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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DILEVON LO, ET AL.,

Plaintiffs,

v.

COUNTY OF SISKIYOU, ET AL.,

Defendants.

Case No. 21-cv-00999-KJM-DMC

BRIEF OF AMICI CURIAE ACLU OF NORTHERN CALIFORNIA AND ASIAN LAW CAUCUS IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION AND INTERESTS OF AMICI

Amici curiae the American Civil Liberties Union of Northern California ("ACLU") and Asian American Advancing Justice-Asian Law Caucus ("Asian Law Caucus")[1] are civil rights organizations deeply concerned with alarming reports regarding Siskiyou County's treatment of the Hmong community stemming from anti-Asian sentiment which has culminated in the County cutting off the Hmong community's water supply. There is an immediate need to restore water access. In response to the Court's recent observations and questions[2] at the August 6, 2021 preliminary injunction hearing and in light of the important equities at stake, the ACLU and Asian Law Caucus respectfully submit this brief supporting Plaintiffs' motion for preliminary injunction, particularly regarding Plaintiffs' Fourteenth Amendment claims.

The ACLU and the Asian Law Caucus are deeply concerned about the targeting and discrimination of Asian residents, particularly the Hmong people, in Siskiyou County who created a thriving community. The Hmong are ethnic minorities who fled persecution in Laos and other Asian countries after assisting the U.S. military in fighting against communist forces. Hmong refugees arrived in the U.S. in the 1980's and 1990's after U.S. Congress passed legislation that allowed Southeast Asian refugees to resettle in this country. Hmong community members began putting down roots in Siskiyou County in 2015 and they now make up a majority of the Shasta Vista district.

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[1] The American Civil Liberties Union of Northern California is the regional affiliate of the American Civil Liberties Union, a national nonprofit, nonpartisan organization dedicated to furthering the principles of due process and equal protection embodied in the state and federal constitutions. Asian Law Caucus is the oldest legal and civil rights organization in the country serving Asian and Pacific-Islander (API) communities. The mission of Asian Law Caucus is to promote, advance, and represent the legal and civil rights of APIs. Recognizing that social, economic, political, and racial inequalities continue to exist in the United States, Asian Law Caucus is committed to the pursuit of equality and justice for all sectors of our society with a specific focus directed toward addressing the needs of low-income, immigrant, and underserved APIs like Siskiyou County's Hmong community. The interests of Amici for this case are further detailed in the preceding motion.

[2] *See e.g.,* Aug. 6, 2021 Hearing Tr. 6:11-13 ("But both sides – there's – there's information here that appears to be getting in the way of the Courts having what it needs to decide this question fully and fairly.").

Soon after their arrival, in 2015, the Board of Supervisors passed series of ordinances to purportedly curtail marijuana cultivation. The Siskiyou Sheriff's Department has used the ordinances to target the Hmong community.[3] The Hmong community, intern, has reached out to both the ACLU and the ALC to share stories and concerns about their safety given the continued harassment by local law enforcement and the lack of access to a basic resource, water.

II. ARGUMENT

Plaintiffs' motion for a preliminary injunction should be granted because they have established that: (1) they are "likely to suffer irreparable harm in the absence of preliminary relief," (2) they are "like[ly] to succeed on the merits" on at least their Fourteenth Amendment claims, (3) "the balance of equities tips in [their] favor," and (4) "an injunction is in the public interest." *Am. Trucking Ass'ns v. City of L.A.*, 559 F.3d 1046, 1052 (9th Cir. 2009) (internal quotation omitted). Although Plaintiffs has a sufficient showing for each prong, the Court need only apply a "sliding scale"—that is, "a stronger showing of one element may offset a weaker showing of another." *Hernandez v. Sessions*, 872 F.3d 976, 990 (9th Cir. 2017); *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 15 1127, 1131 (9th Cir. 2011).

A. Plaintiffs have Established They are Likely to Suffer Irreparable Harm from Being Deprived of Water and Their Constitutional Rights.

Plaintiffs have also established that they are suffering irreparable harms because the ordinances[4] deprive them of water necessary for consumption, bathing, laundry, vegetables, pets, livestock, sanitation, fire protection, and maintaining one's physical and mental health.[5] Plaintiffs'

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[3] Plaintiffs' moving papers discuss on the Hmong community's history and the context of growing anti-Asian sentiment. Dkt. 4 at 2-7.

[4] The ordinances create a civil penalty to use groundwater for use on land other than the land from where the extraction occurs without a permit (Ordinance 21-07); make it a crime to drive a water truck on particular roads, including the singular entrances to the Shasta Vista community (Ordinance 21-08; Resolution); and make it a crime to "wast[e] or unreasonably us[e]" groundwater in cultivating cannabis (Ordinance 20-13).

[5] Decl. of Pl. Koua Lee, Dkt. 9-8¸ ¶ 6; Sup. Decl. of Pl. Koua Lee, Dkt. 24¸ ¶ 5; Decl. of Pl. Nhia Thai Vang, Dkt. 9-5, ¶ 12; Decl. of Pl. Zeng Lee, Dkt. 27, ¶ 7; Decl. of Pl. Der Lee, Dkt. 23¸ ¶¶ 10, 12; Decl. of Pl. Khue Cha, Dkt. 9-10, ¶ 6; Decl. of Pl. Khue Cha, Dkt. 25¸ ¶ 4.

declarations support the ongoing danger to human health and the loss of crops and livestock used for sustenance. Decl. of Pl. Koua Lee, Dkt. 9-8 , ¶¶ 6-7(limiting bathing); Sup. Decl. of Pl. Koua Lee, Dkt. 24 , ¶¶ 5 and 7-8 (reporting thirst and depression); Decl. of Pl. Nhia Thai Vang, Dkt. 9-5, ¶ 12 (questioning ability to survive and stay); Decl. of Pl. Zeng Lee, Dkt. 27, ¶¶ 7, 9-10 (testifying family and animals are "slowly dying"); Decl. of Pl. Der Lee, Dkt. 23, ¶ 15 (comparing living conditions to Laotian jungle, but with less water); Decl. of Pl. Khue Cha, Dkt. 9-10, ¶ 5 (reporting depression and illness); Decl. of Pl. Khue Cha, Dkt. 25, ¶ 4 (reporting ongoing death of livestock and garden). This harm is ongoing and cannot be fully mitigated without water trucks, despite Plaintiffs' laborious attempts to secure alternative water.[6] The water ordinances make no distinction between potable and non-potable water and do not appear to provide for non-property owners to secure a permit independently. The Court has already recognized such dire circumstances are plainly irreparable harm. June 15, 2021 Order, Dkt. 11, at 8-9 ("Many of these declarations do support the plaintiffs' argument that the County's ordinances and resolution will deprive people in the Hmong community of the water they need for many basic needs").

Furthermore, "[i]t is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Hernandez*, 872 F.3d at 994. "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Warsoldier v. Woodford,* 418 F.3d 989, 1001-02 (9th Cir. 2005) (quotations and citation omitted). A procedural injury may also "serve as a basis for a finding of irreparable harm when a preliminary injunction is sought." *California v. Health & Human Servs*., 281 F. Supp. 3d 806, 829-30 (N.D. Cal. 2017). For the reasons discussed below, *infra* Part B, Defendants have violated Plaintiffs' constitutional rights. The Court must thus find that they are likely to suffer irreparable injury.

[6] Decl. of Pl. Koua Lee, Dkt. 9-8, ¶ 6; Decl. of Pl. Nhia Thai Vang, Dkt. 9-5¸ ¶ 8; Decl. of Pl. Zeng Lee, Dkt. 27, ¶ 8 ; Decl. of Pl. Der Lee, Dkt. 23¸ ¶¶ 7, 9; Decl. of Pl. Khue Cha, Dkt. 9-10, ¶ 3.

B. Plaintiffs are Likely to Succeed on at Least their Equal Protection and Due Process Claims.

At a minimum, Plaintiffs are likely to succeed on their Fourteenth Amendment claims because the ordinances violate the Equal Protection Clause and Plaintiffs' Substantive Due Process.[7] The County offers no legitimate or sufficient rationale for enacting restrictive water ordinances that target the Hmong community. Further, the County's disparate treatment of the County's Hmong community has created a hazard. The ordinances should be enjoined.

1. The County Ordinances targeting the Hmong community violate the Equal Protection Clause.

The Supreme Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), governs the Plaintiffs' claim that the County's ordinances dramatically restricting their water access violate the Equal Protection Clause of the Fourteenth Amendment. *See Ave. 6E Invs., LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 504 (9th Cir. 2016); *see also* Dkt. 33 at 20-26 (citing *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 605 (2d Cir. 2016)). Plaintiffs need only show that racial discrimination was at least "a motivating factor" for the water ordinances to prevail on their equal protection claim. *Id*. at 265-66 ("When there is a proof that a discriminatory purpose has been a motivating factor in the decision, th[e] judicial deference [that courts normally afford legislators and administrators] is no longer justified."). The ordinances may violate equal protection even if they may not, on their face, target the Hmong community. *See Washington v. Davis*, 426 U.S. 229, 241 (1976) (both facially discriminatory and facially neutral laws enacted with discriminatory animus may violate equal protection); *see also Shaw v. Reno*, 509 U.S. 630, 643–44 (1993) ("[R]acial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an

[7] Although this brief focuses on equal protection and substantive due process, Plaintiffs have raised other meritorious claims that Defendants have violated their procedural due process rights and rights under the Fourth Amendment.

extraordinary justification…This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination" (internal citations omitted).

Arlington Heights provides that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266. Factors to consider in this inquiry include the "impact of the official action" and whether it "bears more heavily on one race than another," the "historical background of the decision" and whether it "reveals a series of official actions taken for invidious purposes," the "specific sequence of events leading up the challenged decision" and whether it departs procedurally or substantively from normal practice, and the "legislative or administrative history" and what it reveals about the purpose of the official action. *Ramos v. Wolf*, 975 F.3d 872, 896-97 (9th Cir. 2020) (quoting *Arlington Heights,* 429 U.S. at 266-68).

In this case, the fact most relevant to the *Arlington Heights* analysis is that the water ordinances targeting the Shasta Vista subdivision, which is approximately 75% Hmong, even though approximately 97% of the marijuana grows (and persuadably associated water and environmental impacts) that the ordinance is supposedly designed to address are located *outside* Shasta Vista *according to Defendants' own records*. *Infra* n. 8; *Avenue 6E*, 818 F.3d at 507-508 (disparate impact and deviation from government substantive conclusions are relevant considerations). The County's justifications are also undermined by the County's total lack of attention to examining the relative water use and environmental impacts within the county.

Defendants do not dispute Plaintiffs' evidence that the Shasta Vista subdivision is approximately 75% Hmong. *See* Decl. of Neil Thao, Dkt 4-8, ¶ 3 ("Shasta Vista Subdivision consists of 1600 lots, 1200 lots of which are occupied by Hmong families."); Decl. of Suewasiengboom Saiaaron Lee, Dkt 4-9, ¶ 2 (majority of Shasta Vista subdivision's 1600 lots occupied by Hmong families). Nor do Defendants meaningfully dispute the County's own Annual Strategic Plan for 2021 which identifies only 80 allege grow sites in Shasta Vista of the "upwards of 2,500" sites in the county. *See* Siskiyou County 2021 Annual Strategic Plan, Dkt 4-5 at 30-31. Instead, Defendants only proffer vague, post-hoc assertions that cannabis grows exist

in Shasta Vista, as opposed to actual evidence such activities are more common there compared to the rest of the County. Thus, the water ordinances target a geographic area that includes only some 3.2% of the county's grow sites (and presumably less water use and environmental impacts),[8] but is 75% Hmong. *See* Dkt. 4-5 at 30-31; Decl. of Chris Conrad, Dkt 22, ¶ 6 (specifying numerous large areas of cannabis grows not subject to the water truck ordinance).

These facts raise a compelling inference that the purpose of the water ordinances is to discriminate against the County's Asian and Hmong community rather than address illegal marijuana grows or a water shortage in the County. *Cf. The Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 704 (9th Cir. 2009) (plaintiffs from predominantly Latino neighborhoods adduced sufficient summary judgment evidence to maintain claim for equal protection violation for failure to provide adequate municipal services).

Other *Arlington Heights* factors also support this inference. In addition to the historical antecedents of the ordinances, the use of "code[d] language" and the "presence of community animus can support a finding of discriminatory motives by government officials, even if the officials do not personally hold such views," particularly when concerning an "influx of undesirables." *Avenue 6E*, 818 F.3d at 504-05. Plaintiffs' have chronicled the extensive animus from government officials to the local community since their arrival in 2015. *See* Dkt. 4 at 1-6; Dkt. 33 at 23-26 (noting, for example, Sherriff LaRue's comments reflecting a desire to "choke" out "those people…helping" and encouraging "direct[ing] our anger at the right people" and

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[8] This conservative estimated percentage is based on 80 of the 2,500 sites, but the County's report refers to "upwards of 2,500" sites countywide. If that number were 3,000, for example, the percentage of the county's sites in this subdivision would be only 2.6%. Also, the report refers to parcels surrounding the 80 sites "being used for the sole purpose of cultivating hundred if not thousands of marijuana *plants*." *See* Siskiyou County 2021 Annual Strategic Plan, Dkt 4-5 at 30 (emphasis added). It is not clear if those surrounding parcels are all part of the Shasta Vista subdivision or how many plants make up a site. The report's language of "hundreds if not thousands" of plants is imprecise and without any substantiation. Regardless, even if the number of sites in the subdivision identified by the county were tripled and the number in the county overall were kept at the most conservative 2,500, the subdivision would still only host less than 10% of the county's grow sites, yet account for the zones for water truck enforcement.

comments from the public like "It's just, if you're Asian, you're connected to the community, you're connected. You're guilty. End of the story.").

Once a "pretext for racial discrimination" is shown – as Amici believe it is here – the ordinances can only survive if they meet strict scrutiny. *See Shaw*, 509 U.S. at 643–44; *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). To survive strict scrutiny, the County must establish that the water restriction ordinances are "justified by a compelling government interest and [are] narrowly drawn to serve that interest." *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 799 (2011). Even if water regulation and eradicating marijuana grows were a compelling government interest[9], by no measure could the County's water restriction ordinances be deemed narrowly tailored and the least restrictive means of furthering that interest. Notably, if illegal marijuana grows were the problem the County sought to address, it could do so by addressing the *actual* marijuana grows rather than water that is used by those plants or at least focus on areas with the actual highest amount of grows. Through satellite photos and the County's own capacity to generate the photos used in its annual report, identifying significant suspected marijuana grows is apparently not difficult. *See* Siskiyou County 2021 Annual Strategic Plan, Dkt 4-5 at 30-31; Decl. of Chris Conrad, Dkt. 22, ¶¶ 2, 5, 6-7, 9 (use of Google satellite photos and aerial images to identify suspected marijuana grows). Even absent the ease with which the grows themselves can be identified, placing severe broad restrictions on access to the most basic necessity for human life in order to address one of the supplies needed to grow marijuana is not rational, legitimate, reasonably tailored, or the least restrictive means of eradicating illegal marijuana grows.

[9] Amici could not find, and Defendants do not cite, authority indicating that such government interest is compelling. The Fourth Circuit assumed without deciding that if the government "interest in preserving agricultural land, water quality, and open space" were compelling, the county's zoning regulation was not narrowly tailored and the least restrictive means of furthering that interest. *Bethel World Outreach Ministries v. Montgomery Cty. Council*, 706 F.3d 548, 559 (4th Cir. 2013).

2. Curtailing Plaintiffs' access to water is a State-created danger which violates Substantive Due Process.

Under the Substantive Due Process Clause of the Fourteenth Amendment, the state deprives a person of a substantive due process right if it "affirmatively place[s] the plaintiff in a position of danger." *Wood v. Ostrander*, 879 F.2d 583, 589 (9th Cir. 1989). Liability under substantive due process requires: (1) official state action that affirmatively places an individual in danger; and (2) deliberate indifference to that danger. *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1062 (9th Cir. 2006). Deliberate indifference requires proof of (1) serious risk of harm, (2) defendant's actual knowledge of that risk, and (3) defendant's failure to take obvious steps to address that risk. *L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996).

An actionable deprivation of substantive due process is found where, like here, an ordinance deprives individuals of the ability to shield themselves from the dangers of the outdoors and causes risk of personal and physical safety. *See, e.g., Jeremiah v. Sutter Cty.*, 2018 WL 1367541, at *4 (E.D. Cal. Mar. 16, 2018) (finding that plaintiffs were likely to succeed on a substantive due process claim because Sutter County intended to enforce an ordinance that it knew placed unhoused persons at risk of physical harm); *see also Sanchez v. City of Fresno*, 914 F. Supp. 2d 1079, 1102 (E.D. Cal. 2012) (finding a substantive due process claim where defendants were warned their conduct would threaten plaintiffs' survival, but continued conduct notwithstanding). Water, like shelter, is undeniably necessary for physical safety. Accordingly, this case is directly analogous to other substantive due process cases where courts have found that state actors can be liable for affirmatively depriving individuals of the necessities of life and putting them in physical danger.

Plaintiffs are likely to succeed on the merits on a substantive due process claim as their evidence firmly demonstrates that (1) Defendants passed the challenged ordinances which deprive Plaintiffs residing in the Shasta Vista subdivision of access to water and have enforced these ordinances to cut off water supplies to Plaintiffs' community; (2) Defendants' actions have caused real danger to Plaintiffs, whose lives and livelihood depend on water access, particularly

in the midst of summer, a drought, and a volatile and dangerous fire season; (3) Defendants are aware their actions have placed Plaintiffs in real danger; and (4) Defendants have failed to take obvious steps to address the danger of water deprivation they continue to inflict on Plaintiffs.[10]

First, the ordinances at issue in this case have created a near ban on water – potable or not – entering the Shasta Vista subdivision. The challenged ordinances effectively make it illegal to transport sufficient water into the Shasta Vista community, which has no water available without transport. The ordinances and the enforcement of these ordinances (which has resulted in the seizure of even relatively small amounts of water entering Shasta Vista) has cut off any water supply to where Plaintiffs Der Lee, Koua Lee, Khue Cha, Nhia Thai Vang, and Zeng Lee live.[11]

Second, water deprivation places Plaintiffs at dire risk of personal and physical safety. Plaintiffs who reside in the Shasta Vista community have lost crops and animals needed for food, and are in danger of life-threatening health risks, such as heat stroke, if the Defendants continue to deprive them of water access. Dkt. 23-27. Further, there are fires, like the Lava Fire, that threaten these communities, making prompt access to water vital.

Third, Defendants have been informed directly, through emails, community outreach, declarations filed in this lawsuit, Amici's letter, and County Board of Supervisors meetings that the ordinances are depriving Plaintiffs of water that is necessary for their health, safety and survival. Supp. Decl. of Edward Szendrey. Dkt. 28, ¶ 15-16.

And *Fourth*, Defendants have "fail[ed] to take obvious steps" to address the risk they have caused Plaintiffs. Despite Plaintiffs' pleas for access to water for survival, the Defendants have responded only by dismissing Plaintiffs as non-property owners and casting the entire

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[10] *See* Pls' Memorandum of Points and Authorities in Support of Pls' Application for a Temporary Restraining Order and Preliminary Injunction, Dkt. 4, at 27; Pls' Additional Supplemental Memorandum of Points and Authorities in Support of Plaitniffs' Ex Parte Application for a Temporary Restraining Order and Motion for Preliminary Injunction, Dkt. 21, at 4-6.

[11] Decl. of Pl. Der Lee, Dkt. 23¸ ¶ 10, 12; Sup. Decl. of Pl. Koua Lee, Dkt. 24, ¶ 5; Decl. of Pl. Khue Cha, Dkt. 25, ¶ 4; Decl. of Pl. Nhia Thai Vang, Dkt. 26; Decl. of Pl. Zeng Lee, Dkt. 27, ¶ 7.

Hmong community in Siskiyou County as violent criminals. Defs' Opposition to Pls' Request for Preliminary Injunction, Dkt. 31, at 2. Defendants have taken no steps to ensure that its actions do not continue to deprive Plaintiffs Der Lee, Koua Lee, Khue Cha, Nhia Thai Vang, and Zeng Lee of access to water for their survival needs. Defendants can provide Plaintiffs with water truck permits, grant exceptions to the ordinances, or even limit the scope of their ordinances to what they purport to prohibit - water used for cannabis growth. The Defendants have refused to take such necessary action.

Defendants' disregard for Plaintiffs' physical safety and survival shocks the conscience and exemplifies deliberate indifference. Accordingly, Plaintiffs are likely to succeed on their substantive due process claim.

C. The balance of equities and the public interest factors also support Plaintiffs' motion.

The final two considerations for a preliminary injunction—the balance of the equities and the public interest—merge when the government is a party and the Court can consider the interests of nonparties. *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014). Considering the interests of non-parties compels granting the motion here. Most importantly, the ordinances restrict water access to the entire Hmong community in the subdivision. Moreover, the broader public interest strongly favors prompt water access to prevent the spread of fires, particularly in a historic drought where fire risks are severe. Where plaintiffs establish "a likelihood that Defendants' policy violates the U.S. Constitution, they also "establish[] that both the public interest and the balance of the equities favor a preliminary injunction." *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014). Finally, the County's purported interests in limiting cannabis grows, water usage, and environmental harm can be accomplished by numerous other tools. *See* Dkt. 33 at 14-19 (discussing other laws that can enforced).

III. CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction should be granted.

Date: August 13, 2021

Respectfully,

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