

Eric Boyd Vogeler (12707)
VOGELER, PLLC
1941 E Tartan Ave
Salt Lake City, Utah 84108
801.440.3161 | eric@vogeler.org

John J. Nielsen (11736)
LEE NIELSEN, PLLC
299 S. Main Street, Suite 1300
Salt Lake City, Utah 84111
801.683.6880 | john@leenielson.com

Stephen Tully
Ilan Wurman
Michael Bailey
TULLY BAILEY, LLP
11811 N. Tatum Blvd., Ste 3031
Phoenix, AZ 85028
(602) 805-8960
stully@tullybailey.com
iwurman@tullybailey.com
m Bailey@tullybailey.com
Pro hac vice forthcoming

**IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

DANIELLE BARRANI; KADRI
BARRANI; LIESA COVEY; SCOTT
EVANS; JIM GRISLEY; JUAN
GUTIERREZ; CLOTILDE HOUCHON;
DAVID IBARRA; and RANDY
TOPHAM, individuals and Utah
entities,

Plaintiffs,

vs.

SALT LAKE CITY, a Utah municipal
corporation,

Defendant.

(TIER II)

**APPLICATION FOR PRELIMINARY
INJUNCTION**

Case No. 230907360

Judge Andrew H. Stone

Plaintiffs/Petitioners Danielle Barrani, Kadri Barrani, Liesa Covey, Scott Evans, Jim Grisley, Juan Gutierrez, Clotilde Houchon, David Ibarra, and Randy Topham (collectively "Plaintiffs") pursuant to Utah Code §§ 76-10-801, 803, 804, Utah Code §§ 78B-6-1101, 1102 and URCP 65A(a) request the court issue a preliminary injunction directing Defendant/Respondent Salt Lake City ("SLC") to abate the illegal nuisances on the public streets, sidewalks, easements, parks and other lands within its control in the Plaintiffs' neighborhood. The illegal public (and private) nuisances result from

1 unsheltered individuals who have been and continue to be permitted to camp, sleep,
2 urinate, defecate, consume illegal drugs and otherwise commit antisocial acts on public
3 lands. The Plaintiffs all live, work, or own property adjacent to or near such nuisances
4 and are entitled to injunctive relief.

5 The City's intentional policies of permitting such public nuisances are unlawful.
6 Plaintiffs therefore seek a court order instructing the City to abate the nuisances that it
7 has created by permitting the erection of tents and the associated unlawful and
8 disorderly behaviors on public lands for which it is responsible. The City admits that
9 most of the unsheltered individuals living in encampments are there by choice and
10 prefer living on the street over going into shelter. Additionally, this year's annual point-
11 in-time count establishes that there were 485 unsheltered homeless persons living on the
12 streets in Salt Lake County this past winter, while there were 600 available and
13 unoccupied emergency shelter beds or supportive, rapid, and transitional housing beds.
14 In other words, there are shelter and housing beds available for anyone in the City who
15 will accept them. And even if there were no such beds available, the City could certainly
16 erect regulated campgrounds as other cities have done. Or the City can enforce the laws
17 and ordinances against public disorder that the unsheltered routinely violate, which
18 would encourage the unsheltered to accept available beds. What the City cannot do,
19 however, is itself continue to violate the public nuisance laws. Simply put, the City's
20 decision to allow unsheltered individuals to camp on public lands instead is illegal and
21 should be enjoined.

22
23
24
25
26

1 **FACTUAL BACKGROUND**

2 1. Plaintiffs are all homeowners and/or business owners who live, work, or
3 own property in Salt Lake City in the downtown area around Pioneer Park and Gateway
4 Plaza. They have filed a complaint seeking declaratory and injunctive relief against SLC.
5 They complaint that the City has maintained a public and private nuisance by permitting
6 individuals to camp, sleep, consume illegal drugs and alcohol, urinate, defecate, perform
7 public sex acts, harass and intimidate the Plaintiffs (and their families' guests and
8 patrons) and light fires on property owned and controlled by the City, which acts also
9 spill over into Plaintiffs' private properties or businesses.

10 2. Over the past four to five years the City has allowed the erection of
11 encampments on public lands and easements in front of or nearby Plaintiffs' residences
12 and businesses, even though there is generally shelter or supportive housing beds
13 available.

14 3. The City refuses to enforce ordinances that proscribe the conduct
15 complained of in Plaintiffs' Complaint, specifically City Code chapter 9.40 and code
16 sections 11.16.100 (Urinating in public and other disorderly conduct); 11.12.065
17 (Unlawfully opening, possessing or consuming alcoholic beverages in a public place);
18 11.12.080 (camping on public grounds, streets, parks and playgrounds); 14.20.010
19 (sidewalk obstructions prohibited); 14.20.100 (Loitering on sidewalk); 14.28.050
20 (standing, lying or sitting on streets or highways).

21 4. The Plaintiffs have suffered specific harms as a result of the City's actions
22 and inactions.

23 5. Ms. Barrani and Mr. Barrani are prisoners in their own homes. Verif.
24 Compl. ¶ 25.

25
26

1 6. Over the last 4 years, Mr. Barrani he has been unable to sleep on his front
2 porch because of threats from the unsheltered. The Barranis have a daughter with Down
3 Syndrome. She cannot play in the front yard or on the front porch. *Id.* ¶ 26.

4 7. The Barranis have been robbed. They have had a laptop, tools, a pressure
5 washer, and other items taken by the unsheltered. Ms. Barrani's car was broken into and
6 an individual slept in the vehicle. *Id.* ¶ 27.

7 8. The unsheltered openly inject themselves with drugs in the public right of
8 way in front of their homes and leave the needles and other residue. The unsheltered
9 defecate and urinate on the Barranis' properties. *Id.* ¶ 28.

10 9. The unsheltered break down the fences surrounding the Barranis'
11 connected yards and sleep in their yards and on their front porches. *Id.* ¶ 29.

12 10. The unsheltered use Ms. Barrani's hose to bathe and wash their clothes.
13 *Id.* ¶ 30.

14 11. The Barranis are constantly being watched by the unsheltered who are
15 constantly roaming the neighborhood looking for an opportunity to pilfer objects to
16 support their drug and alcohol addiction. *Id.* ¶ 31.

17 12. Ms. Covey is regularly confronted with drug addled and/or mentally ill
18 individuals roaming the neighborhood who often yell at her and threaten to assault her.
19 She avoids walking her dog at night and in some areas because of fear of the unsheltered.
20 *Verif. Compl.* ¶ 32.

21 13. Ms. Covey's building was recently set on fire by an unsheltered individual.
22 After setting the fire the individual attempted to break into the apartments of vacating
23 tenants. *Id.* ¶ 33.

24 14. Ms. Covey's car has been broken into twice. *Id.* ¶ 34.

25 15. Ms. Covey recently had an unsheltered individual attempt to break into
26 her patio. She has a photo of the individual. *Id.* ¶ 35.

1 16. The unsheltered regularly use Ms. Covey's stairwell to take drugs and
2 have left drug paraphernalia. *Id.* ¶ 36.

3 17. A female employee of Mr. Evan's business, Euro Treasures, was attacked
4 by two men attempting to break into the store. She called the police; they arrived 45
5 minutes later and advised her to make the retail business less attractive to thieves. Verif.
6 Compl. ¶ 37.

7 18. Mr. Evans regularly arrives at Euro Treasures to find 20-30 individuals
8 camped out on his property. *Id.* ¶ 38.

9 19. Mr. Gutierrez recently had a drug addled individual occupy the landing
10 into his business where the individual began ranting and raving incoherently. Mr.
11 Gutierrez' clients, mostly older women, were unable to leave the premises until the
12 individual finally departed. Verif. Compl. ¶ 39.

13 20. Mr. Gutierrez's business has no dedicated parking. Therefore, his patrons
14 must park on the street and often must walk a few blocks to the salon. His patrons are
15 constantly complaining of being approached by unsheltered individuals occupying the
16 streets seeking money or simply acting incoherently. The unsheltered further leave trash
17 around his business that he is forced to clean up. *Id.* ¶ 40.

18 21. Mr. Grisley regularly has unsheltered individuals defecate on the premises
19 of his business, break windows, and steal property. They also strew the premises of his
20 business with used liquor bottles and other trash. Verif. Compl. ¶ 41.

21 22. Ms. Houchon was molested by an individual living on the street. Verif.
22 Compl. ¶ 42.

23 23. Ms. Houchon has had to clear drugs, including Black Tar Heroin, from the
24 periphery of her property, along with having to repeatedly wash down human feces and
25 urine from street campers. *Id.* ¶ 43.

1 24. Mr. Ibarra has been a resident of downtown Salt Lake City since 1999.
2 Verif. Compl. ¶ 48.

3 25. Mr. Ibarra owned a condominium in The Club located at 150 S. 300 East in
4 Salt Lake City. The City permitted the unsheltered to inject themselves with illegal drugs
5 in the public spaces around the building and then wander about the streets in various
6 states of consciousness. As a result, prospective purchasers were scared to purchase in
7 the building. When Mr. Ibarra recently went to sell his condominiums, he was forced to
8 take a price below what he otherwise would have fetched but for the nuisance. *Id.* ¶ 49.

9 26. Mr. Ibarra's office building is constantly under siege from the unhoused.
10 He has been forced to spend approximately \$25,000 to install cameras and electronic
11 door locks in his building to keep the unhoused from coming in and stealing from him
12 and his tenants and otherwise damaging the building. As a result, he and his tenants
13 are now locked into the building and they must "buzz" clients and other guests into the
14 building. *Id.* ¶ 50.

15 27. Mr. Ibarra has had his vehicle broken into at his business and has grappled
16 with a homeless individual stealing his property who pulled a knife on Mr. Ibarra. Mr.
17 Ibarra was able to disarm the individual, but while restraining him as he waited for the
18 police to arrive (they never did) a crowd of street dwellers began to arrive and to yell at
19 Mr. Ibarra to let "Johnny" go. Fearing that the situation might get further out of hand,
20 Mr. Ibarra was forced to release the thief. *Id.* ¶ 51.

21 28. Mr. Topham has been physically attacked inside his store by an
22 unsheltered individual living in the nearby encampments. Verif. Compl. ¶¶ 52-53.

23 29. Mr. Topham found an individual passed out in the alleyway behind his
24 business with a needle still in his arm. *Id.* ¶ 54.

25 30. Mr. Topham encountered an individual defecating on the back door of his
26 business. When confronted, the man threatened Mr. Topham, claiming he would "gut"

1 him. The police did nothing. The gentleman continued to camp at an adjacent building.
2 *Id.* ¶ 55.

3 31. Mr. Topham has on two separate occasions come upon unsheltered men
4 openly masturbating in his parking lot. His surveillance cameras also captured an
5 unsheltered couple having sex there. *Id.* ¶ 56.

6 32. Mr. Topham has observed multiple fires set by the unsheltered. *Id.* ¶ 57.

7 33. Every year, counties and municipal governments conduct a point-in-time
8 (“PIT”) count of unsheltered individuals within their jurisdictions and a housing
9 inventory count. This survey is required by federal law. Verif. Compl. ¶¶ 74-75.

10 34. On January 25, 2023, Salt Lake City and County conducted the annual
11 point-in-time and housing inventory counts. State of Utah, Workforce Services—
12 Homeless Services, 2023 Annual Data Report on Homelessness (“2023 Annual Data
13 Report”), at 14-15.¹

14 35. According to the PIT count, there were 485 unsheltered individuals in Salt
15 Lake City and County on the night of January 25, 2023. *Id.* at 39.

16 36. According to the inventory count, there were 5,975 total emergency shelter
17 beds, permanent supportive housing units, rapid rehousing units, and transitional
18 housing units, but only 5,375 of them were occupied on that same night. Thus, 600 such
19 beds and units were available. *Id.* at 37.

20 37. Salt Lake City admits that most of the unsheltered individuals living in
21 encampments are there by choice and prefer living on the street over going into shelter.
22 According to the City, the “most common” reasons unsheltered individuals “form
23 encampments” are because “[t]he individuals feel that shelter options available don’t

24
25
26 ¹ <https://jobs.utah.gov/homelessness/homelessnessreport.pdf>
(<https://perma.cc/H4TX-UHNT>)

1 work for them and they feel a sense of relative safety and community in encampments,”
2 “[t]hey are looking for a sense of autonomy and privacy that they don’t think they can
3 get in shelter,” and “[t]he individual prioritizes access to illegal substances over shelter
4 services.” Verif. Compl. ¶ 73.

5 LEGAL ARGUMENT

6 The premise of this case is simple: If any property owner were to allow
7 individuals to set up camp on their property, openly consume drugs and alcohol,
8 intimidate the neighbors, urinate and defecate in public, and perform public sex acts, the
9 city and the court would have no problem finding the property owner liable for creating
10 a nuisance and would order the property owner immediately to abate the nuisance by
11 preventing the individuals from occupying the property. In this respect Salt Lake City
12 is no different from any other property owner. Its choice to allow public camping and
13 the associated activities on its land violates state law, the common law, and the city’s
14 own ordinances. This Court should order the City to abate the nuisance.

15 Rule 65A(e) of the Utah Rules of Civil Procedure sets forth the elements an
16 applicant for preliminary injunction must satisfy: (I) the applicant will suffer irreparable
17 harm unless the order or injunction issues; (II) the threatened injury to the applicant
18 outweighs whatever damage the proposed order or injunction may cause the party
19 restrained or enjoined; (III) the order or injunction, if issued, would not be adverse to the
20 public interest; and (IV) there is a substantial likelihood that the applicant will prevail
21 on the merits of the underlying claim, or the case presents serious issues on the merits
22 which should be the subject of further litigation.

23 **I. Plaintiffs Will Suffer Irreparable Harm**

24 “Injunctive relief is not purely limited to cases where no other possible remedy
25 will be available. Its broader purpose is preventive in nature. A preliminary injunction
26 is ‘an anticipatory remedy purposed to prevent the perpetration of a threatened wrong

1 or to compel the cessation of a continuing one.” *Hunsaker v. Kersh* 1999 UT 106, ¶ 8 (1999)
2 (citations omitted). Harm justifying a preliminary injunction includes “wrongs of a
3 repeated and continuing character, or which occasion damages that are estimated only
4 by conjecture, and not by any accurate standard. *Id.* at ¶ 9 (citing *System Concepts, Inc. v.*
5 *Dixon*, 669 P.2d 421, 427-28 (Utah 1983)). Irreparable injury “is that which cannot be
6 adequately compensated in damages or for which damages cannot be compensable in
7 money.” *Id.*

8 Here all of these definitions of irreparable injury are met. An ongoing public
9 nuisance is by definition a “continuing” wrong, and the Plaintiffs have suffered and
10 continue to suffer from that wrong. It is also a wrong that occasions damages that can
11 only be estimated by conjecture. What is the value of not being able to walk the
12 neighborhood? What is the value of not being able to use the local park? What are the
13 damages for having to lock oneself in one’s home and business? What are the damages
14 for fear of safety or from cleaning up after drug use and public defecation? Utah courts
15 have issued injunctions and shuttered private businesses for less. See *Wade v. Fuller*, 365
16 P.2d 802 (Utah 1961) (upholding an injunction against the Polar King café’s operation in
17 Magna, Utah, due to the nuisance created by patrons of the café).² And it has found
18 “disruptions to [plaintiffs’] peaceful use and enjoyment of their property” to be
19 irreparable. *Johnson v. Hermes Assocs., Ltd.*, 128 P.3d 1151, 1158 (Utah 2005).

20 More still, the Plaintiffs have been victims of violence and property crimes. They
21 are unlikely ever to recover against the unsheltered and mentally ill persons who

22
23
24 ² In securing their injunction, the plaintiffs in *Wade* merely had to show that the
25 Polar King attracted obnoxious patrons whose conduct—unlike the objectively
26 dangerous conditions created by the unhoused in parts of Salt Lake City—could have
been found in the playbill from a high school production of *Grease*. *Wade*, 365 P.2d at 804.

1 commit such crimes. And the public nuisance also deters customers, which is often held
2 to be an irreparable harm. *Hunsaker*, 991 P.2d at 70 (“Loss of business and goodwill may
3 constitute irreparable harm susceptible to injunction.”). In sum, the harms Plaintiffs are
4 suffering meet several of the definitions of irreparable harm, each of which alone would
5 be sufficient to demonstrate irreparable harm. The irreparable harm element is therefore
6 met in this case.

7 **II. The Threatened Injury to The Plaintiffs Grossly Outweighs Whatever**
8 **Damage The Proposed Injunction Might Cause The City**

9 Here the relief sought by the Plaintiffs is that the Defendant abate the nuisance it
10 is permitting to exist on the property it owns and controls. It can do so by enforcing
11 existing law; at a minimum, it can do so by abandoning its policy of allowing public
12 encampments even when there is sufficient alternative space available. As noted above,
13 the annual point-in-time data from January of this past year reveal that the City has *more*
14 available and unoccupied shelter beds and supportive, rapid, and transitional housing
15 beds than there are unsheltered persons – and the point-in-time count was conducted in
16 winter, when there are generally more homeless individuals who move into shelter and
17 one would expect the utilization rates to be highest. And even if such beds were
18 suddenly to become unavailable, the City can always erect regulated campgrounds as
19 other cities have done. There are no unresolvable impediments to the City abating the
20 nuisance. Plaintiffs on the other hand are and will continue to be severely damaged for
21 as long as the City permits a public nuisance to remain on the City’s property.

22 **III. The Order or Injunction, If Issued, Would Not Be Adverse to The Public**
23 **Interest**

24 The interest of the public is best indicated by the laws passed by the City and the
25 State of Utah. *Bastian v. King*, 661 P.2d 953, 956 (Utah 1983) (“It is the power and
26 responsibility of the Legislature to enact laws to promote the public health, safety,

1 morals and general welfare of society, and this Court will not substitute our judgment
2 for that of the Legislature with respect to what best serves the public interest.” (cleaned
3 up)). Here, and as discussed in more detail in Part IV below, the laws of the City and
4 the State indicate that it is the public policy of the state not to permit camping on the
5 streets and public parks; not to permit the sale and consumption of illegal drugs
6 anywhere, but certainly not in public; not to permit public urination and defecation; not
7 to permit public sex acts; and not to permit harassment of blameless people who simply
8 want to live, work, and conduct business. An injunction requiring the City to abate the
9 nuisance by dismantling the campsites, relocating the unhoused from the streets, parks
10 and public easements to available shelter beds and supportive housing units, or to a
11 sanctioned and regulated campground, or to where their presence does not cause a
12 nuisance, and preventing public camping and the associated acts going forward is most
13 assuredly in the public interest.

14 **IV. There Is a Substantial Likelihood That The Plaintiffs Will Prevail on**
15 **The Merits of The Underlying Claim, or The Case Presents Serious**
16 **Issues on The Merits Which Should Be The Subject of Further Litigation**

17 **A. The City has created a public nuisance.**

18 The Plaintiffs are likely to prevail on the merits. The five elements of a private
19 party public nuisance claim are:

20 (1) the alleged nuisance consists of ‘*unlawfully* doing any act or omitting to
21 perform any duty,’ Utah Code Ann. § 76-10-803(1) (emphasis added); (2)
22 the ‘act or omission ... in any way renders three or more persons insecure
23 in life or the use of property,’ *Id.* § 76-10-803(1)(e); (3) Plaintiffs ‘suffer
24 damages different from those of society at large,’ *Erickson v. Sorensen*, 877
25 P.2d 144, 148 (Utah Ct. App. 1994), (4) Defendants caused or are
26 responsible for the nuisance complained of; and (5) Defendant’s conduct
was unreasonable,’ *Id.* at 148-49.

27 *Whaley v. Park City Mun. Corp.*, 2008 UT App 234, ¶ 13, 190 P.3d 1, 6. That last element
28 only applies if the actions do not otherwise violate a specific public nuisance provision
29 already in law (here they do). *Erickson* at 149; *see also* Restatement (Second) of Torts

1 § 821B (public nuisance may be sustained if “the conduct is proscribed by a statute,
2 ordinance or administrative regulation”).

3 The Plaintiffs can prove each element.

4 1. *The City is acting unlawfully*

5 As an initial matter, the public encampments and associated activities are
6 unlawful. The SLC Municipal Code specifically prohibits “camping on public grounds,
7 streets, parks and playgrounds.” It states:

8 It is unlawful for any person to camp, lodge, cook, make a fire, or pitch a
9 tent, fly, lean to, tarpaulin, or any other type of camping equipment on any
10 “public grounds,” as defined in subsection B of this section, upon any
11 portion of a “street,” as defined in section 1.04.010 of this code, or in any
park or playground, unless allowed by section 15.08.080 of this code.

12 SLC Municipal Code § § 11.12.080(A).

13 Subsection B provides that “public grounds” include any property owned by Salt
14 Lake City, in addition to any other public property “upon which no camping has been
15 authorized by the owner.” *Id.* The camping ban separately applies to any “street,” and
16 the relevant provision of the code defines street as “alleys, lanes, courts, boulevards,
17 public ways, public squares, public places and sidewalks.” SLC Municipal Code
18 § 1.04.010. In other words, the encampments violate this provision if they are in public
19 ways, squares, places, or sidewalks. And they are. The homeless encampments clearly
20 are unlawful under applicable law.

21 Utah’s criminal code further provides that “[a] nuisance is any item, thing, manner,
22 condition whatsoever that is dangerous to human life or health or renders soil, air, water,
23 or food impure or unwholesome.” Utah Code § 76-10-801. Here, the public property on
24 which the unsheltered have been allowed to camp, and the associated activities, are
25 “dangerous to human life or health or renders soil, air, water, or food impure or
26 unwholesome.” Part of Utah’s civil nuisance statutes also provides, in part, that any

1 “place” is a nuisance where “any controlled substance” is sold, stored, distributed,
2 dispensed, or acquired, or where “prostitution” is “regularly carried on,” or where there
3 are weapons violations. Utah Code Ann. § 78B-6-1107. Here, at a minimum illegal drug
4 sales, drug distribution, and drug acquisition is occurring daily on City property,
5 primarily in the neighborhoods in which the Plaintiffs live and work.

6 The encampments also violate the environmental laws. In Utah, “it is unlawful
7 for any person to **discharge** a **pollutant** into **waters of the state** or to cause pollution
8 which constitutes a menace to public health and welfare, or is harmful to wildlife, fish,
9 or aquatic life, or impairs domestic, agricultural, industrial, recreational, or other
10 beneficial uses of water, or to place or cause to be placed any waste in a location where
11 there is probable cause to believe it will cause pollution.” Utah Code § 19-5-107(1)(a).
12 Further, the statute provides that “[f]or purposes of injunctive relief, any violation of this
13 subsection is a public nuisance.” *Id.* § (1)(b).

14 The residents of the encampments are discharging trash (including drug
15 paraphernalia) and human waste into storm drains, where they pollute the “waters of
16 the state,” or which otherwise cause “pollution.” Under the statute, “discharge” “means
17 the addition of a pollutant to waters of the state.” *Id.* § 19-5-102(7). And “waste” or
18 “pollutant” is defined to include “**solid waste**” as well as “**sewage, garbage, [and]**
19 **sewage sludge.**” *Id.* § 102(22). “Waters of the state” is then defined to mean “streams,
20 lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems,
21 **drainage systems**, and all other bodies or accumulations of water, surface and
22 underground, natural or artificial, public or private, that are contained within, flow
23 through, or border upon this state or any portion of the state.” *Id.* § 102(23)(a). The City
24 is unlawfully causing a nuisance by permitting unsheltered individuals to urinate,
25 defecate, leave trash, and drug paraphernalia on its property that is then washed into
26 the storm drains.

1 Not only are the encampments themselves unlawful, but the City itself is acting
2 unlawfully by “omitting to perform” a duty with respect to them. Utah Code Ann. § 76-
3 10-803(1); *Whaley*, 190 P.3d at 6. As the Utah Supreme Court has observed, “That the city
4 is charged with the duty of maintaining the sidewalks within its limits in a safe condition
5 for use in the usual mode by pedestrians thereon is so well established as to need no
6 citations of authority.” *Salt Lake City v. Schubach, United Pac. Ins. Co., Intervener*, 108 Utah
7 266, 272, 159 P.2d 149, 151-52 (1945). “[T]he sidewalks are part of the public highway,
8 dedicated to use by the public, and the municipal corporations have no right or authority
9 to grant individuals the use thereof which would in any way interfere with the use by the
10 public.” *Id.* at 157. Neither a village nor a city could “absolve itself of a . . . duty in respect
11 to permitting a nuisance to be maintained, partly or wholly, in its streets.” *Id.* at 158
12 (quoting *Moore v. Townsend*, 76 Minn. 64, 67 78 N.W. 880, 880 (1899)). The City is liable
13 for the permitting the unsheltered to camp on its streets and other public rights of way.

14 The City is also acting unlawfully for a second and independent reason, namely
15 that it is responsible for the conduct that occurs on its lands. The Restatement provides
16 that “[a] possessor of land” is liable for nuisances on his property if he “knows or should
17 know of the condition and the nuisance” and fails “to take reasonable steps to abate the
18 condition.” Restatement (Second) of Torts § 839. It further provides that “[a] possessor
19 of land upon which a third person carries on an activity that causes a nuisance is subject
20 to liability for the nuisance” if the possessor “knows or has reason to know” of the
21 activity and “consents to the activity or fails to exercise reasonable care to prevent the
22 nuisance.” *Id.* § 838. Here, the City has either consented to the activities on its lands, or
23 has failed to take reasonable steps to abate the conditions.

24 The City is acting unlawfully for a third and independent reason: it is failing to
25 provide equal protection of the laws to Plaintiffs. The Utah Constitution provides that
26 “[n]o person shall be deprived of life, liberty or property, without due process of law,”

1 Article I, § 7, and that “[a]ll laws of a general nature shall have uniform operation,”
2 Article I, § 24. The Utah Supreme Court has held that the latter clause “incorporates the
3 same general fundamental principles as are incorporated in the Equal Protection
4 Clause,” but that the Utah Supreme Court’s “construction and application of Article I, §
5 24 are not controlled by the federal courts’ construction and application of the Equal
6 Protection Clause.” *Malan v. Lewis*, 693 P.2d 661, 670 (Utah 1984).

7 At the time the clause was adopted, the uniform operation provisions were not
8 viewed as a limit on legislative classifications, but rather “as a rule of uniformity in the
9 actual application of such classifications.” *Bolden v. Doe (In re Adoption of J.S.)*, 358 P.3d
10 1009, 1026 (Utah 2014). Here, the City has de facto exempted itself from the operation of
11 the nuisance laws, and has also exempted certain individuals in certain areas from the
12 operation of the City’s anti-camping laws. Additionally, the original meaning of “due
13 process of law” included a “protection of the laws” component. “Protection of the laws”
14 was historically the protection against private invasion of private rights. *Marbury v.*
15 *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); Randy E. Barnett & Evan D. Bernick, The
16 Original Meaning of the Fourteenth Amendment: Its Letter and Spirit 320 (2021)
17 (protection of the laws “entitles people . . . to equal *enforcement* of whatever state laws
18 are on the books to protect their personal security.”); *id.* at 321 (“States have an
19 affirmative duty to provide executive branch enforcement of laws protecting life, liberty,
20 and property.”). Therefore, the City has an obligation to enforce the camping bans
21 equally throughout the City and has an obligation to protect the Plaintiffs against
22 interference with their property rights; otherwise, it is not providing equal “protection
23 of the laws” to its citizens and is acting unlawfully.

24 2. *The acts and omissions of the City make numerous of its citizens, not just three,*
25 *insecure in their persons and property.*

1 There are more than three Plaintiffs in this suit, so the numerosity requirement is
2 met. It is self-evident that numerous Salt Lake City residents are also insecure in their
3 persons and property as a result of the City's actions and inactions.

4 3. *The Plaintiffs each have special and particular damages.*

5 As described in their Complaint and herein, Plaintiffs live in the areas of the City
6 that are most affected by the actions and inactions of the City. They live in the areas
7 where the largest number of unsheltered are allowed to roam and where the largest
8 concentration of wrongful acts occur. The Plaintiffs each have direct experience with the
9 effects of the City's permitting unsheltered persons to camp on public lands and to
10 violate state and city laws without consequence. They have suffered, currently suffer,
11 and will undoubtedly continue to suffer both monetary and irreparable harms as a result
12 of the City permitting the nuisance to remain.

13 4. *The City is responsible for the nuisance.*

14 The City is permitting individuals to squat and dwell on its property, on the
15 streets, in the parks, and on public easements. As noted above, that is sufficient for legal
16 responsibility because the Restatement provides that "[a] possessor of land" is liable for
17 nuisances on his property if he "knows or should know of the condition and the nuisance"
18 and fails "to take reasonable steps to abate the condition," and that "[a] possessor of land
19 upon which a third person carries on an activity that causes a nuisance is subject to
20 liability for the nuisance" if the possessor "knows or has reason to know" of the activity
21 and "consents to the activity or fails to exercise reasonable care to prevent the nuisance."
22 *Restatement (Second) of Torts §§ 838-39.*

23 That is enough on its own for legal responsibility. But, the City has greater
24 culpability in that the City has affirmatively encouraged (and therefore caused) the
25 nuisance by creating an amenity—a no-barrier shelter on the City streets and parks—
26 that attracts unsheltered persons to Plaintiffs' neighborhood. The City *admits* that the

1 unsheltered are on the street not because shelter is unavailable, but because they prefer
2 the freedom of the street; and the PIT count demonstrates there is adequate bed space
3 available in any event. Thus, this is not merely a matter of enforcement discretion, but
4 rather an *illegal policy choice* to allow and encourage, and therefore cause, public
5 nuisances on City lands.

6 5. *The City's actions are unreasonable as a matter of law because they violate State*
7 *law and City ordinances.*

8 The City's actions and omissions in failing to maintain its property in, *inter alia*, a
9 sanitary condition, violate various state laws and its own ordinances as described above.
10 Accordingly, its actions are unreasonable as a matter of law.

11 **B. The City has created a private nuisance.**

12 Plaintiffs are also likely to succeed on a private nuisance claim. The elements of
13 such a claim are: (1) a substantial invasion in the private use and enjoyment of land, (2)
14 caused by Defendants or for which Defendants are responsible, and (3) the invasion is
15 either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable.
16 *Whaley*, 190 P.3d at 9. Private nuisance claims do not require that the defendant's actions
17 be unlawful, and specific authorization from a municipality does not defeat a private
18 nuisance claim. Rather, the focus of the Court in a private nuisance claim is on the injury
19 to the Plaintiff. *Id.*

20 As the facts asserted in the verified complaint attest, Plaintiffs are unquestionably
21 experiencing a substantial and unreasonable invasion of their private use and enjoyment
22 of their property and businesses. And, as noted, the City is responsible for the nuisance
23 because it occurs on its lands. Restatement (Second) of Torts §§ 838, 839. The City's
24 actions are also intentional. "An invasion of another's interest in the use and enjoyment
25 of land or an interference with the public right, is intentional if the actor (a) acts for the
26 purpose of causing it, or (b) knows that it is resulting or is substantially certain to result

1 from his conduct.” Restatement (Second) of Torts § 825. Intentionality therefore includes
2 “conduct,” and “conduct” is either an act *or* a failure to act: “The conduct necessary to
3 make the actor liable for either a public or a private nuisance may consist of (a) an act;
4 or (b) a failure to act under circumstances in which the actor is under a duty to take
5 positive action to prevent or abate the interference with the public interest or the
6 invasion of the private interest.” *Id.* § 824.

7 Finally, as noted above, the injury to the Plaintiffs is unreasonable in light of the
8 intentional failure of the City to enforce numerous laws that, if enforced, would abate
9 the nuisance. There are shelter beds or housing units available for all the unsheltered
10 who would accept it. And even if there are not sufficient beds for everybody, the City
11 could substantially abate the nuisance by offering the available beds and units to the
12 vast majority of unsheltered persons and create a regulated campground for the rest.
13 The City’s activities are by definition unreasonable if they could be done elsewhere
14 where they would not constitute a nuisance. *Shaw v. Salt Lake County*, 224 P.2d 1037, 1040–
15 41 (Utah 1950).

16 CONCLUSION

17 For the reasons set forth above, the Court should issue a preliminary injunction
18 compelling the City to abate any and all nuisances caused by the unhoused on its
19 property, including without limitation those discrete nuisances detailed above. Further,
20 as authorized by Utah Code Section 78B-6-1114, Plaintiffs are entitled to attorney fees
21 and costs incurred herein, including “the costs of investigation and discovery,” incurred
22 pursuant to the present motion and this lawsuit generally.

23
24
25
26

DATED this 28th day of September, 2023.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

VOGELER, PLLC

/s/ Eric Vogeler
Eric Boyd Vogeler
Attorney for Plaintiffs

LEE NIELSEN, PLLC

/s/ John N Nielsen
John J. Nielsen
Attorney for Plaintiffs

TULLY BAILEY, LLP

/s/ Stephen Tully
Stephen Tully
Ilan Wurman
Michael Bailey
Attorneys for Plaintiffs (*Pro Hac
Pending*)

CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading was filed electronically with the Court via its electronic filing system, which system effected service of the same on all counsel currently appearing on the case. I further certify that, if and as necessary, alternative means of service – including personal service if necessary – have been or will be utilized to ensure that this pleading is timely delivered to Defendant Salt Lake City.

/s/ Eric Vogeler