather information about
19 what public officials do on public property, and specifically, a right to record matters of public
20 interest.”). “Gathering information about government officials in a form that can readily be
21 disseminated to others serves a cardinal First Amendment interest in protecting and promoting the
22 free discussion of governmental affairs.” *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011)
23 (cleaned up). The public is unable to discuss and debate events that are kept secret.

24 The First Amendment also guarantees the right to receive the news, which strengthens the
25 democratic process more broadly. “Free speech carries with it some freedom to listen.”
26 *Richmond Newspapers*, 448 U.S. at 576; *see also, e.g., Va. State Bd. of Pharmacy v. Va. Citizens*
27 *Consumer Council, Inc.*, 425 U.S. 748, 756–57 (1976) (“[T]he protection afforded is to the
28 communication, to its source and to its recipients both.”); *Stanley v. Georgia*, 394 U.S. 557, 564

1 (1969) (“It is now well established that the Constitution protects the right to receive information
2 and ideas.”). “By guaranteeing that the individual citizen can effectively participate in and
3 contribute to our republican system of self-government, the First Amendment ... ensures that the
4 constitutionally protected discussion of governmental affairs is an informed one.” *Courthouse*
5 *News Serv. v. Planet*, 750 F.3d 776, 785 (9th Cir. 2014) (cleaned up). Press and public access
6 permits the public to make informed decisions about the government. If the press and public are
7 unable to document an incident, the harm can never be undone. There is no way to go back and
8 capture the photograph or story to accurately depict what occurred. Firsthand, immediate accounts
9 of government abuses with photographic evidence are highly persuasive, but secondhand
10 recollections are a pale comparison. Stories of unhoused individuals are particularly fleeting in
11 the case of a sweep as they are shuffled around town and possibly arrested.

12 **II. PRESS ACCESS IS ESSENTIAL FOR GOVERNMENT TRANSPARENCY AND**
13 **ACCOUNTABILITY**

14 Courts have recognized several significant public policy rationales behind the First
15 Amendment right to record government activity, including the ability to hold public officials
16 accountable for misconduct and the promotion of trust in the community that comes with such
17 transparency. “Open government has been a hallmark of our democracy since our nation’s
18 founding.” *Leigh*, 677 F.3d at 900. “Transparency assures that the government’s response is
19 carried out fairly to all concerned, and public access discourages misconduct of participants, and
20 decisions based on secret bias or partiality.” *Index Newspapers LLC v. United States Marshals*
21 *Serv.*, 977 F.3d 817, 831 (9th Cir. 2020) (cleaned up). “When wrongdoing is underway, officials
22 have great incentive to blindfold the watchful eyes of the Fourth Estate.” *Leigh*, 677 F.3d at 900.
23 “[T]he publication of information relating to alleged governmental misconduct” is core protected
24 speech, *Butterworth v. Smith*, 494 U.S. 624, 632 (1990), because “contemporaneous review in the
25 forum of public opinion is an effective restraint on possible abuse of . . . power,” *Gentile*, 501 U.S.
26 at 1035 (cleaned up). Here in particular, the history leading up to the Ordinance’s adoption,
27 including the alleged battery of Plaintiff Dez Martinez by a city worker during an abatement
28 sweep, raises significant concerns that the city’s “real motive may be to prevent the gathering of

1 information about government abuses or incompetence.” *Leigh*, 677 F.3d at 900 (quoting
2 Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV.
3 927, 949 (1992)); *see also* Plaintiffs’ Memorandum at 16-17.

4 **A. Press Coverage Inspires Legal and Public Policy Changes**

5 Throughout our country’s history, the press has aided the public by shedding light on false
6 government narratives, especially in recent times where contemporaneous recording has been
7 essential to exposing misconduct and brutality. For example, “the public became aware of the
8 circumstances surrounding George Floyd’s death because citizens standing on a sidewalk
9 exercised their First Amendment rights and filmed a police officer kneeling on Floyd’s neck until
10 he died.” *Index Newspapers LLC*, 977 F.3d at 831. The full social and legal ramifications of Mr.
11 Floyd’s death and the subsequent protests are still in progress, but it is clear that the video of the
12 incident galvanized the nation in a way no other report could have done.

13 Transparency is particularly important when it comes to the issue of encampment sweeps.
14 The City of Fresno has an unfortunate history of trampling on the rights of unhoused persons. *See*,
15 *e.g.*, *Kincaid v. City of Fresno*, 2006 U.S. Dist. LEXIS 93464, at *108 (E.D. Cal. Dec. 8, 2006)
16 (reviewing city’s abuses and enjoining it “from seizing and immediately destroying the property of
17 homeless persons”). The government’s self-serving description of sweeps is often at odds with
18 reporting on the ground. Before the *Kincaid* lawsuit, news coverage described how tents and
19 belongings were unceremoniously tossed into the trash by city employees even though the city
20 denied destroying property without due process. *See, e.g.*, Mike Rhodes, *Fresno Homeless Under*
21 *Attack*, Indy Bay (May 25, 2006), perma.cc/583A-MZEK. More recently, Fresno Mayor Jerry
22 Dyer’s office announced that Project Off-Ramp would move unhoused people from encampments
23 near the freeway into housing. However, activists and unhoused individuals on the ground
24 streamed video of unhoused people being “put out in the cold rain.” *See* Karah Rucker, *Project*
25 *Off-Ramp expected to clean Fresno highways of homeless encampments in 6 months*, Your Central
26 Valley (Feb. 5, 2021), perma.cc/6VDE-X69M; Bob McCloskey, *Death, Corruption and Ideology*,
27 Community Alliance (Mar. 3, 2021), perma.cc/D52H-RPBV.

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1 This problem is not unique to Fresno—conflicting narratives permeate the discourse
2 around encampment sweeps in other areas as well. While the City of San Diego credits its
3 encampment sweeps as “progressive enforcement” because people are offered shelter beds,
4 advocates on the ground report “aggressive enforcement, with several police vehicles arriving at a
5 time and officers warning people that they would be arrested if they stayed.” Gary Warth, *Number*
6 *of tents, people drops dramatically after police crackdown at Midway homeless encampment*, The
7 San Diego Union-Tribune (Feb. 18, 2022), [bit.ly/3LNDqG3](https://www.sandiegouniontribune.com/2022/02/18/number-of-tents-people-drops-dramatically-after-police-crackdown-at-midway-homeless-encampment/). Writing for the Center for Health
8 Journalism, Nuala Sawyer noted that the City of San Francisco refused to admit that it conducts
9 “sweeps,” instead referring to “encampment resolutions,” “[d]espite hundreds of photos and
10 videos showing city employees tossing tents, backpacks, and walkers into the back of dump
11 trucks—plus countless testimonies from homeless people and their neighbors—city leaders
12 repeatedly denied to me over and over again that homeless sweeps were even happening.” Nuala
13 Sawyer, *Homeless sweeps in SF: How do you report on an issue city leaders deny is happening?*,
14 Center for Health Journalism (June 25, 2020), [perma.cc/2KC3-7PYX](https://www.chjournalism.org/2020/06/25/homeless-sweeps-in-sf-how-do-you-report-on-an-issue-city-leaders-deny-is-happening/).

15 As seen in the record, journalists are already concerned that they will be unable to
16 document abatements as a result of the Ordinance without risking arrest or injury from law
17 enforcement. Plaintiffs’ Memorandum at 19-20. These fears are not unfounded. In the case of
18 photojournalist Jeremy Portje, documenting encampments and unhoused persons’ interactions
19 with law enforcement in Marin County resulted in an unlawful arrest and illegal search and seizure
20 of his newsgathering materials and cell phone. Giuseppe Ricapito, *Marin DA: No charges for*
21 *photographer in Sausalito arrest*, Marin Independent Journal (Dec. 28, 2021),
22 [bayareane.ws/3ui4ZBn](https://www.bayareane.ws/3ui4ZBn). In March 2021, at least 20 journalists were arrested, detained, or
23 assaulted by law enforcement while documenting demonstrations near an encampment sweep at
24 Echo Park in Los Angeles. See, e.g., *Journalist detained by LAPD during Echo Park Lake*
25 *protest*, Press Freedom Tracker (Mar. 25, 2021), [perma.cc/K59H-DU69](https://www.pressfreedomtracker.org/journalist-detained-by-lapd-during-echo-park-lake-protest/). Reporters were shot with
26 rubber bullets and zip-tied at the scene as well. See David Folkenflik, *When police cracked down*
27 *on reporters on one chaotic night in LA’s Echo Park*, Nat. Public Radio (Mar. 31, 2022),
28 [perma.cc/T7EJ-EM6A](https://www.npr.org/2022/03/31/1078888881/when-police-cracked-down-on-reporters-on-one-chaotic-night-in-las-echo-park). As is common, the city proclaimed that it would provide housing and

1 social services, a claim that activists and a recent University of Los Angeles report dispute. *Id.*;
2 Roy Ananya, et al., *(Dis)Placement: The Fight for Housing and Community After Echo Park Lake*
3 (2022), escholarship.org/uc/item/70r0p7q4.

4 **B. A Picture is Worth a Thousand Words: The Unique Importance of**
5 **Photojournalism**

6 Journalism is a deeply visual medium of expression—photographs and videos
7 communicate in ways words simply cannot. The human brain can process and interpret images in
8 less than a second, where reading takes much longer. Anne Trafton, *In the blink of an eye*, MIT
9 News (Jan. 16, 2014), perma.cc/P4J2-NNC6. Photographs and videos convey facts as they are
10 seen by the journalist, without gloss or spin, showing facts in ways that words cannot. However,
11 we do live in a world where photos can be doctored and deep-faked. This means that “live
12 streaming” video, is particularly important because it shows events in real time, adding another
13 layer of veracity. “Facts, after all, are the beginning point for much of the speech that is most
14 essential to advance human knowledge and to conduct human affairs.” *Sorrell v. IMS Health Inc.*,
15 564 U.S. 552, 570 (2011).

16 Many of the most compelling and effective news stories use photography or video.
17 Photojournalists and members of the public often capture iconic and historic photographs or
18 videos that change perceptions and public policy, as recently exemplified by videos of police
19 brutality against George Floyd and others. The housing crisis in California is particularly
20 newsworthy, and photojournalism plays a central role in bringing public awareness to this crisis.

21 On that note, photographs and video documenting encampment sweeps force the public
22 and the courts to confront the reality and pain of seeing all of one’s worldly possessions—tents,
23 blankets, photographs, birth certificates, medications, and mobility devices—unceremoniously
24 thrown into a dumpster. Members of the press and public, including Plaintiffs, regularly attend
25 encampment sweeps capturing such images and scenes. Without the ability of the press and
26 public to document abuses, the city could easily declare that its sweeps are both humane and
27 effective when the reality is quite different. What the city refers to as a beneficial “clean-up”
28 involves bulldozers and garbage trucks, while intentionally displaced people flee with whatever

1 they can carry, depicted in the photo below. Mike Rhodes, *Aug. 6 Demolition of a Homeless*
2 *Encampment*, Community Alliance (Sept. 3, 2021), perma.cc/E34M-5HVR.



12 Photo by Peter Maiden of a 2021 encampment sweep. *Id.*

13 In one instance, an unhoused man from Fresno, Lewis Brown, was assaulted by police at
14 an encampment sweep in 2020. Mike Rhodes, *Police Brutality Will Be Put on Trial in Fresno*,
15 Community Alliance (Mar. 1, 2022), perma.cc/5HLJ-KHLC. Footage of the incident is part of a
16 class action lawsuit filed against the City of Fresno.



28 Photo by Dez Martinez of Mr. Brown after encampment sweep. *Id.*

1 Journalist Mike Rhodes also captured these images of encampment sweeps in Fresno in
2 2006, which helped inform the Court during the *Kincaid* litigation:



12 In this photo by Mike Rhodes, Liza Apper stood between a bulldozer and tent, preventing
13 the city from seizing and destroying the tent along with the possessions inside. Mike
14 Rhodes, *Fresno Homeless Under Attack*, Indy Bay (May 25, 2006), [perma.cc/583A-
15 MZEK](https://perma.cc/583A-MZEK).



24 This photo by Mike Rhodes shows City workers illegally dumping possessions that were
25 specifically set aside in accordance with City procedures. Mike Rhodes, *Fresno Homeless
26 Attacked and Insulted by City Workers*, Indy Bay (June 22, 2006), perma.cc/KU5N-8XL2.

27 In San Francisco, a similar photograph of the Department of Public Works throwing
28 unhoused man Neil Taylor's walker into a trash compactor went viral and led to public outrage

1 and assurances from the Mayor’s office that they were reviewing the situation and that items must
2 be “bagged and tagged” instead of trashed. Joe Fitzgerald Rodriguez, *What happens when SF*
3 *takes homeless people’s ‘stuff’*, San Francisco Examiner (June 29, 2016), [perma.cc/L4EG-DUGW](https://www.sfgate.com/news/article/What-happens-when-SF-takes-homeless-people-s-stuff-13676773.html).



15 Photo by Kelley Cutler of Mr. Taylor’s walker in the trash compactor. *Id.*

16
17 These photos tell a vital story about the illegal and senseless seizure and destruction of
18 unhoused persons’ possessions. There is a huge difference between reading about a sweep and
19 seeing the pain, desperation and senselessness in photographs. It is not possible to tell these
20 stories the same way or capture these images without access to encampment sweeps. The
21 Ordinance will prevent the press and public from capturing similar photos in the future, preventing
22 the public from witnessing and discussing the truth about encampment sweeps.

23 CONCLUSION

24 The First Amendment protects the press and public’s right to witness and document
25 government officials in public, particularly at encampment sweeps. The Ordinance will prevent
26 the press and public from exercising these rights by permitting the government to arbitrarily block
27 access to “restricted areas” of undetermined size for undetermined lengths of time. This
28 unconstitutional infringement is not in the public’s interest and will prevent the press from

