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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CLARK SULLIVAN, ADAM BREDENBERG,
and BENJAMIN ROYER, individually and on
behalf of all others similarly situated,

No. C 17-06051 WHA

Plaintiffs,

v.

**ORDER RE MOTION FOR
SUMMARY JUDGMENT**

CITY OF BERKELEY,

Defendants.

INTRODUCTION

In this action for violations of constitutional rights, defendant City of Berkeley moves for summary judgment on all of plaintiffs’ claims. For the reasons herein, the motion is **GRANTED IN PART AND DENIED IN PART.**

STATEMENT

At all material times, on any given night, nearly one thousand individuals experienced homelessness in Berkeley. Most were unsheltered and living on public streets, sidewalks, and parks. The City of Berkeley received frequent complaints regarding the encampments, including complaints concerning rodents, garbage, and illegal dumping. Businesses claimed that encampments discouraged patronage. Encampments on roadways and medians risked interfering with the visibility of traffic, thereby putting both homeless residents and drivers at risk. Encampments on sidewalks also interfered with access to public facilities and created liability for the City under the Americans with Disabilities Act. For these reasons and more, the City regularly removed homeless encampments located on its property, with the City Manager’s Office directing large-scale removals (Williams-Ridley Decl. ¶¶ 3–5, Exh. 1).

1 At all relevant times, the City Manager’s Office had a policy of distributing a written
2 “Public Notice” prior to removing an encampment. The content of these notices evolved over
3 time. Beginning in 2016, the notice listed (1) a distribution date, (2) sections of municipal and
4 penal statutes that an encampment may be violating, (3) a list of services available to the
5 homeless, and (4) instructions on how to find information on Berkeley’s housing options.
6 Beginning in December 2017, the notice began to include the following:

7 Any property which is left unattended will be handled in accordance
8 with City policy regarding temporary storage of unattended property.
9 Individuals who wish to reclaim their property may contact 311
Customer Service Center during regular business hours
(Monday–Friday 8:00 AM to 5:00 PM): (510) 981-2489.

10 Since at least March 2018, the notice has also stated: “Alternatively, information regarding
11 retrieval of unattended property is available in the lobby of the Berkeley Civic Center, 2180
12 Milvia Street, Berkeley, during regular business hours.” The notice has never explained
13 precisely what types of unattended property would be stored or where it would be stored. Nor
14 did it ever contain the date upon which the City would return to enforce the encampment’s
15 removal. The notice instead directed homeless residents to move immediately (Hynes Decl. ¶ 6;
16 Slimick Dep. 13:2–27:2; Williams-Ridley Dep. 51:22–52:9; Johns Decl. Exh. C).

17 The City had a general policy of distributing the written notice at least 72 hours prior to
18 the removal of an encampment, although less notice was given where an immediate health or
19 safety risk was implicated. City employees posted the notices on unoccupied tents and on
20 nearby telephone poles or other available surfaces. Some notices were torn down but plaintiffs
21 always received some amount of prior notice that their encampment would be the subject of an
22 enforcement action (Hynes Decl. ¶¶ 6–8; Slimick Dep. 27:19–31:2; Zint Dep. 132:20–23).

23 The City also had a policy regarding the storage of unattended property collected during
24 the removal of homeless encampments. Under the policy revised in 2006, City employees
25 stored unattended property for 14 or 90 days depending on the property’s value. The policy
26 directed employees to keep together all property collected from the same location, to bag any
27 loose items, and to fill out a storage tag. The storage tag included the date and location of the
28 pickup, the staff name or employee number, and a notation indicating whether to store the

1 property for 14 or 90 days. One copy of the tag stayed with the property and another copy went
2 into a binder maintained by a supervisor. The policy also provided that the tag be faxed to the
3 City's Mental Health division, which division coordinated retrieval of property with the public.
4 "Representatives" of the property's owner could retrieve it on their behalf, which property the
5 City stored at the Transfer Station on Second Street (Yavneh Decl. ¶¶ 3–11, Exh. 1; Hurtado
6 Decl. ¶¶ 4–8).

7 Under this policy, the municipal homeless outreach worker, Eve Ahmed, coordinated the
8 retrieval of property. When Ahmed or her staff received an inquiry from the public about
9 missing property, they would cross check the provided information with the information on the
10 storage tags. If the information matched, Ahmed would make an appointment to meet at the
11 City's storage container on Second Street. Ahmed regularly drove people who lacked
12 transportation to the storage container, even when the tags in the binder did not indicate a
13 match, so that the person could check for their property. If anyone complained that their
14 property had been damaged or lost, they received a claim form to seek reimbursement from the
15 City (Yavneh Decl. ¶¶ 3–11; Ahmed Decl. ¶¶ 5–11).

16 In June 2017, the City revised its policies and practices with respect to the collection and
17 storage of unattended property and memorialized the changes in Administrative Regulation 10.1
18 (AR 10.1). During an enforcement action, it provided occupied encampments with "a
19 reasonable time to remove their property, as determined by the Berkeley Police Department."
20 AR 10.1 stated that unattended property removed by the City would be held for at least 14 days.
21 The policy required property to be held for longer if it had an apparent value of one hundred
22 dollars or more or if the items appeared usable for shelter. Unattended property that was
23 "clearly refuse or garbage," however, would be disposed of immediately. City staff were
24 directed to photograph unattended property before removal, regardless of whether the property
25 would be disposed of or stored. Moreover, when removing property, the City had to utilize an
26 inventory form to list the collected property either as individual items or by the quantity of bags
27 removed. Items of value had to be inventoried and the inventory form noted whether the item
28 was stored or disposed of. AR 10.1 also required items to be "secured in a locked, covered,

1 storage container located at the Corporation Yard at 1326 Allston Way” (Hurtado Decl. ¶¶
2 14–17, Exh. 6).

3 * * *

4 In October 2016, plaintiff Benjamin Royer joined a homeless community in Berkeley
5 called “First They Came for the Homeless” or FTCftH. That winter, FTCftH started the “Poor
6 Tour,” whereby they camped in visible places to demonstrate the plight of the homeless and
7 “make a statement” about their treatment by the City. While he lived with FTCftH, Royer
8 experienced nine encampment removals. During a December 2016 removal, the City collected
9 certain of Royer’s property, including a tarp, sleeping pad and bag, clothing, and a therapy tool.
10 At that time, the written notice distributed by the City did not inform Royer how to retrieve his
11 property. And, because Royer did not have a cell phone, he could not call 311 to try and find
12 information about collecting his property (Dkt. No. 121 ¶¶ 7–8; Royer Dep. 94:24–99:20).

13 Plaintiff Clark Sullivan, a homeless member of FTCftH since November 2016,
14 experienced seven encampment removals that winter. During two incidents, the City seized
15 Sullivan’s tent and a suitcase containing clothing, respectively. Although he eventually
16 retrieved the suitcase through the assistance of other community members, the suitcase was
17 empty. He never retrieved the tent (Dkt. No. 122 ¶¶ 3–13; Sullivan Dep. 75:10–76:6).

18 Plaintiff Adam Bredenberg, a homeless member of FTCftH between October 2016 and
19 February 2018, experienced five encampment removals while living with the group, during
20 which he lost certain communal property such as pots and pans for cooking (Dkt. No. 122 ¶¶
21 3–24).

22 FTCftH received less than 24-hours notice before certain of these removals and received
23 less than 48-hours notice with respect to others. In each instance, however, the group received
24 some notice (Zint Dep. 132:20–23).

25 Plaintiffs filed this civil action *pro se* in late 2017. Since the filing of this lawsuit,
26 FTCftH’s encampment has not been the subject of an enforcement action. A September 2018
27 order granted in part and denied in part plaintiffs’ motion for class certification, certifying a
28 class of all homeless individuals in Berkeley who are now subject to the City’s policies and

1 practices of property collection, storage and disposal, with respect to Royer's Fourth and
2 Fourteenth Amendment claims for injunctive and declaratory relief. The September 2018 order
3 denied plaintiffs' request to certify their First Amendment retaliation claim. The City now
4 moves for summary judgment on all of plaintiffs' claims (Dkt. Nos. 1, 133, 139). This order
5 follows full briefing and oral argument. Trial is set to begin on May 6.

6 ANALYSIS

7 Summary judgment is proper where the pleadings, discovery, and affidavits show that
8 there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a
9 matter of law." FRCP 56(a). A fact is material if it might affect the outcome of the suit under
10 governing law, and a dispute about a material fact is genuine "if the evidence is such that a
11 reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby,*
12 *Inc.*, 477 U.S. 242, 248 (1986).

13 1. FOURTH AND FOURTEENTH AMENDMENT.

14 Under the Fourteenth Amendment, homeless individuals are entitled to meaningful
15 notice and an opportunity to be heard before their unabandoned property is seized and
16 destroyed. *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1032 (9th Cir. 2012). Due process is
17 satisfied where law enforcement "take[s] reasonable steps to give notice that the property has
18 been taken so the owner can pursue available remedies for its return." *Ibid.* (citation omitted).
19 A "seizure" of property under the Fourth Amendment occurs when there is "some meaningful
20 interference with an individual's possessory interests in that property." *Id.* at 1027 (citation
21 omitted). A seizure is deemed unreasonable if the government's legitimate interest in the
22 seizure does not outweigh the individual's interest in the property seized. *Id.* at 1030.

23 Royer represents a class of all homeless individuals in Berkeley who are subject to the
24 City's collection, storage, and disposal policies and practices, on behalf of whom he seeks
25 declaratory and injunctive relief as to his Fourth and Fourteenth Amendment claims. This order
26 concludes that plaintiffs have failed to raise a triable issue as to whether the City's policies and
27 practices regarding the removal and storage of unattended (and unabandoned) property at
28 homeless encampments meet constitutional requirements, as now explained.

1 The City generally provides written notice at least 72 hours prior to removing a homeless
2 encampment, although less notice is provided when health and safety is immediately at stake
3 and more notice is provided when feasible. The notice informs homeless residents that they are
4 violating municipal or penal statutes and that they must leave the area. The notice also explains
5 how individuals may reclaim any property collected by the City. Once City staff comes to
6 enforce the notice, occupied encampments are given reasonable time to move their belongings
7 before anything is taken. As to any unattended property collected, staff will inventory the items
8 before placing them in a secured storage container at the Corporation Yard, where property is
9 kept for at least 14 days (or longer if it has a high apparent resale value or is usable for shelter).
10 The City disposes of items that are clearly “refuse or garbage,” or which are soiled, moldy, or
11 damp. Regardless of whether disposed of or stored, employees must photograph property before
12 it is removed (Hurtado Decl. Exh. 6; Johns Decl. Exh. C; Slimick Dep. 29:20–30:2).

13 Plaintiffs raise three arguments as to why the City’s policy is constitutionally deficient
14 on its face. None has merit.

15 *First*, plaintiffs argue that even if the City provides 72-hours’ notice that a removal
16 action is imminent, the City must also disclose the precise date and time at which it will return
17 to enforce the encampment’s removal. In support, plaintiffs cite *Hooper v. City of Seattle*, No.
18 17-cv-0077, 2017 WL 591112 at *6 (W.D. Wash. Feb. 14, 2017) (Chief Judge Ricardo
19 Martinez). There, the district court preliminarily found that Seattle’s policy for removing
20 homeless encampments did not violate the Fourth and Fourteenth Amendments where Seattle
21 “provide[d] notice of the particular dates scheduled for any clean-up (rather than merely a 72-
22 hour deadline for removing property).” *Hooper* did not hold, however, that the specifics of
23 Seattle’s notice were constitutionally required.

24 And, notably, plaintiffs cite no evidence suggesting that such a policy would have
25 prevented the City’s allegedly erroneous seizure of unabandoned property. Instead, the
26 undisputed facts demonstrate that even when homeless encampments received notice that they
27 needed to move, they remained in place until the police returned to force them out. Members of
28 FTCfH in particular refused to pack up upon receiving notice because they wanted “to be

1 kicked out, to be removed.” And, as described below, other homeless encampments remained
2 in place for weeks after being told they needed to change locations (Zint Dep. 132:20–133:7;
3 Bredenberg Dep. 98:2–20; Rodriques Decl. ¶¶ 2–5; Schofield Decl. ¶¶ 2–8).

4 *Second*, plaintiffs argue that the City’s written notice to homeless encampments must
5 explain “where a person can go to retrieve their property or when they can retrieve it.”
6 Specifically, plaintiffs argue, the notice must state the address of the storage facility where the
7 property has been brought. This order disagrees. “[D]ue process requires law enforcement ‘to
8 take reasonable steps to give notice that the property has been taken so the owner can pursue
9 available remedies for its return.’ ” *Lavan*, 693 F.3d at 1032 (quoting *City of West Covina v.*
10 *Perkins*, 525 U.S. 234, 240 (1999)). Here, since at least March 2018, the notice has explained
11 who to call or where to go if someone wants to reclaim their property. From there, employees
12 direct them to the appropriate City agency, which agency in turn schedules an appointment to
13 retrieve the property. This is sufficient to allow property owners to “pursue available remedies
14 for its return.”

15 *Third*, and again relying on the district court’s decision in *Hooper*, 2017 WL 591112 at
16 *6, plaintiffs argue that the policy is unconstitutional because it does not require the City to (1)
17 use a storage facility accessible by public transportation, or (2) deliver stored property to its
18 owner within one business day. Moreover, plaintiffs argue, the policy requires homeless
19 residents to engage in a process over the phone (a resource homeless individuals may not have
20 access to). This order again disagrees. The undisputed evidence shows that homeless residents
21 no longer need a phone to retrieve their belongings because they are notified that they can obtain
22 information regarding the retrieval of their property by visiting the Berkeley Civic Center.
23 Plaintiffs also cite no evidence to support their claim that the Corporation Yard at 1326 Allston
24 Way is *not* accessible by public transportation. Plaintiffs’ evidence instead demonstrates that a
25 local bus *does* in fact stop within a few blocks of that location (Cheema Decl. ¶ 16).¹

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28 ¹ Plaintiffs also complain that Berkeley police do not have a “bulletin” on the rights of homeless
individuals to retain or retrieve their property, but wholly fails to explain why such “bulletins” are necessary in
light of the City’s policies discussed herein.

1 Next, plaintiffs raise a scattershot of arguments as to why, irregardless of the
2 constitutionality of the City’s policies and procedures, the application of those policies in
3 practice violates the Fourth and Fourteenth Amendments. This order rejects each argument in
4 turn.

5 *First*, plaintiffs’ contention that the City fails to prominently post written notices at sites
6 where property is removed is unsupported by the record. The undisputed evidence is that
7 notices are posted on occupied tents, telephone poles, and other available surfaces nearby. In
8 wet weather, the notices would be placed in plastic sleeves. And, although Royer states that he
9 has “never seen the City of Berkeley post notices on a building or structure near [his]
10 encampment before,” he and other members of FTCfH acknowledge that they did, in fact,
11 receive notice prior to encampment removals and Royer further acknowledges that in one
12 instance notices were posted on cement pillars nearby (Royer Decl. ¶¶ 9–12; Hynes Decl. ¶ 7;
13 Zint Dep. 126:20–132:23; Royer Dep. 71:9–19, 102:7–107:17).

14 *Second*, plaintiffs argue that although the City’s policy is to provide 72-hours’ notice
15 before forcing an encampment to move, there are instances where the homeless receive less than
16 24-hours’ notice. Plaintiffs cite the declaration of Michelle Lot, a homeless Berkeley resident
17 who states that in October 2018 the police required her to move within 24 hours of providing
18 notice. And, in December 2018, “with no warning, the police came in SWAT gear and forced
19 [her] to move,” giving her two hours to pack up her belongings. Lot’s declaration fails to
20 establish, however, that this resulted in the seizure of her property. Rather, her declaration
21 indicates that she was given sufficient time to pack up and move “all [her] belongings.”
22 Similarly, although Royer describes an instance in which he was given less than 24-hours notice
23 to move his belongings, he nevertheless had time to pack all of his belongings in a wheelchair
24 (Lot Decl. ¶¶ 6–17; Royer Decl. ¶ 11).

25 Plaintiffs also cite various public notices attached to the declaration of Attorney
26 EmilyRose Johns to argue that they received less than 24-hours’ notice before the removal of
27 FTCfH’s encampment on October 7, 2016, October 18, 2016, November 7, 2016, and January
28 6, 2017, less than 48-hours’ notice on December 21, 2016, to move from the median, and same-

1 day notice to move from the lawn in front of City Hall. As the City points out, however, while
2 plaintiffs have submitted all of the notices produced by the City in discovery, there is nothing in
3 the record to indicate that this is the full set of notices provided to FTCfH. Indeed, the face of
4 the documents themselves indicates that the set is not complete. For example, the notices dated
5 December 2, 2015, and October 17, 2016, are both labeled “SECOND PUBLIC NOTICE,” yet
6 the first notices are missing. Moreover, even if less than 24-hours’ notice to leave a public
7 space was provided on certain occasions, plaintiffs have failed to raise a triable issue as to
8 whether this would violate due process when the encampment did, in fact, receive notice and a
9 reasonable opportunity to pack up their belongings before the City collected any remaining
10 unattended property.

11 *Third*, plaintiffs argue that the City engages in conduct prohibited by *Lavan*, 693 F.3d at
12 1032–33, by summarily destroying unabandoned property as “trash” when it clears
13 encampments. According to the declaration of Frank Dieterich, Berkeley police notified him
14 that he needed to move three structures that he had built in the roadway. Dieterich says that
15 when the police and Department of Public Works returned three days later, he had not yet been
16 able to move the structures, resulting in City workers crushing them, placed them in a garbage
17 truck, and destroyed various personal items in the process. Kelley Webinger, who lived nearby
18 at the same encampment, acknowledges that she also received notice that she needed to move
19 the shelter she had built on the sidewalk. When the police returned three days later, the police
20 told her “to grab what [she] wanted to keep and move it across the street.” “Once [she] did,” the
21 City destroyed the rest of her belongings. She wanted to return to grab more items from her
22 shelter but claims Officer Veronica Rodrigues physically prevented her from doing so
23 (Dieterich Decl. ¶¶ 5–16; Webinger Decl. ¶¶ 5–19).

24 Webinger and Dieterich’s testimony need not be adopted to the extent it is “blatantly
25 contradicted by the record, so that no reasonable jury could believe it.” *Scott v. Harris*, 550
26 U.S. 372, 380 (2007). As shown by video of their interactions with Berkeley police, Webinger
27 and Dieterich first received notice that they needed to move their encampment nearly a month
28 prior to the enforcement action. At that time, Webinger told Officer Rodrigues that she

1 intended to “downsize” and get rid of items surrounding her shelter. Police told Webinger and
2 Dietderich that anything they did not want could be left behind and would be taken care of by
3 the City. Over the next three and a half weeks, police returned multiple times to warn Webinger
4 and Dietderich that they needed to move. When police and City staff returned to finally require
5 them to leave, Webinger and Dietderich received additional time to move their belongings
6 before the City cleared out the encampment. When Officer Rodrigues arrived on the scene,
7 Webinger acknowledged that “she got all the stuff she needed” from her shelter. At no point
8 does Officer Rodrigues prevent Webinger from grabbing more items. Webinger also told
9 Officer Rodrigues that a structure left behind by Dietderich had been vandalized. Dietderich
10 had since left the immediate area and did not return when Berkeley police began to move it.
11 Nothing in Dietderich’s declaration indicates that he told the officers that he intended to return
12 for more property (Schofield Decl. ¶¶ 2–8, Exhs. 1–2; Rodrigues Decl. ¶¶ 2–6, Exhs. 1–2).

13 In connection with a different removal action six months earlier, homeless resident
14 Patricia Moore explains that she had heard “for a while” that the City would be coming to clear
15 her encampment. When the City arrived and began to clear an encampment a few streets over,
16 Moore “did not move [her] property until the day that the City started to clear [her] shelter.”
17 Everything she could not carry away was placed into a garbage pile. Moore does not say that
18 she informed the police that she wanted more time to remove items from her shelter or that she
19 otherwise indicated to City employees that her property had not been abandoned or that she
20 wanted help. She acknowledges that nearby businesses had started to complain about the
21 encampment because of the amount of trash. The City had not been by to pick up garbage for at
22 least a month (Moore Decl. ¶¶ 6–13).

23 These incidents fail to raise a triable issue as to whether the City has a practice of
24 summarily destroying unabandoned property in violation of the Fourth and Fourteenth
25 Amendments. The circumstances and holding of our court of appeals’ decision in *Lavan* bear
26 repeating. There, the plaintiffs were homeless individuals who temporarily left their personal
27 possessions on public sidewalks while attending to necessary tasks such as eating, showering,
28 and using restrooms. *Lavan*, 693 F.3d at 1025. Although the plaintiffs had not abandoned their

1 property, employees of the City of Los Angeles seized and summarily destroyed the plaintiffs'
2 possessions. *Ibid.* Importantly, Los Angeles “did not have a good-faith belief that [the
3 plaintiffs’] possessions were abandoned when it destroyed them.” *Ibid.* And, while not
4 addressing the scope of the preliminary injunction at issue, our court of appeals noted that the
5 district court had permitted Los Angeles to “lawfully seize and detain property, as well as
6 remove hazardous debris and other trash.” *Ibid.* (citing *Lavan v. City of Los Angeles*, 797 F.
7 Supp. 2d 1005, 1020 (C.D. Cal. 2011)). The decision held that “collecting and destroying [the
8 plaintiffs’] property on the spot” constituted an unreasonable seizure under the Fourth
9 Amendment and that Los Angeles violated the Fourteenth Amendment when it “failed to
10 provide any notice or opportunity to be heard” before seizing and destroying the plaintiffs’
11 property. *Lavan* made clear that the decision did not “concern any purported right to use public
12 sidewalks as personal storage facilities.” *Id.* at 1030–32.

13 Here, Moore, Webinger and Dieterich all had prior notice that they needed to move
14 their belongings from public roads and sidewalks. Although Moore does not say exactly how
15 long she knew that the City would be forcing them to move, the undisputed facts demonstrate
16 that Webinger and Dieterich had nearly a month to comply with the City’s directives.
17 Moreover, the record demonstrates that the City had an objectively reasonable basis to believe
18 that the property left behind by these three individuals was wholly abandoned rather than
19 temporarily unattended. Webinger and Dieterich were specifically informed that they should
20 take what they wanted to keep and could leave behind any trash for disposal. Webinger told
21 Officer Rodrigues that she had taken what she needed and that Dieterich’s remaining structure
22 had been vandalized. Moore acknowledges that her encampment (which spanned multiple
23 streets) had a large amount of trash. Nothing in the record indicates that the property she lost, or
24 any other items discarded by the City that day, appeared such that a reasonable person would
25 have believed it to be temporarily unattended rather than abandoned.

26 There is no genuine issue of material fact that the City’s actions were reasonable. These
27 individuals knew that the City would not allow them to keep their property on public property
28 and were on notice that the police would come and require them to move. Still, they did not

1 timely move the items they wished to keep. To be sure, “[t]he government may not take
2 property like a thief in the night; rather, it must announce its intentions and give the property
3 owner a chance to argue against the taking.” *Id.* at 1032 (quoting *Clement v. City of Glendale*,
4 518 F.3d 1090, 1093 (9th Cir. 2008)). The latter happened here. The Constitution does not
5 prohibit the City from removing items stored on its property where a homeless resident, if given
6 an indefinite amount of time, would eventually return to collect them. Moreover, the City has a
7 legitimate interest in enforcing its penal and municipal statutes and in removing unsafe or
8 hazardous conditions from its public spaces. In balancing the invasion of these individuals’
9 possessory interests in their personal belongings against the government’s interest in clearing
10 out items they left behind, plaintiffs fail to raise a triable issue as to whether the City’s seized
11 items unreasonably. Under the circumstances described by plaintiffs’ evidence, the City’s
12 seizure and destruction of the items was reasonable as a matter of law.

13 *Fourth*, plaintiffs argue that the City seizes people’s property even when they are present
14 to claim it. Plaintiffs point to a three-minute clip of a 34-minute video where a FTCfH
15 supporter asked the police and Department of Public Works not to take certain property from the
16 encampment because a van was on its way. For the first 20 minutes of that same video,
17 however, the police asked members of the encampment to pack up and leave, to no avail.
18 Rather than pack their belongings, most stood around and criticized the police. To the extent
19 certain individuals present actively packed, those items were not seized by the City. Under
20 these circumstances, plaintiffs may not sit on their hands and then be heard to complain when
21 the City enforces its laws and, in so doing, places their property into storage for collection at a
22 later date.

23 Bredenberg’s declaration also fails to raise a triable issue. He recalls a single instance
24 where a police offer came to take a nearby bag of clothing that had been donated to the camp.
25 Although Bredenberg explained that the clothes belonged to FTCfH, the officer took the
26 clothes and put it in the back of his truck (Bredenberg Decl. ¶¶ 23–24). But even if the City *had*
27 failed to give Bredenberg reasonable notice that it would seize the items, and further assuming
28 that Bredenberg’s comments to the officer constituted a claim of ownership over the clothing,

1 this lone incident is insufficient to raise a triable issue as to the City's liability under the Fourth
 2 and Fourteenth Amendments. At most, this would constitute an individual incident of
 3 unconstitutional action by a non-policymaking employee that is insufficient to establish *Monell*
 4 liability. *See McDade v. West*, 223 F.3d 1135, 1141 (9th Cir. 2000).

5 *Fifth*, plaintiffs complain that police threaten to take residents' property if the police are
 6 forced to assist with packing or if a resident packs too slowly. They further assert that the police
 7 should do more to identify the owners of unattended items that are placed into storage. The
 8 enforcement actions described in plaintiffs' deposition testimony and declarations and captured
 9 by video, however, do not raise a triable issue as to whether the City has a practice of
 10 unconstitutionally seizing momentarily unattended property. To repeat, the City has a legitimate
 11 interest in enforcing its penal and municipal codes. FTCfH always received notice in advance
 12 of enforcement actions. As did Webinger, Moore and Dietderich. For all that can be gleaned
 13 from the record, the encampments had sufficient notice to move yet declined to do so until they
 14 were forced out by the police. In those circumstances, members are essentially given the option
 15 of moving their items away from public property to avoid seizure or retrieving them
 16 post-seizure. The City's removal of unattended items for placement into storage (or its disposal
 17 of items reasonably believed to be abandoned or trash) in these instances does not violate the
 18 Fourth or the Fourteenth Amendments. Otherwise, the City would never be able to enforce its
 19 laws or clear entrenched encampments that block public spaces without running afoul of the
 20 Constitution (*see* Johns Decl. Exhs. P-V; Bredenberg Dep. 98:2-20; Zint Dep. 132:24-133:7).²

21 *Sixth*, plaintiffs argue that the City commingles homeless residents' property with
 22 garbage and otherwise fails to store property in a way that prevents damage. In his deposition,
 23 Bredenberg described one instance in which he observed the City place a tent into the back of a

24
 25 ² Plaintiffs cite Exhibit P as demonstrating that the City physically prevents residents from keeping
 26 belongings they want or need. Yet the man in the video who is prevented from accessing the Department of
 27 Public Works truck had been present when the City gave notice that the encampment needed to leave. When
 28 asked whether "any of this stuff belong[ed] to [him]," he said no. He instead came back nearly 30 minutes later
 and tried to access the Department of Public Works truck as it prepared to drive away (*see* Johns Decl. Exh. P at
 5:25). Plaintiffs also cite Exhibit U, a video in which a man states that his tent was taken while he was moving
 other belongings (*see* Johns Decl. Exh. U at 28:37). Because this statement is offered for the truth of the matter
 asserted and no exception to the hearsay rule applies, the City's objection as to this portion of the video is

SUSTAINED.

1 truck before “drop[ping] heavy objects on top of it in a way that snapped the poles of the tent.”
2 (Bredenberg Dep. 102:14–104:18). During Royer’s deposition, he claimed at first to have
3 observed the City commingling garbage with collected property but shortly thereafter admitted
4 that he had never approached a City truck because he “was focused on trying to salvage [his]
5 own property” (Royer Dep. 154:14–155:17). Again, Bredenberg’s lone observation would, at
6 most, constitute an individual incident of unconstitutional action by a non-policymaking
7 employee that is insufficient to establish *Monell* liability. See *McDade*, 223 F.3d at 1141.

8 *Seventh*, plaintiffs’ claim that the City “rarely” stores any property from “large-scale”
9 encampment removals is without merit under the current record. On the one hand, plaintiffs
10 reference a set of notices provided to homeless residents prior to encampment removals. On the
11 other hand, plaintiffs merely cite to a set of “inventory forms” produced by the City. Because
12 there is no matching inventory form for each public notice, plaintiffs argue that the City did not
13 store homeless residents’ property following the removal of encampments. This argument does
14 not persuade and fails to raise a triable issue of material fact. The whole point of providing
15 homeless residents with notice is to give them an opportunity to remove their belongings and
16 avoid its collection and storage by the City. Plaintiffs’ exercise could very well demonstrate the
17 effectiveness of the notices rather than the City’s failure to store property.

18 In sum, taking plaintiffs’ evidence as true (except to the extent blatantly contradicted by
19 the indisputable record) and drawing all reasonable inferences in their favor, plaintiffs have
20 failed to raise a triable issue on the Fourth and Fourteenth Amendment claims for declaratory
21 and injunctive relief on behalf of the class. The City’s motion for summary judgment on these
22 claims is **GRANTED**.

23 **2. INDIVIDUAL DAMAGES CLAIMS.**

24 Although the class-wide claims under the Fourth and Fourteenth Amendments only seek
25 declaratory and injunctive relief, the individual plaintiffs also seek to recover damages for the
26 City’s alleged violations of their Fourth and Fourteenth Amendment rights. Specifically, Royer
27 claims that on December 2, 2016, the City collected several items of his property, including a
28 tarp, sleeping pad and bag, clothing, and a therapy tool. During an enforcement action on

1 November 17, 2016, Sullivan claims that the City seized his tent when he went to get a cup of
2 coffee. And, on December 21, 2016, the City took a suitcase containing his clothes.
3 Bredenberg did not lose any personal items. Rather, he claims to have lost property that he
4 shared communally with other members of FTCftH.

5 For the same reasons set forth above, there is no genuine issue of material fact that the
6 City's actions were reasonable under the Fourth Amendment. Assuming for purposes of this
7 order that the City did collect the property plaintiffs' claim to have lost, plaintiffs knew in
8 advance of each enforcement action that the City would not permit them to stay with their
9 belongings on public property. Still, they did not timely move the items they wished to keep
10 and there is no evidence to suggest the items were summarily destroyed. Balancing the invasion
11 of plaintiffs' possessory interests in their personal belongings against the City's interests in
12 enforcing its penal and municipal statutes and removing unsafe or hazardous conditions from its
13 public spaces, plaintiffs have failed to raise a triable issue as to whether the City's seizure of
14 their items was unreasonable. The City's motion for summary judgment on plaintiffs'
15 individual Fourth Amendment claims is **GRANTED**.

16 As to plaintiffs' Fourteenth Amendment claims, however, the notice distributed by the
17 City prior to the November and December 2016 enforcement actions did not provide any
18 information as to how residents could retrieve their seized property. While the City cites
19 evidence indicating that certain community members knew that Eve Ahmed, a social worker
20 with the City, was "the go-to person" for retrieval of property at the time, plaintiffs cite evidence
21 indicating that they either lacked information as to how to obtain their property or reached dead
22 ends when they attempted to do so (Zint Dep. 189:6–18; Brust Dep. 32:14–16; Bredenberg Dep.
23 44:11–45:3). A triable issue therefore remains as to whether the City provided plaintiffs with
24 sufficient information such that they had the ability the reclaim their property before its
25 destruction at the end of the storage period. A triable issue also remains regarding the extent to
26 which (if at all) plaintiffs' loss of property resulted from any actions by FTCftH's supporters.

27 Finally, this order disagrees with defendants that plaintiffs' Section 1983 claims are
28 barred because they did not avail themselves of a state tort remedy. "The availability of a state

1 tort remedy does not bar due process claims brought under section 1983 in cases where a
2 plaintiff is challenging an established state procedure.” *Sanders v. Kennedy*, 794 F.2d 478, 482
3 (9th Cir. 1986). Because the City’s failure to provide sufficient notice under its policy did not
4 involve “random and unauthorized acts,” the existence of a state-law tort remedy does not bar
5 plaintiffs’ Fourteenth Amendment claims. *Ibid.* The City’s motion for summary judgment on
6 plaintiffs’ Fourteenth Amendment claims for damages is **DENIED**.

7 **3. FIRST AMENDMENT RETALIATION.**

8 Pursuant to Section 1983 and *Monell v. New York City Department of Social Services*,
9 436 U.S. 658 (1978), plaintiffs also contend that the City targeted their encampment for removal
10 in retaliation for their exercise of their First Amendment rights. “In order to demonstrate a First
11 Amendment violation, a plaintiff must provide evidence showing that ‘by his actions [the
12 defendant] deterred or chilled [the plaintiff’s] political speech and such deterrence was a
13 substantial or motivating factor in [the defendant’s] conduct.’” *Mendocino Envtl. Ctr. v.*
14 *Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999) (citation omitted). Courts consider
15 “whether an official’s acts would chill or silence a person of ordinary firmness from future First
16 Amendment activities.” *Ibid.* (citation omitted). A plaintiff must “prove the elements of
17 retaliatory animus as the cause of injury,” with causation being “understood to be but-for
18 causation.” *Hartman v. Moore*, 547 U.S. 250, 260 (2006).

19 Moreover, for a municipality to be liable under Section 1983, there must have been an
20 unconstitutional action taken due to governmental custom or implementation or execution of a
21 policy, regulation or decision adopted by the municipality. The policy or custom must have
22 been adopted by the municipality’s lawmakers or by “those whose edicts or acts may fairly be
23 said to represent official policy.” A municipality cannot be held liable merely because it
24 employs a tortfeasor. *Monell*, 436 U.S. at 690–91, 694. A municipality may be held liable if it
25 is “obvious” that specific employees need “more or different training” and that the failure to do
26 so was “so likely to result in the violation of constitutional rights[,] that the policymakers . . .
27 can reasonably be said to have been deliberately indifferent to the need.” *City of Canton, Ohio*
28 *v. Harris*, 489 U.S. 378, 390 (1989).

1 The City first argues that plaintiffs have not shown they engaged in protected speech,
2 arguing that “camping” is not a form of First Amendment expression because plaintiffs merely
3 seek to immunize unlawful behavior (lodging on public property without permission) by calling
4 it a “protest.” As to Bredenberg, this argument ignores that he spoke at Berkeley City Council
5 meetings, wrote an “Op-ed,” read a Bible verse to the City’s code enforcement officer, and drew
6 “abstract images” on the sidewalk. As to all plaintiffs, the City’s argument ignores that its own
7 declarations indicate that its employees knew that a group of individuals called themselves
8 “First They Came for the Homeless,” that signs displayed the name at the encampment, and that
9 representatives of FTCftH had asked the City for land and services. Berkeley police also
10 understood that members of FTCftH “represented it as a ‘protest’ encampment related to
11 concerns about homelessness” and referred to the group by name in police reports as “creat[ing]
12 a disruptive environment to the community” (Williams-Ridley Decl. ¶ 6; Ahmed Decl. ¶ 14;
13 Schofield Decl. ¶ 5, Exh. 2; Rateaver Decl. ¶ 5; Montgomery Decl. ¶ 4).³

14 The City next argues that plaintiffs have failed to raise a triable issue with respect to
15 causation. This order disagrees. Although the City claims that it would have enforced the anti-
16 lodging laws against plaintiffs even if City officials had known of the group’s political views, it
17 remains disputed as to whether the City selectively enforced these laws against FTCftH (and
18 against plaintiffs as a result). It is undisputed that the City cleared FTCftH’s encampment at
19 least 12 times in three months while leaving other encampments in place (Williams-Ridley
20 Decl. ¶ 8; Moore Decl. ¶ 4). Moreover, the Berkeley police’s operation plans included the
21 specific objective of “deter[ing]” FTCftH “from establishing an illegal encampment on City
22 property” (Johns Decl. Exh. CC) While the City argues that the reason for this disparate
23 treatment was FTCftH’s decision to camp in more disruptive locations, the resolution of this
24 question requires the weighing of evidence which must be accomplished by the trier of fact.

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27
28 ³ The City argues that plaintiffs were not all present for every enforcement action, yet concedes that each was present on numerous occasions when the City removed their encampment.

1 Defendants' motion for summary judgment on plaintiffs' individual First Amendment
2 retaliation claims is accordingly **DENIED**.⁴

3 **4. REMAINING EVIDENTIARY OBJECTIONS.**

4 The City objects to numerous additional items of evidence, including various exhibits to
5 the Declaration of Attorney EmilyRose Johns, paragraph 16 of the declaration of Boona
6 Cheema, and news articles referenced in a footnote of plaintiffs' opposition brief. Because
7 consideration of this evidence would not change the outcome of this order, the objection is
8 **OVERRULED AS MOOT** (except to the extent already ruled on above).

9 **CONCLUSION**

10 To the extent stated above, the City's motion for summary judgment is **GRANTED**. The
11 motion is otherwise **DENIED**.

12
13 **IT IS SO ORDERED.**

14
15 Dated: April 19, 2019.

16 
17 _____
18 WILLIAM ALSUP
19 UNITED STATES DISTRICT JUDGE
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27 _____
28 ⁴ The City objects to the admission of the police operation plans on the grounds of hearsay, lack of authentication, and relevance. These objections are **OVERRULED**. This is the City's own document that it produced in discovery. It is therefore clearly relevant, is the admission of a party opponent, and is deemed authenticated. *See Orr v. Bank of America*, 285 F.3d 764, 777 n.20 (9th Cir. 2002).