Nos. 21-55395, 21-55404, 21-55408
(Consolidated)

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LA ALLIANCE FOR HUMAN RIGHTS, et al.,
Plaintiffs-Appellees,

v.

CITY OF LOS ANGELES,
Defendant-Appellant,

and

COUNTY OF LOS ANGELES,
Defendant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION
DAVID O. CARTER, DISTRICT JUDGE
CASE NO. 2:20-cv-02291-DOC-KES

OPENING BRIEF BY APPELLANT CITY OF LOS ANGELES

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Introduction

The existence of a crisis—even one as serious, life-threatening, and complex as homelessness—does not obviate the rule of law or eliminate the separation of powers. Here, the district court's preliminary injunction would impermissibly invade key municipal functions and policy choices in Los Angeles. Instead of adjudicating Plaintiffs' claims, theories, and requested relief, the district court itself generated novel (and ultimately untenable) theories of its own and ordered remedies beyond the scope of what Plaintiffs themselves sought—disclosing these to the parties for the first time in its Order imposing a preliminary, mandatory injunction ("Order").

Before the case against the City was even at-issue, before any discovery had been taken, without any violation by the City of any previous order, and without providing the City any opportunity to respond to the theories raised for the first time by the district court in its Order, the court issued an extraordinary injunction which include the imposition of: (1) judicial authority over $1 billion of the City's budget; (2) judicial control over the disposition of all real property owned by the City and an accounting of all property owned by anyone that could potentially be used to address homelessness; (3) a judicial mandate to create (presumably

temporary) shelter for, and to potentially relocate, several thousand people experiencing homelessness in the next 180 days; and (4) the requirement of a *post hoc* hearing by a City Council committee to develop evidence to support conclusions the court already had reached. Joint Excerpts of Record ("ER"), Volume 1, at pp. 27-31, 137-142.

To be sure, homelessness is the defining issue facing Los Angeles's elected leadership. But the district court's preliminary injunction goes too far based on too little, ironically imperiling crucial progress. In our system of government, social policy cannot be dictated by a single judge based on materials outside an evidentiary record. The preliminary injunction should be vacated and the Order reversed.

Jurisdiction

Plaintiffs have alleged claims under 42 U.S.C. § 1983, the Americans with Disabilities Act (42 USC§§ 12131 et seq.) ("ADA"), and the Fifth, and Fourteenth Amendments of the United States Constitution. Citing these claims—but ultimately resorting in significant measure to theories of its own—the district court imposed an invasive preliminary mandatory injunction to compel a wide variety of actions by the City and to assume control of a portion of City governance. There is

appellate jurisdiction over the granting a preliminary injunction. 28 U.S.C. § 1292(a)(1).

Issues Presented

1. Did the district court's preliminary, mandatory injunction violate Article III standing, the separation of powers, federalism, and other constitutional and statutory principles that limit the judicial branch to adjudicating cases and controversies?
2. Did the preliminary injunction exceed the district court's equitable powers, requiring reversal?
3. Did the district court make legal errors, or otherwise abuse its discretion, when determining that the facts and law established that Plaintiffs were likely to succeed on the merits of their claims, when in fact they are not?
4. Did the district court err by issuing a preliminary injunction based on facts the parties did not litigate and law Plaintiffs never raised?

Statement of the Case

A. Plaintiffs' Complaint

On March 10, 2020, Plaintiffs sued the City of Los Angeles and the County of Los Angeles, stating generalized grievances about the effects of homeless encampments on business owners and residents, and about the way the City and

County allocate their resources to address the homelessness crisis. The LA Alliance for Human Rights is "an unincorporated association consisting of a broad coalition of Los Angeles stakeholders who understand that homelessness in LA is a human rights crisis and are working toward solutions to address the crisis…" 12-ER-2831. Notably, the Complaint did not allege that any plaintiff was a person currently experiencing homelessness.

While acknowledging the City has expended great effort, money, and resources to address the homelessness crisis, the Complaint asserts fourteen claims, all but one of which (the second claim for violation of California Welfare and Institutions Code section 17000) are asserted against the City. 12-ER-2791:5-7, 2800:20-23, and 2830:11-15.

B. The Case Was Stayed from March 19, 2020 to April 13, 2021

On March 17 and 18, 2020, homeless rights advocates Orange County Catholic Worker, CANGRESS dba Los Angeles Community Action Network, and Los Angeles Catholic Worker (collectively, "Intervenors") intervened in this action. 11-ER-2781 and 2774-2780.

On March 19, 2020, just nine days after the complaint was filed, the district court held an emergency status conference attended, at the court's invitation, by the Mayor, the President of the City Council, the City Attorney, and other City

officials. Acknowledging the opportunity to address the homelessness crisis, despite the legal deficiencies of Plaintiffs' Complaint, the City agreed to stay all proceedings to discuss settlement. *See e.g.* Transcript of 3/19/20 Conference, Dkts. 36, 90, p. 10.[1] The district court also requested unfettered *ex parte* access to all parties and their representatives, to which the parties acquiesced. *Id.*

In May, 2020, during that stay, the district court, acting *sua sponte*, issued a preliminary injunction mandating that the City and County offer housing to and relocate all persons "camped within 500 feet of an overpass, underpass, or ramp" by no later than September 1, 2020. 11-ER-2513. The district court vacated that injunction after the City and County agreed to create 6,700 new shelter solutions in 18 months, which the City and County are implementing. Dkt. 185-1. In the meantime, the district court noticed its intent to appoint legal counsel to provide "assistance and information . . . directly to the Court, not the parties," but reconsidered in light of the parties' objections. Dkt. 224-228.

The litigation stay was not lifted until April 13, 2021, in response to Plaintiffs' motion for preliminary injunction, filed on April 12, 2021, and the

[1] The district court's multiple status conferences, held during the stay before Plaintiffs filed their preliminary injunction motion, were not evidentiary hearings with testimony subject to any examination. *See* Dkt. 39, 90, 92, 94, 110, 112, 117, 162, 165, 181, 201, and 218. The district court itself describes them as hearings to learn what efforts were being made to address homelessness. Dkt. 300 at 2.

County's motion to dismiss, filed on March 29, 2021. 7-ER-1694. The City has not responded to the Complaint and no party has conducted discovery.

C. The District Court Requested Briefing on Equitable Remedies and Information that Refutes the Findings in Its Order

In a series of Orders dated January 31, February 3 and February 8, 2021 (10-ER-2255, 2452 and 2454), the district court requested briefing on structural equitable remedies available to it, and information about the City's actions towards persons experiencing homelessness, both past and present, including (1) inventories of property and funding that can be used to address homelessness. The district court also request evidence of whether the City has been "deliberately indifferent" by not providing shelter to unhoused Angelenos, and whether the City intended to discriminate against racial minorities, unsheltered women, or persons suffering from mental illness by using Skid Row as a gathering place for such individuals. 10-ER-2255, 2452 and 2454. The City filed its response on March 4, 2021, which provided legal analysis on structural equitable remedies available to the court—and the limits of such authority—as well as responses to the information requested. 9-ER-2150.[2]

[2] The City's response was cited only once by the district court in the Order for the acknowledgement that the "crisis of homeless is among the great challenges facing our region." Dkt. 277, p. 40, n. 245

D. Plaintiffs' Preliminary Injunction Motion

On April 12, 2021, Plaintiffs filed their motion for a preliminary injunction ("Motion"), which effectively asked the district court to become the local homelessness authority and to take sweeping and affirmative steps based on four legal theories. 8-ER-1696.

First, Plaintiffs moved exclusively against the County for violation of Welfare and Institutions Code § 17000. 8-ER-1730–38.

Second, Plaintiffs argued they were likely to succeed under the Fifth and Fourteenth Amendments, specifically: (1) on their twelfth claim for violation of the state-created danger because "Defendants have violated Due Process . . . by adopting and implementing policies that have created danger to Plaintiffs and [people experiencing homelessness]" (8-ER-1733–34); and (2) on their eleventh claim for violation of Plaintiffs' procedural due process rights because City policies addressing homelessness resulted in Plaintiffs' property values depreciating without notice and an opportunity to be heard on the "taking" of their property (*see* 8-ER-1734–35).

Plaintiffs also argued they were likely to succeed on their seventh, eight, and ninth claims for violation of the California Disabled Persons Act, ADA, and Rehabilitation Act because, they argued, homeless encampments obstruct access to

sidewalks in Skid Row. 8-ER-1739:13-14.

Finally, Plaintiffs argued they were likely to succeed on their third and fourth claims for public and private nuisance under California state law premised on alleged harms, including health hazards and decreased property values, caused by homeless encampments throughout Skid Row. 8-ER-1735–38.

E. The District Court Issued a 110-Page Preliminary Injunction Order within 24 Hours of Defendants' and Intervenors' Opposition Filings

The day after Plaintiffs' Motion was filed, the district court ordered oppositions to be filed by April 19, 2021, but noted that "[n]o reply will be required from Plaintiffs." 7-ER-1694. The City, the County, and the Intervenors all filed timely oppositions. *See* 7-ER-1498, 1556, and 1587.

Less than 24 hours after the oppositions were filed, and without a hearing, the court issued its 110-page preliminary, mandatory injunction order. 1-ER-33. In addition to the extraordinary directive that the City escrow $1 billion from its proposed budget, the court ordered the City to: cease all sales and transfers of City properties pending a court-ordered report by the City Controller on all land—not all *City* land, but *all* land—potentially available for homeless housing; offer housing to everyone in Skid Row within 180 days; perform various audits,

investigations, and reports; and comply with numerous other terms. 1-ER-138-142.

The Order devoted significant discussion to a theory that racial discrimination by various public and private entities was the root cause of homelessness, even though Plaintiffs alleged no claim of racial discrimination in their lawsuit or their Motion.

While Plaintiffs did make a state-created danger due process argument, the district court unilaterally added a racial discrimination component. Moreover, the court asserted a legal theory that failure to solve a social problem was equivalent to creating it under the Due Process Clause of the Fourteenth Amendment.

The district court also created and applied three new theories of constitutional violations not advanced by Plaintiffs:

First, the court opined that the City had created a special relationship with the homeless community through a long-terminated policy of trying to contain homeless individuals and services to Skid Row and now owes currently unsheltered persons an affirmative duty under the Due Process Clause of the Fourteenth Amendment. 1-ER-108–09.

Second, though Plaintiffs' Motion did not invoke an equal protection

theory,[3] the district court set about to "advance" equal protection jurisprudence by creating a "severe inaction theory" that interprets the Equal Protection Clause to impose an affirmative duty to stop inequality wherever it exists and then equates "state *inaction*" with "state action that is strongly likely in violation of the Equal Protection Clause." 1-ER-112 (emphasis added). The district court concluded that "the Defendants have allowed themselves to become paralyzed, failing to muster the moral courage and political will to serve their homeless population" and blamed this perceived inaction for the disproportionately high death rate among Black people experiencing homelessness. 1-ER-109–111.

Third, though Plaintiffs did not argue that Defendants had violated unhoused Black families' substantive right to family integrity, the district court concluded that the City and County had done so in a way tantamount to the substantive due process violations committed by federal officials forcibly separating children from their parents at the U.S.-Mexico border. 1-ER-115–119.

In addition, though on its face Welfare and Institutions Code § 17000 does not apply to the City[4], the district court concluded that "the City of Los Angeles is

[3] While Plaintiffs dedicated a portion of their brief to alleging that a historic containment policy and systemic societal racism contributed to the conditions on Skid Row, the injunction motion did not invoke any equal protection theory.

[4] *Tobe v. City of Santa Ana*, 9 Cal.4th 1069, 1104, n.18 (Cal. 1995).

likewise likely liable for violations of [Welfare and Institutions Code] § 17000" even though Plaintiffs' Complaint and preliminary injunction motion only asserted that claim against the County. 1-ER-121; 12-ER-2862– 2864; and see 8-ER-1730–1733. The court also found the plaintiffs were likely to succeed on their ADA claim. 1-ER-123.

The district court's Order did not address Plaintiffs' arguments based on state law nuisance claims, the California Disabled Persons Act, or the Rehabilitation Act. 8-ER-1735–738.

Two days after issuing the Order, on April 22, 2021, the district court clarified that the Order's directives relating to "Accountability" and "City- and County-Wide Actions" were not limited to Skid Row but in fact applied to all districts in the City and County and the problem of homelessness generally, even though almost all of the allegations made by Plaintiffs are connected to the Skid Row area. The court also clarified that the provision regarding the cessation of sales and transfers of City property did not apply to "projects in progress"—without defining what "in progress" means. 1-ER-32. The City, County, and Intervener Cangress dba Los Angeles Community Action Network, each promptly appealed the Order. 12-ER-2880–82.

F. The District Court's Rejection of Defendants' Stay Requests

The City and County each filed *ex parte* applications to stay the order. 2-ER-359, 401. Plaintiffs opposed. Dkt. 285. On April 26, 2021, the district court primarily denied the requests for a stay, agreeing only to delay (i) the compelled escrow of $1 billion by 60 days—while simultaneously asking the City to create and submit a binding spending plan for the $1 billion for the court's approval—and (ii) the prohibition on land transfers until a hearing could be held on May 27, 2021 to determine what properties exist and are available for homelessness relief. 1-ER-2. The district court also indicated that, at the May 27, 2021 hearing, it would receive testimony regarding the court's findings on structural racism in its April 20, 2021 preliminary injunction. 1-ER-2, 17.

The City and County then filed emergency motions for stay in this Court. This Court entered an administrative stay until June 15, 2021 of the Order, pending the May 27, 2021, hearing and additional briefing by the parties. The same order consolidated all three appeals of the Order.

After the May 27 hearing, the district court stayed its prohibition on City land transfers pending resolution of this appeal, and continued the stay of the escrow of $1 billion dollars to October 18, 2021. The district court also affirmed its factual findings concerning structural racism, citing statements made at the

hearing from a wide variety of sources. 2-ER-311.

Summary of Argument

In its Order, the district court invented novel legal theories to invoke open-ended equitable powers in a sweeping mandatory preliminary injunction which granted unrequested remedies. Brushing past the scale and complexity of the homelessness crisis and the numerous practical challenges it poses to local governments, the district court essentially asserted managerial control of key municipal operations on the premise it would be more effective at addressing homelessness than the elected officials whose authority it supplanted. The Order should be reversed and the injunction vacated.

The Order is defective for several reasons. Fundamentally, in its purported assertion of equitable powers, the district court violates basic principles of federalism and separation of powers by imposing its policy choices on the City's legislative and executive branches and forcing local government officials to answer to the district court, not the people who elected them, under the threat of contempt.

The Order thus has extraordinary implications for the respective roles of the branches of government in setting policy to address complex social problems like homelessness. A pervasive theme of the district court is that a government's failure to solve a serious and complex social problem renders that government

legally accountable for the existence of that problem, triggering Substantive Due Process and Equal Protection violations and justifying a sweeping intrusion by the judiciary into local government decision making.

If accepted, this rationale would undermine separation of powers and eviscerate long-held limitations on courts' equitable powers. Future plaintiffs dissatisfied with government responses to a plethora of challenging social ills could deploy the district court's theory to render government liable for the persistence of a problem, then obtain sweeping judicial intervention into policymaking heretofore reserved for elected lawmakers and executives. This Court should reverse the Order for this reason alone.

The Order also fails to satisfy the required elements of a preliminary mandatory injunction: (1) that the facts and law clearly favor the imposition of the injunction, (2) that Plaintiffs will suffer an irreparable harm without the preliminary injunction, (3) that the balancing of party interests favors the injunction, and (4) that the injunction is in the public interest.

The legal theories offered by the district court are unsupported by the law and facts. Several were never raised or argued by Plaintiffs—denying Defendants the opportunity to respond to them. For example, the district court found racist policies over the last century – put in place by the federal, state, and local

governments, as well as private actors – caused modern homelessness and created a violation of the Equal Protection Clause for which the City must now bear legal responsibility. No racial discrimination claim is even alleged in this lawsuit and no equal protection claim was raised by Plaintiffs' injunction motion.

The "state-created danger" doctrine, on which the Order also relies, is a narrow exception that only applies when a specific action by a public official directly puts a plaintiff in danger. It has never been applied to broad and complex social issues that span decades. While Plaintiffs claimed that homelessness was a "state-created danger" through government policies that resulted in, or failed to address, homelessness in Skid Row (to which the district court added a racial discrimination component), the Order did not identify *any* affirmative act by the City that placed Plaintiffs in any current danger. Moreover, the court asserted a legal theory that failure to solve a social problem was equivalent to creating it, which would establish a virtual blank check for courts to intervene in addressing social issues not fully resolved to their satisfaction by elected officials. And given the City's extensive efforts to address homelessness, the court cannot establish the required "deliberate indifference" element.

The district court also made novel and misguided findings *sua sponte*, including finding that a previous policy of attempting to contain homeless

individuals and the services provided for them in Skid Row established a "special relationship" with homeless residents that was equivalent to the duty prison guards owe incarcerated prisoners, creating a due process duty of care. The Order also asserted a "severe inaction" theory that equated inaction with action and then found the inaction an equal protection violation. The Order further found that the historical structural racism that contributed to modern homelessness threatens the integrity of African-American families, and therefore the failure of the City to solve homelessness violates Plaintiffs' substantive due process rights. The facts and law do not support any of these findings or conclusions.

In addition, the district court found the City likely liable under Cal. Welf. & Inst. Code § 17000; yet, by its own terms this statute does not apply to the City. *Tobe*, *supra*, 9 Cal.4th 1069, 1104, n.18.

Finally, the district court found a probable violation of the ADA because the City has not prevented homeless encampments from blocking some sidewalks, even though the injunction does not even mention sidewalks. Moreover, while the ADA is violated only if the condition complained of specifically burdens disabled people (see 42 U.S.C. § 12132), Plaintiffs complain that *everyone's* path is blocked, with no distinction for access by disabled people. And more than 9,000

miles of City sidewalks are passable as a whole, leaving no basis for ADA liability for blockage at a few locations.

The preliminary injunction lacked a legal basis, and therefore should be vacated. But the remaining three prerequisites for a preliminary injunction are also lacking, since irreparable injury concerns, the balancing of equities, and public interest considerations all militate in *the City's* favor—adding to the reasons the injunction should be vacated.

Because the district court has failed to justify its overreaching and intrusive injunction, the Order should be vacated and the matter remanded.

Argument

I. Standards of Review

"An order granting a preliminary injunction may be reversed only if the district court abused its discretion, made an error of law, or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. [Citation.] We review issues of law underlying the preliminary injunction de novo." *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1234 (9th Cir. 1999).

A preliminary injunction issued prior to a trial on the merits and final judgment is "an extraordinary remedy that may only be awarded upon a clear

showing that the plaintiff is entitled to such relief" and is "never awarded as of right." *Winter v. Natural Resources Defense Council, Inc*., 555 U.S. 7, 22-23 (2008); see also *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) ("a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion."). Generally, to obtain preliminary injunctive relief, the moving party must make a "clear showing" that (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of the preliminary relief; (3) the balance of equities tip in its favor; and (4) an injunction is in the public interest. See *Winter*, 555 U.S. at 20.

The first element, "likely to succeed," is the most important and can be decided before considering the others. *Garcia v. Google*, 786 F.3d 733, 740 (9th Cir. 2015). For purposes of a "particularly disfavored" mandatory injunction, such as the Order, the moving party must meet a "doubly demanding" burden "that the law and facts *clearly favor*" the injunction, not simply that they are likely to succeed. *Id*. (emphasis in original); *Anderson v. United States*, 612 F.2d 1112, 1114-15 (9th Cir. 1979).

II. The Preliminary Injunction Violates Federalism and Separation of Powers.

To justify a significant and unjustified intrusion into City government, the district court describes its equitable powers as a blank check to impose judicial supervision on municipal affairs. 1-ER-130 ("the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies"); citing *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971). However, the court exceeded its equitable authority, and violated principles of federalism and separation of powers by asserting control over key municipal functions and substituting its judgment regarding policy priorities and the allocation of limited resources for that of the officials elected to make those decisions.

A. The District Court Exceeded Its Equitable Powers.

1. The district court ignored the limits on equitable remedies.

While a court's equitable powers are generally broad and flexible, they are not limitless. For example, "[a] court's equitable power lies only over the merits of the case or controversy before it. When a plaintiff seeks injunctive relief based on claims not pled in the compliant, the court does not have the authority to issue

an injunction." *Pacific Radiation Oncology, LLC v. Queen's Medical Center*, 810 F.3d 631, 633, 636 (9th Cir. 2015). In addition, injunctive relief "must be tailored to remedy the specific harm alleged. An overbroad injunction is an abuse of discretion." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009). In defining the scope of a court's equitable powers "it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation." "The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." *Swann*, 402 U.S. at 16. The Order disregards these fundamental restrictions on its power.

The Order does not reflect the case or controversy with which the court was presented. Instead, it raises new legal theories and makes findings on those theories even though no party raised them. The Complaint does not allege any claim for racial discrimination, which is the primary basis for the Order. Plaintiffs' preliminary injunction motion made no equal protection argument but the Order is steeped in Equal Protection. See 1-ER-1733–35. The only Equal Protection claim in the Complaint is the alleged inconsistency by region, i.e., that homeless encampments are tolerated in some areas of the City but not others; the Order makes no mention of that claim. 12-ER-2875–76. Similarly, Plaintiffs did not argue for relief based on any "special relationship" or "severe inaction theory," nor did they allege threats to family integrity that violated substantive due process.

And yet, the district court based its Order on each of these claims and made findings on them. Similarly, Plaintiffs did not ask the court to sequester $1 billion of taxpayer money, seize control of the disposition of all City property, or mandate City Council committee meetings with prescribed agendas and witnesses. Compare, 1-ER-33 and 12-ER-2788.

The Order is based on legal theories and remedies that went well beyond the Complaint, and therefore beyond the court's authority to act.

2. Cases cited in the Order do not support the district court's overreach.

The cases cited by the district court do not support its preliminary injunction. For example, the court cites *Swann, supra,* to find that the district court's equitable remedies are "broad," allowing "breadth and flexibility" in the remedies it orders. 1-ER-101. And yet, *Swann* confirms that even when a court finds a constitutional violation, the elected local public entities bear the duty to adopt a plan to make the needed corrections. *Swann* at 13-14. The state and local public entities "are traditionally charged with broad power to formulate and implement [] policy." *Id.* at 16. "Remedial judicial authority does not put judges automatically in the shoes of [local] authorities whose powers are plenary. Judicial authority enters *only*

when local authority defaults." *Id*. (emphasis added). In other words, if a court finds a constitutional violation, it issues such a finding, which puts the local entity on notice to correct the violation and leaves the method of the correction to policy makers. Only if the local entity defaults on that court order should any further judicial action be contemplated. The district court is not empowered to do what it did here – issue the first notice of a constitutional violation in the same order where it directs local government functions and requires policy changes that the government must adopt under the threat of contempt.

In stark contrast to this case, *Swann* addressed local public entities that deployed "[d]eliberate resistance" and "dilatory tactics" to actively thwart court-ordered desegregation. *Swann* at 13. *Swann* found that if a local entity is "in default" by failing to obey a previous court order, then "a district court has broad power to fashion a remedy that will assure" compliance with the previous constitutional ruling. *Id*. at 16 and 24-25.

Here, the City has not defaulted on a previous order by the district court. *Swann* certainly does not authorize the district court to assume control over municipal functions as the first, preliminary step in litigation that has yet to be at-issue.

The district court also cited *Brown v. Plata*, 563 U.S. 493 to conclude that it was not bound by plaintiffs' claims or theories, and that it may issue orders against local governments even though the orders impact the government's budget. Order, pp. 97, 102. But *Plata* also is readily distinguishable. In *Plata*, the State had failed to remedy the unconstitutional prison conditions despite 12 years of attempts following the initial court order to address the problem. *Id*., at 516, 521. In addition, the court had received abundant expert testimony supporting the conclusion that overcrowding was the primary cause of the Eighth Amendment violations. *Id*., at 521-22. Following the default on the previous orders, and based on the expert testimony, the *Plata* court ordered the State to relieve prison overcrowding under a statutory scheme that specifically authorized the court to address prison overcrowding. *Id*. at 512, 537-538. Despite holding that the district court had the power to fashion appropriate equitable relief under those circumstances, the *Plata* court still noted that "courts should presume that state officials are in a better position to gauge how best to preserve public safety and balance competing correctional and law enforcement concerns. The decision to leave details of implementation to the State's discretion protected public safety by leaving sensitive policy decisions to responsible and competent state officials." *Id*. at 538.

The district court similarly cites *Armstrong v. Brown*, 768 F.3d 975 (9th Cir. 2014) to assert that its Orders could exceed the relief requested by Plaintiffs here, but *Armstrong* comes nowhere close to supporting that conclusion. In *Armstrong,* the plaintiff prisoners sought disability accommodations under the ADA and the State filed a remedial plan for compliance. Then the district court entered a permanent injunction based on the State's remedial plan. Because the State was still out of compliance many years later, the district court modified the injunction after giving the parties notice and a chance to be heard. *Id*., at 979-81. As in *Plata*, the State in *Armstrong* both crafted and was responsible for executing the plan to resolve the constitutional violation, and only after the State had failed to comply with the existing order was it appropriate for the court to take a more active role in addressing the constitutional violation. Nothing about *Armstrong* gave the district court here authority to issue orders far beyond what Plaintiffs dreamed of seeking.

Unlike the cases relied on by the district court, the court here never articulated a clear, relevant constitutional violation by the City, and the City never defaulted on a requirement to rectify an unconstitutional practice. While the court narrates a history of purported constitutional violations dating back a century, those practices were mostly by public entities other than the City, or by private parties—all of which have long been expressly rejected or otherwise abandoned.

Dkt 277 at 5-21. Moreover, the district court had no evidence which demonstrated how any of the past alleged practices by the City were the cause of Plaintiffs' claimed injuries, such as blocked sidewalks, inadequate city services and diminished property values.

Instead, the district court relies on only three purported aspects of current City action as grounds for the Order, none of which justifies the sweeping mandatory injunction.

(1) Highlighting the flaws that come with issuing orders without first seeking to adduce facts on the record, the Order incorrectly states that the City is reducing its Project Roomkey program for temporary housing, citing news articles quoting statements by the ***County***, not the City; in fact, those same articles cite the City's intention to continue and expand the program. 1-ER-80; but see 9-ER-2169–70, 7-ER-1601:21-25. This also ignores the City's expansion of the similar housing program, Project Homekey. See 7-ER-1669.

(2) The district court makes assertions of "corruption," even though the court's own cited sources indicate that the City conducts regular audits of its programs and appropriately responds to recover funds and prosecute abuses once improprieties are discovered or exposed. 1-ER-74–76. More importantly, the Order provides no legal authority for the proposition that local officials violate the

Constitution if they do not immediately discover and hold accountable someone who attempts to defraud a public program like Proposition HHH.[5]

(3) The district court disagrees with the City's policy decision to allocate HHH funds primarily to long-term supportive housing as opposed to temporary shelters, even though—barring a finding that this decision somehow violates the Constitution—such an allocation of resources is the prerogative of executive and legislative branches grappling with complex, competing policy considerations.

None of these supports judicial control of any municipal function.

B. The Order Constitutes Judicial Overreach in Violation of Federalism and Separation of Powers.

"[A] federal court must exercise restraint when a plaintiff seeks to enjoin any non-federal government agency, be it local or state." *Midgett v. Tri-Ct. Metro. Transp. Dist. of Oregon*, 254 F.3d 846, 851 (9th Cir. 2001); see also *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1042 (9th Cir. 1999) ("The Supreme Court has repeatedly cautioned that, absent a threat of immediate and irreparable harm, the federal courts should not enjoin a state to conduct its business in a particular

[5] Nor does the Order explain how its antidote for this purported violation—ordering additional and largely duplicative audits of local, state, and federal programs that all have their own auditing requirements—would prevent similar transgressions.

way."); *Lewis v, Casey*, 518 U.S. 343, 362-63 (1996) (district court overstepped where it imposed system wide remedial injunction that "was inordinately – indeed, wildly – intrusive" and failed to give prison officials primary responsibility for devising a remedy). An injunction is "rarely if ever appropriate for federal-court adjudication," "even when premised on allegations of several instances of violations of law" when the claims are based on "not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations." *Allen v. Wright*, 468 U.S. 737, 760-61 (1984).

Because state and local governments are afforded the "widest latitude in the dispatch of [their] own internal affairs" they are owed significant deference in shaping policies to deal with complex social issues and this weighs "heavily against the grant of an injunction except in the most extraordinary circumstances." *Rizzo v. Goode*, 423 U.S. 362, 380 (1976). Even where authorizing broad structural injunctive relief, the Supreme Court cautions that the choice of the means to achieve the result should be left to local officials. See e.g., *Plata*, 563 U.S. at 501 ("The order leaves the choice of means to reduce overcrowding to the discretion of state officials."); *Lewis*, 518 U.S. at 362-63 (praising a court for having "scrupulously respected the limits on [its] role" rather than "thrusting itself into prison administration"). "Federalism concerns are heightened when . . . a

federal-court decree has the effect of dictating state or local budget priorities." *Horne v. Flores*, 557 U.S. 433, 448 (2009).

Disregarding these restrictions, the Order subjects key elements of the City's daily affairs to the federal judiciary, ignores the expertise of the agencies created to manage those affairs, and usurps the discretion of elected officials to continue responding to the complex homelessness crisis. 1-ER-27– 31. This "inordinately – indeed wildly – intrusive" and overbroad sweeping injunction is the kind consistently overturned on the grounds of federalism and separation of powers, especially at this early stage of litigation. The City has not even responded to the Complaint, no discovery has been conducted, and no evidentiary hearings were held prior to the Order. See e.g., *Lewis*, 518 U.S. at 363; 7-ER-1601:5-6.[6]

These longstanding principles of federalism and separation of powers stand in the way of the district court's attempt to direct municipal government operations through the Order. Because the district court lacked power to issue the relief in the Order, Plaintiffs would have lacked Article III standing to seek it, had they done so—which they did not. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61

[6] While there appears to be some debate as to whether the status conferences held before the Order was issued were "evidentiary hearings," if that was actually the case there would be evidence in the record, rather than the collection of news clippings and other outside reports which are cited in the Order.

(1992); *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018) ("Even where a plaintiff requests relief that would redress her claimed injury, there is no redressability if a federal court lacks the power to issue such relief.") (citations omitted); see also *Juliana v. United States*, 947 F.3d 1159, 1172, 1175 (9th Cir. 2020) (directing dismissal of case on redressability grounds where plaintiffs sought to compel the executive and legislative branches to address climate change in specific manner).

The doctrines of federalism and separation of powers resonate with particular force here, where Plaintiffs concede—and the district court itself seemed to realize—that multiple interacting causes resulted in the current regional homelessness crisis, and no single action, agency, or official can be reasonably ordered to solve it. Rather, the complexities of the homelessness crisis, and the associated competing interests highlighted by this lawsuit, demand a collaborative response by the executive and legislative branches of government – federal, state, county and city – each addressing the factors within its scope of authority.

C. The District Court Improperly Used Its Equitable Powers to Deny the City Due Process.

The Order is also invalid because the district court issued a preliminary injunction that did not even resemble what the parties had been litigating: The

City's first notice of these issues was the Order itself, which thus denied the City due process by failing to provide notice and an opportunity to respond to the novel and unlitigated bases for the Order—both legal and factual—and the broad scope of the unrequested remedies. This deficiency is all the more pronounced here, where far from preserving the status quo, the Order contains sweeping and dramatic mandates that include judicial direction over significant municipal operations.

Importantly, in each case the district court cites to support its broad use of equitable powers, the courts afforded full due process to the governments subject to the orders. In *Armstrong*, *supra,* for example, the court notified the parties of its intention to modify an existing injunction and provided an opportunity for written and oral argument before issuing the order. 768 F.3d at 980. Here, in stark contrast, the district court announced that no reply would be necessary when it set the preliminary injunction briefing schedule, conducted no hearing, then issued the 110-page Order within hours of receiving the oppositions. 1-ER-33, 7-ER-1694.

III. The Stated Legal Grounds for the Order Do Not Support a Preliminary Injunction.

The legal grounds provided in the Order are addressed in turn.

A. No Equal Protection Claim Supports this Extraordinary Judicial Intervention by the District Court.

In its Order, the district court cites *Brown v. Board of Education of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954) ("*Brown I*") and some of its progeny as creating a general duty to broadly enforce the Equal Protection Clause. The district court then relies on a reported history of racism as the foundation for modern homelessness to conclude that the facts and law clearly favor Plaintiffs' success on the merits supporting the Order.

This reasoning is fundamentally flawed for at least three reasons.

First, Plaintiffs' Motion for Preliminary Injunction does not include any claim based on Equal Protection, nor does the Complaint assert any claim of racial discrimination; it is unfathomable that Plaintiffs would succeed on a claim they never made. The only equal protection claim that Plaintiffs did make was in the Complaint, in which they alleged downtown business owners and residents were treated unfairly because homeless encampments were tolerated more there than in other areas of the City. 12-ER-2875–2876. Plaintiffs' preliminary injunction motion did not make any equal protection argument. See 8-ER-1733–35. And yet, the district court found an Equal Protection violation – not based on a theory in the Complaint – but based on the court's own theory about a reported history of

racism. This finding is beyond the scope of both this litigation and the underlying motion.

Second, *Brown* and its progeny addressed a fundamentally different set of circumstances—a public entity resisting the antidiscrimination efforts of a Court's order—than those present here. In *Brown* and later cases, the local governments had shown resistance and hostility toward the desegregation ordered in those decisions. In contrast, here the district court had not previously issued any orders which the City failed to obey; rather, the City undeniably devotes significant resources to the issue of homelessness. Indeed, the Order never identified a single relevant constitutional violation by the City which would support the Order on racial discrimination grounds.

The *Brown* cases overturned "separate but equal" in education and ordered the dismantling of the existing segregation systems "with all deliberate speed." *Brown v. Board of Education of Topeka, Kan*., 349 U.S. 294, 301 (1955) ("*Brown II*"). That order expressly invalidated several state and local legal schemes which were then being enforced to impose education segregation of both faculty and students. Correcting for that unconstitutional segregation required locating and dismantling every aspect of each segregation program. *Swann,* 402 U.S. 1, 18, 22.

Those courts initially left to the local entities how best to desegregate, but some jurisdictions rejected the *Brown* rulings and actively sought to thwart desegregation. *Swann* at 16; and see *Milliken v. Bradley*, 433 U.S. 267, 269 (1977) (the issue of segregation remedies alone was litigated for six years); *United States v. Fordice*, 505 U.S. 717, 722-24 (1992) (State university maintained segregation practices for decades after *Brown* and state legislature refused to fund desegregation efforts). In each of those cases, the Court first expressly found a constitutional violation which the public entity was charged to correct. Only when the public entity proved unwilling to repair the constitutional violation, or in some cases was openly contemptuous, did the court issue more specific targets for doing so, still leaving the operational details to the administrators. *Swann* at 10-14; *Fordice* at 721-25 and 732-33; *Milliken* at 273-77; and see *Hutto v. Finney*, 437 U.S. 678, 683-84 (finding prison conditions unconstitutional, the court ordered state to make improvements, when that failed more specific goals were identified, after apparent improvements the court stopped supervision only to find that conditions promptly deteriorated, requiring a more detailed order).

No similar facts exist in this case. The district court's first finding of any constitutional violation was in the Order itself, and that finding was based upon legal theories the parties had not raised. Also, nothing akin to the pervasive and explicit segregation policies in *Brown I*, et al., exists here. Moreover, far from

defending any constitutional violation, the City long ago disclaimed the practices complained of in the Order (most of which were not even City policies) and had devoted considerable resources to addressing homelessness long before these legal proceedings began and continues to do so independent of the Order. 7-ER-1601:21–1604:6; and see 9-ER-2169:9–2172:1.

Indeed, the evidence does not support a finding of racial discrimination by the City. To the contrary, most of the historical complaints asserted by the district court address actions by the federal government (redlining, banking loan policies, etc.), the State (highway construction, enforcement of restrictive covenants, etc.), the county (reducing Project Roomkey, etc.) or private parties (restrictive covenants, actions of private charities that limit assistance, etc.), or other influences that resulted in economic hardships (the Great Depression, the War on Drugs, etc.). 1-ER-36–64. None of these provide any basis for a court to order the City to address homelessness through one means versus another, let alone empower a federal judge to substitute his judgment for that of policymakers contending with the complex issues homelessness presents.

Those actions which the district court does attribute to the City do not support the Order. For example, the Order describes some actions that occurred a century ago, such as demolishing ramshackle "house courts" (that were used to

house mostly white immigrants) from 1910 to 1913, the discrimination of private charities in 1928, and the allocation of money for the homeless in 1931, without explaining how these long-ago actions caused injury to Plaintiffs. 1-ER-38–39.

Part of the difficulty in sorting out what the Order even claims as the historical record are repeated misstatements about who is responsible for the alleged action. For example, the Order berates the City for reducing Project Roomkey, but only cites a statement about *the County's* intended reduction. 1-ER-80, and n. 281. Similarly, the Order complains that "Los Angeles employed eminent domain" regarding highway construction, which it finds had a discriminatory impact, but cites to an article which reports that CalTrans, a *State* agency, condemned and seized the property—and then spent millions of dollars to compensate displaced families. See 1-ER-44, n. 63.

Ultimately, the Order's primary complaint against the City is the purported disproportionate impact of some City policies that were not facially discriminatory, such as law enforcement practices regarding homeless populations, zoning ordinances that limit construction, and the use of Skid Row as a location for its homeless populations and the services provided to them. E.g., 1-ER48–49, 56-57, 62, and 122-123. However, a disproportionate impact, in itself, is insufficient to support a violation of the Equal Protection Clause. *Washington v. Davis*, 426 U.S.

229, 240-241 (1976); and see *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) ("the Fourteenth Amendment guarantees equal laws, not equal results"). The Order never shows any likelihood of succeeding against the City on this equal protection claim.

B. The State-Created Danger Exception Does Not Apply Here.

In a second attempt to find legal support for its order, the district court invoked the "state-created danger" doctrine, making the overbroad and unsupported finding that the City had created the homeless community, particularly those living in Skid Row, and thus the City was constitutionally responsible to find shelter or housing for everyone in Skid Row. Actually, the "state-created danger" doctrine constitutes a narrow exception to the rule that the Due Process Clause of the Fourteenth Amendment "generally does not confer any affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests." *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 971 (9th Cir. 2011); *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 202 (1989). A plaintiff (or a court) claiming this exception must show: (1) that the state actors "affirmatively place[d] an individual in danger" of losing her liberty interest in bodily security; and (2) that they acted with "deliberate

indifference to [a] known or obvious danger in subjecting the plaintiff to it." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1062 (9th Cir. 2006).

The district court's finding of a "state-created danger"—through an analysis that not only led to judicial overreach here, but portends it in a broad array of future cases—fails for multiple reasons, set forth below.

1. The District Court significantly distorted the "state-created danger" doctrine.

The "state-created danger" doctrine originated in *DeShaney*, *supra,* in which the Supreme Court found that an officer had not created such a danger when he failed to protect a boy severely beaten by his father, even though the officer knew of the continued abuse, because the officer did not cause the harm or put the boy at greater risk than he was at already. 489 U.S. at 202. This circuit later found a "state-created danger" in *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), which upheld a complaint alleging that an officer abandoned a female passenger in a dangerous part of town at 2 a.m., where she was later raped, after the officer arrested her driver, impounded the vehicle, and ignored her request for assistance. *Id*., at 588.

Thereafter, the doctrine has only been applied when individuals were put in imminent danger to which they would not have been subjected but for affirmative

and contemporary actions by a public employee. E.g., *L.W. v. Grubbs*, 974 F.2d 119, 121-22 (9th Cir. 1992) (prison nurse attacked when left alone with violent prisoner); *Munger v. City of Glasgow Police Dept.*, 227 F.3d 1082, 1086 (9th Cir. 2000) (police ejected intoxicated man from bar into subfreezing temperatures with only jeans and a t-shirt). In each case the subject officer was accused of changing the status quo and creating a new danger to an individual's bodily integrity.

Instead of evaluating a discrete alleged act by an individual government actor, the district court here provided an incomplete, century-long history involving many actions and policies by *multiple* government and private actors to find that the *City* had created a "state-created danger" of homelessness. Without justification, the district court thus improperly recast this limited doctrine – designed to protect the fundamental liberties of individuals from direct state action – into a tool for imposing the court's public policy choices.

2. The District Court failed to identify a City action that placed a plaintiff in imminent danger.

The district court also failed to identify any particular action by a City official that placed one of the plaintiffs in imminent danger to their bodily integrity. To the contrary, given all the discriminatory actions the Order attributes to *other* entities, let alone economic factors beyond the City's control, it would be

impossible to make a credible finding that "but for" the City's actions alone, there would be no homelessness. See 1-ER-20–53.[7] To fill that gap, the Order attributes federal and state discriminatory policies to the City, ultimately concluding that homelessness is a "state-created disaster" and blaming "the government," while failing to justify holding the City accountable for federal, state, and private acts of discrimination such as redlining and enforcing restrictive covenants. 1-ER-105–106, and see 1-ER-38–41. The only past City practice raised by the Order in this context was the failure of the City to stop private charities from racially discriminating in the 1920's, but the Order offers no explanation of how that caused a specific threat to Plaintiffs in 2021. 1-ER-105.

Apparently recognizing the weakness of its history-based "state-created danger" theory, the district court goes on to find that providing thousands of shelter beds and spending hundreds of millions of dollars towards permanent supportive housing was so deficient as to constitute a "state-created danger." In essence, the

[7] As cited in the Order (for the first of many times at Dkt. 277 at 5, n.4), the L.A. Homeless Services Authority Report And Recommendations Of The Ad Hoc Committee On Black People Experiencing Homelessness 5 (2018), https://www.lahsa.org/documents?id=2823-report-and-recommendationsof-the-ad-hoc-committee-on-black-people-experiencing-homelessness, concluded on page 20 that the multiple "system failures that together cause a person to experience homelessness" cannot be "untangled."

Court justifies the Order based on the argument that the City should have done more. 1-ER-24; 1-ER-106.

This alternative argument fails for multiple reasons. First, the belief that the City could do more does not support a due process violation. *DeShaney*, 489 U.S. at 201. In any event, even Plaintiffs acknowledge the efforts made by the City, and the great many people who significantly benefited from City action. 12-ER-2790–91, ¶ 2; 2800, ¶ 18, 2830, ¶ 74; and see 7-ER-1601:26-1602:5. Second, the district court's complaint that too many HHH funds were allocated to permanent supportive housing—citing its belief that short-term temporary shelters are more urgently needed—implicates the very sort of difficult policy decision courts defer to elected officials. Article III of the United States Constitution does not allow federal judges to second-guess elected officials' programmatic and spending priorities absent a record of ongoing constitutional violations. Third, as a matter of fact, the City is addressing short-term housing through an array of other solutions, from villages of tiny houses to programs such as Roomkey and Homekey.

3. The facts disprove any assertion of deliberate indifference.

Further, the undisputed facts dispel any conclusion that the City was deliberately indifferent to the issue of homelessness generally, or to Plaintiffs specifically. The "deliberate indifference" standard is "a stringent standard of

fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action" and "requires a culpable mental state." *Patel*, 648 F.3d at 974-76 ("mere negligence–or even gross negligence–is not enough for deliberate indifference."). This district court wrongly concluded that the inability to resolve all homelessness is proof of "deliberate indifference."

In the context of the state-created danger doctrine, the plaintiff must prove the state actor acted with deliberate indifference in placing the plaintiff in danger. *Momox-Caselis v. Donohue*, 987 F.3d 835, 845 (9th Cir. 2021). Determining deliberate indifference therefore focuses on the decision which put the plaintiff in danger. E.g., *Momox-Caselis* at 845-47 (decision to place minor in the foster home where she later died); *DeShaney* 489 U.S. at 201 (decision not to protect boy from known abuse); *Grubbs*, 92 F.3d at 121 (decision to leave prison nurse alone with violent inmate). There is no factual support for the conclusion of deliberate indifference here; indeed, there is ample support for the contrary conclusion.

Plaintiffs confirm that the City has undertaken extensive efforts to address homelessness. See 12-ER-2790–91, ¶ 2 ("The City and County combined spend over a billion dollars annually providing police, emergency, and support services to those living on the streets."); 2800, ¶ 18 ("Officials in both the County and City have gone to great lengths in the last couple years to address this crisis, and their

efforts are impressive and commendable"); and 2830, ¶ 74 ("Plaintiffs do not suggest the City and County are doing nothing; the amount of effort and resources that have been devoted to addressing this issue is considerable and admirable.").

Additional details of the City's Comprehensive Homeless Strategy[8] are provided in the record, including (1) programs to provide permanent supportive housing for a long-term solution, primarily funded by a voter-approved $1.2 billion bond measure (Proposition HHH); (2) temporary housing solutions for the unsheltered, which includes the A Bridge Home (ABH) shelter program to provide 222 shelter beds in each of the 15 Council Districts, as well as the Roomkey and Homekey programs; and, (3) a renewed commitment to fund these and other homeless programs in the face of a drastic loss of municipal revenues due to the pandemic shutdown, but still committing over $429 million to support homeless individuals in fiscal year 2020-2021. See 7-ER-1599:18–1600:18 and footnotes. The City committed almost twice that amount for the coming fiscal year. 2-ER-393–95, at ¶¶ 8-15. These facts, and Plaintiffs' concessions, dispel any assertion of deliberate indifference.

[8] The full Strategy document, previously cited to the district court in Dkt. 269 at 13:20-22, can be accessed at http://clkrep.lacity.org/onlinedocs/2015/15-1138-s1_misc_03-21-2016.pdf

The district court dismissed all these efforts, asserting that deliberate indifference is demonstrated by: (1) the fact that there are still far too many homeless people and (2) reports of bureaucratic inefficiency and waste in the programs enacted to address homelessness. 1-ER-107 –108. The court's reasoning apparently is: homelessness is harmful to those affected; the City has failed to solve homelessness because it has not dedicated resources in a manner preferred by the court; therefore, the City is deliberately indifferent to homelessness. The district court never provides any authority, however, for the proposition that the City's massive and expensive effort constitutes "deliberate indifference" because that effort has not resolved homelessness.

Nor could it. The district court readily conceded that the City has both initiated and joined programs to address homelessness and further conceded that the decisions related to implementing those programs are political decisions – meaning such decisions necessarily balance various interests, priorities, and the allocation of limited resources – that are the sole province of "the policy-making officials of government…" *Zelig v. County of Los Angeles*, 27 Cal.4th 1112, 1144 (2002); *Casella v. City of Morgan Hill*, 230 Cal.App.3d 43, 57 (1991) (whether ordinance was a good idea for reaching policy goals was a political decision for the legislative branch); and see 1-ER-106 (two references).

However, because the programs identified by the court did not adopt *the district court*'s priorities (e.g., the allocation between short-term shelter and long term affordable housing, or the suspension of HHH deadlines in light of the COVID-19 pandemic shutdown) and did not provide the short-term benefits desired by the court, the court used the very opposite of deliberate indifference—that is, evidence of the City's serious and concerted efforts to address homelessness—to incorrectly conclude that the City had *caused* the homeless problem by not already resolving it to the court's satisfaction. 1-ER-106.

C. No Special Relationship Supports the Preliminary Injunction.

The district court then turned to another argument not raised by Plaintiffs – the "special relationship" exception to the general rule that due process does not support an affirmative duty for the government to act. This exception also originates with *DeShaney*, which found a duty of care when a state "takes a person into its custody and holds him there against his will," by "'incarceration, institutionalization, or other similar restraint of personal liberty." *DeShaney*, 489 U.S. at 199–200 (1989)); *Patel*, 648 F.3d at 972. The district court found that a policy, since abandoned, to discourage homeless people from leaving Skid Row was a "similar restraint" to being locked in a prison cell. 1-ER-109.

The holding in *Patel*, cited by the court, confirms that no "special relationship" exists here. In *Patel*, a developmentally disabled student who was supposed to be supervised at all times by her teacher was instead allowed to go to the bathroom on her own. 648 F.3d at 969. As a result of her teacher's lapse in attention, the student had sex with another student in the bathroom. *Id*. at 969–70. In affirming summary judgment against the mother, the Ninth Circuit held that there was no special relationship between the school and student, even though the child was legally compelled to go to school and the school acted *in loco parentis* under state law while the child was there. *Id*. at 972–73.

Nothing here suggests that any plaintiff was legally compelled to stay in Skid Row, and Plaintiffs do not make such a claim. The district court asserted that the reported former policy of trying to contain people experiencing homelessness, and the services provided for them, in Skid Row somehow constitutes "incarceration" equivalent to being in prison. Dkt, 277 at 76-77. The court ignores the undisputed reality the people have always been able to, and in fact do, regularly enter and leave Skid Row. There is simply no basis for a "special relationship" here.

D. The District Court's Attempt to Create a "Severe Inaction" Equal Protection Theory Is Misguided.

The district court then proposed a new constitutional claim – which, again, was never raised by Plaintiffs -- in which *inaction* by a public entity in the face of inequality in society is deemed to be *an action*, which can then be evaluated under the Equal Protection Clause. There is no legal basis for such a claim, which is contrary to well-established law that the Fourteenth Amendment equal protection guarantee only applies to state laws and actions, not inaction. See *United States v. Stanley*, 109 U.S. 3, 11(1883).

The district court made the unfounded conclusion that the Equal Protection Clause creates an affirmative duty for local governments to address disparate economic impacts among their citizens. In part, this fails for the same reasons as the racial equal protection argument discussed above: Plaintiffs never alleged such a claim, and neither Plaintiffs nor the district court presented any evidence that the City committed such a violation—even if one could exist. But further, the Order reached the unprecedented conclusion that government *inaction* in addressing a problem could be construed as the *action* of perpetuating the problem, such as the racial disparities in the homelessness population, making that lack of action subject to equal protection review. 1-ER-109–112.

This conclusion flies in the face of well-established Equal Protection jurisprudence. The Clause protects against "disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." *Ross v. Moffitt*, 417 U.S. 600, 609 (1974). "In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race." *Brown I*, 347 U.S. 483, 490. The cases cited in the Order to show the importance of the Equal Protection Clause also reaffirm that its function is to protect people from "unfriendly legislation" and "legal discriminations," i.e., government action. *Strauder v. W. Va.*, 100 U.S. 303, 307-08 (1879).

The plain language of the clause confirms that it is limited to "the equal protection of the laws." U.S. Const., 14th Amend, Sec. 1. Thus, the Equal Protection Clause prohibits both the enactment of unequal laws as well as the unequal enforcement of otherwise neutral laws. By its express terms, the Equal Protection clause is limited to governing the operation of laws by the State, and does not "require the State to equalize economic conditions" between its citizens. *Ross*, 417 U.S. at 612.

The Order cites other affirmative duties found under the Fourteenth Amendment, but these likewise do not support the Order. See 1-ER-110–111. For

example, the school desegregation cases address the need to actively dismantle explicitly discriminatory, i.e., unconstitutional, laws and practices. In that context, equal protection is only invoked when "the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools…" *Swann* at 32. The Order also cites the requirement to get a search warrant and the bar on the use of self-incrimination as examples of constitutional "affirmative duties." 1-ER-110. However, each of these is an explicit restriction on government action, not a duty to act. The example of placing conditions on the use of federal funds by the recipient is similarly misplaced here, as that is just an agreed-upon condition of receiving federal funds.

For these reasons, this Court should reject the district court's effort to impose this unsupported Equal Protection Clause obligation on the City. Interestingly, the district court did not even purport to make the necessary finding that the law and facts clearly favor Plaintiffs succeeding on this claim to support a preliminary mandatory injunction. See, *Anderson*, 612 F.2d 1112, 1114-15.

E. The Court-Created Family Separation Theory Has No Merit.

The district court added another unsolicited substantive due process rationale for its Order: that the historical structural racism that has caused Black individuals

to endure the disproportional impact of modern homelessness threatens the integrity of Black families with family separations, triggering a community-wide substantive due process violation supporting the court's sweeping injunction against the City. This rationale is fundamentally flawed because: (1) Plaintiffs would have had no standing to make it, and indeed, they never did make it; (2) no legal basis supports this family separation theory; (3) no facts support this theory, nor the proposed remedy; and (4) the district court failed to make the necessary finding that the law and facts clearly favor Plaintiffs succeeding on this claim. See *Anderson*, 612 F.2d 1112, 1114-15.

The most obvious reason this claim fails is Plaintiffs' lack of standing to assert it – which is presumably why Plaintiffs never alleged or argued any such claim. This lack of standing is a "threshold jurisdiction question" and should end this due process claim without further discussion. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-103 (1998).

In any event, this rationale would fail to survive even the most basic scrutiny. It is undisputed, of course, that "the relationship between parent and child is constitutionally protected." *Quilloin v. Walcott*, 434 U.S. 246, 255, (1978) (court rejected attempt of biological father who never had custody to block adoption by step-father); and see *Troxel v. Granville*, 530 U.S. 57, 65, (2000)

(striking state law granting grandparent rights which interfered with parental rights). However, this accepted principle provides no support for the Order.

Each of the familial loss cases is founded on a specific action by the government which directly impacted the familial relationship— particularly in the cases that the district court most relied on, in which government agents physically took the children at the U.S. border as part of a deliberate but unjustified family separation policy. *Ms. L. v. U.S. Immigr. & Customs Enf't*, 302 F. Supp. 3d 1149 (S.D. Cal. 2018), and *Jacinto-Castanon de Nolasco v. U.S. Immigr. & Customs En't*, 319 F. Supp. 3d 491, 500–01 (D.D.C. 2018). Even those courts acknowledged that due process guarantees are only "applied to deliberate decisions of government officials to deprive a person of life, liberty, or property" and that the "right to family integrity has been recognized in only a narrow subset of circumstances." *Ms. L*, 302 F. Supp. 3d at 1162 and 1166.

This case presents no remotely analogous circumstances, and the district court did not suggest otherwise. Instead, the district court relied on general reports of the disparate impact of homelessness on African Americans, and on the disparate representation of African American children in the *County's* foster care system—highly significant issues, to be sure, but they do not indicate a deliberate decision by City actors to disrupt family integrity. The facts and law do not clearly

favor this injunction, and the district court did not make such a finding on this issue. 1-ER-111 and 119 (applying incorrect standard of likelihood).[9]

Importantly, the Supreme Court cautions against expanding constitutional claims of substantive due process "because guideposts for responsible decision making in this unchartered area are scarce and open-ended.'" *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). The Supreme Court warns that "extending constitutional protection to an asserted right or liberty interest" would "to a great extent, place the matter outside the arena of public debate and legislative action" and that this required "the utmost care. . . lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences" of the ruling judge. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). This warning foreshadowed the very concerns raised by the district court's broad order, which disregards the public and legislative process in favor of judicial policy preferences.

F. The State Law Claim Has No Application to the City.

In another failed attempt to find a legal basis for its flawed Order, the district court invokes a state statute that by its own terms does not apply to the City.

[9] In addition, each of the due process cases the Order cites to support its broad conclusions addressed the claim of an *individual* plaintiff claiming damages for injury to a specific family relationship. E.g., *Rosenbaum v. Washoe County*, 663 F.3d 1071, 1079 (9th Cir. 2011); and see *Quilloin* and *Traxel*.

California Welfare and Institutions Code section 17000 mandates the provision of medical care to people in need. By its express terms, Section 17000 mandates such care from (1) all counties and (2) the only "city and county" in California: San Francisco. See *Hunt v. Superior Court*, 21 Cal.4th 984, 1007 (1999). The California Supreme Court has confirmed Section 17000 only imposes a duty on counties, not cities within a county. *Tobe*, *supra*, 9 Cal.4th 1069, 1104, n.18. Section 17000 thus imposes no obligation on the City, as a matter of law, which is presumably why Plaintiffs did not allege this claim, or cite it as a basis for an injunction, against the City. The ruling of the California Supreme Court on the meaning of a state statue is the final word. *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) (No federal tribunal "has any authority to place a construction on a state statute different from the one rendered by the highest court of the state."). Thus, the district court's attempt to use the statute to apply its mandate to the City should be rejected.

G. The Law and Facts Do Not Clearly Support Plaintiffs Succeeding on their ADA claim.

The district court also relied on Plaintiffs' ADA claim to support the preliminary injunction, arguing that homeless encampments which block some sidewalks constitute an ADA violation. This argument has two fundamental flaws:

(1) the district court never made the required finding that the law and facts clearly favor Plaintiffs succeeding on their ADA claims (*Anderson*, 612 F.2d 1112, 1114-15; 1-ER-141); and (2) the Order does not in any way refer to the obstruction of sidewalks, making the ADA claims irrelevant to the injunction. See 1-ER-140-142.

In any case, Plaintiffs will not likely succeed on their ADA claim for at least three reasons. First, Plaintiffs cannot establish the City has discriminated against them solely by reason of a disability, and instead improperly seek to use the ADA as a tool to address more generalized grievances about the City's homelessness policies. The ADA requires Plaintiffs to establish that they are qualified individuals with disabilities who were either excluded from participation in or denied a benefit, or were discriminated against, by the City *solely by reason of their disability*. See 42 U.S.C. § 12132; see *Weinreich v. Los Angeles Cnty. Metro. Transp. Auth.*, 114 F. 3d 976, 978-79 (9th Cir. 1997). The Order makes no mention of any actionable discrimination by the City "solely by reason of disability" because Plaintiffs have not shown that any disabled person, including the two disabled plaintiffs, are uniquely injured *solely because of their disability*. See *Weinreich*, 114 F. 3d at 978-79 ("A plaintiff proceeding under Title II of the ADA must. . . prove that the exclusion from participation in the program was 'solely by reason of disability.'").

In fact, Plaintiffs have consistently alleged and argued that the blockage of the sidewalks is a generalized concern affecting all City residents in the same manner. See e.g., 12-ER-2792, ¶ 5 ("The massive build-up of property and tents has made the sidewalks unpassable.") and see 2790-91, ¶ 2, and 2814–15, ¶ 45. The declarations submitted similarly complained that the homeless encampments made several sidewalks "untraversable to most residents" which "hinders [the] ability to freely travel the public sidewalks" and makes it difficult for "customers to access my business…" See 9-ER-2005, ¶ 5; 2060, ¶ 2; and 2067, ¶ 3. Plaintiffs affirmatively allege that such blockages are equally burdensome to all, making it a generalized claim and not one based on any disability.

Second, City's sidewalks are passable when viewing the more than 9,000 miles of City sidewalks in their entirety, as they must be for Plaintiffs' ADA claim addressing "existing facilities," i.e., constructed before January 26, 1992. 7-ER-1664, ¶ 6; See 28 C.F.R. 35.150(a); see also *Soto v. Los Angeles Cty. Flood Control Dist*., 2016 U.S. Dist. LEXIS 197210, at *13 (C.D. Cal. May 24, 2016) ("a public entity is only required to operate each service, program, or activity so that

the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.").[10]

Moreover, the City regulates its vast system of sidewalks for compliance with the ADA, including in Plaintiffs' "Designated Area," through enforcement of local ordinances. See L.A.M.C. § 56.11(3)(d)) ("[w]ithout prior notice, the City may move and may immediately impound any Personal Property, whether Attended or Unattended, Stored in a Public Area in such a manner that it does not allow for passage as required by the ADA."), at 7-ER-1638–39; 7-ER-1668, ¶ 5.[11] ADA compliance does not require the City to undergo the impossible task of immediately and constantly removing ***every*** obstruction on every sidewalk. See e.g., *Midgett v. Tri-County Metro. Transp. Dist*., 254 F.3d at 849 ("The regulations implementing the ADA do not contemplate perfect service…"); *Soto v. Los Angeles Cty. Flood Control Dist*., 2016 U.S. Dist. LEXIS 197210, at *13 ("the

[10] Indeed, if temporary obstructions from homeless individuals and their belongings are the type of barriers to which the ADA applies, then the settlement in *Willits v. City of Los Angeles*, 925 F. Supp. 2d 1089 (C.D. Cal. 2013) would preclude Plaintiffs' claim for injunctive relief because it is based on the same set of facts—that disabled individuals have trouble maneuvering the City's sidewalks. See *Sarfaty v. City of Los Angeles*, 765 Fed. Appx. 280, 281 (9th Cir. 2019).

[11] This portion of the City's ordinance is still enforceable under the preliminary injunction enjoining a different portion of the same ordinance in another lawsuit against the City involving homelessness pending in the Central District. See *Garcia v. City of Los Angeles*, 481 F. Supp. 3d 1031 (C.D. Cal. 2020).

relevant question is not whether each Bike Path entry point is accessible, but whether, *viewed in its entirety*, the Bike Path can be entered and used by persons with disabilities.") (emphasis in original); *Montoya v. City of San Diego*, 2021 U.S. Dist. LEXIS 52340, at *24-25 (denying preliminary injunction against sidewalk obstructions from dockless scooters and bikes because, among other reasons, "the court [was] not convinced that Plaintiffs have demonstrated that they will succeed in showing that they have been denied meaningful access to the City's sidewalks when it considers the 5,000 miles of sidewalks the City has to maintain in relation to the number of Plaintiffs' 'documented obstructions.'")

Finally, Plaintiffs bear the burden of establishing "the existence of a reasonable accommodation" that would enable them to participate in the program, service, or activity at issue. 28 C.F.R. § 35.150(a)(3); *Zukle v. Regents of the Univ. of Cal*., 166 F.3d 1041, 1046 (9th Cir. 1999); see also *Tennessee v. Lane*, 541 U.S. 509, 532 (2004). Here, there has been no attempt to show that the City failed to take reasonable measures to accommodate individuals with disabilities to navigate public sidewalks. Indeed, Plaintiffs' declarations indicate that disabled residents have the same access as everyone else and the evidence shows that the City already takes reasonable measures to ensure access to sidewalks by enforcing LAMC 56.11(3)(d), and that it would not be feasible to keep every single portion of the

City's expansive sidewalk system clear of any obstructions 100% of the time. See 7-ER-1664, ¶¶ 5, 6; see also 7-ER-1667, ¶ 4.

For all these reasons, the facts and laws do not clearly favor the injunction, or even that they have a viable claim at all.

IV. The Other Elements Needed for a Preliminary Injunction Are Similarly Unsupported.

The failure to establish a factual and legal basis which clearly favors issuing a preliminary mandatory injunction obviates the need for further analysis. *Winter,* 555 U.S. 7, 20; *Anderson*, 612 F.2d 1112, 1114-15; and *Garcia*, 786 F.3d 733, 740 ("The first factor under *Winter* is the most important – likely success on the merits. Because it is a threshold inquiry, when a plaintiff has failed to show the likelihood of success on the merits, we need not consider the remaining three [*Winter* elements]."). However, consideration of the remaining elements further demonstrates that there is no support for the district court's sweeping preliminary injunction.

A. Plaintiffs Have Not Shown an Imminent Risk of Irreparable Harm from the Lack of this Injunction.

Although the second element in evaluating the justification for a preliminary injunction is whether the party is likely to suffer irreparable harm without the

injunction (*Winter*, *supra,* 555 U.S. at 20), the Order never makes this finding. In part, this is because the Order does not really consider Plaintiffs at all. Many of Plaintiffs' claimed injuries are monetary – e.g., depreciation of property value, increased insurance and cleanup costs, etc. – and thus are compensable by a damages award. See *Los Angeles Coliseum Comm'n v. NFL*, 634 F.2d 1197, 1202 (9th Cir. 1980). Other objectives include clearing the sidewalks and improved maintenance of Skid Row, which the Order does not address. Nothing shows that Plaintiffs would face irreparable harm without a preliminary injunction.

Even considering the district court's broader goal of addressing homelessness, the Order still fails to support irreparable harm. The Order primarily relies on the flawed theories of constitutional violations to support a finding of irreparable harm. 1-ER-125. For all the reasons discussed above, because Plaintiffs have not established any viable constitutional violation by the City, the district court cannot rely on constitutional violations as irreparable injury. This is in contrast to *Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012), on which the district court relied. In *Melendres*, the injunction was to stop officers from arresting and illegally holding people in detention without cause – clearly an injunction that was needed to stop the actual and direct violation of constitutional rights.

In fact, the Order *itself* poses more potential for irreparable injury because its terms—escrowing $1 billion, dictating how City programs should function, forcing City officials to divert resources to fulfill the district court's policy preferences—jeopardize City progress in addressing homelessness.[12]

The Order fails to support a finding of irreparable harm to Plaintiffs.

B. Plaintiffs Have Not Demonstrated that the Balance of Equities Favors Entering this Preliminary Injunction.

Plaintiffs also failed to establish that the balance of equities tips in favor of granting injunctive relief. *Winter*, 555 U.S. at 20. And again, the Order ignores the actual Plaintiffs and their interests and relies on its constitutional legal discussion to support the balancing on interests. 1-ER-125. This must be weighed against the very real and imminent harm the Order presents to the City by: (1) controlling a significant portion of the City budget without regard to the City's needed cash-flow or other financial commitments of needed City programs;

[12] For example: "25,036 people experiencing homelessness were placed in interim or emergency shelters in the City in 2020, including 1,441 people in Skid Row. Of the 25,036 individuals placed in interim or emergency shelters in the City in 2020, 3,733 people exited to permanent housing, and 4,690 entered transitional housing placements. Dkt. 242-9. Furthermore, to help prevent sheltered Angelenos from becoming unsheltered, the City enacted Ordinances to protect against evictions (Ordinance No. 186606), and rent increases in Rent Stabilization Ordinance properties (Ordinance No. 186607) during COVID-19." Dkt. 269 at 15:26-16:5.

(2) controlling the leasing or selling of *all* City property, disrupting a wide range of City functions; (3) forcing the City to consider diverting funds from permanent supportive housing to temporary shelters, thus undermining the development of long term solutions to homelessness; and (4) significantly undermining the discretion and authority of elected officials and interfering with municipal government. 1-ER-138–142; 4-ER-860:19–861:5 (by Intervenors, "such a wide-reaching order would not serve the public interest; in fact, just the opposite."). The Order has not established that the balance of equities supports the preliminary injunction.

C. Plaintiffs Have Not Shown that the Public Interest Weighs in Favor of this Mandatory Preliminary Injunction.

Finally, a court must consider whether the injunction is in the public interest (*Winter*, *supra,* 555 U.S. at 20), but the Order here fails to satisfy this requirement for many of the same reasons previously discussed. At a basic level, this is because the district court apparently designed the Order to force the parties into a settlement, rather than because of the intrinsic value of the Order's provisions. 1-ER-27 (complaining of lack of a settlement, and stating "Without a global settlement, the Court will continue to impose" the Order); and see Dkt. 331 (reaffirming use of Order to force a settlement).

But even taking the Order's provisions at face value, the district court relies on the unsupported assumption that it is more capable of dealing with the complex financial, practical and structural issues homelessness presents than publicly accountable elected officials. This is highly speculative at best, and the public interest requirement mandates a demonstration that "the public interest favors granting the injunction in light of [its] likely consequences i.e., consequences [that are not] too remote, insubstantial, or speculative and [are] supported by evidence.'" *Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017).

None of this can be demonstrated here. Beyond assuming its conclusions, the Order has not established that the preliminary injunction is in the public interest.

Conclusion

The district court's Order fails to justify the sweeping preliminary injunction and its substantial intrusion into the finances and operations of municipal government. It fails to justify its expansive use of equitable powers to sidestep federalism and the separation of powers. It fails to identify a relevant constitutional violation by the City or any other legal basis on which to support such judicial overreach. It fails to support any of the other elements needed for any preliminary injunction, particularly one which so infringes on the workings of

local government. Homelessness is an emergency with which City leaders are grappling. There clearly is much more to do. But the district court's deeply-flawed, overreaching Order is not the solution.

Dated: June 3, 2021

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Statement of Related Cases

Other than the other two consolidated actions, the City is unaware of any related appeals.

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Certificate of Compliance

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,342 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Office Professional Plus 2016 in Times New Roman 14-point font.

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