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18 Austin Davis; Jane Parker; and Ron Tapscott,
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20 Plaintiffs,
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22 v.
23 City of Tempe, Arizona; and Rosa Inchausti,
24 in her official capacity as City Manager,
25
26 Defendants.

No. CV-25-01200-PHX-DJH

**PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Rule 65(a) of the Federal Rules of Civil Procedure and Rule 7.2 of the Rules of Practice and Procedure of the U.S. District Court for the District of Arizona, Plaintiffs hereby move the Court to enter a preliminary injunction barring Defendants

1 from enforcing the special events permit requirement of Tempe City Code § 5-2(a)(1)
2 against their charitable food-sharing activities until such time as the propriety of a
3 permanent injunction is determined. This motion is based on Plaintiffs' Memorandum of
4 Points and Authorities and the Verified Complaint of Austin Davis, Jane Parker, and Ron
5 Tapscott, which are filed herewith.

6 DATED: April 11, 2025.

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Austin Davis; Jane Parker; and Ron Tapscott,
Plaintiffs,

v.

City of Tempe, Arizona; and Rosa Inchausti,
in her official capacity as City Manager,
Defendants.

No. CV-25-01200-PHX-DJH

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

INTRODUCTION

Plaintiffs Austin Davis, Ron Tapscott, and Jane Parker want to share food, in public, with those most in need—both improving their community and protesting Tempe’s treatment of the homeless. Sharing food in public expresses their belief that the homeless

1 are deserving of dignity and that no person should go hungry in a society of abundance.
2 Verified Complaint, ¶ 2. But two of them have been cited and threatened with jail time for
3 engaging in these expressive, charitable acts. Their crime? Sharing food with those who are
4 hungry without first securing an expensive and onerous Special Events permit—the same
5 permit that applies to concerts, festivals, and other large public gatherings that use amplified
6 sound or involve commercial activity. T.C.C. § 5-2.

7 That permit ordinance is so broad, and so vague, that it lends itself to selective
8 enforcement. And indeed Defendants have enforced it in contradictory ways. Up until
9 recently, Tempe¹ never contended that it applied to food-sharing activities. In 2022, it even
10 gave Plaintiff Austin Davis an award for the “Sunday Picnics” he held for the homeless.
11 Verified Complaint, ¶ 15. But just months later, the City demanded he obtain a permit,
12 claiming that *all* outdoor public events require one, even though the City does not require
13 them for similar, small food-sharing events (picnics or barbeques) and despite that such an
14 interpretation would sweep in a vast swath of protected speech, including protests, busking,
15 panhandling, or book clubs of any size in the park. *Cf. Berger v. City of Seattle*, 569 F.3d
16 1029, 1053 (9th Cir. 2009) (ban on street-performing was not adequately tailored because
17 government must target actual nuisance, not all speech, and must punish afterward rather
18 than imposing prior restraint). The City later denied Davis’s permit application, invoking
19 its unfettered discretion over permit approvals. And then, when Davis refused to watch
20 people go hungry and continued to share food, the City repeatedly cited him for lacking a
21 permit. His charitable efforts eventually landed him in jail. Verified Complaint, ¶ 20.

22 The City’s interpretation of the permit requirement is constantly changing. When
23 another plaintiff, Ron Tapscott, converted his food-sharing activities to private events that
24 require membership in a club, Tempe cited him anyway. The City’s haphazard and selective
25 enforcement of the Special Events permit reveal its obvious constitutional infirmity: it is
26 an impermissible prior restraint on speech.

27
28 ¹ Defendants are collectively referred to as “the City,” or “Tempe.”

1 Tempe is forcing Plaintiffs to choose between exercising their First and Fourteenth
2 Amendment rights or facing arrest. *Id.* ¶¶ 20, 28, 32. In the meanwhile, people are going
3 hungry. A preliminary injunction is therefore necessary to prevent immediate harm.

4 Plaintiffs satisfy all the criteria necessary for a preliminary injunction. *See Am.*
5 *Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). First,
6 they are likely to succeed on the merits of their claim. Tempe's enforcement of the permit
7 requirement violates Plaintiffs' First Amendment rights to free speech and free assembly.
8 *See, e.g., Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022 (9th Cir.
9 2006) (invalidating, in part, permit requirement for food-sharing under the First
10 Amendment); *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266
11 (11th Cir. 2021) (invalidating food-sharing permit requirement as an unconstitutional
12 burden on expressive conduct); *Food Not Bombs Houston v. City of Houston, Texas*, Case
13 No. 4:24-CV-0338, 2024 WL 623913 (S.D. Tex. 2024) (granting preliminary injunction
14 after deeming a food sharing permit requirement a prior restraint on expressive conduct).
15 And because requiring a Special Events permit for charitable food-sharing does not further
16 any legitimate, let alone compelling, government interest and serves only to keep a
17 disfavored community out of the public eye, it also violates the Fourteenth Amendment.
18 *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432 (1985). Last, because
19 Chapter 5 of the Tempe Code regulates amusements and entertainment activities—not all
20 activities—Tempe's enforcement of the statute against sharing food with the homeless
21 exceeds its authority and is *ultra vires*.

22 Plaintiffs also satisfy the remaining criteria for securing a preliminary injunction. A
23 violation of constitutional rights constitutes irreparable harm, and preventing this violation
24 is always in the public interest. By contrast, the government has no competing interest in
25 enforcing its unconstitutional, ineffectual, and unjust permit scheme against Plaintiffs and
26 others who do not wish to see people go hungry.

27 Accordingly, the Court should grant preliminary injunctive relief and enjoin the City
28 from enforcing the permit requirement of Tempe City Code Sec. 5-2 while the lawsuit

1 proceeds.

2 **STATEMENT OF FACTS**

3 **I. The Special Events Permit Requirement**

4 Chapter 5 of the Tempe City Code is titled “Amusements.” Sec. 5-2 requires a permit
5 for “[t]emporary special events,” defined as “[a]ny outdoor public gathering or celebration
6 involving the use of City-owned properties” that “involve *but are not limited to* any of the
7 following”:

- 8 a. Entertainment, amusements, festivals, carnivals, parades, walks,
runs or bicycle rides;
- 9 b. Amplified sound;
- 10 c. Activities that charge a fee for participation;
- 11 d. Sale of merchandise or food, including sidewalk sales;
- 12 e. Any temporary extension of premises of an existing use; or
- 13 f. Activities that are open to the public.
- 14 g. Sale of merchandise, food or alcohol, including sidewalk
sales[.]

15 T.C.C. § 5-2 (emphasis added). Applications must be made 60 days in advance of the
16 scheduled event and the applicant must submit a non-refundable application fee. T.C.C. § 5-
17 2(c). If the event is approved, a permit fee must then be paid for each day of the event, as
18 well as a rental fee ranging from \$125–\$3000. The City Manager may deny the application
19 “if . . . it appears that the intended activity would be detrimental to the health, safety or
20 welfare of either the general public or of nearby residents or owners of nearby property or
21 place an undue burden on City services.” T.C.C. § 5-2(f). The City Manager also has
22 discretion to attach permit conditions, like requiring security personnel, parking, or
23 sanitation facilities, thereby allowing the City Manager to unilaterally drive up the cost of
24 the permit. T.C.C § 5-2(d). Beginning in late 2022, Tempe officials began interpreting Sec.
25 5-2 as requiring individuals who share food with the homeless in public spaces to obtain a
26 Special Events permit. Verified Complaint, ¶ 16.

27 **II. Tempe’s Enforcement of the Permit Requirement Against Plaintiffs**

28 **A. Austin Davis and AZ HUGS**

Austin Davis is the founder of a 501(c)(3) nonprofit, AZ HUGS. Davis has devoted
his career to helping people experiencing homelessness throughout the Tempe area. *Id.* ¶

1 12. Austin and AZ HUGS provide free food, free rides to mental health and addiction
2 treatment, and assistance in securing social services, temporary housing, and jobs. Austin
3 is partially motivated by his desire to help people in need. He is also motivated by a desire
4 to protest against what he sees as government’s failure to help the homeless and the stigma
5 some people attach to them. *Id.* ¶ 13. He therefore shares food publicly to communicate that
6 the poorest amongst us are deserving of dignity and are members of the community as much
7 as the rest of the City’s residents. *Id.*

8 In March 2022, Austin received Tempe’s Neighborhood Event of the Year award for
9 organizing AZ HUGS’ “Sunday picnics.” *Id.* ¶ 15. Up until that time and for months after,
10 no one suggested that Austin was breaking any laws. But that Fall, the City’s attitude
11 towards the homeless changed, and in October the City told Austin that he needed a Special
12 Events permit to continue his picnics. *Id.* ¶ 16.

13 Though Austin did not believe that the permit requirement applied to his activities, he
14 applied for one in December 2023. His application was denied in January 2024. *Id.* ¶ 17.
15 The City stated that it rejected Austin’s application because he did not comply with its
16 demand that he stop his picnics for 60 days while his application was pending. *Id.* ¶ 18.
17 Austin believed that it made no sense to stop feeding hungry people for two months when
18 he had been doing so without incident (and with the city’s express approval) for years. *Id.*
19 Instead, he had asked the city to expedite the review process, but the city refused. *Id.*

20 After Austin’s permit application was denied, Tempe police began to cite Austin every
21 weekend for conducting a picnic in the park without a permit. *Id.* ¶ 19–20. On September
22 11, 2024, Austin accepted a plea deal from the city in which it agreed to drop 34 charges of
23 conducting picnics without a permit in exchange for Austin pleading guilty to one count of
24 the permit violation. *Id.* ¶ 22.

25 **Jane Parker and H.O.P.E. Arizona**

26 Jane Parker is a 77-year-old Tempe resident who runs a 501(c)(3) nonprofit
27 organization called H.O.P.E. Arizona. *Id.* ¶ 24. Her organization began serving the homeless
28 in 2020 by providing the homeless with food, hygiene kits, and sleeping bags. *Id.* Jane began

1 helping the homeless for the simple reason that she did not want to see people go hungry.
 2 She believes that because there is an abundance of food and plenty of people who want to
 3 share it, letting people go hungry is inhumane and wrong. By sharing food in public, she
 4 also communicates that we can make sure people don't go hungry if we simply engage with
 5 our community, including the homeless.²

6 Jane estimates that continuing to feed the homeless once or twice a month would cost
 7 \$5,000 a year in fees, which is money she and her organization do not have. *Id.* ¶ 27. Jane
 8 would like to continue to offer food to the homeless, as she has been doing for years without
 9 incident. But Jane fears that the city will treat her the way it has already treated Austin Davis
 10 and Ron Tapscott. *Id.* ¶ 28. With her caretaking responsibilities to her disabled son and sick
 11 husband, Jane cannot afford to go to jail. *Id.* But she cannot afford the permit, either. *Id.*

12 **Ron Tapscott and New Deal Meal**

13 Ron Tapscott is a retired social worker and an advocate for the homeless. *Id.* ¶ 29. Ron
 14 is a member of a club called New Deal Meal, which provides free food for the homeless.
 15 *Id.* When engaging in food-sharing, Ron and other volunteers often bring signs to
 16 underscore the message behind their activity and to bring attention to Tempe's treatment of
 17 the homeless. At one event, Ron and his fellow members held a sign that said, "When City
 18 of Tempe fails, we feel it is our duty to care 4 our community." Other signs have said,
 19 "Feeding people is not a crime," "Fining compassion is where my tax dollars go?" "Feeding
 20 the hungry is not an event it's for survival," "Hey Corey!! I was hungry and you didn't feed
 21 me," and "Matthew 25:42." Ron has said that he engages in his activities to "make a
 22 statement. There are people who need help out there. If the city isn't willing to help, we
 23 are." *Id.* ¶ 31. As with Ron's co-plaintiffs, it's vital to Ron's expression that he be able to
 24 express these messages in public rather than in private or at a shelter.

25 Ron's and New Deal Meal's food sharing activities are not "open to the public." *Id.* ¶

26 _____
 27 ² Jane can be seen expressing some of these sentiments at a City Council meeting in a video
 28 of public hearings posted on YouTube. <https://m.youtube.com/watch?v=cI0R1Dz8Z-E&t=3000s>

1 30. New Deal Meal is a private club, and only members may share or receive food.
 2 Attendees are asked to register with the group. *Id.* Nevertheless, the police cited Ron for
 3 sharing food without a Special Events permit on January 26, 2025. *Id.* ¶ 32.

4 This lawsuit does not challenge any previous enforcement efforts against Plaintiffs. It
 5 does not, for example, ask that their previous citations be overturned. Instead, it seeks
 6 wholly prospective declaratory and injunctive relief pursuant to *Ex Parte Young*, 209 U.S.
 7 123 (1908), prohibiting Defendants from enforcing the challenged law in the future.

8 LEGAL STANDARD

9 To secure a preliminary injunction, Plaintiffs must show that they are “likely to
 10 succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of
 11 preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is
 12 in the public interest.” *Am. Trucking Ass’ns, Inc. v. City of Los Angeles*, 559 F.3d at 1052
 13 (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Plaintiffs satisfy
 14 each of these four requirements.

15 ARGUMENT

16 I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

17 Plaintiffs are likely to succeed on the merits of their claims that Tempe City Code Sec.
 18 5-2(a)(1) violates the First and Fourteenth Amendment and that Defendants are exceeding
 19 their authority by applying the statute to charitable food-sharing.

20 First, the permit requirement is an unconstitutional prior restraint on speech. *See Food*
 21 *Not Bombs Houston v. City of Houston, Texas*, 2024 WL 623913 (S.D. Tex. 2024) (entering
 22 preliminary injunction against food-sharing ordinance on basis it was an unconstitutional
 23 prior restraint). It gives Defendants unfettered discretion to determine whether the permit
 24 requirement applies to the desired activity, to approve or deny the permit, and to drive up
 25 the cost of the permit by attaching certain conditions. It’s also overbroad, since it applies to
 26 a vast amount of protected speech. *Food Not Bombs Houston*, 2024 WL 623913, at *6 (S.D.
 27 Tex. 2024) (invalidating food sharing ordinance because it did was not tailored to any state
 28 interest and instead merely made food-sharing impossible). The danger is evidenced by the

1 City’s enforcement history; it threatened crushing fees and jail time for the same activity it
2 had applauded just months before. By all accounts, the City has failed to require a permit
3 of other public food-sharing activities, like small picnics or barbeques, and has cited Ron
4 Tapscott even when his food-sharing events were private and limited to members only.

5 Second, the permit requirement violates the Fourteenth Amendment’s Due Process of
6 Law and Equal Protection Clauses because it is arbitrary and selectively enforced. It bears
7 no connection to keeping parks clean or ensuring food is safe. It does not prohibit littering,
8 or impose food safety standards; it simply makes it prohibitively expensive to share food
9 with those in need. As applied to Plaintiffs, its only purpose is to burden a disfavored group.
10 *City of Cleburne*, 473 U.S. at 448.

11 Last, enforcing the permit requirement against Plaintiffs is *ultra vires* because the
12 scheme does not cover food sharing and is instead meant to regulate entertainment activities
13 that draw large public audiences.

14 **A. The Permit Requirement Violates the First Amendment**

15 Courts have recognized that food-sharing can be expressive conduct protected by the
16 First Amendment. In *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th
17 1266 (11th Cir. 2021), the Eleventh Circuit ruled that, taking into consideration the context
18 surrounding the plaintiffs’ food-sharing events, it was clear the plaintiffs intended to convey
19 a particular message and that the public would understand their activity as doing so. *Id.* at
20 1240–44; *see also Food Not Bombs Houston*, No. 4:24-CV-0338, 2024 WL 623913, at *4
21 (“the political message of feeding the hungry, eating with them, and doing so on public
22 property, would be understood by an onlooker”).

23 Here, Plaintiffs communicate the importance of sharing food with the homeless and
24 the failure of society to help those in need. Verified Complaint, ¶¶ 13, 25, 31. They do so
25 publicly to demonstrate that the homeless are equal in dignity and that homelessness can be
26 solved if the community steps up and help.³ Given ongoing public debate about the City’s

27 ³ The permit requirement also restricts the First Amendment right to peaceably assemble,
28

1 homelessness policies and the social significance of not only sharing food, but eating
2 together with the homeless, Plaintiffs’ activities would be understood as sending a political
3 message. Their activity is therefore protected First Amendment expression. That’s only
4 bolstered by the signs that some volunteers bring when sharing food.

5 Because Sec. 5-2(a)(1) requires a permit before engaging in this protected speech and
6 peaceable assembly, and because it lacks objective standards to guide public officials, it is
7 an unconstitutional prior restraint. But even if considered a time, place, manner restriction,
8 it fails intermediate scrutiny because it is not adequately tailored to any important
9 government interest.

10 **i. Section 5-2(a)(1) is a vague and unconstitutional prior restraint**

11 Because Sec. 5-2(a)(1) requires a permit before engaging in expression, it is a classic
12 prior restraint. *Spirit of Aloha Temple v. County of Maui*, 49 F.4th 1180, 1191 (9th Cir.
13 2022) (citation omitted) (a law that makes speech “contingent upon the uncontrolled will of
14 an official—as by requiring a permit or license which may be granted or withheld in the
15 discretion of such official—is an unconstitutional censorship or prior restraint”). Prior
16 restraints bear a “heavy presumption” of unconstitutionality. *Forsyth Cnty. v. Nationalist*
17 *Movement*, 505 U.S. 123, 130 (1992). To survive First Amendment scrutiny, they must “not
18 delegate overly broad licensing discretion to a government official” and must use “narrow,
19 objective, and definite standards” to guide the licensing authority. *Id.* at 131. If the permit
20 scheme “involves appraisal of facts, the exercise of judgment, and the formation of an
21 opinion” by the licensing authority, the risk of censorship is too great and the law is
22 unconstitutional. *Id.*

23 In *Food Not Bombs Houston*, 2024 WL 623913, at *5, a district court granted a
24 preliminary injunction against a law that required a permit for food-sharing on the basis that
25 it was a prior restraint. The law granted discretion over permit approvals to one official, the
26 mayor, resulting in different applications at different times. Though the city had outlined

27 _____
28 which is “a right cognate to . . . free speech and free press and is equally fundamental.” *De*
Jonge v. State of Oregon, 299 U.S. 353, 364 (1937).

1 criteria that would be considered, the criteria were necessary but not sufficient to secure a
2 permit, leaving applicants to guess at whether their application would be granted. In fact,
3 the ordinance did “not even guarantee that that at least one location would be permitted.”

4 Similarly, the Special Events permit ordinance lacks any objective standards to guide
5 officials in determining whether a permit is required, whether to grant or to deny the permit,
6 or whether officials may impose expensive permit conditions. For example, though the
7 Ordinance falls under a Chapter that covers “entertainment,” it allows the City to require a
8 permit for *any* activity open to the public. T.C.C. § 5-2(a)(1)(f). The ordinance provides
9 some examples of activity that can be regulated, but the list is non-exhaustive. T.C.C. § 5-
10 2(a)(1). This has led to selective and arbitrary enforcement: for some time, Tempe
11 apparently did not think the ordinance applied to food-sharing. Later, it cited Davis on the
12 theory that a permit was required for all events open to the public. But even after Ron
13 Tapscott deliberately made his events private and required membership in a private club,
14 Tempe cited him, too. What’s more, the City’s interpretation applies to small political
15 protests of any kind, or food-sharing of any kind, and yet the City has only enforced it
16 against those who protest government’s treatment of the homeless.

17 Similarly, the City can deny a permit for effectively any reason. The ordinance allows
18 the City Manager to refuse a permit if he or she decides that “the intended activity would
19 be detrimental to the health, safety or welfare of either the general public or of nearby
20 residents or owners of nearby property or place an undue burden on City services.” T.C.C.
21 § 5-2(f). City officials are guided only by their own subjective judgment about what is good
22 or what harms the public—including, even, charity. The Supreme Court has deemed
23 permitting schemes unconstitutional where they allow officials to be guided only by their
24 own ideas of “public welfare, peace, safety, health, decency, good order, morals or
25 convenience.” *Shuttlesworth*, 394 U.S. at 150; *see also Spirit of Aloha Temple*, 49 F.4th at
26 1192 (law allowing officials to base decisions on whether they believe something
27 “adversely affect[s] surrounding property” was unconstitutional because it was too vague).
28 What’s more, Tempe can impose expensive permit conditions (paying for security

1 personnel, portable toilets, “or any other measures” for seemingly any reason at all without
2 limitation. T.C.C. § 5-2(d).

3 This is not a case where the City sets out objective criteria that must be met to share
4 food (or to otherwise speak), like a limitation on the size, duration, or location of the event,
5 limitations on noise amplification, or imposing requirements for clean-up. Instead, it leaves
6 applicants clueless as to whether their activity is covered by the permitting scheme, how to
7 estimate their costs, or how to effectively secure a permit, since the ordinance leaves those
8 three questions at the whim of city officials. Because the law lacks objective criteria to cabin
9 those who enforce it, it is an unconstitutional prior restraint.

10 **ii. Section 5-2(a)(1) fails intermediate scrutiny**

11 Even if viewed as a “time, place, and manner” restriction rather than a prior restraint,
12 the Special Events permit ordinance is unconstitutional because it fails intermediate
13 scrutiny. To be constitutional, a time, place, and manner restriction must be (1) content-
14 neutral, (2) must not be “substantially broader than necessary to achieve the government’s
15 interest,” and (3) it must leave open ample alternative channels for communicating the
16 speaker’s message. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). And it “may
17 not regulate expression in such a manner that a substantial portion of the burden on speech
18 does not serve to advance its goals.” *Id.* at 799. It is the government’s burden to
19 “demonstrate that alternative measures that burden substantially less speech would fail to
20 achieve the government's interests[.]” *McCullen v. Coakley*, 573 U.S. 464, 495 (2014).

21 In *Food Not Bombs Houston*, 2024 WL 623913, the court ruled that the city’s food-
22 sharing ordinance was not a valid time, place, and manner restriction because there was no
23 nexus at all between “healthy and safety” and the ordinance. *Id.* at *6. The city did not
24 require food safety training, or even ban serving spoiled food, and the scheme had no
25 apparent connection to other purported rationales, like preventing vermin or “unifying its
26 efforts to support Houston’s homeless.” *Id.* The restrictions also did not leave open ample
27 alternative channels of communication because they only allowed events in a single
28 location. *Id.*

1 Similarly, Sec. 5-2(a)(1) lacks a relationship to *any* government interest. It does not
2 actually prevent any public harm, like ensuring clean parks or safe food. It does not require
3 clean-up of the relevant area or prohibit littering. Nor does it impose food or sanitation
4 requirements. The City has myriad other ordinances, like provisions against littering,
5 nuisance, and camping, that protect against any negative externalities of offering food to
6 the homeless. The permit requirement merely makes it too expensive for anyone to afford
7 a permit and allows officials to deny the permit for any reason. As in *Food Not Bombs*,
8 “The City may impose restrictions on the conduct of individuals with regard to health and
9 safety, but it cannot limit that conduct to certain locations in the name of health and safety
10 when there are no actual health and safety protocols tied to those locations.” *Id.*

11 The ordinance also sweeps far too broadly. If Tempe is concerned with protecting
12 public parks, it could limit the permit requirement to activities involving groups above a
13 certain number of people, events involving sound amplification, or that are situated adjacent
14 to private residences. Instead, the permit requirement is imposed on *every* outdoor activity
15 “open to the public” on city property regardless of size, noise-level, or how much space
16 they intend to take up. Anyone who wishes to hold a celebration, or a political or religious
17 discussion that is “open to the public,” including even a small, public book club, a prayer
18 circle, an outdoor “Change My Mind” debate, is included under the plain terms of the
19 ordinance. Even a person holding a “Free Hugs” sign would arguably need a permit. This
20 sweeps too far and leaves no alternatives, making the ordinance overbroad.

21 **B. Section 5-2(a)(1) Is Arbitrary and Irrational in Violation of the**
22 **Fourteenth Amendment**

23 The right of charity is deeply rooted in this Nation’s history and tradition, making it a
24 fundamental right. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022)
25 (setting out standard for whether an unenumerated right is fundamental). Americans have
26 consistently engaged in charity since the Founding, when it powered basic services like
27 colleges, hospitals, and helping the needy.

28 The right to charitable giving is so deeply-rooted that evidence of this right is apparent

1 in our laws of property, trusts, and estates. Adam MacLeod & Mark David Hall,
2 *Foundations of the Right of Charitable Uses*, 94 Miss. L.J. 251, 282 (2024–2025) (“The
3 power to give, devise, and bequeath one’s property for charitable ends is one of the strongest
4 rights in all of property law.”) State and federal governments affirmatively encouraged acts
5 of charity through things like Good Samaritan food donations laws, present in every state,
6 which limit the liability of those who donate food to the poor. *Id.* at 302; *see, e.g.*, Ariz.
7 Rev. Stat. § 36-916 (this law renders the permit requirement even more irrational). The
8 states and the federal government have a long tradition of exempting charitable
9 organizations from taxation. *See, e.g.*, A.R.S. § 42-11104, § 42-5159(A)(12)(f), I.R.C.
10 501(c)(3). By contrast, laws restricting sharing food with the homeless are not deeply
11 rooted. In fact, Tempe only decided to employ its Special Events permit to this activity in
12 the past few years.

13 Because it deprives Plaintiffs of their fundamental right to engage in charity and treats
14 them differently than others similarly situated based on this fundamental right, it is subject
15 to strict judicial scrutiny under a due process and equal protection inquiry. But both on its
16 face and as applied to Plaintiffs, the ordinance fails even rational basis scrutiny. The permit
17 scheme does nothing to protect the public because it does not impose clean-up requirements
18 or impose health and safety standards. Instead, it imposes burdensome costs and gives
19 officials a free-wheeling ability to stifle events of their choice. *See, e.g., City of Cleburne*,
20 473 U.S. 432 (invalidating law under rational basis test lacked a rational connection to its
21 purported end); *Zobel v. Williams*, 457 U.S. 55, 56 (1982) (same); *Dep’t of Agric. v.*
22 *Moreno*, 413 U.S. 528 (1973) (same); *Plyler v. Doe*, 457 U.S. 202 (1983) (same).

23 Because it lacks a relationship to any apparent government interest, the City’s
24 enforcement appears more clearly related to stifling events they do not like. Here, Tempe
25 officials have used the permit requirement to discourage Tempe citizens from sharing food
26 with the homeless in public parks, even while tolerating similarly situated small food-
27 sharing events, like small picnics. But the desire to remove a disfavored group from a
28 particular area is not a legitimate government interest. *See, e.g., City of Cleburne*, 473 U.S.

1 at 447–48. Because Tempe’s enforcement of ordinance Sec. 5 2(a)(1)(f) is motivated by the
2 desire to remove an unpopular group (the homeless and charitable groups who serve them)
3 from public parks, it fails rational basis review and is unconstitutional.

4 **C. Section 5-2(a)(1) Does Not Apply to Food-Sharing**

5 The Special Events permit scheme does not apply to sharing food with the homeless,
6 meaning Tempe’s application of the laws to Plaintiffs’ desired conduct is *ultra vires*.
7 Chapter 5 of the Tempe City Code is titled “Amusements,” which is defined elsewhere in
8 the code as activities having “the following type or nature”:

9 Operating or conducting theaters, movies, operas, shows of any type or
10 nature, exhibitions, concerts, carnivals, circuses, amusement parks,
11 menageries, fairs, races, contests, games, billiard or pool parlors, bowling
12 alleys, skating rinks, tennis courts, golf courses, video games, pinball
machines, public dances, dance halls, sports events, jukeboxes, batting and
driving ranges, animal rides, or any other business charging admission for
exhibition, amusement, or entertainment.

13 T.C.C. § 16-410.

14 The Special Events permit itself explicitly covers things like, “[e]ntertainment,
15 amusements, festivals, carnivals, parades, walks, runs or bicycle rides,” or that use
16 “[a]mplified sound,” “charge a fee,” or involve commercial sales. The inescapable
17 conclusion is that the permitting scheme was meant to apply to large gatherings involving
18 entertainment activities that are open to the public, especially for a fee or commercial
19 purpose, since those are intended to draw large crowds. It does not apply to small gatherings
20 in the park that do not involve loud music, do not involve commercial activities, are not
21 intended to entertain the public, and are not open to the public writ large.

22 If the ordinance refers to all activities of any kind that are open to some segment of
23 the public on city property, without any further qualification, it would render the other
24 provisions of the ordinance superfluous. Antonin Scalia and Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012) (“[No provision] should needlessly be given
25 an interpretation that causes it to duplicate another provision[.]”). It would require a Special
26 Events permit for activities like a pick-up basketball game, a small (but open) prayer circle
27 or Bible study, a local yoga studio’s free group meditation, or even a lemonade stand run
28

1 by children. Given that the ordinance imposes criminal penalties for its violation, T.C.C.
2 § 1-7, the ordinance ought to be interpreted narrowly, in accordance with the rule of lenity.
3 *Id.* at 296 (“Ambiguity in a statute defining a crime or imposing a penalty should be resolved
4 in the defendant’s favor.”). And given the First Amendment implications of such a broad
5 reading, a narrow interpretation is necessary to avoid rendering the law unconstitutional.

6 Plaintiffs’ activities do not fall under the ordinance’s text for three reasons. First, they
7 are not entertainment activities meant for public consumption. Instead, they are expressive,
8 charitable acts meant to convey a social and political message. Second, they are not open to
9 the public in the way contemplated by the text. While Plaintiffs would share food with all
10 who need, they do not invite the public writ large. Third, the law does not apply to
11 gatherings like Ron Tapscott’s, which are explicitly closed to the public and require
12 membership. The City has long interpreted its ordinance as excluding charitable food-
13 sharing. This Court should follow that practice and enjoin Defendants’ new application of
14 the challenged laws against Plaintiffs.

15 **II. PLAINTIFFS ARE SUFFERING AND WILL CONTINUE TO SUFFER**
16 **IRREPARABLE HARM WITHOUT A PRELIMINARY INJUNCTION**

17 The loss of First Amendment freedoms, “for even minimal periods of time,
18 unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976).
19 And the degree of irreparable harm required to justify a preliminary injunction is lowered
20 if the probability of success on the merits is high. *Earth Island Inst. v. U.S. Forest Serv.*,
21 351 F.3d 1291, 1300 (9th Cir. 2003). Here, Plaintiffs are both likely to succeed and are
22 suffering the grave irreparable harm: the loss of constitutional rights which will prevent
23 them from helping people in need.

24 Plaintiffs have been and continue to be injured by Tempe’s enforcement of the permit
25 requirement. Over the past year, Austin Davis has been cited, arrested, jailed, and subject
26 to a plea deal that bans him from public areas for engaging in activities that courts have
27 deemed protected First Amendment activity. Ron Tapscott has recently been cited by
28 Tempe police for doing the same. And the cost of the permit, combined with fear of arrest,

1 has forced Jane Parker to stop expressing her deeply held belief that in a wealthy country,
2 no one should have to go hungry. Because the loss of their First Amendment freedoms is
3 concrete, ongoing, and significant, Plaintiffs have established irreparable harm.

4 **III. THE BALANCE OF HARMS WEIGHS IN FAVOR OF THE PLAINTIFF,**
5 **AND THE PUBLIC INTEREST WOULD BE SERVED BY THE**
6 **ISSUANCE OF A PRELIMINARY INJUNCTION**

7 The final two preliminary injunction factors merge when the government is the
8 opposing party. *Porretti v. Dzurenda*, 11 F.4th 1037, 1050 (9th Cir. 2021). The “balance of
9 equities” concerns the burdens or hardships on the plaintiff compared with the burden on
10 the defendant if an injunction is ordered, while the “public interest” mostly concerns the
11 injunction’s impact on nonparties rather than parties. *Id.*

12 The potential irreparable harm to Plaintiffs outweighs any harm that a preliminary
13 injunction would cause Defendant because the government “cannot suffer harm from an
14 injunction that merely ends an unlawful practice.” *Rodriguez v. Robbins*, 715 F.3d 1127,
15 1145 (9th Cir. 2013); *see also Zepeda v. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983).
16 Moreover, it is always in the public interest to prevent the violation of a person’s
17 constitutional rights. *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012).

18 In contrast, enjoining the enforcement of Tempe’s permit requirement would not harm
19 anyone. Far from causing harm, Plaintiffs’ food-sharing events *benefit* the public by
20 providing life-sustaining nourishment to those most in need. To the extent that the
21 government has legitimate concerns over the effect of food-sharing events on other parties
22 (such as littering or nuisance concerns), other Tempe laws provide a more than adequate
23 remedy. It is simply not necessary to impose a costly and time-consuming permit
24 requirement on all activities in the parks in order protect the public interest. And that should
25 be evident by the fact that the City applauded Austin’s efforts and never required a permit
26 until its attitude towards the homeless changed.

27 **IV. NO SECURITY SHOULD BE REQUIRED**

28 No bond should be required in this case. “Federal courts have consistently waived the

1 bond requirement in public interest . . . litigation, or required only a nominal bond.”
2 *Landwatch v. Connaughton*, 905 F. Supp. 2d 1192, 1198 (D. Or. 2012) (citing *People of*
3 *State of Cal. ex rel. Van de Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319 (9th
4 Cir. 1985)). Moreover, Plaintiffs have established a strong likelihood of success and this
5 “tips in favor of a minimal bond or no bond at all.” *Van de Kamp*, 766 F.2d at 1326. Finally,
6 “the bond amount may be zero if there is no evidence the party will suffer damages from
7 the injunction,” and such is the case here. *Conn. Gen. Life Ins. Co. v. New Images of Beverly*
8 *Hills*, 321 F.3d 878, 882 (9th Cir. 2003).

9 **CONCLUSION**

10 For the foregoing reasons, the Court should grant Plaintiffs’ Motion for Preliminary
11 Injunction.

12 DATED: April 11, 2025.

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*Pro Hac Vice

24 *Attorneys for Plaintiffs*

CERTIFICATE OF SERVICE

On April 11, 2025, I caused the forgoing Motion and Memorandum, together with the Summons, Complaint and other case opening documents, to be served and / or delivered to the following parties:

City of Tempe, Arizona	Personal Service
City Hall	
31 E. 5th St.	
Tempe, AZ 85281	

Rosa Inchausti, City Manager	Personal or Substituted Service
Tempe City Attorney’s Office	
Civil Division	
21 E. Sixth Street	
Suite 201	
Tempe, AZ 85281	

s/ Russell Facente
Russell Facente, Esq.

Attorney for Plaintiffs

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Austin Davis; Jane Parker; and Ron Tapscott,
Plaintiffs,

v.

City of Tempe, Arizona; and Rosa Inchausti,
in her official capacity as City Manager,
Defendants.

No. CV-25-01200-PHX-DJH

**PROPOSED ORDER GRANTING
PLAINTIFFS’ MOTION FOR
PRELIMINARY INJUNCTION**

This matter is before the Court on Plaintiffs’ application for a preliminary injunction prohibiting Defendants from enforcing Tempe City Code § 5-2(a)(1)(f).

IT IS ORDERED that Plaintiffs’ application for a preliminary injunction is GRANTED.

IT IS FURTHER ORDERED that Defendant is enjoined from enforcing the permit requirement imposed by Tempe City Code § 5-2(a)(1)(f) against Plaintiffs’ charitable food-sharing activities.

IT IS FURTHER ORDERED that no bond or other security shall be required of Plaintiffs.

IT IS SO ORDERED.

DATED this ____ day of _____, 2025.

Judge Diane J Humetewa
United States District Judge