



Northern  
California

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**VIA EMAIL**

RE: Concerns About Anti-Mask Measures in Modesto City Ordinance 4-23.02

Dear City Clerk and Councilmembers:

We write on behalf of the American Civil Liberties Union of Northern California to express concern over Modesto City Ordinance 4-23.02 (“the Ordinance”), which is attached for reference. The Ordinance prohibits people from possessing or wearing at *any* public assembly numerous lawful items like bike helmets, metal water bottles, and—most problematically—face masks. The Ordinance’s general restrictions are so vague and overbroad that they violate due process and undercut the legitimate exercise of free speech protected by both federal and state law. And more specifically, the Ordinance’s anti-masking provision runs afoul of the right to privacy enshrined in California’s Constitution at Article I, section 1, as well as contravenes legal protections for those with disabilities and other health issues. Beyond these blatant facial defects, recent events in Modesto on June 14 indicate that Modesto law enforcement officers are enforcing the anti-masking provision in a disparate and viewpoint-discriminatory manner, which presents yet additional constitutional problems.

We elaborate on some of these issues below to help explain the basis of our concerns. In light of the law and facts presented here, we ask that you agendaize discussion on the Ordinance at an upcoming City Council meeting, vote to repeal or amend it, and then consider alternate provisions that comply with federal and state law. We also respectfully urge that no prosecutions proceed against anyone arrested for allegedly violating the Ordinance on June 14. Failure to take action on the Ordinance will subject Modesto to the significant threat of litigation.

### **The Ordinance Criminalizes Lawful Conduct**

On its face, the Ordinance makes it a misdemeanor for any person to “utilize, carry, or possess” nineteen enumerated categories of items at “any demonstration, rally, protest, counter-protest, picket line, march, or public assembly.” 4-23.02(a)-(b). Many of these prohibited items are regular, everyday things commonly present at protests and assemblies throughout the nation

and do not pose any particular or heightened risks. For example, among the prohibited items are: “[s]igns, posters, [and] banners” that are no greater than one-quarter inch thick; impact-resistant “sports equipment” and protective vests; breathing devices; bike and motorcycle helmets; glass or metal water bottles; “umbrellas in the absence of rain;” and, most problematically, masks and other face coverings. 4-23.02(a). Specifically, the Ordinance prohibits: “The wearing of a mask, scarf, bandana or any other accessory or item that covers or partially covers the face shielding the wearer’s face from view and conceals the wearer’s identity, except for coverings worn due to religious beliefs, practices or observances or due to medical necessity.” 4-23.02(a)(13).<sup>1</sup>

### **The Ordinance is Both Overbroad and Unduly Vague in Violation of Due Process**

A law is unconstitutionally overbroad if it “reaches a substantial amount of constitutionally protected conduct.” *Kolender v. Lawson*, 461 U.S. 352, 359 n.8 (1983) (citation and quotation marks omitted). It is unconstitutionally vague if “it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests.” *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). The Ordinance suffers from both infirmities.

Here, the Ordinance sweeps in a host of innocuous and protected conduct. Taken literally, the Ordinance would criminalize a baseball catcher who runs into a celebratory crowd wearing his helmet and uniform after winning a game, a teen who rides her bike to a march and clips her bike helmet and water bottle to her backpack during the procession, and a healthy elderly couple who attends an outdoor event performance wearing masks because it has been their practice to mask outside the home from the pandemic to present. With respect to this last hypothetical, and as is discussed further below, the Ordinance is woefully vague as to whether the couple’s rationale would qualify as a “medical necessity.” And to provide one more example of the Ordinance’s problematic overbreadth and vagueness interplay, consider its prohibition on “[a]ny umbrellas in the absence of rain.” 4-23.02(a)(17). The provision is overbroad because it criminalizes the functional uses of umbrellas, like providing shade on a sunny day, and vague because it provides no clear standard for when rain is deemed “absent.”

These overbreadth and vagueness concerns are even more acute given their implications for members of the press, who often face chaotic and dangerous conditions while covering protests—conditions that, at times, are created by the police. In particular, as a federal court recently recognized, officers tear-gassed reporters and shot them with so-called “less-lethal munitions” while they covered recent protests in Los Angeles. *See Los Angeles Press Club v. City of Los Angeles*, Case No. 25-cv-05423, Doc. No. 44, Order Granting Temporary Restraining Order (C.D. Cal. Jul. 10, 2025) (citation omitted).<sup>2</sup> In fact, these risks are so great that American journalism organizations now recommend that reporters always carry breathing devices and wear

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<sup>1</sup> The Ordinance does not define the term “public assembly,” and thus these prohibitions can be construed to apply at any time to any gathering of people in public spaces.

<sup>2</sup> For reference, the Temporary Restraining Order is available at <https://firstamendmentcoalition.org/wp-content/uploads/2025/07/2025-07-10-Order-Granting-TRO.pdf>.

impact-resistant helmets, masks, and flak vests when reporting from a protest.<sup>3</sup> And yet, the Ordinance prohibits each and every one of these important pieces of safety gear.

### The Prohibition on Anonymity Silences Protestors' Speech and Invades Their Privacy

In addition to the foregoing issues, the anti-masking provision set forth at section (a)(13) of the Ordinance raises free speech and privacy problems. The provision prevents protesters from maintaining their anonymity while engaging in *lawful, peaceful* protest. This restriction violates longstanding U.S. Supreme Court precedent, which recognizes that anonymity is “indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.” *Nat’l Ass’n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958).

California courts are in accord with the need to protect anonymous speech. In 1978, for example, the California Court of Appeal reasoned that there are times when “anonymity is essential to the exercise of constitutional rights.” *Ghafari v. Municipal Court*, 87 Cal. App. 3d 255, 260 (1978). Applying this reasoning, the *Ghafari* Court struck down a mask ban very similar to Modesto’s. *Ghafari* remains good law nearly 50 years later and is binding on the Stanislaus County Superior Court should litigation proceed on the Ordinance. *See Auto Equity Sales, Inc. v. Superior Ct. of Santa Clara Cnty.*, 57 Cal. 2d 450, 455 (1962) (“Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state.”).

Preventing people from protesting without revealing their identities has a stark chilling effect. Those who seek to challenge policies that harm vulnerable communities or unpopular opinions because they are especially likely to be targeted for reprisal. Even absent a risk of harassment, “[t]he decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341-42 (1995). “Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.” *Talley v. California*, 362 U.S. 60, 64 (1960).<sup>4</sup>

Prohibiting people from being able to peacefully, lawfully, *and* anonymously protest also invades those persons’ affirmative constitutional right to privacy under Article I, section 1, of the California Constitution. As the California Supreme Court observed, voters across the state adopted

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<sup>3</sup> *See, e.g.*, Los Angeles Press Club, Tips for Safely Covering Protests (Feb. 7, 2022), <https://lapressclub.org/tips-for-safely-covering-protests-updated-2022/>; Committee to Protect Journalists, Physical and Digital Safety: Civil Disorder (Jul. 20, 2021), <https://cpj.org/2018/09/physical-safety-civil-disorder/>.

<sup>4</sup> The public’s concerns over surveillance and privacy invasions on June 14 seem to have been particularly well-founded considering Police Chief Brandon Gillespie’s admission that Modesto police did employ a “real-time crime center” with surveillance cameras in parks and downtown to monitor the protests. *See* Julietta Bisharyan, *Modesto Police Chief Defends Arrests During Protests Amid Mask Ordinance*, MODESTO BEE (Jul. 17, 2025), <https://www.modbee.com/news/local/article310895280.html>.

this constitutional protection to defend against “the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society.” *White v. Davis*, 13 Cal. 3d 757, 774 (1975). The *White* Court, quoting statements from the election materials in support of Article I, section 1, continued: “The right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion and our freedom to associate with the people we choose.” *Id.*<sup>5</sup>

### **The Ordinance’s Anti-Masking Provision Invites Disproportionate Enforcement and Viewpoint Discrimination**

Laws that are overbroad and vague, like the Ordinance, are particularly problematic when they implicate First Amendment rights because they chill speech and expression, and enable arbitrary, “unbridled discretion” and discriminatory enforcement practices. *Kaahumanu v. Hawaii*, 682 F.3d 789, 802 (9th Cir. 2012); *see also Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024). Among the worst of these sins is the chance that the Ordinance will be enforced in a viewpoint discriminatory manner, which is a forbidden and “egregious form of content discrimination” that prohibits speech based on the views of the speaker. *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828-29 (1995).

The Ordinance’s anti-masking provision falls squarely within this constitutional concern. Its exceptions for “religious beliefs, practices or observances” and “medical necessity” are vague and unworkable. It is unclear, for example, how law enforcement officers are supposed to assess such justifications for wearing a mask. In fact, under this Ordinance, police seem compelled to intuit a person’s subjective reasons for masking. But law enforcement officers are rarely equipped to independently determine subjective intent—and they may not legally interrogate people about their religious practices, their disabilities, and/or health-related reasons for wearing a mask. Alternatively, anyone wearing a mask for any reason could be subject to Police Chief Brandon Gillespie’s proffered approach of arrest first, then let a judge or jury determine the sincerity of one’s religious beliefs or the necessity of one’s medical condition.<sup>6</sup> Practically speaking, it is difficult to overstate the waste of time and resources, much of it at the taxpayer’s expense, such

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<sup>5</sup> Protestors have good reason to believe that they could suffer harm, doxxing, and additional privacy invasions if their identities are exposed. *See* Nicholas Fandos, *In an Online World, a New Generation of Protesters Chooses Anonymity*, N.Y. TIMES (May 2, 2024), <https://www.nytimes.com/2024/05/02/nyregion/college-campus-protests-anonymity.html>. In light of the message of the ICE Out protest, protestors might also credibly fear becoming a target of ICE themselves were they to protest without a mask on. And when unmasking poses credible threats to personal safety—and particularly when public hostility chills speech and expression—courts have struck down similar statutes. *See Ghafari*, 87 Cal. App. 3d at 259 (recognizing that protestors had “good reason” to fear that “if their identity became known . . . retaliatory measures of an unpleasant nature may be taken against them”); *Aryan v. Mackey*, 462 F. Supp. 90, 91 (N.D. Tex. 1978) (same); *Am. Knights of Ku Klux Klan v. City of Goshen*, 50 F. Supp. 2d 835, 841 (N.D. Ind. 1999) (holding unconstitutional a mask ban where there was “cogent evidence of . . . retaliation that [KKK] members suffered as a result of disclosure of their identity”).

<sup>6</sup> At the July 16, 2025 Community Police Review Board meeting, which considered the events of the June 14 protests, the Police Chief said: “I’m not the one who decides. They’ll have to convince a judge or a jury that, ultimately, that they were wearing [a mask] for one of the essential reasons.” *See* Bisharyan, *supra* n.4.

misdemeanor trials would entail—not to mention the significant disruption to the lives of peaceful protesters exercising their right to free speech.

The exception for “religious beliefs, practices or observances” is particularly vulnerable to abuse due to ignorance or prejudice, in the absence of explicit policies governing how law enforcement officers engage with people wearing religious garments. The First Amendment of the United States Constitution and Article I of the California Constitution both forbid the government from prohibiting the free exercise of religion, but any policy that prohibits masking in public would have a disproportionate impact on people whose core religious beliefs require them to mask. This is true, for example, for some Muslim women who wear Niqabs or Burqas in public.

More generally, Modesto’s mask ban gives police a reason to stop, surveil, and scrutinize groups of vulnerable people. People of color have consistently been over-policed and subjected to greater suspicion and scrutiny, as evidenced by the racial disparities pervasive in policing practices.<sup>7</sup> Indeed, this disproportionate and viewpoint-discriminatory enforcement materialized on June 14. On that day, two protests took place: the ICE Out rally organized by the Central Valley Black Indigenous People of Color Coalition, and the No Kings protest organized in part by Indivisible Stanislaus.<sup>8</sup> Protestors at both rallies wore masks. Yet law enforcement arrested and cited under the Ordinance only protestors from the ICE Out rally—which was attended predominantly by people of color. For the arrestees with whom we have spoken, officers did not inquire about any person’s reasons for wearing a mask, whether on account of religious beliefs, medical necessity, or otherwise. By comparison, we are aware of no arrests for violations of the anti-masking provision at the No Kings protest, which promoted a different viewpoint and was reportedly attended in greater numbers by white participants. This incident exemplifies the constitutional dangers inherent in the Ordinance. Again, when a law lacks clear standards, it delegates unchecked discretion to law enforcement, increasing the likelihood that enforcement will reflect existing societal biases rather than neutral application.

### **The Anti-Masking Provision Undermines Public Health and Discriminates on the Basis of Disability**

Prohibiting people from wearing masks in public or at demonstrations has a potent chilling effect on the free speech rights of immunocompromised individuals and people who have disabilities, including underlying health conditions that make them susceptible to severe illness like COVID-19. Even though the Ordinance contains an exception for “medical necessity,” this carve-out is undefined and fails to provide protection to those wearing masks for the safety of others instead of themselves. Individuals may not feel, or be, safe in large crowds if they are unable to mask, so a prohibition on masking at protests forces them to choose between their free speech

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<sup>7</sup> See California Department of Justice, California Racial and Identity Profiling Advisory Board Releases Report on 2023 Police Stop Data (Dec. 31, 2024), <https://oag.ca.gov/news/press-releases/california-racial-and-identity-profiling-advisory-board-releases-report-2023>.

<sup>8</sup> Julietta Bisharyan, *‘No Kings’ Rally Draws Thousands to Modesto in Protest of Donald Trump*, MODESTO BEE (Jun. 18, 2025), <https://www.modbee.com/news/local/article308569555.html>.

rights and their or their loved ones' health and safety.

The Ordinance also risks violating the Americans with Disabilities Act (“ADA”) by preventing individuals with medical issues from engaging in a crucial aspect of public life and participating in practices that form the cornerstone of democracy. The ADA prohibits government entities from discriminating against individuals with disabilities and from cutting off their participation in government programs or activities. 42 U.S.C.A. § 12132. These ADA protections extend to “anything a public entity does,” including enacting and enforcing discriminatory law enforcement measures. *Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001) (citations and internal quotation marks omitted).

People should not have to risk their health in order to attend a protest. Being forced to make such a choice effectively denies them the “right of peaceable assembly” that “lie[s] at the foundation of a government based upon the consent of an informed citizenry.” *Bates v. City of Little Rock*, 361 U.S. 516, 522-23 (1960).

### **California Law Already Prohibits Wearing a Mask While Committing Unlawful Acts and Modesto’s Anti-Masking Provision is Thus Preempted**

We understand that Modesto may be concerned that people wearing a mask at a protest could feel a sense of impunity and therefore act recklessly or unlawfully. This speculative concern cannot justify the complete abridgement of the entire community’s right to engage in anonymous speech and peaceful protest. Simply put, and as the *Ghafari* Court held, a “blanket prohibition” on the use of masks during protests “restricts the legitimate exercise of First Amendment freedoms” and “sweeps too broadly” to withstand constitutional scrutiny. *Ghafari*, 87 Cal. App. 3d at 261-62. Such a prohibition serves “no legitimate law enforcement function and is unconstitutionally overbroad.” *Id.* at 262.

Moreover, Modesto already has a law at its disposal to prevent people from masking their identities while committing unlawful acts. Penal Code section 185 makes it a misdemeanor “for any person to wear any mask, false whiskers, or any personal disguise” for the purpose of “[e]vading or escaping discovery, recognition, or identification in the commission of any public offense,” or “[c]oncealment, flight, or escape, when charged with, arrested for, or convicted of, any public offense.” This law, coupled with the many other more narrowly tailored laws aimed at unprotected conduct and breaches of the peace, should provide the city with “the legal armamentarium to deal effectively” with any disturbances. *Ghafari*, 87 Cal. App. 3d at 262.

And given that California prohibits local governments from legislating in a field fully occupied by state law, the existence of Penal Code section 185 leads to yet another fatal conclusion about Modesto’s Ordinance: it is preempted. *See* Cal. Const., art XI, §§ 5, 7; Gov. Code § 37100. Because the Ordinance prohibits wearing a mask in public without regard to criminal intent or activity, it conflicts with section 185 and cannot survive. *See Am. Fin. Servs. Ass’n v. City of Oakland*, 34 Cal. 4th 1239, 1251-52 (2005) (striking down ordinance as preempted because it invaded an area “fully occupied by general law”).

## Conclusion

For all of the foregoing reasons, we urge you to agendize discussion on the Ordinance at a City Council meeting in the near future, vote to repeal or amend it, and then consider alternate provisions that comply with federal and state law. We also respectfully ask that no prosecutions proceed against anyone arrested for allegedly violating the Ordinance on June 14 given the substantial legal uncertainties involved. If the concerns about the Ordinance are not addressed, the ACLU may be compelled to initiate legal action against the city.

Sincerely,



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#### 4-23.02 - Restrictions.

- (a) No person shall utilize, carry, or possess the following items or articles while attending or participating in any demonstration, rally, protest, counter-protest, picket line, march, or public assembly:
- (1) Any length of lumber, wood, or wood lath unless that object is one-quarter ( $\frac{1}{4}$ ) inch or less in thickness and two (2) inches or less in width, or if not generally rectangular in shape, such object shall not exceed three-quarter ( $\frac{3}{4}$ ) inch in its thickest dimension. Both ends of the lumber, wood or wood lath shall be blunt;
  - (2) Any length of metal or plastic pipe, whether hollow or solid; provided, however, that hollow plastic piping not exceeding three quarter ( $\frac{3}{4}$ ) inch in its thickest dimension and not exceeding one-eighth ( $\frac{1}{8}$ ) inch in wall thickness, and not filled with any material, liquid, gas or solid may be used solely to support a sign, banner, placard, puppet or other similar expressive display. Both ends of any plastic pipe permissible under this subsection shall be blunt;
  - (3) Signs, posters, banners, plaques or notices, unless such sign, poster, banner, plaque or notice is constructed solely of soft material, such as cloth, paper, soft plastic capable of being rolled or folded, or cardboard material no greater than one-quarter ( $\frac{1}{4}$ ) inch in thickness;
  - (4) Baseball or softball bats, regardless of composition or size;
  - (5) Any aerosol spray, tear gas, mace, pepper spray, smoke canisters, or bear repellent;
  - (6) Any projectile launcher or other device, such as a catapult or wrist rocket, which is commonly used for the purpose of launching, hurling or throwing any object, liquid, material or other substance, whether through force of air pressure, spring action or any other mechanism;
  - (7) Weapons such as knives, daggers, swords, sabers or other bladed devices, axes, axe handles, hatchets, billy clubs, ice picks, razor blades, nunchucks or martial arts weapons of any kind, box cutters, pellet or BB guns, improvised explosive devices (IEDs), dynamite, conducted electrical weapons (CEWs), including, but not limited to, Tasers or stun guns, metal/composite/wooden knuckles, or any chain greater than twenty (20) inches in length or greater than one-quarter ( $\frac{1}{4}$ ) inch in diameter;
  - (8) Balloons, bottles or any other container such as water cannons, super-soakers, or toy or replica firearms filled with any flammable, biohazard or other noxious matter which is injurious, or nauseous, sickening or irritating to any of the senses, with intent to throw, drop, pour, disperse, deposit, release, discharge or expose the same in, upon or about any demonstration, rally, protest, picket line or public assembly;
  - (9) Glass bottles or metal containers, whether empty or filled;
  - (10) Open flame torches, lanterns or other devices that utilize combustible materials such as gasoline, kerosene, propane or other fuel sources;

- (11) Shields made of metal, wood, hard plastic or any combination thereof;
  - (12) Bricks, rocks, pieces of asphalt, concrete, pellets or ball bearings; and
  - (13) The wearing of a mask, scarf, bandana or any other accessory or item that covers or partially covers the face shielding the wearer's face from view and conceals the wearer's identity, except for coverings worn due to religious beliefs, practices or observances or due to medical necessity.
  - (14) Any gas masks or similar breathing devices;
  - (15) Any impact resistant helmet, including, but not limited to: motorcycle helmets, bicycle helmets, sports helmets, or ballistic helmets;
  - (16) Any laser pointing devices;
  - (17) Any umbrellas in the absence of rain. During rainy weather an umbrella shall not exceed sixteen (16) inches in its longest dimension when fully collapsed and shall have a blunt end;
  - (18) Any professionally manufactured or personally fabricated equipment or clothing designed to be bullet-resistant, fragment-resistant, stab-resistant, or impact resistant, including, but not limited to: riot control gear, sports equipment, bullet-resistant vests, flak jackets, or stab-resistant vests; and
  - (19) Load-bearing or similar "tactical" vests designed to carry weapons, tactical equipment, or armor plates, commonly used by law enforcement or military institutions.
- (b) It shall be unlawful and a misdemeanor to violate any provisions of this chapter.
  - (c) When feasible, excluding exigent circumstances, a warning shall be issued before enforcement of the provisions of this chapter. Such warning shall be sufficient if provided orally, by posted signs or by amplified announcement.
  - (d) Authorized peace officers, or employees, agents or representatives of the City, shall be exempt from the provisions of this chapter when such officers, employees, agents or representatives of the City are engaged in official business of the City.
  - (e) Nothing in this chapter shall prohibit the imposition of specific conditions for activities expressly authorized under a permit issued pursuant to Modesto Municipal Code Section 4-8.01 et seq. (Regulation of Parades) or prohibit the modification of these provisions for such permits issued pursuant to Section 4-8.01 et seq. upon a finding by the Chief of Police that such modification will not impair or threaten public safety.
  - (f) Nothing in this section shall prohibit an individual from carrying a cane or using a walker or other device necessary for providing mobility or access so that the person may participate in a public protest, demonstration, rally, picket line or public assembly.

(Ord. No. 3701-C.S., § 2, effective 8-13-19; Ord. No. 3702-C.S., § 2, effective 10-3-19; Ord. No. 3735-C.S., § 2, effective 8-10-21; Ord. No. 3736-C.S., § 2, effective 10-7-21)