AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Northern California

FIRST AMENDMENT COALITION

October 9, 2025

Diane Nayares-Perez
Modesto City Clerk
1010 10th Street
Modesto, CA 95354
dnayaresperez@modestogov.com

VIA EMAIL

RE: Concerns About Modesto City Ordinance 4-23.02

Dear City Clerk and Councilmembers:

We write on behalf of the American Civil Liberties Union of Northern California and the First Amendment Coalition to follow up on the concerns we raised regarding Modesto City Ordinance 4-23.02 (the "Ordinance") in our letters to the City Council dated July 18 and 21, 2025 and to the City's Community Police Review Board ("CPRB") dated August 15, 2025.[1] Since submitting these letters, we have continued to follow this issue as it has undergone review by the CPRB and in the public eye. We ask that you now (1) provide a written response by **October 23** as to the status of the Council's deliberations on the Ordinance and (2) agendize public discussion of the Ordinance's repeal or amendment at the soonest practicable date and no later than **November 4**. The Ordinance poses an ongoing threat to constitutional freedoms, especially in light of upcoming national protests. Failure to take these actions in a timely manner will risk exposing the City to legal liability, including the high costs and fees of any lawsuit.

In our July 18 correspondence, we highlighted several of the Ordinance's legal problems. First, the Ordinance criminalizes lawful conduct by prohibiting people from possessing or wearing at ***any*** public assembly numerous common items like bike helmets, metal water bottles, and—especially of concern for members of the press—safety gear considered to be essential when reporting on protests. Second, and even more problematically, it bans individuals from wearing face masks with limited, but largely unworkable, exceptions. Third, the Ordinance communicates all of these overbroad restrictions using language so vague that it violates due process and undercuts the legitimate exercise of free speech protected by both federal and state law. Fourth, it runs afoul of the right to privacy enshrined in California's Constitution at Article I, section 1. And fifth, it contravenes legal protections for those with disabilities and other health issues. We also noted that Modesto law enforcement officers had apparently enforced the anti-masking provision in a disparate and viewpoint-discriminatory manner at protests on June 14, 2025.

[1] The July 18, July 21, and August 15 letters are attached hereto as **Exhibits A**, **B**, and **C** respectively.

While it appears that City Council discussed the July 18 letter in closed session on September 23, 2025, discussion of the Ordinance's repeal or amendment has not been placed on an open session agenda despite robust public comment urging action. And while we welcomed the news that the City Attorney will not pursue charges against those arrested on June 14 for allegedly violating the anti-mask provision, the threat of arrest and prosecution for exercising one's right to protest—or right to document a protest—remains.[2]

We understand that the CPRB voted to recommend repeal of the Ordinance's anti-masking provision at its September 17, 2025 meeting. We ask that the City Council adopt this recommendation as soon as possible and also review with the City Manager and legal counsel the Ordinance's other problematic sections.

At its September 17 meeting, the CPRB also voted to add questions to a survey conducted by the City Council to gather community input on the Ordinance. While such a survey may offer additional insight as to the Ordinance's scope and impact, the survey cannot cure the legal deficiencies that we have identified in our letters. The survey's development and administration should therefore not delay open discussion and action.

Despite outreach from leading First Amendment legal organizations, sustained engagement by your constituents, and an unequivocal recommendation from the CPRB, you have yet to engage with the Ordinance in a public meeting. We thus call on the City Council to agendize discussion of the Ordinance's repeal or amendment as soon as possible. Failure to do so may compel us to initiate legal action against the City in order to protect residents' constitutional rights. Such litigation would impose a significant burden on the City. And our success in a lawsuit would—pursuant to Code of Civil Procedure section 1021.5—potentially subject the City to liability for not only its attorneys' fees and costs, but for ours as well. Because we believe Modesto's resources would much better serve the community if not spent defending an unconstitutional law, we urge you to take the concerns raised herein seriously.

Sincerely,

Chessie Thacher
Senior Staff Attorney
ACLU Foundation of Northern California
cthacher@aclunc.org

David Loy
Legal Director
First Amendment Coalition
dloy@firstamendmentcoalition.org

Shaila Nathu
Staff Attorney
ACLU Foundation of Northern California
snathu@aclunc.org

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[2] See *City Elects to Move Forward: Continues to Encourage Awareness and Adherence to Local Laws* (Aug. 11, 2015), https://www.modestogov.com/DocumentCenter/View/24201/Press-Release-City-Elects-to-Move-Forward.

cc: The Honorable Sue Zwahlen, Modesto Mayor (mayor@modestogov.com)
Councilmember Rosa Escutia-Braaton (rescutiabraaton@modestogov.com)
Councilmember Eric E. Alvarez (ealvarez@modestogov.com)
Councilmember Chris Ricci (cricci@modestogov.com)
Councilmember Nick Bavaro, Modesto Vice Mayor (nbavaro@modestogov.com)
Councilmember Jeremiah Williams (jwilliams@modestogov.com)
Councilmember David Wright (dawright@modestogov.com)
Jose M. Sanchez, Modesto City Attorney (jnunes@modestogov.com)

EXHIBIT A

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Northern California

July 18, 2025

Diane Nayares-Perez
Modesto City Clerk
1010 10th Street
Modesto, CA 95354
dnayaresperez@modestogov.com

VIA EMAIL

RE: Concerns About Anti-Mask Measures in Modesto City Ordinance 4-23.02

Dear City Clerk and Councilmembers:

We write on behalf of the American Civil Liberties Union of Northern California to express concern over Modesto City Ordinance 4-23.02 ("the Ordinance"), which is attached for reference. The Ordinance prohibits people from possessing or wearing at ***any*** public assembly numerous lawful items like bike helmets, metal water bottles, and—most problematically—face masks. The Ordinance's general restrictions are so vague and overbroad that they violate due process and undercut the legitimate exercise of free speech protected by both federal and state law. And more specifically, the Ordinance's anti-masking provision runs afoul of the right to privacy enshrined in California's Constitution at Article I, section 1, as well as contravenes legal protections for those with disabilities and other health issues. Beyond these blatant facial defects, recent events in Modesto on June 14 indicate that Modesto law enforcement officers are enforcing the anti-masking provision in a disparate and viewpoint-discriminatory manner, which presents yet additional constitutional problems.

We elaborate on some of these issues below to help explain the basis of our concerns. In light of the law and facts presented here, we ask that you agendize discussion on the Ordinance at an upcoming City Council meeting, vote to repeal or amend it, and then consider alternate provisions that comply with federal and state law. We also respectfully urge that no prosecutions proceed against anyone arrested for allegedly violating the Ordinance on June 14. Failure to take action on the Ordinance will subject Modesto to the significant threat of litigation.

The Ordinance Criminalizes Lawful Conduct

On its face, the Ordinance makes it a misdemeanor for any person to "utilize, carry, or possess" nineteen enumerated categories of items at "any demonstration, rally, protest, counter-protest, picket line, march, or public assembly." 4-23.02(a)-(b). Many of these prohibited items are regular, everyday things commonly present at protests and assemblies throughout the nation

and do not pose any particular or heightened risks. For example, among the prohibited items are: "[s]igns, posters, [and] banners" that are no greater than one-quarter inch thick; impact-resistant "sports equipment" and protective vests; breathing devices; bike and motorcycle helmets; glass or metal water bottles; "umbrellas in the absence of rain;" and, most problematically, masks and other face coverings. 4-23.02(a). Specifically, the Ordinance prohibits: "The wearing of a mask, scarf, bandana or any other accessory or item that covers or partially covers the face shielding the wearer's face from view and conceals the wearer's identity, except for coverings worn due to religious beliefs, practices or observances or due to medical necessity." 4-23.02(a)(13).[1]

The Ordinance is Both Overbroad and Unduly Vague in Violation of Due Process

A law is unconstitutionally overbroad if it "reaches a substantial amount of constitutionally protected conduct." *Kolender v. Lawson*, 461 U.S. 352, 359 n.8 (1983) (citation and quotation marks omitted). It is unconstitutionally vague if "it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). The Ordinance suffers from both infirmities.

Here, the Ordinance sweeps in a host of innocuous and protected conduct. Taken literally, the Ordinance would criminalize a baseball catcher who runs into a celebratory crowd wearing his helmet and uniform after winning a game, a teen who rides her bike to a march and clips her bike helmet and water bottle to her backpack during the procession, and a healthy elderly couple who attends an outdoor event performance wearing masks because it has been their practice to mask outside the home from the pandemic to present. With respect to this last hypothetical, and as is discussed further below, the Ordinance is woefully vague as to whether the couple's rationale would qualify as a "medical necessity." And to provide one more example of the Ordinance's problematic overbreadth and vagueness interplay, consider its prohibition on "[a]ny umbrellas in the absence of rain." 4-23.02(a)(17). The provision is overbroad because it criminalizes the functional uses of umbrellas, like providing shade on a sunny day, and vague because it provides no clear standard for when rain is deemed "absent."

These overbreadth and vagueness concerns are even more acute given their implications for members of the press, who often face chaotic and dangerous conditions while covering protests—conditions that, at times, are created by the police. In particular, as a federal court recently recognized, officers tear-gassed reporters and shot them with so-called "less-lethal munitions" while they covered recent protests in Los Angeles. *See Los Angeles Press Club v. City of Los Angeles*, Case No. 25-cv-05423, Doc. No. 44, Order Granting Temporary Restraining Order (C.D. Cal. Jul. 10, 2025) (citation omitted).[2] In fact, these risks are so great that American journalism organizations now recommend that reporters always carry breathing devices and wear

[1] The Ordinance does not define the term "public assembly," and thus these prohibitions can be construed to apply at any time to any gathering of people in public spaces.

[2] For reference, the Temporary Restraining Order is available at https://firstamendmentcoalition.org/wp-content/uploads/2025/07/2025-07-10-Order-Granting-TRO.pdf.

impact-resistant helmets, masks, and flak vests when reporting from a protest.[3] And yet, the Ordinance prohibits each and every one of these important pieces of safety gear.

The Prohibition on Anonymity Silences Protestors' Speech and Invades Their Privacy

In addition to the foregoing issues, the anti-masking provision set forth at section (a)(13) of the Ordinance raises free speech and privacy problems. The provision prevents protesters from maintaining their anonymity while engaging in ***lawful, peaceful*** protest. This restriction violates longstanding U.S. Supreme Court precedent, which recognizes that anonymity is "indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958).

California courts are in accord with the need to protect anonymous speech. In 1978, for example, the California Court of Appeal reasoned that there are times when "anonymity is essential to the exercise of constitutional rights." *Ghafari v. Municipal Court*, 87 Cal. App. 3d 255, 260 (1978). Applying this reasoning, the *Ghafari* Court struck down a mask ban very similar to Modesto's. *Ghafari* remains good law nearly 50 years later and is binding on the Stanislaus County Superior Court should litigation proceed on the Ordinance. *See Auto Equity Sales, Inc. v. Superior Ct. of Santa Clara Cnty*., 57 Cal. 2d 450, 455 (1962) ("Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state.").

Preventing people from protesting without revealing their identities has a stark chilling effect. Those who seek to challenge policies that harm vulnerable communities or unpopular opinions because they are especially likely to be targeted for reprisal. Even absent a risk of harassment, "[t]he decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995). "Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Talley v. California*, 362 U.S. 60, 64 (1960).[4]

Prohibiting people from being able to peacefully, lawfully, ***and*** anonymously protest also invades those persons' affirmative constitutional right to privacy under Article I, section 1, of the California Constitution. As the California Supreme Court observed, voters across the state adopted

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[3] *See, e.g.*, Los Angeles Press Club, Tips for Safely Covering Protests (Feb. 7, 2022), https://lapressclub.org/tips-for-safely-covering-protests-updated-2022/; Committee to Protect Journalists, Physical and Digital Safety: Civil Disorder (Jul. 20, 2021), https://cpj.org/2018/09/physical-safety-civil-disorder/.

[4] The public's concerns over surveillance and privacy invasions on June 14 seem to have been particularly well-founded considering Police Chief Brandon Gillespie's admission that Modesto police did employ a "real-time crime center" with surveillance cameras in parks and downtown to monitor the protests. *See* Julietta Bisharyan, *Modesto Police Chief Defends Arrests During Protests Amid Mask Ordinance*, MODESTO BEE (Jul. 17, 2025), https://www.modbee.com/news/local/article310895280.html.

this constitutional protection to defend against "the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society." *White v. Davis*, 13 Cal. 3d 757, 774 (1975). The *White* Court, quoting statements from the election materials in support of Article I, section 1, continued: "The right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion and our freedom to associate with the people we choose." *Id.* [5]

The Ordinance's Anti-Masking Provision Invites Disproportionate Enforcement and Viewpoint Discrimination

Laws that are overbroad and vague, like the Ordinance, are particularly problematic when they implicate First Amendment rights because they chill speech and expression, and enable arbitrary, "unbridled discretion" and discriminatory enforcement practices. *Kaahumanu v. Hawaii*, 682 F.3d 789, 802 (9th Cir. 2012); *see also Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024). Among the worst of these sins is the chance that the Ordinance will be enforced in a viewpoint discriminatory manner, which is a forbidden and "egregious form of content discrimination" that prohibits speech based on the views of the speaker. *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828-29 (1995).

The Ordinance's anti-masking provision falls squarely within this constitutional concern. Its exceptions for "religious beliefs, practices or observances" and "medical necessity" are vague and unworkable. It is unclear, for example, how law enforcement officers are supposed to assess such justifications for wearing a mask. In fact, under this Ordinance, police seem compelled to intuit a person's subjective reasons for masking. But law enforcement officers are rarely equipped to independently determine subjective intent—and they may not legally interrogate people about their religious practices, their disabilities, and/or health-related reasons for wearing a mask. Alternatively, anyone wearing a mask for any reason could be subject to Police Chief Brandon Gillespie's proffered approach of arrest first, then let a judge or jury determine the sincerity of one's religious beliefs or the necessity of one's medical condition.[6] Practically speaking, it is difficult to overstate the waste of time and resources, much of it at the taxpayer's expense, such

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[5] Protestors have good reason to believe that they could suffer harm, doxxing, and additional privacy invasions if their identities are exposed. *See* Nicholas Fandos, *In an Online World, a New Generation of Protesters Chooses Anonymity*, N.Y. TIMES (May 2, 2024), https://www.nytimes.com/2024/05/02/nyregion/college-campus-protests-anonymity.html. In light of the message of the ICE Out protest, protestors might also credibly fear becoming a target of ICE themselves were they to protest without a mask on. And when unmasking poses credible threats to personal safety—and particularly when public hostility chills speech and expression—courts have struck down similar statutes. *See Ghafari*, 87 Cal. App. 3d at 259 (recognizing that protestors had "good reason" to fear that "if their identity became known . . . retaliatory measures of an unpleasant nature may be taken against them"); *Aryan v. Mackey*, 462 F. Supp. 90, 91 (N.D. Tex. 1978) (same); *Am. Knights of Ku Klux Klan v. City of Goshen*, 50 F. Supp. 2d 835, 841 (N.D. Ind. 1999) (holding unconstitutional a mask ban where there was "cogent evidence of . . . retaliation that [KKK] members suffered as a result of disclosure of their identity").

[6] At the July 16, 2025 Community Police Review Board meeting, which considered the events of the June 14 protests, the Police Chief said: "I'm not the one who decides. They'll have to convince a judge or a jury that, ultimately, that they were wearing [a mask] for one of the essential reasons." *See* Bisharyan, *supra* n.4.

misdemeanor trials would entail—not to mention the significant disruption to the lives of peaceful protesters exercising their right to free speech.

The exception for "religious beliefs, practices or observances" is particularly vulnerable to abuse due to ignorance or prejudice, in the absence of explicit policies governing how law enforcement officers engage with people wearing religious garments. The First Amendment of the United States Constitution and Article I of the California Constitution both forbid the government from prohibiting the free exercise of religion, but any policy that prohibits masking in public would have a disproportionate impact on people whose core religious beliefs require them to mask. This is true, for example, for some Muslim women who wear Niqabs or Burqas in public.

More generally, Modesto's mask ban gives police a reason to stop, surveil, and scrutinize groups of vulnerable people. People of color have consistently been over-policed and subjected to greater suspicion and scrutiny, as evidenced by the racial disparities pervasive in policing practices.[7] Indeed, this disproportionate and viewpoint-discriminatory enforcement materialized on June 14. On that day, two protests took place: the ICE Out rally organized by the Central Valley Black Indigenous People of Color Coalition, and the No Kings protest organized in part by Indivisible Stanislaus.[8] Protestors at both rallies wore masks. Yet law enforcement arrested and cited under the Ordinance only protestors from the ICE Out rally—which was attended predominantly by people of color. For the arrestees with whom we have spoken, officers did not inquire about any person's reasons for wearing a mask, whether on account of religious beliefs, medical necessity, or otherwise. By comparison, we are aware of no arrests for violations of the anti-masking provision at the No Kings protest, which promoted a different viewpoint and was reportedly attended in greater numbers by white participants. This incident exemplifies the constitutional dangers inherent in the Ordinance. Again, when a law lacks clear standards, it delegates unchecked discretion to law enforcement, increasing the likelihood that enforcement will reflect existing societal biases rather than neutral application.

The Anti-Masking Provision Undermines Public Health and Discriminates on the Basis of Disability

Prohibiting people from wearing masks in public or at demonstrations has a potent chilling effect on the free speech rights of immunocompromised individuals and people who have disabilities, including underlying health conditions that make them susceptible to severe illness like COVID-19. Even though the Ordinance contains an exception for "medical necessity," this carve-out is undefined and fails to provide protection to those wearing masks for the safety of others instead of themselves. Individuals may not feel, or be, safe in large crowds if they are unable to mask, so a prohibition on masking at protests forces them to choose between their free speech

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[7] *See* California Department of Justice, California Racial and Identity Profiling Advisory Board Releases Report on 2023 Police Stop Data (Dec. 31, 2024), https://oag.ca.gov/news/press-releases/california-racial-and-identity-profiling-advisory-board-releases-report-2023.

[8] Julietta Bisharyan, *'No Kings' Rally Draws Thousands to Modesto in Protest of Donald Trump*, MODESTO BEE (Jun. 18, 2025), https://www.modbee.com/news/local/article308569555.html.

rights and their or their loved ones' health and safety.

The Ordinance also risks violating the Americans with Disabilities Act ("ADA") by preventing individuals with medical issues from engaging in a crucial aspect of public life and participating in practices that form the cornerstone of democracy. The ADA prohibits government entities from discriminating against individuals with disabilities and from cutting off their participation in government programs or activities. 42 U.S.C.A. § 12132. These ADA protections extend to "anything a public entity does," including enacting and enforcing discriminatory law enforcement measures. *Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001) (citations and internal quotation marks omitted).

People should not have to risk their health in order to attend a protest. Being forced to make such a choice effectively denies them the "right of peaceable assembly" that "lie[s] at the foundation of a government based upon the consent of an informed citizenry." *Bates v. City of Little Rock*, 361 U.S. 516, 522-23 (1960).

California Law Already Prohibits Wearing a Mask While Committing Unlawful Acts and Modesto's Anti-Masking Provision is Thus Preempted

We understand that Modesto may be concerned that people wearing a mask at a protest could feel a sense of impunity and therefore act recklessly or unlawfully. This speculative concern cannot justify the complete abridgement of the entire community's right to engage in anonymous speech and peaceful protest. Simply put, and as the *Ghafari* Court held, a "blanket prohibition" on the use of masks during protests "restricts the legitimate exercise of First Amendment freedoms" and "sweeps too broadly" to withstand constitutional scrutiny. *Ghafari*, 87 Cal. App. 3d at 261-62. Such a prohibition serves "no legitimate law enforcement function and is unconstitutionally overbroad." *Id*. at 262.

Moreover, Modesto already has a law at its disposal to prevent people from masking their identities while committing unlawful acts. Penal Code section 185 makes it a misdemeanor "for any person to wear any mask, false whiskers, or any personal disguise" for the purpose of "[e]vading or escaping discovery, recognition, or identification in the commission of any public offense," or "[c]oncealment, flight, or escape, when charged with, arrested for, or convicted of, any public offense." This law, coupled with the many other more narrowly tailored laws aimed at unprotected conduct and breaches of the peace, should provide the city with "the legal armamentarium to deal effectively" with any disturbances. *Ghafari*, 87 Cal. App. 3d at 262.

And given that California prohibits local governments from legislating in a field fully occupied by state law, the existence of Penal Code section 185 leads to yet another fatal conclusion about Modesto's Ordinance: it is preempted. *See* Cal. Const., art XI, §§ 5, 7; Gov. Code § 37100. Because the Ordinance prohibits wearing a mask in public without regard to criminal intent or activity, it conflicts with section 185 and cannot survive. *See Am. Fin. Servs. Ass'n v. City of Oakland*, 34 Cal. 4th 1239, 1251-52 (2005) (striking down ordinance as preempted because it invaded an area "fully occupied by general law").

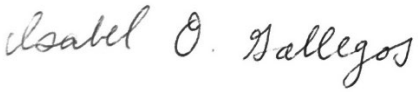
Conclusion

For all of the foregoing reasons, we urge you to agendize discussion on the Ordinance at a City Council meeting in the near future, vote to repeal or amend it, and then consider alternate provisions that comply with federal and state law. We also respectfully ask that no prosecutions proceed against anyone arrested for allegedly violating the Ordinance on June 14 given the substantial legal uncertainties involved. If the concerns about the Ordinance are not addressed, the ACLU may be compelled to initiate legal action against the city.

Sincerely,

Chessie Thacher
Senior Staff Attorney
ACLU Foundation of
Northern California
cthacher@aclunc.org

Shaila Nathu
Staff Attorney
ACLU Foundation of
Northern California
snathu@aclunc.org



Isabel O. Gallegos
Legal Intern
ACLU Foundation of
Northern California
igallegos@aclunc.org

cc: The Honorable Sue Zwahlen, Modesto Mayor (mayor@modestogov.com)
Councilmember Rosa Escutia-Braaton (rescutiabraaton@modestogov.com)
Councilmember Eric E. Alvarez (ealvarez@modestogov.com)
Councilmember Chris Ricci (cricci@modestogov.com)
Councilmember Nick Bavaro, Modesto Vice Mayor (nbavaro@modestogov.com)
Councilmember Jeremiah Williams (jwilliams@modestogov.com)
Councilmember David Wright (dawright@modestogov.com)
Jose M. Sanchez, Modesto City Attorney (jnunes@modestogov.com)
Jeff Laugero, Stanislaus County District Attorney (jeffrey.laugero@standa.org)

4-23.02 - Restrictions.

(a) No person shall utilize, carry, or possess the following items or articles while attending or participating in any demonstration, rally, protest, counter-protest, picket line, march, or public assembly:

(1) Any length of lumber, wood, or wood lath unless that object is one-quarter (¼) inch or less in thickness and two (2) inches or less in width, or if not generally rectangular in shape, such object shall not exceed three-quarter (¾) inch in its thickest dimension. Both ends of the lumber, wood or wood lath shall be blunt;

(2) Any length of metal or plastic pipe, whether hollow or solid; provided, however, that hollow plastic piping not exceeding three quarter (¾) inch in its thickest dimension and not exceeding one-eighth (⅛) inch in wall thickness, and not filled with any material, liquid, gas or solid may be used solely to support a sign, banner, placard, puppet or other similar expressive display. Both ends of any plastic pipe permissible under this subsection shall be blunt;

(3) Signs, posters, banners, plaques or notices, unless such sign, poster, banner, plaque or notice is constructed solely of soft material, such as cloth, paper, soft plastic capable of being rolled or folded, or cardboard material no greater than one-quarter (¼) inch in thickness;

(4) Baseball or softball bats, regardless of composition or size;

(5) Any aerosol spray, tear gas, mace, pepper spray, smoke canisters, or bear repellant;

(6) Any projectile launcher or other device, such as a catapult or wrist rocket, which is commonly used for the purpose of launching, hurling or throwing any object, liquid, material or other substance, whether through force of air pressure, spring action or any other mechanism;

(7) Weapons such as knives, daggers, swords, sabers or other bladed devices, axes, axe handles, hatchets, billy clubs, ice picks, razor blades, nunchucks or martial arts weapons of any kind, box cutters, pellet or BB guns, improvised explosive devices (IEDs), dynamite, conducted electrical weapons (CEWs), including, but not limited to, Tasers or stun guns, metal/composite/wooden knuckles, or any chain greater than twenty (20) inches in length or greater than one-quarter (¼) inch in diameter;

(8) Balloons, bottles or any other container such as water cannons, super-soakers, or toy or replica firearms filled with any flammable, biohazard or other noxious matter which is injurious, or nauseous, sickening or irritating to any of the senses, with intent to throw, drop, pour, disperse, deposit, release, discharge or expose the same in, upon or about any demonstration, rally, protest, picket line or public assembly;

(9) Glass bottles or metal containers, whether empty or filled;

(10) Open flame torches, lanterns or other devices that utilize combustible materials such as gasoline, kerosene, propane or other fuel sources;

(11) Shields made of metal, wood, hard plastic or any combination thereof;

(12) Bricks, rocks, pieces of asphalt, concrete, pellets or ball bearings; and

(13) The wearing of a mask, scarf, bandana or any other accessory or item that covers or partially covers the face shielding the wearer's face from view and conceals the wearer's identity, except for coverings worn due to religious beliefs, practices or observances or due to medical necessity.

(14) Any gas masks or similar breathing devices;

(15) Any impact resistant helmet, including, but not limited to: motorcycle helmets, bicycle helmets, sports helmets, or ballistic helmets;

(16) Any laser pointing devices;

(17) Any umbrellas in the absence of rain. During rainy weather an umbrella shall not exceed sixteen (16) inches in its longest dimension when fully collapsed and shall have a blunt end;

(18) Any professionally manufactured or personally fabricated equipment or clothing designed to be bullet-resistant, fragment-resistant, stab-resistant, or impact resistant, including, but not limited to: riot control gear, sports equipment, bullet-resistant vests, flak jackets, or stab-resistant vests; and

(19) Load-bearing or similar "tactical" vests designed to carry weapons, tactical equipment, or armor plates, commonly used by law enforcement or military institutions.

(b) It shall be unlawful and a misdemeanor to violate any provisions of this chapter.

(c) When feasible, excluding exigent circumstances, a warning shall be issued before enforcement of the provisions of this chapter. Such warning shall be sufficient if provided orally, by posted signs or by amplified announcement.

(d) Authorized peace officers, or employees, agents or representatives of the City, shall be exempt from the provisions of this chapter when such officers, employees, agents or representatives of the City are engaged in official business of the City.

(e) Nothing in this chapter shall prohibit the imposition of specific conditions for activities expressly authorized under a permit issued pursuant to Modesto Municipal Code Section 4-8.01 et seq. (Regulation of Parades) or prohibit the modification of these provisions for such permits issued pursuant to Section 4-8.01 et seq. upon a finding by the Chief of Police that such modification will not impair or threaten public safety.

(f) Nothing in this section shall prohibit an individual from carrying a cane or using a walker or other device necessary for providing mobility or access so that the person may participate in a public protest, demonstration, rally, picket line or public assembly.

(Ord. No. 3701-C.S., § 2, effective 8-13-19; Ord. No. 3702-C.S., § 2, effective 10-3-19; Ord. No, 3735-C.S., § 2, effective 8-10-21; Ord. No. 3736-C.S., § 2, effective 10-7-21)

EXHIBIT B

July 21, 2025

VIA EMAIL

The Honorable Sue Zwahlen, Modesto Mayor
Councilmember Rosa Escutia-Braaton
Councilmember Eric E. Alvarez
Councilmember Chris Ricci
Councilmember Nick Bavaro, Modesto Vice Mayor
Councilmember Jeremiah Williams
Councilmember David Wright
1010 10th Street
Modesto, CA 95354

Re: Concerns About Modesto Ordinance 4-23.02's Impact on Journalists

Dear Councilmembers:

We write on behalf of the First Amendment Coalition, the Society of Professional Journalists of Northern California and the Pacific Media Workers NewsGuild-CWA Local 39521 to express concern over Modesto City Ordinance 4-23.02 and its impact on lawful newsgathering. The ordinance's broad provisions prohibit anyone, including journalists, from possessing pieces of safety gear while covering public demonstrations. This puts journalists at risk while doing the job of keeping communities informed about important events in the city.

We urge the council to repeal or amend the ordinance at the earliest possible date and commit to not enforcing it against any journalist or other person engaged in lawful activity at any protest, march or public demonstration. While we appreciate the city's intentions of the ordinance are to ensure public safety for police and the public, we believe the ordinance has the opposite effect for members of the press who take common sense steps to protect their own safety while on assignment.

Specifically, the ordinance makes it a misdemeanor for anyone attending a protest to possess or wear a wide range of personal protective gear that is commonly used by journalists to cover public demonstrations. It prohibits wearing "a mask, scarf, bandana or any other accessory or item that covers or partially covers the face, except when worn for "religious beliefs or "medical necessity"; any gas masks or similar breathing devices; helmets; protective vests and jackets; and certain water bottles and much more.

These prohibited items on their face include pieces of gear that journalists often rely on to reduce risk of injury while covering protests. See the Committee to Protect Journalists' "Guide to PPE (Personal Protective Equipment)," the Reporters Committee for Freedom of the Press' "Tips for covering protests," the Radio Television Digital News

Association's training guides for safe coverage of civil unrest, and the Los Angeles Press Club's "Tips for Safety Covering Protests." Given this — and the fact that a number of people were recently arrested under ordinance — you can understand why we are concerned the ordinance effectively criminalizes safe newsgathering practices.

Threats to the safety of journalists cannot be understated. Since 2017, there are more than 1,000 documented instances of journalists in the United States facing injury from assaults by both law enforcement and others, according to the U.S. Press Freedom Tracker. That data includes 310 instances when journalists were struck or sprayed with chemical irritants and another 371 instances when journalists were shot or shot at with various crowd-control munitions. Hundreds of these incidents occurred in California, underscoring the real need for journalists to be able to carry and use the kind of equipment the city currently outlaws. For example, a recent court order noted that journalists covering protests in Los Angeles were exposed to tear gas and hit with so-called "less-lethal munitions."

Helmets, vests, masks and breathing devices have helped mitigate injury for an untold number of journalists who bravely report from public assemblies even when they become dangerous. Given the known risks to journalists and the inherent newsworthiness of public assemblies, Central Valley journalists, including those focused on informing Modesto residents, recently invested in personal protective equipment that the city prohibits. When the next protest, rally or other public assembly occurs, local reporters, photographers and other media workers should not be forced to choose between protecting themselves from harm and risking arrest.

California lawmakers made it the public policy of the state to ensure journalists can do their jobs at protests while law enforcement officers do theirs. Penal Code section 409.7, adopted via SB 98 of 2021, requires journalists be permitted to access areas that are closed or blocked off by police responding to protests, and it prohibits any efforts to obstruct journalists from doing their jobs. This is a recognition of the important role journalists play in serving as the eyes and ears of communities. Modesto should ensure that its policies do not put journalists at risk by prohibiting items a given reporter or photographer may find essential to do this work.

We appreciate the city may be concerned that people wearing face coverings who attend public assemblies could feel a sense of impunity and therefore commit criminal acts. We appreciate those concerns, as California journalists have been attacked by attendees at protests and other assemblies. However, we believe the harms of the ordinance outweigh any speculative benefit.

We also want to amplify the concerns raised by the ACLU of Northern California in its July 18 letter to you, detailing the ordinance's constitutional failings and harm to people's ability to peacefully assemble and report on protests. We share the concern of the clear legal defects and real risk to otherwise lawful activity, including newsgathering. Given this, we urge you to move swiftly to repeal or amend the ordinance to ensure it

complies with federal and state law and avoids unnecessary risk to journalists' ability to safely keep communities informed.

Thank you for your consideration of this important issue.

FIRST AMENDMENT COALITION

Ginny LaRoe
Advocacy Director
glaroe@firstamendmentcoalition.org

SOCIETY OF PROFESSIONAL JOURNALISTS OF NORTHERN CALIFORNIA

Joe Fitzgerald Rodriguez
President
spjnorcal@gmail.com

PACIFIC MEDIA WORKERS GUILD
NEWSGUILD-CWA
LOCAL 39521

Annie Sciacca
President
aesciacca@gmail.com

cc: Diane Nayares-Perez, City Clerk
Jose M. Sanchez, Modesto City Attorney
Jeff Laugero, Stanislaus County District Attorney
Brandon Gillespie, Modesto Chief of Police

EXHIBIT C

ACLU Northern California

FAC FIRST AMENDMENT COALITION

August 15, 2025

MODESTO COMMUNITY POLICE REVIEW BOARD
1010 10th Street Place
Modesto, CA 95354

VIA ELECTRONIC MAIL:
Austin Grant: agrant@modestocprb.com
Brad Hawn: bhawn@modestocprb.com
Frank Damrell: fdamrell@modestocprb.com
Kenneth Bryant: kbryant@modestocprb.com
Letricia Beasley-Day: Lbeasley-day@modestocprb.com
Nancy Smith: nsmith@modestocprb.com
Nico Solorio: nsolorio@modestocprb.com
Trish Christensen: Tchristensen@modestocprb.com
Wendy Byrd: Wbyrd@modestocprb.com

Re: Support for Repealing Modesto Anti-Mask Measure City Ordinance 4-23.02

Dear Members of the Community Police Review Board:

We write on behalf of the ACLU of Northern California and the First Amendment Coalition regarding Modesto City Ordinance 4-23.02 ("the Ordinance"). We understand that the CPRB has undertaken a review of the Ordinance in light of recent arrests of people accused of violating the anti-mask provisions. We strongly urge you to recommend that the City Council take all necessary steps to vote to repeal or substantially amend the Ordinance without further delay. We further urge you to recommend that, should any amendments be proposed, the City Council agendize these proposed revisions for public debate at a Council meeting so that Councilmembers can come to understand why certain provisions in the existing Ordinance are not only unclear and unworkable, but also discriminatory in violation of controlling law.

To assist with your consideration of these issues, we have enclosed the letters that our organizations previously submitted to the Modesto City Council detailing our concerns that the ordinance is so vague and overbroad that it violates due process and undercuts the legitimate exercise of free speech protected by both the federal and state constitutions. We also highlighted the specific concerns of journalists, who could face arrest for the mere act of wearing the kind of personal protective gear that is commonly recommended for safe newsgathering.

As recent events indicate, Modesto police are enforcing these problematic provisions of the municipal code, underscoring the need for swift action. While we welcome the news that the City Attorney will not prosecute the people arrested on June 14 on charges of violating the anti-mask provision, no one should face the threat of arrest for exercising their right to protest — or right to document a protest — while wearing a face covering or possessing any of the many other prohibited items commonly present during a protest. Indeed, such a threat of prosecution for engaging in these constitutionally-protected acts creates a chilling effect contrary to law.

If we can be of any assistance, please let us know. Thank you for your careful consideration of these important issues.

Sincerely,

ACLU FOUNDATION OF
NORTHERN CALIFORNIA

Chessie Thaccher
Senior Staff Attorney

FIRST AMENDMENT COALITION

Ginny LaRoe
Advocacy Director

cc: Simi Bhangoo, Secretary of the Board, sbhangoo@modestogov.com

Letter from ACLU to Modesto City Council dated July 18, 2025

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Northern California

July 18, 2025

Diane Nayares-Perez
Modesto City Clerk
1010 10th Street
Modesto, CA 95354
dnayaresperez@modestogov.com

VIA EMAIL

RE: Concerns About Anti-Mask Measures in Modesto City Ordinance 4-23.02

Dear City Clerk and Councilmembers:

We write on behalf of the American Civil Liberties Union of Northern California to express concern over Modesto City Ordinance 4-23.02 ("the Ordinance"), which is attached for reference. The Ordinance prohibits people from possessing or wearing at ***any*** public assembly numerous lawful items like bike helmets, metal water bottles, and—most problematically—face masks. The Ordinance's general restrictions are so vague and overbroad that they violate due process and undercut the legitimate exercise of free speech protected by both federal and state law. And more specifically, the Ordinance's anti-masking provision runs afoul of the right to privacy enshrined in California's Constitution at Article I, section 1, as well as contravenes legal protections for those with disabilities and other health issues. Beyond these blatant facial defects, recent events in Modesto on June 14 indicate that Modesto law enforcement officers are enforcing the anti-masking provision in a disparate and viewpoint-discriminatory manner, which presents yet additional constitutional problems.

We elaborate on some of these issues below to help explain the basis of our concerns. In light of the law and facts presented here, we ask that you agendize discussion on the Ordinance at an upcoming City Council meeting, vote to repeal or amend it, and then consider alternate provisions that comply with federal and state law. We also respectfully urge that no prosecutions proceed against anyone arrested for allegedly violating the Ordinance on June 14. Failure to take action on the Ordinance will subject Modesto to the significant threat of litigation.

The Ordinance Criminalizes Lawful Conduct

On its face, the Ordinance makes it a misdemeanor for any person to "utilize, carry, or possess" nineteen enumerated categories of items at "any demonstration, rally, protest, counter-protest, picket line, march, or public assembly." 4-23.02(a)-(b). Many of these prohibited items are regular, everyday things commonly present at protests and assemblies throughout the nation

and do not pose any particular or heightened risks. For example, among the prohibited items are: "[s]igns, posters, [and] banners" that are no greater than one-quarter inch thick; impact-resistant "sports equipment" and protective vests; breathing devices; bike and motorcycle helmets; glass or metal water bottles; "umbrellas in the absence of rain;" and, most problematically, masks and other face coverings. 4-23.02(a). Specifically, the Ordinance prohibits: "The wearing of a mask, scarf, bandana or any other accessory or item that covers or partially covers the face shielding the wearer's face from view and conceals the wearer's identity, except for coverings worn due to religious beliefs, practices or observances or due to medical necessity." 4-23.02(a)(13).[1]

The Ordinance is Both Overbroad and Unduly Vague in Violation of Due Process

A law is unconstitutionally overbroad if it "reaches a substantial amount of constitutionally protected conduct." *Kolender v. Lawson*, 461 U.S. 352, 359 n.8 (1983) (citation and quotation marks omitted). It is unconstitutionally vague if "it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). The Ordinance suffers from both infirmities.

Here, the Ordinance sweeps in a host of innocuous and protected conduct. Taken literally, the Ordinance would criminalize a baseball catcher who runs into a celebratory crowd wearing his helmet and uniform after winning a game, a teen who rides her bike to a march and clips her bike helmet and water bottle to her backpack during the procession, and a healthy elderly couple who attends an outdoor event performance wearing masks because it has been their practice to mask outside the home from the pandemic to present. With respect to this last hypothetical, and as is discussed further below, the Ordinance is woefully vague as to whether the couple's rationale would qualify as a "medical necessity." And to provide one more example of the Ordinance's problematic overbreadth and vagueness interplay, consider its prohibition on "[a]ny umbrellas in the absence of rain." 4-23.02(a)(17). The provision is overbroad because it criminalizes the functional uses of umbrellas, like providing shade on a sunny day, and vague because it provides no clear standard for when rain is deemed "absent."

These overbreadth and vagueness concerns are even more acute given their implications for members of the press, who often face chaotic and dangerous conditions while covering protests—conditions that, at times, are created by the police. In particular, as a federal court recently recognized, officers tear-gassed reporters and shot them with so-called "less-lethal munitions" while they covered recent protests in Los Angeles. *See Los Angeles Press Club v. City of Los Angeles*, Case No. 25-cv-05423, Doc. No. 44, Order Granting Temporary Restraining Order (C.D. Cal. Jul. 10, 2025) (citation omitted).[2] In fact, these risks are so great that American journalism organizations now recommend that reporters always carry breathing devices and wear

[1] The Ordinance does not define the term "public assembly," and thus these prohibitions can be construed to apply at any time to any gathering of people in public spaces.

[2] For reference, the Temporary Restraining Order is available at https://firstamendmentcoalition.org/wp-content/uploads/2025/07/2025-07-10-Order-Granting-TRO.pdf.

impact-resistant helmets, masks, and flak vests when reporting from a protest.[3] And yet, the Ordinance prohibits each and every one of these important pieces of safety gear.

The Prohibition on Anonymity Silences Protestors' Speech and Invades Their Privacy

In addition to the foregoing issues, the anti-masking provision set forth at section (a)(13) of the Ordinance raises free speech and privacy problems. The provision prevents protesters from maintaining their anonymity while engaging in ***lawful, peaceful*** protest. This restriction violates longstanding U.S. Supreme Court precedent, which recognizes that anonymity is "indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958).

California courts are in accord with the need to protect anonymous speech. In 1978, for example, the California Court of Appeal reasoned that there are times when "anonymity is essential to the exercise of constitutional rights." *Ghafari v. Municipal Court*, 87 Cal. App. 3d 255, 260 (1978). Applying this reasoning, the *Ghafari* Court struck down a mask ban very similar to Modesto's. *Ghafari* remains good law nearly 50 years later and is binding on the Stanislaus County Superior Court should litigation proceed on the Ordinance. *See Auto Equity Sales, Inc. v. Superior Ct. of Santa Clara Cnty*., 57 Cal. 2d 450, 455 (1962) ("Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state.").

Preventing people from protesting without revealing their identities has a stark chilling effect. Those who seek to challenge policies that harm vulnerable communities or unpopular opinions because they are especially likely to be targeted for reprisal. Even absent a risk of harassment, "[t]he decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995). "Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Talley v. California*, 362 U.S. 60, 64 (1960).[4]

Prohibiting people from being able to peacefully, lawfully, ***and*** anonymously protest also invades those persons' affirmative constitutional right to privacy under Article I, section 1, of the California Constitution. As the California Supreme Court observed, voters across the state adopted

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[3] *See, e.g.*, Los Angeles Press Club, Tips for Safely Covering Protests (Feb. 7, 2022), https://lapressclub.org/tips-for-safely-covering-protests-updated-2022/; Committee to Protect Journalists, Physical and Digital Safety: Civil Disorder (Jul. 20, 2021), https://cpj.org/2018/09/physical-safety-civil-disorder/.

[4] The public's concerns over surveillance and privacy invasions on June 14 seem to have been particularly well-founded considering Police Chief Brandon Gillespie's admission that Modesto police did employ a "real-time crime center" with surveillance cameras in parks and downtown to monitor the protests. *See* Julietta Bisharyan, *Modesto Police Chief Defends Arrests During Protests Amid Mask Ordinance*, MODESTO BEE (Jul. 17, 2025), https://www.modbee.com/news/local/article310895280.html.

this constitutional protection to defend against "the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society." *White v. Davis*, 13 Cal. 3d 757, 774 (1975). The *White* Court, quoting statements from the election materials in support of Article I, section 1, continued: "The right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion and our freedom to associate with the people we choose." *Id.* [5]

The Ordinance's Anti-Masking Provision Invites Disproportionate Enforcement and Viewpoint Discrimination

Laws that are overbroad and vague, like the Ordinance, are particularly problematic when they implicate First Amendment rights because they chill speech and expression, and enable arbitrary, "unbridled discretion" and discriminatory enforcement practices. *Kaahumanu v. Hawaii*, 682 F.3d 789, 802 (9th Cir. 2012); *see also Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024). Among the worst of these sins is the chance that the Ordinance will be enforced in a viewpoint discriminatory manner, which is a forbidden and "egregious form of content discrimination" that prohibits speech based on the views of the speaker. *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828-29 (1995).

The Ordinance's anti-masking provision falls squarely within this constitutional concern. Its exceptions for "religious beliefs, practices or observances" and "medical necessity" are vague and unworkable. It is unclear, for example, how law enforcement officers are supposed to assess such justifications for wearing a mask. In fact, under this Ordinance, police seem compelled to intuit a person's subjective reasons for masking. But law enforcement officers are rarely equipped to independently determine subjective intent—and they may not legally interrogate people about their religious practices, their disabilities, and/or health-related reasons for wearing a mask. Alternatively, anyone wearing a mask for any reason could be subject to Police Chief Brandon Gillespie's proffered approach of arrest first, then let a judge or jury determine the sincerity of one's religious beliefs or the necessity of one's medical condition.[6] Practically speaking, it is difficult to overstate the waste of time and resources, much of it at the taxpayer's expense, such

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[5] Protestors have good reason to believe that they could suffer harm, doxxing, and additional privacy invasions if their identities are exposed. *See* Nicholas Fandos, *In an Online World, a New Generation of Protesters Chooses Anonymity*, N.Y. TIMES (May 2, 2024), https://www.nytimes.com/2024/05/02/nyregion/college-campus-protests-anonymity.html. In light of the message of the ICE Out protest, protestors might also credibly fear becoming a target of ICE themselves were they to protest without a mask on. And when unmasking poses credible threats to personal safety—and particularly when public hostility chills speech and expression—courts have struck down similar statutes. *See Ghafari*, 87 Cal. App. 3d at 259 (recognizing that protestors had "good reason" to fear that "if their identity became known . . . retaliatory measures of an unpleasant nature may be taken against them"); *Aryan v. Mackey*, 462 F. Supp. 90, 91 (N.D. Tex. 1978) (same); *Am. Knights of Ku Klux Klan v. City of Goshen*, 50 F. Supp. 2d 835, 841 (N.D. Ind. 1999) (holding unconstitutional a mask ban where there was "cogent evidence of . . . retaliation that [KKK] members suffered as a result of disclosure of their identity").

[6] At the July 16, 2025 Community Police Review Board meeting, which considered the events of the June 14 protests, the Police Chief said: "I'm not the one who decides. They'll have to convince a judge or a jury that, ultimately, that they were wearing [a mask] for one of the essential reasons." *See* Bisharyan, *supra* n.4.

misdemeanor trials would entail—not to mention the significant disruption to the lives of peaceful protesters exercising their right to free speech.

The exception for "religious beliefs, practices or observances" is particularly vulnerable to abuse due to ignorance or prejudice, in the absence of explicit policies governing how law enforcement officers engage with people wearing religious garments. The First Amendment of the United States Constitution and Article I of the California Constitution both forbid the government from prohibiting the free exercise of religion, but any policy that prohibits masking in public would have a disproportionate impact on people whose core religious beliefs require them to mask. This is true, for example, for some Muslim women who wear Niqabs or Burqas in public.

More generally, Modesto's mask ban gives police a reason to stop, surveil, and scrutinize groups of vulnerable people. People of color have consistently been over-policed and subjected to greater suspicion and scrutiny, as evidenced by the racial disparities pervasive in policing practices.[7] Indeed, this disproportionate and viewpoint-discriminatory enforcement materialized on June 14. On that day, two protests took place: the ICE Out rally organized by the Central Valley Black Indigenous People of Color Coalition, and the No Kings protest organized in part by Indivisible Stanislaus.[8] Protestors at both rallies wore masks. Yet law enforcement arrested and cited under the Ordinance only protestors from the ICE Out rally—which was attended predominantly by people of color. For the arrestees with whom we have spoken, officers did not inquire about any person's reasons for wearing a mask, whether on account of religious beliefs, medical necessity, or otherwise. By comparison, we are aware of no arrests for violations of the anti-masking provision at the No Kings protest, which promoted a different viewpoint and was reportedly attended in greater numbers by white participants. This incident exemplifies the constitutional dangers inherent in the Ordinance. Again, when a law lacks clear standards, it delegates unchecked discretion to law enforcement, increasing the likelihood that enforcement will reflect existing societal biases rather than neutral application.

The Anti-Masking Provision Undermines Public Health and Discriminates on the Basis of Disability

Prohibiting people from wearing masks in public or at demonstrations has a potent chilling effect on the free speech rights of immunocompromised individuals and people who have disabilities, including underlying health conditions that make them susceptible to severe illness like COVID-19. Even though the Ordinance contains an exception for "medical necessity," this carve-out is undefined and fails to provide protection to those wearing masks for the safety of others instead of themselves. Individuals may not feel, or be, safe in large crowds if they are unable to mask, so a prohibition on masking at protests forces them to choose between their free speech

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[7] *See* California Department of Justice, California Racial and Identity Profiling Advisory Board Releases Report on 2023 Police Stop Data (Dec. 31, 2024), https://oag.ca.gov/news/press-releases/california-racial-and-identity-profiling-advisory-board-releases-report-2023.

[8] Julietta Bisharyan, *'No Kings' Rally Draws Thousands to Modesto in Protest of Donald Trump*, MODESTO BEE (Jun. 18, 2025), https://www.modbee.com/news/local/article308569555.html.

rights and their or their loved ones' health and safety.

The Ordinance also risks violating the Americans with Disabilities Act ("ADA") by preventing individuals with medical issues from engaging in a crucial aspect of public life and participating in practices that form the cornerstone of democracy. The ADA prohibits government entities from discriminating against individuals with disabilities and from cutting off their participation in government programs or activities. 42 U.S.C.A. § 12132. These ADA protections extend to "anything a public entity does," including enacting and enforcing discriminatory law enforcement measures. *Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001) (citations and internal quotation marks omitted).

People should not have to risk their health in order to attend a protest. Being forced to make such a choice effectively denies them the "right of peaceable assembly" that "lie[s] at the foundation of a government based upon the consent of an informed citizenry." *Bates v. City of Little Rock*, 361 U.S. 516, 522-23 (1960).

California Law Already Prohibits Wearing a Mask While Committing Unlawful Acts and Modesto's Anti-Masking Provision is Thus Preempted

We understand that Modesto may be concerned that people wearing a mask at a protest could feel a sense of impunity and therefore act recklessly or unlawfully. This speculative concern cannot justify the complete abridgement of the entire community's right to engage in anonymous speech and peaceful protest. Simply put, and as the *Ghafari* Court held, a "blanket prohibition" on the use of masks during protests "restricts the legitimate exercise of First Amendment freedoms" and "sweeps too broadly" to withstand constitutional scrutiny. *Ghafari*, 87 Cal. App. 3d at 261-62. Such a prohibition serves "no legitimate law enforcement function and is unconstitutionally overbroad." *Id*. at 262.

Moreover, Modesto already has a law at its disposal to prevent people from masking their identities while committing unlawful acts. Penal Code section 185 makes it a misdemeanor "for any person to wear any mask, false whiskers, or any personal disguise" for the purpose of "[e]vading or escaping discovery, recognition, or identification in the commission of any public offense," or "[c]oncealment, flight, or escape, when charged with, arrested for, or convicted of, any public offense." This law, coupled with the many other more narrowly tailored laws aimed at unprotected conduct and breaches of the peace, should provide the city with "the legal armamentarium to deal effectively" with any disturbances. *Ghafari*, 87 Cal. App. 3d at 262.

And given that California prohibits local governments from legislating in a field fully occupied by state law, the existence of Penal Code section 185 leads to yet another fatal conclusion about Modesto's Ordinance: it is preempted. *See* Cal. Const., art XI, §§ 5, 7; Gov. Code § 37100. Because the Ordinance prohibits wearing a mask in public without regard to criminal intent or activity, it conflicts with section 185 and cannot survive. *See Am. Fin. Servs. Ass'n v. City of Oakland*, 34 Cal. 4th 1239, 1251-52 (2005) (striking down ordinance as preempted because it invaded an area "fully occupied by general law").

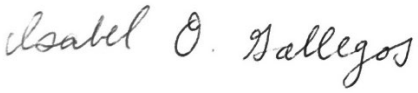
Conclusion

For all of the foregoing reasons, we urge you to agendize discussion on the Ordinance at a City Council meeting in the near future, vote to repeal or amend it, and then consider alternate provisions that comply with federal and state law. We also respectfully ask that no prosecutions proceed against anyone arrested for allegedly violating the Ordinance on June 14 given the substantial legal uncertainties involved. If the concerns about the Ordinance are not addressed, the ACLU may be compelled to initiate legal action against the city.

Sincerely,

Chessie Thacher
Senior Staff Attorney
ACLU Foundation of
Northern California
cthacher@aclunc.org

Shaila Nathu
Staff Attorney
ACLU Foundation of
Northern California
snathu@aclunc.org



Isabel O. Gallegos
Legal Intern
ACLU Foundation of
Northern California
igallegos@aclunc.org

cc: The Honorable Sue Zwahlen, Modesto Mayor (mayor@modestogov.com)
Councilmember Rosa Escutia-Braaton (rescutiabraaton@modestogov.com)
Councilmember Eric E. Alvarez (ealvarez@modestogov.com)
Councilmember Chris Ricci (cricci@modestogov.com)
Councilmember Nick Bavaro, Modesto Vice Mayor (nbavaro@modestogov.com)
Councilmember Jeremiah Williams (jwilliams@modestogov.com)
Councilmember David Wright (dawright@modestogov.com)
Jose M. Sanchez, Modesto City Attorney (jnunes@modestogov.com)
Jeff Laugero, Stanislaus County District Attorney (jeffrey.laugero@standa.org)

4-23.02 - Restrictions.

(a) No person shall utilize, carry, or possess the following items or articles while attending or participating in any demonstration, rally, protest, counter-protest, picket line, march, or public assembly:

(1) Any length of lumber, wood, or wood lath unless that object is one-quarter (¼) inch or less in thickness and two (2) inches or less in width, or if not generally rectangular in shape, such object shall not exceed three-quarter (¾) inch in its thickest dimension. Both ends of the lumber, wood or wood lath shall be blunt;

(2) Any length of metal or plastic pipe, whether hollow or solid; provided, however, that hollow plastic piping not exceeding three quarter (¾) inch in its thickest dimension and not exceeding one-eighth (⅛) inch in wall thickness, and not filled with any material, liquid, gas or solid may be used solely to support a sign, banner, placard, puppet or other similar expressive display. Both ends of any plastic pipe permissible under this subsection shall be blunt;

(3) Signs, posters, banners, plaques or notices, unless such sign, poster, banner, plaque or notice is constructed solely of soft material, such as cloth, paper, soft plastic capable of being rolled or folded, or cardboard material no greater than one-quarter (¼) inch in thickness;

(4) Baseball or softball bats, regardless of composition or size;

(5) Any aerosol spray, tear gas, mace, pepper spray, smoke canisters, or bear repellant;

(6) Any projectile launcher or other device, such as a catapult or wrist rocket, which is commonly used for the purpose of launching, hurling or throwing any object, liquid, material or other substance, whether through force of air pressure, spring action or any other mechanism;

(7) Weapons such as knives, daggers, swords, sabers or other bladed devices, axes, axe handles, hatchets, billy clubs, ice picks, razor blades, nunchucks or martial arts weapons of any kind, box cutters, pellet or BB guns, improvised explosive devices (IEDs), dynamite, conducted electrical weapons (CEWs), including, but not limited to, Tasers or stun guns, metal/composite/wooden knuckles, or any chain greater than twenty (20) inches in length or greater than one-quarter (¼) inch in diameter;

(8) Balloons, bottles or any other container such as water cannons, super-soakers, or toy or replica firearms filled with any flammable, biohazard or other noxious matter which is injurious, or nauseous, sickening or irritating to any of the senses, with intent to throw, drop, pour, disperse, deposit, release, discharge or expose the same in, upon or about any demonstration, rally, protest, picket line or public assembly;

(9) Glass bottles or metal containers, whether empty or filled;

(10) Open flame torches, lanterns or other devices that utilize combustible materials such as gasoline, kerosene, propane or other fuel sources;

(11) Shields made of metal, wood, hard plastic or any combination thereof;

(12) Bricks, rocks, pieces of asphalt, concrete, pellets or ball bearings; and

(13) The wearing of a mask, scarf, bandana or any other accessory or item that covers or partially covers the face shielding the wearer's face from view and conceals the wearer's identity, except for coverings worn due to religious beliefs, practices or observances or due to medical necessity.

(14) Any gas masks or similar breathing devices;

(15) Any impact resistant helmet, including, but not limited to: motorcycle helmets, bicycle helmets, sports helmets, or ballistic helmets;

(16) Any laser pointing devices;

(17) Any umbrellas in the absence of rain. During rainy weather an umbrella shall not exceed sixteen (16) inches in its longest dimension when fully collapsed and shall have a blunt end;

(18) Any professionally manufactured or personally fabricated equipment or clothing designed to be bullet-resistant, fragment-resistant, stab-resistant, or impact resistant, including, but not limited to: riot control gear, sports equipment, bullet-resistant vests, flak jackets, or stab-resistant vests; and

(19) Load-bearing or similar "tactical" vests designed to carry weapons, tactical equipment, or armor plates, commonly used by law enforcement or military institutions.

(b) It shall be unlawful and a misdemeanor to violate any provisions of this chapter.

(c) When feasible, excluding exigent circumstances, a warning shall be issued before enforcement of the provisions of this chapter. Such warning shall be sufficient if provided orally, by posted signs or by amplified announcement.

(d) Authorized peace officers, or employees, agents or representatives of the City, shall be exempt from the provisions of this chapter when such officers, employees, agents or representatives of the City are engaged in official business of the City.

(e) Nothing in this chapter shall prohibit the imposition of specific conditions for activities expressly authorized under a permit issued pursuant to Modesto Municipal Code Section 4-8.01 et seq. (Regulation of Parades) or prohibit the modification of these provisions for such permits issued pursuant to Section 4-8.01 et seq. upon a finding by the Chief of Police that such modification will not impair or threaten public safety.

(f) Nothing in this section shall prohibit an individual from carrying a cane or using a walker or other device necessary for providing mobility or access so that the person may participate in a public protest, demonstration, rally, picket line or public assembly.

(Ord. No. 3701-C.S., § 2, effective 8-13-19; Ord. No. 3702-C.S., § 2, effective 10-3-19; Ord. No, 3735-C.S., § 2, effective 8-10-21; Ord. No. 3736-C.S., § 2, effective 10-7-21)

Letter from FAC, the Society of Professional Journalists of Northern California and the Pacific Media Workers NewsGuild-CWA Local 39521 to Modesto City Council dated July 21, 2025

July 21, 2025

VIA EMAIL

The Honorable Sue Zwahlen, Modesto Mayor
Councilmember Rosa Escutia-Braaton
Councilmember Eric E. Alvarez
Councilmember Chris Ricci
Councilmember Nick Bavaro, Modesto Vice Mayor
Councilmember Jeremiah Williams
Councilmember David Wright
1010 10th Street
Modesto, CA 95354

Re: Concerns About Modesto Ordinance 4-23.02's Impact on Journalists

Dear Councilmembers:

We write on behalf of the First Amendment Coalition, the Society of Professional Journalists of Northern California and the Pacific Media Workers NewsGuild-CWA Local 39521 to express concern over Modesto City Ordinance 4-23.02 and its impact on lawful newsgathering. The ordinance's broad provisions prohibit anyone, including journalists, from possessing pieces of safety gear while covering public demonstrations. This puts journalists at risk while doing the job of keeping communities informed about important events in the city.

We urge the council to repeal or amend the ordinance at the earliest possible date and commit to not enforcing it against any journalist or other person engaged in lawful activity at any protest, march or public demonstration. While we appreciate the city's intentions of the ordinance are to ensure public safety for police and the public, we believe the ordinance has the opposite effect for members of the press who take common sense steps to protect their own safety while on assignment.

Specifically, the ordinance makes it a misdemeanor for anyone attending a protest to possess or wear a wide range of personal protective gear that is commonly used by journalists to cover public demonstrations. It prohibits wearing "a mask, scarf, bandana or any other accessory or item that covers or partially covers the face, except when worn for "religious beliefs or "medical necessity"; any gas masks or similar breathing devices; helmets; protective vests and jackets; and certain water bottles and much more.

These prohibited items on their face include pieces of gear that journalists often rely on to reduce risk of injury while covering protests. See the Committee to Protect Journalists' "Guide to PPE (Personal Protective Equipment)," the Reporters Committee for Freedom of the Press' "Tips for covering protests," the Radio Television Digital News

Association's training guides for safe coverage of civil unrest, and the Los Angeles Press Club's "Tips for Safety Covering Protests." Given this — and the fact that a number of people were recently arrested under ordinance — you can understand why we are concerned the ordinance effectively criminalizes safe newsgathering practices.

Threats to the safety of journalists cannot be understated. Since 2017, there are more than 1,000 documented instances of journalists in the United States facing injury from assaults by both law enforcement and others, according to the U.S. Press Freedom Tracker. That data includes 310 instances when journalists were struck or sprayed with chemical irritants and another 371 instances when journalists were shot or shot at with various crowd-control munitions. Hundreds of these incidents occurred in California, underscoring the real need for journalists to be able to carry and use the kind of equipment the city currently outlaws. For example, a recent court order noted that journalists covering protests in Los Angeles were exposed to tear gas and hit with so-called "less-lethal munitions."

Helmets, vests, masks and breathing devices have helped mitigate injury for an untold number of journalists who bravely report from public assemblies even when they become dangerous. Given the known risks to journalists and the inherent newsworthiness of public assemblies, Central Valley journalists, including those focused on informing Modesto residents, recently invested in personal protective equipment that the city prohibits. When the next protest, rally or other public assembly occurs, local reporters, photographers and other media workers should not be forced to choose between protecting themselves from harm and risking arrest.

California lawmakers made it the public policy of the state to ensure journalists can do their jobs at protests while law enforcement officers do theirs. Penal Code section 409.7, adopted via SB 98 of 2021, requires journalists be permitted to access areas that are closed or blocked off by police responding to protests, and it prohibits any efforts to obstruct journalists from doing their jobs. This is a recognition of the important role journalists play in serving as the eyes and ears of communities. Modesto should ensure that its policies do not put journalists at risk by prohibiting items a given reporter or photographer may find essential to do this work.

We appreciate the city may be concerned that people wearing face coverings who attend public assemblies could feel a sense of impunity and therefore commit criminal acts. We appreciate those concerns, as California journalists have been attacked by attendees at protests and other assemblies. However, we believe the harms of the ordinance outweigh any speculative benefit.

We also want to amplify the concerns raised by the ACLU of Northern California in its July 18 letter to you, detailing the ordinance's constitutional failings and harm to people's ability to peacefully assemble and report on protests. We share the concern of the clear legal defects and real risk to otherwise lawful activity, including newsgathering. Given this, we urge you to move swiftly to repeal or amend the ordinance to ensure it

complies with federal and state law and avoids unnecessary risk to journalists' ability to safely keep communities informed.

Thank you for your consideration of this important issue.

FIRST AMENDMENT COALITION

Ginny LaRoe
Advocacy Director
glaroe@firstamendmentcoalition.org

SOCIETY OF PROFESSIONAL JOURNALISTS OF NORTHERN CALIFORNIA

Joe Fitzgerald Rodriguez
President
spjnorcal@gmail.com

PACIFIC MEDIA WORKERS GUILD
NEWSGUILD-CWA
LOCAL 39521

Annie Sciacca
President
aesciacca@gmail.com

cc: Diane Nayares-Perez, City Clerk
Jose M. Sanchez, Modesto City Attorney
Jeff Laugero, Stanislaus County District Attorney
Brandon Gillespie, Modesto Chief of Police