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10 **UNITED STATES DISTRICT COURT**

11 **EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO DIVISION**

12 PACIFIC MEDIA WORKERS GUILD;
ANGEL JOSE FLORES; JULISSA RUIZ
13 RAMIREZ; and ALYSSA LEIVA;

14 Plaintiffs,

15 v.

16 CITY OF MODESTO and BRANDON
GILLESPIE, in his official capacity as
17 Modesto Chief of Police,

18 Defendants.

Case No. 2:26-cv-01623-JAM-CKD

**CITY DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Date: June 30, 2026
Time: 1:30 p.m.
Dept: Courtroom 6, 14th Floor

The Honorable John A. Mendez

Action Filed: March 25, 2026
Trial Date: None Set

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1 **I. INTRODUCTION**

2 The City of Modesto is a place where people can assemble and protest to get their point
 3 across and stay safe at the same time. The City’s restrictions on wearing masks and combat
 4 equipment at public assemblies – a regulation of conduct, not speech – is critical to these goals.
 5 Plaintiffs nevertheless valiantly try to manufacture a First Amendment emergency situation,
 6 asking the Court to step in and impose extraordinary relief by ordering the City to stand down on
 7 the City’s no combat gear and no face coverings requirements at public protests based on a
 8 “constitutional” violation. In actuality, there is no immediate threat of enforcement or a chilling of
 9 any First Amendment rights that would warrant court intervention – Plaintiffs are free to assemble
 10 and express their views, with the City setting rules for their conduct (e.g. no weapons, masks or
 11 combat gear) to ensure the right to peaceful assembly. And indeed, thousands took to the Modesto
 12 streets on March 28, 2026 for the No Kings March without incident, citation, or arrest.

13 The record shows that the Modesto City Council, based on its understanding of the various
 14 community interests at play and the prior history of public protests, carefully crafted its December
 15 2025 Ordinance to balance the important rights of peaceful assembly with public safety. The City
 16 Council had broad input from the community, the City’s Police Chief, along with the City
 17 Council’s own lived community experiences and tailored the Ordinance to restrict wearing masks
 18 and combat gear at public assemblies in order to reduce the potential for violence and protect the
 19 public safety. Plaintiffs’ disagreement with the City Council’s decision on these regulations of
 20 conduct simply fails to rise to the level of urgency to support a preliminary injunction.

21 Each of the Plaintiffs are free to protest and organize or attend a public assembly in
 22 Modesto. Under the mask provisions (which regulate conduct not speech) they can wear medical
 23 masks, religious face coverings, and costumes that cover the face if necessary to convey the
 24 expressive message of the costume, such as an inflatable dancing frog costume, which cannot be
 25 worn without the mask as it is not separate and removable from the overall costume. As to the
 26 press, they can, and do, report on public protests without any access restrictions and there is no
 27 evidence that they have, or would be, excluded if an unlawful assembly was declared. However,
 28 neither the press nor the public can wear combat gear – a pure conduct regulation adopted back in

2021 which Plaintiffs now belatedly challenge. Plaintiffs seek a preliminary injunction to enjoin these important safety regulations but fail to meet the criteria for this extraordinary relief because:

(1) Plaintiffs have not shown a likelihood of irreparable harm as they have not identified any immediate threat of enforcement for any upcoming public assembly they wish to attend;

(2) Plaintiffs are unlikely to succeed on the merits since the City's restrictions on wearing face coverings to conceal one's identity and wearing combat equipment are content neutral regulations of conduct during public assembly; and

(3) The balance of the equities and the public interest weigh in the City's favor since these restrictions were specifically enacted to protect the public safety of protesters, businesses, the press and peace officers alike, while helping to ensure the right of the people to peacefully assemble in Modesto.

Plaintiffs' request for a preliminary injunction should be denied.

II. FACTUAL BACKGROUND

A. Modesto's December 2025 Ordinance

On December 2, 2025, the Modesto City Council voted to adopt Ordinance No. 3804 Amending the City of Modesto Municipal Code Title 4, Chapter 23 (the "Dec. 2025 Ordinance" or the "Ordinance" found at Exh. 5).¹ The key features of the Dec. 2025 Ordinance are:

- Clarifying the scope of the face covering exemption for religious reasons;
- Clarifying the scope of the face covering for medical reasons; and
- Providing additional findings in support of the safety needs for the limitation on wearing masks and combat equipment during public assembly. Exh. 5 [Dec. 2025 Ord.].

The Dec. 2025 Ordinance provisions as to face coverings and the October 2021 combat equipment restrictions (*see* Exh. 2 [Oct. 2021 Ord.]) are challenged here by Plaintiffs and have been employed at all public protests in Modesto over the past six plus months. The Dec. 2025 Ordinance was adopted by the City Council after a full public hearing, presentation of various

¹ References to Exhibits are to the City Defendants' Compendium of Exhibits in Support of Opposition to Motion for Preliminary Injunction, unless otherwise noted.

1 letters, and a detailed staff report and PowerPoint presentation by Police Chief Gillespie and legal
 2 counsel. Exhs. 4, 7, 8 [Staff Report, PowerPoint, Transcript]. Taking all this information into
 3 consideration, and with their knowledge and understanding of their constituents and the needs of
 4 the community, the Council determined that these provisions were necessary to protect the public
 5 health, safety, and welfare by providing a mechanism to address the potential for violence and the
 6 companion property damage and personal injuries that have been known to accompany several
 7 highly charged public protests. Exh. 5 at 80-81 [Dec. 2025 Ord.].

8 The findings and staff report aptly explain that the City Council adopted these provisions
 9 in order to safeguard against violence and promote peaceful assembly. Exhs. 4, 5 [Staff Report,
 10 Dec. 2025 Ord.]. The mask and combat equipment restrictions are critical elements of these safety
 11 measures aimed at reducing the threats of violence at public assemblies and protecting citizens,
 12 businesses, property and the police alike and avoid creating a “battlefield mentality” at these
 13 public events. Declaration of Police Chief Gillespie (“Chief Gillespie Decl.”) at ¶ 5 and Exh. 5 at
 14 80-85 [Dec. 2025 Ord.].

15 **1. The City’s Restrictions on Combat Gear**

16 Back in 2019, the City had certain limitations on bringing bats, sticks and the like to public
 17 protests in an effort to keep the peace and avoid a battlefield mentality at public protests. Then in
 18 2021, the City amended Chapter 4.23 further to preclude various combat gear at public assemblies
 19 in order to protect the health, safety and welfare of those attending a public assembly, residents,
 20 local businesses, and peace officers alike. *See* Ordinance Nos. 3702 and Ordinance No. No. 3736,
 21 also referred to collectively as the “prior Ordinances” found at Exhs. 1 and 2, respectively. The
 22 prior Ordinances prohibited bringing items that could easily be weaponized and restricted wearing
 23 masks that concealed the wearer’s identity, except for enumerated exceptions, and (as to the later
 24 one) also prohibited wearing combat equipment at public assemblies. Exhs. 1, 2 [prior Ords.].

25 Carrying through on the concern for public safety, the Council also included detailed
 26 findings in its recent Dec. 2025 Ordinance, calling out that in enacting the restrictions it was aware
 27 of, and concerned about, the increased violence taking place at demonstrations around the Country
 28 including Los Angeles, Portland and Chicago where violence erupted between protestors and

1 counter-protestors and was aware and concerned about incidents at demonstrations where groups
 2 wore masks to utilize anonymity to commit acts of violence and/or came suited up in
 3 tactical/combat gear increasing tensions and the likelihood for violent clashes. Exh. 5 at 80-81
 4 [Dec. 2025 Ord.]. The City was initially concerned in 2019 because a Straight Pride event was
 5 scheduled to take place in Modesto, and police intelligence indicated that the event was likely to
 6 attract supporters and counter-protestors with diametrically opposed views, namely the Proud
 7 Boys and Antifa. Exh. 1 at 6-7 [Prior Ord.]; Exh. 5 at 80-81 [Dec. 2025 Ord.]. The City’s actual
 8 experience bore out violence at the Straight Pride events held in 2020 and 2022. Chief Gillespie
 9 Decl. at ¶¶ 5, 14; Exh. 5 at 81 [Dec. 2025 Ord.].

10 In fact, the Proud Boys is designated as a hate group by the Southern Poverty Law Center,
 11 with a known history of violence, and members were expected to attend and support the Straight
 12 Pride rally. Chief Gillespie Decl. at 8 and Exh. 5 at 80 [Dec. 2025 Ord.]. Antifa groups also have
 13 a known history of violence when counter-protesting, and it was anticipated they planned to
 14 counter-protest the Straight Pride event. Chief Gillespie Decl. at ¶ 9. The Ordinance’s explicit
 15 findings and Chief Gillespie’s testimony set forth the public safety needs at play in order to avoid
 16 a “battlefield” mentality with the likelihood of violent clashes by escalating tensions between
 17 protestors and counter-protestors or between protestors/counter-protestors and the police. *Id.* at
 18 ¶¶ 17, 19, 20; Exh. 5 at 80-81 [Dec. 2025 Ord.]. The City’s findings reflect the facts on the
 19 ground – they are not directed at the speech or message of the Proud Boys, Antifa, or any other
 20 group, but rather at the prior violence. While the City Council is required to enact viewpoint-
 21 neutral regulations, it is not required to ignore the news and the facts in their own community.

22 **2. The City’s Regulations of Face Coverings/Masks**

23 In enacting the Dec. 2025 Ordinance (along with the earlier iterations) the City Council in
 24 its findings and companion staff report called out the violence taking place at demonstrations
 25 around the Country and the risk of violence when groups with opposing views clash at public
 26 assemblies. Exh. 5 at 80-81 [Dec. 2025 Ord.]. This included the concern that individuals were
 27 wearing face coverings at public assemblies in an attempt to conceal their identity and commit
 28 criminal acts without fear of accountability. *Id.* When the prior Ordinances were initially

1 adopted, it was well documented that at events throughout the country groups, such as Antifa,
 2 wore masks and other apparel to cover their faces to conceal their identities, using their anonymity
 3 to then commit acts of violence or vandalism without concern of identification. Exh. 1 at 6-7
 4 [prior Ord.] This is not a hypothetical or speculative concern for Modesto. Rather, the Modesto
 5 Police Chief has documented various events in Modesto where masked participants used masks to
 6 hide their identity as a means to intimidate, including when acting in coordinated groups. Chief
 7 Gillespie Decl. ¶ 14; Exh. 5 at 80-82 [Dec. 2025 Ord.]; Exh. 7 at 107-112, 116, 120 [PowerPoint].

8 As explained further below, the provisions prohibiting masks are narrowly tailored to
 9 provide exceptions for religious beliefs, medical necessity, and costumes which obscure the face
 10 as part of the expressive function of the costume. This allows people to protect themselves from
 11 infectious diseases, observe their religious practice or engage in expressive conduct while greatly
 12 reducing the use of masks at public assemblies. As the March 2026 No Kings event illustrates,
 13 Modesto has experienced a dancing inflatable unicorn and the like – it simply has not experienced
 14 high rates of people using exempt masks at public assemblies. Chief Gillespie Decl. at ¶¶ 13, 26.

15 Since the City’s adoption of the content-neutral restrictions on masks and combat
 16 equipment in the prior Ordinance, there has been reduced violence at public protests, and over the
 17 last six months since the Ordinance’s adoption there have been no citations or arrests for combat
 18 gear or face covering violations. *Id.* at ¶¶ 20, 24-25. In fact, the majority of the participants at
 19 public assemblies since the adoption of the Ordinance have been unmasked, and those wearing
 20 masks that are allowed subject to an exemption have been minimal. *Id.* at ¶¶ 20, 24-25, 29. The
 21 City has not experienced any ninja costumes, Halloween costumes or theatrical costumes at the
 22 numerous protests in Modesto to date. *Id.* at ¶ 13. If a participant has a medical grade mask on,
 23 this is allowed, and no proof of medical necessity is needed. *Id.* at ¶ 12. Likewise, if a participant
 24 is wearing an item that is recognized as a religious covering, an individual’s offer that it is worn
 25 for a religious purpose is accepted without further examination. *Id.* at ¶ 12. While other cities
 26 have had an increase in violent protests, and/or situations where unlawful assemblies have been
 27 declared, that has not happened in Modesto. *See id.* at ¶¶ 34-35.

28 ///

B. The Mask and Combat Equipment Restrictions Ensure the Right of Peaceful Assembly

Individuals often decide where to protest after assessing the safety of a particular City and location and avoid areas where they think there will be masked individuals attempting to obscure their identity or individuals coming wearing tactical/combat gear. Chief Gillespie Decl at ¶ 18. Modesto’s restrictions on masks and combat equipment help to ensure that Modesto remains a welcoming environment for all people to participate in public assembly, whether they are families, activists, or journalists. *Id.* at ¶¶ 7-10, 16-18, 20, 34-35.

Modesto generally does not require a permit for people to engage in public assembly (exceptions include where there are road closures or use of park facilities). But it does set rules on conduct to ensure the safety of all participants, onlookers and the police. The limitations on wearing masks and combat equipment are important aspects of the content-neutral regulations enacted to further free speech and assembly. These restrictions help ensure the City’s key objectives: (a) respect/protect First Amendment rights to peacefully assemble and protest; (b) ensure community members feel safe/secure; (c) prevent/minimize acts of violence/vandalism; and (d) ensure no peace officers are injured. Chief Gillespie Decl at ¶ 3; Exh. 5 at 79 [Dec. 2025 Ord.]. The restrictions on masks and combat gear help ensure that Modesto is a place where people can come and assemble and protest to get their point across and stay safe at the same time.

III. PLAINTIFFS HAVE NOT MET THE STANDARD FOR GRANTING THE EXTRAORDINARY RELIEF OF A PRELIMINARY INJUNCTION

The Supreme Court has deemed preliminary injunctions to be an extraordinary remedy and one that mandates a strong showing for a court to step in and grant such relief. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To obtain such extraordinary relief mandates that the moving party show: (1) likelihood of success on the merits; (2) likelihood of irreparable harm absent a preliminary injunction; (3) that the balance of equities tips in favor of issuing an injunction; and (4) that an injunction is in the public interest. *Id.*; Fed. R. Civ. Proc. § 65(b)(1). In the alternative, the “sliding scale” approach can be used whereby a party must show a combination of serious questions going to the merits and must also show that the balance of hardships tips

1 sharply in the movant’s favor. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–32 (9th
 2 Cir. 2011). A weaker showing on either of the two points can be outweighed by a stronger
 3 showing on the other. *Id.* Here, Plaintiffs fall well short of satisfying either of the standards for
 4 granting the extraordinary relief of a preliminary injunction. This Court should decline their
 5 request to enjoin the restrictions on wearing masks and combat equipment which are important
 6 public safety measures enacted to reduce the potential for violence and allow people to peacefully
 7 and safely protest, demonstrate or engage in other public assemblies in Modesto.

8 **A. There Is No Irreparable Harm**

9 As an initial matter, there is no immediate threat of irreparable harm to support enjoining
 10 the City’s restrictions on conduct that preclude the wearing of masks and combat equipment. This
 11 lack of irreparable harm is fatal to Plaintiff’s preliminary injunction request. Plaintiffs appear to
 12 rest on the mistaken proposition that because they “allege” a violation of constitutionally protected
 13 First Amendment rights that such is sufficient. Plaintiffs, however, do not get a “free pass” simply
 14 because they are making claims of purported constitutional violations. *See CTIA - The Wireless*
 15 *Ass’n v. City of Berkeley, Cal.*, 928 F.3d 832, 851 (9th Cir. 2019) [“the mere assertion of First
 16 Amendment rights does not automatically require a finding of irreparable injury”].

17 Rather, to satisfy the irreparable injury element, Plaintiffs’ assertion of harm must be
 18 grounded in their alleged constitutional injury – they need to establish that there is in fact a First
 19 Amendment right to wear combat gear and/or a face mask. They simply cannot and have not done
 20 so here, as more fully explained in Section III.B.1 below. *See Preminger v. Principi*, 422 F.3d
 21 815, 826 (9th Cir. 2005) [no irreparable harm where plaintiff failed to show likelihood of success
 22 on the merits of First Amendment claim]; *see also Comfort v. MacLaughlin*, 473 F. Supp. 2d
 23 1026, 1029–30 (C.D. Cal. 2006) [where “Plaintiffs’ First Amendment claim is unlikely to succeed,
 24 the Court does not find that the prohibition on speech is currently causing an irreparable injury”].

25 Plaintiffs have also not identified any immediate threat of enforcement for any upcoming
 26 public assembly they wish to attend, nor have they sought, nor has the City denied them, any
 27 parade, entertainment, or temporary street closure permit or any other type of permit, which would
 28 support a claim of potential immediate irreparable harm. Plaintiffs’ reliance on *Elrod v. Burns*,

427 U.S. 347, 373 (1976), regarding the harm from the chilling of First Amendment protected political speech does not compel a different result. *Elrod* involved highly protected, time-sensitive, political speech/belief associated with party affiliation and being discharged from one’s job for same. By contrast here, Plaintiffs are not being prevented from “speaking” at all. Rather, it is only conduct – namely, their attire that is being regulated which is not a regulation of protected speech. *See Edge v. City of Everett*, 929 F.3d 657, 668 (9th Cir. 2019); *see also Ku Klux Klan v. Kerik*, 356 F.3d 197, 208 (2nd Cir. 2004). A temporary restriction on wearing certain items of clothing does not rise to the level of an infringement on time-sensitive expressive activity that the Supreme Court addressed in *Elrod*. Without a protected speech interest, Plaintiffs fail to establish irreparable harm and this alone mandates denying their requested extraordinary relief.

B. Plaintiffs Have Not Shown a Likelihood of Success on the Merits

Plaintiffs have also failed to show a likelihood of success on the merits, and this too is fatal to their request for a preliminary injunction.

1. The City’s Mask and Combat Equipment Restrictions Do Not Violate Plaintiffs’ Free Speech Rights (First and Second Causes of Action)

The challenged masking and combat equipment restrictions regulate conduct, not speech. Plaintiffs’ failure to acknowledge this fundamental fact is fatal to their request for a preliminary injunction.² Specifically, Plaintiffs erroneously employ the higher standards of review reserved for regulations of pure speech, and compound that error by employing the most rigorous standard of review used for content-based restrictions. But here, the City’s restrictions on wearing masks and combat gear do not regulate expressive conduct, and thus are subject to the most deferential rational basis standard of review which they easily pass. Even assuming *arguendo* that the restrictions trigger free speech rights, they also meet with the applicable intermediate scrutiny standard of review. The regulations are neither content-based, nor do they violate a right to

² Plaintiffs’ challenge to the combat equipment restriction, which was first adopted in the fall of 2021, is barred by the applicable two-year statute of limitations, precluding injunctive relief for this reason alone. *See Holt v. Cnty. of Orange*, 91 F.4th 1013, 1018 (9th Cir. 2024) [California’s two-year limitation period for personal injury applies to Section 1983 claims].)

1 anonymity, and Plaintiffs’ arguments on these fronts are also misstated as a matter of law.

2 **(a) The Restrictions Regulate Conduct, Not Speech, and Meet the**
 3 **Applicable Rational Basis Standard of Review**

4 The Supreme Court has cautioned that the courts “cannot accept the view that an
 5 apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in
 6 the conduct intends thereby to express an idea.” *U.S. v. O’Brien*, 391 U.S. 367, 376 (1968)
 7 [prohibition on burning draft card did not violate First Amendment]. Thus, a conduct-regulating
 8 statute of general application, which imposes an incidental burden on the exercise of free speech
 9 rights, does not implicate the First Amendment. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706
 10 (1986); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1058 (9th Cir. 2010). In regards to
 11 clothing (as is relevant here), the courts have specifically explained that the mere act of wearing
 12 certain articles of clothing is not protected activity under the First Amendment. *Edge*, 929 F.3d at
 13 668 (baristas’ act of wearing pasties and g-strings not expressive conduct); *Cuviello v. City of*
 14 *Belmont*, No. 24-5191, 2025 WL 2887199, *2 (9th Cir. Oct. 10, 2025) [wearing protective gear
 15 while removing plants off-trail not expressive conduct]; *see also Kerik*, 356 F.3d at 208 [anti-mask
 16 statute did not regulate conduct afforded First Amendment protection].

17 A regulation of conduct only needs to meet with the deferential rational basis standard of
 18 review and passes muster when it is rationally related to a legitimate government interest.
 19 *Anderson*, 621 F.3d at 1059. In order for the regulation of conduct to burden expressive rights
 20 such that it rise to the level of triggering First Amendment protection, the conduct being regulated
 21 must include: an intent to convey a particularized message; *and* a great likelihood that the
 22 message will be understood by those who view it. *Edge*, 929 F.3d at 668; *Spence*, 418 U.S. at
 23 409-11. Conduct that does not meet both these criteria – such as the restriction on wearing masks
 24 and combat equipment here – does not trigger First Amendment protection.³ *See Edge*, 929 F.3d
 25 at 670; *see also Kerik*, 356 F.3d at 208.

26 _____
 27 ³ The California constitution also does not protect non-expressive conduct. *Ctr. for Bio-*
 28 *Ethical Reform v. Irvine Co., LLC*, 37 Cal. App. 5th 97, 114 (2019) [finding restrictions on
 plaintiffs’ videotaping fell outside the bounds of California’s constitutional protection].

1 The *Kerik* case out of the Second Circuit, involving a masking restriction similar to the one
 2 challenged in this case, found that the regulated activity – the wearing of masks in groups – was
 3 not expressive conduct and thus did not implicate the First Amendment at all. *Kerik*, 356 F.3d at
 4 210. In *Kerik*, the Klu Klux Klan had sought, and was denied, a parade permit on the basis that
 5 the plan for members to wear their full regalia, including hooded masks during the parade,
 6 violated provisions of New York’s state penal code which prohibited wearing masks while
 7 congregating in public places. *Id.* at 200-01. The Second Circuit explained that while the robe,
 8 mask and hood regalia of the Klan are expressive, *that the mask portion of the regalia does not*
 9 *convey a message independently of the robe and hood*, but was duplicative of the rest of the attire.
 10 *Id.* at 207-08. Thus, New York’s anti-mask statute did not rise to the level of burdening
 11 expressive conduct afforded First Amendment protection. *Id.* The same holds true here.

12 While the Ninth Circuit has not specifically addressed the issue of mask restrictions at
 13 public assemblies, it has found that statutes regulating articles of clothing do not rise to the level
 14 of triggering First Amendment protection. *See Edge*, 929 F.3d at 669-70. In *Edge*, the Court
 15 analyzed a dress code ordinance that required all employees of quick-service facilities (including
 16 bikini barista stands) to comply with a dress requirement mandating coverage of “minimum body
 17 areas.” *Id.* at 662. The baristas argued that their First Amendment rights were violated by the
 18 dress code ordinance as they intended to convey messages such as female empowerment by
 19 wearing bikinis while serving lattes and espressos. *Id.* The Ninth Circuit explained that the
 20 baristas’ choice to wear such attire did not constitute sufficiently expressive conduct to warrant
 21 First Amendment protection as there was neither a particularized message, and even if there was,
 22 the plaintiffs had not demonstrated a “great likelihood” that their intended message (related to
 23 female empowerment and confidence) would be understood by those who viewed them. *Id.* at
 24 662, 668-69. Thus, the Ninth Circuit found that the mode of dress at issue was not sufficiently
 25 communicative to merit constitutional protection. *Id.* The same is true here.

26 Plaintiffs attempt to evade this necessary conclusion that the mode of dress at issue (as in
 27 *Kerik* and *Edge*), does not rise to the level of impacting First Amendment rights by arguing *inter*
 28 *alia*: (1) that the mask restrictions violate individual Plaintiffs’ rights to freedom of expression;

(2) that the mask and combat gear restrictions violate the expressive rights of third party groups (e.g. Proud Boys and Antifa); and (3) that the mask and combat gear restrictions violate journalists’ free speech rights. Each of these arguments fails for the reasons discussed below.

(i) Individual Plaintiffs

In regards to the three individually named Plaintiffs, none has shown that their face coverings convey a particularized message or that there is a great likelihood that any particularized message would be understood by those who viewed their face coverings nor does their fear of protesting without a mask trigger a First Amendment right. Specifically, each named plaintiff fails to establish they had a particularized message that a reasonable person would understand.

(A) Plaintiff Angel Flores.

Plaintiff Flores does not claim an intent to express any particularized message but instead declares that he wore his skull face mask for his “own comfort” and because “it is part of who I am.” Flores Decl. at ¶ 3. Mr. Flores’ non-particularized message simply does not implicate a First Amendment right. *See Edge*, 929 F.3d at 668. Likewise, his concern over protesting without a mask fares no better. *See* Section III.B.1.d. *infra*; *see also Kerik*, 356 F.3d at 209.

(B) Plaintiff Julissa Ramirez

Plaintiff Ramirez describes the expressive function of wearing a keffiyeh “around my head” which is “a symbol of resistance against such oppression [against Palestine]” and as it connects her with her grandmother who wore a traditional scarf called a rebozo “around her head.” Ramirez Decl. at ¶¶ 4-5; emphasis added. By her own admission, Ms. Ramirez notes that the keffiyeh can be worn around her head (which the Ordinance allows) and fails to call out any particularized message, which would be conveyed or understood by wearing the scarf across her face. And indeed, her own photo she offers to this Court shows she is not covering her face but has it over her head and shoulders. Ramirez Decl., Exh. A. Similarly, her desire to wear a keffiyeh to cover her face for comfort and safety reasons, is not a communicative function that triggers a First Amendment right. Nor does Ms. Ramirez have the right to protest under her ideal conditions, such as with anonymity. *See* Section III.B.1.d. *infra*; *see also Kerik*, 356 F.3d at 209.

Ms. Ramirez’ expressive rights in wearing a bandana as a sign of Latino and Mexican-

American culture (Ramirez Decl. at ¶ 20) are also not impacted by the mask restrictions as there is no particularized message in wearing it across her face that would be understood by those viewing it, and as she can wear a bandana around her neck, around her head, as an arm band or attached to her purse or backpack – she is only prohibited from using it to cover her face.

(C) Plaintiff Alyssa Leiva

Ms. Leiva also wears a keffiyeh at protests. Leiva Decl. at ¶ 6. As with Ms. Ramirez, Ms. Leiva has not identified a particularized message she intends to convey that would be understood by those viewing it, by wearing her keffiyeh over her face, separate from wearing it around her head, which is permitted under the Ordinance. *See id.* at ¶¶ 6-7. And similarly, the desire to cover her face with a keffiyeh at protests for comfort and safety reasons is not a First Amendment protected activity. *See* Section III.B.1.d; *see also* *Kerik*, 356 F.3d at 209.

(ii) Third Parties

The expressive rights of other third parties identified by Plaintiffs (e.g. Proud Boys and Antifa) are also not unconstitutionally impacted by the restrictions on masks and combat gear (and any challenge to the latter provision is time-barred). The third party declarations offered by Plaintiffs are not only objectionable and should not be considered by this Court (see objections filed concurrently herewith), but they also do not identify a particularized message that the masks and combat gear worn by these groups express, let alone a “great likelihood” that an intended message associated with the masks and/or combat gear (separate from their overall attire) would be understood by those who viewed them as is required for expressive conduct to be afforded First Amendment protection.

(iii) Journalists

The First Amendment rights of journalists to report on the news is also not violated by the mask and combat gear restrictions, and a challenge to the latter is time-barred. Rather, “generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.” *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) [overturning state law judgment that First Amendment precluded promissory estoppel claim regarding disclosure of confidential source]. This is especially so,

1 where, as here, “the law does not target or single out the press” but instead applies generally to all
 2 citizens. *Id.* at 670. As in *Cohen*, the mere incidental effect that some newsmen might be
 3 dissuaded from gathering some news by not being able to wear masks and combat equipment to a
 4 public assembly does not cause the Ordinance to violate their First Amendment rights.

5 Plaintiffs cite no cases that support a journalist’s First Amendment right to wear masks or
 6 combat gear. Instead, they primarily rely on journalists’ rights to remain at a protest after a
 7 dispersal order under California Penal Code Section 409.7. But this statutory right does not confer
 8 a right on journalists to wear masks or combat gear as discussed in detail in Section III.B.3. *infra*.⁴
 9 The City also notes that the declarations offered by Plaintiffs that detail journalists’ concerns with
 10 injuries sustained when covering protests, almost exclusively concern events outside Modesto,
 11 save one which occurred before the Dec. 2025 Ordinance, and do nothing to establish the need for
 12 a preliminary injunction in this scenario. Indeed, the restrictions on masks and combat equipment
 13 were enacted to minimize exactly what Plaintiffs are scared of – namely the potential for violent
 14 interactions at protests, the potential need for crowd control measures, and the risk of physical
 15 injuries from protestors and/or crowd control measures. *See* Chief Gillespie Decl. ¶¶ 3, 20; Exh. 5
 16 at 79-82, 85 [Dec. 2025 Ord.].

17 In short, the restrictions on wearing masks or combat gear are conduct-based regulations of
 18 general applicability that do not trigger First Amendment protections for Plaintiffs or for third
 19 parties, including the press. Thus, the rational basis standard of review applies, and the City
 20 clearly meets this standard as the restrictions are rationally related to a legitimate government
 21 interest – that of public safety. The restrictions promote: the protection of individuals’ First
 22 Amendment rights to peacefully assemble/protest; making the Modesto community members feel
 23 safe/secure; preventing/minimizing any acts of violence/vandalism in Modesto; and ensuring no
 24 peace officers are injured. Chief Gillespie Decl. at ¶ 3 and Exh. 5 at 79-82, 85 [Dec. 2025 Ord.].

25 _____
 26 ⁴ Plaintiffs’ reliance on *Garcia v. Cnty. of Alameda*, 150 F.4th 1224 (9th Cir. 2025) is also
 27 misplaced. There, the Court found that a ban on observing sideshows, as-applied to a journalist,
 28 violated the First Amendment, as he could not report on sideshows without observing them. *Id.*
 By contrast, here, the press is not prevented from observing protests. It is only their non-
 expressive conduct in wearing masks and combat equipment that is limited.

**(b) Even Assuming *Arguendo* That the Restrictions Regulate
Expressive Conduct, They Pass Intermediate Scrutiny**

Assuming *arguendo* that the restrictions on wearing masks and combat equipment trigger First Amendment protection, the restrictions also comport with the intermediate standard for regulating expressive conduct established in *US v. O'Brien*. Under the four part *O'Brien* test, regulations of expressive conduct are constitutionally sound if they: (1) are within the constitutional power of the government; (2) further an important or substantial government interest; (3) are unrelated to the suppression of free expression; and (4) burden expressive conduct no more than is essential to the furtherance of the government interest. *O'Brien*, 391 U.S. at 377.

First, restrictions on clothing at public assemblies are within the constitutional power of Modesto. The Supreme Court has affirmed that it is the right of a state or municipality to regulate the use of city streets and other facilities to assure safety and convenience of people in their use. *Cox v. State of La.*, 379 U.S. 536, 554 (1965). Second, the City has identified a number of substantial interests served by the restrictions that relate to health and safety, including promoting the protection of First Amendment rights to peacefully assemble, making the Modesto community members feel safe and secure, minimizing any act of violence or vandalism in Modesto, and ensuring that no members of the public nor peace officers are injured. Chief Gillespie Decl. at ¶ 3 and Exh. 5 at 79-82, 85 [Dec. 2025 Ord.]. The third factor is also satisfied as the restrictions regulate conduct regardless of its expressive nature, and unrelated to animus or content/viewpoint discrimination. See Section III.B.1.(c). *infra*. The fourth factor is also met as the restrictions on First Amendment freedoms (assuming *arguendo* it burdens such) is no more than is essential for the furtherance of the City's interest.

Plaintiffs argue that the restrictions are overbroad – defeating the fourth *O'Brien* factor – because the City purportedly has other means available to it to address safety issues, including by declaring an unlawful assembly or arresting people for inciting a riot, disturbing the peace, vandalism, looting and the like. But this ignores the fact the penal codes offered by Plaintiffs only come into play after health and safety issues have arisen rather than promoting the peaceful assembly and overall protection of the protesters and businesses alike. Moreover, the City is not

1 required to employ the least restrictive means to achieve its interest. Indeed, “so long as the
 2 neutral regulation promotes a substantial government interest that would be achieved less
 3 effectively absent the regulation” it is permissible under the *O’Brien* test. *Rumsfeld v. Forum for*
 4 *Acad. & Instit. Rights, Inc.*, 547 U.S. 47, 67 (2006).

5 Moreover, even if the overbreadth doctrine were applicable (which it is not) the doctrine
 6 has no relevance here as the Ordinance does not prohibit a substantial amount of protected speech
 7 in relation to its constitutional applications – indeed it does not prohibit any speech at all. *See U.S.*
 8 *v. Williams*, 553 U.S. 285, 293 (2008). And “the mere fact that one can conceive of some
 9 impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth
 10 challenge.” *Members of City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800
 11 (1984). Rather, an overbreadth challenge will “rarely, if ever,” succeed where the law or
 12 regulation at issue is not specifically addressed to speech or to conduct necessarily associated with
 13 speech. *Virginia v. Hicks*, 539 U.S. 113, 124 (2003). This perfectly illustrates why the
 14 overbreadth doctrine has no applicability here where the challenged restrictions limit what can be
 15 worn and are not addressed to speech or conduct potentially associated with speech.

16 The City’s legitimate interest in protecting the safety of protest attendees, counter-
 17 protestors, local residents, business owners and police officers would be achieved less effectively
 18 absent the restrictions on masks and combat equipment that can be worn at public assemblies.
 19 Specifically, the regulations address the concern that individuals wearing masks to obscure their
 20 identity and/or geared up in combat equipment creates a less safe environment for people to
 21 exercise their First Amendment rights peacefully that other penal code provisions do not address.
 22 Thus, even assuming *arguendo* that the restrictions burden First Amendment rights, they meet the
 23 *O’Brien* standard of review for expressive conduct.⁵

24
 25
 26 ⁵ The restrictions on masks and combat gear also pass muster under the slightly more
 27 rigorous time, place and manner standard applicable to expressive activity (as opposed to
 28 expressive conduct) as the restrictions are content-neutral, narrowly tailored to serve a significant
 government interest and leave open ample alternative channels for communication of the
 information. *See Anderson*, 621 F.3d at 1059 and 1064.

(c) The Restrictions Are Content Neutral

Plaintiffs also speciously argue that the Ordinance’s findings and the exceptions to the mask restrictions show impermissible content-based discrimination.⁶ This is false.

Plaintiffs take issue with the mention of documented events regarding the Proud Boys and Antifa in the City’s findings, ignoring the fact that the courts have explained that the government can enact content-neutral restrictions in response to activities by specific groups without that response constituting viewpoint discrimination or animus. *See Boardman v. Inslee*, 978 F.3d 1092, 1119 (9th Cir. 2020) [facially neutral statute with a legitimate end is not discriminatory simply because it affects some groups more than others]; *Swanner v. U.S.*, 937 F.2d 1478, 1483 (9th Cir. 1991) [drafting a regulation with specific speaker in mind does not equate to viewpoint-based discrimination]. The key principle is that a regulation affecting entities holding a particular viewpoint is not viewpoint discriminatory unless it targets those entities because of their viewpoint. *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 900 (9th Cir. 2018) [facially neutral statute with “legitimate end is not discriminatory simply because it *affects* some groups more than others”]; *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 695 (2010) [“regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others”]. This is also reflected in the Ninth Circuit’s decision in *Edge* where it upheld the dress code ordinance that was specifically enacted because of concerns about one business – the bikini barista stands. *Edge*, 929 F.3d at 662.

Plaintiffs’ arguments that the exceptions to the masking restrictions are content-based on their face because the findings reflect animus toward the Proud Boys and Antifa (two groups with diametrically opposed ideologies on the far-right and far-left of the political spectrum) is illogical and contrary to the law and facts here. Modesto may properly take notice of contemporaneous

⁶ A law is content-based where the regulation was adopted because of disagreement with the message the speech conveys, is enacted or enforced based on viewpoint discrimination (a subset of content-based discrimination) or animus (i.e. “an irrational prejudice,” or “a bare desire to harm”) violates the First Amendment. *See Boardman*, 978 F.3d at 1119; *see also Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015). None of these indicia of prohibited content or viewpoint-based discrimination or animus are present here.

1 activities occurring within its community without running afoul of content neutrality, such as the
2 well documented violent conduct of the Proud Boys and violent clashes between Proud Boys and
3 individuals identifying as Antifa. *See* Chief Gillespie Decl. at ¶¶ 7-13 and Exh. 5 at 80 [Dec. 2025
4 Ord.]. Likewise, even if the mask and combat equipment restrictions impact the Proud Boys or
5 Antifa disproportionately, as compared to other groups that do not as frequently wear such attire,
6 this does not transform the facially neutral language into an invidiously discriminatory regulation
7 as those groups are not being targeted based on their message or viewpoint.

8 The exceptions to the mask restrictions also do not render the regulations facially content-
9 based or discriminatory. Rather, the exceptions are an example of the City narrowly tailoring its
10 regulations and excluding and minimizing any burden on expressive conduct. The *Kerik* opinion
11 is again instructive here, where the Second Circuit explained that New York could “legitimately
12 create an exception for mask wearing that occurs in connection with a masquerade party or like
13 entertainment” without offending constitutional rights as it was not the place of the courts to
14 second-guess the New York legislature’s determination that mask wearing at entertainment events
15 does not pose the same security risks as mask wearing in other circumstances. *Kerik*, 356 F.3d at
16 209-10. The same is true here. Plaintiffs cannot ask the courts to second-guess the City’s
17 legislative determination that mask wearing for medical or religious reasons, or where it is the
18 expressive function of the costume, does not carry the same risks as mask wearing to conceal
19 one’s identity. *See* Chief Gillespie Decl. at ¶¶ 5-15 and Exh. 5 at 85-86 [Dec. 2025 Ord.].

20 Indeed, the exceptions for the mask restrictions mean that the City’s restrictions do not
21 sweep as broadly as the anti-mask regulations upheld in *Kerik*, and are narrowly tailored precisely
22 to the conduct associated with a heightened risk of violence in a content-neutral manner while
23 excluding potentially expressive conduct (such as an inflatable unicorn costume) and excluding
24 wearing medical masks or masks for religious purposes that have not been associated with the
25 same risk of violence. *See* Chief Gillespie Decl. at ¶¶ 5-15 and Exh. 5 at 85-86 [Dec. 2025 Ord.].
26 It is not the function of the courts to appraise the wisdom of the City’s regulatory decisions, and
27 the City must be allowed a reasonable opportunity to experiment with solutions to the serious
28 safety problems that can arise at public assemblies. *See Young v. Am. Mini Theatres, Inc.*, 427

1 U.S. 50, 71 (1976) [plurality opinion]. As the Supreme Court has explained, the City “may rely
 2 on any evidence that is ‘reasonably believed to be relevant’ for demonstrating a connection
 3 between speech and a substantial [] government interest.” *See City of L.A. v. Alameda Books, Inc.*,
 4 535 U.S. 425, 438-39 (2002). The City is not required to offer empirical data as Plaintiffs
 5 implicitly urge which ignores the understanding that the legislative body and Police Chief have of
 6 their own community. *See id.* Rather, the courts give deference to the City’s evidence
 7 recognizing that the City Council is in a better position than the judiciary to gather and evaluate
 8 data on local problems. *See id.*

9 **(d) The Restrictions Do Not Violate a Right to Anonymity**

10 Plaintiffs also argue that preventing the public from protesting anonymously is “arguably
 11 unlawful” and supports the application of strict scrutiny. This too is wrong. “[T]he Supreme
 12 Court has never held that the freedom of association or the right to engage in anonymous speech
 13 entails a right to conceal one’s appearance at a public demonstration. Nor has any Circuit found
 14 such a right.” *Kerik*, 356 F.3d at 209; *see John Doe No. 1 v. Reed*, 561 U.S. 186, 217 n. 4 (2010)
 15 (J. Stevens, concurring) [right to speak is protected – not the right to speak anonymously.] The
 16 cases offered by Plaintiffs are inapposite as they address anonymity in various written disclosures
 17 (speech). *See Talley v. Cal.*, 362 U.S. 60, 64 (1960) [compelled disclosure on political handbills
 18 impermissible]; *see also NAACP v State of Ala.*, 357 U.S. 449 (1958) [disclosure of NAACP
 19 membership improper]. And not anonymity at public protest and the right to assemble for which
 20 there is no attendant right to anonymity. *See Kerik*, 356 F.3d at 209

21 The Second Circuit aptly explained that an anti-mask law that makes some individuals less
 22 willing to participate in public assembly is not a constitutional infringement and “reject[ed] the
 23 view the First Amendment is implicated every time a law makes someone – including a member
 24 of a politically unpopular group – less willing to exercise his or her free speech rights.” *Id.* While
 25 the First Amendment protects the rights to express one’s viewpoints, however, unpopular, “*it does*
 26 *not guarantee ideal conditions for doing so*, since the individual’s right to speech must always be
 27 balanced against the state’s interest in safety, and its right to regulate conduct that it legitimately
 28 considers potentially dangerous.” *Id.* (emphasis added). The same holds true here.

1 While Plaintiffs may prefer to attend public protests, demonstrations or rallies with masks
2 to conceal their identity, they do not have a constitutional right to do so. Plaintiffs testify that they
3 are less likely to engage in protests for fear of identification and harassment by third parties with
4 divergent views. But this does not implicate their First Amendment rights where, as here, the
5 regulations at issue are content-neutral regulations of conduct that the City carefully examined and
6 determined were needed for safety and to promote peaceful public protests. *See* Exh. 5 [Dec. 2025
7 Ord.]; *see also Kerik*, 356 F.3d at 209. Plaintiffs’ urging that this Court second-guess the City
8 Council’s legislative determination should be rejected.

9 As well, there simply is no reasonable expectation of anonymity when individuals are in
10 the public street, public park and the like. *See Kerik*, 356 F.3d at 209. This is amplified in today’s
11 modern reality where it is clear that individuals can have no reasonable expectation of being
12 anonymous while in the public right of way given the ubiquitous nature of recording devices,
13 whether it be by other individuals (e.g. iphones), businesses (e.g. ring and security cameras), or
14 law enforcement (traffic enforcement cameras and surveillance cameras). *See* Chief Gillespie
15 Decl. at ¶ 7. The right to speak anonymously is not impacted by the Ordinance – it is a regulation
16 of conduct at public assemblies which does not carry with it any attendant right to anonymity.
17 Indeed, the very notion of public protest carries with it that individuals are joining their voices
18 together publicly to show solidarity for a cause.

19 Plaintiffs’ reliance on the state court decision in *Ghafari v. Mun. Ct.*, 87 Cal. App. 3d 255
20 (1978), from nearly fifty years ago (which clearly predated the iPhone), is not persuasive here.
21 There, the court considered whether a state penal code that prohibited individuals from appearing
22 in public with their face partially or completely concealed, violated the First Amendment (the
23 court did not consider any California constitutional claims). *Ghafari*, 87 Cal. App. 3d at 260-61.
24 The case is of limited value as it was an analysis of a state court’s interpretation of federal law, it
25 considered a much broader mask restriction, the protestors challenging the prohibition were
26 unaware of the restriction before they demonstrated (unlike Plaintiffs here that have clear notice),
27 and the court noted that the issue was one of first impression under federal law and did not have
28 the benefit of the Second Circuit’s decision in *Kerik*. *See id.*

1 The mask restrictions here do not prevent Plaintiffs, or anyone else, from speaking
 2 anonymously on the internet, through handbill distribution, in costume at a City Council meeting,
 3 or otherwise. That Plaintiffs are restricted from using masks to conceal their identity when
 4 exercising their right to peacefully assemble, does not violate their First Amendment rights.

5 **2. The City’s Mask and Combat Equipment Restrictions Comport with**
 6 **Due Process (Third and Fourth Causes of Action)**

7 Plaintiffs’ arguments that the Ordinance violates due process (which are focused
 8 exclusively on the mask restriction) are equally flawed.

9 **(a) The Prohibited Conduct Is Not Unconstitutionally Vague**

10 It is a basic principle of due process that for an enactment to be constitutionally sound, it
 11 must apprise the individual of reasonable notice of what conduct is allowed and what conduct is
 12 precluded. *See Edge*, 929 F.3d at 664. As explained by the courts, this means a regulation should
 13 “define the criminal offense with sufficient definiteness that ordinary people can understand what
 14 conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory
 15 enforcement.” *Gammoh v. City of La Habra*, 395 F.3d 1114, 1119 (9th Cir. 2005) quoting
 16 *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Edge*, 929 F.3d at 664. The vagueness doctrine
 17 also does not require “mathematical certainty from our language.” *Grayned v. City of Rockford*,
 18 408 U.S. 104, 110 (1972); *Crownholm v. Moore*, No. 23-15138, 2024 WL 1635566, *3 (9th Cir.
 19 Apr. 16, 2024). Rather, the courts have explained that “[c]ondemned to the use of words, we can
 20 never expect mathematical certainty from our language. Perfect clarity and precise guidance have
 21 never been required even of regulations that restrict expressive activity.” *Edge*, 929 F.3d at 664
 22 (cleaned up), quoting *United States v. Williams*, 553 U.S. 285, 304 (2008); *see also Givens v.*
 23 *Newsom*, 459 F. Supp. 3d 1302, 1316 (E.D. Cal. 2020). Likewise, a regulation must be read in
 24 full because multiple potentially subjective terms can be read together to provide the definiteness
 25 required. *Gammoh*, 395 F.3d. at 1120-21.

26 The City’s provisions found in Chapter 4.23 easily meet this test. Plaintiffs’ manufactured
 27 arguments about vagueness as to the meaning of the exceptions to the no mask provisions that
 28 allow for: (1) medical masks; (2) religious face coverings; and (3) costumed characters, should be

1 rejected. Rather, read in full, these exceptions and the language of the Ordinance clearly provide
 2 reasonable notice such that ordinary people understand what conduct is precluded and what
 3 conduct is allowed. Specifically, for the “medical mask” exception, not only is this a term of
 4 common usage, but the Ordinance also provides a list of examples of medical mask, along with
 5 examples of what are not medical masks for further clarity. Exh. 5 at 85 [Dec. 2025 Ord.].
 6 Similarly, the Ordinance provides a list of religious face covering that provides clarity and fair
 7 notice of what can and cannot be worn. *Id.*

8 Likewise, the costume exception makes clear that it allows face coverings that are
 9 necessary to convey the expressive message of the costume, such as an inflatable dancing frog
 10 costume, which cannot be worn without the mask as it is not separate and removable from the
 11 overall costume. *See id.* Whereas, in comparison, a cowgirl is just as much a cowgirl whether the
 12 bandana is around her neck (allowed) or covering her face (prohibited). While Plaintiffs offer
 13 declarations that say this distinction “seems silly” and “makes no sense” their own declarant
 14 makes clear ordinary people know what is, and what is not, allowed but simply disagree with these
 15 distinctions.⁷ E.g. Diaz Decl. at ¶ 21. Their disagreement does not create a constitutional
 16 infirmity, nor can they (or should the courts) second-guess the City Council’s legislative wisdom
 17 in tailoring the mask restriction. *See* Section III.B.1.c. *supra*.

18 **(b) The Objective Language of the Ordinance Does Not Trigger**
 19 **Arbitrary Enforcement Concerns**

20 The Ordinance also comports with the requirement of due process to “provide explicit
 21 standards for those who apply them” so as to avoid arbitrary and discriminatory enforcement, a
 22 standard met by the Ordinance here. While definitions of proscribed conduct that rest wholly or
 23 principally on the subjective viewpoint of a law enforcement officer run the risk of
 24

25 ⁷ Plaintiffs’ argument that “partially covered” is vague fares no better as read in context with
 26 the regulation as a whole, a reasonable person understands that neither a headband over the
 27 forehead nor a Native American headdress partially covers one’s face and “conceals the wearer’s
 28 identity.” Plaintiffs’ complaint about the term “public assembly” is also unsound – it is commonly
 used and understood to refer to any gathering in a public space and the First Amendment itself
 uses the term “assemble” without further specificity.

1 unconstitutional murkiness, those that set standards governing the exercise of discretion, such as
 2 the Ordinance here, do not. *See Gammoh*, 395 F.3d at 1119-20; *see also Edge*, 929 F.3d at 666;
 3 *Grayned*, 408 U.S. at 108. Moreover, an arbitrary enforcement theory fails where a plaintiff's
 4 conduct falls well within the provision's prohibited conduct. *See United States v. Melgar-Diaz*, 2
 5 F.4th 1263, 1270 (9th Cir. 2021) citing *Farrell v. Burke*, 449 F.3d 470, 494 (2d Cir.
 6 2006) (Sotomayor, J.) [arbitrary enforcement challenge fails if "conduct at issue falls within the
 7 core of the statute's prohibition, so that the enforcement before the court was not the result of the
 8 unfettered latitude that law enforcement officers and factfinders might have in other, hypothetical
 9 applications of the statute"]; *see also United States v. Kuzma*, 967 F.3d 959, 970 (9th Cir. 2020).⁸

10 Here, Plaintiffs arguments about clear notice and potential arbitrary enforcement fail as
 11 there are clear standards as to what conduct is allowed and prohibited as discussed above.
 12 Moreover, the Modesto Police Chief also provides officers with further guidance on enforcement
 13 of the Ordinance, and in particular with regards to the restrictions at issue in this case. Chief
 14 Gillespie Decl. at ¶ 28. Specifically, officers are instructed that if a face covering is one of the
 15 medical grade masks specified in the Ordinance, then nothing further is necessary as to the face
 16 covering and that no proof of medical necessity is needed. *Id.* Similarly, if an individual is
 17 wearing a burka or an item that they clearly recognize as a religious covering, which is exempt
 18 from the mask restriction, and if the individual offers that it is a religious face covering, officers
 19 are to accept that representation without examination. *Id.* And indeed, there have been no alleged
 20 arbitrary enforcement claims under the Dec. 2025 Ordinance, as illustrated by the March 2026 No
 21 Kings event, which resulted in no citations or arrests under the Ordinance, no violence, and no
 22 declaration of an unlawful assembly (nor have there been any other citations or arrests under the
 23 Ordinance).⁹ *Id.* ¶¶ 29-30. Rather, the Ordinance provides both sufficient notice as to what is

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 25 ⁸ *Grayned v. City of Rockford*, 408 U.S. 104, 111 (1972) cited by Plaintiffs also supports the
 26 City's position as there a ban on speech that "tends to disturb" school was not impermissibly
 vague given that the overall "context" gave "fair notice to those to whom it was directed."

27 ⁹ The 2019 iteration of the Ordinance is no longer in effect and thus an arbitrary
 28 enforcement claim under the prior iteration is moot and does not support prospective injunctive
 relief. Even assuming *arguendo* that enforcement of the prior iteration of the Ordinance was at

1 prohibited and sufficient guidance to prevent against arbitrary enforcement and thus does not
2 violate due process.

3 **(c) Plaintiffs’ Claimed Liberty of Interest, Equal Protection, and**
4 **Selective Enforcement Arguments Are Meritless**

5 Plaintiffs’ menagerie of arguments about liberty interests, equal protection, and selective
6 enforcement as part of a Due Process cause of action are also misplaced.

7 First, a substantive due process liberty interest applies to “fundamental” liberty interests,
8 but there are no fundamental liberty interests at play under the Ordinance, as the restrictions only
9 prohibit wearing masks and combat gear at public assemblies. *See Nunez by Nunez v. City of San*
10 *Diego*, 114 F.3d 935, 951-52 (9th Cir. 1997) [right to raise children without undue governmental
11 interference is a fundamental liberty interest]; *see also Reno v. Flores*, 507 U.S. 292, 302 (1993)
12 [right for juveniles to only be released to parents is not a fundamental due process right].¹⁰ The
13 restrictions on wearing masks and combat gear fail to hit upon a fundamental right.

14 Next, Plaintiffs’ selective enforcement and equal protection arguments fare no better.
15 Assuming *arguendo* that these arguments can be made under Due Process, there is a high bar for
16 establishing a selective enforcement/equal protection claim which requires a showing that law
17 enforcement had both a discriminatory effect and was motivated by a discriminatory purpose.
18 *Rosenbaum v. City and Cnty. of San Francisco*, 484 F.3d 1142, 1152 (9th Cir. 2007); *Nat’l Inst.*
19 *of Fam. and Life Advoc. v. Bonta*, 769 F. Supp. 3d 1109, 1131 (C.D. Cal. 2025). Here, the Dec.
20 2025 Ordinance has not ever been enforced against any of the Plaintiffs, nor has any person been
21 cited or arrested for violating it. Chief Gillespie Decl. ¶¶ 29-30. That should end the inquiry.
22 Should the Court look further, there is no credible evidence that Plaintiffs were discriminatorily
23 targeted because of their messages or viewpoints. Plaintiffs argue that because the City arrested

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25 issue, Plaintiffs’ masks were clearly prohibited and thus provide no basis for an arbitrary
26 enforcement claim for this reason as well. *See Melgar-Diaz*, 2 F.4th at 1270.

27 ¹⁰ The state court opinion offered by Plaintiffs has no precedential value, and, even if it did, it
28 explains that an alleged infringement of a liberty interest in personal dress is subject to deferential
rational basis review. *See Gatto v. Cnty. of Sonoma*, 98 Cal. App. 4th 744, 772 (2002).

1 protestors for wearing masks at an ICE Out rally but made no arrests for masks at a No Kings
 2 rally, this establishes a selective enforcement and/or an equal protection violation. They are
 3 mistaken. Plaintiffs’ pure speculation of an inherent discriminatory intent does not suffice nor rise
 4 to the level needed to enjoin enforcement of the Dec. 2025 Ordinance. As Chief Gillespie notes in
 5 his declaration, the organizers of the No Kings march were more successful in educating
 6 protestors on the City’s no mask provision. Chief Gillespie Decl. ¶¶ 26, 32.

7 **3. The City’s Mask and Combat Equipment Restrictions Do Not Violate**
 8 **the Statutory Rights of Journalists Under Penal Code Section 409.7**
 9 **(Fifth Cause of Action)**

10 Plaintiffs are also unlikely to succeed on the merits of their fifth and final cause of action
 11 under California Penal Code § 409 (“Section 409.7”). Section 409.7 provides a limited statutory
 12 right for a “duly authorized representative of any news service” to, inter alia, enter a closed area
 13 “at a demonstration, march, protest, or rally”, it does not, as Plaintiffs suggest, provide a right for
 14 journalists to wear any clothing or equipment they desire when engaging in newsgathering at
 15 public protests. *See* Cal. Penal Code § 409.7(a). Plaintiffs push the envelope too far by
 16 attempting to insert such a right into the statute. *See People v. Guzman*, 35 Cal. 4th 577, 587
 17 (2005) [holding that courts must not add provisions to statutes]; *see also Gillotti v. Stewart*, 11
 18 Cal. App. 5th 875, 896 (2017) [holding that inserting additional language into a statute violates the
 19 cardinal rule of statutory construction that courts must not add provisions to statutes].

20 This rule of statutory construction has been codified in Code of Civil Procedure § 1858 and
 21 Plaintiffs offer no support to supersede this long standing canon of statutory construction in order
 22 to push forward their claim that without combat gear they are being de facto excluded from public
 23 protests (and any challenge to the combat equipment provision is time-barred in any regards).
 24 Rather, Plaintiffs’ offered cases stand for the unremarkable proposition that a public entity may
 25 not use force or otherwise disperse reporters who are reporting on an unlawful assembly, not that
 26 reporters have a right to wear combat equipment. *See e.g. Index Newspapers LLC v. U.S.*
 27 *Marshals Serv.*, 977 F.3d 817, 823-24 (9th Cir. 2020) [considered claims that DHS targeted and
 28 used force against press reporting on an unlawful assembly]; *Garcia*, 150 F.4th at 1228

1 [considered constitutionality of an ordinance making it illegal to report on car sideshows]; *Goyette*
 2 *v. City of Minneapolis*, 338 F.R.D. 109, 114 (D. Minn. 2021) [considered TRO preventing police
 3 from using force or chemical agents to disperse journalists reporting on ongoing protests].

4 A journalist’s right to remain after the issuance of a dispersal order or the like, as provided
 5 for in Section 409.7, is not in dispute here. In fact, the press has never been excluded from a
 6 closed area at a public protest in Modesto. Chief Gillespie Decl ¶ 34. And while journalists may
 7 prefer to wear masks and combat equipment, the language of Section 409.7 makes no mention of
 8 any such right. The legislature had the means to include language about wearing masks and
 9 combat gear when engaged in newsgathering activities at protests, and it chose not to. The Court
 10 should reject Plaintiffs’ improper attempt to rewrite the statute.

11 **C. The Balance of Equities and the Public Interest Favor Denying the**
 12 **Extraordinary Relief of a Preliminary Injunction**

13 The final two criteria for a preliminary injunction – the balance of the equities and the
 14 public interest – merge and also weigh heavily in favor of denying Plaintiffs’ request to enjoin the
 15 mask and combat equipment restrictions of the Dec. 2025 Ordinance. *See Roman v. Wolf*, 977
 16 F.3d 935 (9th Cir. 2020); *Baird v. Bonta*, 81 F.4th 1036 (9th Cir. 2023) [balance of the equities
 17 and public interest factors merge where government is a party]; *see also Swain v. Junior*, 958 F.3d
 18 1081 (11th Cir. 2020) [governmental interests inherently implicates public concerns]; *Ahlman v.*
 19 *Barnes*, 445 F. Supp. 3d 671 (C.D. Cal. 2020) [where government is defendant under merger court
 20 “asks whether any significant public consequences would result from issuing the preliminary
 21 injunction.”]. Here, Plaintiffs have not shown a likelihood of success on the merits and any
 22 impact on their constitutional rights in not enjoining the provisions is minimal as compared to the
 23 harm and significant public consequences that would incur in enjoining these important safety
 24 measures for public assemblies, which were enacted after considerable findings and consideration
 25 by the Modesto City Council. The merged third and fourth criteria for a preliminary injunction
 26 dictates denial of Plaintiffs’ request for this extraordinary relief.

27 **IV. CONCLUSION**

28 Respectfully, this Court should deny Plaintiffs’ request for a preliminary injunction.

1 DATED: June 9, 2026

MEYERS NAVE

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By: /s/Deborah J. Fox

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