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

REPLY BRIEF BY APPELLANT CITY OF LOS ANGELES

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Introduction

There is no dispute that the homelessness crisis in Los Angeles presents a complex and urgent social and political challenge that is both longstanding and deeply troubling. Local political leaders have universally and publicly recognized this, and the City of Los Angeles has devoted, and continues to devote, significant resources to address homelessness—which Plaintiffs-Appellees acknowledge in their brief. In this context, the district court's misguided attempt to usurp the City's powers simply undermines and distracts from the City's continuing efforts to address homelessness and diverts needed attention and resources. While passionately expressing their support for the Order, Appellees' Answering Brief ("AAB") further confirms that the unprecedented legal theories used to support the district court's order imposing a preliminary, mandatory injunction ("Order") ultimately are untenable and unsupported by an evidentiary record. Moreover, the Order bears almost no relation to the complaint or moving papers in this case. The basic issues remain unchanged – the Order represents an excessive and unjustified exercise of equitable powers which unreasonably infringes on federalism and the separation of powers.

Argument

I. Plaintiffs Incorrectly Argue for a Lower Burden of Proof and Concede that the Order Did Not Make the Necessary Findings to Support Portions of Its Order.

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. *Winter v. Natural Resources Defense Council, Inc*., 555 U.S. 7, 20. Plaintiffs acknowledge that "particularly disfavored" mandatory preliminary injunctions must meet a "doubly demanding" burden "that the law and facts *clearly favor*" relief, not simply that they are likely to succeed. See *Garcia v. Google*, 786 F.3d 733, 740 (9th Cir. 2015) (Emphasis in original); AOB 27-28; and AAB at 26. Importantly, they do not satisfy that higher burden, which is a threshold issue that can eliminate the need to consider the other elements. *Garcia* at 740.

Rather than meet the higher "clearly favors" standard for mandatory injunctions, or even the lesser "likely to succeed" burden for prohibitory injunctions, Plaintiffs argue for an even lower burden – an implicit concession that even Plaintiffs do not believe the legal theories supporting the Order can otherwise

survive.[1] Plaintiffs assert that under the sliding scale approach (i.e., a stronger showing in one element excuses a weaker showing in another), they need only show "serious questions going to the merits" if the balance of hardships "tips sharply in [Plaintiffs] favor" and the other two required elements are met. AAB at 25-26; citing *Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011) and *Epic Games, Inc. v. Apple, Inc*., 493 F.Supp. 3d 817 (N.D. Cal 2020). But *Wild Rockies* and *Epic Games, Inc*. considered *prohibitory* injunctions which protected the status quo, and never addressed the higher standard needed for a mandatory injunction.

In any case, as discussed in the Opening Brief and herein, the misplaced legal arguments invoked by the Order do not raise serious questions on the merits, the balance of hardships does not "tip sharply" to Plaintiffs, and the remaining elements do not strongly favor Plaintiffs, who fail to satisfy the "clearly favors" standard that applies to all claims on which the Order is based.

II. The Disregard for Federalism and Separation of Powers in Favor of Judicial Control Is Reversible Error.

[1] In addition, Plaintiffs do not mention that the district court failed to find the facts and law "clearly favors" relief on the due process family separation theory (that the City caused homelessness and that this results in family separations) and the ADA claim (regarding blocked sidewalks). See AOB 59 and 63. As such, these theories fail on the face of the Order.

A. Equitable Powers Are Not Unlimited.

Plaintiffs argue that the district court's equitable powers are exceedingly broad – effectively a blank check which allows the court to issue an order even if the order is not based on the issues raised by the parties, the evidence before it, or the relief sought by the plaintiff. AAB at 26-29. Judicial equitable powers, though certainly broad, do not go this far. See AOB at 29-36.

Plaintiffs argue that equitable powers are flexible, and therefore the district court has discretion to fashion a case-specific remedy whether requested or not. But this fails to address the judicial overreach at issue here. The cases Plaintiffs cite do not support such unrestrained powers. For example, they cite *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) to argue that a reviewing court is deferential to the district court's discretion to grant equitable relief. (AAB at 27.) While this general principle is properly stated, Plaintiffs fail to acknowledge that in *Lemon*, the relief granted (reimbursement of educational services) was exactly the remedy the plaintiff had requested, and was based a straightforward application of an accepted legal theory. Likewise, they cite *Brown v. Plata*, 563 U.S. 493, 499-500 (2011) to support their claim that district courts are not "limited" by the relief requested by plaintiffs, and yet, in *Plata*, the relief that the district court granted – a reduction of the prison population – fit squarely within the relief requested by the plaintiffs, and was authorized under the specific statute invoked by the plaintiffs.

While the parties apparently agree that *Plata* provides an illustration of the appropriate exercise of equitable powers, Plaintiffs overlook the differences between *Plata* and this case that illuminate why the Order here should be vacated.

In *Plata,* plaintiffs claimed prisoners with medical conditions suffered from unconstitutional conditions in state prisons, most of which arose out of overpopulation. The state conceded the problem and stipulated to a remedial injunction. *Plata*, 563 U.S. at 507. After the state later admitted that it was incapable of fixing the constitutional violations, the district court held several days of evidentiary hearings and then appointed a receiver to oversee remedial efforts, which the state agreed was "a necessary component of the constitutional remedy in this case." *Id*.; and see *Plata v. Schwarzenegger*, Case No. NO. C01-1351 THE, 2008 U.S. Dist. LEXIS 104035, *20 and 33 (N.D. Cal. Nov. 7, 2008). When the state failed to fund the capital improvements sought by the receiver, even though it had consented to the projects, the court ordered the transfer of funds that had already been specifically designated for such prison capital improvements. *Plata v. Schwarzenegger*, at *20-21, *32-33. However, conditions continued to deteriorate due to extensive overcrowding. *Plata*, 563 U.S. at 508-09. Ultimately, the plaintiffs requested a three-judge panel to consider prison population. After 14 days of additional testimony and extensive factual findings based on that evidence, the panel found that overpopulation was the primary driver of the constitutional

violations. The panel ordered a significant reduction in the prison population, but left the means of doing so to the state. *Id*., at 509-510.

In stark contrast, the district court here found constitutional violations that had never been previously raised by the parties, based on legal theories that had never been argued by anyone. Then, unlike the *Plata* court, which left the policy decisions to the state, this district court ordered the seizure of significant control of municipal finances, asserted control over the disposition of all City property, ordered City Council committees to hold hearings and make findings in support of the Order, and imposed duplicative auditing and reporting requirements. 1-ER-33, et seq. Moreover, unlike *Plata*, the district court did not conduct any evidentiary hearings, which is why the sweeping Order does not cite to any evidentiary record.

Thus, Plaintiffs' attempt to equate the transfer of funds in *Plata* with the Order's sequester of one billion dollars fails. ABB at 38-39. In *Plata*, the state had already stipulated that constitutional violations existed, had admitted its inability to correct those violations, had agreed to a receiver to supervise remedies and agreed to his proposed capital improvements, but then failed to fund them. In contrast, the district court here ordered the City to escrow one billion dollars after reading in the newspaper that the Mayor aspired to spend that amount on homelessness – but before the City's budget was actually adopted. The district

court thus sought to sequester *all* City funds intended to address homelessness into a fund that the district court would manage.

Plaintiffs downplay the stakes in *Plata* as just involving "prisoner welfare" to argue that the district court should not be constrained by the same fundamental legal principles which governed the *Plata* court. AAB at 29-30. But Plaintiffs never explain why the seriousness of issues in this case somehow means *Plata* does not apply. The conditions in *Plata* implicated basic constitutional rights similar to what Plaintiffs assert here; yet that did not justify abandoning the legal principles which govern judicial power.

Finally, Plaintiffs' reliance on *Harris v. Bd. of Supervisors*, 366 F.3d 754, (9th Cir. 2004) is misplaced regarding the City. In *Harris*, the court ordered the County not to close a rehabilitation center or to reduce capacity at a medical center because of the resulting impact on some of its patients, regardless of the budget shortfalls that led to these planned closures. However, that ruling was based on statutory Medicaid obligations and express statutory duties to provide medical care regardless of budgetary concerns, neither of which apply to the City. *Id*., 764-66; and see AOB at 61-62. Indeed, Plaintiffs acknowledge the Order cannot be supported against the City because they argue that their injuries are traceable ***only*** to the County, not the City. AAB at 52.

B. Plaintiffs' Disregard of Separation of Powers and Federalism Ignores Controlling Authorities.

Plaintiffs offer two main arguments to justify the clear violation of the separation of powers and federalism evident here: that federal courts can violate these principles as needed and that the Order is not significantly intrusive. Neither is persuasive or correct. See AOB at 36-39.

The district court has no authority to direct the activities of the City simply because it disagrees with the discretionary decisions made by its elected officials. Under the principles of federalism and separation of powers, a court must first identify a constitutional violation and direct the local government to correct it, leaving the means of doing so within the prerogative of the local government. Plaintiffs assert that there is no case supporting such restraint on federal courts, but every case follows this principle. E.g., *Rizzo v. Goode*, 423 U.S. 362, 380 (1976) (local governments are "granted the widest latitude in the dispatch of [their] own internal affairs"); *Lewis v, Casey*, 518 U.S. 343, 362-63 (1996) (praising an order which directed the state government to determine how to address the constitutional violation identified); *Swann v. Charlotte-Mecklenburg Bd. of Ed*., 402 U.S. 1, 16 (1971) ("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.")

Plata, again, provides an example of reasonable judicial prudence, having provided state officials the repeated opportunity to address and design the response to the proven serious constitutional violations, while steadily pushing for continued progress in doing so. Only when it became clear that the state was unable to remedy the constitutional violation did the Court take more direct action, but even then it left it to the state to determine on how to achieve the result. *Plata*, 563 U.S. at 507-08 and 537-38.

Plaintiffs then argue that the Order is not actually intrusive by disregarding its terms. They never confront, for example, the Order's demand – unsupported by any evidence – that the City sequester $1 billion of taxpayer money, compelling the City to dispense this money only as the district court approved, i.e. in compliance with the district court's policy preferences and not based on the policy decisions of the City Council, the Mayor, or any of the experts on which they rely. 1-ER-139. Taken in combination with the imposition of outside audits of all related funds and programs (duplicative of existing audit processes), this escrow displays the district court's intention to take control over this entire municipal function, apparently on the basis that the district court believes it is better suited to properly manage these funds and programs.

Likewise, the Order would also seize control of the disposition of all City property, precluding any sale or lease without judicial approval. 1-ER-138.

Moreover, in an apparent recognition that the Order lacked a supporting record, the district court ordered a City Council committee to hold a hearing with a prescribed agenda for the purpose of making pre-determined findings to support the Order. 1-ER-140. Plaintiffs do not even attempt to justify these aspects of the Order, which are entirely inappropriate.

Plaintiffs do argue that the requirement to offer every resident of Skid Row shelter or housing within 180 days leaves to Defendants the "discretion" as to which type of shelter or housing to provide (AAB at 45-46), although providing that number of beds in that timeframe creates practical limits on any "discretion." In any case, compelling a specific number of beds within a specific time frame will necessarily divert resources from other efforts to address homelessness, or from other necessary and urgent priorities of the City.

Ultimately, under the principles of federalism, separation of powers, and Article III standing, it is the City's role, not the district court's, to address these issues, and to allocate and deploy City resources.

C. Plaintiffs Have No Meaningful Response Regarding the Lack of Procedural Due Process.

In an attempt to avoid the plain procedural due process failings of the Order (see AOB at 39-40), Plaintiffs rely on the district court's after-the-fact May 27

hearing. AAB at 59-61. The hearing – a month after the Order issued with the district court's findings of fact – has no impact on the Order's validity, as the district court had already lost jurisdiction over it. *Flynt Distributing Co. v. Harvey*, 734 F.2d 1389, 1392, n.1 (9th Cir. 1984). The cases cited by Plaintiffs on this point are all inapplicable, because in each the party had the opportunity to raise the issue below or in briefing before the order was issued, but did not. Here, the City never had such an opportunity because the first notice of most of the issues in the Order was the Order itself.

III. The Law and Facts Do Not Clearly Favor this Preliminary Injunction.

A. The Record Remains Incomplete and Speculative.

Plaintiffs inaccurately assert that the district court's factual findings are undisputed, when in actuality they are completely disputed because the record is wholly lacking to support them. See AOB at 12, 39 and at n.6; and see. e.g. 2-ER-370:5-7 and 385:24-87:8. Plaintiffs never cite to any substantive materials in the record that support the Order's factual findings (neither did the district court), and the supposed "hearings" were actually status conferences without any evidentiary issues. AOB at 15, n.1. Plaintiffs reliance on cases like *Armstrong v. Davis, 275* F.3d 849, 857-58 (9th Cir. 2001), in which the equitable relief ordering ADA compliance followed a ten-day bench trial which admitted evidence to establish the

factual basis for that order, merely highlight the absence of such an evidentiary foundation to support the Order.

B. The Asserted Race-Based Equal Protection Claim Fails.

Although they never before raised a race-based equal protection argument, Plaintiffs now defend the district court's Order on this premise, arguing—without any authority—that *any* equal protection claim sufficiently invokes *all* equal protection claims, so that the court can pick whatever equal protection theory it likes, whether alleged or not. See AAB at 55. And they do not even contest the City's point that the racial discrimination claim fails. See AOB at 41-46.

Plaintiffs also fail to address, and thus concede, that no evidence whatsoever supports a finding of a discriminatory purpose by the City. Instead, Plaintiffs argue that such intent can be implied by historical discriminatory impact, but they fail to support this argument. For example, in contrast to this case, the courts in each case Plaintiffs cite had adduced compelling evidence of a contemporary "invidious discriminatory purpose," even if the subject law was superficially neutral. *Rogers v. Lodge*, 458 U.S. 613, 618 (1982); and see *Yick v. Hopkins,* 118 U.S. 356, 375 (1886) (only Chinese individuals were excluded from obtaining certain permits); and *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (City border redrawn in odd fashion, excluding almost all back families but no white families).

Importantly, a disparate impact is not enough to show discriminatory purpose absent additional evidence not present here. Without such a purpose there is no Equal Protection violation. *Rogers*, at 618; citing *Washington v. Davis*, 426 U.S. 229, 242 (1976), and *Arlington Heights v. Metropolitan Housing Dev. Corp*., 429 U.S. 252, 265 (1977).

C. Plaintiffs Fail to Justify the Order's Distortion of the Narrow State-Created Danger Exception.

The answering brief confirms that the state-created danger exception is inapplicable and cannot support the Order.

1. Plaintiffs Misconstrue the State-Created Danger Exception.

In every case applying the state-created danger exception, including the cases cited by Plaintiffs, specific individuals were placed in imminent danger of a readily identifiable risk by an affirmative act of a public employee. See AOB 47-48 and 51; AAB at 63.[2] Contrary to Plaintiffs' arguments, every case applying the

[2] This is consistent with holdings in other circuits. E.g., *Rios v. City of Del Rio*, 444 F.3d 417, 424 (5th Cir. 2006) (the deputy must be "aware of an immediate danger facing a known victim."); *Ruiz v. McDonnell*, 299 F.3d 1173, 1183 (10th Cir. 2002) ("Affirmative conduct [sufficient for a state-created danger] should typically involve conduct that imposes an immediate threat of harm, which by its nature has a limited range and duration."); *Henry v. City of Erie*, 728 F.3d 275, 282, 286 (3rd Cir. 2013) (harm caused must be "foreseeable and fairly direct," rejecting state-caused danger when "there are too many links in the causal chain").

state-created danger exception reaffirms the limited nature of the exception, and Plaintiffs have failed to support the Order's attempt to disregard these cases.

Plaintiffs cite these cases:

(1) in *Hernandez* v. *City of San Jose*, 897 F.3d 1125, 1137 (9th Cir. 2018), police officers placed political rally participants in immediate danger when they required them to exit the rally into a hostile, violent crowd;

(2) in *Kennedy City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006), the victim's family was immediately at risk when the officer told the violent accused molester about their claim, who then shot the father the following morning; and

(3) in *Wood v. Ostrander*, 879 F.2d 583, 590 (9th Cir. 1989), the officer impounded the car of an intoxicated driver, deliberately leaving the plaintiff passenger in immediate danger, abandoned in a high-crime area at 2 am.

Plaintiffs cite no case – because there is none – in which the state-created danger exception is applied not to the conduct of an individual government actor, but to a complex social problem with multiple causes. Even if, *arguendo*, homelessness in Los Angeles is the result of past government policies that are properly attributed to City actors, there is no legal authority to apply the state-created danger exception to such a situation.

Plaintiffs' reliance on two recent cases addressing homeless encampments is similarly misplaced. In *Santa Cruz Homeless v. Bernal*, Case No. 20-cv-09425-SVK, 2021 U.S. Dist. LEXIS 13839 (N.D. Cal. Jan. 20, 2021), the court issued a prohibitory preliminary injunction to preserve the status quo – the continued

existence of a homeless encampment on public land – on the grounds that the COVID-19 pandemic would put the camp inhabitants at greater risk if the camp were simply dispersed. *Id* at *22-23. The court declined to order the public entity to take any action or to provide any housing. *Id*. at *9; citing *Lindsey v. Normet*, 405 U.S. 56, 74 (1972). Less than four months later, the court modified the injunction to allow the city to relocate the camp residents to a different camping location. *Santa Cruz Homeless v. Bernal*, Case No. 20-cv-09425-SVK, 2021 U.S. Dist. LEXIS 68058, *2-6 (N.D. Cal. Apr. 1, 2021).

Similarly, the court in *Sausalito/Marin Cty. Chapter of the Cal. Homeless Union v. City of Sausalito*, Case No. 21-cv-01143-EMC, 2021 U.S. Dist. LEXIS 37806, *1-3, (N.D. Cal. Mar. 1, 2021) issued a prohibitory injunction to prevent the county from moving a homeless encampment based on claims that the new site was unsuitable. Two months later it modified the injunction to allow the move after finding that original objections to the new site were unsupported. *Sausalito/Marin Cty. Chapter of the Cal. Homeless Union v. City of Sausalito*, Case No. 21-cv-01143-EMC, 2021 U.S. Dist. LEXIS 99764, *2-3, (N.D. Cal. May 26, 2021).

Neither of these cases contemplated any affirmative duty by the public entity to provide housing or protect against the harm of being homeless; instead, each ruling was limited to preventing state actors from interfering with existing

homeless encampments when such affirmative actions would place those specific occupants at greater imminent risk. No case supports applying the state-created danger exception to a broad social problem like homelessness.

2. Plaintiffs Fail to Identify an Affirmative Act by the City that Directly Caused Imminent Harm to a Particular Plaintiff.

Plaintiffs make no attempt to identify any City affirmative act which exposed a specific individual to "an actual, particularized danger." See *Kennedy*, 439 F.3d at 1063. Instead, Plaintiffs expend great effort to attack broad and long abandoned social policies, many of them not City policies, often relying on the unsupported and often contradictory statements in the Order. The City anticipated and addressed these arguments in its Opening Brief. AOB 34-36, 44-45, and 48-50.

For example, Plaintiffs repeat their arguments regarding the policy of "containment" (7-ER-67-70), but then admit the policy did not work, meaning it could not create the harm Plaintiffs ascribe to it and does not justify any relief. AAB at 68. Moreover, the Los Angeles City Council passed an ordinance in 2016 formally ending any policy of concentrating homelessness in Skid Row as part of a continuing and extensive reconsideration of how homelessness is addressed, including increased funding, making related services accessible city-wide, opening shelters throughout the City, and taking affirmative steps to prevent homelessness

and address the racial disparities within homeless communities. See 7-ER-1603:15-04:6; 9-ER-2167-2170, 2187-93 and 2200-2204. Plaintiffs acknowledge the significant effort and resources deployed by the City to address homelessness. AOB at 51-52; and see AAB at 88-89.

Plaintiffs' complaints about the current conditions at Skid Row also provide no support for a state-created danger exception. The alleged practices of other parties in dropping off just released prisoners, etc., at Skid Row to better access the support services there do not implicate the City. AAB at 69-70.

In addition, as Plaintiffs concede, the voters approved Proposition HHH to fund whatever combination of supportive housing and temporary shelters (at least 80% of funds), in addition to some affordable housing (up to 20% of funds), was deemed most effective. AAB at 70. City officials, supported by most homeless and housing advocacy groups, focused this funding on long term solutions, i.e., supportive housing, rather than shelters. See e.g., 2-ER-318, 324; 3-ER-477 ¶ 19; 4-ER-871-72; 9-ER-2182:9-86:12, and the supporting amicus briefs.

Plaintiffs and the district court disagree with the City's decision to focus on long-term housing, preferring their own policy of short-term shelters. See AOB at 35-36, 50, 53-54. But the City's actions under Proposition HHH are fully consistent with its terms, and thus do not justify the Order. Thus Plaintiffs' citation to *Hunter v. Santa Barbara County*, 110 Cal.App. 698 (1930) is

misguided, because that case addressed the board's failure to spend the designated funds as authorized, and, in any event, did not involve the state-created danger doctrine.

Importantly, the City also creates temporary shelters though various programs such as A Bridge Home, Project Roomkey, and Project Homekey, as well as programs to support tenants who are at risk of becoming homeless. See AOB at 35, 45, 50, 52; and see, e.g. 7-ER-1601:7-02:16; 9-ER-2167:19-72:2, 2176:1-78:10, 2180:17-28, 2181:13-87:24. While Plaintiffs (and the district court) argue that the failure to use HHH funds for temporary shelters instead of long-term solutions somehow violated constitutional mandates, they fail to demonstrate how the City's exercise of discretion in seeking to achieve multiple policy goals – with various, limited and often earmarked resources – was improper or otherwise violates a federal right.[3]

Similarly, the Mayor's public health and policy decision to suspend Proposition HHH deadlines in light of the COVID-19 pandemic does not support

[3] Moreover, while Plaintiffs complain, mostly without evidence, about financial abuses involving Proposition HHH funds, these are generally perpetrated by third parties on the City and those same reports also disclose the City's effort to recover those funds as abuses are discovered. See 1-ER-74-76 and at 13. Neither Plaintiffs nor the district court have explained how the Order's duplicative audits (thus diverting more money from homelessness projects) will be more effective than those already regularly conducted, or how abuses of these programs by third parties violates a constitutional right.

any claim. Proposition HHH projects did not stop during the pandemic, but the Mayor provided the developers with additional flexibility in light of the pandemic restrictions and concerns about worker safety so that existing projects would not be disqualified because of COVID-19 related delays. 2-SER-393-94. Such a policy choice – weighing conflicting public health and policy concerns – was appropriately made by the City's elected Mayor.

3. Plaintiffs Fail to Show Deliberate Indifference.

In an effort to show deliberate indifference in the face of the City's extensive efforts relating to homelessness, Plaintiffs repeat the district court's reasoning: the homelessness problem is severe, the City has not fixed it, and therefore the City is deliberately indifferent. In fact, the City has devoted, and continues to devote, significant resources – in money, human resources, and attention – to address homelessness. See AOB 50-54. Plaintiffs' own Complaint confirms (and their Brief repeats) the "great lengths" the City has undertaken. See 12-ER-2790–91, ¶ 2 "over a billion dollars" spent); 2800, ¶ 18 ("efforts are impressive and commendable"); and 2830, ¶ 74 ("the amount of effort and resources . . . is considerable and admirable"); AAB at 88-89 ("unlike other cities, Los Angeles spends significant resources on supporting persons experiencing homelessness [including] crisis response, eviction defense, multi-disciplinary teams including

mental health workers, outreach workers, medical programs, and job development, all of which are traditionally the purview of the County.").

Plaintiffs' other arguments fare no better. For example, they claim that the City has not yet requested federal reimbursement for Project Roomkey, but when the City seeks reimbursement is no basis for a constitutional violation or an injunction. See 9-ER-2169:20-70:5 (City plans to expand Project Roomkey). Though the COVID-19 pandemic exacerbated homelessness while greatly reducing the City's resources to address it, the City has persisted in its efforts to address homelessness, and expanded these efforts to address changing conditions. This is not deliberate indifference.

D. Plaintiffs Effectively Concede the District Court's other Failed Findings on Due Process, Equal Protection, and overriding the California Supreme Court.

Plaintiffs provide no substantive defense to the remaining theories against the City in the Order. First, though Plaintiffs note that the district court invoked a "Special Relationship" argument, they make no attempt to support this argument beyond merely repeating the underlying test that such a relationship requires a restraint on personal liberty equivalent to full-custody incarceration, which does not exist here. AAB at 81 and 83-84; and see AOB at 54-55.

Second, while even the district court acknowledged that its Severe Inaction Theory Equal Protection theory is unprecedented, Plaintiffs do not appear to even recognize this as a separate theory of liability and instead treat this theory as if it were simply an accepted part of the racial Equal Protection argument discussed above, thus acknowledging that it is inadequate as a separate legal theory to support the Order. AAB at 82-83; and see AOB at 56-58.

Similarly, Plaintiffs note in passing the district court's substantive due process theory regarding familial relations, but again make no attempt to support that misapplied theory. See AOB at 58-61.

Finally, Plaintiffs attempt to take advantage of the district court's purported re-writing of Welfare and Institutions Code Section 17000 "to the extent" it obligates the City (AAB p. 89), despite the fact that their Complaint and Preliminary Injunction Motion explicitly assert that the state law applies solely to county governments. See *Tobe v. City of Santa Ana*, 9 Cal.4th 1069, 1104, n.18 (Cal. 1995); and AOB at 61-62. Plaintiffs suggest no basis on which to disregard the express terms of the statute or the ruling of the California Supreme Court on California law to apply the law to the City.

E. Plaintiffs' Attempt to Transform the ADA into a Mandate on General Maintenance Continues to Fail.

Plaintiffs do not contest the arguments made in the Opening Brief that the ADA claim fails, and instead raise two points in an effort to support the Order's use of the ADA claim. Neither point is persuasive.

First, to avoid the fact that the Order does not refer to the obstruction of sidewalks or impose relief specific to the ADA claim, Plaintiffs contend that the Order's requirement that the City offer shelter to unhoused individuals in Skid Row will result in "reducing the number of people on the street" which, in turn, "will necessarily reduce the sidewalk blockages as well." AAB at 92. Plaintiffs' contention, however, assumes that every offer of housing will be accepted; that if such an offer is accepted, the unhoused person will remove their property from the public right of way; and that no other unhoused individuals (and their property) will thereafter take their place. Plaintiffs point to no evidence to support these assumptions. In short, the ADA claim remains irrelevant to the terms of the injunction. If the district court intended to address blocked sidewalks, it would have done so.

Second, Plaintiffs contend that *Cohen v. City of Culver City* forecloses the City's argument that its vast system of sidewalks is ADA compliant when properly

viewed in its entirety, but *Cohen* does not support Plaintiffs' contention. See AAB at 93; *Cohen v. Culver City*, 754 F.3d 690 (9th Cir. 2014). In *Cohen*, a disabled plaintiff alleged Culver City violated the ADA when it allowed a street vendor to block a particular sidewalk curb ramp. Culver City moved for summary judgment under 28 C.F.R. § 35.150, the regulation exempting "existing facilities" from the ADA. The *Cohen* court found Culver City's construction of the curb ramp removed the sidewalk from the exception for "existing facilities" and into ADA compliance, and that Culver City's decision to affirmatively grant permits that allowed vendors to block the otherwise ADA-accessible curb ramp precluded summary judgment. *See Cohen*, 754 F.3d at 697 (contrasting the situation in *Cohen* with other cases dealing with existing facilities to which 28 C.F.R. § 35.150 applied, such as the City's sidewalks).

The situation in *Cohen* was vastly different from the alleged circumstances here, where no evidence suggests that Skid Row's sidewalks are not "existing facilities" exempt under 28 C.F.R. § 35.150, and where – far from affirmatively granting permits to block an otherwise-accessible curb ramp – the City attempts to regulate its vast system of sidewalks for compliance with the ADA through enforcement of its local ordinance. The ADA does not require the City to achieve perfect compliance by immediately and constantly removing every obstruction caused by every homeless encampment on every sidewalk. *See* L.A.M.C.

§ 56.11(3)(d), at 7-ER-1638-39; 7-ER-1668, ¶ 5. The rationale in *Cohen* for refusing to apply 28 C.F.R. § 35.150's existing facilities exception does not apply here.

IV. Plaintiffs' Speculation Regarding the other *Winter* Elements Is Insufficient to Support this Sweeping Order.

In attempting to satisfy the other three *Winter* elements required to support a preliminary injunction (irreparable harm, balance of equities, and public interest), Plaintiffs repeatedly depend on the presumption that the City has committed a constitutional or statutory violation to support each element. As discussed above and in the Opening Brief, there are no grounds for finding such violations by the City, undermining Plaintiffs' arguments as to the other elements.

Regarding any alleged irreparable harm, Plaintiffs fail to address, and therefore concede, that the Order does not address the irreparable harm that they claimed in their Motion for Preliminary Injunction, and the Order therefore fails on that level. See AOB at 67-68. Instead of addressing whether the Order will remedy ***their*** irreparable harms, Plaintiffs essentially argue that the Order is better than doing nothing and they assume the district court's stated goals will all be met. Meanwhile, without this Order, the City continues to undertake significant efforts

to address homelessness. See, e.g., 7-ER-1601:7-02:16; 9-ER-2167:19-72:2, 2176:1-78:10, 2180:17-28, 2181:13-87:24.

Plaintiffs' similarly fail to show how the balance of equities "tip sharply" to Plaintiffs or how the public interest justifies the sweeping Order, especially given the mandatory nature of the Order. See AOB at 69-71. For example, Plaintiffs fail to acknowledge the Order will disrupt existing efforts to address homelessness by interfering with ongoing municipal government operations, including the imposition of required judicial approvals for all expenditures and land transfers, and by diverting money from existing homelessness projects to fulfill the district court's policy preferences.

Plaintiffs also disregard the Order's infringement on representative government, including the district court's effort to override policy decisions reached by elected officials acting within their official capacity. See *Burford v. Sun Oil Co*., 319 U.S. 315, 318 (1943) ("[I]t is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy."); followed by *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) ("the district court should give due weight to the serious consideration of the public interest . . . that has already been undertaken by the responsible state officials.") The harm from this infringement, coupled with the uncertain result that

judicial control over municipal operations will ultimately prove a more efficient way to run local government, underscores the defects of the Order.

Conclusion

Plaintiffs have failed to justify the district court's unprecedented judicial overreach and its unduly expansive exercise of equitable powers in the absence of any legitimate constitutional or statutory violation by the City, at the expense of federalism, separation of powers, and the deference to the legislative discretion of local government. As a result, Plaintiffs have failed to support the elements needed for a mandatory preliminary injunction. For all the foregoing reasons, the Order should be vacated.

Dated: June 24, 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 5,761 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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