DISTRICT COURT, PUEBLO COUNTY, STATE OF COLORADO 501 N. Elizabeth Street Pueblo, CO 81003	
Plaintiffs: COLORADO HEALTH NETWORK INC., a nonprofit corporation, and SOUTHERN COLORADO HARM REDUCTION ASSOCIATION, a nonprofit corporation; v. **Defendant:** CITY OF PUEBLO.	▲COURT USE ONLY▲
Attorneys for Plaintiffs: Timothy Macdonald, No. 29180 Sara R. Neel, No. 36904 Anna I. Kurtz, No. 51525 Lindsey M. Floyd, No. 56870 American Civil Liberties Union Foundation of Colorado 303 East 17th Avenue, Suite 350 Denver, Colorado 80203 tmacdonald@aclu-co.org sneel@aclu-co.org akurtz@aclu-co.org lfloyd@aclu-co.org P: (720) 402-3114 | F: (303) 777-1773 Christine Ranney, No. 55398 Al Kelly, No. 55112 John P. Harrison, No. 57988 Gibson, Dunn & Crutcher LLP 1801 California Street, Suite 4200 Denver, Colorado 80202 cranney@gibsondunn.com akelly@gibsondunn.com jharrison2@gibsondunn.com P: (303) 298-5700 | F: (303) 298-5907	Case Number: Division: Courtroom:
PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION	

Certification of Conferral: Pursuant to C.R.C.P. 121, § 1-15, Plaintiffs' counsel conferred with counsel for the City of Pueblo on June 3, 2024 about this request for temporary injunctive relief. The City opposes this Motion.

I. INTRODUCTION

As part of its statewide public health scheme, Colorado law expressly authorizes any qualified "nonprofit organization" to "operate a clean syringe exchange program." C.R.S. § 25-1-520. On May 16, 2024, the City of Pueblo (the "City") enacted an ordinance purporting to prohibit "the establishment, operation, use, or participation in" such programs within the city. Pueblo Ordinance No. 10698 (the "Ordinance," attached as Ex. 1). In other words, the City criminalized the exact same activity the General Assembly authorized as part of a statewide public health effort.

Plaintiffs Colorado Health Network, Inc. ("CHN"), and Southern Colorado Harm Reduction Association ("SCHRA") are two qualified nonprofit organizations that operate established clean syringe exchange programs ("SEPs") in Pueblo. Plaintiffs' life-saving work now exposes them to criminal penalties under the Ordinance. Plaintiffs ask this Court to immediately enjoin the City from enforcing the Ordinance, which impermissibly conflicts with Colorado law.

II. ARGUMENT

A temporary restraining order is warranted where "specific immediate and irreparable harm will occur absent the order." *City of Golden v. Simpson*, 83 P.3d 87, 96 (Colo. 2004). Likewise, a preliminary injunction is appropriate where (1) the parties seeking relief have a reasonable probability of success on the merits; (2) there is a danger of real, immediate and irreparable injury that may be prevented by injunctive relief; (3) there is no plain, speedy, and adequate remedy at law; (4) the granting of a temporary injunction will not disserve the public interest; (5) the balance

of equities favors the injunction; and (6) the injunction will preserve the status quo pending trial on the merits. *Rathke v. MacFarlane*, 648 P.2d 648, 653 (Colo. 1982). Plaintiffs meet all the requirements for both forms of relief.

I. Plaintiffs Have a Substantial Probability of Success on the Merits Because Colorado Law Preempts the Ordinance.

Colorado recognizes three types of preemption: express, implied, and operational conflict preemption. *City of Longmont v. Colorado Oil & Gas Ass'n*, 2016 CO 29, ¶ 33, 369 P.3d 573, 582. Here, the Ordinance poses at least an operational conflict with state law[1]—that is, the "operational effect of the local law conflicts with the application of the state law." *Id.* at ¶ 36, 369 P.3d at 582. "[W]hen a home-rule ordinance conflicts with state law in a matter of either statewide or mixed state and local concern, the state law supersedes that conflicting ordinance." *Id.* at ¶ 18, 369 P.3d at 579. Because the Ordinance prohibiting SEPs within city limits conflicts with state law on a matter of mixed state and local concern, it is preempted and must be enjoined.

A. The Ordinance Conflicts with Colorado Law.

An operational conflict arises wherever "the effectuation of a local interest would materially impede or destroy a state interest." *City of Longmont*, ¶ 42, 369 P.3d at 583. "A local ordinance that . . . forbids what state law authorizes will necessarily satisfy this standard." *Id.*

SEPs are community-based prevention programs that allow individuals who inject substances access to and disposal of sterile syringes and access to other injection paraphernalia

[1] Express preemption applies when the legislature clearly and unequivocally states its intent to prohibit a local government from exercising its authority over the subject matter at issue. *City of Longmont*, ¶ 34, 369 P.3d at 582. Implied preemption applies when the legislature "impliedly evinces a legislative intent to completely occupy a given field by reason of a dominant state interest." *Id.* at ¶ 35, 369 P.3d at 582. For purposes of this motion, Plaintiffs discuss only the operational conflict between the Ordinance and state law.

without a prescription. Declaration of Jude Solano ("Solano Decl.," attached as Ex. 2), ¶ 5; Declaration of Darrell Vigil ("Vigil Decl.," attached as Ex. 3), ¶ 4; Declaration of José Esquibel ("Esquibel Decl." attached as Ex. 4), ¶ 4. Here, state law expressly authorizes the operation of SEPs in Colorado so long as they meet certain statutory requirements. C.R.S. § 25-1-520. First, SEPs must either be approved by a local board of health under C.R.S. § 25-1-520(1), or they must be a "a nonprofit organization with experience operating a clean syringe exchange program or a health facility licensed or certified by the state." *Id.* § 520(2.5)(a). Second, they must be able to provide certain statutorily mandated services, including education about blood-borne diseases and referrals to drug abuse treatment. *Id.* § 520(2). Plaintiffs are both "nonprofit organization[s] with experience operating a clean syringe exchange program." *Id.* § 520(2.5)(a). They also meet the other minimum requirements imposed by section 520(2). Solano Decl., Ex. 2, ¶ 3; Vigil Decl., Ex. 3, ¶ 3. Thus, state law expressly authorizes Plaintiffs to operate SEPs.

In addition, state law expressly allows Plaintiffs, as harm reduction organizations, to possess, provide, and administer injectable naloxone hydrochloride and similar opiate antagonists. *See* C.R.S. §§ 12-30-110(1)(a)(3) & (b) (authorizing harm reduction organization workers to possess opiate antagonists, furnish them to anyone in a position to assist an individual at risk of overdose, and administer them to anyone reasonably believed to be experiencing an overdose); *Id.* § 110(d) (defining opiate antagonist to mean "naloxone hydrochloride or any similarly acting drug that is not a controlled substance and that is approved by the federal food and drug administration for the treatment of a drug overdose"); Solano Decl., Ex. 2, ¶ 3; Vigil Decl., Ex. 3, ¶ 3.

Notwithstanding that Plaintiffs are allowed to operate SEPs and possess, furnish, or administer injectable naloxone under state law—indeed, *because* Plaintiffs are so empowered—

Pueblo purports to forbid them from doing so. The Ordinance criminalizes the "creation, establishment, operation, or participation" in any SEP within its borders. Ordinance, Ex. 1, at 2 (P.M.C. § 11-1-405(a)(7)). And it specifically defines SEPs as those programs the state has authorized and "exempted from criminal prosecution." *Id.* (§ 405(a)(3)). Plaintiffs thus face criminal penalties in Pueblo for doing precisely what state law authorizes—operating SEPs and furnishing to their participants syringes with life-saving naloxone.

The Ordinance explicitly acknowledges that C.R.S. § 25-1-520(2.5) "allows any nonprofit organization with experience operating a Needle Exchange or health facilities certified by the state to operate a Needle Exchange without local approval." Ordinance, Ex. 1 at 1. But it does not pretend to respect or comply with the Colorado law. Instead, the City simply claims authority for the conflicting ordinance under its home rule powers, reciting a series of bare (and demonstrably false) assertions that SEPs result in various negative local impacts. *Id.* Neither these assertions (even if true, which they are not) nor the City's home rule powers permit it to defy Colorado statutes and impede statewide public health goals. Pueblo's Ordinance "forbids what state statute authorizes." *City of Longmont*, ¶ 42, 369 P.3d at 583. It therefore creates an operational conflict with Colorado law and is preempted. *Id.*

B. The Ordinance Regulates a Matter in which the State Has an Interest.

"When a home-rule ordinance conflicts with state law in a matter of either statewide or mixed state and local concern, the state law supersedes that conflicting ordinance." *City of Longmont*, ¶ 18, 369 P.3d at 579. In determining whether a matter is of statewide, mixed, or purely local concern, courts "weigh the relative interests of the state and the municipality in regulating the particular issue in the case, making the determination on a case-by-case basis considering the

totality of the circumstances." *Id.* ¶ 20, 369 P.3d at 580. Four factors guide the inquiry: (1) the need for statewide uniformity of regulation, (2) the extraterritorial impact of the local regulation, (3) whether the state or local governments have traditionally regulated the matter, and (4) whether the Colorado Constitution specifically commits the matter to either state or local regulation. *Id.* In addition, "changing conditions may affect the analysis of whether an issue is one of local, state, or mixed concern." *City of Commerce City v. State*, 40 P.3d 1273, 1281 (Colo. 2002).

All four factors point to the same conclusion here: the State has a profound interest at stake, making this a matter of at least mixed state and local concern. The State of Colorado has a long tradition of regulating the public health, which is a core feature of its constitutionally committed police powers. Statewide availability of SEPs and naloxone are crucial to the state's public health scheme. Further, local criminalization has impacts beyond the City's borders. Because the Ordinance "regulates a matter in which the state has an interest" and its operational effect conflicts with the application of state law as discussed in Part I(A), it cannot be enforced. *City of Longmont*, ¶ 32, 369 P.3d at 581–82. Indeed, the Ordinance does not merely "regulate"—it flat-out prohibits, subject to criminal penalty—what state law expressly authorizes. It should thus be enjoined.

1. Uniform standards on the availability of SEPs and life-saving opiate antagonists are essential to Colorado's harm reduction and public health scheme.

"A need for uniformity exists 'when it achieves and maintains specific state goals.'" *Ryals v. City of Englewood*, 2016 CO 8, ¶ 21, 364 P.3d 900, 906 (quoting *City of Northglenn v. Ibarra*, 62 P.3d 151, 160 (Colo. 2003)); *City of Commerce City v. State*, 40 P.3d 1273, 1280 (the "need for uniform standards" in the operation of the law may be a sufficient basis for state legislative preemption). Here, uniform standards governing the availability of SEPs and life-saving opiate antagonists like naloxone are crucial to Colorado's harm reduction goals and public health scheme.

First, Colorado law recognizes that public health transcends municipal borders. *See Ryals*, ¶ 22, 364 P.3d at 906 (looking to General Assembly's determinations as "strongest indication of a need for uniformity"). Public health is defined as a matter of state law to mean "the prevention of injury, disease, and premature mortality; the promotion of health in the community; and the response to public and environmental health needs and emergencies as is accomplished through the provision of essential public health services." C.R.S. § 25-1-502(5). The General Assembly has declared that "*[e]ach community* in Colorado should provide high-quality public health services regardless of its location." *Id.* § 501(1)(b) (emphasis added). That is because a "strong public health infrastructure is needed to provide essential public health services," *id.* § 501(1)(d), and "reduces health care costs by preventing disease and injury, promoting healthy behavior, and reducing incidents of chronic disease and conditions," *id.* § 501(1)(a). State law likewise recognizes that "[d]eveloping a strong public health infrastructure requires the coordinated efforts of state and local public health agencies and their public and private sector partners within the public health system." *Id.* § 501(e).

Reflecting the need for uniform regulation, Colorado law empowers the State Board of Health to establish, by rule: core public health services that each local public health agency must provide or arrange for; minimum quality standards for public health services; minimum qualifications for local health directors and medical officers; standards to ensure the development and implementation of a comprehensive, statewide public health improvement plan, among other things. C.R.S. § 25-1-503. State law further mandates that all local public health agencies provide certain enumerated "essential public health services." *Id.* § 502(3). It requires the Colorado Department of Public Health & Environment ("CDPHE") to develop a "comprehensive, statewide

public health improvement plan" every five years. *Id.* § 504. And it requires that local public health agencies adopt their own health plans that "shall not be inconsistent with the comprehensive, statewide public health improvement plan." *Id.* § 505.

Uniform rules allowing SEPs to operate across Colorado are necessary because SEPs are part and parcel of the state's broader public health and harm reduction scheme. Esquibel Decl., Ex. 4, ¶ 6. Sharing needles and other injection equipment is an extremely efficient mode for Human Immunodeficiency Virus ("HIV") Hepatitis C transmission. Esquibel Decl., Ex. 4, ¶ 3. SEPs play a critical role in lowering the incidence of blood-borne diseases by providing safe injection equipment and education. Esquibel Decl., Ex. 4, ¶ 3; Solano Decl., Ex. 2, ¶ 8. The people who are served by SEPs are often connected to care providers, and, when the service providers have built trust with participants; for example, many will elect to get tested for HIV and other infectious diseases and be connected with providers who can provide medical treatment. Solano Decl., Ex. 2, ¶¶ 6–19; Vigil Decl., Ex. 3, ¶¶ 9–17; Esquibel Decl., Ex. 4, ¶ 10.

Ensuring the availability of SEPs to help stem and prevent the spread of HIV and Hepatitis C is particularly a matter of statewide concern because the boundaries of communicable disease "do not conform to any jurisdictional pattern." *See Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061, 1067 (Colo. 1992) (concluding this quality supported a state interest in uniform statewide oil and gas regulation). Indeed, Plaintiffs' SEPs are funded in part by the Colorado HIV/AIDS Prevention Program (CHAPP), pursuant to C.R.S. §§ 25-4-1403 to 25-4-1405, to address the increasing rates of HIV in Colorado. Solano Decl., Ex. 2, ¶¶ 20–24; Vigil Decl., Ex. 3, ¶¶ 18–21. The contracts that Plaintiffs have with the State of Colorado expressly state that SEPs are intended to reduce the spread of HIV "throughout Colorado" and require Plaintiffs to 1) evaluate clients for HIV support

services, and 2) complete syringe access services to people who inject and use drugs. Solano Decl., Ex. 2, ¶¶ 20–24; Vigil Decl., Ex. 3, ¶¶ 18–21. The SEPs thus further the state's interest in "a *comprehensive approach* that will decrease the transmission and acquisition of HIV and AIDS in Colorado." 6 CCR 1009-10-1.2 (emphasis added).

SEPs are also the primary access point for overdose prevention education and life-saving tools such as naloxone, a drug used to reverse overdoses of narcotic drugs such as opioids and heroin. Esquibel Decl., Ex. 4, ¶ 9; Solano Decl., Ex. 2, ¶ 11; Vigil Decl., Ex. 3, ¶¶ 8, 18, 25. CDPHE's statewide public health improvement plan recognizes that "fatal overdoses are increasing and remain a significant public health issue, both nationally and in Colorado." *Colorado's 2024 Public & Env't Health Improvement Plan* at 57 ("CDPHE Plan") (published June 2022), (available at https://drive.google.com/file/d/148dJjwRi1rLz-S6UkhP9BbQd1K-j2_vx/view). The plan therefore identifies a focus on "preventing overdose deaths, particularly from opioids including fentanyl," among Coloradans. CDPHE Plan at 4. CDPHE has been funding SEPs for more than a decade to further this goal. Esquibel Decl., Ex. 4, ¶ 6.

Reflecting SEPs' integral role in furthering Colorado public health, the state codified authority for their operation in the public health statutes. C.R.S. § 25-1-520. The General Assembly first authorized SEPs in 2010 to "reduce the spread of blood-borne disease." 2010 Colo. Sess. Laws 1252. A number of public health officials, including CDPHE's Chief Medical Officer, testified in support of the bill, citing the programs' proven benefits in preventing transmission of infectious diseases and connecting individuals with treatment opportunities. Colo. S.B. 10-189, *Bill Summary*, Senate Comm. On Health and Human Servs. (Apr. 14, 2010).

The General Assembly has since taken repeated actions to expand the role of SEPs in Colorado's statewide public health response to the overdose crisis. In 2015, the state expanded access to naloxone. 2015 Colo. Sess. Laws 207. The law gave CDPHE's Chief Medical Officer the authority to issue standing orders so naloxone may be dispensed by harm reduction organizations like Plaintiffs, pharmacies, and others "to help expand statewide access." CDPHE Plan at 57. In 2019, the General Assembly expanded authorization for SEPs by providing that they could operate in a hospital licensed or certified by the state. 2019 Colo. Sess. Laws 2575. The same law also created the Opiate Antagonist Naloxone Bulk Purchase Fund, which allowed eligible entities, including harm reduction entities like SEPs, to purchase naloxone at no cost, making it more widely available. CDPHE Plan at 57. Plaintiffs both obtain naloxone from these funds pursuant to the CDPHE's Chief Medical Officer's standing orders. Solano Decl., Ex. 2, ¶ 26; Vigil Decl., Ex. 3, ¶ 24. CDPHE also supports these SEPs through a Harm Reduction Grant Fund Program that seeks to "rethink and expand opportunities to address substance use using a public health approach, rather than through the criminal legal system." CDPHE Plan at 57.

Finally, not only has the state repeatedly reaffirmed SEPs' importance to statewide harm reduction and public health schemes—it has affirmatively acted to overcome local obstacles to its statewide policy of encouraging their operation. Prior to 2020, state law authorized SEPs operated only by organizations that were approved by a local board of health. C.R.S. § 25-1-520 (2019) (amended by Colo. H.B. 20-1065, 2020 Colo. Sess. Laws 1419 § 7). The law was amended on the recommendation of the General Assembly's Opioid and Other Substance Use Disorders Interim Study Committee, which reported that barriers to implementing harm reduction programs in certain localities—such as stigma and bias toward persons with substance use disorders—would

impede the state's public health goals. Leg. Council Staff, 2019 Report to the Gen. Assemb., 38–44, Research Pub. No. 730 (Dec. 2019), https://leg.colorado.gov/sites/default/files/opioid_committee_final_report.pdf;[2] 2020 Colo. Sess. Laws 1422, § 7. The law now specifically permits experienced nonprofits like Plaintiffs to operate SEPs in Colorado *without* local approval. C.R.S. § 25-1-520(2.5). In other words, statewide uniformity is an express purpose of the statutory provision that the City sought to thwart in adopting the Ordinance.

In sum, Colorado authorizes SEPs and the provision of naloxone as part of a statewide harm reduction and public health policy scheme. The problems this scheme is meant to address are not limited to any one municipality's borders. And the General Assembly has specifically designed this scheme to prevent local interference with statewide public health goals. Accordingly, Plaintiffs are likely to succeed in demonstrating a need for uniform statewide standards.

2. The Ordinance has extraterritorial impact.

A local ordinance has "extraterritorial impact" if it causes a "ripple effect that impacts state residents outside the municipality." *Ibarra*, 62 P.3d at 161; *Commerce City*, 40 P.3d at 1280 (the second preemption factor examines "the impact of municipal regulation on persons living outside the municipal limits"). The question is whether "the ordinance could produce impacts beyond [the City's] borders." *Ryals*, ¶ 27, 364 P.3d at 907.

Here, the Ordinance is likely to have impacts beyond the City's borders. Plaintiffs' SEPs are the only ones operating within a 50-mile radius. Solano Decl., Ex. 2, ¶ 33; Vigil Decl. ¶ 31;

[2] The Opioid and Other Substance Use Disorders Interim Study Committee, created in 2017, is tasked with studying data, resources, treatment, evidence-based best practices relating to substance use; identifying gaps in prevention, intervention, harm reduction, treatment, and recovery resources available to Coloradans and hurdles to accessing those resources; and identifying potential state legislative fixes to those gaps and barriers. C.R.S. § 10-22.3-101.

Esquibel Decl., Ex. 4, ¶ 20. Disrupting their provision of safer injection equipment increases the risk of an outbreak of infectious disease. Esquibel Decl., Ex. 4, ¶ 18; Vigil Decl. ¶ 31. And as discussed above, the potential spread of communicable diseases like HIV and Hepatitis C is not contained by municipal lines. In addition, because SEPs are also the best access point for providing life-saving opiate antagonists and harm prevention education and training to people who inject drugs, preventing SEPs from operating in Pueblo will vastly limit the supply of life-saving opiate antagonists in regional circulation and impede public health education efforts. Esquibel Decl., Ex. 4, ¶ 18; Vigil Decl. ¶ 31. All of this increases the risk of overdose deaths both within and beyond the City's borders. Esquibel Decl., Ex. 4, ¶ 18; Vigil Decl. ¶ 31; Solano Decl., Ex. 2, ¶ 31. And by diverting people who seek safer injection equipment and compromising prevention efforts, the local prohibition on SEPs is also likely to overwhelm the capacity of other SEPs and emergency public health infrastructure in the state. Esquibel Decl., Ex. 4, ¶ 19; Solano Decl., Ex. 2, ¶ 31; Vigil Decl. ¶ 32; *see Ibarra*, 62 P.3d at 161 (finding extraterritorial impact where state foster system was strained by local placement prohibition).

Finally, the Ordinance may also have a potential "ripple effect" of encouraging a cascade of other municipalities to enact their own "not in my backyard"-type bans, resulting in de facto bans in many areas across the state. The Colorado Supreme Court has repeatedly recognized such a potential domino effect as evidence of a statewide concern. See*, e.g.*, *City of Longmont*, ¶ 28, 369 P.3d at 581 (recognizing that one city's fracking ban might encourage other municipalities to enact their own, which could ultimately result in a de facto statewide ban); *Webb*, ¶ 37, 295 P.3d at 491 (warning that a city ordinance granting authority to ban bicycles from certain city streets "may lead to other municipal bicycle bans by local communities[,] . . . creating a patchwork of

local and state rules contrary to the [applicable] state legislation's wording and intent"). Here, there is already evidence that the Ordinance has encouraged other municipalities to consider banning SEPs. Esquibel Decl., Ex. 4, ¶¶ 20–21; Solano Decl., Ex. 2, ¶ 33; Vigil Decl. ¶ 32. Because the City's local prohibition has already had, and will continue to have, ripple effects on Coloradans and public health beyond its borders, the second factor also weighs in favor of an injunction.

3. The state has a clear tradition of regulating public health.

Colorado has a clear tradition of regulating the public health, particularly to prevent and contain the spread of disease. The state's very first General Assembly established the State Board of Health in 1877. 1877 Colo. Sess. Laws 106–09. The State Board was granted "general supervision of the interests of health and life of the citizens of this state." *Id.* at 107. Reflecting an early state concern with communicable illness, the board was also specifically charged with "investigation and inquiries respecting the cause of disease, and especially of epidemics." *Id.*

The State Board was soon strengthened expressly to address the issue of local hindrances to public health objectives. In 1893, it was given "full power" to take measures to abate nuisances or prevent the introduction or spread of disease in the event that any local community was "unable or unwilling" to do so. 1893 Colo. Session Laws 397–403. The General Assembly also authorized additional appropriations to the board "to prevent the introduction or spread, in this state, of cholera or other communicable diseases dangerous to public health," and expanded its powers to mitigate public health threats, for example to inspect travelers, baggage, and freight and take action to respond to suspected infection; to prohibit the importation of rags or clothing suspected of infection, and to sue for violations of state public health laws. *Id.*

The State Board's powers increased over time. In the early 1900s, it acquired further regulatory responsibility over public health, including food inspection and licensing of hospitals. In the mid-20th century, the General Assembly passed a package of landmark public health laws and created what is now the Colorado Department of Public Health and Environment, with a long list of enumerated duties and powers, among them authority to investigate and control the causes of epidemic and communicable diseases affecting the public health; to abate nuisances when necessary for the purpose of eliminating sources of epidemic and communicable diseases affecting the public health; and to license, establish, and enforce standards for the operation and maintenance of health institutions. 1947 Colo. Session Laws 505.[3]

In sum, the General Assembly's authorization of SEPs and expanded naloxone access across Colorado is part of the state's long tradition of regulating the public health. *See City of Longmont*, ¶ 29, 369 P.3d at 581 (recognizing statewide interest in fracking based on tradition of state's regulation of oil and gas development). For all these reasons, Plaintiffs are substantially likely to show that the state of Colorado has traditionally had a stake in regulating the subject matter of the Ordinance.

[3] Another of these landmark laws included a measure specifically targeting the spread of venereal disease by expanding access to prophylactics—an historical analogue to the state's modern harm reduction laws. An Act Relating to Venereal Diseases and Public Health, 1947 Colo. Session Laws 519. The Act recognized the public health benefits of prophylactics, which it defined as any appliance, device, drug, or medicinal preparation or compound which is or may be designed, intended for use or used, or which has or may have special utility for the prevention or treatment of venereal disease. *Id.* § 5. Among other things, the Act provided as a matter of state law that physicians could sell or give prophylactics to their patients. *Id.* § 6. Also foreshadowing modern harm reduction legislation, the Act required the dissemination of educational materials related to the dangers of communicable disease and to prevention. *Id.* § 4.

4. Regulation of Public Health Is a Core State Police Power.

While the Colorado Constitution does not mention of SEPs or naloxone in particular, the police power—the power to establish laws promoting the health, safety, and welfare of citizens—"is an inherent attribute of sovereignty with which the state is endowed for the protection and general welfare of its citizens." *In re Interrogatories of the Governor on Chapter 118*, *Sess. Laws 1935*, 97 Colo. 587, 595, 52 P.2d 663, 667 (1935); *Platte & Denver Canal & Milling Co. v. Dowell*, 30 P. 68, 70 (Colo. 1892). That power "belongs to the legislative department to exert the police power of the state, and to determine primarily what measures are appropriate and needful for the protection of the public morals, *the public health*, or the public safety." *Bland v. People*, 76 P. 359, 360–61 (Colo. 1904) (emphasis added).

The Constitution vests home rule cities with some amount of "power to legislate upon, provide, regulate, conduct, and control . . . the imposition, enforcement and collection of fines and penalties for the violation of any of the provisions of the charter, or of any ordinance adopted in pursuance of the charter." Colo. Const. art. XX, § 6(h). But "the enumeration in Section 6 of matters subject to regulation by home rule municipalities is not dispositive" of whether such matters are of purely local concern. *Denver v. State*, 788 P.2d 764, 771 (Colo. 1990); *see also Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161, 172 (Colo. 2008) (Coats, J., concurring) ("Article XX's grant of [a] power to home rule cities . . . does not purport to designate the exercise of the power . . . exclusively [as] a matter of local interest."). In other words, the City and the state both have authority to establish laws that promote the health, safety, and welfare of citizens. *Town of Dillon v. Yacht Club Condominiums Home Owners Ass'n*, 2014 CO 37, ¶ 25.

Here, the City has outright banned public health services that Colorado law explicitly authorizes. *See City of Fort Collins v. Colorado Oil*, 2016 CO 28, ¶¶ 36–37 (finding operational conflict where local fracking moratorium "does not regulate, but forbids" practice state authorizes). Rather than further a valid local purpose, the Ordinance's intent and impact is to "materially impede or destroy a state interest." *Id.* ¶ 21. Because the Ordinance "regulates a matter in which the state has an interest, . . . state law preempts [the] conflicting local regulation," and Plaintiffs are highly likely to succeed on the merits of their claim. *City of Longmont*, ¶ 32, 369 P.3d at 581–82.

II. Plaintiffs satisfy the additional requirements for interim injunctive relief.

A. Immediate injunctive relief is necessary to prevent Plaintiffs further real and irreparable injury for which there is no adequate remedy at law.

Plaintiffs are currently suffering real and irreparable injury because the Ordinance prevents them from fulfilling a core piece of their mission: harm prevention through SEPs. Solano Decl., Ex. 2, ¶¶ 4–19, 28–34; Vigil Decl. ¶¶ 4–17, 28–33. Both Plaintiffs' SEPs previously provided access to sterile syringes, injection equipment, and overdose prevention medication (e.g., naloxone). Solano Decl., Ex. 2, ¶¶ 9–10. They provided naloxone in three forms: a pre-filled syringe, an empty syringe with a pre-filled vial, and the nasal spray. Solano Decl., Ex. 2, ¶ 10; Vigil Decl. ¶ 7. They also provided medical waste disposal for used syringes. Solano Decl., Ex. 2, ¶¶ 9–10; Vigil Decl. ¶ 7.

Plaintiffs both ceased all SEP operations in Pueblo after the Ordinance was enacted. Solano Decl., Ex. 2, ¶¶ 28–34; Vigil Decl. ¶ 28. This includes ceasing the provision of pre-filled syringes of naloxone or sterile syringes with vials of naloxone that the State provides to Plaintiffs through the State's Opiate Antagonist Bulk Purchasing Fund. Solano Decl., Ex. 2, ¶ 28; Vigil Decl. ¶ 28.

As a result of the Ordinance, neither Plaintiff is able to fulfill its requirements to provide syringe access or naloxone to the community pursuant to their respective contracts with CDPHE. Solano Decl., Ex. 2, ¶ 29; Vigil Decl. ¶ 29.

The Ordinance has caused a significant reduction in community members receiving all of the critical public health services that Plaintiffs provide. Solano Decl., Ex., 2, ¶ 30; Vigil Decl., Ex. 3, ¶ 30. Plaintiffs were previously able to provide an array of other services and public health education to their participants. Plaintiffs provided overdose prevention and other education; vaccines; treatment through telehealth and a mental health clinic; referrals to other medical and mental health providers; on-site medical testing, including for HIV, Hepatitis C, sexually transmitted infections, and other blood-borne infections; and other medical care and programming. Solano Decl., Ex. 2, ¶¶ 11–19; Vigil Decl. Ex. 3, ¶¶ 8–17. Since the Ordinance went into effect and Plaintiffs were forced to cease their SEPs, Plaintiffs have experienced a 40% to 50% decline in individuals utilizing their other critical public health services. Solano Decl., Ex., 2, ¶ 30; Vigil Decl., Ex. 3, ¶ 30. In other words, the Ordinance is hampering the exact goals state law demands that Plaintiffs pursue when running an SEP: "facilitat[ing] entry into substance use disorder treatment programs" and "[e]ncourag[ing] usage of medical care and mental health services as well as social welfare and health promotion" by community members who come to Plaintiffs for SEP services. C.R.S. § 25-1-520(2)(b)–(c); Solano Decl., Ex. 2, ¶¶ 20–29; Vigil Decl. ¶¶ 18–29.

These are not hypothetical threats: In 2022, Colorado lost 1,799 residents as a result of drug overdose and that number increased in 2023 to 1,822. Esquibel Decl., Ex. 4, ¶ 7. The age-adjusted rate per 100,000 population of opioid-related overdose deaths increased from 19.5% in 2022 to 20.9% in 2023. *Id.* As recognized by the General Assembly, SEPs provide one of the best

means to reach populations at risk of overdose and other health concerns. C.R.S. § 25-1-520(2). So long as the Ordinance remains in place, Plaintiffs cannot fulfill that key objective without risking criminal penalty for them and their staffs, and the communities they serve are at increased risk of death and infectious disease. Solano Decl., Ex. 2, ¶¶ 29–34; Vigil Decl., Ex. 3, ¶¶ 25–33.

Until enforcement of the Ordinance is enjoined, Plaintiffs are "forced to choose between violating the law and incurring any attendant penalties or suffering the injury of obeying the law during the pendency of the proceedings"—including injuries to them and profound risk of harm to the community. *Colo. Motor Carriers Ass'n v. Town of Vail*, 2023 WL 8702074, at *11 (D. Colo. Dec. 15, 2023). For Plaintiffs, having their SEPs prohibited from "deliver[ing services] altogether" is an injury with no adequate remedy at law. *Id.* And "[n]o amount of money damages" can unwind the clock on the disastrous public health impacts that the disruption in Plaintiffs' services risks setting in motion. *Id.* The Court should enjoin enforcement of the Ordinance to prevent accumulation of further harm to Plaintiffs, the communities they serve, and Colorado public health.

B. A temporary injunction will serve the public interest.

Enjoining enforcement of the Ordinance will serve and "not disserve the public interest" for two main reasons. *Rathke*, 648 P.2d at 654.

First, "the public interest is served by enjoining the enforcement of a law that likely violates the Constitution." *Colo. Christian Univ. v. Sebelius*, 51 F. Supp. 3d 1052, 1064 (D. Colo. 2014). Pueblo has enacted an Ordinance that directly contradicts state policy in this area, in violation of the Colorado Constitution. *See supra* § I. Enjoining that unlawful and preempted Ordinance thus serves the public interest. *Cf. Bioganic Safety Brands, Inc. v. Ament*, 174 F. Supp. 2d 1168, 1179

(D. Colo. 2001) (recognizing in an analogous context that an "injunction [that] seeks to enforce express federal preemption from state encroachment . . . is in the public interest").

Second, enjoining Pueblo's ill-conceived Ordinance will allow Plaintiffs to continue the important work in the community they have been doing for years—work the General Assembly has determined is in the interest of Coloradans statewide. As the General Assembly has recognized, SEPs like those run by Plaintiffs are a critical tool in addressing the multiple, overlapping health crises facing the state. *Supra* pp. 5–10. Indeed, Plaintiffs' SEPs have saved lives. Solano Decl., Ex. 2, ¶ 27; Vigil Decl., Ex. 3, ¶¶ 26–27. SEPs also serve the public interest by helping to avoid the tremendous healthcare costs associated with treating HIV, Hepatitis C, and other infections. Esquibel Decl., Ex. 4, ¶ 13; Solano Decl., Ex. 2, ¶ 31.

Moreover, the evidence shows that SEPs help individuals enter drug treatment and prevent improper syringe disposal and litter. Esquibel Decl., Ex. 4, ¶¶ 11–12. As the Chief Medical Officer of Colorado stated in opposing Pueblo's proposed ordinance, SEPs "do not increase illegal substance use or crime" and in fact decrease drug use because "new users of SEPs are five times more likely to enter drug treatment and three times more likely to reduce and/or stop using drugs than those who don't use the programs." Esquibel Decl., Ex. 4, ¶¶ 12, 17 & Ex. B; *see also* Solano Decl., Ex. 2, ¶ 7; Vigil Decl., Ex. 3, ¶ 5. As summarized by the United States Centers for Disease Control and Prevention, "nearly thirty years of research show that comprehensive [syringe services programs] are safe and effective, cost-saving, [do] not increase[e] illegal drug use or crime, [and] reduc[e] spread of viral hepatitis, HIV, and other infections." Syringe Services Programs, CDC (Feb. 8, 2024), https://www.cdc.gov/syringe-services-programs/php/index.html.

For all these reasons, allowing SEPs to continue operating in Pueblo during the pendency of this case is in the public interest.

C. The balance of equities favors a grant of interim relief.

The balance of equities here weighs in favor of a preliminary injunction. Plaintiffs have an important interest in continuing their state-authorized SEP programs. These programs are a critical part of Plaintiffs' missions and are a key means Plaintiffs have to reach at-risk members of the community and connect them with other services. Esquibel Decl., Ex. 4, ¶¶ 9–10; Solano Decl., Ex. 2, ¶¶ 6, 11–19. Plaintiff CHN has been operating its SEP in Pueblo for a decade, since 2014, Vigil Decl., Ex. 3, ¶¶ 6, and SCHRA has been operating its SEP in Pueblo for seven years. Solano Decl., Ex. 2, ¶ 4. These SEPs are proven to reduce overdose risk and to save lives. Esquibel Decl., Ex. 4, ¶¶ 4–5; Vigil Decl., Ex. 3, ¶ 4; Solano Decl., Ex. 2, ¶ 7-8. Plaintiffs' interest in continuing this life-saving work is paramount. *See Comprecare Ins. Co. v. Snow*, 1993 WL 330929, at *3 (Colo. Dist. Ct. Feb. 16, 1993) (there is "no doubt that the equities . . . favor the granting of [an] injunction" when there are "risks [relating to] the loss of . . . life").

By contrast, Pueblo has a minimal interest in enforcing the two-week old Ordinance. A municipality "does not have a strong interest in enforcing a law that is reasonably likely to be found constitutionally infirm." *Colo. Motor Carriers*, 2023 WL 8702074, at *11. Nor do the rationales Pueblo offered in enacting its ordinance—for instance, wanting to stop needles from ending up in parks—tip the balance in its favor, given that the facts show that SEPs actually *increase* public safety (which is why the State and federal governments both support them). Esquibel Decl., Ex. 4, ¶¶ 11–12 & Ex. B thereto (Dr. Calonge letter) (explaining that "studies have shown an eight-fold increase in improperly discarded syringes in communities without SEPs

compared to those with SEPs"); Solano Decl., Ex. 2, ¶¶ 32; Vigil Decl. ¶¶ 31. The City's interest in enforcing an unlawful Ordinance does not outweigh the critical public health and safety interests the SEPs serve in Pueblo and the larger community.

D. Interim injunctive relief will preserve the status quo pending trial.

The Court should grant interim injunctive relief to preserve the status quo that existed before the Ordinance was passed. Where a plaintiff challenges a new statute or rule, the "appropriate status quo" is the "status quo ante, that is the status quo before the rule was enacted. *Sanger v. Dennis*, 148 P.3d 404, 419 (Colo. App. 2006). Enjoining the enforcement of new restrictions on previously permitted activities preserves the status quo. *Dallman v. Ritter*, 2009 WL 8652473 (Colo. Dist. Ct., Aug. 12, 2009), *aff'd* 225 P.3d 610 (Colo. 2010)).

Here, Plaintiffs have continuously operated their SEPs in Pueblo since 2014 and 2017, respectively, stopping only on May 16, 2024, when the City enacted the Ordinance. Solano Decl., Ex. 2, ¶ 4; Vigil Decl., Ex. 3, ¶ 6. Permitting Plaintiffs to continue operating their SEPs while this case is pending would preserve the status quo ante that has existed in Pueblo since 2014.

E. Security bond should be waived or set at $1.

While C.R.C.P. Rule 65(c) requires an applicant for a temporary restraining order or preliminary injunction to pay damages sustained by a party that is wrongfully restrained by the order or injunction, the Court may set the bond at a nominal amount where the enjoined party would not suffer a compensable loss if the injunction was wrongfully issued. *Kaiser v. Market Square Discount Liquors, Inc.*, 992 P.2d 636, 642–43 (Colo. App. 1999); *see also Bella Health and Wellness v. Weiser*, 2023 WL 6996860, at *20–21 (D. Colo. Oct. 21, 2023) (not requiring a bond is permissible where there is "an absence of proof showing a likelihood of harm" to the

enjoined party). The Court's authority to set a nominal bond ensures that the Court is not "render[ed] . . . powerless in innumerable situations where immediate equitable relief is required." *Kaiser*, 992 P.2d at 643 (internal citation omitted).

Pueblo will not suffer a compensable loss as a result of the injunction, including because it will retain other mechanisms to target the harm the Ordinance seeks to address. *See Hassay v. Mayor*, 955 F. Supp. 2d 505, 527 (D. Md. 2013) (finding nominal bond appropriate where the city retained authority to prohibit "unreasonably loud noises" targeted by sound level ordinance and to enforce the ordinance in other areas, and thus, "any costs suffered by [the city] during the period of the preliminary injunction [would] be minimal or nonexistent."). Here, the Ordinance focuses on "improper disposal of dirty hypodermic needles and syringes" and a purported "increase in the number of syringes and other drug paraphernalia found in its public places." Ordinance, Ex. 1 at 1. If the Court issues a preliminary injunction, the City will retain mechanisms to address these problems. *See, e.g.*, Pueblo Code of Ordinances, Title VII, Ch. 3, Art. 1, § 7-3-3 (making it unlawful for any person to deposit litter "in or upon any street, sidewalk, alley or other public place within the City"). As such, the risk of harm is remote and a nominal bond is appropriate.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court (1) set an accelerated briefing schedule and a prompt date for an evidentiary hearing on the issues Plaintiffs raise herein; (2) issue an immediate temporary restraining order—to be effective until the Court conducts an evidentiary hearing—that Defendant is prohibited from enforcing the Ordinance; and (3) after a hearing, issue a preliminary and permanent injunction ordering the same relief.

Respectfully submitted this 4th day of June, 2024

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CERTIFICATE OF SERVICE

I hereby certify that, on June 4, 2024, a true and correct copy of this pleading was served via the Colorado Courts E-Filing system and email upon:

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