No. 21-55395
(Consolidated with Nos. 21-55404 and 21-55408)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LA ALLIANCE FOR HUMAN RIGHTS, et al.

Plaintiffs-Appellees,

v.

CITY OF LOS ANGELES, et al.

Defendants-Appellants.

CANGRESS,

Intervenor-Appellant.

Appeal From The United States District Court,
Central District of California, Case No. 2:20-cv-02291
Hon. David O. Carter

INTERVENOR'S REPLY BRIEF

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INTRODUCTION

When the District Court issued the broad, sweeping injunction in this case, it departed significantly from the arguments and motivations of the Plaintiffs who, when they brought this case a year ago, were not seeking to end homelessness or addresss structural racism. Instead, they sougt to end the visible signs of homelessness in their neighborhood. And when they brought the motion for a preliminary injunction in April, they asked the District Court to do just that: to compel the City and County to "offer shelter or housing" to everyone in Skid Row and then clear the sidewalks, parks and other public spaces of unhoused people and their belongings. And they went a step further, asking the District Court to order the City of Los Angeles to aggressively enforce its anti-camping ordinance against people who remained.

When the District Court instead issued an order discussing the racist origins of the homelessness crisis, but issuing an order granting much of the relief they sought, Plaintiffs took the reframing in stride. They now defend the District Court's ruling as if it were the case they brought all along. But regardless of the framing of the case, the injunction is simply not legally justified nor supported by evidence in the record, and it was an abuse of discretion to grant it.

ARGUMENT

I. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

Plaintiffs, like the District Court, begin their analysis by focusing in the abstract on the Court's equitable power to grant structural relief and dedicate a significant portion of its answering brief to that issue. *See* AAB at 26-47. But the question of whether any given remedy is appropriate is guided in the first instance by the right that is at stake and the violation that must be remedied. *See Swann v. Charlotte-Mecklenburg Bd. of Ed*., 402 U.S. 1, 15 (1971). In this case, Plaintiffs have failed make a clear showing that they are entitled to any injunction at all. *See Garcia v. Google*, 786 F.3d 733, 740 (9th Cir. 2015) (the first *Winter* factor is the most important factor and can be decided before considering any other factor).

a. The District Court Abused its Discretion by Finding that Plaintiffs are Likely to Succeed on the Merits of its State-Create Danger Claim

Plaintiffs defend the District Court's finding that the City and County are responsible for a state-created danger by broadly asserting that they should be held liable for centuries of discriminatory policies that created the homelessness crisis. Intervenor agrees that deeply-entrenched and longstanding racist policies could give rise to a state-created danger theory, but that issue was not properly before the District Court. And it is not before this Court either, because neither Plaintiffs nor the District Court have identified which discriminatory policies of Defendants

resulted in a state-created danger, let alone shown how those policies created "an actual, particularized danger" to Plaintiffs.[1] *Hernandez v. City of San Jose,* 897 F.3d 1125, 1133 (9th Cir. 2018). Plaintiffs argue only vaguely that discrimination "against a racial group over a series of years" has led the group to "experience poverty and homelessness at a far higher rate than other individuals not in that group." While true, Plaintiff still has to attribute those policies to the City and the County and show harm to Plaintiffs, which it simply has not done, and nor has the District Court. The District Court's finding that "there are no shortage of affirmative steps that the City and County have taken that have created or worsened the discriminatory homelessness regime that plagues Los Angeles today" is too broad and vague to base liability under a state-created danger theory, *Huffman v. Cnty of L.A*., 147 F.3d 1054, 1061 (9th Cir. 1998), let alone meet the "doubly demanding" standard that the law and facts "clearly favor" a mandatory injunction. *Garcia,* 786 F.3d at 740.

[1] The one specific policy identified by the Court—"redlining"—was, as explained by the District Court, a federal program created by the Federal Housing Administration and supported by the Congressionally-mandated Home Owners' Loan Corporation. *See* 1-ER-39-41. Any findings connecting City and County to this policy are not supported by evidence in the record, and the District Court provides no explanation how the City and County enforced racially-restrictive covenants.

The two actions[2] specifically identified by the District Court and defended by Plaintiffs—continuing a "containment policy" by providing services to people in Skid Row and building permanent housing instead of shelters--also do not pass muster.

i. Providing Necessary Services to Unhoused People in Skid Row is not a State-Created Danger

Plaintiffs argue that the creation of a "Containment Policy" in 1976 can support a state-created danger 40 years later. AAB at 69-70. They concede however that both the City and County have repudiated this policy, but argue that they have "unofficially" continued this policy by concentrating services for people experiencing homelessness in Skid Row. *Id.* at 69. There is no evidence in the record to support this claim, and in in fact, there is ample evidence in the record that, since at least the 2000s, the City and County have taken affirmative steps in the opposite direction. *See e.g.,* 4-ER-879-84. Consistent with Intervenors' evidence (which the District Court did not reference), the District Court found that, beginning in the 1980s, continuing through "Safer Cities Initiative" in the 2000s, the City of Los Angeles had a policy of dramatically over-policing Skid Row. 1-

[2] The District Court also identified the choice to defund and ramp down Project Roomkey, despite federal funding available for the program. 1-ER-106. Plaintiffs concede however that the decisions to do not constitute "affirmative state action that rises to the level of a state created danger." AAB at 76-77.

ER-48-49. As gentrification forces have continued to grow stronger in downtown Los Angeles, the "police presence in Skid Row grows stronger." 1-ER-49.

At the same time, there has been a significant expansion of services for unhoused people outside of Skid Row. This has been done both in order to to decentralize poverty away from Skid Row, 8-ER-1715, n. 18, and also, because the City has recognized that the vast majority of people experiencing homelessness in Los Angeles County do not, in fact, reside in Skid Row. *See* 8-ER-1711, n. 6 (citing City Council motion by Jose Huizar, officially repudiating the "containment policy" and noting that 85% of unhoused people do not live in Skid Row).

Even if were true that the City and County affirmatively concentrated services in Skid Row, providing services like COVID-19 vaccines, storage and shelter to people experiencing homelessness is simply not a state-created danger. In fact, it's not a danger at all. A plaintiff alleging a violation of their constitutional rights based on a theory of state-created danger must show that the alleged "affirmative conduct placed him in a worse position than that in which he would have been had the state not acted at all." *Pauluk v. Savage*, 836 F.3d 1117, 1124 (9th Cir. 2016) (internal quotations omitted); *Johnson v. City of Seattle*, 474 F.3d 634, 641 (9th Cir. 2007). It is nonsensical to suggest that the City and County are creating danger by providing COVID-19 vaccines, storage, mental health

services or shelter to people in Skid Row.[3] And it is even more nonsensical to suggest that Plaintiffs are in a worse position than they would have been, had the City and County not provided these services at all.

ii. The Policy Decision To Use Proposition HHH Money to Fund Permanent Housing Does Not Constitute A State-Created Danger

Nowhere is the District Court's and Plaintiffs' results-oriented strategy more clear than the Court's finding that the City's decision to use Proposition HHH funds for permanent housing instead of emergency shelters constituted a "state-created danger." It is little more than a transparent effort to transform a disagreement with the City's policy decision into a theory of liability predicated on a constitutional violation.

Plaintiffs and the District Court have consistently taken issue with the cost of building permanent supportive housing and have expressed their desire for the City to take money away from constructing new permanent housing and reallocate that money towards creating more emergency shelter beds. *See e.g.,* 1-ER-106; AAB at 97-98. The District Court and Plaintiffs inexplicably take aim at Proposition HHH, a ballot initiative that passed in 2016, with the explicit goal of generating funding for supportive housing and services for people experiencing

[3] In fact, the storage program complained about by Plaintiffs was actually created by members of the LA Alliance themselves. 4-ER-857.

homelessness.[4] They allege that the program is "woefully inadequate," has "fallen short of its stated goals," 1-ER-103 and 126; and a "lack of government oversight has allowed a proliferation of corruption," *id.* at 103.

The District Court spent pages of the order discussing Proposition HHH, the decision to fund permanent housing over temporary shelter beds, and perceived mismanagement of the program. *See e.g.,* 1-ER-43-46, 48. But these findings are unsupported by evidence in the record and otherwise untethered to any legal claim before the Court. Instead, the District Court shoehorned its findings about Proposition HHH into Plaintiffs' Due Process claims, finding that the decision to fund permanent housing instead of temporary shelters constituted a state-created danger. *Id.* at 106. On appeal, Plaintiffs defend the Court's decision. But this is neither legally sound nor supported by evidence in the record.

As a legal matter, the funding of permanent housing instead of emergency shelters is not the type of state action that gives rise to liability based on state-created danger. As discussed above, the test for state-created danger is not whether a different policy decision would have yielded a better result, which is effectively what Plaintiffs and the District Court are arguing here, but instead, whether the

[4] On appeal, Plaintiffs also take aim at Measure H, an LA-County initiative that provides funding for services for people experiencing homeless, even though the District Court did not base its state-created danger theory on a misuse of Measure H funds. *See* 1-ER-105-06; 1-ER-24.

affirmative act "left Plaintiffs in a worse position than that in which he would have been had the state not acted at all." *Johnson,* 474 F.3d at 641. Therefore, the correct legal question is whether Plaintiffs were harmed because the City is funding permanent housing instead of *not* funding permanent housing, and the answer is unquestionably no.

As a factual matter, there is also no evidence in the record to support Plaintiffs' contention that the decision to invest Proposition HHH funds in the financing of permanent supportive housing was a bad decision, let alone one that put Plaintiffs in harms' way. Plaintiffs and the District Court contend that the cost of constructing a unit of supportive housing using Proposition HHH funding is too expensive, but both misunderstand the financing structure of Proposition HHH. As SCANPH explains in its Amicus Brief, the Proposition HHH subsidy, which is on average $130,000.00 per unit,[5] is seed money that is used as leverage to secure hundreds of thousands of dollars in additional state and federal funds to cover the rest of the costs of the projects. 1-SER-226. Funding permanent housing actually brings considerable additional federal, state, and private funding to the City, which does not generally occur when the City builds interim shelter beds. *Id.*[6]

[5] Incidentally, this is the same cost, per bed, as an interim shelter project constructed by the City just last year. *See* 1-SER-226.

[6] Plaintiffs and the District Court place considerable weight on the cost to build a unit of permanent supportive housing, compared to the cost of a market rate unit.

Plaintiffs and the District Court wage myriad other attacks on the City's choice to use Proposition HHH funding to fund permanent housing, none of which are supported by credible evidence in the record. But Plaintiffs' real complaint about Proposition HHH is that "[t]he City unilaterally decided to spend the vast majority of the funding on supportive housing and virtually nothing on temporary shelters." AAB at 70. This is not only inaccurate and misleading, since Proposition HHH is only one dedicated funding stream into the City's homelessness budget and the City spends millions of dollars from other funding sources on interim housing—but it is also irrelevant. While Plaintiffs and the District Court may support temporary shelters over permanent housing solutions and disagree with the decision to expend these dedicated funds to finance permanent supportive housing, that decision does not constitute to a state-created danger. *Johnson*, 474 F.3d at 641. Framing it as such is little more than an attempt to leverage the District Court's authority to compel a different political result.

But the evidence relied on by both Plaintiffs and the Court to support this claim is simply not credible: Plaintiffs quote $250,000.00, AAB at 72; the District Court noted that the average cost of a custom home in LA starts at $350,000. 1-ER-77. In fact, the underlying source relied on by both Plaintiffs and the District Court-a residential construction contractor's website-actually states without citation that "the average price of a custom home costs . .. about $350,000 to $1.5. Million, and it only goes up from there." 2-SER-291, n. 33 (citing https://www.pacificgreenhomesinc.com/new-home-construction/how-much-does-it-cost-to-build-a-house-in-los-angeles/).

b. None of the Other Constitutional Claims are Legally Cognizable

Plaintiffs half-heartedly defend some of the Court's other bases for finding that the City and County are likely liable for constitutional violations, but they fail to address Intervenor's or Defendants' arguments that these claims are not legally or factually viable in this case.

First, Plaintiffs do not dispute that they did not raise an Equal Protection claim on the basis of race. They gloss over this fact by citing to the parties' agreement that structural racism at all levels of government and throughout society has played a significant role in the creation of the homelessness crisis. But Plaintiffs did not even plead the fact that any members of the LA Alliance are Black, let alone that any of the harms they experienced are the result of invidious discrimination by the City and the County. And because they did not actually raise these claims in the complaint, let alone in their application for a preliminary injunction, they certainly did not put forth any evidence that any discriminatory actions by the City and County, invidious or otherwise, caused harm to Plaintiffs. Plaintiffs do not even point to any specific laws or official acts that they allege have a disparate impact on people of color, like the permitting scheme in *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886); the redistricting of electoral districts in *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960), or the at-large voting system in

Rogers v. Lodge, 458 U.S. 613, 618 (1982). The failure to identify the official act that has a disparate impact is fatal to any purported Equal Protection challenge.[7]

Second, Plaintiffs do not cite to a single allegation in the record, let alone concrete evidence, that Plaintiffs or any LA Alliance members were constrained in any way, let alone constrained to such a degree as to create a substantive due process claim based on a deprivation of liberty. *See DeShaney v. Winnebago Cty. Dep't of Soc. Servs.,* 489 U.S. 189, 200 (1989).

Finally, Plaintiffs fail to even address the Court's ruling on "Substantive Due Process – Family relations" in its answering brief.

c. Plaintiffs Fail to Show that Any Plaintiff has Standing to Bring their Section 17000 Claims

In response to Intervenor and Defendants' arguments about the plain language of Welfare and Institutions Code Section 17000, Plaintiffs simply rehash their argue, with which the District Court ostensibly agreed, that the County violated its mandatory duty to provide "subsistence medical care" to LA Alliance members because "housing is healthcare." They do little more to explain how the District Court's findings square with the plain language of the statute or with

[7] Because the District Court erred in finding that Plaintiffs are likely to succeed on an Equal Protection challenge based on race, there is no need to reach the question of whether, under the right circumstances, the Court could order affirmative relief to undo a legacy of racial discrimination based on the District Court's "severe inaction theory." *See* 1-ER-111.

legislative intent. Nor do they establish that they have standing to even bring this claim.

Plaintiffs respond to Intervenor's argument that no plaintiff has standing to bring a claim that the County violated a mandatory duty to provide healthcare under Section 17000 by pointing out that some LA Alliance members have medical and mental health conditions.[8] This does not solve Plaintiffs' standing issue, because they still have not alleged that they sought and were denied a mental health bed or are at imminent risk of needing a mental health bed. Likewise, Plaintiffs do not dispute that they have failed to plead, let alone put forth any evidence, that its members are entitled to healthcare coverage under Section 17000. This is fatal to their standing argument, because absent a showing they would be entitled to healthcare services of any kind from the County, they cannot show they are harmed by any failure of the County to provide specific medical services (which they contend includes housing).

Instead, Plaintiffs argue that there is no relationship between Medi-Cal and the County's obligation to provide medical care under 17000. Plaintiffs are simply wrong. By its plain terms, Section 17000 "creates 'the *residual* fund' to sustain

[8] Plaintiffs identify named plaintiff Gary Whitter as having documented medical conditions, *see* AAB at 89, but Mr. Whitter lacks standing for another reason. According to the Complaint, he is currently living at the Union Rescue Mission, and therefore, would not have standing to challenge the County's failure to provide shelter. 12-ER-2858.

indigents 'who cannot qualify ... under any specialized aid programs.'" *County of San Diego v. State of California*, 15 Cal.4th 68, 92 (1997) (quoting *Mooney v. Pickett*, 4 Cal.3d 669, 681 (1971) (italics in original); *Board of Supervisors v. Sup. Ct.,* 207 Cal.App.3d 552, 562 (1989). *See also* Ca. W&I Code § 17000 (mandating support for residents in poverty "when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions"). As the California Supreme Court in *County of San Diego* explained, "[b]y its express terms, the statute requires a county to relieve and support indigent persons *only* "when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions." 15 Cal.4th at 92 (emphasis in original). The County does not have a duty to provide care to individuals who receive Medi-Cal or another form of private insurance because they are "supported and relieved" by another program. *Id.* Therefore, individuals who receive or are eligible for Medi-Cal do not have standing to bring a claim that the County violated a mandatory duty by failing to provide healthcare under Section 17000 because they are not entitled to care from the County.

Plaintiffs rely on *Madera Community Hospital v. County of Madera,* 155 Cal.App.3d. 136, 151 (1984), but that case actually explains the relationship between Medi-Cal and the County's obligation to provide healthcare under Section

17000, and why Plaintiffs' failure to demonstrate that its members are entitled to County healthcare is fatal to their claim. In *Madera*, the County of Madera sought to impermissibly narrow their obligation to provide healthcare of last resort by defining the class of those eligible to receive such services as individuals eligible for Medi-Cal. 155 Cal.App.3d at 151. Doing so would thereby insulate themselves from any expenditure of County funds to provide healthcare of last resort. *Id.* The Court held that it was an impermissible to limit eligibility for Section 17000 healthcare to only those individuals who were eligible for Medi-Cal, concluding that, for Section 17000 to have any substance, it would have to reach those individuals who are ineligible under Medi-Cal and other programs. *Id.* Therefore, as relevant here, *Madera* simply stands for the proposition that the County has a duty to provide medical care only to individuals left behind by other programs like Medi-Cal, which is precisely Intervenor's point.

II. PLAINTIFFS HAVE NOT SHOWN THAT THE ORDER IS IN THE PUBLIC INTEREST

Plaintiffs, like the District Court, continue to pay little attention to the question of whether the preliminary injunction is in public interest, even though the Supreme Court and this Court have counseled that, where "the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences," whether or not the injunction is in the public interest is a critical consideration. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009). *See*

also Winter v. Natural Resources Def. Council, 555 U.S. 7, (2009) ("in exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction); *Bernhardt v. Los Angeles Cty.*, 339 F.3d 920, 931-32 (9th Cir. 2003) ("The public interest inquiry takes into consideration "the public consequences in employing the extraordinary remedy of injunction").

There is more than the potential for public consequences of the preliminary injunction in this case. The District Court ordered the City of Los Angeles to place one billion dollars in escrow with the District Court, halt the transfer of public lands, disrupt homeless service provision throughout the county by diverting significant shelter, housing and other resources to a single geographic area, and conduct audits and investigations into all manner of homeless services. Such a dramatic disruption of the status quo is unquestionably a public consequence.

And yet, just like the District Court, Plaintiffs do little to address this factor. They devote less than three pages of their oversized brief arguing that the preliminary injunction is in the public interest (after not mentioning the public interest at all in their moving papers). And in those pages, they focus more on rhetoric and hyperbole aimed at maligning Defendants, Intervenors and Amici, than putting forth any arguments that the District Court properly weighed the public interest at stake or that they, as the moving party, met the heavy burden of

persuasion required to make a "clear showing" show that such a sweeping mandatory injunction is in the public interest. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *see also Stormans, Inc.*, 586 F.3d at 1139, *Bernhardt*, 339 F.3d at 932.

a. Diverting Resources Away From An Evidence-Based Regional Housing System To A "Hyper-Local," Location-Based System Is Not In The Public Interest

There is little doubt that the public has an interest in reducing the number of people who are compelled to live on the streets of Los Angeles. Plaintiffs and the District Court simply presume, without evidence or discussion, that the Court's order will reduce the number of people on the streets. But there is uncontroverted evidence in the record, which the District Court ignored and which Plaintiffs do not address here, that the injunction will not result in fewer people on the streets, and instead, will actually make it harder to move people off the streets and into housing.

First, Plaintiffs continue to focus on the public interest at stake in providing housing to LA Alliance members in Skid Row, *see* AAB at 98, but this is the wrong inquiry. "The public interest inquiry primarily addresses impact on non-parties rather than parties." *Bernhardt*, 339 F.3d at 932. Neither the District Court nor the Plaintiffs dispute Appellants' evidence that requiring the City and County to offer shelter and housing to all individuals in Skid Row in the next 180 days will

negatively impact other non-parties who are experiencing homelessness outside of Skid Row. Scarce shelter and housing resources in LA County and the Court's expedited timeline mean that Defendants will likely shift resources away from serving people who are located outside of Skid Row in order to comply with the Court's order to offer shelter to everyone in Skid Row in 180 days. Moreover, because shelter and housing resources are currently allocated based on vulnerability and need, it is likely that at least some of those resources will be diverted away from people who are more vulnerable, more likely to die on the streets, and but for the injunction, would be in line to get those housing resources under the current system (or even worse, are currently in shelter and will be displaced) that some of the individuals who will receive the resource simply because they live in Skid Row.

Second, the District Court and Plaintiffs fail to address the structural harm that this forced resource reallocation will cause to the City and County's homeless services delivery system. Amicus LAHSA and United Way explain that the current system used in Los Angeles County to "offer shelter and housing" to people experiencing homelessness is an evidence-based model that matches individuals with appropriate housing resources as they become available, based on their vulnerability and need. Far from a "perceived failure," AAB at 98, this system has been developed and refined over years, with considerable input from

the community, and it has proven effective at matching people with the resources they need to move permanently out of homelessness. Critical to the program's success is the fact that it deploys an evidence-based, regional approach that allocates resources equitably throughout the county. The District Court's preliminary injunction disrupts this individualized needs-based system and replaces it with an indiscriminate, "hyper-local" system that is fragmented, inequitable, and inefficient. *See* 4-ER-895 (explaining that resources must be matched to the individual and their unique needs in order for a person to effectively move out of homelessness). In fact, the approach mandated by the District Court has been tried before. It was the broken system that the current system was designed to replace.

b. Diverting Financial Support Away from Permanent Solutions and Towards More Temporary Shelters is Not in the Public Interest

Appellants and amicus put forth significant evidence that funding shelter beds to the *exclusion* of permanent housing will not reduce homelessness in Skid Row, and doing so is not in the public interest. In response, Plaintiffs argue only that the District Court's order does not mandate how the City and County must provide shelter or housing to everyone in Skid Row. But the role of the Court is to "weigh the public interest in light of the *likely* consequences of the injunction." *Stormans*, 586 F.3d at 1139 (emphasis in original). Both common sense and evidence in the record lead to the conclusion that, in order to offer everyone in

Skid Row shelter within 90, 120, and 180 days, the City and County will have to divert existing shelter and housing resources away from the current system and towards Skid Row and divert financial resources towards the creation of new interventions, which given the timeframe, will have to be emergency shelters.

Plaintiffs and the District Court have been explicit that they prefer "shelter solutions" over the creation of supportive and affordable housing. *See* AAB at 98. The District Court went so far as to find the City's decision to use the funding stream from a single voter-approved bond measure to build permanent housing instead of emergency shelters a "state-created danger." Accordingly, the District Court constructed an order that, while not mandating the City and County offer shelter over housing, ensures that this result is the "likely consequence." *Stormans*, 586 F.3d at 1139.

Los Angeles County already invests significant financial resources to fund a substantial temporary shelter system, which has grown significantly over the past four years. According to the 2020 Continuum of Care Shelter Count and Housing Inventory County, there are more than 14,880 emergency shelter beds and 4, 147 transitional shelter beds in Los Angeles County. 1-SER-225. Since then, and as a result of Defendants' agreement resulting from the May 15 *sue sponte* preliminary injunction, more than two thousand additional shelter beds have been created in Los Angeles. 7-ER-1689.

Plaintiffs and the District Court argue that this is not enough emergency shelter, but as Amicus LAHSA explains, it is not the number of emergency shelter beds that is driving the continued number of people on the streets, it is the lack of affordable permanent housing. Dkt. 49 at 8. The reason is simple: emergency shelters provide only a temporary respite from unsheltered homelessness but do not actually reduce homelessness. People need to be able to move from the emergency shelter beds into permanent housing. When that happens, the emergency shelter space will be freed up for the next person experiencing homelessness. When it does not happen because there is no permanent housing available, the backlog keeps each temporary bed occupied for longer periods of time, and it also means that individuals in temporary shelter are more likely to move from the emergency shelter back onto the streets, a fact most clearly illustrated by Plaintiffs' own members. *See e.g.*, 9-ER-2033; 12-ER-2858; *see also* 4-ER-920-22.

Intervenors put forth uncontroverted evidence that moving people into shelter only for them to move back onto the street not only fails to reduce homelessness, but it also makes it harder to end homelessness. *Id.* Often, when a person leaves a temporary shelter and falls back into homelessness, temporary shelter becomes less and less of a a viable option for them; instead, they become

"persistently homeless."[9] And there is uncontroverted evidence in the record that the growth of homelessness is attributable not to newly homeless households, but rather to those homeless households with barriers who either cannot exit homelessness and become persistent, or who become persistently homeless after several re-entries. 4 ER 706. Addressing persistent homelessness takes time and permanent housing resources, but dedicating these resources "would have the greatest potential impact on the level of homelessness in LA," 4 ER 677. Yet this is exactly the opposite of what will occur as as a result of the preliminary injunction.

c. The Continued Uncertainty Stemming from this Case is Not in the Public Interest

Finally, the instability caused by this litigation, which will be exacerbated by this injunction, is not in the public interest. Since this case was filed in March 2020, what began as a nuisance suit brought by property owners and other housed or sheltered residents living and working in Skid Row has transformed into a sweeping lawsuit about the impact of homelessness on people experiencing it themselves. Along the way, it has also become about COVID-19, the health impacts of freeway pollution on people seeking shelter under overpasses and underpasses, and now, Los Angeles's legacy of structural racism.

[9] Persistent homelessness is defined as receiving services from a homeless services provider for six or more months during the previous 12 months. 4-ER-702.

As the case has moved forward, Plaintiff have gone along with the District Court, shifting their legal theories and swapping out members of the LA Alliance to match the changes to the scope and nature of the case. As a result, the rest of the parties and the public are left in a constant state of uncertainty about what issues will be discussed and even what relief the Court will order next. For example, in May 2020, the Court, on its own motion, ordered the City and County to clear all homeless encampments within 500 feet of freeways and underpasses. 11-ER-2574. The order was not requested by any of the parties; in fact, none of the parties would have had standing to seek such an order. The Court vacated the order only after Defendants City and County entered into agreement, negotiated and overseen by the Court, which required the City to create 6700 new shelter options and for the County to pay for services for each of those beds. *See* 10-ER-2468.

This preliminary injunction will only compound the uncertainty that has defined this litigation, since the Court's order gives itself control over the entirety of the City's homelessness budget and oversight over the provision of services to all of Skid Row and beyond.

As reflected in the numerous Amicus briefs filed in support of Appellants, the impact of the uncertainty caused by this litigation extends far beyond the parties in this case. The constant changing nature of the litigation and now, the threat of this sweeping preliminary injunction has disrupted the whole of homeless

services in Los Angeles. Non-profit supportive and affordable housing developers are seeing the uncertainty threaten existing projects and impact their ability to get new funding. Dkt. 35 at 23. The injunction threatens to undermine the coordinated entry system used to match the City's most vulnerable residents to appropriate housing. Dkt. 49 at 3, 12 (noting that referrals to Project Roomkey were reduced by 75% after the referrals directed by the district court were put in place); Dkt. 50 at 9. And most importantly, all of this disruption is felt most acutely by unhoused people in Skid Row and throughout the City, the group most impacted by this litigation. *See e.g.*, Dkt. 51 at 3.

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY GRANTING SUCH A BROAD INJUNCTION IN THIS CASE

To justify the sweeping nature of the Court's injunction, like the District Court, Plaintiffs invoke *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Brown v. Plata*, 563 U.S. 493 (2011). But like the District Court, Plaintiffs give short shrift to the fundamental differences between those cases and this one: first, the structural relief granted or upheld by the Supreme Court in those cases came after years of litigation, factual development by the parties, and decisions on the merits. *See Brown v. Board of Education* 349 U.S. 294 (1955) ("*Brown II*"); *Plata*, 563 U.S. at 513. In *Brown v. Plata,* the Supreme Court specifically highlighted the extent to which the record was developed in the case, including a two week trial and significant testimony by experts, to say nothing of the years of prior litigation

and the prior remedial efforts that proceeded the Court's dramatic intervention in the form of a receivership. *Id.* Similarly, in *Brown v. Board of Education* and its progeny, structural relief came only after the Supreme Court ruled on the ultimate issue in the case and found that a number of school districts had violated Black children's constitutional rights. 347 U.S. at 495-96 (after holding clearly that segregation of schools violated students' Fourteenth Amendment rights, re-calendaring the case for further oral argument on the question of appropriate remedies).

By comparison, this litigation has only just begun, and although the District Court held numerous status conferences, while the case was stayed, the parties have had no chance to adequately develop th factual record in the case. The case is still very far from a final decision on the merits.

The relief in *Brown v. Board of Education and Brown v. Plata* were also far more circumscribed than what is contemplated here. In *Brown v. Plata*, the structural relief that was eventually ordered was "required by the Constitution and was authorized by Congress in the PLRA." 563 U.S. at 545. In *Brown v. Board of Education*, the Supreme Court acknowledged that there may be the need for significant intervention to ensure that the constitutional violations were remedied, but the Supreme Court recognized that the role of deciding how to integrate the schools lie, in the first instance, with the school districts themselves. *Brown*, 349

U.S. at 299 ("School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."). More significant interventions were contemplated when necessary, but the district court's role at the outset was to consider the adequacy of the plans put forth by the School Districts who were found to have violated the Fourteenth Amendment. *Id.* at 300-01.

The remedy ordered by the Court in this case—placing one seventh of the City of Los Angeles's annual budget and all land owned by the City and the County under the Court's authority, reallocating thousands of shelter beds, and auditing and investigating all manner of homeless services--is far from the narrow order Plaintiffs contend that it is. It is more expansive in scope than even the remedies in *Brown* and *Plata*, where the Courts' orders focused on discrete actions to remedy discrete harms; here, the relief is not tethered to any specific constitutional violation or authorized by a specific statute.

CONCLUSION

Plaintiffs fault Defendants for not solving the homelessness crisis in the year since they filed their case, and they accuse Appellants of failing to "come up with any other ideas to stymie the daily tragedy on the streets immediately." Opp. At 98. But that is precisely the problem. As Intervenor's expert, Dr. Tsemberis explains,

the premise that "homelessness is an emergency that requires an emergency response" represents a fundamental misunderstanding of the structural forces (e.g., lack of supply of affordable housing, low wages, low benefits and entitlements so that those who are extremely poor are permanently priced out of the housing market)" that cause homelessness. 4-ER-904.

The homelessness crisis is decades in the making, and "homelessness will continue to increase unless these structural economic issues are addressed." *Id.* The City and the County have made the choice to invest in long-term solutions that are at least starting to address some of the structural issues that created and continues to perpetuate this crisis. Plaintiffs and the District Court may disagree with this approach because unlike shelters and enforcement, investing in long terms solutions will not immediately lead to a reduction in the visible signs of homelessness in Plaintiffs' neighbor. But disagreements with a policy decision is not a basis for a preliminary injunction, especially one as sweeping as was issued here.

Intervenor respectfully requests the County vacate the order granting the preliminary injunction.

Respectfully Summitted,

Dated: June 24, 2021

LEGAL AID FOUNDATION OF LOS ANGELES

By: s/ *Shayla R. Myers*
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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(g)(1), the attached brief complies with the type-volume limitation of Ninth Circuit Rule 32-1(a) because it contains 5,841 words, as indicated by the word count function in Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it uses a proportionally spaced Times New Roman typeface in 14-point font.

Dated: June 24, 2021

LEGAL AID FOUNDATION OF LOS ANGELES

By: s/ *Shayla R. Myers*
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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2021, I electronically filed the foregoing document INTERVENOR'S REPLY BRIEF with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I hereby certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 24, 2021

By: *s/ Shayla R. Myers*
Shayla R. Myers